IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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LG ELECTRONICS U.S.A., INC., and LG ELECTRONICS, INC.,	:	Civil Action
Plaintiffs,	:	
v.	:	
WHIRLPOOL CORPORATION,	:	
Defendant.	:	08-234(GMS)
WHIRLPOOL CORPORATION, WHIRLPOOL PATENTS COMPANY, WHIRLPOOL MANUFACTURING CORPORATION, and MAYTAG CORPORATION,	:	
Counterclaim Plaintiffs,	:	
v.	:	
LG ELECTRONICS U.S.A., INC., LG ELECTRONICS, INC., and LG ELECTRONICS MONTERREY MEXICO, S.A., DE, CV,	:	
Counterclaim Defendants.	:	

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Wilmington, Delaware
Thursday, January 7, 2010
10:00 a.m.
Pretrial Conference

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BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

APPEARANCES:

RICHARD K. HERRMANN, ESQ.
Morris James LLP
-and-
PATRICK J. COYNE, ESQ., and
ANDREW C. SONU, ESQ.
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FREDERICK L. COTTRELL, III, ESQ.
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-and-
SCOTT F. PARTRIDGE, ESQ.,
AMANDA WOODALL, ESQ.,
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(Houston, TX)

Counsel for Defendant and Counterclaim Plaintiffs

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THE COURT: Please take your seats. This is an office conference, counsel.

Counsel, let's start out on the record with introductions.

MR. HERRMANN: Thank you, Your Honor.

THE COURT: Mr. Herrmann.

MR. HERRMANN: Good morning. I have Patrick Coyne and Andrew Sonu, from the Finnegan firm.

THE COURT: Okay.

MR. COTTRELL: Good morning, Your Honor.

THE COURT: Mr. Cottrell.

MR. COTTRELL: Fred Cottrell for Whirlpool. With me at counsel table, of course, Scott Partridge, Paul Morico, Amanda Woodall, and Iona Kaiser, all from Baker Botts.

THE COURT: Ms. Woodall, when you are being introduced, it is customary to stop writing and acknowledge the introduction.

MR. PARTRIDGE: Your Honor, I have that same problem.

(Laughter.)

MR. COTTRELL: Your Honor, lastly, in the back, from Whirlpool, in-house counsel is Kirk Goodwin and Tom Schwyn.

THE COURT: Good morning. Happy new year to

all.

Counsel, here is the way we are going proceed. Some of you have been with me before and done this and will have an idea. We are going to first talk about the motions in limine. I will begin with the plaintiffs. I believe, as a housekeeping point, that Whirlpool has withdrawn, I have numbered it 4, and substituted -- did you substitute anything? I have substituted, because you filed this motion for an adverse inference that I actually considered to be a motion in limine. So I was going to make you make a choice. You have made your choice. I will add it to the fifth motion in limine.

Then, after we have that discussion, and I am hopefully able to rule on all of the motions, to the extent that I don't, or feel I need additional time, I will reserve, and get back to you on those matters that I reserve upon.

Then we will more or less go through the pretrial order. We won't discuss objections to exhibits. There are too many. I think you all are familiar with my general practice of denying all objections to exhibits without prejudice to your ability to raise them again at some time that we will talk about, either in realtime during the trial of the case or before or after the jury sits.

We will talk about your proposed interrogatories

for the jury, voir dire. There is not a lot of difference between the two submissions. We will go through that.

I am going to defer discussion of a meaningful nature on the jury instructions, both preliminary and final proposed. That will give you an opportunity to consolidate the two -- I think there are two submissions on both. I will add the verdict form submission.

Mr. Partridge.

MR. PARTRIDGE: The preliminary instructions, Your Honor, we are in substantial agreement. I think there is one correction based on some resolutions that we achieved over the last couple weeks.

THE COURT: Maybe we can take a look at that and maybe put those to bed. On the finals, as one would expect, and on the verdict form, in a patent case, as one would expect, there is a contest. To the extent that you really haven't turned your attention, and you probably haven't as fully to the instructions and the verdict form, I am going to require that you do, and consolidate those submissions to the extent that you can't agree after further meet-and-confers or whatever you do about that, so that it eases my ability to review them, and not have to shuffle back and forth between two documents.

I will then discuss just sort of my general nudges and do's and don'ts in the courtroom. Then I will

turn to plaintiff and defendants for your agenda items. And we will conclude.

Hopefully, we can get this done, I should think, by lunchtime, lunchtime being in the neighborhood of 12:30-1:00, if not before. Before would be good.

So let's get started.

I have at Docket Item 290, I called it Plaintiff's Motion in Limine No. 1. It's LG's Motion In Limine To Exclude Alleged Damages Prior To 'Notice Of Infringement.'"

Let me just take a quick look.

Mr. Partridge, I don't know who you have designated to handle this. Was it Whirlpool who made the point that you viewed this as a motion for summary judgment?

MR. PARTRIDGE: Correct, Your Honor.

THE COURT: I sort of do as well.

So who is going to handle this for LG?

MR. COYNE: I am, Your Honor.

THE COURT: So you are swimming upstream, counsel. You can keep your seats or not. It is up to you.

MR. COYNE: I am more comfortable standing.

The statute is very clear, Your Honor. 287 requires that the focus -- and the Federal Circuit has actually ruled on this very recently in the Amstead case. The focus is on the patentee's behavior, not the notice, not

knowledge, not even actual knowledge by the defendant. It's on whether or not the patentee gave notice of the infringement. Not notice of the patent, not an offer to license years earlier or in some vague, unsubstantiated form. It's got to be notice of the infringement. There is no marking here. That's undisputed. And there was no notice of the infringement.

And it's as simple as that. That is why we are asking that evidence not come in and confuse the jury. Whirlpool has got a very substantial damages claim. The jury is already going to have a very difficult time dealing with it. If they are added on with this factor, is it in, is it out, it becomes much more confusing.

That is really our point, Your Honor.

THE COURT: How is going to handle this?

MR. PARTRIDGE: Ms. Woodall will, Your Honor.

MS. WOODALL: Yes, Your Honor.

As Your Honor has ably pointed out, we believe this is a motion for summary judgment. There is a time and place for raising this issue with the Court, and the plaintiff did not do that. In fact, they appear to use that ruling in defense when we raised the issue in our opening letter to the Court on proposed motions for summary judgment.

We believe the motion in limine briefing raises

fact issues, where LG has taken contrary positions as to which date might apply with respect to notice in this case and a date for damages to take effect. We are well familiar with the Federal Circuit's interpretation of this statute as to what actual notice is. We are not disagreeing with LG's counsel's statement of fact. We do believe there are facts in this case that are distinguishable. We believe that there is evidence that puts at issue circumstances that have never before been dealt with by the Federal Circuit.

The documentary evidence is going to show a pattern of knowledge and a pattern of conduct that highlights the dichotomy in the law between willfulness notice and actual notice for damages that has not yet been addressed. So we believe this is actually an open issue before the Federal Circuit. And we believe that that should be left for the jury to decide by the end of the day.

If this had been something for summary judgment, they should have raised it then. There is plenty of evidence before this jury upon which a jury can find that we are entitled to damages going back prior to filing the lawsuit.

THE COURT: Your reply?

MR. COYNE: Your Honor, at the end of the day, the only two facts that matter was these were never marked, the products were never marked. That is undisputed. And

there has been no notice letter to LG of any kind. They are relying on other types of things, which Amstead says is irrelevant. What matters is whether they gave us actual notice of the infringement, namely, a product is on the market, they accused it of infringement. It never happened, and there is no dispute that it never happened.

THE COURT: Well, it may or may not be as open and shut as you suggest. There will be another opportunity, it seems to me, prior to the submission of the case to the jury, to raise this. In anticipation of that, counsel might want to watch how the record develops, if you are inclined, if you have the time, prepare additional submissions, written submissions, for my consideration at the JMOL juncture, so that if I feel able and am inclined to rule and don't reserve on it, do so; in that way, avoid any possibility of confusing the jury, though our juries do wrestle with oftentimes very complicated matters.

MR. PARTRIDGE: Your Honor, I would just add, we are also cognizant of doing this in a way that we don't create error with respect to damages in terms of how the verdict form is submitted and the like. And as we go forward during the course of the trial, we don't want the case to come back, and we will be cognizant of the need to address it in that manner.

THE COURT: That is good to note. Frankly, I

feel that I will be in a better position, after having heard the evidence, at least to the extent that I have heard it from the defendant, counter- -- what is your position?

MR. PARTRIDGE: We are the counterclaim plaintiffs. We are counter-plaintiffs, I guess.

THE COURT: -- Whirlpool's position, evidentiary position has, at least in terms of your case-in-chief, been made manifest.

We will do it that way.

I am going to deny the motion.

MR. COYNE: Thank you, Your Honor.

THE COURT: So plaintiffs', LG's No. 2 I think is related to Whirlpool's No. 2. Is that correct?

MR. PARTRIDGE: There is a relationship, Your Honor.

THE COURT: I think there is a relationship, so we might discuss them together, it seemed to me, after I read the papers. Let's see.

So LG, in its motion docketed at 292, has filed a motion in limine to Preclude Whirlpool From Offering Collateral Evidence of Alleged Bad Acts That Are Unrelated to the Issues in This Case.

I think these alleged bad acts have to do with claims that I believe I recall Whirlpool asserts have been dismissed from the case, unfair competition and false

advertising claims. That's why I thought there was a relation.

MR. COYNE: No, Your Honor. If I may.

THE COURT: Sure.

MR. COYNE: The concern that we have is basically something that happened at the ITC trial a year ago, which didn't involve any of those issues, either. And Whirlpool then proceeded to try to move into evidence at the ITC, for example, a consent order against LG Display, which is not a party to this case. It is an affiliated company, but business operations have nothing to do with the operations of these companies that are the plaintiffs and counter-defendants here.

There was a situation in Australia where there was an agreement with the Australian Government on some refrigeration products. There have been dumping duties applied in Europe.

These are all very tangential and unrelated matters. For example, there is an alleged price-fixing conspiracy with LG Display. There is this alleged illegal contributions to a Korean politician by an LG employee.

THE COURT: When I said related, I am reading, I believe, from -- this is where I came up with this notion of relation. Counsel, if you would look at Whirlpool's response, in Paragraph I, at Page 2, where it says,

"However, to the extent that the Court does not grant Whirlpool's motion," I think they are talking about Motion No. 2, their Motion in Limine No. 2.

I am not saying it was LG who called out a relationship, but somebody did, it was Whirlpool in this case. You see none.

MR. COYNE: Yes, Your Honor. I think they are calling out a relationship. I am not sure it exists. I think it's a little bit of misdirection. The focus of our motion was not the ITC case. There is a separate set of issues. That proceeding clearly has some relevance to this case, because it involved the same patent. Obviously, it is up to Your Honor whether or not you are going to permit this jury to hear about it. But there are reasons why we think certain factors should come in.

But these facts that we are relying on in In Limine No. 2 are completely different. These are things like this alleged price fixing -- I think there is a list on the first page of the motion, Your Honor. It's this alleged price fixing with the LCD display company. It is the anti-dumping duties being applied in Europe. It is these campaign contributions, the agreement with the Australian LG entity, which again is not a party to this case, with the Australian Government, allegations that LG employees broke into Whirlpool's space at a trade show and took unauthorized

photos.

None of these facts relate to any of the issues on this patent infringement case. They are all highly prejudicial. And that's what we are asking to be excluded. I appreciate Whirlpool is trying to make the relationship. Quite frankly, the focus of this motion is not the ITC. We would like to treat that as a separate matter.

There is another issue that I think is also related, Your Honor, with respect to our misuse claim. We had argued that Whirlpool has brought serial litigation against us that has been unsuccessful and we think, frankly, not well founded. That is not the focus of this motion. I think there are other issues of relevance on each of those other matters that we will need to address separately.

What we are really talking about here is just these purely unrelated bad acts. You have an affiliate that was allegedly price fixing. An employee paid illegal campaign contributions. You broke into our booth and took pictures, when, frankly, everybody has taken pictures of everybody's product at all these trade shows.

The focus of this is that is unduly prejudicial. It is not relevant at all to this case. It is attempting to try LG's character, in fact, a different LG entity's character on this, rather than the issues of patent infringement.

THE COURT: LG responds that they have no intention of doing that which you suggest they want to do.

MR. COYNE: No, Your Honor. I actually am the one who adduced the testimony they are complaining of in their opposition in the ITC case. I don't intend to adduce that testimony in this Court.

If I do, frankly, I think no matter what Your Honor's in limine ruling, it is only a tentative ruling. If I open the door to something like that, I fully expect that Your Honor is going to let them respond in appropriate fashion. But I have no intention of getting up there and saying, We are great, we are wonderful, we are self-righteous, we are perfect. If I did that, sure, I would freely agree I am opening the door, and you would be well within your rights, Your Honor, to let them have at me.

But this is an in limine on things that are totally irrelevant. If that is the issue, there is no relevance at this point to any of these other things except to try to trash our reputation on unrelated matters. That is why we are moving to exclude it.

MR. PARTRIDGE: Your Honor, a little background first -- maybe even before I do the background...

I would note, to simplify this thing a little bit, that with respect to the price-fixing issue addressed in the first page of their motion in the alleged illegal

campaign contribution, we are not going to attempt to introduce evidence with respect to those two categories. So with respect to those two categories, it's my representation that we won't introduce that evidence, and it moots that part of the motion.

With respect to the rest of the motion, I would like to address the relationship that does, in fact, exist, between their motion in limine and what is at issue in the case and why the motion is improper.

I would note that the fifth of the five things that they identify in their motion concerns unauthorized photos taken at trade shows. So it's not just all governmental actions. That brings me to my first point.

The motion addresses two categories of evidence. The first category concerns government actions. And I have removed the first two of the four government actions that they point out in their motion.

THE COURT: That's price fixing and?

MR. PARTRIDGE: And the illegal campaign contribution.

The second category of evidence that is addressed by their motion is the improper activity at trade shows involving refrigerators and washing machines. These two categories of evidence relate to two sets of legal issues that are still in the case. Except the fact that we

have finally disposed of the Lanham Act claim, the question becomes what's still in this case as to which this evidence might relate.

Here is what is still in the case: first of all, affirmative claims or causes still asserted by LG, and second of all, affirmative claims or causes still asserted by Whirlpool. With respect to the first of those two, affirmative causes asserted by LG, there are two, an unclean hands defense, in which they claim Whirlpool's Honest Energy Program is inequitable. They have that claim in the case as a defense.

The second claim, affirmative claim that they have is the one that Mr. Coyne mentioned, patent misuse. As to patent misuse -- and I am using the characterizations of these defenses from their trial brief. If we were to go into their contentions, it gets far more complicated than even this. But let's focus on what they said in their trial brief.

As to patent misuse, they say the misuse occurred because of Whirlpool's use of serial litigation. And the serial litigation that they have in mind involves not just refrigerators but washing machines. They are throwing in the kitchen sink, Your Honor.

