APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOGGERHEAD TOOLS, LLC,	)	
	)	
Plaintiff,	)	Docket No. 12 C 9033
	)	
vs.	)	
	)	
SEARS HOLDINGS CORPORATION and APEX TOOL GROUP, LLC.,	)	Chicago, Illinois
	)	April 28, 2017
Defendants.	)	9:57 a.m.

VOLUME 1
TRANSCRIPT OF PROCEEDINGS -
BEFORE THE HONORABLE REBECCA R. PALLMEYER, and a jury

APPEARANCES:

For the Plaintiff:	SKIERMONT DERBY LLP BY: MR. PAUL J. SKIERMONT MS. SARAH E. SPIRES MS. SADAF ABDULLAH 2200 Ross Avenue, Suite 4800W Dallas, Texas 75201
	BARTLIT BECK HERMAN PALENCHAR & SCOTT BY: MR. JASON L. PELTZ MS. ASHA L.I. SPENCER MS. JEANNIE K. TINKHAM 54 West Hubbard Street, Suite 300 Chicago, Illinois 60654
For the Defendant Sears Holdings Corporation:	WINSTON & STRAWN BY: MR. JAMES M. HILMERT 35 West Wacker Drive, Suite 4100 Chicago, Illinois 60606
For the Defendants Sears Holdings Corporation and Apex Tool Group:	KIRKLAND & ELLIS LLP BY: MR. MARCUS E. SERNEL MR. IAN J. BLOCK MR. ERIC D. HAYES MS. KATHERINE E. RHOADES 300 North LaSalle Chicago, Illinois 60654

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THE CLERK: 12 C 9033, LoggerHead versus Sears and Apex.

THE COURT: Okay. I believe our jurors are completing their questionnaires. I will just check on that and make sure we are making progress.

(A brief recess was taken at 9:57 a.m. until 10:20 a.m.)

THE COURT: We have got our questionnaires. Ladies and gentlemen, I am ready to bring in the jurors and begin the process of jury selection.

I did take a quick look at the questionnaires. I don't think that we have a large number of problems.

Are there any of the questionnaires that you think right now should generate a cause challenge before we even bring people in?

Did you see that we have a patent lawyer on our jury -- our panel?

MR. SERNEL: Yes. And that was one of the ones that we had flagged. I think a patent lawyer, as he says in his own comments, "I think I'd have undue influence." I think that's somebody we should strike.

THE COURT: What's the plaintiff's view on that?

MR. SKIERMONT: No objection.

THE COURT: We will excuse him. That's kind of a shame.

Any other person who you think really is not likely

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LOGGERHEAD TOOLS, LLC,	)	
	)	
Plaintiff,	)	Docket No. 12 C 9033
	)	
vs.	)	
	)	
SEARS HOLDINGS CORPORATION and APEX TOOL GROUP, LLC.,	)	Chicago, Illinois
	)	May 3, 2017
Defendants.	)	9:39 a.m.

VOLUME 2
TRANSCRIPT OF PROCEEDINGS - Trial
BEFORE THE HONORABLE REBECCA R. PALLMEYER, and a jury

APPEARANCES:

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THE CLERK: 12 C 9033, LoggerHead versus Sears and Apex. On trial.

THE COURT: I believe everybody else is here on LoggerHead, correct? Good.

I believe all the jurors are here. I am going to double-check on that and we can bring them in.

Is everyone ready?

MR. SKIERMONT: Your Honor, we do have a couple of disputes about the opening slide exchange that we did, that we could not resolve last night.

THE COURT: Let's talk about those right now.

(Document tendered.)

MR. SKIERMONT: LoggerHead has some objections to the slides.

There are three categories. What I would like to handle is -- there are three slides, I believe it is, related to the advice-of-counsel issue.

If you turn to their Slide DDX 19, DDX 19 has document excerpts with Mr. John Owen as a recipient or an author, and Mr. Owen, as you will recall, is the outside patent counsel who Apex is relying on for the advice-of-counsel defense to willfulness.

THE COURT: Right.

MR. SKIERMONT: These documents -- for example, the one -- the second excerpt that says "from Owen to Broadaway"

study this design." You see where that is highlighted. "I have shipped one to you for evaluation," meaning I have shipped a Bionic Wrench to you so you could reverse engineer it. That's what the evidence will show. And the evidence will also show that that's exactly what happened.

You can see that this is February 21. By March 8, the evidence will show that Apex did reverse engineer the Bionic Wrench, because what you can see there is an exploded-view drawing that looks just like the Bionic Wrench exploded -- an exploded-view picture, computer picture. But the difference -- the only difference is that it has three jaws instead of six.

So they got the Bionic Wrench. They reverse engineer it so they could see what all those different parts are and they labeled it "left handle," "right handle," "rivet," et cetera. But then they had started to think about, how can we change this so it's just not the Bionic Wrench exactly? And the first thing that they thought about was, maybe we should move to three jaws.

Over a little bit of time, the product begins to evolve. And you see here, by now, I am showing you what the evidence will show at trial, is that the product evolves a little bit, and they decided three jaws isn't going to do the trick. We need six jaws.

So you are seeing a design now that has the six

you know, we'd been to the shows. We'd done all the paperwork. We had worked out everything. And all of a sudden, they dropped -- they said, "We're not going with you." The buyer said, "It wasn't my call. I was overruled."

I found out on Black Friday that it was -- the Max Axess had somehow overruled it.

Q. When did --

A. That's how we live, right? We live on these Christmas sales and programs.

Q. When did you file this lawsuit?

A. October -- the fall of 2012.

Q. Why did you file this lawsuit against Sears and Apex?

A. I filed it because it's my dignity. It's my right to file it. And I'm trying to save this business. And frankly, I want to recoup the losses. I'm on the hook.

I started this company by, you know, using up money I had and taking basically a paid-off house and refinancing it and borrowing and getting money for the tooling. I owe $400,000 still on tooling. This is not just a wham-bam thing. You know, you've got to run a business.

I've taken so much risk, it's unbelievable. And I've done it -- I'm proud to say I don't mind taking the risk. I don't mind competing fairly. But this is wrong. I followed the rules. I did it right. I got an American dream. It worked.

I filed this suit because this is wrong, not just for me, but for anybody in my shoes. How are we going to ever get jobs in this -- if we can't create new products and at least make the new products here, if everything's got to go offshore, who's going to work? Are we going to sell ice cream and shirts to each other forever? It just doesn't make any sense to me.

I want -- I would love to have the win here and a statement that this is wrong.

Now, this -- for a patent, for the inventor, this is it. I get a jury of my peers. This is it. I think -- well, I'm not going to go there, but if we can't say that this is wrong, why invent? Why take the risk? Why do it? I don't know how I could face my students. It's almost a joke.

We have rules. We have laws. And then people that don't follow them, they don't get punished, or the punishment's so low that they make more money doing it and getting away with it, it doesn't work. So they do it and do it and do it. And maybe they get caught once in a while, but this is ridiculous.

So, I'm fighting this. It's a principle fight, and I want to recoup my losses. And I want to build that American-made company that I dreamed of, and I want to make it happen. And I don't feel it's fair to have somebody take my intellectual property and destroy my marketplace.

Q. Is it also fair to say, sir, that the tool market is a crowded market?

There is lots of tool options for consumers to choose from and in the prior art and prior patents and other publications, correct?

A. Compared to what?

Q. Would you agree with me -- with the characterization the tool market is a crowded market?

A. Crowded with art? Crowded with products?

There has been a lot of hand tools. It's probably the oldest thing we have had known to man, right?

Q. Can you agree with the statement that the tool market is a crowded market?

A. It's a crowded market, but I don't know your reference. But it is crowded. Okay.

Q. Now, another thing that it's okay for a company to do is to benchmark their products against other competitive products, right?

A. Yes.

Q. LoggerHead is engaged in benchmarking of its products against other competitive products, correct?

A. I would say you would have to know the existing knowledge so you can get to a new knowledge base. That benchmarking is part of the research of all types of research.

Q. A part of the process of developing a new tool is, you are going to look at what's out there, and you are going to benchmark your product against other products, correct?
A. You look at it. You do the research.
Q. And there is nothing wrong with engaging in the benchmarking process?
A. Nothing wrong, no.
Q. And, in fact, when you developed your product, you benchmarked the Bionic Wrench against the Robo Grip product that Sears was selling at the time, correct?
A. From, I think, the business motto, yes. But the performance, it's a different performance type. But I benchmarked it, sure.
Q. And another thing that's appropriate for a developer of a product to do is to run a prior art search, search for what patents might be out there to make sure that you are not infringing on anybody else's patents, correct?
A. That typically happens in the prosecution of the patent, yes.
Q. And, in fact, you engaged in that process. You went out and looked for prior art -- looked for prior patents as you were developing your product, correct?
A. Well, today you can. I mean, it's easy. The databases are there. You can search. It's very easy.
Back in 2002 and 2003, that wasn't available. That

(Defendants' Exhibits 169, 178 were received in evidence.)

(Plaintiff's Exhibits 1, 2, 9, 10, 11, 12, 181, 183, 184, 188, 210, 223, 275, 285, 287, 291, 292, 293, 301, 304, 419, 441 were received in evidence.)

MR. SERNEL: There were actually two, 376 and 391 -- I don't want to argue those now, but I think there may have been issues that were raised on those. So if we can table those --

THE COURT: We will take that up later.

Ladies and gentlemen, you may be seated.

I think we are ready to hear from the plaintiff's next witness.

MS. TINKHAM: Your Honor, LoggerHead calls as our next witness Mr. Peng Li.

Mr. Li is the vice president of engineering and program management at Apex Tools. His deposition video is about 30 minutes.

THE COURT: That's fine.

We are going to be hearing this next witness, ladies and gentlemen, by way of a videoconference deposition. In other words, this witness was sworn. He gave testimony under oath. His testimony will be shown to you on a camera.

You should consider this testimony and this evidence in the same way that you do all the other testimony

and evidence in the case.

This particular deposition is not a terribly long one. It sounds like it's about a half an hour.

Mr. Li, as we just heard from the plaintiff, is actually an employee of Apex.

You are welcome to proceed.

MS. TINKHAM: Your Honor, there are just about six exhibits that are on the Li video that LoggerHead moves to admit. We understand that there is no objection to those exhibits.

THE COURT: That's fine. You are welcome to proceed with those.

MS. TINKHAM: I am going to hand you up a binder with the exhibits.

(Document tendered.)

THE COURT: All right.

(Excerpt of videotaped deposition of Mr. Peng Li was played in open court.)

THE COURT: Can you scroll back a little bit so we can get the question and answer.

(Brief pause.)

(Excerpt of videotaped deposition of Mr. Peng Li continued to be played in open court.)

THE COURT: All right. That concludes that testimony?

Can you describe what you have put together here for the jury on Cagan 41.

A. Well, on the left side, you will see the gripping element from the Max Axess. And what you will see in dashed lines is, there is a portion toward the front of what you are seeing, which is the body portion. That's the part that will engage and impart force onto the workpiece.

What you see as dotted lines running along the gripping element and on both sides of that, that is the portion -- that's the arm portion. That's the portion that is engaged within the guide of the first element and also abuts the force transfer element, which you see there.

On the right you see a similar breakdown of the different portions. This one is from the LoggerHead patent. You will see that, again, there is a body portion that's toward the front of what you are seeing, which is some part of it that engages the workpiece and is thick enough to impart force. And then there is an arm portion, which engages the guides and also abuts the force transfer element.

Q. Moving on to the next claim limitation -- or claim element, starting with the second element.

Can you walk the jury through that.

A. Yes. So this is the part that's in orange, and the top part is yellow. That's the second element.

And what you can see is, the second element has

you've just made?
A I have.
Q And can you describe for the jury what is on the left and right side of Cagan 82?
A Yes. So on the left is the patent, the Loggerhead patent. On the right is the Max Axess wrench. And you can see the first elements are in blue, the second elements in orange.

Now, one of the things you'll note is that, first of all, the order of the plates is different. Secondly, you'll note that there's two second elements that are visible or shown for the Max Axess, but only one shown in this particular embodiment of the '470 patent.

And it doesn't matter. They still meet the require -- Max Axess still meets every requirement of claim 1. As a matter of fact, that first -- sorry, that second element of the four of the different Loggerhead patents could be made with two pieces. If you don't mind clicking to the next slide, please.
Q Yes, would you, using your red -- press the screen to show them what you're talking about. The first element of -- I mean, I'm sorry, the second --
A Second.
Q -- element of the figure in the patent.
A Hopefully this will work -- oh, it does, okay. So this particular figure --
Q Go ahead.

A And so there's no reason why that can't be, for example, made of two pieces. If you don't mind clicking the next button, you'll see that.

And as a matter of fact, if you look at your Loggerhead Bionic wrench, which is an instantiation of the patent, it's made with two panels, two pieces.

Q And what you were indicating there to the jury, Dr. Cagan, you were noting that the Bionic Wrench -- the Bionic Wrench's orange second element is, in fact, a two-piece assembly?

A That's correct.

Now, if you can -- I'd like to -- but if -- again, in terms of the overall functioning and the requirements of the claims that we've looked at, you'll see that they are the same.

And as a matter of fact, if you can -- you're about to see what will happen is we'll bring -- bringing these two elements back together where we were and then again you'll watch both of these tools function if you don't mind, please, sir.

So they come together again so that's where we were. Now everything's assembled. And as the elements are -- as the elements are brought together, the crimping elements actually.

Q And on the left hand, there is the depiction of the Bionic Wrench. And on the right hand is the Max Axess Locking Wrench. Is that right, Dr. Cagan?

A Well, the one on the left is the different Loggerhead

A Up to down -- yes, except it would have the body portion which you're about to show. Below, I assume, needs to have some depth to it obviously.
Q So the body portion is the portion here on the bottom -- the bottom of the screen of the Bionic Wrench gripping element, correct?
A Correct.
Q And then the two things sticking up, those are the arm portions in the Bionic Wrench gripping element, correct?
A Correct.
Q Now --
A Can I just see it first?
Q I'm going to show the jury, then I'll bring it to you.
A Okay.
Q This is what we're going to put on the screen. I believe this is the gripping element in the Max Axess Locking Wrench product.
(Object tendered to the witness.)
THE WITNESS: That's correct.
BY MR. SERNEL:
Q And again, we had nothing poking through the holes here, so the force transfer element's been removed, correct?
A Correct.
Q But the reason why we're here is you say that this block has both a body portion and an arm portion, correct? That's

your opinion?
A It is.
MR. SERNEL: I'd like to, if possible, your Honor, could I just hand the little -- the parts --
THE COURT: Sure.
MR. SERNEL: -- to the jury?
THE COURT: Sure.
(Objects published to the jury.)
BY MR. SERNEL:
Q Let's talk a little bit about your work as an expert.
A Okay.
Q I think I heard during direct that your typical hourly rate for your expert work is $400 an hour, correct?
A Correct.
Q That's what you're being paid for, for your testimony and all the work that you've done in this case, correct?
A My time, correct.
Q Now, this isn't the first time you've done expert work in litigation, correct?
A Correct.
Q You've done it for a variety of different clients in a variety of different subject matter, correct?
A A few.
Q One of the subject matters on which you've offered expert testimony in a prior patent case is on an automatic cow milking

For right now, you can leave it.

MS. TINKHAM: Your Honor, plaintiff Loggerhead now calls Mr. Barry Pope by video deposition.

THE COURT: All right. We'll get started with that. Ladies and gentlemen, once again, a video deposition is for you to consider just as you would any other evidence.

All right. So I need to switch the computer, correct?

MS. TINKHAM: By way of background, Mr. Pope is the former manager of Craftsman hand tools and the video is about 45 minutes.

THE COURT: We'll do about 15 minutes, and then we'll give the jurors a break and then finish.

(Video recording played in open court.)

MR. SKIERMONT: Is this a good time for a break, your Honor?

THE COURT: Yeah, let's take a break.

Ladies and gentlemen, we'll take a short recess.

(Recess at 2:40 p.m., until 2:55 p.m.)

THE COURT: All right. You may be seated. We'll continue further with the video deposition.

(Video recording played in open court.)

MS. TINKHAM: Loggerhead would like to move Mr. Pope's exhibits into testimony. I have a list that we can do at the end of the day so as not to --

THE COURT: We can do that at the end of the day,

that's fine.

MS. TINKHAM: The next witness is Jill Lowe, and her video is going to take about 40 minutes. After that, we have one more video to play. It's about an hour.

So if you want to let us know what time we should cut that off because that will put us, I think, over 5:00 o'clock.

THE COURT: It will go past 5:00 o'clock. All right. Well, why don't we get started with the next video and once again take a break in the middle, maybe after 10, 15 minutes.

MS. TINKHAM: Okay. And Ms. Lowe is vice president of national retail accounts at Apex Tools.

THE COURT: Okay, great. Thank you.

(Video recording played in open court.)

THE COURT: We'll take a short break. And we will finish this deposition today and then get started on the next one. We won't finish that last one today.

(Recess at 3:44 p.m. until 4:00 p.m.)

(Jury in at 3:59 p.m.)

THE COURT: You may be seated.

We will proceed further with this video deposition.

(The videotaped deposition of Jill Lowe continued to be played in open court.)

MS. TINKHAM: Your Honor, LoggerHead now calls Mr. Adam Whitney.

Mr. Whitney is the former division merchandise manager of Sears hand tools and power tools.

THE COURT: All right. That's fine.

We are going to push on until about five minutes until 5:00, ladies and gentlemen, and then we will adjourn for the day.

(The videotaped deposition of Adam Whitney was played in open court.)

MS. TINKHAM: That's all for today, your Honor.

THE COURT: All right. We will recess.

Ladies and gentlemen, we are going to resume at 9:30 tomorrow. Tomorrow is Friday, which is the last day of the week obviously.

A scheduling issue I wanted to mention to you. It may not be entirely good news.

On Monday I have got so many things going on in the morning that I just am afraid I will have you in and out of the courtroom all day if we start in the morning. So I think

So Judge Darrah's ruling that LoggerHead cannot consider increased manufacturing costs as well as loss of goodwill in determining the floor, or the minimum, that they would be willing to accept has nothing to do with the ceiling. And conflating those two is not useful.

THE COURT: The objection to this second exhibit is overruled.

MS. SPENCER: Thank you, your Honor.

(Jury in at 9:51 a.m.)

THE COURT: Ladies and gentlemen, sorry to keep you waiting this morning. You are welcome to be seated.

I think we are going to proceed further with the video deposition that we began yesterday afternoon.

MS. TINKHAM: Your Honor, could we just switch the outlet to counsel table?

(The videotaped deposition of Adam Whitney continued to be played in open court.)

THE COURT: All right. Thank you.

The plaintiff's next witness.

MS. TINKHAM: Plaintiff LoggerHead's next witness is Tom Arvia. Mr. Arvia is the division vice president of product management for Craftsman at Sears.

THE COURT: For Craftsman at Sears. All right.

Let's proceed.

(The videotaped deposition of Thomas Arvia was played in

open court.)

THE COURT: We should take a break at some point. I don't know how close we are to the end.

MS. TINKHAM: That's fine, your Honor. We only have about six or seven minutes left of the video.

THE COURT: Let's take a recess anyway, and then we will resume and finish the last six and go on with the next witness.

All rise.

(Jury out at 11:16 a.m.)

(A brief recess was taken at 11:18 a.m. until 11:37 a.m.)

MR. HILMERT: We got a list of documents last night that plaintiff is intending to use with Dr. Bokhart, which are predominantly emails back and forth between various Sears employees, for which there has been no testimony at trial or at deposition.

Frankly, I haven't seen these documents before last night. I don't know how Mr. Bokhart can present them to the jury and talk about them when they haven't had a foundation laid for them. So I have an objection under Rule 703, based on foundation.

Obviously, Mr. Bokhart has reviewed certain documents for purposes of his expert report. Under 703, those documents aren't presented to the jury unless there is

THE COURT: Does this conclude the plaintiff's case?

MR. SKIERMONT: It does, your Honor.

THE COURT: Tell me what's defendants' preference here.

MR. SERNEL: So I think I want to make my motion for JMOL just to preserve the record. I assume we can just do that quickly orally and then be ready to move on.

Our first witness is going to be Ms. Stephanie Kaleta. She is no longer with Sears. She is a third-party. She is sitting here ready to go.

I think the examination will last the better part of an hour. So she is probably having to come back Monday. I don't know how you want to proceed. If you want to get her in the box and do some of it and then hold her over, or we can adjourn and start fresh on Monday afternoon, whichever is your preference.

THE COURT: You know, I normally -- I ordinarily think it makes sense to start Monday, but I am concerned about the fact that Monday is a short day on my account anyway.

Let's put her on for at least half an hour or so.

MR. SERNEL: Okay.

THE COURT: You want to make your record on a JMOL.

MR. SERNEL: Yes.

So Defendants Apex and Sears move for judgment as a matter of law on LoggerHead's claims.

We don't believe that LoggerHead has provided legally sufficient evidence in support of the claim that its made in this case.

First, defendants move for judgment as a matter of law of no infringement under the doctrine of equivalents of either the '579 or the '470 patent. We do not believe that LoggerHead has presented any evidence supporting its claim that the accused Max Axess Locking Wrench products infringe under the doctrine of equivalents. And because they bear the burden of proof on that issue and chose not to present any evidence on the issue, we believe we are entitled to judgment as a matter of law on the issue of doctrine of equivalents infringement.

Second, defendants move for judgment as a matter of law that the accused Max Axess Locking Wrench products do not literally infringe any asserted claims of the '579 and '470 patents.

In particular, we don't believe that LoggerHead has presented a sufficient evidentiary basis for a jury to find that the limitations and the asserted claims are literally infringed by the accused products.

I will just note quickly three elements that we believe have not been met.

The first is the limitation -- the requirements for the gripping element and the three requirements -- arm portion, body portion, and force transfer element for the gripping element limitation.

The second element that we think has not been met in terms of literal infringement is with respect to the slots limitation. Each said "at least one slot having a first section configured to engage the force transfer element of one said at least one gripping element." We don't believe the evidence has been sufficient to prove infringement on that across all claims of all patents.

And then No. 3, we believe that the evidence has not been sufficient to prove literal infringement of the aligning element limitation, which I believe is in the '470 patent claims.

So we would move for judgment as a matter of law with respect to literal infringement as well.

And then third, defendants move for judgment as a matter of law that LoggerHead is not entitled to damages for any purported infringement.

Pursuant to the reasons stated in our *Daubert* motion, we believe that the reasonable royalty analysis is flawed and should not have been presented in the first place.

We also believe that the evidence that was presented does not support the damages that have been

requested and specifically runs afoul of Federal Circuit precedent with respect to what's required for a reasonable royalty analysis.

So we don't believe there is a basis in law or fact for the reasonable royalty claim of damages that's been presented. So we move for judgment as a matter of law on that as well.

THE COURT: All right. I am going to enter and continue the motion.

I would note that at least some of those arguments appear to be -- appear to have been addressed to some degree in Judge Darrah's pretrial rulings. But recognizing that things look different at trial, I will certainly consider those arguments if it reaches that point.

Right now I'll call back the -- well, I will give the jurors a short recess and then call them back. So if you can get Ms. Kaleta.

MR. SKIERMONT: Your Honor, just one additional piece of housekeeping.

You obviously have a conflict Monday morning.

THE COURT: Right. I am here first thing, but then I have to leave. So I will be here, like, between 8:30 and about 10.

MR. SKIERMONT: So -- and I think you agree -- we have a dispute -- a relatively large dispute -- about the

Q. Can you identify those for the jury, please.
A. These are the Max Axess Locking Wrenches that we have been talking about this week.
Q. Go ahead.
A. Go ahead. I am sorry.
Q. Who designed the Max Axess Locking Wrench?
A. I worked on -- I led the team that designed this product with Apex Tool Group.
Q. Let's go back to the beginning of when that design process started.

How did it start?

A. Well, we were contacted -- or I was contacted by my boss. But we were contacted by the customer, asking if we could make a competitive product to the Bionic Wrench that would avoid Mr. Brown's patents. We were asked if we could do that. So that's how it started.
Q. When did it start?
A. Sorry. That was -- February 21st is the first I became aware of it.
Q. Year being what year?
A. I am sorry. 2012 was the year that we did this development.
Q. And was it typical or common for a project -- for a new product to start in this manner, in your experience?
A. It wasn't uncommon. The customer -- multiple times this

customer, Craftsman, has come to me -- well, in the couple years that I had the job -- asking for us to develop products -- ideas that they had for products like this.

Q. And what was your understanding of what Sears and the Craftsman brand people were looking for when they came to you to try to develop this product?

A. Like I mentioned, they were looking for a competitive product to compete with Mr. Brown's Bionic Wrench, but certainly avoid Mr. Brown's patents.

Q. Have you heard of something called the Craftsman Advantage?

A. Yeah. I have heard it a lot. So it's an interesting thing. As I got to become, you know, involved in development with Craftsman, that customer, it really is a mantra that organization lives by. It's something that all associates know. It's a big part of, I think, why the Craftsman brand has been so successful and why it's so legendary here in the U.S. is that, whenever they put something in their brand, they want it to be a superior product in the marketplace. They want it to have distinct advantages over the competition and change the way the tool is used.

So that's what it means to me. That's what I hear them say, Craftsman Advantage.

Q. And you mentioned a competitive product.

What did you mean by that?

A. A product that would be, you know, an adjustable gripping tool that could do the work of -- like the Bionic Wrench but would be -- have Craftsman Advantage features, you know, have better torque, better fitment, you know. I didn't know what at the time. But in order for them to want to put something in the Craftsman brand, it was going to have to be a better, different shape of product and avoid Mr. Brown's patents.

Q. So you mentioned avoiding Mr. Brown's patents.

Was that something that Apex typically did in developing products, in terms of looking at patents and trying to make sure they avoided them?

A. The work that I do, there are patents from -- a number of patents from the 1800s associated with hand tools.

My point is, it's one of the oldest categories of products with a whole lot of patents in this category. So it's a crowded space.

We are always dealing with other people's property associated with patents on hand tools, from mechanics that come up with ideas when they are on the work to competitors that have product. It's an integral part of what we must do, is look at what IP is out there or what patents are out there and make sure that we avoid them. We don't want to be infringing on other people's property.

Q. Do you have any understanding as to why Sears reached

out to you and Apex to develop this product as opposed to maybe one of their other suppliers?

A. Well, the customer, Craftsman -- many of our customers -- in fact, most all of our customers are very -- are always commenting on how innovative we are. We have a team of engineers that are working a lot on making innovative new hand tools. Although they are kind of old products that have been around for a long time, we continually work to innovate them and make them better than the other products on the marketplace, and that innovation that we bring to our own brands. We also have a long partnership with Craftsman about being able to innovate products.

I think that's the primary reason they came to us.

Q. Now, what were the first steps that you took once you were contacted to try to develop this competitive product?

A. So the first things -- that February 21st, 22nd, the first thing I did is challenge the engineering team to start brainstorming ways to make a competitive product that would avoid Mr. Brown's patents.

And then I also got to work looking for and researching the patents that we needed to be aware of.

Q. Now, did you reach out to anyone in particular to help you look at the patent issues?

A. Yeah. We reached out to a consultant. John Owen is his name. We will be talking about him some. He helped us

identify the patents and helped us with our design process throughout.

Q. And why was one of your first steps to reach out to Mr. Owen to help you guide the process through the patents?

A. Because we were aware of Mr. Brown's patents, and we wanted to, you know, be aware of them, understand them, and make sure we were avoiding his property.

Q. Now, if we could turn to DTX 2 in your binder.

A. Sure.

Q. Can you tell us what DTX 2 is?

A. That's an email to Mr. Owen, who I was just mentioning, from me on February 22nd.

MR. SERNEL: Your Honor, I would like to seek admittance into evidence of DTX 2.

THE COURT: That will be admitted.

(Defendants' Exhibit 2 was received in evidence.)

MR. SERNEL: Okay. If we could, publish that on the screen, please.

MR. SKIERMONT: Your Honor, can I have a quick sidebar?

THE COURT: Sure.

(The following proceedings were had at sidebar:)

MR. SKIERMONT: I just want to object for the record that the evidence of their intent in trying to avoid infringement is irrelevant and prejudicial. I just wanted to

make a record.

(End of sidebar proceedings.)

BY MR. SERNEL:

Q. Mr. Broadaway, can you explain to the jury what this is, DTX 2.

A. Yeah. It's the email I just mentioned. It's to John Owen, at 4:23 on February 22nd, from me. The subject line is "Voicemail."

So I had called. Like I said, I reached out to John, and I had called him, but I didn't get ahold of him. I left him a voicemail, and I gave him a heads-up about the project that we were considering and what help I wanted from him. This was a follow-up to that, giving him a copy of Mr. Brown's '579 patent.

Q. I see there is an attachment there.

What is that?

A. The attachment is one of Mr. Brown's patents, '579.

Q. And how common was it for Apex or you to reach out to an outside consultant to help you look at patent issues when developing products?

A. I worked with -- we have not just Mr. Owen. We have some other consultants we worked with. But any time that there is a situation like this, where we want to avoid patents and not infringe on someone's patents, we are engaging help like that.

Q. If we could now turn to DTX 3 in your binder, please.

What is this?

A. This is an email from John Owen to me later that day, on February 22nd.

MR. SERNEL: Your Honor, we would seek admission into evidence of DTX 3.

THE COURT: That will be admitted.

(Defendants' Exhibit 3 was received in evidence.)

MR. SERNEL: If we could publish that to the jury?

BY MR. SERNEL:

Q. Can you describe to the jury what this is, DTX 3.

A. Like I mentioned before, I left him a voicemail. I wasn't able to get ahold of him. I forwarded him one of Mr. Brown's patents, the '579 patent.

He replied later that evening, after he listened to my voicemail and whatnot. And he attached a couple more of Mr. Brown's patents, including the '470 patent.

And then he also attached -- you see there a '925 Buchanan patent.

He gave me some guidance, you know, referencing those attachments.

MR. SERNEL: If we could, go down to the second-to-last paragraph and pull that up.

BY MR. SERNEL:

Q. Can you explain what Mr. Owen is suggesting here to you

in this email.
A. Yeah. It was, you know, a preliminary first look. He had only spent a couple hours here. But he had identified that one possible option was to copy an old patent. He suggested the Buchanan '925 patent from '57 as an option for what we could do to avoid Mr. Brown's property.
MR. SERNEL: If we could, turn to the third page of DTX 3. I think this is one of the attachments. That's it.
BY MR. SERNEL:
Q. What is this?
A. That's Figure 1 and Figure 2 from the '925 Buchanan patent. It was filed in '54 but issued April 9th, '57, of a cam-slot crimping tooling.
Q. Now, if we could, turn to DTX 1 in your binder, please.
A. Okay.
Q. What is this?
A. This is an email the next day, at 6 o'clock in the morning, on February 23rd, from me to one of the engineers that I worked with on this project.
MR. SERNEL: Your Honor, we would seek admittance into evidence of DTX 1, please.
THE COURT: That will be admitted.
(Defendants' Exhibit 1 was received in evidence.)
MR. SERNEL: If we could publish this to the jury?

BY MR. SERNEL:

Q. Can you explain in a little bit more detail what DTX 1 is.

A. Like I said, this is an email to Fu, one of my team members, who was an engineer that worked on this project with me. I was giving him an update, that I had gotten some feedback from John, and that he had suggested a patent from 1957.

I had attached that patent -- that recommendation. The attachment "Bionic Wrench patent analysis" there, that's the recommendation, and it's the details of what I had -- the initial feedback from John.

Q. I see a cc there to a Peng Li.

Who was Mr. Li?

