

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION and KEYSTONE AUTOMOTIVE
INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

IPR2020-00064
Patent D823,741S

Record of Oral Hearing
Held: January 28, 2021

Before JOSIAH C. COCKS, SCOTT A. DANIELS, and
ROBERT L. KINDER, *Administrative Patent Judges*.

IPR 2020-00064
Patent D823,741 S

APPEARANCES:

ON BEHALF OF THE PETITIONER:

BARRY F. IRWIN, ESQUIRE
Irwin IP LLC
222 South Riverside Plaza, Suite 2350
Chicago, Illinois 60606

ON BEHALF OF THE PATENT OWNER:

DOROTHY P. WHELEN, ESQUIRE
JOSEPH A. HERRIGES, PRO HAC VICE
Fish & Richardson P.C.
3200 RBC Plaza
60 South Sixth Street
Minneapolis, Minnesota 55402

ALSO PRESENT:

Ifti Zaim, Irwin IP LLC
Andy Himebaugh, Irwin IP LLC

The above-entitled matter came on for hearing on Thursday,
January 28, 2021, commencing at 10:00 a.m. EDT, by video/by telephone.

PROCEEDINGS

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3 JUDGE DANIELS: Good morning, everyone. So, today's January
4 28th. We have this morning our final hearing in IPR 2020-00064, which is
5 *LKQ Corporation and Keystone Automotive v. GM Global Technology*. GM
6 is the Patent Owner in this case.

7 I'm Judge Daniels. Also on this panel are Judge Cocks and Judge
8 Kinder. Let me see -- let's get the parties appearances here. Who do we
9 have from Petitioner?

10 MR. IRWIN: Good morning, Your Honor. This is Barry Irwin of
11 Irwin IP for the Petitioner, LKQ Corporation.

12 JUDGE DANIELS: Good morning, Mr. Irwin. Are you going to be
13 doing all or the majority of the speaking today?

14 MR. IRWIN: For Petitioner, yes, Your Honor.

15 JUDGE DANIELS
16 : Okay. Certainly. And is there anyone else in the room with you or
17 also on that's from your -- from the Petitioner's side?

18 MR. IRWIN: There is. Ifti Zaim is in my office with me and Andy
19 Himebaugh, who is on the video, is participating remotely, both with Irwin
20 IP.

21 JUDGE DANIELS: Great, thank you. And for GM, for Patent
22 Owner, who do we have?

23 MR. HERRIGES: Good morning, Your Honor. This is Joe Herriges
24 from Fish & Richardson for General Motors. And with me on the line is
25 Dorothy Whelen, also from Fish & Richardson.

1 JUDGE DANIELS: Mr. Herriges, are you doing the presentation
2 today?

3 MR. HERRIGES: I will be, Your Honor.

4 JUDGE DANIELS: Okay, great. So we have a public audio line, as
5 well, for today's hearing. And let's just -- although we set forth the
6 procedure, as you all know in the hearing order, I'll just go over a couple of
7 things, housekeeping matters here.

8 So, you all asked for 30 minutes each for time, so you can allocate
9 your time however you'd like today. Just let me know if you'd like to
10 reserve any when you --at the beginning of your presentation.

11 We have your papers and exhibits. Your demonstratives are going to
12 be what we're looking at on our screens, as well, so we can follow along.
13 Just remember to tell us, if you're pointing, just remember to let us know the
14 slide number, so we can following along. That's super helpful.

15 The court reporter may have some questions at the end, spellings, so
16 don't go anywhere after we're done with the hearing.

17 Judge Cocks is going to keep time for me today. If you'd like to keep
18 it yourself, that's great. That's always helpful. We don't have the luxury of
19 the hearing room timer here, but -- so we'll do -- we'll keep you all on track
20 and it's always helpful if you are aware of what time you've got left, too.

21 All right. So, let me just ask this. Mr. Herriges, do you have any
22 questions before we get going?

23 MR. HERRIGES: No, Your Honor.

24 JUDGE DANIELS: And Mr. Irwin, any questions? And if not, I'll
25 let you get started here and you can tell me what time you want to allocate
26 for a rebuttal.

1 MR. IRWIN: Sure. I just have one question. Should I be seeing you
2 on video? Because I don't.

3 ALEX: Okay. This is Alex with VTC Ops. On the top right corner
4 of your Webex there should be an icon for video layouts. And go ahead and
5 select the stage view.

6 MR. IRWIN: On layout stage view. Okay, great. Actually that --
7 thank you. I'm glad I asked. I just assumed I wasn't supposed to be seeing
8 any of the judges, so I'm glad that I asked. So, yes, that was my only
9 question.

10 And you asked how much time I would like to reserve for a rebuttal. I
11 think I'd like to reserve about three minutes to whatever time I have
12 remaining, if that's okay.

13 JUDGE DANIELS: Yeah, that's fine. We will -- you all asked for a
14 pretty short hearing time today, so, you know, I know the panel has some
15 questions, so it doesn't -- usually we're able to allocate times so that
16 everyone has an opportunity to present what they wanted to present and have
17 their time to do that. So, that's fine.

18 I will say just as a note, Mr. Irwin, you did -- everyone should be able
19 to see especially whoever's speaking. So, sometimes you cannot see the
20 other counsel when they're not speaking, and just remember to mute. If
21 you're not speaking just remember to mute your audio, so that we don't hear
22 any background noise.

23 All right. With that, Mr. Irwin, the floor is yours.

24 MR. IRWIN: Okay. Thank you, Your Honor. And good morning
25 again. Appreciate the opportunity to be heard on LKQ's petition to

1 invalidate GM's design Patent Number 823,741, which we'll call the '741
2 patent.

3 Turning to slide 2, my PowerPoint just literally crashed. That is really
4 frustrating, but I can go off of the hard copy here. All right, sorry. Turning
5 to slide 2, I thought I'd first discuss the '741 patent and claim construction
6 generally, and then take a look at the primary reference and similarities to
7 the '741 patent.

8 So, referring to slide 3, as Your Honors know, the '741 patent is for a
9 vehicle fender. The patent shows four views: perspective, front, side, and
10 top. It's undisputed that the fender's embodiment is for the 2018 Cadillac
11 XTS.

12 So then turning to slide 4, in terms of claim construction I believe the
13 Board got it right in its *Institution* decision when it found a verbal
14 description is unnecessary as that is consistent with the Federal Circuit
15 statement that the preferred course for the court is to not attempt to provide a
16 verbal description, but yet to refer to the drawings in the design patent. GM
17 has occasionally relied upon the *High Point* case to suggest a verbal
18 description is necessary. But, in fact, in *MRC*, the Federal Circuit explained
19 that that is not what *High Point* requires.

20 And the Federal Circuit has also explained the risk of a verbal
21 description. And the risk is that the Court will do what GM would have this
22 tribunal do here, which is place an undue emphasis on particular features
23 when the analysis should be focused on the design as a whole.

24 To be clear on one point --

25 JUDGE DANIELS: Mr. Irwin?

26 MR. IRWIN: Yes. Yes, sir.

1 JUDGE DANIELS: But we do still need to, in the analysis, whether
2 it's your analysis or mine, when we consider the design as a whole we still
3 have to consider these different elements and how they play into the design
4 of this fender as a whole, correct?

5 MR. IRWIN: That's correct. What the Federal Circuit explained in
6 *MRC* is what you're required to do is when you're demonstrating that
7 something is appropriate primary reference, you should point to the
8 similarities between the design of the patent and the primary reference in
9 order to support your explanation as to why something is an appropriate
10 primary reference. And you should also point out the differences that you
11 see. But a separate claim construction where you describe the design is not
12 necessary.

13 JUDGE DANIELS: Do we have -- I was -- in reviewing the case I
14 couldn't quite tell if there's -- and I may have to ask this, also, of Patent
15 Owner, but do we have an actual dispute over this, over this that there
16 should be a verbal claim construction?

