EXHIBIT G

(November 12, 2010, 3M company vs. Avery Dennison.)

THE COURT: Let's call the first matter, please.

THE CLERK: 3M company et al. vs. Avery Dennison et al., civil number 10-CV-2630. Counsel, will you please state your appearances for the record.

MS. CHAPLIN: Good morning, Your Honor. I've been losing my voice, so I will make sure I am on the microphone to do our appearances for you. Ann Cathcart Chaplin on behalf of plaintiffs 3M company and 3M innovative properties company. I am joined by my co-counsel Courtland Reichman and Shane Nichols and Courtland will be doing our presentation for you this morning. Also joining us from 3M at counsel table is John hul, who is the vice president of 3M's traffic safety systems division, and in the first row we're also joined by Mary Jo Abler who directs the 3M business that's involved in this case, right there, Your Honor, and next to her is Ken Smith, who is a 3M corporate scientist and the inventor of the patents in suit and also in that first row is Kevin Rhodes of 3M who is the vice president and chief intellectual property counsel.

THE COURT: Good morning to all. I don't know if the three individuals that are in the first row, if they

want to move on the softer cushions on the bench within the well.

MR. RHODES: We've got all our stuff here.

THE COURT: You are a glutton for punishment to sit on those hard benches for hours.

MS. FRIEDEMANN: Good morning, Your Honor. On behalf of Avery Dennison we have David Bilsker and James Baker from Quin Emanuel and in the gallery Mike Meyer and rage czar va who are in-house counsel at Avery Dennison. My colleague Curt Niederluecke and I am Lora Friedemann from Fredrikson & Byron.

THE COURT: Good morning. We may proceed.

MR. REICHMAN: Good morning, Judge.

THE COURT: Good morning.

MR. REICHMAN: May it please the Court. I understand we have an hour total for our motions this morning and.

THE COURT: Up to an hour.

MR. REICHMAN: Up to an hour. Hopefully less. Well taken. If I may, I would like to reserve 20 minutes for rebuttal argument.

THE COURT: All right.

MR. REICHMAN: We've got an audiovisual presentation, some slides that will play along as we go with the presentation today.

Your Honor, 3M brought this preliminary injunction motion to preserve the status quo. Avery, the defendant in this case, has not yet meaningfully launched its type 11 retroreflective sheeting product. As it stands, 3M is the only supplier of type 11 product on the market today. This is the status quo that 3M seeks to preserve. Avery is make no mistake about it infringing 3M's patents. In fact, Avery doesn't dispute that it infringes the '386 patent. These are patents that 3M worked very hard and invested very heavily to obtain and they represent real and meaningful innovation in this technology space. Reflecting that, the U.S. Patent and Trademark Office granted this limited statutory exclusivity in the form of the patents it granted to 3M.

With the infringement of one of these patents, at least the '386 undisputed and the other one very clear, what Avery does is it argues that the patents are invalid and if you focus, for example, on the one that is undisputed, it's claiming that the patents are invalid based on two prior art references, two things that came before that were already in front of the Patent and Trademark Office when it granted these patents. It was already considered and it was already rejected. The case law says that that make Avery's burden particularly high. It's no reason to change the result here that the Patent and Trademark Office reached. The law says

that it's ultimately Avery's burden to prove by clear and convincing evidence that these patents are invalid. They are presumed to be valid under the law.

One point I want to underscore today is that this is not the run of the mill preliminary injunction motion. There are several facts and circumstances that make it unique and we've talked about some of these. One is that 3M is currently the only provider of type 11 sheeting out in the marketplace and the status quo is that we're before Avery has even launched. Avery doesn't dispute that it infringes at least one of the patents and on that one patent it seeks to invalidate based on references that were already considered and rejected by the Patent and Trademark Office.

The case is unique for some other reasons as well. It's not just these. It's also unique in the irreparable harm that 3M faces if a preliminary injunction is not granted. The point here is that if Avery is allowed to launch its infringing product into the marketplace, 3M will not be able as a practical matter to enforce a permanent injunction to pull that product back out of the complex and multitiered supply arrangements that feed into the retroreflective sheeting market. In the briefing you may see this we refer to it as the unwinding problem. You might also consider it as you can't unring the bell. This is the road construction industry. The state and local governments

really are the ultimately consumer of the retroreflective sheeting products that's used on things like road signs or on barricades type of things you might see on the road.

They enter strict contracts. There's liquidated damages involved in these contracts. Public funds are used. There are state and local budgetary implications involved. If Avery's product is allowed to fill up this supply chain, a permanent injunction will honestly be ineffective in pulling it back out again and stopping the further supply.

I will give you an example to illustrate the point. Consider a typical two year construction project that a state might enter into. It would want to build a section of road or highway. It would enter a contract after a competitive bidding process with a prime contractor who would be supplying all of the materials and the labor, who then would subcontract with subcontractors who then might go to a sign fabricator to get the sign supply and then that sign fabricator would go out to a company, say Avery, to purchase the retroreflective sheeting that it puts onto the road signs. These signs will be supplied over the two-year period during the pendency of this contract and some contracts are much longer than two years.

If a permanent injunction later issues and there's no preliminary injunction, the question is what happens then. The supply, Avery's supply is stopped. Must 3M

enforce that patent, enforce the sign fabricator to default, to pay liquidated damages? Does the prime contractor have to default on its obligations to the state, does it have to pay liquidated damages, does it have to cease installation of the road project waiting for replacement signs to be manufactured and brought up. Are the state and local governments going to be left with mismatched road signs in terms of color on a stretch of highway? Sitting here, it seems like mismatched signs is not as big of problem, but I can assure you to the state and local governments it's a major concern and it would be something that they would look to 3M as creating that problem.

More importantly, if we cut off the supply of Avery having not granted a preliminary injunction, the road construction projects will be delayed waiting for replacement supplies to come. There are huge budgetary and financial implications of delaying these major road projects and of course if you continue to have detour signs up you continue to have the road construction going on. There are safety implications, safety implications for the drivers and of course for the crew working on the road.

This is just one example of many I could give of the type of havoc that will be created if Avery is allowed to launch its product and later a permanent injunction is issued. The point here is that 3M faces imminent and

irreparable harm, as do third parties, if a preliminary injunction is not granted delaying temporarily delaying Avery's entry into the market.

Even Avery indirectly makes this point in its brief. It argues that if a preliminary injunction is not granted, the court could later be powerless under a federal statute to enforce a permanent injunction on construction projects using federal money and to me it's hard to imagine a clearer case of irreparable harm. If you don't stop it now, you could be powerless to stop it later.

Now, in reviewing Avery's brief it takes what one might call the kitchen sink approach to its defense, puts a lot of arguments on the table and there is a tactic of trying to overwhelm so as to obscure holes in the argument. But while there's no shortage of words in the brief, no shortage in terms of volume of arguments, I would respectfully submit it's what's not there that speaks volumes and I want to draw the Court's attention to.

So, for example, on infringement of the '386 patent, one of the two that are at issue in this case, what we don't hear is Avery disputing that it infringes with any facts or circumstances showing noninfringement. On the '983 patent, the other patent at issue, we don't hear as any proffer of Avery's actual manufacturing specifications. If it doesn't infringe, it could come forward with its

manufacturing specifications and presumably settle the matter. The absence of those manufacturing specifications is what speaks volumes.

On validity, what is missing are key elements in the prior art. Listen carefully. I'm going to identify some of the missing elements for you a little bit later this morning, but what we don't hear from Avery on those missing elements is here's a column, here's a line number in the patent, the prior art patent where this appears. We don't hear it because it's simply not there. What we hear are lots of words and explanations about why it must be there even though one can read it and see that it's not there.

On irreparable harm what we don't see from Avery is someone with actual industry experience stepping up and saying, look, as a practical matter with industry experience unwinding is completely possible. We don't hear somebody with industry experience saying, yeah, you can raise prices again once you have suffered price erosion.

3M has presented such testimony. It's presented testimony of an industry expert, Mr. Yaeger, and it also presented testimony of the head of the business, Mary Joe Abler to talk about the unwinding problem and to talk about price erosion.

Notably missing from Avery's submission, again speaking volumes, is that there's no industry expert who

gets up and testifies unwinding is completely possible. There's no Avery employee who is even willing to step up and testify that this stuff could be unwound from the market or that price erosion won't occur and the absence of this testimony is what speaks volumes.

For purposes of today's argument, especially given time constraints, what I am going to try to do, Your Honor, is focus on a few key points, if you will a road map through the case and if I may I'll leave the rest to the briefs.

THE COURT: You may.

MR. REICHMAN: Thank you. Let me start then by providing a very brief introduction to the technology at issue. It's a patent case and so there's technology involved and I want to make sure that the basic concepts are out on the table.

To start at the beginning, this is, of course, a case about retroreflective sheeting and as I mentioned earlier it's the type of sheeting that's used on road signs on the road when you're driving at night and the light is shining up on the sign, it's what makes the sign reflective and send the light back to the driver. That's what retroreflective means, reflected back to the source.

What's difficult in these signs is making them as bright as possible from many different vantage points and angles, so from a distance when you are mile away, when you

are up close, if the sign is up high, if it's to one side or the other, if you're in a motorcycle, a truck, a car, everything in between.

What we're talking about in this case is the technology that makes the signs work and really what it comes down to we're going to hear about are very small retroreflective elements that make these signs work. They are almost too small to see.

Historically, and we can go to the next slide here, the technology centered around these retroreflective beads, a series of very tiny beads that were placed on the sheeting that retro reflected the light. The technology moved on. There was a sea change. It went to what's known as truncated cubes. It's what you see on left-hand side of your screen. That's a type of cube corner that's used and it creates a reflection.

