UNITED STATES
INTERNATIONAL TRADE COMMISSION

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In the Matter of | Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME | 337-TA-1325

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Pages: 1 through 33

Place: Washington, D.C.

Date: May 17, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

BEFORE THE HONORABLE MARYJOAN McNAMARA

Administrative Law Judge

In the Matter of | Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME | 337-TA-1325

International Trade Commission

500 E Street, S.W.

Washington, D.C.

Evidentiary Hearing

Wednesday, May 17, 2023

Volume I

The parties met pursuant to notice of the Administrative Law Judge at 9:30 a.m. Eastern.

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P R O C E E D I N G S

(In session at 9:30 a.m.)

JUDGE MCNAMARA: Good morning everyone. Please be seated. It's good to see you all. I'm really looking forward to this trial. We've had some interesting turns of event in the last 24 hours. I gather that one of the additional Defendants -- or Respondents has settled.

So we are here this morning on a much smaller group of Respondents. We'll see where it goes.

So what I'm going to do first is just remind you of a few things. Again, it has been so long since some of you have been in a courtroom, and, again, it is just really wonderful to see you in person. But we are here on the trial, and what I would like to start with is with Complainants' counsel.

Would you kindly introduce yourselves?

MR. CORDELL: Good morning, Your Honor. Ruffin Cordell from Fish & Richardson.

JUDGE MCNAMARA: Good morning. I saw you a couple of months ago fleetingly.

MR. CORDELL: They don't let me out much. But I'm joined this morning by my colleagues Brian Boyd, Ben Thompson, Linhong Zhang, Jack Wilson, Jeff Shneidman, Autumn Hwang and Irene Hwang. And we're ready to proceed.

JUDGE MCNAMARA: Do you have any clients with

you?

MR. CORDELL: You're right, thank you, the most important thing. Yes. Ms. Sardiaa Leney is our in-house counsel representative, and Mr. Nick Tino is our corporate representative.

JUDGE MCNAMARA: Thank you. Good morning to everybody. Welcome.

All right. I assume that some of your experts are going to sit in for the opening.

MR. CORDELL: They are here and I'll introduce them during the opening.

JUDGE MCNAMARA: That's great. Thank you.

First, on behalf of the Respondents -- and I understand Splat-R-Ball Respondents settled within the last 24 hours.

MR. CORDELL: That's correct, Your Honor.

JUDGE MCNAMARA: Good morning, Mr. Brinkman.

MR. BRINKMAN: Good morning, Your Honor. I am counsel for Splat-R-Ball Respondents. We're here. We're hoping that we see you fleetingly, as Mr. Cordell mentioned.

JUDGE MCNAMARA: Nice way to put it.

MR. BRINKMAN: We're here, but we're going to turn the show over to the PTT Respondents.

And if you'd like me to introduce everybody who came in, I brought them all along because everybody wanted

to see the courtroom because there are a lot of folks who have never been in the ITC courtroom before and came along, but we probably won't be staying very long.

JUDGE MCNAMARA: All right. If you would like to introduce them, please do so. I mean, you did a lot of work to get here.

MR. BRINKMAN: We did, Your Honor. Gianni Cutri next to me has probably done the most work. We have Brian Verbus, and I think you know Adam Alper and Mike De Vries.

JUDGE MCNAMARA: I do, yes. Good morning. It's been a long time.

MR. BRINKMAN: We have -- Drew Morrill is here, Jake Rambeau is here, Dan Gross is right here, Atifah Safi and Laura Uhlenhuth, all from Kirkland & Ellis. We're here, and until 7:00 this morning we were all ready to jump right in.

JUDGE MCNAMARA: It must be a good feeling.

MR. BRINKMAN: It's an interesting feeling. With us is Keith Higginbotham, who is CEO with the company who signed the settlement this morning.

JUDGE MCNAMARA: So it goes.

And on behalf of the PTT Respondents, good morning.

MR. GEORGE: Good morning, Your Honor. My name is Kenneth George. I'm with Amster Rothstein & Ebenstein,

and with me here today is Brian Comack.

JUDGE MCNAMARA: Good morning.

MR. GEORGE: Also from that firm. And we have Dan Smith from the Polsinelli firm.

JUDGE MCNAMARA: Good morning.

MR. GEORGE: And I have two client representatives in the back, Francis Chia and Veronica Wong.

JUDGE MCNAMARA: Good morning. Welcome.

MR. GEORGE: And one of my other partners, Chester Rothstein, is here.

Now you asked Mr. Ruffin if he was ready to go, and he said yes. I am not ready to go. This was a complete surprise to me. I just learned about it about two hours ago. And we had divided up responsibilities, and we had worked on certain things and not worked on other things. We're not prepared to go this morning. I'm requesting an extension until Monday.

I will say, Your Honor, that we plan to put on a shorter case, but we're just not in a position to put it on today. And I was handed by Dan Smith a decision in 337-TA-493, Order Amending the Procedural Schedule, where basically the same thing happened, and I think the trial was extended for over two weeks.

We're not asking for that. The witnesses are here, the experts are here, but we do need until Monday to

be prepared to put this case on.

JUDGE MCNAMARA: Let me first turn to Staff and introduce Staff, and then I guess we better talk and see what kind of conversation we will have and what will happen.

MR. TAYLOR: Good morning, Your Honor. Todd Taylor representing the Office of Unfair Import Investigations. Also here is Margaret Macdonald. And Mr. David Lloyd will be here tomorrow, if there is a tomorrow.

JUDGE MCNAMARA: All right. So before I get started with anything else, I think we have to deal with the question that was raised by Mr. George.

Mr. Cordell, what's your thinking? I know you probably have not had an opportunity to really talk about this.

MR. CORDELL: Mr. George actually approached me before the hearing this morning. Originally his request was to have a one-day continuance, and I think, after conferring with his colleagues, he has now pushed it back to Monday.

We were okay with one day. We think that's appropriate. We understand the players have changed quite a bit, although we also understand that, for example, Gel Blaster settled, what, two weeks ago. It's not uncommon that this would happen. But we're sympathetic. We don't want to force him to do anything that he doesn't feel ready

to do, although the Amster firm is a great firm and we have every confidence in them.

We would oppose going all the way to Monday, however. We've got witness issues. We've got our whole entourage gathered. I didn't introduce everybody. We have scheduling issues. We need to wrap this up on Tuesday, as Your Honor specified.

We take Mr. George at his word. He tells us he's not calling the fact witnesses that Kirkland had marshalled and that will shorten the case, and we're appreciative of that. But we're a little mindful that Tuesday is Tuesday, and, if we wait until Monday, that seems to be an awfully short trial. So we would ask that we give them a one-day continuance and we come back again tomorrow and go forward.

JUDGE MCNAMARA: Mr. Taylor, did Mr. George talk to you at all about this?

MR. TAYLOR: Yes, Your Honor. They informed me this morning, and we had some discussions.

JUDGE MCNAMARA: What's your thinking?

MR. TAYLOR: I don't know exactly how the Respondents split up their case. I'm not privy to that information. But I believe, in view of this morning's circumstances, I believe one day is definitely reasonable. But without more information, it's --

JUDGE MCNAMARA: I think that's right.

All right. So, Mr. George, would you care to explain how the case was divided up? And then there would also be, as -- you might want to think about whether or not some of the witnesses' deposition designations might be added to those that have already been admitted into evidence. Again, I prefer live testimony, but if there is a way to do this to get us back on track, that, again, gives you some leeway but doesn't necessarily go to Monday, maybe we can find some solutions.

MR. GEORGE: Right. How the case was done, Kirkland had a very large team of 12 lawyers on this case, and, to be perfectly frank, they did the lion's share of the work. We were there in a supporting role. It was just really two of us.

And so we're really not in a position to move forward. It really puts us in a really terrible position, Your Honor.

As far as the witnesses, there were going to be three live witnesses, Steve Spangler, Ellen Brooks, and Ms. Peterson, I believe, and all of their testimony is already in by deposition. And I think we're not going to call them. We would just go with the deposition testimony.

So really the case is going to come down to the experts. And we have our main expert, our invalidity expert, Joel Delman. We have Dr. Reitman, who I think is

going to play a much smaller role than she would have if Splat-R-Ball was still in the case. We're going to cut her testimony down. And then we have Charles Taylor, and, again, I think his testimony is going to be cut down as well.

But just to give you an idea, we provided cross-examination questions to them. They did the outlines. We don't even have the outlines back. We're at a tremendous disadvantage, you know, at this point.

One day, Your Honor, respectfully, I don't think is going to do it. I understand schedules. I would say at least we would need two days, until Friday morning, and that's pushing it for us.

JUDGE MCNAMARA: So let's talk a little bit more about this. Has Kirkland -- who is in charge of the deck slides, for example?

MR. GEORGE: That's the whole thing. We've had discussions this morning, and, you know, we have to go back to Kirkland, we have to get everything. We don't even have a graphics person. They hired the graphics person. I was told this morning that maybe he is not going to work for us. This is really a terrible position that we've been put in at the last minute with absolutely no notice.

JUDGE MCNAMARA: So before you speak, would you identify yourself, just so the record is clear? I know who

you are.

MR. CUTRI: Your Honor, this is Gianni Cutri on behalf of Splat-R-Ball Respondents. I'm trying to put myself where you are and just want to figure out a solution to get this all resolved.

Maybe I could offer the following. I think Mr. Delman, the technical expert, is sort of the main part of the PTT case that is proposed to go forward, like, in the main. I know that we're working with -- we were working -- with the Complainants on a stipulation that would shorten -- would have shortened Mr. Delman's testimony substantially. At the urging of Mr. Taylor, he pointed out that there's not a lot of dispute with respect to certain of the limitations being in the prior art.

JUDGE MCNAMARA: There is not.

MR. CUTRI: And so I think we're very close there. Mr. George, who was working with Mr. Delman over the past couple days, can confirm that that presentation will become an hour or so shorter.

Mr. George -- to answer your question about who has been doing what with respect to Mr. Delman, the past two days it's been Mr. George and Mr. Comack, along with one of my colleagues preparing him. I have been predominantly ready to do the opening. I think Mr. George is very much correct that to ask him to do the opening on short order

would be a huge lift.

I'm just offering those as kind of a perspective. And if you subtract out Mr. Spangler, Ms. Peterson, Mr. Brooks, and Mr. Cleveland, who were the fact witnesses, subtract out at least half day, maybe a day, by the time we're done with all the logistics.

I mention all that because this may not be a five-day trial anymore. I don't think it is. I think it's a three and a half maybe. And so I'll just offer you that.

In terms of getting Mr. Delman suited up and ready, he is an excellent witness, and I think that that's something that could happen given Mr. George's familiarity with that, with that witness in particular.

And we'll, of course, if they need assistance -- they worked on Mr. Delman's slides. We're going to give them those slides. That is not an issue. We are going to strongly encourage our graphics person to sign on and do what would make your life, your life in particular, easier.

JUDGE MCNAMARA: Well, I am not so concerned about me. I have read everything that has come in so far. I am more concerned, again, about making sure we have a cohesive, coherent trial and that everyone's due process rights are protected.

I know what the graphics look like. I was hoping to see also some exhibits coming in with the projectiles.

In any event, there are other questions I have. I looked at some of the affirmative defenses, and many of them, I will be quite blunt, seemed quite thin. And I am talking about unclean hands, I am talking about estoppel, inequitable conduct. I think that there were additional affirmative defenses as well that seemed not to have much evidence supporting them.

So I guess my question also is how much of that could be cut down, cut back. And any of that testimony that I suspect was going to be live could, again, either the defenses be withdrawn, if there is not enough information to support the elements, and/or cut it back again to possible witness designations, deposition designations.

MR. GEORGE: If I may, Your Honor?

JUDGE MCNAMARA: Sure.

MR. GEORGE: This is Kenneth George again. Most of those defenses, I think, are going to go away now, and there were defenses -- there were a couple of them that I think Splat-R-Ball's counsel was going to proceed with, and I don't think we're going to do it.

But, again, I just found out about this two hours ago, so I need time to get my arms around this case.

JUDGE MCNAMARA: I do understand that, but I also have to take into consideration previous scheduling.

Maybe, Mr. Cordell, you can help me with this in

terms of what kind of accommodation can be made on travel or witnesses, let's say, if we were to start Friday morning.

MR. CORDELL: My only worry, Your Honor, is then -- we do have a couple of witnesses that we thought would go on and off today and we would release, but we understand that everybody has got to accommodate some.

My big worry is just having enough time to complete the trial. I wonder if maybe midday Thursday wouldn't be a good compromise.

JUDGE MCNAMARA: Mr. George, I would be certainly willing to do that. That gives you a little more time. And, again, I think -- my sense is, again, if some of these affirmative defenses will be withdrawn, that's a matter of just, you know, filing a one-liner, we're withdrawing them, or just agreeing on deposition designations. That's fast.

And then it seems to me the big part really are the invalidity experts, to a certain extent maybe the expert who will be contesting infringement, but, to be quite honest, I think they have a hard row to hoe.

MR. GEORGE: Your Honor, the other thing that -- this is Ken George again.

The other thing that Mr. Cutri brought up was the stipulation. And if we can get that stipulation that we sent to you yesterday, if we can get that signed, that's going to cut a huge amount of time out of Mr. Delman's

testimony.

I personally think we could complete the trial if we started Friday morning based on my view of how, you know, what we're going to get rid of and what we're going to shorten. As I said, if we got that stipulation, that would go a long way to that as well.

JUDGE MCNAMARA: So that would mean --

Go ahead, Mr. Cordell.

MR. CORDELL: There are parts of the stipulation that we can't accept, Your Honor, so that's -- although we're happy to sit down and work out stipulations galore to the extent that we can shorten the process, that would be good.

One suggestion that I did have is we could perhaps do the prehearing conference now, and that would take care of whatever issues that would otherwise occupy time and then start after lunch on Thursday. That would give us a nice running head start.

JUDGE MCNAMARA: Well, that might work, but here is the thing. I think we handled all of the pretrial motions. I think we handled all of the motions for request for admission into evidence without a sponsoring witness. I'm not sure what remains.

MR. CORDELL: Your Honor, as a patent lawyer, there's always something that remains. I always have

issues.

JUDGE MCNAMARA: It's like The Remains of the Day.

MR. CORDELL: That's what my wife tells me, I have issues.

The things that are weighing on our minds primarily have to do with the issues that Your Honor has already decided. So you entered in Order 37, I believe, Summary Determination of Infringement. Then yesterday, late yesterday, we entered a stipulation as to the technical prong of domestic industry as to all asserted claims.

That obviously shortens everything. But Respondents have petitioned for review of Order 37. And so we really just kind of wanted to get a little guidance. I think all the parties wanted Your Honor's views on whether we should spend any time putting in evidence on those issues or not.

JUDGE MCNAMARA: Mr. Taylor, let me come to you first. What's your thinking? And would you please --

MR. TAYLOR: I'm sorry, Your Honor. The Zoom --

JUDGE MCNAMARA: I'm well aware. I sat in my house in bare feet. I'm not bare-footed today. My preference might be.

MR. TAYLOR: Your Honor, the parties reached -- I believe the Respondents agreed to stipulate to domestic

industry technical prong in the sense that means the Staff is not challenging it. There are no -- I don't believe there's any facts attached to the stipulation showing they satisfied the domestic industry technical prong.

So I believe Your Honor may want that evidence into the record. Somehow it's not attached to the stipulation. How you get that evidence in, it's up to Your Honor.

JUDGE MCNAMARA: Well, here is the thing. Here is another thought I had. So I think that is a good idea. I think that might be able -- well, it would still have to come in live, I think, at this point. But, again, if a solution could be worked out, I am amenable.

Here is another thought I had. The Commission has a certain period of time in which to review infringement. Much as I hate to do this, maybe we could put on the invalidity case and the economic prong case and then wait to see what the Commission is going to do on infringement and bring you back for part of the -- for the infringement.

But I am not sure of any other way to do this that would preserve everybody's rights and make sure that we stuck more or less to a schedule. Some of the procedural schedule might change now, maybe the date of the ID for sure depending on the dates that I could give you for the

infringement case. But, again, that date might go away depending on what the Commission does.

MR. CORDELL: And I think that's likely, Your Honor.

JUDGE MCNAMARA: Well, let me just put it this way. In eight years I have only -- I think we have only issued two MSDs on infringement. One was a trial balloon for me because I really didn't know which way the Commission might go on a molecular structure, and so I raised that as a balloon. We haven't done one since. So our odds are pretty good is what I would say, but no one is ever sure.

MR. CORDELL: I think that's a perfectly, not only acceptable, but that's a great idea to schedule something short, if we needed it.

The only wrinkle is that tech DI. Now that's a stipulation. So there would be no Petition for Review. I guess I'm interested in what the Staff would like to see in terms of factual support.

JUDGE MCNAMARA: Sure. Go ahead. I'd love to hear it.

MR. TAYLOR: Your Honor, it's not the Staff who is looking for the evidence. I believe Your Honor would have to make a determination.

JUDGE MCNAMARA: I would. I'd like to know a little bit more about tech DI. I mean, if it is a clear

stipulation onto which everyone has signed and there are no issues, can it just be turned into an MSD?

MR. CORDELL: I don't want to --

JUDGE MCNAMARA: Motion for Summary Determination.

MR. CORDELL: I don't want to presage my opening statement, Your Honor, but what I was going to tell you as part of the tech DI case was that their expert has said -- well, at least I had a slide in here. Their expert has said that tech DI rises and falls --

JUDGE MCNAMARA: With infringement, yes.

MR. CORDELL: So it would be that terse. It's pretty straightforward.

JUDGE MCNAMARA: Well, I think I have to hear from Mr. George on this, because there are also some rights that the Respondents have and certainly in terms of any kind of addendum or any way of presenting the technical DI.

What is your thinking, Mr. George?

MR. GEORGE: This is Ken George.

Again, the infringement and tech DI are interwoven, so could we put -- you know, wait to see what the Commission does and then do both of them later, if we have to or not?

JUDGE MCNAMARA: What do you think, Mr. Cordell?

MR. CORDELL: I think that would be wonderful.

JUDGE MCNAMARA: I think that would work.

Mr. Taylor?

MR. TAYLOR: Yes, Your Honor, that's fine with the Staff.

JUDGE MCNAMARA: Okay. So now the question remains could we start Friday morning on the other components of the case, which would include -- which would be left with invalidity and economic prong, and then whatever defenses remain that you're not actually withdrawing because of --

MR. GEORGE: Thank you, Your Honor. I don't think -- again, it's a little too new for me, but I don't think -- I don't think there will be much else. I think it's going to be invalidity. It's going to be invalidity and the other part of the DI case.

JUDGE MCNAMARA: Okay. Mr. Taylor?

MR. TAYLOR: I believe a lot of the defenses were the Gel Blaster defenses.

JUDGE MCNAMARA: They were.

MR. TAYLOR: So they are not in the case, I don't believe, anymore.

JUDGE MCNAMARA: They may not be. The question is the extent to which the other parties signed on. And I am not really sure about that one without seeing some case law.

There are times when the defenses can also be maintained by the other parties. I think we looked at the responses, and I'm not sure that all of the affirmative defenses were raised by Splat-R-Ball and the PTT Respondents, but we have to take another look and make sure that we're on firm grounds on that. Obviously it's always easier for us if you withdraw them and realize that the evidence is pretty thin, but we would have to take another look.

MR. GEORGE: Your Honor, this is Ken George again. I don't see us putting forward any of the Gel Blaster defenses at all.

JUDGE MCNAMARA: Okay.

MR. GEORGE: I actually don't see us doing anything except invalidity and the other part of the DI. The only issue I'm wrestling with, I don't have an answer for you yet, but it's not a big issue, is we still have one claim that's left, claim 14.

JUDGE MCNAMARA: Yes.

MR. GEORGE: And that, frankly, is the only claim that's left on infringement. Even if we were to do that, and I'm not sure we still will, that would take about five minutes.

JUDGE MCNAMARA: So that would also be up to Mr. Cordell, that one claim limitation that's left.

MR. CORDELL: Yes, Your Honor. We are planning on presenting claim 14.

JUDGE MCNAMARA: Okay. Mr. Taylor, any thoughts?

MR. TAYLOR: No, Your Honor.

JUDGE MCNAMARA: I think I caught you off guard there.

All right. Couldn't we put that over again to the infringement case?

MR. CORDELL: I mean, we could. It's really at Your Honor's --

JUDGE MCNAMARA: I think it makes sense to do that, because, again, we don't know what will happen in the interim.

MR. CORDELL: My only concern is that we will then be sending the case up without claim 14, if they affirm.

JUDGE MCNAMARA: That's true.

MR. CORDELL: I think we would like to have claim 14 in the case.

JUDGE MCNAMARA: All right. So the next question is can we start Friday morning and still cover what needs to be covered.

MR. CORDELL: I've just taken a poll of our witnesses, and I think we can do it, but obviously we need to be disciplined, and that's --

JUDGE MCNAMARA: Well, that's nothing new to you-all, seriously.

MR. CORDELL: We do try, Your Honor.

To that end, could I raise one more housekeeping matter, which is exhibits?

JUDGE MCNAMARA: Sure.

MR. CORDELL: Your Honor's prior practice is, at the end of every day, the parties meet and confer, we come up with a list. If there are disputes, we hash them out the next morning.

Is that the procedure you would like us to follow?

JUDGE MCNAMARA: Sure. I think it might be easiest all around. It gives everybody an opportunity to confer and make sure that they are in agreement or not in agreement, and we can take them up the next day.

Will that work for you-all again with this modified schedule?

MR. GEORGE: Yes, it will, Your Honor. This is Mr. George again.

JUDGE MCNAMARA: Thank you.

MR. CORDELL: One last issue, Your Honor. In prior cases we have had at least a practice that, in order to have an exhibit admitted, we need to actually, not only put it on a slide, but read it into the record. Does

Your Honor have a preference?

JUDGE MCNAMARA: I think at this point, if everybody agrees to those exhibits, you can make a statement when the slide comes in that the parties have agreed upon the exhibits, and then you don't have to read them into the record. They become part of the exhibit list. They can just become part of the submission. And that would streamline things extraordinarily also in terms of time.

MR. CORDELL: It would. Thank you.

JUDGE MCNAMARA: Are you in agreement with that, Mr. George?

MR. GEORGE: Yes, I am, Your Honor.

JUDGE MCNAMARA: Okay. Mr. Taylor?

MR. TAYLOR: Yes, Your Honor.

JUDGE MCNAMARA: All right. So to recap, we'll start Friday morning at 9:30. And then it looks, again, as though we'll end on Tuesday, so that gives you three full days. The case will be limited -- well, the case will have the one claim.

Are you prepared for that, Mr. George, to deal with that now, I mean within this three-day period?

MR. GEORGE: Yes, Your Honor.

JUDGE MCNAMARA: All right. That's good. And then what we'll do is, on Friday, rather, on Tuesday, I'll propose some dates for you-all to come back for the

infringement case, and we will select a date before we even all leave so that you can confer with your witnesses and make sure their schedules are clear.

We'll come up with a date. We'll revise the procedural schedule, but I'll wait until we know what that date is for the infringement case.

As I understand, I will see a modified -- or I will see a stipulation at least on the Delman testimony. I may see a withdrawal of the affirmative defenses. I should see a withdrawal of the affirmative defenses, I think, but that is up to you also to check. And I think that should then cover it.

MR. GEORGE: Thank you, Your Honor.

JUDGE MCNAMARA: Does that work, Mr. George?

MR. GEORGE: It does. Thank you, Your Honor.

JUDGE MCNAMARA: Mr. Cordell?

MR. CORDELL: Yes, Your Honor.

MR. TAYLOR: Yes, Your Honor.

JUDGE MCNAMARA: All right. Are there any other pretrial issues that needed to be dealt with? I thought we had taken care of just about all of them.

MR. TAYLOR: Just one point, Your Honor. Ms. Macdonald reminded me that the Commission actually may not meet their deadline but --

JUDGE MCNAMARA: They may not. You know what, we

will be prepared. Whatever happens, we'll do it, and they will understand that the schedule in this case, then, is going to be thrown off in part because of this. We will do what we have to do.

But I would rather protect your rights and I would rather not have to put on a whole infringement case when it may not be necessary. So that is what makes sense to me.

MR. CORDELL: Understood. Thank you.

JUDGE MCNAMARA: All right. Then I will see you-all -- at least you-all got a glimpse of the courtroom. So you now have creative visualization about where you're going to stand and where you're going to be and how it is going to work.

Is there anything else before we adjourn?

MR. CORDELL: Not from Complainants, Your Honor. Thank you.

JUDGE MCNAMARA: Great.

MR. GEORGE: No, Your Honor, not from Respondents.

JUDGE MCNAMARA: Mr. Taylor?

MR. TAYLOR: No, Your Honor, unless you wanted to see one of the products.

JUDGE MCNAMARA: I would, and then we'll go. I think Anita bought one, but we were hoping to try one out.

MR. CORDELL: Your Honor, if you wanted to see a real product, I have a NERF. So what you're holding in your hand there are the dehydrated --

JUDGE MCNAMARA: Yes.

MR. CORDELL: -- SAPs. You are holding, I bet, five thousand in your hand. They are larger than a grain of sand but not much.

JUDGE MCNAMARA: All right.

MR. CORDELL: And mine is actually battery-operated. If you would like to fire it, you may.

JUDGE MCNAMARA: Maybe not with all of you here. I am not sure of my aim. So maybe I'll wait and we'll do it at another point and we'll take care of it then. But thank you. I appreciate the offer. I am learning to shoot.

MR. CORDELL: These are remarkable. And, particularly, if you are just shooting at a wall, they are very, very safe.

JUDGE MCNAMARA: That's what I have read, but you never know.

All right. Then I will see you bright and early -- well, I will see you at 9:30 on Friday morning. Thank you.

(Whereupon, the proceedings concluded at 10:04 a.m.)

C E R T I F I C A T E

TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME

INVESTIGATION NO.: 337-TA-1325

HEARING DATE: May 17, 2023

LOCATION: Courtroom B

NATURE OF HEARING: Evidentiary Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceedings of the U.S. International Trade Commission.

Date: May 17, 2023

Signed:

ss//

Signature of the Contractor or the Authorized Contractor's Representative

I hereby certify that I am not the court reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission against the aforementioned court reporter's notes and recordings for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

Signed:

ss//

I hereby certify that I reported the above-referenced proceedings of the U.S. International Trade Commission and caused to be prepared from my record media and notes of the proceedings a true, correct and complete verbatim recording of the proceedings.

Signed:

ss//

UNITED STATES
INTERNATIONAL TRADE COMMISSION

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In the Matter of | Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME | 337-TA-1325

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OPEN SESSIONS

Pages: 34 through 320 (with excerpts)

Place: Washington, D.C.

Date: May 19, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Before the Honorable MaryJoan McNamara
Administrative Law Judge

In the Matter of	Investigation No.
CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME	337-TA-1325

International Trade Commission
500 E Street, SW
Washington, D.C.

Evidentiary Hearing
Friday, May 19, 2023
Volume II

The parties met pursuant to notice of the Administrative Law Judge at 9:30 a.m. Eastern.

Reported by: Linda S. Kinkade RDR CRR RMR RPR CSR

Pet. Ex. 1004
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*** Index appears at end of transcript ***

P R O C E E D I N G S

(In session at 9:30 a.m.)

JUDGE MCNAMARA: Good morning everyone. Please be seated.

So I saw the stipulation that came in. Very good.

Good morning, Mr. Cordell.

MR. CORDELL: It is, Your Honor. We're happy to report that we worked over the last couple of days to narrow the case a bit. And the stipulation represents a number of agreements we've come to with respect to, for example, treatment of prior art and qualifying it as prior art and whatnot.

There are a couple of additional ones that I'd like to tell you about.

JUDGE MCNAMARA: Sure.

MR. CORDELL: So with respect to the economic prong of domestic industry, what the parties have agreed is that we would put in the respective expert reports, the excerpts that relate to the actual econ DI issue, some deposition designations and some demonstratives.

JUDGE MCNAMARA: That's fine.

MR. CORDELL: Thank you. And then for the tech prong of domestic industry, Respondents have stipulated to that, but we were a little concerned, Mr. Taylor was

concerned, that we needed some evidence in the record. So with Your Honor's permission, what we would do is put in an excerpt of Dr. Kudrowitz, our technical expert's report, relating to the technical prong of domestic industry, and that would put some evidence in the record that you could rely on, if you needed it.

JUDGE MCNAMARA: I think that's important, because when I looked at the stipulation, I was thinking about -- that particular stipulation, I was thinking it is relying on Markman constructions that had been adopted. And so I was thinking, okay, infringement and invalidity rise and fall together. Kind of interesting.

MR. CORDELL: And that was their expert's testimony, is infringement and domestic industry would rise and fall. So we feel that's sufficient evidence. I wonder if Mr. Taylor has a view on that.

JUDGE MCNAMARA: Mr. Taylor?

MR. TAYLOR: Good morning, Your Honor.

JUDGE MCNAMARA: Good morning.

MR. TAYLOR: On the technical DI prong, that sounds fine with the Staff. But on the econ prong evidence about submitting expert reports and depo designations, the private parties reached that agreement; the Staff, as always, we have a general position that we prefer live testimony --

JUDGE MCNAMARA: Yes, I do too.

MR. TAYLOR: -- especially on issues that are contested. One here in this investigation I believe is obviousness in the DI econ prong.

But, Your Honor, we don't like to stand in the way of agreements between the private parties, and we understand this is a special circumstance in this investigation, so we...

MR. CORDELL: Our view, Your Honor, is that the experts are confined to their reports and perhaps what they said in their depositions. So it won't get any better than that, so we feel pretty secure about that record.

JUDGE MCNAMARA: What do you think about that?

MR. TAYLOR: The expert reports coming in, they are not sworn -- I checked them this morning -- which is fine, but it has a lot of good information, the exhibits and attachments. That's the information they need, which is fine, that coming in. Again, relying on deposition designations for the sworn testimony, which is fine. It's just if Your Honor wanted to hear about that evidence and may benefit from it, I don't know.

JUDGE MCNAMARA: So I looked at the issues, and so -- and I looked at where the disputes lie, and it seems to me that, based on the quantity of investments, that Hasbro has it pretty much. I mean, I'm not -- you know, the

quantity of investments, even though it is in the process -- let me think about this a little bit.

MR. CORDELL: We could add affidavits to each of the experts' reports swearing to their -- the accuracy and completeness.

JUDGE MCNAMARA: I think that would certainly be helpful.

What I would also like to see when you come around to actually drafting the IDs -- or, I'm sorry, when you -- when you get around to drafting your post-hearing briefs, I would like to see some charting of the investments by prong, even though, again, it's in the process of.

And it's also helpful for me to have a timeline so that I can see, for example, when -- I know there were some pre-institution investments, there were post-institution investments. So I kind of like to see that in a timeline and see it broken up by prong. It's really helpful. I know there was some comparative information with respect to foreign investments. It is always helpful for me to see that because perhaps I'm more visual. I like to see that, again, if we have some charting comparisons. So just some thoughts there.

If we were to put on any live testimony, how much would that impinge on time?

MR. CORDELL: Anytime we put on experts, it does

take some time. Perhaps what we can do is see if we can do an agreement on a declaration to affirm the expert reports, and then if we can't satisfy Mr. Taylor, perhaps next week we could call the experts.

JUDGE MCNAMARA: How would you feel about that?

MR. TAYLOR: That's fine, Your Honor. It's not so much me being satisfied, it's Your Honor's being satisfied.

JUDGE MCNAMARA: I know.

MR. TAYLOR: I don't really have, today, any specific questions regarding -- well, there is one area about the competitive analysis of what you're comparing the design-based industry versus --

JUDGE MCNAMARA: Yes.

MR. TAYLOR: That's -- you know, the Staff took a position in the prehearing brief, and we're going to stick, to this point in time, to that position.

JUDGE MCNAMARA: All right. Let me think about that through lunchtime, and then let's bring this up again. I don't want to leave it hanging for too long. But I think if we could even get just -- let's say if we had a declaration, but if there were some testimony on just that issue about which Staff has some issues, maybe we could narrow it to that, and maybe perhaps we could have you focus also on which -- and provide in writing just a list of the

exhibits of the expert reports are the most salient and support the information best.

I know that they produce a lot of exhibits to the reports. I've seen some of them. But some of it obviously goes to the crux of the issues that have to be decided more clearly than others that are supporting information that can be rendered in chart form when you write.

So let's come back to this after lunch, after you-all have had a chance to talk. How would that be?

MR. CORDELL: Thank you.

JUDGE MCNAMARA: And everybody is taken into consideration on this. But we can narrow it. We'll find a way to get it streamlined.

MR. CORDELL: Thank you. That's all.

JUDGE MCNAMARA: All right. Thank you.

Mr. George, is there anything from the Respondent PTT side that you'd like to mention or raise?

MR. SMITH: Your Honor, Dan Smith from Polsinelli for PTT. I was standing here just in case you had a question about the economic domestic industry for PTT's side, but, other than that, I believe we are ready to proceed with openings.

JUDGE MCNAMARA: Okay. Good. So I think we've got resolved, at least for the time being, what we need.

Mr. Taylor, is there anything from Staff's side?

MR. TAYLOR: One question about timekeeping. I don't remember if we talked about that last time.

JUDGE MCNAMARA: Much appreciated. Thank you.

There should be a timekeeper from each side. And at the end of the day, I would appreciate it if you would send a joint email to mcnamara337@usitc.gov, and in that you should break down the amount of time the Complainants have spent, the amount of time the Respondents have spent, and then the remaining time. And if you could get that in at the end of the day, that would be helpful. And then we'll just -- I'll refer to it.

Just so that you know, we'll have an hour's lunch break. Usually I break at some organic time when it makes sense to do it. We will have a 15-minute morning break, a 15-minute afternoon break.

And what I have been trying to do, being mindful, as I think we all have been, about screen time and what happened during the pandemic, I'm trying to take a break every hour on the half hour for five minutes so everybody has a chance to move around a little bit and kind of decompress a little bit. So that's what we will try and do.

And, again, as was mentioned on Wednesday, at the end of the day you-all will have time to look at exhibits and prepare your exhibit lists, and we'll try and enter them into the record the next day, if we're finished with certain

witnesses. Or we'll try and get them in, actually, that day, if we can. Otherwise, we'll put them in the next morning as part of the next morning's business.

We have already agreed, and you have already agreed what we will do with the deck slides and the exhibits that are mentioned on the deck slides. So I think that is fine. We'll just proceed and it will be more streamlined that way.

All right. So is there anything more, Mr. Taylor, going in reverse order?

MR. TAYLOR: No, Your Honor.

JUDGE MCNAMARA: Mr. George?

MR. GEORGE: No, Your Honor.

JUDGE MCNAMARA: Thank you. Mr. Cordell?

MR. CORDELL: No, Your Honor. Thank you.

JUDGE MCNAMARA: All right. Then the floor is yours.

OPENING STATEMENT

MR. CORDELL: Good morning, Your Honor. Ruffin Cordell from Fish & Richardson. By way of introductions, with me this morning are my partners Brian Boyd, Linhong Zhang and Autumn Wu that will be presenting witnesses today. The rest of the folks may appear from time to time. And then our client representative, Ms. Sardiaa Leney, is here, and Mr. Nick Tino is our corporate representative.

JUDGE MCNAMARA: Good morning. Welcome.

MR. CORDELL: So, with that, Your Honor, we thank you for hearing us. We had a little bit of a winding road to get here, but it's always good, and it is great to be back in person. And we appreciated all the efforts you made to keep us going during COVID, but as you pointed out, this is the second time I've actually seen you. But it's good to be back.

Hasbro doesn't need a lot of introduction. It's a great American company. Their brands are epic, iconic. It is hard for me to find the right word.

Monopoly was the game that took us through the Depression and has resurfaced. We were playing it all during COVID. Things like Clue and Mr. Potato Head. I mean one of the things I learned in this case is the original Mr. Potato Head actually required a real potato. You put the pieces into the potato. There was no plastic head there.

Active games like Connect 4 and -- they make all manner of things. Dungeons & Dragons is obviously a very popular entry. But they are a great American toy company and have been so for essentially a century.

This is Hasbro's headquarters in Pawtucket, Rhode Island. On the left side of the slide we have what they call Main Street, which has a collection of the great

toys that Hasbro has brought us over the years, including -- you can see the Transformer, a life-sized Transformer there. But all of the games -- and the hallway is simply lined with all the great contributions they have made, including an original Monopoly set, one that dates back, again, to the Depression, when it was folded up on a sheet. And it gave people a distraction and made them feel like they were tycoons at least for a few moments.

One of my favorites is Risk, shown on the right side. I can claim that I was part of a Guinness World Record Risk game, the largest Risk game ever, 40 years ago. And we threw the dice off of the top of the building, which they were enormous dice. It was a complete disaster because it took so long to run the dice back up to the roof that we ended up sort of playing with some smaller dice. But we had live people that were the armies. It was great fun.

But suffice it to say that Hasbro has been with us for a long, long time.

Now we're here to talk about blasters. And the blasters really began with Hasbro when they introduced the NERF Blaster, and that was back in 1992. The NERF Sharpshooter was the very first NERF Blaster. I have a now teenage son, a 16-year-old, but I till tell you that we are still trying to separate him from his NERF Blasters. He has coveted those, and that was the most popular birthday gift

for him and his friends for years and years.

They make all manner of form factors. There are those with big drums on them, and there are double-barrelled ones. There are just all manner of blasters, including this Motoblitz, which is one of the most recent ones, that actually can shoot not only a single shot, but if you notice in the large orange drum, it shoots six darts at the same time.

So they really have been very creative, Hasbro has, in the way they have configured these things and inspired the imaginations of people that -- and kids have played with these throughout.

Now one of the problems that you have with the blasters, the NERF blasters, is that when my son and his friends would get together and they would play with their NERF blasters, my basement looked like this. So there was a pile of these NERF foam darts. I still find them in the yard. It amazes me at how elusive they can be. And it was a big part of it.

One of the things you will find about this case is that we moved on to the GelFire products, and the ammunition itself is tiny. I'll show you this in a moment, but I'm holding in my hand a packet of five thousand of these rounds. And they go into a magazine of some kind and they feed into these blasters.

And the Mythic and Legion were the first two that we introduced, and they were introduced before the case was filed. And the performance of these is really something that has to be experienced.

I know Your Honor has one, but I have eye protection I brought, if you'd like to try it.

JUDGE MCNAMARA: I would. Maybe not right now, but I will try it. We'll take it back and maybe -- if you don't mind. I'm not quite sure of my aim.

MR. CORDELL: Let me just demonstrate briefly, if I can. So if I can have the ELMO. I don't know how well this is going to show up on the ELMO.

But there's a wheel here, and you simply move it to the Active position. You can see the little green light has come on. That means it's live. And then it is simply a trigger pull, and away it goes (demonstrating).

That's for a single shot, but there is also a setting for full automatic. So to the extent that you have any Rambo illusions, this is -- (demonstrating) and away they go.

Again, we do recommend the eye protection. I probably should have done that, but I'm not likely to have any bounceback shooting at the floor. That's the plus. We'll submit these for in camera review.

JUDGE MCNAMARA: Yes. Thank you.

MR. CORDELL: But, suffice it to say that the GelFire and products like it have revolutionized the market for blasters.

So the Mythic and Legion have been enormous sellers for Hasbro.

As I mentioned, the ammunition itself is a huge step up. Because instead of thousands of these foam darts that sell -- you know, for ten dollars you'll get a couple dozen of these foam darts, you get five thousand for a couple of bucks.

As much as I enjoyed the disciplinary exercise of forcing my son and his friends to pick them all up, the gel blasters and the GelFire ammunition simply dehydrate back to the same posture and they can be vacuumed up. They are biodegradeable. It is basically just a little bit of cellulose that's left. Particularly when you fire them, they often break up, so it really becomes dust. So it was a remarkable development overall.

Now I have -- I didn't pass out my slides, but I need to, if I might, Your Honor, because I have a confidential slide I'd like to show you.

May I approach?

JUDGE MCNAMARA: Yes. Thank you.

MR. CORDELL: For Hasbro, the NERF blasters have been an enormous seller for years and years and years.

Their market share was two-thirds of the market plus for many of those years.

What we found when some of the other Respondents entered the market with gel-based blasters is that Hasbro's market share went way down, which really necessitated this case.

And the product line for Hasbro, as Your Honor will see in the domestic industry portion of the case, is not limited only to the Mythic and Legion. And the Mythic Beast is a variant of the Mythic. It has a different, what my son would call, skin. Meaning it just has different colors and different form factor. But you can see that the structures are pretty much the same.

And those were the products that were released before the Complaint was filed. On the right-hand side of the slide, which is blacked out for confidentiality, are the products that have been in the process during the case, and you'll see that there are many of them. They take lots of different form factors.

Some are made for longer shots. The one in the upper center is a long-shot kind of blaster, and then there are those that are small and then there are those that are made for multiple -- there's one that has -- well, again, I don't want to clear the courtroom, but it has multiple barrels that can be fired.

So it's a very exciting time at Hasbro, and the development behind it has been enormous.

The team at Pawtucket, Rhode Island is keenly focused on developing these products. You're going to hear from Mr. Nick Tino. And he has -- we won't have time for him to tell all the stories about the development of these gel-fired products at Hasbro, but it's obviously been an enormous effort.

As Your Honor pointed out early, we have a pre-filing domestic industry, where we had substantial resources and investments that were made in these products, but we also have an ongoing process where month after month the entirety of the engineering, design, model shop, development, reliability teams are actively working on these products. And so we have a very real American domestic industry.

And what have we heard from Respondents? Well, they say they are manufactured overseas. And that's true, but the manufacturing is the tail of the dog, not the dog. So we end up with all of the design, all of the testing, all of the form factor analysis, the reliability analysis, all of that takes place in Pawtucket, Rhode Island.

And when we look at which companies are actually making investments in these products, Hasbro is head and shoulders above anything that anybody else is doing.

So this is a patent case, after all, so we should talk about the patents, the '282 and the '683. We don't have -- Hasbro is a licensee of these patents, and so we don't have the inventors coming, but we have lots of inventor testimony designated for Your Honor. And part of it is from Mr. Ron Brawer.

And Mr. Brawer tells the story that he was just outside of London, in Camden, walking through a flower market and encountered a florist that had flowers soaking in the gel material, and was so fascinated with these gel nodules that he took some home. And he was a toy guy, and he and his compatriots got together and started to brainstorm about how they could make a toy out of these things. And that is the genesis of the GelFire and all the products we're here to talk about.

So what we're going to hear from Respondents when we get to the validity case is, oh, this is a natural step, everybody knew it. But that's not what happened. What happened was Mr. Brawer had the insight to recognize this material as being something new and really awesome that he could then make into a toy. And then he and his colleagues did the blood, sweat and tears necessary to make that happen. And those are the actual facts.

Now we started this case with hotly contested infringement issues. Your Honor has heard lots and lots of

this. But it's sort of ending with a whimper on infringement.

This next slide is confidential, but it comes from the PTT Respondents, and it's slide 11, I guess. And Your Honor has seen this evidence. It's the testimony where they talk about the fact that their ammunition is made of SAP. And we have some chemical analysis to back that up.

Your Honor's decision on summary was that infringement was established for the claims that I've got on the screen, 8, 19, and 20 and claim 5 of the '683, and that's -- we've dealt with that over and over again.

Domestic industry, I don't need to talk about. We have a stipulation. We've got a plan to back that up with some evidence.

And then I promised you the other day to show you Mr. Delman, their expert's testimony, that the tech DI prong rises and falls with infringement. And claim 14 has now been swept in. Not only have we shortened the case but we shortened my opening statement at the same time.

The good news is we're only facing one Respondent because both Gel Blaster and Splat-R-Ball have signed license agreements.

One of the things they talk about in the briefing and in their expert reports is, wait a minute, people take licenses for all kinds of reasons. They want to avoid

litigation costs. They want to do this, they want to do that. It's very intrusive.

But it's important to keep the time frame of these licenses in mind. These were not licenses that were entered into the day after the Complaint was filed or the day after institution or the day after discovery began.

Gel Blaster took us all the way up to almost the very end. It was just a few weeks ago when they finally signed a license agreement.

Splat-R-Ball took us until Wednesday morning, when their lawyers were here in court and were ready to proceed, but in fact decided, instead, to take a license.

So it hasn't -- these licenses are not technically, you know, part of the record in the sense that our experts have relied on them, but they are part of the record in that they are before Your Honor.

And the reality is that it is yet another supporting post in the platform of validity in this case that they do support the fact that these are valid patents, that the biggest companies in the world, who have hired the most sophisticated law firms in the world, spent all of this money on the litigation and then settled. They didn't do it on the front end.

So what are we left with? So PTT is left with a validity challenge. And it's important to start with the

fact that this isn't an anticipation challenge, it's only obviousness.

And that means that they have got to clear some significant hurdles. They can't simply point to a reference, find the existence of one element or another and throw up their hands. They need to convince you that, in fact, this remarkable combination, this remarkable device, that has sold widely, that has won all kinds of awards, would have been obvious. And that's a problem. That's a problem for a few reasons.

First of all, we know that SAPs were invented in the '60s. They are over fifty years old. They've been widely used for all kinds of applications. We know that shooting toys have been around for 150-plus years. And you could suggest that they go back to Biblical times when there's evidence of those.

The patented devices revolutionized this class of toys. We have direct evidence from the Respondents themselves, out of their own mouths, that it created a whole new class of devices. It was a whole new market. And sales have skyrocketed. Those are immutable facts of this case.

So the ultimate question that we all have to ask and that Respondents bear an enormous clear and convincing burden on is, if there was a motivation to combine SAP and these air guns, these shooting toys, why did it take so

long?

Why is it that the SAPs were available in the '60s and the shooting toys were available -- I'm going to show you Ralphie from A Christmas Story -- going back for decades and decades, back to 1889, I believe -- why, if that motivation was so apparent, if it was so available, why wasn't it done before?

The reality is that these shooting toys have been around for a long, long time. So I've got Ralphie's Red Ryder on the left-hand side. This is made by Daisy, who was part of the Splat-R-Ball Respondents. And we can debate when the first one was introduced, but the patent on it came out in 1889.

We have the NERF blasters, which we know were introduced in 1992. Again, were ubiquitous. They were widely sold. Everybody knew about them.

We have a thing called a Goo Spewer, which is really not part of the case because Respondents aren't relying on it for obviousness. It was really kind of a squirt gun that squirted, you know, a goo. And what it really did was make a mess. I'm thankful that this never made its way into my house.

We also have a variety of products dating back to the '60s that were sort of AirSoft-like. They shot small plastic projectiles. So this is the Meggs patent I've got

on the right-hand side of the slide, who is the father of one of the inventors in this case.

And then the primary focus of Respondents has been on the AirSoft platform. And AirSoft is a little bit different. The guns -- you have to call them guns -- were really made to mimic powders firearms.

So what I've got on the screen is the first one that Daisy made, which was an AS240. And that AS240, they called it a pistol for good reasons, and it was a .24 caliber weapon. That's how they marketed it. And it shoots a very hard plastic ball. And they regulate how fast it can shoot to try to minimize the injury possibilities, but you'll see, as we go through the other evidence, these AirSoft guns are made to mimic real weapons.

In my house, we didn't let my son have them because they look like assault weapons. I mean, that's really what they are.

So what we have is a platform where the whole world knew about these. Daisy and Splat-R-Ball knew about their air guns, you know, a BB gun being an air gun, since 1889, but they didn't make a device that would shoot SAPs until they saw guns made by The Maya Group at a toy fair. So they saw our patentee's, original patentee's, toys at a toy fair and that's when they started.

Hasbro has made NERF for years and years. They

shoot darts, they shoot balls, they shoot water. But the NERF blasters, Hasbro didn't think to make SAP until after the patents came out. The Goo Spewer really doesn't shoot. It's -- again, like I said, it's a water gun that really just makes a mess.

There's no question that people knew about AirSoft-like platforms. For years and years and years. And yet no one -- the evidence will be that no one thought to put an SAP into an AirSoft platform.

We're going to hear from Mr. Delman, the Respondents' expert, and he will tell you that, before this case, he never thought about it. And he's got a lot of experience with AirSoft guns. He plays with them a lot. He takes them apart. But he didn't do it.

So what do we have? What do we have, fundamentally? What is the fundamental issue in this case?

Well, we have this combination that Respondents are forming, and we tried -- as part of the last two-day winnowing-down process, we agreed to concede that Peev and Nagayoshi are prior art, for example. We removed all those things from the case.

What we were hoping, in exchange, is that the Respondents would pick a horse. I believe they have chosen a horse. I think that in their discussions with their expert and with the Kirkland people, they all knew kind of

what their focus would be, but they just aren't going to share it with all of us.

So what we have is this awkward amalgam of two-way obviousness combinations. So you can't even say that it's Clear Spheres in view of Peev or Peev in view of Spit Balls, because they are bilateral. They go both ways.

I had a big argument with Mr. Zhang about this. Because I was like, no, it's just two things taken two at a time. And he proved to me, no, what Respondents are doing is they are saying sometimes you start out with the AirSoft gun and you add in the Clear Spheres, but sometimes you start with Clear Spheres and you add in the AirSoft gun.

I'm going to leave it to Respondents to explain why that is and why that's significant to Your Honor.

We don't think it is. We think that the Clear Spheres and the Spit Balls, the evidence will show that those were meant primarily to be thrown or perhaps shot through a tube, like a regular spitball, I suppose. But that part is dubious.

What's clear is that they were thrown. The weapons on the right -- and they are weapons, Peev and Nagayoshi -- those are AirSoft guns that are made to look like real military weapons. And so what we see is, you know, this awkward combination where we have a science toy, Spit Balls, that are fun to throw. I blew that up just to

make sure we didn't miss it. It says right on the package.

And this science toy is somehow to be combined with this HK, you know, .223-looking assault weapon, which is really something. And Peev tells us that they really tried to make them look and function like real assault weapons, because they want them to be used for training purposes. And you could imagine, you know, Seal Team 6 going out with these, and think of the money the taxpayer will save on ammunition if they are shooting AirSoft pellets instead of real bullets.

But that's the goal of Peev. So it's not an insignificant burden. They have to convince you that somehow the motivation to combine came from something. Came from something. And what have we heard from Respondents?

Well, they tell us, motivation to combine is safety, that everybody knew that these AirSoft guns were dangerous, and so one of ordinary skill would have been motivated then to go and embrace the Spit Balls as a way to deal with this.

But here's their problem. The safety problem has been well-known for a long, long time. So any kind of these shooting toys have presented safety issues. We have an excerpt from Mr. Delman's expert report where he cites that 21,000 injuries a year are attributed to these air guns. And this goes back to the year 2000. And this is not a new

phenomenon in 2000. This had been around for a long, long time.

But we know more, because we're all fans of Christmas movies and we have Ralphie. And when Ralphie wanted a Red Ryder BB gun, he was told by his mother, by his teacher and then by Santa himself that "You'll put your eye out, kid." And remember the end of the movie, where he is actually shooting and the bullet does ricochet and hit him in the cheek. It didn't hit him in the eye, but -- this is not a new phenomenon.

If, in fact, they are correct, if, in fact, the motivation to combine was this concern for safety, they need to explain to you why year after year, decade after decade, nobody ever thought to combine SAP ammunition with an air gun.

And that's it, an insurmountable challenge.

What we know from the experts -- we're going to hear from Mr. Delman, the Respondents' expert, that he is a gun enthusiast, that he's got dozens of these air guns and that he and his sons play with them and take them apart and try to improve them and they do all kinds of things.

And he will admit that, before this investigation, he never thought of putting SAP-type ammo into one of these air guns. Despite his expertise, despite his long experience, he never thought to do this with his

own sons.

Our expert, Dr. Kudrowitz, will tell you a little more. He will tell you why this, in fact, is not an obvious thing to do, and that back in his days at MIT he did a thesis on blasters. And part of his thesis was coming up with every possible thing you could shoot out of a blaster. And he had dozens of them.

And it never occurred to him that you would fire SAP-type ammo through an AirSoft gun or a toy blaster. It just never came up.

So here is their fundamental problem. I stole this from Respondents' slide deck, so my apologies, but I annotated it a little bit. We've got air guns that have been known since 1889, centuries, at least decades for sure. I'll stick with Ralphie in the '40s. That's probably good enough.

And we've got SAPs that were known since the '60s. They need to overcome the notion that, whatever problems existed -- and I should say that their motivation to combine is really just a recognition of a problem. So they don't say, well, you know, there was a conference where people were talking about safety, and they suggested SAPs might be a good solution.

There's none of that evidence. What they say is that people were concerned about safety and then they went

looking for a problem. Well, Your Honor, that's not motivation to combine. If recognizing a problem renders an invention obvious, there would be very few inventions, because the reality is most of them are going to start with recognizing a problem.

And here they have to overcome the fundamental fact that since the 1800's these air guns were available and the SAPs came out in the 1960s, and yet nobody, nobody, ever thought to make this combination.

And the evidence will also show that, in fact, the SAP-based blaster was an enormous success. So The Maya Group was the original assignee in these patents, and they made products called Xploderz. You'll hear a lot about that. And they were an enormous success. Nobody had ever heard of The Maya Group. They came out of nowhere. Because the other toy companies had been around for a long time. Hasbro -- you know, there had been a bunch.

And Maya comes out of left field because they have the new "it" product. There is just no way to sugarcoat that.

They made dozens of products. They suddenly were launched into the stratosphere and became a commercial success almost overnight. And what Respondents will say, well, you know, maybe they were -- they had some -- they had some other features that made these things saleable.

But, Your Honor, what you'll see is that the original Maya Group product was actually kind of crude. You'll see some testimony that some of our witnesses didn't like it very much, and yet it sold. It sold in a big way. Why? Because they were shooting this SAP ammunition that you didn't have to pick up, that didn't hurt very much, that had all of the advantages that we're here to talk about.

And, again, they were enormously successful.

So this slide, we had a lot of debate about. But this is Ron Brawer, who I mentioned was the fellow walking through the Camden flower market. And he was asked how do the Xploderz perform, when they introduced it. He said it was a huge hit.

Now, I have to apologize. He calls it a boy toy, and we have had a lot of discussion about that. It should be a toy for boys or maybe just for adolescents. I don't know why we even have to go there, but that's what he calls it.

And they were the No. 1 selling toy in that spring.

We know that Toys "R" Us -- now Toys "R" Us is not doing too good today, but you have to put yourself back into the 2010, 2011 time frame, and they were the it toy dealer in the whole country by far. And this toy was voted by all of the Toys "R" Us directors as the No. 1 best toy in

the millions that Toys "R" Us sold. It was the No. 1 back in 2011.

We know that the Toy Fair, which was held in Huntington Beach in 2011, named the Xploderz, which was The Maya Group product, the hot toy of 2011. I'm sorry, this is the London Toy Fair, 2011. And you'll see evidence of award after award after award.

The Toy of the Year Award in 2012 had the Xploderz as a finalist. And, again, making the final list out of the millions of toys that existed was an enormous, enormous achievement.

And then we have, out of the Respondents' own mouths, how important this development was. So Splat-R-Ball is gone now, but their evidence lives on. And, remember, Splat-R-Ball comes from Daisy that made the Red Ryder BB gun, they make the Gamo AirSoft guns. It is a big, accomplished air gun manufacturer.

And they recognized, they recognized that this new water bead blaster category was entirely new. It was perfect for backyard fun. They didn't say, well, we have tweaked the AirSoft gun and added this feature to it. They didn't say, well, instead of your Daisy Red Ryder, you can shoot this SAP-based blaster.

They said, an entirely new water-based blaster category, perfect for backyard fun. This is out of their

mouths, not mine.

And then we know that they had explosive growth as a result of it. That even though Daisy had been around for 135 years and Gamo, which is the AirSoft brand, was 61 years old, in just one year the Splat-R-Ball blaster with SAP outsold them both combined.

So imagine that, the first year the product was on the market. So typically you have a ramp-up, right? People have to recognize the product, there has to be some development, you need to have your marketing and advertising out there. But that's not what happened.

As soon as they put it on the market, they outsold every other product that Daisy and GAMO sold combined. There's no question that this had tremendous, tremendous commercial success.

So for the economic prong of domestic industry, I'm not going to dwell on this, but I have the three blaster products, the Mythic, the Legion and Mythic Beast, that were introduced before the Complaint. And we have some of the ammo refills. Again, these are all pre-Complaint.

And then we have our process of establishment case that included all of the devices and blasters that I showed you earlier.

Let me just quickly introduce you to our witnesses. We have Mr. Nick Tino, who is here in court and

will testify first. And then Dr. Barry Kudrowitz, our technical expert. I don't think we're going to have to hear from him because we have taken all his issues away, but he will be here for rebuttal after the Respondents speak.

Dr. Fuller was our chemical technical expert for analyzing things like the content of SAPs. Because of the stipulations that the parties have agreed to, it doesn't look like we're going to need him.

I think we have designated some of his material, but he was primarily here to testify about whether or not things -- well, that there was infringement in the first instance, that SAPs were used by the Respondents, and then also to support the commercial success case and secondary considerations case -- or objective indicia, I should say, that he was going to testify that Xploderz, The Maya Group product, included the SAP.

Carla Mulhern, Your Honor knows her well, and we'll deal with her testimony during the day.

And then, finally, Lynn Rosenblum is our toy industry expert, who may be called in rebuttal, depending on what Respondents do.

So, with that, Your Honor, I'll thank you for your time and attention, and we look forward to putting on the case.

JUDGE MCNAMARA: Thank you, Mr. Cordell.

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Mr. George?

MR. CORDELL: Actually, before he does that, may I approach with the material?

JUDGE MCNAMARA: Of course.

MR. GEORGE: Good morning, Your Honor.

JUDGE MCNAMARA: Good morning.

MR. GEORGE: Let me just start by introducing my team. I have Brian Comack from Amster Rothstein & Ebenstein. That's the firm that I'm with as well. And I have Dan Smith from Polsinelli.

JUDGE MCNAMARA: Good morning.

MR. GEORGE: We also have some folks with us. We have the client representatives, Veronica Wong, Francis Chia. And we have our experts as well, Dr. Rowe.

JUDGE MCNAMARA: Good morning.

MR. GEORGE: Dr. Reitman is here as well. You have already heard about Mr. Delman, and he is here as well.

So an overview of what I'm going to talk about, Your Honor, in this opening is the reasons why we believe the claims are invalid and why the enormous evidence that's been played up here about commercial success doesn't really do it for legal reasons. And I note you didn't hear anything about the law in this presentation from Hasbro. And, lastly, we'll speak briefly about domestic industry.

Prime Time Toys has only been around since 1990.

They are a small company, but they have done very well, especially in the field of pool toys.

So what's interesting is months ago, when we had the Markman hearing, counsel for Hasbro, Mr. Cordell, explained that the secret sauce of the inventions, the two asserted patents, was a projectile launcher and SAP ammunition.

Now that's covered by claim 11, which depends from claim 1. Claim 1 has the SAP ammunition. And I'm looking at the '683 patent, just to be clear. And claim 11 says, to use air pressure to launch these soft projectiles.

And it's worth pointing out that this is the secret sauce, and the secret sauce is no longer being asserted in this case. Claim 11 was withdrawn. And it's no surprise because the Commission Staff made it clear that, no pun intended, Clear Spheres' launcher anticipates claim 11.

So the secret sauce is old.

And, in fact, all of the claim limitations were known in the prior art. And I have on the screen now claims 1, 5, and 14 from the '683 patent. Of course only claims 5 and 14 are being asserted, but they depend from claim 1.

And, basically, this really boils down to that claim 1, which is old. And then we read in just a feed chamber and a firing mechanism that directly applies a force.

Looking at the asserted claims in the '282 patent it's just 8, 19, and 20. Again, they are not asserting claim 1. Again, they add a lot of words, but it really just adds a feed chamber, a firing position for the -- a feed chamber that moves the ammo to a firing position. And then claims 19 and 20 have a lot more detail, a compression chamber, a spring, a piston, a small-diameter tube. All of this was known in the art.

Now we're going to hear from Joel Delman, and he is going to take you through the references. His job is actually going to be a lot easier because we have a stipulation, and so -- we just got it last night, so when I put him on later, I'm going to breeze through a bunch of slides.

But just to give you an idea, here, the Peev and the Nagayoshi guns, they are both air guns. And looking at Peev, the things we just talked about in claims 19 and 20 are, of course, all there. It's a very old mechanism, the spring, the piston, the compression chamber. These polymer balls, though, were hard plastic balls.

We have a little animation here just to show you how it works.

So we have this going, hopefully, continuously. And they are mechanized, but basically you pull the trigger, and gearing pulls back a piston which compresses a spring.

At some point that piston is released, the spring then pushes forward. Whatever air is in that chamber gets pushed through that smaller-diameter tube, and the ammunition, the spherical round balls, is shot out.

Nagayoshi operates in exactly the same way. And we have an animation here as well.

Again, a motor drives gears, moves the piston back, compresses a spring, then, finally, the piston is released, the spring pushes the air through a small-diameter tube and shoots out the hard plastic bullet.

And, in fact, we have testimony that's in the record, RX-18C. Mr. Meggs, he was the first named inventor on these patents. And he agreed that this basic mechanism that's in claims 19 and 20 in Nagayoshi and Peev has been around for a really long time.

Now what the Patent Office didn't know about and what Mr. Brawer didn't know about was the Clear Spheres SAP launcher. And, in fact, our expert, Mr. Delman, didn't know about it either.

So what's interesting is I didn't hear a word about this during Hasbro's opening, and I understand why.

