

Exh. D

1 A I'm a partner at Barnes & Thornburg.

2 Q Okay. And how long have you been a partner at
3 Barnes & Thornburg?

4 A Approximately one year.

5 Q And can you briefly tell us about your
6 educational background and give us up to and
7 including the year you graduated from law school?

8 A I attended Paul Harding High School in Fort
9 Wayne, Indiana. I attended the University of
10 Notre Dame. I graduated in 1989 with a B.S. in
11 Metallurgical Engineering. And I graduated from
12 the Notre Dame Law School with a Jurist Doctorate
13 degree in 1992.

14 Q And did you take full-time employment in 1992?

15 A Yes, I did.

16 Q What did you do?

17 A I was an associate with Barnes & Thornburg.

18 Q And, at that time, what were your job duties?

19 A I was a first-year associate in the Intellectual
20 Property Department, you know, learning how to
21 practice patent and trademark law at that point.

22 Q How long were you an associate with Barnes &
23 Thornburg?

24 A I was an associate with Barnes & Thornburg until
25 January of 2000, I believe.

1 Q And did you take another job at that time?

2 A Yes, I did.

3 Q Where did you go?

4 A I became an associate with Baker & Daniels.

5 Q And how long were you an associate with Baker &

6 Daniels?

7 A I was an associate for one year. Actually, a

8 little less than one year.

9 Q And what was your new title with Baker & Daniels?

10 A I became a partner in January, 2001, I believe.

11 Q And how long were you a partner with Baker &

12 Daniels?

13 A Until October 31, 2008. Wait. Yes, 2000 -- yes,

14 2008.

15 Q And at that time you became a partner --

16 A Partner with Barnes & Thornburg.

17 Q -- with Barnes & Thornburg?

18 A Exactly.

19 Q And during the time that you've been a practicing

20 attorney since 1992, has your practice focused on

21 patent and trademark law?

22 A Yes.

23 Q And has a focus of that practice been the

24 prosecution of patent applications?

25 A You'd have to define focus for me. I mean, I --

1 at Baker & Daniels?

2 A Yes.

3 Q What department was that?

4 A The intellectual property team.

5 Q You understand that this case involves
6 allegations of inequitable conduct against
7 Heartland and against Mr. Cooper and yourself; is
8 that correct?

9 A Yes.

10 Q What is your understanding of what inequitable
11 conduct is?

12 A My understanding of inequitable conduct is when a
13 person associated with the prosecution of a
14 patent application intentionally withholds
15 information from the patent office or
16 intentionally presents false information with the
17 intent of -- I should say material false
18 information or material information with the
19 intention of misleading the patent examiner or
20 the patent office.

21 Q You're aware that the patent in this case has
22 been called the .650 Patent, correct?

23 A Yes.

24 Q Did you commit inequitable conduct in the
25 prosecution of the .650 Patent?

1 A No.

2 Q Do you know of anybody else who did?

3 A No.

4 Q What did you do to prepare to come to testify
5 here today?

6 A I reviewed the deposition transcript of
7 Mr. Tuttle. I reviewed the deposition transcript
8 of Mr. Cooper. I reviewed the prosecution
9 history, what I believe was the prosecution
10 history file that I was working with at Baker &
11 Daniels for the .650 Patent. I reviewed certain
12 e-mails between myself and others relating to
13 that matter. I reviewed certain provisions of
14 the MPEP and the CFR.

15 Q Did you review the -- the provisional application
16 file?

17 A Not that I recall.

18 Q At this point, what I'd like to do is I'd like to
19 focus your attention on the actual case itself.

20 A Okay.

21 Q Can you tell us how you first became involved in
22 the prosecution of what became the .650 Patent?

23 A Yes. The application was originally being
24 handled by Barnes & Thornburg. And it's my
25 understanding that Barnes & Thornburg had a

1 conflict that required them to withdraw -- or I
2 shouldn't say required. They had a conflict of
3 some sort that resulted in the file being
4 transferred to Baker & Daniels.

5 Q And I think the record's clear on this, but let's
6 be sure.

7 You were at Baker & Daniels all the way up
8 through the issuance of this patent; is that
9 right?

10 A Yes. I -- I believe that's correct, yes.

11 Q And at the time that you became aware of this
12 conflict, can you tell us how the -- how the file
13 came to be in your possession or how the
14 responsibility for the prosecution came to be
15 yours? Tell us about that.

