

UNITED STATES INTERNATIONAL TRADE COMMISSION

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In the Matter of

Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING

337-TA-1325

DEVICES, COMPONENTS THEREOF,

AMMUNITION, AND PRODUCTS

CONTAINING SAME

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OPEN SESSIONS

Pages: 34 through 320 (with excerpts)

Place: Washington, D.C.

Date: May 19, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Before the Honorable MaryJoan McNamara
Administrative Law Judge

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In the Matter of Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING 337-TA-1325
DEVICES, COMPONENTS THEREOF,
AMMUNITION, AND PRODUCTS
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International Trade Commission
500 E Street, SW
Washington, D.C.

Evidentiary Hearing
Friday, May 19, 2023
Volume II

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

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

1 A P P E A R A N C E S:

2

3 Counsel for Complainant Hasbro, Inc.:

4 FISH & RICHARDSON P.C.

5 1000 Maine Avenue, SW

6 Washington, DC 20024

7 (202) 783-5070

8 Ruffin B. Cordell, Esq.

9 Linhong Zhang, Esq.

10 Jack R. Wilson, Esq.

11 Benjamin Thompson, Esq.

12

13 -and-

14

15 FISH & RICHARDSON P.C.

16 1180 Peachtree Street, NE

17 Atlanta, Georgia 30309

18 (404) 892-5005

19 Brian P. Boyd, Esq.

20

21

22

23

24

25 CONTINUED ON FOLLOWING PAGE

1 A P P E A R A N C E S (continued):

2

3 Counsel for Complainant Hasbro, Inc.:

4 -and-

5 FISH & RICHARDSON P.C.

6 One Marina Park Drive

7 Boston, Massachusetts 02210

8 (617) 542-5070

9 Jeffrey Shneidman, Esq.

10 Autumn Hwang, Esq.

11 Irene Hwang, Esq.

12

13

14 Counsel for Respondents Prime Time Toys Ltd., Prime Time

15 Toys LLC & Easebon Services Ltd.:

16 AMSTER ROTHSTEIN & EBENSTEIN LLP

17 90 Park Avenue

18 New York, New York 10016

19 (212) 336-8098

20 Brian A. Comack, Esq.

21 Kenneth P. George, Esq.

22 Chester Rothstein, Esq.

23

24

25 CONTINUED ON FOLLOWING PAGE

1 A P P E A R A N C E S (continued):

2

3 -and-

4 Counsel for Respondents Prime Time Toys Ltd., Prime Time
5 Toys LLC & Easebon Services Ltd.:

6 POLSINELLI PC

7 1401 Eye Street, NW

8 Washington, DC 20005

9 (202) 783-3300

10 Daniel F. Smith, Esq.

11

12 Counsel for the Office of Unfair Import Investigations:

13 U.S. INTERNATIONAL TRADE COMMISSION

14 500 E Street, SW

15 Washington, DC 20436

16 (202) 205-2000

17 Todd P. Taylor, Esq.

18 Investigative Attorney

19

20

21 *** Index appears at end of transcript ***

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23

24

25

P R O C E E D I N G S

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

JUDGE MCNAMARA: Good morning everyone. Please be seated.

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

Good morning, Mr. Cordell.

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

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

JUDGE MCNAMARA: Sure.

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

JUDGE MCNAMARA: That's fine.

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

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

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

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

17 JUDGE MCNAMARA: Mr. Taylor?

18 MR. TAYLOR: Good morning, Your Honor.

19 JUDGE MCNAMARA: Good morning.

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

1 JUDGE MCNAMARA: Yes, I do too.

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

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

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

13 JUDGE MCNAMARA: What do you think about that?

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

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

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

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

6 JUDGE MCNAMARA: I think that would certainly be
7 helpful.

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

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

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

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

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

5 JUDGE MCNAMARA: How would you feel about that?

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

9 JUDGE MCNAMARA: I know.

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

14 JUDGE MCNAMARA: Yes.

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

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

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

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

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

10 MR. CORDELL: Thank you.

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

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

15 JUDGE MCNAMARA: All right. Thank you.

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

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

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

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

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

3 JUDGE MCNAMARA: Much appreciated. Thank you.

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

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

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

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

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

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

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

11 MR. TAYLOR: No, Your Honor.

12 JUDGE MCNAMARA: Mr. George?

13 MR. GEORGE: No, Your Honor.

14 JUDGE MCNAMARA: Thank you. Mr. Cordell?

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

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

18 OPENING STATEMENT

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

1 JUDGE MCNAMARA: Good morning. Welcome.

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

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

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

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

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

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

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

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

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

1 for him and his friends for years and years.

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE MCNAMARA: Yes. Thank you.

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

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

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

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

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

22 May I approach?

23 JUDGE MCNAMARA: Yes. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 long?

2 Why is it that the SAPs were available in the
3 '60s and the shooting toys were available -- I'm going to
4 show you Ralphie from A Christmas Story -- going back for
5 decades and decades, back to 1889, I believe -- why, if that
6 motivation was so apparent, if it was so available, why
7 wasn't it done before?

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

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

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

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

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

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

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

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

18 So what we have is a platform where the whole
19 world knew about these. Daisy and Splat-R-Ball knew about
20 their air guns, you know, a BB gun being an air gun, since
21 1889, but they didn't make a device that would shoot SAPs
22 until they saw guns made by The Maya Group at a toy fair.
23 So they saw our patentee's, original patentee's, toys at a
24 toy fair and that's when they started.

25 Hasbro has made NERF for years and years. They

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 But here's their problem. The safety problem has
21 been well-known for a long, long time. So any kind of these
22 shooting toys have presented safety issues. We have an
23 excerpt from Mr. Delman's expert report where he cites that
24 21,000 injuries a year are attributed to these air guns.
25 And this goes back to the year 2000. And this is not a new

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

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

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

16 And that's it, an insurmountable challenge.

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

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

1 own sons.

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

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

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

17 And we've got SAPs that were known since the
18 '60s. They need to overcome the notion that, whatever
19 problems existed -- and I should say that their motivation
20 to combine is really just a recognition of a problem. So
21 they don't say, well, you know, there was a conference where
22 people were talking about safety, and they suggested SAPs
23 might be a good solution.

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

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

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

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

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

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

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

8 And, again, they were enormously successful.

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

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

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

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

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

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

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

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

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

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

1 mouths, not mine.

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

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

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

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

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

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

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

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

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

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

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

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

25 JUDGE MCNAMARA: Thank you, Mr. Cordell.

1 Mr. George?

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

4 JUDGE MCNAMARA: Of course.

5 MR. GEORGE: Good morning, Your Honor.

6 JUDGE MCNAMARA: Good morning.

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

11 JUDGE MCNAMARA: Good morning.

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

15 JUDGE MCNAMARA: Good morning.

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

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

25 Prime Time Toys has only been around since 1990.

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

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

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

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

17 So the secret sauce is old.

18 And, in fact, all of the claim limitations were
19 known in the prior art. And I have on the screen now claims
20 1, 5, and 14 from the '683 patent. Of course only claims 5
21 and 14 are being asserted, but they depend from claim 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 What's interesting is all of this occurred in
13 2008, and the patents were filed in 2010. So there's a lot
14 of talk about how SAPs were around for fifty years. It's
15 true, they were in diapers. You know, that's how they were
16 used, and in agriculture.

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

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

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

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

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

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

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

18 Do I just push this again?

19 (Video clip played.)

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

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

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

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

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

14 And what we're looking at is the bag of -- these
15 are super absorbent polymers, that's admitted. And I think
16 on the other side it says it can hold 150. So this idea of
17 what a great idea super absorbent polymers, because you can
18 hold so much ammunition -- old -- I'm sorry, it's here in
19 2008 in the Spit Balls product.

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

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

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

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

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

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

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

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

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

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

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

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

18 So the question is was there a problem. Now we
19 heard from Hasbro that, yes, safety was always a problem
20 with guns, it's been a problem for a hundred years. Okay.
21 But we're talking about AirSoft guns. And the quote that he
22 showed about -- the article that he showed was a 2000
23 article. Not from 1890, but from 2000. And this article
24 really shows that this issue came to the forefront when?
25 2008. Everything happened in 2008.

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

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

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

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

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

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

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

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

7 We actually asked Dr. Kudrowitz about this,
8 whether this was a known problem, the problem described in
9 that Bleacher Report article. And he agreed. You know, in
10 2010, we asked him was it known that these AirSoft guns
11 could cause harm, and he said, yeah, it was known.

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

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

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

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

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

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

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

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

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

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

1 Mr. Spangler. He looks relatively unscathed.

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

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

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

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

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

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

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

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

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

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

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

11 And this is Exhibit RX-52, which is sort of a
12 fascinating thing. It's a Korean patent application. And
13 what's fascinating about it is that it was filed on November
14 1st, 2008. And it was published, unfortunately, one day
15 after the filing date of the patents. So it comes in on --
16 the issue of -- under secondary considerations, one of the
17 things you're supposed to look at is simultaneous invention.
18 In fact, I think I have a slide on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And actually Mr. Brawer, who we spoke about a

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

7 And Spit Balls also taught using it.

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

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

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

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

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

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

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

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

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

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

1 projectile launcher launched by air. Anticipated.

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

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

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

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

17 (Whereupon, the hearing proceeded in confidential
18 session.)

19

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1 O P E N S E S S I O N

2

3 JUDGE MCNAMARA: All right.

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

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

13 And I can't get away from the fact that we have
14 an extremely strong case of obviousness here, and typically
15 in that situation the objective evidence just can't overcome
16 it. And that's the Agrizap case from the Federal Circuit in
17 2008.

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

21 JUDGE MCNAMARA: Not quite yet.

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

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

1 just a licensee.

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

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

7 JUDGE MCNAMARA: Thank you, Mr. George.

8 Mr. Taylor?

9 OPENING STATEMENT

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

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

14 JUDGE MCNAMARA: Sure.

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

18 JUDGE MCNAMARA: Sure. Thank you.

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

22 JUDGE MCNAMARA: They were?

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

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

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

8 JUDGE MCNAMARA: Okay.

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

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

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

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

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

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

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

1 this morning.

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

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

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

16 Is this the public version? Thank you.

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

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

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

25 So from the Staff's perspective, the two main

1 remaining issues are obviousness and DI econ prong.

2 So slide 3, please. SDX-1

3 This is my confusing slide about -- kind of
4 showing the dependency -- kind of the claim terms at issue.
5 For example, the '282 patent, claims 8, 19 and 20, these are
6 all, you know, toy launcher components. The same with 5 and
7 14.

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

14 So slide 4, please.

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

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

1 substantially spherical.

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

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

10 Next slide, please.

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

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

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

24 Next slide, please.

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

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

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

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

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

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

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

5 The next slide, please.

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

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

17 The next slide, please.

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

23 Next slide, please.

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

1 Bumbarger. And then the Hall reference from 1867.

2 The next slide, please.

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

10 The next slide, please.

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

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

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

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

22 The next slide, please.

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

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

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

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

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

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

20 The next slide, please.

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

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

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

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

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

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

20 JUDGE MCNAMARA: Okay. Good.

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

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

25 So here we just looked at the launcher side of

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

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

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

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

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

1 story here.

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

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

12 The next slide, please.

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

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

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

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

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

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

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

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

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

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

1 JUDGE MCNAMARA: Thank you, Mr. Taylor.

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

9 MR. TAYLOR: Your Honor, on the comparison?

10 JUDGE MCNAMARA: Yes.

11 MR. TAYLOR: Okay. Is there anything else?

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

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

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

25 If there's anything else that you think ought to

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

8 MR. TAYLOR: Okay.

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

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

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

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

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

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

21 JUDGE MCNAMARA: Great.

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

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

1 earlier, just for this examination.

2 JUDGE MCNAMARA: Sure.

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

5 JUDGE MCNAMARA: I have to administer the oath.

6 NICHOLAS TINO,

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

10 JUDGE MCNAMARA: Please state your full name.

11 THE WITNESS: Nicholas Tino.

12 JUDGE MCNAMARA: Thank you very much.

13 DIRECT EXAMINATION

14 BY MR. BOYD:

15 Q. Could you please introduce yourself to the Court?

16 A. Yes. My name is Nicholas Tino.

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

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

19 Q. Could you tell us about your educational
20 background?

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

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

25 A. Coming up on ten years.

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

3 A. Yes, I did.

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

6 A. Yes.

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

8 Which Hasbro location do you work from?

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

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

12 A. Yes, it is.

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

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

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

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

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

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

4 A. Yes, I am.

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

7 JUDGE MCNAMARA: Yes.

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

11 A. Yes, I am.

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

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

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

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

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

25 A. Yes.

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

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

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

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

13 A. Yes, they are.

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

15 A. They do.

16 Q. What does Hasbro call that?

17 A. GelFire rounds.

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

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

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

1 information.

2 (Whereupon, the hearing proceeded in confidential
3 session.)

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1 O P E N S E S S I O N

2 AFTERNOON SESSION

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

4 JUDGE MCNAMARA: Good afternoon everyone. Please
5 be seated.

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

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

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

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

14 JUDGE MCNAMARA: Yes. Thank you.

15 JOEL DELMAN,

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

19 JUDGE MCNAMARA: Please state your full name.

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

22 JUDGE MCNAMARA: It's a round disk.

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

25 THE WITNESS: Sure. Joel Delman.

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

3 THE WITNESS: Thank you.

4 DIRECT EXAMINATION

5 BY MR. GEORGE:

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

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

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

14 A. Yes, that is correct.

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

16 A. Yes, I have.

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

19 A. I did.

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

21 A. Yes, they appear to be, yes.

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

24 Could you take us through your educational
25 background?

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

3 Q. What is industrial design?

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Q. Do you have experience designing toys?

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

1 of that.

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

6 Q. And do you have experience designing launching
7 toys?

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

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

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

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

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

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

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

14 A. That's exactly right, yes.

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

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

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

1 kits and see instructions on how to do that.

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

4 Q. Do you have airguns at home?

5 A. I do. I've been an airgun enthusiast since I'm
6 10, 11, 12, when I got my first BB guns and such. Today we
7 probably have about 35 different airguns. We only do target
8 shooting, I'm not into hunting, but really enjoy target
9 shooting, and we have airguns of all types of mechanisms and
10 all types of ammunition.

11 Q. Do you have AirSoft guns?

12 A. We do, yes.

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

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

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

25 JUDGE MCNAMARA: Any objection?

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

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

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

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

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

14 MR. GEORGE: Thank you, Your Honor.

15 JUDGE MCNAMARA: You're welcome.

16 BY MR. GEORGE:

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

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

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

25 Q. And have you considered a person of ordinary

1 skill in the art, what qualifications they would have?

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

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

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

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

16 A. Yes, I have.

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

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

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

22 A. I have, yes.

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

25 A. No, not in the least.

1 Q. And why is that?

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

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

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

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

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

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

25 And it goes on with respect to air pressure, in

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

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

8 A. Yes, I do.

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

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

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

17 A. Yes, it does.

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

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

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

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

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

14 I'm sorry. All of my references to 35 U.S.C.
15 were pre-AIA, if I missed that. So that means we're going
16 to skip this slide, 11, and we're going to skip to 14, slide
17 14.

18 BY MR. GEORGE:

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

22 A. I did, yes.

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

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

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

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

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

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

11 MR. CORDELL: Okay.

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

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

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

20 MR. CORDELL: Thank you, Your Honor.

21 BY MR. GEORGE:

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

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

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

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

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

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

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

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

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

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

4 JUDGE MCNAMARA: It's really not.

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

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

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

9 Q. Mr. Delman, let's just briefly go through these.
10 So the yellow highlighted limitations on slide 17 for claim
11 1 of the '282 and the '683 patents, are those found in Peev?

12 A. Yes, they are.

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

15 A. Okay.

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

19 A. Yes, they are.

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

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

23 A. Yes, they are.

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

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

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

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

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

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

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

17 A. That is correct.

18 Q. And you did an animation as well?

19 A. I did.

20 Q. Let's just go through that briefly.

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

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

3 Q. Okay.

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

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

10 A. Yes, they are.

11 Q. And on the next slide, 28, are the yellow
12 highlighted portions of claim 8 of the '282 patent and claim
13 5 of the '683 patent found in Nagayoshi?

14 A. Yes, they are.

15 Q. And, again, we're just going to go right to the
16 end. So it's slide 332 and we're looking at claims 19 and
17 20 of the '282 patent.

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

20 A. Yes, they are.

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

22 MR. GEORGE: And, here again, we have a
23 stipulation on this claim. Let me see if I can find it.
24 It's in -- so with respect to Nagayoshi, it is in paragraph
25 1 of the stipulation, and that's all we need it for because

1 it's only -- I'm sorry. We're talking about asserted claim
2 14 of the '683 patent, and we have a stipulation in
3 paragraph 1 that that is found in Nagayoshi, it's paragraph
4 109, and we have a stipulation that it's found in Peev, and
5 that's paragraph 2i of the stipulation.

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

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

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

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

15 Q. And what was that problem?

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

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

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

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

24 Does this article support your position?

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

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

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

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

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

16 A. Yes, it does.

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

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

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

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

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

5 Q. Does Nagayoshi refer to children as well?

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

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

14 A. That's correct, yes.

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

17 A. That's correct, yes.

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

20 A. There was.

21 Q. And what was that?

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

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

1 patents?

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

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

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

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

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

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

20 A. Yes, I do.

21 Q. Do you know what that is?

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

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

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

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

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

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

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

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

25 Q. And he looks uninjured.

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

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

5 A. I did.

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

8 A. Yes.

9 Q. Can you tell us about Spit Balls?

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

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

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

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

1 of Spit Ball launching.