But what you're going to hear -- and, again, these witnesses were going to come, but with what happened at the last minute we're just going to rely on their depositions. But we have Steve Spangler, who is a STEM

educator. He is also a minor celebrity. And he invented the Clear Spheres launcher.

Clear Spheres launcher is basically -- it's a projectile launcher that shoots SAP ammunition. So he did it, and he did it before Mr. Brawer.

Ellen Peterson is the elementary school science teacher who was at a Science in the Rockies presentation, which you'll learn more about, and witnessed Mr. Spangler demonstrate this to a roomful of STEM educators.

And you'll also hear from Jeff Brooks, who worked with Mr. Spangler.

What's interesting is all of this occurred in 2008, and the patents were filed in 2010. So there's a lot of talk about how SAPs were around for fifty years. It's true, they were in diapers. You know, that's how they were used, and in agriculture.

When were they first used in a projectile launcher? 2008. So that's the first time they were used. And, as we're going to see, that very quickly led, not just Mr. Brawer, but others to say, oh, we have ammunition. What do we do with ammunition? Put it in a different gun.

So this whole thing about SAP's around for fifty years, that's not really accurate.

So just some of the testimony and just -- so we're looking at -- in this RX-21, we're looking at Steve

Spangler on the right, and he is holding a plastic tube. And it's sort of -- it was part of a potato launcher, and he is going to do a video where he tells you how he took it apart and used it to shoot ammunition.

Again, this is 2018 at this science -- 2008, pardon me -- at this Science in the Rockies conference.

And Jeff Brooks, you know, he walks into the room, and there was hooping and hollering and craziness. Teachers were reaching into the bowl of Jelly Marbles -- Jelly Marbles and Clear Spheres are exactly the same thing. It's just a different name -- loading them into the potato gun. And all of them were firing at Steve on stage. So poor Steve was the target. And on the floor are broken Jelly Marbles that were shot at him. All in 2008.

Here is the video -- this is a current-day video, but he is going to re-create, in essence, what he did back in 2008 at that Science in the Rockies.

Do I just push this again?

(Video clip played.)

MR. GEORGE: What's interesting is what he said at the end, "dual purpose." Had one launcher with one ammunition and he switched out another ammunition.

And, again, this is -- basically all of this evidence that you have just seen is why the Staff took the position that claim 11 is anticipated. And, again, the

secret sauce of a projectile launcher using air pressure to shoot a superabsorbent polymer -- anticipated.

And it wasn't just one person that had this idea. It was also a fellow named Grant Cleveland, and he had a product called Spit Balls. And this product was also being sold in 2008, two years before the patent was filed, two years before Mr. Brawer had his idea.

And Spit Balls, I love this package, we see it's either a boy or a girl, going from the top to the bottom, with the blue eyes. You can see the nose a little bit. You can see the fingers, and the fingers are holding a tube, a Spit Ball tube. And there's a Spit Ball coming out of the tube.

And what we're looking at is the bag of -- these are super absorbent polymers, that's admitted. And I think on the other side it says it can hold 150. So this idea of what a great idea super absorbent polymers, because you can hold so much ammunition -- old -- I'm sorry, it's here in 2008 in the Spit Balls product.

So they slip, they slide, they bounce, they explode. There's some pictures of the spheres at the bottom.

I made it -- I just colored in the tube in yellow just so you can see it more easily. I had trouble -- when I looked at it, I didn't see it easily.

So this is the back of the Spit Balls packaging. And the stuff that's highlighted in yellow reminds us of the regular spitballs that, at least when I was a kid, kids played with. I don't know if they do anymore. But, you know, you wadded up a piece of paper, you took a straw that you got from the cafeteria, and you shot people with it.

And this is saying, wait, yes, that's a blow-gun-type thing, do a substitution. Substitute that wadded-up piece of paper -- don't use that, use a Spit Ball. And it talks about mastering the fine art of Spit Ball launching and exploding on target.

And, again, the package -- it's called Spit Balls. The package shows them being blown out of a tube. And what's also interesting is there's a description about these SAP spheres. The bigger they are, the quicker they explode. Smaller Spit Balls will bounce more and last longer. You can put different amounts of water in.

We ended up seeing language like that in the patent two years later, that you could adjust -- you could put more water or less water. So all of this was already out there two years before.

So we're now at the critical question -- maybe I went one slide too far. I did. I'm sorry.

Is there a motivation? Because what we're left with -- the secret sauce is gone. So what we're left with

is the claims 19 and 20 that have the spring, the air compression chamber, all of the mechanics that were very old.

So we have those very old mechanics, which you can find -- we picked Nagayoshi and Peev, all the mechanics are there. Was there a motivation to take that hard plastic out of that, out of those guns, and use the soft SAP projectile that people were shooting at each other through blow guns in 2008? That's really the question.

And, for me, if I have a question -- I'm sorry, I should have done this slide just to show you what I was talking about -- there it is, the AirSoft guns and the ammunition.

So when I have a question about motivation to combine, I go to KSR, because that's the case. So we'll start with when there is a design need or market pressure to solve a problem, okay.

So the question is was there a problem. Now we heard from Hasbro that, yes, safety was always a problem with guns, it's been a problem for a hundred years. Okay. But we're talking about AirSoft guns. And the quote that he showed about -- the article that he showed was a 2000 article. Not from 1890, but from 2000. And this article really shows that this issue came to the forefront when? 2008. Everything happened in 2008.

This is from Bleacher Report. AirSoft guns are fun. And it then talks about -- I like the quote at the bottom, it's a lot of fun to shoot AirSoft guns with your friends in the backyard. It doesn't take a rocket scientist to figure out why young boys like them so much.

Okay. We heard a half an hour ago that AirSoft guns weren't toys. They were toys. This article is telling us young boys like them so much. You know, maybe originally they were intended -- or maybe they also have use in some more serious application, but young boys were playing with these toys.

And when you give a young boy a toy, you usually end up with a problem. If there's a way to hurt themselves, they find it. And sure enough, they did.

And what's interesting about -- this is all one article. I just liked that it was a double-edged sword there. They are really fun, but they are not safe. And this is Exhibit RX-841 at page 3.

What's the real problem? The rounds are made of hard plastic. It's really the problem. And it goes on to say it can be enough to crack the skin, cause minor bleedings, and some of them can cause more damage than a paintball gun.

It makes sense. Paintball hits you, it splats. This doesn't splat. This is going to be painful.

I'm sorry. I went too far. I'll get the hang of this.

The next slide is from the patent. It's the '282 patent at column 1, lines 56-60. And the patent recognizes that both AirSoft guns and paintball guns can cause serious harm.

We actually asked Dr. Kudrowitz about this, whether this was a known problem, the problem described in that Bleacher Report article. And he agreed. You know, in 2010, we asked him was it known that these AirSoft guns could cause harm, and he said, yeah, it was known.

So it's a known problem. It sort of came to the fore in the 2000s.

It sort of reminds me of bicycle helmets and bicycles. So bicycles always had a danger you could fall off of them. But when I was a kid -- I spent my teenage years on a bicycle -- I never wore a helmet. It's just the time hadn't come.

My kids, of course, wear helmets. And my grandkids wear helmets, of course. Same with skiing. I started skiing, I never wore a helmet. Was it dangerous? It's as dangerous today as it was when I started, but the time hadn't come yet.

It's pretty clear that time is the 2000, that's when this problem really came to the fore.

Let's go back to KSR. Is there a market pressure to solve a problem? There certainly is. Dr. Kudrowitz admitted it, the patent admitted it, and the Bleacher Report article talks about it, as well as the article from 2000 that Hasbro's counsel cited.

So the next question is, are there a finite number of identified, predictable solutions? That's the next question for us from KSR.

Here, again, Dr. Kudrowitz solves the problem for us simply. I asked him, was it known in 2009, a year before the patent, that the way to make a projectile less likely to cause injury would be to make it softer? It seems obvious, of course. And he said, yeah, this is true.

So it was known that if you had a soft, round hard projectile that was causing you injury, it would be a good idea to substitute for something softer. Okay. Well, what was available?

Spit Balls was available. It was ready to go. It was being launched. It had the secret sauce of a projectile launcher and super absorbent polymer.

What was also available? Mr. Spangler's Clear Spheres launcher. And it didn't hurt. Ellen Peterson, they shot her with it. She said, nope, didn't hurt, didn't leave a welt. And she explains, again, how all those broken marbles on the floor are because they were shooting

Mr. Spangler. He looks relatively unscathed.

So we asked Dr. Kudrowitz about this, and he identified you could do rubber, foam, cork, or soft plastics. I'm not sure what he meant by "soft plastics," but certainly SAP, super absorbent polymer, is a soft plastic. So that's certainly a finite number.

So we have the problem. People are getting hurt with AirSoft guns. It comes to the fore in 2000, 2008. We have a finite number of predictable solutions. Dr. Kudrowitz has told us, make it softer. Okay. What do we have to make it softer? We have rubber, foam, cork, soft plastics.

The next question is, are these options within the technical grasp of the person of ordinary skill in the art? Thankfully, Dr. Kudrowitz gave the answer to that, and he said it was. We showed him Peev. We asked, could you modify this to launch an SAP? Would it be within the skills of a person of ordinary skill in the art?

He answered the question that -- first, he answered it, they should have the skills. And then we asked, do you mean they would have the skills? Yeah, they would have the skills. So he admits that the work of ordinary skill would have been able to -- if modifications were needed to the Peev or Nagayoshi, to make those modifications.

So we have the problem, the injury. We have the predictable solution, make it softer. Here's some examples, all provided by Dr. Kudrowitz. And we have -- also Dr. Kudrowitz tells us that it was in the technical grasp of the person to do this.

Well, we checked all the boxes. And what KSR tells us, this isn't a patentable invention. This is an obvious invention. It's the product of ordinary skill and common sense.

Now we're going to hear, we already heard, that somehow the Peev and Nagayoshi are not in the same field because they are weapons and they are not toys. I mean, under KSR I'm not even sure that argument holds water, because what's said in this quote, it can be either in the same field or a different one. But they are all in the same field. They are all toys.

I mean, look at Nagayoshi. On the first page of Nagayoshi, Exhibit 9, 194, I highlighted all the toy guns. And it says, designed for children. I don't know. It's a toy.

Peev, Exhibit 8, it's the same thing. It does say you can use it for military simulations or training, or -- and this part was cut off on their slides -- or for entertainment in AirSoft games. For fun when conducting AirSoft games.

And let's -- I mean, you can't really argue with the Bleacher Report article. They are toys. They are AirSoft guns. The young boys are playing with them in the backyard and getting hurt. It's all the same field.

Now what's interesting about this story that I've told you is that we have a problem. Dr. Kudrowitz recognized that it existed, and people knew about it. He said make it softer. And also in 2008 -- everything happens in 2008 -- we have some evidence of near-simultaneous invention.

And this is Exhibit RX-52, which is sort of a fascinating thing. It's a Korean patent application. And what's fascinating about it is that it was filed on November 1st, 2008. And it was published, unfortunately, one day after the filing date of the patents. So it comes in on -- the issue of -- under secondary considerations, one of the things you're supposed to look at is simultaneous invention. In fact, I think I have a slide on that.

Yes. Independently made, simultaneous inventions, made within a comparatively short space of time, are persuasive evidence that the claimed apparatus was the product only of ordinary mechanical or engineering skill.

That's the George M. Martin v. Alliance case, the Federal Circuit 618 F.3d 1294 back in 2010.

So let's go back to this reference. So, again,

it's 2008. And I just, you know, explained how there was a problem and you would be pointed to the solution. And that's exactly what happened with this inventor.

He wanted to improve the bullet of a toy gun. Why? To prevent injury in 2008. What did he do? He switched it from a -- at the last line -- conventional rigid material. He says it's -- he is using a toy bullet made of gel or gel material, and it's very safe. And it's safer to use than a bullet of a conventional rigid material and does not cause injury to the human body.

So exactly what I said one of ordinary skill in the art would be thinking in 2008, somebody was.

The other thing about this gun, this is basically an AirSoft gun. It has the same -- it talks about the same things in claims 19 and 20: the piston, the cylinder. Yeah, it's the same.

And he wasn't alone. There was another inventor, Carlson, who filed on October 6, 2010, which is -- May, June, July, August, September -- about five months later of the same year. And what does he do? He recognizes the same exact problem. He wants to reduce injury. And how are we going to do that with these toy guns? We're going to fire soft projectiles.

He specifically suggests using the absorbent material used in a diaper. So we have these soft spherical

projectiles that are being used by Mr. Spangler in his blow tube. They are being used in the Spit Ball products. It's ammunition for weapons, and it's available. And everyone is going to the same place to solve the same problem in the same way.

So let's talk about this secondary considerations evidence. Any discussion of secondary considerations has to start with Ormco. It's the Federal Circuit's leading case on nexus. And if you don't have a nexus, you don't have anything. And it's not a difficult concept. If the commercial success is due to unclaimed features, it's irrelevant. And if the feature that creates the commercial success was known in the prior art, not pertinent.

So this is the Federal Circuit. This is the test we have to use.

So what have we heard about? And I think so far -- and it was mentioned -- one of the big issues was that you could hold more ammo, and that's why this product was successful. We saw the slide before where you had the box, there were millions of NERF foam bullets taking up all the space, and there's this little bag of the gel beads.

The problem is that's not claimed. More ammo is not claimed. The other thing we're going to hear a lot about is more distance. That's not claimed either.

And actually Mr. Brawer, who we spoke about a

lot, when they asked him really why were these things successful, it actually all boiled down to the using SAP as an ammunition. But that was old. Two years before this patent was filed, Mr. Spangler used SAP as an ammunition. And that's, as the Staff noted, with a projectile and that was anticipated.

And Spit Balls also taught using it.

So if that's really the feature that did it, and we're going to see it was, that doesn't count. It's in the prior art. That was somebody else's invention -- Mr. Spangler's, Mr. Cleveland's -- to use it in a projectile. It wasn't Mr. Brawer's.

The closest we come to more ammo is a plurality of soft-projectiles, but a plurality is just two. There's nothing about distance.

So let's look at this testimony from Mr. Brawer. He was asked about the more ammo, and because a lot of the advertisements had more ammo, a lot of the TV commercial talked about it. And he explained that it really was the physical quality of the SAP. They are smaller. You can hold more.

And, you know, ultimately he attributed it -- what enabled the Xploderz product to hold more rounds in the magazine? Was the SAP why? And he basically said yes. And this is RX-137C, Mr. Brawer's deposition, at 267.

Just to be clear, Ron Brawer was an executive of The Maya Group. He was one of the named inventors. He is the fellow that Hasbro's lawyer talked about that he said his daughter playing with the beads. And he is the one that did all this.

He is attributing everything to the SAP. He was asked, more distance, is that because of the SAP? And in your mind, the use of SAPs as ammunition was part of what enabled the Xploderz product to shoot twice as far as comparable NERF products.

Was it part of it? No. It was, by far, the most important thing. And that's RX-137C beginning at -- running from pages 266-293.

I go back to Ormco. If the feature that creates the commercial success was known in the prior art, the success is not pertinent.

And one more slide on this, from Mr. Brawer, at pages 275 through 293. The SAP ammunition was the foundation of the line. All the features of the product used to create excitement in your TV advertising were directly linked to the use of SAPs as ammunition in your projectile launcher. Absolutely.

Unfortunately for them, SAP was in the prior art. The Spit Balls product. Mr. Spangler, in 2008, two years before. Staff agrees. The use of SAP ammunition in a

projectile launcher launched by air. Anticipated.

So what we heard, and I don't know that we'll hear it again, is, oh, it wasn't just the SAP, it was the SAP -- first, oh, it's the secret sauce. Well, it's not the secret sauce anymore because that's old.

Now it's, oh, it's more distance, more ammo. Well, it can't be that because they are not claimed. Well, it's the SAP. Well, it can't be SAP because it's in the entire art.

So what is it? Oh, it's the SAP plus the mechanism, that's what did it. It was that mechanism in claim 19, with the spring, the piston and all that other stuff. Okay.

So my next two slides are confidential. And I can't black them out because there would be nothing to see. So do you want me to ask my client to leave?

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

JUDGE MCNAMARA: All right.

MR. GEORGE: Just to sum up, all of this evidence of the sales, it was due to unclaimed features and, frankly, features that came directly from the SAP. The SAP was in the prior art. It just doesn't count.

And the industry praise, when we start looking at those articles, you're going to see it's all about more SAP, more ammo. There's no nexus here. That's the problem. And it's a very nice story that they are going to tell, but it's legally irrelevant.

And I can't get away from the fact that we have an extremely strong case of obviousness here, and typically in that situation the objective evidence just can't overcome it. And that's the Agrizap case from the Federal Circuit in 2008.

So the final point is about the domestic industry. And I'll be brief on this point, Your Honor, since we're submitting it all on paper, I guess.

JUDGE MCNAMARA: Not quite yet.

MR. GEORGE: Not quite yet. Very good. Thank you.

In our view, remember, they didn't invest in the original development of the patented technology, they are

just a licensee.

Our view is the investments are not significant and certainly not as important as other domestic investments. And we don't believe there's evidence in the record supporting a DI process.

That's all I have, Your Honor. Thank you.

JUDGE MCNAMARA: Thank you, Mr. George.

Mr. Taylor?

OPENING STATEMENT

MR. TAYLOR: Your Honor, good morning. Todd Taylor from the OUII.

I want to take one second to confer with counsel regarding a confidentiality issue.

JUDGE MCNAMARA: Sure.

MR. TAYLOR: Thank you. Your Honor, while counsel looks at our presentation, I'd like to approach with the Staff's presentation.

JUDGE MCNAMARA: Sure. Thank you.

MR. TAYLOR: Your Honor, just two preliminary matters from the prehearing conference. I believe the Respondents were going to agree to withdraw any defenses --

JUDGE MCNAMARA: They were?

MR. TAYLOR: -- on the record, I believe.

MR. SMITH: Dan Smith from Polsinelli for Prime Time Toys.

We have agreed to withdraw the Gel Blaster specific affirmative defenses. And let me just tell you the section of the prehearing brief. But it's the Gel Blaster specific affirmative defenses in section 7, so the unclean hands, patent misuse, waiver and estoppel, and the breach of pre-institution duty of candor that Gel Blaster was asserting.

JUDGE MCNAMARA: Okay.

MR. TAYLOR: Your Honor, the other issue is the parties have agreed to a revised witness order, and we can get you copies of that.

JUDGE MCNAMARA: That would be great, whenever it is available.

MR. TAYLOR: I have, actually, a couple of copies.

JUDGE MCNAMARA: Sure. That would be helpful. Thank you.

MR. TAYLOR: Could you please pull up SDX-1, which is the Staff's demonstrative exhibit, please. If we have a volunteer. I just sent around a public version, if you could use that.

I'm going to go ahead and get started, Your Honor, while they pull that up.

There's only two confidential slides, 14 and 16, and I created a public version. Hopefully we can use that

this morning.

A lot of discussion from PTT counsel's opening statement this morning about a toy, you know, that AirSoft is a toy, it's all toys. And maybe this case will come down to whether the AirSoft gun is a toy or not, I don't know, but it's always interesting to me that the '282 patent and the '683 patent actually have a claim directed towards a toy.

Claim 9 of the '282, it says, the projectile launcher of claim 8 the projectile launcher is a toy -- I've always wondered why those claims are in there. They are not being asserted, but it kind of fits in with what's going on in the obviousness field maybe.

That was just something I picked up this morning, Your Honor.

Is this the public version? Thank you.

So, Your Honor, this is SDX-1. You can't see the number. It's at the top right.

Can you please go to the opening slide, page 1? Okay. Page 2, please.

The only claims remaining are the claims that the Staff found not invalid -- or does not believe the evidence will show that they are invalid. The other issues have already been discussed this morning.

So from the Staff's perspective, the two main

remaining issues are obviousness and DI econ prong.

So slide 3, please. SDX-1

This is my confusing slide about -- kind of showing the dependency -- kind of the claim terms at issue. For example, the '282 patent, claims 8, 19 and 20, these are all, you know, toy launcher components. The same with 5 and 14.

So we're down to, not just launching a SAP from a tube, we're talking about -- I don't want to say the word "gun" this whole hearing. I'm going to try to say "launcher" -- "toy launchers." So the issue is really toy launchers. I don't believe the Clear Spheres launcher is really relevant going forward, but we'll see.

So slide 4, please.

And here, Your Honor, the purpose of my presentation this morning is more about -- I want to just sort of show how the Staff came to its conclusions. And it was hard. And I had to take three steps back, looking at the prior art, looking at the prosecution history, looking at the prior art that was not cited in the prosecution history, looking at the claim language, and see what the Examiner did during the prosecution history.

And, actually, the Examiner did a good job. And so these are some of the terms that I just want to put in our heads: hydrated, the shape of the SAP, and

substantially spherical.

And then the launcher side of the plus sign, the combination, the toy launcher components.

Your Honor, I gave you sort of an example of the SAPs. I didn't sort of finish my short demo, but this is actually a gel blaster launcher, and it includes SAPs that you can use up there. And this is the box. There's ten thousand SAPs. And I had to hydrate this for two hours. And they start in the form in the small bag there.

Next slide, please.

So really quick, claim 5 of the '683 is still being asserted. Here on the right, you can see the Clear Spheres launcher. There's two types. One's the Spangler Potato Gun and the other is the Weltster 3000 -- or 300.

I believe we don't have those in the courtroom this morning, but I believe the PTT Respondents are trying to get them here maybe today or during the hearing. And also the same with the AirSoft physical example, it's currently not here.

So, Your Honor, one expert is going to say there's a feed chamber, one is going to say there's not one there. I think you can probably figure this one out yourself.

Next slide, please.

So I want to -- Mr. Lloyd walked into my office

last July, and he assigned this case to me. And I don't remember whether it was before the institution notice was published or not. And I said, okay, good. And I printed the patents, walked halfway down the hall, picked up the patent, and I walked back to my office. And I looked at the claims, claim 1, claim 2, claim 3, and I said to myself, how is this not obvious? That was my first thought.

Well, I came to that, you know, initial conclusion without looking at the prior art, without considering the Graham factors, without looking at one of ordinary skill in the art, and the secondary considerations.

And so, believe it or not, after four inventor depositions, numerous fact depositions, numerous expert testimony, the Staff came to the conclusion that there is not clear and convincing evidence that the asserted claims are obvious.

And also this case is kind of interesting. It's fun to get a case where you feel like you can understand the technology and you say, wow, I alone can validate this patent. That was also one of my thoughts.

We can all, I'm sure, have the Respondents' counsel in this room search themselves for something to invalidate, because I tried. It's one of my functions as a Staff attorney. We represent the public interest ò and we also investigate on behalf of the Commission. And I tried

to find something. And I actually came up with Carlson independently, which I believe the Respondents also found themselves, but Carlson falls short based on its priority date.

The next slide, please.

And here is the Carlson patent. It talks about absorbent polymer material. This date is not early enough. And actually -- but there is a provisional application, but there is not sufficient disclosure, unfortunately. It does not have sufficient disclosure regarding SAP.

Actually, it's interesting, the reference actually discloses different shapes of the projectiles. It discloses a toy launcher. Actually, you would dip the launcher into water, which is interesting, I thought. And then it would absorb -- the ammunition would absorb the water and then you could use it.

The next slide, please.

So this is still -- we're still on SDX-1, slide 8. This is just the '282 patent. I just want to talk briefly about some of the prior art that the Examiner looked at so we can sort of understand what's out there in the prior art.

Next slide, please.

So here is the combination SAP plus a launcher. The Examiner looked at SAP, prior art, alone, on the left,

Bumbarger. And then the Hall reference from 1867.

The next slide, please.

And then the Examiner found references where you're actually launching SAPs, but not in the size required by the claims, not hydrated, and also missing were the toy launcher components. So the Examiner is doing the job of finding SAPs, finding toy guns, launchers, and look for the combination, look for launching SAPs, and this is what the Examiner found.

The next slide, please.

And here is another example of the combination of launching SAPs. This is Cordani. Here it is dehydrated super absorbent polymer that was mixed with water and launched for distinguishing fires.

So it's interesting, you know, what the Examiner looked at and what was eventually allowed in the claims.

But here there's no toy components and there are no -- they don't have the proper shape of the SAPs. That's what's missing.

Also, with respect to this particular reference, we're missing the hydrated portion.

The next slide, please.

So here is some prior art that was not looked at by the Examiner. It was already mentioned this morning, the PTT Goo Shooter and Goo Spewer, which is hard to say.

Again, here, this is -- the SAP lacks the proper form at least. And also these, to my understanding, as it says on the --

Do we have a clicker? I forgot to mention this at the very beginning. It's great to be back in Courtroom A and it's great to have these new microphones where you can actually step away and it can still pick you up.

So I believe on the packaging it says these are actually water gun mechanisms. And I don't see it here, but I'm pretty sure these are water guns. So they are not the same type of mechanism, to my understanding, used to shoot SAPs.

And these are products that were offered by PTT Respondents. I believe they were first sold in 1995. And it's my understanding that the PTT Respondents didn't start developing an actual SAP launcher until 2021.

So here's an example of someone in the toy business, a manufacturer, who did not come up with the claimed invention before the inventors in this case.

The next slide, please.

So going back to the combination of SAP and launcher, I want to look at the launcher side of the plus sign and see what was out there. So here on the left we have the tubes, which is the Clear Spheres launcher, RX-6. And then on the far right of the continuum is a BB gun.

This is my lay of the land. And then you have NERF, water guns, paintballs, AirSofts.

And it's interesting, when I first saw this and played with this -- we were fortunate enough, Your Honor, we got a lot of samples, and they were quite fun. My first thought was it's a paintball, it was similar to a paintball gun. But then it was like -- kind of like a NERF gun too. So it really is a unique device. And I'm not sure where it goes.

And then I believe you will see evidence, Your Honor, that this really is a new category of product. It's for different ages of kids than the AirSoft gun or a BB gun. I believe they are being sold at 14 plus.

And I wanted to show you a physical exhibit of the launch -- of the Clear Spheres launcher and AirSoft, just so you can look at it. And maybe during the hearing we'll have those in the courtroom.

This next slide should be partly confidential. Do you want to try it? Good. I have it blacked out.

JUDGE MCNAMARA: Okay. Good.

MR. TAYLOR: So we can stay on the public record. So the black box is confidential in your slide deck.

So, actually, can we go back to -- I have the clicker, but you're much better.

So here we just looked at the launcher side of

the plus sign, but, Your Honor, it's interesting, the claimed invention came from the SAP side. It wasn't all the manufacturers of toy guns, water guns, NERF guns. Mattel didn't invent this. It didn't come from BB gun manufacturers. It came from the SAP side, which is interesting.

So please go back to slide 14 of SDX-1.

So the inventors started with Orbeez, which is interesting when you try to step back and look at the prior art and the obviousness analysis. You know, what happened? And I think it was challenging, I'm suspecting, for the Respondents to say, how do we build our case? Do we start with SAPs and add a launcher? Or do we start with a launcher? It's not an easy case.

So the inventors are interesting. Three of them have industrial design experience, one an MBA, and they have an interesting story. I think Mr. Cordell talked about Mr. Brawer walking through a flower market. And he came back and said, hey, we got to do something with these Orbeez, we have to shoot these, we have to launch these.

So there is an invention story. They built prototypes and they brought a product to market, The Maya Group, the Xploderz. So this is not a case where someone ran to the Patent Office and said, I'm going to be the first one to get a patent on this. There is an actual invention

story here.

And, actually, in the patent there's a statement saying that one object of the present patent document is to provide an alternative soft projectile launching system to those presently on the market. That statement is true. They were the first ones.

So in view of this constellation of prior art, Your Honor, we can see sort of the thinking of the Staff and how we came to our conclusion that there is -- it will not be clear and convincing evidence that the claimed invention would have been obvious.

The next slide, please.

Motivation to combine, we're going to hear about that. Secondary considerations, going to put up a summary of the Staff's position. Some evidence of commercial success. Yes, the Xploderz product was eventually discontinued, but there are sales, millions of dollars in sales. Praise by competitors in the industry, yes.

And to rebut that, as Respondents pointed out, yeah, there is simultaneous invention. There is close stuff out there, Carlson and the Korean patent application, but we believe, if you weigh this evidence, it will not show -- will not overcome any finding of obviousness.

And it's not -- Your Honor, if you find that there is motivation to combine and you find some prima facie

evidence of obviousness, we think this evidence of secondary considerations will overcome that.

The next slide, please. And I think this is the final slide.

There's an advance payment issue that we dealt with in our prehearing brief. I spent a lot of time researching that issue, so I feel confident about that.

And then the one issue we sort of talked about this morning at the prehearing conference, on the DI, is what do you compare -- Hasbro wants to compare, of course, their numbers, their design numbers, against foreign design numbers, leaving out manufacturing and -- you know, it's a tough analysis, what's the proper analysis.

But, you know, none of the manufacturers of these products, none of them were manufactured in the United States. So maybe the design-based investments is the proper analysis, but something to look at.

And then the Staff took the position that there is evidence of administering the process being established. Hasbro started development in November 2021. I think it's been nine months since the Mythic and Legion weren't -- hopefully that's not confidential -- didn't start production runs until after the Complaint was filed, and there are other products in development.

So, Your Honor, that is all I have. Thank you.

JUDGE MCNAMARA: Thank you, Mr. Taylor.

Again, would you just talk with Mr. Cordell and Mr. George at lunchtime about the economic prong? Maybe we could get some testimony but keep it just very short on -- but I prefer live testimony, if we can, especially around the issue that is being hotly objected to or where there is the real dispute. And maybe that's where we should just have some live testimony.

MR. TAYLOR: Your Honor, on the comparison?

JUDGE MCNAMARA: Yes.

MR. TAYLOR: Okay. Is there anything else?

JUDGE MCNAMARA: I can't think of anything else, because I think the timeline is clear, unless there is -- I saw some other issues that were raised, but they are typical sorts of issues that we deal with: allocation, time of production, whether or not the prototypes were available in time and so forth.

All of that, there are factors that can be looked at with respect to some of that evidence that's pretty clearly set out. But it is that comparison that I think we better have some live testimony on, because Commission keeps focusing on either comparative data or value-added.

So just to be sure that we have that would be helpful. And I think it can be short.

If there's anything else that you think ought to

be in there, Mr. Taylor, raise it with the parties. But, again, I think we can keep this testimony quite short, and then it can be briefed. As I suggested, there can be some comparative charts in the post-hearing briefs, which, again, the Commission looks at, we look at, they look at. We look at value-added, we look at percentages and so forth, if there is a good value-added evaluation.

MR. TAYLOR: Okay.

JUDGE MCNAMARA: All right. Thank you very much. Let's take a 15-minute break now. And then we'll come back with Mr. Tino.

(Whereupon, the proceedings recessed at 11:20 a.m.)

(In session at 11:40 a.m.)

JUDGE MCNAMARA: Thank you, everybody. Please be seated.

Mr. Cordell, I believe you're calling your first witness.

MR. CORDELL: We are, Your Honor. With your permission, Mr. Boyd will present that.

JUDGE MCNAMARA: Great.

MR. BOYD: Good morning, Your Honor. Brian Boyd from Fish & Richardson on behalf of Complainant Hasbro.

Before I begin, I was hoping I might borrow the Hasbro blaster back from you that Mr. Cordell gave you

earlier, just for this examination.

JUDGE MCNAMARA: Sure.

MR. BOYD: Our first witness will be Nicholas Tino. Mr. Tino is an engineering manager at Hasbro.

JUDGE MCNAMARA: I have to administer the oath.

NICHOLAS TINO,

having been first duly sworn and/or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: Nicholas Tino.

JUDGE MCNAMARA: Thank you very much.

DIRECT EXAMINATION

BY MR. BOYD:

Q. Could you please introduce yourself to the Court?

A. Yes. My name is Nicholas Tino.

Q. What's your position at Hasbro, Mr. Tino?

A. I'm an engineering manager on the NERF brand.

Q. Could you tell us about your educational background?

A. Yes. I have a bachelor's of science in mechanical engineering from the University of Massachusetts, Amherst.

Q. How long have you worked at Hasbro, Mr. Tino?

A. Coming up on ten years.

Q. Before we go any further, did you prepare some demonstratives to assist with your testimony today?

A. Yes, I did.

Q. Let's pull up CDX-0007C. Are these the demonstratives you prepared?

A. Yes.

Q. Let's turn to your slide 2, Mr. Tino.

Which Hasbro location do you work from?

A. I work from the 1027 Newport Ave, Pawtucket, Rhode Island location.

Q. Is that Hasbro's U.S. headquarters?

A. Yes, it is.

Q. Turn to slide 3. You mentioned you're an engineering manager. What types of products are you working on?

A. I work on the 14 plus product or what we call Competitive Battling team. Some of those examples here on the slide are the NERF Rival line, the NERF Hyper line and the NERF Pro GelFire line.

Q. I'd like to ask you about the GelFire products, Mr. Tino. Let's turn to your slide 4.

What kind of work have you done on the GelFire products?

A. I oversee all the project engineering-related tasks on the GelFire line.

Q. Okay. Mr. Tino, I want to ask you about some of the GelFire blasters at issue in this case. Are you familiar with the Mythic and Legion?

A. Yes, I am.

MR. BOYD: Your Honor, may I have permission to approach the witness?

JUDGE MCNAMARA: Yes.

Q. I've handed you what's been marked CPX-0001, CPX-0002, CPX-0005, and CPX-0006. Are you familiar with these?

A. Yes, I am.

Q. Let's start with CPX-0002. Can you hold that up and show us what that is?

A. Yes. This is the NERF Pro GelFire Mythic Blaster.

Q. Can you give us a general overview of what the Mythic is?

A. Yes. The Mythic is a motorized, battery-powered GelFire blaster. It's used by hydrating rounds, filling this hopper with drained rounds, inserting that hopper into the blaster, turning the blaster on, and then firing the blaster by pulling the trigger.

Q. And what about CPX-0001, are you familiar with that?

A. Yes.

Q. Can you do the same, hold it up and give us a little --

A. Yes. This is the NERF Pro GelFire Legion Blaster. Also fires the same GelFire rounds. Similarly, you would hydrate those rounds, drain them, fill this hopper, place it in the blaster.

In this case, to fire this blaster the user would pull back on this priming mechanism here, let it go, and then the pull the trigger to fire.

Q. Are the Mythic and Legion, the two blasters we just went through, are those available for purchase, Mr. Tino?

A. Yes, they are.

Q. Do they come with any ammunition in the box?

A. They do.

Q. What does Hasbro call that?

A. GelFire rounds.

Q. Can you show us some of the GelFire rounds that are included in the package? I think Mr. Cordell showed them earlier.

A. If I can find them in here... this is what they look like, packaged in the box.

MR. BOYD: Your Honor, at this time for the rest of Mr. Tino's examination we do need to move to the confidential record to discuss Hasbro's confidential

information.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

AFTERNOON SESSION

(In session at 2:10 p.m.)

JUDGE MCNAMARA: Good afternoon everyone. Please be seated.

All right. I think we're ready for the next witness, if I'm not mistaken.

MR. CORDELL: I think the plan is for Respondents to call their expert now.

JUDGE MCNAMARA: I think that's right. Thank you very much.

MR. GEORGE: Your Honor, could we go off the confidential?

JUDGE MCNAMARA: Yes. Thank you.

JOEL DELMAN,

having been first duly sworn and/or affirmed on his oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: Is there a microphone here I'm missing?

JUDGE MCNAMARA: It's a round disk.

Would you please state your full name for the record so we know who you are?

THE WITNESS: Sure. Joel Delman.

JUDGE MCNAMARA: Very good. Thank you. And you're coming in nice and clearly.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. GEORGE:

Q. Good afternoon, Mr. Delman. I know you've introduced yourself already, but could you tell the Court who you are?

A. Sure. I am a professional industrial design consultant.

Q. And, Mr. Delman, you've provided a number of reports in this case containing your opinions; is that correct?

A. Yes, that is correct.

Q. And you've been present all day today, correct?

A. Yes, I have.

Q. And did you prepare some slides to present your testimony?

A. I did.

Q. We have called up RDX-3. Are these your slides?

A. Yes, they appear to be, yes.

Q. So let's start with your background, which I've called up on the second slide.

Could you take us through your educational background?

A. Sure. I have a Master of Industrial Design from Pratt Institute in New York City.

Q. What is industrial design?

A. I like to describe industrial design as sort of a combination of art and engineering. A designer creates beautiful things but at the same time they need to be functional, intuitive to use, manufacturable at a certain price point, meet certain durability requirements. So it's art with a great deal of restraint on it.

Q. Have you won any awards or received any recognition for your work in industrial design?

A. I have. Over the years I've won several awards, including most recently from the Industrial Designers Society of America or IDSA the 2020 award for the 20 designers who contributed most to the profession in 2020.

I've won the IDEA or the Industrial Design Excellence Award. Toys I've worked on have won Best New Toy from Dr. Toy and the Toy Industry Association. And I'm also chair of the Industrial Designer Society's Design Protection Committee.

Q. And are you named on any patents or patent applications?

A. Yes. I'm named on over 40 design and utility patent and patent applications here in the United States as well as some overseas.

Q. And I see you have a law degree. Are you going to give opinions on legal matters in this case?

A. No, I'm going to try very hard not to. That's sort of a past life, many years back. I haven't been a practicing attorney for 27 or 28 years.

Q. Okay. I'm going to go to the next slide so you can tell us about your work experience as an industrial designer.

A. Sure. So I have been working as an industrial designer, a design strategist and inventor for the past 28 years. Again, after I practiced law for a few years, I made quite a career change and have not looked back.

Q. Let's go through some of your present employment, if you will, on this slide.

A. Sure. So I currently have my own consultancy called Informed Innovation, which I started in 2018 after the firm that I had been with, a large consultancy based out of Chicago called Product Development Technologies, was sold at the very end of 2017 or beginning of 2018.

Prior to that I had a toy invention company for a few years in Chicago called Twenty Twenty Thinking. And I'm also an associate professor of design at the Art Center College of Design in Pasadena, California.

Q. Do you have experience designing toys?

A. I do. I think the next slide might discuss some

of that.

So over the years I've worked in a number of industries, including toys, and some of my clients have included Fisher-Price, Learning Resources, Little Kids, V-Tech and Crayola, amongst others.

Q. And do you have experience designing launching toys?

A. I do. I have worked on several toys that launch or shoot in various ways, one of which was a concept called Team Stomp Rockets. You may be familiar with Stomp Rockets, which are these foam projectiles that look like little rocketships. A child places them on a hollow tube, and that tube is connected with a cushion that the child jumps on or kind of a pillow and thus launches the rocket upwards through that air pressure.

So one thing that I noticed was kids loved playing with Stomp Rockets, but they really hated taking their turn and waiting for their turn to launch the rocket. So by using multiple cushions two or three kids could jump at the same time and make a game out of that and also increase the air pressure simultaneously.

Q. And what is your experience designing other types of launchers?

A. So other types of launchers I've worked on have included a concept called Ice Riders, which used a gun-like

launcher to launch these vehicles on a Hot Wheels type of a track, which -- then the vehicles would slide on a cushion of ice. You would put them in a freezer tray and they would be molded. So that was kind of a neat idea.

I've also worked on medical devices that have included launchers, especially diabetes lancing devices. One in particular used a magnetic launching system which at the time was quite novel. And we prototyped that using NERF gun mechanisms until we had the right to sort of breadboard that concept and then had it reduced to a smaller size for purposes of a medical device.

Q. And is this lancing device what the diabetics use to get a small drop of blood to then test?

A. That's exactly right, yes.

Q. Do you have any hands-on experience designing or modifying other types of launchers?

A. Yes. Well, I've got two boys, and they are a bit older now, but all of us were serious NERF enthusiasts for many years.

And in addition to just enjoying playing with NERF guns, there's a whole online community that we found called NERF Modders. So NERF guns out of the box for the most part they fire pretty well, but there's a lot of people who spend perhaps too much time figuring out how to make them fire further, faster, more accurately. And you can buy

kits and see instructions on how to do that.

So my boys and I have torn apart quite a few new guns and improved them over the years.

Q. Do you have airguns at home?

A. I do. I've been an airgun enthusiast since I'm 10, 11, 12, when I got my first BB guns and such. Today we probably have about 35 different airguns. We only do target shooting, I'm not into hunting, but really enjoy target shooting, and we have airguns of all types of mechanisms and all types of ammunition.

Q. Do you have AirSoft guns?

A. We do, yes.

Q. Do you do any sort of maintenance or repair on the 35 odd number of guns that you have?

A. Yes. You have to. Even a new gun requires some basic maintenance to keep it sealed, to keep it lubricated properly. Though I also collect some vintage guns and restoring them to operating condition has been something I've worked on with the boys again and opening them up and working on the mechanisms, replacing parts as they are needed.

MR. GEORGE: Your Honor, we tender Joel Delman as an expert in the field of industrial design, including areas of toy and launcher design.

JUDGE MCNAMARA: Any objection?

MR. CORDELL: Your Honor, we'll reserve our objections for cross.

JUDGE MCNAMARA: That's fine. Thank you. I'm just curious, are you planning to do any more of a voir dire?

MR. CORDELL: Maybe a bit. If it's okay with you, I'll do it on my cross.

JUDGE MCNAMARA: That's fine. Thank you very much.

So at this point Mr. Delman is going to go ahead and testify, and I'm accepting his credentials, and we'll wait and see what the objections are, if any, as to his expertise.

MR. GEORGE: Thank you, Your Honor.

JUDGE MCNAMARA: You're welcome.

BY MR. GEORGE:

Q. So do you have a summary, a high-level summary of your opinions in this case?

A. I do, and I believe the next slide provides that.

So my opinions in this case are that all of the asserted claims of the asserted patents are rendered obvious by Peev in combination with Spit Balls or Clear Spheres Launcher, and Nagayoshi in combination with Spit Balls or Clear Spheres Launcher.

Q. And have you considered a person of ordinary

skill in the art, what qualifications they would have?

A. I have, yes. I think the next slide discusses that.

Q. Let me start with, did you provide a definition of what you think a person of ordinary skill in the art would be for the asserted patents?

A. I did. On the left, as it states, someone with a bachelor's degree in industrial design or mechanical engineering, or a toy designer with at least five years' experience designing toys, including launchers, with both either of those individuals having access to a chemist who is knowledgeable regarding super absorbent polymers.

Q. Do you understand that the Complainants and Staff have also offered opinions regarding the qualifications of a person of ordinary skill in the art?

A. Yes, I have.

Q. Are those on this slide number 3.006 as well?

A. Yes, Complainants' and Staff's definitions are in the center and the right, respectively.

Q. Have you considered the definitions provided by Complainants and Staff?

A. I have, yes.

Q. Do your opinions change depending upon whose definition you use?

A. No, not in the least.

Q. And why is that?

A. The opinions remain the same, and the definitions for the most part cover the same type of individual, and I would qualify under any of them.

Q. So now I would like to do an overview of the asserted patents.

Could you tell us what the asserted patents say about projectile launchers?

A. Sure. So the asserted patents describe projectile launchers in a very broad manner. So it says a projection device in the '282 patent is in the general form of a gun, but, however, other embodiments can have shapes and designs of other devices, for example, can be a bow, a crossbow, a slingshot, a handgun, a machine gun, a futuristic weapon, a catapult, or any other type of weaponry. So it's a very broad definition of what it can be.

Q. And how about firing mechanisms? Does the patent describe the firing mechanisms for use with these projectile launchers?

A. It does. Again, in a very broad fashion. The firing mechanism of the projection device may be based on any of the known ways of firing or launching projectiles or ammunition from a projectile device.

And it goes on with respect to air pressure, in

particular, that air pressure can be created in a number of ways, including, for example, from a plunger operated by the user, from a cartridge containing compressed gas, from air that's been pumped into an internal chamber and then released, or from an explosion.

Q. And the patent mentions the CO2 cartridges. Do you see that?

A. Yes, I do.

Q. What kind of toy guns are those typically used in?

A. CO2 cartridges can be used in a variety of airguns, including AirSoft guns, but also in BB guns and pellet guns. It's a fairly common and very old way of providing the pressure required.

Q. Now the patent also talks about super absorbent polymers, correct?

A. Yes, it does.

Q. And can you briefly describe what the patent says about super absorbent polymers?

A. Sure. So the patent describes that super absorbent polymers were first invented by the U.S. Department of Agriculture in the '60s and commonly used in personal hygiene products like diapers. It goes on to say that SAPs are polymers that can absorb an extremely large amount of liquid relative to their own mass.

Q. Okay. Before, Mr. Delman, you mentioned a summary of your opinions and I mentioned prior art references, and I'm going to go to slide RDX-3.11.

MR. GEORGE: Your Honor, our stipulation that we entered into yesterday, the stipulation regarding prior art dated May 18th, 2023, under that stipulation the parties have agreed that Nagayoshi is prior art under section 102(b) for the purposes of this investigation, and that Peev is prior art under 35 U.S.C. º 102(a), again, for the purposes of this investigation.

That for the purposes of this investigation only, Complainants will stipulate that Spit Balls and Clear Spheres are prior art under pre-AIA 35 U.S.C. º 102(b).

I'm sorry. All of my references to 35 U.S.C. were pre-AIA, if I missed that. So that means we're going to skip this slide, 11, and we're going to skip to 14, slide 14.

BY MR. GEORGE:

Q. Mr. Delman, did you take a look at Peev and compare it to the claims of the -- the asserted claims of the '282 and '863 patents?

A. I did, yes.

MR. CORDELL: Your Honor, I hate to interrupt, and this may not make any difference, but I believe Mr. George said that we had stipulated under several

sections of the statute, but I think it was all 102(a) or (b).

MR. GEORGE: Yeah, I was just reading off of the stipulation. That's all.

JUDGE MCNAMARA: Yes. And I think the added qualification was pre- AIA.

MR. CORDELL: I think he cited other sections of the statute. Can we go backward in the slide deck?

MR. GEORGE: The slide deck, I'm not using that slide, because I read the stipulation into the record.

MR. CORDELL: Okay.

JUDGE MCNAMARA: Effectively, as I understood, slide 11 is not pertinent now. That's how I read it.

MR. GEORGE: Thank you. That's exactly right, Your Honor. I think what you're confused about is there's more sections in slide 11, but we don't need them anymore.

JUDGE MCNAMARA: Right. That was my understanding. So disregard slide 11. It's the stipulation that controls.

MR. CORDELL: Thank you, Your Honor.

BY MR. GEORGE:

Q. Mr. Delman, I've pulled up slide RDX-315.

Could you take us through Peev, which is RX-8?

A. Sure. So as the title of the slide states, "Peev discloses everything but soft SAP projectiles." I've

highlighted in colors here the spring is highlighted in green; the piston that surrounds the spring is highlighted in blue; the air compression chamber that the piston is axially aligned within and slides within is in white; the feed chamber is again in green, with a stack of polymer balls are shown; and then the smaller diameter tube is at the front of the toy.

Q. And did you prepare an animation showing how Peev works?

A. I did, and it should be the next slide.

So, as you can see, what's happening here is there is an electric motor in one of these automatic electric guns, which turns a series of gears. The gears engage with teeth on the bottom of the piston pulling the piston back and simultaneously compressing that spring that's within the piston.

When the gear reaches a point where the teeth run out, the piston is free to be pushed forward by the spring, which compresses the air in the compression chamber ahead of it, and fires the ammunition out the front of the tube in the front.

MR. GEORGE: So originally, Your Honor, we were going to go through all the limitations. We don't have to do that anymore because we have the stipulation. And so we're going to rely on paragraph 2 of the stipulation.

Your Honor, I can read this into the record, if you think it's necessary, I hope it's not, and we can just proceed.

JUDGE MCNAMARA: It's really not.

MR. GEORGE: I didn't think so, Your Honor.

JUDGE MCNAMARA: The stipulation is part of the record at this point.

MR. GEORGE: Yes. And just to confirm --

Q. Mr. Delman, let's just briefly go through these. So the yellow highlighted limitations on slide 17 for claim 1 of the '282 and the '683 patents, are those found in Peev?

A. Yes, they are.

Q. Yes. And I'm just going to ask you for yes and no answers.

A. Okay.

Q. And the same question, the yellow highlighted limitations on slide RDX-3.18 of claim 8 of the '282 and claim 5 of the '683, are those found in Peev?

A. Yes, they are.

Q. And then let's just skip to the end.

Are all of the limitations in claim 19 and 20 found in Peev?

A. Yes, they are.

Q. So now we're -- let's talk about Nagayoshi. And, again, do you have an opinion on whether or not Nagayoshi

teaches all of the limitations of the asserted claims except for the soft SAP projectile limitation?

A. Yes, just like Peev, Nagayoshi teaches everything but the soft SAP projectiles.

Q. And you've also -- slide RDX-3.25 is what, Mr. Delman?

A. So this is from Fig. 10 of Nagayoshi. I've added some highlight color here. But essentially it shows exactly the same type of mechanism that Peev disclosed.

You've got a spring in green that is within the blue piston, which slides axially aligned within the air compression chamber in white. The feed chamber is shown with a stack of spherical bullets, and one of those bullets is shown firing out of the smaller diameter tube.

Q. And just -- it's Nagayoshi, RX-9 at Fig. 10, correct?

A. That is correct.

Q. And you did an animation as well?

A. I did.

Q. Let's just go through that briefly.

A. So just as with Peev, the gear system pulls back the piston, compressing the spring within the piston, and then, when the gear reaches a point where the teeth run out, the piston is free to slide forward and the spring forces the piston forward compressing the air ahead of it and

forcing out the ammunition, which has been loaded into the firing position.

Q. Okay.

MR. GEORGE: And here again, Your Honor, we're going to rely on paragraph 1 of the stipulation regarding prior art that was entered into yesterday.

Q. Very briefly, looking at slide 3.27, the yellow highlighted portions of the '282 and '683 patent, are they found in Nagayoshi?

A. Yes, they are.

Q. And on the next slide, 28, are the yellow highlighted portions of claim 8 of the '282 patent and claim 5 of the '683 patent found in Nagayoshi?

A. Yes, they are.

Q. And, again, we're just going to go right to the end. So it's slide 332 and we're looking at claims 19 and 20 of the '282 patent.

Are all of the limitations set forth in those two claims found in Nagayoshi?

A. Yes, they are.

Q. And that only leaves one claim, claim 14.

MR. GEORGE: And, here again, we have a stipulation on this claim. Let me see if I can find it. It's in -- so with respect to Nagayoshi, it is in paragraph 1 of the stipulation, and that's all we need it for because

it's only -- I'm sorry. We're talking about asserted claim 14 of the '683 patent, and we have a stipulation in paragraph 1 that that is found in Nagayoshi, it's paragraph 109, and we have a stipulation that it's found in Peev, and that's paragraph 2i of the stipulation.

Q. Mr. Delman, is it your opinion that -- well, let's just proceed. We'll rely on the stipulation.

Okay. So we've now gone through the asserted claims of the two patents and we've compared them to Peev and Nagayoshi.

Was there a problem with Peev and Nagayoshi prior to the 2010 filing date of the asserted patents?

A. There was. Well, a problem with airsoft guns in a general sense, yes.

Q. And what was that problem?

A. The problem was that, while airsoft guns are a lot of fun to play with, they fire hard plastic ammunition, and that ammunition can hurt and even cause injury.

Q. Are you familiar with articles that describe this issue?

A. I am, and I believe I have one right here.

Q. We're now at slide 338 and it's Exhibit RX-841.003.

Does this article support your position?

A. It does. So this is an article from an online, I

guess, sporting blog, is the best way to describe it, called The Bleacher Report dating from August of 2008.

And the article starts off by acknowledging that airsoft guns are fun to play with. It's a lot of fun to shoot airsoft guns with your friends in the backward. It doesn't take a rocket scientist to figure out why young boys like them so much.

But at the same time it acknowledges that there's a risk of injury because the rounds are made of hard plastic and they can be enough to crack the skin and even cause minor bleeding. And it even notes that some guns, airsoft guns, can cause more damage than their brethren paintball guns.

Q. So this describes airsoft guns as something that young boys play with. Do you see that?

A. Yes, it does.

Q. Is it your opinion that the guns described in Peev and Nagayoshi can function as toys?

A. Yes, very much so, and Peev and Nagayoshi both acknowledge that within the patents themselves.

Q. So let's take a look at RDX-3.039. Why don't you point out the parts that support your opinion.

A. Sure. So Peev, at the top, I've highlighted that these guns, electric airsoft guns, in particular, are for fun when conducting airsoft games. And Nagayoshi below that

discusses the present invention relates to a toy gun having a function for continuously shooting spherical bullets, and goes on to repeat the phrase or the description "toy gun" no fewer than five times in that particular paragraph.

Q. Does Nagayoshi refer to children as well?

A. It does. I think on the next slide I've highlighted how it refers to a type of plastic that it states is suitable for inexpensive products designed for children. And it goes on to discuss the mechanism for storing energy as one that is effective when providing an inexpensive product for children.

Q. Just for the record, you were referring to RX-9 at paragraph 101, RX-9 at paragraph 53?

A. That's correct, yes.

Q. And in the previous slide you were referring to RX-80003 and RX-9 at paragraph 1.

A. That's correct, yes.

Q. So let's go back to the problem here of injury. Was there a solution at hand?

A. There was.

Q. And what was that?

A. The use of soft SAP projectiles as a replacement for the hard spherical plastic balls.

Q. And are you aware of any soft SAP projectiles that existed before the 2010 filing of these asserted

patents?

A. Yes. As far back as 2008, Steve Spangler was launching Clear Spheres, and you could go to the store and buy Spit Balls.

Q. So we're looking at RX-3.41 and there's two pictures. One is RX-21.

Are you familiar with what's shown in RX-21?

A. Yes, I am. So that's a picture of Steve Spangler. And I know we've watched a video of him earlier and his name has been mentioned, but just to refresh the Court, Steve is a somewhat well-known science guy who has made a really fun career of getting kids and educators excited about scientific principles. And he invents things to that end. He hosts conferences to that end.

And this is a picture of Steve on stage at a conference that he organized in 2008 called Science in the Rockies that was aimed at educators and others, and it was in Colorado.

Q. And do you see the picture on the right, RX-138?

A. Yes, I do.

Q. Do you know what that is?

A. That is a Clear Spheres that Steve has just launched out of the Clear Spheres launcher. So we watched that video earlier. This is a screen capture from that video.

Q. Are you familiar with the testimony about the Science in the Rockies presentation?

A. I am, yes. A teacher, who has won a lot of awards, I gather, is a science educator, Ellen Peterson, was attending that very conference, and she was deposed and asked questions about what she experienced at the event, in particular, questions regarding the launching of Clear Spheres.

Q. Did she have anything to say about whether Clear Spheres would cause injury, like -- or not?

A. So when asked about that, she was asked, did you get hit with these Jelly Marbles -- and Jelly Marbles are just another name for Clear Spheres; they are the same thing -- and she said yes.

And she was then asked, did it hurt? She said no. Did it leave a welt? No. Do you know what happened to the Jelly Marbles when you got hit? So when the Jelly Marbles hit something, they fracture into all the tiny little pieces you see laying around in the pictures.

Q. And the picture she is referring to, if we go back a slide, is RX-0021?

A. That's correct. That's Steve standing on stage after a Clear Spheres war broke out, I guess, and he was the target of many of them.

Q. And he looks uninjured.

A. He looks pretty happy to me, and I don't see any blood. I think he is just fine, yes.

Q. Okay. You also mentioned Spit Balls before, correct?

A. I did.

Q. Okay. Let's take a look at RX-3043. Is that what you were referring to?

A. Yes.

Q. Can you tell us about Spit Balls?

A. So Spit Balls were a product that was available in 2008, and this is a photograph on the left of the front of the Spit Balls package. And on the right I've got an excerpt from text on the back of the package.

Q. Is there anything here that speaks to the issue of softness versus hardness?

A. Well, there's quite a lot here. So on the back it says, unlike regular spitballs, which I think many of us are familiar with from our childhood, that are mere pieces of wadded up paper, DuneCraft Spit Balls are amazing wonders of chemistry that are slimy and gross to the touch. When launched at your opponent, they provide that extra element of surprise guaranteed to win you the victory.

With respect to softness, in particular, it says only DuneCraft's Spit Balls can bounce and then explode on target. You'll have hours of fun mastering the simple art

of Spit Ball launching.

And then how to make Spit Balls goes on to provide instructions to the child on how you can make them, by adding more or less water, you can make them bigger or smaller. They can bounce or be more durable. They are fully adjustable as you experiment with a ratio of water that they absorb.

Q. So you can change the size?

A. Yes, you can change the size.

Q. And you can -- okay. The Jelly Marbles/Clear Spheres product, was that also customizable that you could change the size?

A. Absolutely. It's been explained to me by Dr. Reitman that one of the great things about these SAPs is that they can be ready adjusted according to all their properties. You can adjust how big they get or how not big they get. You can adjust their hardness and their explosiveness or their durability when they hit something. All of those are easily adjustable through the chemistry behind them.

Q. And are you aware of any testimony from Mr. Spangler on this point?

A. Yes. So Mr. Spangler testified at his deposition. I can -- I totally can control the size of the Jelly Marble, which is great. And, again, by -- he notes

that by hydrating it, depending on how long you hydrate it for.

Q. Did you prepare a summary of your opinion regarding combining or using the Clear Spheres or Spit Balls with Peev and Nagayoshi?

A. I did. I believe the next slide.

Q. Would you take us through your summary?

A. Sure. So POSITAs were, as I discussed, aware that airsoft guns were fun toys, but that they posed this risk of injury due to the hard plastic ammunition that they utilized.

A POSITA would have been motivated to preserve the fun of playing with these airsoft guns and the games that kids play with them but to reduce the risk of injury from them.

And they would have naturally looked to Clear Spheres Launcher and to Spit Balls for the way they teach that you can have a softer, gel-like spherical projectile to launch using air pressure, which, when placed into the airsoft gun, makes that airsoft gun safer.

Q. Are you aware of any evidence that supports your summary?

A. I think the next slide will address that.

So it wasn't just a proposition that, you know, the summary I just gave, it's not just my proposition, but,

basically, at the same time across the world a Korean inventor filed for a patent in Korea in 2008.

Now the way the system works there, I understand that it wasn't actually published until May 11th of 2010, which, coincidentally, is one day after the filing date of the asserted patents. But the application was filed in 2008 that sets forth exactly the same motivation for making these gel bullets, which the named inventors had and which I've just described.

So if you take a look at the abstract, which I've highlighted here, the patent is titled "Toy Bullets Formed of Gel Or Gel Material," and the present invention is to improve the bullet of a toy gun to prevent injury to the human body.

A toy bullet formed of gel or gel material is placed inside the barrel, and it then describes the same airsoft mechanism that we discussed in Peev and Nagayoshi using a piston to charge air pressure inside the bullet cylinder to fire the gel bullet out the front of the gun and resulting in a very safe and useful toy bullet that is safer to use than a bullet of a conventional rigid material.

Q. And it goes on to say that that does not cause injury to the human body, correct?

A. That's correct.

Q. Okay. Now before we went through the claim

limitations of the asserted claims and saw how the ones that related to projectile launchers were found in Peev and Nagayoshi, do you recall that?

A. Yes.

Q. Now my question is the limitations we didn't look at, the SAP, the soft SAP projectile substantially spherical, are those found in Clear Spheres and Spit Balls?

A. Yes, very much so.

Q. Just to be clear, we're looking at -- I'm sorry. Let me just go back.

The Korean reference that you were speaking about just before was RX-52, correct?

A. Yes, that's right.

Q. So now let's go to RDX-348, and these are the two asserted claims, 5 and 14 of the '683 patent. I've included claim 1 only because these two claims depend on and claim 1 is not is asserted.

The limitations that you're going to talk about now are the ones highlighted in blue.

A. That's correct. Soft projectiles formed from hydrated super absorbent polymer.

Q. We're going to look at RDX-349, and, again, we have the three asserted claims, claims 18, 19, and 20, and they all depend on claim 1. And, again, the limitations you're going to talk about now are the ones highlighted in

blue, correct?

A. Yes, that's correct.

Q. And let's start with the Clear Spheres Launcher.

Before we get to this, let's go to slide 52.

Do you understand that the Court issued a claim construction on the claim term "ammunition configured for use with a projectile launcher"?

A. Yes, I do.

Q. And you considered that when you were rendering -- doing your analysis and rendering your opinions?

A. Yes, I did.

Q. Okay. So take a step back. Does Clear Spheres teach ammunition configured for use with a projectile launcher?

A. It does.

Q. And your support for that?

A. So Steve Spangler, again, is shown on stage here holding the Clear Spheres Launcher after a great number of Clear Spheres have been shot by hundreds of people in the audience as well as Steve. And Steve has described what happened at the Science in the Rockies conference in 2008.

At his deposition he says, I put a jelly marble in the tube and used my air to push it out and taught the people in the room how to do that and chaos ensued.

Q. And that's from -- you're reading from his transcript, RX-110, November 23rd, 2022, his deposition at page 47, lines 14-22.

A. That's correct.

Q. And are you familiar with the video we saw before?

A. I am, yes. Steve demonstrates exactly how the Clear Spheres Launcher can be used, both to launch potato pieces as well as changing the ammunition to launch Clear Spheres.

MR. GEORGE: Your Honor, would you like to see this video again?

JUDGE MCNAMARA: I think I have it pretty well in memory and especially potato. It's hard to miss that when you see that. And, again, I have to say I'm familiar with spitballs. So what can I say.

MR. GEORGE: Very good. Very good. All right.

Q. Let's move on, then, to Jeff Brooks' testimony.

Is there some of that that supports your opinion?

