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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 17, 2015

VOLUME VIII  
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
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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  
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KUTAK ROCK, LLP  
The Omaha Building  
1650 Farnam Street  
Omaha, NE 68102-2186, For the Defendant.

1 (At 8:35 a.m. on September 17, 2015; with counsel and the  
2 parties' representatives present; WITHOUT the jury:)

3 THE COURT: Please be seated.

4 Okay. We're here outside the presence of the jury.

5 We had some issues that we talked about last night. The  
6 one I specifically recall, Mr. Wolf, is whether you wanted to  
7 present any evidence concerning front baffles that were in  
8 production or in the market at or about the time that the --  
9 that Ferris prepared its front baffle system.

10 Do you have any?

11 MR. WOLF: Your Honor, I'll, if I may, give you some  
12 examples. And we disclosed what we intended to do.

13 THE COURT: Okay.

14 MR. WOLF: So let me start, Your Honor, with  
15 Exhibit 659. And just to lay our cards on the table,  
16 Your Honor.

17 THE COURT: Sure.

18 MR. WOLF: We were told -- told a story about  
19 Mr. Busboom on Thanksgiving of 1994, taking his brand-new mower  
20 out for a spin and test-drive and whatever -- and we were told  
21 it would be an incredible coincidence for someone to come up  
22 with a similar design.

23 In fact, two months earlier, someone did put a  
24 curved-straight-curved front baffle in a mower. Now, granted,  
25 it's a mulching mower and this is why this is not a validity

1 issue, but curved-straight-curved, someone in Germany was doing  
2 exactly the same thing at exactly the same time. The point is  
3 this was in the air.

4 THE COURT: So the Exhibit 659 is a German patent?

5 MR. WOLF: It's a -- yes, Your Honor. And we have an  
6 English translation if necessary, although I think the only  
7 point are the dates and the figure.

8 THE COURT: Okay.

9 MR. WOLF: And you'll notice that the date of  
10 application is September 1994, in other words two months before  
11 that fateful Thanksgiving day.

12 THE COURT: Was this in production in anybody's lawn  
13 mower?

14 MR. WOLF: We don't know. But it was -- but,  
15 Your Honor, they said what -- the point they made was, and this  
16 is why I want to draw the distinction between the validity  
17 argument and their -- they basically said for Mr. Bus- -- I  
18 mean for Mr. Baumbach to have come up with the same idea in the  
19 same time frame would have been an incredible coincidence.

20 Well, that incredible coincidence happened -- let me give  
21 you a second example much, much earlier, Your Honor.

22 THE COURT: All right.

23 MR. WOLF: This is 657 and this is -- as you will  
24 immediately see, Your Honor, this is a patent from 1956, very  
25 old. If you just flip to the second page, you'll look at

1 Figure 2. You see a shape that looks very, very much like the  
2 shape they said practiced their patent. This was 20 years old  
3 at the time, 25 years old at the time.

4 And the only thing this is missing is a -- is a front --  
5 are the walls.

6 So -- again, the point is, is that -- and I understand  
7 Your Honor's ruling on validity, but to say that there weren't  
8 lots of really similar things that Mr. Baumbach could have  
9 drawn from or that other people were doing at the same time  
10 based on this inspiration is misleading, I believe.

11 THE COURT: And these are the only two?

12 MR. WOLF: Well, Your Honor, I can keep going.

13 There's ones that show the front baffle -- they made a point of  
14 the front baffle across the whole front wall. I can show you  
15 655 that has that but --

16 THE COURT: May I see 655?

17 MR. WOLF: Yes, Your Honor. Again, we're looking at  
18 a patent that was almost 20 years old at the time.

19 THE COURT: Was it in production?

20 MR. WOLF: I -- I don't know, Your Honor. I don't  
21 know.

22 THE COURT: All right. Anything else?

23 MR. WOLF: No, Your Honor.

24 THE COURT: All right. Mr. Vandenburg.

25 MR. VANDENBURGH: Thank you, Your Honor. I think we

1 should start with the question of why are we talking about this  
2 now. It's not like Mr. Busboom testified yesterday. It's not  
3 like the issue of copying came up yesterday. It's been in this  
4 case throughout the week. And I suggest that we're here now  
5 talking about it because their technical expert has gone home.  
6 And, in fact, specifically on Colburn, Mr. Cohn asked me if I  
7 was going to raise Colburn in their expert's cross-examination,  
8 and I said no, and he didn't raise it either. And now that  
9 we're done, we suddenly want to just enter these into evidence,  
10 with no evidence that they were ever actually commercially  
11 used.

12 And they're really just red herrings. I mean look at this  
13 Colburn patent, Your Honor. Look at the front page if you  
14 would. Not only the thing -- pointing to not the -- a baffle,  
15 it's not even a side wall. This thing has blades hanging out  
16 in space. You know, this is not a real-world mower certainly  
17 that Dale Baumbach could have been aware of in 1996.

18 The German one, again, was published, in German, on  
19 March 28th, 1996. Are they really contending that Dale  
20 Baumbach happened to pull this patent, read German, and use  
21 this as his basis to come up with his idea?

22 THE COURT: All right.

23 MR. VANDENBURGH: I think I'll let it be, Your Honor.

24 THE COURT: All right. Well, if there was any  
25 evidence that any of these three were in production or that

1 Mr. Baumbach had a reasonable opportunity to look at them, I  
2 might consider them. But there's no evidence of that. I don't  
3 know that any of these -- some of these don't even fit what  
4 we're talking about today. I think that it opens up a can of  
5 worms. And at this late in the trial I don't intend to change  
6 course, so I'm going to overrule your objection.

7 MR. WOLF: I understand, Your Honor, I'm not trying  
8 to belabor this. I would only point out that you say this  
9 late. This was subject to a motion in limine so this is  
10 renewing something we argued in part.

11 THE COURT: And I understand. No problem. Same  
12 ruling though.

13 MR. WOLF: Yeah, understood.

14 THE COURT: All right. Anything else, gentlemen?

15 MR. WOLF: Your Honor, looks like we've got -- I  
16 haven't counted, but not that many jury instructions so we  
17 think the charge conference can be -- will be pretty quick. Is  
18 that right?

19 MR. WINKELS: Yeah.

20 MR. WOLF: There are probably five or six that are in  
21 dispute. So whenever we get done with the evidence, at  
22 Your Honor's convenience, I don't think that will take more  
23 than 20 minutes or, so I would hope.

24 I'm not sure there are any other issues.

25 THE COURT: I saw -- well, we'll see. I -- I've

1 looked at both of your submissions with respect to jury  
2 instructions. I mean, I think there might be some issues that  
3 we have to take care of but it certainly won't take any more  
4 than an hour.

5 MR. WOLF: Okay.

6 MR. VANDENBURGH: And, Your Honor, we're also going  
7 to have JMOL motions to bring.

8 THE COURT: Oh, I understand that.

9 MR. VANDENBURGH: And in -- yeah, certainly the  
10 verdict form is also something we would like to get --

11 THE COURT: Yeah, I'd like to talk about the verdict  
12 form. Maybe we can do that now because it's fairly easy to  
13 discuss.

14 So, you know, the evidence -- the evidence is -- at least  
15 the way the parties have presented it, has to do with both a  
16 lump sum -- because the plaintiffs have come up with a number  
17 and then totaled it. So the original verdict forms that we  
18 gave you contemplated a lump sum and didn't have the jury do  
19 any computation as to how they got to the lump sum, and that's  
20 typically the way I think cases are done, frankly, because the  
21 appeals court doesn't know -- want to know what the jury did,  
22 they just want to know the result.

23 But be that as it may, so we -- that's the way we did the  
24 original jury form.

25 The trouble with that is if the -- if there's a verdict on

1 validity -- or not -- if there's a verdict on infringement,  
2 then there has to be some way to compute a running total  
3 because the infringement would be ongoing. And some -- there'd  
4 have to be some way to calculate what the ongoing infringement  
5 damages are.

6 And so in context of the infringement damages, for the  
7 Court to come up with a number, the Court almost has to -- has  
8 to say how much per average mower? And frankly, that's what  
9 both sides have done throughout the course of this case. The  
10 plaintiff's expert has given a number of what per average mower  
11 is and the defendant has said here's how much per mower it  
12 ought to be.

13 So I'm interested in your ideas of how the verdict form  
14 ought to read.

15 So I'll start with the plaintiffs because it's the  
16 plaintiff's case.

17 MR. VANDENBURGH: Your Honor, that last point is the  
18 only thing that we have a problem with. We're fine with the  
19 first three instructions.

20 The issue with giving a per-unit royalty is just that it  
21 impairs our credibility. We -- while we have periodically  
22 converted our 5 percent of revenues royalty to, hey, here's  
23 what it would work out per unit, opening -- you know, we said  
24 it's 5 percent of sales. It's on the basis of sales. We've  
25 said it in Miss Bennis's testimony. It's been throughout the

1 case.

2 So if you give the jury an instruction that asks for  
3 average per unit, which is how their experts have done it, it  
4 sounds like you're favoring their side.

5 THE COURT: Their expert says it's \$10 per mower, it  
6 has nothing to do with average per unit, and so that's a  
7 problem with what I've given you to begin with. But go ahead.

8 MR. VANDENBURGH: Yeah, so I worry that we lose  
9 credibility with a form like this.

10 We are going to have an issue with an accounting, you  
11 know, after trial, no matter what happens. The experts don't  
12 agree on the number of units either. So even if we get a  
13 per-unit royalty we're going to have an issue on our hands.

14 But I would submit that -- we're only going to be talking  
15 about one year's worth of sales. The experts have in their  
16 reports the first six years and then the four-and-a-half years  
17 of the -- of the redesign. So the vast majority of the damages  
18 are going to be handled by the jury.

19 THE COURT: Okay.

20 MR. VANDENBURGH: If we give them a number -- you  
21 know, just give them the same lump -- whatever the total  
22 damages, we can deal with later what the last year of sales are  
23 going to be -- damages are going to be.

24 THE COURT: Okay. So Mr. Wolf.

25 MR. WOLF: Your Honor, I understand what you were

1 trying to do with question 4 and I think it's --

2 THE COURT: Commendable because I did it, but what's  
3 your opinion?

4 MR. WOLF: Well, no, I think -- I think -- I was  
5 going to say it makes sense. I wasn't going to go quite so  
6 gratuitously --

7 THE COURT: Thank you very much. But --

8 MR. WOLF: I was going to measure my comments. I  
9 mean, it does make sense. And ironically, our expert actually  
10 has a higher unit number than theirs so it's not what you  
11 thought, when you said there was a disagreement.

12 So Your Honor, you know how you handle post-trial issues  
13 better than we do. You know, to address Mr. Vandenburg's  
14 issue you can just drop the dollar sign from that mark and if  
15 they want to put a percentage instead of a dollar, they can do  
16 that.

17 Our biggest concern, really our only concern, is we think  
18 the issue of infringement should come first.

19 THE COURT: Oh, so -- well -- oh, I see. Okay.

20 MR. WOLF: Usually --

21 THE COURT: Don't I have -- that form is damages for  
22 the issue of the original infringement.

23 MR. WOLF: Right.

24 THE COURT: And then --

25 MR. WOLF: Willful.

1 THE COURT: And then willfulness?

2 MR. WOLF: Yeah.

3 THE COURT: And then after that the redesign, if  
4 there's infringement --

5 MR. WOLF: Right.

6 THE COURT: -- and then what the damages are for the  
7 infringement.

8 MR. WOLF: Right. And traditionally in a verdict  
9 form you go liability and then damages.

10 THE COURT: All right. Okay. So Mr. Vandenburg, do  
11 you have any preference on the order of the verdict form?

12 MR. VANDENBURGH: That raises another issue,  
13 Your Honor. If we're going to have two separate damages  
14 questions, then I think we should do it the way we've got.  
15 We've got original mowers that have been found to infringe,  
16 we've got the redesign. Makes sense.

17 We are somewhat concerned that two damages numbers creates  
18 the possibility for a inconsistent verdict. I mean, the  
19 experts generally have said it's the same royalty analysis for  
20 both the new and the old. And so if the jury comes up with a  
21 much different number in the two boxes, even if they're doing  
22 it on a per-unit basis, we're going to be scratching our heads  
23 going, can you reconcile what the jury did?

24 So we would be open to a single damages line where we  
25 would start with infringement by the redesign, then go to

1 damages, and then go to willfulness.

2 But if we're going to do two damages lines, I think this  
3 is the way to do it.

4 THE COURT: All right. Mr. Wolf, one damage line?

5 MR. WOLF: If it's on a per-unit basis.

6 THE COURT: They won't do that. I think that I'm  
7 just going to say here's -- I'm going to say what are the  
8 damages? And I'll put a dollar sign because if I don't put a  
9 dollar sign, it just doesn't make any sense, because that's  
10 what we're talking about is dollars.

11 MR. WOLF: I think in the spirit of compromise if  
12 we go non-infringement first, we can live with the  
13 consolidated --

14 THE COURT: Damages.

15 MR. WOLF: -- damages.

16 THE COURT: Okay.

17 MR. VANDENBURGH: It's going to go take some  
18 rewriting --

19 THE COURT: It will take some rewriting. And I'll  
20 look at it.

21 MR. VANDENBURGH: Yeah.

22 THE COURT: I'm going to have to think of how we do  
23 this because some -- some juror's going to think that if they  
24 find that there's no infringement, then they're going to think  
25 that they -- there's no damages, okay? And the defendants have

1       conceded there's some damages, but only for the original  
2       design.

3               So let's see what we can come up with and my staff will  
4       work on that and then I'll show it to you after we finish  
5       evidence this morning.

6               MR. WOLF:   Okay.

7               THE COURT:   But -- but what -- but the idea will be  
8       is, is there any -- is there any infringement on the redesign?  
9       If there is infringement, then ask them to consider the damages  
10      for the original design and -- and the redesign.  If -- if  
11      there is infringement, what's that number, and then ask for  
12      willfulness at the end.

13              Is that -- is that generally acceptable from a format  
14      standpoint for the plaintiff, Mr. Vandenburg?

15              MR. VANDENBURGH:   Yes, Your Honor.

16              THE COURT:   And Mr. Wolf?

17              MR. WOLF:   Yes, Your Honor.

18              THE COURT:   Okay.  So of course the devil is in the  
19      details but we'll put something together and see if we can make  
20      it work.

21              All right.  Are there any other issues?

22              MR. PASSARELLI:   A couple of logistic issues,  
23      Your Honor.  What do you want to do with the decks, keep them  
24      in here until the verdict?

25              THE COURT:   You know, I thought about that.  I do not

1 have -- I take that back. I have one hearing tomorrow morning.

2 Is that correct, Ms. Lawrence?

3 COURTROOM DEPUTY: Yes, Judge.

4 THE COURT: So I think -- certainly it's just too big  
5 for the jury room. And they're exhibits, so the jury ought to  
6 be able to look at them.

7 So I think what we'll do is seal the courtroom after my  
8 hearing at nine o'clock tomorrow morning and seal the courtroom  
9 after we submit it to the jury and then have Ms. Lawrence let  
10 the jury know that they can come out and look at the deck  
11 during the course of their deliberations if that's what they  
12 want to do.

13 COURTROOM DEPUTY: Okay.

14 THE COURT: Is that acceptable to the plaintiff?

15 MR. VANDENBURGH: Yes, Your Honor.

16 THE COURT: And to the defendant?

17 MR. WOLF: Yes, Your Honor.

18 MR. VANDENBURGH: Are we going to leave the decks in  
19 for -- during your other hearings, you don't mind --

20 THE COURT: Yes. No, I don't mind that. But if  
21 they're deliberating on Monday, we got -- we have trouble  
22 because we have another jury trial starting. I suppose I can  
23 do it in another courtroom.

24 COURTROOM DEPUTY: I'll have to check and see what's  
25 available.

1 THE COURT: We'll check. Okay.

2 MR. PASSARELLI: There's a lot of storage in the --  
3 downstairs.

4 THE COURT: Yeah, but then that means they've got to  
5 move -- I would just as soon have their -- something adjacent  
6 to the jury room that they can use.

7 MR. PASSARELLI: And once the verdict issues, we'll  
8 get them down there as soon as you tell us to.

9 THE COURT: Well, once the verdict issues, I want  
10 them out of here, okay, otherwise we'll sell them for scrap.

11 MR. PASSARELLI: The -- the other issue is what's  
12 your preference, Your Honor, in taking a verdict?

13 THE COURT: You don't have to be here. If you're in  
14 the building, then we'll -- you can hear the verdict. If  
15 you're not in the building and you want to be here, I'll give  
16 you a reasonable amount of time to get here, but not very long.  
17 I mean, no more than 15 minutes.

18 MR. WOLF: Is Your Honor's -- just -- is your  
19 preference that we're here, not here, do you care?

20 THE COURT: Doesn't matter to me. That's just  
21 completely up to you. And I usually tell jurors that in the  
22 interest of saving time that we take their verdict right away  
23 and sometimes the lawyers can't be here. So, I mean, you won't  
24 lose any face by not being here. But, of course, after they  
25 make -- after they do their verdict, it doesn't matter whether

1 you lose face or not, so --

2 MR. WOLF: Right.

3 THE COURT: So it's up to you, whatever you want to  
4 do. But traditionally, the lawyers are here if they're  
5 available and they're not if they're not and -- and I don't  
6 require lawyers to be here, or parties.

7 Any other issues? Mr. Winkels.

8 MR. WINKELS: We just have one exhibit to admit,  
9 Your Honor. I think we can do it outside the presence of the  
10 jury. This is the transcript of the deposition portion that  
11 was played to the jury for Mr. Del Ponte.

12 THE COURT: If you -- yes, please.

13 MR. WOLF: We would object to that, Your Honor.

14 THE COURT: Well, this is just for the record so that  
15 the court reporter --

16 MR. WOLF: Oh.

17 THE COURT: -- can use it if necessary.

18 MR. WOLF: It's not going back to the jury room?

19 THE COURT: Correct.

20 MR. WOLF: Okay, then objection withdrawn.

21 THE COURT: Okay.

22 MR. WINKELS: So for the record we'd move  
23 Exhibit 541.

24 THE COURT: All right. And it's received for  
25 purposes of the record only.

1 MR. WINKELS: Thank you.

2 MR. WOLF: And finally a logistical point,  
3 Your Honor, we're going to be talking demonstratives as soon as  
4 the -- you know, roughly 11:30, 12, so hopefully there won't be  
5 that many but when would you like to talk about -- 12:45, is  
6 that when you would anticipate? Or you want to roll right  
7 into -- I guess my point is we'll be ready to talk charge  
8 issues as soon as the evidence is over.

9 THE COURT: Correct.

10 MR. WOLF: But the demonstratives, I don't know  
11 whether that means Mr. Vandenburg is going to be in here  
12 and --

13 THE COURT: I'm not sure I understand the  
14 demonstratives. You have some additional demonstratives?

15 MR. WOLF: Well, if there are closing  
16 demonstratives -- they just sent theirs.

17 THE COURT: Okay.

18 MR. WOLF: We're going to give them ours.

19 THE COURT: Okay. If there's a problem, you need to  
20 let me know.

21 MR. WOLF: Right.

22 THE COURT: And, you know, the sooner the better.

23 MR. WOLF: Understood. Thank you, Your Honor.

24 THE COURT: But generally speaking, if there was a  
25 demonstrative that was used at trial, then I'm not going to

1 fight anybody from using it. If it's something new, then I  
2 need to look at it and then we'll talk about it.

3 MR. WOLF: Understood.

4 THE COURT: All right. Anything else, gentlemen?

5 MR. WOLF: No, Your Honor.

6 THE COURT: All right. Let's take -- well, we'll  
7 take a few minutes until we get the jury here.

8 (Recess taken at 8:57 a.m.)

9 (At 9:06 a.m.; with counsel and the parties'  
10 representatives present; WITHOUT the jury:)

11 THE COURT: Please be seated.

12 If you could get the jury.

13 (Jury in at 9:07 a.m.)

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

15 Ms. DeWitt, you may call your next witness.

16 MS. DEWITT: Thank you, Your Honor. The defense  
17 calls Mr. John Bone.

18 THE COURT: Mr. Bone, if you would come to the front  
19 of the courtroom and stand in front of my court reporter, we'll  
20 ask you a couple of questions and then swear you in as a  
21 witness.

22 COURTROOM DEPUTY: Would you please state your full  
23 name, spelling your first and last name for the record.

24 THE WITNESS: Sure. John Robert Bone, J-O-H-N,  
25 R-O-B-E-R-T, B-O-N-E.

1 JOHN BONE, DEFENDANT'S WITNESS, SWORN

2 MS. DEWITT: Your Honor, may I briefly approach the  
3 witness?

4 THE COURT: Yes, you may.

5 You may proceed.

6 MS. DEWITT: Thank you.

7 DIRECT EXAMINATION

8 BY MS. DEWITT:

9 Q. Good morning.

10 A. Good morning.

11 Q. Could you please introduce yourself to the jury.

12 A. Hi. My name's John Bone. I'm a managing director with  
13 the firm Stout Risius Ross.

14 Q. Mr. Bone, did you prepare some slides to help with your  
15 testimony today?

16 A. I have.

17 Q. Could you tell the jury where you currently live?

18 A. I live in Chicago. I was actually born and raised in  
19 Michigan. Actually, midwestern roots. My dad actually grew up  
20 across the river in Council Bluffs.

21 Q. And you work where?

22 A. Stout Risius Ross. It's easier to say SRR.

23 Q. And what's your current position at SRR?

24 A. Managing director.

25 Q. And how long have you worked there?

1 A. I've been with SRR for about six years. And prior to that  
2 I was with a firm called Charles River Associates. I was with  
3 them about ten years.

4 Q. Could you describe your work at SRR?

5 A. Sure. I mean, broadly speaking what I do is I'm hired to  
6 measure the economic impact of certain events and then  
7 determine the appropriate compensation based on that.

8 Q. How long have you been performing the type of work you do  
9 at SRR?

10 A. So I've been doing this my entire professional career,  
11 which is roughly 25 years.

12 Q. Could you give the jury some examples of the clients  
13 you've worked with?

14 A. Sure. I mean, I worked for smaller companies, midsize  
15 firms, large companies, but some of the names that you might be  
16 familiar with would be Verizon Wireless, Kimberly-Clark,  
17 Halliburton, Medtronic, Best Buy, companies like that.

18 Q. Do you hold any certifications?

19 A. I do. I'm a certified public accountant, CPA. I'm also a  
20 CFF, which is a sub-designation within the CPA; it's a  
21 Certified Financial Forensics.

22 Q. Have you authored any publications?

23 A. I do write from time to time. I publish articles in trade  
24 magazines as well as professional newsletters and publications  
25 and then our firm actually publishes a book, a journal,

1 actually, twice a year, so I write articles for that as well.

2 Q. And do those articles include topics such as valuing  
3 intellectual property?

4 A. They do. Most -- I'd say for the most part it deals with  
5 assessing damages, but my focus, frankly, over the last 20  
6 years, has been in intellectual property cases, in particular,  
7 patent cases.

8 Q. Have you testified at trial on appropriate damages in a  
9 patent infringement case before?

10 A. Yes, in a courtroom like this, I testified on patent  
11 damages a handful of times.

12 Q. And trial or non-trial, can you give an estimate of the  
13 number of opinions you've offered as an expert in calculating  
14 damages for intellectual property?

15 A. When you ask opinions, so I've been retained in cases as  
16 an expert to opine on damages anywhere between 50 and 100  
17 cases, and just been -- some of those result in publishing a  
18 report, which we'll talk about, and then some of them result in  
19 testimony at trial, or arbitration.

20 MS. DEWITT: Your Honor, the defense tenders Mr. Bone  
21 as a damages expert.

22 MR. VANDENBURGH: No objection, Your Honor.

23 THE COURT: You may proceed.

24 BY MS. DEWITT:

25 Q. Mr. Bone, when were you first retained?

1 A. I was retained in the first part of 2012, so about five  
2 years --

3 Q. And when -- I'm sorry.

4 A. Sorry. About five years ago.

5 Q. What were you asked to do?

6 A. So I was asked to do largely two things. One, as you see  
7 on the slide, determine fair compensation under two scenarios.  
8 Under the first scenario for the value of Ferris's infringement  
9 of the old design, and then if the jury finds that the redesign  
10 infringes, then what is the fair compensation for that use as  
11 well.

12 So that was one thing I was asked to do.

13 The second thing I was asked to do was review and opine on  
14 Ms. Bennis's opinions.

15 Q. And how did you go about doing that?

16 A. Well, it started by understanding the facts. And so that  
17 involved reviewing the documents that were produced by both  
18 parties, so Exmark produced a bunch of documents, so did -- so  
19 did Briggs, relating to all the different brands, Ferris and  
20 whatnot. It included marketing documents. It included  
21 financial documents, business records, and a host of different  
22 records, many of which -- some of which you've seen in the  
23 courtroom.

24 It also involved reviewing the testimony of -- you've  
25 heard about depositions, we've seen some of them in the

1 courtroom, but I reviewed the transcripts of -- of employees of  
2 both Exmark and Briggs. Reviewed the court documents.  
3 Reviewed the patent. Did some research.

4 So it's a host of -- a review of -- basically trying to  
5 understand a number of things: understand the market,  
6 understand the products, and understand how the patented  
7 feature plays into all of that.

8 Q. At some point did you reach a conclusion?

9 A. I did.

10 Q. And when was that?

11 A. Well, initially came to a conclusion middle part of 2012,  
12 issued a report, which was ultimately updated in 2015, so  
13 earlier this year.

14 Q. Let's move on to your opinions. I think with the first  
15 one, determining fair compensation for Exmark for  
16 infringement -- any infringement of the '863 patent.

17 Can you describe the kind of framework you use to assess  
18 that?

19 A. So you've heard Ms. Bennis refer to this hypothetical  
20 negotiation framework, and that is the framework that damage  
21 experts use to determine the reasonable royalty or the amount  
22 of fair compensation.

23 Now, within this hypothetical framework, there's certain  
24 assumptions that we need to make and that the parties would  
25 know.

1           So one would be you have a willing buyer, willing seller  
2 framework.

3           Two, the patent is assumed to be valid and infringed.

4           And the thing -- the third one I think is really important  
5 here is both parties would come to the table with all their  
6 information. In other words, it's not like a traditional  
7 negotiation where there's a lot of posturing and strategy.  
8 This is where you come to the table and you lay every -- all  
9 your information, all the facts on the table and you're trying  
10 to seek an amount that is fair and objective based on the data.  
11 And it's like playing cards, you know, when you're playing  
12 cards with your kids, the first time you lay the cards up  
13 face-up, it's like playing cards and you kind of know what  
14 everybody has.

15 Q.    So the end result of this hypothetical negotiation I think  
16 you said was a reasonable royalty?

17 A.    Yes.

18 Q.    Can you explain -- I think we've heard it but if you  
19 wouldn't mind explaining again, what's a reasonable royalty?

20 A.    So a reasonable royalty's essentially just a fee or a  
21 payment that you're paying for the use of that technology.  
22 It's like a rental payment or lease payment.

23 Q.    And back to this hypothetical negotiation, when does it  
24 take place?

25 A.    So this is also another important part of this

1 hypothetical negotiation. The -- the timing of it is tied to  
2 when infringement begins. The patent issued in November 1999  
3 so that's when the hypothetical would have occurred.

4 Q. Can you explain, who is sitting at this table in 1999?

5 A. So in 1999, you have Exmark, who's the patent holder,  
6 they're owned by Toro, so they would be on one side of the  
7 table. And then you have Ferris, who is the accused infringer.

8 Now, at that time, Simplicity -- you've heard testimony  
9 that they were in the process of buying Ferris, so I'd assume  
10 that Simplicity would also it be at the table because they  
11 would have an interest in, you know, going forward.

12 Q. Would Briggs have been sitting at this table?

13 A. Briggs would not have been at this table because Briggs  
14 didn't acquire Simplicity until 2004.

15 Q. And if I can back up, I think you said you made some  
16 assumptions in -- in looking at this framework and one was a  
17 willing buyer and willing seller?

18 A. Yes.

19 Q. And you assume that the patent is infringed and valid?

20 A. That's correct.

21 Q. And open access to the parties' information?

22 A. That is correct.

23 Q. And when -- you were here for Ms. Bennis's testimony,  
24 right?

25 A. Yes.

1 Q. And you heard Ms. Bennis say that one of the main  
2 assumptions used is called the book of wisdom. Do you recall  
3 that?

4 A. I do.

5 Q. First, can you explain what the book of wisdom is and then  
6 explain whether it's a main assumption to rely on?

7 A. So -- all right. So the book of wisdom is -- it's more of  
8 a -- it's more of a concept than an assumption that one makes.  
9 So what it is, is that -- again, you're doing -- you're  
10 evaluating the information that was available at the time of  
11 first infringement, so in November 1999. Now, oftentimes  
12 you're doing this sort of down the road so you don't have  
13 perfect information. And we're talking about a negotiation  
14 that occurred a long time ago and the business records -- many  
15 business records are not available, and so sometimes you have  
16 to peek forward to identify things that might shed light on  
17 what the parties would have known back in 1999.

18 And so that's what they call the book of wisdom, you know,  
19 where information regarding the value at the time the  
20 infringement is not known, you can peek forward to help  
21 understand what the parties would have considered at that time.

22 Q. And you mentioned they were looking for a reasonable  
23 royalty.

24 A. Yes.

25 Q. That's their end result?

1 A. That's right.

2 Q. Are there different types of reasonable royalties?

3 A. Yes. There are basically two types of reasonable  
4 royalties. Could be a lump sum. Basically would be one single  
5 payment that would cover all your activity for the entire time  
6 frame.

7 And the other would be what they call a running royalty,  
8 and so you're paying based on the activity as you go. It's  
9 like a pay-as-you-go type of system.

10 Q. And are there different types of running royalties?

11 A. Yeah, so there are two types of running royalties. One  
12 would be an amount per unit, so in this case it might be some  
13 amount per mower. The other one would be -- could be a  
14 percentage of the selling price. So that would be consistent  
15 with what Ms. Bennis has done with the percentage of the  
16 revenue.

17 Q. In this case, what did you conclude was the appropriate  
18 type of running royalty?

19 A. So I concluded that the most appropriate form of royalty  
20 is an amount per mower. And we'll get into this a little bit,  
21 but it's important to -- when we're talking about a royalty,  
22 the royalty is for the patented feature, okay? And nothing  
23 more than that.

24 And so when you have a product, particularly like a mower  
25 that has a lot of functionality, a lot of technology, a lot of

1 features, it's really important to make sure you -- you  
2 determine how much that feature is worth relative to everything  
3 else.

4 And my -- you know, my experience has shown that by doing  
5 it on a per-unit basis, you're able to isolate the value of  
6 that patented feature. If you use a percentage of royalty --  
7 percentage of the revenue, percentage of the selling price, you  
8 run a significant risk of overcompensating the patent holder  
9 because it'll include value of other components.

10 Q. And what kind of royalty did Ms. Bennis use?

11 A. She used a -- a running royalty that was a percentage of  
12 the revenue.

13 Q. Do you think that's appropriate in this case?

14 A. I don't.

15 Q. Can you explain why?

16 A. The best way to explain that is, again, a mower has a lot  
17 of -- well, has the patented feature with respect to the old  
18 design, but it also has a lot of non-patented elements, okay?  
19 One example of it, with respect to the Ferris mowers, is the  
20 independent suspension, right? So if you apply a percentage  
21 royalty to that entire mower, that means Ferris is paying a  
22 royalty based on the value of the independent suspension.  
23 Well, that's not what Exmark invented.

24 Another example that would be -- you know, if you look at  
25 the difference in price of a mower and it's because of a larger

1 engine, that incremental price, incremental payment to the  
2 patent holder is due to the engine, not the patent -- the  
3 design of the baffle.

4 Q. So what -- what did you include in your royalty base?

5 A. So when I calculated royalties, I included only the units.  
6 I counted -- I counted -- basically, if it had a baffle in it,  
7 I counted it.

8 Q. And are we looking at the number of units in your royalty  
9 base?

10 A. Yes.

11 Q. And what were the number of -- and can you describe what's  
12 on the slide.

13 A. So based on my analysis, there were 179,000 mowers that  
14 had an accused baffle. Now, some of those, frankly, are decks  
15 that were sold separately. They may have been replacement  
16 decks but I considered a mower for my royalty base.

17 97,000 of those mowers were old -- had the old design.

18 And 82,000 mowers we had this redesign.

19 Q. So is it fair to say that if it had a baffle, it's  
20 included in that base?

21 A. That's correct.

22 Q. And what were the number of units in Ms. Bennis's base?  
23 Are yours higher or lower?

24 A. So I -- her -- if you looked at the number of mowers, of  
25 the units in her royalty calculation, it was about 160,000

1 units. So I actually have a higher royalty base, I've got  
2 about 20,000 more units in my royalty base, in part because  
3 I've included like these replacement decks and other things,  
4 anything had a baffle in there.

5 Q. So we've got a royalty base. What's the next part -- the  
6 step of your analysis?

7 A. So now that we've got the base figured out, now the  
8 question is, what is the rate? What is the fair -- what is  
9 fair compensation for the shape of the baffle?

10 Q. And what -- are there different types of measures you use  
11 to kind of determine that?

12 A. So to do that, I looked broadly at two things. I looked  
13 at quantitative measures, so is there anything actually  
14 pointing to the value of the invention? And then I also looked  
15 at qualitative factors.

16 And then within the quantitative measures I looked at a  
17 couple of things. One, I looked at profit apportionment. I  
18 looked at how much of their profit can you attribute to the  
19 patent feature, as well as other -- as well as other things  
20 we'll get into.

21 Q. All right. Let's move to the first bullet. A portion of  
22 profits attributable to the '863 patent. I know we saw this in  
23 the opening, but can you kind of refresh everyone's memory of  
24 what we're looking at here?

25 A. So this is a reflection of how much profit Ferris makes

1 based on the sale of an average mower. Okay, and I believe you  
2 saw this in opening arguments. And just to be clear, the --  
3 everything you see in red is what it takes to make a mower in  
4 terms of the -- basically the raw material, the labor. That's  
5 what it takes to make it. And everything in yellow is what it  
6 basically takes to run the business. That's for marketing and  
7 selling and everything else.

8 So at the end of the day, the operating profit is about  
9 \$365 per mower. Now, that's kind of the -- you know, that's an  
10 important number to keep in mind because that's the amount of  
11 money that they have to pay a royalty from. So it's really the  
12 starting point and we'll come back to it at the end because  
13 it's -- when you determine a royalty you have to think about it  
14 in the context of that amount, does it make sense in light of  
15 the profit that they're making.

16 Q. And we heard Mr. Wenzel talk about take-home pay. Is that  
17 what the \$365 represents?

18 A. So technically -- I mean, from a business perspective,  
19 yeah, someone that runs a business, that might be how they  
20 consider their bottom line, but it doesn't consider all the  
21 costs. The company still has to pay interest. They still have  
22 to pay taxes. So that's not really the take-home pay. So  
23 that's actually a smaller number. But -- but when you're  
24 looking at valuing royalty, it's standard practice to consider  
25 operating profit.

1 Q. And we have an average price to the dealer of \$5,000. Is  
2 that what you used in your -- when you were doing your --  
3 your -- crunching the numbers in your report?

4 A. The actual average is \$4,997. I round it up for  
5 presentation purposes. So the actual operating profit I think  
6 is like \$366 per mower.

7 Q. And in your expert report that you submitted in this case,  
8 you have a little less colorful table but nonetheless it shows  
9 us how you walked through Briggs's expenses to get to that  
10 \$365; is that right?

11 A. That's correct.

12 MS. DEWITT: Your Honor, we would move for a portion  
13 of DX-717 into the record, and we would ask for it to be  
14 introduced as DX-1427.

15 THE COURT: Any objection?

16 MR. VANDENBURGH: Are we talking about the slide  
17 we're looking at?

18 MS. DEWITT: No, I haven't published it yet.

19 MR. VANDENBURGH: Okay. I'm sorry.

20 MS. DEWITT: I'm sorry, it's on schedule 3A that I  
21 handed to you.

22 The schedule.

23 MR. VANDENBURGH: This one.

24 Your Honor, my only objection, we had this when Ms. Bennis  
25 was presenting schedules, is that these exhibits should be

1 marked clearly as being one side's expert or the other. So I  
2 have no objection if there's some label put on these that  
3 indicates they're Mr. Bone's analysis.

4 THE COURT: All right. And do you have any objection  
5 to that, Ms. DeWitt?

6 MS. DEWITT: Not at all, Your Honor.

7 THE COURT: All right. So I'll receive the exhibits  
8 once they're properly marked.

9 You may proceed.

10 MS. DEWITT: May we publish?

11 THE COURT: Yes, you may.

12 BY MS. DEWITT:

13 Q. Mr. Bone, is this the schedule from your report that  
14 details out how you arrived at the operating margin?

15 A. Yes.

16 Q. And I -- the first slide we just saw is operating profit.  
17 And you've heard a lot of talk between -- why we should be  
18 looking at profit versus revenue. And I think Ms. Bennis  
19 focused a lot of her testimony on revenue.

20 Do you have any problems focusing on revenue versus  
21 profit?

22 A. Well, you certainly can consider revenue, but you have to  
23 look at profit. It all comes down to how much profit there is  
24 and how much of that profit you can attribute to the feature  
25 and how much profit you can use to pay a royalty.

1 Q. What's the risk if you don't do that?

2 A. If you focus solely on revenue, and in this case with a  
3 multi-feature product, you come up with a royalty base in  
4 revenue, you run the high risk of coming up with a royalty that  
5 does not leave the licensee with a reasonable degree of profit.

