

# Effective Use of Technology on Appeal

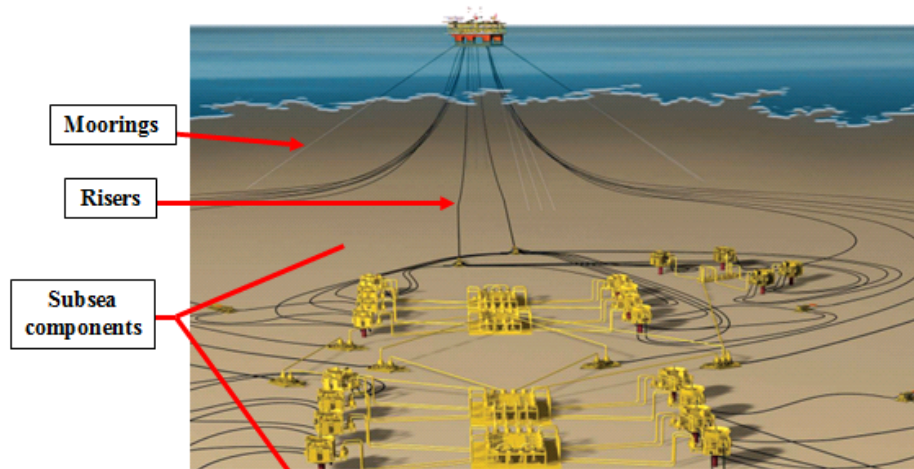
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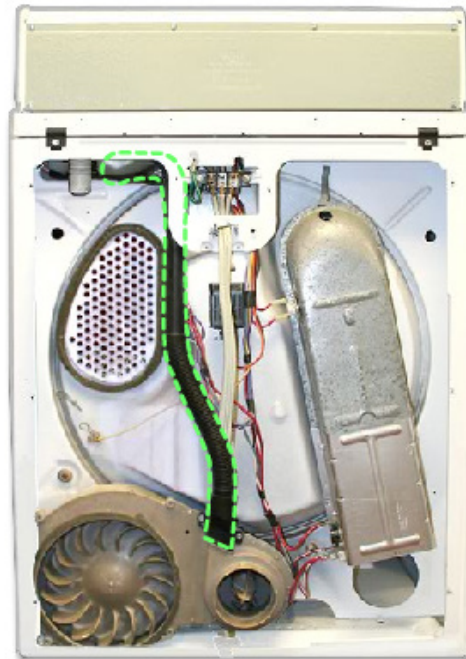
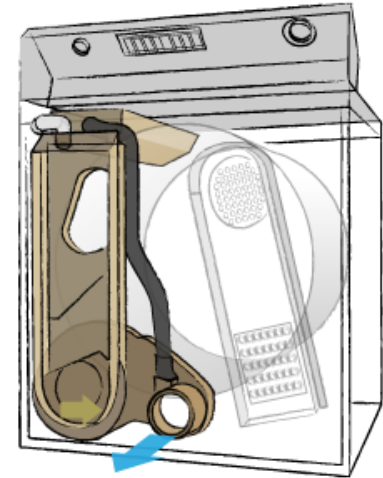
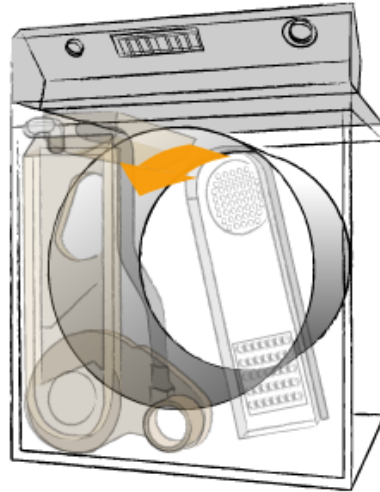
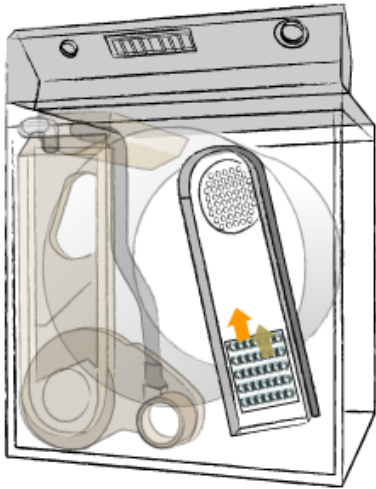
# Visuals as Context



Atlantis also has subsea equipment that facilitates the flow of production from the reservoirs beneath the seafloor through wells and pipelines to a point on the seafloor below Atlantis. (ROA.24854; ROA.6118.) There, the production enters “risers” that carry it up to the platform, where it is processed and measured before entering export pipelines for delivery to shore. (ROA.24853; ROA.5370.)