A. Yes. So, firstly, I should mention that Jeff Brooks was or perhaps still is the chief operating officer of Steve Spangler Science, which is Steve's company that develops these products and creates these events and such.

So Steve was asked to -- excuse me. Jeff was asked to describe what he saw when he came into the

conference room at Science in the Rockies. And he states that there was teachers reaching into the bowl of the Jelly Marbles and loading them up into the potato gun, and all of them were firing at Steve on stage. It was quite comical.

Some people were loading two and three Jelly Marbles. Then all of a sudden the color Jelly Marbles started being shot. So, yeah, it was -- it was a lot of Jelly Marbles in the room.

Q. Okay. And you're reading from Jeff Brooks' transcript, RX-122, December 9th, 2022 deposition, page 79, line 23, to page 80, line 12.

A. Yes, that's correct.

Q. And the other -- how about Ellen Peterson, is there any testimony of hers that supports your opinion?

A. Yes, it does. And I should note here on this slide that it was Ellen that took this picture of Steve on stage here. So --

Q. Let me just stop you for a minute. When you said it was Ellen that took the picture of Steve on the stage, the picture you're referring to is RX-21, correct?

A. That's correct yes.

Q. I'm sorry. Please go ahead.

A. So Ellen was asked about this picture at her deposition. She states, so that is Steve Spangler on the presentation platform at Science in the Rockies 2008. He is

holding the polycarbonate tube from the potato launcher in his left hand. There are Jelly Marbles broken and scattered all over the floor there. In the background, you can see a graduated cylinder with water gel crystals and Jelly Marbles in them.

She was asked further, and so you're saying that on the floor there were Jelly Marbles, and her response is yes.

Q. Let me just stop you. You're reading from the transcript of Ellen Peterson's deposition, which is RX-0111, November 28th, 2022, page 47, line 18, to page 48, line 8, correct?

A. Yes, that's correct.

Q. And you see there's another picture here, RX-1729, on this slide RDX-356?

A. Yes. So --

Q. Can you tell us what that is?

A. Yeah. On the far right, that is a photograph of the metadata for the digital camera file that this photograph was labeled with. And the date on that metadata states that it was taken July 10th of 2008.

MR. CORDELL: Your Honor, I'm going to object as lacking foundation. This witness is not an expert in metadata and he is just parroting what he has been told. This is rank hearsay.

JUDGE MCNAMARA: Fair enough. I think, in terms of the metadata, did Ellen Peterson authenticate?

MR. GEORGE: Yes, I believe she did. The testimony has already been submitted so --

JUDGE MCNAMARA: All right. Then I don't think that Mr. Delman is in a position to actually authenticate in any way or lay the foundation for that. If it's already in the record. It's there in the record.

MR. GEORGE: Thank you, Your Honor.

JUDGE MCNAMARA: Yes.

Q. Let's switch now. Are Clear Spheres and Jelly Marbles spherical?

A. Yes, they definitely are.

Q. What supports your position there?

A. So on this slide I've got a couple of photographs.

Q. This slide is RDX-3.057.

A. That's correct. So on the left there's a photograph of a bag of Clear Spheres, unhydrated or not yet hydrated Clear Spheres. They are definitely spherical.

On the right is a photograph which I took of the Clear Spheres after they had been hydrated. And as you can see they are spherical.

Q. And the two photos you're referring to are RPX-3 and RX-36, correct?

A. That's correct, yes.
Q. Is there any testimony or anything else you want to tell us about these Jelly Marbles that you looked at?
A. Sure. So Jeff Brooks, again, Steve's COO, confirmed to me on a telephone conversation or a Zoom call, I believe, that Jelly Marbles in the jar were always sourced from the same manufacturer, a company called JRM Chemical, and that the formula never changed.

And Steve at his deposition confirmed that the samples that I had were an archived sample of the product that we sold back at the time.
Q. And with respect to that deposition testimony, that's RX-110, November 23rd, 2022, Spangler deposition, page 121, lines 13-14, correct?
A. Yes, that's correct.
Q. Do you have any other evidence that support your opinion?
A. Yes. So I have a photograph on this slide that was taken directly from the 2008 Jelly Marbles Activity Guide.

On the left of that photo box is a jar full of hydrated Jelly Marbles, which are spherical, and on the right is a cupful of nonhydrated, and they are very small. I think you can see that they are spherical, but in case you can't, the images just to the right of that also from the

Jelly Marbles Activity Guide show a hydrated and a nonhydrated spherical jelly marble.

And the Jelly Marbles Activity Guide, the text of the guide itself, also states the cause of the spherical shape, it creates a convex lens over the words. So even the guide itself uses the word "spherical" to describe them.

Q. Okay.

JUDGE MCNAMARA: And that was slide 59?

MR. GEORGE: Thank you, Your Honor.

A. That is correct.

Q. Just to be clear, the picture that you referred to first was RX-139000, 1 and 2, and the text that you talked about later from the Jelly Marble Activity Guide was RX-139.002, correct?

A. Yes, that's correct.

Q. So the next slide has to do with something we've stipulated to. So we're looking at RDX-3.060. Let me just find -- I'm going to read --

So in paragraph 3 of the stipulation regarding prior art --

MR. CORDELL: Your Honor, I hate to interrupt again, but as I'm trying to organize my cross-examination, it doesn't look like the slides are sequential in number.

MR. GEORGE: I thought they were. There were some objections you had and we may have done something

because of that.

MR. CORDELL: I wonder if I can ask Respondent's graphics specialist, Mr. Sayres, to back up a few slides.

MR. GEORGE: Which slide do you want to go to?

MR. CORDELL: Well, this is a good example. See, this is slide 1-30. If we can go to the next slide, we're at 356.

MR. GEORGE: That does appear to be misnumbered. I can't tell if there is another number below it.

A. It seems like there is something that is cut off on my screen.

JUDGE MCNAMARA: I think what it makes sense to do, however, is to leave the numbering as it is, because otherwise it's going to get very confusing if they try and go back and renumber.

So you have already pointed it out, which is helpful, but there may be some issues, but I think it is best to leave the deck slide numbers as they are.

MR. CORDELL: I agree, but I think we probably have to be disciplined about referring to slides.

JUDGE MCNAMARA: I think that's right. This happens at times.

MR. GEORGE: Very good.

Can we go to RDX slide 3.060.

Q. And here I was about to read from paragraph 3 of

the stipulation regarding prior art. For the purpose of this investigation only, Complainant stipulate that Clear Spheres and Spit Ball toys are formed from super absorbent polymer as required by '282 patent claim 1 and '683 patent claim 1 as construed by the ALJ.

We can pass this slide and we can pass the next slide, which is 621.

And let's go to slide 3.062. What's being shown here in RX-719?

A. So I'm not sure if that's a video or just a still from a video.

Q. Let's see what happens if I click it.

A. Okay.

Q. It's a video.

A. So that is a video of me launching hydrated Clear Spheres two at a time in that particular instance. And you can see them coming out of the launcher and bouncing off of the target chair.

Q. Now I'd like to talk about Spit Balls. And, again, what I want to talk about are the SAP limitations, if you will. So let's go to slide 3.064.

And I have there claim 1 of the '683 patent and claim 1 of the '282 patent, and the language I've highlighted is projectile launching system and ammunition configured for use with a projectile launcher.

Are those limitations found in the Spit Ball product?

A. Yes, they are.

Q. Can you tell us why?

A. So on the right we're looking at a photograph or a scan of the front of the Spit Ball's packaging. That package shows a child, a boy or a girl, holding a launching tube in their mouth, pointing it directly at you, and pushing a spitball out from that tube, blowing through that tube to launch a spitball directly at you. That's what the graphic shows. It shows a child using a projectile launcher to launch a spitball.

Q. And that's Exhibit RX-1 that you're referring to?

A. Yes, that's correct.

Q. Let's take a look at the back of that packaging, which is RX-02, and which is on slide 3.065.

Is there anything on the back of the package that supports your opinion?

A. Yes. So the back of the package first contrasts DuneCraft Spit Ball, and DuneCraft is the brand name here, to regular spitballs that are merely wadded up pieces of paper. But instead says that these are slimy and gross to the touch, wonders of chemistry, which, when launched at your opponent, provide that extra element of surprise guaranteed to win you a victory.

So it specifically instructs you to launch them at your opponent. It goes on to describe that they explode on target and that you will have hours of fun mastering the simple art of Spit Ball launching.

And on the right I've also highlighted under the categories of bullet points to use Spit Balls to master the art of Spit Ball launching. Spit Balls are great for target practice and Spit Ball tag.

So everything about the description of this product tells you to launch them. But, of course, they are called Spit Balls, and I would venture to guess that everybody in the courtroom today is probably familiar with what a spitball is. So the very name of this product tells you to launch it through a projectile launcher.

Q. Let's assume for the moment that there is somebody who doesn't know. Did you look at the dictionary definitions?

A. I did and was not surprised to find dictionary definitions, such as that on the left from the New Oxford American, which defines spitball as a piece of paper that has been chewed and shaped into a ball for use as a missile, and Websters Second New College Dictionary defines it as paper chewed and shaped into a lump for use as a projectile.

So if you wanted a dictionary definition, it just backs up what you probably already knew.

Q. So you were reading from RX-832.001 and 3, and RX-832.007 through 99, correct?

A. Yes, that's correct.

Q. And this is on slide 3, RDX-3.066.

A. Yes.

Q. Did the Spit Balls disclose a plurality of projectiles?

A. They do, yes. So, again, looking at the front of the Spit Balls package, the way that they were sold, you've got a plastic baggie that's attached to the card, the image card, and that baggie is filled with many, many nonhydrated Spit Balls, and the package states that you get over 150 in the package. So there is a plurality of the Spit Balls there.

Q. And you're looking at the front -- RX-001 and RX-002, correct?

A. That's right. The RX-002 is from the back of the package.

Q. Thank you. And that's on RDX-003.067. Are the Spit Balls substantially spherical?

A. They are.

Q. And what's your support for that?

A. Well, with respect to the package, not only do you see the substantially spherical nonhydrated Spit Balls in the baggie that's attached to the card, but there is also

a photograph on the bottom left zoomed in on hydrated Spit Balls showing a group of hydrated spherical Spit Balls.

Q. Do you have other evidence that supports your opinion?

A. I do.

Q. Let me stop you for one minute. We were just looking at slide RDX-3.068 and now we're going to look at RDX-3.069. Go ahead, Mr. Delman.

A. So I've also examined what's called the Material Safety Data Sheet or the MSDS for these Spit Balls, and amongst the various specifics that are provided, appearance is described on the MSDS as one of its properties, and I've highlighted that its appearance is described as spherical. That's on the left. And --

Q. That's RX-0231.0002, correct?

A. Correct. And on the right there is a webpage capture using the Wayback Machine from DuneCraft's webpage, website, back in June 30th of 2009 showing photographs of Spit Balls on that webpage. And, as you can see from the single, zoomed-in and the image to the right of that showing a large number of hydrated Spit Balls, they are spherical.

Q. And you've testified before that Spit Balls are soft; is that correct?

A. Yes, I have.

Q. And you also testified that you can control the

softness?

A. That's correct, depending on how long you hydrate them for.

Q. And that's on the back of the Spit Balls packaging, isn't it?

A. That's correct.

Q. Let's take a look at the next slide, RDX-3.070. I'm not going to ask you to testify about this slide. We're going to rely on the stipulation regarding prior art.

Paragraph 3, it's the same sentence I read into the record before, so we'll pass that.

Do you have an opinion as to whether it would be obvious to try these Spit Balls and Clear Spheres as ammunition in an AirSoft gun?

A. Yes, I do. I believe the next slide speaks to that. So there were a finite number of ammunition options that a POSITA could have considered to have a reasonable expectation of success when making this combination.

Dr. Kudrowitz suggested rubber, foam of some sort, cork, which I assume is wood cork, and soft plastics, which I think can be a fairly broad range of things, including SAPs.

And I specifically suggested that hydrated SAPs would be a fantastic and obvious solution.

Q. Was there a reasonable expectation of success?

A. Yes. We know that airsoft guns can be easily adjusted should you need to make any adjustments to make this work, and we also know, as we've discussed, both from the description on the back of Spit Balls, from Steve Spangler's testimony, and from my conversations with Dr. Reitman that SAPs are easily adjusted. You can make them bigger. You can make them smaller. You can make them harder, softer, less durable, et cetera.

Q. Let's focus on the airsoft guns. Can you tell us ways to adjust them?

A. Sure. So at least one way to adjust an airsoft gun -- and I'm not sure, are these videos or --

Q. Why don't you just talk through them first and then we can see.

A. Sure.

Q. Just for the record, you're looking at RDX-3.074, please go ahead, which shows an animation of Peev Figs. 1 to 3.

A. Right. So it must be a video, then. So if we can get it to play while we're speaking.

Q. Sure.

A. So here you've got a stronger spring in an airsoft gun being shown. And the result with the amount of air pressure that's being caused by that strong spring pushing that piston forward at the speed it's pushing it is

that the SAP seems to be exploding and not firing the way you would want it to fire.

So a POSITA would have readily understood that you can adjust the spring tension by just changing the spring into a weaker spring. On the right, for example, shown in green, and if we hit Play on that, it now drives the piston forward more slowly, less force driving the bullet out, and the SAP launches from the gun in a solid fashion.

Q. Is there another way that you could make adjustments to the launcher?

A. Sure. Another way that comes to mind, I believe I'm showing it on the following slide, you could change the diameter or size of the air pressure chamber.

So when you have the piston on the left pushing a large amount of air through that tube, it seems to be causing too much force, such that the SAP ammunition isn't surviving it. It's exploding on the way out of the gun.

But if you instead use a smaller chamber, which pushes less air at the ammunition round, the round comes out in a more gentle fashion and it doesn't explode.

Q. For the record, we were talking about RDX-3.075 and the animations on that.

What if I didn't want to make any changes to the airsoft gun, I didn't want to change the pressure, I didn't

want to change the chamber, what other options would I have?

A. Well, if we take a look at the next slide, again, Dr. Reitman has provided all the guidance that a POSITA would need to understand that, if you didn't want to change the gun, you could easily change the SAP material.

So a POSITA would be able -- reading from Dr. Reitman's report now at paragraph 106, Exhibit RX-0580 -- a POSITA would be easily able to achieve different material properties and physical characteristics for SAP ammunition, including adjustments to desired size of the hydrated SAP and adjustments to the strength and durability of the SAP before 2010. These would all be routine adjustments that would not require extensive effort. Just as changing the springs out in my kids' NERF guns were routine adjustments that don't require extensive effort.

Q. So, for the record, that's RDX-3.076.

Did you try and launch Clear Spheres out of a airsoft gun?

A. I did. So, I mean, just to put what we're going to see on this next slide into context here, you don't necessarily have to make any modifications because I didn't. I placed hydrated Clear Spheres into a prior art airsoft gun, which in this case is the Daisy AirStrike 470, and I wanted to see what would happen. And my son recorded this.

And if you hit Play, you can see that they fire

just fine. It's actually -- they fire so quickly it's hard to see them, but you can if you watch closely and, of course, you can see them bouncing off the chair. They work just great without any modifications whatsoever.

Q. And we're looking at RX-0717 and we're on slide RDX-3.077.

Did you try and shoot spitballs out of an airsoft gun?

A. I did, and I believe the next video shows that. This is still -- yes. So this video is the Spit Balls version of the same thing. I hydrated Spit Balls, placed them in a stock prior art airsoft gun, and you can see they fire nicely without any modifications whatsoever.

Q. I'm going to skip the next slide, 799, and I'm going to -- we'll go back to the slide we were on -- in your opinion was the airsoft gun -- the airsoft guns before 2010, were they ready for improvement?

A. Yes. Again, we knew they were lots of fun to play with, but that at the same time they posed a risk of injury due to their hard plastic ammunition, hard spherical plastic ammunition.

Q. And what are you relying on for that?

A. Well, I'm relying on articles such as I've cited here. "Airsoft guns is a double-edged sword." This is, again, back from 2008, first noting that the rounds are made

of hard plastic and that they can be enough to crack the skin and even cause minor bleeding.

Q. And that's RX-0841.0001 and 3.

And that polymer ball that we show here in yellow that's hard, if we replace it, what kind of results would we get?

A. Well, if you replace the hard plastic ball with a soft SAP ball, you get a very safe round of ammunition that fires from the gun, providing the same fun experience of an airsoft gun but with ammunition which doesn't hurt when you get hit with it. It explodes and is soft when you get hit with it. And Steve Spangler is showing you how much fun shooting SAPs can be.

Q. So that was, just for the record, that was RDX-3.082 when you were referring to the picture of Steve Spangler. RX-0021, we were also referring to the Spit Balls. RX-001, the front of the packaging and the back of the packaging, RX-002.

We have one more slide on this, RDX-3.083. Do you want to take us through that?

A. Sure. So this is just an attempt to describe graphically what a POSITA would do and why they would do it. So on the upper left you have a device that's ready for improvement, an airsoft gun that's fun to play with, boys love playing with them, but they hurt and can cause injury.

Beneath that we've got a known technique for improvement, launching hydrated SAPs as ammunition. We know they are round. We know they don't hurt or injure you when they hit you.

So the predictable result of this combination is a safer airsoft gun.

Q. Mr. Delman, did you consider any evidence of simultaneous invention?

A. I did. So if you go to the next slide, so we've discussed this already, this is the Kim patent, which was filed by an inventor in Korea back in 2008, but, again, published one day after the filing date of the asserted patents describing this inventor's identification and description of exactly the same problem that these airsoft guns had, to improve the bullet of a toy gun, to prevent injury to the human body by using a toy bullet formed of gel or gel material.

And the patent goes on to describe the same type of AirSoft mechanism and the solution being a safe and useful bullet, safer to use than a bullet of a conventional rigid material, it doesn't cause injury to the human body.

Q. Are you aware of any other instances of simultaneous invention?

A. Yes. If you look at the next slide, so there was a patent that was filed by an inventor and other inventors,

I believe, but named Carlson, so I've referred to it as the Carlson patent. This was filed about five months after the asserted patents.

So it's not prior art, but it teaches that round bullets formed by hydrated SAPs to form a toy projectile for the same reasons, a present invention relates to toy projectiles made of hydro-polymers similar to the absor -- excuse me -- polymer material used in a diaper can be formed of a variety of shapes, examples of which include being round.

Q. Did you compare the text of the Carlson patent '209 text of the '282?

A. I did, and I believe that comparison is on this slide.

So if you read from this Carlson patent, you can see that the motivation here of the inventors is to reduce injury several toy guns have been created to fire soft projectiles, and the inventor notes that toy companies sell toy guns that shoot plastic or foam bullets. Both the plastic and foam do not possess the mass of a real metallic bullet and, therefore, are less dangerous.

An advantage of plastic bullets is that they are solid and typically smaller than foam and are less influenced by wind resistance than foam bullets.

So he goes on to note that, after being fired by

a toy gun, a solid and plastic projectile is more likely than a porous projectile like foam to shoot straight. But he notes exactly what we've been discussing, that a disadvantage to such plastic bullets is that they are solid, and although softer than metal, they can still cause injury.

On the right I've highlighted elements from the '282 patent, and this patent notes that one reason NERF foam and other foam-based projectile toys have become so popular has been due to the soft and light properties of the foam material, and they can be formed into balls and darts and fired from toys with little risk of injury.

But it goes on to note that the properties of NERF and other foam materials have significant drawbacks when used as projectiles for launching toys. Because foam-based materials are light, they are highly susceptible to air forces when trying to project them through the air in free flight.

Q. Just to make sure we have the record straight, when you were talking about the Korean reference on RDX-003.085, you were talking about RX-0052.001, and also RX-0052 Fig. 1; is that correct?

A. That's correct, yes.

Q. And when you were talking about the Carlson patent, you were talking about RX-0053 at column 1, lines 10-15, and also at column 3, lines 44-60. And this is on

slide RDX-3.086.

A. Yes.

Q. And then the last thing, when you were talking about the Carlson patent on slide RDX-3.087, you were referring to the section of the Carlson patent RX-0053 appearing at line 1 -- column 1, lines 16-35. And you were comparing it to the '282 patent, which is JX-001, at line 1, column 30-50, correct?

A. Yes, that's correct.

Q. To wrap it up, is it your opinion that all of the asserted claims are obvious?

A. Yes.

Q. And they are obvious for the reasons that you've just given?

A. Yes.

MR. GEORGE: I pass the witness.

JUDGE MCNAMARA: Thank you, Mr. George. Let's take five minutes.

(Whereupon, the proceedings recessed at 3:26 p.m.)

(In session at 3:32 p.m.)

CROSS-EXAMINATION

BY MR. CORDELL:

Q. Thank you, Your Honor.

Good afternoon, Mr. Delman.

A. Good afternoon.
Q. My name is Ruffin Cordell. I don't think we've met before; is that right?
A. Not before today, but nice to meet you.
Q. Good to meet you. You understand that I represent Hasbro.
A. I do.
Q. So let's start off with some easy things. You don't have an engineering degree, correct?
A. No, I don't. I have an industrial design degree.
Q. You have a law degree, though, right?
A. From way back.
Q. But you don't practice law, correct?
A. I've not practiced or been licensed for 27 or 28 years.
Q. Okay. But you have a BS in economics from NYU in 1988, correct?
A. That's correct, yes.
Q. And you went on to law school for a few years, right, at Harvard?
A. That's correct, yes.
Q. And then you went to the Pratt Institute, where you got a master's in industrial design, correct?
A. That's correct.
Q. So when I look at your CV --

Can I have Mr. Delman's CV, please?

So in the last 20 years you don't list any toy companies on your CV, correct?

A. I'm an industrial design consultant so I haven't worked for a company since Zenith Electronics, which was a TV manufacturer.

Q. Let me rephrase that, sir. Again, I want to be very precise in my questions.

On your CV you don't list any toy experience within the last 20 years, correct?

A. Actually this is page 1 of 2 of my CV. The second page, do you have that available?

Q. Can we have the next page?

A. So I listed select clients, and, as you can see --

Q. The precise answer to my question would be, no, you don't list any toy experience in the last 20 years on your CV.

MR. GEORGE: Your Honor --

JUDGE MCNAMARA: Pardon me. Before you answer -- let's not talk over one another.

Before you answer, Mr. Delman, Mr. George has an objection.

Go ahead, Mr. George.

MR. GEORGE: The witness is being interrupted.

JUDGE MCNAMARA: Okay. I think that you will be able to come back around on that, but the answer was, just as Mr. Cordell posed it, and then you can always come back around and elucidate.

MR. CORDELL: Thank you.

A. I would say that, with respect to toy-specific experience, under Honors, I list some of my awards that I've won from toy consulting design work, but my work as a consultant, I don't list anything -- actually if you zoom in -- or I'll zoom in with my reading glasses. I apologize.

So if you look at -- well, from 1997 to 1999 I specifically state the focus of my work in Twenty Twenty Thinking, the consultancy that I ran during those two years, and then transferred that work over to my work as a designer of product development technologies after that in 1999, where we did quite a bit of toy work and where I also continue to do toy consulting work on the side.

Q. I'm going to ask you to focus on my question and answer, if you will.

Is it a true statement that there is nothing listed on your CV that shows toy experience within the last 20 years, correct?

A. I suppose that I did not provide dates for the awards, so you're technically correct because I also did not provide dates for the clients that I've listed, which

includes some toy work.

Q. You did some toy work back in the '90s, correct?

A. No, I've done toy work throughout the 2000s.

Q. So you're disputing that you did work, toy work, in the 1990s.

A. I did work in the 1990s as well as the 2000s, yes.

Q. So the answer to my question is you did toy work back in the 1990s, correct?

A. That is some of the toy work that I've done, yes.

Q. Now you say you've been an industrial designer, design strategist and inventor for 28 years, correct?

A. That's correct.

Q. And you said that you're a named inventor on 40 plus U.S. patents and applications, correct?

A. That's correct.

Q. It turns out that most of those are patent applications that never went anywhere, correct?

A. As a design consultant, my name is listed under the client's patent application. It's up to the client whether they pursue a patent application, whether it's a successful application or not. I have nothing to do because -- with it, because, as a design consultant, you assign all of your rights to the design work you do to your clients.

There are many patent applications where I should have been named as an inventor and wasn't simply because the client decided to only name their particular product managers, for example, and that's up to them to do that.

MR. CORDELL: I move to strike as nonresponsive, Your Honor.

JUDGE MCNAMARA: I'm going to let Mr. George come back around.

MR. CORDELL: Thank you.

Q. So it is a fact, sir, that many of the patent applications you were listed on never resulted in issued patents, correct?

A. To my knowledge, some of them did not result in issued patents.

Q. So you had a patent application on a cat litter box, correct?

A. I believe that was -- could you show me that application or call it you up on screen to refresh my memory?

Q. Sure. Can I have the '740 patent application?

Do you recognize this as a published patent application with your name on it, sir?

A. I do, yes. So this was for one of my clients, Aspen Pet Products, I did.

Q. The idea here is you had a kitty litter box with

curved sides, correct?

A. That was the focus of the invention that, without corners, if you've ever had a cat or scooped kitty litter, the litter had no place to get stuck so it was much easier to keep clean, yes.

Q. You also had a design patent application on a radar detector, correct?

A. That's correct. One of our clients for many years was Cobra Electronics. You can call this up on screen, if you like, but I'm sure I'm familiar with it, yes.

Q. But it was a design patent rather than a utility patent, correct?

A. You'd need to refresh my memory on that. I also had some utility patent applications for Cobra.

Q. Can I have the '224 patent, please?

A. That is a design patent, yes.

Q. And you were fairly active in the, for lack of a better phrase, the toilet paper dispenser art, correct?

A. Can you show me what you're referring to? Just so I understand what you mean.

Q. Sure. So can I have Mr. Delman's '342 patent, please.

Does this refresh your recollection, sir?

A. Yes. That was done for, I guess, Kleenex -- Kimberly-Clark, yes.

Q. And the idea here is that, if you had trifold tissues that were in a little box, but you had a toilet paper receptacle that expected a tube, you had little hangers that went on the side of the box so you can install it on the tube, right?

A. It was one of many ideas we developed for Kimberly-Clark to hang a disposable box of wipes, for lack of a better term.

Q. Wipes were known before you filed for this patent, correct?

A. Well, this particular type of wipe was novel, but wipes in a general sense, yes.

Q. Well, this patent isn't limited to any particular kind of wipe, right; it's just trifold wipes in a box, right?

A. I'm afraid I don't have much recollection of the specifics of the patent. I'd need to review it to see exactly what it claims.

Q. But your invention was to put the two little cardboard flaps on the sides so that you could install it on the receptacle that would normally expect a tube, right?

A. I believe from my recollection and looking at this figure, that that was among the innovations of this patent. I don't know that it was the only one without having time to review it.

Q. You were also pretty active in the stapler art, right?

A. We did quite a lot of work for, not -- was it Avery Dennison? You'd have to show me a patent.

Q. Would ACCO Brands sound right?

A. I'm sorry?

Q. ACCO Brands?

A. Yes, uh-huh.

Q. Can I have Mr. Delman's '537 patent, please.

A. Yes, this is one of many staplers that I helped to develop for SwingArm.

Q. And this was a powered stapler, right?

A. An electric stapler that ran on batteries, yes, or it might have been rechargeable. I don't recall.

Q. And people had made staplers before you came along with the '537 idea, right?

A. Yes, they did.

Q. And people had made powered staplers before the '537 patent, right?

A. I am quite sure they did, yes.

Q. Well, let's take a look at it. Can I have column 1, lines 15-22.

Can you blow that up, Mr. Lee? There we go.

So you say right upfront that powered staplers are known to be automatically actuated, right?

A. I didn't write this patent. My name was assigned as an inventor to it. But, yes, that is what it says.

Q. And the idea is that you had contact switches or photosensors that would sense when the paper was sliding into position, right?

A. That is what the Background of the Invention seems to describe, yes.

Q. But that was done before you came along, right?

A. I don't recall whether there was some new type of switch used in this patent. I have no recollection.

Q. Well, you actually tell us that, in fact, it was known for powered staplers to commonly use automatic actuation with contact switches or photosensors, right?

A. Yes, though, again, I don't know whether this invention involved any new inventive way of actuating things. I just have no recollection.

Q. Okay. Well, you can also put a button on the outside of the stapler and that would trigger the stapling mechanism, right?

A. Yes. The patent also discloses that in the Background of the Invention.

Q. And then when you get to the Summary of the Invention itself, you say, well, this is new because your trigger is now going to be in the jaws of the stapler itself, right?

A. Can you scroll down and let me read what it says? Because I certainly don't remember it.

Q. Sure. Can we scroll down a few lines, Mr. Lee?

A. So where are you reading from?

Q. Under the Summary of the Invention, the invention provides a powered stapler configured to be held in a single hand of the user that can be actuated by the user squeezing his or her hand while holding the stapler, right?

A. That's what it says, yes.

Q. What you did is you moved the switch from the photosensor inside to the hinge on the jaws of the stapler, right?

A. That simple description sounds to be accurate, but, again, without reading the rest of this patent and what it claims, I honestly don't remember.

Q. Well, let me have claim 1. So here we have a hand-actuated powered stapler, right?

A. Yes.

Q. And it's electrically operable staple drive mechanism. That was old, right?

A. In a general sense, an electrically operable staple drive mechanism was not new.

Q. The housing, that was old, right?

A. I wouldn't call a housing to be novel, yeah.

Q. A trigger member, there had to be triggers on an

electric stapler, right?

A. I am assuming there were such things before.

Q. So what you did here is the stapler was actuated by creating relative movement between the trigger member and the housing, right?

A. I think what this patent is describing and to the best of my memory, which is still pretty good but this is some years ago, I think what this patent is describing is a method of actuating the stapler by squeezing a soft flexible surface that was formed as part of the grip of the stapler.

Q. Well, it says it's actuated by creating relative movement between the trigger member and the housing, right? You squeeze the jaws a little bit and that fired the stapler.

A. No, that isn't how this stapler worked. The jaws did not squeeze. I remember that distinctly.

Q. Okay.

A. This stapler did not have moving jaws. What this stapler did, it had a squeezable surface. And, again, I did not write the patent, I had nothing to do with the patent other than assigning my name to it.

Q. But you admit --

A. So what this stapler did was it had a squeezable grip, which allows the user to actuate it by giving the housing a squeeze on some soft rubber, which at the time --

at least we believed to be and I believe that ACCO believed and perhaps the Patent Office as well -- that that was a fairly novel way to actuate a stapler.

Q. So in your view that was a perfectly valid patent, right?

A. I have no reason to believe it's not. Has it been invalidated? I have no knowledge of that.

Q. But you will agree with me that staplers were known, yes?

A. Absolutely, yes.

Q. And powered staplers were known, yes?

A. Yes.

Q. And buttons on the side of the powered stapler to actuate the mechanism was known, right?

A. I'm going to assume they were, but I don't know other than to make that assumption.

Q. Would you like me to take you back to the Background of the Invention that reads --

A. I'll trust you on it.

Q. Okay. So your invention was moving that actuator to you, say, a soft surface on the top of the stapler, right?

A. No. My recollection is correct, my invention or part of the invention -- again, I don't know what else this might claim -- this particular patent -- was creating a

squeezie stapler, for lack of a better description.

The idea that you can hold a stapler in your hand and not press a button that's localized or have to find that button that's localized, if you have arthritis or otherwise physically impaired in your hand, you can just hold the stapler and give the entire grip a little squeeze and it works. And that, to my recollection, was a novel thing back in the day.

Q. Have you ever seen one of these on the market?

A. Yeah. I know it sold quite well for many years.

Q. Now you'll acknowledge, sir, that when we take existing elements and combine them in a new way, it is often patentable, correct?

A. I would say it is sometimes patentable. I don't know about often, but sometimes, sure.

Q. There was a Commissioner of Patents back in 1900 that resigned because everything that could have been invented had. Are you aware of that?

A. I've heard that story, yes.

Q. So there is nothing new under the sun and the vast majority of inventions are combinations of known elements, correct?

A. I'm not able to say that, but I know that some inventions are new ways of combining old things.

Q. Now you tell us that you are an airgun

enthusiast, right?

A. Yes.

Q. What does that mean?

A. I've been shooting airguns since I was 10, 11 years old. I'm now 57. I own 35 plus airguns. I've taught my kids to shoot. We regularly shoot them. I maintain them. I enjoy them. I love target shooting. I guess that makes me an enthusiast, I don't know.

Q. Do you take the guns apart, modify them, and put them back together?

A. I wouldn't say I've modified my airguns. I've modified NERF guns, but I've taken some airguns apart and maintained them and replaced broken parts and put them back together, yes.

Q. You've told us that you are a NERF Blaster Modder, right?

A. My boys and I went through a phase, yes, when they were big NERF enthusiasts of modding NERF guns, yes.

Q. But you've never had any professional experience with airguns, correct?

A. Professional experience... I'm not sure what you mean.

Q. You didn't do it as part of your master's degree at Pratt, correct?

A. That is correct.

Q. You've never been hired by an airgun company to redesign one of their products, correct?

A. That's correct.

Q. You've never been hired by a toy company to modify a blaster product, correct?

A. Well, I have described some work on projectile launching devices that I've done for toy companies over the years as well as using projectile launchers as a means to create different types of launchers, such as a diabetes lancing device.

Q. Okay. But a diabetes lancing device is not a blaster; you would agree with that, right?

A. No, but this particular one started off as a NERF Maverick and some other NERF gun, I recall, yeah.

Q. And you told us about a group Stomp product to launch rockets. Do you remember that?

A. Team Stomp Rockets, yes.

Q. And the Team Stomp Rockets was a toy, but it was not a blaster, correct?

A. It was a projectile launcher.

Q. But it was not a blaster, correct?

A. It was not a blaster gun, no.

Q. Your client would have been very upset if they had found children aiming those Stomp Rockets at each other, correct?

A. I would imagine the client prefers them to be launched at the sky rather than another child, yes.

Q. Now what is Boyle's law, Mr. Delman?

A. You're asking me to go back to AP physics, and at the moment I wouldn't be able to recite what that is for you.

Q. Okay. What is a pneumatic force?

A. In a general sense, I would say that a pneumatic force is a force brought about by the pressurization of a gas, whether that would be air or some other material.

Q. So earlier in this case you took the position that the accused devices didn't infringe because they didn't apply a direct force to the ammunition. Do you remember that?

A. Could you show me what in particular you're referring to? Was there testimony you're speaking of?

Q. I can refresh your recollection, sure.

Can I have Mr. Delman's transcript, which is CX-1644, at page 72, 20, through 73, 2.

A. Could you zoom out a bit so I can read more of the entirety of this testimony?

Q. You can, but does that refresh your recollection that you took the position that the accused devices don't apply a direct force to the ammunition?

A. If you can just give me one moment to review,

please. Thank you.

MR. GEORGE: Your Honor?

JUDGE MCNAMARA: Pardon me. Go ahead, Mr. George.

MR. GEORGE: Okay. Number one, I object that it's way beyond the scope of direct. Number two, this claim 14 that I think this is going, we stipulated that we infringe that. We're not maintaining this noninfringement position anymore. We did this to streamline the case and he didn't offer any opinion on it.

JUDGE MCNAMARA: Mr. Cordell?

MR. CORDELL: Your Honor, this is a credibility issue, plain and simple, regardless of whether it is a live infringement issue or not. This witness told us that he didn't know what a pneumatic force is, and I'm entitled to develop that.

JUDGE MCNAMARA: I'm going to allow the testimony, but, again, it's something I'm going to consider when I've seen all of the testimony.

A. Okay. So could you please repeat the question for me?

Q. Let me just try directly, Mr. Delman. You don't know what a pneumatic force is, correct?

A. I just told you what I believe a general, high-level definition of a pneumatic force would be.

Q. So you're telling us today you do know what a pneumatic force is.

A. I'm not sure what you're asking. Yes, I did respond to your question.

Q. Okay. So can I have Mr. Delman's transcript at page 21, lines 13 through 17. This is CX-1644.

You were asked:

Question. Okay. But as an expert you wouldn't --

A. Can you put this on screen for me? I'm sorry.

Q. So at page 21, lines 13 through 17.

Question. Okay. But as an expert, you wouldn't know what pneumatic force means?

Answer. I know what air pressure is. Whether pneumatic force is a term that implies something different than air pressure, I would not know.

That was your testimony, correct, sir?

A. Could you zoom out? Could you take that off the screen and let me just look at the entirety of the testimony?

Q. Mr. Delman, Mr. George is here to do that. He is here to protect that record. So if he thinks that I am not showing you enough, he will invoke the rule of optional completeness. It's a very --

A. Okay. I don't recall exactly the context of this

quote without looking further at the transcript. I state that I know what air pressure is. Whether the question -- whether it was an issue of the term pneumatic force and what the attorney who was asking the question was that I wasn't sure what he meant, and that's what I was saying.

I'm not saying that I don't understand what pressure brought about by compressing gas is. I have filled the tires in my car many times. I've filled the tanks in my airguns many times. I understand what that kind of pressure is. This is referring to not understanding what the attorney was asking me with respect to that term.

MR. CORDELL: Your Honor, I move to strike. My question was simply whether that was his testimony.

JUDGE MCNAMARA: Any response to that, Mr. George?

MR. GEORGE: I'm sorry. I have to admit I just was looking at the transcript.

JUDGE MCNAMARA: Sure. The question simply was whether or not the testimony was accurate, and I think Mr. Cordell was asking Mr. Delman to respond to whether the testimony was accurate, not to go into the explanation as to what Mr. Delman understood or did not understand the questioning to mean at the time.

MR. GEORGE: I'm sorry, Your Honor. Your question?

JUDGE MCNAMARA: Mr. Cordell moved to strike anything beyond essentially was this your testimony.

MR. GEORGE: I don't care.

JUDGE MCNAMARA: You'll be able to come back around.

MR. GEORGE: Of course.

A. If you're asking me, Mr. Cordell, if those are my words, I'm sure that that transcript is accurate. Though, again, I think the words you have on screen are within a larger context, as I've just described.

Q. Mr. Delman, you're a lawyer, correct?

A. No. I haven't been a lawyer for 28 years.

Q. Well, you were trained as a lawyer, correct?

A. Way back in 1991 I believe was my graduation.

Q. You understand the seriousness of taking an oath, correct?

A. Yes, I do.

Q. You understand that mincing words in highly technical fields can be a dangerous endeavor, correct?

A. I would imagine it could be, but I don't believe I'm doing so.

Q. You understand that we all need to rely on your expert testimony for the purposes of these cases, right?

A. Yes.

Q. So when we ask you whether or not you know what

pneumatic force means and you give us an answer, we're entitled to rely on that, correct?

A. You are.

Q. Let's talk about Clear Spheres. Now you gave us an opinion that a product called Clear Spheres or Jelly Marbles serve as ammunition for a launcher, right?

A. Yes.

Q. And that was the product that Mr. Spangler was demonstrating, correct?

A. Yes, that's correct.

Q. Now Mr. Spangler actually sold a potato gun, right?

A. I don't recall what gun, if any, Mr. Spangler sold. You mean through Steve Spangler Science?

Q. Let me show you your expert report, sir.

Can I have paragraph 173 where you write -- did you write your expert report, sir?

A. I wrote it in conjunction with counsel, yes.

Q. With Mr. George or with the Kirkland lawyers?

A. I believe Mr. George was involved as well, but with the Kirkland team as well.

Q. Okay. The first sentence in paragraph 173 is the Steve Spangler Science Potato Gun Launcher, which I will refer to as the Spangler Gun Launcher, was offered for sale in the United States. Do you see that, sir?

A. I do. I do, yes.
Q. Does that refresh your recollection that what Mr. Spangler was selling was a potato gun, correct?
A. That is what was sold in the United States as of 2003, yes.
Q. And what he did is he took the tube off of the potato gun and he used that as essentially a very large straw with which to shoot, to launch Clear Spheres. Is that your testimony?
A. I think that's a high-level accurate description, yes.
Q. Well, you're relying just on the tube, not on the plunger or the other parts of the potato gun, correct?
A. That's correct.
Q. And when you take a Clear Spheres and you hydrate it by soaking it in water, how big does it get?
A. It gets -- I forget the exact dimensions. You would need to refresh my memory from my report as to how large a Clear Spheres grows if you leave it in for an extended period of time. But, of course, if you leave it in for a short amount of time it grows less.
Q. So the answer is you don't know.
A. The answer is it grows across a large range.
Q. What is that range?
A. I don't know what you mean, and I certainly don't

recall offhand the maximum growth of the Clear Spheres. If you would like to refresh my memory, that would be great.

Q. Would it surprise you that it will grow to over 20 millimeters, sir?

A. Again, if you showed me in my report, if that's what my report says, it wouldn't surprise me.

Q. Can I have Mr. Delman's deposition? And we'll go to page 77, at lines -- I'm sorry, 78 -- lines 2 through 10.

Does this refresh your recollection, sir, that the Clear Spheres grow to at least 22 millimeters?

A. It does, yes.

Q. Now what we're talking about here is a tube, right? Is that correct?

A. Yes.

Q. You didn't bring the tube with you today, correct?

A. I don't know.

Counselor, do we have the tube with us?

MR. GEORGE: The Kirkland & Ellis folks were holding those and I thought they had left them here. When I got here today, none of it was here. So we have sent them an email asking them to get them here.

JUDGE MCNAMARA: So I guess they will come when they come.

MR. CORDELL: We can all imagine it, right, sir?

JUDGE MCNAMARA: Just a minute, Mr. Cordell.

MR. SMITH: If I may, Your Honor, Dan Smith for Prime Time Toys.

We just worked out a stipulation with the Splat-R-Ball people. They wanted a stipulation about the use of the prior art samples, and we just worked that out. So I suspect we'll have them here Monday morning.

JUDGE MCNAMARA: Mr. Cordell?

MR. CORDELL: Well, it makes it a little less useful when I'm doing my cross-examination, but we'll work with what we have.

JUDGE MCNAMARA: I think I can imagine what the tube looks like because I've seen pictures of it, so I have a pretty good imagination based on recall.

MR. CORDELL: It turns out that there are things there that apparently don't meet the eye, but let me proceed.

JUDGE MCNAMARA: I'm all for seeing the exact object.

Q. Mr. Delman, the tube we're talking about does not have a compression chamber, correct?

A. It does not. It is a simple tube. It does not have a separate component that we would call a compression chamber.

Q. No, sir, it doesn't have a compression chamber,

correct?

A. Correct.

Q. The tube does not have a piston, correct?

A. Correct.

Q. It does not have a spring, correct?

A. Correct.

Q. It is a single diameter tube throughout, correct?

A. Correct.

Q. There are not two different diameters of tubes present there, correct?

A. Correct.

Q. Now you tell us that that tube has a feed chamber, correct?

A. If you'd like to refer me to testimony on that.

Q. Sir, do you recall your opinions? It is your opinion that the tube has a feed chamber, correct?

MR. GEORGE: Your Honor, I'm going --

JUDGE MCNAMARA: Go ahead.

MR. GEORGE: I'm going to object for two reasons. One, it's beyond the scope, and two, again, to streamline this case so we could be here today and not Monday, we're no longer taking the position that claim 5 is anticipated. That's what this relates to. And he gave no opinion on this.

JUDGE MCNAMARA: Go ahead, Mr. Cordell.

MR. CORDELL: It's a credibility issue, Your Honor. He told us point blank that it has a feed chamber and I'm entitled to expose that.

JUDGE MCNAMARA: I'm going to allow it in and it is going to be considered in the context of all of the evidence and the weight of the evidence.

Q. Mr. Delman, it is your opinion that the simple tube used by Mr. Spangler has a feed chamber, correct?

A. Yes. It was my opinion as well as Mr. Spangler's opinion, who gave testimony to that effect.

MR. CORDELL: Your Honor, I move to strike everything except correct.

JUDGE MCNAMARA: Fair enough. I will allow that to be stricken.

Again, Mr. Delman, your counsel will have an opportunity to come back around.

THE WITNESS: Yes. Thank you.

Q. So you showed us RDX-3.62, if I can have that brought up, and I believe it was an animation.

Do you recall this, Mr. Delman?

A. That is a video of me launching Clear Spheres through the tube, yes.

Q. Where in this tube is the feed chamber?

A. The feed chamber -- well, you're quite right, it would be nice to have one here to demonstrate.

The feed chamber is right where I've pushed the SAP ammunition into the front of the tube with my finger into a firing position, and I then put it into my mouth and blow and launch it from that firing position.

Q. You weren't holding the SAP ammunition in your mouth, right?

A. No, I was not.

Q. So you say the feed chamber is just a part of the tube; is that right?

A. The feed chamber is at the end of the tube into which I feed the SAP ammunition and it is pushed into place into a firing position. I then place the tube in my mouth and I blow through it to launch the ammunition.

Q. There's no difference in the structure of the tube, correct? It is homogenous throughout.

A. That is correct.

Q. And it is just a tube, right?

A. It's a tube.

Q. Now the way this works is you take the Clear Spheres and you put them in water, right?

A. To hydrate them, yes.

Q. And they grow the longer you leave them in the water; is that right?

A. That is correct.

Q. And if you hydrate them according to the

instructions they grow to at least 22 millimeters, correct?

A. Well, the instructions tell you to experiment with your hydration such that you may -- and as was described in various ways during my earlier testimony -- you're taught to hydrate them to the degree you want to to experiment with their size, their durability, et cetera. If you leave them in to the full extent, then, yes, they grow to 22. If you take them out after a shorter period of time, they may have only grown to 10, for example.

Q. The instructions tell you how to fully hydrate the Clear Spheres, correct?

A. Can you show me the instructions, please, that you're referring to?

Q. Can you answer my question, sir? Do you know?

A. I'd like to see the instructions you're referring to so I can read exactly what they describe.

Q. When they are fully hydrated they grow to at least 22 millimeters, correct?

A. When fully hydrated that is correct, yes.

Q. The tube that we're talking about here was only 15 millimeters, correct?

A. I'll take your word on it. I forget what the exact diameter was, but that sounds about right.

Q. You don't know?

A. I don't recall exactly. I'll assume your

dimension is accurate.

Q. So in order to get the spheres to fit into the tube, you had to partially hydrate them, correct?

A. That's correct. I only partially hydrated them to fit in the tube.

Q. And you showed us at 3.77 a demonstration of what you say were Clear Spheres that you put through a Daisy AirSoft gun, correct?

A. Is that the exhibit that shows the video of me shooting them out of the AirSoft gun?

Q. Can we bring that up?

A. Yes, that is correct. I hydrated Clear Spheres and I put them into the AirSoft gun.

Q. The ammunition that the Daisy AS470 shoots is 6-millimeter AirSoft ammunition, correct?

A. That is correct.

Q. So each of the little yellow balls, the little plastic balls, are 6 millimeters across, correct?

A. That's correct.

Q. And it is your sworn testimony that you took fully hydrated Clear Spheres at 22 millimeters and ran them through a barrel that was expecting 6 millimeter ammunition, correct?

A. No, that wasn't my testimony. I testified that I hydrated Clear Spheres. It says right on the slide. I

hydrated Clear Spheres to 6 millimeters and shot them from the AS470.

Q. You didn't tell us how long you hydrated the Clear Spheres, did you.

A. I don't recall if it was in my report or not. On this particular slide I didn't mention the time, no. I mentioned the dimension.

Q. You didn't mention that the Clear Spheres had barely grown at all, correct?

A. I don't believe that's an accurate statement so I didn't mention it.

Q. Well, let's try a little experiment. First of all, what happens if you put a 22-millimeter Clear Spheres into the Daisy AirSoft gun?

A. I haven't experimented with it so I couldn't tell you.

Q. As an expert, you can't imagine that a 22-millimeter round will gum up a 6-millimeter barrel?

A. I would imagine it would not travel through the gun very smoothly. I haven't experimented to see where it might break up or -- but, yes, it would not fire the way the 6-millimeter shot fired.

Q. In fact, it wouldn't even enter the chamber, if you want to call it that, on the AirSoft gun, correct?

A. I don't remember what the aperture size is, but

you're likely correct.

Q. You would have a big mess on your hands if you tried to run a hydrated Clear Spheres through an AirSoft gun, correct?

A. A fully hydrated Clear Spheres would probably not operate properly, no.

Q. And, in fact, you couldn't operate it for the rest of the day because you would gum up the entire barrel, correct?

A. I would assume it would not operate.

Q. Okay. Let's try a little experiment. I've got my caliper here. It starts out at -- well, a little less -- well, about 5 --

A. I don't think you're squeezing it really.

Q. I'm not.

A. Why don't you -- you know how to --

Q. I was expanding it. So it starts out at 4.66. Do you see that?

A. I didn't see it zeroed before, but I trust you.

Q. Okay. I can zero it again, if you'd like, but --

A. I think it's always just a good thing to do if we're going to do a measurement like this.

Q. Okay. It's pretty much zero.

A. Thank you.

Q. Do that -- well, 4.64 now.

A. Okay.
Q. All right? Now let me --
MR. CORDELL: Your Honor, in-court experiments are never recommended but...
JUDGE MCNAMARA: Of course you're not asking permission. It's just going to be an apology if something goes wrong.
MR. CORDELL: It's a demonstrative at this point. Let's just see how we do.
Q. Let me get my trusty phone, and let's try something modest. Let's see if we can hydrate it for 30 seconds. What do you say?
A. Okay. I'll time you as well as you. Are you hydrating it now?
Q. Now. I'll put the clock on the ELMO. The tough part about this is getting the water out of it.
A. They are slippery.
Q. All right. So there's 30. A little longer than 30 because I couldn't get it out fast enough.
Okay. So let's see if we were able to keep it under 6 millimeters. So, no, it's at 6.39. So 30 seconds and I'm already out of spec.
Mr. Delman -- may I approach the witness?
JUDGE MCNAMARA: Yes.
Q. -- I want you to feel this Clear Spheres and

describe it for Her Honor.

A. It is on the floor. Let me see where it went. Here it is.

It's firm. It has a bit of squishability to it, but it's fairly firm.

Q. Would you want to shoot one of your children with that Clear Spheres?

A. I wouldn't hesitate to do so from an airsoft gun, to be honest with you. Perhaps other parents would decide otherwise, but I wouldn't be particularly worried about this.

MR. CORDELL: Your Honor, may I approach?

JUDGE MCNAMARA: Yes.

Q. I think the word you were looking for, Mr. Delman, is that the Clear Spheres is hard, correct?

A. I said firm. In other words, in comparison to one that's been hydrated for a longer period of time, you would find it to be significantly softer, but, as I discussed earlier, that can all be ready adjusted. How soft it gets when it grows to only 6 millimeters is something that Dr. Reitman has assured me can be readily adjusted so that it could be soft at 6 millimeters.

MR. CORDELL: Move to strike, Your Honor. I asked just whether or not he would describe it as hard.

JUDGE MCNAMARA: If you could just answer the

question, we'll move along a little bit faster that way.

Q. And, in fact, to stay under 6 millimeters, you would have to hydrate it for even less than the 30 seconds that I did, correct?

A. According to your current hydration, it would seem that it grew to over 6 millimeters in a very short period of time of 30 seconds, yes.

Q. So when we go back to your demonstration at 3.77, it seems pretty likely, sir, that you barely hydrated those Clear Spheres, correct?

A. I don't recall how the experiment proceeded. I see what you've just done, but I don't recall what I did at the time.

Q. So this is the experiment that you showed Her Honor to suggest that you could simply take Clear Spheres and put them in an AirSoft gun, correct?

A. That is correct.

Q. But, in fact, you had to have been hyper-focused on how little time you hydrated those parts before you put them into the gun, correct?

A. Well, I was focused on making sure that it would fit into the gun, yes.

Q. Mr. Delman, did you hydrate them at all? And I remind you you're under oath.

A. Absolutely. I wouldn't say that I hydrated Clear

Spheres if I didn't hydrate them.

Q. And --

A. And you can even see on the video from the size of the sphere that it is larger than not hydrated.

Q. Well, what we see, there are just a couple of rounds that come out and they bounce right back at you, kind of like Ralphie with his BB gun trying to shoot his eye out, right?

A. If you notice I'm shooting it at an Aeron chair. If you're familiar with an Aeron chair, it's essentially a trampoline, so it will bounce. Many things will bounce right off an Aeron chair.

Q. But it's a trampoline made of mesh, correct?

A. Extremely tight mesh, but, yes, it is a mesh surface.

Q. And you would expect if these had been hydrated so they were soft they would have shredded when they hit the mesh, correct?

A. No, because you remember I have video showing a larger hydrated Clear Spheres being launched out of the tube and also bouncing off the chair in a very similar fashion. They didn't fall apart.

Q. So the reality is these patents require you to have soft ammunition, correct?

A. Yes, they do.

Q. And what you demonstrated for all of us was taking a very hard Clear Spheres and running it through an airsoft gun, correct?

A. I can tell you that the one you've just handed to me was quite firm. I don't recall that the ones that I utilized in that airsoft gun during that videotaping were that firm.

Q. Let's talk about Spit Balls. Now it's your opinion that Spit Balls are also hydrated ammunition, right?

A. Yes.

Q. And you showed us some packaging from Spit Balls during your direct testimony.

Can I have RDX-364?

And you talked about Spit Balls being a projectile launching system, right?

A. Yes.

Q. And you were able to somehow decode the image on the front to suggest that some of the white images might be a straw, right?

A. I would disagree with your terminology, counselor. I don't think I decoded it. I think I described it as being a straw being held in a hand of a child pointing straight at you and launching a Spit Ball straight at you.

Q. And when you -- did you make this slide, sir?

A. I worked with counsel to make these slides. I

didn't do the actual graphic design work, so to speak.

Q. When you made the slide, you put the arrow for projectile launcher right over a label, right?

A. No. I'm pointing -- where the arrow is pointing is the upper surface of the tube or straw that's in the child's mouth.

Q. You put the arrow right over the label that says "fun to throw," correct?

A. Ah. The arrow crosses over that label, yes.

Q. You weren't trying to hide that label from Her Honor, were you?

A. No, I was not.

Q. Can I have the original exhibit, which I think is RDX-1?

Without the arrow, we can clearly read "fun to throw," correct?

A. That is what it says, yes.

Q. Can we go back to RDX-364? And let's look at the next page that you showed us, which is RDX-365, right?

A. Yes.

Q. And then you show us the back of the Spit Balls packaging on the right side. Do you see that?

A. I do, yes.

Q. You offered us a lot of testimony about what that means, correct?

A. I did.
Q. Did you make this slide too, sir?
A. Again, I worked with counsel to develop the slide, yes.
Q. Now can I have RX-02? Can I have the top of that exhibit?
So when we look at the full label of RX-002, what is the first thing that's said on the back of the package, sir?
A. "See how far you can throw them!"
Q. Somehow that didn't make it to your slide 3.65, right?
A. I don't recall. I believe I just had the text in the center there, yes.
Q. I can take you back to 365, back to your slide. There you don't say anything about how far you can throw the Spit Ball, right?
A. No. It doesn't say the word "throw" in the excerpt which I show there.
Q. Now these devices, when they are fully hydrated, grow to at least 15 millimeters, right?
A. Again, without referencing my report, I'll take your word for it.
Q. And you got to have an awfully big straw if you're going to try to launch one in the traditional

spitball sense, correct?

A. Well, if you could please call that back up for me in a sec?

So the instructions, which I did refer to earlier today, tell the child how to make Spit Balls, and it discusses the more water you add, the bigger they get, the bigger they are, the quicker they explode, smaller will bounce more and last longer. And it instructs the child, teaches, that you can experiment with different ratios of water to make spitballs that best suit your fancy.

So it depends on the size of straw or tube you have. For example, I have straws at home which we use for, I don't know if you're familiar with boba tea, that has tapioca beans in it, those straws are, I would guess, at least 15 millimeters in diameter. If you were using a straw like that, you might hydrate it to its full amount. If the child was using a thinner straw, they would hydrate it less.

Q. So your expectation here is that the users here are sufficiently skilled to titrate the hydration of these to a particular receptacle; am I understanding you correctly?

A. The instruction, the teaching of it is to hydrate it to the needs that you wish it to fulfill. I would guess that its diameter is amongst those.

Q. So you agrees with me that, in order to shoot one

of these out of a straw, you would have to partially hydrate it, fair?

A. Yes.

Q. And if you were going to somehow launch a Spit Ball out of an airsoft gun, you'd have to really partially hydrate it, right?

A. I don't recall what I -- yes, you would have to partially hydrate them, yes.

Q. But, I mean, we'd have to go through the same exercise we did with Clear Spheres. You'd have to hydrate it for just a few seconds, right?

A. I don't recall how quickly the Spit Balls grow and what -- how long it would take them to grow to 6 millimeters.

Q. Okay. Now the claims require a projectile launcher, correct?

A. Yes.

Q. And in your opinion -- well, first of all, Spit Balls were never sold with a launch of any kind, correct?

A. That's correct.

Q. And the claim requires ammunition configured for use with a projectile launcher, right?

A. Well, it speaks of using them with a projectile launcher, that they are to be used with a projectile launcher, but it wasn't sold with one.

Q. Right. But I want to confirm, the claim, claim 1, begins, ammunition of the '282, ammunition configured for use with a projectile launcher.

A. Yes.

Q. And Her Honor found that that was a limiting part of the claim. Are you aware of that?

A. Yes.

Q. Now you say that a projectile launcher could be a spoon in this context, right?

A. The patent describes that a projectile launcher can be most anything, as I discussed earlier.

Q. Can you just answer my question, sir? You say a projectile launcher can be a spoon, correct?

A. It could be a spoon.

Q. You say a projectile launcher could be a catapult, correct?

A. It could be a catapult.

Q. You say it could be a slingshot, correct?

A. It could be a slingshot.

Q. You say it could be a bow and arrow, correct?

A. It could be a bow and arrow.

Q. It could be David's sling from the Bible, right?

A. Yes, I suppose it could.

Q. It could be a ping pong racket, correct?

A. A ping pong what, I'm sorry?

Q. Racket?
A. I suppose that could be used to launch, sure.
Q. Do you know what a Jai alai cesta is?
A. I used to live in South Florida. I'm familiar with them, yes.
Q. So a launcher for these products could be a Jai alai cesta, right?
A. It could.
Q. And, importantly, Mr. Delman, a launcher in the context of these patents could be a human hand, correct?
A. A human hand could launch or throw one of these, sure.
Q. The package on the Spit Balls says "fun to throw," right?
A. It does.
Q. And on the back side it says, "see how far you can throw it," right?
A. It does.
Q. You cite the ThinkGeek website as part of your analysis in this case, right?
A. Yes. Though if you've got a specific example or citation, if you could please call it up to refresh my memory.
Q. Can I have paragraph 398 of Mr. Delman's report?
Do you see about the middle of the paragraph you

talk about ThinkGeek further teaches, if you throw them gently, they will bounce. If you throw them hard enough, they will explode into mushy pieces. Does that refresh your recollection, sir?

A. Yes.

Q. And that's your opinion, correct?

A. I'm citing the ThinkGeek website, yes.

Q. Well, more than that, sir, you cite it for the proposition that you can throw them hard or you can throw them softly, right?

A. Yes.

Q. Are these Spit Balls toxic, sir?

A. My understanding is that you can -- children or you -- can swallow them without any harm. They are nontoxic.

Q. Isn't it a fact, sir, that these are sold in Europe only in a fully hydrated form because they may cause harm to children?

A. I am not personally aware of the European regulations around them.

Q. You just don't know one way or the other.

A. I do not know that, no.

Q. Have you ever eaten one?

A. I'm trying to remember if I did just for the sake of saying that I've tried one. I don't recall whether or

not I did. I may have.

Q. What is the chemical that they are made of?

A. They are made of a plastic polymer.

Q. Which one?

A. Polyacrylamide, I believe, but, again, without my report or the Material Safety Data Sheet, I wouldn't recall exactly.

Q. Now you told us about two airgun reference, correct, Peev and Nagayoshi, right?

A. That's correct.

Q. Now Peev describes an electric airsoft gun, correct?

A. Yes.

Q. And one of their objectives was to mimic the functioning and manipulation of a real firearm, correct?

A. That was among the objectives in addition to others, including airsoft fun games.

Q. The technical nature of the Peev invention or Peev disclosure indicates that its purpose is to, quote, bringing the way of functioning and manipulation of the electric airsoft gun as close as possible to the way a functioning and manipulation of a real firearm, right?

A. If you'd like to bring up the patent, I would like to review what it says. I am sure it does say what you have just read, but I'm also sure that that is not the only

thing it says. I know it does refer to having fun playing airsoft games.

Q. Okay. So let's bring up RX-557 at page 6.

Can you confirm, sir, that Peev wants to make a realistic airsoft gun?

A. Yes, that is generally the function of operating an airsoft gun is to create a realistic operational experience with the toy.

Q. To make it seem as much like an assault weapon as you possibly could, fair?

A. Without one critical and unfortunate aspect of an assault weapon, which is that it isn't as dangerous as an assault weapon or --

Q. Peev does not disclose launching a soft projectile made of super absorbent polymers, correct?

A. That's correct.

Q. Your direct presentation in summary a couple of times with Mr. George, you said, well, the Peev disclosure includes all of the elements of the claims. Are you aware of that?

A. All of the elements aside from the super absorbent polymer, yes.

Q. So that's an important qualification, right? We need to make sure that your testimony is clear. You do not have the opinion that Peev includes the super absorbent

polymer limitations, correct?

A. That is correct.

Q. So to the extent that in summary you said something that might be contrary, your statement here and now would control, fair?

A. I would need to hear what you said I stated contrary, but what I've just stated is what I have testified to today, that Peev and Nagayoshi both disclose everything but the super absorbent polymer limitation.