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

8 Q. So you can change the size?

9 A. Yes, you can change the size.

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

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

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

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

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

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

6 A. I did. I believe the next slide.

7 Q. Would you take us through your summary?

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

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

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

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

23 A. I think the next slide will address that.

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

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

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

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

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

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

24 A. That's correct.

25 Q. Okay. Now before we went through the claim

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

4 A. Yes.

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

8 A. Yes, very much so.

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

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

13 A. Yes, that's right.

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

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

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

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

1 blue, correct?

2 A. Yes, that's correct.

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

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

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

8 A. Yes, I do.

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

12 A. Yes, I did.

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

16 A. It does.

17 Q. And your support for that?

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

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

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

4 A. That's correct.

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

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

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

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

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

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

19 Is there some of that that supports your opinion?

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

24 So Steve was asked to -- excuse me. Jeff was
25 asked to describe what he saw when he came into the

1 conference room at Science in the Rockies. And he states
2 that there was teachers reaching into the bowl of the Jelly
3 Marbles and loading them up into the potato gun, and all of
4 them were firing at Steve on stage. It was quite comical.

5 Some people were loading two and three Jelly
6 Marbles. Then all of a sudden the color Jelly Marbles
7 started being shot. So, yeah, it was -- it was a lot of
8 Jelly Marbles in the room.

9 Q. Okay. And you're reading from Jeff Brooks'
10 transcript, RX-122, December 9th, 2022 deposition, page 79,
11 line 23, to page 80, line 12.

12 A. Yes, that's correct.

13 Q. And the other -- how about Ellen Peterson, is
14 there any testimony of hers that supports your opinion?

15 A. Yes, it does. And I should note here on this
16 slide that it was Ellen that took this picture of Steve on
17 stage here. So --

18 Q. Let me just stop you for a minute. When you said
19 it was Ellen that took the picture of Steve on the stage,
20 the picture you're referring to is RX-21, correct?

21 A. That's correct yes.

22 Q. I'm sorry. Please go ahead.

23 A. So Ellen was asked about this picture at her
24 deposition. She states, so that is Steve Spangler on the
25 presentation platform at Science in the Rockies 2008. He is

1 holding the polycarbonate tube from the potato launcher in
2 his left hand. There are Jelly Marbles broken and scattered
3 all over the floor there. In the background, you can see a
4 graduated cylinder with water gel crystals and Jelly Marbles
5 in them.

6 She was asked further, and so you're saying that
7 on the floor there were Jelly Marbles, and her response is
8 yes.

9 Q. Let me just stop you. You're reading from the
10 transcript of Ellen Peterson's deposition, which is RX-0111,
11 November 28th, 2022, page 47, line 18, to page 48, line 8,
12 correct?

13 A. Yes, that's correct.

14 Q. And you see there's another picture here,
15 RX-1729, on this slide RDX-356?

16 A. Yes. So --

17 Q. Can you tell us what that is?

18 A. Yeah. On the far right, that is a photograph of
19 the metadata for the digital camera file that this
20 photograph was labeled with. And the date on that metadata
21 states that it was taken July 10th of 2008.

22 MR. CORDELL: Your Honor, I'm going to object as
23 lacking foundation. This witness is not an expert in
24 metadata and he is just parroting what he has been told.
25 This is rank hearsay.

1 JUDGE MCNAMARA: Fair enough. I think, in terms
2 of the metadata, did Ellen Peterson authenticate?

3 MR. GEORGE: Yes, I believe she did. The
4 testimony has already been submitted so --

5 JUDGE MCNAMARA: All right. Then I don't think
6 that Mr. Delman is in a position to actually authenticate in
7 any way or lay the foundation for that. If it's already in
8 the record. It's there in the record.

9 MR. GEORGE: Thank you, Your Honor.

10 JUDGE MCNAMARA: Yes.

11 Q. Let's switch now. Are Clear Spheres and Jelly
12 Marbles spherical?

13 A. Yes, they definitely are.

14 Q. What supports your position there?

15 A. So on this slide I've got a couple of
16 photographs.

17 Q. This slide is RDX-3.057.

18 A. That's correct. So on the left there's a
19 photograph of a bag of Clear Spheres, unhydrated or not yet
20 hydrated Clear Spheres. They are definitely spherical.

21 On the right is a photograph which I took of the
22 Clear Spheres after they had been hydrated. And as you can
23 see they are spherical.

24 Q. And the two photos you're referring to are RPX-3
25 and RX-36, correct?

1 A. That's correct, yes.

2 Q. Is there any testimony or anything else you want
3 to tell us about these Jelly Marbles that you looked at?

4 A. Sure. So Jeff Brooks, again, Steve's COO,
5 confirmed to me on a telephone conversation or a Zoom call,
6 I believe, that Jelly Marbles in the jar were always sourced
7 from the same manufacturer, a company called JRM Chemical,
8 and that the formula never changed.

9 And Steve at his deposition confirmed that the
10 samples that I had were an archived sample of the product
11 that we sold back at the time.

12 Q. And with respect to that deposition testimony,
13 that's RX-110, November 23rd, 2022, Spangler deposition,
14 page 121, lines 13-14, correct?

15 A. Yes, that's correct.

16 Q. Do you have any other evidence that support your
17 opinion?

18 A. Yes. So I have a photograph on this slide that
19 was taken directly from the 2008 Jelly Marbles Activity
20 Guide.

21 On the left of that photo box is a jar full of
22 hydrated Jelly Marbles, which are spherical, and on the
23 right is a cupful of nonhydrated, and they are very small.
24 I think you can see that they are spherical, but in case you
25 can't, the images just to the right of that also from the

1 Jelly Marbles Activity Guide show a hydrated and a
2 nonhydrated spherical jelly marble.

3 And the Jelly Marbles Activity Guide, the text of
4 the guide itself, also states the cause of the spherical
5 shape, it creates a convex lens over the words. So even the
6 guide itself uses the word "spherical" to describe them.

7 Q. Okay.

8 JUDGE MCNAMARA: And that was slide 59?

9 MR. GEORGE: Thank you, Your Honor.

10 A. That is correct.

11 Q. Just to be clear, the picture that you referred
12 to first was RX-139000, 1 and 2, and the text that you
13 talked about later from the Jelly Marble Activity Guide was
14 RX-139.002, correct?

15 A. Yes, that's correct.

16 Q. So the next slide has to do with something we've
17 stipulated to. So we're looking at RDX-3.060. Let me just
18 find -- I'm going to read --

19 So in paragraph 3 of the stipulation regarding
20 prior art --

21 MR. CORDELL: Your Honor, I hate to interrupt
22 again, but as I'm trying to organize my cross-examination,
23 it doesn't look like the slides are sequential in number.

24 MR. GEORGE: I thought they were. There were
25 some objections you had and we may have done something

1 because of that.

2 MR. CORDELL: I wonder if I can ask Respondent's
3 graphics specialist, Mr. Sayres, to back up a few slides.

4 MR. GEORGE: Which slide do you want to go to?

5 MR. CORDELL: Well, this is a good example. See,
6 this is slide 1-30. If we can go to the next slide, we're
7 at 356.

8 MR. GEORGE: That does appear to be misnumbered.
9 I can't tell if there is another number below it.

10 A. It seems like there is something that is cut off
11 on my screen.

12 JUDGE MCNAMARA: I think what it makes sense to
13 do, however, is to leave the numbering as it is, because
14 otherwise it's going to get very confusing if they try and
15 go back and renumber.

16 So you have already pointed it out, which is
17 helpful, but there may be some issues, but I think it is
18 best to leave the deck slide numbers as they are.

19 MR. CORDELL: I agree, but I think we probably
20 have to be disciplined about referring to slides.

21 JUDGE MCNAMARA: I think that's right. This
22 happens at times.

23 MR. GEORGE: Very good.

24 Can we go to RDX slide 3.060.

25 Q. And here I was about to read from paragraph 3 of

1 the stipulation regarding prior art. For the purpose of
2 this investigation only, Complainant stipulate that Clear
3 Spheres and Spit Ball toys are formed from super absorbent
4 polymer as required by '282 patent claim 1 and '683 patent
5 claim 1 as construed by the ALJ.

6 We can pass this slide and we can pass the next
7 slide, which is 621.

8 And let's go to slide 3.062. What's being shown
9 here in RX-719?

10 A. So I'm not sure if that's a video or just a still
11 from a video.

12 Q. Let's see what happens if I click it.

13 A. Okay.

14 Q. It's a video.

15 A. So that is a video of me launching hydrated Clear
16 Spheres two at a time in that particular instance. And you
17 can see them coming out of the launcher and bouncing off of
18 the target chair.

19 Q. Now I'd like to talk about Spit Balls. And,
20 again, what I want to talk about are the SAP limitations, if
21 you will. So let's go to slide 3.064.

22 And I have there claim 1 of the '683 patent and
23 claim 1 of the '282 patent, and the language I've
24 highlighted is projectile launching system and ammunition
25 configured for use with a projectile launcher.

1 Are those limitations found in the Spit Ball
2 product?

3 A. Yes, they are.

4 Q. Can you tell us why?

5 A. So on the right we're looking at a photograph or
6 a scan of the front of the Spit Ball's packaging. That
7 package shows a child, a boy or a girl, holding a launching
8 tube in their mouth, pointing it directly at you, and
9 pushing a spitball out from that tube, blowing through that
10 tube to launch a spitball directly at you. That's what the
11 graphic shows. It shows a child using a projectile launcher
12 to launch a spitball.

13 Q. And that's Exhibit RX-1 that you're referring to?

14 A. Yes, that's correct.

15 Q. Let's take a look at the back of that packaging,
16 which is RX-02, and which is on slide 3.065.

17 Is there anything on the back of the package that
18 supports your opinion?

19 A. Yes. So the back of the package first contrasts
20 DuneCraft Spit Ball, and DuneCraft is the brand name here,
21 to regular spitballs that are merely wadded up pieces of
22 paper. But instead says that these are slimy and gross to
23 the touch, wonders of chemistry, which, when launched at
24 your opponent, provide that extra element of surprise
25 guaranteed to win you a victory.

1 So it specifically instructs you to launch them
2 at your opponent. It goes on to describe that they explode
3 on target and that you will have hours of fun mastering the
4 simple art of Spit Ball launching.

5 And on the right I've also highlighted under the
6 categories of bullet points to use Spit Balls to master the
7 art of Spit Ball launching. Spit Balls are great for target
8 practice and Spit Ball tag.

9 So everything about the description of this
10 product tells you to launch them. But, of course, they are
11 called Spit Balls, and I would venture to guess that
12 everybody in the courtroom today is probably familiar with
13 what a spitball is. So the very name of this product tells
14 you to launch it through a projectile launcher.

15 Q. Let's assume for the moment that there is
16 somebody who doesn't know. Did you look at the dictionary
17 definitions?

18 A. I did and was not surprised to find dictionary
19 definitions, such as that on the left from the New Oxford
20 American, which defines spitball as a piece of paper that
21 has been chewed and shaped into a ball for use as a missile,
22 and Websters Second New College Dictionary defines it as
23 paper chewed and shaped into a lump for use as a projectile.

24 So if you wanted a dictionary definition, it just
25 backs up what you probably already knew.

1 Q. So you were reading from RX-832.001 and 3, and
2 RX-832.007 through 99, correct?

3 A. Yes, that's correct.

4 Q. And this is on slide 3, RDX-3.066.

5 A. Yes.

6 Q. Did the Spit Balls disclose a plurality of
7 projectiles?

8 A. They do, yes. So, again, looking at the front of
9 the Spit Balls package, the way that they were sold, you've
10 got a plastic baggie that's attached to the card, the image
11 card, and that baggie is filled with many, many nonhydrated
12 Spit Balls, and the package states that you get over 150 in
13 the package. So there is a plurality of the Spit Balls
14 there.

15 Q. And you're looking at the front -- RX-001 and
16 RX-002, correct?

17 A. That's right. The RX-002 is from the back of the
18 package.

19 Q. Thank you. And that's on RDX-003.067. Are the
20 Spit Balls substantially spherical?

21 A. They are.

22 Q. And what's your support for that?

23 A. Well, with respect to the package, not only do
24 you see the substantially spherical nonhydrated Spit Balls
25 in the baggie that's attached to the card, but there is also

1 a photograph on the bottom left zoomed in on hydrated Spit
2 Balls showing a group of hydrated spherical Spit Balls.

3 Q. Do you have other evidence that supports your
4 opinion?

5 A. I do.

6 Q. Let me stop you for one minute. We were just
7 looking at slide RDX-3.068 and now we're going to look at
8 RDX-3.069. Go ahead, Mr. Delman.

9 A. So I've also examined what's called the Material
10 Safety Data Sheet or the MSDS for these Spit Balls, and
11 amongst the various specifics that are provided, appearance
12 is described on the MSDS as one of its properties, and I've
13 highlighted that its appearance is described as spherical.
14 That's on the left. And --

15 Q. That's RX-0231.0002, correct?

16 A. Correct. And on the right there is a webpage
17 capture using the Wayback Machine from DuneCraft's webpage,
18 website, back in June 30th of 2009 showing photographs of
19 Spit Balls on that webpage. And, as you can see from the
20 single, zoomed-in and the image to the right of that showing
21 a large number of hydrated Spit Balls, they are spherical.

22 Q. And you've testified before that Spit Balls are
23 soft; is that correct?

24 A. Yes, I have.

25 Q. And you also testified that you can control the

1 softness?

2 A. That's correct, depending on how long you hydrate
3 them for.

4 Q. And that's on the back of the Spit Balls
5 packaging, isn't it?

6 A. That's correct.

7 Q. Let's take a look at the next slide, RDX-3.070.
8 I'm not going to ask you to testify about this slide. We're
9 going to rely on the stipulation regarding prior art.

10 Paragraph 3, it's the same sentence I read into
11 the record before, so we'll pass that.

12 Do you have an opinion as to whether it would be
13 obvious to try these Spit Balls and Clear Spheres as
14 ammunition in an AirSoft gun?

15 A. Yes, I do. I believe the next slide speaks to
16 that. So there were a finite number of ammunition options
17 that a POSITA could have considered to have a reasonable
18 expectation of success when making this combination.

19 Dr. Kudrowitz suggested rubber, foam of some
20 sort, cork, which I assume is wood cork, and soft plastics,
21 which I think can be a fairly broad range of things,
22 including SAPs.

23 And I specifically suggested that hydrated SAPs
24 would be a fantastic and obvious solution.

25 Q. Was there a reasonable expectation of success?

1 A. Yes. We know that airsoft guns can be easily
2 adjusted should you need to make any adjustments to make
3 this work, and we also know, as we've discussed, both from
4 the description on the back of Spit Balls, from Steve
5 Spangler's testimony, and from my conversations with
6 Dr. Reitman that SAPs are easily adjusted. You can make
7 them bigger. You can make them smaller. You can make them
8 harder, softer, less durable, et cetera.

9 Q. Let's focus on the airsoft guns. Can you tell us
10 ways to adjust them?

11 A. Sure. So at least one way to adjust an airsoft
12 gun -- and I'm not sure, are these videos or --

13 Q. Why don't you just talk through them first and
14 then we can see.

15 A. Sure.

16 Q. Just for the record, you're looking at RDX-3.074,
17 please go ahead, which shows an animation of Peev Figs. 1 to
18 3.

19 A. Right. So it must be a video, then. So if we
20 can get it to play while we're speaking.

21 Q. Sure.

22 A. So here you've got a stronger spring in an
23 airsoft gun being shown. And the result with the amount of
24 air pressure that's being caused by that strong spring
25 pushing that piston forward at the speed it's pushing it is

1 that the SAP seems to be exploding and not firing the way
2 you would want it to fire.

3 So a POSITA would have readily understood that
4 you can adjust the spring tension by just changing the
5 spring into a weaker spring. On the right, for example,
6 shown in green, and if we hit Play on that, it now drives
7 the piston forward more slowly, less force driving the
8 bullet out, and the SAP launches from the gun in a solid
9 fashion.

10 Q. Is there another way that you could make
11 adjustments to the launcher?

12 A. Sure. Another way that comes to mind, I believe
13 I'm showing it on the following slide, you could change the
14 diameter or size of the air pressure chamber.

15 So when you have the piston on the left pushing a
16 large amount of air through that tube, it seems to be
17 causing too much force, such that the SAP ammunition isn't
18 surviving it. It's exploding on the way out of the gun.

19 But if you instead use a smaller chamber, which
20 pushes less air at the ammunition round, the round comes out
21 in a more gentle fashion and it doesn't explode.

22 Q. For the record, we were talking about RDX-3.075
23 and the animations on that.

24 What if I didn't want to make any changes to the
25 airsoft gun, I didn't want to change the pressure, I didn't

1 want to change the chamber, what other options would I have?

2 A. Well, if we take a look at the next slide, again,
3 Dr. Reitman has provided all the guidance that a POSITA
4 would need to understand that, if you didn't want to change
5 the gun, you could easily change the SAP material.

6 So a POSITA would be able -- reading from
7 Dr. Reitman's report now at paragraph 106, Exhibit
8 RX-0580 -- a POSITA would be easily able to achieve
9 different material properties and physical characteristics
10 for SAP ammunition, including adjustments to desired size of
11 the hydrated SAP and adjustments to the strength and
12 durability of the SAP before 2010. These would all be
13 routine adjustments that would not require extensive effort.
14 Just as changing the springs out in my kids' NERF guns were
15 routine adjustments that don't require extensive effort.

