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, March 10, 2010
9:30 a.m.
Trial - Day Eight

- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge, and a Jury

APPEARANCES:

RICHARD K. HERRMANN, ESQ.
Morris James
-and-
PATRICK J. COYNE, ESQ.,
ANAND K. SHARMA, ESQ.,
JEFFREY W. ABRAHAM, ESQ., and
WALTER D. DAVIS, JR., 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.,
AMANDA M. WOODALL, ESQ.,
GENE SPEARS, ESQ., and
ROBINSON VU, ESQ.
Baker Botts L.L.P.
(Houston, TX)

Counsel for Defendant and Counterclaim Plaintiffs

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THE COURT: Yesterday evening at the close of the day, Mr. Coyne moved the Court to further instruct the jury in light of argument that was made by Mr. Partridge to the jury.

I am going to read into the record what I believe to be the relevant passages from Mr. Partridge's discussion with the jury, then I will tell you how I am going to rule.

I don't know where this appears in the overall transcript, so I can't identify its location. Mr. Maurer provided me with a separate couple pieces of paper.

Here we go. This is Mr. Partridge:

"And when you see documents like those presented to you from LG where 'a dispute is expected,' and you saw that in a number of documents, 'a dispute is expected,' those words were used in the first draft of the final report, and both were dated December 2003. We don't know what the period of time was between those two drafts. But they were both intended for December of 2003, after about one year and three months of total engineering work on the Bics project.

"One year and three months later.

"So here we are with a dispute expected with respect to the '130 patent. What does your common sense tell you a normal business would do in that circumstance?

What would you do if you thought you might be using something that belonged to someone else without permission and you thought there might be a legal dispute? What would you do?

"Well, one option is you wouldn't do it. Another option is you would ask an attorney whether doing it might get you in trouble.

"Would you simply paper over it by issuing a second report that said, gee, we designed around the creative genius of our engineers, overcame what was previously -- I forget the word that was used -- the impenetrable, I believe it was, patent of Whirlpool? Is that reasonable? Is that an acceptable standard to be employed, either personally, and in this case in business? Do we have higher expectations of businesses when they are faced with a dispute and have identified it as such?

"We asked LG whether or not they had any basis for saying they did not infringe. And you will remember the testimony we received from one of LG's engineers, Mr. Eui Yeop Chung. He was instructed by his attorney not to answer. Well, LG can certainly stand on attorney-client privilege. You can also infer, if you so choose, that the answer may not have been favorable to LG. And that wasn't the only occasion on which that occurred. And you heard evidence about those other occasions during the course of

this trial."

I read all that to give context to what I think -- I am quite confident is the language about which Mr. Coyne complains, and that is the next-to-last sentence that I read, namely, "You can also infer, if you so choose, that the answer may not have been favorable to LG."

So what that presents -- and this has been addressed in many, many cases around the country, but certainly first and foremost by Knorr-Bremse. I addressed this in my opinion in Telcordia, identifying cases in which the defendant obtained an opinion of counsel but has asserted the attorney-client privilege to withhold this opinion, which I think is this case, and said the following:

"The Federal Circuit has stated that the threshold showing a patentee must make in establishing willful infringement 'cannot be satisfied merely by proof that the accused is asserting the attorney-client privilege to withhold an opinion of counsel,'" and I cite the Golden Blount case. "This also makes sense to the Court, because it can envision only one inference that the jury will draw from learning that the defendant has consulted counsel and obtained advice, but has chosen to assert the attorney-client privilege: that the opinion received by the defendant was unfavorable. This is precisely the inference that would run afoul of the Federal Circuit's reasoned

opinion in Knorr-Bremse, and an inference that the Court would not permit the jury to draw."

That is the situation we have. It needs to be addressed.

I invite you, Mr. Coyne, to craft a curative instruction, if you haven't already done that.

MR. COYNE: Our suggestion --

THE COURT: To say anything else you want to say in light of my comments.

MR. COYNE: Your Honor, our suggestion would be just to point out that the statement was made, and then re-read the attorney-client instruction that you gave them yesterday. I think that's the simplest and least confusing way for the jury.

THE COURT: That's fine.

Do you agree with that, Mr. Partridge?

MR. PARTRIDGE: That is fine, Your Honor. I think we are in a little bit of a gray area, based on how I read the Broadcom-Qualcomm case, in which the Federal Circuit actually approved specific language dealing with this issue.

But we could either accept --

THE COURT: What did they say there?