6 Q. And if we can move to a similar-looking slide but there's  
7 different numbers here. Can you explain the difference between  
8 this slide and your operating profit slide.

9 A. Okay. So the last slide was focused on operating profit.  
10 This is another measure of profit. You know, it gets a little  
11 confusing sometimes. But this is called incremental profit.  
12 We've heard Ms. Bennis refer to it. This is basically the  
13 profit when you only consider the variable portion of the SG&A.  
14 So if you look in the yellow highlighted portion, if you recall  
15 in the last slide, it had a lot of other things in there like  
16 warranty and engineering and things of that nature. Many of  
17 that is fixed. So if you strip that out and just focus on the  
18 variable portion, then that means there's a larger profit pool.  
19 And that, when you're doing a profit apportionment, it -- it's  
20 proper to look at incremental profit.

21 So I'm actually starting with a bigger pie -- bigger  
22 profit pie and then I'm going to take -- walk you through how  
23 you take that pie and you basically apportion it to the  
24 patented feature.

25 Q. So when we're looking to apportion the value attributed to

1 one feature, the first step is to get the contribution margin,  
2 right?

3 A. Contribution margin is a different measure -- it's  
4 synonymous with incremental profit, right.

5 Q. Okay. Incremental profit?

6 A. Yes.

7 Q. And then what's the next step?

8 A. So the next step is to figure out how much of that profit,  
9 so of that \$875 of profit per mower, how much of that can we  
10 attribute to the shape of the baffle?

11 Now, we've heard a lot of testimony about all the things  
12 that are in a mower, right? We walked outside, we saw the  
13 Ferris mower. It's a pretty complex machine, right? There's  
14 an engine in there. It's got lots -- it's got suspension.  
15 It's got a lot of stuff in it, right, more than just the  
16 baffle.

17 So the first question is, you know, what drives demand?  
18 What drives demand for a mower? Why do people buy it? And  
19 then you say okay, let's -- and we'll see that there's  
20 objective evidence in terms of why people buy mowers.

21 Q. And what kind of objective evidence can we look at?

22 A. So the -- it might be some of the best evidence is survey  
23 data. So surveys will tell you, if you do surveys and you  
24 elicit why people buy something, then you can use that survey  
25 data to carve up that patent pool. This is used in patent

1 cases by damage experts like myself and Exmark actually does a  
2 lot of surveys. I mean, they have a company, we've heard  
3 referred to as Wiese, I think it's called Wiese. So they hire  
4 Wiese to do a bunch of research and they've done research  
5 throughout the years. And we have a study that was done in  
6 1995, just shortly before the negotiation, which informs us why  
7 people were buying mowers.

8 Q. Mr. Bone, I handed you earlier DX-1073. Is this the 1995  
9 survey you're referring to?

10 A. Yes.

11 Q. And you relied upon this survey for purposes of your  
12 opinions in this case?

13 A. I did.

14 MS. DEWITT: Your Honor, we move for the introduction  
15 of DX-1073.

16 THE COURT: Any objection?

17 MR. VANDENBURGH: No objection.

18 MS. DEWITT: May we publish?

19 THE COURT: Yes, you may. 1073 is received.

20 BY MS. DEWITT:

21 Q. This is the Wiese study, Mr. Bone?

22 A. Yes.

23 Q. And let's go to the next feature -- or I'm sorry, the next  
24 slide.

25 Could you explain what's on the slide?

1 A. So there were -- this is a fairly lengthy report so I just  
2 pulled out one of the slides that summarizes the results.

3 So Wiese went out there and surveyed a bunch of landscape  
4 contractors and said, you know, what's important to you? What  
5 features do you desire in a mower?

6 And here they listed -- there's 30-some different reasons  
7 or features that they found desirable in a mower. And I've  
8 highlighted a number of them. I think there are six that are  
9 highlighted. And all of those -- by the way, I should say that  
10 not only are there 30 factors but then there are scores or  
11 ratings. And I should be clear. When they -- when the  
12 landscaper was asked the question, you know, what features are  
13 desirable, they were asked to, you know, rate them on a scale  
14 of 1 to 10, 1 being not very important, don't really need it,  
15 to 10, extremely important, couldn't live without it, okay?  
16 And then they converted those scores to 10 to 100. So anything  
17 close to 100 is like got to have it, can't live without it.

18 You'll see here there are six that are all above 90  
19 percent -- or not 90 percent -- a rating of 90. Number 1 is  
20 quality of cut with a score of 96.

21 Right below that is product reliability, score of 95.

22 There are two at 94, which have to do with -- one has to  
23 do with dealer and the other has to do with the value, the  
24 price of the mower.

25 And then you have one at 92, which has the reputation of

1 the dealer.

2 And then lastly, product life is at 90.

3 But again, these are just six of, say, 30 different  
4 desirable features in a mower.

5 Q. And what type of mower are we looking at here? What's  
6 the -- what's the type of mower that is being surveyed?

7 A. So this is for riding mowers but they were also asked  
8 about walk-behinds. And they were -- actually they were asked  
9 about hydrostatic walk-behinds and belt-driven walk-behinds.  
10 So there would be two other tables just like this that had  
11 similar factors and similar ratings.

12 Q. I think you said that relying on these surveys to get an  
13 idea of what the customer wants is -- it's typically used by  
14 professionals such as you; is that right?

15 A. That's correct. And if you can find them in the normal  
16 course of business -- surveys that are done in the normal  
17 course of business, those are good. Sometimes if they don't  
18 have them, companies will actually do their own research.

19 Q. And you heard some concern from Ms. Bennis about relying  
20 on these types of customer surveys. Do you recall her  
21 testifying about that?

22 A. I recall her saying that, yes.

23 Q. Do you share her concerns about using customer surveys and  
24 figuring out what the customer wants?

25 A. No, I mean, you have to -- this is, in my view, the best

1 sort of contemporaneous, objective evidence in terms of what  
2 people desired.

3 So I have no concerns about using a research study like  
4 this, a survey like this. In fact, like I said, it's, in my  
5 view, the best evidence of what was happening in the market at  
6 that time.

7 Q. If we can, I think we also saw this in the opening, is  
8 this just a different way of looking at the results from the  
9 Wiese study?

10 A. Yeah. So if you looked at the -- the different factors,  
11 the -- the primary factors that were cited for the riding  
12 mowers and the walk-behinds, there were roughly a dozen  
13 different factors that accounted for demand for a mower, good  
14 cut quality being one of a dozen.

15 Q. And if we go to the next slide, is this a compilation of  
16 the attributes you pulled from the Wiese study?

17 A. Yes. So what you see here is a table which summarizes  
18 those attributes that had a rating of 90 or above under the  
19 three different tables that were in the report. So one  
20 relating to riding mowers and two relating to walk-behinds.

21 And some were common across all three, for example,  
22 product reliability was important across all three. Cut  
23 quality was important across all three.

24 But if you look at all of them, cut quality accounted for  
25 roughly one-fifth or 20 percent of the factors that drove

1 demand for mowers.

2 Q. How did you use this -- these studies and these ratings to  
3 come up with a value attributable to the quality of cut?

4 A. So if you took that -- I basically took this information,  
5 my conclusions that 20 percent of the demand was accountable to  
6 quality and cut, and I took that profit pile, the 875, and I  
7 applied it to that profit pool.

8 Q. Were there other studies or analyses that confirmed or  
9 validated the 20 percent that you're using?

10 A. Yes. So as I mentioned, Wiese did studies -- a number of  
11 studies for Exmark. There was a study in I think 2004. There  
12 was another study in 2014. And all those studies basically  
13 confirm or you come to the same conclusion regarding the role  
14 of cut quality in terms of demand for a mower.

15 Q. Now, now that we see the quality of cut is attributed 20  
16 percent of the value, walk us through the next step.

17 A. So as I mentioned a minute ago, what you do is you start  
18 with that incremental profit that I calculated initially, so  
19 that's \$875 a mower, and you say, all right, there's a lot of  
20 things in that mower that are driving it but 20 percent of it  
21 relates to cut quality. So the 875, you can attribute \$175 to  
22 cut quality.

23 Q. So now at that we've figured out \$175 is attributable to  
24 cut quality, are we done?

25 A. No, because as we've heard over the last two weeks,

1 there's a lot of things that impact cut quality, only one of  
2 which relates to the shape of the baffle.

3 Q. Well, let's go on to the next slide. How does the baffle  
4 fit in into all of the components that may affect cut quality?

5 A. So again, as we've heard over the last two weeks, a lot of  
6 things impact cut quality. So a lot of it has to do with the  
7 deck. So, for example, you have a front baffle, rear baffle,  
8 blades are very important, as you've seen and heard, and  
9 antiscalp rollers you see there. A lot of things impact cut  
10 quality or things that are in the deck.

11 Q. And you sat -- you were -- you've been here most trial  
12 days, correct, Mr. Bone?

13 A. Most trial days and I've caught up by reading transcripts  
14 to the extent I wasn't here, yes.

15 Q. And have you heard a lot of testimony through the course  
16 of these two weeks that there's a lot of factors that go into  
17 cut quality?

18 A. Yes. I mean, we kind of work backwards. We heard  
19 yesterday from Mr. Converse, Mr. Benson, the ones we heard by  
20 video deposition, they talked about things that impact cut  
21 quality. Even the inventor, Mr. Busboom, talked about all the  
22 different factors. Both Mr. Wolf and Mr. Cohn walked some of  
23 the Exmark witnesses sort of tediously through all the things,  
24 I mean, it probably was painful to kind of hear as they walked  
25 through all the things that impact quality cut but those were

1 very important in terms of considering what role the baffle has  
2 in driving quality of cut.

3 Q. So how did you figure out where the baffle fits in?

4 A. So based on all the testimony, based on the marketing  
5 materials, based on, you know, Exmark and Briggs and Ferris  
6 business documents, I identified probably 20 different things  
7 that impact the quality of cut, a lot of it in documents from  
8 Exmark that say, hey, listen, quality of cut follows the blade.  
9 And you'll see a lot of the mentions here having to do with  
10 aspects of the blade in terms of the speed of the blade, the  
11 sharpness of the blade. But certainly the baffle plays a role.  
12 The analogy that was used yesterday in terms of the link, you  
13 know, the baffle's part of that link but there's a lot of links  
14 in that chain.

15 Now, you see here there's probably about 20 different  
16 factors that lead to good cut quality, the baffle being one  
17 of 20. But for my analysis, I assumed that one in ten, so  
18 roughly 10 percent account -- can -- 10 percent of cut quality  
19 can be accounted for by the shape of the baffle.

20 Q. And why don't we move on. So we've started right with the  
21 portion attributed to the quality of cut, and are we moving to  
22 the next step now, the portion attributable to the flow control  
23 baffle?

24 A. That's correct. So now what we have, we start where we  
25 were before, the 175, and now we say, all right, how much of

1 that profit that we can attribute to cut quality can we now  
2 attribute to not just the front flow control baffle but the  
3 particular shape of a flow control baffle. And in my opinion,  
4 you know, that accounts for roughly 10 percent of cut quality.

5 So if you take the 10 percent and multiply it by 175, you  
6 can attribute \$17.50 of Briggs' profit, of Ferris' profit at  
7 the time, to the patented baffle design.

8 Q. If we were to think of the \$17.50 as a percentage of  
9 profit -- I think I have a point here -- what's that -- what's  
10 that number?

11 A. So just to kind of put it in perspective, the 17.50 is  
12 roughly 2 percent of the incremental profits or roughly 5  
13 percent of the operating profits.

14 Q. And you have a similar table in your report that details  
15 out each number to the penny -- almost to the penny as to the  
16 deductions made to get to the 17.50?

17 A. Yes.

18 Q. Is this Schedule 6 -- or Exhibit 6A to your report?

19 A. Yes.

20 MS. DEWITT: Your Honor, we would move to introduce  
21 this as DX-1428, and we'll do the same, making sure it's a -- a  
22 schedule out of an expert report.

23 THE COURT: So you'll -- you'll recaption it, so to  
24 speak?

25 MS. DEWITT: Yes, Your Honor.

1 THE COURT: All right. Any objection, Mr. Van- --

2 MR. VANDENBURGH: I'm not sure which exhibit we're  
3 talking about.

4 MS. DEWITT: 6A from his report.

5 MR. VANDENBURGH: No objection to the designation.

6 THE COURT: Exhibit 1428 is received. You may  
7 publish.

8 MS. DEWITT: Thank you.

9 BY MS. DEWITT:

10 Q. Is this the schedule from your report, Mr. Bone, that  
11 details out the calculation?

12 A. Yes.

13 Q. Now, is this type of apportionment common in determining a  
14 royalty?

15 A. Yes. When you're dealing with a product, a multi-featured  
16 product where the patented feature is just one element of it,  
17 this is very common.

18 Q. Have you ever performed an apportionment before?

19 A. Yes, many times.

20 Q. And it's an acceptable method of determining a royalty?

21 A. Yes. In fact, I've testified to portions --  
22 apportionment -- apportionments like this and the courts have  
23 accepted it.

24 Q. Now, you ultimately conclude that \$10 per mower is  
25 appropriate, right?

1 A. That's correct.

2 Q. Can you walk us through how you get from 17.50 to \$10?

3 A. Sure. Well, it's important to keep in mind that the 17.50  
4 is sort of the economic, sort of a ceiling or, you know, from  
5 an economic perspective the value you put on the patent design,  
6 but there's a lot of other things that would go into what the  
7 parties would have agreed to at the hypothetical. And -- oh, I  
8 think we have a slide that kind of goes through some of those  
9 other factors.

10 Q. Is it fair to look at the \$17.50 as the maximum amount  
11 Briggs would be willing to pay?

12 A. Well, I would -- I would put it this way, that it's from  
13 an economics perspective, based on the objective evidence, it's  
14 the most that they should pay, based on what I -- what I  
15 determined based on the review of the records.

16 Q. Now, we've covered -- so under quantitative measures,  
17 we've covered the portion of profits attributable to the '863  
18 patent, right?

19 A. That's correct.

20 Q. Okay. If we can move on to the indicators of value.

21 Could you look at changes in the price of a product to  
22 kind of determine what the value is to a particular feature?

23 A. Yes, that's commonly done in our business, yes.

24 MS. DEWITT: Let's go to the next slide.

25 BY MS. DEWITT:

1 Q. Can you explain how that works in your analysis with  
2 respect to the patented flow control baffle?

3 A. So one indication -- an indication of value, so how a  
4 company values a feature, values a technology, is what do they  
5 do with the price after they incorporate it into the product?  
6 And that's really the first step, because you ultimately want  
7 to look at the profits, but let's just focus on price.

8 So what I did is I found some documents in the record that  
9 reflected around the time when they actually implemented --  
10 when Exmark added the patented flow control baffle into their  
11 mowers and I was able to identify and look at the prices and  
12 what happened.

13 And these are just a couple of examples. There were  
14 numerous ones, but these are representative.

15 And so, for example, the 52-inch Exmark Metro, it was  
16 priced at 1898 in '96 but after they incorporated the baffles,  
17 the price actually went down \$95.

18 And similarly -- well, I shouldn't say similarly but with  
19 respect to the Viking, there was a price increase after they  
20 incorporated the baffles, but if you look at other Viking  
21 products that were, you know, that were introduced in 1997 that  
22 didn't have the baffle, the price also increased \$33. So you  
23 can't attribute it to the fact that they incorporated the  
24 baffles; more likely it's an overall price increase.

25 So based on the analysis of prices there was no

1 discernible increase of price once they added the baffle and  
2 that tells me that at the time they did not place a lot of  
3 value on the patented baffle.

4 Q. Were you here when Mr. Stinson testified as -- on the '863  
5 patent?

6 A. I was.

7 Q. Do you recall his testimony with the price increase that  
8 Exmark instituted when the Lazer Z first came out?

9 A. I was, yes. So that's -- so I think there's also evidence  
10 Exmark's not shy about increasing their price, right, so we've  
11 heard that in context with what happened in Brickman. We  
12 understand that, you know, when they introduced the fuel  
13 injection -- fuel injected motor into their engines they  
14 increased the price because it provided a huge benefit to  
15 their -- to their customers. So they are not shy about it.

16 And, in fact, Mr. Stinson testified that, you know, prior  
17 to the introduction of the Lazer Z, Exmark was known --  
18 didn't -- wasn't really well known for good cut quality, they  
19 had lower prices, but once they introduced the Lazer Z, which  
20 had all of these -- had a lot of stuff in there, it was a  
21 really successful product, they were able to increase their  
22 price.

23 Again, that's evidence that, you know, when you can offer  
24 a feature to the market, you can generally get a price increase  
25 and Exmark has demonstrated that they are willing to do that.

1 But in the case of the baffle, there's no evidence that  
2 they did it.

3 Q. Let's look at another way as to how Exmark valued the  
4 technology. And I want to show you -- I think we've seen it  
5 before, it's previously introduced as DX-608. Can you explain  
6 to the jury what's on the slide?

7 A. So the -- we've heard evidence about baffle kits. So  
8 around what -- well, right around the time they introduced the  
9 mowers with the patented baffle design, they also offered what  
10 they call baffle kits to customers that had mowers with the old  
11 design, but enabled those customers to basically put the  
12 baffle -- patented baffle in their mowers.

13 Now -- and we've heard a lot about the fact that, hey,  
14 listen, this patented baffle provides a lot of economic benefit  
15 to the landscaper, I mean increased productivity, better  
16 quality of cut, all of these benefits associated with the  
17 baffle, and, you know, so I -- so you can look to see, well,  
18 what price, you know, what price did they get in the  
19 marketplace for that feature, for that baffle? And when they  
20 offered these baffle kits, they were initially priced at \$26 a  
21 kit.

22 Q. What's the date on this?

23 A. This is March 15th, 1995.

24 Q. Okay. I want to show you one more. This has been  
25 previously introduced as DX-614. Is this a similar type of

1 bulletin announcing a price for a baffle kit?

2 A. Yes. So this was in 1996, so next year. They continued  
3 to offer these baffle kits to customers that didn't have the --  
4 a baffle in there. Now the price was \$49 a kit.

5 Q. You heard Ms. Bennis' testimony that we shouldn't really  
6 look at these baffle kits because Exmark considered it goodwill  
7 and that's why it shouldn't be considered an indicator of  
8 value. Do you agree with her?

9 A. Well, they certainly gave some of these away, so there's  
10 evidence that they, for a number of these, they actually gave  
11 the kits away. So I certainly would agree that if you're  
12 giving a kit away, it's either no value or you're giving it  
13 away goodwill. But here they're actually selling to a  
14 customer, they're actually paying for something. So this is my  
15 view is a indication of the value they place on the baffle.

16 Q. And you reviewed a lot of documents in this case; is that  
17 right, Mr. Bone?

18 A. A lot of documents.

19 Q. Did you see documents that would indicate that Exmark  
20 priced the baffle kits in this manner as a matter of goodwill?

21 A. Not that I recall. I don't recall seeing anything like  
22 that.

23 Q. Let's go back to the road map. And we've talked about the  
24 indicators of value and we had the change in the mower price  
25 and the price of the baffle kits.

1 Is there any other quantitative measures we could use to  
2 see what others have paid for similar types of technology?

3 A. Yes, and that is looking to other license agreements that  
4 reflect what people pay in this industry for technology. And  
5 so there's actually -- there were -- I think the parties  
6 collectively produced 24 license agreements. So examples of  
7 when either Exmark or Ferris or Briggs or Toro had entered into  
8 agreements where they're licensing technology.

9 Some of them were done in the normal course of business.  
10 Some of them were settlements. And they related to technology  
11 such as discharge baffles to self-propelled mowers, but if  
12 you -- the one thing that's very clear, of the 24 agreements,  
13 with few exceptions, all of the agreements -- well, I should  
14 say of the 24 agreements, with few exceptions, they're all on a  
15 per-mower or per-unit basis, so that tells me that that is sort  
16 of the accepted practice. And it makes sense in light of the  
17 fact that there's a lot of technology in these mowers. And so  
18 again, to make sure you don't overvalue something, putting it  
19 on a per-unit basis makes sense.

20 The other thing to -- that I observed is that with the  
21 agreements that were done in the normal course of business, the  
22 rates that were paid range from \$5.50 per mower to \$50 per  
23 mower.

24 Q. And let's move -- we've talked about quantitative  
25 measures. Now, we -- I want to back up. When you said

1 per-unit, you're talking about kind of royalty you propose in  
2 this case, right, a flat amount per unit?

3 A. Yeah, so it's -- yes. It would be a per-unit, per-mower  
4 basis. So in this case, it would -- one of the license  
5 agreements was five fifty per mower. Another one was seven --  
6 I think it was seven fifty per mower. One was \$50 per mower.

7 Q. So not a percentage?

8 A. In terms of -- the only ones that I recall that had a  
9 percentage were like the -- were the Scag settlement agreement  
10 so those were not done in the normal course of business.

11 Q. Okay. And moving on, I think we're ready to go to  
12 qualitative measures. And we saw this with Ms. Bennis but I  
13 think the first one is the *Georgia-Pacific* factors. Can you  
14 just again refresh us on what they are and how they're used?

15 A. So as Ms. Bennis said, there's a case out there that  
16 identifies 15 factors that you should consider. They're not an  
17 exclusive list but they're helpful and they instruct -- give us  
18 some instructions on how to consider a reasonable royalty. And  
19 you know, there are a number of them here. I considered all of  
20 them in terms of what the parties would have agreed to. Some  
21 of these point to the analysis I did. For example, if you look  
22 at factor 13, it specifically calls for portion of the profit  
23 attributable to the invention as distinguished from  
24 non-patented elements. That's exactly what we've been talking  
25 about earlier.

1           So -- and you look at number 12, portion of the profit  
2 that's customary. So again, the focus here is on profit.

3 Q.    And did you consider all these factors in reaching your  
4 conclusions and opinions in this case?

5 A.    I did.

6 Q.    You heard Ms. Bennis also talk about *Georgia-Pacific*  
7 factor 13 in her testimony, right?

8 A.    I did.

9 Q.    And we've walked through with you kind of step by step how  
10 you apportion the profit due to the flow control baffle in the  
11 '863 patent?

12 A.    That's correct, yeah. Yeah.

13 Q.    That's the \$17.50?

14 A.    Correct.

15 Q.    Did you find anywhere in Ms. Bennis's report any formula,  
16 any calculation, any way we can figure out how she arrived at  
17 her 5 percent?

18 A.    No. There -- she did not do any form of profit  
19 apportionment, where -- of any nature. There's nothing in her  
20 report that shows how she arrived specifically at the 5  
21 percent. It's almost like a black box. I mean, just -- took a  
22 lot of things, kind of stirred it up and said, yeah, I think  
23 it's 5 percent. That's kind of my general assessment of how  
24 she reached her 5 percent.

25 Q.    So is it fair to say that the only evidence we have that

1 her opinion is reasonable is because she says it's reasonable?

2 A. In my opinion, that's correct.

3 Q. Let's talk specifically about what would have been the  
4 parties' position -- well, first, let me back up.

5 Let's talk about factor 15. We've seen that. That's the  
6 hypothetical negotiation, right?

7 A. That is, yes.

8 Q. And let's talk specifically about what some of the  
9 positions would have been for both Ferris and Exmark at that  
10 1999 table. Can you first talk about how they would have  
11 viewed each other as competitors?

12 A. So again, you've got to keep in mind this negotiation  
13 would have occurred in November of 1999, you know, both --  
14 Ferris was certainly smaller. Their focus -- and I think we've  
15 heard a lot of testimony on this, is that their focus was more  
16 on the large acreage customer. We heard testimony yesterday,  
17 actually, let's use that, testimony yesterday from one of the  
18 Exmark employees that talked about segmenting the market and  
19 the market was segmented between landscapers and large-acreage  
20 consumers.

21 And we've heard testimony from I think Ms. Altmaier and  
22 some other witnesses that Exmark's focus, they were 80 percent  
23 landscapers, 20 percent sort of the large acreage user, whereas  
24 Ferris's focus was more on the consumer end, the large acreage  
25 users, whereas only 20 percent were related to the landscapers.

1           And there's certainly a perception of quality -- in fact,  
2           there's documents produced by Exmark that -- where they  
3           specifically say Ferris is a niche player. And Ferris really  
4           wasn't on their radar screen.

5           Q.     And how about the -- would they have looked at how Ferris  
6           is using the front flow control baffle in terms of what kind of  
7           cut quality and their reputation for cut quality at that time?

8           A.     Sure. Well, Ferris would have come into the negotiating  
9           table having -- I think they had used the baffle for maybe  
10          about a year, year and a half, but they really weren't getting  
11          the benefits or the claimed benefits of the invention. We  
12          heard a lot of testimony that they weren't known for their cut  
13          quality and really frankly bad -- not -- you know, bad cut  
14          quality all the way up through the time when they introduced  
15          the iCD Cutting System.

16          So they come into the negotiating table like, okay, so  
17          you're wanting us to pay for a particular shape of a design  
18          that allegedly provides good quality cut, we're not seeing  
19          that, so that would certainly influence their willingness to  
20          pay for a royalty for that technology.

21          Q.     By 1999, Ferris would have already introduced its  
22          independent suspension feature, correct?

23          A.     That's correct.

24          Q.     And how would that have factored into the negotiating at  
25          the -- at the hypothetical negotiation?

1 A. Well, that would have been, from Ferris's perspective,  
2 their primary point of differentiation, and they would have  
3 known that, okay, that's -- for their segment of the market,  
4 consumers, comfort was -- comfort was very important, it's  
5 paramount.

6 So that certainly would influence Ferris's perspective.

7 Q. Do you have a summary of -- so we're down to the \$10.

8 A. Um-hum.

9 Q. Do you have a summary of what that total amount would be  
10 for each of the old and the new redesign -- the old and new  
11 baffles?

12 A. Yes. So if you take the total mowers that were  
13 manufactured and sold with the old design, that's 97,000 units  
14 or 97,000 mowers. If you multiply that by the \$10 royalty per  
15 unit, you get \$970,000.

16 And if you have the -- there were 82,000 mowers that had  
17 the redesigned baffle, at \$10 a mower, that comes out to  
18 \$820,000.

19 So in total, if the redesign is found to infringe, the  
20 total would be 179,000 units at \$10 per unit would be  
21 \$1,790,000.

22 Q. Does the \$10 per unit royalty assume that Ferris had a  
23 design-around option available to it in 1999?

24 A. It does not assume -- well, it assumes that they didn't  
25 have a design-around at the time of the hypothetical

1 negotiation.

2 Q. Did you also consider an alternative scenario in which  
3 they would have had an option available to it to design around  
4 the '863 patent?

5 A. I did.

6 Q. And can you first start by just explaining, what is a  
7 non-infringing alternative?

8 A. Sure. So a non-infringing alternative is essentially just  
9 the design-around, a design-around that doesn't infringe the  
10 '863 patent. And we've heard a lot of testimony that -- that  
11 Exmark designs around technology, that others have designed  
12 around technology, and that significantly impacts what  
13 someone's willing to pay if they can design around it. It's  
14 their walkaway.

15 Q. Is it enough that they can design around it or does it  
16 also have to be accepted?

17 A. Well, it certainly -- it has to be acceptable, acceptable  
18 to not only the manufacturer but it has to be acceptable to the  
19 market.

20 Q. And can you tell us what we're -- it looks like we were  
21 looking at some lawn mower companies on the slide. What's the  
22 significance of some of these?

23 A. So we've heard a lot about these companies. We can start  
24 with Walker on the bottom left-hand side. Walker is a  
25 competitor that had a design that doesn't practice the '863

1 patent, even back in 1999.

2 We've heard that both Schiller and Scag were once accused  
3 of infringing the '863 patent but they have both redesigned.  
4 They've come up with their own redesign that no longer  
5 infringes the '863 patent.

6 And then I understand that Hustler and John Deere, a  
7 couple of others, by way of example, that do not -- or not been  
8 accused of infringing the '863 patent.

9 Q. And we've heard some testimony on Scag from earlier these  
10 past two weeks. Can you remind us about Scag and their  
11 redesign?

12 A. So -- so Scag actually came up with a redesign -- so after  
13 they were sued by Exmark they -- they basically implemented a  
14 redesign and they went to market and they've done very well  
15 with this redesign.

16 There was also some testimony, Ms. Bennis suggested that  
17 there was a patent on Scag's redesign. But the patent they  
18 have doesn't cover the shape, so it would not preclude  
19 Ferris-Briggs from coming up with a design that -- that  
20 followed the shape of the Scag redesign.

21 Q. Do you recall testimony that the Scag patent relates to  
22 the adjustability of the baffle?

23 A. That's correct. So the Scag patent that relates to the  
24 front baffle relates to its adjustability, not to the shape.

25 Q. And I want to ask you one question about Schiller. You

1 also heard Ms. Bennis talk about the CEO of Schiller. Do you  
2 recall that testimony?

3 A. I do.

4 Q. And do you recall that she said the CEO of Schiller has  
5 said they're going to go back to the '863 design once the  
6 patent expires? Do you recall that?

7 A. I recall hearing her say that, yes.

8 Q. Did you see anywhere before last -- a couple of days ago  
9 or last week of Ms. Bennis' reliance on this testimony from the  
10 CEO of Schiller?

11 A. No, that was news to me.

12 Q. Did she rely on that anywhere in her two reports that she  
13 issued in this case?

14 A. Not that I could find.

15 Q. And do you know that if she had an opportunity to add to  
16 her report with new information, she could have done so?

17 A. That's my understanding, yes.

18 Q. And in any event, if you had known about it before she was  
19 in the courtroom, what would your response be?

20 A. Actually I think it's interesting, for this -- for this  
21 reason. So Scag -- or excuse me, Schiller had this  
22 opportunity, you know -- well, I think the testimony was we're  
23 going to move back to the '863 design after it expires. So  
24 essentially what happened is that Schiller's accepting a  
25 suboptimal baffle design, admittedly not as good, but they're

1 willing to go with that and then ultimately go back to  
2 something else. So it tells me that going with something that  
3 is maybe less effective is perfectly acceptable in the  
4 marketplace.

5 Q. So what evidence do we have that some of these companies  
6 on here and their non-infringing alternatives are actually  
7 acceptable in the marketplace?

8 A. Well, one evidence, you can look at the market shares,  
9 what was happening in the marketplace.

10 Q. And if I may, this has already been introduced as DX-1240,  
11 but could you walk through us what -- some of the points you  
12 would like to make from this market share.

13 A. So it's -- we've been talking about Scag. And just as a  
14 reminder, Scag introduced their redesign in 2003, okay? So  
15 they're the yellow line, which is just below 10 percent, okay?

16 Now, if -- if the '863 baffle shape was as important as  
17 Exmark would -- would suggest, then if they moved away from  
18 that design, you would expect that Scag would actually have  
19 difficulty competing in the marketplace, that it wouldn't do as  
20 well. But what do we find? If you look at the market share of  
21 Scag after they came out with -- or moved away from the '863  
22 patent, their market share actually went up.

23 So there's no way you can conclude that having the '863  
24 patent is a basis for competition.

25 Another way to think about this is you can look at Ferris,

1 which is one of the light blue lines. Again, it's very hard to  
2 see but it's one of the light blue lines below the 5 percent  
3 mark. Now, Ferris, during this time period, was competing with  
4 the -- the '863 baffle design, but yet we don't see them really  
5 doing very well in the marketplace. And keep in mind, they  
6 were using this baffle design since 1998, so they had all these  
7 years to build up momentum and whatnot and they're still  
8 languishing under the 5 percent market share.

9 Q. Do you recall Mr. Stinson's testimony about why Ferris  
10 kind of was flat between 3 and 5 percent?

11 A. I believe his testimony was that, you know, they weren't  
12 practicing quite as long as Exmark was and -- but frankly,  
13 there was only a three-year difference. I think Exmark went to  
14 the patented flow design -- patented baffle designs I think in  
15 '95 and Ferris did it in '98, so there's really not much  
16 difference in terms of time in the market.

17 Q. I want so correct something. I think I referred to this  
18 wrong. This is PX-149 that we're looking at. I just want to  
19 correct the record. I apologize if I said a different exhibit  
20 number.

21 THE COURT: Counsel, it doesn't matter.

22 MS. DEWITT: Oh, okay.

23 THE COURT: It's just the exhibit number, all right?

24 MS. DEWITT: Okay.

25 THE COURT: You may continue.

1 BY MS. DEWITT:

2 Q. And so this is for about the 2008-2009 time frame?

3 A. Yes.

4 Q. And we have some more recent numbers as well?

5 A. Yes. So this comes from another study. This shows market  
6 shares for the period 2011, 2012, 2013, and I've highlighted  
7 all of the competitors that are competing with a baffle -- with  
8 mowers that do not have baffle designs that meet the claims of  
9 the '863 patent.

10 So, you know, I think the evidence is -- suggests to me  
11 that you don't need to have the '863 patent -- or practice the  
12 '863 patent to be successful in the market.

13 Q. Let's go back to what Ferris -- the availability of a  
14 redesign -- Ferris actually did redesign its product in 2010,  
15 is that your understanding?

16 A. That is.

17 Q. And did you analyze the costs associated with that  
18 redesign?

19 A. I did.

20 So I worked with the folks in Munnsville, a couple of them  
21 were here yesterday -- I think it was yesterday. Anyway, we --  
22 I worked with them and their team to understand, you know, what  
23 did it take to actually design -- to come up with a new baffle  
24 design and how much did it cost. And so through that analysis  
25 I determined it costs about \$50,000 to come up with the new

1 design.

2 And I looked at a couple other things to make sure that  
3 made sense. I also learned that to design a new mower,  
4 basically kind of a -- a -- kind of a standard mower, that's  
5 about \$150,000. And then the total cost to develop a complex  
6 mower is about \$250,000.

7 So based on that, I -- I've assumed that, you know, if  
8 they were at the negotiating table with Exmark and they believe  
9 that they had a design-around, they would not be -- they would  
10 not pay anything more than \$150,000. Otherwise they would say,  
11 you know what, we're just going to go with a different design,  
12 we'll pay \$150,000.

13 Q. Mr. Bone, can you kind of summarize for the jury what your  
14 opinions are in terms of what's fair compensation to Exmark?

15 A. So we've already gone through them, sort of the box on the  
16 left. So assuming that Ferris did not have the -- a  
17 design-around at the time of the first infringement, then I  
18 believe the total damages should be 1,790,000.

19 If they did have a design-around that they could have  
20 switched to at the hypothetical, then from my perspective the  
21 damages would be no more than 150,000.

22 Q. Mr. Bone, is it fair to say that you and Ms. Bennis have a  
23 number of disagreements with respect to the damages in this  
24 case?

25 A. We do.

1 Q. I want to ask you about a couple of those disagreements.

2 First, we've heard a lot of talk about gross profit and  
3 incremental profit. In terms of assessing the reasonableness  
4 of a royalty, what's appropriate to look at?

5 A. So, again, we talked about both different measures of  
6 profit but when it comes down to the end of the day to figuring  
7 out what is reasonable, you need to look at operating profit  
8 because that's the profit that they're going to pay the royalty  
9 from.

10 Q. Now, if we take Briggs' operating profit, is Ms. Bennis's  
11 royalty rate reasonable?

12 A. In my opinion, no. Because her royalty effectively comes  
13 up to \$250 a mower. That would mean that Ferris would be  
14 paying 70 percent of the available profit to Exmark to practice  
15 one feature.

16 Q. And I want to --

17 MS. DEWITT: If we could switch to the ELMO, please.

18 BY MS. DEWITT:

19 Q. I want to bring up a slide that Ms. Bennis used during her  
20 testimony.

21 You see that?

22 A. Yes, I do.

23 Q. And how did she -- how did she use this slide?

24 A. So she used this slide to basically give the impression  
25 that Briggs had all this excess profit that they could pay a

1 royalty from. So what she did is she said Briggs' target  
2 margin was 20 to 25 percent but they're actually making 31  
3 percent, which would mean that, if subtracted to, there was  
4 between 6 and 11 percent from which to pay a royalty. So from  
5 that, 5 percent seemed reasonable.

6 Q. And she relied on, among other things -- there's two  
7 things there. One is the deposition testimony of Bill Shea.

8 A. Yes.

9 Q. Did you read that deposition testimony?

10 A. I did.

11 Q. And would you -- is it fair to say that you don't think  
12 this slide is accurate?

13 A. That is correct.

14 Q. All right. I'd like to have you walk me through what  
15 needs to be changed here in order to make it accurate. So I've  
16 got a Sharpie and why don't we start with the -- what she calls  
17 standard gross profit. Is that accurate to put on this slide?

18 A. No. So based on Mr. Shea's testimony, while he does refer  
19 to standard costs, he's referring to the fact that they have a  
20 standard costing system, but the target margin is gross profit.

21 So you need to scratch out "standard" -- excuse me. Yeah,  
22 scratch out "standard."

23 Q. Do I do it in both lines?

24 A. Well, if you're going to compare apples to apples you've  
25 got to scratch out standard in the bottom line too.

1           So the correct comparison -- if the target -- if their  
2 target gross profit is 20 to 25 percent, then you have to  
3 compare that with what they actually did.

4           So that's -- the first part is getting the right measure.

5           Now, the second issue is, now that we've changed the  
6 bottom part and we're -- we need to figure out what Briggs'  
7 actual gross profit was during that period.