16 Q. So, for the record, that's RDX-3.076.

17 Did you try and launch Clear Spheres out of a
18 airsoft gun?

19 A. I did. So, I mean, just to put what we're going
20 to see on this next slide into context here, you don't
21 necessarily have to make any modifications because I didn't.
22 I placed hydrated Clear Spheres into a prior art airsoft
23 gun, which in this case is the Daisy AirStrike 470, and I
24 wanted to see what would happen. And my son recorded this.

25 And if you hit Play, you can see that they fire

1 just fine. It's actually -- they fire so quickly it's hard
2 to see them, but you can if you watch closely and, of
3 course, you can see them bouncing off the chair. They work
4 just great without any modifications whatsoever.

5 Q. And we're looking at RX-0717 and we're on slide
6 RDX-3.077.

7 Did you try and shoot spitballs out of an airsoft
8 gun?

9 A. I did, and I believe the next video shows that.
10 This is still -- yes. So this video is the Spit Balls
11 version of the same thing. I hydrated Spit Balls, placed
12 them in a stock prior art airsoft gun, and you can see they
13 fire nicely without any modifications whatsoever.

14 Q. I'm going to skip the next slide, 799, and I'm
15 going to -- we'll go back to the slide we were on -- in your
16 opinion was the airsoft gun -- the airsoft guns before 2010,
17 were they ready for improvement?

18 A. Yes. Again, we knew they were lots of fun to
19 play with, but that at the same time they posed a risk of
20 injury due to their hard plastic ammunition, hard spherical
21 plastic ammunition.

22 Q. And what are you relying on for that?

23 A. Well, I'm relying on articles such as I've cited
24 here. "Airsoft guns is a double-edged sword." This is,
25 again, back from 2008, first noting that the rounds are made

1 of hard plastic and that they can be enough to crack the
2 skin and even cause minor bleeding.

3 Q. And that's RX-0841.0001 and 3.

4 And that polymer ball that we show here in yellow
5 that's hard, if we replace it, what kind of results would we
6 get?

7 A. Well, if you replace the hard plastic ball with a
8 soft SAP ball, you get a very safe round of ammunition that
9 fires from the gun, providing the same fun experience of an
10 airsoft gun but with ammunition which doesn't hurt when you
11 get hit with it. It explodes and is soft when you get hit
12 with it. And Steve Spangler is showing you how much fun
13 shooting SAPs can be.

14 Q. So that was, just for the record, that was
15 RDX-3.082 when you were referring to the picture of Steve
16 Spangler. RX-0021, we were also referring to the Spit
17 Balls. RX-001, the front of the packaging and the back of
18 the packaging, RX-002.

19 We have one more slide on this, RDX-3.083. Do
20 you want to take us through that?

21 A. Sure. So this is just an attempt to describe
22 graphically what a POSITA would do and why they would do it.
23 So on the upper left you have a device that's ready for
24 improvement, an airsoft gun that's fun to play with, boys
25 love playing with them, but they hurt and can cause injury.

1 Beneath that we've got a known technique for
2 improvement, launching hydrated SAPs as ammunition. We know
3 they are round. We know they don't hurt or injure you when
4 they hit you.

5 So the predictable result of this combination is
6 a safer airsoft gun.

7 Q. Mr. Delman, did you consider any evidence of
8 simultaneous invention?

9 A. I did. So if you go to the next slide, so we've
10 discussed this already, this is the Kim patent, which was
11 filed by an inventor in Korea back in 2008, but, again,
12 published one day after the filing date of the asserted
13 patents describing this inventor's identification and
14 description of exactly the same problem that these airsoft
15 guns had, to improve the bullet of a toy gun, to prevent
16 injury to the human body by using a toy bullet formed of gel
17 or gel material.

18 And the patent goes on to describe the same type
19 of AirSoft mechanism and the solution being a safe and
20 useful bullet, safer to use than a bullet of a conventional
21 rigid material, it doesn't cause injury to the human body.

22 Q. Are you aware of any other instances of
23 simultaneous invention?

24 A. Yes. If you look at the next slide, so there was
25 a patent that was filed by an inventor and other inventors,

1 I believe, but named Carlson, so I've referred to it as the
2 Carlson patent. This was filed about five months after the
3 asserted patents.

4 So it's not prior art, but it teaches that round
5 bullets formed by hydrated SAPs to form a toy projectile for
6 the same reasons, a present invention relates to toy
7 projectiles made of hydro-polymers similar to the absor --
8 excuse me -- polymer material used in a diaper can be formed
9 of a variety of shapes, examples of which include being
10 round.

11 Q. Did you compare the text of the Carlson patent
12 '209 text of the '282?

13 A. I did, and I believe that comparison is on this
14 slide.

15 So if you read from this Carlson patent, you can
16 see that the motivation here of the inventors is to reduce
17 injury several toy guns have been created to fire soft
18 projectiles, and the inventor notes that toy companies sell
19 toy guns that shoot plastic or foam bullets. Both the
20 plastic and foam do not possess the mass of a real metallic
21 bullet and, therefore, are less dangerous.

22 An advantage of plastic bullets is that they are
23 solid and typically smaller than foam and are less
24 influenced by wind resistance than foam bullets.

25 So he goes on to note that, after being fired by

1 a toy gun, a solid and plastic projectile is more likely
2 than a porous projectile like foam to shoot straight. But
3 he notes exactly what we've been discussing, that a
4 disadvantage to such plastic bullets is that they are solid,
5 and although softer than metal, they can still cause injury.

6 On the right I've highlighted elements from the
7 '82 patent, and this patent notes that one reason NERF foam
8 and other foam-based projectile toys have become so popular
9 has been due to the soft and light properties of the foam
10 material, and they can be formed into balls and darts and
11 fired from toys with little risk of injury.

12 But it goes on to note that the properties of
13 NERF and other foam materials have significant drawbacks
14 when used as projectiles for launching toys. Because
15 foam-based materials are light, they are highly susceptible
16 to air forces when trying to project them through the air in
17 free flight.

18 Q. Just to make sure we have the record straight,
19 when you were talking about the Korean reference on
20 RDX-003.085, you were talking about RX-0052.001, and also
21 RX-0052 Fig. 1; is that correct?

22 A. That's correct, yes.

23 Q. And when you were talking about the Carlson
24 patent, you were talking about RX-0053 at column 1, lines
25 10-15, and also at column 3, lines 44-60. And this is on

1 slide RDX-3.086.

2 A. Yes.

3 Q. And then the last thing, when you were talking
4 about the Carlson patent on slide RDX-3.087, you were
5 referring to the section of the Carlson patent RX-0053
6 appearing at line 1 -- column 1, lines 16-35. And you were
7 comparing it to the '282 patent, which is JX-001, at line 1,
8 column 30-50, correct?

9 A. Yes, that's correct.

10 Q. To wrap it up, is it your opinion that all of the
11 asserted claims are obvious?

12 A. Yes.

13 Q. And they are obvious for the reasons that you've
14 just given?

15 A. Yes.

16 MR. GEORGE: I pass the witness.

17 JUDGE MCNAMARA: Thank you, Mr. George. Let's
18 take five minutes.

19 (Whereupon, the proceedings recessed at 3:26
20 p.m.)

21 (In session at 3:32 p.m.)

22 CROSS-EXAMINATION

23 BY MR. CORDELL:

24 Q. Thank you, Your Honor.

25 Good afternoon, Mr. Delman.

- 1 A. Good afternoon.
- 2 Q. My name is Ruffin Cordell. I don't think we've
3 met before; is that right?
- 4 A. Not before today, but nice to meet you.
- 5 Q. Good to meet you. You understand that I
6 represent Hasbro.
- 7 A. I do.
- 8 Q. So let's start off with some easy things. You
9 don't have an engineering degree, correct?
- 10 A. No, I don't. I have an industrial design degree.
- 11 Q. You have a law degree, though, right?
- 12 A. From way back.
- 13 Q. But you don't practice law, correct?
- 14 A. I've not practiced or been licensed for 27 or 28
15 years.
- 16 Q. Okay. But you have a BS in economics from NYU in
17 1988, correct?
- 18 A. That's correct, yes.
- 19 Q. And you went on to law school for a few years,
20 right, at Harvard?
- 21 A. That's correct, yes.
- 22 Q. And then you went to the Pratt Institute, where
23 you got a master's in industrial design, correct?
- 24 A. That's correct.
- 25 Q. So when I look at your CV --

1 Can I have Mr. Delman's CV, please?

2 So in the last 20 years you don't list any toy
3 companies on your CV, correct?

4 A. I'm an industrial design consultant so I haven't
5 worked for a company since Zenith Electronics, which was a
6 TV manufacturer.

7 Q. Let me rephrase that, sir. Again, I want to be
8 very precise in my questions.

9 On your CV you don't list any toy experience
10 within the last 20 years, correct?

11 A. Actually this is page 1 of 2 of my CV. The
12 second page, do you have that available?

13 Q. Can we have the next page?

14 A. So I listed select clients, and, as you can
15 see --

16 Q. The precise answer to my question would be, no,
17 you don't list any toy experience in the last 20 years on
18 your CV.

19 MR. GEORGE: Your Honor --

20 JUDGE MCNAMARA: Pardon me. Before you answer --
21 let's not talk over one another.

22 Before you answer, Mr. Delman, Mr. George has an
23 objection.

24 Go ahead, Mr. George.

25 MR. GEORGE: The witness is being interrupted.

1 JUDGE MCNAMARA: Okay. I think that you will be
2 able to come back around on that, but the answer was, just
3 as Mr. Cordell posed it, and then you can always come back
4 around and elucidate.

5 MR. CORDELL: Thank you.

6 A. I would say that, with respect to toy-specific
7 experience, under Honors, I list some of my awards that I've
8 won from toy consulting design work, but my work as a
9 consultant, I don't list anything -- actually if you zoom
10 in -- or I'll zoom in with my reading glasses. I apologize.

11 So if you look at -- well, from 1997 to 1999 I
12 specifically state the focus of my work in Twenty Twenty
13 Thinking, the consultancy that I ran during those two years,
14 and then transferred that work over to my work as a designer
15 of product development technologies after that in 1999,
16 where we did quite a bit of toy work and where I also
17 continue to do toy consulting work on the side.

18 Q. I'm going to ask you to focus on my question and
19 answer, if you will.

20 Is it a true statement that there is nothing
21 listed on your CV that shows toy experience within the last
22 20 years, correct?

23 A. I suppose that I did not provide dates for the
24 awards, so you're technically correct because I also did not
25 provide dates for the clients that I've listed, which

1 includes some toy work.

2 Q. You did some toy work back in the '90s, correct?

3 A. No, I've done toy work throughout the 2000s.

4 Q. So you're disputing that you did work, toy work,
5 in the 1990s.

6 A. I did work in the 1990s as well as the 2000s,
7 yes.

8 Q. So the answer to my question is you did toy work
9 back in the 1990s, correct?

10 A. That is some of the toy work that I've done, yes.

11 Q. Now you say you've been an industrial designer,
12 design strategist and inventor for 28 years, correct?

13 A. That's correct.

14 Q. And you said that you're a named inventor on 40
15 plus U.S. patents and applications, correct?

16 A. That's correct.

17 Q. It turns out that most of those are patent
18 applications that never went anywhere, correct?

19 A. As a design consultant, my name is listed under
20 the client's patent application. It's up to the client
21 whether they pursue a patent application, whether it's a
22 successful application or not. I have nothing to do
23 because -- with it, because, as a design consultant, you
24 assign all of your rights to the design work you do to your
25 clients.

1 There are many patent applications where I should
2 have been named as an inventor and wasn't simply because the
3 client decided to only name their particular product
4 managers, for example, and that's up to them to do that.

5 MR. CORDELL: I move to strike as nonresponsive,
6 Your Honor.

7 JUDGE MCNAMARA: I'm going to let Mr. George come
8 back around.

9 MR. CORDELL: Thank you.

10 Q. So it is a fact, sir, that many of the patent
11 applications you were listed on never resulted in issued
12 patents, correct?

13 A. To my knowledge, some of them did not result in
14 issued patents.

15 Q. So you had a patent application on a cat litter
16 box, correct?

17 A. I believe that was -- could you show me that
18 application or call it up on screen to refresh my
19 memory?

20 Q. Sure. Can I have the '740 patent application?

21 Do you recognize this as a published patent
22 application with your name on it, sir?

23 A. I do, yes. So this was for one of my clients,
24 Aspen Pet Products, I did.

25 Q. The idea here is you had a kitty litter box with

1 curved sides, correct?

2 A. That was the focus of the invention that, without
3 corners, if you've ever had a cat or scooped kitty litter,
4 the litter had no place to get stuck so it was much easier
5 to keep clean, yes.

6 Q. You also had a design patent application on a
7 radar detector, correct?

8 A. That's correct. One of our clients for many
9 years was Cobra Electronics. You can call this up on
10 screen, if you like, but I'm sure I'm familiar with it, yes.

11 Q. But it was a design patent rather than a utility
12 patent, correct?

13 A. You'd need to refresh my memory on that. I also
14 had some utility patent applications for Cobra.

15 Q. Can I have the '224 patent, please?

16 A. That is a design patent, yes.

17 Q. And you were fairly active in the, for lack of a
18 better phrase, the toilet paper dispenser art, correct?

19 A. Can you show me what you're referring to? Just
20 so I understand what you mean.

21 Q. Sure. So can I have Mr. Delman's '342 patent,
22 please.

23 Does this refresh your recollection, sir?

24 A. Yes. That was done for, I guess, Kleenex --
25 Kimberly-Clark, yes.

1 Q. And the idea here is that, if you had trifold
2 tissues that were in a little box, but you had a toilet
3 paper receptacle that expected a tube, you had little
4 hangers that went on the side of the box so you can install
5 it on the tube, right?

6 A. It was one of many ideas we developed for
7 Kimberly-Clark to hang a disposable box of wipes, for lack
8 of a better term.

9 Q. Wipes were known before you filed for this
10 patent, correct?

11 A. Well, this particular type of wipe was novel, but
12 wipes in a general sense, yes.

13 Q. Well, this patent isn't limited to any particular
14 kind of wipe, right; it's just trifold wipes in a box,
15 right?

16 A. I'm afraid I don't have much recollection of the
17 specifics of the patent. I'd need to review it to see
18 exactly what it claims.

19 Q. But your invention was to put the two little
20 cardboard flaps on the sides so that you could install it on
21 the receptacle that would normally expect a tube, right?

22 A. I believe from my recollection and looking at
23 this figure, that that was among the innovations of this
24 patent. I don't know that it was the only one without
25 having time to review it.

1 Q. You were also pretty active in the stapler art,
2 right?

3 A. We did quite a lot of work for, not -- was it
4 Avery Dennison? You'd have to show me a patent.

5 Q. Would ACCO Brands sound right?

6 A. I'm sorry?

7 Q. ACCO Brands?

8 A. Yes, uh-huh.

9 Q. Can I have Mr. Delman's '537 patent, please.

10 A. Yes, this is one of many staplers that I helped
11 to develop for SwingArm.

12 Q. And this was a powered stapler, right?

13 A. An electric stapler that ran on batteries, yes,
14 or it might have been rechargeable. I don't recall.

15 Q. And people had made staplers before you came
16 along with the '537 idea, right?

17 A. Yes, they did.

18 Q. And people had made powered staplers before the
19 '537 patent, right?

20 A. I am quite sure they did, yes.

21 Q. Well, let's take a look at it. Can I have column
22 1, lines 15-22.

23 Can you blow that up, Mr. Lee? There we go.

24 So you say right upfront that powered staplers
25 are known to be automatically actuated, right?

1 A. I didn't write this patent. My name was assigned
2 as an inventor to it. But, yes, that is what it says.

3 Q. And the idea is that you had contact switches or
4 photosensors that would sense when the paper was sliding
5 into position, right?

6 A. That is what the Background of the Invention
7 seems to describe, yes.

8 Q. But that was done before you came along, right?

9 A. I don't recall whether there was some new type of
10 switch used in this patent. I have no recollection.

11 Q. Well, you actually tell us that, in fact, it was
12 known for powered staplers to commonly use automatic
13 actuation with contact switches or photosensors, right?

14 A. Yes, though, again, I don't know whether this
15 invention involved any new inventive way of actuating
16 things. I just have no recollection.

17 Q. Okay. Well, you can also put a button on the
18 outside of the stapler and that would trigger the stapling
19 mechanism, right?

20 A. Yes. The patent also discloses that in the
21 Background of the Invention.

22 Q. And then when you get to the Summary of the
23 Invention itself, you say, well, this is new because your
24 trigger is now going to be in the jaws of the stapler
25 itself, right?

1 A. Can you scroll down and let me read what it says?
2 Because I certainly don't remember it.

3 Q. Sure. Can we scroll down a few lines, Mr. Lee?

4 A. So where are you reading from?

5 Q. Under the Summary of the Invention, the invention
6 provides a powered stapler configured to be held in a single
7 hand of the user that can be actuated by the user squeezing
8 his or her hand while holding the stapler, right?

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

10 Q. What you did is you moved the switch from the
11 photosensor inside to the hinge on the jaws of the stapler,
12 right?

13 A. That simple description sounds to be accurate,
14 but, again, without reading the rest of this patent and what
15 it claims, I honestly don't remember.

16 Q. Well, let me have claim 1. So here we have a
17 hand-actuated powered stapler, right?

18 A. Yes.

19 Q. And it's electrically operable staple drive
20 mechanism. That was old, right?

21 A. In a general sense, an electrically operable
22 staple drive mechanism was not new.

23 Q. The housing, that was old, right?

24 A. I wouldn't call a housing to be novel, yeah.

25 Q. A trigger member, there had to be triggers on an

1 electric stapler, right?

