

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF TENNESSEE  
3 CHATTANOOGA

4 LANE SHARK USA, LLC, . DOCKET NO. CV-1-19-326  
5 PLAINTIFF, .  
6 VS. . GREENEVILLE, TN  
7 TITAN IMPLEMENT, LLC AND . JANUARY 14, 2020  
8 TRAILBLAZER ATTACHMENTS, . 8:55 A.M.  
9 LLC, . SEALED  
10 DEFENDANTS. . {UNREDACTED}  
11 . . . . .

12 TRANSCRIPT OF MOTION HEARING  
13 BEFORE THE HONORABLE J. RONNIE GREER  
14 UNITED STATES DISTRICT JUDGE  
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1 APPEARANCES:

2 FOR THE PLAINTIFF: DORSEY & WHITNEY LLP (UTAH)  
3 BRETT L. FOSTER, ESQ.  
4 MARK A. MILLER, ESQ.  
111 SOUTH MAIN STREET  
SALT LAKE CITY, UT 84111

5 FOR THE DEFENDANTS: MILLER & MARTIN, PLLC (ATLANTA)  
6 EILEEN H. RUMFELT, ESQ.  
7 PHARAN EVANS, ESQ.  
1180 WEST PEACHTREE STREET NW  
8 REGIONS PLAZA SUITE 2100  
ATLANTA, GA 30309

9 MILLER & MARTIN, PLLC  
10 (CHATTANOOGA)  
DONALD J. AHO, ESQ.  
11 832 GEORGIA AVENUE  
1200 VOLUNTEER BUILDING  
12 CHATTANOOGA, TN 37402

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22 COURT REPORTER: KAREN J. BRADLEY  
23 RPR-RMR  
U.S. COURTHOUSE  
24 220 WEST DEPOT STREET  
GREENEVILLE, TN 37743

25 PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT  
PRODUCED BY COMPUTER.

1 (CALL TO ORDER OF THE COURT AT 8:55 A.M.)

2 THE COURT: GOOD MORNING.

3 MR. AHO: GOOD MORNING, YOUR HONOR.

4 MR. MILLER: GOOD MORNING.

5 THE COURT: ALL RIGHT. CALL THE CASE, PLEASE.

6 THE CLERK: CIVIL ACTION 1:19-CV-326, LANE

7 SHARK USA VERSUS TITAN IMPLEMENT AND TRAILBLAZER

8 ATTACHMENTS.

9 THE COURT: ALL RIGHT. COUNSEL, FIRST OF ALL,  
10 WOULD YOU INTRODUCE YOURSELVES, THE LAWYERS WHO ARE GOING  
11 TO BE INVOLVED, MAKE AN APPEARANCE FOR THE RECORD, PLEASE.

12 MR. FOSTER: BRETT FOSTER FROM DORSEY AND  
13 WHITNEY ON BEHALF OF PLAINTIFF, LANE SHARK USA. WITH ME  
14 IS MY PARTNER MARK MILLER.

15 WE ALSO HAVE THE PLANT REPRESENTATIVE,  
16 MR. TRAVIS ODOM WITH US, AND MY TRIAL PARALEGAL,  
17 MS. SHERRI STUCKI.

18 THE COURT: ALL RIGHT. THANK YOU.

19 MR. AHO: GOOD MORNING, YOUR HONOR. DON AHO ON  
20 BEHALF OF THE DEFENDANTS.

21 MS. RUMFELT: EILEEN RUMFELT ALSO WITH MILLER &  
22 MARTIN ON BEHALF OF THE DEFENDANTS.

23 MS. EVANS: I'M PHARAN EVANS WITH MILLER &  
24 MARTIN.

25 THE COURT: ALL RIGHT. THANK YOU.

1 COUNSEL, I'VE SEEN THIS E-MAIL CHAIN ABOUT HOW  
2 WE PROCEED TODAY. FRANKLY, I'VE BEEN IN COURT, I DON'T  
3 KNOW WHERE YOU ARE ON THAT, BUT SOMEBODY TELL ME WHERE WE  
4 ARE ON YOUR REQUEST FOR ANOTHER CONFERENCE ABOUT THAT  
5 BEFORE WE BEGIN. WHAT'S AT ISSUE HERE?

6 MR. AHO: YOUR HONOR, WE'VE BEEN, I THINK,  
7 WORKING FAIRLY WELL TOGETHER ON THOSE ISSUES.

8 THE COURT: I HOPE SO.

9 MR. AHO: CERTAINLY TRYING TO COOPERATE WITH  
10 ONE ANOTHER; BUT, YOU KNOW, FROM OUR STANDPOINT IT REALLY  
11 IS WHAT'S CONVENIENT FOR THE COURT THAT ALLOWS THE COURT  
12 TO TAKE THE PROOF IN MOST EFFICIENTLY.

13 THE WAY THIS, THIS BEGAN IS THAT LANE SHARK  
14 COUNSEL INFORMED US THAT THEY WERE GOING TO TRAVEL ON THE  
15 PAPERS ON THE DECLARATION. WHEN WE HEARD THAT, WE SAID,  
16 WE MAY HAVE ONE LIVE WITNESS, MR. BOB FOX, OUR EXPERT  
17 WITNESS. BEFORE WE MADE THAT DECISION, WE ASKED TO SEE  
18 THEIR REPLY BRIEF; AND WHEN WE HAD A TELEPHONE CONFERENCE  
19 WITH YOUR, WITH YOUR LAW CLERK DONA, WE SAID THEN AND  
20 THERE THAT WE WOULD CALL MR. FOX. THERE'S BEEN SOME,  
21 THERE'S BEEN AN OBJECTION TO THAT OR THERE'S BEEN SOME  
22 BACK AND FORTH; BUT BOTTOM LINE AS WE'VE STATED IN OUR  
23 FILING, WE THINK IT'S BETTER FOR THE COURT TO ALLOW LANE  
24 SHARK TO GO FIRST, PRESENT THEIR ARGUMENTS; FOR DEFENDANTS  
25 TO GO NEXT, MAKE AN INTRODUCTORY ARGUMENT AND THEN ALLOW

1 MR. FOX TO TESTIFY IN KIND OF THE STANDARD ORDER WHERE WE  
2 THINK HE WOULD GO ON DIRECT, THEY COULD CROSS, WE COULD  
3 REDIRECT IF NECESSARY; AND THAT'S JUST THE MOST ORDERLY  
4 WAY AND THE MOST STANDARD WAY WE BELIEVE TO PRESENT THE  
5 PROOF, SO IT'S REALLY THAT SIMPLE, YOUR HONOR. OBVIOUSLY  
6 IT'S UP TO YOU, WHAT WORKS BEST FOR YOU.

7 THE COURT: ALL RIGHT. WHY WOULD I NEED ANY  
8 ORAL ARGUMENTS WITH ALL THESE NOTEBOOKS FULL OF PLEADINGS  
9 HERE, OR ANY OPENING ARGUMENTS, I SHOULD SAY?

10 MR. AHO: WELL, I THINK FROM OUR STANDPOINT,  
11 YOUR HONOR, IT WOULD BE GOOD FOR YOU TO HEAR -- AND, BY  
12 THE WAY, THIS IS MS. RUMFELT'S SHOW HERE, I THINK IT WOULD  
13 BE GOOD FOR THE COURT TO HEAR KIND OF WHERE THE PARTIES  
14 STAND AT LEAST INITIALLY, AND WE CAN DIVE INTO WHATEVER  
15 THE COURT WANTS.

16 THE COURT: ALL RIGHT.

17 MR. AHO: BUT, YEAH, YOU'RE RIGHT, THERE'S A  
18 LOT OF MATERIALS, AND MAYBE THAT'S ONE OF THE REASONS IT  
19 WILL MAKE IT EASIER FOR YOU, YOU KNOW, TO KIND OF GET TO  
20 THE MEAT OF THE COCONUTS, SO TO SPEAK.

21 THE COURT: I'M BEGINNING TO THINK THAT THERE  
22 MUST BE SOMETHING MAGIC ABOUT 30 PAGES BECAUSE IT SEEMS  
23 THAT IN JUST ABOUT EVERY CASE THAT INVOLVES THESE KINDS OF  
24 ISSUES I GET A MOTION TO EXTEND THE PAGE LIMIT TO 30, NOT  
25 25.

1 MR. AHO: WELL, WE TRY TO BE REASONABLE, YOUR  
2 HONOR.

3 THE COURT: BUT I HAVE READ ALL OF THESE  
4 PLEADINGS, SO.

5 ALL RIGHT. TELL ME THEN WHERE THE PLAINTIFFS  
6 ARE ON ALL THAT, OR THE PLAINTIFF, I SHOULD SAY.

7 MR. MILLER: YOUR HONOR, WITH RESPECT TO  
8 MR. FOX, WE DON'T HAVE A PROBLEM WITH HIM TESTIFYING, WE  
9 WERE JUST RECOMMENDING TO THE COURT IN OUR OBJECTION THAT  
10 WE THOUGHT GIVEN THE SUBMISSION OF DECLARATIONS IT WOULD  
11 BE MORE EFFICIENT TO HAVE HIS DECLARATION SERVE AS HIS  
12 DIRECT TESTIMONY AND BEGIN WITH CROSS EXAMINATION AND THEN  
13 THEY CAN REDIRECT HIM, RATHER THAN HAVE HIM WALK THROUGH  
14 THE DECLARATION FOR PURPOSES OF THE HEARING.

15 AND WE'RE -- MY INTENTION IS IN OUR, WHEN WE  
16 ARGUE THE CASE, I WAS PLANNING TO JUST CALL MR. FOX IN OUR  
17 CASE IN CHIEF AND CROSS EXAMINE HIM ON HIS REPORT, OR HIS  
18 DECLARATION AS A PART OF OUR PRESENTATION OF OUR MOTION TO  
19 THE COURT, SO WE JUST THOUGHT THAT WAS THE MOST EFFICIENT.  
20 WE'RE FINE WITH WHATEVER THE COURT WANTS TO DO.

21 WITH REGARD TO THE THIRD, THE SUPPLEMENTAL  
22 DECLARATION THAT THEY SUBMITTED TO THE COURT RECENTLY FOR  
23 MR. WILLIS, WE, WE DON'T HAVE A PROBLEM WITH IT. WE THINK  
24 IT WILL LIKELY, GIVEN THAT SUPPLEMENTAL DECLARATION,  
25 MR. ODOM IS HERE, AND WE ANTICIPATE WE WILL CALL MR. ODOM

1 TO TESTIFY BRIEFLY ON, ON SOME ISSUES THAT AREN'T ALREADY  
2 EXPRESSLY OR FULLY DEVELOPED IN HIS DECLARATIONS BASED ON  
3 THE SUPPLEMENTAL DECLARATION OF MR. WILLIS, SO MR. ODOM  
4 MAY ALSO GIVE SOME LIVE TESTIMONY TODAY.

5 THE COURT: ALL RIGHT. I DO NOT ORDINARILY  
6 TELL PARTIES HOW TO PRESENT THEIR CASE; AND IF THERE'S A  
7 DISPUTE, WE END UP I THINK MOST OF THE TIME JUST DOING IT  
8 IN THE TRADITIONAL MANNER. THE PARTY WITH THE BURDEN OF  
9 GOING FORTH GOES FIRST, PRESENTS WITNESSES THAT MAY BE  
10 CROSS-EXAMINED BY THE DEFENDANT, AND THEN THE DEFENDANT  
11 MAY PRESENT WHATEVER WITNESSES IT CHOOSES TO DO. IT'S NOT  
12 REALLY A QUESTION OF WHAT'S MOST EFFICIENT FOR THE COURT  
13 AT THIS POINT BECAUSE I'M NOT GOING TO TELL YOU HOW TO  
14 PRESENT YOUR PROOF. I WILL SAY THAT I'VE READ ALL THOSE  
15 AFFIDAVITS. I'M NOT HAPPY TO SAY THAT, BUT I'VE READ THEM  
16 ALL.

17 SO I THINK, YOU KNOW, LIKE -- MR. MILLER, I  
18 THINK YOU GO FIRST, CALL WHICHEVER WITNESSES YOU WANT TO  
19 CALL, THEY'RE SUBJECT TO CROSS EXAMINATION BY THE  
20 DEFENDANT. WHEN YOU'RE FINISHED, THE DEFENDANT CAN DO THE  
21 SAME.

22 MR. MILLER: THANK YOU, YOUR HONOR.

23 THE COURT: ALL RIGHT. THE REASON FOR THE  
24 CALL, OF COURSE, ON THURSDAY AFTERNOON WAS TO TRY TO  
25 RESOLVE THIS, AND IT WAS ALSO FOR SCHEDULING PURPOSES

1 BECAUSE I HAVE HAD PARTIES COME INTO THESE HEARINGS AND  
2 SAY THEY WANT TO PRESENT ALL THE PROOF BY LIVE TESTIMONY,  
3 WHICH CAN BE DONE; BUT I WILL TELL YOU THIS, I WILL  
4 PROBABLY GET IMPATIENT IF WITNESSES SIMPLY REPEAT THEIR  
5 DECLARATIONS, THERE'S NO POINT IN THAT, OKAY.

6 AS FAR AS AN OPENING STATEMENT IS CONCERNED,  
7 I'LL ALLOW YOU TO DO THAT, BUT FAIRLY BRIEF, PLEASE.

8 ALL RIGHT. GO AHEAD.

9 MR. FOSTER: GIVE US A MOMENT, YOUR HONOR.

10 THE COURT: LET ME ASK YOU ALL A QUESTION  
11 BEFORE WE ACTUALLY GET TO THAT POINT. IS THE FOCUS TODAY  
12 GOING TO BE PRIMARILY ON THE ALLEGATIONS MADE BY THE  
13 DEFENDANT AS TO THE INVALIDITY OF THE PATENT?

14 MR. FOSTER: YOUR HONOR, WE'RE PREPARED TO  
15 FOCUS ON -- WE DON'T THINK INFRINGEMENT IS CONTESTED. WE  
16 DO BELIEVE THAT THERE ARE SOME BACKGROUND ISSUES RELATING  
17 TO COPYING AND WHAT HAPPENED WITH THAT THAT THEY'RE  
18 IMPORTANT; AND ALSO WE THINK EMPHASIZING IRREPARABLE HARM  
19 AND HEARING FROM MR. ODOM ON THAT WILL BE VALUABLE AND  
20 ARGUING THAT; AND THE WAY WE PLAN TO HANDLE IT IS I WILL  
21 HANDLE ALL ISSUES IN THE CASE EXCEPT THE INVALIDITY  
22 ISSUES, MR. MILLER WILL HANDLE THE INVALIDITY ISSUES, AND  
23 WE'LL EXPECT HIM TO CALL MR. FOX FIRST AS A WITNESS,  
24 EXAMINE HIM; AND WHEN THAT WITNESS' TESTIMONY IS DONE, HE  
25 CAN ARGUE. I WILL PUT ON MR. ODOM FIRST BEFORE PRESENTING

1 MY CASE TO PROVIDE SOME TESTIMONY RELATING TO THE RECENTLY  
2 SUBMITTED DECLARATION OF MR. WILLIS AND TO REINFORCE A FEW  
3 POINTS NOT IN THE DECLARATION OR TO EXPAND ON IT ON  
4 IRREPARABLE HARM, NOT TO REPEAT IT; SO THAT'S HOW WE  
5 EXPECT IT, AND I WOULD EXPECT A PRIMARY FOCAL POINT WILL  
6 BE INVALIDITY, CERTAINLY THEIR CLAIMS.

7 THE COURT: MS. RUMFELT, DO YOU AGREE THAT  
8 INFRINGEMENT IS NOT CONTESTED TODAY FOR THE PURPOSES OF  
9 THIS HEARING?

10 MS. RUMFELT: YOUR HONOR, I DON'T BELIEVE THAT  
11 INFRINGEMENT IS THE FOCUS TODAY, BUT WE DO VERY MUCH  
12 CONTEST INFRINGEMENT, AND WE WILL TALK A LITTLE BIT ABOUT  
13 THAT IN OUR CASE TODAY.

14 THE COURT: SO YOU'RE GOING TO PRESENT PROOF ON  
15 THE INFRINGEMENT ISSUE TODAY?

16 MS. RUMFELT: WE WILL ARGUE ON THE INFRINGEMENT  
17 ISSUE, YES. WE -- VERY MUCH THE FOCUS IS ON THE  
18 INVALIDITY OF THE PATENT AND THE VULNERABILITY TO  
19 INVALIDITY CHALLENGES, BUT WE DO INTEND TO ARGUE AS PART  
20 OF OUR DISCUSSIONS.

21 THE COURT: I'VE GOT TO TELL YOU THAT I CAME TO  
22 THE SAME CONCLUSION THAT MR. FOSTER DID WHEN I READ ALL  
23 THESE PLEADINGS, AND THAT IS THAT YOUR FOCUS TODAY WAS ON  
24 INVALIDITY, THAT YOU WERE NOT MAKING A MERITS ARGUMENT ON  
25 INFRINGEMENT.

1 MS. RUMFELT: YEAH, I CERTAINLY DO THINK THAT  
2 IS THE FOCUS, BUT WE DO HAVE A FEW POINTS TO MAKE ON  
3 INFRINGEMENT.

4 THE COURT: OKAY.

5 MR. FOSTER: AS FOR AN OPENING, YOUR HONOR,  
6 THIS IS -- WE ARE EARLY IN THIS COMPANY'S HISTORY, THE  
7 BEGINNING OF YEAR FOUR. THE COMPANY IS AT A CROSSROADS.  
8 THIS IS INDEED STARTED BY A MAN WHO IS A CONSTRUCTION  
9 WORKER, HAD A GREAT IDEA, FIRST-TIME BUSINESS OWNER, A  
10 START-UP BUSINESS OWNER; AND BECAUSE OF INGENUITY, HARD  
11 WORK, INCLUDING WEEKENDS AND EVENINGS UNTIL HE GOT THE  
12 THING GOING, YOU'VE GOT A VIABLE BUSINESS; AND AS THE  
13 COURT IS AWARE, THE COPYING OF THE INVENTION IS CLEAR.  
14 THE NOTICE OF THE PATENT PENDING STATUS WAS CLEAR. THEY  
15 PROCEEDED AHEAD WITH THE RISK KNOWING WHAT WAS GOING TO  
16 HAPPEN, THAT IT WAS LIKELY TO BE PATENTED; AND WHEN IT  
17 WAS, THEY SHOULD HAVE STOPPED. THAT'S WHAT SHOULD HAVE  
18 HAPPENED HERE, BUT INSTEAD THEY'RE CONJURING UP INVALIDITY  
19 ARGUMENTS THAT HAVE NO BASIS IN FACT, AND WHEN THE LAW IS  
20 PROPERLY APPLIED ARE RELATIVELY EASILY DISPOSED OF.

21 NOW, THEY'VE ADDED A LOT OF DETAIL, WE BELIEVE,  
22 TO TRY TO CONFUSE, BUT WE THINK THE QUESTION HERE IS  
23 LIKELIHOOD OF PREVAILING ON THE MERITS. THEY HAVE NOT  
24 MOUNTED EVEN A HINT OF AN INVALIDITY CHALLENGE IN THEIR  
25 PAPERS. APPARENTLY WE'RE GOING TO BE SURPRISED TODAY TO

1 LEARN THAT THEY'RE GOING TO HAVE SOME IN --  
2 NONINFRINGEMENT POSITION; BUT ON PAPERS -- AND, FRANKLY,  
3 GIVEN THE COPYING TO THE GNAT'S EYEBROW OF THE PATENTED  
4 INVENTION EVIDENCED BY THE PHOTOGRAPHS SIDE BY SIDE AND  
5 THE OTHER EVIDENCE, IT'S REALLY DIFFICULT TO CONCEIVE OF  
6 THEM COMING IN GOOD FAITH AND ARGUING ON INFRINGEMENT  
7 WHERE THE PREFERRED EMBODIMENT IS ALMOST NEVER EXCLUDED BY  
8 THE PATENT AND CERTAINLY HERE IT'S NOT.

9 AND IRREPARABLE HARM, WE BELIEVE THIS IS A  
10 COMPELLING CASE FOR IRREPARABLE HARM. YOU HAVE A COMPANY  
11 THAT SELLS 40,000 UNITS A YEAR, TITAN. THEY FORMED  
12 TRAILBLAZER FOR THIS PURPOSE TO DO THIS INFRINGING  
13 PRODUCT. THEY'RE GOING TO BE FINE. THEY'LL KEEP SELLING  
14 40,000 UNITS A YEAR. LANE SHARK HAS ONE PRINCIPAL  
15 PRODUCT, IT'S THIS BRUSH CUTTER THAT'S BEEN PATENTED IN  
16 TWO FORMS, ONE A 44 INCH AND A 32 INCH, THE LS-1 AND LS-3.  
17 THOSE ARE THE FLAGSHIP PRODUCTS. EVERYTHING ELSE IS A  
18 RELATED PRODUCT TO THAT. IF THEY HAVE TO COMPETE WITH  
19 THIS TITAN IN THE INDUSTRY, SO TO SPEAK, THEY'RE LIKELY TO  
20 GO OUT OF BUSINESS. THEY'RE GOING TO LOSE THEIR  
21 REPUTATION AS AN INVENTOR, THEY'RE GOING TO LOSE THEIR  
22 REPUTATION AND CREDIBILITY AS A PATENT HOLDER TRYING TO  
23 ENFORCE IT. THEY WILL NOT BE ABLE TO INCREASE THEIR  
24 MARKET SHARE AS THEY SHOULD. THEY SHOULD NOT HAVE TO  
25 COMPETE AGAINST THEIR OWN TECHNOLOGY, AND WE BELIEVE THE

1 EVIDENCE SHOWS THAT IT IS LIKELY A TWO SUPPLIER MARKET  
2 WITH THESE TWO COMPETING HEAD-TO-HEAD. IN THESE  
3 CIRCUMSTANCES IRREPARABLE HARM IS CLEAR, AND WE BELIEVE  
4 THAT ON PAPERS WE HAVE MET OUR BURDEN, WE'LL EMPHASIZE  
5 THAT WITH THE WITNESSES HERE TODAY.

6 AND BECAUSE THE RECORD IS VOLUMINOUS, WE'LL  
7 HAVE OUR PRESENTATION TOUCHING ON SOME OF THE KEY POINTS  
8 IN OUR CASE IN CHIEF, AND THEN WE'LL WRAP UP WITH  
9 REBUTTAL. WE'RE GRATEFUL TO BE HERE. WE'RE GRATEFUL FOR  
10 THE COURT'S TIME AND ATTENTION, AND MR. ODOM AND LANE  
11 SHARK SIMPLY WANTS THE BENEFIT OF WHAT HE'S INVESTED IN  
12 WITH THE PATENT SYSTEM THAT'S ENDORSED BY THE CONSTITUTION  
13 OF THE UNITED STATES.

14 THE COURT: ALL RIGHT.

15 MS. RUMFELT.

16 MS. RUMFELT: GOOD MORNING.

17 THE COURT: GOOD MORNING.

18 MS. RUMFELT: HIGH LEVEL HERE, THIS IS A  
19 REQUEST FOR EXTRAORDINARY RELIEF. WE'VE HAD JUST A FEW  
20 WEEKS OVER THE HOLIDAYS TO DEAL WITH THIS, AND WE'VE  
21 UNCOVERED WHAT WE CONSIDER TO BE SIGNIFICANT ISSUES TOWARD  
22 THE VULNERABILITY OF THE PATENT. IF THE PATENT IS  
23 VULNERABLE TO AN INVALIDITY CHALLENGE, THEY'RE NOT LIKELY  
24 TO SUCCEED ON THE MERITS; AND, FRANKLY, WE THINK THE EARLY  
25 EVIDENCE SHOWS THAT IT'S MORE LIKELY THAN NOT THAT THE

1 PATENT IS INVALID, SO IN FACT THE REVERSE IS TRUE.

2 WE'RE GOING TO MOUNT TODAY FOUR KEY CHALLENGES  
3 TO THE VALIDITY OF THE PATENT. FIRST IS THAT IT'S INVALID  
4 DUE TO ANTICIPATION. THIS MEANS THAT A PRIOR ART EXISTS  
5 THAT ANTICIPATES EVERY CLAIM IN THE PATENT. BOB FOX WILL  
6 SHOW TODAY THAT EVERY CLAIM OF THE PATENT WAS ANTICIPATED  
7 BY THE PUBLICLY DISCLOSED WHAT WE'RE CALLING THE JANUARY  
8 2017 UNIT.

9 OUR SECOND INVALIDITY CHALLENGE IS OBVIOUSNESS.  
10 THIS MEANS THAT A PERSON OF ORDINARY SKILL IN THE ART  
11 WOULD BE MOTIVATED TO COMBINE THE EXISTING PRIOR ART  
12 REFERENCES TO COME UP WITH THIS PATENT AND INVENTION. BOB  
13 FOX IS MORE THAN QUALIFIED AS A PERSON OF ORDINARY SKILL  
14 IN THE ART, AND HE'S EASILY COME TO THIS CONCLUSION.

15 THE COURT: LET ME ASK YOU A QUESTION THERE.

16 MS. RUMFELT: SURE.

17 THE COURT: I KNOW WE'RE GOING TO GET INTO THIS  
18 LATER, BUT WHAT QUALIFIES HIM TO GIVE THESE OPINIONS?

19 MS. RUMFELT: WHAT QUALIFIES HIM, HE'S TWO-  
20 PRONG QUALIFIED. HE'S QUALIFIED FOR SOME ISSUES AS A  
21 PATENT ATTORNEY WHO HAS LOOKED AT THESE THINGS OVER A 30  
22 YEAR CAREER, BUT HE'S ALSO QUALIFIED AS A PERSON OF  
23 ORDINARY SKILL IN THE ART. THIS IS SIMPLE TECHNOLOGY.  
24 THIS IS SOMETHING THAT A PERSON WHO HAS WORKED WITH THE  
25 EQUIPMENT, HAS SEEN EQUIPMENT LIKE THIS, AS HE HAS IN HIS

1 PRACTICE AND IN HIS LIFE --

2 THE COURT: WELL, THAT'S WHAT BOTHERS ME. I  
3 GREW UP ON A FARM TOO, SPENT A LOT OF HOURS IN THE SEAT OF  
4 A TRACTOR, OPERATED THIS -- NOT THIS EQUIPMENT, OBVIOUSLY,  
5 BUT VARIOUS EQUIPMENT SIMILAR, AND I'M NOT AN EXPERT; SO  
6 HOW DOES, HOW DOES HIS BACKGROUND ON A FARM QUALIFY HIM AS  
7 AN EXPERT ON THESE KINDS OF ISSUES?

8 MS. RUMFELT: BECAUSE THE STANDARD, YOUR HONOR,  
9 IS ORDINARY SKILL IN THE ART, AND THAT'S WHAT WE'RE  
10 SAYING, HE HAS ORDINARY SKILL.

11 THE COURT: BUT THAT HAS A SPECIAL MEANING IN  
12 THE PATENT CONTEXT. THAT DOESN'T JUST MEAN YOU CAN PULL A  
13 FARMER IN OFF HIS FARM TO TESTIFY ABOUT THESE ISSUES.

14 MS. RUMFELT: IT CAN SOMETIMES DEPENDING ON THE  
15 LEVEL OF THE SOPHISTICATION OF THE PRODUCT AND THE CLAIMED  
16 INVENTION. AND WHAT MAKES BOB UNIQUELY QUALIFIED HERE IS  
17 THAT --

18 THE COURT: LET'S CALL HIM MR. FOX HERE, OKAY.

19 MS. RUMFELT: CERTAINLY. WHAT MAKES MR. FOX  
20 UNIQUELY QUALIFIED HERE IS THAT HE HAS BOTH THE EXPERIENCE  
21 IN LOOKING AT THESE KINDS OF STRUCTURES AND HIS ENGINEER-  
22 ING EXPERIENCE, AS WELL AS THAT EXPERIENCE WITH THIS KIND  
23 OF EQUIPMENT.

24 THE COURT: BUT THE ENGINEERING EXPERIENCE HE  
25 HAS IS AS A CHEMICAL ENGINEER; CORRECT?

1 MS. RUMFELT: HIS DEGREE IS IN CHEMICAL  
2 ENGINEERING, BUT HE HAS SPENT THE MAJORITY OF HIS CAREER  
3 DOING ALL KINDS OF PATENTS, A LOT OF THEM IN THE  
4 MECHANICAL FIELD; SO HE'S DEALT WITH, HE'S DEALT WITH  
5 ARTICULATING ARMS, FOR EXAMPLE, IN EXERCISE EQUIPMENT.  
6 HE'S DONE -- HE HAS DONE PATENTS AS WELL IN THE FARMING  
7 EQUIPMENT WORLD; SO IT'S THE COMBINATION OF THOSE TWO THAT  
8 MAKES HIM UNIQUELY QUALIFIED TO DO THIS.

9 HE, HE -- YOU DON'T HAVE TO BE WORKING IN THE  
10 INDUSTRY. THERE'S NO, THERE'S NO REQUIREMENT THAT YOU  
11 HAVE YEARS, FOR EXAMPLE, IN THE INDUSTRY, YOU JUST HAVE TO  
12 BE A PERSON OF ORDINARY SKILL IN THE ART; AND THAT'S A  
13 CIRCUMSTANTIAL QUESTION BASED ON THE TECHNOLOGY ISSUE.

14 THE COURT: ALL RIGHT.

15 MS. RUMFELT: OUR THIRD ARGUMENT ON INVALIDITY  
16 OF THE PATENT IS UNENFORCEABILITY DUE TO FAILURE TO  
17 DISCLOSE THE MATERIAL PRIOR ART.

18 COURT REPORTER: I'M SORRY, I CAN'T UNDERSTAND  
19 YOU, UNENFORCEABILITY OF THE PATENT.

20 MS. RUMFELT: UNENFORCEABILITY DUE TO FAILURE  
21 TO DISCLOSE THE MATERIAL PRIOR ART.

22 IT'S UNDISPUTED THAT THE PLAINTIFF KNEW ABOUT  
23 THE DUERWOOD UNIT. IT'S UNDISPUTED HE KNEW ABOUT WHAT  
24 WE'RE CALLING THE JANUARY 2017 UNIT. HE RECENTLY  
25 TESTIFIED ABOUT A CUTTER HIS STEPFATHER DEVELOPED AND

1 POSTED ONLINE. ALL OF THESE ARE PUBLIC DISCLOSURES OF  
2 PRIOR ART REFERENCES, BUT IT'S UNDISPUTED THAT HE NEVER  
3 DISCLOSED ANY OF THIS TO THE PATENT OFFICE.

4 AND, FOURTH, UNENFORCEABILITY DUE TO FAILURE TO  
5 NAME A COINVENTOR, AND THAT'S MR. WILLIS. MR. WILLIS HAS  
6 OUTLINED IN PAINSTAKING DETAIL THE COLLABORATION THAT HE  
7 HAD WITH MR. ODOM. THE TEXT MESSAGES WHEN READ COLLEC-  
8 TIVELY INDISPUTABLY SHOW A HIGH LEVEL OF COLLABORATION,  
9 AND THAT'S WHAT MATTERS FOR PURPOSE OF COINVENTORSHIP.

10 BRIEFLY ON IRREPARABLE HARM, THEY'VE DONE  
11 NOTHING HERE TO PROVE A CAUSAL NEXUS TO THE PATENTED  
12 FEATURES, AND THAT HAS TO BE SHOWN IN AN IRREPARABLE HARM  
13 CASE ON PATENT INFRINGEMENT.

14 PARTICULARLY, THE ELEMENT THAT OVERCAME THE  
15 REJECTION IN THE PATENT OFFICE, WHICH IS THE TOWER LOCK,  
16 THERE'S NO SHOWING THAT THAT TOWER LOCK IS WHY PEOPLE BUY  
17 THIS PRODUCT, AND THAT'S WHAT THEY HAVE TO SHOW.

18 AND WE'VE ALSO SUBMITTED EVIDENCE TO REFUTE  
19 IRREPARABLE HARM. WE'VE GOT SOCIAL MEDIA POSTS THAT SHOW  
20 OUR PRODUCT SELLS FOR DIFFERENT REASONS. OUR PRODUCT  
21 SELLS BECAUSE OF SAFETY FEATURES, TRUSTED PRODUCT QUALITY,  
22 DEALER RELATIONSHIPS. NO ONE HAS MENTIONED TOWER LOCKS  
23 WHEN THEY --

24 THE COURT: DO THOSE THINGS REALLY MATTER? I  
25 MEAN, THE FACT THAT YOU HAVE DEALER RELATIONSHIPS, THE

1 FACT THAT PEOPLE BUY IT FOR A DIFFERENT PURPOSE, THOSE  
2 REALLY AREN'T RELEVANT ON THE IRREPARABLE HARM ISSUE; ARE  
3 THEY?

4 MS. RUMFELT: THEY'RE RELEVANT TO THE CAUSAL  
5 NEXUS PRONG OF THE IRREPARABLE HARM INQUIRY; AND SO TO  
6 SHOW THE ONE, YOU KNOW, THE ONE-FOR-ONE LOSS THAT THEY'RE  
7 CLAIMING HERE, THEY HAVE TO SHOW THAT PEOPLE ARE BUYING  
8 OUR PRODUCT -- THEIR PRODUCT FOR THE PATENTED FEATURES,  
9 AND THAT THAT'S WHY PEOPLE BUY THE PRODUCT; AND SO WE ARE  
10 SHOWING THAT PEOPLE ARE BUYING OUR PRODUCT FOR LOTS OF  
11 DIFFERENT REASONS. THERE'S MARKET FORCES AT ISSUE HERE  
12 THAT AREN'T THE PATENTED INVENTION; AND THE KEY FEATURE OF  
13 THE PATENTED INVENTION THAT THEY'RE CLAIMING IS THE TOWER  
14 LOCK, THAT'S WHAT OVERCAME THE OBJECTION, AND THERE'S JUST  
15 NO EVIDENCE THAT PEOPLE ARE BUYING IT FOR THE TOWER LOCK.  
16 THEY HAVEN'T PUT ANYTHING IN, AND WE'VE PUT IN EVIDENCE  
17 THAT SHOWS OTHERWISE, THAT PEOPLE BUY IT FOR DIFFERENT  
18 REASONS.

19 THE COURT: OKAY.

20 MS. RUMFELT: THE CLAIM HERE IS AT CORE REALLY  
21 ONE FOR LOST SALES. THESE ARE CALCULABLE DAMAGES. THEY  
22 DON'T STAND FOR IRREPARABLE HARM. ALL THE OTHER ARGUMENTS  
23 ABOUT LOSS OF GOODWILL, REPUTATION, BUSINESS OPPOR-  
24 TUNITIES, THOSE ARE ALL BASED ON A VERY SPECULATIVE AND  
25 UNSUBSTANTIATED TESTIMONY OF A SINGLE PERSON, MR. ODOM.

1 THIS --

2 THE COURT: HOW DO YOU ANSWER MR. FOSTER'S  
3 ARGUMENT THAT IS SOMEWHAT PERSUASIVE THAT TITAN WITH  
4 KNOWLEDGE OF A PENDING PATENT DECIDED TO GO AHEAD AND RUN  
5 THE RISK OF MARKETING THIS PRODUCT?

6 MS. RUMFELT: FIRST --

7 THE COURT: I MEAN, THEY, IT SEEMS TO ME  
8 THEY'VE ASSUMED THE RISK OF A PATENT INFRINGEMENT SUIT.

9 MS. RUMFELT: FIRST OF ALL, I THINK WE WOULD  
10 CONTEST THAT THEY ACTED WITH KNOWLEDGE OF A PENDING  
11 PATENT. THERE WERE NUMEROUS REQUESTS FOR INFORMATION  
12 ABOUT THE DETAILS OF THE PATENT, AND THAT HAPPENS A LOT  
13 WHERE PEOPLE SAY --

14 THE COURT: DIDN'T MR. -- I DON'T REMEMBER HIS  
15 NAME AT THE MOMENT.

16 MS. RUMFELT: MR. TURNER?

17 THE COURT: MR. TURNER SAY THAT MR. ODOM  
18 ADVISED HIM THAT THERE WAS A PATENT PENDING BUT WOULDN'T  
19 GIVE HIM ANY DETAIL?

20 MS. RUMFELT: THAT'S RIGHT, THAT'S RIGHT.

21 THE COURT: SO THEY KNEW THAT THERE WAS A  
22 PATENT PENDING.

23 MS. RUMFELT: WELL, HE LEFT THAT DISCUSSION  
24 WITH A CLEAR FEELING THAT, THAT MR. ODOM WAS BLUFFING  
25 BECAUSE HE JUST DID NOT --

1 THE COURT: HE CAN MAKE THAT CONCLUSION, BUT MY  
2 POINT IS HE LEFT THAT MEETING HAVING BEEN TOLD THAT THERE  
3 WAS A PATENT PENDING. HE CAN CHOOSE TO CONSIDER IT AS A  
4 BLUFF IF HE WANTS TO, BUT DIDN'T TITAN THEN GO FORWARD  
5 WITH THE PRODUCTION OF THE PRODUCT AND MARKET IT WITH FULL  
6 KNOWLEDGE OF THE POTENTIAL RISK OF A PATENT INFRINGEMENT  
7 SUIT?

8 MS. RUMFELT: THAT'S WHY AS WELL MR. AHO WITH  
9 ME SENT A LETTER TO, TO COUNSEL TO TRY TO UNDERSTAND THE  
10 SCOPE OF THE POTENTIAL PATENT CLAIM SO THAT WE COULD AGAIN  
11 TRY TO GET THE DETAILS AND MAKE SURE -- AND THAT'S A  
12 COMMON THING, YOU TALK ABOUT THE DETAILS OF THE PATENT AND  
13 YOU FIGURE OUT, THERE'S A POTENTIAL FOR A DESIGN AROUND  
14 HERE AND LET'S FIGURE THAT OUT; BUT WE WEREN'T ABLE TO GET  
15 THOSE DETAILS, HAVING ASKED FOR THEM. INSTEAD, WE GET A  
16 PATENT INFRINGEMENT SUIT TWO DAYS AFTER THE PATENT ISSUES  
17 WITH NO, NO DISCUSSION, NO DEMAND LETTER. WE END UP HERE.

18 SO OUR -- WHILE OUR CLIENT WENT AWAY WITH A  
19 DECISION TO OPERATE IN THIS MARKET, THEY WENT AWAY WITH  
20 THAT DECISION WITHOUT INFORMATION ABOUT THE PATENT AND  
21 WITHOUT A CLEAR BELIEF THAT, THAT A PATENT ACTUALLY WAS  
22 OUT THERE.

23 THE COURT: WELL, DOES TURNER'S SUBJECTIVE  
24 BELIEF HAVE ANYTHING TO DO WITH THAT?

25 MS. RUMFELT: I THINK IT DOES, YOUR HONOR, I

1 THINK IT DOES.

2 THE COURT: HOW SO?

3 MS. RUMFELT: I THINK IN TERMS OF CERTAINLY  
4 THEY'RE ASCRIBING INTENT TO HIM THAT I DON'T THINK IS  
5 THERE AS PART OF THIS ARGUMENT.

6 THE COURT: I MEAN, THE SUBSEQUENT FACTS PROVE  
7 THE INFORMATION MR. ODOM GAVE TO MR. TURNER TO BE TRUE,  
8 THERE WAS IN FACT A PATENT APPLICATION PENDING. I'M NOT  
9 SURE YOU HAVE ANSWERED MY QUESTION, DOESN'T IT CUT AGAINST  
10 TITAN THAT THEY WITH KNOWLEDGE OF THE PATENT PENDING  
11 DECIDED TO MARKET A PRODUCT WHICH IS IF NOT A COPY, A VERY  
12 SIMILAR PRODUCT TO THE ONE THAT MR. ODOM WAS SELLING?

13 MS. RUMFELT: I THINK THAT WHAT IT SHOWS IS  
14 THEY MADE THE DECISION TO OPERATE IN THIS MARKET, AND THEY  
15 MADE THAT DECISION IN LIGHT OF THE INFORMATION THAT THEY  
16 HAD IN THEIR -- THAT THEY HAD BEFORE THEM; BUT I THINK  
17 THE -- YOU KNOW, WHEN YOU'RE LOOKING, AND THIS REALLY,  
18 THIS ISSUES GOES TO THE BALANCE OF THE HARDSHIP PRONG,  
19 WHEN YOU'RE LOOKING AT THE BALANCE OF THE HARDSHIPS, YOU  
20 STILL HAVE TO WEIGH THE VALIDITY OF THE PATENT ON THE  
21 OTHER, THE VALIDITY OF THE PATENT ON THE OTHER SIDE.

22 THE COURT: WELL, I UNDERSTAND THAT; BUT  
23 DOESN'T THE FACT THAT THEY PROCEEDED WITH KNOWLEDGE OF THE  
24 PATENT, IN ESSENCE ASSUMING THE RISK OF AN INFRINGEMENT  
25 CLAIM, CUT AGAINST THEN WHEN YOU BALANCE THE HARDSHIPS?

1 MS. RUMFELT: I THINK IT'S ALL A QUESTION OF  
2 PERSPECTIVE HERE TO ME, THAT THEY DECIDED TO ENGAGE IN  
3 WHAT THEY BELIEVED LEGITIMATELY WAS LAWFUL COMPETITION  
4 BASED ON, YOU KNOW, KIND OF SKETCHY DETAILS OF A PATENT  
5 THAT THEY DIDN'T BELIEVE ACTUALLY WAS ISSUED.

6 THE COURT: WELL, ONCE AGAIN YOU'RE NOT  
7 ANSWERING MY QUESTION. YOU KNOW, I KNOW HOW PEOPLE  
8 PRACTICE LAW NOWADAYS, THEY WON'T ADMIT ANYTHING; BUT I  
9 DON'T THINK ANY OF YOU HAVE EVER BEEN IN MY COURT, MAYBE  
10 MR. AHO HAS, I DON'T REMEMBER --

11 MR. AHO: IT'S BEEN A LONG TIME, YOUR HONOR.

12 THE COURT: -- BUT I LIKE A DIRECT ANSWER TO A  
13 QUESTION; AND IF YOU KNOW THE ANSWER, WHY NOT JUST GIVE ME  
14 THE ANSWER.

15 MS. RUMFELT: WELL, YOU KNOW, YOUR HONOR, I DO  
16 AGREE WITH YOU THAT THEY, THEY TOOK ON THE RISK OF  
17 COMPETITION WITH THESE GUYS, BUT I--

18 THE COURT: NO, NO, NO, THEY TOOK ON THE RISK  
19 OF A PATENT INFRINGEMENT SUIT; DIDN'T THEY?

20 MS. RUMFELT: ON A PATENT THAT THEY DIDN'T KNOW  
21 WAS -- WHAT THE DETAILS OF WERE, YES. I MEAN, THEY  
22 KNEW --

23 THE COURT: OKAY.

24 MS. RUMFELT: -- THEY HEARD THAT THERE WAS A  
25 PATENT PENDING, THEY DIDN'T KNOW ANY OF THE DETAILS.

1 THE COURT: BUT THEY KNEW WHAT THE LS-2 PRODUCT  
2 WAS AT THAT TIME; RIGHT?

3 THEY KNOW --

4 MS. RUMFELT: THAT'S TRUE.

5 THE COURT: -- THERE'S A PATENT PENDING ON THAT  
6 PARTICULAR PRODUCT. THEY CHOOSE TO IGNORE THAT, THEY  
7 CHOOSE TO CALL IT A BLUFF, THEY CHOOSE TO DO WHATEVER THEY  
8 DID; BUT THEY AT THAT POINT ASSUMED THE RISK, DID THEY  
9 NOT, OF HAVING A PATENT INFRINGEMENT SUIT FILED?

10 MS. RUMFELT: UNDERSTOOD, AND I AGREE THAT THEY  
11 ASSUMED THE RISK. MY POINT IS JUST THAT THERE'S -- THE  
12 DEVIL IS REALLY IN THE DETAILS WITH PATENTS, AND THAT'S  
13 THE POINT I'M TRYING TO MAKE IS THAT THE DEVIL IS VERY  
14 MUCH IN THE DETAILS.

15 THE COURT: ALL RIGHT. GO AHEAD, I'M SORRY,  
16 AND I TEND TO ASK QUESTIONS, SO.

17 MS. RUMFELT: THAT'S GREAT.

18 THE COURT: GO AHEAD.

19 MS. RUMFELT: THE REMAINING POINTS WE'VE REALLY  
20 TOUCHED ON THROUGH THIS DISCUSSION. WE BELIEVE THE  
21 BALANCE OF THE HARDSHIP AND THE PUBLIC INTEREST WEIGH  
22 AGAINST THIS WHEN THERE'S A SIGNIFICANT VULNERABILITY  
23 QUESTION ABOUT A PATENT. THE PUBLIC INTEREST JUST DOESN'T  
24 FAVOR THAT KIND OF MONOPOLY, IT FAVORS COMPETITION; AND WE  
25 BELIEVE THAT THERE'S EVIDENCE HERE THAT MR. ODOM WASN'T

1 HONEST WITH THE PATENT OFFICE, AND THAT RAISES THE SPECTER  
2 OF UNCLEAN HANDS FOR PURPOSES OF THE BALANCE OF THE  
3 HARDSHIPS.

4 THE COURT: LET ME ASK YOU A QUESTION ON THAT  
5 ISSUE.

6 MS. RUMFELT: SURE.

7 THE COURT: AT LEAST IN PART THAT ISSUE  
8 REQUIRES THE COURT TO MAKE SOME FACTUAL DETERMINATIONS,  
9 SOME CREDIBILITY DETERMINATIONS. I'M APPARENTLY GOING TO  
10 HEAR FROM MR. ODOM LIVE, I'VE GOT MR. WILLIS'S DEPOSITION,  
11 HOW DOES THE COURT JUST AS A PRACTICAL MATTER MAKE  
12 CREDIBILITY DETERMINATIONS BASED ON A WRITTEN FILING WHEN  
13 I DON'T EVER SEE THE WITNESS? BECAUSE YOU ARGUE THAT HE'S  
14 NOT -- I MEAN, THEY ARGUE THAT HE'S NOT CREDIBLE, SO HOW,  
15 HOW DO I MAKE THAT DECISION?

16 MS. RUMFELT: I THINK THE, FROM OUR PERSPECTIVE  
17 THE BEST WAY TO DO THAT IS TO LOOK AT THE CORROBORATION  
18 THAT SUPPORTS HIS TESTIMONY, AND WE BELIEVE THAT THERE'S  
19 EVIDENCE THAT SUPPORTS WHAT MR. WILLIS SAYS, AND WE  
20 BELIEVE NOT TO SUPPORT WHAT MR. ODOM HAS SAID AS  
21 UNSUBSTANTIATED BY THE DOCUMENTS.

22 THE COURT: WELL, AND WE CAN GET TO THAT LATER,  
23 AND I -- YOU KNOW, I'VE JOTTED DOWN SOME QUESTIONS, AND  
24 THAT'S ONE OF THEM, WHAT IS IT IN THE RECORD THAT  
25 CORROBORATES WHAT MR. WILLIS HAS SAID. WE'LL GET TO THAT

1 AT THE APPROPRIATE TIME.

2 MS. RUMFELT: ALL RIGHT. THANKS, YOUR HONOR.

3 THE COURT: OKAY.

4 ALL RIGHT. ARE YOU READY TO BEGIN? CALL YOUR  
5 FIRST WITNESS.

6 MR. MILLER: WE ARE, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 MR. FOSTER: YOUR HONOR, WE'LL CALL MR. TRAVIS  
9 ODOM AS A WITNESS, PLEASE.

10 TRAVIS ODOM, PLAINTIFF'S WITNESS, SWORN

11 THE CLERK: PLEASE STATE AND SPELL YOUR NAME  
12 FOR THE RECORD.

13 A. TRAVIS ODOM, T R A V I S O D O M.

14 DIRECT EXAMINATION

15 BY MR. FOSTER:

16 Q. GOOD MORNING, MR. ODOM. FIRST THING THE COURT HAS  
17 INDICATED HERE TODAY THAT HE'S READ THE DECLARATIONS THAT  
18 YOU'VE SUBMITTED, SO I'M NOT GOING TO REHASH THAT GROUND,  
19 WE'LL HAVE SOME FINE POINTS. THE FIRST THING I'D LIKE TO  
20 DO IS COVER SOME POINTS THAT WAS IN THE RECENTLY FILED  
21 SUPPLEMENTAL DECLARATION OF DUERWOOD WILLIS, HAVE YOU HAD  
22 A CHANCE TO LOOK AT THAT?

23 A. YES, SIR.

24 Q. OKAY. FIRST THING I WANT TO ASK YOU IS RELATING TO  
25 WHY THE PATENT APPLICATION, WHY WAS THE PROVISIONAL

1 APPLICATION FILED ON JANUARY 30, 2017?

2 A. SO I HAD BEEN ASKING MR. WILLIS TO HELP GET THAT  
3 PROCESS STARTED, AND HE JUST KEPT NOT DOING IT. I GOT --  
4 I FOUND THE PATENT ATTORNEY AFTER I REALIZED MR. WILLIS  
5 WASN'T GOING TO HELP GET THAT PROCESS STARTED. I SAT DOWN  
6 WITH THE PATENT ATTORNEY FIRST PART OF JANUARY. HE ASKED  
7 WHEN WE FIRST DISCLOSED THE LS-2 AND/OR WHEN WE FIRST SOLD  
8 ONE, AND JANUARY 30TH OF 2017 WAS WHENEVER WE SOLD THAT  
9 FIRST ONE; SO I WENT BACK IN MY RECORDS TO CONFIRM THAT,  
10 AND I TOLD MR. SHAFFER THAT THAT WAS, THAT JANUARY 30TH  
11 WAS THE DAY THAT WE FIRST PUBLICLY DISCLOSED IT. HE TOLD  
12 ME THAT THAT WAS, THAT WE HAD TO FILE WITHIN A YEAR, SO  
13 OVER THE NEXT COUPLE OF WEEKS WE GOT ALL OF OUR STUFF TO  
14 HIM, AND HE FILED IT ON THE 30TH.

15 Q. OKAY. SO THIS CONVERSATION TOOK PLACE IN JANUARY OF  
16 2018 WITH YOUR PATENT COUNSEL?

17 A. YES, 18, CORRECT.

18 Q. AND AT THAT TIME BEFORE TITAN'S IN EXISTENCE, BEFORE  
19 YOU'VE HAD A MEETING WITH MR. TURNER, THEY'RE NOT EVEN IN  
20 THE PICTURE, YOU DID THE DUE DILIGENCE THAT YOU JUST  
21 TALKED ABOUT; IS THAT CORRECT?

22 A. CORRECT.

23 Q. OKAY, AND HAD YOU -- DID YOU DO THIS EARLY ENOUGH  
24 THAT IF YOU'D HAD TO HURRY AND FILE IT BY JANUARY 10TH OR  
25 JANUARY 12TH, YOU COULD HAVE DONE IT?

1 A. YES, SIR. I MET WITH MR. SHAFFER THE FIRST PART OF  
2 JANUARY, PROBABLY THE FIRST WEEK, SO WE HAD, YOU KNOW,  
3 THREE OR FOUR WEEKS, THREE WEEKS TO GET ALL THAT TOGETHER.  
4 WE COULD HAVE DEFINITELY DONE IT SOONER HAD WE NEEDED  
5 TO.

6 Q. OKAY. THERE --

7 ALL RIGHT. WOULD YOU PULL UP EXHIBIT 1 TO  
8 DUERWOOD'S SECOND, DUERWOOD WILLIS' SECOND DECLARATION.

9 OKAY. THIS IS PRETTY SMALL PRINT, BUT THIS  
10 IS -- DO YOU RECOGNIZE THIS AS EXHIBIT 1 TO DUERWOOD'S  
11 SECOND DECLARATION?

12 A. YES.

13 MR. AHO: EXCUSE ME, YOUR HONOR, OUR MONITOR  
14 APPARENTLY ISN'T ON.

15 THE COURT: ALL RIGHT. LET'S SEE WHAT WE CAN  
16 DO ABOUT THAT HERE.

17 MR. AHO: IT WAS JUST -- THE SWITCH WAS OFF.

18 MR. FOSTER: SIMPLE TECHNOLOGY.

19 Q. OKAY. MY QUESTION IS BASICALLY GENERAL OF THIS, HE  
20 USES, MR. WILLIS USES THIS TO TRY TO SUBSTANTIATE CERTAIN  
21 DATES AND SALES, DID YOU LOOK AT THIS SPREADSHEET WHEN YOU  
22 WERE TRYING TO DECIDE WHEN TO GET YOUR PATENT FILED?

23 A. THIS SPREADSHEET, NO, SIR.

24 Q. DID YOU USE THIS AS A COMPANY RECORD AT, FOR LANE  
25 SHARK?

1 A. I DID NOT PERSONALLY, NO. DUERWOOD WOULD KEEP  
2 STUFF, BUT I DIDN'T USE THIS. I MEAN, IT DOESN'T EVEN  
3 HAVE ANY DATES ON IT TO MY KNOWLEDGE.

4 Q. OKAY. ALL RIGHT.

5 A. NO, SIR.

6 MR. FOSTER: ALL RIGHT. ALL RIGHT. LET'S PULL  
7 UP, MS. STUCKI, PARAGRAPHS 4 AND 5 OF DUERWOOD'S SECOND  
8 DECLARATION.

9 Q. NOW, THIS RELATES TO THE, THE SALE TO MR. GORDAN  
10 HOWELL OF THE FIRST LS-2, AND BACKGROUND, YOU'VE ALREADY  
11 TESTIFIED ABOUT THAT, AND HE CLAIMS THAT YOU'RE MISLEADING  
12 THE COURT BY TESTIFYING THAT THERE WERE NO FLOW CONTROL  
13 VALVES ON GORDAN'S BRUSH CUTTER. WHAT'S YOUR RESPONSE TO  
14 THAT?

15 A. WELL, IT'S -- BASED ON THE PICTURE AND THE INFORMA-  
16 TION THERE IS NO FLOW CONTROL VALVE ON GORDAN'S UNIT.  
17 DUERWOOD CLAIMS THAT IT WOULDN'T FUNCTION ON GORDAN'S UNIT  
18 WITHOUT A FLOW CONTROL, WHICH IS ALSO FALSE; AND DURING  
19 THIS PROCESS WHENEVER I SPOKE WITH GORDAN, HE'S HAD SOME  
20 ISSUES WITH HIS LANE SHARK, SOME DAMAGE, SO MY FATHER WENT  
21 AND PICKED IT UP THIS WEEK, AND THE ONE THAT HE HAS NOW  
22 STILL HAS NO FLOW CONTROL VALVE ON IT, SO THAT REALLY  
23 DOESN'T PROVE ANYTHING.

24 Q. OKAY. SO LET'S FIRST GO BACK TO THE PICTURE OF THE  
25 FIRST SALE, AND IT'S MR. ODOM'S FIRST DECLARATION, PAGE 8.

1                   AND IF YOU COULD BLOW UP THE SCREENSHOT TO THE  
2 RIGHT FOR THE COURT.

3                   OKAY, AND CAN YOU, CAN YOU SEE FROM THAT THAT,  
4 WHETHER THERE'S A FLOW CONTROL VALVE ON THAT?

5       A.       IT'S HARD TO SEE IN THIS EXACT PICTURE ON THE  
6 SCREEN, BUT IN THE PICTURE, YES. THE FLOW CONTROL EITHER  
7 HAS TO GO ON ONE END OF THE HOSE OR THE OTHER. YOU CAN  
8 CLEARLY SEE THAT IT'S NOT CONNECTED TO THE MOTOR AND IT'S  
9 NOT CONNECTED TO THE OTHER TWO ENDS OF THE HOSE.

10      Q.       OKAY.

11      A.       SO THERE'S NO FLOW CONTROL ON THAT UNIT.

12      Q.       AND WHO BUILT THIS PRODUCT THAT WAS SOLD TO GORDAN  
13 HOWELL?

14      A.       THAT EXACT UNIT THERE WAS BUILT BY MY FATHER AND I.

15      Q.       AND IS THIS WHAT YOU REFERRED TO IN YOUR DECLARATION  
16 AS THE JANUARY 2017 PROTOTYPE?

17      A.       YES, SIR.

18      Q.       ALL RIGHT, AND YOUR TESTIMONY IS THERE WAS NO FLOW  
19 CONTROL VALVE ON THAT PRODUCT; IS THAT CORRECT?

20      A.       CORRECT.

21      Q.       ALL RIGHT. NOW, LET'S, LET'S LOOK AT -- CAN YOU  
22 PULL UP A PICTURE OF THE FLOW CONTROL VALVE.

23                   OKAY. YOU SEE THAT PICTURE?

24      A.       YES, SIR.

25      Q.       CAN YOU DESCRIBE FOR THE COURT WHAT THAT IS?

1 A. SO IN MY HAND THERE, THE TOP PART IS THE FLOW  
2 CONTROL VALVE WITH THE BLACK KNOB ON IT, AND WHAT THAT  
3 DOES IS YOU CRANK DOWN OR OPEN THAT VALVE TO ALLOW MORE OR  
4 LESS FLUID TO FLOW THROUGH.

5 MS. RUMFELT: I NEED TO OBJECT. I DON'T THINK  
6 THIS IS A PICTURE WE RECEIVED OR THAT'S IN THE RECORD.

7 MR. FOSTER: THAT IS CORRECT. THIS IS RESPOND-  
8 ING TO THE DECLARATION THEY FILED SUNDAY. I HAVE PICTURES  
9 HERE.

10 THE COURT: ALL RIGHT. PROVIDE THE DEFENDANT  
11 WITH A COPY.

12 MR. FOSTER: AND WHAT WE'LL DO, YOUR HONOR, IS  
13 AT A BREAK WE'LL MARK THESE AS AN EXHIBIT AND HAND THEM TO  
14 THE COURT, IF THAT WOULD BE OKAY.

15 THE COURT: WELL, SO THAT WE CAN KEEP THE  
16 RECORD STRAIGHT, THIS WOULD BE -- I WANT ALL OTHER  
17 EXHIBITS REFERRED TO BY THEIR DESIGNATION IN THE RECORD.  
18 THIS WILL BE EXHIBIT 1 TO THE HEARING.

19 MR. FOSTER: EXHIBIT 1 TO THE HEARING, OKAY.  
20 PERFECT. THANK YOU, YOUR HONOR.

21 Q. AND WHEN YOU LOOKED -- WE DON'T HAVE TO GO BACK TO  
22 THAT PICTURE, BUT IS THIS OR A SIMILAR CONTROL VALVE ON  
23 THE 2017, JANUARY 2017 PROTOTYPE THAT YOU SOLD TO  
24 MR. HOWELL?

25 A. NO, SIR.

1 Q. NOW, I'D LIKE TO SHOW -- YOU JUST TESTIFIED THAT  
2 MR. HOWELL BROUGHT HIS LANE SHARK, IMPROVED LANE SHARK  
3 THAT YOU SUBSTITUTED FOR THE PROTOTYPE IN FOR SERVICE?

4 A. CORRECT. WE WENT AND PICKED IT UP, BUT, YES.

5 Q. YOU WENT AND PICKED IT UP?

6 A. YES.

7 Q. AND WHAT WAS YOUR TESTIMONY AS TO WHETHER THERE WAS  
8 A CONTROL VALVE ON THAT?

9 A. THERE'S NO CONTROL VALVE ON THAT UNIT EITHER.

10 Q. OKAY.

11 A. AND WE HAVEN'T TOUCHED IT. MY DAD PICKED IT UP, PUT  
12 IT IN HIS TRUCK, BROUGHT IT TO MY SHOP, DROPPED IT OFF;  
13 AND I TOOK A VIDEO OF IT SUNDAY OR MONDAY, AND --

14 Q. THIS WEEK?

15 A. YES.

16 Q. OKAY. WOULD YOU SHOW THAT VIDEO, AND WE WILL, WE --  
17 IF APPROPRIATE, WE'LL IDENTIFY THAT AS EXHIBIT 2 TO THE  
18 HEARING, AND WE'LL PROVIDE THAT TO THE COURT.

19 A. OKAY.

20 THE COURT: MARK IT AS EXHIBIT 2.

21 MR. FOSTER: WILL YOU PLAY THAT VIDEO.

22 THE COURT: MS. RUMFELT?

23 MS. RUMFELT: WE OBJECT. I DON'T THINK -- WE  
24 WERE PROVIDED WITH A SERIES OF VIDEOS, WERE WE PROVIDED  
25 WITH THIS VIDEO?

1 MR. FOSTER: NO. THIS IS REBUTTAL TO THE  
2 DECLARATION THAT WAS FILED SUNDAY, AND HE GOT THE VIDEO  
3 YESTERDAY.

4 MS. RUMFELT: I BELIEVE WE WERE PROVIDED  
5 VIDEOS AFTER WE FILED.

6 MR. FOSTER: MAYBE. WE WILL GET YOU A COPY OF  
7 THE VIDEO. THIS IS REBUTTAL TO THE DECLARATION THAT WAS  
8 FILED SUNDAY.

9 MS. RUMFELT: WE'RE OBJECTING TO IT NOW BASED  
10 ON THAT.

11 MR. FOSTER: FINE.

12 THE COURT: THE TWO OF YOU CAN HAVE A  
13 CONVERSATION ALL DAY LONG, AND I'M NOT GOING TO GET  
14 INVOLVED IN IT, BUT THERE WON'T BE ANY RULING BASED ON  
15 THIS KIND OF BACK AND FORTH BETWEEN THE TWO OF YOU.

16 MS. RUMFELT: WE OBJECT TO IT.

17 THE COURT: AND THE BASIS OF YOUR OBJECTION IS  
18 WHAT?

19 MS. RUMFELT: THAT WE WEREN'T PROVIDED THIS IN  
20 ADVANCE.

21 THE COURT: AND WHAT ORDER OR RULE REQUIRES  
22 THEM TO PROVIDE IT TO YOU IN ADVANCE?

23 MS. RUMFELT: WE HAD A CONFERENCE WITH THE  
24 COURT TO TALK ABOUT EXHIBITS AND WHAT WAS GOING TO BE  
25 ENTERED IN THE RECORD, AND THERE WAS A DISCUSSION, AND IT

1 WAS CLEARLY STATED THAT THERE WASN'T ANYTHING ELSE THAT  
2 WAS GOING TO BE BROUGHT.

3 MR. FOSTER: PURELY REBUTTAL, YOUR HONOR. THIS  
4 IS REBUTTING A DECLARATION, HIS CLAIM THAT HE'S MISLEADING  
5 THE COURT ABOUT WHETHER THERE'S A FLOW CONTROL VALVE ON  
6 UNITS THAT MR. HOWELL HAD. IT'S DIRECTLY RESPONSIVE TO  
7 THAT, AND THAT WAS FILED SUNDAY. THIS IS EVIDENCE. HE  
8 TOOK THE VIDEO OF --

9 A. SUNDAY EVENING.

10 MR. FOSTER: -- SUNDAY OR MONDAY.

11 MS. RUMFELT: WE SOUGHT LEAVE TO FILE THAT  
12 DECLARATION --

13 THE COURT: WELL, I WILL SAY --

14 MS. RUMFELT: -- AND THAT'S THE DISTINCTION I'M  
15 MAKING HERE.

16 THE COURT: I'M SORRY?

17 MS. RUMFELT: I'M SORRY, WE SOUGHT LEAVE TO  
18 FILE THAT DECLARATION, AND THAT'S THE DISTINCTION I'M  
19 MAKING HERE IS THAT THIS IS A SURPRISE HERE TODAY.