8 Q.       So the 31 is not correct?

9 A.       That's not correct either, correct.

10 Q.       All right.

11 A.       So if you -- the gross profit over that period of time is  
12 19 percent.

13 Q.       So I should -- I'm going to cross out the 31 and put --  
14 oh, shoot. Sorry -- 19 percent?

15 A.       That's correct.

16 Q.       So based on this corrected slide, can you draw the same  
17 conclusion as Ms. Bennis did as to the ability to pay a 5  
18 percent royalty on -- on the revenue?

19 A.       No. Based on the correct measures of profit, you cannot  
20 conclude or reach the same conclusion that she did. In other  
21 words, the only conclusion you can draw from this is that  
22 they're not even quite reaching their target. There would be  
23 no excess profits from which to pay. Again, I'm not using that  
24 as my analysis. But if you were to use her analysis but use  
25 the right numbers, you can't come to the same conclusion.

1 Q. And she also said -- I don't want to paraphrase, but I  
2 think she said basically your math is wrong. Do you remember  
3 her kind of making some testimony about your math?

4 A. Yes, she did.

5 Q. Do you know what she's talking about?

6 A. I don't know but I suspect that Mr. Vandenburg will tell  
7 me.

8 Q. Well, we'll let --

9 A. I have a feeling it has to do more with what's included as  
10 opposed to a math error, but we'll find out.

11 Q. Okay. And we also heard Ms. Bennis talk about price  
12 erosion based on Brickman. Do you recall that?

13 A. I do.

14 Q. Can you explain to the jury, what is price erosion?

15 A. So price erosion is essentially a situation where, because  
16 of competition, you have to lower your price, and that's --  
17 that's price erosion. And if you can attribute -- if you can  
18 attribute that competition to a wrongful act, like patent  
19 infringement or something like that, it can be recovered. In  
20 other words, you can collect that.

21 But that is a different form of damages. Damages can come  
22 in the formed of a reasonable -- a reasonable royalty, which  
23 we're focused on here, but it can also come in the form of lost  
24 profits or price erosion. And Exmark is not claiming lost  
25 profits or price erosion.

1 Q. One area of disagreement is relating to Ferris's  
2 suspension. And you heard Ms. Bennis say that -- over and over  
3 that the flow control baffle is more important than Ferris's  
4 patented independent suspension. Is that consistent with what  
5 we've heard from Briggs?

6 A. No, that would not be consistent.

7 Q. And what have we heard from Briggs?

8 A. From their perspective, the -- you know, the independent  
9 suspension is what distinguishes their product.

10 Q. And based on what Ms. Bennis's -- Ms. Bennis proposes as a  
11 reasonable royalty rate, how would that play out for Mr. Wenzel  
12 sitting at the negotiating table in 1999?

13 A. I think it's fair to say that if Exmark came in and asked  
14 them to pay -- asked Ferris to pay or asked Mr. Wenzel to pay 5  
15 percent on the value of the mower, again, that would mean that  
16 he would have to pay 5 percent on the value of the independent  
17 suspension, and that would not -- one, it's not fair; and two,  
18 it just wouldn't go over well.

19 Q. I'd like to go to a document that Mr. Vandenburg used  
20 with Mr. Wenzel. And I think Mr. Wenzel, in no better terms,  
21 punted this to you, so we're going to have you walk through it.

22 And Mr. Wenzel was asked some questions about comparing  
23 the \$10 per-mower royalty that you've proposed against the  
24 numbers we see here for selling value. Do you recall that  
25 testimony?

1 A. I do.

2 Q. Is it fair to compare your \$10 per-unit reasonable  
3 royalty -- or royalty against the selling value numbers we see  
4 here?

5 A. No.

6 Q. And can you explain why?

7 A. Sure. No, it's -- it's -- you're -- it's not appropriate  
8 to make that comparison. You're comparing apples and oranges,  
9 and I'll explain that.

10 What's -- it's clearly -- this is based on selling value.  
11 So this is what the customer -- this is what sales people are  
12 using to justify the selling price of their mowers and the  
13 various features that are in there.

14 It doesn't speak to economic value or doesn't -- you know,  
15 so that's what's ultimately important. So -- and what do I  
16 mean by that? What do I mean by economic value?

17 So let me give you an example. So let's look at the  
18 selling value for the four-wheel independent suspension.  
19 According to this, the selling value is \$350. If it costs  
20 Ferris \$350 to actually make and incorporate that into the  
21 mower, what's -- what is the economic value for that feature?  
22 There's really not. I mean, in that hypothetical that I just  
23 gave you, there's no value. And so that would certainly  
24 indicate how much one would be willing to pay as a royalty to  
25 be able to use that.

1           So that's an extreme example. I don't -- I'm not  
2 suggesting that that's the cost, but it's -- I'm just trying to  
3 prove a point that we're talking about two different things  
4 here.

5 Q. Ms. Bennis said your proposed royalty rate was de minimis.  
6 What's your reaction to that?

7 A. I don't believe it's de minimis. We're -- in light of the  
8 objective facts, in terms of the role of the patented baffle,  
9 in light of all the other technology, I think my royalty is  
10 fair and reasonable. The total amount is almost \$2 million. I  
11 do not consider that to be de minimis.

12 Q. Exmark has asked every one of its witnesses would they  
13 ever in a million years have accepted \$10 a mower. Why do you  
14 think they would have in a hypothetical negotiation?

15 A. So certainly the parties come to the negotiation table  
16 with different expectations, okay? I said earlier that it's  
17 sort of this willing buyer, willing seller framework. And in  
18 some respects it's a misnomer or it's not necessarily true  
19 because hard to -- there were -- there would never be an  
20 overlap at which point both parties would be willing.

21           So what you have here -- that's why we call it  
22 hypothetical negotiation, is you have a situation where  
23 parties that would not otherwise come to an agreement but  
24 you have to figure out what is fair based on the objective  
25 data. And based on my review of the facts in this case, I

1 think, again, with all the cards on the table face-up, I  
2 think a reasonable conclusion is that a \$10 per mower royalty  
3 is fair.

4 Q. I think you said the \$365, that slide there, is a starting  
5 point and the end point, so I want to end there. And at the  
6 end of the day, obviously it's up to the jury to decide what  
7 the appropriate amount of damages is. But if you wanted to  
8 leave the jury with about what's really important when they're  
9 thinking about that and with respect to the hypothetical  
10 negotiation, what would that be?

11 A. So as I've said before, you start with the operating  
12 profit, you end with the operating profit. And the question  
13 is, how much of -- how much of that \$365 per mower is  
14 reasonable to pay for the shape of the baffle?

15 MS. DEWITT: Thank you, Your Honor. We pass the  
16 witness.

17 THE COURT: Ladies and gentlemen, it's basically time  
18 for our morning break, so we'll break now for 15 minutes.

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

20 MR. WOLF: Do you need us, Your Honor?

21 THE COURT: Off the record.

22 (An off-the-record discussion was had.)

23 (Recess was taken at 10:22 a.m.)

24 (At 10:40 a.m.; with counsel and the parties'  
25 representatives present; WITHOUT the jury:)

1 JOHN BONE RESUMED THE WITNESS STAND

2 THE COURT: Please be seated.

3 If you'd get the jury, Ms. Lawrence.

4 (Jury in at 10:40 a.m.)

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

6 Mr. Vandenburgh, are you doing cross-examination?

7 MR. VANDENBURGH: Yes, Your Honor.

8 THE COURT: You may proceed.

9 CROSS-EXAMINATION

10 BY MR. VANDENBURGH:

11 Q. Good morning, Mr. Bone.

12 A. Good morning.

13 Q. Let's start with the basics. What's the hourly rate  
14 you're currently charging Briggs for your work in this case?

15 A. My firm is -- receives 575 an hour.

16 Q. Okay. And are there other people at your firm who have  
17 worked on this matter?

18 A. Yes.

19 Q. How many?

20 A. Probably two or three, maybe.

21 Q. And what are their hourly rates?

22 A. I don't know.

23 Q. Can you give me a range?

24 A. On the low end it's probably 150. On the high end it's  
25 probably in the \$300 range, I think.

1 Q. I think if you look at your report you'd see four, 400.

2 Will you take my word for that?

3 A. I'll take your word for it.

4 Q. Okay. So then what are the total billings that you have  
5 received so far for your work in this case?

6 A. I don't know offhand.

7 Q. Can you give me a number within \$50,000?

8 A. I've not gone back to look. I don't know.

9 Q. Well, it's less than \$250,000, isn't it?

10 A. I really don't know.

11 Q. Well, it's less than half a million, isn't it?

12 A. I would -- I would think so, but, again, I don't know.

13 Q. All right. So it could be more than half a million?

14 A. I would highly doubt that.

15 Q. Okay. But you think it's probably more than 250,000?

16 A. Again, I don't know. I -- I have a lot of engagements and  
17 I don't keep track of exactly how much is billed on each job.

18 Q. This is your profession, right, serving as a testifying  
19 expert?

20 A. Well, I do consulting work, but a large part of what I do  
21 is provide testimony on economic damages, that's right.

22 Q. And in every case that you work on, there's an expert on  
23 the other side who has a different opinion than you, right?

24 A. Generally speaking, that's correct.

25 Q. And in the other cases where you've given testimony, has

1 the jury or the judge always sided with you?

2 A. Not necessarily, no.

3 Q. Have your opinions been actually criticized in court  
4 cases?

5 A. I -- the very first time I testified in a case 15 years  
6 ago, a judge did criticize the opinion.

7 Q. Let's go ahead and move on to your opinion in this case.

8 I want to start with something that's hopefully easy  
9 because I think it's an area of agreement.

10 You've done your analysis, at least your \$10 per-mower  
11 analysis, by applying a royalty rate to a royalty base,  
12 correct?

13 A. That's correct.

14 Q. And in terms of the royalty base, you use all of the  
15 infringing mowers, right?

16 A. Well, that plus decks, yes.

17 Q. Yeah, okay. So, in fact, you actually mentioned mowers  
18 with the old design, mowers with the redesign. That actually  
19 in your calculation includes things that are just decks and not  
20 an entire mower?

21 A. That's correct.

22 Q. Okay. And then you adjusted for the value by determining  
23 what you considered to be the appropriate rate; is that right?

24 A. I'm not sure what you mean.

25 Q. Well, you found a rate -- I mean -- strike that.

1 Reasonable royalty is rate times base, right?

2 A. Correct.

3 Q. And your base was all infringing mowers, including decks?

4 A. That's correct.

5 Q. Okay. And you didn't try to get down to the value of this  
6 invention by whittling away at the number of infringing mowers,  
7 right?

8 A. I'm not sure I -- I'm not follow you, I'm sorry.

9 Q. This shouldn't be this difficult.

10 Ultimately, you determined your value by ascertaining the  
11 \$10 number, right?

12 A. Right, the analysis -- so I had a base, which is 179,000  
13 mowers, and then the next step was to determine what's the  
14 proper rate, which I came to \$10.

15 Q. Okay. Not trying to trick you here.

16 A. No, no, I'm just -- I'm not following you.

17 Q. Yeah, okay. The reason why I'm asking you is because when  
18 Mr. Passarelli questioned Ms. Bennis, he went through this  
19 exercise where he took Ms. Bennis's base and started whittling  
20 away at it. Do you remember this? You were here, right?

21 A. Yeah, yeah, I was here, yeah.

22 Q. So he started with the one billion dollars worth of sales,  
23 which is Ms. Bennis's base, right?

24 A. Correct.

25 Q. And then he started whittling away with, well, this is the

1 percentage of people who perhaps care about quality of cut and  
2 I don't even remember what these various categories were but he  
3 was whittling away at the base, right?

4 A. Yes, yes.

5 Q. All right. And even you would agree you didn't do your  
6 analysis this way?

7 A. No, I took a different approach. I mean, I think the  
8 point is that you have to do an apportionment. And so I think  
9 what Mr. Passarelli was attempting to do is that, you know,  
10 show that under Ms. Bennis's approach she didn't do  
11 apportionment of the base. So if you're going to do a  
12 percentage of royalty analysis, you need to apportion the base.  
13 And I think that's what he was doing.

14 Q. Okay. But --

15 A. I didn't need to do that because I had determined that the  
16 proper royalty was on a per-mower basis.

17 Q. Rate. And so -- and partly that's because claim 1 of the  
18 '863 patent is directed to an improved mower, right?

19 A. Well, it -- that is certainly the claim. It's a mower  
20 having a baffle. But the inventive feature is the shape of the  
21 baffle.

22 So I have used as my base -- you know, the mowers --  
23 number of mowers is a proxy for how many baffles were sold or  
24 how many decks that had an accused baffle, so that's why I use  
25 mowers as a proxy for the activity.

1 Q. So do you think the fact that claim 1 of the '863 patent  
2 is directed to a mower is irrelevant to your analysis?

3 A. It's certainly something I consider. So it's a mower  
4 having a certain characteristic. But when you're determining a  
5 royalty and you're looking at the inventive feature, and so  
6 that's what I focused on.

7 Q. So does that mean that there is a -- a heart of the  
8 invention?

9 A. Pardon?

10 Q. Is there a heart of the invention?

11 A. I don't know if I've heard that phrase, the heart of the  
12 invention.

13 Q. Is there an essence of the invention?

14 A. I would say the point of novelty, the inventive feature,  
15 those are the terms that I would traditionally use --

16 Q. Okay.

17 A. -- to describe that.

18 Q. And you think it's then appropriate to subdivide the claim  
19 into what you believe is the inventive feature, right?

20 A. What I'm doing is, and that's consistent with what I've  
21 done in every other case, is you're looking at the value of the  
22 inventive feature. Is the value of that feature over and above  
23 what was available in the past. So again it's, as I understand  
24 it, the particular shape of the baffle.

25 Q. So -- but claim 1 is directed to a mower that's improved

1 with an improved baffle design, correct?

2 A. Absolutely, yeah.

3 Q. Okay. Now, why -- you understand that Briggs added the  
4 front flow control baffle in order to improve quality of cut,  
5 correct?

6 A. I think you've showed that yesterday that there's  
7 design -- or engineering documents that show that they were  
8 doing that to improve quality of cut.

9 Q. And you accepted that in your analysis, correct?

10 A. The -- in my analysis -- yes and no. So it's -- it's  
11 clear that there -- that the design can -- there's been  
12 evidence that the shape of the baffle can influence quality of  
13 cut. But I've also -- with a fair reading of my report,  
14 there's a lot of evidence that shows that it's more than just a  
15 shape and in fact the shape in and of itself doesn't  
16 necessarily equate to good quality -- cut quality.

17 Q. Well, we're going to get to all the other features but --

18 A. Okay.

19 Q. -- you'll agree that the baffle, even in a deck that has  
20 poor quality of cut, is there to improve quality of cut, right?

21 A. It should.

22 Q. Right. Briggs didn't keep that baffle in their mowers  
23 from 1998 to today because it has no value, correct?

24 A. That's correct.

25 Q. They didn't put it in there because, you know, it was

1 hurting their quality of cut, right?

2 A. No, that's correct, right.

3 Q. It's a necessary part of the package?

4 A. It's one link of the chain, that's right.

5 Q. And we can assume that even during this time period where  
6 you believe they had bad quality of cut, that if the baffle  
7 were removed, it would be even worse?

8 A. Well, again, if you're -- removing the baffle is not the  
9 standard. That's not the basis of comparison. I think the  
10 proper basis of comparison is another design and whether there  
11 would be any meaningful difference in the performance of the  
12 deck to the quality of cut given a different design.

13 So certainly they could have removed the baffle, that  
14 would have been one option, but we talked about different  
15 designs.

16 Q. Okay. Again, we're going to get to later designs. But  
17 let me be clear. At the time that Briggs put the baffle in,  
18 are you aware of any other company that had a front baffle that  
19 went all the way across the front of the deck in a side  
20 discharge mower?

21 A. Well, what I do know is not every -- actually, that was  
22 where I think baffles were just coming into vogue, so to speak,  
23 so I think it was more common not to have that baffle. And --  
24 but sitting here right now I can't think of any.

25 Q. And they came into vogue because of Garry Busboom, right?

1 A. No, I don't -- I wouldn't necessarily agree with that.

2 Q. Did you hear Mr. Wenzel say that Exmark brought cutting  
3 technology to a new level?

4 A. I don't remember that specifically.

5 Q. You seem to have selective memory in terms of what  
6 testimony you hear and what you don't hear.

7 A. No, I just -- I -- frankly, I just don't recall sitting  
8 here. I'm not questioning it, I just don't remember.

9 Q. Okay. Is it possible that the reason baffles didn't come  
10 into vogue until 1995 is because Garry Busboom hadn't created  
11 his invention yet?

12 A. No, I think there's -- I've seen evidence and records that  
13 there were were baffle design -- there was baffles being used  
14 before then.

15 Q. Okay. And what are you referring to?

16 A. Baffles in the mower deck.

17 Q. But you can't identify a specific product you're talking  
18 about?

19 A. Not sitting here today, no.

20 MR. VANDENBURGH: Can we pull up 179.

21 BY MR. VANDENBURGH:

22 Q. The jury probably remembers this perhaps better than you  
23 do, but isn't this the only side discharge mower we've seen  
24 that existed prior to Garry Busboom's design?

25 A. I don't know that to be true or not.

1 Q. You've -- I thought you said you'd sat through the  
2 testimony here and reviewed all the other transcripts.

3 A. Yes.

4 Q. Okay. And you just -- do you remember any other side  
5 discharge deck that we've seen with a front baffle?

6 A. That we've heard about in the courtroom?

7 Q. Correct.

8 A. Not that I can think of, no.

9 Q. Okay. Do you know anything about when, where, this  
10 particular product was ever sold?

11 A. I don't. I -- again, sitting here I just don't recall.

12 Q. Can you even name whose deck this is?

13 A. I think this is Walker.

14 Q. I'll give you that. This is Walker.

15 Now, you talked about Walker's market share, right, that  
16 they've got a good market share, correct?

17 A. Well, they're competing in the marketplace. They have a  
18 better market share than Ferris.

19 Q. Okay. Did you hear the testimony of Mr. Stinson saying  
20 that the reason Walker has a reasonable market share is because  
21 of a very popular rear-bagging product?

22 A. I believe I recall that.

23 Q. Okay. So the fact that they had a decent market share  
24 doesn't say anything about whether or not that product was at  
25 all successful?

1 A. Right, which -- which is consistent with what I've said  
2 before, there's a lot of things that influence whether one  
3 competes well in the marketplace.

4 Q. Is this an acceptable alternative in your mind?

5 A. Yes, because Walker has used it and has competed in the  
6 marketplace with it.

7 Q. You don't have any information on whether they sold one of  
8 these, a hundred of these, correct?

9 A. No, not sitting here today, no.

10 Q. Okay. The other point relating to Walker of course is  
11 when Briggs redesigned in 2010, they were free to go to Walker,  
12 weren't they?

13 A. That would have been one of the options that they could  
14 have or may have considered.

15 Q. And you've assumed for the purpose of your analysis that  
16 the redesign infringes, right?

17 A. That is correct.

18 Q. Okay. So doesn't it make sense that, if this were an  
19 acceptable alternative that they could do without infringing,  
20 that they would have gone to it?

21 A. They certainly could have, yes.

22 Q. So we've talked a lot about Briggs's profits.

23 A. Um-hum.

24 MR. VANDENBURGH: And if we could put up  
25 Exhibit 1427. That was just offered. You may not have it.

1 MR. MAYLEBEN: I don't have it.

2 MR. VANDENBURGH: Okay. I'm going to put it on the  
3 ELMO.

4 BY MR. VANDENBURGH:

5 Q. So this is Exhibit 3A to your report, correct?

6 A. Correct.

7 Q. And we've talked -- we've had conversation about what  
8 these various levels of sales and profit are. I just want to  
9 walk through and make sure I understand how you're using these  
10 numbers.

11 A. Sure.

12 Q. So you start at the top with Average Gross Revenue.

13 A. Yes.

14 Q. Is that the -- the total sales number? Describe what that  
15 represents.

16 A. That's the -- the revenue that -- in this case it would be  
17 Briggs would receive based on the sale of the ZTR.

18 Q. Is that also equivalent to gross sales?

19 A. Roughly, yes.

20 Q. And then what's the next thing that happens in that  
21 calculation?

22 A. Well, to generate those sales, there's certain allowances,  
23 discounts and such that in this case, since we're looking at  
24 the Briggs' financials, that they had to pay to basically sell  
25 the product.

1           So you subtract that to determine what their net revenue  
2 would be or net selling price is another way to look at it.

3           Q.    So is that also an indication of net sales?

4           A.    Yeah.

5           Q.    And then what do we do next?

6           A.    So then, since they're on a standard costing system, you  
7 look at their standard profit, so you have to calculate that.

8           Q.    Okay.  And how did you calculate that?

9           A.    By analyzing the standard costs and determining that their  
10 average standard profit was 27.5 percent, based on net sales.

11          Q.    And is that -- was that done based specifically on the  
12 accused products or was there some sort of allocation?

13          A.    I believe that was done on the accused products.

14          Q.    Okay.  And then from there we step down, we have variances  
15 of 8.5 percent.

16          A.    That's correct.

17          Q.    Again, are those allocated or are those specific to the  
18 accused mowers?

19          A.    So those are allocated but they are a meaningful part of  
20 how you get to gross profit, so that would reflect things like,  
21 you know, the price of steel went up and it was higher than we  
22 planned or, you know, we had to hike up labor because of  
23 whatnot.  So that's what that reflects.

24          Q.    When we talk about them being allocated on the entire  
25 business, it's true, isn't it, that Briggs & Stratton Power

1 Products Group is a lot bigger than the commercial mower  
2 business at issue in this case, right?

3 A. That's generally true, yeah.

4 Q. What else is included in Briggs & Stratton Power Products  
5 Group?

6 A. I don't recall the products but it is certainly larger.

7 Q. They, I think, have consumer products, correct?

8 A. I believe so.

9 Q. Anything else that you're aware of?

10 A. Not -- sitting here today, not that I can think of.

11 Q. And just to finish this off then we -- to get down to  
12 operating profit, you subtracted out one more level of expense,  
13 correct?

14 A. That's correct, their operating expenses.

15 Q. And again, that's an allocated number?

16 A. Yeah, these are real costs that the company incurs; again,  
17 engineering, selling, marketing, whatnot. But it is an  
18 allocated cost. It's allocated to determine what their average  
19 operating profit would be.

20 Q. And just to be clear then, if, for example, the consumer  
21 products business is less profitable than the commercial  
22 products business, this allocation that you've done would tend  
23 to drive the profit down for the commercial division lower than  
24 it actually is, right?

25 A. No, not necessarily.

1 Q. Okay. If you've got more expenses in the variances  
2 line --

3 A. Right.

4 Q. -- seven and the operating expenses line, that's a higher  
5 percentage in the consumer business relative to the commercial  
6 business. You're then combining those expenses and allocating  
7 them across both. Isn't it true that you end up with a lower  
8 profit number reflected in here than is actually true for this  
9 business?

10 A. It could, but there's a lot that's going on there. It  
11 could.

12 Q. All right. I want to step back up, and this is the one  
13 time I'm going to ask you to delve into the schedules of your  
14 report. You've got your report there in front of you?

15 A. I do.

16 Q. This average gross revenue number at the top, gross sales?

17 A. Yeah.

18 Q. That comes from Exhibit 1.A.1. Is that right?

19 A. Yes.

20 Q. If you'd open to that in your report.

21 A. Pardon?

22 Q. Open to that in your report if you would.

23 A. Yes.

24 MR. VANDENBURGH: And I'd like to, without -- not  
25 going to offer the report, but I'd like to at least publish it

1 for the purposes of our examination. Is that acceptable?

2 THE COURT: Any objection, counsel?

3 MS. DEWITT: No objection.

4 THE COURT: You may proceed.

5 MR. VANDENBURGH: So we -- hang on a second, Bill.

6 I'll take the witness through the first step.

7 BY MR. VANDENBURGH:

8 Q. Are you at Exhibit 1.A.1?

9 A. I am.

10 Q. Okay. And that in turn directs you to get the gross  
11 revenue numbers to a sub-schedule called 1.A.11.A, correct?

12 A. It does.

13 Q. Okay. That's the one that I'd like to get to, if we could  
14 put that up on the screen.

15 And I think if we could just go to the last page of that  
16 schedule, page 7 of 7.

17 MR. VANDENBURGH: And Bill, if you could just blow up  
18 that little line right there.

19 BY MR. VANDENBURGH:

20 Q. This report indicates that what you used for gross revenue  
21 is actually a net sales document, correct?

22 A. Well, it was entitled Net Sales, yes.

23 Q. Okay. So it's your understanding that it's not actually  
24 net sales, it's gross sales?

25 A. Based on -- yes, based on the discussions with Briggs, it

1 was not net of allowances.

2 Q. Okay. In particular, who at Briggs?

3 A. I think it was David Paul.

4 Q. All right. So let's then go to an example -- if I could  
5 pull up -- I'll use this example Tab 377 in a binder I haven't  
6 given you yet.

7 MR. VANDENBURGH: Your Honor, may I approach?

8 THE COURT: You may.

9 THE WITNESS: Okay.

10 BY MR. VANDENBURGH:

11 Q. Turn to you Tab 377. That's an example of one of Ferris's  
12 net sales reports, correct?

13 A. It appears to be, yes.

14 Q. Okay. And do you see that -- well --

15 MR. VANDENBURGH: Your Honor, I'd like to offer  
16 Plaintiff's Exhibit 377.

17 THE COURT: Any objection?

18 MS. DEWITT: No objection.

19 THE COURT: 377's received.

20 MR. VANDENBURGH: May we publish that for the jury,  
21 please?

22 THE COURT: Yes, you may.

23 BY MR. VANDENBURGH:

24 Q. All right. Just so to get to the point that we've already  
25 covered.

1 MR. VANDENBURGH: Bill, if you could blow up the top  
2 left-hand corner there.

3 BY MR. VANDENBURGH:

4 Q. So this is one of these net sales documents that you  
5 relied on to get your gross revenue, correct?

6 A. That's correct.

7 Q. Okay. And do you see on the -- it's on the right-hand  
8 side as it's viewed here that it's got another exhibit sticker,  
9 204?

10 A. Yes, I see that.

11 Q. And I want to pull up some deposition testimony from  
12 Mr. Paul where he testified about Exhibit 204.

13 MR. VANDENBURGH: Your Honor, if there's no  
14 objection, I believe this was a 30(b)(6) deposition. I'd like  
15 to pull up some deposition pages.

16 THE COURT: Any objection, counsel?

17 MS. DEWITT: I'd like to know the page and line he's  
18 referring to.

19 THE COURT: Yes.

20 MR. VANDENBURGH: Page 35, we're going to start at  
21 line 23.

22 THE COURT: Twenty-three?

23 MR. VANDENBURGH: I believe so, yes.

24 THE COURT: All right. Any objection, counsel?

25 MS. DEWITT: No objection.

1 THE COURT: You may proceed.

2 BY MR. VANDENBURGH:

3 Q. We're going to have to carry it over two pages here.

4 You see at line 23, Exhibit 204 was marked for  
5 identification. Mr. Goggin handed that document to you -- or  
6 to Mr. Paul and asked what it is.

7 A. Yep.

8 Q. And his answer was: This is the number of units sold and  
9 it's the net number of units sold and the net sales dollars  
10 associated with a particular part number for the year listed.

11 A. Yes.

12 Q. See that testimony?

13 A. I do.

14 Q. So at least if we accept the words that Mr. Paul was using  
15 at his deposition, the -- the sales that you relied on for  
16 gross sales are actually net sales?

17 A. They are -- they're net, they're net of some things but  
18 they're not net of everything.

19 Q. They're not -- they're not net of everything.

20 A. They're not net of allowances.

21 Q. Okay. So -- that's interesting. It sounds like when you  
22 said before that the difference between gross sales and net  
23 sales was allowances, now you're saying there's other  
24 allowances that aren't the allowances you referred to the first  
25 time?

1 A. Well, I guess the best way to say it is when people say  
2 net, it can be net of a lot of things. We talked about like  
3 net income. Talk about bottom line. It's -- you know, net  
4 just means net of something, right? And so certainly the --  
5 this document is entitled Net Sales, but we went back and spoke  
6 with Mr. Paul and others and understand in light of other  
7 financial statements, you know, is this truly all of the net  
8 sales. And we determined that, no, it doesn't include the  
9 allowances. And so that's why we included allowances in the  
10 analysis.

11 Q. So let's assume just for the sake of our discussion that  
12 Ms. Bennis was correct in relying on Mr. Paul's sworn testimony  
13 that these were net sales. And let's just see what happens on  
14 your analysis if we include the discount for allowances that  
15 you took off back into the profit numbers.

16 A. Okay.

17 Q. Can we do that?

18 A. Sure.

19 Q. Okay. So if we could go back to Exhibit 1428, which is  
20 still on the ELMO. The sales allowances that you removed on a  
21 per mower basis are \$296, correct?

22 A. That's correct.

23 Q. Let's first of all --

24 MR. VANDENBURGH: Bill, do you have the slide? If  
25 you go to Slide 8.

1 BY MR. VANDENBURGH:

2 Q. So if Ms. Bennis were right and we really should have  
3 another \$296 of profit attributable to the sales of these  
4 products, we would then take that \$365 net net profit number  
5 you have and we'd add \$296, wouldn't we?

6 A. If that were the right way to do it.

7 Q. Okay.

8 A. But not based on what I know about Briggs's accounting.  
9 But you're right.

10 Q. Which is apparently not based on the testimony of their  
11 witness under oath?

12 A. I disagree with that. Again, it's net but it's not net of  
13 everything.

14 Q. So that would increase the profit from \$365 per mower  
15 to -- let's see if I can do that math -- four hundred and -- or  
16 I'm sorry, 561, correct?

17 A. 365 and what was it?

18 Q. Well, it's 296.

19 A. Yeah. 661, to be accurate.

20 Q. 661, I'm sorry. And so even if we would accept that net  
21 net profit is a relevant number, it'd suddenly be a lot bigger  
22 than it was before, correct?

23 A. If that's true, which I don't believe it is, the profit  
24 would be 661.

25 Q. Okay. Did you treat Briggs's net profitability as a limit

1 on the royalty you could -- could award?

2 A. No.

3 Q. Okay.

4 A. Not that I can think of.

5 Q. I -- actually, I wrote down a piece of your testimony.

6 You said that Ms. Bennis's royalty doesn't leave the infringer  
7 with a reasonable amount of profit.

8 A. Oh, I did say that, yes.

9 Q. Yeah. And is that a necessary part of an analysis, that  
10 you leave the infringer with a reasonable amount of profit?

11 A. Well, if you read the language of GP 15, it says the  
12 royalty has to leave the licensee with a reasonable degree of  
13 profit.

14 Q. But it's also true, isn't it, that ultimately the amount  
15 of profit that the infringer earned by the infringement is not  
16 a cap on a reasonable royalty, correct?

17 A. In certain circumstances, that's right.

18 Q. Let me go ahead and go to your next slide and just do the  
19 same bit of math where you did calculate -- you show an  
20 incremental margin of \$875 per mower.

21 If again Ms. Bennis is right based on the testimony of  
22 Mr. Paul that we should add \$296 of cost back in, what does  
23 that make Briggs's incremental margin?

24 A. Well, here's where we disagree, because whether it's a  
25 net -- whether you take the analysis -- the sales allowances

1 out to go from gross to net, you would have to consider them in  
2 determining your incremental profit, so it wouldn't change your  
3 incremental profit.

4 Q. Well, I think we need to go back, though, because  
5 basically, if you don't have the 296 -- if you can't subtract  
6 the \$296 because the gross sales, if you go back to the chart,  
7 is already 5293, then that extra \$296 flows through the entire  
8 profit analysis, doesn't it?

9 A. But you have to consider it somewhere, right.

10 Q. But it was already considered. If it's already net sales,  
11 it's already out of the equation?

12 A. I see. So under your hypothetical.

13 Q. Correct.

14 A. Under your hypothetical, where sales allowances were  
15 already accounted for in the net sales figures reported by  
16 Briggs, you're right, it would increase the incremental margin.

17 Q. Okay.

18 A. But again, that's not what I understand to be true.

19 Q. I understand. So let's go back to that chart where you  
20 have the incremental margin, Slide 9.

21 So then we would add 296 to 875 and we'd get a incremental  
22 profit margin of what?

23 A. \$1,171.

24 Q. And what is that on a percent basis? This is based on a  
25 \$5,000 mower. So what would be the margin percentage?

1 A. Well, is it based on a 5,000 or based on 5293?

2 Q. Well --

3 A. It's a little over 20 percent.

4 Q. The 296 is added in to both ZTRs and to walk-behinds,  
5 correct?

6 A. Well, the allowances are, that's correct.

7 Q. The allowances were the same for both types of products?

8 A. On a percentage basis, that's correct.

9 Q. I think on a dollar amount basis, what I saw, they were  
10 the same. Do you have a schedule that shows that?

11 A. I mean, I'm going from memory. I have to look at it.

12 Q. Well, I am too.

13 A. It's -- the allowance for walk-behinds was \$169.

14 Q. Okay. All right.

15 A. So it was on a percentage basis.

16 Q. All right. So for the combined, we can't quite add in  
17 \$296, it's going to be some number less than that?

18 A. Correct.

19 Q. Okay. But regardless, the -- well, let's start with this.  
20 The actual incremental profit -- well, the incremental profit  
21 that you calculated on Slide 9 is what, 875 divided by 5,000?

22 A. What was the question? Now that I --

23 Q. What's that percentage?

24 A. 875 divided by 5,000?

25 Q. Correct.

1 A. 17.5 percent.

2 Q. Okay. And so whatever the exact average of the -- the  
3 allowances, if there was a double counting that we need to back  
4 in, would raise that number up above 70 percent?

5 A. Again, if that was wrong -- assuming your hypothetical,  
6 that's true, yes, it would be above -- it would be above  
7 number.

8 Q. Okay. Let me switch to a new topic. I didn't see  
9 anything in your testimony today where you discussed Exmark's  
10 profits on its mowers.

11 A. We didn't talk about it today but it's in my report where  
12 I talked about it.

13 Q. So what did you calculate Exmark's profitability to be on  
14 an incremental basis?

15 A. I don't think I did it on an increments basis.

16 Q. Okay.

17 A. At least I don't recall. I'd have to go back in my  
18 report.

19 Q. Do you recall that Ms. Bennis did an analysis of Exmark's  
20 profitability on an incremental basis?

21 A. I don't.

22 Q. Okay.

23 MR. VANDENBURGH: Why don't we pull up Exhibit 529.  
24 If I could publish it. I think it's already been admitted.

25 THE COURT: Yes, you may.

1 A. Now I -- yeah, I'm picture it now, yeah.

2 BY MR. VANDENBURGH:

3 Q. This shows that Exmark had an incremental profit of 27  
4 percent over this 12-year period. See that?

5 A. I see that, yes.

6 Q. And I'm sorry, did you do an incremental analysis for  
7 Exmark?

8 A. No, because we're focused on, you know, what would be  
9 reasonable for Ferris to pay based on, you know, their mower  
10 and based on how it would fit into that mower.

11 Q. So the analysis of what Exmark would accept is irrelevant  
12 to your analysis?

13 A. No, it is -- it is definitely relevant.

14 Q. And is Exmark's profitability on its mowers relevant to  
15 what it would accept as a royalty?

16 A. Their profitability is a consideration in terms of what  
17 they would be willing to accept, that's correct.

18 Q. But for some reason in your analysis you didn't even  
19 analyze Exmark's incremental profitability?

20 A. Not their incremental profit but I did look at their  
21 profitability.

22 Q. Well, let's look at it on an incremental basis. Do you  
23 disagree with Ms. Bennis's -- are you aware of any errors in  
24 her conclusion that led her to a 27 percent incremental profit  
25 margin?

1 A. From Exmark's perspective?

2 Q. Correct.

3 A. Not that I can think of. Her -- the only issues I had had  
4 to do more with Briggs's calculation.

5 Q. Okay. So on a \$5,000 mower, what's the incremental profit  
6 that Exmark receives on that mower?

7 A. \$1350.

8 Q. And so on an incremental basis, that reflects the amount  
9 that selling one more mower gives to the company to help it run  
10 its operations, correct?

11 A. To cover all the fixed costs and all the other costs,  
12 that's right.

13 Q. Exactly. So in this hypothetical negotiation, these are  
14 competitors, right?

15 A. Well, they do compete in the commercial lawn mower space  
16 but they -- they don't overlap a lot. I mean --

17 Q. Or at least in 1999 they didn't overlap that much --

18 A. That's correct.

19 Q. -- right?

20 A. But that's the date of the hypothetical.

21 Q. Understood. Understood. But there's still a possibility  
22 that if Exmark licenses its patent to Ferris in 1999, Ferris  
23 can start using the technology, that Exmark will lose a sale,  
24 one sale?

25 A. Certainly. But it's also an opportunity then for them to

1 generate income in a market that they're not exploiting.

2 Q. I'm going to get to that. It's also possible that by  
3 giving a license to a competitor who's currently not really in  
4 your market, but the license is unlimited in scope, that in  
5 five or ten years they might turn out to be a more direct  
6 competitor, correct?

7 A. Certainly.

8 Q. Okay. And, in fact, there's some indication that that's  
9 the case here, that over time Briggs became more of a direct  
10 competitor. Correct?

11 A. Yes.

12 Q. So, again, just let's assume that we lose just one sale.  
13 Incremental loss of margin is \$1350, correct?

14 A. That's correct.

15 Q. How many \$10 royalties would Exmark need to receive from  
16 Ferris in order to make up for the lost profit on that one  
17 mower it lost?

18 A. 135.

19 Q. Okay.

20 A. But I'm --

21 Q. So just even one lawn mower sale goes away, they got a --  
22 Briggs has to sell 135 mowers before Exmark gets even again.  
23 Correct?

