

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

-----x

OPEN SESSIONS

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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
Monday, May 22, 2023
Volume III

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

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22 *** Index appears at end of transcript ***

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P R O C E E D I N G S

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

JUDGE MCNAMARA: Good morning, everyone. I hope everybody had a good weekend. I am sure it was a little bit less enjoyable than it might have been. Please be seated.

MR. CORDELL: It was a beautiful weekend in the office, Your Honor.

JUDGE MCNAMARA: I am glad that it was pleasant in the office.

We are starting this morning on the cross-examination of Mr. Delman. So as soon as Mr. Delman wants to take his seat, we will proceed.

MR. TAYLOR: Your Honor, I just have some preliminary matters. Do you want to discuss them now?

JUDGE MCNAMARA: Sure. Mr. Delman, come on up and be seated.

MR. TAYLOR: Your Honor, we have a new schedule, if you would like the new schedule.

JUDGE MCNAMARA: Sure. I appreciate that.

MR. TAYLOR: I'm sure it will change.

JUDGE MCNAMARA: We can adapt, as we know. We all did for three years. We can keep adapting.

MR. TAYLOR: Your Honor, I believe you saw this morning a motion was filed regarding trying to get some Airsoft exhibits into the courtroom, so I wanted to make you

1 aware of that.

2 JUDGE MCNAMARA: The order should be on its way
3 to EDIS. I appreciated the fact that you drafted one. In
4 future, it would really be helpful if you, instead of
5 sending in a PDF, which is what we usually ask for, if you
6 have a proposed schedule, send it in Word and we can modify
7 it if we need to. But my support specialist is already
8 doing that. So it should be on EDIS within the next half
9 hour or so.

10 MR. CORDELL: We can email Your Honor the Word
11 version in about ten seconds.

12 JUDGE MCNAMARA: I saw it about a half an hour
13 ago. It should be already on its way, I think. But thank
14 you. I appreciate it.

15 MR. TAYLOR: Logistics-wise, how does that work?
16 I guess once the order issues, then it can be brought in?

17 JUDGE MCNAMARA: You can, yes. And I'm giving
18 you an oral order now that I agree with the order and that I
19 am allowing it. I don't know if we have to let the security
20 people know. Do we?

21 MR. TAYLOR: It might be a good idea.

22 MR. CORDELL: That was our vision behind the
23 order.

24 JUDGE MCNAMARA: That is what I thought.

25 Jae, could you go out and let security know that

1 the parties are bringing in Airsoft guns and that I'm
2 allowing it and that an order should be on EDIS within the
3 next half hour but it has been granted orally. Thank you
4 very much.

5 MR. TAYLOR: They will probably come in through
6 the loading dock.

7 JUDGE MCNAMARA: All right. We will give it a
8 shot.

9 MR. TAYLOR: The only other thing, I believe,
10 Your Honor, this morning is just want to update you on some
11 progress in narrowing the case. I believe the Respondents
12 have -- are just going to assert the primary references,
13 Peev and Nagayoshi, and not just rely on the launchers or
14 the Spit Balls by themselves for obviousness.

15 JUDGE MCNAMARA: Okay.

16 MR. TAYLOR: Is that correct?

17 JUDGE MCNAMARA: Mr. George? Good morning.

18 MR. GEORGE: Good morning. I'm not adept at this
19 microphone.

20 Yes, that is correct. The slide that Staff has
21 put up is correct, and he also took out the claims that are
22 no longer asserted.

23 JUDGE MCNAMARA: Okay. So would you do me a
24 favor, then, at the end of today, just file something on
25 EDIS, just a notice that these have been withdrawn. So then

1 we have a filing on EDIS and it is there. That would be
2 helpful.

3 MR. TAYLOR: Yes, Your Honor.

4 JUDGE MCNAMARA: All right. Anything else,
5 Mr. Taylor? And I do have your time from Friday.

6 MR. TAYLOR: In relation to the new schedule,
7 Your Honor, there were some DI experts at the end of the
8 hearing. I believe all the parties are working on a motion
9 for the admission of certain DI expert reports and
10 deposition designations.

11 Then there will be, I believe, some live direct
12 and cross regarding significance under DI and also in the
13 process of being established.

14 JUDGE MCNAMARA: That is helpful. Thank you. I
15 think that should do it. It is not a lot of time, but I
16 think it will help solidify some of the information that is
17 already in the record.

18 Anything more, Mr. Cordell?

19 MR. CORDELL: Well, Your Honor, we are prepared
20 to read in the exhibits that were used on Friday.

21 JUDGE MCNAMARA: Okay. Do you have the list?

22 MR. CORDELL: I believe we do.

23 JUDGE MCNAMARA: Have both sides -- Mr. George,
24 has your party agreed on the exhibits?

25 Good morning, Mr. Smith.

1 MR. SMITH: Thank you, Your Honor. Yes, we have
2 conferred with Complainants, and we're in agreement with the
3 list that Mr. Wilson is holding in his hand.

4 JUDGE MCNAMARA: Does the list have a caption,
5 Mr. Wilson?

6 MR. WILSON: Yes, Your Honor, it does.

7 JUDGE MCNAMARA: What is the title of the
8 caption? What I will say is that you've moved those
9 exhibits in that the parties have agreed upon.

10 MR. WILSON: Yes, Your Honor. The caption of the
11 document is the case caption, and it refers to the
12 admitted -- exhibits admitted during the evidentiary hearing
13 on May 19th, 2023. It reflects the opening demonstratives,
14 which will be admitted for demonstrative purposes only, and
15 the exhibits for Mr. Nicholas Tino, who completed his
16 testimony. The exhibits for Mr. Delman's, the testimony is
17 ongoing and we'll submit those later.

18 JUDGE MCNAMARA: That is fine. So the parties, I
19 understand, Mr. Wilson, have all agreed. Is that correct?

20 MR. WILSON: That's correct, Your Honor.

21 JUDGE MCNAMARA: Okay. Then all of the exhibits
22 on that list are admitted into evidence.

23 (Whereupon, the exhibits as recited by counsel
24 and reflected in the attached index were submitted and
25 received in evidence.)

1 JUDGE MCNAMARA: And if you give a copy also to
2 Ms. Kinkade, that would be helpful.

3 Okay. So I have an update from the security
4 staff. Security would like to know the name of the person
5 bringing in the guns and exactly when.

6 MR. CORDELL: Mr. Ali Ahmed.

7 JUDGE MCNAMARA: Could you spell his name?

8 MR. CORDELL: I do it phonetically. A-L-I, and
9 then A-H-M-E-D.

10 JUDGE MCNAMARA: All right. He will have to show
11 identification. And do you know when that's coming in?

12 MR. CORDELL: I think he can come at any time. I
13 think he is standing by.

14 JUDGE MCNAMARA: I will let security know. That
15 is the loading dock to which you're referring, correct,
16 where the cars come in and park?

17 MR. CORDELL: Yes, Your Honor. And just to avoid
18 any slip-ups, I may have Mr. Wilson go out there.

19 JUDGE MCNAMARA: That is really a good idea.
20 Thank you.

21 MR. CORDELL: If he can be excused.

22 JUDGE MCNAMARA: Absolutely. I am sure we will
23 hear soon enough if there is an issue.

24 Mr. Taylor, do you need the Airsoft gun in order
25 to start the cross-examination of Mr. Delman?

1 MR. TAYLOR: Pardon me, Your Honor?

2 JUDGE MCNAMARA: Do you need the Airsoft gun?

3 MR. TAYLOR: It would be nice, if it's here. I
4 would like to get started.

5 JUDGE MCNAMARA: All right. Mr. Delman, you're
6 still under oath.

7 JOEL DELMAN,

8 having been previously duly sworn or affirmed
9 on their oath, was thereafter examined and testified further
10 as follows:

11 EXAMINATION BY COUNSEL FOR ITC STAFF

12 BY MR. TAYLOR:

13 Q. Good morning, Mr. Delman.

14 A. Good morning, Mr. Taylor.

15 Q. How are you?

16 A. I'm good, thanks. Good to see you.

17 Q. Thanks for leaning forward.

18 A. If you don't, it doesn't quite work as well.

19 Q. We met at your deposition, correct?

20 A. We did.

21 Q. In beautiful LA, right?

22 A. Yes.

23 MR. TAYLOR: Your Honor, I believe Mr. Cordell
24 had a preliminary objection to his qualifications as an
25 expert, and I don't think he raised that.

1 JUDGE MCNAMARA: He did not, which I thought was
2 really interesting. I got through the questions that were
3 asked in cross-examination, but there was no ultimate
4 question about that.

5 MR. TAYLOR: I believe, Your Honor, that since he
6 went beyond voir dire that the objection was withdrawn, just
7 to make the record clean.

8 MR. CORDELL: Just to make it clear, I don't
9 think I withdrew the objection, Your Honor, but I did not
10 make objections to his offering opinion testimony.

11 JUDGE MCNAMARA: You did not.

12 MR. CORDELL: Your Honor may take the testimony
13 for whatever weight you're willing to give it.

14 JUDGE MCNAMARA: Yes, and I heard it carefully
15 that you did not object.

16 MR. TAYLOR: Your Honor, you would think if I had
17 two days, my cross would be a little more organized, but for
18 me it doesn't work that way.

19 Q. I'd like to start with the Staff's demonstrative
20 exhibit. I'm going to try to use the ELMO here. And I just
21 want to talk about some of your experience and background.

22 I believe you testified that you actually own
23 Airsoft guns, correct?

24 A. Yes, that's correct.

25 Q. When we say "Airsoft," that also means air

1 rifles, air guns?

2 A. Well, I guess my testimony was -- and I forget
3 exactly what the questions were, but I own air guns, and I
4 would consider Airsoft to be a type of air gun, which I own
5 as well. So I own several categories of air guns, including
6 Airsoft.

7 Q. What are the different categories of Airsoft
8 guns?

9 A. Well, not of Airsoft guns, but of air guns. So,
10 in other words, you could categorize them based on the
11 ammunition they fire. So we have BB guns, pellet guns, and
12 Airsoft guns. You could also categorize them based upon the
13 mechanism by which the air is compressed, so...

14 Q. And so here on the right side of SDX-1, slide 13,
15 we have BB guns and Airsoft shown on the right.

16 A. Yes, uh-huh, I do see.

17 Q. Would you consider those Airsoft?

18 A. I would consider both Airsoft guns and BB guns
19 types of air guns.

20 Q. Air guns. I'm sorry.

21 A. Air guns, yes.

22 Q. Okay. And you personally own Airsoft.

23 A. Yes.

24 Q. Do you own BB guns?

25 A. Yes.

1 Q. How about paintball guns?

2 A. We don't own any paintball guns. We've used
3 them, but they tend to be the kind of thing you get when you
4 go to a party or some event, and you don't necessarily need
5 to own them.

6 Q. How about water guns?

7 A. Quite a few, yeah.

8 Q. How about NERF guns?

9 A. Quite a few.

10 Q. A lot in your house, huh?

11 A. Yeah. You can talk to my wife about that. She
12 has had her moments with it.

13 Some books just fell down there. I don't know
14 what they were.

15 Q. How about, do you personally own any --

16 JUDGE MCNAMARA: That was great timing. I don't
17 know how you did that.

18 THE WITNESS: Theatrical, yes.

19 JUDGE MCNAMARA: Very nice.

20 Q. Do you personally own any SAP launchers?

21 A. No, I do not, other than the ones which I have
22 utilized in terms of engagement with this case.

23 Q. Do you consider BB guns to be toys?

24 A. Yes, I do consider them to be a type of toy,
25 yeah.

1 Q. Do you consider Airsoft guns to be toy guns?

2 A. Yes, I do.

3 Q. How about paintball guns?

4 A. I would consider them to be a type of toy gaming
5 gun, yes.

6 Q. So what would not be a toy gun?

7 A. Well, by way of example, a gun which fires
8 ammunition that could and has an intention of self-defense
9 or harming people.

10 Q. Kind of a real gun, like the guards may have
11 outside?

12 A. "A real gun," maybe that's the best way to put
13 it. A real gun as opposed to a toy gun.

14 Q. What state do you live in?

15 A. California.

16 Q. California? Is there an age group restriction
17 for purchasing Airsoft guns in California?

18 A. Offhand, I don't know if there's an age
19 restriction for purchase. It may be highly dependent on the
20 county as well. I know that I have made all the purchases
21 of these guns for my family, so I've never really been
22 questioned about my age in that regard, that I can recall.

23 I don't know what the state or county rules on
24 that could be or how they might vary across the state.

25 Q. Are you aware of any age restrictions on

1 purchases of Airsoft guns in the United States?

2 A. I know of regulations in the United States
3 requiring marking the Airsoft gun so that it is distinct
4 from a real gun, utilizing orange paint and such or an
5 orange cone at the front, et cetera.

6 I forget what the age might be. Again, I make
7 all the purchases, and I've never had my age be questioned,
8 so...

9 Q. And why do they put -- you said the orange cone
10 on the end of the muzzle?

11 A. Mm-hmm.

12 Q. What's the purpose of that?

13 A. I think that over the years there have been some
14 very unfortunate incidents where children playing with these
15 guns have been mistaken for carrying a real weapon, because
16 they are often dark-colored or black, the way a real gun
17 might appear. And these laws are hoping to allow, say, a
18 police officer, for example, to immediately distinguish that
19 that isn't a real gun.

20 Q. So the Airsoft guns, they can sometimes look like
21 a real gun, correct?

22 A. Yes, they can.

23 Q. Do they feel like a real gun?

24 A. Some of them do, yes.

25 Q. On my continuum here, slide 13, SDX-1, I kind of

1 put the SAP launcher between a NERF gun and a water gun.

2 If you were making this slide, where would you
3 put the SAP launcher?

4 A. Well, can I ask you what the left side of the
5 arrow is indicative of, and the right side is, so that I can
6 better understand your intention in laying them out? I'm
7 not totally, totally sure what -- you know, how they are
8 being categorized.

9 Q. Are you familiar with the internal workings of a
10 water gun?

11 A. Yes.

12 Q. Would an SAP work inside of a water gun?

13 A. Well, we know that non-solid forms of SAP have
14 worked in a water gun type of mechanism from earlier PTT
15 prior art that we have discussed in the courtroom.

16 Q. Thank you for fixing my question.

17 A. That's okay.

18 Q. I meant spherical SAPs.

19 A. Okay. Gotcha.

20 Would a solid, spherical SAP work in a water gun?
21 I have not tested it. I believe it could be challenging. I
22 don't know that it would work in a water gun mechanism.

23 Q. Are you familiar with the internal firing
24 mechanism of a paintball gun?

25 A. In a general sense, yes. I haven't really opened

1 them up and played with them myself.

2 Q. You think a spherical SAP would work in a
3 paintball gun?

4 A. I think, again, from my general knowledge, it
5 would probably be as likely to work in a paintball gun, very
6 similar likelihood, as it would to an Airsoft mechanism.

7 Q. How about a NERF gun? Are you familiar with the
8 firing mechanism of NERF guns?

9 A. Yes. Do you mean the kind that shoot darts?
10 Because there are several different types of NERF
11 ammunition.

12 Q. Well, what are the different types?

13 A. Offhand, there are some NERF guns that shoot the
14 darts, the cylindrical things with a solid head.

15 Q. Foam, right?

16 A. Yes, they are foam, except for the head, which is
17 a molded plastic usually. There are some NERF guns --
18 there's a line called the NERF Rival which shoots large foam
19 balls. There's a disk-shooting NERF gun. I don't know if
20 it's still on the market, but it shoots these little frisbee
21 type of things.

22 So when you say "NERF gun," I was just asking
23 what type of gun you meant.

24 Q. And would a spherical SAP work in a NERF gun that
25 shoots those spherical balls?

1 A. I've never taken apart a Rival before, so I'm
2 really not sure how the mechanism inside works. I wouldn't
3 want to answer without seeing how the mechanism looks.

4 Q. Is it fair to say that you think -- would you
5 agree that Airsoft and BB guns are primarily for adults?

6 A. No. I know that kids play with them, and they
7 are aimed at kids. And there's competitions with targets,
8 you know, target practice for kids and target competitions
9 and such.

10 Q. Can a 14-year-old purchase an Airsoft gun in,
11 let's say, the District of Columbia?

12 A. I wouldn't know the District of Columbia's
13 regulations. I really don't. I'm sure there are some
14 states where it probably is permitted and I'm sure there's
15 other cities or localities where there are regulations. I
16 don't know what they are offhand.

17 Q. I'm asking from a perspective of ignorance. I'm
18 not very familiar with, actually, any of these except maybe
19 the NERF gun.

20 A. Right.

21 Q. But, thank you, I appreciate the testimony.

22 Can you please pull up JX-1, which is the '282
23 patent, please. Would you please go to column 1, lines
24 57-60, please, and highlight those.

25 So this is the '282, JX-1. Do you see where it

1 talks about -- talking about the prior art, these include
2 paintball guns and Airsoft guns, but these systems are for
3 adult use only.

4 Do you see that in the '282 patent?

5 A. Yes, I do see that in the '282 patent here that
6 is highlighted.

7 Q. Next I'd like to look at -- can you please pull
8 up RDX-3, slide 77, please.

9 This is your demonstrative exhibits. Do you
10 remember this slide?

11 A. Yes. And is this the video on this slide or is
12 it a screen capture? I don't recall.

13 Q. This is a screen capture. And this is you, your
14 hand, in this clip, correct?

15 A. Yes, it is.

16 Q. And you put an SAP -- spherical SAP into a Daisy
17 AS470?

18 A. Yes, I did.

19 Q. Was that your personal device?

20 A. No, it was lent to me by counsel. It was one of
21 the exhibits in the matter, and it had one of those stickers
22 on it with a number.

23 Q. And you successfully -- I believe you testified
24 you successfully fired an SAP, correct?

25 A. Yes, that's correct.

1 Q. And how long did it take you to achieve that,
2 like how many -- did you do any test runs?

3 A. Just so I understand your question, do you mean
4 were there attempts, prior to this attempt, that were
5 unsuccessful?

6 Q. Yes.

7 A. No, to the best of my recollection the first
8 attempt was successful. And I think the first attempt was
9 the one my son videotaped here.

10 Q. And did you try to launch a Clear Spheres SAP
11 without hydrating it?

12 A. No, I did not launch anything without hydrating
13 it first.

14 Q. How did you know to stop at a certain time, then?

15 A. In other words, how did I know how long to
16 hydrate it for?

17 Q. Correct.

18 A. Well, I was aiming for an approximate diameter.
19 So I did not know -- it was a bit of trial and error really
20 to -- you know, to soak and measure type of thing.

21 Q. And so you had a caliper, or you measured it?

22 A. Yes, that's correct.

23 Q. What happened when you went beyond 30 seconds?

24 A. I don't recall. I think that I was watching
25 very -- to the best of my recollection -- and this was done

1 some months back. To the best of my recollection, I was
2 watching it very carefully, removing it, measuring, you
3 know, putting it back in, if need be.

4 So I think I got to the approximate size fairly
5 quickly, in terms of trial and error quickly, and utilized
6 that ammunition. I didn't try ammunition that was too big,
7 so to speak, or too small.

8 Q. And when did you perform this experiment, let's
9 call it?

10 A. It may have a date in my report that I don't
11 recall, or in the exhibit list. To the best of my
12 recollection, it would have been perhaps February-ish time
13 frame, February or March.

14 Q. Of 2023?

15 A. Yes.

16 Q. Going back to my continuum here, which is SDX-1,
17 slide 13, are there any differences between an Airsoft
18 firing mechanism -- actually, you testified you're not
19 familiar with the internal workings of the NERF launcher,
20 correct?

21 A. No, I said I wasn't particularly familiar with
22 the internal workings of the NERF Rival launcher. You were
23 asking me about the type of NERF that launches the large
24 foam balls, and I'm not -- I've never opened one of those
25 up. I'm familiar with the dart launchers, quite a few of

1 the dart launchers, but not the Rival line.

2 Q. At the beginning of your testimony, I believe you
3 indicated that you're an Airsoft modder. Is that correct?

4 A. Well, my boys and I got into the NERF modding
5 community. So NERF mods, yes.

6 Q. Can you please spell that?

7 A. "NERF"?

8 Q. No, "modding."

9 A. Oh, "modding." M-O-D-D-I-N-G. Or Mods, M-O-D-S.

10 Q. Okay. And what is the purpose of modding?

11 A. In general, to improve the performance of a NERF
12 gun, either its distance, the distance the dart would shoot,
13 the accuracy in some cases. Those tend to be the primary
14 objectives of the modding community that I've personally
15 experienced.

16 Q. Is it usually to make the ammunition shoot
17 further?

18 A. Usually distance is a goal, yes. One of the main
19 goals.

20 And one of the main frustrations of a NERF dart,
21 dart gun, to people who want to mod them, is they -- you
22 know, the dart tends to sink back to the ground a little bit
23 too quickly or its speed is such that the breeze takes it
24 away more quickly from its target. So given more velocity,
25 you would have more distance and potentially more accuracy

1 as well.

2 Q. And are the modders also interested in making the
3 ammunition shoot slower?

4 A. I am not personally aware of modders who have
5 that as a goal.

6 Q. It's usually to increase distance or firepower,
7 correct?

8 A. Yes. Yes.

9 And by "firepower," I wouldn't say the rapidity
10 of shooting, if it's a multi-shot-gun. I suppose there have
11 been attempts to do that, and perhaps there are some I'm not
12 familiar with. It's mainly getting it to shoot farther,
13 which also involves getting it to shoot faster.

14 Q. And it's also not -- then it's not -- they are
15 not modding to make it safer, is that correct, then?

16 A. No, that wouldn't be the objective that I'm
17 familiar with.

18 Q. Did you review any of the inventor testimony in
19 this case?

20 A. Yes, I did.

21 Q. Do you remember if any of the inventors had any
22 experience with Airsoft guns?

23 A. I wouldn't recall any particular testimony to
24 that effect. If you'd like to refresh my memory on
25 something in particular. It wouldn't surprise me, but I

1 don't recall any, any testimony on that particular subject.

2 Q. I'd like to ask you some questions about some of
3 the prior art you relied on, which is Peev, RX-8. This is
4 the first page.

5 I assume you're very familiar with this document?

6 A. Yes. I've seen it at least once.

7 Q. So here is RX-8, page 3. And the area of
8 technology discusses electric Airsoft guns find application
9 in the sporting gun industry.

10 What is the "sporting gun industry"?

11 A. Well, what you've highlighted is part of that
12 sentence. It does go on, I would note, to say, or for fun
13 when conducting Airsoft games.

14 Q. We'll get there.

15 A. Okay.

16 Q. Let's start with "sporting gun industry."

17 A. The "sporting gun industry," I have not looked
18 for a definition. If you're asking me what my definition of
19 that might be, it would be an area of projectile launchers,
20 in the form of guns, that are used for sport as opposed to
21 nonsporting purposes.

22 So sport purposes could include target shooting,
23 just fun -- "plinking" is a term which you may or may not be
24 familiar with, but just shooting cans and things like that
25 in your backyard. Hunting can also be considered part of

1 the sporting gun industry.

2 What wouldn't be part of at least my
3 interpretation of the "sporting gun industry" would be
4 self-defense or, you know, military-type purposes.

5 Q. This is not some type of play for kids, correct?

6 A. Well, in some instances target shooting can be an
7 entertainment form for kids, yes. And, again, there are
8 organized competitions through the Boy Scouts and whatnot
9 that revolve around target shooting using -- using air guns
10 such as BB guns.

11 Q. That sentence continues, electric Airsoft guns
12 find application in the sporting gun industry and are used
13 for military emulations or training.

