

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXMARK MANUFACTURING CO.,)	Case No. 8:10CV187
INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
BRIGGS & STRATTON POWER)	
PRODUCTS GROUP, LLC,)	
)	Omaha, Nebraska
Defendant.)	September 15, 2015

VOLUME VI
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JOSEPH F. BATAILLON
UNITED STATES SENIOR DISTRICT JUDGE, AND A JURY

COURT REPORTER:	Ms. Susan M. DeVetter, RDR, CRR
	Official Court Reporter
	Hruska Courthouse, Suite 3130
	111 South 18th Plaza
	Omaha, Nebraska 68102-1322
	(402) 661-7309

Proceedings recorded by mechanical stenography, transcript produced with computer.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

Mr. J. Derek Vandenburg
Mr. Joseph W. Winkels
CARLSON, CASPERS, VANDENBURGH &
LINDQUIST, P.A.,
225 South Sixth Street, Suite 4200
Minneapolis, MN 55402, For the Plaintiff;

Mr. Matthew M. Wolf
Mr. Marc A. Cohn
Ms. Amy L. DeWitt
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington DC 20004

Mr. John P. Passarelli
KUTAK ROCK, LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186, For the Defendant.

1 (At 8:54 a.m. on September 15, 2015; with counsel and the
2 parties' representatives present; WITHOUT the jury:)

3 THE COURT: Please be seated.

4 I have received the designations that you sent -- the --
5 everyone sent last night. I do not have a copy of Dave
6 Converse's deposition.

7 MS. DEWITT: Well, Your Honor, I don't think
8 there's any objections to those designations. I probably
9 shouldn't have included them. I don't think plaintiffs have
10 objected to any of Mr. Converse's designations, so it's really
11 we're just going to be focusing on the objections for
12 Mr. Benson.

13 THE COURT: Okay. Very good. So let's go through
14 the list that I have here of objections.

15 And we'll start with Benson's deposition.

16 Now, if I miss one of these, somebody has to tell me
17 because some of the printing included the yellow highlighting
18 and some of it didn't and so I'm not sure we got them all.

19 So the first objection that I see is on page 32 of
20 Exhibit B. That I assume is the first deposition. Is that
21 correct? July 12th, 2011.

22 MS. DEWITT: Your Honor, I actually -- I think
23 they've also -- we've also agreed on all of the designations
24 for Exhibit B. It's Exhibit C --

25 THE COURT: Okay. So --

1 MS. DEWITT: -- which is going to be Mr. Benson's
2 October 2011 deposition that we should probably look at first.

3 THE COURT: All right. That's fine.

4 MS. DEWITT: And I think the first one is
5 actually -- the first one objected to is on page 57, beginning
6 with line 7.

7 THE COURT: Thanks. Okay. And what's the objection?
8 Who's doing -- Okay, go ahead, Mr. Winkels.

9 MR. WINKELS: Subject to our motion in limine on
10 laches, Your Honor. Again, these are going to delay and
11 Exmark's state of mind.

12 THE COURT: Oh, I see. Okay. All right.

13 MS. DEWITT: Your Honor, if I may?

14 THE COURT: Sure.

15 MS. DEWITT: It's actually showing that Briggs was
16 open and not hiding its baffles at all if it knew in 2000 and
17 2001 of a brochure with the Ferris baffle on it.

18 THE COURT: Okay. Just a second.

19 All right. So Mr. Winkels, I mean, the question is, is
20 how far we let this go. The issue of brochures is out and in
21 front. So what difference does it make whether a brochure was
22 known to Exmark this early?

23 MR. WINKELS: It's really the question at line 7,
24 Your Honor: Does Exmark assert that Ferris was infringing the
25 patent '863 in 2003?

1 I mean that is not relevant to --

2 THE COURT: Oh, that's the problem.

3 MR. WINKELS: Yeah, that's the problem.

4 MS. DEWITT: But the answer is relevant.

5 THE COURT: Well, that may be.

6 MR. WINKELS: And to your point, Your Honor, this
7 information is coming in through other sources, so asking the
8 question is what we have the problem with.

9 THE COURT: Just a second.

10 MS. DEWITT: Your Honor, we could --

11 THE COURT: Just a second.

12 MS. DEWITT: Oop, sorry.

13 THE COURT: So what was your compromise going to be,
14 Ms. DeWitt?

15 MS. DEWITT: Remove the question.

16 THE COURT: Oh, I see.

17 MS. DEWITT: It's a little unorthodox but we think it
18 would --

19 THE COURT: Just a second.

20 You know, I'm going to overrule the objection. I just --
21 I think that we've gotten enough into brochures that it's --
22 that it's -- and the information concerning brochure is
23 relevant. So I'm going to overrule the objection.

24 What's the next objection?

25 MS. DEWITT: Your Honor, if you go to page 78 of the

1 same transcript, beginning in line 10.

2 THE COURT: Oh, here they are. Okay. 78, beginning
3 at line 10.

4 MS. DEWITT: And it's really down to 79:6.

5 THE COURT: Correct. So I'm sustaining that
6 objection. All right. What's the next one?

7 MS. DEWITT: On page 114, Your Honor -- oops, I'm
8 sorry. I'm sorry. 121. I apologize.

9 THE COURT: And I've already ruled on 108.

10 MS. DEWITT: Yes.

11 THE COURT: Okay.

12 MS. DEWITT: And I should have -- yes, they agreed to
13 remove those objections.

14 THE COURT: So now you're at 121?

15 MS. DEWITT: 121.

16 THE COURT: And that's sustained as well.

17 I'm sorry, I've seen these but I keep getting them in new
18 formats and then I keep forgetting to bring out the old work
19 that I did, so I'm double-billing; I hope nobody minds.

20 All right. And that objection goes through page 122,
21 line 21, correct?

22 MS. DEWITT: Yes, Your Honor.

23 THE COURT: Okay. All right. So the next is 125?

24 MS. DEWITT: Yes. And again, this is -- you know,
25 Ferris is out there, they're at trade shows, Ferris is at trade

1 shows.

2 THE COURT: Right. And Mr. Winkels? Same objection?

3 MR. WINKELS: Yes, Your Honor.

4 THE COURT: Overruled. We've talked about trade
5 shows and people going to trade shows and the question is
6 whether it's open and obvious and the fact that you're sending
7 people to trade shows shows that that's what people do, so I'm
8 not so concerned about it.

9 All right. Next.

10 MS. DEWITT: Next, Your Honor, is the testimony
11 beginning on page 141, line 18.

12 THE COURT: Okay. And the Exhibit 147 is what?

13 MS. DEWITT: It is -- it's a summary of a -- of a
14 GIE trade show where they're looking at the competitors'
15 products.

16 THE COURT: Okay.

17 MS. DEWITT: And we think that this is directly
18 relevant because we heard Mr. Stinson and Mr. Dorn talk about,
19 you know, how important it is, they wouldn't condone anyone
20 using the technology, but they knew that there were competitors
21 out there potentially infringing the products.

22 THE COURT: So this goes -- this goes to the -- to
23 the run-on of objections after 142, line 23, correct?

24 MS. DEWITT: It does -- yes. So it starts again
25 142:23 and this is the same -- 148 is the same type of meeting

1 summary minutes, talking about, you know, we heard Mr. Dorn
2 say it bothers us to compete with a competitor using our
3 technology that we identified. Well, they knew about it in
4 these memos and it didn't seem to bother them because they
5 didn't sue them.

6 THE COURT: They didn't sue them because it doesn't
7 cost \$10 million to sue -- it costs \$10 million to sue
8 somebody, okay?

9 The average cost of a patent litigation through trial
10 is \$5.9 million, okay? Between the two of you and the times
11 that have gone to re-patent consideration, it's probably
12 \$10 million apiece, okay? I wouldn't be surprised. And if
13 you want the other side to be able to recover their attorneys'
14 fees, then I -- then you can do this, but I don't think that's
15 appropriate under the circumstances and that's not why I'm not
16 allowing it.

17 I don't think the Supreme Court is going to -- has --
18 Supreme Court's already ruled that laches doesn't really apply.
19 Whether the Fed. Circuit does or not is another matter.

20 So you've already kind of opened the door on -- that
21 Exmark knew what was going on. Your shadow jury has given you
22 appropriate information. And you've -- you've kicked open the
23 door.

24 But I'm not going to let you kick it open very much more
25 and that's kind of where I'm going, okay?

1 Yes, Mr. Wolf.

2 MR. WOLF: Your Honor, I just want to be clear. We
3 understand and -- and my -- my understanding of what's happened
4 here is you're denying our motion for reconsideration except to
5 the extent that you're overruling certain specific objections.

6 THE COURT: Correct.

7 MR. WOLF: And just so we're clear, just to put a
8 caveat on what Ms. DeWitt just said, we want to make clear that
9 we are drawing a distinction between not suing on the one hand,
10 and we obviously respectfully disagree, but then there's a
11 second issue of not even saying anything by letter or phone
12 call or whatever.

13 THE COURT: And that's -- that's the same thing.

14 MR. WOLF: Well, we respectfully -- I just want to
15 make clear for the record that we -- we see them as two
16 separate issues. And we're -- and there is a sword and shield
17 component to this. And even Ms. Bennis on the stand yesterday
18 invited the jury to go beyond 5 percent. She on two occasions
19 suggested that 5 percent might not be enough because you heard
20 how Exmark wouldn't tolerate infringement, they wouldn't accept
21 it, they would never voluntarily license.

22 So we're now not only -- we're now not only hearing
23 counterfactual things about what they would do or not do, we're
24 actually having the expert complicit in that, inviting a
25 runaway jury in that regard.

1 THE COURT: Well, Mr. Stinson already agreed during
2 his cross-examination that they would accept 5 percent, okay?

3 I don't think anybody's -- I -- I think the real question
4 is, is what would you accept for your suspension technology?
5 Okay? Nobody's asked that question. And I suspect 5 percent
6 wouldn't be enough because that's your whole marketing plan.

7 So, you know, I -- you guys get to litigate what you get
8 to litigate. You don't get to litigate this.

9 MR. WOLF: I'm sorry, I just wanted to make sure --

10 THE COURT: So any rate, let's go back to page 142
11 and page 141. Let me look at this again.

12 And this is a memo -- memo that somebody wrote after the
13 2002 or -- or 2001 or 2000 trade show, correct?

14 MS. DEWITT: Yes, Your Honor.

15 THE COURT: This one's problematic.

16 But the document doesn't specifically talk about the front
17 baffle, correct, Mr. Winkels?

18 MS. DEWITT: It doesn't. It's talked --

19 MR. WOLF: He asked --

20 MS. DEWITT: Oh, I'm sorry.

21 MR. WINKELS: I'm wondering, what is Exhibit 147?

22 THE COURT: It's 148.

23 MR. WINKELS: Oh, 148.

24 THE COURT: Yeah, it starts with 147 and then goes to
25 148.

1 MR. WINKELS: That's -- is this the -- the notes from
2 the GIE show that lists --

3 THE COURT: Correct.

4 MS. DEWITT: We didn't -- I'm not sure where
5 Your Honor is. We didn't designate 147.

6 MR. WOLF: Is there a page 147?

7 MS. DEWITT: Page 147.

8 THE COURT: Well, if you look at page 141, it refers
9 to an Exhibit 147.

10 MS. DEWITT: Oh, an exhibit, yes.

11 THE COURT: And then in page 142, it refers to an
12 Exhibit 148. And then as it proceeds it refers to both. So
13 apparently both have to do with some kind of memo that occurred
14 at the -- at the trade show and how they were comparing the two
15 mowers during the trade show. And it seems to me that there's
16 been some testimony about that already.

17 So Mr. Winkels.

18 MR. WINKELS: Your Honor, if I'm -- if I'm correct,
19 and sounds like I am, that these are notes from a GIE show --

20 THE COURT: Correct.

21 MR. WINKELS: -- and these are notes that Mr. Busboom
22 had in front of him but the Court precluded them from actually
23 showing the document to the jury and getting into some of the
24 details on that document. I think that's what this testimony
25 goes to.

1 THE COURT: Well, he -- he was here to testify so his
2 notes generally aren't admissible. And these -- this -- this
3 testimony refers to his notes, apparently. So the question is
4 whether the witness had a discussion about these notes at some
5 time and considered them.

6 Am I correct, Ms. DeWitt?

7 MS. DEWITT: Yes, Your Honor, that's what we believe.
8 With Mr. Benson, he's talking about what was going on at these
9 trade shows. They were riding each other's mowers and
10 comparing the mowers.

11 THE COURT: But these are Busboom's notes,
12 apparently.

13 MR. WINKELS: I don't think they're Mr. Busboom's
14 notes.

15 Your Honor, I think if you look at 144, line 16, this kind
16 of gets to the point that they're trying to get at here. And
17 again, it's going to what Exmark did and Exmark's state of mind
18 and that it was -- that it did not sue and that it did not
19 write a letter. Again, Exmark's state of mind here does -- is
20 not relevant to their state of mind for willfulness and
21 certainly not relevant to damages.

22 THE COURT: All right. All right, well --

23 MS. DEWITT: Your Honor, I don't think any of this
24 testimony refers to Exmark's state -- it's simply talking about
25 riding a Ferris lawn mower in 2001.

1 THE COURT: But he -- he was -- I'm not sure. Was
2 Mr. Benson present for this or was this just Mr. Busboom with
3 Mr. Busboom's -- in other words, somebody found the document
4 and will now you're asking Mr. Benson about the document. We
5 don't know the answer to that, do we?

6 MS. DEWITT: We know Mr. Benson was in charge of
7 monitoring competitive products. And we -- we can pull the
8 document up just to see if Mr. Benson was sent the memo on 147
9 if you'd allow us, Your Honor.

10 THE COURT: Well, I'm looking at the deposition. It
11 doesn't appear that Mr. Benson was even there. It appears that
12 you're getting him to talk about a document and his --

13 MS. DEWITT: He was the 30(b)(6) witness on this
14 topic.

15 THE COURT: Okay. All right. All right. Well, I'm
16 sustaining the objection. Their present -- their state of
17 mind, the plaintiff's state of mind, is not at issue, and we've
18 already gotten into this so I don't need to be -- I don't think
19 that we need to open the door any further.

20 MS. DEWITT: Okay.

21 THE COURT: All right. What's the next?

22 MS. DEWITT: Your Honor, page 154 and 158 are kind of
23 the same area of testimony.

24 THE COURT: Okay.

25 MS. DEWITT: And we would say we don't need to look

1 at -- we don't need to pull the document up. We can just
2 get --

3 THE COURT: No, I understand. So I'm sustaining both
4 of those objections.

5 All right. So what's the next one?

6 MS. DEWITT: I don't think there's any more for that
7 deposition. We have one more deposition of Mr. Benson --

8 THE COURT: All right.

9 MS. DEWITT: -- from February 2015.

10 THE COURT: And you start with?

11 MS. DEWITT: And we start with, I have been informed
12 that plaintiffs object to page 26 --

13 THE COURT: All right.

14 MS. DEWITT: -- lines 10 through 25.

15 THE COURT: Twenty-six?

16 MS. DEWITT: Yeah, they didn't include it but now
17 they're objecting to it.

18 MR. WINKELS: Your Honor, we did have it included in
19 our originals and -- it wasn't included in the version you got
20 last night but it was in our originals.

21 MS. DEWITT: So it wasn't included in what you filed?

22 THE COURT: So what -- so what are you objecting to,
23 Mr. Winkels?

24 MR. WINKELS: Same objection on -- it relates on
25 motion in limine on laches and again it goes to Exmark's state

1 of mind.

2 THE COURT: Goes to what page and line number?

3 MR. WINKELS: I'm sorry, Your Honor. Line 26 -- I'm
4 sorry, page 26, lines 10 to 25.

5 THE COURT: Thank you. And -- so Ms. DeWitt, why is
6 this relevant, what Deere does?

7 MS. DEWITT: Well, Deere had a non-infringing baffle
8 or at the time it had a baffle alternative design on the market
9 and it was succeeding in the market, competing against Exmark
10 without the patented flow control baffle.

11 MR. WINKELS: And, Your Honor, again, this goes --
12 the question on line 21 to 22 is: Does it -- meaning Exmark --
13 continue to suspect that Deere infringed?

14 Again, it goes directly to Exmark's state of mind.

15 THE COURT: Okay. Well, I'm going to sustain the
16 objection from 26:14 through 25 but not with respect to 10
17 through 13. 10 through 13 is exactly what Ms. DeWitt says and
18 that is that there are products with a front flow baffle that
19 compete against the defendant -- or compete against the
20 plaintiff, and so any sales figures relating to them
21 theoretically would be relevant to the value of the front flow
22 control baffle.

23 All right. And the next.

24 MS. DEWITT: Yes, Your Honor. Well, on the next,
25 page 27 to 28, I think given that ruling --

1 THE COURT: Go ahead.

2 MS. DEWITT: Twenty-seven, line 18.

3 THE COURT: Twenty-seven. Are we going backwards?

4 MS. DEWITT: We were on page 26, Your Honor. Now I'm
5 just going to page 27.

6 THE COURT: Oh, thank you very much.

7 MS. DEWITT: Um-hum.

8 THE COURT: I don't see an objection here. Where is
9 it?

10 MS. DEWITT: Oh, I'm sorry.

11 MR. WINKELS: Yeah, I don't see an objection.

12 MS. DEWITT: I'm sorry. You're right.

13 MR. WINKELS: We have a conditional designation.

14 THE COURT: So let's go to the next objection.

15 MS. DEWITT: Yes. Page -- begins on 45, line 12
16 through 15 and bleeds into pages 46 and 47.

17 THE COURT: Yeah, that's sustained. I've seen this
18 before. Let me look at 47.

19 MS. DEWITT: And finally, Your Honor --

20 THE COURT: Just a second.

21 MS. DEWITT: Oop.

22 THE COURT: Yeah, that's sustained, the whole thing.
23 All right. Next?

24 MS. DEWITT: The last set will begin on page 53,
25 line 7. But actually I'm going to point you -- we're going to

1 remove -- we're going to take some of these designations away.

2 It should start page 53, line 23.

3 THE COURT: Correct. Okay. And that's sustained as
4 well.

5 Any -- and then the next is 56:23. Does that -- that's a
6 follow-on to the previous, correct?

7 MS. DEWITT: Yes, Your Honor.

8 THE COURT: And that's sustained as well.

9 And any additional? Oh, here we go, page 66.

10 MS. DEWITT: Yes, Your Honor.

11 THE COURT: Line 19.

12 MR. WINKELS: Your Honor, this appears to be a
13 follow-on from the prior testimony.

14 THE COURT: Just a second. Isn't the issue with
15 respect to Scag in play or not, Mr. Winkels?

16 MR. WINKELS: Certainly some of the issues with
17 respect to Scag have been in play in that there was a Scag
18 lawsuit and the parties settled, but certainly, Your Honor,
19 we've been precluded from getting into any of the details of
20 Scag and obviously if this information comes in, we may need to
21 get into the details of the Scag case.

22 THE COURT: Let me look at this a little bit more.

23 Yeah, this is sustained.

24 Okay. Next.

25 MS. DEWITT: The next, beginning on -- you're still

1 on page 70, is another GIE summary, so I'm going to anticipate
2 that you're going to be --

3 THE COURT: I don't see page 70. Is it page 75?

4 MS. DEWITT: Yes, that's the actual --

5 THE COURT: The objection -- I show the objection
6 starts at page 75, line 12. Is that correct? Or does it start
7 earlier than that?

8 MR. WINKELS: I'm not following where you are.

9 MS. DEWITT: I think, Your Honor, after the portion
10 of testimony on Scag, where -- you were on pages 69 and 70,
11 right?

12 THE COURT: No, this objection that I show runs from
13 page 66 through page 69, line 7. And then I don't show an
14 objection thereafter on this copy of the deposition.

15 MS. DEWITT: We might have withdrawn some of those
16 based on an earlier ruling of Your Honor.

17 THE COURT: Okay.

18 MS. DEWITT: If I can just point you to the next
19 Q and A, and that was on page 70.

20 THE COURT: Okay. What line?

21 MS. DEWITT: Beginning with line 15.

22 THE COURT: All right. And then continuing through?

23 MS. DEWITT: 71 through 4, but I'll -- if I can maybe
24 short-circuit this, this is another GIE summary.

25 THE COURT: All right. Sustained.

1 And then the next designation?

2 MS. DEWITT: I think the last one we have is on
3 page 77.

4 THE COURT: Okay.

5 MS. DEWITT: Beginning with line 3.

6 THE COURT: So just to be clear, I have a designation
7 objected to on page 75, line 12 that runs through 77, line 2.
8 Is that --

9 MS. DEWITT: We withdrew the designation based on
10 Your Honor's earlier order on a motion in limine.

11 THE COURT: Thank you. So the next designation then
12 begins at page 77, line 3?

13 MS. DEWITT: Line 3 through 7.

14 THE COURT: I'm going to sustain this objection as
15 well.

16 All right. Next.

17 MS. DEWITT: That's it, Your Honor.

18 THE COURT: Okay. Anything else, Mr. Winkels?

19 MR. WINKELS: Your Honor, could we just ask that we
20 get a transcript of the clips that's going to be played
21 before --

22 MS. DEWITT: Absolutely.

23 THE COURT: Okay. Mr. Wolf.

24 MR. WOLF: Your Honor, when Mr. Wenzel concludes,
25 that's when by parties' agreement plaintiff's case closes.

1 THE COURT: Correct.

2 MR. WOLF: How would Your Honor mechanically like to
3 handle the directed verdict issues that we don't waive?

4 THE COURT: What's your -- how much longer do you
5 think you have with Mr. Wenzel? My guess is he's going to run
6 till the break and then if he runs to the break between direct
7 and cross-examination that we could -- or do you technically
8 rest at the end -- yeah, you rest at the end of his
9 cross-examination, right?

10 MR. WOLF: Right.

11 THE COURT: So I think we'll be at a break point
12 then.

13 MR. WOLF: Okay. Just in terms of just how
14 feverishly people should be writing. What we would propose is
15 that we orally state our grounds at that time and then we can
16 submit something in writing this evening?

17 THE COURT: That's fine.

18 MR. WOLF: Okay. So we will -- we will do that then,
19 Your Honor.

20 THE COURT: Is that acceptable to you,
21 Mr. Vandenburg?

22 MR. VANDENBURGH: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. WOLF: Thank you.

25 THE COURT: Anything else?

1 I'm sorry we miscommunicated on the starting time. That's
2 my fault. I didn't tell my courtroom deputy that she was
3 supposed to be here at 8:30 as opposed to what I had previously
4 told her, which was nine o'clock, and thankfully she came early
5 as she always does, but not early enough.

6 MR. WOLF: No problem.

7 THE COURT: Anything else, Mr. Wolf?

8 MR. WOLF: No, Your Honor, just -- we are -- we've
9 talked about time. If Your Honor wants an update where we are
10 on timing?

11 THE COURT: Sure.

12 MR. WOLF: I suspect that we'll be done roughly the
13 first break this morning on direct. Counsel's indicated that
14 they have a substantial amount of time with Mr. Wenzel. My
15 guess is that he will be done some time after lunch.

16 We have about an hour direct with -- maybe a little less
17 with our expert, Mr. Del Ponte. So I suspect by the end of the
18 day we will be roughly done with Mr. Del Ponte. We have two
19 short witnesses, each 30 minutes to 45 minutes, and then we
20 have our damages expert.

21 THE COURT: For Wednesday.

22 MR. WOLF: For Wednesday. So I'm still optimistic
23 maybe we'll bleed a little into Thursday morning, depending on
24 how things go, but that shouldn't preclude us from doing
25 closings on Thursday even if we have 20 minutes of testimony on

1 Thursday morning.

2 THE COURT: Okay.

3 MR. WOLF: Unless Your Honor disagreed.

4 THE COURT: And do you anticipate any rebuttal
5 testimony, Mr. Vandenburg?

6 MR. VANDENBURGH: I can't say at this point,
7 Your Honor, but not yet.

8 THE COURT: Okay. Well, I've -- we've canceled --
9 I think we've canceled about six hearings already for
10 Thursday morning and we have another five or six that we
11 have to cancel for Thursday afternoon if you're going into
12 Thursday afternoon.

13 MR. WOLF: We'll do everything we can to finish
14 Wednesday.

15 THE COURT: So -- and -- and I don't begrudge you
16 the time, I just need to have a heads-up so that I can give the
17 lawyers and the parties sufficient notice that we're cancelling
18 hearings.

19 MR. WOLF: And what we're doing, Your Honor, and just
20 to be -- for the two nonexperts tomorrow, we're keeping their
21 testimony very limited, because they're only adding certain
22 things. We will be -- both for time reasons and because of
23 that, we will be zealously objecting to beyond the scope issues
24 just to give Your Honor a heads-up.

25 THE COURT: Well, you know, this is a serious case

1 and I want to give it the time that's necessary. It's just a
2 scheduling issue. So just give me a heads-up so that I can,
3 out of courtesy to the other lawyers, let them know that we're
4 going along.

5 Anything else, Mr. Wolf?

6 MR. WOLF: No, Your Honor.

7 THE COURT: All right. Let's just take five and then
8 we'll bring the jury in.

9 (Recess taken at 9:20 a.m.)

10 (At 9:29 a.m.; with counsel and the parties'
11 representatives present; WITHOUT the jury:)

12 PHILIP WENZEL RESUMED THE WITNESS STAND

13 THE COURT: Please be seated.

14 We're outside the presence of the jury. We -- the jury's
15 just given us another two questions, but really one question.
16 And I'm not sure exactly how to answer that question or if we
17 even need to.

18 So you ponder on the question.

19 MR. WOLF: Yeah, this is a tricky one, Your Honor. I
20 mean, the answer -- just so we all know, the answer's yes,
21 there were discussions, but I don't know what Rule 408 allows
22 us to get into and what --

23 THE COURT: I think that -- I think that the nature
24 of this matter is, is that the parties have been unable to
25 resolve their differences. And -- and that's what their job --

1 what the jury's job is, is to resolve their differences. How
2 we answer it is really kind of the trick.

3 But I think that when we do the closing instructions, we
4 might just say the parties -- just a sentence that the parties
5 have been unable to resolve their differences and it's your job
6 to do that.

7 And I think we've effectively done that in the jury
8 instruction already.

9 MR. WOLF: Yeah, I would be --

10 THE COURT: We've got them involved so much in the
11 process that now they're thinking through the issues.

12 MR. WOLF: Correct. Your Honor, I would be -- I
13 would be hesitant not to address this question in one way or
14 another and -- but instructions may well be the right way to go
15 but I don't want it to -- I don't want the jury to go back in
16 the room thinking that we refused to talk to them.

17 THE COURT: Or vice versa.

18 MR. WOLF: Or vice versa, right, Your Honor.

19 THE COURT: I agree. So I think what we'll do when
20 the jury comes out is to -- I think I would prefer to end this
21 witness's testimony and then when we finish that I'll --
22 I'll -- I'll talk to them about the next instruction that we've
23 agreed upon, cautionary instruction that we've agreed upon
24 having to do with different evidentiary exhibits.

25 MR. WOLF: Okay.

1 THE COURT: And then my preference would be to wait
2 on this negotiation until the end of trial, unless either of
3 you has a preference otherwise.

4 So Mr. Wolf, you're standing up.

5 MR. WOLF: Yeah, I would prefer that we not wait to
6 the end of trial if you're going to give an instruction because
7 someone is sitting in that jury box expecting me to ask this
8 question of Mr. Wenzel.

9 THE COURT: Okay.

10 MR. WOLF: And out of respect for Rule 408, I've not
11 asked such questions.

12 THE COURT: All right. Mr. Vandenburg.

13 MR. VANDENBURGH: Your Honor, this one cuts both ways
14 and of course we've rested our case so we can't put up a
15 witness to talk about it. I think we should just wait until --
16 until the jury instructions.

17 THE COURT: The difficulty is, is that there's only
18 one person and not the whole person -- and not the whole jury
19 asked the question. And I don't know whether they discussed
20 it or not. This question process is individual to each juror.

21 I really don't have a preference either way of talking
22 about negotiations -- or I mean talking about the process,
23 but I don't want to read something without both sides agreeing
24 to it and I haven't drafted anything yet.

25 MR. WOLF: Okay.

1 THE COURT: So I think we'll wait until this witness
2 is finished at the next break and then maybe I'll have
3 something and we can all agree on what to say.

4 MR. WOLF: Very good, Your Honor. Thank you.

5 THE COURT: All right. You may get the jury.

6 (Jury in at 9:32 a.m.)

7 THE COURT: Please be seated, ladies and gentlemen.

8 Mr. Wenzel, you're still under oath, sir.

9 You may continue your examination, Mr. Wolf.

10 MR. WOLF: Thank you, Your Honor.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. WOLF:

13 Q. Good morning, Mr. Wenzel.

14 A. Good morning.

15 Q. Thank you for the demonstration yesterday. I want to just
16 ask you a few questions about the demand in this case for
17 royalties related to that demonstration.

18 Is it your understanding, sitting here in court, that
19 Ms. Bennis's damages model asks for 5 percent of -- of the
20 revenue for that entire mower you were driving around
21 yesterday?

22 A. I understand that.

23 Q. And all the technology we -- that was under the hood when
24 you popped up the hood, that Caterpillar engine, that Exmark is
25 asking for 5 percent of the revenue you derived from that?

1 A. Yes.

2 Q. What about all the things that contribute to the speed:
3 the wheels, tires?

4 A. Hydraulic systems, drive systems, yes.

5 Q. What about all the things that had to do with comfort:
6 the suspension, the seat, et cetera?

7 A. It's all included.

8 Q. So I want to make sure that we all understand the
9 distinction in this case, because I think it's important,
10 between the profits and revenue.

11 MR. WOLF: Counsel, will you turn on this ELMO? I'll
12 try to do this -- zoom out a little bit.

13 BY MR. WOLF:

14 Q. Is there a fair round number that represents to you
15 roughly what Ferris gets when it sells a typical mower?

16 A. What our take-home pay is, so to speak?

17 Q. No, let's start with revenue.

18 A. Okay.

19 Q. Is there a number that roughly -- I'm trying to deal with
20 round numbers so we can do the math easy. Is \$5,000 roughly
21 what you get from your dealer/distributor?

22 A. Yeah, that's a pretty good average, I think they -- 5,000,
23 5500.

24 Q. Okay. Well, just for simple sake let's stick with 5,000.

25 A. Okay.

1 Q. So revenue, \$5,000. And again, I think you said
2 yesterday, but this is -- you sell this to a dealer or
3 distributor and they in turn sell it to a customer. Is that
4 the way it works?

5 A. That's correct.

6 Q. Now, what is the -- in percentage terms, your take-home
7 profit? What do you -- after you pay your bills, you pay the
8 taxes, you pay the warranty, the commission, everything else,
9 the -- you pay Caterpillar, what is your profit margin,
10 take-home?

11 A. Our take-home would be in the range of 5 to 7 percent.

12 Q. So let's -- to be fair to Exmark, let's take the higher of
13 those numbers. Is it -- is it accurate that \$350 is roughly
14 your take-home profit on your average mower?

15 A. Yeah, I would say on average.

16 Q. Now, you were here when Ms. Bennis testified; is that
17 right?

18 A. I was.

19 Q. On that same average mower, what did she say that the
20 appropriate royalty was, the hypothetical negotiation royalty?

21 A. 5 percent, I believe.

22 Q. So after you get your \$350 in profit, if you immediately
23 had to turn around and give a royalty of \$250 to Exmark, how
24 much profit would that leave you per mower?

25 A. Hundred dollars.

1 Q. Mr. Wenzel, in 1999, when this jury's being asked to
2 imagine the hypothetical negotiation, would you have agreed to
3 a royalty that would have required you to turn over \$250 out of
4 the \$350 profit you made on the mower?

5 A. We wouldn't have been able to, no.

6 Q. Now, I want to ask you an alternative just to draw the
7 distinction between revenues and profits. If we apply
8 Ms. Bennis's royalty of 5 percent, apply it to not your
9 revenue, what you give to Caterpillar and your sales folks and
10 all that, but to your profit, how much would that work out to
11 per mower?

12 A. Let's see, between 17, \$18.

13 Q. So 17.50 is the price if you paid 5 percent of your
14 profits to Exmark; is that right?

15 A. That's correct.

16 Q. Would you have contemplated that as a potential reasonable
17 business solution if you would have negotiated in 1999 with
18 Exmark?

19 A. I would think that would be reasonable to consider.

20 MR. WOLF: I'd like to mark this. What's our next
21 number? 1411?

22 Your Honor, we would move the admission of Exhibit 1411.

23 THE COURT: Any objection?

24 MR. VANDENBURGH: Your Honor, we would object. They
25 have their own damages expert with his own schedules. This is

1 just the witness's testimony and the jury's seen it.

2 THE COURT: This is for demonstrative purposes,
3 counsel, so I'm going to sustain the objection, but you've
4 already used it as a demonstrative.

5 MR. WOLF: Okay. Well then we'll just use it --
6 we'll label it demonstrative 1411, is that --

7 THE COURT: Just leave it 1411 and we'll keep track.

8 MR. WOLF: Thank you, Your Honor.

9 THE COURT: You can -- when you're arguing your
10 damages case, I'm sure we'll see 1411 again.

11 MR. WOLF: You might, Your Honor. You might.

12 THE COURT: Yeah, go ahead.

13 BY MR. WOLF:

14 Q. Now, we talked yesterday --

15 MR. WOLF: And Alex, we can take that down.

16 BY MR. WOLF:

17 Q. You told us yesterday about what Ferris was doing in its
18 brochures regarding displaying its baffle. You recall that?

19 A. Yes.

20 Q. We looked at several brochures showing Ferris's
21 advertising of, among many other things, the underside of its
22 deck, right?

23 A. Yes.

24 Q. Okay. There was some discussion of trade shows. Did you
25 attend trade shows on a regular basis?

1 A. The big ones. I didn't go -- there's hundreds of trade
2 shows everywhere. Big ones I would go to.

3 Q. So roughly how many trade shows would you go to a year?

4 A. One or two.

5 Q. And did you see other products at those trade shows that
6 had baffles?

7 A. Yeah, yeah. Yes.

8 Q. And did Exmark, to your knowledge, attend those trade
9 shows as well?

10 A. Yes.

11 Q. Did you actually see folks from Exmark at those trade
12 shows?

13 A. Sure.

14 Q. Who do you know at Exmark personally?

15 A. Garry Busboom.

16 Q. Do you know Mr. Dorn or Mr. Stinson?

17 A. I don't.

18 Q. But Mr. Busboom, someone you know reasonably well?

19 A. Well, enough to say, "Hi, Garry" at a show. We didn't,
20 you know, have pizza and beer afterwards, but certainly enough
21 respect for, "Hello. How you doing?"

22 Q. And no one at Exmark ever came up to you to talk to you
23 about your baffles; is that right?

24 A. That's right.

25 Q. If they had done so, Mr. Wenzel, what would you have done

1 if Exmark had come up to you at any of these trade shows or if
2 they had written you a letter or an email or a phone call in
3 '99 or 2000 and 2001 and said, hey, you might want to take a
4 look at your baffles. You might want to talk to your patent
5 attorney. You might be infringing our patent.

6 What would you have done?

7 A. Well, I think the first thing I would have done is thank
8 them for bringing that to my attention.

9 And probably would have asked, well, what do you suggest
10 would be the best way for us to take a look at this? Whether
11 it be to start with a conference call or whatever it might be.
12 I'd be -- and we'd do this as quickly as possible. So you're
13 bringing this to my attention, you lay out a process, and let's
14 go at it.

15 Q. If you came to the conclusion that there was a risk of
16 infringement based on these conversations, what would you have
17 done?

18 A. I -- I, of course, as soon as I hung up with -- with them,
19 or in person or whatever it was, I'd call our patent attorney
20 and let him know that, hey, we might have a problem here.

21 Q. And if you determined, with your patent attorney, that
22 there may be a problem, what was the next step? What would you
23 have done as a result of that?

24 A. Well, if -- if patent attorney says that, you know, you're
25 awful close to the border, I can do some more analysis but

1 let's just say we infringed, then we would have to go back to
2 Exmark in this case and say, looks like we're on our
3 property -- on your property, we're sorry, we're going to get
4 off there as quick as we can or would you consider licensing it
5 to us.

6 Q. Is infringement good for business?

7 A. Oh, my gosh, no. No.

8 Q. Why do you say that?

9 A. I mean, you -- you build your company on your innovation
10 and what you bring to the market with your competitors. I
11 don't -- I don't know of any sustainable or successful business
12 case that was built on trying to copy your -- copy your
13 competitors, much less the market leaders in the industry. I
14 just -- I've never seen an example of anything like that be
15 successful.

16 Q. Now, at those trade shows, and I want to focus on a
17 particular time frame here, let's say the -- the mid-2000s
18 onward, did you see Scag's deck?

19 A. Sure, I saw it at a trade show.

20 Q. If you could look --

21 MR. WOLF: Don't publish it.

22 BY MR. WOLF:

23 Q. If you could look at Exhibit 240 in your binder, please.
24 So one -- just the front page of Exhibit 240.

25 A. Yes.

1 Q. Are you there?

2 A. Yes, I am.

3 Q. Is Exhibit 240 consistent with your understanding of what
4 the Scag deck looked like and looks like to this day from, say,
5 the mid-2000s forward?

6 A. You know, I can't speak year to year but, generally
7 speaking, it looks about like that.

8 MR. WOLF: Your Honor, we would move the admission --
9 I note this is a plaintiff's exhibit, 240.

10 THE COURT: Any objection to 240?

11 MR. VANDENBURGH: No, Your Honor.

12 THE COURT: 240's received.

13 MR. WOLF: All right.

14 BY MR. WOLF:

15 Q. And this is consistent with your recollection of what the
16 Scag decks looks like from mid 2000s to today; is that right?