# Visuals as Context



- Top Of Dryer
- Back Of Dryer
- Heating Element
- Drum Inlet Grill
- Lint Chute
- Blower Housing
- Blower Scroll
- Lint Transport
- Recirculation Tube
- Exhaust Air
- Replace Back

# Visuals as Context



*Garfield crossing, showing traffic signals as train approaches*

(CR2:456, 529.)

Before this accident, there had never been a fatal accident at the Garfield crossing, and there had not been any accident of any kind there for more than 15 years. (CR2:685.) Thousands of trains and millions of vehicles had passed through the Garfield crossing without incident. (CR2:682, 686.) The history of safety can be attributed to the multiple warning systems in place at the Garfield crossing.



# Visuals as Context

## STATEMENT OF FACTS

### *A Church Buys A Genie Lift*

Tall buildings, like gymnasiums, auditoriums and churches, need a safe way to reach the ceilings. The Beaumont church in this case had previously reached the ceilings with a huge stepladder. RR3:82. It eventually invested in a Genie aerial lift, using it weekly to change lightbulbs in the sanctuary or the gym. RR3:60. The stationary lift in this case was especially useful in church environments, given its unique design features and its ability to reach extended heights indoors.

Genie (a Terex Company) is the top seller of aerial work platforms. **Tab E.** It is a U.S.-based company that sells hundreds of thousands of lifts worldwide. *Id.* Its lifts have been used millions of times by its customers. RR4:174.



### *The Lift is Designed For Portability With a Small Base and High Reach*

Genie makes a wide variety of lifts. See **Tab E** (PX-38: Genie brochure).

This case involves the AWP-40S model, which stands for “Aerial Work Platform—40’ SuperSeries.”



# From Court's Subsequent Opinion

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## I

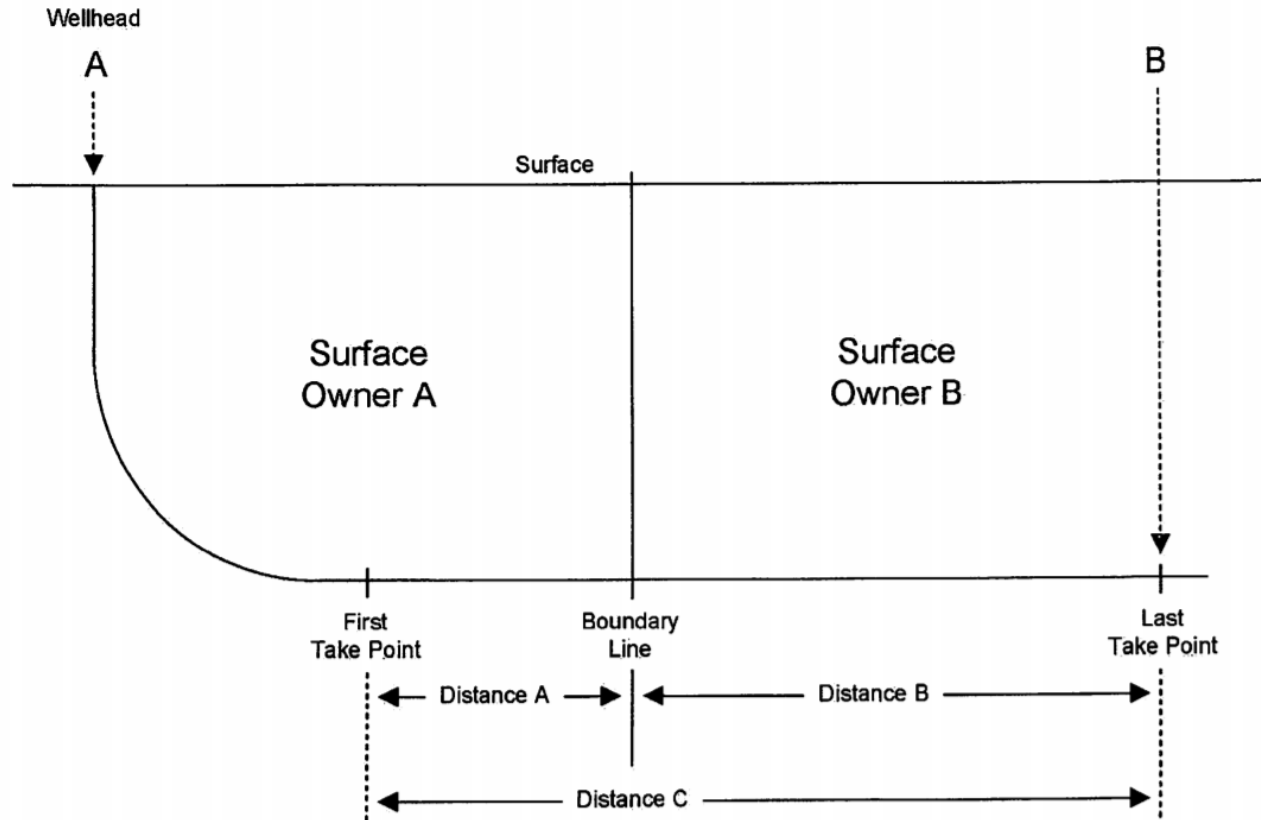
Genie Industries, Inc., manufactures and sells a wide variety of aerial lifts throughout the world. An aerial lift is used to raise a worker on a platform to reach the ceilings of tall buildings or other high places. One of these lifts is the Aerial Work Platform-40' SuperSeries, also known as the AWP-40S, pictured here.



