UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C.

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IN THE MATTER OF CERTAIN SOFT :

PROJECTILE LAUNCHING DEVICES, : Inv. No

COMPONENTS THEREOF, AMMUNITION, : 337-TA-1325

PRODUCT CONTAINING SAME :

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Deposition of RONALD BRAWER

Conducted Remotely

Friday, March 31, 2023

9:05 a.m. PST

Reported by: Matthew Goldstein, RMR, CRR

DIGITAL EVIDENCE GROUP

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Deposition of RONALD BRAWER, conducted remotely:

Pursuant to Notice, before Matthew Goldstein, RMR, CRR, Notary Public in and for the State of Maryland.

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THE VIDEOGRAPHER: We are on the record.

This is the remote video deposition of Ronald Brawer, in the matter of Certain Soft Projectile Launching Devices, Components Thereof, Ammunition, and Products Containing the Same, in the United States International Trade Commission, Washington, D.C.

My name is Billy Fahnert. I am the video technician today. The court reporter is Matthew Goldstein. We are here on behalf of Digital Evidence Group.

Today's date is March 31st, 2023. The time is 9:05 a.m., Pacific Daylight Time.

All parties have stipulated to the witness being sworn in remotely.

Will counsel please identify yourselves for the record, and then the witness will be sworn in.

MR. CUTRI: Good morning. This is Gianni Cutri. I'm here with Jake Rambeau for respondent SplatRBall and the SplatRBall respondents.

MR. LEWIS: This is Douglas Lewis. I am here for the Gel Blaster respondents.

MR. GEORGE: This is Kenneth George. I'm here for the PTT respondents.

MR. TAYLOR: This is Todd Taylor. I represent the Office of Unfair Import Investigations.

MS. REICHEL: This is Whitney Reichel of Fish & Richardson for Hasbro.

MR. RUTTENBERG: Good morning. This is Guy Ruttenberg for the witness.

THE WITNESS: I'm Ron Brawer.

MR. RUTTENBERG: You don't have to introduce yourself. It's for the lawyers.

P R O C E E D I N G S

Whereupon,

RONALD BRAWER,

being first duly sworn or affirmed to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE SPLATRBALL RESPONDENTS

BY MR. CUTRI:

Q. Good morning, Mr. Brawer. How are you?

A. Good.

Q. My name is Gianni Cutri. I'm going to be asking you some questions today.

As you can see, we have a -- or you probably could see a minute ago. We have a court reporter here. So I would ask -- and we're proceeding over video. So I would ask that we do our best to -- and when I ask you a question, you wait until I finish and then give your answer so the court reporter can get that down.

Is that okay?

A. Yes.

Q. And please give verbal answers. Even though you are on video, the court reporter can't record head nods or shaking your head.

Is that okay?

A. Yes.

Q. And if you don't hear or understand one of my questions, would you please let me know?

A. Yes.

Q. If you answer, I'm going to assume you heard and understood my questions.

Is that okay with you?

A. Yes.

Q. One or more lawyers may object to my questions. After the objection, you should answer unless your lawyer, Mr. Ruttenberg, instructs you otherwise.

Is that your understanding of how we're going to proceed today?

MR. RUTTENBERG: Yes.

THE WITNESS: Yes.

MR. RUTTENBERG: The witness is looking at me. Yes, I will instruct him. Obviously, if a

different party has some sort of privilege or privilege-like objection to the witness answering on behalf of their own client, and I don't know if that's going to come up or not, I guess someone needs to alert me and the witness if they need us to not answer that question. Because I wouldn't purport to raise that on behalf of anybody other than the witness himself.

MR. CUTRI: Okay.

BY MR. CUTRI:

Q. Mr. Brawer, if you need a break, just ask; and unless a question is pending, we can take a break whenever you like.

Is that okay?

A. Yes, thank you.

Q. Is there any reason that you can think of that you can't give full, accurate, and truthful testimony to the best of your knowledge today?

A. No.

Q. When did you first -- you understand that you're being deposed in a lawsuit that was

brought by Hasbro and Spin Master; right?

A. Yes.

Q. When did you first learn about this case?

A. I received an e-mail from, I believe, the legal party of -- the lawyers of Hasbro.

Q. Okay. And do you know about when that was?

A. Less than a year ago.

Q. Okay. And you signed a consulting agreement -- did you sign a consulting agreement with Hasbro?

A. Yes.

Q. And you had a number of conversations with Hasbro's lawyers; right?

A. Yes.

Q. Okay. I will come back to those -- that line of questioning in a minute. But before I get to that, I wanted to ask you about your background.

We have your LinkedIn profile, Mr. Brawer. So maybe I'll -- I can bring that up,

but maybe you could just tell me -- I understand that you worked for a time for Mattel; is that right?

A. Yes.

Q. Okay. What did you do for Mattel?

A. I was both in the marketing and the sales divisions.

Q. And how did you come to work for Mattel?

A. I applied for a job at Tyco Toys and received a marketing role at Tyco Toys. And approximately one year after starting at Tyco Toys, Mattel acquired Tyco Toys.

Q. And that's how you came to work for Mattel?

A. Yes.

Q. And did you stay in your marketing role at Tyco, or did you go on to do other things?

A. I stayed in the marketing role at Tyco, which became Mattel. It was a full acquisition. And then I went on -- into the customer marketing and sales roles.

Q. What does marketing -- what did your job

in marketing entail when you were at Mattel?

A. I would describe it as the hub of wheel with spokes. And so I coordinated all of the disciplines that went into creating a product and included the presentation of the product often to customers. So I would coordinate design, finance, sales, at some level engineering, work on -- I was responsible for the P&L.

So I had financial visibility to the product and financial accountability to the company -- reporting accountability for the product and would be responsible for, at the beginning of any new product development process, conceptualizing what the product fit would be within the brand group that I worked for.

Q. And you said you had -- did you have a marketing role throughout your time -- that role that you just described, during what time periods did you have that for Tyco and about what time period did you have that for Mattel?

A. So I was in straight-up marketing from -- for about four or five years, the first

four or five years that I was at Tyco, which was one year, and then an additional three or four years that I was at Mattel as an employee after the acquisition. And then I transitioned more into a sales role.

Q. Your LinkedIn says you started at Mattel in June of 1996. Is 1996 when you -- and I know that LinkedIns might gloss over detail, but when did you start at Tyco and when was Tyco acquired by Mattel, if you know?

A. I can't answer with any definitive year.

Q. About how long were you at Mattel -- well, including the time that you were just at Tyco before it was acquired, about how long were you -- was it before you left Mattel?

A. Approximately nine years.

Q. You said that about four years or so into your work experience with -- after starting with Tyco, you moved from a sales role -- I'm sorry, from a marketing role into a sales role at Mattel; is that right?

A. Yes.

Q. What did your sales role entail?

A. So in the division that I was in, which was the boys toys division, I was working with the leaders of sales in a customer marketing role. So I developed marketing plans for customers, which included everything from planograms to promotional plans, P&Ls, and worked hand in hand with the sales team to build ours -- build our product programs at retail.

Q. Got it.

Did you end up going to a different company after Mattel?

A. Yes.

Q. And what company was that?

A. MGA Entertainment.

Q. What did you do for -- what was your -- well, when you left Mattel, what was your title?

A. I believe I was a senior vice president of sales.

Q. And what role -- when you first got to MGA, what was your role and title?

A. I believe it was executive vice

president of sales and marketing.

Q. And what was your role -- what did your job duties entail when you were at MGA?

A. I oversaw all the marketing and sales functions for the company.

Q. And what products did you oversee when you were at MGA?

A. I mean, the largest product group was Bratz dolls by far, but then there were -- there was everything from radio control to games to -- I have no way of recollecting all the different products. But we were in many different categories of toys.

Q. And then did there come a time when you left MGA -- well, did there come a time when you left MGA, and when was that?

A. Yes, I left MGA. I think it was approximately five years after I started.

Q. Do you know about what year that was when you left?

A. Approximately 2009.

Q. And what did you do after you left MGA?

A. I formed my own company.

Q. Okay. And what company was that?

A. Hobbeezone, Inc.

Q. Okay. And what was the business of Hobbeezone?

A. To develop and market and sell toys.

Q. Let me show you a document.

MR. CUTRI: Oh, can we have Exhibit -- the exhibit at Tab 5.

(Brawer Deposition Exhibit 1 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. Mr. Brawer, I'm showing you what's been marked as SRB_2932, and it continues through 2938. This is an article from the Los Angeles Times that's been dated December 22nd, 2012.

Do you see that?

A. Yes.

Q. Have you ever seen this article before?

A. Yes.

Q. Okay. When was the last time you saw

it?

A. Years and years ago.

Q. Okay. If you like, I can let you read the whole thing. I'm going to have a number of questions about it, but what I wanted to draw your attention to was a discussion -- if we go to the next -- so, actually, why don't we do this, just so you get some basic familiarity with the document.

If you go to the next page of the document, there is a -- if you just sort of scan this, just so you're -- in fairness to you, this document talks about, you know, California has an important place where toys are developed.

If you go to the next page, there's still some more discussion about that concept of southern California and New York being places where toys are developed.

And if we go to the next page, we continue with the discussion of, you know, southern California. And then we start to talk about your background. At the bottom half of the

page is kind of your history.

Do you see that?

A. Yeah.

Q. Okay. And then if we go to the next page, there is some discussion here about the beginnings of what was called the Maya -- what was named the Maya Group.

So we can take the exhibit down for a second because I'm going to ask you a couple of questions, Mr. Brawer. So that was just orienting you a little bit.

You were working at Hobbeezone after you left MGA. Did you come to work for the Maya Group at some point?

A. Yes.

Q. How did that come about?

A. Hobbeezone merged with the Maya Group.

Q. Got it.

And how did you come to -- did you work with someone named Ben-Ezer, Oded Ben-Ezer?

A. Yes.

Q. And how did you come to meet or know

Mr. Ben-Ezer?

A. Oded Ben-Ezer was an acquaintance that both my wife and I had with him and his wife from my first entrepreneurial venture, which was baby products back a long time ago, before the toy experiences that you just went over. And we were both two young couples standing in booths next to each other, trying to hock our stuff at trade shows in Dallas in particular. And we got to be friendly from those experiences.

Q. Got it.

And then when you left MGA, did you reconnect with Mr. Ben-Ezer?

A. We stayed in touch with the Ben-Ezers all through the years. It wasn't a reconnection.

Q. Okay. How did it come to pass that you -- that Hobbeezone merged with the Maya Group?

A. So I had made the decision -- or our family had made the decision to go out on our own and try to develop a toy company of our own. And the Ben-Ezers had been in the same company, the Maya Group, that we -- that they were standing in

that booth a long, long time ago. And so they still owned that company. But it wasn't doing much. The company was rather -- it was fairly dormant. It was selling a little bit of radio control vehicles, but their main business in baby products had been sold off.

And so I think it was just -- Oded Ben-Ezer and I stayed in touch. And I was starting a new company, wanted to develop products, sell products. He had a company. They didn't have products. They wanted to sell products, and it just seemed like a good idea.

Q. What -- did you develop a product based on superabsorbent polymers?

A. Eventually, yes.

Q. If I say "SAP," will you understand that that stands for "superabsorbent polymer"?

A. Absolutely.

Q. How did you come to develop -- well, the superabsorbent polymer -- am I correct that one toy that you developed based on a superabsorbent polymer that was called Orbeez?

A. Yes.

Q. How did you come to develop the Orbeez superabsorbent polymer toy?

A. I'm going to ask you to be a little bit more specific on that question, please.

Q. Okay. What do you mean?

A. Like what do you mean by how did I come to develop it? Like how did I find it?

Q. Yeah, let's start with that. How did you find -- well, in your words, how did you find it?

A. So superabsorbent polymers is a chemical compound that was developed by the Department of Agriculture way back when and through the decades had been used in different -- in a few different industries. And I came upon it in the first time in my life walking through a market in Camden, London, where somebody was using them to hydrate flowers.

Q. Okay. And what happened next?

A. I was intrigued by not the flowers but the hydration balls and bought some and took them

home and grew them, which you basically grow superabsorbent polymers through water, hydrated them. And then left them in the house, exposed them to -- I have two kids at that time who are younger, and they had friends come over and just watched people interacting with them.

Q. And what did you observe when you saw -- you were watching children interact with the SAPs?

A. Yeah, and adults, frankly. But I was more intrigued -- I had an eye with the kids more so than with the adults.

Q. What did you observe the kids doing with the hydrated SAPs?

A. They were touching them. They couldn't really let them go. They have a very special tactile sort of feel. When I showed them or somebody showed them how they start out and then what they transform into, they were all rather amazed. You can bounce them. You can roll them. You can play with them. They were just a versatile compound that you could do a lot of different things with them.

And then when you put enough pressure on them, they would crush. And then because they were primarily water, in the high 90 percentiles of water, basically anything that crushed would evaporate, and you basically had nothing left.

Q. I see.

A. So they leave no mess.

Q. Got it.

And what did you see kids --

MR. CUTRI: Well, let's pull up the article again and if we --

THE VIDEOGRAPHER: Sorry, just a quick question, what number are we marking this as?

MR. CUTRI: We'll mark this as Exhibit 1.

THE VIDEOGRAPHER: Okay. Thank you.

MR. CUTRI: Can you go to page ending 2937.

MR. RUTTENBERG: And, Mr. Cutri, it looks like you're showing him the page you want to show him, which is fine. But do you mind if I just show the witness, if he wants to get the

entire document, you go to the other screen and it's there, as well.

So you can follow along if Mr. Cutri is going to show you a specific document. You just have to reload here. And then it appears here, as well. So you can look at this version which has everything, or you can just look at this version, which is -- Mr. Cutri is showing you just the pages he wants to show you at the moment.

THE WITNESS: Okay.

BY MR. CUTRI:

Q. The bottom half of this page talks about, "The Orbeez line included a toy ladybug that poops the beads, which can then be vacuumed up. Another popular toy is a foot spa for girls, allowing them to duplicate what they have seen their mothers enjoy with regular ones [sic]."

And then it says this: "For the boys, the response was nearly universal: 'These are paintballs,' they would say. 'We want to shoot them,' Brawer said."

Do you see that?

A. Yes.

Q. So what was your observation -- did you observe children use the SAPs as projectiles when they were playing with them?

MS. REICHEL: Objection to form.

THE WITNESS: What happens now?

MR. RUTTENBERG: You can answer.

THE WITNESS: Oh. So if I could ask, please, for a little more -- at what point?

BY MR. CUTRI:

Q. Ever. Like I was referring to kind of early on in the development stage, but ever. I mean --

A. So --

MS. REICHEL: I'm sorry, objection to form. I wasn't sure when Mr. Cutri was done.

Go ahead.

MR. RUTTENBERG: Mr. Cutri, can you just please repeat the question? It's just a little unclear what --

MR. CUTRI: Sure.

MR. RUTTENBERG: -- the pending question

is right now.

BY MR. CUTRI:

Q. Maybe I'll make this a little easier for you, Mr. Brawer.

We were talking before about when you first were working on developing toys out of the SAPs. Do you remember that?

A. Yes.

Q. And you said that one of the things that you did was give the SAPs to adults and children; is that right?

A. Yes.

Q. And you observed like the way -- did you observe the way that they played with the SAPs?

A. Yes.

Q. When you observed children playing with the SAPs in that context, did you ever see them use the SAPs as projectiles?

MS. REICHEL: Objection to form.

THE WITNESS: They would throw them at each other, yes.

BY MR. CUTRI:

Q. Okay. And did they ever -- I mean, this article says that kids would say to you, "These are paintballs. We want to shoot them"; right?

MS. REICHEL: Objection; form.

THE WITNESS: So my recollection is that when I expressed this quote to the reporter, I was probably focused more on feedback that we were getting in a little more formal research setting.

BY MR. CUTRI:

Q. Okay.

A. I don't recall, although it may have been said, when they were throwing them at each other in the beginning stages of my interaction with the SAPs that they were like paintballs. But I definitely remember that when we would sit in focus groups early on, boys were often calling them paintballs.

Q. Okay. Did boys say, "We want to shoot them" in these early focus groups?

MS. REICHEL: Objection to form.

THE WITNESS: I can only recall that

from the article, but I would assume yes.
BY MR. CUTRI:
Q. Why would you assume that boys would want to shoot the SAP projectiles?
MS. REICHEL: Objection to form.
THE WITNESS: Because it says that.
BY MR. CUTRI:
Q. Okay.
A. And I -- I mean, I think at the time -- this was in 2012, so ten years ago -- I would have had a much better recollection of what the boys were saying in the focus groups, and they said, "We want to shoot them."
Q. Did they -- do you think it was -- did you think it was a natural thing -- well, the idea of launching an SAP, is that a natural thing that you would think to do with an SAP?
MS. REICHEL: Objection to form.
MR. RUTTENBERG: Join that one.
THE WITNESS: I don't know if anyone who didn't have a professional eye, you know, of a toy person would necessarily think of them as

ammunition for a toy, but I did.

BY MR. CUTRI:

Q. Did the children, you said -- but here in the article it says, at least kids thought I -- the children in the -- let me back up.

According to this article, the children that played with the SAPs conveyed to you that they wanted to shoot them; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Okay. And why do you think the children who were playing with the SAP wanted to shoot them?

MS. REICHEL: Objection to form.

THE WITNESS: Because it's one of the more popular play patterns for boys.

BY MR. CUTRI:

Q. What is?

A. In particular. Boys in particular.

Q. What is? What is?

A. Shooting stuff.

Q. Okay. What do you mean -- I've never heard that term before, "play patterns." What does that refer to?

A. So when you're developing toys professionally, one of the things that you look for is consistency in play pattern where you've seen things that have worked in the past and try and find things that entertain your audience, boys in this case. So a very parallel thing here would be crashing. Boys like to crash stuff. Girls might, too. So please forgive me when I say "boys."

But in the context of toy development, at least back in 2012, there was a fairly strong gender focus in terms of what the play patterns are. I continue to believe that that's pretty consistent with today. It's not as -- it's being challenged more as a thought today.

But back in 2012, boys like to crash stuff, boys like to shoot stuff; girls nurture, more role play. And so shooting was certainly something that was well -- well known within the

toy industry at least as one of the perennial play patterns of boys.

Q. And was that known even -- was shooting as known as a perennial play pattern earlier than 2012?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Would you say it was established -- would you say that shooting as a -- shooting things as a play pattern for boys was established and known in the toy industry by 2005?

MS. REICHEL: Objection to form.

THE WITNESS: I would -- I wouldn't know for certain, but yes would be my professional opinion. Yes.

BY MR. CUTRI:

Q. Okay. And why is it -- why by 2005 was, you know, shooting things known as an established play pattern for boys? What historically confirmed that that was a known play pattern for boys?

MS. REICHEL: Objection to form.

THE WITNESS: You'll see toy guns that go back hundreds -- probably over a hundred years, maybe more. You know, rubber bands that would shoot, guns that would shoot rubber bands, blasters. I've tried not to use the word "guns." I've tried to use more "Blasters" because I feel it's important to understand that in the development of a toy product, the difference is that when you're giving a child something like this to play with, it's not meant to have --

(Cell phone ringing)

THE WITNESS: Sorry, I thought I turned this off. Yeah, I'll just turn the whole thing off. So -- there we go.

So in the history of toys, there have been toy guns for a long time. And so it's been a known way of playing. We try not to use the word "gun," we try to use the word "Blasters" by differentiating them as something that really can't create harm to someone once you're shot. It doesn't mean you can't have any pain, but the

likelihood of harm is not there.

And so toy blasters, if you will, or toys that shoot stuff have been around for a long time. And so it's a play pattern that you're familiar with. And it's not something you have to teach the boys. The boys seem to want to do it.

BY MR. CUTRI:

Q. Got it.

And so did boys -- when you gave them SAPs, did they want to -- in your observation, did they want to apply that play pattern of shooting things out of blasters or toy guns, did the boys have the instinct to apply that same play pattern to the SAPs that you gave them?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. And can you tell me a little bit more about that? Like what did you observe?

A. I mean, it's not ubiquitous, it's not 100 percent, but you'll find boys who in general would be inclined to play with a foam dart gun or

Blaster or water blasters or even probably bows and arrow-type product, they could see the opportunity for using these SAPs as ammunition.

Q. Okay. Do you think that other toy designers would also see that same opportunity?

MS. REICHEL: Objection to form.

THE WITNESS: I have no idea. No idea.

BY MR. CUTRI:

Q. Okay. But -- so where did you get the SAPs -- so you saw them in the -- I'm going to go back a little bit. I know we're kind of jumping around.

You saw them in the London market in Camden. You took some home. Did you secure a supplier of SAPs, or did you get access to more SAPs or --

A. So I -- as my interest in the compound grew, I reconnected with the flower guy that I bought the product from. All I can remember is that he was French. And I remember speaking to him. And then I assume, I'm trying to remember, but I believe he gave me a contact where I could

buy a larger quantity, because he was selling them in fairly small quantities, and sort of worked my way up a little bit in terms of being able to find someone who might have larger quantities and then started to understand what this was and where it really was produced and what it was being used for outside of hydrating flowers. And then it became easier to try and pinpoint a source for the product.

Q. Did you have -- about what time -- well, did you have an awareness -- did you ever learn that SAPs were already being used as toys or as, you know, children's items -- let me back up.

When you were exploring the uses of -- you testified just now that you looked into what SAPs were used for; right? After you saw them at the London market; right?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Sorry, Mr. Brawer, let me ask that question again, and then I'll ask you to respond orally rather than nodding your head.

But after you observed the SAPs at the London market, you started to explore how they had been -- what industry they had been used in; is that correct?

A. Yes, not just specifically what industry they had been used in. But, for example, I didn't know they were called SAPs. I didn't know they were called superabsorbent polymers. I didn't know they were polymers. I didn't know what a polymer was. So I had to learn. It wasn't hard, but I had to learn what these things were.

Because you didn't walk into a Walmart and go up to the greeter and say, Hey, could you send me to the superabsorbent polymer section? You know, it wasn't a -- it's not a known consumer item, by any means. And so I had to learn what they were.

Q. Were you aware that they were available to consumers in, for example, like craft stores?

A. I don't remember seeing them in craft stores, no.

Q. Okay. Did you -- when you were first

learning about superabsorbent polymers, did you ever learn that they were used as toys for children in, for example, Asia or in any other context outside of -- in any context?

A. I had --

MS. REICHEL: Objection; form.

THE WITNESS: Sorry.

I had never seen them used in toys.

BY MR. CUTRI:

Q. Okay. So when you started your development, as far as you knew, no one had ever used SAPs as a toy?

A. Correct.

Q. And what -- did you develop any other -- did you develop any -- well, how did you come to develop Orbeez as a toy?

A. So you're fast-forwarding a bit, but once I had industry -- once I had -- simultaneously while I was learning about the SAPs, I was also beginning to exit my employment with MGA. I made MGA aware of my interest in developing an activity line or other toy lines, I

guess is a way to say it, which I had an agreement with the owner of MGA that was okay. And at that point, I had started Hobbeezone. So once I had the agreement with MGA, I began Hobbeezone.

And I had probably other ideas for toys, but certainly the SAPs was one of the stronger ones. And I had pretty much, I think, by then gotten to the conclusion that there were two basic ways to use this compound that were obvious to me or that were probably commercially viable. And one was as an activity compound. I would reference Play-Doh as sort of something that people might understand and know about. So it's a compound that you could sell into activities and then as ammunition for blasters.

Q. Okay.

A. And if I recall, the question is Orbeez specifically. So we accelerated or put first in line the development of the activity use, and at the time they were probably called gel beads or whatever name we were using. But then we went through a full product development process,

quickly, but a full product development process to try to brand and market and develop product around this compound.

Q. And can you tell me about that product development process around the SAP compound?

A. So number one and most important to my family and me was, was it safe and could we expose it to kids in great quantity and be very comfortable that none of the properties of expansion, transformation, ingestion could do any serious harm to kids.

Obviously, there could be some level of misuse. So we couldn't guarantee that if a child stuck ten of them in their ear, that there wouldn't be a problem, but any small part sold to a child has that risk. So where we drew the line was if there was anything more dangerous than, say, a small Lego piece, then it wasn't something that we were going to move forward with.

And so we began primary research with a chemical company somewhere in the Midwest, I don't remember exactly where, but in particular the

concern was ingestion and if a kid ate a bunch of these, what would happen. And they were able to replicate that for us, and so they could actually re-create all the enzymes in the stomach and show you what level of degradation the SAP would go through. And so, basically, could you eat them, swallow them, and just poop them out and no harm, no foul. And that's basically what they came back with.

So at that point, even though I had probably eaten a couple hundred of them already, you know, myself, we were pretty confident that we could move forward with a product line that was safe. And then we needed to start developing, you know, how we would market them and what exactly the kid would buy.

So imagine you've developed Play-Doh, and you have an open-ended compound. Is the kid just buying Play-Doh? Is he buying play sets that go along with the Play-Doh? And that was the beginning of that product development process.

And in the beginning, because we took an

activity perspective on it, the play pattern we were looking for was you took small beads, you transformed them into colorful gel balls, and ultimately you decorated with them. And so decoration was going to be the first sort of idea behind them. And that was, as a play pattern, acceptable.

But, ultimately, to get off the ground we needed to create more fun in the transformation process. And that's when we also came up with the Magic Maker item, which essentially made it look like a factory that would create these balls. And then you had them, and then you could use the balls to decorate.

And simultaneously with that development process, we also began a sales process. So I went and started to speak to -- actually, only really went to Target stores and, you know, sort of checked their interest and if they would work with a company like ours. And I got an affirmative answer, and so we were sort of off to the races.

So we had a product idea, we had a

customer, and layered in there -- this is all taking place probably over eight, nine, ten months. Layered in there is naming the item, trademarking the item, copyrighting what we could, developing, packaging, and ultimately developing a TV commercial that would promote the item.

Q. Got it.

So let me take -- first of all, before I -- I don't want to -- thank you for that answer. I don't want to overlook that.

Did you say you ate several hundred of these things yourself?

A. I might be exaggerating a little bit with hundreds, but yeah, a lot. I mean, I was eating them all the time. I would pop them and chew them like M&Ms. Because I just needed to know that you could ingest a bunch of these things and you weren't going to get sick and you weren't going to get hurt and you weren't going to need to go to the hospital.

And it is a true story that before we launched, I made my daughter eat a few of them,

you know, because I wasn't going to put this out in the market if I didn't feel like my kid could eat them. Because there were kids that were going to eat these things. There was just no -- you know, if we sold a billion of these, some kid was going to put some of them in their mouth, and we really needed to make sure nobody was going to get hurt.

Now, by the time I made her do that, I was pretty confident, but she does bring it up often. Especially when we talk about inheritance, you know, she reminds me that she was on the front line for Orbeez.

