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
Wednesday, February 17, 2010
10:00 a.m.
Telephone Conference

- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

APPEARANCES:

RICHARD K. HERRMANN, ESQ.
Morris James
-and-
PATRICK J. COYNE, ESQ., and
ANDREW CHANHO SONU, ESQ.
Finnegan, Henderson, Farabow,
Garrett & Dunner, L.L.P
(Washington, D.C.)

Counsel for Plaintiffs and Counterclaim Defendant

FREDERICK L. COTTRELL, III, ESQ., and
ANNE SHEA GAZA, ESQ.
Richards, Layton & Finger, P.A.
-and-
SCOTT F. PARTRIDGE, ESQ.,
PAUL R. MORICO, ESQ., and
AMANDA WOODALL, ESQ.
Baker Botts L.L.P.
(Houston, TX)

Counsel for Defendant and Counterclaim Plaintiffs

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THE COURT: Good morning.

(Counsel respond "Good morning, Your Honor.")

THE COURT: Mr. Coyne, who is on the line for LG today?

MR. HERRMANN: Good morning, Your Honor. Richard Herrmann. I have with me Patrick Coyne and Andy Sonu.

THE COURT: Good morning.

UNIDENTIFIED SPEAKER: Good morning, Your Honor.

THE COURT: For Whirlpool?

MR. COTTRELL: Good morning, Your Honor. In Wilmington, Fred Cottrell and Anne Gaza. My co-counsel from Baker Botts, Scott Partridge, Paul Morico, and Amanda Woodall.

THE COURT: Good morning.

I gather this is a status conference to address any issues that we know about at this time in the leadup to trial in March.

I guess one of them -- I did, by the way -- I am in receipt of the letter of yesterday over Mr. Herrmann's signature. Let's address that first. Does everybody have that letter?

MR. PARTRIDGE: Yes, Your Honor.

THE COURT: Mr. Partridge, I gather you haven't had a chance to respond? Or are you in accord with what is

written in the letter?

MR. PARTRIDGE: Isn't this the letter that just informs you that the ITC Commission had entered a decision?

THE COURT: Yes. But it seems to do more than that. If you look at the last paragraph, you will find this sentence: "In the event that the Court desires anything further in connection with its consideration of LGE's request to file a summary judgment motion on the invalidity of the '130 patent, counsel for LGE remain available at the Court's convenience."

I am not quite sure what to make of that sentence.

MR. PARTRIDGE: Neither were we, Your Honor. Our view is that the exclusive and original jurisdiction for determining the validity of patents rests with you and not with an administrative agency.

And the manner in which evidence is taken in the ITC is different than it is with respect to a jury case. I think we are a week and a half away from trial. I don't see a reason at this juncture to go through some summary judgment exercise between now and the start of trial.

THE COURT: Yes. There is really some practical impediments as well.

Let me give LG a chance to tell me what you mean in that sentence?

MR. COYNE: Your Honor, I apologize first off for saying summary judgment. I should have said judgment as a matter of law.

THE COURT: Okay.

MR. COYNE: I apologize to the Court for the confusion.

THE COURT: Terms of art are just that, counsel: terms of art.

MR. COYNE: I am sorry, Your Honor. We all running a little fast these days.

THE COURT: All right.

MR. COYNE: The concern we had -- we are not trying to say that this is dispositive of the Court's rulings on infringement. Absolutely. The District Court and your jury has a primary jurisdiction over this.

But what we are alluding to is that under the Professional Real Estate Investors decision, which, unfortunately, I know all too well, having lost it at the Supreme Court, we can't be held objectively reckless, having received a judgment in our favor. We may be wrong at the the end of the day depending on what the jury decides. But we can't be acting in a way that is objectively baseless. That is really the concern. When we were in front of you on January 7th, we had an interim decision. Now it is a final determination, and the investigation has been terminated.

It's over.

THE COURT: So you believe that the results of the investigation are dispositive of the issue of willfulness?

MR. COYNE: Yes, Your Honor. We believe that it should be dispositive. I will admit to Your Honor, there is no Federal Circuit case directly on point. The Court has not had this particular situation come up on appeal where they have dismissed post-Seagate -- there is prior cases to Seagate -- but the Seagate analysis is a game-changer. There are just two recent -- there are a couple of cases, which we would be happy to share with the Court, on related issues, things like an antitrust or unfair competition claim, where somebody said, dismiss it because it's sham, and the Court has held on appeal, no, it can't have been sham if the ITC let you proceed. At least it's reasonable, it's not a sham.

That is a comparable standard to what we have here with this objectively reckless standard post-Seagate.

Our view is this issue of willfulness, at least, is disposed of by the ITC finding, even if it gets reversed.

THE COURT: What is your view, Mr. Partridge?

MR. PARTRIDGE: Totally to the contrary. I don't think you will be surprised by that.

THE COURT: No, I am not.