14 What does that mean to one of skill in the art?
15 "Military emulation or training," what does that involve?

16 A. So my understanding of how Airsoft guns have been
17 used in that fashion is that there are certain Airsoft guns
18 whose operations and -- you asked me earlier do some guns
19 feel real, are they heavy or do they weigh the same.

20 Some Airsoft guns, higher-end models in
21 particular, are very realistic in terms of how they feel in
22 your hand, the way they work. So, in other words, how you
23 would cock them or take the safety on and off would be done
24 in a manner that is an accurate representation or at least
25 attempts to be an accurate representation of the real gun.

1 So if you had an Airsoft Glock, for example, it
2 would have a safety in exactly the same place that would
3 operate with a similar feel to the safety on a real Glock
4 that a police officer might use. And it allows police
5 officers or security guards, et cetera, to practice in the
6 handling of these guns without much danger to themselves or
7 others, as well as the expense of actually firing live
8 rounds.

9 Q. And then at the end of the sentence it talks
10 about, find application for fun when conducting Airsoft
11 games.

12 What are Airsoft games?

13 A. So there's really kind of a broad range of
14 activities that can come from that category. Informal
15 backyard wars that your kids might set up with their
16 friends, to organized parties. You can hire companies to,
17 you know, host you at a facility, for example, to have
18 competitive team Airsoft. And that might be for a birthday
19 party or it might be for a corporate event. You know,
20 sometimes they will divide into teams for team building.

21 Q. Is it similar to like a paintball location where
22 you go and play paintball for the day? Is that similar?

23 A. I would say it would be, yes.

24 Q. Have you done it before, where you go to an
25 Airsoft facility and have an Airsoft game?

1 A. I've done the paintball. I've never done the
2 Airsoft, no. Yeah.

3 Q. Just to be clear, Peev discloses an Airsoft gun,
4 correct?

5 A. Yes, it does.

6 Q. If I could go to RDX-8, slide or page 15.

7 And Peev discloses that it's for replacing an
8 existing mechanism, an Airsoft gun, correct?

9 Do you see at page 15 it says, electric Airsoft
10 gun control system of the invention can replace the existing
11 electrical installation of existing electric Airsoft guns,
12 correct? That's what Peev discloses.

13 A. That is -- yes, that is what you're highlighting
14 there. That's correct.

15 Q. And it doesn't disclose using Peev in NERF guns
16 or water guns or any other type of toy gun, correct?

17 A. That's correct.

18 Q. I'd like to look at the other reference that you
19 relied on, Nagayoshi, which is RX-9. There is the first
20 page. I just have a question about one or two pages. So
21 this is RX-9, page 197.

22 Do you see what I highlighted there? It says,
23 the current level of technology in the toy gun industry can
24 be in the advertisements of specialized journals. And then
25 it says, on page 153 of the February 2004 edition of the

1 monthly Combat Magazine.

2 Are you familiar with the Combat Magazine?

3 A. I'm not. And as this is a Japanese patent, I'm
4 guessing that this is -- well, I know this is a translation,
5 and I'm guessing it refers to some Japanese magazine
6 publication.

7 Q. It sounds kind of serious, though, doesn't it?

8 A. I don't know. The Japanese have some
9 interesting -- interesting magazines and hobbies and such
10 I'm not really familiar with. And, of course, it's a
11 translation, so...

12 Q. Just to be clear, Nagayoshi is also directed
13 towards an Airsoft gun, correct?

14 A. Yes, it is.

15 Q. And then if we look at Peev, page 201, I've
16 highlighted a sentence there. Fig. 8 is a drawing for
17 explaining the structure of an electric toy gun using as a
18 model a gun officially adopted by the American Army such as
19 the M-16 series or the M4 series.

20 And that's sort of consistent with your testimony
21 that these Airsoft guns can be -- can look like real guns,
22 correct?

23 A. Yes, I'd say that is consistent.

24 Q. And you took issue with the translation a little
25 bit in this document, correct?

1 A. You mean my comment just before about Combat
2 Magazine?

3 Q. Yes.

4 A. No, I didn't take issue with it. I'm sure it's
5 been translated just fine. The title of the magazine was a
6 translation, so, you know, sometimes -- I don't know. You
7 asked me if that sounds pretty serious, and, you know, it
8 could but, you know, I just don't know the publication.

9 MR. TAYLOR: Your Honor, may I just quickly
10 confer with counsel? I'd like to get an update on the
11 physical samples.

12 JUDGE MCNAMARA: Sure.

13 MR. TAYLOR: May we bring them in, Your Honor?

14 JUDGE MCNAMARA: Yes. While we are waiting,
15 would anybody mind if I asked a couple of questions?

16 Maybe CDX-0007C.5 could be pulled up. That is
17 Mr. Tino's direct examination. I just want to take a look
18 at some of the pictures and see if Mr. Delman has looked at
19 some of these.

20 Now I think slide 5 -- let's start there -- I
21 don't think this is CBI, is it?

22 MR. CORDELL: It is not, Your Honor.

23 JUDGE MCNAMARA: Okay. So have you looked at an
24 example of the Mythic gun, Mr. Delman?

25 THE WITNESS: I'm fairly sure I have, yes.

1 JUDGE MCNAMARA: And the Legion gun?

2 THE WITNESS: Yes.

3 JUDGE MCNAMARA: Okay. Are these -- if you know,
4 is the design of these guns similar to military-style
5 weapons, or were they copied from military-style weapons, if
6 you know?

7 THE WITNESS: I would say, as a designer, that
8 they depart significantly from a realistic military-style
9 weapon. I would say they are intended to look more like a
10 science fiction type of a weapon; the colors, the forms, the
11 details. They look great, but I would never mistake them
12 for a military gun.

13 JUDGE MCNAMARA: And that's true of both the
14 Mythic and the Legion.

15 THE WITNESS: I would agree, yes.

16 JUDGE MCNAMARA: Let me stop there. Do we have
17 the guns?

18 MR. CORDELL: The very careful security function
19 here at the ITC is actually removing them -- they were all
20 in their original packaging -- they are removing them and
21 inspecting them to make sure they are not actual
22 powder-burning firearms.

23 JUDGE MCNAMARA: Good for them.

24 MR. CORDELL: But I'm told there are a couple of
25 them that are through that we'll have walked in.

1 JUDGE MCNAMARA: We are fine. We have the time.
2 And if we have to cut back a little bit on lunch to make
3 sure we accommodate everything, we can do that.

4 MR. CORDELL: Thank you.

5 JUDGE MCNAMARA: Okay. A couple more questions.
6 Before I go to the next slide, is slide 7 in the Tino deck
7 slides also not CBI? That was put badly.

8 Does deck slide 7 from the Tino slides,
9 CDX-0007C, contain any CBI?

10 MR. BOYD: Your Honor, yes, it does.

11 JUDGE MCNAMARA: Okay. I wanted to double-check
12 and make sure. So if anyone -- before we show the slide, if
13 anyone who is not on the protective order could kindly leave
14 for just a moment, I would appreciate it.

15 Let me ask these questions quickly. I'll be fast
16 and then we can get to the Airsoft.

17 Looking at CDX-7C.7, Mr. Delman, have you had an
18 opportunity to look at any of the prototypes or any of the
19 guns that actually have made it to the shelves that are
20 shown on CDX-007C.7?

21 THE WITNESS: I don't recall having had a chance
22 to be hands-on with any of these. I looked at a lot of guns
23 throughout the case, but to the best of my recollection, I
24 don't recall seeing these in person, no.

25 JUDGE MCNAMARA: Would you know enough, from

1 looking at these guns -- I am referencing the Ghost, the
2 Raid, the Dual Wield, the Mini Buckshot, the BurstFire
3 Springer, and the Tri-Barrel -- whether any of them appear
4 to simulate, in design, military-style weapons?

5 THE WITNESS: Again, I'd say that their intent is
6 to simulate some sort of a science fiction-y type of weapon.
7 The forms, colors, et cetera, I don't believe would make
8 anyone think they are military-style weapons.

9 JUDGE MCNAMARA: How about the shapes?

10 THE WITNESS: The Ghost and the Raid and the
11 Dual -- well, you know, there are at least two on here that
12 are pistols. There are at least two on here that are rifles
13 in format.

14 JUDGE MCNAMARA: Can you tell me which ones?

15 THE WITNESS: Sure. So the Ghost is generally a
16 rifle format in its length, I'd say, and form. And the Raid
17 as well. The Dual Wield guns are pistols or handguns. The
18 Mini Buckshot is also a pistol or a handgun.

19 The BurstFire is something in between. There's a
20 category of guns, perhaps -- I forget what they call them --
21 bullpups -- they are sort of halfway between a pistol and a
22 rifle. And it may be that type of a form factor or that
23 might be its intention.

24 And the Tri-Barrel is -- if you didn't tell me it
25 was a gun, I wouldn't know it was a gun from this picture.

1 It's certainly not the form of a standard, standard gun that
2 I would be familiar with at least.

3 But having said that about their overall forms,
4 you know, design is very much about everything, the whole
5 holistic visual appearance. And even though the form of the
6 Ghost may be in a general rifle form factor, its colors, its
7 details, et cetera, or the Raid has a -- has a stock on it,
8 you know, to go up against your shoulder, I guess, but it's
9 not a stock which looks at all like a real stock on a
10 military or other genuine weapon.

11 So there's references to things about,
12 quote/unquote, real guns, and I think that those are
13 intentional, but, in general, they are intended to look like
14 fun, futuristic weapons that you would not mistake for a
15 genuine gun.

16 JUDGE MCNAMARA: Do you know anything about
17 European or Russian weapons?

18 THE WITNESS: A little bit, sure.

19 JUDGE MCNAMARA: Have you seen a Kalashnikov?

20 THE WITNESS: I am familiar with the general form
21 of a Kalashnikov, yes.

22 JUDGE MCNAMARA: In your estimation, does it
23 appear at all similar to the Tri-Barrel?

24 THE WITNESS: To the which one? I'm sorry.

25 JUDGE MCNAMARA: To the Tri-Barrel.

1 THE WITNESS: A Kalashnikov rifle? Maybe there
2 are different models of Kalashnikov than the one I'm
3 thinking of. I'm thinking of the traditional ones used, you
4 know, by the fighters in Afghanistan, for example, which is
5 more of a wooden-stocked, you know, machine gun or assault
6 weapon. I wouldn't say it looks like a Tri-Barrel, no.

7 JUDGE MCNAMARA: Okay. Thank you.

8 I think we have guns in the courtroom. I mean,
9 we have -- sorry about that. We have Airsoft guns.

10 MR. TAYLOR: Yes, Your Honor, I believe there are
11 a number of exhibits. I would just like to use this as more
12 of a demonstrative exhibit. It will not be admitted into
13 evidence.

14 JUDGE MCNAMARA: Okay.

15 MR. TAYLOR: It's for Your Honor's purposes.

16 May I approach and retrieve the Gel Blaster
17 pistol there?

18 JUDGE MCNAMARA: Sure.

19 MR. CORDELL: Your Honor, we'll take your
20 guidance. If you want them as part of the record, we're
21 happy to submit them.

22 JUDGE MCNAMARA: Are you okay with that, so that
23 we have them as exhibits? I would like to see them as
24 exhibits, actually. I know you are using it as a
25 demonstrative, but I would like to see them.

1 MR. TAYLOR: I would like to hear Mr. --

2 MR. GEORGE: Do we need a sponsoring witness for
3 the time frame of these documents -- for these guns? I'm
4 sorry.

5 JUDGE MCNAMARA: Good point.

6 MR. GEORGE: Were they bought yesterday? I don't
7 know how relevant they are, if they were bought yesterday.
8 So I would not agree to anything until I heard a sponsoring
9 witness.

10 JUDGE MCNAMARA: Fair enough.

11 MR. TAYLOR: So, Your Honor, our expert can
12 sponsor these. He did comment on most of them in his
13 report. So that would be a way to get it in.

14 JUDGE MCNAMARA: Mr. George?

15 MR. GEORGE: They will put their expert on and
16 I'll see what he says.

17 JUDGE MCNAMARA: Very good. Fair enough.

18 MR. GEORGE: Thank you.

19 JUDGE MCNAMARA: Mr. Taylor?

20 MR. TAYLOR: I would just like to use them for
21 demonstrative purposes, and then if Complainants' counsel
22 wants to do that --

23 JUDGE MCNAMARA: Of course.

24 MR. TAYLOR: -- that's the case.

25 BY MR. TAYLOR:

1 Q. Mr. Delman, I'd like to just show you a device --
2 unfortunately, I'm a lawyer here and I keep saying "device."
3 It's a gun. It's in the case of a Gel Blaster pistol.

4 MR. TAYLOR: May I approach the witness?

5 JUDGE MCNAMARA: Yes, please.

6 BY MR. TAYLOR:

7 Q. Have you seen that one before?

8 A. I have, yes.

9 MR. TAYLOR: And I believe, Your Honor -- have
10 you felt that one?

11 JUDGE MCNAMARA: I did. I picked it up, yes.

12 Q. And then I have here a Glock Perfection, I
13 believe, a CO2 Airsoft gun. This is called a Glock 19. Let
14 me just show that.

15 Are you familiar with this type of Airsoft gun?

16 A. I'm familiar with the type, yes. Not that
17 particular model, but yes.

18 Q. Okay.

19 MR. GEORGE: Your Honor, I want to make sure, the
20 sign says "Public." And I assume we are on the public
21 record right now, and I was going to --

22 JUDGE MCNAMARA: Thank you. We are on the public
23 record, yes. Thank you very much.

24 MR. TAYLOR: Your Honor, would you like to
25 inspect this?

1 JUDGE MCNAMARA: Sure. Thank you.

2 Q. Mr. Delman, we see here on the Glock 19, it has
3 that orange safety feature, right?

4 A. Yes. The orange tip, yeah.

5 Q. So one would not misinterpret this as a real gun,
6 correct?

7 A. That is the hope, yes.

8 Q. I have one last series of questions, Mr. Delman.
9 Can you please pull up RPX-84.

10 RPX-84, have you seen this exhibit before?

11 A. I believe I have. If not in that exact
12 coloration, something very similar, but, yes, the AS240.

13 Q. What is this?

14 A. It is an Airsoft pistol manufactured by Daisy.

15 Q. And do you see the warning there at the very
16 bottom left of RPX-84-1? Do you see where it says "Not a
17 Toy"?

18 A. I do.

19 MR. TAYLOR: Your Honor, I have no further
20 questions.

21 JUDGE MCNAMARA: Okay. Thank you.

22 MR. TAYLOR: Thank you.

23 JUDGE MCNAMARA: I thought you were going to
24 shoot the gun.

25 MR. TAYLOR: Pardon me?

1 JUDGE MCNAMARA: I thought you were going to
2 shoot the Airsoft.

3 MR. TAYLOR: No, thank you.

4 JUDGE MCNAMARA: Do you have any redirect?

5 MR. GEORGE: I do, Your Honor.

6 JUDGE MCNAMARA: Please, Mr. George. Go ahead.

7 Mr. Taylor, I am letting you off easily. I
8 thought better you than me.

9 REDIRECT EXAMINATION

10 BY MR. GEORGE:

11 Q. If I can pick up on the very last question. The
12 products accused of infringement in this case, do they
13 include a similar warning where they say, this is not a toy?

14 A. I'm not familiar with any such warning on these
15 products, no.

16 MR. GEORGE: Your Honor, I had tendered
17 Mr. Delman as an expert in the field of industrial design,
18 including areas of toy and launcher design, and I assume
19 that proffer is unobjected to.

20 JUDGE MCNAMARA: I did not hear an objection. I
21 heard -- so go ahead.

22 MR. CORDELL: Again, Your Honor, subject to my
23 cross-examination and the admissions that I have listed
24 there, I think it goes to weight, but if it would make the
25 record more complete, I'm happy to object. But for my

1 money, it goes to weight.

2 JUDGE MCNAMARA: I think it goes to weight as
3 well, and that is what I heard by way of the questions that
4 were asked and no clear objection.

5 MR. CORDELL: Yes. Thank you.

6 JUDGE MCNAMARA: Thank you.

7 Q. Let's call up RX-52 and RDX-3.085 on the screen,
8 if you can put them side by side.

9 Mr. Delman, do you recall Mr. Cordell asking you
10 questions about this Korean patent application?

11 A. Yes, I do.

12 Q. And do you recall testifying that this
13 application teaches improving the bullet of a toy gun to
14 prevent injury?

15 A. Yes, I did testify to that effect.

16 Q. And do you recall testifying that the solution to
17 the injury problem in RX-52 is to use a bullet formed of gel
18 or gel material?

19 A. Yes.

20 Q. Do you recall Mr. Cordell asking you about
21 reducing the muzzle velocity of an Airsoft gun in order to
22 avoid injury?

23 A. Yes, I do.

24 Q. Does RX-52 disclose reducing the muzzle velocity
25 to reduce injury? And, if you want, there's -- the entire

1 exhibit is in those binders to your left there.

2 A. They are now on the floor. But, to the best of
3 my recollection, it doesn't discuss a reduction in muzzle
4 velocity.

5 Q. Now if we could put up RX-53 and RDX-3.086.

6 Mr. Delman, do you recall Mr. Cordell asking you
7 questions about the Carlson patent?

8 A. Yes, I do.

9 Q. And do you recall testifying that the Carlson
10 patent teaches improving the bullet of a toy gun to prevent
11 injury?

12 A. Yes.

13 Q. And do you recall testifying that a solution in
14 Carlson is to use a bullet formed of hydro-polymer similar
15 to the absorbent polymer used in diapers?

16 A. Yes.

17 Q. Does RX-53, the Carlson patent, disclose reducing
18 the muzzle velocity to reduce injury?

19 A. No, to the best of my recollection, it doesn't
20 discuss that.

21 Q. Looking at the first page of RDX-53, the Carlson
22 patent, can you tell me when it was filed?

23 A. The filing date is October 6 of 2010.

24 Q. So was the Carlson patent filed after the
25 asserted patents?

1 A. Yes.

2 Q. And the Carlson patent is not prior art, correct?

3 A. No, it's not.

4 Q. Okay. And do you see, if you look at line 65,
5 that this patent was published on October 6, 2011?

6 A. I'm sorry, I'm not --

7 Q. That's okay.

8 A. Yes, okay, I now see that. Yes.

9 Q. So this patent was not available to a person of
10 ordinary skill in the art prior to the filing date of the
11 asserted patents.

12 A. That would be my understanding, yes.

13 Q. Let's go back to RDX- -- let's focus on
14 RDX-3.086.

15 Do you recall that Mr. Cordell asked you
16 questions about the text in the right-hand box? And that
17 text is from RX-50, column 3, lines 44-60.

18 A. I do recall, yes.

19 Q. And do you recall that Mr. Cordell spoke to you
20 about his experience in the sawmill and the examples of wood
21 pulp in this passage?

22 A. Yes, I recall that discussion.

23 Q. Was this passage available to a person of
24 ordinary skill in the art prior to the filing date of the
25 asserted patents?

1 A. No, it would not have been.

2 Q. Let's pull up RDX-1.033.

3 Do you recall Mr. Cordell asking you questions
4 about the information on this slide?

5 A. Yes.

6 Q. Do you understand that what we are looking at is
7 a passage from Dr. Kudrowitz' rebuttal report, which is
8 RX-0679C, at paragraph 167?

9 A. Yes.

10 Q. Do you see wood pulp in Dr. Kudrowitz' list of
11 materials?

12 A. No, I do not.

13 Q. Now do you see Dr. Kudrowitz lists rubber as a
14 material from which a projectile could be made?

15 A. Yes.

16 Q. Are you aware of rubber ammunition?

17 A. The only rubber ammunition I'm familiar with
18 would be the types of rubber bullets that are used by police
19 in riot-control and crowd-control operations that are kind
20 of not lethal but put people down and get things calmed
21 down. I gather on occasion they can be lethal as well. But
22 those are the only kinds of rubber bullets I'm familiar
23 with.

24 Q. I'd like to go to RDX-3.077. And this is the
25 Airsoft gun, AS470, correct?

1 A. Yes.

2 Q. And this gun was available, to your knowledge,
3 before the filing date of the patents?

4 A. Yes. It's a prior art gun.

5 Q. Is this gun made to look like a real gun?

6 A. There are aspects of it that certainly reflect,
7 you know, certain real guns, quote/unquote, but it's molded
8 in clear plastic. It doesn't look -- there's no real gun
9 that looks like this, aside from certain details about its
10 form perhaps.

11 Q. Could we look at RDX-77? If we could rotate it,
12 if that's possible, and then maybe blow it up. Could you
13 focus on the warning? That's not the one I want. Okay.

14 A. The one on the bottom?

15 Q. It's on the bottom. Thank you.

16 So, first of all, are you familiar with the
17 product that we just -- that is shown here in RPX-77?

18 A. Yes, I am familiar with it.

19 Q. And what product is that? We can zoom out, if
20 you want.

21 A. It's called the Nebula Pro from the Hydro Strike
22 line.

23 Q. It's a PTT product, correct?

24 A. Yes.

25 Q. Okay. And it's one of the products that's

1 accused of infringement in this ITC action, correct?

2 A. Correct.

3 Q. Is there a warning on this package?

4 A. There is, yes.

5 Q. And could you read the warning into the record?

6 A. Not a toy. Adult supervision required. Misuse
7 or careless use may cause serious injury, particularly to
8 the eye. May be dangerous up to 54.6 yards or 50 meters.

9 MR. GEORGE: I pass the witness.

10 JUDGE MCNAMARA: Thank you.

11 Mr. Cordell, any recross?

12 MR. CORDELL: If I may, Your Honor.

13 RE-CROSS-EXAMINATION

14 BY MR. CORDELL:

15 Q. Good morning, Mr. Delman.

16 A. Good morning.

17 Q. So Mr. Taylor asked you a number of questions
18 about whether you could put an SAP ammunition into a
19 paintball gun. Do you recall that?

20 A. Yes, I do recall.

21 Q. And he asked you whether you could put SAP into a
22 NERF gun. Do you recall that?

23 A. Yes, I do.

24 Q. So I've taken the liberty of, those Clear Spheres
25 that you and I talked about last time, and I soaked them

1 overnight. Have you done that?

2 A. I believe I have. They grow pretty big, as you
3 have seen there.

4 Q. Let me put it on the ELMO.

5 Your Honor, I will wipe up the ELMO.

6 Do you recognize what I've got on the ELMO as a
7 fully hydrated Clear Sphere?

8 A. I will take your word for it that it is fully
9 hydrated, being that you left it overnight, et cetera.

10 Q. You don't recognize it as such?

11 A. It looks to be a fully hydrated Clear Sphere in
12 terms of its size.

13 Q. Would you like to handle it?

14 A. Sure.

15 MR. CORDELL: May I approach, Your Honor?

16 JUDGE MCNAMARA: Yes.

17 A. Thank you. Okay.

18 MR. CORDELL: Your Honor?

19 JUDGE MCNAMARA: Yes, please. Oh, that is really
20 interesting.

21 Q. Now, Mr. Delman, you would agree with me that if
22 you attempted to put that fully hydrated Clear Sphere into a
23 paintball gun, it would not launch, correct?

24 A. I would guess you're correct on that, yes.

25 Q. And if you tried to put that fully hydrated

1 Clear Sphere into a NERF blaster, it would not launch,
2 correct?

3 A. That's correct.

4 Q. You would have a big mess on your hands, right?

5 A. Probably.

6 Q. And the same would be true if you tried to put
7 that fully hydrated Clear Sphere into an Airsoft gun,
8 correct?

9 A. Correct.

10 Q. Now Mr. Taylor asked you about your video firing
11 the AS470 Daisy Airsoft gun. Do you recall that?

12 A. Yes.

13 Q. And he asked you whether you had to take several
14 attempts to load and effectively discharge SAP ammunition
15 through the AS470. Do you recall that?