Figure 1: AWP-40S

The base of the AWP-40S is small, only about 29" x 55"—narrower than a standard door—and sits on wheels. A vertical, telescoping mast is mounted on the base. An enclosed platform

# Visuals as Context



# Visuals as Argument



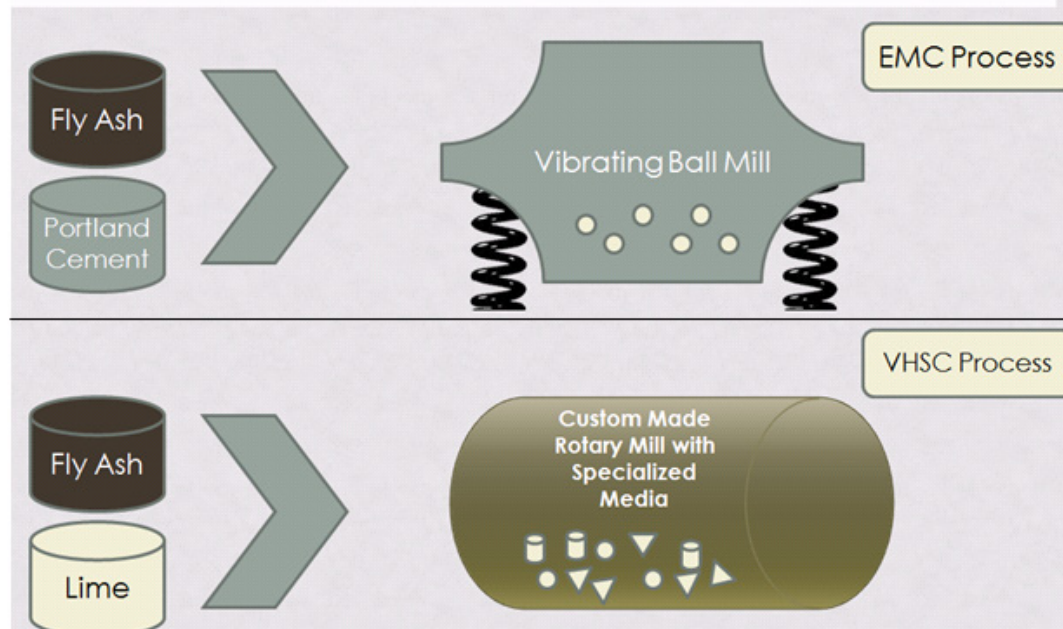
*View from South Garfield Street, looking west*

(CR1:323; CR2:765-66.) The locomotive's headlights and ditchlights were shining brightly and the train was well within view. (CR2:766, 867, 903.) However, Hayden failed to notice the train at that time.



# Visuals as Argument

## EMC Process vs. VHSC Process



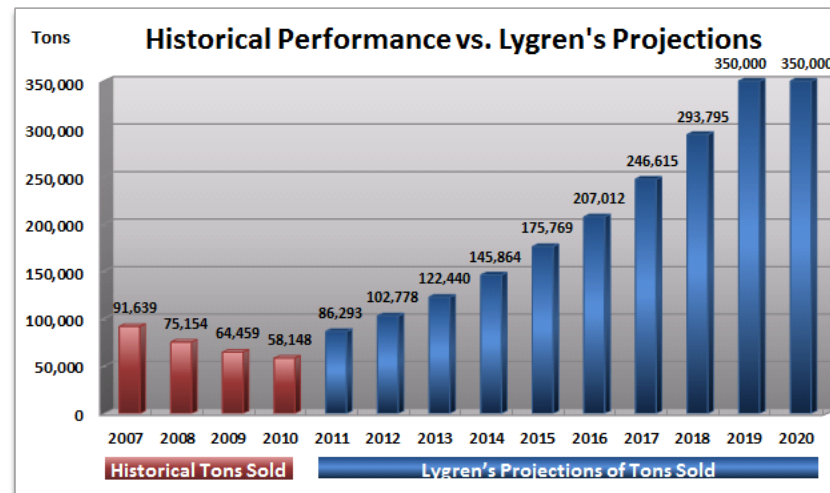
Having invested millions in this new technology, VHSC filed for patent protection.

(PX94A.) It continues to operate the Jewett plant solely with its new technology.