24 A. That is true, but think of -- also keep in mind what  
25 Ferris's market share is relative to -- you know, they're a

1 relatively small player, right, so the likely -- the impact  
2 that Ferris would have on Exmark is quite small.

3 Q. Well, that cuts both ways. They're also small so they're  
4 not expected to sell a lot of mowers that are going to generate  
5 royalty income either?

6 A. Well, again, but you're -- your question is about when  
7 they -- you know, the impact on lost sales and how that would  
8 affect the royalty.

9 Q. We saw some market share data that suggested that in this  
10 time frame, limited to the landscape contractor market, that at  
11 a certain point in time or really throughout a period, Ferris's  
12 market share was around 3 percent, right?

13 A. I think that's fair.

14 Q. And in the early years, closer to the hypothetical  
15 negotiation, Exmark's market share was perhaps 15 percent?

16 A. Sounds about right.

17 Q. So that makes Exmark, at least in the landscape contractor  
18 market, five times larger than Briggs?

19 A. Yes, but again -- yeah.

20 Q. Yeah. Okay. So if one -- if there's only a 5X  
21 difference, there is actually a real possibility that if Exmark  
22 licenses its product -- patent to Ferris, it's going to lose a  
23 sale to Ferris, right?

24 A. Well, there's a possibility. But again, you have to look  
25 at, you know, what role does the patented feature have in the

1 overall sale. And so you've got to keep in mind that Ferris  
2 sells its mowers based on its independent suspension, a lot of  
3 people buy it because of that, and so the real test, the real  
4 question is, you know, what's the likelihood that -- I mean, if  
5 I was in Exmark's shoes, like what's the likelihood that we're  
6 going to lose a sale if they include this shape of baffle  
7 versus some other shape of baffle relative to all the other  
8 things that are in the mower. And that would -- that certainly  
9 is part of the consideration.

10 So in light of, you know, how important the shape of the  
11 baffle is to the overall demand for mowers, I don't think there  
12 is a big risk or as big as a risk that you suggest there.

13 Q. Okay. But the bottom line is, whatever the risk is, if  
14 one sale is lost, Briggs has got to sell 135 mowers before  
15 Exmark breaks even?

16 A. On the loss -- under your hypothetical situation,  
17 that's -- that is -- that is correct.

18 Q. Now, let's talk about the importance of this invention.  
19 It sounds like you believe that it's not very important.

20 A. I wouldn't say it's not important. It's -- you have to  
21 look at it in light of the value that the parties are getting  
22 for it and from it and in particular is Briggs getting value  
23 from it.

24 Q. Well, again, this is -- this is two-sided, right? It's  
25 not just what matters to Briggs, it's what matters to Exmark

1 too, right?

2 A. That is correct. I mean, you have to look at it from both  
3 perspectives --

4 Q. Okay.

5 A. -- and you have to look at the objective evidence and what  
6 does the evidence point to.

7 Q. We're going to get to that too. But you've certainly  
8 heard testimony, haven't you, that Exmark considered this  
9 invention to be very valuable, right?

10 A. I sat through most of the testimony here and, yes, that's  
11 pretty clear.

12 Q. Okay. And every Exmark witness said it was very valuable  
13 to Exmark, right?

14 A. Generally speaking, that's right.

15 Q. Did you hear they considered it to be their most important  
16 patent?

17 A. I've heard that in the testimony. You don't see that  
18 necessarily in the documents.

19 Q. Okay. Again, we're going to get -- we're going to get to  
20 the documents. But I take it, are you acting as the  
21 fact-finder to decide which witnesses are truthful and which  
22 are not?

23 A. No. I'm just -- I -- my analysis -- I have to look at all  
24 the testimony and all the facts and based on that determine  
25 what I think is a reasonable royalty.

1 Q. Okay. Let's continue to move through your slides here.  
2 I'm kind of taking them in order. If we could go to Slide 10,  
3 where you get into the idea of all the other things that are  
4 important to selling a mower.

5 Do you understand the concept of a market differentiator?

6 A. Sure.

7 Q. A market differentiator is something that a company can  
8 use to sell its products because nobody else has it, right?

9 A. That's correct.

10 Q. Okay. When we look down that list, are wheels a market  
11 differentiator, to your knowledge?

12 A. Depends. Could be.

13 Q. Are you aware of any evidence of a company out there  
14 saying, hey, buy our mowers because we've got the one and only  
15 wheel that nobody else can have? Are you aware of that?

16 A. Not that I can think of, but there are aspects of it that  
17 affect stability and whatnot that -- and they -- certainly  
18 mower companies promote stability of their mowers and whatnot,  
19 so...

20 Q. They do, but if it doesn't -- if they don't have the  
21 ability to say we've got these wheels and nobody else gets  
22 them, it doesn't have as much value to say, hey, we've got good  
23 wheels, the same as the good wheels everybody else has, right?

24 A. Depends.

25 Q. Okay. Are you willing to say yes to that question?

1 A. To which question?

2 Q. To the question I just asked.

3 A. Well, can you read it back or --

4 Q. I'm not sure I could read it back. Why don't I just go on  
5 and I think we'll probably hit it again.

6 How about fuel tanks? Are fuel tanks a market  
7 differentiator?

8 A. They could be. Not that I can think of right now in light  
9 of the way they -- the products I'm thinking of, the Ferris and  
10 the Exmark mowers.

11 Q. Are you aware of any evidence of a company that seeks to  
12 get a -- a market differentiating advantage over its  
13 competitors through its fuel tanks?

14 A. Again, I -- not that I can think of right now.

15 Q. Okay. And is that also true of brakes?

16 A. No. But again, it's -- it's -- not that I can think of  
17 but you have to think of it in terms of these are all elements  
18 of a mower and all of that goes into why people buy a mower,  
19 regardless of whether it's a differentiator or not.

20 Q. But there is increased value, isn't there, for a feature  
21 where you can go to the market and say, hey, we've got patented  
22 flow control baffles and nobody else does?

23 A. There can be, yes.

24 Q. And did you hear the Exmark employees say that that's  
25 exactly what they sought to do in the marketplace?

1 A. Well, not only testimony but you can see it in the  
2 marketing brochures.

3 Q. Okay. And so are there any features in that list on  
4 Slide 10 other than Ferris's patented suspension that you are  
5 aware of any ability for a company to use it as a market  
6 differentiator?

7 A. Again, I -- that's not something I endeavored to determine  
8 in terms of looking at each one of these elements to see to  
9 what extent they could.

10 Certainly some companies can and probably do use them as  
11 differentiators.

12 But again, in my view, it's not that -- it's not as  
13 relevant because, again, you're looking at it in the light of  
14 all the things that drive demand for a mower.

15 Q. Mr. Bone, are you just speculating when you say, well,  
16 maybe some other companies do use these as market  
17 differentiators?

18 A. You can see it from the marketing materials.

19 Q. Well, people talk about it but do you have any indication  
20 that other than Ferris's patented suspension anybody ever  
21 promotes any of these features as a unique feature only to  
22 them?

23 A. I -- again, I can't think of a particular promotional  
24 brochure or something that I -- that comes to mind that would  
25 support that right now.

1 It wouldn't surprise me though.

2 Q. Let's go forward to Slide 13.

3 This is the second part of your apportionment analysis,  
4 right, where you say, okay, let's look at all the features that  
5 are relevant to quality of cut, right?

6 A. Yep.

7 Q. Okay. And I think -- there's been a lot of testimony that  
8 you -- there's a lot of things that you have to have in a deck  
9 in order to have it cut well, right?

10 A. Yes.

11 Q. If you don't have walls, it's not going to cut well,  
12 right?

13 A. That's correct.

14 Q. Does anybody have a patent on deck walls?

15 A. I don't know.

16 Q. You're not aware of any?

17 A. Not sitting here today, no.

18 Q. How about the rear baffle? We've heard the rear baffle's  
19 very important, right?

20 A. Yep.

21 Q. Does anybody have a patent on the rear baffle?

22 A. Not to my knowledge.

23 Q. The blades. Isn't it true that in this market everybody  
24 pretty much buys their blades from third-party blade  
25 manufacturers?

1 A. I don't know if I would necessarily agree with that.

2 Q. You're aware of some that don't?

3 A. I know that some of our -- our designs specifically, or at  
4 least, you know, the manufacturers specify certain things about  
5 the blades, but others make them for them, make the blades for  
6 them.

7 Q. Now, it's very important for a deck to cut well that the  
8 blades be sharp, right?

9 A. Certainly.

10 Q. Why didn't you include that in your list of factors, that  
11 having sharp blades is valuable to a -- to this invention and  
12 so cut it down from 10 percent to, say, 8 percent?

13 A. Well, that was one of the considerations I looked at. I  
14 think that was on the next slide.

15 Q. That having sharp blades as opposed to dull blades is  
16 important in a mower deck?

17 A. I'd have to look at the next page, but I think that was  
18 part of -- that was one of the number of things that I found  
19 based on the documents, many of which were Exmark documents,  
20 that talk about the things that impact cut quality.

21 Q. And so you reduced the value that you ascribed to the '863  
22 patent based on how sharp the user maintained the blades of  
23 their mower, correct?

24 A. Again, it comes down to what role did the shape of the  
25 front flow control baffle have to cut quality. Cut -- the

1 shape of the front flow control baffle is just one of a number  
2 of features that impact cut quality.

3 Q. Let's get back to the concept of market differentiators.  
4 Looking at Slide 13, are you aware of any of those that serve  
5 as market differentiators for companies in this business, other  
6 than the front baffle, of course?

7 A. Sitting here, I can't think of it. There probably are.  
8 But again, it doesn't have to be a differentiator in terms of  
9 whether you include it in your apportionment or not. Again,  
10 it's what are the things that contribute to -- if you're going  
11 to focus on cut quality, what are the things that contribute to  
12 cut quality and how much of an impact does a front flow control  
13 baffle have, regardless of whether it's patented or not, what  
14 impact does it have.

15 Q. But if there's nine things that everybody has, they're all  
16 the same in all manufacturers, and then there's one thing that  
17 one manufacturer has that raises the bar up enough to make a  
18 difference in the marketplace, that makes that one thing pretty  
19 important, doesn't it?

20 A. It could. Again, if that's the one thing, but, again, I  
21 point back to what did Exmark do with the prices and what did  
22 they do with the kit -- I mean, there's no evidence that that  
23 one particular element, the shape of the baffle, enabled them  
24 all this value. You'd see it in the prices.

25 Q. All right. That's where I was heading next.

1 A. Okay.

2 Q. Let's go to Slide 16.

3 So this is the slide that you used to show that Exmark  
4 didn't raise its prices when it added the flow control baffles  
5 to its products, right?

6 A. Yes.

7 Q. Okay. Now, it is true, isn't it, at least theoretically,  
8 that sometimes a company can try to take advantage of its  
9 invention by raising prices or they could try to take advantage  
10 of their invention by selling more mowers, correct?

11 A. That is certainly possible. I didn't -- you know, based  
12 on what I've seen in terms of Exmark's practices, that's not  
13 what they do.

14 Q. But at least in terms of the testimony that came in in the  
15 courtroom, you heard a number of Exmark witnesses say that that  
16 was their mindset, correct?

17 A. That they were looking to grab share?

18 Q. Correct.

19 A. Yes, but there was also testimony that, you know, they  
20 were increasing prices, that they had increased their prices  
21 based on incorporating technology into their products, so, yes.

22 Q. I'm going to get do that. But don't we need to break it  
23 up by time frame? Because the flow control baffle invention  
24 was developed in 1995?

25 A. That's correct.

1 Q. And at that point, Exmark wasn't a market leader, right?

2 A. Not yet.

3 Q. It didn't necessarily have the ability to dictate prices  
4 in the market, right?

5 A. But -- well, but again, if you're offering something that  
6 has value -- if you're out there suggesting, hey, listen, I've  
7 got this patented flow control baffle that provides great cut  
8 quality, you can mow your field with, you know -- or your  
9 clients' lawn much quicker and get all these cost savings, you  
10 could certainly support a price increase.

11 Q. You could?

12 A. Again, it's an economic question.

13 Q. Would it be -- would you consider it to be a success if  
14 Exmark used its invention to double its sales from 1995 to  
15 1997? Would that be successful?

16 A. Well, you have to keep in mind that the Lazer Z was --  
17 that was -- you know, I think you're conflating two things.  
18 You're looking -- they certainly doubled their share. There's  
19 no question about it. Their sales took off. But it was  
20 because of this whole new mower that they created that had all  
21 these elements. The baffle was just one piece of that. So you  
22 can't attribute all that success to the shape of the baffle.

23 Q. True, but you heard the Exmark witnesses say that it was a  
24 very important piece, didn't you?

25 A. They believe that, that's right.

1 Q. And they live in this business, right, not you?

2 A. Well, yes, they do, but again, look at the documents, look  
3 at the advertisements, there's a lot of stuff in there.

4 Q. Okay. But you will agree with me that shortly after this  
5 invention, Exmark sales doubled in two years and it doubled in  
6 two years after that, right? You don't dispute that?

7 A. The invention was introduced along with a lot of other  
8 things, so, yes, their sales increased significantly, but based  
9 on my knowledge, you cannot attribute it just the baffle  
10 design.

11 Q. I understand that. But you would agree that if that were  
12 not the case, that Exmark actually did a pretty good job of  
13 speculating its invention here, didn't it?

14 A. I don't understand.

15 Q. That was a poor question. I know you think that the flow  
16 control baffles were an insignificant part of the success of  
17 Exmark from '95 to '99, right?

18 A. I wouldn't call it insignificant. It was a part of it.

19 Q. Well, how much a part of it? Was it a significant part?

20 A. Again, I would go back to the survey data and I would look  
21 to see what -- how important quality of cut was and I would go  
22 back and look at what role does baffle shape design play. And  
23 it's -- again, if you look at it, it's a relatively small  
24 percentage.

25 Q. I -- I planned to actually skip by the survey because we

1 have limited time but now that you've raised it, I do want to  
2 go there.

3 That survey was January of 1995, right?

4 A. That's correct.

5 Q. So it came out before the Exmark Lazer Z was introduced to  
6 the market, right?

7 A. That's correct.

8 Q. So if the facts were that at that point the market didn't  
9 realize that it was possible to take a large step forward in  
10 cut quality, that that might reflect why cut quality wasn't  
11 rated the highest, correct?

12 A. Well, I guess that's theoretically possible but, again, I  
13 mean, lawn mowers are there to cut lawn, cut your grass, and  
14 just, you know, to do it well. So --

15 Q. But again, Mr. -- I didn't -- I shouldn't interrupt.  
16 Please finish your answer.

17 A. I've forgotten.

18 Q. Okay. I don't know -- you apparently didn't hear this  
19 testimony, but Mr. Wenzel testified that Exmark raised the  
20 level of cutting technology. Do you accept that?

21 A. No, I remember -- I think I recall that.

22 Q. Okay. So it would make sense that if the market in  
23 January of 1995 didn't know that it was possible to raise the  
24 level above whatever low level it was at and everybody was even  
25 because they were all using the same technology, they might not

1 think cut quality's that important of a differentiator,  
2 correct?

3 A. I don't know, I have to go back to the study, but I think  
4 they were asked in that particular study -- I might be  
5 confusing different studies -- but they were asked specifically  
6 like, hey, listen, forget about what you have had but what  
7 would you really like and --

8 Q. But they don't know the Exmark exists yet, right?

9 A. Yeah.

10 Q. The Exmark Lazer Z?

11 A. But if you've got mowers that are blowing out in front and  
12 doing all these other things, certainly that would be something  
13 like, hey, listen, I'd love to have a mower that doesn't have  
14 blowout, that does a better job --

15 (The court reporter requested clarification.)

16 A. It would be like, hey, that's certainly something that we  
17 would want to see improvement with.

18 BY MR. VANDENBURGH:

19 Q. But if everybody's the same and they don't know it can be  
20 made better, don't they just accept that as the reality of  
21 life?

22 A. I -- I wouldn't necessarily agree with that.

23 Q. Okay. But you would agree, wouldn't you, that when Exmark  
24 comes along and makes a major step forward, raises the level,  
25 as Mr. Wenzel says, that the market might catch notice of that

1 and that would be a big deal, right?

2 A. It's theoretically possible, yes.

3 Q. Let's go ahead and go to your non-infringing alternative  
4 slide. That's Slide 19.

5 MR. MAYLEBEN: Which slide?

6 MR. VANDENBURGH: 19.

7 BY MR. VANDENBURGH:

8 Q. And in no particular order. We've already talked about  
9 Walker, right? Walker's claim to fame is a rear bagger,  
10 correct?

11 A. I believe so.

12 Q. We have no evidence that that one side discharging  
13 mower -- mower we've ever seen had any significant sales,  
14 correct?

15 A. Not that I can think of.

16 Q. Okay. Let's go to Scag. Now, Scag certainly is a big  
17 player. They were a big player when they infringed and they  
18 remained a big player after they stopped infringing, right?

19 A. That's correct.

20 Q. Okay. And they invented in order to come up with  
21 something else to have on the market, right?

22 I'm not going to pass by the issue that you discussed in  
23 your direct.

24 MS. DEWITT: Objection.

25 THE COURT: Objection what?

1 MS. DEWITT: It's inconsistent with your instructions  
2 on patents, Your Honor.

3 THE COURT: Overruled. I don't think he's going  
4 there. Go ahead.

5 BY MR. VANDENBURGH:

6 Q. We've had a lot of discussion. You testified in your  
7 direct that Scag had a patent on the design that they went to  
8 in connection with settlement of the lawsuit Exmark against  
9 Scag, right?

10 A. That's correct.

11 Q. Okay. And I believe you testified that that baffle they  
12 went to and got patented, the patent requires adjustability,  
13 right?

14 A. Right, but it -- but the -- it appears as though the shape  
15 didn't -- it --

16 Q. Right.

17 A. -- there's no novelty apparently with the shape of the  
18 baffle that they went to.

19 Q. But is it possible that the reason that design has been  
20 acceptable in the market is because of its adjustability  
21 feature?

22 A. Well, it could be, but it certainly is impacted --  
23 according to Exmark, it would be influenced by the shape,  
24 right? So if you can't get good cut quality with that shape  
25 then it would obviously impact it, right? So they're

1 successful not only because they can be successful with good  
2 cut quality with that shape but also the adjustability, so it's  
3 a little bit of both.

4 Q. Well, you understand that mowers -- decks have to cut well  
5 in numerous conditions, right?

6 A. Certainly.

7 Q. Okay. And one of the things adjustability gives you the  
8 ability to do is to change the deck configuration in different  
9 conditions. Correct?

10 A. That's my understanding, yes.

11 Q. Okay. So it's possible that the only reason the Scag deck  
12 has remained acceptable is because of that adjustability  
13 feature which allows it to adjust to different conditions,  
14 correct?

15 A. Yes, but again, if what you're saying is true that the  
16 shape of the baffle also impacts it, then what it tells me is  
17 that that particular shape is -- enables some level of success.  
18 And I'm sure the adjustability also enables some level of  
19 success.

20 Q. Okay. It is true, isn't it, that in 2010, when Briggs was  
21 sued, they could have gone to Scag's front baffle design, as  
22 long as they didn't make it adjustable, right?

23 A. They could have but I think the design they went with, I  
24 thought they -- they believe it doesn't infringe.

25 Q. But you've assumed for the purposes of your report that it

1 does infringe?

2 A. For the purposes of determining royalty I've assumed that,  
3 but you're asking me what they would have done. I think they  
4 believe that that design doesn't infringe.

5 Q. Okay. But in fact, if they truly thought that there was  
6 no difference between the design that they went to and the Scag  
7 design, wouldn't it have made a lot more business sense for  
8 them to go to Scag's design and avoid further accusation of  
9 infringement?

10 A. I mean, I -- I think -- it's a question of, you know, how  
11 different that design is and whether they thought that was  
12 materially different or -- I think they -- again, I'm  
13 speaking -- you're asking me to speak to what they thought at  
14 the time, but my understanding is that they believed the design  
15 they had was not infringing, so they went with it.

16 Q. Let's just talk about John Deere.

17 A. Okay.

18 Q. Do you know if John Deere has a patent on whatever current  
19 deck design they have?

20 A. The deck design or the baffle design?

21 Q. Well, the deck including the baffles. Do you know if they  
22 have a patent on their baffle design in their decks?

23 A. I don't believe so.

24 Q. What's your basis for that?

25 A. Yeah, I just don't know -- I don't know one way or

1 another.

2 Q. Okay. You haven't done any sort of search to determine if  
3 it were patented, right?

4 A. My understanding is that it's not patented, but I didn't  
5 do a search.

6 Q. And what's your understanding based on?

7 A. Through discussions with counsel.

8 Q. Okay. So counsel has told you that John Deere doesn't  
9 have a patent on their current baffle design of their  
10 commercial mower decks?

11 A. That's my recollection.

12 Q. Okay. Well, if they were wrong about that and it in fact  
13 were patented, then it wouldn't be an available non-infringing  
14 alternative, would it?

15 A. Not that particular design, that's correct.

16 Q. Okay. And let's go over to the Schiller design. You  
17 talked about that. Now, just to be clear, you're not talking  
18 about the baffle design that has been found to infringe, have  
19 you -- are you?

20 A. No, no.

21 Q. Okay. You are talking about the design that they went to  
22 in maybe late 2010, 2011, right?

23 A. That's correct.

24 Q. And they've also obtained a patent on that design, haven't  
25 they?

1 A. I'm not sure about that.

2 Q. Okay. If they have obtained a patent, would that affect  
3 your analysis of whether it was an available non-infringing  
4 alternative?

5 A. Well, if it truly was patented, it could. But again,  
6 we're -- we're talking about a hypothetical that would have  
7 occurred back in 1999, so, you know, what would -- could have  
8 been available back then.

9 Q. That's actually an excellent point.

10 So let's -- just assume for me that Schiller did obtain a  
11 patent on its redesign in 2010.

12 A. Um-hum.

13 Q. That shows that they had to invent even in 2010 to come up  
14 with a new baffle design, right?

15 A. Well, define invent. We've heard testimony from, I think  
16 it was Mr. Benson yesterday that, you know, designing around a  
17 baffle would not be surprising, particularly in three months,  
18 six months. Remember that -- that line of questioning from  
19 yesterday?

20 Q. But it has to not just be an incremental change, it has to  
21 be an inventive change in order to get a patent, right?

22 A. Well, if you wanted patent, yes, it has to be.

23 Q. Okay.

24 A. But for the purpose of determining a royalty it doesn't  
25 have to be, you know, a patent design, it just has to be

1 non-infringing.

2 Q. Okay. But I think you were suggesting that the Schiller  
3 redesign from 2010 might have been available back in 1999,  
4 right?

5 A. Could have.

6 Q. But if they got a patent on it in 2010, wouldn't that  
7 suggest that even in 1999 when the market was much less  
8 developed, that somebody would have had to invent in order to  
9 come up with that design?

10 A. It would be different enough to be able to qualify for  
11 patent.

12 Q. I'm going to cut this short. I just want to get to  
13 your -- your total numbers.

14 Let's see. Your higher royalty theory is roughly  
15 \$1.8 million, right?

16 A. That's correct.

17 Q. And you agree that the total revenue on the infringing  
18 mowers, if the redesign infringes, is basically one billion  
19 dollars?

20 A. It's under that, but it's close to a billion if you round  
21 up.

22 Q. Close to -- close to one billion. So on a percentage of  
23 revenue basis, your opinion is a roughly under .2 percent  
24 royalty; is that right?

25 A. That's about right, yeah.

1 Q. So for every dollar of revenue selling accused mowers,  
2 infringing mowers, Briggs would get to keep 99.8 cents, right?

3 A. Yeah, but they've got to cover a lot of things with  
4 that 98 cents, like what it cost to make the mower, what it  
5 cost to run the business, so, yes, that's correct.

6 Q. Okay. And under your alternative theory, I think it gets  
7 to -- they get to keep 99.985 cents on every dollar; is that  
8 right?

9 A. Well, if you look at it that way, yes.

10 Q. Okay. Do you seriously think that Exmark would have been  
11 willing to grant a license to a competitor where they only got  
12 a fifth of a penny for every dollar that the competitor sold?

13 A. Based on the facts, again, if you're in a hypothetical  
14 negotiation where you have all the facts on the table and  
15 you're looking at the objective evidence and you look at the  
16 baffle -- the impact of the baffle design on the overall  
17 success of a mower, I think it's objectively fair.

18 Q. Just to be clear, you've been paid more in this case than  
19 the amount of your opinion, at least for the lower opinion you  
20 offer in this case, right?

21 A. I personally don't get paid. My -- the company that I  
22 work for gets paid.

23 Q. Your company has gotten paid more than the amount of the  
24 lower of your two theories, correct?

25 A. Probably.

1 MR. VANDENBURGH: I have no further questions.

2 THE COURT: Redirect, counsel?

3 MS. DEWITT: Very quickly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. DEWITT:

6 Q. Mr. Bone, do you remember the slide that Mr. Vandenburg  
7 put up with the picture of the mower and some of the different  
8 attributes on the mower?

9 A. Yes, the one --

10 Q. And --

11 A. The one with the mower, not the deck, just to be clear.

12 Q. With the mower.

13 A. Okay.

14 Q. And he was asking you about the market -- if whether this  
15 was a market differentiator or this feature was?

16 A. Yes.

17 Q. Now, I think you referred earlier -- you remember Mr. Wolf  
18 walked through with Mr. Dorn about all of the different market  
19 differentiators that Exmark thought about its mowers?

20 A. I generally recall that.

21 Q. And there were quite a few of those, weren't there?

22 A. There were a lot, yes.

23 Q. And they weren't all inventive aspects of the mower; is  
24 that right?

25 A. They weren't patented, correct.

1 Q. Thank you. And finally, do you remember Mr. Vandenburgh  
2 asking you a series of questions about the incremental profit  
3 that Exmark would -- Exmark would receive?

4 A. That it makes on its mowers, yes.

5 Q. Yes. And he was asking you about every lost sale from  
6 Briggs would result in what reflected in the incremental  
7 profit?

8 A. Yes, I remember that.

9 Q. Should we be looking at incremental profit or at the end  
10 of the day what should we be taking home?

11 A. You know, when you're looking at the reasonableness of a  
12 royalty, again, that's what we're looking at, reasonable  
13 royalty is what is it in context of their operating profits,  
14 the 365 per mower.

15 MS. DEWITT: Thank you, Mr. Bone.

16 THE COURT: Any -- ladies and gentlemen of the jury,  
17 do you have any questions of this witness?

18 All right, Mr. Vandenburgh, any follow-up?

19 RECCROSS-EXAMINATION

20 BY MR. VANDENBURGH:

21 Q. Just one question. If a company knew that all they had to  
22 pay was one-fifth of a penny for -- on every dollar of sales  
23 for infringing a competitor's patent that they believed to be  
24 their most important patent, don't you think that would  
25 encourage people to infringe patents?

1 A. I don't know that I necessarily agree with that. Again,  
2 it's based on -- if it's a reasonable value, if it's a right  
3 value, then no.

4 MR. VANDENBURGH: I have no further questions.

5 THE COURT: All right. You may step down, sir.

6 Do you have any additional evidence from the defense?

7 MR. WOLF: No, Your Honor. Subject to all of the  
8 previous...

9 THE COURT: All right.

10 MR. WOLF: And there's one more thing I want to raise  
11 in that regard before we formally close.

12 THE COURT: Okay. Do we need to take a short break  
13 before we do that?

14 MR. WOLF: Well, we probably can excuse the jury for  
15 lunch and --

16 THE COURT: Okay. So ladies and gentlemen, I'm  
17 going to excuse you for lunch. I have a hearing at one o'clock  
18 that should last for a while, so I'd ask you to come back here  
19 at a quarter to two, and then we'll hopefully be ready for  
20 closing arguments at that time, if there's no additional  
21 evidence. All right?

22 So we're in recess until a quarter to two.

23 (Jury out at 11:52 a.m.)

24 THE COURT: So off the record.

25 (Discussion was had off the record.)

1 (Recess taken at 11:52 a.m.)

2 (At 12 noon; with counsel and the parties' representatives  
3 present; WITHOUT the jury:)

4 THE COURT: Please be seated.

5 So the record should reflect that we're outside the  
6 presence of the jury.

7 Mr. Wolf, there's something you wanted to take up?

8 MR. WOLF: Well, two things, Your Honor. One -- one  
9 is a cooperative thing we want to take up to try to -- to allow  
10 Mr. Vandenburg and I to get to closings.

11 If we -- are we to understand -- we understand that the  
12 two additional instructions you handed out are your response to  
13 the parties' respective filings for requests for additional  
14 jury instructions?

15 THE COURT: Not really.

16 MR. WOLF: Oh.

17 THE COURT: We went through the instructions that we  
18 previously gave and we want -- I wanted to change the damage  
19 instruction because I thought it might be a little confusing,  
20 on the calculation for the data damages.

21 MR. WOLF: Right.

22 THE COURT: And the --

23 MR. WOLF: The Marshall correlation instruction? We  
24 certainly have no objection to that.

25 THE COURT: Okay. I didn't think anybody did.

1 MR. WOLF: Okay.

2 THE COURT: So I haven't -- so we need to talk about  
3 your other -- your other instructions.

4 MR. WOLF: Oh, okay.

5 THE COURT: Okay.

6 MR. WOLF: Who -- would Your Honor like us to come  
7 back at 1:30 to talk about that?

8 THE COURT: Well, here's what I'd like to do. I'd  
9 like to -- yeah, I'd like to get all the matters completed with  
10 respect to your rest.

11 MR. WOLF: Okay.

12 THE COURT: And then I would like to make -- to find  
13 out whether the plaintiff has rebuttal testimony, and then  
14 argue the motions. And then I'd like to briefly go over the  
15 few things that I have here that nobody's going to have any  
16 argument with. And then if we can, I'd like to go off the  
17 record to find out which instructions, if any, you have that  
18 you're still objecting to and which -- and just to be sure I  
19 understand which instructions you want me to give.

20 And then we'll come back at 1:15 because I have to give  
21 some guy probation. You might want to come and watch that,  
22 that happens like once in every six years or something, so just  
23 to say that you witnessed a federal judge giving somebody  
24 probation.

25 So -- then we'll come back at either 1:15 or 1:10 and then

1 we'll talk about the jury instructions on the record.

2 MR. WOLF: Oh, okay.

3 THE COURT: Okay?

4 MR. WOLF: Good.

5 THE COURT: And that's just kind of where I want to  
6 go.

7 MR. WOLF: Gotcha. All right. So then as to our  
8 case, Your Honor, recognizing that we talked about this more  
9 than once, but even with that testimony, we've now seen the  
10 jaws close on the evidentiary Vise-Grip that counsel has  
11 successfully, and to his credit -- on the one hand we've been  
12 told that we can only use, for purposes of a number of reasons,  
13 commercially available alternative designs, but we just heard  
14 counsel say but these were all patented so those aren't  
15 available. And on the other hand they have successfully argued  
16 that, for example, expired patents on designs that might not  
17 have at the time been commercially available can't be talked  
18 about to the jury as well.

19 So essentially we've been told we're damned if we do and  
20 we're damned if we don't, and -- so we would renew our  
21 objections on both fronts and just say that they've now muddled  
22 what it means to have a -- a commercially available  
23 alternative.

24 THE COURT: Well, I thought the point of  
25 Mr. Vandenburg's cross-examination was that if you have a

1 market differentiator, which most people would just call a  
2 gimmick, if you got a gimmick, that's worth more than  
3 everything else, okay?

4 MR. WOLF: Oh, that --

5 THE COURT: And -- and I think that was one of the  
6 points of his -- of his cross-examination.

7 And then the other one is, you know, what was available to  
8 them if they wanted to redesign? And you went into that -- you  
9 didn't, but Ms. DeWitt went into what was available for them to  
10 redesign, if they wanted to redesign.

11 And so I -- that's the way I took the analysis.

12 I was very concerned that we get into the issue of  
13 validity and that we get into the issue of what else was  
14 available.

15 But in relation to this witness, it was what he examined  
16 and what he knew when he was doing the evaluation and so I  
17 didn't think that it went over the line.

18 So I -- I -- I'm sensitive to your objection, but I don't  
19 think that he's crossed the line and I'm going to overrule your  
20 objection.

21 MR. WOLF: Understood. And obviously there's a  
22 chance that I may be -- I'm going to do everything that I can  
23 to avoid rising during Mr. Vandenberg's closing, but to  
24 preserve that issue -- well, the question is do I need to rise  
25 during his closing to preserve the issue or -- or --

1 THE COURT: I think if he goes past what I've talked  
2 about, then you should rise. Otherwise, you can have a  
3 continuing objection to his --

4 MR. WOLF: Okay. Thank you, Your Honor.

5 THE COURT: At least to the level we've talked so  
6 far.

7 MR. WOLF: Thank you. I appreciate that  
8 clarification.

9 So with that, Your Honor, understanding that -- that but  
10 for Your Honor's rulings, we would have put in the evidence  
11 we've talked about, that we now rest.

12 THE COURT: All right. And does the plaintiff have  
13 any rebuttal evidence?

14 MR. VANDENBURGH: No, Your Honor.

15 THE COURT: All right. So you renew your motions,  
16 correct, Mr. Wolf?

17 MR. WOLF: We renew all motions, yes, Your Honor.

18 THE COURT: All right. Is there anything additional  
19 you want me to consider?

20 MR. WOLF: Your Honor, just to emphasize the point,  
21 and this -- particularly -- well, two points. And this may not  
22 be additional, but on the redesign issue, we do believe that  
23 "end" is -- that they're asking the Court to -- I mean the jury  
24 to do claim construction, that "end" means "end" and that  
25 they're offering -- they're asking the jury to understand "end"

1 in a way contrary to the ordinary meaning, and under *O2 Micro*  
2 that's inappropriate.

3 And the second issue is, Your Honor, on the entire market  
4 value rule, we believe -- and particularly under Mr. Dorn's  
5 testimony, where he testified -- and this will obviously show  
6 up in closing -- replete with market differentiators, that  
7 there is no evidence from which a reasonable jury could find  
8 that the sales of this mower are being driven by the -- the  
9 shape of the baffle.

10 THE COURT: All right. I'm going to overrule your  
11 motions. You know, I think the course of this case has been  
12 set earlier. I don't see any reason to change my original  
13 rulings.

14 My perseveration, if that's what you want to -- what I  
15 would call it, maybe, at the close of the plaintiff's evidence  
16 is reflective of the factual dispute between the parties with  
17 respect to infringement. And that's why I'm giving a jury  
18 trial in this matter on the -- on the redesign as opposed to  
19 just making a decision on my own.

20 And if I -- if I made the decision on my own, I -- I don't  
21 know who would be happy and who would be sad, but one of you  
22 would, and I thought that it would be more appropriate for the  
23 parties to be able to litigate it because it is such a close  
24 question. And I think that's what the patent framework and the  
25 balancing of the -- of the standards of proof are on either

1 side of this.

2 And I understand your position and I respect it, but  
3 that's the way I've decided to go.

4 MR. WOLF: Understood, Your Honor.

5 THE COURT: All right.

6 MR. WOLF: So for all -- we preserved all of our  
7 post-plaintiff's close motions.

8 THE COURT: Exactly. And that's the way I take it.

9 MR. WOLF: Thank you.

10 THE COURT: Anything from the plaintiff,  
11 Mr. Vandenburg?

12 MR. VANDENBURGH: Yes, Your Honor. I have posttrial  
13 motions as well.

14 First of all, based on your comments, I feel like this is  
15 probably more for the record.

16 We do move for judgment as a matter of law that the  
17 redesign product infringes. Based on the testimony we've  
18 heard, there is no limitation in the claim that you have to go  
19 to the inflection point. The end of a baffle portion, the ends  
20 are defined by the portion, not vice versa. And based on that,  
21 we have the claimed elements.

22 There's, I think, not as much dispute at this point,  
23 there's certainly been testimony -- we've heard from  
24 Mr. Del Ponte, at least during his deposition, that that middle  
25 section is in fact elongated and substantially straight.

1           And then relative to the comments Your Honor raised on the  
2           second arcuate baffle portion, as I hope you recognized from  
3           yesterday's testimony, there are other examples that have  
4           already been found to infringe where the baffle starts to move  
5           away and you -- the bottom line is the claim language just  
6           requires that it extend partially around and it can do that  
7           even if it's also moving farther away from the blade.

8           So with that, we move for judgment as a matter of law on  
9           infringement.

10           THE COURT: Well, I think I'm going to roll the dice.  
11           I'm going to overrule your motion.

12           MR. VANDENBURGH: All right.

13           THE COURT: Both of you, I mean, in the context of  
14           this lawsuit, have -- have pushed the -- the limits of -- of  
15           what patent law is and that's why we're in front of a jury. So  
16           just -- I wish both sides luck.

17           All right. So are there any -- is there anything else?

18           MR. VANDENBURGH: Yes, Your Honor. I would also like  
19           to move for judgment as a matter of law on the issue of willful  
20           infringement.

21           THE COURT: Oh. I can't do that. Okay. I'm going  
22           to overrule that.

23           MR. VANDENBURGH: Are we good that I don't need to  
24           provide any further --

25           THE COURT: Exactly.

1 MR. VANDENBURGH: -- specificity?

2 THE COURT: Correct.

3 MR. VANDENBURGH: All right. Thank you, Your Honor.

4 THE COURT: So let's talk about what we do agree. I  
5 gave you a new verdict form. Are both parties okay with the  
6 new verdict form? Or do you have any editorial comments with  
7 respect to the new verdict form?