The newest generation is full cubes, what you see on the right on your screen right now, and that is the latest generation reflecting a sea change from what came before the truncated cubes and even further sea change from the beaded technology. The type of full cube, you will hear that term, the type of full cube that 3M uses is called the preferred geometry cube corner element. That's a long word for 3M's type of full cube.

You can see a practical example on the stop sign

on the screen of the difference a full cube makes from the previous generation, the truncated cubes. 3M was the first to create working and commercialized full cube sheeting and its patents cover aspects of this full cubed technology.

I'm going to start here, if I may, Your Honor, by showing a very brief video tutorial that you have that we have provided the Court and opposing counsel on a thumb drive as well so you can review later if you need to. It's a demonstrative based on the evidence in the record that just shows some basics of how cube corner geometry works.

So what you see here when we're starting is driving down a road with a typical 70 miles an hour sign, blowing up and now we will head down into the sign where you can see the actual sheeting involved. There's many layers on a sign. It's this top layer, the sheeting where all the action is for purposes of our case.

The Court may remember from the opening briefs and from the declaration of Dr. Smith that a full cube is like in its classic form is like three mirrors on the corner of a room where light will bounce off of one of the mirrors and then retro reflect back towards the source. You can see the example as we had in the brief of the yellow cube which represents three mirrors and how light bounces off these three mirrors when you put three squares together, three square mirrors in the corner of a room.

The basics of this geometry play out in the sheeting. You can see a sample of the sheeting on the right blown up of course for these purposes and it's illustrative. What always confused me until I saw this is how does a cube fit into this structure and so we created this to show that the individual preferred geometry cube corner element that you see in gray there is just like the cube corner. It's a slightly different shape on the sides, but it's the same principles at play.

The light bounces off of each of the faces. We've colored it in there for ease of reference. It's not colored in the actual. And that cube corner fits back into the sheeting. And then these cubes are arranged in a repeating pattern. If you want a sense of the size, you saw that human hair as an example. There's something like 50 to 100 of these individual cube elements like the colored one in a centimeter. So very, very small.

These basics about how cube corners work, the basics of cube corner geometry were well known, well known for years. Scientists, though, labored for years and years to create a working sheet of full cube elements, something that would actually work on the roadway. Full cubes were desirable because of the brightness, because they have better efficiency in light return and they are just frankly better. The problem was it required very different

techniques from what was used in that previous generation, the truncated cubes to make them work, to direct light where you wanted it to go and to be able to manufacture it in some efficient way.

3M obtained its patents on technology that allowed it to be the first to bring this to market. Those are the basics of how the technology works and what I'll do now is shift gears slightly and talk about the '386 patent, that's one of the two that 3M has asserted in this case.

The underlying case has 13 patents that 3M has asserted against Avery. For purposes of this motion we've simplified it down to two and there's one claim per patent. So at the end of the day we're talking about two claims at issue in the preliminary injunction. And I'm going to focus my discussion today on the '386. We'll talk a little bit about the 983, but of course that's in the papers as well.

The first and very important point on this '386 patent is that infringement is undisputed and we talked earlier about how that makes this case unique. 3M asserted in its moving papers that Avery's white, yellow and fluorescent yellow-green sheeting infringes claim 1 of the 386 patent. Avery offers no argument in response to this.

So the issue is validity on this patent and validity is almost as straightforward. There are two varieties of validity at issue in this case or with respect

to the '386 patent in particular, anticipation and obviousness.

There are only two references cited. So we've got this claim and the only exercise is to look at these two references, the Heenan 214 and the Appledorn 219. I'll talk about each of those. Those each are prior art references that Avery claims invalidate 3M's '386 patent.

To prove invalidity it's ultimately Avery's burden to come forward and overcome the presumption of validity by clear and convincing evidence. Both of these references, the Heenan 214 and Appledorn 219, were before the Patent and Trademark Office, considered and rejected. Case law dictates that Avery's burden is particularly high under these circumstances.

Now, the focus of Avery's argument is anticipation. The case law on anticipation says that Avery must satisfy what's known as the strict identity rule and that means that when you look at one of these prior art references, each and every element set forth in claim 1 of our patent has to be present in that element, present in that prior art reference.

And the key problem here, hear me underscore it today, is that the reference and references that Avery points to are missing key elements. For ease of reference I've put the elements of the '386 patent up on the board so

Your Honor can refer to them as we're talking. There's a few elements that we're going to focus on in particular.

It's most easy to see when you look at this Heenan 214 reference that Avery claims invalidates this patent. It's most easy to see that the brightness element is missing. That's the third element on the bottom. The prior art has to show 375 what's known as candle power of brightness at a certain specified angle and under certain conditions.

You can look through and through that 214 patent and spend all day with it and you're not going to see anything in there about this brightness. There's simply nothing there. And as we set forth in our brief and provided the Court with citations, Avery's expert admits that it's not in that Heenan 214 reference, simply not there.

To overcome this missing reference what the expert -- missing element -- what the expert does is he runs calculations. He pulls in data from another patent, runs it through proprietary software that is not available in the market and that he created, and then says based on that he thinks it would show 375 brightness.

The problem is on its face. If you have to pull in data from elsewhere and you have to run your own secret proprietary calculations that are not publicly available on

a program that's not publicly available, it underscores the point that it is not within the four corners of that document. And as I said you can look all day and you're not going to see it there.

This one element, Your Honor, defeats the anticipation argument on that patent. If it's missing the prior art reference, the Heenan 214 patent is missing even one element, the case law says that it is not anticipated.

But there's more. The Heenan patent is also missing any disclosure of the element you see on the board here, where the second red box is, the 1-2 dihedral angle error and 1-3 dihedral angle error varied in opposition. This element requires some understanding of some terms of art so I am going to work through some of those terms of art with the Court.

First concept is what's known as a dihedral angle and I would like to say that's a $10 word for a 50 cent concept. I'll show you a sample cube corner here. I hope that the Court can see this. This is just an example of one of those cube corners we looked at. When we're talking about a dihedral angle when you see it in 3-D you're not describing it. It's as straightforward as if you hold it --

THE COURT: It looks like something I drew in drafting class in 7th grade.

MR. REICHMAN: Exactly.

THE COURT: I couldn't get my angles right.

MR. REICHMAN: That's the trick. A dihedral angle -- the dihedral edges, let's start with that, are simply the edges that are attached to this high point, Judge, so the dihedral edges are this edge, this edge and this one. They are the ones that are attached to the high point. And the angles are just where these faces come together, the opposite side really of this edge. That's all a dihedral angle is is just a word that describes these three angles that are attached to the high point here.

Normally these dihedral angles are considered to be at 90 degrees. If they're off 90 degrees they are said to have a dihedral angle error. Error in this context doesn't mean a mistake. It means that they are not 90 degrees. So if you have a dihedral angle error of plus 1 degree, then that means that the angle is 91 degrees.

The '386 patent defines particular dihedral angles. If you can go back to the previous screen, this comes out of Figure 22 of the patent, the diagram that I put up on the screen, and the patent defines the three specific angles by naming convention. It calls them the 1-2, the 1-3 and the 2-3. Again that's just a naming convention. It is how the patent defines these particular dihedral angles, not any of them. It's these particular ones in relation to this what's known as primary groove face.

So then the last concept is varied in opposition and this concept is simply that the dihedral angle errors, the amount by which they are off 90 degrees, are varied in sign plus or minus or magnitude. So when it says that the 1-2 and 1-3 dihedral angle error and 1-3 are varied in opposition, that means that they are off of 90 degrees. These two particular angles are off of 90 degrees in opposition to one another plus or minus or different in magnitude.

I have a brief tutorial that goes back over these concepts and shows it in some 3-D. Hopefully it will help make it easier to understand. So we see the representative sheeting here and there's the cube that we looked at before, the individual cube element.

If you pull out that cube element, the video then shows how we've got three different faces and then it shows the dihedral angles as defined in the patent and when you change, you vary those dihedral angles in opposition to one another, you see what happens is the light spreads in a very particular way and this has very particular practical applications as you can see on this final shot with the car. When you vary those dihedral angles in opposition to one another, you take the light from the headlight where it would normally go and it spreads up to the driver, which is where it needs to go.

This is no small feat to accomplish this. Again, normally a retroreflector will send the light back to the source, so the light from the sign would head back to the headlights of the car. The goal and the real art and science of it is to get the light to retroreflect back up to the driver and as we talked about the driver of many different vehicles, the driver of the Mac truck or the moped and everything in between, as well as from a distance, as well as from different sides of the road or even overhead, for example, when you are talking about exit signs on the freeway.

The second problem with the 214 patent -- we talked about brightness. Now talking about the second problem. The second problem with it is that it simply fails to disclose 1-2 and 1-3 dihedral angle errors varied in opposition and I will make the same point as I did with respect to brightness, Your Honor.

One can spend all day looking through that patent. You're not going to see anything about 1-2 and 1-3 dihedral angle errors varied in opposition, not in words or in substance.

In fact, Avery's expert even admitted and the cites are in our brief that there is nothing in the 214 patent about varying these two specific angles in opposition to one other.

As I mentioned before, missing even one element is fatal to the claim and here we are missing two, brightness and then the dihedral angle errors varied in opposition, these two particular dihedral error angles.

The second reference of two that are cited against this '386 patent that I've got up on the board is the Appledorn 219 and what Avery is trying to do is prop up this previous patent with some of the missing elements and tries to pull them out of Appledorn and argue obviousness, but again we're missing elements in Appledorn that's just simply not there.

The most glaring missing element is that Appledorn does not disclose the 1-2 and 1-3 dihedral angle errors varied in opposition and there's a very straightforward reason for this. It's because there are truncated cubes in Appledorn. They are not these preferred geometry or full cubes. They are truncated cubes. The problem is with truncated cubes there are no 1-2 and 1-3 dihedral angles much less having them varied in opposition. Those angles are defined by reference to a primary groove face which simply doesn't exist.