MR. PARTRIDGE: I would start, you ruled at the first pretrial conference, basically under 403, that the ITC shouldn't come into this case. Then you gave Mr. Coyne sort of the option to try to come up with something that would convince you otherwise. And the various proposals that he has made have ranged from having us drop our right to a jury trial to dropping willfulness entirely. And obviously, we are entitled to a jury trial. Actually, if you look at Seagate, the focus of Seagate is on pre-litigation conduct, not on some opinion that occurs years after the objectively reckless conduct of which we complain.

It is clear from Seagate that the focus is on pre-litigation conduct.

It would be I think of interest to you to know that the Federal Circuit has affirmed other judges who have made 403 rulings with respect to the admissibility of other litigation in connection with a jury trial. And, in fact, just two weeks ago, Judge Robinson agreed with you and your previous 403 ruling in the Cordis case.

I think, while I am not suggesting, Your Honor, that this is the law of Delaware or any such thing, I do think, though, the way she described the issue is exactly what we said to you previously when you made your previous decision.

THE COURT: Mr. Partridge, it never can be a bad

thing for you to refer to a fellow District Judge, although I agree with you that there is no law of the District of Delaware. Certainly, Judge Robinson, it should be understood by all, her views would be persuasive.

MR. PARTRIDGE: Yes. And, Judge, if you look at Cordis Corporation versus Boston Scientific Corporation, January 28, 2010, I only have the Westlaw cite, it is 2010 Westlaw 331792. The issue post-Seagate was the admissibility of her preliminary injunction ruling at trial. And she focused on the fact that Seagate addresses pre-litigation conduct, and, in fact, expressly stated that from her point of view the real inquiry is pre-litigation conduct and not post-litigation rulings of the Court.

It was interesting, as she made her 403 ruling as well as her ruling as to the relevance under Rule 402 of a post-litigation decision, she said the following. In fact, the lawyers in that case had agreed to allow the ruling admitted, and even with that she denied its admission. And she said:

> Counsel's interpretation of what this record encompasses is as imaginative as it is variable.
>
> Indeed, it has become the new mantra for requests to admit such 'objective evidence as expert opinions in court decisions. It cannot be emphasized enough that the litigation process is a complicated one,

comprising multiple steps and moves forward by multiple decisions, ranging from resolving a discovery dispute to a case-dispositive motion.

"Consequently, I am very uncomfortable with characterizing administrative and Court decisions as 'objective evidence' for presentation to a jury. As recognized by counsel, a jury is going to give such evidence great weight even when the procedural and substantive basis for most such decisions will not be apparent to the jury."

Then she goes on to say almost exactly what you said at the pretrial conference, which is that the use of the words a Judge said or an Administrative Law Judge said has a profound effect on a jury, which is why you, Judge Robinson, and other courts who have been affirmed by the Federal Circuit have applied Rule 403.

This changes the willful infringement landscape here not one iota. The willful conduct, the reckless conduct that occurred here occurred years ago. And ironically, the ITC has found that when LG said it was designing around our patent, the ITC actually rejected that and found infringement by the side-by-side refrigerators, which were the refrigerators LG was originally designing. Ironically, the very prior art that the ITC now relies upon and that LG relies on upon LG actually had at the time in its own documents described, and there isn't one word of

belief on the part of LG that the patent is invalid over that prior art. And, indeed, they tried to copy that prior art in order to do a design-around and it didn't work, and instead they did a new design and never obtained advice of outside counsel with respect to any of this.

So the willful infringement evidence here is, in our view, overwhelmingly in favor of our position.

THE COURT: Mr. Coyne, I am constrained to agree with your opponent and with my esteemed colleague's view, and that which mine has been as well.

Your answer to my question earlier, the question being success along the lines of whether the ITC determination was dispositive and therefore willfulness should come out, was yes. That can't be right. So I guess you are asking -- is this an oral motion of some type? What is it that you are exactly asking me to do?

MR. COYNE: We are trying to resolve this issue that we were talking about on the 7th and continue to discuss it with Whirlpool. I understand Your Honor's ruling. We would like to reserve that issue, obviously, if we have to take an appeal.

We proposed to Whirlpool going forward on this. As Mr. Partridge pointed out, we have asked them to drop willfulness. They have said no. And we have come up with two other alternatives to avoid the prejudice. What Your

Honor was discussing with us on the 7th --

THE COURT: What prejudice is that you are trying to avoid?

MR. COYNE: When we were talking about this on the 7th of January, I thought we were all on the understanding that the evidence is at least relevant. It is just that its prejudicial value outweighs the relevance. Mr. Partridge was just arguing that it is totally irrelevant. We continue to believe it is highly relevant.

THE COURT: The outcome in the tribunal, in the ITC?

MR. COYNE: Yes, Your Honor.

THE COURT: That's another issue as to whether it's dispositive versus whether it is relevant.