16 A. Yes, I do.

17 Q. And he asked you a very interesting question. He
18 asked you how you knew only to hydrate the SAP Clear Spheres
19 ammunition for 30 seconds. Do you recall that?

20 A. I recall him asking that, and I said that I was
21 aiming for a particular size so I was measuring it. I
22 really wasn't going by time as much as I was on measuring
23 its diameter as it grew.

24 Q. As we reviewed on Friday, when you hydrated it
25 for only 30 seconds, the Clear Spheres ammunition was still

1 quite firm, I think were the words you used.

2 A. Yes, that's correct.

3 Q. And in contradistinction, the Clear Sphere ball
4 that I just handed you was quite soft, correct?

5 A. Yes, in comparison, it was.

6 Q. It was also kind of misshapen, almost
7 brain-shaped?

8 A. I wouldn't characterize it as such. It was
9 substantially round, spherical.

10 Q. I heard somebody characterize it as a M+bius
11 strip sphere. Would you agree with that?

12 A. It wouldn't be my description, no, but everybody
13 is entitled to their opinion.

14 Q. But, more importantly, you said that you came to
15 the conclusion about how long to hydrate the Clear Spheres
16 ammunition based on a couple of experiments you did in
17 February or March of this year, correct?

18 A. I don't remember saying it quite like that, but I
19 knew that the longer I left it in, the larger it would grow.
20 And, again, I was aiming for a certain range of size that
21 was my objective.

22 Q. But my point is that you were determining that
23 range of size in the February or March time frame of 2023.

24 A. Again, to the best of my recollection. The dates
25 may not be correct.

1 Q. But, in fact, sir, you gave us your report
2 detailing the AS470 as prior art in December of 2022,
3 correct?

4 A. Then, indeed, my recollection of that particular
5 video was not correct. I have fired these guns and utilized
6 these guns for the range of time that I've worked on the
7 case. It's possible that my recollection of firing them
8 more recently was confused with when that video was taken.
9 But obviously if the video was in my report, it was taken
10 before I filed the report.

11 MR. CORDELL: Your Honor, I move to strike as
12 nonresponsive.

13 JUDGE MCNAMARA: The first part of it I think is
14 responsive. And then I think the latter part -- I will
15 allow some redirect on that.

16 Q. But the point is, sir, you gave us your report on
17 the AS470 in December of 2022, correct?

18 A. I suppose that's correct, now that you remind me,
19 yes.

20 Q. Now you also had a great deal of discussion about
21 the Peev and Nagayoshi references. Do you recall that?

22 A. With Mr. Taylor this morning, yes.

23 Q. Now we also have the advantage of having these
24 Airsoft guns in the courtroom, correct?

25 A. We did, yes.

1 Q. So you handled the Glock 19 earlier. Do you
2 recall that?

3 A. Yes.

4 MR. CORDELL: Your Honor, this one is marked with
5 Physical Exhibit 83, the Glock 19.

6 Q. Mr. Delman -- may I approach, Your Honor?

7 JUDGE MCNAMARA: Yes.

8 Q. -- I'll hand you the Glock 19. And if you
9 like -- would you like it out of the package?

10 A. It depends on what your questions are going to
11 be. It would be nice to handle it. If you have -- these
12 kind of packages are quite the pain to open. If you have
13 something sharp we can slice it with?

14 MR. GEORGE: I'm going to object here,
15 Your Honor. We're starting to go beyond what Mr. Taylor did
16 with this witness. He didn't render an opinion about this,
17 so, you know, this is sort of -- he is taking a little
18 opportunity, Mr. Cordell, to go much further. I don't know
19 where he is going to go, but Mr. Taylor did very little with
20 this gun.

21 JUDGE MCNAMARA: I tend to agree, Mr. Cordell.
22 Where are you going?

23 MR. CORDELL: My questions are going to be pretty
24 simple. I'm going to continue the same line that I was on,
25 but with the exhibit in his hand.

1 JUDGE MCNAMARA: Well, it is an exhibit, but it
2 is going beyond what Mr. Taylor asked. There is no question
3 about that. So where are you going exactly?

4 MR. CORDELL: I'm specifically going to have him
5 verify that the ammunition that sits before Your Honor could
6 not ever fit in that device.

7 JUDGE MCNAMARA: Can he do that by observation?

8 MR. CORDELL: Yes.

9 JUDGE MCNAMARA: All right. So if that is the
10 case, and it is not taking the gun out of the -- or the
11 launcher out of the packaging, and he can verify that, I
12 have the --

13 MR. CORDELL: He can. I didn't want to deprive
14 the witness of the ability to examine the barrel of the gun.

15 JUDGE MCNAMARA: Mr. Delman, you are a designer.
16 Can you tell, from looking at that gun, what the approximate
17 size of the barrel might be?

18 THE WITNESS: Yes, I can certainly see that. I
19 can see what -- I can read the package in terms of the size
20 of ammunition that is included with the gun. I don't know
21 that I would need to open it up to verify.

22 JUDGE MCNAMARA: Okay. And I have the hydrated
23 Clear Sphere. Would you like it?

24 THE WITNESS: No, I don't think so, but thank
25 you.

1 BY MR. CORDELL:

2 Q. Just to tie it all up, Mr. Delman, is there any
3 way that you could successfully launch the Clear Sphere that
4 is now at the bench through the physical Glock 19 that sits
5 before you?

6 A. No, I don't believe there would be.

7 Q. Now let's start with Peev. The Peev reference is
8 intended to mimic a real assault weapon, correct?

9 A. Could you just refresh my memory as to the
10 appearance of the Peev gun by putting a figure up on screen
11 perhaps?

12 Q. Sure.

13 Can I have RX-557? Can we go to page 3.

14 So, Mr. Delman, do you see that it begins with,
15 electric Airsoft guns find application in the sporting gun
16 industry and are used for military emulations or training,
17 or for fun when conducting Airsoft games.

18 Do you see that?

19 A. Yes.

20 Q. Do you see that it says, electric Airsoft guns
21 externally represent a copy of real firearms?

22 Do you see that?

23 A. I do, yes.

24 Q. So the intention of the Peev author is to create
25 a device that emulates a real military firearm, fair?

1 A. A real firearm, yes. When you mentioned -- you
2 mentioned assault weapon. That was the specific reference I
3 wanted to compare to as to -- but I would not disagree that
4 it is representative of a real firearm or realistic firearm.

5 Q. Well, let me have some of the figures from Peev,
6 if it would help you.

7 Can I have Fig. 1 or Fig. 2? It's at RX-557,
8 page 18. There we go.

9 So here we see the inner workings of the Peev
10 device, correct?

11 A. Correct, yes.

12 Q. And the idea here was to package this in
13 something that emulated -- I guess I would call it an Uzi
14 form factor. Is that fair?

15 A. I don't know that I would characterize it as
16 such. There may be further images which show the external
17 design. This is more of a representative diagram, I think.
18 It doesn't really include details that describe the outer
19 shell of the gun's appearance.

20 Q. Well, let's look at Nagayoshi. Maybe that's
21 easier.

22 Can I have Nagayoshi at Fig. 8, which I think is
23 the one you focused on.

24 And that's, for the record, RX-558 at page 74.

25 Do you see in this diagram, sir, there's a

1 charging -- I'm sorry -- a carrying handle at the top of the
2 weapon?

3 A. Yes.

4 MR. GEORGE: Your Honor, I'm going to object
5 again. We're going far beyond what Mr. Taylor did.
6 Mr. Taylor showed him two sentences and asked him about
7 those two sentences. That was it. That's all he did. If
8 Mr. Cordell wanted to go through these drawings, he should
9 have done it on direct. It's going beyond. I object to it.

10 JUDGE MCNAMARA: What is your response,
11 Mr. Cordell?

12 MR. CORDELL: My response, Your Honor, is that
13 they brought up the Nagayoshi reference. They discussed its
14 contents and whether it was, in fact, a suitable piece of
15 prior art or not. This is directly relevant to exactly that
16 analysis.

17 JUDGE MCNAMARA: Mr. Taylor? Do you have a view
18 on this?

19 MR. TAYLOR: I agree with the objection, Your
20 Honor.

21 JUDGE MCNAMARA: You do. I'm not sure I do. And
22 so I am going to allow some latitude here, because
23 Mr. Delman has testified about some of these issues, and so
24 I think it's important to know more about Nagayoshi and his
25 opinion based upon what was asked.

1 Q. Mr. Delman, do you recall the question?

2 A. I think you asked, do you see there's a carrying
3 handle?

4 Q. Yes.

5 A. And my response is, yes, it does have a handle at
6 the top.

7 Q. And the same carrying handle appears on the U.S.
8 military M-16 that I was given in the Marine Corps, right?

9 A. Very similar to that design, yes.

10 Q. Nowadays they use an M4 instead, but it's a
11 similar form factor?

12 A. Right.

13 Q. It resembles the AR-15, correct?

14 A. Correct.

15 Q. And we have a large magazine extending down from
16 the weapon in Nagayoshi at Fig. 8 of RX-558, 074. Again,
17 that is similar to the M-16 form factor, correct?

18 A. Yes, it is.

19 Q. So when we're thinking about Nagayoshi as a
20 product, it would be similar to the HK-556 physical exhibit
21 that we brought into the courtroom, correct?

22 MR. GEORGE: I object, Your Honor. Now we have
23 really gone far beyond what Mr. Taylor was doing.

24 MR. CORDELL: Your Honor, I expected Respondents
25 to bring these physicals in for trial, they didn't, so I was

1 deprived of the ability to ask him -- I'm not going to go
2 beyond just having him verify that this is the kind of
3 weapon that Nagayoshi describes.

4 MR. GEORGE: Your Honor, these are not our
5 exhibits. I don't know what he is talking about.

6 JUDGE MCNAMARA: They are not exhibits yet, are
7 they? They are not.

8 MR. CORDELL: These are just demonstratives.

9 JUDGE MCNAMARA: That was my understanding, and
10 that is where everyone was leaving them.

11 I am going to allow some latitude here because it
12 is going to go to his view of Nagayoshi and his design
13 expertise. And also there has been a fair amount of
14 comparison about warnings on the packaging. I would like to
15 hear a little bit more about this.

16 MR. CORDELL: Thank you, Your Honor. May I
17 approach the witness?

18 JUDGE MCNAMARA: Yes.

19 Q. I'll hand you the demonstrative, which, for the
20 record, is an HK, or Heckler & Koch, G36, which is a 556,
21 545 Airsoft gun.

22 MR. CORDELL: I'm sorry, Your Honor. I should
23 have allowed opposing counsel to --

24 MR. GEORGE: That's all right. There's nothing I
25 can do to look at it in the short time I'm being permitted.

1 MR. CORDELL: It is not loaded.

2 Q. Mr. Delman, this is the German version of the M4,
3 correct?

4 A. It's an equivalent, yes.

5 Q. So the Germans fire a little better rifles than
6 the Americans do; is that right?

7 JUDGE MCNAMARA: Well, I think that is beyond the
8 scope.

9 THE WITNESS: That's probably beyond my pay
10 grade.

11 MR. GEORGE: If Mr. Cordell is going to testify,
12 he should be sworn in.

13 MR. CORDELL: That was a question. I wasn't
14 testifying.

15 JUDGE MCNAMARA: Well, the question, I think, is
16 a little beyond the scope.

17 MR. CORDELL: That might be an apt objection, but
18 I'm not testifying.

19 Q. The fact is that what Nagayoshi attempted to
20 disclose or to patent was a better way to feed ammunition
21 into a device like that HK 556 you're holding, right?

22 A. I think at a high level, that is an accurate
23 description, yes.

24 Q. So if I can have Nagayoshi at Fig. 21. Actually,
25 can we start with Fig. 17.

1 So the idea behind Nagayoshi is that the little
2 darkened wheel at the bottom of the magazine would grab the
3 Airsoft ammunition and channel it into a narrow channel that
4 goes up through the magazine, correct?

5 A. Yes, that's correct.

6 Q. And the little teeth on the wheel would grab each
7 of the Airsoft pellets and move them into that channel and
8 force them up and into the chamber of the gun, right?

9 A. Yes, that's correct.

10 Q. And I had an Airsoft round that I brought with
11 me, and I don't know what I've done with it. But you will
12 confirm for me that the Airsoft round are these hard plastic
13 pellets, right?

14 A. I actually have the sample you left with me the
15 other day, so I'll --

16 MR. GEORGE: Your Honor, we're really going far
17 beyond --

18 JUDGE MCNAMARA: Just a minute.

19 Mr. George, I'm sorry, your objection?

20 MR. GEORGE: I'm objecting. I don't know how --
21 this is going on -- we're so far down the road from where
22 Mr. Taylor is. And, yes, you've given him leeway, and, yes,
23 I understand that you want to hear more about this, but this
24 is really not fair to the witness. This is not how this
25 works, Your Honor.

1 JUDGE MCNAMARA: Mr. Cordell, could you respond?

2 MR. CORDELL: Yes, Your Honor. I'm tying up,
3 again, the feed mechanism, the focus of Nagayoshi, with the
4 Clear Sphere that Your Honor has before you.

5 MR. GEORGE: But that has nothing to do with
6 Mr. Taylor's testimony. It has nothing to do with what I
7 asked him on direct.

8 JUDGE MCNAMARA: It does not, so I think this is
9 going a little bit beyond.

10 Again, I think really delving into Nagayoshi a
11 little more deeply in terms of its design is within his area
12 of expertise, but starting to go beyond that. I know he has
13 done it with some of the gel and some of the things that he
14 has tested, fair enough, but it is getting -- we are moving
15 a little wide, I think.

16 MR. CORDELL: Thank you, Your Honor. If I can
17 hazard one more, which is I'd like to hand the witness
18 Physical Exhibit 80.

19 MR. GEORGE: Same objection, Your Honor.

20 JUDGE MCNAMARA: Let's see where it is going. He
21 is handing him the exhibit for the time being. Let's see
22 where that goes.

23 MR. CORDELL: Would you like it, Your Honor?

24 JUDGE MCNAMARA: Yes. And that is the SIG
25 Airsoft?

1 MR. CORDELL: Yes, Your Honor. This is the SIG
2 Air 1, which does still have marking on it, the packaging
3 was preserved, as Physical Exhibit 80.

4 BY MR. CORDELL:

5 Q. Mr. Delman, I've handed you the SIG1 Airsoft gun.
6 First, let me ask you, have you ever encountered that
7 particular gun before?

8 A. I have seen very similar. I can't say if it was
9 the exact same.

10 Just to note, though, this is not the same gun
11 that I have here, though, correct? This is a different
12 model from the box.

13 Q. The one in your right hand is a Heckler & Koch
14 556 and the one in your left hand is a SIG1.

15 A. Correct.

16 Q. Is there a warning at the end of that SIG1 box?

17 JUDGE MCNAMARA: Go ahead, Mr. George.

18 MR. GEORGE: Objection, again. We now know where
19 we're going, and we're going far beyond -- This has gone on
20 for some time now, Your Honor.

21 JUDGE MCNAMARA: I am aware of that, but I am
22 also drawing some lines. First of all, you agreed to
23 bringing in these demonstratives, correct?

24 MR. GEORGE: Yes.

25 JUDGE MCNAMARA: Okay. What did you think was

1 going -- what did you think they were going to be used for?
2 I'm just curious.

3 MR. GEORGE: I thought they were going to use
4 them with their expert, Your Honor. That's what I thought.
5 It's in his report. These aren't in Mr. Delman's report.
6 So you're asking what I thought; that's what I thought.

7 JUDGE MCNAMARA: Okay. So the objection is this
8 is beyond the scope of the expert report.

9 MR. GEORGE: It's beyond the scope of the expert
10 report. It's beyond the scope of our prehearing brief.
11 It's beyond the scope of what Mr. Taylor asked him about.
12 Yes, that's the objection, Your Honor.

13 JUDGE MCNAMARA: Mr. Taylor?

14 MR. TAYLOR: Your Honor, I just wanted to have
15 the demonstratives for my examination so Your Honor and the
16 witness could actually feel it, look at it, and get an
17 understanding of the design.

18 JUDGE MCNAMARA: Well, okay. I think it is going
19 beyond now, the scope. If it was not discussed in
20 Mr. Delman's report, if it was not discussed in the brief,
21 at least through Mr. Delman, and if it was not discussed in
22 his deposition testimony, then it is now going beyond the
23 scope and it's going beyond the scope of what Mr. Taylor
24 asked.

25 MR. CORDELL: If I can just respond, Your Honor.

1 We were not constrained by his expert report. We can go
2 beyond his expert report. They can't.

3 JUDGE MCNAMARA: I am aware of that. But the
4 problem is, if there is nothing there about this and he is
5 being shown this and there are questions being asked about
6 something he has never seen before, this is pretty much --
7 you know, it is pretty much live testimony and something new
8 to him.

9 MR. CORDELL: So I understand that. And the
10 proper objection then would be lack of foundation, and --

11 JUDGE MCNAMARA: Well, there could be that too.
12 But you're also asking me to open up a door on something by
13 asking him to lay the foundation on something, again, he has
14 never seen before.

15 MR. CORDELL: I heard this witness tell the
16 entire court that he was unaware of whether or not there was
17 a warning placed on the accused device boxes. He said that
18 at the beginning of his testimony.

19 JUDGE MCNAMARA: Okay.

20 MR. CORDELL: Mr. George then got back up -- or
21 then continued -- he was already up -- and led him by
22 showing him a box and having him read the warning into the
23 record. And I think I'm entitled to establish that these
24 devices have warnings that go far beyond the one that
25 Mr. George led him into reading into the record.

1 JUDGE MCNAMARA: Was there a reason -- well, I am
2 not going to ask that question.

3 Okay. So this is one of the accused products?

4 MR. GEORGE: No, Your Honor, it's not.

5 JUDGE MCNAMARA: It is not.

6 MR. GEORGE: And it is not prior art either.

7 MR. CORDELL: My point is that this is in
8 contradistinction -- so, again, the way this happened is the
9 witness said he was unaware of whether or not the accused
10 products had any warnings. He didn't think they had any
11 warnings.

12 Mr. George kind of recoiled -- I saw him, I've
13 been in that position, I know what that's like -- and he
14 then pulls the box up and hands it to the witness and says,
15 can you read this? And he actually did it through the
16 graphics, can you read the warning that you just said
17 doesn't exist?

18 JUDGE MCNAMARA: Well, I understand that that
19 happened. And I can remember also seeing one of the other
20 exhibit slides that also contained, I think, the three NERF
21 guns, and he had to be directed to the -- et cetera.

22 That, however, is not an accused product.

23 MR. CORDELL: Correct. I'm just trying --

24 JUDGE MCNAMARA: So, no, I think it is not an
25 accused product, it is not in his report, he is seeing it

1 for the first time. You could pick out any number of
2 products out there on the shelves and bring in a warning or
3 not a warning and it would not matter to whether or not the
4 accused products have warnings on them.

5 MR. CORDELL: It puts it into context, I guess,
6 is my point.

7 JUDGE MCNAMARA: I think the context is the
8 accused products and what do the accused products say on the
9 boxes.

10 MR. CORDELL: Well, recall that it is their
11 position that you should adopt these weapons as the base
12 prior art, and then the question is whether or not these
13 weapons have warnings on them.

14 JUDGE MCNAMARA: I think the base prior art is
15 Nagayoshi and Peev, and I think any of the weapons that are
16 described generally in Nagayoshi and Peev. But we do not
17 know if Peev had this weapon or Nagayoshi had this weapon
18 when they actually -- when those patents were issued. I do
19 not know that. I cannot tie these weapons -- I'm sorry --
20 these launchers -- I'm sorry. I have been involved with
21 some trap shooting recently.

22 So I do not know whether or not these boxes,
23 these products tie in any way to Nagayoshi or to Peev. I
24 just do not know. We do not have the dates on them. I do
25 not know when they were produced.

1 MR. CORDELL: That's why the expert's testimony
2 relating them would be useful --

3 JUDGE MCNAMARA: It would not be. I have to tell
4 you right now, as evidence, there is no linkage that I know
5 of, there is no clear linkage between Peev, Nagayoshi, and
6 this SIG weapon. I do not know the date that was produced.
7 I know the dates on Peev and Nagayoshi, but in order to tie
8 it, I would have to have had some connectivity in the
9 evidence in terms of time, who looked at it, what the
10 product was. It is not an accused product.

11 MR. CORDELL: I understand. I'll move on.

12 JUDGE MCNAMARA: So, in other words, I have
13 sustained your objection, Mr. George.

14 MR. GEORGE: Thank you, Your Honor.

15 BY MR. CORDELL:

16 Q. Mr. Delman, Mr. George asked you about RX-52.

17 Can I have that?

18 It was the Korean gel patent application. Do you
19 recall this?

20 A. Yes, I do.

21 Q. And he asked you about whether or not there was a
22 reduction in muzzle velocity in this particular disclosure.
23 Do you recall that?

24 A. I do recall that.

25 Q. What is the formula for energy coming out of the

1 muzzle velocity?

2 MR. GEORGE: Object, Your Honor. Again, we're
3 going far beyond. He was asked a simple question, does this
4 reference teach lowering the muzzle velocity as a solution
5 to safety, and his answer was, no, it doesn't.

6 JUDGE MCNAMARA: Well, I think -- where are you
7 going with this? You are just following up on the question
8 of muzzle velocity, correct?

9 MR. CORDELL: That's right.

10 JUDGE MCNAMARA: So I am going to allow a little
11 bit of latitude on this. I am not sure where the force
12 issue is coming in, other than, again, there has to be force
13 to be muzzle velocity. So I am not sure where it is going
14 exactly.

15 MR. CORDELL: It relates to the issue of reducing
16 the muzzle velocity and whether or not that is impactful,
17 whether that's meaningful.

18 MR. GEORGE: That's not what I asked him about.
19 I asked him one question, does this patent teach reducing
20 the muzzle velocity?

21 JUDGE MCNAMARA: I am going to let him have some
22 leeway on this.

23 Q. What is the formula for energy out of the muzzle?

24 A. I wouldn't know, without referencing.

25 Q. You aren't familiar with the basic physics

1 formula for kinetic energy out of the muzzle of a weapon?

2 MR. GEORGE: I'm going to object again. I think
3 what's going on here, Your Honor, is you are going to learn
4 this afternoon that they have a slide that has a formula for
5 kinetic energy, and we have objected to that slide. And I
6 think this is Mr. Cordell's way to try to lay some
7 foundation for that. It has nothing to do with what I asked
8 him.

9 MR. CORDELL: It has to do with this witness's
10 qualification to offer the opinion that Mr. George elicited.
11 He doesn't get to get up here and ask little questions that
12 involve a lot of foundation without addressing it.

13 JUDGE MCNAMARA: I tend to agree with this. I
14 already understand about Mr. Cordell's and Hasbro's voir
15 dire questioning and the cross-examination and where it was
16 going. I am going to allow a little latitude here. I am
17 going to take this into consideration in terms of the weight
18 of all of the evidence.

19 MR. CORDELL: Thank you, Your Honor.

20 Q. Do you recall the question, sir?

21 A. If you could please repeat it for me.

22 Q. Are you aware of the formula to evaluate kinetic
23 energy of a projectile at the muzzle of a launcher?

24 A. At this moment, I wouldn't be able to recall that
25 formula, no.

1 Q. You're not aware of $1/2 mv$ squared as the proper
2 instantiation of the kinetic energy of a projectile out of a
3 muzzle?

4 A. As I said, at this moment I would not have been
5 able to recall that.

6 Q. But you would recognize that, if you assume that
7 that is the proper formula, that reducing the mass will
8 reduce the total kinetic energy out of the weapon, right?

9 MR. GEORGE: Your Honor, I'm going to object.
10 How far is he going to go with this? He just said he is not
11 familiar with the formula.