16 A I believe Jim Brotherson of Baker & Daniels
17 called or e-mailed or stopped by my office and
18 asked me if I could become involved in this
19 matter.

20 Q And did you, in fact, get the file from
21 Mr. Cooper and Barnes & Thornburg?

22 A I believe I did, yes.

23 Q And, at that time, approximately what -- what
24 month, year? Do you recall when that was?

25 A I don't recall.

1 Q Okay. Would that have been your normal practice
2 to do that?

3 A Yes.

4 Q Okay. And who was the person at Heartland that
5 was your contact, if there was such a person,
6 when you began working on this, what became the
7 .650 Patent?

8 A Scott Tuttle.

9 Q And what did you understand Mr. Tuttle's title to
10 be, if any?

11 A I -- I don't -- I don't recall what his title
12 was.

13 Q Was he the only contact you had in the -- from
14 Heartland in connection with the prosecution of
15 this patent?

16 A That depends what you mean by contact.

17 Q Well, what I'm trying to get at is, who was the
18 person that you were working with at the client
19 for direction and things like that to get the --
20 the prosecution handled?

21 A Primarily Mr. Tuttle.

22 Q Okay. You said, "Primarily Mr. Tuttle." Who
23 else did you have contact with on those issues?

24 A I had contact with Mr. Brady on this matter, and
25 I had contact with Mr. Rhymer on this matter. I

1 may have had contact with others, but those are
2 the three I recall.

3 Q Would it be fair to say that Mr. Tuttle was the
4 one that you had, by far, the most contact with?

5 A I believe that's the case.

6 Q And did you take your direction from Mr. Tuttle?

7 A If any of the three of them gave me direction, I
8 would've taken it.

9 Q Can you tell us about what contacts you had with
10 Mr. Brady in connection with the prosecution of
11 the 6 -- what became the .650 Patent?

12 A Yes. I met with Mr. Brady at Heartland, I
13 believe, on at least three occasions. I'm sure
14 there were at least two, might have been three,
15 might have been more. I recall speaking to him
16 on the phone on at least one occasion. There may
17 have been e-mails with Mr. Brady as -- as well.

18 Q Can you tell us what the meetings were about on
19 these three occasions that you met with Mr. Brady
20 about the prosecution of the .650 Patent?

21 A Generally speaking, yes. We would have
22 discussed -- or we did discuss, I should say, the
23 status of the application. We discussed the
24 subject matter being pursued in the application.
25 We discussed -- and I just want to make clear

1 this isn't necessarily all at the same meeting.

2 I'm just saying over the course of my
3 dealings with Mr. Brady, these are the topics we
4 -- we discussed.

5 Q Uh-huh.

6 A We discussed whether or not there was prior art
7 that he was aware of. And we discussed potential
8 infringement of any claims that might issue. And
9 we discussed the possibility of expediting
10 issuance of the patent. And that's everything I
11 can recall.

12 Q And all of those -- if I -- I want to make sure
13 I'm clear on this. That was the at least three
14 meetings that you had with Mr. Brady during the
15 pendency of the .650 application; is that right?

16 A I can't say for sure that all three occurred
17 during the pendency. It's possible one occurred
18 after the .650 issued.

19 Q Okay.

20 A But at least some of those discussions would've
21 occurred during the pendency of the .650.

22 Q And what about Mr. Rhymer? What -- what -- well,
23 wait a minute. Let me back up.

24 You said you spoke on the phone at least
25 once --

1 meetings that you had with Mr. Brady?

2 A I don't know that he was present at all three of
3 them. I have a similar -- similar recollection.
4 I met with Mr. Rhymer, I believe, at least twice.
5 I believe Mr. Brady was present at at least one
6 of those meetings, possibly two. And it's
7 possible that I met with Mr. Rhymer more than --
8 more than twice; but there's at least two times
9 that I recall.