20 THE COURT: ARE YOU TRYING TO FORECLOSE A  
21 RESPONSE TO THE DECLARATION OR SIMPLY OBJECTING TO THESE  
22 EXHIBITS?

23 MS. RUMFELT: OBJECTING TO THESE EXHIBITS.

24 THE COURT: WELL, I WILL SAY, MR. FOSTER, THE  
25 PRUDENT THING TO HAVE DONE WOULD HAVE BEEN TO TELL MY LAW

1 CLERK THIS IS WHAT YOU PLANNED TO DO AND TO PROVIDE THE  
2 DEFENDANT WITH NOTICE OF THESE THINGS; HOWEVER, GIVEN THE  
3 NATURE OF THIS HEARING, I WILL PERMIT IT; BUT TO THE  
4 EXTENT YOU NEED SOME TIME TO LOOK AT THESE EXHIBITS,  
5 CONSULT WITH WHOEVER YOU NEED TO CONSULT WITH, I'LL GIVE  
6 YOU THAT AS WELL.

7 MR. FOSTER: THANK YOU, YOUR HONOR.

8 WILL YOU PLAY THE VIDEO, MS. STUCKI.

9 THANK YOU.

10 (VIDEO PLAYING)

11 BY MR. FOSTER:

12 Q. AND CAN YOU DESCRIBE FOR THE COURT WHETHER THERE ARE  
13 FLOW CONTROL VALVES ON THIS OR --

14 A. CAN YOU PAUSE IT RIGHT THERE.

15 SO IF YOU LOOK AT THE MOTOR, THERE ARE TWO 90  
16 DEGREE FITTINGS COMING OUT, THAT'S -- ALL THAT IS IS JUST  
17 HOSE AND FITTINGS, AND THEN ON THE OTHER END RIGHT THERE  
18 IS JUST TWO QUICK CONNECTS. THERE'S NO FLOW CONTROL  
19 VALVE, THERE'S NO ADJUSTABILITY TO CHANGE THE FLOW; AND,  
20 AGAIN, WE PICKED THIS UP LAST WEEK AND HAVE NOT TOUCHED IT  
21 OTHER THAN TAKING IT OUT OF THE TRUCK; AND THIS IS THE  
22 UNIT -- SO WE ORIGINALLY SOLD GORDAN THE PROTOTYPE, AND  
23 THEN AS TIME WENT BY WE MADE IMPROVEMENTS, WE EXCHANGED  
24 THAT UNIT FOR THIS UNIT. I HAVE THIS UNIT IN MY  
25 POSSESSION AND THEN THE ORIGINAL THAT WE SOLD HIM IS ALSO

1 IN, IN LANE SHARK'S POSSESSION AS WELL THAT WE JUST KEPT  
2 JUST TO HAVE FOR NOSTALGIA, BASICALLY.

3 Q. OKAY. THANK YOU. NOW, MR. WILLIS CLAIMS THAT THAT  
4 COLORED SPREADSHEET WE LOOKED AT A MOMENT AGO SHOWS THAT A  
5 CONTROL VALVE WAS SOLD TO MR. HOWELL, HOW DO YOU RESPOND  
6 TO THAT?

7 A. TO MY KNOWLEDGE MR. HOWELL HAS NO FLOW CONTROL AND  
8 NEVER HAS.

9 Q. DO YOU KNOW IF MR. WILLIS HAD ANY DIRECT CONTACT  
10 WITH MR. HOWELL REGARDING HIS PURCHASES OR THE DELIVERY OF  
11 THE ORIGINAL 2017 JANUARY PROTOTYPE OR THE LS-2 THAT  
12 REPLACED IT?

13 A. NO, SIR. THAT WAS ALL DONE THROUGH MY STEPFATHER,  
14 ACTUALLY.

15 Q. OKAY.

16 OKAY. DO YOU REMEMBER LOOKING AT THE PRICE  
17 THAT WAS ON THE SPREADSHEET VERSUS THE PRICE THAT  
18 MR. HOWELL PAID?

19 A. I REMEMBER SEEING THAT DUERWOOD CLAIMS WE SOLD IT  
20 FOR 2,500, BUT WE SOLD IT TO MR. GORDAN FOR 2,750, WHICH  
21 WAS THE PRICE THAT WE HAD ESTABLISHED, AND WE HAVE A  
22 CLEARED CHECK TO PROVE THAT PRICE.

23 Q. SO THE COLORED SHEET SAYS 2,500 BUT YOUR TESTIMONY  
24 IS THAT HE PAID 2,750 FOR IT?

25 A. CORRECT.

1 Q. OKAY. ALL RIGHT. BY THE WAY, CAN YOU GO BACK TO  
2 THAT, THAT PICTURE. MR. WILLIS TALKS ABOUT "JUST SOLD  
3 ANOTHER ONE" AND CONTINUES IN HIS SECOND DECLARATION TO  
4 TRY TO SUPPORT HIS POSITION THAT "JUST SOLD ANOTHER ONE",  
5 THE TEXT YOU SENT ON JANUARY 12TH, REFERRED TO THE JANUARY  
6 2017 PROTOTYPE, AND WHAT'S YOUR RESPONSE TO THAT?

7 A. THAT IT'S INCORRECT. I HAD NOT CREATED THE LS-2  
8 YET, THEREFORE, I COULD NOT HAVE SOLD IT.

9 Q. AND ON JANUARY 7 -- 12TH, MR. MILLER WILL GET INTO  
10 THE DETAILS OF THIS, HAD YOU EVEN PUT THE CONCEPTION VIDEO  
11 TOGETHER SHOWING IT WOULD WORK?

12 A. NO, SIR. THAT WAS JANUARY 15TH THAT I FIGURED OUT  
13 HOW TO MAKE THE ARTICULATING ARM FUNCTION AT LEAST IN  
14 THEORY.

15 MR. FOSTER: OKAY. MS. STUCKI, WOULD YOU GO  
16 BACK TO MR. ODOM'S FIRST DECLARATION PAGE 8, PULL UP THAT  
17 SAME, HIS FIRST DECLARATION PAGE.

18 THE COURT: BEFORE YOU GET TO THAT, SINCE WE'RE  
19 TALKING ABOUT DATES, MR. ODOM, ON PAGE 5 OF YOUR INITIAL  
20 DECLARATION, PARAGRAPH 9, IT SAYS, ON JANUARY 10, 2019, I  
21 THOUGHT OF A NEW DESIGN, IS THAT A TYPO?

22 A. OH, YES, IT WOULD HAVE BEEN 17, 19 MUST BE A TYPO, I  
23 APOLOGIZE.

24 THE COURT: GO AHEAD.

25 MR. FOSTER: THANK YOU, YOUR HONOR, I

1 APPRECIATE THAT.

2 MR. FOSTER: OKAY. CAN YOU BLOW UP THE ONE ON  
3 THE RIGHT, MS. STUCKI. AGAIN, THIS IS THE SAME THING WE  
4 LOOKED AT A MOMENT AGO.

5 Q. WHAT I WANTED TO FOCUS ON IS THE STATEMENT -- THE  
6 PICTURE IS FINE, THAT'S PERFECT. CAN YOU READ WHAT'S  
7 BELOW THE PICTURE ON THAT SCREENSHOT?

8 A. FIRST ONE SOLD.

9 Q. AND WHAT'S THE DATE OF THAT SCREENSHOT?

10 A. JANUARY 30, 2017.

11 Q. AND IS THAT -- WAS THAT, WAS THAT ACCURATE, THAT IT  
12 WAS THE FIRST LS-2 THAT YOU HAD SOLD?

13 A. CORRECT. IT WAS THE FIRST AND ONLY ONE IN  
14 EXISTENCE, SO, YES.

15 Q. OKAY. LET'S GO TO MR. WILLIS' DECLARATION, PARA-  
16 GRAPH 8, AND THE TEXT STRING IN PARTICULAR. HIS SECOND  
17 DECLARATION, PARAGRAPH 8, I BELIEVE.

18 MR. WILLIS CLAIMS THAT -- THERE IT IS, OKAY.

19 THANK YOU, SHERRI.

20 OKAY. HERE IT IS, AND THIS TEXT STRING IS  
21 DATED JULY 14, 2017. CAN YOU PUT THAT IN CONNECTION --  
22 CAN YOU HELP US WITH THE TIMELINE ON WHEN FRANKENSTEIN WAS  
23 FIRST, OR DUERWOOD'S MODEL WAS FIRST MADE?

24 A. THE -- CAN YOU RE --

25 Q. YEAH, SORRY ABOUT THAT. LET ME GET BACKGROUND.

1 YOU'VE ALREADY TESTIFIED IN YOUR DECLARATIONS THAT YOU  
2 HELPED MR. WILLIS BUILD HIS DESIGN AFTER YOU STARTED  
3 WORKING TOGETHER, DO YOU KNOW WHAT TIME FRAME ROUGHLY THAT  
4 WAS?

5 A. IT WAS RIGHT AROUND CHRISTMAS OF 2016 WHEN WE'D BEEN  
6 BUILDING THE FRANKENSTEIN UNIT.

7 Q. WE JUST WENT THROUGH THE DATES RELATING TO THE LS-2  
8 AND PROTOTYPE AND THE FIRST SALE OF JANUARY 30, 2017.

9 A. CORRECT.

10 Q. SO THIS IS SEVEN MONTHS LATER THERE'S AN E-MAIL  
11 EXCHANGE?

12 A. CORRECT.

13 Q. CAN YOU GIVE THE COURT THE BENEFIT OF YOUR THOUGHT  
14 PROCESS, WHY YOU, YOU BROUGHT THIS UP?

15 A. SO I TEXTED DUERWOOD AND ASKED HIM IF HE WAS EVER  
16 GOING TO SELL THE FRANKENSTEIN UNIT BECAUSE I HAD MONEY  
17 INVESTED IN IT AND IT WAS JUST WASTING AWAY. I JUST  
18 WANTED HIM -- AND THAT'S WHY I ASKED HIM TO SELL IT  
19 INSTEAD OF US TRYING TO SELL IT THROUGH LANE SHARK BECAUSE  
20 I DIDN'T WANT IT BEING TIED TO LANE SHARK BECAUSE IT WAS  
21 NOT A GOOD PRODUCT; SO I ASKED HIM IF HE WAS EVER GOING TO  
22 SELL IT, JUST RIGHT THERE, GOT TO BE A WAY TO GET MONEY  
23 OUT OF IT INSTEAD OF IT JUST WASTING AWAY, BECAUSE I  
24 PUT -- I PROBABLY HAD, YOU KNOW, 5 OR \$600 IN THAT UNIT,  
25 AND I WAS JUST WANTING TO GET THAT BACK TO PUT BACK INTO

1 THE COMPANY.

2 Q. DID YOU HAVE ANY DESIGN TO COMMERCIALIZE AND SELL  
3 THIS FRANKENSTEIN UNIT?

4 A. NO, SIR. THE DAY, THE DAY THAT WE CREATED THAT, I  
5 TOLD MR. WILLIS AND MY FATHER THAT THERE WAS NO WAY I'D  
6 PUT MY NAME ON THAT BECAUSE IT WOULD HURT SOMEBODY BECAUSE  
7 IT WAS TOO DANGEROUS TO CHANGE POSITIONS.

8 Q. IN DUERWOOD'S DECLARATION THAT WAS JUST FILED HE  
9 TESTIFIES ABOUT, IN PARAGRAPHS 12 THROUGH 16 ABOUT A BRUSH  
10 CUTTER THAT HE FOUND ONLINE, AN SSQA THAT HE -- WHAT'S AN  
11 SSQA?

12 A. SKID STEER QUICK ATTACHMENT. IT'S JUST A UNIVERSAL  
13 ATTACHMENT, OR UNIVERSAL PLATE THAT ALLOWS YOU TO ATTACH  
14 TO THE LOADER OF A TRACTOR OR A SKID STEER.

15 Q. DID YOU INVENT THAT?

16 A. NO, SIR.

17 Q. DID MR. WILLIS INVENT THAT?

18 A. NO, SIR.

19 Q. WHAT WAS YOUR, WHAT WAS YOUR RESPONSE TO HIS CLAIMS  
20 THAT HE FOUND AN SSQ PLATE AND WAS DEVELOPING A BRUSH  
21 CUTTER SIMULTANEOUSLY WITH YOUR STEPFATHER?

22 A. TO MY KNOWLEDGE HE -- I DON'T KNOW THE TIMELINE OF  
23 WHEN HE FOUND IT. ALL I KNOW IS THAT MY STEPFATHER FOUND  
24 SOMETHING, CREATED IT. DUERWOOD MAY HAVE BEEN CREATING  
25 HIS EARLIER, BUT HE HAD NOT FINISHED WHATEVER HE CREATED

1 UNTIL AFTER MY STEPDAD CREATED HIS.

2 Q. AND DID YOU START YOUR WORK TOWARD A BRUSH CUTTER  
3 BEFORE YOU TALKED TO DUERWOOD WILLIS OR AFTER?

4 A. BEFORE.

5 Q. AND WHAT INSPIRED THAT?

6 A. I SAW THE ONE THAT MY STEPDAD HAD CREATED, AND I  
7 WAS, IT WAS THANKSGIVING OF 2016, AND I WAS LOOKING FOR  
8 SOMETHING FOR MY DAD AND I TO DO; SO I TOOK THAT VIDEO AND  
9 I SENT A MESSAGE TO MY DAD ASKING HIM IF HE THOUGHT WE  
10 COULD BUILD SOME, HE SAID YES, SO WE STARTED WORKING ON  
11 THAT; AND PROBABLY A FEW WEEKS LATER I HAD SOME HYDRAULIC  
12 QUESTIONS, AND THAT'S WHEN I ASKED DUERWOOD FOR SOME  
13 HYDRAULIC HELP; AND THEN HE HAD ALL THESE IDEAS THAT  
14 DIDN'T TURN OUT TO ANYTHING.

15 Q. OKAY. THANK YOU. ONE QUESTION, I'M NOT SURE YOUR  
16 DECLARATION HAS ASKED, BUT I WANT YOU TO TELL THE COURT  
17 WHAT WAS YOUR THOUGHT WHEN YOU FIRST SAW THE TB-ONE  
18 PRODUCT THAT WAS OFFERED BY TRAILBLAZER AND TITAN?

19 A. I WAS TERRIFIED.

20 Q. WHY?

21 A. BECAUSE -- WELL, ONE, I'M A SMALL COMPANY, AND I  
22 HAVE ALREADY TALKED TO THESE GUYS, AND I JUST FIGURED WITH  
23 THEIR MARKET SHARE AND THEIR MONEY THAT THEY WERE TRYING  
24 TO PUT US OUT OF BUSINESS BECAUSE IT'S AN EXACT COPY.

25 Q. NOW, YOU SAY "AN EXACT COPY", ARE THERE FEATURES

1 THAT THEY HAVE THAT YOU DON'T HAVE?

2 A. YES, SIR.

3 Q. OKAY. AND WHAT -- FROM YOUR PERSPECTIVE BEING IN  
4 THE MARKET FOR THE LAST THREE YEARS, WHAT IMPACT DO THOSE  
5 ADDITIONAL CHANGES HAVE TO THE CUSTOMER DEMAND?

6 A. ZERO.

7 Q. ALL RIGHT. I WANT TO TALK TO YOU A LITTLE BIT ABOUT  
8 YOUR MANUFACTURING CONTRACT, AND THIS IS HIGHLY  
9 CONFIDENTIAL, AND WE -- THIS RELATES TO THE SEALED  
10 DECLARATION. I'M NOT SURE WHO THIS GENTLEMAN IS IN THE  
11 BACK?

12 THE COURT: THAT'S ONE OF MY LAW CLERKS.

13 MR. FOSTER: WHAT'S THAT?

14 THE COURT: THAT'S ONE OF MY LAW CLERKS.

15 MR. FOSTER: OH, PERFECT. THANK YOU. THEN IT  
16 LOOKS LIKE WE DON'T HAVE ANY RISK OF ANYBODY LISTENING TO  
17 THIS, AND I'LL PROCEED IF THE COURT IS OKAY WITH THAT.

18 THE COURT: ALTHOUGH THERE ARE PEOPLE IN THE  
19 COURTHOUSE WHO CAN LISTEN TO IT ON THEIR COMPUTER.

20 THE CLERK: DO YOU WANT ME TO TURN THE AUDIO  
21 OFF?

22 THE COURT: SO YOU CAN TURN THE AUDIO OFF.

23 MR. FOSTER: THANK YOU.

24 (THE FOLLOWING PROCEEDINGS ARE SEALED)

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(SEALED PROCEEDINGS ARE CONCLUDED)

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(THE FOLLOWING PROCEEDINGS ARE NOT SEALED)

8

BY MR. FOSTER:

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Q. YOU TESTIFIED ABOUT YOUR, YOUR DISTRIBUTORSHIP OPPORTUNITY WITH MESSICK, AND WE'VE PUT THOSE E-MAILS IN THE FILINGS WITH THE COURT SO WE DON'T NEED TO REHASH THAT WITH THE COURT. MY QUESTION IS THAT WAS ONE EXAMPLE OF A DISTRIBUTOR YOU'VE LOST BECAUSE OF TITAN, ARE THERE OTHER EXAMPLES OF DISTRIBUTORS YOU'VE LOST BECAUSE OF TITAN AND TRAILBLAZER?

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A. YES, SIR. WE'VE -- JUST OFF THE TOP OF MY HEAD THERE'S THREE OR FOUR. ONE THAT STANDS OUT IS ARTEC TRACTOR IN, SOMEWHERE IN ALABAMA. WE WERE TALKING TO THEM, I HAD ACTUALLY TALKED TO THEM TWO YEARS AGO, AND SO WE HAD LAID THE GROUNDWORK, AND THEN WE STARTED TALKING TO THEM AGAIN THE BEGINNING OF 19; AND ONCE THEY FOUND OUT THAT TRAILBLAZER HAD THEIR COPY, THEY STOPPED RESPONDING TO US ALTOGETHER.

24

25

Q. WHAT'S THE IMPACT WHEN YOU DON'T LAND A DISTRIBUTOR ON THE FUTURE MARKETING OPPORTUNITIES FOR YOUR COMPANY?

1 A. IT JUST, IT SLOWS OUR MARKET SHARE, AND, YOU KNOW,  
2 IT JUST CAUSES US TO NOT BE ABLE TO GROW LIKE WE, LIKE WE  
3 NEED TO; AND FOR EVERY TIME THEY GET A DEALERSHIP THAT WE  
4 DON'T, I MEAN, IT'S APPLES FOR APPLES AS FAR AS SALES.

5 Q. GOT YOU. ARE THERE OTHER EXAMPLES THAT WE COULD GO  
6 THROUGH WHERE YOU'VE HAD SIMILAR EXPERIENCES LIKE ARTEC  
7 AND MESSICK?

8 A. YES, THERE'S FUTCH'S TRACTOR DOWN IN FLORIDA.

9 COURT REPORTER: THERE'S WHAT?

10 A. FUTCH'S, F U T C H'S, AND THERE ARE A FEW OTHERS,  
11 I'M --

12 Q. SURE. I JUST, I DON'T WANT TO GO THROUGH THEM --

13 A. RIGHT.

14 Q. -- IF THAT'S REPRESENTATIVE OF WHAT YOU'VE SEEN A  
15 NUMBER OF TIMES.

16 A. CORRECT; AND THEN ALSO WE'VE GOT DEALERS THAT CARRY  
17 TITAN PRODUCTS, AND I'VE SPOKE TO A FEW, THEY CARRY TITAN  
18 AND THEY CARRY OUR PRODUCT, AND TITAN BASICALLY JUST KIND  
19 OF SNUCK IN, I GUESS. I DON'T -- THAT'S PROBABLY NOT THE  
20 CORRECT WORD, I DON'T WANT TO MISSPEAK; BUT THE ONE DEALER  
21 IN, THAT I'M REFERRING TO IS GORDON TRACTOR IN FLORIDA.  
22 THE STORE MANAGER, CODY STRICKLAND, HE, HE CARRIES OUR  
23 PRODUCT, HE HAD BEEN CARRYING OUR PRODUCT, AND HE CALLED  
24 ME ONE DAY AND WAS LIKE, DUDE, THE OWNER OF OUR COMPANY  
25 JUST BROUGHT IN THIS YELLOW THING THAT'S A COPY, WHAT IS

1 THIS? AND I EXPLAINED TO HIM; AND HE'S LIKE, ALL RIGHT,  
2 COOL, WELL, IT WILL JUST SIT THERE AND RUST; AND THAT WAS  
3 HIS RESPONSE TO THAT.

4 Q. QUICKLY, YOU TALKED A LITTLE BIT ABOUT PRICING, BUT  
5 REMIND THE COURT WHAT YOUR PRICE POINT IS COMPARED TO THE  
6 TB-ONE AND THE LS-2 AND THE TB-JR AND THE LS-3?

7 A. THE LS-2 IS \$4,095, AND TO MY KNOWLEDGE THE  
8 TRAILBLAZER IS 3,900. IT MAY BE 3,950 OR SOMETHING LIKE  
9 THAT, BUT IT'S BASICALLY A HUNDRED DOLLARS CHEAPER THAN  
10 OUR PRODUCT. THE LS-3 TO THE TB-JR, I BELIEVE THEIR, I  
11 BELIEVE THEIRS IS 3,695 AND OURS IS 3,895. I MAY BE, I  
12 MAY BE WRONG ON THEIR PRICE, BUT IT'S -- THEY'RE  
13 UNDERCUTTING OUR PRICE.

14 Q. THEY'RE UNDERCUTTING YOUR PRICE. OKAY. HERE'S THE  
15 QUESTION, HAVE YOU HAD SINCE THEY'VE GOTTEN IN THE MARKET  
16 AN OPPORTUNITY TO RAISE YOUR PRICE?

17 A. ABSOLUTELY NOT.

18 Q. AND WITH THEM IN THE INDUSTRY AS YOUR COSTS INCREASE  
19 WILL YOU HAVE A CHANCE TO INCREASE YOUR PRICE?

20 A. ABSOLUTELY NOT.

21 Q. WHY NOT?

22 A. WELL, ONE, TITAN OR TRAILBLAZER MANUFACTURES THEIR  
23 OWN THINGS, SO THEY HAVE A LOT MORE PROFIT MARGIN BUILT  
24 INTO THE MACHINE THAN I DO. SO WITH THEM UNDERCUTTING US  
25 ALREADY, THERE'S NO WAY IF I INCUR AN ADDITIONAL COST, I

1 WILL JUST HAVE TO ABSORB THAT INTO MY -- JUST EAT THAT  
2 BASICALLY BECAUSE IF I RAISE MY PRICE ANY MORE, THEN, THEN  
3 WHY WOULD PEOPLE SPEND \$200 MORE TO BUY MY PRODUCT.

4 Q. NOW, THERE'S ANOTHER COMPANY THAT YOU TESTIFIED  
5 ABOUT, MODERN AG, AND THEY WERE SELLING A PRODUCT THAT YOU  
6 BELIEVE INFRINGES YOUR PATENT; IS THAT CORRECT?

7 A. CORRECT.

8 Q. AND YOU UNDERSTAND THAT THEY HAVE INDICATED IN A  
9 RESPONSE TO A CEASE AND DESIST LETTER ATTACHED TO THE  
10 COMPLAINT IN THIS CASE THAT THEY'RE GOING TO STOP SELLING  
11 AND MAKING, IS THAT YOUR UNDERSTANDING?

12 A. CORRECT.

13 Q. WHAT DO YOU BELIEVE IS LIKELY TO HAPPEN IF THERE'S  
14 NOT AN INJUNCTION HERE WITH MODERN AG?

15 A. THEY'LL JUST CONTINUE TO SELL IT UNTIL THEY CAN'T,  
16 SO IT WILL JUST TAKE AWAY MORE SALES FROM LANE SHARK.

17 Q. ONE SMALL ISSUE, IN YOUR DECLARATION YOU TALK ABOUT  
18 TITAN SELLING 40,000 UNITS A YEAR, REMIND US OF YOUR BEST  
19 YEAR, WHAT -- ABOUT A LITTLE OVER A THOUSAND UNITS?

20 A. YES, SIR. RIGHT AT 1,100 IS HOW MANY WE'VE SOLD.

21 Q. AND HOW DO YOU KNOW THAT TITAN SELLS 40,000 UNITS A  
22 YEAR?

23 A. THAT WAS BASED ON BAILY TURNER'S AND I'S CONVERSA-  
24 TION IN THE MEETING THAT WE HAD AT THANKSGIVING OF 18.

25 Q. WHAT'S THE NATURE -- AND JUST TO BE CLEAR, THE

1 40,000 UNITS THEY'RE SELLING IS ALL TITAN UNITS --

2 A. CORRECT.

3 Q. -- NOT THE INFRINGING PRODUCT?

4 A. RIGHT. IT'S NOT THE INFRINGING PRODUCT, IT'S  
5 OVERALL, IT'S JUST TO SHOW THE SIZE OF THEIR COMPANY.

6 Q. WHAT'S THE NATURE, BY THE WAY, OF YOUR DEALER  
7 RELATIONSHIPS, HOW DO YOU REACH AN AGREEMENT WITH THEM?

8 A. SO WHENEVER WE REACH AN AGREEMENT WITH OUR DEALERS,  
9 WE BASICALLY, WE TALK TO THEM ON THE PHONE BETWEEN THREE  
10 AND FOUR TIMES, MAYBE MORE. WE GET TO KNOW EACH OTHER,  
11 AND THEY -- YOU KNOW, WE SEND THEM A LOT OF INFORMATION.  
12 WE BUILD A TRUST WITH THESE DEALERSHIPS, AND ALL OF OUR  
13 AGREEMENTS WITH OUR DEALERS ARE BASICALLY A VERBAL  
14 HANDSHAKE. YOU KNOW, WE TELL THEM THIS IS WHAT WE'RE  
15 GOING TO DO, AND WE STAND BEHIND WHAT WE SAY, AND WE  
16 DON'T, WE DON'T FORCE THEM TO SIGN AN AGREEMENT.

17 Q. AND HAVE YOU HAD DISCUSSIONS WITH DEALERS OR  
18 DISTRIBUTORS ABOUT YOUR PATENT RIGHTS AND YOUR ATTEMPT TO  
19 ENFORCE THEM?

20 A. ABSOLUTELY. WE HAVE A LOT OF DEALERS THAT ARE  
21 BASICALLY ACROSS THE STREET FROM SOMEONE THAT'S SELLING  
22 TRAILBLAZER; AND WHEN THAT HAPPENS, THEY CALL US A LOT,  
23 HEY, WHAT ARE YOU GUYS DOING ABOUT THIS; HEY, WE'RE LOSING  
24 SALES TO THE YELLOW PRODUCT BECAUSE IT'S CHEAPER; AND WE,  
25 WE LET THEM KNOW THAT WE -- WELL, UP UNTIL WE GOT THE

1 PATENT THAT WE WERE PATENT PENDING, THEN WE LET THEM KNOW  
2 THAT WE HAD A PATENT AND THAT WE ARE DOING EVERYTHING THAT  
3 WE CAN TO ENFORCE IT TO STOP THE DIRECT COMPETITION.  
4 LET'S SEE, WARRANTY, THERE'S CLAIMS THAT HAVE BEEN MADE BY  
5 THE DEFENDANTS THAT THEY HAVE A SUPERIOR WARRANTY, WHAT IS  
6 YOUR APPROACH TO HANDLING WARRANTY ISSUES WITH LANE  
7 SHARK.

8 BASICALLY IF SOMETHING, IF SOMETHING HAPPENS TO  
9 A LANE SHARK, THE CUSTOMER WILL CALL US. ALL THAT WE ASK  
10 IS FOR PICTURES OF THE DAMAGE AND THE SERIAL NUMBER, AND  
11 THEN WE SEND THE PARTS OUT IMMEDIATELY. WE'VE NEVER HAD  
12 AN LS-2 MOTOR EXPLODE OR BREAK OR GO BAD, SO WE'VE NEVER  
13 HAD TO REPLACE ONE; BUT I HAVE HAD OTHER ISSUES WITH OLDER  
14 PRODUCTS THAT WE'VE IMPROVED UPON THAT ARE, YOU KNOW, TWO,  
15 TWO AND A HALF YEARS OLD, AND WHEN THAT HAPPENS, THE CUS-  
16 TOMER CALLS US, YOU KNOW, I SEND THEM REPLACEMENT PARTS.  
17 SO IN WRITING OUR WARRANTY IS A YEAR, BUT, YOU KNOW, I'VE  
18 NEVER, NEVER TURNED SOMEBODY DOWN FOR A LEGITIMATE ISSUE.

19 Q. AND JUST, ALSO THERE'S TESTIMONY ABOUT BLADE BOLTS  
20 THAT WERE PROBLEMATIC BASED UPON ONE OF THE POSTS IN  
21 SOCIAL MEDIA, CAN YOU TELL THE COURT WHAT HAPPENED AND  
22 WHEN THAT WAS RESOLVED?

23 A. CORRECT. SO WHENEVER WE FIRST STARTED, WE WERE  
24 USING A BLADE CARRIER AND BLADES FROM DR TRIMMER; AND THE  
25 BLADE BOLTS THAT THEY SUPPLIED THAT THEY USE ON THEIR

1 EQUIPMENT, IT WAS JUST A THREE-QUARTER INCH BOLT WITH A  
2 NYLOC NUT, AND WE HAD A FEW OF THOSE WHERE THE BOLTS WOULD  
3 COME OFF. WHEN THAT HAPPENED, WE REDESIGNED OUR CARRIER  
4 AND OUR BLADES, AND THEN WE TOOK A ONE INCH BOLT WITH A  
5 BUSHING, AND WE PUT A COTTER PIN IN THE BOLT TO KEEP THE  
6 NUT FROM EVER COMING OFF IF IT WERE TO LOOSEN; AND THAT  
7 WAS, THAT HAPPENED MARCH, APRIL OF 2018.

8 Q. AND WHEN DID, AGAIN, WHEN DID TITAN AND TRAILBLAZER  
9 COME INTO THE MARKET?

10 A. JANUARY OF 19.

11 Q. SO THAT ISSUE WAS RESOLVED LONG BEFORE THEN?

12 A. YES, THAT ISSUE WAS RESOLVED; AND THEN SINCE, SINCE  
13 RECENTLY WE'VE CHANGED TO A DIFFERENT TYPE OF BOLT AS  
14 WELL, BUT STILL A CORRECT BOLT.

15 Q. YOU MENTIONED IN YOUR DECLARATION THAT THE FINANCIAL  
16 POSITION YOU'RE IN AND THIS LAWSUIT PREVENTS YOU FROM  
17 DEVELOPING NEW PRODUCTS. ARE THOSE SIMPLY IDEAS IN YOUR  
18 HEAD? EXPLAIN WHAT YOU'RE MEANING BY THAT AND HOW THIS  
19 HARM IS OCCURRING TO YOU.

20 A. SO THE COSTS THAT I HAVE INCURRED IN THE LAST FEW  
21 MONTHS IS, IS, IS BASICALLY ALL OF MY, MY PROFITS THAT  
22 I'VE HAD SAVED UP; SO IT'S TAKEN A LOT OF MY MONEY, ALMOST  
23 ALL OF IT, HAS TAKEN ALL OF MY TIME, AND THEN -- SO WITH  
24 ALL OF THAT TIME AND MONEY GONE, I DON'T HAVE THE ABILITY  
25 TO CREATE THE NEW PRODUCTS THAT I HAVE. AND I HAVE

1 PROTOTYPES OF NEW PRODUCTS, THEY'RE NOT JUST IDEAS IN MY  
2 HEAD; AND MOST RECENTLY WE CREATED A NEW VALVE KIT FOR THE  
3 TRACTORS, AND FOR EACH TRACTOR I HAVE TO DESIGN THE KIT  
4 SPECIFICALLY FOR THAT MODEL, SO I HAVE TO EITHER BRING  
5 THAT TRACTOR INTO MY OFFICE AND MAP IT ALL OUT OR I HAVE  
6 TO GO OUT IN THE FIELD, AND RIGHT NOW I JUST DON'T HAVE  
7 THE ABILITY TO DO THAT, SO I CAN'T FURTHER MY PRODUCT  
8 LINE.

9 AND I ALSO HAVE BOUGHT A, A NEW COVERED TRAILER  
10 TO BUILD A MOBILE HYDRAULIC SHOP, AND I'VE SUNK A LOT OF  
11 MONEY INTO THAT, BUT IT'S JUST SITTING THERE BECAUSE I  
12 DON'T HAVE TIME TO BUILD THE TRAILER OUT. SO MY PLAN WITH  
13 THAT IS TO BUILD A MOBILE HYDRAULIC SHOP SO I CAN GO TO  
14 DEALERSHIPS AND CREATE THIS, THESE KITS FOR THESE TRACTORS  
15 AND INCREASE MY PRODUCT LINE, AND I'M JUST NOT ABLE TO DO  
16 THAT.

17 Q. ALL RIGHT. I WANT TO HIT A COUPLE OF ISSUES THAT  
18 COUNSEL MENTIONED IN HER OPENING. FIRST OF ALL, I THINK I  
19 HEARD HER SAY THAT THERE IS NO INDICATION THAT THE TOWER  
20 LOCKS DRIVE DEMAND. CAN YOU EXPLAIN, WILL THIS PRODUCT  
21 WORK WITHOUT TOWER LOCKS?

22 A. 100 PERCENT WILL NOT, WILL NOT WORK.

23 Q. EXPLAIN WHY.

24 A. WELL, IN THE HOME POSITION WHENEVER IT'S SITTING  
25 THERE, IF YOU REMOVE THE TOWER LOCKS, ANY TIME YOU MOVE

1 THAT TRACTOR, THE ENTIRE DECK IS GOING TO FALL STRAIGHT  
2 DOWN AND THEN THE ARM WILL FALL DOWN, SO IT WILL JUST BE  
3 HANGING AND THE BLADES WILL BE FACING OFF TO THE LEFT,  
4 OKAY, SO IT JUST WON'T FUNCTION. AND THEN WHENEVER IT'S  
5 IN THE OFFSET POSITION, IF YOU HAVE IT SET OUT WITHOUT ANY  
6 TOWER LOCKS, ANY TIME YOU'RE CUTTING AND YOU, YOU HIT  
7 SOMETHING, THE DECK WILL JUST FLIP UP AND FLIP  
8 UPSIDE-DOWN, WHICH IS, WHICH IS EXTREMELY DANGEROUS.

9 Q. AND BASED UPON YOUR THREE FULL YEARS IN THIS NEW  
10 MARKET CATEGORY, WHY DO PEOPLE BUY YOUR PRODUCTS?

11 A. WELL, ONE, BECAUSE OF OUR REPUTATION. WHENEVER,  
12 WHENEVER WE FIRST STARTED, BASICALLY WE JUST PUT AS MUCH  
13 INFORMATION OUT THERE, AND I WOULD TRAVEL TO THESE  
14 DEALERSHIPS IN PERSON TO DELIVER THESE, I WOULD GO OVER  
15 EVERYTHING WITH THE DEALERS, AND I WOULD BUILD A TRUST  
16 WITH THEM; AND THAT TRUST, YOU KNOW, TRICKLES DOWN FROM  
17 THE DEALER TO THE CUSTOMER BECAUSE THEY KNOW THAT WE'RE  
18 GOING TO STAND BEHIND OUR PRODUCT.

19 Q. IN TERMS OF FUNCTIONALITY OF THE PRODUCT, WHAT  
20 DEMAND -- WHAT CREATES THE DEMAND FOR THE PRODUCT IN YOUR  
21 VIEW BASED ON THREE YEARS IN THE MARKET?

22 A. OH, MAN, WELL, JUST BECAUSE MOST PEOPLE WERE USING A  
23 POLE SAW UP UNTIL THIS POINT, AND SO YOU CAN DO WITH A  
24 LANE SHARK IN A DAY WHAT IT WOULD TAKE TWO WEEKS TO DO  
25 WITH A POLE SAW; AND SO PEOPLE SEE THAT, AND THEY'RE JUST

1 IMMEDIATELY, YOU KNOW, WANT OUR PRODUCT.

2 Q. OKAY. FINALLY, IN REGARD TO THE PATENT OFFICE, THE  
3 CLAIM THAT YOU WILLFULLY FAILED TO DISCLOSE INFORMATION,  
4 MY QUESTION IS SIMPLE, WERE YOU HONEST WITH THE PATENT  
5 OFFICE IN CONNECTION WITH YOUR PATENT FILING?

6 A. 100 PERCENT.

7 Q. WAS THERE ANYTHING THAT YOU INTENTIONALLY WITHHELD  
8 FROM THE PATENT OFFICE?

9 A. ABSOLUTELY NOT.

10 Q. DID YOU, DID YOU BELIEVE THAT THERE WAS SOMETHING  
11 THAT YOU COULD HAVE OR SHOULD HAVE PRESENTED TO THE PATENT  
12 OFFICE BUT DIDN'T?

13 A. NOT TO MY KNOWLEDGE, NO. I --

14 Q. WHO DID YOU TRUST TO HELP YOU THROUGH THAT PROCESS?

15 A. MY PATENT ATTORNEY, NEVIN SHAFFER.

16 Q. HAD YOU NEVER GONE THROUGH THE PATENT PROCESS  
17 BEFORE?

18 A. NO, SIR.

19 Q. HAVE YOU EVER TESTIFIED BEFORE?

20 A. NO, SIR.

21 Q. I'M DONE ON MY DIRECT. THANK YOU VERY MUCH.

22 A. THANK YOU.

23 THE COURT: ALL RIGHT. MS. RUMFELT, DO YOU  
24 NEED SOME ADDITIONAL TIME BEFORE YOU QUESTION HIM IN LIGHT  
25 OF THESE EXHIBITS?

1 MS. RUMFELT: IF WE COULD TAKE A COUPLE MINUTES  
2 BREAK, THAT WOULD BE GREAT.

3 THE COURT: ALL RIGHT. LET'S TAKE A SHORT  
4 RECESS THEN.

5 (RECESS AT 10:12 A.M., UNTIL 10:47 A.M.)

6 THE COURT: ALL RIGHT. I AM SORRY FOR THAT  
7 DELAY, SOMETHING ELSE CAME UP, BUT I THINK WE'RE READY NOW  
8 IF YOU ARE, ALL RIGHT.

9 MS. RUMFELT: THANK YOU.  
10 CROSS EXAMINATION

11 BY MS. RUMFELT:

12 Q. GOOD MORNING, MR. ODOM.

13 A. GOOD MORNING.

14 Q. I'M GOING TO ASK YOU A COUPLE OF QUESTIONS ABOUT  
15 YOUR RELATIONSHIP WITH MR. DUERWOOD WILLIS.

16 A. OKAY.

17 Q. YOU DON'T DENY THAT YOU APPROACHED HIM ABOUT WORKING  
18 TOGETHER; DO YOU?

19 A. I ASKED HIM FOR SOME HELP IN THE BEGINNING TO HELP  
20 WITH HYDRAULIC STUFF, YES.

21 Q. SO YOU APPROACHED HIM?

22 A. YES.

23 Q. AND YOU SAW -- WHEN YOU WENT OVER THERE TO TALK TO  
24 HIM, YOU SAW THE UNIT HE WAS BUILDING AT THAT TIME; DIDN'T  
25 YOU?

1 A. THAT'S INCORRECT.

2 Q. HOW IS THAT INCORRECT?

3 A. BECAUSE I DIDN'T GO TO DUERWOOD'S HOUSE, TO MY  
4 KNOWLEDGE I DIDN'T GO TO DUERWOOD'S HOUSE UNTIL ABOUT TWO  
5 MONTHS AFTER WE CREATED THE FIRST ONE. I DON'T HAVE ANY  
6 PICTURES OF DUERWOOD'S UNIT; AND IF I WENT TO GO LOOK AT  
7 DUERWOOD'S UNIT, I FEEL LIKE I WOULD HAVE TAKEN A BUNCH OF  
8 PICTURES OF IT.

9 Q. YOU GAVE A DECLARATION IN THIS CASE, RIGHT, IN FACT  
10 YOU GAVE MULTIPLE DECLARATIONS?

11 A. YES.

12 Q. LET ME HAVE YOU -- YOU RECENTLY GAVE ONE IN SUPPORT  
13 OF A REPLY; CORRECT?

14 A. YES.

15 Q. DO YOU RECALL IN YOUR DECLARATION, THAT THIRD  
16 DECLARATION THAT'S PART OF THE REPLY, SAYING, I RECALL  
17 SEEING A CHAIN ON ONE OF DUERWOOD'S BRUSH CUTTER DESIGNS  
18 BEFORE HE STARTED WORKING WITH ME; IS THAT CORRECT?

19 A. YES, IN THE PICTURE.

20 Q. SO YOU SAW THE UNIT HE WAS BUILDING?

21 A. I'VE SEEN THE PICTURE, YES.

22 Q. AND YOU DON'T DENY HERE TODAY THAT MR. WILLIS CAME  
23 UP WITH SOME OF THE UNDERLYING FEATURES OF THE PATENTED  
24 INVENTION; CORRECT?

25 A. I DO DENY THAT.

1 Q. YOU DO DENY THAT. WELL, LET'S LOOK AT YOUR  
2 DECLARATION AGAIN. LET'S LOOK AT YOUR FIRST DECLARATION  
3 IN SUPPORT OF THE MOVING BRIEF, AND I'M GOING TO DIRECT  
4 YOU TO PARAGRAPH 8. YOU SAID, MY COUSIN, DUERWOOD WILLIS,  
5 CAME UP WITH AN IDEA FOR A CUTTING DECK THAT COULD BE  
6 FIXED IN A FEW POSITIONS USING A SOLID BAR AS SHOWN BELOW.  
7 DO YOU RECALL THAT TESTIMONY?

8 A. YES.

9 Q. SO MR. WILLIS DID COME UP WITH SOME OF THE UNDER-  
10 LYING FEATURES OF THE PATENTED INVENTION; CORRECT?

11 A. WELL, HE CAME UP WITH THOSE AFTER MY STEPDAD CAME UP  
12 WITH THEM, SO, NO. IT'S, IT'S IN THE RECORD THAT HIS WAS  
13 UNFINISHED UNTIL AFTER MY STEPDAD'S WAS CREATED.

14 Q. YOU DON'T DENY THAT HE BROUGHT SIGNIFICANT EXPERI-  
15 ENCE TO THE DEVELOPMENT OF THE LS-2 THAT YOU DIDN'T HAVE;  
16 CORRECT?

17 A. BASED ON HYDRAULICS.

18 Q. WELL, IT WAS HYDRAULICS, BEARINGS AND FITTINGS;  
19 CORRECT?

20 A. OKAY, YES.

21 Q. YOU TESTIFIED TO THAT; CORRECT?

22 A. OKAY.

23 Q. YOU DIDN'T HAVE ANY HYDRAULICS EXPERIENCE BEFORE  
24 WORKING ON THIS; DID YOU?

25 A. NO.

1 Q. YOU TESTIFIED I THINK EARLIER TODAY THAT YOU WERE  
2 PUSHING MR. WILLIS TO CONTACT A PATENT ATTORNEY; CORRECT?

3 A. YES.

4 Q. YOU WERE DOING THAT BECAUSE YOU WERE WORKING  
5 TOGETHER TO DEVELOP THIS PRODUCT AND YOU WANTED TO GET IT  
6 PATENTED; CORRECT?

7 A. THERE'S NO DENYING THAT WE WERE WORKING TOGETHER,  
8 THAT'S CORRECT. HE WAS GOOD AT PAPERWORK, SO I ASKED HIM  
9 TO HELP GET THAT STARTED.

10 Q. SO AFTER PUSHING HIM TO GET THE PATENT, YOU JUST  
11 WENT AHEAD AND DID IT WITHOUT HIM?

12 A. WELL, AFTER SIX MONTHS OF ASKING HIM TO DO SOMETHING  
13 AND HE DOESN'T DO IT, I HAD NO CHOICE BUT TO DO IT MYSELF.

14 Q. AND YOU APPLIED WITHOUT HIM AS A LISTED INVENTOR;  
15 CORRECT?

16 A. HE WAS NOT AN INVENTOR.

17 Q. DID YOU CUT HIM OFF FROM THE BUSINESS ACCOUNT?

18 A. IN LIKE MAY OF 2018.

19 Q. YOU NEVER PAID MR. WILLIS; CORRECT?

20 A. I DID, YES. HE RECEIVED \$14,000 THAT HE NEEDED TO  
21 PAY OFF SOME LOANS THAT HE KEPT, AND THEN I GAVE HIM A  
22 \$10,000 LOAN TO PAY OFF TO BUY A CAR FOR HIS DAUGHTER THAT  
23 HE DID RETURN.

24 Q. AND WHERE IS THAT IN THE RECORD?

25 A. SOMEWHERE IN THERE, I'M NOT SURE, BUT IT'S IN ONE OF

1 MY DECLARATIONS THAT HE RECEIVED \$14,000 AND A \$10,000  
2 LOAN FROM THE COMPANY.

3 Q. DID HE EVER GET A W-2 FROM THE COMPANY?

4 A. NO.

5 Q. NEVER GOT A K-1?

6 A. NO.

7 Q. YOU AND DUERWOOD TEXTED A LOT; RIGHT?

8 A. YES.

9 Q. IN FACT, IF I REPRESENTED TO YOU THAT THESE TWO  
10 BINDERS CONTAIN TEXTS FROM YOU AND MR. WILLIS, WOULD THAT  
11 SURPRISE YOU?

12 A. NOT AT ALL.

13 Q. IN FACT, YOU PRETTY MUCH TEXTED EVERYDAY DURING THE  
14 TIME PERIOD FROM DECEMBER 2016 WELL INTO 2018; CORRECT?

15 A. YES.

16 Q. I'M GOING TO HAVE YOU LOOK AT A TEXT EXCHANGE THAT'S  
17 IN THE RECORD. IF WE COULD PULL IT UP FOR THE RECORD,  
18 THIS IS DOC 46 PAGE ID 1106. CAN YOU SEE THAT UP THERE?

19 A. YES.

20 Q. CAN I HAVE YOU READ THOSE THREE TEXTS, STARTING WITH  
21 MR. WILLIS' THAT SAYS, AGREED.

22 A. AGREED, I LAID IN BED THINKING HOW WE CAN  
23 ARTICULATE, HOW WE CAN HAVE AN ARTICULATING ARM THAT WILL  
24 WORK IN ALL POSITIONS.

25 YEAH, IT'S DRIVING ME CRAZY. I FEEL LIKE WE'RE

1 RIGHT ON THE EDGE OF HAVING THE PERFECT CONCEPT. JUST  
2 NEED A LITTLE PUSH.

3 I CAN PICTURE IT IN MY HEAD. I TRIED TO DRAW  
4 IT, KINDA DREAMED, KINDA LIKE A DREAM I CAN CLEARLY SEE  
5 BUT CAN'T DESCRIBE.

6 Q. SO YOU WERE WORKING TOGETHER ON THE CONCEPTION OF  
7 THIS PRODUCT; CORRECT?

8 A. WE HAD IDEAS THAT WE EXCHANGED BACK AND FORTH BUT  
9 NOTHING THAT LED TO THE ACTUAL INVENTED, THE CLAIMED  
10 INVENTION.

11 Q. YOU DON'T DENY HERE TODAY FOR A PERIOD OF TIME THAT  
12 MR. WILLIS KEPT LANE SHARK'S RECORDS; DO YOU?

13 A. HE KEPT THEM POORLY, BUT YES.

14 Q. BUT HE KEPT THEM?

15 A. SOME OF THEM TO MY KNOWLEDGE, YES.

16 Q. YOU DIDN'T TELL YOUR ATTORNEYS BEFORE FILING THIS  
17 LAWSUIT ABOUT MR. WILLIS AT ALL; DID YOU?

18 A. NO.

19 Q. THEY DIDN'T EVEN HEAR HIS NAME UNTIL WE BROUGHT HIM  
20 UP IN THE LITIGATION; DID THEY?

21 A. CORRECT, BECAUSE THERE'S -- IT DOESN'T APPLY TO ANY  
22 OF THIS.

23 Q. IT'S YOUR POSITION HERE TODAY THAT MR. HOWELL BOUGHT  
24 THE LANE SHARK IN ONE DAY ON JANUARY 30TH; CORRECT?

25 A. YES.

1 Q. I'M GOING TO HAVE YOU TAKE A LOOK AT DECLARATIONS  
2 THAT LANE SHARK HAS ENTERED IN THIS CASE. THE FIRST ONE  
3 IS DOC ID 19 PAGE ID 321 FOR THE RECORD. I DON'T KNOW IF  
4 YOU'RE GOING TO BE ABLE TO SEE THAT, CAN YOU READ IT?

5 A. I THINK I CAN MAKE IT OUT, GIVE ME JUST ONE SECOND,  
6 PLEASE.

7 OKAY.

8 Q. YOU RECALL THAT MR. HOWELL SUBMITTED A DECLARATION  
9 IN THIS MATTER; CORRECT?

10 A. YES.

11 Q. AND HE RECALLS IN THAT DECLARATION TALKING ON THE  
12 PHONE WITH TERRY MARSH ABOUT THIS BRUSH CUTTER IN ADVANCE  
13 OF THAT JANUARY 30TH DATE; CORRECT?

14 A. YES, A BRUSH CUTTER.

15 Q. IN FACT, HE TOLD TERRY MARSH THAT HE HAD BEEN  
16 LOOKING FOR A BRUSH CUTTER AND HE WAS INTERESTED IN BUYING  
17 ONE; CORRECT?

18 A. WELL, THE CHAIN OF EVENTS THAT LED TO THAT WERE MY  
19 STEPDAD, TERRY, BUILT HIS. GORDAN SAW THAT ONE IN PERSON  
20 OVER THE SUMMER, TOLD HIM THAT IF HE EVER BUILT ANOTHER  
21 ONE THAT HE WANTED IT; SO HE KNEW THAT WE WERE BUILDING  
22 ONE, BUT HE KNEW NOTHING ABOUT THE ONE THAT WE WERE  
23 BUILDING.

24 Q. AND THERE WAS A CONVERSATION THEN BETWEEN MR. MARSH  
25 AND MR. HOWELL IN WHICH HE SAID, IF THIS BRUSH CUTTER IS

1 BUILT, I WOULD CONSIDER BUYING IT; CORRECT, THAT'S WHAT HE  
2 SAYS IN HIS TESTIMONY?

3 A. TO MY KNOWLEDGE, YES.

4 Q. IN MR. MARSH'S DECLARATION, WHICH IS DOC ID PAGE ID  
5 324, THAT ALSO TALKS ABOUT A DISCUSSION PRIOR TO JANUARY  
6 30TH; CORRECT?

7 A. CORRECT.

8 Q. HE SAYS, PRIOR TO THE VISIT I TOLD HIM ABOUT THE  
9 BRUSH CUTTER THAT TRAVIS HAD INVENTED; CORRECT?

10 A. YES.

11 Q. NOT THE BRUSH CUTTER THAT HE WAS WORKING ON, THE  
12 BRUSH CUTTER THAT YOU INVENTED?

13 A. YES, BUT THIS, THIS DOESN'T PROVE THAT IT'S AN LS-1  
14 OR LS-2.

15 Q. BUT HE TALKED TO HIM ABOUT THE UNIT THAT MR. HOWELL  
16 ULTIMATELY PURCHASED; CORRECT?

17 A. THAT I DO NOT KNOW. HE JUST -- TO MY KNOWLEDGE  
18 BASED ON THIS HE TOLD HIM ABOUT A BRUSH CUTTER THAT WE  
19 WERE WORKING ON. SO WE HAD TWO DIFFERENT ONES, AND  
20 WHETHER -- IF THIS CONVERSATION, I DON'T KNOW WHEN THIS  
21 CONVERSATION HAPPENED, SO IT COULD HAVE HAPPENED PROBABLY  
22 BEFORE WE CREATED THE LS-2 BECAUSE HE WAS -- HE WANTED THE  
23 ONE THAT BIG TERRY MADE, WHICH DID TWO POSITIONS, AND SO  
24 DID THE LS-1.

25 Q. THE BRUSH CUTTER HE ULTIMATELY PURCHASED ON JANUARY

1 30TH WAS THE LS-2; CORRECT?

2 A. CORRECT.

3 Q. DO YOU KNOW WHAT MODEL SKID STEER GORDAN HOWELL HAS?

4 A. NO.

5 Q. DO YOU KNOW THE FLOW RATE OF MR. HOWELL'S TRACTOR?

6 A. I DO NOT.

7 Q. YOUR OWN MARKETING MATERIALS THOUGH SAY THAT THIS  
8 PRODUCT CAN HANDLE MORE THAN 10 GALLONS PER MINUTE FLOW  
9 RATE; CORRECT?

10 A. TWENTY. YOU MAY BE LOOKING AT SOMETHING OLD. TEN  
11 GALLONS IS WHAT THE MOTOR IS SPEC'D AT, ONE OF THE MOTORS.

12 Q. LET'S TAKE A LOOK AT YOUR MARKETING MATERIALS.

13 A. THAT'S IT, YEAH.

14 Q. ARE THESE MARKETING MATERIALS THAT WERE IN PLACE AT  
15 THE TIME THAT YOU WERE TALKING TO MR. HOWELL?

16 A. THESE WERE -- NO. THESE WOULD HAVE BEEN CREATED  
17 AFTER.

18 Q. AFTER. OKAY. AND YOU SEE HERE THAT THEY SAY THAT  
19 THE SPECIFICATIONS ARE 10 GALLONS PER MINUTE FOR THE  
20 HYDRAULIC SYSTEM; RIGHT?

21 A. CALCULATED AT, MEANING AT 10 GALLONS A MINUTE IT'S  
22 GOING TO ROTATE 1,028 RPMS, SO IT CAN GO ABOVE AND BELOW  
23 THAT.

24 Q. YOU SUGGEST TO YOUR CUSTOMERS THOUGH, DON'T YOU,  
25 THAT FOR LARGER SYSTEMS YOU'LL NEED A FLOW REGULATOR TO

1 PROTECT YOUR INVESTMENT; CORRECT?

2 A. I DO NOT ANYMORE, NO.

3 Q. YOU DID AT THE TIME?

4 A. AFTER GORDAN BOUGHT THAT, YES; THAT'S -- THIS IS,  
5 ALL OF THIS IS STUFF THAT DUERWOOD CAME UP WITH.

6 Q. SO THE POINT IS YOU NEEDED A FLOW CONTROL VALVE TO  
7 HANDLE ANYTHING GREATER THAN 10 GALLONS PER MINUTE; DIDN'T  
8 YOU --

9 A. FALSE.

10 Q. -- AT THE TIME?

11 A. THIS IS FALSE.

12 Q. WHAT'S FALSE?

13 A. THAT YOU DON'T NEED A FLOW REGULATOR TO HANDLE MORE  
14 THAN 10 GALLONS A MINUTE. IF, IF THAT'S WHAT THIS SAYS,  
15 THEN I DON'T DENY THAT; BUT WITH A TRACTOR OR A SKID STEER  
16 THEY, THE FLOW IS DIRECTLY RELATED TO THE ENGINE RPM; SO  
17 IF YOU WIDE OPEN THROTTLE, THEN IT WILL FLOW WHAT IT'S  
18 RATED AT; BUT NOW IF WE HAVE CUSTOMERS THAT ARE OVER THAT,  
19 THIS FLOW CONTROL VALVE IS RESTRICTIVE AND CAUSES HEAT  
20 BUILDUP, SO IT'S DANGEROUS FOR THE TRACTOR; BUT IF YOU  
21 HAVE MORE -- IF YOUR TRACTOR IS RATED AT 22 GALLONS A  
22 MINUTE, WE SELL YOU A MOTOR THAT'S RATED UP TO 20, AND WE  
23 TELL THE CUSTOMER TO THROTTLE BACK.

24 Q. BUT YOU DON'T DENY THAT THESE ARE MARKETING  
25 MATERIALS THAT WERE ON YOUR WEBSITE --

1 A. I DON'T DENY THAT AT ALL.

2 Q. -- CORRECT? I'M SORRY?

3 A. I DON'T DENY THAT.

4 Q. YOU DON'T DENY THAT; AND SO YOU TOLD YOUR CUSTOMERS  
5 THAT THIS IS WHAT WAS NECESSARY FOR A 10, FOR GREATER THAN  
6 10 GALLONS PER MINUTE; CORRECT?

7 A. AT THE TIME THAT'S BASED ON THIS, THAT'S CORRECT.

8 Q. NOW, A FLOW CONTROL VALVE, IT CAN BE TAKEN ON AND  
9 OFF; CORRECT?

10 A. YOU CAN TECHNICALLY TAKE IT ON AND OFF, BUT TO DO IT  
11 YOU HAVE TO BREAK APART THE HYDRAULIC HOSE AND MOVE  
12 FITTINGS AROUND, WHICH IS EXTREMELY CUMBERSOME; SO YOU --  
13 IT'S NOT SOMETHING THAT YOU WOULD PUT ON YOUR TRACTOR TO  
14 TAKE ON AND OFF OF THE ATTACHMENT.

15 Q. BUT YOU CAN TAKE IT ON AND OFF FOR TRANSPORT, IT CAN  
16 BE TAKEN ON AND OFF?

17 A. ABSOLUTELY.

18 Q. IN FACT, LOOKING AT YOUR EXHIBIT 1 THAT WAS ENTERED  
19 TODAY BY LANE SHARK, IT CAN FIT IN YOUR HAND; CORRECT?

20 A. YEP.

21 Q. SO SOMEBODY COULD HAND IT TO SOMEBODY ELSE, IT  
22 DOESN'T HAVE TO BE SITTING ON THAT TRACTOR?

23 A. CORRECT; BUT ALSO WHERE'S THE TEXT OF ME ASKING HIM  
24 TO ORDER THIS AND/OR THE RECEIPT OF DUERWOOD PURCHASING IT  
25 BEFORE ON OR AFTER JANUARY 30TH?

1 Q. I'M GLAD YOU ASKED ABOUT THAT. WHY DON'T WE GO  
2 AHEAD AND GO TO THE DOC 51-2 PAGE ID COURT 232. YOU TOLD  
3 US THAT MR. WILLIS KEPT RECORDS FOR THE COMPANY; CORRECT?

4 A. PARTIALLY, YES.

5 Q. AND I DON'T -- I DIDN'T HEAR YOU DENY THIS MORNING  
6 THAT THIS IS A RECORD THAT HE MAINTAINED AS PART OF HIS  
7 SALES EFFORTS; CORRECT?

8 A. THIS COULD HAVE BEEN A RECORD THAT HE KEPT, BUT  
9 THERE ARE NO DATES ON IT WITH ANY SPECIFIC INFORMATION;  
10 AND I BELIEVE IN HIS DECLARATION HE SAYS THAT HE CREATED  
11 THIS IN FEBRUARY. SO JUST BECAUSE IT HAS THAT \$50 CHARGE  
12 STILL DOES NOT PROVE THAT WE SOLD IT BEFORE THE 30TH.

13 Q. SO LET ME JUST, TO MAKE SURE EVERYBODY IS WITH US  
14 FOR A SECOND, SO THE, THE \$50 CHARGE YOU'RE REFERRING TO,  
15 AND HOPEFULLY YOU CAN SEE IT WITH THIS CALL-OUT BOX,  
16 THERE'S A \$50 CHARGE FOR I BELIEVE IT'S FLOW UNIT.

17 A. FLOW CONTROL.

18 Q. FLOW CONTROL. YOU SEE THAT; CORRECT?

19 A. YES, MA'AM.

20 Q. AND THAT'S FOR THE SALE TO MR. HOWELL; CORRECT?

21 A. CORRECT.

22 Q. YOU DON'T HAVE ANY REASON TO REFUTE THAT THIS IS A  
23 SALES RECORD OF THE COMPANY; DO YOU?

24 A. WELL, I MEAN, JUST TO START OFF WITH, IT'S ALREADY  
25 FALSE, SO I DON'T -- I DON'T KNOW HOW IT COULD BE A VIABLE

1 RECORD, AND IT'S AN EXCEL SPREADSHEET THAT'S EASILY  
2 EDITABLE.

3 Q. AND YOUR BASIS FOR REFUTING THAT THIS IS A CORRECT  
4 DOCUMENT IS THAT YOU DON'T REMEMBER THE FLOW CONTROL VALVE  
5 BEING GIVEN TO MR. HOWELL?

6 A. NOR IS THERE ANY -- AS YOU STATED EARLIER THAT  
7 DUERWOOD AND I TEXT PRETTY MUCH PRIMARILY THROUGHOUT ALL  
8 THIS TIME, WHERE, WHERE DID I ASK HIM TO PURCHASE THAT,  
9 WHERE IS THE RECEIPT FOR THAT; SO, YES, I DO DENY THAT  
10 THIS IS CORRECT.

11 Q. YOU WEREN'T PHYSICALLY THERE WHEN THE UNIT WAS SOLD  
12 TO MR. HOWELL; WERE YOU?

13 A. NO.

14 Q. SO IF A FLOW CONTROL VALVE WAS HANDED TO HIM, YOU  
15 WOULDN'T KNOW THAT?

16 A. THAT'S POSSIBLE, YES; BUT I WOULD HAVE HAD THE FLOW  
17 CONTROL OR DUERWOOD WOULD HAVE HAD IT. DUERWOOD WAS NOT  
18 THERE AND NEITHER WERE I.

19 Q. THE UNIT THAT WAS SOLD TO MR. HOWELL, IT CUT BRUSH;  
20 RIGHT?

21 A. YES.

22 Q. DID ANYBODY TELL HIM AT THE TIME THEY SOLD IT TO HIM  
23 THAT IT WASN'T SUITABLE FOR ITS INTENDED PURPOSE?

24 A. WE TOLD HIM THAT IT WAS A PROTOTYPE AND THAT WE  
25 WOULD -- THE REASON WE SOLD IT TO HIM SO EARLY ON IS SO WE

1 COULD GET HIS FEEDBACK; SO, YES.

2 Q. WHEN DID YOU TELL HIM THAT?

3 A. WHENEVER HE SOLD -- WHENEVER HE BOUGHT IT WE LET HIM  
4 KNOW --

5 Q. ON JANUARY 30TH?

6 A. I WOULD ASSUME, YES.

7 Q. HOW DO YOU KNOW, YOU WEREN'T THERE?

8 A. WELL, BASED ON CONVERSATION I HAD WITH MY STEPDAD I  
9 DON'T SEE ANY REASON WHY HE WOULD NOT TELL HIM.

10 Q. AND YOU HAVE A SPECIFIC RECOLLECTION OF YOUR STEPDAD  
11 TELLING HIM THAT IT WAS A PROTOTYPE?

12 A. WELL, YEAH, I MEAN, IT IS A PROTOTYPE, IT'S THE VERY  
13 FIRST ONE. THAT'S, TO ME THAT'S THE DEFINITION OF A  
14 PROTOTYPE.

15 Q. YOU DIDN'T DISCLOSE ANY PRIOR ART REFERENCES TO THE  
16 PATENT AND TRADEMARK OFFICE WITH YOUR PATENT APPLICATION;  
17 DID YOU?

18 A. I DISCLOSED EVERYTHING THAT I WAS TOLD THAT I NEEDED  
19 TO DISCLOSE. I RELIED ON MY ATTORNEY BECAUSE I'VE NEVER  
20 DONE THIS BEFORE; SO EVERYTHING THAT HE ASKED, I ANSWERED  
21 TO THE BEST OF MY ABILITY TO BE TRUE.

22 AS I'VE STATED EARLIER, I'VE HAD PLENTY OF TIME  
23 TO FILE EVERYTHING, SO.

24 Q. OTHER THAN THE CHARTS THAT YOU'VE SUBMITTED HERE,  
25 YOU'VE NEVER COMPARED THE CLAIMS OF A PATENT AGAINST THE

1 FEATURES OF A PRODUCT; HAVE YOU?

2 A. I DON'T UNDERSTAND.

3 Q. YOU'VE SUBMITTED IN YOUR DECLARATION WHAT I THINK  
4 YOU CALLED COPYING CHARTS, DO YOU REMEMBER THOSE?

5 A. NOT OFF THE TOP OF MY HEAD, I DO NOT. DO YOU HAVE A  
6 REFERENCE PAGE?

7 Q. HAVE YOU EVER GONE THROUGH THE EFFORT OF -- YEAH,  
8 LET ME STEP BACK FOR A SECOND. IF YOU'LL -- YOUR  
9 DECLARATION IN SUPPORT OF A MOTION FOR PRELIMINARY  
10 INJUNCTION, THERE'S A SERIES OF CHARTS IN HERE CALLED  
11 COPYING CHART 1, COPYING CHART 2.