A. Peng Li was the vice president of R and D. He was both mine and Fu's supervisor. We copied him on our work, but he wasn't involved in the details. He was like a supervisor, what you would expect. He was removing obstacles, answering questions, making sure we had the resources we needed to complete assigned projects.

Q. So did you and the rest of your design team use the Buchanan gripping mechanism design as the guide for the product that became the Max Axess Locking Wrench?

A. We did. We referenced this throughout the development.

Q. And in developing the gripping mechanism for the Max

Axess Locking Wrench, did it evolve in any way over time?
A. It did. There were a number of iterations or prototype or concept designs that we did. We continued to review those with John as we would come up with them, and get his direction on how they compared to the Buchanan and use that as our guide, like I said.
Q. Let's discuss some of those developments during the design process.
If we could turn now to DTX 8 in your binder, please.
A. DTX 8. I'm seeing an 8R. Same thing?
Q. Are you there?
A. Yes.
Q. What is DTX 8R?
A. That is an email to John Owen on March 12th -- so it's a few weeks later -- where I am giving him an update.
MR. SERNEL: Your Honor, I would seek to admit DTX 8R, which is redacted pursuant to your instructions.
THE COURT: That will be admitted.
(Defendants' Exhibit 8R was received in evidence.)
THE WITNESS: Excuse me.
MR. SERNEL: No need to excuse yourself.
Mr. Broadaway has picked up a cold here with our Chicago weather, so we apologize.
THE WITNESS: I thought Baltimore was the same, but

it's colder here.
BY MR. SERNEL:
Q. Now, what is DTX 8?
A. As I mentioned, it's an email to John Owen on March 12th, where I'm giving him some feedback. So I had attached one of the -- like the current rendition of the design. It was not final, but I was giving him some feedback also.

We had phone calls. We had other communications. But, "Per your guidance, John, we are changing the design to have a plunger or gripping element matching the Buchanan design, not Brown as the current PowerPoint file shows."

So he had given us some feedback back on this, and I was confirming that we were changing it.

Q. If we could, turn now to PTX 467, please.
A. That's an email chain as well.
Q. If you could, I guess, describe it, identify PTX 467 for us, please.
A. So this is an email chain between me and Sears and then, also, one of the engineers that worked on this project.

So we are giving the customer an update, essentially, of the progress and asking for some feedback.

MR. SERNEL: I would like to seek to admit PTX 467, please.

THE COURT: That will be admitted.

(Plaintiff's Exhibit 467 was received in evidence.)

MR. SERNEL: If we can publish that to the jury?

BY MR. SERNEL:

Q. I guess, first of all, can you tell us who the "to" and the "from" and the date of this email are?

A. So the top email here at this chain is from Yongsheng. He is one of the engineers that I worked with on this. And I asked him to forward a step file, which was just a -- it's a CAD file that he could open and look at our design. So it's a computer file of the design as we had at that point. So I was asking him to forward it to Mark at Craftsman.

Q. If we could actually turn to the second page and the email that starts on the second page, who's the sender and the recipients of that email?

A. So at the bottom of this email chain, I am sending the note to Craftsman, both Matt McDonald and Mark Good at Craftsman, like I said, giving some updates and asking for some feedback.

Q. And then, if I could direct your attention here to the first paragraph of the email, what are you communicating there?

A. Well, up to this point, we didn't know if it was possible to make a competitive product that would avoid Mr. Brown's IP or patents. We had been researching that.

This was one of the first times that we are giving

feedback to the customer that, we have made some good progress on the pliers-style wrench for Craftsman, that we thought we could do it.

"Attached is a model of a design that should not infringe upon Mr. Brown's patents for the LoggerHead Tools. The jaws or plungers are gripping elements, as we call them, are not the U-shape design of Brown."

Q. And then it goes on, and what's the next thing that you mention here?

A. I also mention that the design is different in that the plates with the radial arcs are on the outside of the tool.

With our design, the radial slots that actuate the plungers are visible on the outer plates of the tool, as you can see from the picture. And then there is an attached picture on this email chain as well.

Q. So if we can actually to that picture, which I think is the last page of DTX 467, what's being depicted there?

A. So this is a visual that I was using in that paragraph that I just had typed to Craftsman, explaining that our product has the arcs on the outer surface; that the force transfer elements or the pins and the gripping element engage, they are on the outside of the Max Axess Locking Wrench, which is on the left-hand side of this image.

And then on the right-hand side of this image, I'm sure you will recognize is the Bionic tool. Mr. Brown's

patents have the U-shaped gripping element. That image that's pointing to those gripping elements is from the patent -- from one of Mr. Brown's patents, just kind of zoomed up.

So I was trying to explain to the customer that this was one of the key differences that we had identified as a way to make a competitive product that wouldn't use Mr. Brown's property.

Q. Just so we are clear, the top left of this picture here is depicting what?

A. The top left is the gripping element and our design for the Max Axess Locking Wrench. It's got the force transfer pin in it, so that's a subassembly. It's the solid block gripping element that we have plus the pin inserted in it. That's on the left-hand side, like I said.

Q. And from a technical standpoint, how does using a solid block-like gripping element like that compare to using something like the U-shape gripping element that's depicted for the Bionic Wrench product?

A. So there is tradeoffs, in our opinion. I mean, we looked at this thoroughly, of course. I would say one of the things that you can see in the product, if you look at it -- if you look at the two products, is that these teeth, jaws -- gripping elements, is what they call them -- on the inside, on our product, these solid blocks are, what I say is

inboard; in other words, the outer surface of the tool. Ours are recessed inside there by the thickness of that outer plate, where making that U-shaped gripping element design enables it to kind of straddle that plate, the force transfer elements go in, and it's the full thickness.

So Mr. Brown's property enables the gripping element to go the full width and even, in fact, he has embodiments where it goes longer; in other words, it could stick out.

So that's -- an advantage of that property is where that design can kind of reach into a recessed fastener. If you imagine a fastener in a hole, right, you could have a design that can actually get that, where this product doesn't.

Then also -- but then, like I said, there were tradeoffs. I think the other thing I would point out -- I could talk a long time about this. Sorry.

So the tradeoffs, in my mind, are two.

With the U-shaped element, it's kind of got a hollow element, where this solid jaw is more reinforced. It's pretty strong and robust for the increased torque. It also works well for the locking mechanism that we added to the product. I think there will be an opportunity to show that better in some other images.

But that's some of the -- I think I answered your

question.
Q. Thank you.
Now, if we could, turn to DTX 9 in your binder.
A. I have a 9R. Same thing.
This is an email from John Owen to me on March 22nd. So the last email we looked at, this is kind of continuing communication with John Owen.
MR. SERNEL: Your Honor, I would like to seek admittance of DTX 9 into evidence.
THE COURT: That will be admitted.
(Defendants' Exhibit 9 was received in evidence.)
MR. SERNEL: If we can publish that to the jury?
BY MR. SERNEL:
Q. Can you explain a little bit more as to -- I guess maybe start with the lower email at the bottom of the page.
What are you communicating there to Mr. Owen?
A. At the bottom email, I am giving him a file. It's a computer file of the design so he can look at it, and telling him that it's further along and wanted him to confirm if we were still on track and if he saw any issues with infringement, as I said there on the design.
Q. And then, if we move to the upper part of the page, to the other email, what was Mr. Owen's response?
A. He just thanked me for sending him the email, right?
And then he said, based on the review of the file,

he said it still fits within his earlier analysis. It should not be found to infringe on Mr. Brown's property.

Q. Now, let's talk about the work that remained.

If we could, turn to DTX 12 in your binder, please.

A. Yes.

Q. What is this?

A. So this is a continuation of communication with the customer.

Mark Good is an industrial designer at Craftsman. That profession, he is working on kind of the style and the industrial design and ergonomics of the tool. So this is some correspondence with him -- to him -- or from him back to me, but I had started the communication.

MR. SERNEL: Your Honor, I would like to seek admission into evidence of DTX 12.

THE COURT: That will be admitted.

(Defendants' Exhibit 12 was received in evidence.)

MR. SERNEL: If we can publish that to the jury?

BY MR. SERNEL:

Q. Maybe you can provide a little bit more detail as to what the communication here is with Mr. Good.

A. So we had sent him -- kind of like I've mentioned a couple times, we had sent him a copy of our design at a point in time soliciting his feedback to start looking at how he would like the Craftsman elements to be applied to our

design. So we were kind of designing the bare-bones tool. He was applying some style and design to the product.

So he is giving that feedback with his sketches and images.

Q. And then if we turn to the second page of DTX 12, the picture there, what's that?

A. That's kind of the base CAD model at a point in time that we had sent him to use in his software to update with his design.

Q. And then if we can turn to the last page of DTX 12, can you explain what is depicted there.

A. Those are renderings. You can see that it's starting to look a little bit more like the finished product did, although not exactly the same. He does a nice job of making some creative look to the product. Aside from the functional improvements that we were designing, he had -- I thought it looked cool anyway.

Q. Now, I see a little nub in the top image. There is sort of two nubs sticking out the top of the tool.

What's that?

A. That was an earlier lock. Like I mentioned, there were a number of iterations to the design process coming up with the final product. This was an earlier lock design. It was kind of a thumb-trigger style that we didn't end up going with.

Q. We will take a look at the lock on the actual product in a little bit.

Now, as part of the design process of developing this Max Axess Locking Wrench, did Apex conduct any testing as part of the process of the Bionic Wrench?

A. Yes, we did. We tested the Bionic Wrench a lot.

Q. And what does it mean to reverse engineer a product?

A. It means to tear it apart and do a detailed analysis of it to understand its inner workings, understand how it works.

Q. And is it a typical practice for Apex to reverse engineer products as part of the process of developing a new competitive product?

A. Yes. Any time that we have a competitive target, which is, like I mentioned, how crowded our space is, it's almost always, we take apart a lot of our competitors' products when we are designing something to make it better or see if we can. We are not always successful, to be honest, but we are always looking at competitors' products.

Q. And did Apex in this case reverse engineer the Bionic Wrench as part of the development process of the Max Axess Locking Wrench?

A. Yes. It was one of the first steps.

Q. Now, if we could -- I think it's been preadmitted -- pull up PTX 51, please. Turn to that in your binder.

A. I am not seeing it right off. It's kind of hidden. So

that is --

Q. Let me ask a question.

What is PTX 51?

A. So that's one of the -- it's a drawing for the pin that has the measurement scale that's on our product. When you actuate this product, this pin slides in this measurement scale. That's a drawing for that pin. It's like the detailed engineering drawing for that component of this product.

Q. Actually, let's now turn to Page 19 of PTX 51.

What's depicted on this page?

It's there on the screen, too. I think you can just probably use that.

A. Okay. You beat me.

So that is the gripping element, these solid block gripping elements that I discussed a little bit being inboard on the tool, that is the drawing for that component in and of itself.

It's got --

Q. I can see on the left there, there is one with a circle in it.

Can you explain to the jury what that is.

A. Yeah. So these force transfer elements or the pins that go through that -- you can see them riding in the external slot -- that is the hole in which we press that pin.

So this is just the gripping element itself without the force transfer element or pin attached.

Q. And then, on the right-hand side, what's that?

A. That's kind of the front view. So if you look at this in the tool, you can see it from the side view, right, like with the hole.

But if you were to look at it from this way (indicating) with the front of the block, you can see there's -- you don't see anything much, because it's a block.

Q. Now, if you could turn to Page 25 of PTX 51, please.

What is shown on this page?

A. That's what we call an exploded view of an assembly. So it's an engineering drawing for the Max Axess Locking Wrench. I think this is probably the 8-inch size. Yes.

So this is all the components that come together to make this product, exploded out in a view for you to see.

Q. Can you explain kind of how the various elements and plates on this are oriented in the Max Axess Locking Wrench design.

A. So as I mentioned before, the pin that goes through the gripping elements, or the block, that force transfer element, rides in these slots, right? When you actuate it, that's what's making them drive in.

Well, that plate that's on this side, this handle of the product, that is on the outside of our product, the

Max Axess Locking Wrench. Those are on the inside of the Bionic Wrench.

The gripping elements, or that U-shape, kind of straddle that, is how I would explain it a little bit. So ours is different in that regard.

And then it has -- the downside of that is, the inboard jaws that I talked about, that don't come all the way to the outside edge of our product.

But another benefit is that solid jaw that I talked about and how we said would we kind of explain that a little further. This is a better image, I think, for you to get a picture of that. But putting those solid jaws in the middle worked well with the way we implemented the lock mechanism here.

So it gave us -- we were able to have a pretty thick jaw with this lock cam ring that is -- actually, let me use the screen -- right here (indicating), this kind of knucklehead ring, I call it. It's assembled in the middle of the assembly. And arranging those plates that way worked well with that.

You can lock this product down or put it on a fastener on a particular size, and then you can slide this.

What you are doing is -- you notice how that looks like a shark fin. It's like a wedge that you would put under a door. And it's wedging on this pin down here, this pin

that is also the -- it's got the scale for the measurement of the fastener.

My point is, you can look that in on a particular fastener size. And one of the big benefits of that is that without that lock feature, whenever you grip on a fastener and then you want to apply torque or you want to push on it to turn the fastener, right, you have to -- when you are doing that, there is oppositional forces that are going to want to push against your work, and you have to hold tightly on the handle. The more you push -- you got to hold it shut and push it at the same time to apply torque, right?

So this takes that out of it. In other words, you don't have any longer hold it shut with it locked in, right? You put it on the fastener, lock it in, and then you can just concentrate on pushing as hard as you possibly can with the tool. The way we designed it, we are proud of the blocks and the performance and the high torque that this product will achieve. And that lock is a key part of it.

Q. You mentioned torque. Just real quickly, what is that?

A. I mean, I think many of you probably know, but -- so it's -- you know, it's a force applied at a distance is torque. So it's when you push to turn a fastener, a force that you are applying to the fastener is the torque.

Q. I think you have explained this a little bit. I just want to clarify it.

How does sort of how you put the sandwich pieces together in the design here allow you to create this product that confers the advantages you have discussed?

A. The primary thing is that the blocks are solid and in the middle of the tool. And then we can put that lock in addition, so we have these nice solid jaws, that when you lock it, someone can really push on it. They can apply a lot of torque. So the product can be used to provide an increased user-generated torque to a fastener.

MR. SERNEL: Now, if we could turn to DDX 27, please.

BY MR. SERNEL:

Q. I don't know if you can clear the red marking you made there. There we go.

Can you maybe just summarize for the jury what you believe to be some of the advantages of the Max Axess Locking Wrench as compared to the Bionic Wrench?

A. Well, after we went through all this, we were happy that we had created a product with a lot of features -- more than one, really. This is kind of a bullet point list showing that, of what those Craftsman advantages are for the Max Axess Locking Wrench.

The user can generate more torque, a greater maximum user torque, like I talked about. The lock feature helps enable that to a great degree. But also the straight,

ergonomic handles are more comfortable for the user, so they can push harder.

And then the sizing guide has some nice benefits, too, that we found.

Users, in some cases, they might have a fastener that's, like, under something and they want to hold it still while they are working on the top side. It's kind of hard to look in two places at once. If you know you have got a three-quarter-inch hex under there, you can put this in line with a three-quarter-inch size and lock it in and slide it on there. It has some benefit that way.

Also, if you don't know what size fastener you have, you can put this on it, and it can kind of tell you what it is.

So it has some benefits for the user as well.

And then the Craftsman lifetime guarantee, that's quite a promise that that brand makes to the marketplace. It's another key part of what's made them successful. You can take your product back, and Craftsman -- for the no hassle replacement at any time. So the Craftsman lifetime guarantee is another part of the Craftsman Advantage as well.

Q. And did you have to go through any testing in order to qualify for the Craftsman branding?

A. Certainly. We had -- our product had to meet the spec that Craftsman defined for this product. It has to do with

torque and corrosion resistance. So we put it, like, in, you know, water, fog chambers to see how long it will last before it rusts up too much to use. We subject it to extreme temperatures, like freezing and heating it to see that it will survive that and still be usable.

And then, how much torque can it generate on a fastener before it's broken? So we put it in a machine and put way more force on it than what you can with the human hand.

But those are some key parts, for example, of the spec that the customer has. We have to meet that in order to put it in their brand.

Q. Have you and your team received any awards for the Max Axess Locking Wrench?

A. We were awarded a patent from the U.S. patent office for our development of the Max Axess Locking Wrench.

Q. If you could turn in your binder to DTX 74, please.

A. It should be one of the last ones, right? 74, you said?

Q. Yes.

A. Is it possible I don't have it? DTX?

Q. DTX.

A. Defense's?

Q. Yes.

THE COURT: Why don't I just show the witness my copy.

A. So could I try to summarize what you just asked to make sure I understand?
Q. Sure.
A. Did he ever suggest something other than Buchanan?
Q. Correct.
A. No, not to my recollection.
Q. So he never suggested anything other than the thing he suggested within hours of first reviewing Mr. Brown's patents; is that correct?
A. No, that's not exactly correct. There was a lot of discussion, and other patents were -- other prior art, other older patents were reviewed and discussed.

But generally, I don't have a recollection through the process of ever not coming back to the gripping element of Buchanan and following that.

Other things were discussed, like I said, but -- yeah.

MR. SKIERMONT: I will move to admit Plaintiff's Exhibit 166.

MR. SERNEL: No objection.

THE COURT: It's already in evidence, I think, but that will be admitted.

MR. SKIERMONT: Thank you, your Honor.

BY MR. SKIERMONT:
Q. I want to show you Plaintiff's Exhibit 160,

patent?
A. Okay. Yes.
Q. And did you look at the figures of the patent also --
A. Sure.
Q. -- when you reviewed these patents?
A. Sure.
Q. And did you look for -- did you review, for example, Figure 12 of the patent when you undertook your review?
A. 12 or 11? 12? I think both of them, actually.
Q. And, Mr. Broadaway, are the gripping elements in Figure 12 of the patent U-shaped?
A. I am pretty sure in Figure 11 they are not U-shaped. I think that's the case for Figure 12 as well.
Q. And did you analyze Figure 18 when you undertook your review of the patents?
A. I recall this figure. I mean, it was looked at.
Q. What do you recall about this figure?
A. It kind of -- it has some gripping elements shown without the U-shaped arms.
Q. No U-shaped arms in this figure?
A. Well, they are kind of separated, like two, but yeah.
Q. And did you ever consider -- withdrawn.

Did you ever do any analysis to determine whether the gripping element that the Max Axess Locking Wrench uses could be any shape other than U-shaped?

A. I'm sorry. I got a little confused.
Q. Let me ask it better.
A. Okay.
Q. Was it your understanding, Mr. Broadaway, that so long as the Max Axess Locking Wrench didn't have the exact same shape of a gripping element as the Bionic Wrench, that that designed around the 35 claims in LoggerHead's patents?
A. No. In fact -- I mean, we talked about John Owen and his involvement and our continual review with him on the patents. We had multiple designs of the gripping element that, based on his counsel, we didn't go with that we thought -- so to answer your question, we had T-shape. We had U-shape. We had other shapes that we discussed and considered, but per his guidance, came back to the solid block that we went to production with.
Q. Right. I think we saw an example of that earlier, where the very first drawing, CAD drawing, of the competitive version of the Bionic Wrench had three U-shaped jaws, right?
A. With a different tip configuration. We had that discussion about how Fu thought it was -- yeah. Yes.
Q. Mr. Broadaway, I am putting up on the screen a document that's been marked Defendants' Exhibit 5.

And just to orient you where we are, this is an email from February 27th from you to Fu, and it has several attachments. I want to show you this one.

ready to try to elicit arguments made during the prosecution history.

THE COURT: What's the relevance of the difference between Buchanan and the --

MR. SERNEL: So, they obviously overcame Buchanan to get the patent claims, and the point is Buchanan doesn't have arm portions and ours doesn't have arm portions. And he's already done this misleading cross-examination on that point.

THE COURT: I don't think it's relevant. Sustained.

(Proceedings heard in open court, jury present:)

BY MR. SERNEL:

Q. And do you have an understanding as to why the Max Axess Locking Wrench gripping element does not practice Mr. Brown's patent claims?

A. Yeah. Primary -- one of the primary things is it's missing the arm portion of the gripping element. It's a solid block with a hole through it for the force transfer element.

Q. If we can move on to another topic that Mr. Skiermont spent quite a bit of time on, and that's benchmarking. Just quickly for the jury, what is benchmarking?

A. Well, I mean, it's kind of a pretty broad meaning, I guess; but in our daily work and my team's work, we're taking competitive product, or maybe some of our own product, and we're testing it, reviewing it, understanding how it performs.

THE WITNESS: I do.
THE COURT: You may be seated.
MR. HAYES: Your Honor, can I hand up the binders?
THE COURT: Yes. Thank you.
THE WITNESS: Thank you.
JOHN OWEN, DEFENDANTS' WITNESS, DULY SWORN.

DIRECT EXAMINATION

BY MR. HAYES:

Q. Good afternoon.
A. Good afternoon.
Q. Please introduce yourself to the jury.
A. Hello. My name is John Owen.
Q. Mr. Owen, what is your role in this case?
A. I'm here today to talk about my role in giving design guidance regarding the Max Axess wrench and related patent issues.
Q. So, before we discuss your role with the design guidance in this case, I'd like to take a minute to talk about your background and your education and your experience.
A. Okay.
Q. Mr. Owen, where are you from?
A. I live in North Carolina. I live in the Raleigh-Durham area, which is sort of the central part of North Carolina.
Q. And is Raleigh-Durham located close to one of the parties in this case?

A. Yes. We're close to the Apex offices. In fact, it's probably about 8 miles from my office to the Apex plant.
Q. As I said, let's take a little bit of time talking about your education. Did you go to college?
A. Yes, I did.
Q. And where did you go to college?
A. I went to Duke University.
Q. When did you graduate from Duke?
A. Graduated from Duke in 1983.
Q. What did you study at Duke?
A. Mechanical engineering and materials science.
Q. Did you graduate with any honors?
A. I did well in school, and I was able to graduate with some honors for that degree.
Q. Okay. And did you earn any degrees beyond your engineering degree?
A. Yes. About 10 years after getting my engineering degree, I went back and went to law school.
Q. When did you get your law degree?
A. I got my law degree in 1996.
Q. And where did you get your law degree from?
A. From the University of North Carolina.
Q. And again, did you graduate with any honors from law school?
A. Yes, I did.

Q. So, you mentioned there was a period of time between your engineering degree and going to law school. Did you work during those 10 years?
A. Yes, I did work in those 10 years in various positions, engineering positions.
Q. What was your first job out of engineering school?
A. I went to work for Texas Instruments, and I worked with them as a design engineer in designing hard disk drives for computers, and actually Texas Instruments' first effort at making laptop computers.
Q. After your work for Texas Instruments as a design engineer, what was your next job?
A. After TI, I went to work for a company called Sumitomo Electric, which is a fiber optic cable manufacturer.
Q. What was your job and job responsibilities at Sumitomo Electric?
A. I was a design and applications engineer with them.
Q. After working for Sumitomo, what was your next job?
A. After Sumitomo, I went to go work for another fiber optic cable manufacturer, Berk-Tek. They made other types of fiber optic cables.
Q. What was your title and job responsibilities at Berk-Tek?
A. There, I was a design engineer and manufacturing engineer for making fiber optic cables.
Q. What was your next job after working as a design engineer

at Berk-Tek?
A. Then I went to work for a company called Newton Instrument Company, which is a metal fabrication company that makes cable racks and cabinets for telecommunications equipment.
Q. What was your job title and job responsibilities at Newton?
A. I was the design manager and overseeing the drafting department for Newton Instrument Company.
Q. And then your next move after Newton, where did you go?
A. I went back to work for Berk-Tek as a -- first as a design or product engineer and then as a quality assurance manager.
Q. And what did you do after then working for Berk-Tek that second time?
A. After working for Berk-Tek the second time, I went to law school.
Q. Why did you decide to go to law school?
A. Well, I've always been interested in the law, and I also wanted to see if there was some way to use my engineering background to help people with patents and other types of technical aspects of the law.
Q. So, you mentioned earlier that your role in this case was providing design guidance, so I'd like to talk about that -- switch gears and talk about that now a little bit.
A. All right.
Q. Can you talk about in general, in your job, what you do

in this -- with your kind of product design guidance hat on?
A. Well, I work with various individuals and companies regarding their products to help see whether some aspect of their product might be patentable and also provide guidance about how they might design their product so that they don't get in trouble with other people's patents.
Q. What type of person or job are you interacting with at your clients, typically?
A. I'm working with a design team at those clients, if they're with a company. So, it might be the lead project engineer or multiple engineers on the project team.
Q. You mentioned kind of this initial contact with engineers. You know, what's kind of the next step once you've become part of the design team in kind of the design process?
A. Well, usually I'm shown or they bring to me an initial design concept, and we'll take a look at that initial design concept and decide if there are maybe some potential issues with it or some avenues that need -- some aspects that need particular attention.
Q. In kind of the design process, are there some kind of typical approaches you might recommend a client follow kind of from the get-go?
A. Certainly. Because I'm looking at this design process from a patent perspective and provide design guidance with respect to patent, one of the things that I frequently do is

suggest that the clients look at old products like what they're looking to make, such as products that are maybe 20 years old or older, to start their design from there and move forward because that has the most likelihood of coming out with a good outcome.

Q. Once the design is started, do you have continued interaction and involvement in the design process?

A. Yes. My experience with the design process is that it typically proceeds in multiple phases. So, you might have a first design, an initial design, then further, Version 2, Version 3, Version 4, before you get to a final product design.

And I'm usually involved with each of those steps, maybe not all the steps, but certainly along the way to take a look at those various design options and design considerations, proposals that they have, and give them guidance regarding those.

Q. Approximately how many times have you been involved in this design guidance process in your career?

A. Oh, over 70, maybe approaching 100, I don't know, somewhere.

Q. Now let's talk about your specific design guidance that you gave in this case. To whom did you give your design guidance?

A. I would be giving my design guidance to the Apex design

team for the Max Axess wrench, principally Eric Broadaway.
Q. Prior to this instance, had you been involved with Apex before; and if so, how many times had you given Apex design guidance?
A. Oh, I've been working with Apex for well over a decade, and easily over 25, 30 times that I've done design guidance for projects.
Q. Okay. So, let's take a look at some of the documents with respect to your design guidance in this case. You've got a binder there in front of you. Could you take a look at DTX 2?
A. Sure. Give me a second to put on my glasses.
DTX 2, yes.
Q. Do you recognize it?
A. I do recognize this.
Q. If he could have DTX 2. It's been previously admitted. And if we could highlight the top "From," "To," and the date.
Mr. Owen, what does this e-mail, DTX 2, tell you about when you started -- or when you got involved in the design process in this case?
A. Well, this would have been, to my recollection, probably the first e-mail from Eric Broadaway regarding this project, and it was on February 22nd in the afternoon. And he sent me this e-mail. So that I would have started working on it -- on that project right about that time.
Q. And I've highlighted the attachment. Do you recognize

what that attachment is?
A. I do. That attachment would be a .pdf, an electronic copy of a patent. In this case, it's the Brown '579 patent.
Q. Turn in your binder to DTX 3, please.
A. Yes.
Q. Do you recognize DTX 3?
A. I do.
Q. And what is that?
A. This is an e-mail from me back to Eric Broadaway responding to his e-mail.
Q. And what's the date of this e-mail?
A. This is also dated February 22nd, 2012. It's about, I don't know, three hours, two-and-a-half hours later.
Q. I was going to say, what does the date and time of this e-mail tell you about how much work you'd done between receiving Mr. Broadaway's first e-mail and sending this response?
A. Oh, I would be very early in the process of even taking a look at the patents that are involved, and so this would be a very initial look at what was happening.
Q. And then throughout the process, design process in this case, did you provide additional design guidance?
A. Yes, I did provide additional design guidance at several points.
Q. And throughout that process of providing additional design

guidance, did you discover anything additional, any additional information relevant to your design guidance in this case?
A. Yes, I did.
Q. And what was that?
A. I was able to review the Brown patents in further detail and also take a look at the public record that was involved with getting their patents, the so-called prosecution history.
Q. Okay. We'll come back to the patents and that public record in a minute; but before we leave this document, can we take a look at the second paragraph. And we've all seen this before. It's a paragraph that says, "First pass through the patents," and it ends with, "is not a good sign."

Can you tell the jurors what you've looked at and again kind of where in your initial process of providing the design guidance you were when you sent this e-mail?
A. Sure. I was very early in the design guidance process and had just barely begun to take a look at these patents. And I took a look at that -- first the '579 patent and just took a look at the claims without really significantly reading any of the rest of the explanation regarding those patents.

And from a very high level, I looked at it, what you might call like a 50,000-foot view, it looked like the claims were fairly broad; and so I was telling Eric that.
Q. Had you looked at the public record?
A. I don't recall having looked at the public record yet.

Q. Okay. I'm jumping ahead a bit, but let's move down to the second-to-the-last paragraph here.
A. The one that starts, "One possible option"?
Q. That's right. You mentioned earlier a potential approach to your design guidance and the design guidance process. Can you explain that here in the context of the paragraph that we've pulled up?
A. Sure. I'm working with Eric here and suggesting that a good place for them to start is by looking at this Buchanan '925 patent. Since it's a -- it dates from 1957, that would be a much older design; and if they were to build a tool starting from that, that that would be a good place to start their design.
Q. For the relevant reasons, did Apex follow your design guidance here with respect to DTX 3?
MR. SKIERMONT: Object to form, lacks foundation.
THE COURT: Sustained.
BY MR. HAYES:
Q. You're familiar with the final Apex Max Axess design in this case, yes?
A. I am familiar with the final design.
Q. You're familiar with the gripping element within the Max Axess?
A. I am familiar with the gripping element.
Q. Have you considered whether the Max Axess gripping element

is the same or similar to the gripping element disclosed in the Buchanan '925 patent?
A. I believe that the gripping element in the Max Axess wrench is very similar to the Buchanan gripping element.
Q. Take a look at PTX 175 in your binder, please.
A. Forgive me. It's all the way at the back.
PTX 175, yes.
Q. Are you familiar with that?
A. I am familiar with that.
Q. And what is it?
A. It is an e-mail from Eric Broadaway to myself regarding this project.
MR. HAYES: Your Honor, we move to admit PTX 175.
THE COURT: Any objection?
MR. SKIERMONT: No objection.
THE COURT: That will be admitted.
(Said exhibit admitted in evidence.)
MR. HAYES: Josh, can we take a look at the top of page 2, please. That's fine. You can -- that's fine. You can go back to that.
BY MR. HAYES:
Q. So, I've highlighted here the e-mail from Mr. Broadaway to you, Mr. Owen, that says, "John." Can you explain what's going on in this e-mail?
A. Certainly. This is Eric letting me know that their design

that they're going to start working from is the 1957 Buchanan design, which is consistent with the guidance I proposed to them in the earlier e-mail that we just looked at. And he's saying we're going to follow that design closely and make a couple of modifications that he's describing here.

Q. Take a look in your binder at DTX 7R, please.

A. DTX 7R, yes.

Q. Do you recognize that?

A. I do recognize that.

Q. What is it?

A. This is an e-mail from Eric Broadaway to myself dated March 12th, 2012.

MR. HAYES: Your Honor, we offer DTX 7R and move it into evidence, please.

THE COURT: Any objection?

MR. SKIERMONT: No objection.

THE COURT: That will be admitted.

(Said exhibit admitted in evidence.)

BY MR. HAYES:

Q. Mr. Owen, can you explain generally what Mr. Broadaway is sending you in this e-mail, DTX 7R?

A. Yes. In the e-mail, it has an attachment, a Power Point attachment that's -- depicts a design proposal that they had. This would be what I would call their second design proposal for purposes of discussion. So, he's passing a second design

proposal by me. Consistent with that design process that I said typically has multiple phases in it, this would be another phase in it.