And if I can, it's a little bit of an esoteric concept, but the basic idea here is that in a truncated cube each of the sides are about the same, they are three triangles put together. There's no way to uniquely identify

1-2 and 1-3 dihedral angle. They are all the same. Avery's expert even admitted that there is no 1-2 and 1-3 dihedral angle in a truncated cube. Those cites are in our brief. It's because they're different. They are a sea change before the full cube environment.

As an additional point and again it's in our brief, there is some brightness data that the Court will see in Appledorn, it does talk about brightness of 375 or higher under specified conditions, but it doesn't mean much here. That is a truncated cube, a whole generation before this full cube environment. It is a completely different technology area.

And the point here is that just because you could achieve that level of brightness under certain conditions for the truncated cubes does not mean that you could do it with the full cubes. That is, in fact, what is difficult is achieving with the full cubes.

If I can give an analogy, the argument is like saying that if a gasoline powered car can go 300 miles between fill ups, then it must be obvious that an electric car can go 300 miles between charges. They are completely different technologies with no real application to one another. The challenge with the electric car is making it go 300 miles between charges.

So let me recap then the '386 patent.

Infringement is undisputed. Validity there's two references and if you're missing an element it's fatal. The Heenan 214 is missing brightness and is missing the 1-2 and 1-3 dihedral angles errors varied in opposition. The Appledorn 219 is missing the same thing, the 1-2 and 1-3 dihedral angle errors varied in opposition and is also missing the preferred geometry cube corner elements with the brightness as specified.

The evidence Avery has submitted again is not nearly enough to overcome the presumption of validity by clear and convincing evidence, especially when both of these references were considered by the Patent and Trademark Office and rejected. There's no reason to change that result.

I'm going to touch briefly, if I may, shift gears and talk very briefly about the '983 patent. I am not going to talk in as much detail. If I can go over to the board, Your Honor?

THE COURT: You may.

MR. REICHMAN: Put the elements of the '983 patent up on the Styrofoam board. And we'll leave most of the argument to the brief, but I want to give the Court, if I may, a road map through analyzing this claim to cut through a lot of the words.

On infringement, the first issue, 3M had to go out

and take measurements of Avery's sheeting and these are set forth in the opening brief. These measurements plainly showed infringement.

Avery's argument is really a quibble that maybe the 3M scientists didn't know how to conduct the tests correctly to figure out whether it's infringing. Well, we had to take measurements to figure it out because it's somebody else's product. They have their own manufacturing specifications. All they had to do is come forward and present them and we can determine whether their product is infringing. They didn't come forward with that evidence and the fact that they didn't is what speaks volumes.

On validity, the second issue, Avery argues anticipation and as we said before each and every element must be present, the strict identity rule. To provide the Court with a road map, we've got it on the screen that's been provided to the Court. There are again only two prior art references, the Luttrell 860 and the Heenan 285.

The Luttrell 860 for the reasons set forth in the brief is missing skewed side grooves within the meaning of the patent. You can look through and through Luttrell. You are not going to see anything about skewed side grooves within the meaning of this patent and the argument is set forth in the brief.

Similarly with the Heenan 285, it's missing skewed

side grooves in the same way. There's no skewed side grooves within the meaning of the patent.

The point here is simply to provide the Court with a road map of what is missing because there is a lot of words and there's a lot of concepts that are thrown around, but this is cutting to the heart of the matter. These elements are missing and that's fatal to Avery's claim. It's got to prove by clear and convincing evidence that each and every element was present in the prior art.

With that, I'll shift gears again to Avery's waiver argument. In its brief Avery argues that 3M somehow withdrew its patents and therefore cannot assert them now. With all respect, Your Honor, this is a side show without any real grounding in fact. To be clear, 3M never told Avery that it was okay to go out and infringe its patents.

What Avery points to in its brief is an e-mail from 2006 attaching something from the Patent and Trademark Office saying that it would withdraw certain claims, certain patent claims in a 2006 ASTM process. ASTM is an organization that sets classifications for products.

The problem with that e-mail is it's from four years ago and is part of a different failed ASTM process and most importantly it dealt with different claims that are at issue -- than are at issue in today's preliminary injunction motion.

And let me just be absolutely clear about that. You don't see any connection in Avery's brief between the patents -- the claims it alleges are withdrawn and the claims that are at issue in today's preliminary injunction. They don't make that point because they're different claims. Very specific claims were discussed in that e-mail and they're not these claims.

The patents were a matter of public record. Avery doesn't set forth the elements of waiver and equitable estoppel in any detail because they are very rigorous and it's their burden to prove them as an affirmative defense and essential to those is reliance and it's difficult indeed to understand how Avery could have relied on withdrawing different claims when these patents published and/or were issued after that statement were a matter of public record and they had every reason to know about them.

In conclusion, Your Honor, I'll finish with the point I made at the beginning, that this is a very unique and fact specific preliminary injunction motion. There's plenty of other suitable sheeting on the market available for customers, other types of sheeting. Even if Avery is temporarily stopped from launching its type 11 retroreflective sheeting product that indisputably infringes, 3M worked hard and invested heavily and produced real and meaningful innovation here and was awarded patents

under the patent statutes by the Patent and Trademark Office reflecting that innovation.

In substance what Avery is asking for permission to launch a product that indisputably infringes before a trial can be held knowing that it will be almost impossible for a later permanent injunction to pull those back out of the market.

What 3M respectfully asks, Judge, is that the status quo be preserved. Avery just loses a little bit of time to launch and is of course protected by a bond and 3M is not forced to suffer infringements during the pendency of the suit that can't later be undone.

With that substantive presentation I want to just spend a few more moments talking about the bond requirement. Given the sales domestically of type 11 sheeting we understand to be Avery's profit margins, we believe a bond of $10 million would be very, very high relative to the possible lost profits suffered by Avery if it turned out that the injunction was wrongfully granted.

We can provide more argument about the basis by which we arrived at that $10 million number, but it would require a disclosure of highly confidential information and perhaps sealing the record.

And so what I would propose if Your Honor is willing is to determine whether there's any disagreement

about that $10 million number and then determine what types of information would be helpful to reach a conclusion.

THE COURT: All right. Thank you.

MR. REICHMAN: Thank you.

MR. BILSKER: May I have a moment just to bring some of these exhibits up?

THE COURT: You may.

MR. BILSKER: Never goes exactly as it's supposed to. Your Honor, would you like a hard copy of these slides as well?

THE COURT: I've got them.

MR. BILSKER: Okay. So let me begin with the standard.

THE COURT: Let me begin first. So certainly you have your presentation to give me and I will not interrupt you. Usually I don't interrupt presentations, but let me give you some guidance on what I need both sides to come back and make sure that I'm clear on.

The plaintiffs are saying that if I don't grant this injunction any remedy at the end would be ineffective. And when I first looked at this case it seemed like it was just a money case and we could sort things out at the end, but -- that's part of it, but you do your presentation. The summary given to me by 3M on the '983 patent and the '386 patent, you are going to have to hone in on those issues and

convince me that 3M is wrong.

MR. BILSKER: Absolutely, Your Honor, and I am splitting my time with Mr. Baker and he's going to address this unwinding or so-called unwinding issue. The first thing -- and I will address the patent matters.

The first thing that I would like to address is the standard, whose burden of proof it is, because Mr. Reichman repeatedly referred to Avery not proving this or Avery not proving that.

What 3M's burden is as the movant, they must come forward with a case with respect to validity of the patent. They must come forward with a case showing evidence supporting validity of the patent.

The way that is normally done is a situation where a patent has been through a re-examination, a situation where a patent has been through prior litigation, a situation where there's industry acquiescence where everyone is licensing the patent. None of that evidence is present here. If you look at the cases and we cited the Amazon case in our brief and I bring it up again, that is the standard that they have to meet. Instead they rested on the presumption. They said all patents are presumed valid, but the law is clear that is not the standard in a preliminary injunction.

Further, Mr. Reichman said, well, these references

that Avery relies on, they were before the Patent Office. They were cited on the face of the patents. We didn't have an opportunity to submit the file histories. I asked Mr. Reichman if it was okay to lodge them and we must have crossed paths, but we can submit those file histories to Your Honor. You'll see absolutely nowhere in any of the discussions about those patents are the references that we're talking about today. In fact, on the '386 there was not a discussion of any patents.

Once 3M meets its burden, which we don't think it did even in the first instance because all it did was rely on the presumption, then we need to come forward with our case. What does that require us to do? You heard Mr. Reichman say repeatedly that we have to prove by clear and convincing evidence that the patents are invalid. Again, that's not the standard. The standard is that we have to present a case of substantial question. And what does it mean to present a substantial question? It means we have to show the patents are vulnerable, that's it, and that's Federal Circuit law.

Now, in their reply brief 3M raised the question and they raised this Abbott case where judge Newman said she -- it was her language where she said clear and convincing evidence, but when you take a look at that case, you'll see it was a split decision or it was not 3-0, three

judges on the same side. There was a dissent, two people in the majority. The other judge in the majority -- judge Newman wrote the decision. The other judge in the majority did not join in that part of the decision. I believe it's part 3 or part 5 in which judge Newman stated this new standard. She recognized it was different than what the law said and we know that a panel cannot overrule another panel, that's one thing. Number two, it's not even a part of the majority opinion. It's only judge Newman. So the rule still stands. The law is still what we need to do is present a case that shows the patents are vulnerable and we have done more than that.

And we'll go through some of the evidence that Your Honor did not have a chance to see because we just took the deposition of 3M's new technical expert and essentially he gave away the farm, Your Honor.

Now, what's the evidence that we're going to rely on to show that there's not going to be a likelihood of success or 3M cannot show a likelihood of success on the merits with respect to the validity of the '386 patent? There are four things.