12 JUDGE MCNAMARA: I think that is right. I think
13 we have the basic information we need about whether or not
14 Mr. Delman has a physics background with respect to muzzle
15 velocity.

16 MR. CORDELL: Thank you.

17 Q. Let's have RX-53, the Carlson reference.

18 Mr. George also asked you about the muzzle
19 velocity out of the Carlson reference. Do you recall that?

20 A. I recall a similar question, yes.

21 Q. And you are not qualified to offer this Court any
22 opinion about the energy for projectile being launched by
23 the Carlson reference, correct?

24 MR. GEORGE: Object. That's not what I asked
25 him. I just asked him if this patent taught reducing muzzle

1 velocity as a solution to the harm being caused by Airsoft
2 guns. His answer was, no, it didn't. I object.

3 MR. CORDELL: I'm entitled to know whether he is
4 qualified to offer that opinion.

5 JUDGE MCNAMARA: I am going to allow this. I
6 already think I know what the answer is. I am just going to
7 allow it on the record. I think it is going to go in the
8 same direction the last question --

9 MR. CORDELL: Thank you.

10 JUDGE MCNAMARA: -- went.

11 A. If you could please repeat the question for me.

12 Q. You are not qualified to offer this Court any
13 opinion about the effect of reducing velocity or mass as to
14 the total energy of a projectile launched by the Carlson
15 device, correct?

16 A. I'm trying to understand your question. If
17 you're asking me am I qualified to discuss, as I have, the
18 means by which a person of ordinary skill would consider
19 reducing muzzle velocity, the answer is yes, very much so.

20 If your question is do I understand at this
21 moment the formula to calculate that based on modifications
22 to the mass of the ammunition versus other factors, I
23 wouldn't feel comfortable doing so right now, no.

24 Q. But you acknowledge that the thing that has an
25 impact on a target is the total energy of the projectile,

1 correct?

2 MR. GEORGE: Objection, Your Honor. How far are
3 we going to go with this?

4 JUDGE MCNAMARA: Again, the nature of your
5 objection?

6 MR. GEORGE: There's no foundation. It's beyond
7 what Mr. Taylor did. It's beyond what I did. It's not in
8 his expert report. I could go on.

9 JUDGE MCNAMARA: Right. So the only question you
10 really asked is whether or not Carlson actually contains --

11 MR. GEORGE: I just said, does it have a teaching
12 to lower the muzzle velocity. That was it.

13 JUDGE MCNAMARA: Right, and that was it.

14 MR. CORDELL: And the only way he would be able
15 to inform the Court of that is that he had read Carlson and
16 he had decided that, as a matter of expert testimony, he had
17 digested all of this information and come to the conclusion
18 that it doesn't say anything about reducing muzzle velocity.

19 JUDGE MCNAMARA: So here is the thing. You can
20 ask him that, but the point still is that is going to go to
21 his credibility as an expert. But whether or not he
22 understands the physics of it also may, in some sense, go to
23 his credibility, but you have asked him that. He does not
24 know what that is.

25 MR. CORDELL: Thank you, Your Honor.

1 Q. Mr. George said that I worked at a sawmill; is
2 that right?

3 A. He may not have referred to it as a sawmill,
4 counsel. I think a paper plant or something like that.

5 Q. A paper mill.

6 A. A paper mill.

7 Q. We paper people are very particular about that.

8 And can I have RDX- -- I'm sorry, it's RX-53.

9 Can I have the section at column 3, I believe.

10 MR. CORDELL: My apologies, Your Honor. May I
11 have a moment?

12 JUDGE MCNAMARA: Yes.

13 MR. CORDELL: Tell you what. Let's go with
14 column 3, lines 44-60.

15 Q. You recall testifying about this, correct?

16 A. Yes, I recall our discussing this last Friday, I
17 believe.

18 Q. And, well -- no, but Mr. George just led you
19 through this and asked you to confirm whether or not this
20 patent was published before the filing date of the
21 patents-in-suit. Do you recall that?

22 A. I do.

23 Q. And he asked you whether or not one of ordinary
24 skill in the art would know about these various options
25 before --

1 MR. GEORGE: That's not what I asked.

2 JUDGE MCNAMARA: Not precisely, but you did ask
3 something very similar to that. We can pull up the record.
4 You did go through each of these examples.

5 MR. GEORGE: No, he went through each of these
6 examples. I did not. I simply asked, was this passage
7 available to one of ordinary skill in the art? That was my
8 question. And it wasn't because it was published later.
9 That's it.

10 MR. CORDELL: Your Honor, he would not have
11 needed to entertain his expert if what he wanted to do was
12 to verify the dates of publications of these documents.

13 JUDGE MCNAMARA: There is some truth to that too.
14 I am going to allow some latitude here.

15 Q. Is it your testimony, your sworn expert
16 testimony, Mr. Delman, that wood pulp was not known before
17 2010?

18 A. I don't believe that was my response earlier or
19 the intention of my response, no.

20 Q. Was it -- was it your sworn testimony that a
21 sponge material was not known before 2010?

22 A. Again, I don't believe that's what I said earlier
23 or that I would have said that earlier.

24 Q. And you're aware that people made projectile toys
25 that would fire all manner of materials before 2010,

1 correct?

2 A. There was a variety of projectile toys out there,
3 sure.

4 Q. You mentioned something about rubber bullets in
5 your testimony with Mr. George. Do you recall that?

6 A. He asked me what type of rubber bullet I might be
7 familiar with, and I responded, yes.

8 Q. And I believe you testified on direct about the
9 NERF blasters that fire little yellow balls. Do you
10 remember that?

11 A. I believe I was referring to the NERF Rival
12 product, yes.

13 Q. And those have rubber in them, correct?

14 A. I have not analyzed the materials. I have called
15 them, and heard them called, foam balls, but I don't know
16 exactly what they are comprised of.

17 Q. So you would call them sponge material?

18 A. No. I'd call them foam balls.

19 MR. CORDELL: Thank you, Your Honor. Nothing
20 further.

21 JUDGE MCNAMARA: Thank you, Mr. Cordell.

22 Mr. Taylor?

23 MR. TAYLOR: No questions, Your Honor.

24 JUDGE MCNAMARA: Okay. Mr. George?

25 MR. GEORGE: No questions.

1 JUDGE MCNAMARA: Thank you.

2 Mr. Delman, you may step down. Thank you very
3 much.

4 Why don't we use this time to take a break. I'll
5 see you back here in 15 minutes.

6 (Whereupon, the proceedings recessed at 11:07
7 a.m.)

8 (In session at 11:25 a.m.)

9 JUDGE MCNAMARA: I think we're on the next
10 witness.

11 MR. COMACK: Brian Comack, Your Honor. The PTT
12 Respondents call Dr. Maureen Reitman.

13 JUDGE MCNAMARA: Very good. Thank you.

14 MAUREEN REITMAN,

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

18 JUDGE MCNAMARA: Please state your full name.

19 THE WITNESS: My name is Maureen Teresa Fahey
20 Reitman.

21 JUDGE MCNAMARA: Thank you very much. You may be
22 seated.

23 MR. CORDELL: Your Honor, with your permission,
24 my partner, Rob Courtney, will examine this witness.

25 JUDGE MCNAMARA: Very good.

DIRECT EXAMINATION

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BY MR. COMACK:

Q. Good morning again, Dr. Reitman.

A. Good morning.

Q. Dr. Reitman, did you provide reports containing your opinions in this matter?

A. Yes, I did.

Q. And what did those opinions generally relate to?

A. The super absorbent polymer limitation of the asserted claims.

Q. Have you been present for all the testimony that's occurred thus far at the hearing?

A. Yes, I have.

Q. On Friday and today, you've been present the entire time?

A. Yes, I have.

Q. Have you prepared a slide presentation for your testimony today?

A. Yes, I have.

Q. And we have displayed it on the screen as RDX-004.001, your slides?

A. Yes, this is the cover slide.

Q. I meant to say RDX-4 without the page, so I'll repeat the question just for the record.

Are these your slides?

1 A. Yes, this is the slide deck.

2 Q. All right. Let's take a look at slide 2. Can
3 you please talk about your education and professional
4 experience?

5 A. Yes. I am trained as a polymer materials
6 scientist. I hold two degrees from MIT, a Bachelor of
7 Science in Materials Science and Engineering with a
8 concentration in polymers and a Doctor of Science through
9 the program in Polymer Science and Technology.

10 So that means that I look at structure property
11 relationships for polymeric materials as a main part of my
12 job.

13 After graduation I worked for the 3M Company in
14 various roles in technology development and product
15 development.

16 I currently work for Exponent, which is a
17 scientific and engineering consulting firm. I currently
18 hold the title of group vice president for polymer science,
19 materials chemistry, and biomedical engineering and
20 sciences. And I am a principal engineer in the polymer
21 science and materials chemistry division.

22 Q. Dr. Reitman, how many years of experience do you
23 have in natural and synthetic polymer structure property
24 research and applications?

25 A. I've been working in this field for over 30

1 years.

2 Q. Okay. Could we go to the next slide, please.

3 Dr. Reitman, can you talk about your
4 contributions and recognitions in the field?

5 A. Yes. I continue to participate in my profession
6 through professional societies. For example, those listed
7 at the bottom of the slide 3, the Society of Plastics
8 Engineers, the American Chemical Society, ASTM
9 International, the American Association of Textile Chemists
10 and Colorists, and the American Association for the
11 Advancement of Science, as examples.

12 I continue to publish in my area. I have
13 about -- over 60 publications and presentations. I have
14 also contributed chapters to various books.

15 I am a named inventor on three issued patents. I
16 am a fellow of the Society of Plastics Engineers for my work
17 in the field. I hold a professional engineering license
18 from the State of Maryland. I'm a licensed mechanical
19 engineer.

20 And I have received numerous awards over the
21 years for my work. For example, the National Academy of
22 Engineering Frontiers of Engineering Program, an industrial
23 fellowship with ICI, acknowledgment for my work in
24 developing and teaching an NSF-funded laboratory to
25 undergraduates to understand structure property

1 relationships, and a handful of awards for the combined
2 scholar-athlete work.

3 I was a basketball player and did pretty well in
4 school at the same time, and so MIT, the college sports
5 information directors, and the NCAA all acknowledged that.

6 MR. COMACK: Your Honor, we tender Dr. Reitman as
7 an expert in the field of chemistry and the behavior of
8 polymers.

9 JUDGE MCNAMARA: Is there any objection?

10 MR. COURTNEY: No objection, Your Honor.

11 JUDGE MCNAMARA: Then Dr. Reitman is admitted as
12 an expert on the topics upon which she has been called to
13 testify.

14 MR. COMACK: Thank you, Your Honor.

15 THE WITNESS: Thank you.

16 MR. COMACK: If we could pull up slide 4, please.

17 Q. Can you please briefly summarize your opinions
18 that you'll be discussing today?

19 A. Yes. I've been asked to discuss the opinion that
20 is listed here on slide 4, which is that a chemist
21 knowledgeable about super absorbent polymers, or SAPs, would
22 have known how to adjust shape, size, softness and strength
23 prior to 2010.

24 Q. Okay. So you're going to provide your opinions
25 that a chemist knowledgeable about SAPs would have known how

1 to adjust these properties, strength, softness, shape and
2 size, prior to 2010; is that correct?

3 A. Yes.

4 Q. And just to make things a bit easier, I'm going
5 to use the shorthand "chemist" to refer to a chemist who is
6 knowledgeable about SAPs. Is that okay with you?

7 A. Yes.

8 Q. And, again, your opinions relating to these
9 properties relate to what was known to a chemist prior to
10 2010?

11 A. Yes.

12 Q. Have you reviewed the asserted patents?

13 A. Yes, I have.

14 Q. Do you have a slide relating to the asserted
15 patents?

16 A. Yes, I believe the two independent claims may be
17 on the next slide.

18 Q. Let's go to the next slide. I see you have
19 highlighted --

20 JUDGE MCNAMARA: Pardon me. Mr. Comack, would
21 you make sure that you are giving us the slide deck number,
22 not just "the next."

23 MR. COMACK: I apologize. Of course, Your Honor.

24 Q. I'm on RDX-4, slide 5. I see that you've
25 highlighted the language in the independent claims in the

1 two asserted patents. Why did you do that?

2 A. Yes. So this slide has just claim 1 from the
3 '282, which is JXM-1, and the '683, which is JXM-2. I have
4 highlighted the phrase "soft projectile being formed from
5 hydrated super absorbent polymer" because the scope of my
6 work is to address the aspects of the hydrated super
7 absorbent polymer. So what it is and how it behaves and how
8 you could adjust it.

9 Q. Thank you.

10 So I'd like to now pull up JX-1, which is the
11 '282 patent. And if we can go to column 4. If we could
12 focus in on lines 21-23.

13 I'll read it while we're waiting. It says, round
14 is preferable -- is a preferable shape not only because it
15 has fairly good ballistic characteristics but because SAPs
16 are easily formed in round shapes.

17 Do you see that?

18 A. Yes.

19 Q. Do you agree that SAPs are easily formed in round
20 shapes?

21 A. Yes.

22 Q. And do you agree that SAPs are easily formed into
23 spherical shapes?

24 A. Yes. So "round" I'm equating to "spherical"
25 being three-dimensionally round.

1 Q. Was that all known by chemists prior to 2010?

2 A. Yes.

3 Q. And how were shapes formed into round shapes
4 prior to 2010?

5 A. There are a number of different pathways that are
6 related to the manufacturing process that you select for the
7 given SAP. So I believe there may be a slide coming up --

8 Q. There is.

9 A. -- that indicates some of the manufacturing
10 pathways.

11 Q. Okay. If we can go back to RDX-4, and go to
12 slide 6.

13 What does this slide show?

14 A. Basically this provides some known manufacturing
15 methods, known before 2010, that a chemist would know in
16 order to make SAPs spherical and to adjust the size.

17 Q. Okay. Can you walk us through the methods that
18 you've listed, suspension polymerization and bulk
19 polymerization and grinding, and explain how it relates to
20 making a SAP spherical?

21 A. Yes. This slide RDX-4, page 6, shows two
22 examples of general manufacturing methods used to
23 manufacture polymers and specifically super absorbent
24 polymers.

25 One version is suspension polymerization, and

1 that's basically a method by which you grow the polymers.
2 Polymers are long molecules, and you grow them through
3 polymerization. In methods where they are in the liquid and
4 you are creating dispersed phases or droplets, you create a
5 suspension and you grow the polymer in those droplets. So
6 when you finish, the finished polymer is already in that
7 round or spherical shape.

8 And so you can imagine that things like the
9 particular materials, the shear, the temperature, the time,
10 and so on, which are normal manufacturing conditions that
11 you would control, they determine how big of a particle you
12 make and how tight the particle size distribution.

13 The bulk polymerization method is another
14 approach. That does not have the solvents and necessarily
15 the recovery processes you might need, but it doesn't have
16 as good of thermal control. There are still very standard
17 polymerization methods for that.

18 Typically bulk polymerization will make a larger
19 mass, and, therefore, you go through a secondary process
20 where you grind the material into the preferred size and
21 size distribution. So basically I can make them spheres
22 initially, and then collect them, or I can make them as a
23 big lump, I can chop it up and grind it into spherical
24 shapes.

25 Q. So were these methods that you just described

1 known to a chemist prior to 2010?

2 A. Yes. There are other methods as well, but these
3 are two common methods used for super absorbent polymers.

4 Q. If we can go back to the '282 patent, which is
5 JX-1. And, again, let's go to column 4 and focus in on
6 lines 24 through line 28.

7 I'll read it. It says -- and I'm starting with
8 the sentence that starts -- I'm sorry -- soft projectiles
9 made from a SAP can be any size. Preferably, however, the
10 soft projectiles made from a SAP are between about 3mm and
11 about 15mm in diameter when hydrated and more preferably
12 between about 5mm and 8mm in diameter when hydrated.

13 Do the asserted patents include any explanation
14 as to how a soft projectile can have a diameter between 3
15 and 15mm when hydrated?

16 A. No.

17 Q. So at the time the asserted patents were filed in
18 2010, did a chemist know how to make a soft spherical SAP
19 that has a diameter between 3mm and 15mm when hydrated?

20 A. Yes.

21 Q. Dr. Reitman, let's go back to your slide 6 in
22 RDX-4.

23 Can you explain -- I see that you list chemists
24 knew how to make SAPs spherical and to adjust the size. I'd
25 like to now ask you about these methods and how they relate

1 to your opinion that a chemist knew how to make SAP polymers
2 of any size or in this range that we talked about, 3 to
3 15mm.

4 A. These methods are the ways that you would control
5 the size. As I mentioned, you can control the various
6 factors. You can also, in suspension polymerization, choose
7 the suspending agent, with larger ones and particles
8 typically giving you larger particle sizes and smaller ones
9 giving you smaller particle sizes.

10 So these are standard polymer manufacturing
11 methods that are used actually in many types of polymer
12 production, but they are specifically also used and were
13 used prior to 2010 to make SAPs in different sizes.

14 Q. Just to be clear, did these methods allow a
15 chemist before 2010 to control the size of a soft spherical
16 SAP when hydrated?

17 A. Yes.

18 Q. And that was known to a chemist prior to 2010?

19 A. Yes.

20 Q. Prior to 2010 did a chemist know how to adjust
21 the softness of super absorbent polymers?

22 A. Yes.

23 Q. Do you have a slide on that?

24 A. Yes. An example of that is on RDX-4, slide 7.

25 Q. All right. I see you've put up a graph. I'm

1 going to ask you some questions about it.

2 Can you start by explaining the legend, Fig. 4,
3 impact of crosslinker? Let me withdraw that.

4 Does this graph relate to super absorbent
5 polymers?

6 A. Yes. This graph is taken from a textbook that is
7 about super absorbent polymers, and it is Fig. 4 from my
8 report.

9 Q. Okay. Now if we look along the y-axis, can you
10 explain what that is?

11 A. The y, or vertical, axis is for shear modulus in
12 kilopascals. Shear modulus is force. So the relationship
13 between force and deformation is called modulus. And the
14 higher the modulus, the stiffer it is; the lower the
15 modulus, the softer it is.

16 So in this case the loading style is shear, which
17 is a sliding motion. So rubbing against something would be
18 a shear behavior, whereas compression is squishing and
19 tension is pulling.

20 The different stiffnesses are related. They are
21 all related to the type of material. In this case, again,
22 we're showing shear modulus on the y-axis. And for
23 convenience, I have labeled with a blue marker there softer
24 and stiffer as the range, so that you know that 25, for
25 example, is stiffer than 10, which is stiffer than 5. So

1 the softest would be in the 0 to 5 and then increasing to 10
2 range.

3 Q. So just so I understand it, the shear modulus
4 along the y-axis, the lower the SAP is on the y-axis, the
5 softer it is?

6 A. Yes.

7 Q. And the higher on the y-axis, the stiffer it is?

8 A. Yes.

9 Q. Thank you.

10 Can you explain what's shown on the x-axis?

11 A. Yes. In this figure the x, or horizontal, axis
12 is mole percent crosslinker. A mole is just a concentration
13 measure. And this is about the crosslinker. So polymers
14 are long molecules and typically linear, and they entangle
15 but they can move past each other.

16 One thing that we can do chemically is to connect
17 them. We call that crosslinking. And one way we
18 characterize the material is by how much crosslinking we do
19 to it.

20 So the x-axis here is about how much crosslinker
21 we are putting in in order to connect the starting polymers
22 together.

23 Q. Okay. So, again, I need your help in
24 understanding this, because I do not have a chemistry
25 background. But are you using a specific crosslinker in a

1 SAP, in the SAP that's in line A in this graph?

2 A. Yes. So this graph shows two sets of data. Line
3 A is associated with the open markers and line B, or curve
4 B, is associated with the filled-in markers.

5 A and B represent the effect of two different
6 crosslinkers. Those crosslinkers are identified in the
7 legend below.

8 Q. Okay. So if you use one of the specific
9 crosslinkers, for example, in line A, is it the case that
10 the more crosslinker you add, the stiffer it becomes?

11 A. Yes. More crosslinker is to the right on the
12 x-axis, and stiffer is up, and you can see that the line
13 basically goes up to the right. So, yes, more crosslinker
14 means stiffer.

15 Q. And does less crosslinker mean softer for the
16 SAP?

17 A. Yes, less crosslinker means softer.

18 Q. Now you spoke a little bit about line B in this
19 graph. And I think you said it's using a different
20 crosslinker than the one used in line A; is that correct?

21 A. Yes.

22 Q. Okay. Now in line B, I see that it starts out as
23 a curve and then it sort of levels out in a horizontal
24 plane. Do you see that?

25 A. Yes, it is a curve, so -- and, yes, it's a

1 chemically different system.

2 Q. So what does it mean that -- in line B that it
3 started out as a curve and leveled out sort of in the
4 horizontal plane, in terms of controlling the softness and
5 stiffness of a SAP with respect to this crosslinker?

6 A. So for this particular polymer with this
7 particular crosslinker, again, at least in the beginning the
8 more crosslinker you add, the stiffer it gets, but at a
9 different rate. And then as you continue to add
10 crosslinker, the effect of adding more crosslinker is
11 diminished. So you have a different relationship between
12 crosslinking concentration and change in mechanical
13 properties.

14 And also for these particular examples, this
15 shows that the SAP that you make using crosslinker B cannot
16 get to the same stiffness that the SAP that you make with
17 crosslinker A. So you can achieve different mechanical
18 properties with one versus the other.

19 Q. So were the methods for controlling the softness
20 and stiffness of a SAP that you just described with respect
21 to RDX-4.7 known to a chemist prior to 2010?

22 A. Yes.

23 Q. Last week did you see Mr. Cordell hydrate
24 Clear Spheres when he was questioning Mr. Delman?

25 A. Yes.

1 Q. And do you remember that he soaked the
2 Clear Spheres in water for about 30 seconds?

3 A. Yes.

4 Q. Do you remember that Mr. Cordell asked Mr. Delman
5 about the stiffness of the Clear Spheres that he soaked for
6 30 seconds?

7 A. Yes.

8 Q. If a chemist thought that Clear Spheres that were
9 soaked for 30 seconds were too stiff, or hard, could she
10 make it softer without changing the size?

11 MR. COURTNEY: Objection, Your Honor. We're well
12 outside the opinions that are in Dr. Reitman's report and
13 also outside the stipulation that covers the scope of her
14 testimony.

15 JUDGE MCNAMARA: Mr. Comack, would you respond?
16 Is this outside the scope of Dr. Reitman's expert report?

17 MR. COMACK: I don't believe it is. The scope of
18 her testimony is about softness and stiffness. There has
19 been testimony here that she heard relating to softness and
20 stiffness of something that was done by Mr. Cordell up here
21 in an uncontrolled experiment. And I believe it's
22 appropriate to hear from the witness on that testimony.

23 JUDGE MCNAMARA: So part of this involved also an
24 objection to beyond the scope of her expert report. Is it?
25 Did she talk about the relationship between softness, size,

1 and the chemical properties of the projectile or of the SAP?

2 MR. COMACK: Yes, in paragraph 64 and 65 she
3 talks all about that.

4 MR. COURTNEY: Your Honor, those are paragraphs
5 of the report that -- subject to the stipulation that was
6 filed last week, PTT expressly agreed they would not seek to
7 elicit opinions on those subjects.

8 MR. COMACK: I'm just asking if a SAP could be
9 controlled in softness and stiffness. And that's just an
10 example.

11 JUDGE MCNAMARA: I am going to preliminarily
12 allow it. And if you want to file a motion to strike, you
13 can. I would have to go back and tie the stipulation, take
14 a look at her expert report, and take a look. This seems to
15 me these are simple propositions of chemistry.