MR. COYNE: I am retreating to that. I accede to Your Honor's ruling. I accept it. Like I said, we reserve whatever appeal we need to. We need to move forward and figure out what we are going to do two weeks from now. With accepting Your Honor's ruling that it is relevant -- I am sorry, something that we are not going to keep it out or get it in necessarily straight up as the ITC, we have made two other proposals to Whirlpool to try to enable us to use what we consider this highly relevant evidence, with at least mitigating or avoiding what Your Honor indicated was the undue prejudice of that evidence.

We have asked them to agree to try this to the Bench. In our view they don't have a right to a jury trial on this. They have not agreed with that. We have also asked them to bifurcate this. In other words, if they feel they are entitled to a jury trial, we disagree, but one way to do this would be to limit its admissibility as well as the admissibility of any other evidence on the issue of willfulness, such as their arguments about Harrington, to a second stage of the trial, which we are going to have, anyway, and while Your Honor is hearing the Bench issues or sometime around then, have the jury come back, if they render a verdict of infringement, and deal with the willfulness issue in a very short proceeding, when they can address only that issue and have that evidence that is relevant to that issue before them. That would eliminate the undue prejudice to us of not being able to use it.

I understand Your Honor's ruling that it is not dispositive. But we still feel it is highly relevant. It does show we aren't out in left field by thinking what we did.

THE COURT: You show that with great certitude. In contrast Mr. Partridge says what he says with equal force, that the focus is on pre-litigation, should be on pre-litigation activity, even insofar as this particular question we are addressing now is concerned. I guess you

would agree with that characterization, right?

MR. COYNE: Yes, I would agree that the focus is on pre-litigation activity. I understand we are fighting about whether --

THE COURT: That's exactly right. If you take Judge Robinson's thoughts and words into account, which I think are well put and artfully articulate, one I think can raise reasonably the question as to whether it is objective evidence.

MR. COYNE: I understand, Your Honor. We believe that it is.

THE COURT: I know you do. Mr. Partridge says -- what do you say Mr. Partridge?

MR. PARTRIDGE: I say, Your Honor, we ought to have one trial and not have to recall the witnesses. And, in fact, your 403 ruling would be equally applicable to a stand-alone willfulness trial, as well as a 402 argument that I think is a viable one and which is consistent with what Judge Robinson recently said in her opinion.

THE COURT: And I agree. Therefore, what happened in the ITC will not be considered by this Court or the jury that this Court ultimately empanels. All right?

So then, there is another issue. Mr. Coyne, I am afraid you are in deep water here today.

MR. COYNE: I am prepared to try to swim.

THE COURT: This is on the DJ question issue that is still extant. For a number of reasons. I am going to allow brief argument on this request that the redesign, ice bin, I think it is, be included in these proceedings. Why don't you go ahead. We have seen your briefs. I have had a chance to consider them.

MR. COYNE: Your Honor, let me start with the proposition that under Georgia-Pacific, the ability of -- you look at what the alleged infringer's best available alternative is. This is one of the best available alternatives. Whether it is treated as a DJ or not, we would like to put in evidence, we think we are entitled to put in evidence, we are asking your Court to put in evidence, on the fact that we could have redesigned around this for about $700,000 and, in fact, have. So those numbers are real.

Totally apart from the DJ issues, we would submit this comes in on the damages side of the case as to what the value of the technology is versus a noninfringing alternative. The reason I raised this on the 7th is what I don't want to have happen is us put that in in our damages opposition to Whirlpool's case, and then Whirlpool start an infringement case saying, well, it's not a noninfringing alternative at that time.

So totally apart from the DJ issues, this is

evidence that we feel should come in on the damages for the existing case.

If it's going to come in on that, it makes little sense to require us to file a separate lawsuit, joint issue, and start a whole other proceeding going down this parallel path on that design, when it is going to be involved in this case and the jury will hopefully hear about it anyway.

THE COURT: I will let you continue, and Mr. Partridge is obviously able to speak for himself. You say it's going to be in the case anyway. But after, perhaps, assuming I were willing to permit this, what might be a considerable amount of additional work, I am just wondering, are we going to need to engage in additional claim construction?

MR. COYNE: Your Honor, we certainly don't feel additional claim construction is needed. The term augur is in the claim. It is in the patent. Whirlpool didn't ask for a construction of it before. The term ice-crushing blade is in the patent.

THE COURT: Is there possibly a good reason for why Whirlpool did not ask the Court to construe auger before because the redesign bend was not an issue at the time? Could that be the case?

MR. COYNE: Your Honor, I don't know what their

position is going to be. It's been in the case all along. The bottom line is, it has a very well-accepted engineering meaning.

THE COURT: Auger?

MR. COYNE: Yes, Your Honor.

THE COURT: Well accepted, okay.

MR. COYNE: Okay, Your Honor.

A machine for moving material in an apfield (phonetic) direction.

THE COURT: Are you talking about plain and ordinary meaning there, counsel?