So those are their affirmative causes of action that are still in the case.

With respect to Whirlpool's affirmative claims still in the case, we assert copying by LG which relates to both our willfulness claim and our defense of their invalidity claim. And there is, and you can readily see it with respect to the trade shows, a relationship between our assertion of willfulness and copying to the trade show activity.

As to both sets of evidence, and these causes of action, I think LG has already opened the door.

First, as to LG's affirmative claims, here is the real confusion I have, and maybe they can address this and solve a big part of the problem. Looking at their pretrial submissions, I can't tell whether they think that the unclean hands and patent misuse case is going to the Bench or to the jury.

Page 14 of their pretrial brief says that these issues -- and I will just quote it, Your Honor, I am not going to read much of it. I will give you a couple of quotes from their brief and tell you where it is. Page 14 of their brief, they say, "Both of these defenses and inequitable conduct," which still remains in the case with respect to one of our remaining three patents, "require an equitable determination by the Court."

Then on Page 15 of their brief they say, "The Court can deal most efficiently with these equitable issues,

freeing additional time for issues that must be resolved by the jury."

Then they submit in the pretrial submission in exhibit J-1 their proposed findings and conclusions of law for a Bench trial, which include these issues.

So on the one hand, it looks like this is all a Bench trial. And if this is all a Bench trial with respect to LG's affirmative causes of action and the exhibits that relate to those, we can deal with those later, as long as they don't try to put any of that evidence before the jury.

With respect to our causes of action, it's a little more complicated. Inconsistent with this Bench trial notion in their papers is the fact that when you look at their proposed jury instructions, they include inequitable conduct, patent misuse, unclean hands. And you look at their verdict form, they include them. If you look at their statement of contested issues, they include these defenses.

So, which is it? Is this a Bench trial or a jury trial? If it's a Bench trial, our situation is more easily solved with respect to many of these documents.

Now, if it is a jury trial --

THE COURT: Should we talk about that first issue?

MR. PARTRIDGE: Get an answer to that question. Yes, Your Honor.

MR. COYNE: I would be happy to talk about it, Your Honor.

Your Honor, there should be no confusion. Mr. Partridge just rattled off three places in our papers where we said very clearly and unequivocally that it is an issue ultimately for Your Honor to decide and not for the jury to decide.

In opposition to the In Limine Motion No. 2 where they raised this point, their In Limine Motion No. 2, we said at Page 5, "The two equitable defenses of unclean hands and patent misuse will be heard by the Court and not the jury."

I don't know how to be any more clear than that.

The reason that we left those jury instructions in is because we have a deadline to present jury instructions. If the Court decides in terms of management of the case to ask for an advisory verdict on any of the underlying facts from the jury or an advisory verdict on the ultimate question from the jury, we wanted to have that in so we aren't being precluded from saying later, Well, you can't get an advisory verdict, you never put your instructions in.

So we have made, at least by my count, three unequivocal statements that Mr. Partridge rattled off. The one unequivocal statement here, that is in the jury

instructions simply to reserve the point in the event that Your Honor decides that what makes the most sense is to submit some or all of these for an advisory verdict. It is not an attempt to say these issues are going to be tried by the jury. We have no intention of trying to try these issues to the jury. But some of the underlying facts are going to show up in the patent infringement case. And I don't know at this point, it's hard for me to see at this point the way the evidence is going to look, and I may come back to Your Honor at the end of the case.

THE COURT: Those objections can be dealt in realtime.

MR. COYNE: Absolutely.

THE COURT: Those issues.

Counsel.

MR. PARTRIDGE: The problem I had with the unequivocal statement is the use of the word "ultimately" in describing it. What I don't want to have happen is to have counsel try to put before the jury this evidence of patent misuse and serial litigation and the inequitable conduct issues to taint the jury from our point of view with respect to issues that the jury is going to be asked to rule upon.

THE COURT: Would it make sense, Mr. Partridge, counsel, from both of your perspectives, for the Court to entertain as fact-finder and arbiter of the law those

matters that we know the Federal Circuit has entrusted to the Court and not use -- I have done it all three ways -- not use an advisory jury on those matters?

MR. COYNE: As a former appellate clerk, I think it makes an easier record if the Court deals with them.

But there are some facts that are going to come in on both sides. I will give you one example. This is not all of them.

But, for example, one of the things that Whirlpool relies on very heavily in its expert reports is its expert relies on a statement in one of our engineering reports summarizing a project where we conclude we have designed around the technology. And there is a statement in it that says, Nonetheless, we expect Whirlpool is going to sue us anyway.

They rely on that saying, aha, you knew you failed to design around because Whirlpool is going to sue you anyway. No. We knew Whirlpool was going to sue us anyway because they have already done it five times.

That is one of these facts that the jury is going to be exposed to when they introduce it.

THE COURT: The jury may or may not be exposed to it. Again, this gets back to the Court's ability to react as we go through the evidence.

MR. COYNE: Yes, Your Honor.

THE COURT: For purposes of managing the case and these motions, these two motions, my question is, is it the preference of the parties to bifurcate those issues out or separate those issues out that the Court can deal with, those equitable issues, those issues of equity, and others that the circuit has given District Judges discretion to deal with in a Bench context, and do that?

MR. COYNE: Your Honor, I am fine with that.

MR. PARTRIDGE: We are as well, Your Honor. I would say that these issues, I think, can be dealt with in realtime. I would note the example counsel gave, which would be part of our realtime discussion, is that the document he references predates the washing machine case and any of these other cases anyway. So it is not possible for a witness to say the reason they said that was because of other litigation.

That is something we can deal with in realtime.

I think if we have a separate Bench trial on these issues, it solves a lot of these problems.

THE COURT: For purposes of your planning on how you want to raise these issues and the best utilization of the jury's time, those matters that can be anticipated should be teed up so that we can meet about them in the morning or at the end of the day, the day before they become ripe for consideration.

To the extent that something happens that you didn't anticipate, that's what trials are for and that's what judges are for. Supposedly, we are able, I think I am able to react in realtime.

MR. COYNE: Your Honor, I think these issues are known to both of us well enough that we can probably take five minutes before we bring the jury in and raise it with Your Honor.

THE COURT: It will probably be more than five minutes. On those days we will meet at 8:30 and give ourselves a half an hour before the 9:00 opening of court.

I would think that it would be prudent for you to enter a stipulation as to the process we have just agreed upon and what issues are going to be addressed, so that there is no question about what we have done here. And I will execute a stipulation.

My question for you is, now, this resolution, how will it impact the trial time that we need with the jury?

MR. PARTRIDGE: Before you get there, Your Honor, if I may. This doesn't complete the resolution of the motion.

THE COURT: Okay.

MR. PARTRIDGE: There are really two caveats to all of that.

THE COURT: We are with your motion now?

MR. PARTRIDGE: No, no. With respect to his motion, with respect to LG's motion.

This, I think, resolves the issue as to the first four items on Page 1 of their motion. I have already indicated I am not going to pursue the first two items. The third and fourth items, this resolves the issue as to those items. That brings us to the fifth item, which concerns unauthorized photos at trade shows.

I said there were two caveats. The second is if they open the door by asserting the reputation and good will, et cetera, of LG -- which is what they did in the ITC, where they submitted witness statements that talked about LG being an honorable company with righteous management, and it went on and on, and that was the reason these documents came up as an issue in the ITC proceeding.

I understand from Mr. Coyne's explanation of his position for purposes of this trial that he doesn't intend to do that sort of thing, and if he does he acknowledges that he has opened the door to some of these documents coming in.

So apart from that, the question remains, as to Whirlpool's affirmative causes of action in this case, what's the relevance of the trade show documentation.

We have a copying claim that relates to both

willfulness and invalidity. There are a number of instances in which photographs were taken at trade shows. There is a course of conduct with respect to that that's reflected in the deposition transcript of their corporate representative, Mr. Noh, N-o-h.

And I believe, Your Honor, with respect to the trade show issue, and our claim of willfulness, and copying, that these documents are relevant.

Now, they have evidentiary objections they would like to make with respect to those. They argue hearsay with respect to statements made by their corporate representative about investigations he conducted for purposes of being prepared for his deposition. They have other types of evidentiary objections they want to make. I would suggest that with respect to all of that, it's inappropriate for a motion in limine, but very much appropriate for realtime consideration when we get to trial.

THE COURT: I believe I agree with that.

MR. COYNE: Your Honor, I can make this very easy. We withdraw the request on that specific set of facts because Whirlpool's files are filled with comments and e-mails about here's the photographs we took at the trade show at LG's booth. So it is fine. We are happy to deal with it in cross at trial, and the jury can hear that they are doing the same thing.

THE COURT: I will deny the motion as moot pursuant to the discussion we have just had.

As far as, Mr. Partridge, your No. 2.

MR. PARTRIDGE: The prior litigation motion, Ms. Woodall was going to address, Your Honor. But with the resolution that the issues of patent misuse are going to be Bench trial issues, I think it resolves it except for a point that Ms. Woodall apparently would like to make.

MS. WOODALL: Yes, Your Honor. It resolves the majority of that motion in limine.

One part that has not yet been addressed, though, is LG's proposed use and introduction of the decisions of the Administrative Law Judge in the ITC action.

THE COURT: Introduction of --

MS. WOODALL: Of Judge Essex's opinions in this case.

THE COURT: What place do those have, would those have in this trial?

MR. COYNE: Your Honor, if I might.

THE COURT: Yes.

MR. COYNE: They have a very direct place.

THE COURT: Let me tell you, Mr. Coyne, that I, generally speaking, frown upon jurors being told about official proceedings that occurred somewhere else, because that can be prejudicial.

MR. COYNE: Yes, Your Honor.

THE COURT: With that in mind...

MR. COYNE: It is also relevant in this situation.

THE COURT: It may be relevant, but the prejudice may outweigh the relevance.

Go ahead.

MR. COYNE: Okay, Your Honor.

THE COURT: The probative value.

MR. COYNE: Yes, Your Honor.

The relevance of it is that whether Whirlpool believes it or not, LG believed that it had designed around this technology by doing several things, including moving the ice maker to the door. We appreciate now that with Your Honor's claim construction that is not a valid distinction. But there were other distinctions to get around other of the claims of not moving the ice pieces through the bottom opening but rather taking out a side opening. And whether LG was right or wrong, LG believed in good faith, going forward with launching the product, that those were valid distinctions. Judge Essex has endorsed that.

So at least as of through Your Honor's claim construction ruling on August 4th and Judge Essex's initial determination, we had no input from a judicial body that our thinking on this issue was wrong. And at that point, when

we got Your Honor's ruling on August 4, and we got the ITC review petition ruling, changing some of his constructions, we promptly redesigned to make another difference.

So this goes decree to willfulness. We do not need to introduce to the jury the entirety of the ITC proceeding. All we are trying to use is that we may have been wrong, but we certainly weren't idiots about it or, more specifically, objectively reckless. We had at least an Administrative Law Judge who at least agreed with that construction. We appreciate that construction is inconsistent --

THE COURT: You can see -- and I will let counsel address this -- but you can see, can't you, Mr. Coyne, the possible influence that just those three words, an "Administrative Law Judge," might have on a lay jury?

MR. COYNE: Your Honor, I do. Here is the problem that I have got with this. Whirlpool has instantaneously, at every time the ITC has burped in this proceeding, filed a letter off to Your Honor saying, See, here is what the ITC is doing.

THE COURT: That may be. I can tell you, I haven't read those letters. That may be. That is not this jury.

MR. COYNE: Now that it may not turn out the way they want, they are running head long from it. I am sure if

the shoe were on the other foot we would be switching places. I am confident of that.

Is there a way? I believe there might be a way to at least show that that is evidence that we weren't objectively reckless, at least somebody else in a position to make a decision on an issue like that, that has some level of authority has confirmed our thinking. It is wrong. I concede under the Court's claim construction that thinking is incorrect, at least as far as the location of the ice maker. However, it wasn't objectively reckless. And we promptly changed as soon as we found Your Honor's ruling and the ITC review ruling that changed that construction.

THE COURT: Counsel may want to argue, that is too little, too late. But we will see. Go ahead.

MS. WOODALL: Your Honor, I think you have hit the nail on the head with the Rule 403 problem here. We are not dealing with just one opinion by Judge Essex. At this point we have two opinions by Judge Essex. They are internally inconsistent. They flip-flop on a number of issues. It would be our position --

THE COURT: I hate to see other judges getting trashed like that, because I know what you guys do to me in the Federal Circuit.

(Laughter.)

THE COURT: It's okay. Go ahead.

MS. WOODARD: For the point of jury confusion, we would have a mini-trial, Your Honor, on trying to explain to the jury the flip-flopping, why it wasn't even reasonable for LG to have relied upon these opinions.

THE COURT: You have appealed those rulings.

MS. WOODARD: Yes. In fact, the ITC is fully reviewing that second decision again.

THE COURT: I don't mean to cut you off, but that is part of the problem. These aren't even final determinations by the ITC.

I am going to end this discussion.

I am going to find that the prejudice, potential prejudice outweighs the probative value of that offering.

If, counsel, you can agree, as you suggest, on another way that does not place the imprimatur of some official body on that evidence, I am willing to hear you. Or if you agree on it, I don't need to hear you.

MR. COYNE: Your Honor, we can certainly do this -- the only thing that I would seek to use out of this is that it doesn't have to be that it was an Administrative Law Judge. What we are looking for is that LG did, in fact, take heart when it got that initial determination.

THE COURT: How do you want to couch the evidentiary presentation? What do you want to say to the jury?

MR. COYNE: Your Honor, the only thing I can think of is that, have it be some unidentified administrative agency made a determination and leave it at that and leave it vague.

THE COURT: That is not very vague. That's an administrative agency, an official body. It's one of the problems that, depending upon which hat you guys are wearing on any given day, that you have with the presumption, the PTO issues, it's presumed.

That doesn't seem to me to address the problem, quite frankly, Mr. Coyne. If you can think of another way that you want to raise with counsel, or if counsel doesn't agree with you, later raise with me, I will entertain that.

MR. COYNE: We would like time to do that, Your Honor.

THE COURT: You haven't gone far enough for me.

MR. COYNE: I understand, Your Honor.

THE COURT: To the extent that Whirlpool's Motion No. 2 was not otherwise resolved by our prior conversation, and therefore those portions of the motion moot, I will grant that portion of Whirlpool's Motion No. 2 that seeks to exclude reference to administrative law bodies or administrative bodies and ALJs. I think the point is made.

MS. WOODALL: Thank you, Your Honor.

THE COURT: I will say granted in part and moot.

So No. 3, and the final LG motion, Mr. Coyne, are you going to handle this at one?

MR. COYNE: Yes, Your Honor.

THE COURT: Let me tell you the note I made to myself. I said, "Deny. This is a weight issue."

Why do you want to tell me I am wrong about that?

MR. COYNE: Your Honor, with that in mind, if I may limit my request, then, to two very specific factors. They are two factors that Whirlpool has not responded to.