Q. And her name is Maya, too, as I understand it from this article?

A. She's Maya, also, yeah. Yeah.

Q. Her name is Maya, too. Okay. Well, I'll let you work that out with her, but -- sorry for that digression, but the -- well, I did want to talk about this concept.

So the -- and this article -- I'm going to take this article down in a second, but I

wanted to talk about what's listed here at the top of this page, "Through my" -- and this is a quote from you. I'm on the second paragraph.

"Through my contacts within the industry over the years" -- well, it starts at, "One set of products would use the Orbeez brand name and focus on the fun of growing the beads, turning them into lights, decorations and other things."

And then you're quoted here, "'Through my contacts within the industry over the years, we were able to get a few of those products on store shelves in Target and Toys R Us,' Brawer said."

So you alluded to this, but tell me how you developed and what the extent of your network of contacts was in the toy industry, you know, when you left MGA. Was it a substantial network? Did you have a lot of contacts, and if so, how did that come to pass?

MS. REICHEL: Objection to form.

THE WITNESS: It's a very broad question. So, yes, I had many contacts in the industry. It came to pass because I worked for

16 years -- or at the time I think it was about 16, 15 years in the industry and had progressive growth through two very significant functions, marketing and sales, and had an executive role at MGA. I eventually became president of MGA. And so, yeah, I knew a lot of people in a lot of different disciplines.

BY MR. CUTRI:

Q. Did you know --

A. Not all of them, but a lot of them.

Q. Did you know people who it would be helpful to know if you were launching a new toy product -- let me rephrase that question.

Did you know the people who decided -- did you know any people who had a decision-making role in terms of whether to put a new product onto the store shelves?

MS. REICHEL: Objection to form.

THE WITNESS: If you're asking me -- so just clarify, if I knew any buyers at retailers?

BY MR. CUTRI:

Q. Sure.

Are those the people that make the decision about whether to put a product on a shelf at a retailer?

A. Yes.

Q. And did you know buyers at retailers?

A. Yes.

Q. Did you know -- tell me about the extent of your knowledge and connection to buyers at retailers when you left MGA and before you started Hobbeezone.

MS. REICHEL: Objection to form.

THE WITNESS: So I had years of sales experience at Mattel, and I had years of sales experience at MGA. My Mattel experience was all domestic, meaning U.S. market. The MGA experience was a combination of U.S. and global and other international markets.

The last two years of working at MGA were primarily in London. I lived in London with my family and operated the European market for the company. So, yeah, I knew a lot of different buyers at different levels, particularly in the

toy industry.

BY MR. CUTRI:

Q. And so tell me about the retailers. Are there -- at this time, and let's call it 2009, this article makes reference to Target and Toys "R" Us -- and, of course, we're sitting here in 2023. Toys "R" Us doesn't exist anymore.

But my question is: In 2009, what were the major retailers where you had contacts with buyers?

MS. REICHEL: Objection to form.

THE WITNESS: Walmart, Target, Toys "R" Us, Kmart at the time, Amazon -- those are, I believe, the big five in the U.S. And then Argos, Carrefour, Auchan, BK, I mean, retailers all over the world. Toys "R" Us.

BY MR. CUTRI:

Q. Do you think that your contacts with buyers at retailers helped you place the new products that you were developing at the Maya Group?

A. Yes.

MS. REICHEL: Objection to form.

THE WITNESS: I'm sorry. Yes.

MS. REICHEL: You can go ahead.

BY MR. CUTRI:

Q. Why? Why did it help?

A. It's much easier when a buyer has had professional experience with someone to trust that they know what they're doing and to hear them out as to whether their ideas are worthy. And so one of the obstacles to sales is just even getting the first meeting. More people want to meet with buyers than buyers have time for. So they have to prioritize.

So it's obviously easier once you know someone to be able to try and connect with them and say, I have an idea, I need 20 minutes, or I need a half an hour. And you're more likely to get that appointment.

Q. And you had that advantage because of your experience with Mattel and MGA; correct?

A. Correct.

Q. Do you think that contributed to the

success -- that advantage that you had contributed to the success of the Orbeez products?

MS. REICHEL: Objection to form.

THE WITNESS: My sales experience certainly helped Orbeez get distribution.

BY MR. CUTRI:

Q. Did your sales experience also help the Xploderz product get distribution?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I would say that it did. But I would only add the caveat that because Xploderz came second to Orbeez, it was easier.

BY MR. CUTRI:

Q. What do you mean by that?

A. Well, once a company has commercial success in a brand group, then at least they know that we can deliver product, we promised advertising, we delivered the advertising, and we forecasted sales.

And in the Orbeez case, early on, at least, you know, we beat our forecasted sales. So those are the elements that a buyer is looking for

for a successful partnership.

Q. And so because of that, that was one of the things that helped with Xploderz, the commercial success of Xploderz?

A. That helped distribution for Xploderz, yes.

Q. We've been going an hour -- well, a little less than an hour. I was going to go for a few more minutes, Mr. Brawer. But if you say, Hey, I want to take a break, just let me know.

A. Okay.

Q. What would you prefer? Are you okay with going for a little bit longer?

A. I can go a little bit longer, yes.

Q. Okay. So what else -- so you talked about this hub with a bunch of spokes on it at the beginning of the deposition.

Do you remember that?

A. Yes.

Q. So did you work on the -- did you work on the marketing for Orbeez products and for Xploderz products?

A. Yes.

Q. Is -- was the marketing of the Xploderz products important to its success in the marketplace?

MS. REICHEL: Objection to form.

THE WITNESS: I definitely believe so, yes.

BY MR. CUTRI:

Q. Why was the marketing important to the commercial success of Xploderz?

MS. REICHEL: Objection to form.

THE WITNESS: The Xploderz concept or product proposition was not a new category, but it was a new product for the category that -- of blasters. And in order for a consumer to have any interest in it, it was whatever we could communicate on the shelf in the packaging, but also through television advertising, we could create awareness to the product and its proposition so that consumers would want it. And in this case, so when I say "consumers," we're talking about boys.

BY MR. CUTRI:

Q. Okay. And what proposition were you trying to convey to boys as to why they would want the Xploderz product?

A. So Xploderz had a range of firing that was significantly farther than what they were familiar with in foam darts. And foam darts made up the bulk of the category at the time. And so whereas foam darts had an average distance of, I believe, around 30 feet, Xploderz as -- when we first -- the first version of the Xploderz product had a range of, I believe, 85 feet. So you're almost able to shoot three times farther than you could a foam dart.

The cartridge -- the ammunition -- the amount of ammunition you could carry on an Xploderz product was significantly higher since Xploderz ammunition was much smaller than a foam dart. So you could carry, I don't recall the exact number, but 50, 60, 70 rounds of ammunition quite easily, whereas in foam darts that was a tall order.

Once you'd fired the ammunition, you didn't have to run around and collect it and try and reuse it. You didn't leave any mess. You just had to get more ammunition.

So those were the major benefits of our blasters versus what the marketplace had at the time.

Q. Do you -- and so you -- did you convey to -- in your marketing anything about how the exact mechanism of the Xploderz worked, like the internals of how the Xploderz products worked?

MS. REICHEL: Objection to form.

THE WITNESS: There might have been some very top level sort of explanation of -- you know, as part of the story of what we were explaining. I don't recall. I remember in the commercials, possibly, I don't believe on the packaging, at some point we may have done some kind of line art drawing of how they come out of the barrel or something of that nature, but never a technical explanation. It was just -- it would only have been in the context of helping people to

understand what it is that we were introducing to the marketplace.

BY MR. CUTRI:

Q. So a consumer -- would you agree that a consumer buying an Xploderz based on -- just knowing what was conveyed on the package and was conveyed in the commercial would not know whether the internals of the Xploderz used a piston and a compression chamber or some other mechanism to launch the Xploderz?

MS. REICHEL: Objection to form.

THE WITNESS: So like I said, I remember we did occasionally, I don't think on every commercial, some line art. I don't recall if we did any on the packaging. I doubt it. But it was not our -- the objective of the marketing was to convince the consumer that we had a better product for something that they wanted to do, which was to shoot and to shoot farther.

And the reason they wanted our product was not because it was air compression or spring or -- they wanted our product because it shot

farther, it held more ammunition, you didn't have to clean up after you were done playing with it.

And so as a marketer, those would have been the key points that we would have tried to convey in our marketing. How we got to that, if anything, the more interesting thing was the ammunition itself. And so I would -- I don't remember exactly, but in the scale of priorities, there's no question that whether it was spring-loaded, air compression was not a -- was not something that was important to convey in our messaging to the consumer as to why they wanted Xploderz.

BY MR. CUTRI:

Q. Got it.

A. It was -- it -- yeah.

MR. CUTRI: Let's do this -- let's go ahead and take our first break now, if that's okay. We'll take ten minutes.

THE WITNESS: Sure. Thank you.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 10:07.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 10:22.

BY MR. CUTRI:

Q. Mr. Brawer, I would like to show you an exhibit, and it's actually a video exhibit.

MR. CUTRI: So, Mr. Fahnert, are you able to get an exhibit and then confirm that it can play in the deposition?

THE VIDEOGRAPHER: Yeah, absolutely.

MR. CUTRI: Okay. It's HASBRO-ITC-111621. It should be a video.

THE VIDEOGRAPHER: I don't see that one.

MR. RAMBEAU: I just uploaded it. So if you just, like, refresh your page, it should be there.

THE VIDEOGRAPHER: All right. So I need to download that and then put it into my system. So that's going to take me a moment.

MS. REICHEL: And, Mr. Cutri, can you just confirm this wasn't produced with any kind of confidentiality designation before you play it?

MR. CUTRI: I don't know if it was or was not, but it's a commercial. So...

MR. RAMBEAU: I can confirm it was not.

MR. CUTRI: Okay.

MS. REICHEL: Thank you.

MR. CUTRI: Okay. Whenever you're ready.

THE VIDEOGRAPHER: Yeah, it takes a moment to download. It's a video file. So it takes a moment.

MR. CUTRI: Okay. No problem.

(Brawer Deposition Exhibit 2 was marked for identification and attached to the transcript.)

THE VIDEOGRAPHER: Okay. Here we go.

(Video playing.)

BY MR. CUTRI:

Q. Mr. Brawer, do you recognize that commercial?

A. Yes, I do.

Q. Is that the first commercial that introduced the Xploderz?

A. Yes, it was.

Q. Does that commercial -- do you think that commercial reflects the idea we were talking about before the break that you were trying to convey to the consumer that the product shot farther, held more ammunition, and you didn't have to collect the ammo?

A. Especially the first two points.

Q. Okay. And because -- do you think the consumers were interested and ultimately purchased Xploderz because that advertisement conveyed those ideas to them?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I believe that was a -- yes.

MR. CUTRI: Let me have -- hold on. Let me go off the record for one second. Can we go off the record for one second?

THE VIDEOGRAPHER: Okay. Going off the record. The time is 10:26.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the

record. The time is 10:28.

MR. CUTRI: So for the record, the video that we just watched, which is HASBRO-ITC-111621, will be marked as Exhibit 2.

And Exhibit 3 should be a document produced at SRB_000004353.

(Brawer Deposition Exhibit 3 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So, Mr. Brawer, there is a product that says Xploderz XStormer 1000. These are Amazon reviews.

MR. CUTRI: We can zoom in, Mr. Fahnert.

BY MR. CUTRI:

Q. So, yeah, these are Amazon reviews for the Xploderz XStormer 1000. And if we scroll down, these are reviews that are sorted in chronological -- reverse chrono- -- I think -- well, it's not reverse chronological order. It's just however Amazon sorts them.

And if we can scroll down a little bit

further, there is a review from Thomas Avila that says "Poor Quality."

Do you see that review?

A. Yes.

Q. And it says, "Reviewed in the United States on May 2nd, 2012."

Do you see that?

A. Yes.

Q. And it says, "Verified Purchase"; right?

A. Correct.

Q. And if we scroll down, this reviewer says, "Well the commercials are great but this toy is horrible and will break withing the first couple of hours of use. The gun gets jammed with the bullets provided. You have to shake the gun to get the bullets inside the chamber and the only way to shoot the gun is if you have it at an upright angle. I wouldn't recommend this toy to anyone. Very cheap and expensive!"

Do you see that?

A. Yes, I do.

Q. And then there is another -- if we

scroll down to the bottom of that page, there's a review that begins "Lame."

And, Mr. Brawer, I'm not showing you these to embarrass you or make you feel bad. There's a point that I'm trying to make here.

There is a review that begins, "RedCoats." And then it says "Lame" underneath it.

Do you see that?

A. Uh-huh.

Q. And it says, "Reviewed in the United States on February 10th, 2011."

And the review says, "It has not trigger and only works 10 percent of the time. Although the toy and it's TV commercials are designed to look like it has a trigger it, in fact, has no working trigger. You fire it by pulling back a spring loaded rod and the releasing it; just like a slingshot. And the ammo is a serious rip-off. $5 for 500 pounds - that may not sound bad and the large ammo retail packaging does a good job of making it look like something that might be worth

$5, but here's what you get. Inside that large package is a very small plastic pouch about the size of two postage stamps. The 500 rounds are about the size of large grains of sand, about 1 millimeter in size. You pour about a teaspoon's worth of them into a roughly quart sized plastic container that comes with the gun, then fill it with water and wait 4 hours. $5 for 500 rounds of ready to shoot ammo that works might be worth it, but $5 for a teaspoon of ready to do-it-yourself at home in 4 hours ammo is a rip-off in my mind. And then when you're done and finally get to shoot the gun actual -- finally get to shoot the gun actually works about 10 percent of the time, the rest of the time the rounds fragment in the barrel of the gun and come out in multiple pieces that go anywhere but straight, or shoot multiple rounds at once that also fail to go straight. This gun is a joke, don't bother [sic]."

I want to talk to you about a number of things in this, Mr. Brawer. But if we go back, there is -- in the first review that we read --

well, actually, both of the reviews that we read, would you agree with me that the consumer who's -- the consumers who wrote those reviews are noticing a discrepancy between what the product advertising promised and what the product itself delivered?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Would you agree with me that there was a serious gap between the promise that the advertising made and what the product actually delivered?

MS. REICHEL: Objection to form.

THE WITNESS: For these two consumers, yes.

BY MR. CUTRI:

Q. I'm sorry, you said for what?

A. For these two --

Q. For these two consumers?

A. -- two consumers, yes.

Q. Did you think that in general there was

a gap between what the advertising promised and what the product delivered?

MS. REICHEL: Objection to form.

THE WITNESS: I have no way of knowing exactly what -- if there was -- how big a gap there was and what the expectation was of the consumer. But in the case of these two consumers, they clearly -- the product didn't perform for them.

BY MR. CUTRI:

Q. Was there -- I understand that there was a recall of the products; is that correct?

A. Yes.

Q. Can you tell me a little bit about the circumstances of the recall, as you understand them?

A. So the first batch of manufactured product we felt did not perform to the level that we needed it to in order for the product to be successful long term. And so I don't recall the amount of product, but it was probably in the tens of thousands -- low tens of thousands, the first

shipments out towards Target and Toys "R" Us and potentially one or two other customers. We -- we quarantined them, I guess is a way to say it, so that we could put out a new generation of product as our launch product.

Q. Okay. And so when you say "quarantine," what do you mean?

A. So if you ship something to a retailer that hasn't actually gotten to the shelf yet, or in some cases it may have even hit the shelf, you can ask the retailer or work with the retailer to decide to put their inventory aside so that they don't sell them.

Q. And is that -- that is what you did with the first --

A. The initial -- yeah, sorry.

Q. Go ahead. The initial -- go ahead. What were you saying?

A. Yeah. The initial shipment, yes. Sorry, I didn't mean to cut you off there.

Q. The initial shipment of Xploderz?

A. Yes.

Q. And so the retailers -- the retailers paid for the initial shipment of Xploderz; correct?

A. Yes.

Q. And then you asked the retailers to quarantine those Xploderz; right?

A. Correct.

Q. And then did you ship them new Xploderz that you thought had remedied the issue?

A. Correct.

Q. Did the retailers have to pay for the second shipment of replacement Xploderz?

A. In all likelihood -- I'm not remembering exactly the negotiated deal, but in all likelihood we paid for any cost related to the quarantine and would have credited them anything they had paid for that product and then replaced that product with new product. So they would have got a credit. So they wouldn't have paid twice. They would not have paid for quarantined product.

Q. Right. So if we were looking at shipments -- if we were looking at a listing of

all the sales of Xploderz that the Maya Group made, at least some of those -- your understanding is at least some of those sales would have resulted in credits back to the retailers for the same amount of money that they paid for the first shipment of Xploderz; right?

MS. REICHEL: Objection to form.

THE WITNESS: So it would be very -- if you were really trying to get to that accurate a number, you'd have to know whether your data included any returns or not and whether those returns were credited into the numbers. So if we shipped them 100 units and they returned us the 100 units and overall we shipped them a thousand units, you'd have to know whether it was 900 because they returned 100 or whether it was a thousand and 100 of those were the returned items. You'd have to know what the data consisted of.

BY MR. CUTRI:

Q. And so in order to understand how many sales Maya Group made of the Xploderz in 2011, you agree with me that you'd have to not only have the

amount that was -- the number that was sold and the price the retailer initially paid, but you'd also have to figure out how to account for the recalled products that were sold in 2011; right?

MS. REICHEL: Objection to form.

THE WITNESS: You would just have to know what your data consisted of. But you're talking about a fairly small percentage of total sales.

BY MR. CUTRI:

Q. Okay. Do you know the quantity of Xploderz that had to be recalled or -- do you know the quantity of Xploderz for which the retailers received credit, do you know like how many there were?

A. So I can't give you an exact number, but it would have been in the low tens of thousands. So ten -- somewhere -- 10, 20 thousand, not more than that.

Q. Okay. Do you know what time period those sales applied to, how many months of sales would have been the sales that were ultimately

quarantined?

A. So what makes it easy is that it was the initial shipment to very specific retailers. So it was the first products that we shipped.

Q. Got it.

A. So it would have been whenever -- if you're looking at a timeline of manufactured Xploderz, you can look at the first 30 days or where they went. If you had all the data in front of you, you could look at where the first 30 days went, which retailers, and you could get a pretty solid estimate as to what quantity would have been either quarantined -- I don't recall if we took them back and fixed them, if we had them destroyed, but they didn't -- we quarantined enough that it wasn't put out on the shelves when they were supposed to be initially.

Q. What -- well, but could we go back to the review?

A. Sure.

Q. And let's go up. The one that's -- the first one that we read that said "Poor Quality,"

it says, "Reviewed in the" --

MR. CUTRI: If we can zoom in on that one, bottom of the page of 4354.

BY MR. CUTRI:

Q. It says, "Reviewed in the United States on May 2, 2012."

And this one says, "Well the commercials are great but this toy is horrible and will break within the first couple of hours of use. The gun gets jammed with the bullets provided."

Do you see that?

A. Yes, I do.

Q. So May 2012 -- by May 2012, the products that you were selling on Amazon were not the quarantined products anymore?

A. Yeah, I wouldn't suspect they were. I mean, I can't say for certain. I don't even recall whether Amazon was part of the re- -- the quarantine or not, but...

Q. Oh, okay. So then what do you attribute --

A. So there is a possibility they -- it --

there's no -- there's no overlap here. I don't remember.

Q. Okay. What do you attribute the -- this consumer's experience, like this negative experience, what do you attribute that to?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join in the objection.

THE WITNESS: There was definitely an improvement in the quality of the product as we developed it further.

BY MR. CUTRI:

Q. Got it. Okay. Let's talk a little bit about that.

The -- when the product was first launched, we talked about the recall; right? What was the specific issue that -- did you make the decision to do the recall? Was that, like, your decision, or was it a decision with Mr. Ben-Ezer or --

A. That would have been a management team decision. So it would have been the decision of myself, Ben-Ezer, and Meggs.

Q. Okay. Why did you decide to have that recall of that first shipment of products? What was the issue?

A. The biggest problem in that first shipment was the ammunition from the cartridge was not flowing into the chamber where it needed to fire from consistently. And so the gun would jam.

Q. Got it.

And you did something to try to remedy that issue; right?

A. We did something to remedy it, yes.

Q. Okay. Do you remember what it was that you did to remedy that issue?

A. Yes. We attached to all of the next generation of product a loading device. So if you could think of an automatic weapon versus a musket, so each time somebody wanted to fire, instead of just pulling back on the plunger to load the item, there was a little loader that was inserted between the cartridge and the chamber where it fired from, and that gave a much higher accuracy level or a flow level of ammunition from

the cartridge into the loading of the gun, of the Blaster.

Q. I see. I think if I understand, on the magazine that attached to the top of the Xploderz, there was a little thing that you slid to open the magazine and drop an Xploderz down into it, and then you would close the magazine; is that right?

A. Actually, so the magazine, when it was not attached to the Blaster, was closed. When you attached it properly to the Blaster, it automatically opened. The problem became transferring those balls, or the ammunition, from that cartridge to the Blaster. So we added a little chamber into the Blaster itself that you could -- you slid it forward, you would pick up a piece of ammo, you slid it back, it would drop it into the chamber of the Blaster. So it was actually a physical piece, if you will, that you attached to every Blaster.

The problem wasn't in the cartridge. It was in the transfer of the ammunition from the cartridge into the Blaster. And so, therefore, we

needed to create a little holder that would move the ammo from the cartridge into the Blaster.

Q. When you had -- for the post-recall products, you changed the way the SAPs were loaded into the Xploderz; correct?

A. Post recall, the SAPs loaded slightly differently than prior to, yes. Not slightly, we changed the mechanism, yes.

Q. And was there a trade-off of making that change, in terms of the fun of the product?

MS. REICHEL: Objection to form.

THE WITNESS: What I would say is there was an extra step required in order to fire the product.

BY MR. CUTRI:

Q. You said you made improvements. What improvements are you aware of being made to the Xploderz products over time?

A. Wow, I mean, that's very broad. This would be an example of one of them. We made cartridges that held different amounts of ammo. So that was significant for kids. I believe, and

I'll be fair here, I think Keith Meggs is more of the expert in this area than I am.

But we improved how far the ammo could shoot. We improved the consistency by which the ammo would fire, you know, how many misfires that we had versus regular fires. But all of the -- with the exception of this loader piece that I just described to you, which was actually something I developed for the product personally, Meggs was much more involved in continually improving how the product performed.

Q. So when you compare the post-re- -- the first generation -- let's exclude the recall. When you compare the first generation of Xploderz to the generation that was being sold by the end of the product's lifeline, would you say that there were significant differences?

MS. REICHEL: Objection to form.

THE WITNESS: I wouldn't say the product was significantly different, but I don't believe we fundamentally changed how the product worked in terms of, you know, compressed air. But there

were definitely changes to how the ammo loaded, how the ammo was propelled, you know, there were mechanical improvements to the performance of the product.

BY MR. CUTRI:

Q. One of these consumers -- if we go to the consumer --

MR. CUTRI: It's not this one. If we go to the one that was from -- to the bottom of the next page at 4355. The one that says "RedCoats." Yep, that one.

BY MR. CUTRI:

Q. This consumer is in February 2011, this review; right?

A. Correct.

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. And you'd agree with me that the person who's reviewing this in February 2011 begins by saying, "It has not trigger and only works 10 percent of the time"; right?

A. Correct. That's what it says, yes.

Q. "Although the toy and it's TV commercials are designed to look like it has a trigger it, in fact, has no working trigger."

Do you see that?

A. Yes.

Q. Do you think that the TV commercials conveyed to consumer -- do you think that the first Xploderz commercial conveyed to the consumer that the product had a trigger?

MS. REICHEL: Objection to form.

THE WITNESS: No.

BY MR. CUTRI:

Q. Did you say no?

A. I don't, no.

Q. Okay. Do you think that consumers may be -- well, why do you think that this -- let me back up.

When you were out evaluating the sales of Xploderz, did you think that the lack of a trigger impacted Xploderz's ability to compete with other blasters that were on the market?

A. Yes, I did.

Q. And in what way?

A. So going back to the play pattern, which we discussed earlier, the -- part of the reason my impression is that boys would like to shoot things is because there are things in the world that shoot, and obviously they find them exciting. And so whatever you think of it ethically, the closer you come to what that experience is like in the real world, the more likely it is that a child, a boy, might enjoy that experience and want to be a part of that experience.

So it's fantasy, but obviously the closer you can come to reality, the stronger the marketing connection in the child's mind. I am in no way trying to suggest that a child who sees actually a bullet go out of a gun and hurt someone is looking to emulate that, but what they are looking to emulate is potentially the idea of what shooting a gun makes you feel like.

Q. Got it.

And was it also the case that other products in this category did have triggers?

MS. REICHEL: Objection to form.

THE WITNESS: Most of the products in this category had triggers.

BY MR. CUTRI:

Q. And what were most of the products in this category? Were they mostly NERF products?

A. Yeah, mostly -- well, yeah, NERF was the biggest brand, and then foam darts was the number 1 product category -- one form of the product category.

Q. Why didn't Xploderz have a trigger?

A. So in order to sell a small part, which is generally defined as something under one and a quarter inches in size, in diameter, you cannot shoot it with stored energy. Essentially, what a trigger does is it releases energy.

So if you can't store the energy, you can't have a trigger to release the energy. So you can put a trigger on the Blaster, but the trigger couldn't do anything. You couldn't release stored energy. So you have to create the energy, and as soon as you personally release it,

it has to release itself. It has to expel the energy.

Q. Do you think that the Xploderz -- well, do you think the Xploderz products suffered in comparison to NERF products that had a trigger and stored energy?

MS. REICHEL: Objection to form.

THE WITNESS: It was definitely a marketing disadvantage, yes.

BY MR. CUTRI:

Q. Are you familiar with SAP launchers that are being sold today by, for example, Gel Blaster?

A. As a consumer, yes.

Q. And do you understand that those Gel Blaster products use a trigger and stored energy?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I understand.

BY MR. CUTRI:

Q. Do you attribute the success -- do you think that those products are more successful than Xploderz because they have a trigger and stored

energy?

MS. REICHEL: Objection to form.

THE WITNESS: First, I don't know whether they are more successful than Xploderz.

BY MR. CUTRI:

Q. Okay.

A. I know they're in the marketplace. Xploderz was a decent-sized business. So I can't tell you whether they're more successful. I can tell you that as someone developing this product line for kids, it would have been advantageous to use stored energy.

Q. Why is it -- why do you think a toy gun that uses stored energy -- is it advantageous to be -- well, let me back up.

Why is it advantageous to be able to use stored energy when developing a superabsorbent polymer launcher?

MS. REICHEL: Objection to form.

THE WITNESS: It's the same answer I just described before. It's that ability to associate with reality. So stored energy is the

ability to put a trigger. The shooting category has a real-life component to it, and there's certainly a performance element in being able to have a trigger that you can't -- you know, that you can't have when you only have stored energy. So -- when you don't have stored energy.