17 MR. IRWIN: I think you'll have to ask the Patent Owner that. As far
18 as -- they seem to have attacked what we provided as sort of a summary of
19 the design in the patent and saying it's incomplete. And so I'm not certain
20 whether they're suggesting that a claim construction is appropriate. It seems
21 like they're attacking our claim construction. And the pointed to *High Point*
22 to say that this verbal description is necessary when in reality it's not.

23 JUDGE DANIELS: Okay.

24 MR. IRWIN: We'll get to some of the features of the design and the
25 similarities in the primary reference, the *Karras* reference. And as long as
26 you're describing why *Karras* is an appropriate primary reference with

1 reference to common features, that's all that's necessary according to the
2 Federal Circuit in *MRC*.

3 So, any further questions on that?

4 JUDGE DANIELS: No. Thank you.

5 MR. IRWIN: To be clear -- okay. To be clear, small -- whether or
6 not a designer of ordinary skill in the art can notice small differences
7 between the patent and the prior art, the primary reference, is not the point.
8 A designer of ordinary skill in the art may very well notice small
9 differences, but as we will explain in more detail later, the question is
10 whether the prior art and the patent have basically the same design or
11 whether they have the same overall visual appearance. So, despite GM's
12 expert's assertion that small differences can have an impact, which is what
13 all he says, here these -- the small differences that GM points out do not.

14 So, with that, I think I'll turn to the primary reference, if that's okay.
15 Slide 5 is just the introduction to the *Karras* patent. That's LKQ's primary
16 references.

17 The images for the *Karras* patent are shown on slide 6. *Karras* is
18 indisputably the patent for the 2013-2017 Cadillac XTS front fender, i.e., the
19 '741's predecessor. Yet inexplicably and indisputably, it was not disclosed
20 in the prosecution of the '741 patent.

21 More importantly, for the purposes of this proceeding, *Karras* is an
22 appropriate primary reference because it has design characteristics that are
23 basically the same as the '741. And that's illustrated on slide 7. Slide 7
24 juxtaposes the images of the '741 and the *Karras* patent. Starting in the top
25 left corner of slide 7 you see the side views of the '741 and *Karras*
26 juxtaposed next to each other. And similarities between the designs, if we

1 start with 1 and go around the fender to 9, you can see those similarities,
2 including 1, the location, size, the angular orientation and shape of the notch
3 are virtually identical in both designs.

4 Going to 2, the shape, size, angular orientation and contouring of the
5 protrusion is nearly identical in both sides, including the inflection line that
6 starts in the protrusion and runs from the back of the protrusion to the
7 headlamp aperture; including the fact that it -- the vertical location, the
8 vertical starting location of that line is identical in both designs. And the
9 fact that it traverses along the notch in the same direction until the end of the
10 notch where it curves forward and parallel to the top of the fender.

11 Turning to 4, the downward and forward arching front portion; 5, the
12 shape, location, radius, and degrees traversed by the wheel arch are nearly
13 identical, if not identical; 6, the width, the angle, and flat contour of the
14 wheel arch flat is nearly identical in both designs; 7, the inwardly forward
15 bent surface at the rear lower corner and the fact that it's perpendicular to
16 the back of the fender, perpendicular to the wheel arch flat crease, and
17 perpendicular to the wheel arch is identical; 8, the rear edge of the fender is
18 identical as best as we can see; 9, the location, the length, the angular
19 orientation and the prominence of the feature line are all similar features, if
20 not identical features, in the '741 and *Karras*.

21 Turning to the front view, the profile as a whole of the fenders are
22 virtually identical. And what do --

23 JUDGE DANIELS: Mr. Irwin.

24 MR. IRWIN: Yes?

25 JUDGE DANIELS: Mr. Irwin, this is Judge Daniels. Let me ask you,
26 before we go to that front view, I do note that the -- I mean, one of the things

1 that is apparent in your comparison is that at reference numeral 4 -- and
2 Patent Owner had a good point about this, is that all fender designs extends
3 downwardly and curves. Well, I guess many fender designs extend
4 forwardly and downwardly. But in looking at the comparison I see a more
5 angular shape and more of a drop from the top edge of the fender that in
6 *Karras*. Isn't that enough to say that these are so dissimilar that they can't
7 be -- that *Karras* can't be a primary reference?

8 MR. IRWIN: I don't think so at all, Your Honor, with all due respect.
9 I think that the design as a whole -- first of all, looking at that element, that
10 element 4, they have very similar characteristics, very similar design in that
11 they have that downward and forward arching front portion. But we're
12 supposed to look at the design as a whole. Are the designs as a whole
13 basically the same? And when you have so many overwhelming similarities
14 between the designs, that aspect of difference, which is a difference that we
15 pointed out, but that aspect of the difference doesn't stop it from being a
16 primary reference. In fact, I think it wouldn't even preclude it from being
17 obviating the patent by itself. There's numerous cases that we've talked
18 about that show there are differences between the patent and the references
19 that relied upon.

20 But nevertheless, the Court said that's still obvious because it's the
21 same overall visual appearance. So, that minor difference does not change
22 the fact that the design as a whole are basically the same. All those
23 similarities that we pointed out on the side view demonstrate the fact that the
24 designs are basically the same. And from the front view, the similarities in
25 the front view were also pretty compelling, including the fact that the
26 vertical stance of the fender, in other words, from the bottom of the fender

1 up to the crease line, it's almost perpendicular to the horizon. There might
2 be a slight outward cant, like a degree or two, but it's identical in both
3 fenders.

4 Then when you get to the crease line it angles in at about the same
5 angle, about 15 degrees it looks like in both fenders. The flat above and
6 below the crease line is identical in both fenders.

7 And then when you get to the protrusion, protrusions curve in in the
8 same way in both designs. And then 11, the contour of the front portion, is
9 also the same.

10 So, turning then to the top view, you see additional similarities between the
11 designs. For example, the tapered appearance of the parameter of the fender
12 as a whole, that it gets smaller as it goes from the back to the front. And it
13 has a nearly identical series of arcuate and linear edges.

14 Starting with the arcuate edge at the back of the protrusion, the
15 arcuate edge along the top of the protrusion, the arcuate edge at the front
16 protrusion, they're all the same. And then that curves around into a linear
17 portion along the top of the fender. And then when you get to the headlamp
18 cutout you have a curvature rounding into another flat portion, and then the
19 fenders had a sort of tapered point.

20 So, all of these similarities demonstrate that *Karras* is basically the
21 same design as the '741. Now, GM in their --

22 JUDGE DANIELS: Mr. Irwin?

23 MR. IRWIN: Yes. Yes, Your Honor.

24 JUDGE DANIELS: Let me ask you about one other thing. Patent
25 Owner has an argument about that the -- I think it's the arcuate curvature
26 that you are referring to that is the transition between the top edge and the

1 headlamp cutout. I don't love calling this the headlamp, but I'll -- because
2 that gets us -- we don't -- we want to stay away from anything functional,
3 but I guess for purposes of description that's what it is.

4 That arcuate section or curve, Patent Owner has labeled various
5 segments of it A, B, and C. Do you -- whether you address it here or at
6 some point, I wanted you to address that part. Because that is a little
7 different at reference number 16 than in *Karras*.

8 MR. IRWIN: Yeah. And I can address it here. I have another slide
9 that goes through it specifically. I think it is slide 20. So, if we go to slide --
10 but before we dip -- dive into slide 20, that is such a minute aspect of this
11 fender design. But it doesn't change the fact that even if that difference was
12 something that we would focus in on, it doesn't change the fact that the
13 fenders as a whole are basically the same given the overwhelming number of
14 similarities.