Q. Had the design evolved over a long time?

A. It had evolved some. I don't know how -- it had been a couple of weeks, it looks like, between.

MR. HAYES: Josh, could we pull up page 4 of the attachment. It's Apex 18603.

And could we highlight or pull up the section on the jaws.

BY MR. HAYES:

Q. Mr. Owen, did you consider and analyze this iteration of the Max Axess when Mr. Broadaway sent it to you?

A. Yes, I did. This is -- this figure is what we call an exploded view of the proposed tool, where each of the parts is sort of spread apart so you can see them. And so I did review this design proposal in particular looking at this figure.

Q. And what did you tell Mr. Broadaway, what was your design guidance to Mr. Broadaway with respect to this proposed iteration of the Max Axess?

A. I suggested to him those gripping elements, they shouldn't pursue that type of gripping element, that instead, he should pursue the simple block with a pin through it approach shown in Buchanan.

Q. With respect to the claims in this case, what was your

guidance based on?
A. My guidance was based on taking a look at the claims and the prosecution history, where the gripping element in the claims is described as having three parts. It has a body portion, an arm portion, and a force transfer element. And taking a look at what happened in the prosecution history and what the Buchanan prior invention showed, it was clear to me that design of a simple block with a pin through it wouldn't meet those claim limitations.
Q. Take a look at DTX 8R in your binder, please, Mr. Owen. Do you recognize that?
A. Yes, I do.
MR. HAYES: This has been previously admitted, so Josh, could we have DTX 8R, please. And can you pull up the first -- the first part of the top e-mail that says, "John, per your guidance."
BY MR. HAYES:
Q. Mr. Owen, can you explain what we see here in this e-mail from Mr. Broadaway?
A. This is Eric Broadaway sending me an e-mail back regarding the guidance that I've just given him to not pursue those U-shaped gripping elements, and Eric indicating that they were going to have the gripping element that is, quote -- that's following Buchanan, not Brown, as the Power Point showed.
Q. Let's take a look at Buchanan. We've heard a lot about

that. Can you turn in your binder to DTX 75, please.
A. Yes.
Q. Do you recognize DTX 75?
A. Yes. This is a copy of the Brown '925 patent.
Q. So, I want -- the Brown or --
A. I'm sorry, the Buchanan '925 patent.
MR. HAYES: Your Honor, we move to admit into evidence DTX 75.
THE COURT: Any objection?
MR. SKIERMONT: Your Honor, no objection.
THE COURT: That will be admitted.
(Said exhibit admitted in evidence.)
BY MR. HAYES:
Q. Can you take a look at Figure 4?
MR. SKIERMONT: Josh, could we have 4, please. Can we highlight Figure 4?
BY MR. HAYES:
Q. In the previous e-mail, you said -- Mr. Broadaway says, "Per your guidance, Mr. Owen, we are changing the design to have a plunger matching Buchanan." Can you explain -- we've heard a lot of terms, plunger, gripping element. Are those all the same?
A. Those are all the same, different words for the same thing. Buchanan called them plungers. Brown calls them gripping elements. They serve the same function.

MR. HAYES: Josh, can we highlight just the very middle of this photo here of Figure 4 that shows the gripping elements of Buchanan.

BY MR. HAYES:

Q. And can you explain your guidance, Mr. Owen, based on the plungers or gripping elements that are disclosed here in the Buchanan reference?

A. So, I took a look at what Buchanan was showing in these drawings and what Buchanan described in the accompanying text and saw that the Buchanan gripping elements were essentially blocks with a pin through them. And applying essentially common sense to look at that, these gripping elements didn't have an arm portion; and since they didn't have an arm portion, they should be clear of the Brown patents.

And so my design guidance to Eric was to try to use a gripping element that was like this, a block with a pin through it.

Q. Turning in your binder to DTX 11R, please.

A. Yes.

Q. Do you recognize it?

A. I do recognize this.

Q. And what is this?

A. Well, this is an e-mail from Zhu, I guess, to Eric Broadaway. I've seen this e-mail.

MR. HAYES: Your Honor, we'd move to admit DTX 11R.

THE COURT: Any objection?

MR. SKIERMONT: Your Honor, for this and the two that came before the patent, no objection subject to what we discussed yesterday.

THE COURT: That's fine. That will be admitted.

(Said exhibit admitted in evidence.)

MR. HAYES: Josh, we want to focus on the figure in the bottom left of this front e-mail.

BY MR. HAYES:

Q. Mr. Owen, this shows a T-shaped gripping element. Are you familiar with this iteration of the Max Axess design?

A. Yes. So, this would be at least a third version that the Max Axess team proposed, and this one, they proposed a plunger that had a T shape.

Q. What was your design guidance to Mr. Broadaway and Apex with respect to whether or not they could use or should use the T-shaped gripping element in this case?

A. I recommended to Eric that they not use this T-shaped design, instead they return to the simple block with a pin through it that was shown by Buchanan.

Q. You mentioned earlier that -- in one of the e-mails, we saw your initial design guidance. You said you considered some more information along the way. What was that?

A. Well, I looked further at the descriptions provided by Brown itself and looked much more closely at the claims, and

then I also examined what we call the prosecution history of the patents in question.

Q. Turn to DTX 73, please.

MR. SKIERMONT: Your Honor, could we be heard at sidebar?

THE COURT: All right.

(Proceedings heard at sidebar:)

MR. SKIERMONT: This is again trying to tell the prosecution history story.

THE COURT: The question is whether or not the device infringes the patent.

MR. HAYES: Could I just briefly respond?

THE COURT: Sure.

MR. HAYES: So, there was a document earlier that Mr. Skiermont has already crossed Mr. Broadaway on it. It's from Mr. Owen. It says, "After my first pass, it doesn't look good." He just looked at the claims, the very broad scope of the claims.

In his additional analysis, he looks at the prosecution history; and the prosecution history, which is a public record, which is someplace back in 2012 during the design process, he takes a look at that and further informs his design guidance in this case.

Those are the facts in 2012. He's going to explain a couple of the statements with his design guidance.

THE COURT: He's welcome to talk about what he observed and recommended that they do, but I don't want to go deep into the prosecution history.

MR. HAYES: But can he at least say that he's looked at them and he's considered some of the statements in them?

THE COURT: It opens the door. Overruled -- sustained.

(Proceedings heard in open court, jury present:)

BY MR. HAYES:

Q. Mr. Owen, I asked you earlier about your design guidance, and we started with the Buchanan plunger. Are you -- and you're familiar with what the final Max Axess gripping element looks like, correct?

A. Yes, I am.

MR. HAYES: Could we get the actual gripping element?

BY MR. HAYES:

Q. And could you describe for the jury in your own words what the Max Axess gripping element is like, what it is?

A. The Max Axess gripping element is basically a mostly rectangular block with a pin through it, the force transfer element.

Q. And what do the claims require in this case?

A. Well, the claim requires that the gripping element have at least three things. It's got to have a body portion, an arm portion, and the force transfer element.

MR. HAYES: Josh, as they're looking for that, can we have DTX 24, please -- sorry, DDX 24.

MR. SKIERMONT: Your Honor, I'm going to object on foundation, whether Mr. Owen even saw this at the time he was giving his advice.

THE COURT: Well, we'll find out if he did; and if he didn't, your objection will be sustained.

BY MR. HAYES:

Q. So, Mr. Owen, do you recognize the figure on the left half of DDX 24?

A. Yes.

Q. What is it?

A. That's a portion of the Buchanan '925 patent. It's the Buchanan plunger.

Q. Is that the Buchanan '925 patent that we just looked at and you considered during your design guidance?

A. Yes, it is.

Q. Do you recognize the picture on the right side of DDX 24?

A. Yes.

Q. What is that?

A. That's a picture of the Max Axess gripping element.

Q. What does it tell you about whether or not Apex followed your design guidance in this case?

MR. SKIERMONT: I'm going to object again, your Honor, because they haven't established he ever saw that part

when he gave the guidance.
BY MR. HAYES:
Q. Are you familiar with --
A. This is the final product. And I suggested it be a block with a pin through it. That's what that is. It's a block with a pin through it.
THE COURT: I'll allow it. Let's move on.
BY MR. HAYES:
Q. And once again, what do the claims with respect to the gripping element in this case require?
A. The claims require that the gripping element have three things again. It's the body portion, the arm portion, and the force transfer element.
As you can see here in the -- well, I'll stop there.
Q. On the right side, we see a picture of the Max Axess gripping element. Does that meet all three requirements of the claims that are asserted in this case?
MR. SKIERMONT: Your Honor, I'm going to object. He's asking for expert testimony on infringement, not about development.
THE COURT: Let's talk about this at sidebar.
(Proceedings heard at sidebar:)
MR. SKIERMONT: My concern is that was not a, "What did you do in the design development," question.
THE COURT: I'm less concerned about the design than

I am this: Does this infringe? Because I thought where we were going with this all along was this man gets to testify as to what he would -- if he were just a plain old engineer, he'd be talking about. So, then he would say, "This is the same. This isn't the same." That's what I think this question is.

MR. SKIERMONT: He would say -- I agree with that. He would not say infringe. For example, even when Dr. Cagan took the stand for us --

THE COURT: Whether he would or wouldn't, the question is --

MR. SKIERMONT: I'm not talking about the -- I'm making a separate point. When Dr. Cagan testified yesterday, for example, your Honor, he did not opine as an engineer on infringement. He said, "The product has this element and this element and this element."

THE COURT: And that's what I think this witness gets to do.

MR. SKIERMONT: But he was asked if it infringes.

THE COURT: So he'll rephrase.

MR. SKIERMONT: Thank you.

(Proceedings heard in open court, jury present:)

BY MR. HAYES:

Q. So, Mr. Owen, just one more quick question with respect to the Max Axess gripping element. And I'm holding it up here. Does that include all three requirements of the claims

in this case, force transfer element, arm portion, and the body portion?

A. No, it does not.

MR. HAYES: Thank you. Your Honor, no further questions.

THE COURT: All right. Cross-examination?

MS. SPENCER: Your Honor, may I approach just to give him the binder material?

THE COURT: Sure.

THE WITNESS: Thank you.

MS. SPENCER: Would your Honor like one?

THE COURT: Yes. Thank you.

MS. SPENCER: Thank you. And would you check to make sure that the computer is switched to plaintiff's counsel table?

THE COURT: Sure, I will do that.

MS. SPENCER: Thank you.

We'll be just one very brief second.

THE COURT: All right.

CROSS-EXAMINATION

BY MS. SPENCER:

Q. Okay. Good afternoon, Mr. Owen.

A. Good afternoon.

Q. I don't believe we've met. My name is Asha Spencer. I'm counsel for LoggerHead in this matter. I understand that

Q. Now, on direct examination, I think you told defendants' lawyers that you advised Apex to follow Buchanan, the Buchanan patent to avoid infringement, is that right?
A. I said to start with that design from Buchanan and develop a tool from that position.
Q. And your advice on this issue as to the design of the Max Axess began on about February 22nd, 2012, right, when Mr. Broadaway reached out to you to ask your advice about the Brown patents, those are Dan Brown's patents on the Bionic Wrench, correct?
A. My work on the project began around February 22nd, if that answers your question. I sort of lost it along the way.
Q. Sure. And let me pull up, just so that we're looking at it -- and we looked at it earlier, but it's Defense Exhibit 2. And this is that e-mail --
A. Yes.
Q. -- voice mail from Mr. Broadaway, and he attaches Dan Brown's patent for you to look at, correct?
A. He -- yes, he attached that.
Q. And your recollection was that Mr. Broadaway, when he sent you the patent -- Dan Brown's patent, he was just hoping to get a 50,000-foot view of what the patent covered and what it was directed to, is that right?
A. That's not correct.
Q. That's not your recollection?

words, that the Buchanan plunger of a block with a pin through it doesn't have an arm portion.

Q We've been talking a lot about the Buchanan plunger. How is that related to the Max Axess gripping element in this case?

A Well, the Max Axess gripping element, like the Buchanan plunger, is a basic block with a pin through it. So the two are very similar in that regard. Relevant to the claim language, they're both essentially blocks with pins through them.

Q If we can turn to the next page, Loggerhead 1836. And if we could pull up the first full paragraph there.

Again, I want to call your attention to the first two sentences and then the last sentence. If you could explain how this portion affected your design guidance in this case, Mr. Owen.

A Certainly. I took a look at this. This is where Loggerhead is saying specifically Buchanan's gripping element does not contain an arm portion, and instead that the force transfer element is directly attached to the body. And then they also say that Buchanan does not teach or suggest an arm portion.

So if Buchanan's approach of a block with a pin through it doesn't have an arm portion, then from a design guidance standpoint, a design that uses a block with a -- a simple block with a pin -- a pin through it, much like

Buchanan, then that shouldn't be within the scope of their claims either.

Q And what design does the Max Axess Locking Wrench utilize for its gripping element in this case?

A It uses a simple block with a pin through it.

MR. HAYES: Thank you. No more questions, your Honor.

THE COURT: All right. Recross-examination.

MS. SPENCER: No, your Honor.

THE COURT: Ladies and gentlemen of the jury, do any of you have any questions for this witness?

(No response.)

THE COURT: Mr. Owen, you may step down.

THE WITNESS: Thank you.

THE COURT: All right. The defendants' next witness.

MR. HAYES: Your Honor, defendants call Professor Frank Fronczak.

THE COURT: Thank you. You can just leave that stuff right there. Thank you.

And it's Professor Fronczak?

THE WITNESS: Pardon?

THE COURT: It's Professor Fronczak?

THE WITNESS: Yes. Yes, ma'am.

THE COURT: Can I ask you to raise your right hand.

THE WITNESS: I'm sorry, yes, your Honor.

(Witness duly sworn and takes the stand.)

THE COURT: You may be seated.

MR. HAYES: Your Honor, may I approach?

THE COURT: You may.

(Exhibits tendered to the witness.)

THE WITNESS: Thank you.

MR. HAYES: May I proceed, your Honor?

THE COURT: You may.

FRANK FRONCZAK, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. HAYES:

Q Good afternoon. Could you please introduce yourself to the jury.

A Good afternoon. I'm Frank Fronczak.

Q Professor Fronczak. Is that okay?

A Sure.

Q Professor Fronczak, what is your role in this case?

A I'm a technical expert in the case.

Q And as a technical expert in this case, did you provide opinions?

A Yes, I did.

Q Before we get into your opinions, I'd like to talk a little bit about your background.

A Sure.

Q On opening, Mr. Skiermont, I think, inadvertently said that you're from Michigan.

Professor Fronczak, where were you born and raised?
A I was born and raised in the Back of the Yards of Chicago, and I've never lived in Michigan.
Q Professor Fronczak, this is a case about hand tools. We've heard a lot about hand tools.
What was your first experience in life with hand tools?
A A little background. My family, my father and my uncle after World War II, came back and opened up a hardware store. We lived -- the family lived in a flat above the hardware store on 47th Street. And so I worked in the hardware store ever since I was a little boy.
My uncle had been a machinist, worked with him. My father had been a plumber before the war, a pipefitter, plumber before the war. And so we started working with hand tools when we were kids.
Started tearing apart cars when I was probably about 12 because I had an older brother. So he got me into cars. We took our bikes apart, put new rear ends in bikes. All of this was done with hand tools.
Q Professor Fronczak you said you grew up on the South Side. Where did you go to high school?
A I went to school -- even though I lived in Back of the Yards, I went to school far southwest side at Brother Rice.
Q What year did you graduate from Brother Rice High School?

A It would have been 1968.
Q Through the years, have you had a chance to work with and collect some tools, hand tools.
A Yes I have. I'm what's called a gearhead.
Q How many tools do you own today, Professor Fronczak?
A Easily, easily more than a thousand. Some I inherited from my grandfather, some I inherited from my father. Some I purchased. Some I designed and built my own.
Q So Professor Fronczak, to help with your testimony today, did you prepare a set of slides?
A Yes, I did.
MR. HAYES: We're going to pull up those slides, Josh, if we can have those.
THE COURT: Are we in the right place here?
MR. HAYES: We are, your Honor.
THE COURT: Okay.
BY MR. HAYES:
Q I'd like to start by talking about your education and training, Professor Fronczak.
A Sure.
Q After graduating from Brother Rice High School, did you go to college?
A Yes, I did.
Q Where did you go to college?
A I went -- started off with bachelor's. I earned a

bachelor's at the University of Illinois in Urbana-Champaign.
Q And what was your area of study, or what was your degree in?
A My degree was in general engineering, which is a hybrid degree between mechanical and civil engineering at the time.
Q What year did you graduate from the University of Illinois?
A With my bachelor's degree, it was 1972.
Q After your bachelor's degree, did you go on and get a master's degree?
A I continued on at Illinois, yes, and I received -- earned my master's degree in theoretical and applied mechanics at Illinois, and that was in 1974.
Q Can you explain for the jury just a little bit about what theoretical and applied mechanics might be about?
A Sure. At the time -- the department no longer exists. It's been common across the different universities to abandon theoretical applied mechanics departments and typically mold them into or bring them over to a mechanical engineering department. That's what was done at Illinois.

So there is no more theoretical applied mechanics department at Illinois. It's part of mechanical engineering. So applied -- well, theoretical and applied mechanics, mechanics is the study of subjects which are relevant to a wide variety of engineering things such as vibrations, strength of materials, fluid mechanics and so on.

So these are things that engineers -- the fundamentals that engineers learn that they then use to apply. And so theoretical and applied mechanics, the department was the oldest department of theoretical and applied mechanics in the country. And it had the theory on one end, but it had also the application aspects of it.

Q Professor Fronczak, after getting your master's, did you get any more formal education?

A Yes, I did.

Q What was that?

A It was a doctor of engineering degree at the University of Kansas. And notice it's not a Ph.D. It's Ph.D. stands for Doctor of Philosophy.

University of Kansas started a doctor of engineering program in conjunction with NASA, Stanford, MIT, Tulane, Kansas, I think were all part of this program where NASA said they needed more application-oriented, high-level engineers.

So the rigor, the requirements were the same, but the nature of the work was more application-oriented rather than theoretical-oriented.

Q What was the focus of your doctor of engineering at the University of Kansas?

A I did coursework at Kansas, but then I worked at NASA, National Aeronautics and Space Administration, to do my research. And my project was I designed a machine for rotating

and shaking a helicopter blade in a vacuum, full-size helicopter blade, and then measuring the response of the blade to the hydraulic input that we had given it, the force in motion input that we gave into the hub of the blade.

So the blade is rotating around. It's shaking up and down, twisting back and forth. We made it do these things. And then we had a system that I designed that would be able to measure the mode shapes, the shapes of this motion that's doing like this. It looks like a wet noodle.

Q Professor Fronczak, I'd like to move on now to your work experience.

A Sure.

Q You mentioned that you worked for your dad or in your dad's hardware store during high school.

Did you have any jobs during college?

A Yes, I did.

Q What were those jobs?

A Well, I started off working at Central Steel & Wire as a laborer after my sophomore year. I also worked -- my mom had a small business that she had bought out selling drafting board tops, and I worked for her. And then I worked for my dad store in the day, and then second shift, I worked at Central Steel & Wire as a laborer. That was sophomore year.

After my junior year, I got a job as a -- that was as a pack -- I'm sorry, as a baby powder processing engineer at

Johnson & Johnson on the South Side of Chicago, southwest side of Chicago.

And then after my senior year, I had completed all my coursework except for one accounting course that I still had to take care of. So I took care of that at Ford City College. I don't know what it's called now, but it used to be Ford City College by Ford Center -- or Ford -- by Ford City.

And I had another job at Johnson & Johnson. There, I was working as a packaging engineer.

Q What was your next job after working at Johnson & Johnson as a packaging engineer?

A Then while I was in grad school at the University of Illinois, in the summers and then during breaks and during the year, I also worked as a project engineer for Clark Deitz & Associates. That's a consulting engineering firm in Champaign-Urbana. It's in Urbana.

And then I also was a teaching assistant in the -- started off in general engineering department, and then I moved over to theoretical and applied mechanics department and taught strength and materials there.

Q After working for Clark Deitz & Associates as a project engineer, what was your next job?

A Well, then I went to graduate -- or I'm sorry, for my doctorate at Kansas. And while I was working at Kansas, that's where I was back and forth between campus and NASA.

So I was really working as a project engineer for my thesis project while I was a grad student at NASA -- I'm sorry, while I was a grad student at Kansas.

Q After that, what was your next job?

A After I finished up my doctorate, I moved to Madison, Wisconsin, and I was employed by the Forest Products Lab, which is part of the Forest Service, which is part of the U.S. Department of Agriculture.

So I was an engineer for the U.S. Department of Agriculture primarily -- well, within the Forest Service at the Forest Products Lab in Madison.

Q What type of engineering work were you doing at the Forest Products Lab?

A I was doing mechanical design work. I was designing both product and process. But most of my work involved the design of machines for processing large logs into veneer.

So when you think of veneer, that's plywood. So plywood is made out of veneer. I was designing machines for processing the turning the logs into veneer.

Q After working for the Department of Agriculture, what was your next job?

A After I left the -- well, actually while I was still at the forest project -- Forest Products Lab, I decided I wanted to also start doing some teaching.

So I went part-time at the Forest Products Lab and

part-time at the university, and I was a lecturer. I was a mechanical systems -- well, we had a mechanical systems design group at the time, and I was a professor teaching -- or I'm sorry, I was a lecturer teaching senior design as well as dynamic systems analysis.

Q Now, you've mentioned "the university" a couple times. What university are you talking about?

A Oh, I'm sorry, it's University of Wisconsin-Madison, archrivals of Michigan.

Q What year did you start working at the University of Wisconsin?

A Well, it would have been about 19 -- let's see, I got to think for a second. '77, about 1980, about 1980. Because we moved to Madison in '77, and I was at the Forest Products Lab for full-time about three years, and then I started transitioning to the university. So it was about '70 -- it would have been about 1980.

Q Do you still work for the University of Wisconsin?

A No. I'm an emeritus professor. I'm retired from the university. I retired about four years ago.

Q Approximately how many years did you work as a professor for the University of Wisconsin?

A 30 -- 30 some years, 34 years or so I was at UW in the faculty as a lecturer and professor. Most of the time as a professor.

Q So I'd like to move forward now and talk a little bit about your achievements.

Have you received any -- have you published any papers, articles or technical presentations throughout your career, Professor Fronczak?

A Yes, I have. That's part of your job as a professor to do that.

Q So you obviously published a large number of them. For this case, can you focus on some that are most relevant with respect to design, tool design?

A Well, I've published over 100 papers, articles and technical publications. Virtually all of them were based on the design activity that I did either at the Forest Products Lab or following subsequent to that at the university.

A number of mechanical systems that I designed. One of the papers that is part -- I think it's part of the -- part of my vitae, my CV. It should be. We designed a router for a -- for surgery.

And just mechanical -- mechanical devices. We have a design for -- the words won't mean anything, but a modified hypocycloid engine. You know, some hydraulic pumps and motors, a variety of devices and tools.

Q As a professor at the University of Wisconsin, did you teach classes about mechanical design, tool design?

A I have, yes, when I was a professor there.

Q Can you tell the jury about some of those classes?
A Sure. We had, as I mentioned earlier, I taught a number of courses, but primarily in the mechanical design area. So I taught machine design.

But the main one I think that's -- or the main ones that I think are particularly relevant here, I taught senior design. Senior design is a project-based course where the students will work on projects.

One example of a project that I think is particularly relevant here is the students with my guidance designed a gripping device that would be able to be converted to an expansion device. Because sometimes you want to squeeze something. Sometimes you want to expand something.

If you're familiar with snap rings, you have internal/external snap rings. But this was for a very different application. This was for a surgical application, but it still was a gripping tool and expansion tool.

I designed a device for a welder. We had a welder who had a -- he lost ability with his left hand. That was his hold hand. He was still able to hold and control his hand for his torch, but he couldn't hold the device. He could move it up there. He couldn't hold it there. So we designed a device to assist him. That was part of my work.

I was a founder member of the -- founding member of the UW Center for Rehabilitative Engineering and Assistive

Technology where we would design --

THE REPORTER: Rehabilitative Center?

THE WITNESS: I'm sorry. I'm sorry.

THE COURT: Rehabilitative technology.

THE REPORTER: Thank you.

MR. HAYES: Professor Fronczak --

THE WITNESS: Rehabilitative, yeah, I'm sorry.

MR. HAYES: You got to slow down just a little bit.

THE WITNESS: Sure. I get excited. I'm sorry.

MR. HAYES: Taking down everything that you're saying.

THE WITNESS: That gives the gamut a little bit.

BY MR. HAYES:

Q Sure. One more question with respect to courses you've taught at the university. We've heard a lot in this case about reverse engineering.

A Yes.

Q Have you taught any courses at the University of Wisconsin about reverse engineering?

A Yes, I did. Two parts -- or two in two different courses, although our senior design course typically would have a little bit of reverse engineering.

But I'm not sure how many years ago, probably about 20 years ago, I had a student approach me who had had a summer internship at Ford. And he came back and he says, "How come we're not doing reverse engineering courses here at Madison?"

He said, "First thing, my whole summer assignment was doing reverse engineering at Ford." It was a student that I knew pretty well, so we got together and we actually proposed a course. And we had a senior graduate level course in reverse engineering.

We called it mechanical dissection because the idea is to take things apart, study them, see how they perform, see how they're made, see how they're manufactured, see what materials they are.

So it's very much like biology, you know, where you dissect things, but we were dissecting machines. Machines, products, devices.

And then also we introduced -- or I introduced, I should say, reverse engineering section into our Introduction to Engineering course, which was a common engineering course.

Not every department required it, but the vast number of departments in the college required it or at least recommended it and all gave credit for it as a freshman course, and that -- a good section of that was reverse engineering.

Q Professor Fronczak, do you have any patents?

A Yes, I do.

Q Can you talk a little bit about generally the patents that you have?

A Sure. And it says here I've got -- I'm an inventor on eight U.S. patents or patent applications. The way it works at

Wisconsin is that -- and which is where most of these are. Seven of the eight are while I was at the University of Wisconsin.

What we typically do as a faculty member or a grad student or the students, we will assign the rights to the University of Wisconsin, Wisconsin Alumni Research Foundation. That's commonly called WARF, W-A-R-F.

And so we assign our rights over there, and then they decide whether they will pursue the patent. Sometimes they will pursue the patent. But it's when they have decided to submit an application, that's when, as a faculty member as a -- for my CV purposes, that's when I've done my job basically in terms of how the university looks at patents.

And so that's why I say eight U.S. patents or patent applications, seven of which fall in that category.

Q Throughout your career, Professor Fronczak, have you received any awards?

A Yes, I have.

Q Spend a minute here telling us about the awards you've received throughout your career.

A Well, this is a sampling of them. I guess it's the ones I think are -- the ones I'm proudest of, I guess I'd say.

The first one was the USDA Superior Service Award. There was -- this was tied to the -- I said I was designing wood veneer processing equipment. So I have a patent along

with two other coinventors.

I led the team, and we have a patent on a powered backup roll. It's a device to help more effectively conserve or peel lumber, peel the log down into veneer and get better yield with better accuracy of the veneer. It saves about a million dollars' worth of product per year per every plant that it's in.

So I received the patent. I was awarded the patent. And then the USDA Superior Service Award was an award that was given to the -- to me by the Department of Agriculture for this device, which, you know, was quickly adopted by many companies in the industry.

Q You list as your next award the SAE --

A Okay, I'm sorry.

Q -- fellow?

A The next one, SAE fellow. SAE, most people think of it as Society of Automotive Engineers, but really it's SAE. And so I'm an SAE fellow.

This was awarded to me for my contributions to design education and for the work that I had done on hybrid vehicles. So I had done a lot of research in my life on hybrid vehicles. Work was sponsored by General Motors, Ford, the EPA.

And SAE recognized me as a fellow. It's an honor that's given to the members -- by the members of SAE to members of SAE that they feel have given high contributions to the

technology.

And then the Benjamin Smith Reynolds Award is the next one. That's a college of engineering -- University of Wisconsin-Madison College of Engineering teaching award. It was given to me in recognition of my contributions to design engineering education at the UW.

I was -- my home's mechanical engineering, but I also had an appointment in biomedical engineering. And I started up a design program in biomedical engineering along with a colleague in the biomedical engineering department.

And then UW Teaching Academy, it's along the similar lines, but it's not a college of engineering award. It's a university-wide award to recognize people who have made contributions and have shown particular emphasis throughout their careers on teaching particularly undergraduates, but teaching.

People that are teachers and dedicated to teaching and have made accomplishments in the university's mission to produce good students. Good engineers in our case.

Q So you mentioned that you're a professor emeritus. That means you're retired from the university.

A That's right.

Q Are you currently doing any other jobs or working on anything else?

A Sure. I'm still working. I do consulting work, a number

of -- a number of different consulting activities. Cases like this, I'm a consultant.

But I also am a consultant to a couple local design firms in Madison will call me in on occasion on particular projects, particular aspects that I'll consult on.

Sometimes it's a short consultation. It might be half hour. It might be a longer consultation. It might involve several days of work. It might involve some traveling. It might just be local.

But also I work as a senior mechanical design adviser to Marvel Medtech. That's a local Madison and suburb, Middleton-based medical products startup firm that's based on a patent that a few students and I got when I was teaching the biomedical engineering course.

And so Marvel Medtech is in the process of trying to commercialize this. And I work with the engineers. Every week I go over there and work with the engineers, and I'm a consultant regularly on that project. I think my title is senior mechanical design adviser.

Q What type of product are you working on designing at Marvel Medtech?

A Marvel Medtech, our product -- we only have one product that we're working on. Well, one product with a little offshoot.

It's an MRI image-guided breast biopsy positioning

device and for -- for identifying very, very early stage tumors, breast cancer tumors in hard-to-find regions. We're finding BB-size tumors and then being able to identify these tumors and then being able to ablate these tumors.

We're looking at cryogenic ablation, which leaves the tissue there, which enables this tissue to continue to generate antibodies to prevent or reduce the likelihood of future tumors from forming.

Q And what benefits does your invention there at Marvel Medtech provide to a patient in general?

A Well, a couple things. First of all, it saves -- it's going to save lives. I mean, there's no question about that, I don't think.

But more important -- well, I wouldn't say more important thing. Nothing more important than that. But it's also important that it creates a much quicker diagnosis, much less invasive intervention, much smaller level because it's early. And the nature of our intervention is long-lasting.

MR. HAYES: Thank you. Your Honor, at this time I offer Professor Fronczak as an expert in the relevant art in this case.

MR. SKIERMONT: No objection.

THE COURT: This witness, too, is an expert and will be permitted to offer opinions about these issues. You're welcome to proceed, Counsel.

BY MR. HAYES:

Q So Professor Fronczak, I'd like to transition now and focus on the opinions that you've given in this case.

A Sure.

Q Have you given both non-infringement and invalidity opinions in this case?

A Yes, I have.

Q Can we start with the non-infringement opinions?

A Sure. It's my opinion -- can I have the tools up here?

Q Sure. Let's grab the tools.

Did you bring a bunch of tools with you today assembled and disassembled?

A They're in envelopes. I don't need it right now. Sometime I'll need it, but they're in those brown envelopes, those brown manila envelopes.

(Objects tendered to the witness.)

THE WITNESS: Thank you. Okay, so I'm sorry, back to the question.

BY MR. HAYES:

Q So I wanted to start by focusing on your non-infringement analysis in this case.

A Right.

Q What generally did you consider?

A I didn't -- you had asked me what opinion I gave.

Q Okay.