So as an example, why is -- why would it be better potentially to be able to shoot a Blaster than to only be able to use a slingshot. You know, it's the same idea. There's an inherent weakness in the slingshot in the sense that as you let it go, it shoots. You can't -- well, the traditional slingshot, you can't set it up for firing whenever you want without putting some kind of trigger on it.

BY MR. CUTRI:

Q. And would you agree with me that Xploderz suffered from that same disadvantage, meaning you had to, just like a slingshot, pull it back and release it any time you wanted to shoot; right?

A. Correct.

MS. REICHEL: Objection to form.

THE WITNESS: Sorry.

Yes, that was a disadvantage to the design.

BY MR. CUTRI:

Q. And you would agree with me that current SAP launchers that have a trigger and stored energy have an advantage over -- an advantage in the marketplace over the Xploderz hit power design; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Do you think that consumers buy -- well, let me -- actually, I'll come back to that.

Do you know how the internals of the SAP blasters made by Gel Blaster work, what internal functionality there is inside the Gel Blasters?

A. I've never studied that.

Q. Do you know the internals of how any of the -- the SAP launchers that are on sale today, meaning NERF, SplatRBall, you know, things that

are being sold on Amazon today, do you know the internals of how any of those work?

A. I've only used them. I've never opened them.

Q. Oh, so which superabsorbent polymer launchers have -- modern day -- let's call them modern day, which ones have you used?

A. Gel Blasters.

Q. So do you have a Gel Blaster SAP launcher?

A. I have two of them.

Q. You have two of them. Okay.

Tell me what do you think is better about a Gel Blaster superabsorbent polymer than the Xploderz products that didn't use stored energy.

MS. REICHEL: Objection to form.

THE WITNESS: The two current Gel Blasters that I own both have triggers, as we discussed, and have stored energy, and they're also battery operated.

BY MR. CUTRI:

Q. Why is it -- why does being battery operated make the Gel Blaster SAP launcher better than the Xploderz SAP launcher?

MS. REICHEL: Objection to form.

THE WITNESS: It gives you an option for automatic fire.

BY MR. CUTRI:

Q. And why is having the option for automatic fire an advantage?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Over the Xploderz?

A. Because if you can do single shot and you can do automatic fire, it's better to have both options than just single shot.

Q. And the Xploderz didn't have an option for automatic fire; correct?

MS. REICHEL: Objection to form.

THE WITNESS: Not the original ones, no.

BY MR. CUTRI:

Q. You ultimately launched a product later

called Blaster Pro. And did those products have battery and -- were those battery-operated products?

A. Yeah -- well, some of the versions were -- or at least one of the versions were, yeah.

Q. To your knowledge, were any of the products that were marketed under the Xploderz brand, did they ever -- well, did any of those products use a battery-powered launching mechanism?

A. Not during my tenure with Xploderz.

Q. To your knowledge, did any of the Xploderz products -- the launchers that were sold in the Xploderz brand have an option for automatic fire?

A. Not during my tenure at Xploderz. I'm not -- I didn't stay abreast with how they further developed Xploderz, but not during my tenure.

Q. The -- when we say "automatic fire," can you just for the record explain what that means?

A. So automatic fire would be the ability

to pull a trigger, hold it, and for the gun at a certain cadence to continuously shoot.

Q. Looking at the form factor of the Gel Blaster SAP launcher, do you think that is an advantage -- well, setting aside the mechanical -- let me ask this question: Taking into account the construction, the advertising, the form factor, the marketing, can you identify for me things that would have -- that contribute to the commercial success of Gel Blaster's products that you don't think are present or were not present in Xploderz?

MS. REICHEL: Objection to form.

THE WITNESS: I'm going to ask you to kind of dumb that question down a bit, if you can.

BY MR. CUTRI:

Q. Yeah.

Are there -- in terms of commercial success of Gel Blaster products, do you think there are things that contribute to the commercial success of Gel Blaster products that are not found in -- or were not found in the Xploderz products?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Beyond automatic fire and battery?

MS. REICHEL: Objection to form.

THE WITNESS: So I want to begin with the caveat that I have no real knowledge as to what commercial success is for Gel Blaster or for SplatR. I don't know the size of those businesses. I mean, I know they're in the marketplace and they've been for a couple of years, but I don't have any firsthand knowledge of really what the commercial size is of those businesses.

BY MR. CUTRI:

Q. Okay.

A. I really wasn't even following it up until I got that notice of this lawsuit. So I wasn't really somebody who stayed abreast of this category. But as I said, in the performance of if you're only comparing Xploderz and you're leaving Blaster Pro off the table and you are comparing that to Gel Blaster, there is a few things that I can provide my opinion on as to whether -- you

know, why they would be considered better or may have better performance. I don't even know if they do.

Q. Okay. What would those things be?

A. So as we discussed, having triggers is not a small thing. So having the ability to fire with a stored energy is certainly something that if we had had the option with Xploderz to provide stored energy, we would have. I think anybody who would disagree with that wouldn't be telling the truth.

So stored energy was certainly something that we wanted to do. We were very well aware of it and knew how to do it. It's just we were trying to sell to young boys, meaning boys 8, 9, 10 years old, under 14 years old.

Any -- the additional two things that I've seen that Gel Blaster/SplatRBall have achieved that we didn't with Xploderz is the Gel Blaster I bought, at least one of them, was at the Target store in the toy department. Now, generally toys are not marketed 14-plus. So, in

other words, they are not age graded as being something that you would sell to someone who's over 14 years old. The toy department long ago gave up the aspiration of selling, quote-unquote, toys to kids -- to people that age.

And so what Gel Blaster has achieved, which we didn't do, is they brought a product in that is age graded 14-plus and put it in the toy department. So that could have given them some momentum with boys and access of the product to boys that -- in a form that was different than what we had, and that could contribute to some of their performance success.

The third thing, and this can be the biggest thing, is media and how you speak to consumers at different ages has dramatically changed in the last ten years. It's completely different. So when I was relevant in toy marketing, by far our biggest budget lines were television. And kids sat in front of their TVs and watched television, and based on the programming that they were watching, you could

target TV ads to kids that certain age. And today that doesn't happen.

I mean, now it's all different screens and different methods of distribution. So YouTube is a much more powerful, you know, means of marketing to consumers than it was 12 years ago. And, therefore, the ability to micromarket to this consumer is vastly different than what it was 12 years ago or 10 years ago. So the marketplace media distribution has changed.

And, you know, at -- my opinion, at the highest level, yes, relative to Xploderz, the stored energy certainly would have been a great thing to have, you know. And then it certainly would have been awesome to be able to micromarket to kids 11 years old, 12 years old, 13 years old, not necessarily have to pick up the 5-year-olds. You know, it's a different -- it's a different media market today.

Q. Got it.

A. And so there's two, I think, reasonable reasons for why the Gel Blaster product today

could be a, you know, more successful brand, if it is, than Xploderz.

Q. Well, do you think that the advertising for Xploderz contributed to Xploderz's commercial success? And you're the marketing person. So I don't want to prejudge the answer, but let me ask -- let me ask it again.

A. I would say --

Q. Let me ask it in a clean way.

Do you think the marketing of Xploderz drove Xploderz's commercial success?

MS. REICHEL: Objection to form.

THE WITNESS: I believe in everything that I've done in toys that has been successful, the two key elements are always -- well, there's three key elements, the -- without the distribution, the sales -- we talked about that earlier. You can't get to the consumer. Today you have at least ecommerce. Back then you didn't.

You have the product itself and its performance and its delivery of promises and its

novelty and how much it appeals ultimately to the kid or to the consumer. And then the marketing, absolutely, the ability to drive awareness and create, you know, a brand and name recognition and, you know, give kids a curiosity that they want to fulfill by buying the product.

And if you get those three right, you have a business.

BY MR. CUTRI:

Q. Can you talk a little bit more about how the marketing and advertising of Xploderz contributed to the commercial success of Xploderz?

MS. REICHEL: Objection to form.

THE WITNESS: Well, it was a significant expenditure of money. It created awareness for the product and the brand, created name recognition. It gave us in a way access to retail because the retailer would never have accepted a new form product that they had never seen before without having some level -- a significant level of marketing budget behind it to make the consumer aware.

All these product launches in toys they have, you know, initial lives of a few weeks, maybe a few months, but these are not days -- there were not days, and I don't know if today they are. But at least in those days, they're not -- you can't sell in a new concept product and say, you know, wait two years and we'll get the sales.

It's much more -- it's much more like a movie, maybe as people would understand it. You know, how you do in your opening weekend is very, very important to the future of the movie. How you sell in your first three, four months on the shelf is extremely important to the viability of the brand and the product long term. Anything not performing at a reasonable level that's brand-new will ultimately be cut to make way for new product.

And so the marketing has to drive an initial consumer base of early adapters to go out and purchase the product. And if you don't have the messaging right and if you don't have the

distribution, meaning the reach on the advertising to make a significant dent in what the sales need to be, then ultimately you'll fail.

BY MR. CUTRI:

Q. Do you -- are you aware of the trend, like, of sales of Xploderz -- like year over year, do you know what that trend line looks like in terms of the revenue that came in for that product?

A. I did not stay connected to the revenue stream of the Maya Group post my departure from the company.

Q. When did you depart from the company?

A. You have my LinkedIn. I think, what was it, '13?

Q. Well, I know from --

A. Yeah, I think it's '13.

Q. I know from the article that at least on December 22nd, 2012, you were in an LA Times article saying that you worked there at that time.

A. Yeah, yeah. No, I don't think it's '12. I think it's '13, would be my guess.

MR. RUTTENBERG: Gianni, do you have his LinkedIn profile? Do you want to show it to him?

MR. CUTRI: I do. I do. I always hesitate to use it because they can be a little inaccurate. But let me do this. Why don't we put up Tab 4 --

THE WITNESS: I can't promise you it's exactly right, but it's directionally right.

MR. CUTRI: Okay. Let's pull up Tab 4. I don't think it's been marked.

BY MR. CUTRI:

Q. But this is your LinkedIn, Mr. Brawer.

A. Yep. Yeah, there you go. May 2014.

(Brawer Deposition Exhibit 4 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. May 2014. So -- yeah, the reason I was -- the reason I was hesitant is because I could see that Maya Group -- your start date is April 2010, and I just wasn't -- that didn't seem accurate to me, based on what I know, but that's

why I was hesitating to, like, suggest that. But go ahead.

A. Yeah, so if you want to address that issue, as I mentioned I think earlier today, I came up with an agreement with MGA Entertainment where I remained at MGA as a part-time employee and -- if I didn't say this earlier, then I'm sorry -- and then I began to work on Maya Group projects as an overlap. So I was sort of halftime at MGA Entertainment -- like officially halftime at MGA Entertainment, and I had a release to go work on some other product. And at the same time I was providing that -- you know, developing that in Hobbeezone. You see Hobbeezone isn't even really listed here.

Q. Right.

A. And so Hobbeezone sort of lays in as the halftime job between my official departure from MGA and my start at Maya Group.

Q. Okay. Got it. I just assumed the LinkedIn was, like, off by a year. That's why I wasn't showing it to you. But you think -- so let

me get back to my original question.

As best you recall, you departed Maya Group in May of 2014?

A. Yeah, if this isn't off by a year, and I don't know that it is, but it should be about May of 2014 that I left.

Q. Got it. So my original question was: Do you know when Xploderz were first launched in the retail space?

A. So I think it was 2011.

Q. Okay. And do you know the trend line of sales for Xploderz from 2011 through your departure in May 2014?

I'm not suggesting that you would. I'll tell you, I have access to certain financial information that you don't. I just don't know if you know what I know in terms of the sale of the trend line.

A. So based on how I sold the company, the trend line was up. So we were selling -- Xploderz grew, from what I can recall, every year that we were -- that I was there.

Q. Okay. All right.

A. But that's what I remember. I cannot -- you know, I can't say that with absolute certainty.

Q. Got it. Okay.

A. I know when I departed the company, so at the end of 2013 -- like at the end of -- 2013, if you recall -- whatever my last full year of employment was at the Maya Group was larger than the year before, which was larger than the year before that and larger than the year before that.

Q. But the Maya Group was also selling Orbeez; right?

A. Right. Correct. That's why I don't want to -- I don't want to pretend that I can recall the -- you know, whether a dollar came in through Orbeez or whether a dollar came in through Xploderz, I was a happy guy.

Q. Sorry, so that's what I -- so let me ask that question again.

You feel fairly confident that year over year Maya Group's overall sales increased; is that

fair?

A. Yeah, through 2013, yes.

Q. But you don't know whether the Xploderz line itself increased every year; do you?

A. Yeah, I don't recall. I know it grew a lot in the beginning. I just don't remember when it stopped growing. I don't know when it stopped growing.

Q. Got it. Okay.

Do you know why Xploderz -- so Xploderz was ultimately removed from the marketplace; right?

MS. REICHEL: Objection to form.

THE WITNESS: I mean, if your -- I really didn't track it closely. I know it got smaller or there was less of it, but I don't know whether it was completely removed or what -- I left the company and Oded Ben-Ezer continued to run the company, and he would know much better what happened to Xploderz after 2013 than I do.

BY MR. CUTRI:

Q. Do you know why the Xploderz sales

started to decrease?

MS. REICHEL: I'm going to object to the form.

And, again, Mr. Cutri, if you can just make sure you're not providing the witness any information he doesn't have regarding what happened after his departure.

MR. CUTRI: I was not referencing that.

BY MR. CUTRI:

Q. Mr. Brawer, I was referencing what you just said, which I think was something akin to, I know the sales decreased. And so I was asking you whether you know why the sales of --

A. Well, what I said was there was less product in the marketplace. I had no access to any of their data in terms of sales. So -- but there was certainly -- you know, you could go to a store, and at some point you saw there was less. But I did not stay in touch with Oded Ben-Ezer on anything related to the financials of Maya Group.

Q. Well, Orbeez are still being sold today; right?

A. Yes, I know that for certain.

Q. Why do you think it is that Xploderz are not being sold today?

MS. REICHEL: Objection to form.

THE WITNESS: Again, I think Oded Ben-Ezer is the better address for that.

BY MR. CUTRI:

Q. Okay. So let's --

MR. CUTRI: Can I get Tab 89.

(Brawer Deposition Exhibit 5 was marked for identification and attached to the transcript.)

MR. CUTRI: That's not -- give me something that's X1 products.

MR. RAMBEAU: That's right, Gianni. It's just the first page shows the --

MR. CUTRI: Oh, I'm sorry. Okay. Go back. That's right. This is Tab 89. So we can go back. I'm sorry, you can pull that back up.

So this is a -- thank you, Jake. That's right.

BY MR. CUTRI:

Q. So, Mr. Brawer, are you familiar with something called The Wayback Machine on the Internet?

A. Wayback?

Q. The Wayback Machine. Okay.

A. No.

Q. I'll represent to you that there is a website, it's actually at archive.org, where you can go in and type in a web page and say, Show me what that web page looked like on a particular day. And if The Wayback Machine, is what it's called, has captured it, it will show you to the best -- you know, what it captured for a particular web page on that date.

Are you following me?

A. So it's not showing you the content, it's showing you the traffic?

Q. No, it will actually -- like so, for example, let's zoom in --

A. I'm not sure --

Q. Let's zoom in here.

A. Maybe, yeah, you can help me just -- what am I looking at?

Q. Yeah, so let's zoom in here. This is a -- we call a capture from The Wayback Machine.

A. Okay.

Q. What we did is we put in "Xploderz.com/products."

A. Yeah.

Q. And what this essentially is is the timeline. And the red bar is saying that each white square is a year. And it's showing you, hey --

THE WITNESS: Do you see white bar?

BY MR. CUTRI:

Q. -- this white square on August 29th, 2011. What follows beyond here is what Xploderz.com/products looked like on August 29th, 2011.

MR. RUTTENBERG: The witness was asking me do I see a white square. I think what you're referring to by white square is the areas between the gray lines?

MR. CUTRI: Yes.

MR. RUTTENBERG: Is that -- I'm showing the witness -- you can't see what I'm showing the witness, but I assume, yeah, you're -- each one of those represents a year is what Mr. Cutri is representing, I assume.

MR. CUTRI: That's right.

MS. REICHEL: I just want to make a running objection to the foundation of the representations being made.

BY MR. CUTRI:

Q. So this is a capture that The Wayback Machine did of Xploderz.com/products on August 29th, 2011. But let me go to the next page.

A. So -- okay. My question would have been at that --

MR. RUTTENBERG: Well, hold on. There's no question pending.

THE WITNESS: No, I just have a -- I would just like to understand what I was looking at.

MR. RUTTENBERG: Okay.

BY MR. CUTRI:

Q. Maybe this will be easier.

A. Okay.

Q. Let me show you this capture. And maybe you're the person who can tell us what it is. So this is -- at the top of this page on page 2 says "Xploderz."

And if you go to the next page -- and then you can see that the -- under "More Distance. More Ammo," it says "Products" in dark gray.

Do you see that?

A. Yeah, I see "Products" is highlighted as a tab on the top.

Q. Yep. And then it says "Products, Ammo Refill Packs," and then there's three boxes.

A. Yeah.

Q. And then it says "Blasters."

MR. CUTRI: We can go to the next page.

BY MR. CUTRI:

Q. And what do you see on the next page of this exhibit?

MR. CUTRI: And what exhibit number are we on, Mr. Fahnert?

THE VIDEOGRAPHER: This is Exhibit 5.

MR. CUTRI: Exhibit 5 here.

BY MR. CUTRI:

Q. What do you see on page -- on the last page of Exhibit 5?

MR. RUTTENBERG: Objection; form.

BY MR. CUTRI:

Q. Do you see what's on this page?

A. Are you -- is there a question to me?

Q. Yeah, I'm sorry. I'm asking you what are we looking at on the -- on Exhibit 5, the page that says 2 of 2, what do you --

A. Okay.

Q. What do you see on that page?

A. So I see --

MS. REICHEL: Objection to form.

Go ahead.

THE WITNESS: So I see the blasters. I just see the continuation, I assume, of had you had this on one page, it would just be the lower

part of that page. And these -- we're showing the ammo and packs that we were selling, and these would have been the items that we were selling, the blasters that we were selling.

BY MR. CUTRI:

Q. The blasters that you were selling.

And are you familiar with the blasters that are depicted on this page?

A. This line of blasters, yes. This was in my tenure.

Q. Okay. Is this the initial line of blasters that was launched as Xploderz?

A. To the best of my recollection, it is. I don't know about the ground -- the Ground Pounder would not have been. So it wouldn't have been in the initial distribution of the product. I think that was a Christmas item, so to speak -- so it would have come in in the fall. But my guess is the first four were.

Q. Got it.

A. Not guess, it's very likely those are the four, yeah.

Q. Okay. The XBlaster -- let's just focus in on the XBlaster 200. That was a product that you -- it was a hand-held sort of pistol product; right?

A. Correct.

Q. And you pulled back a plunger, and when you released it, it launched an SAP; correct?

A. Correct.

Q. So a consumer could get access to an SAP launcher that used a pullback plunger mechanism to fire SAPs with the XBlaster 200; right?

A. Correct. Although, again, you see the orange piece under the --

MR. CUTRI: Let's zoom in --

THE WITNESS: -- magazine? Yeah.

MR. CUTRI: Let's zoom in on the XBlaster 200.

BY MR. CUTRI:

Q. And I think you're referring to, if we zoom in even closer, the orange piece, there is a slider?

A. The only orange piece, yeah. That's the

loader we spoke about earlier.

Q. Got it.

So the consumer --

A. Right. Which means it's the generation not of the recall, but of the first generation that actually got to the shelf.

Q. Got it.

So that's how we can tell the difference between -- a recalled product would not have -- a first generation product that was recalled would be one if it was -- would be one that did not have the slider loader in orange; right?

A. Correct. The slider loader at some point went away, too. So you just have to be careful, but --

Q. Right. So a consumer could get access to an SAP launcher that used a plunger pullback mechanism if they bought the XBlaster 200?

A. That's correct.

Q. So if we go back to the overall page, the Face Off 400 would give a consumer access to two of the pistols; right?

A. 12.99 and 19.99.

Q. Okay. That's what I was going to tell you -- ask you.

The XBlaster 200 was available for 12.99 to a consumer, right, when it was launched?

A. Yes.

Q. Okay. And so why would a consumer buy -- if a consumer could already get an SAP launcher that used a pullback plunger to launch the product, why would a consumer buy the Face Off 400?

MS. REICHEL: Objection to form.

THE WITNESS: So the play pattern again is shooting and some people like to shoot at targets and some boys like to shoot each other, like a water gun. And so by offering a two pack and a little bit of a discount, you made a convenient purchase for mom.

BY MR. CUTRI:

Q. And then if you go to the next product, this is the XStormer 1000.

A. Correct.

Q. What additional feature would drive a consumer to purchase the XStormer 1000 over the XBlaster 200?

A. So the best I can recall, and it would probably be answered if we had the packaging, but my first -- the obvious thing is the number represented the amount of ammo we provided. So the XBlaster 200 came with 200 rounds of ammo. The XStormer 1000 came with 1,000 rounds of ammo. So number 1 is you had five times more ammo in this Blaster than you did the opening price point.

The second thing, which I'm only 98 percent sure, is we -- you know, the way we designed the product, the longer the barrel, the more distance we could achieve. And so you could give a different commitment to distance. And as I discussed, I think, about two hours ago, an hour and a half ago, one of the key features, if not the key feature in this Blaster range relative to the foam darts was the fact that they shot farther than foam darts, and farther was a very motivating purchase piece of information.

Q. Do you know how far you advertised the XBlaster 200 as being able to fire?

A. I don't believe that we ever specifically, you know, advertised the XBlaster 200.

Q. What do you mean?

A. I don't believe we ever made a commercial that -- oh, do you mean like on the packaging what did we say?

Q. I meant on the packaging.

A. Yeah, I'm sorry, I don't remember. You'd have to look at it.

Q. Okay.

A. I would imagine it's on there, but I'm not --

Q. Okay.

A. I can't even say with certainty.

I know that from the commercial you just showed me, the next one you're about to show me hit about 85 feet.

Q. I see. So the commercial --

MR. CUTRI: Let's go back to the full

view. The XRanger 2000, let's look at that one.

THE WITNESS: Yeah.

BY MR. CUTRI:

Q. So what features in the XRanger 2000 would drive a consumer to purchase this launcher as opposed to the XBlaster 200?

MS. REICHEL: Objection to form.

THE WITNESS: Well, we now know this comes with 2,000 rounds of ammo. So you've got a lot more ammo. And then, again, with a high degree of certainty, but not positivity, we could achieve a greater distance with this.

BY MR. CUTRI:

Q. Okay. And then this one also has a tripod on the front of it, is that another reason that a consumer might buy the XRanger 2000?

A. Yeah, I mean, I'm going to the functional features. Obviously, anyone can fall in love with a design form. You know, if you want to play sniper, you're going to want a XRanger 2000. If you're going to want a tight, in the house -- like XRanger 2000, the disadvantage of it

as a consumer is that it's bigger, it's longer, it's shoulder held, you know, it's not as versatile. You can imagine from all the action movies you've ever watched, you go into some situations where a handgun is actually a better weapon for you than a big long rifle.

That said, ultimately, the kids -- you know, ultimately, one of the biggest driving marketing factors for kids was the ability to shoot farther.

Q. To shoot farther. And so that would be why a consumer would buy an XRanger 2000 as opposed to an XBlaster 200?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Is that correct?

A. Yes.

Q. Okay. And now let's look at the next one, which is --

MR. CUTRI: Go back to the --

THE WITNESS: The Ground --

BY MR. CUTRI:

Q. -- the Ground Pounder 2500.

A. Right.

Q. So a Ground Pounder 2500 is an SAP launcher that used a plunger-type mechanism, and so is the XBlaster 200.

Why would a consumer purchase the Ground Pounder 2500 as opposed to purchasing the XBlaster 200?

MS. REICHEL: Objection to form.

THE WITNESS: Well, we now know it comes with 2500 rounds of ammo. So it has more ammo. I'm also seeing the magazine size. So your ability to take into battle 200 or 250 rounds of ammo versus only 70, which the smaller cartridges held, would be a new feature that had not been introduced at that time.

And while I can't say from this picture with certainty, and it would not have been an advertised point, it looks like we got rid of the loading device even by the time we got to the Ground Pounder. So I don't see that orange thing

anymore. But it might be in there and it's just in a different coloration. But it wouldn't have been a marketing piece.

I think in this particular case, and I have no rec- -- I can't say with any certainty whether we got a further distance than the XRanger on this item, but maybe we get to a point where we could hit 90 feet or 100 feet.

So, you know, all of the marketing points that I was discussing earlier continue to fall into these higher price point items. So you have more ammo, you have the ability to carry more ammo and have more ammo, and then, you know, certainly the Ground Pounder shot farther -- in my opinion, I believe that the Ground Pounder is going to shoot farther than the Stormer or the -- what was the first one, whatever the opening price point one was.

BY MR. CUTRI:

Q. The XBlaster 200.

A. Yeah, the XBlaster 200.

Q. Okay.

A. Yeah.

MR. CUTRI: Let's go to Tab 94. And this will be Exhibit 6.

(Brawer Deposition Exhibit 6 was marked for identification and attached to the transcript.)

THE WITNESS: Ah, there we go. Okay.

BY MR. CUTRI:

Q. So these products in general begin with "X2" at the front of them.

Do you know what the "X2" referred to?

A. So as I was mentioning earlier, we were continuously improving the performance of the product. And so I think these -- the X2 performed better than the X1, which fundamentally, you know, would have meant that they could shoot farther. So then they're comparable sort of items. So I would imagine just looking at them that the X -- what was it the Blaster, the X1, the 200 --

Q. The XBlaster 200?

A. Yeah, that the Invader probably shoots farther than the XBlaster 200, probably performs

better. The cartridge seems to be the same size. So I don't think you're carrying more ammo, but you are getting more ammo. So at 700, you're getting 700 rounds. You know, there's a marketing strategy in toys which talks to refreshing product continuously to keep people interested in your brand. And so --

Q. Yeah, that's what I wanted to talk to you a little bit about is as opposed to -- well, when you say refreshing the brand, do you -- let me back up.

With Xploderz, in order to continue to drive sales in the second and third generations, did the Maya Group introduce new or additional features to the product?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Was one of the features that Maya introduced glow-in-the-dark SAP ammunition?

A. Yes.

Q. Did glow-in-the-dark ammunition -- well,

looking here at Exhibit 6, you can see that there is a Night Fighterz Gen-700.

Do you see that?

A. Yes.

Q. Was the Night Fighterz Gen-700 a glow-in-the-dark SAP launcher?

A. Yes.

Q. And when I say "glow in the dark," can you explain what -- what -- like did the gun glow in the dark, did the ammo glow in the dark, or was it both?

A. From what I remember, the ammo glowed in the dark, and I believe what you have in there is a translucent green plastic with an LED. I don't think we made the gun of a plastic that glowed. That's what I remember.