16 MR. COURTNEY: Thank you, Your Honor. We have no
17 objection to Dr. Reitman speaking about SAPs generally, but
18 specific testimony about alleged prior art is expressly
19 stipulated out.

20 JUDGE MCNAMARA: I do not think her answer was
21 about expressed prior art. I did not hear any prior art
22 mentioned at all. I just heard her talking about what a
23 chemist would have known in 2010.

24 MR. COURTNEY: This question that's under
25 discussion specifically addresses Clear Spheres, which are

1 alleged prior art.

2 JUDGE MCNAMARA: But that is not how the question
3 was posed. It was posed in terms of a time frame. It was
4 posed in terms of a demonstration. I am holding the Clear
5 Spheres in my hand. She saw that. She was asked about a
6 chemical relationship. Just using a demonstrative that
7 everybody -- that everybody looked at, she can do that. I
8 am permitting that.

9 MR. COURTNEY: Thank you, Your Honor.

10 BY MR. COMACK:

11 Q. How would a chemist in 2010, when they saw a SAP
12 that was only soaked for 30 seconds, such as the one -- the
13 Clear Spheres that was just being discussed, how do they
14 adjust the properties so that they could make it softer
15 without changing the size?

16 A. Without changing the initial size?

17 Q. Yes, unhydrated.

18 A. So you can change the initial size so that you
19 hydrate to the same final size. You can change the
20 crosslink density so that the amount of swelling that occurs
21 for a given starting size is diminished. You could also
22 change the rest of the chemistry as well.

23 Those would be some of the first ways you would
24 look at it.

25 Q. Since we have RDX-4.7 on the screen, could you

1 adjust the softness of the spherical SAP by adjusting the
2 crosslinker?

3 A. Yes, you could also change the crosslinker type.
4 That's part of the chemistry change. So you can change the
5 polymer backbone, you can change the crosslinker type, you
6 can change the amount of crosslinker, you can change the
7 physical starting size. These are some of the common tools
8 that we would use prior to 2010.

9 Q. Prior to 2010. Thank you. Okay.

10 Do all super absorbent polymers have the same
11 strength?

12 A. No.

13 Q. Prior to 2010 did chemists know how to adjust the
14 strength of super absorbent polymer?

15 A. Yes.

16 Q. Do you have a slide on that?

17 A. Yes, I do. It looks like it's up. Slide 8 from
18 RDX-4.

19 Q. RDX-4, slide 8, I see. What do you show on this
20 slide?

21 A. This is a cartoon depiction that is intended to
22 help illustrate an example of how a chemist, prior to 2010,
23 would know how to adjust strength.

24 Q. Okay. So I see on the left side of your cartoon
25 depiction a bunch of red squiggly lines. What do those

1 represent?

2 A. They are intended to represent polymers, so long
3 polymer chains.

4 Q. Sorry about that. I needed a lesson on how to
5 use the pointer.

6 So right here, I'm circling like a blue little
7 line. There's a few here, and a few down here. Again, I'm
8 talking about the image on the left side of RDX-4.8.

9 What are those blue lines intended to indicate?

10 A. So on the left image, at least two of them have
11 arrows pointing to them that say crosslinks. They are
12 intended to provide an example of crosslinking. So it's a
13 small bridge. Can be chemically different or chemically the
14 same. Typically it's different than the main chain. And
15 there are a limited number of crosslinks in the material
16 that's represented on the left side of the slide.

17 Q. Okay. Now let's focus on the image or the
18 drawing on the right side of the slide. I see red squiggly
19 lines. Are those intended to be the same red squiggly lines
20 in the drawing on the left?

21 A. Yes.

22 Q. And now we see many more blue lines connecting
23 the red squiggly lines. Do you see that?

24 A. Yes.

25 Q. What are you trying to show with the more blue --

1 the blue lines connecting the red squiggly lines?

2 A. This is a cartoon depiction of increasing the
3 crosslink density. One of the things that you can see here
4 is how it would then constrain the movement of the long
5 chain.

6 So if you think about chains being like strings,
7 they might get tangled, but you can generally pull them
8 apart. On the other hand, if you knot them together in
9 certain locations, you can only pull them so far.

10 So what I'm trying to show on a molecular level
11 here is how crosslinks make bridges in different ways for
12 polymers that are in different configurations.

13 Q. Okay. So in the drawing on the left there's
14 fewer crosslinks for the polymer, and then the drawing on
15 the right there's more crosslinks, correct?

16 A. Yes.

17 Q. So which one of these two drawings shows a
18 greater strength in the polymer, the one on the left or the
19 one on the right?

20 A. For the same chemistry, the one on the right
21 would be stronger.

22 Q. Is that because there's more crosslinks?

23 A. Yes, basically it means that there are more
24 molecules that are able to resist the force that's applied.
25 There's kind of more to it than that, but that is basically

1 how it works.

2 Q. Thank you.

3 Now prior to 2010, if a chemist wanted to have a
4 spherical SAP that would explode on impact, would they use
5 less or more cross linkers?

6 A. Well, it would depend on the rest of the system,
7 but compared to an example that you gave me, if you did --
8 if it didn't explode and you wanted it to, I would reduce
9 the crosslinking density.

10 Q. And if a chemist wanted to have a spherical --
11 let me start over.

12 Prior to 2010, if a chemist wanted to have a
13 spherical SAP that would not explode on impact, would they
14 use more crosslinkers?

15 A. Again, if you gave me an example and said this
16 explodes and I don't want it to, then I would typically
17 increase the crosslink density. Again, there are other --
18 there are other tools for doing it that we talked about
19 already, but increasing the crosslink density would be a
20 straightforward approach.

21 Q. Okay. Were the methods that you described for
22 adjusting the strength of super absorbent polymers known to
23 chemists prior to 2010?

24 A. Yes.

25 MR. COMACK: We pass the witness.

1 JUDGE MCNAMARA: Thank you, Mr. Comack.

2 CROSS-EXAMINATION

3 BY MR. COURTNEY:

4 Q. Robert Courtney from Fish & Richardson.

5 Good morning, Dr. Reitman.

6 A. Good morning.

7 Q. I just wanted to get a few items straight about
8 the scope of the opinions you've been giving to the Court
9 and the purposes for which the Commission and the ALJ should
10 take them.

11 You'd agree that the ALJ and the Commission
12 should understand that your testimony today doesn't present
13 opinions relating to obviousness of combining elements
14 beyond SAP, right?

15 A. Basically. As I said before, I'm only speaking
16 about the polymer limitation. I have not done the claim
17 analysis for obviousness, for example.

18 Q. And you're speaking about that polymer limitation
19 about the ability of chemists, not about the reasons they
20 might have, to make changes to an SAP prior to 2010, right?

21 A. Well, other than if I were part of the team where
22 I was asked, can you do that, that would be the reason. But
23 in terms of the reasons, if it were part of the claim
24 analysis, then, no, because I'm not doing a claim analysis,
25 I'm speaking to the limitation itself.

1 Q. And just so we're on the same page, you're not
2 telling the Court -- you're not providing any opinions that
3 those in this polymer space or any other space prior to 2010
4 would have had a reason to modify available prior art,
5 right?

6 A. If you're asking me am I talking about an
7 obviousness analysis, I'm not doing an obviousness analysis.
8 I'm providing information to a person of ordinary skill
9 about the SAP limitation and what would be known in terms of
10 how readily you could manipulate the properties, the size,
11 the behavior, and so on.

12 Q. Let me try it a different way.

13 You're testifying about the ability of chemists
14 prior to 2010 to do certain transformations, not about the
15 reasoning they might have to think of doing those
16 transformations in the first place, right?

17 A. If you're asking me about reasoning meaning in
18 the context of an obviousness analysis, no, I'm not
19 providing that type of analysis.

20 MR. COURTNEY: No further questions. Thank you.

21 JUDGE MCNAMARA: Thank you, Mr. Courtney.

22 Mr. Taylor?

23 EXAMINATION BY COUNSEL FOR ITC STAFF

24 BY MR. TAYLOR:

25 Q. Good morning, Ms. Reitman.

1 A. Hello again. How are you?

2 Q. Fine.

3 I believe your testimony was by Zoom; is that
4 correct?

5 A. It was. It's nice to meet you in person.

6 Q. Yes, nice to meet you. I just have one or two
7 questions about JX-1, which is the '282 patent.

8 So this is at JX-1 at column 4, 14 to line 16.
9 We're talking about -- this passage is talking about
10 crosslinking density and strength, correct?

11 A. It does speak about, yes, strength and crosslink
12 density.

13 Q. And then there's a sentence that says, depending
14 on the level of safety required, different SAPs with
15 different crosslink densities may be used.

16 Actually, I highlighted the wrong sentence.

17 If we continue, it says, for example, SAPs can be
18 constructed that would be considered highly compliant by
19 industry standards.

20 A. Yes, I see that.

21 Q. What does that mean?

22 A. I don't know. The "industry standards" speak to
23 an industry that's not defined for me. So as a polymer
24 scientist, if someone asked me to make something more
25 compliant or to have a certain compliance, I absolutely

1 could do that, but I actually do not know from the way it is
2 described here what the industry standards are.

3 Q. Are there any industry standards on hydration of
4 SAPs?

5 A. Well, I'm interpreting this industry standard to
6 be related to the application. There are lots of material
7 standards of different types. There are many standards that
8 call out different things.

9 Would you ask again, so I understand your --

10 Q. Are there industry standards for hydration of
11 SAPs?

12 A. I'm not following. What do you mean? Like how
13 to do it?

14 Q. The hydration levels.

15 A. I don't think so. Well, I may not be
16 understanding. So would you ask me again, please?

17 Q. That's fine. I mean, your answer is also an
18 answer in a way.

19 A. Right, right.

20 So -- so SAPs can be hydrated. The degree of
21 hydration will depend on the chemistry and the network
22 structure as well as the hydrating fluid and the conditions.
23 There can be specifications for different product
24 applications that had minimum or maximum hydration levels,
25 but I'm not sure that I've seen a definition of "hydration"

1 the way that I'm understanding your question.

2 Q. Thank you.

3 MR. TAYLOR: I have no further questions, Your
4 Honor.

5 JUDGE MCNAMARA: Okay. Thank you.

6 Mr. Comack, do you have any redirect?

7 MR. COMACK: We don't. No further questions.

8 JUDGE MCNAMARA: All right. Mr. Courtney, do you
9 have any recross?

10 MR. COURTNEY: No, Your Honor.

11 JUDGE MCNAMARA: Mr. Taylor, anything more?

12 MR. TAYLOR: No, Your Honor.

13 JUDGE MCNAMARA: Dr. Reitman, you may step down.
14 Thank you very much.

15 THE WITNESS: Thank you.

16 MR. CORDELL: Your Honor, next we would call our
17 technical expert. I'm wondering if it's Your Honor's
18 preference whether we begin that before lunch or take a
19 lunch break and then come back.

20 JUDGE MCNAMARA: It's still early. We will have
21 a very long afternoon if we take lunch now, so why don't we
22 get started.

23 MR. CORDELL: Sure. Your Honor, Mr. Zhang will
24 present Dr. Kudrowitz.

25 MR. ZHANG: Good afternoon, Your Honor.

1 JUDGE MCNAMARA: Good afternoon, Mr. Zhang.
2 Good afternoon, Dr. Kudrowitz.

3 BARRY KUDROWITZ,
4 having been first duly sworn or affirmed on
5 their oath, was thereafter examined and testified as
6 follows:

7 JUDGE MCNAMARA: Please state your full name.

8 THE WITNESS: Barry Kudrowitz.

9 JUDGE MCNAMARA: Very good. Please be seated.

10 MR. ZHANG: May I proceed?

11 JUDGE MCNAMARA: Yes, thank you.

12 DIRECT EXAMINATION

13 BY MR. ZHANG:

14 Q. Good afternoon, Dr. Kudrowitz.

15 A. Good afternoon.

16 Q. Could you please introduce yourself?

17 A. Sure. My name is Barry Kudrowitz.

18 Q. And before we start, did you prepare slides to
19 assist with your examination today?

20 A. Yes, I did.

21 Q. And are those slides CDX-5?

22 A. Yes.

23 Q. Turning to slide 2, could you please tell us
24 about your educational background?

25 A. Sure. So I received my Bachelor of Science in

1 Mechanical Engineering from the University of Central
2 Florida in Orlando. And after that I went to MIT to
3 continue with mechanical engineering, and there I did my
4 graduate studies, both Master's and Ph.D. in Mechanical
5 Engineering. And in between I went to the Netherlands to
6 study industrial design.

7 Q. And where do you currently work?

8 A. I'm currently at the University of Minnesota.
9 When I graduated, I started as a professor of product
10 design, and I developed the product design program at the
11 University of Minnesota. And I was the director of that
12 program for eleven years, and until last year, when I became
13 the department head of the department that includes product
14 design. And I'm a tenured, full professor.

15 Q. Turning to slide 3, could you tell us about your
16 professional experience in toy and product design?

17 A. Sure. So my master's thesis was specifically on
18 designing new types of projectile toys. And at the same
19 time I was doing my master's thesis, I was also developing a
20 class called Toy Product Design, where I teach students to
21 take their own toy ideas from concept to functional
22 prototype working in small teams. And I taught this for six
23 years at MIT, and then I brought the class with me to the
24 University of Minnesota, and I taught it there for nine
25 years.

1 I also speak nationally and internationally about
2 toys and play.

3 Q. Turning to slide 4, have you published any books
4 or publications?

5 A. Yes. So this is my -- part of my CV, and I have
6 a number of publications related to toys and play.
7 Specifically, I have two book chapters on designing toys,
8 and one of those book chapters is on designing toys using
9 new technologies. And then I have a book coming out in two
10 weeks that's on the slide here. That relates to play, and I
11 talk about toy design too.

12 JUDGE MCNAMARA: Pardon me, Mr. Zhang. Before
13 you continue, I do not have the deck slides.

14 MR. ZHANG: Apologies.

15 JUDGE MCNAMARA: Thank you very much.

16 Q. Dr. Kudrowitz, is your book on presale right now?

17 A. It is, yes.

18 Q. And what is the sales rank on Amazon?

19 A. Currently I think it's No. 2 for new releases in
20 product design.

21 MR. ZHANG: At this time Complainants proffer
22 Dr. Kudrowitz as an expert in the field of product design
23 and toy design.

24 JUDGE MCNAMARA: Mr. Comack, are you up?

25 MR. COMACK: We have no objection.

1 JUDGE MCNAMARA: Thank you.

2 Then Dr. Kudrowitz is accepted as an expert on
3 the topics upon which he has been called to testify.

4 Q. Moving to slide 5, what is your master's thesis
5 about?

6 A. My master's thesis was specifically on trying to
7 come up with new type of projectile technologies, so both
8 new projectiles and ways of projecting them.

9 Q. And moving to slide 6, what types of objects did
10 you investigate?

11 A. There are a lot of things we explored. As you
12 can see, some of the top ideas are here. These are sketches
13 I made from the thesis. There's foam and water. There's
14 also popcorn and marshmallows and slime and string, for
15 example.

16 And in this work we prototyped many of these
17 concepts, and the end result -- there is a patent that came
18 out of this for a way of projecting foam balls, and it also
19 led to a ball shooter that was on the market for about five
20 years.

21 Q. Moving to slide 7, did you investigate projecting
22 any water-based projectiles?

23 A. Yeah, one of the interests that we had in this
24 project was trying to make a way of shooting like a chunk of
25 water through the air, so something that looked like a

1 bullet but it was made of water. And so we were coming up
2 with different ways of creating these chunks.

3 One of them was, like, little tiny water
4 balloons. But another way was using laminar flow, which is
5 sort of like the fountains at the wharf here, where they,
6 like, make the little noodles jump in the air. And so we
7 were creating water guns that made those noodles, but then
8 we cut them, so you could kind of make little water slugs
9 that go through the air.

10 Q. Were you aware of super absorbent polymers at the
11 time of your master's thesis?

12 A. I was.

13 Q. And did you ever try to launch super absorbent
14 polymers as part of your work?

15 A. No.

16 Q. I'd like to switch gears and move to what you did
17 for this investigation. What were you asked to do?

18 A. I was asked to review Mr. Delman's invalidity
19 positions and opine on them.

20 Q. And what is your general conclusion?

21 A. So, in general, I feel that the patent claims are
22 valid, and so I disagree with Mr. Delman.

23 Q. And before we move on, have you had any dealings
24 with Hasbro in the past?

25 A. Oh, yes. So they sponsored the research lab that

1 I joined when I started my master's thesis, and so my thesis
2 advisor had funding from Hasbro. And I was working on that
3 project back in 2004.

4 Q. Have you had any other dealings with Hasbro
5 since?

6 A. They helped out with the toy design class, but
7 that was back at MIT, so I haven't worked with Hasbro since
8 2010.

9 Q. And have you had any dealings with Spin Master in
10 the past?

11 A. The last case I was involved in, I was adverse to
12 Spin Master.

13 Q. And do your dealings with Hasbro or Spin Master
14 change your opinion in any way in this case?

15 A. No.

16 Q. All right. Turning to slide 8, could you tell us
17 what Mr. Delman's original combinations were?

18 A. Yes. So originally it was sort of like a mix and
19 match. There were Clear Spheres and Spit Balls and there
20 was Peev and Nagayoshi. And originally Mr. Delman proposed
21 any combinations, kind of starting with the Clear Spheres,
22 Spit Balls and then looking to Peev and Nagayoshi, and then
23 also starting with Peev and Nagayoshi and then looking to
24 Clear Spheres and Spit Balls.

25 Q. And turning to slide 9, is that still

1 Mr. Delman's position?

2 A. As I understand it now, Mr. Delman is just
3 starting with Peev and Nagayoshi, and then looking to
4 Clear Spheres and Spit Balls as ammunition.

5 Q. So turning to slide 10, before we discuss the
6 details of your opinion, I'd like to go through briefly each
7 of these references.

8 Let's start with Clear Spheres. Could you tell
9 us, what are Clear Spheres?

10 A. Clear Spheres is a science activity. Or Jelly
11 Marbles, as it says here on the slide. So it says you
12 experiment with them and you put them in your scientists'
13 hands. It's for teachers. It says, have your students
14 predict whether the marble will change shape. It's like a
15 science-learning tool.

16 Q. And turning to slide 11, what is the size of
17 Clear Spheres when they are hydrated, according to their
18 instructions?

19 A. So when you hydrate them according to the
20 instructions, they get to about 22mm, which is approximately
21 an inch or the size of a gum ball.

22 Q. And turning to slide 12, what do you show here?

23 A. These are the instructions for how to hydrate
24 Clear Spheres. And it says, soak the marbles for at least
25 three hours, and then it also says, for maximum growth, five

1 to six hours, or leaving them overnight is better.

2 Q. Turning to slide 13, do the instructions for
3 Clear Spheres teach using them as ammunition?

4 A. No.

5 Q. What do they teach them as using as?

6 A. They -- the instructions say that you should
7 measure them, draw pictures of them, watch them grow and
8 change shape, and then trace them. And then it says you can
9 watch them shrink back down to their original size.

10 Q. And could the Clear Spheres instructions be found
11 at CX-82?

12 A. Yes.

13 Q. Now turning to slide 14, are you aware of any
14 evidence that indicates Clear Spheres were not used as
15 ammunition?

16 A. Yes. So this is the COO of Spangler Science, and
17 he was specifically asked if they were ever intended to be
18 used as projectiles. And he said that we never marketed the
19 Jelly Marbles or Clear Spheres as a projectile.

20 Q. Okay. Turning to slide 15, let's switch gears
21 and talk about Spit Balls. What are Spit Balls?

22 A. Spit Balls are very similar to Jelly Marbles, but
23 they are a bit smaller. So they grow to about 18mm instead
24 of 22mm.

25 Q. And how long does that take for them to grow to

1 18mm?

2 A. So the instructions suggest four hours or
3 overnight as best, which is very similar to the instructions
4 for Jelly Marbles.

5 Q. Turning to slide 16, what does Spit Balls'
6 packaging say about their use?

7 A. On both the front and the back of the packaging,
8 in large text, it says, fun to throw, see how far you can
9 throw them!

10 Q. And could the Spit Ball packaging be found at
11 CX-58 and CX-56?

12 A. Yes.

13 Q. Turning to slide 17, what does the founder of
14 DuneCraft say about whether DuneCraft wanted Spit Balls to
15 be shot?

16 A. So Mr. Cleveland, who is the founder of DuneCraft
17 that makes these Spit Balls, was asked if they wanted the
18 kids to actually shoot Spit Balls out of a straw. And he
19 said, I didn't want to encourage it, as DuneCraft. And he
20 also agreed that there's no text telling people to shoot
21 them out of a tube.

22 Q. Turning to slide 18, let's talk about the Airsoft
23 references. Could you tell us a little bit about Peev?

24 A. Sure. So Peev is a patent that, I think we've
25 talked about this already, but applies to the sporting gun

1 industry and is used for military simulations or Airsoft
2 games. And it's a sensor system that gets incorporated into
3 an Airsoft gun to make the Airsoft gun behave more like a
4 real firearm.

5 Q. And looking at slide 19, could you describe the
6 Nagayoshi reference?

7 A. Sure. Nagayoshi also, like Peev, is a way of
8 making an Airsoft gun behave more like a real firearm. But
9 the way that Nagayoshi goes about doing this is it adds --
10 it powers the magazine to force the ammunition up into the
11 firing position of the Airsoft gun, and it also uses -- it
12 also times it better so that the rounds are in line with the
13 firing mechanism as they get fed up. And so essentially
14 making it behave more like a real gun.

15 Q. Let's turn to your opinions in this matter.
16 Turning to slide 21, do the combinations that Mr. Delman
17 proposed actually satisfy all the elements of the asserted
18 claims?

19 A. No, none of the combinations disclose "configured
20 for," which is in claim 1 of the '282 patent. And then none
21 of the combinations disclose "soft projectiles" of claim 1
22 of the '282 and the '683.

23 Q. All right. Let's look at slide 22. Could you
24 tell us why the combinations would not satisfy the
25 limitation of "ammunition configured for"?

1 A. Sure. So as we discussed before, the
2 Clear Spheres and Spit Balls, when you follow their
3 instructions, they grow to 22mm and 18mm respectively, and
4 the standard size for Airsoft guns is 6mm. This is as per
5 Mr. Delman's report. And so these Clear Spheres and Spit
6 Balls just would not fit in Airsoft guns.

7 Q. And then turning to slide 23, could you tell us
8 why the combinations involving Clear Spheres would not
9 disclose the "soft projectile" limitation?

10 A. Yes. So we saw this in the courtroom last week,
11 but in order to have a Clear Sphere fit into an Airsoft gun,
12 you have to hydrate it for maybe 30 seconds to get it to
13 6mm, such that it actually can fit into an Airsoft gun. And
14 at 6mm, it is not soft.

15 Q. Turning to slide 24, what is your understanding
16 of Mr. Delman's motivation to combine the references?

17 A. So I understand that Mr. Delman's motivation to
18 combine is entirely based on safety, specifically breakage
19 of skin.

20 Q. Do you agree that a POSITA would have been
21 motivated to change the ammunition in an Airsoft gun, like
22 Peev or Nagayoshi, to use Clear Spheres or Spit Balls?

23 A. No, that would change the use of the Airsoft gun.
24 The intent is to be like a real gun. And they are used for
25 hunting, they are used for target practice.

1 Q. Turning to slide 26, what would happen if you
2 changed the ammunition to the Airsoft gun?

3 A. Yeah, if you put SAP in an Airsoft gun, it sort
4 of conflicts with the intent or the purpose of these Airsoft
5 guns. So you can't -- you could no longer use it for
6 hunting, they become less accurate, and then you can't use
7 them for target practice.