(RR16:75.)

# Visuals as Argument

First, Lygren's pie-in-the-sky assumption that the partnership's sales would grow at a constant 19% rate cannot be reconciled with the actual facts, and Lygren did not bridge this analytical gap. The amount of product that EMC Products sold had *declined every year* between 2007 (its peak sales year) and 2010. (RR13:83-85, 87; [App.12](#).) Notwithstanding this consistent decline, Lygren projected that EMC Products would achieve a sales volume in 2011 that was 67% higher than the volume sold in the last full year of operations in 2010—and then assumed that the tonnage of product sold would increase by 19% every year thereafter, hitting totals that the business had *never* come close to achieving. (RR16:304-06; [App.9](#).)



Worse yet, the only support for this miraculous turnaround was Lygren's speculation. There was no objective evidence presented to demonstrate that this

# Images of Documents

On May 19, 2007, while he was still in the hospital, Gutierrez filled out a routine accident report. (RR5:1009-11; RR12:DX1; Tab D.) He reported that working conditions did not cause his accident. (RR5:1013-16; RR12:DX1; Tab D.) On the report, Gutierrez did not admit that he had taken a prohibited shortcut, and instead represented that he fell after properly descending from a ladder. (RR12:DX1; Tab D.) The relevant excerpt of his accident report follows:

(1) DESCRIBE FULLY HOW THE ACCIDENT/INJURY OCCURRED:	
Getting down RR ladder with hands + feet one step at a time, then having reached ground with both feet on ground I turned to go East and fell.	
(2) WHAT SPECIFICALLY CAUSED THE ACCIDENT/INJURY:	
My ankle gave way and I fell	
(3) DID EQUIPMENT OR TOOLS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY?	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE DETAILS (INCLUDING EQUIPMENT ID NUMBER)
(4) DID WORKING CONDITIONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY?	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE COMPLETE DETAILS
(5) DID OTHER PERSONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY?	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE COMPLETE DETAILS

(RR12:DX1; Tab D.)

# Images of Documents

The Airport continued to demand all new leases, refused to apply the relocation provision, and indicated that it would condemn the spaces without new agreements:

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**From:** Tomme, Paul [mailto:ptomme@dfwairport.com]  
**Sent:** Wednesday, February 16, 2011 7:09 PM  
**To:** Coldwell, Deborah  
**Cc:** pete.markelos@gmail.com; Wells, Jennifer  
**Subject:** TGIFriday's at DFW Airport