MR. COYNE: I actually am. But at the end of the day, if we are precluded from putting in the noninfringing alternative, Your Honor, that ends up being extremely prejudicial to LG. The bottom line is any licensee facing these issues would be entitled to come up with a noninfringing alternative. We feel that we have. What I don't want to do is start a whole separate trial on infringement in Stage 4 or 5 of this case.

THE COURT: Isn't that just the question? Have you actually come up with a noninfringing alternative? Because if you have, then perhaps there wouldn't be a question as to your entitlement to have the bin included, the redesign.

MR. COYNE: Your Honor, we feel that we have.

The terms auger and ice-crushing blade are two separate structural limitations of this patent. And we went back, after Your Honor's claim construction, after the ITC's review decision, and we have designed this anew and we have eliminated that part. We have actually taken out about 19 parts from the bin. It saves about $80 in cost, and improves the reliability of the product tremendously.

The bottom line is, this design, as Your Honor asked about in January, when is this finalized? Well, it was finalized in December. And it is the same design that we showed them back in September. We are, in fact, engaging in production of that design. The units have been shipped to Sears in the United States for tests. Units have been shipped to my office. Is there alleged active infringement? Yes, importation has been made of these products.

And it is a product that we are now in production. We are getting ready to start production, and the product will be released to market. The best estimate I have right now from the client is March-April of this year.

So it is real, and it is happening. And it would be, we feel, very highly prejudicial to us to preclude us from showing that the cost of a noninfringing alternative is very low.

THE COURT: Go ahead, Mr. Partridge.

MR. PARTRIDGE: Yes, Your Honor. I actually had

asked Ms. Woodall to argue this. Let me say a few things up front. It actually may end the argument.

First of all, we don't agree that it's a noninfringing alternative, that, in fact, had we had notice of this prior to the claim construction process, we would have requested a construction of the term auger because we think that that would be relevant to applying the claims to this particular device.

But they waited until the end of discovery and, in fact, any discovery we really had of this thing didn't occur until a couple of months after close of fact discovery. This has been a changing situation over time. And we are still at the point where they are running tests on this.

What we have is de minimis importation, which apparently has occurred very recently. And indeed, the fact that we would accuse this of infringement based -- actually, at this point, Your Honor, I don't know that there has been infringing activity, meaning to what extent there has been actual importation, offers for sale, and the like. But apart from whether there is infringing activity, and if you just look at here are the claims, do they describe this design which they have provided to us? Our answer to that question is yes, in our view, the claims do describe that design.

And what that then means is that their damages expert has to assume, one of the assumptions a damage expert has to make is to assume that the party's contention as to what infringes does, in fact, infringe, which thereby eliminates it as a noninfringing alternative. So this is a very circular argument by Mr. Coyne, using damages as an avenue to try to get a redesign into the case, which they came up with too late and for which there has been an inadequate amount of discovery. We are just not in a position to go forward with trying this issue at this juncture.

THE COURT: Did you want your colleague to weigh in on this as well, Mr. Partridge?

MR. PARTRIDGE: Amanda, did I misstate or incompletely argue the issue?

MS. WOODALL: No. That is precisely the issue. There is a great deal of circularity with respect to LG's position on this. Implicit in any jury determination finding, the noninfringing, alleged noninfringing alternative to be viable and therefore a limitation on damages would be a pronouncement on infringement. And it would open up a can of worms and a sideshow where we would need the opportunity to say, yes, it does infringe for these reasons, which brings it into the case fully .

I would note, as we raised in a footnote in our

briefing, Your Honor, that there are other issues that LG has not yet are addressed regarding the admission of the alleged design-around. These do not necessarily deal with the DG claim that is at issue now, but they are real. There are evidentiary requirements to getting a redesign in, a noninfringing alternative. It's not just three or four years of after the hypothetical negotiation, what can you do. That is not permissible under binding case law.

They have a number of hurdles other than whether or not this is an actual redesign that we would accuse or not to getting it into the case as a redesign.

Acceptability in the marketplace, they have to put on evidence of that. They have to show that they would have been able to do this at the time of the hypothetical negotiation, not in 2010. Those are just two of the issues that are still outstanding, apart from the justiciability and putting at issue infringement of something that has not been accused and for which there has not been a claim construction, really, on auger.

THE COURT: Thank you, counsel.

Mr. Partridge and your co-counsel there, did you want to comment at all, you will recall -- and I will give, of course, LG a chance to respond -- I believe I expressed some concern at the pretrial conference that the request that we are considering right now was based in large measure

on attorney argument and I didn't have any declarations or sworn testimony or anything like that to support the underlying contentions by the lawyers. And I think I have a deposition that has been offered by LG. Did you want to talk about that tall? Mr. Partridge?

MR. PARTRIDGE: Your Honor, that is a deposition -- here is what happened.

You know, at the hearing, there was discussion about making a witness available. I expressed concern about the fact that there had been attorney argument on this. And the response was, well, we would make a witness available. What happened then is that they filed a response, a timely response, in accordance with the order you entered at the pretrial conference, but they ended up including no declaration.