Q. But the gun --

A. I can't say for 1,000 percent sure, but I'm pretty sure.

Q. Your recollection is that the Night Fighterz Gen-700 had a light inside of it; right?

A. Yeah. So it would have a battery.

Q. It would have a battery, but not stored energy.

A. Not stored energy.

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. So a consumer could get an SAP launcher with a plunger mechanism in the XBlaster 200. Why would a consumer buy -- sorry, let me back up and ask this question: Why do you think a consumer would buy a Night Fighterz Gen-700? What feature was it that you thought drove the sales of that product?

MS. REICHEL: Objection to form.

THE WITNESS: Generally, when you introduce glow in the dark, it extends the life of the play pattern into at least a fantasy that you can use it in the dark. So most kids, humans, wouldn't think about spending a lot of energy shooting stuff at each other in the dark where you can't really see the ammo, you can't really see what's coming at you. The play pattern isn't as fun.

And when you go and create something that's glow in the dark, in theory, if it works well enough, you know, now you're looking at sort of tracer rounds or something that's a little more glowing and that can, you know, be used in daytime and in nighttime. So you have a fantasy that you've created or a story that you've created and a curiosity that allows you to use it more in the evening, which is where the commercial went.

BY MR. CUTRI:

Q. Got it.

There was a Night Fighterz commercial even; right?

A. I'm pretty sure, yeah, it was quite clever I thought.

Q. I've seen most of them, but I don't think I've seen that one. Do you remember what the Night Fighterz commercial was?

A. So I remember we did a whole series of commercials where we went into an old age home and, you know, Johnny visits grandpa and says good-bye and the lights go out and now these old

people just rip out their blasters and they're just having a party.

And it all takes place at night. So that was the way to convey, Hey, you might know Xploderz already and you know you can play with them in the daytime, but, you know, even your old grandpa at the old age home can have fun with blasters at night. You know, it was a nice way to say it.

Q. Got it. Okay.

The X2 Long Bow on this -- what was the X2 Long Bow 1500?

A. It's not on my -- oh, you know what, if you could maybe help me here. You're covering it.

MR. RUTTENBERG: I think you can move this. Yeah, let's move -- well --

THE VIDEOGRAPHER: If you go to the top of the screen where it says that you're viewing Billy's screen, there should be view options.

THE WITNESS: Yeah.

THE VIDEOGRAPHER: Click on that, and then you can set it to side-by-side mode, and that

will fix it.

THE WITNESS: Ah, there we go.

X2 Long Bow 1500?

BY MR. CUTRI:

Q. Yes. What was the X2 Long Bow 1500?

A. So just looking at it, it was a fairly early Xploderz, because it's got the orange thing on the bottom, and it would have been designed more to give a sense of a crossbow. So it probably had the shooting features or the performance features of a Mauler or what I think -- I don't remember what we called it in the first one that was a thousand. And then obviously it comes with 1500 rounds.

Q. Okay.

A. If you give me one more second, I'll explain that -- you know, so, for example, we may have chosen on the Night Fighterz to develop that so that we'd have something new to say at Christmastime. So there's a new range, and here's a new reason to come to our section and a new reason to try this.

And then potentially say on the Long Bow for springtime -- and this was a kind of cool line because, you know, there was some action obviously around Christmas when the majority of toy sales happened, but in springtime it was pretty active because it was an outdoor product largely. So it was something that you could in theory buy your kids and they could run around outside with.

And the X2 Long Bow, if I remember right, was more oriented to spring. So it was a way to put on a commercial in the spring and say, Here's something new that we have.

Q. Okay.

MR. CUTRI: Let's go to Tab 90.

THE WITNESS: Yeah.

(Brawer Deposition Exhibit 7 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So I'll represent to you that this was a Wayback Machine capture that we did in November 2013. But I'll let you look at the next

page.

A. Am I allowed -- can I ask a question on what I'm looking at? Because I just want to -- I love when I look at chart to understand what it is.

Q. Sure. Do you want to download it and, like, flip through it first or --

A. I mean, I'm happy to do that. I just -- what's the time sequence here? What am I looking at? So I see it has highlighted -- is this a one-day-in-time thing, or is this --

Q. Yes.

A. -- over a long -- so on November 20th, 2013, this was the activity of this page on the Internet; is that --

Q. This was a capture of this page. You're wondering why are there bars; right? Like why are there --

A. Yeah. Usually they represent numbers. So I'm trying to understand how the numbers fit in.

Q. Yeah, I believe -- and I can go back and

look, I believe what this represents is in certain months, The Wayback Machine, which just goes out and crawls, did a lot of captures. So the bars are actually months. And so, like, I think what it's showing is, like, Hey, you know, we have a lot of versions of the March -- you know, March 2012 --

A. Oh, so --

Q. But to be clear, you are not -- my understanding, you are not -- like, for example, you see where on the left it says "33 captures"?

A. Yeah.

Q. And there's a red line that's about roughly a third up from the top. I think it's sort of suggesting that -- well, not a third. I think it's suggesting, like, there are 33 captures, and that's what the bar is representing, whereas some of these might be 150 captures or --

A. So what I think it says is there's 33 captures of this page between the 24th of January, 2011, and 23rd of September 2015; is that --

Q. I think you're right.

A. That would be my guess. And then I don't know what the bars mean exactly.

Q. I'd have to go back and tell you, but I can just tell you --

A. And then you're highlighting November 20th, 2013, something in the middle, and then you're showing me those pictures.

Q. I'm showing you what I understand to be one capture of the web page at a particular day, and that day is November 20th, 2013.

A. Yes.

Q. And as patent lawyers, we use this website -- other lawyers do it, too, but we use this website to kind of show what the evidence was at a particular time.

A. Got it. So on November 20 --

MS. REICHEL: Wait -- sorry, I don't mean to interrupt. I thought you were going to start answering a question. I just want to, again, lay the same objection to all of the representations that were made as lacking foundation.

Go ahead.

MR. CUTRI: Well, Ms. Reichel, you don't disagree this is how The Wayback Machine works. I mean, your firm uses it, too; right?

MS. REICHEL: I don't work for The Wayback Machine. So my objection is that you've made a lot of representations. I don't think you have foundation.

Go ahead. I'm just preserving for the record.

BY MR. CUTRI:

Q. Okay. Let's look at this November -- what I understand to be a November 20th, 2013, capture here.

What do you see on --

MR. CUTRI: This is Exhibit -- I believe it's Exhibit 7; is that right?

THE VIDEOGRAPHER: That's correct.

BY MR. CUTRI:

Q. So, Mr. Brawer, what do you see here on Exhibit 7?

A. So under "Products," I see -- one, two,

three, four -- five different blasters.

Q. Okay.

A. Blaster presentations. My guess is the third one is a two pack. It's a little small.

Q. Well, let's go to the next page. There's a bit more.

A. Yeah, here's some more. Yeah. Yeah.

Q. And --

A. Get into grenades.

Q. -- after the last page there's ammo re- -- there's grenades --

A. Yeah.

Q. -- and there's ammo refill packs.

Let's go back to the first page.

A. It's definitely growing. Yep.

Q. Yep. You would agree with me the number of variants of the launcher is increasing; correct?

A. Correct.

Q. But you don't know whether that additional -- the larger number of variants translated to more overall sales; do you?

MS. REICHEL: Objection to form.

THE WITNESS: No, but there's a good chance that they would have.

BY MR. CUTRI:

Q. Okay. Well, yeah, so let's talk about that. There are new features being --

MR. CUTRI: Well, let's zoom in on the Sneak Attack X3.

BY MR. CUTRI:

Q. Do you remember the Sneak Attack X3, Mr. Brawer? I don't want to suggest to you how it worked, but --

A. That's the one, I believe, that could turn a right angle.

Q. Is that your understanding? That's my understanding, but I want to make sure I get your --

A. Yeah. Yeah, so you had a -- believe it or not, that whole blue piece could just turn 90 degrees. And the gray piece is a mirror so you could look around the corner.

Q. Would you agree with me that the reason

that consumers would buy the Sneak Attack X3 is because of this unique feature that the barrel of the gun can turn 90 degrees and you can actually shoot around a corner?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join.

THE WITNESS: So, again, it would be a feature that would allow us to advertise the brand, all of its features, the ammo, and then bring something new, which would appeal to a percentage of the consumer base, not all of them. Not everyone necessarily wants a Sneak Attack. But rather than put the same commercial on over and over and not say anything new, this is how you continually innovate a brand. And so here's the Sneak Attack coming in, and it has a surprising curiosity-generating feature.

BY MR. CUTRI:

Q. And that feature is the fact that it can turn 90 degrees and fire around a corner; right?

A. Yeah. So in that fantasy, again, of you're going and getting the bad guy, or whatever

you're thinking, even if he's around the corner, you don't have to expose yourself, you can get him. It's actually a pretty cool idea. You know, you don't have to put yourself in harm's way in order to get the bad guy.

Q. Why do you think it's a pretty cool idea?

A. Because I think anything -- you know, what I looked for in product development was things that were unexpected, you know, that created a curiosity. Could I really do that? Does it give me an advantage? Does it create a feature that I didn't have before? Is it going to make me really feel good? Is it going to make me win? Is it going to make me better?

So, you know, marketing is also partly about the emotional connection that you can create between a product and the consumer. So here you're able to give them that sense that there's a new way to have a competitive advantage with Xploderz.

Q. And that new way is being able to shoot

around a corner, essentially; right?

A. Yeah, I'm 99 -- that's this product.

Q. Okay. Now, the --

MR. CUTRI: If we go to the next -- we can put this away. I'm on here on Exhibit 7. If we can zoom in a little bit, I just want to look at -- sorry, yeah, if we can zoom in just -- if you can capture the page that says "X Blasters, Now With Select-A-Shot [sic]" and then the four squares below it. Thank you.

BY MR. CUTRI:

Q. So, Mr. Brawer, there is a reference here on this Exhibit 7 to "select-a-shot"; correct?

A. Yeah.

Q. And then do you know what "select-a-shot" refers to?

A. No, I'm banging my head to try and remember. I can't remember.

Q. Hang on one second. I'm trying to figure out a way if I can get you something objective.

Is there a way that I can share my screen?

THE VIDEOGRAPHER: Yeah, you should --

BY MR. CUTRI:

Q. Well, let me ask you this, Mr. Brawer: Did select-a-shot -- here, I'm going to share my screen with you. I'm sharing with you my Google.com, and I put in Xploderz select-a-shot at the top.

Do you see that?

A. Uh-huh.

Q. If I scroll down, there is a blogger, evan-and-lauren-a.blogspot. Then you click on this. And if you scroll down, there's some pictures of a child. And then it says, "Plus you can select how many shots it will fire. Either 1, 2, or 3 rounds at a time."

A. Okay.

Q. Now, I'm telling you what I have observed by running a Google search and looking at what I think is a relevant result.

Does that refresh your recollection as

to what select-a-shot was in the third generation of X3 Blasters?

MS. REICHEL: I just object to the form of the question and to not having a copy of what was just shown to the witness.

THE WITNESS: Can I answer?

BY MR. CUTRI:

Q. Go ahead.

MS. REICHEL: Go ahead.

MR. RUTTENBERG: You can answer the question.

THE WITNESS: Yes, it does refresh my memory.

BY MR. CUTRI:

Q. What do you understand --

MR. CUTRI: Let's go back to Exhibit 7.

BY MR. CUTRI:

Q. And before we get to that, on Exhibit 7, I hadn't been asking these questions, but I take it from your answer about the Sneak Attack, were you the one who came up with the idea of going around the corner? Because you spoke about it as

if maybe you were, but --

A. My guess would have been that's more of a Keith thing, if I had to guess, you know.

Q. Okay.

A. But maybe. I don't -- I wouldn't take credit for it off the cuff.

Q. Okay.

A. If Keith said -- if Keith gives me the credit, then I'll take it, but otherwise I'm passing it to him.

Q. We don't know -- I don't know. I was just --

A. Yeah, I don't know. It was one of us, probably.

Q. Okay. If we go to Exhibit 7, "X Blasters, Now With Select-A-Shot [sic]."

MR. CUTRI: If we can zoom in on that same row.

THE WITNESS: Yeah.

BY MR. CUTRI:

Q. What is -- if you know, what is select-a-shot?

A. So --

MS. REICHEL: Objection to form.

THE WITNESS: Sorry.

MS. REICHEL: Go ahead.

THE WITNESS: So based on what you showed me and what I think I can remember now -- if you show me more zoomed in on the bodies of these blasters.

BY MR. CUTRI:

Q. Let's zoom in on the Equalizer X3.

A. Yeah, go for that one. Give me that as my full screen.

Now, if you can see where we used to have that orange piece, there's now a little blue knob.

Q. Yep. And so you're referring to -- on Exhibit 7, we have zoomed in on the Equalizer X3. The gun is pointed, as you're looking at it, to the right. And are you referring to just below the magazine where we see some blue SAPs, there is a -- first there is an orange line and then a black line and then there's white space; correct?

A. Correct.

Q. And then below that, there is what is an oval-shaped item that has a black line sticking out of the right of it; right?

A. Correct.

Q. Is that what you're referring to as the select-a-shot?

A. Yes.

MS. REICHEL: Objection to form.

THE WITNESS: Sorry.

MS. REICHEL: Go ahead.

BY MR. CUTRI:

Q. So what is --

A. So --

Q. -- select-a-shot? How did it work?

MS. REICHEL: Objection to form.

THE WITNESS: So I believe if you moved in even tighter, you would see that it's probably sitting on one right now. You could slot it over and sit on two and then you could slot it forward and it would sit on three.

BY MR. CUTRI:

Q. Okay.

A. And that would determine the number of bullets or ammo pieces that would come out of this particular Blaster.

Q. Got it.

And so if we go back out, the Invader X3, do you know whether it had any new features other than select-a-shot as compared to prior versions of the entry-level pistol SAP launcher?

A. Not that I know of. Not that I remember.

Q. Okay. So in the third generation of the Xploderz product, the new feature that you were introducing for the products shown here on page 1 of 3 of Exhibit 7, the new feature under the heading "X3 Blasters" was select-a-shot; right?

A. Correct.

Q. The form factors were the same, meaning there was a blast -- there was a -- well, actually, I take that back.

Well, that's sufficient.

MR. CUTRI: If we go to the next page and zoom in on Punisher and Huntress.

BY MR. CUTRI:

Q. What do you think the feature is that drove the sales of the Huntress product?

MS. REICHEL: Objection to form.

THE WITNESS: So this I remember. This was an attempt of ours to bring more girls into the franchise. And at the time, Hunger Games was a big entertainment property out. And so, you know, the whole notion that girls would play more in this category was something everybody was hopeful and excited about.

And so just a coloration that, you know, taking an opening price point, which is actually the feature of this, and giving a more girl aesthetic to it, the hope was that we could then bring more girls into the franchise. And I believe it also became a time when we were the first to put girls in our commercials.

BY MR. CUTRI:

Q. I see. So is it fair to say that with respect to the Huntress product, the feature that you were emphasizing was that the aesthetic, as well as the name, appeal to girls; right?

MS. REICHEL: Objection to form.

THE WITNESS: So both the Punisher and the Huntress was a new opening price point.

BY MR. CUTRI:

Q. Oh, I see.

A. So the -- if I'm not mistaken, and you can see the number is lower now than we've ever had it, and we're at 120, you now have a 9.99 item that --

Q. And so --

A. And so you have now the ability to buy a Blaster at $10, where the previous opening price point to this date I think had been 12.99. And so you have a feature that appeals to the parent, not to the kid. The kid doesn't care. But the parent cares.

And, simultaneously, we took that

opening price point and said, Well, what if we create one that has more of a girl aesthetic to it and see if we can find more girls interested in playing with Xploderz.

Q. I see.

So would it be fair to say that the feature -- you would agree that the feature that drove sales of the Punisher -- one feature that drove sales of the Punisher -- let me start over.

The feature of the Punisher that drove sales was its lower price point; is that right?

A. Correct.

MS. REICHEL: Objection to form.

THE WITNESS: Sorry. Sorry.

BY MR. CUTRI:

Q. And the feature of the Huntress -- the features of the Huntress that drove the sales of that product were, one, the lower price point, and the girl coloring and name; correct?

MS. REICHEL: Objection to form.

THE WITNESS: Correct.

BY MR. CUTRI:

Q. Let's go to the Night Fighterz Blasters, which is the next one and the last -- well, not the last one. We're almost done.

Okay. Do you know -- so this is the Night Fighterz Gen-200. I'll rep- --

MR. CUTRI: Well, we can go back to Exhibit 6.

BY MR. CUTRI:

Q. There -- there was something called the Night Fighterz Gen-700. Do you remember looking at that previously?

MR. CUTRI: If we go back to Exhibit 7.

BY MR. CUTRI:

Q. The Night Fighterz Gen-200 product. What was different about the Night Fighterz Gen-200 product versus the blasters that had preceded it?

A. So can you do me a favor and flip back one more time?

Q. Sure.

MR. CUTRI: Go back to Exhibit 6 and

zoom in.

THE WITNESS: Zoom in on Night Fighterz Gen-700. Yeah. And now give me the Gen-200.

So from what I'm seeing, it's just the amount of ammo. They both --

BY MR. CUTRI:

Q. Okay.

A. -- represent the new glow-in-the-dark nighttime play, Night Fighterz line, but my thinking would be that for whatever reason at the time, creating a lower price point and taking out some ammo was thought to be a good idea.

Q. And so you think for this Night Fighterz Gen-200, what was different about all of the other blasters that came before it was that it had less ammo but a lower price point?

A. Well, it would have been in the Night Fighterz subline, within the Night Fighterz subline, if the previous two items that you showed me were 19.99 and 29.99 and the retailers felt that for spring, let's say, we needed a 14.99 Night Fighterz in order to keep it in the line

because that 19.99 was too high, then potentially we could have just said, You know what, we'll pull out some ammo, we'll lower the cost, and we can market it at 14.99.

Q. Okay.

MR. CUTRI: Let's do one more, which is the -- let's go to Tab 91.

MR. RUTTENBERG: Mr. Cutri, if it's a good time, it would be nice to have just a quick break.

MR. CUTRI: Well, we're getting to lunchtime for you; right?

THE WITNESS: Yeah. What time is it?

MR. RUTTENBERG: 12:03.

MR. CUTRI: So what I was thinking to do was to go through -- there's one more generation of the products that we just looked at and just so we can finish off and then we can take a break for lunch, but that's up to you guys.

THE WITNESS: Yeah, yeah, I'd like to do that. That would be great.

MR. CUTRI: Okay. Let's do that.

THE WITNESS: Are you okay?

MR. RUTTENBERG: Yeah, I just need a bathroom break soon. That's okay.

MR. CUTRI: I'll go quick. Tab 91.

Well, if you want to take a bathroom break really quickly?

MR. RUTTENBERG: Sure.

MR. CUTRI: Let's do that. Then we'll come back, and then we'll finish for lunch.

THE VIDEOGRAPHER: Okay. We're going off the record. The time is 12:04.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 12:08.

(Brawer Deposition Exhibit 8 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So if we go to Exhibit 8, Mr. Brawer, I will zoom in. Now, the web page here says Xploderz.com/product-listing. And you'll see that the captures begin on -- at least under 37

captures, it says 6 October 2014.

A. Yeah. It's a new --

MR. CUTRI: So let's go to the next page.

And the next page.

BY MR. CUTRI:

Q. So, Mr. Brawer, are you familiar with the products that are shown here on Exhibit 8?

A. Much less so.

Q. Okay.

THE VIDEOGRAPHER: Oh, my apologies, something just went wrong with my computer. The video went out, and I need to go off the record.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 12:11.

BY MR. CUTRI:

Q. So we were looking at Exhibit 8, Mr. Brawer, are you familiar with the Cobra Shield product?

A. As I said earlier, I'm not as familiar, but I've seen them.

Q. And you would agree with me that the products shown here --

MR. CUTRI: Well, let's flip to the next page of Exhibit 8.

BY MR. CUTRI:

Q. And there we can see a Renegade, a Quick Draw 2 Pack, and then a Stinger; right?

A. Correct. And an Aerial Assault --

Q. If we go back to the Mayhem -- sorry, the page before this, there's also something called the Mayhem.

Do you see that?

A. Yes.

Q. Do you remember how the Mayhem launched the products, launched the SAPs?

A. So I'm pretty sure the Mayhem was after my departure from the company. So it was the fall 2014 item. And by "fall," it's the August to December period. And I was already gone, and I was not heavily involved in that item.

Q. Okay. I wondered if maybe since you were there for six months in 2014, you were

involved in, like, this -- I guess this generation of products; is that --

A. So Cobra Shield and Savage Shield ring a bell more so. I think they may have come out in spring. And I do remember we had a line of product where shields were the big feature. So, in addition to all the wonderful things Xploderz did besides shoot farther, carry more ammo, you now had the ability to have a shield on your weapon, which obviously played to the fantasy and gave you something new to talk about.

Q. Okay. So what do you -- on the Cobra Shield, what would you say is the defining feature of that product?

A. The new feature is the shield.

Q. Okay. And do you think that that new feature drove the sales of the Cobra Shield over the prior launchers that just launched SAPs?

MS. REICHEL: Objection to form.

THE WITNESS: I don't know how it performed -- I don't recall how it performed, but it was -- I mean, it's consistent with how we

develop product, twice a year, new news, new price points. This would have probably been more of a spring price point. And the shield would have looked good on TV.

BY MR. CUTRI:

Q. I see.

Let me just show you the next page, again, just in case you know anything about it. The -- was the Renegade a spring product -- were any of the products on this page a spring product such that you might have been involved with them more?

A. Well, the Stinger looks like just a recolor, and it looks like we moved into black ammo. And I don't recall much about this -- you know, I don't remember this line as much. We definitely recolored, you know. And there might be some new tooling in there. I'd have to lay it in. It looks like it may have borrowed some pieces from the Ground Pounder, the Renegade. But they may have put together, you know, something that was new but not completely new. And that's

what I can see from these pictures.

Q. Okay. The Quick Draw 2 Pack, does it have the feature of two packs of ammunition on the same weapon?

A. Quick Draw 2 Pack.

Q. So --

A. Is that what that is? Is there two cannisters? If you zoom in on that, let me see if I can answer the question.

Q. There's a cannister on the top. And then in the front, do you see a cannister hanging off the bottom?

A. Yeah, I don't know whether that was a two pack, meaning two blasters, or if it was just trying to talk about the fact that you had two cannisters on the Blaster itself. I actually don't recall this feature. So...

Q. Got it.

MR. CUTRI: Let's go quickly to Tab 95.

(Brawer Deposition Exhibit 9 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. And this will be the last one for this.

Are you familiar with what was called the Blaster Pro line of products?

A. Yes.

Q. And what was the Blaster Pro line of products?

A. So the Blaster Pro line of products was our development of a stored energy age graded 14-plus more authentic to the real-world SAP firing device.

Q. Okay. And so what were the features that you think drove the sales of the Blaster Pro products?

MS. REICHEL: Objection to form.

THE WITNESS: Well, the benefits of the Blaster Pro versus the Xploderz was the stored energy. We did do a different SAP size, so a different ammo size and a different -- it was a slightly harder ball or harder ammo.

In the case of the auto fire, we actually had, as we discussed earlier, the single

shot and automatic fire in the same way that I described. And if I wasn't clear in my comments just now, they have triggers.

So all that -- all that conversation about the limitations that we had being in the toy area and under age 14 and ASTM regulations, we didn't have to -- we didn't have to live by that because we didn't try and sell this to the toy buyer.

BY MR. CUTRI:

Q. Did the Blaster Pro products perform better than the Xploderz products?

MS. REICHEL: Objection to form.

THE WITNESS: I can tell you at the time that I was involved in Blaster Pro, Blaster Pro had not gotten larger than Xploderz. I don't --

BY MR. CUTRI:

Q. I'm sorry, we're both talking.

My question was about whether it performed better from a financial perspective. Is that how you were answering?

A. Yeah. So, in other words, Xploderz up

until the time I had visibility to the sales were -- was still a bigger business than Blaster Pro.

Q. But you left, and so you don't know if Blaster Pro overtook Xploderz?

A. Correct. I don't -- I don't believe they did, but I don't know for sure.

Q. Okay.

MR. CUTRI: Let's go off the record.

THE VIDEOGRAPHER: Okay. We are going off the record. The time is 12:19.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 1:09.

(Brawer Deposition Exhibit 10 was marked for identification and attached to the transcript.)

MR. CUTRI: And, Mr. Fahnert, what exhibit number are we up to now?

THE VIDEOGRAPHER: This is Exhibit 10.

BY MR. CUTRI:

Q. So I'm going to show you, Mr. Brawer,

what's been marked as Exhibit 10. It's BangZoom-159 through 161. So this is one that I'm going to ask you to not download, not that you have been downloading them necessarily, but this is something that was given to us by Bang Zoom.

So if we scroll to the bottom of this page, it's an e-mail exchange between you and someone named Steve Fink.

MR. CUTRI: Not that, I'm sorry, the next page. Yeah. If we can go all the way to the bottom, there's a little -- there's an e-mail that begins on Thursday -- very bottom, yep. Thursday, Feb 18. All the way, yep.

BY MR. CUTRI:

Q. So, Mr. Brawer, on the bottom of BangZoom-160, do you see the e-mail from Steve Fink on Thursday, February 18th, 2010, to you, "Subject: LA"?

A. Yes.

Q. And it says, "Ron, would you be able to get together on either Sunday night? I land at 7:00pm. I can drive to meet you after I land."

Do you see that?

A. Yes.

Q. Who is Steve Fink?

A. Steve Fink is -- or was at least a Bang Zoom principal. Bang Zoom is an inventing group based out of Cincinnati. And he's someone that I worked with in the past.

Q. And had you worked with Mr. Fink on Orbeez prior -- well, actually, let me ask you this: Do you recall -- well, if we go up to the next page -- sorry, on the same page, the next e-mail, it says, "OK, please send me the address to go to. I'm going to try to attend the event I had planned for that night after we meet."

And then you give -- if we go to the next e-mail, you give directions -- is that directions to what was then your home?

A. Yes.

Q. We know it's 2010 because you actually had to give directions as opposed to, like, just use a GPS, which everyone will do nowadays. But then, just one more notable detail, if we look at

the top pair of exchanges on this page on 159, it says, "FYI, I'll be with Neil and Steve (coworkers). See you then."

And you say, "No problem. Happy to invite you guys for dinner if you have the time."

Do you see that?

A. Yes.

Q. Do you remember an in-person meeting in approximately February of 2010 between you, Steve Fink, and two of his coworkers, Neil and Steve, at your home?

A. No.

Q. Okay. Do you recall that there was -- that at some point you met with Mr. Fink in your home?

A. Yes.

Q. Okay. Was it -- would it have been approximately in February of 2010, to your knowledge?

A. Very possibly.

Q. Okay. At that meeting, did -- did you guys discuss Xploderz -- I'm sorry, did you guys

discuss any SAP-oriented products, do you know?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Sorry.