Number one, at the time that we filed our opposition brief there was a re-examination that we had filed on the '386 patent. That re-examination is now mature.

Number two, 3M's expert recently testified about the concepts involved in these patents and basically agreed there's nothing to them. We have patents both to Avery and to 3M which invalidate the '386 patent.

And, four, we haven't admitted that we infringe. You cannot infringe a patent on which you have a license and that ASTM process, we'll go through it was very, very clear 3M made an unequivocal statement to the members of the standards setting board about what it was going to do with respect to its patents that claimed ASTM standards, performance standards.

So let's start with the re-examination and this is just the face page. Your Honor has not gotten a chance to see this because it was not granted until October 14th. Mr. Reichman never raised this issue.

The re-examination was granted on the basis of a priority error and what that means is the '386 patent claimed priority back to an earlier application. There are very specific rules that one must go through to claim priority. Those rules were violated. 3M therefore does not get the priority going back to I believe it's 2003. They lose that priority.

When they lose that priority, all the patents in that chain, the parent patent becomes an invalidating reference and the Patent Office recognized that and granted

the re-examination.

Now, 3M will likely say, oh, it's not a big deal. It's a technical -- it's just a technical problem. Certainly they didn't raise it in their reply briefs. But we know it's more than just a technical problem. There's an Encyclopedia Britannica case that's 609 F.3d 1345 at 1351. It's a 2010 case from the Federal Circuit. It says in a situation like this where there's a priority claiming error you can't just reach back and change what's happened in the past. It's over. Your patent -- if earlier patents in the chain disclose the same thing, your patent is invalid. We therefore think -- we actually do think this meets the clear and convincing evidence standard. We don't even have to do that. This certainly raises an issue of vulnerability about the '386 patent.

Now, what are the other arguments that we have with respect to the '386 patent? Let me just go with respect to the art. So Mr. Reichman I believe did properly explain what the elements were and I think we have our own board if I may.

THE COURT: Oh, of course.

MR. BILSKER: Is it easier for Your Honor to read it over here or over there?

THE COURT: Over here.

MR. BILSKER: So what we've got up is the language

of the claim, but in essence there are really three issues with respect to that claim. It's different dihedral 1-2 and 1-3 angle errors. You heard the term in opposition. Well -- and you heard Mr. Reichman I think say that it's a 50 cent concept. I agree, maybe it's a nickel concept, the concept of dihedral angle errors. And really what we've got are terms that sound fancy, but have been in the prior art and people just used different verbiage to describe it.

When we're talking about dihedral 1-2 and 1-3 angles that vary in opposition, all we're talking about is that they have different values. That's it. It's just one might be 6 minutes, one might be 7 minutes, one might be 1 degree, one might be 2 degrees. If they have different values, under the patent they vary in opposition.

Point number two, we're talking about a particular brightness. So, in other words, the sheeting must reflect back and it must give you a certain brightness.

And third, that brightness must exist at a certain angle where the light goes in and a certain angle where light comes out. So, in other words, if I had a flashlight and I was shining it at the wall behind Your Honor, the entrance angle would be am I tilting it up like this, am I holding it straight and the observation angle would be where the observer is. So there's a triangle that's formed and those are the angles.

And those second two points, where do those come from? Did those come out of thin air? No. Those came out of the standard and, in fact, you'll even see that mentioned in the claim itself.

May I?

THE COURT: Go ahead. You don't have to ask. It's your presentation.

MR. BILSKER: Okay. So this right here, this language, ASTM, what that actually refers to, Your Honor, is ASTM is an organization which deals with signage and many other things, but they set a standard so that when you measure the brightness everyone is doing it the same way.

So within the claim itself they've actually referenced you to the ASTM standard, told you when you measure the brightness, this is how you have to do it.

Point number two. So those are the three points of the claims. In our brief and our expert's declaration he went through a long history about cube corners and this whole concept of dihedral angle errors and then varying in opposition and being different. Why did he do that? To show that this concept has been around literally since the 1920s.

Our predecessor company, the stim son corporation, I think his name was Jonathan stim son, in 1926 obtained patents for cubed corners in which he mentioned the dihedral

angle errors. He followed that up -- his first patent was on the truncated cube and that's in Dr. Chipman's declaration and those are some of those exhibits attached. He followed that up a few years later with a patent on full cubes. Same concepts. The whole dihedral angle error issue, it ports over from truncated to full cubes completely and I'll even read you the testimony of 3M's expert Dr. Moore who said exactly that.

So Dr. Chipman, our expert, went through this long history and it's relevant. He had to go through this history to show what the state of the art was, to show that this concept which -- we're going to be focusing on these dihedral angle errors. Why? Because if you ask anyone in this field, hey, if I want to get a certain brightness at a certain angle of observation, what's the most important thing? Everyone will tell you it's the dihedral angle error.

And what you're going to see is that their own expert recently testified, it was last week, he said that's something he's been teaching since the 1970s to undergraduate students and the reason it seems to have come out here, we'll go through that.

So with respect to 3M's own expert, here's what he said. He said since the 1970s he's known and he's told his students that they could vary the dihedral angle errors

differently and we've cited the pages at his deposition and if Your Honor would allow us maybe at the end of the hearing or tomorrow we'll submit those pages electronically to you, but we haven't had an opportunity to do that since we just took his deposition last week.

He taught also point number two that in the 1970s --

THE COURT: You may.

MR. BILSKER: Thank you.

THE COURT: Do it by Monday.

MR. BILSKER: Thank you, Your Honor. He taught that in the 1970s changing the dihedral angle error was really the most important factor in spreading the light and you heard Mr. Reichman talk about the spreading of the light. That's when you saw that cone coming back between a motorcycle or a Mac truck, spreading it out. If you want to do that, the way that you do it is by changing the dihedral error angles.

And he said certainly by 2000, three years before Mr. Smith filed his patents, it was known to vary the dihedral angle errors differently.

So let me just if I may, I can do it from here or I can show Your Honor. This is a representation of a full cube and this is a truncated cube. You see this looks kind of like a pyramid. Essentially you would be looking in it

like this. The light would shine -- if you had a flashlight, you would shine it into this hollow and it would bounce off these sides and come back to you. Same thing with this full cube. You can see it's three sides are made up of a square. You would do the same thing, shine the light in, it would bounce off.

What are we talking about in changing the dihedral angle errors? Here it is, Your Honor. This is what we're talking about in changing dihedral angle errors, moving these towards each other, moving this one towards it. That's it. That's all it is. That's all we're talking about is pushing these angles in or stretching them out. And you can do it one with respect to the other, you can do them the same, they can all vary independently and everyone knew that.

And it was the same thing with these. The truncated cube, it's the same concept, you move them with respect to one another, you could move one or all three. Now, if that was such a easy concept and something so straightforward, then why do we have these patents, why did the Patent Office grant them and why did 3M seek them?

Well, I think it was because of a misconception of 3M's inventor. When we asked him at his deposition was he aware of anyone prior to him filing his patent varying dihedral angle errors in opposition to one another, the 1-2

and 1-3, he said, no, I'm the first person to have ever done that.

Now, Mr. Reichman told you, well, there are no 1-2 and 1-3 angle errors in a truncated cube because there's no groove. Your Honor, what you do is you name the three sides and that's how you come up with 1-2, 1-3, 2-3. It's just a random reference system. All I did was on these I put 1, 2, and 3. I'll leave these with Your Honor if you want to look at them.

So 3M's inventor said that he was the first person to ever do it. But what did 3M's expert say whose deposition was taken last week? He was asked, there are three possible angle errors that one could vary in a preferred geometry cube corner? Yes, he says. And it was known prior to 2000, again three years before 3M filed those patents, it was known before 2000 that each of those three dihedral angles in a preferred geometry cube corner and again a preferred geometry cube corner is just a fancy word. All it is a cube corner that's not a truncated one that's shaped like a square or rectangle. That's it, no big deal, and those existed. He said -- he was asked whether it was known before 2000 whether you would vary each one of these angles independently. Yes. No equivocation.

So if each of those varied independently, he was asked, would they have different values and would they be

varied in opposition as that term is used in the patent? Answer, yes.

Now, do we have a specific example of where that's taught? Mr. Reichman kept saying you'll never find this in any patent or any publication. Well, maybe no one used the word 1-2 and 1-3, but again there's only three possibilities and if you can change all three of them independently, then you are changing the 1-2, 1-3 and 2-3. That's it. There's only three possibilities.

So one of the articles that Dr. Chipman talked about in his declaration from the 1970s is this Eckhardt article. So when 3M's expert started saying it was known since the '70s, '70s just kind of popped up and I knew this Eckhardt article was from the '70s.

So I started asking him about this article and, in fact, he testified that the Eckhardt article shows preferred geometry cube corners, same kind that are being claimed in the '386 patent with 1-2 and 1-3 angles varied in opposition.

Now, did the Eckhardt article actually say at a -- with a brightness of 375 at this observation angle and this entrance angle? No, it didn't. It was actually more general because what it did was it told you, well, if you want to get this brightness at this angle, at this observation angle, here's how you set your dihedral angle

errors. It actually taught the mathematics of how to get a certain brightness at any particular angle.

So picking out one where it's taught generally the mathematics of how to do it is not an invention. Just like if I was to change this claim now and say I want a brightness of 400 and an observation angle of .6. All I do is go back to Eckhardt and use the mathematics to give me that value. The inventor didn't know about this at all or testified that he didn't know about this.

So again let's go to the testimony from Dr. Moore. When asked about this Eckhardt article very specifically he was asked does it show a preferred geometry cube corner or full cube corner? Yes, I believe it is. So we were looking at Figure 11.

And then he was asked whether Figure 11 and other parts of the Eckhardt article describe predicting how light would act when given certain dihedral angle errors and he said, yes, that appears to be the whole meaning of the article.