17 A. Again, in general. I don't study the underside of them,
18 but that -- I do believe that's pretty close, yeah.

19 Q. Could you show us the metal -- I mean, maybe you can use
20 your finger, and just trace the shape of the metal facing the
21 blade. I don't want to get into a dispute about what's a
22 baffle and what's a wall. But just can you trace...

23 A. Okay. (The witness complied.)

24 Q. So that's the -- the front baffle wall area. Then could
25 you circle the back baffle wall area.

1 A. (The witness complied.)

2 Q. Thank you.

3 A. I don't know if that's perfect, but...

4 MR. WOLF: Your Honor, we -- we have a better image
5 of this that I'd like to just show purely for demonstrative
6 purposes consistent with some previous discussions we've had.

7 Derek, it's the upper right corner and we'll just show the
8 picture of Exhibit 678.

9 THE COURT: Any objection, Mr. Vandenburg?

10 MR. WOLF: We're not going to seek to introduce it.

11 THE COURT: I understand but --

12 MR. WOLF: Yeah.

13 THE COURT: -- you're effectively introducing it.

14 MR. VANDENBURGH: Yes, Your Honor. This is one of
15 the exhibits that was ruled on before trial.

16 MR. WOLF: Your Honor, may I approach just to show
17 you --

18 THE COURT: Yes.

19 MR. WOLF: -- what we're talking about?

20 THE COURT: Yes, you may. Just hand it to the
21 courtroom deputy.

22 MR. WOLF: All I'm going to do is blow up that
23 because it's a better look of what we were just looking at.

24 THE COURT: So you're not introducing the exhibit,
25 just the blow-up of the picture in the exhibit, correct?

1 MR. WOLF: Right. And no text, Your Honor, or
2 anything like that.

3 THE COURT: Okay. And your objection is?

4 MR. VANDENBURGH: Based on your earlier ruling, there
5 was an issue of the timing of the disclosure of this.

6 THE COURT: No, I understand. Overruled. So you can
7 display just the --

8 MR. WOLF: Right.

9 THE COURT: -- deck part of this exhibit.

10 MR. WOLF: Alex, would you show me what you're going
11 to display. I'll just make sure...

12 Perfect. Yeah, that's it.

13 Yeah, go ahead.

14 BY MR. WOLF:

15 Q. All right. So now we see a -- a -- is this consistent
16 with the Exhibit 240 Scag deck we were just looking at?

17 A. Yes, it is.

18 THE COURT: And --

19 BY MR. WOLF:

20 Q. And --

21 THE COURT: And Mr. Wolf, for the record, that is a
22 portion of Exhibit what?

23 MR. WOLF: It is the upper right-hand corner of
24 Defense Exhibit 678.

25 THE COURT: Thank you very much.

1 MR. WOLF: Thank you, Your Honor.

2 BY MR. WOLF:

3 Q. So, again, could you just circle the front baffle, slash,
4 wall area.

5 A. Front baffle?

6 Q. Yeah.

7 A. (The witness complied.)

8 Q. And then could you also circle the rear baffle area.

9 A. (The witness complied.)

10 Q. Thank you. To your knowledge, Mr. Wenzel, is there any
11 patent or any other reason why if tomorrow you wanted to adopt
12 this design you couldn't do so?

13 A. Yes.

14 Q. What is that?

15 A. The fact that this baffle is adjustable up and down.
16 There's no problem with the shape, to my knowledge, but I
17 believe that it is adjustable up and down. You see those
18 little silver...

19 I'm not an expert on it, but I do believe there's
20 something there.

21 Q. So when Ms. Bennis referred to a patent on the Scag, your
22 understanding is that the patent is on the adjustability of the
23 baffle height?

24 A. Yes.

25 Q. Now, if you wanted to tomorrow make the Scag deck with

1 exactly the same shape but just not adjustable, is there
2 anything that would prevent you from doing that?

3 A. Not that I'm aware of.

4 Q. There came a time when --

5 MR. WOLF: We can take that down, Alex. Thank you.

6 BY MR. WOLF:

7 Q. There came a time when Briggs in fact did redesign its
8 front baffle; is that right?

9 A. When we did redesign our front baffle?

10 Q. Yes.

11 A. Yes.

12 Q. And when was that?

13 A. In 2010.

14 Q. And was that in response to this lawsuit?

15 A. Yes, it was.

16 Q. How much, roughly speaking, did it cost Briggs to redesign
17 its front baffle in response to this lawsuit?

18 A. Probably in the neighborhood of 50 to \$100,000.

19 Q. And who was primarily responsible for that redesign, or
20 implementing it?

21 A. Our engineering group.

22 Q. Was Mr. Laurin --

23 A. Yeah, he was -- he was in charge of the group that was
24 heading that project up.

25 Q. And the jury will hear from Mr. Laurin tomorrow.

1 Was it your belief that with the redesign, the
2 curved-curved-curved redesign, that you had stepped off of
3 Exmark's property?

4 A. Yes, we had extensive review on that.

5 Q. Going back to 1999, this hypothetical negotiation, if
6 Exmark said to you, well, our bottom line is we're not going to
7 take less than \$250 a mower, 5 percent of your entire revenue,
8 how would you have responded if they had taken that hardline
9 position?

10 A. Well, it's really pretty simple, you can't afford it, so
11 you can't agree to it.

12 Q. At some point would the price of the license demand of
13 Exmark in that hypothetical negotiation been low enough that it
14 would have made sense to pay the license fee rather than
15 redesign your baffle?

16 A. Certainly.

17 Q. And was that the number we looked at before, the 5 percent
18 of -- of -- of profits, about the line there?

19 A. I don't know if it's exactly the line. I would say it
20 would be the line if we were going to continue to use it
21 indefinitely. We might agree to something else higher for a
22 brief period of time if they were to say, you know, we won't go
23 after your inventory, we won't do this, just pay us. You know,
24 that could have been possibly affordable. It would be another
25 type of discussion we could have had.

1 Q. Now, let's shift gears to the process that Ferris used to
2 make sure it didn't infringe patents. That process didn't
3 succeed here, did it?

4 A. It did not.

5 Q. But let's describe the process nonetheless.

6 How long did Ferris have -- and if I use the term patent
7 review process, does that make sense to you?

8 A. Yes.

9 Q. Can you tell the jury generally what a patent review
10 process is?

11 A. Patent review process is where -- there's kind of two
12 sections of it. Redesign a completely new product, say we're
13 building a new commercial walk-behind and we haven't been
14 building commercial walk-behinds.

15 Can I take -- should I take them through the whole
16 process?

17 Q. Sure.

18 A. Okay. What we would do is, through feedback, through the
19 sales field or our just general knowledge, we would take a look
20 probably at who was the leader in that field and is that where
21 we would want to compete as a company. Not always you want to
22 be competing with the leader, but most often you want to
23 compare yourself with the best. And if they were leading, we
24 would probably collect as much information about that as we
25 could, determine what our competitive position that we would

1 want to take against that product, how he would want to compete
2 with that. And then we would review that product by looking at
3 literature, possi- -- and -- and bringing our patent counsel in
4 to say, hey, this is what we want to compete with, here's the
5 things we want to do to differentiate ourselves from this, what
6 should we do next?

7 And if there are stickers on that product, you know, we
8 would look at those at that time. We do a complete product.

9 And, you know, there goes your analysis. They do
10 things -- they have ways to find things that, you know, aren't
11 obvious or easy for us to do.

12 Now, it's a little different from if, say, we're going to
13 change -- there's a part -- a part of the product that you want
14 to modify. You don't necessarily go back and look at
15 everything on the whole mower and review everything that
16 anybody might have had a patent on, it's been on the market.
17 So you just take a look at what you're changing.

18 So understand there's a -- there's a less -- I won't call
19 it thorough, there's just a -- a different process for if
20 you're changing something small on there or at least
21 significant- -- significantly small, I don't know if that makes
22 sense, but versus introducing a whole new product. It's a
23 little bit different process.

24 Q. How long has Ferris had a patent review process in place?

25 A. I know back when I was part of Ferris, you know, I started

1 in 1972. I don't know exactly what they did back then. I was
2 general production laborer. But certainly since the '80s, I
3 knew about what we did with the feed carts, the agricultural.
4 And then it -- and I continued the process from 1985 to 1995.

5 Q. Has that process evolved over time, the patent review
6 process?

7 A. Through -- at Ferris or...

8 Q. Well, let's start -- that's a good point. Let me break it
9 down.

10 Let's start with the '90s, before Briggs & Stratton came
11 along and purchased Ferris. Tell me about how the patent
12 review process worked at Ferris prior to 2004. Was that what
13 you basically just described?

14 A. Yeah. And I guess I kind of did it the other day too when
15 talked about, you know, we were building agricultural equipment
16 and we decided we wanted to build lawn mowers, so Dane Scag was
17 the leader. I mean, I won't say we necessarily call the people
18 up as a habit but we did in that case and we looked at the
19 stickers and we looked at all his advertising, and our patent
20 attorney thoroughly went through it. I don't -- I don't
21 generally start reading the patents, they're too technical.
22 And they explain all of the things that you -- areas that you
23 should avoid. And they also try to help us identify where
24 there might be opportunities.

25 Q. Was there ever a time where the patent review process

1 identified something that you couldn't do because a patent
2 already existed?

3 A. Oh, sure.

4 Q. Can you give an example?

5 A. Let's see, give an example. Well, I know that when we
6 were taking a look to do our -- what we call the iCD deck, the
7 one that's in question here, one of the areas we were thinking
8 about was -- I think it's been brought into evidence here, you
9 understand we -- we opened up and made the discharge, where the
10 grass comes out, made that area wider, okay?

11 One consideration was, gee, would there be any advantage
12 to having that area adjustable? Because it could be in
13 different grass conditions that have a -- there may be a great
14 big opening doesn't work quite as well in all conditions.

15 And we discovered there was several patents in the area of
16 adjustability of discharge openings.

17 Q. And was one of those patents, in fact, did one of them
18 belong to Toro?

19 A. Yes, one belonged to Toro, one to John Deere. I mean,
20 that's -- there could have even been others. Bottom line is
21 our patent counsel told us it's kind of a minefield, stay away
22 from it if you can.

23 Q. And did you stay away from it?

24 A. Yeah, it wasn't that important to us.

25 Q. If it -- if it was important to you, would you have just

1 gone ahead and infringed the patent?

2 A. No, no.

3 Q. Now, this patent review process you just described, let me
4 ask the \$64,000 question -- and I think I'm betraying my age by
5 using that phrase, but -- I don't think that show's on anymore.

6 Why didn't -- do you have an understanding, a guess,
7 speculation or anything, why didn't the patent review process
8 in place at Ferris uncover claim 1 of the '863 patent as being
9 relevant to the baffle?

10 A. Again, Dale Baumbach would have done that process in that
11 time period. And I'm -- I don't see any reason why he wouldn't
12 have. He wouldn't have found it because when he designed that
13 and put it in production, there was no patent to see.

14 Q. So as part of the patent review process at Ferris, when
15 you started a product, you looked existing patents; is that
16 right?

17 A. That's correct.

18 Q. Did -- as part of that process, did you ever go back in
19 time and look at patents that may have issued after the fact?
20 You understand my question? Wasn't very good.

21 A. If I understand it, in other words, you know, we
22 introduced this product in 1998 and this patent came out in
23 1999. Is our process to look back and -- after we have
24 something in production, selling it to the public, showing it,
25 selling it, to look back and see if there might be a patent

1 newly issued that wasn't available during the process? No, we
2 did not.

3 Q. What did you rely on to deal with patents that issued
4 after you had introduced a product?

5 A. Well, I guess we didn't have it -- at the time, being the
6 size of the company, we didn't have it identified as a risk,
7 but I guess we relied on people saying something to us. You
8 know, they've got a new patent and, hey, you're on my property.

9 Q. Did anybody ever say anything to you about the baffles?

10 A. No.

11 Q. Remind us how big Ferris was in 1999 just before
12 Simplicity bought them or --

13 A. We were about 60, 70 employees.

14 Q. Sitting here today, how much does Briggs & Stratton spend
15 on its patent review process? Do you know roughly?

16 A. I don't know the total amount. They do have someone
17 that -- or someones, not just one person, that does do that,
18 does look and analyze newly published patents and if they have
19 any application to our business. And it's my understanding
20 it's just shy of a million dollars for just that part of it.
21 That's not the whole process, just that part of it.

22 Q. So that million dollars that Briggs spends each year
23 today, how does that compare to the profitability of Ferris at
24 the time that the old design came out?

25 A. Well, that would have been more than what we -- than our

1 take-home pay.

2 Q. So in other words, the price of the kind of check you're
3 talking about would have been more than all the money you made
4 at the time?

5 A. That's correct.

6 Q. Generally speaking, Mr. Wenzel, from 1999-2010 when this
7 lawsuit was filed, did you rely on patent attorneys to tell you
8 if there was a risk of infringement?

9 A. We did.

10 Q. Who was your patent attorney?

11 A. At what time?

12 Q. In the '99 to 2010 time frame.

13 A. Michael Best and Friedrich.

14 Q. That's the name of a law firm?

15 A. Law firm. Oh, the actual attorney?

16 Q. Yeah.

17 A. Jerry Fellows.

18 Q. Let me ask it more broadly then. At any time from 1999 to
19 2010, did Jerry Fellows specifically, or anybody at Michael
20 Best generally tell you that you were at risk of infringing the
21 '863 patent?

22 A. No.

23 Q. Did anybody at any time anywhere tell you that you were at
24 risk of infringing the '863 patent before this lawsuit was
25 filed?

1 A. No.

2 Q. Now, you were just talking a minute ago about the iCD
3 deck.

4 A. Yes.

5 Q. Could you tell the jury what the iCD deck is, was?

6 A. We -- the deck -- iCD, one of the sales guys came up with
7 that, felt that since we were doing work on it they wanted to
8 give it a name, call more attention to it, so they called it
9 Ideal Cut and Discharge. That's what the acronym stood for.

10 Q. And when did you introduce the iCD deck?

11 A. I think 2008.

12 Q. And did you introduce it across all of your products?

13 A. We did.

14 Q. Okay. Let's -- let's look at an exhibit -- or actually a
15 demonstrative that Ms. Bennis used yesterday during her direct.

16 And it says -- do you recall seeing this?

17 A. Yes, I do.

18 Q. Says: Introducing the iCD Cutting System.

19 Just to be clear, you were introducing it across every
20 product you had, big, small, right?

21 A. Yes.

22 THE COURT: And this is Exhibit 313?

23 MR. WOLF: Yeah. It was on -- I believe it was
24 admitted yesterday, Your Honor.

25 THE COURT: No, I just want the record to reflect

1 what we're looking at.

2 MR. WOLF: I apologize, Your Honor. Yes,
3 Exhibit 313. And I believe it was demonstrative Slide 4 from
4 Ms. Bennis's direct.

5 BY MR. WOLF:

6 Q. Says: Offering you unparalleled cut quality with
7 redesigned baffle chambers for superior airflow and optimum
8 discharge.

9 First question: What is a baffle chamber? Who came up
10 with that term?

11 A. Oh, it might have even been me. You know, marketing was
12 going over the, you know, what -- what'd you guys change? We
13 had a list. And we were explaining the -- we opened up the
14 discharge area and marketing likes to have kind of attractive
15 names to call stuff and they said well, could you call that the
16 baffle chamber? Yeah, I guess you could. I don't know if it
17 means the whole baffle chamber, but it is a baffle chamber, so,
18 yeah, I guess you could probably call it that. That's the
19 extent of the analysis that was done on that.

20 Q. So I want to focus on the word "redesigned." Here you are
21 touting what was new and redesigned. That was what was the iCD
22 deck, right?

23 A. Yes.

24 Q. What was redesigned in 19- -- in 2008-2009 in the iCD deck
25 compared to a few years before? And could you tell the jury.

1 A. You want everything or just --

2 Q. Well, the highlights.

3 A. The highlights? Okay.

4 We opened up the discharge opening, I think about two
5 inches or so.

6 We increased the blade speed.

7 We redesigned our mower blade. On the end of a mower
8 blade, I don't know if you're familiar with, they have a little
9 wing, like an airplane wing or -- on the back of it. Changed
10 the angle of it. Changed the length of it.

11 We also -- we spent a lot of time on the blade.

12 We increased the length that we sharpen the blade.

13 We introduced a new spindle that had cone shape to it.

14 Let's see.

15 Q. You're looking at that picture over there. Would it help
16 to point to that? Is that what -- I see --

17 A. Well, I don't know. I'm just trying to, you know, refresh
18 my memory.

19 Q. Okay.

20 A. Again, I know a broad overview of all this stuff.

21 Mr. Laurin was the chief project guy. He could tell you in
22 intimate detail.

23 But the other thing we did do, I remember -- thanks for
24 jogging my memory here -- is we -- we previously had a -- a
25 flat nose on the front of the deck, just squared. And may not

1 seem like much but we tipped it out at a 45-degree angle.

2 Q. Did in any way, shape or form, you change, as part of the
3 iCD process, the baffle that's at issue in claim 1, that right
4 side of the baffle, the curved-straight-curved?

5 A. No, we did not.

6 Q. So when you were advertising this -- Ms. Bennis's three
7 slides about this redesigned baffle chamber, were you
8 advertising the baffles or everything but the baffles?

9 A. Well, it's the area inside of the baffles, yeah.

10 Q. And -- and had everything -- what had been -- Let me just
11 ask. Had the baffles been changed?

12 A. No.

13 Q. Had everything else just about been changed?

14 A. Everything else?

15 Q. Well, fair. I'm -- you went through the list of what --

16 A. Yes.

17 Q. -- actually had been changed, right?

18 A. Yes.

19 Q. Thank you. Sometimes I put rhetorical flourishes on
20 questions and I should just let the facts speak.

21 And this brochure was touting the benefits of the changes;
22 is that right?

23 A. Yes, it was.

24 Q. Did you test the iCD deck against the old deck to see how
25 it compared in performance?

1 A. We did.

2 Q. And how did it perform?

3 A. It was -- it was an improvement over what we had before,
4 particularly in taller grass and wetter grass. Grass could get
5 out easier. And the blade increased the air flow. And by
6 making the blade sharpened longer, we were able to pick up --
7 we had just more sharp edge, being able to be in contact with
8 the grass. We were able to pick up some of those stragglers
9 and things that you would leave from time to time.

10 Q. So whether we say that your cut prior to the iCD was poor
11 or good or average, whatever label we put on it, did it improve
12 significantly as a result of the changes of the iCD deck?

13 A. Yes, it did.

14 Q. Did Ferris -- well, now of course Briggs -- at the time do
15 a patent review on the iCD deck before it launched the iCD?

16 A. We did.

17 Q. What did you focus on in the patent review process for the
18 iCD?

19 A. All the things that we changed.

20 Q. Did you focus on the things you didn't change?

21 A. We did not.

22 Q. Shifting topics. You were here when Mr. Dorn from Exmark
23 said that Ferris had competed with it for business with a
24 company known as Brickman?

25 A. Yes.

1 Q. And I think we heard this, but very briefly, who is
2 Brickman?

3 A. I think probably Mr. Dorn probably has the most accurate
4 description. Largest franchised -- franchise meaning they have
5 many locations throughout the United States -- landscape
6 company in the -- in the United States.

7 Q. Can you tell the jury about your understanding of the
8 interactions with Brickman that Mr. Dorn touched on last week?
9 How did Ferris-Briggs come in contact with Brickman? What
10 happened?

11 A. Well, they were -- they were on our -- you know, we're
12 trying to grow the company. They're on our radar screen. The
13 sales guys were looking to see, you know, is this something we
14 should go after? You know, it would be -- we knew it would be
15 a big undertaking to try to compete for that business, didn't
16 know if we were up to it or not.

17 But coincidentally, one of the dealers that -- that works
18 with the Baltimore office, which is their headquarters,
19 Baltimore, called and said -- he's one of our dealers also,
20 he's also an Exmark dealer. He says I'm getting -- I'm getting
21 a little nervous here. He's very close to the Brickman and --
22 Group there. I'm getting a little nervous about -- John
23 Deere's really trying to crack that door open at -- at
24 Brickman's and I'm concerned that, you know, I'm going to lose
25 a whole bunch of business if they're successful. Would you

1 guys -- would you guys come down and talk to them to see if you
2 would be -- if they would consider your product?

3 Q. Did he -- did you have an understanding of why it was that
4 this dealer was nervous that Brickman might turn from Exmark at
5 the time?

6 A. He had a few things that Brickman had expressed to him
7 that they were disgruntled about.

8 Q. And what was the disgruntlement, if that's a word?

9 A. Well, actually, without going through third party, I
10 actually went down and met with, along with our sales guys,
11 said I'd kind of like to tag along on this visit and I'd like
12 to understand a little bit more.

13 Q. And what did you learn?

14 A. What I learned was they were -- you know, you got to
15 remember the time period here is the economic downturn and
16 they're struggling because people are -- big part of their
17 business was what they call hardscaping, trees, brick pavers,
18 you know, installations to make properties nice and that just
19 tanked during that -- the recession, and their grass cutting
20 also, people were saying, well, you know, can we cut back on
21 that a little bit?

22 So, you know, they're looking at it. And they were --
23 three things that they expressed to me was that they were
24 disgruntled that Exmark continued to raise prices with them,
25 and that they did a lot of research and testing for Exmark.

1 And again, this is just their -- their opinion. They didn't
2 feel that they were getting their due, so to speak, with that.

3 And the third thing was they were seeing more -- what
4 they -- use their words, little widgets appear on the product
5 that had no value to them. And when they would break or fall
6 off or they'd take them off and then went to trade them back
7 in, they had to buy all those little widgets that they didn't
8 want in the first place, trade them back in. So they thought
9 that was a little unfair.

10 Q. So just to be clear, in this back and forth, did Ferris
11 first approach Brickman or did Brickman -- did a dealer first
12 approach Ferris about getting the two of you together?

13 A. The dealer approached Ferris. I mean, not to say that we
14 wouldn't -- you know, Brickman would visit our booth and say
15 hello and look at our products every year, but that was about
16 it.

17 Q. How many mowers did Brickman purchase from Ferris-Briggs
18 in, say, 2010?

19 A. None.

20 Q. Did Ferris ever sign a contract with Brickman?

21 A. We did not.

22 Q. When Brickman was kicking your tires, do you know whether
23 they were also checking out the possibility of using someone
24 other than -- entirely different than Exmark and Ferris?

25 A. Well, that's what we believe. I don't have any evidence

1 to that effect. But that's what the dealer -- you know, he's
2 pretty close to them and felt that John Deere was wrestling
3 with them pretty -- pretty closely.

4 Q. So at least the dealer thought that John Deere was also in
5 the mix?

6 A. Yes.

7 Q. Now, has Ferris had similar experiences with Ruppert?

8 A. Yes.

9 Q. Can you tell me about that -- or tell the jury, not me,
10 tell the jury about that.

11 A. I could add a little bit to the -- to the Brickman story
12 too, is why they -- what they were happy that we went there.

13 Q. If you want to, go ahead.

14 A. Oh, I think it's kind of important, is they --

15 MR. VANDENBURGH: Your Honor --

16 THE WITNESS: Okay, can't do that?

17 MR. VANDENBURGH: -- he's getting ready to volunteer
18 some more hearsay.

19 THE WITNESS: No, it's not hearsay. I was there.

20 THE COURT: Well, just a second.

21 Overruled. You can continue.

22 BY MR. WOLF:

23 Q. Please.

24 A. Okay. You know, Brickman was disgruntled with a few
25 things there. They'd had some trouble with Kawasaki engines

1 also and they felt that -- and I don't know if you know -- in a
2 lawn mower, you've got the lawn mower, which is generally
3 warrantied by the -- like a Ferris or an Exmark, something like
4 that. The engine is warrantied by the engine manufacturer.
5 And so that's technically not supported by the lawn mower
6 manufacturer. They had a lot of Kawasaki engine problems and
7 they knew that arrangement but they thought that
8 Brickman- -- or that Exmark should have helped them some more.

9 Actually, their strategy was a lot deeper than that.
10 Because of that experience, they wanted to see if someone
11 that -- a company that had both the engine and the end product
12 and would warranty it all as one and reduce their supplier
13 base, that was part of their bigger strategy, was to try to
14 reduce their supplier base because they felt that would overall
15 lower the cost of their business. They were doing that across
16 their business, not just for the lawn mowers in particular.

17 Q. So just to be clear, you have -- I mean, the -- you have a
18 lawn mower that can be made by somebody and the engine can be
19 made by either that same person or someone altogether
20 different?

21 A. Yes.

22 Q. Just like the -- the Ferris mower we saw yesterday didn't
23 actually have a Briggs engine in it, it had a Caterpillar
24 engine in it, right?

25 A. That's correct.

1 Q. And that's just based on whatever the lawn mower folks
2 think would be the best particular engine for whatever
3 application?

4 A. Right.

5 Q. We were talking about Ruppert then. We were just starting
6 to talk about Ruppert.

7 A. Okay.

8 Q. Can you tell the jury about what you understand about the
9 Ruppert discussions that Mr. Dorn brought up last week.

10 A. They were very similar. No -- I happen to know they were
11 talking to John Deere because I didn't go on every visit but
12 I -- I've gone down there a couple of times. I saw the John
13 Deere test mower there.

14 They had a similar situation. They weren't -- they didn't
15 have anything -- they just were looking to lower their purchase
16 cost more than -- they didn't have as big a strategy as
17 Brickman. They're just saying, hey, it's a downturn, we're
18 struggling here to justify buying new mowers, our others are
19 about wore out and we're struggling with the price based on
20 where we're at right now.

21 Q. Did -- what's the nature of Ferris's -- Briggs's
22 relationship with Ruppert today?

23 A. We don't sell any mowers to Ruppert today.

24 Q. I want to shift topics to a little bit later in 2010. The
25 redesign of -- who was -- I believe you said Mr. Laurin was

1 primarily responsible for implementing the redesign?

2 A. He was in charge of overseeing all the testing,
3 development and ultimate implementation, yes.

4 Q. So I'll leave most of the detailed questions for -- for
5 him for likely tomorrow. But let me ask you a few high-level
6 questions.

7 When in 2010 did the new design move into production?

8 A. Oh, I don't know if I remember the exact date.
9 Sometime --

10 Q. Do you remember roughly how long after this lawsuit was
11 filed that --

12 A. Oh, oh, I'm -- I'm sorry. I apologize. I thought you
13 were -- I messed up here. I thought you were talking about the
14 iCD deck. You're asking me about the redesigned iCD deck.
15 Sorry.

16 Q. That's --

17 A. Go ahead.

18 Q. Let me reorient. That's a great point. That was my
19 fault, not yours.

20 So we were talking about the iCD deck that was a redesign
21 of the -- the discharge opening and the spindles and the
22 blades, right?

23 A. Yes.

24 Q. Now, shortly thereafter, a year or two after that, there
25 was a -- there was a new redesign, right, and this time we were

1 talking about the baffles themselves?

2 A. Yes.

3 Q. Is that right?

4 A. That's correct.

5 Q. All right. And I should have been clearer. So with the
6 baffles themselves, for the first time since 1998 there was
7 a -- a redesign in 2002; is that right? 2010. Is that right?

8 A. Yes.

9 Q. And the reason you -- the primary reason you redesigned
10 the baffles in 2010 was?

11 A. Because of this lawsuit.

12 Q. All right. And how long after this lawsuit was filed did
13 you start rolling into production the redesigned baffles?

14 A. I believe the suit was filed in May of 2010 and all and
15 all -- all mower decks had the new design baffles November 1st,
16 2010.

17 Q. Did the change in the baffle design from the old design,
18 the curved-straight-curved design to the new design, the
19 curved-curved-curved design, did that affect the performance of
20 the mower?

21 A. A little bit, yeah.

22 Q. And how did it affect the performance of the mower?

23 A. Made it a little better.

24 Q. So it -- the new design is actually a little better than
25 the old design?

1 A. Yes.

2 Q. How do you know that?

3 A. Because I went to -- I was concerned about our customers
4 and whenever you're making a change of something you had in
5 production for a number of years, so I wanted to know what our
6 customers might think and so I went to many of the sessions
7 where they were testing.

8 Q. So there was actual testing of the new design versus the
9 old design?

10 A. Yes.

11 Q. Roughly how many are you aware of, personally?

12 A. Oh, boy. I -- good question.

13 Q. Five, ten, fifteen?

14 A. Oh, at least, yes.

15 Q. And what did you see in those five or ten or fifteen, at
16 least, tests of the old design versus the new design?

17 A. The actual cut wasn't much different, but I think we had
18 just a slightly bit better, more even discharge.

19 Q. And what do you mean by discharge?

20 A. Well, the grass clippings coming out the chute and being
21 distributed along the line -- along the lawn.

22 Q. Is the new design, does it differ at all in terms of
23 manufacturability than the old design?

24 A. Yeah, that's one of the things I liked about it a lot is
25 because Bob was ahead of me and, you know, it was going to be a

1 lot easier to manufacture also.

2 Q. Can you explain to the jury what you mean by it was a lot
3 easier to manufacture.

4 A. Well, it's a -- before you had, just like it says, you
5 have a curved section, then you've got straight section. And
6 what you had to do is take these straight pieces and try to
7 just put this curve a little bit on the end. That's -- that's
8 more difficult than it -- than it actually might seem by
9 looking at it. Get that precisely where that straight ends and
10 the curve comes.

11 Now we can just simply take all curves, all being the same
12 radius, and just bend those, bend them all the same, per the
13 deck size because each deck has a different size blade, and
14 then just put them in the deck, so...

15 Q. So it's made your life easier for manufacturing?

16 A. Made my manufacturing hat -- that's one of the hats I
17 wear -- a lot easier, yes.

18 Q. Just a few more topics and then I'll turn you over to
19 Mr. Vandenburg for his questions.

20 I want to get back to the different features of the mower.
21 I believe you testified you interact with customers in your
22 role?

23 A. I do.

24 Q. And for how many years have you been interacting with
25 customers?

1 A. I would say since about 1975.

2 Q. In your interactions with your customers, have you learned
3 what features of a Ferris mower are important to them?

4 A. I -- I -- I do, yes.

5 Q. And over the course of the last 15, 20, 25 years, have you
6 interacted regularly with your distributors?

7 A. Yes.

8 Q. And with your dealers?

9 A. Yes.

10 Q. And these are the people that actually buy the Ferris
11 products on the way to the end user; is that right?

12 A. Yes.

13 Q. You've heard Exmark in this case talk about how it has
14 made its brand based on quality of cut. You've heard that?

15 A. Yes, I have.

16 Q. Is quality of cut the most important thing to customers
17 buying your mowers, based on your experience?

18 A. It's not the most important thing.

19 Q. What is the most important thing?

20 A. We focus on the -- the overall productivity of the mower
21 through the suspension, through the ride, how it handles.
22 That's what we -- that's been our primary focus. And
23 overall -- overall quality and durability of the product too.

24 Q. Okay. And just to be clear on some topics that were
25 coming up yesterday, there were questions about the -- how --

1 the quality of your -- your cut prior to the iCD deck coming
2 out and some people had characterized it as poor yet you had
3 lots of sales.

4 So when we say poor quality of cut but you're still
5 selling, what are we talking about there?

6 A. You know, that's a -- it's all relative. It's all
7 relative, I guess, is what we're really talking about. What's
8 acceptable to -- you know, if you had your lawn cut by a
9 professional landscaper, what would you expect, you know,
10 versus I think -- I mentioned it yesterday, big hotel, flowers
11 and lot of ornaments out front that, you know, to find a weed
12 in there would be like winning the lottery and it's irrigated
13 and all those things.

14 I mean, the level of -- everybody -- and everybody throws
15 everything in the basket of quality of cut. And it -- but it's
16 really -- you need to separate it out. Does it discharge the
17 grass better? Does it cut the grass? The cutting of the grass
18 is a finer line. If you throw clumps out there, that's going
19 to be easily noticeable. So -- and a lot of that's due to the
20 conditions too.

21 So I don't know if I'm doing a very good job of answering
22 your question.

23 Q. No, I think that -- from my perspective you did. I guess
24 the jury will figure out whether it has more questions.

25 You've heard a lot this past week about how Exmark is a

1 leader in this industry. Do you agree with that?

2 A. Oh, absolutely.

3 Q. And Exmark is -- is substantially bigger than Ferris; is
4 that right?

5 A. Yes.

6 Q. How much bigger?

7 A. From what we've heard here today, at least double.

8 Q. Was the Lazer Z mid-mount that we've talked about a lot,
9 was that a revolutionary product?

10 A. It was.

11 Q. And what was revolutionary about it in your mind?

12 A. Boy, I mean, it just -- it just lit the industry on fire
13 there. I think their advertising brochure is very accurate.
14 Those guys did their homework. They didn't just get one thing
15 right, they got everything right.

16 Q. In your entire career, have you heard anyone anywhere,
17 prior to this lawsuit, say that the reason for the Lazer Z's
18 success had anything to do with its front control baffle?

19 A. No.

20 Q. Based on your experience with distributors, dealers and
21 customers, how many features are there that provide value to a
22 mower, generally? A lot? A little?

23 A. A lot, yeah. Sure. It's probably just like -- be
24 probably an 80/20 role where there's 20 percent of the overall
25 features are really important. The others are important to a

1 lesser degree. I mean, we had a -- we had a Exmark survey. I
2 think that's pretty -- I would agree with that. I would say
3 that's a pretty good -- pretty good measurement. I was pretty
4 impressed when I saw it.

5 Q. Can you turn to Exhibit 839 in your binder, please.

6 A. Yes.

7 Q. Is this a training manual prepared and maintained in the
8 ordinary course of business by Ferris, was this?

9 A. Yeah, it looks like something that our sales folks put
10 together.

11 MR. WOLF: Move the admission of 839, Your Honor.

12 THE COURT: Any objection?

13 MR. VANDENBURGH: No objection, Your Honor.

14 THE COURT: 839 is received.

15 MR. WOLF: If we could go to Bates 1290 and put it
16 up on the screen.

17 BY MR. WOLF:

18 Q. Could you tell us what we're looking at here,
19 Mr. Wenzel?

20 A. Yes. The sales guys had put together a list of things
21 that are on our mowers that they felt was important for our
22 customers and they assigned a value to those. That was not
23 scientific. It was their -- from their interaction with
24 customers, things what they felt they could sell those features
25 for, how much value they added.

1 Q. And this is an internal training document; is that right?

2 A. Yes, it is.

3 Q. And just to be clear, these aren't actual retail prices.
4 This is kind of their estimate of the value of these to a
5 customer?

6 A. That's right. We don't actually sell them individually,
7 no.

8 Q. So could you just read into the record, slowly, the
9 features that your salespeople identified as having value in
10 the 2001 time frame?

11 A. Sure. The first one is ten-gauge -- that's the gauge of
12 the steel -- double top mower deck, which means that we -- you
13 want me to explain or -- or just read?

14 Q. If there's -- if there's ambiguity or if it's a little
15 confusing, explain. If it's self-explanatory, just read.

16 A. Okay. I just -- for the jury, double top mower deck means
17 that, rather than using a single layer for parts of the mower
18 for steel for strength, we actually use a plywood-type and
19 overall that's a little thicker and a little stronger than some
20 of the single piece, so they felt that was pretty important.
21 And they -- we double reinforce the side skirts because they
22 take a lot of abuse bumping into things.

23 And lap welding, that's probably more technical than we
24 need to get. \$100.

25 Hanging deck frames, \$100.

1 Adjustable 360-degree rotating anti-scalp rollers. That's
2 those little wheels on the deck.

3 Foot-operated deck lift. Some had hand-operated deck
4 lifts. It's easier with your foot.

5 Twin A-section hydro drive belts, for longer durability.

6 Internal reserve reservoir. That's kind of a hydraulic
7 thing. I'm not going to try to explain that. It's not very
8 big on the list anyways.

9 Styled fuel tanks with large filler necks. Filler neck is
10 the part that -- actually where you insert the gas nozzle.
11 It's important for those to be large. Makes it easier for them
12 to refuel them.

13 Two-wheel rear independent suspension.

14 Four-wheel (front and rear) independent suspension.

15 Dual point pivoting front axle.

16 Hydrostatic pumps with cooling fans. Not all hydrostatic
17 systems had cooling systems on them.

18 Dual screen filters. That's probably too technical to
19 bother explaining.

20 And a two-year commercial warranty.

21 Q. Would you confirm for me that there's no mention in your
22 sales force's internal evaluation of the top 12 or so features
23 of your mower, there's no mention of front flow control
24 baffles?

25 A. There's not.

1 Q. In your opinion, what affects quality of cut more, the
2 shape of the baffle or the blade?

3 A. The quality of the cut?

4 Q. Yeah.

5 A. I would take a sharp blade with any type of a baffle
6 versus a dull blade and a baffle, I guess the best way to put
7 it to folks.

8 Q. Last two questions, Mr. Wenzel. Other than in this case,
9 has anyone ever accused you personally or Ferris of infringing
10 a patent?

11 A. No, never.

12 Q. Other than this case, has anyone ever accused you or
13 Ferris of lying, cheating, stealing someone else's design?

14 A. Absolutely not.

15 Q. Sitting here today, do you believe you stole Exmark's
16 design?

17 A. No.

18 MR. WOLF: No further questions, Your Honor.

19 THE COURT: Ladies and gentlemen, at this time we'll
20 take our morning recess. We'll take 15 minutes.

21 (Jury out at 10:36 a.m.)

22 THE COURT: Off the record.

23 (Discussion was had off the record.)

24 (Recess taken at 10:37 a.m.)

25 (At 10:55 a.m.; with counsel and the parties'

1 representatives present; WITHOUT the jury:)

2 PHILIP WENZEL RESUMED THE WITNESS STAND

3 THE COURT: Please be seated.

4 (Jury in at 10:56 a.m.)