12 ARE YOU ABLE TO PULL IT UP?

13 135 AND 136, IT'S DOC ID 19.

14 DO YOU RECALL HAVING SUBMITTED, THIS IS ONE  
15 PAGE, THERE'S MULTIPLES, BUT DO YOU RECALL HAVING  
16 SUBMITTED THIS AS PART OF THE DECLARATION?

17 A. YES, MA'AM.

18 THE COURT: WHAT PAGES?

19 MS. RUMFELT: PAGE 20 THROUGH 22 OF HIS  
20 DECLARATION. I THINK THE EXAMPLE WE HAVE UP IS FROM PAGE  
21 22. IT'S DOC 18 PAGE ID NUMBER 137.

22 THE COURT: ALL RIGHT. THANK YOU.

23 Q. DO YOU RECALL HAVING SUBMITTED THIS --

24 A. YES, MA'AM.

25 Q. -- AS PART OF YOUR DECLARATION? IS THIS SOMETHING,

1 AN EXERCISE THAT YOU'VE EVER DONE BEFORE?

2 A. NO.

3 Q. YOU FILED FOR A TRADEMARK FOR LANE SHARK; RIGHT?

4 A. YES.

5 Q. YOU SENT A DECLARATION IN SUPPORT OF THAT TRADEMARK  
6 APPLICATION?

7 A. I'M NOT SURE WHAT ALL WAS SUBMITTED.

8 Q. DO YOU DISPUTE THAT THE FIRST USE IN COMMERCE OF  
9 THAT LANE SHARK MARK THAT WAS SUBMITTED TO THE OFFICE WAS  
10 NOVEMBER 1, 2016?

11 A. UNDER THAT I ASSUME THEY WANTED TO KNOW WHENEVER I  
12 FIRST CAME UP WITH THE IDEA OF LANE SHARK, THAT WAS THE  
13 REASON FOR THAT DATE, CAME UP WITH THE CONCEPT TO BUILD A  
14 BRUSH CUTTER AND NAMED IT.

15 Q. WERE YOU USING THE LANE SHARK MARK IN COMMERCE ON  
16 NOVEMBER 1, 2016?

17 A. IN COMMERCE, NO. WE DIDN'T HAVE ANY SALES, PHYSICAL  
18 SALES UNTIL JANUARY 30TH.

19 Q. YOU TESTIFIED THIS MORNING THAT THE BLADE BOLT ISSUE  
20 THAT HAD BEEN OUT IN PUBLIC FORUMS, THAT THERE WAS A BLADE  
21 BOLT ISSUE ON THE LANE SHARK PRODUCT, THAT THAT'S  
22 SOMETHING THAT HAD BEEN FIXED IN MARCH OF 2018; RIGHT?

23 A. TO MY KNOWLEDGE, YES, BECAUSE THAT'S WHENEVER I HAD  
24 TO CHANGE BLADES AND BLADE CARRIER.

25 Q. AND YOU SAID THAT ISSUE WAS FIXED BEFORE TITAN EVEN

1 WAS ON THE MARKET; CORRECT?

2 A. I BELIEVE SO, YES.

3 Q. LET'S PULL UP A POST HERE AND HAVE YOU TAKE A LOOK  
4 AT THIS. IF YOU COULD TAKE A LOOK AT THIS, THIS IS A POST  
5 FROM ONE OF THE ONLINE FORUMS. DO YOU RECALL THIS? I  
6 BELIEVE IT WAS SUBMITTED IN SUPPORT OF YOUR MATERIALS.

7 A. IT JUST WENT AWAY.

8 OKAY.

9 Q. AND CAN I -- DO YOU RECALL THIS POST?

10 A. I RECALL, YES.

11 Q. AND IT RAISES ISSUES WITH THE LOCK NUTS USED AND THE  
12 BLADE BOLTS USED ON THE LANE SHARK PRODUCT, DO YOU SEE  
13 THAT?

14 A. YES.

15 Q. I'M JUST GOING TO HIGHLIGHT FOR YOU THE DATE THERE,  
16 WE ARE GOING TO HIGHLIGHT IT FOR YOU THE DATE THERE. I'LL  
17 REPRESENT TO YOU THAT THAT POST IS DATED APRIL 2019.  
18 THAT'S AFTER TITAN ENTERS THE MARKET; CORRECT?

19 A. YOU REALIZE THAT THIS PERSON PROBABLY BOUGHT ONE WAY  
20 BEFORE THAT OR SAW ONE WAY BEFORE THAT AND THEN MADE THIS  
21 POST. THIS DOESN'T PROVE ANYTHING ABOUT ME CHANGING  
22 ANYTHING.

23 Q. SO IT'S YOUR TESTIMONY TODAY THAT A YEAR, OVER A  
24 YEAR LATER SOMEBODY IS COMMENTING ON THE BLADE BOLTS OF  
25 THEIR PRODUCT THAT THEY PURCHASED SOMETIME BEFORE MARCH OF

1 2018?

2 A. YEAH, PEOPLE COMMENT LATER ALL THE TIME.

3 Q. LET ME HAVE YOU LOOK AT ONE MORE. IT'S A POST, I'LL  
4 REPRESENT TO YOU, DATED SEPTEMBER 16, 2019, SO SIGNIFI-  
5 CANTLY PAST THAT MARCH 2018 DATE, AND THIS PERSON IS  
6 COMPARING THE LANE SHARK AND THE TRAILBLAZER PRODUCTS, DO  
7 YOU SEE THAT?

8 A. YEP.

9 Q. AND THEY SAY THEY WOULD TEND TO USE THE TRAILBLAZER  
10 PRODUCTS BECAUSE OF THE USE OF BLADE BOLTS THAT DO NOT USE  
11 LOCK NUTS, DO YOU SEE THAT?

12 A. YEAH.

13 Q. SO THIS IS IN SEPTEMBER 2019, WELL AFTER TITAN'S  
14 OBVIOUSLY ON THE MARKET?

15 A. YEAH, CORRECT. SO AT THIS POINT WE HAD CHANGED TO  
16 ONE INCH NUT, OR ONE INCH BOLT WITH A BUSHING, AS I STATED  
17 EARLIER, WITH A COTTER PIN TO KEEP THE BOLT FROM EVER  
18 COMING OFF. AT THIS POINT WE STILL USED DIFFERENT BOLTS,  
19 BUT --

20 Q. SO YOU WERE STILL HAVING CUSTOMER CONCERNS ABOUT THE  
21 BLADE BOLTS AS OF SEPTEMBER?

22 A. THAT IS, THAT IS JUST MERELY THEM LOOKING AT IT AND  
23 HAVING A, AN OPINION. THERE'S NO SAFETY ISSUE WITH THAT.

24 Q. THE LAST SET OF QUESTIONS I HAVE, I THINK, IS ON  
25 MATERIAL THAT'S BEEN DESIGNATED ATTORNEYS' EYES ONLY, SO I

1 SUPPOSE WE NEED TO TURN THINGS OFF.

2 (THE FOLLOWING PROCEEDINGS ARE SEALED)

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1

2

3

4

5

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8

9

(END OF SEALED PROCEEDINGS)

10

(THE FOLLOWING PROCEEDINGS ARE HELD IN OPEN COURT)

11

BY MS. RUMFELT:

12

Q. YOU TALKED A BIT ABOUT THE TOWER LOCKS AND THE ROLE  
13 IN MAKING SURE THAT THE PRODUCT IS SAFE FOR OPERATION, DO  
14 YOU REMEMBER THAT THIS MORNING? THE POINT OF THAT IS IT  
15 HAS TO LOCK INTO PLACE; CORRECT? IT DOESN'T HAVE TO BE A  
16 TOWER LOCK TO PERFORM THAT FUNCTION; DOES IT?

17

A. IT CAN BE ANY MEANS, BUT WHAT'S COVERED IN OUR  
18 PATENT COVERS ANY MEANS OF LOCKING THAT TOGETHER.

19

MS. RUMFELT: ALL RIGHT. THAT'S ALL I HAVE.

20

THANK YOU.

21

THE COURT: ALL RIGHT. ANY REDIRECT?

22

MR. FOSTER: VERY BRIEFLY, YOUR HONOR.

23

REDIRECT EXAMINATION

24

BY MR. FOSTER:

25

Q. OKAY. I WANT TO GO BACK TO THE TEXT MESSAGES THAT

1 COUNSEL JUST SHOWED YOU, AND I WANT TO ADD THE TEXT BEFORE  
2 THE ONE THAT SHE PULLED UP.

3 WOULD YOU GO TO MR. ODOM'S THIRD DECLARATION AT  
4 PAGE 5 AND THEN BLOW UP THE WHOLE TEXT STREAM THERE.

5 YOU SEE THAT?

6 A. YES, SIR.

7 Q. DATE THERE IS WHAT?

8 A. SAY AGAIN, I'M SORRY?

9 Q. WHAT IS THE DATE OF THAT ON THAT?

10 A. DECEMBER 28, 2016.

11 Q. OKAY. AND THE BLUE TEXT IS YOUR TEXT; CORRECT?

12 A. YES, SIR.

13 Q. AND WHAT DID YOU SAY TO MR. WILLIS?

14 A. WE NEED A THREE-WAY ARTICULATING ARM.

15 Q. SO WHOSE IDEA WAS IT TO HAVE THE THREE-WAY  
16 ARTICULATING ARM?

17 A. MINE.

18 Q. COUNSEL ASKED YOU ABOUT WHETHER YOU COULD TAKE A  
19 FLOW VALVE ON OR OFF. DID YOU TAKE A FLOW VALVE OFF OF  
20 MR. HOWELL'S LS-2 EITHER PROTOTYPE OR THE SUBSTITUTE?

21 A. NO, SIR.

22 Q. ARE YOU AWARE OF ANYBODY WHO DID?

23 A. NO, SIR.

24 Q. ARE YOU AWARE OF ANYBODY THAT ORDERED A FLOW CONTROL  
25 VALVE FOR MR. HOWELL?

1 A. NO, SIR.

2 Q. WOULD YOU HAVE KNOWN IF THAT HAD HAPPENED WITH  
3 RESPECT TO THE JANUARY 2017 PROTOTYPE?

4 A. I WOULD HAVE HAD TO HAVE ASKED DUERWOOD TO PURCHASE  
5 IT, SO, YES, I WOULD HAVE HAD TO HAVE KNOWN.

6 Q. OKAY. IF YOU WOULD GO TO MR. ODOM'S FIRST  
7 DECLARATION, PAGE 21, AND IF YOU COULD JUST BLOW UP THIS  
8 PART OF THE COPYING CHART.

9 THIS COPYING CHART GOES FOR A COUPLE OF PAGES.  
10 COUNSEL ASKED YOU IF YOU HAD EVER DONE THAT BEFORE.

11 A. RIGHT.

12 Q. EVEN WITHOUT EXPERIENCE DID YOU HAVE ANY DIFFICULTY  
13 SEEING WHAT THEY HAD DONE?

14 A. NOT AT ALL. I MEAN, IT'S --

15 Q. WHY NOT?

16 A. IT'S MY PRODUCT THAT I INVENTED AND THAT I SPENT  
17 HOURS AND HOURS AND HOURS WORKING ON, SO IT'S SUPER EASY  
18 BECAUSE I CAN SEE EVERYTHING ON MY -- ON THEIR EQUIPMENT  
19 THAT'S MINE, SO COMPARING THEM IS NOTHING.

20 Q. IN REGARD TO YOUR TRADEMARK APPLICATION, WERE YOU  
21 USING THE NAME LANE SHARK IN CONNECTION WITH YOUR BUSINESS  
22 IN NOVEMBER OF 2016?

23 A. TO MY KNOWLEDGE, YES, BECAUSE JUST THANKSGIVING IS  
24 WHENEVER I CAME UP WITH THE IDEA, SO THAT WOULD HAVE BEEN  
25 NOVEMBER, BUT WHENEVER WE CAME UP WITH THE, THE NAME AND

1 PLAN TO START A BUSINESS.

2 Q. SO WHEN YOU SAY "THE IDEA", ARE YOU REFERRING TO THE  
3 IDEA TO USE LANE SHARK AS YOUR TRADEMARK OR JUST IN  
4 GENERAL --

5 A. JUST IN GENERAL --

6 Q. -- THE IDEA?

7 A. -- JUST THE NAME LANE SHARK JUST TO USE BECAUSE THAT  
8 WAS WHENEVER MY MOTHER AND I CAME UP WITH THE NAME.

9 Q. SO WHEN YOU'RE TALKING ABOUT THE NAME IDEA, THAT'S  
10 NOT REFERRING AT ALL TO WHAT YOU LATER DEVELOPED IN  
11 JANUARY 2017?

12 A. CORRECT.

13 Q. OKAY. COUNSEL ASKED YOU ABOUT A COUPLE OF POSTS ON  
14 YOUR, ONE OF THE ONLINE TRACTORBYNET SITES.

15 WOULD YOU GO, MS. STUCKI, TO MR. ODOM'S FIRST  
16 DECLARATION, EXHIBIT Q, PAGE 7.

17 AND FOR THE RECORD THE -- IT STARTS ON PAGE 6.  
18 COULD YOU BLOW UP THAT FIRST COMMENT RESPONDING TO THE  
19 EARLIER ONE THAT SHE SAID.

20 COULD YOU READ THAT FOR THE COURT.

21 FIRST OF ALL, THE JWR, THAT WAS THE PERSON THAT  
22 POSTED IT.

23 LET'S GO BACK AND LET'S SET THAT FOUNDATION.  
24 GO TO PAGE 1 OF EXHIBIT Q. AND CAN YOU BLOW UP THAT FIRST  
25 JWR POST, ABOUT TWO THIRDS OF IT, SO WE CAN READ IT.

1 YEAH, PERFECT. OKAY.

2 DO YOU KNOW WHO JWR IS?

3 A. NOT OFF THE TOP OF MY HEAD. I HAVE TALKED TO THAT  
4 CUSTOMER BECAUSE WHENEVER I SAW HIS POST, I REACHED OUT TO  
5 HIM AND ASKED IF THERE WAS ANYTHING THAT WE COULD DO TO  
6 TAKE CARE OF HIS ISSUE.

7 Q. OKAY. IT SAYS, LAST YEAR I BOUGHT A LANE SHARK FEL  
8 MOUNTED. WHAT DOES FEL STAND FOR?

9 A. FRONT-END LOADER.

10 Q. 44 INCH BRUSH CUTTER HYDRAULICALLY DRIVEN RUNS AT  
11 MANY ANGLES. NICE FOR CLEARING FENCE ROWS, OVER-HANGING  
12 LIMBS, ET CETERA. GREAT TOOL.

13 AND THEN SKIPPING DOWN TO THE NEXT PARAGRAPH.  
14 NOW I STUMBLE INTO MY FRIENDLY TRACTOR DEALER AND FIND A  
15 VERY NEW BROCHURE ON TRAILBLAZER ATTACHMENT TB-ONE MODEL  
16 TRAILBLAZER EFL {SIC} MOUNTED CUTTER IS OBVIOUSLY THE SAME  
17 THING AS MY LANE SHARK FROM LAST YEAR; AND SO DID YOU HAVE  
18 ANYTHING TO DO WITH THIS POST WHEN IT WAS MADE?

19 A. NO, SIR.

20 Q. OKAY. AND THEN -- WHEN IT SAYS JOINED DATE, APRIL  
21 2011, DO YOU KNOW WHAT THAT MEANS?

22 A. THAT MEANS WHEN THIS PERSON FIRST CREATED THEIR  
23 PROFILE FOR THIS FORUM.

24 Q. OKAY, AND YOUR TESTIMONY NOW AGAIN, AFTER YOU BECAME  
25 AWARE OF THIS, WHAT DID YOU, WHAT DID YOU SAY TO THIS

1 CUSTOMER?

2 A. I REACHED OUT TO THIS CUSTOMER AND TOLD HIM THAT WE  
3 HAD UPDATED OUR CARRIER AND BLADE BOLTS, AND I BELIEVE I  
4 SENT HIM REPLACEMENT PARTS SO HE WOULDN'T HAVE THAT ISSUE  
5 ANYMORE.

6 Q. OKAY. AND THEN LET'S GO TO YOUR, TRAVIS ODOM'S  
7 DECLARATION Q PAGE 7, AND THIS RESPONDS TO THE EARLIER  
8 POST, AND CAN YOU READ THAT FOR THE COURT, THAT FIRST POST  
9 BY -- AND THIS IS BY JWR AGAIN.

10 A. YOU WANT ME TO READ IT OUT LOUD?

11 Q. YEAH.

12 A. THE SPRING LOADED BLADE TIP GUARDS ARE ABOUT THE  
13 ONLY THING ON TITAN UNITS THAT ARE NOT A KNOCK-OFF  
14 PLAGIARISM OF THE LANE SHARK. THE LANE SHARK NOW HAS  
15 NEWER BLADE BOLTS AND BLADE CARRIERS WHICH THEY PROVIDED  
16 TO ME REPLACING THE OLDER DESIGN, AND THE NEW ONES DO NOT  
17 USE LOCK NUTS. THEY HAVE A -- THEY HAVE SHOULDER BOLTS  
18 WITH A COTTER KEY NUT RETENTION.

19 Q. AND, AGAIN, WHEN DID THAT CHANGE TAKE PLACE FOR THE  
20 COMPANY?

21 A. IT WAS AROUND MARCH, APRIL OF 18 BECAUSE WE HAD TO  
22 CHANGE BLADE MANUFACTURER AND REDO THAT TO -- TO GET A  
23 BETTER BLADE MANUFACTURER AND TO MAKE IT SAFER.

24 Q. THANK YOU. NOTHING FURTHER, YOUR HONOR, UNLESS YOU  
25 HAVE SOMETHING TO ADD.

1 A. ONE OF THE -- I WOULD LIKE, IF IT'S OKAY WITH YOU,  
2 TO PUT IN THE RECORD ABOUT THE IRREPARABLE HARM THAT I  
3 DIDN'T GET TO HIT ON EARLIER, IS THAT OKAY?

4 THE COURT: ORDINARILY I WOULD PREFER THAT YOU  
5 ANSWER YOUR LAWYER'S QUESTIONS.

6 Q. OKAY. DO YOU HAVE ANYTHING TO ADD ON IRREPARABLE  
7 HARM?

8 A. WELL, ONE OF THE THINGS --

9 THE COURT: WE'RE NOT GOING TOO FAR WITH THIS,  
10 BY THE WAY.

11 A. SO --

12 THE COURT: ARE YOU EXPANDING AN ANSWER YOU  
13 GAVE EARLIER OR --

14 A. YES, ABOUT THE IRREPARABLE HARM. SO ONE OF THE  
15 THINGS THAT, TO GO TOWARDS IRREPARABLE HARM IS PUBLIC  
16 INTEREST, WHICH SHE STATED EARLIER THAT IT WAS NOT IN THE  
17 PUBLIC INTEREST.

18 TO ME THE PUBLIC INTEREST WOULD BE BETTER OFF  
19 HAVING ANOTHER PRODUCT ON THE MARKET THAT IS ALSO  
20 INNOVATIVE; SO BY GIVING US THE PRELIMINARY INJUNCTION AND  
21 FORCING THIS COMPANY THAT CLAIMS TO BE PUSHING THE  
22 ENVELOPE AND AN INNOVATOR IN THE MARKET, THIS ONLY GIVES  
23 THEM THE OPPORTUNITY TO INNOVATE AND COME UP WITH THEIR  
24 OWN IDEAS THAT ARE NOT MINE.

25 MR. FOSTER: THANK YOU.

1 THE COURT: ALL RIGHT. ANY RECROSS ON THOSE  
2 LIMITED SUBJECTS?

3 MS. RUMFELT: NO, YOUR HONOR.  
4 EXAMINATION

5 BY THE COURT:

6 Q. ALL RIGHT. MR. ODOM, I HAVE ONE QUESTION.

7 A. YES, SIR.

8 Q. COUNSEL FOR THE DEFENSE ASKED YOU A FEW MINUTES AGO,  
9 EARLIER IN YOUR TESTIMONY, ABOUT WHAT YOU TOLD THE LAWYERS  
10 IN THIS CASE ABOUT MR. WILLIS' INVOLVEMENT. I BELIEVE YOU  
11 SAID YOU DID NOT INFORM THEM OF HIS INVOLVEMENT; BUT TELL  
12 ME AGAIN WHO YOUR ATTORNEY WAS IN THE PATENT APPLICATION?

13 A. YES, SIR. NEVIN SHAFFER.

14 Q. AND DID YOU INFORM HIM ABOUT THE INVOLVEMENT  
15 MR. WILLIS HAD HAD, WHATEVER IT WAS, IN THE DEVELOPMENT OF  
16 THIS PRODUCT?

17 A. TO, TO -- YES, SIR, BECAUSE WE TALKED ABOUT ALL OF  
18 EVERYTHING THAT LED UP TO THAT, THAT CREATION OF THE  
19 LS-2.

20 Q. AND DID YOU LEAVE ANYTHING OUT? THERE'S BEEN A LOT  
21 OF INFORMATION BROUGHT TO LIGHT NOW, BUT DID YOU FULLY  
22 INFORM HIM OF MR. WILLIS' INVOLVEMENT WITH YOU AS FAR AS  
23 THESE BRUSH CUTTERS WERE CONCERNED?

24 A. TO THE BEST OF MY KNOWLEDGE, YES, SIR.

25 Q. WHY DID YOU GIVE HIM THAT INFORMATION, DID HE ASK

1 YOU SPECIFICALLY?

2 A. HE -- TO BE HONEST, I DON'T REMEMBER THE EXACT CHAIN  
3 OF EVENTS THAT LED TO ME TALKING ABOUT THAT, BUT I WAS  
4 JUST GIVING HIM A STORY OF HOW I CREATED THE LANE SHARK.

5 Q. ALL RIGHT, AND WAS THE DECISION THEN MADE BY HIM AS  
6 TO WHAT WAS TO BE DISCLOSED AS PART OF THE PATENT  
7 APPLICATION?

8 A. TO MY KNOWLEDGE, YES. I DON'T KNOW A HUNDRED  
9 PERCENT WHOSE DECISION OR HOW THAT CAME TO BE.

10 Q. WELL, WAS IT YOUR DECISION?

11 A. CAN YOU REPHRASE THE QUESTION, I'M SORRY.

12 Q. I WANT TO KNOW AFTER YOU FULLY INFORMED YOUR PATENT  
13 ATTORNEY, WHO MADE THE DECISION OF WHAT INFORMATION TO  
14 INCLUDE IN THE APPLICATION?

15 A. I GUESS I WOULD HAVE MADE THAT DECISION BECAUSE WE  
16 GAVE HIM ALL OF THE PAPERWORK.

17 Q. LET ME ASK YOU SPECIFICALLY, WAS IT YOUR DECISION  
18 NOT TO INCLUDE INFORMATION ABOUT MR. WILLIS' ROLE IN THE  
19 APPLICATION?

20 A. TO BE HONEST, I CAN'T ANSWER IT A HUNDRED PERCENT,  
21 BUT I BELIEVE IT WOULD HAVE BEEN MY DECISION, YES.

22 Q. WHY DID YOU MAKE THAT DECISION?

23 A. BECAUSE I DIDN'T FEEL LIKE HE CREATED ANYTHING, SO I  
24 DIDN'T FEEL LIKE HE NEEDED TO BE ON THE PATENT; AND  
25 DUERWOOD AND I TALKED ABOUT THIS, ABOUT THE PATENT AND

1       EVERYTHING, HE HAD NEVER REQUESTED TO BE ON THE PATENT.

2               THE COURT:    OKAY.   DO THOSE QUESTIONS CAUSE  
3       ANYBODY ELSE TO HAVE ANY OTHER QUESTIONS?

4               MR. FOSTER:   NOTHING, YOUR HONOR.

5               THE COURT:    ALL RIGHT.   MR. ODOM, YOU MAY STEP  
6       DOWN.

7       A.       THANK YOU, SIR, OR YOUR HONOR.

8               THE COURT:    IS THAT YOUR ONLY WITNESS?

9               MR. MILLER:   YOUR HONOR, WE'D LIKE TO CALL  
10       MR. FOX.

11               THE COURT:    I REMEMBER YOU WERE GOING TO CALL  
12       HIM.   ALL RIGHT.   YOU'LL HAVE TO STEP OUT, I ASSUME HE'S  
13       OUTSIDE, YOU'LL HAVE TO STEP OUT AND TELL HIM TO COME IN.

14               ROBERT O. FOX, DEFENDANTS' WITNESS, SWORN

15               THE CLERK:    PLEASE STATE AND SPELL YOUR NAME  
16       FOR THE RECORD.

17       A.       MY NAME IS ROBERT OUTLAW FOX, R O -- DID YOU SAY  
18       SPELL, MA'AM?

19               THE CLERK:    YES, SIR.

20       A.       R O B E R T, MIDDLE NAME O U T L A W, FOX, F O X.  
21       YOU CAN CALL ME BOB.

22               THE COURT:    GO AHEAD, MR. MILLER.

23       CROSS EXAMINATION

24       BY MR. MILLER:

25       Q.       HELLO, MR. FOX.

1 A. HELLO.

2 Q. YOU SUBMITTED A DECLARATION IN THIS CASE; CORRECT?

3 A. YES.

4 Q. I'M GOING TO JUST ASK YOU A FEW THINGS FOR THE SAKE  
5 OF CLARITY FROM YOUR DECLARATION, BUT I'M NOT GOING TO GO  
6 THROUGH EVERY ASPECT, IS THAT OKAY?

7 A. OKAY.

8 Q. YOU HAVE A CHEMICAL ENGINEERING DEGREE FROM 1984?

9 A. YES, SIR. I GRADUATED VANDERBILT UNIVERSITY WITH A  
10 BACHELOR OF ENGINEERING, A B.E. IN ENGINEERING, CHEMICAL  
11 ENGINEERING AS WELL.

12 Q. AND I THINK YOU SET FORTH YOUR EDUCATION AND WORK  
13 HISTORY NICELY IN YOUR DECLARATION, I JUST WANT TO  
14 CLARIFY. YOU DON'T HAVE ANY EXPERIENCE AS AN ENGINEER IN  
15 THE INDUSTRY OF TRACTORS OR FARM IMPLEMENTS; RIGHT?

16 A. DID I EVER WORK AS AN ENGINEER IN THOSE FIELDS?

17 Q. CORRECT.

18 A. LIKE FOR WORKING FOR JOHN DEERE OR SOMETHING, NO,  
19 SIR.

20 Q. YOU'VE NEVER BEEN PART OF A DESIGN TEAM THAT IS  
21 TRYING TO ENGINEER A NEW PRODUCT FOR TRACTORS OR FARM  
22 IMPLEMENTS; RIGHT?

23 A. IN THE CAPACITY OF WORKING FOR SOMEONE LIKE JOHN  
24 DEERE OR SOMETHING, NO; BUT I'VE BEEN INVOLVED IN DRAFTING  
25 APPLICATIONS WHERE WORKING WITH INVENTORS.

1 Q. SURE, I APPRECIATE THAT. YOU'VE SPENT THE LAST 30  
2 YEARS WORKING AS A PATENT ATTORNEY PROSECUTING PATENT  
3 APPLICATIONS; CORRECT?

4 A. THAT'S BEEN MY PRIMARY WORK, YES.

5 Q. AND, FIRST OF ALL, YOU INDICATE YOU HAVEN'T  
6 TESTIFIED AS AN EXPERT IN A CASE IN THE LAST FOUR YEARS;  
7 IS THAT ACCURATE?

8 A. I DON'T THINK I EVER HAVE, BUT, YES, THAT'S  
9 ACCURATE.

10 Q. SO THAT'S WHAT I WANTED TO CLARIFY, HAVE YOU EVER  
11 TESTIFIED AS A TECHNICAL EXPERT IN A PATENT CASE?

12 A. NOT THAT I CAN REMEMBER.

13 Q. IN PARAGRAPH 9 -- MS. STUCKI, IF YOU COULD BRING UP  
14 MR. FOX'S DECLARATION ON PAGE 3 AND HIGHLIGHT PARAGRAPH 9,  
15 OR BLOW UP PARAGRAPH 9.

16 IN PARAGRAPH 9 YOU MENTION THAT THERE IS AN  
17 APPLICATION, OR AN ISSUED PATENT THAT YOU ATTACH AS  
18 EXHIBIT C; CORRECT?

19 A. OKAY.

20 Q. THAT RELATED TO AGRICULTURAL EQUIPMENT; RIGHT?

21 A. YES.

22 Q. AND THEN YOU ALSO MENTIONED ANOTHER ONE THAT HAS TO  
23 DO WITH A FRONT-END LOADER, BUT HASN'T BEEN PUBLISHED?

24 A. YEAH, I CAN'T TALK ABOUT THAT.

25 Q. OKAY. ARE THESE THE ONLY TWO PATENT APPLICATIONS

1 THAT YOU'VE WORKED ON THAT DEAL WITH TRACTORS, FARM  
2 IMPLEMENTS?

3 A. NO. I THINK ONE, ANOTHER ONE ISSUED YESTERDAY OR  
4 THE DAY BEFORE MAYBE. I JUST GOT AN ISSUE NOTICE CAME  
5 OUT. THERE'S BEEN SEVERAL OTHERS, AND THERE'S BEEN SOME  
6 THAT -- BACK IN THE OLD DAYS TOO, YOU KNOW, WHEN THINGS  
7 DIDN'T ISSUE UNLESS THEY ISSUED, THEY DIDN'T PUBLISH  
8 PREPUBLICATION STUFF.

9 Q. OKAY, BUT MY QUESTION IS THE ONE THAT, THE ONE THAT  
10 IS NOT YET PUBLIC AND THE ONE YOU ATTACH AS EXHIBIT C IN  
11 THIS DECLARATION, ARE THESE THE ONLY TWO THAT YOU, PATENT  
12 APPLICATIONS --

13 A. NO.

14 Q. -- YOU'VE SUBMITTED ON TRACTORS OR FARM EQUIPMENT?

15 A. NO.

16 Q. OKAY. IN PARAGRAPH 17, WHICH IS ON PAGE 5 --  
17 MS. STUCKI, COULD YOU BLOW UP PARAGRAPH 17. YOU INDICATE  
18 IN PARAGRAPH 17 THAT YOU'VE BEEN PERUSING THE MARKET FOR  
19 YEARS FOR BETTER WAYS TO HANDLE CUTTING THE DIKE AROUND  
20 YOUR POND; RIGHT?

21 A. CORRECT.

22 Q. SO YOU'VE BEEN SEARCHING FOR A BETTER BRUSH CUTTER  
23 FOR YEARS?

24 A. YES.

25 Q. OKAY.

1 A. WELL, I'VE BEEN SEARCHING JUST EVERYTHING FOR  
2 EQUIPMENT. IT'S A BIG INVESTMENT. YOU KNOW, I STILL  
3 HAVEN'T DECIDED EXACTLY WHAT I'LL BUY, BUT I'M  
4 RESEARCHING, AND IT'S, IT'S -- MY WIFE WOULD SAY I HAVE AN  
5 OBSESSION. I'M MADE FUN OF QUITE FREQUENTLY FOR THIS.  
6 YEAH, I'VE LOOKED A LOT.

7 Q. IT'S NOT UNUSUAL FOR FARMERS TO DO A LOT OF RESEARCH  
8 BEFORE THEY MAKE AN INVESTMENT IN THAT KIND OF EQUIPMENT;  
9 RIGHT?

10 A. I WOULDN'T THINK SO, NO, BECAUSE I TALK ABOUT THAT A  
11 LOT, YEAH.

12 Q. AS A CONSUMER OF FARMING EQUIPMENT, THAT'S SOMETHING  
13 YOU'RE GOING TO PAY A LOT OF ATTENTION TO; RIGHT?

14 A. YEAH.

15 Q. NOW, IN YOUR DECLARATION YOU CLAIM THAT YOU'RE A  
16 PERSON OF ORDINARY SKILL IN THE ART --

17 A. YES, SIR.

18 Q. -- RIGHT? YOU DON'T REALLY GIVE A DEFINITION OF A  
19 PERSON OF ORDINARY SKILL IN THE ART; DO YOU?

20 A. YEAH, I THINK I DID FOR THIS.

21 Q. WELL, YOU SAY THAT YOU QUALIFIED AND THEN LISTED  
22 YOUR QUALIFICATIONS, SO ARE YOU JUST DEFINING YOURSELF AS  
23 THE STANDARD FOR A PERSON OF ORDINARY SKILL IN THE ART  
24 WITH RESPECT TO THIS PATENT?

25 A. I THINK LOOK AT THE PARAGRAPH PAST THAT -- LET ME

1 SAY I DON'T RECALL EXACTLY; BUT, IN ANY EVENT, IT WOULD  
2 BE -- IT DEPENDS ON THE TECHNOLOGY WHO A PERSON OF  
3 ORDINARY SKILL IS, YOU KNOW THAT; AND IT'S THE WORD  
4 "ORDINARY". IT'S NOT A HIGH LEVEL IN -- IT'S NOT AN  
5 INVENTOR. AN INVENTOR IS A HIGHER LEVEL THAN A PERSON OF  
6 ORDINARY SKILL IN THE ART.

7 Q. AND YOU WOULD AGREE THAT THAT'S A TERM OF ART IN  
8 PATENT LAW, PERSON OF ORDINARY SKILL IN THE ART; RIGHT?

9 A. IT'S IN THE STATUTE.

10 Q. AND THAT'S SOMETHING FOR THE COURT TO DECIDE WHAT IS  
11 A PERSON OF ORDINARY SKILL IN THE ART?

12 A. THAT'S A FACT FINDING.

13 Q. IF THE COURT OR A JURY WERE TO DETERMINE THAT YOU  
14 DID NOT QUALIFY FOR WHAT THEY BELIEVE IS THE APPROPRIATE  
15 PERSON OF ORDINARY SKILL IN THE ART, THEN YOUR OPINIONS  
16 WOULD NOT BE PERTINENT TO THE QUESTIONS OF OBVIOUSNESS OR  
17 CLAIM CONSTRUCTION; CORRECT?

18 A. IN -- I DON'T THINK ALL ASPECTS WOULD NOT BE  
19 RELEVANT IN TERMS OF WHAT I WOULD SAY AN ORDINARY PERSON  
20 OF SKILL, IF I'M NOT THAT; BUT I THINK MY OPINIONS OF  
21 PRIOR ART AND WHAT THEY SHOW ARE RELEVANT. I MEAN, YOU  
22 SEE, I TAKE -- I'M, I'M NOT A FULL TIME FARMER, BUT I LOOK  
23 AT STUFF LIKE -- I MEAN, MY MIND -- YOUR MIND, YOU'RE A  
24 PATENT ATTORNEY, YOUR MIND IS TRAINED. THE WAY I WORK, I  
25 TEAR THINGS APART, SIMPLE MECHANICAL THINGS. MY ENGINEER-

1     ING BACKGROUND, IT'S A B.E., NOT A B.S., THERE'S A  
2     DIFFERENCE.

3     Q.     YES, I TOTALLY UNDERSTAND.

4     A.     YEAH.

5     Q.     MY QUESTION WAS SIMPLY THAT IF IT TURNS OUT THAT THE  
6     COURT OR A JURY WERE TO DETERMINE THAT YOU DIDN'T FIT  
7     THEIR DEFINITION OF PERSON OF ORDINARY SKILL IN THE ART  
8     AND ANY INVALIDITY QUESTIONS THAT HAVE TO BE DRAWN FROM  
9     THE PERSPECTIVE OF A PERSON OF ORDINARY SKILL IN THE ART,  
10    THOSE WOULD BE QUESTIONS THAT YOU WOULD NOT BE QUALIFIED  
11    TO ANSWER; CORRECT?

12    A.     I DON'T KNOW; BUT, YOU KNOW, I THINK THE QUESTION IS  
13    FOR THE COURT TO DECIDE IF I AM OR NOT --

14    Q.     OKAY.

15    A.     -- AND THEN TREAT IT AS THEY TREAT IT.

16    Q.     YOU TALK ABOUT ANTICIPATION, AND YOUR ANTICIPATION  
17    OPINION RESTS SOLELY ON THE SEPTEMBER 2017 PROTOTYPE;  
18    CORRECT?

19    A.     YEAH, I BELIEVE THAT'S RIGHT. IT HAS EVERY SINGLE  
20    ELEMENT IN ONE REFERENCE.

21    Q.     OKAY, AND THE ANTICIPATION LAW DOESN'T REQUIRE ONLY  
22    THAT YOU FIND EVERY ELEMENT IN A SINGLE REFERENCE, YOU  
23    ALSO HAVE TO FIND THOSE ELEMENTS ARRANGED AS STATED IN THE  
24    CLAIM; CORRECT?

25    A.     CORRECT, YES.

1 Q. OKAY. AND SO IT'S NOT ENOUGH TO JUST SAY THERE'S  
2 LOCKS AND THERE'S A CUTTING DECK AND THERE'S AN ARM,  
3 YOU'VE GOT TO SHOW THAT THE LOCKS ARE LOCATED WHERE THE  
4 CLAIM SAYS THEY'RE LOCATED AND THAT THE ORIENTATIONS ARE  
5 THE SAME; CORRECT?

6 A. IT DEPENDS WHAT THE CLAIM SAYS.

7 Q. OKAY. PERFECT.

8 IF WE GO TO PAGE 6 OF HIS DECLARATION,  
9 MS. STUCKI, PARAGRAPH 21.

10 IN PARAGRAPH 21 YOU MENTION A PATENT, THIS '935  
11 PATENT, DO YOU SEE THAT?

12 A. YES, YES.

13 Q. YOU DON'T CLAIM THAT THAT ANTICIPATES; RIGHT?

14 A. NO, IT'S AN OBVIOUS REFERENCE, IT'S A 103  
15 REFERENCE.

16 Q. WELL, IT'S A REFERENCE THAT YOU DON'T CLAIM THAT  
17 THIS ANTICIPATES THE INVENTION; CORRECT?

18 A. I DON'T THINK SO. I DON'T HAVE ALL THE CLAIM  
19 ELEMENTS IN MY HEAD RIGHT THIS SECOND, BUT I DON'T THINK  
20 THAT -- AND WE'RE TALKING ABOUT THE BROADEST CLAIM HERE,  
21 SAY CLAIM 1, I THINK IT REQUIRES A MOVEMENT AND, ON -- OF  
22 THE ONE END OF THE ARM, I THINK. I DON'T KNOW, THE  
23 REFERENCE SHOWS WHAT IT SHOWS.

24 Q. OKAY. WELL, MAYBE I CAN SHORT CIRCUIT THIS. IN  
25 YOUR DECLARATION THE ONLY PRIOR ART REFERENCE THAT YOU

1 CLAIM COULD ANTICIPATE ANY CLAIMS IN LANE SHARK'S PATENT  
2 WOULD BE THE JANUARY 2017 PROTOTYPE?

3 A. I DON'T KNOW ABOUT COULD, BUT DID I -- THE JANUARY  
4 2017 IN MY OPINION DOES, YES.

5 Q. OKAY. NOW, IF YOU GO TO PAGE 21, MS. STUCKI, OF HIS  
6 DECLARATION AND BLOW UP PARAGRAPH 60 WITH THE HEADING  
7 ABOVE IT. THERE'S A SECTION IN YOUR DECLARATION WHERE YOU  
8 SAY THIS IS THE STATEMENT OF YOUR OPINIONS; CORRECT?

9 A. THAT'S FROM MY DECLARATION, OKAY. YEAH.

10 Q. AND SO AFTER YOU'VE DONE YOUR ANALYSIS UNDER  
11 STATEMENT OF YOUR OPINIONS IN PARAGRAPH 60, YOU DON'T  
12 STATE IN YOUR OPINION THAT THE JANUARY 2017 UNIT INCLUDES  
13 ALL OF THE FEATURES OF ANY CLAIM IN THE PATENT; CORRECT?

14 A. WELL, IT'S A BROAD, IT'S A BROAD STATEMENT THAT --  
15 THAT'S NOT A CLAIM COMPARISON, BUT IT'S GOT -- IT SAYS  
16 WHAT IT SAYS, I MEAN.

17 Q. BUT IT'S A STATEMENT OF YOUR OPINION, DO YOU  
18 DISAGREE, UNDER STATEMENT OF OPINIONS AFTER ALL OF YOUR  
19 ANALYSIS IN PARAGRAPH 60?

20 A. WELL, I THINK IT'S TRUE, I THINK IT'S A TRUE  
21 STATEMENT, BUT IT'S NOT THE ONLY -- MAY NOT BE THE ONLY  
22 CONCLUSION TO DRAW; BUT, YEAH, THAT'S HOW I TALK.

23 Q. YOU DON'T STATE AN ANTICIPATION OPINION IN PARAGRAPH  
24 60; DO YOU?

25 A. I DON'T KNOW IF I NEEDED TO THERE; BUT, NO, I

1 DON'T.

2 Q. OKAY. WHERE IN YOUR DECLARATION DID YOU STATE AN  
3 ANTICIPATION OPINION?

4 A. I DON'T RECALL.

5 Q. YOU DON'T RECALL. DID YOU PREPARE THIS DECLARATION?

6 A. YES, SIR.

7 Q. ALL BY -- JUST YOURSELF. DO YOU KNOW WHERE YOU  
8 STATED AN ANTICIPATION --

9 A. WE CAN LOOK THROUGH IT. I DON'T KNOW IF I USED THE  
10 WORD "ANTICIPATION".

11 Q. WELL, YOU'VE BEEN A PATENT ATTORNEY FOR 30 YEARS,  
12 DON'T YOU THINK YOU WOULD HAVE USED ANTICIPATION IF YOU  
13 WERE OFFERING ANTICIPATION?

14 A. NOT NECESSARILY. IT'S RELEVANT FROM THE STANDPOINT  
15 OF IT'S SO DARN CLOSE, AND I UNDERSTAND THAT YOU ALL WERE  
16 FIGHTING ABOUT DIFFERENT TERMS AND ALL. IN MY OPINION I  
17 THINK IT'S GOT EVERYTHING. IT'S AN ANTICIPATION  
18 REFERENCE.

19 Q. OKAY.

20 A. SO IF I NEED TO SUPPLEMENT OR WHATEVER; BUT, YOU  
21 KNOW, THE WAY I DO IT, I'LL SIT DOWN AND LOOK AT IT AND DO  
22 MY DRAWINGS AND DO THINGS LIKE THAT, SO. GO BACK AND LOOK  
23 AT WHAT I HAVE.

24 THE COURT: MR. MILLER, I HATE TO INTERRUPT.  
25 I'M HAVING A HARD TIME FOLLOWING THIS.

1 A. OKAY.

2 THE COURT: LET ME ASK A QUESTION.

3 A. YES, SIR.

4 THE COURT: WHAT IS YOUR OPINION WITH RESPECT  
5 TO ANTICIPATION?

6 A. WITH REGARD TO WHICH CLAIM, SIR?

7 THE COURT: WELL, WITH REGARD TO ANY OF THE  
8 CLAIMS.

9 A. WITH REGARD TO CLAIM 1, IT IS MY OPINION THAT THE  
10 JANUARY 2017, THAT PIECE, WE CAN CALL IT THAT --

11 THE COURT: I KNOW WHAT YOU'RE REFERRING TO.

12 A. -- ANTICIPATES THAT CLAIM AS IT'S WRITTEN.

13 THE COURT: AND IS THERE ANYTHING ELSE ON WHICH  
14 YOU BASE THAT OPINION, OTHER THAN THE 2017, JANUARY 2017  
15 UNIT?

16 A. NO, SIR.

17 THE COURT: OKAY, AND THAT GOES TO CLAIM 1.  
18 ANY ANTICIPATION OPINIONS WITH RESPECT TO ANY OF THE OTHER  
19 CLAIMS?

20 A. NO, SIR.

21 THE COURT: OKAY. ALL RIGHT. GO AHEAD,  
22 MR. MILLER.

23 MR. MILLER: THANK YOU, YOUR HONOR.

24 BY MR. MILLER:

25 Q. I WANT TO TALK ABOUT THE SPECIFIC LIMITATION OF

1 POSITIONS IN BETWEEN, MR. FOX.

2 A. IN CLAIM 1?

3 Q. YES.

4 AND, MS. STUCKI, IF YOU CAN GO TO PAGE 17 AND  
5 HIGHLIGHT PARAGRAPH 43.

6 IN PARAGRAPH 43 YOU SAY THAT YOU BELIEVE THAT  
7 THE JANUARY 2017 UNIT IS ADJUSTABLE FROM A HORIZONTAL TO A  
8 VERTICAL POSITION AND POSITIONS IN BETWEEN, WHICH IS A  
9 STATED CLAIM LIMITATION; CORRECT?

10 A. CORRECT.

11 Q. AND WHAT I DIDN'T SEE IN HERE IS AN EXPLANATION OF  
12 WHY YOU BELIEVE THAT HAPPENS. HAVE YOU SEEN A PICTURE OF  
13 THAT JANUARY 2017 PROTOTYPE BEING USED WHERE THE CUTTING  
14 DECK IS ADJUSTED TO A POSITION IN BETWEEN HORIZONTAL AND  
15 VERTICAL?

16 A. IT MOVES FROM ONE TO THE OTHER, WHERE DOES IT GO IN  
17 BETWEEN?

18 Q. SO IS IT YOUR POSITION THAT THE PHRASE "POSITIONS IN  
19 BETWEEN" AS STATED IN THE CLAIM OF THE PATENT SHOULD BE  
20 CONSTRUED TO MEAN, AS LONG AS THE DECK IS PASSING THROUGH  
21 ONE OF THOSE POSITIONS WHILE IT'S BEING ADJUSTED FROM  
22 HORIZONTAL TO VERTICAL, THEN IT'S SATISFIED?

23 A. IT'S PART OF THE ADJUSTMENT. LOOK AT THE ARM ON IT.  
24 YOU CAN PULL UP THE PICTURE IF YOU WANT; BUT, YOU KNOW,  
25 WALK HOW IT MOVES.

1 Q. OKAY. SO MY QUESTION IS THIS, DO YOU BELIEVE -- SO  
2 YOU BELIEVE IT'S NOT NECESSARY, TO SATISFY THE CLAIM  
3 LANGUAGE, IT'S NOT NECESSARY FOR THE CUTTING DECK TO BE  
4 ABLE TO OPERATE AND CUT BRUSH IN AN ANGLED POSITION  
5 BETWEEN HORIZONTAL AND VERTICAL?

6 A. WELL, THE WAY YOU WERE HOLDING YOUR HAND THERE IS  
7 KIND OF FUNNY TOO BECAUSE THAT'S BELOW HORIZONTAL, SO ARE  
8 YOU TALKING VERTICAL JUST UP, YOU KNOW, 90 DEGREE ANGLE  
9 THERE? I MEAN, HOW DO YOU WRITE PATENT CLAIMS? THAT'S,  
10 THIS IS TYPICALLY THE BROADER, THIS TO ME MEANS IT MOVES,  
11 THERE -- IT MOVES, IT DOES THIS.

12 Q. SO MY QUESTION, DO YOU BELIEVE THAT YOU -- IN ORDER  
13 TO SATISFY THE PATENT CLAIM, YOUR OPINION OF THIS CLAIM  
14 LANGUAGE IS THAT AS LONG AS IT MOVES BETWEEN ON ITS WAY,  
15 IT DOESN'T HAVE TO BE ABLE TO LOCK IN PLACE AT THIS ANGLE  
16 AND CUT BRUSH --

17 A. CORRECT.

18 Q. -- TO SATISFY THE CLAIM?

19 A. YES, SIR.

20 Q. THAT'S YOUR POSITION?

21 A. YES, SIR.

22 Q. AND YOU DIDN'T PROVIDE ANY CLAIM CONSTRUCTION  
23 ANALYSIS OR OPINION IN YOUR DECLARATION; CORRECT?

24 A. THROUGH THE CHART; BUT THAT'S JUST THE PLAIN  
25 ORDINARY MEANING OF THE TERMINOLOGY, I DON'T SEE THE WORD

1 "LOCK" ANYWHERE IN THAT.

2 Q. YOU UNDERSTAND CLAIMS ARE CONSTRUED IN THE CONTEXT  
3 OF THE SPECIFICATION; CORRECT?

4 A. YES.

5 Q. OKAY.

6 A. IN THE ORDINARY MEANING.

7 Q. AND DOES THE SPECIFICATION INDICATE THAT THE PURPOSE  
8 OF THIS INVENTION IS TO ENABLE A BRUSH CUTTER TO ACTUALLY  
9 CUT BRUSH AT AN ANGLE BETWEEN HORIZONTAL AND VERTICAL?

10 A. THE PATENT DESCRIBES THIS, SHOWS THIS ARM. THERE'S  
11 A LOT OF THINGS NOT, PER SE, DESCRIBED AND YOU HAVE TO  
12 LOOK AT THE DRAWINGS, BUT IT'S -- YOU LOOK AT HOW THE  
13 DIFFERENT DRAWINGS AND HOW THE ARM MOVES.

14 Q. MY QUESTION IS DIFFERENT, MR. FOX.

15 A. ARE WE TALKING ABOUT THE PATENT OR THE 2017 --

16 Q. I'M TALKING ABOUT THE PATENT NOW.

17 A. -- GOING BACK AND FORTH. OH, IT'S NOT IN THE  
18 PATENT, THE JANUARY -- I MEAN, WE'RE LOOKING AT THE  
19 BROCHURE; RIGHT?

20 Q. OKAY. LET ME FOCUS YOU ON WHAT MY QUESTION IS.

21 A. OH, OKAY.

22 Q. MY QUESTION WAS DOES THE '364 PATENT INDICATE THAT  
23 THE PURPOSE OF THE INVENTION IS TO ENABLE A BRUSH CUTTER  
24 TO CUT IN AN ANGLED ORIENTATION BETWEEN HORIZONTAL AND  
25 VERTICAL?

1 A. IF YOU CAN POINT ME TO IT, BUT IT DESCRIBES MOVING  
2 THIS ARM WITH THIS, ALONG THE RADIAL THING, AND IT  
3 ROTATES; AND, YEAH, I MEAN, IF YOU'RE GOING TO CUT WITH A  
4 BRUSH CUTTER AT SOME POINT.

5 MR. MILLER: MS. STUCKI, WILL YOU PULL UP THE  
6 PATENT AND GO TO PAGE 8 OF THE PATENT, AND THEN IF YOU  
7 COULD HIGHLIGHT THE BACKGROUND OF THE INVENTION SECTION.

8 Q. OKAY. YOU SEE THERE UNDER BACKGROUND OF THE  
9 INVENTION STARTING AT ABOUT LINE 35, YOU CAN SEE A  
10 SENTENCE THAT SAYS, NO KNOWN CUTTING DEVICES INCLUDE THE  
11 ABILITY TO MECHANICALLY ROTATE THE CUTTING DEVICE FOR  
12 CUTTING AT AN ANGLE. DO YOU SEE THAT?

13 A. YEAH.

14 Q. AND IF YOU GO TO THE BOTTOM OF THAT PARAGRAPH, IT  
15 ALSO INDICATES -- THAT, THAT SECOND PARAGRAPH IN THIS  
16 SECTION IS A STATEMENT OF WHAT THE INVENTOR THOUGHT THERE  
17 WAS A NEED FOR IN THE INDUSTRY, AND ONE OF THOSE NEEDS WAS  
18 A CUTTING DECK THAT'S MECHANICALLY ROTATABLE FOR USE FROM  
19 A HORIZONTAL TO VERTICAL AND POSITIONS IN BETWEEN, DO YOU  
20 SEE THAT?

21 A. YEAH.

22 Q. SO IN THE PATENT ITSELF IT EXPLAINS THAT THE NEED  
23 IT'S TRYING TO FILL IN THE ART IS THE ABILITY TO CUT BRUSH  
24 AT AN ANGLE IN BETWEEN HORIZONTAL AND VERTICAL; CORRECT?

25 AND THEN IN THE FINAL PARAGRAPH OF THE --

1 THE COURT: MR. FOX, YOU NEED TO VERBALIZE AN  
2 ANSWER, PLEASE.

3 A. OH, I APOLOGIZE.

4 THE COURT: I SAW YOU SHAKE YOUR HEAD BUT THE  
5 COURT REPORTER DIDN'T SEE THAT.

6 A. YES, SIR.

7 MR. MILLER: THANK YOU. SORRY, YOUR HONOR, I  
8 SHOULD HAVE CAUGHT THAT TOO.

9 Q. THAT FINAL PARAGRAPH INDICATES WHAT THE OBJECTS OF  
10 THE INVENTION ARE, AND THAT'S A WAY PATENT ATTORNEYS WRITE  
11 THE PURPOSE OF THE INVENTION; RIGHT?

12 A. RIGHT.

13 Q. ONE OF THOSE PURPOSES AT THE END OF THAT PARAGRAPH  
14 IS TO MAKE SURE THE CUTTING DECK IS ROTATABLE SUCH THAT  
15 CUTTING AT AN ANGLE FROM HORIZONTAL TO VERTICAL AND  
16 POSITIONS IN BETWEEN IS PROVIDED; CORRECT?

17 A. RIGHT. THAT GIVES CONTEXT HERE IN UNDERSTANDING THE  
18 SPECIFICATION.

19 Q. OKAY, AND THAT CONTEXT AND SPECIFICATION IS  
20 IMPORTANT IN CONSTRUING THE MEANING OF CLAIM TERMS;  
21 RIGHT?

22 A. IT'S USED, BUT YOU DON'T IMPORT THOSE TERMS INTO IT.  
23 THE CLAIMS SAY WHAT THEY SAY AND YOU READ IT.

24 Q. SURE, BUT IT'S NECESSARY -- YOU CAN'T INTERPRET  
25 CLAIMS OUTSIDE THE CONTEXT OF SPECIFICATION, ISN'T THAT

1 THE LAW?

2 A. YOU HAVE TO READ THE PATENT SPECIFICATION.

3 Q. OKAY. THANK YOU. NOW, IF WE GO BACK TO YOUR  
4 STATEMENT OF OPINIONS ON -- WE TALKED ABOUT ANTICIPATION,  
5 YOU'VE MADE IT CLEAR THAT YOUR ANTICIPATION OPINION IS  
6 BASED ON THE JANUARY 2017 PROTOTYPE.

7 A. SO FAR, YES.

8 Q. YOUR OBVIOUSNESS OPINION IS BASED ON BEGINNING WITH  
9 THE 2017 PROTOTYPE, AND IN YOUR OPINION IT WOULD HAVE BEEN  
10 OBVIOUS TO MAKE CHANGES TO THAT IN ORDER TO ACHIEVE THE  
11 INVENTION IF YOU COMBINE IT WITH OTHER REFERENCES;  
12 CORRECT?

13 A. YES.

14 Q. OKAY. SO THE JANUARY 2017 PROTOTYPE FOR YOUR  
15 INVALIDITY OPINION IS THAT HAS TO QUALIFY AS PRIOR ART;  
16 CORRECT?

17 A. YES, THAT'S ONE OF THE ASSUMPTIONS.

18 Q. AND YOU'RE, YOU'RE NOT, YOU'RE NOT GIVING AN OPINION  
19 OF WHETHER IT IS OR IS NOT PRIOR ART, CORRECT, YOU'RE JUST  
20 ASSUMING IT IS?

21 A. CORRECT; AND I'LL CUT TO THE CHASE, THE DUERWOOD  
22 2016 AS WELL.

23 Q. OKAY.

24 A. BOTH OF THOSE I HAVE TO ASSUME ARE PRIOR ART.

25 Q. BUT IF THE JANUARY 2017 PROTOTYPE IS NOT PRIOR ART,

1 EVEN WITH THE DUERWOOD 2016, YOUR OBVIOUSNESS AND  
2 ANTICIPATION OPINIONS FALL; CORRECT?

3 A. NO.

4 Q. YOU JUST SAID THAT FOR YOUR OPINIONS --

5 A. OH, ANTICIPATION, BUT OBVIOUSNESS. YOU LUMPED THEM  
6 TOGETHER.

7 Q. OKAY, BUT YOUR OBVIOUSNESS OPINION RESTS ON THE  
8 JANUARY 2017 PROTOTYPE AND THEN COMBINING IT WITH THE  
9 DUERWOOD 2016 TO FILL IN ANY GAPS?

10 A. ON ONE BASIS, BUT I HAVE SEVERAL OTHERS.

11 Q. WHERE HAVE YOU STATED THE SEVERAL OTHERS IN YOUR  
12 DECLARATION?

13 A. WELL, THERE'S THE DUERWOOD 2016 WITH THE SWISHER  
14 MOWER AND THE OTHER LOCK THINGS THAT ARE IN THERE. IT'S  
15 ALL IN THERE. THERE'S ALSO THAT PATENT YOU PULLED UP THAT  
16 HAD, THAT YOU ASKED ME DOES THIS ANTICIPATE, YOU KNOW,  
17 THAT SHOWS THE L-SHAPED ARM WITH THE PIVOTING MOWER ON THE  
18 END OF IT, THAT TOO EASILY COMBINED WITH THE SWISHER AND  
19 THE LOCKS. THESE ARE OBVIOUSNESS.

20 Q. THIS IS ALL NEWS TO ME, MR. FOX. I'M WONDERING  
21 WHERE IN YOUR DECLARATION OR EVEN THE DEFENDANTS' BRIEFING  
22 THERE'S BEEN AN OBVIOUSNESS DEFENSE RAISED THAT DOES NOT  
23 START WITH THE JANUARY 2017 PROTOTYPE AND COMBINE IT WITH  
24 EITHER THE SWISHER OR THE DUERWOOD 2016?

25 A. IT'S --

1 Q. MY UNDERSTANDING IS THAT'S THE OBVIOUSNESS CLAIM.

2 A. IF THEY'RE ALL PRIOR ART, THERE'S MULTIPLE BASIS FOR  
3 MAKING, PUTTING THEM TOGETHER. THE PRIMARY ONE RESTS WITH  
4 THE JANUARY 2017.

5 Q. OKAY, AND THAT'S THE ONE YOU INCLUDED EXPRESSLY IN  
6 YOUR DECLARATION, OKAY. AND THESE OTHER ONES THAT YOU SAY  
7 THERE'S MULTIPLE --

8 A. YES, SIR, I'M SORRY.

9 Q. OKAY. THAT'S RIGHT. LET'S STATE THAT QUESTION  
10 AGAIN. THE ONE THAT'S BASED ON THE JANUARY 2017 PROTOTYPE  
11 IS THE ONE YOU EXPRESSLY PUT IN YOUR DECLARATION; CORRECT?

12 A. IT'S -- MY DECLARATION SAYS WHAT IT SAYS, I CAN READ  
13 IT TO YOU, I DON'T -- I'LL HAVE TO LOOK BACK AT IT, BUT  
14 IT'S THE PRIMARY ONE.

15 Q. DID YOU PUT ALL OF THESE OTHER ALTERNATIVE  
16 COMBINATIONS THAT YOU'RE NOW SAYING IN YOUR --

17 A. YEAH, THEY'RE MENTIONED.

18 Q. IN HERE, IN YOUR DECLARATION?

19 A. YES, SIR.

20 Q. YOU ACTUALLY IDENTIFIED HOW TO COMBINE PRIOR ART  
21 REFERENCES WITHOUT THE 2017 PROTOTYPE TO ACHIEVE AN  
22 OBVIOUSNESS CONCLUSION?

23 A. I BELIEVE SO. IF YOU WOULD HAVE SAID IT DIFFERENTLY  
24 MAYBE, YOU WOULD UNDERSTAND WHAT I SAID, YOU KNOW. WE MAY  
25 NOT SAY IT THE EXACT SAME WAY, BUT THEY'RE, THEY'RE

1 DEFINITELY IN THERE.

2 Q. OKAY, SO YOU -- MY UNDERSTANDING IS YOUR DECLARATION  
3 OFFERS AN OPINION OF OBVIOUSNESS THAT'S BASED ON THE  
4 JANUARY 2017 PROTOTYPE COMBINED WITH OTHER REFERENCES.

5 A. ANTICIPATION FOR CLAIM 1.

6 Q. OKAY.

7 A. AND THEN YOU HAVE ADDITIONAL CLAIMS. FOR EXAMPLE,  
8 THE ROTATING PART IS I THINK CLAIM 6, 7 -- CLAIM 6 AND --  
9 WELL, THEY'RE INDEPENDENT CLAIMS.

10 Q. HOW ABOUT I ASK IT THIS WAY, MR. FOX. YOU DON'T  
11 OFFER AN OBVIOUSNESS OPINION IN YOUR DECLARATION THAT DOES  
12 NOT RELY ON THE JANUARY 2017 PROTOTYPE AS ONE OF THE  
13 REFERENCES?

14 A. NO, I DON'T THINK THAT'S RIGHT; BUT IT -- I CAN LOOK  
15 AT IT, IF YOU'D LIKE, BUT IT SAYS WHAT IT SAYS; BUT I CAN  
16 TELL YOU WHAT THE ART IS AND HOW THEY GO TOGETHER.

17 Q. I AGREE IT SAYS WHAT IT SAYS. YOU DO HAVE A  
18 STATEMENT OF OPINIONS IN PARAGRAPH 60 AND 61; RIGHT? WHAT  
19 WAS YOUR PURPOSE FOR THOSE TWO PARAGRAPHS?

20 A. OKAY. WHERE IS IT?

21 Q. IN YOUR REPORT.

22 A. I'M NOT SEEING IT.

23 Q. STATEMENT OF OPINIONS.

24 A. I'M NOT SEEING ANYTHING ON THE SCREEN.

25 Q. ON PAGE 21. WHAT WAS YOUR PURPOSE FOR THOSE TWO

1 PARAGRAPHS?

2 A. TO HAMMER HOME THE FACT THAT THE JANUARY 2017 IS, IS  
3 VERY IMPORTANT TO THE EVALUATION OF THIS CASE.

4 Q. OKAY, SO LET'S TALK ABOUT THE JANUARY 2017  
5 PROTOTYPE.

6 A. OKAY.

7 Q. AGAIN, YOU'RE JUST ASSUMING IT'S PRIOR ART;  
8 CORRECT?

9 A. CORRECT.

10 Q. OKAY. SO IF IT'S NOT PRIOR ART, THEN ANY OPINIONS  
11 YOU OFFER THAT RELY ON THAT TO BE PRIOR ART WOULD FALL?

12 A. YOU WOULDN'T USE IT AS A REFERENCE.

13 Q. OKAY. YOU ALSO OFFER AN OPINION ABOUT INVENTOR-  
14 SHIP, DUERWOOD WILLIS' STATUS AS A COINVENTOR.

15 A. OH, I DIDN'T ESTABLISH HIM AS -- THAT'S BASED ON HIS  
16 DECLARATION.

17 Q. OKAY. SO YOU JUST READ HIS DECLARATION AND SAID --

18 A. I DON'T KNOW DUERWOOD.

19 Q. DID YOU EVER SPEAK TO HIM PERSONALLY?

20 A. NO.

21 Q. SO YOU READ MR. WILLIS' DECLARATION AND EFFECTIVELY  
22 SAID, ASSUMING WHAT HE SAYS IS TRUE, IN YOUR OPINION HE'D  
23 BE A COINVENTOR?

24 A. YES.

25 Q. AND, AND THE LAW ON INVENTORSHIP, YOU AGREE WITH ME

1 THAT TO BE AN INVENTOR, YOU HAVE TO CONTRIBUTE TO THE  
2 CONCEPTION OF THE INVENTION IN A SUBSTANTIAL WAY; CORRECT?

3 A. WELL, YOU LOOK AT THE CLAIMS ULTIMATELY.

4 Q. SURE, BUT THERE CAN BE ELEMENTS IN THE CLAIM THAT  
5 ARE BASICALLY PRIOR ART ELEMENTS THAT ARE NOT THE FOCUS OF  
6 THE INVENTION; CORRECT?