2 A. I am assuming there were such things before.

3 Q. So what you did here is the stapler was actuated
4 by creating relative movement between the trigger member and
5 the housing, right?

6 A. I think what this patent is describing and to the
7 best of my memory, which is still pretty good but this is
8 some years ago, I think what this patent is describing is a
9 method of actuating the stapler by squeezing a soft flexible
10 surface that was formed as part of the grip of the stapler.

11 Q. Well, it says it's actuated by creating relative
12 movement between the trigger member and the housing, right?
13 You squeeze the jaws a little bit and that fired the
14 stapler.

15 A. No, that isn't how this stapler worked. The jaws
16 did not squeeze. I remember that distinctly.

17 Q. Okay.

18 A. This stapler did not have moving jaws. What this
19 stapler did, it had a squeezable surface. And, again, I did
20 not write the patent, I had nothing to do with the patent
21 other than assigning my name to it.

22 Q. But you admit --

23 A. So what this stapler did was it had a squeezable
24 grip, which allows the user to actuate it by giving the
25 housing a squeeze on some soft rubber, which at the time --

1 at least we believed to be and I believe that ACCO believed
2 and perhaps the Patent Office as well -- that that was a
3 fairly novel way to actuate a stapler.

4 Q. So in your view that was a perfectly valid
5 patent, right?

6 A. I have no reason to believe it's not. Has it
7 been invalidated? I have no knowledge of that.

8 Q. But you will agree with me that staplers were
9 known, yes?

10 A. Absolutely, yes.

11 Q. And powered staplers were known, yes?

12 A. Yes.

13 Q. And buttons on the side of the powered stapler to
14 actuate the mechanism was known, right?

15 A. I'm going to assume they were, but I don't know
16 other than to make that assumption.

17 Q. Would you like me to take you back to the
18 Background of the Invention that reads --

19 A. I'll trust you on it.

20 Q. Okay. So your invention was moving that actuator
21 to you, say, a soft surface on the top of the stapler,
22 right?

23 A. No. My recollection is correct, my invention or
24 part of the invention -- again, I don't know what else this
25 might claim -- this particular patent -- was creating a

1 squeezie stapler, for lack of a better description.

2 The idea that you can hold a stapler in your hand
3 and not press a button that's localized or have to find that
4 button that's localized, if you have arthritis or otherwise
5 physically impaired in your hand, you can just hold the
6 stapler and give the entire grip a little squeeze and it
7 works. And that, to my recollection, was a novel thing back
8 in the day.

9 Q. Have you ever seen one of these on the market?

10 A. Yeah. I know it sold quite well for many years.

11 Q. Now you'll acknowledge, sir, that when we take
12 existing elements and combine them in a new way, it is often
13 patentable, correct?

14 A. I would say it is sometimes patentable. I don't
15 know about often, but sometimes, sure.

16 Q. There was a Commissioner of Patents back in 1900
17 that resigned because everything that could have been
18 invented had. Are you aware of that?

19 A. I've heard that story, yes.

20 Q. So there is nothing new under the sun and the
21 vast majority of inventions are combinations of known
22 elements, correct?

23 A. I'm not able to say that, but I know that some
24 inventions are new ways of combining old things.

25 Q. Now you tell us that you are an airgun

1 enthusiast, right?

2 A. Yes.

3 Q. What does that mean?

4 A. I've been shooting airguns since I was 10, 11
5 years old. I'm now 57. I own 35 plus airguns. I've taught
6 my kids to shoot. We regularly shoot them. I maintain
7 them. I enjoy them. I love target shooting. I guess that
8 makes me an enthusiast, I don't know.

9 Q. Do you take the guns apart, modify them, and put
10 them back together?

11 A. I wouldn't say I've modified my airguns. I've
12 modified NERF guns, but I've taken some airguns apart and
13 maintained them and replaced broken parts and put them back
14 together, yes.

15 Q. You've told us that you are a NERF Blaster
16 Modder, right?

17 A. My boys and I went through a phase, yes, when
18 they were big NERF enthusiasts of modding NERF guns, yes.

19 Q. But you've never had any professional experience
20 with airguns, correct?

21 A. Professional experience... I'm not sure what you
22 mean.

23 Q. You didn't do it as part of your master's degree
24 at Pratt, correct?

25 A. That is correct.

1 Q. You've never been hired by an airgun company to
2 redesign one of their products, correct?

3 A. That's correct.

4 Q. You've never been hired by a toy company to
5 modify a blaster product, correct?

6 A. Well, I have described some work on projectile
7 launching devices that I've done for toy companies over the
8 years as well as using projectile launchers as a means to
9 create different types of launchers, such as a diabetes
10 lancing device.

11 Q. Okay. But a diabetes lancing device is not a
12 blaster; you would agree with that, right?

13 A. No, but this particular one started off as a NERF
14 Maverick and some other NERF gun, I recall, yeah.

15 Q. And you told us about a group Stomp product to
16 launch rockets. Do you remember that?

17 A. Team Stomp Rockets, yes.

18 Q. And the Team Stomp Rockets was a toy, but it was
19 not a blaster, correct?

20 A. It was a projectile launcher.

21 Q. But it was not a blaster, correct?

22 A. It was not a blaster gun, no.

23 Q. Your client would have been very upset if they
24 had found children aiming those Stomp Rockets at each other,
25 correct?

1 A. I would imagine the client prefers them to be
2 launched at the sky rather than another child, yes.

3 Q. Now what is Boyle's law, Mr. Delman?

4 A. You're asking me to go back to AP physics, and at
5 the moment I wouldn't be able to recite what that is for
6 you.

7 Q. Okay. What is a pneumatic force?

8 A. In a general sense, I would say that a pneumatic
9 force is a force brought about by the pressurization of a
10 gas, whether that would be air or some other material.

11 Q. So earlier in this case you took the position
12 that the accused devices didn't infringe because they didn't
13 apply a direct force to the ammunition. Do you remember
14 that?

15 A. Could you show me what in particular you're
16 referring to? Was there testimony you're speaking of?

17 Q. I can refresh your recollection, sure.

18 Can I have Mr. Delman's transcript, which is
19 CX-1644, at page 72, 20, through 73, 2.

20 A. Could you zoom out a bit so I can read more of
21 the entirety of this testimony?

22 Q. You can, but does that refresh your recollection
23 that you took the position that the accused devices don't
24 apply a direct force to the ammunition?

25 A. If you can just give me one moment to review,

1 please. Thank you.

2 MR. GEORGE: Your Honor?

3 JUDGE MCNAMARA: Pardon me. Go ahead,
4 Mr. George.

5 MR. GEORGE: Okay. Number one, I object that
6 it's way beyond the scope of direct. Number two, this claim
7 14 that I think this is going, we stipulated that we
8 infringe that. We're not maintaining this noninfringement
9 position anymore. We did this to streamline the case and he
10 didn't offer any opinion on it.

11 JUDGE MCNAMARA: Mr. Cordell?

12 MR. CORDELL: Your Honor, this is a credibility
13 issue, plain and simple, regardless of whether it is a live
14 infringement issue or not. This witness told us that he
15 didn't know what a pneumatic force is, and I'm entitled to
16 develop that.

17 JUDGE MCNAMARA: I'm going to allow the
18 testimony, but, again, it's something I'm going to consider
19 when I've seen all of the testimony.

20 A. Okay. So could you please repeat the question
21 for me?

22 Q. Let me just try directly, Mr. Delman. You don't
23 know what a pneumatic force is, correct?

24 A. I just told you what I believe a general,
25 high-level definition of a pneumatic force would be.

1 Q. So you're telling us today you do know what a
2 pneumatic force is.

3 A. I'm not sure what you're asking. Yes, I did
4 respond to your question.

5 Q. Okay. So can I have Mr. Delman's transcript at
6 page 21, lines 13 through 17. This is CX-1644.

7 You were asked:

8 Question. Okay. But as an expert you wouldn't
9 --

10 A. Can you put this on screen for me? I'm sorry.

11 Q. So at page 21, lines 13 through 17.

12 Question. Okay. But as an expert, you wouldn't
13 know what pneumatic force means?

14 Answer. I know what air pressure is. Whether
15 pneumatic force is a term that implies something different
16 than air pressure, I would not know.

17 That was your testimony, correct, sir?

18 A. Could you zoom out? Could you take that off the
19 screen and let me just look at the entirety of the
20 testimony?

21 Q. Mr. Delman, Mr. George is here to do that. He is
22 here to protect that record. So if he thinks that I am not
23 showing you enough, he will invoke the rule of optional
24 completeness. It's a very --

25 A. Okay. I don't recall exactly the context of this

1 quote without looking further at the transcript. I state
2 that I know what air pressure is. Whether the question --
3 whether it was an issue of the term pneumatic force and what
4 the attorney who was asking the question was that I wasn't
5 sure what he meant, and that's what I was saying.

6 I'm not saying that I don't understand what
7 pressure brought about by compressing gas is. I have filled
8 the tires in my car many times. I've filled the tanks in my
9 airguns many times. I understand what that kind of pressure
10 is. This is referring to not understanding what the
11 attorney was asking me with respect to that term.

12 MR. CORDELL: Your Honor, I move to strike. My
13 question was simply whether that was his testimony.

14 JUDGE MCNAMARA: Any response to that,
15 Mr. George?

16 MR. GEORGE: I'm sorry. I have to admit I just
17 was looking at the transcript.

18 JUDGE MCNAMARA: Sure. The question simply was
19 whether or not the testimony was accurate, and I think
20 Mr. Cordell was asking Mr. Delman to respond to whether the
21 testimony was accurate, not to go into the explanation as to
22 what Mr. Delman understood or did not understand the
23 questioning to mean at the time.

24 MR. GEORGE: I'm sorry, Your Honor. Your
25 question?

1 JUDGE MCNAMARA: Mr. Cordell moved to strike
2 anything beyond essentially was this your testimony.

3 MR. GEORGE: I don't care.

4 JUDGE MCNAMARA: You'll be able to come back
5 around.

6 MR. GEORGE: Of course.

7 A. If you're asking me, Mr. Cordell, if those are my
8 words, I'm sure that that transcript is accurate. Though,
9 again, I think the words you have on screen are within a
10 larger context, as I've just described.

11 Q. Mr. Delman, you're a lawyer, correct?

12 A. No. I haven't been a lawyer for 28 years.

13 Q. Well, you were trained as a lawyer, correct?

14 A. Way back in 1991 I believe was my graduation.

15 Q. You understand the seriousness of taking an oath,
16 correct?

17 A. Yes, I do.

18 Q. You understand that mincing words in highly
19 technical fields can be a dangerous endeavor, correct?

20 A. I would imagine it could be, but I don't believe
21 I'm doing so.

22 Q. You understand that we all need to rely on your
23 expert testimony for the purposes of these cases, right?

24 A. Yes.

25 Q. So when we ask you whether or not you know what

1 pneumatic force means and you give us an answer, we're
2 entitled to rely on that, correct?

3 A. You are.

4 Q. Let's talk about Clear Spheres. Now you gave us
5 an opinion that a product called Clear Spheres or Jelly
6 Marbles serve as ammunition for a launcher, right?

7 A. Yes.

8 Q. And that was the product that Mr. Spangler was
9 demonstrating, correct?

10 A. Yes, that's correct.

11 Q. Now Mr. Spangler actually sold a potato gun,
12 right?

13 A. I don't recall what gun, if any, Mr. Spangler
14 sold. You mean through Steve Spangler Science?

15 Q. Let me show you your expert report, sir.

16 Can I have paragraph 173 where you write -- did
17 you write your expert report, sir?

18 A. I wrote it in conjunction with counsel, yes.

19 Q. With Mr. George or with the Kirkland lawyers?

20 A. I believe Mr. George was involved as well, but
21 with the Kirkland team as well.

22 Q. Okay. The first sentence in paragraph 173 is the
23 Steve Spangler Science Potato Gun Launcher, which I will
24 refer to as the Spangler Gun Launcher, was offered for sale
25 in the United States. Do you see that, sir?

1 A. I do. I do, yes.

2 Q. Does that refresh your recollection that what
3 Mr. Spangler was selling was a potato gun, correct?

4 A. That is what was sold in the United States as of
5 2003, yes.

6 Q. And what he did is he took the tube off of the
7 potato gun and he used that as essentially a very large
8 straw with which to shoot, to launch Clear Spheres. Is that
9 your testimony?

10 A. I think that's a high-level accurate description,
11 yes.

12 Q. Well, you're relying just on the tube, not on the
13 plunger or the other parts of the potato gun, correct?

14 A. That's correct.

15 Q. And when you take a Clear Spheres and you hydrate
16 it by soaking it in water, how big does it get?

17 A. It gets -- I forget the exact dimensions. You
18 would need to refresh my memory from my report as to how
19 large a Clear Spheres grows if you leave it in for an
20 extended period of time. But, of course, if you leave it in
21 for a short amount of time it grows less.

22 Q. So the answer is you don't know.

23 A. The answer is it grows across a large range.

24 Q. What is that range?

25 A. I don't know what you mean, and I certainly don't

1 recall offhand the maximum growth of the Clear Spheres. If
2 you would like to refresh my memory, that would be great.

3 Q. Would it surprise you that it will grow to over
4 20 millimeters, sir?

5 A. Again, if you showed me in my report, if that's
6 what my report says, it wouldn't surprise me.

7 Q. Can I have Mr. Delman's deposition? And we'll go
8 to page 77, at lines -- I'm sorry, 78 -- lines 2 through 10.

9 Does this refresh your recollection, sir, that
10 the Clear Spheres grow to at least 22 millimeters?

11 A. It does, yes.

12 Q. Now what we're talking about here is a tube,
13 right? Is that correct?

14 A. Yes.

15 Q. You didn't bring the tube with you today,
16 correct?

17 A. I don't know.

18 Counselor, do we have the tube with us?

19 MR. GEORGE: The Kirkland & Ellis folks were
20 holding those and I thought they had left them here. When I
21 got here today, none of it was here. So we have sent them
22 an email asking them to get them here.

23 JUDGE MCNAMARA: So I guess they will come when
24 they come.

25 MR. CORDELL: We can all imagine it, right, sir?

1 JUDGE MCNAMARA: Just a minute, Mr. Cordell.

2 MR. SMITH: If I may, Your Honor, Dan Smith for
3 Prime Time Toys.

4 We just worked out a stipulation with the
5 Splat-R-Ball people. They wanted a stipulation about the
6 use of the prior art samples, and we just worked that out.
7 So I suspect we'll have them here Monday morning.

8 JUDGE MCNAMARA: Mr. Cordell?

9 MR. CORDELL: Well, it makes it a little less
10 useful when I'm doing my cross-examination, but we'll work
11 with what we have.

12 JUDGE MCNAMARA: I think I can imagine what the
13 tube looks like because I've seen pictures of it, so I have
14 a pretty good imagination based on recall.

15 MR. CORDELL: It turns out that there are things
16 there that apparently don't meet the eye, but let me
17 proceed.

18 JUDGE MCNAMARA: I'm all for seeing the exact
19 object.

20 Q. Mr. Delman, the tube we're talking about does not
21 have a compression chamber, correct?

22 A. It does not. It is a simple tube. It does not
23 have a separate component that we would call a compression
24 chamber.

25 Q. No, sir, it doesn't have a compression chamber,

1 correct?

2 A. Correct.

3 Q. The tube does not have a piston, correct?

4 A. Correct.

5 Q. It does not have a spring, correct?

6 A. Correct.

7 Q. It is a single diameter tube throughout, correct?

8 A. Correct.

9 Q. There are not two different diameters of tubes
10 present there, correct?

11 A. Correct.

12 Q. Now you tell us that that tube has a feed
13 chamber, correct?

14 A. If you'd like to refer me to testimony on that.

15 Q. Sir, do you recall your opinions? It is your
16 opinion that the tube has a feed chamber, correct?

17 MR. GEORGE: Your Honor, I'm going --

18 JUDGE MCNAMARA: Go ahead.

19 MR. GEORGE: I'm going to object for two reasons.

20 One, it's beyond the scope, and two, again, to streamline
21 this case so we could be here today and not Monday, we're no
22 longer taking the position that claim 5 is anticipated.
23 That's what this relates to. And he gave no opinion on
24 this.

25 JUDGE MCNAMARA: Go ahead, Mr. Cordell.

1 MR. CORDELL: It's a credibility issue,
2 Your Honor. He told us point blank that it has a feed
3 chamber and I'm entitled to expose that.

4 JUDGE MCNAMARA: I'm going to allow it in and it
5 is going to be considered in the context of all of the
6 evidence and the weight of the evidence.

7 Q. Mr. Delman, it is your opinion that the simple
8 tube used by Mr. Spangler has a feed chamber, correct?

9 A. Yes. It was my opinion as well as Mr. Spangler's
10 opinion, who gave testimony to that effect.

11 MR. CORDELL: Your Honor, I move to strike
12 everything except correct.

13 JUDGE MCNAMARA: Fair enough. I will allow that
14 to be stricken.

15 Again, Mr. Delman, your counsel will have an
16 opportunity to come back around.

17 THE WITNESS: Yes. Thank you.

18 Q. So you showed us RDX-3.62, if I can have that
19 brought up, and I believe it was an animation.

20 Do you recall this, Mr. Delman?

21 A. That is a video of me launching Clear Spheres
22 through the tube, yes.

23 Q. Where in this tube is the feed chamber?

24 A. The feed chamber -- well, you're quite right, it
25 would be nice to have one here to demonstrate.

1 The feed chamber is right where I've pushed the
2 SAP ammunition into the front of the tube with my finger
3 into a firing position, and I then put it into my mouth and
4 blow and launch it from that firing position.