15 Again, this is all we're focusing on. We're not focusing on can you identify
16 a difference? Right? What we're supposed to be asking, are they basically
17 the same such that this is an appropriate primary reference? And with all
18 these similarities, it's hard to say that they're not basically the same. Is that
19 transition deeper in the '741 than in the *Karras*? Yes, but even that fact, if
20 we go to slide 20, even as to that transition area, the designs are basically the
21 same. Even at that aspect, the designs are basically the same.

22 And what do I mean by that? Well, they labeled this transition A, B,
23 and C. A being out, it goes out; B being where the transition goes down;
24 and C, C is really just the top of -- that entire top edge of the headlamp
25 cutout. So, the headlamp, that C is definitely in *Karras*, no question about
26 it. Now, A is also -- A and B are also there. Now, they're not as prominent,

1 but they're also there in *Karras*, as you can see on slide 20. *Karras* shows
2 that at that transition point the cutout goes out and down, and then
3 transitions to C, which is that curvature that goes forward.

4 And even GM's expert, if you go to slide 21, admitted that *Karras* has
5 that similar transition that goes out, down, and forward. But, again, my
6 point is even if the difference is there, it doesn't change the fact that the
7 designs are basically the same. It doesn't even -- the tops are basically the
8 same even with that difference. And certainly the fenders as a whole are
9 basically the same.

10 So, that's --

11 JUDGE COCKS: Mr. Irwin, this is Judge Cocks.

12 MR. IRWIN: Yeah. Hey, Judge Cocks.

13 JUDGE COCKS: Can we turn to slide 13 of your slide deck? I'd like
14 to -- if you can ground me by answering this question.

15 So, you represented at the top two images, the *Karras* Figure 1 and
16 the '741 design, those are basically the same. Well, are you saying -- is this
17 slide conveying -- that you do not believe that the remaining nine images or
18 depictions of the other nine patents here, those are not basically the same as
19 the '741 design?

20 MR. IRWIN: That's correct. What we show on slide 13, this is their
21 so-called "crowded field" that they say would cause a designer of ordinary
22 skill in the art to focus on this minutiae that they identify. So, what's
23 arrayed on slide 13 is the prior art that GM has pointed to.

24 Well, first of all, slide 21 is not prior art. That was undisputed in the
25 surreply, so we put a red X on that. And then in the other references, what
26 we've done is we've indicated where their own expert has agreed that either

1 a feature that is common to both *Karras* and the '741 is either absent or
2 different in the prior art reference that they identified. So, the red lettering,
3 “CL” stands for “character line”; “P” stands for “protrusion”; “N” is
4 “notch”; “U” is “upper portion”; and “WA” is the “wheel arch”. And so if
5 you look at, for example, the '607, their own expert admitted that the
6 character line was either different or absent, in this case it was absent;
7 admitted that the protrusion was different; that the notch was different; that
8 the upper part was different; and the wheel arch different, different in both
9 '741 and *Karras*.

10 Does that make sense?

11 JUDGE COCKS: Yes, thank you, it does. And while I have an
12 opportunity, you have about eight and a half minutes left of your opening
13 presentation time.

14 MR. IRWIN: Okay. Are there any other questions that the Court
15 would like me to address? Because I’ve pretty much deviated from my
16 presentation and maybe I can be better served by just answering specific
17 questions.

18 JUDGE DANIELS: I have one. This is Judge Daniels. I think one of
19 your arguments with respect to their crowded art argument was that crowded
20 art is limited to infringement, issues of infringement and the ordinary
21 observer. I did note that there are cases that involve obviousness where the
22 Federal Circuit has discussed crowded art.

23 MR. IRWIN: All right. So, there’s only one case that I’m aware of
24 where the Federal Circuit has mentioned crowded field in the context of
25 obviousness, and that was the *Harvey* case. And in the *Harvey* case, they
26 mention it in the context of distinguishing a prior case where the Court

1 found that you could substitute one geometric shape for another and said,
2 well, in a crowded field it may not be so obvious to substitute one thing for
3 another.

4 But no case has ever applied the field as GM would have the Court
5 apply the field where they seek to increase the level of similarity necessary
6 in order to have something be found as a primary reference. Rather, as I
7 mentioned, *Harvey* mentions the field in the context of suggesting that in a
8 crowded field, a designer may not substitute one geometric for another.

9 In both *Harvey* and the other case that GM points to, the *ITC* case,
10 they were before *Egyptian Goddess*. And what *Egyptian Goddess* said, I
11 mean, you can't -- I don't know how they could have been more clear. It's
12 on slide 12. "We emphasize that the approach we adopt will frequently
13 involve comparisons between the claimed design and the prior art, it is not a
14 test for determine validity, but it is designed solely as a test for
15 infringement." If the Federal Circuit expected us to examine the field, take
16 into consideration the crowded field in the context of obviousness, why
17 would they have expressly said this is not a test for determining validity it's
18 solely a test for infringement?

19 But even if we were to take --

20 JUDGE COCKS: Mr. Irwin?

21 MR. IRWIN: Yes, Judge?

22 JUDGE COCKS: This is Judge Cocks. Just to probe a little bit on
23 that, on your slide 12 the "it is not a test for determining validity," what is
24 your understanding of the "it" there? What is the "it"?

25 MR. IRWIN: The "it" is that you have to look at the differences
26 between the patented design and the prior art to determine what is novel in

1 order to determine whether or not substantial similarity arises from those --
2 in connection with those differences. So, in other words, if you take the case
3 that had to do with the pencil, pencil-shaped chalk holder, I can't remember
4 the name, but what the Court said is, look, when we're determining whether
5 or not this design infringes, we're not going to take into consideration the
6 fact that it has a conical front or that it has a tubular shape or that it has an
7 eraser at the end. Those things are common in the prior art.

8 What we're going to look at is what makes this holder unique? And
9 this is the *Lanard* case. But what makes it unique? And what makes it
10 unique is the particular angle or the particular formation of this feature. And
11 it says, so, if we look closely at those elements, they're not substantially
12 similar.

13 So, that's my understanding of what the test is. The test is where you
14 look to see what the differences are between the patented design and the
15 prior art to see if the infringing device is similar in those regards. And the
16 cases don't --

17 JUDGE KINDER: Mr. Irwin, this is Judge Kinder. I mean, are the
18 cases you just mentioned post-*Egyptian Goddess*? Because *Egyptian*
19 *Goddess* got rid of the point of novelty test, right? We no longer consider a
20 point of novelty necessary to prove infringement. So, I don't know if you're
21 blending point of novelty or the cases you're talking about are post-*Egyptian*
22 *Goddess*.

23 MR. IRWIN: No, they are post-*Egyptian Goddess*.

24 JUDGE KINDER: Okay.

25 MR. IRWIN: And yeah, *Lanard* was a 2020 case.

26 JUDGE KINDER: Okay.

1 MR. IRWIN: Okay. And so I think that that was the test that was
2 being referred to by the Fourth Federal Circuit in *Egyptian Goddess*. But I'll
3 circle back and say even if we were to give some credence to this crowded
4 field, if you took it -- take a look at slide 13, you know, there's no factual
5 foundation to suggest that this so-called crowded field would cause an
6 ordinary designer to pay particular attention to these differences that GM
7 points out.

8 None of this crowded field is going to cause a designer to say, oh,
9 well, look, doesn't the '741 character line, even though it starts at the same
10 place and even though it's at the same length and even though it's at the
11 same angle, doesn't it cant out a little bit more? Nobody is going to look --
12 take a look at this prior art and say -- have that reaction. Nor are they going
13 to have the reaction, well, you know, based upon this prior art, how about
14 the fact that the transition in the headlamp is much more prominent in the
15 '749 [*sic*]? If anything, they're going to look at this prior art and they're
16 going to be astounded about how similar '741 and *Karras* is.