7 A. IN THIS CASE ALL OF THE ELEMENTS ARE PRIOR ART  
8 ELEMENTS.

9 Q. WELL, THEN WE HAVE TO GO DO SOME RESEARCH ON WHO  
10 INVENTED AN SSQA PLATE BECAUSE THOSE HAVE BEEN IN THE  
11 PRIOR ART FOR A LONG TIME; CORRECT?

12 A. YEAH. NO, I MEAN, THAT'S NOT -- YOU KNOW, WHO  
13 WORKED WITH THIS TO PUT THIS TOGETHER, THE WHOLE, AND THEN  
14 YOU LOOK AT THE, EACH CLAIM.

15 Q. SO IS IT YOUR UNDERSTANDING THAT AS LONG AS YOU'RE  
16 PART OF THE TEAM THAT DEVELOPED THE ULTIMATE INVENTION,  
17 YOU'RE AUTOMATICALLY A COINVENTOR?

18 A. NOT A TEAM. YOU KNOW, WHAT'S A TEAM, SOMEONE WHO  
19 GOES AND GETS YOU PAINT TO PAINT IT, THAT'S NOT A PERSON  
20 WHO IS AN INVENTOR, UNLESS THAT'S SIGNIFICANT TO THE  
21 INVENTION.

22 Q. SO AS YOU STATED EARLIER, YOUR OPINION REGARDING  
23 INVENTORSHIP RELIES ON YOUR UNDERSTANDING THAT YOU GET  
24 FROM MR. WILLIS' DECLARATION THAT HE HELPED CONCEIVE OF  
25 THE ARTICULATING ARM AND THE LOCKING SYSTEM?

1 A. YEAH, I DON'T KNOW MR. WILLIS.

2 Q. OKAY, BUT --

3 A. AND I HAVEN'T SPOKEN TO HIM, I'VE READ HIS  
4 DECLARATION.

5 Q. I UNDERSTAND; AND BASED ON THAT READING YOU WERE  
6 COMFORTABLE OFFERING AN OPINION THAT HE WOULD BE A  
7 COINVENTOR FOR HELPING CONCEIVE OF THE ARTICULATING ARM  
8 AND THE LOCKING MECHANISM?

9 A. HIS ARM, IT -- HE'S GOT A MOWER THAT DOES THAT.

10 Q. HE'S GOT A HINGED MOWER.

11 A. BUT HIS ARM DOES NOT ARTICULATE, BUT IT'S PART OF  
12 THE, THE MOVEMENT OF THE, OF THE --

13 Q. OKAY.

14 A. -- PUTTING -- YOU'RE BASICALLY PUTTING A MOWER TO  
15 CUT WHATEVER ANGLE YOU WANT TO CUT AND TO GO FROM  
16 HORIZONTAL OR VERTICAL TO HORIZONTAL.

17 Q. DID YOU READ ALL OF THE TEXT MESSAGES BETWEEN  
18 MR. WILLIS AND MR. ODOM?

19 A. I DON'T KNOW WHAT ALL OF THEM ARE IN -- IN WHERE?

20 Q. SO YOU READ MR. WILLIS' DECLARATION?

21 A. I'M UTILIZING WHAT IS MANIFESTED IN THE 2016  
22 DEVICE.

23 Q. OKAY. SO THAT DEVICE IS YOUR BASIS FOR SAYING HE  
24 SHOULD BE A COINVENTOR?

25 A. AND WHAT IT SHOWS.

1 Q. OKAY. DID YOU READ ANY OF MR. ODOM'S, TRAVIS ODOM'S  
2 DECLARATIONS?

3 A. YES.

4 Q. OKAY, AND YOU UNDERSTAND THAT MR. ODOM INDICATES  
5 THAT MR. WILLIS PLAYED NO ROLE IN THE CONCEPTION OF THE  
6 ARTICULATING ARM AND THE LOCKING MECHANISM?

7 A. I UNDERSTAND THAT THAT'S WHAT HE SAYS.

8 Q. ARE YOU CHOOSING TO BELIEVE MR. WILLIS OVER MR. ODOM  
9 FOR YOUR OPINION?

10 A. I DON'T KNOW WHO TO BELIEVE ON THAT, YOU KNOW,  
11 WHETHER -- I DON'T KNOW WHO TO BELIEVE. I'M LOOKING AT  
12 THE DEVICE AND WHAT IT DOES.

13 Q. SO YOUR OPINION FOR MR. WILLIS' CONTRIBUTION COMES  
14 FROM THAT DUERWOOD 2016 DEVICE?

15 A. IN CONJUNCTION. I'VE READ WHAT THE STORY LOOKS LIKE  
16 HERE, YOU'VE GOT PEOPLE WORKING TOGETHER AND HERE'S WHAT  
17 YOU COME UP WITH, HERE'S WHAT YOU STARTED WITH, AND I  
18 THINK THAT'S IMPORTANT TO WHEN YOU SEE HOW IT WORKS.

19 Q. IS WORKING TOGETHER ENOUGH TO BE A COINVENTOR UNDER  
20 PATENT LAWS?

21 A. IT CAN BE IF -- DEPENDING ON WHAT YOU'RE DOING. I  
22 CAN'T -- I DON'T KNOW --

23 Q. IS THAT ENOUGH?

24 A. -- ALL THE FACTS HERE. I'D BE SPECULATING ON THIS  
25 ONE TO KNOW EVERY FACT.

1 Q. OKAY. HAVE YOU SEEN, MY LAST QUESTION, HAVE YOU  
2 SEEN ANY IN YOUR REVIEW OF THE DECLARATIONS -- YOU  
3 UNDERSTAND AS A PATENT ATTORNEY THE LAW REQUIRES  
4 INDEPENDENT CORROBORATION FOR A COINVENTOR'S TESTIMONY FOR  
5 THEM TO BE QUALIFIED AS AN INVENTOR; CORRECT?

6 A. COINVENTORS CANNOT CORROBORATE ONE ANOTHER.

7 Q. CORRECT. I AGREE. SO -- AND ALSO MR. WILLIS CANNOT  
8 BE DEEMED AN INVENTOR BASED ON HIS SAY SO; CORRECT, UNDER  
9 THE LAW?

10 A. I THINK THERE'S A LOT OF FACTS HERE THAT NEED TO BE  
11 LOOKED AT.

12 Q. MY -- YOU'RE A PATENT ATTORNEY --

13 A. DOCUMENT -- WELL, THERE'S, THERE'S DOCUMENTATION.  
14 TEXTS ARE DOCUMENTATION.

15 Q. SURE. I UNDERSTAND.

16 A. SO WHEN YOU'RE JUST SAYING, SAY SO, THAT'S TWO  
17 PEOPLE, I DID, I DIDN'T, I DID, I DIDN'T. THAT'S NOT WHAT  
18 WE HAVE HERE. WE HAVE CORROBORATING EVIDENCE. YOU MAY  
19 SAY IT'S NOT CORROBORATING, THAT IT CORROBORATES SOMETHING  
20 ELSE, BUT IT'S DOCUMENTARY EVIDENCE THAT SUPPORTS THE  
21 DECLARANT'S STATEMENT.

22 Q. OKAY. UNDERSTOOD. IS PART OF YOUR OPINION COMING  
23 TO A CONCLUSION ON WHETHER MR. WILLIS HAS SUFFICIENTLY  
24 CORROBORATED HIS STATUS AS A COINVENTOR? DID YOU, DID YOU  
25 MAKE THAT FACTUAL DETERMINATION?

1 A. NO, I DO NOT -- THIS ISN'T LIKE AN INTERFERENCE  
2 PROCEEDING LIKE WE USED TO HAVE. THAT'S WHY WE'RE UNDER  
3 THE FIRST TO FILE SYSTEM THESE DAYS.

4 MR. MILLER: I HAVE NOTHING FURTHER, YOUR  
5 HONOR.

6 THE COURT: ALL RIGHT, MS. RUMFELT, YOU MAY  
7 QUESTION THE WITNESS.

8 REDIRECT EXAMINATION

9 BY MS. RUMFELT:

10 Q. GOOD AFTERNOON, MR. FOX.

11 A. HELLO.

12 Q. I WANT TO -- I'M GOING TO TRY TO SHORTCUT THIS AS  
13 MUCH AS I CAN BASED ON WHAT WAS DONE ON CROSS, BUT LET ME  
14 GO BACK A LITTLE BIT. LET'S START WITH YOUR EDUCATIONAL  
15 BACKGROUND. YOU REFERENCED A B.E. VERSUS A B.S., CAN YOU  
16 EXPLAIN WHY YOU THINK THAT THAT DISTINCTION MATTERS HERE?

17 A. WELL, A B.E. IS MORE OF A HANDS-ON APPLICATION  
18 DRIVEN EDUCATION AS OPPOSED TO JUST THEORETICAL, SO WE HAD  
19 LOTS OF LABS, HANDS-ON STUFF, MECHANICAL ENGINEERING  
20 CLASSES, DOING LABS, BUILDING STRUCTURES, THINGS LIKE  
21 THAT.

22 Q. IS THERE ANY OTHER TESTING OR QUALIFICATIONS THAT  
23 YOU UNDERWENT AS PART OF YOUR EDUCATIONAL BACKGROUND THAT  
24 ALSO RELATES TO ENGINEERING?

25 A. WHEN I WAS A SENIOR AT VANDERBILT, I TOOK THE EIT,

1 OR ENGINEERING IN TRAINING TEST, WHICH IS JUST AN  
2 ENGINEERING TEST. YOU TAKE IT, YOU PASS, FAIL; AND IF YOU  
3 PASS IT, THEN YOU'RE QUALIFIED TO START BEGINNING TRAINING  
4 TO BE -- WHEN YOU, YOU KNOW, WORKING OR HOWEVER THE  
5 PROCESS IS FOR BECOMING A PROFESSIONAL, LICENSED  
6 PROFESSIONAL ENGINEER; AND THAT'S -- TAKES SEVERAL YEARS  
7 OF WORKING IN A FIELD AND -- I DID NOT -- I PASSED THE  
8 EIT. I DID NOT PURSUE MY P.E. LATER.

9 Q. AND WHAT ARE THE MAJORITY OF THE PATENTS THAT YOU'VE  
10 PROSECUTED IN YOUR 30 YEARS EXPERIENCE, WHAT, WHAT FIELD  
11 HAVE YOU PRIMARILY BEEN PROSECUTING PATENTS IN?

12 A. PRIMARILY MECHANICAL, AND MOST OF THOSE INVOLVE --  
13 THE WAY I DRAFT PATENT APPLICATIONS IS VERY VISUAL, IT'S  
14 LIKE HIEROGLYPHICS IS HOW I WRITE THEM; AND GOOD DRAWINGS  
15 AND TELLING A STORY WITH THE DRAWINGS IS IMPORTANT TO ME,  
16 SO I PUT A LOT OF EMPHASIS ON THAT, AND IT ALSO ENABLES A  
17 LOWER COST PROCESS.

18 Q. LET'S TALK ABOUT EXPERIENCE THAT YOU BELIEVE  
19 QUALIFIES YOU TO OPINE ON FARMING EQUIPMENT AND RURAL  
20 LIFESTYLE EQUIPMENT. CAN YOU TELL THE COURT A LITTLE BIT  
21 ABOUT THAT EXPERIENCE?

22 A. YES. I'VE JUST OVER MY YEARS HAVE BEEN EXPOSED TO  
23 FARM EQUIPMENT, AND I WILL TELL YOU THAT NEITHER MY  
24 ENGINEERING BACKGROUND AND PATENT WORK AND SUCH IN AND OF  
25 ITSELF BY ITSELF OR THE FARMING ASPECTS, YOU KNOW,

1 INDEPENDENTLY WOULD BE WHAT I WOULD RELY ON. I'M KIND OF  
2 A UNIQUE MELD OF THOSE, AND I KNOW HOW TO LOOK AT  
3 SIMPLE -- THESE ARE SIMPLE MECHANICAL STRUCTURES, VERY  
4 SIMPLE, AND I CAN TELL YOU ABOUT THAT; BUT I CAN LOOK AT  
5 SIMPLE STRUCTURES, FIGURE OUT HOW THEY WORK AND HOW THEY  
6 GO TOGETHER; AND I'M FAMILIAR WITH BASIC SIMPLE FARM  
7 EQUIPMENT FROM MY EXPERIENCE ON MY FARM, TINKERING WITH  
8 THEM, TALKING WITH DAVID WHO DOES MY HAY AND ALL, HE HELPS  
9 ME. I HELPED HIM REPAIR A HAY BALER AND THINGS; AND I'VE  
10 JUST OVER THE YEARS I'VE HAD THE PLACE, YOU KNOW, KNOW HOW  
11 THESE THINGS WORK AND KEEP THEM GOING, BUT.

12 Q. YOU LIKE TO TINKER TOO; DON'T YOU?

13 A. YEAH. YES, I DO.

14 Q. AND HOW DOES THAT HELP YOU UNDERSTAND WHAT WE'RE  
15 TALKING ABOUT HERE TODAY?

16 A. WELL, YOU GET TO SEE HOW THINGS WORK. I MEAN,  
17 THAT'S ONE OF MY FAVORITE -- IF YOU ALL HAVE NEVER LOOKED  
18 UP HOW THINGS WORK, THOSE ARE GREAT BOOKS, AND I ALWAYS  
19 REFERENCE THINGS LIKE THAT, OLD MANUALS, AND SEE HOW  
20 THINGS GO TOGETHER AND HOW THEY WORK.

21 Q. BASED ON YOUR EXPERIENCE WHAT DOES THE TERM "A  
22 PERSON OF ORDINARY SKILL IN THE ART" MEAN TO YOU?

23 A. WELL, IT DEPENDS ON THE TECHNOLOGY WHO WOULD BE --  
24 AND IT'S A HYPOTHETICAL PERSON. IT'S -- BUT THAT'S HARD  
25 TO, TO COMPREHEND, BUT IT'S SOMEBODY OF ORDINARY SKILL

1 THAT IS NOT, NOT RISING TO THE INVENTOR LEVEL, NOT THIS  
2 IMMENSE LEVEL, BUT SOMEBODY WHO HAS AN ORDINARY WORKING  
3 KNOWLEDGE OF, IN THE CASE OF MECHANICAL STUFF WE'LL TALK  
4 ABOUT, MECHANICAL PROPERTY, HOW THINGS FIT TOGETHER, HOW  
5 THEY OPERATE; AND IN THIS CASE WE HAVE SIMPLE MECHANICAL  
6 STRUCTURES THAT ATTACH TO A VEHICLE LIKE A TRACTOR, AND I  
7 UNDERSTAND HOW THESE STRUCTURES GO TOGETHER AND HOW THEY  
8 ATTACH TO A TRACTOR.

9 Q. WHAT WOULD YOU SAY IN RESPONSE TO THE POSITION THAT  
10 I THINK YOU HEARD ON CROSS TODAY THAT SOMEBODY HAS TO BE  
11 WORKING IN THAT INDUSTRY TO BE A PERSON OF ORDINARY SKILL  
12 IN THE ART?

13 A. FOR THIS TECHNOLOGY, FOR THIS, YOU KNOW, LOOKING AT  
14 THIS INVENTION, THE CLAIMS, I WOULD DISAGREE. THERE ARE,  
15 YOU KNOW, DEPENDS ON THE TECHNOLOGY.

16 Q. IN THE WORK THAT YOU DO, DO YOU WORK WITH THE DESIGN  
17 TEAM AS PART OF HELPING THEM TO SUBMIT THEIR PATENT APPLI-  
18 CATIONS, ARE YOU PART OF THE DESIGN TEAM IN THAT REGARD?

19 A. IT DEPENDS ON THE CLIENT AND WHAT YOU CALL A DESIGN  
20 TEAM. A DESIGN TEAM COULD BE AN INDIVIDUAL INVENTOR, IT  
21 COULD BE A ROOM FULL OF PEOPLE, I WORK WITH BOTH DEPENDING  
22 ON THE CLIENT.

23 Q. AND THAT'S PART OF WHAT YOU DO AS PART OF YOUR WORK  
24 PROSECUTING PATENTS; CORRECT?

25 A. YES.

1 Q. DID YOU REVIEW THE PROSECUTION HISTORY FOR THIS  
2 PATENT THAT WE'RE TALKING ABOUT HERE TODAY?

3 A. I DID.

4 Q. IS THERE ANYTHING REMARKABLE TO YOU ABOUT THAT  
5 PROSECUTION HISTORY?

6 A. WELL, IT WAS FAST TRACKED, AND YOU PAY A FEE FOR  
7 THAT. IT WAS MICRO ENTITY, SO YOU'VE GOT A 75 PERCENT  
8 REDUCED FEE FOR THAT. THERE WAS MULTIPLE REJECTIONS. THE  
9 CLAIMS WERE AMENDED MULTIPLE TIMES, EACH TIME BEING  
10 NARROWED, THERE WERE ARGUMENTS MADE; AND ULTIMATELY THE  
11 CASE WAS ALLOWED AFTER, I THINK AFTER A FINAL AMENDMENT OR  
12 SOMETHING. "FINAL" IS JUST A TERM. IT DOESN'T REALLY  
13 MEAN FINAL. IT'S NOT THE END OF THINGS, THERE'S WAYS TO  
14 EXTEND THAT; BUT AFTER AN AMENDMENT WAS MADE ADDING SOME  
15 SUBJECT MATTER -- THE EXAMINER BASICALLY SAID, OKAY, ALL  
16 THESE CLAIMS ARE REJECTED, BUT CLAIMS WHATEVER HAVE SOME,  
17 HAVE ALLOWABLE SUBJECT MATTER; SO IF YOU -- BASICALLY IF  
18 YOU AMEND THE INDEPENDENT CLAIM TO INCLUDE THE SUBJECT  
19 MATTER OF THE ALLOWABLE CLAIM, I'LL GIVE YOU A PATENT  
20 ON -- I'LL ALLOW THAT CLAIM.

21 Q. AND WHAT WAS THAT, THAT FINAL OFFICE ACTION THAT YOU  
22 REFERENCED, WHAT WAS IT THAT THEY WERE ASKING THE PATENTEE  
23 TO INCORPORATE INTO THE INDEPENDENT CLAIM?

24 A. DEPENDENT CLAIM LANGUAGE THAT RELATED TO LIMITA-  
25 TIONS, OR STRUCTURE LIMITATIONS OF TOWER LOCKS AND LOCK

1 BRACKETS OR LOCK -- A BRACKET THAT LOCKS WITH THE TOWER  
2 LOCK.

3 AND ALL OF THE REFERENCES THAT WERE CITED BY,  
4 THAT WERE CONSIDERED BY THE PATENT OFFICE, THERE WEREN'T  
5 MANY, IF YOU LOOK AT THE FACE OF THE PATENT, THERE WERE  
6 TEN, MAYBE, YOU'LL HAVE TO LOOK AT IT, COUNT THEM, BUT  
7 EVERY SINGLE ONE OF THEM WAS FOUND, LOCATED, CITED --  
8 CITED DOESN'T MEAN NECESSARILY USED, BUT THEY WERE IN-  
9 CLUDED IN A NOTICE OF REFERENCE AS CITED BY THE EXAMINER.  
10 NONE OF THE ART CONSIDERED IN THIS PATENT APPLICATION WAS  
11 SUPPLIED TO THE PATENT OFFICE BY THE ATTORNEYS OR THE  
12 INVENTOR, BOTH WHO HAVE AN OBLIGATION OF DISCLOSING WHAT  
13 THEY KNOW ABOUT. YOU DON'T HAVE TO GO LOOK; BUT IF YOU  
14 KNOW ABOUT IT, YOU HAVE TO DISCLOSE IT IF IT'S RELEVANT.  
15 Q. SO JUST TO MAKE SURE THAT WE'RE UNDERSTANDING THIS,  
16 THE FINAL OFFICE ACTION, WHAT DO YOU CONSIDER TO BE THE  
17 IMPORT OF THE FACT THAT THAT, THAT DEPENDENT CLAIM WAS  
18 INCORPORATED INTO THE --

19 A. WELL, IF YOU LOOK AT THE HISTORY OF HOW THE CLAIMS  
20 WENT, THEY NARROWED, YOU KNOW; BUT WHEN YOU ADD LIMITATION  
21 TO A PATENT CLAIM, YOU'RE NARROWING IT, IT'S GOT TO  
22 REQUIRE MORE THINGS TO, TO BE INFRINGED, SO YOU'RE JUST  
23 ADDING LIMITATIONS OF WHAT'S INCLUDED. SO IN THIS CASE IT  
24 WAS A FAIRLY NARROW LIMITATION OF TOWER LOCKS AND THE LOCK  
25 BRACKETS AND WHAT THEY DO.

1 Q. JUST GOING BACK FOR A SECOND TO YOUR, YOUR DESIGN  
2 EXPERIENCE, DO YOU ASSIST YOUR CLIENTS IN DESIGNING AROUND  
3 PATENTS?

4 A. YES.

5 Q. IS THAT SOMETHING YOU DO ROUTINELY?

6 A. YES.

7 Q. SO IN THIS CASE HOW WOULD YOU JUST GENERALLY FOR THE  
8 COURT DESCRIBE WHAT YOU CONSIDER TO BE THE STATE OF THE  
9 ART BEFORE THE CLAIMED INVENTION?

10 A. THE STATE OF THE ART, WELL, THERE'S LOTS OF THINGS  
11 OUT THERE THAT WOULD DO WHAT I WANT TO DO, WE'RE NOT  
12 TALKING ABOUT THAT NECESSARILY, BUT DO THINGS LIKE CUT  
13 BRUSH AT HARD TO REACH ANGLES, PRIMARILY OFFSET. MY  
14 PARTICULAR -- WHERE I HAD RESEARCHED AND HAD BEEN FOR  
15 YEARS IS TO CUT MY POND DIKE PRIMARILY AND FENCE LINES,  
16 AND THE -- ONE OF THE LEADING THINGS THAT I'VE BEEN  
17 LOOKING AT WAS THE MIGHTY MIKE, AND IT'S JUST A SELF-  
18 CONTAINED MOWER THAT HAS AN ARM THAT PIVOTS FROM HERE TO  
19 UP, YOU KNOW, 180 DEGREES THERE, AND IT ALSO REACHES OUT,  
20 AND SO YOU CAN CUT ALONG A POND BANK THAT'S DOWN OR IF ONE  
21 IS, YOU KNOW, A DITCH IS UP LIKE THAT, YOU CAN DO ALL OF  
22 THAT AND UP, BACK AND FORTH; AND IT FITS, JUST HOOK UP TO  
23 A 3-POINT PTO ON A TRACTOR. IT'S GOT ITS OWN SELF-  
24 CONTAINED HYDRAULICS AND WEIGHTS AND ALL THAT STUFF, YOU  
25 JUST TAKE IT ON AND OFF; BUT IT'S -- YOU GOT TO LOOK --

1 YOU CAN'T JUST CONSIDER ME, I JUST CAN'T CONSIDER IT IN  
2 THAT CONTEXT. THERE'S LOTS OF STUFF. THERE'S BOOM  
3 MOWERS. THERE'S ALL -- YOU'VE GOT TO LOOK AT COST, YOU'VE  
4 GOT TO LOOK AT WHAT TRACTOR YOU HAVE. MOST OF THE ONES I  
5 WAS INTERESTED IN RELATE TO WHAT ARE CALLED COMPACT  
6 TRACTORS, 30 TO 50 HORSEPOWER, AND THAT'S PRIMARILY WHERE  
7 I'VE BEEN INTERESTED, AN OPEN CAB, SO. THERE'S SABRE  
8 SAMURAI, THERE'S JUST OFFSET MOWERS, THERE'S -- THEY'RE IN  
9 MY DECLARATION, SOME OF THE ONES I'VE LOOKED AT OVER  
10 TIME.

11 Q. SO LET ME ASK YOU, I THINK ON CROSS THE IMPLICATION  
12 WAS MADE THAT YOU'VE DONE A LOT OF RESEARCH FOR YOUR  
13 PARTICULAR NEEDS, AND YOU MAYBE HAVEN'T FOUND SOMETHING  
14 OUT THERE THAT SUITED THEM, IS THAT -- DOES THAT SUGGEST  
15 TO YOU THAT, DOES THAT CHANGE YOUR OPINION ABOUT THIS,  
16 THIS PRODUCT HERE TODAY AND ITS NOVELTY?

17 A. NO. YOU KNOW, IT'S HARD TIMES IN THE AGRICULTURAL,  
18 AS I UNDERSTAND IT, IN THE AGRICULTURAL IMPLEMENT WORLD.  
19 MARGINS AREN'T GREAT, I GUESS, AND, YOU KNOW, PEOPLE  
20 AREN'T BUYING; BUT, YOU KNOW, IT FLUCTUATES, I GUESS, WITH  
21 THE MONEY; BUT, YOU KNOW, SOME OF THIS IS WHAT'S OUT  
22 THERE, AND, AND THAT'S NOT JUST ALL THE PRIOR ART. YOU  
23 KNOW, PRIOR ART IS NOT JUST SOMETHING YOU CAN GO BUY, IT'S  
24 SOMETHING THAT WAS OUT THERE BEFORE THAT YOU USED TO COULD  
25 GO BUY. IT'S SOMETHING THAT'S BEEN WRITTEN ABOUT IN

1 "POPULAR MECHANICS" MAGAZINE WITH DRAWINGS. IT'S A PATENT  
2 THAT'S ISSUED OR BEEN PUBLISHED, A PUBLISHED APPLICATION  
3 THAT JUST HAS DRAWINGS, MAY HAVE NEVER SEEN THE LIGHT OF  
4 DAY, SO. AND IT'S NOT JUST IN THE UNITED STATES, IT'S ALL  
5 OVER THE WORLD, YOU KNOW, EVERY -- WHEREVER, WHEREVER  
6 PEOPLE ARE; AND THERE'S LOTS OF STUFF IN EUROPE I'VE  
7 LOOKED AT, BUT I DON'T THINK THEY SELL IT HERE, I HAVEN'T  
8 BEEN ABLE TO FIND IT, SO.

9 Q. SO LET ME FOCUS YOU ON THE PRIOR ART THAT YOU  
10 SPECIFICALLY CONSIDERED HERE FOR THIS ANALYSIS. WHAT,  
11 WHAT PRIOR ART DID YOU CONSIDER FOR PURPOSES OF WHAT WE'VE  
12 DEALT WITH TODAY?

13 A. I'VE CONSIDERED THREE -- TWO MAIN CATEGORIES OF  
14 PRIOR ART, AND THE TWO MAIN CATEGORIES ARE DEVICES THAT,  
15 ACTUAL DEVICES THAT EXISTED PRIOR TO THE FILING OF THE  
16 PROFESSIONAL APPLICATION AND THAT WERE KNOWN TO THE PEOPLE  
17 INVOLVED, AND THAT WOULD BE THE DUERWOOD 2016 DEVICE AND  
18 THE 2000 -- WHAT'S THE NAME OF THAT THING?

19 Q. IT'S WHAT WE'RE CALLING THE JANUARY 2017.

20 A. YEAH, JANUARY 2017 THING; AND THEN IN ADDITION TO  
21 THAT I ALSO CONSIDERED PATENT REFERENCES, THEY BE  
22 PUBLISHED APPLICATIONS FOR PATENTS THAT I LOCATED; PRIOR  
23 ART DEVICES, THESE ARE THINGS THAT ARE OUT THERE ON THE  
24 MARKET OR WERE ON THE MARKET OR SHOWN IN A VIDEO, TALKED  
25 ABOUT ON A TRACTOR FORUM THAT, YOU KNOW, I HAVE AN ACCOUNT

1 WITH; AND JUST A LOT OF STUFF LIKE THAT.

2 Q. SO WHILE WE'RE TALKING ABOUT THE JANUARY 2017 UNIT,  
3 LET ME ASK YOU ABOUT SOMETHING THAT WAS RAISED IN CROSS.  
4 IT'S YOUR TESTIMONY HERE TODAY THAT THE JANUARY 2017 UNIT  
5 ANTICIPATES THE CLAIMS OF THE PATENT?

6 A. CLAIM 1.

7 Q. BUT IS IT YOUR TESTIMONY THAT NECESSARILY ONLY THE  
8 JANUARY 2017 UNIT ANTICIPATES THE CLAIMS OF THE PATENT OR  
9 IS THAT JUST WHAT YOU FOCUSED ON FOR PURPOSES OF THIS  
10 ANALYSIS?

11 A. THAT'S WHAT I FOCUSED ON, AND I'VE YET BEGUN. I  
12 LIKE SEARCHING THIS STUFF; AND I'VE SEEN A LOT OF STUFF,  
13 AND NOT ALL OF IT IS INCLUDED IN MY DECLARATION. YOU  
14 DIDN'T WANT SOMETHING THAT LONG; BUT THE JANUARY --

15 Q. SO I'D LIKE TO BRIEFLY GO THROUGH EACH OF THOSE  
16 UNITS THAT YOU CONSIDERED JUST SO THAT YOU CAN KIND OF  
17 GIVE THE COURT A FLAVOR OF LOOKING AT THE PICTURES OF WHAT  
18 MATTERED TO YOU.

19 A. OKAY.

20 Q. SO LET'S FIRST TALK ABOUT WHAT WE'RE CALLING THE  
21 DUERWOOD 2016 DEVICE.

22 AND IF YOU CAN PULL UP, THAT'S FOR THE RECORD,  
23 IT'S DOC NUMBER 40-1 PAGE ID 566.

24 A. OKAY.

25 Q. AND THIS IS FROM MR. WILLIS' DECLARATION, DID YOU

1 LOOK AT THESE PICTURES AS PART OF YOUR ANALYSIS?

2 A. YES, YES.

3 Q. AND WHAT, WHAT WAS YOUR IMPRESSION BASED ON THESE  
4 PHOTOS, IF YOU CAN LOOK AT THEM AND EXPLAIN?

5 A. THAT WOULDN'T WORK FOR WHAT I WANT IT TO DO, BUT  
6 THAT IS A CUTTING DECK THAT -- IT'S LIKE A DRAWBRIDGE,  
7 IT'S EXACTLY LIKE A DRAWBRIDGE; AND IT'S GOT A CHAIN LIKE  
8 A DRAWBRIDGE, AND YOU ADJUST IT UP AND DOWN FROM HERE TO  
9 HERE. DEPENDING ON THE LIMITS OF YOUR HINGE, YOU CAN MAKE  
10 IT STOP. IF YOU WANT IT TO EVER GO ALL THE WAY DOWN, YOU  
11 COULD PUT A DIFFERENT HINGE IN, YOU KNOW, HINGES HAVE  
12 TRAVEL.

13 Q. SO BASED ON YOUR REVIEW OF THESE PHOTOS, WAS THE  
14 CUTTING DECK ADJUSTABLE TO POSITIONS BETWEEN HORIZONTAL  
15 AND VERTICAL?

16 A. YES.

17 Q. HOW SO?

18 A. LIKE A DRAWBRIDGE. I'M SORRY, I NEED TO PUT MY HAND  
19 MOVEMENTS INTO WORDS. YOU HAVE A DECK THAT IS VERTICAL  
20 RELATIVE, SAY, TO A LEVEL GROUND SURFACE AND A CHAIN  
21 ATTACHED TO A PORTION OF THE DECK, AND AT THE LOWER END,  
22 WE'LL CALL IT, YOU COULD DO IT A DIFFERENT WAY, BUT AT THE  
23 LOWER END OF THIS THERE'S A HINGE; AND SO WHEN YOU RETRACT  
24 THE CHAIN TO ITS SHORTEST POSITION, THE DECK WILL BE  
25 VERTICAL; AND THEN AS YOU LENGTHEN THE CHAIN, PLAY IT OUT

1     LIKE A DRAWBRIDGE, IT WILL GO DOWN.

2     Q.     ALL RIGHT.  SO LET'S MOVE ON THEN TO WHAT WE'RE  
3     DESCRIBING AS THE JANUARY 2017 UNIT, AND THAT'S DOC 40-2  
4     PAGE ID 633.  SO IF YOU CAN TAKE A LOOK AT THIS PICTURE  
5     WHICH IS IN THE RECORD, AND CAN YOU JUST DESCRIBE TO THE  
6     COURT WHAT WAS SIGNIFICANT TO YOU IN REVIEWING THESE  
7     PHOTOS?

8     A.     WELL, IT'S GOT A CUTTING DECK THAT MOVES FROM -- IF  
9     YOU LOOK AT THE FAR RIGHT PHOTOGRAPH, IT'S VERTICAL; AND  
10    IF YOU LOOK AT THE MIDDLE PHOTOGRAPH, IT'S HORIZONTAL; AND  
11    IF YOU LOOK -- YOU CAN LOOK AT THE PICTURES CLOSER, BUT  
12    IT'S BASICALLY GOT A HUB.  INSTEAD OF A CHAIN, IT'S A  
13    ROTATING HUB; SO IT'S JUST LIKE A DOORKNOB OR, YOU KNOW,  
14    JUST ROTATES FROM, SORRY, IT ROTATES FROM VERTICAL TO  
15    HORIZONTAL.

16   Q.     LET ME ASK YOU, DO YOU SEE WHAT YOU WOULD CONSIDER  
17   TO BE TOWER LOCKS ON THIS UNIT?

18   A.     YES.

19   Q.     WHERE DO YOU SEE THAT?

20   A.     IT -- I CAN SHOW YOU, BUT -- IT'S GOING TO BE ON THE  
21   DECK --

22   Q.     I THINK WE MIGHT HAVE A BETTER PICTURE OF THAT  
23   ACTUALLY, SO -- FOR THE RECORD IT'S DOC NUMBER 18-2 PAGE  
24   ID 170.

25   A.     CAN I POINT, YOUR HONOR?

1 MS. RUMFELT: PHARAN MAY BE ABLE TO HELP YOU  
2 WITH THAT.

3 THE COURT: DOES SOMEBODY HAVE A HARD COPY OF  
4 THAT?

5 THE CLERK: YOUR HONOR, HE'S ABLE TO ANNOTATE  
6 ON AND DRAW ON THE SCREEN.

7 THE COURT: CAN YOU CAPTURE THAT ON THIS  
8 SYSTEM?

9 MR. AHO: HE SHOULD BE ABLE TO DRAW ON THERE,  
10 YOUR HONOR.

11 THE CLERK: NOT ABLE TO CAPTURE IT.

12 THE COURT: YOU WON'T BE ABLE TO CAPTURE IT ON  
13 THIS ONE. THE REASON I'M ASKING FOR A HARD COPY IS HE CAN  
14 DRAW ON IT AND WE CAN CAPTURE WHAT HE SAYS.

15 MS. RUMFELT: 18-2.

16 THE COURT: MR. FOX, YOU CAN CERTAINLY DRAW ON  
17 THE SCREEN SO EVERYBODY WILL BE ABLE TO SEE IT, BUT IN  
18 ORDER TO CAPTURE IT YOU'RE GOING TO HAVE TO PUT IT ON THE  
19 HARD COPY SO WE CAN MAKE IT PART OF THE RECORD.

20 A. YES, SIR. I'LL DRAW ON THE HARD COPY AND THEN I'LL  
21 POINT TO WHERE I DREW.

22 THE CLERK: DO YOU WANT A SHARPIE, THAT MIGHT  
23 BE A LITTLE BIT --

24 A. IT'S UP TO YOU, WHATEVER WILL CAPTURE --

25 THE CLERK: WHATEVER MIGHT BE EASIER.

1 A. THANK YOU.

2 AND THE PICTURE IS A LITTLE SMALL HERE, BUT  
3 YOU'LL SEE WHAT IT IS.

4 SO IT WOULD BE --

5 MR. AHO: EXCUSE ME, YOUR HONOR, WOULD THAT BE  
6 INJUNCTION EXHIBIT NUMBER 2 THAT WE'RE TALKING ABOUT?  
7 THERE'S ONE OTHER ONE YOU HAD MENTIONED.

8 THE COURT: WE'LL MAKE IT NUMBER 2, YES.

9 MR. AHO: THANK YOU, YOUR HONOR.

10 A. I'LL SHOW YOU WHERE I --

11 THE COURT: ARE YOU DONE DRAWING ON IT?

12 A. YES, SIR.

13 THE COURT: WELL, THEN ANOTHER OPTION IS JUST  
14 TO PUT IT ON THE CAMERA AND LET EVERYBODY SEE IT.

15 MR. FOSTER: YOUR HONOR, I THINK IT WOULD BE  
16 NUMBER 3 BECAUSE WE HAD TWO PRIOR TO THIS ONE.

17 THE COURT: HOW MANY HAVE YOU MARKED,  
18 MS. KINGERY?

19 THE CLERK: TWO, YOUR HONOR.

20 THE COURT: ALL RIGHT. THIS WILL BE NUMBER  
21 3.

22 MR. FOSTER: THANK YOU, YOUR HONOR.

23 A. I MAY HAVE TO DRAW ON IT AGAIN IF SOMETHING ELSE  
24 COMES UP.

25 THE COURT: ALL RIGHT.

1 BY MS. RUMFELT:

2 Q. OKAY, SO JUST TO ORIENT ME, WHAT ARE WE CIRCLING  
3 HERE, WHAT IS THAT?

4 A. OKAY. ON THE DECK -- AND ACTUALLY THIS IS GREAT  
5 BECAUSE THE DECK WAS A REAL LIGHT, BRIGHT COLOR AND YOU  
6 CAN SEE THIS BETTER. THERE'S TWO, LIKE ON THE FAR LEFT OF  
7 THE PHOTO ON THE BACK EDGE OF THE DECK WHERE YOU'RE  
8 POINTING THERE, THERE'S TWO UPSTANDING MEMBERS, AND THEN  
9 THERE'S THE EXACT SAME THING ON THE OTHER SIDE OF THE  
10 DECK, IT'S JUST NOT SO EASY TO SEE BECAUSE THERE'S  
11 SOMETHING RECEIVED IN IT AND A PIN GOING THROUGH THERE;  
12 AND I CALL THOSE -- YOU USE THE TERM "TOWER LOCK", AND  
13 WE'RE TALKING ABOUT THAT BECAUSE IT'S IN THE PATENT  
14 CLAIMS, AND -- IT'S IN THE PATENT, AND THEY HAVE IN THEIR  
15 DRAWINGS, THEY HAVE NO DESCRIPTION OF WHAT A TOWER LOCK  
16 IS, SO I JUST GAVE IT THE ORDINARY MEANING AS I WOULD  
17 ANYTHING ELSE WHERE THERE'S NOT A SPECIAL MEANING GIVEN TO  
18 IT IN THE PATENT. THEY DIDN'T SAY, A TOWER LOCK IS BLAH,  
19 BLAH, BLAH, BLAH, BLAH. THEY SAID, THERE'S A TOWER LOCK  
20 52, I THINK IT IS IN THE PATENT DRAWINGS; AND THAT'S WHAT  
21 IT IS, IT'S TOWER LOCK 52; AND THEN THEY, I THINK THEY  
22 SAY -- YOU CAN READ IT, BUT IT'S WHAT THE TOWER, THE TOWER  
23 LOCK AND THE BRACKETS COME TOGETHER AND THERE'S A PIN PUT  
24 THROUGH THEM, SOMETHING TO THAT BASIC EFFECT. IT DOESN'T  
25 SAY EXACTLY THAT, YOU CAN READ IT. SO WHEN FACED WITH

1 SOMETHING LIKE THAT, YOU COULD CALL IT -- YOU COULD HAVE  
2 CALLED IT A LOCK STRUCTURE, YOU COULD HAVE, YOU CAN CALL  
3 IT -- A PATENTEE CAN BE YOUR OWN LEXICOGRAPHER, AND YOU  
4 JUST GIVE THINGS THEIR ORDINARY MEANINGS; BUT IF IT'S,  
5 LIKE IF I DECIDED TO CALL THAT A ZIP-A-DEE-DOO-DAH, I'D  
6 PROBABLY HAVE TO SAY THAT IN THE PATENT SPEC, AS IF I'D  
7 GET A REJECTION, THE EXAMINER WOULD SAY, WHAT'S A  
8 ZIP-A-DEE-DOO-DAH THEN; BUT A TOWER IS TO ME AND LOOKING  
9 UP WHAT A TOWER IS IS A ENLONGATE STRUCTURE RISING UP LIKE  
10 A TOWER.

11 Q. SO HAVE YOU SEEN A TOWER LOCK STRUCTURE LIKE THE ONE  
12 YOU SEE HERE AND LIKE THE ONE THAT'S IN THE PATENT  
13 ANYWHERE ELSE?

14 A. YES, MA'AM.

15 Q. WHAT REFERENCES DID YOU LOOK UP THAT YOU BELIEVE  
16 INCORPORATE A TOWER LOCK STRUCTURE?

17 A. WELL, JUST SOMETHING COMING UP THAT IS USED TO LOCK  
18 FARM IMPLEMENTS ON LOTS OF THINGS. ONE THAT LOOKS MORE  
19 LIKE A TOWER, YOU KNOW, LIKE A BUILDING, A TOWER, YOU  
20 KNOW, IT COULD BE CIRCULAR -- TOWERS COME IN DIFFERENT  
21 SHAPES AND SIZES, BUT A TOWER WAS IN OLD BUSH HOG, I CALL  
22 THEM BUSH HOGS, I KNOW ROTARY CUTTERS, BUT THERE'S A  
23 PATENT PUBLICATION I FOUND THAT IS BASICALLY -- YEAH,  
24 THOSE ARE TWO, AND THOSE ARE GOOD ONES, THAT'S AN OLD  
25 BRUSH CUTTER, AND YOU'LL SEE THEY'RE USING -- THERE'S --

1 I'M POINTING, I'M SORRY.

2 THE COURT: THAT'S ALL RIGHT.

3 A. THERE'S A, BASICALLY A TOWER THAT COMES UP FROM THE  
4 DECK, AND THE SAME ON THE PUBLISHED APPLICATION, AND  
5 THEY'RE ALL AT THE EDGE OF THE DECK BECAUSE THEY'RE  
6 SECURING THE DECK TO SOMETHING USING THOSE.

7 Q. ALL RIGHT. LET ME ASK YOU THEN, YOU ALSO LOOKED AT  
8 A SWISHER ROUGH CUT MOWER AS PART OF YOUR ANALYSIS;  
9 CORRECT?

10 A. YES, MA'AM.

11 Q. AND LET'S PULL UP A PICTURE AND YOU CAN EXPLAIN A  
12 LITTLE BIT MORE WHY THAT MATTERED TO YOU. SO THIS IS DOC  
13 40-2 PAGE ID 636.

14 AND WHILE WE'RE PULLING IT UP, HOW WERE YOU  
15 AWARE OF THIS SWISHER ROUGH CUT MOWER?

16 A. IT'S MINE. I BOUGHT IT IN 2014. THERE'S A RECEIPT,  
17 AND THAT'S A MANUAL THEY HAVE ON THEIR WEBSITE, SWISHER'S  
18 WEBSITE. THAT'S WHAT MINE -- THAT'S HOW MINE IS  
19 CONFIGURED. THAT PHOTO IS MINE. I APOLOGIZE FOR IT NOT  
20 BEING CLEANED UP, THAT'S SHAMEFUL, BUT --

21 Q. AND WHY DOES THIS MATTER TO YOU?

22 A. WHY DOES WHAT MATTER, THAT IT'S NOT CLEANED UP?

23 Q. WHAT IS THE RELEVANCE OF THIS MOWER AND THIS UNIT?

24 A. WELL, WHAT YOU HAVE THERE IS THE BASIC STRUCTURE  
25 THAT THIS WHOLE THING REVOLVES AROUND, AND IT'S -- THAT

1 PART OF IT IS ALSO VERY SIMILAR TO -- I HAVE A -- I  
2 STARTED MY CAREER WITH, TINKERING WITH THESE THINGS WITH A  
3 STIHL BRUSH CUTTER, AND IT HAS A HEAD THAT ROTATES UP, UP  
4 AND DOWN AND YOU LOCK IT IN WHATEVER POSITION YOU WANT IT  
5 TO BE WITH A -- IT'S GOT A PLATE AND YOU'VE GOT A PIN YOU  
6 PULL BACK AND YOU LOCK IT IN THAT POSITION. THIS IS THE  
7 SAME THING FOR ADJUSTING THE POSITION OF THE MOWER; AND  
8 THIS, HOW THIS ONE IN PARTICULAR IS USED, YOU'LL SEE IN  
9 THE PHOTOGRAPH THAT'S AT THE FRONT OF THE CUTTER, AND THIS  
10 IS A 44 INCH HEAVY BRUSH CUTTER WITH ITS OWN GASOLINE  
11 MOTOR; AND WHEN YOU DON'T HAVE A TRACTOR -- OR YOU CAN  
12 PULL IT WITH A TRACTOR AND OFFSET IT IF YOU HAVE A BRUSH  
13 CUTTER, BUT YOU CAN -- YOU PULL IT WITH A VEHICLE, IT'S  
14 NOT SELF PROPELLED, AND YOU CHANGE THE POSITION OF THE  
15 BRUSH CUTTER. NOW, THIS IS HORIZONTALLY ALONG THE GROUND,  
16 THIS WAY, THIS WAY, WITH THE POSITION OF THE -- YOU HAVE  
17 AN ARM THAT -- YOU HAVE THE MOUNT THERE ON THE MOWER,  
18 WHICH IS A PLATE, AND IT'S GOT A HOLE IN THE FRONT AND  
19 THEN YOU'VE GOT A SEMI-CIRCLE ROUGHLY OF UNIFORMLY SPACED-  
20 APART HOLES; AND THEN YOU'VE GOT AN ARM THAT ATTACHES TO  
21 THAT, YOU'VE -- YOU HAVE THE ONE FRONT ARM HAS A HOLE  
22 THROUGH IT AND THE BACK END OF THE ARM HAS A HOLE THROUGH  
23 IT THAT ALIGNS WITH ANY, IT'S ALIGNABLE WITH ANY OF THOSE  
24 AS THE ROD PIVOTS. THE FRONT ONE IS THE PIVOT POINT  
25 BECAUSE YOU'VE GOT TO PUT A PIN, A BOLT AND HOLD THAT IN

1 PLACE; AND THEN TO ADJUST IT YOU PULL THE BACK ONE OR YOU  
2 MOVE THE ANGLE OF THE ROD RELATIVE TO THE PLATE.

3 Q. SO HOW, HOW DO YOU -- HOW DOES THIS, IS THIS  
4 RELEVANT TO YOUR ANALYSIS OF THE CLAIMS OF THE PATENT?

5 A. WELL, IT IS A L-SHAPED ARM HERE THAT IS ADJUSTABLE  
6 THROUGH A RANGE OF POSITIONS; AND IF YOU LOOK AT THIS  
7 STRUCTURE, IT'S IDENTICAL TO WHAT'S IN THE PATENT. THE  
8 ONLY THING THAT'S CHANGED IS JUST IF YOU JUST REVERSE IT.  
9 SEE, DOWN HERE THAT ATTACHES TO YOUR -- THAT'S A PIVOTAL  
10 ATTACHMENT TO YOUR UTV OR TRACTOR OR WHATEVER HITCH YOU  
11 PUT IT ON, AND UP HERE, THAT'S WELDED TO THE MOWER, BUT  
12 YOU JUST REVERSE THAT, AND IT'S IDENTICAL. YOU PUT THE  
13 CUTTER HERE AND PUT THAT ON -- AND ATTACH THAT TO THE  
14 TRACTOR, AND YOU DO THE -- YOU CAN CHANGE IT FROM HORI-  
15 ZONTAL TO VERTICAL ADJUSTMENT OR WHICHEVER ORIENTATION YOU  
16 WANT IT, BUT IT'S THE BASIC STRUCTURE THAT WE HAVE HERE.

17 Q. SO --

18 A. AND IT'S ALSO THE SAME STRUCTURE -- THAT'S NOT THE  
19 ONLY THING IN MY BARN THAT HAS THAT. SOMETHING OLDER,  
20 SOMETHING I'VE USED BEFORE, AND I THINK I PUT A PATENT  
21 LIKE THAT IN MY DECLARATION, BUT THAT'S HOW, SAY, SCRAPER  
22 BLADES ON THE BACK OF A TRACTOR, THAT'S HOW THEY WORK,  
23 THEY HAVE THAT SAME PLATE AND YOU'VE GOT AN ARM THAT GOES  
24 UP AND YOU ATTACH HERE, PIVOTALLY ATTACH TO THE THREE  
25 POINT HITCH, SAY, AND YOU ADJUST THE ROTATION OF WHERE THE

1 CUTTING IMPLEMENT OR BLADE OR WHATEVER YOU HAVE THERE  
2 IS.

3 Q. SO AS PART OF THE ANTICIPATION DISCUSSION THAT YOU  
4 HAD WITH MY OPPOSING COUNSEL, THEY ASKED YOU ABOUT THE  
5 REQUIREMENT THAT PRIOR ART MUST BE ARRANGED AS STATED IN  
6 THE CLAIM, DO YOU REMEMBER THAT DISCUSSION?

7 A. YES.

8 Q. AND IS THERE ANYTHING HERE THAT TELLS YOU THE  
9 JANUARY 2017 UNIT WASN'T ARRANGED AS STATED IN THE  
10 CLAIM?

11 A. I'M SORRY?

12 Q. IS THERE ANYTHING HERE THAT SUGGESTS TO YOU THAT THE  
13 JANUARY 2017 UNIT WASN'T ARRANGED AS STATED IN THE CLAIM?

14 A. WASN'T. HOW IT PIVOTS?

15 Q. JUST IN GENERAL, STEPPING AWAY FROM THIS PIVOT, JUST  
16 AS A GENERAL PROPOSITION, IS THERE ANYTHING THAT SUGGESTS  
17 TO YOU THAT THE 2017 UNIT WASN'T AS WAS SUGGESTED ARRANGED  
18 AS STATED IN THE CLAIM?

19 A. NO.

20 Q. SO LET'S FOCUS A LITTLE BIT ON THE DISCUSSION THAT  
21 YOU HAD ABOUT ADJUSTABLE FROM A HORIZONTAL TO A VERTICAL  
22 POSITION AND POSITIONS IN BETWEEN. YOUR -- CAN YOU  
23 EXPLAIN TO THE COURT AGAIN WHY IT IS YOUR VIEW THAT THE  
24 JANUARY 2017 UNIT NEEDS THIS CLAIM LIMITATION?

25 A. BECAUSE IT MOVES FROM HORIZONTAL TO -- HORIZONTAL,

1 VERTICAL TO HORIZONTAL AND ALL PARTS IN BETWEEN. IT'S  
2 LIKE WHEN I DROVE HERE THIS MORNING FROM KNOXVILLE, I CAME  
3 FROM KNOXVILLE TO HERE, AND I CAME THROUGH ALL POINTS ON  
4 THE INTERSTATE IN BETWEEN. I COULD HAVE PULLED OFF AND  
5 GONE TO YODER'S, I PROBABLY SHOULD HAVE, BUT STOPPING IS  
6 NOT A BIG DEAL; AND THIS, YOU KNOW, THIS ARM, THEY COULD  
7 HAVE HAD THAT ARM -- THE SWISHER, IF YOU JUST TAKE OUT ALL  
8 THE HOLES BUT TWO, YOU KNOW, IT STILL GOES THROUGH THEM,  
9 WHETHER YOU WANT TO STOP IT THERE OR NOT IS NOT -- FROM  
10 WHEN YOU'RE DRAFTING A CLAIM, AND YOU GIVE CLAIMS THEIR  
11 BROADEST REASONABLE CONSTRUCTION, AND IF A LIMITATION --  
12 PEOPLE OFTEN MISUNDERSTAND THAT A PATENT ISN'T WHAT, YOU  
13 KNOW, ISN'T WHAT'S IN THE SPECIFICATION AND EVERYTHING  
14 SHOWN IN THE DRAWINGS, THAT'S, THAT'S YOUR DESCRIPTION  
15 THAT SUPPORTS THE CLAIMS. YOUR CLAIMS DEFINE YOUR METES  
16 AND BOUNDS, DEFINES YOUR PROTECTABLE SUBJECT MATTER.

17 SO WHEN YOU'RE DRAFTING -- I DON'T KNOW OF TOO  
18 MANY PATENT APPLICATIONS THAT ARE INITIALLY DRAFTED WHERE  
19 THE CLAIMS ARE AS NARROW AS THE STRUCTURE IN THE PATENT  
20 SPECIFICATION. YOU TRY TO DRAFT YOUR CLAIMS -- YOU KNOW,  
21 I DON'T KNOW WHAT THEY WERE TRYING TO DRAFT OR WHATEVER,  
22 BUT. SO WHAT I DO IS I READ IT, I LOOK AT IT, I READ THE  
23 SPECIFICATION, I UNDERSTAND HOW IT WORKS, AND THEN I LOOK  
24 AT THE CLAIMS AND READ THE CLAIMS AND TRY TO UNDERSTAND  
25 THEM AND GIVE MEANING TO THEM; AND UNLESS THERE IS

1 SOMETHING WHERE THEY SAID, THIS IS THIS, YOU KNOW, IT'S  
2 LIMITED TO THIS OR SOMETHING LIKE THAT, I GIVE IT THE  
3 ORDINARY MEANING OF THE TERMS; AND READING THAT JUST  
4 STRAIGHT UP, THAT'S WHAT IT SAYS.

5 Q. SO WHAT WOULD YOU HAVE DONE IF, IF YOU WANTED TO  
6 EXPRESS THAT IT HAS TO CUT AT POSITIONS IN BETWEEN OR LOCK  
7 AT POSITIONS IN BETWEEN, HOW DO YOU DO THAT?

8 A. WELL, FIRST, I WOULD CONSIDER HOW TO SAY IT IN THE,  
9 WITH THE STRUCTURE I HAVE, AND THEN I WOULD TRY TO SAY IT  
10 SO THAT IT WOULD ALSO INCORPORATE OTHER STRUCTURES THAT --  
11 IT HAS TO BE SUPPORTED BY MY SPECIFICATION FOR ME TO CLAIM  
12 IT, BUT I WOULD TRY TO WRITE IT IN A MANNER SO IT WOULD  
13 READ ON, YOU KNOW, IF SOMEBODY TRIED TO NOT HAVE THAT, YOU  
14 KNOW, A BROADER, A BROADER STATEMENT; BUT IF I WANTED TO  
15 GO THAT NARROW -- AND THAT'S KIND OF THE CATCH 22 HERE, IF  
16 IT GOES FROM VERTICAL TO HORIZONTAL, WELL, AS I UNDERSTAND  
17 IN THE PATENT, IT GOES MORE THAN THAT, IT GOES DOWN PAST  
18 HORIZONTAL; SO FROM WHAT I'VE BEEN TOLD WHEN I WAS BEING  
19 ASKED WAS IT GOES JUST FROM HERE TO HERE AND THAT'S IT;  
20 BUT I WOULD -- WHAT I WOULD HAVE DONE IS I WOULD HAVE SAID  
21 SOMETHING, YOU KNOW, I DON'T DRAFT CLAIMS ON THE FLY MUCH;  
22 BUT IF I WAS GOING TO DO SO, IT WOULD BE SOMETHING ALONG  
23 THE LINES OF THE MOWER POSITIONABLE FROM A VERTICAL  
24 POSITION TO A HORIZONTAL POSITION AND ALSO FIXEDLY OR  
25 LOCKABLY POSITIONABLE TO BE MAINTAINED AT ANGLES, AT

1 DISCREET ANGLES IN BETWEEN VERTICAL AND HORIZONTAL, OR  
2 SOMETHING LIKE THAT; BUT SOME LANGUAGE BASICALLY SAYING,  
3 HEY, WE'RE GOING TO FIX IT, LOCK IT, KEEP IT HERE.

4 Q. ALL RIGHT, SO JUST ANOTHER COUPLE OF QUESTIONS.  
5 THE -- THEY TALKED TO YOU ABOUT THE STANDARD FOR  
6 COINVENTORSHIP HERE, THEY ASKED YOU ABOUT THAT. DOES  
7 MR. WILLIS HAVE TO HAVE CONTRIBUTED SPECIFICALLY TO ANY  
8 GIVEN PARTICULAR PATENTED FEATURE TO BE CONSIDERED A  
9 COINVENTOR?

10 A. WELL, YOU LOOK AT THE CLAIMS AND YOU LOOK AT THE  
11 SUBJECT MATTER THAT'S CLAIMED, AND IT'S A JUDGMENT -- I  
12 MEAN, I DON'T KNOW OF ANYTHING THAT'S -- LIKE I INVENTED  
13 THIS PIECE HERE, AND, YOU KNOW, THEY ALL KIND OF MERGE  
14 TOGETHER IN HOW THEY FUNCTION AND OPERATE, AND WHAT YOU  
15 ENDED UP TO WITH IS YOU HAVE A MOWER THAT GOES FROM HERE  
16 TO HERE, AND THE 2016 CHAIN, THE DRAWBRIDGE DOES EXACTLY  
17 THAT. I THINK IT'S RELEVANT TO -- I WOULD HAVE WANTED TO  
18 KNOW ABOUT IT BECAUSE -- THAT'S ALL.

19 Q. AND JUST SO I'M CLEAR IN UNDERSTANDING THE REFERENCE  
20 TO THE DRAWBRIDGE, SO YOU'RE REFERENCING SOMETHING THAT  
21 MR. WILLIS DID WITH THE DUERWOOD UNIT?

22 A. THAT'S WHAT WE WERE TALKING ABOUT.

23 MS. RUMFELT: IF I COULD CHECK AND MAKE SURE  
24 I'VE GOT EVERYTHING.

25 THE COURT: YOU MAY.

1 Q. ALL RIGHT. A COUPLE OF THINGS JUST TO CLARIFY FOR  
2 THE RECORD. I THINK -- DID I NOT REFERENCE THE NUMBERS?  
3 OKAY, SO I DIDN'T REFERENCE THE NUMBERS FOR TWO OF THE  
4 PHOTOS THAT WE PUT UP, AND THAT'S THE BUSH HOG PHOTO AND  
5 THERE WAS A PATENT IMAGE THERE AS WELL, THOSE ARE DOC 40-2  
6 PAGE ID 874, DOC 40-2 PAGE ID NUMBER 913.

7 AND, MR. FOX, YOU, WHEN YOU LOOKED AT THE  
8 PATENT FOR PURPOSES OF YOUR OPINION HERE, YOU WERE LOOKING  
9 AT THE TERMS AND YOU WERE CONSTRUING THE TERMS ACCORDING  
10 TO THEIR PLAIN AND ORDINARY MEANING; CORRECT?

11 A. YES.

12 MS. RUMFELT: YEAH, THOSE TWO REFERENCES ARE  
13 SPECIFIC TO THE TOWER LOCK DISCUSSION, OKAY, JUST TO  
14 CLARIFY.

15 THANK YOU.

16 THE COURT: ANYTHING ELSE?

17 MR. MILLER: THREE QUICK POINTS, YOUR HONOR.  
18 RECROSS EXAMINATION

19 BY MR. MILLER:

20 Q. MR. FOX, WE TALKED ABOUT THE DUERWOOD 2016 UNIT, YOU  
21 JUST TESTIFIED ABOUT IT.

22 A. PARDON?

23 Q. YOU JUST TESTIFIED ABOUT IT; CORRECT?

24 A. I --

25 Q. YOU WERE JUST ASKED QUESTIONS BY COUNSEL, SOME OF

1 HER QUESTIONS WERE ABOUT THE DUERWOOD 2016?

2 A. YEAH, WE WERE TALKING ABOUT IT.

3 Q. OKAY. THAT UNIT HAS A CHAIN; CORRECT?

4 A. YES.

5 Q. AND IT'S YOUR VIEW THAT IF YOU ALLOW THE CUTTING  
6 DECK TO FALL PART WAY FROM VERTICAL TO AN ANGLE AND ALLOW  
7 THE CHAIN TO HOLD IT IN PLACE, THEN YOU BELIEVE THAT IT --  
8 THAT'S WHY IT COULD BE IN POSITIONS IN BETWEEN; CORRECT?

9 A. COULD YOU ASK THAT ANOTHER -- I'M NOT FOLLOWING.

10 Q. DIDN'T YOU SAY THAT IN YOUR OPINION THE DUERWOOD  
11 2016 COULD BE ADJUSTED TO POSITIONS IN BETWEEN BECAUSE OF  
12 THE CHAIN?

13 A. YES.

14 Q. OKAY. AND SO WHEN IT'S THAT WAY, THE CHAIN IS  
15 HOLDING IT IN THAT ANGLED POSITION IN BETWEEN VERTICAL AND  
16 HORIZONTAL; RIGHT?

17 A. YES.

18 Q. OKAY. SO IF YOU WERE -- YOU DON'T KNOW THAT IT WAS  
19 EVER ACTUALLY USED THAT WAY; CORRECT?

20 A. NO.

21 Q. OKAY. AND THAT CHAIN WOULD NOT PREVENT THE DECK  
22 FROM BOUNCING BACK UP WHEN IT HIT BRANCHES AND THINGS;  
23 CORRECT?

24 A. THE WEIGHT OF THE MACHINE WOULD. IT DEPENDS ON HOW  
25 YOU'RE TREATING THIS THING, HOW YOU'RE USING IT. I MEAN,

1 IT DEPENDS ALSO ON THE, YOU KNOW, THE HINGE, YOU COULD  
2 HAVE A SPRING-LOADED HINGE. I DON'T KNOW ANYTHING ABOUT  
3 THE FREEDOM OF MOVEMENT OF THAT HINGE; BUT IT'S JUST LIKE  
4 I THINK IN MY DECLARATION YOU MAY HAVE SEEN, YOU KNOW, A  
5 THREE-POINT HITCH OF A TRACTOR, THE TOP LINK IS AN  
6 ADJUSTABLE ROD, AND IT CHANGES THE ATTITUDE OF THE MOWER,  
7 UP, DOWN, YOU KNOW, AND ALL THAT.

8 Q. SURE. SO YOU NEVER INSPECTED THE DUERWOOD 2016  
9 PERSONALLY?

10 A. NO.

11 Q. OKAY. YOU'VE ONLY SEEN THOSE FUZZY PICTURES THAT  
12 WE'VE SEEN?

13 A. RIGHT. THOSE ARE THE ASSUMPTIONS. I HAVEN'T SEEN  
14 THE JANUARY 2017, I HAVEN'T SEEN DUERWOOD. THOSE WERE  
15 SHOWN TO ME IN PICTURES ONLY.

16 Q. OKAY. MY ONLY QUESTION WAS THE CHAIN WOULD NOT  
17 PREVENT THE DECK FROM BOUNCING UP IF IT WAS IN AN ANGLED  
18 CUTTING POSITION?

19 A. CHAINS SHORTEN AGAINST THEIR LENGTH.

20 Q. OKAY. THEY'RE NOT RIGID, IT WOULD NOT PREVENT IT  
21 FROM BOUNCING; CORRECT?

22 A. IT DEPENDS ON THE WEIGHT AND WHAT YOU'RE HITTING.

23 Q. I'M TALKING ABOUT THE CHAIN, THE CHAIN WOULD NOT  
24 SERVE TO PREVENT THAT FROM BOUNCING BACK IF IT DID?

25 A. AGAIN, IT DEPENDS ON THE PRESSURES YOU'RE

1 ENCOUNTERING. GRAVITY, IT'S, IT'S, I MEAN --

2 Q. LET ME ASK IT A DIFFERENT WAY. LET'S ASSUME IT'S IN  
3 AN ANGLED CUTTING POSITION AND IT HITS A BRANCH THAT GIVES  
4 IT ENOUGH FORCE TO PUSH THE DECK BACK BASED ON THE  
5 MOVEABILITY OF THE HINGE --

6 A. RIGHT, RIGHT.

7 Q. -- THE CHAIN WOULD NOT PREVENT THAT BOUNCE BACK;  
8 CORRECT?

9 A. NO. SOMETIMES THAT'S GOOD, SOMETIMES IT'S NOT, BUT  
10 IT WORKS; BUT, YEAH, NO, I DON'T -- THE CHAIN ITSELF,  
11 UNLESS ITS WEIGHT -- THE CHAIN IS NOT, YOU CAN'T PUSH A  
12 CHAIN.