5 Q. You weren't holding the SAP ammunition in your
6 mouth, right?

7 A. No, I was not.

8 Q. So you say the feed chamber is just a part of the
9 tube; is that right?

10 A. The feed chamber is at the end of the tube into
11 which I feed the SAP ammunition and it is pushed into place
12 into a firing position. I then place the tube in my mouth
13 and I blow through it to launch the ammunition.

14 Q. There's no difference in the structure of the
15 tube, correct? It is homogenous throughout.

16 A. That is correct.

17 Q. And it is just a tube, right?

18 A. It's a tube.

19 Q. Now the way this works is you take the Clear
20 Spheres and you put them in water, right?

21 A. To hydrate them, yes.

22 Q. And they grow the longer you leave them in the
23 water; is that right?

24 A. That is correct.

25 Q. And if you hydrate them according to the

1 instructions they grow to at least 22 millimeters, correct?

2 A. Well, the instructions tell you to experiment
3 with your hydration such that you may -- and as was
4 described in various ways during my earlier testimony --
5 you're taught to hydrate them to the degree you want to to
6 experiment with their size, their durability, et cetera. If
7 you leave them in to the full extent, then, yes, they grow
8 to 22. If you take them out after a shorter period of time,
9 they may have only grown to 10, for example.

10 Q. The instructions tell you how to fully hydrate
11 the Clear Spheres, correct?

12 A. Can you show me the instructions, please, that
13 you're referring to?

14 Q. Can you answer my question, sir? Do you know?

15 A. I'd like to see the instructions you're referring
16 to so I can read exactly what they describe.

17 Q. When they are fully hydrated they grow to at
18 least 22 millimeters, correct?

19 A. When fully hydrated that is correct, yes.

20 Q. The tube that we're talking about here was only
21 15 millimeters, correct?

22 A. I'll take your word on it. I forget what the
23 exact diameter was, but that sounds about right.

24 Q. You don't know?

25 A. I don't recall exactly. I'll assume your

1 dimension is accurate.

2 Q. So in order to get the spheres to fit into the
3 tube, you had to partially hydrate them, correct?

4 A. That's correct. I only partially hydrated them
5 to fit in the tube.

6 Q. And you showed us at 3.77 a demonstration of what
7 you say were Clear Spheres that you put through a Daisy
8 AirSoft gun, correct?

9 A. Is that the exhibit that shows the video of me
10 shooting them out of the AirSoft gun?

11 Q. Can we bring that up?

12 A. Yes, that is correct. I hydrated Clear Spheres
13 and I put them into the AirSoft gun.

14 Q. The ammunition that the Daisy AS470 shoots is
15 6-millimeter AirSoft ammunition, correct?

16 A. That is correct.

17 Q. So each of the little yellow balls, the little
18 plastic balls, are 6 millimeters across, correct?

19 A. That's correct.

20 Q. And it is your sworn testimony that you took
21 fully hydrated Clear Spheres at 22 millimeters and ran them
22 through a barrel that was expecting 6 millimeter ammunition,
23 correct?

24 A. No, that wasn't my testimony. I testified that I
25 hydrated Clear Spheres. It says right on the slide. I

1 hydrated Clear Spheres to 6 millimeters and shot them from
2 the AS470.

3 Q. You didn't tell us how long you hydrated the
4 Clear Spheres, did you.

5 A. I don't recall if it was in my report or not. On
6 this particular slide I didn't mention the time, no. I
7 mentioned the dimension.

8 Q. You didn't mention that the Clear Spheres had
9 barely grown at all, correct?

10 A. I don't believe that's an accurate statement so I
11 didn't mention it.

12 Q. Well, let's try a little experiment. First of
13 all, what happens if you put a 22-millimeter Clear Spheres
14 into the Daisy AirSoft gun?

15 A. I haven't experimented with it so I couldn't tell
16 you.

17 Q. As an expert, you can't imagine that a
18 22-millimeter round will gum up a 6-millimeter barrel?

19 A. I would imagine it would not travel through the
20 gun very smoothly. I haven't experimented to see where it
21 might break up or -- but, yes, it would not fire the way the
22 6-millimeter shot fired.

23 Q. In fact, it wouldn't even enter the chamber, if
24 you want to call it that, on the AirSoft gun, correct?

25 A. I don't remember what the aperture size is, but

1 you're likely correct.

2 Q. You would have a big mess on your hands if you
3 tried to run a hydrated Clear Spheres through an AirSoft
4 gun, correct?

5 A. A fully hydrated Clear Spheres would probably not
6 operate properly, no.

7 Q. And, in fact, you couldn't operate it for the
8 rest of the day because you would gum up the entire barrel,
9 correct?

10 A. I would assume it would not operate.

11 Q. Okay. Let's try a little experiment. I've got
12 my caliper here. It starts out at -- well, a little less --
13 well, about 5 --

14 A. I don't think you're squeezing it really.

15 Q. I'm not.

16 A. Why don't you -- you know how to --

17 Q. I was expanding it. So it starts out at 4.66.
18 Do you see that?

19 A. I didn't see it zeroed before, but I trust you.

20 Q. Okay. I can zero it again, if you'd like, but --

21 A. I think it's always just a good thing to do if
22 we're going to do a measurement like this.

23 Q. Okay. It's pretty much zero.

24 A. Thank you.

25 Q. Do that -- well, 4.64 now.

1 A. Okay.

2 Q. All right? Now let me --

3 MR. CORDELL: Your Honor, in-court experiments
4 are never recommended but...

5 JUDGE MCNAMARA: Of course you're not asking
6 permission. It's just going to be an apology if something
7 goes wrong.

8 MR. CORDELL: It's a demonstrative at this point.
9 Let's just see how we do.

10 Q. Let me get my trusty phone, and let's try
11 something modest. Let's see if we can hydrate it for 30
12 seconds. What do you say?

13 A. Okay. I'll time you as well as you. Are you
14 hydrating it now?

15 Q. Now. I'll put the clock on the ELMO. The tough
16 part about this is getting the water out of it.

17 A. They are slippery.

18 Q. All right. So there's 30. A little longer than
19 30 because I couldn't get it out fast enough.

20 Okay. So let's see if we were able to keep it
21 under 6 millimeters. So, no, it's at 6.39. So 30 seconds
22 and I'm already out of spec.

23 Mr. Delman -- may I approach the witness?

24 JUDGE MCNAMARA: Yes.

25 Q. -- I want you to feel this Clear Spheres and

1 describe it for Her Honor.

2 A. It is on the floor. Let me see where it went.

3 Here it is.

4 It's firm. It has a bit of squishability to it,
5 but it's fairly firm.

6 Q. Would you want to shoot one of your children with
7 that Clear Spheres?

8 A. I wouldn't hesitate to do so from an airsoft gun,
9 to be honest with you. Perhaps other parents would decide
10 otherwise, but I wouldn't be particularly worried about
11 this.

12 MR. CORDELL: Your Honor, may I approach?

13 JUDGE MCNAMARA: Yes.

14 Q. I think the word you were looking for,
15 Mr. Delman, is that the Clear Spheres is hard, correct?

16 A. I said firm. In other words, in comparison to
17 one that's been hydrated for a longer period of time, you
18 would find it to be significantly softer, but, as I
19 discussed earlier, that can all be readily adjusted. How soft
20 it gets when it grows to only 6 millimeters is something
21 that Dr. Reitman has assured me can be readily adjusted so
22 that it could be soft at 6 millimeters.

23 MR. CORDELL: Move to strike, Your Honor. I
24 asked just whether or not he would describe it as hard.

25 JUDGE MCNAMARA: If you could just answer the

1 question, we'll move along a little bit faster that way.

2 Q. And, in fact, to stay under 6 millimeters, you
3 would have to hydrate it for even less than the 30 seconds
4 that I did, correct?

5 A. According to your current hydration, it would
6 seem that it grew to over 6 millimeters in a very short
7 period of time of 30 seconds, yes.

8 Q. So when we go back to your demonstration at 3.77,
9 it seems pretty likely, sir, that you barely hydrated those
10 Clear Spheres, correct?

11 A. I don't recall how the experiment proceeded. I
12 see what you've just done, but I don't recall what I did at
13 the time.

14 Q. So this is the experiment that you showed Her
15 Honor to suggest that you could simply take Clear Spheres
16 and put them in an AirSoft gun, correct?

17 A. That is correct.

18 Q. But, in fact, you had to have been hyper-focused
19 on how little time you hydrated those parts before you put
20 them into the gun, correct?

21 A. Well, I was focused on making sure that it would
22 fit into the gun, yes.

23 Q. Mr. Delman, did you hydrate them at all? And I
24 remind you you're under oath.

25 A. Absolutely. I wouldn't say that I hydrated Clear

1 Spheres if I didn't hydrate them.

2 Q. And --

3 A. And you can even see on the video from the size
4 of the sphere that it is larger than not hydrated.

5 Q. Well, what we see, there are just a couple of
6 rounds that come out and they bounce right back at you, kind
7 of like Ralphie with his BB gun trying to shoot his eye out,
8 right?

9 A. If you notice I'm shooting it at an Aeron chair.
10 If you're familiar with an Aeron chair, it's essentially a
11 trampoline, so it will bounce. Many things will bounce
12 right off an Aeron chair.

13 Q. But it's a trampoline made of mesh, correct?

14 A. Extremely tight mesh, but, yes, it is a mesh
15 surface.

16 Q. And you would expect if these had been hydrated
17 so they were soft they would have shredded when they hit the
18 mesh, correct?

19 A. No, because you remember I have video showing a
20 larger hydrated Clear Spheres being launched out of the tube
21 and also bouncing off the chair in a very similar fashion.
22 They didn't fall apart.

23 Q. So the reality is these patents require you to
24 have soft ammunition, correct?

25 A. Yes, they do.

1 Q. And what you demonstrated for all of us was
2 taking a very hard Clear Spheres and running it through an
3 airsoft gun, correct?

4 A. I can tell you that the one you've just handed to
5 me was quite firm. I don't recall that the ones that I
6 utilized in that airsoft gun during that videotaping were
7 that firm.

8 Q. Let's talk about Spit Balls. Now it's your
9 opinion that Spit Balls are also hydrated ammunition, right?

10 A. Yes.

11 Q. And you showed us some packaging from Spit Balls
12 during your direct testimony.

13 Can I have RDX-364?

14 And you talked about Spit Balls being a
15 projectile launching system, right?

16 A. Yes.

17 Q. And you were able to somehow decode the image on
18 the front to suggest that some of the white images might be
19 a straw, right?

20 A. I would disagree with your terminology,
21 counselor. I don't think I decoded it. I think I described
22 it as being a straw being held in a hand of a child pointing
23 straight at you and launching a Spit Ball straight at you.

24 Q. And when you -- did you make this slide, sir?

25 A. I worked with counsel to make these slides. I

1 didn't do the actual graphic design work, so to speak.

2 Q. When you made the slide, you put the arrow for
3 projectile launcher right over a label, right?

4 A. No. I'm pointing -- where the arrow is pointing
5 is the upper surface of the tube or straw that's in the
6 child's mouth.

7 Q. You put the arrow right over the label that says
8 "fun to throw," correct?

9 A. Ah. The arrow crosses over that label, yes.

10 Q. You weren't trying to hide that label from Her
11 Honor, were you?

12 A. No, I was not.

13 Q. Can I have the original exhibit, which I think is
14 RDX-1?

15 Without the arrow, we can clearly read "fun to
16 throw," correct?

17 A. That is what it says, yes.

18 Q. Can we go back to RDX-364? And let's look at the
19 next page that you showed us, which is RDX-365, right?

20 A. Yes.

21 Q. And then you show us the back of the Spit Balls
22 packaging on the right side. Do you see that?

23 A. I do, yes.

24 Q. You offered us a lot of testimony about what that
25 means, correct?

1 A. I did.

2 Q. Did you make this slide too, sir?

3 A. Again, I worked with counsel to develop the
4 slide, yes.

5 Q. Now can I have RX-02? Can I have the top of that
6 exhibit?

7 So when we look at the full label of RX-002, what
8 is the first thing that's said on the back of the package,
9 sir?

10 A. "See how far you can throw them!"

11 Q. Somehow that didn't make it to your slide 3.65,
12 right?

13 A. I don't recall. I believe I just had the text in
14 the center there, yes.

15 Q. I can take you back to 365, back to your slide.
16 There you don't say anything about how far you can throw the
17 Spit Ball, right?

18 A. No. It doesn't say the word "throw" in the
19 excerpt which I show there.

20 Q. Now these devices, when they are fully hydrated,
21 grow to at least 15 millimeters, right?

22 A. Again, without referencing my report, I'll take
23 your word for it.

24 Q. And you got to have an awfully big straw if
25 you're going to try to launch one in the traditional

1 spitball sense, correct?

2 A. Well, if you could please call that back up for
3 me in a sec?

4 So the instructions, which I did refer to earlier
5 today, tell the child how to make Spit Balls, and it
6 discusses the more water you add, the bigger they get, the
7 bigger they are, the quicker they explode, smaller will
8 bounce more and last longer. And it instructs the child,
9 teaches, that you can experiment with different ratios of
10 water to make spitballs that best suit your fancy.

11 So it depends on the size of straw or tube you
12 have. For example, I have straws at home which we use for,
13 I don't know if you're familiar with boba tea, that has
14 tapioca beans in it, those straws are, I would guess, at
15 least 15 millimeters in diameter. If you were using a straw
16 like that, you might hydrate it to its full amount. If the
17 child was using a thinner straw, they would hydrate it less.

18 Q. So your expectation here is that the users here
19 are sufficiently skilled to titrate the hydration of these
20 to a particular receptacle; am I understanding you
21 correctly?

22 A. The instruction, the teaching of it is to hydrate
23 it to the needs that you wish it to fulfill. I would guess
24 that its diameter is amongst those.

25 Q. So you agrees with me that, in order to shoot one

1 of these out of a straw, you would have to partially hydrate
2 it, fair?

3 A. Yes.

4 Q. And if you were going to somehow launch a Spit
5 Ball out of an airsoft gun, you'd have to really partially
6 hydrate it, right?

7 A. I don't recall what I -- yes, you would have to
8 partially hydrate them, yes.

9 Q. But, I mean, we'd have to go through the same
10 exercise we did with Clear Spheres. You'd have to hydrate
11 it for just a few seconds, right?

12 A. I don't recall how quickly the Spit Balls grow
13 and what -- how long it would take them to grow to 6
14 millimeters.

15 Q. Okay. Now the claims require a projectile
16 launcher, correct?

17 A. Yes.

18 Q. And in your opinion -- well, first of all, Spit
19 Balls were never sold with a launch of any kind, correct?

20 A. That's correct.

21 Q. And the claim requires ammunition configured for
22 use with a projectile launcher, right?

23 A. Well, it speaks of using them with a projectile
24 launcher, that they are to be used with a projectile
25 launcher, but it wasn't sold with one.

1 Q. Right. But I want to confirm, the claim, claim
2 1, begins, ammunition of the '282, ammunition configured for
3 use with a projectile launcher.

4 A. Yes.

5 Q. And Her Honor found that that was a limiting part
6 of the claim. Are you aware of that?

7 A. Yes.

8 Q. Now you say that a projectile launcher could be a
9 spoon in this context, right?

10 A. The patent describes that a projectile launcher
11 can be most anything, as I discussed earlier.

12 Q. Can you just answer my question, sir? You say a
13 projectile launcher can be a spoon, correct?

14 A. It could be a spoon.

15 Q. You say a projectile launcher could be a
16 catapult, correct?

17 A. It could be a catapult.

18 Q. You say it could be a slingshot, correct?

19 A. It could be a slingshot.

20 Q. You say it could be a bow and arrow, correct?

21 A. It could be a bow and arrow.

22 Q. It could be David's sling from the Bible, right?

23 A. Yes, I suppose it could.

24 Q. It could be a ping pong racket, correct?

25 A. A ping pong what, I'm sorry?

1 Q. Racket?

2 A. I suppose that could be used to launch, sure.

3 Q. Do you know what a Jai alai cesta is?

4 A. I used to live in South Florida. I'm familiar
5 with them, yes.

6 Q. So a launcher for these products could be a Jai
7 alai cesta, right?

8 A. It could.

9 Q. And, importantly, Mr. Delman, a launcher in the
10 context of these patents could be a human hand, correct?

11 A. A human hand could launch or throw one of these,
12 sure.

13 Q. The package on the Spit Balls says "fun to
14 throw," right?

15 A. It does.

16 Q. And on the back side it says, "see how far you
17 can throw it," right?

18 A. It does.

19 Q. You cite the ThinkGeek website as part of your
20 analysis in this case, right?

21 A. Yes. Though if you've got a specific example or
22 citation, if you could please call it up to refresh my
23 memory.

24 Q. Can I have paragraph 398 of Mr. Delman's report?

25 Do you see about the middle of the paragraph you

1 talk about ThinkGeek further teaches, if you throw them
2 gently, they will bounce. If you throw them hard enough,
3 they will explode into mushy pieces. Does that refresh your
4 recollection, sir?

5 A. Yes.

6 Q. And that's your opinion, correct?

7 A. I'm citing the ThinkGeek website, yes.

8 Q. Well, more than that, sir, you cite it for the
9 proposition that you can throw them hard or you can throw
10 them softly, right?

11 A. Yes.

12 Q. Are these Spit Balls toxic, sir?

13 A. My understanding is that you can -- children or
14 you -- can swallow them without any harm. They are
15 nontoxic.

16 Q. Isn't it a fact, sir, that these are sold in
17 Europe only in a fully hydrated form because they may cause
18 harm to children?