A. I'm sorry, we lost you there. Could you repeat it?

Q. Sure.

Do you remember any in-person meetings with Bang Zoom employees where you discussed an SAP launcher?

A. Yes.

Q. Okay. What do you remember about -- was there more than one or just one or --

A. In-person meetings, I can't tell you the number. But I do recall a meeting where they came to the house and we discussed SAP launchers.

Q. Okay.

A. That's about it.

Q. At that meeting, do you recall whether anyone -- at that meeting, you were talking about launching spherical SAP projectiles; right?

A. We were talking about launching what

they already knew to be Orbeez. So, yeah, round, round -- all Orbeez were round at that time. So round.

Q. Got it.

And did -- do you remember talking about the different ways that you might launch SAPs or Orbeez at that time?

A. So I have -- as part of, you know, getting to this moment in time, reviewed a lot of documents, and while I can't remember specifically the meaning without that review, but because I did the review, I can recall that we did look at how to shoot various -- or how to, you know, blast various Orbeez. Blast Orbeez in various ways, sorry.

Q. So let me -- can you just give me that answer one more time? I apologize.

A. Yeah. So if a year and a half ago you had come to me and said, Do you remember meeting these guys and what you did and how you did it and what were you looking at, I would have to answer honestly, no.

But over the last, three, four, five months, I've looked at a lot of documents, and that's certainly helped refresh my recollection of the various ways that Bang Zoom introduced me to ways that we might be able to blast these Orbeez, and I do recall one of those meetings at least having been in my house.

Q. Okay.

A. So that's what I can remember.

Q. What were the -- what ways were you aware of -- so what -- so what were the ways of -- we talked previously about launching projectiles by throwing them; right? We talked about that earlier today, and we talked about boys saying that they thought -- boys suggesting that you could shoot SAPs; right?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Do you remember that?

A. I do recall.

Q. In terms of the actual projectile launcher itself, what is the -- what different

types of projectile launchers, if any, did you utilize or experiment with to launch the spherical SAPs?

MS. REICHEL: Objection to form.

THE WITNESS: Are you asking just me by myself or with the assistance of Bang Zoom?

BY MR. CUTRI:

Q. Can we start with just you?

A. The only -- the only recollection I have of actually playing with these in a way that they could be shot would be through straws.

Q. Okay. And what do you mean?

A. So I would try and find a straw that could match more or less with the size of an Orbee or an SAP, let's call it, and then put it in the S -- put it in the straw, blow it on one end, and see what happens if it came out the other.

Q. And so the straw, was that the earliest projectile launcher that you can remember utilizing?

MS. REICHEL: Objection to form.

THE WITNESS: That -- sorry.

MS. REICHEL: Go ahead.

THE WITNESS: So, yes, that would be the first time I can remember doing something with the Orbee as a projectile that wasn't just throwing them.

BY MR. CUTRI:

Q. Okay. And did you -- one second.

So we talked earlier about patterns of -- play patterns; right?

A. Correct.

Q. And we talked earlier about one of the established play patterns is shooting; right?

A. Yes.

Q. And in particular, shooting with a projectile launcher is something that you said went back, you know, maybe 100 years or more; is that right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. And the -- was it a known play pattern to use -- in toy making to use a projectile

launcher that used air pressure to launch a projectile?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Okay. And it was known -- would you say that was known by 2000, the year 2000?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Was it also known by the year 2000 to rather than use human air to generate air pressure to instead use a mechanical air pressure system to launch a projectile?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. And was that known in the toy industry?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. What were the ways that you were aware

of -- what were the mechanical air pressure systems that were used to launch toy projectiles by the year 2000 that were known in the toy industry, what different ways were there to generate air pressure?

MS. REICHEL: Objection to form.

THE WITNESS: I don't know that I could give you a comprehensive list.

BY MR. CUTRI:

Q. Okay.

A. But there was certainly the ability to load a foam dart, create some air pressure, and punch out the air -- the foam dart. There was -- I don't know exactly at what point, but there was certainly stomping. So there's a pump that attaches to a hose and attaches to a device that usually is something foam on top of it would sit and then you stomp on the pump and it shoots air into the foam object and that creates the air pressure.

In the case of water guns, I'm pretty sure that air is used to do a lot of the

squirting. So they create some pressure there and create -- I know as a child, one of my favorite toys when I was young, there was a little -- there was a little rocket that you would fill with water and then attach it tightly to a pump, and then you'd pump air under the -- into the rocket and then you'd release the rocket and the water would turn to fuel and the object could actually shoot, you know, whatever, 30, 40, 50 feet into the air. So there may be many, many more examples, but that's just some of them.

Q. Was another known way of creating air pressure to use an air compression chamber with a piston inside of it and a spring that would bias the piston so that you could draw the piston back and the spring would compress air in the compression chamber and generate air pressure that way?

MS. REICHEL: Objection to form.

THE WITNESS: That sounds completely plausible, yes.

BY MR. CUTRI:

Q. And you think that was known by the year 2000 in the toy industry?

MS. REICHEL: Objection to form.

THE WITNESS: I can't say with exact accuracy, but it seems like an invention or an idea that would have been developed by 2000, yes.

BY MR. CUTRI:

Q. The first projectile launcher that you utilized was a straw that blew the SAP out of the straw; right?

A. Yeah. If you want to call the straw a projectile launcher, yes.

Q. Yeah. Well, that's -- the straw is what you used to launch the projectile, and the ammunition was the SAP; right?

A. Right. And the energy was -- and the force came from my lungs.

Q. Right. The force came from your lungs. So the projectile launcher is the straw; correct?

MS. REICHEL: Objection to form.

THE WITNESS: I guess so.

BY MR. CUTRI:

Q. Let me ask it to you this way.

A. Yeah, sure. I mean, yes. That's the other -- that's not the SAP, and it's not my lungs. So whatever comes in between those two, yes.

Q. Yes. But you understood that the -- well, your Xploderz needed a human being's energy, as well; right? The Xploderz device needed a human being's energy, as well; right?

MS. REICHEL: Objection to form.

THE WITNESS: So I would answer that one, up until you have battery power, you know, you need human force in almost every case. It's just whether that can be stored or not.

BY MR. CUTRI:

Q. Got it.

A. So all these pumps that I'm talking about, they needed a pump -- they needed to be pumped. Some of them could store the pressure and then release -- something to release the pressure. In Xploderz's case, in the generations that we

were talking about earlier, you couldn't store the pressure.

Q. In other words, the Xploderz's guns in the same way that your straw needed your lungs, the Xploderz's guns needed a human being's muscle power to pull it back; right?

MS. REICHEL: Objection to form.

THE WITNESS: Correct.

BY MR. CUTRI:

Q. So if you wanted to use a projectile launcher -- well, as opposed to a straw -- well, let me back up a little bit.

If you were designing a toy, what do you think some of the disadvantages are of using a straw as your projectile launcher?

MS. REICHEL: Objection to form.

THE WITNESS: So I'm just going to paraphrase your question, and tell me if I'm on the right track. If it was a peashooter, some kind of -- you know peashooters from the past. So it's basically a straw. I mean, what's the advantage or disadvantage of a peashooter?

BY MR. CUTRI:

Q. No. Let me ask you this -- let me ask it this way -- well, actually, yeah, let me ask that. What's the advantage -- what do you think was known by, let's say, 2000 to be the advantages and disadvantages of a peashooter?

MS. REICHEL: Objection to form.

THE WITNESS: Well, I would start with, you know, I'm just not quite sure how fun or magical it is when the force is coming from your lungs. You would have to -- you would have to aim it from your mouth. So it's certainly not as versatile as something that's mobile in your hands.

I can't ever recall -- I mean, there's some really long peashooters, I guess, and some short ones, but I don't know if there's a real variety of expressions and designs that could really come off a peashooter.

You know, from a combat standpoint, you can't be completely ready with a large amount of ammunition with a peashooter. And then, you know,

I have no expertise in how far you can shoot with a peashooter. I mean, it might be pretty good if the ammunition was perfect to the peashooter or the straw, but, you know, there's probably some limitations based on your lung strength and the ammunition that you're shooting or the paper -- what you call the spitball or the pea. You know, so it's not -- it's not like the worst thing in the world, but it just doesn't seem really fun.

BY MR. CUTRI:

Q. And so you would agree with me that people who design toys would -- you know, if you were using a straw as a projectile launcher, you would recognize that there would be motivations to improve that projectile launcher if you wanted to make a toy that kids would like?

A. Yes.

MS. REICHEL: Objection to form.

THE WITNESS: Oh, sorry. Yes. Yes.

MS. REICHEL: I wasn't sure if he was done.

THE WITNESS: Yeah, sorry. So I don't

think just putting a straw on the shelf and saying, you know, Shoot with this, would be really fun, yeah. You would need to make it -- I agree with you, yes, that you would need to improve it.

BY MR. CUTRI:

Q. Yeah. And people knew that even before, let's say, the year 2000; right?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Yeah, I would join that objection to that question.

THE WITNESS: But -- yes, I would imagine a toy group -- a professional toy group looking at that would say it's got to be more interesting than just a straw.

BY MR. CUTRI:

Q. And would one of the advantages -- so if you were going from using a straw with a human breath to power it to using a mechanical method of generating air pressure, would you agree that one advantage you get is consistency, meaning with your breath, you know, it might vary from person to person, but a mechanical launcher, it's easier

to generate the same amount of air pressure each time you fire?

MS. REICHEL: Objection to form.

THE WITNESS: You could certainly make that one of your objectives, yeah.

BY MR. CUTRI:

Q. What do you mean by that?

A. I don't know exactly -- I'm not like a complete expert on exactly how consistent air pressure you get when you fire an air pressure toy. I don't want to misrepresent my scope of knowledge.

I've owned dozens, if not hundreds, of NERF guns and Xploderz Blasters, and they fire differently all the time. I don't know if that's because there's inconsistent air pressure or what in every case. But there's certainly a desire, I'm sure, that if you put X amount of pressure on the plunger, that it would give you a consistent amount of airflow. I mean, the more consistent you could get it to perform would be good, yes.

Q. And that would be better than a breath,

which might vary from person to person or how tired you are?

MS. REICHEL: Objection to form.

THE WITNESS: Yeah. Size of the lungs, whether you smoke, all those things, sure.

BY MR. CUTRI:

Q. All those things would make it variable if you're using a human breath as opposed to using a mechanical --

A. Yes.

Q. -- launcher; correct?

A. Yes, yes. I would agree with that, yes.

Q. And then another thing that a mechanical launcher gives you as an advantage over a human blowing through a straw you said was portability; right?

A. Yes.

Q. Meaning you can make a form factor that is in the shape of a pistol, for example?

A. Actually, on portability what I meant more was because you're holding it in your hands, you know, you can maneuver it. It's not something

that has to be tied to your lips. And so, you know, it's much more -- I don't know if there's a better word than portable. Maybe you can help me with that, but that --

Q. Maneuverable.

A. Maneuverable. It's much more maneuverable, yeah.

Q. What about aim? How does using a mechanical system of launching -- of creating air pressure improve your ability to aim versus blowing out of a tube?

MS. REICHEL: Objection to form.

THE WITNESS: I would assume that it's, you know, a better system. It can be designed to be a little more accurate. I'm not sure a peashooter is all that inaccurate, depending on the distance you're going and what you're trying to hit. But, yeah, I would say accuracy is probably a little secondary to maneuverability, but accuracy could be improved for sure.

BY MR. CUTRI:

Q. What about safety, does -- do you agree

that using a mechanical air launcher reduces the risk that a user might accidentally ingest the ammunition if they were blowing out of a straw?

MS. REICHEL: Objection to form.

THE WITNESS: I'm sorry. Yes.

BY MR. CUTRI:

Q. And that might reduce the possibility that the user -- using a mechanical air pressure system would reduce the possibility that a user of the straw would suck the ammunition in and choke on it; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. And that certainly would be an objective of someone who was trying to -- well, reducing injury, you would agree, is -- has been an objective of toy makers for decades; right? Decades before 2010?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. Let me show you --

MR. CUTRI: Could I have Tab 83, which is SRB3753.

(Brawer Deposition Exhibit 11 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So I am showing you a patent from -- in the upper left-hand corner it says July 28th, 1970. And in the right it says -- upper right, 3,521,616.

Mr. Brawer, look in the lower right-hand corner.

MR. CUTRI: Maybe we could zoom in on the list of inventors.

BY MR. CUTRI:

Q. They're Richard Shih-Teng Chang, Daniel H. Meggs, and John W. Ryan. I'll represent to you --

MR. CUTRI: That's good, Videographer.

BY MR. CUTRI:

Q. I'll represent to you that I showed this patent to Mr. Keith Meggs, who you know; correct?

A. Yes.

Q. I'm sorry. You know Keith Meggs; right?

A. Yes. Yes, I do.

Q. Who is Keith Meggs?

A. Keith was the head of engineering for the Mattel boys group, had a very long career at Mattel. And he was the person I called upon as our ideas were starting to take shape in the Maya Group with Orbeez to assist me in managing, engineering, and manufacturing challenges that were in front of me that I did not know how to manage on my own. And he was going to come in for a couple of weeks on a day rate, and he ended up staying for multiple years and essentially became a non-equity partner in the group.

Q. Got it. Okay. Thank you.

MR. CUTRI: If we go to the next page, there's some figures here.

We can go to the next page. So if we

rotate this page 90 degrees to the right.

BY MR. CUTRI:

Q. Do you see in the upper left-hand corner, there's a Figure 10?

A. 13 -- 10, yes. Yeah, of course. Yeah.

Q. All right. Now, I'm going to show you that.

MR. CUTRI: And if I could have Tab 84.

(Brawer Deposition Exhibit 12 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So this is the same --

MR. CUTRI: And, by the way, what was that last exhibit?

THE VIDEOGRAPHER: The previous was 11. This will be 12.

BY MR. CUTRI:

Q. So the -- Exhibit 12 is an annotated version of the Meggs patent that we just looked at. And if we zoom in, I just want to give you a little bit of a background on this, Mr. Brawer.

Do you see that there is a blue -- well, first of all, there's a green outline box.

Do you see that?

A. Yes.

MS. REICHEL: Objection to form.

THE WITNESS: Oh, sorry.

BY MR. CUTRI:

Q. And do you also see that there is a blue piston?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: I also join that objection.

THE WITNESS: Yes, I do.

BY MR. CUTRI:

Q. And do you see that there's a red spring that's been highlighted here in Exhibit 12?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I do.

BY MR. CUTRI:

Q. And then you can see that there's a yellow tube that's been highlighted, as well; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I do.

BY MR. CUTRI:

Q. And do you see that there is -- there's an item over on the right. It's 190 -- well, first of all, you can see there's some circular-shaped objects above the green box; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I do.

BY MR. CUTRI:

Q. And do you know what "air soft" is, Mr. Brawer?

A. Yes, I do.

Q. Do you have air soft guns yourself?

A. Not any longer. I used to.

Q. You used to. Okay.

But you said you've had hundreds of -- you said you've owned, like, hundreds of NERF guns; is that right?

A. Hundreds would have been a lot, but yeah, dozens. I mean, we bought them all the

time. You know, it was part of -- we were in the category. So we, you know, kept abreast of what was coming out.

Q. Did you ever take --

A. Not for personal use, mostly for professional use.

Q. Oh, I see. Did you ever, like, open a NERF gun and see whether they -- you know, how the internals operated?

A. Me personally, no.

Q. Okay. Anyway, getting back to this Meggs patent.

MR. CUTRI: If we can go to the -- is there another page to this annotation?

THE VIDEOGRAPHER: No, it's just one page.

BY MR. CUTRI:

Q. Okay. Yeah. So, if we go to the lower page, do you see how there's -- Figure 12 is annotated, as well?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Do you see, Mr. Brawer?

A. I think this is -- oh, Figure 11. It says Figure 11. It's Figure 12. Got it. Yes, I see it.

MR. RUTTENBERG: Is it Figure 12 or Figure 11? I'm not sure what we're looking at.

BY MR. CUTRI:

Q. It's Figure 12.

MR. CUTRI: If we can actually pull it down a little bit.

MR. RUTTENBERG: It's in the middle, is that what --

THE WITNESS: Yeah, Figure 12 is in the middle.

MR. RUTTENBERG: I see it.

THE WITNESS: I think we're with you. It's the big one.

BY MR. CUTRI:

Q. Yeah.

MR. RUTTENBERG: All right. Got it.

BY MR. CUTRI:

Q. Do you see here, Mr. Brawer, there's the blue piston again; right?

MS. REICHEL: Objection to form.

THE WITNESS: Yes.

BY MR. CUTRI:

Q. And do you see how the piston is now pulled back and the spring is compressed?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join the objection. Just personal knowledge of this document, objection. But I'm not going to stop, Mr. Cutri.

BY MR. CUTRI:

Q. Go ahead, Mr. Brawer.

A. The question was: Do I see how the spring is pulled back?

Q. No, the piston is pulled back and the spring is compressed.

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I see that.

BY MR. CUTRI:

Q. Do you know what would happen if you

released that spring and the piston traveled forward?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join.

THE WITNESS: The air inside the chamber would blow out.

BY MR. CUTRI:

Q. Okay. And it would blow out through the narrow diameter tube; right?

MS. REICHEL: Objection to form.

THE WITNESS: It would travel through -- assuming that green is not solid where it shows green there and that it's not a wall of some kind, but that it would travel through 180 and then through to 178, assuming that's a chamber.

BY MR. CUTRI:

Q. Okay. Have you ever seen this type of air compression system before today?

MS. REICHEL: Objection to form.

THE WITNESS: Me personally, no.

BY MR. CUTRI:

Q. Okay. Let's -- but you recognize,

Mr. Brawer, that --

MR. CUTRI: We can zoom out a little bit.

Let's go back to the first page of this patent. I don't know if that's annotated.

THE VIDEOGRAPHER: Yeah, there's only one page of this.

MR. CUTRI: Oh, okay. If you can go back to the original patent.

BY MR. CUTRI:

Q. You can see that this patent is dated July 28th, 1970, in the upper left-hand corner; right?

A. Yes, I can.

Q. Okay. When you said you guys had NERF products, I asked you whether you ever took them apart. Do you remember that?

And you said, Not me personally?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Is that right?

A. Yes. I do recall that, yes.

Q. Have you ever -- but setting aside who took them apart, did you ever look at the inside of a NERF gun or get awareness of how the internals of a NERF gun worked?

A. I have looked with others at open product, yes.

Q. You mean like sort of --

A. Unscrewed plates.

Q. Got it.

Have you ever seen an air compression -- have you ever -- where did you see that?

A. To the best of my recollection, it would have been at our office or headquarters or whatever you want to call it.

Q. In Mattel or --

A. No, I'm sorry, at the Maya Group.

Q. At the Maya Group. At the Maya Group.

And was that before you -- was that -- you looked at the NERF product while you were developing the Xploderz product?

MS. REICHEL: Objection to form.

THE WITNESS: It would have been in the

same time period, yes.

BY MR. CUTRI:

Q. Okay. Actually, let's -- I think I know what you're referring to. What NERF product did you look at, if you recall? Was it a bow and arrow?

A. I don't recall.

Q. So -- well, then let's do this. The --

A. It's just the trigger.

Q. Let's look at Tab 24. This is an e-mail --

MR. RAMBEAU: This is actually one that we could do 24B instead.

MS. REICHEL: Yeah, again, I don't think this is one that he's seen the entire document. So, Mr. Cutri, we talked about that before the deposition. You shouldn't be showing him e-mails he hasn't seen.

MR. CUTRI: I think we just said 24B?

MR. RAMBEAU: Yeah, I replaced it with 24B.

MR. CUTRI: Oh, sorry, Ms. Reichel.

Before the deposition, we endeavored to accommodate what you asked for. But it's just in my outline it hasn't been updated. So 24B --

MS. REICHEL: And just to be clear, I think it's to accommodate what the protective order requires, not just what I asked for, but go ahead.

MR. CUTRI: Yeah, the content -- what was on the screen for momentarily was just like a forward with no content. So I just want to make that clear.

(Brawer Deposition Exhibit 13 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. It's BangZoom-0000128. And this is from Mike Hoeting. Mr. Brawer, we can zoom in. It says, Include -- this is -- now we are on April 8th, 2010.

Do you see that?

Sorry, Mr. Brawer --

A. Yeah. I'm just reading it. Yeah.

Q. Feel free. Go ahead and read it.

A. I finished.

MS. REICHEL: And, Mr. Brawer, just for clarity, this is another one of those documents you shouldn't download.

THE WITNESS: I'll avoid downloading.

MR. RUTTENBERG: I think I mentioned this earlier, but I don't remember if it was on the record. The witness is using one of my office's computers. So he's not downloading anything to any computer. He's taking -- and if you want me to delete stuff from my office computer when we're done, just let me know, and we're happy to comply with that request.

MS. REICHEL: Great. Thank you.

BY MR. CUTRI:

Q. So this is April 8th, and there's a reference in this e-mail to a video that's attached to this e-mail about three different designs. The video is native. It's BangZoom-390.

MR. CUTRI: Mr. Videographer, if you can pull that up and show it.

(Brawer Deposition Exhibit 14 was marked for identification and attached to the transcript.)

(Video playing.)

BY MR. CUTRI:

Q. So, Mr. Brawer, my point in showing you that was to place you in time. We talked about a February 2010 e-mail suggesting an in-person meeting. I just showed you an April 8th video that shows that up to that point what Bang Zoom had proposed. I'm going to show you an e-mail from about two weeks later.

MR. CUTRI: If I could have Tab 33, which is BangZoom-223.

Actually, before I ask, Mr. Rambeau, has this been redacted as needed?

MR. RAMBEAU: Yeah, this one is fine.

MR. CUTRI: Okay.

(Brawer Deposition Exhibit 15 was marked for identification and attached to the transcript.)

MR. CUTRI: Okay. If we can scroll down to -- I'm looking for an April 22 -- Thursday, April 22 e-mail. Here.

BY MR. CUTRI:

Q. So, Mr. Brawer, this is a Thursday, April 22 e-mail. It's from meggskei, which is flyzone -- meggskei. And then to bzfink and ronbrawer@yahoo.com.

Do you see that?

A. Yes.

Q. Okay. And it says, "Steve just an update. I'm in China this week and HK next. I reviewed the breadboards and essentially the latest spring catapult shows the most promise in my view, but it still lacks power. Perhaps a stronger spring would help. Next week I will be reviewing the models with BV in HK to confirm ASTM conformance. In the meantime, did Mike proceed with the air piston version of breadboard? I noted it would be done early this week. We need to see how this will function as well. Please advise thks, Keith [sic]."

Do you see that?

A. Yes.

Q. Okay. Again, this is just to -- there's a reference here to an "air piston version of breadboard."

Do you understand the reference to bread board to be a reference to like a prototype of a launcher, or what do you understand that to be a reference to?

MS. REICHEL: Objection to form.

THE WITNESS: Prototype is a good description.

BY MR. CUTRI:

Q. Okay.

MR. CUTRI: Now, let's look at Tab 35, which is BangZoom-351. And this is April 27th at 2:49 p.m. If we can zoom in on the top.

(Brawer Deposition Exhibit 16 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. This is --

MR. CUTRI: Well, let's look at the bottom really quickly.

BY MR. CUTRI:

Q. Mr. Brawer, the bottom of this e-mail is the one we just read from Thursday, April 22nd. And so this is a reply on -- about five days later.

MR. CUTRI: And if we go up to the top.

BY MR. CUTRI:

Q. This is from Mr. Fink. And it says, "Ron, Keith, Ron: Good catching up with you this morning. We have a model to show you that uses a piston, please see attached quicktime video."

And I'll let you read the rest of it.

(Witness peruses the exhibit.)

BY MR. CUTRI:

Q. And let me know when you're done.

A. Yep, I'm done.

Q. So here there's the reference -- now, we talked about a piston when we talked about the Meggs patent a minute ago. But here's the reference to something that is a piston -- the

piston holds the Orbeez and prevents them from rubbing the sides of chamber so they do not break when launched.

Do you see that reference?

A. Yes.

Q. Okay. Let's watch the video. I wanted to give you that background as we watch the video.

MR. CUTRI: So we can go ahead and watch the video, which is BangZoom-352.

(Brawer Deposition Exhibit 17 was marked for identification and attached to the transcript.)

(Video playing)

BY MR. CUTRI:

Q. Do you recall that prototype that we just --

MR. CUTRI: So what exhibit was that?

THE VIDEOGRAPHER: 17.

BY MR. CUTRI:

Q. So in Exhibit -- we just watched a video, which is Exhibit 17.

Do you recall that prototype?

A. So I -- in preparation for -- and in looking for documents that I had in my possession, I found that video, and so my memory is from that review of the documents. I did not recall that prior.

Q. Okay.

A. But I have no reason to believe it's not authentic.

Q. Got it. Okay.

And do you know that blue --

MR. CUTRI: If we can go back to the video and just get a good sort of wide shot of the launcher.

(Video playing).

MR. CUTRI: Can you pause it? There we go.

BY MR. CUTRI:

Q. Do you know what -- where the blue, pink, and yellow portion of the launcher shown here in the screenshot of Exhibit 17, where that came from?

A. No, I don't.

Q. Okay.

MR. RUTTENBERG: Mr. Cutri, if you have a minute, if we can go off the record for 60 seconds just for a quick break?

MR. CUTRI: Sure.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 1:56.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 1:57.

MR. CUTRI: Let's look at Tab 38.

(Brawer Deposition Exhibit 18 was marked for identification and attached to the transcript.)

MR. CUTRI: BangZoom -- which is BangZoom-231.

So at the bottom of BangZoom 2 --

MS. REICHEL: Sorry, I'm just looking for Ron's e-mail on the top there.

MR. CUTRI: Oh, I don't know -- I'm sorry, this -- let's delete this. I think this one needs the top deleted.

MS. REICHEL: Sorry, it's hard to read because I don't have the actual exhibit yet, but --

MR. CUTRI: Yeah, we probably have to delete the top of this one, Mr. Rambeau, maybe. Actually, you know what, is there a way, Mr. Videographer, to just grab the e-mail that says Friday, April 30th, 2010?

THE VIDEOGRAPHER: Friday --

MR. CUTRI: It's just below the top. It begins, "Keith, good talking with you today. Here are some answers to your questions."

THE VIDEOGRAPHER: Yeah, I can do that, but I can't -- I can't do it to the original one as an exhibit until --

MR. CUTRI: Yeah, just do it to the --

THE VIDEOGRAPHER: Okay. So I can -- let me --

MR. RAMBEAU: If we want to go off the record for like --

MR. CUTRI: Okay. Let's do it really quick.

MR. RAMBEAU: -- three minutes, I can just redact it.

MR. CUTRI: Actually, you know what, let's just show -- it's fine. We'll just show it. We'll mark it as an exhibit.

What exhibit number is this?

THE VIDEOGRAPHER: This will be 18.