13 Q. GOT YOU. YOU MENTIONED THAT -- YOU SAID THESE  
14 CLAIMS ARE GIVEN THEIR BROADEST REASONABLE DESCRIPTION, IS  
15 THAT WHAT YOU SAID, BROADEST REASONABLE CONSTRUCTION?

16 A. YOU INTERPRET THEM TO GIVE THEM THEIR MEANING,  
17 YEAH.

18 Q. WELL, I HEARD YOU ON YOUR TESTIMONY WHILE COUNSEL  
19 WAS QUESTIONING YOU, YOU SAID, YOU GIVE THE CLAIMS THEIR  
20 BROADEST REASONABLE MEANING OR CONSTRUCTION?

21 A. WELL, IT DEPENDS ON WHAT YOU'RE TALKING ABOUT. THE  
22 PATENT EXAMINER IS GOING TO GIVE THEM -- A COURT CAN  
23 CONSTRUE THEM IN A MANNER TO NOT INVALIDATE IT, THERE'S  
24 NOT INVALIDATING ART; BUT, YEAH, YOU GIVE THEM THE  
25 REASONABLE ORDINARY MEANING WITHIN CORRESPONDING TO THE

1 SPECIFICATION.

2 Q. RIGHT; BUT I HEARD YOU SAY THE BROADEST REASONABLE  
3 CONSTRUCTION, IS IT YOUR BELIEF THAT IN DISTRICT --

4 A. OH.

5 Q. -- COURT THAT'S THE CLAIM CONSTRUCTION STANDARD?

6 A. I DIDN'T PREPARE THE CLAIM CONSTRUCTION ON THAT, YOU  
7 KNOW, THE PRECISE LANGUAGE; BUT, YEAH, YOU CAN GIVE THEM  
8 THEIR --

9 COURT REPORTER: I'M SORRY, COULD YOU REPEAT  
10 YOUR QUESTION. MR. MILLER, CAN YOU REPEAT YOUR QUESTION.

11 MR. MILLER: I CAN, YES.

12 Q. IS IT YOUR BELIEF THAT THE BROADEST REASONABLE  
13 CONSTRUCTION IS THE STANDARD FOR CLAIM CONSTRUCTION IN  
14 DISTRICT COURT?

15 A. I LOOK AT STUFF LIKE THAT; BUT, YEAH, YOU GIVE IT  
16 THE BROADEST REASONABLE CONSTRUCTION BASED, BASED ON WHAT  
17 YOU HAVE BEFORE YOU.

18 Q. OKAY. AND THEN MY FINAL QUESTION -- MS. STUCKI, IF  
19 YOU COULD BRING UP PAGE 8 OF THE PATENT AGAIN AND THEN  
20 HIGHLIGHT THIS LAST PARAGRAPH RIGHT HERE.

21 OKAY. WE WENT OVER THIS AT THE BEGINNING,  
22 MR. FOX, THIS IS WHERE THE PATENT DESCRIBES AN OBJECT OF  
23 THE INVENTION, AND IT TALKS ABOUT BEING ABLE TO CUT AT AN  
24 ANGLE BETWEEN HORIZONTAL AND VERTICAL; CORRECT? SO YOU  
25 WOULD AGREE WITH ME THAT THE JANUARY 2017 PROTOTYPE CANNOT

1 FULFILL THIS PURPOSE, REGARDLESS OF WHAT YOU BELIEVE ABOUT  
2 THE CLAIM LANGUAGE, IT DOESN'T FULFILL THIS OBJECT OF THE  
3 INVENTION OF CUTTING AT AN ANGLE BETWEEN HORIZONTAL AND  
4 VERTICAL?

5 A. THE JANUARY 2017 THING?

6 Q. YES.

7 A. YEAH, IT COULD.

8 Q. THE JANUARY 2017 PROTOTYPE --

9 A. YEAH.

10 Q. -- IS DESIGNED TO CUT AT AN ANGLE?

11 A. IS THERE A KILL SWITCH WHERE -- I DON'T SEE ANYTHING  
12 WHERE IT ONLY OPERATES AT THIS; BUT IT'S CAPABLE OF IT,  
13 DEFINITELY CAPABLE OF IT.

14 Q. EXPLAIN HOW IT'S CAPABLE OF BEING RUNNING AND  
15 CUTTING BRUSH WHILE AT AN ANGLE BETWEEN HORIZONTAL AND  
16 VERTICAL?

17 A. YOU MOVE THAT ARM.

18 Q. WHILE IT'S OPERATING?

19 A. YOU COULD.

20 Q. WELL, YOU COULD, IF YOU HAD A DEATH WISH; RIGHT --

21 A. RIGHT.

22 Q. -- MR. FOX? OKAY, SO WOULD A REASONABLE --

23 A. WELL, NO, YOU COULD -- YOU DON'T HAVE TO BE RUNNING  
24 IT TO MOVE IT. YOU DON'T RUN THE ONE IN THE PATENT TO  
25 MOVE IT; DO YOU?

1 Q. OKAY. MY QUESTION IS ABOUT THIS STATED PURPOSE.

2 A. YOU DON'T.

3 Q. I WANT TO KNOW IF THE JANUARY 2017 PROTOTYPE COULD  
4 CUT BRUSH WHILE THE CUTTING DECK IS AT AN ANGLE BETWEEN  
5 HORIZONTAL AND VERTICAL?

6 A. YEAH.

7 Q. AND HOW WOULD THAT HAPPEN?

8 A. OKAY. WELL, SO YOU COULD, YOU -- I WOULDN'T STAND  
9 IN FRONT OF IT AND MOVE IT; BUT IF YOU WANTED TO, YOU  
10 COULD UNHOOK IT, AND AS YOU'RE MOVING IT DECIDE, OH, LET'S  
11 STOP IT HERE. YOU COULD HOOK A CHAIN TO IT, YOU COULD DO  
12 LOTS OF DIFFERENT THINGS TO STOP IT THERE. YOU COULD EVEN  
13 LET IT FREE. IT COULD BOUNCE ALONG THE GROUND IF YOU  
14 WANTED, IF YOU HAD A ROUGH TERRAIN DOING LIKE THAT. I  
15 DON'T KNOW WHAT IT WOULD TEAR UP, BUT IT WOULD GO ALONG  
16 DEFINITELY. IF YOU -- SAY YOU WERE GOING TO A DITCH BANK  
17 RIGHT THERE, RIGHT; SO, YEAH, IT'S CAPABLE OF IT.

18 Q. OKAY. IF YOU MODIFIED IT OR --

19 A. NO, YOU DON'T EVEN HAVE TO MODIFY IT --

20 Q. -- YOU TRY TO STAND OUT THERE AND HOLD IT AT AN  
21 ANGLE?

22 A. IF THE, BUT IF THE CLAIM, YOU KNOW, IF WE WANT TO  
23 REPLACE THE CLAIM WITH AN OBJECT, THAT'S FINE; BUT USUALLY  
24 OBJECTS, SUMMARY OF THE INVENTION, ALL THOSE THINGS ARE  
25 WRITTEN AT THE FRONT END OF A PATENT; AND THEN AS THE

1 CHANGE, AS THE CLAIMS CHANGE SCOPE, MOST PEOPLE DON'T  
2 TYPICALLY GO BACK AND AMEND THOSE.

3 Q. SO YOU'VE NEVER USED THE JANUARY 2017 PROTOTYPE;  
4 RIGHT?

5 A. DID I USE IT? NO.

6 Q. AND YOU'VE -- SO YOU DON'T KNOW, AND YOU DON'T KNOW  
7 IF ANYBODY ELSE HAS EVER TRIED TO PROP IT UP AT AN ANGLE  
8 WHILE IT'S RUNNING TO CUT BRUSH?

9 A. HOW WOULD I KNOW THAT? YEAH.

10 Q. AND DO YOU THINK IT WOULD BE A SAFE, ADVISABLE WAY  
11 TO USE THAT PROTOTYPE TO PROP IT UP WHILE THE BLADE IS  
12 RUNNING?

13 A. I DON'T KNOW IF THAT'S THE STANDARD; BUT ON ANY OF  
14 THEM, YOU NEVER MOVE EQUIPMENT WHILE THE BLADE IS RUNNING.  
15 YOU STOP THE EQUIPMENT, TURN THE TRACTOR OFF. PEOPLE DO  
16 IT, YOU READ ABOUT IT IN THE PAPER ALL THE TIME, BUT IT'S  
17 NOT A GOOD IDEA. YOU CAN DO IT, BUT YOU --

18 Q. OKAY, AND THAT PROTOTYPE HAD TWO PLACES WHERE THE  
19 ARM LOCKED IN PLACE, HORIZONTAL AND VERTICAL; RIGHT?

20 A. RIGHT.

21 MR. MILLER: NOTHING FURTHER, YOUR HONOR.

22 THE COURT: ALL RIGHT. ANYTHING ELSE ON THOSE  
23 LIMITED SUBJECTS?

24 MS. RUMFELT: I JUST HAVE ONE QUICK QUESTION.  
25 REDIRECT EXAMINATION

1 BY MS. RUMFELT:

2 Q. I THINK YOU TWO WERE TALKING PAST EACH OTHER FOR A  
3 SECOND ABOUT THE STANDARD THAT YOU APPLIED HERE. IN YOUR  
4 ANALYSIS HERE YOU GAVE THE CLAIM TERMS THEIR PLAIN AND  
5 ORDINARY MEANING; CORRECT?

6 A. THE CLAIM TERMS, YES.

7 MS. RUMFELT: ALL RIGHT. THANK YOU.

8 EXAMINATION

9 BY THE COURT:

10 Q. MR. FOX, I HAVE JUST A FEW QUESTIONS.

11 A. YES, SIR.

12 Q. I'VE GOT TO ADMIT THAT I'VE HAD SOME DIFFICULTY  
13 FIGURING OUT JUST WHAT YOUR BOTTOM LINE OPINIONS ARE IN  
14 THIS CASE BECAUSE WHEN I READ YOUR 23 PAGE DECLARATION, I  
15 THINK I CAME TO THE SAME CONCLUSION THAT MR. MILLER DID  
16 EARLIER, THAT IS THAT PARAGRAPH 60 AND 61 STATED YOUR  
17 OPINIONS; BUT I THINK YOU'VE GONE BEYOND THAT TODAY, AND  
18 THAT'S NOT MY QUESTION. I WANT YOU TO CONSIDER PARAGRAPH  
19 60 AND 61, WHERE IT APPEARS TO ME YOU ARE GIVING OPINIONS  
20 WITH RESPECT TO OBVIOUSNESS AND WITH RESPECT TO THE  
21 QUESTION OF WHETHER OR NOT MR. WILLIS WAS AN INVENTOR.  
22 LET ME START WITH 61 FIRST, AND SINCE YOU DON'T HAVE A  
23 COPY OF IT IN FRONT OF YOU, I'LL JUST READ IT. IT SAYS,  
24 "ADDITIONALLY, AS ILLUSTRATED ABOVE IN APPENDIX A AND B,  
25 THE VARIOUS ITERATIONS OF BRUSH CUTTERS DEVELOPED BY

1 MR. DUERWOOD WILLIS, EITHER ALONE OR IN COLLABORATION WITH  
2 TRAVIS ODOM, TOGETHER INCORPORATE THE ELEMENTS OF THE '364  
3 PATENT CLAIMS. IT IS MY OPINION THAT IF MR. WILLIS MADE  
4 THE CONTRIBUTIONS HE CLAIMS TO HAVE MADE IN HIS DECLARA-  
5 TION, HE MATERIALLY CONTRIBUTED TO THE CONCEPTION OF AT  
6 LEAST ONE CLAIM OF THE '364 PATENT, NOT JUST REDUCTION TO  
7 PRACTICE THEREOF AND MEETS THE DEFINITION OF AN INVENTOR."

8 A. YES, SIR.

9 Q. SO MY QUESTION IS THIS, ARE YOU SIMPLY ASSUMING THAT  
10 ALL OF THE STATEMENTS MADE BY MR. WILLIS IN HIS  
11 DECLARATION ARE TRUE?

12 A. YES, SIR.

13 Q. AND THEN BASED UPON THOSE FACTS BEING TRUE, YOU  
14 OFFER AN OPINION THAT HE IS AN INVENTOR?

15 A. YES, SIR.

16 Q. AND THAT IS BECAUSE ACCORDING TO HIM HE MATERIALLY  
17 CONTRIBUTED TO THE CONCEPTION OF AT LEAST ONE CLAIM OF THE  
18 '364 PATENT?

19 A. YES, SIR.

20 IF I MAY, YOUR HONOR?

21 Q. YES.

22 A. THE, IT'S THE CONTRIBUTING TO IT. REDUCTION TO  
23 PRACTICE WOULD BE IN, HOW I UNDERSTAND IT, IS IF, SAY,  
24 YOU'RE JUST SOMEBODY THAT IS DOING SOMEBODY ELSE'S  
25 BIDDING, YOU KNOW, HOLD THIS PIECE WHILE I PUT IT HERE, GO

1 GET ME THIS, HELP ME HOLD THIS, YOU'RE NOT ADDING TO THIS  
2 COLLECTIVE UNDERSTANDING OF HOW IT'S GOING TO OPERATE.

3 Q. AND THAT SORT OF LEADS INTO MY NEXT QUESTION. I  
4 KNOW YOU AGAIN DON'T HAVE A COPY OF THE WILLIS DECLARATION  
5 IN FRONT OF YOU. MUCH OF WHAT MR. WILLIS TALKS ABOUT  
6 THROUGHOUT THAT DECLARATION IS OBTAINING PARTS, GETTING  
7 WORK DONE, KEEPING RECORDS, THINGS OF THAT SORT. THOSE  
8 ARE NOT THE KINDS OF THINGS THAT CONTRIBUTE TO THE  
9 CONCEPTION OF AN IDEA; ARE THEY?

10 A. RUNNING ERRANDS IS NOT, NO, SIR.

11 Q. SO IT HAS TO BE SOMETHING MORE THAN THOSE KINDS OF  
12 THINGS --

13 A. YES, SIR.

14 Q. -- RIGHT? IT HAS TO BE SOMETHING MORE THAN JUST  
15 TEAMWORK IN A GENERAL SENSE?

16 A. WELL, DEPENDS ON WHAT YOU CALL --

17 Q. I MEAN, AS YOU SAID A MINUTE AGO, THERE COULD BE A  
18 WHOLE HOST OF PEOPLE ON THE TEAM, BUT THEY'RE NOT  
19 INVENTORS; CORRECT?

20 A. THAT'S A LITTLE BIT DIFFERENT. IF YOU'RE WORKING  
21 TOGETHER AND YOU'RE POSITIONING PARTS AND YOU'RE, HEY, PUT  
22 IT HERE AND DO THAT AND -- THAT IS ACTIVE; BUT GOING TO GO  
23 GET THE PAINT OR THE PERSON IS HOLDING IT THERE AND SAYS,  
24 I NEED A 1/16TH INCH BOLT TO HOLD THIS IN OR, YOU KNOW,  
25 FIGURING OUT, OH, YOU NEED A 1/16TH INCH BOLT, THAT, WE'RE

1 TALKING ABOUT CONTRIBUTING TO THAT STRUCTURE AS A BROADER  
2 SENSE OF MOVEMENT AND WHAT IT'S DOING, YES, SIR.

3 Q. OKAY. WELL, I PROBABLY NEED TO LOOK INTO THAT A  
4 BIT, BUT MY UNDERSTANDING WAS THAT WE WERE TALKING ABOUT  
5 THE CONCEPTION OF THE IDEA, NOT THE ACTUAL PUTTING  
6 TOGETHER ALL THE PARTS?

7 A. OH, I THOUGHT THAT'S WHAT WE WERE DISCUSSING ON  
8 THAT.

9 Q. BUT WHICH ONE IS REQUIRED FOR HIM TO BE AN INVENTOR,  
10 I MEAN, IS JUST HELPING TO PUT TOGETHER THE PARTS ENOUGH?

11 A. IT'S WHEN THEY HAPPEN AND WHAT'S GOING ON. IT'S A  
12 DYNAMIC SITUATION. INVENTIONS ARE TYPICALLY DYNAMIC.

13 Q. WELL, I UNDERSTAND THAT; BUT WHEN YOU TALK ABOUT HIM  
14 BEING AN INVENTOR, YOU'RE COMING TO THE CONCLUSION, I TAKE  
15 IT, THAT BASED ON HIS DECLARATION HE HELPED TO CONCEIVE OF  
16 THE IDEA --

17 A. THE CONCEPTS.

18 Q. -- NOT THAT HE HELPED ASSEMBLE THE DEVICE?

19 A. RIGHT, RIGHT, CONCEPTS --

20 Q. RIGHT?

21 A. -- ASSOCIATED WITH THE ULTIMATE PIECE.

22 Q. AND ARE YOU OFFERING ANY OPINION ABOUT -- WELL, LET  
23 ME ASK YOU SOMETHING. IF ALL I HAVE IN THIS RECORD IS  
24 MR. WILLIS' DECLARATION, IS THAT ENOUGH TO MAKE HIM AN  
25 INVENTOR?

1 A. IF YOU CAN CORROBORATE HIS STATEMENTS WITH THE  
2 DECLARATORY -- WITH THE DOCUMENTARY EVIDENCE THAT'S  
3 SUPPLIED WITH IT.

4 Q. ARE YOU OFFERING ANY OPINION HERE AS TO WHETHER OR  
5 NOT HIS STATEMENTS IN THAT DECLARATION ARE CORROBORATED IN  
6 ANY WAY?

7 A. NO, SIR.

8 Q. OKAY.

9 A. THEY, THEY, THEY'RE PUT AS THIS -- THE WAY THEY'RE  
10 WRITTEN IS HOW I READ IT. I'M READING IT THAT HE'S  
11 TELLING THE TRUTH. THIS IS THIS DOCUMENT THAT GOES WITH  
12 THIS AND THIS IS WHAT THIS MEANS AND THIS CORROBORATES  
13 THAT, BUT --

14 Q. ALL RIGHT, BUT FROM A LEGAL POINT OF VIEW BEFORE THE  
15 COURT COULD CONCLUDE THAT HE IS A COINVENTOR HERE, THE  
16 COURT WOULD HAVE TO FIND CORROBORATING, CORROBORATION OF  
17 THAT, THOSE STATEMENTS ELSEWHERE IN THE RECORD; CORRECT?

18 A. SIR, I DON'T KNOW THAT ANSWER.

19 Q. ALL RIGHT. WELL, IT'S A PRETTY IMPORTANT QUESTION,  
20 I THINK, BECAUSE IF CORROBORATION IS REQUIRED, IT CAN'T BE  
21 FOUND WITHIN THE WILLIS DECLARATION ITSELF; CAN IT?

22 A. YES, WITH THE EVIDENCE THAT'S PUT WITH IT.

23 Q. NO, NO, I'M TALKING ABOUT WITHIN THE DECLARATION,  
24 HIS STATEMENTS. HIS TESTIMONY IS NOT ENOUGH TO ESTABLISH  
25 HIM AS AN INVENTOR, IS IT, BY ITSELF, IF THAT'S ALL I'VE

1 GOT?

2 A. SIR, AND I'M, I'M TRYING TO UNDERSTAND. THE  
3 DECLARATION INCLUDES DOCUMENTARY PIECES WITH IT, IT'S  
4 TEXTS AND THINGS LIKE THAT.

5 Q. OKAY, BUT I'M TALKING ABOUT THE BODY OF THE  
6 DECLARATION.

7 A. THOSE TWO TOGETHER, THE DECLARATION, YES, I WOULD  
8 THINK SO BECAUSE IT'S GOT CORROBORATING EVIDENCE.

9 Q. ALL RIGHT. I THINK WE'RE NOT COMMUNICATING,  
10 MR. FOX, AND I'LL JUST LEAVE IT AT THAT.

11 A. I APOLOGIZE.

12 Q. YOU'RE THE PATENT LAWYER, I'M NOT, BUT I ULTIMATELY  
13 HAVE TO MAKE THESE DECISIONS HERE.

14 A. YOU DO.

15 Q. WHAT YOU TOLD ME IN THIS DECLARATION IS THAT YOU  
16 VIEWED HIS DECLARATION.

17 A. YES, SIR.

18 Q. YOU MAKE NO REFERENCE TO THE ATTACHMENTS OR ANY  
19 OTHER EVIDENCE IN THE RECORD WITH RESPECT TO THAT BEING  
20 CORROBORATED EVIDENCE; CORRECT?

21 A. THEY'RE INCLUDED IN IT.

22 Q. SO YOU ARE THEN MAKING A, STATING AN OPINION THAT  
23 THERE IS CORROBORATION IN THIS RECORD OF MR. TRAVIS'  
24 CLAIMS IN THAT DECLARATION?

25 A. YES, SIR. I'M --

1 Q. OKAY. ALL I'M TRYING TO FIND OUT IS JUST WHAT YOUR  
2 OPINIONS ARE, OKAY.

3 NOW, WITH RESPECT TO THE OTHER ONE, YOU SAY,  
4 "AS PROVIDED IN THE JANUARY 2017 UNIT" -- OR "AS PROVIDED  
5 ABOVE, THE JANUARY 2017 UNIT INCLUDES MANY FEATURES OF THE  
6 '364 PATENT. TO THE EXTENT THERE ARE GAPS IN THE  
7 TEACHINGS OF THE JANUARY 2017 UNIT, OTHER PRIOR ART SUCH  
8 AS THE DUERWOOD 2016 UNIT AND/OR THE SWISHER ROUGH CUT 44  
9 MOWER FILL IN THOSE GAPS." I WANT TO MAKE SURE I  
10 UNDERSTOOD WHAT YOU SAID EARLIER. YOU ARE ASSUMING THAT  
11 THE JANUARY 2017 UNIT REPRESENTS PRIOR ART?

12 A. YES, SIR.

13 Q. AND YOU ARE ASSUMING THAT THE DUERWOOD 2016 UNIT IS  
14 PRIOR ART?

15 A. YES, SIR.

16 Q. YOU'RE NOT OFFERING AN OPINION THAT THEY ARE IN FACT  
17 PRIOR ART; CORRECT?

18 A. YES, SIR.

19 Q. OKAY. AND THEN BASED ON THAT, YOU SAY, "FOR THE  
20 REASONS LAID OUT ABOVE, A PERSON OF ORDINARY SKILL IN THE  
21 ART WOULD HAVE THUS VIEWED THE CLAIMS OF THE '364 PATENT  
22 AS OBVIOUS IN VIEW OF THE PRIOR ART." THAT'S AN OPINION  
23 AS TO OBVIOUSNESS; CORRECT?

24 A. YES, SIR.

25 Q. NOT ANTICIPATION?

1 A. WHEN YOU'RE ADDING IN THE OTHER REFERENCES, YES.

2 Q. OKAY. DID YOU MEAN THAT AS AN OPINION ON  
3 ANTICIPATION?

4 A. LET ME THINK THROUGH THE CLAIM. I'M TRYING TO  
5 REMEMBER -- WELL, OKAY, THERE'S MORE THAN ONE CLAIM HERE,  
6 SO IT'S A BROADER STATEMENT COLLECTIVELY HERE. SO I  
7 BELIEVE CLAIM 1 IS ANTICIPATED, BUT THE OTHER CLAIMS  
8 LIMITATIONS THAT AREN'T IN THAT WOULD HAVE TO -- LIKE THE  
9 ROTATING, THE THING ON THE SWISHER MOWER, THE THING WITH  
10 THE PINS, THAT'S A DEPENDENT CLAIM.

11 Q. RIGHT. SO YOU'RE -- I THINK YOU COVERED THIS A  
12 MINUTE AGO. EVEN THOUGH THIS DOESN'T SPECIFICALLY STATE  
13 THAT YOU'RE OFFERING AN OPINION AS TO ANTICIPATION AS TO  
14 CLAIM 1, YOU ARE TELLING ME THAT YOU ARE IN FACT OFFERING  
15 AN OPINION BASED ON THESE ASSUMPTIONS HERE AS TO CLAIM  
16 1 --

17 A. YES --

18 Q. -- CORRECT?

19 A. -- JUST CLAIM 1.

20 Q. ALL RIGHT. WHAT MAKES SOMETHING PRIOR ART IN A  
21 GENERAL SENSE?

22 A. IN A GENERAL SENSE, SIR, LONG BEFORE THE PATENT  
23 SYSTEM, IT DOESN'T HAVE TO BE A PATENT REFERENCE, IT NEEDS  
24 TO BE OUT THERE WHERE IT IS ACCESSIBLE, AVAILABLE TO BE  
25 SEEN. YOU KNOW, IF YOU LOOK AT SOME OF THE PATENT LAW AND

1 THE OBSCURE TREATIES, IF YOU HAD A PH.D. PAPER AND YOU  
2 PUBLISHED IT, PUBLISHED IT, IT WAS AVAILABLE IN THE  
3 LIBRARY AND NO ONE EVER CHECKED IT OUT, IT'S PRIOR ART.  
4 IT WAS AVAILABLE FOR INSPECTION. IF I MAKE SOMETHING AND  
5 I USE IT, IF, IF IT'S PEOPLE CAN SEE IT, IF IT'S WRITTEN  
6 UP IN A MAGAZINE, THOSE ARE THE EASIER ONES, OF COURSE.

7 Q. IN THIS CASE --

8 A. IT'S NOT SECRET.

9 Q. -- IT APPEARS THAT THE DUERWOOD, WHAT WE'RE  
10 REFERRING TO AS THE DUERWOOD UNIT, NOTHING WAS EVER DONE  
11 WITH IT?

12 A. NO, SIR. IT WAS -- I UNDERSTAND IT TO HAVE BEEN --  
13 WHEN I SAY "PRIOR ART", AND AS I UNDERSTAND THE  
14 DECLARATION NOW, IT WAS ON -- A VIDEOTAPE WAS MADE, AND IT  
15 WAS SHOWN ON LIKE FACEBOOK OR SOMETHING LIKE THAT, SO  
16 PEOPLE COULD LOOK AT IT AND --

17 Q. AND THAT'S ENOUGH TO MAKE IT PRIOR ART?

18 A. YES, SIR.

19 Q. AND THEN THE FACT THAT THERE WAS SIMILAR USE OF THE  
20 2017 UNIT WOULD ALSO MAKE IT PRIOR ART?

21 A. IF THAT HAPPENED, YES.

22 THE COURT: OKAY. ALL RIGHT.

23 ALL RIGHT. I THINK THAT'S ALL I HAVE. ANYBODY  
24 ELSE, ANYTHING ELSE?

25 MR. MILLER: NOT ME, YOUR HONOR.

1 MS. RUMFELT: NO, YOUR HONOR.

2 THE COURT: ALL RIGHT. MR. FOX, THANK YOU VERY  
3 MUCH.

4 A. THANK YOU.

5 THE COURT: YOU MAY BE EXCUSED.

6 COUNSEL, I'VE GLEANED, I THINK, FROM YOUR  
7 E-MAIL CHAIN THAT YOU HAVE PREPARED CLOSING ARGUMENTS THAT  
8 YOU WANT TO MAKE. HOW LONG DO YOU ANTICIPATE THOSE  
9 TAKING?

10 MR. FOSTER: WELL, WHAT WE WOULD PROPOSE, YOUR  
11 HONOR, SINCE WE JUST FINISHED WITH THIS IS HAVING  
12 MR. MILLER PRESENT THE INVALIDITY ISSUE AND PERHAPS HAVE  
13 THEIR RESPONSE, AND THEN I WOULD TAKE UP THE INFRINGEMENT/  
14 IRREPARABLE HARM, I THINK COLLECTIVELY ON OUR SIDE MAYBE  
15 AN HOUR, MAYBE, MAYBE SOMETHING LIKE THAT.

16 THE COURT: OKAY, AND, MS. RUMFELT, HOW ABOUT  
17 YOU?

18 MS. RUMFELT: YOUR HONOR, AROUND THAT, MAYBE A  
19 LITTLE BIT LESS; BUT I WOULD PREFER THAT THEY MAKE AN  
20 ARGUMENT, WE MAKE AN ARGUMENT. I DON'T THINK IT MAKES  
21 SENSE TO GET UP AND DOWN, TRY TO --

22 MR. FOSTER: IT'S YOUR CALL.

23 MS. RUMFELT: -- ONE OR THE OTHER.

24 THE COURT: WELL, IT MAKES SOME SENSE BECAUSE  
25 YOU ARE RAISING THESE INVALIDITY DEFENSES. I MEAN,

1 WITHOUT YOU RAISING THEM, THEY WOULDN'T HAVE TO RESPOND TO  
2 THEM.

3 MR. FOSTER: WE'RE COMFORTABLE --

4 THE COURT: THAT'S SORT OF WHY I ASKED THE  
5 QUESTION EARLIER IS WHETHER OR NOT YOU ARE CLAIMING THAT  
6 THERE IS NOT A LIKELIHOOD OF SUCCESS ON THE CURRENT RECORD  
7 WITH RESPECT TO INFRINGEMENT. IF ON THIS RECORD YOU'RE  
8 NOT MAKING THAT ARGUMENT, WE DON'T NEED TO ADDRESS  
9 INFRINGEMENT THIS AFTERNOON.

10 MS. RUMFELT: AND PERHAPS IT MAKES SENSE FOR ME  
11 TO JUST KIND OF EXPLAIN OUR POSITION ON THIS A LITTLE BIT.

12 OUR POSITION ON INFRINGEMENT IS THAT WHAT'S  
13 BEEN PUT IN THE RECORD IS ATTORNEY ARGUMENT AND MR. ODOM'S  
14 CLAIM, COPYING CHARTS I THINK HE CALLED THEM, AND HE SAID  
15 TODAY HE'S NEVER DONE THAT BEFORE, HE JUST DID IT HERE  
16 TODAY, AND WE THINK THAT THE CASE LAW SUGGESTS THAT AT  
17 THIS POSTURE WITH THE BURDEN THAT THEY HAVE, ATTORNEY  
18 ARGUMENT PLUS THE INVENTOR'S CLAIMS TO HAVE LOOKED AT THE  
19 INFRINGING DEVICE ARE NOT ENOUGH AND THAT THEY HAVEN'T MET  
20 THEIR BURDEN ON THAT REGARD, AND WE CAN --

21 THE COURT: OKAY. WITH ALL DUE RESPECT, I  
22 THINK YOU'RE WRONG ABOUT THAT; BUT IF YOU WANT TO ARGUE  
23 IT, PUT IT IN THE RECORD, I'LL LET YOU DO SO. I THINK THE  
24 PRIMARY ISSUE HERE HAS TO DO WITH THE LIKELIHOOD OF  
25 SUCCESS ON THESE VALIDITY DEFENSES.

1 MS. RUMFELT: AND, AGAIN, I THINK WE ARE ALL IN  
2 AGREEMENT THAT THAT'S THE PROPER ISSUE.

3 THE COURT: I MEAN, I GUESS WHAT I'M SAYING TO  
4 YOU IS IF ALL I WAS PRESENTED HERE WAS THE CLAIMED  
5 INFRINGEMENT, I'D PROBABLY GRANT THE INJUNCTION, BUT YOU  
6 RAISE CERTAIN DEFENSES TO THE VALIDITY OF THE PATENT.  
7 BECAUSE WITHOUT THE DEFENSES AS TO VALIDITY YOU'VE GOT A  
8 VALID PATENT AND A PRESUMPTION THAT I HAVE TO APPLY;  
9 CORRECT?

10 MS. RUMFELT: A PRESUMPTION OF VALIDITY, NOT --

11 THE COURT: VALIDITY, RIGHT.

12 MS. RUMFELT: -- A PRESUMPTION OF  
13 INFRINGEMENT.

14 THE COURT: SO I'VE GOT A PATENT THAT WAS  
15 ISSUED, I'VE GOT A PRESUMPTION THAT IT'S A VALID, IF  
16 THAT'S ALL I'VE GOT AND IF THEY CAN SHOW IRREPARABLE HARM,  
17 I GRANT THE INJUNCTION; RIGHT?

18 MS. RUMFELT: WELL, WHAT -- TO MEET OUR BURDEN  
19 THOUGH ALL WE HAVE TO SHOW AT THIS STAGE IS VULNERABILITY  
20 TO AN ATTACK, SO VULNERABILITY TO AN INVALIDITY ATTACK.

21 THE COURT: BUT WE'RE TALKING ABOUT INVALIDITY,  
22 THAT'S ALL I'M TRYING TO GET YOU TO SAY --

23 MS. RUMFELT: THAT'S RIGHT.

24 THE COURT: -- ARE WE TALKING ABOUT VALIDITY?

25 MS. RUMFELT: YEAH, I THINK WE AGREE. MAYBE I

1 MIGHT BE MISSING THE --

2 THE COURT: ALL RIGHT. THEN IT DOES SEEM TO ME  
3 IF THAT'S WHAT WE'RE TALKING ABOUT IS THE VALIDITY  
4 DEFENSES IS FOR YOU TO GO FIRST BECAUSE YOU RAISE THOSE  
5 DEFENSES AND YOU HAVE THE BURDEN ON THOSE DEFENSES AND  
6 THEN LET THE PLAINTIFF RESPOND. DOESN'T THAT MAKE SENSE?

7 AND THEN I, I THINK THE RECORD IS SUFFICIENT ON  
8 THE INFRINGEMENT ISSUE. EVERYBODY AGREE?

9 MR. MILLER: AGREED.

10 MR. FOSTER: AGREED.

11 THE COURT: YOU DON'T, MS. RUMFELT, I CAN TELL.

12 MS. RUMFELT: WELL, I MEAN, I, I JUST WANT TO  
13 POINT OUT THAT WE DID CONTEST INFRINGEMENT IN OUR  
14 BRIEFING, WE DID RAISE THAT, AND IT'S NOT --

15 THE COURT: I UNDERSTAND THAT, BUT WE'RE NOT AT  
16 TRIAL, AND THIS DOESN'T BIND YOU AT TRIAL.

17 MS. RUMFELT: RIGHT, UNDERSTOOD.

18 THE COURT: I GUESS LAW SCHOOLS TEACH THAT  
19 ANYMORE, I DON'T KNOW, DON'T AGREE THAT IT'S RAINING  
20 OUTSIDE BECAUSE IT WILL BE USED AGAINST YOU SOMETIME  
21 LATER, BUT THAT'S SORT OF RIDICULOUS.

22 ALL RIGHT. THEN LET'S TAKE -- HOW MUCH TIME DO  
23 YOU NEED TO EAT LUNCH? CAN WE DO THAT IN AN HOUR AND BE  
24 BACK AND START ABOUT 5 AFTER 2:00 AND GET THIS WRAPPED UP?

25 MR. MILLER: YES, YOUR HONOR.

1 MR. FOSTER: YES, YOUR HONOR.

2 THE COURT: ALL RIGHT. LET'S DO THAT.

3 (RECESSED AT 1:05 P.M., UNTIL 2:07 P.M.)

4 THE COURT: ALL RIGHT. I BELIEVE WE'RE READY  
5 TO PROCEED. MS. RUMFELT, YOU MAY BEGIN.

6 MS. RUMFELT: THANK YOU, YOUR HONOR.

7 I WANT TO START -- I KNOW YOU WANT ME TO FOCUS  
8 AT THIS EARLY STAGE ON INVALIDITY, BUT I WANT TO START  
9 WITH A COUPLE OF JUST THRESHOLD ISSUES FIRST. I DON'T  
10 THINK I NEED TO REITERATE THAT PRELIMINARY INJUNCTIONS ARE  
11 DRASTIC REMEDIES THAT SHOULDN'T BE ROUTINELY GRANTED AND  
12 PLAINTIFF --

13 THE COURT: YOU DON'T? I THOUGHT YOU DID.

14 MS. RUMFELT: BUT I'M DOING IT ANYWAY, AND THAT  
15 THE PLAINTIFF NEEDS TO PROVE ALL FOUR FACTORS HERE,  
16 INCLUDING LIKELIHOOD OF SUCCESS ON THE MERITS AND  
17 IRREPARABLE HARM, BOTH OF WHICH ARE PARAMOUNT. IF THEY  
18 CAN'T PROVE THOSE, INJUNCTIONS SHOULDN'T ISSUE.

19 WE THINK THAT THERE'S A LOT OF UNDISPUTED FACTS  
20 THAT WEIGH IN FAVOR OF VULNERABILITY HERE; BUT THERE'S  
21 ALSO SIGNIFICANT DISPUTES OF FACT HERE, AND COURTS HAVE  
22 HELD THAT WHERE YOU'RE AT THE STAGE AND THERE ARE SIGNIFI-  
23 CANT FACTUAL DISPUTES, THAT WEIGHS IN FAVOR OF DENYING THE  
24 INJUNCTION AND ALLOWING THE CASE TO PROCEED TO DISCOVERY.

25 THERE'S A CASE OUT OF THE SOUTHERN DISTRICT OF

1 NEW YORK THAT SAYS, A TRIAL COURT'S INQUIRY ON MOTION FOR  
2 PRELIMINARY INJUNCTION IS LIMITED AND DISPUTES OF LAW AS  
3 WELL AS DISPUTES OF FACT MAY PROVIDE A FAIR GROUND FOR  
4 LITIGATION.

5 IN DECIDING A MOTION FOR PRELIMINARY INJUNCTION  
6 ANOTHER COURT RULES, THE DISTRICT COURT IS NOT BOUND TO  
7 DECIDE DIFFICULT QUESTIONS OF LAW OR DISPUTED QUESTIONS OF  
8 FACT.

9 SO OVER THE COURSE OF JUST A FEW WEEKS WHAT  
10 WE'VE PUT TOGETHER HAS BEEN WHAT WE CONTEND IS A  
11 SIGNIFICANT QUESTION ON THE VULNERABILITY OF THE PATENT.  
12 THERE'S A LOT HERE, ASSEMBLED PRETTY QUICKLY. WE THINK  
13 THAT AFTER DISCOVERY THERE'S A LOT MORE THAT WILL BE HERE  
14 AS WELL, BUT AT THIS STAGE IT IS OUR CONTENTION THAT  
15 THERE'S ENOUGH HERE BOTH WITH THE UNDISPUTED FACTS AND THE  
16 DISPUTES OF FACT TO SAY, WE'VE GOT TO KEEP GOING, AND  
17 GOING IS WITHOUT A PRELIMINARY INJUNCTION IN THIS CASE.

18 SO ON THE LIKELIHOOD OF SUCCESS ON THE MERITS  
19 PRONG, TO SATISFY THE BURDEN AT THIS STAGE WE JUST HAVE TO  
20 SHOW THAT THE PATENT IS VULNERABLE TO AN INVALIDITY  
21 FINDING. OUR POSITION NEED NOT BE ENTIRELY FLUSHED OUT,  
22 THAT'S WHAT THE CASE LAW SAYS, IT JUST HAS TO BE A  
23 VULNERABILITY.

24 THE COURT: HAS TO BE MORE THAN JUST AN  
25 ALLEGATION THOUGH; CORRECT?

1 MS. RUMFELT: THAT'S TRUE, THAT'S TRUE; BUT WE  
2 THINK THAT THERE IS MORE THAN AN ALLEGATION HERE, AND  
3 WE'LL WALK THROUGH THAT.

4 AS YOU'VE HEARD, THERE'S FOUR BASES FOR, FROM  
5 OUR PERSPECTIVE FOR INVALIDATING THE PATENT. TWO ARE  
6 INVALIDITY CONTENTIONS AND TWO ARE UNENFORCEABILITY  
7 CONTENTIONS. THE FIRST TWO YOU'VE HEARD BOB FOX ON TODAY:  
8 INVALIDITY DUE TO ANTICIPATION, AND HIS PERSPECTIVE ON  
9 ANTICIPATION IS AS TO CLAIM 1, THE FIRST INDEPENDENT  
10 CLAIM, WHICH IS THE MAIN CLAIM, THE BROADEST CLAIM OF THE  
11 PATENT; AND THEN INVALIDITY DUE TO OBVIOUSNESS.

12 THE COURT: LET ME ASK YOU A QUESTION THERE.

13 MS. RUMFELT: SURE.

14 THE COURT: DOES THE EVIDENCE I CONSIDER ON  
15 THIS ISSUE HAVE TO BE ADMISSIBLE EVIDENCE?

16 MS. RUMFELT: NOT AT THIS STAGE.

17 THE COURT: FOR INSTANCE, CAN I RELY ON HEARSAY  
18 OR OTHER TYPES OF EVIDENCE THAT WOULD NOT BE ADMISSIBLE AT  
19 TRIAL?

20 MS. RUMFELT: THE CASE LAW ON THAT IS THAT THE  
21 FEDERAL RULES OF EVIDENCE DON'T APPLY TO PRELIMINARY  
22 INJUNCTION HEARINGS, AND THAT, FOR EXAMPLE, THE COURT CAN  
23 CONSIDER HEARSAY, AS WELL AS SOMETHING ARISING TO, YOU  
24 KNOW, JUST KIND OF NOT -- A LOWER STANDARD THAN WHAT IS  
25 APPLICABLE AT TRIAL.

1 THE COURT: WHAT ABOUT THE TESTIMONY OF AN  
2 EXPERT WITNESS? I WAS TALKING TO MY CLERK ABOUT THIS AT  
3 LUNCH. WHAT -- I MEAN, I DON'T HAVE A DAUBERT MOTION OR  
4 ANYTHING OF THAT SORT, BUT WHAT ABOUT TESTIMONY OF A  
5 PROPOSED EXPERT WITNESS THAT MIGHT NOT BE ADMISSIBLE AT  
6 TRIAL?

7 MS. RUMFELT: RIGHT, AND I THINK -- LET ME JUST  
8 PULL UP THE CASE LAW I HAVE ON THAT. THE VERY IDEA HERE  
9 IS THAT WE'RE TRYING TO GET PAST THE MOTION PAPERS AND  
10 PROVIDING YOU WITH SOME ADDITIONAL INFORMATION. WE'RE NOT  
11 DEALING WITH A GATEKEEPER FUNCTION HERE. IT'S NOT A JURY.  
12 YOU CAN LISTEN TO THE TESTIMONY, YOU CAN GIVE IT THE  
13 WEIGHT YOU SEE FIT. OF COURSE, WE CONTEND THAT HE IS  
14 QUALIFIED, AND WE CONTEND THAT THAT'S BASED ON THIS UNIQUE  
15 SET OF QUALIFICATIONS THAT HE HAS, BOTH HIS, HIS  
16 EXPERIENCE AS A LAWYER AND HIS, HIS WORK IN THE FIELD; BUT  
17 I DON'T THINK, I DON'T THINK THAT THE LEVEL OF SCRUTINY  
18 THAT YOU APPLY TO HIM AT THIS STAGE, PARTICULARLY BECAUSE  
19 THERE'S NO JURY, IS THE SAME.

20 ALL RIGHT. MOVING TO THE INVALIDITY POSITIONS,  
21 AS I SAID, WE'VE GOT TWO SEPARATE POSITIONS ON THIS.  
22 WE'VE GOT THE ANTICIPATION ARGUMENT AND THE OBVIOUSNESS  
23 ARGUMENT. AND IN TALKING ABOUT THE JANUARY 2017 UNIT AND  
24 WHETHER THAT UNIT WAS READY FOR PATENTING AND SOME OF THE  
25 STUFF THAT'S BEEN COVERED IN THE BRIEFING, I THINK THERE'S

1 BEEN, PLAINTIFF'S CONFLATED SOME OF THESE ISSUES, AND I  
2 JUST WANT TO MAKE SURE THAT THAT'S CLEAR.

3 SO THE ISSUE OF READY FOR PATENTING AND WHETHER  
4 A PRIOR ART REFERENCE IS READY FOR PATENTING, THAT ONLY  
5 MATTERS FOR ANTICIPATION PURPOSES. WE DON'T DISPUTE THAT  
6 READY FOR PATENTING IS THE GOVERNING STANDARD IN THAT  
7 SECTION OF THE STATUTE, BUT IT'S NOT -- AND WE DO DISPUTE  
8 HOW YOU APPLY IT, BUT THAT'S NOT RELEVANT TO THE OBVIOUS-  
9 NESS ARGUMENT. THE OBVIOUSNESS ARGUMENT, NONE OF THOSE  
10 READY FOR PATENTING ISSUES MATTER. WHAT MATTERS IS ARE  
11 THERE PUBLICLY DISCLOSED PIECES OF PRIOR ART THAT ARE  
12 RELEVANT HERE, AND WE, AND WE CONTEND THAT PUBLIC  
13 DISCLOSURE IS NOT AN ISSUE, SO LET ME TALK ABOUT PUBLIC  
14 DISCLOSURE BECAUSE IT APPLIES TO BOTH ANTICIPATION AND  
15 OBVIOUSNESS.

16 THERE'S MANY FACTUAL DISPUTES IN THE PAPERS  
17 ABOUT WHETHER THERE WAS A PUBLIC DISCLOSURE ABOUT THE  
18 VARIETY OF DEVICES LEADING UP TO THIS. THOSE DISPUTES  
19 ALONE, WE CONTEND, SHOULD BE ENOUGH TO MAKE THE COURT A  
20 BIT NERVOUS ABOUT ISSUING AN INJUNCTION HERE BECAUSE  
21 THEY'RE FACTUAL DISPUTES GOING TO THE CORE ISSUES; BUT  
22 LET'S SET THOSE DISPUTES ASIDE FOR A SECOND AND LOOK AT  
23 THE DISCLOSURES, THE PUBLIC DISCLOSURES THAT ARE  
24 UNDISPUTED.

25 WE HEAR TODAY THAT MR. WILLIS WASN'T AN

1 INVENTOR. HE WASN'T EVEN A PARTNER IN THE BUSINESS. IF  
2 THAT -- IF WE WERE TO TAKE THAT AS TRUE, THEN ALL THE  
3 DISCLOSURES TO HIM ARE PUBLIC DISCLOSURES IF ONE PERSON IS  
4 ENOUGH, AND THERE ARE DISCLOSURES INDISPUTABLY TO HIM.  
5 WE'VE HEARD TODAY ABOUT A VIDEO THAT MR. ODOM DISCLOSED TO  
6 MR. WILLIS ON JANUARY 23RD, WE HEARD ABOUT ANOTHER ONE  
7 THAT HE SENT ON JANUARY 24TH. WILLIS TESTIFIES THAT HE  
8 THEN TALKED ABOUT THE INVENTION TO ANYBODY WHO WOULD  
9 LISTEN. HE SENT IT AROUND, HE SENT THOSE VIDEOS AROUND,  
10 HE WAS EXCITED TO TALK ABOUT THIS INVENTION.

11 PLAINTIFF SAYS, OH, WELL, WILLIS HAD AN EXPECT-  
12 TATION OR A REQUIREMENT OF CONFIDENTIALITY BECAUSE HE IS,  
13 HE'S AN EMPLOYEE OF THE BUSINESS; BUT THE BUSINESS DIDN'T  
14 EVEN EXIST AT THE TIME, THE BUSINESS WASN'T EVEN FORMED  
15 UNTIL FEBRUARY; AND WE HEARD TODAY THAT HE'S NEVER  
16 RECEIVED A W-2 AS AN EMPLOYEE, HE'S NEVER RECEIVED A K-1.  
17 THERE'S SOME ALLEGATION ABOUT AN EXCHANGE OF A LOAN, BUT  
18 THE POINT IS HE WASN'T AN EMPLOYEE.

19 SO THEY CAN'T HAVE IT BOTH WAYS HERE, EITHER  
20 HE'S PART OF THE INVENTION, HE HELPED PUT THIS TOGETHER,  
21 OR HE'S NOT AN INVENTOR AND THOSE WERE PUBLIC DISCLOSURES  
22 TO MR. WILLIS.

23 BUT THERE'S ALSO UNDISPUTED OTHER PUBLIC  
24 DISCLOSURES. SETTING ASIDE WHETHER WHAT HAPPENED WITH  
25 MR. GORDAN HOWELL WAS A SALE, THAT WAS CERTAINLY A

1 DISCLOSURE PRIOR TO JANUARY 30TH. THERE WAS CERTAINLY  
2 DISCUSSION, AND WE'VE LOOKED AT THOSE AFFIDAVITS HERE  
3 TODAY, THERE WAS CERTAINLY DISCUSSION ABOUT THIS LEADING  
4 UP TO JANUARY 30TH, AND THAT'S A DISCLOSURE.

5 WE'VE SEEN IN THE PAPERS ALSO THAT MR. ODOM HAD  
6 HIS FATHER HELPING HIM WITH THE TOWER LOCKS LATER ON IN  
7 THE ONGOING COURSE OF DEVELOPMENT, THIS IS A PUBLIC  
8 DISCLOSURE. HE'S NEVER SAID THAT HIS FATHER WAS AN  
9 EMPLOYEE OF THE BUSINESS, AND SO HIS FATHER HAS WORKED  
10 WITH HIM ON THIS, THAT'S A PUBLIC DISCLOSURE TO A SINGLE  
11 PERSON. AND WE'VE NEVER HEARD ANYTHING ABOUT ANY  
12 OBLIGATION OF CONFIDENTIALITY WITH ANY OF THEM.

13 SO WHY DOES THAT MATTER? WITH OUR ANTICIPATION  
14 ARGUMENT, AND, AGAIN, THAT'S THAT THE INVENTION IS NOT  
15 NEW. IN OTHER WORDS, IT'S ANTICIPATED BECAUSE THERE'S A  
16 SINGLE PRIOR ART REFERENCE THAT DISCLOSES EVERY ELEMENT,  
17 AND WE CONTEND THAT THE JANUARY 2017 UNIT DISCLOSES ALL OF  
18 THE CLAIMS -- OR ALL OF THE COMPONENTS, ELEMENTS OF CLAIM  
19 1.

20 ANTICIPATION IS A QUESTION OF FACT. SO ALL WE  
21 HAVE TO DO HERE THEN IS RAISE SUBSTANTIAL FACTUAL QUES-  
22 TIONS AS TO WHETHER THE JANUARY 2017 UNIT ANTICIPATED ALL  
23 OF THE CLAIMS. BOB FOX SAT UP THERE TODAY AND WALKED US  
24 ALL THROUGH HOW HE BELIEVES THE JANUARY 2017 UNIT ANTICI-  
25 PATE THE CLAIMS, ANTICIPATES THE CLAIMS. HE TESTIFIED

1 THAT THERE'S NO MATERIAL DIFFERENCE BETWEEN THE TOWER LOCK  
2 THAT HE SAW ON THE JANUARY 2017 UNIT AND THE ONE DESCRIBED  
3 IN THE PATENT, AND IT DOESN'T MATTER ANYWAY BECAUSE THE  
4 FINE TUNING OF MATERIALS AND SHAPES AND THINGS LIKE THAT  
5 IS JUST NOT -- THAT'S NOT WHAT'S CLAIMED IN THE PATENT.  
6 IT'S A TOWER LOCK.

7 THE ONLY REAL ARGUMENT THAT THIS COMES DOWN TO  
8 ON ANTICIPATION IS THIS NEW CLAIM CONSTRUCTION ON  
9 POSITIONS IN BETWEEN, AND ALL THAT THEY HAVE ON THAT IS AN  
10 INTERPRETATION OF THE CLAIM LANGUAGE BY THE INVENTOR; BUT  
11 BOB FOX READS IT A DIFFERENT WAY. HE READS IT THAT IT  
12 JUST MEANS IT HAS TO MOVE THROUGH POSITIONS BETWEEN  
13 HORIZONTAL AND VERTICAL. WE'VE PUT MR. FOX IN AS A PERSON  
14 OF ORDINARY SKILL IN THE ART, THAT'S THE PERSON THAT  
15 MATTERS HERE, AND HIS VIEW MAKES SENSE. IF POSITIONS IN  
16 BETWEEN WAS MEANT TO SAY LOCKING, IF IT WAS MEANT TO SAY  
17 CUTTING AT POSITIONS IN BETWEEN, IT COULD HAVE SAID THIS.  
18 IT COULD HAVE BEEN DONE BY A DEPENDENT CLAIM.

19 SO FOR PURPOSES OF ANTICIPATION THERE -- AND  
20 THE ON-SALE BAR MEANING THAT THE JANUARY 2017 UNIT WAS ON  
21 SALE FOR PURPOSES OF ANTICIPATION --

22 THE COURT: WHAT DO I DO WITH THE DISPUTE ABOUT  
23 CLAIM CONSTRUCTION AT THIS POINT IN THIS LAWSUIT?

24 MS. RUMFELT: I DO THINK THAT YOU -- IF THERE  
25 ARE DISPUTED CLAIM ISSUES, THAT THAT'S, THAT THAT'S PART

1 OF THE PROCESS HERE IS TO LOOK AT THOSE AND MAKE AN INTER-  
2 PRETATION. WE WOULD CONTEND THOUGH THAT A LOT OF THIS  
3 STUFF, AGAIN, THERE SHOULD BE A MARKMAN HEARING, THERE  
4 SHOULD BE A MUCH MORE --

5 THE COURT: PRIOR TO MY RULING ON THIS MOTION?

6 MS. RUMFELT: I'M SORRY?

7 THE COURT: ARE YOU SUGGESTING THERE SHOULD BE  
8 A MARKMAN HEARING PRIOR TO --

9 MS. RUMFELT: I THINK FOR PURPOSES OF THIS  
10 MOTION, MY VIEW, MY UNDERSTANDING IS BOTH PARTIES HAVE  
11 REALLY SAID, WELL, IT'S THE PLAIN AND ORDINARY MEANING FOR  
12 PURPOSES OF TODAY. I THINK THAT'S CHANGED A LITTLE BIT  
13 AND EVOLVED KIND OF THROUGH THE PROCESS WITH THIS  
14 POSITIONS-IN-BETWEEN INTERPRETATION; BUT OUR POSITION HAS  
15 ALWAYS BEEN PLAIN AND ORDINARY LANGUAGE OF ALL OF THESE  
16 CLAIMS AT LEAST AT THIS STAGE, AND I THINK THAT THERE,  
17 THAT THERE IS A REQUIREMENT THAT TO THE EXTENT THERE ARE  
18 CONTENTIONS ABOUT CLAIM CONSTRUCTION THAT GET RESOLVED ON  
19 THE RECORD THAT WE HAVE HERE THOUGH, I THINK THAT THAT IS  
20 WHAT THE LAW REQUIRES; BUT FROM OUR PERSPECTIVE YOU CAN GO  
21 WITH THE PLAIN AND ORDINARY MEANING AND GET US THERE, AND  
22 THAT IS THAT, AT LEAST FOR THAT ONE, THAT IT MOVES BETWEEN  
23 THOSE POSITIONS IN BETWEEN, NOT THAT IT HAS TO LOCK OR  
24 CUT.

25 SO FOR PURPOSES --

1 THE COURT: LET ME -- OF WHAT UTILITY WOULD IT  
2 BE IF IT DIDN'T CUT AT VARIOUS SPOTS ON THAT CONTINUUM OF  
3 MOVEMENT?

4 MS. RUMFELT: WELL, THERE'S UTILITY IN THIS  
5 POSITION AND THERE'S UTILITY IN THIS POSITION.

6 THE COURT: I UNDERSTAND THAT, BUT AS I --  
7 WHOSE -- I'LL BE PERFECTLY HONEST WITH YOU, I DIDN'T FIND  
8 MR. FOX'S EXPLANATION OF THAT TO BE VERY REASONABLE, SO DO  
9 I APPLY MY JUDGMENT ON THAT? HOW DO I RESOLVE THAT ISSUE?

10 MS. RUMFELT: OUR PERSPECTIVE ON THAT, FIRST,  
11 IS THAT MR. FOX IS THE ONLY PERSON HERE OPINING ON THAT  
12 ISSUE, THE REST OF IT IS ATTORNEY ARGUMENT.

13 THE COURT: HE DIDN'T COME HERE TO TESTIFY AS  
14 AN EXPERT ON CLAIMS CONSTRUCTION, HE SAID AS MUCH IN HIS  
15 TESTIMONY.

16 MS. RUMFELT: THAT'S RIGHT, AND HE DEALT WITH  
17 IT BECAUSE THAT WAS A NEW CLAIM CONSTRUCTION POSITION  
18 BROUGHT IN BY --

19 THE COURT: NO. I WATCHED HIM VERY CAREFULLY.  
20 HE DID THAT, HE LEANED BACK IN HIS CHAIR, AND HE SAID,  
21 WELL, YOU KNOW, I SHOULDN'T DO CLAIM CONSTRUCTION OR WRITE  
22 A CLAIM, YOU KNOW, WITHOUT A LOT OF THOUGHT, BUT, HERE,  
23 I'LL DO IT ANYWAY. I JUST DON'T FIND THAT VERY HELPFUL,  
24 SO I'M ASKING A VERY PRACTICAL QUESTION. BECAUSE THE TWO  
25 OF YOU INTERPRET THAT CLAIM DIFFERENTLY, WHAT DO I MAKE OF

1 THAT IN RELATIONSHIP TO THIS MOTION FOR PRELIMINARY  
2 INJUNCTION?

3 MS. RUMFELT: I MEAN, I THINK THE OTHER ISSUE  
4 THAT DIDN'T COME OUT AS CLEARLY IN BOB'S TESTIMONY, AND  
5 THAT'S BECAUSE THIS IS NOT REALLY HIS JOB, BUT THE  
6 SPECIFICATION OF THE PATENT, AND WE CAN PULL IT UP IF WE  
7 NEED TO. IT SAYS ONE, ONE ENABLEMENT OR ONE POSSIBLE WAY,  
8 I CAN'T -- I DON'T HAVE THE EXACT LANGUAGE IN FRONT OF ME,  
9 BUT THAT IS A -- IT'S A SPECIFICATION, THE CLAIMS ARE WHAT  
10 MATTERS; AND SO THE CLAIMS ARE WHAT TELL US, AND ALL THE  
11 CLAIMS SAY IS "POSITIONS IN BETWEEN", SO THEY'RE TRYING TO  
12 IMPORT LANGUAGE.

13 THE COURT: DON'T YOU DEFINE THE CLAIM IN THE  
14 CONTEXT OF THE SPECIFICATIONS?

15 MS. RUMFELT: BUT YOU CAN'T IMPORT LANGUAGE  
16 BACK INTO THE, INTO THE CLAIM.

17 THE COURT: I'M SORRY?

18 MS. RUMFELT: YOU CAN'T IMPORT LANGUAGE FROM  
19 THE SPECIFICATION TO THE CLAIM.

20 THE COURT: THAT WASN'T MY QUESTION ABOUT  
21 IMPORTING LANGUAGE. I'M ASKING IF YOU DON'T INTERPRET THE  
22 MEANING OF THAT CLAIM IN THE CONTEXT OF THE  
23 SPECIFICATIONS?

24 MS. RUMFELT: THAT'S RIGHT, THAT'S RIGHT; AND  
25 MY POINT WITH THE SPECIFICATION IS THAT IT DESCRIBES ONE

1     ENABLEMENT, IT DOESN'T DESCRIBE EVERYTHING; AND, AGAIN, IF  
2     THEY WANTED TO SAY IT, THEY COULD HAVE SAID IT.  THEY  
3     DIDN'T.

4                 SO FOR PURPOSES OF, OF THE ANTICIPATION ARGU-  
5     MENT, THERE'S THIS QUESTION ABOUT WHETHER THERE'S BEEN A  
6     SALE BEFORE THE OPERATIVE DATE, WHICH IS JANUARY 30TH.  
7     THE CENTRAL FOCUS ON THE ON-SALE ISSUE IS WHETHER THERE'S  
8     BEEN A COMMERCIALIZATION, AND WE CONTEND THAT AT THIS  
9     STAGE THERE'S STRONG EVIDENCE ENOUGH TO SUGGEST THAT THERE  
10    WAS A SALE BEFORE JANUARY 30TH.  WE'VE LOOKED AT THE  
11    DECLARATIONS OF MARSH AND HOWELL THAT SHOW THERE WAS AN  
12    OFFER FOR SALE BEFORE JANUARY 30TH; AND, BY THE WAY, AN  
13    OFFER FOR SALE IS ENOUGH.  WE CONTEND THAT MR. ODOM IN  
14    HIS, AND HE WAS ASKED ABOUT THIS TODAY, IN HIS EFFORT TO  
15    TALK OUT OF THAT, THAT DISCUSSION BEFORE THE 30TH WAS JUST  
16    NOT CREDIBLE.  THERE'S A TEXT IN THE RECORD IN WHICH HE'S  
17    TEXTING HIS MOTHER AND SAYING, IS GORDON HERE YET ON THE  
18    30TH.  WELL, THAT SUGGESTS THAT EVERYBODY KNEW MR. GORDAN  
19    WAS COMING TO LOOK AT THE UNIT THAT DAY.  AND THEN WE HAVE  
20    THE TESTIMONY ABOUT THE FLOW CONTROL VALVE, AND I UNDER-  
21    STAND THAT THAT'S DISPUTED, BUT THERE IS CORROBORATING  
22    EVIDENCE IN THAT SALES SHEET THAT THERE WAS A FLOW CONTROL  
23    VALVE PURCHASED FOR MR. HOWELL'S TRACTOR, AND WHY, WHY WAS  
24    THAT DONE?  WHY IF HE HADN'T PLANNED IN ADVANCE TO BUY  
25    THIS DID THEY, THEY PURCHASE THAT FLOW CONTROL VALVE?

1           LOOKING AT ALL OF THIS TOGETHER, WHAT MAKES THE  
2 MOST SENSE ABOUT THIS JANUARY 30TH SALE, DOES IT MAKE  
3 SENSE THAT MR. HOWELL SHOWED UP AND SPENT THOUSANDS OF  
4 DOLLARS IN ONE DAY WITHOUT A PRE-DISCUSSION? I DON'T  
5 THINK SO GIVEN THE BACK AND FORTH IN THE DECLARATIONS. IT  
6 MAKES MORE SENSE THAT THE SALE WAS MADE BEFORE JANUARY  
7 30TH, OR AT LEAST OFFERED BEFORE JANUARY 30TH, AND THEN  
8 CONSUMMATED THAT DAY.

9           IN RESPONSE TO THE ANTICIPATION ARGUMENTS,  
10 PLAINTIFF ALSO CLAIMS THAT THE JANUARY 2017 UNIT WAS AN  
11 EXPERIMENTAL PROTOTYPE. "PROTOTYPE" IS THE WORD THEY'VE  
12 USED ALL DAY TODAY. CASE LAW SHOWS THOUGH THAT WHEN AN  
13 INVENTOR IS MAKING STATEMENTS ABOUT EXPERIMENTAL USE IN  
14 THE COURSE OF A LITIGATION, YOU HAVE TO VIEW THAT WITH A  
15 PRETTY HIGH DEGREE OF SKEPTICISM. SO, IN OTHER WORDS, IF  
16 THE PLAINTIFF SUGGESTS THAT THERE'S AN INTENT TO EXPERI-  
17 MENT HERE, AND IT'S THE FIRST TIME WE HEAR ABOUT IT IS IN  
18 LITIGATION, THAT'S OF VERY LITTLE EVIDENTIARY VALUE.