So the response they submitted to you was all attorney argument. And we expected they were going to give us a declaration so we knew what their position was. They gave us no evidence. And thereafter we said, well, gee, we are not going to go take a deposition after the fact, to allow them somehow to try to introduce evidence after they had filed their paper when they had not introduced any evidence before.

So we told them we don't need the deposition because you apparently have decided to rely on attorney

argument again.

So we told them we don't. We don't need the deposition.

What they do is take a self-serving deposition of their own, in which they asked a few questions and the witness went on for pages in a narrative, which they have now provided to you as so-called evidence in support of their position.

THE COURT: Okay. Thank you.

Mr. Coyne.

MR. COYNE: Yes, Your Honor.

I would respectfully disagree with Mr. Partridge's characterization. We provided the Court a number of exhibits attached to our brief. What happened after Your Honor's conference is they demanded a deponent. And we brought one over from Korea, prepared to tell them exactly what the status of the development work was. He arrived here on Friday morning. And we received notice from Whirlpool Friday midday after the gentleman had already come to the United States for the deposition that the they requested, that they had decided to cancel it.

We did in our papers provide evidence. Mr. Partridge is simply incorrect. We gave the Court a number of exhibits. Frankly, Your Honor, most of the those exhibits are also on the exhibit list, detailing what has

been done.

There is evidence in the record at this point of what LG has been doing and that those documents reflect that that design was finalized in December.

Whirlpool, sensing that this was not going to be helpful to their cause, decided to cancel the deposition anyway. The gentleman was here, he was prepared to testify, so the court reporter was brought in and we simply had him make a statement.

We did provide in the brief that we provided Your Honor evidence. It is not just attorney argument.

Whirlpool is simply trying to play games and evade this by canceling a deposition that they knew was going to hurt them.

The design is finalized. It is proceeding. It has been transferred down to the plant at Chawon back in December, and LG is going forward with it.

So in terms of the issue about is it ripe, absolutely. That is the product design that we are making.

THE COURT: You have to keep in mind, Mr. Coyne, let's assume all that is correct, and I take you at your word as an officer of this Court, both of you, there is a process in which LG was engaged and it's called litigation in front of a Federal Judge.

There was a well-ordered process put in place to

lead us up to a trial. Now, you correct me if I am wrong. It wouldn't be the first time I was, Mr. Coyne. My recollection is the first time I heard of this design-around issue was at the final pretrial conference. Is that correct?

MR. COYNE: Your Honor, I don't know if that is the first time the Court heard.

THE COURT: Obviously, I am not asking you to get inside my head. Would that not have been the first time that I would have been able to understand that there was that issue?

MR. COYNE: I don't know whether we filed anything with the Court with respect to the depositions back in September or not.

THE COURT: You know I am not going to read those filings. You know that. Right? You are talking about deposition notices?

Mr. Partridge, do you have a recollection?

MR. PARTRIDGE: Your Honor, I think that the discovery that was taken in the fall that Mr. Coyne is referencing was done by agreement of the parties. I don't remember the couple of discovery calls we had with you well enough to say that this issue absolutely didn't come up --

THE COURT: Mr. Partridge, that would have been after discovery had concluded. Right?

MR. PARTRIDGE: That's correct. I believe the answer is that the first time this was brought to your attention in a way in which you would have been alert to the issues that we are really discussing here today would have been the pretrial conference.

You know, Judge, in looking at their responsive papers, what they gave us was an argument, and attached Korean language exhibits, and that was it. There might have been a couple other drawings and things that we could decipher from that.

And I think a day or two later they gave us translations of the Korean exhibits and I think filed a supplement with you. This happened on a Thursday. I remember this well, because on Friday we looked at their paper and said, why on earth should we take a deposition on Monday when they haven't even, other than attorney argument, established that there has been any infringing activity in the United States?

So we immediately contacted them and said, we don't need the deposition for purposes of this motion. Then the following Monday, they went ahead and did this narrative with the witness and then submitted another paper to you. There was supposed to be one submission. That was very clear: You have one shot at this, submit a ten-page brief and that was it. We would do a response, ten pages, and

that was it. There was to be no reply.

So we looked on Friday morning at what they had submitted, and there was no evidence of any infringing activity. So that even if at that point in time we had decided as the holder of the patent that we wanted to sue them for something, we had no basis, no reasonable belief that there was infringing activity other than inferring, perhaps, some de minimis test or something that might have been done on this thing. That is the position we were in. I guess it was about a week and a half after the pretrial conference.

THE COURT: Okay. Mr. Coyne, I am going to deny the request. It seems to me that I am still at sea to a large degree as to the minimum requirements of sufficient immediacy and reality and whether there has, in fact, been meaningful time to conduct potentially meaningful activity and activity is ongoing. In spite of your well taken -- you are an officer of the Court and I accept your word, but this is a Court of law, but the evidence does not persuade me that in point of fact you are right.