5 THE COURT: Please be seated, ladies and gentlemen.

6 Mr. Vandenburgh, you may cross-examine the witness.

7 MR. VANDENBURGH: Thank you.

8 CROSS-EXAMINATION

9 BY MR. VANDENBURGH:

10 Q. Good morning, Mr. Wenzel.

11 A. Good morning, Mr. Vandenburgh.

12 Q. I'd like to start with the issue of whether or not the
13 original baffle design that's been found to infringe was copied
14 from Exmark. And I believe that you testified yesterday that
15 it was at least possible that that's what had happened in 1997.

16 A. That's correct.

17 Q. Would you agree that it's likely that that's what
18 happened?

19 A. No, I can't -- I can't say that.

20 Q. Okay. Let's talk about the idea of coincidences. Do you
21 know what a coincidence is?

22 A. I believe I do.

23 Q. Is it a coincidence when an inventor in the United States
24 comes up with the same idea as an inventor in Siberia, Russia
25 at the same time?

1 A. Yeah, I guess so. Yes.

2 Q. That's an example of a coincidence.

3 A. Coincidence, sure.

4 Q. Now, in this case though, Mr. Busboom and Mr. Baumbach
5 didn't come up with this idea at the same time, did they?

6 A. I don't know.

7 Q. Well, you heard the testimony from Mr. Busboom that he
8 conceived of his invention in 1994, correct?

9 A. Oh, okay. Yes.

10 Q. And you don't disagree with that testimony, do you?

11 A. No.

12 Q. And you saw the testimony of Mr. Marshall saying that he
13 was handed a sketch from Mr. Baumbach in the fall of 1996,
14 roughly two years later, correct?

15 A. That's correct.

16 Q. Now, at that time -- you also heard the testimony from
17 Mr. Marshall that Briggs had an Exmark mower at that time.

18 A. Yes.

19 Q. And, in fact, specifically an Exmark Lazer Z?

20 A. Yes.

21 Q. Now, do you recall seeing that mower in 1996?

22 A. I do.

23 Q. Did you use that mower in 1996?

24 A. Yes, I drove that mower.

25 Q. And you've heard the testimony that one of the primary

1 benefits of that mower is an improvement in quality of cut?

2 A. Yes, I've listened to that testimony.

3 Q. Now, you'd also agree that the reason Ferris put their
4 front baffle in in -- the -- roughly the '97 time frame, was to
5 improve quality of cut?

6 A. I don't know the reason that Dale put that in there.

7 Q. Okay. Well, let's talk about that. Are you familiar with
8 what an engineering change order is?

9 A. Yes.

10 Q. Can you -- well, an engineering change order for Ferris is
11 a document that reflects a change from one physical design to
12 another, correct?

13 A. That would be correct, yes.

14 Q. I'd like you to turn to Tab 36 of your binder, if you
15 would.

16 A. Exhibit 36?

17 Q. Correct.

18 A. Okay.

19 Q. Is that a Ferris engineering change form?

20 A. Yes, it is.

21 Q. And what is the date of that engineering change form?

22 A. 11-19-97.

23 Q. And does this reflect a change from one drawing number to
24 another drawing number?

25 A. Yes, it does.

1 Q. And what is the -- what is the initial drawing number?

2 A. You want to know what it is?

3 Q. Just read it into the record --

4 A. Oh, okay.

5 Q. -- if you would.

6 A. 1531078.

7 Q. Okay. Farther down on the document it indicates they were
8 going to replace one deck weldment with another deck weldment,
9 correct?

10 A. Yes.

11 Q. And what's the deck weldment we're replacing?

12 A. 1545165.

13 Q. I'd like to direct your attention now to Exhibit 49.

14 MR. VANDENBURGH: Has this been admitted?

15 Exhibit 49's been admitted. I'd like to publish,
16 Your Honor.

17 THE COURT: You may.

18 BY MR. VANDENBURGH:

19 Q. So if you go between Exhibit 36 and Exhibit 49, this is
20 the weldment drawing that's being replaced in the engineering
21 change order, correct?

22 A. That's correct.

23 Q. And this, in fact, then is the deck weldment that does not
24 have the front flow control baffle, correct?

25 A. That's correct.

1 Q. Now, if you'd go back to Exhibit 36, what's the number
2 that is being -- that is replacing this deck design?

3 A. Isn't that the number we just read here?

4 Q. No, the -- I'm looking for what replaced this deck design.
5 What -- what was this -- what was the updated design reflected
6 in the engineering change form?

7 Mr. Wenzel, if you go back to Exhibit 36.

8 A. Yeah, I'm looking right at it.

9 Q. I think you'll see that the one we've looked at is being
10 replaced by another cutter deck weldment?

11 A. Yes.

12 Q. And what's the cutter deck weldment that is replacing this
13 one?

14 A. Says 1545165 has front rings.

15 Q. Right. So let's go ahead and turn to Exhibit 34.

16 MR. VANDENBURGH: If it's not already been admitted,
17 I'd like to offer Exhibit 34.

18 THE COURT: Any objection?

19 MR. WOLF: No, Your Honor.

20 THE COURT: Exhibit 34's received.

21 MR. VANDENBURGH: We could publish that.

22 BY MR. VANDENBURGH:

23 Q. So this is showing the cutter deck weldment that is coming
24 into play, that's going to replace the first one that we saw,
25 correct?

1 A. Correct.

2 Q. And this is the cutter deck weldment that has the front
3 flow control baffle?

4 A. Yes, it is.

5 MR. VANDENBURGH: Now, I would like to go back to the
6 engineering change form and offer that into evidence.

7 MR. WOLF: No objection.

8 THE COURT: 36 is received.

9 MR. VANDENBURGH: And I'd like to publish it for the
10 jury.

11 THE COURT: You may.

12 BY MR. VANDENBURGH:

13 Q. So if we look about a third of the way down, there's an
14 indication of what the reason for the change was, isn't there?

15 A. Yes. Says to improve cut quality.

16 Q. Okay. So Ferris from the very outset instituted this
17 front flow control baffle for the purpose of improving cut
18 quality. Agreed?

19 A. Agreed.

20 Q. Now, what was your position at the -- at this time in
21 1997?

22 A. I was in charge of manufacturing.

23 Q. And if we look down on the lower left-hand side there's a
24 list of people who have to sign off on this change. Do you see
25 that?

1 A. Yes, I do.

2 Q. Are your initials down there?

3 A. Yes, they are.

4 Q. So you knew in 1997 that the reason for this new baffle
5 was to improve cut quality?

6 A. Well, I -- I signed the document, so...

7 Q. Well, you're in charge of manufacturing --

8 A. Yes.

9 Q. -- at this point?

10 A. Yes.

11 Q. So you also have -- you're responsible for instituting
12 this change into commercial products, aren't you?

13 A. Absolutely right.

14 Q. Okay. So you weren't oblivious to this change in the
15 Briggs mower deck. I should say Ferris.

16 A. No, I generally sign off so that I agree I can manufacture
17 what's been designed.

18 Q. Now, will you also agree with me that Exhibit 34 --

19 MR. VANDENBURGH: Put that back up.

20 Split-screen it.

21 Exhibit 9.

22 If you could -- I'm putting back up Exhibit 9. If I could
23 publish it?

24 THE COURT: Yes, you may.

25 BY MR. VANDENBURGH:

1 Q. Mr. Wenzel, we've seen this Exmark brochure many times,
2 haven't we?

3 A. Yes, we have.

4 Q. And right there on the cover is the Lazer Z mower that you
5 remember seeing in 1996, correct?

6 A. Looks like it, yes.

7 MR. VANDENBURGH: And let's turn to the second page
8 of that document.

9 We blow up the picture down there at the bottom.

10 Put that alongside the -- make it small enough that we can
11 see it next to the drawing.

12 BY MR. VANDENBURGH:

13 Q. You'll agree with me, won't you, that the shape of the
14 front flow control baffle that was added by Ferris in 1997 is
15 very similar to the shape of the baffle in the mower that
16 Ferris bought in 1996?

17 A. I would agree with that.

18 Q. But it's nonetheless your opinion that it's not even
19 likely that Mr. Baumbach copied in this case?

20 A. I said -- yes, that's what I said.

21 Q. You don't think it's likely.

22 A. I said that it's possible.

23 Q. And I asked you whether you thought it was likely and you
24 said no.

25 A. The reason I said that is because I considered Dale to be

1 an honest person and he wouldn't copy somebody's patented
2 design if -- I just don't think he would. That's why I said
3 that.

4 Q. Well, we're going to get into the issue of patented design
5 but you've already I think made the point in your direct that
6 at the time this was copied, it was copied so quickly that
7 Exmark's patent was still pending, it hadn't even issued at
8 that point.

9 A. That's correct.

10 Q. You remember that testimony?

11 A. Sure. Yeah.

12 Q. So there was no patent to copy but there was a design to
13 copy, wasn't there?

14 A. Yes.

15 Q. Okay. And at this point in time, as -- at least you know
16 now, that Exmark's patent was pending at that time?

17 A. That's correct, yes.

18 Q. Let's talk about Mr. Baumbach because there's been
19 insinuations in this case that somehow Exmark is responsible
20 for the fact he's not here as a witness.

21 When is the last time that anyone at Briggs or Ferris
22 looked for Mr. Baumbach?

23 A. I think we said yesterday in approximately the 2002 -- no,
24 I'm sorry, that's the last time we looked for him at Ferris.
25 Our counsel looked for him. Isn't that in evidence from

1 yesterday? 2000 and --

2 Q. If anybody said it, it was you, Mr. Wenzel.

3 A. Okay.

4 Q. But I want to put aside first your counsel. Let's talk
5 about just Ferris and Briggs.

6 A. Okay.

7 Q. And the last time that anybody at Ferris and Briggs looked
8 for Mr. Baumbach was 2002, correct?

9 A. That's correct, yes.

10 Q. So even after this lawsuit was filed and there was this
11 allegation of copying, nobody at Briggs made any effort to try
12 to find Mr. Baumbach, did they?

13 A. At -- at our company internally? No.

14 Q. Correct. Now let's talk about what your counsel did. Who
15 did that?

16 A. I -- I don't know who did that specifically.

17 Q. When did they do it?

18 A. I don't know the exact date either.

19 Q. What did they do?

20 A. I don't know exactly what they did.

21 MR. WOLF: Your Honor -- Your Honor, we're going to
22 get into privileged issues. We should have a sidebar about
23 what will and will not be waived because he's getting into work
24 product of lawyers and this is a much more significant
25 discussion than...

1 MR. VANDENBURGH: Your Honor, I'm happy to join a
2 sidebar.

3 THE COURT: All right. Let's have a sidebar.

4 MR. WOLF: Or we can do it at the break.

5 THE COURT: Let's see what's going on.

6 (At sidebar)

7 THE COURT: All right. How far do you intend to go
8 on this issue?

9 MR. VANDENBURGH: I want to show -- I think that what
10 we're going to show is that he doesn't know anything about what
11 was allegedly done to find Mr. Baumbach. They made a big deal
12 about the fact that we didn't bring Mr. Baumbach to this case
13 and I need to show that they never tried.

14 THE COURT: Well -- all right. And your position,
15 Mr. Wolf, is?

16 MR. WOLF: In-house counsel is the one that looked.
17 We didn't go through any of this with the witness. And unless
18 we're going to --

19 MR. VANDENBURGH: He got the --

20 THE COURT: Just a minute. He just said that they
21 didn't do it, that their lawyers did it. And he's -- you're
22 saying he's confused in-house counsel with outside counsel?

23 MR. WOLF: Yes, Your Honor.

24 THE COURT: All right. When you took his deposition,
25 did he make any distinction?

1 MR. VANDENBURGH: I don't think --

2 THE COURT: You don't know.

3 MR. VANDENBURGH: This topic never came up. This was
4 a surprise to us yesterday when he testified.

5 THE COURT: Okay. Now you know.

6 But you -- you are asserting attorney-client privilege,
7 correct, for outside counsel or inside counsel or both?

8 MR. WOLF: We never got to this topic. I'd have to
9 talk to the client. This is new to me that he's going to
10 inquire -- the only point is if he wants to say do you
11 personally know, that's fine. But he wouldn't know, so I think
12 that's the point where we're crossing the line into --

13 THE COURT: Yeah, but -- but you opened the door,
14 okay. You opened the door, not plaintiff's counsel. So now he
15 gets to inquire about -- about this issue.

16 And if he -- if the witness doesn't know, he can say he
17 doesn't know.

18 MR. WOLF: Okay. Okay.

19 THE COURT: And he can say what he doesn't know
20 about.

21 MR. WOLF: That's fine.

22 THE COURT: And so he -- so I'm overruling your
23 objection.

24 MR. WOLF: Okay. I mean, the one thing I would ask
25 to clarify, and maybe this will be relevant, maybe not, is the

1 distinction between in-house counsel and outside counsel. You
2 know, that's --

3 MR. VANDENBURGH: You can bring that out in redirect.

4 MR. WOLF: That's fine. That's fine. Okay.

5 THE COURT: Okay.

6 MR. WOLF: All right.

7 (In open court)

8 MR. VANDENBURGH: I've forgotten all the questions
9 that I asked --

10 THE COURT: Wait.

11 MR. VANDENBURGH: Oh.

12 THE COURT: You have to wait for my court reporter to
13 be prepared to proceed. Are you prepared, Ms. DeVetter?

14 All right. You may proceed, counsel.

15 BY MR. VANDENBURGH:

16 Q. I think I'm going to repeat a couple of questions. Do you
17 know who investigated Mr. Baumbach's whereabouts?

18 A. I do not.

19 Q. And do you know when it was done, even the year?

20 A. I do not.

21 Q. Do you know how much effort was put into it?

22 A. I don't have specific knowledge of that, no.

23 Q. So as far as you know, perhaps all they did was pull out
24 the Munnsville phone book, not find the name Baumbach, and then
25 stop?

1 A. I wouldn't think that to be the case.

2 Q. But you don't know one way or the other?

3 A. I know this is a very serious matter and I trust our legal
4 counsel to do the appropriate thing.

5 Q. Do you know whether they hired a private investigator?

6 A. I do not.

7 Q. Now, we've heard testimony that Exmark hired a private
8 investigator to find Mr. Baumbach; is that correct?

9 A. That's correct.

10 Q. And you were shown a declaration yesterday referring to
11 that information, correct?

12 A. I was.

13 Q. I'd like you to turn to Tab A of the binder that your
14 counsel gave you yesterday.

15 A. Okay.

16 Q. And you told the jury certain information from this
17 document that you thought was relevant to your view of the
18 case, correct?

19 A. I read this document, yes.

20 Q. There's other information in this that you didn't talk
21 about yesterday, isn't there?

22 A. Yes, I did not read the whole thing.

23 Q. Okay. First of all, it reflects how long it took the
24 investigator to find Mr. Baumbach, doesn't it?

25 A. Well, I didn't read the whole thing here. I just read

1 what I was told to read.

2 Q. Why don't you look at paragraph 4.

3 A. Okay.

4 Q. Does it indicate how long it took the investigator to find
5 Mr. Baumbach?

6 A. It does.

7 Q. And how long did it take him?

8 A. 2.25 hours.

9 Q. And does the prior paragraph indicate what the
10 investigator used to find Mr. Baumbach?

11 A. Using a computer and a telephone.

12 Q. All right. So to be clear, this isn't like Magnum, PI,
13 had to go out on the road for a week looking for clues to hunt
14 down the elusive Mr. Baumbach, correct?

15 A. Doesn't appear so.

16 Q. Now, here's the other really important thing about this
17 document. When was it provided to Briggs? There's a date at
18 the top of this document that indicates when it was submitted
19 to the Court. Do you see that?

20 Very top of the document.

21 A. Very -- the very top? Okay. Oh, okay, I see it here,
22 where it says "filed"?

23 Q. Correct. What's that date?

24 A. 3-13-15.

25 Q. Okay. So Briggs has had this document for over six

1 months, correct?

2 A. Yes, looks like it.

3 Q. In that six-month period, has anybody at Briggs or its
4 counsel reached out to Mr. Baumbach?

5 A. Not to my knowledge.

6 Q. Now, this -- the other point I forgot to make in this
7 document is it includes his address, correct?

8 A. It does.

9 Q. So as of March 13th of this year, Briggs knew exactly
10 where Mr. Baumbach lived, didn't they?

11 A. Looks like it, yep.

12 Q. And Briggs did not reach out to him?

13 A. Not to my knowledge, no.

14 Q. Now, you know, don't you -- well, say this. What state
15 does Mr. Baumbach live in according to this document?

16 A. North Carolina.

17 Q. And you know that a witness from North Carolina cannot be
18 compelled to come to Nebraska for a trial, don't you?

19 MR. WOLF: Objection, Your Honor, deposition rules
20 are different.

21 THE COURT: Sustained.

22 BY MR. VANDENBURGH:

23 Q. Let me ask you this: If Mr. Baumbach had, in fact, not
24 copied Exmark's product, don't you think he'd want to come to
25 Nebraska to clear his name?

1 MR. WOLF: Objection, Your Honor.

2 THE COURT: It's speculation. Sustained.

3 BY MR. VANDENBURGH:

4 Q. If Mr. Baumbach was willing to come to Nebraska for this
5 trial, would Briggs pay his airfare for him to come here?

6 A. I would think so.

7 Q. If Mr. Baumbach could get on that stand and deny copying,
8 don't you think he'd be here?

9 MR. WOLF: Objection, Your Honor.

10 THE COURT: To?

11 MR. WOLF: Rank speculation.

12 THE COURT: Sustained.

13 MR. VANDENBURGH: I think we understand the point.

14 BY MR. VANDENBURGH:

15 Q. Now, I think we've heard that patents are very important
16 to Briggs, correct?

17 A. Yes.

18 Q. And -- and to the Ferris business before that, correct?

19 A. Yes.

20 Q. And we've also heard that you are an inventor?

21 A. Yes.

22 Q. How many patents do you have?

23 A. I don't know for sure. Maybe three or four.

24 Q. And have you been involved in the process of obtaining
25 those patents?

1 A. In a -- in a general way.

2 Q. And you've reviewed patents, correct?

3 A. In a general way.

4 Q. Now, you're also familiar, aren't you, with Briggs's
5 practice of marking its products with its patent numbers,
6 correct?

7 A. Yes.

8 Q. And, in fact, you are in charge of deciding whether to
9 mark products with patent numbers, aren't you?

10 A. I am not.

11 Q. Do you know Mr. Laurin?

12 A. I do.

13 Q. He's going to be here tomorrow?

14 A. Um-hum.

15 Q. If he had testified that you are in charge of deciding
16 which products to mark, are you saying that he's just wrong?

17 A. No, but there -- the decision is made higher -- in a
18 different place than myself. I am advised by counsel which
19 products to mark or not. Mr. Laurin works for me, so I direct
20 him.

21 Q. And so you are personally involved in the process of
22 deciding which products to mark with which patents -- patent
23 numbers?

24 A. I'm -- I'm responsible for carrying out the order of
25 counsel, yes.

1 Q. And you put patent numbers on your product for the purpose
2 of putting your competitors on notice of your patent rights,
3 correct?

4 A. We presently do not mark products with patent numbers.

5 Q. But you have in the past?

6 A. We have in the past, yes.

7 Q. And the purpose in the past was to put your competitors on
8 notice regarding your patent rights, correct?

9 A. Yes.

10 MR. VANDENBURGH: Maybe just to show an example,
11 could we pull up Plaintiff's Exhibit 432.

12 Show it for the witness only.

13 MR. WOLF: There's no objection.

14 MR. VANDENBURGH: Okay. I believe there's not an
15 objection to 432.

16 THE COURT: There is but --

17 MR. WOLF: Not -- withdrawn.

18 THE COURT: All right.

19 MR. WOLF: Okay.

20 THE COURT: You're moving for 432?

21 MR. VANDENBURGH: 432.

22 THE COURT: 432's received.

23 MR. VANDENBURGH: If we could publish that for the
24 jury?

25 THE COURT: Yes, you may.

1 BY MR. VANDENBURGH:

2 Q. So is this a picture of a part of a Ferris mower?

3 A. Yes, it is.

4 Q. And what part of the mower are we looking at here?

5 A. It looks like the front panel -- top panel of a
6 walk-behind -- wide-area walk-behind mower.

7 Q. And do we see there to the left an example of Briggs'
8 marking its products with its patent numbers?

9 A. Yes. Yes.

10 Q. Do you intend your patent numbers -- your patent notices
11 to be prominent?

12 A. I guess that's pretty prominent.

13 Q. So the answer to my question's "yes"?

14 A. Yes.

15 Q. And you expect the competitors will heed your patent
16 notices and respect your patent rights?

17 A. That's one thing, yes.

18 Q. Now, you also know, don't you, that other companies mark
19 their product -- their products with patent numbers, correct?

20 A. Correct.

21 Q. And at least sometimes you personally have paid close
22 attention to patent marking stickers, correct?

23 A. Correct.

24 Q. And over the years, you've actually obtained copies of
25 patents that you learned of while looking at a patent marking

1 sticker, correct?

2 A. That's correct.

3 Q. And the purpose of doing this type of investigation is to
4 avoid infringing somebody's patent, correct?

5 A. Correct.

6 Q. I'd like then to go into the patent -- the Exmark products
7 that Briggs and Ferris have owned over the years.

8 There have been at least five Exmark mowers located at the
9 Ferris facility in Upstate New York over the years, correct?

10 A. That's correct.

11 Q. And one, of course, is the 1996 deck that Mr. Baumbach and
12 Mr. Marshall and you all saw prior to development of the
13 infringing baffles in this case, correct?

14 A. That's correct.

15 Q. Okay. And I think we've already established that that one
16 was not marked with a patent number because the patent hadn't
17 issued yet, correct?

18 A. That's correct.

19 Q. Now, you know from your experience with patents that they
20 often take a while to actually issue as a patent, right?

21 A. Yes.

22 Q. You had patents that have taken as much as three years to
23 get through the Patent Office, correct?

24 A. Yeah, could be.

25 Q. So if you copy a product right after it comes out, you

1 know that just looking for a patent on that day and concluding
2 there's no patent that day doesn't mean there's never going to
3 be a patent, right?

4 A. That would be correct.

5 Q. And I think you testified earlier today though that your
6 process, when you come up with a product, is just to look at
7 that day and never take another look backwards in the future,
8 right? That's your policy?

9 A. That was the policy at that time.

10 Q. Okay. Is that a flawed policy at that time, knowing that
11 it takes time for patents to issue?

12 A. Yes.

13 Q. Let's look at some of the mowers that Briggs has had that
14 are marked with Exmark's patent number.

15 We saw these, I believe, on the first or second day of
16 trial. I'd like to -- to start with Exhibit 46.

17 MR. VANDENBURGH: And I believe this is admitted and
18 I can publish it for the jury.

19 THE WITNESS: This is in your book now?

20 MR. VANDENBURGH: I believe it is.

21 THE WITNESS: Do I use the book or the screen here?

22 MR. VANDENBURGH: You can use either one you'd like.

23 THE WITNESS: Okay.

24 BY MR. VANDENBURGH:

25 Q. And looking then at the first page of Exhibit 46, what are

1 we looking at there?

2 A. In the center?

3 Q. Correct.

4 A. That would be a -- an Exmark wide-area walk-behind mower.

5 Q. And where is that mower located?

6 A. That was located in a storage barn in Munnsville.

7 Q. This is located in "the barn"?

8 A. The barn, yes.

9 Q. We heard from Mr. Marshall about a barn where the 1996
10 Exmark product was kept. Do you remember that testimony?

11 A. I do.

12 Q. And that's not the same barn as the one we're looking at
13 here, correct?

14 A. No, that's correct.

15 Q. You had a barn at both your previous facility and at your
16 current facility where you keep the competitive mowers that
17 you --

18 A. Yes.

19 Q. -- you have? Okay. Now, this mower's pretty heavily
20 used, isn't it?

21 A. Yes. We bought it with 1,000 hours on it.

22 Q. Okay. And you continued to use it, correct?

23 A. Yeah, we probably put 50 hours on it.

24 Q. Have you personally used that mower?

25 A. I have.

1 MR. VANDENBURGH: If we could go to one of the
2 interior pictures, on page three.

3 BY MR. VANDENBURGH:

4 Q. You heard the testimony from Mr. Busboom that this patent
5 sticker is right at the base of the mower as you're standing
6 behind it, correct?

7 A. That's correct.

8 Q. And so when you personally use this mower, you look down
9 at your feet, you would see this patent sticker, wouldn't you?

10 A. You would, yes.

11 Q. It's actually kind of interesting that -- that it seems to
12 be partially peeled off. Is that just a reflection of the
13 amount of use that this mower has had?

14 A. I would say so.

15 Q. And you do agree that on that list is the '863 patent
16 that's at issue in this case?

17 A. Yes. Looks like it's right in the center.

18 MR. VANDENBURGH: Then go to Exhibit 47.

19 BY MR. VANDENBURGH:

20 Q. Again, is this another Exmark mower located in Briggs's
21 barn?

22 A. Yes.

23 Q. And did you get this one new or used?

24 A. I think we bought that one new.

25 Q. Okay. And have you also used that mower?

1 A. Yes.

2 Q. When you -- when you get onto a mower, do you get on from
3 only one side or is it sometimes either side depending on the
4 day?

5 A. We're used to getting on from -- if you're seated in the
6 operator's seat, it'd be your left side.

7 Q. Okay. So the patent marking sticker on this point -- on
8 this particular mower is on the right side, correct?

9 A. Whatever you say I would agree with. I don't know --

10 MR. VANDENBURGH: Well, let's go ahead and turn to
11 the -- one, two, three, four -- fifth picture.

12 BY MR. VANDENBURGH:

13 Q. Do you see the patent marking sticker down there on the --
14 in the middle right of the mower?

15 A. I do.

16 Q. Does anybody ever stand on that side of the mower?

17 A. I mean, standing by you mean or...

18 Q. When people are looking at this mower, do they always
19 stand on the left side --

20 A. Oh, okay.

21 Q. -- or sometimes do they stand on the right side?

22 A. Well, you could stand on any side: front, back, around,
23 anywheres you want.

24 Q. And you buy these mowers to look at them, right, at least
25 in part?

1 A. The primary reason that we buy these is to benchmark our
2 suspension, how they ride, how they handle, against these
3 mowers.

4 Q. We're going to get to benchmarking.

5 A. Okay.

6 Q. But part of benchmarking is inspecting them, correct?

7 A. Just in general.

8 Q. In general from all sides of the mower?

9 A. Sure.

10 Q. Okay. Now, just to confirm, and we've seen this already
11 if we go back two more pages in this slide, this deck.

12 You'll agree that this product is also marked with the
13 '863 patent in this case?

14 A. I do. I agree.

15 Q. And at the risk of belaboring this point, let's go ahead
16 and talk about Exhibit 48.

17 And this is another Exmark mower that was located in your
18 barn at the time this lawsuit was brought?

19 A. Yes, it is.

20 Q. And you heard the testimony from Mr. Busboom that this
21 product is also covered -- or marked with a patent number that
22 includes the patent-in-suit?

23 A. I agree.

24 Q. Okay.

25 MR. WOLF: Counsel, apologies, but what is the Bates

1 list we just looked at?

2 MR. VANDENBURGH: Sorry?

3 MR. WOLF: I was just asking for an exhibit number,
4 sorry. I was just asking what the previous exhibit number was.

5 THE COURT: 47.

6 MR. WOLF: Thank you.

7 BY MR. VANDENBURGH:

8 Q. There's at least one other Exmark mower that you've owned
9 over the years that we don't have pictures of, correct?

10 A. That's correct.

11 Q. Is that from around the 2001 time frame?

12 A. I think so. I'm not sure.

13 Q. Okay. We've talked about at least five. Are there
14 actually more Exmark mowers that you recall having over the
15 years than five?

16 A. You know, what could happen, we could have a -- a
17 demonstration day and salesmen might borrow one from a dealer
18 for a day for a demo where dealers come in and try products and
19 they bring them back. I mean, that's -- that's --

20 Q. I'm talking about Exmark mowers that you've actually
21 purchased. Have you owned more than five Exmark mowers?

22 A. Boy, I -- is it possible we had a couple more? Sure.

23 Q. Now, did you hear Mr. Busboom testify that all of the ZTRs
24 and the wide-area walks that Exmark has made, at least the
25 commercial ones, have the baffles of this -- of this

1 patent-in-suit?

2 A. I did.

3 Q. And so you agree that all the mowers that we've seen the
4 pictures of, in fact, if you look underneath the deck, have the
5 patented flow control baffles?

6 A. I do agree.

7 Q. You've personally seen a patent sticker on a Exmark
8 product, haven't you?

9 A. I have.

10 Q. When was that?

11 A. I mean, you've got all the mowers there. I would have --
12 you've proved that I've seen them all, so...

13 Q. But I'm not talking -- I'm not talking just seeing the
14 mowers. You've seen the stickers, correct?

15 A. Yeah, I've seen the sticker, sure.

16 Q. You've looked at those stickers.

17 A. Sure. Sure. I wouldn't deny that I saw a sticker.

18 Q. And we've also heard that in the past you have, when
19 looking at a sticker, you've ordered a copy of a patent based
20 on looking at that, correct?

21 A. At sometimes in the past during our review process have
22 we? Yes.

23 Q. Now, you mentioned a review process. How many patents
24 might your attorney look at in the course of a review process?

25 A. Boy, I don't know for sure.

1 Q. Many dozens, don't you expect?

2 A. Yeah, sure.

3 Q. So there was an inference that there was an awful lot of
4 patents on the Exmark marking sticker. Do you remember when
5 Mr. Wolf said that early in the case?

6 A. He -- he may have said it. Don't remember for sure.

7 Q. It wouldn't be -- it wouldn't be a large project for your
8 counsel to look at all the patents on the Exmark marking
9 sticker, would it?

10 A. On just Exmark?

11 Q. Correct.

12 A. No.

13 Q. Let's talk about competitive benchmark. I believe that --
14 I have a definition of competitive benchmarking from you. It
15 refers to comparing the performance and features of
16 competitors' mowers to yours. Is that a fair definition?

17 A. Yes.

18 Q. And we've heard the testimony that everybody does that in
19 the industry, correct?

20 A. Yes, we have.

21 Q. You know that your competitors periodically buy your
22 mowers for the purpose of comparing performance and features?

23 A. Yes.

24 Q. And we've heard testimony that Exmark does that
25 periodically. Did you hear that testimony?

1 A. I did.

2 Q. But, in fact, isn't it true that Briggs does more than
3 competitive benchmarking with the Exmark mowers that it buys?
4 Isn't that true?

5 A. You want to give me a little more description so I know
6 what I'm agreeing to?

7 Q. Well, you'll agree that Briggs uses its Exmark mowers to
8 help it solve problems with its mowers, correct?

9 A. Solve problems?

10 Q. Do you not understand what "solve problems" means?

11 A. Not in the context that you're asking me, I'm sorry.

12 Q. Okay. You have problems with your mowers sometimes,
13 right? Things don't work perfectly?

14 A. Sure, everybody does.

15 Q. And in that context, isn't it true that Briggs uses the
16 Exmark mowers that it has to help it solve some of those
17 problems?

18 A. Okay. I see what you're saying. So in other words if we
19 had a front wheel bearing that was failing regularly on our
20 mower and we'd heard -- we -- we polled some Exmark dealers and
21 they said we don't have any problem with that, would we look at
22 that? Sure we could look at that.

23 Q. You might actually disassemble an Exmark mower in order to
24 do that, correct?

25 A. Yes.

1 Q. Let's look at some of these examples of you solving
2 problems using your Exmark mowers.

3 Now, let's start with Exhibit 454.

4 MR. VANDENBURGH: Let's not publish it to the jury
5 but I want to show it to the witness.

6 (Mr. Winkels conferred with Mr. Vandenburgh.)

7 MR. VANDENBURGH: Oh, that's right, we can't put it
8 up on --

9 BY MR. VANDENBURGH:

10 Q. Can you just turn in your binder to 454?

11 BY MR. VANDENBURGH:

12 Q. Exhibit 454 is an email from Marvin Butler to Bob Laurin,
13 correct?

14 A. Just give me just a half a second here. Keep up with you
15 here.

16 From Marv Butler to Bob Laurin, yes.

17 Q. Yeah. And the date of this email is that it was sent on
18 July 23rd, 2003?

19 A. Yes.

20 Q. And Mr. Marv Butler and Mr. Bob Laurin, are they both in
21 the engineering department at Briggs?

22 A. Marv is not exactly in the engineering. He's in the
23 product liability and safety and compliance area.

24 Q. Was that true in 2003?

25 A. I'm not sure if he -- we had that official of a separation

1 there. That was his specialty.

2 Q. Mr. Laurin is in the engineering department at Briggs?

3 A. Mr. Laurin is, yes.

4 Q. Yes.

5 A. Yes.

6 Q. And does Briggs maintain emails like this in the ordinary
7 course of its business?

8 A. I believe they stay on the computer, yeah, they're --

9 Q. Okay.

10 MR. VANDENBURGH: I'd like to offer Exhibit 454.

11 MR. WOLF: No objection, Your Honor.

12 THE COURT: 454's received.

13 MR. VANDENBURGH: If we could publish that for the
14 jury?

15 THE COURT: Yes, you may.

16 BY MR. VANDENBURGH:

17 Q. So in the underlying email there --

18 MR. VANDENBURGH: If we can blow up the middle
19 portion. Yeah.

20 BY MR. VANDENBURGH:

21 Q. Mr. Butler is describing a problem with a -- with a lock
22 washer, correct?

23 A. Yes, he is.

24 Q. And one of the ways he wants to try to solve that problem
25 is to have R&D disassemble the Exmark and learn more about

1 their design. Do you see that?

2 A. Talks about insufficient bolt torque.

3 Q. Okay. But, at least as part of the solution to this
4 problem, he wants R&D to disassemble the Exmark and learn more
5 about their design. Do you agree?

6 A. He wants them to disassemble, take the wheel off, yes.

7 Q. Okay. Let's look at some other examples. Let's go to
8 Exhibit 461. Again, if you could go to that tab in your
9 binder.

10 MR. WOLF: To skip a step, Your Honor, we'll withdraw
11 our objection.

12 THE COURT: All right. Are you moving to admit --

13 MR. VANDENBURGH: Move to admit 461.

14 THE COURT: 461's received.

15 MR. VANDENBURGH: Publish this for the jury?

16 THE COURT: Yes, you may.

17 BY MR. VANDENBURGH:

18 Q. In this instance --

19 MR. VANDENBURGH: Again, if we pull up the underlying
20 email.

21 BY MR. VANDENBURGH:

22 Q. We're looking at an email from Mr. Butler to Mr. Terry
23 Schaal copying Bob Laurin. I take it, Mr. Schaal, was he a
24 Ferris or Briggs' employee?

25 A. Yes, he was.

1 Q. Okay. And in this case, does this indicate there's a
2 muffler guard project going on?

3 A. Yeah, something about a muffler guard, yes.

4 Q. Okay. And as part of that, does it indicate that they
5 took photos of the Exmark muffler guard?

6 A. Yes.

7 Q. And you agree that that was -- there was an intent to look
8 at Exmark's product and -- and learn what you could in terms of
9 developing your own muffler guard?

10 A. Something to that effect.

11 Q. You didn't copy Exmark's muffler guard, right?

12 A. I don't believe so.

13 Q. Okay. Just like you say that it's not likely that you
14 copied the flow control baffles in this case, correct?

15 A. That's what we've said, yes.

16 Q. All right. Let's keep going on some of these other
17 examples.

18 MR. VANDENBURGH: Pull up Exhibit 453.

19 A. 453?

20 BY MR. VANDENBURGH:

21 Q. Yeah.

22 MR. VANDENBURGH: And Mr. Wolf, can we speed this up?

23 MR. WOLF: I'm all for shortening the day.

24 THE COURT: Any objection to it 453, Mr. Wolf?

25 MR. WOLF: Your Honor, I don't see any evidence the

1 witness was on this, but we'll withdraw anyway. He can ask
2 what he wants to ask.

3 THE COURT: So are you moving to introduce --

4 MR. VANDENBURGH: Moving to admit 453.

5 THE COURT: Received.

6 MR. VANDENBURGH: If we could publish it for the
7 jury?

8 THE COURT: Yes, you may.

9 BY MR. VANDENBURGH:

10 Q. What's the problem with Ferris mowers that's at issue
11 here?

12 A. Looks like there's some sort of a switch.

13 Q. So you're having problems with your switch -- with your
14 switches on your mowers?

15 A. That's what it says.

16 MR. VANDENBURGH: And if we highlight the top three
17 lines of the top email.

18 BY MR. VANDENBURGH:

19 Q. The solution was to get a switch from an Exmark machine
20 ASAP. Is that correct?

21 A. That's what it says, yes. Yep.

22 Q. So again, another example of your using Exmark to solve
23 problems with your mowers?

24 A. Those switches are pretty common in the industry. There's
25 a couple of suppliers and Exmark mowers are handy and, sure,

1 they would have looked at that. There's...

2 Q. But you'll agree it's more than, in these instances, just
3 what you define as competitive benchmarking?

4 A. Appears so, yes.

5 Q. Let's go to Exhibit 447.

6 Mr. Wenzel, you mentioned as an example looking at a -- at
7 a wheel spindle on an Exmark mower. Do you recall that?

8 A. The -- this previously here?

9 Q. No. When I first started asking you about problems, you
10 mentioned an example of a wheel spindle. Do you recall --

11 A. Oh, yes, okay.

12 Q. -- that testimony? Yeah.

13 A. Yes.

14 Q. Does Exhibit 447 relate to a wheel spindle examination in
15 an Exmark product?

16 A. It does, yes.

17 MR. VANDENBURGH: I'd like to offer Exhibit 447.

18 THE COURT: Any objection?

19 MR. WOLF: No, Your Honor.

20 THE COURT: Received.

21 MR. VANDENBURGH: If we could publish that for the
22 jury.

23 THE COURT: Yes, you may.

24 BY MR. VANDENBURGH:

25 Q. So if we just look at the first page, this is an email

1 from Pete Jones at Ferris to Mr. Bob Laurin at Ferris, correct?