MR. PARTRIDGE: They said, and this is in connection with -- let me hand it up.

THE COURT: Just read it.

MR. PARTRIDGE: The Court said, this was the instruction given by Judge Selna in the Central District of California, that:

What the Federal Circuit said in the Broadcom case comports with its holding in the Knorr case."

And here is the instruction:

In considering whether Qualcomm acted in good faith, you should consider all the circumstances, including whether or not Qualcomm obtained and followed the advice of a competent lawyer with regard to infringement. The absence of a lawyer's opinion by itself is insufficient to support a finding of willfulness, and you may not assume that merely because a party had not obtained an opinion of counsel that that opinion would have been unfavorable. However, you may consider whether Qualcomm sought a legal opinion as one factor in assessing whether, under the totality of the circumstances, any infringement by Qualcomm was willful.

THE COURT: Yes. What was the context for the reading of that instruction by the District Judge?

MR. PARTRIDGE: It was a willful infringement issue.

THE COURT: Was it in response to a lawyer

making an inappropriate argument with respect to the jury?

MR. PARTRIDGE: This was part of the regular --

THE COURT: The general instructions.

MR. PARTRIDGE: -- the general instruction that the judge gave.

THE COURT: You are not suggesting that the Qualcomm Court, that is the Federal Circuit, in any way watered down its holding and the previous panel's holding, that is the en banc opinion, I believe it was an en banc opinion in Knorr-Bremse?

MR. PARTRIDGE: I am not, Your Honor. I am merely saying the Court after that case said here is an example of an instruction that fits with that case. That's what I am saying.

I am fine if we just, you know, read the instruction previously given, as Mr. Coyne suggested. That works for me, too.

THE COURT: Mr. Partridge and Mr. Coyne, the thing is, as you pointed out, Mr. Coyne, and as Mr. Partridge agrees, we have already given a totality of the circumstances willfulness instruction along that line. Now the Court is trying to address, it needs to cure a situation where the jury has been invited to do exactly that which they are not permitted.

So if you are content to merely have me read

back that which I have already done, that's fine. If you would want something stronger, I would be prepared to consider that.

That's my point. This is not that circumstance, Mr. Partridge, that you cited.

MR. PARTRIDGE: Understood.

MR. COYNE: Your Honor, I just have it in handwriting here. What we would propose the Court say is, "During his closing argument yesterday Mr. Partridge made a statement dealing with attorney-client privilege which was inconsistent with my instructions to you. So that there is no confusion, I will re-read this instruction."

THE COURT: That's what I had in mind.

MR. COYNE: Thank you, Your Honor.

THE COURT: If you don't mind, I will take that. That is what we will do.

Ms. Walker, when we go back, you can get me the jury instructions.

So that's how we will deal with that.

The jury has this question for us, I think among a number of others. They only provided this one. It is as follows:

"If one claim is judged to be invalid, does that prevent infringement for any of the other claims of the patent?"

Now, I guess the easy answer is, the short answer is probably no. But it may depend, I guess. I wanted to talk with counsel and get your views on how the jury should be advised on this.

Mr. Coyne.

MR. COYNE: Your Honor, I would say it does not, but the relationship between the claims matters. If it is an independent claim, then none of the dependent claims from it are infringed.

THE COURT: That's the point.

Mr. Partridge.

I don't think the question is capable of just a short yes or no response, was my initial -- remains my thought on the subject.

MR. PARTRIDGE: I agree that it depends on the claim.

THE COURT: Do you want to agree, see if you can work on, agree on an instruction to the jury on this?

MR. PARTRIDGE: Yes.

THE COURT: Or refer back to the appropriate place in the instructions we have already given. Maybe we can just do that.

What I wanted to do is see if you concurred with my view, which you do, and give you a chance to talk to one another and agree on something.

While you are doing that, I am going to go back into chambers and collect the willfulness instruction, and we will see if the jury has any other questions for us. And I will be back.

(Recess taken.)

THE COURT: Okay. I realize I misspoke when I left the Bench. We have the attorney-client privilege and opinion of counsel instruction that I delivered in the final instructions.

Have you agreed upon an answer to the jury's question?

MR. COYNE: We haven't yet, and we didn't bring the copy of the instructions. Mr. Herrmann ran back to the office to grab them.

MR. PARTRIDGE: I have them here.

THE COURT: What are you thinking?