Q. It's your opinion that Peev has a piston, though, correct?

A. Yes.

Q. And it has a compression chamber, correct?

A. Yes.

Q. Now Nagayoshi, I have a hard time saying that, is also a realistic-looking airsoft gun, correct?

A. Yes, in the patent it is disclosed as such.

Q. And what Nagayoshi really does is it really takes on the magazine so that the magazine looks and feels like a real powder-based weapon magazine, right?

A. I would describe it that Nagayoshi is trying to provide a means for a continuous firing mechanism, which utilizes a magazine that can be filled with spherical ammunition and continuously feeds that to fire it.

Q. But Nagayoshi also does not disclose launching a

soft projectile made of super absorbent polymers, correct?

A. Yes, that's correct.

Q. In fact, prior to this case you were not aware of any dice that launched soft projectiles made of super absorbent polymers using an airsoft mechanism, correct?

A. That's correct, prior to this case.

Q. In fact, prior to your own attempt to load Clear Spheres into the airsoft gun you demonstrated, you had not attempted to put super absorbent polymers into an airsoft device, correct?

A. That is correct, yes.

Q. All right. So let's talk about motivation to combine.

It's your opinion that a person having ordinary skill in the art would have been motivated to find an alternative ammunition for airguns that preserved fun and entertainment that reduced the risk of accident or injury, correct?

A. That's correct, yes.

Q. And one risk that you were focused on was the risk that an airsoft gun could penetrate the human skin, correct?

A. Yes.

Q. As part of your analysis, you relied on an article that stated that, when the muzzle velocity is around

350 feet per second, that's when human skin may be penetrated, correct?

A. I do recall that article, and perhaps you can bring it up on screen to refresh my memory. I forget whether that 350 feet per second statistic was referring to AirSoft specifically or if it was referring to BB guns or some other, you know -- if you could refresh my memory, I'd appreciate it.

Q. So can I have Mr. Delman's transcript at page 25, lines 22 through 26, 9.

Do you see, sir, where you say, you do cite an article which states that, referring to the 350 feet per second metric.

A. So I stated in my report, I do cite an article which states that. I haven't tested it myself. But it does state in the article around 350 feet per second is a figure you want to keep in mind. At 300 to 400, that's where penetration occurs in the human skin. Below 350 it's generally considered capable of only limited harm.

But, again, I don't think that this testimony asks or discusses whether that article was focusing on airsoft or on BBs, and that's what I was asking you. I don't recall.

Q. But, first of all, tell us what muzzle velocity is.

A. Muzzle velocity, at a high level, the speed at which the ammunition exits the muzzle of the gun.

Q. So you didn't seem terribly concerned about the distance that the target was from the weapon. That would make a difference, wouldn't it?

A. Well, if I understand your question, the further away you are from any gun, whether it's firing a bullet or a NERF dart, the ammunition slows over a distance, if that's what you're getting at. So the muzzle velocity would be measured immediately upon -- generally measured immediately upon exit from the gun.

Q. Well, my point is just this, in order to make an airsoft gun safer, you could simply move the participants further apart, correct?

A. I don't believe that makes the airsoft gun safer. I believe it makes the play of the participants safer, because you're also less likely to hit somebody when they are further away from you, but I don't think that's changing the nature of the airsoft mechanism or the gun.

Q. So it's your testimony that it would not reduce the number of injuries as a result of playing with airsoft guns if the participants were separated by a greater distance.

A. No, that's not my testimony.

Q. Is that what --

A. It would -- if people were further separated, it would likely reduce injuries, but what I said is that it does -- that moving people further apart doesn't change the gun. It moves people further apart.

Q. What does change the gun is you can reduce the muzzle velocity, correct?

A. Yes, that is one thing, which, if you wanted to change muzzle velocity, that is something you could do, sure.

Q. One of the things you told us about on direct is that you could use a less strong spring, correct?

A. Yes.

Q. A weaker spring. I don't know why I couldn't come up with that word. Fair?

A. Either one, weaker or less strong.

Q. You could also use a smaller compression chamber, correct?

A. Yes.

Q. You could use a smaller ratio between the compression chamber and the actual acceleration tube used for the ammunition, correct?

A. Yes.

Q. Those are all viable techniques to reduce the number of injuries that would be inflicted by an airsoft gun, fair?

A. Yes, and there are a variety of muzzle velocities which airsoft guns are sold with, as this article notes.

Q. So, for example, Prime Time makes an airsoft gun called the Pulsar Pro that states that its muzzle velocity is limited to 200 feet per second, right?

A. I'll take your words on it. I don't recall the exact data for that particular gun.

Q. Can I have CX-324 at page 1?

Do you recognize this as a Prime Time Toy product, the Pulsar Pro?

A. Yes, and it does say velocity up to 200 feet per second.

Q. So at least Prime Time found a way to manage or reduce the number of injuries by reducing the muzzle velocity to only 200 feet per second, correct?

A. Well, that would be one potential result of reducing the muzzle velocity, but it would have other impact on the gun's performance as well.

Q. And Splat-R-Ball makes a product that they have limited to only 205 feet per second, right?

A. Again, if you would like to show me the data sheet on it, or I can take your word on that.

Q. Well, CX-0206C at page 1, would you believe page 2? There we go. Sorry.

Do you see there that there is a specification

for the muzzle velocity to 205 feet per second?

A. Yes, it does state that, an average for ten rounds.

Q. The AirStrike 470 is one of the ones you tested, right? That's a Daisy product.

A. I'll note that it also seems to have a note next to that area you've highlighted that they have changed the velocity from 160 feet per second. It sounds like in the development they may have sped it up, but I'm not really sure what this document comes from.

Q. Okay. So that's interesting. So it's your interpretation of this that the Splat-R-Ball product actually increased its muzzle velocity.

A. Again, I don't know what this document came from or what that note refers to. I just wanted to read that as it was next to the highlighted area that you just mentioned.

Q. But both of these numbers are under the 350 feet per second threshold that your article had identified as penetrating human skin, right?

A. They are, yes.

Q. The AirStrike 470 is the one Daisy product that you tested, right?

A. Yes.

Q. And you agree that the Daisy AirStrike 470 is a low-powered airsoft rifle, correct?

A. Correct. I believe it has a muzzle velocity of about 160 feet per second.

Q. Correct. And you would consider the Daisy AirStrike 470 to be a type of airsoft gun that would be considered a toy for children, right?

A. Yes.

Q. And it's your opinion that the Daisy AirStrike 470 operates similarly to the Peev and Nagayoshi references, correct?

A. Yes.

Q. So I think we agree that reducing the muzzle velocity also reduces injuries, correct?

A. It is one way that injuries may be reduced, yes.

Q. Wearing eye protection will reduce injuries, correct?

A. It is one way you might reduce eye injuries, in particular.

Q. Well, you've played with airsoft guns with your boys, correct?

A. Yes.

Q. Have you ever had let them play without eye protection?

A. No.

Q. Would you ever let your boys play with an airsoft gun with a muzzle velocity turned up to 400 feet per second?

A. I don't believe we own any with that speed nor would I seek one out, but they do shoot other guns that have fairly high muzzle velocities.

Q. But your intention as a father is to limit the muzzle velocity that they use for airsoft guns that they shoot at each other.

A. Yes, if they are shooting at each other, I would not want 400 feet per second, correct.

Q. And in RDX-374 -- can I have that -- here you were talking about the Peev reference, right?

A. Yes, I believe that is the Peev, an animation from the Peev reference, yes, though we were talking more generally about modifications you might make to the spring, not necessarily with respect to the Peev reference.

Q. Well, the title of this suggested that you needed to swap out the ammunition in order to make the gun safer, right?

A. The title of this slide discusses that you can adjust airsoft guns to fire harder or softer as desired.

Q. And your point here was that it makes it safer if it's softer, right?

A. My point here was with respect to the success of firing the SAP. So when you played this animation, and I won't ask you to do it again, but I'll remind you that on the left-hand side what was illustrated was an SAP which

didn't survive the strength of the firing mechanism on the left-hand side such that a weaker spring provided lower air pressure and, thus, a velocity which allowed the SAP to survive the firing.

Q. You would agree with me, sir, that using a weaker spring makes the airsoft gun safer, the Peev airsoft gun safer, correct?

A. Use of a weaker spring would make the ammunition fire at a slower rate, which would likely make it safer, yes.

Q. Can I have the next slide, RDX-75, 3-75.

And using a smaller chamber would make the Peev airsoft gun safer, correct?

A. It would lower the rate of speed for the ammunition to exit the gun, and, thus, likely make it safer.

Q. Now the other safety concern you identified had to do with eye injuries, right?

A. I believe I did mention eye injuries or I cited an article which mentioned eye injuries, I did.

Q. And the accused Hydro Strike Nebula Blaster made by PTT poses a risk of eye injury, right?

A. I believe that most any projectile launched at somebody else can pose a risk of an eye injury.

Q. If I can have CX-323. This is the manual for the Nebula Hydro Strike Nebula Pro, right?

A. Yes.
Q. This is one of the accused PTT products, right?
A. Yes.
Q. And it uses fully hydrated SAP ammunition, correct?
A. That's -- well, this particular ammunition is hydrated to a certain degree before you utilize it. I guess you could call that being fully hydrated.
Q. And yet, if I can go to page 3 of the manual -- first of all, can I stay on that page?
The device is sold with Hydro Strike protective eyewear, correct?
A. Yes.
Q. And then it tells us in the instructions, at page 3, in all caps, "EYE PROTECTION SHOULD BE WORN DURING PLAY, WHETHER SHOOTING OR OBSERVING." Do you see that?
A. I do.
Q. They even provide that the protective eyewear is designed to fit over normal optical glasses. Do you see that?
A. It does say that, yes.
Q. And if we look at a couple of the others, say, for example, the Splat-R-Ball -- can I have CX-178 -- Splat-R-Ball, which is also a device that shoots SAP, correct?

A. Correct.
Q. Fully hydrated soft SAP, correct?
A. Correct.
Q. And yet it tells us, WARNING: This Splat-R-Ball can cause eye injury. Always wear eye protection. Read and follow all instructions, never aim or shoot Splat-R-Ball at people or animals. Be sure of your target. Correct?
A. It does say that, yes.
Q. You also opined that a person of ordinary skill would be motivated to reduce the risk of choking with these products, right?
A. Can you refresh my memory on where I opine that, please?
MR. GEORGE: Objection, Your Honor. Again, it's beyond the scope of direct. And, again, we went to great pains to be here today. We narrowed his opinions. We narrowed his positions down to one. And now we're asking about things that we dropped.
MR. CORDELL: I heard him suggest, Your Honor, that their motivation to combine was to avoid injuries. I didn't realize that I had to pick and choose the injuries.
JUDGE MCNAMARA: Mr. George, would you address that? Because one of the motivations to combine was safety.
MR. GEORGE: It's to reduce injury, as he testified by getting hit with one of these. We had another

argument where we were worried about ingesting, but we've dropped it. Again, we dropped a lot to get here today, Your Honor.

JUDGE MCNAMARA: Yes.

MR. GEORGE: I think it's -- this is way beyond the scope of direct.

MR. CORDELL: It's not -- if they are not going to rely on it, Your Honor, I'll move on.

JUDGE MCNAMARA: Go ahead, Mr. George.

MR. GEORGE: You're correct, Your Honor. We're not going to rely on the choking risk. Thank you, Your Honor.

Q. You also inspected a product called the Goo Shooter or Goo Spewer, correct?

A. I did, yes.

Q. And these Goo Spewers or Shooters were produced by Prime Time Toys, correct?

A. Yes, that's correct.

Q. And in your opinion the goo that these products emitted were some form of SAP, right?

A. Yes, I believe Dr. Reitman confirmed that for me.

Q. But the Goo Shooter is not one of the references you're relying on for your invalidity opinions, correct?

A. That is correct.

Q. And nor the Goo Spewer, that's not one that

you're relying on for your invalidity opinions, correct?

A. That's correct, yes.

Q. And, in fact, these were water guns, fair?

A. Their mechanism could be described as a water gun mechanism.

Q. All right. Let's talk about your number of solutions. Can I have slide 33?

I need slide 33 from Prime Time's opening statement.

MR. CORDELL: Your Honor, I wonder if this would be a good time to take a short break.

JUDGE MCNAMARA: I think so. Why don't I see you back here in five minutes.

(Whereupon, the proceedings recessed at 4:50 p.m.)

(In session at 4:57 p.m.)

JUDGE MCNAMARA: Thank you everyone. Please be seated.

MR. CORDELL: Can I have opening slide 1-33.

Q. You were here for opening, weren't you, Mr. Delman?

A. Yes, I was.

Q. And you heard Mr. George say that Dr. Kudrowitz had identified only four types of soft ammunition. Do you

see that?

A. Yes, I did.

Q. You know that's not true, right?

A. Please elaborate. I'm not sure what you mean.

Q. Well, you know that he identified a long list of materials from which a projectile could be made, correct?

A. The only ones that I recall are the four here, rubber, foam, cork, soft plastics.

Q. And the "et cetera" there doesn't give you any pause.

A. It doesn't because there's nothing identified. To me "et cetera" doesn't identify anything.

Q. And it's your opinion that there are only a finite number of solutions that could be used as alternatives to the hard plastic of airsoft guns.

A. Yes, that is correct.

Q. And I have brought some airsoft ammunition.

May I approach, Your Honor?

JUDGE MCNAMARA: Yes. By the way, I preserved the 6-millimeter with my notes and we'll mark it maybe Monday and I will preserve this as well.

Q. So, Mr. Delman, you can confirm that the plastic ammunition used in the airsoft gun is pretty firm, right?

A. It is. I'm familiar with it, and this is an example of that hard plastic.

Q. And 6 millimeters, yes?
A. I'm assuming these are 6 millimeters, yes.
Q. How much do they weigh, do you know?
A. It's my recollection that you can get airsoft ammunition in different weights. So I'm not sure what this particular sample weighs.
Q. Okay. Would it surprise you that it's maybe around 200 grams?
A. It would not surprise me.
Q. Milligrams?
A. Grams would surprise me but milligrams would not, no.
Q. But it's your testimony that there were just a finite number of solutions that one of ordinary skill could use to replace this plastic ammunition, right?
A. Yes.
Q. And one of the things that you cite in your direct testimony was the Carlson reference, right?
A. Yes.
Q. And can I have -- well, let's have slide 43 of the opening. You can stay with the opening. I think it's the same slide.
So 1-43, this is a summary of the Carlson reference, right?
A. Yes.

Q. You had a very similar -- we can stay on this, but you had a very similar slide, which is 3-86, right?

A. It certainly looked generally similar. I'll take your word for it. I don't know if I had highlighted anything differently or underlined anything differently offhand.

Q. Okay. Well, let me have Mr. Delman's slide just to make sure he is not led astray. It's 3-86.

And you had highlighted exactly the same words that Mr. George did, right?

A. It certainly appears to be, yes.

Q. Can you pick one of them, Mr. Lee? There we go. We'll go with yours, 3-86.

So what the Carlson reference is teaching us is that you can use pulp-based materials as the projectile, correct?

A. Well, it does teach that, but further down, as I've underlined in red, it says additional non-limiting examples of material that you could use would be a rice-based material, dehydrated gels, or a hydro-polymer, similar to the absorbent polymer material used in a diaper.

Q. But didn't you just tell us that there were just four possible alternative ammunitions -- rubber, foam, cork, and soft plastics?

A. I did state that, yes.

Q. But Mr. Carlson tells us that, in fact, you can use wood pulp, correct?

A. That would potentially be cork pulp. So when I read Mr. Kudrowitz' mention of cork, I assumed we're talking about some kind of a wood pulp material, which is what I understand cork to be.

Q. Have you ever worked in a paper mill?

A. I'm afraid I have not.

Q. Well, I did. It's the only real engineering job I've had and I would tell you we never saw cork at the entry gates to the paper mill. Can you cite anybody, anyplace, anytime that would pulp cork?

A. I am not an expert in pulping wood, so, no, I would not be able to do so.

Q. In fact, cork is a bark, isn't it?

A. I believe it is the bark of some type of tree, yes.

Q. So the first thing that happened when the trees came in to the paper mill is they were put through the de-barker. Are you aware of that?

A. I am not putting myself forward as an expert in paper or paper mills.

Q. Mr. Carlson thinks wood pulp is a fine material to make a projectile out of, right?

A. Mr. Carlson does suggest that, yes.

Q. He says you can use dehydrated paper pulp, correct?
A. He does refer to dehydrated pulp material or dehydrated paper pulp, yes.
Q. He says you can use recycled or virgin pulp as a projectile, correct?
A. He refers to that, yes.
Q. He says you can use colored pulp, correct?
A. He does.
Q. He says you can use bleached or natural pulp, correct?
A. He does.
Q. Do you know the difference between those two?
A. Again, I'm not an expert in those materials.
Q. You've seen cardboard. That's nonbleached pulp and you've seen white paper that's bleached pulp. Does that make sense?
A. Okay.
Q. And he says that you can use a starch-based material, right?
A. He does.
Q. He says you can use peanuts as your projectile material, correct?
A. He does suggest that as well.
Q. He says you can use a fiber filler with a binding

agent, like glue or starch, correct?

A. He does.

Q. He says you can use a rice-based material, correct?

A. He does.

Q. He says you can use dehydrated gels without telling us what kind of gels he is referring to, right?

A. He does.

Q. And then, finally, at the end of his long list of alternatives, he tells us you can use a hydro-polymer similar to the absorbent polymer used in a diaper, right?

A. He does.

Q. So at least Mr. Carlson thinks here is a whole bunch of possible alternatives to form a softer projectile, right?

A. At least Mr. Carlson has suggested these as possibilities, yes.

Q. And have you studied the Carlson patent, sir?

A. I did review it sometime back, yes.

Q. One of the things he is looking for is a projectile that will stick to you when you get shot, right?

A. You'd have to refresh my memory on that.

Q. Okay. So the fundamental crux of your opinion rises or falls with motivation to combine, correct?

A. I don't know that I'd characterize it in exactly

the way you said, but I have opined that a POSITA would have the motivation to combine these elements, yes.

Q. But you understand enough about the law to know that, if you fail to convince Her Honor that there is a motivation to combine here, your obviousness case falls, fair?

A. I'm not an attorney, but I believe that is one of the elements that I do need to convince Your Honor of.

Q. You keep saying you're not an attorney, but you went to Harvard Law School, right?

A. And I hated every minute of it. I went back to school and I never practiced again.

Q. Far be it for me to defend Harvard, so I'm not going to do it.

So aside from the work you performed when forming your opinions, you're not aware of any prior art device that launched soft projectiles made super absorbent polymers using an airsoft mechanism, correct?

A. Prior to my engagement on this matter that is correct, yes.

Q. And you've been an industrial designer for 28 years, right?

A. Yes.

Q. And in the opening at slide 35 -- can I have that -- I have to rise to the defense of Dr. Kudrowitz.

Mr. George said, well, if you were given SAP and a airsoft gun, could you make them work together somehow?

And Dr. Kudrowitz says, well, you know, you might have those skills.

Do you remember this?

A. I do. Mr. Kudrowitz -- Dr. Kudrowitz, I apologize -- was asked, they would have those skills and his response is they would have those skills.

Q. But as far as you know, despite your 28 years as a designer, nobody ever handed a designer SAP and an airsoft gun and said make these work together, right?

A. To the best of my knowledge nobody did, no.

Q. Now you spent some time working on toys and games, right?

A. Yes.

Q. You worked for Fisher-Price and The Learning Resources, correct?

A. Correct.

Q. And you've told us about the fact that you used to be a NERF Blaster Modder, right?

A. Yes.

Q. And you personally use and maintain your family's large collection of airguns, right?

A. Yes.

Q. You have over 35 of these airguns, right?

A. Give or take, yes.
Q. And they -- your personal collection of airguns have virtually every mechanism available, right?
A. I believe that's right, yes.
Q. Multi-pump, spring piston, gas piston, electric, CO2 and PCP, right?
A. Yes.
Q. What does PCP stand for?
A. It stands for precharged pneumatic. It's -- you pressurize the air chamber utilizing a pump, either hand pump or an electric pump, and then you can fire multiple rounds until it is depressurized.
Q. Your sons are 14 and 18; is that right?
A. That's correct, yes.
Q. And you use and maintain your airguns with your two sons, right?
A. That's correct.
Q. And --
A. Though the 18-year-old has new interests that are a bit different.
Q. That will happen.
But you considered your family to be a group of enthusiasts, right?
A. I wouldn't include my wife.
Q. Okay. Well, but you and your sons.

A. Yes.
Q. Now when you use these guns with your son, your airguns, safety was always a paramount concern, right?
A. Very much so.
Q. And you were familiar with spherical SAPs before you were retained in this case, correct?
A. I was familiar with them in the craft market and the craft science-y kind of market. I was not familiar with them as projectiles.
Q. You certainly were familiar with SAPs as diapers, right? You changed these boys' diapers?
A. Yes, I did.
Q. It was sort of staring you in the face for a few years, right?
A. In all the years I can't say I ever tore one open, but, yes, I'm familiar with them from my design work.
Q. And you were very familiar with airguns, correct?
A. Yes.
Q. And yet you knew that airguns were dangerous, right?
A. Yes.
Q. You cited 21,000 injuries in the year 2000 alone, correct?
A. Yes.
Q. You recounted a story from President George Bush

shooting his brothers, Neil and Jeb, when they were children, right?

A. I do recall that story, yes.

Q. And we have Ralphie with the Red Ryder where everybody in town was telling him he was going to shoot his eye out, right?

A. Yes.

Q. And yet you were playing with these airguns with your sons as they were growing up, correct?

A. Yes.

Q. And never once did you think that you could make that airgun safer by using SAP ammunition, correct?

A. It was not a problem that I was particularly interested in solving personally.

Q. Well, but you were worried about your sons' safety, right?

A. To be honest, I wasn't worried about it, no. I've never been worried about it, because, to me, one of the benefits of learning to target shoot and handle airguns is the discipline of safety and handling them properly and knowing not to aim them at each other, et cetera, not to do dangerous things with them or to use them in dangerous ways.

So I was always very comfortable with my boys playing with these toys because I have taught them to play with them in a safe manner.

Q. Mr. Delman, is it your sworn testimony that your teenage boys never shot at each other with their airsoft guns?

A. Oh, airsoft guns, they did, yes, absolutely.

Q. And you had worry that that might cause some injury, right?

A. They would -- they would never do it without wearing long sleeves, long pants, eye protection, et cetera. They would never do it with bare skin aside from, I suppose, a little on their face. And they were always never, ever shooting at each other's face.

But, yes, I was conscious that there was a danger involved, but, as a father, call me a bad dad, I don't know what that does for my credibility here, but I trusted my sons to use them in a safe manner.

Q. My point is just this. You knew there was a risk and yet it didn't occur to you with your master's degree in industrial engineering and all your wealth of experience to make ammunition out of SAP to make your boys safer.

A. No, it didn't. It wasn't a problem that I was personally ever interested in solving, but that's not the POSITA that's relevant for this matter. The POSITA that's relevant for this matter was aware.

And I mind you, I was unaware, as I've just testified, of SAPs being used as ammunition. I wasn't until

this engagement. But the POSITA in this case would have been aware of that as of 2008.

Q. My question is very simple, sir. It didn't occur to you, even though you were concerned about your boys' safety, correct?

A. It did not occur to me to modify my airguns in that manner.

Q. You are also a NERF modder, right?

A. Yes.

Q. And while the NERF foam dart blasters are pretty safe, there's always a risk that an injury could happen, right?

A. A slight risk. It's never really overly concerned about NERF guns, but yes.

Q. But you never tried to modify a NERF blaster to fire SAP ammunition, correct?

A. No, I did not.

Q. And as for PTT is concerned, they had a commercial SAP product back in 1995, right, the Goo Spewer?

A. It shot goo. It didn't shoot rounds of ammunition. It shot liquified goo. But, yes, it was an SAP-based ammunition.

Q. So, I mean, it was a squirt gun, I'm sure it made a tremendous mess, but it was firing SAP in a form, fair?

A. In a gel goo form, yes.

Q. And yet they didn't make their Hydro Strike Nebula product back in 1995, right?

A. They weren't aware of SAPs being shot as individual rounds.

Q. Well, they were shooting them out of the Goo Spewers, right?

A. Not individual rounds. They were shooting a gel-like liquidy substance that came out, as you suggest, as a mess. They weren't aware of doing so in a neat, safe fashion until 2008.

Q. The Goo Shooter was a gun, right?

A. Yes.

Q. Like a water gun, correct?

A. Correct.

Q. What came out of it was SAP, right?

A. In a very different form than the kind of SAP ammunition we're talking about today.

Q. And PTT did not make their Hydro Strike Nebula product back in 1995, right?

A. No, they did not.

Q. They didn't make it in 1996, right?

A. No, they did not.

Q. They didn't make the Hydro Strike in the year 2000 or 2005 or even 2010, correct?

A. They first learned about -- well, yes, you are

correct, but they first learned about shooting these kind of individual rounds of spherical ammunition much later than the goo shooters origination date in the 1990s.

Q. The Hydro Strike Nebula has been very successful for PTT, right?

A. I would say so.

Q. So they just didn't want all the extra revenue they would have gotten by creating this back in 1995?

A. I wasn't privy to the development team at PTT in that time range.

Q. Let's talk about your simultaneous invention testimony. You say there were multiple simultaneous independent inventions in this case, right?

A. Yes, I did note that.

Q. Let's start with your reference to the Kim Korean patent application. Can I have CX-115? I'm sorry. RX-0052.

Just to remind everyone, this is the Kim reference that you were referring to.

A. Yes, it's different -- in a different format than I showed it, but, yes, it appears to be.

Q. Okay. Now Kim discloses a toy bullet formed of gel or gel material, correct?

A. Yes, it does.

Q. The claims in this case require a particular kind

of material, correct?

A. The claims in this case require super absorbent polymer.

Q. And Kim just doesn't tell us what kind of gel we're talking about, correct?

A. It does not specify.

Q. And you certainly have not offered the opinion that came discloses a super absorbent polymer, correct?

A. I have not.

Q. You do not have a degree in chemistry, correct?

A. Correct.

Q. You don't have a degree in any material science, correct?

A. Correct, though I would just note that, per the discussion earlier about a POSITA, I would have access to somebody with those qualifications.

Q. Well, my question is really precise. You don't have a degree in material science, correct?

A. Correct.

Q. Now you relied on Dr. Reitman to inform you regarding issues relating to SAP, right?

A. Yes.

Q. You also testified that the Carlson patent was an example of simultaneous invention, correct?

A. Yes.

Q. Except the Carlson patent was filed five months after the asserted patents were filed in the U.S. Patent Office, right?

A. I did note that it was five months after that filing, yes, but it is near in time.

Q. And in your experience as a patentholder, it takes some time to take an invention and actually get the patent lawyers to write it up and file it with the Patent Office, right?

A. That would be my experience, yes.

Q. So your expectation is that the patents in this case were actually conceived of sometime prior to their actual filing date, right?

A. Yes.

Q. Carlson discloses a hydro-polymer at the end of a long list of alternative materials, right?

A. It is listed in addition to other materials, but it is toward the end or at the end of that list, yes.

Q. And we went through that a minute ago. It could be wood pulp, it could be rice, it would be peanuts, lots of things, right?

A. He suggested those materials, yes.

Q. Now can I have RX-53, the Carlson patent at the abstract? Can you blow up the abstract, Mr. Lee?

Here he talks about a dehydrated pulp-based

projectile, right?

A. He does.

Q. That's his focus, right?

A. Well, in addition to that, yes, he talks about it in the context of dipping or soaking the bullet in water to absorb water and soften, but it is discussed as a pulp-based material here.

Q. But he tells us that the key to his projectile is it sticks to you, right, when you get shot with it. If you look at the last sentence.

A. He does note that, with respect to a pulp-based material, that would be a characteristic.

Q. And then let me have column 1 at lines 51-65 of the Carlson patent, the RX-53.

Do you see where it says, thus, a continuing need exists for a soft projectile that is safer than a plastic bullet, that is less influenced by air current than a foam bullet or tipped projectile, and that is capable of sticking to its target? Do you see that?

A. I do.

Q. Do you see below it in the Summary of the Invention, it says that this bullet, when fired, will stick to a target? Do you see that?

A. Yes.

Q. So as we've all played with these SAPs and we've

shot them around, one thing we can all acknowledge is that they don't stick to the target, correct?

A. They don't stick to the target, no, but, as I also read from this patent earlier and compared it to it '282 patent, what Carlson has identified is the same problem and a very similar solution to that problem.

Q. Well, not quite, sir. He says you can use rice, right?

A. He says you can use a softer projectile, and goes on in detail to include that that projectile could include the gel from a diaper.

Q. But my question was Carlson suggests that we can use rice, correct?

A. I believe he does mention that, yes.

Q. He mentioned wood pulp, correct?

A. Correct.

Q. He mentioned peanuts, right?

A. He did.

Q. He mentioned recycled wood pulp or paper, right?

A. I believe he did.

Q. So he gave us lots of options, but what he has told us over and over again is, whatever you choose, it needs to stick to the target, right?

A. I would need to look at the claims to see if sticking to the target is amongst the claims, if you'd like

to refer me to them so that I can review. I know he does mention that here in the Summary of the Invention. I don't know if sticking to the target is a claim limitation.

Q. Well, but for the purposes of your opinion, sir, does it matter what was claimed?

A. He discloses sticking to a target in the patent.

Q. And he mentions a hydro-polymer similar to the absorbent polymer used in a diaper, right?

A. Yes, he does.

Q. But he doesn't call it an SAP, correct?

A. He does not use that term, no.

Q. You are not a chemist, correct?

A. Correct.

Q. You don't know the composition of the hydro-polymer in Carlson, correct?

A. I do not know whether he had the term SAP in mind as identical to what he is referring to there.

Q. Now you prepared demonstratives for your testimony in this case, right? Well, one more question about Carlson.

You have no -- you have offered no opinion about the particularly -- particular absorbency level of the hydro-polymer in Carlson, correct?

A. Absorbency level, in other words, how much water it would absorb in comparison to its weight?

Q. Right.
A. No, I have not.
Q. You prepared demonstratives for your testimony, right?
A. Yes.
Q. And one of the things you showed us were videos of Mr. Spangler launching Clear Spheres, right?
A. From what launcher are you referring to? Just so I know what you're talking about.
Q. Well, he was out on his porch --
A. Oh, yes, yes. I apologize.
Q. Do you remember that?
A. Yes.
Q. And he takes the big tube and he blows through it?
A. Yep.
Q. And off it goes. That video was made for the purposes of this case, right?
A. I did not engage Mr. Spangler, but it is my understanding that he made that video in conjunction with his work on this case.
Q. Do you know when he made that video?
A. I don't have the exact date, no.
Q. And then you spent a lot of time in this case; is that correct?

A. Yes, I would say that's an accurate characterization.

Q. Can you give Her Honor an estimate of the number of hours you spent working on this case?

A. Honestly, I would need to refer back to my records to give you really a number of hours, or I could take out a calculator and perhaps figure it out for you now, but off the top of my head I wouldn't know.

Q. If you took out a calculator, what would you need? Would you need to divide something?

A. I would try to recall certain aspects of my invoices related to this matter and extrapolate from that approximately how many hours were included on those invoices, but I don't have them offhand.

Q. Well, can you give us a round number as to how much you've billed in this case?

A. It would have to be a range, counselor. Somewhere between 35 and 55,000, I think, somewhere in there is the best guesstimate I would give you right now.

Q. So somewhere --

A. I know that's a large range. I apologize.

Q. So that's between one and two hundred hours?

A. Something along those lines, yeah.

Q. You spent a lot of time with the Kirkland & Ellis lawyers before Mr. George took over, right?

A. That's correct, yes.
Q. Probably wouldn't surprise you to know that their billing rates are quite a bit higher than yours.
A. I did know that when I gave up my law career I was taking a cut in salary.
Q. And one of the things you cite in your report is that people sometimes take licenses to avoid litigation costs; is that right?
A. Yes.
Q. But you agree with me that at least Splat-R-Ball didn't avoid much in the way of litigation costs having taken it all the way to the morning of trial, fair?
A. I'll be honest, counselor --
MR. GEORGE: Objection. Again, this is so far beyond the scope.
JUDGE MCNAMARA: I think that's a fair objection.
MR. CORDELL: Your Honor, I'll pass the witness.
JUDGE MCNAMARA: Thank you. It's now 5:30. So we are not going to start with Mr. Taylor at this point. We'll pick up Monday morning.
We'll pick up again Monday morning, and we'll start with Mr. Taylor then, and --
MR. SMITH: I'll let you finish, Your Honor.
JUDGE MCNAMARA: Go ahead.
MR. SMITH: I was going to simply say, given that

it's Friday afternoon and Mr. Delman is our primary expert on invalidity, and also we have him up on rebuttal, we would like to be able to talk to him about his rebuttal testimony over the weekend.

And then also he was going to be helping us prepare our cross-examination of Dr. Kudrowitz, where if we can't talk to him about his testimony -- we understand we can't talk to him about his testimony on direct in our affirmative case, but we would like to be able to talk to him at least about his rebuttal testimony and help us prepare our cross-examination for Dr. Kudrowitz.

JUDGE MCNAMARA: Oh, this is a tough one. He certainly cannot talk about any of the testimony that was just given on cross-examination. You would agree with that.

MR. SMITH: Yes.

JUDGE MCNAMARA: Okay. But Mr. Taylor hasn't had a chance to finish cross, which is a problem in terms of your being able to talk about rebuttal since you don't know the full scope of cross yet. It's a bit of a conundrum here.

MR. CORDELL: And made more complicated, Your Honor, given that the issues in this case have collapsed to the rebuttal issues.

JUDGE MCNAMARA: They have. I think you could talk about -- I'm not sure. You would have to work out how

you would do this. I think you can talk to him and help with preparation of Dr. Kudrowitz, at least with respect to the information that was conveyed back and forth. I don't think that would be off limits. There was not much testimony about that today. It was quite limited actually, just that he relied on Dr. Kudrowitz.

So I think you would be able to help --

MR. CORDELL: Dr. Kudrowitz is our expert, Your Honor.

JUDGE MCNAMARA: I know, but he is -- I'm sorry. He is still trying to figure out -- tell me again exactly, then, where you would go. If I'm limiting this, he can't talk about any of his direct and he can't talk right now about the cross because it's not finished. Where would you go?

MR. SMITH: For example, I think this wouldn't be a problem if we finish with Mr. Delman today.

JUDGE MCNAMARA: But we can't --

How much time, Mr. Taylor, do you have on cross?

MR. TAYLOR: Your Honor, it's 10, 15 minutes.

JUDGE MCNAMARA: All right. Let's do this, because I think you run over time on this, Mr. Cordell, would you be willing to do -- could you stay 10 or 15 minutes so we could get this part done, and that way it opens up -- it both opens up and it limits what he can talk

about and confer with his counsel on, but I think they have gone a great distance to try and narrow this. So let's try. Let's try and get Mr. Taylor done.

And then, Mr. Smith, what are you thinking about, again, in terms of -- if the cross-examination is done, what do you think we would work with Mr. Delman on with respect to rebuttal, just to give me a broad idea?

MR. SMITH: Well, Your Honor, if cross-examination is done of Mr. Delman on Respondents' case on direct, then I believe we're free to talk to him about anything because he is done talking about invalidity per se on the prior art and the obviousness combinations, and what he is left talking about is a rebuttal secondary indicia of non-obviousness, which he did not talk about at all today.

MR. CORDELL: Well, that presumes, though, that they in fact exhaust the redirect.

JUDGE MCNAMARA: There's a problem there too.

Mr. George?

MR. GEORGE: Yes. We're not going to have enough time to have Mr. Taylor give his questions and I do my redirect.

Here's the real problem. There's the secondary considerations, it's the rebuttal part. It's nothing we talked about today. It's commercial success. It's nothing he talked about today. And if we're going to do this on

this abbreviated schedule and we have dropped so many things, he will be finished with this Monday morning, and I think we have maybe one more witness, and we're done. And then Kudrowitz, Dr. Kudrowitz will probably go next, and I don't know how long he will be, but we're going to have to put him back on for rebuttal. We need to be able to talk to him about rebuttal this weekend. We need to be able to prepare the slides. We need to be able to do all of that.

MR. CORDELL: If this were Tuesday, Your Honor, we would be coming back on Wednesday morning, and we would be proceeding at pace and there wouldn't be this sort of artificial hiatus that is presented.

JUDGE MCNAMARA: So we did reserve -- but, on the other hand, I -- the parties know there's the weekend built in.

MR. CORDELL: We have time on Monday, because, remember, we have to call our domestic industry witnesses on both sides. So we can push back Mr. Delman's return to Tuesday. That's easily done.

MR. GEORGE: That's worse for me. Then I don't have the weekend. I don't have another day to work with him. No, that's absolutely worse.

MR. CORDELL: No, no, no, I mean we would push back his rebuttal testimony to Tuesday. I think it naturally falls on Tuesday anyway. But the point is he

would be on and off Monday morning. They could then work with him Monday and Monday evening and he would be prepared for Tuesday.

JUDGE MCNAMARA: Mr. George, would that work for you? Would any part of that work for you?

MR. GEORGE: Well, moving his rebuttal to Tuesday is definitely a good thing if we have that commitment. And then the only thing that I'm stuck with is I can't talk to him about our cross of Mr. Kudrowitz, which will be Monday.

MR. CORDELL: We expected them to be prepared for this trial, Your Honor.

MR. GEORGE: We asked --

JUDGE MCNAMARA: I think, Mr. Cordell, there was accommodation made and there were stipulations entered into that limited Respondents putting on the case. I recognize there were some real difficulties on that side that affect due process, frankly, and putting it in.

So they did streamline the case. You accommodated with travel. But the fact is that they are still putting on much of the case and they still have the difficulty of having to put in, and it's a timing issue, they do want to work with Mr. Delman, and I get that. I'm trying to figure out a reasonable solution here where they get certainly some of what they need while we preserve and protect what we need to preserve and protect.

So, Mr. Taylor, let me turn to you and ask you if you have any thoughts on this to help us out of this dilemma.

MR. TAYLOR: I'm not sure I have a solution, but I think Delman on Tuesday would seem reasonable.

JUDGE MCNAMARA: I think that is too. And I also think that it's reasonable since secondary considerations have not been discussed today, that they could certainly prepare Mr. Delman on that issue with respect to rebuttal. They have an idea of where you're going to go and they could prepare slides on that this weekend and talk to him about that this weekend.

MR. CORDELL: I just worry that it's almost two sides of the same coin. We did do a fair amount of the precursors to secondary considerations today. We heard the simultaneous patenting, for example.

MR. GEORGE: We won't do that. We already did it. That was our burden. That's why we did it today. We now have the rebuttal, which we're going to do --

MR. CORDELL: It's all their burden. The way this has unfolded is a little odd.

JUDGE MCNAMARA: It is a little odd.

MR. CORDELL: It is their burden. They should do all the secondary considerations. They should have done them all today.

MR. GEORGE: Actually we had a discussion about this before and we came to the exact opposite thing where we would put on our case, they would put on their rebuttal case, their reply case, and then we would do our rebuttal. We actually had rebuttal slides in there, and because of our discussions with them we took it out. This is, you know --

JUDGE MCNAMARA: I agree with that. I don't know what the discussions were, but I will take the representation of counsel that that's what happened, that they withdrew those slides based on some discussion.

Let me finish. I am inclined at this point, again, since Mr. Delman is going to be on on Tuesday, that gives you, Mr. George, some time to work with him Monday night. It's not ideal by any stretch, none of this is, but it happens. It's what happens in trials sometimes.

However, I do think it is fair that you should be able to deal with secondary considerations of non-obviousness with him and prepare slides. That did not come up today. And that -- you'll have an opportunity to do cross.

MR. CORDELL: We're happy with that, Your Honor. I just want to make sure that you're clear about what happened. There were discussions with the Kirkland firm where this odd structure where the experts would testify in the order of their reports. It was the most extrajudicial

procedure I've ever seen.

Mr. George told us just now that he has the slides already, but I'll take Your Honor's ruling and I don't want to hamstring him.

JUDGE MCNAMARA: I don't either. I want this to be fair. I could rule at some point that it all comes in and we'll sort it out. I'm not trying to do that. I'm trying to keep this streamlined.

But I think there has got to be some equity on each side in terms of the scope here and what was done. Again, it doesn't matter whether the Kirkland firm prepared the slides or not. If there was discussion about withdrawing them today and not using them today, then there it is, and they were pulled.

So I have ruled. That's where they can go. I think they are going to honorably do what they need to do to keep the work with Mr. Delman limited. And I think as soon as questions were to come up where -- were it to become an issue, and I'm using this, again, subjunctively, we will know that if it comes up and there's a change. We're going to know that.

MR. CORDELL: We always have to rely on the good faith --

JUDGE MCNAMARA: Absolutely.

MR. CORDELL: -- of counsel. Although it might

be nice, Your Honor, if you could share with Mr. Delman kind of what our rule is.

JUDGE MCNAMARA: I think I'm going to let -- I'm going to let his counsel explain that, because it is -- I think, as a lawyer, you understand --

THE WITNESS: Ex-lawyer.

JUDGE MCNAMARA: I got that point that you did not want to practice. I can understand that very well. But I think you need to talk to your counsel about that, and I think counsel needs to give guidance on that, and I'm going to -- I think they will honor their word and that's where we're going.

MR. GEORGE: Thank you, Your Honor.

MR. CORDELL: Thank you.

JUDGE MCNAMARA: Okay. I'll see you all on Monday morning. Have a great weekend.

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(Whereupon, the proceedings concluded at 5:38 p.m.)

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C E R T I F I C A T E

TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME

INVESTIGATION NO.: 337-TA-1325

HEARING DATE: May 19, 2023

LOCATION: Courtroom A

NATURE OF HEARING: Evidentiary Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceedings of the U.S. International Trade Commission.

Date: May 19, 2023

Signed:

ss//

Signature of the Contractor or the Authorized Contractor's Representative

I hereby certify that I am not the court reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission against the aforementioned court reporter's notes and recordings for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

Signed:

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I hereby certify that I reported the above-referenced proceedings of the U.S. International Trade Commission and caused to be prepared from my record media and notes of the proceedings a true, correct and complete verbatim recording of the proceedings.

Signed:

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UNITED STATES
INTERNATIONAL TRADE COMMISSION

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In the Matter of Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME 337-TA-1325

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OPEN SESSIONS

Pages: 321 through 598 (with excerpts)

Place: Washington, D.C.

Date: May 22, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Before the Honorable MaryJoan McNamara
Administrative Law Judge

In the Matter of	Investigation No.
CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME	337-TA-1325

International Trade Commission
500 E Street, SW
Washington, D.C.

Evidentiary Hearing
Monday, May 22, 2023
Volume III

The parties met pursuant to notice of the Administrative Law Judge at 9:30 a.m. Eastern.

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P R O C E E D I N G S

(In session at 9:30 a.m.)

JUDGE MCNAMARA: Good morning, everyone. I hope everybody had a good weekend. I am sure it was a little bit less enjoyable than it might have been. Please be seated.

MR. CORDELL: It was a beautiful weekend in the office, Your Honor.

JUDGE MCNAMARA: I am glad that it was pleasant in the office.

We are starting this morning on the cross-examination of Mr. Delman. So as soon as Mr. Delman wants to take his seat, we will proceed.

MR. TAYLOR: Your Honor, I just have some preliminary matters. Do you want to discuss them now?

JUDGE MCNAMARA: Sure. Mr. Delman, come on up and be seated.

MR. TAYLOR: Your Honor, we have a new schedule, if you would like the new schedule.

JUDGE MCNAMARA: Sure. I appreciate that.

MR. TAYLOR: I'm sure it will change.

JUDGE MCNAMARA: We can adapt, as we know. We all did for three years. We can keep adapting.

MR. TAYLOR: Your Honor, I believe you saw this morning a motion was filed regarding trying to get some Airsoft exhibits into the courtroom, so I wanted to make you

aware of that.

JUDGE MCNAMARA: The order should be on its way to EDIS. I appreciated the fact that you drafted one. In future, it would really be helpful if you, instead of sending in a PDF, which is what we usually ask for, if you have a proposed schedule, send it in Word and we can modify it if we need to. But my support specialist is already doing that. So it should be on EDIS within the next half hour or so.

MR. CORDELL: We can email Your Honor the Word version in about ten seconds.

JUDGE MCNAMARA: I saw it about a half an hour ago. It should be already on its way, I think. But thank you. I appreciate it.

MR. TAYLOR: Logistics-wise, how does that work? I guess once the order issues, then it can be brought in?

JUDGE MCNAMARA: You can, yes. And I'm giving you an oral order now that I agree with the order and that I am allowing it. I don't know if we have to let the security people know. Do we?

MR. TAYLOR: It might be a good idea.

MR. CORDELL: That was our vision behind the order.

JUDGE MCNAMARA: That is what I thought.

Jae, could you go out and let security know that

the parties are bringing in Airsoft guns and that I'm allowing it and that an order should be on EDIS within the next half hour but it has been granted orally. Thank you very much.

MR. TAYLOR: They will probably come in through the loading dock.

JUDGE MCNAMARA: All right. We will give it a shot.

MR. TAYLOR: The only other thing, I believe, Your Honor, this morning is just want to update you on some progress in narrowing the case. I believe the Respondents have -- are just going to assert the primary references, Peev and Nagayoshi, and not just rely on the launchers or the Spit Balls by themselves for obviousness.

JUDGE MCNAMARA: Okay.

MR. TAYLOR: Is that correct?

JUDGE MCNAMARA: Mr. George? Good morning.

MR. GEORGE: Good morning. I'm not adept at this microphone.

Yes, that is correct. The slide that Staff has put up is correct, and he also took out the claims that are no longer asserted.

JUDGE MCNAMARA: Okay. So would you do me a favor, then, at the end of today, just file something on EDIS, just a notice that these have been withdrawn. So then

we have a filing on EDIS and it is there. That would be helpful.

MR. TAYLOR: Yes, Your Honor.

JUDGE MCNAMARA: All right. Anything else, Mr. Taylor? And I do have your time from Friday.

MR. TAYLOR: In relation to the new schedule, Your Honor, there were some DI experts at the end of the hearing. I believe all the parties are working on a motion for the admission of certain DI expert reports and deposition designations.

Then there will be, I believe, some live direct and cross regarding significance under DI and also in the process of being established.

JUDGE MCNAMARA: That is helpful. Thank you. I think that should do it. It is not a lot of time, but I think it will help solidify some of the information that is already in the record.

Anything more, Mr. Cordell?

MR. CORDELL: Well, Your Honor, we are prepared to read in the exhibits that were used on Friday.

JUDGE MCNAMARA: Okay. Do you have the list?

MR. CORDELL: I believe we do.

JUDGE MCNAMARA: Have both sides -- Mr. George, has your party agreed on the exhibits?

Good morning, Mr. Smith.

MR. SMITH: Thank you, Your Honor. Yes, we have conferred with Complainants, and we're in agreement with the list that Mr. Wilson is holding in his hand.

JUDGE MCNAMARA: Does the list have a caption, Mr. Wilson?

MR. WILSON: Yes, Your Honor, it does.

JUDGE MCNAMARA: What is the title of the caption? What I will say is that you've moved those exhibits in that the parties have agreed upon.

MR. WILSON: Yes, Your Honor. The caption of the document is the case caption, and it refers to the admitted -- exhibits admitted during the evidentiary hearing on May 19th, 2023. It reflects the opening demonstratives, which will be admitted for demonstrative purposes only, and the exhibits for Mr. Nicholas Tino, who completed his testimony. The exhibits for Mr. Delman's, the testimony is ongoing and we'll submit those later.

JUDGE MCNAMARA: That is fine. So the parties, I understand, Mr. Wilson, have all agreed. Is that correct?

MR. WILSON: That's correct, Your Honor.

JUDGE MCNAMARA: Okay. Then all of the exhibits on that list are admitted into evidence.

(Whereupon, the exhibits as recited by counsel and reflected in the attached index were submitted and received in evidence.)

JUDGE MCNAMARA: And if you give a copy also to Ms. Kinkade, that would be helpful.

Okay. So I have an update from the security staff. Security would like to know the name of the person bringing in the guns and exactly when.

MR. CORDELL: Mr. Ali Ahmed.

JUDGE MCNAMARA: Could you spell his name?

MR. CORDELL: I do it phonetically. A-L-I, and then A-H-M-E-D.

JUDGE MCNAMARA: All right. He will have to show identification. And do you know when that's coming in?

MR. CORDELL: I think he can come at any time. I think he is standing by.

JUDGE MCNAMARA: I will let security know. That is the loading dock to which you're referring, correct, where the cars come in and park?

MR. CORDELL: Yes, Your Honor. And just to avoid any slip-ups, I may have Mr. Wilson go out there.

JUDGE MCNAMARA: That is really a good idea. Thank you.

MR. CORDELL: If he can be excused.

JUDGE MCNAMARA: Absolutely. I am sure we will hear soon enough if there is an issue.

Mr. Taylor, do you need the Airsoft gun in order to start the cross-examination of Mr. Delman?

MR. TAYLOR: Pardon me, Your Honor?
JUDGE MCNAMARA: Do you need the Airsoft gun?
MR. TAYLOR: It would be nice, if it's here. I would like to get started.
JUDGE MCNAMARA: All right. Mr. Delman, you're still under oath.

JOEL DELMAN,

having been previously duly sworn or affirmed on their oath, was thereafter examined and testified further as follows:

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. TAYLOR:

Q. Good morning, Mr. Delman.
A. Good morning, Mr. Taylor.
Q. How are you?
A. I'm good, thanks. Good to see you.
Q. Thanks for leaning forward.
A. If you don't, it doesn't quite work as well.
Q. We met at your deposition, correct?
A. We did.
Q. In beautiful LA, right?
A. Yes.

MR. TAYLOR: Your Honor, I believe Mr. Cordell had a preliminary objection to his qualifications as an expert, and I don't think he raised that.

JUDGE MCNAMARA: He did not, which I thought was really interesting. I got through the questions that were asked in cross-examination, but there was no ultimate question about that.

MR. TAYLOR: I believe, Your Honor, that since he went beyond voir dire that the objection was withdrawn, just to make the record clean.

MR. CORDELL: Just to make it clear, I don't think I withdrew the objection, Your Honor, but I did not make objections to his offering opinion testimony.

JUDGE MCNAMARA: You did not.

MR. CORDELL: Your Honor may take the testimony for whatever weight you're willing to give it.

JUDGE MCNAMARA: Yes, and I heard it carefully that you did not object.

MR. TAYLOR: Your Honor, you would think if I had two days, my cross would be a little more organized, but for me it doesn't work that way.

Q. I'd like to start with the Staff's demonstrative exhibit. I'm going to try to use the ELMO here. And I just want to talk about some of your experience and background.

I believe you testified that you actually own Airsoft guns, correct?

A. Yes, that's correct.

Q. When we say "Airsoft," that also means air

rifles, air guns?

A. Well, I guess my testimony was -- and I forget exactly what the questions were, but I own air guns, and I would consider Airsoft to be a type of air gun, which I own as well. So I own several categories of air guns, including Airsoft.

Q. What are the different categories of Airsoft guns?

A. Well, not of Airsoft guns, but of air guns. So, in other words, you could categorize them based on the ammunition they fire. So we have BB guns, pellet guns, and Airsoft guns. You could also categorize them based upon the mechanism by which the air is compressed, so...

Q. And so here on the right side of SDX-1, slide 13, we have BB guns and Airsoft shown on the right.

A. Yes, uh-huh, I do see.

Q. Would you consider those Airsoft?

A. I would consider both Airsoft guns and BB guns types of air guns.

Q. Air guns. I'm sorry.

A. Air guns, yes.

Q. Okay. And you personally own Airsoft.

A. Yes.

Q. Do you own BB guns?

A. Yes.

Q. How about paintball guns?
A. We don't own any paintball guns. We've used them, but they tend to be the kind of thing you get when you go to a party or some event, and you don't necessarily need to own them.
Q. How about water guns?
A. Quite a few, yeah.
Q. How about NERF guns?
A. Quite a few.
Q. A lot in your house, huh?
A. Yeah. You can talk to my wife about that. She has had her moments with it.
Some books just fell down there. I don't know what they were.
Q. How about, do you personally own any --
JUDGE MCNAMARA: That was great timing. I don't know how you did that.
THE WITNESS: Theatrical, yes.
JUDGE MCNAMARA: Very nice.
Q. Do you personally own any SAP launchers?
A. No, I do not, other than the ones which I have utilized in terms of engagement with this case.
Q. Do you consider BB guns to be toys?
A. Yes, I do consider them to be a type of toy, yeah.

Q. Do you consider Airsoft guns to be toy guns?
A. Yes, I do.
Q. How about paintball guns?
A. I would consider them to be a type of toy gaming gun, yes.
Q. So what would not be a toy gun?
A. Well, by way of example, a gun which fires ammunition that could and has an intention of self-defense or harming people.
Q. Kind of a real gun, like the guards may have outside?
A. "A real gun," maybe that's the best way to put it. A real gun as opposed to a toy gun.
Q. What state do you live in?
A. California.
Q. California? Is there an age group restriction for purchasing Airsoft guns in California?
A. Offhand, I don't know if there's an age restriction for purchase. It may be highly dependent on the county as well. I know that I have made all the purchases of these guns for my family, so I've never really been questioned about my age in that regard, that I can recall.
I don't know what the state or county rules on that could be or how they might vary across the state.
Q. Are you aware of any age restrictions on

purchases of Airsoft guns in the United States?

A. I know of regulations in the United States requiring marking the Airsoft gun so that it is distinct from a real gun, utilizing orange paint and such or an orange cone at the front, et cetera.

I forget what the age might be. Again, I make all the purchases, and I've never had my age be questioned, so...

Q. And why do they put -- you said the orange cone on the end of the muzzle?

A. Mm-hmm.

Q. What's the purpose of that?

A. I think that over the years there have been some very unfortunate incidents where children playing with these guns have been mistaken for carrying a real weapon, because they are often dark-colored or black, the way a real gun might appear. And these laws are hoping to allow, say, a police officer, for example, to immediately distinguish that that isn't a real gun.

Q. So the Airsoft guns, they can sometimes look like a real gun, correct?

A. Yes, they can.

Q. Do they feel like a real gun?

A. Some of them do, yes.

Q. On my continuum here, slide 13, SDX-1, I kind of

put the SAP launcher between a NERF gun and a water gun.

If you were making this slide, where would you put the SAP launcher?

A. Well, can I ask you what the left side of the arrow is indicative of, and the right side is, so that I can better understand your intention in laying them out? I'm not totally, totally sure what -- you know, how they are being categorized.

Q. Are you familiar with the internal workings of a water gun?

A. Yes.

Q. Would an SAP work inside of a water gun?

A. Well, we know that non-solid forms of SAP have worked in a water gun type of mechanism from earlier PTT prior art that we have discussed in the courtroom.

Q. Thank you for fixing my question.

A. That's okay.

Q. I meant spherical SAPs.

A. Okay. Gotcha.

Would a solid, spherical SAP work in a water gun? I have not tested it. I believe it could be challenging. I don't know that it would work in a water gun mechanism.

Q. Are you familiar with the internal firing mechanism of a paintball gun?

A. In a general sense, yes. I haven't really opened

them up and played with them myself.

Q. You think a spherical SAP would work in a paintball gun?

A. I think, again, from my general knowledge, it would probably be as likely to work in a paintball gun, very similar likelihood, as it would to an Airsoft mechanism.

Q. How about a NERF gun? Are you familiar with the firing mechanism of NERF guns?

A. Yes. Do you mean the kind that shoot darts? Because there are several different types of NERF ammunition.

Q. Well, what are the different types?

A. Offhand, there are some NERF guns that shoot the darts, the cylindrical things with a solid head.

Q. Foam, right?

A. Yes, they are foam, except for the head, which is a molded plastic usually. There are some NERF guns -- there's a line called the NERF Rival which shoots large foam balls. There's a disk-shooting NERF gun. I don't know if it's still on the market, but it shoots these little frisbee type of things.

So when you say "NERF gun," I was just asking what type of gun you meant.

Q. And would a spherical SAP work in a NERF gun that shoots those spherical balls?

A. I've never taken apart a Rival before, so I'm really not sure how the mechanism inside works. I wouldn't want to answer without seeing how the mechanism looks.

Q. Is it fair to say that you think -- would you agree that Airsoft and BB guns are primarily for adults?

A. No. I know that kids play with them, and they are aimed at kids. And there's competitions with targets, you know, target practice for kids and target competitions and such.

Q. Can a 14-year-old purchase an Airsoft gun in, let's say, the District of Columbia?

A. I wouldn't know the District of Columbia's regulations. I really don't. I'm sure there are some states where it probably is permitted and I'm sure there's other cities or localities where there are regulations. I don't know what they are offhand.

Q. I'm asking from a perspective of ignorance. I'm not very familiar with, actually, any of these except maybe the NERF gun.

A. Right.

Q. But, thank you, I appreciate the testimony.

Can you please pull up JX-1, which is the '282 patent, please. Would you please go to column 1, lines 57-60, please, and highlight those.

So this is the '282, JX-1. Do you see where it

talks about -- talking about the prior art, these include paintball guns and Airsoft guns, but these systems are for adult use only.

Do you see that in the '282 patent?

A. Yes, I do see that in the '282 patent here that is highlighted.

Q. Next I'd like to look at -- can you please pull up RDX-3, slide 77, please.

This is your demonstrative exhibits. Do you remember this slide?

A. Yes. And is this the video on this slide or is it a screen capture? I don't recall.

Q. This is a screen capture. And this is you, your hand, in this clip, correct?

A. Yes, it is.

Q. And you put an SAP -- spherical SAP into a Daisy AS470?

A. Yes, I did.

Q. Was that your personal device?

A. No, it was lent to me by counsel. It was one of the exhibits in the matter, and it had one of those stickers on it with a number.

Q. And you successfully -- I believe you testified you successfully fired an SAP, correct?

A. Yes, that's correct.

Q. And how long did it take you to achieve that, like how many -- did you do any test runs?

A. Just so I understand your question, do you mean were there attempts, prior to this attempt, that were unsuccessful?

Q. Yes.

A. No, to the best of my recollection the first attempt was successful. And I think the first attempt was the one my son videotaped here.

Q. And did you try to launch a Clear Spheres SAP without hydrating it?

A. No, I did not launch anything without hydrating it first.

Q. How did you know to stop at a certain time, then?

A. In other words, how did I know how long to hydrate it for?

Q. Correct.

A. Well, I was aiming for an approximate diameter. So I did not know -- it was a bit of trial and error really to -- you know, to soak and measure type of thing.

Q. And so you had a caliper, or you measured it?

A. Yes, that's correct.

Q. What happened when you went beyond 30 seconds?

A. I don't recall. I think that I was watching very -- to the best of my recollection -- and this was done

some months back. To the best of my recollection, I was watching it very carefully, removing it, measuring, you know, putting it back in, if need be.

So I think I got to the approximate size fairly quickly, in terms of trial and error quickly, and utilized that ammunition. I didn't try ammunition that was too big, so to speak, or too small.

Q. And when did you perform this experiment, let's call it?

A. It may have a date in my report that I don't recall, or in the exhibit list. To the best of my recollection, it would have been perhaps February-ish time frame, February or March.

Q. Of 2023?

A. Yes.

Q. Going back to my continuum here, which is SDX-1, slide 13, are there any differences between an Airsoft firing mechanism -- actually, you testified you're not familiar with the internal workings of the NERF launcher, correct?

A. No, I said I wasn't particularly familiar with the internal workings of the NERF Rival launcher. You were asking me about the type of NERF that launches the large foam balls, and I'm not -- I've never opened one of those up. I'm familiar with the dart launchers, quite a few of

the dart launchers, but not the Rival line.

Q. At the beginning of your testimony, I believe you indicated that you're an Airsoft modder. Is that correct?

A. Well, my boys and I got into the NERF modding community. So NERF mods, yes.

Q. Can you please spell that?

A. "NERF"?

Q. No, "modding."

A. Oh, "modding." M-O-D-D-I-N-G. Or Mods, M-O-D-S.

Q. Okay. And what is the purpose of modding?

A. In general, to improve the performance of a NERF gun, either its distance, the distance the dart would shoot, the accuracy in some cases. Those tend to be the primary objectives of the modding community that I've personally experienced.

Q. Is it usually to make the ammunition shoot further?

A. Usually distance is a goal, yes. One of the main goals.

And one of the main frustrations of a NERF dart, dart gun, to people who want to mod them, is they -- you know, the dart tends to sink back to the ground a little bit too quickly or its speed is such that the breeze takes it away more quickly from its target. So given more velocity, you would have more distance and potentially more accuracy

as well.

Q. And are the modders also interested in making the ammunition shoot slower?

A. I am not personally aware of modders who have that as a goal.

Q. It's usually to increase distance or firepower, correct?

A. Yes. Yes.

And by "firepower," I wouldn't say the rapidity of shooting, if it's a multi-shot-gun. I suppose there have been attempts to do that, and perhaps there are some I'm not familiar with. It's mainly getting it to shoot farther, which also involves getting it to shoot faster.

Q. And it's also not -- then it's not -- they are not modding to make it safer, is that correct, then?

A. No, that wouldn't be the objective that I'm familiar with.

Q. Did you review any of the inventor testimony in this case?

A. Yes, I did.

Q. Do you remember if any of the inventors had any experience with Airsoft guns?

A. I wouldn't recall any particular testimony to that effect. If you'd like to refresh my memory on something in particular. It wouldn't surprise me, but I

don't recall any, any testimony on that particular subject.