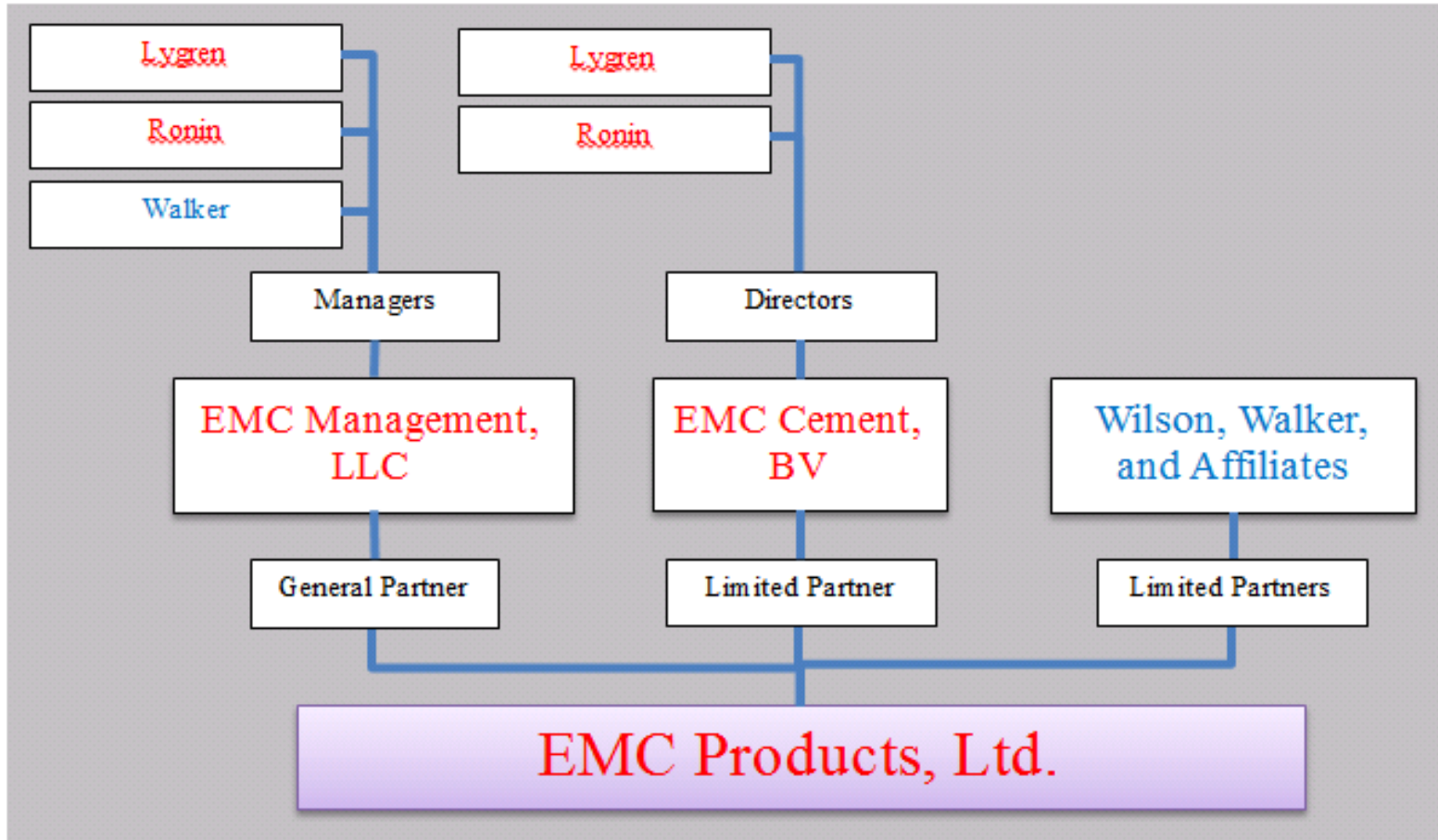
Deborah,

The statute that I mentioned, **exempting condemnation of government leaseholds** from the general prohibition on condemnations for economic development, is found at Texas Government Code Section 2206.001(d). However, given that all of the TGIF leaseholds will be taken for things that are clearly public purposes, such as TSA checkpoints, we don't really need to rely on that statute.

**The relocation provision in Article 20 of the lease affects only the three café/bars in Terminals B and C. Even as to those locations, it can't prevent the taking of the leasehold by eminent domain.** First, Article 20 never mentions condemnation or eminent domain. Second, to the extent the tenant or any individual investor seeks to use Article 20 to prevent condemnation, or to augment compensation above the property's value absent condemnation, it would be void as against public policy. Governmental entities cannot contract away their power of eminent domain. See *West River Bridge Co. v. Dix*, 47 U.S. 507, 12 L.Ed. 535 (1848); *Gay Investment Co. v. Texas Turnpike Authority*, 510 S.W.2d 147 (Tex.Civ.App.—Dallas 1974, writ ref'd n.r.e.); and *Corpus Christi v. Taylor*, 126 S.W.3d 712 (Tex.App.—Corpus Christi 2004, pet. dismissed). That is especially true in our case, because it is actually the Cities of Dallas and Fort Worth that have the power of eminent domain, which they exercise occasionally on behalf of the Airport Board; and they didn't sign the

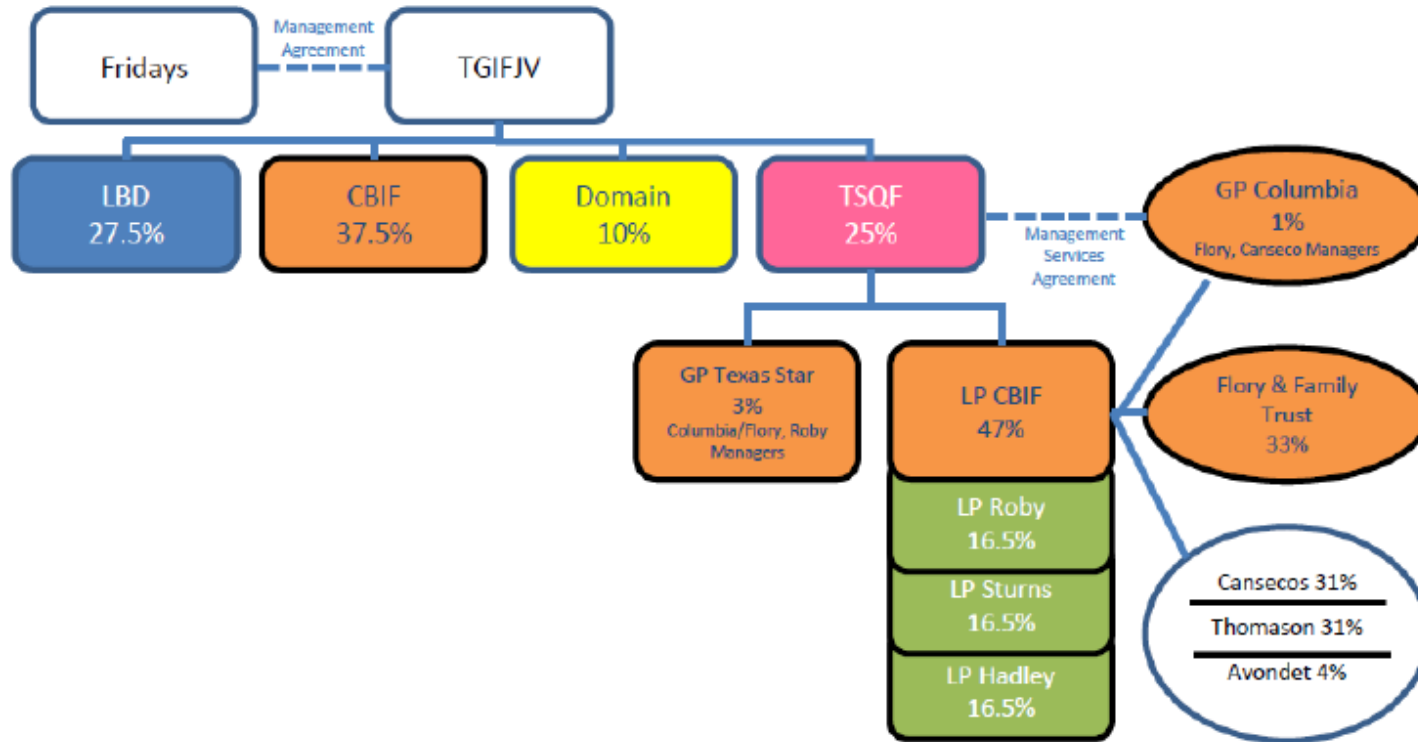
The testimony at trial from Fridays and the Airport confirmed the points made in the documents that were contemporaneously created at the time of the negotiations—the Airport demanded new leases and joint venture agreements for each location. (See, e.g., 4RR105; 5RR9-12, 50-55, 59-60, 72; 13RR53-54;