MR. COYNE: As we started working through it, it's a more nuanced problem than it presents at first, because you have got one issue of an invalid claim can't be infringed and you have also have the aspect that we are asserting a dependent claim on 20 and 21 without asserting the independent claim on which it depends.

I certainly don't want to encourage them to go out and make findings on a claim that is not asserted in the case or get confused by thinking claim 10 is invalid and it

therefore somehow implicates 20 and 21 of the '121 patent.

THE COURT: Let's talk about that for a moment.

We don't know which patent they are looking at, which claim, which patent they are looking at. You have honed in on your patent. I understand that.

Do you have a thought?

MR. PARTRIDGE: Yes, Your Honor. Two answers we can give them, from our point of view. We think that the simple answer is no. In other words, they have to go look at the claims.

But another way to do it is just simply say to them you should answer all the questions on infringement and validity. And when you look at the verdict form, we have separated the infringement and validity questions. And we have -- it's a fairly simple check-off on each claim, check-off on each claim for each of infringement and validity. And I think if we just tell them you have to answer all the questions, it probably deals with this.

But I do think the simple answer is, if we were to give an answer as opposed to just telling them to go back and answer all the questions, I think the answer is no.

MR. COYNE: Your Honor, as I am wrestling with this, I can't think of a simple way to phrase this. I think a no and answer all the questions is probably going to be the simplest and least confusing for the jury.

THE COURT: I will tell them, ladies and gentlemen, the short answer is no, but by way of further response, please -- well, you should answer each question on the verdict form.

MR. SPEARS: Each question dealing with infringement and validity, because the damages question is conditional.

THE COURT: All right. I don't think they have passed out that, or resubmitted the sheet they gave us yesterday, which had a number of questions on it, which I didn't read, because when they reported to the jury officer that they were going home, I just gave it back to the jury officer and said we will deal with this tomorrow.

So let's get the jury out.

You may want to check first as to whether they have any questions before you bring them out, have the jury officer check that.

(Jury enters courtroom at 10:10 a.m.)

THE COURT: Good morning, ladies and gentlemen. Please take your seats.

All right. We have two things to deal with, and since you posed the question, I am going to deal with your question first. Then I need to give you a further instruction.

Your question: If one claim is judged to be

invalid, does that prevent infringement of any other claim of the patent?

The short answer is no. I will further instruct you that you should answer each, on the verdict form, I am referencing the verdict form right now, you should answer each question that deals with infringement and validity on that form. I think this will give you further guidance.

Something occurred during the closing speech of Mr. Partridge yesterday, and I am going to give you an instruction on that issue.

During his closing argument yesterday, Mr. Partridge made a statement dealing with the attorney-client privilege which was inconsistent with my final instructions to you. In order to avoid any confusion, I am going to re-read that instruction. And you can certainly take another look at it when you go back.

During the trial you heard the phrase attorney-client privilege. And you also saw documents that were redacted by the parties. The attorney-client privilege protects clients, or a client's confidentiality, when seeking legal advice from attorneys. You should know that it is perfectly proper for any witness to invoke the attorney-client privilege, and you shouldn't draw any conclusion adverse to either party simply because a witness has invoked the privilege, nor should you speculate on what

the witness might have testified if the privilege had not been raised.

You should also not draw any negative inference from the redaction of the documents that were presented to you throughout the trial. These redactions were also made to protect a claim of attorney-client privilege asserted by LG, the plaintiff here, and you should not draw any negative inference from these redactions or attempt to speculate what information was contained in those redactions. Confine your deliberations to the testimony that you have heard and to the documents that are in evidence.

Okay. You may resume your deliberations. Thank you.

One other thing. While you are here, I will advise you in the presence of counsel, so if they see you milling about the courtroom, it's because you have already indicated that you want access to certain exhibits, physical exhibits, namely, the three refrigerators that are here in the courtroom, and all you need to do is let your jury officer know that you want to come out. The front door of the courtroom is going to remain locked. The jury officer will protect the other entrances, so that you will be undisturbed and you can deliberate in this room, is the point.

Don't feel that you have to save a comment until

you get back. Nobody is going to listen to you here and you will be just fine. Okay?

You may return to the jury room.

(Jury leaves courtroom at 10:13 a.m.)

(Recess taken.)

THE COURT: Counsel, there is a request from the jury. The way it is phrased -- and I don't remember, there are enough exhibits in this case that, frankly -- was Kim a patent or a patent application?

MR. PARTRIDGE: Kim was a patent.

THE COURT: They want Kim. Do they have Kim?