2 A. Yes.

3 Q. It indicates that the Exmark data is attached?

4 A. Yes.

5 Q. Then if we look -- turn to the next page, you see a fairly
6 detailed chart of it looks like a measurement analysis. Can
7 you -- can you explain what was done with this Exmark spindle?

8 A. Looks like it was closely examined.

9 Q. By you?

10 A. No, I don't think by me.

11 Q. By somebody at -- let me ask this question. Was this --
12 was this data collected by somebody at Ferris or was it sent
13 outside for somebody else to do it?

14 A. I would think that it was done by someone at Ferris. I
15 guess I don't know that for sure, but I would think so.

16 Q. Do you have the ability to do these sort of analyses
17 in-house of an Exmark spindle?

18 A. Yes, all just basic measurements and things.

19 Q. And did this have anything to do whatsoever with trying to
20 improve Ferris's products?

21 A. Sure, in the way they were trying to solve a service
22 problem, yes.

23 Q. Let me go over one more example because it involves, I
24 believe, you personally. We you go to Exhibit 441 in your
25 binder.

1 MR. WOLF: Counsel, what -- I don't think we have
2 a 441.

3 MR. VANDENBURGH: I think this one got added.

4 MR. WOLF: Do you have an extra?

5 MR. VANDENBURGH: I don't.

6 MR. WOLF: The witness may not have it either then.

7 BY MR. VANDENBURGH:

8 Q. Do you have a copy of 441 in your binder?

9 THE COURT: Mr. --

10 A. Yes, I do.

11 BY MR. VANDENBURGH:

12 Q. Okay.

13 MR. WOLF: Just us then. Thank you.

14 BY MR. VANDENBURGH:

15 Q. Can you tell me what this document is?

16 MR. WOLF: Here you go. Just put it up on the
17 screen. That's fine.

18 MR. VANDENBURGH: Doesn't sound like there's any
19 objection. Can I offer 441?

20 THE COURT: Mr. Wolf?

21 MR. WOLF: No objection, Your Honor. If he could
22 just put it on the screen because we don't have a copy.

23 THE COURT: 441 is received and you may publish it.

24 BY MR. VANDENBURGH:

25 Q. So is this notes from a management team meeting on

1 August 11th, 2000?

2 A. Yes, it is.

3 Q. And it looks like the second list of the names going down
4 there, there's a reference to Phil. Is that you?

5 A. That's me.

6 Q. So does this discuss a report that you gave at this
7 management team meeting?

8 A. I was involved in it. I can't -- I don't know if I'm the
9 one that published it or not. I don't know if that matters or
10 not but...

11 Q. Well, why is it under your name?

12 A. I don't know what you -- my name is on there. I don't
13 know if I -- I must not understand your question.

14 Q. I think I asked a poor question there.

15 The items that are under your name, are those things that
16 you're responsible for?

17 A. Yes.

18 Q. Okay. The third bullet point down, where it says "1000Z
19 prototype being used, comparing against Exmark version and
20 project is on schedule."

21 So at this point you were developing a 100Z [sic]
22 prototype and comparing it against Exmark, correct?

23 A. A 1000Z, yes.

24 Q. I'm sorry, a 1000Z.

25 A. Yeah.

1 Q. And were you trying to get the performance in the cutting
2 deck on that prototype up close to the level of the Exmark?

3 A. It just says comparing against Exmark. I'm -- I don't
4 know if there's a cutter deck element of it or if it's a whole
5 machine. I can't tell from this.

6 Q. So you don't recall trying to make improvements to the
7 cutter deck on that machine in order to get it close to the
8 performance of the Exmark?

9 A. I don't remember specifically.

10 Q. All right. Then let's go ahead and turn to the next one,
11 Exhibit 442.

12 MR. WOLF: Counsel, we seem to have a defective --

13 MR. VANDENBURGH: No, no, it should be just these
14 two.

15 MR. WOLF: Oh, okay. No objection.

16 THE COURT: 442's received. And you may publish.

17 MR. WOLF: If we could just get a copy during lunch?

18 MR. VANDENBURGH: Okay.

19 BY MR. VANDENBURGH:

20 Q. So this is another notes from the management team meeting
21 less than a week later, correct?

22 A. Yes.

23 Q. And again we have a list of items that you brought to that
24 meeting under -- where it indicates Phil on the left-hand side,
25 correct?

1 A. Yes. Yes.

2 Q. And again you discuss the progress on this 1000Z
3 prototype, don't you?

4 A. I did.

5 Q. And it says there: Discussed progress on 1000Z. Made
6 changes to deck to improve cut, very close to quality of Exmark
7 now. Still needs lots of detail work on other components of
8 the machine, but will be on schedule.

9 So this does indicate that at this point you are adjusting
10 the deck, based on this Exmark mower that you have, in order to
11 try to get the cut quality close to the Exmark, correct?

12 A. Yes, we were benchmarking with the Exmark, yes.

13 Q. Okay. And solving problems using your Exmark, correct?

14 A. Yes.

15 Q. So the thing that you say that everybody does in this
16 business, which is competitive benchmarking, you actually do
17 much more than that. You use your Exmark mowers to solve
18 problems. Correct?

19 A. Yes, as I believe everyone else does also.

20 Q. Mr. Wenzel, let's talk about product literature. As the
21 ordinary -- in the ordinary course of Ferris and then Briggs'
22 business, you maintain a competitive literature file in
23 Munnsville, don't you?

24 A. I believe that some of the folks in marketing keep some
25 literature, yes.

1 Q. And where do they get that literature?

2 A. Could get it anywheres that's in the public, trade shows,
3 dealers.

4 Q. Have you personally picked up competitive literature at
5 trade shows?

6 A. I used to do it quite frequently, and with the -- since
7 the Internet and things, do it not so frequently.

8 Q. Did you also used to collect competitive literature
9 from -- from dealers?

10 A. Yeah, like I said, we could get -- get it anywheres.

11 Q. And the purpose of getting this literature is to look at
12 it, right?

13 A. Oh, there's a lot of different things. Depends who's
14 looking at it.

15 Q. I just want to make sure, you don't just pick them up and
16 shove them in a file and never, ever look at them, right?

17 A. It's possible but not likely.

18 Q. You personally have looked at competitive brochures over
19 the years, correct?

20 A. Sure I have, yes.

21 Q. Page through them?

22 A. Sure.

23 Q. You've done that with Exmark brochures?

24 A. I have.

25 Q. And you've actually seen references to patented features

1 in Exmark brochures, haven't you?

2 A. I won't say that I haven't.

3 Q. Will you agree that you have?

4 A. The only reason I'm hesitating on your question is I'm
5 trying to think of an exact example and I -- quick one doesn't
6 come to mind.

7 Q. We've been through this process before, but you've had
8 your deposition taken in this case, correct, Mr. Wenzel?

9 A. Yes. Yes, I have.

10 Q. Okay. How many times have you had your deposition taken
11 in this case?

12 A. Three or four.

13 Q. Well, let's -- let's turn to the first of those, which was
14 taken on April 8th of 2011. It's towards the end of your
15 binder.

16 MR. WOLF: Page and line number, counsel?

17 MR. VANDENBURGH: Page 134. We're going to start at
18 line 16.

19 MR. WOLF: Your Honor, improper impeachment but I
20 have no problem with the jury seeing the question.

21 THE COURT: You may proceed, counsel.

22 MR. VANDENBURGH: Go ahead and publish that for the
23 jury.

24 And if we could blow up from 16 to the bottom of the page.

25 BY MR. VANDENBURGH:

1 Q. In your earlier testimony, you said -- you were asked: Do
2 you look to see whether a feature is indicated in a competitive
3 brochure as being a patented feature?

4 You answered: Yes.

5 Okay. Have you seen Exmark brochures that refer to
6 patented features?

7 Again: Yes.

8 Okay. And what features have you seen in Exmark brochures
9 as being patented?

10 I don't remember specifically, I just know I have noted
11 them from time to time.

12 A. Yes.

13 MR. WOLF: For completeness, Your Honor, I just
14 request the next two Q and A's.

15 THE COURT: Counsel.

16 MR. VANDENBURGH: I have no problem with that,
17 Your Honor.

18 Let's go down to the next page.

19 BY MR. VANDENBURGH:

20 Q. Do you specifically recall ever seeing a reference to
21 patented flow control baffles?

22 And there you said no.

23 Then you were asked: To your knowledge has anyone at
24 Briggs & Stratton ever seen a reference to patented flow
25 control baffles in Exmark's brochures?

1 And after an objection you answered: Not to my knowledge.

2 A. That's correct.

3 Q. Okay. So let's test that knowledge.

4 Now, as part of this lawsuit, you know that we get to ask
5 for documents from Briggs's files, right?

6 A. Yes.

7 Q. And as part of that, you turned over to us some Exmark
8 brochures from your competitive literature file. Is that
9 correct?

10 A. From the file at our marketing department, yes.

11 Q. Okay. And that file includes brochures that you've
12 personally picked up, correct?

13 A. It could.

14 Q. Okay. And it includes brochures that you've personally
15 looked at, correct?

16 A. Well, I mean that's -- I don't know if I've looked at
17 everything that's in that file. That would be unfair. But to
18 say that I may have looked at some of those, sure.

19 Q. And certainly somebody at Briggs has looked at all of
20 those brochures, correct?

21 A. I -- I'll just agree with you just to -- just to go on to
22 the next question.

23 Q. All right. Well, let's go ahead and pull up -- or I'll
24 have you turn to Plaintiff's Exhibit 438, if you would.

25 Is this a brochure that came out of Briggs's files?

1 A. I'm sorry, it's just taking me a minute to get here.

2 438.

3 I go from 432 to 441.

4 THE COURT: You know, we're getting close enough to
5 the lunch break that we might just get the logistical issues
6 squared away during the lunch hour.

7 So if you'd compare the book to what you want to examine
8 and be sure that Mr. Wolf has copies, that'll help us.

9 So -- but I think at this time, Mr. Vandenburg, what
10 we're going to do is break for lunch.

11 So, ladies and gentlemen, let's break for lunch and let's
12 take an hour.

13 So we're in recess.

14 (Jury out at 11:58 a.m.)

15 THE COURT: Mr. Wenzel, you can step down if you'd
16 like to.

17 So the only issue I want to take up with the lawyers is
18 the proposed instruction that I -- or proposed the answer, so
19 to speak, that I prepared on the myriad questions the jury's
20 had for us.

21 The bottom half of this you've already agreed to is
22 acceptable, as I understand it.

23 The top half is something that I came up with in -- during
24 lulls in the examination.

25 So the question is, I want you to look it over. Do --

1 Mr. Vandenburg, have you had a chance to look at this?

2 MR. VANDENBURGH: Yes, and I'm going to let
3 Mr. Winkels speak because I think we have a small modification
4 suggestion.

5 THE COURT: All right. Mr. Winkels.

6 MR. WINKELS: Just one small modification,
7 Your Honor, just to be accurate. In the first -- I suppose the
8 second paragraph that starts, "This matter."

9 THE COURT: Correct.

10 MR. WINKELS: At the very end of the last sentence,
11 where it's talking about infringement, after the word
12 "infringement," we'd propose putting "infringement by mowers
13 having the redesigned front baffle."

14 The infringement is actually by the mower itself. So we'd
15 propose after "infringement" add the words "by mowers having,"
16 and then you could get rid of --

17 THE COURT: Okay, so just a second.

18 "Infringement of the redesigned front baffle," you want to
19 change that to -- is that what you want to change?

20 MR. WINKELS: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. WINKELS: To say "infringement by mowers
23 having" --

24 THE COURT: Okay.

25 MR. WINKELS: -- "the redesigned front baffle."

1 THE COURT: Okay.

2 All right. Anything else?

3 MR. WINKELS: There is just one small -- before
4 willfulness in that sentence I think there needs to be an "of,"
5 "issues of willfulness."

6 THE COURT: Okay.

7 MR. WINKELS: And that's it, Your Honor.

8 THE COURT: Oh, thank you. Okay.

9 All right. Mr. Wolf, are you -- did you have a chance to
10 review this?

11 MR. WOLF: I did, Your Honor. Two observations only.
12 First of all, on the second paragraph where a second full
13 sentence you say the negotiating process.

14 THE COURT: Correct.

15 MR. WOLF: Just to avoid confusion with the
16 hypothetical negotiation, you might want to say the actual
17 negotiating process.

18 THE COURT: Okay. All right. All right.

19 MR. WOLF: And then, Your Honor, the sentence about
20 Scag is no longer true because we have introduced, it's been
21 admitted in evidence, the Scag redesign.

22 THE COURT: Okay. Just a second. All right. And so
23 Mr. Winkels, do you have any objection if we cut this line
24 altogether?

25 MR. WINKELS: No, Your Honor.

1 THE COURT: So I'll take out -- okay. Anything else,
2 Mr. Wolf?

3 MR. WOLF: No, Your Honor.

4 THE COURT: So do you have any objection to the edits
5 by Mr. Winkels?

6 MR. WOLF: I actually think yours was a little
7 clearer, but I have no objection to it.

8 THE COURT: Okay. And then Mr. Winkels, do you have
9 any objection to Mr. Wolf's addition?

10 MR. WINKELS: No, Your Honor.

11 THE COURT: So I'll delete that, then.

12 MR. WOLF: Thank you, Your Honor.

13 THE COURT: And I'll do that at the end of this
14 witness.

15 MR. WINKELS: Your Honor?

16 THE COURT: Yes.

17 MR. WINKELS: May I raise just one issue? During the
18 testimony of Mr. Wenzel, my colleague asked me about Exhibit 49
19 and I indicated that it was admitted, and that was my mistake,
20 Your Honor. It was admitted during the pretrial conference.
21 And there are no objections to it. I just wanted to be clear
22 throughout, I don't think Your Honor said it's -- it had been
23 received.

24 THE COURT: No, if -- if it was already admitted in
25 the pretrial conference, I'd like you to identify it because

1 for some reason I never got a copy of that and that's only
2 because I didn't ask for it, apparently, or somebody didn't put
3 it in my book.

4 So if there's one that's been previously admitted, I'd
5 just like to know the number so I could keep track of what
6 we've done and if it's already been admitted, just say it's
7 already been admitted. That's not a problem.

8 MR. WINKELS: Yeah. It was my mistake.

9 THE COURT: That's -- well, it wouldn't have been a
10 mistake if I had the right list, but there you go. All right.

11 Mr. Wolf, did you want something?

12 MR. WOLF: No, Your Honor.

13 THE COURT: Okay. Well, we'll see you at one o'clock
14 then, ladies and gentlemen.

15 MR. WINKELS: Thank you.

16 (Recess taken at 12:03 p.m.)

17 (At 1:00 p.m.; with counsel and the parties'
18 representatives present; WITHOUT the jury:)

19 PHILIP WENZEL RESUMED THE WITNESS STAND

20 THE COURT: Please be seated.

21 (Jury in at 1:02 p.m.)

22 THE COURT: Please be seated, ladies and gentlemen.

23 Mr. Vandenburg, you may continue your examination of the
24 witness.

25 MR. VANDENBURGH: Thank you, Your Honor.

1 CROSS-EXAMINATION CONTINUED

2 BY MR. VANDENBURGH:

3 Q. Mr. Wenzel, when we broke for lunch we were just starting
4 to go into the Exmark brochures that Briggs had in its
5 possession at the time this lawsuit was brought. And we were
6 starting with Exhibit 438.

7 MR. VANDENBURGH: I understand there's no objection
8 to 438 and if we could publish that for the jury.

9 THE COURT: Yes, you may.

10 MR. VANDENBURGH: Oh, and admit it. I'm sorry.

11 THE COURT: Just a second. 438 is received.

12 BY MR. VANDENBURGH:

13 Q. Now, we've seen a color version of this many times in this
14 trial, correct?

15 A. Yes.

16 Q. This is the original 1995 brochure on Exmark's new
17 Lazer Z?

18 A. Yes.

19 Q. And there's a tab over there that indicates Louisville
20 1995. What does that suggest to you?

21 A. That it was first put on display in the literature in '95.

22 Q. Okay. Does it indicate to you that somebody at Ferris
23 picked it up from the Louisville trade show in 1995?

24 A. I think that would be reasonable to assume, sure.

25 Q. This lawsuit was brought in 2010 and you still had a copy

1 of this brochure from 15 years ago at the time suit was
2 brought?

3 A. Yeah, looks -- looks like it.

4 Q. Now, this brochure doesn't refer to patented flow control
5 baffles, does it?

6 A. That I've seen over the last couple of days.

7 Q. All right. And that's because at this point, Exmark's
8 patent was still pending so there was no patent issued yet.

9 A. That's correct.

10 Q. Right? Okay. So let's move ahead in time. Let's go to
11 443.

12 MR. VANDENBURGH: Again, Your Honor, I understand
13 there's no objection to it so I would offer it and ask that it
14 be published to the jury.

15 THE COURT: Correct?

16 MR. WOLF: No objection.

17 THE COURT: 443's received and may be published.

18 BY MR. VANDENBURGH:

19 Q. Now, again, this is another brochure that came out of
20 Briggs's files in this case, correct?

21 A. I -- I'm not going to argue with you. I don't know that,
22 but it --

23 Q. Well, let's -- just so it's clear --

24 A. I would assume that's probably right.

25 MR. VANDENBURGH: Could we blow up the number in the

1 lower right-hand corner?

2 We have a stipulation in this case, Your Honor, that we've
3 agreed we can read to the jury at any time. It was given to
4 the jury at the outset of trial. And it reads:

5 If a document is introduced at trial having a Bates number
6 beginning with BRIGGS, the document was in the possession,
7 custody or control of defendant Briggs.

8 BY MR. VANDENBURGH:

9 Q. So is it your understanding that that number down there in
10 the corner is what we lawyers refer to as a Bates number?

11 A. I do now.

12 Q. Okay. And so based on the stipulation, you now understand
13 that this document was, in fact, in the possession, custody or
14 control of Briggs?

15 A. Yes. I have no intention of arguing with you on that.

16 Q. Okay. Just wanted to make -- make clear because we're
17 going to go through a number of these.

18 Now, do you recall -- I think we've seen a color brochure
19 of -- of this particular brochure as well during this trial.
20 Do you recall that?

21 A. I -- again, I don't want to argue with you. It's just
22 hard for me to say. I'll take your word for it, yeah.

23 Q. Okay. Well, we can go ahead and work off the
24 black-and-white copy because I think we can see what we need to
25 see.

1 If you can turn -- you have it there in your binder?

2 A. Yes, I do.

3 Q. Can you turn to the page that's got the -- the document
4 control number ending in 698.

5 MR. VANDENBURGH: And if we can highlight the -- the
6 second bullet point down on the left side there.

7 That's close enough.

8 BY MR. VANDENBURGH:

9 Q. So do you see the reference there to "Patented
10 flow-control baffles that improve the quality of cut, reduce
11 grass and leaf blowout and lessen horsepower requirements when
12 mowing in heavy grass"?

13 A. I do.

14 Q. Now, you had this brochure in your possession at the time
15 that you claim that you did not know about Exmark's patent,
16 correct?

17 A. That's true.

18 Q. Let's turn -- there's a couple more instances in this. If
19 we turn to pages 14 and 15 of the brochure.

20 Pages 14 and 15 are specifically advertising Exmark's
21 deck, correct?

22 A. They are.

23 Q. And on the left-hand side, you see the reference to
24 patented flow control baffles?

25 A. I do.

1 Q. I think it's the same text so I won't take the time to
2 read it again.

3 But then on page 15, I think we'll see the same reference
4 as item B there.

5 Do you see the reference to patented flow-control baffles
6 there?

7 A. I do.

8 Q. So this brochure from 2001 that came from your files
9 refers three times to patented flow control baffles?

10 A. It does.

11 MR. VANDENBURGH: Let's go on to 2002. This is
12 Exhibit 445. Again, I don't believe there's an objection,
13 Your Honor.

14 MR. WOLF: No objection.

15 THE COURT: And that's Exhibit -- 2 -- say again.

16 MR. VANDENBURGH: 445.

17 THE COURT: 445.

18 MR. VANDENBURGH: I'd offer it and ask to publish it.

19 THE COURT: 445 is received. You may publish it.

20 BY MR. VANDENBURGH:

21 Q. Again, looking at the document control number down on the
22 lower right, it's your understanding that this is a document
23 that came out of Briggs's files?

24 A. Yes.

25 Q. And if you'd turn to the last page, I believe there's a

1 copyright date on it. It's very poor on this -- I don't know
2 if you'll be able to see it.

3 I don't have a reference to the color brochure that --
4 that we produced so I'm going to skip that for now.

5 I'm just going to have you again turn to pages 14 and 15
6 in the middle of the document.

7 A. Oh.

8 Q. Again, we have two pages relating to Exmark's cutting deck
9 there.

10 A. Yes. Yes.

11 Q. Again, on page 14 we see the reference over to the left to
12 patented flow control baffles?

13 A. Yes.

14 Q. And on the right, on page 15 we have another reference to
15 patented flow control baffles?

16 A. We do.

17 Q. Again, if you'll take my word for it that that is a 2002
18 brochure, this was during the time that you say that you did
19 not know about Exmark's '863 patent?

20 A. That's correct.

21 Q. In the last brochure we saw a specific reference to
22 patented flow control baffles in connection with a walk-behind
23 mower.

24 If you'll turn to page 19 of this brochure, I think you'll
25 see a reference there, specifically in connection with a

1 Lazer Z mower.

2 See the reference to full-floating UltraCut decks with
3 patented flow-control baffles are standard on every 52, 60,
4 or 72 Lazer Z?

5 A. I do.

6 Q. The next one's particularly interesting.

7 MR. VANDENBURGH: Can I -- I'd like to offer
8 Exhibit 430 and publish it to the jury.

9 THE COURT: Any objection?

10 MR. WOLF: No, Your Honor.

11 THE COURT: 430's received.

12 BY MR. VANDENBURGH:

13 Q. Now again, the document control number indicates that this
14 is a brochure that came out of Briggs's files, correct?

15 A. Yes.

16 Q. And this is a smaller document than the other ones we've
17 looked at, right? It's only two pages.

18 A. Yes.

19 Q. And is this two-page document focused specifically on
20 Exmark's deck?

21 A. Yes, it appears so.

22 Q. And are you familiar with Exmark's trade name for its
23 UltraCut deck mowers or its UltraCut decks?

24 A. I've heard UltraCut decks before, yes.

25 Q. Okay. You're familiar with that --

1 A. Yes.

2 Q. -- as being an Exmark deck?

3 A. Yes.

4 Q. Okay. And in this two-page document that was obtained by
5 Briggs, if you'd turn to the second page. You see there's a
6 description of the various features of this deck?

7 A. Yes.

8 Q. And you'll see there on the second bullet point down, in
9 the middle, the reference to patented flow control baffles?

10 A. I do.

11 MR. VANDENBURGH: Now, I've got -- let's see, one,
12 two, three, four -- five more of these. And I'd like to get
13 them all admitted and have them confirmed that they are, in
14 fact, Exmark brochures that were in Briggs's possession.

15 So first I'd like to offer Exhibit 457.

16 MR. WOLF: No objection.

17 THE COURT: 457's received.

18 MR. VANDENBURGH: And can we publish that for the
19 jury?

20 THE COURT: Yes, you may.

21 BY MR. VANDENBURGH:

22 Q. And Mr. Wenzel, can you confirm that that's an Exmark
23 brochure from Briggs's files?

24 A. Yes.

25 Q. And next go to 450.

1 MR. VANDENBURGH: Same offer of the exhibit. Publish
2 to the jury.

3 MR. WOLF: No objection.

4 THE COURT: 450's received. You may publish.

5 BY MR. VANDENBURGH:

6 Q. Again, this is the brochure from Briggs's files, an Exmark
7 brochure?

8 A. Yes, that's the number on the bottom.

9 Q. Now, because we had some trouble with some dates before,
10 I'm going to take the time on this one to turn to the last page
11 if I could.

12 (Mr. Vandenburgh conferred with Mr. Mayleben.)

13 MR. VANDENBURGH: And if we could pull up the
14 copyright date at the bottom of that.

15 BY MR. VANDENBURGH:

16 Q. Do you see that this has a date of 2003 at the bottom of
17 it?

18 A. Oh, okay. Yes.

19 Q. And that is the time period during which you claim that
20 you did not know about Exmark's '863 patent?

21 A. That's correct.

22 MR. WOLF: Your Honor, just for logistically, this
23 appears to be a different document.

24 Can you just --

25 THE COURT: Different than what?

1 MR. WOLF: This 450 doesn't match the 450 that's on
2 the screen. But it's probably close enough for government
3 work.

4 THE COURT: All right.

5 (Mr. Wolf and Mr. Vandenburgh conferred.)

6 THE COURT: It looks like there's more than one
7 copyright 2003. And maybe somebody made copies of it.

8 MR. WOLF: Your Honor, I don't want to belabor it.
9 Unless we find something, we'll just for the moment -- it's
10 different but I suspect it doesn't matter.

11 THE COURT: Okay. Thank you.

12 You may continue, Mr. Vandenburgh.

13 MR. VANDENBURGH: I'd like to offer Exhibit 464.

14 THE COURT: Any objection to 464?

15 MR. WOLF: No, Your Honor.

16 MR. VANDENBURGH: Publish this for the jury?

17 THE COURT: 464's received and it may be published.

18 BY MR. VANDENBURGH:

19 Q. Again, is this an Exmark brochure in Briggs's possession?

20 A. Yep. It's got the number.

21 Q. And if we go to the last page, we can see that this is a
22 brochure from 2005?

23 A. Yes.

24 Q. And that's also the time period during which you say you
25 were not aware of the '863 patent?

1 A. That's correct.

2 Q. And the next brochure is Exhibit 466.

3 THE COURT: Any objection?

4 MR. WOLF: No, Your Honor.

5 THE COURT: 466 is received. You may publish it.

6 BY MR. VANDENBURGH:

7 Q. That's another brochure that was in Briggs's possession.

8 It's an Exmark brochure.

9 A. Yes.

10 Q. And if we go to the last page, do we see that that's from
11 2006?

12 A. Yes.

13 Q. It's still the time frame that you say that you were not
14 aware of Exmark's '863 patent?

15 A. It is.

16 Q. I'd like to go to 471.

17 MR. VANDENBURGH: I'd like to offer 471 and publish
18 to the jury.

19 THE COURT: Any objection?

20 MR. WOLF: No, Your Honor.

21 THE COURT: 471 is received. It may be published.

22 BY MR. VANDENBURGH:

23 Q. Again, is this another brochure that was in Briggs's
24 possession?

25 A. I'll have to go to -- it's not in my book, but I'll look

1 at the screen.

2 Q. 471?

3 A. Last tab here is 466 -- oh, here it is. Sorry. Sorry,
4 sorry. Okay.

5 Q. This is another Exmark brochure --

6 A. Yes.

7 Q. -- that was in Briggs's possession?

8 A. Yes.

9 Q. And we can see on the front cover that this is from 2008?

10 A. Yes.

11 Q. And that's also the time period during which you say that
12 you were not aware of the '863 patent?

13 A. That's correct.

14 Q. One more. Exhibit 474.

15 MR. VANDENBURGH: I would offer that exhibit.

16 MR. WOLF: No objection.

17 THE COURT: 474's received. It may be published.

18 BY MR. VANDENBURGH:

19 Q. Is this an Exmark brochure that came out of Briggs's
20 files?

21 A. It's got the number, yes.

22 Q. Okay. And this indicates a date of 2010?

23 A. Yes.

24 Q. And that's the year that this lawsuit was brought,
25 correct?

1 A. That's correct.

2 Q. Now, for each of these exhibits -- and for the record I'll
3 go through them -- 474, 471, 466, 464, 457, and 450, I haven't
4 taken the time to go through and point out all the times that
5 patented flow control baffles appear in there, but will you
6 take my word for it that those words can be found in each of
7 those brochures?

8 A. I will, yes.

9 Q. And if there's any question about that, at some later date
10 the jury could look at that or the lawyers could look at that,
11 correct?

12 A. Sure, yes.

13 Q. If you wanted to know -- well, strike that.

14 Is it your experience that companies are generally proud
15 of their patented inventions?

16 A. Yes.

17 Q. And again, I think we've already heard that you've seen
18 reference to patented features in Exmark brochures. Didn't we
19 say that this morning?

20 A. I said I -- I looked through the brochures, flipped
21 through them, sure.

22 Q. I think you also said that you have seen reference to the
23 word "patented" in an Exmark brochure and we took the time --

24 A. I believe I did.

25 Q. -- to look at your deposition?

1 A. I believe I did.

2 Q. Yeah, okay.

3 A. Yeah.

4 Q. That would be a good way, if you wanted to find out about
5 what features a company had patented, a good way to do that
6 would be to look at their brochures, right?

7 A. Sure. Yes.

8 Q. And you've done that in -- you recall in the past?

9 A. Yes. I didn't do it in an analytical way, but like we've
10 said, I've seen them, sure.

11 Q. And if you had looked at any of the brochures that we've
12 gone through over the last 15 minutes, you would have seen a
13 reference to patented flow control baffles, correct?

14 A. If I looked and read that whole page, yes.

15 Q. Let's talk about trade shows. You mentioned that trade
16 shows are important in this industry.

17 A. Yes, they are.

18 Q. Everybody in the industry attends them?

19 A. Yes.

20 Q. Everybody shows their products there?

21 A. Yes.

22 Q. Everybody shows their mowers tipped up periodically?

23 A. Probably periodically everybody, yeah.

24 Q. And you -- I think you said you -- you attend multiple
25 trade shows per year.

1 A. Yes, I said I attend one or two, yes, big ones.

2 Q. Did you attend multiple trade shows per year during the
3 time prior to filing this lawsuit when you say you didn't know
4 about the '863 patent?

5 A. Yes.

6 Q. And in the course of attending those trade shows, you saw
7 Exmark decks there, didn't you?

8 A. I did.

9 Q. And you saw Exmark decks tipped up where you could see the
10 flow control baffles?

11 A. I did.

12 Q. And you understand from the testimony that Exmark marks
13 all of its mowers with a patent number?

14 A. Yes, I do.

15 Q. So if you had wanted to know whether those baffles were
16 patented, you could have looked at that marking sticker,
17 couldn't you?

18 A. I could have, yes.

19 Q. Yeah. So -- and I wanted to go back and ask you about the
20 pictures of the mowers that we saw that were in Briggs's
21 possession. I just want to confirm that the three mowers we
22 looked at with the pictures, you had those in your possession
23 during the time that you say you didn't know about the '863
24 patent?

25 A. That's correct -- that's correct.

1 Q. And we saw a reference to the development work you were
2 doing back in the 2000 time frame where you were working on a
3 Ferris mower and using an Exmark mower to try to match its
4 quality of cut. Do you remember that testimony?

5 A. I do.

6 Q. And that was also during the time period that you say that
7 you did not know about the '863 patent.

8 A. That's correct.

9 Q. So here's my -- my ultimate question. I know that you say
10 that you didn't actually know about the patent, right?

11 A. That's correct, yes.

12 Q. When we hear about the mowers you had in your possession
13 that were marked, the brochures that you had in your possession
14 that said patented flow control baffles, the trade shows that
15 you attended where you saw Exmark mowers, when you look back in
16 hindsight, do you think you should have known about Exmark's
17 patent?

18 A. I wish I'd known, that's for sure.

19 Q. I understand that. Do you think you should have known?

20 A. I don't know. I don't know. Like I said, I -- I wish I
21 did. I wish that somebody or somebody told me or I saw it or
22 somebody else saw it there. You know, Exmark promoted, you
23 know, their quality of cut and they were known in the industry,
24 so to be honest with you, when you look through a brochure, you
25 don't even -- you didn't even look at that page. You just flip

1 over it. You walk through the display. You know, Exmark's got
2 a great cut. I mean, they say that everywhere. Your eyes just
3 kind of gloss over it, you walk by it, yeah, they've got a
4 great cut. I didn't look at the details. That's it, that's --

5 Q. Most times when I'm questioning a witness I don't insist
6 on a yes or no answer but this is one of those times where I
7 have to have a yes or no answer.

8 A. I figured you would probably get to that.

9 Q. Yes or no, do you think you should have known about
10 Exmark's patents?

11 A. I would almost have to say yes.

12 Q. And is the reason you say yes because there were a lot of
13 indicators out there that Exmark had this patent?

14 A. Yes. Yeah. I mean, you've done a really good job here.

15 Q. Yeah, stickers on the mowers and the brochure references,
16 did those make it pretty obvious that there was patent issue
17 there?

18 A. They were well marked, yes. Well, I shouldn't say -- they
19 were marked, yes.

20 Q. And so that made it pretty obvious that there was a patent
21 issue?

22 A. I -- you know, I'm not going to go as far to say obvious.

23 Q. Okay.

24 A. I can't go at that had far.

25 Q. Okay. But you certainly agree that you should have known?

1 A. I wish I had known. That's -- if you're asking me how to
2 describe it, you asked me to say yes to the other question. I
3 guess I --

4 Q. Can you say yes a second time?

5 A. Yes, I will say a second time.

6 Q. I want to talk next about the Scag litigation. You spent
7 a lot of time yesterday trying to explain how it is that you
8 got your deposition taken in the Scag case but never found out
9 about the '863 patent.

10 And I kind of want to go over some of the testimony you
11 gave yesterday because you seem to have a pretty good
12 recollection of what happened back in 2002.

13 You testified, first of all, of course, about the details
14 of the questions that were asked at the deposition, right?

15 A. That's correct.

16 Q. A lot of that you can get from just looking at your
17 deposition.

18 A. Yes, I read the deposition three times.

19 Q. Yeah, okay. But you also testified about what happened
20 before the deposition. Do you remember that? I mean,
21 yesterday you testified.

22 A. Yes, yes.

23 Q. Yeah. And I think you testified that the initial contact
24 was by your patent attorney; is that right?

25 A. Yes.

1 Q. And what was his name?

2 A. Jerry Fellows.

3 Q. And he told you during that initial call that it was a
4 patent case, right?

5 A. Yes.

6 Q. And he told you that the -- one party was Scag?

7 A. Yes.

8 Q. And did he tell you at that call that -- that his firm
9 also represented Scag?

10 A. Yeah -- I don't know if he told me that. I knew that --
11 or if I knew it previously. I'm not sure.

12 Q. You're saying that perhaps you knew prior to talking to
13 Mr. Fellows on that instance that Scag and Ferris shared law
14 firms?

15 A. Yes, I -- I don't know exactly when I became aware of
16 that, before or after.

17 Q. Did he also tell you that -- that Toro and Exmark were
18 involved in the case?

19 A. I think he just said Exmark.

20 Q. Okay. And did he indicate that Exmark was the one who
21 owned patents?

22 A. He may have.

23 Q. Was it in that conversation that you were told that you --
24 he couldn't give you details about the case?

25 A. I asked him, I said, well, what's it about? He said I

1 can't give you details.

2 Q. And you recall that in the initial phone call?

3 A. Yes.

4 Q. Okay. And you testified, I believe, that shortly before
5 the deposition, perhaps the night before, you had a meeting
6 with a Mr. Marschall, also a lawyer for Scag?

7 A. Yes.

8 Q. And you testified that at that meeting there was also a
9 discussion that -- that they couldn't tell you anything about
10 the case because of this conflict -- potential conflict between
11 the two companies. Is that right?

12 A. That's correct.

13 Q. Okay. And you testified that Mr. Marschall did not
14 represent you at the deposition, correct?

15 A. That's correct.

16 Q. And, in fact, I think you said several times yesterday
17 that you were not represented at the deposition?

18 A. Right. That was my understanding.

19 Q. Yeah, okay. You also testified about the breaks that
20 happened at the deposition and the fact that nothing was said
21 during the breaks. Do you remember that testimony yesterday?

22 A. Yes.

23 Q. And you have a recollection from 13 years later about what
24 was said at the breaks?

25 A. I know it's a standard procedure not to talk about

1 anything during the breaks, so...

2 Q. Well, now I'm confused because before you said you
3 actually did remember what happened at the breaks.

4 MR. WOLF: Your Honor, mischaracterizing the
5 testimony. He hasn't --

6 THE COURT: Sustained.

7 BY MR. VANDENBURGH:

8 Q. Your Honor -- Mr. Wenzel, do you have a recollection of
9 the breaks in that deposition?

10 A. I guess I don't.

11 Q. And finally, you recalled talking to Mr. Fellows after the
12 deposition; is that right?

13 A. Yes. Yes, definitely.

14 Q. And you recall being unhappy with him at that
15 conversation?

16 A. Yes.

17 Q. All right. I want to test a little bit this recollection.
18 I want to start that by talking about your first deposition in
19 this case. Again, we -- we've already established that you
20 were deposed multiple times in this case, correct?

21 A. That's correct.

22 Q. And the first one of these depositions took place in
23 Munnsville, New York, didn't it? Or I guess I should say
24 Syracuse.

25 A. Okay.

1 Q. I think it was not --

2 A. I was trying to picture Munnsville. I wasn't finding a
3 picture in my mind.

4 Q. I know I was in New York.

5 A. Yeah, okay. Yeah.

6 Q. It was in the Syracuse area?

7 A. Yes.

8 Q. Do you recall that? And do you recall that I took your
9 deposition?

10 A. I'm not going to forget that.

11 Q. And you recall that I took your deposition?

12 A. Oh, yeah, yeah.

13 Q. And -- now, I wasn't involved in the Scag case, right? At
14 least as far as you know.

15 A. No.

16 Q. Okay. And at the first deposition in this case, I asked
17 you whether you'd -- how many times you'd been deposed before.
18 Do you remember that?