He was asked whether he could think of any reason why the teachings of the Eckhardt article how to design a cube would not apply to sheeting. Absolutely not.

So -- and then he was asked whether anyone of skill in the art prior to 2000 would be able to use the Eckhardt article to calculate the brightness for certain

observation and certain entrance angles and he said absolutely.

Now, what's a piece of sheeting? A piece of sheeting is made up of these individual cubes. So what you do is if you want a piece of sheeting that has that value, you design one cube to have it and then you make the whole sheeting that way.

So given that background, which is something that 3M's expert didn't even think was important in evaluating the validity with respect to obviousness or anticipation, he said, well, I skimmed these articles, but I didn't really think it was important to know, you know, what the teaching of the art was, but since he had known -- since he himself had been using those equations to calculate brightness and figure out how a cube corner would behave given certain dihedral angles, we decided to go through one with him.

So given that background what have we got? We've got these two references. Aside from the fact that the re-examination has been granted on the '386, we have the two references, the Heenan patent, which is Avery's patent, and the Appledorn patent, which is 3M's patent.

Now, Mr. Reichman and 3M have admitted Appledorn teaches sheeting with truncated cube corners where they meet those brightness values at .5 observation angle and minus 4 entrance angle, which is what the -- excuse me? I thought

you said something -- at an entrance angle of minus 4 degrees and an observation angle of .5.

Appledorn absolutely has those brightness values disclosed, but they say totally irrelevant because truncated cubes don't apply, it's just totally different technology, like having an electric car and a gas car I think was the analogy that he gave.

Well, his own expert doesn't actually agree with him. At page 16 of Mr. -- Dr. Moore's deposition he was asked whether the equations used to calculate the spread of light in truncated cubes would be the same as those used for full cubes or preferred geometry cubes and he said they would be the same, yes. And that's at page 16 of his deposition.

Moreover, what you've got in the Heenan patent is Heenan actually specifically references the Appledorn patent and says with respect to changing dihedral angle error, the Appledorn patent literally discusses changing one, two, or three of those angle errors. By the way, they did it in 1980, but we had even done it before that or I had done it before that, I, Heenan, in the '70s.

So what you've got is you've got a combination which is specifically suggested in the Heenan patent. Now, what's the big thing about going from the truncated to the full? In the Heenan patent and throughout the literature

you will find that people knew that when you went from this kind of cube to this kind, and again this kind existed in 1930, people knew that you get more reflection back with this kind of cube because the faces are bigger. So they usually say that this is 66 percent efficient, the truncated, the triangle, whereas the full, the square is 100 percent. What does that mean? That means if you create a piece of sheeting with full cubes that was essentially similar to the ones with the truncated, you know as a matter of mathematics and physics it's going to be brighter and, in fact, the Heenan 214 patent tells you that. So how is that not obvious? We've got a specific instance where those very particular brightness values are identified at those very particular entrance and observation angles.

And, again, it's hard to find that little needle in the haystack because it's just not a big deal. People didn't really think it was earth shattering to publish, hey, I've gotten this brightness at this observation angle and this entrance angle. So to find that literally when you know how to calculate for anything is a little like searching for a needle in a haystack.

So Mr. Reichman when he attacked the Heenan 214 patent and that's the patent we -- the Avery patent which we think renders the '386 both invalid both under obviousness and anticipation. He says you can scour that patent and

you'll never find the brightness, you'll never find the brightness mentioned in there. I agree.

But that's like saying I'm reading an article and it said that I went from here to St. Cloud, Minnesota, in two hours and 20 minutes without stopping and that's like saying, well, that doesn't disclose my average speed. Of course it does. If I know the distance between here and St. Cloud and I know how long it took me to get there, I can calculate the average speed.

That's what we've got here. We've got all the information in the Heenan patent that you need to calculate what the brightness would be at a particular observation angle and entrance angle. That's what Eckhardt taught in 1970. Dr. Chipman actually refers to even earlier articles, the Yoder article from 1950.

With that set of mathematical tools, if you have these things disclosed, particular sizes and dihedral angle errors, then you can calculate what the brightness is going to be.

So the fact that it doesn't mention it is again the same as saying I know how far I went and I know how long it took me to get there, but that doesn't disclose my speed. That's really not correct.

Mr. Reichman also said what you're going to find is that the Heenan patent doesn't disclose that. We were

picking and choosing values from all over the place. That's not true, Your Honor. What we did was we tried to pick very specific things that were mentioned in the patent, put them into the standard well known formulas and see what they produced.

So what Dr. Chipman did was example 3 of the Heenan patent, which starts on column 27, has sizes of the cubes. That's one thing that you need to put into your equation, how big these cubes are, how big on a side they are. He put those values in. Then you've got to put in the values for your dihedral angle errors and you've got to put in what the material is. The material was specified in example 3 of the Heenan patent.

At the very beginning of example 3 of the Heenan 214 patent he says that the dihedral angles or the spread of light, if you will, can be varied in one, two, or three planes and then he mentions his earlier patent, the Heenan 285 patent, and he says, for example, take a look at those values.

So we're not randomly picking some numbers. We went to the very patent that Heenan mentions, his earlier patent that he specifically incorporates. And that's a well known concept in patent law. You are allowed to incorporate by reference. If there are things in another publication that you don't want to rewrite, you can say take a look at

what's taught in this other thing. I'm specifically incorporating it by reference. And that's what the Heenan 214 patent does. He says I'm specifically incorporating my teachings from my earlier patent.

And Dr. Moore, their own expert, admitted that when you look at that earlier patent it teaches dihedral angle errors of 6 minutes and 7 minutes. And you will see in the briefs a minute is written with like a little slash and apostrophe. There are 60 minutes in one degree. So one degree of angle has 60 minutes and what the Heenan 285 patent said was you can change your 1-2 and your 1-3 such that one is 6 minutes and one is 7 minutes.

So what I've put up on the screen this is from the Heenan 214 patent and I've highlighted where it actually is referring to specifically referencing those values in the Heenan 285 patent. He says divergence, which is the spread of light, can be varied in one plane or many. How do you vary it in one plane or many? You change, one, two, or three of these angles. And he says you can do it by changing the dihedral angles between either two or three faces as taught in my other patent, the 285. So when you go to that, that's where you find the numbers. And here's the 285 patent and you see down in this part which is highlighted you can see 6 and 7 minutes. So those are the values that Dr. Chipman took and put into his standard,

well-known equation.

And I think one other thing that's interesting to point out there is Mr. Reichman in his presentation put up a picture of that naming convention of the dihedral angle errors and if I may I'll just show this to Your Honor. This is Figure 22 of the Smith patents. They're both the same. And I've turned it upside down and you see when you turn it upside down it's literally exactly the same as Figure 4 in this Heenan 285 patent from the 1970s. And you'll see that that Figure 3 is also identical to other figures in the Smith patents.

So, again, these cubed corner geometries and designs were taught by Heenan, Avery's own predecessor or Avery's predecessor in the 1970s. So, for example, if you look at Figure 3 and you look at Figure 6 of the Smith patents, they're the same. Those preferred geometry cube corners, identical looking, and their expert actually admitted that.

So what you heard Mr. Reichman say is there's this proprietary software out there, you know, he's made this stuff all up, he's picked numbers from out of the air and then he's run it through this proprietary software. That is a whole lot about nothing.

He had his own program, yes. So he had his own program. Big deal. The equations have existed since the

1950s and 1970s as their own expert admitted. In fact, their expert said he derived the equations himself in a day or two to make these calculations.

What's interesting is has 3M ever said that they asked for that proprietary software. We certainly would have given it to them if they wanted to literally go through the code line by line, but you will see in Dr. Chipman's declaration he went through exactly the process that that software went through to make the calculations.

And there's no dispute, no one has ever said that the process that he used was incorrect. They've never said the steps were incorrect. I asked their expert. Never said that and we have cited the pages at their expert's deposition.

What was also interesting is I asked Dr. Moore, their expert, whether he had any programs, ray tracing programs they're called, which he could use to measure the brightness. And do you know what he said. I've got many of them. Companies like to give them to our universities so that they can convince our students to use them. Well, did you use it to check his calculation? No. You know who else has one? Dr. Smith, 3M's inventor, has his own programs as well, programs that he never disclosed in the patents, but again these are programs that people fiddle with on their own, they sometimes make tweaks to them.

There's no dispute that the brightness values that were calculated are done correctly and, in fact, the brightness that comes out using those values that are disclosed in the Heenan patents are so much over what's claimed there really can't be any dispute.

Now, last on the '386 patent is this issue about the ASTM. It was a totally different process, has no relevance here at all. That is just completely unsupportable, Your Honor.

The ASTM process went on for years, started in about 2004 when 3M first introduced its proposal to have a new type. People objected left and right. And why did they object? Because they realized that 3M had a bunch of patents that covered literally these values and they said -- so they go through a formal voting process and they actually say why they're going to reject their proposal.

So people identified patents, they identified certain pending claims and then about six or seven other patents that were potentially relevant to this standard and two of the claims literally read right on top. It was that brightness under, you know, at minus 4 degrees and .5 observation angle.

People objected left and right. The standard was not going to get passed. So what did 3M do? They repeatedly, at least three or four times verbally and then

in writing, this is all in writing, the minutes of the meetings, e-mails, they came back and said, look, guys, we understand essentially that you've got a problem here with this standard and some of our patents, so here's what we're going to do. We're going to withdraw the claims that cover the ASTM performance standard and that's exactly what they said. Claims related to the ASTM performance standards have been withdrawn. There were certain pending claims.

The standard goes up for a vote. It goes through all these processes, gets to the final stage and there were 11 no votes that had to be overcome at the main committee. All but one of them was overcome. The one that was not overcome had to do with something totally different than this performance standard. It was about including a daytime luminescence value. So you had one vote shy. It had to be completely unanimous at the main committee. So vote gets denied.