8 Q. Moving on to slide 27, what evidence have you
9 seen in this investigation that supports your opinion?

10 A. So the Daisy director of product development,
11 Mr. Whiteis, testified, similar to what I just said here,
12 that the air rifles, these Airsoft guns, are used for
13 hunting and target practice. And their Splat-R-Ball
14 products, which use the SAP ammo, are terribly inaccurate
15 and you can't hunt with them.

16 Q. Now turning to slide 28, how would you respond to
17 Mr. Delman's position that Peev and Nagayoshi were just toys
18 and it would have been obvious to modify Airsoft
19 specifically for children?

20 A. So I disagree that Peev and Nagayoshi are toys
21 for little children. Again, Peev and Nagayoshi are patents
22 that are about ways of taking an Airsoft gun and making it
23 more like a real gun.

24 And specific to Nagayoshi calling out children,
25 Nagayoshi says, you know, you can sub out some parts, like

1 metal parts or plastic parts, if you're designing these toy
2 guns for children, but what I -- how I interpret that is
3 talking about youth Airsoft, or teens, and not little kids
4 and toys.

5 Q. Is there anything that supports your opinion
6 there?

7 A. Yes. So this is from Mr. Delman's report.
8 Classifying Airsoft guns into two categories, there's
9 adult-focused Airsoft guns, and then there's youth Airsoft
10 guns. And the youth Airsoft guns are under -- they shoot at
11 a muzzle velocity of under 350 feet per second, and the
12 adult air guns shoot at over 350 feet per second, because
13 that's when penetration of skin happens, at that
14 350-feet-per-second muzzle velocity.

15 Q. And just for the benefit of the record, we were
16 looking at slide 29?

17 A. Yes.

18 Q. Now turning to slide 30, what other materials did
19 Mr. Delman cite?

20 A. So this is, again, from Mr. Delman's report. Not
21 referenced in trial, but this is from The Washington Post,
22 describing these sort of two categories of Airsoft guns.
23 Adult Airsoft guns that are really powerful, that can break
24 skin, and the youth line of guns that have lower than 350
25 feet per second, which are -- which don't break skin.

1 Again, highlighting that above 350 is harmful and
2 maybe lethal.

3 Q. And the reference found on slide 30, that can be
4 found at CX-584?

5 A. Yes.

6 Q. Turning to slide 31, are there any other
7 references that were cited by Mr. Delman?

8 A. Yes, these are also from Mr. Delman's report, two
9 other articles from the California Senate Office of Research
10 and from WebMD talking about how breakage of skin happens at
11 350 feet per second, and when you go over that, you start --
12 the WebMD, at least, calls them weapons and not toys.

13 Q. Could the references on slide 31 be found at
14 RX-834 and RX-835?

15 A. Yes.

16 Q. Turning to slide 32, what is problematic with
17 Mr. Delman's modification?

18 A. Well, Mr. Delman says that the motivation to use
19 SAP in the Airsoft is that there's a problem with breakage
20 of skin, but he is referencing all of these articles that
21 say breakage of skin happens at above 350-feet-per-second
22 muzzle velocity. But he is not saying that we should modify
23 those adult ones. He is saying that we should modify the
24 youth line, or the ones that already don't break skin.

25 And so there's -- yeah, I guess, what's the

1 motivation if they already don't break skin.

2 Q. And turning to slide 33, have you seen any
3 instance of a lower-powered air gun?

4 A. So, yeah, this is the AirStrike AS470, and this
5 one has a muzzle velocity of 150 feet per second. And
6 that's half, or less than half, of the velocity that breaks
7 skin.

8 Q. And is this the air gun that Mr. Delman used in
9 his video?

10 A. Yes, this is the Airsoft that Mr. Delman
11 demonstrates with, putting SAP into. I also experimented --
12 tried using this one too.

13 Q. So moving to slide 34, could you tell us what is
14 muzzle velocity, just so we're clear?

15 MR. COMACK: Your Honor, this slide, I don't want
16 it to go too far, we have an objection to the bottom half of
17 it relating to kinetic energy. This was discussed by
18 Mr. Cordell.

19 Dr. Kudrowitz didn't discuss kinetic energy in
20 his report. It's not in their prehearing brief. He didn't
21 discuss it at his deposition. He has discussed other
22 concepts, like mass and velocity, but not kinetic energy
23 equals $1/2 mv$ -squared.

24 JUDGE MCNAMARA: Is that correct? It was not
25 mentioned in the brief, it is not mentioned in

1 Dr. Kudrowitz' reports, not discussed?

2 MR. ZHANG: So what was discussed was muzzle
3 velocity and whether it would have been obvious to decrease
4 muzzle velocity. And during deposition, they specifically
5 asked about the danger of these guns, and Dr. Kudrowitz
6 answered that the danger is associated with the energy of
7 the guns.

8 JUDGE MCNAMARA: Okay. But did he give, during
9 his deposition -- or was he asked about the formula for
10 kinetic energy?

11 MR. ZHANG: He was asked about momentum.

12 JUDGE MCNAMARA: Okay. But was he asked
13 specifically about the formula for kinetic energy?

14 MR. ZHANG: He was not, but he was asked --

15 JUDGE MCNAMARA: Then you can stick to the
16 questions that he was asked. But I know this came up --
17 actually, it was Mr. Cordell who raised the issue of kinetic
18 energy and the formula, and I allowed some latitude with
19 Mr. Delman, but if there is specific questioning about other
20 aspects of force, muzzle force -- I'm sorry -- force and
21 muzzle velocity, you can ask those.

22 But it doesn't prove anything one way or another
23 whether both or either expert knows about kinetic energy,
24 the formula for it. If they can talk about concepts, if
25 they can talk about what they talked about during the

1 deposition or their expert reports, that is fine, but I am
2 not going to let him go there.

3 MR. COMACK: Thank you, Your Honor.

4 BY MR. ZHANG:

5 Q. So, Dr. Kudrowitz, could you tell us, what is
6 muzzle velocity?

7 A. Yeah. Muzzle velocity is the velocity or the
8 speed of the ammunition exiting the projectile launcher.

9 Q. And what is the most natural way to make Airsoft
10 guns safer?

11 A. By lowering the velocity. That's -- that's what
12 they do with Airsoft guns. They have ones with lower
13 velocity and they have ones with higher velocity.

14 Q. And why would lowering velocity make Airsoft guns
15 safer?

16 A. When you lower the velocity, you -- well, you
17 would lower the momentum. You also would lower energy.

18 Q. Why does lowering velocity -- how does -- well,
19 let me ask this. How does velocity factor into momentum?

20 A. Well, the momentum of the particle is the mass
21 times the velocity of it.

22 Q. And would lowering the velocity also lower the
23 energy that the projectile is traveling at?

24 A. Yeah. If you lower the velocity of -- the muzzle
25 velocity, you're lowering the energy of that projectile.

1 Am I allowed to say by how much or is that not --

2 JUDGE MCNAMARA: You have not been given, I
3 think, any metrics.

4 THE WITNESS: Okay.

5 JUDGE MCNAMARA: Not that I heard. So I am not
6 sure how, without metrics, you would know how one interacts
7 with the other.

8 THE WITNESS: That's fine.

9 Q. Moving on to slide 35, what would be one way to
10 lower the muzzle velocity?

11 A. Sure. Yeah, so one way of lowering muzzle
12 velocity is by -- this is according to Mr. Delman's
13 testimony -- just changing out the spring and using a weaker
14 spring.

15 Q. Moving to slide 36, what's another simple way to
16 lower muzzle velocity?

17 A. Also from Mr. Delman's testimony, you could use a
18 smaller compression chamber.

19 Q. And would either of these changes require
20 changing the ammunition to the Airsoft?

21 A. No.

22 Q. Moving to slide 37, are there any other reasons
23 why the combinations proposed by Mr. Delman would not be
24 obvious?

25 A. Yes. So I tried putting SAP into an assortment

1 of different Airsoft guns, and I did not have success. So I
2 first tried -- well, using the top -- some of the guns here,
3 so the top row and the one on the bottom right, these are
4 Airsoft guns that have that magazine clip that you see in
5 Peev and Nagayoshi, where you kind of put the ammo in the
6 clip and then you put it up into the gun.

7 And with the SAP, I wasn't able to get any of the
8 SAP to stay in the clip. They just kind of bounce out. I
9 was able to kind of rig it so I could get one to stay in the
10 clip, but then it just kind of jams or maybe explodes
11 inside -- I can't see -- but I wasn't able to get any to
12 come out of these kind of clip-style ones.

13 Regarding the AirStrike, the one on the bottom
14 left, I think I testified to this already, but the only way
15 to get Clear Spheres to launch out of that was when you
16 hydrate it for about 30 seconds, and then at that point it's
17 still hard. And I was able to get it to fire the
18 Clear Sphere when it was hard, but it also goes only about
19 ten feet or so.

20 Regarding Spit Balls, it just gums up inside, and
21 it kind of sprays out sometimes. Sometimes it just doesn't
22 come out.

23 Q. And just so we're clear, what's shown on slide 37
24 are actual physical air guns that you yourself operated?

25 A. Yes.

1 Q. Could they be found at CPX-155, CPX-80, CPX-85,
2 CPX-82, and CPX-83?

3 A. Yes.

4 Q. Moving on to slide 38, what is shown here?

5 A. This is my experiment at Kirkland, where I was
6 trying to get a Spit Ball that was hydrated to 6mm to shoot
7 out of the Daisy AirStrike. And most of them would jam or
8 gum up inside. You could see on the figure on the left,
9 it's sort of stuck in the barrel there.

10 The ones that did come out sort of just sprayed
11 out in little pieces. You can see one of the stills from
12 the video here.

13 Q. And turning to slide 39, did you -- I want to
14 switch gears and talk about objective indicia of
15 non-obviousness.

16 Did you consider that as part of your analysis?

17 A. Yes.

18 Q. And what did you observe, at a high level?

19 A. At a high level, there was success from The Maya
20 Group products, and praise. There was copying of The Maya
21 Group products. And then there's also success of the
22 Splat-R-Ball line.

23 Q. Turning to slide 40, let's talk about The Maya
24 Group products. What are The Maya Group products?

25 A. So there's the Xploderz and the XBlaster. Well,

1 what you see on the screen are The Maya Group products, the
2 blasters and ammunition.

3 Q. What are they, at a high level?

4 A. Oh, at a high level, they are projectile
5 launchers that shoot super absorbent polymer.

6 Q. And what did you do to analyze The Maya Group
7 products?

8 A. Well, I tried all of them, and I shot the ammo
9 with them. I opened all of these up and looked at the
10 insides of them. I put some of them back together.

11 Q. And so what's depicted here at slide 40, you've
12 had a chance to operate each one of these?

13 A. Yes.

14 Q. Moving on to slide 41, do you have any -- did you
15 form any opinions about whether The Maya Group products
16 practice the asserted claims?

17 A. Yes, they practice the asserted claims. There
18 are a few of the -- a few of those blasters that don't
19 practice claim 14 of the '683, but, in general, they all
20 practice the asserted claims.

21 Q. And does Mr. Delman dispute whether The Maya
22 Group products practice the asserted claims?

23 A. No.

24 Q. Could you tell us -- I want to go back to slide
25 41. Sorry. 40.

1 Could you tell us about the firing mechanisms of
2 The Maya Group products depicted here?

3 A. Sure. So they all have a very similar firing
4 mechanism inside. They all use the compression chamber with
5 a spring and a piston, and that is connected to a
6 smaller-diameter tube. They have feed chambers that feed
7 the ammunition into a firing position. And all of them have
8 those same components inside.

9 Q. Now turning to slide 42, what objective indicia
10 of non-obviousness did you observe with respect to The Maya
11 Group products?

12 A. Yeah, so there is praise of these products and
13 then there was also commercial success.

14 Q. So let's look at praise first. And on slide 43,
15 what do you show here?

16 A. This is an article from The Wall Street Journal
17 praising the Xploderz XGround Pounder Blaster with an
18 astonishing 100-foot range, again, talking about the super
19 absorbent polymers and the mechanism pulling and releasing a
20 spring-loaded lever.

21 So in this case, that distance is a result of
22 that as-claimed firing mechanism using the as-claimed
23 ammunition. And they also talk a little bit in here about
24 the actual mechanism with the spring-loaded piston.

25 Q. And just so we're clear, how did the statements

1 with an astounding 100-foot range and you pull and release a
2 spring-loaded lever relate to the asserted claims?

3 A. Yes, so the asserted claims relate to a piston
4 that's spring-loaded that compresses air and transfers it to
5 a smaller-diameter tube, which launches the SAP. And the
6 range that you can get here is directly a result of those
7 asserted claim components.

8 Q. And when you're referring to those asserted claim
9 elements, you're referring to claims 19 and 20 of the '282
10 patent?

11 A. Yes.

12 Q. Moving on to slide 44, what do you show here?

13 A. This is a small excerpt from Popular Science.
14 Also calling out the range of 100 feet, and saying that this
15 shoots ammo farther than all other toy guns on the market.

16 Q. And how do -- how does the statement with a range
17 of 100 feet and shoots ammo farther than any other toy gun
18 relate to the asserted claims?

19 A. So this, again, is talking about the asserted --
20 the ammunition as described, being the SAP ammo, and the
21 blaster as described by these claims being able to take the
22 SAP and use that mechanism to launch it 100 feet, in this
23 case, making it shoot farther than all of the other toys
24 that are on the market.

25 Q. Let's move on to slide 45 and talk about some of

1 the awards that The Maya Group products received. What do
2 you show here?

3 A. This is the TOTY Awards, the Toy of the Year
4 Awards, that is organized by the Toy Industry Association
5 every year. And the Xploderz -- or the Xploderz XBlaster
6 200 was one of the finalists in 2012 for the Outdoor Toy of
7 the Year. This is sort of the biggest toy award thing in
8 the U.S., and there's multiple categories for the TOTYs.

9 I was a judge for the TOTY Awards for like six
10 years, I think, in a number of the categories, including
11 outdoor toys. I was actually a judge this year for the
12 Outdoor Toy of the Year in 2012 also.

13 Q. And then moving on to slide 46, what was the
14 criteria that's used to judge toys in the TOTY Awards?

15 A. So this is what the TIA gives all of the judges.
16 To be clear here, the judges are given a long list of
17 applicants who applied for this award, and, like, submission
18 materials, and the judges get it down to, like, seven
19 finalists, which are then presented to the public for the
20 final vote.

21 So all of the judges are told to rate whatever is
22 in their category on the same four criteria regardless of
23 what category it's in. So those are creativity,
24 originality, innovation, design and promotion, excellence of
25 product, and marketplace acceptance.

1 Q. In your opinion how does The Maya Group product's
2 TOTY nomination relate to the asserted claims?

3 A. Well, in this case the Xploderz -- I mean, my
4 opinion -- but the Xploderz was a -- it was a new thing that
5 you can shoot. It was a new type of blaster that was on the
6 market, and a blaster that shot SAP ammo, and that was
7 unlike the other blasters that were on the market at the
8 time. So that strongly relates to the first criteria here
9 of creativity and innovation.

10 Q. Now turning to slide 47, what award do you show
11 here?

12 A. This is the Best Overall Toy, Toys "R" Us.
13 Specifically, this is Canada Toys "R" Us. There's some
14 highlighting here, but essentially the store directors of
15 all the Toys "R" Us stores in Canada look at all of the new
16 products that are coming in and then they vote on Best
17 Overall Toy. And so the Xploderz line won the Best Overall
18 Toy from the Canadian Toys "R" Us store directors.

19 Q. What is significant about an award given by
20 Toys "R" Us?

21 A. Well, at the time, it was the big -- quote the
22 jingle here -- but it was the biggest toy store there was,
23 and so these store directors should know -- they should be
24 very familiar with toys that were on the market here. And
25 they are seeing all of the new stuff, and they should have a

1 pretty good sense of what is coming onto the market and --
2 yeah.

3 Q. On slide 47 you have underlined a unique and safe
4 firing and ammo system. How does that relate to the
5 asserted claims?

6 A. Sure. So in this, you know, relatively short
7 blurb here, it's calling out specifically the firing ammo
8 system. So the ammo plus the blaster. It also calls out
9 that it's patented technology. It speaks to 70 rounds per
10 second. And this is related to being able to have a feed
11 chamber that can hold that large amount of ammo and then
12 feed it into the blaster.

13 Again, it also talks about the firing distance,
14 which is directly related to that firing mechanism that
15 can -- with the spring, the air compression chamber, the
16 smaller-diameter tube -- that can get that SAP to reach that
17 distance.

18 Again, also the kids love Xploderz because they
19 can shoot further and carry more ammo, and carrying more
20 ammo relates to having a feed chamber.

21 Q. How would you respond to criticism that the
22 claims do not specifically recite a particular distance or a
23 particular ammo capacity?

24 A. Yeah, I think -- I mean, the only way to get the
25 distance is through having a firing mechanism. And so the

1 firing mechanism -- I mean, we don't usually talk in claim
2 terms in advertisements like this. So the way that that
3 distance is reached is by using that firing mechanism as
4 claimed with the ammunition as claimed. And the way that
5 you have the rapid fire or the lots of ammo is related to
6 having a feed chamber that can hold lots of ammo.

7 Q. And moving on to slide 48, what award do you show
8 here?

9 A. This is the Best -- this is actually on the
10 bottom of the slide -- the Best New Toy of 2011 by the
11 British Toy and Hobby Association during the London Toy
12 Fair. And this was named Best New Toy in 2011 by the
13 British group.

14 Q. In your opinion how does this award relate to the
15 asserted claims?

16 A. So, again, I highlighted some things here, but
17 they are talking about this new firing system, so the
18 blaster plus the ammo, and that you can get a lot of
19 distance with this and more ammo with this. So, again,
20 talking about the firing mechanism itself as well as the
21 ammunition and having a feed chamber.

22 It also talks about -- it specifically calls out
23 the ammo clip that can hold 70 rounds. That's the feed
24 chamber that can feed into the blaster.

25 Q. Now let's switch gears and talk about commercial

1 success of The Maya Group products.

2 Turning to slide 49, what did you observe in
3 terms of commercial success?

4 A. So Ron Brawer, this is the founder of The Maya
5 Group, and he was asked, you know, how did this perform at
6 Target, and he said it was a huge hit. And he said it was
7 the No. 1 selling toy for boys at Target in the spring
8 launch.

9 MR. ZHANG: Your Honor, before we go on, we're
10 going to touch upon some confidential information that's
11 third party.

12 JUDGE MCNAMARA: All right.

13 (Whereupon, the hearing proceeded in confidential
14 session.)

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

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3 JUDGE MCNAMARA: Mr. Comack? Before you start,
4 am I going to have deck slides for this?

5 MR. COMACK: I don't have any slides.

6 JUDGE MCNAMARA: Okay. That's fine. Thank you.

7 MR. COMACK: I may use some of the slides that
8 you've seen before.

9 CROSS EXAMINATION

10 BY MR. COMACK:

11 Q. Good afternoon, Dr. Kudrowitz.

12 A. Good afternoon.

13 Q. It's good to see you again.

14 A. Nice seeing you.

15 Q. Okay. Do you recall just before the break you
16 were discussing industry praise?

17 A. Yes.

18 Q. And if we could pull up slide CDX-5C at 43.

19 Do you recall discussing this Wall Street Journal
20 article?

21 A. Yes.

22 Q. And you're relying on this article to show
23 industry praise of the Xploderz products, correct?

24 A. Correct.

25 Q. And you've underlined some language in red.

1 "With an astounding 100-foot range, the XGround Pounder
2 shoots squishy blue gel balls that break apart on impact."

3 Do you see that?

4 A. Yes.

5 Q. And you're pointing to the praise as being to the
6 "astounding 100-foot range," correct?

7 A. Yes.

8 Q. Range is not in any asserted claims of the
9 asserted patents, is it.

10 A. It does not say range.

11 Q. And that's because it doesn't require range,
12 right?

13 A. Yeah, there's no requirement of range.

14 Q. Range is unclaimed, correct?

15 A. I think that the mechanism allows for that
16 astounding range.

17 Q. Dr. Kudrowitz, I'm asking you about the claims.
18 Is there range in the claims?

19 A. No.

20 Q. Okay. Now The Wall Street Journal article that
21 you cite also notes that SAP balls are safer to scatter
22 around your backyard. Do you see that? It's the third
23 line. They're safer to scatter around your backyard (they
24 end up watering the grass), right?

25 A. Yeah, I see that.

1 Q. Spit Balls Clear Spheres were also safe to
2 scatter around your backyard, correct?

3 A. What else did you say?

4 Q. I can't hear you.

5 A. I'm sorry. What else did you say was safe at the
6 time?

7 Q. I said Spit Balls and Clear Spheres were also
8 safe to scatter around your backyard, correct?

9 A. I guess so. I don't know if people were
10 scattering them around backyards but --

11 Q. Not my question. I'm asking you if they were
12 safe to scatter around the backyard.

13 A. Yeah, the same way these would be, sure.

14 Q. The same way that the ammunition from the
15 Xploderz would be safe to scatter around the backyard,
16 right?

17 A. Sure.

18 Q. Now the article also notes that the SAP balls
19 from the Xploderz product breaks apart on impact, correct?

20 A. What line are you on? Oh, on the top. Yes, I
21 see that.

22 Q. I hope you don't mind my asking. If you could
23 just move a little closer to the microphone. It's hard to
24 hear you.

25 A. Okay. Sure.

1 Q. Thank you.

2 A. Yeah.

3 Q. Let's put up RX-2.

4 This is the back of the packaging for the Spit
5 Balls product, correct?

6 A. Correct.

7 Q. And it says that the Spit Ball SAP breaks apart
8 on impact, correct? It will explode on target. It's in the
9 first paragraph, the third line from the bottom, plus only
10 DuneCraft's reusable can bounce and then explode on target.
11 Do you see that?

12 A. I see that.

13 Q. So isn't the packaging indicating that the Spit
14 Balls break apart on impact?

15 A. Yes, that's what that sounds like.

16 Q. Let's go back to slide CDX-5C at 43.

17 Now the article indicates that to fire -- let me
18 back up.

19 The article says that, despite its gun-like
20 shape, third line from the bottom, despite its gun-like
21 shape, the XGround Pounder has no trigger. Do you see that?

22 A. Yes.

23 Q. Is that praise?

24 A. I think so. I think it's highlighting that it
25 has a different way of shooting, which is unlike a gun.

1 Q. Now is that referring to what you've called the
2 power arm in this case?

3 A. Did you say "power arm"?

4 Q. Yeah. Let me back up. If you read the next
5 sentence, it says, according to the manufacturer, toys that
6 shoot small objects can't be used -- can't use stored energy
7 for safety reasons, so to fire, you pull and release the
8 spring-loaded lever. Do you see that?

9 A. Yes.

10 Q. Do you recall this morning talking about the
11 spring-loaded lever being the firing mechanism?

12 A. Yeah, one of the components of the firing
13 mechanism.

14 Q. And that's the firing mechanism in the Xploderz
15 product this article is talking about, right?

16 A. That's part of the firing mechanism that it's
17 talking about.

18 Q. And have you called that the power arm, the pull
19 and release spring-loaded lever?

20 A. I don't recall calling it a power arm.

21 Q. Okay. Is this a piston that you pull back on and
22 then release to fire?

23 A. Yeah, there is a piston that you pull back, and
24 that is what fires.

25 Q. Okay. Let's go to slide CDX-SC44. This is

1 referring to CDX-1408. It's a Popular Science article from
2 2012 that you've also relied on to support your argument for
3 praise, correct?

4 A. Correct.

5 Q. Are you relying on this article -- I'm sorry.
6 Let me start over.

7 The article explains that the Xploderz X2 had a
8 range of 100 feet and the Retaliator 2000 shot farther than
9 all other guns.