I can understand Your Honor's position, and we accept that with respect to the other issues, except for these two.

On Page 4, we identified two specific things that are going on in some of the expert testimony.

THE COURT: Page 4 of your motion?

MR. COYNE: Yes, Your Honor. I don't have the docket number, Your Honor, I am sorry.

THE COURT: I have got it. Go ahead.

MR. COYNE: It is the top of Page 4. There are two paragraphs that begin "Second" and "Third."
what Dr. Calligury, their technical expert does, is he goes through some of the prior art, and he proportions and measures the features of the drawings, and says, oh, well,

that prior art isn't effective or it wouldn't work based on my proportioning and measuring of dimensions off the drawings.

Your Honor, I had the displeasure of being on the receiving end of that issue in this Nystrom case and was reversed for doing exactly the same thing. We got a judgment of invalidity based on that type analysis. And the Federal Circuit said very distinctly, you cannot measure or proportion patent drawings, they are not scale drawings. They are impressionistic. They are illustrations. They show features, not proportions and dimensions of things relative to each other. That is exactly what Dr. Calligury is trying to do in distinguishing some of this art.

This is an issue that I think does threaten, at least we feel it does threaten some measure of jury confusion and disruption of the trial. If he starts doing that, I am going to be objecting. It looks like I am hiding something. It's going to get really confusing very fast. And we would like Dr. Calligury not to be doing something that the Federal Circuit has said he can't do anyway.

Secondly, with respect to the paragraph that starts "Third, alleging copying," he does make this allegation of copying, and we will deal with that on the merits. But one of the ways he says we are copying is the two ice storage bins are both plastic bins, they are both

clear plastic and white plastic and they both use blue ink. So this is kind of a trade dress argument he is making. And we call it an ice bin. So he uses the fact that they are both called ice bins for the fact that we are copying. Of course. They are ice bins. All ice bins look like that.

It is very misleading to the jury to start making that kind of a trade dress type of argument. First, he doesn't have any expertise in trade dress. Second, there is no trade dress protection for this ice bin, and even if there were, it is not in this case.

He has got plenty of evidence that he can rely on from the technical documents without trying to confuse or mislead the jury by making this kind of a trade dress argument that because both bins are white and clear plastic and have blue ink on them and say ice bin on them, we must have copied their ice bin. This is all very descriptive, plainly accessible stuff to everyone. There is no proprietary rights, and he is certainly not the right one to be talking about it.

Thank you, Your Honor.

THE COURT: Ms. Woodall. So it is two very specific and narrow points.

MS. WOODALL: Yes, Your Honor.

Your Honor, with respect to the first, Dr. Calligury did refer to dimensions and proportions with

respect to some drawings, but his analysis was not so limited as counsel for LG has posited it.

He also considered the disclosures, the descriptions, all of those things he gathered for his dimensions. His analysis was not limited to this drawing shows this, therefore the proportions would not have disclosed X. He looks at references in toto. He looks at descriptions, specifications, uses all of those things --

THE COURT: But the scale issue, Ms. Woodall, that Mr. Coyne addresses, and the spectacle that he envisions of having to object when you offer that, attempt to offer Dr. Calligury to the jury for making a demonstrative or something in realtime. His points about scale are rather well taken by me.

Go ahead.

MS. WOODALL: Your Honor, we believe that those can be addressed in realtime. We are not proposing to have them get up and --

THE COURT: I think his point can be addressed right now.

MS. WOODALL: Yes. Your Honor, I think that we would be able to limit the presentation of his material so that he is not drawing specific proportional, to-scale demonstratives for the jury.

MR. PARTRIDGE: Here is a compromise that would

be acceptable I think to us, which is he won't do the two-scale presentation, but he ought to be able to express his impression from the drawings and everything else. And as Mr. Coyne stated the law, the witness' impression is okay. It's the actual measurements that are the problem.

We would be fine with that.

MR. COYNE: Your Honor, with all due respect, the Nystrom case and the progeny of this line, I can't remember the, Hockerson -- I can get the Court the cite. There are three or four cases that say this. It's not just the dimension. It's proportioning the drawing. That is exactly what he purports to do. He says, the slope that's shown in one of the references is not steep enough to drain the ice cubes out of the tray. Therefore, it's ineffective. It's inoperable.

THE COURT: So he is painting a word picture, essentially, that is equally as impermissible.

MR. COYNE: Yes. Based on the dimensionality and the proportioning. And those are the two things the Federal Circuit has now said three times you can't do.

MS. WOODALL: I believe he also looks at the descriptions of those references and puts those together.

THE COURT: I don't think Mr. Coyne has a difficulty with that.

MR. COYNE: No problem. If he wants to talk

about it's his impression based on the written description that it doesn't work, that's fine. I am happy to cross him on it. What I don't want to do is have him sitting there saying, Oh, sethee, slope of this is this and I am in a legal argument.

THE COURT: I think, Ms. Woodall, Mr. Coyne has the better position on the law on this with regard to impressions and actual attempts at scaling by way of some kind of demonstrative drawing.

MS. WOODALL: So that we understand Your Honor's position on this point, I think we would offer that Dr. Calligury could describe his understanding of the art based on the descriptions, specifications where they are applicable, and maybe use the drawing as a reference but without going so far as to say the proportions are this or the size is X.

THE COURT: Using a drawing he has created?

MS. WOODALL: No, but he would need --

THE COURT: Are we talking about a figure in a patent?

MS. WOODALL: A figure in a patent. Otherwise, he can't explain.

THE COURT: Absolutely.

You don't have any difficulty with that?

MR. COYNE: I don't have a problem with that.

The point is still going to be, though, when he says, looking at this it doesn't work. Fine, I don't have a problem with that. But when he says looking at this sit it doesn't work because the slope on the bin isn't strong enough, I have a problem with that.

MR. COYNE: Yes, Your Honor.

THE COURT: No, he cannot do that. I am trying to be clear, that's not permissible.

MR. COYNE: Thank you, Your Honor.

MS. WOODALL: That's all we will do, Your Honor.

THE COURT: Talk about the second point.

MS. WOODALL: The second point, Your Honor, this is not limited to just the coloring. There were actually notes and descriptive legends on those drawings.

I think that given Dr. Calligury's expertise in the area of refrigerator design and development, he should be able to speak to what the implications of those notes and highlighting and colorings are.

THE COURT: Let me ask you this: Given your opponent's assertions with regard to the, I guess this is a term of art, trade dress, two things I think he says, that these aren't proprietary to Whirlpool, and that this isn't the witness who would have the expertise to talk about them in the first place. What is your response? I think I have correctly --

MR. COYNE: Yes, sir.

MS. WOODALL: It is not just trade dress, Your Honor. It is that there are internal LG documents with notes and descriptions of component parts for a refrigerator that indicate copying of similar features --

THE COURT: Is it so generic, is this alleged copying of such a generic type that one might reasonably conclude you would have a difficult time concluding anything about whether it was copying or not?

MS. WOODALL: Actually, Your Honor, it's clear from the documents that they were specifically taking elements out of Whirlpool's patents and appropriating them into their own.

THE COURT: You are saying there are LG documents that connect, as we have heard a lot these days, the dots.

MS. WOODARD: Yes, Your Honor.

THE COURT: I thought we would never hear that again after 9/11, but...

MR. COYNE: Your Honor, if I might. What she is talking about is in some of the internal drawings there are some drawings that look like portions of them are taken frompatent drawings, which are public domain, of some Whirlpool patents during the development stage. That is not the subject of this motion. The subject of this motion is

Dr. Callurgy should not be standing up and saying, You infringe the patent because you are copying the patented features because your bin looks alike in terms of its form and configuration and it's got blue ink on it. That is the focus of this motion.

THE COURT: That is the very specific objection.

MS. WOODALL: Your Honor, Dr. Calligury has looked at a number of documents in collection, collectively, from LG. It's not just one document that would go to this issue of whether or not they have copied or you can infer copying. He is not going to stand up and say here is this one document that shows blues on an ice bin. Therefore, they copied. It is a chain of evidence that establishes copying. It is the selection of features out of your patent.

It is specific comments by their engineers about trying to catch up and taking this element and that element. And it is the progression of their development and their intent to design around that they failed to do. So they just copied.

This is just a piece of that evidence. He is not going to get up and say, this one document that shows blue on an ice bin shows copying. He is going to say, look at this and look at this and look at where they said take from here and look at where they said take from here, and

here's where they ended up, and all of this along the way shows copying.

It's out of context.

THE COURT: Let's get a response from Mr. Coyne.

MR. COYNE: Your Honor, we don't have any problem if they want to stick with the issues in the case. If there is technical drawings that show we were copying proprietary features, if it is not a proprietary feature, like these, if it's not something he should be talking about anyway, my fear is it's confusing to the jury, it's prejudicial, and then I am left fighting a trade dress case on cross-examination. It's not right.

We will talk about the technical drawings. That is not a problem. It's this particular set of facts.

MS. WOODALL: Your Honor we are happy to have Dr. Calligury refrain from mentioning the color.

MR. COYNE: I am sorry?

THE COURT: Refrain from mentioning the color, Ms. Woodall indicates that Whirlpool is happy to have Dr. Calligury refrain from mentioning the color of the bin.

MR. COYNE: He does a whole analysis of, the top is clear, the bottom is white, it's got -- they are both called ice bins, it has blue ink. That's the package of stuff we are talking about. If they want to talk about the fact that some of the drawings --

THE COURT: Your point is that all of those features you have just mentioned are not proprietary --

MR. COYNE: There is no they are not proprietary. There is no exclusive rights on it. And he is not the guy to talk on it.

THE COURT: Mr. Partridge, your mouth was halfway open. But I will let Ms. Woodall handle this.

MR. PARTRIDGE: I will try to stay out of it, Your Honor.

MS. WOODALL: I think Mr. Coyne's point more or less highlights that this is a realtime issue for trial, because we are not prepared here to tell you exactly every little piece of evidence that Dr. Calligury is going to use on the stand.

We are not claiming that they copied trade dress. But it is very artificial to remove from the jury's consideration the overall look, feel of their icebin, their entire system that is alleged to infringe, and just pull that from consideration, and make this very hyper-technical, when they can't even derive what the completed design looked like and think about that for themselves and how it --

THE COURT: Except as to this, I will call it this third -- or second issue, it's called third on Page 4, that we have been discussing, I will call it the trade dress issue for ease of reference, I think we have achieved

agreement on what Mr. Coyne identified as the first issue at the top of Page 4. That is moot.

I am going to reserve judgment for trial.

Why don't I do this for ease of the record.

I don't think it matters whether I grant or deny. I am going to deny without prejudice that part of the motion, understanding that it's likely we are going to hear about this again, or maybe not, in realtime.

For ease of everyone's recording, I will deny the motion without prejudice.

Let's go to, we have resolved Whirlpool's No. 2. Let's go to Whirlpool's No. 1, Docket Item 288. Let me see what I have here. This is a discovery dispute. Okay. This is styled Whirlpool's Motion in Limine 1 to Exclude Untimely Evidence Relied Upon By LG. I made a few notes.

One of the principal complaints in response that LG has raised is that Whirlpool in LG's view does not identify which claims and defenses these allegedly late produced documents apply and has no idea additionally what some witnesses would say when deposed.

Who is going to handle this?

MR. PARTRIDGE: Mr. Morico, Your Honor.

MR. MORICO: Yes, Your Honor, good morning. Good to see you again.

THE COURT: Good morning. Good to see you

again.

MR. MORICO: There are two categories of information.

THE COURT: Also prejudice, LG contends, you haven't demonstrated what the prejudice would be. Go ahead.

MR. MORICO: Your Honor, first off, as the Court has correctly identified, there are two categories of information. One is documents that were produced late, after the close of fact discovery, after even expert discovery. We have had something on the order of 20 productions since the close of fact discovery. And a large number of those documents, a large percentage of those documents, have appeared on their trial exhibit list.

The other category of information relates to witness testimony in connection with witnesses who were for the first time identified only on their preliminary trial witness list.

THE COURT: Was this the one with two witnesses who were named?

MR. MORINO: Correct, Your Honor, it is.

Let me address the document issue first.

First off, when we got LG's initial exhibit list, it had 2400 exhibits on it. Of those, approximately 500 of those documents were produced after fact discovery had closed. A handful, maybe ten percent of that 500, had

been produced on the last day of discovery, although we didn't actually receive it until the following Monday, long after depositions in the case had already taken place, long after very expensive depositions in Korea of some ten witnesses, most of their technical witnesses, had taken place.

So we were denied the opportunity to depose their witnesses in connection with that large collection of documents.

THE COURT: Was this John Taylor and Timothy McGrady?

MR. MORINO: No. They were not part of those depositions, Your Honor. They were the technical witnesses, not these corporate witnesses.

Now, since the preliminary exchange of exhibit lists, LG has reduced its exhibits considerably, from 2400 down to about 770, Your Honor. And admittedly, a number, quite a few of those 500 exhibits no longer appear on their exhibit list. Some of them dealt with the false advertising claim.

However, Your Honor, there is still quite a few exhibits. There are approximately 43 exhibits out of the 770 which weren't produced until after the close of discovery, 30 of them were produced on the last day, again, we hadn't received them until the Monday after, long after

we had time to take depositions. And then there is another 74.

So approximately -- another 74, excuse me, Your Honor, that have no Bates numbers at all, that have been produced over the course of the last several months, one of which is a redesign video, which is yet another redesign after the redesign they had provided us with in September after the close of discovery when we had taken a deposition.

We understand, obviously, that these are documents that counsel and LG is going to rely on at trial. They are on their exhibit list. And it's not just one or two categories of information where we could say, well, we could bring back one witness and depose this one witness and it will dispense with all of these documents.

These documents cut across a wide range of parts of the case. They involve LG design documents, LG redesign documents, technical schematics, which we have been after them for and had been after them for from the beginning of the case, as well as prior art materials. These are prior art materials that include brochures and other information with respect to refrigerators that date back 20 years ago. And they are refrigerators that only LG has had possession of. These are documents that have all appeared after the fact. For us to be able to find out what evidence they are going to provide to the jury in connection with these

documents, we would have to depose a whole host of witnesses all over again.

That's your prejudice, Your Honor, with respect to the documents.

With respect to the witnesses, as I mentioned, the first time these witnesses appeared on their trial exhibit list --

THE COURT: Now you are talking about Taylor and McGrady.

MR. MORINO: Taylor and McGrady.

The first time we had any notice of them being a witness that might appear in this case was on November 3rd, when when he got their trial exhibit list. They were never on their initial disclosures. Their initial disclosures were supplemented twice, most recently this summer, in July, at or around the time the depositions were taking place. During those two supplements to the initial disclosures, neither witness was identified on the initial disclosures. And we have also propounded interrogatories that date back to 2008 that standard interrogatories asked in connection with all of the different issues the interrogatories touched on, which were most of the issues in the case, we asked for identification of witnesses with relevant knowledge. And neither one of those witnesses appeared on their responses to interrogatories, which were supplemented, Your Honor,

nine times, most recently October 23rd, a week before we got their preliminary trial exhibit list.