19 A. I am not personally aware of the European
20 regulations around them.

21 Q. You just don't know one way or the other.

22 A. I do not know that, no.

23 Q. Have you ever eaten one?

24 A. I'm trying to remember if I did just for the sake
25 of saying that I've tried one. I don't recall whether or

1 not I did. I may have.

2 Q. What is the chemical that they are made of?

3 A. They are made of a plastic polymer.

4 Q. Which one?

5 A. Polyacrylamide, I believe, but, again, without my
6 report or the Material Safety Data Sheet, I wouldn't recall
7 exactly.

8 Q. Now you told us about two airgun reference,
9 correct, Peev and Nagayoshi, right?

10 A. That's correct.

11 Q. Now Peev describes an electric airsoft gun,
12 correct?

13 A. Yes.

14 Q. And one of their objectives was to mimic the
15 functioning and manipulation of a real firearm, correct?

16 A. That was among the objectives in addition to
17 others, including airsoft fun games.

18 Q. The technical nature of the Peev invention or
19 Peev disclosure indicates that its purpose is to, quote,
20 bringing the way of functioning and manipulation of the
21 electric airsoft gun as close as possible to the way a
22 functioning and manipulation of a real firearm, right?

23 A. If you'd like to bring up the patent, I would
24 like to review what it says. I am sure it does say what you
25 have just read, but I'm also sure that that is not the only

1 thing it says. I know it does refer to having fun playing
2 airsoft games.

3 Q. Okay. So let's bring up RX-557 at page 6.

4 Can you confirm, sir, that Peev wants to make a
5 realistic airsoft gun?

6 A. Yes, that is generally the function of operating
7 an airsoft gun is to create a realistic operational
8 experience with the toy.

9 Q. To make it seem as much like an assault weapon as
10 you possibly could, fair?

11 A. Without one critical and unfortunate aspect of an
12 assault weapon, which is that it isn't as dangerous as an
13 assault weapon or --

14 Q. Peev does not disclose launching a soft
15 projectile made of super absorbent polymers, correct?

16 A. That's correct.

17 Q. Your direct presentation in summary a couple of
18 times with Mr. George, you said, well, the Peev disclosure
19 includes all of the elements of the claims. Are you aware
20 of that?

21 A. All of the elements aside from the super
22 absorbent polymer, yes.

23 Q. So that's an important qualification, right? We
24 need to make sure that your testimony is clear. You do not
25 have the opinion that Peev includes the super absorbent

1 polymer limitations, correct?

2 A. That is correct.

3 Q. So to the extent that in summary you said
4 something that might be contrary, your statement here and
5 now would control, fair?

6 A. I would need to hear what you said I stated
7 contrary, but what I've just stated is what I have testified
8 to today, that Peev and Nagayoshi both disclose everything
9 but the super absorbent polymer limitation.

10 Q. It's your opinion that Peev has a piston, though,
11 correct?

12 A. Yes.

13 Q. And it has a compression chamber, correct?

14 A. Yes.

15 Q. Now Nagayoshi, I have a hard time saying that, is
16 also a realistic-looking airsoft gun, correct?

17 A. Yes, in the patent it is disclosed as such.

18 Q. And what Nagayoshi really does is it really takes
19 on the magazine so that the magazine looks and feels like a
20 real powder-based weapon magazine, right?

21 A. I would describe it that Nagayoshi is trying to
22 provide a means for a continuous firing mechanism, which
23 utilizes a magazine that can be filled with spherical
24 ammunition and continuously feeds that to fire it.

25 Q. But Nagayoshi also does not disclose launching a

1 soft projectile made of super absorbent polymers, correct?

2 A. Yes, that's correct.

3 Q. In fact, prior to this case you were not aware of
4 any dice that launched soft projectiles made of super
5 absorbent polymers using an airsoft mechanism, correct?

6 A. That's correct, prior to this case.

7 Q. In fact, prior to your own attempt to load Clear
8 Spheres into the airsoft gun you demonstrated, you had not
9 attempted to put super absorbent polymers into an airsoft
10 device, correct?

11 A. That is correct, yes.

12 Q. All right. So let's talk about motivation to
13 combine.

14 It's your opinion that a person having ordinary
15 skill in the art would have been motivated to find an
16 alternative ammunition for airguns that preserved fun and
17 entertainment that reduced the risk of accident or injury,
18 correct?

19 A. That's correct, yes.

20 Q. And one risk that you were focused on was the
21 risk that an airsoft gun could penetrate the human skin,
22 correct?

23 A. Yes.

24 Q. As part of your analysis, you relied on an
25 article that stated that, when the muzzle velocity is around

1 350 feet per second, that's when human skin may be
2 penetrated, correct?

3 A. I do recall that article, and perhaps you can
4 bring it up on screen to refresh my memory. I forget
5 whether that 350 feet per second statistic was referring to
6 AirSoft specifically or if it was referring to BB guns or
7 some other, you know -- if you could refresh my memory, I'd
8 appreciate it.

9 Q. So can I have Mr. Delman's transcript at page 25,
10 lines 22 through 26, 9.

11 Do you see, sir, where you say, you do cite an
12 article which states that, referring to the 350 feet per
13 second metric.

14 A. So I stated in my report, I do cite an article
15 which states that. I haven't tested it myself. But it does
16 state in the article around 350 feet per second is a figure
17 you want to keep in mind. At 300 to 400, that's where
18 penetration occurs in the human skin. Below 350 it's
19 generally considered capable of only limited harm.

20 But, again, I don't think that this testimony
21 asks or discusses whether that article was focusing on
22 airsoft or on BBs, and that's what I was asking you. I
23 don't recall.

24 Q. But, first of all, tell us what muzzle velocity
25 is.

1 A. Muzzle velocity, at a high level, the speed at
2 which the ammunition exits the muzzle of the gun.

3 Q. So you didn't seem terribly concerned about the
4 distance that the target was from the weapon. That would
5 make a difference, wouldn't it?

6 A. Well, if I understand your question, the further
7 away you are from any gun, whether it's firing a bullet or a
8 NERF dart, the ammunition slows over a distance, if that's
9 what you're getting at. So the muzzle velocity would be
10 measured immediately upon -- generally measured immediately
11 upon exit from the gun.

12 Q. Well, my point is just this, in order to make an
13 airsoft gun safer, you could simply move the participants
14 further apart, correct?

15 A. I don't believe that makes the airsoft gun safer.
16 I believe it makes the play of the participants safer,
17 because you're also less likely to hit somebody when they
18 are further away from you, but I don't think that's changing
19 the nature of the airsoft mechanism or the gun.

20 Q. So it's your testimony that it would not reduce
21 the number of injuries as a result of playing with airsoft
22 guns if the participants were separated by a greater
23 distance.

24 A. No, that's not my testimony.

25 Q. Is that what --

1 A. It would -- if people were further separated, it
2 would likely reduce injuries, but what I said is that it
3 does -- that moving people further apart doesn't change the
4 gun. It moves people further apart.

5 Q. What does change the gun is you can reduce the
6 muzzle velocity, correct?

7 A. Yes, that is one thing, which, if you wanted to
8 change muzzle velocity, that is something you could do,
9 sure.

10 Q. One of the things you told us about on direct is
11 that you could use a less strong spring, correct?

12 A. Yes.

13 Q. A weaker spring. I don't know why I couldn't
14 come up with that word. Fair?

15 A. Either one, weaker or less strong.

16 Q. You could also use a smaller compression chamber,
17 correct?

18 A. Yes.

19 Q. You could use a smaller ratio between the
20 compression chamber and the actual acceleration tube used
21 for the ammunition, correct?

22 A. Yes.

23 Q. Those are all viable techniques to reduce the
24 number of injuries that would be inflicted by an airsoft
25 gun, fair?

1 A. Yes, and there are a variety of muzzle velocities
2 which airsoft guns are sold with, as this article notes.

3 Q. So, for example, Prime Time makes an airsoft gun
4 called the Pulsar Pro that states that its muzzle velocity
5 is limited to 200 feet per second, right?

6 A. I'll take your words on it. I don't recall the
7 exact data for that particular gun.

8 Q. Can I have CX-324 at page 1?

9 Do you recognize this as a Prime Time Toy
10 product, the Pulsar Pro?

11 A. Yes, and it does say velocity up to 200 feet per
12 second.

13 Q. So at least Prime Time found a way to manage or
14 reduce the number of injuries by reducing the muzzle
15 velocity to only 200 feet per second, correct?

16 A. Well, that would be one potential result of
17 reducing the muzzle velocity, but it would have other impact
18 on the gun's performance as well.

19 Q. And Splat-R-Ball makes a product that they have
20 limited to only 205 feet per second, right?

21 A. Again, if you would like to show me the data
22 sheet on it, or I can take your word on that.

23 Q. Well, CX-0206C at page 1, would you believe page
24 2? There we go. Sorry.

25 Do you see there that there is a specification

1 for the muzzle velocity to 205 feet per second?

2 A. Yes, it does state that, an average for ten
3 rounds.

4 Q. The AirStrike 470 is one of the ones you tested,
5 right? That's a Daisy product.

6 A. I'll note that it also seems to have a note next
7 to that area you've highlighted that they have changed the
8 velocity from 160 feet per second. It sounds like in the
9 development they may have sped it up, but I'm not really
10 sure what this document comes from.

11 Q. Okay. So that's interesting. So it's your
12 interpretation of this that the Splat-R-Ball product
13 actually increased its muzzle velocity.

14 A. Again, I don't know what this document came from
15 or what that note refers to. I just wanted to read that as
16 it was next to the highlighted area that you just mentioned.

17 Q. But both of these numbers are under the 350 feet
18 per second threshold that your article had identified as
19 penetrating human skin, right?

20 A. They are, yes.

21 Q. The AirStrike 470 is the one Daisy product that
22 you tested, right?

23 A. Yes.

24 Q. And you agree that the Daisy AirStrike 470 is a
25 low-powered airsoft rifle, correct?

1 A. Correct. I believe it has a muzzle velocity of
2 about 160 feet per second.

3 Q. Correct. And you would consider the Daisy
4 AirStrike 470 to be a type of airsoft gun that would be
5 considered a toy for children, right?

6 A. Yes.

7 Q. And it's your opinion that the Daisy AirStrike
8 470 operates similarly to the Peev and Nagayoshi references,
9 correct?

10 A. Yes.

11 Q. So I think we agree that reducing the muzzle
12 velocity also reduces injuries, correct?

13 A. It is one way that injuries may be reduced, yes.

14 Q. Wearing eye protection will reduce injuries,
15 correct?

16 A. It is one way you might reduce eye injuries, in
17 particular.

18 Q. Well, you've played with airsoft guns with your
19 boys, correct?

20 A. Yes.

21 Q. Have you ever had let them play without eye
22 protection?

23 A. No.

24 Q. Would you ever let your boys play with an airsoft
25 gun with a muzzle velocity turned up to 400 feet per second?

1 A. I don't believe we own any with that speed nor
2 would I seek one out, but they do shoot other guns that have
3 fairly high muzzle velocities.

4 Q. But your intention as a father is to limit the
5 muzzle velocity that they use for airsoft guns that they
6 shoot at each other.

7 A. Yes, if they are shooting at each other, I would
8 not want 400 feet per second, correct.

9 Q. And in RDX-374 -- can I have that -- here you
10 were talking about the Peev reference, right?

11 A. Yes, I believe that is the Peev, an animation
12 from the Peev reference, yes, though we were talking more
13 generally about modifications you might make to the spring,
14 not necessarily with respect to the Peev reference.

15 Q. Well, the title of this suggested that you needed
16 to swap out the ammunition in order to make the gun safer,
17 right?

18 A. The title of this slide discusses that you can
19 adjust airsoft guns to fire harder or softer as desired.

20 Q. And your point here was that it makes it safer if
21 it's softer, right?

22 A. My point here was with respect to the success of
23 firing the SAP. So when you played this animation, and I
24 won't ask you to do it again, but I'll remind you that on
25 the left-hand side what was illustrated was an SAP which

1 didn't survive the strength of the firing mechanism on the
2 left-hand side such that a weaker spring provided lower air
3 pressure and, thus, a velocity which allowed the SAP to
4 survive the firing.

5 Q. You would agree with me, sir, that using a weaker
6 spring makes the airsoft gun safer, the Peev airsoft gun
7 safer, correct?

8 A. Use of a weaker spring would make the ammunition
9 fire at a slower rate, which would likely make it safer,
10 yes.

11 Q. Can I have the next slide, RDX-75, 3-75.

12 And using a smaller chamber would make the Peev
13 airsoft gun safer, correct?

14 A. It would lower the rate of speed for the
15 ammunition to exit the gun, and, thus, likely make it safer.

16 Q. Now the other safety concern you identified had
17 to do with eye injuries, right?

18 A. I believe I did mention eye injuries or I cited
19 an article which mentioned eye injuries, I did.

20 Q. And the accused Hydro Strike Nebula Blaster made
21 by PTT poses a risk of eye injury, right?

22 A. I believe that most any projectile launched at
23 somebody else can pose a risk of an eye injury.

24 Q. If I can have CX-323. This is the manual for the
25 Nebula Hydro Strike Nebula Pro, right?

1 A. Yes.

2 Q. This is one of the accused PTT products, right?

3 A. Yes.

4 Q. And it uses fully hydrated SAP ammunition,
5 correct?

6 A. That's -- well, this particular ammunition is
7 hydrated to a certain degree before you utilize it. I guess
8 you could call that being fully hydrated.

9 Q. And yet, if I can go to page 3 of the manual --
10 first of all, can I stay on that page?

11 The device is sold with Hydro Strike protective
12 eyewear, correct?

13 A. Yes.

14 Q. And then it tells us in the instructions, at page
15 3, in all caps, "EYE PROTECTION SHOULD BE WORN DURING PLAY,
16 WHETHER SHOOTING OR OBSERVING." Do you see that?

17 A. I do.

18 Q. They even provide that the protective eyewear is
19 designed to fit over normal optical glasses. Do you see
20 that?

21 A. It does say that, yes.

22 Q. And if we look at a couple of the others, say,
23 for example, the Splat-R-Ball -- can I have CX-178 --
24 Splat-R-Ball, which is also a device that shoots SAP,
25 correct?

1 A. Correct.

2 Q. Fully hydrated soft SAP, correct?

3 A. Correct.

4 Q. And yet it tells us, WARNING: This Splat-R-Ball
5 can cause eye injury. Always wear eye protection. Read and
6 follow all instructions, never aim or shoot Splat-R-Ball at
7 people or animals. Be sure of your target. Correct?

8 A. It does say that, yes.

9 Q. You also opined that a person of ordinary skill
10 would be motivated to reduce the risk of choking with these
11 products, right?

12 A. Can you refresh my memory on where I opine that,
13 please?

14 MR. GEORGE: Objection, Your Honor. Again, it's
15 beyond the scope of direct. And, again, we went to great
16 pains to be here today. We narrowed his opinions. We
17 narrowed his positions down to one. And now we're asking
18 about things that we dropped.

19 MR. CORDELL: I heard him suggest, Your Honor,
20 that their motivation to combine was to avoid injuries. I
21 didn't realize that I had to pick and choose the injuries.

22 JUDGE MCNAMARA: Mr. George, would you address
23 that? Because one of the motivations to combine was safety.

24 MR. GEORGE: It's to reduce injury, as he
25 testified by getting hit with one of these. We had another

1 argument where we were worried about ingesting, but we've
2 dropped it. Again, we dropped a lot to get here today,
3 Your Honor.

4 JUDGE MCNAMARA: Yes.

5 MR. GEORGE: I think it's -- this is way beyond
6 the scope of direct.

7 MR. CORDELL: It's not -- if they are not going
8 to rely on it, Your Honor, I'll move on.

9 JUDGE MCNAMARA: Go ahead, Mr. George.

10 MR. GEORGE: You're correct, Your Honor. We're
11 not going to rely on the choking risk. Thank you,
12 Your Honor.

13 Q. You also inspected a product called the Goo
14 Shooter or Goo Spewer, correct?

15 A. I did, yes.

16 Q. And these Goo Spewers or Shooters were produced
17 by Prime Time Toys, correct?

18 A. Yes, that's correct.

19 Q. And in your opinion the goo that these products
20 emitted were some form of SAP, right?

21 A. Yes, I believe Dr. Reitman confirmed that for me.

22 Q. But the Goo Shooter is not one of the references
23 you're relying on for your invalidity opinions, correct?

24 A. That is correct.

25 Q. And nor the Goo Spewer, that's not one that

1 you're relying on for your invalidity opinions, correct?

2 A. That's correct, yes.

3 Q. And, in fact, these were water guns, fair?

4 A. Their mechanism could be described as a water gun
5 mechanism.

6 Q. All right. Let's talk about your number of
7 solutions. Can I have slide 33?

8 I need slide 33 from Prime Time's opening
9 statement.

10 MR. CORDELL: Your Honor, I wonder if this would
11 be a good time to take a short break.

12 JUDGE MCNAMARA: I think so. Why don't I see you
13 back here in five minutes.

14 (Whereupon, the proceedings recessed at 4:50
15 p.m.)

16 (In session at 4:57 p.m.)

17 JUDGE MCNAMARA: Thank you everyone. Please be
18 seated.

19

20 MR. CORDELL: Can I have opening slide 1-33.

21 Q. You were here for opening, weren't you,
22 Mr. Delman?

23 A. Yes, I was.

24 Q. And you heard Mr. George say that Dr. Kudrowitz
25 had identified only four types of soft ammunition. Do you

1 see that?