MR. PARTRIDGE: Yes, they do have Kim.

THE COURT: Mr. Coyne?

MR. COYNE: Your Honor, there is two Kims, unfortunately. The Kim patent --

THE COURT: They say the Kim patent that has the push-button spigot as mentioned by Karvelis.

MR. PARTRIDGE: I think it's DX-569. I don't have the exhibits here. But that is the only --

THE COURT: That is in the box that they have, one of the boxes?

MR. COYNE: Yes, Your Honor.

MR. PARTRIDGE: Yes. If they go and look at the exhibits we provided, they are arranged by patent, and it should be in that set of exhibits. I think they are in

numerical order for each patent, so they should be able to find it in the '121 set of exhibits in numerical order. DX-569.

THE COURT: Are the two sets of boxes clearly marked, one LG and one Whirlpool?

MR. PARTRIDGE: I believe they are, Your Honor. The easy way to tell is, one set I think is all DX's and I think we put all the PTX's in the other binders.

I believe on the notebooks our legal assistants put labels.

THE COURT: Is it DTX?

MR. PARTRIDGE: DX.

THE COURT: And PTX?

MR. PARTRIDGE: Yes.

THE COURT: All right.

"Members of the jury, you should be able to find this patent in the box of exhibits with DX designations. The Kim patent you seek may be found at DX-569."

All right?

MR. PARTRIDGE: Very well, Your Honor.

MR. COYNE: Yes, Your Honor.

(Recess taken at 12:35 p.m.)

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(The following took place in chambers, by teleconference, at approximately 3:00 p.m.)

THE COURT: Hi, counsel.

(Counsel respond "Good afternoon.")

THE COURT: Two things. Let me put on the record the conversation that I had in response to the previous request from the jury, previous to the one I am going to share with you, that I imagine by now was shared by each side's respective Delaware counsel.

The jury asked whether we could tell them who manufactured PTX-552. The response that I hand-wrote on the question was, "PTX-552 is a Whirlpool-manufactured Kenmore refrigerator accused under the '121 patent."

That is now on the record.

We now have a request for a dictionary. And I wanted to get the parties' views on that. That is why I have asked to speak with you.

MR. PARTRIDGE: Your Honor, I always hate to turn a jury down, but I think that's a bad idea, to give them a dictionary. I think if we do so, we run a risk of creating the potential for reversible error.

THE COURT: Why do you say that?

MR. PARTRIDGE: Because what will happen is that they will pull out the dictionary and use it perhaps to second-guess claim construction or to make claim constructions.

It is really hard to know what they would do

with that dictionary. And depending which dictionary you choose, they can vary considerably. So I am hesitant to move in that direction.

THE COURT: Mr. Coyne.

MR. COYNE: Yes, Your Honor. I share the same concerns. But if they have specific words that Your Honor has not construed that they want a definition of, I guess I am still even concerned, because I think they are going to use the dictionary instead of the specification. That is my fear.

THE COURT: Counsel, why don't we tell the jurors that they can use the plain English meaning of words that aren't construed by the Court?

MR. PARTRIDGE: That is exactly right, Your Honor. We are on all fours with that.

MR. COYNE: Without a dictionary, Your Honor?

THE COURT: Maybe they need a dictionary to determine the plain English meaning of a term that has not been construed, and contrary to what you have suggested, Mr. Partridge, they have no intention to stray from the Court's claim construction.

MR. PARTRIDGE: But I don't think you can give them a dictionary. I think you have to leave them to base it on their collective knowledge and sense of whatever words they are struggling with, to come up with their common sense

about what words mean, as opposed to giving them dictionaries to do so.

I think we do create the risk of error in doing that.

They ought to look at the specifications, as Mr. Coyne indicated, and make their determination on the basis of the record that is before them.

THE COURT: Perhaps purely as an academic question, Mr. Partridge, you suggested it might create reversible error for a variety of reasons. How would you know? The jury's deliberations are secret.

MR. PARTRIDGE: That is true.

THE COURT: What argument would you be able to articulate in the Federal Circuit to support that somehow reversible error had been committed?

MR. PARTRIDGE: Judge, let me confer with my group here for a moment.

(Pause.)

MR. PARTRIDGE: Judge Sleet, the conversation we just had was whether collectively we thought there might be cases on this point. Collectively, we do. I can't cite a case to you without going and looking. But the problem is that we are giving them something that is not part of the trial record.

