1 IN THE UNITED STATES DISTRICT COURT 2 IN AND FOR THE DISTRICT OF DELAWARE 3 - - -4 ETHANOL BOOSTING SYSTEMS, : CIVIL ACTION 5 LLC, and MASSACHUSETTS : INSTITUTE OF TECHNOLOGY, : 6 : Plaintiffs, : 7 : vs. : 8 : FORD MOTOR COMPANY, : 9 : Defendant. : NO. 19-196-CFC-SRF 10 11 _ _ _ 12 Wilmington, Delaware Wednesday, January 8, 2020 13 9:00 o'clock, a.m. 14 - - -15 BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J. 16 17 **APPEARANCES:** 18 FARNAN LLP 19 BY: BRIAN E. FARNAN, ESQ. 20 -and-21 22 23 24 Valerie J. Gunning Official Court Reporter 25

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1	ADDEARANCES (Continued):		4
	SUSMAN GODFREY LLP	1	THE COURT: Sure.
3	BY: MATTHEW R. BERRY, ESQ. and ANDREW C. HEALY, ESQ.	2	(Mr. Farnan handed a slide deck to the Court.)
4	(Seattle, Washington)	3	THE COURT: Go ahead.
5		4	MR. HEALY: Thank you, Your Honor. Before
6	Counsel for Plaintiff	5	turning to the first term in dispute, and I would note for
		6	the record that we jointly filed something yesterday that
'	MORRIS, NICHOLS, ARSHT & TUNNELL LLP	7	should set forth what we had requested, an order of claim
8	BY: RODGER D. SMITH, II, ESQ.	8	terms in which to discuss the terms. I just want to
9		9	double-check that that is acceptable for Your Honor.
10	-and-	10	THE COURT: For right now, you can start with
11	ALSTON & BIDD II D	11	claim E, yes.
1	BY: MICHAEL S. CONNOR, ESQ.,	12	MR. HEALY: Claim?
12	NATALIE C. CLAYTON, ESQ. and ANDREW J. LIGOTTI, ESQ.	13	THE COURT: I thought you wanted to begin with
13	(Atlanta, Georgia)	14	claim term E.
14		15	MR. HEALY: Yes. Before turning to the first
15	Counsel for Defendants	16	dispute, I would like to provide the Court with a little bit
		17	of background because I think it's helpful to understanding
16		18	claim term E.
17		19	Number one, there are four patents in dispute,
18		20	the '839, the '519, the '166 and the '826. Each of these
19		21	patents is owned by MIT. Each of these patents continues
20		22	from and shares a common specification with U.S. Application
21		23	No. 10/991,774. That application was filed in November of
23		24	2004, eventually issued. And for purposes of today, Your
25		25	Honor, we have cited it because each of the patents shared
	3		5
1	PPOCEEDINGS	1	the specification with that application which was submitted
	FROCLEDINGS		as Exhibit 1 All of our references are to Exhibit 1 for
2	(Proceedings commenced in the courtroom	2	the Court's convenience
	beginning at 900 a m)		Each of these patents was invented by the same
	beginning at 9.00 a.m.)		group of three inventors. Dr. Dapiel Cohn. Dr. Loclie
	THE COUPT: Good morning Please be seated		Bromberg and Dr. John Heywood Each of these inventors are
	Mr. Fornan?		employed by MIT. They're pictured here on the left
	MD FADNAN: Cood manning Your Honor, Drinn	'	Collectively they expert roughly ten decades
	Farnan on behalf of the plaintiff, and with mo today is Matt		THE COUDT: 1 at a right to the marite
10	Parry and Andres Healy, both from Susman Codfroy in Seattle	10	MD HEALVI Voc Your Honor
11	Weshington	11	MR. HEALT: Tes, four nonor.
12	THE COUDT: Thank you Mr Smith?	12	technology I don't need to know shout the inventors'
12	MS SMITH: Good morning Your Honor Bodger	12	background
14	Smith from Marris Nichols on babalf of the defendant. Ford	14	MP HEALVI Voc Your Honor Did you say you
15	Mater Company	15	wanted to discuss background technology. Your Honor?
10	Tim ising at source table by my so source	10	THE COURT: To the extent you think it's
10	I m joined at course table by my co-courser,	10	THE COORT: To the extent you think it's
17	Mike Connor, Natalle Clayton, and Andrew Ligotti. We re		necessary. It's pretty basic relative to a lot of
10	and joined this morning by Joe Denz, who is chief if	10	recumology we see here. I think perhaps one term presents
20	Counsel at Ford.	20	me with some questions, but I think a lot of this is very
20	MS SMITH: These you	20	MD HEALV, Absolutely, Very Hease, Well turns
21	MB. SMITH: THANK YOU.	21	MR. NEALT: ADSOLUTELY, YOUR MONOR. WE'LL TURN
22	ITE COUKI: All right. Do you want to all start	22	ngni io the terms. Claim term 5, final that is directly interstad
23	MD HEALY, Your House and M. S.	23	Claim term E, fuel that is directly injected,
24	MR. NEALT: YOUR HONOR, MAY MR. Farnan approach	24	number one. There's certainly a number of versions of this
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1	dispute.	1	THE COURT: I know you would. This is the best
2	The parties' dispute to each of these terms	2	you've got. Right?
3	effectively boils down to the meaning of the word fuel, Your	3	MR. HEALY: It is not. This is the first
4	Honor. As demonstrated by our agreed claim construction, we	4	reference in which the patent specifically contemplates that
5	have largely agreed to what the direct injection, the	5	you could directly inject gasoline as well as solely
6	directly injected term means. The same is true of the first	6	ethanol, which is the previously described embodiment.
7	fueling system. And so the core dispute here is as to the	7	Skipping forward to the next reference, this is
8	meaning of the word fuel and the crux of the dispute is	8	on the following page, page 6, columns 5 through 8. The
9	this.	9	patent then describes how direct injection of gasoline
10	Ford says that number one, fuel cannot equal	10	results in approximately a five-octane number decrease in
11	gasoline in the context of these terms.	11	the octane number required by the engine. This serves the
12	Number two	12	purpose of the invention, which is if you directly inject a
13	THE COURT: Well, wait. Where does Ford say	13	fuel, that entitles you, or that basically results in
14	that?	14	something called or a cooling effect on the cylinder, the
15	MR. HEALY: Ford's construction, Your Honor, and	15	cylinder temperature. That results in, as the patent
16	I will just turn back to the previous page. Fuel that	16	explains, an effective increase in the octane of the fuel,
17	contains an antiknock agent that is not gasoline. So Ford's	17	which allows you to better resist knock.
18	position is that fuel cannot mean solely gasoline. It has	18	So this is page 6. It talks about again direct
19	to be gasoline plus or something other than gasoline	19	injection of gasoline and then expressly identifies
20	entirely.	20	THE COURT: Again, it's saying this is what's
21	Number two, Your Honor, Ford's position is that	21	unsatisfactory. Right? If you had direct injection of
22	rule must be construed for this purpose of these terms to	22	gasoline, you get a lower octane number, right, whereas the
23	require two different fuels. For the Court's benefit, that	23	engine, the invention is saying you want a higher octane to
24	is the second part of its construction here. The terms must	24	address the knocking.
25	be different from the first fuel used for port injection in	25	MR. HEALY: No, Your Honor. Right here what
	7		9
1	the second fueling system.	1	it's saying, if you directly inject gasoline, that results
2	No support exists for either of these	2	in a five-octane number decrease in the octane number
3	limitations, Your Honor. First, none of the patents at	3	required by the engine.
4	issue define the word fuel to exclude gasoline or to require	4	By directly injecting the gasoline
5	that different fuels be used. In fact, they do the	5	THE COURT: Do you think they are trying to
6	opposite. The specification, and this is Exhibit 1, again,	6	teach you how to do it poorly?
7	the original application at page 5, columns 25 through 26.	7	MR. HEALY: No, Your Honor. I think what the
8	THE COURT: So that's clearly a criticism of the	8	patent is trying to do is say, here is the preferred
9	existing state of affairs. Right? It's saying the	9	embodiment, ethanol. If you directly inject ethanol, you
10	invention is designed to overcome this, isn't it?	10	get this much of an increasing effect of octane, you get
11	MR. HEALY: I don't believe so, Your Honor.	11	this much of a benefit to the antiknock properties of the
12	Certainly, I think that the specification contemplates that	12	ethanol fuel. It's also saying, and this is demonstrated by
13	the ethanol is the preferred embodiment. It says that	13	the previous page, in addition to directly injecting
14	expressly, and it certainly contemplates that ethanol would	14	ethanol, you could also directly inject gasoline. And then
15	be a more beneficial or more effective direct antiknock,	15	it doesn't certainly admittedly say that's not as effective
16	direct injection antiknock agent, but the patent also	16	as ethanol. Ethanol would be the preferred embodiment. But
17	contemplates that while perhaps less effective, the direct	17	it the same benefit. It has a similar general benefit. The
18	injection of gasoline as well is a potential, it has a	18	specifics and the number of the octane enhancement, the
19	viable benefit.	19	cooling effect of directly injecting gasoline is not as
20 24	THE COURT: You were discussing kind of the	20	effective as ethanol, agreed, but it still accomplishes the
21 22	problems. Right? You're saying it's possible to have an	21	purpose.
22 วว	engine that does this, but clearly, the invention that's	22	THE COURT: What's the title of the patent?
∠ວ ว₄	described in the specification is a dual fuel engine.	23	MR. HEALT: The title of the patent, Your Honor,
24 25	MR. REALT: WE WOULD CERTAINLY DISAGREE WITH	24	i uon i nave ni nere arrectiy in front of me, but I belleve
	28 chapte Dage 6 th	<u> </u>	
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1	management system for variable ethanol octane enhancement of	1	THE COURT: So why is it relevant?
2	gasoline engine.	2	MR. HEALY: The Federal Circuit has held
3	THE COURT: Who came up with the title?	3	regardless of whether a claim is amended, that the original
4	MR. HEALY: Presumably the inventors, Your	4	claims of the original application remain a part of the
5	Honor.	5	specification and are useful and certainly helpful in
6	THE COURT: Those three MIT guys that you wanted	6	understanding the context and the scope of the
7	to tell me about their great bios?	7	specification, Your Honor.
8	MR. HEALY: Yes, Your Honor.	8	THE COURT: Doesn't the fact that they
9	THE COURT: So when they wrote this patent, they	9	jettisoned that claim also inform me?
10	were thinking it's a dual fuel system. Right?	10	MR. HEALY: I mean, I don't believe so, Your
11	MR. HEALY: I don't belive so, Your Honor. I	11	Honor. Certainly, the context of why it was jettisoned was
12	mean, this is outside the certain contexts of the record,	12	with respect to specific prior art references and specific
13	and understandably	13	discussions. None of those bear certainly support is not
14	THE COURT: The title is not outside the record.	14	demonstrated, bear relevance to a single gasoline embodiment
15	Right?	15	as we're contemplating here, Your Honor.
16	MR. HEALY: No, Your Honor.	16	THE COURT: Okay.
17	THE COURT: Who wrote the abstract?	17	MR. HEALY: And I do just want to mention, the
18	MR. HEALY: Also the inventors, Your Honor.	18	asserted patents also say when gasoline alone cannot be
19	THE COURT: All right.	19	used. This is the '839 patent, which is the first of the
20	MR. HEALY: And now, Your Honor, with respect to	20	four patents at issue here. Sparking is an issue of claim 1
21	the context of further support for certainly our position	21	where the engine is fueled with ethanol. So, again, when
22	that the use of gasoline alone is contemplated by the	22	the patentees, when the inventors intended for the specific
23	inventors, was contemplated by the inventors when they	23	fuel limitation to be in place, it said so expressly.
24	invented the patent, the original application in 2004 is the	24	THE COURT: Doesn't that just basically, they
25	original claim of the original patent.	25	are limiting or they are identifying the specific second
	11		13