BY MR. CUTRI:

Q. Okay. Towards the top of Exhibit 18, which is BangZoom-231, do you see this e-mail from Mr. Fink, Mr. Brawer?

A. Yes, I do.

Q. And it says, "Keith" -- this is now on Friday, April 30th, so a couple of days after the video arrived.

"Keith, good talking with you today. Here are some answers to your questions: On the piston model, we used the plunger/stock from the 1993 NERF Bow and Arrow. If you need one, here is a link to eBay to purchase: The current piston model can be made more sturdy, and here is our suggestion: You can use electrical tape to keep

the end-cap wrapped to the barrel. The rest of the model was hot melted on (the air tubes hot melted to the barrel). When you create a duplicate model, we suggest using a thicker walled clear tube that you can anchor the endcaps to the tube. I hope this helps. Steve Fink [sic]."

Do you see that?

A. Yes, I do.

MR. CUTRI: Let me just show you Tab 40, which is a teardown of a NERF product.

(Brawer Deposition Exhibit 19 was marked for identification and attached to the transcript.)

MR. CUTRI: This will be Exhibit 19.

Is it possible, Mr. Videographer, to get a screenshot from the video at Exhibit 17 and putting it side by side with the picture shown here in Exhibit 19?

THE VIDEOGRAPHER: I'll have to -- that will take me a few minutes.

MR. CUTRI: Okay. Well, no, go back to 17 --

BY MR. CUTRI:

Q. Well, first of all, Mr. Brawer, take a look at this. You see that this is something that has a -- have you ever seen this toy before?

A. Not that I can recall.

Q. Okay. Do you see that it has a yellow pullback handle?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I do.

MR. RUTTENBERG: And also just objection, personal knowledge of this witness.

BY MR. CUTRI:

Q. Okay. If you don't -- so if I asked you -- if someone were to ask you questions about this product, you wouldn't be able to describe how it works. You wouldn't have any familiarity with the internals of it; is that fair?

MS. REICHEL: Objection to form.

THE WITNESS: That would be fair.

BY MR. CUTRI:

Q. Okay. Do you know if prior to -- do you know if anyone ever put an SAP into a tube and

launched it out with their breath before you did it?

MS. REICHEL: Objection to form.

THE WITNESS: No, I don't.

BY MR. CUTRI:

Q. Okay. Do you know someone named Steve Spangler?

A. I have a feeling I do, but you're going to have to refresh my memory.

Q. Well, Steve Spangler is an educator and toy maker who has appeared on like the Ellen DeGeneres show and has like done sort of science-based toys.

Do you know him?

A. I think now that you mention -- I don't know him personally. I think I've potentially seen videos of him or --

Q. Do you know in what context you would have seen any of his videos?

A. Not -- not in any specificity.

Q. Okay. So you're not aware of Mr. Spangler launching a tube -- launching an SAP

out of a tube?

A. No.

MS. REICHEL: Objection to form.

THE WITNESS: Sorry. No, definitely not.

BY MR. CUTRI:

Q. Let me ask again just so I -- you're not aware of Steve Spangler launching an SAP out of a tube using his breath power; are you?

MS. REICHEL: Objection to form.

THE WITNESS: No, I'm not.

BY MR. CUTRI:

Q. Okay. After -- even after you did the -- so you did a recall -- I'm going to switch topics and go back to Xploderz.

A. Wherever you want to go.

Q. Okay. After you did the -- you did a recall of Xploderz with respect to the first shipment; right?

Is that right?

A. Oh, yes. Yes, I confirm that.

Q. And -- but thereafter did consumers

still experience any issues with the performance of the Xploderz products, to your knowledge?

A. Yes.

Q. And what issues are you aware of consumers experiencing?

A. So Xploderz is a toy, it didn't work perfectly every time. There was variances in performance. There were times when ammo didn't load. There were times when there were misfires.

Q. What else?

A. Misfires, loading issues, operator error, kids not strong enough or not pulling the plunger back far enough to make them operate properly.

Q. Did you ever hear from retailers about concerns they had with the product or getting too many returns on the product?

A. I don't recall us having a major return problem, no.

Q. Okay. Did retailers ever express to you concerns or problems they found with the product, with the Xploderz product?

A. There may have been some times when, you know, a retailer may have said something like, I tried to use it. It didn't work well. But never enough that I can recall us having to take any product back or -- in many cases it may have been having to just try to explain to them how to use it better.

Q. Okay.

MR. CUTRI: Let me show you -- let me show you Tab 27, which is BangZoom-365.

(Brawer Deposition Exhibit 20 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So I'm placing -- just to kind of place you in time again, Mr. Brawer, we're still in April of 2010, and I'm directing you to -- I'm going to keep going down a little bit. I'm looking for an April 13th e-mail in this thread. There it is. So it's the beginning of your e-mail.

It says from Ron Brawer to Mike Hoeting.

"Mike, two things: Orbeez" -- so this is April 13th. So to place you in time, it was about two weeks before the video with the air piston launcher -- "we sent you a bunch of different orbeez monday (should arrive today). The orange and green mix are the smaller tougher balls -- in case you want to revisit their performance (I still have a gut that this is the right way to go). Powered Launcher -- I spent the weekend gangsta fighting with 'air-soft' pellet guns with my son Aviv. What fun!! I have no doubt that we must find a motorized ways to fire an orbee at some stage. That product will be magic."

Do you see that?

A. Yes.

Q. What did you mean -- in the second paragraph, what were you referring to?

A. Similar to our discussions I think prior to lunch, the -- you know, we've gone through this pretty exhaustively today. The stored energy challenge and the inability to leave the product in a loaded state, have a trigger, definitely held

back some of the opportunity the idea had, you know.

And then even more so, if you could get to that stage where you did have stored energy and you did have a trigger, I mean, putting an automatic feature on it, which we went through earlier, would make it even more fun. So this is basically describing the Blaster Pro auto fire.

Q. Was -- but you were describing the Blaster Pro auto fire, which was like a machine gun style -- sorry, let me back up.

The Blaster Pro auto fire was a machine gun style launcher; right?

A. Well, it had the option. You could do single shot or you could do auto fire. Most blasters or frankly guns that have an auto feature will have a single fire feature as well.

Q. Got it. Okay.

Was air soft well known as a way of launching projectiles by the year 2000?

MS. REICHEL: Objection to form.

THE WITNESS: I wasn't a big air soft

guy prior to getting into this category. So what I can say, I had no problems finding air soft in 2010.

BY MR. CUTRI:

Q. I see.

A. And I will say that from what I do remember, I -- as a kid, there were metal BBs and, you know, we played with metal BBs, but they were pretty dangerous and pretty painful. I remember having an incident with one of them when I was a kid. And I don't think I even really knew that it had developed a whole category on plastic pellets until much closer to when I'm dealing with Xploderz and Orbeez and, you know, that time period.

I had never worked for a company -- you know, Mattel didn't really have blasters. MGA didn't have a real Blaster line. So I wasn't hyper familiar with blasters and shooters. So I got to learn a lot in that two-year time period.

Q. I see. So you became -- so you were not a person who had had any experience designing

projectile launchers when you started the SAP launcher project; right?

A. Yeah. And I lived in a house where guns were not a thing.

Q. I live in that house, too. So -- okay.

A. Yeah.

Q. So I see. You started -- when you started out -- well, let me ask you this: Why did you -- you know, why did you -- how did you -- why were you looking at -- or how did you come to find the air soft gun -- how did you come to come upon the air soft technology?

A. So air soft is sold pretty -- you know, pretty broadly in more the Walmart style, you know, mass department, you know, whatever you want to call them, mass marketer. And certainly as you get out of the LA, New York, Chicago, you know, municipalities, and you get into the more rural areas or further down south, many of these stores have entire gun sections and sell guns over the counter.

And it was quite common to go into a

sporting goods store or a sporting goods section of one of these retailers, and you could find air soft. I didn't frequent those sections before we got into this business because it wasn't anything I was ever going to buy there. So -- and it's not my community. But there's an entire world out there of people who consume this stuff and --

Q. So you're -- the reason that you were -- was the reason that you were looking at air soft was to understand what known ways there were to launch projectiles?

MS. REICHEL: Objection to form.

THE WITNESS: You asked the question more like an engineer, and I'm a little more like a marketer. So, you know, I wanted to understand the entire scope of who was playing with these things, what the age ranges were, what you could buy, what was available in the market.

I couldn't go into a retailer at Walmart and not know about air soft and try and tell them, you know, I have a new blasting system. It wouldn't have been smart. You know, there are

different departments there. And I wasn't heading, in the beginning at least, to the sporting good department, but I was going to a guy who frankly, at Walmart for sure, you know, who probably owned guns, knew all about air soft and, you know, knew plenty about BB guns. And, you know, I couldn't -- I could come in as a coastal -- a coastal guy who doesn't own all these things, but I couldn't come in completely ignorant. So --

BY MR. CUTRI:

Q. I see. When you say -- you're talking about you felt like in order to be credible with the buyers in the toy or sporting good sections of Walmart, you needed to have some understanding of --

A. Yeah, I mean, that's one example. I mean, from a marketing standpoint, it was all about, you know, what ages are watching what shows and, you know -- and they're -- from a marketing standpoint, as well, and it's probably something your clients deal with quite often is you have

handoffs of different ages of different product lines. So there's a possibility that a kid who was playing with NERF when they were 6, 7, 8, 9 years old, if they're in a home where either they have older siblings or whatever, they could very well be exposed all the time to them playing with air soft.

Because air soft became quite clearly the -- you know, if you were really into NERF and then you wanted to go to sort of the next level, you would go buy air soft. And you would get out of the toy department and you'd go into the sporting goods department, but you weren't using metal BBs and it was a little bit safer than metal BBs and it was certainly way safer than real guns. So it became a line between an adult product, we would hope an adult product of a real gun, and, you know, a toy product of a Blaster.

Q. Okay.

A. Still boys, you know, everybody is still liking to shoot. Some boys get over it and some boys never stop and they want to -- it's a sport,

it's a hobby.

Q. Sorry, Mr. Brawer, I apologize for cutting you off. What I was planning to do was to take a quick break and just kind of collect whether I have a few more questions, but I'm getting very close to the end if it's okay if we take a little break.

THE WITNESS: Yeah, for sure.

MR. RUTTENBERG: Were you finished answering the question?

THE WITNESS: Yeah.

MR. RUTTENBERG: Okay.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 2:16.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 2:32.

BY MR. CUTRI:

Q. All right. Mr. Brawer, I'm going to show you another couple of exhibits.

MR. CUTRI: So if we can go to Tab 82.

(Brawer Deposition Exhibit 21 was marked

for identification and attached to the transcript.)

MS. REICHEL: And, Mr. Cutri, while you're pulling that be up, was there an Exhibit 19? Because I didn't see it in the folder, but maybe I missed it.

MR. CUTRI: I have a note that --

THE VIDEOGRAPHER: Yeah, Tab 19 was the NERF teardown -- I'm sorry, Exhibit 19. Oh, yeah, you're right, it's not in there.

MR. CUTRI: Okay. Are you putting it in there now?

THE VIDEOGRAPHER: Yeah, I'm putting it -- exactly, I'm putting it in there now.

BY MR. CUTRI:

Q. All right. Mr. Brawer, I'm showing you a document that has been marked as Exhibit --

MR. CUTRI: Is it Exhibit 20, Mr. Fahnert?

THE VIDEOGRAPHER: 21.

BY MR. CUTRI:

Q. -- 21. And this is SRB_2939. This is

something that's referred to as -- it says from Steve -- "From the Spangler Science Labs" at the top of it.

Do you see that?

A. Yes, I do.

Q. And it says, "Vanishing Jelly Marbles. Clear sphere polymers that vanish like magic in a glass of water."

Do you see that?

A. Yes, I do.

MR. CUTRI: And if we scroll down to the bottom of this document.

BY MR. CUTRI:

Q. Under "How does it work?"

And it says, "Jelly Marbles are actually made from a superabsorbent polymer that absorbs 300 times its weight in water."

Do you see that?

A. Yes, I do.

Q. I'll represent to you that -- if you look at the bottom of this page --

MR. CUTRI: If we can zoom in on the

web.archive.org.

BY MR. CUTRI:

Q. This is -- I'll represent to you, just for the purposes of orienting you, that this is a capture from The Wayback Machine. And then there is a date in this web address. It says 20090308, and then there's a few more numbers.

Do you see that?

A. Yes, I do.

Q. I'll represent to you that this is from March of 2009, this web capture.

With that representation, were you aware of Jelly Marbles as a product by March of 2009?

MS. REICHEL: Objection to form. Also, objection to the foundation of the representation.

THE WITNESS: I don't believe I was, no.

BY MR. CUTRI:

Q. Okay. And then if you go under "Materials" it says -- if you go under "Materials," this is a description of the product. It's sometimes called -- it says, "Clear Spheres - Jelly Marbles."

Do you see that at the top of the tear-out?

A. Yes, I do.

MR. CUTRI: Let's go to Tab -- let's go to the native video, which is Spangler_167.

(Brawer Deposition Exhibit 22 was marked for identification and attached to the transcript.)

MR. CUTRI: Can we pause it, and turn it up for me. It's a little bit quiet.

Okay. Can we try again.

(Video playing).

BY MR. CUTRI:

Q. So, Mr. Brawer, I believe you testified that you put Orbeez inside of a straw and blew them out; right?

A. Correct.

Q. You just saw a video where Mr. Spangler took a tube and the SAP Jelly Marbles and he put the Jelly Marble into the tube and blew it out; right?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: Join.

BY MR. CUTRI:

Q. Sorry, did you observe that, Mr. Brawer?

A. Yes, I did.

Q. And there's nothing different between the way you launched your superabsorbent polymer through the straw and the way that Mr. Spangler launched his superabsorbent polymer through a straw; was there?

MS. REICHEL: Objection to form.

THE WITNESS: No, there isn't.

BY MR. CUTRI:

Q. You don't have any financial interest in the Maya Group anymore; right?

A. No, I don't.

Q. And you don't have any financial interest in any of the parties that are in this lawsuit and that would be Spin Master, Hasbro, SplatRBall, Prime Time Toys, and Gel Blaster; is that right?

A. No, I don't.

Q. And you don't have any financial

interest in a company called Daisy that makes air rifles; do you?

A. No, I don't.

MR. CUTRI: I have one more document. This is Tab 55, BRAWER000001.

(Brawer Deposition Exhibit 23 was marked for identification and attached to the transcript.)

BY MR. CUTRI:

Q. So, Mr. Brawer, this is a document that you found and produced in response to the subpoena; correct?

A. I believe so.

Q. And just to orient us again, orient us in time, May 27th, 2010, is what it says on the front of it; right?

A. Yes.

Q. And it says, "Conducted by: Gene Del Vecchio, Founder DelVecchio's CoolWorks."

Do you see that?

A. Yes.

Q. Who is Gene Del Vecchio?

A. He's a pay-for-hire consultant who provides market research services.

Q. Okay. The product -- sorry, the document says -- hold on one second.

Under "Tentative" --

MR. CUTRI: If we go to the first page of the document, and we zoom in on "Tentative Procedure."

BY MR. CUTRI:

Q. It says, "The boys were first asked about the appeal of toys, and specifically various types of shooting products from foam dart shooters to paintballs. They were then read the new blaster concept, shown styles, prototypes and a video demo [sic]."

Do you see that?

A. Yes, I do.

Q. And then there is a --

MR. CUTRI: If we go to page BRAWER0009 [sic]. Back one.

BY MR. CUTRI:

Q. This is the Blasterz Concept (Read to

Kids and Moms); right?

A. Okay.

MR. CUTRI: And if we zoom in on the bottom -- well, go to "Now the Shooters."

BY MR. CUTRI:

Q. And it says, "There are three styles (show illustrations)...and each shoots twice as far, twice as fast, and holds 12 times the ammo (150) than any foam dart shooters. The 3 styles are...Hand held like a pistol which has the shortest range...about 35 feet, Sidewinder; a medium range blaster which is fired from the hip...about 70 feet, Long Ranger; a full distance rifle blaster that is shot from the shoulder...about 100 feet."

But then it says "Demo." Underneath this it says "Demo."

MR. CUTRI: If you can go down below that.

Yeah, that's great.

BY MR. CUTRI:

Q. "(Show Prototype - explain that it's

only for demo and will not look that way). You control the distance and power behind the Blasterz guns. Pull the Blasterz Air-Power arm back and release. Fire over and over. Hit your target as many times as you want and with as much force as you can. Count the hits [sic]." And then it says "(Show Sizzle Video)."

Do you see that?

A. Yes, I do.

Q. So at this point in time, the concept that was being shown was called "Blasterz" with a Z; right?

A. Yes.

Q. So I take it then that whatever was being shown was not the Xploderz with a Z, it wasn't an actual -- by this point, May 2010, there was no Xploderz product that you could show as a prototype to the kids in this focus group?

MS. REICHEL: Objection to form.

THE WITNESS: I just -- I want to make sure I understand your question. So are you saying that what we were talking about here in

Blasterz was different than what Xploderz became?
BY MR. CUTRI:
Q. Well, I know -- I guess what I'm asking about is the actual prototype. I am trying to find out if -- you don't have the prototype that's being referenced in this focus group report; do you?
A. Definitely not.
Q. Okay. So you don't know how the prototype functioned, the internals of how the prototype functioned, or how it launched or anything; right?
A. I can't speak to that specifically, no.
Q. Okay. And you also don't know the sizzle -- you don't have -- I presume you don't still have what's called the Sizzle Video here; do you?
A. No, I don't believe so.
Q. Okay. So there is -- there would be no way, to your knowledge, to compare what the patents in this case claim to what was shown to the children who participated in this focus group;

is that fair?

MS. REICHEL: Objection to form.

THE WITNESS: The only thing I would say is it's possible we just -- the name changed. So everything -- this is all Xploderz development. It just -- at some point we decided it's not going to be called Blasterz. Very possibly we got some input from a significant customer --

BY MR. CUTRI:

Q. Right.

A. -- or -- you know, or somebody, and they said, you know, maybe too generic, just thinking out loud, you know, give it something a little more, you know, memorable or whatever, and it became Xploderz.

I don't recall that we worked on a separate line called Blasterz, if you know what I mean. So it wasn't some different -- I don't remember having two product development tests, We're either going to make the Blasterz line, or we're going to make the Xploderz line.

My guess is -- and I don't want to

guess, but my recollection and my hunch here would be that we just changed the name.

Q. I understand, but I guess what I was trying to get to is the function -- the way the product functioned, right, in other words, how did it launch -- the internals of how it launched SAPs?

MS. REICHEL: Objection to form.

BY MR. CUTRI:

Q. Do you know whether -- well, first of all, do you know if the prototype you showed them actually launched SAPs or if it was just like a mockup of like a physical product that didn't have the internals? Do you have any way of knowing how or whether the prototype that's referenced here functioned?

A. I don't recall if at this specific research session, which seemed to have taken place in May --

Q. Yeah.

A. -- if we, you know, had a working prototype of -- you know, that was really good

and, you know, exactly how it would have worked. I can't recall that. I mean, we've shown videos today that showed there are ways to launch Blasterz back in April -- Blasterz -- SAPs back in April. But I don't know what we were ready with -- come whatever this was, May 27th, whatever the --

Q. Yeah.

A. You know, one month later, I don't know exactly where we were.

Q. That's right. And, actually, why don't I just show you something here really, really quickly.

MR. CUTRI: Tab 74, this is another e-mail you produced, BRAWER57 and 58.

(Brawer Deposition Exhibit 24 was marked for identification and attached to the transcript.)

THE WITNESS: Now we're in August. Okay.

BY MR. CUTRI:

Q. Yep. So if you look at this e-mail,

Mr. -- this is the bottom half of this e-mail. Flyzonemx is writing -- you're writing -- well, the top is you're writing back to Keith; right? The top e-mail?

A. Yeah, flyzone is Keith.

Q. Right. Okay. Good.

Bottom e-mail says, "Very good day today, very good." Mr. Meggs talks about a number of things he's working on. But he says in August of 2010, the last paragraph, "While I've taken a lot of license to move things around, like the pump under the barrel for the mid size and flipping around the rifle pump to the front, the styling is consistent with the original sketches. Hopefully you will agree."

Do you see that?

A. Yes, I do.

Q. So you would agree with me that even by August of 2010, there were still changes being made to the functional way the way the -- the functional way that the launchers launched SAPs?

MS. REICHEL: Objection; form.

THE WITNESS: Or at least to how they -- how they -- where they got their power from or what the traveling -- what the -- the way the layout of the tubing was inside of the design.

BY MR. CUTRI:

Q. Right.

A. You know, that would be -- more likely at this stage, we weren't radically changing how the products shot -- how the ammunition shot, but more likely how we got the force or the energy or the air pressure or whatever it is that's going to move that ammunition or that SAP out of the barrel.

Q. Right. So those changes to the way -- I want to make sure I capture what you just said.

By August of 2010, you were making changes -- you're potentially still making changes to the force or the energy or the air pressure that's going to move the ammunition or SAPs out of the barrel?

MS. REICHEL: Objection to form.

THE WITNESS: I guess if I was going

to -- so Keith would have probably written me this because we -- I was the front face to our customers with what we were trying to do. I would have shown them designs and drawings of what we were trying to sell them.

They, in August, may have already ordered product for spring, which would have delivered in January. And what I think Keith was trying to make me aware of, and this is all I can really, you know, describe is, Hey, I showed you something, it's going to be pretty much the same, but there's some things inside that might be moving around and changing and, therefore, you know, it may not look on the outside exactly the same as what you showed them three weeks ago.

BY MR. CUTRI:

Q. That's exactly --

A. And that would be the reason he would have sent me something like that.

Q. Okay. And that's the interpretation I think that I was trying to get to, was in May -- on May 27th in 2010 when focus groups were being

shown the externals of a launcher, right, whether it was at that time called Blasterz, the internals of how the Blasterz launched the SAPs, first of all, would be unknown to the focus group participants; right?

A. Abs- --

MS. REICHEL: Objection to form.

THE WITNESS: Sorry.

Yeah, we would never get into with the kids and the moms what the internal -- you know, what it took internally to actually shoot these things.

BY MR. CUTRI:

Q. Got it.

A. That would not -- it would be illogical.

Q. Right. And then, similarly, we also cannot know today what internal mechanism was inside a prototype that may have been shown to the focus group on May 27th, 2010.

We have no way of knowing how the internal of that prototype may or may not have functioned; right?

MS. REICHEL: Objection to form.

THE WITNESS: I would say your best address for that would be Keith.

BY MR. CUTRI:

Q. But you don't know?

A. I don't know.

Q. Okay.

MR. CUTRI: Do you mind for just a moment, Mr. Meggs and Mr. Ruttenberg, is there a way that you can --

THE WITNESS: Meggs? Brawer.

MR. CUTRI: -- bound your speakers for -- I want to have a conversation with Ms. Reichel briefly on the record, but I don't want you-all to hear it.

MR. RUTTENBERG: You don't want us to hear it?

MR. CUTRI: I do not want you to hear it. So you can either step out of the room or -- you know what, we can go off the record because my questioning is very close to being done. Why don't we take a five-minute break and then --

MR. RUTTENBERG: Sure.

MR. CUTRI: Ms. Reichel, I'll just have a conversation with you off the record. That's fine.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 2:53.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 3:05.

MR. CUTRI: So prior -- over the break, we had a discussion with counsel, I am going to ask Mr. Brawer -- and, Mr. Brawer, I'm going to ask you a question. I ask for you to pause, if you would, please, to allow Hasbro's counsel to interpose an objection, and then your counsel will guide you from there. Okay?

THE WITNESS: Yes.

BY MR. CUTRI:

Q. You had discussions with Hasbro's counsel; correct?

A. Yes.

MS. REICHEL: And --

THE WITNESS: Or sorry.

MS. REICHEL: I was just going to say I'll let you answer that yes or no, but I want to make sure you give me a chance to speak without diving into any substance.

BY MR. CUTRI:

Q. Okay. Now I'm going to ask my question, and just pause for a minute.

What did you discuss with Hasbro's counsel?

MS. REICHEL: And I'll just interject there. Hasbro's position is that Mr. Brawer's communication with counsel that took place subject to his engagement as a consultant are privileged work product information that is not subject to discovery. I'll refer to the parties' discovery stipulation in which the parties have stipulated not to ask questions, not to seek discovery or testimony relating to communications with consultants.

Mr. Brawer falls within that category relative to the scope of the question that was

asked. We believe that's an improper intrusion into work product and Mr. Brawer, as part of his engagement, agreed to maintain the confidences of Hasbro as it relates to those conversations. So it's our position that that is an improper question and that Mr. Brawer should not respond.

MR. RUTTENBERG: Hold on a second, Mr. Brawer.

Just so I'm clear, the question was pretty broad, which was: What did you discuss with Hasbro's counsel?

And just so I'm clear, Ms. Reichel, are you saying that there's no information that he can provide in response to that question at all?

MS. REICHEL: I'm saying that any information that would be subject to his consulting agreement would be covered by these provisions and is not discoverable and he should not reveal.

MR. RUTTENBERG: It's hard for me to know what -- and I'm happy to talk to the client off -- you know, off the record. I don't know

what conversations or certainly not all of them. What I'm trying to figure out is are you -- is your instruction or your request for instruction that he not answer this question in its entirety, or is there anything that could be answered from what you know, if you know?

MS. REICHEL: The consulting relationship began at least by August 2nd, 2022. I suppose if there are communications that happened before that and Mr. Brawer is confident happened prior to the creation of the consulting agreement, he could testify about those to the extent he recalls. But anything that was relevant to or made -- any communications made as a result of the consulting relationship, it's our position cannot be subject to discovery.

MR. RUTTENBERG: As a result, it's a tougher -- it's a tougher inquiry. It's easier maybe to separate them in time. So I don't know if there's a difference.

But is there anything, Mr. Brawer, that you can remember that you're aware of that

happened in terms of conversations before August 2nd, 2022?

MS. REICHEL: And, again, just -- sorry, I don't mean to interrupt. But just to be clear, to the extent he doesn't recall whether it was before or after, we would want to understand that without having him reveal that information, if we need to have a conversation about it.

MR. RUTTENBERG: Okay. Is it okay if I talk to him off the record for a minute? Because it's kind of complicated.

MS. REICHEL: Sure. Yeah.

MR. RUTTENBERG: I just want to make sure I understand -- and I'm not trying to put words in your mouth. I'm just trying to understand your position, Ms. Reichel.

MS. REICHEL: Sure.

MR. RUTTENBERG: It's your position that any communications that Mr. Brawer would have had with Hasbro's counsel regarding this litigation would be work product and/or privileged if those communications occurred on or after August 2nd,

2022. And if he doesn't remember whether the communications were before or after that specific date, it's your position that he shouldn't disclose those communications.

Did I understand that correctly?