19 A. I do.

20 Q. And you mentioned that you'd been deposed twice.

21 A. Yes.

22 Q. Remember that?

23 A. I do.

24 Q. And you indicated that both were product liability cases?

25 A. That's correct.

1 Q. So you never mentioned, in response to my question, that
2 you had been deposed in the Scag case.

3 A. You're right, I did not remember it then.

4 Q. And that's because you'd forgotten it?

5 A. I had forgotten it, yes.

6 Q. Okay. But now you have a detailed recollection of events
7 before, during, and after that you just simply didn't remember
8 when I asked you about it at your deposition that was five
9 years ago?

10 A. That's correct. You want me to explain why?

11 Q. Please.

12 A. Okay. I -- I didn't remember it. I had these little
13 flashes of a hotel in Vernon. That doesn't -- oh, there.
14 Remember lawyers. I can't -- I don't picture my lawyer. Then
15 I pictured -- and there's a little flash in my memory of
16 standing next to our patent attorney in Fort Washington,
17 Wisconsin, looking underneath a walk-hind mower and it just --
18 that's just flashing through my mind. You know, you're waiting
19 for an answer. So I said no.

20 And it was driving me crazy. Just -- there was these
21 inferences that this had all been exposed to me at some point.
22 And I was -- I was fearful to the point that I couldn't sleep
23 at night that I had somehow seen this patent and somehow didn't
24 recognize its importance and had somehow brought this all down
25 on our company.

1 And our -- our patent -- or not our patent counsel, but
2 our counsel that represents us in this case, I said, guys, if I
3 gave a deposition, can I see it? Is that legally allowed?
4 Because this is driving me crazy. If I -- if I messed up so
5 bad that I saw this, I just need to know.

6 And that's when they gave me the copy of the deposition.
7 Well, once I started reading it, well, then it all came back to
8 me.

9 So I'm sorry it makes me look like a villain, but that's
10 the honest to God truth.

11 Q. Okay. Another possible explanation for it is that you
12 just didn't want to tell me about the Scag deposition at that
13 point --

14 MR. WOLF: Objection, Your Honor.

15 BY MR. VANDENBURGH:

16 Q. -- isn't that possible?

17 A. No, absolutely not. Insulted by that.

18 THE COURT: You got the answer you wanted, Mr. Wolf.

19 MR. WOLF: I guess my witness can defend himself.

20 THE COURT: Well, you never know.

21 All right. You may continue, Mr. Vandenburgh.

22 BY MR. VANDENBURGH:

23 Q. Now, you've testified very clearly that it was your
24 attorney, Mr. Fellows, who first contacted you regarding giving
25 a deposition in the Scag case, correct?

1 A. Yes.

2 Q. And in 2002, Mr. Fellows is the person who's
3 responsible -- who's in charge of monitoring competitor patents
4 for Ferris, right?

5 A. He's our -- he's our patent counsel, yes.

6 Q. And as part of that, he handles this clearance process
7 that you referred to?

8 A. Yes.

9 Q. Okay. Now, when you were deposed in the Scag case, you
10 didn't remember that it was Mr. Fellows -- Mr. Fellows who
11 contacted you first regarding that case, right?

12 A. That's correct, I didn't remember.

13 Q. Okay. So you have a clear recollection now, you know it
14 was Mr. Fellows?

15 A. I don't know who else I would have talked to. He's --
16 he's our patent attorney. I don't know who else would have
17 contacted me.

18 Q. Roughly how long before -- or after that initial contact
19 were you deposed in the Scag case?

20 A. I -- oh, I don't -- I don't remember that well.

21 Q. Well, was it less than six months?

22 A. I think so.

23 Q. Would you be surprised if you indicated if in your
24 deposition that it was roughly two months, in your Scag
25 deposition?

1 A. No.

2 Q. Okay. So two months after you were contacted, you
3 couldn't remember whether it was Mr. Fellows who contacted you,
4 but here, 13 years later, you're sure it was Mr. Fellows; is
5 that right?

6 A. When you put it like that, I -- I -- that's the best of
7 my -- I mean, I don't know who else would have contacted me.
8 He was my patent guy. But I mean, if there's -- so I guess
9 I -- I guess I can't absolutely swear to you that I remember
10 perfectly that it was Mr. Fellows. I know it was from that --
11 that firm. I assume it would be Mr. Fellows because he's
12 our -- our patent guy there. I don't -- I don't remember any
13 relationship with someone else.

14 Q. That goes to my next point, which is Mr. Marschall, who
15 was at the deposition asking questions, he was also your
16 lawyer, wasn't he?

17 A. I -- I don't -- I don't know.

18 Q. Okay. You have testified numerous times both yesterday
19 and today that you were not represented at the deposition,
20 correct?

21 A. That was my understanding.

22 Q. Okay. And, now, you met with Mr. Marschall both before
23 the deposition and he -- you said you sat with him during the
24 deposition, right?

25 A. Yes.

1 Q. Okay. And I want to get one of the questions exactly from
2 yesterday. And I'm quoting from page 979 of the transcript
3 where Mr. Wolf said:

4 And this is really important. Was Mr. Marschall your
5 lawyer or Scag's lawyer when you met with him?

6 And you answered: Scag's lawyer.

7 Do you remember that testimony yesterday?

8 A. Yes.

9 Q. Okay. Let's turn to your transcript of the Scag
10 testimony. I think it's the very last tab in your binder.

11 A. Yep.

12 Q. If you'd go to page 62.

13 MR. VANDENBURGH: And I'd like to show this,
14 Your Honor, while I read it. And it's starting at line 14.

15 THE COURT: You may. What page is it, counsel?

16 MR. VANDENBURGH: Page 62.

17 THE COURT: 14?

18 BY MR. VANDENBURGH:

19 Q. And this is -- this is from your transcript, right?
20 You're the --

21 A. Yes.

22 Q. -- one testifying in this case?

23 A. Yes.

24 Q. Okay. So at line 14 it says: Okay. Mr. Marschall has
25 referred several times to potential of attorney-client

1 privileged issues. Is it your understanding that you're
2 represented by Mr. Marschall here today?

3 Answer: Yes.

4 Did I read that correctly?

5 A. I guess you did.

6 Q. So the testimony that you gave numerous times over the
7 last two days was incorrect on this point?

8 A. I believe you're right.

9 Q. You were, in fact, represented by counsel at that
10 deposition?

11 A. I believe you're right. I believe I was wrong. Didn't
12 feel like it, but...

13 Q. So that goes to my final point on the deposition.

14 I believe you've testified that both of your lawyers,
15 Mr. Marschall and Mr. Fellows, refused to tell you about the
16 case, right?

17 A. That's correct. That's correct.

18 Q. But they -- they did give you some information, right?
19 They told you that it was a patent case?

20 A. Told me it was a patent case, yes.

21 Q. And they told you who the parties were, that it was Exmark
22 and Scag, right?

23 A. They did.

24 Q. And they told you that because that's public information
25 and they can give you that information, right?

1 A. I -- I don't -- I guess so. You know better than I do,
2 sure.

3 Q. Yeah. They weren't breaching any confidentiality by
4 telling you who the parties were or the fact that it was a
5 patent case?

6 A. Probably not. They're pretty ethical guys, I would think.

7 Q. Okay. So let me ask you a very specific question. Did
8 you ever ask them what patents were involved in that lawsuit?
9 Did you ask, specifically identify the patents for me?

10 A. I did not.

11 Q. Did you want to know what the patents were in that case?

12 A. I wanted to know what's at issue, yes.

13 Q. Okay. And patents, you know, you're an inventor, they're
14 not secret, are they?

15 A. No, once they're published they're not secret; no, not at
16 all.

17 Q. We saw the Complaint yesterday that identified the patents
18 at issue in the Scag case. That's not a secret document, is
19 it?

20 A. Say that again.

21 Q. The Complaint that your counsel showed you yesterday that
22 identified the patents that were at issue in the Scag case, is
23 that Complaint a secret document?

24 A. I don't know.

25 Q. Okay. These are your two largest competitors in the

1 landscape mower business, correct, Scag and Exmark?

2 A. They are -- they're the biggest. They're the market
3 leaders, yes.

4 Q. Okay. And they're -- you know that they're locked in a
5 patent battle --

6 A. Yes.

7 Q. -- correct?

8 A. That's correct.

9 Q. Okay. And you know that it's Exmark's patents at issue,
10 right?

11 A. I do.

12 Q. And we've established earlier that you regularly look at
13 the Exmark mowers that you own to help you solve problems,
14 right?

15 A. Yes.

16 Q. Don't you think that a reasonable person would have asked
17 specifically what are those patents in that lawsuit?

18 A. I thought I did.

19 Q. You testified, I believe, about three minutes ago, that
20 you -- the one question you didn't ask your lawyers is what are
21 the patents at issue in the lawsuit. Are you now changing that
22 testimony?

23 A. No, I'm not trying to change my testimony.

24 Q. Okay.

25 A. I just didn't understand what you were saying. I -- if I

1 had realized that I -- I thought I was asking that. I didn't
2 realize if I'd asked the question technically different that I
3 could have gotten all the information that -- that I would have
4 loved to have had.

5 Q. Now, it sounds like you also know that your lawyers were
6 in a conflict situation, right?

7 A. Yes.

8 Q. And they couldn't give you all the information that you
9 wanted because of the conflict situation?

10 A. That's correct.

11 Q. Right?

12 A. Yes.

13 Q. Doesn't it make that all the more important that you
14 figure out what patents are in that lawsuit so you can have an
15 independent lawyer do an analysis?

16 A. Does today.

17 Q. Again, looking back in hindsight, don't you think you
18 should have known about Exmark's '863 patent in 2002 during the
19 Scag litigation?

20 A. Not on that point, no.

21 Q. Not willing to agree with me on that?

22 A. No, I'm not willing to agree with you on that.

23 Q. Let's go to some lighter-hearted subject matter. Let's
24 talk about your iCD Cutting System.

25 A. Okay.

1 Q. So when did the iCD Cutting advertising campaign kick off?

2 A. Approximately 2008.

3 Q. Okay. And so before the iCD Cutting System campaign, you
4 were selling the mowers with the original baffle design that
5 had been found to infringe, correct?

6 A. That's correct.

7 Q. And you made some changes to the deck as part of the iCD
8 Cutting System, correct?

9 A. We did.

10 Q. But even -- those modifications aren't the ones that you
11 claim avoided infringement of the patent, right?

12 A. That's correct.

13 Q. So the ones that were sold, starting between 2008 and
14 2010, are -- still have the original baffle design, at least
15 one of those versions?

16 A. That's correct.

17 Q. Let's look at --

18 MR. VANDENBURGH: If we could, pull up Exhibit 313.
19 I believe it's already been admitted.

20 THE WITNESS: 313.

21 MR. VANDENBURGH: And if we could just pull up the
22 deck and three points across the side, that would be great.

23 BY MR. VANDENBURGH:

24 Q. So the primary emphasis of this advertisement is the deck
25 and then these three bullet points on the right that indicate

1 Superior Cut Quality, Innovative Design, and Excellent
2 Discharge. Do you see that?

3 A. Well, I'm getting there.

4 Q. Okay.

5 MR. WOLF: Counsel, I think you gave the wrong
6 exhibit number.

7 MR. VANDENBURGH: Did I?

8 MR. WOLF: Or at least I don't have --

9 MR. VANDENBURGH: I think I have it as -- I switched
10 it to 313 because that's already admitted. It's also 314.

11 MR. WOLF: It's not in our binders, but that's fine.

12 THE COURT: Three -- it's either 314 or 313, counsel?

13 MR. VANDENBURGH: Those two exhibits are essentially
14 the same document, Your Honor.

15 THE COURT: All right.

16 MR. WOLF: Your Honor, 314, not 313. Either way he
17 wants to do it.

18 MR. VANDENBURGH: Right, right. Let's stick with
19 313. It's already been admitted.

20 MR. WOLF: I don't have it, but no objection.

21 THE WITNESS: I don't have it either, but...

22 MR. VANDENBURGH: Okay. Let's -- well, then let's go
23 ahead and move to 314 because then we're looking at the one
24 we've all got. It's actually a little clearer document too.

25 THE COURT: So is there any objection --

1 MR. WOLF: No, Your Honor.

2 THE COURT: 313 --

3 MR. VANDENBURGH: Publish this for the jury?

4 THE COURT: 314's received and it may be published.

5 BY MR. VANDENBURGH:

6 Q. So 314 is very similar to Exhibit 313, isn't it?

7 A. I don't have 313.

8 THE COURT: He doesn't have --

9 MR. VANDENBURGH: Well, showed it on the screen a
10 minute ago. Sorry.

11 BY MR. VANDENBURGH:

12 Q. Can you tell us what Exhibit 313 is?

13 A. It's part of an advertising -- no, a website. Is it our
14 website? Looks like it on the top. I --

15 MR. VANDENBURGH: Can you take off the below print
16 now?

17 BY MR. VANDENBURGH:

18 Q. You can see the whole document there?

19 A. Oh, okay. Yeah.

20 Q. That's an advertisement for your iCD Cutting System?

21 A. Yes.

22 Q. Okay.

23 MR. VANDENBURGH: You can go ahead and blow that back
24 up.

25 BY MR. VANDENBURGH:

1 Q. So again, if we look on the left, we can see the original
2 baffle design there, correct?

3 A. You talking about this left or...

4 Q. On the picture that's shown there, the underside of the
5 deck, that's the original baffle design that's been found to
6 infringe in this case, correct?

7 A. Yes.

8 Q. An example of.

9 A. Yes.

10 Q. Okay. Now, I want to be clear, because there's been
11 testimony on this before, did the baffle design, the shape of
12 the baffles, change at all in connection with introducing the
13 iCD Cutting System?

14 A. Not -- not where -- in the area of the infringement, no.

15 Q. Okay. Now, there's a reference over there to Innovative
16 Design. Do you see that?

17 A. Yes.

18 Q. What features were innovative in this product?

19 A. I don't know if I can specifically call out innovative
20 there.

21 Q. You consider anything to be particularly innovative in
22 that design?

23 A. No, I would have to say it would not be.

24 Q. Now, there's a patented design shown in that picture,
25 right? It's Exmark's patent.

1 A. That would be correct.

2 Q. Did you file any patent applications on this innovative
3 design?

4 A. We did not.

5 MR. VANDENBURGH: Let's blow up the text down below.

6 BY MR. VANDENBURGH:

7 Q. Read the text there. It says: The new iCD Cutting System
8 is more than cutting edge, it provides you with a competitive
9 edge. Offering you unparalleled cut quality with redesigned
10 baffle chambers for superior airflow and optimum discharge.

11 Now, your counsel, I believe, sought some testimony from
12 you that indicated that "redesigned baffle chambers" didn't
13 actually refer to the baffles at all, correct?

14 A. Yes.

15 Q. And that's your testimony, that when it says "redesigned
16 baffle chambers," it's not actually talking about the chamber
17 defined by the baffles?

18 MR. WOLF: Objection, mischaracterizes.

19 THE COURT: It's cross-examination. Overruled.

20 A. Say that one more time just so I make sure how I answer
21 this here.

22 BY MR. VANDENBURGH:

23 Q. Is it your testimony that when it says "redesigned baffle
24 chambers," it's not talking at all about the baffles and the
25 chamber defined by those baffles?

1 A. It is or it isn't?

2 Q. Why don't I just ask you. Is it --

3 A. Oh, okay.

4 Q. -- referring to the baffles and the chamber defined by
5 those baffles?

6 A. I would say so, yes.

7 Q. Is it your testimony that it's actually referring to the
8 blades?

9 A. They're within that chamber.

10 Q. So -- so then you believe that when it says "redesigned
11 baffle chambers" it's referring to the blades because those are
12 also inside that space?

13 A. Boy, it's just -- marketing people write this stuff that I
14 can -- it's amazing how this can come back to haunt you looking
15 at this stuff and how technical this is, so...

16 Q. So can you answer my question?

17 A. I would -- I would say that the blades are within the --
18 the baffle chamber but I wouldn't say they are the baffle
19 chamber.

20 Q. Okay. And I guess a more specific question would be when
21 will it says "redesigned baffle chambers," is that Briggs's way
22 of calling outs the blades?

23 A. No.

24 Q. No. And when it says "redesigned baffle chambers," it's
25 not calling outs the shape of the front wall, right?

1 A. No.

2 Q. And when it says "redesigned baffle chambers," it's not
3 talking about the size of the discharge opening?

4 A. Well, that's what it was, but maybe -- maybe not in the
5 context of what we've been reviewing here, but that was the
6 intention of it.

7 Q. The only feature that's called out in this brochure is the
8 redesigned baffle chambers, correct?

9 A. Yes.

10 Q. So let's go to a different exhibit that does call out some
11 other features.

12 MR. VANDENBURGH: Go to Exhibit 311.

13 BY MR. VANDENBURGH:

14 Q. Turn to that in your binder.

15 MR. VANDENBURGH: Is there any objection to this one?

16 MR. WOLF: No, Your Honor.

17 THE COURT: 311's received.

18 MR. VANDENBURGH: Like to offer that into evidence
19 and publish to the jury.

20 THE COURT: Yes, you may.

21 BY MR. VANDENBURGH:

22 Q. Now, this is an advertisement from Ferris's website,
23 correct?

24 A. Appears so, yes.

25 Q. Now -- let's first focus on the -- on the top text.

1 So on that top text, the first line is again similar to
2 what we saw before. It says, "The innovative iCD Cutting
3 System" --

4 THE COURT: Slow down.

5 BY MR. VANDENBURGH:

6 Q. -- "allows for better airflow discharge and superior cut
7 quality."

8 Do you see that?

9 A. Yes, I do.

10 Q. Now, down below, we have a number of call-outs of
11 different features on that deck, right? Do you see that?

12 A. Yes.

13 Q. Okay. How many of them refer to baffle chamber design?

14 A. Can you pull that up just a little further?

15 There.

16 Q. Can you read that?

17 A. Looks like one.

18 Q. One.

19 A. Yeah.

20 Q. And can you read that text for us.

21 A. "Baffle chamber design increases air flow and reduces
22 clumping."

23 Q. And the lead line from that particular one points
24 specifically to the front baffle, correct?

25 A. Yes, it points to the baffle leading to the discharge.

1 Q. Okay. And it's the original front baffle that is part of
2 the original design that's already been found to infringe?

3 A. I don't -- I think the -- I think that part of -- isn't
4 that part of the baffle not part of the infringement?

5 Q. I'd rather not go into an entire claim reading,
6 Mr. Wenzel, but I certainly -- are you comfortable reading the
7 claims at issue in this case?

8 A. No, I'm just referring to everything that I've heard and
9 seen over here the last couple of days.

10 Q. And so you've heard the testimony that the claim requires
11 a front flow control baffle that extends from a location
12 adjacent one side of the deck to a location adjacent the other
13 side wall of the deck?

14 A. Yes.

15 Q. Okay. So it does in fact implicate the portion of the
16 flow control baffle that's indicated by that arrow, right?

17 A. Yes, of that portion, yeah.

18 Q. Okay.

19 A. Agree.

20 Q. Now, there's other call-outs in there that don't refer to
21 the baffle chamber design, right?

22 A. No, just says the "Extra wide chute opening discharge for
23 dispersal of grass," but it doesn't refer to that as a wide --
24 wider baffle chamber opening.

25 Q. So one thing we can conclude then is that in the previous

1 exhibit where it refers to the baffle chamber design, that in
2 fact what we're talking about are the baffles?

3 A. Well, that wasn't the intention, but it -- it appears you
4 can make a case for that.

5 Q. The other features in this deck that are called out, one
6 of them is the sloped nose on the front of the deck, right?

7 A. Yes.

8 Q. Now, that wasn't an innovative feature of a lawn mower
9 deck, was it?

10 A. It was new to us. I don't know as it's that innovative,
11 no.

12 Q. You've seen it on lots of other decks, haven't you?

13 A. Sure.

14 Q. Toro has a sloped nose?

15 A. Scag.

16 Q. Scag has a -- I was going to get there. But Toro has a
17 sloped nose, right?

18 A. Yes.

19 Q. And Scag has a sloped nose?

20 A. Yes.

21 Q. We saw a picture of a Scag deck earlier today with a
22 sloped nose?

23 A. We did.

24 Q. Okay. How about Marbain steel blades? Is Briggs the only
25 company that sells Marbain steel blades?

1 A. We're not the only company, no.

2 Q. What is Marbain steel?

3 A. It's a specialty steel. It is innovative to blades but
4 not exclusive to -- I mean, other mower manufacturers can buy
5 it. Separates different blade companies.

6 Q. It's not a -- a differentiator for Briggs, right?

7 A. It's not a differentiator for Briggs, no.

8 Q. How about the extra wide discharge chute? Is this an
9 innovative feature?

10 A. Not in the way that I would define innovative, I guess,
11 no.

12 Q. Okay. And the last call-out is -- relates to the
13 spindles. Don't most mower manufacturers have access to the
14 same spindles?

15 A. No. I mean, we custom -- those are custom mold and
16 things.

17 Q. But -- they're specifically designed for your product but
18 they're designed by third parties, right?

19 A. No, we design them.

20 Q. Well, they are manufactured by third parties?

21 A. Manufactured by a third party, yes.

22 Q. And those third parties manufacture for other mower
23 manufacturers as well, right?

24 A. I don't know about that, that they would be -- I don't
25 think they are. I think that's a machining operation that

1 makes those for us.

2 Q. Okay. Perhaps we'll come back to that one.

3 I want to talk next about other ways that you advertised
4 your iCD Cutting System. You actually had a display of an
5 actual metal deck that you sent out to dealers, correct?

6 A. We did.

7 Q. If you turn to Tab 37 in your binder.

8 Is that a photograph of one of these iCD displays?

9 A. I'm trying to get there. There's a lot of stuff in here.
10 I'm sure it probably is if you say so.

11 I'm there.

12 Q. Okay. Do you recognize that as a photograph depicting one
13 of your iCD displays that Briggs provided to dealers?

14 A. I believe it is.

15 MR. VANDENBURGH: I'd offer Exhibit 37, Your Honor.

16 THE COURT: Any objection?

17 MR. WOLF: No objection.

18 MR. VANDENBURGH: Publish that to the jury.

19 THE COURT: Exhibit 37's received. You may publish.

20 BY MR. VANDENBURGH:

21 Q. You actually sold these to your dealers, didn't you?

22 A. I don't know if we sold them to them or gave them to them.
23 I -- I don't know that detail.

24 Q. Okay. In terms of calling out features in this display,
25 all we really have are the names -- the word iCD and three

1 yellow arrows, right?

2 A. Yes.

3 Q. And those three yellow arrows define the airflow that's
4 created underneath this deck, correct, when the blades spin?

5 A. I'm not exactly sure but they certainly could be.

6 Q. Do you disagree with me on that? Do you think they might
7 be something else?

8 A. Well, it doesn't seem to make sense that it would be the
9 direction of the blade, so I would say it's probably the
10 direction that the grass is being discharged from the grass --
11 from the --

12 Q. I probably asked a poor question. That was actually what
13 I was trying to get at. It's indicating how the grass moves
14 inside this deck?

15 A. Yes.

16 Q. And that flow in this deck is controlled by that front
17 flow control baffle, correct?

18 A. Both the front and the rear.

19 Q. Right. And that flow control baffle system is the
20 original baffle design that's already been found to infringe in
21 this case, correct?

22 A. That's correct.

23 Q. Now, after the suit was brought, you stopped showing the
24 underside of your deck in your marketing materials relating to
25 the iCD system, right?

1 A. We did.

2 Q. And can we see an example of that in Exhibit 327, if I'm
3 not mistaken?

4 MR. VANDENBURGH: I'd offer 327, Your Honor.

5 MR. WOLF: No objection.

6 THE COURT: 327 is received.

7 MR. VANDENBURGH: Publish that for jury?

8 THE COURT: Yes, you may.

9 BY MR. VANDENBURGH:

10 Q. So is this representative of how you advertise the iCD
11 Cutting System after this lawsuit was brought?

12 A. It is.

13 Q. The baffles are still under there, aren't they?

14 A. They are.

15 Q. You didn't -- you didn't take those baffles out of there?

16 A. No, didn't take them out.

17 Q. Okay. You just stopped talking about them in your
18 advertising?

19 A. Yes.

20 Q. I want to talk a bit about now -- we've heard about your
21 suspension technology. You put great value on your suspension
22 technology, don't you?

23 A. We do.

24 Q. It's a very important feature for Briggs in distinguishing
25 its products from that of its competitors?

1 A. It is. We feel it is.

2 Q. And you have patents on that system, right?

3 A. We have many patents on the system.

4 Q. And you want your competitors to respect those patents,
5 don't you?

6 A. Yes.

7 Q. And you've brought suit when people have infringed those
8 patents, correct?

9 A. Yes.

10 Q. And just to be clear, when you brought that suit, did you
11 first call the infringer up and say we'd like to give you a
12 license for \$10 a unit?

13 A. On that particular -- or tell me who you're speaking to
14 exactly.

15 Q. Well, let's -- tell me which one -- have there been more
16 than one?

17 A. Yes.

18 Q. You've filed multiple lawsuits?

19 A. No, we didn't file suit --

20 Q. Okay. How many have you filed suit on?

21 A. I think one.

22 Q. Okay. And in that one, did you call the potential
23 infringer up ahead of time and offer them a license for \$10 a
24 unit?

25 A. I did not.

1 Q. Would Briggs have been happy to do that at that time?

2 A. To call them up or to offer -- or to sell --

3 Q. Offer them a license for \$10 a unit?

4 A. We'd be willing to negotiate.

5 Q. And you'd be willing to negotiate and end up at \$10 a
6 unit?

7 A. I don't think it would be fair to -- to calculate what
8 that would be without any other factors at this point.

9 Q. So is the answer to my question "no"? You wouldn't be
10 willing to license for \$10 a unit?

11 A. Probably not, no.

12 Q. Now, the primary aspects of your suspension that you
13 market are the productivity and speed advantage it provides,
14 right?

15 A. That's -- yes.

16 Q. And that's because productivity is extremely important.
17 Correct?

18 A. Yes.

19 Q. Sorry.

20 A. I didn't know it was a question.

21 Q. Yeah.

22 A. Thought it was a statement.

23 Q. Now, have you heard the -- you heard the Exmark witnesses
24 say that having a good quality of cut is more important than
25 having -- than the ride of the mower? Did you hear our

1 witnesses say that?

2 A. Yes, I did.

3 Q. Do you agree with that statement?

4 A. No.

5 Q. You don't?

6 A. No.

7 Q. Let me ask this carefully. Isn't it true that if there's
8 one thing that matters more than the ride, it's the cut? Do
9 you agree with that statement?

10 A. It's the -- you know, it's a quantitative -- you know,
11 just the cut in general is -- I don't -- I don't agree with
12 that. There's a level of acceptance and then there's an
13 exceptional cut.

14 Q. Do you tell your customers that if there's one thing that
15 matters more than the ride, it's the cut?

16 A. We do that?

17 Q. Do you do that? That's my question.

18 A. I don't believe so.

19 MR. VANDENBURGH: Okay. I'd like to show a -- an
20 excerpt of Exhibit 479. There hasn't been any objection to
21 that exhibit, Your Honor.

22 THE COURT: Are you moving -- are you moving to --

23 MR. VANDENBURGH: Well, because we're going to show
24 it, I would like to move its admittance and have it played for
25 the jury.

1 THE COURT: Any objection?

2 MR. WOLF: The only concern, Your Honor, it's an
3 excerpt of the video, so I don't know --

4 THE COURT: How long is the video, counsel?

5 MR. VANDENBURGH: The video's about -- I think
6 three -- a little over three minutes. The excerpt that we have
7 is I think probably 20 seconds. We had the same issue come up
8 yesterday where there was an excerpt shown for the jury.

9 THE COURT: No, I don't have a problem with the
10 excerpt. I just wanted to have an idea of how long the video
11 is.

12 So you may play the excerpt and of course counsel for the
13 defendant can play the whole thing.

14 MR. WOLF: Okay.

15 THE COURT: Or the jury will be able to play the
16 whole thing --

17 MR. WOLF: That's the only thing -- we want the whole
18 context, Your Honor.

19 THE COURT: The objection's overruled.

20 MR. WOLF: I'm sorry, I withdrew the objection.

21 THE COURT: Oh, okay.

22 MR. WOLF: Not that it matters, but I withdrew the
23 objection based on...

24 THE COURT: Thank you.

25 MR. VANDENBURGH: Go ahead.

1 (A video clip was played.)

2 BY MR. VANDENBURGH:

3 Q. So you heard that indication, if there's one thing that's
4 more important than the ride, it's the cut?

5 A. It looks like those marketing folks are getting me in
6 trouble right and left here.

7 Q. So do you think your marketing people are wrong?

8 A. I do.

9 Q. Perhaps you need to get a new marketing department.

10 A. Perhaps.

11 Q. I want to go to Defendant's Exhibit 811, which was shown
12 to you yesterday.

13 MR. VANDENBURGH: I think it's already been admitted;
14 if we could publish it, Your Honor.

15 THE COURT: Yes, you may.

16 MR. VANDENBURGH: If you could blow up in the first
17 half.

18 BY MR. VANDENBURGH:

19 Q. And I think you testified yesterday that this is typical
20 of the way that you advertise your suspension. Do you remember
21 that testimony?

22 A. Yes.

23 Q. Okay. So when we look on the left-hand side, you're
24 explaining how your independent suspension works, right?

25 A. Yes.

1 Q. And then on the right side, you give the benefits of your
2 suspension. Correct?

3 A. Yes.

4 Q. Okay. And in order, it's productivity, speed, consistency
5 of cut, extended mower life, and then comfort. Correct?

6 A. That's correct.

7 Q. So relatively speaking, you would agree that productivity
8 is more important than comfort? For most people?

9 A. Well, if -- if -- if you -- I guess this was fair play
10 from yesterday. If -- if you take it that the order means the
11 order of importance, yes. But I wouldn't necessarily agree
12 with it, but it certainly was yesterday --

13 Q. Well, certainly your counsel --

14 A. I know.

15 Q. Your counsel when he was examining our witnesses suggested
16 the order mattered, correct?

17 A. Yeah, I get it.

18 Q. All right. I want to talk a bit about that speed one that
19 you indicated there.

20 I think if I understand testimony I've heard and what I've
21 read, the theory on speed is if the -- if the person riding on
22 the mower isn't bouncing around so much, they tend to go
23 faster, right?

24 A. Yes.

25 Q. Is that also the productivity advantage of the independent

1 suspension, that they drive faster and so they're more
2 productive?

3 A. They can drive faster longer, yes.

4 Q. Okay. Now, at some point, the speed of a mower when
5 you're cutting is limited by the ability of the deck, correct?

6 A. Sure. If the grass is really tall, sure.

7 Q. Okay.

8 A. Yeah.

9 Q. Or if it's really thick, you can drive -- perhaps -- let
10 me ask this question: Your mower allows and encourages people
11 to drive faster, but if they outdo what the deck can handle,
12 they're going to end up with a bad quality of cut. Agreed?

13 A. Yes.

14 Q. Okay. So if you paired your suspension up with a poor
15 cutting deck, you'd have a problem, right?

16 A. I -- I think you're -- you're kind of comparing apples and
17 oranges a little bit there.

18 Q. And I'm not trying to get at the issue of what's a poor
19 cut versus a good cut in this industry. I understand your
20 testimony regarding the -- how experts look at it versus
21 perhaps laymen. I'm not trying to get at that issue.

22 A. Yeah.

23 Q. But if you had a truly poor cutting deck that didn't work
24 well --

25 A. Okay.

1 Q. -- and you teamed it up with something that was really
2 fast, that could be a problem, right?

3 A. Could be a problem, sure.

4 Q. Okay. And -- now, you do agree that -- or I think we
5 heard testimony that it's your view that prior to the iCD
6 Cutting System, Ferris was known as having a mediocre cutting
7 deck, at least by professional standards, correct?

8 A. I would agree with that.

9 Q. Would you say it was even below mediocre?

10 A. No.

11 Q. Okay. Mediocre?

12 A. Yeah.

13 Q. Okay. We established this morning that in 1997 the reason
14 that the front baffle was added to your mowers was to improve
15 quality of cut. Do you remember that?

16 A. Yes, that's what that said on that engineering change
17 notice.

18 Q. It's reasonable --

19 A. Yep.

20 Q. -- to assume that they weren't making that up, right?

21 A. Yes, absolutely.

22 Q. Okay. So doesn't that mean that if you removed the baffle
23 from the mower you were selling prior to the iCD Cutting
24 System, the quality of cut with that deck might drop from
25 mediocre to really, really subpar, right?

1 A. I don't know how much it would drop but I think it's
2 reasonable to assume that it would drop, yes.

3 Q. Okay. And it might actually drop to the point where your
4 mowers weren't even able to compete at all in the marketplace
5 even with their suspension, correct?

6 A. I don't know if I could agree with that. We were selling
7 mowers prior to and after, so...

8 Q. But -- but prior to having those baffles, you weren't
9 competing for very long, at least, with Exmark's mowers having
10 the '863 patented invention, right?

11 A. That's fair to say.

12 Q. So Exmark sort of raised the cutting level to -- the
13 cutting technology to a new level?

14 A. They definitely raised the cutting level, yeah, sure.

15 Q. And if you weren't able to somehow keep pace with that,
16 you were going to have a hard time selling lawn mowers, right?

17 A. To some degree, yes.

18 Q. I'd like to look at some more examples of the documents
19 that your counsel showed you relating to selling value. And if
20 I could have you turn in your tab -- in your book to Tab 366.

21 And if you could just start by identifying what
22 Exhibit 366 is.

23 A. This is a big book here.

24 MR. WOLF: Do you want him to use my book or yours?

25 MR. VANDENBURGH: Oh, he -- I think it's our book --

1 A. Okay. I got it.

2 BY MR. VANDENBURGH:

3 Q. Yep.

4 A. 366.

5 Q. And what is that document?

6 A. It says Spring Ahead. Looks to be this Ferris Spring
7 Training 2002.

8 Q. This is a document that Ferris provides to its dealers?

9 A. Yeah.

10 MR. VANDENBURGH: I'd offer Exhibit 366, Your Honor.

11 THE COURT: Any objection?

12 MR. WOLF: No, Your Honor.

13 THE COURT: 366 is received.

14 MR. VANDENBURGH: If I may publish to the jury?

15 THE COURT: And you may publish.

16 BY MR. VANDENBURGH:

17 Q. Then I'd like to have you turn to the page that bears the
18 document control number ending in 38- -- or I'm sorry, 584.

19 MR. VANDENBURGH: Just generally blow that up.

20 BY MR. VANDENBURGH:

21 Q. So this is another example of what we saw earlier this
22 morning, right?

23 A. Yes.

24 Q. And Briggs provides a lot of these over the years,
25 correct?

1 A. "These" meaning?

2 Q. These -- these pages that show the value in dollar
3 quantities that you get when you buy a Briggs mower.

4 A. This was in -- for internal training for the salespeople,
5 so not a brochure that we put out.

6 Q. Understood. But you put these in a lot of your training
7 materials, correct?

8 A. We put them in training materials. I don't know how many.

9 Q. Okay. And this is for the purpose of training dealers?

10 A. First training salesmen and then training dealers, yes,
11 correct.

12 Q. And the dealers are the ones that interact with the
13 customers, correct?

14 A. Yes.

15 Q. And so in part, this information is loading up the
16 salespeople with things they can tell customers why they should
17 buy a Ferris mower, correct?

18 A. Yes.

19 Q. And these are things they could say to justify the price
20 of a Ferris mower, right?

21 A. Yes.

22 Q. So you went through, again, another one of these and --
23 well, I'll start by asking you this question. Are there any
24 items on here that are only worth \$10?

25 A. I don't see any.

1 Q. I thought it was interesting this morning when you were
2 going through the other one -- this is pretty close to a quote.
3 You got to the internal fuel reservoir and you said it's not
4 even enough to explain.

5 You remember saying that? Kind of passed that one by.

6 A. I did because I wasn't supposed to explain at all, so I
7 did say that, yes.

8 Q. Okay. But even an internal reserve reservoir you value at
9 \$25. Correct?

10 A. That's correct.

11 Q. And you know that in this case Briggs's damages expert
12 says that a reasonable royalty on Exmark's invention is \$10 a
13 mower, correct?

14 A. Yes. Of course, these are retail prices, not wholesale
15 prices or costs.

16 Q. Okay. How much is the markup between your sales price and
17 the end -- what's the markup between your sales price and what
18 the end user pays?

19 A. Probably about another 20 percent.

20 Q. So if we upped the \$10 per mower that Briggs's expert says
21 is appropriate in this case and said, okay, let's look at
22 that -- at the value to the end user, that'd be \$12?

23 A. Yes.

24 Q. Okay. So the internal reserve reservoir is still worth
25 twice what your expert says the invention in this case is

1 worth. Correct?

2 A. Yeah, that's what all these sales guys put this together.

3 Q. Okay.

4 A. Of course, you add everything up, yep.

5 Q. Now, your sales guys say that an additional one horsepower
6 is worth \$100. Do you see that at the bottom?

7 A. Yes.

8 Q. And did you hear testimony that among the many benefits of
9 Mr. Busboom's invention is that it actually reduces horsepower
10 demand on the engine?

11 A. I did.

12 Q. You may not agree with this, but let's assume that his
13 invention reduced it by one horsepower. Based on that feature
14 alone, even if it did nothing else, it'd be worth \$100,
15 wouldn't it?