1	Claim 1, fuel management system for efficient	1	fuel to be used?
2	operation of a spark ignition gasoline engine comprising a	2	MR. HEALY: Absolutely correct, Your Honor. I
3	gasoline engine, a source of an antiknock agent and an	3	agree with that. The key point for us, Your Honor, is that
4	injector for direct injection of the antiknock agent into a	4	the definition of fuel is understood. It's a plain and
5	cylinder of the engine, and a little bit more detail about	5	ordinary meaning. Anyone on the street would understand
6	that direct injection. And then claim 14 and claim 15	6	what fuel is. Anyone that would understand probably better
7	embodiments specifically recite gasoline is port injected	7	than the fact that ethanol or methanol might be fuel, that
8	into the engine. Gasoline is directly injected into the	8	gasoline is a fuel. So when the patentees intended to limit
9	cylinder, Your Honor. It's a direct injection component.	9	the word fuel, when they intended to have a clear and
10	And from our perspective, this is further	10	unmistakable limitation as to the scope of that term, they
11	support that consistent with what the specification says,	11	said so expressly. Again, claim 15 of the '839 patent also
12	absolutely, ethanol is a preferred embodiment. Ethanol is	12	demonstrates this. I will turn to the next slide.
13	contemplated to be the ideal fuel to be directly injected,	13	Compared with claim 1, which doesn't have the
14	but the patentees and the inventors also contemplated that	14	additional language limiting to a particular fuel type, it
15	you could use gasoline, wouldn't be as effective admittedly,	15	just says a spark ignition engine that is fueled both by
16	but it would still have the desired effect of increasing the	16	direct injection and by port injection wherein above the
17	knock resistance of the engine, which is the ultimate	17	selected torque value ratio of fuel that is directly
18	purpose of the patents, Your Honor.	18	injected to fuel that is port injected increases, et cetera.
19	And	19	The only real substantive difference between
20	THE COURT: So what happened to claim 14, that	20	claim 1 and claim 15 is that the second clause. Claim 15
21	original claim you just had up there?	21	goes on to say, again, talking about fuel being directly
22	MR. HEALY: Claim 14 was, during the process of	22	injected, fuel, the same word being port injected, then goes
23	prosecution was amended and was never contemplated or was	23	on to say, and there's a limitation here. Where the engine
24	never included within the context of the final issued	24	must be fueled with gasoline and ethanol, so it's
25	patent, Your Honor.	25	identifying gasoline, number one, as a fuel. Otherwise,
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1	this paragraph, the element wouldn't make sense. So	1	hand them up?
2	gasoline and ethanol are fuel. That's defined specifically	2	THE COURT: Sure.
3	in this claim. And then it says, and ethanol is directly	3	(Mr. Connor handed a slide deck to the Court.)
4	injected.	4	MR. CONNOR: Okay. So in this part of the
5	So under basic claim differentiation concepts,	5	specification, Your Honor
6	Your Honor, to give effect to both claim 1 and claim 15,	6	THE COURT: So as I understood, your adversary
7	this is evidence that there is no express fuel limitation.	7	was suggesting that Ford interprets this to mean that it's
8	There's no requirement, no limitation that for purposes of	8	only directed to situations where you have both gasoline and
9	claim 1, which is an asserted claim, that the fuel to be	9	ethanol?
10	directly injected is limited to a particular type of fuel,	10	MR. CONNOR: Yes, Your Honor. That is what it
11	Your Honor.	11	means, Your Honor. If you look at the specification and the
12	THE COURT: All right. Anything else?	12	paragraph that this is in, it talks about Figure it's
13	MR. HEALY: I do have one other point, Your	13	discussing Figure 2 of the illustrations, Your Honor.
14	Honor, and this just goes to Ford's point as to the initial	14	It starts off with, in the case of ethanol
15	reference to the use of gasoline as a directly injected	15	direct injection.
16	fuel.	16	THE COURT: All right. So you do agree with
17	Ford's position on this is that this simply	17	it?
18	says, this simply contemplates that you could mix gasoline	18	MR. CONNOR: So I agree. What it says, it's
19	and ethanol and that that would be an acceptable fuel type	19	also possible to use direct injection of gasoline as well
20	for the directly injected fuel.	20	as. So it means in addition to, Your Honor.
21	Number one, we disagree for the reasons I	21	THE COURT: Okay.
22	pointed out, but I do want to point out as well, Your	22	MR. CONNOR: And that's consistent entirely with
23	Honor	23	what the figures show, which never show, in fact, nowhere in
24	THE COURT: Wait. You disagree with what is	24	this patent, Your Honor, or these patents or in this
25		20	
	15		17
1	MR. HEALY: We disagree with Ford's	1	gasoline. And, in fact, this language is consistent with
2	interpretation of that language. Ford's interpretation of	2	claim 1 and claim 15 of the original application that
3	this language as set forth in their brief of this language	3	opposing counsel identified previously.
4	is that all it contemplates here is that you are going to	4	
5	take gasoline, you are going to mix that with ethanol, and	_	You recall I have to flip to the right slide.
6	take gubbinne, you are going to hink that with ethanol, and	5	You recall I have to flip to the right slide. THE COURT: When you say nowhere it discusses
L -	then you're going to directly inject a mix.	5 6	You recall I have to flip to the right slide. THE COURT: When you say nowhere it discusses just gasoline means directly injected, what about on page 6
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7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	then you're going to directly inject a mix. THE COURT: I will wait until Ford speaks. I don't know that they are limiting themselves to that. We'll hear from them. MR. HEALY: Very well, Your Honor. Thank you, Your Honor. THE COURT: All right. Thank you. All right. Ford, do you want to address this last point? MR. CONNOR: Sure. Actually, I have some slides on that if I can turn to that and maybe address all of these points they've made about the specification. THE COURT: Well, let's start with that one. MR. CONNOR: Okay. Could we put that slide up again? Do you mind? THE COURT: And for the record, you are, sir? MR. CONNOR: Yes Your Honor. Mike Connor from	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	You recall I have to flip to the right slide. THE COURT: When you say nowhere it discusses just gasoline means directly injected, what about on page 6 of Exhibit 1? MR. CONNOR: Yes. THE COURT: At line 5 through 7. "Direct injection of gasoline results in approximately a five octane number decrease in the octane number required by the engine." MR. CONNOR: First of all, Your Honor, that's not the invention. It can't be the invention. THE COURT: Well, wait. You actually said something, I thought this is what kind of led to these questions. MR. CONNOR: Yes. THE COURT: I mean, there is discussion in the written description. I thought you just said there's no discussion whatsoever. MR. CONNOR: It's part of the invention, Your
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	then you're going to directly inject a mix. THE COURT: I will wait until Ford speaks. I don't know that they are limiting themselves to that. We'll hear from them. MR. HEALY: Very well, Your Honor. Thank you, Your Honor. THE COURT: All right. Thank you. All right. Ford, do you want to address this last point? MR. CONNOR: Sure. Actually, I have some slides on that if I can turn to that and maybe address all of these points they've made about the specification. THE COURT: Well, let's start with that one. MR. CONNOR: Okay. Could we put that slide up again? Do you mind? THE COURT: And for the record, you are, sir? MR. CONNOR: Yes Your Honor. Mike Connor from Alston & Bird for Ford.	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	You recall I have to flip to the right slide. THE COURT: When you say nowhere it discusses just gasoline means directly injected, what about on page 6 of Exhibit 1? MR. CONNOR: Yes. THE COURT: At line 5 through 7. "Direct injection of gasoline results in approximately a five octane number decrease in the octane number required by the engine." MR. CONNOR: First of all, Your Honor, that's not the invention. It can't be the invention. THE COURT: Well, wait. You actually said something, I thought this is what kind of led to these questions. MR. CONNOR: Yes. THE COURT: I mean, there is discussion in the written description. I thought you just said there's no discussion whatsoever. MR. CONNOR: It's part of the invention, Your Honor.
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	18		20
1	THE COURT: Okay.	1	"It is also possible to use direct injection of gasoline as
2	MR. CONNOR: Direct injection is known, Your	2	well as direct injection of ethanol," that's referring to
3	Honor. These inventors, they didn't invent port injection.	3	the injection of a mixture of gasoline and ethanol.
4	They didn't in invent direct injection. They didn't invent	4	I agree with Ford that at page 6, lines 5
5	the combination of port and direct injection of a single	5	through 7 of Exhibit 1, what's being discussed there is a
6	fuel. That's all in the prior art. It's in the briefs,	6	criticism, or better yet, I like the word the starting point
7	Your Honor. The Cajero (phonetic) reference shows that.	7	from which the invention is designed to improve the art.
8	And, certainly, direct injection of gasoline is known.	8	And as far as the claim differentiation argument as that's
9	This sentence cites to the prior art, the Stokes	9	made by the plaintiff, I just disagree. I think the
10	article. Stokes is not one of the inventors. This is an	10	dependent claims merely limit the antiknock agents to
11	article from 2001, I think, Your Honor.	11	ethanol and to methanol.
12	THE COURT: This is almost a criticism for it.	12	All right. Let's move to the next term.
13	MR. CONNOR: This is a starting point. What	13	MR. CONNOR: Thank you, Your Honor.
14	this paragraph deals with, Your Honor, is how good the	14	MR. HEALY: May I ask one question, Your Honor?
15	octane enhancement is in this injection system for ethanol	15	THE COURT: Yes.
16	or another antiknock agent, and they start off with a	16	MR. HEALY: A point of clarification. For
17	baseline of what is known.	17	purposes of the construction of this term, if the port
18	It is known that gasoline by direct injection	18	injection is also a dual fuel, a mixture of gasoline and
19	gives you a five-octane number decrease in the octane number	19	ethanol, would that suffice for purposes I just want to
20	required by the engine. That's the starting point.	20	clarify the Court's construction.
21	And they say that the contribution from gasoline	21	THE COURT: So I was given alternative
22	is about five octane numbers and that gives you about a	22	constructions. You gave the plain and ordinary meaning.
23	30-degree a 30-K drop in charge temperature, and then it	23	They gave a specific construction and I'm adopting their
24	talks about ethanol, Your Honor. And it says an ethanol	24	construction.
25	charge can decrease the charge temperatures by about 120 K.	25	MR. HEALY: Thank you, Your Honor.