19           IN APPLYING THAT SKEPTICISM, IT DOESN'T MAKE  
20 SENSE LOOKING AT IT TO BE PAID \$2,700 FOR A PROTOTYPE  
21 PRODUCT. AND TO SHOW EXPERIMENTATION THEY HAVE TO SHOW  
22 THAT THE, THERE WAS AN EFFORT TO TEST THE DEVICE SECRETLY,  
23 TO MAINTAIN CONTROL OVER THE EXPERIMENTATION, THERE'S JUST  
24 NO PROOF OF THAT HERE. AT BEST THEY'VE SHOWN THAT THE  
25 JANUARY 2017 UNIT WASN'T PERFECT, BUT THAT'S NOT A REASON

1 FOR FINDING EXPERIMENTAL USE.

2 THERE'S NO EVIDENCE -- PART OF THE STANDARD IS  
3 THAT THE PRODUCT, AS TO WHETHER THE PRODUCT HAS BEEN  
4 ADEQUATELY COMMERCIALIZED, IS WHETHER IT'S FIT FOR ITS  
5 INTENDED PURPOSE. THERE'S NO EVIDENCE THAT ANYONE SAID TO  
6 MR. HOWELL, OH, THIS PRODUCT ISN'T FIT FOR ITS INTENDED  
7 PURPOSE. IN FACT, WE'VE GOT TESTIMONY FROM MR. ODOM TODAY  
8 THAT IT WAS, IT DID SERVE A PURPOSE, IT CUT. THE REALITY  
9 IS THAT AS OF JANUARY 24TH WHEN TRAVIS SENT THE VIDEO, HE  
10 KNEW THAT THE UNIT WOULD WORK FOR ITS INTENDED PURPOSE;  
11 AND THE BEST THEY CAN TALK ABOUT IS FURTHER REFINEMENTS  
12 DOWN THE ROAD, BUT SOME OF THOSE AREN'T EVEN CLAIMED BY  
13 THE PATENT AND OTHERS ARE JUST DEPENDENT CLAIMS.

14 SO THAT'S, THAT'S OUR POSITION ON, ON  
15 ANTICIPATION. I'M GOING TO SHIFT TO OBVIOUSNESS.

16 OBVIOUSNESS IS DISTINCT IN THAT SOMETHING CAN  
17 BE OBVIOUS EVEN IF IT'S NOT IDENTICALLY DISCLOSED SOME-  
18 WHERE IN THE PRIOR ART; SO THE QUESTION IS WHETHER A  
19 PERSON OF ORDINARY SKILL IN THE ART, WHETHER IT WOULD HAVE  
20 BEEN OBVIOUS TO THEM TO PUT THIS TOGETHER IN LIGHT OF THE  
21 PRIOR ART. THIS HAS TO BE VIEWED IN AN EXPANSIVE AND  
22 FLEXIBLE APPROACH; AND, AGAIN, LOOKING AT THIS FLEXABLY,  
23 WE'VE GOT VULNERABILITY HERE. WE'VE GOT THE JANUARY 2017  
24 UNIT INDISPUTABLY READING ON A MAJORITY OF THE CLAIMS OF  
25 THE PATENT; AND THEN WE'VE GOT MR. FOX'S TESTIMONY AS TO

1 THE REMAINING TWO DEPENDENT CLAIMS, WHICH ARE 6 AND 12  
2 DEALING WITH THE ROTATION ADJUSTMENT HOLES, AND THAT, YOU  
3 KNOW, HE HAD SOMETHING IN HIS BARN THAT, THAT READ ON  
4 THAT. THE REALLY ONLY CONTRADICTING EVIDENCE IS TRAVIS  
5 ODOM'S DECLARATION HERE, AND THERE'S CASE LAW THAT SAYS  
6 MR. ODOM SHOULDN'T BE TESTIFYING ABOUT -- HE'S A FACT  
7 WITNESS, HE CAN'T PROVIDE EXPERT OPINION ON VALIDITY.

8 SO THAT LEAVES THE REMAINING QUESTION --

9 THE COURT: LET ME STOP YOU RIGHT THERE.

10 MS. RUMFELT: I'M SORRY?

11 THE COURT: LET ME STOP YOU RIGHT THERE.

12 MS. RUMFELT: YEAH.

13 THE COURT: ARE YOU REQUIRED TO BRING FORTH  
14 EXPERT TESTIMONY?

15 MS. RUMFELT: I THINK THAT'S HOW IT'S TYPICALLY  
16 DONE IS WE, WE PUT IN EXPERT TESTIMONY TO DEMONSTRATE WHAT  
17 A PERSON OF ORDINARY SKILL IN THE ART WOULD DO.

18 THE COURT: AND IF I FIND THAT MR. FOX IS NOT  
19 QUALIFIED TO RENDER THAT OPINION, DOES THAT MEAN YOU LOSE  
20 ON THAT ISSUE?

21 MS. RUMFELT: I THINK THAT MR. FOX -- YES, I  
22 THINK MR. FOX IS OUR EVIDENCE OF THOSE ISSUES, BUT WHAT I  
23 WOULD POINT OUT IS THAT THERE'S NOTHING CONTRADICTORY IN  
24 THE RECORD; AND SO RECOGNIZING THAT THIS IS AN ISSUE ON  
25 WHICH WE BEAR THE BURDEN, IT'S ALSO -- THERE'S, YOU KNOW,

1 IT'S A PRELIMINARY INJUNCTION VULNERABILITY QUESTION, AND  
2 IT'S MORE THAN WHAT WE HAVE ON THE OTHER SIDE.

3 BRIEFLY, BECAUSE THEY RAISED SECONDARY CON-  
4 siderations in their reply brief, secondary considerations  
5 are only a question with obviousness, and they only come  
6 up to rebut a substantial defense of obviousness. So if  
7 you've got -- this is from the AMAZON case in the federal  
8 circuit. At this stage on preliminary injunction if  
9 you've got significant evidence of copying, significant  
10 evidence going to the validity issue, this evidence of  
11 copying and other secondary considerations is typically  
12 insufficient to demonstrate nonobviousness.

13 AND THEY ALSO HAVE TO SHOW A NEXUS, AND THE  
14 nexus issue is important for irreparable harm as well.  
15 They have to show that that commercial success is based on  
16 the novelty of the patent. Arguably, the novelty of the  
17 patent is these tower locks, and that's not the basis for  
18 its commercial success. Without a sufficient nexus, the  
19 court can infer that the success is due to market forces  
20 other than inventiveness, and plaintiff bears the burden  
21 to show that nexus.

22 MOVING ON TO THE THIRD POSITION, WHICH IS AN  
23 unenforceability position, is the omission of the prior  
24 art. It is our contention that there's material prior art  
25 here that had to have been disclosed to the patent office,

1 AND IT WASN'T DISCLOSED. MR. ODOM ADMITTED TODAY ON THE  
2 COURT'S QUESTIONING THAT IT WAS HIS DECISION NOT TO DIS-  
3 CLOSE HIS COINVENTOR. HE ALSO ADMITTED THAT HE KNEW ABOUT  
4 MATERIAL PRIOR ART IN HIS FATHER'S, HIS STEPFATHER'S DE-  
5 SIGN THAT HE KNEW ABOUT THE DUERWOOD UNIT. HE SAID HE WAS  
6 THERE AND HE SAW PICTURES. HE -- THERE'S NO QUESTION HE  
7 KNEW ABOUT THE JANUARY 2017 UNIT, BUT FOR WHATEVER REASON  
8 NO DISCLOSURE STATEMENT WAS FILED WITH THE PATENT OFFICE.

9 AND THEN FOURTH IS INVENTORSHIP. PURPOSEFUL  
10 FAILURE TO DISCLOSE A COINVENTOR RENDERS THE PATENT  
11 UNENFORCEABLE. AS I JUST SAID, HE, MR. ODOM KNEW ABOUT  
12 MR. WILLIS, HE KNEW ABOUT THE CONTRIBUTIONS HE HAD MADE TO  
13 THE INVENTION, HE EVEN WAS HAVING HIM TALK TO A PATENT  
14 LAWYER AND WAS FRUSTRATED THAT HE HADN'T DONE THAT YET,  
15 YOU'VE HEARD THAT TODAY, BUT HE DIDN'T DISCLOSE ALL THAT  
16 HAPPENED AND HE DIDN'T DISCLOSE HIM AS A POTENTIAL  
17 COINVENTOR.

18 THERE'S BEEN SOME DISCUSSION ABOUT CREDIBILITY  
19 AND CORROB --

20 THE COURT: I'M SORRY.

21 MS. RUMFELT: GO AHEAD.

22 THE COURT: I WAS THINKING ABOUT WHAT YOU JUST  
23 SAID, AS A POTENTIAL COINVENTOR, IS THAT WHAT HE HAS TO  
24 DISCLOSE?

25 MS. RUMFELT: MY POINT IS THAT I THINK THE

1 TESTIMONY WAS THAT HE TALKED TO HIS LAWYER, AND, AND  
2 THROUGH WHATEVER THE DECISION WAS HE DIDN'T DISCLOSE HIM  
3 AS A COINVENTOR. NO, NOT -- I'M SORRY, I MEANT THAT HE  
4 DIDN'T TALK TO HIS LAWYER AND MAKE THAT DECISION ABOUT  
5 WHETHER HE WAS OR WASN'T. HE SAID HE MADE THAT DECISION  
6 HIMSELF, MAYBE IN CONJUNCTION WITH HIS LAWYER; BUT MY  
7 POINT IS IT WAS HIS DECISION NOT TO RAISE THAT WITH THE  
8 PATENT OFFICE.

9 THERE'S BEEN SOME DISCUSSION TODAY ABOUT THE  
10 STANDARD HERE AND THAT THERE HAS TO BE CORROBORATION TO  
11 FIND A WITNESS ON THIS CREDIBLE. THERE IS, THERE IS CASE  
12 LAW THAT SAYS THAT ABOUT A COINVENTOR ARGUMENT. ALL THE  
13 CASE LAW THAT I'VE LOOKED AT IS ON SUMMARY JUDGMENT, IS ON  
14 TRIAL, IT'S IN A CLEAR AND CONVINCING STANDARD. THAT'S  
15 NOT WHAT WE HAVE HERE; AND SO FROM OUR PERSPECTIVE THE  
16 CORROBORATION THAT WE HAVE, WHICH WE THINK IS FAIRLY  
17 SIGNIFICANT, BUT IT DOESN'T HAVE TO RISE TO THE LEVEL OF  
18 WHAT YOU WOULD PROVE IN TERMS OF CORROBORATION AT TRIAL.  
19 SO LET'S --

20 THE COURT: SO YOU THINK THE STANDARD THEN IS,  
21 ON THAT ISSUE IS IT MORE LIKELY THAN NOT, NOT CLEAR AND  
22 CONVINCING?

23 MS. RUMFELT: SOMETHING SHORT OF CLEAR AND  
24 CONVINCING. THE VAST, THE MAJORITY OF CASES THAT COME UP  
25 ON THIS ISSUE ARE AT A DIFFERENT POSTURE THAN WE ARE HERE

1 TODAY, BUT --

2 THE COURT: WELL, THE MAJORITY, ARE THERE SOME  
3 THAT DON'T?

4 MS. RUMFELT: I DON'T -- I COULDN'T LOOKING  
5 BACK TODAY FIND ONE THAT I HAD BROUGHT WITH ME. I'M NOT  
6 SAYING THAT THAT NECESSARILY MEANS THERE ISN'T ONE --

7 THE COURT: I UNDERSTAND.

8 MS. RUMFELT: -- BUT THE ONES I LOOKED AT TODAY  
9 THAT WERE CITED IN THE BRIEFING WERE PRIMARILY ON A MUCH  
10 DIFFERENT POSTURE, EXCLUSIVELY ON A MUCH DIFFERENT  
11 POSTURE.

12 SO LET'S LOOK AT THE CORROBORATION THAT WE DO  
13 HAVE HERE. SO IT'S CORROBORATED THAT MR., MR. WILLIS,  
14 THAT THE BASIS FOR THE PARTIES' COLLABORATION WAS  
15 MR. WILLIS' WHAT WE'VE CALLED THE DUERWOOD 2016 UNIT.  
16 THERE'S A CONTEMPORANEOUS FACEBOOK POST BY WILLIS' WIFE  
17 WHEN HE FINISHES THIS PRODUCT; AND THAT'S FOR THE RECORD  
18 DOC ID 40-1 PAGE 586. THIS IS THE FACEBOOK POST FROM HIS  
19 WIFE SHOWING HIM OPERATING WHAT IS THE UNIT THAT FORMS THE  
20 BASIS OF THE PARTIES' COLLABORATIONS. IT'S CORROBORATED  
21 BY TEXT AT THE TIME THAT THE PARTIES ARE TALKING BETWEEN  
22 WILLIS AND ODOM SHOWING THAT WILLIS BOUGHT THE UNIT ON  
23 CRAIG'S LIST THAT GOT THE BALL GOING IS HOW THE PARTIES  
24 SAY IT. AND WE CAN PULL THAT UP HERE, SO THAT'S DOC 46  
25 PAGE ID 1123. AND THIS IS THE INITIAL TEXT IS ONE FROM

1 MR. WILLIS SAYING HE SAW THE ONE ON CRAIG'S LIST THAT GOT  
2 THE BALL GOING.

3 MR. ODOM NOW CLAIMS THAT HIS STEPFATHER  
4 CONCEIVED OF THAT INITIAL DESIGN, BUT THAT'S, THAT'S  
5 REFUTED BY EVIDENCE THAT WE'VE PUT IN THE RECORD BY --  
6 FROM MR. WILLIS THAT SHOWS THAT HE'S THE ONE WHO TOLD  
7 MR. MARSH ABOUT A SALE ON SKID, SKID STEER QUICK ATTACHES;  
8 AND THEN FROM THAT POINT WHEN THEY START WITH THE DUERWOOD  
9 2016 UNIT, IT'S CLEAR THAT THEY WORKED TOGETHER IN EARNEST  
10 TO DEVELOP WHAT BECAME THE PATENTED INVENTION.

11 WE'VE GOT TWO BINDERS SITTING OVER THERE FULL  
12 OF TEXTS ABOUT THE PARTIES' COLLABORATION, AND THERE'S  
13 CORROBORATION --

14 THE COURT: ARE THOSE IN ADDITION TO THE ONES  
15 THAT ARE IN THE RECORD?

16 MS. RUMFELT: THAT'S RIGHT. BOTH PARTIES I  
17 THINK HAVE EXCERPTED SOME OF THESE TEXTS. THEY DO HAVE  
18 SOME PERSONAL STUFF IN THEM, AND SO IT'S NOT THE FULL --

19 THE COURT: DO YOU WANT TO PUT THOSE IN THE  
20 RECORD? I MEAN, I CAN'T JUST TAKE YOUR WORD THAT YOU'VE  
21 GOT EVIDENCE IN A NOTEBOOK OVER THERE THAT SAYS THEY  
22 COLLABORATED, SO.

23 MS. RUMFELT: I THINK WE COULD DO THAT. I  
24 THINK WE'D PROBABLY HAVE TO LOOK AT MAYBE SOME REDACTIONS  
25 OF -- I KNOW THERE WERE PHONE NUMBERS AND STUFF LIKE THAT

1 IN THERE, SO WE PROBABLY WOULD HAVE TO DO THAT FIRST; BUT,  
2 I MEAN, I DON'T THINK THAT ANYBODY IS HIDING FROM THOSE  
3 TEXTS, IT'S JUST THE MOST RELEVANT STUFF IS IN THERE.

4 THE COURT: WELL, I'M JUST SAYING TO THE EXTENT  
5 YOU WANT ME TO CONSIDER ANY OF THAT, IT'S NOT IN THE  
6 RECORD, SO YOU'LL HAVE TO MAKE A POINT TO PUT IT IN THE  
7 RECORD.

8 MS. RUMFELT: ALL RIGHT.

9 THE CORROBORATION FOR THE PARTIES WORKING  
10 TOGETHER ON THIS IS THAT ODOM UP ON THE STAND TODAY SAID,  
11 WILLIS BROUGHT SIGNIFICANT EXPERIENCE TO THE COLLABORA-  
12 TION. HE BROUGHT HYDRAULICS, HE BROUGHT BEARINGS, HE  
13 BROUGHT FITTINGS. HE AGREED TO THAT TODAY. WE'VE GOT  
14 SOME ISOLATED TEXTS THAT SUGGEST THAT MR. ODOM DID  
15 EVERYTHING THAT MATTERED BY HIMSELF, BUT I REALLY DO  
16 CHALLENGE EVEN THE STUFF THAT'S IN THE RECORD NOW TO FLIP  
17 THROUGH IT AND SAY, IS THAT REALLY HOW THIS READS? IT  
18 REALLY READS TO ME LIKE THE TWO WERE WORKING TOGETHER AND  
19 COLLABORATING VERY INTENSELY ON THIS PROJECT.

20 JUST A COUPLE OF SPECIFIC TEXTS THAT REFUTE THE  
21 VIEW THAT MR., MR. ODOM DID THIS BY HIMSELF. THE FIRST IS  
22 DOC 46 PAGE ID 1106, AND THIS IS THE ONE THAT MR. ODOM  
23 READ ON THE STAND TODAY IN WHICH MR. WILLIS IS TALKING  
24 ABOUT HOW HE LAID IN BED TRYING TO CONCEIVE OF THIS AND  
25 CONCEPTUALIZE THIS DESIGN. THERE'S ALSO ANOTHER WILLIS

1 TEXT ON JANUARY 24TH, AND THAT'S A PRETTY IMPORTANT DATE,  
2 THE DAY THAT ONE OF THOSE VIDEOS WAS SHARED, WHERE  
3 MR. ODOM ASKS WILLIS -- OR MR. WILLIS, I'M SORRY, ASKS  
4 ODOM FOR AN UPDATE ON THE DESIGN, SUGGESTING THE PARTIES  
5 ARE VERY MUCH WORKING TOGETHER AND THEY'RE UPDATING EACH  
6 OTHER ON THE DESIGN. THEY REFER TO THEMSELVES FREQUENTLY  
7 AS PARTNERS. MR. WILLIS SAID HE'S PUTTING SWEAT EQUITY  
8 INTO THIS BUSINESS. THERE ARE POSTS AT THE SAME TIME,  
9 CONTEMPORANEOUS POSTS TALKING ABOUT THE HOURS THAT THEY  
10 WORKED TOGETHER ON THIS; AND A QUICK EXAMPLE, THIS IS DOC  
11 40-1 PAGE ID 614, AND THIS IS A POST ON ONE OF THE TRACTOR  
12 WEBSITES IN WHICH HE'S TOUTING THE COUNTLESS HOURS THE  
13 PARTIES HAVE WORKED TOGETHER TO DEVELOP THIS PRODUCT AND  
14 HIS EXCITEMENT THAT IT'S COME TO FRUITION.

15 AND THERE'S SIGNIFICANT EVIDENCE THAT HE HAD A  
16 BIG ROLE IN THE MANAGEMENT OF THE BUSINESS. HE'S NAMED AS  
17 THE CONTACT IN THE BROCHURE FOR SALES PURPOSES. HE MAIN-  
18 TAINED THE COMPANY'S SALES RECORDS, MR. ODOM DOESN'T  
19 DISPUTE THAT; AND IF HE WAS JUST AN EMPLOYEE, WHY WASN'T  
20 HE PAID?

21 AND FROM A LEGAL PERSPECTIVE WILLIS DOESN'T  
22 HAVE TO HAVE CONTRIBUTED TO THE SPECIFIC IDEA THAT  
23 PLAINTIFF NOW CLAIMS IS THE NOVEL IDEA, BOB TALKED ABOUT  
24 THAT TODAY. ALL THAT'S REQUIRED IS SOME QUANTUM OF  
25 COLLABORATION OR CONNECTION. THERE'S NO EXPRESS FLOOR

1       HERE, IT'S A FACTUAL ISSUE, IT'S WHETHER HE WAS PART OF  
2       THE CONCEPTION. BY STATUTE THEY DON'T EVEN HAVE TO  
3       PHYSICALLY BE IN THE SAME PLACE AT THE TIME THAT THIS  
4       COLLABORATION IS HAPPENING.

5               THAT'S WHAT I HAVE ON INVALIDITY, DO YOU WANT  
6       ME TO FINISH OUT THROUGH THE REMAINING ELEMENTS, OR THE  
7       REMAINING FOUR FACTORS, OR GIVE MY OPPOSING COUNSEL A  
8       CHANCE TO --

9               THE COURT: WELL, THEY'RE GOING TO SPLIT, SO IT  
10      MIGHT MAKE MORE SENSE --

11              MS. RUMFELT: TO SPLIT IT.

12              THE COURT: -- TO SPLIT IT.

13              MS. RUMFELT: ALL RIGHT. THANK YOU. I'LL BE  
14      BACK.

15              THE COURT: ALL RIGHT.

16              ALL RIGHT, WHO -- MR. MILLER, I GUESS YOU'RE  
17      FIRST OVER HERE.

18              MR. MILLER: THANK YOU, YOUR HONOR.

19              ALL RIGHT. ARE WE ON OUR -- OKAY. I WANT TO  
20      START OFF BY JUST BRIEFLY ADDRESSING THE STANDARD.  
21      DEFENDANTS KEEP USING THE WORD "VULNERABILITY", AND THEY  
22      LIKE THAT WORD, AND THEY USE IT OUT OF CONTEXT BECAUSE IT  
23      SOUNDS LIKE, HEY, WE JUST COME IN AND PRESENT THE QUESTION  
24      OF VALIDITY AND IT'S VULNERABLE, AND THAT'S NOT THE  
25      STANDARD. THAT WORD COMES FROM THE AMAZON CASE IN 1997

1 FROM THE FEDERAL CIRCUIT, BUT EQUATES VULNERABILITY TO A  
2 SUBSTANTIAL QUESTION OF INVALIDITY; AND LATER CASE LAW  
3 FROM THE FEDERAL CIRCUIT UP TO THE TITAN CASE, WHICH IS  
4 CITED IN BOTH PARTIES' BRIEFS, IT SAYS THAT WHAT THE  
5 STANDARD IS IS YOU'VE GOT TO PROVE, YOU'VE GOT TO  
6 ESTABLISH A SUBSTANTIAL INVALIDITY CASE AND ONE THAT  
7 CONVINCES THE COURT THAT THEY'RE MORE LIKELY THAN NOT  
8 GOING TO MEET THE CLEAR AND CONVINCING EVIDENCE BURDEN AT  
9 TRIAL, RATHER THAN WE'RE MORE LIKELY TO WITHSTAND THEIR  
10 CHALLENGE. THAT'S THE PERSPECTIVE. SO I JUST DIDN'T WANT  
11 THIS "VULNERABILITY" TERM TO BE USED IMPROPERLY.

12 THE COURT: WELL, I AGREE WITH YOU, BUT I THINK  
13 MS. RUMFELT ACTUALLY ACKNOWLEDGED THAT. I MEAN, IT'S  
14 NOT -- A SUBSTANTIAL QUESTION IS NOT RAISED JUST BECAUSE  
15 OF AN ALLEGATION.

16 MR. MILLER: CORRECT.

17 THE COURT: IT TAKES A GOOD BIT MORE THAN THAT,  
18 I THINK EVERYBODY UNDERSTANDS THAT.

19 MR. MILLER: YEAH; AND I THINK WITH REGARD TO  
20 MR. FOX AS AN EXPERT, HE'S CLEARLY NOT QUALIFIED TO OFFER  
21 THE OPINIONS HE'S TRYING TO OFFER FROM A PERSPECTIVE OF A  
22 PERSON WITH ORDINARY SKILL IN THE ART; AND THAT GOES INTO  
23 THE STANDARD OF ARE THEY LIKELY TO PRESENT EVIDENCE THAT A  
24 PERSON OF ORDINARY SKILL WOULD FOLLOW HIS ANALYSIS.  
25 HIS -- IN OTHER WORDS, MR. FOX'S EVIDENCE IS, IS THE

1 EQUIVALENT OF ATTORNEY ARGUMENT IN THIS, AT THIS STAGE.

2 THE COURT: THAT RAISES A QUESTION. MR. MARTIN  
3 {SIC}, HOW DO YOU DEFINE A PERSON OF ORDINARY SKILL IN THE  
4 INDUSTRY IN THE CONTEXT OF THIS CASE? AND TO BE PERFECTLY  
5 CANDID, THAT'S ONE OF THE THINGS I -- THAT A LITTLE BIT  
6 FRUSTRATED ME ABOUT MR. FOX. HE WAS ASKED THAT QUESTION  
7 AT LEAST TWICE, BOTH TIMES HE BASICALLY SAID, WELL,  
8 SOMEBODY WHO LOOKS LIKE ME, BUT HOW DO YOU DEFINE THAT  
9 PHRASE?

10 MR. MILLER: YOU KNOW, IN THIS -- I KNOW THIS  
11 IS NOT COMPLEX BIOTECH TECHNOLOGY, BUT THIS IS MECHANICAL  
12 ENGINEERING TECHNOLOGY; AND, YOU KNOW, IN THE CASES I'VE  
13 HANDLED IN THE PAST IN THESE TYPE OF THINGS, IN THESE TYPE  
14 OF PATENT CASES, A PERSON OF ORDINARY SKILL IS  
15 TYPICALLY -- WE'RE NOT GOING TO SAY YOU'VE GOT TO HAVE A  
16 PH.D. IN MECHANICAL ENGINEERING, BUT IT SHOULD BE SOMEONE  
17 WITH A DEGREE IN MECHANICAL ENGINEERING AND ONE TO TWO  
18 YEARS OF EXPERIENCE IN ENGINEERING AND DESIGN ENGINEERING  
19 IN THE FIELD; AND THE REASON THAT'S IMPORTANT IS THIS,  
20 WHAT MR. FOX AND DEFENDANTS ARE DOING IS THEY'RE, THEY'RE  
21 CONFLATING THE IDEA OF AN OBVIOUSNESS ANALYSIS AND A  
22 PERSON OF ORDINARY SKILL WITH THE ABILITY TO UNDERSTAND  
23 THE TECHNOLOGY. THAT'S NOT WHAT -- IT ISN'T ABOUT WHETHER  
24 YOU CAN UNDERSTAND THE TECHNOLOGY. I CAN UNDERSTAND THE  
25 TECHNOLOGY. I CAN LOOK AT THESE, I CAN READ THE PATENT, I

1 CAN TALK TO MR. ODOM THE INVENTOR JUST LIKE ANY PATENT  
2 ATTORNEY DOES. I CAN UNDERSTAND HOW IT WORKS NOW. THEY  
3 CAN TELL ME, OH, I GET IT, I GET IT, USING BEARINGS, I  
4 UNDERSTAND FORCES AND PHYSICS, I UNDERSTAND IT; BUT A  
5 PERSON OF ORDINARY SKILL IN THE ART IN AN OBVIOUSNESS  
6 ANALYSIS IS SUPPOSED TO SAY, HEY, AT THE TIME OF THE  
7 INVENTION, LIKE THE DAY BEFORE THIS INVENTION BECAME PART  
8 OF THE ART, WOULD A PERSON OF ORDINARY SKILL HAVE FOUND IT  
9 OBVIOUS? WOULD THEY HAVE MADE THE CHANGES TO THE PRIOR  
10 ART THAT MR. FOX SAID THEY WOULD? WHAT WOULD HAVE BEEN  
11 THEIR MOTIVATION? WHY WOULD THEY HAVE DONE IT? WHAT IS  
12 THEIR EXPERIENCE IN THE PAST? SO IF YOU'VE BEEN ON A  
13 DESIGN TEAM AND YOU'VE BEEN WORKING IN THIS INDUSTRY, YOU  
14 WILL HAVE THE BACKGROUND TO KNOW. YOU KNOW WHAT, WE TRIED  
15 THAT WITH THIS PRODUCT A LONG TIME AGO AND WE'RE ALWAYS  
16 RESEARCHING OUR COMPETITORS' PRODUCTS AND YOU CAN NEVER  
17 USE THIS TYPE OF BEARING IN THIS CAPACITY, AND THERE MAY  
18 BE THINGS THEY'VE EXPERIENCED THAT WOULD LEAD THEM AWAY  
19 FROM THE DIRECTION MR. ODOM WENT; BUT MR. FOX DOESN'T HAVE  
20 THAT BACKGROUND. HE'S JUST SMART ENOUGH TO UNDERSTAND THE  
21 TECHNOLOGY, AS AM I, AS IS PROBABLY EVERYBODY HERE ONCE  
22 YOU DIG IN; BUT CLAIM CONSTRUCTION, INTERPRETING PRIOR ART  
23 AND OBVIOUSNESS REQUIRES SOMEBODY TO SAY, HEY, BACK THEN  
24 BEFORE YOU KNEW ABOUT THIS INVENTION AT ALL, THIS WAS THE  
25 STATE OF THE ART, THIS IS WHERE PEOPLE WERE GOING, THIS --

1 COMPANIES WERE GOING IN THIS DIRECTION WITH THEIR  
2 PRODUCTS, THIS IS WHAT HAD FAILED IN THE PAST, HERE'S WHAT  
3 WE'VE ENCOUNTERED AS DESIGN ENGINEERS; SO YOU'VE GOT TO  
4 HAVE SOME EXPERIENCE IN THE FIELD TO GIVE THAT  
5 PERSPECTIVE, AND MR. FOX DOESN'T, AND --

6 THE COURT: SO YOU'RE SAYING MR. FOX'S  
7 EXPERIENCE IN TERMS OF HAVING MECHANICAL ENGINEERING  
8 COURSES IN THE COURSE OF A BROADER COURSE OF EDUCATION --

9 MR. MILLER: CORRECT.

10 THE COURT: -- AS WELL AS EXPERIENCE IN WRITING  
11 WHAT HE CHARACTERIZED AS MANY PATENT APPLICATIONS FOR  
12 MECHANICAL ISSUES, THAT'S NOT ENOUGH?

13 MR. MILLER: NO, NO; NOT ONLY IS IT NOT ENOUGH,  
14 IT'S WOEFULLY INADEQUATE. IT DOESN'T EVEN COME CLOSE.  
15 HE -- THIS -- MAYBE I CAN JUMP TO THIS SLIDE.

16 SHERRI, WHY DON'T YOU -- OPEN MY -- IF YOU WANT  
17 HARD COPIES OF MY POWER POINT, MAY I APPROACH?

18 THE COURT: SURE. HAND THEM TO THE CLERK,  
19 PLEASE.

20 MR. MILLER: SINCE WE'RE ON THE TOPIC OF  
21 MR. FOX, I'M GOING TO JUMP TO THAT SLIDE. IT'S IMPORTANT  
22 WHEN YOU'RE TALKING ABOUT OBVIOUSNESS TO JUST GO TO THE  
23 STATUTE. THIS IS WHAT CONGRESS HAS SAID, WHEN YOU'RE  
24 EVALUATING WHETHER AN INVENTION IS OBVIOUS, YOU HAVE TO  
25 EVALUATE THE INVENTION AS A WHOLE AND YOU HAVE TO

1 DETERMINE THAT WHETHER IT WAS -- IT WOULD HAVE BEEN, WOULD  
2 HAVE BEEN OBVIOUS BEFORE THE EFFECTIVE FILING DATE OF THE  
3 CLAIMED INVENTION TO A PERSON HAVING ORDINARY SKILL IN THE  
4 ART TO WHICH THE CLAIMED INVENTION PERTAINS.

5 OKAY. NOW, MR. FOX, HIS ENGINEERING DEGREE  
6 DOESN'T BRING HIM WITHIN THE REALM OF THIS TECHNOLOGY; AND  
7 IT'S A B.E. IN ENGINEERING INSTEAD OF A B.S., I'M SORRY I  
8 PUT BACHELOR'S OF SCIENCE, IT'S BACHELOR OF ENGINEERING.  
9 YOU KNOW, I HAVE A DEGREE IN CIVIL ENGINEERING, YOUR  
10 HONOR. I TOOK MECHANICAL ENGINEERING COURSES, I TOOK A  
11 COUPLE OF CHEMISTRY COURSES. I'M NOT A QUALIFIED  
12 TECHNICAL EXPERT FOR ANY PATENT CASE UNLESS I'VE BEEN IN  
13 THE FIELD AND I CAN SAY WHAT A PERSON OF ORDINARY SKILL IN  
14 THE ART WOULD EXPECT AND PREDICT. SO HE DOESN'T QUALIFY,  
15 AND THIS IS WHERE YOU GET INTO PROBLEMS.

16 IF YOU GO TO THE NEXT SLIDE, THE CASE LAW TALKS  
17 ABOUT THIS PROBLEM OF HINDSIGHT RECONSTRUCTION ALL THE  
18 TIME. SOMETIMES IT CALLS IT AN INSIDIOUS DISEASE, OKAY.  
19 AND THE REASON SECTION 103 OF THE PATENT ACT SAYS THAT YOU  
20 EVALUATE THE INVENTION AS A WHOLE IS BECAUSE YOU HAVE TO  
21 SHOW THAT THE PERSON OF ORDINARY SKILL IN THE ART CON-  
22 FRONTED WITH THE SAME MARKETPLACE AND THE SAME PROBLEMS AS  
23 THE INVENTOR BUT WITH NO KNOWLEDGE OF THE INVENTION WOULD  
24 HAVE DONE WHAT THE INVENTOR DID, OKAY; AND IF YOU ENGAGE  
25 IN HINDSIGHT RECONSTRUCTION, THAT'S WHERE YOU'RE VIOLATING

1 SECTION 103 OF THE PATENT ACT. HOW MANY OF US HAVE SEEN  
2 SOME NEW PRODUCT COME INTO THE MARKET; AND AFTER WE SEE  
3 IT, WE GO, OH, THAT'S GREAT, THAT'S SO SIMPLE. AND WHAT  
4 MR. FOX HAS DONE IS HE HAS ENGAGED IN THIS HINDSIGHT,  
5 PROHIBITED HINDSIGHT ANALYSIS.

6 HERE'S SOME MORE CASE LAW. YOU'VE GOT THAT --  
7 THE FEDERAL CIRCUIT HAS REALLY BEAT THIS DRUM HARD. THE  
8 AS-A-WHOLE INSTRUCTION IN TITLE 35 PREVENTS EVALUATION OF  
9 THE INVENTION PART BY PART. WITHOUT THIS IMPORTANT  
10 REQUIREMENT, AN OBVIOUSNESS ASSESSMENT MIGHT SUCCESSFULLY  
11 BREAK AN INVENTION INTO ITS COMPONENT PARTS AND THEN FIND  
12 A PRIOR ART REFERENCE CORRESPONDING TO EACH COMPONENT.  
13 THIS LINE OF REASONING WOULD IMPORT HINDSIGHT INTO THE  
14 OBVIOUSNESS DETERMINATION BY USING THE INVENTION AS A ROAD  
15 MAP TO FIND ITS PRIOR ART COMPONENTS. IT DISCOUNTS THE  
16 VALUE OF WHAT THE INVENTOR DID.

17 THE COURT: ARE YOU SAYING THAT'S WHAT MR. FOX  
18 DID WHEN HE, FOR INSTANCE, TALKED ABOUT THE TOWER LOCKS  
19 AND SAID THERE WERE LOTS OF APPLICATIONS OF THAT IN A  
20 PRIOR ART, IS THAT --

21 MR. MILLER: YOUR HONOR, THAT'S EXACTLY WHAT  
22 I'M SAYING. IN FACT, I MADE A NOTE DURING HIS TESTIMONY  
23 ON ONE OF MY SLIDES COMING UP THAT SAYS -- HE DID IT IN  
24 HIS DECLARATION. HIS DECLARATION READS LIKE A PERFECT  
25 HINDSIGHT ANALYSIS. HE STARTS BY SAYING, HERE'S THE

1 PATENT. THEN HE SAYS, I WENT AND RESEARCHED ALL THE PRIOR  
2 ART, AND, LOOK, I'M FINDING TOWER LOCKS AND I'M FINDING  
3 ARMS AND I'M FINDING ADJUSTABLE ARMS BECAUSE HE'S HUNTING  
4 FOR THE ELEMENTS OF THE INVENTION. THIS IS WHAT HE'S  
5 DOING, IF YOU LOOK RIGHT HERE, THAT'S WHAT HE DID IN HIS  
6 DECLARATION IN THIS SLIDE, AND HE -- WE SAW IT AGAIN ON  
7 THE STAND. ON THE STAND WHEN HE TALKED ABOUT THE TOWER  
8 LOCKS AND WHEN WE TALKED ABOUT -- YEAH, MOSTLY THE TOWER  
9 LOCKS, IT WAS A HINDSIGHT ANALYSIS; AND TO HIS CREDIT  
10 THAT, THE REASON MR. FOX DID IT THIS WAY, YOUR HONOR, IS  
11 BECAUSE HE DOESN'T HAVE ANY OTHER OPTION. HE'S NOT A  
12 PERSON OF ORDINARY SKILL IN THE ART.

13 THE PROHIBITION AGAINST HINDSIGHT IS THERE IN  
14 THE LAW TO PROTECT AGAINST EXACTLY THIS, AND THERE'S EVEN  
15 CASE LAW THAT SAYS THE STANDARD OF A PERSON OF ORDINARY  
16 SKILL IN THE ART, AND DEFINING THE LEVEL OF ORDINARY SKILL  
17 IN THE ART IN THE OBVIOUSNESS ANALYSIS IS ALSO A PROTEC-  
18 TION AGAINST HINDSIGHT. BECAUSE MR. FOX DOESN'T HAVE THE  
19 BACKGROUND TO SAY, HEY, YOU KNOW, IN DESIGNING THESE FARM  
20 IMPLEMENTS, THIS IS WHAT YOU RUN INTO ALL THE TIME, HE'S  
21 JUST LOOKING FOR ONE THAT WORKS; AND, YOU KNOW, IF I'M A  
22 CAR ENTHUSIAST AND I SPEND YEARS AND I RESEARCH, I LOVE  
23 TIRES, I WANT THE BEST TIRES FOR THE RACETRACK AND I DO IT  
24 ALL THE TIME AND I BUY THEM AND I USE THEM, THAT DOESN'T  
25 QUALIFY ME TO OPINE ON TIRE PATENTS.

1 THE COURT: WHILE WE'RE TALKING ABOUT MR. FOX,  
2 DO YOU AGREE THAT IN EVALUATING MR. FOX'S TESTIMONY HERE,  
3 THAT THE COURT'S ROLE IS NOT THE SAME KIND OF GATEKEEPER  
4 ROLE THAT WOULD BE UNDER DAUBERT?

5 MR. MILLER: OH, I AGREE. I DON'T THINK THE  
6 COURT NEEDS TO EVALUATE MR. FOX AND COME TO A CONCLUSION  
7 ON WHETHER HE'S ADMISSIBLE; HOWEVER -- IN OTHER WORDS, I  
8 DON'T THINK THE COURT HAS TO APPLY DAUBERT AND FORMALLY  
9 DEQUALIFY HIM AS AN EXPERT IN THIS CONTEXT; HOWEVER, THE  
10 COURT SHOULD EVALUATE WHETHER HE'S OFFERING COMPETENT  
11 TESTIMONY THAT COULD SUPPORT A DEFENSE AT TRIAL; AND IF  
12 HE'S NOT, THEN HE'S NO LONGER PUTTING THE WEIGHT ON THEIR  
13 SIDE OF THE SCALE.

14 THE COURT: IS THAT ANY DIFFERENT THAN JUST  
15 ASKING THE QUESTION OF WHETHER OR NOT HE IS A PERSON --  
16 I'M SORRY, I'M DRAWING A BLANK.

17 MR. MILLER: ORDINARY SKILL IN THE ART.

18 THE COURT: ORDINARY SKILL IN THE TRADE.

19 MR. MILLER: I THINK THAT'S EXACTLY THE  
20 QUESTION YOU ASK; AND AT THE PRELIMINARY INJUNCTION STAGE  
21 THE COURT SHOULD FIND WHILE MR. FOX OFFERED OPINIONS,  
22 BASED ON MY REVIEW HE'S NOT A PERSON OF ORDINARY SKILL IN  
23 THE ART AND NOT COMPETENT TO OFFER THESE OPINIONS, SO  
24 THESE DON'T REALLY LEND ANY CREDENCE TO WHETHER OR NOT  
25 THEY'RE LIKELY TO PREVAIL AT TRIAL. HIS OPINIONS HAVE NO

1 WEIGHT. HE WOULD BE EXCLUDED BEFORE TRIAL, SO THEY WOULD  
2 BE ABSENT; AND SO AT THIS STAGE YOU HAVE TO LOOK AT WHAT  
3 BURDENS ARE GOING TO HAPPEN AT TRIAL AND YOU HAVE TO SEE  
4 IF THEY'RE PRESENTING ENOUGH TO MAKE IT LIKELY THAT  
5 THEY'RE GOING TO CARRY THAT BURDEN; AND AT THIS STAGE YOU  
6 JUST SAY, MR. FOX'S OPINIONS HAVE NO WEIGHT. AND I THINK  
7 IT WOULD BE UNFAIR TO THE MOVING PARTY TO SAY, BUT MAYBE  
8 THEY COULD FIND A QUALIFIED EXPERT WHO COULD GIVE OPINIONS  
9 LIKE THAT. YOU CAN'T DO THAT. THEY HAD THE OPPORTUNITY.  
10 THEY KNOW THAT OBVIOUSNESS ALMOST ALWAYS REQUIRES  
11 TESTIMONY FROM A PERSON OF ORDINARY SKILL IN THE ART. YOU  
12 CAN'T DO IT WITHOUT IT. THEY KNOW THEY HAD TO; AND WHAT  
13 THEY GOT WITH MR. FOX IS HE ENGAGED IN HINDSIGHT, BLATANT  
14 HINDSIGHT.

15 IF YOU LOOK AT HIS FINAL -- HIS STATEMENTS  
16 OF -- IN THIS NEXT SLIDE YOU'VE GOT PARAGRAPHS 53 AND 60  
17 ARE STATEMENTS WHERE HE'S, HE'S TAKING THE MOTIVATION OF  
18 THE INVENTOR AND JUST IMPORTING IT INTO THE PRIOR ART. HE  
19 SAYS, HEY, I BELIEVE A PERSON OF ORDINARY SKILL IN THE ART  
20 ON JANUARY 30TH WHO WAS LOOKING TO IMPROVE THE ADJUST-  
21 ABILITY OF THE UNIT WOULD TAKE ALL THESE ACTIONS. WELL,  
22 THAT'S HINDSIGHT BECAUSE HE'S JUST SAYING, HEY, IF THE  
23 INVENTOR WAS TRYING TO ACCOMPLISH THIS, I'M GOING TO SAY  
24 THAT THAT'S A MOTIVATION THAT WAS PRESENT IN THE PRIOR ART  
25 AS WELL.

1           IN FACT, PARAGRAPH 60, WHICH IS ONE OF THE  
2       PARAGRAPHS IN HIS STATEMENT OF OPINIONS, HE USES THE EXACT  
3       LANGUAGE THE FEDERAL CIRCUIT HAS USED TO DEFINE HINDSIGHT.  
4       THE FEDERAL CIRCUIT HAS SAID, IT'S IMPERMISSIBLE, IF YOU  
5       LOOK AT THE NEXT SLIDE, IT'S IMPERMISSIBLE TO ENGAGE IN A  
6       HINDSIGHT RECONSTRUCTION OF THE CLAIMED INVENTION USING  
7       THE APPLICANT'S STRUCTURE AS A TEMPLATE AND SELECTING  
8       ELEMENTS FROM REFERENCES TO FILL THE GAPS; AND MR. FOX'S  
9       OPINION SAYS, HEY, LET'S START WITH THE JANUARY 2017  
10      PROTOTYPE AND THEN WE'LL JUST FILL IN THOSE GAPS WITH --  
11      I'LL, I'LL FIND THOSE ELEMENTS IN THE PRIOR ART TO FILL  
12      THE GAPS. IT'S CLEAR HINDSIGHT RECONSTRUCTION.

13           SO IN OUR VIEW UNDER THE STANDARD AT THE  
14      PRELIMINARY INJUNCTION STAGE, MR. FOX'S TESTIMONY SHOULD  
15      CARRY NO EVIDENTIARY WEIGHT AT ALL. IT IS THE EQUIVALENT  
16      OF ATTORNEY ARGUMENT; AND UNLESS MY ARGUMENTS HAVE  
17      EVIDENTIARY WEIGHT, MR. FOX'S SHOULDN'T.

18           NOW I WANT TO BACK UP IN MY PRESENTATION.  
19      OKAY. EARLIER THERE WAS A LOT OF BACK AND FORTH, YOU  
20      ACTUALLY TALKED TO MR. FOX A BIT ABOUT THE STANDARDS FOR  
21      INVENTORSHIP, AND THERE'S BEEN A LOT ABOUT THE LAW ON  
22      INVENTORSHIP. I JUST WANT TO HIGHLIGHT KEY ELEMENTS OF  
23      THE LAW FOR INVENTORSHIP.

24           THIS FIRST PART IS CRITICAL. YOU HAVE TO  
25      CONTRIBUTE TO THE CONCEPTION OF THE INVENTION. SO ONE OF

1 THE, THE IMPORTANT THINGS IN THE INVENTION, YOU HAVE TO  
2 HAVE CONTRIBUTED TO THE COMING UP WITH THE IDEA FOR IT,  
3 NOT JUST HEARING ABOUT IT FROM THE OTHER COINVENTOR AND  
4 THEN HELPING THEM REFINE IT.

5 NOW, CONCEPTION MEANS THAT YOU HAVE A CLEARLY  
6 DEFINED IDEA IN THE INVENTOR'S MIND, OKAY. CONCEPTION IS  
7 EVIDENCED IF THE INVENTOR CAN ACTUALLY ARTICULATE OR  
8 DESCRIBE THE INVENTION WITH PARTICULARITY TO SOMEBODY  
9 ELSE; THAT'S GOING TO BE EVIDENCE OF CONCEPTION OF THAT  
10 IDEA. SO THAT'S NUMBER ONE. IT'S GOT TO BE CONCEPTION,  
11 AND IT'S GOT TO BE CONCEPTION REGARDING A SUBSTANTIAL  
12 PORTION OF THE INVENTION.

13 THE CASE LAW WE CITE IN OUR BRIEF SAYS, "IF  
14 YOUR CONTRIBUTION TO CONCEPTION IS NOT SUBSTANTIAL WHEN  
15 MEASURED AGAINST THE VALUE OF THE INVENTION AS A WHOLE, IT  
16 DOESN'T COUNT." AND THAT'S WHY YOU LOOK AT WHAT PART OF  
17 THIS INVENTION MADE IT NOVEL, MADE IT NEW OVER THE PRIOR  
18 ART, WHAT MADE IT AN INVENTION, AND YOU'VE GOT TO  
19 CONTRIBUTE TO THE CONCEPTION OF THAT.

20 ANOTHER THING ABOUT INVENTORSHIP THAT IS  
21 IMPORTANT IS THE COURTS HAVE FOUND THAT WE DON'T WANT TO  
22 CAST DISPERSIONS ON ANYBODY'S CHARACTER, IT'S JUST A  
23 NATURAL HUMAN INCLINATION, YOU'RE GOING TO WANT TO  
24 CHARACTERIZE THE EVENTS IN YOUR BEST INTERESTS, AND  
25 COINVENTORS CAN REALLY BE TEMPTED TO CHARACTERIZE THINGS

1 TO MAKE THEM AN INVENTOR BECAUSE THEY WANT TO BE AN  
2 INVENTOR. IF I'M PART OF A TEAM, YOU KNOW, IF I'M ON A  
3 DEVELOPMENT TEAM AT APPLE AND OUR TEAM PRODUCES A NEW  
4 PRODUCT, I'M GOING TO GET CREDIT FOR THAT. HEY, I WAS  
5 PART OF THIS TEAM. I MAY NOT BE AN INVENTOR, BUT MAYBE  
6 YOU WANT TO BE AN INVENTOR.

7 SO THE LAW SAYS, TO GUARD AGAINST COURTS BEING  
8 DECEIVED BY INVENTORS WHO MAY BE TEMPTED TO MISCHARAC-  
9 TERIZE THE EVENTS, YOU NEED CORROBORATION OF CREDIBLE  
10 TESTIMONY. THAT'S THE STANDARD. AND CORROBORATING  
11 EVIDENCE IS A CONTEMPORANEOUS DISCLOSURE THAT SHOWS A  
12 COMMUNICATION OF THAT CONCEPTION. I DO NOT DISPUTE THAT  
13 THEY HAVE CORROBORATED THAT MR. WILLIS WORKED WITH  
14 MR. ODOM, THAT THEY WORKED AS A TEAM. THAT IS THE ONLY  
15 THING THE CONTEMPORANEOUS RECORD PROVES, BUT THAT'S NOT  
16 ENOUGH.

17 LET'S GO TO THE NEXT SLIDE. IT'S JUST AS  
18 IMPORTANT TO EVALUATE WHAT DOESN'T SHOW INVENTORSHIP IN  
19 THE LAW, AND THIS IS WHAT THE LAW SAYS ON NOT INVENTOR-  
20 SHIP, COLLABORATION ON A PROJECT WITH A COMMON GOAL DOES  
21 NOT ITSELF PRODUCE JOINT INVENTION. OKAY. BEING TEAM-  
22 MATES, COLLABORATION DOESN'T QUALIFY. AND IF ALL YOU DO  
23 IS YOU BRING TO THE TABLE WHAT THE STATE OF THE ART IS,  
24 YOU'RE NOT A COINVENTOR. THOMAS EDISON DOESN'T HAVE TO BE  
25 NAMED AS A COINVENTOR EVERY TIME SOMEBODY IMPROVES THE

1 LIGHT BULB; AND IF SOMEBODY COMES TO YOU, AND WE CITED  
2 CASES IN OUR BRIEF, IF SOMEBODY WHO CLAIMS TO BE A  
3 COINVENTOR, IF ALL THEY DID WAS COME UP TO THE INVENTOR  
4 AND SAY, HEY, HAVE YOU HEARD OF THIS, PEOPLE USE THIS ALL  
5 THE TIME, AND THE INVENTOR DIDN'T EVEN KNOW ABOUT IT.  
6 WOW, THAT'S GREAT. WELL, THAT PERSON ISN'T A COINVENTOR  
7 IF THE INVENTOR TAKES THAT DISCLOSURE AND THEN IMPROVES ON  
8 THE STATE OF THE ART. IF ALL YOU'RE DOING IS INTRODUCING  
9 THE INVENTOR TO THE STATE OF THE ART, YOU'RE NOT AN  
10 INVENTOR.

11 AND IF ALL YOU -- THE NEXT CASE, THE NEXT  
12 STATEMENT DOWN FROM THIS ELI LILLY CASE. IF YOU JUST  
13 JOINTLY COME UP WITH THE IDEA OF THE RESULT TO BE ACCOM-  
14 PLISHED OF THE GOAL, WHAT SHOULD WE -- WHAT ARE WE TRYING  
15 TO DO? WELL, LET'S DO A BRUSH CUTTER THAT CAN BE IN A LOT  
16 OF DIFFERENT POSITIONS. GREAT, THAT'S THE GOAL. THAT'S  
17 NOT INVENTION EITHER. THAT DOESN'T QUALIFY A PERSON AS A  
18 COINVENTOR. AND IF HE MERELY ASSISTS THE ACTUAL INVENTOR  
19 AFTER IT'S BEEN CONCEIVED, YOU'RE NOT A COINVENTOR.

20 SO IT'S IMPORTANT TO KEEP THESE LEGAL  
21 PRINCIPLES IN MIND. I HAVE A SUMMARY HERE. WE NEED TO  
22 KEEP IN MIND UNDER THE LAW WHAT IS COINVENTOR AND WHAT  
23 DOESN'T COUNT AS A COINVENTOR.

24 ONCE WE HAVE THOSE IN MIND, LET'S JUST LOOK AT  
25 THE EVIDENCE IN THE CASE. WHAT WE HAVE IS STATE OF THE

1 ART WHEN MR. ODOM DECIDED TO PURSUE AND IMPROVE THE BRUSH  
2 CUTTER. HIS STEPDAD CREATED A BRUSH CUTTER. HE USED A --  
3 WHAT WERE THEY CALLED, BUSH BUSTERS -- BRUSH BUSTER,  
4 ATTACHED IT TO THE SIDE OF A SSQA PLATE, AND IT COULD BE  
5 IN THE VERTICAL POSITION AND IT COULD BE IN THE HORIZONTAL  
6 POSITION. THAT WAS THE STATE OF THE ART. THAT'S ACTUALLY  
7 WHAT EVOLVED INTO THE LS-1, AND THAT IS NO DIFFERENT THAN  
8 WHAT WAS BEFORE THE PATENT OFFICE.

9 YOU CAN SEE THIS FIGURE IN THIS SLIDE, THIS  
10 PATENT DRAWING. THIS IS FROM A PATENT THAT WAS CONSIDERED  
11 BY THE PATENT OFFICE DURING PROSECUTION, AND WHAT DOES IT  
12 HAVE? IT'S GOT A CUTTING DECK ATTACHED TO THE SIDE OF A  
13 STANDARD MOUNT PLATE, AND IT CAN GO FROM VERTICAL TO  
14 HORIZONTAL; AND BECAUSE IT'S A HYDRAULIC ARM, IT CAN EVEN  
15 STOP AT ANGLES IN BETWEEN. THAT'S THE PRIOR ART. THAT  
16 WAS ALREADY THERE.

17 SO WHAT MR. ODOM LEARNED FROM MR. MARSH AND  
18 EVEN FROM THE DUERWOOD 2016 IS NOTHING MORE THAN WHAT WAS  
19 IN THE PRIOR ART. MR., MR. ODOM MAY NOT HAVE KNOWN ABOUT  
20 THIS STUFF BEFORE HE SAW HIS STEPDAD'S PROTOTYPE OR HIS  
21 STEPDAD'S BRUSH BUSTER MODIFICATION, BUT IT'S, IT'S EVEN  
22 LESS SIGNIFICANT THAN WHAT WAS BEFORE THE PATENT OFFICE  
23 ALREADY.

24 IF YOU LOOK -- MR. WILLIS, THE NEXT SLIDE,  
25 WE'VE SEEN THIS, IT'S VERY CLEAR, MR. WILLIS' DUERWOOD

1 2016 WAS NOT EVEN CLOSE TO COMPLETE -- WELL, IT WAS ALMOST  
2 COMPLETE, HE SAYS. THIS IS A WEEK BEFORE HE FINISHED IT,  
3 AND TERRY MARSH'S VIDEO IS ALREADY POSTED. AND MR. ODOM  
4 HAS SAID CLEARLY THAT HE LEARNED ABOUT THIS IDEA FROM  
5 TERRY MARSH AND HIS IDEA BEFORE HE EVER TALKED TO  
6 MR. WILLIS ABOUT THE DUERWOOD 2016.

7 AND LET'S TALK ABOUT THE DUERWOOD 2016. THIS  
8 IS WHAT IT IS, EXACTLY LIKE -- NOT EXACTLY, IT'S EVEN LESS  
9 COMPELLING THAN THE PRIOR ART THAT THE PATENT OFFICE HAD.  
10 IT'S GOT A CUTTING DECK HELD TO THE SIDE OF A STANDARD  
11 MOUNT PLATE, AND IT'S HELD BY A CHAIN, AND IT CAN GO  
12 STRAIGHT UP OR IT CAN GO VERTICAL OR HORIZONTAL; BUT SO  
13 COULD, IF WE BACK UP, SO COULD THE PRIOR ART THAT WAS  
14 CONSIDERED BY THE PATENT OFFICE. SO WHAT -- GIVING,  
15 GIVING MR. WILLIS EVERY BENEFIT OF THE DOUBT, WHAT HE  
16 CONTRIBUTED WITH THE DUERWOOD 2016 WAS ENTIRELY DUPLICA-  
17 TIVE OF WHAT WAS IN THE PRIOR ART AND EVEN, EVEN IN THE  
18 PRIOR ART RECORD BEFORE THE PATENT OFFICE.

19 SO NOW LET'S GO THROUGH -- OH, AND THIS  
20 TIMELINE JUST SHOWS, IF YOU READ THE DECLARATIONS FROM  
21 MR. ODOM, MR. WILLIS AND MR. MARSH, MR. ODOM WAS AWARE OF  
22 TERRY MARSH'S BRUSH BUSTER DEVICE IN SEPTEMBER WHEN IT WAS  
23 POSTED ON SOCIAL MEDIA. EVEN MR. WILLIS SAYS THAT  
24 MR. ODOM DIDN'T COME OVER TO SEE HIS DEVICE UNTIL NOVEMBER  
25 OF 2016, AND MR. ODOM DOESN'T EVEN RECALL DOING THAT AT

1 THAT TIME, HE THINKS IT WAS MUCH LATER; BUT EVEN GIVING  
2 MR. WILLIS THE BENEFIT OF THE DOUBT, MR. ODOM DIDN'T SEE  
3 THE DUERWOOD 2016 UNTIL THANKSGIVING, TWO MONTHS AFTER HE  
4 ALREADY KNEW ABOUT THE BETTER DESIGN OF TERRY MARSH THAT  
5 DOESN'T HAVE A CHAIN. IT'S GOT A SOLID BAR SUPPORT ARM.  
6 SO MR. WILLIS' SUPPOSED CONTRIBUTION THROUGH THE DUERWOOD  
7 2016 REALLY ISN'T A MATERIAL CONTRIBUTION AT ALL BECAUSE  
8 IT WAS DUPLICATIVE OF WHAT MR. ODOM HAD ALREADY LEARNED,  
9 AND IT'S ALSO DUPLICATIVE OF THE PRIOR ART; AND GIVEN THE  
10 LEGAL STANDARDS WE JUST WENT THROUGH, THAT DOESN'T QUALIFY  
11 FOR COINVENTORSHIP AS A MATTER OF LAW EVEN IF YOU GRANT  
12 MR. WILLIS EVERY BENEFIT OF THE DOUBT.

13 SO WHAT DOES HE NEED TO CONTRIBUTE TO TO BE A  
14 COINVENTOR? HE HAS TO PROVIDE CORROBORATING EVIDENCE THAT  
15 HE HELPED CONCEIVE THE ARTICULATING ARM -- THE COMBINATION  
16 OF AN ARTICULATING ARM AND LOCKS, SOME ASPECT OF THAT.  
17 THIS SHOWS THIS WAS THE PROJECT GOAL, AND WE AGREE THEY  
18 WORKED ON THIS GOAL TOGETHER, AND THE GOAL WAS, WE WANT  
19 THREE CUTTING POSITIONS. WE DON'T WANT IT JUST TO BE ON  
20 THE SIDE HORIZONTAL AND VERTICAL, WE WANT IT TO BE ABLE TO  
21 BE IN THE FRONT, DIRECTLY IN THE FRONT TOO, SO A THREE-  
22 CUTTING POSITION.

23 ON DECEMBER 26 MR. WILLIS CAME UP WITH HIS  
24 IDEA, WHICH WAS THE FRANKENSTEIN, AND ALL OF THE EVIDENCE  
25 POINTS TO THIS BEING A FAILURE. IT WAS, IT WAS -- YOU

1 HAVE TO PULL IT OUT OF THAT TRAILER HITCH, CARRY IT TO THE  
2 SIDE AND STICK IT BACK IN THE TRAILER HITCH ON THE SIDE.  
3 IT WEIGHS A TON. IT WAS DANGEROUS TO EVEN DO THAT; AND AS  
4 MR. ODOM TESTIFIED TODAY, HE DID NOT -- THE DAY THEY MADE  
5 IT HE DIDN'T WANT HIS NAME ASSOCIATED WITH IT, AND TO THIS  
6 DAY IT IS SITTING AROUND WASTING AWAY. NOBODY, NOBODY  
7 USED IT. IT'S A FAILED EXPERIMENT, BUT IT WAS THE FIRST  
8 ONE.

9 NOW, IT'S IMPORTANT TO LOOK THE NEXT DAY, THE  
10 NEXT DAY, DECEMBER 27, MR. ODOM CONTRIBUTES THE IDEA OF A  
11 THREE-WAY ARTICULATING ARM. HE SAYS, WE NEED A THREE-WAY  
12 ARTICULATING ARM. IS THAT A COMPLETE CONCEPTION? NO, BUT  
13 IT'S THE START, AND IT CAME FROM MR. ODOM, AND THAT'S WHAT  
14 EVENTUALLY LED TO THE PATENT.

15 SO LET'S WALK THROUGH THAT TIMELINE. WHAT'S  
16 INTERESTING TO ME IS DEFENSE COUNSEL TWICE, BOTH IN THE  
17 EXAMINATION OF MR. ODOM AND IN THE ORAL ARGUMENT  
18 PRESENTED, THESE -- THIS TEXT STREAM RIGHT HERE TO THE  
19 COURT, BUT OMITTED THE TOP ONE WHERE MR. ODOM IS THE ONE  
20 THAT SAYS, WE NEED A THREE-WAY ARTICULATING ARM. SHE  
21 PRESENTED BOTH TIMES THE NEXT ONE DOWN. IN FACT, CAN WE  
22 GO TO THAT PAGE OF -- I THINK IT'S -- IT WAS TRAVIS'  
23 THIRD DECLARATION WHERE --

24 MR. FOSTER: THIRD DECLARATION PAGE 5.

25 MR. MILLER: YEAH, AND THEN HIGHLIGHT THOSE

1 TEXTS.

2 SEE, IN THIS TEXT STREAM THE NIGHT BEFORE ON  
3 DECEMBER 27TH AT 4:00 P.M. IS WHEN MR. ODOM SAID, WE NEED  
4 A THREE-WAY ARTICULATING ARM; HOWEVER, WHAT THEY PRESENTED  
5 TWICE IS ONLY THIS PART. THEY PUT THIS UP ON THE SCREEN,  
6 AND THEN THEY SAY, HEY, LOOK, MR. WILLIS IS TALKING ABOUT  
7 GOING THROUGH THE ARTICULATING ARM.

8 OKAY. GO BACK TO MINE.

9 SO WHAT I'VE DONE IN MY SLIDES IS I'VE PULLED  
10 OUT THE TEXTS THAT ARE RELEVANT TO EACH PARTY'S -- ARE  
11 RELEVANT TO STATEMENTS THAT RELATE TO THE ARTICULATING ARM  
12 AND THE TOWER LOCKS. I HAVEN'T JUST DUPLICATED THEM HERE  
13 EXACTLY; BUT IF YOU'LL NOTICE AS WE GO THROUGH THIS, THE  
14 IDEAS OF WHAT TO DO EVERY TIME COME FROM MR. ODOM.  
15 MR. WILLIS EVERY TIME REACTS TO THEM AS "GREAT IDEA" OR "I  
16 DON'T UNDERSTAND IT" OR "GOOD JOB", BUT HE NEVER --  
17 THERE'S NOT ONE DOCUMENT, NOT ONE OUNCE OF CORROBORATING  
18 EVIDENCE WHERE MR. WILLIS SAYS, HEY, HERE'S WHAT WE NEED  
19 TO DO, AND HE CONTRIBUTES A CONCEPT.

20 LOOK AT -- SO HERE'S WHERE THE ARTICULATING ARM  
21 STARTS, AND THEN THEY BOTH, THEY BOTH AGONIZE OVER IT, HOW  
22 CAN WE MAKE THIS WORK? I'VE BEEN THINKING ABOUT IT ALL  
23 NIGHT. YEAH, ME TOO. THE NEXT THING THAT HAPPENS,  
24 JANUARY 10TH, MR. ODOM SAYS, YOU'RE NOT GOING TO BELIEVE  
25 THIS, BUT I'VE FIGURED IT OUT. MR. WILLIS SAYS, AWESOME.

1 AND THEN IN THE DECLARATIONS YOU FIND OUT THEY HAD A PHONE  
2 CALL, MR. ODOM TRIED TO EXPLAIN IT TO HIM. YOU CAN SEE  
3 HERE ON THE 12TH, I'LL PLAN ON CALLING YOU AT SOME POINT,  
4 YOU CAN EXPLAIN IT.

5 THEN ON THE 15TH MR. ODOM SENT THE VIDEO -- HE  
6 HAD GONE INTO THE SHOP AND HE HAD DONE A PROOF OF CONCEPT  
7 VIDEO AND SENT THAT TO MR. WILLIS, AND I WANT TO PLAY THAT  
8 VIDEO.