2 A. Yes, I did.

3 Q. You know that's not true, right?

4 A. Please elaborate. I'm not sure what you mean.

5 Q. Well, you know that he identified a long list of
6 materials from which a projectile could be made, correct?

7 A. The only ones that I recall are the four here,
8 rubber, foam, cork, soft plastics.

9 Q. And the "et cetera" there doesn't give you any
10 pause.

11 A. It doesn't because there's nothing identified.
12 To me "et cetera" doesn't identify anything.

13 Q. And it's your opinion that there are only a
14 finite number of solutions that could be used as
15 alternatives to the hard plastic of airsoft guns.

16 A. Yes, that is correct.

17 Q. And I have brought some airsoft ammunition.

18 May I approach, Your Honor?

19 JUDGE MCNAMARA: Yes. By the way, I preserved
20 the 6-millimeter with my notes and we'll mark it maybe
21 Monday and I will preserve this as well.

22 Q. So, Mr. Delman, you can confirm that the plastic
23 ammunition used in the airsoft gun is pretty firm, right?

24 A. It is. I'm familiar with it, and this is an
25 example of that hard plastic.

1 Q. And 6 millimeters, yes?

2 A. I'm assuming these are 6 millimeters, yes.

3 Q. How much do they weigh, do you know?

4 A. It's my recollection that you can get airsoft
5 ammunition in different weights. So I'm not sure what this
6 particular sample weighs.

7 Q. Okay. Would it surprise you that it's maybe
8 around 200 grams?

9 A. It would not surprise me.

10 Q. Milligrams?

11 A. Grams would surprise me but milligrams would not,
12 no.

13 Q. But it's your testimony that there were just a
14 finite number of solutions that one of ordinary skill could
15 use to replace this plastic ammunition, right?

16 A. Yes.

17 Q. And one of the things that you cite in your
18 direct testimony was the Carlson reference, right?

19 A. Yes.

20 Q. And can I have -- well, let's have slide 43 of
21 the opening. You can stay with the opening. I think it's
22 the same slide.

23 So 1-43, this is a summary of the Carlson
24 reference, right?

25 A. Yes.

1 Q. You had a very similar -- we can stay on this,
2 but you had a very similar slide, which is 3-86, right?

3 A. It certainly looked generally similar. I'll take
4 your word for it. I don't know if I had highlighted
5 anything differently or underlined anything differently
6 offhand.

7 Q. Okay. Well, let me have Mr. Delman's slide just
8 to make sure he is not led astray. It's 3-86.

9 And you had highlighted exactly the same words
10 that Mr. George did, right?

11 A. It certainly appears to be, yes.

12 Q. Can you pick one of them, Mr. Lee? There we go.
13 We'll go with yours, 3-86.

14 So what the Carlson reference is teaching us is
15 that you can use pulp-based materials as the projectile,
16 correct?

17 A. Well, it does teach that, but further down, as
18 I've underlined in red, it says additional non-limiting
19 examples of material that you could use would be a
20 rice-based material, dehydrated gels, or a hydro-polymer,
21 similar to the absorbent polymer material used in a diaper.

22 Q. But didn't you just tell us that there were just
23 four possible alternative ammunitions -- rubber, foam, cork,
24 and soft plastics?

25 A. I did state that, yes.

1 Q. But Mr. Carlson tells us that, in fact, you can
2 use wood pulp, correct?

3 A. That would potentially be cork pulp. So when I
4 read Mr. Kudrowitz' mention of cork, I assumed we're talking
5 about some kind of a wood pulp material, which is what I
6 understand cork to be.

7 Q. Have you ever worked in a paper mill?

8 A. I'm afraid I have not.

9 Q. Well, I did. It's the only real engineering job
10 I've had and I would tell you we never saw cork at the entry
11 gates to the paper mill. Can you cite anybody, anyplace,
12 anytime that would pulp cork?

13 A. I am not an expert in pulping wood, so, no, I
14 would not be able to do so.

15 Q. In fact, cork is a bark, isn't it?

16 A. I believe it is the bark of some type of tree,
17 yes.

18 Q. So the first thing that happened when the trees
19 came in to the paper mill is they were put through the
20 de-barker. Are you aware of that?

21 A. I am not putting myself forward as an expert in
22 paper or paper mills.

23 Q. Mr. Carlson thinks wood pulp is a fine material
24 to make a projectile out of, right?

25 A. Mr. Carlson does suggest that, yes.

1 Q. He says you can use dehydrated paper pulp,
2 correct?

3 A. He does refer to dehydrated pulp material or
4 dehydrated paper pulp, yes.

5 Q. He says you can use recycled or virgin pulp as a
6 projectile, correct?

7 A. He refers to that, yes.

8 Q. He says you can use colored pulp, correct?

9 A. He does.

10 Q. He says you can use bleached or natural pulp,
11 correct?

12 A. He does.

13 Q. Do you know the difference between those two?

14 A. Again, I'm not an expert in those materials.

15 Q. You've seen cardboard. That's nonbleached pulp
16 and you've seen white paper that's bleached pulp. Does that
17 make sense?

18 A. Okay.

19 Q. And he says that you can use a starch-based
20 material, right?

21 A. He does.

22 Q. He says you can use peanuts as your projectile
23 material, correct?

24 A. He does suggest that as well.

25 Q. He says you can use a fiber filler with a binding

1 agent, like glue or starch, correct?

2 A. He does.

3 Q. He says you can use a rice-based material,
4 correct?

5 A. He does.

6 Q. He says you can use dehydrated gels without
7 telling us what kind of gels he is referring to, right?

8 A. He does.

9 Q. And then, finally, at the end of his long list of
10 alternatives, he tells us you can use a hydro-polymer
11 similar to the absorbent polymer used in a diaper, right?

12 A. He does.

13 Q. So at least Mr. Carlson thinks here is a whole
14 bunch of possible alternatives to form a softer projectile,
15 right?

16 A. At least Mr. Carlson has suggested these as
17 possibilities, yes.

18 Q. And have you studied the Carlson patent, sir?

19 A. I did review it sometime back, yes.

20 Q. One of the things he is looking for is a
21 projectile that will stick to you when you get shot, right?

22 A. You'd have to refresh my memory on that.

23 Q. Okay. So the fundamental crux of your opinion
24 rises or falls with motivation to combine, correct?

25 A. I don't know that I'd characterize it in exactly

1 the way you said, but I have opined that a POSITA would have
2 the motivation to combine these elements, yes.

3 Q. But you understand enough about the law to know
4 that, if you fail to convince Her Honor that there is a
5 motivation to combine here, your obviousness case falls,
6 fair?

7 A. I'm not an attorney, but I believe that is one of
8 the elements that I do need to convince Your Honor of.

9 Q. You keep saying you're not an attorney, but you
10 went to Harvard Law School, right?

11 A. And I hated every minute of it. I went back to
12 school and I never practiced again.

13 Q. Far be it for me to defend Harvard, so I'm not
14 going to do it.

15 So aside from the work you performed when forming
16 your opinions, you're not aware of any prior art device that
17 launched soft projectiles made super absorbent polymers
18 using an airsoft mechanism, correct?

19 A. Prior to my engagement on this matter that is
20 correct, yes.

21 Q. And you've been an industrial designer for 28
22 years, right?

23 A. Yes.

24 Q. And in the opening at slide 35 -- can I have
25 that -- I have to rise to the defense of Dr. Kudrowitz.

1 Mr. George said, well, if you were given SAP and a airsoft
2 gun, could you make them work together somehow?

3 And Dr. Kudrowitz says, well, you know, you might
4 have those skills.

5 Do you remember this?

6 A. I do. Mr. Kudrowitz -- Dr. Kudrowitz, I
7 apologize -- was asked, they would have those skills and his
8 response is they would have those skills.

9 Q. But as far as you know, despite your 28 years as
10 a designer, nobody ever handed a designer SAP and an airsoft
11 gun and said make these work together, right?

12 A. To the best of my knowledge nobody did, no.

13 Q. Now you spent some time working on toys and
14 games, right?

15 A. Yes.

16 Q. You worked for Fisher-Price and The Learning
17 Resources, correct?

18 A. Correct.

19 Q. And you've told us about the fact that you used
20 to be a NERF Blaster Modder, right?

21 A. Yes.

22 Q. And you personally use and maintain your family's
23 large collection of airguns, right?

24 A. Yes.

25 Q. You have over 35 of these airguns, right?

1 A. Give or take, yes.

2 Q. And they -- your personal collection of airguns
3 have virtually every mechanism available, right?

4 A. I believe that's right, yes.

5 Q. Multi-pump, spring piston, gas piston, electric,
6 CO2 and PCP, right?

7 A. Yes.

8 Q. What does PCP stand for?

9 A. It stands for precharged pneumatic. It's -- you
10 pressurize the air chamber utilizing a pump, either hand
11 pump or an electric pump, and then you can fire multiple
12 rounds until it is depressurized.

13 Q. Your sons are 14 and 18; is that right?

14 A. That's correct, yes.

15 Q. And you use and maintain your airguns with your
16 two sons, right?

17 A. That's correct.

18 Q. And --

19 A. Though the 18-year-old has new interests that are
20 a bit different.

21 Q. That will happen.

22 But you considered your family to be a group of
23 enthusiasts, right?

24 A. I wouldn't include my wife.

25 Q. Okay. Well, but you and your sons.

1 A. Yes.

2 Q. Now when you use these guns with your son, your
3 airguns, safety was always a paramount concern, right?

4 A. Very much so.

5 Q. And you were familiar with spherical SAPs before
6 you were retained in this case, correct?

7 A. I was familiar with them in the craft market and
8 the craft science-y kind of market. I was not familiar with
9 them as projectiles.

10 Q. You certainly were familiar with SAPs as diapers,
11 right? You changed these boys' diapers?

12 A. Yes, I did.

13 Q. It was sort of staring you in the face for a few
14 years, right?

15 A. In all the years I can't say I ever tore one
16 open, but, yes, I'm familiar with them from my design work.

17 Q. And you were very familiar with airguns, correct?

18 A. Yes.

19 Q. And yet you knew that airguns were dangerous,
20 right?

21 A. Yes.

22 Q. You cited 21,000 injuries in the year 2000 alone,
23 correct?

24 A. Yes.

25 Q. You recounted a story from President George Bush

1 shooting his brothers, Neil and Jeb, when they were
2 children, right?

3 A. I do recall that story, yes.

4 Q. And we have Ralphie with the Red Ryder where
5 everybody in town was telling him he was going to shoot his
6 eye out, right?

7 A. Yes.

8 Q. And yet you were playing with these airguns with
9 your sons as they were growing up, correct?

10 A. Yes.

11 Q. And never once did you think that you could make
12 that airgun safer by using SAP ammunition, correct?

13 A. It was not a problem that I was particularly
14 interested in solving personally.

15 Q. Well, but you were worried about your sons'
16 safety, right?

17 A. To be honest, I wasn't worried about it, no.
18 I've never been worried about it, because, to me, one of the
19 benefits of learning to target shoot and handle airguns is
20 the discipline of safety and handling them properly and
21 knowing not to aim them at each other, et cetera, not to do
22 dangerous things with them or to use them in dangerous ways.

23 So I was always very comfortable with my boys
24 playing with these toys because I have taught them to play
25 with them in a safe manner.

1 Q. Mr. Delman, is it your sworn testimony that your
2 teenage boys never shot at each other with their airsoft
3 guns?

4 A. Oh, airsoft guns, they did, yes, absolutely.

5 Q. And you had worry that that might cause some
6 injury, right?

7 A. They would -- they would never do it without
8 wearing long sleeves, long pants, eye protection, et cetera.
9 They would never do it with bare skin aside from, I suppose,
10 a little on their face. And they were always never, ever
11 shooting at each other's face.

12 But, yes, I was conscious that there was a danger
13 involved, but, as a father, call me a bad dad, I don't know
14 what that does for my credibility here, but I trusted my
15 sons to use them in a safe manner.

16 Q. My point is just this. You knew there was a risk
17 and yet it didn't occur to you with your master's degree in
18 industrial engineering and all your wealth of experience to
19 make ammunition out of SAP to make your boys safer.

20 A. No, it didn't. It wasn't a problem that I was
21 personally ever interested in solving, but that's not the
22 POSITA that's relevant for this matter. The POSITA that's
23 relevant for this matter was aware.

24 And I mind you, I was unaware, as I've just
25 testified, of SAPs being used as ammunition. I wasn't until

1 this engagement. But the POSITA in this case would have
2 been aware of that as of 2008.

3 Q. My question is very simple, sir. It didn't occur
4 to you, even though you were concerned about your boys'
5 safety, correct?

6 A. It did not occur to me to modify my airguns in
7 that manner.

8 Q. You are also a NERF modder, right?

9 A. Yes.

10 Q. And while the NERF foam dart blasters are pretty
11 safe, there's always a risk that an injury could happen,
12 right?

13 A. A slight risk. It's never really overly
14 concerned about NERF guns, but yes.

15 Q. But you never tried to modify a NERF blaster to
16 fire SAP ammunition, correct?

17 A. No, I did not.

18 Q. And as for PTT is concerned, they had a
19 commercial SAP product back in 1995, right, the Goo Spewer?

20 A. It shot goo. It didn't shoot rounds of
21 ammunition. It shot liquified goo. But, yes, it was an
22 SAP-based ammunition.

23 Q. So, I mean, it was a squirt gun, I'm sure it made
24 a tremendous mess, but it was firing SAP in a form, fair?

25 A. In a gel goo form, yes.

1 Q. And yet they didn't make their Hydro Strike
2 Nebula product back in 1995, right?

3 A. They weren't aware of SAPs being shot as
4 individual rounds.

5 Q. Well, they were shooting them out of the Goo
6 Spewers, right?

7 A. Not individual rounds. They were shooting a
8 gel-like liquidy substance that came out, as you suggest, as
9 a mess. They weren't aware of doing so in a neat, safe
10 fashion until 2008.

11 Q. The Goo Shooter was a gun, right?

12 A. Yes.

13 Q. Like a water gun, correct?

14 A. Correct.

15 Q. What came out of it was SAP, right?

16 A. In a very different form than the kind of SAP
17 ammunition we're talking about today.

18 Q. And PTT did not make their Hydro Strike Nebula
19 product back in 1995, right?

20 A. No, they did not.

21 Q. They didn't make it in 1996, right?

22 A. No, they did not.

23 Q. They didn't make the Hydro Strike in the year
24 2000 or 2005 or even 2010, correct?

25 A. They first learned about -- well, yes, you are

1 correct, but they first learned about shooting these kind of
2 individual rounds of spherical ammunition much later than
3 the goo shooters origination date in the 1990s.

4 Q. The Hydro Strike Nebula has been very successful
5 for PTT, right?

6 A. I would say so.

7 Q. So they just didn't want all the extra revenue
8 they would have gotten by creating this back in 1995?

9 A. I wasn't privy to the development team at PTT in
10 that time range.

11 Q. Let's talk about your simultaneous invention
12 testimony. You say there were multiple simultaneous
13 independent inventions in this case, right?

14 A. Yes, I did note that.

15 Q. Let's start with your reference to the Kim Korean
16 patent application. Can I have CX-115? I'm sorry.
17 RX-0052.

18 Just to remind everyone, this is the Kim
19 reference that you were referring to.

20 A. Yes, it's different -- in a different format than
21 I showed it, but, yes, it appears to be.

22 Q. Okay. Now Kim discloses a toy bullet formed of
23 gel or gel material, correct?

24 A. Yes, it does.

25 Q. The claims in this case require a particular kind

1 of material, correct?

2 A. The claims in this case require super absorbent
3 polymer.

4 Q. And Kim just doesn't tell us what kind of gel
5 we're talking about, correct?

6 A. It does not specify.

7 Q. And you certainly have not offered the opinion
8 that came discloses a super absorbent polymer, correct?

9 A. I have not.

10 Q. You do not have a degree in chemistry, correct?

11 A. Correct.

12 Q. You don't have a degree in any material science,
13 correct?

14 A. Correct, though I would just note that, per the
15 discussion earlier about a POSITA, I would have access to
16 somebody with those qualifications.

17 Q. Well, my question is really precise. You don't
18 have a degree in material science, correct?

19 A. Correct.

20 Q. Now you relied on Dr. Reitman to inform you
21 regarding issues relating to SAP, right?

22 A. Yes.

23 Q. You also testified that the Carlson patent was an
24 example of simultaneous invention, correct?

25 A. Yes.

1 Q. Except the Carlson patent was filed five months
2 after the asserted patents were filed in the U.S. Patent
3 Office, right?

4 A. I did note that it was five months after that
5 filing, yes, but it is near in time.

6 Q. And in your experience as a patentholder, it
7 takes some time to take an invention and actually get the
8 patent lawyers to write it up and file it with the Patent
9 Office, right?

10 A. That would be my experience, yes.

11 Q. So your expectation is that the patents in this
12 case were actually conceived of sometime prior to their
13 actual filing date, right?

14 A. Yes.

15 Q. Carlson discloses a hydro-polymer at the end of a
16 long list of alternative materials, right?

17 A. It is listed in addition to other materials, but
18 it is toward the end or at the end of that list, yes.

19 Q. And we went through that a minute ago. It could
20 be wood pulp, it could be rice, it would be peanuts, lots of
21 things, right?

22 A. He suggested those materials, yes.

23 Q. Now can I have RX-53, the Carlson patent at the
24 abstract? Can you blow up the abstract, Mr. Lee?

25 Here he talks about a dehydrated pulp-based

1 projectile, right?