17 So, I know I don't have a ton of time left. I think that the last thing I
18 would like to talk about, if I only have a few more minutes, I assume would
19 be the case, is --

20 JUDGE DANIELS: I have one question for you, too, before you -- if
21 you'd like finish up, go ahead, Mr. Irwin, but I have one question before I let
22 you go.

23 MR. IRWIN: No, go ahead. I'd love to answer it.

24 JUDGE DANIELS: So, let's assume we agree with you that this is a
25 *Rosen* or a primary reference that *Karras* is an appropriate primary
26 reference. And let's assume that the secondary reference is -- suggests itself

1 enough that one of ordinary -- a designer of ordinary skill in the art would
2 suggest a combination. Assuming that, and I'm not sure we're there yet, but
3 what if there's still differences between this reference that we build,
4 whatever, this sort of pseudo references we build from the two from the
5 primary and secondary, what if there's still differences? How different --
6 how much -- how close do they have to be, your pseudo reference to the '741
7 design?

8 MR. IRWIN: Well, they don't have to be exact. They have to have the
9 same overall visual appearance. And if you look at the cases that we cited,
10 there's cases that found patent obviousness despite the fact that there were
11 pretty significant differences.

12 For example, in the *MRC* case, which was the pet jersey case, the
13 combination completely lacked the ornamental stitching along the back. It
14 wasn't in the primary, it wasn't in the secondary. And the Court said, well, a
15 designer of ordinary skill in the art would know to do that.

16 If you look at the *Nalbandian* case, which is the case that has to do
17 with the tweezers, the Court invalidated those tweezers notwithstanding the
18 fact that the only reference relied upon had a different expression of the way
19 the grooves were on the arms, a completely different expression in the way
20 the grooves were on the arms.

21 We also cited *In re Cooper*, which was a CCTA case. And it has to
22 do with a barrelhouse. And basically it invalidated the design on the
23 barrelhouse because it found another barrelhouse and there were lots of
24 differences between the designs in the barrelhouses, which the Court
25 recognized.

1 We also cited the *In re Carter* case, which is basically the infant
2 onesie case. And the infant onesies were -- the design patent was
3 invalidated notwithstanding the fact that there were numerous differences
4 between the patent and the prior art reference.

5 So, you know, there can be some differences. The question is whether
6 after that combination you have the same overall visual appearance, not
7 whether they're exactly the same. And I think that if you look at slide 20 --

8 JUDGE COCKS: Mr. Irwin, this is Judge Cocks, just to let you know
9 you are through your time, but we have asked quite a few questions and I
10 believe we may have derailed your presentation. So, I will defer to Judge
11 Daniels as to additional allotted time.

12 JUDGE DANIELS: Yes. So, we asked a lot of questions and if we
13 do that I have no problem, you know, if you are finishing up in the next
14 minute or two, we can still allocate you a few minutes, three minutes for
15 rebuttal. And, of course, we'll do the -- we will extend Patent Owner's time,
16 as well, to match it.

17 MR. IRWIN: Okay. Thank you, Your Honor. The only thing that I
18 think is worthy of talking about, I have lots of other things in the slides
19 which, of course, speak for themselves, but GM suggested that we didn't
20 properly establish that the Escalade and *Karras* were so related. And I
21 address that on slide 26.

22 And I don't know if Your Honors have any questions about that, but I
23 just wanted to be clear -- clarify that GM is asserting is not accurate in terms
24 of how we established "so related." GM suggests that all we did was say
25 that *Karras* and the Escalade reference disclose a fender. That's not all we
26 did. Certainly we said that *Karras* and the Escalade reference both are

1 vehicle fenders. But we also demonstrated that they're both GM fenders for
2 GM vehicles. They're fenders for GM Cadillac vehicles. And, in fact,
3 they're fenders for the same model year Cadillac, at least 2015. So, we have
4 a primary and a secondary reference that are both fenders for GM Cadillac
5 vehicles in the model year 2015.

6 But that's not all we are.

7 JUDGE DANIELS: Mr. Irwin.

8 MR. IRWIN: Yes.

9 JUDGE DANIELS: Mr. Irwin, do you have -- is there any testimonial
10 evidence, either from depositions, about that relatedness aspect of it, of these
11 designs?

12 MR. IRWIN: That's a good question.

13 JUDGE DANIELS: I apologize, that's my timer for you.

14 MR. IRWIN: Okay. That's a good question. I am not 100 percent
15 certain of the answer and I don't want to just speak. I know that we had -- it
16 was undisputed that both vehicles -- both references disclosed fenders for
17 GM vehicles, for Cadillacs, for model year 2015. But we also talked about
18 -- we also got admissions that the Cadillac Escalade's front portion is similar
19 to that of the '741. I'm not certain whether they deposed our expert with
20 regard to the similarities of the *Karras* and Escalade. But we certainly
21 introduced evidence not just the fact that they're both fenders for GM
22 Cadillacs of 2015, but in the very portion where they cite our brief to suggest
23 that that's all we did, right after that quote we show, juxtapose one above the
24 other, the fender for *Karras* and the fender for the Cadillac Escalade to
25 illustrate those similarities.

1 And in addition to that, in the portion that the quote, Hill’s declaration
2 is cited. And Hill’s declaration explains how the *Karras* and Escalade are so
3 related. And he said in addition to them being substantially similar front
4 fenders, they’re fenders on Cadillac models and the same model line. And
5 so he explained that we’re relying upon the similarity.

6 And by the way, we established they were similar because we argued
7 that both of them were appropriate primary references because they were
8 both similar to the '741 in similar ways. And so we demonstrated “so
9 relatedness” in that regard.

10 And as your *Institution* decision pointed out, they’re so related
11 because they share many of the same ornamental features, including the
12 vertical rear edge to the upper protrusion, the crease line below the upper
13 protrusion generally perpendicular to that rear edge, the crease defining two
14 surfaces, and the similar wheel arches, among many other similarities in the
15 designs of *Karras* and the Escalade reference.

16 JUDGE DANIELS: All right. Mr. Irwin, well, you’ve run about five
17 minutes over your time, which I’m going to also give to Patent Owner. So,
18 if you are complete with this, we’ll give you your three-minute rebuttal
19 afterwards.

20 MR. IRWIN: Thank you.

21 JUDGE DANIELS: Thank you very much.

22 MR. IRWIN: Thank you, Your Honor.

23 JUDGE DANIELS: All right. Mr. Herriges, are you ready?

24 MR. HERRIGES: I’m ready, Your Honor. And if it pleases the
25 Board, I’d like to reserve two minutes for surrebuttal.

1 JUDGE DANIELS: Certainly. And again, you have, as we extended
2 Mr. Irwin's time just about five minutes, unless Judge Cocks has a different
3 time, I think we're pretty close, about five minutes extra if you'd like.

4 MR. HERRIGES: Okay.

5 JUDGE DANIELS: So, when you're ready.

6 MR. HERRIGES: Okay. Good morning again, Your Honors, and
7 may it please the Board. There's no real dispute here that there are
8 distinctions between the claimed design and the *Karras* patent. And there's
9 no real dispute that even if you combine *Karras* with Escalade those
10 distinctions remains. I think the issue here is whether LKQ put forth
11 evidence in its petition to show that those differences don't matter to the
12 visual impression of the design, and they haven't done that. In many
13 instances, as I'll point out, they didn't even address the elements in their
14 petition.

15 And I think it's particularly notable, Your Honors, that during their
16 entire presentation today, after we've been through a year of this proceeding
17 and discovery, we've heard no evidence about the significance of these
18 missing features, no evidence from their expert about why they do or do not
19 matter. The only thing we heard was attorney argument.