Q. I'd like to ask you some questions about some of the prior art you relied on, which is Peev, RX-8. This is the first page.

I assume you're very familiar with this document?

A. Yes. I've seen it at least once.

Q. So here is RX-8, page 3. And the area of technology discusses electric Airsoft guns find application in the sporting gun industry.

What is the "sporting gun industry"?

A. Well, what you've highlighted is part of that sentence. It does go on, I would note, to say, or for fun when conducting Airsoft games.

Q. We'll get there.

A. Okay.

Q. Let's start with "sporting gun industry."

A. The "sporting gun industry," I have not looked for a definition. If you're asking me what my definition of that might be, it would be an area of projectile launchers, in the form of guns, that are used for sport as opposed to nonsporting purposes.

So sport purposes could include target shooting, just fun -- "plinking" is a term which you may or may not be familiar with, but just shooting cans and things like that in your backyard. Hunting can also be considered part of

the sporting gun industry.

What wouldn't be part of at least my interpretation of the "sporting gun industry" would be self-defense or, you know, military-type purposes.

Q. This is not some type of play for kids, correct?

A. Well, in some instances target shooting can be an entertainment form for kids, yes. And, again, there are organized competitions through the Boy Scouts and whatnot that revolve around target shooting using -- using air guns such as BB guns.

Q. That sentence continues, electric Airsoft guns find application in the sporting gun industry and are used for military emulations or training.

What does that mean to one of skill in the art? "Military emulation or training," what does that involve?

A. So my understanding of how Airsoft guns have been used in that fashion is that there are certain Airsoft guns whose operations and -- you asked me earlier do some guns feel real, are they heavy or do they weigh the same.

Some Airsoft guns, higher-end models in particular, are very realistic in terms of how they feel in your hand, the way they work. So, in other words, how you would cock them or take the safety on and off would be done in a manner that is an accurate representation or at least attempts to be an accurate representation of the real gun.

So if you had an Airsoft Glock, for example, it would have a safety in exactly the same place that would operate with a similar feel to the safety on a real Glock that a police officer might use. And it allows police officers or security guards, et cetera, to practice in the handling of these guns without much danger to themselves or others, as well as the expense of actually firing live rounds.

Q. And then at the end of the sentence it talks about, find application for fun when conducting Airsoft games.

What are Airsoft games?

A. So there's really kind of a broad range of activities that can come from that category. Informal backyard wars that your kids might set up with their friends, to organized parties. You can hire companies to, you know, host you at a facility, for example, to have competitive team Airsoft. And that might be for a birthday party or it might be for a corporate event. You know, sometimes they will divide into teams for team building.

Q. Is it similar to like a paintball location where you go and play paintball for the day? Is that similar?

A. I would say it would be, yes.

Q. Have you done it before, where you go to an Airsoft facility and have an Airsoft game?

A. I've done the paintball. I've never done the Airsoft, no. Yeah.

Q. Just to be clear, Peev discloses an Airsoft gun, correct?

A. Yes, it does.

Q. If I could go to RDX-8, slide or page 15.

And Peev discloses that it's for replacing an existing mechanism, an Airsoft gun, correct?

Do you see at page 15 it says, electric Airsoft gun control system of the invention can replace the existing electrical installation of existing electric Airsoft guns, correct? That's what Peev discloses.

A. That is -- yes, that is what you're highlighting there. That's correct.

Q. And it doesn't disclose using Peev in NERF guns or water guns or any other type of toy gun, correct?

A. That's correct.

Q. I'd like to look at the other reference that you relied on, Nagayoshi, which is RX-9. There is the first page. I just have a question about one or two pages. So this is RX-9, page 197.

Do you see what I highlighted there? It says, the current level of technology in the toy gun industry can be in the advertisements of specialized journals. And then it says, on page 153 of the February 2004 edition of the

monthly Combat Magazine.

Are you familiar with the Combat Magazine?

A. I'm not. And as this is a Japanese patent, I'm guessing that this is -- well, I know this is a translation, and I'm guessing it refers to some Japanese magazine publication.

Q. It sounds kind of serious, though, doesn't it?

A. I don't know. The Japanese have some interesting -- interesting magazines and hobbies and such I'm not really familiar with. And, of course, it's a translation, so...

Q. Just to be clear, Nagayoshi is also directed towards an Airsoft gun, correct?

A. Yes, it is.

Q. And then if we look at Peev, page 201, I've highlighted a sentence there. Fig. 8 is a drawing for explaining the structure of an electric toy gun using as a model a gun officially adopted by the American Army such as the M-16 series or the M4 series.

And that's sort of consistent with your testimony that these Airsoft guns can be -- can look like real guns, correct?

A. Yes, I'd say that is consistent.

Q. And you took issue with the translation a little bit in this document, correct?

A. You mean my comment just before about Combat Magazine?

Q. Yes.

A. No, I didn't take issue with it. I'm sure it's been translated just fine. The title of the magazine was a translation, so, you know, sometimes -- I don't know. You asked me if that sounds pretty serious, and, you know, it could but, you know, I just don't know the publication.

MR. TAYLOR: Your Honor, may I just quickly confer with counsel? I'd like to get an update on the physical samples.

JUDGE MCNAMARA: Sure.

MR. TAYLOR: May we bring them in, Your Honor?

JUDGE MCNAMARA: Yes. While we are waiting, would anybody mind if I asked a couple of questions?

Maybe CDX-0007C.5 could be pulled up. That is Mr. Tino's direct examination. I just want to take a look at some of the pictures and see if Mr. Delman has looked at some of these.

Now I think slide 5 -- let's start there -- I don't think this is CBI, is it?

MR. CORDELL: It is not, Your Honor.

JUDGE MCNAMARA: Okay. So have you looked at an example of the Mythic gun, Mr. Delman?

THE WITNESS: I'm fairly sure I have, yes.

JUDGE MCNAMARA: And the Legion gun?

THE WITNESS: Yes.

JUDGE MCNAMARA: Okay. Are these -- if you know, is the design of these guns similar to military-style weapons, or were they copied from military-style weapons, if you know?

THE WITNESS: I would say, as a designer, that they depart significantly from a realistic military-style weapon. I would say they are intended to look more like a science fiction type of a weapon; the colors, the forms, the details. They look great, but I would never mistake them for a military gun.

JUDGE MCNAMARA: And that's true of both the Mythic and the Legion.

THE WITNESS: I would agree, yes.

JUDGE MCNAMARA: Let me stop there. Do we have the guns?

MR. CORDELL: The very careful security function here at the ITC is actually removing them -- they were all in their original packaging -- they are removing them and inspecting them to make sure they are not actual powder-burning firearms.

JUDGE MCNAMARA: Good for them.

MR. CORDELL: But I'm told there are a couple of them that are through that we'll have walked in.

JUDGE MCNAMARA: We are fine. We have the time. And if we have to cut back a little bit on lunch to make sure we accommodate everything, we can do that.

MR. CORDELL: Thank you.

JUDGE MCNAMARA: Okay. A couple more questions. Before I go to the next slide, is slide 7 in the Tino deck slides also not CBI? That was put badly.

Does deck slide 7 from the Tino slides, CDX-0007C, contain any CBI?

MR. BOYD: Your Honor, yes, it does.

JUDGE MCNAMARA: Okay. I wanted to double-check and make sure. So if anyone -- before we show the slide, if anyone who is not on the protective order could kindly leave for just a moment, I would appreciate it.

Let me ask these questions quickly. I'll be fast and then we can get to the Airsoft.

Looking at CDX-7C.7, Mr. Delman, have you had an opportunity to look at any of the prototypes or any of the guns that actually have made it to the shelves that are shown on CDX-007C.7?

THE WITNESS: I don't recall having had a chance to be hands-on with any of these. I looked at a lot of guns throughout the case, but to the best of my recollection, I don't recall seeing these in person, no.

JUDGE MCNAMARA: Would you know enough, from

looking at these guns -- I am referencing the Ghost, the Raid, the Dual Wield, the Mini Buckshot, the BurstFire Springer, and the Tri-Barrel -- whether any of them appear to simulate, in design, military-style weapons?

THE WITNESS: Again, I'd say that their intent is to simulate some sort of a science fiction-y type of weapon. The forms, colors, et cetera, I don't believe would make anyone think they are military-style weapons.

JUDGE MCNAMARA: How about the shapes?

THE WITNESS: The Ghost and the Raid and the Dual -- well, you know, there are at least two on here that are pistols. There are at least two on here that are rifles in format.

JUDGE MCNAMARA: Can you tell me which ones?

THE WITNESS: Sure. So the Ghost is generally a rifle format in its length, I'd say, and form. And the Raid as well. The Dual Wield guns are pistols or handguns. The Mini Buckshot is also a pistol or a handgun.

The BurstFire is something in between. There's a category of guns, perhaps -- I forget what they call them -- bullpups -- they are sort of halfway between a pistol and a rifle. And it may be that type of a form factor or that might be its intention.

And the Tri-Barrel is -- if you didn't tell me it was a gun, I wouldn't know it was a gun from this picture.

It's certainly not the form of a standard, standard gun that I would be familiar with at least.

But having said that about their overall forms, you know, design is very much about everything, the whole holistic visual appearance. And even though the form of the Ghost may be in a general rifle form factor, its colors, its details, et cetera, or the Raid has a -- has a stock on it, you know, to go up against your shoulder, I guess, but it's not a stock which looks at all like a real stock on a military or other genuine weapon.

So there's references to things about, quote/unquote, real guns, and I think that those are intentional, but, in general, they are intended to look like fun, futuristic weapons that you would not mistake for a genuine gun.

JUDGE MCNAMARA: Do you know anything about European or Russian weapons?

THE WITNESS: A little bit, sure.

JUDGE MCNAMARA: Have you seen a Kalashnikov?

THE WITNESS: I am familiar with the general form of a Kalashnikov, yes.

JUDGE MCNAMARA: In your estimation, does it appear at all similar to the Tri-Barrel?

THE WITNESS: To the which one? I'm sorry.

JUDGE MCNAMARA: To the Tri-Barrel.

THE WITNESS: A Kalashnikov rifle? Maybe there are different models of Kalashnikov than the one I'm thinking of. I'm thinking of the traditional ones used, you know, by the fighters in Afghanistan, for example, which is more of a wooden-stocked, you know, machine gun or assault weapon. I wouldn't say it looks like a Tri-Barrel, no.

JUDGE MCNAMARA: Okay. Thank you.

I think we have guns in the courtroom. I mean, we have -- sorry about that. We have Airsoft guns.

MR. TAYLOR: Yes, Your Honor, I believe there are a number of exhibits. I would just like to use this as more of a demonstrative exhibit. It will not be admitted into evidence.

JUDGE MCNAMARA: Okay.

MR. TAYLOR: It's for Your Honor's purposes.

May I approach and retrieve the Gel Blaster pistol there?

JUDGE MCNAMARA: Sure.

MR. CORDELL: Your Honor, we'll take your guidance. If you want them as part of the record, we're happy to submit them.

JUDGE MCNAMARA: Are you okay with that, so that we have them as exhibits? I would like to see them as exhibits, actually. I know you are using it as a demonstrative, but I would like to see them.

MR. TAYLOR: I would like to hear Mr. --

MR. GEORGE: Do we need a sponsoring witness for the time frame of these documents -- for these guns? I'm sorry.

JUDGE MCNAMARA: Good point.

MR. GEORGE: Were they bought yesterday? I don't know how relevant they are, if they were bought yesterday. So I would not agree to anything until I heard a sponsoring witness.

JUDGE MCNAMARA: Fair enough.

MR. TAYLOR: So, Your Honor, our expert can sponsor these. He did comment on most of them in his report. So that would be a way to get it in.

JUDGE MCNAMARA: Mr. George?

MR. GEORGE: They will put their expert on and I'll see what he says.

JUDGE MCNAMARA: Very good. Fair enough.

MR. GEORGE: Thank you.

JUDGE MCNAMARA: Mr. Taylor?

MR. TAYLOR: I would just like to use them for demonstrative purposes, and then if Complainants' counsel wants to do that --

JUDGE MCNAMARA: Of course.

MR. TAYLOR: -- that's the case.

BY MR. TAYLOR:

Q. Mr. Delman, I'd like to just show you a device -- unfortunately, I'm a lawyer here and I keep saying "device." It's a gun. It's in the case of a Gel Blaster pistol.

MR. TAYLOR: May I approach the witness?

JUDGE MCNAMARA: Yes, please.

BY MR. TAYLOR:

Q. Have you seen that one before?

A. I have, yes.

MR. TAYLOR: And I believe, Your Honor -- have you felt that one?

JUDGE MCNAMARA: I did. I picked it up, yes.

Q. And then I have here a Glock Perfection, I believe, a CO2 Airsoft gun. This is called a Glock 19. Let me just show that.

Are you familiar with this type of Airsoft gun?

A. I'm familiar with the type, yes. Not that particular model, but yes.

Q. Okay.

MR. GEORGE: Your Honor, I want to make sure, the sign says "Public." And I assume we are on the public record right now, and I was going to --

JUDGE MCNAMARA: Thank you. We are on the public record, yes. Thank you very much.

MR. TAYLOR: Your Honor, would you like to inspect this?

JUDGE MCNAMARA: Sure. Thank you.

Q. Mr. Delman, we see here on the Glock 19, it has that orange safety feature, right?

A. Yes. The orange tip, yeah.

Q. So one would not misinterpret this as a real gun, correct?

A. That is the hope, yes.

Q. I have one last series of questions, Mr. Delman.

Can you please pull up RPX-84.

RPX-84, have you seen this exhibit before?

A. I believe I have. If not in that exact coloration, something very similar, but, yes, the AS240.

Q. What is this?

A. It is an Airsoft pistol manufactured by Daisy.

Q. And do you see the warning there at the very bottom left of RPX-84-1? Do you see where it says "Not a Toy"?

A. I do.

MR. TAYLOR: Your Honor, I have no further questions.

JUDGE MCNAMARA: Okay. Thank you.

MR. TAYLOR: Thank you.

JUDGE MCNAMARA: I thought you were going to shoot the gun.

MR. TAYLOR: Pardon me?

JUDGE MCNAMARA: I thought you were going to shoot the Airsoft.

MR. TAYLOR: No, thank you.

JUDGE MCNAMARA: Do you have any redirect?

MR. GEORGE: I do, Your Honor.

JUDGE MCNAMARA: Please, Mr. George. Go ahead.

Mr. Taylor, I am letting you off easily. I thought better you than me.

REDIRECT EXAMINATION

BY MR. GEORGE:

Q. If I can pick up on the very last question. The products accused of infringement in this case, do they include a similar warning where they say, this is not a toy?

A. I'm not familiar with any such warning on these products, no.

MR. GEORGE: Your Honor, I had tendered Mr. Delman as an expert in the field of industrial design, including areas of toy and launcher design, and I assume that proffer is unobjected to.

JUDGE MCNAMARA: I did not hear an objection. I heard -- so go ahead.

MR. CORDELL: Again, Your Honor, subject to my cross-examination and the admissions that I have listed there, I think it goes to weight, but if it would make the record more complete, I'm happy to object. But for my

money, it goes to weight.

JUDGE MCNAMARA: I think it goes to weight as well, and that is what I heard by way of the questions that were asked and no clear objection.

MR. CORDELL: Yes. Thank you.

JUDGE MCNAMARA: Thank you.

Q. Let's call up RX-52 and RDX-3.085 on the screen, if you can put them side by side.

Mr. Delman, do you recall Mr. Cordell asking you questions about this Korean patent application?

A. Yes, I do.

Q. And do you recall testifying that this application teaches improving the bullet of a toy gun to prevent injury?

A. Yes, I did testify to that effect.

Q. And do you recall testifying that the solution to the injury problem in RX-52 is to use a bullet formed of gel or gel material?

A. Yes.

Q. Do you recall Mr. Cordell asking you about reducing the muzzle velocity of an Airsoft gun in order to avoid injury?

A. Yes, I do.

Q. Does RX-52 disclose reducing the muzzle velocity to reduce injury? And, if you want, there's -- the entire

exhibit is in those binders to your left there.

A. They are now on the floor. But, to the best of my recollection, it doesn't discuss a reduction in muzzle velocity.

Q. Now if we could put up RX-53 and RDX-3.086.

Mr. Delman, do you recall Mr. Cordell asking you questions about the Carlson patent?

A. Yes, I do.

Q. And do you recall testifying that the Carlson patent teaches improving the bullet of a toy gun to prevent injury?

A. Yes.

Q. And do you recall testifying that a solution in Carlson is to use a bullet formed of hydro-polymer similar to the absorbent polymer used in diapers?

A. Yes.

Q. Does RX-53, the Carlson patent, disclose reducing the muzzle velocity to reduce injury?

A. No, to the best of my recollection, it doesn't discuss that.

Q. Looking at the first page of RDX-53, the Carlson patent, can you tell me when it was filed?

A. The filing date is October 6 of 2010.

Q. So was the Carlson patent filed after the asserted patents?

A. Yes.
Q. And the Carlson patent is not prior art, correct?
A. No, it's not.
Q. Okay. And do you see, if you look at line 65, that this patent was published on October 6, 2011?
A. I'm sorry, I'm not --
Q. That's okay.
A. Yes, okay, I now see that. Yes.
Q. So this patent was not available to a person of ordinary skill in the art prior to the filing date of the asserted patents.
A. That would be my understanding, yes.
Q. Let's go back to RDX- -- let's focus on RDX-3.086.
Do you recall that Mr. Cordell asked you questions about the text in the right-hand box? And that text is from RX-50, column 3, lines 44-60.
A. I do recall, yes.
Q. And do you recall that Mr. Cordell spoke to you about his experience in the sawmill and the examples of wood pulp in this passage?
A. Yes, I recall that discussion.
Q. Was this passage available to a person of ordinary skill in the art prior to the filing date of the asserted patents?

A. No, it would not have been.
Q. Let's pull up RDX-1.033.
Do you recall Mr. Cordell asking you questions about the information on this slide?
A. Yes.
Q. Do you understand that what we are looking at is a passage from Dr. Kudrowitz' rebuttal report, which is RX-0679C, at paragraph 167?
A. Yes.
Q. Do you see wood pulp in Dr. Kudrowitz' list of materials?
A. No, I do not.
Q. Now do you see Dr. Kudrowitz lists rubber as a material from which a projectile could be made?
A. Yes.
Q. Are you aware of rubber ammunition?
A. The only rubber ammunition I'm familiar with would be the types of rubber bullets that are used by police in riot-control and crowd-control operations that are kind of not lethal but put people down and get things calmed down. I gather on occasion they can be lethal as well. But those are the only kinds of rubber bullets I'm familiar with.
Q. I'd like to go to RDX-3.077. And this is the Airsoft gun, AS470, correct?

A. Yes.
Q. And this gun was available, to your knowledge, before the filing date of the patents?
A. Yes. It's a prior art gun.
Q. Is this gun made to look like a real gun?
A. There are aspects of it that certainly reflect, you know, certain real guns, quote/unquote, but it's molded in clear plastic. It doesn't look -- there's no real gun that looks like this, aside from certain details about its form perhaps.
Q. Could we look at RDX-77? If we could rotate it, if that's possible, and then maybe blow it up. Could you focus on the warning? That's not the one I want. Okay.
A. The one on the bottom?
Q. It's on the bottom. Thank you.
So, first of all, are you familiar with the product that we just -- that is shown here in RPX-77?
A. Yes, I am familiar with it.
Q. And what product is that? We can zoom out, if you want.
A. It's called the Nebula Pro from the Hydro Strike line.
Q. It's a PTT product, correct?
A. Yes.
Q. Okay. And it's one of the products that's

accused of infringement in this ITC action, correct?

A. Correct.

Q. Is there a warning on this package?

A. There is, yes.

Q. And could you read the warning into the record?

A. Not a toy. Adult supervision required. Misuse or careless use may cause serious injury, particularly to the eye. May be dangerous up to 54.6 yards or 50 meters.

MR. GEORGE: I pass the witness.

JUDGE MCNAMARA: Thank you.

Mr. Cordell, any recross?

MR. CORDELL: If I may, Your Honor.

RECROSS-EXAMINATION

BY MR. CORDELL:

Q. Good morning, Mr. Delman.

A. Good morning.

Q. So Mr. Taylor asked you a number of questions about whether you could put an SAP ammunition into a paintball gun. Do you recall that?

A. Yes, I do recall.

Q. And he asked you whether you could put SAP into a NERF gun. Do you recall that?

A. Yes, I do.

Q. So I've taken the liberty of, those Clear Spheres that you and I talked about last time, and I soaked them

overnight. Have you done that?

A. I believe I have. They grow pretty big, as you have seen there.

Q. Let me put it on the ELMO.

Your Honor, I will wipe up the ELMO.

Do you recognize what I've got on the ELMO as a fully hydrated Clear Sphere?

A. I will take your word for it that it is fully hydrated, being that you left it overnight, et cetera.

Q. You don't recognize it as such?

A. It looks to be a fully hydrated Clear Sphere in terms of its size.

Q. Would you like to handle it?

A. Sure.

MR. CORDELL: May I approach, Your Honor?

JUDGE MCNAMARA: Yes.

A. Thank you. Okay.

MR. CORDELL: Your Honor?

JUDGE MCNAMARA: Yes, please. Oh, that is really interesting.

Q. Now, Mr. Delman, you would agree with me that if you attempted to put that fully hydrated Clear Sphere into a paintball gun, it would not launch, correct?

A. I would guess you're correct on that, yes.

Q. And if you tried to put that fully hydrated

Clear Sphere into a NERF blaster, it would not launch, correct?

A. That's correct.

Q. You would have a big mess on your hands, right?

A. Probably.

Q. And the same would be true if you tried to put that fully hydrated Clear Sphere into an Airsoft gun, correct?

A. Correct.

Q. Now Mr. Taylor asked you about your video firing the AS470 Daisy Airsoft gun. Do you recall that?

A. Yes.

Q. And he asked you whether you had to take several attempts to load and effectively discharge SAP ammunition through the AS470. Do you recall that?

A. Yes, I do.

Q. And he asked you a very interesting question. He asked you how you knew only to hydrate the SAP Clear Spheres ammunition for 30 seconds. Do you recall that?

A. I recall him asking that, and I said that I was aiming for a particular size so I was measuring it. I really wasn't going by time as much as I was on measuring its diameter as it grew.

Q. As we reviewed on Friday, when you hydrated it for only 30 seconds, the Clear Spheres ammunition was still

quite firm, I think were the words you used.

A. Yes, that's correct.

Q. And in contradistinction, the Clear Sphere ball that I just handed you was quite soft, correct?

A. Yes, in comparison, it was.

Q. It was also kind of misshapen, almost brain-shaped?

A. I wouldn't characterize it as such. It was substantially round, spherical.

Q. I heard somebody characterize it as a M÷bius strip sphere. Would you agree with that?

A. It wouldn't be my description, no, but everybody is entitled to their opinion.

Q. But, more importantly, you said that you came to the conclusion about how long to hydrate the Clear Spheres ammunition based on a couple of experiments you did in February or March of this year, correct?

A. I don't remember saying it quite like that, but I knew that the longer I left it in, the larger it would grow. And, again, I was aiming for a certain range of size that was my objective.

Q. But my point is that you were determining that range of size in the February or March time frame of 2023.

A. Again, to the best of my recollection. The dates may not be correct.

Q. But, in fact, sir, you gave us your report detailing the AS470 as prior art in December of 2022, correct?

A. Then, indeed, my recollection of that particular video was not correct. I have fired these guns and utilized these guns for the range of time that I've worked on the case. It's possible that my recollection of firing them more recently was confused with when that video was taken. But obviously if the video was in my report, it was taken before I filed the report.

MR. CORDELL: Your Honor, I move to strike as nonresponsive.

JUDGE MCNAMARA: The first part of it I think is responsive. And then I think the latter part -- I will allow some redirect on that.

Q. But the point is, sir, you gave us your report on the AS470 in December of 2022, correct?

A. I suppose that's correct, now that you remind me, yes.

Q. Now you also had a great deal of discussion about the Peev and Nagayoshi references. Do you recall that?

A. With Mr. Taylor this morning, yes.

Q. Now we also have the advantage of having these Airsoft guns in the courtroom, correct?

A. We did, yes.

Q. So you handled the Glock 19 earlier. Do you recall that?

A. Yes.

MR. CORDELL: Your Honor, this one is marked with Physical Exhibit 83, the Glock 19.

Q. Mr. Delman -- may I approach, Your Honor?

JUDGE MCNAMARA: Yes.

Q. -- I'll hand you the Glock 19. And if you like -- would you like it out of the package?

A. It depends on what your questions are going to be. It would be nice to handle it. If you have -- these kind of packages are quite the pain to open. If you have something sharp we can slice it with?

MR. GEORGE: I'm going to object here, Your Honor. We're starting to go beyond what Mr. Taylor did with this witness. He didn't render an opinion about this, so, you know, this is sort of -- he is taking a little opportunity, Mr. Cordell, to go much further. I don't know where he is going to go, but Mr. Taylor did very little with this gun.

JUDGE MCNAMARA: I tend to agree, Mr. Cordell. Where are you going?

MR. CORDELL: My questions are going to be pretty simple. I'm going to continue the same line that I was on, but with the exhibit in his hand.

JUDGE MCNAMARA: Well, it is an exhibit, but it is going beyond what Mr. Taylor asked. There is no question about that. So where are you going exactly?

MR. CORDELL: I'm specifically going to have him verify that the ammunition that sits before Your Honor could not ever fit in that device.

JUDGE MCNAMARA: Can he do that by observation?

MR. CORDELL: Yes.

JUDGE MCNAMARA: All right. So if that is the case, and it is not taking the gun out of the -- or the launcher out of the packaging, and he can verify that, I have the --

MR. CORDELL: He can. I didn't want to deprive the witness of the ability to examine the barrel of the gun.

JUDGE MCNAMARA: Mr. Delman, you are a designer. Can you tell, from looking at that gun, what the approximate size of the barrel might be?

THE WITNESS: Yes, I can certainly see that. I can see what -- I can read the package in terms of the size of ammunition that is included with the gun. I don't know that I would need to open it up to verify.

JUDGE MCNAMARA: Okay. And I have the hydrated Clear Sphere. Would you like it?

THE WITNESS: No, I don't think so, but thank you.

BY MR. CORDELL:

Q. Just to tie it all up, Mr. Delman, is there any way that you could successfully launch the Clear Sphere that is now at the bench through the physical Glock 19 that sits before you?

A. No, I don't believe there would be.

Q. Now let's start with Peev. The Peev reference is intended to mimic a real assault weapon, correct?

A. Could you just refresh my memory as to the appearance of the Peev gun by putting a figure up on screen perhaps?

Q. Sure.

Can I have RX-557? Can we go to page 3.

So, Mr. Delman, do you see that it begins with, electric Airsoft guns find application in the sporting gun industry and are used for military emulations or training, or for fun when conducting Airsoft games.

Do you see that?

A. Yes.

Q. Do you see that it says, electric Airsoft guns externally represent a copy of real firearms?

Do you see that?

A. I do, yes.

Q. So the intention of the Peev author is to create a device that emulates a real military firearm, fair?

A. A real firearm, yes. When you mentioned -- you mentioned assault weapon. That was the specific reference I wanted to compare to as to -- but I would not disagree that it is representative of a real firearm or realistic firearm.

Q. Well, let me have some of the figures from Peev, if it would help you.

Can I have Fig. 1 or Fig. 2? It's at RX-557, page 18. There we go.

So here we see the inner workings of the Peev device, correct?

A. Correct, yes.

Q. And the idea here was to package this in something that emulated -- I guess I would call it an Uzi form factor. Is that fair?

A. I don't know that I would characterize it as such. There may be further images which show the external design. This is more of a representative diagram, I think. It doesn't really include details that describe the outer shell of the gun's appearance.

Q. Well, let's look at Nagayoshi. Maybe that's easier.

Can I have Nagayoshi at Fig. 8, which I think is the one you focused on.

And that's, for the record, RX-558 at page 74.

Do you see in this diagram, sir, there's a

charging -- I'm sorry -- a carrying handle at the top of the weapon?

A. Yes.

MR. GEORGE: Your Honor, I'm going to object again. We're going far beyond what Mr. Taylor did. Mr. Taylor showed him two sentences and asked him about those two sentences. That was it. That's all he did. If Mr. Cordell wanted to go through these drawings, he should have done it on direct. It's going beyond. I object to it.

JUDGE MCNAMARA: What is your response, Mr. Cordell?

MR. CORDELL: My response, Your Honor, is that they brought up the Nagayoshi reference. They discussed its contents and whether it was, in fact, a suitable piece of prior art or not. This is directly relevant to exactly that analysis.

JUDGE MCNAMARA: Mr. Taylor? Do you have a view on this?

MR. TAYLOR: I agree with the objection, Your Honor.

JUDGE MCNAMARA: You do. I'm not sure I do. And so I am going to allow some latitude here, because Mr. Delman has testified about some of these issues, and so I think it's important to know more about Nagayoshi and his opinion based upon what was asked.

Q. Mr. Delman, do you recall the question?
A. I think you asked, do you see there's a carrying handle?
Q. Yes.
A. And my response is, yes, it does have a handle at the top.
Q. And the same carrying handle appears on the U.S. military M-16 that I was given in the Marine Corps, right?
A. Very similar to that design, yes.
Q. Nowadays they use an M4 instead, but it's a similar form factor?
A. Right.
Q. It resembles the AR-15, correct?
A. Correct.
Q. And we have a large magazine extending down from the weapon in Nagayoshi at Fig. 8 of RX-558, 074. Again, that is similar to the M-16 form factor, correct?
A. Yes, it is.
Q. So when we're thinking about Nagayoshi as a product, it would be similar to the HK-556 physical exhibit that we brought into the courtroom, correct?
MR. GEORGE: I object, Your Honor. Now we have really gone far beyond what Mr. Taylor was doing.
MR. CORDELL: Your Honor, I expected Respondents to bring these physicals in for trial, they didn't, so I was

deprived of the ability to ask him -- I'm not going to go beyond just having him verify that this is the kind of weapon that Nagayoshi describes.

MR. GEORGE: Your Honor, these are not our exhibits. I don't know what he is talking about.

JUDGE MCNAMARA: They are not exhibits yet, are they? They are not.

MR. CORDELL: These are just demonstratives.

JUDGE MCNAMARA: That was my understanding, and that is where everyone was leaving them.

I am going to allow some latitude here because it is going to go to his view of Nagayoshi and his design expertise. And also there has been a fair amount of comparison about warnings on the packaging. I would like to hear a little bit more about this.

MR. CORDELL: Thank you, Your Honor. May I approach the witness?

JUDGE MCNAMARA: Yes.

Q. I'll hand you the demonstrative, which, for the record, is an HK, or Heckler & Koch, G36, which is a 556, 545 Airsoft gun.

MR. CORDELL: I'm sorry, Your Honor. I should have allowed opposing counsel to --

MR. GEORGE: That's all right. There's nothing I can do to look at it in the short time I'm being permitted.

MR. CORDELL: It is not loaded.

Q. Mr. Delman, this is the German version of the M4, correct?

A. It's an equivalent, yes.

Q. So the Germans fire a little better rifles than the Americans do; is that right?

JUDGE MCNAMARA: Well, I think that is beyond the scope.

THE WITNESS: That's probably beyond my pay grade.

MR. GEORGE: If Mr. Cordell is going to testify, he should be sworn in.

MR. CORDELL: That was a question. I wasn't testifying.

JUDGE MCNAMARA: Well, the question, I think, is a little beyond the scope.

MR. CORDELL: That might be an apt objection, but I'm not testifying.

Q. The fact is that what Nagayoshi attempted to disclose or to patent was a better way to feed ammunition into a device like that HK 556 you're holding, right?

A. I think at a high level, that is an accurate description, yes.

Q. So if I can have Nagayoshi at Fig. 21. Actually, can we start with Fig. 17.

So the idea behind Nagayoshi is that the little darkened wheel at the bottom of the magazine would grab the Airsoft ammunition and channel it into a narrow channel that goes up through the magazine, correct?

A. Yes, that's correct.

Q. And the little teeth on the wheel would grab each of the Airsoft pellets and move them into that channel and force them up and into the chamber of the gun, right?

A. Yes, that's correct.

Q. And I had an Airsoft round that I brought with me, and I don't know what I've done with it. But you will confirm for me that the Airsoft round are these hard plastic pellets, right?

A. I actually have the sample you left with me the other day, so I'll --

MR. GEORGE: Your Honor, we're really going far beyond --

JUDGE MCNAMARA: Just a minute.

Mr. George, I'm sorry, your objection?

MR. GEORGE: I'm objecting. I don't know how -- this is going on -- we're so far down the road from where Mr. Taylor is. And, yes, you've given him leeway, and, yes, I understand that you want to hear more about this, but this is really not fair to the witness. This is not how this works, Your Honor.

JUDGE MCNAMARA: Mr. Cordell, could you respond?

MR. CORDELL: Yes, Your Honor. I'm tying up, again, the feed mechanism, the focus of Nagayoshi, with the Clear Sphere that Your Honor has before you.

MR. GEORGE: But that has nothing to do with Mr. Taylor's testimony. It has nothing to do with what I asked him on direct.

JUDGE MCNAMARA: It does not, so I think this is going a little bit beyond.

Again, I think really delving into Nagayoshi a little more deeply in terms of its design is within his area of expertise, but starting to go beyond that. I know he has done it with some of the gel and some of the things that he has tested, fair enough, but it is getting -- we are moving a little wide, I think.

MR. CORDELL: Thank you, Your Honor. If I can hazard one more, which is I'd like to hand the witness Physical Exhibit 80.

MR. GEORGE: Same objection, Your Honor.

JUDGE MCNAMARA: Let's see where it is going. He is handing him the exhibit for the time being. Let's see where that goes.

MR. CORDELL: Would you like it, Your Honor?

JUDGE MCNAMARA: Yes. And that is the SIG Airsoft?

MR. CORDELL: Yes, Your Honor. This is the SIG Air 1, which does still have marking on it, the packaging was preserved, as Physical Exhibit 80.

BY MR. CORDELL:

Q. Mr. Delman, I've handed you the SIG1 Airsoft gun. First, let me ask you, have you ever encountered that particular gun before?

A. I have seen very similar. I can't say if it was the exact same.

Just to note, though, this is not the same gun that I have here, though, correct? This is a different model from the box.

Q. The one in your right hand is a Heckler & Koch 556 and the one in your left hand is a SIG1.

A. Correct.

Q. Is there a warning at the end of that SIG1 box?

JUDGE MCNAMARA: Go ahead, Mr. George.

MR. GEORGE: Objection, again. We now know where we're going, and we're going far beyond -- This has gone on for some time now, Your Honor.

JUDGE MCNAMARA: I am aware of that, but I am also drawing some lines. First of all, you agreed to bringing in these demonstratives, correct?

MR. GEORGE: Yes.

JUDGE MCNAMARA: Okay. What did you think was

going -- what did you think they were going to be used for? I'm just curious.

MR. GEORGE: I thought they were going to use them with their expert, Your Honor. That's what I thought. It's in his report. These aren't in Mr. Delman's report. So you're asking what I thought; that's what I thought.

JUDGE MCNAMARA: Okay. So the objection is this is beyond the scope of the expert report.

MR. GEORGE: It's beyond the scope of the expert report. It's beyond the scope of our prehearing brief. It's beyond the scope of what Mr. Taylor asked him about. Yes, that's the objection, Your Honor.

JUDGE MCNAMARA: Mr. Taylor?

MR. TAYLOR: Your Honor, I just wanted to have the demonstratives for my examination so Your Honor and the witness could actually feel it, look at it, and get an understanding of the design.

JUDGE MCNAMARA: Well, okay. I think it is going beyond now, the scope. If it was not discussed in Mr. Delman's report, if it was not discussed in the brief, at least through Mr. Delman, and if it was not discussed in his deposition testimony, then it is now going beyond the scope and it's going beyond the scope of what Mr. Taylor asked.

MR. CORDELL: If I can just respond, Your Honor.

We were not constrained by his expert report. We can go beyond his expert report. They can't.

JUDGE MCNAMARA: I am aware of that. But the problem is, if there is nothing there about this and he is being shown this and there are questions being asked about something he has never seen before, this is pretty much -- you know, it is pretty much live testimony and something new to him.

MR. CORDELL: So I understand that. And the proper objection then would be lack of foundation, and --

JUDGE MCNAMARA: Well, there could be that too. But you're also asking me to open up a door on something by asking him to lay the foundation on something, again, he has never seen before.

MR. CORDELL: I heard this witness tell the entire court that he was unaware of whether or not there was a warning placed on the accused device boxes. He said that at the beginning of his testimony.

JUDGE MCNAMARA: Okay.

MR. CORDELL: Mr. George then got back up -- or then continued -- he was already up -- and led him by showing him a box and having him read the warning into the record. And I think I'm entitled to establish that these devices have warnings that go far beyond the one that Mr. George led him into reading into the record.

JUDGE MCNAMARA: Was there a reason -- well, I am not going to ask that question.

Okay. So this is one of the accused products?

MR. GEORGE: No, Your Honor, it's not.

JUDGE MCNAMARA: It is not.

MR. GEORGE: And it is not prior art either.

MR. CORDELL: My point is that this is in contradistinction -- so, again, the way this happened is the witness said he was unaware of whether or not the accused products had any warnings. He didn't think they had any warnings.

Mr. George kind of recoiled -- I saw him, I've been in that position, I know what that's like -- and he then pulls the box up and hands it to the witness and says, can you read this? And he actually did it through the graphics, can you read the warning that you just said doesn't exist?

JUDGE MCNAMARA: Well, I understand that that happened. And I can remember also seeing one of the other exhibit slides that also contained, I think, the three NERF guns, and he had to be directed to the -- et cetera.

That, however, is not an accused product.

MR. CORDELL: Correct. I'm just trying --

JUDGE MCNAMARA: So, no, I think it is not an accused product, it is not in his report, he is seeing it

for the first time. You could pick out any number of products out there on the shelves and bring in a warning or not a warning and it would not matter to whether or not the accused products have warnings on them.

MR. CORDELL: It puts it into context, I guess, is my point.

JUDGE MCNAMARA: I think the context is the accused products and what do the accused products say on the boxes.

MR. CORDELL: Well, recall that it is their position that you should adopt these weapons as the base prior art, and then the question is whether or not these weapons have warnings on them.

JUDGE MCNAMARA: I think the base prior art is Nagayoshi and Peev, and I think any of the weapons that are described generally in Nagayoshi and Peev. But we do not know if Peev had this weapon or Nagayoshi had this weapon when they actually -- when those patents were issued. I do not know that. I cannot tie these weapons -- I'm sorry -- these launchers -- I'm sorry. I have been involved with some trap shooting recently.

So I do not know whether or not these boxes, these products tie in any way to Nagayoshi or to Peev. I just do not know. We do not have the dates on them. I do not know when they were produced.

MR. CORDELL: That's why the expert's testimony relating them would be useful --

JUDGE MCNAMARA: It would not be. I have to tell you right now, as evidence, there is no linkage that I know of, there is no clear linkage between Peev, Nagayoshi, and this SIG weapon. I do not know the date that was produced. I know the dates on Peev and Nagayoshi, but in order to tie it, I would have to have had some connectivity in the evidence in terms of time, who looked at it, what the product was. It is not an accused product.

MR. CORDELL: I understand. I'll move on.

JUDGE MCNAMARA: So, in other words, I have sustained your objection, Mr. George.

MR. GEORGE: Thank you, Your Honor.

BY MR. CORDELL:

Q. Mr. Delman, Mr. George asked you about RX-52.

Can I have that?

It was the Korean gel patent application. Do you recall this?

A. Yes, I do.

Q. And he asked you about whether or not there was a reduction in muzzle velocity in this particular disclosure. Do you recall that?

A. I do recall that.

Q. What is the formula for energy coming out of the

muzzle velocity?

MR. GEORGE: Object, Your Honor. Again, we're going far beyond. He was asked a simple question, does this reference teach lowering the muzzle velocity as a solution to safety, and his answer was, no, it doesn't.

JUDGE MCNAMARA: Well, I think -- where are you going with this? You are just following up on the question of muzzle velocity, correct?

MR. CORDELL: That's right.

JUDGE MCNAMARA: So I am going to allow a little bit of latitude on this. I am not sure where the force issue is coming in, other than, again, there has to be force to be muzzle velocity. So I am not sure where it is going exactly.

MR. CORDELL: It relates to the issue of reducing the muzzle velocity and whether or not that is impactful, whether that's meaningful.

MR. GEORGE: That's not what I asked him about. I asked him one question, does this patent teach reducing the muzzle velocity?

JUDGE MCNAMARA: I am going to let him have some leeway on this.

Q. What is the formula for energy out of the muzzle?

A. I wouldn't know, without referencing.

Q. You aren't familiar with the basic physics

formula for kinetic energy out of the muzzle of a weapon?

MR. GEORGE: I'm going to object again. I think what's going on here, Your Honor, is you are going to learn this afternoon that they have a slide that has a formula for kinetic energy, and we have objected to that slide. And I think this is Mr. Cordell's way to try to lay some foundation for that. It has nothing to do with what I asked him.

MR. CORDELL: It has to do with this witness's qualification to offer the opinion that Mr. George elicited. He doesn't get to get up here and ask little questions that involve a lot of foundation without addressing it.

JUDGE MCNAMARA: I tend to agree with this. I already understand about Mr. Cordell's and Hasbro's voir dire questioning and the cross-examination and where it was going. I am going to allow a little latitude here. I am going to take this into consideration in terms of the weight of all of the evidence.

MR. CORDELL: Thank you, Your Honor.

Q. Do you recall the question, sir?

A. If you could please repeat it for me.

Q. Are you aware of the formula to evaluate kinetic energy of a projectile at the muzzle of a launcher?

A. At this moment, I wouldn't be able to recall that formula, no.

Q. You're not aware of 1/2 mv squared as the proper instantiation of the kinetic energy of a projectile out of a muzzle?

A. As I said, at this moment I would not have been able to recall that.

Q. But you would recognize that, if you assume that that is the proper formula, that reducing the mass will reduce the total kinetic energy out of the weapon, right?

MR. GEORGE: Your Honor, I'm going to object. How far is he going to go with this? He just said he is not familiar with the formula.

JUDGE MCNAMARA: I think that is right. I think we have the basic information we need about whether or not Mr. Delman has a physics background with respect to muzzle velocity.

MR. CORDELL: Thank you.

Q. Let's have RX-53, the Carlson reference.

Mr. George also asked you about the muzzle velocity out of the Carlson reference. Do you recall that?

A. I recall a similar question, yes.

Q. And you are not qualified to offer this Court any opinion about the energy for projectile being launched by the Carlson reference, correct?

MR. GEORGE: Object. That's not what I asked him. I just asked him if this patent taught reducing muzzle

velocity as a solution to the harm being caused by Airsoft guns. His answer was, no, it didn't. I object.

MR. CORDELL: I'm entitled to know whether he is qualified to offer that opinion.

JUDGE MCNAMARA: I am going to allow this. I already think I know what the answer is. I am just going to allow it on the record. I think it is going to go in the same direction the last question --

MR. CORDELL: Thank you.

JUDGE MCNAMARA: -- went.

A. If you could please repeat the question for me.

Q. You are not qualified to offer this Court any opinion about the effect of reducing velocity or mass as to the total energy of a projectile launched by the Carlson device, correct?

A. I'm trying to understand your question. If you're asking me am I qualified to discuss, as I have, the means by which a person of ordinary skill would consider reducing muzzle velocity, the answer is yes, very much so.

If your question is do I understand at this moment the formula to calculate that based on modifications to the mass of the ammunition versus other factors, I wouldn't feel comfortable doing so right now, no.

Q. But you acknowledge that the thing that has an impact on a target is the total energy of the projectile,

correct?

MR. GEORGE: Objection, Your Honor. How far are we going to go with this?

JUDGE MCNAMARA: Again, the nature of your objection?

MR. GEORGE: There's no foundation. It's beyond what Mr. Taylor did. It's beyond what I did. It's not in his expert report. I could go on.

JUDGE MCNAMARA: Right. So the only question you really asked is whether or not Carlson actually contains --

MR. GEORGE: I just said, does it have a teaching to lower the muzzle velocity. That was it.

JUDGE MCNAMARA: Right, and that was it.

MR. CORDELL: And the only way he would be able to inform the Court of that is that he had read Carlson and he had decided that, as a matter of expert testimony, he had digested all of this information and come to the conclusion that it doesn't say anything about reducing muzzle velocity.

JUDGE MCNAMARA: So here is the thing. You can ask him that, but the point still is that is going to go to his credibility as an expert. But whether or not he understands the physics of it also may, in some sense, go to his credibility, but you have asked him that. He does not know what that is.

MR. CORDELL: Thank you, Your Honor.

Q. Mr. George said that I worked at a sawmill; is that right?

A. He may not have referred to it as a sawmill, counsel. I think a paper plant or something like that.

Q. A paper mill.

A. A paper mill.

Q. We paper people are very particular about that.

And can I have RDX- -- I'm sorry, it's RX-53. Can I have the section at column 3, I believe.

MR. CORDELL: My apologies, Your Honor. May I have a moment?

JUDGE MCNAMARA: Yes.

MR. CORDELL: Tell you what. Let's go with column 3, lines 44-60.

Q. You recall testifying about this, correct?

A. Yes, I recall our discussing this last Friday, I believe.

Q. And, well -- no, but Mr. George just led you through this and asked you to confirm whether or not this patent was published before the filing date of the patents-in-suit. Do you recall that?

A. I do.

Q. And he asked you whether or not one of ordinary skill in the art would know about these various options before --

MR. GEORGE: That's not what I asked.

JUDGE MCNAMARA: Not precisely, but you did ask something very similar to that. We can pull up the record. You did go through each of these examples.

MR. GEORGE: No, he went through each of these examples. I did not. I simply asked, was this passage available to one of ordinary skill in the art? That was my question. And it wasn't because it was published later. That's it.

MR. CORDELL: Your Honor, he would not have needed to entertain his expert if what he wanted to do was to verify the dates of publications of these documents.

JUDGE MCNAMARA: There is some truth to that too. I am going to allow some latitude here.

Q. Is it your testimony, your sworn expert testimony, Mr. Delman, that wood pulp was not known before 2010?

A. I don't believe that was my response earlier or the intention of my response, no.

Q. Was it -- was it your sworn testimony that a sponge material was not known before 2010?

A. Again, I don't believe that's what I said earlier or that I would have said that earlier.

Q. And you're aware that people made projectile toys that would fire all manner of materials before 2010,

correct?

A. There was a variety of projectile toys out there, sure.

Q. You mentioned something about rubber bullets in your testimony with Mr. George. Do you recall that?

A. He asked me what type of rubber bullet I might be familiar with, and I responded, yes.

Q. And I believe you testified on direct about the NERF blasters that fire little yellow balls. Do you remember that?

A. I believe I was referring to the NERF Rival product, yes.

Q. And those have rubber in them, correct?

A. I have not analyzed the materials. I have called them, and heard them called, foam balls, but I don't know exactly what they are comprised of.

Q. So you would call them sponge material?

A. No. I'd call them foam balls.

MR. CORDELL: Thank you, Your Honor. Nothing further.

JUDGE MCNAMARA: Thank you, Mr. Cordell.

Mr. Taylor?

MR. TAYLOR: No questions, Your Honor.

JUDGE MCNAMARA: Okay. Mr. George?

MR. GEORGE: No questions.

JUDGE MCNAMARA: Thank you.

Mr. Delman, you may step down. Thank you very much.

Why don't we use this time to take a break. I'll see you back here in 15 minutes.

(Whereupon, the proceedings recessed at 11:07 a.m.)

(In session at 11:25 a.m.)

JUDGE MCNAMARA: I think we're on the next witness.

MR. COMACK: Brian Comack, Your Honor. The PTT Respondents call Dr. Maureen Reitman.

JUDGE MCNAMARA: Very good. Thank you.

MAUREEN REITMAN,

having been first duly sworn or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: My name is Maureen Teresa Fahey Reitman.

JUDGE MCNAMARA: Thank you very much. You may be seated.

MR. CORDELL: Your Honor, with your permission, my partner, Rob Courtney, will examine this witness.

JUDGE MCNAMARA: Very good.

DIRECT EXAMINATION

BY MR. COMACK:

Q. Good morning again, Dr. Reitman.

A. Good morning.

Q. Dr. Reitman, did you provide reports containing your opinions in this matter?

A. Yes, I did.

Q. And what did those opinions generally relate to?

A. The super absorbent polymer limitation of the asserted claims.

Q. Have you been present for all the testimony that's occurred thus far at the hearing?

A. Yes, I have.

Q. On Friday and today, you've been present the entire time?

A. Yes, I have.

Q. Have you prepared a slide presentation for your testimony today?

A. Yes, I have.

Q. And we have displayed it on the screen as RDX-004.001, your slides?

A. Yes, this is the cover slide.

Q. I meant to say RDX-4 without the page, so I'll repeat the question just for the record.

Are these your slides?

A. Yes, this is the slide deck.

Q. All right. Let's take a look at slide 2. Can you please talk about your education and professional experience?

A. Yes. I am trained as a polymer materials scientist. I hold two degrees from MIT, a Bachelor of Science in Materials Science and Engineering with a concentration in polymers and a Doctor of Science through the program in Polymer Science and Technology.

So that means that I look at structure property relationships for polymeric materials as a main part of my job.

After graduation I worked for the 3M Company in various roles in technology development and product development.

I currently work for Exponent, which is a scientific and engineering consulting firm. I currently hold the title of group vice president for polymer science, materials chemistry, and biomedical engineering and sciences. And I am a principal engineer in the polymer science and materials chemistry division.

Q. Dr. Reitman, how many years of experience do you have in natural and synthetic polymer structure property research and applications?

A. I've been working in this field for over 30

years.

Q. Okay. Could we go to the next slide, please.

Dr. Reitman, can you talk about your contributions and recognitions in the field?

A. Yes. I continue to participate in my profession through professional societies. For example, those listed at the bottom of the slide 3, the Society of Plastics Engineers, the American Chemical Society, ASTM International, the American Association of Textile Chemists and Colorists, and the American Association for the Advancement of Science, as examples.

I continue to publish in my area. I have about -- over 60 publications and presentations. I have also contributed chapters to various books.

I am a named inventor on three issued patents. I am a fellow of the Society of Plastics Engineers for my work in the field. I hold a professional engineering license from the State of Maryland. I'm a licensed mechanical engineer.

And I have received numerous awards over the years for my work. For example, the National Academy of Engineering Frontiers of Engineering Program, an industrial fellowship with ICI, acknowledgment for my work in developing and teaching an NSF-funded laboratory to undergraduates to understand structure property

relationships, and a handful of awards for the combined scholar-athlete work.

I was a basketball player and did pretty well in school at the same time, and so MIT, the college sports information directors, and the NCAA all acknowledged that.

MR. COMACK: Your Honor, we tender Dr. Reitman as an expert in the field of chemistry and the behavior of polymers.

JUDGE MCNAMARA: Is there any objection?

MR. COURTNEY: No objection, Your Honor.

JUDGE MCNAMARA: Then Dr. Reitman is admitted as an expert on the topics upon which she has been called to testify.

MR. COMACK: Thank you, Your Honor.

THE WITNESS: Thank you.

MR. COMACK: If we could pull up slide 4, please.

Q. Can you please briefly summarize your opinions that you'll be discussing today?

A. Yes. I've been asked to discuss the opinion that is listed here on slide 4, which is that a chemist knowledgeable about super absorbent polymers, or SAPs, would have known how to adjust shape, size, softness and strength prior to 2010.

Q. Okay. So you're going to provide your opinions that a chemist knowledgeable about SAPs would have known how

to adjust these properties, strength, softness, shape and size, prior to 2010; is that correct?

A. Yes.

Q. And just to make things a bit easier, I'm going to use the shorthand "chemist" to refer to a chemist who is knowledgeable about SAPs. Is that okay with you?

A. Yes.

Q. And, again, your opinions relating to these properties relate to what was known to a chemist prior to 2010?

A. Yes.

Q. Have you reviewed the asserted patents?

A. Yes, I have.

Q. Do you have a slide relating to the asserted patents?

A. Yes, I believe the two independent claims may be on the next slide.

Q. Let's go to the next slide. I see you have highlighted --

JUDGE MCNAMARA: Pardon me. Mr. Comack, would you make sure that you are giving us the slide deck number, not just "the next."

MR. COMACK: I apologize. Of course, Your Honor.

Q. I'm on RDX-4, slide 5. I see that you've highlighted the language in the independent claims in the

two asserted patents. Why did you do that?

A. Yes. So this slide has just claim 1 from the '282, which is JXM-1, and the '683, which is JXM-2. I have highlighted the phrase "soft projectile being formed from hydrated super absorbent polymer" because the scope of my work is to address the aspects of the hydrated super absorbent polymer. So what it is and how it behaves and how you could adjust it.

Q. Thank you.

So I'd like to now pull up JX-1, which is the '282 patent. And if we can go to column 4. If we could focus in on lines 21-23.

I'll read it while we're waiting. It says, round is preferable -- is a preferable shape not only because it has fairly good ballistic characteristics but because SAPs are easily formed in round shapes.

Do you see that?

A. Yes.

Q. Do you agree that SAPs are easily formed in round shapes?

A. Yes.

Q. And do you agree that SAPs are easily formed into spherical shapes?

A. Yes. So "round" I'm equating to "spherical" being three-dimensionally round.

Q. Was that all known by chemists prior to 2010?
A. Yes.
Q. And how were shapes formed into round shapes prior to 2010?
A. There are a number of different pathways that are related to the manufacturing process that you select for the given SAP. So I believe there may be a slide coming up --
Q. There is.
A. -- that indicates some of the manufacturing pathways.
Q. Okay. If we can go back to RDX-4, and go to slide 6.
What does this slide show?
A. Basically this provides some known manufacturing methods, known before 2010, that a chemist would know in order to make SAPs spherical and to adjust the size.
Q. Okay. Can you walk us through the methods that you've listed, suspension polymerization and bulk polymerization and grinding, and explain how it relates to making a SAP spherical?
A. Yes. This slide RDX-4, page 6, shows two examples of general manufacturing methods used to manufacture polymers and specifically super absorbent polymers.
One version is suspension polymerization, and

that's basically a method by which you grow the polymers. Polymers are long molecules, and you grow them through polymerization. In methods where they are in the liquid and you are creating dispersed phases or droplets, you create a suspension and you grow the polymer in those droplets. So when you finish, the finished polymer is already in that round or spherical shape.

And so you can imagine that things like the particular materials, the shear, the temperature, the time, and so on, which are normal manufacturing conditions that you would control, they determine how big of a particle you make and how tight the particle size distribution.

The bulk polymerization method is another approach. That does not have the solvents and necessarily the recovery processes you might need, but it doesn't have as good of thermal control. There are still very standard polymerization methods for that.

Typically bulk polymerization will make a larger mass, and, therefore, you go through a secondary process where you grind the material into the preferred size and size distribution. So basically I can make them spheres initially, and then collect them, or I can make them as a big lump, I can chop it up and grind it into spherical shapes.

Q. So were these methods that you just described

known to a chemist prior to 2010?

A. Yes. There are other methods as well, but these are two common methods used for super absorbent polymers.

Q. If we can go back to the '282 patent, which is JX-1. And, again, let's go to column 4 and focus in on lines 24 through line 28.

I'll read it. It says -- and I'm starting with the sentence that starts -- I'm sorry -- soft projectiles made from a SAP can be any size. Preferably, however, the soft projectiles made from a SAP are between about 3mm and about 15mm in diameter when hydrated and more preferably between about 5mm and 8mm in diameter when hydrated.

Do the asserted patents include any explanation as to how a soft projectile can have a diameter between 3 and 15mm when hydrated?

A. No.

Q. So at the time the asserted patents were filed in 2010, did a chemist know how to make a soft spherical SAP that has a diameter between 3mm and 15mm when hydrated?

A. Yes.

Q. Dr. Reitman, let's go back to your slide 6 in RDX-4.

Can you explain -- I see that you list chemists knew how to make SAPs spherical and to adjust the size. I'd like to now ask you about these methods and how they relate

to your opinion that a chemist knew how to make SAP polymers of any size or in this range that we talked about, 3 to 15mm.

A. These methods are the ways that you would control the size. As I mentioned, you can control the various factors. You can also, in suspension polymerization, choose the suspending agent, with larger ones and particles typically giving you larger particle sizes and smaller ones giving you smaller particle sizes.

So these are standard polymer manufacturing methods that are used actually in many types of polymer production, but they are specifically also used and were used prior to 2010 to make SAPs in different sizes.

Q. Just to be clear, did these methods allow a chemist before 2010 to control the size of a soft spherical SAP when hydrated?

A. Yes.

Q. And that was known to a chemist prior to 2010?

A. Yes.

Q. Prior to 2010 did a chemist know how to adjust the softness of super absorbent polymers?

A. Yes.

Q. Do you have a slide on that?

A. Yes. An example of that is on RDX-4, slide 7.

Q. All right. I see you've put up a graph. I'm

going to ask you some questions about it.

Can you start by explaining the legend, Fig. 4, impact of crosslinker? Let me withdraw that.

Does this graph relate to super absorbent polymers?

A. Yes. This graph is taken from a textbook that is about super absorbent polymers, and it is Fig. 4 from my report.

Q. Okay. Now if we look along the y-axis, can you explain what that is?

A. The y, or vertical, axis is for shear modulus in kilopascals. Shear modulus is force. So the relationship between force and deformation is called modulus. And the higher the modulus, the stiffer it is; the lower the modulus, the softer it is.

So in this case the loading style is shear, which is a sliding motion. So rubbing against something would be a shear behavior, whereas compression is squishing and tension is pulling.

The different stiffnesses are related. They are all related to the type of material. In this case, again, we're showing shear modulus on the y-axis. And for convenience, I have labeled with a blue marker there softer and stiffer as the range, so that you know that 25, for example, is stiffer than 10, which is stiffer than 5. So

the softest would be in the 0 to 5 and then increasing to 10 range.

Q. So just so I understand it, the shear modulus along the y-axis, the lower the SAP is on the y-axis, the softer it is?

A. Yes.

Q. And the higher on the y-axis, the stiffer it is?

A. Yes.

Q. Thank you.

Can you explain what's shown on the x-axis?

A. Yes. In this figure the x, or horizontal, axis is mole percent crosslinker. A mole is just a concentration measure. And this is about the crosslinker. So polymers are long molecules and typically linear, and they entangle but they can move past each other.

One thing that we can do chemically is to connect them. We call that crosslinking. And one way we characterize the material is by how much crosslinking we do to it.

So the x-axis here is about how much crosslinker we are putting in in order to connect the starting polymers together.

Q. Okay. So, again, I need your help in understanding this, because I do not have a chemistry background. But are you using a specific crosslinker in a

SAP, in the SAP that's in line A in this graph?

A. Yes. So this graph shows two sets of data. Line A is associated with the open markers and line B, or curve B, is associated with the filled-in markers.

A and B represent the effect of two different crosslinkers. Those crosslinkers are identified in the legend below.

Q. Okay. So if you use one of the specific crosslinkers, for example, in line A, is it the case that the more crosslinker you add, the stiffer it becomes?

A. Yes. More crosslinker is to the right on the x-axis, and stiffer is up, and you can see that the line basically goes up to the right. So, yes, more crosslinker means stiffer.

Q. And does less crosslinker mean softer for the SAP?

A. Yes, less crosslinker means softer.

Q. Now you spoke a little bit about line B in this graph. And I think you said it's using a different crosslinker than the one used in line A; is that correct?

A. Yes.

Q. Okay. Now in line B, I see that it starts out as a curve and then it sort of levels out in a horizontal plane. Do you see that?

A. Yes, it is a curve, so -- and, yes, it's a

chemically different system.

Q. So what does it mean that -- in line B that it started out as a curve and leveled out sort of in the horizontal plane, in terms of controlling the softness and stiffness of a SAP with respect to this crosslinker?

A. So for this particular polymer with this particular crosslinker, again, at least in the beginning the more crosslinker you add, the stiffer it gets, but at a different rate. And then as you continue to add crosslinker, the effect of adding more crosslinker is diminished. So you have a different relationship between crosslinking concentration and change in mechanical properties.

And also for these particular examples, this shows that the SAP that you make using crosslinker B cannot get to the same stiffness that the SAP that you make with crosslinker A. So you can achieve different mechanical properties with one versus the other.

Q. So were the methods for controlling the softness and stiffness of a SAP that you just described with respect to RDX-4.7 known to a chemist prior to 2010?

A. Yes.

Q. Last week did you see Mr. Cordell hydrate Clear Spheres when he was questioning Mr. Delman?

A. Yes.

Q. And do you remember that he soaked the Clear Spheres in water for about 30 seconds?

A. Yes.

Q. Do you remember that Mr. Cordell asked Mr. Delman about the stiffness of the Clear Spheres that he soaked for 30 seconds?

A. Yes.

Q. If a chemist thought that Clear Spheres that were soaked for 30 seconds were too stiff, or hard, could she make it softer without changing the size?

MR. COURTNEY: Objection, Your Honor. We're well outside the opinions that are in Dr. Reitman's report and also outside the stipulation that covers the scope of her testimony.

JUDGE MCNAMARA: Mr. Comack, would you respond? Is this outside the scope of Dr. Reitman's expert report?

MR. COMACK: I don't believe it is. The scope of her testimony is about softness and stiffness. There has been testimony here that she heard relating to softness and stiffness of something that was done by Mr. Cordell up here in an uncontrolled experiment. And I believe it's appropriate to hear from the witness on that testimony.