2 A. He does.

3 Q. That's his focus, right?

4 A. Well, in addition to that, yes, he talks about it
5 in the context of dipping or soaking the bullet in water to
6 absorb water and soften, but it is discussed as a pulp-based
7 material here.

8 Q. But he tells us that the key to his projectile is
9 it sticks to you, right, when you get shot with it. If you
10 look at the last sentence.

11 A. He does note that, with respect to a pulp-based
12 material, that would be a characteristic.

13 Q. And then let me have column 1 at lines 51-65 of
14 the Carlson patent, the RX-53.

15 Do you see where it says, thus, a continuing need
16 exists for a soft projectile that is safer than a plastic
17 bullet, that is less influenced by air current than a foam
18 bullet or tipped projectile, and that is capable of sticking
19 to its target? Do you see that?

20 A. I do.

21 Q. Do you see below it in the Summary of the
22 Invention, it says that this bullet, when fired, will stick
23 to a target? Do you see that?

24 A. Yes.

25 Q. So as we've all played with these SAPs and we've

1 shot them around, one thing we can all acknowledge is that
2 they don't stick to the target, correct?

3 A. They don't stick to the target, no, but, as I
4 also read from this patent earlier and compared it to it
5 '82 patent, what Carlson has identified is the same problem
6 and a very similar solution to that problem.

7 Q. Well, not quite, sir. He says you can use rice,
8 right?

9 A. He says you can use a softer projectile, and goes
10 on in detail to include that that projectile could include
11 the gel from a diaper.

12 Q. But my question was Carlson suggests that we can
13 use rice, correct?

14 A. I believe he does mention that, yes.

15 Q. He mentioned wood pulp, correct?

16 A. Correct.

17 Q. He mentioned peanuts, right?

18 A. He did.

19 Q. He mentioned recycled wood pulp or paper, right?

20 A. I believe he did.

21 Q. So he gave us lots of options, but what he has
22 told us over and over again is, whatever you choose, it
23 needs to stick to the target, right?

24 A. I would need to look at the claims to see if
25 sticking to the target is amongst the claims, if you'd like

1 to refer me to them so that I can review. I know he does
2 mention that here in the Summary of the Invention. I don't
3 know if sticking to the target is a claim limitation.

4 Q. Well, but for the purposes of your opinion, sir,
5 does it matter what was claimed?

6 A. He discloses sticking to a target in the patent.

7 Q. And he mentions a hydro-polymer similar to the
8 absorbent polymer used in a diaper, right?

9 A. Yes, he does.

10 Q. But he doesn't call it an SAP, correct?

11 A. He does not use that term, no.

12 Q. You are not a chemist, correct?

13 A. Correct.

14 Q. You don't know the composition of the
15 hydro-polymer in Carlson, correct?

16 A. I do not know whether he had the term SAP in mind
17 as identical to what he is referring to there.

18 Q. Now you prepared demonstratives for your
19 testimony in this case, right? Well, one more question
20 about Carlson.

21 You have no -- you have offered no opinion about
22 the particularly -- particular absorbency level of the
23 hydro-polymer in Carlson, correct?

24 A. Absorbency level, in other words, how much water
25 it would absorb in comparison to its weight?

1 Q. Right.

2 A. No, I have not.

3 Q. You prepared demonstratives for your testimony,
4 right?

5 A. Yes.

6 Q. And one of the things you showed us were videos
7 of Mr. Spangler launching Clear Spheres, right?

8 A. From what launcher are you referring to? Just so
9 I know what you're talking about.

10 Q. Well, he was out on his porch --

11 A. Oh, yes, yes. I apologize.

12 Q. Do you remember that?

13 A. Yes.

14 Q. And he takes the big tube and he blows through
15 it?

16 A. Yep.

17 Q. And off it goes. That video was made for the
18 purposes of this case, right?

19 A. I did not engage Mr. Spangler, but it is my
20 understanding that he made that video in conjunction with
21 his work on this case.

22 Q. Do you know when he made that video?

23 A. I don't have the exact date, no.

24 Q. And then you spent a lot of time in this case; is
25 that correct?

1 A. Yes, I would say that's an accurate
2 characterization.

3 Q. Can you give Her Honor an estimate of the number
4 of hours you spent working on this case?

5 A. Honestly, I would need to refer back to my
6 records to give you really a number of hours, or I could
7 take out a calculator and perhaps figure it out for you now,
8 but off the top of my head I wouldn't know.

9 Q. If you took out a calculator, what would you
10 need? Would you need to divide something?

11 A. I would try to recall certain aspects of my
12 invoices related to this matter and extrapolate from that
13 approximately how many hours were included on those
14 invoices, but I don't have them offhand.

15 Q. Well, can you give us a round number as to how
16 much you've billed in this case?

17 A. It would have to be a range, counselor.
18 Somewhere between 35 and 55,000, I think, somewhere in there
19 is the best guesstimate I would give you right now.

20 Q. So somewhere --

21 A. I know that's a large range. I apologize.

22 Q. So that's between one and two hundred hours?

23 A. Something along those lines, yeah.

24 Q. You spent a lot of time with the Kirkland & Ellis
25 lawyers before Mr. George took over, right?

1 A. That's correct, yes.

2 Q. Probably wouldn't surprise you to know that their
3 billing rates are quite a bit higher than yours.

4 A. I did know that when I gave up my law career I
5 was taking a cut in salary.

6 Q. And one of the things you cite in your report is
7 that people sometimes take licenses to avoid litigation
8 costs; is that right?

9 A. Yes.

10 Q. But you agree with me that at least Splat-R-Ball
11 didn't avoid much in the way of litigation costs having
12 taken it all the way to the morning of trial, fair?

13 A. I'll be honest, counselor --

14 MR. GEORGE: Objection. Again, this is so far
15 beyond the scope.

16 JUDGE MCNAMARA: I think that's a fair objection.

17 MR. CORDELL: Your Honor, I'll pass the witness.

18 JUDGE MCNAMARA: Thank you. It's now 5:30. So
19 we are not going to start with Mr. Taylor at this point.
20 We'll pick up Monday morning.

21 We'll pick up again Monday morning, and we'll
22 start with Mr. Taylor then, and --

23 MR. SMITH: I'll let you finish, Your Honor.

24 JUDGE MCNAMARA: Go ahead.

25 MR. SMITH: I was going to simply say, given that

1 it's Friday afternoon and Mr. Delman is our primary expert
2 on invalidity, and also we have him up on rebuttal, we would
3 like to be able to talk to him about his rebuttal testimony
4 over the weekend.

5 And then also he was going to be helping us
6 prepare our cross-examination of Dr. Kudrowitz, where if we
7 can't talk to him about his testimony -- we understand we
8 can't talk to him about his testimony on direct in our
9 affirmative case, but we would like to be able to talk to
10 him at least about his rebuttal testimony and help us
11 prepare our cross-examination for Dr. Kudrowitz.

12 JUDGE MCNAMARA: Oh, this is a tough one. He
13 certainly cannot talk about any of the testimony that was
14 just given on cross-examination. You would agree with that.

15 MR. SMITH: Yes.

16 JUDGE MCNAMARA: Okay. But Mr. Taylor hasn't had
17 a chance to finish cross, which is a problem in terms of
18 your being able to talk about rebuttal since you don't know
19 the full scope of cross yet. It's a bit of a conundrum
20 here.

21 MR. CORDELL: And made more complicated,
22 Your Honor, given that the issues in this case have
23 collapsed to the rebuttal issues.

24 JUDGE MCNAMARA: They have. I think you could
25 talk about -- I'm not sure. You would have to work out how

1 you would do this. I think you can talk to him and help
2 with preparation of Dr. Kudrowitz, at least with respect to
3 the information that was conveyed back and forth. I don't
4 think that would be off limits. There was not much
5 testimony about that today. It was quite limited actually,
6 just that he relied on Dr. Kudrowitz.

7 So I think you would be able to help --

8 MR. CORDELL: Dr. Kudrowitz is our expert,
9 Your Honor.

10 JUDGE MCNAMARA: I know, but he is -- I'm sorry.
11 He is still trying to figure out -- tell me again exactly,
12 then, where you would go. If I'm limiting this, he can't
13 talk about any of his direct and he can't talk right now
14 about the cross because it's not finished. Where would you
15 go?

16 MR. SMITH: For example, I think this wouldn't be
17 a problem if we finish with Mr. Delman today.

18 JUDGE MCNAMARA: But we can't --

19 How much time, Mr. Taylor, do you have on cross?

20 MR. TAYLOR: Your Honor, it's 10, 15 minutes.

21 JUDGE MCNAMARA: All right. Let's do this,
22 because I think you run over time on this, Mr. Cordell,
23 would you be willing to do -- could you stay 10 or 15
24 minutes so we could get this part done, and that way it
25 opens up -- it both opens up and it limits what he can talk

1 about and confer with his counsel on, but I think they have
2 gone a great distance to try and narrow this. So let's try.
3 Let's try and get Mr. Taylor done.

4 And then, Mr. Smith, what are you thinking about,
5 again, in terms of -- if the cross-examination is done, what
6 do you think we would work with Mr. Delman on with respect
7 to rebuttal, just to give me a broad idea?

8 MR. SMITH: Well, Your Honor, if
9 cross-examination is done of Mr. Delman on Respondents' case
10 on direct, then I believe we're free to talk to him about
11 anything because he is done talking about invalidity per se
12 on the prior art and the obviousness combinations, and what
13 he is left talking about is a rebuttal secondary indicia of
14 non-obviousness, which he did not talk about at all today.

15 MR. CORDELL: Well, that presumes, though, that
16 they in fact exhaust the redirect.

17 JUDGE MCNAMARA: There's a problem there too.
18 Mr. George?

19 MR. GEORGE: Yes. We're not going to have enough
20 time to have Mr. Taylor give his questions and I do my
21 redirect.

22 Here's the real problem. There's the secondary
23 considerations, it's the rebuttal part. It's nothing we
24 talked about today. It's commercial success. It's nothing
25 he talked about today. And if we're going to do this on

1 this abbreviated schedule and we have dropped so many
2 things, he will be finished with this Monday morning, and I
3 think we have maybe one more witness, and we're done. And
4 then Kudrowitz, Dr. Kudrowitz will probably go next, and I
5 don't know how long he will be, but we're going to have to
6 put him back on for rebuttal. We need to be able to talk to
7 him about rebuttal this weekend. We need to be able to
8 prepare the slides. We need to be able to do all of that.

9 MR. CORDELL: If this were Tuesday, Your Honor,
10 we would be coming back on Wednesday morning, and we would
11 be proceeding at pace and there wouldn't be this sort of
12 artificial hiatus that is presented.

13 JUDGE MCNAMARA: So we did reserve -- but, on the
14 other hand, I -- the parties know there's the weekend built
15 in.

16 MR. CORDELL: We have time on Monday, because,
17 remember, we have to call our domestic industry witnesses on
18 both sides. So we can push back Mr. Delman's return to
19 Tuesday. That's easily done.

20 MR. GEORGE: That's worse for me. Then I don't
21 have the weekend. I don't have another day to work with
22 him. No, that's absolutely worse.

23 MR. CORDELL: No, no, no, I mean we would push
24 back his rebuttal testimony to Tuesday. I think it
25 naturally falls on Tuesday anyway. But the point is he

1 would be on and off Monday morning. They could then work
2 with him Monday and Monday evening and he would be prepared
3 for Tuesday.

4 JUDGE MCNAMARA: Mr. George, would that work for
5 you? Would any part of that work for you?

6 MR. GEORGE: Well, moving his rebuttal to Tuesday
7 is definitely a good thing if we have that commitment. And
8 then the only thing that I'm stuck with is I can't talk to
9 him about our cross of Mr. Kudrowitz, which will be Monday.

10 MR. CORDELL: We expected them to be prepared for
11 this trial, Your Honor.

12 MR. GEORGE: We asked --

13 JUDGE MCNAMARA: I think, Mr. Cordell, there was
14 accommodation made and there were stipulations entered into
15 that limited Respondents putting on the case. I recognize
16 there were some real difficulties on that side that affect
17 due process, frankly, and putting it in.

18 So they did streamline the case. You
19 accommodated with travel. But the fact is that they are
20 still putting on much of the case and they still have the
21 difficulty of having to put in, and it's a timing issue,
22 they do want to work with Mr. Delman, and I get that. I'm
23 trying to figure out a reasonable solution here where they
24 get certainly some of what they need while we preserve and
25 protect what we need to preserve and protect.

1 So, Mr. Taylor, let me turn to you and ask you if
2 you have any thoughts on this to help us out of this
3 dilemma.

4 MR. TAYLOR: I'm not sure I have a solution, but
5 I think Delman on Tuesday would seem reasonable.

6 JUDGE MCNAMARA: I think that is too. And I also
7 think that it's reasonable since secondary considerations
8 have not been discussed today, that they could certainly
9 prepare Mr. Delman on that issue with respect to rebuttal.
10 They have an idea of where you're going to go and they could
11 prepare slides on that this weekend and talk to him about
12 that this weekend.

13 MR. CORDELL: I just worry that it's almost two
14 sides of the same coin. We did do a fair amount of the
15 precursors to secondary considerations today. We heard the
16 simultaneous patenting, for example.

17 MR. GEORGE: We won't do that. We already did
18 it. That was our burden. That's why we did it today. We
19 now have the rebuttal, which we're going to do --

20 MR. CORDELL: It's all their burden. The way
21 this has unfolded is a little odd.

22 JUDGE MCNAMARA: It is a little odd.

23 MR. CORDELL: It is their burden. They should do
24 all the secondary considerations. They should have done
25 them all today.

1 MR. GEORGE: Actually we had a discussion about
2 this before and we came to the exact opposite thing where we
3 would put on our case, they would put on their rebuttal
4 case, their reply case, and then we would do our rebuttal.
5 We actually had rebuttal slides in there, and because of our
6 discussions with them we took it out. This is, you know --

7 JUDGE MCNAMARA: I agree with that. I don't know
8 what the discussions were, but I will take the
9 representation of counsel that that's what happened, that
10 they withdrew those slides based on some discussion.

11 Let me finish. I am inclined at this point,
12 again, since Mr. Delman is going to be on on Tuesday, that
13 gives you, Mr. George, some time to work with him Monday
14 night. It's not ideal by any stretch, none of this is, but
15 it happens. It's what happens in trials sometimes.

16 However, I do think it is fair that you should be
17 able to deal with secondary considerations of
18 non-obviousness with him and prepare slides. That did not
19 come up today. And that -- you'll have an opportunity to do
20 cross.

21 MR. CORDELL: We're happy with that, Your Honor.
22 I just want to make sure that you're clear about what
23 happened. There were discussions with the Kirkland firm
24 where this odd structure where the experts would testify in
25 the order of their reports. It was the most extrajudicial

1 procedure I've ever seen.

2 Mr. George told us just now that he has the
3 slides already, but I'll take Your Honor's ruling and I
4 don't want to hamstring him.

5 JUDGE MCNAMARA: I don't either. I want this to
6 be fair. I could rule at some point that it all comes in
7 and we'll sort it out. I'm not trying to do that. I'm
8 trying to keep this streamlined.

9 But I think there has got to be some equity on
10 each side in terms of the scope here and what was done.
11 Again, it doesn't matter whether the Kirkland firm prepared
12 the slides or not. If there was discussion about
13 withdrawing them today and not using them today, then there
14 it is, and they were pulled.

15 So I have ruled. That's where they can go. I
16 think they are going to honorably do what they need to do to
17 keep the work with Mr. Delman limited. And I think as soon
18 as questions were to come up where -- were it to become an
19 issue, and I'm using this, again, subjunctively, we will
20 know that if it comes up and there's a change. We're going
21 to know that.

22 MR. CORDELL: We always have to rely on the good
23 faith --

24 JUDGE MCNAMARA: Absolutely.

25 MR. CORDELL: -- of counsel. Although it might

1 be nice, Your Honor, if you could share with Mr. Delman kind
2 of what our rule is.

3 JUDGE MCNAMARA: I think I'm going to let -- I'm
4 going to let his counsel explain that, because it is -- I
5 think, as a lawyer, you understand --

6 THE WITNESS: Ex-lawyer.

7 JUDGE MCNAMARA: I got that point that you did
8 not want to practice. I can understand that very well. But
9 I think you need to talk to your counsel about that, and I
10 think counsel needs to give guidance on that, and I'm going
11 to -- I think they will honor their word and that's where
12 we're going.

13 MR. GEORGE: Thank you, Your Honor.

14 MR. CORDELL: Thank you.

15 JUDGE MCNAMARA: Okay. I'll see you all on
16 Monday morning. Have a great weekend.

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18 (Whereupon, the proceedings concluded at
19 5:38 p.m.)

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C O N T E N T S

INDEX OF WITNESSES

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS	STAFF
NICHOLAS TINO.....	108	150	172		158
JOEL DELMAN.....	179	227			

AFTERNOON SESSION

178

CONFIDENTIAL SESSIONS

89-91

113-177

C E R T I F I C A T E

1
 2 TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING
 3 DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS
 4 CONTAINING SAME
 5 INVESTIGATION NO.: 337-TA-1325
 6 HEARING DATE: May 19, 2023
 7 LOCATION: Courtroom A
 8 NATURE OF HEARING: Evidentiary Hearing

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

11 Date: May 19, 2023
 12 Signed: *Lawrence Shone*
 ss//

13 Signature of the Contractor or the Authorized Contractor's
 14 Representative

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

19 Signed: *Barbara Ayala*
 20 ss//

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

24 Signed: *Linda Kentade*
 25 ss//