20 And I want to start, Your Honors, by addressing your questions that
21 you asked Mr. Irwin early on about claim construction. And I think we're in
22 agreement there that Your Honors don't need to go further than you did in
23 terms of your construction, in terms of a written construction. I think where
24 the rubber really meets the road in this dispute is that the problem is that
25 LKQ didn't go through all of the elements of this design and address, okay,

1 are they in the prior art? And if they're not, provide evidence showing or
2 rationale showing that they don't matter to the overall similarities.

3 So, that's --

4 JUDGE DANIELS: So, Mr. Herriges, let me ask this. So, I get that
5 you're focused on the burden. I think that's a great place for you to start
6 your argument. What -- if we're not going to do -- I understand you're
7 attacking their original claim construction as not addressing enough of the
8 sort of elements or design -- parts of the design. And now you're also
9 arguing that even in their analysis they didn't -- they also didn't do enough
10 to address those elements that make up the design as a whole. Right?

11 MR. HERRIGES: That's right, Your Honor.

12 JUDGE DANIELS: Okay. So, do you -- you seem to focus on a
13 couple of particular elements and maybe you were going to get to this later, I
14 may be jumping the gun on your argument, but I was wondering if there are
15 any of the particular aspects of the design that make up the design as a whole
16 that are more important than others?

17 MR. HERRIGES: Yeah, and I think I can get right there, Your
18 Honor. And if you want to turn to slide 5, I think this is -- this will get to
19 exactly what Your Honor is asking. The features, as Your Honors are going
20 to see it for another panel, this argument will happen again there, too, in this
21 global dispute, but the features that interface with other parts of a vehicle are
22 of particular importance in vehicle design.

23 And so here we've got reference to -- I know Your Honor didn't like
24 this term, but I'm going to use it anyway because it's in the testimony, but
25 have testimony about the headlamps as being a critical feature to the vehicle

1 design. And so that's something that's going to naturally draw a far more
2 critical eye of a skilled designer. And it's similarly going to --

3 JUDGE KINDER: This is Judge Kinder. Wouldn't some of these
4 things be dictated more by function than design what you're pointing to?

5 MR. HERRIGES: No, Your Honor. No, Your Honor. I think it goes
6 to the design of the cutout because we've got here talking about harmonizing
7 how those elements look. So, when we're talking about harmonizing
8 features and you go to the answer on slide 5, and this is from LKQ's expert,
9 you want -- and he says this in the second sentence, "you want a nice
10 harmony of overall expression." So, it's a question of the expression that
11 that design is creating and the harmony between those two features.

12 And so the point I'm getting at, getting to your question, Judge
13 Daniels, is that I think when Your Honors are looking to, you know, what
14 are the real critical pieces of this design, it's the ones that are directly
15 interfacing with the hood, directly interfacing with the headlamp cutout.
16 And that's not to say that the other ones aren't critical, but that is it's really
17 here. It's the arcuate transition which we point out and the way in which
18 that distal portion is a far more aggressive and angular design than *Karras*
19 presents. I think those are -- again, while there are other important
20 differences, those are the most striking ones.

21 So, if Your Honors would turn to page 6 or slide 6, -- I do before I get
22 into these differences specifically, I want to address just a couple of
23 questions that came up during Mr. Irwin's presentation on this notion of
24 crowded art. And I don't necessarily want to get overly bogged down in the
25 legal issue because I think as a factual matter, and we've got testimony on

1 slides 5 and 6 and I also just addressed some in relation to this interfacing
2 notion, but as a factual matter details are particularly important.

3 So, I think our point on the crowded fender issue, the crowded fender
4 field issue is that this only serves to amplify. It serves to amplify the
5 significance of design nuances. And you can see that in the *Harvey* case. I
6 think Your Honor pointed that out in the opening presentation. We can see
7 that in the *In re Automotive Parts* case, which is squarely on point here
8 dealing with vehicle headlamps. And we can also see it in the *Egyptian*
9 *Goddess* case. And I want to address a couple things there.

10 It's clear, we said it in our brief, *Egyptian Goddess* is an infringement
11 case, dealing with the ordinary observer. The important point there I think is
12 twofold. The first is that *Egyptian Goddess* never said that crowded art does
13 not apply in the obviousness context.

14 Your Honor asked about what is "it" when they're talking about it
15 doesn't apply. And I think it's very clear when you look at the context of
16 what the Federal Circuit says there, the "it" is the test as a whole. That
17 paragraph where the Court is talking about the standard there, it's about how
18 bears the burden.

19 So, you go on after the section that Mr. Irwin mentions in his
20 presentation and they're talking about who bears the burden. And that's the
21 reason for the juxtaposition and referring to as a test for infringement. It's
22 the overall test. It's not -- they're not saying that the crowded field issue
23 doesn't apply to obviousness. And we've seen previous Federal Circuit
24 cases, such as *In re Harvey*, where it clearly does.

25 JUDGE DANIELS: Mr. Herriges, let me just say -- oh, sorry, who
26 had a question?

1 JUDGE KINDER: This is Judge Kinder. I was going to ask
2 something real quick on that point.

3 MR. HERRIGES: Yes, Your Honor.

4 JUDGE DANIELS: Yes, you can.

5 JUDGE KINDER: Wouldn't it make more sense as applying the
6 crowded field as a separate legal doctrine, saying it really goes into the
7 background of what a designer of ordinary skill in the art would consider?

8 MR. HERRIGES: I -- if I'm understanding your question, I think the
9 reason it makes sense, and please tell me if I'm not answering it, but I think
10 the reason it makes sense in the obviousness analysis is because the question
11 we're asking is what is an ordinary designer going to consider to be
12 important for sameness? And an ordinary designer, much like in a utility
13 case, a skilled artisan is going to have all of this background, and so they're
14 going to be approaching every problem with that background.

15 And when you turn -- it's in Mr. Irwin's presentation, but the
16 background they're going to be coming at this problem with is a series of
17 fenders that all have character lines of different angles. They all have a
18 distal portion that varies in one way or another. And so a designer's going
19 to have all of that as background and is going to be coming to this problem
20 looking at this as, okay, there are a bunch of general features. What are the
21 more specific things? And those are the things I'm going to be looking at to
22 see how this fender is differentiated from others.

23 So, with that, Your Honor, I do want to turn to talk about the overall
24 appearance if you go to slide 8 of my presentation. The '741 patent, it
25 presents a starkly different design than *Karras*. It's described by our expert
26 as "elegant, precise, angular, and striking." And you can see that in the

1 testimony excerpted on slide 8. Whereas *Karras*, if you turn to slide 9, is
2 “subtle, curved, and smooth.” And that, again, is sworn testimony for our
3 expert. And I want to --

4 JUDGE DANIELS: Well, Mr. Herriges, one of the concerns I have
5 with that is if we compare *Karras* and the '741, I would certainly point out
6 that the design drawings in the '741 are better. Some of that's because there
7 was better prosecution or different prosecution, I guess. There's more
8 shading lines. There is a little bit -- the drawings are just, frankly, a little
9 better.

10 I'm not sure, for instance, when I look at Figure 2 of *Karras* here in
11 your slide 9, I understand that you're saying that's smooth, but it's really
12 not. And I feel like you're using the fact that these are not as good drawings
13 to try and point out differences.

14 MR. HERRIGES: Not at all, Your Honor. I think we point this out in
15 our brief and you can look at any angle of an of the drawings and you can
16 see a far, far more pronounced arcuate edge that is present and a far, far
17 sharper distal portion in the claim design than the prior art. And, you know,
18 the *Karras* patent sort of is what it is and it doesn't show those sharp
19 transitions.

20 And I think it's important to note here that this testimony we've got
21 on slides 8 and 9, LKQ didn't include any of this description in their
22 petition. And they didn't include any of -- we saw a very detailed
23 presentation today with 17 different elements on slide 7. Those graphics
24 were nowhere in any of their papers at all. And in their petition they didn't
25 include -- they didn't address any of those things.