So they have had more than ample opportunity to provide us with the information about these witnesses. And they have been sprung upon us only for the first time.

Their response to that, Your Honor, has been that, well, those names appear in a hundred or so documents. Your Honor, we have had 67,323 documents produced by LG in this case. Over 1.4 million pages of documents.

How is that appropriate notice that these are witnesses that have -- that we could have identified as having relevant information? There are hundreds, if not thousands of witnesses identified in their millions of pages of documents.

I think it's just unfair for them to be able to rely on these witnesses at this late juncture of the case, Your Honor.

THE COURT: LG? Mr. Coyne. Let me address one issue first that's raised in your responsive brief. At least I see it here at Page 2, at the bottom, "Moreover, the parties have previously agreed that if an individual appears on the witness list and was not previously deposed, the other side would be given a chance to depose that individual before trial. The agreement therefore removes any potential prejudice."

Further down, in the paragraph beginning with "Whirlpool simply cannot identify," midway through the sentence, "...LG promptly produced them in compliance with its duty to supplement " -- that is a separate issue -- "and the parties agreements to produce certain documents after the close of fact discovery."

The parties don't get to do that in district courts, certainly not in this one. There is an order, there is a Court order that I could reasonably conclude the parties, if that was the parties' agreement, that you are in contempt of the Court's order. This case, this Judge, Actively, this Court, as you all know, all three of its judges actively manage their cases.

That is not the practice in the District of Delaware.

So to write that in a brief and to offer it as support for conduct that would seem to be outside of this Court's orders doesn't fly very well. That duck sort of doesn't quack here.

Go ahead, Mr. Coyne.

MR. COYNE: Thank you, Your Honor.

Well, Your Honor, I apologize for any offense I have given the Court.

THE COURT: I am not offended. It's been 11 years, Mr. Coyne. I have long since stopped taking these

things personally.

MR. COYNE: Your Honor, this is somewhat of an ironic motion, because, as Mr. Morino has pointed out, there was a volume of material that was produced late. The volume of material that was produced late by Whirlpool was even more substantial, and therein lies the problem.

I think it would be exquisitely unfair to exclude LG from using all of that when Whirlpool is doing precisely the same thing. I do not have numbers. We did not file an in limine motion on those grounds. But there are numerous exhibits on Whirlpool's exhibit list --

THE COURT: Address for me this. Why don't he we talk about -- what concerns me most is when I hear a party raise the red flag of prejudice, because what we strive to do is afford the parties an equal and level playing field. If one party has behaved in a way to the detriment of another party, within the rules, then I need to try to fashion relief that can address that.

MR. COYNE: Let me address that very specifically, then, Your Honor.

I know Mr. Morino rattled off five different categories. But in my mind, there is really three. There is our original design documents. Namely, the designs that were accused of infringement throughout the case. Number two, there would be the redesign documents, namely, the

redesign that we began in August, after we received Your Honor's claim construction order, which was obviously at variance as to what we had argued and the client had understood, as well as we had then begun at that point doing a redesign of the ice storage bin to avoid the loss of that one distinction that we had been relying on.

The third category is prior art references. I would like to address all three very briefly but separately because there are different factors that relate to each of the three.

THE COURT: As the issue of prejudice is concerned.

MR. COYNE: It goes directly to prejudice.

With respect to the LG-designed documents, almost all of those were produced -- most of them were produced during the discovery period. But we had continuing discussions during the end towards the end of the discovery period where Whirlpool was continuing to ask for certain things. For example, there was an issue about whether they wanted specifications for the dies that were used to cast the liners, these types of things. We gathered those as quickly as we could and we produced those pursuant to to Mr. Murico's request for that additional information. Yes, we produced it after August 7. But we produced it as timely as we could get it together and in response to their direct

request for it.

So that's not prejudicial. And it was done very promptly. That was typically done during August, for almost all of those records. And, yes, some of those are on our exhibit list.

Secondly, the redesign documents, we did not even begin the redesign effort, the company didn't make a decision to do the redesign until after we received Your Honor's claim construction order, which, as I said, removed one of the distinctions that we were relying on, and the ITC's review order, which removed one of the distinctions we were relying on, and we then promptly made a corporate decision whether or not to proceed with the redesign.

That decision was made on August 20th. And we proceeded promptly, I informed Mr. Murino, I think within it was within a week, and we offered to him, we will produce you any additional documents relating to this redesign. We will make a witness available. And we did all of that.

We produced the technical information as it existed at that time. It had gone through the design concept stage. We immediately gave them those records. We made a witness available. I think the witness testified -- I can't remember, it was about two or three after that mid-to late-August date. So it was late August to early September sometime. I don't remember the exact date.

We have continued to supplement that production because the project has now moved from the conceptual design at our laboratory in Barone, in Seoul, to the plant at Chawon, where it is now being done, it is being made into something can be mass-produced. So there is quality assurance, there is testing, there is prototyping. And we have continued to feed them those documents as they are generated in batches. So, yes, we have made several productions on that ground starting immediately after the redesign effort began, and we plan to continue to supplement that production as we go through trial, because that is the redesign that we have implemented and we are implementing for the product.

The third is the prior art material.

So with respect to both of those, Your Honor, in terms of prejudice, yes, those are fact discovery. Yes, we produced them after the close of fact discovery, for which I apologize. But in terms of the prejudice to Whirlpool, there is none. Some of it is things they asked for, including information on the redesign after we told them there was one. And we have been very forthcoming in providing that information to them.

The third category --

THE COURT: Are you saying two things there? One, some of these prior art references pertain to redesign

efforts?

MR. COYNE: I am sorry. If I have misspoke if I said prior art. I am talking about the first two categories. The design documents for the older designs is the first category. The second is the redesign of the ice storage bin.

THE COURT: I got that.

Say what you just said again about the prior art, the late production of the prior art.

MR. COYNE: I was getting ready to address that third topic. I am sorry if I misspoke.

The prior art is really a separate category. We did produce a number of references that our experts were relying on during the expert discovery period. And the Court has a specific deadline for expert discovery.

THE COURT: Yes.

MR. COYNE: What he is complaining about now is, we have produced to him expert discovery during the expert discovery period.

THE COURT: And this has to do with prior art.

MR. COYNE: Yes, Your Honor. There are a number of patents. We have done searches for patents relating to automatic ice makers, for various other features that were in commercially sold products.

The brochures that he is referring to, we were

able to secure finally better copies of some of the product manuals for old GE products, which we have been looking for.

THE COURT: Nevertheless, those were timely productions.

MR. COYNE: Absolutely, Your Honor. Our view is that those prior art materials for the expert reports were absolutely timely produced. They are within the expert discovery period. And we produced them when we got a hold of them.

We had been looking for some of these materials for months, namely, better brochures of products that were sold overseas, better brochures of GE models that haven't existed for 20 years. It took took quite some doing to find some of these catalogs and service manuals and user manuals. And we have produced them during the expert discovery period, as we were supposed to. So there is no prejudice. In fact, all of that was done timely.

We do have a duty to supplement, Your Honor. I appreciate the Court's deadlines. We do take it seriously.

THE COURT: It uses the word timely.

What I would like you to do for a moment is just go back to the original design docs.

You have indicated, I believe, that most of all of those were produced within the period.

MR. COYNE: We produced hundreds of thousands of

pages worth of original design documents during the discovery period. There is no issue about that.

What had happened is, Mr. Morico, particularly with respect to these tool die liners, they are very detailed engineering drawings that show the steel tools. They are basically metal castings. I don't know if you remember, you remember from your childhood, Your Honor, there was a toy called the Vaccuform that you used to heat up a little metal plate and put a piece of plastic over it and made a little plastic toy. It's the same kind of thing.

What we use is these metal dies. He has asked us for liners. The liners go into the refrigerators. We don't keep a stock of liners. So he asked us ultimately at the end of the discovery period for these tool die specifications so they could get the dimensions of the plaques on the liners. And we found those and produced those. But it's a very minor number of documents, very small number of documents. And it was things that were done in specific response to requests as we were trying to finish up the discovery.

There is no prejudice from that. We gave them -- the impression that was created by Mr. Murino is that we have withheld vast amounts of technical documentation. It's just not true. We gave it in a timely fashion.

THE COURT: You would reject his assertion, Mr. Murino's assertion, that there would be a need for additional depositions.

MR. COYNE: Yes, Your Honor.

There is an issue that happened last night.

THE COURT: Before you get into that, let me get you to talk about McGrady and Taylor.

MR. COYNE: Your Honor, at this point, yes, McGrady and Taylor, Taylor is a corporate representative witness for LG. He is in the PR Department. What we were proposing to have him talk about is basically general corporate history. As far as I am aware, there was no specific interrogatory request asking for a witness on that issue.

We don't intend to have him get up and talk about anything other than that. We did timely identify him on the witness list.

THE COURT: This is McGrady.

MR. COYNE: No, this is John Taylor.

THE COURT: The general history of the corporation?

MR. COYNE: The general history of the corporation, activities in the U.S. It's general background information.

THE COURT: What about McGrady?

MR. COYNE: McGrady we had put on because of this issue on the energy efficiency claims.

THE COURT: I am going to let Taylor testify. If that is all he is going to talk about, I don't see that that is a problem. You can talk about it. Right now, that's my thinking on that.

MR. COYNE: We are prepared to withdraw McGrady at this point. You had dismissed the Lanham Act claim. That is the only thing he was going to talk about.

THE COURT: You only need talk about Taylor if you want.

Let me get you to address each of the points as designated or outlined by Mr. Coyne, that is the original design documents, the redesign documents and issues related to that and the prior art.

MR. MORICO: Yes, Your Honor.

With respect to the original design documents, our interrogatories and document requests back in November of 2008 requested those documents. It wasn't apparent until we started preparing for the depositions in June that a number of those documents were still missing.

THE COURT: How many documents are we talking about, of the original -- Mr. Coyne, as you have just heard, says they are really limited to these tool die liners.

MR. COYNE: There is about 20 tool die specs,

and each spec may have two or three sheets showing the tool in a different configuration. I don't want to misrepresent the number. My impression is it's about 60 or 70 pages that maybe comprise 15 to 20 exhibits on our exhibit list.

THE COURT: How many witnesses are we talking about that discussed these?

MR. COYNE: A witness to identify what these things are, and maybe the experts will talk about what the implications of that fact is.

THE COURT: Have the experts been deposed on these?

MR. COYNE: The experts have been deposed, not on the tool die specs. They have been deposed on the plaques that are made using those tool dies.

MR. MORICO: That is part of the problem, Your Honor. The specs came too late in order for the experts to fully consider those specifications and take them into account in their reports and ultimately their depositions.

THE COURT: Do you agree with Mr. Coyne's characterization as to the number of documents and the apparently limited area, focus of these documents?

MR. MORICO: I do agree, Your Honor, it is a discrete set of documents.

THE COURT: How long will it take you to get an expert? How much additional deposition time would you need?

MR. MORICO: We wouldn't know until we actually took the fact deposition of the fact witness who is familiar with their design of those documents to know what expert discovery may needed to be supplemented in connection with it. So it would be a fact deposition, potentially an expert report, and then expert deposition on top of that.

MR. COYNE: Your Honor, I am a little stunned by this request, because as we closed out this discovery, what we ended up doing was agreeing to one of the stipulations that we filed with Your Honor. Part of the concern and the reason they were asking for the tool die specs is so we didn't argue, well, this liner is different than the other liners. And what we agreed is that all of these models that are accused of infringement with these various part numbers, these model numbers, would be treated together for purposes of trial, so they don't have to put in and go through seriatim each particular design.

They can simply rely on the fact that we have given them an answer to Topic 53 that says here's a list of all the refrigerators, that you can treat any one of them as representative of the entire group.

My understanding is that's what resolved this issue back in August, when we were making this production.

We had already, at the time Mr. Morico and I had that discussion and reached that stipulation, I think it was

one of the ones that was filed on September 9 or that Your Honor signed on September 9, we had already had LG preparing all these things and shipping them over. It was a couple of days, and we finally got them after Mr. Morico and I had reached this resolution, and I produced them anyway because the client had already taken the effort to gather them.

There is just no prejudice. We resolved this issue.

MR. MORICO: What I would respond to that, Your Honor, then, is are do they need them on their exhibit list? If we have the stipulation in place, I don't see why he should need them. And therefore, we can remove them -- this issue should be removed from us.

MR. COYNE: I don't know what they are going to ask our witnesses about the configuration of our plaques, Your Honor. The patent says very specifically that the plaques have to have a certain dimension in some of the non-asserted claims, and then there is other claims that don't have those dimensions. There is a good possibility that we won't need them. But I don't want to be left with a situation where I do need to correct a witness' testimony or cross-examine them, and then they are arguing I can only use them for impeachment because it wasn't on my exhibit list. They aren't their documents. And the witness is just going to say, well, I never saw them before.

MR. MORICO: Therein would be the reason we would need this additional discovery.

THE COURT: In light of Mr. Coyne's response, why do you need a fact witness for an additional deposition?

MR. MORICO: Well, because, Your Honor, it's their engineers who are going to be familiar with these documents. These are the design documents that are used to actually make these plaques. We need to figure out what the schematics mean, what the documents show, and details about the design of those specifications. And their expert is not going to know that.

MR. COYNE: Your Honor, with all due respect, none of those dimensions that this witness is identifying, the depth of the plaques -- those are unasserted claims. I want them on there just so I am not met with an argument that there is something that I could use to clarify the record, and then I am left with only being able to use it for impeachment because I haven't put it on my exhibit list.

I don't know that we will necessarily use them. But there is no mystery here. He has already got what he needs.

THE COURT: As to this category of documents, I am going to deny your motion. Redesign, it seems to me if a redesign was done in response to this Court's ruling and further rulings, and it's just a timing thing, as opposed to

a party being dilatory.

MR. MORICO: There is more history behind that, Your Honor.

THE COURT: All right.

MR. MORICO: The design documents actually go back, those collection of design documents that were provided to us actually show dates as early as April of 2009, which, incidentally, coincides with the ITC determination, changing the claim construction from the ALJ, which is when that took place.

We had sought discovery in connection with redesigns during the summertime and asked about redesigns, and were blocked on the basis of privilege. It was only later when they decided to provide these redesigns that all of a sudden they came up and it was after the close of fact discovery, and it was much later.

And there has since been, since September of this year, when we actually took the deposition in connection with those documents that were produced late, there has since been another video that was provided to us in November of this past year, just a couple of months ago, that shows yet a different iteration of that redesign.

This has to stop at some point.

THE COURT: So these circumstances -- go ahead.

MR. MORICO: I am sorry, Your Honor. It is our

view that these should not be in the case.

THE COURT: Your position is as a result of this late production -- go ahead. Take a look at your note.