8 Mr. Winkels.

9 MR. WINKELS: Your Honor, we just have one minor one.  
10 And it would be with respect to question 1, the second bullet.

11 THE COURT: Okay.

12 MR. WINKELS: At the end, it would -- it reads, "If  
13 you answer No, do not include those damages in your  
14 calculation, but determine damages below only with respect to  
15 the infringement," and this is where I would insert "by  
16 products with." And then I think to make the sentence make  
17 sense you would need to delete "of." So what it would say is  
18 "by products with the original," and then I would insert "the  
19 mower deck design."

20 THE COURT: Do you have a problem with that,  
21 Mr. Wolf?

22 MR. WOLF: No.

23 THE COURT: All right. Any other editorial issues?

24 MR. WINKELS: No, Your Honor.

25 THE COURT: Mr. Wolf, any other editorial issues with

1 respect to the verdict form?

2 MR. WOLF: Your Honor, I've been told many times do  
3 not let the perfect be the enemy of the good, so, no,  
4 Your Honor.

5 THE COURT: Okay. All right. So we -- we'll make  
6 those changes as suggested by Mr. Winkels and that'll be the  
7 verdict form.

8 Then I -- I changed Instruction No. 22A. Instead of, "The  
9 parties have agreed," I just said, "Under the law, you should  
10 assess damages beginning May 12, 2004."

11 Do either of you have any objection to that change?  
12 Mr. Winkels?

13 MR. WINKELS: No, Your Honor.

14 THE COURT: And Mr. Wolf?

15 MR. WOLF: No, Your Honor.

16 THE COURT: Then what will probably be Instruction  
17 No. 32, which is the Marshall Deposition Exhibits, I think the  
18 parties have agreed that his exhibit -- his deposition exhibit  
19 numbers and trial exhibit numbers should be listed in this  
20 instruction.

21 Do you object to this instruction? Mr. Winkels?

22 MR. WINKELS: No, Your Honor.

23 THE COURT: Mr. Wolf?

24 MR. WOLF: The only thing I would add, and  
25 Your Honor, I defer to you, is something like not -- the

1 purpose of the instruction is not to call out that this witness  
2 is more or less than any other -- more important or less  
3 important, it was just the inconsistency in the --

4 THE COURT: Well, you know, thinking about this, it  
5 might be better if we just made this an exhibit as opposed to  
6 an instruction.

7 MR. WOLF: That would actually solve my concern.

8 THE COURT: Where do we -- where would we put this  
9 though? Is there -- Marshall's deposition -- we could just  
10 call this Marshall Deposition Exhibit. How about that? And  
11 then number it -- I don't see any specific exhibit number that  
12 goes with Marshall's exhibits, so we just put it at the end of  
13 the exhibit list. Does that work for you?

14 MR. WINKELS: I think we'd be fine with that. Does  
15 Your Honor intend to tell the jury that it's admitted?

16 THE COURT: Yes.

17 MR. WINKELS: Okay. Then we're fine with that.

18 MR. WOLF: That's fine, Your Honor.

19 THE COURT: Okay. So we'll call this -- instead of  
20 Instruction Number, we'll just call this Marshall Deposition  
21 Exhibit Number -- and where are we at the end of the  
22 plaintiff's exhibits?

23 MR. WINKELS: That's a good question, Your Honor.

24 THE COURT: Ms. --

25 COURTROOM DEPUTY: It's 542, Judge.

1 THE COURT: 542.

2 MR. WINKELS: Yeah, that's right.

3 THE COURT: So we're going to call this Marshall  
4 Deposition Exhibit No. 542.

5 I'll read this for the jury so they know what we're  
6 talking about, or at least explain it to them, and then we'll  
7 receive this as an exhibit.

8 Is that acceptable to the plaintiff?

9 MR. WINKELS: Yes, Your Honor.

10 THE COURT: And acceptable to the defendant?

11 MR. WOLF: Yes, Your Honor.

12 THE COURT: Okay. I think this works.

13 So I know that both parties have some objections to my  
14 instructions and have some additional instructions that they  
15 want me to give.

16 I'd like to discuss that with you off the record so that  
17 we can have a cleaner record when we come back this afternoon  
18 at about 1:15.

19 Is that acceptable to the parties?

20 MR. VANDENBURGH: Yes, Your Honor.

21 MR. WOLF: Yes, Your Honor.

22 THE COURT: Okay. So we'll go off the record.

23 MR. WOLF: Okay. Oh, actually before we do,

24 Your Honor?

25 THE COURT: Yes.

1 MR. WOLF: Recognizing -- we have -- I'll let  
2 Ms. DeWitt do it. We have a housekeeping with two exhibits.

3 MS. DEWITT: For the videos that were played  
4 yesterday, Your Honor, we want to have the transcripts received  
5 into evidence. For Mr. Benson, that's defendant's 1424; and  
6 for Mr. Converse, that's 1426.

7 THE COURT: And that would be for the record only.

8 MS. DEWITT: Yes, sir.

9 THE COURT: Okay. Any objection to that?  
10 Mr. Vandenburg?

11 MR. VANDENBURGH: I'm -- I'm -- no objection,  
12 Your Honor.

13 THE COURT: Okay. So they're received for the  
14 purposes of the record only.

15 Anything else?

16 MR. WOLF: No, Your Honor. Thank you.

17 THE COURT: So let's go off the record.

18 (An off-the-record discussion was had between the Court  
19 and counsel.)

20 (Recess taken at 12:20 p.m.)

21 (At 1:25 p.m.; with counsel and the parties'  
22 representatives present; WITHOUT the jury:)

23 THE COURT: Please be seated.

24 So the record should reflect we're outside the presence of  
25 the jury. And we're talking about the jury instructions.

1           The parties have each made a request to the Court for  
2 additional jury instructions. And so I will start with the  
3 plaintiff.

4           MR. WINKELS: Thank you, Your Honor.

5           I believe we've requested -- now there's only two open  
6 issues. I'll start with the first one, which is the addition  
7 that we proposed to Instruction No. 17 of the initial  
8 instructions.

9           THE COURT: Right.

10          MR. WINKELS: And what we believe we need to do,  
11 Your Honor, is we need to address this issue of these exact  
12 boundaries that defendants have referred to repeatedly. We  
13 heard it in opening. We've heard it throughout the  
14 questioning.

15          And I would refer the Court to one specific question of  
16 Mr. Busboom where he was asked: The public is entitled to rely  
17 on exact boundaries in your claim so they can know when they're  
18 on or off your property, right?

19          The problem, Your Honor, is that's not what the law says.  
20 What the law sets out in *Nautilus*, as Your Honor's well aware  
21 of, is claims are required to inform those of skill in the art  
22 with reasonable certainty. And they've infused this trial with  
23 this notion that there needs to be these exact mathematical  
24 precision boundaries and they've equated them to property  
25 lines.

1           What I suspect we're going to hear is, well, when we  
2 watched the video from the Federal Judicial Center early on in  
3 the case, trying to explain to a juror what a patent is,  
4 there's a reference to a deed and property lines.

5           I think we need to take that a little bit in context. And  
6 what the video's doing is it's trying to give the jury some  
7 analogy of what an intellectual property right is and they  
8 can -- they have an understanding of what a real property right  
9 is.

10           With all respect to the Federal Judicial Center, I don't  
11 think it is accurate what is said there, that an intellectual  
12 property right is exactly like a real property right. And  
13 that's the distinction we're trying to draw in our proposed  
14 addition, Your Honor.

15           THE COURT: And you would have that -- this paragraph  
16 added where, in Instruction 17?

17           MR. WINKELS: We were thinking, I believe, right  
18 between the two paragraphs. There's two existing paragraphs.

19           THE COURT: Correct.

20           MR. WINKELS: What I -- I think to be fair, I don't  
21 think we need to call this out in its own separate instruction,  
22 but I think putting it in context with the instruction of what  
23 a claim is and what a -- how the -- a claim should be read and  
24 things like that makes the most sense.

25           THE COURT: All right. Mr. Wolf.

1 MR. WOLF: Your Honor, it won't surprise you that I  
2 object to this instruction on the strongest possible terms.

3 Let's start from the proposition -- you want me to step  
4 out here so I'm not blocked by the --

5 THE COURT: I can see you.

6 MR. WOLF: But the court reporter --

7 THE COURT: Oh, yes.

8 MR. WOLF: She was looking around the corner. I'm  
9 sorry.

10 THE COURT: Go ahead.

11 MR. WOLF: I'm not trying to be rude here.

12 Let's start with the proposition that it was the plaintiff  
13 that requested that the Federal Circuit video be played. And  
14 they didn't request at the time that the statements of the law  
15 in that be modified in any way for Your Honor.

16 Secondly, if Your Honor is going to start editorializing  
17 about the evidence in this case or how it's being  
18 characterized, we would want a countervailing instruction that  
19 flexibility has nothing to do with patent law. And you'll  
20 recall Mr. Vandenburg actually asked the witness, now, if you  
21 have one view that infringes and one view that doesn't, you  
22 still infringe. Your Honor, that's the very definition of  
23 indefiniteness under *Nautilus* and *Dow*.

24 So we have been -- we intend to strictly adhere to what  
25 the video -- in closing to what the video said and what

1 Your Honor says, no more. It's the precise language of the  
2 video.

3 But if they're going to start asking you to essentially  
4 opine on the legal import of what we've done during trial, then  
5 we would ask for the reciprocal. And I would suggest that that  
6 would be a very unpleasant experience for plaintiff, to have  
7 Your Honor commenting on whether a claim should be, quote,  
8 flexible, unquote.

9 THE COURT: Well, here's the only issue that I have.  
10 We've just asked the jury to follow the law. I've given the  
11 definitions, and the claim should speak for itself.

12 But generally speaking, the claim needs to be read -- a  
13 patent needs to be understandable to someone that is skilled in  
14 the art, with reasonable certainty. I think that's the law.

15 Would you agree generally that's the law?

16 MR. WOLF: Generally, yes, Your Honor, but there's  
17 very specific language. In the Federal Circuit video --  
18 remember, that video was approved by plaintiffs and defendants,  
19 that's when it came out, and that is the most concise statement  
20 of the law anybody's come up with.

21 THE COURT: No, but my question to you has to do with  
22 the language of Instruction No. 17.

23 So we don't -- we don't really tell the jury by what  
24 standard the language is to be interpreted. And maybe we  
25 shouldn't. I haven't seen a single instruction in any of the

1 pattern instructions that I've reviewed that tells them what  
2 the standard is to review.

3 But it seems to me that the standard for their review is  
4 that a claim must inform those skilled in the art about the  
5 scope of the invention with reasonable certainty.

6 And my question is whether I should add just that sentence  
7 to paragraph one of Instruction No. 17.

8 MR. WOLF: Phrased as such, that would not be  
9 problematic for us.

10 THE COURT: All right. And how about you,  
11 Mr. Winkels?

12 MR. WINKELS: We would of course for the record ask  
13 that Your Honor enter the instruction we proposed.

14 I don't think it -- the language that's being proposed  
15 right now, just that one sentence, it's not really drawing the  
16 distinction to the exact property lines like it's a GPS  
17 coordinate thing from the county.

18 THE COURT: Well, this is -- what you're talking  
19 about to me is argument, okay? This is not a real estate case.  
20 This is a patent case. And the patent claim description  
21 doesn't give specific measurement and it doesn't give the plat  
22 and a surveyor doesn't come out and do it.

23 The FJC tape is an analogy. It's not real estate law.  
24 And that's argument. I don't think I need to argue your case  
25 for you in the context of a jury instruction.

1           But it seems to me that it's reasonable to tell the jury  
2           that a claim -- a patent claim must inform those skilled in the  
3           art about the scope of the invention with reasonable certainty.  
4           And that's all I propose to add.

5           So I'm overruling your suggestion and now asking you  
6           whether that sentence that I've just read to you can be added  
7           to the first paragraph of Instruction 17. And your answer is?

8           MR. WINKELS: Yes, Your Honor.

9           THE COURT: And Mr. Wolf?

10          MR. WOLF: Yes, Your Honor.

11          THE COURT: So we'll add that sentence to  
12          Instruction 17. We'll call it 17A.

13          MR. WOLF: Okay.

14          THE COURT: Okay? All right. Anything else,  
15          Mr. Winkels?

16          MR. WINKELS: The last issue, Your Honor, we had was  
17          the cautionary instruction that Your Honor proposed after  
18          Mr. Busboom's testimony.

19          THE COURT: And I gave that instruction, correct?

20          MR. WINKELS: I don't -- if my recollection's  
21          correct, I don't think we ever did give that instruction.

22          THE COURT: Okay.

23          MR. WINKELS: I think we kind of left it on the  
24          table.

25          THE COURT: All right. Go ahead.

1 MR. WINKELS: And we believe that that cautionary  
2 instruction should be given. Given the timing that the  
3 instruction is coming now, we would suggest not specifically  
4 calling out Garry Busboom in the instruction and revising it to  
5 just say, "The Court has allowed witnesses."

6 We -- we recognize defendant's position that they contend  
7 two witnesses testified to this, so we're fine if Your Honor  
8 wants to say that the Court has allowed witnesses to testify  
9 with respect to Exmark's knowledge. But we would ask the Court  
10 enter that cautionary instruction.

11 THE COURT: Mr. Wolf.

12 MR. WOLF: Your Honor, for -- again, we have, I  
13 believe, adhered scrupulously to the line you set out. I don't  
14 think the instruction is necessary. Certainly it is -- as  
15 phrased, the lily is again gilded. And we don't think it's  
16 necessary. There's lots of little things we want instructions  
17 on too. What's the -- we're going to argue that they knew.  
18 And that's evidence that we told everybody. We're not going to  
19 argue, and therefore, it's -- even though we believe we're  
20 entitled to, but we've gone through this a hundred times, we're  
21 not going to argue in closing that because they did or didn't  
22 do anything the value of the patent must be less.

23 So this instruction is going to an argument that has not  
24 been made, has never been made, and will not be made.

25 THE COURT: All right. Well, I basically made the

1 decision during the trial about this instruction and I'm not  
2 going to go back on it.

3 I don't think -- I think that adding the instruction just  
4 adds a -- an issue that we don't -- that we can -- that you two  
5 can solve in argument. If somebody crosses the line, then an  
6 objection could be made during closing argument. So I'm going  
7 to -- I'm not going to take you up in your invitation for this  
8 instruction.

9 Any other instructions, Mr. Winkels?

10 MR. WINKELS: No, Your Honor.

11 THE COURT: All right. Now, Mr. Wolf, you have some  
12 suggested instructions as well.

13 MR. WOLF: We do. Could I ask -- you just raise an  
14 important point, Your Honor. Different courts and different  
15 circuits have different views on this. I'd like the parties --  
16 and -- if we made a good-faith objection through the course of  
17 trial, I would like to not be jumping up to interrupt  
18 Mr. Vandenburg to review an objection that I have already  
19 made. Is that your understanding, that we don't --

20 THE COURT: Yes, that's my understanding. If it's --  
21 and if you -- and I think for completeness of the record, once  
22 the argument is made, you should reiterate for the record,  
23 outside the presence of the jury, those portions of the  
24 objection that you want the Court to be aware of, the circuit  
25 court, but you don't need to raise them during the closing

1 argument if they've already been raised during trial.

2 MR. WOLF: Thank you, Your Honor. Just as a matter  
3 of professional courtesy, I don't want to do that to my  
4 opposing counsel.

5 THE COURT: Well, professional courtesy or otherwise,  
6 I've seen it done every day. But that's generally my approach.  
7 If it's already been raised in the trial and it's consistent  
8 with my previous rulings, then in order to preserve the record,  
9 you do not have to get up during opening -- or during the  
10 argument and raise the objection. But I would appreciate it if  
11 you would do it at the -- outside the presence of the jury  
12 after the argument.

13 MR. WOLF: Understood, Your Honor.

14 THE COURT: Just to preserve the record.

15 MR. WOLF: Very good.

16 THE COURT: All right. Anything -- yes. Now,  
17 Ms. DeWitt?

18 MR. WOLF: Well, one infringement issue and then I  
19 will turn it over to Ms. DeWitt for damages issues.

20 THE COURT: Okay.

21 MR. WOLF: We had proposed, with respect to  
22 Instruction 20, the notion to establish literal infringement  
23 every limitation set forth in a claim must be found in the  
24 accused product exactly.

25 THE COURT: Right. And I'm not going to give that

1 instruction. I mean, what I have is what I have.

2 MR. WOLF: Understood. The concern that we have,  
3 just so we say it now, is that there has been some suggestion  
4 throughout this trial that meeting the functional limitation of  
5 the -- of the language after what we've been focusing on  
6 somehow is a stand-in for meeting the structural limitation.

7 THE COURT: It's an "and."

8 MR. WOLF: Yes.

9 THE COURT: And you want an instruction more clearly  
10 that says that it's an "and."

11 MR. WOLF: Yeah.

12 THE COURT: I think you can do that in argument. I  
13 think that my instruction makes it clear that all the claims  
14 have to be met.

15 MR. WOLF: Thank you, Your Honor.

16 THE COURT: All right. So Ms. DeWitt, you want me to  
17 give an instruction -- a different damages instruction,  
18 correct?

19 MS. DEWITT: Yes, we have a couple of damages.

20 So with respect to 21, we would request this -- the  
21 following: You may not rely on speculative and unreliable  
22 evidence divorced from proof of economic harm linked to the  
23 claimed invention. Evidence of damages must be tied to the  
24 claimed invention's footprint in the marketplace.

25 I think that we've listened to all the evidence from the

1 damages experts and I think that the important point needs to  
2 be made to the jury that it's got to be related to the claim,  
3 to the patented feature of that product.

4 THE COURT: Right. And I understand your argument  
5 but -- but I -- I'm not going to participate in the argument.  
6 I think that my instruction is adequate and certainly this  
7 issue can be argued. So I'm not going to give this  
8 instruction.

9 So you have an additional instruction with respect to 23;  
10 is that correct?

11 MS. DEWITT: That is. And if you recall, Your Honor,  
12 I think the -- the first part, the two forms of royalties, you  
13 wanted to kind of reserve and hear the evidence. Now you know,  
14 Briggs has put forth both a lump sum, plus a running royalty.

15 THE COURT: So --

16 MR. WOLF: Your Honor?

17 THE COURT: Go ahead.

18 MR. WOLF: Just to make this easier, and knowing what  
19 I'm going to argue in closing, unless Your Honor agrees, we're  
20 not going to press this one.

21 THE COURT: Well, you know, I thought about this.  
22 And we've talked about both. And both are allowable. I don't  
23 know that we need an instruction on it, to be honest with you.

24 MR. WOLF: Your Honor, I'm just trying to save some  
25 time here.

1 THE COURT: Well, your --

2 MR. WOLF: We're withdrawing the --

3 THE COURT: Well, your time-saving is appreciated but  
4 I think I probably would have -- would not have used this  
5 instruction because I think that the instruction that I've  
6 given is open-ended enough for either -- for either party to  
7 argue however they want to argue.

8 MR. WOLF: But Your Honor, you can't fire me, I quit,  
9 so...

10 THE COURT: No, I understand. Anything else,  
11 Mr. Wolf?

12 MR. WOLF: No, Your Honor.

13 THE COURT: Okay. So we're prepared to proceed,  
14 correct?

15 MR. WOLF: I believe so, Your Honor.

16 THE COURT: Who -- do you want me to read the  
17 instructions first or would you prefer that I read them later?  
18 Mr. Winkels? Do you know?

19 MR. WINKELS: I don't know the exact answer to this  
20 but I think it's going to be we would prefer that you read them  
21 later.

22 THE COURT: Okay. And you too?

23 MR. WOLF: Yes. Given the way -- the length --  
24 they're only 10 or 15 minutes; is that right?

25 THE COURT: It will be really short.

1 MR. WOLF: Yeah. So just ballparking this, can we  
2 talk about the afternoon for a second?

3 THE COURT: Sure.

4 MR. WOLF: If we get rolling on closings at ten of  
5 two, can we assume that I will get at least a ten-minute break  
6 after his --

7 THE COURT: Yes.

8 MR. WOLF: Okay. That was my only question then.  
9 And then we'll boom, boom, boom, and then --

10 THE COURT: Right. And depending on how long the --  
11 your argument goes, there might be a ten-minute break after  
12 your argument before rebuttal.

13 MR. WOLF: Okay.

14 THE COURT: I -- I usually like to do the rebuttal  
15 right away, but if it goes long enough, we may take a break.

16 MR. WOLF: Understood. But I will definitely have a  
17 few minutes just if I want to take some arguments out because  
18 they don't make them and that kind of thing?

19 THE COURT: Correct. There will be a break between  
20 the plaintiff's argument and your argument.

21 MR. WOLF: All right. Final point, Your Honor, just  
22 some --

23 MS. DEWITT: For the Court's indulgence, I still need  
24 to ask for the receipt of some exhibits that have been admitted  
25 and inadvertently were not put into the record.

1 THE COURT: If you would.

2 MS. DEWITT: These are all DX numbers: DX-1417,  
3 1418, 1419, 1420, 1421, 1422, 1423, and 1424. And -- I'm  
4 sorry, and 1425, not 1424. Excuse me.

5 THE COURT: All right. So some of those are DVDs of  
6 depositions?

7 MS. DEWITT: Yes. And some -- the Munnsville, we saw  
8 a video yesterday. So they're from Mr. Marshall and Mr. Benson  
9 and Mr. Converse.

10 THE COURT: Okay. So as far as the DVDs are  
11 concerned, you're just admitting those for the record --

12 MS. DEWITT: Correct.

13 THE COURT: -- and not for the jury, correct?

14 MS. DEWITT: Correct.

15 THE COURT: But the others you want received as  
16 evidence for the jury; is that correct?

17 MS. DEWITT: No. They're all just for the record.

18 THE COURT: Okay. All right. Well, there's one  
19 exhibit that has the -- okay. Do you have a problem with that?

20 MR. WINKELS: Not knowing what they are, but if -- if  
21 these are just things going in for the record, they're not  
22 going to be admitted as going to the jury, we don't have an  
23 objection.

24 THE COURT: Okay. So they're received for the  
25 record. Anything else?

1 MR. WOLF: No, Your Honor.

2 THE COURT: All right. And I'll take that as having  
3 been made prior to the defendant's rest.

4 MR. WOLF: We appreciate that, Your Honor.

5 THE COURT: And all the motions and everything will  
6 be considered accordingly.

7 Is there anything else from the plaintiff?

8 MR. WINKELS: Just one logistical question. We moved  
9 orally for judgment as a matter of law and Your Honor denied  
10 those motions. Do we need to file additional briefing on that  
11 tonight or --

12 THE COURT: No.

13 MR. WINKELS: -- we've preserved our rights?

14 THE COURT: You have preserved your record.

15 MR. WINKELS: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 MR. WOLF: Everyone thanks you for that.

18 MS. DEWITT: Yeah.

19 THE COURT: Well, you know, before we start, I just  
20 want to say that I really, really do appreciate the quality of  
21 lawyering on both sides in this case. It's a pleasure for me  
22 to work with good lawyers and -- and despite the fact that my  
23 wife is a little upset with me because I'm a little preoccupied  
24 during this trial, I think you've all done a wonderful job and  
25 I want to thank you for the work that you've done and the

1 professionalism that both of you -- that both sides have shown.  
2 So good luck to both sides.

3 MR. WOLF: Thank you for the kind words, Your Honor.

4 THE COURT: You're welcome.

5 All right. We'll take a few minutes and then bring the  
6 jury in.

7 (An off-the-record discussion was had.)

8 THE COURT: So it's my understanding -- we're outside  
9 the presence of the jury again. It's my understanding there's  
10 some concern by plaintiff's counsel for demonstrative slides  
11 that defense counsel intends to use during closing argument.

12 Is that correct, Mr. Vandenburg?

13 MR. VANDENBURGH: Yes, Your Honor.

14 THE COURT: So which -- there are two slides that  
15 we're talking about?

16 MR. VANDENBURGH: Right. It's this one really -- I  
17 think they're essentially the same as this one, but they're  
18 creating the appearance that what is in red is a front baffle  
19 and no witness agreed to that in this trial. So for them to  
20 show that red portion with a thing that says "Exmark does not  
21 own all front baffles," it's misleading.

22 THE COURT: All right. So Mr. Wolf. Or Mr. Cohn,  
23 you're going to do the argument?

24 MR. COHN: Again, as you talked yesterday, this is  
25 just something that one could draw just to illustrate or a

1 picture of Walker without the red could be put on the screen  
2 and a finger could be traced over it.

3 I mean, it's -- it was as Your Honor discussed yesterday,  
4 this is simply a time-saving tool so we don't have to be  
5 drawing on the ELMO.

6 MR. VANDENBURGH: The other --

7 THE COURT: Just a second.

8 MR. COHN: We do believe that Mr. Busboom testified  
9 that the metal facing the blades had the curved-straight-curved  
10 shape across the deck. Now, he disputed that there was a wall  
11 there, but he did agree that at least the metal facing the  
12 blades had the shape in the claim and we simply just want to  
13 argue that to the jury.

14 We're not going to present this as evidence. It's not  
15 going back there. But it's simply a quick way of tracing one's  
16 finger along the picture.

17 THE COURT: Well, the -- if I look at this slide,  
18 "Exmark does not own all front baffles," and the Walker  
19 mower -- the only part of that that's a front baffle is the --  
20 is on the right side. The front -- there's no front baffle on  
21 the left side. So the second arc and then the line, that's not  
22 a baffle under the definition of baffles.

23 And so by saying that "Exmark does not own all front  
24 baffles," that's trouble.

25 Now, if you want to remove the heading, then that probably

1 solves the problem.

2 Because then you'll have to explain to the jury that you  
3 got to have a baffle -- you've got to have a front in front of  
4 that structure to make it a baffle.

5 MR. COHN: Your Honor, apparently it's been removed  
6 before we even talked about that.

7 THE COURT: All right.

8 MR. VANDENBURGH: Your Honor, I must say, I'm moving  
9 fast here and I thought I was just looking at Walker. I just  
10 realized I'm looking at a combination of two drawings laid over  
11 one another and, again, in some sense creating the appearance  
12 that this is an existing product when in fact they've created a  
13 hybrid of I don't know what.

14 THE COURT: Well, this -- this -- this figure, if you  
15 will, which is number 49 on the slide, is consistent with what  
16 was done as a demonstrative and it may be in evidence, except  
17 for the red mark that goes all the way around the second  
18 baffle.

19 So from my standpoint, as long as it's not marked, then  
20 somebody's got to explain it. And when they explain it,  
21 they'll have to talk about the fact that there's a front and  
22 then that creates the baffle.

23 So I'm okay with this.

24 MR. VANDENBURGH: So they're going to explain that  
25 there are actually two different decks being laid over the top

1 of one another here?

2 THE COURT: Well, if you look at the figure you can  
3 see that there's a deck over the front of the baffle. But I --  
4 but I don't know how they're going to argue it.

5 It's not a baffle. The only part of that that is a baffle  
6 is the first blade -- is in front of the first blade. There's  
7 no third baffle on the second or third blade unless there's a  
8 wall in front of it.

9 And I don't know how they're going to argue it, but it  
10 seems to me that they could use it as a figure from which to  
11 argue.

12 MR. VANDENBURGH: Thank you, Your Honor.

13 THE COURT: Good luck.

14 MR. VANDENBURGH: Am I entitled to use their  
15 demonstratives in my rebuttal?

16 THE COURT: You're certainly welcome to if they want  
17 to transfer it to you. Or you can ask them to pull it up by  
18 number, which is -- looks like number 49.

19 MR. WOLF: They already have it. We disclosed it as  
20 part of the demonstrative.

21 MR. COHN: We sent it this morning.

22 THE COURT: Okay. So what's the next one?

23 MR. WINKELS: I don't think we have that overlay. We  
24 can figure that out off the record.

25 THE COURT: Okay. So now what's the next --

1 MR. WOLF: I think we're done, Your Honor.

2 THE COURT: Is that it? Is there another one?

3 MR. COHN: The second one is the same. In fact,  
4 probably less offensive because we didn't draw the red line  
5 going all the way across and it doesn't have a front wall  
6 either.

7 MR. VANDENBURGH: Okay. But I think the heading  
8 would be the same issue on this one.

9 MR. WOLF: Well, Your Honor, for this one -- if we  
10 could call up -- this one actually -- now, this one is not  
11 offensive for the same reason Your Honor identified, because  
12 what's in red here is the front baffle.

13 THE COURT: Right. That's fine.

14 MR. VANDENBURGH: Your Honor, that's not true.

15 There's no evidence that that whole thing is the front  
16 baffle. It's just --

17 THE COURT: Well, the front baffle -- you're exactly  
18 right. The front baffle is just -- the front baffle is just  
19 that little triangular piece, frankly.

20 MR. WOLF: Well, the tri- -- well -- we'll -- we'll  
21 change the title just to avoid this. I mean, I think we're  
22 talking about a couple millimeters on either side.

23 MR. COHN: Take the title off.

24 THE COURT: All right. If you'd take the title off,  
25 then you'll have to argue it and then we'll go from there.

1 MR. WOLF: Thank you, Your Honor.

2 THE COURT: You're welcome.

3 Anything else, ladies and gentlemen?

4 MR. WINKELS: No, Your Honor.

5 THE COURT: All right. Let's take five and then  
6 we'll bring the jury out.

7 MR. WOLF: Thank you.

8 (Recess at 1:51 p.m.)

9 (At 2:00 p.m.; with counsel and the parties'  
10 representatives present; WITHOUT the jury:)

11 THE COURT: Please be seated.

12 (Jury in at 2:00 p.m.)

13 THE COURT: All right. Please be seated.

14 Ladies and gentlemen of the jury, you'll recall that we  
15 did -- we played the deposition of Mr. Marshall earlier and  
16 that the exhibit numbers in his deposition were different than  
17 the exhibit numbers that we have in court.

18 So the parties have come up with a key that shows the  
19 deposition number of the exhibit and the corresponding trial  
20 exhibit number.

21 And I'm going to put this in evidence, this key. It looks  
22 like this. And that will be Exhibit No. 542. And it's called  
23 Marshall Deposition Exhibit Number. So it's really kind of the  
24 key. So if you're talking about Marshall's -- if you remember  
25 Marshall's deposition and you have notes and it has

1 deposition -- and it has exhibit numbers on it, those won't  
2 correspond with the ones we have. So if you did take notes of  
3 them, then this key will provide you the corresponding number  
4 for trial exhibits as opposed to deposition numbers.

5 So Exhibit 542 is received.

6 Now, the parties have rested so you've heard all the  
7 evidence that's going to be presented in this case.

8 The lawyers now have an opportunity to give you closing  
9 arguments.

10 As I said before in my instructions, closing arguments are  
11 not evidence but they certainly may be considered by you in how  
12 you interpret the evidence.

13 And so the plaintiff has the burden of proof. And the  
14 plaintiff will go first in its closing argument. And because  
15 it has the burden of proof, it gets an opportunity to go last  
16 for a rebuttal.

17 And that -- that's the system that has been in place since  
18 I've been born and that's almost as old as dirt. So we'll just  
19 go by that -- by -- in this trial.

20 So with that, Mr. Vandenburg, you may proceed.

21 MR. VANDENBURGH: Thank you, Your Honor.

22 Good afternoon, ladies and gentlemen.

23 First of all, let me thank each and every one of you for  
24 your time and attention over the last two weeks. Our legal  
25 system only works because people like you are willing to come

1 and spend time away from your work and your family and all your  
2 other important things to help us decide this case. And so I  
3 do thank you all.

4 I told you at the beginning of this case what we were  
5 going to show. And I believe we followed through in that.

6 I'm going to go through today the specific evidence that  
7 we think is -- is relevant to your decision. But I think it's  
8 also important for you all to keep in mind the evidence that  
9 you've heard as a whole.

10 Lawyers will tend to choose sound bites of things that  
11 help their case, and that's fine, but at the end of the day,  
12 it's the witness's testimony as a whole, the evidence as a  
13 whole, that you hear that should govern your decision.

14 Now, it's also been awhile since we heard from the Exmark  
15 witnesses last week, so before I get to the evidence, let me  
16 just remind you from a big picture what you saw last week from  
17 Exmark's witnesses.

18 You know, first of course you heard from Judy Altmaier who  
19 explained who Exmark is and was and explained the commercial  
20 mower business.

21 You then heard from the inventor, Garry Busboom, who  
22 described his invention, the excitement that followed from that  
23 invention, his process of getting a patent. And he also  
24 described why he believes the Briggs' modified design  
25 infringes.

1 I think you probably saw that Mr. Busboom is universally  
2 respected, you know, not just at Exmark, but you also heard  
3 some of Briggs' witnesses talk about him.

4 You also heard from Mark Stinson. If you remember,  
5 Mr. Stinson was the general manager of Exmark back during that  
6 exciting phase when they went from being a small player to a  
7 leader in the industry. He talked about that success.

8 And then you heard from Dr. Strykowski. And he came up  
9 here and he explained to you first of all using the boards why  
10 this invention worked so well. He's an expert in airflow  
11 dynamics and he talked about all the ways that this invention  
12 helps improve the function of a motor -- of a mower deck.

13 And he also talked about infringement and particularly  
14 discussing how the airflow in the Briggs' modified decks is  
15 not -- is within the scope of the claims and meets the language  
16 required in them.

17 The next witness was Mr. Dan Dorn. Remember Mr. Dorn.  
18 He's a -- he's a boots on the ground sales guy. He's the guy  
19 who's out there talking to customers day in and day out. And  
20 you heard how he used Exmark's invention to sell lawn mowers.

21 And finally, you heard from Melissa Bennis. She's an  
22 expert who analyzed all of the relevant factors and concluded  
23 that a 5 percent royalty was reasonable in this case, allowing  
24 defendant Briggs to keep 95 percent of their revenue for all  
25 the other features that they have in their mowers.

1           So with that general introduction, let me dig into  
2 specific evidence.

3           This was an important invention that changed Exmark and  
4 changed the industry.

5           Remember back at the beginning of the evidence, we saw  
6 that Exmark was a small company, down in Beatrice, slow growth,  
7 and then in 1994, Garry Busboom came up with this invention and  
8 he paired it with the Lazer Z mower and an exciting time  
9 followed. They got all this immediate feedback from the  
10 industry, telling what a great product they had.

11           We saw -- get the slides working here.

12           We saw this as just an example of some of the feedback  
13 that he got from the initial distributors who got the product,  
14 talking about the night and day difference that the flow  
15 control baffles made. This was a major leap forward in the  
16 industry.

17           And it resulted in huge growth for Exmark. You heard the  
18 evidence from Mr. Stinson about how they doubled from '95 to  
19 '97, doubled again from '97 to '99. This was a great invention  
20 that caused Exmark to become the industry leader.

21           Not only have to take our word for it, you heard it from  
22 Mr. Wenzel. He said: You've heard a lot in the past week  
23 about how Exmark is a leader in the industry. Do you agree  
24 with that?

25           Oh, absolutely. Nobody disputes that.

1 He even acknowledged that Exmark raised the cutting level,  
2 cutting technology to a new level.

3 They definitely raised the cutting level, yes.

4 Everybody knows that this invention made not just Exmark's  
5 mowers better but it spurred everybody else to come up with  
6 ways to make their mower decks better.

7 Now, like all good inventions, some people copied it.  
8 We've heard a lot of -- about copying this week. Because we  
9 know that Ferris is one of the companies that copied this  
10 invention.

11 If you remember back at the beginning of this case when we  
12 were selecting our jury, I asked you only one question. I  
13 asked you if you could be fair and use your common sense. And  
14 this is one of those instances where we want you to use your  
15 common sense.

16 We heard a lot about this missing witness, Dale Baumbach.  
17 Dale Baumbach was the, at the time, Ferris engineer who handed  
18 the sketch to Mr. Marshall.

19 Now, they tried to blame us for the fact that Mr. Baumbach  
20 is not a witness in this trial. But you heard the evidence.  
21 They never seriously looked for him. And even after we gave  
22 him -- gave them his address, they still never bothered to try  
23 to reach out to him.

24 Common sense tells you that if Dale Baumbach could come  
25 into this courtroom and deny copying, he would be here.

1           Even apart from Mr. Baumbach's absence, based on the  
2 evidence we do have, your common sense tells you that copying  
3 took place here. It's not coincidence that they had this  
4 mower -- a mower with this mower deck and then suddenly had  
5 virtually the identical design.

6           Again, heard this analogy too many times. When an  
7 inventor in the U.S. and inventor in Siberia, Russia, come up  
8 with a same idea at the same time, that's a coincidence.

9           When Briggs had this mower and then they come up with this  
10 design, it's not a coincidence. Your common sense tells you  
11 there was copying.

12           Now, of course with respect to willfulness, that's not  
13 enough. You're going to be instructed regarding willfulness.  
14 And of course there needs to be evidence, clear and convincing  
15 evidence that Briggs knew or the risk was so obvious that it  
16 should have known of this risk of infringement.

17           And for the first mower that they bought, of course, it  
18 was not marked with the patent sticker. Copying was done so  
19 quickly that that one was out in the market during the time  
20 when the patent was still pending but hadn't yet come out of  
21 the Patent Office.

22           But Mr. Wenzel knows that patents take time to issue. And  
23 when you copy a product quickly, you can't just look at it and  
24 conclude, well, there's no sticker on there, I guess I'm okay.  
25 You know that it may take some time and so you need to keep an

1 eye out. And he admitted -- my slides got a little messed up  
2 here. Excuse me.