16 A. No, because there's a perception by the customers
17 that -- you know, if you had a 23-horsepower mower and you had
18 a 24-horsepower mower, customers are going to have a hard time,
19 but they're just going to buy the bigger one. They'll pay
20 the \$100.

21 Q. But in terms of the performance, it would be roughly the
22 same, correct?

23 A. I -- I couldn't verify that. That was -- I mean, that's
24 something that I couldn't verify. Could be correct.

25 Q. Yeah. You've -- there's a reference in there to the

1 foot-operated deck lift that's worth \$75. Do you see that?

2 A. Yes, I do.

3 Q. And I think you said that that's instead of having a
4 hand-operated deck lift, correct?

5 A. Yes.

6 Q. Okay. So having a foot-operated deck lift, even at
7 retail, is worth at least five times the invention of the '863
8 patent, at least according to your expert?

9 A. Our -- according --

10 Q. According to Briggs's expert who says it's \$10 a mower for
11 the Busboom invention.

12 A. Okay. I get the math, but the expert didn't put this
13 together too, so...

14 Q. I understand but --

15 A. Yeah.

16 Q. -- if we compare what the expert did --

17 A. Sure.

18 Q. -- with how your inside people value features on your
19 mowers, your people tell customers that a foot-operated deck
20 lift is worth more than five times what your expert says the
21 invention in this case is worth?

22 A. That's what this says.

23 Q. Let's finish at least for this document on the three
24 references to the independent suspension.

25 So if we look towards the middle there, we've got

1 two-wheeled front IS independent suspension is worth 250.

2 Two-wheel rear IS independent suspension is worth 250.

3 And four-wheel, front and rear, independent suspension is
4 worth 350.

5 Do you see that?

6 A. I do.

7 Q. Now, you heard the testimony, I expect, from Mr. Busboom
8 and perhaps others that from Exmark's perspective, the
9 invention at issue in this case is actually more valuable than
10 independent suspension, correct? You heard the testimony?

11 A. I heard the testimony, yes.

12 Q. Okay.

13 A. Yes.

14 Q. And I take it you probably disagree with that.

15 A. I do.

16 Q. Okay. But if we just say it's a push and say the
17 invention in this case is worth the same as the independent
18 suspension, then we'd be right at around that \$250-a-mower that
19 is Miss Bennis's opinion in this case, correct?

20 A. I -- I don't agree with the on par, but your statement
21 would be correct.

22 Q. The numbers work out correct --

23 A. Yes.

24 Q. -- right?

25 A. Yeah.

1 MR. VANDENBURGH: Okay. I'm going to go through one
2 more of these, Your Honor, and then perhaps take a break?

3 THE COURT: That would be fine.

4 BY MR. VANDENBURGH:

5 Q. I'd like you next to go to Exhibit 391.

6 If you could turn to that in your binder, Mr. Wenzel, just
7 to identify what it is.

8 A. Do you want me to read what it says on the top?

9 Q. Please do.

10 A. "Welcome To Our 2007 Spring Tune-Up."

11 Q. So is this another example of training materials for your
12 salespeople and your dealers?

13 A. Appears to be.

14 MR. VANDENBURGH: Your Honor, I'd offer Exhibit 391.

15 THE COURT: Any objection?

16 MR. WOLF: No, Your Honor.

17 THE COURT: 391's received. You may publish.

18 BY MR. VANDENBURGH:

19 Q. So let's get right to a page on the selling value.

20 MR. VANDENBURGH: If you could turn to the page
21 bearing Bates numbers ending in 248.

22 BY MR. VANDENBURGH:

23 Q. Now -- have you gotten to that page yet?

24 A. Well, I'll just look on the screen here.

25 Q. Okay. The last exhibit we looked at I believe was from

1 2002, correct?

2 A. Yes.

3 Q. The previous one. And now this one we're looking at is
4 five years later, it's 2007.

5 A. Yes. And this was created by one of our distributors.

6 Q. Okay.

7 THE COURT: Is it -- is this 2007?

8 MR. VANDENBURGH: I believe that was the date on the
9 front page.

10 THE COURT: Oh, it's the Ferris IS 2000. I'm reading
11 it wrong. Go ahead.

12 MR. VANDENBURGH: Okay.

13 THE COURT: Sorry, gentlemen.

14 BY MR. VANDENBURGH:

15 Q. So according to this document, the four-way independent
16 suspension is now up to \$750 in value. Do you see that?

17 A. Yes, I do.

18 Q. So if -- again, if I ask you the -- the same question as
19 before, if we're willing to even equate the invention at issue
20 in this case with independent suspension, we put the value
21 at \$750, correct?

22 A. Yeah, sales comparison compared to a professional's
23 analysis, you are correct.

24 Q. And -- and Miss Bennis is a professional, right?

25 A. Yes.

1 Q. And she's opined that roughly \$250 per lawn mower is a
2 reasonable royalty, correct?

3 A. That's what she testified.

4 Q. And that's roughly a third of what this sales document
5 says your independent suspension is worth. Correct?

6 A. That's correct.

7 MR. VANDENBURGH: Your Honor, could we take our
8 break?

9 THE COURT: Yes.

10 Ladies and gentlemen, we'll take our first afternoon
11 recess. Ten minutes.

12 We're in recess.

13 (Jury out and recess taken at 2:25 p.m.)

14 (At 2:35 p.m.; with counsel and the parties'
15 representatives present; WITHOUT the jury:)

16 PHILIP WENZEL RESUMED THE WITNESS STAND

17 THE COURT: Please be seated, ladies and gentlemen.

18 (Jury in at 2:37 p.m.)

19 THE COURT: Please be seated, ladies and gentlemen.

20 Mr. Vandenburgh, you may continue your examination of the
21 witness.

22 MR. VANDENBURGH: Thank you, Your Honor.

23 CROSS-EXAMINATION CONTINUED

24 BY MR. VANDENBURGH:

25 Q. I want to ask you quickly about an issue that I am sure is

1 not very important in the case but we seem to be talking about
2 it anyway.

3 There is no company named Ferris anymore, is there?

4 A. There is no longer a company named Ferris. It's a brand.

5 Q. And there hasn't been a company named Ferris since well
6 prior to this lawsuit being filed, correct?

7 A. That's correct.

8 Q. When talking about your profits, you kept using the term
9 "take-home pay."

10 A. Yes.

11 Q. And you referred to that as being the 5.6 percent profit
12 number. Do you remember that?

13 A. I think I said 5 to 7.

14 Q. 5 to 7, okay. Just to be clear, that number is after
15 absolutely everybody in the company's been paid, right?

16 A. That's correct.

17 Q. All the rent's been paid?

18 A. Yes.

19 Q. The wax on the floor of the gymnasium in Munnsville has
20 been bought and applied?

21 A. Yeah, I don't think we spend too much on that, but...

22 Q. But everybody's --

23 A. Yes.

24 Q. -- everybody's gotten their salaries?

25 A. Correct.

1 Q. Okay. You mentioned that you received your largest bonus
2 of \$90,000 last year. You didn't mention your salary last
3 year. What was your salary last year?

4 A. My salary was about 190.

5 Q. Okay. And isn't it true that in terms of running the
6 day-to-day operation of your business, you target actually a --
7 a standard gross profit that you try to achieve, right?

8 A. That's true.

9 Q. And the standard gross profit that you try to achieve is
10 20 to 25 percent, correct?

11 A. I disagree with that number.

12 Q. Okay. Do you know who Mr. Bill Shea is?

13 A. I do.

14 Q. He is your director of sales?

15 A. He is.

16 MR. VANDENBURGH: Okay. I'd like to show the witness
17 a 30(b)(6) excerpt from Mr. Shea regarding this issue,
18 Your Honor.

19 THE COURT: Any objection, Mr. Wolf?

20 MR. WOLF: Your Honor, I don't believe he was a
21 30(b)(6) on this topic, but I have no objection to him asking
22 the witness about his testimony.

23 THE COURT: He has asked to show the testimony.

24 MR. VANDENBURGH: I'd like to show --

25 MR. WOLF: Oh, that's fine, Your Honor.

1 THE COURT: You may proceed.

2 MR. VANDENBURGH: Will you pull up page 109 of the
3 Shea.

4 Your Honor, can we publish this to the jury?

5 THE COURT: Yes, you may. And we're talking page
6 what?

7 MR. VANDENBURGH: 109, I believe.

8 BY MR. VANDENBURGH:

9 Q. Okay. So at the top there, starting at line 4, it says:
10 So Briggs has -- when Briggs sells to a dealer, delivers
11 to a dealer, at the end of that transaction they want 20 to 25
12 percent generally?

13 And that is a benchmark for the success of your operation?

14 Answer: It's not a benchmark. It's not Briggs's
15 benchmark; it's Phil's benchmark.

16 Would you interpret his reference to Phil as being to you?

17 A. I would.

18 Q. So your director of sales says that you personally have a
19 target standard gross profit of 20 to 25 percent. Do you
20 believe that he's lying when he says that?

21 A. I don't believe he's lying. I've known Bill for most of
22 my life. I think he's just mistaken.

23 Q. Well, assuming he's correct, do you understand that --
24 that both experts agree in this case that the actual standard
25 gross profit that Briggs realized over the entire infringement

1 period was 31 percent?

2 A. Yes.

3 Q. Okay. So assuming we credit Mr. Shea's testimony, you've
4 achieved somewhere between 6 and 11 percent higher profit than
5 what he describes as your target gross -- standard gross
6 profit. Agreed?

7 A. According to what Mr. -- Bill Shea has identified, yep.

8 Q. Just a brief question on the demonstration we saw
9 yesterday.

10 How much does that mower cost at retail? What's the
11 retail price of that mower?

12 A. That particular one is \$20,000.

13 Q. That one of your highest-end mowers?

14 A. It is the highest end one.

15 Q. Okay. Is there a reason why you chose the highest-end
16 mower to bring in to show to the jury?

17 A. We wanted to show everything that we had there with our
18 suspension and just what's all involved with the mower and
19 thought that that was the best demonstration of that.

20 Q. You sell a lot more mowers that have, for example, the
21 48-inch deck that we see here in the courtroom, correct?

22 A. We do.

23 Q. And you didn't bring a 48-inch zero-turn mower to show the
24 jury, did you?

25 A. No. No, we did not.

1 Q. On the issue of national accounts, you answered carefully
2 that you currently do not have any Ruppert's business; do you
3 remember that?

4 A. I do.

5 MR. WOLF: Objection to characterization.

6 THE COURT: Sustained.

7 BY MR. VANDENBURGH:

8 Q. Did you, in fact, get the Ruppert's business for some
9 period of time?

10 A. Yes, couple years.

11 Q. Okay. And you subsequently lost that business back again?

12 A. We did.

13 Q. And you lost that -- do you know who you lost that
14 business to?

15 A. I believe it was Exmark.

16 Q. I want to talk about the change that you made to your
17 baffle design some time after the lawsuit was filed.

18 First of all, even after you instituted that change, you
19 didn't stop selling the mowers with the original baffle design,
20 did you?

21 A. We did not. We sold what we had manufactured, that's
22 correct.

23 Q. Okay. And, in fact, it took -- you sold that original
24 baffle design for years after this lawsuit was brought,
25 correct?

1 A. There's some models that were slow-moving that it took a
2 few years to get rid of them but wasn't any great quantity.

3 Q. I want to understand this though because you testified,
4 when Mr. Wolf was questioning you, that if you had just known
5 that there was an issue with these mowers, you would have
6 stopped right away. Isn't that your testimony?

7 A. I believe that was my testimony.

8 Q. But even for the original baffle design that's been found
9 to infringe, you didn't stop selling right away, did you?

10 A. We did not.

11 Q. Now, let's talk about the modified baffle design. Were
12 you involved -- personally involved in the redesign effort?

13 A. No. Just general oversight.

14 Q. Did that general oversight include input on the shape of
15 the front baffle?

16 A. No, I did not input on the shape.

17 Q. Okay. But you were personally involved in the redesign,
18 weren't you?

19 A. I was watching it very closely.

20 Q. You were involved in testing of it, weren't you?

21 A. I -- yes, I was seeing how it worked, yes.

22 Q. And you were involved in discussions about various
23 possible alternative designs you could go to, right?

24 A. Yes.

25 Q. And -- and one of the things that you considered was

1 actually take that front baffle out altogether, right?

2 A. It's a -- a consideration, sure.

3 Q. And you specifically considered that in this instance,
4 didn't you?

5 A. I don't -- I think, you know, we listed everything up on a
6 board that was possible. That was a first part of the
7 exercise.

8 Q. And one of those considerations was removing the front
9 baffle altogether, wasn't it?

10 A. I don't specifically remember, but it could have been.

11 Q. Okay. In fact, you didn't do that though, did you?

12 A. Did not.

13 Q. And the reason for that is because the front baffle's
14 important, isn't it?

15 A. The front baffle makes a difference.

16 Q. Now, another thing you could have done is remove those
17 baffle portions that direct the air and grass clippings into
18 the downstream blade, correct? Do you know what I'm talking
19 about?

20 A. Yes.

21 Q. Did you consider that as a possible redesign?

22 A. You know, I don't know all the specifics of all the ones.
23 They had a few up there on the board that they were looking at,
24 but, you know, for me to tell you the shape of every one, I...

25 Q. Well, let me ask you this: You already have some mower

1 designs that don't have that portion that directs the air and
2 grass into a downstream blade, right? Your smaller decks?

3 A. Like two-blade decks?

4 Q. I think even some three-blade 44-inch decks have just a
5 front baffle across the front?

6 A. Could be. Could be.

7 MR. VANDENBURGH: If I could have -- draw on the
8 ELMO.

9 BY MR. VANDENBURGH:

10 Q. I'd like to take a version of Plaintiff's Exhibit 49,
11 which has already been admitted, and just draw in what I'm
12 talking about here.

13 See what I've drawn there in red? It's probably too close
14 to the blades that -- the blades might strike it. But do you
15 get what I'm talking about with just a curved front baffle that
16 just goes all the way across the front of the blades?

17 A. I do.

18 Q. Do you remember seeing that shape of a baffle in your
19 smaller 44-inch decks?

20 A. I believe so.

21 Q. Okay. And so that's a design that you could have gone to
22 in 2010 after this lawsuit was brought, right?

23 A. Yes.

24 Q. But you didn't go to that because having those portions
25 that direct the air and grass into the downstream blade, that's

1 important, isn't it?

2 A. Well, we didn't build this one and test it, so I can't say
3 that for sure. This is the way -- this is the direction that
4 we chose.

5 Q. And you chose not to go in the direction of this
6 alternative design that you actually already had on some other
7 smaller mowers, correct?

8 A. That's correct.

9 Q. It's been a couple of days, but we heard a lot early in
10 the trial about the Walker design. Do you remember that?

11 A. Yes, I do.

12 MR. VANDENBURGH: Will you put up Exhibit 179. I
13 think it's already been admitted.

14 BY MR. VANDENBURGH:

15 Q. So you recall this, don't you? There's been testimony
16 that this is a design from Walker that has just a very short
17 baffle there shown in red?

18 A. Yes.

19 Q. Okay. Were you aware of this baffle design at the time
20 that you did your redesign work in late 2010?

21 A. Yes.

22 Q. And so this is a design that you could have gone to,
23 right?

24 A. Yes.

25 Q. And, in fact, it's been pointed out that that small baffle

1 has at least one portion that acts to direct air and grass
2 clippings into the downstream blade, right? You've heard that
3 testimony?

4 A. Yes.

5 Q. But nonetheless, you didn't go to that design, correct?

6 A. That's correct.

7 Q. And the reason is because, having just a short baffle like
8 that doesn't provide the advantages of the '863 patent,
9 correct?

10 A. I don't know that to be true.

11 Q. The last one I want to mention is the Scag redesign. And
12 what I'd like to do is pull up that same -- just a one
13 corner -- I don't want to show anything other than the picture.

14 (Mr. Vandenburgh conferred with Mr. Mayleben.)

15 MR. VANDENBURGH: Your Honor, this was done in his
16 direct examination. I'd like to publish just this one picture
17 for the jury.

18 THE COURT: And -- and for the record, it's exhibit
19 number what?

20 MR. VANDENBURGH: 678.

21 THE COURT: Thank you. You may proceed.

22 BY MR. VANDENBURGH:

23 Q. So I believe you testified earlier that this is Scag's
24 current design, correct?

25 A. Yes.

1 Q. And I want to make sure the jury understands what we're
2 looking at here. So first of all, is it correct that there is
3 a front baffle that's kind of like that one on the small deck
4 that I drew that just goes, you know, like a V across the front
5 of the -- of the deck, right?

6 A. Yes.

7 Q. Those two flat pieces that we see, those aren't vertical
8 baffles inside the deck, are they?

9 A. No, they're not.

10 Q. They're -- they're flat plates that are horizontal to the
11 top wall of the deck?

12 A. That's correct.

13 Q. And so there's actually space underneath where we see
14 those flat plates?

15 A. Yes.

16 Q. Now, I think you testified that you couldn't do exactly
17 what Scag does because they have a patent on it, right?

18 A. That's correct.

19 Q. But it's your understanding that you could put in that
20 baffle design as long as you didn't make that front baffle
21 movable. Was that your testimony?

22 A. Yes.

23 Q. And again, was that an option that you were available --
24 that you were aware of at the time you did your redesign work
25 in 2010 here?

1 A. I was aware of it, yes.

2 Q. Okay. But again, you chose not to go with that design,
3 did you?

4 A. That's correct.

5 Q. So let's talk a little more specifically about what you
6 did go with.

7 Pulled up a deck here. I'd like to place the clips
8 approximately where -- I don't know if I've got it exactly
9 right, but will you agree with me that that's approximately
10 where Dr. Strykowski said there's an elongated and
11 substantially straight portion in the -- in the Briggs decks?

12 MR. WOLF: Objection. I just note for the record,
13 Your Honor, this witness is neither an expert nor --

14 MR. VANDENBURGH: I'm not going to --

15 THE COURT: Just a second. First of all, you've
16 placed clips on exhibit what?

17 MR. VANDENBURGH: Good question, Your Honor. 1401.

18 THE COURT: Okay. So the objection is what?

19 MR. WOLF: I've got three objections, Your Honor:
20 One, he's not an expert.

21 Two, he wasn't intimately involved in the redesign.

22 And third, the witness was sitting next to me during
23 Dr. Strykowski's testimony and I didn't see where the
24 clothespins were. Mr. Cohn is the only one that walked around.

25 MR. VANDENBURGH: If the witness --

1 THE COURT: The trouble is that I don't believe that
2 this witness said that he participated in the redesign. That's
3 my question -- or my problem. So let's just have a short
4 sidebar, counsel.

5 (At sidebar)

6 THE COURT: So where are you going?

7 MR. VANDENBURGH: I'm not planning to ask him any
8 technical questions. I just want to ask him about the
9 testimony of the various experts in this case.

10 THE COURT: Well, the trouble is, is he didn't see
11 the clips. I don't have any doubt he didn't see it, except
12 that somebody's taken some photographs and I don't know if he's
13 reviewed them.

14 MR. VANDENBURGH: Okay. Can I use a different
15 exhibit that I know he has seen because it was published? I
16 can use the Dr. Strykowski cover shots.

17 THE COURT: Report. But where are you going?

18 MR. VANDENBURGH: I just -- I want to ask him that he
19 understands what they say it is and then I want to ask him if
20 he understands what their expert's position is.

21 THE COURT: And why do you want to do that?

22 MR. VANDENBURGH: Because their expert has an
23 interesting position in this case and -- one of the willfulness
24 factors on which Your Honor instructed is efforts to design
25 around the patent.

1 THE COURT: Okay, now stop. I'm not clear I
2 understand this guy's role. He's the vice president of what?

3 MR. WOLF: Of business. He's the -- he runs the
4 business but he was not -- we're going to have Mr. Marshall
5 here -- Mr. Laurin here tomorrow, is actually the one that
6 engineered this redesign. And if he -- if this is fair game
7 for any nonfact witness, it's with Mr. Laurin. I mean, this
8 is -- I mean, frankly --

9 THE COURT: Okay, just a second. He's the CEO,
10 effectively, of this company?

11 MR. WOLF: Yes.

12 THE COURT: Of this brand?

13 MR. WOLF: Yes.

14 THE COURT: And we're talking about willfulness.

15 MR. WOLF: Well, but we're talking about technical
16 aspects of willfulness. We're not asking who did you talk to,
17 who did you hire, who did you consult? He's asking for
18 basically a technical opinion on what claims mean, on how the
19 products read on the claims.

20 MR. VANDENBURGH: I'm not going to ask for that,
21 Your Honor.

22 THE COURT: He didn't -- he didn't -- and the other
23 part of this is this witness did not participate in the
24 development of the new design by his testimony today.

25 MR. VANDENBURGH: My colleague, Mr. Winkels, is so

1 efficient that he has handed me deposition testimony from
2 Mr. Laurin who's going to come in tomorrow. He was their
3 30(b)(6) deponent on this topic.

4 Question: Did Phil Wenzel provide design ideas for the
5 shapes of the baffles?

6 Answer: We shared ideas together.

7 And did Mr. Wenzel have specific ideas about the shape of
8 the baffle that he shared with you?

9 Answer: Yes.

10 MR. WOLF: And if he wants to ask those, that's fine
11 what those are but that's not asking him infringement opinions.

12 MR. VANDENBURGH: I'm not going to ask him
13 infringement opinions.

14 THE COURT: Here's the problem. This guy was -- he's
15 your oldest employee in Ferris and he's done everything, from
16 bottom to top, including fabrication and now including design.

17 And you're asking the jury to do the same thing he's going
18 to ask your CEO to do and if he can't hold up under cross you
19 got trouble.

20 MR. WOLF: Well, Your Honor -- well, no, my question
21 is -- on a question-by-question basis, he -- he is -- there's
22 no evidence that he's analyzed the patent. In fact, he said he
23 hasn't analyzed the patent. If he's going to start using claim
24 terms that Your Honor's construed --

25 THE COURT: I don't want to do that.

1 So tell me again, why do you want to use this?

2 MR. VANDENBURGH: I just -- for willfulness purposes,
3 for his belief he doesn't infringe, I want to ask him about --
4 first just to lay foundation that he knows what our experts
5 have -- how they view certain elements of the claim and then I
6 want to ask him about their expert.

7 THE COURT: You know, my inclination is he's not an
8 expert on the technical end of it. I just as soon we not get
9 into this.

10 MR. VANDENBURGH: Okay.

11 THE COURT: If you want to cross-examine him on his
12 role and lay some more foundation and then be able to get into
13 this, I'm willing to listen to it, but right now I don't think
14 you've got enough foundation for you to cross-examine him on
15 the technical aspects of how the redesign violates the patent
16 and I think that's where you're going.

17 Am I right or wrong?

18 MR. VANDENBURGH: Well, actually -- actually it has
19 more to do with their expert.

20 THE COURT: And if you're -- so now you're asking him
21 to be an expert against their own expert.

22 MR. VANDENBURGH: No. I'm asking him if he knows
23 what their expert said at his deposition.

24 THE COURT: But their expert was hired after they did
25 the redesign, not before they did the redesign.

1 MR. VANDENBURGH: If, for example, their expert
2 disagreed with their case, that would go to willfulness. If --
3 especially if he's aware of that testimony.

4 THE COURT: But his willfulness predates the hiring
5 of the expert.

6 MR. VANDENBURGH: True.

7 THE COURT: So I'm just not --

8 MR. VANDENBURGH: All right.

9 THE COURT: I'm not going to let you do it.

10 MR. VANDENBURGH: Thank you, Your Honor.

11 (In open court)

12 THE COURT: All right. You may proceed.

13 BY MR. VANDENBURGH:

14 Q. So going back to this -- this issue of your testimony this
15 morning where you said, again, if you'd just known, you would
16 have stopped. You sold millions of dollars of inventory of
17 mowers with the original baffle design, even after this lawsuit
18 was filed, correct?

19 A. There's an amount, I don't know exactly how much it is.

20 Q. I'd like to then go back to that.

21 MR. VANDENBURGH: If we could pull up -- and I don't
22 have this in the binder but it's Exhibit 523 that was admitted
23 yesterday during Miss Bennis's testimony.

24 Could we publish this for the jury, Your Honor?

25 THE COURT: Yes, you may.

1 MR. VANDENBURGH: If you can highlight the bottom
2 line -- well, I guess...

3 BY MR. VANDENBURGH:

4 Q. So this shows for the mowers with the original baffle
5 design, in fiscal year 2011 you sold 32 million, roughly,
6 dollars of the -- of mowers.

7 Now, when does your fiscal year begin and end?

8 A. Begins July 1st.

9 Q. So fiscal year 2011 starts July 1st, 2010?

10 A. No, just the opposite.

11 Q. Fiscal year 2011 starts July 2011?

12 A. Fiscal year 2011 would start in July of '10.

13 Q. Okay. All right.

14 A. Yes.

15 Q. So the 32 million in 2011 includes mower sales before you
16 introduced the modified design, correct?

17 A. Yes.

18 Q. Okay. But if we go to fiscal year 2012, that starts
19 July 1, 2011, you already had the modified design in
20 production, correct?

21 A. Yes.

22 Q. And that started about 14 months after the lawsuit was
23 filed, correct?

24 A. Yes.

25 Q. And in that fiscal year you sold roughly a

1 million-and-a-half dollars of the mowers that have already been
2 found to infringe, correct?

3 A. Yes.

4 Q. And then in fiscal year 2013, which starts more than two
5 years after the lawsuit was filed, in that year you sold a
6 little over 700,000, correct?

7 A. Yes.

8 Q. And then in fiscal year 2014, so now we're starting three
9 years after the lawsuit's been filed, we're back up to 921,000,
10 correct?

11 A. That's correct.

12 Q. Now, let's talk about the modified design. Because one of
13 the things, again, that you said is that if we knew that Exmark
14 had a problem, we wouldn't want to deal with it, we would
15 just -- we'd run away from it and avoid it, right? Is that
16 your testimony?

17 A. That was my testimony, had I known back in the -- much
18 earlier, when we were a smaller company, yes.

19 Q. Well, then let's talk about what you did in 2010.

20 Now, Exmark didn't somehow lay in the weeds on the
21 modified design, did they?

22 A. On the modified design, no.

23 Q. Okay. You knew immediately after that product was
24 introduced that Exmark still considered it to be an
25 infringement, correct?

1 A. Yes, that's correct.

2 Q. And yet it's been almost five years now that you've been
3 continuing to sell that -- mowers with that deck design?

4 A. That's true, because we don't -- do not believe that it
5 infringes.

6 Q. Okay. So as long as in your opinion you believe there's
7 no infringement, you'll keep going, even if Exmark thinks it
8 does. Is that your testimony?

9 A. We've had multiple opinions that it does not infringe.

10 Q. Okay. But you've still sought to fight in this case for
11 the right to keep selling that baffle design, right?

12 A. We are staying -- we stuck with that baffle design, yes.

13 Q. And you've sold, at least as of last October, almost a
14 half a billion dollars of mowers with that baffle design,
15 right?

16 A. That's correct.

17 Q. And you chose to continue to do that instead of removing
18 the baffle, going to the straight-across-the-front baffle,
19 going to the Walker baffle, going to the Scag baffle, you chose
20 to stick with this one instead of any of those other
21 alternatives, right?

22 A. We did.

23 Q. In fact, your mindset was never to avoid infringement
24 here, was it?

25 A. No, it was to avoid infringement, absolutely.

1 Q. Wasn't your mindset really to just see if a lawsuit gets
2 filed and if it does you'll just manage your way through it?

3 A. No.

4 Q. You don't view your position in this lawsuit as being one
5 of just managing your way through it?

6 A. No, not at all.

7 Q. Okay. I'd like to have you turn to Exhibit 425.

8 MR. WOLF: Is it in the book?

9 THE WITNESS: I don't see it.

10 MR. WOLF: I'm not finding --

11 MR. VANDENBURGH: No, I'm sorry. I had the wrong
12 exhibit number. That's a page number.

13 Can I have Exhibit 344.

14 BY MR. VANDENBURGH:

15 Q. And can you tell us what this document is?

16 A. It says Commercial Product Plan.

17 Q. Are you involved in preparing commercial product plans at
18 Briggs & Stratton?

19 A. I am.

20 MR. VANDENBURGH: Your Honor, I'd offer Exhibit 344.

21 MR. WOLF: No objection, Your Honor.

22 THE COURT: Received.

23 MR. VANDENBURGH: And publish it for the jury?

24 THE COURT: Yes, you may.

25 BY MR. VANDENBURGH:

1 Q. And I'd like to direct your attention to the page that has
2 425, ends in 425 in the lower right-hand corner.

3 MR. VANDENBURGH: Just blow up the whole thing.

4 BY MR. VANDENBURGH:

5 Q. Now, first of all, what we see on the top left, it says
6 Last Six Months; do you see that?

7 A. Yes.

8 Q. And at the bottom item for -- under What Went Wrong, we
9 see "Exmark/Toro infringement challenge." Correct?

10 A. Yes.

11 Q. Does that suggest to you that this document was prepared
12 some time in the latter half of 2010?

13 A. Yes.

14 Q. And then what's the response that must happen in the next
15 six months to the right there?

16 A. "Manage our way through."

17 Q. Yeah. Manage your way through doesn't mean stop
18 infringing, does it?

19 A. Yes, it does, to me.

20 Q. But you -- you've already acknowledged that you kept
21 selling even the original product design for years after this
22 document was prepared.

23 A. We sold the inventory that we had. And we moved -- we
24 moved to the new design as quickly as we could, which was
25 within six months.

1 Q. But you moved to a design that you know, and you knew,
2 that Exmark still considered to be infringing its patent, even
3 though you say you had lots of alternatives available to you,
4 correct?

5 A. We're confident it does not infringe.

6 Q. Manage your way through doesn't mean pay fair compensation
7 for the years of past sales by the original product design,
8 does it?

9 A. There's no offer on the table that -- to my knowledge for
10 such.

11 Q. One thing that manage your way through could mean is to
12 hire a very talented law firm to fight through five years of
13 litigation, right?

14 A. We redesigned as quickly as we could to get in a
15 non-infringement position. That's what we did. And we did
16 sell our inventory.

17 Q. When this lawsuit was filed, there was about
18 five-and-a-half years left on the life of the '863 patent,
19 correct?

20 A. Yeah, I guess -- yes.

21 Q. Did you hear Mr. Busboom's testimony that this patent
22 is -- expires in November of this year?

23 A. I did.

24 MR. WOLF: Your Honor, I think this counsel's about
25 to open a door to something he doesn't want to open.

1 THE COURT: Well, I think we're getting very close to
2 the edge, so just govern yourself accordingly, counsel.

3 BY MR. VANDENBURGH:

4 Q. I really have just one more question. Isn't managing your
5 way through just making sure that you can keep selling
6 infringing product up until the time that this patent expires?

7 A. Absolutely not.

8 MR. VANDENBURGH: I have no further questions.

9 THE COURT: Redirect, Mr. Wolf.

10 MR. WOLF: Yes. Thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. WOLF:

13 Q. Tired yet?

14 A. I'm getting there, that's for sure.

15 Q. Sometimes when I'm tired at home, I admit to mistakes I
16 didn't make, and that's where I'd like to start.

17 You remember you were questioned about the deposition in
18 Scag?

19 A. Yes.

20 Q. Do you remember -- you were asked about whether or not
21 Mr. Marschall was representing you at that deposition?

22 A. I do.

23 Q. And you remember saying, on the stand, just a couple of
24 hours ago, you might have made a mistake?

25 A. I did.

1 Q. That's what you testified to?

2 A. That's what I testified to.

3 Q. Well, let's figure out whether you actually did make a
4 mistake.

5 MR. WOLF: Alex, can we call it up.

6 Start with that.

7 And, Your Honor, there's been sufficient discussion of
8 this deposition and counsel asked enough about it that we'd
9 actually like to move its admission.

10 THE COURT: Any objection?

11 MR. VANDENBURGH: Yes, Your Honor. It's hearsay.

12 THE COURT: Sustained. It's used for impeachment,
13 counsel.

14 MR. WOLF: I understand, Your Honor.

15 THE COURT: And once it's used for impeachment,
16 that's an exception to the hearsay rule. That's -- that's just
17 my rule, okay? I don't admit depositions except under very
18 exceptional circumstances, so that's my ruling.

19 MR. WOLF: All right. Well, in the issue of
20 completeness then I'd like to show the witness some additional
21 testimony from it.

22 THE COURT: And you're welcome to do that.

23 MR. WOLF: Thank you, Your Honor.

24 BY MR. WOLF:

25 Q. First of all, we were looking at the front screen and it

1 says, For Defendants: Michael Best & Friedrich by
2 Richard H. Marschall.

3 Do you see that?

4 A. Yes.

5 Q. And actually, it might be better, do you still have the
6 binder I gave you?

7 A. Yes, I do.

8 Q. Could you look at the tab.

9 MR. WOLF: And just, Your Honor, for timing, when
10 would you like to take our next break?

11 THE COURT: About 3:40.

12 MR. WOLF: Okay.

13 THE WITNESS: Which was the tab number?

14 MR. WOLF: Is there -- I hate to do this, Your Honor,
15 but is there any way we could take a bio break now?

16 THE COURT: Sure.

17 MR. WOLF: We'll leave the witness on the witness
18 stand but --

19 THE COURT: No, I understand.

20 So, ladies and gentlemen -- Is five minutes sufficient,
21 Mr. Wolf?

22 MR. WOLF: Yes, Your Honor.

23 THE COURT: All right. Ladies and gentlemen, we'll
24 take five minutes at this time.

25 We're in recess.

1 (Jury out and recess taken at 3:15 p.m.)

2 (At 3:22 p.m.; with counsel and the parties'
3 representatives present; WITHOUT the jury:)

4 PHILIP WENZEL RESUMED THE WITNESS STAND

5 THE COURT: Please be seated.

6 We have an issue that we need to take up at this time?

7 MR. WOLF: Very briefly, Your Honor. And it's tricky
8 and I invite your guidance.

9 THE COURT: Good luck.

10 MR. WOLF: Yeah. That was actually sincere in that
11 particular instance.

12 So as Your Honor's aware, there is a willfulness
13 allegation against the old design but not the new design.

14 For the first time that at least I'm aware of, we heard
15 allegations in -- or argument in this cross that somehow that
16 stub period after the filing of the lawsuit, when there was the
17 wind-down of the old product, that that's somehow evidence of
18 willfulness.

19 Now, here's the --

20 THE COURT: Well, here's the way I took the evidence.

21 MR. WOLF: Okay.

22 THE COURT: Mr. Wenzel is coming across as the lamb
23 that has been led to the shearer, okay?

24 MR. WOLF: Yes.

25 THE COURT: He's not the lamb that's been led to the

1 shearer. He's like my old boss's secretary. She's crazy like
2 a fox. Okay?

3 So he says that he would have -- if he would have been
4 contacted originally, he would have done X. And the answer was
5 he was contacted originally on the redesign and he did Y.

6 MR. WOLF: Well, here's the problem --

7 THE COURT: Whether that goes to willfulness, I see
8 your point. But now you want to do what?

9 MR. WOLF: Well, here's the problem. Almost
10 immediately -- and we've kept this out entirely -- almost
11 immediately there were discussions of the invalidity of the
12 patent.

13 THE COURT: Yeah.

14 MR. WOLF: And so I -- we have studiously avoided
15 that topic.

16 THE COURT: Well, he -- yeah. And -- and during
17 cross-examination stuff comes up and he's already testified.
18 We've had numerous opinions that the patent is invalid and you
19 have studiously tried to keep attorney-client privilege out of
20 the redesign process and he brought it in, okay? He did. Not
21 me, not the defendant's lawyer, but your CEO of this mark,
22 okay?

23 Now, it's my intention not to let them pursue that because
24 it happened during cross-examination.

25 So, you know, I'm not sure where you're going. What do

1 you want to do?

2 MR. WOLF: Your Honor, I actually don't want to do
3 anything. What -- I think at the end of the day what I'd like
4 is an instruction that the stub period doesn't weigh into the
5 willfulness analysis.

6 THE COURT: Well, they're not going to be asked about
7 willfulness with respect to the redesign. Your client's
8 conduct before the redesign and then his conduct after the
9 redesign is by the same person, and his conduct in total helps
10 decide what his thinking was before the redesign.

11 And that's just unfortunately the way it is, Mr. Wolf.

12 If you had two different executives, maybe you could get
13 away with it, but you don't.

14 MR. WOLF: Well, Your Honor, we'll -- we'll leave it
15 for today, but we may come back at you to request that
16 instruction.

17 THE COURT: And I have no problem with that at all.

18 I -- it's just that, you know, there's overlap on all of
19 these issues --

20 MR. WOLF: Understood.

21 THE COURT: -- and the question is how far do you get
22 into the overlap before you really are inquiring about
23 something the jury ought not to be inquiring.

24 And I -- I -- at this juncture, I don't think we've gone
25 over the threshold. And that's why I would be reluctant to

1 allow anyone to continue to probe these issues any more deeply,
2 certainly to cover them, but not to probe them any more deeply.

3 MR. WOLF: All right. Well --

4 THE COURT: So that would be my general direction.
5 If there's something specific you want to do and you want to
6 ask me in advance how I'm likely to rule on it, I'm certainly
7 willing to do that.

8 MR. WOLF: I don't think there's anything with this
9 witness we're going to do but it may come up with a later
10 witness and we'll talk about it in advance.

11 THE COURT: Thank you very much.

12 All right. If we can get the jury.

13 And I want to say that you very artfully brought up the
14 bio break. I'd never heard that before. When you get to a
15 certain age, you understand exactly what you're talking about.
16 All right. Nice job, Mr. Wolf.

17 MR. WOLF: Thank you, Your Honor.

18 (Jury in at 3:27 p.m.)