I know you see this all the time, where parties

are arguing before you about what terms mean and various dictionaries, and they will argue you ought to use this dictionary or that to come up with a construction.

I just think it's risky business to go down this path.

MR. COYNE: Your Honor, we have caucused as well, while they have been.

I am troubled by it, as I said before. But I am also sensitive to the jury's need for guidance on this.

I think it's fine, Your Honor. We don't object to you giving them a dictionary.

THE COURT: Just as an example, this is part of the Court's instructions to the jury under literal infringement: A claim limitation is literally present if it exists in the product as it is described in the claim language, either as I have explained that language to you or, if I did not explain it, based on its plain English meaning.

Where do you derive plain English meaning from, Mr. Partridge, if it's not a lexicography issue or the Court otherwise hasn't given the jury a definition? Where do you derive it from? There may be a difference of view as to which version of which dictionary or which dictionary you want to provide. But isn't the dictionary a common source of plain English meaning?

MR. PARTRIDGE: It is, Your Honor.

THE COURT: What if the collective knowledge of the jury isn't sufficient or adequate to address the plain English meaning or know the plain English meaning of a particular term that may be critical to the determination of the case? I don't know what that term might be or why there should be one. I cannot speculate on that, nor can you and your team. But I would be interested, because I don't think you are going to find a case that says that it's reversible error for a judge in a patent case to respond to a jury's request, plain request, may we have a dictionary, by giving that jury a dictionary.

But maybe, like Mr. Spears, I will be "Surprised, surprised." It's possible.

MR. SPEARS: One thing to keep in mind about dictionaries, Your Honor, is that they are sort of two different types. If you look --

THE COURT: I know there are technical dictionaries and there are nontechnical dictionaries.

MR. SPEARS: There are two different types of nontechnical dictionaries.

THE COURT: There are unabridged and abridged.

MR. SPEARS: That's right. And unabridged dictionaries give you every possible sense of a word's usage in the English language.

THE COURT: We could probably agree on a dictionary, if I am determined to provide the jury with one. Or maybe not. Then we could propose, suggest -- I have two types of dictionaries over here unabridged, and I think there are some abridged dictionaries floating around as well.

MR. PARTRIDGE: If we are going to give them one, probably the unabridged is better because it is at least a compilation of what a broader base of what a term means, as contrasted to the more popular subset of the abridged dictionary.

THE COURT: That would be my inclination. Perhaps a midpoint, or suggestion, and I think it was -- I won't take pride of authorship in this, but Mr. Coyne, I think I heard you to say that perhaps -- at least something you said suggested to me that maybe we should pose the question to the jury as to what terms they need to find or something along those lines.

What is your reaction to that, counsel?

MR. COYNE: Your Honor, I think that might give guidance. Then you can just provide them the pages, so they are not spending time sifting through synonyms. That way they have pretty clear guidance.

THE COURT: Mr. Partridge.

MR. PARTRIDGE: I think that is fine, Your

Honor. As long as whatever definitions we give them are from the unabridged version.

THE COURT: That would give us a chance to revisit the subject and discuss. I can pull out the unabridged version, and we can actually look up the words. But I, as are Mr. Coyne and I know you, am sensitive to the jury's need to have the tools it needs to resolve the parties' disputes.

MR. PARTRIDGE: Absolutely.

THE COURT: So I will get back to you. I am going to write a note back to the jury to write a note to us asking us for the terms that need defining.

(Recess taken.)

(The following took place in chambers, by teleconference, at approximately 3:20 p.m.)

THE COURT: There are two words, counsel, in response to my question. The words are "prevent" and "reduce." I will tell you, I have in front of me the Webster's Third New International Unabridged Dictionary, this is an older one, it is 1993. But under the word "prevent," the list of definitions is six and a half inches long, and under the word "reduce," it's 11. That's how long the columns are defining these words.

I don't know what you want to do. Why don't you caucus, or, if you want to just jump into the fray here, go

right ahead.

MR. COYNE: Your Honor, I think we are comfortable with you sending, if you want to just copy the pages for both definitions and send them to the jury, we are fine with that.

THE COURT: Mr. Partridge.

MR. PARTRIDGE: Your Honor, that is okay with us, too. I think we ought to give the jury something so they can reach their conclusion.

THE COURT: Okay. For the record, I have identified the book from which I will have the definitions copied. "Prevent" occurs at Page 1798, and "reduce" occurs at Page 1905. Okay, counsel?

(Counsel respond "Thank you.")

(Court was recessed until the following day.)