3 He admitted that there was a flaw in their process.

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

8 That was our policy at that time.

9 Okay. And is that a flawed policy at that time, knowing  
10 that it takes time for patents to issue?

11 Yes.

12 They had a flawed policy.

13 But even apart from a flawed policy, after the patent  
14 issued, there were red flags everywhere for Mr. Wenzel to see  
15 and anybody else at Briggs to see.

16 One of the biggest red flags, of course, was the Scag  
17 lawsuit. And, as we know, Mr. Wenzel was a witness in that  
18 case, but somehow claims that he went through that process  
19 without ever finding out what the patents were at issue in that  
20 case.

21 He came in and on his direct examination, you heard him  
22 give a long explanation of all the odd circumstances that  
23 resulted in him never learning what the patents were in that  
24 lawsuit.

25 Well, I think this is a good time to talk about some of

1 the instructions that you've received. And I want to talk  
2 about Instruction No. 7. I'm going to step over to the ELMO if  
3 I could.

4 And if you look at the second paragraph --

5 THE COURT: Counsel. If you could turn that  
6 microphone on. Just push the button once. That should work --  
7 now you pushed it twice. There you go.

8 MR. VANDENBURGH: One more time.

9 THE COURT: Very good. It helps.

10 MR. VANDENBURGH: Right.

11 THE COURT: You may continue.

12 MR. VANDENBURGH: As you can see from this  
13 instruction, you're not required to believe everything every  
14 witness says. And particularly in that second paragraph, it  
15 says: In deciding what testimony to believe, consider the  
16 witness's intelligence, the opportunity the witness had to have  
17 seen or heard the things testified about, a witness's memory,  
18 any motives that the witness may have had to testify in a  
19 certain way, the manner of the witness while testifying,  
20 whether that witness said something different at an earlier  
21 time, the general reasonableness of the testimony, and the  
22 extent to which the testimony is consistent with any evidence  
23 that you believe.

24 Now, there's two parts in particular I want to focus on.  
25 One is the witness's memory and the motive they have to testify

1 in a certain way. Because what you saw from Mr. Wenzel is this  
2 very detailed recollection of events that took place 13 years  
3 ago. But when I cross-examined him, it became clear that he  
4 had a recollection of things that he actually couldn't recall  
5 at the Scag deposition itself, two months afterwards. He  
6 claimed to have -- recall things that he didn't remember 13  
7 years earlier at his deposition.

8 There were also things that he was certain of during his  
9 testimony here, that he wasn't represented at the Scag  
10 deposition, that turned out to just be wrong.

11 I don't know if you noticed, but counsel came back and all  
12 they pointed out was that the lawyer there, the lawyer  
13 Mr. Marschall, not the witness Mr. Marshall that you saw, the  
14 lawyer Mr. Marschall was representing Scag. And that's true,  
15 he was Scag's lawyer, but he also was Phil Wenzel's lawyer at  
16 that deposition.

17 Mr. Wenzel here swore that that wasn't the case because  
18 his memory had changed, he had a motivation to testify  
19 differently, and that's what he did. It's simply not  
20 believable.

21 But even if you accept what he said, a reasonable person  
22 in his shoes would have pushed to find out what those patents  
23 were. After all, this is a patent battle between, at the time,  
24 the two biggest competitors in the commercial mower business.  
25 He's in the commercial mower business. Anybody in his shoes,

1 especially if his lawyers started telling him, well, we maybe  
2 can't tell you what's going on, that would be all the more  
3 reason to dig in and figure it out. He ignored that red flag.

4 But there were lots and lots of other red flags and I'm  
5 going to try to move through them quickly.

6 Of course, they had the Exmark machine in 1996. We know  
7 that. They had this machine. And Mr. Wenzel, he remembers  
8 riding on it. And this machine had the patented baffles. He  
9 ignored that.

10 He later had numerous mowers with Exmark's patent number  
11 on them. Remember, this one didn't because it was too soon,  
12 but you saw pictures of these three mowers, and we went through  
13 them in some detail, each one of them has the patent sticker.

14 Mr. Wenzel said he walked behind that walk-behind mower,  
15 where all you have to do is look down at your feet and see the  
16 sticker.

17 He rode each one of those two mowers, where all you have  
18 to do is stand alongside them and see those patent stickers.

19 That's the one from the walk-behind where you'd see it  
20 from above.

21 Each one of those machines was a red flag.

22 There was another one, we don't have a picture of this  
23 one, but this document sort of serves double duty. It's from  
24 the year 2000. It's a memo that discusses what Phil Wenzel's  
25 working on. And he's working on this 1000Z prototype. He's

1 making changes to improve cut and then comparing it to one of  
2 the Exmarks that they own. So this is yet another Exmark. To  
3 compare it, he's obviously riding on that mower. Again, all he  
4 has to do is look at the market -- at the marking sticker and  
5 he can find out that there's a patent here.

6 He knows about marking sticker and he personally recalls  
7 seeing them on Exmark products. He testified to that.

8 We heard some suggestion that, well, there's a lot of  
9 patent numbers on there and '863 patent wouldn't jump out at  
10 you for that, but I asked him, well, would it be a hard project  
11 for your attorney to look at all the patents on that sticker on  
12 just Exmark?

13 No. That wouldn't be a big project. They easily could  
14 have done that and they ignored it.

15 The next category of red flags were the brochures. And we  
16 talked about the brochures as well because, again, Exmark's  
17 proud of its patents. And it refers to patented flow control  
18 baffles in nearly every brochure it issues every year. This is  
19 just one example of the facing pages of a brochure talking  
20 about the deck with two references to patented flow control  
21 baffles.

22 Here's another example from later on. You can see right  
23 there, the sample of a good, clean bottom view of Exmark's  
24 patented deck.

25 And actually, three references on this page to patented

1 flow control baffles.

2 Well, I hope it didn't bore you too much as I went through  
3 the process of putting all of these into evidence. We put in  
4 ten brochures, all black and white because they were turned  
5 over to us from Briggs's competitive literature file that they  
6 maintained brochures of their competitors.

7 The first one actually is the one that doesn't have  
8 patented flow control baffle somewhere inside of it because  
9 that's the original '95 brochure that we saw so much of.

10 Kind of interesting that even at the time this lawsuit's  
11 brought in 2010, they still have the original brochure on the  
12 Lazer Z in their file that indicates it was picked up at a  
13 trade show in 1995.

14 Each and every one of these other nine is a red flag. All  
15 they had to do was open up the brochure to see a reference to  
16 the fact that this feature is patented.

17 And the one I'll call on in particular is Exhibit 430  
18 because it's not a thick brochure. It's -- really what it is  
19 is it's a tri-fold brochure, just a front and a back page that  
20 they close in on each other and it's on the deck itself.  
21 That's all it's about.

22 So they have a simple tri-fold, two-sided piece of paper  
23 that makes reference to patented flow control baffles. All  
24 somebody has to do is look at it and they know that there's a  
25 patent here.

1           We asked him, Mr. Wenzel: You actually seen references to  
2 patented features in Exmark brochures, haven't you?

3           He didn't quite admit it, but he didn't deny it either.

4           That's the red flag of the brochures.

5           The final category of red flags are trade shows. We heard  
6 this, both sides go to trade shows, both sides show their  
7 machines, tipped up. Mr. Wenzel attends those trade shows.  
8 And he remembers seeing the patented baffles.

9           All he needed to do was look, again, at a marking sticker  
10 on one of those and he would know about this patent.

11           So with that, I want to go through, again, the specific  
12 jury instruction on willful infringement.

13           Let me call out some specific things about this.

14           First of all, as you can see, there's five factors that  
15 you can include. It's not a limited list, but here's five  
16 things that you can include -- or that you can consider.

17           First, whether or not Briggs acted in accordance with the  
18 standards of commerce for its industry.

19           What does this industry do? First of all, the standard of  
20 commerce in this industry is to mark your products with the  
21 patent number so that your competitors will know about it. We  
22 do it, they do it, others do it. This industry knows that if  
23 you want to find out about somebody's patent after copying it,  
24 this is where you look.

25           The standard practice in this industry too is to tout your

1 patented features in your advertising. Patents have value.  
2 Companies in this industry, they want to talk about it, because  
3 it's a market differentiator. You heard that term today. It  
4 allows you to say I've got something that nobody else has.

5 That's another standard in this industry. We do it; they  
6 did it with their suspension.

7 There's that factor.

8 Factor 2, whether they intentionally copied. We already  
9 covered that. We know, our common sense tells us they did.

10 Whether or not there's a reasonable basis to believe they  
11 did not infringe.

12 We're talking about the products that have already been  
13 found to infringe. And you've seen them. And you know that  
14 there is -- I guess I got to take it off the ELMO here.

15 Thanks, Bill.

16 You look at Figure 4 of the patent. It's a little off of  
17 that off-angle view so it's always a little bit difficult to do  
18 a perfect comparison, but the baffle of their product is  
19 virtually identical to the patent. Now, at the end of the day  
20 it's the claims that matter, but it makes sense that if there's  
21 one thing the claim's going to cover, it's what's shown in the  
22 patent. Pretty unlikely that that -- you ever have a patent  
23 that doesn't cover at least what's shown in the figures.

24 So if your product looks just like what's in the figures,  
25 you've probably got a serious infringement problem.

1 Will you go back to the ELMO.

2 Factor 4: Whether or not Briggs made good-faith effort to  
3 avoid infringing the '863 patent, for example, whether Briggs  
4 attempted to design around the '863 patent.

5 Now, again, we're only dealing with willfulness relative  
6 to the original design. So this isn't, I don't think, talking  
7 about the redesign we have in this case. This is talking about  
8 whether there was an attempt to design around with the original  
9 product. And with respect to that, we know there wasn't.  
10 There was just copying.

11 And even if it is talking about the subsequent redesign  
12 after we sued them -- and I'm going to get to talking about  
13 that -- it was in fact just a tweak.

14 The final factor is really the only one that they can  
15 point to in their favor. They -- I think it's fair to say that  
16 they didn't try to hide their infringement, because, of course,  
17 you can't hide your infringement in this industry. You're  
18 selling lawn mowers out there. People are going to see your  
19 products. There's no reason to hide them.

20 But the other thing, and you heard evidence about this  
21 even today, is in the early 2000s, they were a small player,  
22 particularly in the landscape contractor market where Exmark  
23 was. They weren't a big player. They were selling in that  
24 different market.

25 So they could sort of lay low and just kind of hope that

1 they wouldn't get sued. And if they did, they always  
2 figured -- this was very interesting bit of testimony -- can I  
3 go back to the presentation -- that they would just manage  
4 their way through.

5 After they got sued, last six months, there's been an  
6 infringement challenge, we're just going to manage our way  
7 through. We're not going to stop infringing. We're not going  
8 to come to write a check until five years later when there's  
9 finally a trial. They're just going to manage their way  
10 through.

11 Go back to the -- hopping back and forth a little bit  
12 here.

13 Well, those are the five factors. The most important  
14 thing, though, that you need to look at on this jury  
15 instruction form is the top, where it says: To prove that  
16 Briggs acted willfully, Exmark must prove by clear and  
17 convincing evidence that Briggs was reckless.

18 This next sentence: You must determine whether Exmark has  
19 shown by clear and convincing evidence that an unjustifiably  
20 high risk of infringement was known to Briggs or it was so  
21 obvious that it should have been known to Briggs.

22 We don't need to show that they actually knew. If you  
23 look at all the evidence and say, well, I just -- you know, I  
24 don't think they actually knew. There's still willful  
25 infringement here because the issue is whether they should have

1 known. And you heard it -- if we could go back -- right from  
2 Mr. Wenzel's own mouth.

3 I asked him twice, actually, because I wanted to make sure  
4 what his position was. And you saw the first time. Boy, did  
5 he hesitate. He knew he was in a bind up there. If he denied  
6 that he should have known, I think he recognized that none of  
7 you were going to believe him. So he sat there for a long  
8 time. And ultimately said: Yes or no, do you think you should  
9 have known about Exmark's patents?

10 I would almost have to say yes.

11 Okay. That's once.

12 We went back to it again.

13 Certainly you would agree that you should have known?

14 Equivocation: I wish I had known.

15 Can you say yes a second time?

16 Yes, I will say a second time.

17 He acknowledged on the stand that he should have known,  
18 with all these red flags out there, of the infringement. That  
19 meets the test in your jury instructions. That's clear and  
20 convincing evidence of willful infringement.

21 Let me turn next to infringement by the modified product.  
22 I've been calling it a tweak throughout this case, and it was a  
23 tweak.

24 I'm going to overlay for you one of these underside views  
25 of the original design and their redesign. I'm going to bring

1 it in in red.

2 That right there is the change they made.

3 They had it perfectly straight. They substituted it with  
4 their curved-curved-curved, but they know very well that they  
5 positioned that inflection point where it changes direction  
6 perfectly to create that substantially straight section that  
7 directs the air and grass into the downstream blade just like  
8 the claims require.

9 If they had wanted to avoid infringement, if Mr. Wenzel  
10 was telling the truth when he was up there saying, you know  
11 if -- if Exmark had just let us know, we don't like to be in  
12 lawsuits, we'd have quickly resolved that. If that was truly  
13 his mindset, they would have done more than this. They would  
14 have gone to one of theirs -- their designs. Well, first of  
15 all, they -- they've said this isn't that important an  
16 invention. They would have just removed that front baffle.  
17 They would have removed the chord-like fashion. They would  
18 have gone to Walker or gone to the Scag deck without the  
19 movable baffle. There was lots of things they could have done.

20 They tweaked it instead.

21 So how do we know that this meets the claim language that  
22 requires a substantially straight section? Well, first of all,  
23 you can see it. We showed you this slide at the opening of the  
24 trick. How do you take three curves -- curved-curved-curved --  
25 and right there in that location you create that substantially

1 straight portion?

2 You can see it by taking the actual baffle portions. You  
3 saw me hold these up numerous times. You take two curved  
4 pieces, you hold them the opposite direction, what do you get  
5 right in the middle? You get something very, very straight.

6 We saw Dr. Strykowski. He analyzed it using a metal rod.  
7 Remember this? Again, the rod is thicker than the baffle  
8 itself, but it's not a lot thicker. And look at how much it  
9 covers. It won't cover that much of the baffle anywhere else  
10 where there's just a single curve, but where there's the  
11 reversing curve, you get this long section that is  
12 substantially straight.

13 Mr. Busboom showed you with clothespins exactly where he  
14 saw the three baffle portions at issue in claim 1. There was a  
15 lot of moving around, Mr. Cohn saying what about this, what  
16 about that. But when he was permitted to choose where he  
17 thought they should be, this is how he laid them out and you  
18 can see exactly where that substantially straight portion is  
19 doing exactly what it needs to do.

20 Briggs's real argument, I think, as you heard, is that the  
21 portion we say is substantially straight includes a portion  
22 that can only be part of the first curve. That's their real  
23 argument. It's the "ends" argument.

24 Put aside the argument. Let's look at the evidence. Both  
25 Dr. Strykowski and Mr. Busboom concluded otherwise. They

1 explained that the claim doesn't restrict them in identifying  
2 where the first arcuate portion is, that they can find a  
3 substantially straight portion in the proper location and if  
4 it's arc -- arcuate to the right-hand side, that's enough for  
5 this claim language.

6 The reason for that, of course, is when you're talking  
7 about a portion and you want to know where the ends of that  
8 portion are, you need to identify the portion first.

9 Off on the slide here, excuse me.

10 The portions are what define the ends, not the other way  
11 around. Here's the claim language we have at issue. A first  
12 arcuate baffle portion, having first and second ends. Find the  
13 portion, then you find the ends.

14 You heard Mr. Cohn talk about, well, where's the end of a  
15 the book? We all know where the end of the book is. But what  
16 about the end of a portion of a book? Somebody says where's  
17 the end of a portion of a book? What's the first question you  
18 ask? Well, what portion are you talking about? Tell me where  
19 the portion is and I'll tell you where the ends are.

20 In this case, it really comes down to this. This right  
21 here is the layout, because they kept this on, we actually have  
22 to look to this clip. Arcuate, substantially straight, arcuate  
23 as a whole.

24 On their argument, the question you have to ask yourself  
25 is, does this baffle portion right here have ends? If you

1 agree that this baffle portion has ends, then there's  
2 infringement in this case. We win.

3 It also makes sense to start where Dr. Strykowski and  
4 Mr. Busboom did because functionally that's the location that  
5 matters. When you read this claim and you're looking for the  
6 various elements, you need to understand what they're there to  
7 do. And in this case, we know from the express language of the  
8 claim that what this elongated and substantially straight  
9 portion needs to do is aim the air and grass clippings into  
10 that downstream blade. Everybody agrees that's the function  
11 we're looking for.

12 And that's exactly where you find it in each of the  
13 products you've seen in this case.

14 Let me start actually -- I'm going to come back to this  
15 one -- with Figure 2 of the patent.

16 Now, again, remember, this one's flipped over. It's like  
17 we're looking downward from the top of the deck. And it's a  
18 little bit confusing because -- nobody ever said that --  
19 this -- that the mulching baffles that are a part of this  
20 patent that isn't at issue here, are shown in here so it gets  
21 kind of busy, but the dotted lines are the flow control baffle  
22 of Mr. Busboom.

23 And you can see that in this embodiment, the first arcuate  
24 portion, where it converts to straight, happens right to -- on  
25 this version, to the left of the spindle. That's not a

1 coincidence. That's because that's where you need to perform  
2 the function. That's where you -- you're done curving the air  
3 and grass and you need to start shooting it that direction.  
4 It's right where it needs to be in the patent.

5 Well, let's flip it over, look at the Briggs' accused  
6 design. Of course, now we've flipped the deck around the other  
7 way so we're blowing air and grass this way instead. But you  
8 find the same thing in their originally -- in their original  
9 design that's been found to infringe, just that smidge off to  
10 the right of the spindle. And the same thing with their  
11 modified design.

12 Now, Mr. Cohn pointed out, yesterday, I believe, that, you  
13 know, these two embodiments, the end of this first elongated  
14 and substantially straight portion isn't in the same location.  
15 And that's right. Because it's not that critical where that  
16 end be.

17 What you need to do is get, again, the air and grass  
18 that's coming around the circle to start going straight.  
19 Exactly how long it needs to be, it's not that critical. So  
20 maybe you'd have a little bit different distance, depending on  
21 your design. But the starting location is important. And  
22 that's why in the patent, the original infringing design, and  
23 in the modified design, starts in the same location every time.

24 Let me go back to my previous slide from before. At the  
25 end of the day when it comes to their -- to their "ends"

1 argument, they're really trying to change the claim language.  
2 The claim just requires a first flow control baffle comprising  
3 a first arcuate -- I'm sorry, I read that incorrectly. Said  
4 first flow control baffle comprising a first arcuate baffle  
5 portion, having first and second ends. That's all the claim  
6 requires. They want to add this requirement that the end is  
7 where the baffle stops curving. If you don't go to the end of  
8 the curve, then it can't be an arcuate baffle portion. The  
9 claim just doesn't say that.

10 What evidence do they have to the contrary?

11 What they have is Mr. Del Ponte. He was a nice gentleman.  
12 But he's never done this before. He doesn't know what he's  
13 doing. He gets confused easily. You saw that in the  
14 deposition excerpts. Everything he knows about how to do an  
15 infringement analysis -- correct that slightly, 90 percent, by  
16 his own admission, of what he knows about how to conduct an  
17 infringement analysis, he got from Briggs's counsel. They told  
18 him that he had to have this ends thing, that you had to add  
19 language to the claims. He doesn't know any better, he's not  
20 being dishonest; he just doesn't know what he's doing.

21 The other reason that we know that the elongated and  
22 substantially straight portion in the modified baffle design is  
23 in fact substantially straight is because, again, it performs  
24 the function. You are heard Dr. Strykowski clearly on this  
25 point. He's the airflow expert.

1           You determine whether the portion that you identified in  
2 the Briggs modified design performed that function?

3           Yes.

4           And what is the function?

5           The function is to direct clippings laterally across the  
6 deck into a region cutting across the middle blade.

7           Does the portion you've identified in blue there on the  
8 exhibit we have up on the screen, does that perform that  
9 function?

10          Yes.

11          And he was referring to this right down here.

12          The final reason that we know that the Briggs accused  
13 product had a substantially straight section is because it's  
14 the kind of shape that the inventor, Mr. Busboom, invented.  
15 Remember, this was way back on the first day of testimony.

16          Mr. Busboom went through all the various iterations of his  
17 initial idea. Had roughly 20 of them. One of them was exactly  
18 what we're talking about here, something where you take the  
19 substantially straight portion and you add curve to it, but  
20 it's still substantially straight.

21          And it's interesting, he testified that he did it -- he  
22 was contemplating this alternative for the same reason you  
23 heard Mr. Laurin come in and say that Briggs did it, for  
24 manufacturability.

25          Here was Mr. Busboom's testimony.

1           Why did you consider the possibility of adding some curve  
2 in that substantially straight region?

3           Well, one of the things that we do when we're looking at  
4 designing things, we're considering the manufacturability. And  
5 that was just the design option that we conceived of at that  
6 particular time and we -- you know, just as another potential  
7 alternative to possibly make it easier to manufacture.

8           He was thinking along the same lines as Mr. Laurin was,  
9 but he was doing it 16 years earlier.

10           And you heard him say that he's -- he's one skilled in the  
11 art. He's one familiar with patents and patent claims. And he  
12 knows that words like "substantially" are important in patent  
13 claims to cover the various alternatives that one skilled in  
14 the art might think of, including these specific ones that this  
15 inventor thought about.

16           So structurally, functionally, and based on the inventor's  
17 compilation of the same idea, this design, the Briggs' modified  
18 design, meets the limitations of the claims and they still  
19 infringe them.

20           Finally, we're going to talk about damages and the  
21 reasonable royalty.

22           This invention was successful because it did a lot of  
23 important things. It -- again, in the words of Mr. Wenzel, it  
24 raised the cutting technology to a new level. Well, what did  
25 it do? It's been a while since we've been talking about all of

1 them. We tend to focus on quality of cut. You heard a lot  
2 about quality of cut yesterday, as if that were the only thing.  
3 It's not just that. There are other things that this invention  
4 did well.

5 Let's get this out of Mr. Busboom's testimony including  
6 his own invention disclosure. This is what he wrote up when he  
7 applied for a patent. And he summarized four things that this  
8 invention does well. It does increase quality of cut.

9 But it does more than that. It reduced the blowout  
10 problem. That was the issue he started off working with.

11 It reduced horsepower requirements. That's a valuable  
12 thing in this industry.

13 And it increased quality of discharge. We kind of tend to  
14 overlook that one, that ability to create that nice, even swath  
15 of grass over the lawn that's -- after it's been cut, but it's  
16 extremely important. I think you heard Mr. Laurin yesterday  
17 talk about clumping and, you know, for a -- for a layperson,  
18 clumping will make a lawn look worse than perhaps if the grass  
19 isn't cut exactly evenly.

20 So the quality of discharge is extremely important.

21 And, of course, part of increased quality of cut is not  
22 just making it better, but making it better at speed, getting  
23 to that idea of productivity.

24 Briggs tries to tell us that quality of cut and ability to  
25 cut well at high speed really aren't that important. The

1 evidence that you heard shows otherwise.

2 All of the evidence shows that these two factors are  
3 paramount. You can have lots of other things, but if you can't  
4 cut well and cut well at speed, you're not going to be  
5 successful in the commercial mower market.

6 We heard from Mr. Stinson. He said it changed the  
7 economics for the landscape contractor. He's talking about the  
8 Lazer Z with this new invention.

9 How did it change the economics for the landscape  
10 contractor?

11 The mid-mount Z did, the Lazer with the flow control  
12 baffles on it, it allowed the landscape contractor to cut at a  
13 higher rate of speed with a more quality cut.

14 The landscape contractors, the customers, can make more  
15 money, cutting lawns faster. You can cut more lawns if you can  
16 go faster.

17 Mr. Dorn said something similar:

18 What is your understanding of what is important to a  
19 landscape contractor?

20 Landscape contractors need productivity. They have to  
21 have efficiency. Cut quality. That's what they use. That's  
22 what they market to their customers, that they perform their  
23 services for. They're not paid to have a soft, cushy ride.

24 You get that out of Briggs's own documents. They, again,  
25 built an entire marketing campaign in 2009 around its original

1 infringing baffle design. It's the iCD Cutting System, but  
2 remember, I thought we might have lost track of this a little  
3 bit yesterday, the iCD still infringed. They worked hard to  
4 try to convince you that when it's talking about the --  
5 offering you unparalleled cut quality with redesigned baffle  
6 chambers for superior airflow, that that was referring to  
7 anything but the baffles. It's not referring to the baffles,  
8 it's referring to the size of the discharge opening, the  
9 blades, and the shape of the spindle. We're not actually  
10 talking about the baffle.

11 That's after-the-fact stuff.

12 They know what they were talking about. Pictures showing  
13 the infringing baffles, touting superior cut quality, and an  
14 innovative design.

15 This was not an innovative design. This was an  
16 infringement.

17 With respect to their independent suspension, that's a  
18 nice feature that they have and, you know, we're happy for them  
19 to have it.

20 But even when they sell their suspension, you think the  
21 suspension, that's about providing a cushy ride. They don't  
22 market it primarily for its cushy ride. Remember in the video,  
23 if there's one thing that's more important than the ride, it's  
24 the cut. They know that, in the relative order of things,  
25 comfort's kind of a -- the last one on the list. Top of the

1 list, productivity, speed, consistency of cut.

2 There's an important tie though -- I hope you recognized  
3 when this came out in the testimony of Mr. Wenzel. There's an  
4 important tie between this idea of how you get productivity  
5 with suspension and how well your deck works. He made a big  
6 deal about how our deck really wasn't that good. They -- they  
7 spent hours yesterday bad-mouthing their own deck, how terrible  
8 it was for years and years. We just had a terrible deck.

9 Didn't hear them say they told that to a customer. That  
10 sounds like somebody who's been called in to court to answer  
11 for their infringement.

12 But the interesting thing to think about is this. Their  
13 theory on why suspension increases productivity is because it  
14 causes you to drive faster. People slow down when they're  
15 getting bumped around and if they have a smooth ride they'll  
16 drive faster. That's great. But if your deck can't handle the  
17 increased speed, you've got a problem. You can have the  
18 greatest suspension that encourages people to drive as fast as  
19 they possibly can, but if the quality of cut then goes down  
20 because of that, you're not going to be able to sell your  
21 mowers with your fancy independent suspension.

22 And again, as much as they bad-mouthed their -- their own  
23 mowers for, like, ten years, let's remember, back in the very  
24 beginning, why did they put this baffle in in the first place?  
25 To improve cut quality.

1           So ask yourself, if it was bad, even with this baffle,  
2 and, you know, we don't dispute, you can -- our baffle's not a  
3 guarantee of success. You still have to do everything else  
4 right, we know that, in your deck. You can't have dull blades.  
5 You can't have misaligned walls. You've got to do it right.  
6 But if they had to add this baffle to improve poor cut quality  
7 just to get to a pretty questionable level, just think about  
8 what their deck would have been like without it. Would that  
9 deck have been able to keep up with their suspension? Their  
10 own actions show otherwise; they kept that baffle in there for  
11 years and they kept it even after this lawsuit was brought.  
12 They just did a tweak.

13           That was the last point I already made.

14           I want to go on to then the testimony of the experts.

15           You heard from Ms. Bennis, who analyzed a lot of data and  
16 concluded that a reasonable royalty here is 5 percent of sales.  
17 It's 5 percent of a billion dollars worth of infringing mower  
18 sales. It's not higher than 5 percent. They get to keep 95  
19 percent, because there are other important things to selling a  
20 lawn mower. We don't disagree with that. If this flow control  
21 baffle design were the only thing that mattered in a deck, we'd  
22 be here asking for a whole lot more money. We're only asking  
23 for 5 percent because we know that there are a lot of other  
24 important features.

25           Now, there's a lot of evidence in this case that points

1 towards that 5 percent number. There's this comparison that  
2 Ms. Bennis prepared showing that they outperformed their  
3 standard gross profit. Now, you've heard some disagreement  
4 today with Mr. Bone about this, but you also heard, when I took  
5 him through the mistake in his analysis, where he used a net  
6 sales report in place of a gross sales report. That makes a  
7 big difference. That made a difference, my recollection is, of  
8 roughly 5 percent.

9 So this is the right number. The adjustment they made is  
10 the wrong number. They exceeded their gross profit in the  
11 years that they sold these mowers.

12 The 5 percent's also consistent with these documents.  
13 These are very interesting. Because these were prepared before  
14 there's any hint of a lawsuit. It's just Briggs talking to its  
15 customers, arming its dealers with things to tell its customers  
16 about why they should buy a Ferris mower.

17 There's nothing close to \$10 on here. In this business,  
18 nobody talks about \$10.

19 The range of values that matter in this industry, starting  
20 at 25 for the very small things. In this early one, going up  
21 to 350. By 2007, going up to 750 for the independent  
22 suspension. Those are the sort of numbers we're talking about.  
23 Five percent royalty that Ms. Bennis did. We saw the  
24 calculation, we don't know exactly what it is. It's in that  
25 range of on average 250 to 275. That's consistent with what we

1 see on these documents. It's way less than how they value  
2 their independent suspension today.

3 The 5 percent royalty is also consistent with this  
4 document, with the competitive situation with Brickman, where  
5 Exmark had to lower its prices to stop -- to not lose business  
6 to these infringing mowers. And they lowered it by  
7 approximately 12 percent.

8 Again, people in this industry aren't looking for a \$10  
9 discount. You don't go to -- you know, you're a customer, you  
10 don't go to Exmark or Briggs and say can I have \$10 off that  
11 mower, please? Nobody cares about \$10.

12 This -- the royalty asked for is very reasonable in  
13 terms -- in -- viewed in the real world.

14 So let me one more time go to the jury -- and actually, I  
15 don't need to go to the jury instructions because I have a  
16 slide. You have -- in your instructions, you have all those  
17 *Georgia-Pacific* factors that everybody's been talking about, so  
18 you can see them.

19 I'm going to talk about the ones that are particularly  
20 relevant in this case.

21 Number 4, the patentee's established licensing policy.

22 You heard again and again, Exmark doesn't license.

23 They're not in the business of licensing. They're in the  
24 business of selling lawn mowers.

25 The commercial relationship between the licensor and the

1 licensee. These are competitors. They perhaps weren't as  
2 direct of competitors back in the early 2000s, but things  
3 changed over time. And if you're talking about licensing in  
4 1999, you need to acknowledge -- you need to keep in mind that  
5 if you license your technology to somebody who's only sort of  
6 your competitor today, you give them that advantage, they may  
7 grow and be your direct competitor.

8 The term of a license. Briggs's infringement here goes on  
9 for 11 years. It's not like they start the infringing for just  
10 the last two years of the patent, or even the first two years.  
11 We heard about the Scag case. Scag infringed for a couple of  
12 years and then agreed to stop. Briggs didn't. So we have a  
13 license that goes on almost 11 years.

14 Profitability and popularity of the product. That's a  
15 very interesting one.

16 We saw Ms. Bennis's slide on profitability. We heard a  
17 lot about this. We heard Mr. Bone insist that the only thing  
18 that matters is bottom line, that after you've paid every last  
19 person, including, you know, the -- Mr. Wenzel and all his  
20 staff, the entire group there, this -- bottom line's all that  
21 matters.

22 Ms. Bennis looked at it otherwise. She looked at the  
23 gross profit. She looked at the incremental profit. How much  
24 does each one of those mowers contribute to your bottom line?  
25 On their billion dollars worth of sales, that incremental

1 profit is over \$200 million. Don't let Briggs -- don't believe  
2 Briggs when they tell you they didn't make money on this  
3 invention. They made plenty of money.

4 But the other thing that I hope you recognized, when I  
5 spoke to Mr. Bone this morning, was that this shouldn't be the  
6 only side of the equation we look at. There's another side of  
7 this equation. There's Exmark's sales and profitability. That  
8 matters in a hypothetical negotiation.

9 Exmark makes good money on its products. And if it grants  
10 a license to somebody else, it risks losing sales, it risks  
11 losing profits. So the fact that Exmark earns even more --  
12 they're a more efficiently run business. They have a 27  
13 percent incremental profit. They have even more to lose by  
14 licensing a competitor. That's why they don't do it. They  
15 want to sell mowers.

16 One of the other factors, going back, the advantages of  
17 the patented property over older products.

18 How big an improvement was this over what existed before?

19 Well, I think you'll find, if you look through the  
20 evidence that was put in by the defendants in this case, that  
21 they only put in evidence of one actually existing at the time  
22 of -- you know, prior to the invention, one product that was a  
23 side discharge, three-bladed mower, this invention improves,  
24 that had any sort of a front baffle, and that's Walker. And  
25 you saw it again and again, Walker just has this little short

1       baffle right there.

2               They keep trying to convince you that, no, there's baffle  
3 all around here. It goes all the way here, goes all the way  
4 here. Or, hey, you could just add a wall. They're just making  
5 things up. Making things up.

6               This patent is a big improvement over this. You heard  
7 Dr. Strykowski say, this doesn't have the advantages of the  
8 Busboom invention.

9               And the industry proves that. Because nobody has adopted  
10 this mower. This -- this was never patented. This is free for  
11 everybody for more than 20 years and nobody's adopted it. In  
12 fact, we don't even have any evidence that Walker continues to  
13 use it or used it for any substantial length of time.

14              The invention here, under factor 9, was a big advance over  
15 the prior art.

16              Number 13, portion of profit attributable to the invention  
17 distinguished from non-patented elements.

18              We heard an awful lot about that and I think you're going  
19 to hear a lot more about that when Mr. Wolf comes up here.

20              Keep that important thing in mind that I talked about  
21 today with Mr. Bone: market differentiators.

22              Everybody's got the same tires. Everybody's got the same  
23 antiscalp rollers. Everybody's got these other features. Do  
24 you have to have them? Yes. But nobody gets to go out there  
25 and say, hey, I'm better than the other guy because I got the

1 best tires, I got the best this or the best that. All those  
2 things are just standard features that everybody has to have.  
3 And that's where the -- that's the 95 percent. That's why  
4 we're only asking for 5 percent royalty, because there are  
5 those other things. But when you've got a market  
6 differentiator, something that allows you to say I'm special,  
7 people buy your deck because of that, that has value.

8 Their proposed \$10 a unit from Mr. Bone is absurd.  
9 Probably saw a lot of me this week and you probably realized  
10 I'm generally a low-key guy. I got a little excited today when  
11 I was questioning Mr. Bone. I'm not particularly proud of  
12 that. I try to keep an even keel. But it was insulting, it  
13 was insulting to hear him come in here and say that Exmark  
14 would be just thrilled, they should be grateful to take \$10 for  
15 each one of the mowers that Briggs sold.

16 Ladies and gentlemen, there's no doubt about it, if you  
17 were to award \$10 a mower, there would be dancing in the  
18 streets in Munnsville, New York. That would be a gift to them.  
19 This invention, Exmark's most important invention, is worth  
20 much more than that. It's much more like what we faced with  
21 the Brickman situation, \$639 a unit. That's the sort of  
22 numbers that matter in this industry. Nobody talks about \$10  
23 per unit.

24 They sold a billion dollars of infringing product for 11  
25 years. Five percent is fair compensation.

1           So the last thing I want to do before I sit down -- and  
2 I'm going to sit down, give Mr. Wolf a chance to talk to you  
3 and then I'm going to come back one more time, but before I do  
4 that I'd like to talk to you about the verdict form.

5           I don't have a copy of it.

6           All right. Thank you.

7           Here's the form that you're going to be asked to fill out.  
8 And the first question you're going to need to decide: Do you  
9 find Briggs infringed Exmark's patent with respect to products  
10 with the redesigned mower deck? That's Versions 5 through 7.  
11 That's what we see here. Now it's the front one back there,  
12 the one that has the multiple curves.

13           And the answer to that is yes.

14           I've explained to you why that is. You put "yes" right  
15 there.

16           And here's the one thing to pay attention to. When we get  
17 to the damages question -- first of all, you heard Mr. Wenzel  
18 say that they're here to write a check. And there's a reason  
19 for that, and that's because the original design has already  
20 been found to infringe. So he's here to write a check no  
21 matter what.

22           Even if you were to conclude that this doesn't infringe,  
23 you need to write a number in down there for infringement by  
24 the original design. And I'll get to what that should be.

25           But in fact, because there is infringement, you should put

1 in -- if I could go back to my slides -- here's Ms. Bennis's  
2 summary slide. This is Exhibit 533? This is Exhibit 533.  
3 This is the one you need to look at to see the damages at  
4 issue.

5 The original baffle design, Mr. Wenzel's here to write a  
6 check for, 24,280,330. Redesign, 24,863,561.

7 So the total, this is a total number that you should put  
8 on that line of the verdict form, is 49,143,891.

9 Would you go back to the ELMO.

10 That \$49 million number is the number that goes right down  
11 there.

12 Finally, there's the question on willful infringement. We  
13 talked about that. Has Exmark proven by clear and convincing  
14 evidence that defendant Briggs's infringement with respect to  
15 its original mower deck design, Versions 1 through 4, was  
16 willful, as instructed in Instruction No. 25?

17 The answer to that question is "yes."

18 You heard Mr. Wenzel acknowledge, at the very least, all  
19 the red flags were out there, they should have known about the  
20 infringement.

21 Date, sign the form, and then your job is done.

22 With that, ladies and gentlemen, I'm going to sit down and  
23 let Mr. Wolf talk, and then I'll get a chance to talk to you  
24 one more time.