9 AND YOU'LL NOTICE BEFORE I PLAY THAT VIDEO,  
10 MR. WILLIS' COMMENTS ON THE SAME DAY INDICATE, I'M IN A  
11 TREE STAND, SO HE'S OFF HUNTING; AND THEN WHEN HE SEES THE  
12 VIDEO, HE SAYS, AWESOME. OR MAYBE HE DIDN'T SEE THE VIDEO  
13 YET, BUT HE RESPONDED WITH AWESOME.

14 SO PLAY THIS VIDEO. THIS WAS THE AHA MOMENT.

15 (VIDEO PLAYING)

16 MR. MILLER: DID YOU HEAR THAT? HE HAS AN  
17 ARTICULATING ARM, AND HE SAYS THAT WE'RE GOING TO PUT THE  
18 LOCKS RIGHT HERE. JANUARY 15TH MR. ODOM CONCEIVES THE  
19 COMBINATION OF ARTICULATING ARM AND LOCKS.

20 NOW, AFTER MR. WILLIS SEES THE VIDEO, HIS  
21 RESPONSE, HE SAYS, I LIKED YOUR IDEA IN THE VIDEO.

22 MR. ODOM, OKAY, YEP, THAT'S THE WAY TO GO.

23 IS THAT WHAT YOU WERE TALKING ABOUT YESTERDAY?

24 YES, SIR.

25 WELL, I STRUGGLED TO COMPLETELY UNDERSTAND, BUT

1 NOW I'M CRYSTAL CLEAR NOW.

2 THERE IS NO WAY ON THIS RECORD, AND IT IS  
3 HIGHLY UNLIKELY THAT DIFFERENT EVIDENCE WILL COME OUT AT  
4 TRIAL THAT WILL SHOW THAT MR. WILLIS CONTRIBUTED TO THE  
5 CONCEPTION OF THIS. IF HE SAYS HE DIDN'T EVEN UNDERSTAND  
6 IT WHEN MR. ODOM TRIED TO EXPLAIN IT TO HIM, AND HE ONLY  
7 UNDERSTOOD IT AFTER WATCHING THE VIDEO, HOW CAN HE  
8 CREDIBLY CLAIM TO BE A COINVENTOR AND HOW CAN WE CREDIBLY  
9 EXPECT THAT THERE'S GOING TO BE SOME OTHER DOCUMENT OUT  
10 THERE WHERE MR. WILLIS IS GOING TO SAY, HERE'S HOW TO MAKE  
11 AN ARTICULATING ARM WORK. WE HAVE WHAT THE PARTIES HAVE  
12 GONE THROUGH, THOSE BINDERS OF TEXTS, EVERYBODY HAS  
13 PRESENTED THE MOST RELEVANT STUFF, AND NOT ONE SUPPORTS  
14 MR. WILLIS.

15 THEN LET'S GO THROUGH THE BUILDING OF THE  
16 JANUARY 2017 PROTOTYPE. ON JANUARY 24TH MR. ODOM TAKES A  
17 VIDEO OF HIM AFTER HAVING BUILT IT, AND HE PLAYS THIS  
18 VIDEO; AND MR. WILLIS AGAIN, LOVE IT, GOOD JOB.

19 SO PLAY THIS VIDEO.

20 (VIDEO PLAYING)

21 MR. MILLER: AND THEN WE KNOW THAT THAT  
22 PROTOTYPE SAT AT TERRY MARSH'S HOUSE UNDER A SHED; AND  
23 BEFORE IT WAS BOUGHT BY MR. HOWELL ON JANUARY 30TH, IT HAD  
24 NEVER EVEN BEEN FIRED UP. IT HAD NEVER BEEN TURNED ON TO  
25 CUT BRUSH, IT HAD NEVER BEEN OPERATED. THE SOLE THING

1 THAT HAD HAPPENED IS THIS, VIDEO. THAT IS NOT SUFFICIENT  
2 TESTING TO CONFIRM IT WILL OPERATE FOR ITS INTENDED  
3 PURPOSE.

4 WHAT HAPPENED AFTER THAT? NOW LET'S TALK ABOUT  
5 THE TOWER LOCKS. WE'VE SEEN CLEARLY WHERE, WHERE THE  
6 CONCEPT, THE IDEA OF THE ARTICULATING ARM AND THE LOCKS  
7 CAME FROM MR. ODOM. SOME REFINEMENTS TO THE TOWER LOCKS  
8 HAPPENED IN FEBRUARY, 21 TO 22. AGAIN, HERE'S MR. ODOM  
9 TEXTING PICTURES OF HIS SKETCHES FOR THE BETTER OPERATING  
10 TOWER LOCKS. WHY WAS HE WORRIED ABOUT MAKING THE TOWER  
11 LOCKS WORK BETTER? BECAUSE IN COMMUNICATING WITH GORDAN  
12 HOWELL ABOUT THE PROTOTYPE THEY FOUND OUT THAT THOSE LOCKS  
13 LEFT TOO MUCH PLAY, THERE WAS TOO MUCH PLAY, YOU'D GET THE  
14 VIBRATION, IT WASN'T WORKING, THEY NEEDED BETTER LOCKS.  
15 MR. ODOM SKETCHES THEM OUT, TEXTS THEM. WHAT DOES  
16 MR. WILLIS SAY? HE AGAIN INDICATES HE STRUGGLES TO  
17 UNDERSTAND SOME OF THE LATCHES, BUT HE GETS THE FRONT  
18 BRACKET, THAT'S A GREAT IDEA.

19 NONE OF THIS -- THE IDEAS DIDN'T COME FROM  
20 MR. WILLIS. SOME -- A LOT OF ASSISTANCE CAME FROM  
21 MR. WILLIS. HE KNOWS HYDRAULICS BETTER. HE WASN'T -- WE  
22 DON'T DOUBT HE WAS PART OF THAT TEAM. HE DIDN'T CONCEIVE  
23 ANY PART OF THE INVENTION.

24 SO IN REVIEW YOU GO, FAST FORWARD ALL THE WAY  
25 TO MARCH, THIS IS HOW THEY REACT TO THE FRANKENSTEIN UNIT.

1 MR. WILLIS SAYS THAT IT WAS A GOOD THING THEY CHANGED THAT  
2 DESIGN, IT WAS NEARLY IMPOSSIBLE TO GET ON THE TRACTOR BY  
3 MYSELF; AND MR. ODOM SAYS, I TOLD YOU FROM THE START I  
4 HATED THAT DESIGN. OKAY. IT'S VERY CLEAR THE  
5 FRANKENSTEIN UNIT WAS A FAILED EXPERIMENT AND REMAINS A  
6 FAILED EXPERIMENT TO THIS DAY.

7 SO IN SUMMARY ON THE ISSUE OF INVENTORSHIP, I  
8 DON'T THINK THEY PRESENTED EVEN A CREDIBLE QUESTION, LET  
9 ALONE A SUBSTANTIAL QUESTION ON INVENTORSHIP. AND THE  
10 COURT ASKED EARLIER, WELL, I CAN'T TEST MR. DUERWOOD'S  
11 CREDIBILITY BECAUSE THEY DIDN'T BRING HIM, SO WE DON'T GET  
12 TO DO THAT; BUT THE WAY YOU TEST HIS CREDIBILITY IS LOOK  
13 AT THE RECORD. FIRST OF ALL, THE CORROBORATION STANDARD  
14 IS THERE, SO THE CREDIBILITY IS KIND OF DOESN'T DRIVE  
15 INVENTORSHIP. YOU CAN PROVIDE THE MOST CREDIBLE TESTIMONY  
16 IN THE WORLD; AND IF YOU DON'T HAVE A CORROBORATING  
17 DOCUMENT OF YOUR CONCEPTION, YOU'RE DONE.

18 THE COURT: WELL, I ACTUALLY THINK THAT'S  
19 RIGHT.

20 MR. MILLER: BUT BEYOND THAT THE RECORD DOESN'T  
21 EVEN SUPPORT MR. WILLIS. EVERYTHING HE SAYS IS CONTRA-  
22 DICTED BY THE RECORD. IF HE -- HE KEEPS SAYING, I  
23 COINVENTED. HE LOVES THAT WORD. I DON'T THINK HE'S USING  
24 IT IN THE LEGAL SENSE BECAUSE HE'S NOT A LAWYER, HE  
25 DOESN'T KNOW THE STANDARD FOR INVENTION; AND I'M SURE IF

1 YOU'RE PART OF A TEAM AND YOU WORK WITH YOUR COUSIN AND  
2 YOU DEVELOP THIS PRODUCT, YOU'RE GOING TO WANT TO TELL  
3 PEOPLE, I COINVENTED THAT; BUT, YOU KNOW, HE DIDN'T. HE  
4 DIDN'T CONCEIVE ONE SINGLE ASPECT OF THE NOVEL PORTION OF  
5 THIS INVENTION; AND HE HELPED WITH HYDRAULICS, BEARINGS,  
6 FITTINGS AND THE PRIOR ART, AND ALL OF THAT STUFF THAT  
7 DEFENDANTS COUNT OF MR. WILLIS DOING, IT'S ALL A RED  
8 HERRING. THAT DOESN'T SHOW COINVENTORSHIP. THEY WANT TO  
9 SHOW HE WAS IMPORTANT. IMPORTANCE AND COINVENTORSHIP ARE  
10 NOT COEXTENSIVE; SO EVEN IF WE WOULD CON -- WE COULD  
11 CONCEDE IF WE WANTED TO THAT MR. WILLIS WAS AN IMPORTANT  
12 TEAM MEMBER, HE WAS HELPFUL WITH HYDRAULICS, WE CAN DO ALL  
13 OF THAT, AND THAT DOESN'T MEAN HE'S A COINVENTOR UNDER THE  
14 LAW.

15 SO WITH NO CONTRIBUTION TO THE CONCEPTION, IF  
16 WE LOOK HERE TO SUMMARIZE, THERE'S NO CONTRIBUTION TO  
17 CONCEPTION, THERE'S NO CORROBORATION FROM MR. WILLIS, EVEN  
18 IF HE CLAIMS HE CONTRIBUTED TO THE CONCEPTION. HE'S NOT  
19 AN INVENTOR. IN FACT, THIS CLAIM OF INVENTORSHIP I DON'T  
20 THINK IS LIKELY TO WITHSTAND SUMMARY JUDGMENT. THERE'S  
21 SUMMARY JUDGMENT CASES OUT THERE WHERE WITHOUT CORROBORA-  
22 TION YOU'RE DONE, AND I DON'T THINK THEY CAN; AND IF YOU  
23 LOOK AT HOW ACTIVE THESE GUYS ARE AT TEXTING EACH OTHER  
24 AND SOCIAL MEDIA, THE FACT THAT MR. WILLIS IN THIS  
25 PROCEEDING WASN'T ABLE TO PRODUCE A SINGLE TEXT OR IMAGE

1 TO SHOW CORROBORATION OF HIM CONTRIBUTING TO THE  
2 ARTICULATING ARM AND TOWER LOCK COMBINATION DESIGN AT ALL  
3 IS PRETTY TELLING OF WHAT'S LIKELY TO HAPPEN AT TRIAL.

4 THE COURT: LET ME ASK YOU THAT, I ASKED  
5 MS. RUMFELT THIS QUESTION ABOUT THE CASE LAW THAT SUGGESTS  
6 THAT CERTAINLY AT THE SUMMARY JUDGMENT STAGE OR AT TRIAL  
7 THE BURDEN IS ON THE CHALLENGER TO PROVE ITS POSITION BY  
8 CLEAR AND CONVINCING EVIDENCE.

9 MR. MILLER: CORRECT.

10 THE COURT: SHE SUGGESTS THAT'S A SUMMARY  
11 JUDGMENT OR TRIAL STANDARD THAT REALLY HAS VERY LITTLE  
12 APPLICATION HERE. DO YOU AGREE?

13 MR. MILLER: I AGREE IT'S A TRIAL AND SUMMARY  
14 JUDGMENT STANDARD, BUT I DISAGREE IT HAS LITTLE APPLICA-  
15 TION HERE. IF YOU READ THE CASE LAW, THAT TITAN CASE IS A  
16 REALLY GOOD ONE. WHEN YOU EVALUATE A PRELIMINARY  
17 INJUNCTION IN A PATENT CASE, YOU DO SO KEEPING IN MIND THE  
18 BURDENS THAT WILL BE APPLICABLE AT TRIAL. SO THEIR BURDEN  
19 IS NOT TO SHOW A SUBSTANTIAL QUESTION OF INVALIDITY,  
20 PERIOD. THEIR BURDEN IS TO SHOW A SUBSTANTIAL QUESTION  
21 THAT MAKES THE COURT CONCLUDE THAT THEY'RE MORE LIKELY  
22 THAN NOT GOING TO MEET THE CLEAR AND CONVINCING EVIDENCE  
23 BURDEN AT TRIAL. SO YOU HAVE TO KEEP IN MIND THE FACT  
24 THAT THEY'RE GOING TO NEED A CORROBORATING DOCUMENT THAT  
25 SHOWS CONCEPTION. THEY'RE GOING TO NEED THIS STUFF AT

1 TRIAL; AND WHAT HAVE THEY DONE FOR -- AND THEN YOU LOOK AT  
2 THE CONTEXT OF THESE PROCEEDINGS. WELL, THEY'VE BEEN IN  
3 COORDINATION WITH MR. WILLIS FOR, FOR A LONG TIME, IT'S  
4 NOT JUST SINCE WE FILED THE COMPLAINT. THEY'VE GOT  
5 BINDERS OF THEIR TEXTS. THEY'VE, THEY'VE DONE THEIR  
6 SEARCHES. THEY'VE ASKED HIM FOR WHAT HE HAS, THEY'VE  
7 ASKED HIM FOR SPREADSHEETS, YOU KNOW; AND KNOWING THAT  
8 THAT'S THE STANDARD, THEY'VE TRIED TO GET EVERYTHING THEY  
9 COULD, AND WHAT THEY HAVE IS, IS A GOOSE EGG WHEN IT COMES  
10 TO MR. WILLIS CONTRIBUTING TO THE CONCEPTION OF THE NOVEL  
11 IDEAS IN THIS PATENT. I THINK THAT TELLS THE COURT IF  
12 YOU'RE, IF YOU'RE DOING THE LIKELIHOOD, THEIR BURDEN HERE  
13 IS THEY HAVE TO PROVE BY A PREPONDERANCE OF THE EVIDENCE  
14 HERE THAT THEY ARE LIKELY TO MEET THEIR CLEAR AND CONVINC-  
15 ING EVIDENCE BURDEN AT TRIAL. THAT'S WHAT THE LAW SAYS,  
16 THEY HAVE TO MAKE IT MORE LIKELY THAN NOT THAT THEY'RE  
17 GOING TO HIT THAT STANDARD AT TRIAL; AND I DON'T THINK  
18 THEY'VE COME CLOSE HERE, NOT A SINGLE DRAWING, NOT A  
19 SINGLE SKETCH, NOT A SINGLE FACEBOOK POST, NOT A SINGLE  
20 TEXT. NOTHING FROM MR. WILLIS SAYS, I HAVE AN IDEA, OR  
21 LOOK AT THIS, LET'S DO THIS. EVERYTHING FROM MR. WILLIS  
22 IS, GOOD IDEA, I LIKE IT, I DIDN'T UNDERSTAND IT BEFORE,  
23 BUT NOW I DO. THERE'S ZERO. AND NOT ONLY IS THERE ZERO,  
24 EVERYTHING WE HAVE FROM MR. WILLIS INDICATES HE DIDN'T,  
25 HE'S REACTING TO IT AND HE DIDN'T UNDERSTAND IT; SO THE

1 DOCUMENTARY EVIDENCE AT THE TIME IS ACTUALLY AN ANTI-  
2 CORROBORATION EFFECT ON MR. WILLIS.

3 NOW, IF WE MOVE ON TO THE PRIOR ART THAT THEY  
4 BASE THEIR INVALIDITY CLAIMS ON, FIRST ONE AS WE KNOW, AND  
5 THIS IS CRITICAL, WITHOUT THIS PROTOTYPE AS PRIOR ART,  
6 THEIR ENTIRE INVALIDITY CASE FALLS. IT'S DONE. THEY HAVE  
7 TO SHOW THIS IS PRIOR ART; AND, FRANKLY, YOUR HONOR,  
8 THEY'RE NOT EVEN CLOSE TO PROVING THIS IS A PRIOR ART  
9 PROTOTYPE. THIS IS WHAT THE LAW REQUIRES. AS YOU CAN SEE  
10 HERE, YOU HAVE TO CHECK BOTH BOXES. YOU'VE GOT TO SHOW  
11 WHEN IT'S THE INVENTOR'S OWN PROTOTYPE, YOU HAVE TO SHOW  
12 THAT IT SATISFIES ALL THE CLAIM LIMITATIONS AND THAT THE  
13 INVENTOR HAS DETERMINED IT WORKS FOR ITS INTENDED PURPOSE;  
14 AND ALL OF THAT HAS TO COME, IF YOU LOOK DOWN HERE, ALL OF  
15 THAT HAS TO COME BEFORE THE CRITICAL DATE OF JANUARY 30TH;  
16 HOWEVER, IT WAS BUILT BETWEEN JANUARY 23RD AND THE 30TH.

17 BY JANUARY 30TH IT HAD NEVER EVEN BEEN FIRED UP  
18 OR OPERATED. IT HAD NEVER BEEN TESTED IN A REAL WORLD  
19 CONDITION. MR. HOWELL HAD BEEN TOLD THAT MR. ODOM WAS  
20 WORKING ON A NEW ONE AND WAS INTERESTED. MR. ODOM WAS  
21 INTERESTED IN MR. HOWELL'S REACTION; SO WHEN HE FINALLY  
22 SHOWED UP AND SAW IT, MR. HOWELL LIKED IT; AND THEN HE  
23 SAID, WILL YOU SELL IT TO ME? I MEAN, WHAT IS, WHAT IS  
24 UNBELIEVABLE ABOUT THAT STORY? THAT'S SOMETHING THAT  
25 HAPPENS. AND HE BOUGHT IT; AND THEN AFTERWARDS HE

1 REMAINED IN COMMUNICATION WITH MR. HOWELL, AND HE FOUND  
2 OUT, I NEED TO IMPROVE THE TOWER LOCKS. HE IMPROVED THE  
3 BEARINGS, HE ADDED THE PIN ADJUSTMENT HOLES; AND SO AT --  
4 ON THE JANUARY 30TH DATE IT HAD NOT EVER BEEN TESTED OR  
5 KNOWN TO WORK FOR ITS INTENDED PURPOSE, AND IT'S IMPORTANT  
6 TO THINK ABOUT WHAT THE INTENDED PURPOSE IS.

7 THE CASE LAW SAYS YOU DON'T HAVE TO RELY ON  
8 JUST THE CLAIM LANGUAGE OF THE PATENT. IF IT'S AN OUTDOOR  
9 PRODUCT AND THE INVENTOR WANTS IT TO BE DURABLE IN OUTDOOR  
10 CONDITIONS, THAT'S AN INTENDED PURPOSE, AND YOU CAN USE IT  
11 PUBLICLY ALL YOU WANT IF YOU'RE TRYING TO DETERMINE THAT  
12 IT NEEDS TO WORK FOR ITS OUTDOOR PURPOSE. THERE'S THE  
13 FAMOUS CASE FROM THE SUPREME COURT MORE THAN A HUNDRED  
14 YEARS AGO, IT'S CALLED THE CITY OF ELIZABETH, AND THEY  
15 WERE TESTING A COBBLESTONE STREET FOR YEARS, AND IT STILL  
16 WAS NOT A REDUCTION OF PRACTICE AND IT DIDN'T QUALIFY AS  
17 PRIOR ART.

18 SO WHAT WE HAVE THERE, THAT ONE DOESN'T  
19 QUALIFY, SO WE MOVE TO THE NEXT ONE. WHAT HAPPENED NEXT?  
20 OH, YEAH, IT'S IMPORTANT -- WELL, I'LL GET TO THAT. SO  
21 FEBRUARY 21ST, AS YOU SEE ON THIS TIMELINE, THAT'S THE  
22 FIRST TIME -- IT STILL DIDN'T HAVE THE POSITIONS IN  
23 BETWEEN, IT DIDN'T HAVE THE PIN LOCKS, IT WAS STILL JUST  
24 TWO POSITIONS, OR THREE POSITIONS, FRONT, HORIZONTAL AND  
25 VERTICAL. WE GOT THE NEW TOWER LOCK DESIGN THERE, BUT

1 EVEN THEN YOU DON'T SATISFY THE ALL CLAIM LIMITATION.

2 IT ISN'T UNTIL JUNE 3RD THAT IT COULD MEET THE  
3 INTENDED PURPOSE OF CUTTING IN POSITIONS IN BETWEEN  
4 HORIZONTAL AND VERTICAL AND THAT IT WORKED FOR ITS  
5 INTENDED PURPOSE; AND THAT'S LIKE SIX MONTHS AFTER THE  
6 CRITICAL DATE, OR FIVE MONTHS AFTER THE CRITICAL DATE. SO  
7 THE JANUARY 30TH PROTOTYPE IS SIMPLY NOT PRIOR ART AT ALL.

8 NOW, LET'S GO TO WHAT THEY CLAIM TO BE THESE  
9 OFFERS FOR SALE FOR PUBLIC USE. THE FIRST ONE, THERE'S A  
10 JANUARY 12TH TEXT WHERE MR. ODOM SAYS, JUST SOLD ANOTHER  
11 ONE; AND IF YOU LOOK OVER HERE, THIS IS WHAT MR. WILLIS  
12 USES IN HIS DECLARATION TO REPRESENT THOSE TEXTS, AND HE  
13 WANTS YOU TO BELIEVE THAT THAT MESSAGE ABOUT JUST SOLD  
14 ANOTHER ONE REFERS UP TO THE STATEMENT OF, "I JUST FIGURED  
15 IT OUT"; THAT HE WAS SELLING A NONEXISTENT PROTOTYPE THAT  
16 HE THOUGHT OF 54 HOURS EARLIER.

17 BUT IF YOU LOOK AT WHAT THE TEXT MESSAGES  
18 ACTUALLY SAY, YOUR HONOR, THE IDEA -- HE MAKES THE  
19 STATEMENT OF "I JUST FIGURED IT OUT" UP HERE, AND THEN  
20 THERE'S ALL THIS TEXTING, AND DOWN HERE HE SENDS A PICTURE  
21 OF LS-1S FRESHLY PAINTED. MR. WILLIS SAYS, THEY LOOK  
22 AWESOME. THEN HE SAYS, YES -- SORRY, I CAN'T READ THAT  
23 WELL, I'M SORRY ABOUT THAT. PAINTING -- NO, AND THEN HE  
24 SAYS, JUST SOLD ANOTHER ONE TOO. THEY STILL ARE ADVOCAT-  
25 ING THAT "JUST SOLD ANOTHER ONE" REFERS TO THE STATEMENT

1 HE MADE 54 HOURS EARLIER RATHER THAN THE TWO PAINTED LS-1S  
2 HE SENT 4 MINUTES EARLIER. IT'S AN IRRATIONAL ARGUMENT.  
3 IT'S NOT JUST, WELL, THIS IS A DISPUTE OF FACT. NO,  
4 THAT'S AN IRRATIONAL READING OF TEXT MESSAGES. IT CAN'T  
5 BE READ THAT WAY BY ANYONE.

6 NOW, LET'S GO TO THE NEXT ONE. SO WE KNOW THAT  
7 THIS JANUARY 12TH TEXT REFERS TO AN LS-1. IT CAN'T  
8 POSSIBLY REFER TO A JANUARY 2017 PROTOTYPE. NEXT ONE,  
9 MR. WILLIS SAYS HE TALKED TO SOME GUY NAMED JOHNNY WATERS.  
10 HE'S VERY VAGUE ABOUT THE DETAILS OF JOHNNY WATERS. HE  
11 DOESN'T WANT TO GIVE DETAILED DATES. WHAT HE SAYS IS OVER  
12 THE PERIOD FROM DECEMBER 2016 TO EARLY 2017 I HAD SHOWN  
13 JOHNNY PHOTOS AND VIDEOS OF THE CUTTER. WELL, IT'S  
14 INTERESTING BECAUSE FROM DECEMBER TO EARLY JANUARY 2017  
15 THE JANUARY PROTOTYPE DIDN'T EXIST, THE VIDEO DIDN'T EXIST  
16 UNTIL JANUARY 23RD. HE COULDN'T HAVE SHOWN JOHNNY WATERS  
17 THAT PROTOTYPE, IT COULDN'T HAVE HAPPENED; AND HE DOESN'T  
18 SAY WHEN HE SOLD SOMETHING TO HIM. HE'S VERY CRYPTIC, HAS  
19 NO DETAILS, HAS NO RECORDS, COMMUNICATIONS, TEXTS OR  
20 ANYTHING. THAT DOESN'T MEET THE SMELL TEST FOR A  
21 SUBSTANTIAL QUESTION OF A PRIOR SALE, EVEN IF THE  
22 PROTOTYPE COULD BE CONSIDERED A REDUCTION OF PRACTICE.

23 THE FINAL ONE, YOU'VE GOT A LOT OF STATEMENTS  
24 FROM MR. WILLIS THAT SAY WHAT HE BELIEVES BECAUSE THE FACT  
25 IS ALL OF THE CRITICAL EVENTS IN THIS CASE WHEN IT COMES

1 TO CONCEPTION AND THE PROTOTYPE, HE WAS ABSENT FOR IT. HE  
2 WASN'T THERE. HE HAS, HE HAS ZERO PERSONAL KNOWLEDGE. HE  
3 DIDN'T HELP BUILD IT, HE WASN'T IN THE SHOP, HE DIDN'T  
4 HELP TEST IT, SO IT'S, IT'S NO WONDER THAT HIS DECLARATION  
5 IS FULL OF STATEMENTS LIKE THIS, I ALSO BELIEVE THAT THE  
6 JANUARY 2017 UNIT MAY HAVE BEEN IN PUBLIC USE OR IT WOULD  
7 HAVE BEEN VISIBLE TO CUSTOMERS. I BELIEVE THE WHITE  
8 CHEVROLET WAS OWNED BY A POTENTIAL CUSTOMER WHO WAS COMING  
9 TO SEE THE JANUARY 2017 UNIT. THAT'S NOT TRUE. THAT  
10 TRUCK WAS A CUSTOMER OF TERRY MARSH'S WHO WAS THERE TO  
11 PICK UP HIS GUN FROM HIS GUNSMITH. I BELIEVE THAT THE  
12 UNIT MUST HAVE BEEN OFFERED FOR SALE. IF YOUR STAR  
13 WITNESS AT THE PRELIMINARY INJUNCTION STAGE CAN ONLY SAY I  
14 BELIEVE WHAT MUST HAVE HAPPENED IN HIS TESTIMONY BECAUSE  
15 HE HAS NO PERCIPIENT FIRST-HAND KNOWLEDGE, YOU ARE NOT  
16 PRESENTING A SUBSTANTIAL CASE, YOU'RE PRESENTING A VERY  
17 FLIMSY CASE, AND THAT'S ALL THAT MR. WILLIS HAS.

18 IF WE -- LET'S CHECK NOW WHAT HE SAYS HE  
19 BELIEVES. I MEAN, LOOK AT THE PICTURE, JUST THE PICTURE  
20 OF THE PROTOTYPE ITSELF AND THEN THE GOOGLE MAPS, ALL OF  
21 THIS TESTING WAS DONE IN A VERY REMOTE LOCATION. IT'S NOT  
22 LIKE THEY'RE IN A VERY DENSE SUBURB NEIGHBORHOOD WITH  
23 NEIGHBORS WALKING BY AND IT'S JUST AROUND THE CORNER IN  
24 THE BACKYARD. THIS IS, THIS IS VERY REMOTE. THERE'S NO  
25 REASON AN INVENTOR WOULD THINK THAT HE'S RISKING PUBLIC

1 DISCLOSURE OF HIS EXPERIMENTAL PROTOTYPE IN THIS TYPE OF  
2 ENVIRONMENT.

3 SO WHAT WE HAVE HERE IS WHEN YOU PEEL BACK THE  
4 LAYERS, THEY HAVE NO EVIDENCE OF AN ACTUAL SALE, OFFER FOR  
5 SALE OR PUBLIC USE BEFORE JANUARY 30TH, THEY HAVE ZERO.  
6 THEY HAVE MR. WILLIS'S SPECULATION, AND THAT IS IT, AND  
7 ATTORNEY ARGUMENT.

8 IF YOU READ THE DECLARATION, THE EVIDENCE OF  
9 THE PERCIPIENT WITNESSES, THERE'S THREE, AND THEY  
10 CORROBORATE EACH OTHER. WE PRESENTED THREE WITNESSES WITH  
11 A CONSISTENT STORY THAT ON JANUARY 30TH MR. HOWELL SAW THE  
12 PROTOTYPE FOR THE FIRST TIME AND OFFERED TO BUY IT.  
13 THAT'S THE FACTS. THEY HAVE NOTHING TO DISPUTE THAT. AND  
14 SO WHAT MR. WILLIS BELIEVES DOESN'T ACTUALLY CREATE AN  
15 ISSUE OF FACT. YOU CAN'T CREATE A MATERIAL ISSUE OF FACT  
16 BY EXPRESSING BELIEF AND SPECULATION.

17 SO WE'LL MOVE TO THE PRIOR ART, FRANKENSTEIN,  
18 WE'VE ALREADY DONE THIS. THIS ONE DID NOT HAVE ALL OF THE  
19 LIMITATIONS OF THE CLAIM, IT DIDN'T EVEN COME CLOSE, AND  
20 IT'S ALSO NOT PRIOR ART.

21 THE DUERWOOD 2006 {SIC} MAY HAVE WORKED FOR  
22 MR. WILLIS' INTENDED PURPOSE. IT CERTAINLY DOESN'T  
23 SATISFY A LOT OF THE CLAIM LIMITATIONS; AND EVEN IF YOU  
24 CONSIDER THAT PRIOR ART, IT'S CUMULATIVE AND DUPLICATIVE  
25 OF OTHER PRIOR ART THAT WAS BEFORE THE PATENT OFFICE.

1                   SO THAT'S AN ANALYSIS OF THE PRIOR ART.  
2       NOW LET'S LOOK AT THEIR ANTICIPATION DEFENSE.  NOW THAT WE  
3       UNDERSTAND THAT THE SEPTEMBER -- OR THE JANUARY 2017  
4       PROTOTYPE IS NOT PRIOR ART, LET'S LOOK AT THEIR DEFENSES.

5                   FIRST OF ALL, I HAVE TO SAY THEIR ANTICIPATION  
6       DEFENSE WAS VERY VEILED AND NONSPECIFIC IN THEIR BRIEFING  
7       AND IN MR. FOX'S DECLARATION, AND I THINK THEY WANTED TO  
8       HIDE FROM A CLAIM CONSTRUCTION ARGUMENT.  THEY DIDN'T --  
9       MR. FOX COULDN'T SAY ANYTHING MORE THAN, I BELIEVE IT  
10      MEETS THIS LIMITATION, NO ANALYSIS OR EXPLANATION WHY; AND  
11      THEIR BRIEFING DOES THE SAME THING, THEY SAY, WHILE IT  
12      MEETS ALL THE LIMITATIONS, THE DUERWOOD 2016 CAN FILL IN  
13      THE GAP; AND THEY DID NOT PROPOSE THE INTERPRETATION OF  
14      POSITIONS IN BETWEEN TO JUSTIFY IT, SO WE HAD TO GUESS IN  
15      OUR REPLY, WE HAD TO GUESS; AND WE SAID, TO THE EXTENT  
16      THEY'RE ASSERTING THAT IT WOULD BE INTERPRETED THIS WAY,  
17      WE GAVE THE ARGUMENT OF WHY IT'S NOT.  WE GAVE A CLAIM  
18      CONSTRUCTION ARGUMENT IN REPLY.

19                  AND THEIR POSITION ON THE INTERPRETATION OF  
20      POSITIONS IN BETWEEN WOULD NEVER BE UPHOLD BY THE FEDERAL  
21      CIRCUIT IN A HUNDRED YEARS.  I'D BET MY HOUSE ON IT.  THE  
22      CLAIM CONSTRUCTION STANDARD IS DIFFERENT THAN WHAT MR. FOX  
23      SAYS.  IT ISN'T BROADEST REASONABLE CONSTRUCTION; BUT HE'S  
24      A PATENT PROSECUTOR, AND THAT'S THE STANDARD YOU APPLY AT  
25      THE PATENT OFFICE FOR SURE.  IN DISTRICT COURT THE FEDERAL

1 CIRCUIT SAYS, YOU GIVE THE TERMS THE MEANING THEY WOULD  
2 HAVE TO A PERSON OF ORDINARY SKILL IN THE ART WHO HAS READ  
3 THE PATENT SPECIFICATION; AND THE MEANING -- THERE IS NO  
4 SUCH THING AS ORDINARY MEANING OUTSIDE THE CONTEXT OF THE  
5 PATENT. AND WHEN YOU HAVE THE PATENT SAYING THAT ONE OF  
6 THE PRIMARY PURPOSES OF THIS INVENTION IS TO ADDRESS THE  
7 ISSUE IN THE ART WHERE YOU CAN'T DO CUTTING POSITIONS IN  
8 BETWEEN HORIZONTAL AND VERTICAL, NOBODY WOULD EVER  
9 CONSTRUE "POSITIONS IN BETWEEN" TO JUST MEAN PASSIVE  
10 POSITIONS THAT ARE THERE WHILE YOU'RE ADJUSTING. YOU HAVE  
11 TO BE ABLE TO ADJUST IT TO THAT POSITION TO QUALIFY.

12 IF THE COURT WANTS ADDITIONAL CLAIM  
13 CONSTRUCTION BRIEFING, I THINK IT'S -- IT'S THE ONLY CLAIM  
14 CONSTRUCTION ISSUE THAT'S PRESENTED IN THIS PROCEEDING,  
15 AND I THINK IT'S, IT'S AN EASY ONE THAT, THAT HAS --  
16 THERE'S NO INTRINSIC EVIDENCE IN THE PATENT OR THE FILE  
17 HISTORY THAT WOULD SUPPORT THEIR ILLOGICAL READING OF THAT  
18 STATEMENT IN THE CLAIM.

19 SO BECAUSE IT'S NOT PRIOR ART AND BECAUSE  
20 THERE'S NO POSITIONS IN BETWEEN, THE ANTICIPATION CLAIM  
21 FAILS. WHEN, WHEN YOU'VE PRESENTED AN ANTICIPATION  
22 DEFENSE THAT FAILS BECAUSE YOU'RE RELYING ON SOMETHING  
23 THAT'S NOT LIKELY PRIOR ART AND YOU HAVE A WEAK CLAIM  
24 CONSTRUCTION POSITION TO SUPPORT IT, YOU ARE NOT MEETING  
25 YOUR BURDEN OF PRESENTING A SUBSTANTIAL QUESTION OF

1       INVALIDITY ON ANTICIPATION.

2                   AND I ALSO HAVE TO SAY IT'S PRETTY TELLING THAT  
3       THEIR ANTICIPATION ARGUMENT IS USING THE INVENTOR'S OWN  
4       PROTOTYPE AGAINST HIM.   THEY COULDN'T EVEN GO IN THE ART  
5       AND FIND ANYBODY WHO DID ANYTHING REMOTELY CLOSE TO THIS,  
6       THEY HAVE TO RELY ON THE INVENTOR'S OWN WORK.   THAT'S  
7       TELLING ABOUT HOW IMPORTANT THE INVENTION WAS.

8                   NOW LET'S MOVE TO OBVIOUSNESS.   WE ALREADY  
9       TALKED ABOUT WHY MR. FOX ENGAGES IN HINDSIGHT, I DON'T  
10      NEED TO REITERATE THAT; BUT THIS IS HIS OBVIOUSNESS  
11      DEFENSE.   THIS IS, THIS IS THE BASIS, YOU START WITH THE  
12      PROTOTYPE FROM JANUARY 2017.   THEN HE SAID, YOU CAN EITHER  
13      USE THE DUEWOOD OR THE SWISHER TO FILL IN THE GAPS, AND  
14      IN HIS OPINION YOU GET THE INVENTION; BUT AT THIS STAGE  
15      THE ONLY THING THE COURT NEEDS TO CONCLUDE IS THAT IT IS  
16      HIGHLY UNLIKELY THAT THEY WILL EVER SATISFY THE STANDARD  
17      TO PROVE THAT THIS JANUARY 2017 PROTOTYPE IS PRIOR ART;  
18      AND IF IT'S NOT PRIOR ART, THE OBVIOUSNESS CASE FAILS AS A  
19      MATTER OF LAW.   THIS IS AN OBVIOUSNESS CASE I THINK WOULD  
20      FAIL AT THE SUMMARY JUDGMENT STAGE BECAUSE OF THAT, IT'S  
21      RELYING ON NONPRIOR ART.

22                   BUT THE OTHER VERY IMPORTANT ASPECT OF  
23      MR. FOX'S FAILED OPINIONS AND THE DEFENDANTS' OBVIOUSNESS  
24      CASE IS THAT THEY DON'T EVEN ADDRESS SECONDARY CONSIDERA-  
25      TIONS OF NONOBVIOUSNESS.   THOSE ARE CRITICAL TO THE CASE.

1 THE CASE LAW SAYS THAT IF YOU HAVE EVIDENCE IN THE RECORD  
2 ABOUT OBJECTIVE EVIDENCE OF NONOBVIOUSNESS, THE CASE LAW  
3 SAYS YOU HAVE TO ANALYZE IT. AND WHAT IS OBJECTIVE  
4 EVIDENCE OF NONOBVIOUSNESS? WELL, WHAT IT IS, IT'S THE  
5 REAL WORLD FACTS. IT ISN'T AN EXPERT GOING OUT IN THE  
6 PRIOR ART AND PIECING IT TOGETHER TO TRY AND PROVE  
7 OBVIOUSNESS. THIS OBJECTIVE EVIDENCE FACTOR, WHICH IS A  
8 REQUIRED ANALYSIS, IS ALSO USED BY THE COURTS TO GUARD  
9 AGAINST HINDSIGHT BECAUSE THEY SAY, LISTEN, YOU MAY GET AN  
10 EXPERT OR SOMEBODY TO COME UP HERE, PIECE TOGETHER THE  
11 PRIOR ART TO GET TO THE INVENTION, BUT ALMOST ALL INVEN-  
12 TIONS ARE A NEW, NOVEL COMBINATION OF PRIOR ART ELEMENTS;  
13 SO TO GUARD AGAINST HINDSIGHT, YOU ALSO HAVE TO ANALYZE  
14 THE REAL WORLD IMPACT OF THE INVENTION, WHAT ACTUALLY  
15 HAPPENED WHEN THIS INVENTION HIT THE MARKET; AND IF THINGS  
16 HAPPENED LIKE PEOPLE HAD FAILED FOR A LONG TIME, THERE HAD  
17 BEEN A LONG-WAITING NEED, AND THE INVENTION MEETS IT, AND  
18 THEN IF PEOPLE COPY IT AND THEN IF IT HAS GREAT COMMERCIAL  
19 SUCCESS AND IT GETS PRAISE, THAT DOESN'T HAPPEN IF YOU'RE  
20 JUST SOME OBVIOUS INVENTION; AND SO THIS EVIDENCE IN THE  
21 FEDERAL CIRCUIT HAS SAID, SOMETIMES THE OBJECTIVE EVIDENCE  
22 OF NONOBVIOUSNESS IS THE MOST POWERFUL EVIDENCE ON THE  
23 OBVIOUSNESS INQUIRY; AND THIS IS WHAT WE HAVE IN THIS  
24 CASE. LET'S GO THROUGH THEM FACTOR BY FACTOR.

25 THE PRIOR FAILURES, IT FILLS A LONG-TIME NEED,

1 OKAY. FRANKENSTEIN WAS A FAILURE. THE DUERWOOD 2016  
2 DIDN'T RESULT IN A COMMERCIAL PRODUCT, OKAY. THERE IS,  
3 THERE IS A STATEMENT FROM A CONSUMER -- I PULLED THAT OUT  
4 FROM THE RECORD, IT'S IN THE BRIEFING -- WE'VE BEEN LOOK-  
5 ING FOR A TOOL JUST LIKE THIS FOR 10 YEARS NOW, AFTER THE  
6 LS-2 CAME OUT; AND, INCIDENTALLY, I NOTICED TODAY MR. FOX  
7 IN HIS DECLARATION AND MR. HOWELL, THE ONE WHO BOUGHT THE  
8 PROTOTYPE IN HIS DECLARATION, BOTH OF THESE MEN STATE AS  
9 FARMERS, I'VE BEEN LOOKING FOR A BETTER CUTTER FOR YEARS.  
10 OKAY, THERE WAS A LONG-TIME NEED, AND THIS SATISFIED IT.

11 NOW, LET'S LOOK AT THE OTHER FACTOR, COPYING BY  
12 COMPETITORS. WHAT DO WE HAVE? WELL, WE KNOW TRAILBLAZER  
13 COPIED, AND IT'S JUST NOT CREDIBLE TO DISPUTE IT, JUST  
14 LOOKING AT THEM. WE KNOW PATH SLAYER MODERN AG COPIED AND  
15 AGREED TO STOP AFTER THE PATENT CAME OUT, SO WE'VE GOT  
16 THAT OBJECTIVE EVIDENCE.

17 THE COURT: IS THAT ABOUT THE PATH SLAYER  
18 HISTORY IN THE RECORD?

19 MR. MILLER: YES, IT IS.

20 THE COURT: I DIDN'T REMEMBER SEEING THAT. I  
21 REMEMBERED SEEING THE ALLEGATION THAT THEY HAD COPIED  
22 IT --

23 MR. MILLER: RIGHT.

24 THE COURT: -- NOT THAT THEY HAD AGREED NOT TO  
25 MARKET IT BECAUSE THE PATENT WAS ISSUED.

1           MR. MILLER:   YEAH, THAT -- IN OUR REPLY BECAUSE  
2   THEY HAD AGREED BETWEEN THE OPENING MOTION AND THE REPLY,  
3   WE SAY THAT IN OUR REPLY, AND I THINK MR. ODOM'S THIRD  
4   DECLARATION INDICATES THAT THEY HAD REACHED OUT AND THEIR  
5   ATTORNEY HAD INDICATED THEY'RE WILLING TO STOP.

6           THE COURT:   ALL RIGHT.

7           MR. MILLER:   SO WE HAVE THE COPYING BY  
8   COMPETITORS, AND THE CASE LAW IS REALLY STRONG ON THIS.  
9   IT'S REALLY TELLING THAT TITAN WITH ALL OF THEIR  
10  RESOURCES, THEY DIDN'T GO IMPROVE ON THE DUERWOOD 2016,  
11  THEY DIDN'T GO TO ONE OF THESE -- ANY PRIOR ART BRUSH  
12  CUTTER AND DEVELOP THEIR OWN.  THEY DIDN'T EVEN HAVE THEIR  
13  OWN BRUSH CUTTER.  THEY STARTED A COMPANY, TRAILBLAZER,  
14  FOR THE PURPOSE OF MARKETING THIS KNOCK-OFF, AND THEY  
15  ADDED IMPROVEMENTS.  THEY DID BETTER BOLTS, THEY PUT IN  
16  THE SAFETY GUARD, WHICH IS ALSO RECITED IN THE  
17  SPECIFICATIONS OF OUR PATENT, THEY DID ALL THESE LITTLE  
18  THINGS; BUT THIS IS NOT A CASE WHERE YOU HAVE AN  
19  ESTABLISHED PRODUCT WITH A HISTORY OF SALES AND THEN THEY  
20  COPY SOMEONE'S INVENTION AS AN IMPROVEMENT TO THAT PRODUCT  
21  AND THE SALES KEEP GOING.  THIS IS A CASE WHERE THERE'S NO  
22  HISTORY OF ANYTHING.  THEY COPY -- THE PRODUCT IS THE  
23  INVENTION AND THEIR SUCCESS STARTS WITH THE COPY.  ALL OF  
24  THESE IMPROVEMENTS AND THINGS ARE, ARE NOT A CREDIBLE  
25  EXCUSE FOR THEIR SUCCESS WHEN THEY DIDN'T EVEN HAVE A

1 BRUSH CUTTER PRODUCT BEFOREHAND; AND IF THEY WANT TO ADD  
2 ALL OF THEIR IMPROVEMENTS TO THE FRANKENSTEIN, THE  
3 DUERWOOD 2016, ANY OF THE PRIOR ART THAT MR. FOX HAS  
4 IDENTIFIED, IF THEY WANT TO TAKE THAT AND ADD THEIR  
5 IMPROVEMENTS, WE'RE HAPPY TO COMPETE AGAINST THAT; BUT  
6 WHEN A DEALER SEES IDENTICAL PRODUCTS, THAT'S THE ONLY  
7 TIME THAT PAINT AND BOLTS AND LITTLE IMPROVEMENTS HAVE ANY  
8 SWAY TO A DEALER. SO THE -- I THINK THE FACT THAT THEY  
9 WIN DEALERS ON THOSE IMPROVEMENTS IS THE EVIDENCE OF HOW  
10 IMPORTANT THE INVENTION IS AND IS THE NEXUS BECAUSE THE  
11 PRODUCT DOESN'T EXIST AT ALL WITHOUT THE INVENTION.

12 NOW, IF WE GO TO INDUSTRY, CONSUMER ACCLAIM, WE  
13 CITE A LOT OF THIS IN THE RECORD, THESE ARE JUST SOME  
14 EXAMPLES, BUT THERE'S A LOT OF SOCIAL MEDIA OUT THERE THAT  
15 SAYS THIS IS A GAME CHANGER, LIFE CHANGER, BEST MONEY I  
16 EVER SPENT; AND MR. ODOM IDENTIFIED THAT THIS IS IMPORTANT  
17 TO HIS BUSINESS TOO. WHEN HE GETS A CUSTOMER, THEY BECOME  
18 A MARKETER; AND IF THEY GET THE CUSTOMER, GUESS WHAT  
19 THEY'RE GETTING, THEY'RE GETTING A MARKETER.

20 FINALLY, COMMERCIAL SUCCESS. I DON'T HAVE THE  
21 NUMBERS IN HERE BECAUSE IT'S THE CONFIDENTIAL; BUT JUST  
22 KIND OF QUANTITATIVELY YOU LOOK AT THIS INTRODUCTION TO  
23 THE MARKET 2017, YOU SEE THE EXPONENTIAL GROWTH. THEIR  
24 PROJECTIONS FOR 2019 WOULD HAVE KEPT GOING UP, AND LOOK  
25 WHAT HAPPENED THE YEAR TRAILBLAZER ENTERS THE MARKET. ALL

1 OF TRAILBLAZER'S COMMERCIAL SUCCESS IS ALSO EVIDENCE OF  
2 NONOBVIOUSNESS. THE SUCCESS OF ANY PRODUCT THAT IS THE  
3 INVENTION IS EVIDENCE OF NONOBVIOUSNESS.

4 AND THIS IS THE CASE LAW. IN FACT, DEFENDANTS  
5 TALKED ABOUT A NEXUS, THERE IS A NEXUS REQUIREMENT. THIS  
6 IS THE CASE LAW. YOU HAVE A PRESUMPTION OF A NEXUS IF THE  
7 PRODUCTS THAT YOU'RE TALKING ABOUT ARE TIED TO THE INVEN-  
8 TION. IF THE PRODUCT IS THE INVENTION DISCLOSED AND  
9 CLAIMED IN THE PATENT, THEN YOU HAVE A PRESUMPTION OF A  
10 NEXUS. YOU HAVE A PRESUMPTION THAT ALL OF THESE OBJECTIVE  
11 FACTORS DO EVIDENCE THE REAL WORLD IMPACT OF THE  
12 INVENTION. IF THE MARKETING PRODUCT EMBODIES THE CLAIMED  
13 INVENTION AND IS COEXTENSIVE WITH THEM, THEN A NEXUS IS  
14 PRESUMED; AND THAT'S WHAT WE HAVE IN THIS CASE.

15 THERE ARE CASES, TOYOTA HAS A COROLLA, SOMEBODY  
16 COMES OUT WITH A PATENT FOR A BETTER WINDSHIELD WIPER,  
17 THEY COPY THEM AND THEY PUT ON THE BETTER WINDSHIELD  
18 WIPER. NOW, THAT WOULDN'T BE CREDIBLE FOR THE INVENTOR TO  
19 GO THERE AND SAY, ALL OF YOUR DEMAND FOR THE TOYOTA  
20 COROLLA IS THE NEW PATENTED WINDSHIELD WIPER; BUT IF THE  
21 PRODUCT STARTS WITH THE COPYING OF THE INVENTION AND IS  
22 THE INVENTION, THEN YOU'VE GOT THE NEXUS.

23 MY LAST THING I WANT TO HIT, YOUR HONOR, IS  
24 THEY HAVE TALKED ABOUT THIS UNENFORCEABILITY BASED ON A  
25 FAILURE TO DISCLOSE TO THE PATENT OFFICE. THE PROBLEM IS

1 IN THEIR BRIEFING, I DIDN'T EVEN RECOGNIZE IT BECAUSE IT'S  
2 SO, IT'S SO LOOSELY ARGUED. I THOUGHT THEY WERE JUST KIND  
3 OF TRYING TO BESMIRCH US BY SAYING THEY INTENTIONALLY  
4 WITHHELD INFORMATION. THEY DON'T EVEN PUT FORTH THE  
5 ACTUAL STANDARD FOR UNENFORCEABILITY. IT ISN'T JUST, YOU  
6 WITHHELD SOMETHING FROM THE PATENT OFFICE, IT'S  
7 UNENFORCEABLE.

8 THE CASE THEY CITE, THERASENSE FROM THE FEDERAL  
9 CIRCUIT, IS THE CASE THAT TALKS ABOUT THE STANDARD FOR,  
10 IT'S CALLED INEQUITABLE CONDUCT, THAT'S THE DEFENSE. YOU  
11 HAVE TO PROVE THAT YOU EITHER WITHHELD OR YOU SAID SOME-  
12 THING TO THE PATENT OFFICE; AND IF YOU WITHHELD  
13 INFORMATION, THEN YOU HAVE TO PROVE YOU DID SO WITH A  
14 SPECIFIC INTENT TO DECEIVE, WHICH IS A HEAVY BURDEN. AND  
15 THE CASE SAYS THAT A FINDING THAT THE MISREPRESENTATION OR  
16 OMISSION AMOUNTS TO GROSS NEGLIGENCE OR NEGLIGENCE UNDER A  
17 SHOULD-HAVE-KNOWN STANDARD DOES NOT SATISFY THE INTENT  
18 REQUIREMENT. I MEAN, THEY'VE GOT TO PROVE THAT MR. ODOM  
19 HERE ON HIS FIRST RODEO IN THE PATENT SENSE WITHHELD  
20 SOMETHING INTENDING TO MISLEAD THE PATENT OFFICE ABOUT HIS  
21 INVENTION. THEY DON'T EVEN COME CLOSE. HE DOESN'T  
22 BELIEVE DUERWOOD IS AN INVENTOR. HE HAS EVERY REASON TO  
23 NOT BELIEVE THAT BECAUSE HE'S NOT. THE RECORD SHOWS THAT.

24 THE STANDARD ALSO REQUIRES THAT THE INFORMATION  
25 YOU DON'T GIVE THE PATENT OFFICE IS MATERIAL; AND MATERIAL

1 DOESN'T MEAN, HEY, IT'S KIND OF RELEVANT TO YOUR  
2 INVENTION. THE THERASENSE CASE RAISED THE BAR AND SAID,  
3 MATERIALITY IS BUT FOR MATERIALITY. MEANING IF YOU WOULD  
4 HAVE DISCLOSED IT, THE PATENT WOULD NOT HAVE ISSUED IN THE  
5 SAME CONDITION IT ISSUED. THEY WOULD HAVE HAD TO AMEND  
6 THE CLAIMS, IT WOULD HAVE CHANGED THINGS. THERE'S NO  
7 PRIOR ART THEY'VE RAISED HERE THAT WOULD HAVE CHANGED THE  
8 OUTCOME OF THE PATENT PROSECUTION. NONE OF THE CLAIMS  
9 WOULD HAVE HAD TO BE AMENDED TO OVERCOME DUERWOOD 2016 AS  
10 A PRIOR ART REFERENCE, NONE OF THEM. SO THE STUFF THAT  
11 THEY CLAIM THAT MR. ODOM WITHHOLD FROM THE PATENT OFFICE,  
12 IT DOESN'T MEET THE LEGAL STANDARD.

13 I WOULD ASK THE COURT TO READ THAT THERASENSE  
14 CASE AND THEN EVALUATE WHETHER THEY PRESENTED EVEN AN IOTA  
15 OF EVIDENCE TO SUPPORT THE INTENT TO DECEIVE AND THE  
16 MATERIALITY PRONG. THEY CERTAINLY DON'T TALK ABOUT THOSE  
17 MUCH IN THE BRIEFING, AND THE MATERIALITY PRONG IS VERY  
18 HIGH. THEY HAVE -- IT'S PRETTY TELLING THAT THEY DON'T  
19 BASE THEIR INVALIDITY DEFENSE SOLELY ON DUERWOOD 2016,  
20 THEY HAVE TO COMBINE IT WITH SOMETHING THAT'S NOT EVEN  
21 PRIOR ART. HOW WOULD FAILURE TO DISCLOSE DUERWOOD'S  
22 PROTOTYPE CHANGE THE OUTCOME OF THE PATENT PROSECUTION  
23 PROCESS? IT WOULD HAVE CHANGED IT ZERO, SO THEY HAVEN'T  
24 MET THAT BURDEN.

25 ON THE WHOLE, YOUR HONOR, I, I KNOW THIS IS A

1 PRELIMINARY INJUNCTION PHASE, AND I KNOW THAT THE  
2 CONCEPT -- THE, THE STANDARD WE'RE APPEARING THROUGH IS  
3 LIKELIHOODS, AND I CAN SAY WHEN YOU'VE GOT A DEAD RINGER  
4 OF AN INFRINGEMENT BASED ON COPYING, AND YOU'VE GOT AN  
5 INVALIDITY DEFENSE THAT WAS BASED ON AN UNQUALIFIED EXPERT  
6 AND A PRIOR ART REFERENCE THAT'S NOT PRIOR ART AND A  
7 NONCORROBORATED INVENTOR WHOSE TESTIMONY IS CONSTANTLY  
8 SPECULATIVE ABOUT WHAT HE BELIEVES AND WHAT HE THINKS IS  
9 LIKELY BECAUSE HE WASN'T A PERCIPIENT WITNESS TO THE  
10 EVENTS, THEY HAVE NOT PRESENTED A SUBSTANTIAL QUESTION OF  
11 INVALIDITY THAT SUGGESTS THAT THERE'S ANY LIKELIHOOD THAT  
12 THEY COULD MEET CLEAR AND CONVINCING EVIDENCE AT TRIAL ON  
13 ANY OF THESE DEFENSES, SO WE THINK THE COURT SHOULD FIND  
14 THAT LANE SHARK IS HIGHLY LIKELY TO PREVAIL ON THE MERITS  
15 IN THIS PROCEEDING AND ISSUE THE INJUNCTION.

16 THE COURT: ALL RIGHT. THANK YOU, MR. MILLER.  
17 MS. RUMFELT, I'LL GIVE YOU BRIEF REBUTTAL ON  
18 THAT.

19 MS. RUMFELT: THANK YOU, YOUR HONOR.

20 IT SOUNDS LIKE MAYBE I SHOULD ASK FOR 35 PAGES  
21 ON THE BRIEF.

22 THE COURT: I'M GOING TO STOP READING AT 25, SO  
23 ASK AWAY.

24 MS. RUMFELT: BRIEFLY ON MR. FOX, WE'VE HEARD A  
25 LOT ABOUT MR. FOX TODAY, BUT WHAT I THINK IS VERY TELLING

1 IS YOU ASKED FOR THEM TO DEFINE WHAT THEY CONSIDER THE  
2 PERSON OF ORDINARY SKILL IN THE ART, AND THEY'RE TALKING A  
3 LOT ABOUT HINDSIGHT AND OUR HINDSIGHT HERE; BUT ASKED  
4 TODAY TO DEFINE IT, THEY SAY, A DEGREE IN MECHANICAL  
5 ENGINEERING; AND YOU'VE HEARD FROM MR. FOX WHAT A B.E. IS,  
6 IT'S PRETTY CLOSE TO A DEGREE IN MECHANICAL ENGINEERING.  
7 HE GOT A BROAD BASE OF ENGINEERING EXPERIENCE.

8 THE COURT: I KNOW THIS IS NOT IN THE RECORD,  
9 BUT DON'T PEOPLE IN ANY ENGINEERING DISCIPLINE, WHETHER  
10 IT'S AN EMPHASIS ON CIVIL OR CHEMICAL OR SOME OTHER KIND,  
11 DON'T THEY GET SOME MECHANICAL ENGINEERING COURSES? I  
12 MEAN, ISN'T THAT PART OF THE CORE?

13 MS. RUMFELT: I THINK THAT'S WHAT YOU HEARD  
14 FROM MR. FOX TODAY, PARTICULARLY WITH THE B.E., AND HE  
15 ALSO TALKED ABOUT THE TESTING THAT HE TOOK AS PART OF HIS  
16 COLLEGE FOR AN ENGINEERING AND BROAD BASED -- IT WAS AN  
17 ENGINEERING SPECIFIC TEST FOR BROAD BASED ENGINEERING.

18 THE COURT: WELL, AND MY FRUSTRATION WITH  
19 MR. FOX WAS HIS REFUSAL TO DEFINE A PERSON OF ORDINARY  
20 SKILL IN THE ART AS IT RELATES TO THIS CASE WITHOUT SIMPLY  
21 SAYING, WELL, I'M THAT PERSON. THAT WAS ESSENTIALLY HIS  
22 ANSWER. HOW DO YOU DEFINE IT?

23 MS. RUMFELT: WELL, AND, YOU KNOW, ONE OF THE  
24 TELLING POINTS THAT WE HAVEN'T BROUGHT UP TODAY IS OUR  
25 INVENTOR, OUR CLAIMS INVENTOR HERE TODAY IS A PERSON WHO

1 WOULDNT' QUALIFY, I DON'T THINK, AS A PERSON OF ORDINARY  
2 SKILL IN THE ART UNDER THIS DEFINITION. I THINK --

3 THE COURT: WELL, HE WOULDNT' UNDER THE  
4 DEFINITION MR. MILLER GAVE ME, THAT'S TRUE.

5 MS. RUMFELT: THAT'S WHAT I'M SAYING. IT IS A  
6 PERSON WHO HAS A DEGREE IN ENGINEERING, I THINK THAT'S  
7 FAIR; BUT HE SAID -- YOU KNOW, I THINK WE COULD ADOPT  
8 THEIR DEFINITION AND BE OKAY HERE TODAY. HE'S GOT ONE TO  
9 TWO YEARS EXPERIENCE OF DESIGN EXPERIENCE IN THE FIELD,  
10 HE'S GOT THAT. HE'S BEEN WORKING FOR 30 YEARS WITH  
11 DESIGNERS TO DEAL WITH THE MECHANICAL ASPECTS OF THE  
12 PATENTS THAT HE PROSECUTES, AND HE'S BEEN OUT THERE FOR  
13 SAME AMOUNT OF TIME TINKERING WITH THE TECHNOLOGIES AT  
14 ISSUE HERE TODAY; SO, YOU KNOW, TAKING THEIR, ADOPTING  
15 THEIR DEFINITION, I THINK WE MEET THAT.

16 THE COURT: SO YOU'RE CONTENT WITH THEIR  
17 DEFINITION?

18 MS. RUMFELT: FOR -- YES, FOR PURPOSES OF WHERE  
19 WE ARE HERE TODAY.

20 THE COURT: ALL RIGHT. ALTHOUGH MR. MILLER, AS  
21 I UNDERSTOOD IT, SAID A DEGREE NOT IN ANY FIELD OF  
22 ENGINEERING, BUT IN MECHANICAL ENGINEERING, SO YOU DON'T  
23 AGREE WITH THAT?

24 MS. RUMFELT: WELL, THAT'S RIGHT; AND I THINK  
25 WHAT WE WOULD SAY IS THAT THE B.E. THAT HE'S DESCRIBED AND

1 HOW HE'S DESCRIBED IT WITH HIS TESTIMONY TODAY IS  
2 SUFFICIENT TO COVER THAT BROAD BASE OF ENGINEERING  
3 EXPERIENCE, SO CERTAINLY A DEGREE IN ENGINEERING.

4 THE COURT: ALL RIGHT.

5 MS. RUMFELT: WITH RESPECT TO THE HINDSIGHT  
6 ARGUMENTS THAT WE HEARD TODAY, HE'S DESCRIBED ESSENTIALLY  
7 ANY EXPERT ANALYSIS IN A LITIGATION CASE. YOU CAN'T DO  
8 THIS AS AN EXPERT IN A LITIGATION CASE WITHOUT SOME  
9 HINDSIGHT; AND I RECOGNIZE THAT HE'S LOOKING AT CASE LAW  
10 SPECIFIC TO HINDSIGHT, BUT THERE IS, THERE IS -- THAT'S  
11 JUST PART OF THE PROCESS IS TO LOOK AT THIS AND APPLY SOME  
12 HINDSIGHT. YOU JUST CAN'T GET AWAY FROM THAT AS AN EXPERT  
13 IN A PIECE OF LITIGATION.

14 I JUST WANT TO POINT OUT TOO MR. FOX IS RELE-  
15 VANT TO THOSE FIRST TWO CLAIMS, THE CLAIM OF OBVIOUSNESS  
16 AND THE CLAIM OF ANTICIPATION. WE DON'T NEED MR. FOX ON  
17 THE COINVENTOR, I MEAN. HE TALKED ABOUT INVENTORSHIP. WE  
18 DON'T NEED HIM.

19 THE COURT: WELL, YOU DON'T NEED HIM, AND HE  
20 DID EXACTLY WHAT I'M REQUIRED TO DO. I MEAN, THAT OPINION  
21 IS OF NO VALUE TO THE COURT SIMPLY TO SAY I READ THE  
22 DECLARATION, I TAKE IT AS TRUE, HE'S AN INVENTOR.  
23 THAT'S -- IN FACT, I'M NOT EVEN SURE THAT'S A PROPER  
24 SUBJECT FOR EXPERT TESTIMONY.

25 MS. RUMFELT: WELL, AND IT'S OUR CONTENTION

1 THAT WE DON'T NEED HIM. HE'S HERE TO TALK ABOUT  
2 INVALIDITY, AND WE THINK HE MET THAT BURDEN, AND THERE'S  
3 NO EXPERT ON THE OTHER SIDE. ALL THAT WE'VE GOT HERE  
4 TODAY IN LIGHT OF US SHOWING WHAT WE CONTEND WOULD BE THE  
5 PRIMA FACIE CASE OF INVALIDITY IS ATTACKS ON MR. FOX, WE  
6 DON'T HAVE ANYTHING ON THE OTHER SIDE.

7 THE COURT: LET ME ASK YOU THIS ABOUT MR. FOX,  
8 IT JUST OCCURRED TO ME A FEW MINUTES AGO, DIDN'T HE MAKE A  
9 FUNDAMENTAL MISTAKE WITH RESPECT TO PRIOR ART IN THAT HE  
10 LOOKED FOR PRIOR ART ON THIS PIECE OF THE INVENTION, THAT  
11 PIECE OF THE INVENTION AND ANOTHER PIECE OF THE INVENTION,  
12 BUT NOT THE TOTAL INVENTION? I MEAN, ISN'T THAT A  
13 FUNDAMENTAL MISTAKE ON HIS PART?