1 JUDGE KINDER: This is Judge Kinder. As Judge Daniels was
2 talking about the lack of detail in *Karras*, do you think that lack of detail and
3 contour, line, shading, etc., would make *Karras* indefinite?

4 MR. HERRIGES: You know, Your Honor, I have not analyzed that
5 issue, so I don't --

6 JUDGE KINDER: It seems like it would help you in this case
7 because, you know, looking at it, to me it is hard to map how the contour,
8 especially in Figure 2, how it would flow, where the inflection points would
9 be. And it just seems to be --

10 MR. HERRIGES: Yeah.

11 JUDGE KINDER: Judge Daniels I think was gracious and said it
12 lacks detail, but it almost lacks detail to the point where it's hard to
13 differentiate how it would flow.

14 MR. HERRIGES: Yeah. And I -- to answer Your Honor's direct
15 question, I don't think I'm prepared to say that it would render it indefinite.
16 But I do think --

17 JUDGE KINDER: And we might be putting you on the spot, too,
18 because I think this might be your client's affiliate patent or something, so I
19 apologize for that. But --

20 MR. HERRIGES: No, it's -- I completely understand Your Honor's
21 question. But I think -- I don't think we need to reach that issue necessarily.
22 I think that the problems with *Karras*, look, we're stuck with the reference
23 that LKQ chose, and if there are ambiguities or you can't tell whether
24 *Karras* is mashing up the '741 patent, that's their burden and they perhaps
25 should have chosen a better reference. But we're stuck with what the

1 reference shows. We're stuck with what a skilled designer would have
2 perceived this reference to show.

3 And if you turn to slide 12, you can see that a skilled designer would
4 perceive -- and this is testimony from our expert, would perceive a much,
5 much sharper arcuate transition. We've got a very -- and these are
6 perspective views, the same perceptive views of both patents. And we've
7 got a very prominent arcuate edge versus an edge that's barely visible. And
8 our expert addressed this in paragraph 75 to 80 of his declaration where he
9 testified to the significance of the feature, particularly because of its role as
10 something that interfaces and connects to the hood and the headlamp.

11 And I want to be clear, he never admitted that *Karras* discloses this
12 feature. There's some suggestion of that by Mr. Irwin. What he said was
13 that the transition goes outward and downward. Well, that may be true, but
14 that's really not the point. The point is that it does not have that pronounced
15 character, that angular character. It's far more subdued than the '741 patent.

16 And so then what we're really left with, and I think again where the
17 rubber meets the road, what is the import of that difference? And as I said,
18 we've got testimony from our expert at paragraph 75 to 80 of his declaration
19 that this matters. These kinds of details matter. And LKQ didn't even
20 address this element in its petition. So, I think there's a burden deficiency
21 there and there's a weight of evidence issue. We've got our expert saying
22 that this matters.

23 And even in reply, if you turn to slide 13, what we hear from LKQ is a
24 summary argument that it just simply does not change the overall visual
25 similarity. And they cite the *Hill* at paragraph 43, but that testimony is just
26 reciting back what is essentially the standard here. He doesn't take on our

1 expert's analysis. He doesn't take on this aspect of it being an interfacing
2 feature. So, we've got, like I said, a burden problem here.

3 And even if Your Honors go outside of the four corners of the
4 petition, which I don't think you should, even if you go there, the weight of
5 the evidence here is still strongly in GM's favor. When you're looking at
6 who put forth evidence on what matters here, Mr. Peters put forth that
7 evidence. It's not coming from LKQ.

8 If Your Honors go to slide 14 here, we see a very similar story, and
9 I'll spend a little less time on this. But you can see, again, these are features,
10 they're not picked out of thin air. We talked about the overarching view of
11 these designs and how they differed. Each one of these features that I'm
12 talking about contributes directly to that distinct overall appearance.

13 So, we have here the profile. We've got a much sportier and
14 aggressive profile in the '741 patent versus a nuanced and subdued profile of
15 *Karras*. You can see here there's surface contour on slide 14 where at the
16 red line on the bottom it's carving in, so you can you see that wheel rim.
17 You see a much greater inward transition on that arcuate angle when looking
18 above than you do on *Karras*.

19 So, again, you look at this from every angle and there is a much
20 sharper and aggressive design to the '741 patent than there is to *Karras*.

21 JUDGE DANIELS: Mr. Herriges, again, one of the problems I've
22 having with this argument is I'm not sure I agree that they're stuck with
23 these drawings in *Karras*. There's been some recent Federal Circuit case
24 law, I think, that allows us to -- that says, look, even if you can't see it in one
25 view, maybe in the *Seely* (phonetic) cases they said, look, if there's handles
26 on some sides, they're going to be on the other sides, as well. So, here, even

1 though I can't see it in this top-down view, I do see it in the -- I do see that
2 wheel surface in the side view. I do see that contour where the wheel rim
3 separates from the -- sort from the upper panel. The wheel rim is pretty
4 distinctive.

5 Are you just arguing there's -- here that there's a slightly different,
6 you know, proportion or something with regards to the upper part of the --
7 above -- part of the design above the wheel rim?

8 MR. HERRIGES: No, what I'm arguing, Your Honor, if you're on
9 slide 14, Your Honor, yeah, I will certainly concede that in other views you
10 can see the wheel rim. And we're not taking issue, I don't think, with the
11 wheel rim as a distinction here.

12 But what I'm saying, though, is you look at -- you can draw a
13 comparison from any view of these two references and these same
14 differences in angularity and in overall appearance are going to be there.
15 And, again, these are differences that LKQ didn't address in their petition.
16 And when we come back on reply, we hear summary attorney argument,
17 which I've got on slide 15 here, that essentially recites back the legal
18 standards.

19 I want to just turn -- I think I'm probably running a little short on
20 time, so we hit these issues in our briefing, but I want to turn to the summary
21 slide here on slide 18. And I think the critical point here for Your Honors is,
22 again, twofold.

23 The first one is a burden issue. These four things, the distal portion,
24 transition, profile, and sculpting, none of them were addressed in the
25 petition. These are elements of the claim that LKQ had a burden in its

1 petition to put forth evidence showing either that they were n the prior art of
2 evidence that they were de minimis. None of it is there.

3 And even in reply, we have summary attorney argument that
4 essentially recites back the standards here in contrast to what we put forth in
5 our response, expert testimony pointing out why these differences matter and
6 why a skilled artisan or a skilled designer would believe they matter.

7 JUDGE COCKS: Counsel, this is Judge Cocks.

8 MR. HERRIGES: Yes.

9 JUDGE COCKS: A quick question on slide 18.

10 MR. HERRIGES: Yes, Your Honor.

11 JUDGE COCKS: You mentioned the distal portion and referring to
12 *Karras* you have “conceded by LKQ.” What was conceded?

13 MR. HERRIGES: Sorry, Your Honor, I’ll clarify that. The
14 concession there is that there -- they did address this in their petition and the
15 conceded that this was one of the distinctions that required a secondary
16 reference.

17 JUDGE COCKS: Okay, thank you.

18 MR. HERRIGES: Your Honors, I’m going to use my remaining time
19 here to address the Escalade unless Your Honors have any questions on the
20 *Sirus* (phonetic) or the *Rosen* reference.

21 JUDGE COCKS: I do not, but to let you know you have about 11
22 minutes and 45 seconds left.

23 MR. HERRIGES: Okay. Thank you, Your Honors. I want to start
24 here with slide 20, which is the standard. And I think it’s important here that
25 the question isn’t only whether there are general similarities between two
26 references. The question is whether there are similarities that would suggest

1 the application of the particular missing feature. And you can see that in that
2 *MRC* case, which I think LKQ was pointing to numerous times as setting a
3 standard here, that it's got to suggest those features. It's not enough to talk
4 about general similarities because when you start talking about just general
5 similarities, you fall in to the trap that the

6 *L.A. Gear* case recognized, and that's still good law. That's on the
7 second part of slide 20.