25 Again, thank you for your patience and for your attention.

1 THE COURT: Ladies and gentlemen, at this time we'll  
2 take our first afternoon recess of ten minutes.

3 (Jury out at 3:07 p.m.)

4 THE COURT: So we're outside the presence of the  
5 jury.

6 Mr. Wolf, did you want to renew your previous objection to  
7 the argument with respect to there only being -- well, I don't  
8 know, you renew your objection.

9 MR. WOLF: We have six, Your Honor, and one of them  
10 is exactly what --

11 THE COURT: All right.

12 MR. WOLF: They said we've only come into court with  
13 evidence of one mower, the Walker mower. Obviously, we've been  
14 trying to present a lot more. But Mr. Cohn's going to briefly  
15 run through the six.

16 THE COURT: Okay. Go ahead, Mr. Cohn.

17 MR. COHN: Some of these are interrelated. So the  
18 first one is there was an argument that the jury should not  
19 assume that there was a coincidence in term of Ferris's design.  
20 And I think there was a suggestion that a guy in Siberia may  
21 have done it. Well, there's --

22 THE COURT: A guy in Germany.

23 MR. COHN: There's evidence that other people have  
24 done it, Your Honor, that we were precluded from presenting, so  
25 we object in that regard.

1 THE COURT: Okay.

2 MR. COHN: The second objection is that we think  
3 counsel has asked the jury to interpret the claims, and  
4 especially the part about adding language to the claims, among  
5 other instances of asking the jury to interpret the words,  
6 which is the province for the Court and not the jury. We  
7 object to that.

8 We object to the suggestion that the scope of the patent  
9 right can be informed by nonpatent drawings or conception  
10 drawings. And I think the language counsel used, this was  
11 around Slides 36 to 38 of the presentation, that the claim --  
12 there was a suggestion and argument that the claims cover what  
13 the inventor, quote, thought of, or, quote, contemplated, but  
14 as we know admitted were not in the patent. We think that was  
15 improper to suggest to the jury, Your Honor.

16 Number four, this relates to our objection that we made  
17 previously in our motions, that there's been no apportionment  
18 of the value of the baffle to the -- to the invention. It was  
19 a particular slide about lost profits. We feel there's been  
20 absolutely no causation tying that to the baffle as opposed to  
21 unpatented components and we object in that regard.

22 And we also reiterate our prior motions in limine  
23 regarding the apportionment issue.

24 Number five was exactly what Your Honor had identified  
25 when counsel said only one mower. As Your Honor's aware, we've

1 been precluded from presenting evidence of other mowers which  
2 we feel like we have to present, if we were allowed to.

3 And then lastly, Your Honor, we feel there was a  
4 mischaracterization of Mr. Bone's testimony. I don't think he  
5 suggested Exmark should be grateful or have a particular  
6 emotional reaction, and we object to that characterization of  
7 the testimony.

8 THE COURT: All right. I mean, the only one that I  
9 was concerned about was the only one mower. I think that  
10 Mr. Vandenburg's closing was basically only one mower that was  
11 on the market. I think that was the way it was couched. I  
12 don't know if he specifically said it that way. And I'm not  
13 aware of any other mower that was on the market that approached  
14 this design, other than the Walker, and that's been thoroughly  
15 discussed.

16 So I don't -- I think he came close but didn't go over the  
17 line.

18 With respect to the other issues, we've talked about these  
19 in some great length, and so I'm -- I'm overruling those  
20 objections.

21 With respect to the mischaracterization, it's closing  
22 argument, so I'm not concerned about that.

23 With respect to the issue of copying, I mean, frankly,  
24 it's clear that everybody copies from one another as long as  
25 it's not patented. And it was not patented, if it was copied

1 by -- by Ferris, before it was marked. And so the real  
2 question is not whether it was copied, it's whether after it  
3 was designed or copied, however you want to -- whether somebody  
4 should have known there was a patent in place.

5 So I'm not really -- I don't like the word "copying"  
6 because of the problem that the patent was not issued when the  
7 alleged copying was done. It's certainly one of the factors in  
8 *Georgia-Pacific*, but it's -- it's relative to the facts of the  
9 case and that's what argument's all about.

10 So with that, I overrule all the objections.

11 MR. COHN: Your Honor, one more thing just for the  
12 record, just -- just for preservation purposes.

13 With respect to mowers that were on the market at the  
14 time, we believe that there were other mowers that were  
15 analogous to the patented mower but -- and there's been a  
16 debate in the motions in limine whether those are relevant.  
17 Your Honor has ruled they're not. For example, the Simplicity  
18 mower.

19 THE COURT: I understand.

20 MR. COHN: Yeah, and I just want to preserve that we  
21 believe there are others as well besides Walker.

22 THE COURT: Thank you.

23 So with that, we'll take ten minutes from now. Okay?

24 MR. WOLF: Thank you, Your Honor.

25 MR. VANDENBURGH: Thank you.

1 (Recess taken at 3:13 p.m.)

2 (At 3:25 p.m.; with counsel and the parties'  
3 representatives present; WITHOUT the jury:)

4 THE COURT: You may remain standing, if you'd like,  
5 because the jury's coming.

6 (Jury in at 3:25 p.m.)

7 THE COURT: Please be seated, ladies and gentlemen.  
8 Mr. Wolf, you may proceed.

9 MR. WOLF: Thank you, Your Honor.

10 Good afternoon. I'd like to begin where Mr. Vandenburg  
11 began, by thanking you for your service. This system doesn't  
12 work without you. And I'd like to thank you also for what has  
13 clearly been a lot of attention-requiring testimony over the  
14 last two weeks. And we've seen that attention from our seats.

15 I'm going to ask you in this closing to pay even more  
16 attention to the evidence. One of the instructions His Honor  
17 gave you is what the lawyers say isn't evidence, and that's  
18 very important, because there are certain things we'd like to  
19 be true that just aren't.

20 I'm going to show you the evidence and remind you what  
21 you've seen and what you've heard, but at the end of the day  
22 it's going to be your memory and your notes and the exhibits  
23 back there that dictate the outcome of this case, not what  
24 Mr. Vandenburg or I may say.

25 That being said, I don't think it's a close call. I don't

1 think it's a close call on any of the questions you're going to  
2 be asked to answer.

3 And the questions -- excuse me -- are broken really into  
4 two categories. For the redesign, the one that Briggs  
5 undertook immediately upon being sued, the one where, as soon  
6 as they had a manufacturable design they ceased production of  
7 the old design, started selling the new one. Does it infringe?  
8 And we think as a matter of English, as a matter of patent law,  
9 as a matter of common sense, it's not a close call.

10 Now, the burden of proof comes into cases in a couple  
11 different ways. One is we're going to hear about a  
12 preponderance of the evidence when it comes to issues of  
13 whether it infringes or not and damages. And in one sense that  
14 just means is the scale tipped 51 percent in one direction or  
15 the other? But where it's really relevant in this case is that  
16 is the party asserting that my client infringed, that my client  
17 owes \$50 million, that they have certain obligations to bring  
18 evidence to the table. And so burden of proof comes into play  
19 when you're weighing this person said X, this person said not  
20 X, which one's right. But in this case it becomes particularly  
21 important when they didn't even bring in a person to say X,  
22 when they want to suggest by innuendo or coincidence or  
23 circumstance or hint that something that they could have  
24 proved, they just didn't even try.

25 If the new design doesn't infringe, which we believe you

1 will find it doesn't, then damages are easy. You -- we owe  
2 zero.

3 If yes, if you do find that it does infringe, then what is  
4 fair compensation?

5 For the old design, you have again two questions: Was  
6 Ferris willful? And I will walk you through the standard what  
7 willfulness means and why willfulness is a very serious charge  
8 and why they have not even begun to satisfy the standard.

9 The second question, just like with the new design, if you  
10 find infringement, which we don't believe you should, as to the  
11 old design, what is fair compensation, fair to both parties?

12 But before I get into these specific questions, I want to  
13 talk about some things that have hung over this trial since day  
14 one. Tricks and myths. Tricks and myths. We lawyers get paid  
15 to put a spin on the facts, to make them seem as palatable as  
16 possible. But that doesn't excuse trying to trick you. That's  
17 not what we're here for. But there have been some tricks that  
18 have attempted to be played in this case and I want to talk  
19 about five or six of them now.

20 These are the six tricks. And I'm going to explain each  
21 of them.

22 That Exmark owns flow control baffles. That patent claims  
23 are flexible. That Exmark believed, outside of the four walls  
24 of this courtroom, that these baffle claims were really  
25 valuable. That the '863 patent is needed to compete. That the

1 baffle is the only market differentiator. And then simple  
2 issues of English and geometry, that curved is straight and  
3 middle is the end, et cetera.

4 So let me go through each of these. And I'm going to take  
5 my time, not just because they're important, but because it's  
6 been a long day for the court reporter. I think I've tested  
7 her more than once during this trial and for that I apologize.

8 So myth number one. Exmark owns flow control baffles.  
9 Now, what do I mean about that? We've heard it time and time  
10 again, the suggestion to you that if it's a front flow control  
11 baffle, it's Exmark's. We heard Mr. Busboom say we added the  
12 front flow control baffle.

13 Mr. Dorn was asked: And you're aware, aren't you, that  
14 any competitor is free to compete against Exmark with a front  
15 control baffle as long as it's curved-not substantially  
16 straight-curved, right? You're aware of that?

17 Seemed like a straightforward question. I was just asking  
18 it to set up the next one. But then he said, not with the  
19 definition you've put it to, no, I'm not aware of that.

20 Mr. Laurin was asked, and as were many witnesses: Now, in  
21 doing this, Briggs did not just remove the front baffle  
22 altogether, did it?

23 No, we did not.

24 Counsel was implying that somehow we were obligated not to  
25 use front flow control baffles, that somehow they were entitled

1 to a monopoly on front flow control baffles.

2 And you testified -- I believe he said with a nefarious  
3 tone in the voice -- at your deposition that Briggs didn't even  
4 consider removing the front baffle; isn't that correct?

5 No, we probably didn't.

6 As if they should have considered it. As if that was the  
7 right thing to consider. But remember where this patent  
8 started. And this may be the single most important document  
9 that hasn't got enough attention in this case. This was the  
10 patent that was originally applied for by Mr. Busboom.

11 Remember, my partner, Mr. Cohn, asked him about that. They  
12 originally said we want a patent on any strategically-located  
13 and downwardly extending upright baffles respectively at least  
14 partially surrounding the blades.

15 They tried to get a monopoly on front flow control  
16 baffles. They said to the Patent Office, we're entitled to  
17 keep other people off this, give us that property right, sell  
18 us that property. And the Patent Office said no, you didn't  
19 invent that.

20 Mr. Busboom: Now, you talked about your intent, that is,  
21 your intent to try to get a broad claim from the Patent Office,  
22 right?

23 Answer: Yes.

24 That's intent.

25 Remember, Mr. Vandenburg just showed you slides of what

1 Mr. Busboom intended. Remember, he showed you the picture of  
2 the curve? That's what he intended to get, what he thought he  
3 was going to get. He didn't get that.

4 And you recall that the Patent Office did not issue a  
5 claim with that broad limitation? Correct?

6 Answer: Yes.

7 They tried to get a monopoly, a patent on all front  
8 baffles and the Patent Office said no, in light of what  
9 people have done before you, you're only entitled to  
10 curved-substantially straight-curved. In some ways this  
11 trial is about trying to undue what the United States  
12 government did back in 1995. They're trying to say, well,  
13 we believed we invented it so you, the jury, pay us for  
14 things that the government said we didn't invent.

15 That's myth number one.

16 And Mr. Busboom had to acknowledge that despite his  
17 intentions, despite what they thought they invented in 1995,  
18 despite what they hoped for in this case, the boundaries of the  
19 property right itself are set forth only in the claims of the  
20 patent.

21 They get royalties for what the Patent Office said they  
22 get royalties for, not what they hoped or thought or wished or  
23 dreamed or prayed for.

24 In fact, he was forced to admit that the claims of the  
25 patent don't cover the idea of a front baffle, right?

1 Answer: I would agree.

2 At the end of the day, he was forced to admit that  
3 although he wanted a patent on all front flow control baffles,  
4 he only got one on curved-straight-curved because others had  
5 been there before.

6 I'm going to skip ahead, in the interests of time, to the  
7 second myth.

8 Patent claims are flexible.

9 Remember that word from yesterday? Flexible.

10 It was asked -- Mr. Del Ponte was asked, aren't they  
11 flexible? Aren't they flexible? And you could hear the myth.  
12 Does this paragraph of claim 1 require that there only be one  
13 possible first arcuate baffle portion?

14 No, I don't believe it does.

15 Mr. Busboom was saying and agreeing with his own lawyer,  
16 they're flexible.

17 And does it require you to place exact boundaries on where  
18 each of those three baffle portions are located?

19 I don't believe it does.

20 They're flexible.

21 Well, you're going to hear His Honor give you the  
22 standard, the reasonable certainty standard, and it only makes  
23 sense. If you, any of you, any of us, want to go out and  
24 compete against Exmark fairly, we need to know where we can and  
25 where we can't compete, and we do so with reasonable certainty.

1 That's the standard. Not flexible.

2 In fact, it Mr. Vandenburgh asked Mr. Del Ponte, here as  
3 the language I was talking about: Now, it's also true, is it  
4 not, that at least for some elements of claim 1 of the '863  
5 patent, you had some flexibility to decide where one structure  
6 begins and another structure ends?

7 Well, Mr. Del Ponte, aren't we flexible as where the  
8 northern boundary or eastern boundary of your property is? No.

9 The boundary lines are the boundary lines, and the  
10 public's entitled to know. They're not flexible.

11 This is what we heard when we heard from the Federal  
12 Judicial Center patent video.

13 Alex, would you play.

14 (A video clip was played.)

15 MR. WOLF: Clear and specific. You're going to hear  
16 His Honor give the exact standard. Clear and specific  
17 boundaries. Not flexible ones. This is not a game of  
18 "gotcha." This is not a game of, well, we'll call what's  
19 straight curved and curved straight so we can get a little more  
20 money. This is a very serious matter. Question is, are we on  
21 their property with the new design? And the answer's no when  
22 you look at the clear and specific boundaries.

23 Now, myth number three. Exmark's belief that the '863  
24 patent was the Crown Jewels, that they were -- it was  
25 everything. It was the key to their company. You've heard

1 that from witness after witness. Now, interestingly, you  
2 haven't seen any documents from the time that put it above  
3 anything else. You haven't heard any testimony, any letters,  
4 any -- anything from back in that '95, '96, '97 time frame.  
5 Again, let's compare what's being said within these four walls  
6 with what was happening at the time outside of this courthouse.

7 And here's an example of the testimony I'm talking about,  
8 the testimony propagating the myth.

9 We have a lot of great patents around our building but the  
10 '863 patent kind of sets above them all.

11 That's what we were told.

12 I think it's the biggest reason, we were told, in court.

13 But let's look at what was being said at the time. You've  
14 seen this brochure far too many times and you're going to look  
15 at it back in the jury room, I'm sure. And I want you to do a  
16 thought experiment, because I don't think His Honor wants you  
17 to actually write on it, maybe you can. Just do me a favor.  
18 Scratch out with the pen the references to the flow control  
19 baffle and look at how much is left to talk about the Lazer Z.  
20 95 percent of the brochure is still there, maybe 98 percent of  
21 the brochure is still there. They weren't saying when they  
22 introduced the Lazer Z the baffle was the key to everything.  
23 It was one of dozens, maybe even a hundred, features. The  
24 Lazer Z was a great product, there's no dispute. Exmark's to  
25 be commended for it, there's no dispute. But to say that the

1 baffle was the reason for that, well, that's said in an effort  
2 to get \$50 million from my client, not because that's what they  
3 thought at the time.

4 In fact, even in court, there was some things that were  
5 said that were questioned -- make one question just how  
6 important baffles are to this whole thing.

7 Remember, I asked Mr. Dorn about what he knew about  
8 competitor's baffles. And at some point -- I mean, to be  
9 candid, I was surprised at the answer. He gave me exactly the  
10 opposite answer I expected.

11 And then I concluded: You spent an hour with counsel --  
12 being this counsel -- talking about how important baffles were  
13 to sales and you're telling me that your number one competitor,  
14 you haven't looked at their baffles once in the last 12 years?

15 I don't recall specifically looking at their baffles once  
16 myself, other than -- underside, in a manner that you have it  
17 presented here.

18 All right. So the next competitor on the list is John  
19 Deere. See that?

20 They don't use the baffles claimed by the '863 patent,  
21 right?

22 I'm not in a position to say. I don't know.

23 If the '863 patent was the Crown Jewels, the most  
24 important patent in their arsenal, don't you think the lead  
25 sales guy, the one that Mr. Vandenburg just an hour ago said

1 knew all there was to know, don't you think you would be  
2 looking around at other peoples' baffles?

3 Mr. Stinson, similarly: Do you know John Deere, does it  
4 have a flow control baffle?

5 I couldn't be specific on that.

6 John Deere? That's not some two-bit player in the market.  
7 That's John Deere. And they don't know? What baffle it has?

8 Well, that means one of two things. I think the more  
9 likely one is maybe baffles aren't quite as important to them  
10 in the real world as they are in this court world.

11 In all those survey studies, you never asked a customer if  
12 they found the flow control baffle important?

13 What we talked about was the cutting, so correct.

14 When companies go out to do marketing surveys, don't you  
15 think they want to know whether what the company thinks is most  
16 important is actually what the customer thinks is most  
17 important? And they didn't even ask?

18 Doesn't that suggest that maybe the flow control baffle  
19 isn't as important in the real world?

20 And this testimony, this -- I mean, this is the -- the  
21 cherry on top of the icing.

22 Even after a couple of months, you hadn't heard of the  
23 baffle, right?

24 Ms. Altmaier, candidly and honestly: I don't recall.

25 In fact, the first time you heard that Exmark even had a

1 baffle was when this lawsuit was filed in 2010, right?

2 I would agree with that.

3 So you've been told for two weeks that the baffle is the  
4 centerpiece of their business and their CEO had never even  
5 heard of a baffle until this lawsuit was filed.

6 So in the entire period when you were overseeing the  
7 Exmark business, before this lawsuit was filed, you never heard  
8 anyone say, boy, we have a great baffle, right?

9 I don't recall that conversation.

10 You never heard anybody say, oh, the keys to the kingdom  
11 are this baffle, right?

12 I don't believe so.

13 Fourth myth. And it's related. The '863 patent is needed  
14 to compete.

15 And we've heard this from multiple witnesses:

16 And what's your basis for saying that the flow control  
17 baffles are one of the things that contributed to the good  
18 quality of cut?

19 From selling Exmark machines that didn't have it. It was  
20 a very obvious difference.

21 Mr. Stinson: Exmark was fortunate that the '863 patent  
22 allowed it to maintain a better cut under those conditions.

23 But then, what's reality? You heard Mr. Bone this morning  
24 talk about all these competitors in yellow. If you add them  
25 up, they make up about 65 or 70 percent of the market. Not one

1 of them uses the '863 patent baffle.

2 Now, they tried to excuse a few of them: Well, you know,  
3 Walker uses back discharge and Deere, well -- two-thirds to  
4 three-quarters of the market, two-thirds to three-quarters of  
5 mowers sold don't have the baffle that they say you must have  
6 to compete. Common sense.

7 In fact, you heard some interesting deposition testimony  
8 yesterday. This was on the screen. It was the end of the day.  
9 I was half asleep in the back of the room. But it was  
10 important.

11 Mr. Benson. Is it fair to say that you don't need a flow  
12 control baffle as claimed in the '863 patent to compete  
13 effectively against Exmark?

14 Well, we have competitors that don't have flow control  
15 baffles, and I guess they're competing.

16 And then we go down: You'd consider Deere a serious  
17 competitor, wouldn't you?

18 Yes.

19 And Scag?

20 Yes.

21 They compete without the '863 patent.

22 David Converse: Agree, it's not the baffle itself. It's  
23 the system.

24 Mr. Dorn: So you can successfully gain market share with  
25 technologies entirely unrelated to a front flow control baffle,

1 right?

2 Depending on how you, the company, decide to market it and  
3 how effective you are with the sales channel.

4 That's as close as he got to a straight yes during his  
5 testimony, but I read that as a yes.

6 Myth number five.

7 Now, this one -- this one came into play just today, that  
8 the baffle is the market differentiator. You just heard  
9 Mr. Vandenburgh, less than half an hour ago, say that the only  
10 market differentiator is the baffle. You heard him question  
11 Mr. Bone about what other market differentiators there are  
12 other than the baffle and what Mr. Bone said was, well, you  
13 heard Mr. Dorn testify, but I don't remember the list off the  
14 top of my head.

15 We're going to get to that.

16 Again, this document shows that there were lots and lots  
17 of things that they advertised the Lazer Z with. And remember,  
18 this was boring even for the person to ask the questions, and  
19 that was me. I went through this document. And I very  
20 specifically asked him, were the features market  
21 differentiators? And I know it was a little annoying sometimes  
22 when I asked him very specifically that question and asked it  
23 again. And I'm not going to repeat the testimony, but we have  
24 highlighted what I was asking him about.

25 Was deck-to-frame clearance, was it a market

1 differentiator?

2 Yes.

3 More clearance?

4 Yes.

5 It was a market differentiator versus other competitor  
6 units at that time?

7 Yes.

8 Caster wheels. The very thing we heard Mr. Vandenburg  
9 half an hour ago mock as not a market differentiator. The very  
10 thing.

11 Yes, it was a market differentiator, Mr. Dorn  
12 acknowledged.

13 Is there a reason that wasn't just a yes answer, Mr. Dorn?  
14 It was a market differentiator, right?

15 I'm defined as -- as why it was, but, yes.

16 Antiscalp rollers. Market differentiator?

17 Yes.

18 Extra deep deck, market differentiator?

19 Yes.

20 Blade speed?

21 Yes.

22 Size of the discharge opening?

23 Yes.

24 Dual-deck shaft, was that a market differentiator?

25 To my recollection, yes, it was.

1 The TriVantage deck, did that differentiate?

2 Yes.

3 Spindles, unique feature, gauge of the metal?

4 Yes.

5 And at this point, got exhausted and I just bundled them  
6 all into one big question. The page two on that brochure,  
7 steering system, position, cutting deck, handle cushions,  
8 cutting system, cutting height settings, seat, fold-up armrest,  
9 are those important to customers?

10 These and others were things that we would talk about,  
11 such as durability of machine, our service capability of the  
12 machines, numerous other facets that go beyond just a mower is  
13 what we as Exmark do as a company to support our customers.

14 And all of these things, what I listed and what you just  
15 listed, they were all important to customers, right?

16 Answer: To potential customers, yes.

17 All of those things are important. That's the only point  
18 we've been trying to make. Not that the baffles are  
19 irrelevant. Not that they're trivial. But that they're one of  
20 many, many, many, many things that customers care about, that  
21 made the Lazer Z a great product, and as a result, when you're  
22 asking what the fair royalty is for my client, when all of  
23 those other things aren't at issue in this case, what should  
24 they pay just for the baffle, that should come into  
25 consideration.

1           And just so we're clear, Mr. Dorn, when we focus just on  
2 the market differentiation relevant to cut quality -- so now I  
3 put aside durability, I put aside productivity, I put aside  
4 comfort, I'm just saying just cut quality, there are many  
5 features of a deck that impact cut quality, right?

6           Many features that contribute to cut quality, yes.

7           And note, market differentiation. I was specifically  
8 asking about that. And he said yes.

9           Myth number six, and I'm going to talk about this more in  
10 the non-infringement section and this is kind of  
11 self-explanatory. But we've been told in this case time and  
12 again that curved is straight, the middle is the end, that  
13 second is first.

14           Now, I want to go with this slide, because it's really  
15 important and we're going to talk about this issue more than  
16 once.

17           In his deposition and then at trial, Mr. Strykowski was  
18 asked -- and if I may, Your Honor -- on the deck like that in  
19 the patent, where does the arcuate portion end? And as you see  
20 on the screen, he said it ended where the arc ended because  
21 that's where the arc ends.

22           If I may -- excuse me while I walk back -- if I make a  
23 point right here, let's just call that Point D, just kind of a  
24 crooked line there is Point D.

25           Somewhere in the middle, exactly. It's not at the end,

1 right?

2 Answer: No.

3 So when they're looking at the patents, they know that the  
4 end of the arc is the end of the arc.

5 Mr. Vandenburg asked Mr. Del Ponte: Now, you also know,  
6 don't you, that generally speaking you don't have to go through  
7 the claim in any particular order, do you?

8 Well, in my mind I would start at the beginning.

9 And again, that's the way commonsense English works.

10 And when you start at the beginning, you say we have a  
11 first arcuate portion, and we're going to talk about this a lot  
12 in a minute, and when it ends, that's when we look for the  
13 substantially straight portion. And that's exactly what they  
14 haven't done.

15 Now, finally, before we get to the specific issues in this  
16 case -- and with that segue I'm going to take a little sip.  
17 Excuse me.

18 I talked to you earlier about the burden of proof and how  
19 it's not just about X versus not X, it's also about bringing  
20 proof forward in the first place to weigh. Who have we not  
21 heard from in this case? Who has Exmark not decided to have  
22 come talk to you to support their claim for \$50 million?

23 They haven't brought a single customer. Not live, not by  
24 deposition, not by survey. Not a single customer to come in  
25 here and say, yep, what they think is important to them, it's

1 important to me. Not one.

2 Again, I'm not saying they had to drag him up here to the  
3 witness stand, but they didn't call him by deposition. They  
4 didn't do a survey. Simply, contractors. What's important to  
5 you? What's your customer -- what's important to your  
6 customers? Not one. Not a dealer.

7 We've heard a lot about Brickman. We didn't see a  
8 deposition from Brickman. We didn't see a Brickman witness  
9 here. I suspect the reason is because they wouldn't have liked  
10 what they heard. Same with Ruppert.

11 We're going to talk more about Dale Baumbach when we get  
12 to the issue of willfulness, but we didn't hear from Dale  
13 Baumbach in this case.

14 We didn't hear from Exmark's lawyer in the Scag case.  
15 Mr. Vandenburg just suggested, well, given all that went  
16 around that case, in the deposition and who said what to whom  
17 and, you know, he challenged -- understand challenging  
18 Mr. Wenzel's memory, but challenging his honesty's -- that one  
19 hurt a bit.

20 But they didn't bring a witness to contradict him. It's  
21 their lawyers. They could have picked up the phone and said,  
22 you know, there's this guy that's claiming that what happened  
23 at the Scag deposition isn't really what happened, could you  
24 come in here and testify?

25 No. They didn't call him.

1           And interestingly, they didn't call an independent lawn  
2 mower guy to vouch for their position. They called two people,  
3 Mr. Busboom, the inventor, who told you all about what he  
4 intended to get with the patent, and it can't help but cloud  
5 when you're reading the patent that you read it through what  
6 you intended, not what you actually got; and they called  
7 Dr. Strykowski, who's very skilled in his particular field but  
8 his particular field isn't lawn mowers.

9           We brought Mr. Del Ponte. Thirty years at Deere.  
10 Independent. A lawn mower guy. He's who we chose to talk to  
11 about infringement.

12           And with that, let's go to the issue of infringement.

13           Does the new redesign infringe? His Honor will tell you  
14 that you must compare the product with each and every one of  
15 the requirements of the claim. And I know it sounds tic-tacky.  
16 I know it sounds like we're trying to get off on a technicality  
17 but let's go back on the analogy of the deed. If I am south of  
18 your northern boundary and north of your southern boundary and  
19 west of your eastern boundary but I'm the fourth -- I'm out  
20 here, I'm not on your property. I'm your neighbor. I bought  
21 this land, you didn't. And that's what's happening here.

22           So we'll go to the claim. This is the very long claim at  
23 issue.

24           And there's the language. Everything else in that -- you  
25 know, mower deck, they don't claim they invented a mower deck.

1 It begins a multi-blade lawn mower. They don't claim they  
2 invented a multi-blade lawn mower. All that -- the vast  
3 majority of the language not in yellow is just any lawn mower  
4 that existed, but now we're going to talk about the special  
5 baffle we designed.

6 And, of course, it has components. A first arcuate baffle  
7 portion, a first elongated and substantially straight baffle  
8 portion, having first and second ends, extending from said  
9 second end of said first arcuate baffle portion.

10 That's, of course, the key.

11 Substantially -- and then a substantially straight baffle  
12 portion partially around said second cutting blade.

13 Now, I want to point out one thing, and I could have put  
14 this in the myths and tricks section, but you've heard a lot  
15 about function, right? What's the function of the blade? Does  
16 it go in chord-like -- you know, in a straight line, the blade,  
17 does it kick grass? You heard that. Dr. Strykowski, that's  
18 most of what he talked about.

19 But function is a totally different requirement. You have  
20 to do this and this to infringe.

21 So it's all of that language about function, about where  
22 the grass clips, but, well, it cuts it right into the blade.  
23 Totally irrelevant to this case.

24 Retrospect, I should have put it in the myths and tricks  
25 section.

1 All right. So now let's talk about the redesign.

2 It was never disputed in this case that the redesign is  
3 made of three components that are equal pieces of circle. The  
4 exact arc. The green circle, the red circle and the blue  
5 circle are exactly the same radius, exactly the same arc.

6 So we have to ask ourselves, what is the first arcuate  
7 portion? Where is its second end? And is there a  
8 substantially straight portion that extends from that end?

9 And this, ladies and gentlemen, this is just words.  
10 English words, with their English meaning.

11 The second end is where the arc stops. An end of an arc  
12 is where the arc stops arcing. That's just common sense.  
13 That's just grammar. That's what Mr. Del Ponte told you, as a  
14 lawn mower guy when he hears end of an arcuate portion, he goes  
15 to the end of the arcuate portion and then says what happened  
16 next.

17 And when you're Briggs and you've just been accused of  
18 infringing and you say we want to quickly get out on the market  
19 a product that doesn't infringe, we want to stop this now and  
20 make sure we're not on the property because we're not in the  
21 business of infringing other people's patents, the easiest way  
22 to do it is to go to the end of the arc and then not have a  
23 straight section and that's exactly what they did.

24 In fact, to be extra safe, they made sure that the second  
25 portion was exactly the same radius as the first portion. If

1 you're going to call this an arc, how can you not call that an  
2 arc?

3 Where is its second end?

4 So now let's go to the meaning of "end" in the patent.

5 Mr. Del Ponte: And what does the word end mean there in  
6 the passage?

7 It means -- it's where the curve stops.

8 The end of a book is the end of a book.

9 If I -- if Mr. Vandenburg tells me in a fit of pique  
10 tells me to go jump off the end of a pier and I jump off in the  
11 middle, I haven't done what he's told me to do.

12 Mr. Busboom was asked, with reference to the patent -- so  
13 this is where, again, you have to remember that -- the two  
14 different standards they're applying. With reference to his  
15 own patent: When you say the arcuate portion stops, you're  
16 talking about Point B? Right here. Not Point C where they're  
17 saying it ends now.

18 His answer was: Yes.

19 And what you mean by that is after Point B it's not  
20 arcuate any more, right?

21 Yes.

22 And before that Point B it is?

23 Yes.

24 So when he's reviewing his own patent, he agrees that what  
25 defines where the first arcuate portion ends is where the arc

1 ends. Not somewhere before that. It's only when money's at  
2 stake that suddenly an end is no longer an end.

3 When I asked you if Point C was the end, you told me it  
4 wasn't, correct?

5 Correct.

6 Mr. Busboom: In this trial, Point C is not the end  
7 because it's still arcing.

8 Similarly, Dr. Strykowski: Okay. True or false, the  
9 first arcuate baffle portion shown in Figure 2 does not end at  
10 Point D because it continues to be arcuate up to Point B, up to  
11 the point where it says "end"; is that correct?

12 For this preferred embodiment, that is correct.

13 Well, the rule you apply in the patent darn well better  
14 apply to someone you're accusing of infringement. They say  
15 that in the patent they know where the arc ends because it's  
16 where the arc ends. That's exactly the same standard we used  
17 when we did the redesign.

18 So this is what Mr. Del Ponte said:

19 The first arcuate portion begins generally in here. And  
20 this is the first arcuate portion and we can see it sweeps the  
21 blade path.

22 That's just more of what I just said.

23 And, in fact, when it talks about the geometry, not about  
24 fighting about what the word "end" means, but just do we agree  
25 on the geometry of this thing, there was complete agreement.

1 Mr. Busboom agreed: The curvature ends here, where the  
2 green 1406 meets the red 1407, correct?

3 It appears so.

4 He agreed with us as to where the first arc ended.

5 He just wanted to say end doesn't mean end.

6 Dr. Strykowski, the same thing: Dr. Strykowski, the  
7 curvature of the metal piece ends at this second clip, right?

8 That's correct.

9 Everyone agrees with us where this arc ends.

10 The second end is where the first arcuate stops. That's  
11 what the patent says. That's what we all agree where it is.  
12 So now the question is, is there a substantially straight  
13 portion that extends from that end? Is the red substantially  
14 straight? And we all can see it's not.

15 Mr. Del Ponte agreed: Is that elongated and substantially  
16 straight?

17 No.

18 More importantly, once again, once you define where the  
19 end is, their own witnesses agree with us.

20 Mr. Busboom: You would agree that the red portion, 1407,  
21 is not elongated and substantially straight? Correct?

22 Yes.

23 He agreed with us that the second arc doesn't meet his  
24 patent.

25 Dr. Strykowski: If the jury decides that the end of this

1 arcuate portion is where it stops being arcuate up here and  
2 Briggs did exactly what I just said, right, they put an  
3 identical curve at the end of an identical curve, right?

4 Answer: Yes.

5 That's the best way not to infringe it and we did it that  
6 way.

7 Does the new redesign infringe?

8 If you agree with us as to what "end" means, there is no  
9 dispute, no factual dispute, no dispute among the experts, no  
10 disagreement from Mr. Busboom, there's no dispute that it  
11 doesn't infringe.

12 Okay. So you say, Mr. Wolf, Matt, what if we don't agree  
13 with you about the end? What if we agree that, despite what  
14 His Honor's going to tell you about what patent claims should  
15 be, that we can be flexible about where we call the end?  
16 Despite what we saw in the video, we can be flexible?

17 Well, you know what? There's still no infringement.

18 Because it's not just curved, substantially straight, the  
19 patent calls for curved, substantially curved, and then curved  
20 again.

21 A second arcuate baffle portion, having first and second  
22 ends, which extends from said second end of said first  
23 elongated and substantially straight baffle portion. And in  
24 layman's terms, the second curve: curved-substantially  
25 straight-curved.

1           There's what Exmark says is the arcuate portion. It stops  
2 before the end of the arcuate portion, but that's their  
3 argument.

4           Here's what Exmark says is the straight portion.

5           The problem is, is right after that is another portion of  
6 exactly the same shape.

7           Simply put, ladies and gentlemen, it is my personal  
8 opinion that that is not elongated and substantially straight.  
9 But that's ultimately for you to decide.

10           But what I think is beyond dispute is that these two  
11 shapes are exactly the same. Mirror images, but exactly the  
12 same.

13           And so if you agree that this is not elongated and  
14 substantially straight, then we win because there's no  
15 elongated and substantially straight portion.

16           But if you say okay -- no, no, that's -- that looks too  
17 straight to me to be called arcuate, well, then there's another  
18 exact same shape right after it. And then rather than curved-  
19 substantially straight-curved, then we go curved-substantially  
20 straight-substantially straight.

21           Again, when Briggs did its redesign, by making it  
22 symmetrical, we thought we had avoided this argument  
23 altogether. But if you think this is straight -- and you're  
24 entitled to that opinion -- if you think this is straight, you  
25 have to find this is straight too because they're exactly the

1 same shape and then the patent is curved-straight -- excuse me,  
2 the product is curved-straight-straight.

3 Mr. Busboom: And the claim also says that after that  
4 substantially straight section, there has to be another arcuate  
5 section, right?

6 Yes.

7 This portion here, which comes after this portion here,  
8 has the same shape?

9 Yes.

10 Mr. Busboom even agreed these are the same shape.

11 If I had a baffle, Mr. Busboom was asked, and I had a  
12 curve, a perfectly straight section, and another perfectly  
13 straight section, like a V, that wouldn't infringe your patent,  
14 right?

15 I believe that's correct.

16 Well, wait a second. If he's saying  
17 curved-straight-straight doesn't infringe, that V we're showing  
18 right there, then how could things that are even less straight  
19 infringe?

20 If you call these straight -- let's just pretend they're  
21 straight, call them straight -- you disagree with me, fine.  
22 Mr. Busboom agreed: Curved-straight-straight doesn't infringe.

23 One final reason why they can't be right. If you see the  
24 top language, it tells us that the first arcuate portion  
25 extends from interior surface of said second side wall. And

1 then later it says the second arcuate baffle portion extends  
2 from said second end and substantially straight baffle portion  
3 and it is partially around said cutting blade.

4         Simply put, we see the first area, the cutting blade --  
5 that's -- represents the cutting blade -- there's the second  
6 cutting blade and the third.

7         His Honor has found that this area in the circle extends  
8 away from -- I guess I should point to this because you can't  
9 see that, can you? This extends from the side wall. Well, if  
10 that extends from the side wall, then that second area extends  
11 away from, not around, the second blade.

12         Now, this is very convoluted and complicated, I recognize.  
13 But this is caused by them trying to call curved straight and  
14 middles ends. The simpler way, the right way, the legally  
15 required way to read this is that our design is  
16 curved-curved-curved and doesn't infringe.

17         As a result, no damages are due.

18         We're going to talk about fair compensation at the end,  
19 the royalty. So let's jump to, was Ferris willful?