Moreover, there is a process issue here, Mr. Coyne. This Court is going to vindicate and protect its process. As far as I am concerned -- this is not intended to be critical or unfair, Mr. Coyne. But I believe that LG has violated this Court's process. And I am going to

exercise my discretion to protect it.

This is way late in the game, the litigation process for this matter to be raised in the manner in which it has been.

I agree with the characterization by Whirlpool that the deposition is at best suspect. And therefore I am rejecting your spin on it, if you will, and the reasons that Whirlpool did not participate in it.

So for those and other reasons that have been articulated already, I am going to deny your request that the redesign be included in this case as a declaratory judgment issue. All right?

Are there other issues we need to talk about?

MR. COYNE: Your Honor, just clarification. Is Your Honor also excluding it with respect to the damages issue issues?

THE COURT: It is out entirely, Mr. Coyne.

MR. PARTRIDGE: Your Honor, we have a couple of very brief issues I would like to raise with you.

THE COURT: Mr. Coyne, in part, you might view it as a sanction, I am not going to reward this kind of conduct -- I do agree with Mr. Partridge's characterization that it's an attempt at an end run, essentially. But also I am not going to avoid this kind of conduct in my Court.

Okay? Anything further you want to ask me on

that?

MR. COYNE: No, Your Honor. Thank you.

THE COURT: Go ahead, Mr. Partridge.

MR. PARTRIDGE: I think these are simple issues, Your Honor.

We have three refrigerators we would like to bring into the courtroom at various times.

THE COURT: Sure.

MR. PARTRIDGE: Not all at once. We are going to try to stage this, because they are big. Is that going to be permissible for us to do that? Obviously, it's like the refrigerator in your kitchen, it's that size.

THE COURT: I have had jet engines in the courtroom, Mr. Partridge, if you can believe it.

If you can, if you would be kind enough to be in touch with Ms. Walker, she is out today, but you will need to make arrangements to -- I am assuming there is no objection from LG on this.

MR. COYNE: Your Honor, we would actually ask for leave to bring the same type of evidence in the courtroom.

THE COURT: Then the parties will need to coordinate between yourselves and with the Court. Ms. Walker is your touchstone there. And you will have to make arrangements to get them over the bar, which can be done, I

have seen it done with jet engines, as I said.

MR. PARTRIDGE: Your Honor, a couple of procedural matters. Mr. Coyne and I have reached a substantial agreement on protocols for identifying witnesses, exhibits, demonstratives and the like. We have agreed pretty much on the order of proof and the like and will probably reduce all that to writing shortly. But there are a couple of things that are still hanging out there. The first of which is that I am concerned about the scope of rebuttal, and want to make sure that we have true rebuttal, and that, in fact -- initially I proposed to Mr. Coyne that there ought not to be rebuttal except for good cause shown. I am not pushing the envelope that far. But I would just ask that you tell us what your expectations are with respect to rebuttal and whatever you say we will live with. What I don't want is for evidence to be held back and used on rebuttal.

THE COURT: Yes. You know, Mr. Partridge, you may know reputationally or from actual experience with me, I usually don't micromanage that issue. If I, however, am confronted with a claim by an opposing party that things are being done improperly for tactical reasons or strategic reasons, as a litigation tactic, that is, I do mean that in a pejorative sense, then I will respond to an appropriate request for exclusion. I hesitate to try to address this at

this time because I am not exactly sure what I am addressing, being asked to do.

MR. PARTRIDGE: I understand, Your Honor. I think that provides us with enough guidance at this juncture. I appreciate that.

Another issue concerns demonstratives. We have worked out an arrangement for demonstratives, an exchange of demonstratives, to be used on direct and for openings. That's all going to be worked out I think just fine.

The one issue that we haven't reached agreement on concerns demonstratives that might be used for cross. My experience with demonstratives for cross is that they rarely raise evidentiary objections because most of the time your witnesses, they mostly involve experts, but most of the time your witnesses are prepared to deal with most anything by the time they take the stand.

To the extent that there are any minor issues that arise in connection with cross-demonstratives, they can be handled in realtime. I don't want to have to exchange cross-demonstratives, thereby laying out what the cross is in a case. Just as I wouldn't want to have to give the other side my cross outline, I wouldn't want to give the other side my cross-demonstrative. And Mr. Coyne and I haven't reached agreement on that.

THE COURT: Let me help you. I agree with you.

Neither party will have to share its cross-demonstratives in advance. To the extent there are issues that they raise, if we need to, we will dismiss the jury and deal with it at sidebar.

MR. PARTRIDGE: Great. Two other issues, Your Honor, briefly. One concerns trial time. We filed, Mr. Coyne and I have worked out an agreement as of yesterday to drop two more patents, one on each side.

THE COURT: I think I saw that stipulation.

MR. PARTRIDGE: This morning Mr. Coyne proposed -- Patrick, is it okay if I reveal this? I don't want to reveal something that you communicated to me prematurely. I am talking about the '922.

MR. COYNE: I would be happy to reveal it.