A And my opinion was that the Max Axess wrench does not infringe on either of the two patents, the claims, the asserted claims of the two patents in this case.

Q And what are those two asserted claims? What are those two asserted patents?

A There's two asserted patents. I remember one number is '470, and I think the other one is '579.

Q And did you study and analyze the '470 and the '579 patents in coming to your opinions in this case?

A Yes, I did.

Q Did you consider and analyze the claims?

A Yes, I did.

Q And the specifications and figures?

A Yes, I did.

Q Did you consider and analyze the Court's claim construction in performing your non-infringement analysis in this case?

A Yes, I did.

Q Did you consider the level of ordinary skill in the art in the context of your non-infringement analysis in this case?

A Yes, I did.

Q Why?

A Well, level of skill, ordinary skill in the art, I think if you recall back to Dr. Cagan's testimony, I think he was asked some questions about this as well.

So the level of ordinary skill in the art, this is at

the time of the invention, the people who are familiar with this technology at a certain level and what would be their understanding of the terms of the patent, of what's in the patent. What does this really mean, what's invented.

So you have to put yourself in the mind of someone of ordinary skill in the art at the time of the invention of the patent.

Q In this case in performing your non-infringement opinions, did you perform those from the perspective of one of ordinary skill in the art?

A Yes, I did.

Q What in your opinion, Professor Fronczak, is the experience necessary to be one of skill in the art in this case?

A I'm consistent -- I think Dr. Cagan and I, we agree that we're in the same -- same -- same level of understanding of this, that it's basically an engineer, one who has a degree in mechanical engineering or a closely related field. And then a year or a couple years of experience in the design of products of comparable complexity.

And in this case, we have a fairly straightforward mechanism, but there's a little bit of complexity to it. It's not a hammer. It's more complex than a hammer.

So an engineer would -- one of ordinary skill in the art would be someone with an engineering degree in mechanical engineering or related field and someone with some experience

in a related field doing about the same level of engineering, year or two experience.

Q So I think you said one of the things you looked at in performing your non-infringement opinion in this case was the claims?

A Yes, I did.

Q Was there a particular -- with respect to the '579 patent, was there a particular claim element that you looked at or focused on in performing your non-infringement analysis?

A Well, certainly not at the very, very beginning when I first started looking at this. But as I progressed through and learned more about the patents and more about the claims and more about the device, it became pretty evident to me at least that one of the cruxes of the invention, it revolved around the gripping element.

You've heard a lot about the gripping element. And so the claims related -- the parts of the claims related to the gripping element became very evident a focus of my attention.

Q So let's pull up that claim. The claim element that you're focused on there is the one that starts, "each at least one gripping element;" is that right?

A That's correct. I want to make sure I looked at -- looked at the other ones, but the focus quickly became here.

Q And we'll go through each one of the claims that are asserted in this case, but let's start here.

Josh, if we could pull up the element, "each at least one gripping element."

A Can I open these up?

THE COURT: You're welcome to.

THE WITNESS: Thank you. Okay, I'm sorry, yes.

BY MR. HAYES:

Q Professor Fronczak, it seems like you've got a number of pieces and parts up there.

Can you just tell the jury generally what you have here before we get to --

A Sure. Generally what I have is I went out and bought a Max Axess wrench, and I disassembled it. I inspected it first. Actually I bought a couple, and then I disassembled it.

I took it apart and -- to look and see what all the different parts were and to see how it works, to see the insides of how it works.

Q Okay. So let's get back to looking at the claim here, specifically the element, "each at least one gripping element." If you could explain to the jury -- this is the element that has the red X on the right side -- what the claim requires with respect to the parts of the gripping element based on the claim, claim 1 of the '579 patent?

A Sure. The wording -- the wording of the -- of the claim says that it's an arm portion configured to engage one of it -- of said at least one guide and a force transfer element

contiguous with the arm portion.
Q So --
A Oh, I'm sorry, I think I missed your question, sir.
Q So let's take a step back.
A Yeah.
Q At a little higher level, we're looking at the gripping element?
A Right.
Q I'd like you to talk to the jury about based on the claim language, what parts are required or what the gripping element requires.
A Now I'm tracking. I'm sorry.
Q Okay.
A Okay. We had the gripping element, and it has to have at least -- has three things. It has to have a body portion. According to the claim, it has to have a body portion, it has to have an arm portion, and it has to have a force transfer element.
Q And that's the first of the asserted claims for the '579 patent. The second of the asserted claims for the '579 patent is claim 9.
A That's correct.
Q Can you explain -- claim 9 is a dependent claim. Can you explain to the jury what that means with respect to what requirements claim 9 must have?

A Sure. The way the patents are laid out is there's a -- can be a number of independent claims and then claims that depend upon the independent claim. In this case, claim 1 was the independent claim, and then claim 9 is a dependent claim. It claims depends upon claim 1. And here we see it's as recited in claim 1. So it has to have everything that's in claim 1.

So if it was in -- if it wasn't in claim 1, it's not in claim 9. Because in order for it to be in claim 9, it has to be in claim 1.

Q So then claim 9 depends from claim 1. Does claim 9 then also require the gripping element that we see here?

A That's correct. It has to have each and every one of these things in order for it to be an infringing claim.

Q Is there any dispute about that in this case?

A I'm sorry?

Q Is there any dispute about that in this case?

A I don't believe there's any dispute about that. That's pure and simple.

Q The final claim of the '579 patent is claim 16. Again, which one of the elements are you focused on or limitations are you focused on with respect to claim 16 of the '579 patent?

A I focused on that light grayed limitation where gripping element has to have a body portion, an arm portion and a force transfer element. It has to have those three things.

Q So all the claims then in the '579 patent require this

gripping element limitation?
A That's my understanding, yes. That's my recollection.
Q Let's take a quick look at the '470 claims. This is claim 1 here. You've got two red X's. Can we start with subsection C and explain to the jury what's required by subsection C of claim 1 of the '470 patent?
A Okay. It's very, very similar. I can't remember if the wording is exactly correct the same, but it's very similar.

It has to have a gripping element. The gripping element has to have the same three things. It has to have a body portion, it has to have an arm portion, and it has to have a force transfer element. So it's got to have all three of those things.

Q One more element here you've got a red X on on the bottom. Can you explain to the jury what claim requirement -- claim limitation you're focusing on there?
A I'm sorry, I missed the first part of your question, sir.
Q Can you explain to the jury --
A Yes.
Q -- the bottom claim limitation that you're focusing on?
A Okay, sure. Yeah, the bottom one is, it says, "wherein the first element further includes one aligning element." And I don't think there's been a lot of discussions about aligning elements in this.

Dr. Cagan addressed it, but it's kind of been lost,

perhaps lost a little bit in the focus on the gripping -- the gripping element. And so the first element includes at least one aligning element. If you -- actually it works nice. Can I use this?

Q Sure.

A Okay. So if we look at this tool, when I disassembled it, what I did is I took out -- there's -- if you remember, there was a number of pins that go -- can you see these holes? There's a number of holes around here.

Maybe if you take out your -- you each have a wrench here, so you'll see those. There's six holes around here, and there's pins that go through those holes.

And so pins that go through those holes, they're the aligning elements. If you don't have those pins in there as I have here, the parts don't align. So those keeps the parts aligned in a certain configuration.

Q And one more claim here. Let's look at claim 9 of the '470 patent. Is this a dependent claim again?

A That is correct. This is another dependent claim.

Q Does dependent 9 include all the limitations that we just saw in claim 1?

A That is correct. Because it's a dependent claim depending upon claim 1, it has to have everything that's in claim 1.

Q Okay. Just take a step back here and talk to the jury for a minute about your non-infringement analysis.

How many elements do you need to show are not present in the Max Axess Locking Wrench such that it is not found to infringe any of the asserted claims in this case?

A If there's one limitation that's not met, then the -- if the allegedly offending device or infringing device doesn't have even just one element or one limitation, then it doesn't infringe. It has to have each and every one of those to infringe. If it doesn't have one, it doesn't infringe.

Q And what did you mean to indicate by including the red X's in the right column of each one of the claims, asserted claims we just saw in this case?

A Well, if you look to the title of the slide, it says, "No Infringement." And if we had green checks on every one of these boxes, then it would infringe.

But if you got a red X, that means it's not there, okay? So the red X indicates that in my opinion, the limitation (c) and then that last line of (d), those limitations are not met in the Max Axess wrench. It does not have those things that need to be there for it to be infringing.

Q In performing your non-infringement analysis in this case -- the Max Axess Locking Wrench is there.

In performing your non-infringement analysis in this case, what did you compare the claims to?

A Well, I compared the claims as construed by the Court to

the actual Max Axess wrench. I said wrench, two wrenches. There's a 6-inch wrench and an 8-inch wrench.

I've got both of them that I looked at. Both of them I bought. Both of them I took apart, and I looked at both of them. So both allegedly infringing wrenches.

Q You mentioned earlier in doing your analysis, you considered the patents in this case including the specification in the claims.

Let's take a look at the specification that you considered. I've pulled up here -- what are you trying to show the jury by this next slide, slide 10?

A Well, here we have the actual Figure 1 from the '470 patent, which you see in that lower left has a picture with the six gripping elements including -- of the '470 patent including the force transfer elements.

So what I did was I extracted a portion of that just so that it's easier to see. So in the upper right where we see that No. 34, No. 36, No. 38, that's a picture of the gripping element in the '470 patent, Figure 1.

Then below that is the wording of the claim language that we just saw basically associated with the '470 patent and we see with the '579 patent. The figure's the same. The figures are the same and I did the same thing.

I took that -- extracted that one just so you can see a single one because it's a little bit of a mumbled, jumbled

mess trying to look at those six of them.

Q You mentioned earlier in performing your non-infringement analysis you considered the Court's claim construction; is that right?

A That's correct.

Q We've got a slide here with the Court's claim construction. Can you talk to the jury a little bit about the terms here and how the Court construed them?

A Sure. The Court considers things and then will -- where there's argument over what these words mean, then the Court will define what these words or terms mean. Sometimes it's a word, sometimes it's a term, sometimes it's a phrase.

So it will order a -- it will -- like it says, memorandum opinion and order. It will order that this is what is meant by an arm portion that I need to do -- understand and need to apply when doing the construction -- I'm sorry, when doing the analysis.

Q And when doing your non-infringement analysis and looking at the claims in this case, did you consider the Court's claim construction?

A Absolutely, yes.

Q Can you tell the jury what we see here on this next slide, slide 12?

A Okay. So what we see is that the wording of the -- let's start off with the one on the left. What we have is the

wording of the '579 patent for the talking about the gripping element. And so we have at least one gripping element including three things we talked about.

And then beneath it, we have the definition of those terms arm portion -- I shouldn't say definition, the construction. The construction of those terms "arm portion" and "body portion" as ordered by the Court for both the '579 patent and the '470 patent, the two patents that we're looking at in the case.

Q Here, we've got the specification of Loggerhead's patents that we just looked at on the left. And on the right, we've got the -- we've seen this a lot now, the gripping element from the Max Axess.

Can you explain to the jury what you're trying to show here?

A Sure. Like I said, I extracted one of the patented -- and the figure's the same for both the '470 and the '579. So I just have one figure there for the Loggerhead patent, and here is the gripping element.

We can clearly see an arm on the Loggerhead gripping element. There's no -- I don't think there's any -- anybody that looks at this that doesn't know what the arm is. And then I'm also showing the Max Axess Locking Wrench gripping element, and these are what I'm comparing when I'm comparing using the Court's claim construction.

I'm seeing does the Max Axess Locking Wrench gripping element have all of the elements or all the limitations as construed by the Court.

Q Professor Fronczak, did you bring along some of the Max Axess Locking Wrench gripping elements?

A Yes, I have a bunch here, one fell. Let me get it.

MR. HAYES: Your Honor, may I approach and give these to the jury?

THE COURT: Sure.

THE WITNESS: Do you want all of them?

MR. HAYES: Yeah.

THE WITNESS: That's the ones I have that are loose.

MR. HAYES: For the record, I'm handing the jury some of the gripping elements from the Max Axess Locking Wrench. Some of them still have the pin, the gripping element or the force transfer element in them, and some of them we've removed the pin.

THE WITNESS: Just so it's clear, those are the ones that I removed from the 8-inch Max Axess wrench.

BY MR. HAYES:

Q As the jury passes those around and gets a chance to look at them, we can continue through the slides here.

A Sure.

MR. SKIERMONT: Your Honor, could we have a brief sidebar while the jury's looking at those?

THE COURT: Sure.

(At sidebar outside the hearing of the jury.)

MR. SKIERMONT: So we objected to some slides because we thought they were going down this road. The Court ordered on summary judgment, further construed a claim and found that the Max Axess Locking Wrench has an arm portion. And so it seems like we're getting ready to have an --

MR. SERNEL: Summary judgment in your favor, is that --

MR. SKIERMONT: The arm portion of the MALW's gripping element has a portion of the element which engages the guide that has a portion that's relevant.

MR. SERNEL: That's construing in the light most favorable to you to deny summary judgment. You're now asking for summary judgment.

MR. SKIERMONT: No, no. This is no different than the lock.

THE COURT: I think that's a matter for cross-examination.

MR. SKIERMONT: Okay.

(In open court in the hearing of the jury.)

BY MR. HAYES:

Q I think we just talked about slide 13. Can we move forward to slide 14 now, Professor Fronczak?

A Sure.

Q Can you explain to the jury what you're trying to show here on slide 14 and what you've got on the top and the bottom of these slides?

A Okay. So what I have is part of my analysis. It's important for me to understand what is meant by -- you know, what the inventor meant by these terms.

I'm looking at the claims themselves. I'm looking at the description, the written description. I'm looking at the figures. I'm also looking at the prosecution history, which is the correspondence between the applicant Loggerhead and the Patent Office in order to understand what they were considering and what the applicant represented as what their understanding was of their invention. So that's what I'm showing here.

Mr. Buchanan, you saw it just earlier. Mr. Buchanan had a patent, and the gripping element from Mr. Buchanan's patent is shown here. And there was some discourse back and forth between the Patent Office and between Loggerhead's representatives.

And what we're looking at is the Loggerhead arm -- I'm sorry, the Loggerhead gripping element, which shows an arm. And Buchanan, which the Buchanan gripping element which Loggerhead submits does not contain an arm portion.

Q Another slide here, and I think we've previously seen this with Mr. Owen. Can you explain what we see here?

A That's correct. This is another response. If you look in

the left, it says response to pending, bunch a numbers, rejection.

And so what we have is that, once again, this is additional correspondence between the applicant and the Patent Office and points out that in Buchanan, the force transfer element -- that's that pin that goes through that force transfer or through the gripping element does not contain an arm portion.

It says the force transfer element, the pin of Buchanan is directly attached to the body portion. Furthermore, it says Buchanan does not teach or suggest an arm portion. It doesn't have an arm.

Q Turn to the next slide. What are you trying to show here on slide 16?

A Okay. So what I'm looking at is we understand a little bit better now from looking at the patent, looking at everything involved. We understand a little bit better what this gripping element has to have, what are the different parts of it.

And we know that the inventor, Mr. Brown at Loggerhead, had told the Patent Office that this device, this gripping element in Buchanan doesn't have an arm. And -- I mean, that's certainly a reasonable position.

We're looking now at the right side. I'm looking at and saying, okay, if I'm looking at the Max Axess gripping element and I'm saying I know this block with the pin coming

through it on the left doesn't have an arm, is there anything that an engineer, one of ordinary skill in the art, would look at the block on the right that has this pin going through it. Is there anything there that would suggest that this is different with respect to having an arm?

So I'm looking at it. I'm not looking at Buchanan to determine infringement. I'm just looking at Buchanan to understand what it is was communicated by Mr. Brown, Loggerhead to the Patent Office about what they understood an arm to be.

And then I'm looking at that to inform me and saying, okay, we've got this gripping element, this block with the force transfer element coming through it. Is that what one of ordinary skill in the art would look and say does this have an arm or doesn't this have an arm?

Q Let's go ahead to the next slide. What are you trying to show here on slide 17?

A Okay. So what we have is we've got those two pictures, those two images that I had in the previous slide, the Buchanan, which is described as having no arm, the Max Axess Locking Wrench gripping element. That, my conclusion is it has no arm.

And then I'm looking at the Loggerhead, and I'm saying, okay, you know, is there a difference here? Is there something that I'm missing? And I'm looking at it and saying no. Loggerhead has a body portion. It has the three parts we

need.

It has a body portion, that's at 34. It has an arm portion, 36. It actually has two arms. And it can have one, it can have two, but this one has two. And then it has a force transfer element, 38, going through it.

I'm looking and I'm comparing the Loggerhead device to the Max Axess gripping element using the Court's claim construction, using my understanding of what Mr. Brown said his patent was with respect to the gripping element, and that's what I'm showing here.

Q Okay. So let's go back to claim 12 -- or sorry, slide 12, which includes the actual claim language and the Court's claim construction.

In light of all the information that you've just considered, can you talk to the jury about how you performed your final non-infringement analysis with respect to the claim language, the Court's claim construction and the actual Max Axess Locking Wrench gripping element that the ladies and gentlemen of the jury have some to look at.

A So I'm using the Court's order, the Court's claim construction order on the bottom to control the analysis. That's the thing that we have to apply, okay, in this analysis.

And I'm looking at the claim language. I'm looking at the construction of the device. I'm looking at all the information that I have. And I'm saying using the Court's

order, how would one of ordinary skill in the art look at this arm portion, look at the body portion and interpret, understand -- what would they understand these claims to mean?

And based on that, I think one of ordinary skill in the art, you know, an engineer is going to look at this, an engineer with a little bit of experience and a little bit experience in mechanisms design is going to look at this and say, okay, yeah, this thing, you know, Loggerhead has a patent, has what we call an arm portion. I understand that.

And they're going to look at the gripping element for the Max Axess wrench. And using the Court's claim construction, they're going to say it's just not there. It doesn't have an arm portion.

Q When we looked at your slides with the red X's on them before, you had a second red X here on the bottom of claim 1 of the '470 patent. I'd now like to take a minute and look at that limitation.

Can you kind of re-orient us all here with what we should be looking at. It might be easiest if you used the tool there to kind of get us oriented in what we need to look at with respect to this final limitation of claim 1 of the '470 patent.

A Okay. If you wouldn't mind, get your tools back out. Appreciate it. Or just look at somebody's.

So what we have -- remember the aligning elements,

we've got these different parts. We've got first -- a first element, second element, and then we have the gripping elements we talked about. There's some other things going on.

But then we have these pins that go through the holes, and hopefully you can see this here. Here, I'll put it on a light background. And so you should be able to see the holes. You can see where I ground off the heads of those aligning elements, okay. And so there's holes left in this part.

Now, this part is the second element. This isn't the first element. This is the second element. There's no -- no argument about that. We all -- I think everybody agrees that this over here is the second element.

And these pins over here, these rivets are pressed -- during manufacturing, they're pressed into this. They're pressed through -- oops, I'm sorry.

THE COURT: That's all right.

THE WITNESS: Excuse me. They pass through these slots over here.

Let me put this like this so you can see a little better. They pass through those slots. The slots you see there is one, two, three, four, five, six arch slots. So those pins pass through.

This is the first element. They pass through it. They've got to be clearance there. They have to pass freely. Because when this tool opens and closes, when you open and

close, when you squeeze the handles, these aligning pins stay fixed to the second element and pass through and don't -- they're not tight.

They're not -- they're not included in that first element -- or second element. I'm sorry, they're not included in the second -- the second element. I'm sorry, they're not included in the first element.

They pass through the first element. And that I believe is actually what Dr. Cagan testified and showed during his -- oh, you got it up already.

Q So we've got the next slides here that are from Dr. Cagan's presentation.

In the context of this first and second element discussion we've just been having, can you use slide 18 here to help the jury better explain what it is you've been saying?

A Sure. And one of the things that, you know, keeps on causing me problems is the first element, second element because these are reversed in the patent and in the Max Axess wrench.

So the first element in the patent is on the outside. That's the outside plates. The first element of the Max Axess, because of the way things are defined here, are the inside ones. That's because of the way the claims were written. We have to interpret it the way the claims are written.

So what we have here is an illustration that Dr. Cagan

artfully prepared, really nice presentation, that shows the first element, which is that second center portion of the Max Axess.

And then highlighted in blue are these aligning elements that I've just been talking about.

Q And so could you talk a little bit about what the claim requires with respect to the aligning elements --

A Sure.

Q -- and the first and second element?

A Okay. So the --

Q Should we move to the next slide, would that be easier?

A Okay. Yeah, yeah, thank you.

Okay. So two things and I'm trying to -- it's a little fuzzy. I'm trying to... oh, okay, yeah. So the highlighted area in blue, we're talking about these aligning elements.

"Along respective set at least one guide wherein the first element further includes at least one aligning element," then a couple other limitations on that alignment, aligning element "such that it is disposed between an adjacent pair of guides.

So the guides, remember, are these slots over here, okay? So we have to have aligning elements between those slots, and then they have to be parallel to the force transfer elements.

The force transfer elements are the pins that don't go -- don't have anything to do with these slots, okay? They don't have anything to do with these slots. The pins are the ones that engage these curved slots, the slots that go in. That's clear, no question. That's where those force transfer elements go.

But it has to be included in the first element, okay? So remember in the Max Axess, this is the first element. The pins go -- the aligning pins -- I got one here -- goes through these, but this thing moves back and forth.

On the other hand, these things are pressed in here. They're headed over. The material is deformed. And in order to get these pins free from the second element -- this is the second element -- I had to grind them off.

I ground off the heads. That's why these don't have the second head on them. And then I had to drive them out with a punch. But to get them through here, they're free and clear. And they have to be for the wrench to function properly.

So consequently, my argument here is that these -- one of ordinary skill in the art would look at these pins and say, well, are they included in the first element? Are they included in the second element? Are they included in both?

Now, looking at this a little bit more, you look at -- if my memory is correct, Dr. Cagan said the force transfer element passed through the first element, therefore, they are

included in the first element. I don't want to quote him -- I'm not saying that's the exact words. I think those were the exact words or very close to it.

But you look at it, the gripping elements also pass through. We can see those gripping elements. That's the great part. Those gripping elements also pass through the first element. But there's no argument that the gripping elements are included in the first element. They're a separate thing, okay?

Furthermore, one of ordinary skill in the art in my opinion would look at the way these pins are attached. And it would be reasonable for them to say, yeah, they're included in this because they are formed such that they are part of this. They don't move with respect to it. They're captured by it. They're positioned by it. They're held by it.

Therefore, they're -- in my opinion, they're included by it, okay, or included in that. They are not included in this. They pass through it, but they pass through for -- oops, I'm sorry, I keep doing that. I apologize.

Q Just about ready to finish up on your non-infringement analysis here, so let's go back to where we started. We were just looking at the '470 claims.

Can you summarize for the jury what your opinion is, Professor Fronczak, with whether or not the Max Axess infringes any of the asserted '470 patent claims in this case?

A My opinion is that it does not infringe on any of the asserted claims of the '470 patent.

Q And then with respect to the '579 patent, can you summarize for the jury what your non-infringement opinion is with respect to whether or not the Max Axess Locking Wrench infringes any of the asserted claims of the '579 patent in this case?

A It does not -- it's my opinion that the Max Axess wrench does not infringe on any of the asserted claims of the '579 patent.

MR. HAYES: So, your Honor, I'm about ready to --

THE WITNESS: I've just given --

MR. HAYES: I'm about ready to transfer to invalidity.

THE COURT: I think this is a good time for a break. It's almost 5:00 o'clock. All right, ladies and gentlemen, 9:30 tomorrow morning.

THE WITNESS: Can we get the gripping elements?

THE COURT: The professor wants his toys back.

(Laughter)

THE WITNESS: Thank you, your Honor.

(Off-the-record discussion.)

(Jury exits courtroom at 4:54 p.m.)

(Pause in proceedings.)

MR. HAYES: Just a quick clarification on whether we can talk to the witness or not.

THE COURT: Oh, I should have -- I should have talked

about that.

MR. HAYES: If we tender him for cross, it's no. But if he's not tendered and it's our witness, we represent him, he can talk. I just want clarification.

THE COURT: Except you don't represent your experts.

MR. PELTZ: And, your Honor, even furthermore, we just asked them to confirm they wouldn't talk to their witness just like your Honor instructed us not to talk to our witness when he was on direct. And they said, No, we want the rule to be different. And I said, Are you kidding? We're going to call back the Judge? Do you think she's going to agree to that?

MR. HAYES: I just want clarification.

THE COURT: I don't change the rules midstream.

MR. PELTZ: Thank you.

(Adjourned at 5:00 p.m.)

C E R T I F I C A T E

We, CHARLES ZANDI and LISA H. BREITER, certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ CHARLES R. ZANDI *May 10, 2017*
CHARLES R. ZANDI, CSR, RPR, FCRR
Official Court Reporter

/s/ LISA H. BREITER *May 10, 2017*
LISA H. BREITER, CSR, RMR, CRR
Official Court Reporter

(Jury in at 10:00 a.m.)

THE COURT: You may be seated.

Ladies and gentlemen, you will recall when we broke yesterday, Mr. Fronczak was on the stand. We heard part of his direct examination. We have more of his direct examination to hear today.

I know that one of you has a hard stop from 12:30 to 1:30. Just so you know, we are going to break at about 12:15 and probably resume at about 1:40 or so, so you will have that window that you need to get some things done. I have got some stuff I have got to do, too. I have got a meeting in my chambers at that time.

So we are ready to proceed with Mr. Fronczak.

FRANK FRONCZAK, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION - Resumed

BY MR. HAYES:

Q. Professor Fronczak, welcome back.

Good morning.

A. Good morning.

Q. Yesterday we finished up your testimony with your noninfringement opinions. So let's just take a minute to summarize your noninfringement opinions in this case.

If you could, grab the gripping element, the rectangular block gripping element.

Can you explain to the jury your opinion with

whether or not that rectangular block gripping element includes an arm portion.

A. I have one of the gripping elements that you have seen yesterday. It's hard to see. It's this block. This one has the force transfer element in it. No dispute about what the force transfer element is. I have this one without the force transfer element.

In order for this, the Max Axess gripping element, to infringe upon either the '470 or the '579 patent, this part here now has to have two portions -- an arm portion configured a certain way and a body portion. It only has a body portion. It does not have, in my opinion, and the opinion is that one of ordinary skill in the art would not consider this to have an arm portion. It's a block.

Q. The one other noninfringement opinion you had was with respect to the first element and the aligning element.

If you could, pick up just the first element and the aligning element for me.

A. Okay. So the first element on the Max Axess tool -- remember this, first and second. This is the -- I said it wrong.

This is the first element (indicating). This is the one which is interior. That's the interior one. And then we have aligning elements.

Q. If you can, take just a minute and just show the jury

what the aligning element is.

A. That's what I'm -- the aligning elements. These are the pins that go through from the second element through -- pass through the first element. They pass through these slots (indicating) in the first element. They are free to pass through those slots in the first element.

And then they are once again fixed to these holes over here (indicating) in the second element.

So they are attached, or included in -- my argument is that they are included in the second element. They pass through, but they are not included in the first element.

The claim says they are to be included in the first element. They pass through, but my opinion that one of ordinary skill in the art would understand that just passing through doesn't mean it's included. That's perhaps a somewhat technical argument, but that's what I think one of ordinary skill in the art, an engineer, would look at. Just because it passes through doesn't mean it's included.

Q. Thank you.

So now let's move on to invalidity.

A. Sure.

Q. Professor Fronczak, in performing your invalidity analysis in this case, did you study both the '579 and the '470 patents?

A. Yes, I did.

Q. Did you consider and analyze the '579 and the '470 asserted claims in this case?
A. Yes, I did.
Q. Did you consider the specification, the descriptions, the figures of the patents in coming to your invalidity opinions in this case?
A. Yes, I did.
Q. Did you consider the prosecution history for both the '579 and the '470 patents --
A. Yes, I did.
Q. -- coming to your invalidity opinions in this case?
A. Yes, sir.
Q. And then, importantly, did you consider the Court's claim construction in forming your invalidity opinions in this case?
A. Yes, I did.
Q. And did you consider a person of having ordinary skill in the art in forming your invalidity opinions in this case?
A. Yes, I did.
Q. If you could, just remind the jury again kind of just this concept of one of ordinary skill in the art, who that person would be.
A. So one of ordinary skill in the art. We have to look at this as one who would be a person would typically be doing this type of work, designing this, coming up with the

invention.

We said that this one who would be someone with an engineering -- mechanical engineering degree or equivalent and a year or so of experience in designing devices of comparable complexity.

That's how we look at it when we talk -- when I talk about one of ordinary skill in the art, I have in mind someone who would have a mechanical engineering degree or equivalent and experience in designing this type of device, somehow having acquired this level of experience, this level of understanding, and how that person, at the time of the invention, would have considered these terms, what it would have considered these terms to mean, in light of the Court's claim construction.

Q. So let's start with where you started in your invalidity analysis.

Did you consider the -- kind of the scope and content of the prior art in starting and performing your invalidity analysis?

A. Yes, I did.

Q. Why did you consider kind of the scope and content or the state of the art in performing your invalidity analysis?

A. This goes to the idea of one of ordinary skill in the art. They are going to have knowledge of things that are out there that are, you know, in the same area.

So if it's a wrench or tools that have these mechanisms, so one would look at it and say, well, if you are an engineer, you are doing this type of work, you are going to have familiarity with certain things. You are not going into it blind, without understanding what's out there in the world that's in this -- in the same area, the art of the patent.

Q. Thank you.

MR. HAYES: Your Honor, could we have the screens, please?

THE COURT: Sure.

BY MR. HAYES:

Q. So let's look at some of the art -- or the state of the art that you considered in forming your invalidity opinions in this case. We will start here with some figures.

Can you explain to the jury, what's disclosed here?

A. What we have is the state of the art. This is a copy or a cover sheet, and then illustrations, figures, from a 1946 patent for a gripping tool. It's a plier-type gripping tool. In this case it's particularly a crimping tool, which is part of the prior art or the art of gripping tools.

Q. Professor Fronczak, so you have got up in the left-hand corner "'549 patent Djidics."

Is that what we are talking about here?

A. That's what we are talking about, patent to Mr. Djidics.

Q. And does the Djidics prior invention disclose an adjustable gripping tool?
A. Yes, it does.
Q. Can you explain why that is?
A. Well, a gripping tool, in this case, as designed -- or as pointed out in the specification of the '470 and the '579 patent, the two patents in the case that we are looking at over here, it talks about not just a wrench. It talks about the patent is for a gripping tool. And a gripping tool -- it further goes on to discuss that this gripping tool can be crimpers, cutters, and so on.

So this over here is within the state of the -- or within the field of the invention; that is, it's for a gripping tool, in this particular case, a crimping tool. And it's adjustable because it can handle different sizes.

Q. What does the Djidics reference here tell us about whether or not Mr. Brown was the first to come up with the idea of an adjustable gripping tool?
A. This, among others that you will see -- certainly 1946 far precedes Mr. Brown's patents.

MR. HAYES: Your Honor, we will offer DTX 76, the Djidics prior invention.

THE COURT: Any objection?

MR. SKIERMONT: No, your Honor.

THE COURT: That will be admitted.