10 Do you see that?

11 A. I see that.

12 Q. Now, again, Dr. Kudrowitz, is range and distance
13 in any asserted claims?

14 A. No, not explicitly.

15 Q. Those are unclaimed features, correct?

16 A. Well, the distance -- you get the distance by
17 having the mechanism described in the claims.

18 Q. That's not what I asked you. I asked you, is the
19 distance in the claims?

20 A. Specific distance is not in the claims.

21 Q. In fact, no distance is in the asserted claims,
22 correct?

23 A. A specific distance does not appear in the
24 claims.

25 Q. Not even a general distance is in the claims,

1 right?

2 A. I don't know if the term "distance" appears in
3 the claims.

4 Q. Would you like to see the claims?

5 A. Sure, if you want.

6 Q. Let's pull up JX-1. We'll start with claim 1.
7 Just put all the claims up on the screen.

8 Let's start with claim 1. Do you see a distance
9 claim there?

10 A. Like the word "distance" is not there; is that
11 what you're asking?

12 Q. I'm asking if distance is claimed. Do you see
13 where the claims recite distance?

14 A. Well, I mean, in order to project something, it
15 has to go somewhere. That's a projectile, right?

16 Q. I didn't ask you that. Do you see the word
17 "distance"?

18 A. No, the word "distance" is not there.

19 Q. And that's because it's not claimed, right?

20 A. The word "distance" is not in the claims.

21 Q. Right. Okay. Now the word "range" is also not
22 claimed in claim 1, correct?

23 A. Correct.

24 Q. All right. Let's go to claim 8.

25 Do you see the word "distance" recited in

1 claim -- the first part of claim 8 that's displayed here?

2 A. No.

3 Q. Let's go to the second part of claim 8.

4 And do you see the word "distance" recited
5 anywhere in claim 8?

6 A. The word "distance" does not appear in claim 8.

7 Q. Claim 8 does not claim distance, correct?

8 A. Again, it still talks about a projectile
9 launcher.

10 Q. Yeah.

11 A. In order to project something there needs to be
12 distance.

13 Q. Right, but distance is unclaimed here; isn't that
14 right?

15 A. Correct, the word "distance" is not in the claim.

16 Q. Now let me ask you a question. You didn't
17 measure the distance that the accused products shoot their
18 SAP for any of your infringement analysis, did you?

19 A. I don't recall.

20 Q. You don't know if you did that?

21 A. If I measured all of the distances?

22 Q. Did you do it for the Maya Xploderz products, did
23 you measure the distance that they shoot?

24 A. Sort of. We shot it -- I shot it down hallways
25 and then sort of estimated the distance, yeah.

1 Q. You didn't measure the distance for the accused
2 products, does that mean they don't infringe?

3 A. I don't understand your question.

4 Q. Well, I think what you're getting at is that
5 distance is implied in all the asserted claims; isn't that
6 right?

7 A. Distance is, like, that something goes a distance
8 is implied by it being a launcher.

9 Q. So to show infringement, do you have to show that
10 the SAP flies a certain distance with respect to the
11 asserted claims?

12 A. If the SAP doesn't go anywhere at all, then it's
13 not projecting.

14 Q. Not what I asked you. Is distance claimed in the
15 claims?

16 A. The word "distance" is not in the claims.

17 Q. Do the claims require distance?

18 A. Do the claims require a distance... I mean, I
19 guess this sounds like if it -- if it doesn't go anywhere,
20 it's not projecting.

21 Q. I see. So but let's go back to the article that
22 you cite. We'll go back to that slide.

23 Do the claims require an astounding 100-foot
24 range in the asserted claims I'm asking you about?

25 A. The asserted claims don't give a specific range.

1 Q. And the asserted claims don't talk about how many
2 feet the projectiles must travel, correct?

3 A. Correct.

4 Q. Let's put up claim 19 of the '282 patent, JX-1.
5 Does this claim recite distance?

6 A. The word "distance" does not appear in claim 19.

7 Q. And that's because this asserted claim doesn't
8 require a distance, correct?

9 A. This asserted claim describes the way you get
10 distance of a projectile.

11 Q. Is this a method claim?

12 A. It's just describing the features here.

13 Q. It's describing components, right?

14 A. It's describing components.

15 Q. It's not describing or requiring a distance that
16 the super absorbent polymer has to travel when it's
17 launched, is it.

18 A. It doesn't give a specific distance.

19 Q. So you agree that the claims do not require a
20 specific distance, correct?

21 A. Again, I think it has to have some distance or
22 else it's not a projectile launcher.

23 Q. Okay. Now you understand that Spit Balls -- let
24 me withdraw that.

25 So your position is you're interpreting this

1 claim to require that the claims travel some distance but
2 not more distance than any other projectile launcher that's
3 out there, right?

4 A. Can you say that again?

5 Q. Sure. Is it your position -- I just want to
6 understand your position. You told me that these claims,
7 the asserted claims, require that a projectile be launched
8 so it has to go some distance, correct?

9 A. That's a projectile, yes.

10 Q. Okay. But you're not saying that these claims
11 require that the ammunition that's launched from claim 19 or
12 20 or 1 or 8 travel a greater distance than any other known
13 launcher that's out there, correct?

14 A. No, I'm not saying that's required by the claim,
15 but I'm saying that the mechanism describing the claim is
16 what allowed the Xploderz to launch ammunition further than
17 what was on the market.

18 Q. Let's go to -- back to the article. You
19 underline the astounding 100-foot range as being the praise,
20 right?

21 A. That's part of it, yes.

22 Q. Do you understand that the law says that, if an
23 unclaimed feature is the reason for success, then it doesn't
24 count and there's no nexus?

25 A. I hear what you're saying.

- 1 Q. Do you agree?
- 2 A. With the law?
- 3 Q. Yeah.
- 4 A. Sure.
- 5 Q. Let's go back to the -- let's pull up JX-2, the
6 '683 patent. Let's go to claim 1.
- 7 Does this claim recite any distance that the
8 projectile needs to travel?
- 9 A. It doesn't specifically say a distance.
- 10 Q. Go to claim 5.
- 11 Does claim 5 of the '683 patent recite any
12 distance that the projectile needs to travel?
- 13 A. No.
- 14 Q. Let's go to claim 14.
- 15 Does claim 14 require any distance that the
16 projectile has to travel?
- 17 A. It doesn't specify a distance.
- 18 Q. Does it require it?
- 19 A. Does it require a distance? I mean, again, the
20 same comment on being a projectile launcher.
- 21 Q. I'm sorry. I can't hear you.
- 22 A. This also says that it has a projectile launcher
23 that fires something, so some distance is going to be
24 produced, but it doesn't say a specific distance.
- 25 Q. Well, the praise that we saw in that Wall Street

1 article was due to the Xploderz 100-foot distance, correct?

2 A. Yes, and the way that distance was achieved is
3 through the mechanism described in the claims.

4 Q. Right, but the praise was because of the distance
5 of 100 feet that is not in the claims, correct?

6 A. Yeah, I don't -- some of these articles, they
7 don't -- they're not going to start talking about claim
8 language in a short blurb, but that's -- the 100 feet speaks
9 to the mechanism.

10 Q. So you believe that it's the mechanism that's the
11 reason for the success, the firing mechanism.

12 A. With the ammo.

13 Q. With the ammo. Earlier -- can we go back to --
14 give me a minute.

15 Let's pull up slide CDX-5C.40.

16 These are all the Maya -- the Xploderz products
17 that you see practice the asserted claims, correct?

18 A. Correct.

19 Q. And earlier you testified that they all have a
20 piston, a spring, an air compression chamber, a feed
21 chamber. Do you recall that?

22 A. Yes.

23 Q. And you actually provided your opinions in this
24 case that these products, these Xploderz, practice all of
25 the asserted claims, right?

1 A. With the exception for a few of the first
2 generation don't practice claim 14.

3 Q. Okay. Now doesn't Peev and Nagayoshi also
4 disclose the same firing mechanism that's in these Xploderz
5 products you list in your slide 40?

6 A. Peev and Nagayoshi are not describing SAP
7 ammunition.

8 Q. Okay. Fair enough. But these products, these
9 Xploderz, have a spring, correct?

10 A. Correct.

11 Q. They have an air compression chamber, correct?

12 A. Yes.

13 Q. They have a small-diameter tube, a piston, a feed
14 chamber, correct?

15 A. Correct.

16 Q. Okay. And, in fact, Hasbro has stipulated that
17 Peev and Nagayoshi disclose all the launcher limitations of
18 the asserted claims; isn't that right?

19 A. If that's what they stipulated, that sounds
20 right.

21 Q. I have a stipulation here that I can read to you,
22 if you like.

23 A. Sure.

24 Q. Okay. This is the -- I'll put it on the ELMO.
25 Good idea.

1 He is going to put the document up. I didn't
2 realize he had it.

3 Take a look at paragraph 1. It says, for
4 purposes of this Investigation only, Complainants stipulate
5 that JP 2006-234191 Nagayoshi is prior art under the pre-AIA
6 35 U.S.C. ^o 102(b). Do you see that?

7 A. Yes.

8 Q. And then it says, for purposes of this
9 investigation only, Complainants stipulate that Nagayoshi
10 discloses a projectile launcher as required by the '282
11 patent, claims 8, 19, and 20, and a projectile launcher for
12 launching ammunition in free flight as required by the '683
13 patent, claims 1, 5, and 14.

14 Do you see that?

15 A. Yes.

16 Q. And if we go to the next page, why don't you go
17 ahead and just read each paragraph to yourself and tell me
18 if you understand that Hasbro has stipulated that Peev and
19 Nagayoshi disclose all the launcher limitations of the
20 asserted claims of the '282 patent and the '683 patent.

21 A. Okay. I've read that.

22 Q. Do you understand that Hasbro has stipulated that
23 Peev and Nagayoshi disclose all of the launcher limitations
24 of the asserted patents?

25 A. Yes.

1 Q. And the Xploderz product, which came later, also
2 discloses all the limitations of the asserted claims,
3 correct?

4 A. Correct.

5 Q. So the launching mechanism was known in the prior
6 art; isn't that correct? The launching mechanism of the
7 Xploderz product I'm talking about.

8 A. Yes.

9 Q. So the success of the Maya product can't be due
10 to those features that are in the prior art, can it, the
11 firing mechanism?

12 A. I think the success is from having a blaster that
13 uses those firing mechanisms to shoot SAP, which wasn't shot
14 before.

15 Q. Right. So the success was due to the use of SAP,
16 correct?

17 A. Using SAP in a firing mechanism like Peev and
18 Nagayoshi.

19 Q. So really the distinguishing feature of the
20 asserted claims was the use of SAP in the ammunition; isn't
21 that right?

22 A. I think it's using SAP in a blaster like the ones
23 described in the claims. That is the essence of the
24 invention.

25 Q. Like the one described in Peev and Nagayoshi?

1 A. Well, they practice some of the claim language.

2 Q. I'm sorry. Could we go back to, I believe it was
3 slide 44, CDX-44.

4 Okay. I have your slide back up, and it says
5 getting shot won't hurt. They disintegrate upon contact.
6 Do you see that?

7 A. Yes.

8 Q. And that's talking about the ammunition shot out
9 of the Xploderz product doesn't hurt the person because they
10 explode, the SAP explodes and disintegrates on contact,
11 correct?

12 A. That's what this says.

13 Q. And, as you pointed out before, the SAP Spit
14 Balls also explode on contact, correct?

15 A. Correct.

16 Q. Let's go to slide CDX-5C.47.

17 Do you recall discussing the Xploderz blasters
18 wins the Best Overall Toy at the Toys "R" Us show?

19 A. Yes.

20 Q. And you're relying on this award to show praise
21 by others, correct?

22 A. Yes.

23 Q. Okay.

24 A. Well, one of other -- one of many slides.

25 Q. One of many slides. You have other awards as

1 well, right?

2 A. Correct.

3 Q. This article that you cite doesn't say why the
4 Xploderz product was chosen as the Best Overall Toy item at
5 the Toys "R" Us show, correct?

6 A. It doesn't say how the Toys "R" Us store
7 directors chose it.

8 Q. It doesn't give a reason why the Xploderz won
9 this award from Toys "R" Us, correct?

10 A. Are you asking if I know what the store directors
11 were looking for?

12 Q. We'll get there, but right now I'm asking you if
13 this article discloses the reason why the Xploderz product
14 won Best Overall Toy.

15 A. This -- so I don't know what the judges were
16 looking for, but this article talks about providing an
17 exciting safe alternative for kids, and then it goes into
18 some details about how it works.

19 Q. Was the author of this article a judge for the
20 Toys "R" Us Best Toy Award?

21 A. I don't know.

22 Q. Did the author talk to any of the judges from the
23 Best Toy Award?

24 A. I don't know.

25 Q. This indicates that it was the choice of all Toys

1 "R" Us department -- I'm sorry -- Toys "R" Us store
2 directors across the country, and it's talking about Canada,
3 right?

4 A. Yes.

5 Q. You didn't speak to even one director from Toys
6 "R" Us to ask them why Xploderz won this award, did you?

7 A. I did not speak to these directors.

8 Q. So you're just speculating as to why the Xploderz
9 product won the award?

10 A. This is the evidence I have and that's what
11 I'm --

12 Q. I'm sorry. Go ahead.

13 A. I'm just going on the limited material I have to
14 work with here.

15 Q. Right. But you don't have any facts or data to
16 support your opinion that this shows awards and praise,
17 correct?

18 A. Well, this was published, and they did win the
19 award.

20 Q. I'm sorry. That's a good point. Let me ask the
21 question again.

22 You don't have any facts or data that support
23 your opinion that this award creates a nexus to the asserted
24 claims of the asserted patents, correct?

25 A. Well, what this article is, let's say,

1 celebrating about the product is describing some of the
2 claim language, and it's tying that to winning the award.

3 Q. The author from Web Newswire you say is doing
4 that, right?

5 A. Whoever authored this is describing some of the
6 elements of the claims and also announcing that it won this
7 award.

8 Q. Now this article says that the Xploderz line
9 features a unique safe firing and ammo system using hydrated
10 rounds that burst upon impact. Do you see that?

11 A. Yes.

12 Q. And as we talked about before, the Spit Balls
13 were hydrated rounds that also burst on impact as we saw in
14 RX-2, correct?

15 A. Yes.

16 Q. And we also saw that the firing system that --
17 Hasbro has stipulated that the firing system in Peev and
18 Nagayoshi meet all the claim elements, correct?

19 A. All of the ones stipulated.

20 Q. Right. Now let's look at another quote. This
21 article says, "Kids love Xploderz because they shoot further
22 and carry more ammo. Parents love Xploderz because they are
23 completely safe."

24 Do you see that?

25 A. I see that.

1 Q. Okay. So, again, shooting further is not a claim
2 requirement, correct, any asserted claim?

3 A. Those words do not appear in the claims.

4 Q. And that's because the claims don't require
5 shooting further.

6 A. The claims describe the mechanism that allows you
7 to shoot SAP far.

8 Q. Further than what?

9 A. That part I --

10 Q. Shooting further is not a claimed feature,
11 correct?

12 A. Shooting further than something else is not a
13 claimed feature.

14 Q. Do any asserted claims require that the launcher
15 hold more ammo?

16 A. The claims discuss a feed chamber, which is what
17 allows you to hold lots of ammo.

18 Q. Do the claims specify more ammo, the asserted
19 claims?

20 A. More ammo -- well, in a sense, comparing it to
21 one single ammunition, a feed chamber allows you to hold
22 more than one bullet.

23 Q. Let's put up claim 5 of the '683 patent, JX-2.

24 Here we have a system of claim 1 wherein the
25 projectile launcher includes a feed chamber for loading the

1 soft projectiles within the projectile launcher. Do you see
2 that?

3 A. Yes.

4 Q. Does this say that the feed chamber has to hold
5 more ammo?

6 A. It describes that it has to have the feed
7 chamber.

8 Q. Does it say how big the feed chamber is?

9 A. It doesn't specify how big --

10 Q. Sorry about that. Does it tell you if it holds
11 more than one SAP pellet?

12 A. I think that's just inherent to a feed chamber,
13 that it has feed.

14 Q. Did you measure the quantity of ammunition that
15 the accused products PTT hold when you did your infringement
16 analysis?

17 A. I didn't measure how many ammunition each product
18 hold.

19 Q. If I want to know whether I infringe this claim
20 or not, how many -- like, what's the safe zone? How many
21 SAP pellets can I put in a feed chamber and not infringe?

22 A. I think it just says that it has a feed chamber.

23 Q. Right. It doesn't specify more ammo, right?

24 A. Well, the way you get more ammo is that you have
25 a chamber that holds feed.

1 Q. So you're reading in more ammo into this claim;
2 is that right?

3 A. No, I'm just -- that's what a feed chamber is.
4 It holds ammo.

5 Q. Right. The feed chamber doesn't have to hold
6 more than one piece of ammo, does it?

7 A. I don't know why you would have a feed chamber if
8 you're only going to have one ammo.

9 Q. To feed the ammo into the firing position.

10 A. I guess, if you only put one ammo into it or
11 many, it just describes the feed chamber.

12 Q. Didn't the inventor specify how much ammo the
13 feed chamber was going to hold?

14 A. I mean, I've reviewed some patents. They don't
15 usually say exactly how many pieces of feed or anything
16 something has to hold.

17 Q. So let's go back to the article that we had up in
18 the CDX-547.

19 When it says "more ammo," more ammo relative to
20 what?

21 A. I think that could be interpreted two ways.

22 Q. Which ways?

23 A. Comparing it to other blasters on the market,
24 like NERF, but it could also be interpreted as if it
25 carries -- you carry all of the ammo in the blaster in

1 addition to what's in the barrel.

2 Q. So you don't even know what this language means.
3 It's not clear to you.

4 A. Well, in both cases it says it has a lot of ammo.

5 Q. Do the claims require that the feed chamber or
6 that the asserted launchers have more ammo than NERF?

7 A. I'm sorry. Can you repeat that?

8 Q. Yes. Do the the asserted claims require that the
9 launchers hold more ammo than NERF products?

10 A. It's not a claimed feature that they hold more
11 ammo than NERF products.

12 Q. Is it a claimed feature that they hold a lot of
13 ammo?

14 A. I think it's a claimed feature that it has a feed
15 chamber, which means it holds ammo.

16 Q. Dr. Kudrowitz, please answer my question. I'm
17 asking you if it holds -- if the asserted claims require
18 that the launcher hold a lot of ammo. I think those were
19 the words you used. So I want to know if you believe the
20 asserted claims require that. It's a simple yes or no.

21 JUDGE MCNAMARA: What's the objection?

22 MR. ZHANG: I think it's argumentative. He has
23 already answered this question multiple times.

24 JUDGE MCNAMARA: I don't think in this instance
25 it is not. He is just looking for a yes or no.

1 And I think, Dr. Kudrowitz, you really do need to
2 answer yes or no. There's specific language that Mr. Comack
3 has asked you and whether or not it's included in the claim
4 language essentially.

5 A. Sure. Can you please state your question again?

6 Q. Sure. Do the asserted claims, the asserted
7 patents, require that the claim launchers hold a lot of
8 ammo?

9 A. It does not say those words.

10 Q. Do they require it?

11 A. Well, it requires a feed chamber which holds
12 multiple ammo. I don't think it says anything about a lot.

13 Q. It doesn't say any number of ammo that it holds,
14 correct?

15 A. It does not have -- sorry. What was your
16 question?

17 Q. The asserted claims don't require any specific
18 number of ammo that the launcher holds, correct?

19 A. It does not require a specific number of ammo.

20 Q. Let's go to slide CDX-5C, I think it's 48. I
21 can't read my handwriting. This is the one.

22 This is an article that you cite to indicate
23 praise by others of the Xploderz product, correct?

24 A. Correct.

25 Q. And this is naming an award that the Xploderz

1 product won from the British Toy and Hobby Association in
2 2011, correct?

3 A. Correct.

4 Q. Do you know who wrote this article?

5 A. No.

6 Q. Go to the next page, please. I'm sorry. I made
7 a mistake.

8 Could we pull up the article itself? It's
9 RX-3299.

10 Let's stop there. Is this the same article that
11 you show in the slide that we just looked at?

12 A. I think so.

13 Q. Could we go to the second page of this? If you
14 could zoom in at the bottom.

15 Do you see where it says, "Source: Maya Group"?

16 A. Yes.

17 Q. Isn't this a press release by The Maya Group?

18 A. It does look like they wrote this and it was
19 published.

20 Q. So let's go back to the first page. Do you
21 understand that to show praise it has to be praise by
22 others, correct, for it to apply to the commercial success
23 or -- I'm sorry. Let me withdraw that.

24 You understand there has to be praise by others
25 in order for this to count as a secondary consideration of

1 non-obviousness, correct?

2 A. Yes.

3 Q. And this is not -- this article is not praise by
4 others; this was written by Maya, correct?

5 A. I mean, it was still published by someone else,
6 though, correct?

7 Q. Yeah, right, but it was written by Maya.

8 A. That's true.

9 Q. Right. And so Maya was praising itself; isn't
10 that correct?

11 A. It looks like they were. They drafted something
12 that was published.

13 Q. So we can forget about this article. It doesn't
14 count as praise by others. You agree with that, right?

15 A. I mean, the publisher still published it.

16 Q. That's not what I asked you. I know the
17 publishers published it. All publishers can publish, but
18 what I'm asking you is if this article indicates praise by
19 others, what's written in the article.

20 A. I see what you're saying. Well, I don't know.

21 Q. You don't know. Now this article does talk about
22 an award that the Xploderz product won, correct?

23 A. Yes.

24 Q. You don't know the criteria for why they won the
25 award, do you. The article doesn't indicate that, correct?

1 A. I don't know the criteria.

2 Q. If we can go to slide CDX-5C.45, please.

3 Here you've -- you rely on the TOTY Award of 2012
4 as showing praise by others, correct?

5 A. Correct.

6 Q. And you were one of the many judges from the TOTY
7 Awards, correct?

8 A. Correct.

9 Q. Let's pull up RX-3297.

10 This is the article that you've cited to show
11 there's been praise -- I'm sorry -- that there was this TOTY
12 Award that happened in 2012, correct?

13 A. Correct.

14 Q. All right. If we scroll down a bit, we'll see it
15 says the article lists that 67 products from 51 companies
16 were selected from 600 nominees for the TOTY Awards. Do you
17 see that?

18 A. I see that.

19 Q. And the article indicates that there were
20 nomination committees, in the same paragraph, who selected
21 the finalists for the TOTY Awards. Do you see that?

22 A. Yes.

23 Q. And those committees consisted of academics, like
24 yourself, journalists, toy experts, play therapists, toy
25 inventors, and designers, and retailers. Do you see that?

1 A. Yes.

2 Q. You did not meet or confer with these other
3 committee members when you voted in the process for the TOTY
4 Award, correct?

5 A. No.

6 Q. In fact, the voting for the TOTY was done online,
7 right?

8 A. Correct.

9 Q. And it was all anonymous. You don't know what
10 the other judges voted for and what they didn't, correct?

11 A. Correct.

12 Q. And you don't know the reasons that they voted
13 for each toy; is that correct?

14 A. I only know the four categories that we were
15 given.

16 Q. But you don't know what categories the other
17 judges considered, correct?

18 A. Correct.

19 Q. And I'm talking about for the Xploderz product,
20 correct?

21 A. Correct.

22 Q. Okay. Is it your understanding that the
23 finalists for the TOTY were selected just based on what
24 products got the most votes?