1	So that's about a four times better improvement than the	1	MR. BERRY: Good morning Your Honor. Matt Berry
2	gasoline. And actually the calculation behind that is tied	2	from Susman on behalf of the plaintiffs.
3	to some of the text on page 5.	3	The next term, Your Honor, is above a selected
4	But it goes on and describes the improvement	4	torque value the ratio of fuel that is directly injected to
5	that you get from two different reasons, from use of direct	5	fuel that is port injected increases. And here the dispute
6	injection of ethanol or another antiknock agent, Your Honor.	6	really is straightforward and simple, Your Honor. It's
7	That's what the focus of this invention is. It is the use	7	whether you can do a plain and ordinary meaning construction
8	on a variable basis of demand of ethanol or another	8	or whether you can take the word increases from the claims,
9	antiknock agent to improve the engine performance,	9	cross that out and change it to is always increasing.
10	especially under turbo charged conditions, Your Honor.	10	THE COURT: Let's do this. I have a hard time
11	THE COURT: Okay. All right. Thanks. I'm	11	with Ford's arguments. Let me hear them first.
12	ready to rule.	12	MR. BERRY: Thank you, Your Honor.
13	I agree with Ford's construction of this term,	13	MS. CLAYTON: Good morning, Your Honor. Natalie
14	and I think it's very, very clear that the specification in	14	Clayton for Ford.
15	its entirety demonstrates that the patent claims are	15	The primary dispute here I think as plaintiffs
16	directed to dual fuel engines. I think the title makes it	16	just discussed is the use of the word always in Ford's
17	clear. I think the abstract makes it clear. I think the	17	construction.
18	description of the invention, in particular column 1, lines	18	Really, the crux of the argument is can above
19	14 through 17 of the patent, of the written description make	19	that selected torque value, can there be a decrease in the
20	it clear.	20	amount of direct injection. Ford used the phrase always
21	I think the fact that Dr. Cohn explained to the	21	increases to try to communicate there can never be a
22	PTO that in the application, or the '774 application, what	22	decrease above that selected toward value. We would be open
23	the invention was is consistent with what Ford says it is.	23	to other language to try to capture that concept.
24	I point the parties to Exhibit 6, DDX, page 97.	24	THE COURT: I know, but I don't think your
25	I agree that on page 5 of Exhibit 1, the quote,	25	construction is going to lend clarity to the jury by any

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1	stretch, and I think it doesn't comport with some of the	1	injection, and that
2	interpretations of the claims that you have in your	2	THE COURT: But now, and this actually was
3	briefing. I think you tried to add, add a limitation that I	3	this in the brief?
4	don't see the word always is not used in the written	4	MS. CLAYTON: It was.
5	description, is it?	5	THE COURT: I did not focus on this, and it's
6	MS. CLAYTON: No. I agree, Your Honor. It is	6	informative. But what about, this seems to be at odds with
7	not.	7	your concession in the brief that you could have a straight
8	THE COURT: And I think what you just said is,	8	line.
9	and I will give you credit for it, you recognize I don't	9	MS. CLAYTON: Because there is an increase in
10	think your construction is a good one and you're saying,	10	direct injection from this area, right, which is before the
11	well, you may have something better, but I don't, and, you	11	selected torque value.
12	know, if you don't have something better, I'm inclined to go	12	THE COURT: What I'm getting at is this language
13	with what the plaintiffs have.	13	seems to be consistent with the language in the decrease
14	MS. CLAYTON: Well, we could say where, you	14	limitation, which has a with, so that seems to well,
15	know, above the selected torque value, the ratio never	15	actually, no, wait a second.I do remember this.You're
16	decreases, because the concern is whether, and I'm going to	16	only dealing with the octane number here. You're not
17	get to it, Your Honor. Plaintiffs say that this type of	17	dealing with the ratio.I do remember this from briefing.
18	ratio would be covered by the plain language of increases,	18	This just tells me an octane number, which is that's only
19	that above a selected torque value, there could be a	19	one component of the ratio. Right?
20	decrease. And the plain reading of the claim, Your Honor,	20	MS. CLAYTON: No. Well, they're the correlation
21	an increase cannot equal a decrease.	21	between increasing the direct injection ratio and also
22	THE COURT: Well, it depends. I mean, the	22	increasing the octane number. The more direct injection of
23	problem is, is when? When are you measuring the increase?	23	ethanol you have, the higher that octane number is going to
24	MS. CLAYTON: Well, the language of the claim	24	get. In other words, it's enhancing the octane number at
25	says, above the selected torque value.	25	each point as you increase the ratio of direct injection of