(Defendants' Exhibit 76 was received in evidence.)
BY MR. HAYES:
Q. Professor Fronczak, we have moved ahead here.
What are you showing on Slide 21?
A. Slide 21 is a -- I'm sorry. 21 is also 1921.
So Slide 21 is a 1921 patent, the '549 patent, given to Mr. Wisenburg. This also is for an adjustable gripping tool.
Q. Does the Wisenburg adjustable gripping tool disclose circumferentially engaging gripping elements?
A. Yes. You can clearly see in that Figure 1, which I have reproduced here from the original patent, that those -- you see those arms that extend up from the plates from the tool. Those are arms that move radially inward as you squeeze the two handles.
So you squeeze the two handles, and -- I can't see it, but there are grooves that drive those gripping elements radially inward. This was for a wrench. This was for a wrench, for a jar opener.
MR. HAYES: Your Honor, we will offer DTX 80, the Wisenburg reference.
THE COURT: Any objection?
MR. SKIERMONT: No, your Honor.
THE COURT: That will be admitted.
(Defendants' Exhibit 80 was received in evidence.)

BY MR. HAYES:

Q. Professor Fronczak, we have moved ahead here.

I have got on the right -- we have got on the right a demonstrative from LoggerHead's presentation that talked about this kind of camera lens idea incorporated into an adjustable gripping tool.

Can you explain to the jury kind of what you are showing here on Slide 22.

A. Sure. On the right-hand side, Mr. Brown, in his testimony, referred to it. I believe he referred to it as a shutter. I think the shutter usually is different in these cameras. This is really the aperture setting, but it's a different function, but it's what you see in the camera. So it's sometimes referred to as a shutter-like -- and some shutters do work this way.

But generally we are talking about having leaves that come in and out. And this was part of what Mr. Brown had described as part of the nature of the operation of his invention.

What we see in 1898, a Mr. Harris has the '837 patent that has -- not perfectly clear here, but if you look at the patent, you can see it has these elements, those -- I think DE, D3, D4. It's a little hard to read those numbers. But those six elements that would move in and out pretty much like what was referred to as the shutter-like

motion or openings created in Mr. Brown's device.

And then also, in 1993, which is a more recent patent, but it has -- it still precedes Mr. Brown's patent, so it's prior art, state of the art. This has the six elements that come in, and they close off, create a smaller opening for grabbing a smaller hex, either a nut or the head of a bolt.

MR. HAYES: Your Honor, we offer DTX 77 and DTX 88.

THE COURT: And is there an objection?

MR. SKIERMONT: No objection.

THE COURT: That will be admitted.

(Defendants' Exhibits 77 and 88 were received in evidence.)

BY MR. HAYES:

Q. So, Professor Fronczak, now I want to talk and get into your actual comparison of the prior art to the claims in this case.

Can you explain to the jury what you have to show with respect to the prior art meeting each and every limitation in the claims to find them invalid in this case.

A. Sure. If you remember back, the original movie or video that was shown talks about boundaries, so the idea of fences as boundaries.

So what we have to look at is where these boundaries are. The boundaries are established by the

limitations on the claims.

So what we have to do to say that, is there something new in a patent? If the patent really does present something new, we have to look at the prior art and compare each and every element in the patented -- in the new patent to the prior art.

In order for you to have a patent that's valid, you have to have -- there has to be something new there. So we have to look, each and everyone. If there is something new in the patent, that defines, basically, where your property is. If there is nothing new there, then it's prior art and the patent should not be valid.

Q. So let's go through that analysis now, Professor Fronczak.

Slide 23. Can you explain what you are showing on -- what's shown on the right half of Slide 23?

A. On the right half, which is labeled in red there, "Buchanan prior invention."

Q. What's on the left half of Slide 23?

A. On the left half is Mr. Brown's '579 patent.

Q. What's the date of the Buchanan prior invention?

A. The Buchanan prior invention was April 9th, 1957.

Q. And what's the date of Mr. Brown's '579 patent?

A. The filing date, which is the relevant date here to look at -- it's the earlier date. That is January 23rd, 2004.

Q. What does that tell you about whether or not the Buchanan prior invention came before the '579 patent?
A. Simple math, the Buchanan invention came about 50 years earlier.
Q. Let's turn to the next slide.
So you have highlighted the first part of Claim 1 on the left, and then you have got some of the Buchanan prior inventions showing on the right.
Can you explain what you have set up here in Slide 24 to the jury, please.
A. So if you remember what I just said a minute or two ago, that we have to look at each and every element, each and every limitation of the claim and see if it existed in the prior art.
So we are looking at the '579 patent. It's tedious. You have to go through this step by step. You can't just gloss over it, because everything that's in the '579 patent, if we are asserting that it's invalid -- if we come to a conclusion it's invalid, everything that's in the '579 patent in this claim is in a piece of prior art for anticipation or it's obvious.
Q. So let's just walk through this and break it down a little bit with what you have got highlighted there.
It starts out "An adjustable gripping tool."
Does the Buchanan prior invention disclose an

adjustable gripping tool?

A. Yes, it does. We talked about gripping tools. These are wrenches, crimpers. Those are included as gripping tools in Mr. Brown's patent and the description of Mr. Brown's patent.

So what we have is, it's an invention. The wording is, "a multifunctional tool more especially adapted for use in insulated wire art. Improved crimper capable of providing effective pressure over a considerable area."

Furthermore, you look at the tool, you understand how the tool works, and you can see the handles move back and forth. It's adjustable. It moves the gripping elements in. We are going to go into that in more detail later.

Q. In the context of adjustable gripping tool, there has been some discussion about this automatically sized tool.

Can you explain to the jury kind of what that means.

A. Sure. Automatically sized means that as you -- the handles are -- typically the handles are open. And in this case and all of the cases of these tools that we have looked at -- Mr. Djidics' tool, Mr. Wisenburg's tool, this tool here that we are talking about right now -- the handles are open. The gripping elements are relatively far apart. You have a large opening.

As you squeeze the handles, those gripping elements

move radially inward, adjust until they come in contact with the workpiece to do the work on the workpiece.

Q. Is it your opinion, Professor Fronczak, that the Buchanan prior invention discloses this first part of Claim 1 of the '579 patent?

A. Absolutely. No question about it.

Q. Is that what you are showing here on this next slide, Slide 25?

A. Right. This next slide over here, you are going to see this again and again. We set it up -- or set it up so that we have the claim language on the left. And then on the right, does it meet that claim language?

So we are going to have to go through each of these one by one to make sure that each and every one of them is there.

Q. Let's keep rolling, then. We will move to the next limitation.

"A first element and a second element connected for relative angular movement, which generates movement of at least one gripping element."

Can you explain to the jury on the right what you are showing as the first element and the second element in Buchanan.

A. Sure. First of all, we have to -- well, let's talk first element first.

So the first element of Mr. Buchanan's tool is the interior element. Okay. Remember, on Mr. Brown's invention, the first element is the outer portion, but that's immaterial. Okay.

Q. What color is the first element?

A. So the first element here is shown as the yellow element. So we have -- the yellow element is the first element. It meets what needs to be there for it to be the first element.

Q. What color are you showing the second element in here, on the right side?

A. The second element is shown in green.

Q. And then this limitation also talks about a gripping element.

What color are the gripping elements here in Figure 4?

A. The gripping elements in Mr. Buchanan's patent, these are shown in blue, light blue.

Q. One quick comment.

You have on the bottom right, I think, the Court's claim construction for a second element. Can you address that?

A. Sure. This has to be looked at in the context of the Court's claim construction. So the Court had a construction. It was a disputed term, what is the second element?

So the Court has the second element as "a second grasping portion containing an opening concentric with an opening with one end of a first element, an actuation portion, and at least one slot defined within one end of the second grasping portion."

And as we saw earlier, it doesn't have to be one piece. The element clearly can be more than one piece. In all of these devices and in the patent it shows each of these elements as being more than one piece.

So what we have to do is say, what parts of this device meets this claim construction? And that's what these parts are shown in green.

Q. Professor Fronczak, it is your opinion that the Buchanan prior invention discloses a second limitation here of Claim 1 of the '579 patent?

A. Yes, it does. It has the first and second element. You move the handles together. It generates motion of the "at least one gripping element."

Q. Okay. Let's move on to the next limitation, then.

It starts, "The first element, including a gripping portion configured to engage the workpiece, including a first opening, at least one guide extending from the first opening, and the at least one gripping element."

A couple of new limitations we see here, the first opening and the guide.

Can you explain to the jury where the Buchanan prior invention discloses the first opening and the guide extending from the first opening.

A. So if you look in the -- you are looking at the picture there, you see that upsidedown Y picture that I have colored in, somewhat reddish color. Right in the center of that, where No. 20 is, that's the second opening. That's the opening that the workpiece passes through. So that's the -- I'm sorry -- the first opening. That's the first opening. Okay.

And then we have guides. That's the other parts, the legs of that Y that extend outward from that central opening.

Q. Is it your opinion, then, that the Buchanan prior invention discloses this third limitation, Claim 1 of the '579 patent?

A. Yes, it does.

Q. So let's move on to the next limitation.

"Each at least one gripping element, including a body portion adapted for engaging the workpiece, an arm portion configured to engage one of said at least one guide, and a force transfer element contiguous with the arm portion."

Can you explain to the jury your opinion on whether or not the Buchanan prior invention discloses this

limitation, Professor Fronczak.

A. This one gets a little bit -- you have to think about this a little bit more carefully.

My opinion is that one of ordinary skill in the art would not consider Mr. Buchanan's gripping elements to have arm portions. That's what I said before when I was talking about the gripping element for the Max Axess wrench.

So what we have to do, though, is, we have to consider that the same understanding, the same approach, the same understanding of saying -- apply the same criteria, the same understanding of what this term means for both infringement and for validity. You got to have this fair, you know, consistent comparison.

So my argument is that this doesn't have arms. Okay? I don't see arm portions here. All right? That's consistent with what LoggerHead's statement was to the patent office when they were pursuing the patent.

So to make it clear, I don't think this has arms.

However, if this is considered to have arms, okay -- and that's -- an argument that's been made is, if this is considered to have arms to show that the Max Axess gripping element has arms, which I don't think it does -- but if we say this has arms -- if someone argues, no, this thing has arms over here, then it meets this claim limitation.

But that's for you to decide if this has arms or

not. I don't think it does. Okay? But if it doesn't, then the Max Axess wrench, also, gripping element doesn't have arms.

So it's -- you know, but we have to keep the same -- you have to keep the same understanding of what arms are when we are looking at the Max Axess gripping element with respect to infringement and this with respect to invalidity.

MR. SKIERMONT: Your Honor, can we have a sidebar?

THE COURT: Sure.

(The following proceedings were had at sidebar:)

MR. SKIERMONT: The expert just testified that, applying his understanding of the Court's claim construction, it doesn't have an arm portion. So that's it. He shouldn't be able to argue that this anticipates Buchanan -- or anticipates any claim. He just admitted it doesn't.

And now he is trying to compare the prior art to something else. This is like the practicing prior art defense that we talked about in the motion *in limine* motion practice. You can't have this conditional thing.

He applies the Court's claim construction and has to make an opinion about whether it has it or not, and he just said it doesn't.

MR. HAYES: So what he said was he doesn't --

THE COURT REPORTER: I can't hear you.

MR. HAYES: He never said "practicing the prior art." What he says was, you have to apply the claims as construed, the same for both infringement and validity. If you apply it this way for infringement, it's invalid.

MR. SERNEL: This is in every case. You have a conditional --

MR. SKIERMONT: It's not a conditional claim construction. He construed the claim and said the Max Axess doesn't have it, and therefore Buchanan doesn't have it. He can't say one but not the other.

THE COURT: Why are we having a sidebar about this instead of just cross-examining him about it?

MR. SKIERMONT: Thank you, your Honor.

(End of sidebar proceedings.)

BY MR. HAYES:

Q. Professor Fronczak, we have moved on to the next limitation.

A. Okay.

Q. This one is quite long, so we have broken it up into a few parts.

The first part here of this next limitation reads, "The second element, including an actuation portion having a second opening concentric with the first opening and at least one slot disposed adjacent the second opening external thereto."

We have a lot going on here. What I think might be best is to start by explaining to the jury the parts, maybe the actuation portion, the second opening, this concentric idea, and the slot.

A. Okay. So actuation portion. That's the part of the -- or a portion of the second element. So remember, we talked about first element, second element. That's the kind of big pieces of the tool, the two bigger pieces of the tool.

So those bigger pieces of the tool have gripping elements -- grasping portions where you grab them, and then they have portions where the work is being done. Where the work is being done, by that I mean, this is where the action is, where the motion is. So we squeeze the handles and then up in the tool head. And that tool head could be referred to as a tool head or the actuation portion. This is where the work is being done.

Furthermore, the Court construed the term "actuation portion." Sometimes they construe words, sometimes terms, sometimes phrases. In this case, it's a term, "actuation portion." It's the portion of the second element that facilities movement of the gripping element.

So we have the thing that causes us -- you have heard the word "cam" used before. The slots -- sometimes they have been referred to as slots, but you have also heard cams. Those terms for some of the slots are synonymous. Not

all slots are cams in this device or in any of these devices we are talking about. But in this case, the slots are slot cams.

So that's what causes the motion, by acting on those force transfer elements that are part of the gripping elements.

Did I answer your question?

Q. You did, Professor Fronczak.

So is it your opinion that the Buchanan prior invention discloses this what I will call first part of the fifth limitation of Claim 1 of the '579 patent?

A. Yes, the yellow highlighted part.

Q. So let's move on to the next part, then, which says, "Each said at least one slot having a first section configured to engage the force transfer element of one said at least one grinning" -- and I think that was a typo in the patent . I think that meant gripping element.

Can you explain to the jury where Buchanan's prior invention discloses this part of Claim 1 of the '579 patent.

A. Sure. Everybody agrees that "grinning" element here is the gripping element, so there is no confusion about that. Okay?

So we have a slot, and we are looking at the green, the second element over here. So the actuation portion is included. You see one is a circular plate on the far left of

that figure, and then there is another circular plate with a little tongue sticking out of that circular plate to the right. These are parts of the actuation portion.

So we have got the slots. We see the slots. It's a little hard to read. I've got a fuzzy screen. It looks like No. 31. The slot is No. 31.

Q. That's right.

A. Are the slots that are referred to. And they engage the force transfer elements of the gripping elements. As you rotate that with respect to -- the gripping elements are held by the guides. So as you rotate that, those gripping elements are driven radially inward.

Q. Professor Fronczak, what is your opinion on whether or not the Buchanan prior invention discloses this subpart of the second element limitation here for Claim 1 of the '579 patent?

A. My opinion is that it does.

Q. Okay. Let's take a look at the last part of Claim 1 of the '579 patent, which reads, "Such that movement of the second element with respect to the first element actuates each at least one first section to contact and move each respective force transfer element, thereby actuating each said at least one gripping element along respective said at least one guide."

Professor Fronczak, can you explain to the jury

whether or not the Buchanan prior invention discloses that final part of Claim 1 of the '579 patent.

A. Sure. We have always heard of legalese. This was written by a lawyer. So I will try to explain it as an engineer and hopefully that will -- hopefully it will fit.

So what we are really talking about here is, we have got the motion of these two handles together. Okay? As you squeeze them together, these gripping elements move radially inward.

So we have two pictures from Mr. Buchanan's patent, Figure 3 and Figure 1.

Figure 3 is -- let's look just at the two elements. The handles are open. So it's open. Look at the location of the blue. Those are the gripping elements. Those are highlighted in blue. Those are shown in Figure 3. They were just colored in for this to show this point.

So you look at two things. Look at the o'clock position. If you look at that top one, and it's maybe at about 1 o'clock position, and then you look at the radial position, and it's farthest out from the center of the hole.

Now we look in the right-hand figure, Figure 1. We see that that upper gripping element has rotated around from the 1 o'clock position up to the 12 o'clock position. So it has moved along a rotation.

And furthermore, you look at it. You see that it

has moved from its outmost position to its innermost position.

So it has moved both along the curve and linearly inward. So it has been actuated. It has moved the gripping element, and it's been moving along the guide.

So I hope that helps.

Q. So, Professor Fronczak, what is your opinion with respect to whether or not the Buchanan prior invention discloses this last part of Claim 1 of the '579 patent?

A. Yes, it does.

Q. So then, ultimately, can you explain to the jury your opinion with respect to whether or not the Buchanan prior invention discloses each and every element of Claim 1 of the '579 patent.

A. Sure. You see, all those boxes are checked except the one. Okay? Because the one -- I'm convinced that this doesn't have an arm portion.

If it does have an arm portion, though, then that box would be checked. But I don't think it does. Okay?

But if it has an arm portion, then -- I just don't see that it has an arm portion. But if you decide that it does have an arm portion, then that box would be checked.

Q. So, Professor Fronczak, you keep saying, "if it has an arm portion."

Are you referring to the infringement analysis?

In other words, if it's found that a rectangular block has an arm portion for infringement, that same understanding and approach must be applied for invalidity as well?

A. Right. We have to look at it -- have to have the same understanding of these terms with respect to infringement and validity. And we can't say, oh, okay. On infringement we are going consider this understanding of what this means, and on validity we are going consider it something else. That's why I didn't check this in, because I don't want to do that.

Q. Let's move ahead to Claim 9, the second asserted claim of the '579 patent.

We have got a claim here, a dependent claim. Therefore, it refers back to Claim 1.

"The gripping tool, as recited in Claim 1, wherein the gripping portion and actuation portion circumferentially engage the workpiece."

Can you explain to the jury what "circumferentially engage the workpiece" means?

A. Sure. Circumference. Remember, a circle has a circumference. That's the perimeter of it. Anything that's remotely circular has a circumference. When we consider a circumference, it's the perimeter. Perhaps a better word is "perimeter." But "circumferentially" means it's around the circumference, around the perimeter.

And so what we see over here in Figure 3 and Figure 5 -- we see Figure 3, the workpiece goes in that hole in the center. And we see, in this case, it's a crimping tool. When the handles are squeezed, those crimpers come in and it engages along the circumference of that connector that you are attaching to the wire.

Q. Professor Fronczak, does the Buchanan prior invention disclose this idea that the actuation portion circumferentially engages the workpiece?

A. Yes, it does.

Q. Is it your opinion, then, that the Buchanan prior invention discloses the limitations seen here in Claim 9 of the '579 patent?

A. Yes, it does.

Q. So there is one more claim, Claim 16 of the '579 patent.

What we are showing here -- what are we showing here on Slide 40?

A. This is from Dr. Cagan's presentation, where he pointed out the differences between Claim 1, which we have looked at in detail, and Claim 16. So there is a couple differences.

There was a portion -- or a phrase removed in a portion of the last limitation of that claim, and then there was a portion that was added over here.

Q. So can we just focus on the two differences, then, between Claim 16 and Claim 1 in performing your invalidity

analysis with respect to Claim 16?
A. Yes. When I originally did it, I looked at each and every one, but this points out the differences to save time to move forward.
Q. You mentioned there is one limitation that's been removed, one limitation that's been added?
A. Right.
Q. In the context of invalidity, then, do we need to spend any time on the limitation that's been removed?
A. No, because that's just less that you have to meet. We have already met the bigger set. So if you take something out, we certainly meet the smaller set.
Q. The limitation that was removed, is that the "no external thereto," or what's shown by the orange arrow?
A. That is correct.
Q. So then do we need to focus on what's been shown there by the purple arrow, or the curvilinear limitation?
A. That is correct.
Q. We can quickly move through these slides.
This is the same analysis that we just saw. As you testified, you performed your same invalidity analysis with respect to all the limitations of Claim 16; is that right?
A. That's correct. Everything was done. It's just, to save time, we focus now, for the discussion purposes, on the ones that are different -- or the one that's different.

Q. Thank goodness we can move through these slides and get to the very last slide here.

The very last limitation of Claim 16 of the '579 patent, which we just saw, reads, "Wherein movement of the at least one gripping element in" -- I think, again, that's a typo in the patent. I think it should say "is curvilinear."

Professor Fronczak, can you explain, first of all, this idea of what curvilinear is.

A. Okay. So I addressed that earlier when I was talking about just the general motion of the handles, how they cause the gripping elements to move in.

So curvilinear is a term that is -- as Dr. Cagan pointed out, he showed how the motion of the gripping element -- you saw that little -- it was -- I think it was a series of photographs or illustrations that were mapped, one on top of the other, showing a motion was along a curved line. Okay? And that's what curvilinear is.

So it's not just rotation. It's along a line, but that line was not a straight line. So it's curvilinear. And that's what we see over here.

Q. So with respect to what we see over here, can you focus on the gripping element in the Buchanan prior invention, which I think is Claim 19, which you have identified in blue, and the slot, Claim 31, and kind of explain, maybe with your

arm, that rotation or that movement and why your opinion is that you see a curvilinear motion in the Buchanan prior invention.

A. Sure. I will try to do it. I can't do it upside down. I was going to say, there is a gripping element.

So we will assume that, you know, we are talking about something rotating just like this (indicating). Okay? That would not be considered curvilinear motion. My hand's motion would be just along an arc.

But if my arm is rotating around and this thing is moving inward -- so it's rotating and moving inward (indicating) -- that's curvilinear motion.

THE COURT: The record will show the witness gestured with his hands in an arc from a stationary position in the first part of his testimony, and in the second part of his testimony, he did the same thing but moved his elbow lower.

MR. HAYES: Thank you, your Honor.

BY MR. HAYES:

Q. So then, Professor Fronczak, if you could, quickly summarize your opinion with respect to Claim 16 of the '579 patent and whether the Buchanan prior invention discloses each and every one of the limitations.

A. Sure. It's clear that each and every element, each and every limitation of Claim 16 is shown in the Buchanan prior

art patent with the caveat that the arm portion, if we consider it the same criteria for looking at -- if this block over here that's in the Max Axess wrench is considered to have an arm portion, then this guy has an arm portion, too. And then it would have each and every element.

Q. Can we move ahead to the '470 patent, then?

A. Sure.

Q. Again, we have got the Buchanan prior invention on the right and the '470 patent on the left.

Can you just remind us, what's the date of the Buchanan prior invention?

A. The Buchanan prior invention, we are talking about 50 years ago, 1957. April 9th, 1957.

Q. And then the date of the '470 patent?

A. The '470 patent, the relevant date here is April 11th, 2005.

Q. What is your opinion with respect to whether or not the Buchanan prior invention is before or predates the '470 patent?

A. The Buchanan invention predates the Brown '470 patent.

Q. So again, there are a number of -- a lot of similarities, luckily, between the '470 claims and the '579 claims.

What are we showing here on Slide 58, Professor Fronczak?

A. We are showing things that were deleted and things that were added over here. This is, once again, from Dr. Cagan's presentation.
Q. And this blue arrow here has some language defined in the gripping portion.
Is that the part that's been removed from the '470 patent or no longer there?
A. That's my understanding. Yes, that's my recollection.
Q. Then, is there no reason to spend any time on that limitation that's been removed?
A. Right.
Q. If we go ahead to the next slide, we have got another blue arrow here that says, "Additional requirement."
Is this the additional material that's been added to the '470 patent as compared to the '579 patent?
A. That's correct.
Q. So can we just focus, then, on this final limitation, or Limitation D of the '470 patent Claim 1 in performing your invalidity analysis in this case?
A. Sure. Now, keep in mind, I did everything -- you know, went through it step by step, but this is the same result, because we looked at the same things.
Q. We can quickly just go through those slides here and show that you did, in fact, do the analysis of comparing the Buchanan prior invention to each and every limitation of the

'470 patent.

But thankfully, we can skip ahead and focus on the final one. Slide 68. I went too far.

A. I think there is one slide got out of order.

Q. So are we okay here, Professor Fronczak?

A. Yes. I think we are okay here.

Q. Starting with the element which is labeled D of Claim 1 of the '470 patent.

This element starts out, "The second element, including an actuation portion, having at least one slot therein."

If you could talk about that -- we have seen this actuation portion before within the case of the '470 patent.

Could you focus on the Court's claim construction there on the right.

A. Right. Even though the same term is used in the '579 and the '470 patent, the Court construed those terms slightly differently because of other information that it considered -- all the information that it considered.

So the Court construed the actuation portion in the '470 patent. I don't remember if they gave a construction in the '579 off the top of my head, but if they did, it was a different construction, or they did not construe that term.

So here, the actuation portion, the Court said that when we are looking -- when you are doing this analysis, you

have to look at it through, like I said, through the eyes of one of ordinary skill in the art, but you also have to use this understanding of what an actuation portion is.

"The portion of the second element integral to and formed within the tool head of the second element that facilitates movement of the gripping element."

That's almost the same as what we saw before, just some differences that we are going to talk about.

Q. So is it your opinion, Professor Fronczak, that the Buchanan prior invention discloses this first part of Element D of Claim 1 of the '470 patent?

A. Yes, it does.

Q. Let's move on to the second part, then.

It talks about, "Each said at least one slot having a first section configured to engage the force transfer element of one said at least one gripping element."

A. Right. So we are looking at the actuation portion, and that's where we have these disks. That's the part -- portion of the second element that we are seeing here shown.

So we have to have a slot. That's the slot -- remember, different slots. Okay. These are the slots that engage the force transfer element. So this has those three slots that engage the force transfer element.

So "configured to engage the force transfer element" and -- of one of said gripping element. The

gripping element, the force transfer element pins go into those cam slots, just to make sure we are talking about the same thing.

Q. And can we take a look at the Court's claim construction, down in the bottom right part of the slide here on Slide 70?

A. Right. I am sorry.

Q. Can you explain the Court's claim construction here on kind of the bottom right part of Slide 70.

A. Okay. So what we have is the second element. I am understanding the second element over here. It's the second part.

We have a grasping portion. That's the part where we grab the handles. The handles cut off over here on the second element, but from the other figures and seeing that broken section, we know it has a grasping portion.

It has a tool head at one end of it. The tool head is the portion where this work is being done.

"Where formed within and integral to the tool head is an opening concentric." So we have those circle -- circular holes in those green parts are formed within. They are integral to the tool head, and it's concentric with an opening within one end of the first element.

Remember that No. 20 in that center of that Y, that upsidedown Y, that's that opening within one end of the first

element; and an actuation portion, that's the slot, basically the thing -- the slots; and at least one slot. Okay.

Q. And do the claims require that the slot be -- can they be in the cam plate, or do think need to be in what I think of as the tool head?

A. They can be anyplace.

Q. Okay. To the extent they are required to be in the tool head and they are in the cam plate in this case, did you consider an obviousness argument in the context of this limitation?

A. Yes, I did. I looked at this and said, what we can do here is -- it could be reasonably argued that these cam plates over here are not -- I don't think it's correct, but there could be an argument made that, wait a second. They are separat pieces, so they shouldn't be considered part of the second element. Okay.

So they would look and say, well, wait a second. What's one of ordinary skill in the art? This engineer with some experience designing devices of similar complexity with some mechanical engineering experience.

One of the things that Mr. Brown mentioned, he talked about doing a design for assembly. I don't know if he referred to it as DFA, or design for assembly. Design for assembly, design for manufacturing, these are things that of one of ordinary skill in the art will do.

So you look at it and you say, well, I have got two parts over here. Do these two parts have to -- is there some reason why they have to be made out of two parts, or could they be made out of one part?

And you look at -- the criteria for this is, well, do they have to be of dissimilar material? And here, the case is no.

Do they have to have relative motion between them? And here, the answer is no. Okay.

So once again we look at it and say, what would one of ordinary skill in the art see as an obvious design change in looking at this and taking this 1950s tool and saying, at the time of the patent, how would we look at this, and what changes would it be obvious to make? And one of the changes would be to incorporate these slots, this actuation portion, into the tool head.

Alternatively, another option would be to -- if, for some reason, you would say, no, I want these out of different material, then to weld them. Maybe perhaps a different -- for whatever reason, say, I do want them in two pieces, but then weld them together to make assembly easier.

So my opinion is that this is part of the second element, that these two cam plates -- or these two circular plates are part of the second element.

But it would also be obvious to someone, say -- if

you say, I don't buy that argument, to say, we could readily -- it would be obvious to incorporate those features into the other portion of that second element.

Q. So then, just to summarize, in performing your obviousness analysis in this case, it sounds like you considered the level of ordinary skill in the art; is that correct?

A. Yes, I did.

Q. You considered the scope and content of all the prior art?

A. Yes, I did.

Q. You considered if there was any difference here between the slot being in the cam plate or the actual tool head; is that right?

A. No.

Q. You talked about whether or not this change could be made -- could you address kind of this idea of, to one of ordinary skill in the art, whether or not this might be just a simple matter of design choice.

A. Design choice. The word "design choice" was used. Straightforward. Engineers can say, well, I'm going to do it this way or I'm going to do this, do it this way. They reach into their -- I won't call it their bag of tricks. But they are experienced. They look at it and say, I can see it could be done this way, this way, this way. I could use rivets to

hold something together, bolts to hold something together. I can weld them together. It's an option. It's a simple design choice -- or a straightforward design choice.

Q. So then, what is your opinion with respect to whether or not the Buchanan prior invention at least renders this limitation obvious in Claim 1 of the '470 patent?

A. It renders it at least obvious. I think it's anticipated but also renders it at least obvious.

Q. Let's move ahead to the second-to-last limitation here.

"Such that movement of the second element with respect to the first element actuates each at least one first section to contact and move each respective force transfer element, thereby actuating each said at least one gripping element along respective said at least one guide."

I will let you explain that, Professor Fronczak.

A. Sure. A lot of words in here.

The first section, it gets a little bit awkward. But here we have got a slot with a section, just arguably one section. You could say more than one section.

So what we are really talking about is movement of the second element with respect to the first element. That's the squeezing of the handles over here. Moving those handles together will actuate at least one first section to contact the first section -- now we are talking the section of the cam arc; we are talking about this cam arc over here -- to

move each respective force transfer element -- those are the pins that come out of the gripping element -- causing the gripping element to move in the guide.

So squeeze the handles. It causes these guides -- or the slots, the cam slots, to rotate, which causes the gripping elements to move inward.

That's what it means.

Q. So let's move ahead to the last limitation, then. I am sorry. Second-to-last. It's a short one here.

"Wherein the first element further includes at least one aligning element."

Professor Fronczak, can you explain to the jury whether or not the Buchanan prior invention discloses this limitation of Claim 1 of the '470 patent.

A. This goes back to my earlier discussion about aligning elements, when we were looking at the infringement argument with respect to the Max Axess wrench.

Those aligning elements, in my opinion, are included in the -- they are included in the second element of the Max Axess wrench, not the first axis.

However, if it's found to infringe, then you would have to say, no, it has to be included in the first element.

So using the same argument for infringement and for validity, which we have to do, then we would have to say, okay. If these aligning elements over here are part of the

first element for the Max Axess, then they are part of the first element in the Buchanan, because the arrangement is the same.

Q. Okay. Let's look at the final part of Claim 1 of the '470 patent, which reads, "Such that each said at least one aligning element is disposed between an adjacent pair of guides and extends parallel to the force transfer element."

Professor Fronczak, if you can, explain to the jury whether or not the Buchanan prior invention discloses that last part of Claim 1 of the '470 patent?

A. Sure. We are looking at the aligning elements in the Buchanan patent. They are not shown in Figure 4. But what they do is, they go through the holes over there, the holes that we see, No. 30. Okay.

We see those holes then go through slots, No. 21. So they go through those slots.

Therefore, the aligning elements go through those slots, and they are between the guides. So that's one of the things that has to happen.

Furthermore, they have to extend parallel to the force transfer elements. Those are those pins in the gripping elements.

So we have got guides. You have got the aligning elements between the guides, and we have -- those are parallel -- "parallel" means they are long lines that run

parallel to each other -- to the force transfer elements of the gripping elements.

Q. Okay. Let's look at the last claim, Claim 9 of the '470 patent.

Similar limitation here, this curvilinear limitation that we saw before.

Maybe quickly explain that, and explain whether the Buchanan prior invention discloses this curvilinear idea.