Your Honor, we have one stipulation that is awaiting your signature from yesterday. We are also trying to narrow our case to get this into a condition where it can be more readily tried.

We are willing to drop two more claims of the '121 patent, leaving us with three claims of the '121. And we are willing to unilaterally drop, I have offered to Mr. Partridge the same type of stipulation we have done on the other four patents for one additional patent that LG is willing to drop. And we are not asking for anything in return.

MR. PARTRIDGE: Your Honor, I haven't had an opportunity to discuss that with my clients this morning. But we could be in a situation where we have one LG patent and two Whirlpool patents. If, in fact, that is the case, and I would say that is likely the case, I think my client is likely to agree to Mr. Coyne's proposal this morning. We are at a ten-day time for trial. I have been very concerned about having the jury have to wait over a weekend before being able to deliberate. My view would be we could probably do this in eight days at the most.

THE COURT: At the most. Given this considerable reduction in the number of patents and asserted claims, yes.

Mr. Coyne, what is your view?

MR. COYNE: We were going to suggest, Your Honor took off two days for dropping off the other two patents, I guess my assumption would be we are down to a seven-day trial.

THE COURT: I am equally comfortable with that, quite frankly.

MR. PARTRIDGE: We can make that work, Your Honor.

THE COURT: Let's doing seven.

MR. COYNE: Your Honor, one other issue. In terms of the timing of the trial, what would Your Honor want

to do if we are shortening this up and freeing up some more of the Court's time? Do you want to still start on the 1st? What was Your Honor's preference in terms of the staging?

MR. PARTRIDGE: We would like to start out on the 1st. We made lots of arrangements with witnesses. It would be very difficult for us to start shuffling the deck.

THE COURT: If the parties have planned for a start date of the first of the month, let's just keep it there.

MR. PARTRIDGE: Thank you, Your Honor.

THE COURT: Let's plan on, counsel, meeting in the morning on the first day of trial at 8:30.

I am going to -- unless you tell us otherwise, and that will be fine with us, I am going to assume there may be some issues we may need to address. If that is not the case, would you just let us know by leaving -- we are starting on a Monday or Tuesday?

MR. PARTRIDGE: On a Monday, Your Honor.

THE COURT: Just leaves a voice mail on the main number -- better yet, leave a voice meal for Ms. Walker on the 573-6471 exchange and let her know whether we need an 8:30 meeting or whether we can convene at 9:00. On the first day, the venire won't be brought up until about 9:30. It takes them that long to receive their instructions and get organized and get up here. By your coming over at 9:00,

unless we need to convene earlier, you will have the chance to meet with Ms. Walker and Ms. McDavid and get the last or most recent iteration of the jury list and report as to who has not appeared, because as you know, you can get the list three days before that Monday, probably Wednesday, the week before, from Mr. Trickey. But that won't be the final list.

MR. PARTRIDGE: Okay. I think that will work, Your Honor. It's possible there could be some exhibits and issues that we will want to discuss for openings that arise over the weekend. Mr. Coyne and I have agreed that I think it's on Saturday evening we are going to identify exhibits and demonstratives and the like.

So hopefully that's more than sufficient time on Monday morning to address any issues that we are unable to resolve.

THE COURT: You mean the 8:30 hour.

MR. PARTRIDGE: Yes.

THE COURT: Again, if you don't need us, let us know.

MR. PARTRIDGE: Will do.

THE COURT: All right. Other issues?

MR. COYNE: Yes, Your Honor. There is another issue. We have an issue of subpoenas. We talked about the deposition designations on the 7th of January. I had indicated that we would like to get these witnesses here

live. Whirlpool has subpoenaed two of LG's witnesses, frankly, people we are bringing anyway. But they are outside the subpoena power of the Court. One hasn't even been served yet. But we have also subpoenaed Whirlpool's witnesses, including its corporate representative witnesses, and several of -- at least one of its officers.

We served those subpoenas on local counsel because Whirlpool has told us all along, contact their witnesses through Whirlpool's counsel.

Whirlpool is now objecting to all of those.

We would like some guidance on, we would feel it appropriate that Whirlpool needs to bring its corporate representatives and officers at a minimum. They are people that are under their control. They have testified in the case as corporate representatives before. And we would like to do that testimony live rather than read deposition transcripts or play videotapes.

THE COURT: Yes. Very experienced trial lawyers on this line on both sides. You got to know the jury hates deposition readings. I loathe them.

MR. COTTRELL: Your Honor, maybe I can cut through this. I will address this issue. I think the answer lies with Your Honor's practice in other trials that I have had before the Court, and consistent with Rule 45. They sent over seven or eight trial subpoenas for current

non-officer employees of Whirlpool and they want those folks to appear live in their case of in chief. We objected and said, look, you have options A or B. A would be, if they are called in Whirlpool's case, because they are Whirlpool employees, you can ask your questions at that time, or Option B would be if they don't show up at trial you can play the videotape of their deposition.