14 MS. RUMFELT: I DON'T THINK SO, NO, BECAUSE I  
15 THINK WHAT -- FOR PURPOSES OF THE OBVIOUSNESS ANALYSIS,  
16 YOU DON'T HAVE TO HAVE EVERYTHING IN ONE INVENTION. THE  
17 QUESTION IS WOULD THAT PERSON OF ORDINARY SKILL IN THE ART  
18 BE MOTIVATED TO COMBINE THESE PREEXISTING PRIOR ART  
19 REFERENCES THE WAY THAT IT WAS DONE HERE. SO THAT, THAT'S  
20 HOW YOU DO IT, I THINK, THAT YOU COMBINE THOSE, THOSE  
21 PRIOR ART REFERENCES AND LOOK AND SAY, WELL, WE'VE BEEN  
22 MOTIVATED TO TAKE THIS STEP BASED ON WHAT WE SEE IN THE  
23 PRIOR ART, WOULD IT BE OBVIOUS TO US TO TAKE THIS NEXT  
24 STEP. AND REALLY THE ONLY ISSUE IN TERMS OF OVERCOMING  
25 THE OFFICE ACTION IS THE TOWER BOX, THAT'S WHAT THEY DID

1 TO OVERCOME THE OBVIOUSNESS REJECTION THERE; AND SO THE  
2 QUESTION IS WOULD THAT BE SOMETHING THAT A PERSON OF  
3 ORDINARY SKILL IN THE ART WOULD DO, AND HE'S LOOKING AT  
4 THE TOWER LOCKS ON THE JANUARY 2017 UNIT ALONE AND SAYING,  
5 YES, BECAUSE THEY DID IT; BUT HE'S SEEN IT ALSO IN PRIOR  
6 ART OTHERWISE.

7 THE COURT: HOW DO YOU RESPOND TO THE, AND IT'S  
8 GETTING LATE, AND WE NEED TO WRAP THIS UP PRETTY QUICKLY,  
9 BUT HOW DO YOU RESPOND TO THE ARGUMENT MR. MILLER MADE  
10 THAT IF IT'S SO OBVIOUS, WHY WAS EVERYBODY, INCLUDING  
11 MR. FOX, OUT THERE LOOKING FOR A PRODUCT THAT MET THOSE  
12 NEEDS?

13 MS. RUMFELT: I THINK WHAT MR. FOX SAID, JUST  
14 TAKING HIM FIRST, IS THAT HE'S ALWAYS TINKERING AND TRYING  
15 TO FIGURE OUT WHAT WORKS FOR HIS PARTICULAR CIRCUMSTANCE,  
16 AND HE'S GOT THIS INCLINE AND HE'S GOT A VERY PARTICU-  
17 LARIZED CIRCUMSTANCE; SO I DON'T THINK I WOULD  
18 CHARACTERIZE WHAT HE SAID AS HIM RECOGNIZING THAT THIS IS,  
19 THIS SOLVED THE PROBLEM THAT HE, THE NEED THAT HE HAD.

20 THE COURT: WITH ALL DUE RESPECT I THINK WHAT  
21 HE SAID WAS THAT HE HAD BEEN LOOKING FOR YEARS FOR A  
22 PRODUCT HE COULD USE TO CLEAN AROUND THAT DAM OR DIKE OR  
23 WHATEVER HE REFERRED TO IT WAS, AND THEN ON THE OTHER HAND  
24 SAID THAT IT WAS OBVIOUS OUT THERE. IT WAS JUST -- I  
25 MEAN, I DON'T -- I HAVE A HARD TIME FOLLOWING THAT

1 RATIONALE.

2 MS. RUMFELT: AND I THINK HIS POINT THERE WAS  
3 THAT, YES, HE'S BEEN OUT THERE LOOKING AT EVERYTHING  
4 BECAUSE HE'S INTERESTED IN THE STUFF AND HE WANTS TO FIND  
5 WHAT WORKS BEST FOR HIM, BUT I DON'T THINK HE TOOK THAT  
6 NEXT STEP AND SAID THIS WAS IT NECESSARILY, AND IT'S NOT  
7 WHAT BECAUSE THIS WAS IT, I DIDN'T HEAR THAT FROM HIM.

8 I'M TRYING TO SHORT-CUT SOME THINGS TO AVOID.

9 THE COURT: AND I DON'T WANT TO CUT YOU SHORT  
10 ON SOME OF THIS IF NECESSARY, BUT WE STILL HAVE ANOTHER  
11 ISSUE TO DEAL WITH.

12 MS. RUMFELT: I THINK THE INTERESTING POINT  
13 THAT'S HAPPENING HERE IN THE RESPONSIVE ARGUMENTS IS TO  
14 ADDRESS THE ISSUE OF COINVENTORSHIP, THEY NECESSARILY HAVE  
15 TO SAY THAT EVERYTHING MR. WILLIS DID WAS JUST PRIOR ART;  
16 BUT ON THE OTHER SIDE IN THE OBVIOUSNESS ANALYSIS, IT'S  
17 NOT ALL PRIOR ART, AND SO IS ALL THIS STUFF OUT THERE  
18 KNOWN OR IS IT NOT? AND I THINK THAT THEY EVEN SAID THAT  
19 THE DUERWOOD 2016 UNIT WAS EXACTLY LIKE THE PRIOR ART OUT  
20 THERE, AND THAT'S OUR POINT, THE DUERWOOD 2016 UNIT WAS  
21 THE PRIOR ART AND PLAINTIFF KNEW ABOUT IT.

22 AGAIN, I THINK A LOT OF WHAT WE'RE HEARING  
23 TODAY IS ATTORNEY INTERPRETATION OF DIFFERENT PEOPLE'S  
24 STATEMENTS, AND I RECOGNIZE THAT ON THE PRELIMINARY  
25 INJUNCTION STANDARD THAT'S, THAT'S APPROPRIATE TO AN

1 EXTENT; BUT THERE WERE SOME COMMENTS MADE TODAY ABOUT WHAT  
2 WE CAN SHOW AT TRIAL. WE'VE HAD NO DISCOVERY IN THIS  
3 CASE, NOBODY KNOWS WHAT WE CAN SHOW AT TRIAL. WE HAVEN'T  
4 DEPOSED ANYBODY. WE'RE RELYING IN LARGE PART ON WHAT, YOU  
5 KNOW, PLAINTIFF REPRESENTATIONS UNDERSTANDABLY SO, BUT  
6 THERE'S A LOT MORE TO BE DONE HERE.

7 THE COURT: I GUESS ON THAT POINT THOUGH TO THE  
8 EXTENT THAT I HAVE TO DETERMINE YOUR LIKELIHOOD OF SUCCESS  
9 ON THE MERITS, THAT'S THE MERITS AT SUMMARY JUDGMENT AT A  
10 TRIAL; RIGHT?

11 MS. RUMFELT: THAT'S RIGHT, BUT IT'S A  
12 LIKELIHOOD OF SUCCESS; AND, AGAIN, IT'S THE SUBSTANTIAL  
13 QUESTION, VULNERABILITY --

14 THE COURT: MY ONLY POINT IS TO THAT EXTENT THE  
15 TRIAL, THE BURDEN AT TRIAL DOES MATTER.

16 MS. RUMFELT: EVENTUALLY IT WILL MATTER, BUT  
17 THERE'S A LOT OF WATER UNDER THE BRIDGE BEFORE WE GET  
18 THERE.

19 THE COURT: I UNDERSTAND.

20 MS. RUMFELT: THERE WAS SOME CONTENTIONS THAT  
21 WE HAD TO GO TO THESE INVENTIONS RATHER THAN PRIOR ART  
22 REFERENCES THAT EXISTED OUT IN THE WORLD. I THINK BOB --  
23 MR. FOX, I'M SORRY -- REFERENCED OTHER PRIOR ART, SO I'M  
24 NOT SURE THAT THAT'S TRUE. THERE WERE OTHER THINGS THAT  
25 CAME IN TODAY; BUT THE POINT IS THAT THESE REFERENCES WERE

1 PRIOR ART THAT WASN'T DISCLOSED TO THE PATENT OFFICE, AND  
2 THAT'S WHY IT'S CRITICAL. THAT'S WHY WE WENT TO THESE  
3 SPECIFIC PRIOR ART REFERENCES. THERE MAY BE A POINT AT  
4 WHICH WE, WE HAVE AN INVALIDITY SEARCH OF THE PRIOR ART  
5 AND THERE'S A MUCH MORE ROBUST SET OF PRIOR ART, I EXPECT  
6 THAT THERE PROBABLY WILL BE, BUT WHY OUR FOCUS HERE TODAY  
7 WAS ON THAT IS BECAUSE IT IMPLICATES ALL THESE OTHER  
8 THINGS.

9 MY LAST POINT IS THAT THERE WAS A REFERENCE TO  
10 THE STANDARD FOR MR. -- FOR MATERIALITY AND DISCLOSURES  
11 FOR PURPOSES OF WHAT MR. ODOM SHOULD HAVE TOLD THE PATENT  
12 OFFICE I THINK, AND THE STANDARD IS NOT SHOULD HAVE KNOWN,  
13 BUT KNOWN AS PLAINTIFFS HAVE SET FORTH. NOBODY IS  
14 CONTENDING HERE THAT MR. ODOM SHOULD HAVE KNOWN ABOUT  
15 THESE PRIOR ART REFERENCES, WE'RE CONTENDING THAT HE KNEW  
16 ABOUT THESE PRIOR ART REFERENCES.

17 THE COURT: SAY THAT -- WELL, I'VE GOT A  
18 TRANSCRIPT RIGHT HERE.

19 MS. RUMFELT: THEY QUOTED A STANDARD FROM I  
20 THINK A THERASENSE CASE ABOUT IT'S A HIGH BAR ON KNOWLEDGE  
21 AND INTENT AND SHOULD HAVE KNOWN IS NOT ENOUGH; AND WE'RE  
22 NOT CONTENDING HERE, I JUST WANT TO MAKE THAT CLEAR, THAT  
23 MR. ODOM SHOULD HAVE KNOWN ABOUT THESE PRIOR ART  
24 REFERENCES, WE'RE CONTENDING THAT HE KNEW ABOUT THESE  
25 PRIOR ART REFERENCES AND DIDN'T DISCLOSE THEM.

1 I THINK THAT'S ALL I HAVE.

2 THE COURT: ALL RIGHT.

3 ALL RIGHT, MR. FOSTER -- DOES ANYBODY NEED A  
4 BREAK?

5 ALL RIGHT. LET'S TAKE A SHORT BREAK --

6 MR. FOSTER: THANK YOU, YOUR HONOR.

7 THE COURT: -- AND THEN I'LL HEAR YOU ON THE  
8 IRREPARABLE HARM ISSUE.

9 (RECESSED AT 4:00 P.M., UNTIL 4:15 P.M.)

10 THE COURT: ALL RIGHT. MR. FOSTER, LET'S START  
11 WITH YOU ON THE IRREPARABLE HARM ISSUE.

12 MR. FOSTER: YOU BET, YOUR HONOR.

13 MAY I APPROACH?

14 THE COURT: PASS IT TO THE CLERK, PLEASE.

15 MR. FOSTER: NOW, THIS PRESENTATION IS GOING --

16 THE COURT: THIS IS THICKER THAN HIS.

17 MR. FOSTER: GO AHEAD.

18 THE COURT: THIS IS THICKER THAN THE OTHER ONE.

19 MR. FOSTER: TRUST ME, I'M GOING TO GO FAST,  
20 OKAY.

21 I THINK WE, WE FELT THE SAME WAY THE COURT DID,  
22 THE FOCAL POINT SHOULD BE ON INVALIDITY. I HAVE THREE  
23 QUICK POINTS ON THAT. FIRST OF ALL, WHETHER THE INVENTOR  
24 QUALIFIES AS A PERSON OF ORDINARY SKILL IN THE ART IS  
25 LEGALLY IRRELEVANT, NOT A CONSIDERATION UNDER FEDERAL LAW.

1 NUMBER TWO, COUNSEL SAID HINDSIGHT IS PART OF IT, THE  
2 FEDERAL CIRCUIT HAS SAID NO. IT'S ABSOLUTELY WRONG; AND  
3 AS FOR HOW MUCH TIME THEY'VE HAD, WE SENT THEM A LETTER  
4 THE DAY THIS LAWSUIT WAS FILED THAT SAID, WE'RE GOING TO  
5 FILE A PRELIMINARY INJUNCTION IF YOU DON'T STOP, AND THAT  
6 WAS I THINK FEBRUARY 12TH; AND MR. AHO WROTE A LETTER --  
7 PARDON ME, THAT WAS NOVEMBER 12TH; AND FEBRUARY 18TH  
8 MR. AHO WROTE A LETTER AND SAID, WE BELIEVE YOUR PATENT IS  
9 INVALID BECAUSE OF PUBLICLY AVAILABLE INFORMATION, SO  
10 THEY'VE HAD A LOT OF TIME ON THIS.

11 THE COURT: IRREGARDLESS, I'M GOING TO DECIDE  
12 THIS ISSUE ON THE RECORD THAT I HAVE.

13 MR. FOSTER: PERFECT.

14 NOW, THIS COVERS -- IT'S BIG BECAUSE IT COVERS  
15 A LOT OF GROUND, INCLUDING SOME BACKGROUND. I HAD SOME  
16 VIDEOS I WAS GOING TO SHOW YOU, BUT I THINK YOU HAVE A  
17 GOOD FEEL FOR IT; BUT I WOULD LIKE TO TURN TO PAGE 17 AND  
18 JUST EMPHASIZE A COUPLE OF POINTS ON COPYING. I'M NOT  
19 GOING TO SPEND A LOT OF TIME BECAUSE WE'VE SPENT A LOT OF  
20 TIME ON THAT. COPYING RUNS TO SO MANY DIFFERENT ISSUES,  
21 SO IF YOU GO TO PAGE 18, IT'S RELEVANT TO INFRINGEMENT,  
22 THE NEXUS, VALIDITY, IRREPARABLE HARM AND THE BALANCE.

23 GOING TO THE NEXT SLIDE, MR. TURNER HAS BROUGHT  
24 OUT A SWORN DECLARATION WHERE HE DISPUTES THAT TITAN  
25 COPIES ANY PRODUCTS, AND THAT'S SIMPLY NOT CREDIBLE.

1           GOING TO THE NEXT SLIDE, THIS IS MR. ODOM'S  
2 TESTIMONY ABOUT WHAT HAPPENED ON THE PHONE CALL; AND THEN  
3 THE NEXT SLIDE IS MR. TURNER TRYING TO SPEAK FOR MR. STOUT  
4 SAYING HE DOESN'T RECALL ANY SUCH CONVERSATION, BUT  
5 DOESN'T BELIEVE HE'D SAY ANYTHING EXCEPT WHAT THE  
6 COMPANY -- WHAT HE'S BEEN TRAINED TO SAY; AND WE PROVIDED  
7 THE COURT WITH THE TRANSCRIPT OF THAT, AND WE WERE GOING  
8 TO PLAY THAT, BUT I'LL SKIP ON THAT BECAUSE YOU HAVE THE  
9 TRANSCRIPT.

10           AND WHAT WAS THE, WHAT WAS THE -- GO TO SLIDE  
11 23. WHAT DO CUSTOMERS THINK? THIS IS MESSICK. OKAY, NOW  
12 MESSICK IS ONE OF THE DISTRIBUTORS WE HAD ON THE HOOK WHO  
13 WAS GOING TO BE OUR DISTRIBUTOR, WE SENT THEM A PRODUCT,  
14 THEY WERE GOING TO TEST IT, AND THEN IT TURNS OUT TITAN,  
15 THEY TOOK ON TITAN AND TO BE THEIR DISTRIBUTOR; AND HERE  
16 IT IS FROM THE VERY DISTRIBUTOR, IT LOOKS LIKE THEY RIPPED  
17 YOU OFF. THAT'S AN OBJECTIVE VIEW OF THAT.

18           TURNING TO THE NEXT SLIDE, MR. TURNER TOLD  
19 MR. ODOM DURING THE MEETING THAT THEY HAD PURCHASED A LANE  
20 SHARK AND HAD BUILT ONE, AND MR. ODOM TESTIFIED HE UNDER-  
21 STOOD THAT BECAUSE THEY WANTED TO UNDERSTAND WHAT IT TOOK  
22 TO MANUFACTURE IT, WHETHER THEY WERE GOING TO ACQUIRE THE  
23 COMPANY OR BECOME A MANUFACTURER. IMPORTANTLY, NOWHERE  
24 DOES MR. TURNER DENY THIS ALLEGATION ANYWHERE IN HIS  
25 DECLARATION.

1                   GO TO THE NEXT SLIDE. WE TALKED ABOUT MR. ODOM  
2 GETTING AN E-MAIL FROM A WHISTLE BLOWER INSIDE OF TITAN  
3 WHO TOLD MR. ODOM HE WAS A FORMER EMPLOYEE; AND WHAT WAS  
4 MR. TURNER'S RESPONSE, SUBSTANTIVELY IGNORED THE ISSUE OF  
5 COPYING; BUT HERE ARE THE PICTURES THAT WERE PROVIDED BY  
6 THIS EMPLOYEE, AND THERE'S NO DISPUTE THAT THEY ACTUALLY  
7 HAD AND PURCHASED ONE OF LANE SHARKS AND MADE A COPY.  
8 DOESN'T DENY THAT.

9                   THE ONE THING I WANTED TO PULL UP, IF YOU CAN  
10 TOGGLE TO TRAVIS ODOM DECLARATION NUMBER 1, EXHIBIT H AT  
11 PAGE 6. ALL THESE COPYING THINGS THAT ARE IN THE RECORD  
12 ARE PRETTY GOOD. IF YOU GO TO THE NEXT SLIDE -- KEEP  
13 GOING THROUGH ANOTHER PAGE, MORE, MORE, MORE, MORE. THERE  
14 YOU GO. GO BACK AND BLOW THAT ONE UP, THE VIDEO. WHAT  
15 YOU CAN'T SEE HERE IS THE UNDERSIDE WHERE THEY HAVE THE  
16 GUARD; BUT IF YOU LOOK AT THAT VIEW, IT'S EXACTLY THE SAME  
17 SHAPE AND THE GUARD IS, JUST COVERS THE SHAPE. SO IF YOU  
18 GO AND MEASURE THESE SIDE BY SIDE, THEY'RE GOING TO BE  
19 EXACTLY THE SAME AS MEASURED, AND THAT'S WHAT LANE SHARK  
20 HAS DONE TO SHOW THAT.

21                   OKAY. ALSO THE BRUSH, THE GUARD ITSELF, FOR  
22 WHAT IT'S WORTH, FIGURE 13 SHOWS THAT SAME BRUSH GUARD IN  
23 THE PATENT ITSELF.

24                   SO I JUST WANTED TO COVER THROUGH THAT, THAT  
25 FAIRLY QUICKLY ON THE COPYING ISSUE, AND THEN I WANT TO GO

1 TO NUMBER 51. AND ONE OF THE NEXUS ISSUES IS, IS THE, YOU  
2 KNOW, IS THE PATENTED FEATURE, IS THERE A NEXUS BETWEEN  
3 THAT AND THE, AND THE SALES OF THE PRODUCT; AND THIS IS  
4 THE MYLAN CASE FROM 2017. WHEN THERE'S COPYING OF A  
5 PATENT, THAT ESTABLISHES THE NEXUS. THE NEXUS ISN'T SOME  
6 DETAILED ANALYSIS, IT'S A MATTER OF WHAT DRIVES THE SALE  
7 OF THE PRODUCT, AND CLEARLY IT IS BECAUSE IT COPIES THE  
8 PATENTED INVENTION.

9 AND LET'S GO TO THE NEXT SLIDE, 52. THIS IS  
10 IMPORTANT BECAUSE THEY DIDN'T GO OUT AND BUILD SOMETHING,  
11 AS MR. MILLER SAID, THEY DIDN'T TAKE FRANKENSTEIN AND MAKE  
12 IT LIVE AND WORK AND BREATHE, THEY DIDN'T TAKE THE  
13 DUERWOOD 2016, THEY DIDN'T EVEN TAKE MR. TERRY MARSH'S  
14 IDEA. THEY CAME AND SAID, WE REALLY LIKE YOUR PRODUCT, WE  
15 SEE IT'S A COMMERCIAL SUCCESS, WE WANT TO PAY YOU A  
16 MILLION DOLLARS AS A STARTING OFFER; AND WHEN LANE SHARK  
17 SAID, NO, WE'D LIKE TO TAKE A GO OF IT OURSELVES, THEY  
18 SAID, OKAY, CAN WE MANUFACTURE FOR YOU? NOW, THEY DENY  
19 THAT TOOK PLACE, BUT THE E-MAIL COMMUNICATION FROM  
20 MR. ODOM, OKAY, LET'S TALK ABOUT MANUFACTURING, WAS NEVER  
21 RESPONDED TO. WHY WOULD HE EVER HAVE SAID THAT IF HE  
22 SAID, I'M GOING TO BE A COMPETITOR; BUT THAT'S WHAT HE  
23 DID, HE KNOCKED IT OFF AND BECAME A COMPETITOR. THAT'S  
24 THE NEXUS, DIDN'T GO OUT AND DO SOMETHING ELSE, COPIED THE  
25 PRODUCT; AND THAT'S ESSENTIALLY WHAT WE'RE TRYING TO SHOW

1 IN SLIDE 54.

2 SLIDE 55, THIS IS WHAT I WAS TALKING ABOUT  
3 BEFORE. THIS COMES RIGHT FROM MR. ODOM'S PATENT. THAT  
4 GUARD ON THE FRONT IS, IS DISCLOSED IN THAT.

5 LOOKING AT 57, AND THESE ARE THE ADVERTISE-  
6 MENTS. WHAT ARE THEY ADVERTISING? THE TOP ITEM ON  
7 EVERYTHING THEY TALK ABOUT IS 11 CUTTING POSITIONS.  
8 ELEVEN CUTTING POSITIONS IS ONLY AVAILABLE IF YOU HAVE THE  
9 ADJUSTABLE POSITIONS OF THE PIVOT ARM. AND ALL OF THE  
10 OTHER THINGS THAT ARE HIGHLIGHTED ON 57 ARE ALSO THE  
11 PATENTED INVENTION.

12 AND IF WE GO TO 56, THIS IS THE SAME ANALYSIS  
13 OF THE ADVERTISEMENTS -- PARDON ME, 58. SAME  
14 ADVERTISEMENT BUT FOR THE TB-JUNIOR VERSUS THE LS-3, SO  
15 THERE IS NO QUESTION ABOUT IT. AND IS THERE A NEXUS, AND  
16 IF YOU CAN COMPARE THE PATENT DRAWINGS TO THE INFRINGING  
17 PRODUCT, ABSOLUTELY.

18 LET'S -- I WANT TO JUMP AHEAD NOW. THERE'S  
19 SOME OTHER SLIDES HERE ON IRREPARABLE HARM, BUT I WANT TO  
20 TALK ABOUT SOME OF THE SPECIFICS THAT WE'VE COVERED AND  
21 THAT YOU'VE HEARD TESTIMONY TODAY ABOUT. FIRST, SLIDE 72,  
22 DIRECT COMPETITION BETWEEN THE PARTIES. THERE IS NO  
23 QUESTION, EVEN IF YOU BELIEVE WHAT MR. BAILY TURNER SAID  
24 AND OUR -- MR. ODOM DOESN'T, SAYS IT DIDN'T HAPPEN, BUT HE  
25 TESTIFIED THAT HE EXPRESSED HIS INTENT TO DIRECTLY COMPETE

1 WITH LANE SHARK, AND HE SAYS IN HIS DECLARATION THAT LANE  
2 SHARK WAS FIRST TO MARKET WITH A COMPETITIVE PRODUCT.  
3 THERE ARE ADMISSIONS ON THE RECORD THAT THEY'RE IN DIRECT  
4 COMPETITION. YOU HEARD HIM TESTIFY TODAY, THERE ARE ONLY  
5 TWO VIABLE COMPETITORS. WHEN THAT IS THE CASE,  
6 IRREPARABLE HARM RESULTS WHEN THE PATENT OWNER HAS THAT  
7 COMPETITION. AND THERE ARE A COUPLE OF SLIDES HERE THAT  
8 HIGHLIGHT THAT TESTIMONY.

9 MR. -- NOW LET'S GO TO SLIDE 77. THIS IS THE  
10 DEALER NETWORKS. ON THE LEFT-HAND SIDE YOU'VE GOT LANE  
11 SHARK AND YOU'VE GOT TRAILBLAZER AND TITAN ON THE OTHER.  
12 THEY'RE COVERING THE SAME GEOGRAPHIC FOOTPRINT WITH THESE  
13 DISTRIBUTORS, AND WE'RE COMPETING FOR THE SAME AREA.

14 ONE THING THAT WASN'T EMPHASIZED IN THE  
15 TESTIMONY TODAY IS THE 50 MILE RADIUS THAT LANE SHARK  
16 DISTRIBUTORS HAVE. WHEN THOSE DISTRIBUTORSHIPS, MOST OF  
17 THOSE WERE SET UP, THEY HAD THE EXCLUSIVE RIGHT AND WERE  
18 THE ONLY COMPANY IN, YOU KNOW, ONLY GAME IN TOWN, ONLY  
19 GAME SELLING THIS BRUSH CUTTER; SO WHEN THEY HAD THOSE  
20 DEALERSHIPS OR DISTRIBUTOR SHIPS, THEY FELT LIKE THEY HAD  
21 THEIR OWN TERRITORY.

22 NOW, OBVIOUSLY, THERE'S COMPLETE OVERLAP WITH  
23 TITAN AND TRAILBLAZER AND NOW THEY'RE COMPETING WITH THEIR  
24 OWN TECHNOLOGIES; AND THEY, AS YOU HEARD THE TESTIMONY  
25 TODAY, THEY'VE LOST NOT ONLY MESSICK BUT MANY OTHER

1 DISTRIBUTORSHIP AGREEMENTS. THAT IS, THAT IS EVIDENCE OF  
2 IRREPARABLE HARM.

3 THE LOSS OF WORD OF MOUTH ADVERTISING, YOU'VE  
4 HEARD TESTIMONY TODAY ABOUT THAT, AND THAT IS A CRITICAL  
5 COMPONENT; AND IF YOU LOOK AT SLIDE 84, I'VE GOT A COUPLE  
6 OF CASE CITATIONS RELATING TO THAT ISSUE; AND WITH A SMALL  
7 COMPANY IN PARTICULAR, YOU KNOW, YOU'RE APPLYING THIS TO  
8 AN APPLE WHERE THEY HAVE WORD-OF-MOUTH ADVERTISING; BUT  
9 FOR A SMALL COMPANY THAT CAN'T AFFORD TO, TO MARKET IN  
10 EXPENSIVE WAYS, BEING ON YOUTUBE, BEING ON FACEBOOK, THE  
11 WORD OF MOUTH, IF YOU LOOK AT EXHIBITS M AND N IN THE  
12 RECORD, THAT'S FACEBOOK AND THE ARMS FARM POSTS, AND THERE  
13 ARE, THERE ARE HUNDREDS OF POSTS FOR PEOPLE EXTOLLING THE  
14 VIRTUES, SAYING HOW THIS IS A GAME CHANGER, A LIFE  
15 CHANGER. THAT'S HOW THIS PRODUCT WAS MADE. THAT'S HOW  
16 THE MARKET WAS MADE. YOU HAVE SOMEBODY WHO HAS NEVER BEEN  
17 IN BUSINESS BEFORE WHO'S REACHED MILLIONS OF DOLLARS OF  
18 SALES VERY QUICKLY, AND NOW IT'S GONE DOWN, AND, AND  
19 THEY'RE -- THE WORD-OF-MOUTH ADVERTISING IS AFFECTED BY  
20 THAT. THE WORD-OF-MOUTH ISSUE, THE LACK OF THAT FOR  
21 DOWNSTREAM SALES, YOU CANNOT ACCOUNT FOR.

22 ALSO, YOU HEARD ABOUT HIM SAYING HE'S THE  
23 COMPANY'S FACE ON YOUTUBE, HE'S THE COMPANY'S FACE ON  
24 THEIR ONLINE SOCIAL MEDIA MARKETING; AND WHEN THAT IS THE  
25 CASE, HIS REPUTATION AS AN INNOVATOR IS AT ISSUE AND HIS

1 REPUTATION FOR ENFORCING HIS PATENTS ARE AN ISSUE. THE  
2 VERY DAY THESE PRODUCTS CAME OUT, HE SAID, WE HAVE A  
3 PATENT PENDING, HOPEFULLY, WE'LL BE THE ONLY ONE SOON ONCE  
4 THAT PATENT ISSUES. WHEN THE PATENT ISSUED, HE PUT IT ON  
5 HIS WEBSITE AND SAID, WE'VE GOT THE PATENT, NOW WE'RE  
6 PURSUING THEM. IF, IF HE CAN'T ENFORCE HIS PATENTS, THE  
7 WORLD, WHAT HE'S ON THE VIDEO IS GOING TO BELIEVE THAT  
8 HE'S NOT CREDIBLE, HE'S NOT THE REAL INNOVATOR, HE DOESN'T  
9 ENFORCE THE PATENT RIGHTS; AND WHEN THAT'S THE VEHICLE  
10 THAT'S CREATED HIS SUCCESS, HE'S, HE'S, HE'S GONE.

11 SLIDE 86 IS WHAT'S ON THE WEBSITE TOUTING THE  
12 PATENTED INVENTION AND INDICATING THAT THEY ARE, THAT THEY  
13 ARE GOING TO ENFORCE THEM.

14 AND SLIDES 87 AND 88 ARE THE RESPONSES ON TWO  
15 POPULAR YOUTUBE CHANNELS WHEN THE PRODUCT WAS RELEASED.

16 ONE OF THE ISSUES OF IRREPARABLE HARM AS WELL,  
17 SLIDE 89, IS -- THIS IS, THIS IS FROM TRAILBLAZER'S OWN  
18 ADVERTISING MATERIALS, THE INDUSTRY WAS IN NEED OF A  
19 MANUFACTURER WILLING TO PUSH THE ENVELOPE WITH DESIGN AND  
20 EXECUTION, TRAILBLAZER ATTACHMENTS WAS CREATED TO FILL  
21 THAT VOID; AND THAT COMES RIGHT FROM THEIR WEBSITE, AND  
22 THEIR WEBSITE IS PART OF THE RECORD THAT THEY'RE  
23 ADVERTISING. THEY'RE SAYING, WE ARE THE INVENTOR, WE ARE  
24 THE DESIGNER, WE PUSHED THE ENVELOPE, WHEN THEY COPIED.  
25 BY ALLOWING THEM TO PROCEED WITHOUT AN INJUNCTION CREATES

1 IRREPARABLE HARM. WE BECOME, AS MR. ODOM TESTIFIED TODAY,  
2 HE BECOMES A LIAR IF THAT'S THE CASE.

3 THE SIZE AND HISTORICAL RELATIONSHIP. WE HAVE  
4 A LARGE COMPANY, 40,000 UNITS A YEAR IS GOING TO TOTAL --  
5 WE'LL FIND OUT IN DISCOVERY, BUT THAT'S GOING TO BE, YOU  
6 KNOW, IN THE 50 MILLION TO \$100 MILLION RANGE, YOU HAVE A  
7 COMPANY THAT JUST PUT ITS Foothold IN HERE; AND IF THEY'RE  
8 PUT OUT OF BUSINESS, THEY'LL BE PUT OUT OF BUSINESS IF  
9 THERE'S NOT AN INJUNCTION, THAT'S THE TESTIMONY, AND  
10 THERE'S NO REBUTTAL TO THAT.

11 A COUPLE OF OTHER QUICK ISSUES ON IRREPARABLE  
12 HARM. THE BUSHNELL CASE DOES A GOOD JOB OF EMPHASIZING A  
13 POINT WE HEARD FROM MR. ODOM HERE TODAY ON THE STAND, AND  
14 THAT IS PRICING. THEY'RE UNDERCUTTING THE PRICES. HE  
15 HASN'T HAD TO LOWER THE PRICES YET, BUT HE CERTAINLY CAN'T  
16 RAISE THE PRICES; AND IN THE BUSHNELL CASE THE FEDERAL  
17 CIRCUIT AFFIRMED A PRELIMINARY INJUNCTION WHERE THE  
18 DEFENDANT COULD NOT RAISE PRICES, AND HE WON'T BE ABLE TO  
19 RAISE PRICES. HIS COSTS ARE GOING TO GO UP, HE CAN'T  
20 RAISE THE PRICES.

21 ALSO YOU HEARD ABOUT BUSINESS RELATIONSHIPS,  
22 HIS MANUFACTURING CONTRACT WITH MUSKOGEE. HE'S NOT  
23 MEETING THE ANNUAL REQUIREMENT. IF HE DOESN'T MEET THAT,  
24 HE'LL BE IN DEFAULT. WHAT HAPPENS IF HIS MANUFACTURING  
25 CONTRACT IS GONE, THAT RELATIONSHIP? BUSHNELL CASE ALSO

1 ESTABLISHES THE PROPOSITION THAT WHEN, WHEN THE LACK OF AN  
2 INJUNCTION WOULD AFFECT BUSINESS RELATIONSHIPS WITH THIRD  
3 PARTIES, IRREPARABLE HARM WOULD OCCUR. SO I COMMEND TO  
4 THE COURT THE BUSHNELL CASE FOR THOSE TWO POINTS.

5 ALSO THE CELAS CASE, THAT'S A CRITICAL ONE AS  
6 WELL, WHERE YOU HAVE A COMPANY IN ITS GROWTH PHASE.  
7 THEY'VE GOTTEN OVER THE HUMP, EVEN IN TWO YEARS, TO BE A  
8 VIABLE BUSINESS, BUT THEY'RE STILL IN THAT GROWTH PHASE.  
9 YOU'VE GOT NEW PRODUCTS THAT NEED TO BE DEVELOPED THAT  
10 CAN'T BE DEVELOPED BECAUSE OF THEIR INFRINGEMENT AND THE  
11 IMPACT ON THE BUSINESS. IN THAT GROWTH PHASE WHERE WE  
12 WANT THE OPPORTUNITY TO BECOME A TITAN, LANE SHARK WANTS  
13 TO BE ABLE TO DEVELOP ITS OWN BUSINESS, BUT THEY CAN'T DO  
14 THAT WITH ONE FLAGSHIP PRODUCT AND WITHOUT AN INJUNCTION.

15 BALANCE OF HARDSHIPS, I'LL BE QUICK ON THAT,  
16 AND THEN THE PUBLIC INTEREST. THE BALANCE OF HARDSHIPS IS  
17 PRETTY EASY. YOU HAVE ONE SENTENCE IN BAILY TURNER'S  
18 DECLARATION SAYING, THIS IS GOING TO HURT US. THAT'S IT.  
19 YOU HEARD THE TESTIMONY HERE, YOU HAVE DETAILED DECLARA-  
20 TIONS ON IRREPARABLE HARM FROM MR. ODOM CANNOT BE DENIED.

21 AND ON THE FINAL SLIDE, 94, A COPYIST CANNOT BE  
22 HEARD TO COMPLAIN IF AN INJUNCTION ISSUES AND DESTROYS THE  
23 BUSINESS THEY ELECTED; BUT HERE, ACTUALLY, THE COURT IS IN  
24 A BETTER POSITION THAN SOME. WE'RE NOT SHUTTING DOWN  
25 TITAN. THEY CAN KEEP SELLING THEIR 40,000 UNITS A YEAR,

1 JUST NOT THE COPY OF THE LANE SHARK.

2 AND ON THE, ON THE PUBLIC INTEREST, THE CASE  
3 HAS ESTABLISHED THERE'S STRONG PUBLIC POLICY UNDERWRITTEN  
4 BY ARTICLE 1 SECTION 8 OF THE CONSTITUTION TO BE PROTECTED  
5 IN YOUR INVENTIONS; AND A PUBLIC INTEREST, AS MR. ODOM  
6 TESTIFIED AND VOLUNTEERED AT THE END OF HIS TESTIMONY,  
7 THAT LET THEM INNOVATE. THAT'S GOOD FOR THE PUBLIC  
8 INTEREST, NOT COPYING. THERE'S ALSO IN OUR VIEW BAD FAITH  
9 CONDUCT RELATING TO THE WAY THEY'VE TAKEN ON THIS, AND  
10 THERE'S A PUBLIC INTEREST IN NOT REWARDING THAT.

11 THAT'S WHAT I HAVE. I KIND OF FLEW THROUGH  
12 THAT UNDERSTANDING THE TIME CONSTRAINTS AND THE FOCUS OF  
13 THE COURT. IF YOU HAVE ANY QUESTIONS, I'LL BE HAPPY TO  
14 ANSWER THEM.

15 THE COURT: WELL I HAVE ONE.

16 MR. FOSTER: YES, SIR.

17 THE COURT: LET'S SUPPOSE I GET TO THE POINT  
18 WHERE I DECIDE THE PRELIMINARY INJUNCTION OUGHT TO ISSUE  
19 HERE, WHAT BOND, IF ANY, SHOULD I REQUIRE THE PLAINTIFF TO  
20 POST?

21 MR. FOSTER: WELL, THE LAW ALLOWS YOU TO HAVE,  
22 AS YOU KNOW, AS YOUR HONOR KNOWS, DISCRETION TO NOT  
23 REQUIRE A BOND, AND I THINK GIVEN THE PECUNIARY CIRCUM-  
24 STANCES OF THE PLAINTIFF THAT'S WHAT WE WOULD REQUEST.  
25 I'M SURE THAT THEY WILL ASK FOR A BOND, BUT THERE WAS

1 NOTHING IN THE PRESENTATION FROM MR. TURNER TO SUGGEST  
2 ANYTHING OTHER THAN THEY MIGHT NOT BE AVAILABLE TO FILL  
3 SOME ORDERS. WE DON'T HAVE ANY EVIDENCE ON THAT. I WOULD  
4 EXPECT A MINIMAL BOND GIVEN THE EVIDENCE BEFORE THE COURT  
5 WOULD BE APPROPRIATE. IN CASES SIMILAR TO THIS WE'VE HAD  
6 ANYWHERE FROM A HUNDRED THOUSAND TO A COUPLE HUNDRED  
7 THOUSAND DOLLAR BOND, WHICH IS GOING TO BE A DIFFICULT  
8 CHALLENGE FOR THIS CLIENT, LANE SHARK, TO DO; BUT I THINK  
9 GIVEN THE CIRCUMSTANCES AND THE RECORD, THERE'S NO BASIS  
10 TO AWARD SOME LARGE SUM TO THE INFRINGER WHERE THEY JUST  
11 GOT IN BUSINESS THIS YEAR. THIS IS THE FIRST WE WERE ABLE  
12 TO NIP THEM IN THE BUD THE MINUTE THE PATENT ISSUED. SO  
13 THAT'S MY THOUGHT ON THE BOND.

14 THE COURT: ALL RIGHT. THANK YOU.

15 ALL RIGHT, MS. RUMFELT, YOU MAY RESPOND.

16 MS. RUMFELT: THANK YOU, YOUR HONOR.

17 AS I THINK YOU'VE, YOU'VE SIGNALLED TO THE  
18 PARTIES TODAY THE ISSUE THAT YOU'RE FOCUSED ON IS  
19 INVALIDITY, AND SO I WILL DEFER TO OUR BRIEFING PRIMARILY  
20 ON THE ISSUE OF IRREPARABLE HARM IN THE INTEREST OF TIME,  
21 AND I THINK WE DID A PRETTY GOOD JOB OF THIS IN OUR  
22 BRIEFING; BUT I WANT TO CITE JUST A COUPLE OF POINTS IN  
23 RESPONSE TO WHAT THEY'VE BROUGHT UP TODAY.

24 FIRST ON THE ISSUE OF INFRINGEMENT, I JUST WANT  
25 TO GIVE YOU THE COUPLE OF CASES THAT I MENTIONED EARLIER

1     TODAY ABOUT THE COMBINATION OF ATTORNEY ARGUMENT AND  
2     UNSUBSTANTIATED INVENTOR COMPARISONS.  SO THE FIRST CASE  
3     THAT I WOULD PROPOSE THE COURT TAKE A LOOK AT IS AIR  
4     TURBINE TECHNOLOGY INC. VERSUS ATLAS COPCO AB, WHICH IS  
5     410 F.3D 701 FED. CIRCUIT 2005; AND THAT IS A CASE THAT,  
6     THAT SAYS, EVEN IF A CO, AN INVENTOR HAS THE KNOWLEDGE OF  
7     THE ACCUSED DEVICE, HERE, THE TB-ONE, THAT MAY NOT BE  
8     ENOUGH FOR THEM TO PUT IN CLAIM CHARTS; AND THAT'S EVEN IF  
9     THAT PERSON HAS EXAMINED AND DISASSEMBLED A DEVICE, WHICH  
10    I DON'T THINK WE HAVE HERE.  THAT'S NOT PERSONAL  
11    KNOWLEDGE.

12                 AND THE CITE THAT I WOULD PROPOSE TAKING A LOOK  
13    AT FOR ABSENT ADMISSIBLE ADDITIONAL EVIDENCE, PLAINTIFF'S  
14    ATTORNEY ARGUMENT CAN'T STAND ALONE.  SO OUR CONTENTION  
15    WOULD BE THAT BECAUSE MR. ODOM HASN'T LOOKED AT THE, THE  
16    TITAN PRODUCT, HE CAN'T TESTIFY AND MAKE NO REAL FACTUAL  
17    RECORD HERE, THE ATTORNEY ARGUMENT THEN CAN'T STAND ALONE;  
18    AND THAT IS CURLIN MED., INC. VS. ACTA MED. LLC 228 F.SUPP  
19    3D 355.  IT'S A DISTRICT OF NEW JERSEY CASE FROM 2017.

20                 SO MOVING ON TO IRREPARABLE HARM, JUST A  
21    REMINDER THAT IRREPARABLE HARM HAS TO BE ACTUAL AND  
22    IMMINENT, NOT SPECULATIVE AND UNSUBSTANTIATED, AND THAT'S  
23    WHAT WE THINK WE HAVE HERE.  YOU HAVE HEARD ABOUT THE  
24    CAUSAL NEXUS, THAT'S NOT JUST SOMETHING THAT YOU CAN DRAW  
25    A SUPERFICIAL CONNECTION TO THE PRODUCT ITSELF AND JUST

1 CHECK IT OFF THE LIST. THAT'S WHAT THIS COURT HAS SAID IN  
2 THE MALIBU BOATS CASE, THAT'S AN EASTERN DISTRICT OF  
3 TENNESSEE CASE IN 2014. YOU CAN'T JUST CROSS IT OFF THE  
4 LIST. YOU CAN'T JUST MAKE A SUPERFICIAL SHOWING.

5 THEY FOCUS NOW ON REPLY ON THIS ON THE 11  
6 POSITION MOVEMENT AND SAY BOTH PARTIES TOUT THIS FEATURE.  
7 YOU HEARD A LOT TODAY ABOUT THE FACT THAT THAT 11 POSITION  
8 MOVEMENT IS BASED ON A, YOU KNOW, CLAIM CONSTRUCTIONS,  
9 QUESTIONABLE WHETHER IT'S EVEN PROVIDED FOR IN THE PATENT;  
10 BUT JUST BECAUSE A FEATURE IS TOUTED BY THE PARTIES  
11 DOESN'T MEAN IT'S ACCEPTED OR INTERESTING OR ANYTHING BY  
12 CONSUMERS. WHAT MATTERS IS WHAT CONSUMERS, WHAT DRIVES  
13 THEIR DEMAND; AND WE COULD SAY UNTIL WE'RE BLUE IN THE  
14 FACE THESE 11, THESE 11 POSITIONS ARE THE MOST FANTASTIC  
15 THING, BUT IF THAT'S NOT WHY PEOPLE ARE BUYING IT, THEN IT  
16 DOESN'T MATTER; AND THAT'S -- WE JUST HAVEN'T HEARD TODAY  
17 THAT ANY OF THE THINGS THAT THEY'RE CLAIMING ARE WHAT  
18 PEOPLE BUY THIS FOR, AND PARTICULARLY THE TOWER LOCKS,  
19 WHICH IS WHAT OVERCAME THEIR PATENT OFFICE --

20 THE COURT: WHAT KIND OF EVIDENCE WOULD THEY  
21 HAVE TO COME FORWARD WITH TO SHOW THAT IN YOUR VIEW?

22 MS. RUMFELT: TO SHOW THAT THE CONSUMER  
23 INTEREST DRIVES IT, WE'VE SEEN NOTHING IN THOSE SOCIAL  
24 MEDIA POSTS ABOUT THE TOWER LOCKS AT ALL; THAT'S ONE THING  
25 IS SPECIFIC COMMENTARY ON THOSE TOWER LOCKS. WE'VE GOT NO

1 DEALER AFFIDAVITS. WE'VE GOT, WE'VE GOT A DISCUSSION OF  
2 THIS, THIS, THIS POTENTIAL LOST BUSINESS OPPORTUNITY OUT  
3 THERE THAT WE'VE GOT NOTHING FROM, YOU KNOW, THAT  
4 SUBSTANTIATES THAT AT ALL OTHER THAN MR. ODOM. SO -- AND  
5 I KNOW I'M GOING A LITTLE BIT FAR AFIELD THERE TO OTHER  
6 IRREPARABLE HARM FACTORS; BUT WHAT WE DO HAVE IN THE  
7 RECORD IS THAT PEOPLE BUY OUR PRODUCT FOR OTHER REASONS.  
8 THERE'S SIGNIFICANT SAFETY FEATURES THAT, THAT THEY  
9 PURCHASE FOR, AND TITAN HAS THIS, AN ESTABLISHED  
10 DEALERSHIP NETWORK, ITS PRODUCT QUALITY IS TRUSTED, AND WE  
11 SEE THAT IN SOME OF THESE ONLINE COMMENTS.

12 IN TERMS OF, AND I MENTIONED THIS JUST A SECOND  
13 AGO, THE MAJOR OPPORTUNITY THAT THEY'VE INDICATED THEY'VE  
14 LOST AS A RESULT OF US BEING IN THE MARKET, THAT'S THAT --  
15 AND I GUESS I, I SHOULD ASK YOU TO TURN OFF THE MICROPHONE  
16 AT THIS POINT -- [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 {END OF SEALED PROCEEDINGS}

23 WE HEARD ABOUT THE, JUST NOW SOMETHING THAT I  
24 THINK WAS NEW TO ME, THESE 50 MILE DISTRIBUTORSHIPS'  
25 EXCLUSIVITY AGREEMENTS THAT THEY'VE MENTIONED THAT THEIR

1 DEALERS WERE EXPECTING 50 MILE EXCLUSIVITY, AND ALL OF A  
2 SUDDEN THERE'S THE TITAN PRODUCTS AND DEALERSHIPS WITHIN  
3 THAT RADIUS; BUT I THINK WE HEARD TESTIMONY TODAY FROM  
4 MR. ODOM THAT THOSE DEALERSHIP AGREEMENTS ARE A HANDSHAKE  
5 DEAL, SO HOW DO WE KNOW THAT THAT'S TRUE IF THERE ARE  
6 THESE 50 MILE EXCLUSIVITY ARRANGEMENTS, WE JUST -- THERE'S  
7 NOTHING IN THE RECORD THAT SHOWS THAT.

8 SIMILARLY, WE HEARD ABOUT LOSSES, THE INABILITY  
9 TO MEET CONTRACTUAL REQUIREMENTS WITH THEIR CONTRACT  
10 MANUFACTURER, MUSKOGEE. AGAIN, WE'VE NOT SEEN THAT  
11 CONTRACT, WE'VE JUST HEARD ABOUT THAT CONTRACT AND THE  
12 POTENTIAL FOR DEFAULT, AND I THINK THE FIRST TIME WE HEARD  
13 ABOUT THAT MAY HAVE BEEN TODAY.

14 SO THOSE ARE -- OTHERWISE, WE THINK IT'S PRETTY  
15 WELL LAID OUT IN THE BRIEFING, AND WE WOULD DEFER TO THE  
16 BRIEFING.

17 OTHERWISE, ON THE BOND THAT YOU ASKED THE OTHER  
18 PARTY ABOUT, CERTAINLY WE WOULD DISAGREE AS TO NO BOND,  
19 AND WE WOULD ASK FOR THE OPPORTUNITY, IF NEED BE, WE WOULD  
20 HOPE THERE IS NO NEED, BUT TO FLUSH THAT OUT ON WHAT THAT  
21 NUMBER SHOULD BE.

22 THE COURT: ALL RIGHT.

23 MS. RUMFELT: THANK YOU.

24 THE COURT: MR. FOSTER, ANYTHING ELSE?

25 MR. FOSTER: IF I COULD REALLY, REALLY BRIEFLY.

1           FIRST OF ALL, ON THE CLAIM THAT MR. ODOM HAS  
2 NOT SEEN THE LANE SHARK OR THE TB-ONE AND TB-JUNIOR, I  
3 BELIEVE THAT CONTRADICTS THE RECORD. MR. ODOM HAS AND  
4 LANE SHARK AND OTHER FOLKS HAVE SEEN IT, LOOKED AT IT,  
5 EVALUATED IT, EXAMINED IT. SO THAT CASE DOESN'T APPLY.

6           AND IF YOU GO TO MR. ODOM'S DECLARATION AT PAGE  
7 22, AGAIN, THIS IS SOMETHING I THINK WE SAW A LITTLE BIT  
8 EARLIER, BUT AS TO WHAT DRIVES THE SALES -- OH, THANK  
9 YOU -- THIS IS A COMPARISON OF THE DRAWINGS AND THE PATENT  
10 TO THE TB-ONE. THEY ARE VIRTUALLY IDENTICAL. IT IS A  
11 PRODUCT THAT IS THE, WHAT WE CALL IN PATENT LAW THE  
12 PREFERRED EMBODIMENT. THEY CAN'T BE THAT CLOSE AND NOT BE  
13 THE PREFERRED EMBODIMENT, AND THE LAW IS CLEAR THAT THE  
14 PATENT IS NOT GOING TO BE -- NOT GOING TO NOT COVER THE  
15 PREFERRED EMBODIMENT. IT WILL ALWAYS COVER THE PREFERRED  
16 EMBODIMENT UNLESS SOMEHOW IT WERE EXCLUDED, AND IT ISN'T  
17 HERE. THERE IS NO SPECIAL QUALIFICATION TO DO THAT, THAT  
18 COPYING COMPARISON OTHER THAN MR. ODOM WHO PUT BLOOD,  
19 SWEAT AND TEARS INTO DEVELOPING THIS BUSINESS AND NOW HAS  
20 IT AT RISK.

21           IN REGARD TO THE TOWER LOCKS ARGUMENT, THAT'S  
22 JUST THEIR, THE WAY THEY TRY TO CONSTRUE THE PATENT; BUT  
23 THE STANDARD IS CONSIDER WHAT'S THE DEMAND FOR THE  
24 INVENTION AS A WHOLE, AND THAT INCLUDES THE ARTICULATING  
25 ARM AND THE ADJUSTABILITY, NOT JUST THE TOWER LOCKS THAT

1 SECURE IT IN PLACE. SO THAT IS NOT THE STANDARD. THEY'RE  
2 MISCONSTRUING WHAT THE INVENTION IS AND THE LAW ON HOW  
3 IT'S APPLIED; AND, AGAIN, THE PREFERRED EMBODIMENT IS WHAT  
4 DRIVES THE DEMAND, THAT'S WHY THEY COPIED IT INSTEAD OF  
5 DOING SOMETHING ELSE.

6 AND IF YOU WANT TO SEE EXAMPLES OF HOW THAT  
7 DEMAND, INCLUDING THE ARTICULATING ARM, THERE -- IF WE GO  
8 TO A COUPLE OF EXAMPLES TO SLIDE 14. THE FIRST COMMENT,  
9 FIRST I THOUGHT LIKE THE BRUSH HOG TILL YOU STARTED  
10 SWINGING IT AROUND. THAT'S THE ARTICULATING ARM THAT  
11 CAUSES EVERYBODY TO SAY IT'S THE MOST AWESOME FREAKING  
12 THING I HAVE EVER SEEN. IF YOU GO TO SLIDE 16, HERE'S  
13 ANOTHER ONE. WOW, IT'S AN ARTICULATED BUSH HOG. GOTTA  
14 HAVE ONE. THE ARTICULATING ARM AND THE TOWER LOCKS, THOSE  
15 ARE THE INVENTIVE FEATURES THAT CAUSED THE PATENT OFFICE  
16 TO GRANT THE PATENT. THAT'S WHAT THEY COPIED. THAT  
17 DRIVES DEMAND. EXHIBITS M AND N HAVE THAT TO HUNDREDS OF  
18 FOLKS RESPONDING.

19 FINALLY, THE 50 MILE RADIUS ISSUE, IT'S IN THE  
20 MESSICK COMMUNICATION AS AN EXAMPLE; AND THE MESSICK IS --  
21 IT IS EXHIBIT P TO TRAVIS ODOM'S FIRST DECLARATION.

22 YOUR HONOR, WE'VE MET OUR BURDEN. WE'VE SHOWN  
23 THAT INFRINGEMENT IS NOT A QUESTION; INVALIDITY, THEY'RE  
24 NOT LIKELY TO PREVAIL ON THAT AT TRIAL; AND SERIOUS  
25 IRREPARABLE HARM WILL BE SUFFERED IF AN INJUNCTION DOESN'T

1     ISSUE, AND WE ASK THE COURT TO GRANT OUR MOTION.  THANK  
2     YOU.

3                     THE COURT:  ALL RIGHT.  THANK YOU.

4                     ALL RIGHT, COUNSEL, IT'S BEEN A LONG DAY.  I'D  
5     LIKE TO HAVE TWO OR THREE POST-HEARING FILINGS FROM YOU.  
6     NUMBER ONE, SINCE WE'VE GONE TO THE NEXT GENERATION  
7     CM-ECF, YOU CAN LINK THE EXACT DOCUMENT AND PAGE REFERRED  
8     TO IN YOUR BRIEF TO THAT DOCUMENT IN THE DOCKET SHEET.  IN  
9     OTHER WORDS, INSTEAD OF REFERRING TO EXHIBIT A TO THE ODOM  
10    DEPOSITION, YOU CAN GIVE ME THE DOCKET NUMBER IN A CERTAIN  
11    FORMAT, PAGE NUMBER, AND I CAN LINK DIRECTLY TO THAT PAGE.  
12    THAT'S IMPORTANT TO ME, ESPECIALLY IF YOU ALL ARE  
13    INTERESTED IN HAVING A REASONABLY QUICK RULING ON THIS.  
14    SO I'M GOING TO ASK YOU TO REFILE YOUR BRIEFS AND PUT  
15    THOSE LINKS INTO YOUR BRIEFS, AND MS. TRNOVSKA CAN TELL  
16    YOU EXACTLY HOW THAT HAS TO BE DONE; BUT YOU CAN'T REFER  
17    TO IT AS DOCKET NUMBER, YOU HAVE TO SAY ECF SOMETHING IN  
18    ORDER FOR THE LINKS TO WORK, BUT SHE CAN GO OVER THAT WITH  
19    YOU.

20                    SECONDLY, I'D LIKE FOR YOU TO FILE A PLEADING,  
21    BRIEF, MEMO, WHATEVER YOU WANT TO CALL IT, THAT ADDRESSES  
22    THIS ISSUE OF MR. FOX'S QUALIFICATIONS.  YOU KNOW, AS I'VE  
23    THOUGHT ABOUT THAT THROUGHOUT THE DAY, I THINK I HAVE COME  
24    TO THE CONCLUSION THAT IT'S NOT A DAUBERT-TYPE ISSUE, IT'S  
25    MORE A QUESTION OF WHETHER OR NOT HE IS IN FACT SOMEBODY

1 SKILLED IN THE ORDINARY -- WHATEVER THAT PHRASE WAS THAT I  
2 FORGOT A MINUTE AGO. ORDINARY SKILL IN THE ART. IF YOU  
3 WANT TO PHRASE IT DIFFERENTLY, FINE, BUT THAT'S WHAT I'M  
4 REALLY AFTER IS TO -- AND I THINK THAT GOES DIRECTLY TO  
5 THE WEIGHT TO GIVE TO HIS TESTIMONY.

6 THIRD -- OH, AND BY THE WAY, THERE'S A TEN PAGE  
7 LIMIT ON THAT BRIEF, AND I'D LIKE TO HAVE IT IN A COUPLE  
8 OF WEEKS IF YOU CAN GET IT TO ME IN A COUPLE OF WEEKS. IT  
9 SEEMS TO ME TWO WEEKS OUGHT TO BE PLENTY OF TIME TO GET  
10 THAT DONE.

11 BEYOND THAT THOUGH I THINK I WOULD LIKE TO HAVE  
12 AN ADDITIONAL BRIEF FROM YOU THAT ADDRESSES ONLY THE FOUR  
13 INVALIDITY ARGUMENTS THAT THE DEFENDANT HAS RAISED:  
14 ANTICIPATION, OBVIOUSNESS, PRIOR ART AND THE, WHETHER OR  
15 NOT MR. WILLIS IS A COINVENTOR WITH THOSE LINKS IN THAT  
16 MEMO SO THAT I CAN LOOK DIRECTLY TO THE PARTICULAR  
17 DECLARATION YOU'RE RELYING ON OR THE PARTICULAR PAGE. I  
18 MEAN, I DON'T KNOW HOW MANY NOTEBOOKS ARE UP HERE, FIVE OR  
19 SIX, THE PAPER IS JUST VOLUMINOUS IN THE CASE, AND I THINK  
20 HAVING THOSE LINKS MAKES IT MUCH, MUCH EASIER FOR US TO DO  
21 THIS.

22 AND THE ONLY OTHER ISSUE I'VE THOUGHT ABOUT IS  
23 THE ONE THAT WAS RAISED BUT NOT REALLY PURSUED MUCH, AND  
24 THAT IS THE QUESTION OF WHETHER OR NOT THERE NEEDS TO BE  
25 ANY LIMITED CLAIMS OF CONSTRUCTION HERE. I'M NOT SURE

1        THAT ISSUE THAT WAS IDENTIFIED HAS VERY MUCH TO DO WITH  
2        THE ULTIMATE OUTCOME HERE; BUT IF YOU WANT TO ADDRESS  
3        THAT, THEN I SUPPOSE I NEED TO HEAR FROM YOU ON IT. I'M  
4        PERFECTLY CONTENT TO LEAVE THE RECORD AS IT IS, NOTE THE  
5        DISAGREEMENT; BUT IF EITHER OF YOU THINK IT'S IMPORTANT TO  
6        HAVE THAT DISAGREEMENT EXPLORED FURTHER, I'LL BE GLAD TO  
7        HEAR FROM YOU, SO YOU TELL ME.

8                MR. AHO: JUST SO WE'RE CLEAR ON THAT, YOUR  
9        HONOR, IS THAT A SEPARATE MEMO THAT YOU WANT US TO --

10               THE COURT: I THINK SO, I THINK WE'RE BETTER  
11        OFF IF WE HAVE THESE IN SEPARATE MEMOS.

12               MR. AHO: FIVE PAGES OR 10 PAGES?

13               THE COURT: FIVE PAGES ON THIS ONE I THINK  
14        WOULD BE PLENTY.

15               MR. AHO: THANK YOU, YOUR HONOR.

16               THE COURT: ALL RIGHT, AND --

17               MR. MILLER: YOUR HONOR, ON THE BRIEF YOU SAID  
18        YOU WANTED THE INVALIDITY ISSUES ADDRESSED A SECOND TIME?

19               THE COURT: I DO.

20               MR. MILLER: OKAY.

21               THE COURT: WITH REFERENCES TO THE RECORD WITH  
22        HYPERLINKS. I MEAN, YOU MAY ESSENTIALLY SAY WHAT YOU'VE  
23        SAID BEFORE, BUT I WANT THE LINKS --

24               MR. MILLER: IF WE SUBMIT ALL THE BRIEFING WITH  
25        HYPERLINKS, YOU'LL HAVE THAT THEN.

1 THE COURT: IF YOU'RE CONTENT, I'M --

2 MR. MILLER: OKAY.

3 THE COURT: BUT I HEARD NEW INFORMATION TODAY  
4 THAT I DID NOT HEAR, OR READ; AND THAT DOESN'T MEAN IT'S  
5 NOT THERE, BUT IT MEANS I DIDN'T SEE IT WHEN I READ IT.  
6 SO I'M OKAY IF YOU WANT TO STAND ON YOUR BRIEFS.

7 MR. MILLER: IS THAT ANOTHER 10 PAGER?

8 THE COURT: WELL, DOES THAT MEAN YOU WANT TO  
9 FILE IT? I THOUGHT YOU WERE SUGGESTING YOU DIDN'T NEED TO  
10 FILE IT.

11 MR. MILLER: WELL, I WAS JUST CLARIFYING IF,  
12 THAT YOU WERE ASKING FOR A DIFFERENT BRIEF THAN OUR  
13 ORIGINAL BRIEFS ON THAT INVALIDITY THING; SO IF THAT'S THE  
14 CASE, I'M WONDERING IF YOU WANT TO PUT A PAGE LIMIT ON  
15 IT.

16 THE COURT: WELL, I SEE NO REASON WHY IT CAN'T  
17 BE DONE IN 10 PAGES.

18 MR. MILLER: I AGREE. I THINK WE'VE BRIEFED IT  
19 PRETTY WELL ALREADY, SO.

20 THE COURT: AND WE GET HYPERLINKS TO THE CASES  
21 AS WELL ANYWAY; DON'T WE? OKAY.

22 MS. RUMFELT: YOUR HONOR, IN TERMS OF TIMING  
23 FOR THOSE NUMBER THREE AND FOUR, IS THAT THE SAME TWO WEEK  
24 PERIOD AS THE SECOND BRIEF?

25 THE COURT: WELL, LET ME ASK YOU SOMETHING, DO

1 EITHER OF YOU BELIEVE YOU NEED A TRANSCRIPT BEFORE YOU  
2 FILE ANY OF THOSE?

3 MR. MILLER: I THINK SINCE IT'S SUPPLEMENTAL  
4 BRIEFING ON IT AND MORE EVIDENCE HAS BEEN TAKEN, I THINK  
5 THAT'S THE SMARTEST THING TO DO SINCE --

6 THE COURT: I HAVE A REAL TIME TRANSCRIPT --

7 MR. MILLER: OKAY.

8 THE COURT: -- BUT YOU'LL HAVE TO ORDER THE  
9 TRANSCRIPT IF YOU WANT THE TRANSCRIPT.

10 MR. MILLER: OKAY. I THINK WE CAN ORDER THAT.

11 THE COURT: WHICH THEN MEANS THAT THE BRIEFING  
12 OUGHT TO RUN, I SUPPOSE, FROM THE FILING OF THE TRAN-  
13 SCRIPT, AND TWO WEEKS OUGHT TO BE SUFFICIENT FOR ALL OF  
14 THAT, IT SEEMS TO ME, AFTER THE FILING OF THE TRANSCRIPT.

15 MR. MILLER: OKAY.

16 MS. RUMFELT: MAKES SENSE.

17 THE COURT: OKAY. ALL RIGHT. ANYTHING ELSE  
18 THAT ANYBODY THINKS WE NEED TO ADDRESS BEFORE WE LEAVE  
19 TODAY?

20 MR. FOSTER: NO, YOUR HONOR, NOT FROM US.

21 MR. AHO: THANK YOU FOR HEARING US, YOUR HONOR.

22 THE COURT: MY PLEASURE. IT'S ACTUALLY BEEN A,  
23 SOME INTERESTING ISSUES IN A PATENT CASE FOR A CHANGE.

24 ALL RIGHT. THEN ONCE WE GET THE TRANSCRIPT AND  
25 YOUR FILINGS, WE'LL GET YOU AN OPINION AS QUICKLY AS WE

1 CAN.

2 ATTORNEYS: THANK YOU, YOUR HONOR.

3 THE COURT: THANK YOU ALL VERY MUCH. HAVE SAFE  
4 TRAVEL.

5 (PROCEEDINGS ARE CONCLUDED AT 4:52 P.M.)

6 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
7 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

8

9

10 KAREN J. BRADLEY/S  
SIGNATURE OF COURT REPORTER

02/07/2020  
DATE

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