MR. MORICO: Here is the testimony, Your Honor. Mr. Noh, on August 27th, this was actually after the close of fact discovery:

"Has there be any redesign of LG's indoor ice storage component from 2008 through today?

"Answer: No."

This was a deposition that actually was agreed to be taken after the close of fact discovery, a month later and then only shortly thereafter do we end up getting these redesign documents.

THE COURT: When was that?

MR. MORICO: August 27, 2009, 20 days after the close of fact discovery.

THE COURT: Okay.

MR. COYNE: If I may put some clarity to that, Your Honor.

THE COURT: I am sure Mr. Morico thinks it's very clear. But go ahead.

MR. COYNE: First off, Mr. Noh is a sales corporate representative. He has no knowledge or involvement in the redesign efforts.

Prior to the August 27 date, I sent Mr. Morico a

letter, explaining that we had been working on this and did he want to take discovery on it.

This witness does not have knowledge of that subject. And I had informed them in August that we were looking at this.

Now, with respect to the earlier document, we have some thresholds to get across here. It can't just be a twin ankle in our eye. We are not entitled to a declaratory judgment just because we are thinking about something. I don't remember any of the documents being dated that early. But I am not going to represent to the Court that there weren't any.

Were we thinking about changing once we got the ITC's ruling? Sure, we were thinking about it. But in order to get jurisdiction for a DJ, we have got to make concrete steps. And we didn't even make the decision -- and he has had a witness on this -- to even make the decision to go ahead and undertake a design project until August 20. And we did that. We gave him the production promptly.

Basically, the trigger of this is a combination of, yes, the ITC's review petition, but also, frankly, more importantly, Your Honor's claim construction. At that point, we realized we were not going to be able to sustain one of the differences that we wanted. And we went forward and promptly produced this stuff as soon as we had done it.

We couldn't get a DJ by simply saying, Gee, Your Honor, we are thinking about changing to this or that or the other thing, how does that sound? We have to take concrete steps. And we didn't take those until August. And we promptly told them about it. And we went forward, and we have been producing it.

In terms of the video being different, this is an engineering design process. Not every detail of every iteration as you go through quality control is identical. But what is identical is the configuration of this redesigned icebin. It doesn't have an auger. And the one in the video doesn't have an auger, either. And that is the whole point, is that we eliminated this claimed part and that is the design that we are proceeding with.

So the implication that we have been hiding the ball on this is not true. Were we thinking about doing a redesign before August 20? Sure. We were thinking about it, but we didn't take any concrete steps to do it until after we got your claim construction order, we sat down and considered the issues, could we had this, does it make sense to do it and we did it. And we promptly gave them the information once we did.

MR. MORICO: I would respond to that, Your Honor.

While Mr. Noh may be a marketing specialist, he

was designated on this topic as their corporate representative with respect to the redesign.

THE COURT: That doesn't really address the larger point Mr. Coyne is making. That is, within the commercial context of this company's business, and their reasonable response to this litigation, a portion of this litigation, they did certain things with regard to a redesign. And according to this officer of the Court, they have made affirmative efforts within reason to be responsive to the requirements of this litigation.

I don't see how I can sanction them at this point, albeit documents produced after the close of the relevant period, for doing that, given, especially, their opportunity -- not opportunity, the requirement that they seasonally supplement. The rules contemplate this kind of situation.

Go ahead.

MR. MORICO: Your Honor, we have had a willfulness claim in the case from the beginning with respect to the '130 patent. If part of their defense is that they were going to redesign this product, and there is documents showing that the redesign started back in April of this year, they seasonally should have been providing those documents to us in time for us to have taken these depositions.

THE COURT: I understand. This isn't going to please you. But my job is to enable both parties to fully prosecute and defend your claims and defenses in this courtroom, to the extent that I have the opportunity to do that without prejudice, without unnecessary expense that might result from one side or the other's inappropriate behavior -- and I don't detect that here, I am going to require, to the extent that you need additional discovery, that there be a meet-and-confer and that LG make available to you whatever witness or witnesses need to be made available within the rules that we have been playing by thus far in terms of the number of hours of deposition. I think we have been using the Federal Rules.

I mean, I don't think there was a treaty outside of those. If there was, that is fine.

MR. PARTRIDGE: We did it by agreement to avoid complications, Your Honor.

THE COURT: Then I am going to insist that you do that again. To the extent the Federal Rules aren't adequate, get back in touch with me. But you should figure out -- you have some time. I know you don't want to be spending the time doing this. I get that.

MR. PARTRIDGE: Your Honor, if I may. There is an issue that goes beyond the limine and restricted to the limine I would stay in my chair.

Here is the --

THE COURT: Because you are tall, Mr. Partridge. So you get an advantage from your height.

MR. PARTRIDGE: I sort of like this approach.

The problem becomes a jurisdictional one. They do have a DJ counterclaim of noninfringement. What they are attempting to do is take a product that is inchoate and put it before the jury to feel us out, try to get a ruling that is favorable to them on noninfringement.

You heard Mr. Coyne say in his presentation that they didn't begin the redesign until after the Markman order and the ITC order, and if I recall correctly he said the date was August 20th of 2009. Then he talked about how they moved from conception to prototyping and that they are continuing to do that work. They moved from one facility in Korea to another facility in Korea. And you never heard him say that they have introduced any product into the United States in that process.

What we have here is a party seeking to use the fact that they have a DJ counterclaim for noninfringement trying to get an advisory opinion from the Court.

On top of that, Your Honor, what we have --

THE COURT: You did raise this in the briefs, I think.

MR. PARTRIDGE: Yes. What we have is a video

they produced just recently that is different than -- at least by our observation of it -- than what they told us the redesign was back in September. And will it be different a month from now? Will it be different by the time we go to trial? Will there even be an actual product?

Ironically, my client is sitting here today, has heard more about this redesign than I have been able to share with them because they have marked all of these documents confidential, new product development, which precludes my even showing them to my client. Yet they want to put this on at trial and I can't even have a discussion with my client about what our position is with respect to these documents.

This is not a justiciable issue at this point.

And the whole issue about, you know, were they bad guys, I am not saying Mr. Coyne is a bad guy because he has produced these additional documents. What we are saying is, this is not ripe for a jury at this stage of the game.

If down the road we think, when they finally get to the point of having some product they introduce, there is some issue with respect to that product, we can deal with it then. I don't think we can deal with that, given the state of discovery and the state of the product development at a trial that begins March 1st.

THE COURT: I am reminded that this issue was

raised by Whirlpool. Go ahead.

MR. COYNE: Your Honor, the law does require concrete steps. It does not require that we be selling a product in commerce in order to get a declaratory judgment.

April, this didn't exist. This was a twinkling in your in our eye, perhaps. I don't know the exact date when the serious thinking started. But I but I do know, because we did produce a corporate representative, that it was August when we decided to proceed with the project and fund it and to go forward with the development work. And we did produce that information promptly.

We have now taken concrete steps. What we gave them in the discovery we provided them on this was a prototype. We have gotten to that stage. They have seen the prototype. They have pictures of it. They have got schematics of it. They have got the engineering drawings of it.

I appreciate the confidentiality order issues. And if Mr. Partridge cares to share something with Mr. Schwinn, I am happy to discuss with him what information might be useful in order to lubricate this and make it all easier for everyone to understand precisely what the issue is.

But we have a specific design, and we are proceeding with it. It has gone from development. The

design has been finalized. It's been prototyped. That has been transferred to the Chawon facility, where it is under quality review right now and is being tested and evaluated. And it's the same design that they saw in August and September. And we will continue to update it. If for some reason we change and it's fundamentally different by the time we get to trial, I appreciate that there is a problem.

But there is no problem now. This is the design that we intend to launch. We are down the development pathway. It is scheduled for release first or second quarter, right on the cusp of the end of the first quarter or second quarter for U.S. production release. So it is being done.

We are taking concrete steps. And it is not an advisory opinion in Mr. Partridge's view. His people have seen the prototype. It is no longer advisory. It is a concept that is being concretely implemented.

THE COURT: Where is the cutoff, temporally, where is the cutoff?

MR. COYNE: In terms of the product hitting the market for sales?

THE COURT: I didn't mean that so much. Mr. PARJT is, to use a colloquial term, that he is shooting at a moving target and wants to pin you down.

MR. COYNE: Your Honor, there is no movement of

the target.

The video is a video. It's a marketing piece. The product hasn't been built yet. It doesn't show the product. We are giving him everything we are generating. That's the point. But the design hasn't changed. The design we gave them in August and September --

THE COURT: Both without auger.

MR. COYNE: It's the augerless design and we are still proceeding with it.

MR. PARTRIDGE: Well, whether it is augurless or not is an issue for claim construction, Your Honor, as to what the word augur in conjunction with the other words in the claim means, as opposed to taking what they are now using to move the ice through the bin and saying, gee, that is not an auger. Well, in the eye of the beholder I would suggest, Your Honor...

This probably raise a claim construction issue for Your Honor.

The one deposition we were able to take, which was taken late because we were concerned that they would try to push this issue, September 22nd, Dr. Lee, LG's corporate representative on this -- and this is, I don't have the pages, Your Honor, unfortunately, I don't think anyone has submitted this to you, because this didn't come up, this part of the pretrial paper process, but we can get you the

transcript.

He admitted following at that deposition:

"The shape and size of the bin itself and of the blades and shutter that are intended to dispense ice from the bin have not yet been finalized. The electrical control functions necessary for the redesigned ice bin to operate in the refrigerators have not yet been designed."

Next thing:

"Additional prototypes are planned, but LG does not yet know how the new prototypes will differ from existing ones."

Next statement:

"A new bin design could necessitate other changes to the refrigerator, including changes to the motor, the coupling between the motor and the bin, and the chute below the bin."

Next point:

"No part numbers have been assigned to any parts."

Next point:

"No suppliers have been told about any details of this design."

As one would suspect, when one goes through the process of original design to prototyping to coming up with a manufacturing prototype to final manufacturing design,

changes get made to take into account production issues, functionality issues, safety issues, which, from my observation of the redesign thus far, are substantial.

When they go through quality control and safety checks and all of that, will this design look like the video they just provided provided us? I would be surprised. But maybe Mr. Coyne is right. But sitting here today, on January 7th, less than two months before our trial, we don't know.

I would suggest, Your Honor, it's too late in the day to put before the jury a question about a design at this stage and one as to which may or may not make it into the marketplace, and one as to which we may or may not, when I am finally able to talk to Mr. Schwyn and Mr. Goodwin about it, assert infringes. I just don't know at this point.

THE COURT: It seems to me this point that we are discussing goes beyond the motion.

MR. PARTRIDGE: It does.

THE COURT: It's a much more interesting point than the one raised in the motion, and one that I wonder -- please believe me, I am not inviting more paper -- that I might nonetheless benefit from an additional, a submission on this subject.

MR. PARTRIDGE: We would be happy to do that,

Your Honor. Whatever guidelines you would like for how to do that.

THE COURT: How many pages do you think you will need to address it?

MR. PARTRIDGE: Ten?

MR. COYNE: Your Honor, that is fine with us.

THE COURT: I will take an opening and an answer of ten pages.

MR. PARTRIDGE: The opening should be I guess theirs.

THE COURT: Yeah, I guess so.

MR. COYNE: In other words, we would be briefing why this is ripe for a declaratory judgment, why we have taken sufficient concrete steps to meet the statutory standards?

THE COURT: Yes, because I think this is obviously within the authority that you have that might address this specific kind of circumstance that confronts the Court.

MR. PARTRIDGE: Your Honor, I won't say this as a matter of tactics in my response to this motion. But I wouldn't be surprised if it turns out to be the case when we see what they assert with respect to this design if the dilemma we are in is one in which we need discovery to test what it is they are saying about the state of the design.

I am reluctant, with all due respect to Mr. Coyne and the Finnegan firm, who I know well and have many friends at that firm, I am reluctant on behalf of my client to depend upon attorney representations with respect to the state of this development.

THE COURT: As would be I, the Court, reluctant to depend upon attorney argument. So, it's certainly a benefit from the guidance and the interpretation that you advocates give to the facts, but it's the facts at the end of the day that need to guide my determination.

I understand your point.

MR. PARTRIDGE: Very well.

THE COURT: It may be, I don't know, that this matter is just not capable of being resolved ultimately, finally. If it should come to pass, for instance, Mr. Coyne, that I agree with Mr. Partridge that additional discovery is necessary -- I don't know whether or not there is time for that. I don't know what burdens that would, the Court would be placing upon the parties by making such an order. We will have to see.

Let's discuss a timeline for the submission of these briefs. Mr. Coyne?

MR. COYNE: When would Your Honor like to receive them?

THE COURT: As soon as possible.

MR. COYNE: A week. Ten days?
THE COURT: Too long.
MR. COYNE: Too long.
THE COURT: I will give you five business days.
MR. COYNE: A week, that is fine.
THE COURT: I will give a --
MR. PARTRIDGE: Five business days for a response also, that is fine, Your Honor.
THE COURT: From today, yes.
I am not going to permit a reply.
MR. COYNE: So next Thursday, Your Honor?
THE COURT: Whatever five days is. Ms. McDavid?
CASE MANAGER McDAVID: From today it is going to be Friday.
THE COURT: Friday, from today. Five full business days would be Friday.
MR. COYNE: Thank you, Your Honor.
MR. PARTRIDGE: Why don't we say next Thursday for them, the following Thursday for us.
THE COURT: Let's do that. Close of business?
MR. COYNE: That is fine, Your Honor.
THE COURT: We will do that.
MR. PARTRIDGE: There is one issue that is kind of --
THE COURT: I haven't forgotten that. The prior

art issue.

MR. PARTRIDGE: There is that, and just one clean-up. And I think you meant this when you indicated that we would get together and talk about discovery. But I would assume we could get a deposition of Mr. Taylor.

THE COURT: Oh, yes. Absolutely.

MR. COYNE: Absolutely, Your Honor. That is what my understanding of the agreement was, that if anybody was going to.

THE COURT: Mr. Partridge, I reacted so quickly on that, hopefully not too hastily, because of the subject matter that was suggested.

MR. PARTRIDGE: I understand, Your Honor. That is fair. We will deal with it. I wasn't involved in all the day-to-day stuff in this case. But we don't have a similar understanding that there was an agreement about deposing a witness post discovery period.

THE COURT: You heard what I have had to say.

MR. PARTRIDGE: There is no point in arguing that I think this morning. That was not our understanding.

THE COURT: Then let's talk about prior art, which Mr. Coyne asserts was the relevant discovery, he says, was produced in time.

MR. MORICO: Your Honor, it was produced during the expert discovery period, not before.

THE COURT: That's what he said.

MR. MORICO: Some of this, a fair number of these documents involve manuals and other material in connection with prior art refrigerators, foreign prior art refrigerators for which we have not had an opportunity to take any discovery in connection with the manuals themselves. Now, the prior art refrigerators were made available for inspection during expert discovery. However, the manuals, we may need to take some depositions or other discovery in connection with those manuals in order to determine their date, whether those manuals actually relate to particular models, and the like.