8 But the point there is that, "A reconstruction of known elements does
9 not invalidate a design patent, absent some basis whereby a designer of
10 ordinary skill would be led to create this particular design." So, it's not
11 enough to point to general similarities. You have to have a specific
12 similarity that would suggest the application of the particular missing
13 features.

14 JUDGE DANIELS: Mr. Herriges, these are both patents for -- these
15 are both design patents -- well, excuse me, let's take a step back. That's a
16 great quote. These are great quotes. But practically, how are we supposed
17 to determine when a secondary reference can be applied?

18 For instance, the secondary reference in this case is a front fender.
19 The patent is a -- the primary reference is a patent of a front fender. You
20 know, they're not taking these from some other part or some other, you
21 know, unrelated device or article of manufacture and applying it. They're
22 taking it from a fender. They're taking it from, you know, and I don't really
23 want to go down this road, but they're taking it from a fender of a Cadillac,
24 which seems to be sort of the theme here, and maybe that's just a good
25 argument on their part. We can't look at the commercial embodiments
26 really here other than the picture we have for the secondary reference.

1 But how am I supposed to do this practically, determine that these are
2 not -- that it wouldn't suggest itself?

3 MR. HERRIGES: Yeah. I think, Your Honor, you have to look at the
4 evidence. You know, every case is going to vary, of course. So, a bright
5 line test is not something I can give you today. But you have to look at the
6 evidence.

7 JUDGE DANIELS: What's the evidence then?

8 MR. HERRIGES: The evidence --

9 JUDGE DANIELS: What's the evidence here?

10 MR. HERRIGES: Yep. If you look at slide 21, the evidence in this
11 case is, and this is out of their petition, what they say is the 2015 Cadillac
12 "also depicts the design of a vehicle fender." Okay. And their expert, as
13 they pointed out, he also said it's a design of a vehicle fender and it's
14 Cadillac. But their expert never goes and assesses the similarity of the
15 features between the Escalade and the *Karras* to determine whether they're
16 similar enough to combine. Okay, so that's the evidence on their side.

17 The evidence --

18 JUDGE KINDER: This is Judge Kinder. How many features have to
19 be similar? Is it the overall similarity? I mean, why do we have to look at
20 individual features?

21 MR. HERRIGES: Because, well, it's the overall similarity, but you
22 have to look at it -- I think the underlying features contribute to how you
23 define that overall similarity. I don't think it's a you know it when you see it
24 kind of thing. You look at, okay, what are the design elements here and how
25 do those similarities align and would a skilled designer take particular
26 features and apply the secondary reference to the primary reference?

1 And what our expert said is that a skilled designer would not do this.
2 And the reason for that is, if you turn to slide 22, is that they present
3 different overall appearances. The *Karras* design, as we've talked about, is
4 rounded, subtle, and softly curved whereas the Escalade is a far more
5 imposing and angular vehicle that would essentially undo *Karras*. It would
6 undo the soft proportions of *Karras*.

7 And I think it's not directly on point, but Your Honors' assessment of
8 the Cadillac Escalade as -- and the *Institution* decision I think does suggest
9 some of the inapplicability here of that reference. Because if Your Honors
10 will recall, what you said was, look, that is not necessarily a good primary
11 reference because it's got a much bolder and truck-like appearance than the
12 other references have.

13 And so when you're trying to assess, look, how do I know whether to
14 combine these, you have to look to the evidence. And we've got summary
15 evidence from LKQ that they're both fenders and they're both fenders on
16 Cadillacs whereas we've got evidence from GM that looks a little closer on
17 this and says, look, they may both be Cadillacs, but they're Cadillacs with
18 different overall impressions and implementing the Escalade into the *Karras*
19 vehicle is actually going to undo what *Karras* is trying to do here. And I
20 think while I can't draw a bright line, certainly in a case where applying a
21 second reference to a primary reference would be inconsistent with the
22 theme of that primary reference, a skilled designer isn't going to do that.

23 And you can see on slide 23 that, you know, GM didn't do it. And
24 there's some corroborating temporal evidence here that I think suggests that
25 -- it corroborates what Mr. Peters is saying. The embodiment of *Karras*
26 came out in 2013 whereas the Escalade came out in 2015. And we have

1 2015, 2016, 2017, GM indisputably didn't implement these Cadillac features
2 onto the XTS. And as Mr. Peters said, the reason for that is because it would
3 undo what *Karras* was teaching.

4 JUDGE DANIELS: Mr. Herriges, if your argument -- I'm having
5 trouble again with this argument, because if we were stuck with everything
6 that's in the primary reference and you could never change it, then we'd
7 never find -- we'd never be able to combine any secondary reference. And it
8 would be impossible to do so.

9 The idea in design patents is we have a secondary reference. And
10 when you -- if it's able to be applied, if there's enough suggestion, then you
11 get sort of this new reference that looks different. And that doesn't -- I don't
12 understand why we have to live and die by only what's in the primary
13 reference.

14 MR. HERRIGES: You don't have to live and die by what's only in
15 the primary reference. What I'm saying is it's almost a teaching away.
16 These references are not compatible in overall theme. And when you're
17 looking towards, look, are they similar enough to combine, there is a
18 requirement of similarity here. And maybe there's a reference out there that
19 you would combine with *Karras*, but there's not one out there that you
20 would combine with *Karras* to reach the design here. And I think, you
21 know, that's really the problem is I'm not saying you can never modify
22 *Karras*, but there's no reference that's been put forth here suggesting you
23 wouldn't combine it in a way to modify *Karras* to reach the claimed
24 invention. And that's the problem. You could modify it, but not in the way
25 that they're suggesting and not with the reference that they're suggesting.

1 I think I'm probably running very close on time here, so I do want to
2 address the final question, Judge Daniels, that I think you were asking to
3 Mr. Irwin. And that, if you go to slide 24, and I think the question was what
4 if all these differences aren't resolved, what do we do with the combination?
5 And I think it's important here to, again, go back to LKQ's petition. And
6 the only thing that they talked about incorporating in their petition is two
7 things that relate to the distal portion. They don't address the arcuate
8 transition at all and they don't address some of the other features that are in
9 our slides and discussed in our brief.

10 And so it's indisputable that there are differences that remain. So, the
11 question then is, do they put forth evidence that even withstanding those
12 differences, the combination would not have the -- or would have the same
13 overall appearance? And they simply didn't do that. There's nothing in
14 their petition. There's no evidence addressing those additional features that
15 would still exist after this combination. Mr. Peters addressed it in his
16 petition -- or in his declaration. We addressed it in our response. But you're
17 not going to find it anywhere at all in their petition or in any of the evidence
18 cited with their petition. And that's a deficiency that renders this argument
19 invalid and we should reject -- and you should reject their obviousness
20 challenge here.

21 So, with that, Your Honors, I do want to reserve a couple minutes.

22 JUDGE DANIELS: You do, you have a couple -- almost pretty much
23 two minutes left, which will be fine for surrebuttal if that's what you want.

24 MR. HERRIGES: Yes, Your Honors, unless you have any questions
25 on my opening.

1 JUDGE DANIELS: I do not have any more unless any of the other
2 judges do.

3 JUDGE COCKS: This is Judge Cocks. I do not. Thank you.

4 JUDGE KINDER: Judge Kinder. I do not have any.

5 JUDGE DANIELS: All right, great. So, this is working out pretty
6 well. I think we have for Petitioner, we have -- Mr. Irwin, you have three
7 minutes for rebuttal and then we'll have about two minutes for surrebuttal,
8 as well.