JUDGE MCNAMARA: So part of this involved also an objection to beyond the scope of her expert report. Is it? Did she talk about the relationship between softness, size,

and the chemical properties of the projectile or of the SAP?

MR. COMACK: Yes, in paragraph 64 and 65 she talks all about that.

MR. COURTNEY: Your Honor, those are paragraphs of the report that -- subject to the stipulation that was filed last week, PTT expressly agreed they would not seek to elicit opinions on those subjects.

MR. COMACK: I'm just asking if a SAP could be controlled in softness and stiffness. And that's just an example.

JUDGE MCNAMARA: I am going to preliminarily allow it. And if you want to file a motion to strike, you can. I would have to go back and tie the stipulation, take a look at her expert report, and take a look. This seems to me these are simple propositions of chemistry.

MR. COURTNEY: Thank you, Your Honor. We have no objection to Dr. Reitman speaking about SAPs generally, but specific testimony about alleged prior art is expressly stipulated out.

JUDGE MCNAMARA: I do not think her answer was about expressed prior art. I did not hear any prior art mentioned at all. I just heard her talking about what a chemist would have known in 2010.

MR. COURTNEY: This question that's under discussion specifically addresses Clear Spheres, which are

alleged prior art.

JUDGE MCNAMARA: But that is not how the question was posed. It was posed in terms of a time frame. It was posed in terms of a demonstration. I am holding the Clear Spheres in my hand. She saw that. She was asked about a chemical relationship. Just using a demonstrative that everybody -- that everybody looked at, she can do that. I am permitting that.

MR. COURTNEY: Thank you, Your Honor.

BY MR. COMACK:

Q. How would a chemist in 2010, when they saw a SAP that was only soaked for 30 seconds, such as the one -- the Clear Spheres that was just being discussed, how do they adjust the properties so that they could make it softer without changing the size?

A. Without changing the initial size?

Q. Yes, unhydrated.

A. So you can change the initial size so that you hydrate to the same final size. You can change the crosslink density so that the amount of swelling that occurs for a given starting size is diminished. You could also change the rest of the chemistry as well.

Those would be some of the first ways you would look at it.

Q. Since we have RDX-4.7 on the screen, could you

adjust the softness of the spherical SAP by adjusting the crosslinker?

A. Yes, you could also change the crosslinker type. That's part of the chemistry change. So you can change the polymer backbone, you can change the crosslinker type, you can change the amount of crosslinker, you can change the physical starting size. These are some of the common tools that we would use prior to 2010.

Q. Prior to 2010. Thank you. Okay.

Do all super absorbent polymers have the same strength?

A. No.

Q. Prior to 2010 did chemists know how to adjust the strength of super absorbent polymer?

A. Yes.

Q. Do you have a slide on that?

A. Yes, I do. It looks like it's up. Slide 8 from RDX-4.

Q. RDX-4, slide 8, I see. What do you show on this slide?

A. This is a cartoon depiction that is intended to help illustrate an example of how a chemist, prior to 2010, would know how to adjust strength.

Q. Okay. So I see on the left side of your cartoon depiction a bunch of red squiggly lines. What do those

represent?

A. They are intended to represent polymers, so long polymer chains.

Q. Sorry about that. I needed a lesson on how to use the pointer.

So right here, I'm circling like a blue little line. There's a few here, and a few down here. Again, I'm talking about the image on the left side of RDX-4.8.

What are those blue lines intended to indicate?

A. So on the left image, at least two of them have arrows pointing to them that say crosslinks. They are intended to provide an example of crosslinking. So it's a small bridge. Can be chemically different or chemically the same. Typically it's different than the main chain. And there are a limited number of crosslinks in the material that's represented on the left side of the slide.

Q. Okay. Now let's focus on the image or the drawing on the right side of the slide. I see red squiggly lines. Are those intended to be the same red squiggly lines in the drawing on the left?

A. Yes.

Q. And now we see many more blue lines connecting the red squiggly lines. Do you see that?

A. Yes.

Q. What are you trying to show with the more blue --

the blue lines connecting the red squiggly lines?

A. This is a cartoon depiction of increasing the crosslink density. One of the things that you can see here is how it would then constrain the movement of the long chain.

So if you think about chains being like strings, they might get tangled, but you can generally pull them apart. On the other hand, if you knot them together in certain locations, you can only pull them so far.

So what I'm trying to show on a molecular level here is how crosslinks make bridges in different ways for polymers that are in different configurations.

Q. Okay. So in the drawing on the left there's fewer crosslinks for the polymer, and then the drawing on the right there's more crosslinks, correct?

A. Yes.

Q. So which one of these two drawings shows a greater strength in the polymer, the one on the left or the one on the right?

A. For the same chemistry, the one on the right would be stronger.

Q. Is that because there's more crosslinks?

A. Yes, basically it means that there are more molecules that are able to resist the force that's applied. There's kind of more to it than that, but that is basically

how it works.

Q. Thank you.

Now prior to 2010, if a chemist wanted to have a spherical SAP that would explode on impact, would they use less or more cross lingers?

A. Well, it would depend on the rest of the system, but compared to an example that you gave me, if you did -- if it didn't explode and you wanted it to, I would reduce the crosslinking density.

Q. And if a chemist wanted to have a spherical -- let me start over.

Prior to 2010, if a chemist wanted to have a spherical SAP that would not explode on impact, would they use more crosslinkers?

A. Again, if you gave me an example and said this explodes and I don't want it to, then I would typically increase the crosslink density. Again, there are other -- there are other tools for doing it that we talked about already, but increasing the crosslink density would be a straightforward approach.

Q. Okay. Were the methods that you described for adjusting the strength of super absorbent polymers known to chemists prior to 2010?

A. Yes.

MR. COMACK: We pass the witness.

JUDGE MCNAMARA: Thank you, Mr. Comack.

CROSS-EXAMINATION

BY MR. COURTNEY:

Q. Robert Courtney from Fish & Richardson.

Good morning, Dr. Reitman.

A. Good morning.

Q. I just wanted to get a few items straight about the scope of the opinions you've been giving to the Court and the purposes for which the Commission and the ALJ should take them.

You'd agree that the ALJ and the Commission should understand that your testimony today doesn't present opinions relating to obviousness of combining elements beyond SAP, right?

A. Basically. As I said before, I'm only speaking about the polymer limitation. I have not done the claim analysis for obviousness, for example.

Q. And you're speaking about that polymer limitation about the ability of chemists, not about the reasons they might have, to make changes to an SAP prior to 2010, right?

A. Well, other than if I were part of the team where I was asked, can you do that, that would be the reason. But in terms of the reasons, if it were part of the claim analysis, then, no, because I'm not doing a claim analysis, I'm speaking to the limitation itself.

Q. And just so we're on the same page, you're not telling the Court -- you're not providing any opinions that those in this polymer space or any other space prior to 2010 would have had a reason to modify available prior art, right?

A. If you're asking me am I talking about an obviousness analysis, I'm not doing an obviousness analysis. I'm providing information to a person of ordinary skill about the SAP limitation and what would be known in terms of how readily you could manipulate the properties, the size, the behavior, and so on.

Q. Let me try it a different way.

You're testifying about the ability of chemists prior to 2010 to do certain transformations, not about the reasoning they might have to think of doing those transformations in the first place, right?

A. If you're asking me about reasoning meaning in the context of an obviousness analysis, no, I'm not providing that type of analysis.

MR. COURTNEY: No further questions. Thank you.

JUDGE MCNAMARA: Thank you, Mr. Courtney.

Mr. Taylor?

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. TAYLOR:

Q. Good morning, Ms. Reitman.

A. Hello again. How are you?
Q. Fine.
I believe your testimony was by Zoom; is that correct?
A. It was. It's nice to meet you in person.
Q. Yes, nice to meet you. I just have one or two questions about JX-1, which is the '282 patent.
So this is at JX-1 at column 4, 14 to line 16. We're talking about -- this passage is talking about crosslinking density and strength, correct?
A. It does speak about, yes, strength and crosslink density.
Q. And then there's a sentence that says, depending on the level of safety required, different SAPs with different crosslink densities may be used.
Actually, I highlighted the wrong sentence.
If we continue, it says, for example, SAPs can be constructed that would be considered highly compliant by industry standards.
A. Yes, I see that.
Q. What does that mean?
A. I don't know. The "industry standards" speak to an industry that's not defined for me. So as a polymer scientist, if someone asked me to make something more compliant or to have a certain compliance, I absolutely

could do that, but I actually do not know from the way it is described here what the industry standards are.

Q. Are there any industry standards on hydration of SAPs?

A. Well, I'm interpreting this industry standard to be related to the application. There are lots of material standards of different types. There are many standards that call out different things.

Would you ask again, so I understand your --

Q. Are there industry standards for hydration of SAPs?

A. I'm not following. What do you mean? Like how to do it?

Q. The hydration levels.

A. I don't think so. Well, I may not be understanding. So would you ask me again, please?

Q. That's fine. I mean, your answer is also an answer in a way.

A. Right, right.

So -- so SAPs can be hydrated. The degree of hydration will depend on the chemistry and the network structure as well as the hydrating fluid and the conditions. There can be specifications for different product applications that had minimum or maximum hydration levels, but I'm not sure that I've seen a definition of "hydration"

the way that I'm understanding your question.

Q. Thank you.

MR. TAYLOR: I have no further questions, Your Honor.

JUDGE MCNAMARA: Okay. Thank you.

Mr. Comack, do you have any redirect?

MR. COMACK: We don't. No further questions.

JUDGE MCNAMARA: All right. Mr. Courtney, do you have any recross?

MR. COURTNEY: No, Your Honor.

JUDGE MCNAMARA: Mr. Taylor, anything more?

MR. TAYLOR: No, Your Honor.

JUDGE MCNAMARA: Dr. Reitman, you may step down. Thank you very much.

THE WITNESS: Thank you.

MR. CORDELL: Your Honor, next we would call our technical expert. I'm wondering if it's Your Honor's preference whether we begin that before lunch or take a lunch break and then come back.

JUDGE MCNAMARA: It's still early. We will have a very long afternoon if we take lunch now, so why don't we get started.

MR. CORDELL: Sure. Your Honor, Mr. Zhang will present Dr. Kudrowitz.

MR. ZHANG: Good afternoon, Your Honor.

JUDGE MCNAMARA: Good afternoon, Mr. Zhang.
Good afternoon, Dr. Kudrowitz.

BARRY KUDROWITZ,

having been first duly sworn or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.
THE WITNESS: Barry Kudrowitz.
JUDGE MCNAMARA: Very good. Please be seated.
MR. ZHANG: May I proceed?
JUDGE MCNAMARA: Yes, thank you.

DIRECT EXAMINATION

BY MR. ZHANG:

Q. Good afternoon, Dr. Kudrowitz.
A. Good afternoon.
Q. Could you please introduce yourself?
A. Sure. My name is Barry Kudrowitz.
Q. And before we start, did you prepare slides to assist with your examination today?
A. Yes, I did.
Q. And are those slides CDX-5?
A. Yes.
Q. Turning to slide 2, could you please tell us about your educational background?
A. Sure. So I received my Bachelor of Science in

Mechanical Engineering from the University of Central Florida in Orlando. And after that I went to MIT to continue with mechanical engineering, and there I did my graduate studies, both Master's and Ph.D. in Mechanical Engineering. And in between I went to the Netherlands to study industrial design.

Q. And where do you currently work?

A. I'm currently at the University of Minnesota. When I graduated, I started as a professor of product design, and I developed the product design program at the University of Minnesota. And I was the director of that program for eleven years, and until last year, when I became the department head of the department that includes product design. And I'm a tenured, full professor.

Q. Turning to slide 3, could you tell us about your professional experience in toy and product design?

A. Sure. So my master's thesis was specifically on designing new types of projectile toys. And at the same time I was doing my master's thesis, I was also developing a class called Toy Product Design, where I teach students to take their own toy ideas from concept to functional prototype working in small teams. And I taught this for six years at MIT, and then I brought the class with me to the University of Minnesota, and I taught it there for nine years.

I also speak nationally and internationally about toys and play.

Q. Turning to slide 4, have you published any books or publications?

A. Yes. So this is my -- part of my CV, and I have a number of publications related to toys and play. Specifically, I have two book chapters on designing toys, and one of those book chapters is on designing toys using new technologies. And then I have a book coming out in two weeks that's on the slide here. That relates to play, and I talk about toy design too.

JUDGE MCNAMARA: Pardon me, Mr. Zhang. Before you continue, I do not have the deck slides.

MR. ZHANG: Apologies.

JUDGE MCNAMARA: Thank you very much.

Q. Dr. Kudrowitz, is your book on presale right now?

A. It is, yes.

Q. And what is the sales rank on Amazon?

A. Currently I think it's No. 2 for new releases in product design.

MR. ZHANG: At this time Complainants proffer Dr. Kudrowitz as an expert in the field of product design and toy design.

JUDGE MCNAMARA: Mr. Comack, are you up?

MR. COMACK: We have no objection.

JUDGE MCNAMARA: Thank you.

Then Dr. Kudrowitz is accepted as an expert on the topics upon which he has been called to testify.

Q. Moving to slide 5, what is your master's thesis about?

A. My master's thesis was specifically on trying to come up with new type of projectile technologies, so both new projectiles and ways of projecting them.

Q. And moving to slide 6, what types of objects did you investigate?

A. There are a lot of things we explored. As you can see, some of the top ideas are here. These are sketches I made from the thesis. There's foam and water. There's also popcorn and marshmallows and slime and string, for example.

And in this work we prototyped many of these concepts, and the end result -- there is a patent that came out of this for a way of projecting foam balls, and it also led to a ball shooter that was on the market for about five years.

Q. Moving to slide 7, did you investigate projecting any water-based projectiles?

A. Yeah, one of the interests that we had in this project was trying to make a way of shooting like a chunk of water through the air, so something that looked like a

bullet but it was made of water. And so we were coming up with different ways of creating these chunks.

One of them was, like, little tiny water balloons. But another way was using laminar flow, which is sort of like the fountains at the wharf here, where they, like, make the little noodles jump in the air. And so we were creating water guns that made those noodles, but then we cut them, so you could kind of make little water slugs that go through the air.

Q. Were you aware of super absorbent polymers at the time of your master's thesis?

A. I was.

Q. And did you ever try to launch super absorbent polymers as part of your work?

A. No.

Q. I'd like to switch gears and move to what you did for this investigation. What were you asked to do?

A. I was asked to review Mr. Delman's invalidity positions and opine on them.

Q. And what is your general conclusion?

A. So, in general, I feel that the patent claims are valid, and so I disagree with Mr. Delman.

Q. And before we move on, have you had any dealings with Hasbro in the past?

A. Oh, yes. So they sponsored the research lab that

I joined when I started my master's thesis, and so my thesis advisor had funding from Hasbro. And I was working on that project back in 2004.

Q. Have you had any other dealings with Hasbro since?

A. They helped out with the toy design class, but that was back at MIT, so I haven't worked with Hasbro since 2010.

Q. And have you had any dealings with Spin Master in the past?

A. The last case I was involved in, I was adverse to Spin Master.

Q. And do your dealings with Hasbro or Spin Master change your opinion in any way in this case?

A. No.

Q. All right. Turning to slide 8, could you tell us what Mr. Delman's original combinations were?

A. Yes. So originally it was sort of like a mix and match. There were Clear Spheres and Spit Balls and there was Peev and Nagayoshi. And originally Mr. Delman proposed any combinations, kind of starting with the Clear Spheres, Spit Balls and then looking to Peev and Nagayoshi, and then also starting with Peev and Nagayoshi and then looking to Clear Spheres and Spit Balls.

Q. And turning to slide 9, is that still

Mr. Delman's position?

A. As I understand it now, Mr. Delman is just starting with Peev and Nagayoshi, and then looking to Clear Spheres and Spit Balls as ammunition.

Q. So turning to slide 10, before we discuss the details of your opinion, I'd like to go through briefly each of these references.

Let's start with Clear Spheres. Could you tell us, what are Clear Spheres?

A. Clear Spheres is a science activity. Or Jelly Marbles, as it says here on the slide. So it says you experiment with them and you put them in your scientists' hands. It's for teachers. It says, have your students predict whether the marble will change shape. It's like a science-learning tool.

Q. And turning to slide 11, what is the size of Clear Spheres when they are hydrated, according to their instructions?

A. So when you hydrate them according to the instructions, they get to about 22mm, which is approximately an inch or the size of a gum ball.

Q. And turning to slide 12, what do you show here?

A. These are the instructions for how to hydrate Clear Spheres. And it says, soak the marbles for at least three hours, and then it also says, for maximum growth, five

to six hours, or leaving them overnight is better.

Q. Turning to slide 13, do the instructions for Clear Spheres teach using them as ammunition?

A. No.

Q. What do they teach them as using as?

A. They -- the instructions say that you should measure them, draw pictures of them, watch them grow and change shape, and then trace them. And then it says you can watch them shrink back down to their original size.

Q. And could the Clear Spheres instructions be found at CX-82?

A. Yes.

Q. Now turning to slide 14, are you aware of any evidence that indicates Clear Spheres were not used as ammunition?

A. Yes. So this is the COO of Spangler Science, and he was specifically asked if they were ever intended to be used as projectiles. And he said that we never marketed the Jelly Marbles or Clear Spheres as a projectile.

Q. Okay. Turning to slide 15, let's switch gears and talk about Spit Balls. What are Spit Balls?

A. Spit Balls are very similar to Jelly Marbles, but they are a bit smaller. So they grow to about 18mm instead of 22mm.

Q. And how long does that take for them to grow to

18mm?

A. So the instructions suggest four hours or overnight as best, which is very similar to the instructions for Jelly Marbles.

Q. Turning to slide 16, what does Spit Balls' packaging say about their use?

A. On both the front and the back of the packaging, in large text, it says, fun to throw, see how far you can throw them!

Q. And could the Spit Ball packaging be found at CX-58 and CX-56?

A. Yes.

Q. Turning to slide 17, what does the founder of DuneCraft say about whether DuneCraft wanted Spit Balls to be shot?

A. So Mr. Cleveland, who is the founder of DuneCraft that makes these Spit Balls, was asked if they wanted the kids to actually shoot Spit Balls out of a straw. And he said, I didn't want to encourage it, as DuneCraft. And he also agreed that there's no text telling people to shoot them out of a tube.

Q. Turning to slide 18, let's talk about the Airsoft references. Could you tell us a little bit about Peev?

A. Sure. So Peev is a patent that, I think we've talked about this already, but applies to the sporting gun

industry and is used for military simulations or Airsoft games. And it's a sensor system that gets incorporated into an Airsoft gun to make the Airsoft gun behave more like a real firearm.

Q. And looking at slide 19, could you describe the Nagayoshi reference?

A. Sure. Nagayoshi also, like Peev, is a way of making an Airsoft gun behave more like a real firearm. But the way that Nagayoshi goes about doing this is it adds -- it powers the magazine to force the ammunition up into the firing position of the Airsoft gun, and it also uses -- it also times it better so that the rounds are in line with the firing mechanism as they get fed up. And so essentially making it behave more like a real gun.

Q. Let's turn to your opinions in this matter. Turning to slide 21, do the combinations that Mr. Delman proposed actually satisfy all the elements of the asserted claims?

A. No, none of the combinations disclose "configured for," which is in claim 1 of the '282 patent. And then none of the combinations disclose "soft projectiles" of claim 1 of the '282 and the '683.

Q. All right. Let's look at slide 22. Could you tell us why the combinations would not satisfy the limitation of "ammunition configured for"?

A. Sure. So as we discussed before, the Clear Spheres and Spit Balls, when you follow their instructions, they grow to 22mm and 18mm respectively, and the standard size for Airsoft guns is 6mm. This is as per Mr. Delman's report. And so these Clear Spheres and Spit Balls just would not fit in Airsoft guns.

Q. And then turning to slide 23, could you tell us why the combinations involving Clear Spheres would not disclose the "soft projectile" limitation?

A. Yes. So we saw this in the courtroom last week, but in order to have a Clear Sphere fit into an Airsoft gun, you have to hydrate it for maybe 30 seconds to get it to 6mm, such that it actually can fit into an Airsoft gun. And at 6mm, it is not soft.

Q. Turning to slide 24, what is your understanding of Mr. Delman's motivation to combine the references?

A. So I understand that Mr. Delman's motivation to combine is entirely based on safety, specifically breakage of skin.

Q. Do you agree that a POSITA would have been motivated to change the ammunition in an Airsoft gun, like Peev or Nagayoshi, to use Clear Spheres or Spit Balls?

A. No, that would change the use of the Airsoft gun. The intent is to be like a real gun. And they are used for hunting, they are used for target practice.

Q. Turning to slide 26, what would happen if you changed the ammunition to the Airsoft gun?

A. Yeah, if you put SAP in an Airsoft gun, it sort of conflicts with the intent or the purpose of these Airsoft guns. So you can't -- you could no longer use it for hunting, they become less accurate, and then you can't use them for target practice.

Q. Moving on to slide 27, what evidence have you seen in this investigation that supports your opinion?

A. So the Daisy director of product development, Mr. Whiteis, testified, similar to what I just said here, that the air rifles, these Airsoft guns, are used for hunting and target practice. And their Splat-R-Ball products, which use the SAP ammo, are terribly inaccurate and you can't hunt with them.

Q. Now turning to slide 28, how would you respond to Mr. Delman's position that Peev and Nagayoshi were just toys and it would have been obvious to modify Airsoft specifically for children?

A. So I disagree that Peev and Nagayoshi are toys for little children. Again, Peev and Nagayoshi are patents that are about ways of taking an Airsoft gun and making it more like a real gun.

And specific to Nagayoshi calling out children, Nagayoshi says, you know, you can sub out some parts, like

metal parts or plastic parts, if you're designing these toy guns for children, but what I -- how I interpret that is talking about youth Airsoft, or teens, and not little kids and toys.

Q. Is there anything that supports your opinion there?

A. Yes. So this is from Mr. Delman's report. Classifying Airsoft guns into two categories, there's adult-focused Airsoft guns, and then there's youth Airsoft guns. And the youth Airsoft guns are under -- they shoot at a muzzle velocity of under 350 feet per second, and the adult air guns shoot at over 350 feet per second, because that's when penetration of skin happens, at that 350-feet-per-second muzzle velocity.

Q. And just for the benefit of the record, we were looking at slide 29?

A. Yes.

Q. Now turning to slide 30, what other materials did Mr. Delman cite?

A. So this is, again, from Mr. Delman's report. Not referenced in trial, but this is from The Washington Post, describing these sort of two categories of Airsoft guns. Adult Airsoft guns that are really powerful, that can break skin, and the youth line of guns that have lower than 350 feet per second, which are -- which don't break skin.

Again, highlighting that above 350 is harmful and maybe lethal.

Q. And the reference found on slide 30, that can be found at CX-584?

A. Yes.

Q. Turning to slide 31, are there any other references that were cited by Mr. Delman?

A. Yes, these are also from Mr. Delman's report, two other articles from the California Senate Office of Research and from WebMD talking about how breakage of skin happens at 350 feet per second, and when you go over that, you start -- the WebMD, at least, calls them weapons and not toys.

Q. Could the references on slide 31 be found at RX-834 and RX-835?

A. Yes.

Q. Turning to slide 32, what is problematic with Mr. Delman's modification?

A. Well, Mr. Delman says that the motivation to use SAP in the Airsoft is that there's a problem with breakage of skin, but he is referencing all of these articles that say breakage of skin happens at above 350-feet-per-second muzzle velocity. But he is not saying that we should modify those adult ones. He is saying that we should modify the youth line, or the ones that already don't break skin.

And so there's -- yeah, I guess, what's the

motivation if they already don't break skin.

Q. And turning to slide 33, have you seen any instance of a lower-powered air gun?

A. So, yeah, this is the AirStrike AS470, and this one has a muzzle velocity of 150 feet per second. And that's half, or less than half, of the velocity that breaks skin.

Q. And is this the air gun that Mr. Delman used in his video?

A. Yes, this is the Airsoft that Mr. Delman demonstrates with, putting SAP into. I also experimented -- tried using this one too.

Q. So moving to slide 34, could you tell us what is muzzle velocity, just so we're clear?

MR. COMACK: Your Honor, this slide, I don't want it to go too far, we have an objection to the bottom half of it relating to kinetic energy. This was discussed by Mr. Cordell.

Dr. Kudrowitz didn't discuss kinetic energy in his report. It's not in their prehearing brief. He didn't discuss it at his deposition. He has discussed other concepts, like mass and velocity, but not kinetic energy equals 1/2 mv-squared.

JUDGE MCNAMARA: Is that correct? It was not mentioned in the brief, it is not mentioned in

Dr. Kudrowitz' reports, not discussed?

MR. ZHANG: So what was discussed was muzzle velocity and whether it would have been obvious to decrease muzzle velocity. And during deposition, they specifically asked about the danger of these guns, and Dr. Kudrowitz answered that the danger is associated with the energy of the guns.

JUDGE MCNAMARA: Okay. But did he give, during his deposition -- or was he asked about the formula for kinetic energy?

MR. ZHANG: He was asked about momentum.

JUDGE MCNAMARA: Okay. But was he asked specifically about the formula for kinetic energy?

MR. ZHANG: He was not, but he was asked --

JUDGE MCNAMARA: Then you can stick to the questions that he was asked. But I know this came up -- actually, it was Mr. Cordell who raised the issue of kinetic energy and the formula, and I allowed some latitude with Mr. Delman, but if there is specific questioning about other aspects of force, muzzle force -- I'm sorry -- force and muzzle velocity, you can ask those.

But it doesn't prove anything one way or another whether both or either expert knows about kinetic energy, the formula for it. If they can talk about concepts, if they can talk about what they talked about during the

deposition or their expert reports, that is fine, but I am not going to let him go there.

MR. COMACK: Thank you, Your Honor.

BY MR. ZHANG:

Q. So, Dr. Kudrowitz, could you tell us, what is muzzle velocity?

A. Yeah. Muzzle velocity is the velocity or the speed of the ammunition exiting the projectile launcher.

Q. And what is the most natural way to make Airsoft guns safer?

A. By lowering the velocity. That's -- that's what they do with Airsoft guns. They have ones with lower velocity and they have ones with higher velocity.

Q. And why would lowering velocity make Airsoft guns safer?

A. When you lower the velocity, you -- well, you would lower the momentum. You also would lower energy.

Q. Why does lowering velocity -- how does -- well, let me ask this. How does velocity factor into momentum?

A. Well, the momentum of the particle is the mass times the velocity of it.

Q. And would lowering the velocity also lower the energy that the projectile is traveling at?

A. Yeah. If you lower the velocity of -- the muzzle velocity, you're lowering the energy of that projectile.

Am I allowed to say by how much or is that not --

JUDGE MCNAMARA: You have not been given, I think, any metrics.

THE WITNESS: Okay.

JUDGE MCNAMARA: Not that I heard. So I am not sure how, without metrics, you would know how one interacts with the other.

THE WITNESS: That's fine.

Q. Moving on to slide 35, what would be one way to lower the muzzle velocity?

A. Sure. Yeah, so one way of lowering muzzle velocity is by -- this is according to Mr. Delman's testimony -- just changing out the spring and using a weaker spring.

Q. Moving to slide 36, what's another simple way to lower muzzle velocity?

A. Also from Mr. Delman's testimony, you could use a smaller compression chamber.

Q. And would either of these changes require changing the ammunition to the Airsoft?

A. No.

Q. Moving to slide 37, are there any other reasons why the combinations proposed by Mr. Delman would not be obvious?

A. Yes. So I tried putting SAP into an assortment

of different Airsoft guns, and I did not have success. So I first tried -- well, using the top -- some of the guns here, so the top row and the one on the bottom right, these are Airsoft guns that have that magazine clip that you see in Peev and Nagayoshi, where you kind of put the ammo in the clip and then you put it up into the gun.

And with the SAP, I wasn't able to get any of the SAP to stay in the clip. They just kind of bounce out. I was able to kind of rig it so I could get one to stay in the clip, but then it just kind of jams or maybe explodes inside -- I can't see -- but I wasn't able to get any to come out of these kind of clip-style ones.

Regarding the AirStrike, the one on the bottom left, I think I testified to this already, but the only way to get Clear Spheres to launch out of that was when you hydrate it for about 30 seconds, and then at that point it's still hard. And I was able to get it to fire the Clear Sphere when it was hard, but it also goes only about ten feet or so.

Regarding Spit Balls, it just gums up inside, and it kind of sprays out sometimes. Sometimes it just doesn't come out.

Q. And just so we're clear, what's shown on slide 37 are actual physical air guns that you yourself operated?

A. Yes.

Q. Could they be found at CPX-155, CPX-80, CPX-85, CPX-82, and CPX-83?

A. Yes.

Q. Moving on to slide 38, what is shown here?

A. This is my experiment at Kirkland, where I was trying to get a Spit Ball that was hydrated to 6mm to shoot out of the Daisy AirStrike. And most of them would jam or gum up inside. You could see on the figure on the left, it's sort of stuck in the barrel there.

The ones that did come out sort of just sprayed out in little pieces. You can see one of the stills from the video here.

Q. And turning to slide 39, did you -- I want to switch gears and talk about objective indicia of non-obviousness.

Did you consider that as part of your analysis?

A. Yes.

Q. And what did you observe, at a high level?

A. At a high level, there was success from The Maya Group products, and praise. There was copying of The Maya Group products. And then there's also success of the Splat-R-Ball line.

Q. Turning to slide 40, let's talk about The Maya Group products. What are The Maya Group products?

A. So there's the Xploderz and the XBlaster. Well,

what you see on the screen are The Maya Group products, the blasters and ammunition.

Q. What are they, at a high level?

A. Oh, at a high level, they are projectile launchers that shoot super absorbent polymer.

Q. And what did you do to analyze The Maya Group products?

A. Well, I tried all of them, and I shot the ammo with them. I opened all of these up and looked at the insides of them. I put some of them back together.

Q. And so what's depicted here at slide 40, you've had a chance to operate each one of these?

A. Yes.

Q. Moving on to slide 41, do you have any -- did you form any opinions about whether The Maya Group products practice the asserted claims?

A. Yes, they practice the asserted claims. There are a few of the -- a few of those blasters that don't practice claim 14 of the '683, but, in general, they all practice the asserted claims.

Q. And does Mr. Delman dispute whether The Maya Group products practice the asserted claims?

A. No.

Q. Could you tell us -- I want to go back to slide 41. Sorry. 40.

Could you tell us about the firing mechanisms of The Maya Group products depicted here?

A. Sure. So they all have a very similar firing mechanism inside. They all use the compression chamber with a spring and a piston, and that is connected to a smaller-diameter tube. They have feed chambers that feed the ammunition into a firing position. And all of them have those same components inside.

Q. Now turning to slide 42, what objective indicia of non-obviousness did you observe with respect to The Maya Group products?

A. Yeah, so there is praise of these products and then there was also commercial success.

Q. So let's look at praise first. And on slide 43, what do you show here?

A. This is an article from The Wall Street Journal praising the Xploderz XGround Pounder Blaster with an astonishing 100-foot range, again, talking about the super absorbent polymers and the mechanism pulling and releasing a spring-loaded lever.

So in this case, that distance is a result of that as-claimed firing mechanism using the as-claimed ammunition. And they also talk a little bit in here about the actual mechanism with the spring-loaded piston.

Q. And just so we're clear, how did the statements

with an astounding 100-foot range and you pull and release a spring-loaded lever relate to the asserted claims?

A. Yes, so the asserted claims relate to a piston that's spring-loaded that compresses air and transfers it to a smaller-diameter tube, which launches the SAP. And the range that you can get here is directly a result of those asserted claim components.

Q. And when you're referring to those asserted claim elements, you're referring to claims 19 and 20 of the '282 patent?

A. Yes.

Q. Moving on to slide 44, what do you show here?

A. This is a small excerpt from Popular Science. Also calling out the range of 100 feet, and saying that this shoots ammo farther than all other toy guns on the market.

Q. And how do -- how does the statement with a range of 100 feet and shoots ammo farther than any other toy gun relate to the asserted claims?

A. So this, again, is talking about the asserted -- the ammunition as described, being the SAP ammo, and the blaster as described by these claims being able to take the SAP and use that mechanism to launch it 100 feet, in this case, making it shoot farther than all of the other toys that are on the market.

Q. Let's move on to slide 45 and talk about some of

the awards that The Maya Group products received. What do you show here?

A. This is the TOTY Awards, the Toy of the Year Awards, that is organized by the Toy Industry Association every year. And the Xploderz -- or the Xploderz XBlaster 200 was one of the finalists in 2012 for the Outdoor Toy of the Year. This is sort of the biggest toy award thing in the U.S., and there's multiple categories for the TOTYs.

I was a judge for the TOTY Awards for like six years, I think, in a number of the categories, including outdoor toys. I was actually a judge this year for the Outdoor Toy of the Year in 2012 also.

Q. And then moving on to slide 46, what was the criteria that's used to judge toys in the TOTY Awards?

A. So this is what the TIA gives all of the judges. To be clear here, the judges are given a long list of applicants who applied for this award, and, like, submission materials, and the judges get it down to, like, seven finalists, which are then presented to the public for the final vote.

So all of the judges are told to rate whatever is in their category on the same four criteria regardless of what category it's in. So those are creativity, originality, innovation, design and promotion, excellence of product, and marketplace acceptance.

Q. In your opinion how does The Maya Group product's TOTY nomination relate to the asserted claims?

A. Well, in this case the Xploderz -- I mean, my opinion -- but the Xploderz was a -- it was a new thing that you can shoot. It was a new type of blaster that was on the market, and a blaster that shot SAP ammo, and that was unlike the other blasters that were on the market at the time. So that strongly relates to the first criteria here of creativity and innovation.

Q. Now turning to slide 47, what award do you show here?

A. This is the Best Overall Toy, Toys "R" Us. Specifically, this is Canada Toys "R" Us. There's some highlighting here, but essentially the store directors of all the Toys "R" Us stores in Canada look at all of the new products that are coming in and then they vote on Best Overall Toy. And so the Xploderz line won the Best Overall Toy from the Canadian Toys "R" Us store directors.

Q. What is significant about an award given by Toys "R" Us?

A. Well, at the time, it was the big -- quote the jingle here -- but it was the biggest toy store there was, and so these store directors should know -- they should be very familiar with toys that were on the market here. And they are seeing all of the new stuff, and they should have a

pretty good sense of what is coming onto the market and -- yeah.

Q. On slide 47 you have underlined a unique and safe firing and ammo system. How does that relate to the asserted claims?

A. Sure. So in this, you know, relatively short blurb here, it's calling out specifically the firing ammo system. So the ammo plus the blaster. It also calls out that it's patented technology. It speaks to 70 rounds per second. And this is related to being able to have a feed chamber that can hold that large amount of ammo and then feed it into the blaster.

Again, it also talks about the firing distance, which is directly related to that firing mechanism that can -- with the spring, the air compression chamber, the smaller-diameter tube -- that can get that SAP to reach that distance.

Again, also the kids love Xploderz because they can shoot further and carry more ammo, and carrying more ammo relates to having a feed chamber.

Q. How would you respond to criticism that the claims do not specifically recite a particular distance or a particular ammo capacity?

A. Yeah, I think -- I mean, the only way to get the distance is through having a firing mechanism. And so the

firing mechanism -- I mean, we don't usually talk in claim terms in advertisements like this. So the way that that distance is reached is by using that firing mechanism as claimed with the ammunition as claimed. And the way that you have the rapid fire or the lots of ammo is related to having a feed chamber that can hold lots of ammo.

Q. And moving on to slide 48, what award do you show here?

A. This is the Best -- this is actually on the bottom of the slide -- the Best New Toy of 2011 by the British Toy and Hobby Association during the London Toy Fair. And this was named Best New Toy in 2011 by the British group.

Q. In your opinion how does this award relate to the asserted claims?

A. So, again, I highlighted some things here, but they are talking about this new firing system, so the blaster plus the ammo, and that you can get a lot of distance with this and more ammo with this. So, again, talking about the firing mechanism itself as well as the ammunition and having a feed chamber.

It also talks about -- it specifically calls out the ammo clip that can hold 70 rounds. That's the feed chamber that can feed into the blaster.

Q. Now let's switch gears and talk about commercial

success of The Maya Group products.

Turning to slide 49, what did you observe in terms of commercial success?

A. So Ron Brawer, this is the founder of The Maya Group, and he was asked, you know, how did this perform at Target, and he said it was a huge hit. And he said it was the No. 1 selling toy for boys at Target in the spring launch.

MR. ZHANG: Your Honor, before we go on, we're going to touch upon some confidential information that's third party.

JUDGE MCNAMARA: All right.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

JUDGE MCNAMARA: Mr. Comack? Before you start, am I going to have deck slides for this?

MR. COMACK: I don't have any slides.

JUDGE MCNAMARA: Okay. That's fine. Thank you.

MR. COMACK: I may use some of the slides that you've seen before.

CROSS EXAMINATION

BY MR. COMACK:

Q. Good afternoon, Dr. Kudrowitz.

A. Good afternoon.

Q. It's good to see you again.

A. Nice seeing you.

Q. Okay. Do you recall just before the break you were discussing industry praise?

A. Yes.

Q. And if we could pull up slide CDX-5C at 43.

Do you recall discussing this Wall Street Journal article?

A. Yes.

Q. And you're relying on this article to show industry praise of the Xploderz products, correct?

A. Correct.

Q. And you've underlined some language in red.

"With an astounding 100-foot range, the XGround Pounder shoots squishy blue gel balls that break apart on impact." Do you see that?

A. Yes.

Q. And you're pointing to the praise as being to the "astounding 100-foot range," correct?

A. Yes.

Q. Range is not in any asserted claims of the asserted patents, is it.

A. It does not say range.

Q. And that's because it doesn't require range, right?

A. Yeah, there's no requirement of range.

Q. Range is unclaimed, correct?

A. I think that the mechanism allows for that astounding range.

Q. Dr. Kudrowitz, I'm asking you about the claims. Is there range in the claims?

A. No.

Q. Okay. Now The Wall Street Journal article that you cite also notes that SAP balls are safer to scatter around your backyard. Do you see that? It's the third line. They're safer to scatter around your backyard (they end up watering the grass), right?

A. Yeah, I see that.

Q. Spit Balls Clear Spheres were also safe to scatter around your backyard, correct?
A. What else did you say?
Q. I can't hear you.
A. I'm sorry. What else did you say was safe at the time?
Q. I said Spit Balls and Clear Spheres were also safe to scatter around your backyard, correct?
A. I guess so. I don't know if people were scattering them around backyards but --
Q. Not my question. I'm asking you if they were safe to scatter around the backyard.
A. Yeah, the same way these would be, sure.
Q. The same way that the ammunition from the Xploderz would be safe to scatter around the backyard, right?
A. Sure.
Q. Now the article also notes that the SAP balls from the Xploderz product breaks apart on impact, correct?
A. What line are you on? Oh, on the top. Yes, I see that.
Q. I hope you don't mind my asking. If you could just move a little closer to the microphone. It's hard to hear you.
A. Okay. Sure.

Q. Thank you.
A. Yeah.
Q. Let's put up RX-2.
This is the back of the packaging for the Spit Balls product, correct?
A. Correct.
Q. And it says that the Spit Ball SAP breaks apart on impact, correct? It will explode on target. It's in the first paragraph, the third line from the bottom, plus only DuneCraft's reusable can bounce and then explode on target. Do you see that?
A. I see that.
Q. So isn't the packaging indicating that the Spit Balls break apart on impact?
A. Yes, that's what that sounds like.
Q. Let's go back to slide CDX-5C at 43.
Now the article indicates that to fire -- let me back up.
The article says that, despite its gun-like shape, third line from the bottom, despite its gun-like shape, the XGround Pounder has no trigger. Do you see that?
A. Yes.
Q. Is that praise?
A. I think so. I think it's highlighting that it has a different way of shooting, which is unlike a gun.

Q. Now is that referring to what you've called the power arm in this case?

A. Did you say "power arm"?

Q. Yeah. Let me back up. If you read the next sentence, it says, according to the manufacturer, toys that shoot small objects can't be used -- can't use stored energy for safety reasons, so to fire, you pull and release the spring-loaded lever. Do you see that?

A. Yes.

Q. Do you recall this morning talking about the spring-loaded lever being the firing mechanism?

A. Yeah, one of the components of the firing mechanism.

Q. And that's the firing mechanism in the Xploderz product this article is talking about, right?

A. That's part of the firing mechanism that it's talking about.

Q. And have you called that the power arm, the pull and release spring-loaded lever?

A. I don't recall calling it a power arm.

Q. Okay. Is this a piston that you pull back on and then release to fire?

A. Yeah, there is a piston that you pull back, and that is what fires.

Q. Okay. Let's go to slide CDX-SC44. This is

referring to CDX-1408. It's a Popular Science article from 2012 that you've also relied on to support your argument for praise, correct?

A. Correct.

Q. Are you relying on this article -- I'm sorry. Let me start over.

The article explains that the Xploderz X2 had a range of 100 feet and the Retaliator 2000 shot farther than all other guns.

Do you see that?

A. I see that.

Q. Now, again, Dr. Kudrowitz, is range and distance in any asserted claims?

A. No, not explicitly.

Q. Those are unclaimed features, correct?

A. Well, the distance -- you get the distance by having the mechanism described in the claims.

Q. That's not what I asked you. I asked you, is the distance in the claims?

A. Specific distance is not in the claims.

Q. In fact, no distance is in the asserted claims, correct?

A. A specific distance does not appear in the claims.

Q. Not even a general distance is in the claims,

right?

A. I don't know if the term "distance" appears in the claims.

Q. Would you like to see the claims?

A. Sure, if you want.

Q. Let's pull up JX-1. We'll start with claim 1. Just put all the claims up on the screen.

Let's start with claim 1. Do you see a distance claim there?

A. Like the word "distance" is not there; is that what you're asking?

Q. I'm asking if distance is claimed. Do you see where the claims recite distance?

A. Well, I mean, in order to project something, it has to go somewhere. That's a projectile, right?

Q. I didn't ask you that. Do you see the word "distance"?

A. No, the word "distance" is not there.

Q. And that's because it's not claimed, right?

A. The word "distance" is not in the claims.

Q. Right. Okay. Now the word "range" is also not claimed in claim 1, correct?

A. Correct.

Q. All right. Let's go to claim 8.

Do you see the word "distance" recited in

claim -- the first part of claim 8 that's displayed here?

A. No.

Q. Let's go to the second part of claim 8.

And do you see the word "distance" recited anywhere in claim 8?

A. The word "distance" does not appear in claim 8.

Q. Claim 8 does not claim distance, correct?

A. Again, it still talks about a projectile launcher.

Q. Yeah.

A. In order to project something there needs to be distance.

Q. Right, but distance is unclaimed here; isn't that right?

A. Correct, the word "distance" is not in the claim.

Q. Now let me ask you a question. You didn't measure the distance that the accused products shoot their SAP for any of your infringement analysis, did you?

A. I don't recall.

Q. You don't know if you did that?

A. If I measured all of the distances?

Q. Did you do it for the Maya Xploderz products, did you measure the distance that they shoot?

A. Sort of. We shot it -- I shot it down hallways and then sort of estimated the distance, yeah.

Q. You didn't measure the distance for the accused products, does that mean they don't infringe?

A. I don't understand your question.

Q. Well, I think what you're getting at is that distance is implied in all the asserted claims; isn't that right?

A. Distance is, like, that something goes a distance is implied by it being a launcher.

Q. So to show infringement, do you have to show that the SAP flies a certain distance with respect to the asserted claims?

A. If the SAP doesn't go anywhere at all, then it's not projecting.

Q. Not what I asked you. Is distance claimed in the claims?

A. The word "distance" is not in the claims.

Q. Do the claims require distance?

A. Do the claims require a distance... I mean, I guess this sounds like if it -- if it doesn't go anywhere, it's not projecting.

Q. I see. So but let's go back to the article that you cite. We'll go back to that slide.

Do the claims require an astounding 100-foot range in the asserted claims I'm asking you about?

A. The asserted claims don't give a specific range.

Q. And the asserted claims don't talk about how many feet the projectiles must travel, correct?
A. Correct.
Q. Let's put up claim 19 of the '282 patent, JX-1.
Does this claim recite distance?
A. The word "distance" does not appear in claim 19.
Q. And that's because this asserted claim doesn't require a distance, correct?
A. This asserted claim describes the way you get distance of a projectile.
Q. Is this a method claim?
A. It's just describing the features here.
Q. It's describing components, right?
A. It's describing components.
Q. It's not describing or requiring a distance that the super absorbent polymer has to travel when it's launched, is it.
A. It doesn't give a specific distance.
Q. So you agree that the claims do not require a specific distance, correct?
A. Again, I think it has to have some distance or else it's not a projectile launcher.
Q. Okay. Now you understand that Spit Balls -- let me withdraw that.
So your position is you're interpreting this

claim to require that the claims travel some distance but not more distance than any other projectile launcher that's out there, right?

A. Can you say that again?

Q. Sure. Is it your position -- I just want to understand your position. You told me that these claims, the asserted claims, require that a projectile be launched so it has to go some distance, correct?

A. That's a projectile, yes.

Q. Okay. But you're not saying that these claims require that the ammunition that's launched from claim 19 or 20 or 1 or 8 travel a greater distance than any other known launcher that's out there, correct?

A. No, I'm not saying that's required by the claim, but I'm saying that the mechanism describing the claim is what allowed the Xploderz to launch ammunition further than what was on the market.

Q. Let's go to -- back to the article. You underline the astounding 100-foot range as being the praise, right?

A. That's part of it, yes.

Q. Do you understand that the law says that, if an unclaimed feature is the reason for success, then it doesn't count and there's no nexus?

A. I hear what you're saying.

Q. Do you agree?
A. With the law?
Q. Yeah.
A. Sure.
Q. Let's go back to the -- let's pull up JX-2, the '683 patent. Let's go to claim 1.
Does this claim recite any distance that the projectile needs to travel?
A. It doesn't specifically say a distance.
Q. Go to claim 5.
Does claim 5 of the '683 patent recite any distance that the projectile needs to travel?
A. No.
Q. Let's go to claim 14.
Does claim 14 require any distance that the projectile has to travel?
A. It doesn't specify a distance.
Q. Does it require it?
A. Does it require a distance? I mean, again, the same comment on being a projectile launcher.
Q. I'm sorry. I can't hear you.
A. This also says that it has a projectile launcher that fires something, so some distance is going to be produced, but it doesn't say a specific distance.
Q. Well, the praise that we saw in that Wall Street

article was due to the Xploderz 100-foot distance, correct?

A. Yes, and the way that distance was achieved is through the mechanism described in the claims.

Q. Right, but the praise was because of the distance of 100 feet that is not in the claims, correct?

A. Yeah, I don't -- some of these articles, they don't -- they're not going to start talking about claim language in a short blurb, but that's -- the 100 feet speaks to the mechanism.

Q. So you believe that it's the mechanism that's the reason for the success, the firing mechanism.

A. With the ammo.

Q. With the ammo. Earlier -- can we go back to -- give me a minute.

Let's pull up slide CDX-5C.40.

These are all the Maya -- the Xploderz products that you see practice the asserted claims, correct?

A. Correct.

Q. And earlier you testified that they all have a piston, a spring, an air compression chamber, a feed chamber. Do you recall that?

A. Yes.

Q. And you actually provided your opinions in this case that these products, these Xploderz, practice all of the asserted claims, right?

A. With the exception for a few of the first generation don't practice claim 14.

Q. Okay. Now doesn't Peev and Nagayoshi also disclose the same firing mechanism that's in these Xploderz products you list in your slide 40?

A. Peev and Nagayoshi are not describing SAP ammunition.

Q. Okay. Fair enough. But these products, these Xploderz, have a spring, correct?

A. Correct.

Q. They have an air compression chamber, correct?

A. Yes.

Q. They have a small-diameter tube, a piston, a feed chamber, correct?

A. Correct.

Q. Okay. And, in fact, Hasbro has stipulated that Peev and Nagayoshi disclose all the launcher limitations of the asserted claims; isn't that right?

A. If that's what they stipulated, that sounds right.

Q. I have a stipulation here that I can read to you, if you like.

A. Sure.

Q. Okay. This is the -- I'll put it on the ELMO. Good idea.

He is going to put the document up. I didn't realize he had it.

Take a look at paragraph 1. It says, for purposes of this Investigation only, Complainants stipulate that JP 2006-234191 Nagayoshi is prior art under the pre-AIA 35 U.S.C. º 102(b). Do you see that?

A. Yes.

Q. And then it says, for purposes of this investigation only, Complainants stipulate that Nagayoshi discloses a projectile launcher as required by the '282 patent, claims 8, 19, and 20, and a projectile launcher for launching ammunition in free flight as required by the '683 patent, claims 1, 5, and 14.

Do you see that?

A. Yes.

Q. And if we go to the next page, why don't you go ahead and just read each paragraph to yourself and tell me if you understand that Hasbro has stipulated that Peev and Nagayoshi disclose all the launcher limitations of the asserted claims of the '282 patent and the '683 patent.

A. Okay. I've read that.

Q. Do you understand that Hasbro has stipulated that Peev and Nagayoshi disclose all of the launcher limitations of the asserted patents?

A. Yes.

Q. And the Xploderz product, which came later, also discloses all the limitations of the asserted claims, correct?

A. Correct.

Q. So the launching mechanism was known in the prior art; isn't that correct? The launching mechanism of the Xploderz product I'm talking about.

A. Yes.

Q. So the success of the Maya product can't be due to those features that are in the prior art, can it, the firing mechanism?

A. I think the success is from having a blaster that uses those firing mechanisms to shoot SAP, which wasn't shot before.

Q. Right. So the success was due to the use of SAP, correct?

A. Using SAP in a firing mechanism like Peev and Nagayoshi.

Q. So really the distinguishing feature of the asserted claims was the use of SAP in the ammunition; isn't that right?

A. I think it's using SAP in a blaster like the ones described in the claims. That is the essence of the invention.

Q. Like the one described in Peev and Nagayoshi?

A. Well, they practice some of the claim language.
Q. I'm sorry. Could we go back to, I believe it was slide 44, CDX-44.
Okay. I have your slide back up, and it says getting shot won't hurt. They disintegrate upon contact. Do you see that?
A. Yes.
Q. And that's talking about the ammunition shot out of the Xploderz product doesn't hurt the person because they explode, the SAP explodes and disintegrates on contact, correct?
A. That's what this says.
Q. And, as you pointed out before, the SAP Spit Balls also explode on contact, correct?
A. Correct.
Q. Let's go to slide CDX-5C.47.
Do you recall discussing the Xploderz blasters wins the Best Overall Toy at the Toys "R" Us show?
A. Yes.
Q. And you're relying on this award to show praise by others, correct?
A. Yes.
Q. Okay.
A. Well, one of other -- one of many slides.
Q. One of many slides. You have other awards as

well, right?

A. Correct.

Q. This article that you cite doesn't say why the Xploderz product was chosen as the Best Overall Toy item at the Toys "R" Us show, correct?

A. It doesn't say how the Toys "R" Us store directors chose it.

Q. It doesn't give a reason why the Xploderz won this award from Toys "R" Us, correct?

A. Are you asking if I know what the store directors were looking for?

Q. We'll get there, but right now I'm asking you if this article discloses the reason why the Xploderz product won Best Overall Toy.

A. This -- so I don't know what the judges were looking for, but this article talks about providing an exciting safe alternative for kids, and then it goes into some details about how it works.

Q. Was the author of this article a judge for the Toys "R" Us Best Toy Award?

A. I don't know.

Q. Did the author talk to any of the judges from the Best Toy Award?

A. I don't know.

Q. This indicates that it was the choice of all Toys

"R" Us department -- I'm sorry -- Toys "R" Us store directors across the country, and it's talking about Canada, right?

A. Yes.

Q. You didn't speak to even one director from Toys "R" Us to ask them why Xploderz won this award, did you?

A. I did not speak to these directors.

Q. So you're just speculating as to why the Xploderz product won the award?

A. This is the evidence I have and that's what I'm --

Q. I'm sorry. Go ahead.

A. I'm just going on the limited material I have to work with here.

Q. Right. But you don't have any facts or data to support your opinion that this shows awards and praise, correct?

A. Well, this was published, and they did win the award.

Q. I'm sorry. That's a good point. Let me ask the question again.

You don't have any facts or data that support your opinion that this award creates a nexus to the asserted claims of the asserted patents, correct?

A. Well, what this article is, let's say,

celebrating about the product is describing some of the claim language, and it's tying that to winning the award.

Q. The author from Web Newswire you say is doing that, right?

A. Whoever authored this is describing some of the elements of the claims and also announcing that it won this award.

Q. Now this article says that the Xploderz line features a unique safe firing and ammo system using hydrated rounds that burst upon impact. Do you see that?

A. Yes.

Q. And as we talked about before, the Spit Balls were hydrated rounds that also burst on impact as we saw in RX-2, correct?

A. Yes.

Q. And we also saw that the firing system that -- Hasbro has stipulated that the firing system in Peev and Nagayoshi meet all the claim elements, correct?

A. All of the ones stipulated.

Q. Right. Now let's look at another quote. This article says, "Kids love Xploderz because they shoot further and carry more ammo. Parents love Xploderz because they are completely safe."

Do you see that?

A. I see that.

Q. Okay. So, again, shooting further is not a claim requirement, correct, any asserted claim?

A. Those words do not appear in the claims.

Q. And that's because the claims don't require shooting further.

A. The claims describe the mechanism that allows you to shoot SAP far.

Q. Further than what?

A. That part I --

Q. Shooting further is not a claimed feature, correct?

A. Shooting further than something else is not a claimed feature.

Q. Do any asserted claims require that the launcher hold more ammo?

A. The claims discuss a feed chamber, which is what allows you to hold lots of ammo.

Q. Do the claims specify more ammo, the asserted claims?

A. More ammo -- well, in a sense, comparing it to one single ammunition, a feed chamber allows you to hold more than one bullet.

Q. Let's put up claim 5 of the '683 patent, JX-2.

Here we have a system of claim 1 wherein the projectile launcher includes a feed chamber for loading the

soft projectiles within the projectile launcher. Do you see that?

A. Yes.

Q. Does this say that the feed chamber has to hold more ammo?

A. It describes that it has to have the feed chamber.

Q. Does it say how big the feed chamber is?

A. It doesn't specify how big --

Q. Sorry about that. Does it tell you if it holds more than one SAP pellet?

A. I think that's just inherent to a feed chamber, that it has feed.

Q. Did you measure the quantity of ammunition that the accused products PTT hold when you did your infringement analysis?

A. I didn't measure how many ammunition each product hold.

Q. If I want to know whether I infringe this claim or not, how many -- like, what's the safe zone? How many SAP pellets can I put in a feed chamber and not infringe?

A. I think it just says that it has a feed chamber.

Q. Right. It doesn't specify more ammo, right?

A. Well, the way you get more ammo is that you have a chamber that holds feed.

Q. So you're reading in more ammo into this claim; is that right?

A. No, I'm just -- that's what a feed chamber is. It holds ammo.

Q. Right. The feed chamber doesn't have to hold more than one piece of ammo, does it?

A. I don't know why you would have a feed chamber if you're only going to have one ammo.

Q. To feed the ammo into the firing position.

A. I guess, if you only put one ammo into it or many, it just describes the feed chamber.

Q. Didn't the inventor specify how much ammo the feed chamber was going to hold?

A. I mean, I've reviewed some patents. They don't usually say exactly how many pieces of feed or anything something has to hold.

Q. So let's go back to the article that we had up in the CDX-547.

When it says "more ammo," more ammo relative to what?

A. I think that could be interpreted two ways.

Q. Which ways?

A. Comparing it to other blasters on the market, like NERF, but it could also be interpreted as if it carries -- you carry all of the ammo in the blaster in

addition to what's in the barrel.

Q. So you don't even know what this language means. It's not clear to you.

A. Well, in both cases it says it has a lot of ammo.

Q. Do the claims require that the feed chamber or that the asserted launchers have more ammo than NERF?

A. I'm sorry. Can you repeat that?

Q. Yes. Do the the asserted claims require that the launchers hold more ammo than NERF products?

A. It's not a claimed feature that they hold more ammo than NERF products.

Q. Is it a claimed feature that they hold a lot of ammo?

A. I think it's a claimed feature that it has a feed chamber, which means it holds ammo.

Q. Dr. Kudrowitz, please answer my question. I'm asking you if it holds -- if the asserted claims require that the launcher hold a lot of ammo. I think those were the words you used. So I want to know if you believe the asserted claims require that. It's a simple yes or no.

JUDGE MCNAMARA: What's the objection?

MR. ZHANG: I think it's argumentative. He has already answered this question multiple times.

JUDGE MCNAMARA: I don't think in this instance it is not. He is just looking for a yes or no.

And I think, Dr. Kudrowitz, you really do need to answer yes or no. There's specific language that Mr. Comack has asked you and whether or not it's included in the claim language essentially.

A. Sure. Can you please state your question again?

Q. Sure. Do the asserted claims, the asserted patents, require that the claim launchers hold a lot of ammo?

A. It does not say those words.

Q. Do they require it?

A. Well, it requires a feed chamber which holds multiple ammo. I don't think it says anything about a lot.

Q. It doesn't say any number of ammo that it holds, correct?

A. It does not have -- sorry. What was your question?

Q. The asserted claims don't require any specific number of ammo that the launcher holds, correct?

A. It does not require a specific number of ammo.

Q. Let's go to slide CDX-5C, I think it's 48. I can't read my handwriting. This is the one.

This is an article that you cite to indicate praise by others of the Xploderz product, correct?

A. Correct.

Q. And this is naming an award that the Xploderz

product won from the British Toy and Hobby Association in 2011, correct?

A. Correct.

Q. Do you know who wrote this article?

A. No.

Q. Go to the next page, please. I'm sorry. I made a mistake.

Could we pull up the article itself? It's RX-3299.

Let's stop there. Is this the same article that you show in the slide that we just looked at?

A. I think so.

Q. Could we go to the second page of this? If you could zoom in at the bottom.

Do you see where it says, "Source: Maya Group"?

A. Yes.

Q. Isn't this a press release by The Maya Group?

A. It does look like they wrote this and it was published.

Q. So let's go back to the first page. Do you understand that to show praise it has to be praise by others, correct, for it to apply to the commercial success or -- I'm sorry. Let me withdraw that.

You understand there has to be praise by others in order for this to count as a secondary consideration of

non-obviousness, correct?

A. Yes.

Q. And this is not -- this article is not praise by others; this was written by Maya, correct?

A. I mean, it was still published by someone else, though, correct?

Q. Yeah, right, but it was written by Maya.

A. That's true.

Q. Right. And so Maya was praising itself; isn't that correct?

A. It looks like they were. They drafted something that was published.

Q. So we can forget about this article. It doesn't count as praise by others. You agree with that, right?

A. I mean, the publisher still published it.

Q. That's not what I asked you. I know the publishers published it. All publishers can publish, but what I'm asking you is if this article indicates praise by others, what's written in the article.

A. I see what you're saying. Well, I don't know.

Q. You don't know. Now this article does talk about an award that the Xploderz product won, correct?

A. Yes.

Q. You don't know the criteria for why they won the award, do you. The article doesn't indicate that, correct?

A. I don't know the criteria.
Q. If we can go to slide CDX-5C.45, please.
Here you've -- you rely on the TOTY Award of 2012 as showing praise by others, correct?
A. Correct.
Q. And you were one of the many judges from the TOTY Awards, correct?
A. Correct.
Q. Let's pull up RX-3297.
This is the article that you've cited to show there's been praise -- I'm sorry -- that there was this TOTY Award that happened in 2012, correct?
A. Correct.
Q. All right. If we scroll down a bit, we'll see it says the article lists that 67 products from 51 companies were selected from 600 nominees for the TOTY Awards. Do you see that?
A. I see that.
Q. And the article indicates that there were nomination committees, in the same paragraph, who selected the finalists for the TOTY Awards. Do you see that?
A. Yes.
Q. And those committees consisted of academics, like yourself, journalists, toy experts, play therapists, toy inventors, and designers, and retailers. Do you see that?

A. Yes.
Q. You did not meet or confer with these other committee members when you voted in the process for the TOTY Award, correct?
A. No.
Q. In fact, the voting for the TOTY was done online, right?
A. Correct.
Q. And it was all anonymous. You don't know what the other judges voted for and what they didn't, correct?
A. Correct.
Q. And you don't know the reasons that they voted for each toy; is that correct?
A. I only know the four categories that we were given.
Q. But you don't know what categories the other judges considered, correct?
A. Correct.
Q. And I'm talking about for the Xploderz product, correct?
A. Correct.
Q. Okay. Is it your understanding that the finalists for the TOTY were selected just based on what products got the most votes?
A. Which round are we talking about?

Q. I'm sorry?
A. Which round -- are you talking about the final round or the expert round?
Q. The ones who became the finalists.
A. Oh, sorry. What was your question?
Q. The finalists were selected based on what products got the most voting, correct?
A. Correct.
Q. Okay. And, again, you don't know why the Xploderz was selected by the other judges as a TOTY finalist, correct?
A. I only know the categories that as a judge we were supposed to look at.
Q. Right, but you don't know how the judges evaluated those categories with respect to the TOTY, correct? I'm sorry, with respect to the Xploderz.
A. Sure, I don't know what they were -- how they prioritized things.
Q. In fact, you don't even remember which products you voted for as a TOTY finalist, correct?
A. I think I testified that I think I voted for it, but I can't tell you with 100 percent because it was 12 years ago.
Q. Let's pull up RX-102C, and let's go to page --
JUDGE MCNAMARA: Before you go on, this is the

deposition transcript?