MS. REICHEL: Yes, with the caveat that if there's some way to determine what he recalls and assess whether we can confirm whether that's a covered communication -- we could go down that process if you like, I don't know what he remembers; but unless we can confirm that it was not subject to the consulting agreement, that would be our position, yes.

MR. RUTTENBERG: Let me talk to him off the record, and I'll be right back.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 3:10.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 3:15.

MR. RUTTENBERG: So, Ms. Reichel, obviously there would have been communications

that led to the execution of the August 2nd, 2022, agreement with Mr. Brawer. I take it you don't assert any kind of protection over those communications, or am I wrong?

MS. REICHEL: You know, I suppose if there was a verbal agreement that led to this written agreement, there's potential that those would be covered, but in general -- like the initial reach out, for example, we would not assert privilege over.

MR. RUTTENBERG: I don't have any idea whether there's a verbal agreement or not. I just kind of -- and, again, I don't care what comes out or not. I just want to make sure we honor your assertion. And so I'm happy to instruct the witness -- I'm not happy to, but I'm willing for the time being to instruct the witness to only talk about communications that lead to the execution of that agreement.

And then, similarly, I understand that at some point it was terminated, and maybe there was a few communications after it was terminated.

And if it's acceptable to you, for the time being, I'll tell him to only disclose the communications he had that led to the execution of the agreement and the ones that happened after the termination.

Is that acceptable to you, Ms. Reichel?

MS. REICHEL: I don't think it would be our position that communications after -- I'm not aware of a termination that would obliterate or alleviate the confidentiality obligations. So I guess I'm not sure what those communications are.

MR. RUTTENBERG: Well, they wouldn't be any -- I'm not suggesting it would obliterate any confidentiality with respect to pre-termination communications. I think there might have been one after it terminated. Maybe it was -- but I just want to make -- and he'll tell you what it is. I don't think it's controversial, but honestly, I'm just trying to understand how to instruct him based on what you're saying.

And so what I -- unless you disagree, unless you tell me otherwise, I'm going to instruct Mr. Brawer that he can talk about any

communications before the execution of his agreement with -- I guess it's with Fish & Richardson, as well as if there were any communications that were after the termination. And I'm not suggesting to him that the fact that he terminated somehow retroactively terminates anything, but if there were new communications after that, he can disclose those.

Is that consistent with what your objection is, Ms. Reichel?

MS. REICHEL: Again, I don't know the details of what he remembers about the post-termination communication, and it's possible those could still involve information that was exchanged pursuant to the consulting agreement. So I guess that's my hesitation there, is that if --

MR. RUTTENBERG: I'll instruct --

MS. REICHEL: Just because the communication was after the fact doesn't mean it wasn't also about privileged information or work product information that he agreed in the

agreement to keep confidential.

MR. RUTTENBERG: With that modification, I'll also instruct him that if there was a post-termination communication that was talking about information he had already received, he should also maintain that in confidence.

With that instruction, are you able to answer the question that was posed, Mr. Brawer?

THE WITNESS: Can we just repeat the question so I'm --

MR. RUTTENBERG: I think the question was just -- well, I have to go back to find it.

MR. CUTRI: I think it was just, what did you discuss with Fish & Richardson?

And then Guy, you -- or Mr. Ruttenberg, you need to -- well, do you want me to ask it again, and then we'll get the objection and instruction in one place?

MR. RUTTENBERG: Sure.

MR. CUTRI: Okay.

BY MR. CUTRI:

Q. What did you discuss with Hasbro's

counsel?

MS. REICHEL: For brevity, I'll incorporate all my prior statements on this matter. But to summarize, it's our position that Mr. Brawer's communications with Fish & Richardson pursuant to his consulting agreement are work product and subject to the discovery stipulation entered into by the parties that they would not seek discovery or testimony regarding such communications and as such they should not be discussed in this deposition.

MR. RUTTENBERG: Mr. Brawer, and just to give you the instruction, I've been e-mailed from Ms. Reichel a document that's dated August 2nd, 2022. It's an agreement between yourself and Fish & Richardson.

And so in responding to Mr. Cutri's question, I would just ask you to exclude any information or any communications you had after execution of that document, although if there are communications that you had after terminating that agreement and those communications were not

including any of the confidential information you'd already received, you can include those post-termination communications, as well.

With that instruction, you can go ahead and answer.

THE WITNESS: So I received the first communication from Fish & -- from Fish, from the lawyers of Hasbro or through Hasbro, representing Hasbro, just that there was litigation, that I was -- they reminded me that I was an inventor on a patent or I was an inventor involved in the sense that it involved the SAP patent that I have my name on.

And I remember that, you know, they were explaining to me that, you know, I had an obligation to defend the patent or come to the aid of the patent or whatever that paragraph was, I think they sent that to me, and that should I require legal counsel, that they were in a position to help me and could provide legal counsel for me. That was -- and that ultimately led to a consulting agreement.

On the other side, once that consulting agreement was terminated, I believe the only communication I got from Fish was them informing me or forwarding to me the subpoena that was out for my testimony, which I received.

MR. CUTRI: Okay. So for the record, I don't know that we agree with what Ms. Reichel has set forth as her interpretation of why she's given the instruction, but in the interest of being fair to Mr. Brawer, I'll conclude my questioning with reserving the right to ask him a few follow-ups after Ms. Reichel is done. And with that, I'll pass the witness.

So, Ms. Reichel, do you want to go ahead? Do you have any questions?

MS. REICHEL: None of the other respondents have questions?

MR. CUTRI: Give us a chance to coordinate. I don't know that we do, but why don't you go ahead -- oh, well, Mr. Taylor is --

MS. REICHEL: Yeah, I was going to ask him next.

MR. CUTRI: We need your audio, Mr. Taylor, I think.

MR. TAYLOR: Thank you. Can you hear me?

MR. CUTRI: Yes.

MS. REICHEL: Yes.

MR. TAYLOR: I have two things. One is I don't have any questions. The second is I need to drop off this call. It actually went longer than I expected.

But, Mr. Brawer, I want to thank you for your testimony today.

THE WITNESS: Thank you.

MR. TAYLOR: That's all I have.

MR. RUTTENBERG: Thank you, Mr. Taylor.

EXAMINATION BY COUNSEL FOR HASBRO

BY MS. REICHEL:

Q. All right. I guess it's my turn.

Hello, Mr. Brawer. My name is Whitney Reichel, and I'm one of the attorneys for Hasbro.

We've not spoken to each other prior to today's deposition; correct?

A. Correct.

Q. I'm going in backward order here.

You were just asked by Mr. Cutri some -- or a question about communications with Fish & Richardson.

Do you recall that?

A. Yes.

Q. In your answer you referenced some sort of paragraph that you said was related to the patent that you're an inventor on.

Do you recall that testimony generally?

A. Yes.

Q. Are you referring to the assignment document that you signed?

A. I believe so, yes.

Q. Okay. There was no other paragraph that was discussed in that conversation about any obligations you had to, quote-unquote, defend the patent; correct?

A. Correct.

MR. RUTTENBERG: Ms. Reichel, I'm sorry, for the record, I printed two copies of the e-mail

you sent me, the August 2nd, 2022, agreement. And so he may have looked over my shoulder at some point to see it. I don't know if you want that marked or not, but I just want to disclose that to you that it's here in the room now. I have a copy, and I have a second copy. I'm not handing it to the witness, but he might have looked over it before. So if that's important, you know about it.

MS. REICHEL: Oh, thank you. I don't see a need to mark it.

MR. RUTTENBERG: Okay.

MS. REICHEL: We can put that issue behind us.

MR. RUTTENBERG: No, that's just where that -- there's a paragraph that's quoted in there. That's all. That's why I brought it up.

MS. REICHEL: Oh, yes. I mean, my question, which I think Mr. Brawer understood, was about the paragraph he described in his earlier testimony. All right.

MR. RUTTENBERG: I'm sorry, what I meant

is -- and I don't know what he was talking about. I don't know if it's the same thing. But in the letter that I'm looking at, there's sort of a paragraph quoted that looks like it would have come out of his assignment document. I haven't seen the assignment document. It's just -- you know, you can see it; right? This paragraph, whatever it is here, if you can see that.

So I don't know if he was referring to that or something else. I just -- do with that as you wish. I just wanted to inform you that that's here in the room.

MS. REICHEL: Okay. Thank you.

BY MS. REICHEL:

Q. Mr. Brawer, the paragraph that you referred to in your prior testimony is a paragraph from your original assignment that you executed to assign the patent to Hobbeezone; correct?

A. Yes, that's what I remember.

Q. Okay. Thank you.

So I don't know -- in terms of exhibits, do you have access to the Box to look at them, or

do you need to have our videographer pull them up for you again?

MR. RUTTENBERG: I think he can -- if I may help him, I think the exhibit share is up here. I think you have to go back and then just refresh this. And I think they're all there. They may not be in numerical order, but they're all there.

MS. REICHEL: Okay. Great.

BY MS. REICHEL:

Q. So, Mr. Brawer, could you please get out what was marked as Exhibit 1.

MR. RUTTENBERG: I think you have to go to the second page here at the bottom. I'll help you scroll.

There you go.

THE WITNESS: Yep.

BY MS. REICHEL:

Q. All right. Exhibit 1 is the article entitled "Toy-making is serious business in Southern California"; right?

A. Yes, it is.

Q. Okay. You were asked some questions about this at the start of your deposition; right?

A. Yes, I was.

Q. Okay. And in particular, if you can turn to page 6 of the document, Mr. Cutri asked you about a statement, "For the boys, the response was nearly universal: 'These are paintballs,' they would say. 'We want to shoot them,' Brawer said."

Do you see where I'm referencing?

A. Yeah, I'm just finding it. Yeah, I see it now.

Q. Okay. And in your prior testimony, I believe you testified that this -- these statements from the boys referenced in this article came from focus groups that happened later in your development process; is that correct?

A. Yeah, I mean, we were -- I had already formed Hobbeezone, and I was looking for the development of products, yes.

Q. And your --

A. So I guess maybe -- let me ask you to

clarify. When you say "later in the development process," at what point are you kind of suggesting?

Q. So I believe you testified earlier that these comments from the boys were things that you heard after you had already conceived of the idea of using the SAPs as ammunition for a projectile launcher; is that right?

A. I had already thought of this idea, yes. It wasn't novel to me. It wasn't a new idea for me.

Q. And if we can turn back to the last exhibit that Mr. Cutri marked.

A. Wait, so we're leaving this now?

Q. You can close that one out for the moment. And I'm sorry, it's not the last exhibit. It's the second-to-last exhibit. If you can please pull up Exhibit 23.

A. Exhibit -- found it. Ah, the research, yes, I'm there.

Q. So Exhibit 23 is a report from three focus groups, and it bears a date of May 27, 2010;

right?

A. Correct.

Q. Is it possible that this is one of the focus groups that generated the statement in the article that we just looked at regarding the boys wanting to shoot paintballs?

A. It's possible, yes.

Q. And, in fact, if we take a look at the appendix of this document, there's a Blasterz Concept writeup.

Do you see that?

A. How far down is the appendix?

Q. So the --

MR. RUTTENBERG: I think it starts at page 8.

BY MS. REICHEL:

Q. Yeah, the Bates number of the appendix -- the first page of the appendix is BRAWER8.

A. Got it. Okay. I'm with you on appendix page.

Q. And it then --

A. Blasterz Concept, page 9.

Q. Right. Turning to page 9 --

A. Yeah.

Q. -- there's some text under a title that says "Blasterz Concept (Read to Kids and Moms)."

Do you see that?

A. How far down is that?

Q. It's the heading of that page.

A. Oh, (Read to Kids and Moms). Sorry, yeah, right under it. Yep, sorry. Got it.

Q. And so the text that we see on this page is text that was read to those kids at the beginning of the focus group; right?

A. Yes.

Q. And the second paragraph of this Blasterz Concept text says, "First the Ammo."

Do you see that?

A. Yes.

Q. "Hydro-Rounds are ball-like pellets made of a special material that absorbs water" -- and then it says in parentheses, "show them dehydrated and hydrated."

Do you see that?

A. Yes, I do.

Q. And then the next sentence says, "They look like paintballs, but feel soft and squishy and feel like foam darts when they hit."

Do you see that?

A. Yes, I do.

Q. Is it possible that this reference to paintballs in the Blasterz Concept that was read to the boys that were part of your May 2010 focus group is the source of the comment in the article about paintballs?

MR. CUTRI: Objection; form.

MR. RUTTENBERG: Join.

THE WITNESS: It is possible.

BY MS. REICHEL:

Q. All right. Do you remember whether the idea of paintballs was something that you proposed first to the boys referenced in the article that's Exhibit 1 as part of your focus group?

A. So I had -- I don't recall exactly at what point the penny dropped on these look like

paintballs, but it was early in the process. It was very early in my discovering the SAPs and beginning to play with them and get to know them.

So I don't know if it came -- you know, if it predated this -- it would have predated this research, certainly my thinking that it looks like a paintball. And whether this was the first group of boys I ever encountered that said this or there were boys prior to that, I can't tell you with a definitive answer.

Q. Sitting here today, you don't have a recollection of a boy affirmatively stating that the Orbeez are like paintballs that they want to throw prior to the focus group that took place and is captured by this May 27, 2010, report?

MR. CUTRI: Objection; form.

THE WITNESS: So I think you're asking me, do I remember boys saying to me, Hey, these things look like paintballs prior to this research? I can't answer you definitively, no.

BY MS. REICHEL:

Q. And the article that we looked at,

Exhibit 1, that was dated December 22nd, 2012; right?

A. Correct.

Q. So the article that contains the statement that boys thought that the Orbeez looked like paintballs was approximately a year and a half after the focus group in which the consultant you had engaged read the boys a statement describing the ammunition as similar to paintballs; right?

A. Yes.

Q. Mr. Cutri asked you some questions about what the firing mechanism was that was used in the prototype described in this focus group report.

Do you generally recall that?

A. I do recall him asking me the questions, yes.

Q. Can you turn to, again, that same page of the Exhibit 23, page 9?

Are you still there?

A. I am.

Q. There's a "Demo" paragraph toward the

end of that page.

Do you see that?

A. Yes, I do.

Q. Okay. And there's a parenthetical. It says, "(Show Prototype - explain that it's only for demo and will not look that way)." And then there's some additional text.

Do you see that?

A. Yes, I do.

Q. "You control the distance and power behind the Blasterz guns. Pull the Blasterz Air-Power arm back, aim and release. Fire over and over."

Do you see that?

A. Yes, I do.

Q. Does that text describe the firing mechanism that was ultimately used in the first generation of the Xploderz product?

A. Pretty much, yes.

Q. And the reference there to the "power arm," what is that referring to, to your recollection?

A. It would be the plunger or however you want to describe it, the element of the product that you had to pull back in order to draw in air and pull back the spring.

Q. Mr. Cutri asked you some questions about the acceptability of a trigger.

Do you remember that generally?

A. Yes, I do.

Q. Can you turn to the page of Exhibit 23 that has the Bates No. BRAWER4?

A. Oh, hold on.

Q. It's page 4 of the PDF, I believe.

A. Same report?

Q. Yes, same Exhibit 23.

A. So we're going to page 4?

Q. Yes.

A. Got it. All right. I am on page 4.

Q. So there's a section sort of in the middle of that page that says, "Secondary features were these:" And then there's some indented bullets.

Do you see that?

A. Yes, I do.

Q. The last bullet there says, "Power arm."

Do you see where it says that?

A. Yes, I do.

Q. And the report says, "Most boys prefer a trigger to a power arm. That said; boys were accepting of the power arm as long as it was not so pronounced/obvious."

Do you see where the document says that?

A. Yes, I do.

Q. Do you have an understanding of what that statement is referring to?

A. Yes, I do.

Q. What is that statement referring to?

A. It's the same power arm that you were referencing earlier where it's the plunger that you pull back in order to put tension on the spring and draw in air.

Q. All right. And this report here describing that even though boys might prefer a trigger, they are still willing to accept a launching device for SAPs that includes that type

of power arm?

A. That is what it says, yeah.

Q. If we go to the top of that page, do you see there's a heading that says, "Key Likes/Features"?

A. Yes.

Q. And then there's a sentence underneath that says, "The most important features are 'shoots twice as far' as comparable products (i.e., Nerf) and 'Can hold 100 rounds in the magazine.'"

Do you see that?

A. Yes, I do.

Q. What is this sentence referring to?

A. The two features that the children like the most of this new concept in Blasterz is the distance that they can shoot and the amount of ammunition that they can hold.

Q. And what was it about the Blasterz product that contributed to this important feature of being able to shoot twice as far as comparable products such as NERF?

A. Can you say that again? Let me see if I understand you.

Q. What was the characteristic of the Blasterz prototype that became the Xploderz product that contributed to that important feature of being able to shoot twice as far as comparable products like NERF?

A. A different ammunition system.

Q. What was that different ammunition system?

A. Oh, yeah, so it was the fact that you were shooting SAPs versus foam.

Q. Was there anything about the actual mechanism for launching of the SAPs that also contributed to the Xploderz product being able to shoot twice as far as comparable products?

A. I can't answer that with any certainty. So it was -- you know, I don't know enough about how NERF products work to be able to say how different their air power system was to ours. But what I can tell you is that the result of shooting ours was that we got twice as far with our

ammunition.

Q. 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?

A. It was by far the most important thing.

Q. There's a second bullet here that says, "Holds More Rounds in the Magazine!"

Do you see that?

A. Yes, I do.

Q. And what is this reference to being able to hold more rounds in the magazine a reference to?

A. Well, if you were to take 70 rounds and develop them for shooting in the Xploderz/Blasterz product, it was a container smaller than a soda can. And if you were to try and take 70 rounds of foam darts, you would be running around with something the size of a shoebox. And so the physical quality of the SAP as an ammunition, because it was much smaller, allowed for you to easily maneuver and hold and carry with you a much

larger number of rounds of ammunition.

Q. 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 this focus group study?

MR. CUTRI: Objection; form.

THE WITNESS: Yes.

BY MS. REICHEL:

Q. Turning again to where it says, "Secondary features were these."

Do you see that?

A. Yes, I do.

Q. The first one there is "Grow Hydro-Round Ammo."

Do you see that?

A. Yes, I do.

Q. What is that referring to?

A. The transformative process of how you actually created the SAPs into Xploderz rounds, so growing them in water.

Q. So, again, the ability to grow their own

ammunition was a direct result of using these SAPs as the ammunition in these Xploderz and Blasterz products?

A. Yes.

Q. Can you turn to the previous page, please, BRAWER3?

A. Yes.

Q. So there's here an "Overall Appeal" section.

Do you see that?

A. Yes, I do.

Q. The second bullet here says, "Preferred to Competition."

Do you see that?

A. Yes.

Q. It says, "When pit against comparable Nerf products, nearly every child preferred Blasterz (even when a real Nerf shooter was compared only to an illustration of Blasterz e.g. Blasterz Sidewinder 1000 versus Nerf Deploy CS-6)."

Do you see that?

A. Yes, I do.

Q. What was your reaction at the time when you learned that in your focus groups, the -- nearly every child in the group preferred your new product relative to these NERF products that had very significant market share at the time?

A. Elation.

Q. Why were you feeling elation?

A. NERF was a very big -- NERF is or was a very big product line, and if you could bring to market something that was better than NERF and transfer market share from NERF to Blasterz, you would have a very -- and if you did everything else right, then you had a chance at being very successful.

In the end -- I do want to say, in the end it's the consumer that decides. And if you can win the consumer, then you have all the power.

Q. In your experience, in order to disrupt a market share leader like NERF, is it necessary to have a product that's truly disruptive?

A. I think you just asked me, in order to

disrupt a market, you need a disruptive product? I mean, I think having a -- I mean, I don't want to -- I think having a disruptive -- having a product that is preferred to the market leader definitely gives you an opportunity to take market leadership.

Back then, honestly, we didn't talk so much in terms of market disruption as we did market share. So we didn't necessarily go into this believing that we were going to grow the Blaster category. We may have, but -- maybe we'd have brought in some older kids. But generally we knew there was a category because there was a 24 feet of Blaster product in a Target.

And so the question is: How much of that market share could you get? And when you go into research like this -- and it's definitely not definitive, but it definitely gives you an indication that you're on the right path. And so certainly coming out with a report that says we were favorite to the market leader, at least in the presentation that we created in the market

research, meant that we had a much better chance of getting market share than if we had come out with the opposite conclusion.

Q. How much brand awareness was there for the Maya Group among boys 5 to 12 prior to the release of your Xploderz product line?

A. So much like Hasbro or Mattel, Maya Group was never a promoted concept to kids or to the consumer. I don't even know if today there's any kids who know what Maya Group is. So we only -- all our energy was focused on presenting our brands. So at the time, the Maya Group's biggest brand was Orbeez. And we may have been known for Orbeez amongst kids that age, in particular girls. But girls don't even know what Maya Group is. No one outside of the profession knows what Maya Group is.

Q. Would it be fair to say that for a boy standing in that 24-foot-long Blaster aisle at Target who's looking to select a product to purchase and they see this new Xploderz product side by side with a NERF product, is it fair to

say that you're competing not only against the merits of the product itself, but also against the market awareness of the NERF brand in trying to convince that boy to purchase your product instead of the NERF product?

A. Absolutely. The child -- I think if you're asking -- the child knows NERF in most cases. I would imagine -- they call it a Q score. Your brand awareness among your target consumer was probably very high in NERF -- not probably -- it was very high in NERF. Boys, by the time they're 7, 8, 9 years old, are familiar with NERF.

As a new brand in that section, they wouldn't have known us at all. And you're overwhelmed. I mean, you might have 18 -- of that 24-feet, 20 of it or 18 of it might be NERF, and you might have three or four boxes on the shelf. So how do you make those three or four boxes seem meaningful against a sea of NERF?

Q. How did you make those three or four boxes of the Xploderz product on the shelf seem meaningful against a sea of NERF?

A. TV advertising. So the brand awareness doesn't come from them walking into the aisle. The brand awareness comes from them sitting on their couch watching SpongeBob and then seeing an Xploderz commercial. And then they go to the store, or they turn -- these days they probably turn on their computers or whatever. Now they all of a sudden know the brand. So the marketing element is what drives the awareness in the consumer.

Q. What were the features of the Xploderz product line that you promoted in the TV advertising to start to grow that brand awareness?

A. So I think we covered this earlier, but distance was by far the number 1, the fact that we shot farther. The amount of ammo that we could carry. The fact that there was no cleanup barely made it to the commercials. And then there were some small illustrative descriptions of how you grew the ammo, but frankly we felt that was almost too complicated. You know, it was -- since our primary -- our primary in the beginning, you know,

clear number 1 feature was distance, we focused the commercial primarily on distance in the beginning.

Q. 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?

A. Absolutely.

Q. I'm going to have you take a look at a couple of other of the previously marked exhibits. Let's see, I want to find the right one here.

Do you recall Mr. Cutri showed you a video of someone named Steven Spangler?

A. Yes.

Q. And you'd never seen that video before today; right?

A. Not that I recall.

Q. And you recall Mr. Cutri asked you whether there were any differences between Mr. Spangler's use of a tube to blow out an SAP and some of your initial development efforts.

Do you recall that?

A. Yes.

Q. Nowhere in the video that we saw at Exhibit 22 did Mr. Spangler talk about the use of a Blaster to launch SAPs as ammunition; right?

A. That's correct.

Q. If you can pull up -- I believe it's Exhibit 11.

THE WITNESS: Page 2?

MR. RUTTENBERG: Yeah, it's page 1, I think.

THE WITNESS: Page 1?

MR. RUTTENBERG: It's going to be the first, yeah. Did you find it? For me it was the very top. Exhibit 11.

MR. CUTRI: What exhibit are we on now, 11?

MS. REICHEL: Yes.

THE WITNESS: Yeah, found it. This is the Meggs drawing. Meggs exhibit.

BY MS. REICHEL:

Q. Exhibit 11 is a patent from 1970 that

you looked at with Mr. Cutri; right?

A. Yes.

Q. You've never seen Exhibit 11 before today; right?

A. Not that I recall.

Q. And then if you can just flip to the next exhibit, which hopefully is nearby in your interface there, Exhibit 12.

THE VIDEOGRAPHER: Yeah, if you click on the name column at the top, it will sort them.

THE WITNESS: I am on Exhibit 12.

BY MS. REICHEL:

Q. Exhibit 12 is an image that appears to be from the patent that was Exhibit 11, and there's some colors added; right?

A. I believe so.

Q. And Mr. Cutri asked you some questions about what these colored components were and how they performed; right?

A. Yes, he did.

Q. You answered those questions without the benefit of ever having read the text of the

patent; right?

A. That's correct.

Q. Is it possible that your answers would change if you actually had an opportunity to consider the full disclosure of this patent?

A. From what I can recollect, he just asked me about the spring and the plunger. So if that's the case, no. But if he asked more than that, then my answer would be yes.

Q. So, for example, if you had an opportunity to actually go look at how this particular patent described the components that are colored in in Exhibit 12, you might have had different answers; right?

A. If they were different than what I -- I'm pretty sure they are. So yes.

Q. Do you recall Mr. Cutri asked you some questions about how many NERF products you own?

A. Yes. I probably didn't answer it -- it's not about ownership, but how many NERF products I had. Remember most of the NERF products that I have -- I've had contact with have

come through my work. It wasn't a product we bought for the house.

Q. And when you say you've had contact with the NERF products through your work, are you referring to your work with the Maya Group or something else?

A. The Maya Group.

Q. All right. So is it fair to say that before you began working on the Xploderz products, you didn't have a large collection of NERF products that you were working with; is that right?

A. That's correct.

Q. Do you recall when you first began purchasing NERF products as part of your work with the Maya Group?

A. I can only speculate or guess that it was as soon as we started thinking that we were getting into this category.

Q. Okay. But you don't have a memory one way or the other of when you would have first began acquiring NERF products?

A. Not with any specificity.

Q. And you yourself were not engaged in attempting to dismantle and study the internal mechanisms in any NERF products; right?

A. No, I look much more for the marketing performance features.

Q. Mr. Cutri asked you some questions about the Blaster Pro or the -- yeah, the Blaster Pro version of your projectile launcher.

Do you remember that?

A. Yes, I do.

Q. Do you recall when you first thought of the idea of the Blaster Pro 3000?

A. The specific product, no.

Q. Okay. Do you recall when you first thought of the idea of having an automatic rapid fire projectile launcher that would use SAPs as ammunition?

A. No. But what I would say is when I first thought of SAPs and being used in the toy industry, as I started the day out, I explained that in my mind, two areas of use came pretty

quick. The first was act- -- one of which was activities, and the other one was as ammunition in blasters.

And I at that point did not have nearly the knowledge I have today of the regulations surrounding stored energy and blasters and what is and is not allowed to be marketed to kids. And so my thinking would have been -- you know, I'm sure I would have thought, Hey, these would be great. And I would have been thinking about stored energy items and automatic shooting items, all of the -- you know, and items with triggers.