What does 3M do? About a year and a half later they reintroduce that same standard in 2007. That final vote was like end of '06. They reintroduce the standard and they reintroduce the same values, but what they don't do is they don't tell anyone that in the interim they have now revived those claims that they had withdrawn before.

So in this process where we now go forward from 2007, it's already assumed, people know that 3M had

represented that they withdrew those claims, claims drawn to the performance standard, in other words, claims like claim 1 of the '386 which mentions the performance standard right in it.

So when there were discussions about that, no one really raised them and you can see we've excerpted a couple of documents here that respond to their argument. They talk about this standard having been previously introduced and they even talk about maintaining the commitment that had been offered with respect to that standard.

The declarant that they offer, Mr. Carol, wasn't even around in that 2006 period and, in fact, at his deposition what he said was that they consider two things, either withdrawing claims or just outright granting a license to everyone. They decided to withdraw the claims at first and then they decided, well, since we don't know whether we're going to reintroduce the claims, we think it's all right to bring them back to life since we don't know whether we're going to reintroduce the standard, but they did reintroduce the standard and what they did was totally improper and it was completely right for people to rely on that.

It's a red herring when Mr. Reichman says, oh, these patents were out there, they were known. Of course they were -- well, these claims were not necessarily known,

but there were other claims that were known and when they were addressed the members of the ASTM, including Avery, received the representation which said they're going to withdrawn, in other words, don't worry about them. So we were entitled to rely on that representation and we did.

So now shifting gears to the '983 patent, the '983 patent has two very significant issues with respect to it. One is the infringement issue and the other is the validity issue. So what are -- and there are claim construction issues that go along with that. 3M never really proffered any claim construction of this claim, these claim elements, which it was its duty to do.

So the issues are how many grooves are there. And why is that relevant? It's relevant to what 3M did to prove infringement. They keep putting that burden back on us. They keep saying where are Avery's specifications, manufacturing specifications. Your Honor, we don't measure the things that are in this claim in our piece of sheeting that we produced when it comes off the line. Here's the thing that is accused. They have it. They should be able to make the measurements. We don't actually make these measurements when it comes off our line. We don't know exactly what those things are. That is their burden to do and they didn't do it.

The next issue is what does it mean to be

nominally parallel. So once they made measurements, does it meet that term nominally parallel.

And third, what does it mean for the grooves to be nonparallel to reference plane 28. And you heard Mr. Reichman say you'll not find anywhere in the prior art anything that talks about skew, therefore those references that Avery uses, they can't invalidate the 983 claim.

Well, I challenge anyone to tell me where the word skew is in that claim and I challenge anyone to tell me where the word dihedral angle error is in claim 26 of the 983 patent. It's not there. Those are limitations that 3M is importing into the claim to try to avoid invalidity and we know that's not proper.

So let's start with the first thing. What's a row? Actually it's what everyone thinks it is. You've got a row of juror chairs. You've got a row of chairs up there. It's just a series of things which are aligned. With respect to the patent, what's a row of preferred geometry cube corners? It's all the cubes that are in straight line that share a similar face.

So here's a representation. It's a figure from the patent. You see there's four cubes there. Those cubes are in a row. Now, is that the entire row? No because you can see it cut off at the top and the bottom because you can't draw all the cubes in a row.

What I've put up on the screen is a representation of a cube corner. You can see how many cube corners are in there and you can see how many cubes there are in a row.

And, Your Honor, I can just pass you this if you want to take a look. This is an actual piece of sheeting. It's an Avery piece and I will hand you a magnifying glass. If you turn it the right way, what you are going to see is a series of lines that look like a honeycomb and then below it you are going to see a square and then within each of those squares you're going to see some very, very fine lines. Each of those fine lines is essentially a row with hundreds and hundreds of cube corners in it.

Now, why is that important? Because what that claim says, what claim 26 of the '983 patent says is you have to have cube corners defined by side grooves and those side grooves need to be nominally parallel to each other.

So what does it mean? How does 3M prove infringement? At the very least they've got to look at a row, look at all the side grooves in that row, there's probably at least 500, and they've got to determine whether all those side grooves --

THE COURT: Hold on. You want me to guess that these lines have cube corners?

MR. BILSKER: Well, you are not going to be able to see the cube corners, Your Honor. What you're going to

see -- do you see the square?

THE COURT: I see the square.

MR. BILSKER: So within the square you see those fine lines and on each one of those fine lines there are hundreds.

THE COURT: Well, that's what you want me to assume that's there.

MR. BILSKER: Yeah. Well, actually I'd prefer that you don't assume.

THE COURT: I can't see them.

MR. BILSKER: If you don't assume that they're there, then we don't infringe.

THE COURT: All right.

MR. BILSKER: So 3M again says, oh, who cares, you know, we measured four and we measured four side grooves on four different samples and they all turned out with these measurements. Well, you've got hundreds. I put up 50, 50 lines there, and you can see right in the middle there's one line that I've shaded in green that's not parallel to the others. If you only take a small sample, four out of 50, you certainly can miss one.

So number one, 3M had the sheeting that it accuses of infringement and it certainly could have made those measurements. It doesn't want to make those measurements because it says it's too much work. Well, that's not our

fault. We didn't write the claim. They did.

Then even assuming, let's take the measurements that they made, are those grooves nominally parallel? What does nominally parallel mean? It means basically you made them as parallel as you can within the manufacturing tolerances. Well, what's a number that you ascribe to that? Because they've given you an Exhibit E of Dr. Smith's declaration. He's put out actual numbers. He said this one is this much off of parallel with that one.

So if you take those numbers, what does it prove? Well, you need some metric to compare it to. So what is the metric? Well, if you take a look at the patent and we challenged 3M to come up with a construction, which they never did, but if you take a look at the patent at the places that we've cited, for example, column 18, line 18, of the 983, you'll see that the patent talks about a quarter of an arc minute being the tolerance and that's something that Dr. Moore agreed with, point number three there on that slide.

Well, a quarter of an arc minute within parallel would make things nominally parallel. So how much is a quarter of an arc minute in degrees? Well, we know it's .0042 degrees.

Well, are the values that are in Exhibit E of Dr. Smith's declaration, do those show lines that are

parallel to within .0042 degrees? Absolutely not. You can do the math. We had Dr. Moore do the math. He went through it at pages 107 to 110 of his deposition and they are usually triple to quadruple that value. So up to a minute or up to a degree off. So even using 3M's own values we don't have nominally parallel.

Now, they're going to come back and they're going to keep saying, well, they have their own manufacturing specifications. Well, no. The patent tells you what the manufacturing tolerances that existed at the time were and those were a quarter of an arc minute.

Now, let's move to the invalidity of claim 26. It really is a very simple concept, Your Honor. It's are those side grooves, are they parallel to some reference plane which you've picked and that's it. They have to be greater than nominally parallel, so not dead on within a quarter of an arc minute, they have to be a little skewed off of that, and then they have to be that much -- between that much and one degree off of parallel to this particular reference plane, reference plane 28.

They didn't actually make any measurements that told us that. What you see in Dr. Smith's declaration is that it suggests, other of his measurements suggest that this is so. Well, suggest doesn't sound like an actual calculation. Dr. Moore said he has no doubt that Dr. Smith

made the calculations correctly. He never took a look at them and they never put the calculation in there. And, again, suggest is not a term that's normally used with mathematics. They either show or they don't show.

But really this relationship that we're talking about I want to talk about with respect to validity because 3M's own earlier patent shows that this claim is invalid. So we know that this earlier patent has preferred geometry cube corners.

THE COURT: Are you saving time for your colleague? Because you've only got 15 more minutes.

MR. BILSKER: Okay. I'll wrap this up, then. So what we see in the Lutrell patent, the 860 patent, we have reference plane 28 and you see that those side grooves which are identified there are not parallel to that reference plane 28. And reference plane 28 is in Figure 1 of this piece of prior art that we're talking about, exact same Figure 1 as used in the '983 patent, exact same thing that's used to define the reference plane 28. And, in fact, if you go to slide I think it's 33 or 32, you'll see that Dr. Smith in his declaration used exactly the same reference plane.

They are now saying, oh, it's not reference plane 28, it's actually primary groove 50. Well, primary groove 50 doesn't appear in the patent. They are also saying it has to have dihedral angle error. Well, that doesn't appear

in the claim and those two words, skew and dihedral angle, those appear in other claims of the very same patent. So if the patentee wanted to include those limitations in the claim, they knew exactly how to do that.

So I will pass it to Mr. Baker.

MR. BAKER: Good morning, Your Honor.

THE COURT: Good morning.

MR. BAKER: May it please the Court. I apologize. I have a little bit of a voice issue, so let me know if you can't understand me.

Your Honor, I have about ten slides to go through. I know we have a limited time, so I will be brief. But, Your Honor, the Court said it best and I can't say it any better. This is a money case. It's a money case. And at the end of the day, at the end of the trial there's absolutely no reason if 3M prevails why they will not be able to be compensated by money damages and we'll walk through some of their arguments.

The first thing I would like to address is their irreparable harm arguments and 3M has essentially three arguments on irreparable harm. The first one they call their unwinding theory. We think that that's simply irrational. More than that, by definition the damages that are implicated in their unwinding theory are past damages, they're past contracts that at the time of trial will have

already occurred and those kind of damages, no one is disputing that past damages are not quantifiable.

Number two, they have an irreversible price erosion theory. We think that that theory contradicts the only factual evidence that's in the record. We also think it contradicts their expert's own testimony and again we think that those kinds of damages are completely quantifiable.

And finally, they have a loss of goodwill argument that we believe is based on a faulty assumption that a permanent injunction would issue in this case.