	1	Now	1	port fuel injection.
	2	THE COURT: So is above a temporal term or is it	2	THE COURT: But you could enhance the octane
	3	a quantitative term to measure torque?	3	number without enhancing the ratio. You agree with that?
	4	MS. CLAYTON: It would be a quantitative term.	4	MS. CLAYTON: You could, but that's not how the
	5	THE COURT: Right. But always is a temporal	5	claim describes the function in the '839 patent.
	6	term, and so that's why I asked you where in the patent or	6	THE COURT: That's because the claim doesn't
	7	where in the specification, and by that I mean claims or the	7	describe the octane number. The claim describes the ratio.
	8	written description is it made clear and unequivocal that	8	MS. CLAYTON: Correct, Your Honor. The claim
	9	temporally, there's no decrease.	9	describes the direct injection of, yes, the ratio of
	10	MS. CLAYTON: I actually believe it's the '839	10	direct injection to port fuel injection, which the
	11	patent. It's this portion of the specification, Your Honor.	11	specification links to enhancing the octane number to
	12	It's column 5, lines 49 through 53.	12	prevent the knock.
	13	If we remember the premise of the invention,	13	THE COURT: Okay. Go ahead.
	14	it's that at these higher torque values, you're going to	14	MS. CLAYTON: And so really, the question is
	15	have a higher chance of knock and therefore you have to	15	whether above the selected torque value, can there be a
	16	increase the level of direct injection to prevent that	16	decrease in the ratio, and Ford believes the specification
	17	knock. And the specification tells us that it's necessary	17	and the claim language does not permit a decrease above
\sim	18	to enhance the octane number, i.e., increase the level of	18	that.
lge	19	direct injection at each point in the drive cycle where the	19	THE COURT: But Ford concedes that you can have
P ² 13	20	torque is greater than permitted for knock-free operation	20	a maintenance of the same ratio.
01,000	21	with gasoline alone.	21	MS. CLAYTON: As long as there's some initial
20)-0	22	So we believe what this portion of the	22	increase, you could have an increase and then maintain it.
Ex. 02(23	specification is telling us is that as soon as you hit that	23	Yes, Your Honor.
LT . R 2	24	torque level where knock is likely to occur, you're always	24	THE COURT: The problem is that's just
I II	25	going to be enhancing the knock, the octane number by direct	25	inconsistent with always increasing.

25

3	25	go
	24	to
202	23	sp

	26		28
1	MS. CLAYTON: And I think it was, if you think	1	it.
2	about it, it was, always was in relation to the amount of	2	THE COURT: Go ahead.
3	direct injection pre- the selected torque value. It's	3	MR. CONNOR: I think the reason is that the
4	always increased as compared to the amount of direct, the	4	ethanol is being stored, maintained separately from the
5	ratio of pre- the selected torque value.	5	gasoline. Right? The idea is you've got a container of
6	. THE COURT: And that though is in tension with	6	ethanol. You don't want people to drink it. I think that's
7	even if I bought your argument that at column 5, lines 49 to	7	what it is.
8	53 of the '839 patent, "It is necessary to enhance the	8	You've got the gas station. Right? You're
9	octane number at each point in the drive cycle where the	9	going down to the Wawa store or whatever. They've got gas
10	torque is greater than permitted for knock-free operation	10	and they've got ethanol. Somebody might come in and drink
11	with gasoline alone," and even if I read that as you asked	11	ethanol.
12	me to to essentially equate the enhancement of the octane	12	THE COURT: Okay. All right. Something new.
13	number with the enhancement of the fuel ratio, and I	13	Thank you. Okay. So go ahead.
14	actually don't read it that way. I think the plaintiff has	14	MS. CLAYTON: So plaintiffs' first argument we
15	a better argument, but if I did, the problem is that would	15	just alluded to in addition to the always language, is
16	still be at odds with what you are now saying, which is that	16	always language, is that we exclude a single increase. Our
17	always just means you have an initial increase above the	17	intention with our construction was not to include a single
18	torque value and that can be maintained, because this	18	increase. As we just discussed, it was to exclude a
19	language at column 5, lines 49 to 53, talks about	19	decrease at any point in the ratio above that selected
20	enhancement at each point. This argument might work if you	20	torque value.
21	had enhanced the fuel ratio at each point, but it does not	21	THE COURT: Let me just ask you this. I think
22	say that.	22	this kind of gets to the nub of it. Would you agree that
23	MS. CLAYTON: Understood, Your Honor.	23	you can't exclude a single one?
24	THE COURT: All right. What else? Anything	24	MS. CLAYTON: Yes, Your Honor.
25	else?	25	THE COURT: I think that just defeats you, and
	27		29
1	27 MS. CLAYTON: We were going to do increase and	1	29 so for that reason alone, I reject the construction you
1	27 MS. CLAYTON: We were going to do increase and decrease together. I don't know if you want me to	1	29 so for that reason alone, I reject the construction you pose. The construction that you've asked me to adopt
1 2 3	27 MS. CLAYTON: We were going to do increase and decrease together. I don't know if you want me to THE COURT: Well, make all of your arguments on	1 2 3	29 so for that reason alone, I reject the construction you pose. The construction that you've asked me to adopt precludes that, and for that reason alone, I can't adopt
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MIT Ex. 2001, Page 8 IPR 2020-00013

1	we're talking about.	1	saying?
2	I also think the defendant's construction would	2	MR. BERRY: Ford is also admitting that it can
3	render claim 2 superfluous, basically become a duplication	3	stay the same. That's what Ford says right here in their
4	of claim 1. So for those reasons, I'm going to adopt I	4	brief a page 47 and 48. Ford is simply saying that there
5	am going to go with plain and ordinary meaning. All right?	5	can be no increase in the direct injection. It does not
6	Now, do you want to go to decrease?	6	prohibit the amount of direct injection remaining the same.
7	MS. CLAYTON: Sure. Do you want to hear from us	7	THE COURT: That's what it says maybe I
8	first?	8	should get clarification on this. I thought it was saying
9	THE COURT: I do.	9	with respect to the increase. Is it also saying with
10	MS. CLAYTON: So this image is slightly	10	respect to the decrease?
11	different. It's actually in line with claim 2 of the '839	11	MS. CLAYTON: Your Honor, they made an argument
12	patent that we just discussed, decreasing torque. And	12	that once you hit zero, right, you can't go any further. We
13	Ford's plain and ordinary meaning is that it is always	13	said, of course, if you hit zero, you can't decrease
14	decreasing with decreasing torque, and it would look akin to	14	further. But I think this is in line with, you know, the
15	something like this. It would be a linear decrease. It	15	argument that plaintiffs made at page 31 of the brief,
16	could be an exponential, consistently decreasing. But we	16	wherefore claim 2, they said that, right, they made a claim
17	believe that the plain and ordinary meaning of decreasing	17	differentiation argument. Claim 2, which we see here, you
18	with decreasing torque is that there is a direct correlation	18	know.
19	and therefore a torque is decreasing, the ratio is always	19	THE COURT: Yes. So my point is just for
20	decreasing in line with claim 2 of the '839 patent.	20	clarity, so I understood your brief and it's actually put on
21	THE COURT: So I guess my question here is: Why	21	the screen right now, page 47 to 48, and it says, it's
22	do you need always? I mean, if you have decreasing with	22	quoting from what Ford said and it says, "Ford is simply
23	decreasing torque, you get that.	23	saying that there can be no increase in the direct
24	MS. CLAYTON: Again, it's because it has been	24	injection. It does not prohibit the amount of direct
25	clear to us that plaintiffs want to capture with that	25	injection remaining the same."
	· · ·		
	31		33
1	language an increase with decreasing torque, which we	1	And I read that incorrectly, but I read that to
2	think is not contemplated by the claim language of the	2	be directed to the increase. But when it comes to the
3	specification, so that's why we included the phrase	3	decrease so, in other words, and I've just said I think
4	always.	4	that that was Ford's problem.
5	THE COURT: So let me hear from the plaintiffs.	5	MS. CLAYTON: Right.
6	MR. BERRY: Your Honor, this term the Court	6	THE COURT: By saying it always increases,
7	should reject for its construction for the same reasons as	7	because, no, Ford allows for the ratio to remain the same
8	the other term.	8	after a single instance of increase.
9	THE COURT: They're different. They're	9	So the flip side for me was, okay. I didn't see
10	different.	10	Ford take that position with respect to decrease.
11	MR. BERRY: Really, but it goes to the same	11	MR. BERRY: This is the decrease section of
12	point here. It goes to the point Your Honor keyed in on.	12	their brief. This is what they said in relation to the term
13	It's the always decreasing. And what Ford is asking the	13	we're arguing now about decrease.
14	ILS LIE AIWAYS UCCICASIIIL. AILU WIIALI ULU IS ASKIILU LIE		
15	Court to instruct the jury in construing this claim is that	14	THE COURT: But the sentence is referring to
	Court to instruct the jury in construing this claim is that you take decreasing and replace that with always decreasing,	14 15	THE COURT: But the sentence is referring to being no increase, so I'm just saving for clarity. Okay.
16	Court to instruct the jury in construing this claim is that you take decreasing and replace that with always decreasing, but then they also admit at the same time that remaining the	14 15 16	THE COURT: But the sentence is referring to being no increase, so I'm just saying for clarity. Okay. They didn't have a sentence that said, and maybe you've got
16	Court to instruct the jury in construing this claim is that you take decreasing and replace that with always decreasing, but then they also admit at the same time that remaining the same works.	14 15 16 17	THE COURT: But the sentence is referring to being no increase, so I'm just saying for clarity. Okay. They didn't have a sentence that said, and maybe you've got it and show it to me now. Ford is simply saying there can
16 17 18	Court to instruct the jury in construing this claim is that you take decreasing and replace that with always decreasing, but then they also admit at the same time that remaining the same works. But how are the jurors supposed to understand	14 15 16 17 18	THE COURT: But the sentence is referring to being no increase, so I'm just saying for clarity. Okay. They didn't have a sentence that said, and maybe you've got it and show it to me now. Ford is simply saying there can be no decrease. It does not prohibit the amount of
16 17 18 19	Court to instruct the jury in construing this claim is that you take decreasing and replace that with always decreasing, but then they also admit at the same time that remaining the same works. But how are the jurors supposed to understand the Court's construction of always decreasing also captures	14 15 16 17 18 19	The COURT: But the sentence is referring to being no increase, so I'm just saying for clarity. Okay. They didn't have a sentence that said, and maybe you've got it and show it to me now. Ford is simply saying there can be no decrease. It does not prohibit the amount of direction in the context of a decrease. This is a problem
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1	connection with a claim differentiation argument that they	1	or is there some kind of implication that this thing has
2	made.	2	that I don't know about?
3	THE COURT: Right.	3	MR. BERRY: There is one more point, Your Honor,
4	MS. CLAYTON: Whereby it says that at some	4	and it goes to a point that Your Honor raised with the last
5	point, it can decrease to zero. Ford agrees that if it	5	term on the difference between absolute amount and ratios,
6	decreases to zero, there's no further decrease to go to and	6	is that you can have the ratio going down, but the amount of
7	it will remain the same at that point, but up until that	7	direct injected fuel can increase, and the opposite is true
8	point, it's always decreasing, decreasing.	8	as well. You can have the amount of directly injected fuel
9	THE COURT: Right. It's not going to decrease a	9	decreasing with the ratio going up. And that just kind
10	little bit. Go back up. It's not going to do that.	10	of it's not a concern of why go away from very plain and
11	MS. CLAYTON: Correct.	11	ordinary claim language and import this limitation of always
12	THE COURT: Okay. So help me out.	12	that appears nowhere in the specification or intrinsic
13	MR. BERRY: Two points, Your Honor. So Ford	13	evidence. Frankly, I'm not sure what Ford is intending to
14	admits that it can decrease and remain the same at zero.	14	do with that, but what I do know
15	THE COURT: When it gets to zero, yes.	15	THE COURT: That's why I wonder if this is all
16	MR. BERRY: When it gets to zero, but their	16	about nothing.
17	construction does not encompass that. They say always	17	MS. CLAYTON: Your Honor, we believe we have a
18	decreasing. To go back to their construction, always	18	noninfringement argument based on this construction. We do
19	decreasing with decreasing torque. Torque can be	19	not believe that we decrease, always decrease.
20	decreasing. It can keep on going down, but the ratio can	20	THE COURT: Because you are going to say when
21	stay the same at zero. Their construction does not	21	you get to zero
22	encompass that and there's no reason to construe this term,	22	MS. CLAYTON: No, Your Honor, that's not the
23	because decreasing, it decreases with decreasing torque,	23	argument. We believe that there is a range at which our
24	it's straightforward.	24	direct injection is not always decreasing.
25	THE COURT: But, see, do you agree when it gets	25	THE COURT: Is it before it gets to zero?
	35		37
1	to zero what is the implication here? What's really	1	MS. CLAYTON: Yes.
2	going on? Where does this all factor into infringement or	2	THE COURT: Well, then, do I have to construe
3	invalidity?	3	it? Can you all agree then, instead of having always,
4	MR. BERRY: I'm not sure, Your Honor, because	4	decreasing with decreasing torque until the torque is zero.
5	when it gets to zero, it can't go lower.	5	They can live with that.
6	THE COURT: Well, that's why I'm wondering, is	6	MR. BERRY: I'm not sure that is correct, Your
7	there really a difference between the parties here. That's	7	Honor, because if you put up there a chart that Ford had
8	what I'm trying to get at.	8	that showed that the torque is going down, the patent