MR. COMACK: I'm sorry. I should have done that.

JUDGE MCNAMARA: And the date, please.

Q. This is the deposition transcript, Dr. Kudrowitz, from when you had your deposition in this case. Do you recall your deposition?

A. Yes.

Q. And that deposition -- if you can just go to the cover page, this was on January 27th, 2023. Do you see that?

A. Yes.

Q. And do you see the case caption on the cover page here for this case?

A. Yes.

Q. 337-TA-1325, correct?

A. Correct.

Q. It says, "In the Matter of Certain Soft Projectile Launching Devices, Components Thereof, Ammunition and Product Containing the Same," correct?

A. Correct.

Q. We're going to go to page 301 of your transcript. Let's look at lines -- we're going to go through lines 2 to 15.

Do you recall being asked -- I'm actually going to start at line 10.

And it says, you were asked: And so don't you know whether you voted for the Xploderz XBlaster 200 by The Maya Group as being an Outdoor Toy of the Year?

You answered -- do you recall that question?

A. I do.

Q. And then you answered: I can't tell. I can't tell you for certain if I voted -- if I ranked -- where I ranked it in the -- or if I ranked it in there.

Do you see that?

A. I see that.

Q. Was that testimony truthful that you provided?

A. That's true. And then later I said I think I voted for it, but I can't tell you 100 percent. That's on the next page.

Q. All right. Let's go back to the slide. Let's go to your slide CPX-5C.50. I have the wrong one written down.

MR. TAYLOR: Your Honor, this is confidential information.

JUDGE MCNAMARA: Yes, it is. Please take that down.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

JUDGE MCNAMARA: Thank you, Mr. Taylor.

MR. COMACK: Thank you.

BY MR. COMACK:

Q. Can we pull up slide 49?

Earlier do you recall testifying about Mr. Brawer's testimony about the Xploderz product?

A. Yes.

Q. And he was an executive at The Maya Group, correct?

A. Correct.

Q. And he is also one of the named inventors on the asserted patents, correct?

A. Correct.

Q. And his testimony is probably the most reliable source as to the reasons for success of the Xploderz product, correct?

A. I don't know if I would say it's the most important source for its reason for success, but if he says it was successful, that's one piece of --

Q. You're comfortable relying on his testimony as to the reasons for success of the products that his company sold, correct?

A. Yes.

Q. Let's put up RX-109C and just do the cover. I want RX-109C.

Do you recognize this as the deposition transcript of Ronald Brawer?

A. I see that, yes.

Q. And do you see it was taken on March 31, 2023?

A. Yes.

Q. Do you see that it was testimony taken in this case, Investigation No. 337-TA-1325?

A. I see that.

Q. And you submitted a supplemental report addressing Mr. Brawer's testimony after his deposition was taken; isn't that right?

A. Yes.

Q. Let's go to page 298 of this transcript, and let's focus on lines 12 to 21.

Mr. Brawer was asked: When The Maya Group released the Xploderz product in 2011, how did the firing range of that product compare to the other blaster products on the market?

Do you see that?

A. I see that.

Q. And he answered: We were double the range, if not more.

Right?

A. Yes.

Q. And then he was asked: How did your ability to achieved double the firing range of your competitor's products impact your sales?

Do you see that?

A. Yes.

Q. And then he answered: I believe that was what was driving consumers to want Xploderz. Positively.

A. I see that.

Q. You have no reason to disagree with Mr. Brawer, correct?

A. I don't have a reason to disagree with him.

MR. COMACK: Now I am about to pull up confidential testimony that's third party.

JUDGE MCNAMARA: Okay.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

MR. COMACK: Can you put up RX-1 side by side with RX-2?

BY MR. COMACK:

Q. So, according to you, this packaging only teaches to throw a Spit Ball, correct?

A. It also says bounce and slide.

Q. So it's your opinion that the Spit Balls packaging does not teach someone to launch a Spit Ball through a tube, correct?

A. The words used say that you should not -- say that you should throw it.

Q. Does the Spit Balls packaging in any way, words or graphics, teach to launch the Spit Balls product through a tube?

A. The graphics indicates someone shooting a spitball.

Q. Through what?

A. Some form, I think it's some form of tube.

Q. Some form of a tube? But you're saying a POSITA wouldn't align that teaching when looking at this product on how to launch a Spit Ball; is that right?

A. I'm sorry. I missed the beginning of your question.

Q. I'll withdraw it.

What about the name Spit Balls, does that teach someone to use a tube?

A. I think it's invoking the traditional term "spitball" that you shoot a wad of paper through a straw.

Q. I'm sorry. I couldn't hear the last thing you said.

A. It's calling reference to the traditional way of shooting a wad of paper through a straw.

Q. "Through a straw."

Okay. Can we call up RX-109C again?

Do you recall Mr. Brawer's deposition testimony earlier?

A. Yes.

Q. Let's go to page 267, lines 2-6.

Just for the record, this is the March 31st, 2023 deposition of Ronald Brawer.

Okay. So here Mr. Brawer was asked:

And in your mind, the use of the SAPs as the ammunition was part of what enabled the Xploderz products to shoot twice as far as comparable NERF products?

Do you see that?

A. I see that.

Q. And his answer was:

It was by far the most important thing.

Do you see that?

A. I see that.

Q. Do you agree with Mr. Brawer that the use of SAP as ammunition was by far the most important thing to enable the Xploderz products to shoot twice as far as comparable to NERF products?

A. I think it's the use of SAP in the Xploderz products.

Q. You don't agree with what he said, that it was the use of SAP by far? He didn't refer to what's in the products, right?

A. Well, without the blasters, it's just essentially like Orbeez. So it's the combination of using the SAP in a blaster.

Q. I want you to focus on the question. It says, in your mind, the use of the SAPs as the ammunition was part of what enabled the Xploderz products to shoot twice as far as comparable NERF products, do you see that?

A. I see that.

Q. The questioner was not asking about the mechanism. He was saying was the ammunition part of what enabled the Xploderz product to shoot twice as far, right?

A. He says that, yes.

Q. And Mr. Brawer said the SAP was by far the most important thing, correct?

A. That's what he says here.
Q. Are you disagreeing with him?
A. I'm not disagreeing. I'm just saying that he's talking in context of the blaster system.
Q. He's not. He doesn't mention the blaster system there anywhere. If you think he does, show me where he does.
A. Oh. He is just saying -- I think the question says what enabled the Xploderz products.
Q. Read the whole question, doctor. The use of the SAPs as the ammunition was part of what enabled the Xploderz products to shoot twice as far as comparable to NERF products. He wasn't asking about the mechanism. He was asking about the SAPs, correct?
A. Sure, but I think it's still in context of the SAP in a blaster, not on its own.
Q. That's your interpretation of this.
A. That's how I interpret this.
Q. Even though it doesn't say that, right? Okay? You can answer. I don't know if you gave one.
A. I mean, that's how I interpret this.
Q. Okay. Let's call up page 268, we'll do lines 2-8.
And here it was Hasbro's counsel that was questioning Mr. Brawer. She asked, so, again, this use of

the SAPs as the ammunition was part of what enabled the Xploderz products to hold more rounds in the magazine, which is one of the most important features in the focus group study.

Do you see that?

A. I see that.

Q. And Mr. Brawer answered yes. Do you see that?

A. Yes.

Q. So, again, he is saying it was the use of the SAPs that enabled the Xploderz products to hold more rounds of ammunition in the magazine, right?

A. The use of SAPs as ammunition in a blaster.

Q. That's because the SAPs are smaller than, say, a NERF foam ball, and that's why they hold more ammunition, correct?

A. I don't know if I get that from this statement here.

Q. Do you agree with Mr. Brawer that the use of SAP as ammunition was what enabled the Xploderz products to hold more ammo in the magazine?

A. I agree that it's part of what enabled.

Q. Okay. I'm going to have to ask to clear the courtroom again.

I'm sorry. My mistake. My mistake. I thought it was confidential.

If we could pull up RDX-1052. RDX-1, and then page 52.

This is testimony from RX-137C, the March 31st, 2023 Brawer deposition. Do you see that?

A. Yes.

Q. Okay. And Mr. Brawer was asked: Is it fair to say that the primary force driving the demand for these products in Exhibit 7 was their use of SAPs as ammunition?

Do you see that?

A. I see that.

Q. And he answered: It was the foundation of the line, absolutely.

Do you see that?

A. I see that.

Q. And then he was asked: Is it fair to say that all of the features of the product that you used to create excitement in your TV advertising were directly linked to the use of SAPs as ammunition in your projectile launcher?

And he answered, absolutely.

Do you see that?

A. I see that.

Q. Do you agree -- I'm sorry.

Do you disagree with Mr. Brawer that the primary force driving demand for the Xploderz products was their use of SAP as ammunition?

A. I think I agree that the primary -- where does he say -- the primary driving force as use of SAPs as ammunition in a projectile launcher as it says in the question.

Q. You agree that that's what it says.

A. I think from using SAPs as ammunition in the projectile launchers described are what gives the distance that people are talking about.

Q. You're disagreeing with the owner of The Maya Group who is selling these products at the time that the foundation of the line was the use of SAPs and they were the primary force driving demand for these products, you're disagreeing with him on those statements; is that right?

A. No, I'm not disagreeing.

Q. And do you agree with him that all of the TV advertising that Maya Group did was directly linked to the use of SAPs as ammunition in the projectile launcher?

A. I think -- I don't have a reason to disagree with him.

Q. Okay. Do you agree that the differentiating factor that set Xploderz apart was the use of SAP as ammunition?

A. The use of SAP as ammunition in a projectile launcher is what sets it apart.

Q. I'm sorry. Would it be possible to have that

read back?

(The requested portion of the record was read by the court reporter.)

Q. It was the differentiating factor?

JUDGE MCNAMARA: Shall I read the entire question?

MR. COMACK: I can look.

A. As described by the patent.

Q. What do you mean "as described by the patent"?

A. Oh, just saying here, like use of SAPs as ammunition in your projectile launcher.

Q. Oh, okay. Let's go to RX-101C.

So here we have Volume I of your deposition on January 26th, 2023 in this case. Do you see that?

A. Yes.

Q. If we can go to page 200 and highlight lines 4-8.

Do you recall being asked: In claim 1 how important is that feature having hydrated super absorbent polymer, how important is that feature to the commercial success of the Respondents' products?

You answered, "I think very important."

You were asked "Why?" Scroll down.

"Why is it important that the absorbent polymer is used as the ammunition?

"Question. Yes.

You answered: I mean, that seems to be the differentiating factor that set Xploderz apart when that came out, and I guess if I go to my report, that -- let me just go to my report.

No other blasters on the market -- were on the market that were shooting SAP at the time.

Do you see that?

A. Yes.

Q. Was that answer truthful when you provided it?

A. Yes.

Q. And is your answer still truthful today?

A. Sure.

Q. Are you aware that the Complainant Hasbro has stipulated that the Clear Spheres and Spit Balls toys are formed from super absorbent polymer as required by the '282 patent, claim 1, and the '683 patent, claim 1, as construed by the ALJ?

A. I think you might need to say that again.

Q. Let's put the stipulation up. Just give me a moment to get there.

MR. ZHANG: Your Honor, objection. This is well outside the scope of my direct. We never said anything about whether Clear Spheres or Spit Balls do not satisfy the SAP limitation.

MR. COMACK: This goes --

JUDGE MCNAMARA: Hold on, Mr. Comack. So what is your response?

MR. COMACK: I'm sorry. Thank you. This goes to Dr. Kudrowitz' argument that there was commercial success that renders the claims non-obvious. And we're establishing under Ormco, it says that, if there's an unclaimed feature, it's not relevant. It says, if the feature that was the reason for the success was in the prior art, then it's not relevant, and that's why I'm asking these questions.

JUDGE MCNAMARA: Okay. No, I understood that. We have gotten that from the very first question.

But the question here, I think, is about the stipulation itself and whether or not Dr. Kudrowitz is aware of what the stipulation entailed. It's now part of the record.

MR. COMACK: Sure. Okay.

JUDGE MCNAMARA: So the fact is that we already have it on the record, whether he agrees with it or not, it's a matter of law now at this point.

MR. COMACK: Okay. That's fine.

JUDGE MCNAMARA: As a matter of fact and law at this point that that there has been an agreement that the Clear Spheres and Spit Balls use SAPs and comply with the requirements of claim 1 of the '282 patent and claim 1 of the '683 patent. So what he thinks or not thinks --

MR. COMACK: I'll move on, Your Honor. Thank you.

JUDGE MCNAMARA: -- yes, is irrelevant at this point.

MR. COMACK: I am going to be pulling up confidential testimony at this point again.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

BY MR. COMACK:

Q. Dr. Kudrowitz, do you agree that the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield a predictable result?

A. I'm sorry. Can you say that again?

Q. Sure. Do you agree that the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results?

A. Combination of known elements giving predictable results is obvious, is that what you're saying?

Q. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results, do you agree with that?

A. That sounds like a legal standard.

Q. You agree with it, right?

A. If that's the legal standard phrase, that sounds right.

Q. And do you agree that a person of ordinary skill is also a person of ordinary creativity?

A. I think so.

Q. And you agree that a person of ordinary skill is not an automaton?

A. Ordinary skill is not an automaton, like a machine?

Q. Yeah.

A. Sure.

Q. Okay. Is it your opinion that, in order for the asserted claims to be obvious, the prior art being combined must address the same problems that the asserted patents address?

A. In order for it to be... must address... I think that sounds right.

Q. So is it your -- okay. So it's your opinion that Peev and Nagayoshi, if they were not addressing the same -- let me start over.

So it's your opinion that since Peev and Nagayoshi were not addressing the same problem that the inventors of the asserted patents were trying to solve, there could be no motivation to combine?

A. I don't think that's how I was phrasing this.

Q. That's not your opinion?

A. That Peev and Nagayoshi are trying to make Airsoft guns more like real guns.

Q. Right. So because Peev and Nagayoshi were not addressing the same problems that the inventors of the asserted patents were trying to solve, it's your opinion there could be no motivation to combine Peev and Nagayoshi

with Spit Balls or Clear Spheres, right?

A. Well, it sounds like Mr. Delman's argument is the motivation comes from reducing skin breakage. So if someone puts SAP in Peev and Nagayoshi, it's not -- they're sort of different purposes. Peev and Nagayoshi are trying to make it more like a real gun, whereas, if you add SAP, you're making it less like a real gun.

Q. Right. So what you're saying is that, since Peev and Nagayoshi are not addressing the same problems as the inventors of the asserted patents, that detracts from combining Peev and Nagayoshi with Clear Spheres and Spit Balls; isn't that right?

A. Maybe I don't fully understand your question.

Q. Okay. I could help you. The inventors were trying to solve a certain problem, the inventors of the asserted patents, right?

A. Yes.

Q. And was it your opinion that, because Peev and Nagayoshi weren't trying to solve the same problem as the inventors, a person of ordinary skill in the art would not have been motivated to combine Peev and Nagayoshi with the Spit Balls and Clear Spheres SAP balls?

A. I don't think that's how I would classify my argument.

Q. Okay. Do you agree that a person of ordinary

skill in the art could use common sense in assessing whether the asserted claims are obvious?

A. I think that sounds reasonable.

Q. And do you agree that a person of ordinary skill in the art would recognize that known items may have been obvious uses beyond their -- let me start over.

Do you agree that a person of ordinary skill in the art would recognize that known items may have obvious uses beyond their primary purposes?

A. Yes.

Q. So, for example, you say the primary purpose of Peev, Peev's Airsoft gun, is for military training, correct?

A. I think Peev says Airsoft guns, in general, are for military training, Airsoft games, and a few other things.

Q. So does Peev's Airsoft gun have a primary purpose?

A. It's to use the sensor system to better time the ammunition to make it fire more like a real gun.

Q. Is it your opinion that Peev's Airsoft gun cannot be used beyond the purpose of military training?

A. The technology described in Peev -- well, at least based on that first sentence identifies several, I think, three uses of Airsoft guns in general, and military training is one of those three that it identifies.

Q. So one purpose is military simulations or training, correct?
A. Correct.
Q. And another purpose of Peev is for use in the sporting gun industry, correct?
A. Yes.
Q. And another purpose of Peev is for fun when conducting Airsoft games; is that correct?
A. Yes.
Q. So are you saying that Peev's Airsoft gun can only be used for military training?
A. No, I'm not saying that.
Q. You agree that Peev's Airsoft gun could be used for fun when conducting Airsoft games, right?
A. Sure, that's what Peev says.
Q. And in determining whether or not the asserted claims are obvious, do you agree that we should take into account the inferences and create steps that a person of ordinary skill in the art would employ?
A. Sure.
Q. Okay. And is it your position that, because no one has ever put a soft projectile in a gun or launcher with a spring, piston, air compression chamber, and small-diameter tube, the asserted claims are not obvious?
A. No, that's not my argument.

Q. I'm sorry. Let me ask the question again.

Is it your position that, because no one has ever put a soft SAP projectile into a launcher with a spring, piston, air compression chamber, a small-diameter tube, the asserted claims are not obvious? Is that your position?

A. Well, that's -- that doesn't classify the entirety of my position.

Q. But is that one of your positions?

A. Well, there's also objective indicia and then there's motivation to combine.

Q. I'm not asking if it's your only position. Is one of your positions that, because no one has ever put a soft SAP projectile in a launcher with a spring, piston, air compression, chamber and small-diameter tube, the asserted claims are not obvious?

A. That's not my only grounds for suggesting that they're not obvious.

Q. But it's one of the grounds that you're asserting here today, correct?

A. Well, it goes back to that novel combination has not existed.

Q. I see. So to be obvious you have to have a novel combination in the prior art; is that correct?

A. Something has to be non-obvious.

Q. So I'll go back. All I want to know is a simple

yes or no, Dr. Kudrowitz. Is one of the positions that you're relying on here today that, because no one has ever put a soft projectile, soft SAP projectile, into a launcher with a spring, a piston, an air compression chamber and a small diameter tube, that means the asserted claims are not obvious?

A. There's also feed chamber, but I assume that doesn't change the answer. I think that was the beginning of the summary statement that I made.

Q. Okay. So that's one of the reasons why you think the claims are not obvious, correct?

A. That no one put those things together until The Maya Group. That was the beginning of my summary.

Q. So it's your position that, because no one has ever used soft SAP projectiles in the precise manner recited in the asserted claims, that means the claims cannot be obvious.

A. I think it's just something that needs to be taken into account with other factors as well.

Q. Okay. Can we put up slide CDX-0005C.22?

Do you recall earlier testifying about this slide?

A. Yes.

Q. I believe you testified that a fully hydrated Clear Spheres SAP projectile or Spit Balls projectile

wouldn't fit in an Airsoft gun. Do you recall that?

A. Yes.

Q. And so it's your opinion, because a fully hydrated SAP projectile, either Clear Spheres or Spit Balls, because it doesn't fit inside -- let me start over.

It's your position that, because you weren't able to physically combine the Clear Spheres or Spit Balls with an Airsoft gun, that means the claims can't be obvious?

A. Well, this is just a -- this is testing for reasonable success. If, you know, you have two -- if the argument here is that someone would try putting these things in a -- in an Airsoft gun, when you follow the instructions, they don't fit in an Airsoft gun.

Q. So you're saying, if a fully hydrated Spit Balls or Clear Spheres does not fit inside a Airsoft gun, then there's -- there cannot be any reasonable possibility of success; is that right?

A. I couldn't fit one of these in an Airsoft gun unless you modify them or treat them differently than intended.

Q. Would a person of ordinary skill in the art know to modify the Spit Balls or Clear Spheres so that it fits in an Airsoft gun?

A. I mean, why would they be doing that in the first place?

Q. Well, we'll get to that, but would a person of ordinary skill in the art know how to do that?

A. To -- they would -- sure, they would know, like, be able to create a SAP that's not that size.

Q. So as of 2010, a person of ordinary skill in the art knew how to make a SAP projectile that's spherical and soft that would fit inside a Airsoft gun, correct?

A. Those didn't exist at the time, but I think a person of ordinary skill would be able to make one, if you asked them to.

Q. As of 2010.

A. Sure.

Q. Okay. Let's pull up the '282 patent. If I could just see the exhibit number on it. JX-0001.0002.

Now let's go to column 1, line 56 to 60 of the '282 patent.

I'll read it to you. It says, there are also small projectile systems for gaming and professional training purposes. These include paintball guns and Airsoft guns, but these systems are for adult use only and only due -- adult use only due to the energy imparted to the projectile and the ability of the projectile to do serious harm.

Do you see that?

A. Yes.

Q. So the asserted patents were recognizing that Airsoft guns were a problem in 2010 because they could do serious harm, correct?

A. It just says these are for -- these are for adult use because they could do serious harm, not that they're problematic.

Q. You don't think doing serious harm was a problem?

A. Well, I mean, some of the Airsoft guns, the purpose of them is to hunt and harm things so...

Q. But you don't think that the fact that an Airsoft gun could do serious harm was a problem; is that what you're saying?

A. No, I think what this is saying here is that Airsoft guns or some Airsoft guns and paintball guns can do harm, and that's why they're for adults.

Q. Okay. And do you agree that a person of ordinary skill in the art knew prior to 2010 that Airsoft guns could cause serious harm for those who get hit by the ammunition?

A. I think people would know that you could -- you could be harmed by the ammunition.

Q. Earlier today you testified that one way to prevent injury with Airsoft guns is to lower the muzzle velocity. Do you recall that?

A. Yes.

Q. And a person of ordinary skill in the art would

have known in 2009 that another way to make a projectile less likely to cause injury would be to make it softer, correct?

A. I believe I testified to that.

Q. So you agree that a person of ordinary skill in the art would have known in 2009 that another way to make a projectile less likely to cause injury would be to make it softer.

A. That's another way to do it.

Q. In 2009 was it within the technical grasp of a person of ordinary skill in the art to modify Airsoft guns such as Peev to launch soft SAP projectiles in place of the hard plastic spheres?

A. Can you say that again?

Q. Sure. In 2009 was it within the technical grasp of a person of ordinary skill in the art to modify Airsoft guns such as Peev to launch soft SAP projectiles in place of the hard plastic spheres that the Airsoft guns used?

A. I see. If someone was asked to do so, they would have the ability to do that.

Q. It was in their technical skills to do that, correct?

A. Sure.

Q. Can we please call up CDX-0005C.32?

Do you recall discussing this slide this morning?

A. Yes.
Q. This is a slide that you created to show where breakage of the skin occurs from Airsoft guns and where it won't occur, correct?
A. Yes.
Q. And this chart that you created indicates that Airsoft guns with a muzzle velocity of 350 feet per second or higher will break the skin, correct?
A. Correct.
Q. In your chart you state that the skin will not break if the muzzle velocity of the Airsoft gun is less than 350 feet per second, correct?
A. That's what I'm getting from these sources.
Q. Are you saying that a muzzle velocity below 350 feet per second, there's no chance of injury?
A. No, that's not what I'm saying.
Q. There could be injury caused by Airsoft hard plastic pellets that cause injury below 350 feet per second, correct?
A. It's possible, but from my understanding the motivation provided by Mr. Delman was specific to the breakage of skin.
MR. COMACK: I move to strike. That was not responsive to my question.
JUDGE MCNAMARA: I'm going to allow it, and it

will go to the weight of the evidence.

MR. COMACK: That's fine.

Q. So putting aside Mr. Delman's opinions that you're trying to characterize, are you saying that below 350 feet per second there is no chance of injury when someone is hit by a hard plastic sphere shot out of an Airsoft gun?

A. No, that's not what I'm saying.

Q. You agree that there could be injury that's caused by a hard plastic sphere that's shot out of an Airsoft gun below 350 feet per second, correct?

A. Sure.

Q. Injury could be bruising, right?

A. Yes.

Q. There could be black and blue marks below 350 feet per second?

A. Yes.

Q. Welts?

A. Yes.

Q. Let's call up CDX-0005.31.

I'm sorry. Let me repeat that. Let's call up CDX-0005C.31. Thank you.

All right. In the top box you've cited the California Senate document. Do you see that?

A. Yes.

Q. And do you see where it says that penetration of

the skin and bone can occur at 350 feet per second?

A. I see that.

Q. Bone is harder to penetrate than skin, correct?

A. I would imagine so.

Q. But it's your opinion that, if you go just below 350 feet per second where penetration of the bone can occur, there's no chance of injury; is that right? I withdraw it.

Is it your opinion that if you go just below 350 feet per second where penetration of the bone and skin occur, that there can be no chance of the sphere penetrating only the skin?

A. I'm only going based on these articles that Mr. Delman provides. I don't know enough about ballistics and skin properties to make that determination.

Q. You agree that the 350 feet per second is not talking about just skin; it's talking about skin and bone, right?

A. That's what this says.

Q. Okay. Now do you see where it says that various references, largely agree that, at a minimum, damage to the human eye can occur from a gun discharging a pellet or BB at a muzzle velocity of 130 feet per second?

A. Yes, I see that.

Q. So let's go back to your chart on CDX-0005C.32.

Isn't it true, based on what the California

Senate said, that there's a chance of injury at 130 feet per second?

A. This chart is just specific to breakage of skin. So, yes, there could be injury at 100 and whatever number you said.

Q. One of those injuries that the California Senate Committee was discussing was eye injuries, correct?

A. Correct.

Q. And that's because children play with Airsoft guns and don't always wear goggles, correct?

A. I don't think I can comment on that. Like, I don't know. I don't know.

MR. COMACK: Excuse me for one second.

Q. Isn't it true that a super absorbent polymer -- I'm sorry. Isn't it true that a person of ordinary skill in the art --

Isn't it true that a person of ordinary skill in the art refers to super absorbent polymer as gel materials?

A. I don't know.

Q. Don't you refer to super absorbent materials as gel beads?

A. Oh, maybe in the context of Gel Blasters.

Q. Right. So in your infringement report you referred to super absorbent ammo as gel beads, correct?

A. I don't have reason to disagree, but I don't -- I

don't recall calling them that.

Q. Let's put up RX-0617C.0039.

Is this your opening expert report?

JUDGE MCNAMARA: What is the date?

MR. COMACK: You know what, there was another version -- there was a mistake and it was signed. We'll come back to it. I don't have that right now.

Thank you, Your Honor.

Q. Are the asserted claims of the asserted patents limited to toys?

A. I think the title is a device. So it could potentially apply beyond.

Q. Okay. Can we pull up the '683 patent, which I believe is JX-2? Start with the cover page. See the full exhibit number.

So we're looking at JX-0002.0001. This is the '683 patent asserted in this case, correct?

A. Yes.

Q. Okay. Can we go to claim 1 of the '683 patent?

Do you see the word "toy"?

A. No.

Q. Let's look at claim 3 of the '683 patent.

Do you see the word "toy"?

A. Yes.

Q. Right. Do you understand that claim 1 of the

'683 patent covers all projectile launchers, whether they are toys or not?

A. Yes.

Q. Let's put up the '282 patent, please, JX-1, and just go to the first page.

Okay. This is JX-0001.0001. Do you recognize this as the asserted '282 patent in this case?

A. Yes.

Q. Let's go to claim 1 of the '282 patent.

Do you see the word "toy"?

A. No.

Q. Let's take a look at claim 9 of the '282 patent.

Do you see the word "toy"?

A. Yes.

Q. Do you understand that claim 1 of the '282 patent covers all projectile launchers whether they -- I'm sorry -- let me start over.

Do you understand that claim 1 of the '282 patent covers all projectile launchers whether they are toys or not?

A. This is one where claim 8 depends on 1 also?

Q. Claim 8 does depend on 1.

A. Yes, that's my understanding.

Q. Let's go to CDX-0005C.22.

Okay. So we talked about this slide before, and

I have some follow-up questions. Here you say Clear Spheres or Spit Balls are not sized for Airsoft guns. Do you see that?

A. Yes.

Q. And earlier do you recall testifying that a person with a bachelor's degree in chemistry would be able to adjust the properties of the Clear Spheres or Spit Balls to fit inside a NERF soft gun?

A. They would have those abilities to do so.

Q. And if we can put up slide CDX-0005C.23.

Do you recall talking about this slide this morning?

A. Yes.

Q. And you testified that the Clear Spheres at 6mm is not soft; isn't that right?

A. Yes.

Q. And then you cited to some testimony from Mr. Delman saying that it was fairly firm at that size. Do you ever recall that?

A. Yes.

Q. But you agree that a person with a bachelor's degree in chemistry would be able to adjust the softness of the SAP projectile, correct?

A. If they were asked to do so, they would be able to do that.

Q. Let's put up slide CDX-0005C.52.

Here this morning you testified about this slide where you talked about how PTT looked at the Xploderz X2 product when it designed the Hydro Strike product. Do you recall that?

A. Yes.

Q. PTT's Hydro Strike products have a trigger, correct?

A. The Hydro Strike products have a trigger.

Q. And when you pull that trigger, the product is launched, correct?

A. Yes.

Q. And the Xploderz X2 product that PTT looked at did not have a trigger, correct?

A. Some of the X Blasters had triggers.

Q. I'm asking you about the one that PTT looked at.

A. Oh. Yeah, I don't -- I guess I don't know which specific blaster that he looked at.

Q. You don't know which blaster PTT looked at when it designed its Hydro Strike products?

A. It just says Xploderz on the shelf.

Q. Did you bother to look into -- for further information to see which product they looked at?

A. Well, maybe it was -- well, I put X2, so I must have pulled that from the testimony.

Q. Okay. So if you put the X2, do you know if the X2 Xploderz that PTT looked at had a trigger?

A. No, the X2 did not.

Q. It had a device that you pull back on to create air pressure then release it to fire the ammo, right?

A. That's how that worked, yes.

Q. PTT's Hydro Strike product does not have an arm that you pull back on to create air pressure and then manually release it to launch the ammo, correct?

A. That's correct.

Q. Let's call up CDX-0005.26.

Do you recall discussing this slide this morning?

A. Yes.

Q. And you say using SAP ammo fundamentally changes air guns. Do you see that?

A. Yes.

Q. And then you list some downsides of using Clear Spheres with Spit Balls, correct?

A. Correct.

Q. And you say that combinations cannot be used for hunting purposes. Do you see that?

A. Yes.

Q. Let's call up CDX-0005C.24.

Do you recall discussing this Bleacher Report article this morning?

A. Yes.

Q. This is an article entitled "Airsoft Guns: A Double-Edged Sword," and it's RX-0841.0003.

Do you see any mention of hunting in this article?

A. This is only a short blurb, but I don't recall if hunting is mentioned in the rest of the article.

Q. Do you see where the article says, "I imagine it's a lot of fun to shoot Airsoft guns with your friends in the backyard. It doesn't take a rocket scientist to figure out why young boys like them so much."

A. I see that.

Q. Is this a description of hunting?

A. It's a description of what?

Q. Hunting.

A. I guess it could be, but it doesn't necessarily need to be.

Q. You think that someone saying it's a lot of fun to shoot Airsoft guns with your friends in the backyard, it doesn't take a rocket scientist to figure out why young boys like them so much, refers to hunting?

A. I don't know. Are you shooting squirrels in your backyard? I don't know.

Q. Does this article refer to hunting?

A. It doesn't -- well, the stuff I see on the screen

doesn't explicitly say "hunting".

Q. Do young boys typically go hunting in their backyard?

A. I know -- I do know some people who shoot squirrels in their backyard.

Q. Young boys?

A. Young adults.

MR. COMACK: Your Honor, I pass the witness.

JUDGE MCNAMARA: Thank you, Mr. Comack.

Mr. Taylor?

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. TAYLOR:

Q. Your Honor, I'm going to bring the realtime over here.

JUDGE MCNAMARA: That's fine.

Q. Good afternoon, Mr. Kudrowitz. Did I say that properly?

A. I say Kudrowitz, but, you know, fine.

Q. I'm sorry.

A. No worries.

Q. Good to see you again. We met at your deposition here in D.C., correct?

A. Yes.

Q. It was a fun deposition, huh?

A. That is not how I would classify that.

JUDGE MCNAMARA: Fair enough.

Q. I need to ask you a few questions this afternoon.

First, looking at CX-518, some questions were asked about this earlier. This is an article about the Xploderz product, and it was pointed out that, if you look at page 2 of CDX-518, page 2, that the source was The Maya Group. Do you remember questions on this?

A. I do.

Q. If we go back to page 1, do you see where I've highlighted that Xploderz were named a Best New Toy of 2011?

A. Yes.

Q. By the British Toy and Hobby Association during the London Toy Fair, correct?

A. Correct.

Q. Regardless of who wrote this article, isn't the underlying fact the same, that the Xploderz did indeed win a New Toy Award in 2011?

A. That is correct.

Q. I'd like to take a look at SDX-1, which is the Staff's opening presentation. I'm going to go to this chart I created.

And it's amazing how long it takes to create a PowerPoint, Your Honor, so I'd like to get my money's worth. It's incredible. Sixteen slides can take me all day. I only have so many hours.

So here I have a continuum going from tubes on the left to BB guns on the right, and I kind of put the SAP launcher between NERFs and water guns.

Were you here when I did my opening argument?

A. Yes.

Q. Did you kind of understand this?

A. I did.

Q. Okay. Do you agree where I put the SAP launcher on this continuum?

A. Yes. I had one thought on modification, though.

Q. Please.

A. If I were making this, I just wouldn't have water guns on here.

Q. What else would you have?

A. I'm not sure actually. I would leave everything else where it was. But I was thinking -- when I saw this, I thought we were talking about like launching sort of like -- or shooting individual bullet item things, and so water sort of was -- maybe there would be like a -- where NERF was I kind of viewed it like a two-prong thing, like water and super soaker and NERF were like here, but, other than that, that's -- I agree with this chart.

Q. Fair enough. You have experience with water guns, correct?

A. Yes.

Q. Or water projectile projecting systems, I would say.

Do SAP launchers, does it really fit separately from these other categories of products?

A. Yes, I think it's a new category. I think it really is, as you said, kind of like this in between NERF and paintball.

Q. And I believe on your CV there's an indication that you have experience with toy design -- one second, I want to mention the -- if we could go to, please, CX-15 -- you don't need to pull this up -- CX-1545, which is your CV. I believe on there there's an indication that you have experience with toy design, right?

A. Yes.

Q. And you gave a lecture on the process of designing a toy.

A. Yeah, lots of lectures.

Q. How does this happen that these inventors come up with a new toy design that's non-obvious or is obvious or -- have you seen something like this before?

A. No, I have not seen -- coming up with something in general new, is that what you're saying, or specific to this?

Q. Specific to this. Well, let me ask you an easier question.

So the toy design process, where does it begin?

A. Sure. So it's the same -- sort of similar to how general design process begins with research, market research and user research and studying what's out there, and then there's ideation and testing with children and parents.

Q. So you have -- so typically a toy design process starts with a company, like Mattel or Gel Blaster, and they say we want to design a new toy?

A. It works different ways. So in our class we start with industry sponsors. So like last year we worked with Plant Toys in Thailand, and they would come in with a specific challenge, and they would say we want to use rubber wood and we want to come up with certain toys in this theme.

But that's -- that's how I run my class. That's not necessarily how invention happens in the wild. Sometimes you're just messing around and you say, oh, my gosh, why hasn't that existed, or what happens in this case, you know, going through the flower market and saying, you know, that's an interesting new material, I wonder how we can launch these things. So there's lots of different ways new toy concepts can come about.

Q. In today's market does -- I'm not sure you're the right one to actually ask this question. The SAP launchers that you have investigated here, have they been accepted by the market?

A. Yeah, I think, I mean, from -- from the data that I've seen, it does sound like people are buying them and a lot of them. And now, you know, we had Splat-R-Ball making them and Prime Time Toys and Hasbro. And so it definitely seems like people want them.

Q. But does it seem like it's a new product that actually many people have never heard of or seen before?

A. That's -- yes.

Q. Why do you say that?

A. Well, you're -- it sort of goes back to your graph here.

Q. Feel free to use my graph.

A. Yeah. Like, it is somewhere in this intermediate between what NERF can offer and what paintball offers, and it strikes that interesting balance, and that's -- you get a little bit more thrill maybe, but it's still a little bit more safe. So it's balancing those elements.

Plus the clean -- sorry. An additional thing that both NERF and paintball don't have that this one does provide is the clean-up element. So with NERF you have to go and pick up all the ammo, right. With paintball, you're all covered in paint, right. And this is a clean -- it's like a very clean way -- anyway, it has some of the benefits of Airsoft and paintball, but it also has some of the benefits of NERF.

Q. In view of -- as part of your work in this investigation, you have become familiar with Airsoft guns, correct?

A. Yes.

Q. Yes. Are you aware where we can purchase Airsoft guns?

A. Online you can get -- that's how I bought them.

Q. I know there was one of the articles earlier was mentioning an award by Toys "R" Us. I'm not sure they even exist anymore. I'm not sure. But could you have purchased an Airsoft gun at a Toys "R" Us?

A. I don't believe Toys "R" Us would sell Airsoft guns.

Q. So kind of your overall opinion regarding the combination of an SAP, spherical SAP, with a launcher, and I believe you testified that there was commercial success, you've seen evidence of some commercial success in some of the articles we've seen, and I guess is it fair to say that the underlying commercial success is due to the combination of SAP with toy gun components but there may be other elements, of course, that certain consumers may be attracted to, correct?

A. Sure. I think there could be, you know, some people might like the Glow in the Dark ones or ones that are bigger form, for example, but the underlying essence is

still the same -- they're blasters that shoot SAP.

Q. Can you please pull up CX-1635C, please? Sorry.

This is a deposition transcript of Mr. Higginbotham dated December 13th, 2022, and you were asked some questions about this, correct?

A. Correct.

Q. And I believe the question was along the lines of asking -- this is a representative from Splat-R-Ball, correct?

A. Correct.

Q. And you understand this deposition was on December 13th, 2022? Do you see that?

A. I see that.

JUDGE MCNAMARA: Confidential? We haven't gotten there yet.

MR. TAYLOR: That's a good question. I think we better. Then I'll finish up on confidential, Your Honor.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

JUDGE MCNAMARA: Thank you.

REDIRECT EXAMINATION

BY MR. ZHANG:

Q. Dr. Kudrowitz, do you remember being asked about your testimony as it relates to whether you voted for the TOTY Awards?

A. Yes.

Q. And specifically whether you voted for the Xploderz products?

A. I recall that.

Q. And do you remember testifying that you believe you did, but you weren't 100 percent sure?

A. Yes, that's what I said.

Q. I'd like to show that testimony to you.

Mr. Lee, could I have page 301 and 302 of Dr. Kudrowitz' testimony?

JUDGE MCNAMARA: Mr. Zhang, would you just repeat the exhibit number, please?

MR. ZHANG: Sure. I believe it's RX-102.

JUDGE MCNAMARA: Thank you.

Q. And starting on page 301, do you remember being asked, starting at line 10, to line 15, about your testimony?

A. I remember that.
Q. And specifically the testimony is, and so you don't know whether you voted for the Xploderz XBlaster 200 by The Maya Group as being an Outdoor Toy of the Year?
Do you see that?
A. Yes.
Q. And you said, I can't -- I can't tell you for certain if I voted -- if I ranked -- where I ranked or if in the -- or if I ranked it in there --
A. Yes.
Q. And so that was the testimony that counsel showed you, counsel for PTT showed you, right?
A. Yes.
Q. But later on, on page 302, do you see, starting on line 3 and ending at line 8, is that the testimony you're referring to?
A. Yes, that's the testimony I was referring to.
Q. And specifically you were asked, that you actually voted for the Xploderz?
And, answer, I mean, I imagine I would given some of the other things in this category.
But you don't know?
Yes, I can't tell you -- like I can't tell you 100 percent for sure right now.
A. Right, that's my testimony.

Q. Was that your -- and is that testimony consistent with your testimony here today?

A. Yes.

MR. ZHANG: I have no further questions.

JUDGE MCNAMARA: Thank you, Mr. Zhang.

Mr. Comack?

MR. COMACK: Nothing further, Your Honor.

JUDGE MCNAMARA: Mr. Taylor?

MR. TAYLOR: Nothing further, Your Honor.

JUDGE MCNAMARA: Thank you.

Dr. Kudrowitz, you may step down.

THE WITNESS: Thank you.

JUDGE MCNAMARA: All right.

Are we sticking to the schedule that I was given this morning? We skipped, for example, this morning we skipped PTT's Veronica Wong, and so I'm wondering are we doing Lynn Rosenblum now? No?

MR. RUBEN: Your Honor, in my understanding Frances Chia and Veronica Wong are not testifying.

JUDGE MCNAMARA: Okay. Thank you.

MR. RUBIN: Your Honor, Ethan Ruben with Fish & Richardson on behalf of Complainants. We call Lynn Rosenblum to the stand.

JUDGE MCNAMARA: Very good. Thank you.

LYNN ROSENBLUM,

having been first duly sworn or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: Lynn Ann Rosenblum.

JUDGE MCNAMARA: Thank you very much. Please be seated.

DIRECT EXAMINATION

BY MR. RUBIN:

Q. Good afternoon, Professor Rosenblum.

A. Thank you. Good afternoon.

Q. Where are you from?

A. San Diego, California.

Q. And what do you do for work in San Diego?

A. I am a full-time professor of toy design and I work at Otis College of Art and Design in Los Angeles.

Q. What are you here to testify about today?

A. The commercial success of Xploderz.

Q. Now I want to be clear. Are you testifying about how the Xploderz commercial success relates to the asserted patents?

A. No. I'm not here to testify about the patents.

Q. Did you prepare some slides today?

A. I did.
Q. So turning to CDX-0004C.2, let's talk about your background.
A. Okay.
Q. Could you tell us about your educational background?
A. So I have an MBA from USC Marshall School of Business.
Q. And as a professor at Otis College of Art and Design, what do you teach?
A. So I teach classes related to toy design, the toy business, product development, some of the classes you'll see listed here on the slide.
Q. And when did you start teaching?
A. 1997.
Q. Do you teach any classes related to the commercial success of toys?
A. Yes.
Q. And what is that course?
A. Business methods.
Q. Turning to slide 3, what do you teach in your business methods course?
A. So we teach how to see a successful brand. We do that a whole number of ways. It's a very unique class. I actually created it. And it's so students can see all the

different ways that a brand might be created.

Q. And does slide 3 here, does that show some of the topics you teach in the toy business methods course?

A. Yes, that shows some of the topics.

Q. How do you teach the class?

A. So we teach the class a variety of ways. We bring in a lot of -- I should say I bring in a lot of guest speakers. I don't want the students just to hear my opinion on subjects, so I like to get a real range of ideas and opinions.

And then we also do a lot of case studies, similar to law school, but a little bit more fun. So we look at those case studies. We also look at successes and failures of products. So we look at the failures too to make sure that we're looking all across the board for all ideas.

Q. How long have you been working in the -- actually turning to slide 4, please -- how long have you been working in the toy industry?

A. Thirty-seven years.

Q. And, again, this is CDX-4C.4. I see Mattel on this slide. How long did you work at Mattel?

A. It was about eight years in total. I kind of went to Mattel and came back a few times but doing different things.

Q. Tell us, what did you do in your eight years at Mattel?

A. My primary job was looking at P&Ls, so profit and loss for all the different brands. There were about 20 different brands that I worked on in my time, all of my time there.

Q. And tell us, yeah, what were some of the brands that you worked on while you were at Mattel?

A. So brands -- I'm going to try to do the ones you may have heard of. So there's Barbie, Polly Pocket, Nickelodeon, Disney, some of the other ones you might not have so...

Q. Have you worked on any unsuccessful toys?

A. Yes, many.

Q. Any that come to mind?

A. I think one we were discussing the other day was Warmup Bears. It was a stuffed animal and you made it out of old athletic clothes, and it didn't do very well. Kind of -- (gesturing).

Q. So after you left Mattel, what did you do?

A. I started teaching, and then I also became a consultant in the toy industry.

Q. What are some of the -- or who have you worked with as a consultant?

A. Yeah, so I'm kind of unique. I've worked with

most of the major toy companies, some of the ones that you see on the slide here -- Mattel, Disney, Spin Master, Hasbro. There's a lot of other smaller toy companies that aren't on here, too, but just doing different kinds of projects for all of them.

Q. Have you received any awards?

A. Yes. I won the national Wonder Women of Toy Award in 2006. I was also nominated in 2017. I didn't win. And I won two Mattel Worldwide Excellence Awards. Those are given to top employees for different projects.

MR. RUBIN: Your Honor, we offer Lynn Rosenblum as an expert in the toy industry, including as a business and product development aspects.

JUDGE MCNAMARA: Mr. George?

MR. GEORGE: Could I hear the offer again?

MR. RUBIN: We offer Lynn Rosenblum as an expert in the toy industry including as to business and product development aspects.

MR. GEORGE: I'm going to object. I don't believe she is not an expert in the entire toy industry. If you want to limit it to what she just talked about, I could consider that.

MR. RUBIN: Your Honor, she has had nearly 40 years of experience in the toy industry from a range of studies. I'm sure counsel, if he wants, can cross-examine

her regarding those -- that experience.

JUDGE MCNAMARA: Would you like to conduct some voir dire, Mr. George, when you're up on cross and do the same thing, for example, that Mr. Cordell did?

MR. GEORGE: Thank you, Your Honor.

JUDGE MCNAMARA: Okay.

Q. Let's get right to it. What is your opinion regarding whether the Xploderz were a commercial success?

A. So the Xploderz, in fact, were a commercial success.

Q. Turning to slide 5, how did you reach that conclusion?

A. Well, I looked at sales and financial data, multiple extensions over multiple years, and finally just knowing the fact that it created a brand-new category in the toy industry. It was not something that had been seen before. It was not something retailers had seen before. So all of these together I believe are what made Xploderz a commercial success.

Q. Turning to slide 6, what are the Xploderz?

A. So the Xploderz are blasters that shoot SAP ammunition.

Q. Are three of the Xploderz products shown here on your slide CDX-4C.6?

A. Yes.

Q. And, for the record, that's CPX-35, CPX-33, and CPX-37.

Before this investigation had you ever heard of The Maya Group?

A. Yes.

Q. Before this investigation had you ever heard of Xploderz?

A. Yes.

Q. When did you first hear of Xploderz?

A. End of 2010, early 2011.

Q. Did you ever use Xploderz?

A. Yes, and I was really wowed by the product.

Q. Tell us more. What did you think of the product?

A. I just -- I had never seen a blaster that shot SAP ammunition, and it was just amazing how far it went. Everything I had seen before had like foam darts. And I had worked on some NERF products in the past. So, you know, I was familiar enough to know that I was seeing something that was going to make a difference, that was going to be successful.

Q. Let's change gears. In analyzing whether Xploderz were a commercial success, did you look at the Maya Group's sales data?

A. I did.

Q. Turning to slide 7.

JUDGE MCNAMARA: Sorry. I think we are going on to the confidential record.

MR. RUBIN: Your Honor, we've gotten consent from Maya Group to show the sales information.

JUDGE MCNAMARA: All right. Thank you.

Q. Professor Rosenblum, what does this slide show?

A. So there is two tables here. The top one shows just blaster products. It's 2011 to 2012, and the units sold were 1.2 million units -- that will be a little easier to see -- so for 2011, 1.2 million units, and then sales of $16 million for 2011 -- just blasters.

Q. And for 2012?

A. So that, again, is about 1.2 million units, and, again, we have $16 million in 2012.

Q. And in calculating these numbers, did you rely on the Maya sales spreadsheet marked as CX-165C?

A. Yes, I did.

Q. Where were the Xploderz sold?

A. So all the major places that basically sold toys -- Target, Walmart, Toys "R" Us, those kinds of stores. Really the big, the big ones.

Q. What did it mean for a company like Maya Group to get Xploderz on the shelves of major retailers like the ones shown here on CDX-4C 7?

A. So I think the way to explain this is to think

about Maya Group at the time. It was a relatively new company, these parties coming together to form a company, and then beyond that they had no awareness, no product whatsoever in the blaster category. And so they didn't have that going for them.

Now certainly I know some relationships happen and they may get you that phone call or even that meeting, but to have a product where you get it in the door, you have a meeting, you get an order, and then you go literally from zero to, you know, two million units in a year, that, like, just doesn't happen.

So, again, that's I really think the commercial success and how impressive it was to get in with these retailers. Because they, you know, they have a lot of people coming to their door, but in order to get this far and sell this much product was pretty extraordinary.

Q. Turning to slide 8, what did The Maya Group think about their sales?

A. They were -- and I remember, so this is a quote that kind of sums it up for me for Mr. Ben-Ezer -- and he calls it a phenomenal success. But I think it's important here to read the quote.

It says, if you have a line that is 3 or 4 million, that is a good brand. And probably in parentheses there it should say "the toy industry," so I'm going to add

that.

And then it says, and we sold in 2011 and 2012 in excess of 15 million or 17 million, which is a phenomenal success for the product. So I completely agree.

Q. For the record, that's CX-1634C, the Oded Ben-Ezer deposition from December 13th, 2022, at page 285.

Turning to slide 9, could you tell the Court what a line extension is?

A. So a line extension, you have to think about just how it sounds. If a toy company has a successful line, you want to extend it, you want to keep it going, you want to keep those dollars going, you want to keep your shelf space, you want to add more products. So you do what are called line extensions.

There can be a variety of ways to do that. You can make a very minor revision. You can do -- change some packaging, or you can do something really major where you might expend money on tooling.

The point is it's an investment when you do a line extension. And you don't make that investment in the toy industry, in a small company, relatively, to a Mattel or some other large company, when you have, you know, you only do it when you have a successful line you want to keep it going and you're going to make those investments in the future.

Q. Did Xploderz have any line extensions?
A. Yes, it had many line extensions.
Q. Turning to slide 10, so let's look at the year 2012, in particular, and focus on the X2 series and the Night Fighterz series.
When we're talking about this extension, are we talking about just one product?
A. Well, in fact here, and, you know, some companies do do one product, but what was so brilliant, what was done about Xploderz is here you see just with the X2 series and Night Fighterz, you've got 12 additional products, so that means you're going to get additional shelf space with putting these out there.
Q. Turning to slide 11, now in addition to the X2 series and the Night Fighterz series, were there any -- were there any other line extensions?
A. Yes, there were. So there was a Blaster Pro in 2012; 2013 was X3. And then Night Fighterz were in 2014. Excuse me. Firestorm. Sorry.
Q. What do these line extensions tell you about whether the Xploderz were commercially successful?
A. Well, again, it's as I explained. Line extensions mean a couple things. One is usually you have your retail customers asking for additional products. When you have a successful line, you say to yourself, how can I

extend that line and how can I do it in the most efficient way. Line extensions are a great way, because you can do very minor things or you can do things where you have investment.

Either way you're making an investment in your line. You're putting more costs, more time into it. So when I see line extensions, extensive, over a four-year period, I know that brand has been successful for the toy industry.

Q. Did Xploderz create a new product category?

A. Absolutely.

Q. And what product category is that?

A. Blasters that shoot SAP ammunition.

Q. Was that the product proposition for the Xploderz, blasters that shoot SAP ammunition?

A. So it's what we call in the industry unique selling proposition, USP, and it's really what differentiates that particular toy in the toy industry. It could be a product anywhere else. It's what differentiates that product, why is it unique, why is it different than anything else out there. A blaster that shoots SAP ammunition has a unique selling proposition that differentiates it from all other toys at the time.

Q. While Xploderz were on the market, were there any other products in that category?

A. No.
Q. How about today?
A. Yes, the Respondents' products would be those.
Q. And turning to slide 12, do Respondents agree that this is a new product category?
A. So if you see Thomas Roeder, the -- I believe this is the deposition, the corporate witness -- when he answers about the product category being new, he says it's a new type of product. So I would see that as agreeing with me.
Q. And specifically regarding the Splat-R-Ball Respondents here, what is shown on the right side of this slide?
A. So the right side is marketing materials. So it's a little different than, you know, maybe his opinion, but I'm assuming it's approved by the organization, and it says right there, entirely new category.

So, again, I see the marketing materials as agreeing with me as well. It's, you know, yeah, it's a new category.

Q. All right.

MR. RUBIN: Your Honor, we would like to go on the confidential record.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

CROSS-EXAMINATION

BY MR. GEORGE:

Q. Do you have an accounting degree?

A. I do not.

Q. You're not a CPA?

A. I am not.

Q. And you don't -- do you have an industrial design degree?

A. I do not.

Q. Is it fair to say your expertise in the toy industry is sort of limited to marketing?

A. I would disagree with that.

Q. So what else do you feel you have expertise in? You don't have it in accounting, you don't have it in industrial design, so...

A. How -- how much would you like me to --

Q. If you can do it broad brushstrokes, only because it's late.

A. Okay. Well, I'm here. I'm willing to stay.

Q. Okay. Good.

A. Let's see. Product development, touring factories, some experience in legal, some experience in packaging -- gosh. I mean, I always say there's about 38

factors.

Q. But, I mean, you don't -- you're not a lawyer either, are you?

A. No.

Q. You just said --

A. No, I'm not a lawyer, but I'm an expert witness, so -- and I've done, gosh, ten cases, children's and toy products.

Q. Sure. You just said in your last answer that you had legal experience. I just wanted to make sure you're not saying that you're a lawyer.

A. I am not saying that I am a lawyer.

Q. And then about walking through the factories, I mean, you don't know how -- you've never had a job as sort of a plant manager in a factory or anything like that, have you?

A. No, but would you like me to explain?

Q. Well, let me ask you a different question. Do you have an engineering degree?

A. No.

Q. Okay.

A. No, I don't.

Q. You wouldn't characterize yourself as an economist either, would you?

A. No. No, I'm not an economist.

Q. Did you, either yourself or through somebody else, conduct a consumer survey to see what actually drove customer purchase decisions for the Xploderz and Blaster Pro products?

A. No, I didn't conduct a survey.

Q. I believe you said you have not looked at the asserted patents in this case.

A. That's not my area.

Q. So I'd like to go to CX-0 -- wait. Hold on a second.

I have to see if we have to go on the confidential record.

A. Okay.

JUDGE MCNAMARA: Whose confidential again, Mr. George?

MR. GEORGE: I think Maya Group, but I'm not sure. Is this confidential? It's not.

MR. RUBIN: No.

JUDGE MCNAMARA: Okay. I think you can tell your client representatives to stay.

MR. GEORGE: Yes. Very good.

Q. So if we could put up slide CDX-0004C, page 7.

So do you see this slide?

A. I do.

Q. Great. And this just shows sales in 2011 and

2012, correct?

A. Correct.

Q. Okay. Do you know that there were sales in 2013 and 2014?

A. Yes.

Q. Okay. And did you know that the Xploderz revenue declined from $17 million in 2012 to $12 million in 2013?

A. Yes.

Q. And did you know that the Xploderz revenue declined again to $7 million in 2014?

A. Yes.

Q. And again in 2015 to just $500,000, did you know that?

A. Yes.

Q. And to zero in 2016?

A. Yes, I knew all of that.

Q. So do you remember that you put in an expert report in this case? And it's dated January 6th, 2023.

Could we pull that up? Do we have an exhibit for that? Very good. Thank you. What's the exhibit?

While we're waiting for the exhibit number, maybe we'll go on with the question.

I don't really have many questions about this. I would just like to go to page 9 of your report. Let's look at paragraph 26.

And you say here, the second sentence, it is also my opinion that the packaging and advertising focus of the Xploderz and Blaster Pro products was on the apparent product differentiators of these products, i.e., their firing distance, ammunition capacity, and ease of use.

Do you see that?

A. I see it.

Q. Is that an accurate statement?

A. Let me just read it real quick here. Yes.

Q. Okay. And for the record, this is RX-578C.

MR. GEORGE: I pass the witness.

JUDGE MCNAMARA: Thank you, Mr. George.

Mr. Taylor?

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. TAYLOR:

Q. Good afternoon, Ms. Rosenblum.

A. How are you?

Q. I'm fine. Thank you.

A. Nice to see you again.

Q. Pardon me?

A. Nice to see you again.

Q. Nice to see you again.

I want to ask you a couple questions from your demonstrative. This is -- you talked about how Xploderz, Maya Group was successful in getting their product into

major retailers like Target, Toys "R" Us. And what is your experience doing that? Do you have any experience getting a product to the shelf?

A. Yes, a lot.

Q. Can you be -- can you give me a little background?

A. Sure. You know, it really depends how large or small your company is, the way you do it. Obviously I've done it at Mattel, but I've also done it at much smaller companies where you go in and, you know, you're making that cold call, trying to get that meeting, first of all.

There's so many different sections in toys, and it's so sliced and diced. And so, you know, let's just say something like this where you have a new category, you've got to figure out who to talk to. You can guess who you might talk to, but you've got to figure out that.

Then -- and I'm trying to think back to 2011, because I think 2011 was different than now. Now it's hard to get anybody on the telephone. They really want you to use email or text them or whatever, but, back then, you know, it was reasonably easy to get someone on the telephone. You know, you would ask, maybe if they had a receptionist, you know, where -- you know, kind of what you were looking for. So you have to -- the phone call is first.

The second thing is a meeting. And usually, in 2011, a lot of times you would go down to Walmart in Bentonville, or you would go up to Target in Minneapolis, or you would go out to New Jersey to see Toys "R" Us. Sometimes those customers would all come to the West Coast for previews. And it was a big vetting process, you know, a lot of discussion about all the different variables. It took a long time.

And that was another thing that really impressed me about Xploderz. Again, zero to 100. Because I do believe, from my own experience, looking at it, that some of the milestones were just pushed out of the way because the retailers were really wowed by it and really thought it was something different.

So that's my experience with the process. It can take a very long time or it can be short. Just depends on the product timing, everything.

Q. So in 2011, you would call up on the retailers and hopefully get a contact, and then you would do a vetting process. Was that typically successful, when you were approaching these companies? Or what's the --

A. It's typically unsuccessful, I would say, because they only have so much room. They have -- you know, going into those Walmart vendor meetings, you see hundreds and hundreds and hundreds of people coming through on the vendor

days, and you'd go out -- they had actually a mock showroom, and you could go out and see how few actually got on the shelves.

So, you know, again, one thing that you keep trying to do is you keep coming out with those line extensions, new products. You're always looking for that new category. And to have that unique selling proposition so that you can get -- because that's really the best way to catch attention in the toy industry. It's kind of a little bit of a fashion business. So you want to, you know --

Q. Have you done these -- this work yourself? You have personal experience going to these retailers, trying to get a product to the shelf?

A. Yes. And going to Bentonville is not much fun, so... I can tell you right now.

Q. Could you please pull up CDX-4 --

Let me see if it's confidential, Your Honor, first.

JUDGE MCNAMARA: Sure.

MR. TAYLOR: This is not confidential, Your Honor.

Q. Please pull up CDX-4, slide 13, please. This is the Xploderz market share in blaster category.

A. Yes.

Q. I'm just a little confused about what we're

talking about. What market are we talking about?

A. We're just talking about the blaster market in general, because that's what I had.

Q. When you say "blaster market," what are we talking about?

A. So anything else that shoots any kind of -- anything, obviously darts or what we're all familiar with, but there were a number of blasters in the market, so...

Q. I know you have some exhibits at the bottom there. Does it include products besides NERF?

A. I used NERF to do this example. So this one actually does not. But NERF was 80 percent so, you know, had to make some assumptions with, you know, the data that I had, knowing that NERF was -- it doesn't include, you know, like, water or, like, Super Soakers.

Q. It does not include water, Super Soakers?

A. Yes.

Q. So NERF launchers that shoot foam or the balls?

A. Shoot darts, yeah, that shoot anything. And, again, you know, it's -- for NERF, themselves, they're always looking for a new category that shoots something that's safe. I mean, it's a -- it's a new way of doing it, so it would add to their product line.

Q. Just to be clear, does it include anything else, any other companies' products besides Mattel's, NERF's

product?

A. No. No, it does not.

Q. So if you have a new category of products, wouldn't it actually, potentially, the market share be 100 percent?

A. It certainly could. It's kind of semantics. I mean, you know, obviously it was part of the blaster category, but think about it -- I think the best way to explain it is when you think about it, you're a retailer and you've got shelf space, and you've got only so much of it. And you've got to divide it in a way that works for you profitability-wise, but you also have to do it in a way that the customer is going to know that there's differentiation as well.

And so -- and it's also how you look at it from the mind of a retail buyer. And someone who is an expert in the toy industry, it's something different. It's completely new and it can offshoot, and it's got line extensions of its own, et cetera.

So me, I definitely see it as a new category. The Splat-R-Ball witness agreed with me, and I've seen a couple other places where people agreed. And that's what Ron Brawer was saying in 2011, so...

Q. When you say "toy industry," what do you mean by "toy industry"? Can you somehow define that?

A. I'm sorry? Give me a little more here.
Q. Pardon me?
A. Give me a little more. I'm not sure I understand the question, when you say -- just how people in the toy industry reviewed it? Is that what you mean?
Q. What is the toy industry?
A. Well, just --
Q. Or your experience, what segment of the toy industry?
A. Oh, I've worked in every -- almost every category once. Maybe die cast cars, I don't have a lot of experience, so...
Q. So kids' toys --
A. Yeah, kids' toys. Sometimes some teenage products will kind of go in there. Like Monster High dolls sell more to teenagers. It's more collectability. So it's kind of -- kids are getting older, younger, but at the same time, I think the toy industry is trying to appeal to an older audience so the toy industry doesn't go out of business.
Q. How about Airsoft guns?
A. No, that's -- and, again, let's go back to 2011, 2012. I mean, I think at that time there were a lot of events happening, world events and things, that -- no, Airsoft, no.