A. Real quickly. Once again, just look at those blue parts. As the handles are moved together, just look at one of those spokes coming up that represents the -- or that show the gripping elements, the motion of the gripping elements. It starts off at a 1 o'clock position. As the handles are squeezed, it moves to a 12 o'clock position. Simultaneously, it moves radially inward as it is moving. So the motion is curvilinear.

Q. So just to finish this up for a minute, we have seen a number of kind of yellow highlighted boxes throughout the asserted claims in this case.

Can you explain to the jury that, if they find that the Max Axess, for example, has an arm portion, then what would they do with that yellow box in each one of the claims?

A. If they find that the Max Axess gripping element has an arm portion, then I see no principal way to not put a checkbox in there -- I mean, to put a check in that box.

Q. For all the claims of the arm portion?
A. Yes.
Q. And then the last limitation discusses the aligning element and this relationship to the first element.
If the jury decides that the Max Axess meets that limitation, then what should they do with that yellow box?
A. If it meets that limitation, then they put a check over here.
Q. I think we are done with that.
One final topic to discuss, then, Professor Fronczak, and that's this idea of secondary considerations of nonobviousness.
The first time the jury has kind of heard this concept. If you could, just explain at a very high level to the jury why one would consider secondary considerations of nonobviousness in this context.
A. Sure. You know, we have done a very careful construct here looking at the invalidity, whether Mr. Brown's patents should be valid or should not be valid.
So we look at the claims as construed by the Court. We look at the understanding of the patent.
But also it's important to look at other issues. And they are called secondary considerations, because they are not the primary considerations. They are secondary. They can factor in to the thought process a little bit -- I

analysis disclosed in your expert report, the jaw in the Max Axess Locking Wrench to the plunger in the Buchanan patent?

A. Because, as I have tried to explain here, is that we understand the terms of the claims in the context of all the information. The terms in the claim as construed by the Court, just reading them alone without figures, without background, without understanding the prior art, without understanding the device itself, without understanding the understanding of the terms as shown in the illustrations and in the written description, you have to understand all of these things.

And so therefore, I looked at the plunger in the Buchanan art -- prior art patent. I saw that this said, you know -- LoggerHead said, this doesn't have arms. I'm looking at that.

I'm saying, well, okay. If this doesn't have arms, what could be arms on the Max Axess wrench? I am looking at the constructs. We have a simple block in one. We have a simple block in the other.

My logic and the logic of one of ordinary skill in the art says, if I have got a simple block here that doesn't have arms, I have got a simple block here, it doesn't have arms as well.

I did not, in doing my infringement analysis, compare what Buchanan's plunger was to the claims as

construed by the Court.

I compared the Max Axess Locking Wrench jaw, the gripping element, to the claims as construed by the Court with my understanding, part of which was gained by looking at other things and my experience. You don't look at things in isolation. You have to use your experience. You have to use your knowledge.

Q. What is the Court's construction of "arm portion"?

A. You would have to put it in front of me to read it. I don't have it memorized, sir.

Q. Let's take a look at your expert report.

You don't know how the Court construed "arm portion"?

A. That's not what I said, sir. I said, I don't have it memorized. You asked me to recite it. I don't have it memorized.

MR. SKIERMONT: All right. Let's put it up.

BY MR. SKIERMONT:

Q. Do you have your report up there? Never mind. I found it.

How did the Court construe "arm portion"?

A. Arm portion, reading here, "Portion of a gripping element(s)" -- so it's a gripping element or gripping elements -- "configured to engage one of the guides" -- you are moving it up and down. It's hard to read.

Q. I am trying to highlight it for you.
A. Again, hold it still.
Q. There you go. Arm portion. There you go.
A. Okay. So arm portion. My understanding is that, unless there is a typo, miscommunication, or something wrong here, arm portion is, portion of a gripping element or elements configured to engage one of the guides and contiguous with a force transfer element.
Q. This is from your report, right?
A. I'm looking at it here. I believe it is. I don't see that it's not. I'm only seeing, you know, two paragraphs.

I'm not disputing that it is. If you say it is, I presume you are not going to lie to me.

Q. How did you apply that construction to the Max Axess Locking Wrench gripping element when you were trying to identify whether there was an arm portion?
A. I looked at it. I looked at the words, and I say, okay, a "portion of a gripping element configured" -- "configured" means it's given a certain form -- "to engage one of the guides and contiguous with a force transfer element."

I look at it and say, I don't see anything here that's configured to look like -- anything that is configured to be an arm portion.

Q. Dr. Fronczak, is it your testimony that there is no portion of the gripping element that engages a guide in the

have said "portion" inadvertently. It was a surface that engages the guide.

Q. I have put on the screen -- let's see if I can cull it out.

That's the Max Axess gripping element, correct?

A. That is a photo of the Max Axess gripping element, yes, sir.

Q. And what were you indicating earlier when you were pointing to the small thing that was difficult to see?

What is the surface that you said engages a guide in the Max Axess Locking Wrench?

A. How does this work?

Q. I think if you press the screen, it will put an arrow.

THE WITNESS: Oh, I'm sorry. How do I get rid of that line?

THE COURT: I get rid of it for you.

BY MR. SKIERMONT:

Q. For these purposes, I think we are good.

Where the red arrow is pointing and there is a red-dashed line on the right-hand surface, underneath the force transfer element, that's what you have said engages the guide?

A. It's a surface that comes in contact with the guide.

Q. Why isn't that an arm portion?

A. It's not an arm portion. One of ordinary skill in the

art would say there is nothing there that is configured -- no portion of this block is configured to engage the guide. It has a surface that is in contact with the guide. But there is nothing here that takes the shape, is configured to engage the guide. That's why it's not an arm portion.

There is other reasons why it's not an arm portion, but that's the main reason.

Q. And you also testified, I think, at your deposition that there is another way to look -- to interpret a portion other than -- rather than being a surface, and that is that a portion could be a three-dimensional solid rather than a surface, correct?

A. Sounds correct. I'm not sure if those are my exact words, but if you say they were, it sounds reasonable.

Q. In your deposition you said, "There are other ways to interpret this as a portion, and a portion could be a three-dimensional solid rather than a surface."

Did you say that at your deposition under oath?

A. It looks like it, yes, sir.

Q. And I am putting up on your screen, Dr. Fronczak, a demonstrative that was shown during Dr. Cagan's direct examination on infringement.

You were in court for that, weren't you?

A. Yes, I was.

Q. And is the three-dimensional depth that you testified

could be a portion, where the dotted lines are that Dr. Cagan drew with a red arrow pointing such that it would include this, where the cursor is, on the gripping element?

A. I'm sorry.

THE WITNESS: Your Honor, could you remove that red line?

THE COURT: Sure. It's driving you nuts. We will take it off.

BY THE WITNESS:

A. Okay. I'm sorry. Could you repeat the question, sir?

BY MR. SKIERMONT:

Q. Sure.

Is that what you meant by three-dimensional depth?

A. I didn't have this figure in mind when I said what three-dimensional depth is.

Three-dimensional depth is just what it says it is. We have a surface, and a surface could be -- I think in Dr. Cagan's words, could be extruded to become a three-dimensional depth.

But this is certainly an arbitrary abstract construct here. There is no dotted lines on the -- there is no dotted lines on the Max Axess gripping element, and there is nothing configured to represent or look like an arm portion.

Q. Does the area that is set off by the dotted line on

Fronczak C1, does that engage the guide?
A. I'm sorry. Say that again.
Q. Does the dotted -- where that red arrow is pointing to the gripping element -- that portion of the gripping element where the red arrow is pointing, does that portion engage the guide?
A. If you are telling me that that arrow represents --
THE WITNESS: I can draw on this now?
THE COURT: You can. I think you can.
BY THE WITNESS:
A. If you are saying -- are you telling me that you think that that arrow points to everything included in, I guess, that box plus --
BY MR. SKIERMONT:
Q. Let's assume that it is.
Is that an arm portion that engages --
A. It's hard to do this with your finger. I got arrows instead of lines.
Q. I think we are fine. We see what you have drawn around. You have drawn around where the dotted line is.
My question is, does that portion that you drew in red, does it engage the guide?
A. That would be a part of the gripping element. I wouldn't say that it is an arm portion. I wouldn't say it's a portion configured to engage the guide.

Q. The Court said that --
A. There is no configuration there.
You just take a block, and then, by that reason, you can take a block, and a block becomes anything. That's not what this is.
Q. My question is a little bit different.
My question is, is the area where you drew red around where the dotted lines are depicted, does that portion of the gripping element engage the guide of the Max Axess Locking Wrench?
A. If I'm applying the Court's construction to say that a portion -- arm portion is a portion configured, I don't see anything here configured.
Q. I am going to get to configured, Dr. Fronczak. I need you to focus on my question. We are going one at a time. There are multiple elements.
My first question --
A. I am trying to explain.
Q. You will get an opportunity to explain. I need you to try to answer my question.
A. I wanted to make sure you understand my answer --
Q. I understand your answer.
A. -- because I have been required to apply the Court's claim construction.
Q. And we are going to get there.

Q. And once again, you are referencing -- there is no reference to the claim term "portion" on Slide 21; isn't that right?

A. There is no arm portion in Buchanan. The word "portion" is not there.

Q. Slide 22. You now have all three of them joined together, right?

You have got the Buchanan figure, the plunger, and you have got the U-shaped gripping element from the LoggerHead patent, and then you have got a picture of the Max Axess gripping element, right?

A. Those are the three pictures that are shown, yes, sir.

Q. And the one thing not shown on Slide 22 is the word "portion," right?

A. "Portion" is not there, sir, no.

Q. You have said a couple of times, I think, on direct and maybe even on cross that the Max Axess Locking Wrench is a solid, rectangular block with a pin driven through it, right?

A. I said that it's pretty much it. There is a little bit of -- there is a couple little secondary features.

It's not a pure rectangular solid. There is some chamfers on it and an arched-back top.

It has some shapes that are configured -- some identifiable shapes that we can see on the tool that are configured to give it certain characteristics.

Q. And you think that a person of ordinary skill in the art would not readily recognize that anything on the Max Axess Locking Wrench gripping element as being separate portions, right?

A. Certainly nothing that would be understood to be an arm portion versus a body portion. They would not parse it into portions. One of ordinary skill in the art would not. They might for some of these secondary features that are on the device, such as a chamfer. They might say that's a chamfered surface, or they might say that that's and arched top. But nothing else.

There is a hole in it, so they could talk about a hole portion.

But they would not recognize anything as distinguishing it from a body portion or an arm portion, using the Court's claim construction.

Q. Did you review the Court's claim construction order that set forth the definitions that we have been discussing today describing -- defining and describing "arm portion" and "body portion"?

A. Did I what?

Q. Read it.

A. The entire order?

Q. The part that defines "arm portion" and "body portion."

A. I believe I did. It's been some time since I've done

that have been stripped and allows you to apply the forces necessary to cold work them together to have a continuous connection; and that allows, of course, electricity to flow.

Q. And why would someone want to crimp a wire?

A. Because if you have different electrical components that need to be attached, you want those wires to have a firm connection.

Q. Did you consider whether the Buchanan patent contained each and every requirement of the LoggerHead patents?

A. I have.

Q. And does it?

A. It does not.

Q. Can you explain why?

A. Sure. Could you bring up my first demonstrative, please.

So, I think the important -- most important part is right in front of you. The Buchanan -- the claim of the -- the claim limitation of the LoggerHead -- I'm sorry, of the LoggerHead patents is that the second element needs to include an actuation portion having at least one slot.

And what you see here is the yellow element on the right is what Dr. Fronczak actually has in the past identified as the second element, and it does not include these auxiliary cam plates that you see in green. Those are separate elements. They are not part of the second element.

And so if they're not part of the second element, then there is no actuation portion, and there is no slot on the second element. And every element needs to be included if it's going to anticipate. And this is a separate structure, separate element altogether.

Q. So, just so we're clear, where is the slot located in this -- in this picture?

A. The slot is located on these auxiliary cam plates that are not part of the second element.

Q. And is that consistent with your review of the prosecution history?

A. It is.

Q. And is it also consistent with the way the Court in this case has interpreted the claims?

A. So, I've seen -- again, I've seen the Court's decisions that specifically say that the cam plates are not part of the second element in Buchanan.

Q. And so that we're crystal clear, which cam plates are the ones that you're saying are not a part of that second element?

A. So, if you can go to the next slide, I put a big red mark on the green ones. Those are cam plates. They're not part of the second element and -- in Buchanan.

Q. Now, this morning when Dr. Fronczak was testifying, did you hear him say that the Buchanan reference described a tool

that automatically sizes? Do you remember that?
A. I do remember that.
Q. And do you agree with that analysis?
MR. SERNEL: Your Honor, I object. If we can have a sidebar, please.
(Proceedings heard at sidebar:)
MR. SERNEL: Your Honor, we had identified this last night as something that was not in Dr. Cagan's expert report. I thought there was an agreement that they would not be raising it, and now they're going into it. It's not in his report at all.
MS. ABDULLAH: Your Honor, the testimony we heard from Dr. Fronczak this morning about automatic sizing is not in his report, either, and he's responding to that testimony.
MR. SERNEL: I disagree. And if that was the point that you were going to make, you should have made the objection at the time.
MS. ABDULLAH: I mean, we're just limiting it to responding to that. We're not going beyond that.
THE COURT: But counsel is still correct. If it wasn't revealed in the report, it can't be put in. It doesn't matter whether they cheated.
MS. ABDULLAH: Well, he was responding, though, in the report --
THE COURT: You have to flag it for me. Otherwise,

I wouldn't know. Sustained.

MS. ABDULLAH: Okay. Thank you.

(Proceedings heard in open court, jury present:)

BY MS. ABDULLAH.

Q. Now, this analysis that you've just presented regarding the second element not containing the slots, does this apply to Claim 1 of both of the LoggerHead patents?

A. It does.

Q. And are there additional reasons that Buchanan does not teach all of the claim elements of Claim 1 of the '470 patent?

A. If you'd go to the next slide, please.

So, in the '470 patent, the claim construction for the second element, which you see on the left, and the actuation portion, as you probably learned by now, is a little bit different than the '579; and it goes further in stating that the second element has a second part. There's a grasping portion and then a tool head. At one end of that grasping portion, formed within and integral to the tool head is an opening concentric with an opening of the first element, an actuation portion, and at least one slot, and that the actuation portion has to be integral to and formed within the tool head of the second element. So, it's being very specific about that.

Q. So, using your next demonstrative, can you describe what

that means with respect to Buchanan?
A. It means, again, that the slot in the actuation portion must be integral and formed within the second element. It is not integral and formed within. It is a second -- it is in these auxiliary cam plates that are separate from the second element.
Q. Now, last week, you told us about some additional claims that LoggerHead has accused the Max Axess of infringing. Do you remember that?
A. I do.
Q. And do you remember what those additional claims are, other than Claim 1 of the '579 and Claim 1 of the '470?
A. So, there was Claim 9 and 16 from the '579 and Claim 9 from the '470.
Q. Now, talking about Claim 16 of the '579 patent and Claim 9 of the '470 patent, would you group those together in terms of any additional requirements?
A. I would. They both have the same additional requirement.
Q. And what is that requirement?
A. Do you mind going to the next slide?
So, it's that --
MR. SERNEL: Your Honor, if I could have another sidebar? We have the same issue.
(Proceedings heard at sidebar:)

MR. SERNEL: I'd object. It's the exact issue. There's no -- nothing in Mr. -- Dr. Cagan's report on this.

MS. ABDULLAH: No, no, this one we talked about last night, and we explained that the issue is not -- he's not going to point to anything else that he hasn't already disclosed. All he's going to say is that they haven't offered evidence that it moves in the way that they say. That's all it is.

MR. SERNEL: He has not made this argument that Buchanan lacks this element. They're now arguing that somehow Dr. Fronczak didn't address it. We know that Dr. Fronczak did address it.

MS. ABDULLAH: Well, he should be able to respond to the way that Dr. Fronczak addressed it. I mean, it's not -- if you're not happy with that, you can cross-examine.

MR. SERNEL: No. Dr. Fronczak addressed it in the manner in which his expert report addressed it. Dr. Cagan was able to say whether he disagreed with that; and this is not an element that has at all been focused on as an argument that Buchanan does not have this. I could walk you through the report and show you there's just a total absence of any discussion about this in Dr. Cagan's report.

MS. ABDULLAH: Again, he's not going to point to anything else, anything else in Buchanan or anything like that. All he's going to say is that what you heard from

Dr. Fronczak doesn't establish what he says it establishes.

MR. SERNEL: Can you show me where that's in his report?

THE COURT: Isn't that a matter of argument?

MS. ABDULLAH: What do you mean?

MR. SERNEL: The absence, arguing the absence.

THE COURT: The witness didn't say why.

MS. ABDULLAH: Well, because Dr. Fronczak did have some testimony, but it just wasn't on point, so that's why we need a technical expert to be able to explain that that's not -- what he said is not what he said it was.

THE COURT: You're talking about one question?

MS. ABDULLAH: From us?

THE COURT: Yes.

MS. ABDULLAH: Yeah.

MR. SERNEL: But I don't want to flash up a new argument.

THE COURT: I don't think it's a new argument. I'll allow one question.

(Proceedings heard in open court, jury present:)

BY MS. ABDULLAH.

Q. And in your opinion, does Buchanan disclose the element -- the additional limitation of curvilinear movement?

MR. SERNEL: Your Honor, I would object. It's not responding to Dr. Fronczak.

THE COURT: I'll allow it.

BY THE WITNESS:

A. Sorry. So, the additional claim is that the movement of at least one gripping element is curvilinear, and there has been no evidence that has been provided to show that the gripping elements or these plungers move in a curvilinear manner. There's been no evidence provided from the teachings of the patent from any -- that this is curvilinear.

BY MS. ABDULLAH:

Q. So, to summarize, in your opinion, does the Buchanan reference that Dr. Fronczak said anticipated the patents actually contain all of the elements of the LoggerHead patents?

A. It does not.

Q. Do you know what year the Buchanan patent is from?

A. Roughly 1957.

Q. And have you prepared a demonstrative to show the relative age of Buchanan?

A. I have.

And so you see, again, that you have the Buchanan patent is 1957, and 48 years until the '579 patent was filed.

Q. And what happened during those 48 years?

A. Well, I'll first note that the problem is still -- that was defined is that there is again stripping of these hex nuts. But between those 48 years, if you go to the next

said that the gripping element was 24 -- or the body portion, I'm sorry, was 24, if I remember. And the response that -- again, I'm not a lawyer. From my understanding is that the onus is upon the applicant to respond directly. And by responding directly, if this is the case, then there would not be an arm portion.

MR. SERNEL: If we could turn to the next page, and if we can keep the figure but then turn to the next page and grab the first full paragraph, Mr. Urban. Blow up that first paragraph, please, just the first paragraph. Yeah, thank you.

BY MR. SERNEL:

Q. So, we can see there -- we weren't talking about what the examiner was saying. That first sentence is presenting the applicant's position, right? That's Mr. Brown and his attorney's position that they're presenting to the patent examiner, correct?

A. I need to take a minute to orient myself on where we're at with this -- is this the -- I'll let you help me. Is this the response to the examiner after -- this is the response, correct?

Q. Yeah, this is something that was typed up and sent in by Mr. Brown --

A. After receiving that notice that we saw earlier?

Q. Yeah, from three years prior, yes.

A. So, the -- just give me a minute, then. One more question, because I know that my file had it in reverse order. Is this the chronological order or reverse chronological?

Q. I believe it's chronological order. I don't know what we're looking for right now. If you could just focus on this page.

MR. SKIERMONT: Why don't you show him the page that you want him to look at?

MR. SERNEL: I'm trying to. I think he's got my page. It's LH --

BY THE WITNESS:

A. I have the page. What I'm trying to understand is the context of this, because we've been taking a lot of things out of context, and I need to understand what was being responded to. That's all.

BY MR. SERNEL:

Q. Okay. And so again, this is the last word that Mr. Brown and his attorneys argued before the Patent Office then agreed and said, "Okay, we're going to give you your patent."

A. Okay.

Q. So, are we oriented?

A. Yes.

Q. So, we can see here that in the first sentence, it says,

"Applicant" -- that's Mr. Brown and his attorneys, correct?
A. Yes.
Q. So, Mr. Brown, "respectfully submits that Buchanan's gripping element does not contain an arm portion." That was the argument presented by Mr. Brown to try to distinguish his invention from the Buchanan patent, correct?
A. Based on the examiner stating that the gripping portion was actually the body portion.
Q. He doesn't say that here about, "based on the examiner." It's just a definitive statement. "Applicant respectfully submits Buchanan's gripping element does not contain an arm portion." That's what it states there, right?
A. That is what's written here, but again, this is out of context. And, you know, the Court has actually gone so far as to state that -- no disclaimer on that.
MR. SERNEL: I would move to strike the last comment, your Honor, about what the Court did or did not do.
THE COURT: Sustained. I think we can disregard that and move on.
BY MR. SERNEL:
Q. Okay. And if we look at the bottom, the last sentence of this paragraph, it says, "The force transfer element of Buchanan, as best understood, however, is contiguous with the body, not an arm portion, because Buchanan does not teach or suggest an arm portion."

That was what Mr. Brown argued to the Patent Office, correct?
A. Based on the response of the examiner stating that the entire gripping element was the body portion.
Q. And then we -- can we actually go down to the last paragraph, pull that one up. And we can see here in the last sentence -- I'm going to go halfway through -- it talks about, "The gripping element of Buchanan does not disclose the same structure as Claim 1."
A. Where are you? I'm sorry.
Q. I apologize. It's about four lines up from the bottom. It's now being highlighted on the screen.
A. And this is again from whom?
Q. Again, this is Mr. Brown's position arguing to the Patent Office, "Why my invention is different than Buchanan."
A. All right. I just want to know where we are.
Q. So, the distinction that's being drawn is, "Gripping element of Buchanan does not disclose the same structure as Claim 1; namely, a body portion, an arm portion, and a force transfer element," correct?
A. That's what is says here; and again, this was taken into account with claim construction.
Q. And kind of the summary is, "For this reason, Claim 1 stands in condition for allowance, and withdrawal of the rejection is requested," correct?

A. That's what this says.
Q. And then we know that this is the last word that Mr. Brown stated on this issue, and then the Patent Office agreed and gave Mr. Brown his patent, correct?
A. Well, the words that were stated -- don't forget, they'd already taken into account the other elements in the prosecution history. And even there, it was with respect to all of the -- all of the elements as they are configured, not just with respect to the gripping element.
Q. You'll remember during your deposition we did some color-coding to try to visualize what was being presented here, correct?
A. We did.
MR. SERNEL: And if we could pull up DTX 213, Mr. Urban.
BY MR. SERNEL:
Q. And so you'll remember that this is an exhibit from your deposition, Dr. Cagan, correct?
A. Correct.
Q. And this was your attempt to color in sort of what the understanding of the examiner and Mr. Brown was during this back-and-forth during prosecution, right?
A. This was my understanding, what I believe that the examiner was identifying as the body element.
Q. Okay. And what you did when I gave you the blue pen or

blue marker and told you to color it in was you colored in the whole thing to identify that blue was the body portion, and then you colored in the whole gripping element with blue, correct?

A. I did color that in.

Q. And so your understanding of what happened in prosecution was that the examiner, Mr. Brown, thought that this block gripping element in Buchanan was essentially all body and didn't have an arm, correct?

A. That was my understanding of what the examiner identified.

Q. Right. And this is what you colored in at your deposition, correct?

A. I did. Not very well, but I colored it in.

Q. Right. And there may be a problem here, because I think you went a little bit overboard and actually colored in the force transfer element, too, right?

A. I see that. I did.

Q. And so the correct way to look at this would be to think, okay, the pin sticking through, that shouldn't be colored in; but when we're looking at the block, that's -- again, based on what the examiner and Mr. Brown were communicating during prosecution, that would be all blue because it's all body, correct?

A. That would be all blue for it's all body. I don't

recall. I'd have to look whether 24 was stated as the entire gripping element or not, but I don't think that's relevant to your discussion.

Q. Okay. And you were here during openings and Mr. Skiermont's presentation during his opening?

A. Yes, yes.

Q. You'll remember -- I remember Mr. Skiermont saying something about, "Well, you're going to hear evidence about how the examiner agrees with Dr. Cagan's analysis." Do you remember him talking about the examiner and suggesting that somehow the examiner -- the patent examiner's analysis at the Patent Office agreed with your analysis of this case?

A. I don't recall.

Q. Now, you agree your analysis of the gripping element is completely different than what Mr. Brown and the examiner were talking about during prosecution, right?

A. Can you be more specific, please?

Q. Well, if I -- when I asked you to do the same color-coding exercise, saying, okay, the way you're trying to apply the arm portion and body portion to the gripping elements in this case, if we try to do that to Buchanan, you remember you came up with a completely different color scheme than what you came up with here for the Brown/examiner position, correct?

A. Correct. What was -- again, this was the examiner's

position. I don't -- you wrote down examiner/Brown -- well, the prosecution. I -- again, my understanding was that Brown was responding to the examiner doing this.

Q. And so it's your view, your opinion, that Mr. Brown wasn't saying that the Buchanan gripping element was all body and wasn't distinguishing it on the basis of it didn't have an arm portion? Is that what you're suggesting?

A. My opinion was that the -- Mr. Brown and his attorney were responding to the examiner that if this were the case, then there would not be an arm portion.

Q. Right. And the argument was, "Buchanan doesn't have an arm portion; that's why our gripping element is different than Buchanan," right?

A. First of all, I guess I need to parse that a little bit. Can you repeat that one more time, actually?

Q. You agree -- again, this all blue, you agree that all of the discussion, whether it was started by the examiner or Mr. Brown, all of the discussion we just looked at was all about Buchanan does not have an arm portion. The block is all blue. It's all body portion, correct?

A. Based on the examiner's identification.

Q. Okay. And now --

A. Incorrect identification.

Q. Okay. And now, in order to try to assert infringement in this case, you've come up with a creative theory to try to

slice and dice these block-like gripping elements into multiple portions to find an arm portion and a body portion, correct?

A. First of all, I don't -- I don't believe that this is necessarily the end result. This was again that the -- Brown was pointing out to the examiner the error.

Now, I don't think it was a creative slice and dice. I think it's actually quite logical and makes a lot of sense, given the claim construction.

Q. Okay. And so what we did was, we said, "Okay. Take the theory you're trying to apply on infringement, and then let's look at Buchanan. And how would we color-code that?"

MR. SERNEL: And let's pull up DTX 212, please.

BY MR. SERNEL:

Q. So, when I asked you and I said, "Okay. Take the way you're trying to apply this for infringement, where you're trying to find an arm and a body portion, and color-code for me if that's what we're talking about with respect to Buchanan, let's color in the arm portion and color in the body portion."

And that was what led to what we've marked as DTX 212, and that's from your deposition, correct?

A. This is from my deposition, and this was in the context of recognizing that there were multiple -- this -- that there were multiple assumptions. I made it clear that Buchanan

didn't meet all of the claims -- requirements of Claim 1 when we did this.

Q. So, again, when we look at what you color-coded here, for the body, you just have a tiny little blue sliver at the bottom of the gripping element, correct?

A. That's what I drew.

Q. And then, again, applying your analysis that you had to apply to find infringement, you then find that the whole rest of it, the part that you colored in in yellow, that somehow that's the arm portion, correct?

A. The arm portion has to be the part that engages the guides and is contiguous with the force transfer element. The body portion is the part that engages the work piece. It has to have some substance to it to support that.

Now, it doesn't have to necessarily -- I mean, you could change -- the important part is the part that's engaging the arm and the force transfer element. So, this could be -- meet those requirements assuming the rest of Buchanan met those requirements.

MR. SERNEL: So, let's pull up maybe DTX 212 and DTX 213 side by side, Mr. Urban.

BY MR. SERNEL:

Q. Okay. So, again, on the right of the screen, that's showing what Mr. Brown and the examiner, when they applied the logic they were using during prosecution, the

'925 reference.

Finally, LoggerHead has proven through the testimony of at least Mr. Brown, Mr. Li, and Mr. Broadaway, as well as through at least the following PTXs: 11, 12, and 64, that LoggerHead's Bionic Wrench, the embodiment of LoggerHead's '579 and '470 patents has been marked with the '579 patent number since defendants began selling either the 8-inch or 6-inch Max Axess Locking Wrenches.

Defendants have not introduced any contrary testimony or other evidence, and a reasonable juror could not find otherwise.

LoggerHead has proven through the testimony of at least Mr. Bokhart, as well as through the following PTXs: 88, 142, 154, 280, 291, 304, 334, 376, and 441 that it is entitled to a reasonable royalty of at a minimum 4.50 for each of the 183,456 6-inch Max Axess Locking Wrenches sold through October 2015; and 5.40 for each of the 586,928 8-inch Max Axess Locking Wrenches sold by Sears and Apex. Defendants have not introduced any contrary testimony or other evidence, and a reasonable juror could not find otherwise.

Thank you for your patience.

THE COURT: Thank you.

MR. HAYES: So considering how full your court is, your Honor, we can do a very shortened version of our JMOL

here, just to get it on the record.

THE COURT: Sure. If you could, just summarize.

As you know, I am going to be entering and continuing these motions. And I am sure you are going to be submitting written material.

MR. HAYES: We will just give you a quick summary.

THE COURT: That's great.

MR. BLOCK: Your Honor, Defendants Apex and Sears move for judgment as a matter of law of no infringement under the doctrine of equivalents, because LoggerHead did not present any evidence on this issue whatsoever.

Defendants Apex and Sears move for judgment as a matter of law of no literal infringement, because there is not sufficient evidence to support a finding that the accused Max Axess Locking Wrench product includes all the limitations of the asserted claims -- of any of the asserted claims.

In particular, there is not sufficient evidence to find that the Max Axess Locking Wrench meets the gripping element, arm portion element, or slots limitations found in all asserted claims, or the aligning element limitation found in the asserted claims of the '470 patent.

Defendants Apex and Sears move for judgment as a matter of law that both the '579 and '470 patents are invalid, as anticipated in light of the Buchanan '925 prior art reference. The Buchanan '925 prior art reference

discloses every element of the asserted claims of both patents, as the evidence defendants presented has shown.

LoggerHead has not presented sufficient evidence to rebut defendants' evidence that every element of the asserted claims is found in the Buchanan '925 reference.

Defendants also move for judgment -- Defendants Apex and Sears also move for judgment as a matter of law that the '470 patent is invalid as obvious, in light of the combination of Buchanan '925, with ordinary design choice of one of skill in the art.

The Buchanan '925 reference, as modified by ordinary design choice, discloses every element of the asserted claims of the '470 patent, as the evidence defendants presented has shown.

Specifically, for example, ordinary design choice would have enabled one of skill in the art, at the time of the alleged invention, to cut slots in the outer plates of the Buchanan second element to satisfy the limitations of every claim. One of ordinary skill in the art would have been motivated to do so.

LoggerHead has not presented sufficient evidence to rebut defendants' evidence that every asserted claim of the '470 patent is therefore rendered obvious by this combination.

Defendants also object to the Court's claim

construction ruling, including, but not limited to, the constructions of the "arm portion" and "body portion" terms, in light of the intrinsic record relating to the '579 and '470 patents.

Finally, Defendants Apex and Sears move for judgment as a matter of law that LoggerHead is not entitled to damages. In particular, LoggerHead has not presented sufficient evidence to support its claim for damages in light of Federal Circuit precedent and has presented damages testimony that violates both this Court's *Daubert* and motion *in limine* rulings.

Thank you, your Honor.

THE COURT: Thank you.

These motions are entered and continued.

And again, I am confident that you are going to be making written submissions as well.

We can call the 8:45 call.

(A brief recess was taken at 9:07 a.m.)F/j

(Jury in at 9:46 a.m.)