# Charts or Graphs to Simplify Complex Relationships





# Charts or Graphs to Simplify Complex Relationships



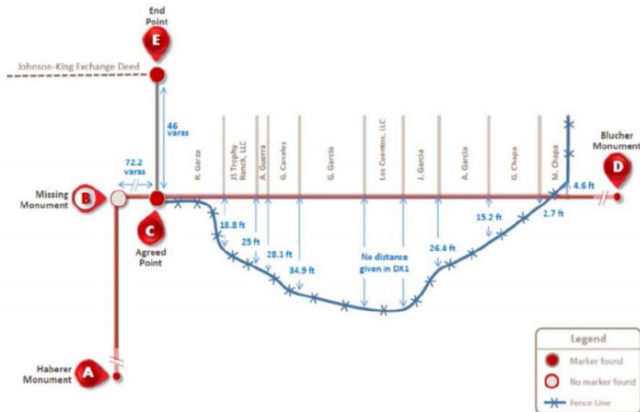
# Maps

## STATEMENT OF FACTS<sup>1</sup>

The dispute concerns the boundary between the King Ranch at three of its northern neighbors—Dr. and Mrs. Roel Garza, JS Trophy Ranch, LLC, and Los Cuentos, LLC. In 2012, the King Ranch unilaterally tried to move the fence line that had served as the legal and functional boundary of the parties' properties for more than one hundred years. The resolution of the dispute involves a review of the deed that originally separated the properties, the subsequent creation



The area of dispute sits at the "notch" in Jim Wells County, along the east-west boundary separating that county from Kleberg Counties, between Alice and Kingsville.



The 1911 Haberer sketch showed the county line running at N. 89° 48' E, but an accompanying diagram showed the boundary following the fence line. R.R.; PX 26, Exhibit 1 (9 R.R. 38). The evidence included testimony and the inference that the current fence was in the same location as the original fence. 5 R.R. 19, 6 R.R. 145, 148, 156.