20         And -- and I said this is a more serious charge, and it  
21 is.

22         Patent infringement is -- is a matter that is of great  
23 import and a lot of money's at stake. But at the end of the  
24 day, it's businesses, it's rent, it's royalties.

25         Willful infringement is accusing someone of doing

1 something wrong, of doing something willfully. And they're  
2 accusing, not Briggs, but let's be clear, and you heard it in  
3 his closing, he's accusing Mr. Wenzel and his colleagues of  
4 being dishonest -- he used that word -- of not telling you the  
5 truth, and of intentionally infringing the patent.

6 The facts just don't support that.

7 And the law sees the allegation of willful infringement as  
8 so serious that there's a different burden of proof for it. I  
9 talked about the standard, the preponderance of the evidence,  
10 that 51 percent, which you have to come forward with evidence  
11 to even talk about that. That's not good enough for willful  
12 infringement. You're going to accuse Mr. Wenzel and his  
13 colleagues of doing something willfully, you have a much higher  
14 standard to meet.

15 Clear conviction that the fact has been proven. They have  
16 the burden to prove a fact. And you have to figure, I've been  
17 clearly convinced that they have proven a fact.

18 Now, just to clear something up, Mr. Wenzel testified,  
19 honestly, that his system was flawed, that the Ferris system  
20 was flawed, and that they should have found the patent. But  
21 that's not what the standard asks you. That's not what willful  
22 infringement is about. The question's not did you know there  
23 was a patent. It was did you know you infringed the patent?

24 An unjustifiably high risk of infringement was known to  
25 Briggs or so obvious that it should have been known to Briggs.

1           The question is not should they have known about the  
2 patent. The question is should they have known that they  
3 infringed the patent.

4           And there's not a shred of evidence, not a shred, let  
5 alone clear and convincing, that that's the case.

6           And Mr. Vandenburg correctly pointed out the five factors  
7 that we're to consider and I'm going to walk through them one  
8 by one.

9           Two of them are irrelevant. Now, why is that? The third  
10 and fourth, whether or not there was a reasonable basis to  
11 believe that Briggs did not infringe or had a reasonable  
12 defense to infringement.

13           Sometimes people come into court when they're accused of  
14 willful fragment and said, yeah, I knew about the patent but I  
15 thought it was invalid. And if they had a good-faith belief in  
16 its invalidity, well, that can say they are not willful, or if  
17 they kind of made it up, they fudged it, well, that counts  
18 against them. Here, we didn't know about the patent. We  
19 should have but didn't. And so this factor doesn't weigh one  
20 way or the other on the scales.

21           Similarly, whether or not Briggs made a good-faith effort  
22 to avoid infringing the '863 patent, for example, whether  
23 Briggs attempted to design around the '863 patent.

24           And Mr. Vandenburg and I agree that this one is also not  
25 relevant for the same reason.

1 So we have three factors that are left.

2 Now, just to be clear: Did you learn about claim 1 or its  
3 import to your baffle in the Scag litigation?

4 Remember that?

5 I did not.

6 Did you know at any time prior to this lawsuit about claim  
7 1 of the '863 patent?

8 I did not know at any time prior to this lawsuit of the  
9 '863 patent. Honest truth.

10 Now, Mr. Vandenburg said, implied -- I think he actually  
11 said, but he certainly implied, that Mr. Wenzel didn't tell the  
12 truth about who represented him at the Scag deposition. Now,  
13 on one level that's irrelevant. Who represented who, you're  
14 not going to see that on the jury form. That issue was brought  
15 up on cross just to try to discredit Mr. Wenzel. Just to make  
16 him out to be something that he's not, dishonest. But you know  
17 what? Mr. Wenzel told the truth. He -- he, on the stand,  
18 thought he had misremembered. Remember, he said oh, you're  
19 right, I must not have gotten this correct.

20 But look at what it said on page 3 of the deposition:  
21 Mr. Wenzel, my name is Rick Marschall, I'm here on behalf of  
22 the defendants. I'm going to ask you a bunch of questions here  
23 this morning.

24 Those are not the words of a lawyer that's representing  
25 Mr. Wenzel.

1 Remember, I showed you the front page, who the defendants  
2 were. Everyone agrees that Briggs wasn't a defendant.

3 Now, much later in the deposition, as we talked about,  
4 there was this huge fight between the lawyers about privilege  
5 issues and it got heated and angry. And in the context of  
6 that, someone said, Mr. Wenzel, are you represented by these  
7 people? And he said yes. Because that's what the lawyer was  
8 saying at the time.

9 Mr. Vandenburg knew about that testimony, yet impeached  
10 this witness on the stand with that confusion.

11 Mr. Wenzel's memory might not be flawless, but it's  
12 completely honest.

13 In fact, it was so honest that he admitted on the stand  
14 that he should have known about the patent.

15 Frankly, I'm not even sure I agree with him. There are  
16 tens of thousands of patents out there in the mower industry.  
17 There are 63 competitors. I know how much it costs because my  
18 law firm does it, I know how much it costs to look at one  
19 patent, let alone a thousand, let alone a hundred a month for  
20 year after year. But his testimony was his testimony.

21 He should have known. But he said he should have known  
22 about the patent, not that he should have known that they  
23 infringed.

24 That's what they need to prove. And they haven't even  
25 tried.

1 All right. Now let's look at the other three factors.  
2 Whether or not Briggs tried to cover up its infringement.  
3 And this only makes sense. If you're a thief and you  
4 steal your neighbor's car, you're not going to park it in your  
5 front yard for them to see you're the one who stole it. If you  
6 have a guilty conscious, if you're a willful infringer, you're  
7 not going to show the world what you took. That's just common  
8 sense. You try to hide it.

9 And there is evidence all over the record that Briggs,  
10 from the moment it put the baffle in place, told the world  
11 about it.

12 I won't belabor the testimony, but trade shows year after  
13 year.

14 Was there ever a time where Ferris did anything at all to  
15 hide its baffles from Exmark or any member of the public?

16 Absolutely not.

17 We saw it from brochures from 2000. Right away. And year  
18 after year after year they showed their baffles to the world.  
19 They did nothing to hide. They did not act like someone that  
20 knew they were willfully infringing a patent.

21 In fact, Mr. Benson testified that as early as 2003 and  
22 perhaps earlier, it was so public that Exmark knew itself what  
23 Briggs was up to. There was no hiding.

24 This factor clearly weighs in favor of not being willful.  
25 They didn't try to hide anything, ever.

1           Next, whether or not Briggs acted in accordance with the  
2 standards of commerce for its industry.

3           And you know what? Sometimes both sides in a case are  
4 right about something, and this is one of those times.

5           But Ferris lived in a different world than Toro. Toro's  
6 world was bare knuckles, bruises, patent markings, stickers,  
7 labels, gotchas. Ferris's world was when Dane Scag, the giant  
8 in the industry, thought you infringed a patent he walked up to  
9 you and said I think you're infringing my patent. And when  
10 Ferris thought someone was infringing a patent, they picked up  
11 the phone and said, sir, I hate to do this, but you probably  
12 want to have your patent lawyer check.

13           That's the way they did business. And that's the way the  
14 industry did business back in the '90s. And you know what?  
15 That phone call never came.

16           And you heard Mr. Wenzel tell the stories about Dane Scag  
17 and about how he set the tone for how patent infringement was  
18 dealt with, what you did if you thought someone infringed your  
19 patent, and more importantly, what you thought if no one said  
20 you infringed the patent.

21           Your state of mind is that someone values their  
22 intellectual property, their patents, that they would say  
23 something.

24           Mr. Wenzel sat there year after year selling his products,  
25 no one saying anything, and year after year that reinforced the

1 notion that he had nothing to worry about, because you know  
2 what? Dane Scag would have called.

3 Have you personally ever approached someone at a trade  
4 show and suggested that they might be infringing, say let's  
5 talk about it?

6 I have.

7 Did you get it sorted out?

8 Yes, we did.

9 That's the way Ferris, Uebler Milk Marketing Company,  
10 dealt with patent infringement and thought the world also dealt  
11 with patent infringement.

12 The fact that the world changed under them when companies  
13 like Toro started to buy companies like Exmark, you don't blame  
14 Ferris for that.

15 Have you ever been approached, prior to this -- the  
16 lawsuit itself being filed, have you ever been approached by  
17 anyone from Exmark at a trade show or otherwise where they  
18 said, hey, you might be infringing our '863 patent, let's talk?

19 I have not.

20 Not once. That's undisputed. From the moment they  
21 introduced the baffle in 1998 to the moment this lawsuit showed  
22 up with a process server in 2010, not a word from anybody,  
23 Exmark or anybody, that they might have a patent infringement  
24 problem.

25 No letter, no email, no phone call, nothing.

1 So that standard, that element, not willful.

2 Last factor, whether or not Briggs intentionally copied a  
3 product of Exmark that is covered by the '863 patent.

4 Now, this one's kind of interesting, because it's our view  
5 that this is an irrelevant factor as well. Why? Because the  
6 alleged copying happened before there was a patent. And this  
7 just makes sense. You can't willfully infringe a patent if you  
8 can't infringe it in the first place. You can't infringe a  
9 patent that doesn't exist. So we don't believe this factor's  
10 relevant because when Ferris developed this product there was  
11 no patent.

12 Now, Exmark takes a different view. They suggest that  
13 somehow, although you can't infringe a patent that doesn't  
14 exist, that somehow it bleeds over into later time periods.

15 So they're the one that are pushing this argument.

16 Remember, in '97, Ferris had fixed its design. The patent  
17 issued in '99.

18 They're the one that are pushing the argument, yet they  
19 didn't call Mr. Baumbach. They didn't depose Mr. Baumbach.  
20 They found Mr. Baumbach. Now, remember, one of the Ferris  
21 children actually looked for Mr. Baumbach, couldn't. This was  
22 after -- shortly after he left, they looked for him for a  
23 completely different purpose. I think it was about COBRA, I  
24 think it was COBRA, right, ongoing health insurance. They  
25 tried to find him and they couldn't find him. So they looked

1 for him in 2002, they looked for him in 2010, they couldn't  
2 find him.

3 Now, a private investigator found him in two-and-a-half  
4 hours. I don't know whether that private investigator was just  
5 really good or had access to databases that you and I don't  
6 have or whatever, but he found him. Okay.

7 And when did they find him?

8 2011.

9 And when did they tell us they found him?

10 Four years later. 2015.

11 At no point in those four years, even though they talked  
12 to him -- we know that he -- the private investigator actually  
13 made voice contact with him. At no point do they say we'd like  
14 to take your deposition, we'd like to get you to sign a  
15 declaration, we'd like you to come into our offices and talk to  
16 us and tell us what happened. We think -- I know Ferris  
17 doesn't agree, but we think it's really important whether this  
18 was copied or not, we think we need to get your testimony to  
19 prove to this jury by clear and convincing evidence that  
20 there's a fact that the product was copied.

21 You didn't hear from Mr. Baumbach, even though they talked  
22 to him.

23 What does common sense tell you about that?

24 This figure was made a lot of in opening argument. You  
25 barely heard a word about it in closing. Because this figure

1 isn't what the product ended up like. This figure is very  
2 different. This figure just evaporated over the course of the  
3 trial.

4 So this is where we are. Two factors leaning strongly  
5 towards not being willful. Two factors being irrelevant. The  
6 final factor copying. We think it's relevant -- I mean,  
7 irrelevant. They think it's relevant, but did nothing to prove  
8 it. They'd rather talk about coincidence. They'd rather let  
9 your imagination run wild. Why? Why not just bring the guy in  
10 and answer the question one way or another? Mr. Baumbach, did  
11 you copy a design or did you think of it on your own or did it  
12 come from an idea of combining Walker with your own deck or did  
13 it come from some other patent we haven't heard of or did it  
14 come to your son in a dream?

15 Why? Why didn't they just ask?

16 Maybe they did. Maybe they didn't like the answer.

17 As to the old design, was Ferris willful?

18 No.

19 Now we get to the question of what is fair compensation.

20 You heard, by the way, that there were 91,000 of the old  
21 and 81,000 of the new. This might have passed you by, but  
22 Mr. Bone, the expert we called, actually brought more units to  
23 the table subject to the royalties than their own expert. So  
24 to the extent that they're suggesting that Mr. Bone is trying  
25 to skimp, that he's trying to cheap out on this, he actually

1 says there are more mowers at issue than they do. And the  
2 reason is, because Mr. Bone rightly says -- starting to get a  
3 little bit tired -- I apologize -- rightly says that this isn't  
4 about the mower, this is about the baffle on the mower. And so  
5 if Ferris sells a deck, which has a baffle, that's what they  
6 should pay on. And so if they sell you a mower, the deck  
7 breaks, they sell you another deck, they'll pay you twice.

8 That's him being fair.

9 And I want to get something out of the way right now. I  
10 actually have it in a later slide, but Mr. Bone never said that  
11 anybody would be thrilled or ecstatic about the reasonable  
12 royalty. In fact, he said exactly the opposite. He's looking  
13 for a number -- how many times have you been told it's a  
14 compromise when both sides are equally unhappy? That's when  
15 you know you've met in the middle. The number is when both  
16 sides are equally unhappy. That's the reasonable royalty. He  
17 never said thrilled. He never said ecstatic. And -- and the  
18 suggestion that my client, a bricks and mortar company in the  
19 heart of America's Rust Belt would be happy to pay \$2 million,  
20 that they'd be skipping down the street?

21 All right. Let's look at the reasonable royalty  
22 definition. A royalty's a payment made to patent holder in  
23 exchange for the right to make, use, or sell the claimed  
24 invention. A reasonable royalty's the amount of royalty  
25 payment that a patent holder and the infringer would have

1 agreed to in a hypothetical negotiation.

2 They would have met where they were equally unhappy.

3 The hypothetical negotiation. We now know who was sitting  
4 at the table.

5 Now, just so we're clear, this is what Mr. Stinson  
6 testified. This was a very important part of the trial that  
7 probably flew under a lot of people's radar.

8 Now, Exmark is seeking a 5 percent royalty on sales. Do  
9 you believe that getting 5 percent of sales would be a good  
10 deal for Exmark?

11 Yes.

12 A good deal for Exmark. Remember, reasonable royalty.  
13 Meet in the middle. Both sides -- (indicating). He says it  
14 would be a good deal. And he's right, it would be a great deal  
15 for Exmark.

16 Now what about Mr. Wenzel?

17 Would you have agreed to a royalty that would have  
18 required you to turn \$250 out of the 350 profit you made on the  
19 mower?

20 We wouldn't have been able to, no.

21 So notice, their witnesses are talking about what they  
22 would have liked, what they would have hoped for. Mr. Wenzel  
23 was talking about as an economic reality what they could have  
24 done in 1999.

25 You can't give away two-thirds of your profit and stay in

1 business for one shape of one baffle. That's not the way  
2 businessmen work.

3 It's really simple, you can't afford it so you can't agree  
4 to it.

5 Now, we've seen this figure a lot. And it's really  
6 important. We've talked about operating margins and standard  
7 operator margins and profits and net profit and gross profit.  
8 The number that matters is how much, when you leave the  
9 factory, you had in your pocket. That's what you have to play  
10 with.

11 Now, Ms. Bennis suggested that somehow we wouldn't --  
12 shouldn't take out the money that goes to -- and she was  
13 somewhat dismissive -- holiday parties and waxing the floor.  
14 And I don't want to speculate as to why she chose those  
15 examples.

16 But if you have to screw a light bulb in, that's not money  
17 you can take home.

18 If you have to pay a salesperson, that's not money you can  
19 take home.

20 If you have to pay a warranty claim, that's not money you  
21 can take home.

22 The money you have to pay this royalty out of is the \$365.

23 So then you heard Mr. Vandeburgh draw kind of a false  
24 comparison. He said: How many mowers would Ferris have had to  
25 sell to make up for the \$1350 that Exmark would make -- and

1 remember the lost sales discussion? But remember, that \$1350,  
2 was that fictional incremental profit number, that 31 percent  
3 number, that number before you paid your -- you paid for the  
4 holiday parties and whatever else dismissed. Not the money you  
5 take home. So that question isn't the right question, even if  
6 it's legally relevant, and it's not.

7 Most importantly, what you pay on is not what you should  
8 pay on, it's what value the technology brings to the table.  
9 It's only common sense. If Apple adds to their iPhone some  
10 tiny little widget, they're going to pay the developer of the  
11 widget the value of the widget, not the value of the iPhone.  
12 You get paid for what you add. And that's what *Georgia-Pacific*  
13 factor, particularly 13, the portion of the realizable  
14 profits -- so we've got two really important words in those  
15 first four -- portion and profits -- I miscounted, five, I  
16 apologize -- that should be credited to the invention as  
17 distinguished from non-patented elements, the manufacturing  
18 process, business risks, or significant features of [sic]  
19 improvements added by the infringer.

20 So ultimately, what your task, when you go back to that  
21 jury room, is to decide what portion of realizable profits are  
22 attributable to that specific shape of front flow control  
23 baffle. Let's not fall into trap number one, myth and trick  
24 number one, apportion to any old baffle. Let's apportion to  
25 them using the specific baffle that 75 percent of the market

1 succeeds with without even using.

2 This chart can make you a little bleary-eyed but the point  
3 is a simple one. There are lots of things that go into why  
4 customers buy lawn mowers. And to be frank, as we've heard, in  
5 1999 in particular and even to today, why people bought the  
6 Lazer Z was different than why people bought Ferris lawn  
7 mowers. They were overlapping, but not much, customer bases.  
8 They had different interests. And it may well be that for  
9 Exmark's customers, what they cared about most was cut quality.  
10 But that wasn't the case, according to the market studies, the  
11 most direct evidence. And it certainly wasn't the case of  
12 Ferris.

13 Now, we've heard suspension dismissed about -- just being  
14 about comfort. But as we told you, the suspension contributes  
15 three things: comfort, productivity, and durability. And so  
16 when you hear all this discussion of minimizing comfort, that's  
17 only talking about one of the three things that suspension  
18 brings. And more importantly, it's dismissing what may be  
19 number one to their customer, the smaller home -- the home  
20 owner, the two- or three-person shop, the person that's buying  
21 the mower and actually using it themselves. Simple question,  
22 if you were your own one-person business and you're buying a  
23 Ferris mower, would comfort matter to you, your only employee?  
24 I suspect it would.

25 So that first column is just saying there are lots of

1 things that drove demand for lawn mowers, not just one.

2 Ms. Bennis, you got it wrong because it wasn't just about cut,  
3 it was about a lot of things, good cut being very important, no  
4 dispute, but that's just one of the very important things.

5 And then with good cut, there are lots of things that go  
6 into that. Lots of factors.

7 And all of that leads -- led Mr. Bone to say 17.50 is the  
8 result of that analysis. That would have been the reasonable  
9 royalty. Now, what's fascinating about that reasonable royalty  
10 to me, and it's probably a complete accident, but there's some  
11 justice to it, is that that works out to 5 percent of Ferris's,  
12 Briggs's profits. So Ms. Bennis says we get 5 percent. We're  
13 not sure we disagree. But it's 5 percent of what? Why do you  
14 get 5 percent of our revenue? Our revenue that goes to pay the  
15 steel manufacturer, Goodyear, Firestone, Caterpillar, the guy  
16 that's changing our lights, you know, Aetna Health Insurance.  
17 You get 5 percent of that?

18 I want to talk about a few specific things, then wrap it  
19 up.

20 Mr. Vandenburg talked about this advertising campaign in  
21 the -- in 2009. And this is interesting, because, remember,  
22 there was not a shred of evidence that from 2008 till the late  
23 2000s, I don't know what you call those, that first decade of  
24 the 2000s, that Briggs ever said, hey, look at your baffles,  
25 which kind of undermines the argument that baffles were

1 important. So they seize upon these brochures when the iCD  
2 deck came out that said redesigned baffle chambers. But  
3 remember the testimony, the only thing that redesigned -- well,  
4 everything that was redesigned had nothing to do with the  
5 baffles. The baffles were the same. What was redesigned were  
6 the blades, discharge, the spindles. So what they were  
7 advertising was not the baffles but everything but the baffles.  
8 What was within the baffles, within the baffle chamber, not the  
9 baffles themselves, because they hadn't changed. They weren't  
10 redesigned.

11 Selling value. We've seen this a lot. And I thought we  
12 had disposed of this one. I thought a fork had been stuck in  
13 this one.

14 But those figures are, if you want to call them that,  
15 revenue figures. They're making exactly the same mistake with  
16 this as they are with the royalty.

17 If you talk about Briggs's profit margins on these, then  
18 we're right back in line with what we say is a reasonable  
19 royalty.

20 The \$200 two-wheel front independent suspension, that's  
21 the selling price. How much does Briggs make on that in  
22 profit? At 5 percent, just to use a round numbers, ten bucks.  
23 Exactly the number we're saying is a reasonable royalty here.  
24 So we are equating, in rough terms -- I mean some of these are  
25 a little higher, some are a little lower, we're equating

1 exactly their baffle with our suspension.

2 Finally, I've beaten up this point -- well, not quite  
3 finally, but almost finally. Sorry for the false promise.

4 Lots of people competing in the marketplace without their  
5 baffle.

6 We've seen the sales numbers. Scag went up when they  
7 changed baffles.

8 Now, Mr. Vandenburgh asked Mr. Bone about these redesign  
9 numbers. And basically said isn't -- he called it absurd but  
10 he said isn't it outrageous that you would only offer 150 or  
11 \$250,000 for something as important as a baffle? Let's be  
12 clear what we're talking about here. You're at the  
13 hypothetical negotiation. You know you can redesign for about  
14 \$250,000. At some point, the demand from the other side gets  
15 so high that you say to heck with you, I'm just going to  
16 redesign. And when the redesign cost is, at most, a quarter  
17 million dollars, that gives you an anchor to how high that  
18 could be.

19 I am not standing before you saying that \$250,000 is a  
20 reasonable royalty. I say \$10 is -- is fair, is the right  
21 number.

22 Maybe you think 17.50 is the right number, the first  
23 categorization, 5 percent of their profits.

24 Ladies and gentlemen of the jury, we trust you to come up  
25 with the right reasonable royalty number for the old design.

1 We just ask you to consider what the law says you consider. We  
2 ask you to look at the language of the claims when asking  
3 whether the new design infringes. And we ask you to look at  
4 what the objective evidence is of what was inside Mr. Wenzel  
5 and Mr. Laurin and Mr. Marshall's head. Did they know they  
6 were infringing that patent? Were they willfully infringing?  
7 And have they come close to proving it by clear and convincing  
8 evidence.

9 Two more comments. First, this is a -- and I hope there's  
10 not applause after I say this. This is the last time you'll  
11 hear from me in the trial. I'm not allowed to say anything  
12 more. The way the law works, because the burden of proof is on  
13 Exmark, they get the last word. And I assure you there will be  
14 things that Mr. Vandenburgh, a dear friend of mine, will say  
15 that I disagree with very strongly and I just can't do anything  
16 about it. All I can do is trust that you'll look at the  
17 evidence fairly and objectively in that jury room to come to a  
18 good conclusion.

19 And the last thing I'll say is, echoing Mr. Vandenburgh,  
20 thank you. This has been a remarkable two weeks for me, a  
21 remarkable two weeks for my client, an important two weeks for  
22 my client, and we thank you for giving it the care and concern  
23 and thoughtfulness that a case of this importance means.

24 Thank you and, since I won't see you again, I wish you all  
25 well in the future.

1 THE COURT: So, ladies and gentlemen, due to the time  
2 factor here, and as close as we are to five, we're just going  
3 to take five minutes, so just time to stretch and use the  
4 facilities if you need to and then we'll come right back and  
5 finish up.

6 So let's take five.

7 (Jury out at 4:34 p.m.)

8 THE COURT: We're outside the presence of the jury.  
9 I suspect, Mr. Vandenburg, you might have some  
10 objections.

11 MR. WOLF: May I bio break while he does that?  
12 Mr. Cohn will address...

13 (Plaintiff's counsel conferred.)

14 MR. WINKELS: Your Honor --

15 THE COURT: Well, wait. You might have some  
16 objections but unless you want a curative something now, I'd  
17 suggest that we wait until after five o'clock.

18 MR. VANDENBURGH: Could we take our five-minute break  
19 and come in before you call the jury back in?

20 THE COURT: Sure.

21 MR. VANDENBURGH: Trying to figure out what the issue  
22 is.

23 THE COURT: So we'll take five.

24 (Recess taken at 4:35 p.m.)

25 (At 4:40 p.m.; with counsel and the parties'

1 representatives present; WITHOUT the jury:)

2 THE COURT: Please be seated.

3 All right. Mr. Vandenburg.

4 MR. VANDENBURGH: We have no objection, Your Honor.

5 THE COURT: All right. Let's get the jury.

6 (Jury in at 4:40 p.m.)

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

8 Mr. Vandenburg, you may proceed.

9 MR. VANDENBURGH: Thank you.

10 I'm going to keep this very short because I know we've all  
11 been here a long time, so I'm going to just touch briefly on  
12 each of the issues.

13 On the issue of willful infringement, one more time about  
14 Dale Baumbach. This insinuation that because we talked to him  
15 it must be unfavorable to us just doesn't make sense. We heard  
16 a lot of reasons why Mr. Baumbach might have given when the  
17 investigator spoke to him. One good possibility is he claimed  
18 not to remember. It's been a long time, I just don't remember.  
19 That's a reason to then not follow up.

20 But the interesting thing to tell yourself, again, using  
21 your common sense, is when Briggs did -- was handed  
22 Mr. Baumbach's address in February of this year, they didn't  
23 even call to ask. Think about that. If you thought he could  
24 clear your name, you'd at least call and ask him. They knew,  
25 under these circumstances, that there was simply no way

1 Mr. Baumbach was going to support them. They knew it was not a  
2 coincidence, so they didn't even bother to pick up the phone  
3 and call.

4 One issue on infringement. I won't belabor the -- the  
5 issues that we've already joined on. I was a little surprised  
6 to hear the curved-straight-straight argument in closing  
7 because I thought we had put that to bed yesterday with  
8 Mr. Del Ponte.

9 And if we could put up Slide 66. You recall my  
10 questioning of him on this. And this is Briggs' Version 4.  
11 This is one that's already been found to infringe but it is one  
12 that's a little different than the others we've seen. It's a  
13 little less, you know, clearly defined.

14 And, in fact, one thing we established, the interesting  
15 thing I like about this is it not only debunks the  
16 curved-straight-straight, it's also showing our point of  
17 flexibility that we've been accused of somehow, you know, being  
18 improper when you read a claim.

19 Because in this design, it's clear that it's curved  
20 straight, then another straight, then a curved.

21 So I asked Mr. Del Ponte though, you agree, don't you,  
22 that this meets the claim because this portion, as a whole,  
23 that portion in red, even though part of it's straight, you  
24 have the flexibility to say that as a whole is an arcuate  
25 portion. And he agreed.

1           That not only proves flexibility, it proves that you  
2           can -- that their curved-straight-straight argument just makes  
3           no sense.

4           Damages. One point I want to make here, ladies and  
5           gentlemen, is that the \$10 a mower or the 150,000 or now we  
6           heard 17.50, these are all really low numbers, they might as  
7           well be zero. Because what Briggs wants you to do is split the  
8           difference. They want you to go into the jury room and say,  
9           well, you know, we'll just take somewhere between their two  
10          numbers and that'll be good enough.

11          Your Honor -- "Your Honor." "Your Honor."

12          Ladies and gentlemen of the jury, please don't do that.  
13          Exmark deserves full compensation for its invention. Briggs  
14          infringed for many years. They took this invention and they  
15          made a billion dollars worth of infringing mowers. We're only  
16          asking for 5 percent.

17          They owe \$24 million for six years of infringement by the  
18          original design and they owe almost another 25 for the  
19          four-plus years on the redesign.

20          And like most defendants, after they're called to account  
21          for their wrongdoing, they come in with all sorts of reasons  
22          and excuses of why they shouldn't have to pay fair  
23          compensation.

24          We came here to seek fair compensation from you. As I  
25          said at the beginning, all we're looking for is 12 fair and

1 honest jurors, apply their common sense to the facts, and award  
2 Exmark the amounts it deserves in this case.

3 We have faith in the legal system and faith in you that  
4 you'll do exactly that.

5 Again, thank you, ladies and gentlemen.

6 THE COURT: So, ladies and gentlemen, you've heard  
7 all the arguments now and you've seen all of the evidence. And  
8 now you have the obligation to resolve the questions that the  
9 Court has given you in the instructions.

10 But we have a few changes in the instructions.  
11 Ms. Lawrence gave you a new 17, it's marked 17A. We changed  
12 one sentence in that instruction, but I'm going to read the  
13 whole thing to you.

14 (The Court read Instruction No. 17A.)

15 THE COURT: Then we changed the language just a tiny  
16 bit in Instruction No. 22, so I'm going to read that to you.

17 (The Court read Instruction No. 22A.)

18 THE COURT: Now I'm going to read to you the closing  
19 instructions. That's the new set of instructions that  
20 Ms. Lawrence gave you before the closing argument.

21 (The Court read Closing Jury Instructions, Instruction  
22 Nos. 30 through 36.)

23 THE COURT: Now, ladies and gentlemen, the jury room  
24 is not a very large place, as you probably already know. And  
25 we've admitted into evidence these mower decks.

1 I have a hearing tomorrow morning at nine o'clock and so  
2 you won't be able to come into the courtroom and deliberate  
3 during that time, but after that time, we will seal the  
4 courtroom and you will have the ability to do your  
5 deliberations inside the courtroom as well as inside the jury  
6 room. So nobody will be able to come or go from the jury  
7 room -- or the courtroom while you're doing your deliberations.  
8 And then that way if you want to, you can come out of the jury  
9 room, look at the deck and discuss the deck among -- among the  
10 12 of you if that's what you choose to do.

11 But it's entirely up to you how you want to do it. But we  
12 will seal the courtroom for you probably at 9:30 tomorrow  
13 morning.

14 With that, ladies and gentlemen, you may retire to  
15 deliberate. Just let Ms. Lawrence know how long you intend to  
16 stay tonight or if you want to retire tonight. It's completely  
17 up to you.

18 So on behalf of the parties in this case, we want to thank  
19 you for your attention in this matter and then we await your  
20 verdict.

21 (Jury out at 4:59 p.m.)

22 THE COURT: Is there anything any of the parties  
23 wants to take up at this time?

24 MR. WOLF: Just to preserve, Your Honor, one  
25 objection on the -- on the rebuttal. It was the same essential

1 use of Your Honor's summary judgment ruling. The whole  
2 Version 4 thing, we talked about it at length the other day,  
3 I'm just renewing it.

4 THE COURT: All right. Well -- okay. It's  
5 overruled.

6 Anything else? From either party?

7 All right. It's important for you to stay in touch with  
8 my courtroom deputy. If there's a question, then we'll need to  
9 be in touch with you. And let her know whether you're going to  
10 be in town or you're going to be out of town and how we should  
11 handle the objections.

12 So -- and -- not objection, how we should handle any  
13 questions.

14 MR. WOLF: We will have at least -- Mr. Cohn or I or  
15 both of us will be available all day tomorrow. And he'll give  
16 his phone, he'll be the contact person.

17 MR. COHN: I'm writing it down right now.

18 THE COURT: Okay. Just let Ms. Lawrence know.

19 And then lastly, I have to be in Lincoln tomorrow. I  
20 leave town at eleven o'clock and I should be back at four.  
21 Judge Smith Camp has agreed to take the verdict if there's a  
22 verdict between eleven and four. If there are questions, I'll  
23 be available by phone.

24 MR. WOLF: Okay.

25 THE COURT: Okay? We're in recess.

1 MR. WOLF: Thank you.

2 MR. VANDENBURGH: Thank you, Your Honor.

3 (The Court left the courtroom at 5:01 p.m.)

4 (An off-the-record discussion was had between the  
5 courtroom deputy and counsel.)

6 (With the courtroom deputy, Ms. DeWitt and Mr. Winkels  
7 present:)

8 COURTROOM DEPUTY: So plaintiff's exhibits that were  
9 offered and received are:

10 Number 1, 2, 4 and 5, 7, 8, 9; 10 was offered but not  
11 received but it was used as a demonstrative exhibit; 11A was  
12 offered and received; 15 was a demonstrative exhibit; 15A was  
13 offered and received; 28 and 29, offered and received; 31  
14 through 37, offered and received; 43 through 50 were offered  
15 and received; 52, offered and received; 61, offered and  
16 received; 64, offered and received; 67, offered and received;  
17 71, offered and received; 123, offered and received; 132,  
18 offered and received; 149, offered and received; 160, offered  
19 and received; 164, offered and received; 167 is a demonstrative  
20 exhibit; 179, offered and received; 182, offered and received;  
21 203, offered and received; 203A, offered and received; 240,  
22 offered and received; 299, offered and received; 311, offered  
23 and received; 313, offered and received; 314, offered and  
24 received; 323, offered and received; 327, offered and received;  
25 344, offered and received; 366, offered and received; 377,

1 offered and received; 391, offered and received; 430, offered  
2 and received; 432, offered and received; 438, offered and  
3 received; 441 through 443, offered and received; 445, offered  
4 and received; 447, offered and received; 450, offered and  
5 received; 453, offered and received; 454, offered and received;  
6 457, offered and received; 461, offered and received; 464,  
7 offered and received; 466, offered and received; 469, offered  
8 and received; 471, offered and received; 474, offered and  
9 received; 479, offered and received; 521, offered and received  
10 but will not go to the jury; 522 is a demonstrative exhibit;  
11 523, offered and received; 524 through 528 are demonstrative  
12 exhibits; 529, offered and received; 530, offered and received;  
13 531 and 532 are demonstrative exhibits; 533, offered and  
14 received; 534, offered and received and will not go to the  
15 jury; 535 through 537, offered and received; 538A offered and  
16 received; 539, offered and received; 540 is a demonstrative  
17 exhibit; 540A offered and received; 541, offered and received  
18 but will not go to the jury; and 542.

19 Okay. Now, defendant's exhibits:

20 605 through 606, offered and received; 608, offered and  
21 received; 609, offered and received; 611, offered and received;  
22 612 through 613, offered and received; 614 through 615, offered  
23 and received; 619, offered and received; 635 through 636,  
24 offered and received; 638 offered and received; 641, offered  
25 and received; 645, offered and received; 647, offered and

1 received; 648, offered and received; 651 through 654, offered  
2 and received; 666, offered and received; 672, offered and  
3 received; 673 through 674, offered and received; 677, offered  
4 and received; 678 is a demonstrative exhibit; 712, offered and  
5 received; 717 through 718, offered and received; 741, offered  
6 and received; 811, offered and received; 823, offered and  
7 received; 839, offered and received; 844, offered and received;  
8 1029, offered and received; 1032 offered and received; 1073,  
9 offered and received; 1158, offered and received; 1227, offered  
10 and received; 1234, offered and received; 1240, offered and  
11 received; 1252, offered and received; 1369, offered and  
12 received; 1400 is a demonstrative exhibit; 1401, offered and  
13 received; 1402 through 1405 are demonstrative exhibits; 1406  
14 through 1409, offered and received; 1410, offered and received;  
15 1411 is a demonstrative exhibit that was offered but not  
16 received; 1412 through 1416, offered and received; 1417 through  
17 1422 were offered and received but will not go to the jury;  
18 1423, 1424 and 1425 and 1426 were offered and received but will  
19 not go to the jury; 1427 and 1428 were offered and received.

20 And then Exhibit No. 42 is being offered and received.  
21 Parties have no objections.

22 And then the demonstrative exhibits also will not go to  
23 the jury.

24 Counsel, do you agree?

25 MR. WINKELS: Can I check one thing?

1 COURTROOM DEPUTY: Sure.

2 MR. WINKELS: So my understanding is that all of  
3 these -- it would be 1402 through -- maybe I heard you wrong.  
4 Is 1402 through 1409, are they all offered and received and  
5 going with the jury?

6 COURTROOM DEPUTY: No. 1402 through 1405 are  
7 demonstrative exhibits and demonstrative exhibits will not go  
8 to the jury.

9 And then 1406 through 1409 were offered and received.

10 MR. WINKELS: And we would move to have 1402 through  
11 1405 go to the jury.

12 That was our understanding that all of those pieces were  
13 going to go back to the jury room.

14 MS. DEWITT: I would need to check the record to see  
15 if our counsel -- if we've offered it but didn't -- if it  
16 wasn't received. I don't know why we would change it now.

17 COURTROOM DEPUTY: He did them as demonstrative  
18 exhibits, when he introduced them; that's how he introduced  
19 them.

20 MR. WINKELS: Do you guys have an objection to all of  
21 them going back?

22 MS. DEWITT: No, I don't think so.

23 COURTROOM DEPUTY: Let me just run it by the judge.

24 Let's take a break here.

25 (The courtroom deputy left the courtroom to confer with

1 the Court.)

2 COURTROOM DEPUTY: All right. So the record should  
3 reflect that Exhibits No. 1402 through 1405 are offered and  
4 received and will go back to the jury.

5 Okay. So counsel, now do you all agree with the exhibits?

6 MR. WINKELS: Plaintiff Exmark does.

7 MS. DEWITT: Briggs does as well.

8 COURTROOM DEPUTY: Okay. Thank you.

9 (Evening recess taken at 5:28 p.m.)

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19 C E R T I F I C A T I O N

20 I, Susan M. DeVetter, RDR, CRR, certify that the foregoing  
21 is a correct transcript from the record of proceedings in the  
22 above-entitled matter.

23

24 /s/ Susan M. DeVetter  
Official Court Reporter

September 17, 2015  
Date

25