9 MR. BERRY: Our concern is the claim language is 10 very straightforward. Decreases with decreasing torque. 11 They take this word always that appears nowhere in the

12 intrinsic evidence and they add that. 13 THE COURT: Right. And I am trying to figure 14 out the practical effect. In other words, look, I 15 understand why you are reluctant to say import the word 16 always. I get that. On the other hand, to a certain 17 extent, if it's decreasing with decreasing torque, it seems 18 to me that the with implicitly has an always. It's a 19 correlation. So as long as the torque is decreasing, the

ratio is decreasing. Right?

MR. BERRY: Or staying the same as zero. THE COURT: Well, that's the point until we get

23 to zero. I mean, for instance, could you just work out a

24 compromise where you say it's decreasing until you get to

25 zero? I don't know. That's what I'm trying to figure out,

	MS. CLATION: Yes.
2	THE COURT: Well, then, do I have to construe
3	it? Can you all agree then, instead of having always,
4	decreasing with decreasing torque until the torque is zero.
5	They can live with that.
6	MR. BERRY: I'm not sure that is correct, Your
7	Honor, because if you put up there a chart that Ford had
8	that showed that the torque is going down, the patent
9	doesn't say always decreasing. There can be a single
10	decrease, just like Your Honor asked was increasing. There
11	can be a single decrease.
12	THE COURT: Just so you all know, I think with
13	is a direct correlation. That's the way I read with. So I
14	see something to Ford's point. Okay? You can't have, if
15	it's decreasing with decreasing torque, you can't have the
16	torque start to go down with decreasing torque and then go
17	back up and come back down. No. It's a straight line. It
18	says with. That's the way I read it.
19	MR. BERRY: Yes, but, Your Honor, at one point
20	in the torque curve, you can have a decreasing with
21	decreasing torque and that satisfies the claim limitation,
22	and there can be other parts of the torque curve where
23	that's not true, but just because, you know, at one point it
24	satisfies the claim language where the ratio is decreasing
25	with decreasing torque, that's sufficient, because the claim

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1	does not say it always does that.		claim 2 that we saw.
2	THE COURT: No. But it has the word with and		MR. BERRY: The problem is they can stay the
3	it's temporal. So as it decreases in torque, the ratio		same as well.
4	decreases. They are field directly to each other. That's	4	THE COURT: If it does remain the same
5	the way I'm going to read it. And so, you know, then I	5	MR. BERRY: Ford here admits this quote from its
0	guess I do have to construe it, because you don't agree on	0	brief that if it stays the same, that also satisfies the
	that. You don't agree in other words, you don't agree		claim limitation. Not always decreasing. If it stays the
	that decreasing with decreasing torque means that you've got		same. It said, Ford is simply saying there can be no
40	a direct correlation over time. You want to allow for	9	increase in the direct injection, it does not prohibit the
10	decreasing at times with decreasing torque but not always		amount of direct injection remaining the same. So Ford
11	with decreasing torque, which is why they want to have	11	concedes that if the ratio stays the same, you would still
12	always, and it sounds like the issue about when torque gets	12	rail within this claim limitation we're taiking about.
13	to zero, that's not an issue.	13	MS. CLAYTON: Again, Your Honor, this was in the
14	So I think because of the way you're trying to	14	context of it you get to zero, you are going to remain the
10	have to so with always but I'm area to some suggestion	10	same at the level of the ratio.
10	nave to go with always, but I'm open to some suggestion,	10	I ne last sentence of that paragraph, Your Honor,
11	because I agree, you know, but that s the way I interpret	10	says Ford does not disagree that the direct injection level
10	decreasing with decreasing torque.	10	is aiready at zero. It cannot go any lower.
20	nave you got an alternative, because you are not	20	four nonor, could I point out at page 31 of the
20	given what we just esid	20	of this language for claim 2. It means always increasing
21	given what we just said.	21	or this language for claim 2. It means always increasing.
22	construe with You said it is a correlation. I mean the	23	the corollary is that this language means always decreasing
24	problem is T just think the claim language is so clear	24	It's that middle paragraph that starts with Ford's
25	decreases with decreasing torque, and the issue I have with	25	construction, also renders superfluous.
	39		41
1	always is we know that it can stay the same. And staying	1	THE COURT: All right. So this is a difficult
2	the same is not saying to the jury is always decreasing.	2	one. The language, the word with, in my view, makes clear
3	So the jury is going to be instructed on the	3	that the fraction of the fuel from the first fueling system
4	term	4	is correlated to torque, directly correlated. The problem
5	THE COURT: So here is the thing. Is the same	5	with putting the word always in is inconsistent with Ford's
6	issue happening with decreasing for Ford, so is Ford going	6	position that at some point, zero, the level remains the
7	to say at times it can remain the same?	7	same.
8	MS. CLAYTON: That's not relevant to our	8	What I'm really looking for is help from the
9	noninfringement defense. I mean	9	parties to figure out how to clarify to the jury what a
10	THE COURT: That's not what I'm asking about.	10	direct correlation is or what with means.
11	This is the problem. This is the problem with always, too,	11	MS. CLAYTON: Always decreasing with decreasing
12	is decreasing with decreasing torque also means temporally,	12	until the ratio reaches zero.
13	you can't stop decreasing. It has got to be an absolute	13	MR. BERRY: But then that requires, that would
14			
15	correlation.	14	add the requirement that it does reach zero.
16	correlation. MS. CLAYTON: Correct, Your Honor.	14 15	add the requirement that it does reach zero. MS. CLAYTON: Unless
	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side	14 15 16	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing
17	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can	14 15 16 17	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero?
17 18	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can you have a single decrease?	14 15 16 17 18	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero? MR. BERRY: Unless and until the ratio is zero.
17 18 19	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can you have a single decrease? MS. CLAYTON: We believe it's a consistent	14 15 16 17 18 19	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero? MR. BERRY: Unless and until the ratio is zero. Right?
17 18 19 20	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can you have a single decrease? MS. CLAYTON: We believe it's a consistent decrease. It can be exponential. It could be linear, you	14 15 16 17 18 19 20	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero? MR. BERRY: Unless and until the ratio is zero. Right? THE COURT: Yes.
17 18 19 20 21	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can you have a single decrease? MS. CLAYTON: We believe it's a consistent decrease. It can be exponential. It could be linear, you know, but it's always to be decreasing.	14 15 16 17 18 19 20 21	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero? MR. BERRY: Unless and until the ratio is zero. Right? THE COURT: Yes. MR. BERRY: Could I confer for one minute?
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17 18 19 20 21 22 23 24	correlation. MS. CLAYTON: Correct, Your Honor. THE COURT: And you admit on the increase side that you can have you have a single increase. You can you have a single decrease? MS. CLAYTON: We believe it's a consistent decrease. It can be exponential. It could be linear, you know, but it's always to be decreasing. THE COURT: Always, and that's how you differentiate the first one where you admit with the increase, there could be a single increase?	14 15 16 17 18 19 20 21 22 23 24	add the requirement that it does reach zero. MS. CLAYTON: Unless THE COURT: How about decreases with decreasing torque unless and until the decreasing torque is zero? MR. BERRY: Unless and until the ratio is zero. Right? THE COURT: Yes. MR. BERRY: Could I confer for one minute? THE COURT: Yes. MS. CLAYTON: That would be fine with Ford, Your Honor.