So first of all, the unwinding theory. Your Honor, as Mr. Reichman already described, the unwinding theory goes something like this. If a preliminary injunction does not issue today and Avery is allowed to continue on the market, then Avery will win a certain number of contracts for type 11 retroreflective sheeting. If at the time of trial 3M prevails and a permanent injunction issues, then 3M says that all of those contracts will have to be unwound. The Avery product that has gone up on signs on roads across the country will have to be pulled down and replaced with 3M product.

Your Honor, there's simply no reason why that would have to happen. As Your Honor knows, if a permanent injunction issues in this case, it's going to be crafted by

the Court, not by 3M, and if Your Honor doesn't order that type of product recall, then it won't exist and this whole unwinding theory simply goes out the window.

Now, we don't believe that there's any reason why Your Honor would need to order that sort of product recall as part of a permanent injunction and the reason is simple. Again, the damages that would be implicated are past contracts. They have very specific provisions. They have pricing provisions, volume provisions, the types of products are in there. Some of them even have liquidated damages. Those damages will be easy to calculate and no one disputes that. Even 3M's own expert, Dr. Hausman, I asked him at his deposition, I said do you think it's possible to calculate damages between now and the time of trial? Unqualified he said, yes, there's no dispute that past damages are quantifiable.

On the issue of irreversible price erosion 3M points to one factual piece of evidence, only one, that they say supports their theory of price erosion. They talk about a negotiation between Avery and a sign company out in Los Angeles called Maneri sign company.

But Your Honor, Avery didn't offer any pricing to Maneri sign company and the reason is simple. Avery is not approved, Avery's product is not approved for use in California. We couldn't offer any pricing. So there was no

pricing offered.

But more than that, even if we had offered pricing, the evidence shows that it did not cause price erosion. 3M's own witness admits that 3M did not lower its price. So the only factual evidence that 3M relies on actually completely contradicts their price erosion theory.

More than that, it's not enough for there to be price erosion. Again, we don't think that there's any evidence that it would be, but even if there were, the price erosion has to be irreversible and we believe that it is completely reversible and we believe that their experts have testified to that fact.

The first expert that 3M put up was Mr. Yaeger and at his deposition I asked Mr. Yaeger point-blank if 3M would have the ability to raise its prices if it wanted to. He said yes. I said so two to three years from now if we're in a situation where 3M is again the sole supplier of the product, will 3M have the ability to control the prices? He said yes. He said it's hard to imagine that they would raise the prices any higher than they are today where they are already the exclusive provider, but, yes, 3M will have the ability to set prices.

That was their first expert and that's damaging testimony for them because it undercuts their entire irreversible price erosion theory. So what do they do? In

their reply they went out and they got someone else. They got Dr. Hausman.

And at Dr. Hausman's deposition I raised the same issue. I asked Dr. Hausman about this, whether price erosion would be irreversible. And here's what he said. He said in his opinion price erosion is always partly reversible, always, and he said under some conditions it can even be fully reversible. I asked him under what conditions are we talking about. He said, well, if you have a two player market and the second player, a firm he called it, leaves the market, if things basically return to the way they were, then prices will go back up in two or three years. So even Dr. Hausman agrees with us that price erosion is not irreversible in this case.

Now, to be fair, Dr. Hausman also said that he thinks that there are a couple of things that make this case unique and we don't agree and I want to address both of those issues.

One of the things that Dr. Hausman says makes this case unique is what he calls an inventory over hang and what he's talking about there, Your Honor, is stocking up on supply. He says if Avery enters the market and prices go down, that customers will stock up on the lower priced goods and that this inventory will stick around for a while and that will keep prices down.

Well, number one, we have no evidence that that's actually occurring. When I asked Dr. Hausman about the details of this inventory issue, he had no idea how much inventory was being stocked, what inventory was being stocked, anything like that. And we have no evidence of that either. But more than that, inventory runs out. So even if stockpiling occurs, eventually that stockpile will run out and prices will shoot right back up.

The second piece of -- the second issue that Dr. Hausman talked about was what he calls asymmetric information. Dr. Hausman says that if Avery is on the market and prices go down, then the customers are going to know more about what 3M is able to price its products at, just how low 3M would be willing to sell its goods.

But, Your Honor, that information is already out in the market. Retroreflective sheeting, as Mr. Reichman pointed out, is sold to governments. It's part of an open bidding process. The entire process is open and publicly known. If you want to find out what the pricing is, you can go on the Internet and pull it down and that's what our expert did. She found an array of prices. If you're a customer in Sedgwick county, Kansas, paying $6 per square foot and you want to know what West Virginia is being charged, you can find out that West Virginia is being charged 2.94, a lot less than you're paying. And that's the

same information that Dr. Hausman is talking about. So Avery coming onto the market is not going to give the customers any more or any less information about 3M's pricing than they already have.

I want to mention is the main case that Dr. Hausman and 3M rely on for this irreversible price erosion theory is a case out of the southern district of New York in front of judge Stein, Sanofi vs. Apotex. And we don't think that that case applies here for a number of reasons, not the least of which is because it's a pharmaceutical case that deals with a very complex pricing scheme where the goods in question, the drugs, are substantially controlled by what are called third party payers. That's what you and I call insurance companies. They have a tiering system that they put drugs into that controls how much co-pay the patient will pay and they use that as an incentive to get people to buy generic drugs.

We don't have anything like that here. We don't have third party payers. We don't have insurance companies. The pricing on these products is controlled by direct competition between 3M and Avery.

And we cite the Bettcher case here because in that case the plaintiff made the same argument relying on the Sanofi case and what the court said is that the Sanofi case involved irreversible price erosion due to complex health

insurance pricing schemes that were outside the control of the parties.

There is no complex pricing scheme here. Rather prices appear to be dictated largely by competition between the two parties. That's exactly what we have here. The Sanofi case doesn't apply and Dr. Hausman agrees. In an interview with the economist, according to the economist Dr. Hausman admitted that the facts of the case are so out of the ordinary that it is unlikely to serve as precedent for any other.

Your Honor, future damages. We've talked about past damages being fully quantifiable at the time of trial. We also believe that any future damages will be fully quantifiable. And let me be clear. At the time of trial if a permanent injunction issues, the damages that we're talking about are any price erosion damages going forward. Again, we don't think that there will be, but even if there are, they are fully quantifiable and here's why. There's two things that you need to calculate those damages and they're common sense. Number one, you need to know what 3M is charging, the actual price, and number two you need to know the but for price, what would 3M be able to charge but for any price erosion if it exists.

We have very clean data that's going to allow us to make very accurate models to quantify those damages, a

lot cleaner than in a lot of cases where this is done. And the reason is because for the actual price we'll know what 3M was charging in the face of this so-called price erosion for the next couple of years while Avery is on the market. For the but for price, 3M has been on the market all by itself since 2005. We have a five-year clean data set that we can model the but for price after. So we're going to be able to quantify future damages.

Now, Dr. Hausman agrees -- disagrees with us, but the reason he disagrees is simple. He didn't even know that 3M launched its product back in 2005. He has no idea that we have a five-year period of clean data to model the future damages off of. I asked him at his deposition, do you know when 3M began selling its DG cubed product? No. I said do you know if it's a matter of months or a matter of years? I don't know. And he didn't know anything else about the pricing either. I asked him if he knew what the lowest price for 3M's product was. No. Do you know the highest price? No. The average price? No. The median price? No. Do you know any price? He didn't know. He is just simply opining about future damages not being quantifiable and his opinion is not credible.

Even if future damages were difficult to quantify, we think it's going to be easy in this case, but even if they were difficult, this court has said that difficulty in

calculating damages because of price erosion does not constitute irreparable harm. We cite the travelers express case there.

Very quickly on the loss of goodwill argument, their loss of goodwill argument basically says that if a permanent injunction enters in this case, the customers are going to blame 3M for taking Avery off the market. Well, that assumes that a permanent injunction will enter if 3M prevails and that's no longer the law. The Supreme Court flipped that on its head a few years ago in the eBay case.

More than that, a permanent -- a preliminary injunction now wouldn't remedy the kind of harm that 3M is talking about. If customers are going to blame them for taking Avery off the market a few years from now, they will blame 3M for keeping Avery off the market today. So it's not going to remedy the kind of harm that 3M is talking about.

I just want to skip ahead. I know we have limited time. The last issue that I want to talk about is the public interest. Now, Your Honor, in their opening brief 3M touts type 11 sheeting as the latest, greatest product out there. They say that it's the most high performance, that it's almost twice as bright. They showed you a stop sign. They showed it to you today too, that the type 11 was much clearer.

We saw that argument and said, well, wait a minute, if it's the latest greatest product out there, then certainly that weighs in Avery's favor for the public interest because it behooves everyone to have another option for type 11 sheeting.

3M in its reply came back and said, well, actually no, we didn't mean it was the latest greatest. Sometimes it's the latest greatest product, but not always. Well, Your Honor, that's just not credible. They made an argument in their brief, opening brief even that we have an aging driving population and vision is going down day by day and we need to be able to see our signs. You can't make that kind of argument in your opening brief and then reverse ground like 3M has done here. They know that this is in the public interest and it is certainly in the public interest to allow Avery to stay on the market and provide the public with another option for type 11 sheeting.

Thank you, Your Honor.

THE COURT: Thank you.

MR. REICHMAN: If we could have just a moment, Your Honor, to get set up here. Judge, may I turn on the ELMO so you can see the document on your screen?

THE COURT: Is it on now?

MR. REICHMAN: It is. Thank you, Judge. I believe I have up to 20 minutes for my rebuttal. I don't

think I will need all that time. I want to address just a few of the points that were raised in response.

First, I want to just make the point, Your Honor, that the kitchen sink continues to grow. Leave was requested to file a surreply brief and not granted and we now have a 50 page what amounts to surreply brief outlining new evidence, new facts, new arguments that didn't exist before.