These are not just prior art patents. Prior art patents would be one issue. There is an issue of chain of custody and there is an issue in connection with whether these models, in fact, qualify as prior art in connection with the validity issues that are at issue in this case.

So there are fact issues in the depositions that may need to be taken.

THE COURT: What's the extent of the written discovery you think you would need, in terms of requests for production?

MR. MORICO: We could probably do some requests for admissions, and maybe if we had some latitude -- we are outside the number of interrogatories at this point in this

case -- I would suggest perhaps we start at that and then, depending upon where we end up , we may need to take a deposition or two. Given the short time frame, I would ask for a compressed schedule in connection with responses to those.

THE COURT: Do you have difficulty with that, Mr. Coyne?

MR. COYNE: Yes, Your Honor. I don't feel any of that is justified at this point.

We did produce this during the appropriate time in the case. They have taken the depositions of the experts. In fact, we offered -- we have collected a number of refrigerators, and we have been offering for months that they come and look at them and for whatever reasons, Whirlpool delayed until the expert period before they came to even look at the refrigerators. But they have had full discovery and opportunity to inspect the units.

We gave them these additional user manuals, product brochures, as we found them during the expert discovery period, and they have deposed the experts on them, which is the witnesses who will be using this information.

So they have taken full discovery on it. We don't see any justification for additional discovery on it at this point.

There just is no issue on these prior art

materials. They were timely produced and they had the deposition.

MR. MORICO: I would respond to which saying, Your Honor, there are requests for production in November of 2008 asking for all prior art information. So to say that these were produced during the expert discovery period time as being timely is not completely correct.

We have had requests out for eight months, during which we could have actually done the fact discovery. In fact, Mr. Coyne even admitted that these were manuals that were just found.

MR. COYNE: That is why we did not produce them during the discovery period. We produced them as soon as we located them.

THE COURT: That is in part why I am going to give them the relief they requested.

MR. COYNE: Thank you, Your Honor.

THE COURT: Counsel, you need to get together and agree upon a compressed schedule, an exceptionally compressed schedule, to get the discovery request out, answer, and the witnesses identified and deposed.

MR. MORICO: Thank you, Your Honor.

I believe with the deposition of Mr. Taylor --

THE COURT: I think that resolves this.

MR. MORICO: It resolves this motion in limine.

THE COURT: Mr. Coyne, you made during a portion of your argument, reference to something that occurred last night with reference to this?

MR. COYNE: Yes, Your Honor. Last night we received from Whirlpool a supplemental rebuttal exhibit list, listing yet an additional witness --

THE COURT: That is not happening.

MR. PARTRIDGE: Your Honor, if I may.

THE COURT: Go ahead.

MR. PARTRIDGE: It really --

THE COURT: I will tell you, that was my in-chambers response with my clerk, when my law clerk brought this to my attention, I said, "Are you kidding me?" Just so you know how the sausage gets made, Mr. Partridge.

MR. PARTRIDGE: Absolutely. And I appreciated that. The fact of the matter is it's a moot issue now because we are having a Bench trial on those issues as to which they pertain.

This is documentation from the Department of Energy, within the last month, addressing the failure of LG to comply with an agreement on energy efficiency under the Energy Star Program from 2008. They will disagree with my characterization. There is litigation between the Department of Energy and LG over this now.

But there is a detailed affidavit from the

Department of Energy about energy comparisons which goes to the heart of the issue they have raised as to unclean hands, which is all about Whirlpool's Honest Energy Program Energy Program.

And the only reason we submitted those to you, Your Honor, was because if this was going to go to the jury, we needed to tell the full story, because what we said in our Honest Energy Program is entirely consistent with what the Department of Energy has now reported about LG's reporting of its energy efficiency.

THE COURT: Your position today is that it's now a moot point.

MR. PARTRIDGE: It's now a moot point. It's a Bench trial issue.

THE COURT: We are not going to clutter this record with a response to that. We are not going to go tit for tat here.

MR. COYNE: Your Honor, the documents, the exhibit list as well as the witnesses. Correct?

THE COURT: I am sorry?

MR. COYNE: There was a witness identified as well as a series of about 20 exhibits.

MR. PARTRIDGE: That's correct. We don't intend to try to call Mr. Katania during the jury trial. It is related to the Bench trial. And the exhibits. That's

correct.

THE COURT: No. 3 by Whirlpool is its motion to exclude evidence and argument comparing the accused products to the prior art, which all of us in this room know would be inappropriate. Whirlpool contends that LG intends to introduce evidence comparing the accused product to the prior art on the issue of literal infringement. LG responds, as I understand it, that its evidence is relevant to DOE and invalidty. Whirlpool says that the evidence re history estoppel is not relevant because that's an issue for the Court.

I am not clear, at least at the time I wasn't clear, and probably still am not, clear on Whirlpool's position on the relevancy of the evidence as to invalidity, I think. There was also an invalidity discussion.

MR. MORICO: Your Honor, I am here to address that issue.

With respect to the issue of invalidity, it is appropriate. The issue really comes down to the issue of infringement.

THE COURT: Did LG really resist that?

MR. MORICO: It's not clear from their papers.

THE COURT: I don't think so. Mr. Coyne is shaking his head negatively. I think he agrees.

MR. COYNE: Yes, Your Honor. This goes to

validity, that basically if the claim gets construed the way they are trying to construing it, it covers us, it also covers the prior art. It's an invalidity argument.

THE COURT: I think we have an agreement.

MR. MORICO: We do, Your Honor.

THE COURT: This is moot, then.

Mr. Partridge, do you agree he as the leader of the team?

MR. PARTRIDGE: I think we can deal with any problems that arise realtime, Your Honor.

THE COURT: Good enough.

No. 4 has been withdrawn by Whirlpool.

The last motion -- the second-to-last motion in limine, because I am treating the motion for sanctions as a motion in limine, is Whirlpool's No. 5 at Docket 302 to exclude improper opinion testimony from fact witnesses regarding prior art.

From LG's perspective, you read, obviously, and responded to --

MR. COYNE: Yes, Your Honor.

THE COURT: Do we have a real contest? Let me let you speak.

MR. MORICO: Yes, Your Honor, I believe we do. There needs to be a little bit of context and history behind this testimony.

All of this testimony was testimony taken in the ITC case of our inventors of the '130 patent, which is the indoor ice maker. And it was testimony in connection with -- all of the issues that concern us involve testimony where a prior art patent was placed in front of the inventor and the inventor was asked, would it be obvious to include an automatic maker with this reference.

THE COURT: The inventor has not been identified here as an expert.

MR. MORICO: He has not, that is exactly right, Your Honor. It was purely trying to get opinion testimony from the inventors on the cuff.

THE COURT: That is a nonstarter.

MR. PARTRIDGE: We felt we could deal with the appropriateness of that evidence before the ALJ if they attempted to use it. Therefore, we didn't instruct them not to answer in those depositions because we had a Bench trial. Now to use that testimony before a jury, where we would have treated it differently, those questions differently in this case, we think, is inappropriate.

MR. COYNE: That is not the entirety of their motion, Your Honor.

THE COURT: Go ahead.

MR. COYNE: Number one, we agreed earlier in this case and under the scheduling order, the depositions

that were taken previously in the ITC case were usable in this case. And frankly, that is the reason why we did not seek to re-depose some of these individuals.

That is one topic.

Now they are raising this well after discovery has ended. It would be prejudicial to preclude us from using the testimony entirely.

THE COURT: I take it the testimony is of one of the inventors has to do -- it's opinion testimony?

MR. COYNE: No, Your Honor, we do not agree with that characterization. Some of the questions are opinions. In fact, a limited number of the questions were that, where the witness is shown the exhibit, would it would have been obvious to combine this?

That is not my problem with this motion. My problem with this motion, they are seeking to exclude all of the testimony -- they have identified sections of these depositions. Much of that is what was in the prior art. What is the scope and content of the prior art, what are the disclosures and the teachings of the prior art, coming out of the mouths of their own inventors, and they are seeking to exclude that testimony.

That is improper. We can deal with the issue about whether a particular question is -- we would like these witnesses here if they aren't going to be made

available. They are their witnesses. If they are not going to make them available, we would like to use the deposition testimony. But we can certainly confer further and focus on which of the opinions that, frankly, they are admissions against interest.

THE COURT: Are the witnesses going to be here?

MR. MORICO: Your Honor, in the case of two of the witnesses, they no longer work for Whirlpool, so it is not possible.

With respect to the other witnesses, we would only be bringing them for purposes of responding to this, which would appear to be defensive to the jury, Your Honor, in our view, as opposed to bringing them affirmatively.

THE COURT: Mr. Coyne.

MR. COYNE: Your Honor, we would like to call some of these Whirlpool witnesses, the inventor witnesses, in our case-in-chief or at least in our rebuttal case on validity as to their patents. There is a lot of this testimony that they specifically cite in this motion which is testimony about whether -- Mr. Harmon, for example, whether automatic icemakers existed. That is not an opinion. That is a fact.

The bulk of what is in this motion is just that type of testimony. Yes, there is also questions that were asked, you know, here is is a patent for an automatic ice

maker. Would it be have been obvious to combine that? We can deal with that in a more limited fashion at the appropriate time at trial. Given the overbreadth of this motion, I don't think it's appropriate to grossly exclude all of this when, frankly, I think all of it is proper, but even if the Court finds that some of it is not, it is a very limited portion of it that's not.

MR. MORICO: Your Honor, I believe I might have a solution to this.

I think what we might be able to do if Mr. Coyne is agreeable to this is in advance of playing those deposition excerpts, that we get them in advance, so that we know what they are going to play at trial, and we can bring this issue up to the Court before the issue goes to the jury.

In terms of dealing with it realtime, it's sort of the issue of having the toothpaste out of the tube. Once it's out of the tube, you can't get it back in.

Once the question has been asked and shown to the jury, it's too late.

MR. PARTRIDGE: We could even start working on that now, going through the transcripts with them and seeing if we can agree on what is acceptable from our point of view and what is not.

MR. COYNE: We are absolutely amenable to that,

Your Honor. We have given them the designations. We have their objections. I think it is inappropriate for all of us to sit down, rather than burdening Your Honor with that at this point.

THE COURT: So I will deny the motion at this point.

MR. PARTRIDGE: Thank you.

THE COURT: I am hoping to make rather short work of this motion that's been filed by Whirlpool seeking an adverse inference sanction due to what is alleged to have been LG's knowing destruction. It's a specific individual I think we are talking about, I have forgotten his name, Mr. Harrod, the destruction of relevant information.

I think that this matter, as I understand the briefs and affidavits, declarations, is better left to permit Whirlpool to explore fully with the witness on the stand.

MR. PARTRIDGE: We are happy to do that, Your Honor.

THE COURT: That is my ruling.

Technically, I am going to deny the motion, with the understanding that this is going to be a matter that I am not going to entertain an objection -- you can object, preserve the issue. But I am going to overrule that objection.

MR. PARTRIDGE: The one additional point I would like to make beyond what I just said, Your Honor, in response to your question, is that when you hear the testimony at trial with respect to this series of events, it may be that at that point in time you might think that in order for the jury to put this in perspective --

THE COURT: An instruction of some type.

MR. PARTRIDGE: -- some sort of instruction would be necessary that obviously isn't in the instructions we have proposed today.

THE COURT: If you want to propose an instruction, pass it by your opponent, whether they agree with it or not, you can submit, take whatever position you want to take. That would make sense.

MR. PARTRIDGE: Understood.

THE COURT: Let's take a quick stretch.

(Recess taken.)

THE COURT: Okay. I am in Volume I of the final pretrial order. I have tabbed some pages. If I skip something, please call my attention, when I say something, I am the point of controversy, let me know.

At Page 4 in Paragraph E, there is a request that the Court permit each party to qualify its own experts, that is fine, rather than relying on some kind of stipulation.

I see at Page 6, Paragraph J 2, Whirlpool disagrees with inclusion of any findings of fact. I guess that's now a moot point.

MR. PARTRIDGE: Correct, Your Honor. I think we can deal with that later.

THE COURT: We are going to have to talk about how we are going to handle the transition from the Bench trial -- from the jury trial to the Bench trial and time and that kind of thing, what we still think we need in terms of jury time in a few moments.

We are going to do eight jurors, not nine. All will deliberate. I don't elect alternatives.

Anything else in that section of the actual final pretrial order?

MR. PARTRIDGE: Not from here, Your Honor.

THE COURT: I am moving ahead to Exhibit C1. Exhibit C1 and C-2 A, I have already alluded to this earlier, that is your objections to various exhibits are overruled without prejudice.

By the way, that means that all exhibits are admitted by operation of -- it doesn't require that you move the admission of each exhibit, to the extent that there has not been an objection that has been renewed that has resulted in a favorable ruling.

MR. PARTRIDGE: The one question I have about

that, Your Honor, and I have gone through a pretrial with you, but we ended up not going to trial, I am sure you don't want the record filled with exhibits that were never sponsored or presented during trial. So I would assume what becomes the record in the case, ultimately, are are the exhibits that are sponsored by a witness and actually discussed before the jury, as opposed to everything that is pre admitted.

THE COURT: Well, this has been a subject of some controversy over time. I would prefer that.

MR. PARTRIDGE: As do I.

THE COURT: Do you have a view?

MR. COYNE: I would definitely prefer it. The problem I see in a case like this, this is not heavy technology, but there is a lot of references. To have them going back and read GE user manuals that nobody has talked about, it seems like we could be a lot of time waiting for the jury to come back.

THE COURT: And that is the operating rule.

MR. PARTRIDGE: Good.

THE COURT: Let me detour to jury books for a moment, because it's an appropriate time, because we are talking about exhibits. My suggestion to you is, I know you are going to have presentation equipment in here, but jurors are very tactile. They like to be able to refer and

re-refer to things. So to just flash something up on the screen that's important in your case, and I have had jurors communicate during the jurors of trials, jurors, when parties have elected not to provide juror books -- and I have since discouraged that strongly to the point of actually ordering -- I don't feel it appropriate for me to order you to spend money that you may not want to spend. But I don't think that's probably a real problem here, even in these days and times. I recommend and will hereby require you to have the jury books.

How many do we need?

THE COURT: We are going to have eight jurors. My Chief Deputy is not here today.

It's like 13.

MR. PARTRIDGE: May I make an inquiry about this, Your Honor?

THE COURT: Yes.

MR. PARTRIDGE: I prefer having juror notebooks, especially pictures of the witnesses and a very brief synopsis of the witness' background. I don't know that I would like a synopsis of the testimony that we may end up not agreeing on. Whereas we can deal with that through short transition statements and the like during the course of trial.

THE COURT: I welcome transition statements that

are not pieces of advocacy.

MR. PARTRIDGE: The one thing that I don't like putting in jury notebooks, I know this practice varies, but I don't like having all the demonstratives in a notebook, because I think it games the demonstratives.