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1	the term "decreases with decreasing torque: To mean,	1	THE COURT: That's lawyer stuff. The footnote
2	"decreases with decreasing torque unless and until the	2	doesn't make sense to me.
3	decreasing torque unless and until the torque is zero."	3	MR. BERRY: Our point was even taking what Ford
4	MR. BERRY: And the word	4	was saying there, it renders the claim superfluous. Going
5	THE COURT: I'm sorry. You want to say the	5	back to the argument now for this term, we simply don't
6	ratio?	6	think it should be construed.
7	MR. BERRY: And the word always would not be in	7	THE COURT: We've got to construe it because
8	the construction?	8	you've got a different meaning. If you are not going to
9	THE COURT: Correct.	9	construe something, I will go with the always. What do you
10	MS. CLAYTON: We would want it to be clear, Your	10	want to do?
11	Honor, that there can't be an increase.	11	MR. BERRY: Well, the problem is there's really
12	THE COURT: I'm sorry. What?	12	decreases with decreasing torque. It cannot get any more
13	MS. CLAYTON: The only concern with taking	13	straightforward I don't think.
14	always out is	14	THE COURT: Well, I think it can, because you
15	THE COURT: You expressed if I were you, I	15	see, you've already indicated in your argument that that
16	would think twice. I will hear you. Do you want to be	16	would allow for an increase during the continuum of time,
17	heard?	17	all right, before it gets to zero, and I don't think that
18	MS. CLAYTON: No.	18	that makes sense, because I think the language, decreasing
19	MR. BERRY: The problem, Your Honor, so we think	19	with decreasing torque is meant to communicate a direct
20	that's a better construction than what Ford proposes, but	20	correlation without exception, a direct correlation over
21	getting back to the actual claim language, we don't think it	21	time. All right.
22	needs to be construed at all.	22	So that is why on the one hand, I can see why
23	THE COURT: You've made that point, and given	23	Ford would want always. On the other hand, the parties both
24	the argument you're making, I think it needs claim	24	agree that when the torque reaches zero, there could not be
25	construction, and here's why, because you said on page 31 in	25	any more decrease. Right? So at that point, it remains the
	43		45
1	your brief, when you are talking about the identical	1	same.
2	language, right, the with, you say, under Ford's	2	And I think and, again, I'm going to put your
3	construction, the language of claim 2 would be entirely	3	words in your own mouth back at you. I will throw them back
4	superfluous given that claim 1 already would require the	4	at you, if you will. I think it's telling what you wrote on
5	ratio of directly injected fuel to be always increasing. So	5	page 31 and I don't think your footnote really helps, makes
6	you are equating always increasing with the word with in	6	sense to me.
7	that claim. So under that, I could argue that you've	7	So I don't think it can be denied, and I don't
8	conceded that always should be construed, but I can see the	8	think you have denied that with indicates a direct
9	problem with always as well.	9	correlation between the ratio and the torque.
10	So what I'm trying to find is something you can	10	MR. BERRY: Here's the issue, Your Honor. We
11	both live with. All right? Because patents, you know what	11	already heard on the last term, very similar term, that Ford
12	the Supreme Court said. Language has its limitations.	12	is arguing for a noninfringement position, which obviously
13	Impossible to capture all nuances of an invention using	13	we don't have the documents. We don't know exactly how
14	language. Inventions outpace our ability to communicate	14	these engines work and I fear the same is going on here.
15	with language. I think this is a good example where we're	15	For example, if you have a torque curve where you're coming
16	encountering the limitations of language. I'm trying to	16	down and the ratio is decreasing with decreasing torque for
17	do something that the parties can both live with. All	17	99 percent of that ratio and you get a blip up at the end,
18	right?	18	for whatever reason they had to meet EPA requirements for
19	So what I propose is that I construe the term,	19	emissions, they are going to say, wait. We have this blip

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at the end. Therefore, it's noninfringing. I assume that'swhere they are trying to go with this.

THE COURT: When you write a patent, you don't write it to -- actually, you do if you are a lawyer, I guess, to figure out how can you capture as many things as you can. In the ideal world, we have honest brokers, honest

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1	inventors, they write and capture what they invented. I	1	THE COURT: They've got to persuade me
2	guess you've got to live with that.	2	otherwise.
3	MR. BERRY: Right.	3	MR. CONNOR: Yes, Your Honor. So on these
4	THE COURT: We're just trying to do what we're	4	closed loop terms, the point here is that they are limited
5	supposed to do, which is informed by what's written in the	5	again by what they disclosed, which is very limited. It's
6	intrinsic evidence, written in the claims, informed by what	6	not consistent with the claims in the subsequent
7	was written in the description, written description, and the	7	application.
8	figures.	8	THE COURT: The difference is when you led off
9	MR. BERRY: All right.	9	here on the first term, you've got the present invention
10	THE COURT: So I'm going to give you your	10	being described.
11	choice. You know, unless you want to come up with something	11	MR. CONNOR: Yes.
12	better, and I'm willing to listen to you, but it's clear	12	THE COURT: So where do you have similar type,
13	that we cannot just end this with the plain and ordinary	13	exclusive-type language in the written description that
14	meaning. We can't because you want to now disown what	14	would mandate the importation of a microprocessor?
15	you've written on page 31 of the joint claim construction	15	MR. CONNOR: Okay. On the microprocessor, Your
16	brief and you basically want to not give meaning to with in	16	Honor, all they disclosed is microprocessor. They disclosed
1/	describing what you admit is a direct correlation.	1/	nothing else. They make this argument somehow that a
18	So always isn't perfect. I agree with you. I'm	18	processor, not a microprocessor, is disclosed.
19	trying to come up with something else. You have not offered	19	THE COURT: So that's in an embodiment.
20	anything else, so we'll either go with what I proposed or	20	Correct?
21	we'll go with always unless you want to speak now and come	21	MR. CONNOR: Yes, Your Honor.
22	up with a third alternative.	22	THE COURT: The disclosure is an embodiment?
23	MR. BERRY: Your Honor, I think that at this	23	MR. CONNOR: Yes.
24	time we have nothing better than the claim language itself.	24	THE COURT: And clearly, the Federal Circuit
25	THE COURT: Okay.	25	makes the distinction between language that is attributed to
	47		49
	47		49
1	47 MR. BERRY: I'm sorry. So whatever Your Honor	1	49 the invention and language that is attributed to
1 2	47 MR. BERRY: I'm sorry. So whatever Your Honor thinks is best between those two. We still believe that the	1 2	49 the invention and language that is attributed to embodiments. Correct?
1 2 3	47 MR. BERRY: I'm sorry. So whatever Your Honor thinks is best between those two. We still believe that the claim language is the best here.	1 2 3	49 the invention and language that is attributed to embodiments. Correct? MR. CONNOR: Yes, Your Honor.
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1	stating what the inventor, the present invention is versus	1	to.
2	this description of Figure 1.	2	MR. CONNOR: Well, the invention, there are
3	THE COURT: I mean, if I adopted you, I'm	3	claims, Your Honor, that do not require I believe there
4	getting reversed. Right? They are going to say you can't	4	are claims that do not require a knock detector. This
5	limit the invention to the embodiment. Right?	5	is if a knock detector is used, this is the only way to
6	MR. CONNOR: Understood, Your Honor. There's	6	use it.
7	really two points here. I mean, there's the issue of the	7	THE COURT: The problem with your rationale,
8	microprocessor. There's the issue of the direct feedback	8	it's an embodiment with a knock detector and the claim
9	being used in the closed loop system.	9	doesn't have it. I guess I have to read the knock detector
10	THE COURT: All right. So let's talk about	10	into the claim.
11	that.	11	MR. CONNOR: No. We're saying if there's closed
12	MR. CONNOR: That I'm sorry?	12	loop control. This is the only closed loop control that
13	THE COURT: Go ahead.	13	they've identified. If there's a knock detector and if it's
14	MR. CONNOR: That one, Your Honor, all they have	14	used, then it has to be used in a closed loop control and
15	disclosed is for purposes of controlling the amount of	15	there has to be direct input and that signal has to be used.
16	ethanol or the other antiknock agent that is controlled by a	16	There's no disclosure of using anything else to control the
17	control, a closed loop system, Your Honor, all they've	17	amount of the first fuel to put in, the antiknock agent.
18	disclosed in all of the embodiments, Your Honor, is a system	18	THE COURT: You know, I don't see direct or
19	that uses closed loop control with a knock detector. Direct	19	microprocessor as limitations that are required by the
20	feedback from a knock detector.	20	written description as limitations that were clearly or
21	THE COURT: Direct. Do they have the word	21	unequivocally disavowed or clearly and unequivocally defined
22	direct in there?	22	in the written description or anywhere in the intrinsic
23	MR. CONNOR: If you look at the picture, the	23	evidence. You've pointed to embodiments. They're not
24	direct is taken from the illustrations, Your Honor, of	24	exclusive. And I think you are trying to read importations
25	Figure 1 and Figure 5. You see Figure 1 to Figure 5.	25	into the claim that absent clear and unequivocal language
	51		53
1	There's a line that shows feedback from the engine to the	1	shouldn't be.
2	knock detector and onto the microprocessor or to the control	2	MR. CONNOR: I mean, I would say that with
3	system, Your Honor.	3	regard to the direct feedback, I think that I think this
4	That's what's being used. There's no other	4	is akin to the Techtronic case that we cited in the
5	input, Your Honor. It is being used to control the ethanol	5	supplemental authority, that all they disclosed is the one
6	that's being injected. If you look at the difference	6	embodiment.
7	between Figure 1 and Figure 5, and the plaintiffs do point	7	THE COURT: Here's the thing. The Techtronic
8	to that, Figure 5 is only an embodiment where you've run out	8	case, which follows up really on the Trustees of Columbia
9	of ethanol, so you're not controlling the amount of ethanol	9	case
10	that is injected there using the fuel management system.	10	MR. CONNOR: Yes.
11	You're out of ethanol, and Figure 5 is a situation where,	11	THE COURT: it uses the word explicit. And
12	well, you're out of ethanol. What do you do? You are stuck	12	the way I read Trustees of Columbia is that you don't have
13	on the side of the road or you get to drive home? We are	13	to have an explicit disavowal or an explicit lexicography.