10 Q Okay. And did you discuss the same topics then
11 with --

12 A Yes.

13 Q Okay. Tell us what you discussed with Mr. Brady
14 or Mr. Rhymer with respect to the status of the
15 application.

16 Can you give us an overview of what that
17 topic was?

18 A Yes. They wanted to know how much longer it was
19 going to be until we could expect the application
20 to actually -- well, actually, they wanted to
21 know how much longer it's going to be until we
22 could expect to get any action from the Patent
23 and Trademark Office, as I recall. The
24 application was pending for some period of time
25 without an office action, and they were very

1 travel trailer that was configured such that it
2 would effectively with a -- with an extended bed
3 pickup truck or a pickup truck have a -- have a
4 better turning radius.

5 The cab of the truck would not hit the front
6 of the travel trailer as -- as the tow vehicle
7 and tow unit were -- were making a turn.

8 Q Did that improved fifth wheel travel trailer --
9 did that include changes to the end cap as well
10 as the frame?

11 A Yes. That's my understanding.

12 Q Okay. And did -- in your mind, did Mr. Brady,
13 Mr. Rhymer, and Mr. Tuttle all have the same
14 understanding of what the invention was?

15 A I -- I believe so.

16 Q You mentioned that you also spoke with Mr. Brady
17 and Mr. Rhymer about the prior art that they were
18 aware of; is that correct?

19 A Yes.

20 Q Tell us what conversations you had with Mr. Brady
21 and/or Mr. Rhymer about the prior art they were
22 aware of.

23 A Well, what I recall specifically, and there could
24 be additional conversations, but I recall at some
25 point in this process Mr. Fountain had sent a

1 Q You can answer.

2 A Not -- in my opinion, not that I recall. There
3 was nothing unusual.

4 Q I may have asked this. And if I -- if I did, I
5 apologize. But what did you tell Mr. Rhymer,
6 Mr. Brady, or Mr. Tuttle was the prior art that
7 you needed to be aware of or be made aware of in
8 connection with the prosecution of this patent?

9 A Well, I mean, you can't identify specific pieces
10 of prior art that you're -- I can't identify
11 specific pieces of prior art that I'm unaware of.
12 So, I -- you know, I can't say to them, "I need
13 you to give me this piece of art."

14 You know, we discussed that, you know,
15 anything that was out there, prior patents,
16 publications, products, you know, that were
17 similar to this or achieve a similar purpose or
18 that, you know, someone might consider material,
19 you know, to their invention, it should be
20 brought to our attention and that they should err
21 on the side of disclosing more to us, not less,
22 and then we'll -- I could sort out whether or not
23 something actually needed to be disclosed.

24 Q Did you have any discussions with Mr. Cooper in
25 connection with taking over the -- the case?

1 please?

2 A 85 and 86? Yes.

3 Q Yes, sir.

4 A Okay.

5 Q And what are 685 and 686?

6 A This is an Information Disclosure Statement.

7 It's used to essentially bring to the attention

8 of the patent examiner information which could

9 potentially be material to patentability.

10 Q And did you prepare this or have someone in your

11 office prepare it or do you recall?

12 A I -- either I would've -- I most likely had my

13 paralegal prepare this at -- at my direction.

14 Q And how did she determine what patents or

15 materials to be included in the information

16 disclosure statement?

17 A Well, I don't -- I don't know that she did. As I

18 recall, there were patents in the file. It

19 appeared that a search had been done or -- or art

20 had been gathered from somewhere. And I would've

21 instructed her to prepare an IDS including all

22 that information.

23 Q And that's your recollection? You told her to

24 put all the -- all the patents into the IDS?

25 A Yes.

1 Q Okay. And if I -- I want to make confident --
2 strike that.

3 The patents that you put in this information
4 disclosure statement were already in the file
5 when you received it? Is that your recollection?

6 A That is my recollection.

7 Q Could you take a look at Pages 680 to 681? Let
8 me know when you've done that.

9 A Okay.

10 Q And what are those documents?

11 A This is a Response to a Notice to File Missing
12 Parts of, I assume, this patent application.

13 Q And can you tell us, did you file those missing
14 parts or did Mr. Cooper or can you tell?

15 A Appears that Mr. Cooper did.

16 Q Can you help us understand why the IDS would be
17 kind of in the middle of the stuff that Mr.
18 Cooper was filing? Because you filed the IDS,
19 correct?

20 A Yes. I mean, I have to go back to the timing. I
21 assume that before he filed the IDS, the file was
22 transferred to me. I mean, I assume it was a
23 timing issue. But I -- other than that, I can't
24 say.