THE COURT: I don't want demonstratives in the juror notebooks, none. They are not exhibits.

MR. PARTRIDGE: That's my problem.

MR. COYNE: I certainly agree with that. The problem I have with the photos and the synopsis is it gets a little problematic.

THE COURT: I think, Mr. Partridge, we have had an expression of concern about it, I won't permit it.

MR. PARTRIDGE: I think Mr. Coyne and I can work this out. My guess is you and I will end up on the same page, agreeing on giving them at least a picture, Tuesday when we insert them in the notebook and that sort of thing. I would be surprised if we couldn't work that out.

THE COURT: I am I am pleased to hear that. I think pictures can be helpful, quite frankly. There are going to be a lot of witnesses and it can be helpful to a jury's recollection.

MR. PARTRIDGE: It gives them a page to take their notes and that sort of thing.

THE COURT: As you know, I do permit note-taking

by my jurors.

As an aside, I just used the term my jurors, it is my jury. You should be very clear on that. Be very careful about how you deal with my juror. They are going to take their guidance from me. As you all know, you are all seasoned trial lawyers. This is the one place I get to really be God, in a manner of speaking.

In that regard, make sure you maintain a respectful distance from the jury when you are addressing them. The center post of that conference table is probably a good distance.

Jurors have told me in the past, they don't like being hovered over. They really don't like, as the kids say, their space being invaded. You are not pinned to the podium which will be returned to the middle of the courtroom. It moves. We have got a new mike system in there. It works really well. I would suggest you take advantage of it. The courtroom's acoustics are are terrible, but it's what we have.

You must conduct your examinations from the podium. My practice is you don't examine from counsel table.

On the witness list, I am looking at LG's, I am at Exhibit D-1, at the end of LG's witness list, I have LG's objections to Whirlpool's witness list. I was looking for

Whirlpool's objections to LG's. Mr. Partridge, where are your objections to the witnesses here? Do you have any objections to any of the LG's?

MR. PARTRIDGE: We have the objections that we discussed in the limine arguments, Your Honor. I don't believe we had other objections to their witness list.

THE COURT: I think your colleague in the back might be trying to signal you.

MR. PARTRIDGE: Page 2 of our witness list, our objections are listed.

THE COURT: I knew I had seen something. Go ahead. Who is going to address these?

MR. PARTRIDGE: This really involves Mr. McGrady and Mr. Taylor. We have already addressed: Mr. McGrady is out, Mr. Taylor you have allowed.

And we have preserved our objection if witnesses go beyond the scope of what they have been identified for during the course of discovery. But I think the rest of this can be dealt with realtime.

THE COURT: I think so, yes.

Let's go to LG's objections. You both preserve the same objection to calling any witness under its employ or otherwise under its control by deposition. You have both preserved that.

Mr. Coyne, anything else?

MR. COYNE: That is our principal objection, Your Honor.

MR. HERRMANN: Your Honor, with regard to witnesses, would Your Honor briefly go over Your Honor's preference with regard to when you are not allowed to talk to the witness during breaks? Is it after he has been submitted for cross?

THE COURT: Mr. Herrmann, you should know, my rule is more strict than my colleagues. You don't talk to the witness when the witness is on the stand. You just don't talk to the witness, not when they are -- that's the rule. I think that's been memorialized in an order somewhere. I should make it a standing order, actually.

MR. COYNE: Your Honor, one point much clarification on that. There may be a possibility that some of the witnesses will be in the direct case, may also be recalled on rebuttal. Does that apply --

THE COURT: No. Any questions about that, Mr. Partridge?

MR. PARTRIDGE: No. I am glad Mr. Coyne raised that.

THE COURT: It's a good point.

On witnesses, again, typically, in cases of this magnitude, of this type, of this degree of complexity, I think it wise for counsel to have books for the individual

witnesses. You should have two copies for me. One for me and one foe my clerk.

MR. PARTRIDGE: In that regard, Your Honor, Mr. Coyne and I haven't talked about this, my intention is over the next few days he and I begin this conversation about specific times for exchanging demonstratives and objections and when we identify the order of witnesses and who will be called on what days and what exhibits will be used with the witnesses.

I am hopeful that we can provide with you stipulated agreement as to how all those matters are going to be handled. They are discussed very generally in the pretrial order we submitted to Your Honor.

THE COURT: It is a good thing to memorialize it, Mr. Partridge. Beyond that, I don't care, quite frankly, because I expect professional lawyers, very experienced lawyers that we have, of the type we have here, to be able to manage that.

MR. PARTRIDGE: The one way it may affect you is if we can't resolve all the objections, then either the evening or the next morning we deal with that.

THE COURT: I agree.

MR. PARTRIDGE: I think we can get it down to a relatively small number of issues.

THE COURT: I agree. It's good to memorialize

it to the extent you need to give it to me or argue about it later and threaten get involved. But I would like to stay out of that level of micromanagement, I would like to avoid that.

I don't do deposition designations. You will have to work those out.

Anything else in Volume 1?

Okay. Let me see if there is anything in Volume 2.

MR. HERRMANN: Your Honor, Judge Robinson has developed a practice of preferring not showing video clips for purposes of impeaching a witness.

THE COURT: That's not my practice, Mr. Herrmann.

MR. HERRMANN: Thank you.

MR. PARTRIDGE: A clarification for my purposes, then. So we should use the hard copy transcript for impeachment purposes?

THE COURT: You can use either.

MR. PARTRIDGE: We can use the video or the paper?

THE COURT: Yes.

Yes. I am are on the same page there.

MR. PARTRIDGE: Thank you.

THE COURT: I think it's unfair that if you are

going to impeach a witness that you provide a copy of the impeaching document or whatever it is so they can respond.

MR. PARTRIDGE: So if we are going to use video we give him the transcript so he can follow along while the video is playing.

THE COURT: Any difficulty with that, Mr. Coyne?

MR. COYNE: That is fine, Your Honor.

THE COURT: As an aside, again, with regard to witnesses, counsel, there are going to be many occasions that you need to approach the witness box. With each witness, you must request permission to do it, but only ones, please, don't continuously ask, Your Honor, may I approach, Your Honor, may I approach, just the first time, then you have free leave to approach the witnesses and hand them documents.

MR. PARTRIDGE: You put the gun away after the first time.

THE COURT: Yes.

(Laughter.)

THE COURT: We have dealt with designations of depositions. I am pleased to hear that there is, in large measure, agreement on the preliminary instructions. I haven't looked at them. Do you want to try to resolve --

MR. PARTRIDGE: There are really three points that I think are relatively simply. We may in fact be in

agreement.

When we submitted the preliminary instructions we addressed inducement and contributory infringement and I believe those are out of the case now so it would be a matter of having to fix this because the claim that involved inducement and contributory infringement I believe have been dropped. Mr. Coyne and I can discuss that here after, Your Honor.

There was a second issue on Page 5.

THE COURT: Mr. Partridge, which exhibit are the film instructions?

MR. PARTRIDGE: It is Exhibit I Romanesque (ii).

THE COURT: That is how you refer to the two little i's?

MR. PARTRIDGE: Romanesque. I don't know who taught me that. But my mother was with an English teacher. Maybe it was her.

On Page 5, this is very minor, and LG is correct that they seek a declaratory judgment. So do we. I don't think juries understand what that means. I found that confusing. I leave it to Your Honor whether to have that in or not.

THE COURT: It should come out. It's legalese. There is no reason for it.

MR. PARTRIDGE: We both did this on the next

page, Page 6. Maybe it's in your standard set, where we talk about defenses as affirmative defenses. It may be better for the jury to just say defenses.

THE COURT: You are going to see, I have rewritten your proposed description of the case, I am going to give you each a copy and ask whoever is doing the word processing if I can find it, wherein I remove words like counterclaimant, counterclaimant is different -- you know what I mean talking about.

MR. PARTRIDGE: Counterclaim plaintiff I guess it is.

My last point about the preliminaries, I apologize, Mr. Coyne, to you, because I haven't raised this with you to date, is that on Pages 13 and 14 and part of 15, with the exception of the paragraph on the bottom of Page 13, if we play the patent video, I think we don't need some of those instructions. We certainly think it's more comprehensible to look at that video than it is to hear instructions about it.

THE COURT: I thoroughly agree with that.

MR. COYNE: I am fine with the AO video. It is a very good piece.

THE COURT: I think so, too. I use it in class. I think it's a very good piece.

MR. PARTRIDGE: That is all I have.

THE COURT: You will remove all footnotes and sourcing. The caption should just be final -- preliminary instructions and the date, whatever that date is, again, sufficient copies, I guess it's 13 or whatever the number is.

I am going to leave the final jury instructions for another day. Again, what I need is another iteration, so that we can, at an appropriate time, deal with them, a combined joint iteration, as well as the verdict form, to the extent that is possible. That may not be possible.

MR. PARTRIDGE: What is the most convenient format for you -- assuming we have some differences and I am sure we will, what is the best format for you? I would think a single document in which the differences are identified within the document.

THE COURT: That's fine. I have been inarticulate. That is exactly what I mean, Mr. Partridge.

MR. COYNE: If we have competing instructions or verdicts, would it be helpful just to put a table that has ours, theirs --

THE COURT: I don't need a table. In the contents, you can signal one after the other, then the objections can appear, the substantive objections can appear in the actual proposed instructions at the end. It's probably not different from what you have done in other

Court's.

MR. PARTRIDGE: The verdict form, maybe we can simplify this, we have a long ways to go. The verdict form is way too complicated. I think we all agree on that. I am concerned whether a single document might end up being more confusing than two documents.

THE COURT: I tried to except out the verdict form. I think that's probably right.

Let's then go, unless I have not covered something you want to talk about, I am prepared to go to Exhibits one Romanesque Ii) and (ii).

These are the proposed voir dire by each side.

I am going to work principally from LG's, just for ease of our discussion today. The first, and I have just asked for an additional copy so I can pass them out in a moment, I have rewritten the description of the case. I am going to pass it by you in a minute for your comment. While we are waiting on that, let's go to Question No. 6., because up to that point I think the questions are identical that are proposed by both sides.

What I have done is simply added the following language at the end -- is that Re-ho, R-e-h-a-u?

MR. MORICO: Re-hau.

THE COURT: Industries is the word I added, industries or Smith-Dalper Associates.

MR. MORICO: That's correct, Your Honor.

THE COURT: That comes from Whirlpool's proposal. Other than that, there is no difference that I could detect.

No. 9 in LG's proposal, I am going to ask that this language be added. After the word experiences, in the middle of the page there, the middle of the question, good or bad, comma.

I think people might default to bad.

I am going to give this out to you. Just pass it out.

THE COURT: Here is what I have done for the description, we will read this into the record, I will give you a chance to offer recommendations as to other language.

There are several corporate entities involved in this civil action. To simplify things a bit, I will tell you that back in April of 2008 the corporate entities I will call LG filed this lawsuit for patent infringement against the corporate entities I will call Whirlpool. In its complaint LG accuses Whirlpool of infringing various of its patents and seeks damages for the claimed infringement. Whirlpool has responded to LG's complaint by denying that it infringes LG's patents. Whirlpool has further responded with a claim of its own that LG infringes various of its patents and, like LG, seeks damages for the claimed

infringement. LG denies that it infringes Whirlpool's patents. In addition, both sides claim the other's patents are invalid and unenforceable. Those of you selected to serve as jurors, I will give you more detailed instructions regarding the meaning of the word infringement once you are sworn in as jurors and again at the conclusion of the trial.

MR. PARTRIDGE: Two comments, Your Honor. Unenforceable, I think, can now come out, so I think it's a Bench trial issue.

I think I would say in your last sentence is, instructions with regard to the meaning of the word infringement and maybe invalidity as part of that, too, because you will somebody instructing on that, obviously, as well.

THE COURT: Those points are well taken, Mr. Coyne, any objection to those changes?

MR. COYNE: Adding validity to infringement.

THE COURT: Yes.

MR. COYNE: That's fine, Your Honor. And it's fine taking out the --

THE COURT: As to the words infringement and invalidity.

Why don't I charge plaintiff with preparing this amendment in the final voir dire, get me a copy of that.

Great. Okay. Let's go to 13 of LG's proposal.

My note here is to use defendants 16 -- actually, this is as to 13 and 14. Let's go to Whirlpool's 16 and see.

Both of -- I think what I was impressed with and the reason I made this change was that I think Whirlpool covers both of these questions in one, having to do with the fact that LG is a foreign-based, that is a company based in solely, and that there are other corporations outside of the U.S.

MR. COYNE: That is the only reason, Your Honor, we split them out is as I started becoming a little concerned these days with the amount of press coming out of Mexico that somebody might have an issue with Mexico that might not have an issue with Korea.

THE COURT: You talking about what's going on down on the boarder?

MR. COYNE: The drug war down there. That's the only reason I split them out.

THE COURT: I am aware of what's going on. But I don't see that as --

MR. PARTRIDGE: I think if we got a positive response we can deal with that.

THE COURT: We sure can. The issue at hand is that we have a South Korean company in contest with a domestic, a U.S.-based company. Those are the entities involved.

By the way, counsel, you will have the opportunity at sidebar after I go through the general questions, we will call up individually those who have responded affirmatively to further questioning on the record. The mechanics of this is that I will go through these, record, all of us will record, and I do rely upon us to act as checks on one, make sure we have recorded accurately who has responded to what, and we go over here on the record and discuss, bring them up individually, I will alternate, each side will get a chance to begin the questioning of the putative juror.

I will then ask the juror back to the well of the court and ask for the parties' positions as to whether there is a request for cause motion, and rule then, generally, I will rule right there.

I might reserve, it may depend on numbers.

I may sua sponte, in all likelihood will, sua sponte, dismiss some jurors. A child care issue, a health issue, that kind of thing. I will give you a chance to raise an objection to it so you can preserve the objection. Then I will dismiss them.

At the end of that process, after we have gone through all of the prospective jurors, after we have gone through the venire, after I have ruled on all of the various cause motions, then we will just recapitulate to make sure

that we have covered accurately the jury in every ruling.

Then we will exercise the preempts. You will each get that number provided by the rules, three a side. And that's how we pick the jury.

Any questions about that?

MR. COYNE: No, Your Honor. One observation that I think we may have missed, both of us may have missed this. Willful also has Mekila Dora Productions out of Mexico. The question is only targeted to LG. That's a pretty neutral factor. Both companies are using production in Mexico. 14, 13, 14, and we substituted their 16 for it. It's my understanding both companies have production facilities in Mexico.

THE COURT: The way LG phrases, the way Whirlpool proposes the question, I believe, is one of LG's companies is a -- I see what you are saying.

MR. COYNE: Both have facilities in Mexico.

THE COURT: Mr. Partridge?

MR. PARTRIDGE: I have to confer a moment, Your Honor. Because I am not sure that facility -- what the relationship is there.

Your Honor, I don't want to belabor this, but I would like to further confer about this.