(The following proceedings were had at sidebar:)

MR. HAYES: We understood on the verdict form that we would take out the standard --

THE COURT: Yes.

MR. HAYES: -- because you are going to separate --

THE COURT: Yes.

relating to the facts of this case.

During his earlier testimony, I instructed the jury that they should not address or discuss his legal advice, because that wasn't relevant to the question of infringement. His comments about design might have been relevant or were relevant, but not his legal advice.

Today he will be free to offer legal advice, because whether and to what extent the defendants were operating under legal advice is relevant to the question of willfulness.

We are going to hear from Sears former employee Barry Pope.

And then we are going to hear brief closing arguments, I think about 15 minutes per side. And you will be asked to deliberate on this one question.

I think we are ready to proceed. I may have one interruption, but at least for now, we are prepared to hear Mr. Reese's testimony by way of video.

Is that correct?

MS. SPIRES: It is, your Honor.

Your Honor, LoggerHead calls Brian Reese, the senior director of product development for Craftsman, who was designated by Sears to testify on behalf of Sears for the following four topics: The circumstances in which Sears became aware of the patents-in-suit; Sears' knowledge of the

patents-in-suit prior to the filing of the lawsuit; all efforts by Sears or its suppliers on its behalf to design around the patents-in-suit; and the conception, reduction to practice, and manufacture, engineering, and so forth, of the accused product.

THE COURT: All right. Thank you.

(Excerpt of the videotaped deposition of Brian Reese was played in open court.)

THE COURT: All right. That concludes this witness.

Ladies and gentlemen, I am going to take a recess in this case. I have another matter I need to call. But then we will resume, and we have got, I think, a very short piece of testimony coming up.

All rise.

(Jury out at 10:20 a.m.)

(A brief recess was taken at 10:20 a.m. until 10:39 a.m.)F/j

MR. SERNEL: I just wanted to raise an objection to some of the testimony that I heard them play from Mr. Reese. I think it's where they are going with some of their arguments here. I think it actually already justifies a mistrial.

The law says that you can't sort of present evidence regarding the failure of a party to obtain an

(Jury in at 10:47 a.m.)

THE COURT: You may be seated.

All right. Our next deposition is ready to go.

MS. TINKHAM: Your Honor, LoggerHead calls Mr. Tom Arvia. He is a current employee at Sears. His position is division vice president of product management for Craftsman.

This video will last about six minutes.

THE COURT: All right. Thank you.

(Excerpt of videotaped deposition of Thomas Arvia was played in open court.)

MR. SKIERMONT: That's all the video, your Honor.

We are ready to call our next witness.

THE COURT: You are welcome to call your next witness. I think that is Mr. Broadaway?

MR. SKIERMONT: Correct, your Honor.

THE COURT: Mr. Broadaway, could you step forward.

Sir, you were already sworn in these proceedings, and I remind you that you are under oath.

ERIC BROADAWAY, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. SKIERMONT:

Q. Good morning, Mr. Broadaway.

A. Good morning.

Q. You received -- we talked about, earlier this week, you received the first written opinion -- or written

document, PTX 172.

MR. SERNEL: No objection.

(Plaintiff's Exhibit 172 was received in evidence.)

MR. SERNEL: May I proceed?

THE COURT: You should be good to go.

CROSS-EXAMINATION

BY MR. SERNEL:

Q. Mr. Broadaway, first question for you is, how do you feel about yesterday's verdict?

A. It's tough. You know, for sure it's a learning experience. For my career, probably a setback, but hopefully nothing more than that.

Q. When you set out to design the Max Axess Locking Wrench, did you intend to infringe on Mr. Brown's patents?

A. No. I mean, as I was trained to do, we engaged our lawyer and saw if there was a design that we could do.

Q. When you say you engaged the lawyer, who was that?

A. John Owen, as we discussed.

Q. How soon into the development process did you engage Mr. Owen, the patent lawyer, to help you with the process?

A. As we have reviewed several times, day one. Right away.

Q. I know your cold is still bothering you. If you could, speak up and pull the microphone a little bit closer.

We have gone through some of those documents already when you testified previously, so I don't want to

belabor everything.

I do want to pull up DTX 6 to start. Mr. Skiermont asked you a few questions about it.

So let me first ask the question.

Leading up to this March 8 letter that you received from Mr. Owen, how frequently were you communicating with Mr. Owen from the time you got him involved with the project through this letter?

A. I left him that voicemail on the first day there, and we had almost daily phone calls the first few weeks -- or very frequent. I am sure -- I don't remember exactly how many, but there was a lot of back and forth trying to get his -- as he learned and gave me direction, and I could work with the team to start making our plans.

But by March 8th, we had not really made a CAD design yet to review with him, but he was documenting his preliminary, as we said before, direction on what we should do.

MR. SERNEL: And then, if we could pull up, Mr. Urban, the last sentence of the first paragraph there.

BY MR. SERNEL:

Q. Can you tell us what Mr. Owen was telling you after he had done this several weeks of analysis, looking at Mr. Brown's patents, and providing you the direction he did?

A. Yeah. I mean, he believed we should move forward. We

fully understood that we were going to be having a lot of correspondence as we -- if we came up with the design and as we reviewed it with him. But he was telling us to proceed. He saw little risk in proceeding to the next element.

Q. If you can, turn to the next page of this document and just pull up the proposed product and figure, just the two lines and the figure.

A. Yes, sir.

Q. Was this -- so let me ask you.

The gripping elements here, were these gripping elements the ones that ultimately made it into the final product?

A. Well, not exactly. But they are solid, you know, like -- that key thing about being a solid member was there, and it ended up in the final product, but the rounded tip did not.

Q. And then, if we could, turn to Page 4 of Mr. Owen's March 8 letter. The fourth page is Apex 18149.

Right above -- I guess it's the last paragraph, last big paragraph there, the sentence starting "As such" and then down to the end of that paragraph. It's right above the cautions and limitations.

A. As such --

Q. If we can, highlight the "As such."

Mr. Skiermont had asked you whether Mr. Owen had

provided you any invalidity analysis as of the time in this March 2012 time frame.

Can you explain to the jury what he was saying here, in terms of if the patent claims were construed to cover a block-like gripping element, what his thoughts were.

A. It comes back to some of our discussion about how I said, you know, it being anticipated or obvious. He was referencing that.

Q. If we can, turn now to DTX 8, please.

This is another document I think we have already looked at. If we could, pull up the first -- the top email there.

So this is four days after receiving this guidance from Mr. Owen.

Can you explain what you are saying here.

A. So at this point, from his letter, we had begun to have some CAD, given more details. And then he had -- I think he had called me, and then I responded, saying, okay -- I'm trying to remember the exact -- I can't remember the exact -- how things transpired there.

But bottom line, he had given me guidance that the model was not -- had issues, and I was telling him, per that guidance, we are going to change the design to not have a Brown-type U-shaped element is what it was.

Q. And did you follow Mr. Owen's guidance with respect to

the gripping element configuration?
A. Yes, sir.
Q. Now, did you keep Sears apprised of your consultations with Mr. Owen and the design guidance he was providing along the way here in February, March, April, May time frame?
A. So from the time, you know, we were requested to look at this until -- we reviewed an email that I sent to Matt McDonnell. I am sure we will bring it up. It was in the middle of March.

So from that February 22nd to the middle of March, they were asking quite frequently my response in that time, as we were making our initial models and having the reviews which was, I don't know yet. We are working on a design. I will keep you up-to-date. If we think there is some potential design for a competitive product that wouldn't infringe on Mr. Brown's product, I will let you know.

There was at least -- it was more than weekly between myself and Jill and others on the team.

But every Friday there is a standing call -- or there was at that point in time -- with the customer reviewing our projects. And it was always what Matt and Barry would ask, as far as the status.

So how many Fridays are between that February 22nd and when I sent that email? There is at least that number of touch bases, but more.

Q. Were you passing along Mr. Owen's guidance as it was continuing to come to you during this design development process?

A. I don't believe -- I mean, I told them that we were investigating, that we have our patent lawyers helping us. We are looking -- I didn't give them many details until I sent that email to Matt, from my recollection.

Q. Okay. Let's pull up PTX 467, which may be the email that you are referring to.

If we could, turn to the second page, please, and pull up the email there.

Is this the email you were referring to in terms of the update that you provided to Sears March 15, as to the design direction you were getting from Mr. Owen?

A. Yeah. I was telling him -- that's what I meant. This was the email, yes.

At this point I had a good understanding of John's direction and what we needed to implement in the design. And I was able to articulate it to the customer, to keep them appraised of our progress.

And then, again, after this, as those Friday calls progressed, it was always discussed, the status and the changes.

There was a point later when we had the T slot -- T-shaped plunger or gripping element that we considered.

That was discussed. It had some benefits in the design. The customer would have liked it, but we didn't do it because of the guidance from our legal team.

Q. If you could, turn to the last page.

I just want to ask you, is this something you also provided to Sears as part of the email telling them why you thought the design -- the direction you were taking was not going to infringe on Mr. Brown's patents?

A. That's right. This was the attachment to the email that we were just looking at, where -- and I had referenced it in the wording of the email, just that we had the solid block, and we had the arcs on the outer plate. It was different than what Mr. Brown told the patent office was his invention, as I understood it from our legal team.

Q. If we could, turn now to DTX 9, please. Let's pull up the bottom email -- the bottom of that.

What is this email doing?

A. So this is one that Mr. Skiermont referenced a few moments ago, I believe.

Like I said, this was March 22nd, so a month into the review. At that point in time I thought -- I mean, it's not that far from the final design, but this design I thought was approaching near final state and was giving him an update and asking him to review it. And then he responded.

Q. And then if you move up to the top, what was Mr. Owen's

response regarding the near final design of the Max Axess?
A. "Thank you for the updated design. Based on my review of the PDF file, the proposed design fits within my earlier analysis. So it should not be found to infringe."
Q. Now, Mr. Skiermont then referenced some emails in May -- we are jumping ahead a couple of months -- where you were kind of going back to Mr. Munn and your superiors asking, hey, do we need to do anything more here?
Do you recall those emails?
A. Yes, sir.
Q. By that point in time, how much time had you spent with Mr. Owen going through the design and then getting his opinions regarding whether the design should be found to infringe Mr. Brown's patents?
A. A good amount. I mean, just as much as before this time.
And then he also helped us apply for our patent on the lock, because ultimately, the design changed a good amount more as we got kind of the aha moment on our lock design. There was a lot of engagement with him, to answer your question.
Q. If we could, pull up DTX 23, please.
Let's look at the bottom email and then the first paragraph of that bottom email.
A. Okay.

Q. I think you had mentioned this in response to Mr. Skiermont's question before about, did you follow up and actually follow up to Mr. Owen with the final design drawings to get his final signoff?

What's being talked about here on May 23?

A. This is, I am assuming, an email to an engineer to help me out and send him the final CAD file so he could review them.

Q. And did that, in fact, happen?

A. Yes.

Q. And did Mr. Owen review the design files and provide you a final opinion with respect to the final version of the Max Axess Locking Wrench?

A. He did.

MR. SERNEL: Can I seek admission of DTX 23, your Honor?

THE COURT: Any objection?

MR. SKIERMONT: No objection.

THE COURT: That will be admitted.

(Defendants' Exhibit 23 was received in evidence.)

BY MR. SERNEL:

Q. Let's turn to DTX 24.

A. This is his response to us forwarding those final designs, end of May there.

Q. If you could, explain what Mr. Owen is saying here, in

terms of his final review of the final design drawings.
A. He said, thanks for sending both the 6 and 8. I have reviewed and find no surprises.
He just says his prior analysis still applies.
My recollection is, we also have had some phone calls about this -- or a phone conversation after this, too.
Q. And along the way, was there any -- from the March time frame to the June 1 time frame, had the configuration of the gripping elements really changed at all, based on the block-like design?
A. I don't remember the exact date, but I would categorize -- from my recollection, I am pretty sure that from that point to this point, most of the innovation was -- were the changes around the lock, the fitment range, you know, not anything, I don't believe, on what you mentioned.
Q. Now, when did Apex first receive any purchase orders from Sears for the Max Axess Locking Wrench?
A. We received purchase orders in the middle part of June, from my recollection.
Q. So was it before or after when Mr. Owen provided this final signoff on the final drawings?
A. It would have been after, I believe.
Q. And when did Apex first ship a Max Axess Locking Wrench to Sears?
A. August, middle of August.

Q. That's a few months later?
A. Yes.
Q. Now, in the Sears-Apex relationship, whose responsibility is it to analyze any patents that might be out there to make sure that you are staying clear of anyone else's property rights?
A. Well, it's our responsibility for anything we design to do that work. We never expect our customers to do that. It's our responsibility. We own the design.
Q. Again, just if you could summarize, what did you do to make sure you did that due diligence?
A. I engaged our patent counsel and asked him to review our design and confirm if we should or should not go to market with a product design like this.
Q. Did Apex and Sears rely upon -- strike that.

Did Apex rely upon that design guidance and opinion from Mr. Owen to progress with the design to market?
A. Yes.
Q. And does Apex have any legal obligation in this case to Sears?
A. Well, all the damages, everything associated with this is our responsibility. It all falls on the work my team did, and our company will be responsible for it.
Q. Now, would Apex or Sears have pursued the Max Axess Locking Wrench if Mr. Owen and his patent analysis had not

cleared the design and suggested that it was free and clear of Mr. Brown's patents?
A. No, I would not have.
Q. How often is it that you rely on advice of your patent attorneys to guide your design process for a particular design?
A. Any time we are aware of potential issues like this, I am engaging for my project, and our peers do as well. In our company, it's something we take serious. That's why we use patent attorneys to help us, because engineers can't make those decisions.
Q. Can you provide some context to the jury, in terms of like how common it is that that's how this is done in the industry, to consult with patent attorneys to make sure that you are avoiding other people's patents?
A. I do have some interaction with my contemporaries and competitors, and then former companies that I have worked for in the hydraulics business. I mean, I don't have exposure to every engineer that sits in every type of job like mine, but those that I know and I talk to, dealing with patent attorneys is a necessary part of our existence.
Q. I guess the last question I will ask you is, did Apex intentionally or deliberately try to infringe on Mr. Brown's patents or property rights?
A. No. Again, I thought that our design was free and

clear, based on the guidance that I had been given through the design process. I didn't intend to infringe. I didn't expect for Mr. Brown to be happy about the competition and the product, but I did expect that it was free and clear of his property.

MR. SERNEL: Thank you. I don't have any further questions, your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. SKIERMONT:

Q. Mr. Broadaway, I believe you said that Apex informed Sears that Apex had received an opinion of counsel but did not provide the opinion; is that correct?

A. I did not provide any -- to my recollection, I did not provide our -- like the official letters or documents from our attorneys.

Q. When you --

A. I mean, I don't know if, you know, our counsel did, like Mike, in corresponding with Sears. I don't know.

Q. When you disclosed to Sears that Apex had received an advice of counsel, Sears was assured -- based on that statement, together with indemnification, Sears was assured, correct?

A. Barry Pope and Matt McDonnell and the people at my level in Sears that I was interacting with, yeah, I think they were

good with that. I don't know for sure. I mean, some of the stuff that we have shown, it sounds like that they had some other reviews in Sears, but not to my knowledge. I don't know.

Q. During your deposition I asked you, Mr. Broadaway, "What was Sears' response when you communicated that Apex had done its diligence and received an opinion of counsel about the jaws of the Max Axess and how that impacts noninfringement?

"A. From my perception, they were assured, that together with the indemnification anyway."

Did I ask that question and did you give that answer under oath?

A. That sounds familiar, yeah.

Q. Mr. Sernel showed you a document where Apex engineers were asked to send final drawings on May 23rd to Mr. Owen, correct?

A. It was very close to that date. I think that's right.

Q. And May 23rd was the day after the Jill Lowe email in Plaintiff's Exhibit 172, where Apex committed to ship hundreds of thousands of wrenches to Sears, right?

A. Why do you say that was a commitment to ship?

Q. Let's take a look.

MR. SKIERMONT: Can you change the screen, your Honor?

THE COURT: Yes.

BY THE WITNESS:
A. I mean, we were preparing to quote. They didn't accept that quote. There was a negotiation over that quote. And then the POs came in mid-June, like we discussed.
We didn't have a commitment to ship until we accepted the PO.
BY MR. SKIERMONT:
Q. At the bottom of Plaintiff's Exhibit 172 is an email from Jill Lowe to you and others on May 22, right?
A. Yes, sir.
Q. So let's see what that says.
"Team, below is the email I would like to send to Sears confirming our commitment on the Max Axess AW program."
Did you receive that email from Ms. Lowe?
A. Yeah.
What's the date of this email?
Q. We just saw. It's May 22?
A. You are jumping around awful fast.
Q. I want to show it to you again. We just looked at it, and I am going to go back to it.
You see it's at the bottom of the page. It's Jill Lowe, Tuesday, May 22, at 11:19 a.m.
A. Okay.
Q. And what she wrote to you and others, like Mr. Constantine, is, "Team, below is the email I would like

to send to Sears confirming our commitment on the Max Axess program."

Correct?

A. Yes. This is correct. She is -- that is our quote and the dates that we can hit and the quantities that they can hit. That's what she is drafting and what she is wanting to send the customer.

Q. And, in fact, on May 22nd, Ms. Lowe did send Stephanie an email that looks a lot like the one -- the draft one we are looking at, committing to the ship dates at these volumes for the Max Axess adjustable wrench, correct?

A. I don't think she would have sent it until -- we looked at the correspondence where John, our boss, told her to go ahead and do it. If that was the 23rd, then, I agree. I don't remember if it was the day after or a couple days after, but it was in that time frame.

Q. And Sears accepted, correct?

A. No. I think we -- I don't remember. I know for sure that there was some debate on the cost. Our quote was not accepted. Our first quotes were not accepted. It ultimately was. I mean, they bought the product.

Q. I am going to show you what's already in evidence as Plaintiff's Exhibit 121.

The bottom of this email is an email from -- actually, let's go -- you see, Jill Lowe, on May 22nd, 12:32,

to Stephanie Kaleta, at the bottom of PTX 121, right?
A. Yes.
Q. Let's see what she says. This looks like the draft email we just saw, right?
Ms. Lowe, on May 22, writes to Stephanie, "Below are the committed ship dates we can offer."
A. Yeah. I am trusting that this is the bottom of that preceding email.
Q. Yes, it is.
A. Okay. Yes.
Q. And Ms. Kaleta responds, "Hi, Jill. Confirming" -- on May 23. "Hi, Jill. Confirming production schedule and FOB costs below." Correct?
A. Yes.
MR. SKIERMONT: I don't have anything further.
MR. SERNEL: Briefly, your Honor.

RECROSS-EXAMINATION

BY MR. SERNEL:
Q. Mr. Owen -- strike that.
Mr. Broadaway, did you have any reason to believe, as you reached out with the final design drawings to Mr. Owen, that his analysis on June 1 would change based on any changes that had happened in the design in that last month leading up to that?
A. No. I anticipated that it was a formality somewhat,

because he was aware of what our design was.
Q. And in the last month or so leading up to that -- so before the May 22 exchanges that Mr. Skiermont is focused on -- how much was the design changing, in terms of the gripping mechanism or the basics of the product?
A. During that time frame, I don't believe it was changing much at all.
MR. SERNEL: No further questions, your Honor.
MR. SKIERMONT: Nothing further, your Honor.
THE COURT: The witness may step down.
(Witness excused.)
THE COURT: I think you have another video, correct?
MS. TINKHAM: That's correct, your Honor.
THE COURT: Go ahead with that.
MS. TINKHAM. LoggerHead calls Mr. Peng Li. He is a current employee at Apex. He is the vice president of engineering and program management. His video is about 15 minutes.
THE COURT: All right.
After this video, we will take a break.
(Excerpt of videotaped deposition of Peng Li was played in open court.)
MS. TINKHAM: Your Honor, we just have one last video. It's only six minutes long.

THE COURT: I am going to have you hang on for six minutes. That concludes the plaintiff's willfulness case.

Then we will take a relatively short lunch break, because I know it's a Friday afternoon. You people want to get back to deliberating.

We do have some testimony from the defendants. Their estimate -- by the way, they have been careful about this -- they think they are going to be calling Mr. Owen for about an hour and then Mr. Pope, a video for 14 minutes.

Then we will hear closings again. They won't be as long as yesterday's, obviously. So we have a little more ground to cover. But I want to get this case to you as quickly as possible.

So let's go ahead with the last six minutes, and then we will take a short lunch break.

MS. TINKHAM: Plaintiff LoggerHead's final witness is Ms. Jill Lowe. She is a current employee at Apex. She is the vice president of national retail.

(Excerpt of videotaped deposition of Jill Lowe was played in open court.)

THE COURT: All right. That concludes the plaintiff's case on willfulness.

Ladies and gentlemen, we are going to take a short recess, because I want to get the case to you as quickly as we can.

Why don't we get back here at about five minutes before 1:00. You just have half an hour. I know that's not a lot of time.

(Jury out at 12:22 p.m.)

MR. SKIERMONT: Your Honor, could we just read some admitted exhibits on the record?

THE COURT: Sure.

MS. TINKHAM: LoggerHead moves to admit the following exhibits:

From Mr. Arvia's video deposition, PX 455.

From Mr. Li's video deposition, PX 64, 97, 113, 161, 169, 356, and 504.

THE COURT: Any objection to the admission of those materials?

MR. BLOCK: We will confirm our list.

THE COURT: That's fine. Okay.

MS. TINKHAM: Excuse me, your Honor. Just two more.

From Ms. Lowe's deposition, PX 357, 358, 503, and 505.

And then from Mr. Reese's, PX 30, PX 429, PX 467, PX 470, PX502.

THE COURT: Counsel, if you can, confirm that.

MR. BLOCK: Certainly.

THE COURT: All right.

MR. SERNEL: Your Honor, if I could just read a quick JMOL into the record?

THE COURT: Sure.

MR. SERNEL: So defendants move for judgment as a matter of law with respect to the allegation of willful infringement.

We just heard LoggerHead's theory that somehow the defendants did not -- and Apex in particular -- did not rely on a final opinion regarding the product. The evidence, I think, showed that there was constant consultation with a patent attorney from the beginning of the process through the end of the process, clearing the product before it was ever sold or shipped to Sears.

There is no question that Apex relied upon Mr. Owen's analysis and opinions in designing the product. They passed that information on to Sears, who relied on Apex's due diligence in that respect.

I think this is a textbook case of a company's doing it the right way. So I don't think there is any willful infringement here.

The halo standard that we know applies requires egregious conduct; willful, malicious infringement intending to infringe. There is not a shred of evidence that that's what occurred here. I think that's why Judge Darrah granted summary judgment on the issue. That ruling still stands

today.

We believe that, now that you have heard all the evidence that plaintiffs have on this issue, you should grant JMOL right now, at the close of plaintiff's evidence, because no reasonable juror could find willful infringement in these circumstances.

THE COURT: You know, I do think the defendants have a good case on willfulness.

I know that the plaintiff is going to -- I believe plaintiffs will argue that, whatever their lawyers may have told them, defendant went out on their own anyway and did other things. I think that's going to be the argument. I need to consider that, and I will consider it.

Again, I know -- I am very aware of Judge Darrah's rulings. Let me be clear that I am really not so much, at this point, throwing that out by proceeding here as much as recognizing that if I adhere to his ruling, either simply adhere to it or grant this motion now or grant a similar motion at the conclusion of all your case or if -- no matter what the jury does, come out differently, all those things could happen. Those things could all happen.

One of the reasons I think it makes sense for us to proceed now, however, is, there is always the chance the Court of Appeals will see things differently. I think the safer course generally is to have a full record.

So if the Court of Appeals says the district court was wrong. It was appropriate for that to go to a jury. The jury was properly instructed. Here is what the jury decided, and they want to leave that in place, then fine.

I am just telling you all these things, because I don't want anybody here to think, well, either, A, that I have got my mind made up in any direction, or that anyone should feel 100 percent comfortable about this situation.

I continue to believe this is a case that really should settle. I wish your clients would be talking about that with you and with one another.

But right now, we are going to press forward. I will see you in about a half an hour.

Let me tell you why I am rushing them so much. I have to leave here middle of the afternoon. I have got another judge standing by to take the verdict. I will certainly be here until all the evidence is in. I won't leave until the record is complete. But if I need to leave before the verdict, there will be at least two other judges standing by to take the verdict.

MR. SKIERMONT: Thank you, your Honor.

THE COURT: Thanks.

(A luncheon recess was taken at 12:27 p.m.)F/j

MR. HAYES: Your Honor, can we go ahead and hand up the binders, to keep things moving.

THE COURT: Yes.

(Documents tendered.)

(Jury in at 12:59 p.m.)

THE COURT: You may be seated.

All right. Ladies and gentlemen, we are ready to turn to the defendants' evidence on the issue of willfulness.

We had Mr. Owen on the stand. You will recall that he testified earlier.

I want to remind you, sir, that you are under oath.

THE WITNESS: Thank you.

JOHN OWEN, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. HAYES:

Q. Mr. Owen, welcome back.

A. Thank you.

Q. The previous time you testified, you told us a little bit about what you do, and that's providing design guidance to Apex.

Can you now talk a little bit more fulsome about what you do in your role with Apex.

A. Certainly.

I am actually a patent attorney with the law firm of Coats + Bennett. I have been a patent attorney for about

20 years with that law firm.

During my prior testimony, I was instructed not to convey that, not to mention that I was a patent attorney or mention words like "opinion."

Q. So what are you here to talk about today?

A. So today I am here to talk about, once again, the design guidance that I provided to Apex and the opinions that I provided to them regarding the patents at issue here.

Q. Before we get into that, let's just talk for a minute about kind of what you do on a day-to-day basis as a patent attorney.

If you could, tell the jury that.

A. Okay. I help -- I meet with inventors and talk to them about their ideas and help them get patents on their ideas. So I am, therefore, basically, almost every day working with the patent office. I am seeing what the patent office is saying about their patents and responding to the patent office about those -- what it said. We call this -- we will go into it later. But that dialogue back and forth with the patent office.

I also work with companies when they are coming out with products, and they have questions about whether these products might have patent issues with them, as far as whether they might be able to patent the product, or also whether the design might infringe someone else's patent.

So I am involved in sort of product development guidance and talking to them about that and with securing patent protection for new designs.

Q. So in the context of kind of providing the opinions or the noninfringement opinions, approximately how many years have you been doing that type of work, Mr. Owen?

A. Well over 15, approaching 20.

Q. About how many times have you written an opinion or done some type of opinion analysis for one of the companies that you do work for?

A. Over 75, approaching 100.

Q. So then, let's focus a little bit about what goes into an opinion.

Can you explain to the jury a little bit about the materials that you review prior to providing an opinion.

A. So the typical process is, I would be given information about a proposed design. It may be a fairly early-in-the-design process. So it may be an early design, or it may be a completely finished design, where I might be provided production drawings and so forth. So I understand what the product is.

And then I also look at patents that would be relevant to that design. If we are talking about a tool here, about a tool. So I take a look at those patents.

Taking a look at those patents is actually -- can

be a fairly involved process of, first, taking a look at -- just taking a brief look at the patent and taking a look at the claims, since the claims define what's covered by the patent. So I will take a look at the claims and try to understand what they are going after, and also take a look at the words and the drawings that are associated with that patent; in other words, the specification and drawings.

At this point I am trying to just understand what the claims cover and what one of ordinary skill in the art would understand them to cover.

So I have some understanding of that from the patent itself, but it's not a complete picture. So I also look at what's called the prosecution history, which I think we have talked about a little bit before. But it's the written record of the conversation going back and forth between the person who's trying to get the patent and the patent office, where they are describing things about what the prior art shows and about what their invention is.

So I look at that to look at this public record of the prosecution history and the patent to try to understand what the claims are trying to cover.

And while I'm doing that, I then compare that to the proposed product to what I understand those claims cover and try to understand if there is going to be infringement or not.

That's what it is on a broad level.

Q. So then, with that in mind, let's look at what you did specifically for this case.

We have seen a lot of the documents before that describe kind of how you initially got involved.

Can you just explain quickly the start of your work in providing your noninfringement opinion to Apex in this case.

A. Certainly.

So I first got a voice mail -- or email from Eric Broadaway, saying they were interested in developing a product, an adjustable gripping wrench. Eric knew about a particular patent in the area, which turned out to be Brown's '579 patent.

Eric was looking initially for an estimate of what it might take -- what it might cost to take a look at this. So I provided that to him, and the project moved on from there.

Q. That was -- if I remember, was that late February, February 22nd?

A. That should have been the February 22nd email.

Q. Did you start your work on your noninfringement opinion in this case there or shortly after there?

A. Yes, I would have started it there or shortly after. I mean, sort of my first stage in this case was to take a

look -- the '579 patent had been identified by Eric. He was interested in that.

But I went looking first to see if there were additional Brown patents that might be relevant to the design. So that's when I uncovered the '470 patent and some other patents that aren't at issue in this case.

I have relayed that back to Eric, that probably actually going to have to look at several Brown patents.

Q. We have seen a number of emails back and forth between you and Mr. Broadaway in this case.

Can you just describe generally for the jury how frequently you were in communication with Mr. Broadaway throughout the process -- phone calls, emails, et cetera.

A. I would call Eric or email him when I had questions about it, about the design or when the design had reached another phase and it was time for me to take a look at the then-current design proposal.

So I think both of us would reach out to the other several times during this process.

Q. Did you provide Mr. Broadaway a number of written correspondence -- or written guidance in this case?

A. Yes, I did.

Q. So let's take a look at DTX 6 in your binder.

Is that one of your written correspondence to Mr. Broadaway?

A. Yes, it is.
Q. Did you author this document?
A. I did write this letter -- or this infringe opinion.
MR. HAYES: Just to be certain, your Honor, we are going offer DTX 6 as evidence.
MR. PELTZ: It's in evidence as PTX 157, just used with Mr. Broadaway.
THE COURT: Okay. Either one. That's fine.
MR. HAYES: Josh, can we pull up DTX 6?
Your Honor, we need to switch to the counsel table, please.
THE COURT: I can do that.
MR. HAYES: Thank you.
BY MR. HAYES:
Q. Mr. Owen, is this your written correspondence letter to Mr. Eric Broadaway?
A. Yes.
Q. Dated 8 March 2012?
A. Yes.
Q. Let's highlight this first paragraph that starts, "Per your request."
Mr. Owen, can you explain to the jury what you are communicating to Mr. Broadaway here in this 8 March letter in this first paragraph.
A. I am writing to Eric here about his request for me to

take an initial look at the Brown patents and take a look at whether Apex might be able to produce a gripping tool along the lines of what they had proposed -- that sort of first-design proposal -- and whether that was likely to have infringement issues or not.

Q. Are we fairly early on in the design process here, Mr. Owen?

A. Yes. At this point Apex had just the first design proposal, which actually is shown a little bit later in the letter.

Q. Did you review additional iterations and versions of the product throughout the process?

A. Yes, I did.

So this opinion is about -- starts with the present design proposal, but sets forth design guidance to avoid infringement for that design and as it proceeded further.

Q. So you have got a sentence here in this first paragraph that says, "I am happy to report that it appears the proposed product would not infringe the Brown patents."

What was that based on?

A. That was based on my analysis of the Brown patents and the file history of the Brown patents and my understanding of what those claims covered, and comparing that to -- the proposed design to that and seeing that there shouldn't be any infringement issues.

Q. If we could turn to the second page, we will quickly go through this, because we have seen it before.

MR. HAYES: There is a section, Josh, that says, "Proposed Product." Could you just highlight that and the wrench that's right underneath it.