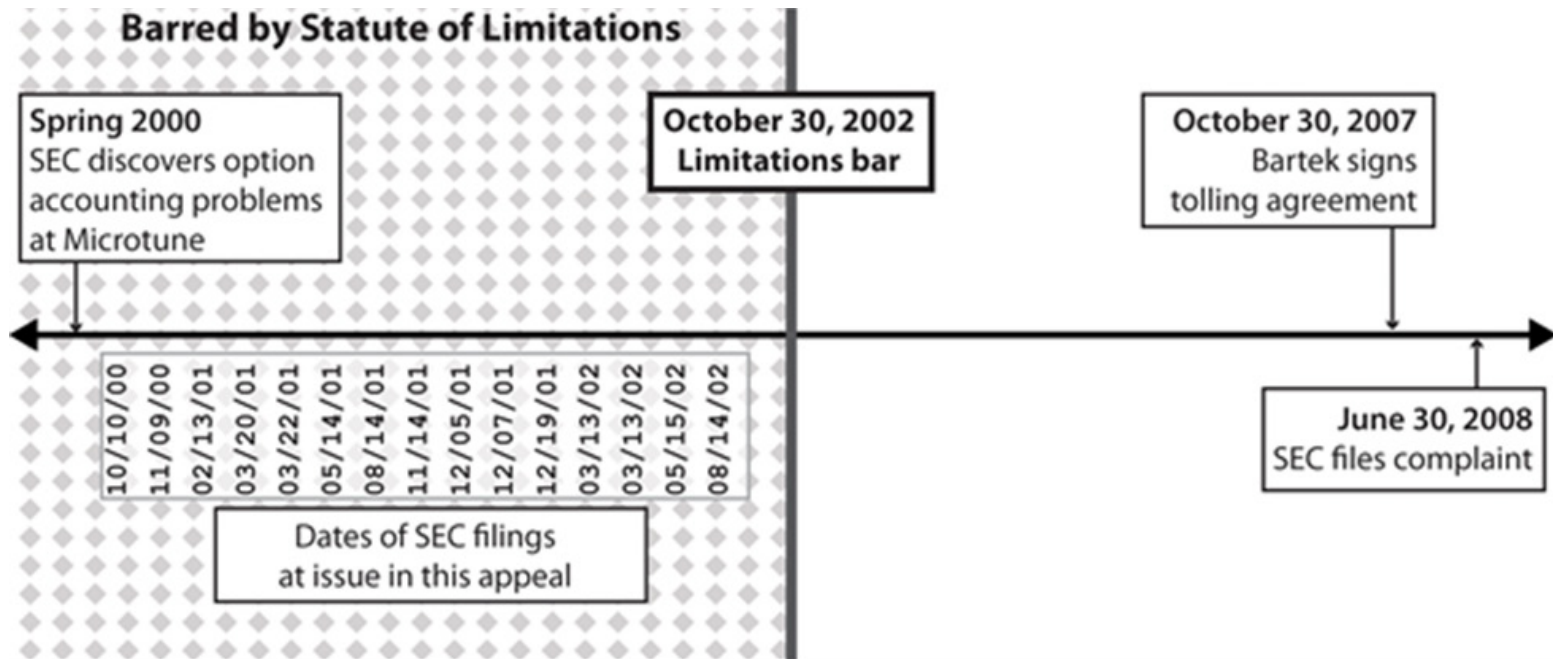


JS Trophy's land, which is east of the Garzas' property is labeled "Johnson & Saenz" on the PX 7; Los Cuentos is shown above the exhibit sticker.

# Maps



# Timelines





# Charts to Illustrate Legal Reasoning

As demonstrated in the chart below, four of the damages questions were explicit about measuring the same injury—lost value to EMC Products—though that injury was sometimes framed in terms of harm to the partnership and sometimes in terms of harm to the value of EMC Cement’s interest in the partnership.

Claim	Claimant	Defendants	Joint and several	Damages Found by Jury
Misappropriation of Trade Secrets (Question 2)	EMC Cement	Pike VHSC	Walker Wilson Few Ready Mix (Conspiracy)	<del>\$1.5 million for “the value that a reasonably prudent investor would have paid for use of trade secrets in Texas.”</del> \$1.5 million for costs saved by VHSC as a result of its use of the trade secrets in Texas.
<del>Breach of Fiduciary Duties (Question 5)</del>	<del>EMC Cement</del>	<del>Walker Wilson</del>	<del>Pike VHSC Few Ready Mix (Knowing Participation/ Conspiracy)</del>	<del>\$2 million for the difference “in the Value of EMC Cement’s interest in the EMC Products partnership before and after the” breach.</del>
Intentional Interference with Management Agreement (Question 9)	EMC Products	VHSC	Walker Wilson Pike Few Ready Mix (Conspiracy)	\$7 million for the difference “in the Value of the EMC Products’ partnership before and after the” interference.
Breach of Management Agreement (Question 13)	EMC Products	Pike	None	\$1 million for the difference “in the Value of the EMC Products’ partnership before and after the” breach.
Breach of Partnership Agreement (Question 16)	EMC Cement	Walker Wilson	None	\$7 million for the difference “in the Value of EMC Cement’s interest in the EMC Products partnership before and after the” breach.