9 If you'd like to go ahead, Mr. Irwin.

10 MR. IRWIN: Sure. Thank you, Your Honor. If you would turn to
11 slide 8 of my presentation, you'll see on slide 8 the embodiment of the
12 *Karras* reference. And you'll see the embodiment of the '741 patent. And
13 you could see in those embodiments, first of all, that the *Karras* is no less
14 elegant, no less precise, no less striking, no less sporty, no less aggressive
15 than the '741 patent.

16 You know, they're trying to muddle up this issue with this adjective
17 soup that they keep using. What you see in slide 8 is what the difference
18 that we called out. You see the difference in the headlamp cutout. And
19 what the question really is, would it have been obvious to combine, to
20 modify the *Karras*, 2017 Cadillac XTS, would it have been obvious to
21 modify it and use a different headlamp cutout which would have resulted in
22 that different articulation of the headlamp aperture?

23 And so if you turn to slide -- and we say it would be obvious. It
24 would be obvious to use the Cadillac Escalade to modify it. When you do,
25 you end up with the same exact fender as the '741.

1 And when you're talking about this so related issue, that's really what
2 you're asking, is the relatedness alone enough that that supplies the
3 motivation to combine? But you're not precluded from looking outside of
4 those two references to determine if there was a motivation to combine.

5 And we also provided evidence of that motivation in our brief. And
6 specifically, what we explained, if you go to slide 32 of my presentation, we
7 explain that this headlamp was first introduced in the Cadillac Escalade. But
8 GM wanted consistency across their Cadillac line. And their own expert
9 admitted that you want to have consistency across the (inaudible) line.

10 And before the critical date, they applied that same headlamp cutout
11 to other -- the same headlamp, i.e., and associated headlamp cutout with
12 other Cadillacs. They applied it on the Cadillac XT5, they applied it on the
13 Cadillac CT5. And so that also provides motivation to modify the *Karras*,
14 to use the headlamp cutout of Escalade because you want to use a consistent
15 headlamp or headlamp cutout from the XTS that you're using on the other
16 Cadillacs. So you get the motivation.

17 JUDGE DANIELS: Mr. Irwin, that's about your three minutes. I'll
18 give you a few seconds just to finish up.

19 MR. IRWIN: Okay. And the last thing I'll point out is they keep
20 trying to say in the petition they didn't address every one of these little teeny
21 features that they pointed out as differences. What we did in the petition is
22 what we were supposed to do. We demonstrated that *Karras* is basically
23 same and that *Karras* and the Escalade are so related that they can be
24 combined. And when you combine, you have the same overall visual
25 impression.

1 Now, in their brief and their declaration, they say all these other minor
2 differences. And they don't say that these minor differences -- despite what
3 he said in his arguments, their expert does not explain how these minor
4 differences change the basic similarity analysis or the overall similarity
5 analysis. He just blankly said here's a difference, here's a difference, here's
6 a difference. He never, ever says those differences caused these designs to
7 be different in basic similarity or overall similarity.

8 Well, we did that in reply, which they want to completely ignore. We
9 said, first of all, that difference, you can't even really see it. If it's there, it's
10 virtually like you can't design it. You can't -- you can only see it if you look
11 from the top and (inaudible) takes out a little (inaudible). The fact that we,
12 you know, didn't address it in the petition, we addressed it in the reply. We
13 say, look, this difference is a minute difference and it doesn't change the fact
14 that the basic similarity is the same and the combination has the same overall
15 visual appearance. It's the entire record, not just what we said in the
16 petition. But we're allowed in the trial to address things that they argued,
17 and that's what we did.

18 JUDGE DANIELS: Well, we understand. Mr. Irwin, we understand
19 there's a complete record here and that you're allowed to respond to some of
20 their arguments. That's not a problem.

21 I am going to cut you off because you're a little bit over and I just
22 want to be fair, so, okay.

23 MR. IRWIN: Thank you, Your Honor.

24 JUDGE DANIELS: Thank you. That was a very good presentation.

25 All right, Mr. Herriges, if you need a couple extra minutes beyond the
26 two you asked for, you're welcome to it.

1 MR. HERRIGES: No, Your Honor. I'll be very brief.

2 I'll start by addressing slide 32, this notion that GM incorporated its
3 headlamp in other vehicle designs. And it's not the same. It's different than
4 the Escalade and it's also irrelevant. This motivation to combine or
5 whatever you want to call it isn't a ground hat they raised in the petition.
6 And the fact that GM may have implemented a headlamp design on other
7 vehicles, different vehicles than *Karras*, doesn't show why the Escalade in
8 *Karras* would be combined and it doesn't address the reason that you
9 wouldn't combine them.

10 In fact, one of these --

11 JUDGE DANIELS: Is there testimony, Mr. Herriges, is there
12 testimony in this case that that was -- that that sort of more aggressive or
13 double-sloped distal portion or nose was a -- was the designers wanted to do
14 that consistently across the Cadillac line?

15 MR. HERRIGES: No, Your Honor. There is some testimony
16 generally about there being general consistency about -- general consistency
17 across Cadillac in general in a broad sense, that you know a Cadillac when
18 you see it, but not that GM had any particular goal here.

19 With that, Your Honors, I do think -- I want to close with something
20 because there's been a lot of questions surrounding this how do you know?
21 You know, how do you know if it's different? And I think the -- as I said
22 before, you have to look to the evidence. You have to look to what they put
23 in their petition. Are they allowed to respond to things that we say? Sure.
24 But they're not allowed to come up with new arguments and address
25 elements that they should have addressed in the petition.

1 So, when you're looking to, look, are these similar, I think the *Apple*
2 case that we cite in our brief presents a good comparison. Everyone on this
3 call, of course, is familiar with the iPad. Right? It's got the glass, it's got
4 the rounded corners, and it's a rectangular tablet. Well, what the Federal
5 Circuit said in the *Apple* case was that the *Fiddler* (phonetic) reference,
6 which was also a rectangular tablet with four evenly rounded corners and a
7 flat back, didn't qualify as a primary reference because even though it had
8 those general similarities, it didn't have other differences that distinguish the
9 iPad patent from the *Fiddler* patent.

10 And that's exactly what we have here. There are some general
11 similarities between the '741 patent and the prior art. But the Federal Circuit
12 has clearly indicated in cases like the *Apple* case, that those general
13 similarities aren't enough to make something a *Rosen* reference. And those
14 same reasons apply here.

15 And we believe for that reason that Your Honors should reject the
16 argument that *Karras* qualifies as a *Rosen* reference, reject the argument that
17 any combination of the Escalade and *Karras* would teach a design that's
18 basically the same.

19 Thank you, Your Honors.

20 JUDGE DANIELS: All right. Thank you, Mr. Herriges. Thank you,
21 Mr. Irwin. Great presentations. Thank you so much for your patience with
22 our questions today. Thank you to our court reporter and the hearings folks
23 that help us put these on smoothly.

24 Let me ask if my counsel have any last questions. Or not my counsel,
25 my fellow judges here.

26 JUDGE COCKS: This is Judge Cocks. I do not. Thank you.

1 JUDGE KINDER: This is Judge Kinder. I do not have any further
2 questions.

3 JUDGE DANIELS: And does the court reporter have -- actually, let's
4 do this. Let's go -- thank both of the counsel and the parties for your time
5 today. It's been super helpful. These cases are now submitted.

6 (Whereupon, the proceedings at 11:21 a.m. were concluded.)

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PETITIONER:

Barry F. Irwin
Reid Huefner
IRWIN IP LLC
birwin@irwinip.com
rhuefner@irwinip.com

PATENT OWNER:

Dorothy P. Whelen
Craig A. Deutsch
Grace J. Kim
Jennifer Huang
Joseph A. Herriges (Pro Hac Vice)
FISH & RICHARDSON P.C.
whelan@fr.com
deutsch@fr.com
gkim@fr.com
jjh@fr.com
herriges@fr.com