Q. You don't have experience marketing Airsoft guns?
A. No. No.
Q. Do you consider that to be part of the toy industry?
A. No.
MR. TAYLOR: No further questions. Thank you.
JUDGE MCNAMARA: Thank you, Mr. Taylor.
Any redirect?
MR. RUBIN: Just briefly.

REDIRECT EXAMINATION

BY MR. RUBIN:
Q. Ethan Rubin, Fish & Richardson, on behalf of Complainants.
Professor Rosenblum, you said earlier that you reviewed a Maya sales spreadsheet?
A. I'm sorry. I couldn't hear you on that one.
Q. You said earlier that you reviewed a Maya sales spreadsheet?
A. Yes.
Q. And that was CX-165C, the same -- the same exhibit number that was on the slides.
A. Yes. The 0011.
Q. And did that document include wholesale prices for all of The Maya Group blasters from 2011 -- 2011, 2012?
A. Yes, that included all the -- I don't know what

to call it, but kind of the granular data of, like, every invoice. There was -- it included like everything, so...

Q. And did you review similar data for Hasbro?

A. Yes. Yes.

MR. RUBIN: No further questions. Thank you.

JUDGE MCNAMARA: Thank you very much.

Mr. George?

MR. GEORGE: Just a few. Thank you, Your Honor.

RECROSS-EXAMINATION

BY MR. GEORGE:

Q. Do you recall how many Maya documents you reviewed in connection with preparing your report?

A. Oh, gosh. I really don't. I don't recall. I'm sorry.

Q. I was looking at your report. I only saw one. Does that sound right?

A. You mean for my report?

Q. Yes, that you said you reviewed.

A. When you say "documents," I'm not sure what you mean.

Q. Like a document that comes from the Maya company.

A. I think there were other things in there. I'm not sure. I don't recall.

Q. I didn't see any cites to emails or communications between Maya and retailers. Were you given

access to any of that?

A. Well, some of the things were mentioned in their depositions and some --

Q. I was talking about documents. I'm sorry to interrupt you, but I was just talking about documents.

A. I'm not sure I understand the question.

Q. So you've just testified that Maya bypassed milestones. Did that come from a review of the Maya documents that were produced to you or --

A. That came from my understanding of being in the toy industry for 37 years and how long it takes from a meeting to -- an initial meeting to introducing a product. It seemed fast to me.

Q. Okay. So that's --

A. My expert opinion.

Q. That's your only basis.

A. Correct.

Q. So you didn't talk to Mr. Ben-Ezer and he didn't tell you that they bypassed milestones.

A. No.

Q. Okay. And you didn't talk to Mr. Brawer and Mr. Brawer -- he didn't tell you that they bypassed milestones, correct?

A. No, I don't think so.

Q. Okay. I'm sorry. Were you finished?

A. Yeah. I said I don't think so.
Q. Thank you.
I just noticed you didn't include any packaging for NERF products that were available in 2011 or 2012 in your report.
A. Correct.
Q. Okay.
A. It wouldn't have affected my opinion.
Q. I'm sorry?
A. It wouldn't have affected my opinion.
Q. Uh-huh. Do you know how much The Maya Group spent on travel for the vendor meetings you talked about?
A. I don't.
Q. Okay. And do you know how many stores were there that the products were sold in for Walmart, Target, or Kmart in 2011?
A. I don't.
Q. You don't know.
A. I don't.
Q. Do you know how many stores, how many Walmart stores or Target stores or Kmart stores the Xploderz products were sold in 2012?
A. I don't.
Q. Okay.
MR. GEORGE: I'm done. Thank you, Your Honor.

JUDGE MCNAMARA: Thank you, Mr. George.

Mr. Taylor?

MR. TAYLOR: Nothing further, Your Honor.

JUDGE MCNAMARA: Thank you very much.

Professor Rosenblum, you may step down. Thank you very much.

THE WITNESS: Thank you.

JUDGE MCNAMARA: All right. So at this point my question is, do we have an exhibit list from the witnesses who have finished testifying? Not this afternoon, but at least this morning.

Anything yet, Mr. Cordell?

MR. CORDELL: We do, Your Honor, but I think it probably behooves us to meet and confer and make sure that we're all on the same page before we proceed.

JUDGE MCNAMARA: Yes. I would assume that would be part of any process. Good.

All right. So is there any other business this afternoon which you would like me to address before we adjourn?

MR. CORDELL: Not from Complainants, Your Honor. Thank you.

JUDGE MCNAMARA: Thank you.

MR. GEORGE: Not from Respondents, Your Honor. Thank you.

JUDGE MCNAMARA: Thank you, Mr. George.

MR. TAYLOR: No, Your Honor.

JUDGE MCNAMARA: Thank you, Mr. Taylor.

All right. Then I will see you tomorrow morning at 9:30. Have a good evening. Thank you.

//

(Whereupon, the proceedings adjourned at 5:36 p.m. to reconvene the following business day May 23, 2023, at 9:30 a.m.)

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SDX-0001C (for demonstrative purposes only)
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C E R T I F I C A T E

TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME

INVESTIGATION NO.: 337-TA-1325

HEARING DATE: May 22, 2023

LOCATION: Courtroom A

NATURE OF HEARING: Evidentiary Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceedings of the U.S. International Trade Commission.

Date: May 22, 203

Signed:

ss//

Signature of the Contractor or the Authorized Contractor's Representative

I hereby certify that I am not the court reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission against the aforementioned court reporter's notes and recordings for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

Signed:

ss//

I hereby certify that I reported the above-referenced proceedings of the U.S. International Trade Commission and caused to be prepared from my record media and notes of the proceedings a true, correct and complete verbatim recording of the proceedings.

Signed:

ss//

UNITED STATES
INTERNATIONAL TRADE COMMISSION

----------x

In the Matter of | Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME | 337-TA-1325

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OPEN SESSIONS

Pages: 599 through 773 (with excerpts)

Place: Washington, D.C.

Date: May 23, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Before the Honorable MaryJoan McNamara
Administrative Law Judge

In the Matter of	Investigation No.
CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME	337-TA-1325

International Trade Commission
500 E Street, SW
Washington, D.C.

Evidentiary Hearing
Tuesday, May 23, 2023
Volume IV of IV

The parties met pursuant to notice of the Administrative Law Judge at 9:33 a.m. Eastern.

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*** Index appears at end of transcript ***

P R O C E E D I N G S

(In session at 9:33 a.m.)

JUDGE MCNAMARA: Good morning, everyone. Please be seated.

Is there any business that needs to be addressed before we get started this morning?

MR. CORDELL: I think we have yesterday's exhibits, Your Honor.

JUDGE MCNAMARA: We do? Very good.

MR. CORDELL: Mr. Wilson will handle that for us.

JUDGE MCNAMARA: All right. Good morning, Mr. Wilson.

MR. WILSON: Good morning, Your Honor. Jeff Wilson. Similar to yesterday, we have a list of exhibits.

JUDGE MCNAMARA: Okay. Who is going to confirm from Respondents?

MR. WESP: Sean Wesp for Respondents.

JUDGE MCNAMARA: Good morning, Mr. Wesp.

All right. Mr. Taylor?

MR. TAYLOR: We agree with the list, Your Honor.

JUDGE MCNAMARA: Good. All right.

So go ahead, Mr. Wilson.

MR. WILSON: Thank you, Your Honor. At this time we would move for the admission of the exhibits listed in the document that I'll pass to the reporter with the caption

of the case and a title Exhibits Admitted During the Evidentiary Hearing on May 22, 2023.

JUDGE MCNAMARA: Very good. They are admitted.

(Whereupon, the exhibits as recited by counsel and reflected in the attached index were submitted and received in evidence.)

MR. TAYLOR: Your Honor, in talking with Ms. Kinkade, I believe she said she would like the exhibit list emailed to a certain address.

JUDGE MCNAMARA: Sure.

MR. TAYLOR: We can do that also.

JUDGE MCNAMARA: Sure, that would be great. I think we send it to LaShonne Robinson, but we'll make sure that you have the email that is the correct email to which you should send the lists. It is at Heritage Reporting, but that is our contact person. We will make sure that you have that. We will send you an email probably at lunchtime, something like that, or at the end of the day, and it will have the contact person at Heritage.

You should have it, because it is the person to whom you send your emails for purposes of receiving the -- oh, we are not doing a Webex.

MR. WILSON: We do have it. I think we sent the exhibits for Mr. Tino from the first day of the hearing. I'm not sure that those made it all the way through, but if

they did...

JUDGE MCNAMARA: We will still send you the email. I guess I am still thinking Webex. We always get the emails from all of the parties, all of the attendees and participants. I am still, I guess, in that mode a lot of the time. I am glad we are in person.

All right. Thank you, Mr. Wilson. Is there anything else?

MR. CORDELL: Just yesterday, Your Honor, I neglected to note that Mr. Ethan Rubin is NEXT Gen, and that was the first time he had presented experts.

JUDGE MCNAMARA: Very good. That is good to know. And welcome. How did it feel?

MR. RUBIN: Felt great, Your Honor.

JUDGE MCNAMARA: Well, what I say to less-experienced attorneys, are you excited? Are you terrified? And if you have both, it is a good situation.

MR. RUBIN: Precisely the case.

JUDGE MCNAMARA: Good. But you should end up on the excited side and just feeling really good about finding your own style. Very good. Good news. Thank you.

All right. So are we ready to get started?

MR. TAYLOR: Your Honor, I believe the Respondents are not going to call Mr. Delman, which may be on your last version of the schedule.

JUDGE MCNAMARA: Yes, it was. So I think we finished with Ms. Rosenblum yesterday. So the next person would be Julia Rowe? Is that --

MR. GEORGE: That's correct, Your Honor. Thank you.

JUDGE MCNAMARA: All right. I saw her in the courtroom the last couple of days. Is she here now?

Okay. You are way at the back. I could not see you. Come on up.

MS. PETERSON: Good morning, Your Honor.

JUDGE MCNAMARA: Good morning. Would you introduce yourself, just for the courtroom?

MS. PETERSON: Lauren Peterson for the Prime Time Toys Respondents.

JUDGE MCNAMARA: Yes. Okay.

JULIA ROWE,

having been first duly sworn or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: Julia Rowe.

JUDGE MCNAMARA: I am sorry. I know that it is Rowe, and I was mispronouncing it. I am sorry about that.

And Ms. Peterson, of course. You did not have your glasses on, and I did not have mine on, so there we go.

Thanks very much. You may be seated. Thank you.

DIRECT EXAMINATION

BY MS. PETERSON:

Q. Good morning, Ms. Rowe.

A. Good morning.

Q. What was your assignment in this investigation?

A. I was asked to review various financial and economic issues, such as the economic prong of the domestic industry requirement, bond, and commercial success.

Q. First this morning, let's focus on commercial success.

A. Okay.

Q. Did you prepare any demonstratives for your testimony today?

A. I did. I believe they are marked RDX-7.

Q. Thank you.

And do you have any prior experience working in Section 337 investigations?

A. Yes. I have been offered as an expert in several Section 337 investigations.

Q. And have you offered opinions on commercial success in the past?

A. I have.

MS. PETERSON: Your Honor, Respondents would like to offer Ms. Rowe as an expert in economics, financial

analysis, and accounting.

JUDGE MCNAMARA: Any objections?

MR. SHNEIDMAN: Subject to cross-examination, that's acceptable.

JUDGE MCNAMARA: So are you accepting her or is this going to be another voir dire situation with credibility?

MR. SHNEIDMAN: We'll accept her as offered.

JUDGE MCNAMARA: Thank you.

Ms. Rowe is then accepted as an expert witness on the topics on which she has been called to testify.

Q. Ms. Rowe, were you here when Ms. Rosenblum testified?

A. Yes, I was.

Q. Were you here when Dr. Kudrowitz testified?

A. No.

Q. Did you review the transcript of his testimony?

A. Yes, I reviewed at least parts of it.

Q. So to clarify, the products that are being alleged to be commercially successful in this investigation, are those Complainants' products?

A. No, these are products that were sold by The Maya Group, which is the original assignee of the asserted patents.

Q. And what is the relationship between The Maya

Group and Complainants?

A. So The Maya Group sold the asserted patents and its business to Spin Master in 2019, and Spin Master entered into an exclusive license with Hasbro in 2022.

Q. Does Spin Master have any products that practice the asserted patents?

A. No. Mr. Ben-Ezer testified that when they sold the business to Spin Master, Spin Master was not interested in the Xploderz or Blaster Pro product lines.

Q. And in this investigation, have you seen any information about Hasbro's sales of the domestic industry products?

A. Very limited. I believe there's one document that shows sales through about October 2022, but that was pretty limited data.

Q. And when did The Maya Group sell its patented products?

A. So my understanding is that The Maya Group started selling the Xploderz line in late 2010, and Ms. Rosenblum and Dr. Kudrowitz focused on the 2011 and 2012 time frame.

MS. PETERSON: Your Honor, the next exhibit I'd like to put up, I believe Complainants said that the Maya Group sales information was allowed to stay on the public record, but I'd just like to confirm.

JUDGE MCNAMARA: Sure.

MR. SHNEIDMAN: Your Honor, I should have introduced myself as well. Jeffrey Shneidman for Complainant Hasbro.

Yes, the slides themselves can be on the public record that we showed, but many of the spreadsheets should go on to the confidential record.

MS. PETERSON: Okay. Thank you.

Mr. Sayres, can you please pull up CDX-004C, slide 7? Can you put that up side by side with CDX-005, slide 50? Thank you.

Q. Ms. Rowe, do you recognize the two slides that we have up on the screen here?

A. Yes, I do.

Q. And these two slides -- CDX-4 was a demonstrative from Ms. Rosenblum's testimony; is that correct?

A. Yes, that's right.

Q. And CDX-5 is from Dr. Kudrowitz' testimony?

A. Yes.

Q. And you mentioned a moment ago that both of their analyses in this case focused on the years of 2011 and 2012?

A. That's right.

Q. Did either of Ms. Rosenblum or Dr. Kudrowitz consider any other years of Maya Group sales?

A. No. Ms. Rosenblum testified that she was aware

that the product was discontinued after four years, but neither she nor Dr. Kudrowitz cited to any of the sales data after 2012. They only focused on these two years.

Q. In the slide CDX-5C, slide 50, on the right-hand side here, lists a number of SKUs.

While I have this up on the screen, Ms. Rowe, can you tell me anything about any information you reviewed regarding the pricing of these products?

A. Yes. So overall -- I believe Your Honor asked a question about pricing of the products yesterday, and the wholesale prices -- so the prices that Maya Group received from the retailers was anywhere from about seven fifty for the more simple models and it ranged up to about $25 or so for the more complicated models that had longer barrels and more ammunition.

The suggested retail prices were about double those figures. So about $15 to $50, depending on the functionality and features of the products.

Q. And backing up a bit, you just mentioned about the sales dropping off after 2012, correct?

A. That's right.

Q. Okay. Mr. Sayres, can you please pull up RDX-7, slide 2, please. Thank you.

Ms. Rowe, what are you showing on this demonstrative here?

A. So this demonstrative summarizes the gross revenue or gross sales that the Maya Group claims to have made from the Xploderz and Blaster Pro product lines. I've highlighted 2011 and 2012 because those are the years that Complainants' experts focused on. And, as you can see, after 2012 there's a fairly sharp dropoff in sales, and the products were discontinued in 2015.

Q. And Mr. Sayres, can you please flip to the next slide? Thank you.

Ms. Rowe, what are you showing on slide 3?

A. This is an illustration of the sales of the patented products, Xploderz and Blaster Pro, compared to another one of Maya Group's products, which was the Orbeez. Orbeez are, as I understand it, the super absorbent polymer, just the balls themselves. It doesn't include any blasters, and it's advertised in a different way.

I have a Spin Master logo around the 2019 time frame, because after Spin Master acquired Maya Group, Spin Master continued to sell the Orbeez product. And as I testified before, they had no interest in the Xploderz or Blaster Pro product lines that were discontinued years earlier.

Q. Mr. Sayres, can you please pull up CDX-4 at slide 9.

Ms. Rowe, do you recall yesterday that

Ms. Rosenblum testified about line extensions?

A. I do.

Q. And are you aware if the additional line extensions shown here on slide 4 were -- continued to be sold after 2014?

A. So the bar chart that I showed in my demonstrative, it would include the line extensions. So to the extent the line extensions were sold in 2013 and 2014, they would have been part of that sales dropoff that you saw on that previous slide, and they were not continued to be sold after 2015.

Q. In her analysis, did Ms. Rosenblum rely on any sales data regarding the sale of these line extensions?

A. No, the source that Ms. Rosenblum referred to only included 2011 and 2012 data. So the products introduced after 2012 would not have been included in the sales data that she looked at.

Q. Do you agree with the sales figures that Ms. Rosenblum and Dr. Kudrowitz used to quantify the sales of The Maya Group products?

A. I think there are some serious issues with using that sales data, because it includes several overstatements that, basically, overstate the true level of sales of the Xploderz and Blaster Pro products.

Q. What type of overstatements are you referring to?

A. So there's a few issues. The first is that the sales data did not account for a recall of the first version of the Xploderz product. When it was first introduced, there was an issue with the mechanism and there was a recall of the product, and that's not accounted for in the sales data.

There is also an element of returns. So any returns made to the retailers or returns made to Maya Group, neither was accounted for in the sales spreadsheets provided by The Maya Group.

There's an issue with the SKUs, in that The Maya Group actually used a single SKU to refer to multiple different products, and there are some non-patented products, such as targets or vests, that were included in the SKUs that, my understanding, are not patented products.

And then there's other discounts, markdown money, allowances that wouldn't have been included in the documents.

So Mr. Ben-Ezer testified that, for example, if there was a markdown, that might be reflected on a later invoice from The Maya Group as a credit against amounts owed, but that type of a discount would not be included in the sales data.

So there's a number of adjustments that would lead me to conclude that the sales figures cited by

Ms. Rosenblum and Dr. Kudrowitz are overstated.

Q. Are you aware of any information regarding the quantitative impact of the issues you just outlined?

A. There is very limited information. I'm not able to perform a specific quantitative adjustment, because that information just wasn't provided by The Maya Group.

My understanding is that Complainants cite to Mr. Ben-Ezer's testimony that there was a 3 to 5 percent return rate associated with the patented products. That's not quite how I read that testimony, not quite how I understood it.

But even if that's right, Mr. Ben-Ezer testified that the returns to the retailers were so significant that some retailers didn't want to keep stocking the Xploderz and Blaster Pro products. So that, to me, is an indication that the quantitative impact of these adjustments that I'm referring to could be quite significant and more significant than the 3 to 5 percent that's associated with returns for defective products.

Q. Did you also consider Ms. Rosenblum's testimony about the profitability of The Maya Group products?

A. I did.

Q. Setting aside your concerns about the revenue data that you just mentioned, do you otherwise agree with her estimates of the profits derived from these products?

A. I don't. The overall formula for profitability is, of course, revenue minus costs equals profits. And even if I set aside any concerns I have with the revenue data, the cost data is also understated, which means that the profits are overstated.

Q. And what types of costs do you believe are understated?

A. So Ms. Rosenblum cited in the documents something called landing costs or total costs, which essentially accounted for the costs of manufacturing the product and transporting it.

She didn't account for any of the selling, marketing, or advertising costs associated with the products. And Mr. Ben-Ezer testified that there was an extensive marketing and advertising campaign, there were commercials, and that The Maya Group spent millions of dollars on advertising these allegedly patented products.

None of those costs were accounted for, which means that the profitability margins that she cited are overstated, and ultimately it's not clear if these allegedly patented products were even profitable to begin with. And we know that, of course, The Maya Group stopped selling them after only a couple of years.

Q. Are you able to estimate how much the profits are overstated?

A. No. As I said, Mr. Ben-Ezer testified that they spent millions on advertising, but the exact figure was not provided in the documents.

Q. Does the product have to be profitable in order for there to be commercial success?

A. So I'm not a lawyer and I'm not aware of any threshold that says that you absolutely have to have a profitable product, but the fact that the products were discontinued relatively quickly and that sales dropped off quickly, despite these large expenditures on advertising and other things, is an indication of a lack of commercial success to me.

Q. Are there any other issues with what Ms. Rosenblum and Dr. Kudrowitz presented in their testimony with respect to the commercial success of The Maya Group products?

A. Yes. So we've been talking about financial and accounting issues. I understand that there's a technical issue as well as that there's a test that the commercial success must have a nexus to the asserted patents, and I understand from Mr. Delman that that nexus requirement is not met.

Q. So based on everything we've discussed this morning, do you believe there is evidence supporting a finding of commercial success attributable to the asserted

patents?

A. I would not conclude that, based on the information available.

Q. Thank you, Ms. Rowe.

MS. PETERSON: Your Honor, I pass the witness.

JUDGE MCNAMARA: Thank you, Ms. Peterson.

Mr. Shneidman?

CROSS-EXAMINATION

BY MR. SHNEIDMAN:

Q. Good morning. Jeffrey Shneidman for the Complainants.

I'd like to ask you a few questions to help the Commission better understand the content of your testimony, if that's okay.

You aren't a toy industry expert, right?

A. That's right.

Q. You don't have any education specifically related to the toy industry, correct?

A. Yeah, I wouldn't describe it as specific to the toy industry.

Q. And you don't have any training in the toy industry, right?

A. That's fair.

Q. You've never worked on the marketing or the advertising of toys, right?

A. That's right.
Q. You've never worked on the branding of toys, correct?
A. Correct.
Q. You don't claim to be an expert on how to market toys, correct?
A. No, I do not.
Q. And you've never worked on the research and development of toys, correct?
A. That's right.
Q. And you've never designed any toys; is that correct?
A. Not in a professional capacity, no.
Q. Well, have you ever worked on the design of any toys?
A. I have a toddler and I have made toys for my toddler before, but I don't claim to be a professional toy designer.
Q. Can we open up Exhibit 1642C, the Rowe deposition, January 31st, 2023? Just go to page 27, lines 11-13.
Do you agree that -- have you ever worked on the design of any toys? And the answer was no, correct?
A. Okay.
Q. You've never taught any classes relating to

commercial success in the toy industry, correct?

A. No.

Q. And you've not been proffered as a toy industry expert in this case, right?

A. Correct.

Q. And you're not a person of ordinary skill in the art for the purposes of this case, correct?

A. I'm not offering opinions on that, no.

Q. And you're not a person of ordinary skill in the art in this case, correct?

A. Probably not. I'm not that familiar with the definition of that term in this case.

Q. Okay. So you don't know what the person of ordinary skill in the art is in this case, correct?

A. That's outside the scope of my work.

Q. Okay. And you had not been familiar with The Maya Group before this investigation, correct?

A. Correct.

Q. And you were not familiar with Xploderz before this investigation either, correct?

A. Correct.

Q. And you're not offering any technical expert testimony with respect to Xploderz and the asserted patents, right?

A. Correct.

Q. So you're not offering any technical opinion as to whether or not there is or is not a nexus between the commercial success and the technical patented claims, correct?

A. That's right, I'm not offering any technical testimony.

Q. You would agree, I think as you testified, there's no single way, no single accepted way, to demonstrate commercial success to the Commission?

A. I think generally that's fair.

Q. So you would agree that there's no single accepted way to demonstrate commercial success to the Commission, right?

A. Yes.

Q. And you agree that commercial success should be evaluated in the context of the relevant industry, right?

A. I think that's fair.

Q. So ten million dollars in sandwiches is different than ten million dollars in airplanes, for example, if you're trying to determine if something is a commercial success?

A. That's not quite how I think about it. But I see your point.

Q. Now you were here for Professor Rosenblum's testimony, correct?

A. Yes.

Q. And you agree that Ms. Rosenblum opined that the Xploderz products were commercially successful based on the Maya sales data, correct?

A. Yes, for the two years.

Q. And you agree that Ms. Rosenblum -- Professor Rosenblum opined that the Xploderz products were commercially successful based on market share and review of sales data of the Xploderz products in comparison with the product sales of the NERF product line, correct?

A. I believe that's what she testified to.

Q. And you agree that Ms. Rosenblum opined that products -- the Xploderz products were commercially successful based on the line extensions, correct?

A. She did.

Q. And Professor Rosenblum opined that the Xploderz products were commercially successful based on reviewed profitability data, correct?

A. She did.

Q. And Professor Rosenblum opined that Xploderz products were commercially successful based on her view that the Xploderz products created an entirely new product category, right?

A. I believe she said that.

Q. Earlier you testified about what you said were

issues with the Maya sales data, which was in CX-0165C, correct?

A. CX-0165C is one of the documents of sales data.

Q. The spreadsheet, right.

And you mentioned returns of products in your testimony, right?

A. I did.

Q. I just want to clear up. You reviewed the deposition testimony of Oded Ben-Ezer, right?

A. I did.

Q. Do you remember who Oded Ben-Ezer is?

A. I do.

Q. Who is he?

A. He is the founder of The Maya Group. One of at least two.

Q. And Mr. Ben-Ezer testified that the returns of the Xploderz products were less than 5 percent, correct?

A. I don't think that's quite right.

Q. Let me pull up the Ben-Ezer deposition at page 277, lines 1-4.

JUDGE MCNAMARA: May I have the date of that, please? And if you have the exhibit number, if that is not the exhibit number that was provided previously.

MR. SHNEIDMAN: Yes. That would be the Exhibit CX-1634C, and that would be December 13, 2022, Your Honor.

JUDGE MCNAMARA: Thank you.

MR. SHNEIDMAN: Thank you.

Q. The question he was asked was: Were returns within an acceptable range, to you, for the Xploderz product?

And he answers: Yeah, which was, you know, less than 5 percent.

A. I recall this testimony. There is some other testimony that I recall that he said that The Maya Group didn't actually track the returns and they surveyed one customer.

Q. You reviewed the deposition testimony of Ron Brawer as well, correct?

A. I did.

Q. And Mr. Brawer said that The Maya Group did not have a major return problem with the Xploderz, right?

A. I don't specifically recall that testimony, but I did review his testimony.

Q. Can we bring up CX-1852C, the March 31st, 2023 deposition of Ron Brawer, at lines 209, 15-19.

The question he was asked is: Did you ever hear from retailers about concerns they had with the product or getting too many returns on the product?

The answer was: I don't recall us having a major return problem, no.

Do you see that?

A. I do.

Q. Let's bring up Ms. Rosenblum's summary slide, which is CDX-4C, at 7.

You showed this slide in your direct examination, correct?

A. Yes.

Q. So even if we assume the returns were the worst case of 5 percent, that reduces the number of units sold in 2011 and 2012 by about 63,000 each year, right?

A. For that one issue, potentially.

Q. And so that would account for -- instead of $32.8 million in sales, it would become $31.2 million in sales, correct, just doing the math?

A. If you adjust for that one assumption that you're asking me to make, that's correct mathematically.

Q. You can take that down.

There was a small recall of the Xploderz products at the beginning of its launch, its life cycle, correct?

A. There was a recall. I don't know if I -- we haven't seen the data of the extent of the recall, so "small" is -- I don't know if I can agree to that word "small," but I understand there was a recall.

Q. That recall only affected Xploderz that were shipped to -- the initial shipment of Xploderz to a very

specific set of retailers in January of 2011, correct?

A. I believe that's what Mr. Ben-Ezer testified to.

Q. If we could pull up, again, the Brawer deposition, CX-1852C, March 31st, 2023, at lines 70 through 20, through 74, 17.

73, 20, if you could extract out through 74, 13.

You would agree Mr. Brawer is testifying that there is a 30-day period of time in which the recall affected sales, correct?

A. I see the testimony that you're referring to. It seems to be a partial answer that you're showing on the screen, but I see what you're referring to.

Q. We can pull up the rest of the answer.

Can you pull up through the rest of his testimony there?

Just to confirm, we're talking about the time frame of January 2011, right?

A. Okay. I'll accept your representation on that.

Q. Okay. Removing the Xploderz products, all the sales that were made in January 2011, assuming all of them were cancelled out, that would reduce the gross revenue in 2011 by $800,000, correct?

A. I don't have that figure in front of me, but I can accept your representation on that.

Q. All right. Can we pull up your expert report,

RX-710C, at page 12, paragraph 21?

This is your expert report, correct?

A. Yes.

Q. And in the expert report you wrote, removing Xploderz products dated 2011 in the Maya Group's sales reduces the 2011 gross revenue by nearly $800,000, correct?

A. Yes.

Q. You can take that down.

Can we bring up CDX-4C at slide 7, which is a summary of the '11-'12 Maya Group sales data?

It's your understanding, I think, from your direct testimony, that The Maya Group invoice-level financial data was available for 2011 and 2012, correct?

A. I'm sorry. Can you please repeat the question?

Q. Sure. It's your understanding that the invoice-level financial data was produced from The Maya Group for the years 2011 and 2012, correct? That's the data you reviewed.

A. That's some of the data I reviewed, yes.

Q. Okay. And do you recall how many invoices that data summarized?

A. No.

MR. SHNEIDMAN: Can we briefly go on the confidential record?

JUDGE MCNAMARA: Yes.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

MR. TAYLOR: Good morning, Your Honor. I'd like to note the Staff brought reinforcements this morning. We have three interns that joined us just on Monday, I believe, so they are here.

JUDGE MCNAMARA: Good. Welcome. Where are you from? Would you introduce yourself for the record?

UNIDENTIFIED SPEAKER: Your Honor, my name is --

JUDGE MCNAMARA: I don't think our reporter could hear you.

MR. TAYLOR: Come on up.

JUDGE MCNAMARA: Might as well.

MR. WARD: Your Honor, my name is Justin Ward. I am a rising 3L student at the George Washington University Law School.

JUDGE MCNAMARA: Good morning. And welcome.

MR. WARD: Thank you.

MR. SOIFER: Your Honor, I'm Spencer Soifer. I'm a rising 2L at the American University Washington College of Law.

JUDGE MCNAMARA: Also welcome. This is great.

Ms. Lee: Thank you. Good morning, Your Honor. My name is Monica Lee, and I am a rising 2L at the George Washington University Law School.

JUDGE MCNAMARA: Also welcome.

This is great. The more young attorneys in process we have coming and watching hearings, the earlier they will get started and move up in their careers, right?

MR. TAYLOR: Just to hear your voice in the courtroom is actually valuable.

Your Honor, does the Staff get 15 extra minutes now?

JUDGE MCNAMARA: We will make adjustments.

MR. TAYLOR: Just joking.

JUDGE MCNAMARA: I know.

EXAMINATION BY COUNSEL FOR ITC STAFF

BY MR. TAYLOR:

Q. Good morning, Ms. Rowe. Sorry for the delay.

A. Good morning.

Q. I just want to ask you a quick question. So this is your Demonstrative RDX-7 at slide 3, and I just want to ask about the distinction between Xploderz and Blaster Pro. Is there a significance to that distinction?

A. My understanding is that they have -- there were two different brand names. And in terms of significance from a technical perspective, that's not something that was within the scope. I've assumed that both the Xploderz and Blaster Pro product lines were patent-practicing for purposes of my work.

Q. Okay. So when we say "Xploderz," you're including both Xploderz and Blaster Pro? Or is there a different word I should be using?

A. That would be fine if you want to use that for your questioning. I tried to try -- to say "Xploderz" and "Blaster Pro" during my testimony when I was referring to both, but if I misspoke at any point, then I was referring to the patented products generally.

Q. Okay. Thank you.

Is The Maya Group incorporated as a functioning company today?

A. I'm not sure about that. I know that there is a representation that Mr. Ben-Ezer is the only remaining employee of The Maya Group, so that would lead me to indicate that there is some continuing concern. But much of The Maya Group products and patents were sold to Spin Master, is my understanding.

Q. Do you know when The Maya Group was founded?

It's okay. Let me ask a different question.

So in the 2010 to 2014 time frame, do you know how many employees The Maya Group had?

A. I don't recall.

Q. So you don't know whether it was a small company, a large company, a medium-sized company?

A. It depends how you measure it. I have

information about The Maya Group's revenues during that time frame of 2010 to 2014, but I don't recall information about the number of -- the total number of employees that they employed.

Q. So let's talk about revenue. How did the -- in this time frame, how did the revenue of the Xploderz and Blaster Pro products compare to the overall revenue of the company?

A. So the gross revenue for The Maya Group that I'm aware of was ranging from about $20 million to about $50 million annually in the 2010 to 2014 time frame.

Q. Thank you.

MR. TAYLOR: Your Honor, I'm just going to quickly get some water here.

JUDGE MCNAMARA: Sure.

Q. You testified earlier that the Xploderz, Blaster Pro products were discontinued, correct?

A. Yes.

Q. Did you see evidence in the record, or any evidence that you looked at, as to why the product was discontinued?

A. So the testimony included some references to that. There were some references to returns, some retailers not wanting to deal with the returns that The Maya Group's products had, and there was some testimony about the

mechanism being less than brilliant, I think is the quote that Mr. Ben-Ezer had.

So there is some context on that. I don't think that there's a single reason that was articulated, but, clearly, we do see the sales declining over time.

Q. I believe you testified earlier that you don't have specific experience in the toy industry, correct?

A. I've not worked at a toy company. I have been involved in other -- other litigation involving toy and games.

Q. I'd like to show CDX-4, slide 7, which was Ms. Rosenblum's demonstrative exhibits. I'll put it on the ELMO.

And do you recall from her testimony that she seemed to be impressed that this company was able to get on the shelves in Toys "R" Us, Walmart, Target?

Do you have any opinion on that, for this size of a company?

A. So my opinions are not dependent on the size of The Maya Group. I don't think that that's necessarily a determining factor, one way or the other.

I would say that merely having a presence on a shelf is not necessarily indicative of commercial success, and that there are lots of products sold in stores, just very, very generally, that are not commercially successful.

I think that further work, further financial analysis is required to reliably get an estimate -- or a conclusion about commercial success.

Q. Actually, you, I believe -- do you have any experience that would support your opinion as to whether this was a success for this company to achieve certain sales in these large retailers?

You wouldn't have any expertise in that area, correct? Specifically with the toy industry.

A. I wouldn't agree with that. I think that looking at gross sales is one consideration, but my background and training is in accounting and financial analysis, and I think that there is further analysis that is required to reliably get an estimate on -- or a conclusion on commercial success.

Q. I'd like to move to CDX-4, slide 14.

Do you remember seeing this demonstrative from Ms. Rosenblum?

A. I do.

Q. And I believe it shows Xploderz slotted, in comparison to NERF lines in 2011, showing, for example, XBlaster 200 would be 38 out of 250 compared to the NERF products, correct?

A. That's what she testified to.

Q. Did you look at any of this underlying data? Do

you have any reason to dispute this?

A. I think that this is incomplete, but I don't dispute the mathematics of her ranking of products.

Q. Thank you.

I just want to go back to your demonstrative, which is RDX-7 at page 3.

I want to ask you a hypothetical question -- wait. Is it your opinion that there is no evidence of commercial success?

A. My opinion is that there isn't sufficient evidence of commercial success, and that when you look at sales data that is overstated and you don't have a good understanding of the overall economics of the product, in terms of being able to assess its profitability, and when you compare that with the relatively short lifespan of the product, these indications, in my opinion, are informative towards an opinion that there is not commercial success.

But, ultimately, there is just not enough information to demonstrate that there is commercial success, in my opinion.

Q. What if we just looked at one year, 2011, do you have an opinion whether this Xploderz, Blaster Pro product would have been -- would be considered commercially successful in 2011?

A. I don't think that limiting the scope to a single

year addresses the issues. One of the most salient issues, in my mind, is the lack of information regarding profitability.

I think that there is serious issues with, not only the sales data, but also the incompleteness of the profit data. And without being able to reliably evaluate the profits of the product, to me, it would be premature or unreliable to conclude that they were a commercial success without understanding those considerations.

Q. So if we're dealing with smaller companies that, you know, have one employee left today, and we don't have every single financial datapoint from that company from years ago, you can never make a determination about commercial success, is what it sounds like.

A. No, I wouldn't agree with the way that you phrased it.

The way that I see it is that, in order to show that there's commercial success, you need to have some baseline of information that's available. And one of the things that I would like to see in this case is whether or not these accused products -- or, I'm sorry -- patented products were profitable, but we can't evaluate that based on the information that we have.

We know that both the revenue data is overstated and the cost data is understated. And I think it would

be -- I think that the analysis is incomplete enough in this instance that, regardless of the overall size of The Maya Group, there isn't sufficient information to conclude that these products specifically were commercially successful.

Q. What if we subtract out $800,000 that was discussed before from the calculation, and The Maya Group, instead of having declining sales, had the same roughly $17 million in sales going across into the future, would that represent commercial success to you?

A. I want to be open to what you're suggesting, because you're essentially asking me to assume that, despite what actually happened with The Maya Group, that there were continued sales of a certain level, that the sales were reliably set forth, and that they were profitable enough to sustain operations for more years than they were actually able to sustain.

So there are a lot of assumptions that would go into that. I'm open to the idea that there could be commercial success if you see multiple years of data showing market share and profits and revenues, but in this case that's just not the information that we have.

Q. Thank you.

MR. TAYLOR: I have no further questions.

JUDGE MCNAMARA: Thank you, Mr. Taylor.

Ms. Peterson, any redirect?

REDIRECT EXAMINATION

BY MS. PETERSON:

Q. Ms. Rowe, you were asked about whether Mr. Ben-Ezer was the only remaining employee in The Maya Group. Do you recall that?

A. Yes.

Q. And that's your understanding?

A. I think that's right.

Q. Mr. Sayres, could you please pull up CDX-4 at slide 8?

Ms. Rowe, you were shown this slide 8 during your cross-examination, which includes testimony from Mr. Ben-Ezer about what he considered commercial success.

A. Yes.

Q. Is it your understanding that Mr. Ben-Ezer has a financial interest in the outcome of this litigation?

A. I believe that he may receive some of the proceeds should there be any financial outcome associated with this investigation.

Q. You were also asked in your cross-examination about The Maya Group's ability to get on the store shelves at major retailers. Do you recall that?

A. I do.

Q. And did you see any other evidence of how The Maya Group was able to do this?

A. So I do recall testimony about Mr. Brawer's relationships with retailers and the positive experience that some retailers had had with the Orbeez product.

Q. Mr. Sayres, can you please pull up the Brawer deposition, which is CX-1852C? And I'm looking for page 52.

Ms. Rowe, you mentioned testimony by Mr. Brawer about retailers. Is this the testimony you're referring to?

A. This is part of it. I think Mr. Ben-Ezer testified to it, or maybe it was in a public news article about the products, but I do recall this.

Q. At the bottom of the page here, line 52 -- I'm sorry -- page 52, line 18-22, is that what you were referring to?

A. That's part of it, yes.

Q. Okay.

MS. PETERSON: All right. I have no further questions.

JUDGE MCNAMARA: Thank you, Ms. Peterson.

Mr. Shneidman?

MR. SHNEIDMAN: Very briefly, Your Honor.

JUDGE MCNAMARA: Sure.

RECROSS-EXAMINATION

BY MR. SHNEIDMAN:

Q. Ms. Rowe, can I -- go ahead, and let's pull up CX-1644C, which is Mr. Delman's deposition transcript. If

you can put the cover page first, so we can see the date. This was January 24, 2023. And can I please have page 188, lines 9-23.

Question: You'd agree with me that there are toys that are commercially successful for a very brief period of time, right?

Mr. Delman testified: Speaking as someone in the industry --

JUDGE MCNAMARA: I am sorry. Okay. Go ahead and read it, and then I will wait and hear what the objection is. I apologize for interrupting.

Q. -- and familiar with the industry, there are some short-lived fads that disappear and then come back again. There are some shorter-lived products than others that might be considered a success.

Question: Fidget spinners, for example?

They had their time, yes.

Question: It was all the rage for two years, right?

Answer: Yes.

JUDGE MCNAMARA: So what is the question?

Q. The question is, do you disagree that a toy that's on the market for a limited period of time can be considered a commercial success?

MS. PETERSON: Your Honor, I just want to object

as outside the scope of redirect.

JUDGE MCNAMARA: I am sorry. Go ahead.

MR. SHNEIDMAN: I believe that Mr. Taylor directly raised this question with respect to the duration of time that something was on --

JUDGE MCNAMARA: I think he did, and I am going to allow this.

THE WITNESS: Would you please repeat the question?

BY MR. SHNEIDMAN:

Q. Do you disagree with Mr. Delman, that a product that is a short-lived product might be considered a success?

A. I'm open to the idea that there could be a product that was available for a short period of time that was commercially successful, but I think that more analysis is required to draw that conclusion.

I think that looking at things such as profit share and profitability and overall sales is sort of a complete picture. And it's my opinion that there hasn't been sufficient evidence shown in this case.

MR. SHNEIDMAN: I have no further questions.

I did want to get back to Your Honor about what "SOP" means. We believe it means sales order processing from a Microsoft software export.

JUDGE MCNAMARA: I appreciate that. Thank you.

Mr. Taylor?

MR. TAYLOR: No further questions, Your Honor.

JUDGE MCNAMARA: All right. Ms. Rowe, you may step down. Thank you very much.

THE WITNESS: Thank you.

JUDGE MCNAMARA: I have as our next witness Mr. Charles Taylor.

MR. CORDELL: I don't think Mr. Taylor is being called to testify, unless I missed something.

JUDGE MCNAMARA: Mr. George?

MR. GEORGE: Yes. Mr. Taylor is not being called to testify.

JUDGE MCNAMARA: So have we finished?

MR. GEORGE: Have we?

MR. SMITH: The Respondents have finished their rebuttal case, but we still have the economic domestic industry experts to put on, which we're going to do right now.

JUDGE MCNAMARA: Okay. Who are you calling first?

MR. WILSON: Your Honor, the Complainants will call Ms. Carla Mulhern. We think her testimony may go for 30, 45 minutes. Would now be an okay time to take a short break?

JUDGE MCNAMARA: It would be a great time to take

a break. I will see you back here in 15 minutes.

(Whereupon, the proceedings recessed at 10:49 a.m.)

(In session at 11:05 a.m.)

JUDGE MCNAMARA: I gather that Ms. Carla Mulhern is being called.

MR. WILSON: That's correct, Your Honor. Jack Wilson from the Complainants. We will call Ms. Carla Mulhern as the next witness.

JUDGE MCNAMARA: Very good. Good morning, Ms. Mulhern.

CARLA MULHERN,

having been first duly sworn or affirmed on their oath, was thereafter examined and testified as follows:

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: My name is Carla S. Mulhern.

JUDGE MCNAMARA: Very good. Thank you.

DIRECT EXAMINATION

BY MR. WILSON:

Q. Good morning, Ms. Mulhern. Before we get started on the testimony today, did you prepare any demonstratives?

A. Yes, I did.

Q. Mr. Lee, if we could please bring up CDX-0003C.

Ms. Mulhern, are these the demonstratives that

you prepared?

A. Yes, they are.

Q. Let's turn to the first slide, please.

Can you briefly describe your background?

A. Yes. I have a bachelor's degree in mathematics from Bucknell University, and a master's degree in economics from the London School of Economics and Political Science. I am currently a managing principal at Analysis Group, which is an economic and financial consulting firm. I'm based here in D.C.

I've worked over the past 30 plus years now in analyzing economic issues arising in the context primarily of intellectual property matters. And I've testified frequently at the International Trade Commission in section 337 investigations.

Q. What kind of issues have you provided testimony on in 337 investigations?

A. So here at the ITC I've testified on the full range of economic issues: economic prong of the domestic industry requirement, amount and significance of inventories as it relates to CDO, bond, public interest, and commercial success.

MR. WILSON: Your Honor, at this time we would tender Ms. Mulhern as an expert in the economic issues related to section 337 investigations.

MR. SMITH: No objection, Your Honor.

JUDGE MCNAMARA: Then Ms. Mulhern is accepted as an expert on the topics for which she has been called to testify.

MR. WILSON: Thank you, Your Honor. I think at this time we should move to Hasbro confidential record.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

AFTERNOON SESSION

(In session at 1:30 p.m.)

JUDGE MCNAMARA: Good afternoon, everyone. I'm sure you might have been surprised knowing that your case -- please be seated. Thank you so much.

You finished your case, and I was a little surprised actually. I shouldn't have been but I was. I think I was expecting maybe some testimony at least initially on remedy and bond.

MR. SMITH: We do have one more witness, Your Honor.

JUDGE MCNAMARA: Oh, yay. I was thinking this is a little truncated.

Pardon me just a moment. I'm going to go get my glasses.

So "oh yay" means, both, oh yes, and oh yay, so take it as a double meaning, whichever you want.

All right. So who is our next witness?

MR. WILSON: Your Honor, if I may. On the question about remedy and bond and cease and desist orders, the parties agreed to streamline the econ DI experts. We have submitted a motion for the admission of their expert reports and demonstratives, deposition designations, and exhibits cited in those reports. We filed that with

Your Honor last night.

The motion also includes some tech DI and infringement issues, but that was submitted last night and would cover those two issues in particular.

JUDGE MCNAMARA: That's good to know. Obviously I didn't see that last night. That's good to know. We'll take care of that, and that will be fine.

The other thing I wanted to mention to you all, I am going to give you now before we leave, we have some other business in addition to the witness to take care of, but I have picked -- my staff and I got together last week and we talked about possible timelines for the infringement component of the case, depending on how the Commission rules, of course. It won't be necessary if they agree with the Motion for Summary Determination Order. It will be necessary, obviously, if they don't.

So what we're looking at, given the schedule and given time and people's vacations and so forth, the last week of October, pick any two days. If you all could get together with your witnesses, and just for the time being just pick two days, the last week of October, and we'll put it on the schedule for the infringement case. And we may not need it. And it will be far enough out. And given, again, schedules and so forth, that we'll certainly know sooner rather than later whether we're going to need -- the

Amgen case came down, so I've been sort of watching that as well.

So that gives you some range within at least that week to pick two days that you all can agree upon. Okay?

Mr. Smith?

MR. CORDELL: Before we do that, Your Honor, could I do one little housekeeping thing?

JUDGE MCNAMARA: Sure.

MR. CORDELL: It may not be apparent to any of us, but Jack Wilson is also a NEXT Advocate.

JUDGE MCNAMARA: Oh, I think that's wonderful. It was not apparent, and good for you, and well done.

MR. CORDELL: And then I would also like to recognize Irene Hwang and Autumn Wu, who were both slated to do witnesses that unceremoniously were withdrawn. So they didn't get a chance.

JUDGE MCNAMARA: So next time. At least you're in it now, you know. You're here to do it, so that's a good thing. That's very good. We'll see you the next time.

MR. CORDELL: Thank you.

JUDGE MCNAMARA: Much appreciated.

MR. SMITH: We start with Ms. Rowe. You mentioned yesterday about PTT Respondents filing updated lists of the invalidity, obviousness assertions that we were making. We filed it on EDIS this morning, and I have a

paper copy, if you would like it.

JUDGE MCNAMARA: Would love it. Thank you.

MR. TAYLOR: Your Honor, we're on confidential.

JUDGE MCNAMARA: I think we can be on public.

Ms. Kinkade? Okay.

All right. We'll take care of exhibits, then, after we're done. I'll give you some time after we're done with the witness. I usually go back into the back and we sit and we kibbutz for a little while, while we're waiting for the exhibits. That way we can get the exhibit lists in today and everything can be finished and concluded except for waiting for the infringement.

Ready to go, Mr. Smith?

MR. SMITH: Sure. Prime Time Toys calls Julia Rowe.

JUDGE MCNAMARA: Okay. Very good. You're still under oath, so you're fine.

JULIA ROWE,

having been previously duly sworn or affirmed on their oath, was thereafter examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good afternoon, Ms. Rowe.

A. Good afternoon.

Q. You mentioned to Ms. Peterson this morning that you essentially had two assignments in this investigation. One was to opine on the economic aspects of domestic industry and remedy and commercial success. So let's talk today about your domestic industry opinions.

A. Okay.

Q. You understand that the parties have agreed to focus your testimony today on just the significance of Hasbro's claim and that a domestic industry is in the process of being established. Do you understand that?

A. That's my understanding.

Q. Did you prepare any demonstratives for your testimony today?

A. I did. I believe they are marked RDX-6C.

Q. Do you have prior experience working on section 337 investigations, particularly with domestic industry?

A. Yes. I've done this many times.

Q. And you were here when Ms. Mulhern testified this morning?

A. I was.

MR. SMITH: Your Honor, in case we need to, Prime Time Toys offers Ms. Rowe as an expert in economics, finance and accounting for this part of her testimony.

JUDGE MCNAMARA: Mr. Boyd?

MR. BOYD: No objection, Your Honor.

JUDGE MCNAMARA: All right. Then Ms. Rowe is accepted as an expert for the topics on which she has been called to testify.

MR. SMITH: Your Honor, at this point I believe we need to move onto the Hasbro confidential record.

(Whereupon, the hearing proceeded in confidential session.)

O P E N S E S S I O N

JUDGE MCNAMARA: So I understand the cases are in except for, of course, the unknown result yet with infringement. Is that accurate?

Mr. Cordell?

MR. CORDELL: Yes, Your Honor.

JUDGE MCNAMARA: Very good. Mr. Smith?

MR. SMITH: Yes, that's our understanding as well.

JUDGE MCNAMARA: All right.

MR. CORDELL: Except, Your Honor, I think we have three exhibits to admit.

JUDGE MCNAMARA: Okay. And you've agreed upon these?

MR. CORDELL: We have.

JUDGE MCNAMARA: Okay. And does that include the exhibits that Ms. Rowe relied upon in her testimony? Is this it, then, for all of the exhibits that are coming in?

MR. WILSON: Yes, Your Honor. This is Jack Wilson. This should be all the exhibits, given the motion that was filed last night, that will cover Ms. Rowe's exhibits for domestic industry as well as Ms. Mulhern's, some depo designations and the issues that I spoke about earlier.

The three exhibits we need to admit -- we conferred over lunch -- relate to Ms. Rowe's testimony for commercial success. Those exhibits are RDX-0007C, and that should be admitted for demonstrative purposes only, CX-0165C and CX-1854C. And those are -- that should be all of the exhibits left for Your Honor.

(Whereupon, the exhibits as recited by counsel and reflected in the attached index were submitted and received in evidence.)

JUDGE MCNAMARA: Okay. Very good. And then since -- if this afternoon you could present a written exhibit list, I think you all have -- you can send that to the contact, we'll let you know, I think it's LaShonne Robinson at Heritage, and I think you have all been given Box or you've been told how to submit exhibits through Box as well.

MR. WILSON: That's correct.

JUDGE MCNAMARA: Have you given Ms. Muhammad contacts? I think she contacted you. If not, she will this afternoon.

MR. WILSON: I think we received that, but we will verify.

MR. SMITH: I believe so.

JUDGE MCNAMARA: Very good. Then you know how to provide the exhibits. Make sure you have very clear tables

of contents when you submit your exhibits. Make sure also, please, that if any exhibit have been withdrawn that you no longer are relying upon, that that's also very clear. Because there are sometimes exhibits in prehearing briefs and sometimes exhibits that are going to be relied upon in post-hearing briefs that have been withdrawn, or there may be a discrepancy. Double-check those lists to be sure that they are accurate so that, as we start to look at the exhibits and start to prepare to write, that we don't run into a problem with that. I have in the past. So just be very careful about that.

The other issue, of course, is the briefing schedule.

MR. SMITH: Your Honor, can we go on the public record?

JUDGE MCNAMARA: Sure.

MR. SMITH: I think we can probably backdate to the end of Ms. Rowe's testimony.

JUDGE MCNAMARA: I think that's right. Thank you. What we're going to do, I'm going to set up the briefing schedule so that you are briefing all of the issues that were addressed during the trial this past week, last week and this week. Depending upon what happens with infringement, there would be a different briefing schedule for just the infringement portion of it, not surprisingly.

Right now we think we can keep the target date in place. We think that with a divided briefing schedule that we can keep the ID date, the ID due date in place, but I'm not quite sure yet. We will wait and see if the decision from the Commission comes down before October and they uphold the Order on Motion for Summary Determination and Infringement, then obviously there is no need for any further briefing. There would be no need for the October dates for an infringement case. So essentially we would be done. And that's how we will work it.

I'll issue an order on a briefing schedule from just the trial. I think the schedule is already in place, and I think we could probably use that schedule that's in place.

Mr. Smith?

MR. SMITH: Just one point of clarification. Given the way that we structured expert reports in this case where we had initial with burden and then non-burden, but during the non-burden time the Complainants put in their secondary considerations and then there was a rebuttal to that. I don't know, do we want to -- I don't want to suggest a three-tiered briefing process.

JUDGE MCNAMARA: No, it's not necessary. I give you an opportunity to submit post-hearing briefs and post-hearing reply briefs.

MR. SMITH: Okay.

JUDGE MCNAMARA: And typically the parties have broken that up as they have chosen, and so you can do that. It would be typical to in a reply brief respond to, for example, some of the secondary considerations. You can break it up. This was an unusual presentation, to say the least.

MR. CORDELL: It really was, Your Honor. I feel a little bit had here, I have to confess, and I think this is part of the Kirkland folks. This is the trail that they have blazed.

Because, remember, I was forestalled from examining Mr. Delman about secondary considerations because he was supposed to reappear and he didn't.

JUDGE MCNAMARA: Good point.

MR. CORDELL: So, again, we'll brief it. We understand where we are. We understand the Respondents' decision not to put him up again, but, again, that was just not kind of what --

JUDGE MCNAMARA: What you had anticipated.

MR. CORDELL: So we think we can do it in an opening brief with a reply and --

JUDGE MCNAMARA: I guess I'm curious, though. Since I wasn't informed until this morning that Mr. Delman was not being called again, did you all know that last

night?

MR. CORDELL: We heard it late last night. They sent us an email saying that they would not present him.

JUDGE MCNAMARA: And so did you raise an issue with them last night saying, hey, we would really like to bring him back?

MR. CORDELL: Well, we did, and we actually toyed with calling him ourselves, although it's a little odd for me to call their witness.

JUDGE MCNAMARA: There might have been, but, under the circumstances, I probably would have allowed it.

MR. CORDELL: Well, and they bear the burden. So validity always remains to them. We have a burden of production, which I think we have clearly met, and so the burden of persuasion is with them. If they make the decision not to recall him, that's really --

JUDGE MCNAMARA: That's true, but you said you feel a little bit had, and that is sort of what I am addressing. Because if you had the opportunity to actually bring him back or let me know that this had occurred -- I was just presented with a fait accompli.

MR. SMITH: Your Honor, if I may, you asked Mr. Cordell if they raised this with us last night and Mr. Cordell said we did. They did not that I can tell. I did not see a response about us not calling Mr. Delman

today.

MR. CORDELL: We were just informed x capitra that they would not be calling him is what happened. And if you recall the exchange that I had with Mr. George on Friday and he forestalled my examination of Mr. Delman promising and telling us all, I heard him say that he had given us exhibits and then had withdrawn them. We rushed back to the office and looked and could find no such exhibits.

And I think what he meant to say is that they pulled them out of the set before they gave them to us, which I think was his prerogative, but it's -- we are where we are.

JUDGE MCNAMARA: We are where we are.

MR. CORDELL: We're prepared to brief it on the record we have developed. But, for example, we firmly believe that a complete obviousness analysis on the part of a patent challenger involves secondary considerations, and there's a big hole in what Respondents have done. But, again, I let them make their own decisions.

JUDGE MCNAMARA: Mr. George, do you have a response?

MR. GEORGE: It sounds like we're just complaining about things, and that's okay. My response is the commercial success -- Mr. Delman gave testimony about secondary considerations in the form of the Carlson patent

and the Korean reference, and he was cross-examined on that.

The remaining testimony about commercial success, I don't know what they were expecting, really goes to nexus. And, frankly, we established that through Mr. Kudrowitz. There was no reason to put Mr. Delman on the stand and say is more ammo covered by claim 1. Just, to me, it seemed a waste of time.

But they can write their brief. They can say we didn't meet our burden. I really don't understand what the complaint is.

JUDGE MCNAMARA: I think part of what at least I'm hearing is there may not have been a mutuality in the communication, let me -- or a mutuality of understanding.

MR. CORDELL: I think that's right, Your Honor. And I think it may be the thing that makes it, again, a little hard for me to see is that Respondents chose the secondary considerations that they wanted to advance in the first presentation promising that the rest of them would be dealt with in the second, and then they withdrew the second.

So, again, everybody has strategic ideas and pathways that they choose, but that's what happened. I'm not asking to go back and redo anything. We're prepared to brief it on this record. But I just want to note that, again, we were promised something that just didn't happen.

JUDGE MCNAMARA: So I guess my question at this

point is what can I do to --

MR. GEORGE: He is not asking you to do anything, Your Honor. He is just complaining.

MR. CORDELL: I would ask you to find against Respondents.

MR. GEORGE: Very good.

JUDGE MCNAMARA: That was certainly expected, you know. I would expect that you would want that.

So I think at this point -- and I think it's something that I hear a little bit too infrequently where there has not been a meeting of the minds on some of these things, and so it does create some difficulties. I have seen it in a lot of different circumstances. Not surprisingly, you all have been part of it.

If there is nothing I can do now, then the only question I have is, again, you are free to divide up your briefing. Again, everything came in a little bit in an unusual fashion in this case.

So the way I look at it is you have got -- do you need more pages to brief, to use in your post-hearing briefs and reply briefs? Do you need more pages? Is there anything you're suggesting that I can do that can make sure that, you know, everyone's rights are protected at this point other than just -- both sides can brief on your burdens. You can have reply briefs. And then what, if

anything?

MR. CORDELL: It is an intriguing possibility, Your Honor, for an additional reason, which is so much of the record was submitted on paper.

JUDGE MCNAMARA: It was, which is unusual for me as well.

MR. CORDELL: And in fairness to Your Honor and to your staff, a few extra pages in the brief might actually assist with the resolution of the case.

MR. GEORGE: That's fine, Your Honor.

JUDGE MCNAMARA: You're easy, Mr. George.

MR. GEORGE: What's that?

JUDGE MCNAMARA: You're easy.

MR. GEORGE: I try. I try.

JUDGE MCNAMARA: Okay. So why don't you give me a proposal on that. Why don't you all get together and talk and agree, all right, and let me know the number of pages that you think might be helpful in this set of circumstances.

Again, this was a little unusual. I don't, as you know, make a practice of relying on expert witness reports. I haven't done that typically. And I think we probably have more coming in on the paper in this case than I often do so we can accommodate that.

MR. GEORGE: Thank you, Your Honor. I would just

like to say one more thing. I would like to thank you and your staff for giving us those two days after they settled at the last moment. We really appreciate it. And we know it's not just you, there's a staff behind you, and we thank them too.

JUDGE MCNAMARA: And they are good.

MR. GEORGE: We thank the staff and we thank opposing counsel for working with us to really narrow this case to where we were able to do it in three days. I want to thank you all.

JUDGE MCNAMARA: I appreciate that. I appreciate what you all did too, because it is very hard in trial. Your heads are so focused on what you need to do and get done and get in, and to have everything disrupted is -- can be a real burden, and yet, on the other hand, it also shows your measure as attorneys that you were able to turn that around and get this in and get it in well. That's a hard thing to do and you did it.

MR. CORDELL: On behalf of Complainants, we also appreciate all the time and attention you and your staff have given us. It's been a pleasure.

JUDGE MCNAMARA: We enjoy this. In case it isn't clear, we all enjoy this and we really get to see really fine work. And that makes practicing law really enjoyable for us.

So thank you very much. We will send you an order on the briefing schedule, which I think is already in place, but we will reaffirm that and any other instructions, but I'll include in that order, once you submit to me, let me know, if you will, by Friday how many pages you think you may need, and then you can split it up between your post-hearing brief and your reply brief, as you choose. Okay?

MR. CORDELL: Thank you.

JUDGE MCNAMARA: And then you have the freedom to do that. Thank you very much.

MR. CORDELL: Thank you, Your Honor.

MR. GEORGE: Thank you.

JUDGE MCNAMARA: And make sure you get the list into us and the three exhibits for today. Thank you again.

(Whereupon, the proceedings concluded at 2:41 p.m.)

C O N T E N T S

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E X H I B I T S

Exhibits admitted during the evidentiary hearing on May 22, 2023.

Exhibits from Mr. Joel Delman

RDX-0003 (for demonstrative purposes only)

JX-0001

JX-0002

RPX-0003

RX-0001

RX-0002

RX-0008

RX-0009

RX-0017

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Exhibits from Maureen Reitman Direct
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CX-1852C
RX-0088C
RX-0101C
RX-0109C
RX-0132C
RX-0137C
RX-0192C
RX-0473C
RX-0617C
RX-1635C

RX-3297
RX-3299
RX-0102
CX-1169

Exhibits from Lynn Rosenblum Direct
CDX-0004C (for demonstrative purposes only)
CX-0531C
CX-0552
CPX-0032 to CPX-0069
CPX-0072 to CPX-0074
CX-0165C
CX-1634C
CX-0173C
CX-1631C

Exhibits admitted during the evidentiary hearing on May 23, 2023
Exhibits from Ms. Rowe
RDX-0007C (for demonstrative purposes only)
CX-1854C
CX-0165C

C E R T I F I C A T E

TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME

INVESTIGATION NO.: 337-TA-1325

HEARING DATE: May 23, 2023

LOCATION: Courtroom A

NATURE OF HEARING: Evidentiary Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceedings of the U.S. International Trade Commission.

Date: May 23, 203

Signed:

ss//

Signature of the Contractor or the Authorized Contractor's Representative

I hereby certify that I am not the court reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission against the aforementioned court reporter's notes and recordings for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

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I hereby certify that I reported the above-referenced proceedings of the U.S. International Trade Commission and caused to be prepared from my record media and notes of the proceedings a true, correct and complete verbatim recording of the proceedings.

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