All of those -- all of those features in our Xploderz line were not put there because we desired them to be there. They were put there because those were what we were required to develop in order to sell to the toy category.

Q. So it's fair to say that those regulations that you mentioned before constrained your implementation in terms of product development, but in terms of overall conception, you had appreciated that there were many other

types of blasters that could use these SAPs as ammunition, including automated blasters; right?

A. Yeah, the way I would phrase it had the ASTM regulations not prohibited triggers, stored energy, we would have -- we would have created items that had triggers and stored energy for toys. We eventually realized the market was large enough that we could try to go older and age grade 14-plus and try and make it more of a sporting goods-type line, which is what Blaster Pro became. But putting a trigger on a Blaster was not something that we just didn't think about.

Q. And, in fact -- sorry to do this, but if I can have you pull up that Exhibit 23 again.

A. Yeah.

Q. And if you can turn to the page that ends in BRAWER3.

A. Page 3 you said?

Q. Yes.

A. Yeah.

Q. So do you see there's this "Overall Appeal" section at the top of the page, and it has

four bullets underneath?

A. Yeah.

Q. And then it says, in the last bullet there, "Broad Age Appeal: The basic Blasterz line had a broad age appeal. Boys estimated that it would range from ages 8 to early teens. The Blasterz Pro 3000 (automatic) brought the age appeal even higher (to be discussed later in this report)."

Do you see that?

A. Actually, you read it before I found it.

Q. Okay.

A. So I'm sorry.

Q. So --

A. "Satisfying Unfilled Needs," is that where I am?

Q. No, it's just above that.

A. Oh, "Broad Age Appeal: The basic Blasterz line had a broad age appeal. Boys estimated that" -- yeah. Yeah, this was the truth. Yep.

Q. All right. So at least as of this focus

group that's described in this May 27, 2010, report, you had already conceived of the Blasterz Pro 3000, which would be an automatic projectile launcher for SAPs; correct?

MR. CUTRI: Objection; form.

THE WITNESS: Yes.

MR. CUTRI: You can answer.

BY MS. REICHEL:

Q. And, in fact, if we can turn to page 5 of this Exhibit 23, there's a whole section on the bottom of that page about the Blasterz Pro 3000.

Do you see that?

A. Absolutely, yes.

Q. And here it looks like you presented quite a bit of information to your focus group about the Blasterz Pro 3000 automatic; correct?

A. Yes.

Q. Including things like the size and what the product would look like on top of it being rapid fire; right?

MR. CUTRI: Objection; form.

THE WITNESS: Yes.

BY MS. REICHEL:

Q. And so you had already fleshed out numerous details about what that Blasterz Pro product would look like by May of 2010; correct?

A. From this report, yes.

Q. And then if you can look at that third bullet, there's a section describing "Mom Acceptance."

Do you see that?

A. Yes.

Q. The last sentence of that section says, "But this product is currently graded for kids ages 14-plus which is older than these moms sons (ages 12 and under)."

Do you see that?

A. Yes, I do.

Q. So is it correct that by May of 2010, you had already developed the product to a point that you had concluded what the age rating would be for that type of product?

A. We were very aware of it, yes.

Q. And then if you can turn to the next

page, please, BRAWER6.

A. Yeah.

Q. There's a listing here of various proposed price ranges for a variety of these different products.

Do you see that?

A. In the price -- price -- under the heading of "Price," yes.

MR. CUTRI: I'm sorry, what exhibit are we in?

MS. REICHEL: We're still looking at Exhibit 23.

MR. CUTRI: Oh, I thought you said Exhibit 6, sorry. You mean page 6.

MS. REICHEL: Page 6.

MR. CUTRI: Got it. Okay.

BY MS. REICHEL:

Q. So based on all the pricing information that you see at page 6 of Exhibit 23, is it correct that by May of 2010, you were far enough along in your product development to have a good understanding of what the components were in these

products and therefore what the appropriate price would be for these different products?

MR. RUTTENBERG: Object to form.

You can answer.

THE WITNESS: I think the way you're asking -- the way you're asking the question, you're talking about cost, and here this isn't related to cost at all. This was consumer impression. So based on the small sample size we had in this focus group, we were able to come up with what I would realize is not necessarily a very accurate number, but the average price or value that was perceived for each product. It had nothing to do with cost.

BY MS. REICHEL:

Q. Do you see that --

A. The cost of the product.

Q. Do you see that in each of these bullets there's a reference to the expected price?

A. Yeah.

Q. How did the Maya Group determine the expected price for these different projectile

launchers?

A. We would -- we would for the most part look at what the competitive set was in the -- in that 24-foot aisle, so to speak, or in the market and determine what we felt the product needed to be retailing for in order to be competitive on a price value equation.

Q. I see. So your expected prices were not based on your analysis of cost of the product, expected profit, that kind of thing?

A. So then if you said, Hey, we think we need to be at 10 bucks, you'd have to see if you could -- let's say you required a 50 percent margin. So then you'd have to see if Keith, China, the factories, could build it for 5. And if they could build it for 5 and we felt, you know, well, okay, that's retail.

So if we were going to go sell it for 6 and -- you know, and then we needed a 50 percent margin, then the factory would have to build it for 3. And if the factory could build it for 3, then we had a winner. If the factory could only

build it for 5 or 4, then we had a problem.

Now, I'll just add a little piece, if you remember we also discussed the Blasterz 200 pistol retailed for 12.99. So at the time of this research, we clearly wanted to go out with a 10-dollar price point. But when the moms came back and said, Hey, you know what, this thing is worth like 15 bucks, we chucked it up a little bit. And I'm sure that made it easier on the margin and on the value and it made it easier to create.

Does that make sense?

Q. Sure.

How much of that work in terms of coming up with pricing and what the factories would be able to make the products for had you done prior to the time of this May 2010 focus group?

A. It's two very different processes that run in parallel. So this would have been a process that I as the leader of marketing would have been managing and running. And Keith would have been in China trying to make these things for

the best cost that he could find.

And what I was trying to figure out is what's our best retail and then we could work back for what the cost would need to be. And Keith was on his end trying to make sure that we would be a good quality product at the best price we could. And if we were close, we had a winner. And if we were off, then we had to go back and redesign or rework the product so that we can either make the margin we needed or not launch the product.

Q. Okay. Thank you.

I'm going to have you pull up another exhibit please, Exhibit 7. Let me know when you have it.

A. Oh, here we go. Found it.

MR. RUTTENBERG: You can sort by name as he was saying, and then it will be in order.

THE WITNESS: I am on Exhibit 7.

BY MS. REICHEL:

Q. Okay. And Exhibit 7 is one of those printouts from this Wayback Machine that Mr. Cutri was discussing with you earlier; correct?

A. Yes, it is.

Q. And if we take a look starting from page 2 of Exhibit 7 and then moving on to page 4, we see a variety of different Xploderz products; correct?

A. Correct.

Q. One of the products was that Sneak Attack product; correct?

A. That's the first one, yes.

Q. And then there's a number of these X3 Blasters with select-a-shot; correct?

A. Correct.

Q. And then on the next page, we have that Punisher and Huntress product segment that's priced at that lower price point; right?

A. Correct.

Q. And then we have the glow-in-the-dark Night Fighterz Blasters; correct?

A. Correct.

Q. And do you recall Mr. Cutri was asking you some questions about the various features that drove demand for these products?

A. Yes.

Q. And he was asking you whether it was the color or the price point or the glow-in-the-dark feature.

Do you generally remember that?

A. Generally.

Q. Setting aside their unique attributes that may have piqued the interest of your consumers, is it the case that for all of these products in Exhibit 7, the primary driver of demand was that long distance capability that you described earlier today?

A. Yeah, it was the foundation for the -- it was the foundational feature for the Blaster. But what I would say and what did evolve is NERF being who they are, you know, all of a sudden they were starting to claim that their foam darts started flying a lot farther.

And so at some point, you know, it got into almost a silly competition of, you know, we're saying 85 feet. All of a sudden they're saying 75, 80 feet. We'd go to 100 feet. They

would suddenly show up with 95 feet or 100 feet.

And so the initial novelty of being able to differentiate by saying we shoot dramatically farther, that gap was starting to close. And so part of it became trying to develop blasters that could shoot even farther and systems that could shoot the projectile even farther, but that's why it became important to keep innovating and delivering on new features.

One thing that they could never close the gap on was the ammunition and how many it could hold and how easy it was to pour it. So it's a long answer to your question, but distance over time became less relevant as a competitive feature to NERF.

Q. Is it fair to say that the primary force driving demand for these products in Exhibit 7 was their use of SAPs as ammunition?

A. It was the foundation of the line, absolutely.

Q. Okay. All right. And -- let's see.

So do you recall Mr. Cutri asked you

some questions about different types of play patterns that were known in the industry by certain points in time?

A. Yes.

Q. And do you recall Mr. Cutri asked you some questions about what types of play patterns were known by the year 2000?

A. I'm not sure exactly that, but I think so, yes.

Q. Mr. Cutri was specifically asking you about different play patterns for launching projectiles.

Do you remember that?

A. Different play patterns for launching projectiles. No, I'm not completely remembering or exactly understanding what you're asking.

Q. It was a little bit confusing, but he asked you some questions like whether it was a known play pattern prior to the year 2000 to use air pressure to launch a projectile.

Do you remember those questions?

MR. CUTRI: Objection; form,

mischaracterizes the question.

THE WITNESS: Yeah, I don't think we're talking about play patterns. I think we're talking about the functional way in which a projectile might be launched.

BY MS. REICHEL:

Q. Okay.

A. The play pattern was shooting. I mean --

Q. Right.

A. -- I think that was the same all the time. And I believe I said that it's been around for approximately 100 years. It's been around for a long time, but...

MR. RUTTENBERG: Ms. Reichel, I assume your question is not just having him remember what his last testimony was. The testimony is what it is, I think you just wanted to orient the witness.

BY MS. REICHEL:

Q. That's right. I'm just trying to refresh your memory of the topic.

A. Yeah, I believe we got into a whole

discussion about ways in which projectiles were shot.

MR. RUTTENBERG: Yeah, the testimony is what it is. Let's let her ask her questions.

THE WITNESS: Yeah, go ahead, sorry.

MR. RUTTENBERG: No, you're doing fine.

BY MS. REICHEL:

Q. Sorry if I wrote it down wrong. I didn't mean to confuse things.

Mr. Cutri asked you some questions about whether it was known by the year 2000 to use air pressure to launch a projectile.

Do you remember that generally?

A. Yes.

Q. He also asked you about whether it was known prior to the year 2000 to use mechanical air pressure systems to launch projectiles.

Do you remember that?

A. Yes.

Q. You were not involved in the development of projectile launchers in 2000; correct?

A. No, I was not.

Q. And most of what you learned about the projectile launcher market, you learned as part of your development of the SAP launcher product around the 2010 time period; right?

A. Yes.

Q. From the 2000 to -- strike that.

Between 2000 and the launch of your Xploderz product in 2011, how many toy companies were in the market selling projectile launchers that used SAPs as ammunition?

A. I think you're asking me how many toy companies sold SAP projectile launchers prior to Maya Group?

Q. That's right.

A. None.

Q. Maya Group was the first one to start selling SAP projectile launchers; correct?

A. Yes.

Q. And the first SAP projectile launcher that Maya Group sold was launched in 2011; correct?

A. I believe so, yes.

Q. And even though it may have been known to use air pressure or mechanical air pressure systems to launch various projectiles by the year 2000, nobody in the industry applied that technique to launch SAPs until the Maya Group did in 2011; correct?

A. Correct.

MR. CUTRI: Objection to form.

THE WITNESS: Oh, sorry.

Correct, never.

BY MS. REICHEL:

Q. When the Maya Group released the Xploderz product in 2011, how did the firing range of that product compare to the other Blaster products in the market?

A. We were double the range, if not more.

Q. How did your ability to achieve double the firing range of your competitor's products impact your sales?

A. I believe that's what was driving consumers to want Xploderz. Positively.

Q. You mentioned that one of the first

places you -- or the first retailers where you placed your product was Target; right?

A. Certainly for Orbeez. Xploderz, I think was, as well, but Orbeez -- that was more around the Orbeez story. But, yes, Target was definitely one of our major retailers, major supporters early on.

Q. How did the Xploderz perform for Target as it relates to their boy toy product line?

A. Upon initial launch, it was a huge hit.

Q. Do you remember whether there was a certain ranking associated with the Xploderz product among the Target group of boy toy products?

A. So what I can recall is a lunch with the buyer for our product line who had worked with us frankly to do the recall and the quarantine. So we weren't necessarily best of friends. And we came in after we had put the product on the shelf just prior to Easter and launched the advertising, and from what I recall, he said we were the number 1 selling boy toy in the spring.

Q. What was your reaction to being told that your Xploderz product was the number 1 selling boy toy product for Target that spring?

A. Elation.

Q. Why was your reaction elation?

A. Why?

Q. Yes.

A. You know, when you try and do something and you're successful, you get elated. It was good. You know, not only did we create the product, we created the demand, and it worked. We were selling. That's what you're in business to do. At the end of the day, what matters is the consumer. And if the consumer buys in, then everything gets easy.

Q. Is it fair to say you were proud of the work you did in developing and selling these SAP projectile launchers?

A. Very proud of the work what we did. We did, not just I did.

Q. At some point did you ever see any competitors selling SAP projectile launchers in

the market?

A. Ever?

Q. Ever?

A. Yeah, I mean, the first, first knockoffs that we found were actually not in the United States. So we found like three years down the line after launch, I think there was some coming out of Israel that we got notified about, maybe South Africa, maybe some Asian markets where basically they had completely copied what we had done, blue packaging, the works, and they were out there trying to sell these things. But very, very, very small amounts.

Q. When did you first see a knockoff SAP projectile launcher in the United States?

A. So I don't recall if I saw these in the U.S. or not. I remember that we first saw the international ones and -- I don't know. I guess we were just a little too busy to overfocus on them, and they were coming in from very kind of marginal markets. But I really don't remember if any of them ever really showed up in the U.S. And

these were I mean just straight-up knockoffs. I mean, they were the same product that we sold.

Years after I left Maya Group, at some point I saw a Gel Blaster Amazon had or -- not on the shelf, probably more on an ecommerce platform and thought that it was pretty close -- and they had a video, if I remember right. And so I felt it was pretty close to what we had done. But I was no longer -- I was way out of the Maya Group at that point.

Q. What was your reaction when you saw this Gel Blaster product that you thought was pretty close to all of the work -- development work that you had done?

A. So I flipped it to Oded --

MR. CUTRI: Objection --

THE WITNESS: I flipped -- oh, I'm sorry.

MR. CUTRI: Objection; form.

THE WITNESS: I flipped it to Oded Ben-Ezer, and I said, Hey, by the way, have you seen this? And that was it.

BY MS. REICHEL:

Q. Why did you send that product to Oded?

A. Because I felt it was a product that was very similar to ours.

Q. When did the Maya Group first begin writing "patent pending" on its marketing materials or product literature?

A. I hope at the right time. I have no idea.

Q. Do you remember putting "patent pending" on your boxes, for example, from the very beginning?

A. I can't say with certainty. At certain points we did do legal review of our packaging, but --

Q. I don't want to ask you about any conversations you had with lawyers, even back in that time period.

A. Okay.

Q. So let me just stop you.

You don't remember one way or the other, though, when you began putting "patent pending" on

your packaging?

A. No, I can't even tell you that we did. I don't remember.

Q. Okay. You weren't involved in that aspect of the decision-making?

A. I probably was involved. I just don't remember.

Q. All right.

MS. REICHEL: Why don't we go off the record and take a quick break. I can't remember how long we've been on, but probably been a while. And I'll just go over my notes.

THE VIDEOGRAPHER: Okay. Going off the record. The time is 4:23.

(Recess from the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 4:31.

MS. REICHEL: All right. Mr. Brawer, I don't have any more questions for you at this time.

MR. CUTRI: Mr. Brawer, I do have a few follow-up questions actually just on one topic.

THE WITNESS: Go for it.

EXAMINATION BY COUNSEL FOR THE SPLATRBALL RESPONDENTS (CONT'D)

BY MR. CUTRI:

Q. Let me read to you a question and an answer that you gave just now in response to Ms. Reichel's questioning.

"So it's fair to say that those regulations that you mentioned before constrained your implementation in terms of product development, but in terms of overall conception, you had appreciated there were many other types of blasters that could use these SAPs as ammunition, including automated blasters; right?"

And you said, "Yeah, the way I would phrase it had the ASTM regulations not prohibited triggers, stored energies, we would have had created items that had triggers and stored energy for toys. We eventually realized the market was large enough that we could try to go older than age grade 14-plus and try to make it more of a sporting goods-type line, which is what Blaster

Pro became. But putting a trigger on a Blaster was not something that we just didn't think about."

And that was only a minute ago. So do you remember that testimony?

MS. REICHEL: Objection to form.

THE WITNESS: Yes, I do.

BY MR. CUTRI:

Q. We looked at an e-mail where the Bang Zoom folks sent a video of a prototype where you pulled your hand -- you pulled back a plunger and released it, and it launched an SAP.

Do you remember that video?

A. Yes, I do.

Q. And do you remember the video -- that the date of that video was April 27th?

A. I'll take your word for it.

Q. Okay.

MR. CUTRI: Let's pull up Tab 37, which is BangZoom-154.

MS. REICHEL: And what's the exhibit number?

MR. CUTRI: What exhibit number are we up to now?

THE VIDEOGRAPHER: So this is a new exhibit?

MR. CUTRI: Yes.

THE WITNESS: Where do I get my exhibits?

MR. CUTRI: It's a new one. It will be in there soon.

MR. RUTTENBERG: It's not there yet. So you can just look at your screen. He'll bring it up.

THE WITNESS: Oh, there we go. Okay. Thank you.

(Brawer Deposition Exhibit 25 was marked for identification and attached to the transcript.)

MR. CUTRI: If we scroll down --

BY MS. REICHEL:

Q. Actually, this one says -- so here is an e-mail -- at the bottom of it is from Mr. Meggs on April 30th, 2010. And it's to you, Mr. Fink, and

Mr. Ben-Ezer.

A. The bottom? The bottom part, yes.

Q. Yeah.

A. Uh-huh.

Q. And it says, "Ron/Oded, As discussed the latest BZ model work amazingly!!! Easy 50 feet, even 75 on a good launch. Combat range of 50 feet can comfortably be accomplished. There is no question this is the bench mark for our high end performance, better than everything we have seen thus far therefore I don't think we need to meet to debate this aspect."

And that was on April 30th; right?

A. Okay.

Q. And if you go to the next page, "What is an issue however is the model quality in general. Besides its appearance, it is roughly made as a quick bench top molding only and will fall apart during presentation (our worst nightmare) and needs a lot of fixes or a complete remake. There are also some easy ways to make it fire even better!"

And then he says, "I have just discussed this with Steve but unfortunately they may have current commitments that will keep them from being able to help us with a complete model remake within our time frame of the 10th delivery. Steve did offer to help with the up-fixing of the current model but that in turn would somewhat hamper our effort to make the new model here in LA since we would be losing our reference. What I am going to do is rebuild the BZ model as a back-up shooter and completely build another 2nd gen model for our meeting on the 11th which will address durability and the aesthetics. This will be our prime model for the demos and we will have the gen one model just in case of a failure. I have someone standing by to build the model here so I will go that route unless I hear otherwise [sic]."

Do you see that?

A. Yes, I do.

Q. And so Mr. Meggs is talking about rebuilding the Bang Zoom model that we saw in the video, which has the plunger on it; right?

MS. REICHEL: Objection to form.

THE WITNESS: Okay.

BY MR. CUTRI:

Q. Is that your understanding?

A. I think so.

Q. And he's talking about doing that on April 30th; right?

A. Okay.

Q. You testified that because of the ASTM standards, you did not pursue -- in the first instance, you did not pursue a product that had a trigger or stored energy; right?

MS. REICHEL: Objection to form.

THE WITNESS: Correct.

BY MR. CUTRI:

Q. Is that correct?

A. Correct.

Q. And when -- to the best of your knowledge, how many years or months after April 30th, 2010, was it that you realized that you could make a trigger-based product that had an automatic fire?

MS. REICHEL: Objection to form.

THE WITNESS: I mean, I think it's a year, maybe two. It was not a lack of desire. It was a resource challenge.

BY MR. CUTRI:

Q. Okay.

A. We could never have created a 14-plus and a toy product at the same time. We just -- we were a new company. We were also launching Orbeez. I mean, we had barely launched Orbeez, if I'm not mistaken, at this point. So we're in one season of Orbeez. I mean, we had put a good foothold in the activity category. We were developing other activity toys. So, you know, there was a limit to what three guys, you know, standing in Hawthorne, California, could do in a certain amount of time.

Q. So --

A. I don't know whether it was a year, 6 months, 18 months. But Blaster Pro came. It certainly came well before I left.

Q. But --

A. So --

Q. But Blaster Pro -- so let me see if you would agree with this.

By May 10th, 2010, which is --

A. Like a week later, two weeks later.

Q. -- a week later --

A. Yeah.

Q. -- you did not have an SAP launcher that could do automatic fire. You had not actually built an SAP launcher that could shoot SAPs with automatic or semiautomatic fire; right?

MS. REICHEL: Objection to form.

THE WITNESS: I can only say that I don't remember having one. I would definitely tell you to ask Keith. Because if we had one, it would have been Keith who would have created it, but --

BY MR. CUTRI:

Q. Okay.

A. -- in all likelihood, certainly the vast majority of our resources ten months -- for the ten months prior to this memo, we're looking at

how to develop a toy line, not a non-toy line.

Q. Would it be fair to say that as of May 10th, 2010, you had the aspiration or perhaps the hope that you might eventually make a SAP launcher that had automatic fire but you had not actually figured out how to do it -- how to actually make an SAP that had an automatic fire?

A. I mean, I think I --

MS. REICHEL: Objection to form.

Sorry. Go ahead.

THE WITNESS: I think I understand your point, but I don't think it was a we had not figured out how to do it. It was a prioritization of what we would take from a rendering. Because we obviously had rendered it, but we had not gone to the level of actually producing. There was a huge difference in cost.

BY MR. CUTRI:

Q. I see.

A. Once you -- you know, you can put a lot of ideas down in 2D, and the cost is manageable, let's say. But once you start going into

prototyping and eventually getting into model making and tooling and -- both the professional -- you know, the professional attention to detail required and also the cost, you know, you can only do so many at one time.

And it's not that there aren't enough model makers, but you have to have people who can manage the model makers. And then the model makers aren't cheap. And so -- and you have to work out the engineering. So there's -- you know, there's a lag between when we decide to do -- you know, we couldn't do everything at once.

Q. So --

A. But your point of had we made a three-dimensional automatic shooting Orbeez -- Xploderz SAP shooter at that point in time, my strong recollection is that we did not. But not for the reason because we were technically challenged. I think --

Q. What do you mean -- sorry.

A. I think we were resource challenged. We had to prioritize. It wasn't a, you know, we

couldn't -- you know, we were dumbfounded with how we were going to make this work. It was actually --

Q. Well, to be clear --

A. -- I think probably harder to --

Q. Sorry.

A. -- create product that didn't have stored energy that shot SAPs and then to go the route -- there were so many blasters out over the last 50 years that had stored energy. I mean, Blaster development had been a very big developed area and, you know, we had to now modify how most blasters were made because we didn't -- we had to make them half Blaster, half slingshot, you know. And that was probably harder.

Q. That was my point, is that because it was an SAP, you had not figured out how to make an SAP launcher -- when you said -- you said you hadn't figured out the engineering; right?

MS. REICHEL: Objection to form.

THE WITNESS: No, we hadn't -- so the steps are 2D, 3D. Within 3D you have to model it

and engineer it and then eventually manufacture it. Creating 2D, not that hard. I mean, you get designers. You give them some general guidelines, and they'll spit back to you all sorts of art. Going from 2D then to 3D, harder, especially when you're going from a model. And then you have to do the engineering.

I don't think the model making or engineering on an automatic shooting stored energy SAP shooter was any harder for us than a non-automatic, you know, non-stored energy SAP shooting device. The difference was one we could sell to the toy industry, and one we couldn't. And so we went with the one that we could sell to the toy industry first.

BY MR. CUTRI:

Q. And it took you about -- when you said --

A. Six months, a year, 18 months. I don't -- you might --

Q. All right.

A. -- have a better understanding of the --

Q. Let me finish my question, sorry.

A. Oh, I'm sorry. I didn't let you finish, sorry. Go for it. Yeah.

Q. No problem. I just want to make sure I have this right.

By May 10th, 2010, let me see if I can get you to agree with this, you had a two-dimensional rendering -- you think you -- well, let me ask you this: By May 10th, 2010, you did not have a functioning prototype that launched SAPs as an automatic launcher -- with an automatic launching mechanism; correct?

MS. REICHEL: Objection to form.

THE WITNESS: I'm almost certain that's correct, yes.

BY MR. CUTRI:

Q. Okay. You had an aspiration or an idea to do that, to make a launcher that used automatic firing mechanism at some point later; correct? Or did you have the aspiration then?

MS. REICHEL: Objection to form.

MR. RUTTENBERG: I join that.

THE WITNESS: We had the drawing. That's all we had.

BY MR. CUTRI:

Q. You had --

A. Yeah, we didn't have a 3D mockup. We had a 2D mockup.

Q. Okay.

A. We had a 2D rendering.

Q. Okay. And you hadn't figured out -- well, I guess that's -- I think that's sufficient. Thank you, Mr. Brawer.

MR. CUTRI: I think that's all I have.

THE WITNESS: Okay.

MS. REICHEL: All right. I think I'm all set. I don't know if your counsel has any questions for you, Mr. Brawer.

MR. RUTTENBERG: I do not.

Is everybody else concluded for the day?

MR. CUTRI: Yes.

Thank you, Mr. Brawer. Before we -- I think I join the staff in appreciation of your time here today. We really do appreciate you

taking the time. It was very interesting. It was a very interesting deposition. Thank you.

MS. REICHEL: Thanks, Mr. Brawer.

MR. RUTTENBERG: Just one second.

MS. REICHEL: Yeah.

MR. RUTTENBERG: Let me just ask him one question.

We can go off the record.

THE VIDEOGRAPHER: I'm sorry, to conclude?

Okay. We're going off the record. This deposition is concluded at 4:46.

(Off the record at 4:46 p.m. PST)

STATE OF MARYLAND)

ss:

COUNTY OF MONTGOMERY)

I, Matthew Goldstein, Notary Public within and for the State of Maryland, do hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of said proceedings.

I further certify that I am not related to any of the parties to the action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of April, 2023.



Matthew Goldstein, RPR

Ronald Brawer, c/o
RUTTENBERG IP LAW
1801 Century Park East, Suite 1920
Los Angeles, California 90067

Case: 337-TA-1325
Date of deposition: March 31, 2023
Deponent: Ronald Brawer

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