BY MR. HAYES:

Q. Was this what you were initially considering as the initial design of the Max Axess, Mr. Owen?

A. Yes, it was.

MR. HAYES: Can we turn, Josh, to Page 3, please. And pull up the top half which includes the figures in that first full that starts, "The Brown gripping element."

BY MR. HAYES:

Q. Mr. Owen, can you explain to the jury here in your March 8th letter what you are communicating to Mr. Broadaway.

A. Certainly.

I wanted to convey to Mr. Broadaway what in general the Brown patents were trying to cover so that the rest of the discussion would have some context for him to understand what I was saying.

So I was trying to describe in general what Brown's disclosure was talking about in the adjustable wrench, and also showing him a picture of the Buchanan plunger, because that was going to be -- he needed to see what that was for some of the discussion that would follow.

Q. You say here in the last sentence that starts, "In comparison, the Buchanan plunger 24" --

A. Yes.

Q. -- "appears to have a relatively flat body." I won't read the whole thing.

If you could, focus on that for a minute and kind of explain your analysis -- your legal analysis with respect to that sentence to the jury.

A. Sure.

As part of my analysis, I would have taken -- I took a look at the Buchanan patent and what it said, similar to what I took a look at Brown's patents. I wouldn't have gone into the prosecution history of the Buchanan patent.

But what did it disclose? What would someone of ordinary skill in the art understand Buchanan to be saying?

In this case, I am putting it in -- sort of boiling it down into what Buchanan said about its plunger and what it showed and that the Buchanan plunger has a body with a pin through it. So that's what he should understand we are talking about, when we are talking about the Buchanan plunger.

MR. HAYES: Josh, could we get the last paragraph that starts, "An analysis of the claims," in that final bullet point there?

BY MR. HAYES:

Q. It looks like you are starting to identify some claims in your analysis.

Can you explain to the jury here your kind of analysis of the claims as you are working through this.

A. Sure.

As I mentioned earlier, there were several Brown patents that we were talking about in this letter, not all of which are a part of this case.

But when I'm going through it, I want to try to group the claims together about what they are talking about and what the key limitations are.

So I am just overviewing the claims that were involved in these various patents as far as what they are talking about.

And here, I am talking about the '579 has ten independent claims, and the various numbers of them, and that they have -- some of them require at least one arm portion configured to engage at least one of -- said at least one guide, that the gripping elements have that. Other claims require that the slots have a particular configuration, and so forth.

Q. Mr. Owen, this is in 2012 when you write this letter.

How many patent claims had you looked at and reviewed in your career in 2012?

A. Thousands.
Q. How many patent claims had you actually drafted and prosecuted in the patent office?
A. Many hundreds.
Q. How many patent claims had you analyzed the meaning of and the scope of in your career as of 2012?
A. Thousands.
Q. Were you pretty comfortable looking at the claims of Mr. Brown's patents that you were looking at and understanding them in March of 2012?
A. Yes, I was. After I had reviewed the Brown patents, its disclosure, and the prosecution history, I thought I had a pretty good handle on what they were trying to claim.
Q. Have you actually written patents from scratch?
A. I have written, yes, several hundred patents from scratch.
Q. As of 2012, how many prosecution histories had you reviewed in your career?
A. Besides the ones that I prosecuted -- on top of all the ones that I prosecuted, because I would obviously be involved with those, additional ones, several hundred on top of that.
Q. You are pretty experienced at working your way through prosecution histories that might include hundreds of pages?
A. I'm used to dealing with prosecution histories as a regular part of my business. So yes, I am used to looking at

prosecution histories and knowing pretty quickly what parts are important to go look at, where likely relevant material is going to be found, and can go through those.

Q. In doing this type of work, are you pretty efficient in what you do?

A. I like to think that I am. I would have to answer, yes.

Q. I don't think I asked you earlier, but what's your current position at your law firm, Coats + Bennett?

A. I am one of the members of the law firm of Coats + Bennett, which most people might refer to as a partner in a law firm, partner-level attorney. I have been that since 2004, I think.

MR. HAYES: So can we turn to the next page, Page 4, please, Josh.

BY MR. HAYES:

Q. Just quickly describe these top 3 bullet points and kind of what you are describing here to Mr. Broadaway.

A. So in these bullet points -- the bullet point we just looked at, I was talking about the '579 patent and what it was aimed at or its key limitations.

These other bullet points, I am talking about a '298 patent and what it says, that there has got to be a living hinge involved with it in a particular place.

The '470 patent that has one claim. But it also requires that gripping element that includes at least one arm

portion.

And then there is a pending -- there is a pending patent. At that point it was pending -- I believe it's now issued -- which would be the 9206 publication and some information about those claims.

MR. HAYES: Let's go to the next paragraph, Josh.

BY MR. HAYES:

Q. Some discussion here about the Buchanan plungers. We have heard a lot about this already, the gripping elements.

Can you kind of quickly summarize what you are telling Mr. Broadaway here in this paragraph.

A. Sure.

This is a summary of my legal analysis that I performed as sort of conclusions of what was involved, what was meant by the arm portion limitation in the Brown patents.

So I had gone through and looked at the prosecution history, what they had said to the patent office about what their patent covers and doesn't cover.

I noted that Brown had argued multiple times that Buchanan's plungers don't have arm portions. In fact, they only have a body and a force transfer element and don't show the required gripping element that had the three parts, including, most important, the arm portion; and that that informed my understanding of what the Brown patents covered.

In other words, I looked at that, and it helped me

understand what actually Brown's patents were trying to cover and what they meant by the term "a gripping element that includes an arm portion."

MR. HAYES: Let's look at the final full paragraph on this page, then, Josh, that starts, "With regard to the pending claims."

BY THE WITNESS:

A. Yes.

BY MR. HAYES:

Q. You can explain whatever you would like about this paragraph, but I would like to call your attention to the sentence that starts, "As such."

It's about three-quarters of the way through. "As such, if the claims that emerge were to cover the proposed device." Do you see that?

A. Yes.

Q. Could you explain to the jury what advice you are going to Mr. Broadaway in response to this paragraph.

A. I can, but it requires a little bit of context.

When a patent issues, its claims are fixed. But when a patent application is pending and it hasn't issued yet, those claims can be changed and modified before they get issued. So exactly what they are going cover when they get issued isn't clear until they actually issue.

You can get some idea, but you don't really know

what they are trying to cover.

So I was talking to him about this pending patent application, and I was noting that the claims might change during prosecution, to make sure that he was aware of that.

But I was saying that I didn't think it was likely that that patent publication was going to mature into a patent that would cause a problem, because it also required the gripping elements to have those three parts of the body portion, the arm portion, and the force transfer element.

But I went on to tell him that it's possible that, despite them saying that this doesn't cover the Buchanan device, that they might -- if the claims are merged to cover the proposed device, which didn't have an arm portion, then they would likely be invalid as being anticipated or obvious over Buchanan, because it looked, to me, that they -- that it was likely that Buchanan had everything that was being claimed at that time -- or a claim that would cover the device that they were proposing.

So it's letting him know what it might look like in the future and that I thought it was unlikely that this patent application would cause him a problem.

Q. So let's look at one more paragraph here in your March 8th letter.

MR. HAYES: And that's the paragraph on Page 5, Josh, second-to-last that starts, "Finally."

BY MR. HAYES:

Q. We have seen this before.

So as the author of this document, Mr. Owen, what did you mean there in the first sentence when you said, "I must remind you that the above analysis is preliminary only, based on minimal information"?

A. The information provided to me about the design at that point didn't have all the design details in it yet. I knew that those were going to be evolving, just having ten years of design engineering experience before becoming an attorney. So I was familiar with that process, and also familiar with the process as it generally flows while I was a patent attorney. You have an initial design concept, and it will get refined over time.

And reminding him that I need -- I am going to probably need to look at those designs as they go forward, if they decide to move forward with the project, because there is some design details that I didn't think were going to be a problem, but sometimes they might introduce some problems, and I didn't want Eric to think that he was okay to go, at that point, all the way to production, that I should look at further information down the road.

Q. Mr. Owen, does "preliminary" here in any way suggest you hadn't done a thorough analysis of Mr. Brown's patents, including the claims and the prosecution history?

A. No, it doesn't mean that. I had done what I thought was a thorough analysis of Brown's patents and understood what I thought those claims covered and that the proposed design wouldn't infringe those claims.

Q. So you mentioned earlier you had looked at -- this was obviously preliminary stages of the design.

You mentioned earlier that you looked at additional design drawings along the way. So let's look at some of those.

If you could, turn to DTX 7 in your binder.

A. I don't have a DTX 7, but I will look at the one that's up here.

Q. Do you not have DTX 7 in your binder?

A. It turns out, I don't.

THE COURT: Can you just look on the screen?

MR. HAYES: May I approach? Can I approach, your Honor, and give him a copy?

THE COURT: Sure.

(Document tendered.)

BY MR. HAYES:

Q. Are you familiar with this document, DTX 7?

A. Yes, I am.

Q. What is it?

A. It is an email from Eric to me including design details about what I might call the second design.

MR. HAYES: Your Honor, we will offer DTX 7 in evidence.

MR. PELTZ: Your Honor, I'm sorry. One minute. What's the date of this one?

No. It's fine on the screen.

THE WITNESS: It's an email dated March 12th, 2012.

MR. PELTZ: Okay. No objection, your Honor.

THE COURT: That will be admitted.

(Defendants' Exhibit 7 was received in evidence.)

BY MR. HAYES:

Q. Is this an email --

MR. HAYES: Josh, can we pull up the first paragraph?

BY MR. HAYES:

Q. Is this an email from Mr. Broadaway to you, Mr. Owen?

A. I'm sorry. Could you repeat the question?

Q. Is this an email dated May 12th from Mr. Broadaway to you?

A. This email dated March 12th, 2012, is from Eric to me.

Q. There is a paragraph there that starts, "John."

The second sentence there is, "Attached is the design concept we presently have."

Is this Mr. Broadaway conveying to you the next design concept?

A. Yes, it is. He is attaching it. I understood that to

be referring to the attachment that's the PowerPoint presentation that's attached to the email.

Q. So let's quickly go to Apex 18603. We have seen this many times.

Did you study and analyze this current proposed design of the Max Axess when Mr. Broadaway sent it to you?

A. Yes, I did.

I would like to say that this is a common type of information provided to me during the design process, that they provide me illustrations or PowerPoints of what they are proposing.

They are not going to -- generally clients don't provide me every iteration of it, but at -- sort of at -- most iterations or versions they send me when they want me to look at it.

Here, he was providing me an illustration of Design Proposal 2, at least that's what I call it in my head. It is, as we discussed before, an exploded view of their design proposal.

Q. Was there a certain part of this design that you focused on?

A. I immediately focused on the plunger shape, since that was the key point for my noninfringement analysis.

Q. Mr. Owen, you mentioned plungers. I don't see the word "plunger" on this figure.

What are you specifically referring to?
A. I am referring to what's labeled there as "jaw" or "jaws." There is three of them shown there. These are the -- they appear to be generally U-shaped jaws, plungers, gripping elements, all sort of mean the same thing.
Q. What advice did you give to Mr. Broadaway about this proposed design?
A. I advised Apex, and Eric Broadaway in particular, not to pursue this design.
Q. Did they follow your advice?
A. Yes, they did.
If I take a look at the final Max Axess product, the gripping elements don't look like this. Instead they are the "solid block with a pin through it" formation that we had discussed earlier.
Q. Okay. So let's look at the next iteration of the design at DTX 11. Do you have that in your binder?
A. I do.
Q. Do you recognize DTX 11?
A. I do.
Q. What is it?
A. It's an email chain, ultimately showing what I would call Design Iteration 3.
MR. HAYES: Your Honor, we will offer DTX 11 in evidence.

THE COURT: Any objection?

MR. PELTZ: No objection.

THE COURT: That will be admitted.

(Defendants' Exhibit 11 was received in evidence.)

BY MR. HAYES:

Q. Let's go in this email chain to the beginning of it. I think that's on Page 3.

A. Yes.

MR. HAYES: Can we highlight that?

BY MR. HAYES:

Q. What starts this email chain, Mr. Owen?

A. This is -- the starting email is from Eric to me. This is dated March 19th, 2012, so several days -- a week-plus after Design Proposal 2, where Eric is showing -- conveying to me what the new design that they are talking about now is, the third design.

MR. HAYES: So then let's look over to Page 4, please, Josh.

BY MR. HAYES:

Q. Do you recognize this version of the design on Page 4 of DTX 11, Mr. Owen?

A. I do. This is an image of what I refer to as Design Version 3.

Q. Did you receive this from Mr. Broadaway?

A. I did.

Q. Did you discuss this -- on occasion discuss this design with Mr. Broadaway?
A. Yes, I did. I had some written correspondence with him about it, and also, I believe I had a phone call with him.
Q. Excuse me?
A. I might have had a phone call with him as well.
Q. Okay.
MR. HAYES: So let's go back, then, to the first page of this, Josh, and highlight -- in the bottom left corner, it's an expanded view or exploded view that pulls out.
BY MR. HAYES:
Q. Why don't you explain to the jury what we see here, Mr. Owen.
A. I understand this image to be showing me what the plunger, jaw, gripping element is in this third proposed design. And this is one that I refer to as the T-shaped design as contrasted with the U-shaped design or the simple block. This would be a T-shaped design.
Q. Did you provide any guidance to Mr. Broadaway with respect to the T-shaped design?
A. Yes, I did. I advised Apex and Eric that they should not use this T-shaped design.
Q. Did, in fact, Apex and Mr. Broadaway follow your advice with respect to not using the T-shaped design?

A. Yes, they did. If I look at the final Max Axess product, the gripping element doesn't look like this, T-shaped. Instead it looks like that basic block with a pin through it.
Q. Take a look at DTX 24 in your binder, please, Mr. Owen.
A. Yes.
Q. Do you recognize it?
A. Yes, I do. This is an email from me to Eric dated June 1, 2012.
MR. HAYES: Your Honor, we will offer DTX 24 into evidence.
MR. PELTZ: No objection.
THE COURT: That will be admitted.
(Defendants' Exhibit 24 was received in evidence.)
MR. HAYES: Josh, can you highlight the first full paragraph that starts, "Thank you for sending."
BY MR. HAYES:
Q. So there is a reference in the first sentence, Mr. Owen, to production drawings.
Can you please explain to the jury what production drawings are.
A. Certainly.
I want to contrast production drawings, which are formal drawings that would be used, such as in a factory, from the illustrative drawings that we have seen before, like

the PowerPoint presentation we were just looking at before or a JPEG, a photo.

Production drawings are two-dimensional representations of what the actual product -- proposed product is going to look like, with dimensions, material cull-outs, typically shown in multiple views.

Production drawings is understood to be a normal process. That would be what you would provide to your manufacturer or your manufacturer would provide to you to show you what it is more exactly what's being proposed.

Q. You then say, "I have briefly reviewed them and find no surprises."

What did you mean by "find no surprises"?

A. That the design was what I expected it to be, based on my earlier advice to them and on my understanding of what the product was, and that these production drawings fit that understanding very well.

So basically, it was what I was expecting to see out of production drawings.

Q. The next sentence there refers to the gripping elements.

Can you explain to the jury what you were telling Mr. Broadaway in this email about the gripping elements.

A. Yes. I was talking to him that the gripping elements are block-like. So my understanding in looking at the production drawings, it was a block. It wasn't T-shaped. It

wasn't U-shaped. It didn't have an arm portion. And it was going to have a pin through it.

So this was confirming my understanding, in writing, that these were going to be block-like gripping elements.

MR. HAYES: Josh, can we, then, highlight the last full sentence there, the paragraph that starts, "As such."

BY MR. HAYES:

Q. You say here, Mr. Owen, "As such, my prior analysis still applies."

A. Yes.

Q. What are you referring to when you say "my prior analysis"?

A. My prior analysis would be that letter of March 8th, the infringement opinion that said, if you use a block-like gripping element, and you have one that doesn't have a living hinge and you have so forth, that these designs should be clear of the various Brown patents.

So it's referring back to that March 8th -- primarily back to that March 8th letter and the other communications that I had had to Eric in the intervening time.

Q. Did you see any reason to rewrite or redo the letter, the six-, seven-page letter that you did back on March 8th again here on June 1st, in light of the production drawings?

A. No, I didn't see a reason to redo that letter. The production drawings were exactly -- I mean, were what I expected. There weren't any surprises in them. And it was merely confirming my understanding of the product.

There was no need to go into a lengthy explanation. Eric understood that my advice to them was that, if you use a gripping element like this, that you shouldn't have a problem with the Brown patents. And so they were following that advice.

Q. So at this point in time, on June 1st, had you reviewed everything that you needed to review to provide your clearance for the Max Axess Locking Wrench and your opinion in this case?

A. Yes. I had seen what the final product was going to look like. I understood what the claims were trying to cover and the inner relation between those two. I had seen everything I needed to at that point.

Q. Can you explain to the jury, then, what you meant when you said, "It is unlikely that the proposed designs (6- and 8-inch)" -- I think you meant "should be found to create liability for infringement of the identified Brown patents."

A. Sure.

This is me telling Eric that I think the product is clear, but recognizing that I'm not the final decider on whether it infringes or not. That's ultimately -- if it

comes to the point, which it has in this case, that's going to be up to the Court and the jury to decide.

In this case, I was thinking -- telling him, basically, there shouldn't be liability because either it wasn't going to infringe, which basically that's what I thought, but, as I mentioned earlier, there might be some possibility that the patents, if they read on the proposed device, would have been invalid. Hadn't reached a firm conclusion on that. But it was -- that possibility existed.

So between that and mostly resting on the fact it wasn't infringing, in my opinion, I was telling him, you shouldn't be found liable for patent infringement.

Q. So one more document here to take a look at, Mr. Owen.

If you could, turn to DTX 38 in your binder.

A. I am afraid I might not have that one either.

MR. HAYES: Your Honor, may I approach?

THE COURT: Sure.

(Document tendered.)

BY MR. HAYES:

Q. Mr. Owen, do you recognize DTX 38?

A. I do.

Q. What is it?

MR. PELTZ: Objection, your Honor. A brief sidebar, please.

THE COURT: Sure.

(The following proceedings were had at sidebar:)

THE COURT: What's the objection?

MR. PELTZ: The objection is *Halo* requires the analysis for willfulness to be what happened at the time of the infringement. This is years later. This was a late opinion that they got after Judge Darrah's claim construction ruling. They go out, and now they do a whole invalidity and a whole analysis.

But this is litigation. So it would be -- first of all, it's irrelevant under *Halo*. It used to be relevant, because the test used to be -- under *Seagate*, Judge, it used to be, do they have an objectionable reasonable basis?

THE COURT: What's the purpose for which it's being offered?

MR. HAYES: It's to tell the circumstances. And why we are going to offer it is to show our continued intent to do the right thing. I am not going to go into any detail. In light of additional things, the Court's claim construction and their application, that we wanted to continue to do the right thing and not --

THE COURT: Sustained. Sustained.

(End of sidebar proceedings.)

BY MR. HAYES:

Q. Mr. Owen, as I was saying a minute ago, when you finished up your noninfringement opinion analysis in this

case, had you seen anything by way of any Apex actions that suggested that they were doing anything to deliberately infringe Mr. Brown's patents?

A. No. In fact, I had seen precisely the opposite. They were aware of the Brown patents. They had asked me to take a look at them to help provide design guidance around the Brown patents, and specifically design around those patents, which is something that's completely okay under the patent laws.

Q. Did, in each instance, Mr. Broadaway at Apex follow your advice?

A. Yes. As we discussed, there were at least two other design proposals where they proposed a different type of plunger, and both times I advised them not to do that, and both times they didn't. They went back to the basic -- the first proposal, which was the block-like plunger with a pin through it, that I had taken a look at and advised them would not infringe.

Q. You mentioned earlier in your testimony that you have written opinions and given legal advice on this type of issue 75 to 100 times; is that right?

A. Yes.

Q. Have any of your prior opinions ever been challenged in court?

A. Before this one, no.

Q. Have any of your opinions prior to this one ever been

found to be wrong?
A. No.
Q. Mr. Owen, do you have any doubt in your mind that you did the right thing in this case?
A. This is hard for me. I take a lot of pride in what I do. I take a lot of pride in what I do, and I want to do a good job. I think I did everything reasonable in this case to take a look at what the patent claims meant and provide guidance to my client. I feel bad that my client followed my advice and this has happened to them.

So I think I did the right thing. So yeah, I think I did the right thing and provided guidance to Apex, and they did the right thing following it.

MR. HAYES: Thank you.

THE COURT: Cross-examination?

MR. PELTZ: May I approach, your Honor?

THE COURT: Sure.

(Document tendered.)

CROSS-EXAMINATION

BY MR. PELTZ:
Q. Good afternoon, Mr. Owen.
A. Good afternoon.
Q. My name is Jason Peltz. I represent part of the team for LoggerHead, and I will be asking you some questions today. Okay?

Q. Mr. Owen, just a final couple questions here.

Any incentive for you in this case to give Apex any advice other than what you honestly believe?

A. No.

Q. Would it make sense for you to give advice to a client, like Apex, that would put them at risk of patent infringement?

A. No. It doesn't make sense to me professionally, doesn't make sense to me ethically, and doesn't make sense from any sort of business perspective.

MR. HAYES: Your Honor, I have no further questions. Thank you.

THE COURT: Anything further?

MR. PELTZ: No, your Honor.

THE COURT: Ladies and gentlemen, any questions for this witness?

Sir, you may step down.

(Witness excused.)F/j

THE COURT: I think what we are about to hear next is one more deposition by way of video, and then we will take a short break before closings.

MR. BLOCK: Your Honor, at this time we would like to play the deposition video of Barry Pope. He was the Craftsman product manager.

THE COURT: Okay.

(Excerpt of videotaped deposition of Barry Pope was played in open court.)

THE COURT: That concludes the deposition?

All right. Short recess. We are going to hear closings, and then you will retire to deliberate on this portion of the verdict.

(Jury out at 2:33 p.m.)

MR. PELTZ: Your Honor, I don't know if I moved to admit the last time record, PTX 313.

MR. HAYES: No objection.

THE COURT: That will be admitted.

(Plaintiff's Exhibit 313 was received in evidence.)

MS. SPIRES: Your Honor, may I briefly read a JMOL into the record?

THE COURT: Actually, if you will, just submit it in writing. I am really on a tight schedule. So five minutes and we will get back here.

MR. BLOCK: Your Honor, can I just admit three exhibits?

THE COURT: Sure.

MR. BLOCK: In Mr. Pope's deposition there was PTX 1, PTX 467, and PTX 470. I think the first two are already in evidence.

MS. TINKHAM: No objection.

THE COURT: That's fine. Thanks.

working with Apex most of the time, that you saw in trial. And Stephanie Kaleta was the buyer.

What the evidence shows clearly happened is that when Stephanie Kaleta and Adam Whitney didn't think they could get the deal that they needed to buy the Bionic Wrench, they tipped off Craftsman and said, hey, we want to put this Bionic Wrench on DRTV. We are having vendor difficulties. Why don't you guys make a Bionic Wrench? Why doesn't Craftsman make a Bionic Wrench so we can put the Craftsman Bionic Wrench on DRTV?

And that's exactly what happened. After they were tipped off that there was a vendor issue, the Craftsman folks reached out to Apex and said, we want a Bionic replacement. And Apex delivered.

And not only did they tell Apex, their loyal vendor, that they wanted a Bionic replacement, you also saw evidence throughout this trial that Sears consistently and repeatedly made requests to change whatever Apex design they were reviewing and looking at and making it to be more like the Bionic -- make the handles the same size, we need the torque to be the same way.

You never saw a single email in two weeks where Sears said, but if we do that, would that change -- would we infringe any of these LoggerHead patents if you made the handle closer or whatnot? They didn't care.

They didn't care to show up here at trial, and they didn't care when they were making the Craftsman Max Axess Locking Wrench whether it infringed or not. And that's what the evidence shows. And the 30(b)(6) witness, the corporate representative you heard on video this morning, Brian Reese, you heard him repeatedly.

We asked Mr. Reese, who was involved in making this decision and kind of give it the go? He says Barry Pope.

So we deposed Barry Pope. What does Barry Pope say? He says, "I'm responsible, but I don't know anything about this. So I rely on my engineers."

So Pope points to Iqbal Singh. Where is Iqbal Singh? I don't know. He doesn't work for Sears anymore. We have never seen him. He is not here to tell you what he did to try to avoid infringement of the LoggerHead patents.

But you remember all of that from the last trial -- the timeline, why they did it. You heard Reese testify this morning that he didn't know what they did to -- he was unaware. He tried to look through the documents. I mean, Reese didn't even show up until all this had already happened, and that's the guy that Sears put up to come testify about their efforts to design around.

So what did he do to prepare for that deposition? He reviewed documents in Sears' emails and their document repositories. He didn't talk to a single former employee,

not on the phone, not in person. And that's -- so he showed up.

And when we asked him all the questions about, what did Sears do? What was their engineering plan to get around this patent?

Basically how the evidence has come in is, you have heard two things. They relied on Apex sight unseen. Apex says so. Good enough for us.

And they are indemnified. So even if they are found to infringe, what's it to them? Apex is on the hook for that. They have got to pay the bill.

So Sears, for both those reasons, while our vendor is telling us they designed around, but the evidence is, they didn't know the details of that. They just knew that Apex told them that.

Remember Reese on the video today. He was saying, I saw emails from -- basically what I found from my review of what happened is, Apex sent some emails to Sears that said, we got around the patent. And Broadaway testified this morning, that was good enough for Sears, together with indemnification. That's what we have.

You have deliberate copying by Sears. You also have it by Apex, which I will get to, but I already kind of went through. Asked its biggest hand tool vendor to make a Bionic Wrench. Evaluated prototypes, then gave suggestions

or instructions to its vendor to make it more like the Bionic Wrench.

What you also heard for the first time some of today that really wasn't in the liability phase, you also heard that Sears told Apex and gathered Bionic Wrench promotional materials, right down to the "try me" packaging. Remember that? They didn't just knock the wrench off, they knocked off how to promote it.

They took the "try me" packaging of the Bionic Wrench. You remember the emails that we saw this morning from Sears, that we need to give the Craftsman Max Axess Locking Wrench packaging more sizzle, like the Bionic. So we are going to do "try me" packaging. We are going to show all the different wrenches it replaces right on the packaging, just like the Bionic Wrench.

And you see internal emails from Sears saying, send me pictures of how the Bionic Wrench is being promoted in stores, because we want to do that -- just like that for the Max Axess, is what Sears was saying.

And they did. That's exactly what they did.

As a result of the fact that they abandoned their longtime successful partnership with their vendor LoggerHead and went down a path of infringement, they can't explain what they did or how they did it to try to do anything to not infringe.

And the kind of pointing the fingers -- Reese says Pope. Pope says Singh. Where is Singh? And then you have Reese saying, all we did was rely on Apex, and we are being indemnified.

All of that together -- and there is also an element of the duration of Sears' misconduct. They have been selling these infringing wrenches now for almost five years. This started in September of 2012, is when this all started, when they first came to market with the Max Axess Locking Wrench.

And it's Sears that's selling the Max Axess Locking Wrench. Apex is supplying Sears. Sears puts the Craftsman brand on that and sells it in their stores, knowing that it is just like the Bionic Wrench. And they either knew or certainly should have known that it was infringing the patents that cover the Bionic Wrench.

It was unreasonably risky for Sears to go down the path they did, knowing that the Bionic Wrench was patent-protected and knowing the similarities between the Max Axess Locking Wrench and the Bionic Wrench.

So it was deliberate. It happened for a long time. It was motivated to get every dollar of margin. That was Stephanie Kaleta, every dollar of margin.

Well, if you dump your vendor and go make a copy of their product that infringes a patent for every dollar of

margin, that, ladies and gentlemen, is willful infringement.

One last point on Sears, a fact that you did not know about -- or that was revealed for the first time today was, in the Reese deposition, you saw we questioning him about a Sears press release, where -- it was shortly after this lawsuit was filed.

There was a fair bit of media coverage over the LoggerHead-Sears battle. And it was picked up in a *New York Times* article, an ABC news article, and there was a media firestorm, and particularly social media. And Sears issued a press release to say, we didn't knock off the Bionic Wrench.

That's -- what I was questioning Mr. Reese about was the Sears press release that says, we take IP very seriously. We didn't -- while there might some -- very corporate speak. While there might be some visual similarities with another product on the market, we copied a 1957 Buchanan design.

You have been here for two weeks and know full well they didn't copy the 1957 Buchanan design. They copied the Bionic Wrench. But that didn't stop them from issuing a press release saying, we take LoggerHead's IP very seriously, and we didn't do anything to infringe their patents. We used a 1957 Buchanan patent. They didn't. That was wrong. It was false. And they tried to cover up their infringement with that press release.

lawyer on day one.

Yeah, they called a patent lawyer on day one. And that patent lawyer spent about 14 to 18 hours. And in the three months -- between the time Apex got the call and they launched the Max Axess, it was about three months, and they got to market. Now contrast that with the development of the Bionic Wrench and the time that took. It's not even close.

They knew exactly what they were doing, and then they even said it in the document. Let's go get the letter from the lawyer so we can say we didn't -- so we can say we did not intend to infringe LoggerHead's patents.

It was conscious. That is from the general counsel of the company.

And in some ways, kind of poor Mr. Broadaway, in a way. You saw, when we walked through the documents with him, he is begging for somebody -- the general counsel, Mr. Munn; the president, Mr. Constantine -- to tell him they have what they need or to tell him that they need to get more analysis before they can launch.

But then we get to May 22. And you heard Mr. Broadaway say on the stand today, on May 18th, four days before they commit to Sears on the Max Axess program, on May 18th Mr. Broadaway said on the stand today, he felt like they needed something more. And when he went to the general counsel and said, should we get something more? the general

counsel said, how much is this worth again? About $2 million a year and hundreds of thousands of units.

And then the president of the company chimes in and says, yeah, we need to hurry up. We can't wait for some patent lawyer to tell us this is okay to do. Let's go ahead and get it so that later, if we get sued, we can say it wasn't willful. But you have the general counsel and the president of the company say three or four times in two different documents all in the same day, don't wait for the lawyers. This is too big of an opportunity to pass up. The profits are unbelievable. We are going to buy it from Great Knives for four or five bucks and sell it to Sears for nine or ten. And we are going to make that spread every month for the next several months. We are not waiting for some IP clearance document.

And Mr. Broadaway was kind of begging for somebody to say, shouldn't we do something else? All we have is a preliminary letter from Mr. Owen, dated March 8th, and some emails that say that analysis applies. How could that analysis apply? His analysis was of a product that looked like the Buchanan 1957 patent.

And two times at two design iterations, where we get to a product that looks way more like the Max Axess than Buchanan, he said, my prior analysis still applies. It couldn't have. It couldn't have applied.

MR. SERNEL: I would suggest we confer and then communicate with the court staff to schedule something. We can call in Monday. Is that okay?

THE COURT: All right. That sounds good. If you could, contact Judge Pallmeyer's chambers on Monday to set a next court date.

Are you going to be taking back any exhibits?

THE CLERK: She usually has them take them.

THE COURT: On the record, I am returning the exhibits to the parties. Take home whichever exhibits go to -- refer to your party.

The parties will call regarding next court date. And other than that, all I have to do is enter judgment on the last portion of the verdict.

Anything else the Court needs to address today?

MR. SERNEL: I don't think so, your Honor.

MR. SKIERMONT: No, your Honor.

THE COURT: Thank you, everybody.

MR. SKIERMONT: Thank you.

(An adjournment was taken at 5:05 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward May 15, 2017.
Official Court Reporter
F