19 THE COURT: Please be seated, ladies and gentlemen.

20 So ladies and gentlemen of the jury, we took a break a
21 little out of order. It's my intention to go to as close to
22 five as we can, but if someone gets uncomfortable sitting
23 there, don't be afraid to raise your hand and we can take a
24 break, okay?

25 Oh, and another question. You know, we shouldn't give you

1 very many breaks.

2 MR. WOLF: Is it one I should have thought of,
3 Your Honor?

4 THE COURT: Who knows?

5 Oh, okay. If you would show this to the lawyers and then
6 they can confer.

7 (The courtroom deputy showed the juror's question to
8 counsel.)

9 THE COURT: You may continue your examination,
10 Mr. Wolf.

11 MR. WOLF: Thank you.

12 REDIRECT EXAMINATION CONTINUED

13 BY MR. WOLF:

14 Q. We were looking at the deposition from the Scag case. Do
15 you recall that?

16 A. Yes.

17 Q. And we were noting that on the cover page it indicates
18 that Mr. Marschall was just the defendant's, not your, lawyer?

19 MR. WOLF: Let's look at the third page, Alex, if we
20 may.

21 BY MR. WOLF:

22 Q. And it begins --

23 MR. WOLF: Let's just do the first ten -- ten lines
24 or so. And actually, can you scroll up just a little higher.

25 BY MR. WOLF:

1 Q. So we see that the first person to question you was
2 Mr. Marschall, right?

3 A. That's correct.

4 Q. Now, that's the person that at the end of the deposition,
5 after that heated exchange about privilege, you said was your
6 lawyer. That's what prompted you to say there was a mistake,
7 right?

8 A. Yes.

9 Q. All right. Well, let's look at how the deposition began.

10 Examination by Mr. Marschall:

11 Question: Good morning. Could you please state your name
12 for the record?

13 Answer: Philip H. Wenzel.

14 Mr. Wenzel, my name is Rick Marschall, I'm here on behalf
15 of the defendants.

16 Do you see that?

17 A. I do.

18 Q. Were you a defendant in that case?

19 A. I was not.

20 Q. Does this perhaps explain your understanding of who was
21 being represented and who wasn't?

22 A. That was certainly my understanding, that I wasn't being
23 represented.

24 Q. And is that consistent with what you see on the screen
25 right there?

1 A. It is.

2 Q. Okay. I'm going to go through roughly in reverse order
3 some of the issues raised by Mr. Vandenburg, perhaps some more
4 important than others.

5 First was this question of when you stopped and what you
6 stopped. Just to be clear, when you finalized the redesign,
7 did you at that point stop making any new mowers of the old
8 design?

9 A. We did.

10 Q. So you ceased entirely --

11 A. A hundred percent.

12 Q. There was a question where you were asked about Mr. Shea's
13 testimony and profit. Do you recall that?

14 A. Yes.

15 Q. Do you happen to know whether Mr. Shea was talking in his
16 deposition -- did Mr. Vandenburg show you whether he was
17 talking about standard gross profit or gross profit?

18 A. It doesn't say.

19 Q. And we'll let Mr. Bone explain the difference, but --

20 A. Exactly.

21 Q. Now, in the video -- well, let -- let's put some context
22 around this. I believe you testified yesterday that suspension
23 was important to three things: comfort, productivity, and
24 maintenance, slash, durability.

25 Did I remember your testimony correctly?

1 A. That's correct.

2 Q. In the video Mr. Vandenburg played, it compared one of
3 those three features, comfort, to cut; is that right?

4 A. Yes.

5 Q. So it didn't talk at all about the other two advantages of
6 suspension?

7 A. It did not.

8 Q. So with that context, does that video in any way change
9 your belief that suspension, with all of its advantages, is or
10 is not more important than cut?

11 A. No.

12 Q. So what is your view? Is suspension with all three of its
13 advantages, not just comfort, more or less important than cut?

14 A. More important than cut.

15 Q. Can you explain why?

16 A. Because we have a -- we're talking about a level of cut,
17 that you're either exceptional or acceptable. And our -- as we
18 established here, even we have -- we have an average cut. And
19 the suspension has many more benefits for the actual users and
20 purchasers of the equipment at that level and we're willing to
21 give up some of the real high-end ones that require an
22 exceptional cut.

23 Q. Let's look at Exhibit 366, at the front page, just to
24 orient ourselves. This is the catalog you were asked. And
25 let's turn to page 1584.

1 Do you remember you were asked a long series of questions
2 about this and a similar document?

3 A. Yes.

4 Q. All right. Now, just so we're clear, these aren't the
5 actual selling prices of these particular features, right?

6 A. They are not.

7 Q. And what do they represent again?

8 A. They're -- the sales folks got together and that's -- put
9 together what they felt those features could be that the buyer
10 gets for free, so to speak, because if you took them out they
11 could be valued that way against the competition.

12 Q. All right. So but let's assume for the most those were
13 retail prices. And let's assume that -- let's do an easy math
14 one, the two-wheel front IS suspension, \$200. Do you see that?

15 A. Yes.

16 Q. That would be revenue, not profit, right?

17 A. That's correct.

18 Q. And so --

19 A. In fact, that wouldn't even actually be revenue. Those
20 are retail prices that would be discounted below that.

21 Q. So if it was for sale for 200 bucks, assume that was an
22 actual retail price, what would your profit be on that number?

23 A. 5 to 7 percent.

24 Q. Of something less than 200?

25 A. Yes.

1 Q. So, what, 5 to \$7?

2 A. Of 200, so it'd be probably \$12.

3 Q. Twelve dollars?

4 A. Yeah.

5 Q. So -- just so this -- this catalog, as it were, if you
6 want to use it the way Mr. Vandenburg uses it, the profit
7 number for independent suspension is 12-ish dollars; is that
8 right?

9 A. Yes.

10 Q. You were asked about Exhibit 327, Commercial Product Plan.
11 And particularly -- excuse me, I apologize, 344. And
12 particularly, page 10- -- 140425. Do you remember that?

13 A. I do.

14 Q. And says, "Manage our way through."

15 How did you manage your way through, in your own words,
16 please?

17 A. We performed a redesign and put that into production as
18 quickly as we possibly could.

19 Q. Let's go to 327.

20 Now, this Mr. Vandenburg established was a -- a -- a
21 marketing brochure for the iCD after this lawsuit was filed
22 during the process of the redesign; is that right?

23 A. It is.

24 Q. Would you believe it would have been appropriate to
25 show -- to advertise the old baffle in light of the fact that

1 it had been accused of infringement?

2 A. Did not. That's why we didn't do it.

3 Q. So in other words, you flipped it around to respect
4 Exmark's claim?

5 A. Absolutely.

6 Q. All right. Let's turn to Exhibit 314, please.

7 Just so we're clear -- and we'll go to 311 which has a
8 better picture. There was some -- some testimony about what
9 was innovative and what was -- well, let's look at the words on
10 the page. "The new iCD" -- and maybe we'll just go straight to
11 311. I'm sorry, I've got my notes wrong.

12 No, 314 is right.

13 MR. WOLF: Can you call up the picture of the baffle.

14 BY MR. WOLF:

15 Q. Can you draw the outlines of the baffle chamber, please.

16 A. (The witness complied.)

17 Q. All right. So are the blades inside the baffle chambers?

18 A. They are.

19 Q. Did you redesign the blades?

20 A. We did.

21 Q. Did they become more effective as a result of the
22 redesign?

23 A. They did.

24 Q. Did you redesign the chute, the discharge?

25 A. We did.

1 Q. Was that inside the baffle chamber?

2 A. Yes, here (indicating).

3 Q. And do you consider that -- did you believe that improved?

4 A. It definitely improved, absolutely.

5 Q. And while the individual features collectively might not
6 have been your own -- collectively, were they innovative in
7 your mind?

8 A. Well, they were, yeah, in my mind, I guess, and the
9 marketing department's, sure.

10 Q. And just to be clear, the one thing that didn't change was
11 the baffle design, right?

12 A. That's correct.

13 Q. So when you use the phrase -- when the jury takes this
14 back in the jury room and they see "redesigned baffle chamber,"
15 what was redesigned?

16 A. The blades, the opening, spindles.

17 Q. Now, there was a lot of discussion before lunch about
18 Mr. Baumbach. First question for you, roughly when did
19 Mr. Baumbach leave?

20 A. 2001.

21 Q. Do you know the circumstances of his departure?

22 A. I don't know for certain.

23 Q. Was he fired? Did he find a new opportunity?

24 A. Well, no, he was not fired. I think it was that his wife
25 didn't like the New York winters.

1 Q. And so he found a new job and moved?

2 A. Yes.

3 Q. It was an amicable departure?

4 A. Oh, absolutely.

5 Q. In this case, is Exmark accusing Mr. Baumbach of copying?

6 A. I think they are.

7 Q. And did Exmark contact Mr. Baumbach in 2011 through a
8 private investigator?

9 A. They did.

10 Q. Did they act- -- did the private investigator actually
11 talk to Mr. Baumbach?

12 A. He did.

13 Q. Did Exmark wait to tell Briggs about that event until
14 2015?

15 A. They did.

16 Q. Are you aware of any effort that Exmark took to secure
17 Mr. Baumbach's testimony through deposition, for example, in
18 this trial?

19 A. No, I am not aware of any.

20 Q. Mr. Wenzel, at any time -- counsel was asking you about
21 the period between the design of the -- between the time you
22 started working on the baffle in roughly '96 and when the
23 patent issued in 1999.

24 At any time in that window did you see any indication that
25 there was patent pending on the baffle design?

1 A. I did not.

2 Q. In this case, have you seen any indication of patent
3 pending with regard to this baffle design?

4 A. I have not.

5 Q. Now, let's look at Exhibits 441 and 442.

6 And let's make it easy and look at just the second one
7 because I'm sure the jury remembers.

8 This was the discussion of your interactions with Exmark
9 products.

10 A. Yes.

11 Q. And it's Phil, discussed program [sic] on 1000Z, made
12 changes to deck to improve cut, very close to quality of Exmark
13 now.

14 MR. WOLF: And can we call up the date, Alex?

15 BY MR. WOLF:

16 Q. So this -- this email was -- or letter, whatever it is,
17 document was about two years after you introduced a product
18 that had the '863 baffle; is that right?

19 A. That's correct.

20 Q. So with the '863 baffle, you had a cut, prior to this
21 letter, that was inferior to Exmark's; is that a fair reading?

22 A. Yes.

23 Q. And you had a lot of engineering to do to -- even though
24 you had this baffle, you had a lot of additional engineering to
25 do to get the quality of cut you wanted to get up to. Is that

1 a fair reading?

2 A. That's a fair reading and that's what that was talking
3 about.

4 Q. Is it common in the industry to say, what do we need to do
5 to get that company's quality of cut or that company's quality
6 of ride or that company's durability?

7 A. Certainly.

8 Q. Beyond that, there were lots of documents about switches
9 and spindles and seeing what certain companies did better than
10 others. Is -- is it your understanding in the industry that
11 everybody does that?

12 A. Yes.

13 Q. Nothing nefarious about that?

14 A. No.

15 Q. All right. Let's get to the heart of the matter, the '863
16 patent and your knowledge of the patent, of course, as the jury
17 will hear, that's not really the question that's going to be
18 asked, but let's still talk about your knowledge of the patent
19 itself.

20 How many competitors does -- did Ferris have in, say, from
21 '99 to 2005?

22 A. I think it's been talked about here by various people,
23 from 30 to 60.

24 Q. Because we've been left with the impression that there are
25 only two players in this world.

1 A. I know, I know.

2 Q. So -- and do each of those 30 to 60, to your knowledge,
3 have patents?

4 A. I can't speak specifically, but there's a lot of patents
5 out there people have on things, so I would assume there'd be a
6 lot of patents, yes.

7 Q. Can -- do you have a rough estimate, even ballpark of how
8 many mower patents come out each year? Are we talking a dozen,
9 hundreds, thousands?

10 A. Oh, no, no, you're talking at least hundreds.

11 Q. Come out each year?

12 A. Come out each year, yes.

13 Q. And for Ferris at the time -- Let me just ask a very
14 straight business question. Given your size and your revenues,
15 would you have had the resources to do a patent policy that
16 checked patents that were issuing and compare it to old
17 products?

18 A. No, we would not.

19 Q. So how did you expect to -- to learn about infringements
20 in the situation where a patent issued after you already had a
21 product on the market?

22 A. We expected the holders of those patents to notify us.

23 Q. And did they in this case?

24 A. They did not.

25 Q. Now, that doesn't get you off the hook for infringement,

1 does it?

2 A. No, no.

3 Q. So was your policy perfect?

4 A. No.

5 Q. You're going to have to write a check?

6 A. We're going to have to write a check for something, yeah.

7 Q. But does that mean you willfully infringed the patent?

8 A. Absolutely not.

9 MR. WOLF: I may be finished, Your Honor.

10 BY MR. WOLF:

11 Q. Actually, let me ask you one more time to look this jury
12 in the eye and simply answer this question: Did you know, at
13 any time prior to this lawsuit, about claim 1 of the '863
14 patent?

15 A. I did not know any time prior to this lawsuit of the '863
16 patent. Honest truth.

17 MR. WOLF: Nothing further, Your Honor.

18 THE COURT: Ladies and gentlemen, do you -- of the
19 jury, do you have any additional questions of this witness?

20 All right. Ms. Lawrence.

21 (A juror submitted a question.)

22 MR. VANDENBURGH: Your Honor, could I have a couple
23 of questions of recross?

24 THE COURT: Well, what I'm going to do is find out
25 what the jury's questions are --

1 MR. VANDENBURGH: I'm sorry.

2 THE COURT: -- and then you can combine it with your
3 recross.

4 (The courtroom deputy showed the question to the Court,
5 and then to counsel.)

6 MR. WOLF: I'll ask the question.

7 THE COURT: If you would. And then -- and then
8 Mr. Vandenburg can do his recross along with cross on that
9 issue.

10 MR. WOLF: Okay.

11 REDIRECT EXAMINATION CONTINUED

12 BY MR. WOLF:

13 Q. Since Briggs & Stratton created a ground-breaking feature
14 with the flow control baffle --

15 MR. WOLF: Actually, Your Honor, may we approach?
16 Because I'm not -- there's actually a -- I misread the question
17 when I first saw it.

18 THE COURT: I think you did. All right.

19 MR. WOLF: May we approach?

20 (At sidebar)

21 THE COURT: So this question really asks if you
22 applied for a patent and why you didn't apply for a patent on
23 your redesign. I think that's what this question is.

24 MR. WOLF: And I don't even know the answer to that
25 question. I don't know if this witness --

1 THE COURT: Well, I know the answer and I think both
2 of you know the answer and the question is whether you want to
3 ask it or not. You don't have to ask the question is the
4 bottom line.

5 MR. WOLF: Yeah. This is not the right witness
6 because he wouldn't know, so I'd like to talk to -- whether
7 Mr. Laurin knows, I mean, can we punt-kick this can down the
8 road?

9 THE COURT: It's up to you if you want to kick the
10 can down the road or not. But then the question is whether
11 Mr. Vandenburg --

12 MR. VANDENBURGH: I'm probably going to ask something
13 around this question. He did testify that he believed the
14 redesign was better.

15 THE COURT: All right. So you were going to ask it
16 in your recross anyway.

17 MR. VANDENBURGH: Correct.

18 THE COURT: Or something similar to it. Correct?

19 MR. VANDENBURGH: Correct.

20 THE COURT: All right. So --

21 MR. WOLF: All right. I'll ask the question then.

22 THE COURT: Do what you want to do.

23 MR. WOLF: Yeah.

24 (In open court)

25 THE COURT: All right, you may proceed.

1 BY MR. WOLF:

2 Q. So let me first ask you whether you'd be the right witness
3 to ask this.

4 Do you happen to know whether or not Briggs is
5 contemplating filing for a patent on its redesigned baffle?

6 A. I do not.

7 Q. Would Mr. Laurin be a better person to ask that question
8 to?

9 A. He would.

10 MR. WOLF: Thank you.

11 THE COURT: All right. Mr. Vandenburgh, recross.

12 MR. VANDENBURGH: Just a couple of questions,
13 Your Honor.

14 RECCROSS-EXAMINATION

15 BY MR. VANDENBURGH:

16 Q. On that one we just talked about, has there been any
17 patent application filed to date on the redesigned baffle
18 design?

19 A. There has not.

20 Q. You emphasized that once you changed manufacturing over to
21 the redesigned baffle you ceased manufacturing of mowers with
22 the original baffle design. But you didn't cease sales. Is
23 that right?

24 A. We didn't cease -- we did not stop selling the inventory
25 that we had at present.

1 Q. You sold out several million dollars of inventory over the
2 next three years?

3 A. Yes.

4 MR. VANDENBURGH: Will you pull up Exhibit 327.

5 BY MR. VANDENBURGH:

6 Q. So this is the exhibit showing how you changed the iCD
7 advertising display after the suit was filed. Do you remember
8 that?

9 A. Yes.

10 Q. And you indicated that you thought it was no longer
11 appropriate to show the underside because you didn't want to
12 show the original baffle design?

13 A. No.

14 Q. Okay. In fact, what's under that design, because it's
15 after the lawsuit was filed, is the modified baffle design?
16 Correct?

17 A. Yes.

18 Q. And that's the modified design that you say you believed
19 avoided infringement?

20 A. Well, I mean, we have inventory too, so --

21 MR. WOLF: Your Honor, now we're really getting into
22 the area we talked about when the jury was out.

23 THE COURT: I don't think so. He may continue the
24 examination. The objection's overruled.

25 BY MR. VANDENBURGH:

1 Q. You never showed your customers in your advertising your
2 decks with the modified baffle design, at least in what we see
3 here. Correct?

4 A. We did not.

5 MR. VANDENBURGH: I have no further questions.

6 THE COURT: All right.

7 MR. WOLF: One question?

8 THE COURT: Any follow-up, Mr. Wolf?

9 Just a second. Just have a seat.

10 All right. Now you may ask your questions, Mr. Wolf.

11 REDIRECT EXAMINATION

12 BY MR. WOLF:

13 Q. Mr. Wenzel, do you continue to routinely show the
14 redesigned baffle at trade shows, et cetera?

15 A. Yes, we do.

16 MR. WOLF: No further questions.

17 THE COURT: All right. You may step down,
18 Mr. Wenzel.

19 You may call your next witness, Mr. Wolf, or --

20 MR. WOLF: Your Honor, Mr. Cohn is going to take over
21 the reins for the rest of the day.

22 THE COURT: Okay. Mr. Cohn, you may call your next
23 witness.

24 MR. COHN: Your Honor, we -- Briggs & Stratton calls
25 Denis Del Ponte.

1 And with Your Honor's permission, I'd like to move one of
2 these decks over here as we had last week.

3 THE COURT: Yes, you may.

4 MR. COHN: A little practice with this, Your Honor.

5 THE COURT: All right. Mr. Del Ponte, we are going
6 to ask you a couple of questions and then swear you in.

7 COURTROOM DEPUTY: Would you please state your full
8 name, spelling your first and last name for the record.

9 THE WITNESS: Yes. My name is Denis, D-E-N-I-S,
10 middle name, J., James, Del Ponte, D-E-L, space, capital
11 P-O-N-T-E.

12 DENIS DEL PONTE, DEFENDANT'S WITNESS, SWORN

13 MR. COHN: Your Honor, may I approach the witness
14 with a binder?

15 THE COURT: Yes, you may.

16 MR. COHN: Do you need some water?

17 THE WITNESS: I have water. Thank you.

18 DIRECT EXAMINATION

19 BY MR. COHN:

20 Q. Good afternoon, Mr. Del Ponte.

21 A. Good afternoon.

22 Q. Could you introduce yourself to the jury, please?

23 A. Yes. My name's Dennis Del Ponte. I'm a former employee
24 of John Deere. I'm from Wisconsin. And I spent 28 years with
25 John Deere in our commercial division -- or pardon me, our

1 consumer products division, which is most notably lawn mowing
2 and lawn-mowing machines.

3 Q. You may have to keep your voice up.

4 A. Okay.

5 Q. I know it's late in the day, but just so everyone can hear
6 you clearly.

7 And are you here today to talk about the mower that's up
8 front here --

9 MR. COHN: Your Honor, if I may, just to look at the
10 sticker.

11 BY MR. COHN:

12 Q. -- Exhibit 32?

13 A. Yes, I am.

14 Q. Okay. So we spent a lot of time today talking about the
15 old mower but today you're going to talk about Exhibit 32. Did
16 I get that right?

17 A. Yes.

18 Q. Okay. Where do you currently live, Mr. Del Ponte?

19 A. I currently live in Wisconsin, in northern Wisconsin.

20 Q. And how long have you lived there?

21 A. Twelve years.

22 Q. What do you currently do, Mr. Del Ponte?

23 A. Currently I'm retired.

24 Q. And have you -- have you ever worked for Briggs & Stratton
25 or Ferris or Simplicity or any of those other companies we've

1 been talking about over here?

2 A. No, I have not.

3 Q. And have you worked for Exmark before?

4 A. No, I have not.

5 Q. Did you go to college?

6 A. Yes, I did.

7 Q. Where'd you go?

8 A. I went to the University of Wisconsin. I studied
9 mechanical engineering. I hold a bachelor of science degree in
10 mechanical engineering.

11 Q. And what did you do after you -- well, let's go back.
12 When did you get that degree?

13 A. I got that degree in 1966.

14 Q. Okay. And what did you do after you graduated?

15 A. After graduation, I went to work in what we refer to as
16 the machine tool industry, which included a company called
17 Giddings & Lewis in Wisconsin, a very small machine tool
18 company in Massachusetts, and a very large machine tool company
19 called Cincinnati Milacron.

20 Q. Did you get a lot of practical experience in engineering?

21 A. In -- yes.

22 Q. Did there come a time when you began to work in the lawn
23 mower industry?

24 A. In 1974, my family and I relocated from Cincinnati, we
25 moved back to Wisconsin, and that's when I joined John Deere.

1 Q. And was that in Horicon, Wisconsin?

2 A. That's in Horicon, Wisconsin, correct.

3 Q. What was the Horicon facility, what was their role for
4 John Deere?

5 A. At that time, within Deere & Company, we had three major
6 divisions: an agricultural division, a construction division,
7 and a consumer products division. The consumer products
8 division was solely located in -- in Horicon, Wisconsin.

9 Q. About how many -- about how many people worked at John
10 Deere Horicon when you started?

11 A. When I started, we employed about 12-, 1500 employees.

12 Q. Okay. Now, when you got there, what did you do for John
13 Deere?

14 A. When I started at John Deere, I worked in what we refer to
15 as manufacturing engineering. It's an area where -- where
16 we're responsible for developing, procuring tooling, fixtures,
17 machinery that's necessary for the manufacture of component
18 parts for weldments, for assembly, and finally, the -- the end
19 assembled product.

20 Q. And what kind of products were being manufactured there at
21 the time?

22 A. When I started, we were manufacturing -- with ride-on
23 equipment, we were manufacturing lawn tractors, lawn and garden
24 tractors, were our major -- major ride-on products. We also
25 had walk-behind mowers, walk-behind snowblowers. We also

1 manufactured, obviously, the mower decks for the -- for the --
2 for the equipment. We also manufactured snowblower
3 attachments, tiller attachments.

4 Q. And did there come a time when you -- your
5 responsibilities changed at Deere?

6 A. Yes. After -- let's see, '74, I believe after five years,
7 about '69, I was promoted to the level of project engineer in
8 manufacturing, which broadened my responsibilities.

9 Q. And did you have a staff as a project engineer?

10 A. At that time I had a staff of I believe about seven or
11 eight personnel in the manufacturing segment.

12 Q. Did there come a time when your responsibilities changed
13 again?

14 A. Yes. Following manufacturing engineering, I became a
15 project engineer in -- in product design where we had direct
16 responsibility for designing the end product, a product that we
17 would -- we would sell eventually to -- to customers.

18 The products -- the products at that time that I was
19 responsible for were our lawn and garden tractors.

20 At the time we had three major series of lawn and garden
21 tractors. They had a numbering system and they were the 200
22 series, the 300s, and the 400 series tractors.

23 Q. And that was -- was that roughly the mid '80s?

24 A. That was in the mid '80s.

25 Q. And did there come a time where your responsibilities

1 changed yet again?

2 A. Yes. After about five years of product design in the lawn
3 and garden tractors, I took responsibility of product design
4 for mowers, mower decks, mower attachments, and the --
5 basically the collection systems that are associated with
6 collecting grass for --

7 Q. And what time frame was that that you were working on the
8 mower attachments?

9 A. That would have been about the late '80s, up until 1993.

10 Q. And the mower attachments that you were working on for
11 Deere in that time frame, did they include three-bladed mowers?

12 A. Yes, they were --

13 Q. And -- I'm sorry. Go ahead.

14 A. They were single-blade mowers, double-blade and
15 triple-blade mowers at that time.

16 Q. And were some of the three-blade mowers decks THAT you
17 were working on, were those in a side discharge mower?

18 A. Yes, all of our mowers were side discharge.

19 Q. Did you have a staff at the time?

20 A. Yes. Here again, my staff was about six, seven engineers,
21 designers, involved with -- with mower design.

22 Q. Did there come a time when you were a project engineer for
23 mower attachments that you became involved in a research
24 project regarding the air flow underneath mower decks?

25 A. Yes. There was a period in there where we were looking

1 for a way to -- oh, how should I say, search -- or -- or work
2 through the -- the black art of trying to understand what's
3 really happening under a -- under a mower deck in terms of air
4 flow. We entered into a -- a development program with a
5 consulting firm that -- whose area of expertise was
6 computational fluid dynamics, or CFD. And the -- the goal
7 was -- was an attempt to establish a computer model that would
8 help us predict how air -- or how material flows in and out of
9 a -- out of a mower deck.

10 Q. Did you say you were working with an outside firm on that
11 project?

12 A. Yes, this was an outside firm. The corporation was
13 Technalysis. They were located in Indianapolis.

14 Q. What kind of credentials did the people at Technalysis
15 have?

16 A. These were high-level engineers, doctorates, Ph.D.'s, on
17 both the -- both the engineering side as well as software
18 engineers, computer programmers, those types of -- those types
19 of people.

20 Q. So you -- now you might need to move the microphone back a
21 bit.

22 Thank you.

23 So with the help of these Ph.D.'s and the computers at the
24 outside firm and the knowledge that you had at John Deere, were
25 you guys able to -- to make a computer model that would -- that

1 could be used to predict air flow under the deck?

2 A. Unfortunately, the program was -- was extremely
3 unsuccessful.

4 Q. How did you know it was unsuccessful? How did you figure
5 that out?

6 A. There was -- there was no way we could predict, even under
7 a basic mower deck with one blade could we predict what the --
8 what the flow in and out and through the mower deck was going
9 to be like.

10 After about, oh, a year or two years and well over a
11 million dollars, the decision was made to abandon the project.

12 Q. So in light of that experience and your subsequent
13 experience at Deere, which we'll talk a bit about, if someone
14 told you that they can just look at a mower deck and predict
15 whether it's going to be good, bad or different than another
16 mower, how would you react to that?

17 A. They don't know anything about lawn mowing.

18 Q. How do you -- how does a person figure out how a lawn
19 mower's actually going to perform?

20 A. We really need to take the mower, bring it up to some
21 design level, but the ultimate test is to put it in the field,
22 under -- under a controlled environment, actually operate the
23 mower, and see how it performs.

24 Q. And were you involved in those kind of tests in your work
25 at Deere in the late '80s and early '90s?

1 A. Yes. Yes, we were.

2 Q. How would those tests generally be done? How would you
3 evaluate the results of the mower?

4 A. Typically we would start with a base mower. We would work
5 on our -- what we refer to as our test quality plots. They
6 were very level plots. They weren't -- at least at that time,
7 I don't believe there were laser-leveled, but they were very
8 high quality plots with a -- with a known grass, be it
9 bluegrass or fescues, in the northern grasses. Southern
10 grasses we typically would use Bermudas or St. Augustines.

11 The type of grass has a significant effect on what we
12 refer to and what's been talked about as cut quality.

13 We would -- we would run the -- the mower over -- over a
14 length of -- of plot and we would have observers, three, four,
15 five observers, and they would be people from marketing or
16 field service or engineering, and with scorecards we would
17 assess various measurements, if you will, of cut quality, grass
18 dispersal, striping, clumping, evenness of cut, that sort of
19 thing.

20 Q. You mentioned the use of scorecards. Would you describe
21 that as a pretty scientific analysis or a pretty subjective
22 analysis?

23 A. It's -- it's a very subjective analysis, but if -- if we
24 can have a half a dozen people from -- from a cross section of
25 disciplines give us a score, it -- it gives -- at least gives

1 us a number that helps us quantify.

2 Q. Did there come a time in the early '90s when you got
3 promoted from the project manager at mower attachments to a
4 different position?

5 A. Yes. In early '93 I was promoted to the manager of -- of
6 the prototype shop and -- and our test facilities. Our
7 prototype shop -- between the prototype shop and our test
8 facilities, we had about 30, 35 technicians. I believe I had
9 on my staff about seven or eight engineers. And -- and across
10 our -- our field test sites, our -- we had about, on average
11 through the year, between 75 and a hundred test engineers.

12 Q. What was the annual budget of your department during that
13 time?

14 A. I believe when I retired, we were -- our total budget was
15 right around 7 million.

16 Q. Per year?

17 A. Per year.

18 Q. Now, what kind of testing, just generally, you don't need
19 to get into too much detail, but generally what kind of testing
20 did your group do?

21 A. Yeah, our testing is generally in two areas. We have what
22 we call lab testing. And these are test cells in a laboratory.
23 One test cell was a sound room that would help us determine how
24 noisy our equipment is.

25 We had a hot room. We had a cold room. So we could do

1 environmental testing as -- at various temperatures.

2 We had dynamometers to help us understand performance
3 characteristics. We could -- we could cycle our machinery
4 through predetermined cycles.

5 We did stress testing, string gauge testing, which helps
6 us measure what kind of loads are on various components.

7 We also had test cells for all of our safety requirements.
8 There's a voluntary standard within the industry by which we
9 conform, by which we -- we need to conform to our safety
10 standards.

11 Beyond that, we have our -- our field test sites. We had
12 one in Horicon and we have one in Florida. And those tests --
13 those test sites, especially Florida, runs year-round. And
14 that's where most of our drivers are.

15 Our -- our -- all of our -- all of our product, before it
16 goes to production, has to -- has to go a minimum of one -- one
17 life cycle; that is to say, if a lawn tractor is -- has a
18 design life of 400 hours, it has to pass a 400-hour field --
19 actual field test.

20 Q. During your role as manager of these test facilities, did
21 your group test both consumer and commercial grade mowers?

22 A. Yes. Our test sites -- when I had a test site, I was
23 responsible for -- for the field -- providing field testing and
24 laboratory testing for all -- all consumer and all commercial
25 products.

1 Q. And just to tie that to this case, did some of the
2 commercial John Deere mowers that you tested, were they side
3 discharge, three-blade kind?

4 A. Yes.

5 Q. And did -- did those side discharge, three-blade
6 commercial mowers that you were responsible for testing, did
7 they have baffles in them?

8 MR. VANDENBURGH: Your Honor, this is outside the
9 scope of his report and is not related to his qualifications.

10 MR. COHN: Your Honor, he was asked about it in
11 deposition.

12 THE COURT: I understand. I don't -- as I sit here,
13 I don't have a copy of his report, but I -- I'm going to
14 overrule the objection if it's just a preliminary inquiry into
15 his experience.

16 MR. COHN: It is, Your Honor.

17 THE COURT: You may proceed.

18 BY MR. COHN:

19 Q. Can you -- can you describe the baffles that were on the
20 John Deere commercial mowers that you were responsible for
21 testing at the time?

22 A. Yes. The -- the type of baffling we used in -- in my
23 period of time as -- at -- at John Deere, almost all of our
24 mower decks were, I would say, of what I would call the stamped
25 mower deck variety and their design configuration is somewhat

1 different than what we see in this commercial configuration.

2 Typically, we did not have a full baffle that went from --
3 from the -- what I call the right side of the -- of the mower
4 deck to the discharge chute.

5 We would -- we would attempt to put in small V-baffles or
6 a hat-shaped baffle or some configuration of baffle, typically,
7 right in front of where the -- the blades meet. Those areas
8 we've known from experience are very suspect of basic things
9 like blowout, grass striping in those areas where there's just
10 so much air pressure in there it actually prevents the grass
11 from coming up to be cut, and in extreme cutting conditions
12 it's -- it's very possible that you would get dribbles of
13 clippings coming off the back of the deck in two distinct
14 paths.

15 MR. COHN: Your Honor, at his deposition he made a
16 drawing of this. I would like to show it as a demonstrative,
17 very briefly.

18 THE COURT: Any objection?

19 MR. VANDENBURGH: No, Your Honor.

20 THE COURT: You may proceed.

21 MR. COHN: Let's put it up.

22 BY MR. COHN:

23 Q. I'm just going to put this up here on the screen. Do you
24 recognize what we're looking at? It's DX-976.

25 A. Yes, I do.

1 Q. And what is that?

2 A. That's the underside of a -- a sketch of an underside
3 after three-spindle mower deck.

4 Q. What's the A and the B that we're looking at?

5 A. The A and B would be representative locations of these
6 small baffles that we would put between the -- between the
7 blade paths.

8 Q. Can you show on the screen with your finger where the A
9 and the B are.

10 A. (The witness complied.) A and B.

11 Q. Okay. Thank you, Mr. Del Ponte.

12 Roughly what percentage of Deere's commercial mowers at
13 the time that you were the manager of the test group had
14 baffles like these?

15 A. I would venture to say upwards of 60 percent.

16 Q. Okay.

17 MR. COHN: You can take that down now.

18 BY MR. COHN:

19 Q. Did there come a time where you became involved with the
20 Outdoor Power Equipment Institute?

21 A. Yes. As manager of -- of the prototype shop and field
22 tests, I also had responsibility of representing John Deere on
23 the -- on the OPEI -- Outdoor Power Equipment Institute. My
24 primary -- my primary role on that -- serving on that committee
25 was the development of -- of standards for our product.

1 Q. Was OPEI, was that an important national trade association
2 at the time?

3 A. To this -- at that time it was a voluntary institute, but
4 quite frankly, they had a very, very heavy impact on consumer
5 products -- or pardon me, on lawn mowers sold in the U.S. and
6 it -- it really behooved all of the manufacturers of lawn --
7 lawn care equipment to be part of the -- of the voluntary
8 institute, if you will.

9 Q. And did you say you were John Deere's representative to
10 OPEI?

11 A. Yes.

12 Q. And in the -- in that capacity, did you meet with
13 representatives from other companies at the OPEI meetings?

14 A. Yes, very definitely.

15 Q. And did that include Exmark?

16 A. Yes, I believe so.

17 Q. Did you review the '863 patent in this case?

18 A. Yes, I did.

19 Q. And you reviewed the -- the redesigned Ferris product in
20 this case?

21 A. Yes, I did.

22 MR. COHN: Your Honor, I would like to offer
23 Mr. Del Ponte as an expert witness on lawn mower design and
24 manufacture.

25 THE COURT: Any objection?

1 MR. VANDENBURGH: Is he not being offered to provide
2 an opinion on infringement?

3 MR. COHN: Yeah, he is being offered to provide
4 opinions -- that was my next question, what are your opinions.
5 He is being offered to provide opinions on non-infringement in
6 this case.

7 MR. VANDENBURGH: I certainly don't question his
8 qualifications generally in lawn mower art but we haven't heard
9 anything yet about his qualifications regarding patents.

10 THE COURT: I agree. So if you'd lay a little
11 more -- little more foundation, Mr. Cohn, as it relates to
12 patent.

13 MR. COHN: Okay.

14 BY MR. COHN:

15 Q. Did you review the patent in this case?

16 A. Yeah -- yes, I did.

17 Q. And did you come to an understanding of how you determine
18 whether a product infringes a patent?

19 A. Yes, I did.

20 Q. How do you -- what is that understanding? How do you make
21 that determination?

22 A. That determination, it comes in an understanding of the
23 claims that are a part of the patent and equally important are
24 the elements within each claim and all of the elements of a
25 claim have to be met.

1 Q. And did you do a comparison of the claim language to the
2 product that's at issue, the redesigned product?

3 A. Yes, I did.

4 Q. And in order to come to an understanding of what the words
5 in the claim mean, did you review the definitions of certain
6 terms that Your Honor provided earlier in the case?

7 A. Yes, I did.

8 Q. And as to other terms in the claim, did you come to an
9 understanding based on your experience in the field of lawn
10 mower design and manufacture?

11 A. Yes.

12 Q. And did you review the entirety of the '863 patent, not
13 just the claims?

14 A. Yes, I did.

15 MR. COHN: Your Honor, I would like to proffer him
16 again as an expert on non-infringement.

17 MR. VANDENBURGH: Your Honor, we don't object.

18 THE COURT: You may proceed.

19 MR. COHN: Thank you.

20 Thank you, counsel.

21 BY MR. COHN:

22 Q. So let's talk about the redesign. I think we just
23 mentioned, you've rendered an opinion that the redesign does
24 not infringe; is that right?

25 A. That is correct.

1 Q. Okay. Why doesn't the redesign infringe? Just -- just
2 generally now. We're going to go through the detail of it.

3 A. Okay. Generally, the redesign does not infringe because
4 it does not meet all the elements of a -- of in this case,
5 claim 1.

6 Q. And specifically, which elements does the redesign not
7 meet, in your opinion?

8 A. In my opinion, it does not meet the elongated and
9 substantially straight baffle portion.

10 Q. Are there any other aspects of the elongated and
11 substantially straight baffle portion that this mower does not
12 meet?