25 Q Well, let me ask a better question. There was no

1 like it made some objection to the drawings and
2 the specification.

3 Q And how did you respond to this office action?

4 A As I believe -- as I recall, I believe the
5 response was to correct whatever informalities
6 there were with respect to the drawings and the
7 specification, cancel the rejected claims,
8 thereby seeking allowance of the allowed claims.
9 That's what I recall.

10 Q And when you look at the Information Disclosure
11 Statement by Applicant and then Notice of
12 References Cited, Pages 611 and 612 --

13 A Uh-huh.

14 Q -- can you tell us what the significance of those
15 pages are?

16 A That's the prior art that the examiner located in
17 his or her search and made of record in this
18 application, some of which I assume was used to
19 reject the claims that were rejected. Yes.

20 Q What is the significance of the examiner initials
21 being next to the art that was submitted by
22 Heartland, if any?

23 A That means that the examiner considered those
24 references in the course of his or her handling
25 of this patent -- his. It's Michael Stabley. In

1 the course of his handling of this patent
2 application, his examination of it.

3 Q Did you have any communication with Mr. Stabley
4 at any point?

5 Did you ever speak to him in connection with
6 this application?

7 A I believe I did.

8 Q And can you tell us on what occasion and about
9 what?

10 A I don't recall what the dates would be. I
11 believe my only discussions with Mr. Stabley were
12 about the status of the application and when we
13 could expect to receive an action. I don't
14 believe I had any substantive conversations with
15 him.

16 Q Were those conversations part of the desire by
17 Heartland to get this patent issued more quickly?

18 A Yes.

19 Q Take a look at Pages 587 to 591 and tell us what
20 those are.

21 A This is the response that was filed to the office
22 action we've just discussed.

23 Q And this is the response that was made that
24 allowed the three claims that had been allowed to
25 issue and led to the continuation applications;

1 Q There was some indication from the patent office
2 that it was gonna publish by a certain date, and
3 then it published actually a later date.

4 Do you recall anything like that?

5 A I don't recall that.

6 Q Do you recall any discussions with Mr. Tuttle
7 about when the application would publish?

8 A Yes. I have some recollection that we discussed
9 when it would publish.

10 Q Can you tell us about the substance of those
11 recollections?

12 A I know we talked about applications normally
13 publishing 18 months from their priority date. I
14 don't recall what else we discussed on that
15 topic.

16 Q Would you take a look at Pages 545 to 557, if you
17 would, please?

18 A Sorry. 545 through 57?

19 Q Yes, sir.

20 A Okay.

21 Q 545 has on it an e-mail from you to Mr. Tuttle
22 including the formal drawings for the patent; is
23 that right?

24 A Yes.

25 Q And then at the top, Mr. Tuttle responds to you

1 and identifies different changes that he thinks
2 needs to be made and approves the remaining
3 drawings; is that correct?

4 A Yes.

5 Q Do you recall discussing with Mr. Tuttle these
6 drawings?

7 A I don't --

8 MR. LADUE: By these, you mean
9 the ones that are in this --

10 MR. IRMSCHER: Yeah. The ones
11 that are the --

12 MR. LADUE: -- range?

13 MR. IRMSCHER: -- 545 to 557.

14 A You mean beyond the discussion that's contained
15 in the correspondence?

16 BY MR. IRMSCHER:

17 Q Yes.

18 A I don't recall discussing them with him. It's
19 possible I did.

20 Q Well, would it be fair to say that Mr. Tuttle
21 reviewed, made corrections to, and approved the
22 drawings?

23 A Yes.

24 Q And did anybody else at Heartland review and
25 approve the drawings, to your knowledge?

1 A Not that I'm aware of.

2 Q And why did you happen --

3 A You're talking about this set of drawings?

4 Q Yes.

5 A Not that I'm aware of.

6 Q And why did you happen to send this set of
7 drawings to Mr. Tuttle for his review and
8 approval?

9 A I assume that the application was filed with
10 informal drawings or, alternatively, there was an
11 error in the drawings and new drawings needed to
12 be submitted. But I don't recall exactly why
13 these were prepared.

14 Q Did you have any sense at the time that you
15 were -- at any time that you communicated with
16 Mr. Tuttle that he did not understand what the
17 invention was?