And I would ask, Your Honor, if this new evidence is to be considered we would respectfully seek leave to respond. We think, though, it's more appropriate to confine the analysis to the arguments in evidence that are actually in the record and made in the briefs.

The core analysis here doesn't change. We heard a lot of words, a lot more in the kitchen sink about different articles and precedent from the prior art that may or may not exist, but I would encourage the Court to look at the actual briefs and to look at the declaration that was filed because when you look at those you'll see that we have two claims, two prior art references each. That's it. The rest of it is narrative and attorney argument. There's two claims that we've asserted and there's two references each. And the exercise, the analytical exercise, is to look in those prior art references and determine whether they invalidate.

You have to determine whether the elements that we've challenged, 3M has challenged are there. Is there a column and line number where they appear. I am not talking about the actual words. I mean even in substance.

We're not claiming general things don't exist in the prior art like spreading light. All of the experts and the inventor acknowledge it's spreading light and using dihedral angles to spread light exists in the art.

The question is do the particular way in which -- does the particular way in which it is done appear in the art. So things like putting up a picture that says, hey, look, several years ago the cubes looked the same, that is a red herring with all respect, Your Honor. Nobody is saying that the cubes look different. Just because those pictures look the same proves nothing.

The core analytical question is for those elements that we've challenged, and I outline them in my opening argument, if one looks in the two prior art references, are they there. The rest of it is discussion and not in the record and not part of those two references.

It sounds like we have a disagreement about what the relevant standard is. I think it comes down to distinctions without a difference. The Federal Circuit is clear, not in the case that my opposing counsel discussed, but in the canon computer case, which is cited in our brief,

that the presumption of validity applies at all stages of the case. And the Abbott Labs case did say that and this is binding Federal Circuit precedent. The question is not whether the patent is vulnerable. The question is who is likely to prevail at the end. And I think that's the core of where we may have a distinction without a difference.

The question here we believe for the Court to answer is does the evidence that was submitted by Avery and that we responded to, does that rise to the level of clear and convincing evidence such that you overturn the Patent and Trademark Office? That's a particularly difficult showing when the Patent and Trademark Office considered these specific references and rejected them.

So we didn't -- it's not that we are just relying on the presumption as was argued. We pointed out specific elements that are missing from those patents and we're saying that all of this discussion in the absence of pointing to a column and line number does not rise to the level of clear and convincing evidence that's needed to overturn the Patent and Trademark Office.

The argument was made the Patent and Trademark Office never really discussed these and there's a -- we agreed that the file histories could be lodged and I'll just show a page of those file histories that Your Honor will have by Monday.

This is the type of form that the examiners have to fill out and what you'll see when you look at these forms, you'll look down them and the prior art references that were alleged by Avery here were considered in both patents by the -- well, let me talk about the '386. On the '386 the two references that they cite were considered by the examiner and you'll see that. The way you see that is they cite this list of references and at the bottom, if I can get this up on the screen, the examiner is required to initial the left-hand column and it says that -- on the bottom, examiner, initial if reference considered whether or not citation is in conformance with the MPEP. Draw a line through the citation if it is not in conformance and not considered. They considered all of these references, you will see that in the file history, and rejected them when they granted the patent.

And what I'm talking about, I'm talking about the references in particular, I am focusing, Your Honor, on the '386 patent because that's the one where infringement is not disputed.

I want to make perhaps an overarching point about -- and I think that the analytical approach to this is to look at the actual references cited too, for example, for the '386 patent, and see if those elements are in there, which they're not.

The point was made in narrative that, oh, this is just so simple, everybody knows it. If it is so simple, why isn't it in those prior art references? Why couldn't they find prior art references that incorporated each of these elements? If it's so simple, why is 3M been the one to have actual retroreflective sheeting on the market all these years? I submit that it's not as simple as represented.

On the ASTM, what you didn't hear, again, the absence speaks volumes, what you didn't hear is any connection to these being the same claims, the ones that were allegedly withdrawn are the same claims that are at issue here today. And let me just state it declaratively they're not the same claims.

We also didn't hear anything -- you hear about historically and you hear about the missing 18 minutes of tape. What about the missing three years of ASTM process? If you read the brief and the declaration, you'll note that we're talking about 2006 and there's no discussion and the next date that's mentioned is 2009 in the next line. There was an entire process that went through this.

We heard lots of words, lots of attorney argument today and perhaps new evidence submitted, I don't know, about other evidence that might exist. If you look in the brief, the evidence that they rely on is an e-mail from Mr. Bliss attaching a form that shows withdrawal of claims.

That's the evidence. The rest of it is narrative. The evidence is that and that evidence shows that we're not talking about the same claims.

I want to address briefly, if I may, the question of public interest. This sheeting, the type 11 sheeting, is better. There's no doubt about it and we think it provides many performance attributes that are desirable to customers. I don't see personally how that's unique in the context of a patent case or in the context of competition between parties. If a product wasn't better, folks wouldn't be fighting over the patents to begin with. So that it's better doesn't mean necessarily that there's a public interest. There's other sheeting available that the public has been using and is available.

The case law is replete with examples of injunctions and preliminary injunctions being granted for much more serious health and safety concerns than this. It's simply not a grounds to overcome the strong public interest in favor of protecting patent rights, which is what encourages innovation in this country, to say the product is better so the public should have it.

Let me just punctuate that argument with the point that if it is important for states and local governments to have this product, then the federal government has a vehicle at its disposable to make it available. It's the public

interest exception to the proprietary products rule.

The federal government can weigh the competing issues, patent rights on the one hand and the public's need for a product on the other, and then grant an exception, an public interest exception. They have been requested to do so. They have not done so.

And there's no reason for this Court to overturn the executive department's discretionary authority concluding that there is no public interest in this by declaring a public interest that requires overriding the patent rights.

3M is coming to the Court for help in all seriousness because this is an important case. 3M hasn't moved for a preliminary injunction at least in the U.S. that I'm aware of in the last six years. This is -- they don't do this regularly and they are doing it because this is critically important and that this case has unique facts.

It's unique because we're not trying to take somebody out of the market that's not already there. We are not talking about a market where there's two or three competitors. We're talking about relatively clean facts where you have 3M is the only player in the market because of the patents granted by the U.S. government and Avery is seeking to enter the market. So we are trying to preserve the status quo before they enter the market.

So let me address what's perhaps the most important point here, which is why isn't this a money case. And there's several reasons for that. The biggest one is this unwinding problem.

Let me start with just the point that the -- Avery makes the point itself, that if the Court does not grant a preliminary injunction now, it could be rendered powerless to grant one later once federal funding starts under the section 1498 of the U.S. Code. So that in and of itself to me speaks volumes about is there irreparable harm. If you don't stop it now, the court could be literally powerless to stop it later.

And this is a version, a more extreme version, of the general unwinding problem. The argument was made, well, can't you just pay damages for this seepage of the product into the market. Well, the response to that is that this is not a consumer product. This is not, you know, for example, putting a pen into Wal-Mart where really all you have to do is just pull it back or let those sales continue. These are multiyear construction projects going through this complex supply chain. So if we go two years into the case there could be three, four years of sales after that that have taken place and then a permanent injunction issues.

We're talking about if you are trying to compensate that with damages is 3M having to suffer six

years of sales going forward because of this complex supply chain.

And if you get an injunction, it's not just so simple as, well, we can just fill those contracts. I'm not sure that's what the law would provide. We wouldn't say, for example, the extreme position, the straw man that we've been characterized as, which is you have to pull down road signs that have already been put up.

What we're saying is assume sort of the simple straightforward injunction that's normally in these cases. You can't make, use, or sell. Let's use that as an example. Avery, you can no longer make, use, or sell. Well, that means they can no longer make the sheeting to fulfill the orders that are going on for the next three or four years.

And understand what Avery is saying. They are saying, Judge, you could just authorize us to continue to sell for three, four or more years into these long-term supply contracts, continue manufacturing and supplying.

And of course in this industry there's all kinds of follow on sales and relationship sales and other things that go with it. We may be talking about, you know, the entire time period before the newest generation comes out. We lose all the value of the patent and the statutes provide for market exclusivity.

Is price erosion quantifiable? Think about what

would have to happen to quantify the price erosion. They are saying that for the next 12 years of the patent one would have to project forward what their sales are going to be for those 12 years, figure out what the prices would be, figure out whether there are other extraneous factors that would filter into the competitive process, are there new products, are there additional products, is there a sea change with some other type of media used. You have to figure all those things out at the time of trial and project them forward 12 years and that's how you calculate damages. Putting aside all of the difficulties of that, how indeed would one calculate even how much Avery would sell for the next 12 years.

And I would respectfully submit that's the point of the patent statutes. The point is that there is a statutory right of exclusivity that's provided by law and this is a very clean case teeing that up.

In sum, what Avery is asking the Court for permission to do is launch an undisputed infringing product that can't be pulled out later without harm to third parties, innocent third parties and to 3M, based on prior art that was already considered and rejected by the Patent and Trademark Office.

And as we said in our brief and would respectfully repeat, if this is not a case that cries out for a

preliminary injunction as provided for by statute, then it's difficult to know what would be.

Thank you, Judge.

THE COURT: Thank you. Thank you, counsel. The Court will allow you to respond to whatever the defendant gives me. How much time will you need after -- I get their materials on Monday.

MR. REICHMAN: Is a week too much, Your Honor?

THE COURT: No. I know it's a busy schedule. We are getting close to Thanksgiving, so I know -- and the end of the year, so I know that you are quite busy. So a week?

MR. REICHMAN: A week. This is important to us and so we will rush and get it in for you.

THE COURT: Thank you. A week from today by 12:00 noon.

MR. REICHMAN: Yes, sir.

THE COURT: Thanks. All right. Thank you.

COUNSEL: Thank you, Your Honor.

THE COURT: We will take a 15-minute break.