13 Let me ask it this way: Does the claim, claim 1, does it
14 provide for a specific location for where the elongated and
15 substantially straight portion must be?

16 A. Most certainly.

17 Q. And where is that?

18 A. The -- the patent limitations require that the elongated
19 and substantially straight portion begins where the -- where
20 the first profile, which is curved, where the first profile
21 ends and the straight portion ends or the second -- or
22 second -- third profile or second curve begins.

23 MR. COHN: Your Honor, may I approach the Exhibit 32?

24 THE COURT: Yes, you may.

25 BY MR. COHN:

1 Q. So I think you talked about a first profile and a second
2 profile and a third profile. Did I hear that right?

3 A. Yes.

4 Q. Okay. And I just want to see if we can explain to the
5 jury what you mean by that.

6 Where is the first profile that you're talking about?

7 A. The first profile begins about where your left hand is,
8 adjacent -- adjacent to the -- that side of the mower housing.
9 And it follows generally the blade path to -- to a point
10 where -- where it no longer follows the -- the path if you
11 would --

12 Q. Where is that, here?

13 A. About --

14 Q. I want to make sure I get this right.

15 A. Okay. Put your finger on the baffle. Over this way.
16 There.

17 Q. Okay. So this is what you called the -- the first
18 profile?

19 A. That is the first profile in the claim, yes.

20 Q. All right. And where's the second one?

21 A. The second profile -- the second profile?

22 Q. Yeah, what you called the second profile.

23 A. Yes, begins where your finger is now.

24 Q. My -- this one on my right hand?

25 A. Yes. Yes. And it continues until it inter- -- until it

1 meets the -- the end of the third profile.

2 Q. Okay. And I'm just going to guess here and you tell me
3 where to put it.

4 A. I would go up a little bit.

5 There.

6 Q. Okay. And between my fingers is what you called the
7 second profile?

8 A. That is correct.

9 Q. And then the third profile goes off --

10 A. Is the curve that follows the blade path.

11 Q. Okay. We'll get back to these and we'll identify these
12 specifically in a moment. I just wanted to establish a basis
13 for our discussion.

14 Now, how did you come to understand what the structure is
15 in the Ferris redesigned deck? Did you look at any engineering
16 drawings?

17 A. Yes.

18 Q. And did you come to an understanding of what the degree of
19 curvature was in that deck?

20 A. Yes, I did.

21 Q. How did you do that?

22 A. We worked with the people at Munnsville. We observed some
23 of the mower decks. We looked at some drawings. We created
24 some drawings that identify the -- the circles, if you will,
25 that surround the blades, and -- and then the -- a third circle

1 that creates what I refer to as the second -- the second
2 profile.

3 Q. Okay.

4 MR. COHN: Can we put up DX-717, please.

5 And I actually don't know if there are any objections to
6 this. I think we updated the exhibit about a week ago.

7 THE COURT: Are there any objections to 717?

8 MR. VANDENBURGH: Just a moment, Your Honor. Is it
9 in the binder?

10 MR. COHN: It's in the binder.

11 MR. VANDENBURGH: No objection, Your Honor.

12 THE COURT: 717 is received.

13 MR. COHN: Thank you, counsel.

14 THE COURT: You want to receive it -- you want it as
15 an exhibit, correct?

16 MR. COHN: I would. I was going to ask the witness
17 to establish what it is and then I was going to move to admit
18 it, Your Honor, but if there's no objection, then I'll just
19 move right now.

20 THE COURT: Any objection, Mr. Vandenburg?

21 MR. VANDENBURGH: No, Your Honor.

22 THE COURT: All right. 717 is received.

23 BY MR. COHN:

24 Q. If -- Mr. Del Ponte, do you recognize this document?

25 A. Yes, I do.

1 Q. Okay. Let's turn to the sixth page, if we could.

2 Yeah, that's right.

3 What are we looking at here, Mr. Del Ponte?

4 A. This is a plan view of -- or the bottom view of a
5 three-spindled mower deck. Happens to be the 52-inch mower
6 deck.

7 Q. And I see these three circles. What do those three
8 circles represent on the deck?

9 A. Those three circles represent circles from which the
10 profile of the baffle is taken from.

11 Q. So -- so those circles reflect the shape of the baffle
12 itself?

13 A. They're representative of segments of the -- of the circle
14 that create the profile.

15 Q. And you see those numbers there where it says R9.25. Do
16 you know what that means?

17 A. Yes.

18 Q. What does that mean?

19 A. That is the -- that is the radius of the circle. Twice
20 the radius is a diameter, or the size of the circle.

21 Q. Now, as a result of the baffle being made from these three
22 circles, parts of the three circles, is there a symmetry that
23 results from that?

24 A. Yes, there is.

25 Q. Can you explain that, please?

1 A. If we -- if we were to split the profile -- Can I draw
2 on...

3 Q. I believe you can, yeah.

4 A. If we draw a line through the -- through the baffle in
5 such a fashion --

6 Q. Try again. I think it only got part of it.

7 A. I got it.

8 Q. There you go.

9 A. The baffle portion to the -- to the left is symmetrical to
10 the baffle to the right.

11 Q. Okay.

12 MR. COHN: You can take that down now.

13 BY MR. COHN:

14 Q. Now, you heard the testimony of Mr. Busboom last week.

15 A. Yes.

16 Q. And have you read the expert reports that Mr. Busboom and
17 Dr. Strykowski have submitted in this case on the issue of
18 infringement?

19 A. Yes, I have.

20 Q. And is anyone arguing about whether those baffles are
21 actually made out of three circles? Is that something that's
22 in dispute?

23 A. Yes, it is, I believe.

24 Q. Well, hang on. Let me see. Maybe my question wasn't
25 clear.

1 MR. COHN: May I approach, Your Honor?

2 BY MR. COHN:

3 Q. Are any of the experts arguing whether these are circles
4 or not?

5 A. Oh, no.

6 Q. Okay. So in terms of -- in terms of how the baffle's made
7 and what its shape is, is anyone arguing about that?

8 A. I'm sorry? Run by --

9 Q. Never mind. I'll ask a different question.

10 Let's talk about -- let's talk about the patent now.

11 And I think I already asked you how -- how someone goes
12 about determining whether a product infringes a patent claim or
13 not.

14 If -- is any one claim requirement in the claim any more
15 important than any other, when you do that analysis?

16 A. No, all the -- all the elements -- all the -- all the
17 elements carry the same weight.

18 Q. So if -- if just one requirement is missing, are you
19 infringing the patent?

20 A. Yes.

21 Q. If -- if one requirement is missing from a product --

22 A. Oh.

23 Q. -- are you infringing a patent?

24 A. Oh, no, no.

25 Q. All right. Let's go to the claim.

1 MR. COHN: If we could go to Exhibit No. 1.

2 And if we could go to claim 1 and specifically column 6,
3 starting around line 21.

4 Yeah, just blow that paragraph up, just the one.

5 Thank you.

6 BY MR. COHN:

7 Q. Do you see on your screen a -- the claim language itself?

8 A. Yes, I do.

9 Q. And did you consider that claim language in your analysis
10 in this case?

11 A. Yes, definitely.

12 Q. I want to go through the claim piece by piece because I'm
13 not sure it's been explained yet.

14 And I want to explain what each of these different terms
15 mean and then how you -- how you lined them up.

16 First there has to be a flow control baffle. Is anyone
17 arguing about that term in this case?

18 A. No.

19 Q. Okay. And then it says "comprising." What does that word
20 "comprising" mean?

21 A. Include, made up of.

22 Q. So the flow control baffle in the patent has to be made up
23 of whatever comes next in the claim; is that fair?

24 A. That's correct, yes.

25 Q. Okay. And the next one it says "a first arcuate baffle

1 portion." Why does it say "first" there?

2 A. We -- it gives us a starting point for the baffle, for the
3 flow control baffle. It's a point to start from in -- in
4 describing the -- the continuous baffle from one side of the
5 mower deck to the other side.

6 Q. Okay. And what is an "arcuate baffle portion"?

7 A. A simple way of looking at arcuate is just to think of it
8 as part of a circle. It's a curve and it -- in this case,
9 it -- it typically has just one -- one center point or one
10 radius.

11 Q. Does the word "arc" have a meaning to an engineer like
12 yourself?

13 A. We -- we oftentimes use the word arc to describe a curve,
14 yes.

15 Q. Now, do -- do the Ferris redesigned mowers have a first
16 arcuate portion in the baffles?

17 A. Yes, they do.

18 Q. So there's no one arguing about that, right?

19 A. No, there's not.

20 Q. Okay. Now, the next thing in the claim, it says that the
21 first arcuate portion has first and second ends. What do those
22 words mean?

23 A. They mean the -- the arc or the curve has a starting point
24 and an end point.

25 Q. And what does the word "end" mean there in that passage?

1 A. It means the -- that is -- that is the end, that's where
2 the -- that's where that curve stops.

3 Q. And then the claim says -- we'll talk more about that in a
4 bit. The claim says "which extends from the interior surface
5 of said second side wall." Can you explain what that means?

6 A. The second side wall in the patent is what we refer to as
7 the right side of the -- of the mower housing. And the --
8 the -- the first arcuate extends away, it moves -- as it
9 travels -- it moves away from the side wall as it continues on
10 its -- on its curve.

11 Q. And then it says "partially around said first cutting
12 blade." What does that language mean?

13 A. That means -- that means it's basically wrapping the --
14 the path of the first cutting blade.

15 Q. Okay. And now -- now to the next claim element, which --
16 which we've heard a lot about.

17 It says "a first elongated and substantially straight
18 baffle portion." What does that mean?

19 A. That means the next profile is elongated and substantially
20 straight.

21 Q. And does the -- does the substantially straight section,
22 does it have to be in a specific location?

23 A. Yes.

24 Q. And what tells us that?

25 A. It -- if we continue reading the -- the claim language, I

1 believe the next -- the next verbiage, "extending from said
2 second end of first arcuate baffle portion."

3 Excuse me.

4 That is to say the claim language is very specific that
5 the -- the profiles are connected. And per the claim language,
6 we have a first profile and a second -- the second profile has
7 to extend from the end of the first profile. And it continues
8 until it reaches its end, which is connected to the start of --
9 of the -- in this case, the third profile.

10 Q. Now, is it important -- when the jury is considering
11 whether this mower falls inside or outside the claim, is it
12 important for the jury to figure out where the end of the first
13 arcuate portion is?

14 A. Absolutely.

15 Q. Why is that important?

16 A. Because that defines the -- that defines the profile of
17 the -- of the various portions of the baffle.

18 Q. Okay.

19 MR. COHN: Now if we could leave the claim language
20 up there just like that.

21 And with Your Honor's permission, I was going to ask you
22 to come down and we were going to put some more clothespins on
23 the mower and show the jury where you find the -- the parts of
24 the baffle.

25 THE COURT: As long as he has a microphone.

1 Ms. Lawrence, if you would fire up the microphone.

2 Sir.

3 THE WITNESS: Thank you.

4 MR. COHN: Let me back this up here so everybody can
5 see. Okay.

6 BY MR. COHN:

7 Q. Can you just test that microphone?

8 A. Yeah. Testing. Testing. Can you hear me?

9 MR. COHN: Is that okay?

10 THE WITNESS: Okay?

11 MR. COHN: Just keep your voice up.

12 BY MR. COHN:

13 Q. So the first question I want to ask is, where are the two
14 ends of the first arcuate portion?

15 A. The first arcuate portion begins generally in here.

16 And -- this is the first arcuate portion and we can see it
17 sweeps the blade path --

18 Q. Keep your voice up if you can.

19 A. -- sweeps the blade path until a location about here where
20 the profile starts to leave the blade path, so I would call
21 that the end of the first profile.

22 Q. Now, you used the blade there to guide you?

23 A. Yes, I used the blade as a guide.

24 Q. Can you explain why that is a guide?

25 A. It's a guide because the -- like -- by the -- per the

1 claim language, the -- the first arcuate profile or the first
2 portion of the -- of the baffle follows the -- follows the
3 blade path.

4 Q. Now, let me just put a clothespin on here somewhere about
5 three or -- well, about five or six inches to the jury's right
6 of your second clothespin that you called the end.

7 I want to ask you, would you call this the end of the
8 first arcuate portion?

9 A. No.

10 Q. Why -- why not?

11 A. It's not the end. It -- the profile continues from here
12 to here. And this portion of the profile is the same as this
13 portion.

14 Q. Does the curvature, the amount of curvature, end at
15 this --

16 A. No.

17 Q. -- the middle clothespin?

18 A. No, it does not.

19 Q. Does the curvature -- the amount of curvature end at the
20 left-most clothespin?

21 A. Yes.

22 Q. Now let's talk about the second claim element. What --
23 Mr. Del Ponte, what is extending from the end of the first
24 arcuate portion in this mower baffle?

25 A. It's a -- it's another curve profile as we've seen in

1 the -- in a previous drawing. And it's a profile that has the
2 same amount of curvature, it has the same radius, the same
3 diameter as this profile as well as this profile.

4 Q. Do you want to use a fourth clothespin and mark the -- the
5 end of that second profile?

6 A. Yes. I would --

7 Q. And describe how you're doing that.

8 A. I will sweep the blade. And I'll use this edge of the
9 blade. And where I -- where I start to see the -- in the --
10 let's say this profile starts to drift away from the blade path
11 is where this profile -- is where this profile ends and this --
12 I'm sorry, where this profile begins and this profile ends.

13 Q. Now, I want to talk about the -- the baffle portion. Now,
14 when you say a profile, are you referring to at that baffle
15 portion, is that --

16 A. I -- yes, I'm referring to the profiles as I believe
17 included in claim 1.

18 Q. Okay. Is there any difference between what you're calling
19 a profile and what we've been calling a baffle portion?

20 A. No, same thing.

21 Q. Okay. So with respect to this second baffle portion, is
22 that made up of one -- a part of one circle or parts of
23 multiple circles?

24 A. One circle.

25 Q. One circle. Is that right?

1 A. Yes, that's correct.

2 Q. Okay. Now, is the second baffle portion that you've
3 identified here between the third and fourth paper clips, is
4 that elongated and substantially straight?

5 A. No.

6 Q. And how do you know that?

7 A. Because it has an arc and --

8 Q. Is the curvature here any different than the curvature
9 here?

10 A. No, no, the curvatures are all the same.

11 Q. Do you remember what Mr. Busboom said about this portion
12 of the baffle last week?

13 A. I --

14 Q. It was a lot of testimony. If you don't, that's fine, I
15 don't want you to guess.

16 A. There was it was a lot of testimony. But he was trying --
17 I believe he was trying to argue that -- that from this
18 clothespin to some arbitrary location up here, there was a -- a
19 section of baffle that was substantially straight and
20 elongated.

21 Q. Okay.

22 MR. COHN: Now, with Your Honor's indulgence, if I
23 could take a picture of this --

24 THE COURT: Yes.

25 MR. COHN: -- and preserve it and then I'll ask the

1 witness about some different clothespins.

2 THE COURT: Yes, you may.

3 MR. COHN: I'm sorry, ladies and gentlemen.

4 (Mr. Cohn took a picture.)

5 MR. COHN: Thank you, Your Honor.

6 BY MR. COHN:

7 Q. Now, I think you just mentioned -- I'm going to take these
8 paper clips off.

9 I'll leave these -- I'll take these off.

10 I think you just mentioned that Mr. Busboom -- I think you
11 used the word "arbitrary."

12 A. Yes.

13 Q. Can you show the jury where you recall Mr. Busboom
14 denoting the end of the first arcuate portion.

15 A. I would say generally here.

16 Q. And where did he put the other end of the -- of what he
17 called an elongated and substantially straight portion?

18 A. Generally, I'd say about here.

19 Q. Okay. Now, do you agree that what Mr. Busboom called the
20 end of the first arcuate portion is the end?

21 A. No, it is not.

22 Q. And I think you said -- you used the word "arbitrary."
23 What did you mean by "arbitrary"?

24 A. I -- in my mind, he -- he roughly picked a point before
25 the end of the profile and it's -- it's perhaps a best guess or

1 an approximate, but --

2 Q. Do you recall whether Mr. Busboom gave any reason why the
3 end of the first arcuate portion couldn't be an inch to the
4 left or an inch to the right of where he put it?

5 A. I don't recall that -- I guess it could be about anywhere.
6 It -- I think it's wherever it fits his argument.

7 Q. Do you believe that the -- the demarcation of these two
8 baffle portions fits the language of the claims?

9 A. Absolutely not.

10 Q. Why not?

11 A. Because the claim is very specific that there's a --
12 there's a first portion that has a beginning and it has an end.
13 And the beginning and the end describe the profile of the first
14 portion.

15 Q. So if you could --

16 MR. COHN: Your Honor, if I may take a picture of
17 this just for the record?

18 THE COURT: Yes, you may.

19 (Mr. Cohn took a picture.)

20 MR. COHN: Apologize to the jury for that, but the
21 record must be preserved.

22 BY MR. COHN:

23 Q. Mr. Del Ponte, if you could move this -- the right-most
24 paper clip to where you believe the end of the first arcuate
25 portion is.

1 A. Here. I would say generally about here.

2 Q. And if you could move the other one to where the end of
3 that second profile is.

4 A. I would say about here.

5 Q. And do you believe that this demarcation between the
6 baffle portions, the end of the first arcuate portion, is that
7 where the claim tells you to put the end?

8 A. Yes.

9 Q. And then the next piece, is that elongated and
10 substantially straight?

11 A. No, it is not.

12 Q. Does this fit the claims, Mr. Del Ponte?

13 A. No, it does not.

14 MR. COHN: Your Honor, I pass the witness.

15 THE COURT: Mr. Van- -- Just have a seat in the
16 witness stand, sir.

17 Mr. Vandenburg, how long do you anticipate your
18 examination lasting?

19 MR. VANDENBURGH: I would anticipate --

20 THE COURT: Longer than 15 minutes?

21 MR. VANDENBURGH: Yes, Your Honor.

22 THE COURT: All right. Ladies and gentlemen, the
23 lawyers and I have some other matters that we need to take up
24 and this is as good a time for us to take up those matters as
25 not.

1 The other thing is -- so we're going break for the day
2 with the evidence, Mr. Cohn.

3 Now, ladies and gentlemen, you have asked us a number of
4 questions as we've gone along, so I'm going to attempt to
5 answer some of those questions that haven't already been
6 answered.

7 The matter that is being tried to you today is tried to
8 you because the parties have been unable to resolve their
9 differences about the issues including -- included in this
10 lawsuit. The actual negotiating process between the parties is
11 irrelevant to the issues before you. I have resolved some of
12 those differences. It is up to you to decide the remaining
13 issues of willfulness, infringement by mowers having the
14 redesigned front baffle, and damages relating to any
15 infringement.

16 You've also asked to see an Exmark deck.

17 The parties created their exhibit lists in preparation for
18 this trial some time ago. The parties are not generally
19 prepared to produce additional exhibits at this time because of
20 that. Some of your requests may be produced during the trial
21 and others may not.

22 So, ladies and gentlemen, with that, we will end for the
23 day. We'll see you tomorrow morning at nine o'clock.

24 Remember to keep an open mind because you haven't heard
25 all the evidence yet and to keep your own counsel and not

1 consult anybody or anything about the case.

2 We'll see you tomorrow morning at nine o'clock.

3 (Jury out at 4:45 p.m.)

4 THE COURT: Sir, you may step down and have a seat in
5 the back if you'd like.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: We're outside the presence of the jury.

8 We finished Mr. Wenzel's testimony and as a result,
9 according to the agreement between the parties, technically the
10 plaintiff has rested; and once the plaintiff rests, then of
11 course defense counsel has some motions that need to be taken
12 up. And it's my understanding that we have an agreement that
13 we'll be -- that the defendant's counsel has some matters that
14 need to be taken up and we have an agreement that we can do it
15 basically at the end of today, and it's the end of today.

16 So is Mr. Wolf available for this or not? Is he the one
17 that was going to do it?

18 MR. COHN: I believe I'll be doing the argument,
19 Your Honor.

20 THE COURT: All right. I don't want to get anybody
21 in any kind of trouble.

22 MR. COHN: No, no, not at all.

23 THE COURT: All right. So do you have any motions,
24 Mr. Cohn?

25 MR. COHN: Your Honor. We would like to move under

1 Rule 50 for judgment as a matter of law on the three issues
2 pending.

3 THE COURT: All right.

4 MR. COHN: And I can take them one at a time.

5 THE COURT: If you would.

6 MR. COHN: Sure.

7 THE COURT: So let's do one and then I'll ask -- I
8 assume -- who -- one of the lawyers for the plaintiff will
9 respond to each and then we'll just do them one at a time.

10 All right. So you may proceed, Mr. Cohn.

11 MR. COHN: Let me start with non-infringement of the
12 design-around. And frankly, Your Honor, I would love to refer
13 to Exhibit 32, if I may?

14 THE COURT: Yes, you may.

15 MR. COHN: Let me turn it and face you.

16 THE COURT: Oh, I can see it fine.

17 MR. COHN: Even from the -- all right.

18 So I think what we saw and heard -- let me just take the
19 podium. If I need to come up, I will.

20 What we heard from all of the witnesses is that the
21 claim language is paramount. This isn't about whether it
22 performs better or worse; we have got to look at the claims.
23 The claims all say a first arcuate portion. It has an end.
24 A substantially straight portion has to extend from that end.
25 Every witness told us what the word "end" means in the claim.

1 Remember, the first part of infringement is claim
2 interpretation and then we apply it.

3 So Mr. Busboom said, when we -- when we looked at the
4 patent, when we looked at Figure 2, and he said that the end of
5 that curve was all the way at that bolt, if you remember. And
6 I wrote "end" on it. And then I marked a point back from that.
7 I said you wouldn't call that the end? And I said why not?
8 Because that's not where the curve ends.

9 They could tell just by looking at it, that's not where
10 the curvature ended.

11 Dr. Strykowski did the exact same thing. The end is where
12 the curvature ends.

13 And, Your Honor, it's in the transcript, and this was with
14 Dr. Strykowski, and I know this because I had impeaching
15 testimony in the deposition, that the end of that curve in the
16 patent was at that top point because that's where the curvature
17 ended. He used the word "because" in his testimony.

18 So if we simply take that language, that definition of the
19 "end" and, if I may, and we apply it, that standard to this
20 mower, everyone agrees that the curvature ends where
21 Mr. Del Ponte just placed the clothespin, which is the same
22 place which Mr. Busboom and Dr. Strykowski did when I said,
23 where does the curvature end?

24 And once you do that and you look at what extends from
25 that end, everyone agreed, it's not elongated and substantially

1 straight, it's just the second circle. All three of those
2 experts.

3 So if Your Honor says the end has to be here because
4 everyone agreed that's the end of the curvature, then
5 non-infringement is -- is conceded at that point, if this is
6 the -- what the end is in the claim.

7 That's our first argument.

8 Our second argument on non-infringement -- I think I can
9 take these -- is that if you -- if you -- if you give
10 Mr. Busboom and Dr. Strykowski the benefit of the doubt and you
11 put the end somewhere to the trim side of where we say the end
12 is, which Doctor -- which Mr. Del Ponte says is arbitrary and
13 they admitted -- you saw Mr. Busboom, we were off by three or
14 four inches on these. It's arbitrary. But in any event,
15 that's what they say. They say you put it several inches away
16 from where the curvature ends. They call that the end.

17 And I -- and I know what they say about that. They say if
18 you look at this piece it's the -- it's the end of whatever
19 comes before it.

20 But, Your Honor, that's just tautological. That just
21 proves what they're trying to -- or proves their conclusion.
22 It's not the end in the middle. I mean, you wouldn't say the
23 end of the game is at the end of the half. The end of the game
24 is at the end of the game.

25 But even if you give them this, okay, this piece here is

1 not elongated and substantially straight. It's made up of --
2 of two curves of the same, okay?

3 And I -- I think the -- that everyone admitted on that
4 issue. But even if you give them that too, if this is the end
5 and this is straight, you got another -- you've got an
6 identical piece. Remember, I held those pieces up there and
7 just colloquially it reminded me of Karate Kid where Mr. Miyagi
8 said same but different. It was the two pieces are exactly the
9 same shape. And Mr. Busboom said this is straight and this is
10 arcuate.

11 And you can't have that, Your Honor, because that would
12 ignore the claim language. You might as well have a first
13 arcuate portion, a second arcuate portion, and a third arcuate
14 portion in the claim and that would be no different than what
15 Mr. Busboom and Dr. Strykowski are trying to do.

16 What happens is, if you agree with everything they say,
17 you get curved-straight-straight. You can't have that either.

18 We think the end argument is just -- I mean, they --
19 everyone admitted the curvature ends there. They even used the
20 word "end." And everyone admitted that what comes next, that's
21 not substantially straight.

22 So for those three reasons, we would move for judgment as
23 a matter of law on non-infringement.

24 THE COURT: All right. And so who argues this end of
25 it?

1 MR. VANDENBURGH: I'll do that, Your Honor.

2 THE COURT: All right. Now, Mr. Vandenburg, let me
3 just tell you where I am on this, okay?

4 Everybody agrees on the curve. The question is where the
5 curve ends, okay, on the first argument portion.

6 I believe that it could be reasonably argued that the
7 curve on the first arcuate portion ends where the reverse curve
8 starts on the second arcuate portion that the plaintiffs have
9 put in place.

10 If you do that, then it's arguable that you have a
11 straight line from the first arcuate portion to the next
12 segment of the -- of the next segment of the -- of the
13 structure.

14 The problem that I have is after the first elongated
15 portion. If I read the patent correctly, after the end of the
16 first -- at the end of the elongated portion begins the second
17 arcuate portion that follows the contour of the tip of the
18 blade.

19 And what your problem is, is that at the end of the
20 elongated portion it doesn't follow the arcuate tip of the
21 portion of the blade, there's another reverse angle that you've
22 got to worry about before you get to the circle that is the
23 arcuate portion of the blade.

24 So how do you get around that?

25 MR. VANDENBURGH: So if I understand what you're

1 saying, you're comfortable with the idea that this could be a
2 first arcuate portion, this could be an elongated and
3 substantially straight portion. Your question is whether this
4 could be a second arcuate portion?

5 THE COURT: As -- as outlined in the patent.

6 What I'm saying to you is not as a matter of law, but
7 enough for the jury to decide.

8 MR. VANDENBURGH: Right.

9 THE COURT: The part that I'm having a problem with
10 as a matter of law is the last segment.

11 MR. VANDENBURGH: Right.

12 THE COURT: So I -- I want to hear your argument.

13 MR. VANDENBURGH: Okay. All right. A couple of
14 things, Your Honor.

15 One is the evidence from the witnesses is when you're
16 considering whether a baffle portion meets the limitations of
17 the claims, you need to look at it as a whole.

18 So you need to identify the portion and then you look for
19 the end.

20 So we start by saying -- I'm going to try to go basically
21 where it stops curving.

22 The question is, as a whole, is this arcuate?

23 Now, the other thing, Your Honor, is the word "arcuate" is
24 broader. The rear baffles are required to be semicircular,
25 which means that they have to have a single radius of

1 curvature. They have to follow the blade, according to the
2 claim language.

3 THE COURT: The first -- the first baffle?

4 MR. VANDENBURGH: The rear baffle. So I'm talking
5 the second baffle.

6 THE COURT: Okay. All right.

7 MR. VANDENBURGH: There's reference to a plurality
8 of --

9 MR. WINKELS: Semicircular baffle.

10 MR. VANDENBURGH: -- semicircular baffle portions.

11 THE COURT: And that's the rear baffle.

12 MR. VANDENBURGH: That's the rear baffle. So these
13 needs to be circular. Not just curved, circular.

14 The term "arcuate" is broad. It just requires "curved."

15 And so you can have varying radiuses of curvature and
16 still have an arcuate portion. And, in fact, "arcuate" is
17 broad enough to cover a curve that at least some point goes in
18 two different directions.

19 THE COURT: All right. But here's the problem. If
20 you look at lines 28 -- or 27 of the -- of column 6, it
21 starts -- it talks about the ends, substantially straight ends,
22 extending from the second end of the first arcuate baffle
23 portion and a second arcuate baffle portion, having first and
24 second ends, which extends from the second end of the -- of
25 said first elongated and substantially straight baffle portion

1 partially around said second cutting blade.

2 So you're saying that -- so that's where I run into the
3 problem --

4 MR. VANDENBURGH: Right. So --

5 THE COURT: There's a circle around the second
6 cutting blade, okay? And then there's an elongated portion but
7 it's the little tiny bit in between that's problematic.

8 MR. VANDENBURGH: That right there.

9 THE COURT: That's right.

10 MR. VANDENBURGH: Right.

11 THE COURT: And so how do you explain that?

12 MR. VANDENBURGH: So my explanation is, as a whole,
13 from here to here, does this baffle portion extend partially
14 around this blade? And as a whole, it does that, even though
15 there may be an inch or two at one end that is not extending
16 around the blade.

17 And I will say, we've heard lots of arguments from the
18 defendants on this device. I'm not sure this is one we've ever
19 heard from them before.

20 THE COURT: Well, that's --

21 MR. VANDENBURGH: That doesn't mean that Your Honor
22 can't --

23 THE COURT: Can't think. But I'm just -- I'm just
24 talking to you --

25 MR. VANDENBURGH: Yeah.

1 THE COURT: -- about what my --

2 MR. VANDENBURGH: Right.

3 THE COURT: -- where I'm coming from and that's the
4 only thing I'm concerned about as far as getting over the hump.

5 MR. VANDENBURGH: Yes.

6 THE COURT: So right now all you've got to do is
7 worry about me no matter how stupid I am.

8 MR. VANDENBURGH: Exactly. So certainly my number
9 one point is, as a whole, this baffle portion is extending
10 partially around this blade even though there might be a small
11 inch or two section on the end --

12 THE COURT: Yeah, but I can't tell where the end of
13 the elongated portion is and the beginning of the second
14 arcuate portion that traces the blade travel.

15 MR. VANDENBURGH: We are --

16 THE COURT: You're saying that it's more than just a
17 point, it could be an inch or two.

18 MR. VANDENBURGH: It's very common in claim -- in
19 patent cases that you don't have just one way to read a claim
20 on an accused device. This idea of arbitrariness, you know,
21 they've come up with it, they're trying to convince the jury of
22 that, but the reality is that there are lots of times where you
23 look at a claim, you say, okay, is there a way to make this
24 claim language fit a product.

25 So the fact that, you know, we could move this one a

1 quarter of an inch or half an inch and this one as well isn't
2 really relevant. What's relevant at the end of the day is can
3 you set up a arrangement where you say, yes, this meets the
4 limitations of the claim? So we are doing exactly that. From
5 here to here, from here to here.

6 And again, whether we slip it a half an inch or an inch
7 one way or the other doesn't change the fact that there's
8 evidence this is elongated substantially straight.
9 Importantly, it performs a function of the elongated and
10 substantially straight.

11 THE COURT: Yeah, but the function is an "and," not
12 an "or." And so the function of the elongated straight -- it's
13 read together. The elongated straight has to perform a
14 function, so you read it together. And then -- and so I'm
15 saying that you're okay on the elongated and straight because
16 it performs the function. But I'm having a problem thereafter.

17 MR. VANDENBURGH: Yeah. Okay.

18 THE COURT: All right. So here's what I'm going to
19 do. I'm going to take this under advisement and I'll probably
20 take it under advisement until the jury gets the case. And if
21 they get hung up, somebody's going to read it and weep. I
22 don't know who yet but somebody will.

23 MR. COHN: Your Honor, can I just add a couple short
24 things on that?

25 THE COURT: Yes, you may.

1 MR. COHN: I know we're running out of time but I
2 think this is a very important point. I'm actually going to
3 start with the least important point very quickly and then talk
4 about the more important one.

5 You remember Mr. Busboom initially put the clothespin over
6 here and then we played around with exactly where it should go
7 and then he -- his report was over here. So you're talking
8 about a pretty wide swath of where they're --

9 THE COURT: No, I understand --

10 MR. COHN: This is clearly not around the second
11 blade. Your Honor's got it perfectly right.

12 THE COURT: Well, everybody tells me I have it
13 perfectly right when I'm on their side.

14 MR. COHN: Well, look, it's moving --

15 THE COURT: But I understand exactly what you're
16 saying.

17 MR. COHN: It's moving straight away from the blade,
18 Your Honor.

19 THE COURT: No, I understand.

20 MR. COHN: Yeah.

21 THE COURT: But I'm not prepared at this juncture to
22 direct verdict. That's what I'm telling you.

23 MR. COHN: Okay.

24 THE COURT: And I'm prepared only to take it under
25 advisement for the time being.

1 MR. COHN: Sure.

2 THE COURT: You're going to renew this motion at the
3 end of your case in chief.

4 MR. COHN: Yes, Your Honor.

5 THE COURT: And after I listen to your experts maybe
6 they'll push me over the edge, maybe they won't, and maybe I'll
7 wait to see whether you can convince the jury before I make a
8 decision.

9 MR. COHN: Yes.

10 THE COURT: But right now I don't know that I have
11 enough to say yea or nay. I'd like to take it under
12 advisement.

13 MR. COHN: Sure. With the promise that my next two
14 arguments will be very short, I would like to make one more
15 point on this.

16 THE COURT: Go ahead.

17 MR. COHN: This notion of where the end is, I think
18 with respect to -- I think it would be a mistake to ask the
19 jury to figure that out because that's an issue of claim
20 construction for the Court and these issues come up at trial
21 sometimes. And I think the -- that Your Honor -- it is
22 Your Honor's role to determine the meaning of "end," that it's
23 not -- it's not anywhere they want, it has to be -- that means
24 something. And we think for the jury to be able to say, well,
25 the end can be here, what does that mean? That the end -- they

1 admitted, in the context of the patent, when we were looking at
2 the patent, the experts admitted that the end is where the
3 curvature ends.

4 And if you simply instruct the jury, maybe -- maybe this
5 is the result of this, you can take that under advisement, if
6 the jury is instructed that the end means the end of the
7 curvature of the baffle, then I think -- I think
8 non-infringement has been admitted, under that
9 interpretation --

10 THE COURT: Well --

11 MR. COHN: -- which is, respectfully, I think for
12 Your Honor to decide.

13 THE COURT: Okay. Your -- see, the trouble is with
14 your whole design is that a reverse angle -- a reverse arc ends
15 up being at -- is straight at some distance because it goes in
16 one arc and then the arc reverses. And where it -- where the
17 confluence of those two arcs is creates a substantially
18 straight portion.

19 Now, whether it's elongated or not -- enough or not is
20 open for discussion. And that's why I'm not really concerned
21 about it. It's what comes after in the context of the claim
22 language that I'm concerned about. And counsel for the
23 plaintiff says that it's not one pinpoint in a -- in a
24 geometric term, it can be a little more than a pinpoint.

25 And I'm having some trouble conceptually with that, but I

1 would like to think about it some more and that's why I'm
2 taking it under advisement.

3 MR. COHN: I appreciate that.

4 MR. VANDENBURGH: Your Honor, could I make one more
5 point I should have made while I was up there but --

6 MR. COHN: It's my fault, Your Honor.

7 MR. VANDENBURGH: -- I was on the spot?

8 THE COURT: See, you can snatch victory.

9 But I would like to defer this until the close of
10 evidence, okay? And then we can talk it in -- about it in the
11 context -- a little bit more thoroughly than the time demands
12 that we have right now.

13 So I'd like you to hold onto that thought,
14 Mr. Vandenburg, and we'll discuss it when we talk about
15 instructions and whether the matter goes to the jury.

16 All right. So Mr. Cohn, your next two arguments?

17 MR. COHN: Indulge me for ten seconds, Your Honor.

18 THE COURT: Well, one has to be on willfulness.

19 MR. COHN: Yes, one is on willfulness, that's right.

20 THE COURT: And I'm overruling that. I think you've
21 got enough facts here to go to the jury.

22 MR. COHN: Just for the record, one sentence. We
23 just want to reiterate the legal question that we asked the
24 Court to resolve in our summary judgment motion regarding the
25 objective prong and we would reiterate those arguments again

1 for purposes of the Rule 50 motion.

2 THE COURT: Well, I understand that and I'll take
3 that under advisement as well. I think that the way the jury
4 instruction is cast right now, the jury is not advised that --
5 that I've made a decision on any prong. We've just asked them
6 to make a decision on a subjective prong. So operationally
7 we're at the same point we would otherwise be.

8 MR. COHN: Okay. And just so the record is clear for
9 appeal, I am asking for judgment as a matter of law on the
10 subjective prong as well.

11 THE COURT: And I'm overruling the subjective prong.

12 MR. COHN: Thank you, Your Honor. And then lastly,
13 Your Honor --

14 THE COURT: Damages?

15 MR. COHN: Damages. We reiterate the arguments that
16 we set forth in our motion, our *Daubert* motion with respect to
17 Miss Bennis, which I think articulated why we believe the
18 damages analysis was legally insufficient. And we would move
19 for a judgment as a matter of law on those bases.

20 THE COURT: All right. And I've written -- I think
21 my opinion on this issue is still sound. I think there's a
22 fact question about which measure of damages is appropriate
23 with respect to the hypothetical negotiation. So your motion's
24 overruled.

25 MR. COHN: Okay.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Anything else, Mr. Cohn?

MR. COHN: Not at the moment, Your Honor, no.

THE COURT: Okay. Anything else, Mr. Vandenburg?

MR. VANDENBURGH: No, Your Honor.

THE COURT: Okay. We'll see you at nine o'clock tomorrow morning. And let's go off the record.

(Discussion was had off the record.)

(Evening recess was taken at 5:07 p.m.)

* * *

C E R T I F I C A T I O N

I, Susan M. DeVetter, RDR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Susan M. DeVetter
Official Court Reporter

September 15, 2015
Date