We thought that was consistent with Rule 45's hundred-mile rule and also other cases we have with the Court.

THE COURT: It is.

Who wants to respond to this from the other side?

MR. HERRMANN: Your Honor, I suppose I should respond, because Mr. Cottrell and I had some discussion on this before we filed the subpoenas, or served the subpoenas.

We were trying to work out an arrangement where we wouldn't have to serve people individually, after Whirlpool had served one of our people outside the 130-mile radius individually. And we sent them over a list. They told us that since they are not officers, even though they are high-level employees, that they would object, so we served them.

It truly does not make any sense for the jury to have to hear the depositions. The only other alternative we

have would be to serve them in their particular district and have them appear at a video teleconference facility, and then the jury to have to hear video teleconferences, which we think will add time to the trial and not be nearly as good as having these people live.

It is within the discretion of the Court. They are Whirlpool employees. As a matter of fact, the objections were pro forma objections that were filed by Whirlpool, to the extent they are outside the radius, to the extent they are not officers. And there weren't any specific objections that were brought to our attention as to any particular one, whether it be inconvenience, except for one. And one is an officer, Mr. Marcey (phonetic), who happens, coincidentally, to, we were told after we subpoenaed Whirlpool, that he was no longer going to be an officer or an employee of Whirlpool the day before trial. And we would like him as well as the others, Your Honor.

THE COURT: I am sort of feeling there are two ships passing by one another in the night here. Is it not, Mr. Herrmann, is Mr. Cottrell's proposal unacceptable?

MR. HERRMANN: It is, Your Honor. We don't know whether those people will be live.

THE COURT: I thought he said they would be.

Mr. Cottrell?

MR. COTTRELL: Your Honor, to the extent that

Whirlpool calls them live, then Mr. Herrmann and Mr. Coyne can ask them the questions they have.

To the extent they are not called live, then they have the depositions they can read in. And we think it's certainly consistent with what Your Honor has done before.

I suppose if they have a concern about, well, we don't want to close our case until we can ask the questions, live, then we can keep the case open, if we do call that witness, and they can ask their questions live.

THE COURT: Mr. Herrmann.

MR. HERRMANN: Consequently, Judge, since they are not telling us whether they are calling these people, we run --

THE COURT: I got you. Hold on a second.

Mr. Cottrell, are you not able to tell.

MR. COTTRELL: I am going to have to ask for a little help from Mr. Partridge, Your Honor, about these seven or eight folks, whether they are -- I don't have the pretrial with me -- whether they are on the may-call or will-call list.

THE COURT: Mr. Partridge.

MR. PARTRIDGE: Your Honor, this may end up changing as a consequence of the dropping of the patents that have occurred in the last day and again this morning.

But there are two or three of them. I don't have that list right in front of me at the moment, those that we are going to call live. There are some that we aren't.

These are all engineers. None of them are officers. They live in Iowa. They live in Michigan. They are in various places. They have all been deposed.

Mr. Marcy, who was the only one in the group who is an officer, and we had told them we would accept the trial subpoena for him because he was an officer.

A week later we found out that he was leaving the company, and that his departure date would be the last day of the month of February. And they did depose him, so they have the deposition there.

I am not sure how I can actually be authorized to accept a subpoena for somebody who won't even be employed by us at the time of trial, who was a former, as of that point in time will have been a former officer. But I don't think I have even the authority to do that on his behalf.

So I am willing to tell them which ones we intend to bring to trial, and can give them a list of those.

I think it's three out of the group of six or seven, whatever the number was.

But I would have to revisit that in light of the dropping of the patents that occurred today and yesterday.

THE COURT: Messrs. Cottrell and Herrmann, is

this a matter that I can safely leave for the guidance of Delaware counsel to work out?

MR. COTTRELL: Your Honor, I would be happy to consult with Mr. Herrmann man on this. After Mr. Partridge and I discuss these witnesses in light of the claims, we can get back to Mr. Herrmann.

THE COURT: Mr. Herrmann.

MR. HERRMANN: Your Honor, in light of the fact that we were unable to deal with it before this conference, I am not hopeful that we will be able to resolve the issue after the conference.

If Your Honor does not require Whirlpool to provide these people live at trial, may LG have permission to set up video teleconferencing equipment in the courtroom so we can subpoena them within a hundred miles of their district and have them live through video teleconferencing?

THE COURT: Sure, you can, Mr. Herrmann, if that is the only way to resolve the issue. I hope that it can be resolved otherwise. But at least that would provide some measure of relief.

MR. HERRMANN: Thank you, Your Honor.

THE COURT: Anything else, counsel?

MR. PARTRIDGE: Nothing from us, Your Honor.

THE COURT: Mr. Coyne?

MR. COYNE: No, Your Honor. I think that covers

everything we had.

THE COURT: We will see you along the way.

(Counsel respond "Thank you.")

(Conference concluded at 10:57 a.m.)

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Reporter: Kevin Maurer