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14 going to produce less horsepower. You won't have the 15 antiknock agent, but you can still get home, and when the

16 system detects a lack of ethanol, well, then, maybe you can 17 control the turbo charger or maybe you can control the spark 18 retard. But that's not using closed loop control to control 19 the amount of ethanol or antiknock agent that's being put

20 in. And that's why there should be a direct feedback and a 21 direct feedback loop, closed loop control, which is what is 22 required by this claim language and is described in the 23 specification.

THE COURT: But show me something that says it is exclusive. I mean, that's what the invention is limited 25

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	shouldn't be.
2	MR. CONNOR: I mean, I would say that with
3	regard to the direct feedback, I think that I think this
4	is akin to the Techtronic case that we cited in the
5	supplemental authority, that all they disclosed is the one
6	embodiment.
7	THE COURT: Here's the thing. The Techtronic
8	case, which follows up really on the Trustees of Columbia
9	case
10	MR. CONNOR: Yes.
11	THE COURT: it uses the word explicit. And
12	the way I read Trustees of Columbia is that you don't have
13	to have an explicit disavowal or an explicit lexicography.
14	MR. CONNOR: Right.
15	THE COURT: Right. But what that means in my,
16	to my understanding is, so you don't have to have language
17	that says, I am disavowing, or I am defining, or the term
18	means
19	MR. CONNOR: Correct.
20	THE COURT: That's what explicit means, explicit
21	as opposed to clear and unambiguous. The Federal Circuit
22	did not jettison in Trustees of Columbia or the case that

forget the name of the case. MR. CONNOR: Techtronic.

did not jettison in Trustees of Columbia or the case that

you brought to my attention, supplemental authority, I

	54		56
1	THE COURT: Techtronic. I did read it. It did	1	MR. BERRY: Thank you.
2	not get rid of the standard that there has to still be a	2	THE COURT: So let me ask: Is it Ford's intent
3	clear and unequivocal and, in fact, a clear and	3	to give a calculator to the jury and have them do a torque
4	unequivocal disavowal or lexicography, and, in fact, I think	4	calculation?
5	it used the word clear in its holding. But it did say it	5	MR. LIGOTTI: No, Your Honor. Ford's intent is
6	doesn't have to be explicit, and what I'm saying is not	6	that the proposed construction is designed to give clarity
7	different from that. I'm not requiring the written	7	and to give guidance to the jury to understand a concept
8	description or anything in the prosecution history to say	8	that they may not be familiar with.
9	that the patentee is hereby defining or hereby disclaiming.	9	Ford's proposal is broken up into three parts.
10	That's what explicit means in my mind, the only way I can	10	The first, plaintiffs do not disagree with.
11	read it.	11	The second, plaintiffs admit in their reply
12	MR. CONNOR: Yes.	12	brief that torque can be calculated by applying force and
13	THE COURT: It means something different than	13	distance, and that there are other ways as well.
14	clear and unequivocal.	14	And, finally, with respect to the third portion
15	MR. CONNOR: May I point, Your Honor, in the	15	of Ford's construction, it's a vector quantity. This is
16	Techtronic case, the Federal Circuit said in that case the	16	added so that jurors will understand that there are two
17	entire specification focused on enabling placement of the	17	components to the term torque, a direction and a magnitude,
18	passive infrared detector. That was the issue. Where was	18	and these claims require
19	the passive infrared detector going to be? The construction	19	THE COURT: So your expert testifies to that and
20	was it has to be in the wall console. That's all they	20	he gets cross-examined or she gets cross-examined.
21	disclosed. That's all they enabled. That's all the	21	MR. LIGOTTI: That very well may be the case,
22	embodiment showed.	22	but clarifying it for the jury in the construction will
23	THE COURT: I think if the Federal Circuit had	23	provide guidance
24	wanted to change the rules to say that it has to be	24	THE COURT: See, here's the thing. To me, you
25	disclosed in the embodiment so that, you know, you've gotten	25	are either saying, do you think we need extrinsic evidence

55 57 1 enablement, they would have said that. They didn't say 1 to construe the term torque? 2 2 that, and that seems to me to be at odds with a long line of MR. LIGOTTI: No, Your Honor. 3 cases. So you can take the issue up, I guess, but I don't 3 THE COURT: Because that's essentially what I 4 4 see it for the reasons I've just articulated and I'm going think you're putting forward. You are saying you're going 5 5 to go with the plain and ordinary meaning. to have an expert who says you need to have a vector 6 MR. CONNOR: Thank you, Your Honor. 6 quantity, got magnitude and direction. I mean, do the 7 THE COURT: All right. The last two terms, I 7 plaintiffs dispute that? 8 MR. BERRY: There should be no extrinsic 8 believe. Now, before I hear argument, I don't know why I'm 9 9 hearing argument on these last two terms. I don't know why evidence for this. 10 this is not an issue for infringement. And you can have 10 THE COURT: No. Do you dispute that it has 11 11 your experts tell the jury how do you measure torque. I direction and magnitude when you talk about torque? 12 don't understand why this issue is a claim construction 12 MR. BERRY: For these claims in this patent? 13 13 issue. The jury should never hear about --14 14 MR. BERRY: We couldn't agree with you more, THE COURT: I'm just asking as a general matter. 15 Your Honor. We don't think it is. Torque is understood 15 MR. BERRY: Oh, general matter, I think that's 16 by -- as far as what you need to do with these patents of, 16 correct, but is it relevant or germane to this dispute in 17 this case? No. 17 is torque increasing, is it decreasing, is it staying the 18 same, it's a simple comparison of numbers. If you start at 18 THE COURT: Right. So I mean, why not have your 19 19 torque 470 and you go to 490, it's increasing. The jury expert just do battle in front of the jury. The jury 20 gets that. To the extent they don't, we will have experts, 20 decides. How is it going to help them to know that torque 21 21 both sides, who will explain that to them. But these can have a vector quantity? 22 22 concepts are not technical. There's no calculating torque. MR. LIGOTTI: Well, Your Honor, the reason is 23 23 There's nothing about torque being a vector quantity. that there's a difference between a torque in a clockwise 24 24 THE COURT: Maybe I will hear from Ford, because direction and torque in a counterclockwise direction. 25 25 obviously, they're the ones that are pushing this. THE COURT: Okay.