# Charts to Illustrate Legal Reasoning

## Effect of VHSC/Pike Appellate Positions

<i>VHSC/Pike Appellate Arguments</i> ↓	Claim: Trade Secret Misappropriation against VHSC/Pike <b>\$ 1.5M</b>	Claim: Tortious Interference with Management Agreement against VHSC <sup>1</sup> <b>\$ 7M</b>	Claim: Breach of Management Agreement against Pike <b>\$1M</b>	EMC Cement's Cross-Appeal Seeking Entry of Permanent Injunction
No competent evidence of damages <sup>2</sup> (VHSC Br. 35-61; VHSC Reply 15-32)	R/R	R/R	R/R	
The rights VHSC acquired in foreclosure sale and note purchase preclude claims (VHSC Br. 21-33; VHSC Reply 4-8, 11-14)	R/R	R/R	R/R	A
No evidence of causation (VHSC Br. 61-62; VHSC Reply 32-33)	R/R	R/R	R/R	
No protectable trade secret (VHSC Br. 16-21 VHSC Reply 8-11)	R/R			A
One-Satisfaction Rule <sup>3</sup> (VHSC Br. 63-66; VHSC Reply 34-37)	R/R	R/R	R/R	
Dispositive trial court finding of no imminent harm/cannot presume harm (VHSC Resp. 9-13)				A
Dispositive trial court finding of adequate remedy at law/no irreparable harm (VHSC Resp. 14-20) <sup>4</sup>				A

# Typography Advice from Seventh Circuit

- Recommends proportionally-spaced, serif fonts, explaining that “long passages of serif type fonts are easier to read and comprehend than long passages of san-serif type.” See <http://www.ca7.uscourts.gov/forms/Handbook.pdf>

This sentence is in Century Schoolbook, a proportionally spaced font with serifs. Baskerville, Bookman, Caslon, Garamond, Georgia, and Times are other common serif faces.

This sentence is in Helvetica, a proportionally spaced sans-serif font. Arial, Eurostile, Trebuchet, Univers, and Verdana are other common sans-serif faces.

# Typography Advice from Seventh Circuit

- **Use** *italics*, not underlining, for case names and emphasis. Avoid **boldface** and ALLCAPS.
- **Avoid:** Times New Roman.
- **Consider instead:** Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, or Bookman Old Style.

# Advice from Council of Appellate Lawyers

- 1.2X line spacing with extra space before headings and between paragraphs
- 1.5” margins on all sides
- Left alignment of text
- Proportionally-spaced fonts, with 12 or 13 point
- Footnotes in same font and font size as body text
- Allow headings in different and larger font than body text
- Use *italics* or **boldface**, not underlining, for case names and emphasis. Avoid ALLCAPS.
- Discourage use of title case (and all initial capitals) in headings.

# Readability on Screen

## A. Expert testimony that is conclusory or speculative is legally insufficient to support Plaintiffs' damages awards.

Expert testimony is conclusory or speculative, and thus legally insufficient evidence, when:

- the expert fails to provide any explanation or predicate for her opinion, *see, e.g., City of San Antonio v. Pollock*, 284 S.W.3d 809, 820 (Tex. 2009);
- the explanation the expert provides for his opinion suffers from too great an “analytical gap,” *see, e.g., Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 835 (Tex. 2014); *Elizondo v. Krist*, 415 S.W.3d 259, 264-65 (Tex. 2013); or
- the expert’s opinion is predicated on facts, data, or assumptions that do not actually support the opinion or that are not supported by the evidence, *see, e.g., City of Keller v. Wilson*, 168 S.W.3d 802, 811-13 (Tex. 2005); *Mel Acres*, 443 S.W.3d at 832-33.

Courts evaluating the legal sufficiency of expert testimony “must ‘rigorously examine the validity of the facts and assumptions on which [expert] testimony is based.’” *Mel Acres*, 443 S.W.3d at 832 (quoting *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009)).

Likewise, the expert’s “underlying data should be independently evaluated in determining if the opinion itself is reliable,” and it “is incumbent on an expert to connect the data relied on and his or her

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These general principles apply with particular force to the damages testimony Plaintiffs offered below. Plaintiffs relied on expert opinions about the



# Readability on Screen

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would have disastrous consequences that Congress could not possibly have intended.

## **A. The Text Of Section 289 Allows Only Total Profit Attributable To Infringement Of The Patented Design**

Two phrases in the text of Section 289 clearly foreclose the Federal Circuit's entire-profits rule. *First*, the term "article of manufacture" is naturally read to mean an entire product only where the design is "applied" to the entire product, and not where (as here) the design is "applied" only to a component of the product. *Second*, the phrase "made from the infringement," which embodies basic principles of causation, is naturally read to limit recoverable profits to those attributable to infringement of the patented design. Were there any doubt about the proper interpretation of either phrase, they should be read in light of background principles of causation and equity that compel the same conclusion.

### **1. "Article Of Manufacture" To Which The Design Is "Applied"**

Section 289 twice uses the term "article of manufacture" to mean that to which "the patented design" is or "has been applied." 35 U.S.C. 289. Section 171 similarly authorizes issuance of a design patent to one who "invents any new, original and ornamental design for an *article of manufacture*." 35 U.S.C. 171 (emphasis added). Thus, where a claimed design covers only a component of a product as sold (like a phone's front face, a cup-holder, or a marine windshield), the relevant "article of manufacture" is the component (the phone's front face, the cup-holder, or the marine windshield), and not the entire product (the phone, the

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**Thank you!**