18 A No.

19 Q Did Mr. Tuttle ever tell you he didn't understand
20 what the invention was?

21 A No.

22 Q Would you please take a look at Pages 542 and
23 543?

24 A (Witness Complying.) Okay.

25 Q Why did you have your paralegal send these

1 A Well, they're --

2 Q Portions of it?

3 A -- drawings sheets. They're portions of it.

4 Q Okay. And why did you send that material to

5 Mr. Tuttle?

6 A Well, one, I wanted to update him on the fact

7 that an office action had been issued and what

8 the results of that action were. I also wanted

9 to show him what the patent examiner was relying

10 on to reject the claims that were rejected so

11 that we could discuss the prior art and the

12 rejections and the allowed claims and the -- the

13 office action.

14 Q And did you, in fact, discuss those matters with

15 Mr. Tuttle?

16 A It's my recollection that I did, yes.

17 Q Would you take a look at Page 486, please?

18 A Okay.

19 Q Do you recall receiving this e-mail or --

20 A I recall receiving this e-mail, yes.

21 Q Okay. Do you recall discussing with Mr. Tuttle

22 what the prior art relied upon by the examiner

23 disclosed?

24 A Yes.

25 Q Tell us about those discussions.

1 A I believe -- as I recall, Mr. Tuttle's view was
2 that the horse trailer and the conventional
3 travel trailer weren't particularly relevant or
4 applicable. We would've also discussed the
5 allowed claims. And I assume around this time we
6 were probably having discussions about filing a
7 continuation application.

8 Q Would you take a look at Page 484, please?

9 A (Witness Complying.) Okay.

10 Q Do you recall having -- or receiving the e-mail
11 that's from Mr. Tuttle and your response to it?

12 A Yes.

13 Q Were there discussions beyond just this e-mail at
14 this time?

15 A Yes.

16 Q Tell us about those discussions.

17 A Well, they're referenced in my response to
18 Mr. Tuttle. We discussed what the claims that
19 were allowed cover. We discussed filing a
20 further application, a continuation application,
21 to seek other claims.

22 Q And is that, in fact, what happened?

23 A Yes.

24 Q Tell us what you can about your recollection of
25 discussing what the claims that were allowed

1 would cover with Mr. Tuttle at this time.

2 And, at this time, I'm talking about July of
3 2007.

4 A As I recall the claims, three claims were
5 allowed. One was an independent claim. And they
6 related essentially to the travel trailer chassis
7 and the construction of the frame with sort of a
8 cut-out or notched or otherwise configured
9 corner.

10 And I recall discussing with Mr. Tuttle just
11 that; that this is -- this is the claim, this
12 is -- you know, if -- if something has these
13 elements, then this claim covers it.

14 Q Did you have any under -- did it appear to you
15 that Mr. Tuttle understood what the claims
16 covered and what the issues were?

17 A Yes.

18 Q And who transmitted the decision to you to take
19 the claims that you could get and file a
20 continuation?

21 A I believe it's in Mr. Tuttle's e-mail here.

22 Q Did you discuss that with any of the other
23 inventors at that time?

24 A I don't recall at this time if I discussed this
25 with Mr. Rhymer or Mr. Brady. It's -- it's

1 Q But in this case, you actually did that? That's
2 your testimony, right?

3 A I think I just answered that question.

4 Q So, the answer's yes, isn't it?

5 A Yes. I actually sat down, and I read this
6 application. And, to my recollection, nothing
7 came to mind when I was reading it that I
8 thought, oh, gee, you know, I'm aware of this
9 thing and this is similar and this ought to be
10 submitted; at least anything that would be, you
11 know, noncumulative.

12 Q Anything that would be noncumulative? What do
13 you mean by that?

14 A Well, I believe there's art in the file that
15 shows, for example, fifth wheel travel trailers
16 or travel trailers. If there's something that
17 shows three travel trailers, you know, submitting
18 yet another example of the same kind of travel
19 trailer would be cumulative.

20 MR. FOUNTAIN: Excuse me just for
21 a minute. Perhaps we could have that
22 door shut -- or window shut.

23 MR. LADUE: Yeah.

24 BY MR. FOUNTAIN:

25 Q You mentioned earlier you participated in the