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1	MR. LIGOTTI: And so when the jury is asked to	1	some management issues going forward, I think, on limiting
2	match torques and compare torques, one torque value to	2	the number of asserted claims based on the rulings today.
3	another and say that they are the same, they should be doing	3	We could take those up now if Your Honor would like, or we
4	so in a way where they are matching the direction as a	4	can
5	magnitude. And for jurors who might not have an	5	THE COURT: What do you mean? Why don't you
6	understanding of that term torque, that it has those two	6	spell it out while I've got you. It might be an incentive
7	components, they might not think, plaintiffs cited in their	7	for me to refer it to the Magistrate.
8	opening brief 470 foot pounds of torque. They might think	8	MR. CONNOR: Sure. Yes, Your Honor. Right now
9	that 470 is the same as 470, but what's important to	9	there are 91 patent claims that have been asserted across
10	understand is that the patents disclose torque in the	10	four patents.
11	context of engine output. They are disclosing torque in	11	THE COURT: That's not workable.
12	terms of what the engine is doing, not what is happening to	12	MR. CONNOR: Right.
13	the engine. So there's torque that is enacted upon an	13	THE COURT: Right.
14	engine and there's torque that an engine is enacting upon	14	MR. CONNOR: So we think that should be
15	other things. The patent is directed to the latter.	15	restricted. I think that the rulings that Your Honor made
16	THE COURT: Here's what I'm going to do. I'm	16	today as to the dual fuel terms I believe affect every
17	not going to construe these terms now. I think the plain	17	asserted claim, either directly
18	and ordinary meaning is sufficient and I think you can do	18	THE COURT: Maybe plaintiffs are willing to tell
19	battle of the experts.	19	me right now you're going to cut this down, which would be a
20	Now, if we're at trial and I thought the	20	wise thing to do.
21	plaintiff came up with something that, or maybe it's not	21	MR. BERRY: So what we suggested to Ford last
22	even a name, but it struck me that, wait a second, maybe I	22	week is that once we had Your Honor's Markman rulings, that
23	need to construe these, I can always do it. Federal Circuit	23	we meet and confer with Ford and come up with a reasonable
24	law permits me to do that and I don't think I will have to	24	number of claims to assert at the same time that they do the
25	do it, but maybe I will do it after I hear the experts	25	same with their prior art references. And so we take your
20			same with their prior art references. And so we take your
23	59		61
	59		61
1	testify and all of a sudden I have to make a decision. But	1	61 Honor's guidance and rulings today, we meet and confer with
1 2 2	testify and all of a sudden I have to make a decision. But I don't think I have to make it now for either of these two	1 2 2	61 Honor's guidance and rulings today, we meet and confer with them and come back to Your Honor with a proposal that
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1 2 3 4	59 testify and all of a sudden I have to make a decision. But I don't think I have to make it now for either of these two terms. I think, I mean, Ford advertises using the word torque. I've seen their commercials. I have fooled around	1 2 3 4	61 Honor's guidance and rulings today, we meet and confer with them and come back to Your Honor with a proposal that hopefully makes sense to everybody. MR. CONNOR: We're happy to meet and confer.
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MR. CONNOR: Your Honor, I think there will be

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with patent lawyers in particular, the message doesn't get

1	across. I don't know if it's client-driven. I practiced a	1	you've got the limit the claims first. Then they can decide
2	little bit. I saw clients drive it. I know I'm sure a lot	2	on advice of counsel.
3	of it is the Federal Circuit, the de novo review in a lot of	3	MR. BERRY: Okay.
4	areas, but if I could communicate one thing to lawyers and	4	MR. CONNOR: Is there a time by which you would
5	say you are a much better advocate if you pick and choose,	5	like us to get back to you about the number of claims?
6	and so it's the same thing with case management.	6	THE COURT: No. You can sit down. You don't
7	You know, I know you want to preserve everything	7	have to keep standing. I appreciate you doing that.
8	you can, and there's one that counsel takes to heart, you	8	There's no time. I'm not going to set a time.
9	lose when you overreach, you know. I mean, I can't tell you	9	I don't have enough it might be helpful for you all to
10	already just the few trials I've had, everybody is	10	hear, especially Delaware counsel, how things get to the
11	preserving 50 prior art references. We get to trial. We	11	Court's attention.
12	know there are six of them and the jury only wants to hear	12	So for starters, there are miscellaneous
13	about three of them.	13	matters. A lot of those are the most urgent matters that
14	And so I just offer that, but I've been offering	14	come to the Court, and basically, the staff kind of are
15	it for 18 months. It does not seem to have made a huge	15	screening these things and they bring them to my attention.
16	impact. But the best lawyers, and I mean they're	16	Now, there are a lot of these matters that don't have an
17	noticeable, the best lawyers, they wisely select. The best	17	urgency to them and they can sit, and frankly, because
18	lawyers I've seen drop the weak invalidity case or	18	they're not reportable motions, they don't get my attention
19	infringement argument because they know what they are doing.	19	necessarily.
20	Those are the best lawyers.	20	So lawyers ought to think twice about do you
21	MR. BERRY: Your Honor, there's one more point.	21	want to file a case versus file a miscellaneous matter,
22	THE COURT: And then on that, you just this	22	because some of these things you can do either. You might
23	case hasn't been one, but the same case, it's amazing. They	23	be advised to file a case.
24	keep coming to the Court with countless discovery disputes,	24	And then in terms of priority, you know, if
25	can't work it out, and then what happens and when I spot the	25	something was marked urgent, it's apparent on its face that
	63		65

1	real unreasonable actor, is that person loses credibility	1	it's urgent, that gets to my attention right away.
2	for the rest of the case.	2	Otherwise, it's my calendar and the reportable issues that
3	MR. BERRY: Your Honor, we have been trying to	3	drive or get my attention.
4	find out from Ford are they going to assert the advice of	4	So, in other words, that's a long way, but
5	counsel defense in this case. This is a substantial	5	background to provide you with I have no idea what your
6	completion of document productions in November, and we've	6	schedule is in this case. I don't know when the trial is.
7	been asking them, how about ten days after the Markman	7	I don't know when discovery ends, because none of that comes
8	order. Can we find out? Is Ford going to do advice of	8	to my attention in an immediate way. So I don't have a
9	counsel, and if so, can you produce those documents within	9	calendar to tell you when you need to get your case
10	ten days.	10	management issues decided.
11	We don't want it to interfere with the schedule	11	Have I had discovery disputes with you all?
12	of in case and they've not yet committed to that. We're	12	MR. CONNOR: We had an issue on production of
13	hoping with guidance from the Court	13	documents from plaintiffs. Yes, Your Honor. I will tell
14	THE COURT: Go ahead.	14	you what the calendar is generally.
15	MR. CONNOR: May I address this, Your Honor?	15	Fact discovery closes the middle of March. I'm
16	THE COURT: Please.	16	not sure of the exact date, but it's the middle of March.
17	MR. CONNOR: This is all bound up, Your Honor,	17	We have a trial date in November. So I think that limiting
18	with the number of asserted claims that they're going to go	18	the number of claims is rather more urgent rather than not.
19	forward with. If they drop all of the claims or most of the	19	THE COURT: Yes. Mr. Farnan?
20	claims, that makes a big difference in terms of waiver of	20	MR. FARNAN: You referred discovery to Judge
21	counsel, Your Honor.	21	Fallon.
22	THE COURT: Yes.	22	THE COURT: Oh, I did?
23	MR. CONNOR: So we think that decision ought to	23	MR. FARNAN: Yes.
24	be made first.	24	MR. CONNOR: Yes, Your Honor. There was an R&R
25	THE COURT: First of all, I agree. I think	25	and an objection.

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1	THE COURT: Was it objected to?
2	MR. CONNOR: It was.
3	THE COURT: All right. I can't remember.
4	MR. CONNOR: It was about production by
5	plaintiffs of documents about conception, reduction to
6	practice.
7	THE COURT: Yes. All right. Okay. All right.
8	So right now all discovery is referred to Judge Fallon.
9	Right?
10	MR. FARNAN: Yes, Your Honor.
11	THE COURT: All right. Well, so I would say
12	obviously that I am going to speak in just general terms.
13	Do what you can. Come together. Be reasonable. I may
14	just, in fact, refer the case management issues that you've
15	just described to Judge Fallon in the first instance because
16	we just have to get through things here, and obviously,
17	there's more deference afforded to a Magistrate Judge in the
18	context of discovery, case management issues, and I hope you
19	can all work it out.
20	MR. CONNOR: Thank you, Your Honor.
21	MR. BERRY: Thank you.
22	THE COURT: Thank you, all. Have a great day.
23	(Hearing concluded at 10:27 a.m.)
24	
25	

	26:10 27:12 27:12	15.12 15.16 62.15	26.2 26.4 22.6	6E-1 6E-2 6E-9
•	20.19, 27.12, 27.13	15.13, 15.10, 03.15	20.2, 20.4, 32.0,	05.1, 05.3, 05.0
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