MR. COYNE: We will talk.

MR. PARTRIDGE: Should we get back to you at

some later point.

THE COURT: Not unless you need me to resolve a controversy. If it is a faculty.

MR. PARTRIDGE: There is a facility in Mexico. I am not sure the extent to which that facility is related to anything that is in this case at this point.

THE COURT: That is fine.

MR. COYNE: We will talk and submit an appropriate revision to Your Honor.

THE COURT: If necessary we can get on the phone and discuss this.

MR. PARTRIDGE: That does raise an interesting question, Your Honor. I understand this would be a rare thing for you to do. But we have had some unusual issues here. I was going to ask you if it makes any sense for us, given we are so far in advance of trial and there are so many issues floating around, to have a second conference a little closer to trial to deal with remaining issues. If it becomes unnecessary, we can drop it.

THE COURT: I have no objection to that. Ms. McDavid, do you want to get the book.

This will be a teleconference.

I am going to add Whirlpool's No. 18, look around the other potential juror members, do you know each other or have you had any relationship with any of the other

jurors before today. Any objection to that from LG?

MR. COYNE: No, Your Honor.

THE COURT: I rather prefer, there is note a big difference, instead of LG's 15 and 16, I think I prefer 19 and 20 from Whirlpool. Have you ever worked in the field of consumer appliance or refrigerator design, No. 19, do you have any experience with design, rare, or upkeep of electronic or mechanical devices such as refrigerators.

MR. COYNE: That is fine, Your Honor.

THE COURT: I thought it was a little more encompassing. By the way, those that I don't address are fine in LG's proposal.

Moving on to LG's 18, I have a note to substitute Whirlpool's 26. Let me see what Whirlpool's 26 is.

Whirlpool's 26 reads, have you or any member of your immediate family or anyone close to you ever been employed by the United States Patent and Trademark Office, the USP T O. I see the difference. I eliminated the ITC, and any other governmental agency, state -- I just don't see the need to inquire into those organizations or agencies.

As to No. 19, I said see 27 of Whirlpool.

Yes. Again, I think the difference is the trade commission or governmental agency issue. In other words, do you hold any opinions about the U.S. PTO is what we are

going to limit it to.

LG's 21, I really, frankly, it reads as follows: Do you believe that because a patent has issued by the U.S. Government it must be valid. Well it is presumed to be valid, issued by the PTO. I don't understand the need for this question.

MR. COYNE: I it must be, that someone is going to be resistance to even accepting evidence and considering evidence of invalidity.

MR. PARTRIDGE: Your Honor, I am not sure how that's helpful in selecting a jury.

THE COURT: I don't, either.

MR. PARTRIDGE: As opposed to it being part of the an instruction to the jury at the end of the case.

THE COURT: That was the end of my little note here. I am going instruct the jury on this subject. I won't make that inquiry.

The only other two that I have are 25 and 26. I am substituting 31 from LG from Whirlpool. Whirlpool's 31 reads would a fact that a witness appearing on behalf of one party or the other was not born here in the U.S. or that a witness testifies through a translator keep you from being a fair and impartial juror?

I think that does in one question what both 25 and 26 seek to do in two separate questions.

MR. PARTRIDGE: The one problem with our statement of this is that we are in the process of agreeing on an interpreter to use during the course of trial. We both have known this interpreter for a long time. He does not like the word translator, because they are interpreters, we really should call them him him an interpreter.

THE COURT: You should change that language, yes.

Are you going to be using a check interpreter?

MR. PARTRIDGE: We are not. We think we are going to agree on Mr. Albert Kim. If we due, we are both comfortable with using a single interpreter. I think he is fair and balanced, as they say, and appropriate. I think, Mr. Coyne, we he agree with that.

MR. COYNE: Yes.

THE COURT: Counsel, when do you want to recommend we get on the phone.

MR. PARTRIDGE: I would think latter half of February, Your Honor. Because we have these -- tissue that is going to be briefed and we have a couple of discovery things that are outstanding. So we probably ought to have some time to deal with that in case there is some issues that we would want to discuss with you before trial.

THE COURT: How about Wednesday, February the 17th. Is that all right?

MR. COYNE: That is fine.

MR. PARTRIDGE: We will make it all right.

THE COURT: Let's do this at 10:00. Counsel for plaintiff, will you initiate the call, please?

MR. HERRMANN: Certainly, sir.

THE COURT: One or two more from me. Then I will certainly hear from you.

Objections. When you want to enterprise an objection, simply rise from the table, object, I object, relevancy, I object. Don't start spouting off rule numbers, please. I just don't think it's helpful in making the record.

Don't argue the objection. Normally, I will rule promptly. If I need to bring you to sidebar, I will. But that does not preclude you from asking for a sidebar or even respectfully demanding a sidebar, if you use the word demand you are going to get in trouble. But my point is that it's your job as thick-skinned advocates to deal with an Rome and Haas believe judge from time to time. And we do get Rome and Haas believe from time to time or difficult to convince that we should hear anything further from you because we have got in our minds that we have the right answer.

I recognize that I am not infallible. But I also recognize that I am going to attempt to place limits on

you. It's my job. We have to manage the time that we have allotted for this case. Within limits, I am going to let you can to sidebar. But don't abuse the privilege.

It's always help, if you anticipated an area of inquiry that is going to raise an objection, for you to have authority when we go to sidebar. It's always help for a judge to have that opportunity with you.

F I feel the issue is of enough significance, I will adjourn the jury for a short period of time and I and my law clerk will adjourn to chambers and do our own research and contemplate the authority that you have provided.

Opening statements are not arguments. They are statements. They are designed to outline your view of what the evidence will show. Not to advocate what you will later be given the opportunity to do, during your final, your closing speeches.

I guess we could talk about, perhaps should, in terms of your burdens, how you feel we should handle opening, rebuttal -- closing arguments, in terms of the number of times you get to address the jury.

MR. COYNE: Your Honor, that raises a larger issue that we wanted to discuss with you today in terms of the order of proof at the trial.

We are both working hard to try to reduce the

number of issues, hopefully as reflected by the stipulation we were able to file yesterday and we are going to continue working on that.

But there is an issue that that come up. There is one redesign that we are talking about and we will submit supplemental brief on, the did this. There is another redesign that is in the case that we provided discovery during the discovery period, all of it on the on a redesign of the mounting bracket, their '526 patent, Whirlpool's '526 patent. And again Whirlpool has not put in any evidence through its experts that that product infringes. And we have got a situation where I just wants to be clear, with the scenario I fear is that we put on our affirmative case on infringement of LG's patents, then Whirlpool puts on its affirmative case responding to that, and then puts on its infringement case against LG, then we get up and put on our noninfringement case, and I want to put in evidence on the new redesign for the '526 patent and I get met with an objection that I am beyond the scope of direct. And I am faced with a situation where I am asking what might be perceived as opening up a whole new set of infringement issues on the day before trial ends.

THE COURT: I think if counsel discuss this matter you can arrive at a protocol for this.

MR. PARTRIDGE: Your Honor, as to the redesign

on the '526 patent, this is an issue that I think, if we have a conversation about what we need in order to validate a few additional things, we may be able to come to an agreement as to whether that is in or out of the case. I don't think that redesign is a big issue. And it's not one of the major patents in the case. We ought to be able to work that out.

I think that leaves us with the order of proof being their case-in-chief on their patents, our response to their patents, our case in chief on our patents, their rebuttal with respect to their patents and their case-in-chief as to our patents, and then our rebuttal with respect to our patents.

That seems like the logical way to do it when you have patents on both sides. It is not my intention at this point as I see the issues, and we have the redesign as to the '130 patent to still deal with, but to use some procedural gimmick to forestall the presentation of, an orderly presentation of the proof.

MR. COYNE: Your Honor, we are fine with that, for example, the two redesigns will come in anyway on damages. I just don't want to be in a position where we are perceived as opening up a whole raft of allegations in rebuttal.

THE COURT: I think Mr. Partridge's point should

be well taken by you. That would be a cheap shot.

MR. PARTRIDGE: Mr. Coyne made a statement about their redesign comes in on damages. That is a contested issue between the parties. Not one that needs to be dealt with now but in realtime. But I don't want the absence of response by me on this record that we have agreed.

THE COURT: Okay. I think my last issue, unless something pops into my head before I open the floor is a discussion of time, maybe the last two issues, and what we are going to do -- what time we are going to need to provide for your presentations to the jury before we transition and if we do, in fact, transition directly into a Bench or schedule a Bench trial at some later time.

Unless there is a disagreement, I think time should be shared evenly.

MR. PARTRIDGE: Agreed, Your Honor.

MR. COYNE: Agreed, Your Honor.

THE COURT: Here is your multiplier. It's five and a half hours per day. I strive for six. But experience has taught that we really end up more in the area of five and a half. So split that. You will keep time on one another. That's the best way. My staff will back that up. But, please, we will do time checks to the extent we need to if I have a sense -- I have generally with developed a fairly decent sense of how things are going.

MR. HERRMANN: Your Honor began talking about openings and closings and then we went off indoor orders of proof.

Does Your Honor intend that we have LG open and Whirlpool open, and that's it, and then LG close, Whirlpool close, LG reply and then Whirlpool reply?

THE COURT: Let's talk about that. As to the first part, it would be, on the openings, yes, LG opens, Whirlpool opens, in that succession, in that order. Let's talk about the other.

MR. PARTRIDGE: We are fine with the way you described the openings.

MR. COYNE: We are fine with that as well, Your Honor.

THE COURT: Is there an issue on the closings?

MR. PARTRIDGE: Your Honor, I am reiterate sent to agree to Mr. Herrmann's proposal of the two rebuttals. But I must say at this juncture, I am not sure I have enough information to make an informed judgment about whether that is what makes sense. It may well be, if, as we get to trial, if we allotted an amount of time for closings and as we get in the middle of trial we could discuss with whether or not we do it all at once, Mr. Coyne goes all at once, I go all at once and that's it or whether we have some rebuttal allowed.

MR. COYNE: My preference generally, Your Honor, is what you had suggested. We are going to be submitting your jury to be drinking from a fire hose with this much evidence coming in. If we can break it up so that they are dealing with infringement, then noninfringement, and validity, then validity, then validity, it enables them to, I think, organize the evidence Moore clearly in their minds.

THE COURT: You have to be more clear. What do you mean, dealing with? Are you saying send the jury out to deliberate on infringement?

MR. COYNE: No, Your Honor. I am talking about the order of closings. If we can break the closings up as you suggested where LG closes then Whirlpool closes and then LG rebuts and Whirlpool rebuts, it does give Whirlpool the last word as well. But it ends up breaking up the evidence into smaller bites that makes it easier for the jury to digest, I think.

MR. PARTRIDGE: I am willing for that to be the default position.

THE COURT: Let me have the two of you talk about this.

MR. PARTRIDGE: I am just not informed enough.

THE COURT: Let me let you ladies and gentlemen think about it a little bit. I am flexible in this.

MR. PARTRIDGE: How much time?

THE COURT: Typically what I do is, the openings and closings are part of your time. I don't limit, place limits on openings and closings. I prefer that lawyers act like lawyers and use some degree of discretion and common sense. You by now know how much time you can expect an injury to attend what you are saying, or not. Okay? I leave that to you.

MR. PARTRIDGE: We could do a little juggling in the middle or something?

THE COURT: You can do that.

MR. COYNE: I just had a question: If there is an issue that comes up that Your Honor decides to exclude evidence and we want to make a proffer, would you prefer a written proffer, doing it at the end of the day, what is your preference?

THE COURT: We will take it as it comes, Mr. Coyne.

THE COURT: All right. Before I open the floor, given the rulings to this point, it would seem to me that we probably won't need as much time with the jury. What is your guesstimate? How many days will we he need with the jury now.

MR. COYNE: I will risk going first, Your Honor. I think we are mightily striving to get eight patents tried in the 12 days already. Now six. I think we are still at a

point where we need to try to compress the number of patents more rather than the number of days more.

THE COURT: 12 days was all you were going to get. Regardless of what happened here today. Now we know that you don't have a need to present as much evidence to the jury. So I am expecting that we are going to be able to reduce the number of days. Because I am not going beyond 12 days. I don't have it to give you during this period.

If you want to come back, if you still want to use 12 days with the jury, okay. I think that would be imprudent.

MR. PARTRIDGE: I am at ten, Your Honor.

THE COURT: That's what makes sense to me.

MR. PARTRIDGE: I don't want to be the one who keeps them here for the third week. I worry about keeping them through the second week. But we are willing to get what we need to get done with a ten-day trial. That means you can do the Bench trial, if we even do a Bench trial, on the following two days.

THE COURT: I think that is the approach, that resonates with me the most. We will plan on ten days for the jury, potentially two days for the Court.

Mr. Coyne, other issues?

MR. COYNE: I think that covers all of the issues I had on my list, Your Honor.

THE COURT: Mr. Partridge.

MR. PARTRIDGE: We have covered everything except for one from my three-page list. I think we will probably both do our best to avoid having to close the courtroom at any point. But the issue could arise and I just wants to inquire of the Court as to how you are currently dealing with that issue?

THE COURT: It doesn't happen very frequently at all. So I don't know that I necessarily have a set method for doing it. As many patent trials as we have had here, I just haven't seen it a lot.

MR. PARTRIDGE: Here is what I would say on the record at this juncture. In the event -- what we would offer to do that in the event there is a possibility that something has to remain confidential, what we would try to do is put that piece of evidence in sort of one package, even if that means it's sort of a little disjointed in the process so that we don't have to get up and down or in and out.

THE COURT: You might even want to consider me giving an instruction to the jury on that point, to help guide them. Now, ladies and gentlemen, we are at a point, we are going to take some of the evidence out of order and the reason is that there are proprietary matters that are going to be discussed during the testimony. Words to that

effect.

Anything else, counsel.

MR. PARTRIDGE: Nothing here.

THE COURT: Settlement. Are there ongoing discussions?

MR. COYNE: We have had discussions. I don't know that there has been discussions since the mediation session right before Thanksgiving.

MR. PARTRIDGE: The Magistrate Judge, who I thought did a fine job as she always does in our discussions, she moved us in the direction of trying to narrow the conveys when she realized we weren't going to be able to settle that day. I think both of our clients have periodically had conversations. I understand they may have some further conversations soon. If the need arises in the next week or two, if there is some benefit to asking Judge Thynge to help us again, we are certainly open to that.

THE COURT: Good. I am sure she has made herself available for that.

MR. PARTRIDGE: She did.

THE COURT: She is wonderful in that regard.

Please, if you really feel that settlement is getting a lot of traction, let me know, because I have got other things I could do. There are other cases that I could -- we probably -- are we booked on those days or have

those cases moved. Let me see.

That is your time. But there might be other matters I could move in there.

Even if not, there are other opinions that need to be written and things of that nature and we are still down a judge.

Counsel, thanks for your time.

(Counsel respond "Thank you.")

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Reporter: Kevin Maurer