25 A. Which round are we talking about?

1 Q. I'm sorry?

2 A. Which round -- are you talking about the final
3 round or the expert round?

4 Q. The ones who became the finalists.

5 A. Oh, sorry. What was your question?

6 Q. The finalists were selected based on what
7 products got the most voting, correct?

8 A. Correct.

9 Q. Okay. And, again, you don't know why the
10 Xploderz was selected by the other judges as a TOTY
11 finalist, correct?

12 A. I only know the categories that as a judge we
13 were supposed to look at.

14 Q. Right, but you don't know how the judges
15 evaluated those categories with respect to the TOTY,
16 correct? I'm sorry, with respect to the Xploderz.

17 A. Sure, I don't know what they were -- how they
18 prioritized things.

19 Q. In fact, you don't even remember which products
20 you voted for as a TOTY finalist, correct?

21 A. I think I testified that I think I voted for it,
22 but I can't tell you with 100 percent because it was 12
23 years ago.

24 Q. Let's pull up RX-102C, and let's go to page --
25 JUDGE MCNAMARA: Before you go on, this is the

1 deposition transcript?

2 MR. COMACK: I'm sorry. I should have done that.

3 JUDGE MCNAMARA: And the date, please.

4 Q. This is the deposition transcript, Dr. Kudrowitz,
5 from when you had your deposition in this case. Do you
6 recall your deposition?

7 A. Yes.

8 Q. And that deposition -- if you can just go to the
9 cover page, this was on January 27th, 2023. Do you see
10 that?

11 A. Yes.

12 Q. And do you see the case caption on the cover page
13 here for this case?

14 A. Yes.

15 Q. 337-TA-1325, correct?

16 A. Correct.

17 Q. It says, "In the Matter of Certain Soft
18 Projectile Launching Devices, Components Thereof, Ammunition
19 and Product Containing the Same," correct?

20 A. Correct.

21 Q. We're going to go to page 301 of your transcript.
22 Let's look at lines -- we're going to go through lines 2 to
23 15.

24 Do you recall being asked -- I'm actually going
25 to start at line 10.

1 And it says, you were asked: And so don't you
2 know whether you voted for the Xploderz XBlaster 200 by The
3 Maya Group as being an Outdoor Toy of the Year?

4 You answered -- do you recall that question?

5 A. I do.

6 Q. And then you answered: I can't tell. I can't
7 tell you for certain if I voted -- if I ranked -- where I
8 ranked it in the -- or if I ranked it in there.

9 Do you see that?

10 A. I see that.

11 Q. Was that testimony truthful that you provided?

12 A. That's true. And then later I said I think I
13 voted for it, but I can't tell you 100 percent. That's on
14 the next page.

15 Q. All right. Let's go back to the slide. Let's go
16 to your slide CPX-5C.50. I have the wrong one written down.

17 MR. TAYLOR: Your Honor, this is confidential
18 information.

19 JUDGE MCNAMARA: Yes, it is. Please take that
20 down.

21 (Whereupon, the hearing proceeded in confidential
22 session.)

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JUDGE MCNAMARA: Thank you, Mr. Taylor.

MR. COMACK: Thank you.

BY MR. COMACK:

Q. Can we pull up slide 49?

Earlier do you recall testifying about Mr. Brawer's testimony about the Xploderz product?

A. Yes.

Q. And he was an executive at The Maya Group, correct?

A. Correct.

Q. And he is also one of the named inventors on the asserted patents, correct?

A. Correct.

Q. And his testimony is probably the most reliable source as to the reasons for success of the Xploderz product, correct?

A. I don't know if I would say it's the most important source for its reason for success, but if he says it was successful, that's one piece of --

Q. You're comfortable relying on his testimony as to the reasons for success of the products that his company sold, correct?

A. Yes.

1 Q. Let's put up RX-109C and just do the cover. I
2 want RX-109C.

3 Do you recognize this as the deposition
4 transcript of Ronald Brawer?

5 A. I see that, yes.

6 Q. And do you see it was taken on March 31, 2023?

7 A. Yes.

8 Q. Do you see that it was testimony taken in this
9 case, Investigation No. 337-TA-1325?

10 A. I see that.

11 Q. And you submitted a supplemental report
12 addressing Mr. Brawer's testimony after his deposition was
13 taken; isn't that right?

14 A. Yes.

15 Q. Let's go to page 298 of this transcript, and
16 let's focus on lines 12 to 21.

17 Mr. Brawer was asked: When The Maya Group
18 released the Xploderz product in 2011, how did the firing
19 range of that product compare to the other blaster products
20 on the market?

21 Do you see that?

22 A. I see that.

23 Q. And he answered: We were double the range, if
24 not more.

25 Right?

1 A. Yes.

2 Q. And then he was asked: How did your ability to
3 achieved double the firing range of your competitor's
4 products impact your sales?

5 Do you see that?

6 A. Yes.

7 Q. And then he answered: I believe that was what
8 was driving consumers to want Xploderz. Positively.

9 A. I see that.

10 Q. You have no reason to disagree with Mr. Brawer,
11 correct?

12 A. I don't have a reason to disagree with him.

13 MR. COMACK: Now I am about to pull up
14 confidential testimony that's third party.

15 JUDGE MCNAMARA: Okay.

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

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MR. COMACK: Can you put up RX-1 side by side with RX-2?

BY MR. COMACK:

Q. So, according to you, this packaging only teaches to throw a Spit Ball, correct?

A. It also says bounce and slide.

Q. So it's your opinion that the Spit Balls packaging does not teach someone to launch a Spit Ball through a tube, correct?

A. The words used say that you should not -- say that you should throw it.

Q. Does the Spit Balls packaging in any way, words or graphics, teach to launch the Spit Balls product through a tube?

A. The graphics indicates someone shooting a spitball.

Q. Through what?

A. Some form, I think it's some form of tube.

Q. Some form of a tube? But you're saying a POSITA wouldn't align that teaching when looking at this product on how to launch a Spit Ball; is that right?

A. I'm sorry. I missed the beginning of your question.

1 Q. I'll withdraw it.

2 What about the name Spit Balls, does that teach
3 someone to use a tube?

4 A. I think it's invoking the traditional term
5 "spitball" that you shoot a wad of paper through a straw.

6 Q. I'm sorry. I couldn't hear the last thing you
7 said.

8 A. It's calling reference to the traditional way of
9 shooting a wad of paper through a straw.

10 Q. "Through a straw."

11 Okay. Can we call up RX-109C again?

12 Do you recall Mr. Brawer's deposition testimony
13 earlier?

14 A. Yes.

15 Q. Let's go to page 267, lines 2-6.

16 Just for the record, this is the March 31st, 2023
17 deposition of Ronald Brawer.

18 Okay. So here Mr. Brawer was asked:

19 And in your mind, the use of the SAPs as the
20 ammunition was part of what enabled the Xploderz products to
21 shoot twice as far as comparable NERF products?

22 Do you see that?

23 A. I see that.

24 Q. And his answer was:

25 It was by far the most important thing.

1 Do you see that?

2 A. I see that.

3 Q. Do you agree with Mr. Brawer that the use of SAP
4 as ammunition was by far the most important thing to enable
5 the Xploderz products to shoot twice as far as comparable to
6 NERF products?

7 A. I think it's the use of SAP in the Xploderz
8 products.

9 Q. You don't agree with what he said, that it was
10 the use of SAP by far? He didn't refer to what's in the
11 products, right?

12 A. Well, without the blasters, it's just essentially
13 like Orbeez. So it's the combination of using the SAP in a
14 blaster.

15 Q. I want you to focus on the question. It says, in
16 your mind, the use of the SAPs as the ammunition was part of
17 what enabled the Xploderz products to shoot twice as far as
18 comparable NERF products, do you see that?

19 A. I see that.

20 Q. The questioner was not asking about the
21 mechanism. He was saying was the ammunition part of what
22 enabled the Xploderz product to shoot twice as far, right?

23 A. He says that, yes.

24 Q. And Mr. Brawer said the SAP was by far the most
25 important thing, correct?

1 A. That's what he says here.

2 Q. Are you disagreeing with him?

3 A. I'm not disagreeing. I'm just saying that he's
4 talking in context of the blaster system.

5 Q. He's not. He doesn't mention the blaster system
6 there anywhere. If you think he does, show me where he
7 does.

8 A. Oh. He is just saying -- I think the question
9 says what enabled the Xploderz products.

10 Q. Read the whole question, doctor. The use of the
11 SAPs as the ammunition was part of what enabled the Xploderz
12 products to shoot twice as far as comparable to NERF
13 products. He wasn't asking about the mechanism. He was
14 asking about the SAPs, correct?

15 A. Sure, but I think it's still in context of the
16 SAP in a blaster, not on its own.

17 Q. That's your interpretation of this.

18 A. That's how I interpret this.

19 Q. Even though it doesn't say that, right? Okay?
20 You can answer. I don't know if you gave one.

21 A. I mean, that's how I interpret this.

22 Q. Okay. Let's call up page 268, we'll do lines
23 2-8.

24 And here it was Hasbro's counsel that was
25 questioning Mr. Brawer. She asked, so, again, this use of

1 the SAPs as the ammunition was part of what enabled the
2 Xploderz products to hold more rounds in the magazine, which
3 is one of the most important features in the focus group
4 study.

5 Do you see that?

6 A. I see that.

7 Q. And Mr. Brawer answered yes. Do you see that?

8 A. Yes.

9 Q. So, again, he is saying it was the use of the
10 SAPs that enabled the Xploderz products to hold more rounds
11 of ammunition in the magazine, right?

12 A. The use of SAPs as ammunition in a blaster.

13 Q. That's because the SAPs are smaller than, say, a
14 NERF foam ball, and that's why they hold more ammunition,
15 correct?

16 A. I don't know if I get that from this statement
17 here.

18 Q. Do you agree with Mr. Brawer that the use of SAP
19 as ammunition was what enabled the Xploderz products to hold
20 more ammo in the magazine?

21 A. I agree that it's part of what enabled.

22 Q. Okay. I'm going to have to ask to clear the
23 courtroom again.

24 I'm sorry. My mistake. My mistake. I thought
25 it was confidential.

1 If we could pull up RDX-1052. RDX-1, and then
2 page 52.

3 This is testimony from RX-137C, the March 31st,
4 2023 Brawer deposition. Do you see that?

5 A. Yes.

6 Q. Okay. And Mr. Brawer was asked: Is it fair to
7 say that the primary force driving the demand for these
8 products in Exhibit 7 was their use of SAPs as ammunition?

9 Do you see that?

10 A. I see that.

11 Q. And he answered: It was the foundation of the
12 line, absolutely.

13 Do you see that?

14 A. I see that.

15 Q. And then he was asked: Is it fair to say that
16 all of the features of the product that you used to create
17 excitement in your TV advertising were directly linked to
18 the use of SAPs as ammunition in your projectile launcher?

19 And he answered, absolutely.

20 Do you see that?

21 A. I see that.

22 Q. Do you agree -- I'm sorry.

23 Do you disagree with Mr. Brawer that the primary
24 force driving demand for the Xploderz products was their use
25 of SAP as ammunition?

1 A. I think I agree that the primary -- where does he
2 say -- the primary driving force as use of SAPs as
3 ammunition in a projectile launcher as it says in the
4 question.

5 Q. You agree that that's what it says.

6 A. I think from using SAPs as ammunition in the
7 projectile launchers described are what gives the distance
8 that people are talking about.

9 Q. You're disagreeing with the owner of The Maya
10 Group who is selling these products at the time that the
11 foundation of the line was the use of SAPs and they were the
12 primary force driving demand for these products, you're
13 disagreeing with him on those statements; is that right?

14 A. No, I'm not disagreeing.

15 Q. And do you agree with him that all of the TV
16 advertising that Maya Group did was directly linked to the
17 use of SAPs as ammunition in the projectile launcher?

18 A. I think -- I don't have a reason to disagree with
19 him.

20 Q. Okay. Do you agree that the differentiating
21 factor that set Xploderz apart was the use of SAP as
22 ammunition?

23 A. The use of SAP as ammunition in a projectile
24 launcher is what sets it apart.

25 Q. I'm sorry. Would it be possible to have that

1 read back?

2 (The requested portion of the record was read by
3 the court reporter.)

4 Q. It was the differentiating factor?

5 JUDGE MCNAMARA: Shall I read the entire
6 question?

7 MR. COMACK: I can look.

8 A. As described by the patent.

9 Q. What do you mean "as described by the patent"?

10 A. Oh, just saying here, like use of SAPs as
11 ammunition in your projectile launcher.

12 Q. Oh, okay. Let's go to RX-101C.

13 So here we have Volume I of your deposition on
14 January 26th, 2023 in this case. Do you see that?

15 A. Yes.

16 Q. If we can go to page 200 and highlight lines 4-8.

17 Do you recall being asked: In claim 1 how
18 important is that feature having hydrated super absorbent
19 polymer, how important is that feature to the commercial
20 success of the Respondents' products?

21 You answered, "I think very important."

22 You were asked "Why?" Scroll down.

23 "Why is it important that the absorbent polymer
24 is used as the ammunition?

25 "Question. Yes.

1 You answered: I mean, that seems to be the
2 differentiating factor that set Xploderz apart when that
3 came out, and I guess if I go to my report, that -- let me
4 just go to my report.

5 No other blasters on the market -- were on the
6 market that were shooting SAP at the time.

7 Do you see that?

8 A. Yes.

9 Q. Was that answer truthful when you provided it?

10 A. Yes.

11 Q. And is your answer still truthful today?

12 A. Sure.

13 Q. Are you aware that the Complainant Hasbro has
14 stipulated that the Clear Spheres and Spit Balls toys are
15 formed from super absorbent polymer as required by the '282
16 patent, claim 1, and the '683 patent, claim 1, as construed
17 by the ALJ?

18 A. I think you might need to say that again.

19 Q. Let's put the stipulation up. Just give me a
20 moment to get there.

21 MR. ZHANG: Your Honor, objection. This is well
22 outside the scope of my direct. We never said anything
23 about whether Clear Spheres or Spit Balls do not satisfy the
24 SAP limitation.

25 MR. COMACK: This goes --

1 JUDGE MCNAMARA: Hold on, Mr. Comack. So what is
2 your response?

3 MR. COMACK: I'm sorry. Thank you. This goes to
4 Dr. Kudrowitz' argument that there was commercial success
5 that renders the claims non-obvious. And we're establishing
6 under Ormco, it says that, if there's an unclaimed feature,
7 it's not relevant. It says, if the feature that was the
8 reason for the success was in the prior art, then it's not
9 relevant, and that's why I'm asking these questions.

10 JUDGE MCNAMARA: Okay. No, I understood that.
11 We have gotten that from the very first question.

12 But the question here, I think, is about the
13 stipulation itself and whether or not Dr. Kudrowitz is aware
14 of what the stipulation entailed. It's now part of the
15 record.

16 MR. COMACK: Sure. Okay.

17 JUDGE MCNAMARA: So the fact is that we already
18 have it on the record, whether he agrees with it or not,
19 it's a matter of law now at this point.

20 MR. COMACK: Okay. That's fine.

21 JUDGE MCNAMARA: As a matter of fact and law at
22 this point that that there has been an agreement that the
23 Clear Spheres and Spit Balls use SAPs and comply with the
24 requirements of claim 1 of the '282 patent and claim 1 of
25 the '683 patent. So what he thinks or not thinks --

1 MR. COMACK: I'll move on, Your Honor. Thank
2 you.

3 JUDGE MCNAMARA: -- yes, is irrelevant at this
4 point.

5 MR. COMACK: I am going to be pulling up
6 confidential testimony at this point again.

7 (Whereupon, the hearing proceeded in confidential
8 session.)

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O P E N S E S S I O N

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BY MR. COMACK:

Q. Dr. Kudrowitz, do you agree that the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield a predictable result?

A. I'm sorry. Can you say that again?

Q. Sure. Do you agree that the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results?

A. Combination of known elements giving predictable results is obvious, is that what you're saying?

Q. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results, do you agree with that?

A. That sounds like a legal standard.

Q. You agree with it, right?

A. If that's the legal standard phrase, that sounds right.

Q. And do you agree that a person of ordinary skill is also a person of ordinary creativity?

A. I think so.

Q. And you agree that a person of ordinary skill is not an automaton?

1 A. Ordinary skill is not an automaton, like a
2 machine?

3 Q. Yeah.

4 A. Sure.

5 Q. Okay. Is it your opinion that, in order for the
6 asserted claims to be obvious, the prior art being combined
7 must address the same problems that the asserted patents
8 address?

9 A. In order for it to be... must address... I think
10 that sounds right.

11 Q. So is it your -- okay. So it's your opinion that
12 Peev and Nagayoshi, if they were not addressing the same --
13 let me start over.

14 So it's your opinion that since Peev and
15 Nagayoshi were not addressing the same problem that the
16 inventors of the asserted patents were trying to solve,
17 there could be no motivation to combine?

18 A. I don't think that's how I was phrasing this.

19 Q. That's not your opinion?

20 A. That Peev and Nagayoshi are trying to make
21 Airsoft guns more like real guns.

22 Q. Right. So because Peev and Nagayoshi were not
23 addressing the same problems that the inventors of the
24 asserted patents were trying to solve, it's your opinion
25 there could be no motivation to combine Peev and Nagayoshi

1 with Spit Balls or Clear Spheres, right?

2 A. Well, it sounds like Mr. Delman's argument is the
3 motivation comes from reducing skin breakage. So if someone
4 puts SAP in Peev and Nagayoshi, it's not -- they're sort of
5 different purposes. Peev and Nagayoshi are trying to make
6 it more like a real gun, whereas, if you add SAP, you're
7 making it less like a real gun.

8 Q. Right. So what you're saying is that, since Peev
9 and Nagayoshi are not addressing the same problems as the
10 inventors of the asserted patents, that detracts from
11 combining Peev and Nagayoshi with Clear Spheres and Spit
12 Balls; isn't that right?

13 A. Maybe I don't fully understand your question.

14 Q. Okay. I could help you. The inventors were
15 trying to solve a certain problem, the inventors of the
16 asserted patents, right?

17 A. Yes.

18 Q. And was it your opinion that, because Peev and
19 Nagayoshi weren't trying to solve the same problem as the
20 inventors, a person of ordinary skill in the art would not
21 have been motivated to combine Peev and Nagayoshi with the
22 Spit Balls and Clear Spheres SAP balls?

23 A. I don't think that's how I would classify my
24 argument.

25 Q. Okay. Do you agree that a person of ordinary

1 skill in the art could use common sense in assessing whether
2 the asserted claims are obvious?

3 A. I think that sounds reasonable.

4 Q. And do you agree that a person of ordinary skill
5 in the art would recognize that known items may have been
6 obvious uses beyond their -- let me start over.

7 Do you agree that a person of ordinary skill in
8 the art would recognize that known items may have obvious
9 uses beyond their primary purposes?

10 A. Yes.

11 Q. So, for example, you say the primary purpose of
12 Peev, Peev's Airsoft gun, is for military training, correct?

13 A. I think Peev says Airsoft guns, in general, are
14 for military training, Airsoft games, and a few other
15 things.

16 Q. So does Peev's Airsoft gun have a primary
17 purpose?

18 A. It's to use the sensor system to better time the
19 ammunition to make it fire more like a real gun.

20 Q. Is it your opinion that Peev's Airsoft gun cannot
21 be used beyond the purpose of military training?

22 A. The technology described in Peev -- well, at
23 least based on that first sentence identifies several, I
24 think, three uses of Airsoft guns in general, and military
25 training is one of those three that it identifies.

1 Q. So one purpose is military simulations or
2 training, correct?

3 A. Correct.

4 Q. And another purpose of Peev is for use in the
5 sporting gun industry, correct?

6 A. Yes.

7 Q. And another purpose of Peev is for fun when
8 conducting Airsoft games; is that correct?

9 A. Yes.

10 Q. So are you saying that Peev's Airsoft gun can
11 only be used for military training?

12 A. No, I'm not saying that.

13 Q. You agree that Peev's Airsoft gun could be used
14 for fun when conducting Airsoft games, right?

15 A. Sure, that's what Peev says.

16 Q. And in determining whether or not the asserted
17 claims are obvious, do you agree that we should take into
18 account the inferences and create steps that a person of
19 ordinary skill in the art would employ?

20 A. Sure.

21 Q. Okay. And is it your position that, because no
22 one has ever put a soft projectile in a gun or launcher with
23 a spring, piston, air compression chamber, and
24 small-diameter tube, the asserted claims are not obvious?

25 A. No, that's not my argument.

1 Q. I'm sorry. Let me ask the question again.

2 Is it your position that, because no one has ever
3 put a soft SAP projectile into a launcher with a spring,
4 piston, air compression chamber, a small-diameter tube, the
5 asserted claims are not obvious? Is that your position?

6 A. Well, that's -- that doesn't classify the
7 entirety of my position.

8 Q. But is that one of your positions?

9 A. Well, there's also objective indicia and then
10 there's motivation to combine.

11 Q. I'm not asking if it's your only position. Is
12 one of your positions that, because no one has ever put a
13 soft SAP projectile in a launcher with a spring, piston, air
14 compression, chamber and small-diameter tube, the asserted
15 claims are not obvious?

16 A. That's not my only grounds for suggesting that
17 they're not obvious.

18 Q. But it's one of the grounds that you're asserting
19 here today, correct?

20 A. Well, it goes back to that novel combination has
21 not existed.

22 Q. I see. So to be obvious you have to have a novel
23 combination in the prior art; is that correct?

24 A. Something has to be non-obvious.

25 Q. So I'll go back. All I want to know is a simple

1 yes or no, Dr. Kudrowitz. Is one of the positions that
2 you're relying on here today that, because no one has ever
3 put a soft projectile, soft SAP projectile, into a launcher
4 with a spring, a piston, an air compression chamber and a
5 small diameter tube, that means the asserted claims are not
6 obvious?

7 A. There's also feed chamber, but I assume that
8 doesn't change the answer. I think that was the beginning
9 of the summary statement that I made.

10 Q. Okay. So that's one of the reasons why you think
11 the claims are not obvious, correct?

12 A. That no one put those things together until The
13 Maya Group. That was the beginning of my summary.

14 Q. So it's your position that, because no one has
15 ever used soft SAP projectiles in the precise manner recited
16 in the asserted claims, that means the claims cannot be
17 obvious.

18 A. I think it's just something that needs to be
19 taken into account with other factors as well.

20 Q. Okay. Can we put up slide CDX-0005C.22?

21 Do you recall earlier testifying about this
22 slide?

23 A. Yes.

24 Q. I believe you testified that a fully hydrated
25 Clear Spheres SAP projectile or Spit Balls projectile

1 wouldn't fit in an Airsoft gun. Do you recall that?

2 A. Yes.

3 Q. And so it's your opinion, because a fully
4 hydrated SAP projectile, either Clear Spheres or Spit Balls,
5 because it doesn't fit inside -- let me start over.

6 It's your position that, because you weren't able
7 to physically combine the Clear Spheres or Spit Balls with
8 an Airsoft gun, that means the claims can't be obvious?

9 A. Well, this is just a -- this is testing for
10 reasonable success. If, you know, you have two -- if the
11 argument here is that someone would try putting these things
12 in a -- in an Airsoft gun, when you follow the instructions,
13 they don't fit in an Airsoft gun.

14 Q. So you're saying, if a fully hydrated Spit Balls
15 or Clear Spheres does not fit inside a Airsoft gun, then
16 there's -- there cannot be any reasonable possibility of
17 success; is that right?

18 A. I couldn't fit one of these in an Airsoft gun
19 unless you modify them or treat them differently than
20 intended.

21 Q. Would a person of ordinary skill in the art know
22 to modify the Spit Balls or Clear Spheres so that it fits in
23 an Airsoft gun?

24 A. I mean, why would they be doing that in the first
25 place?

1 Q. Well, we'll get to that, but would a person of
2 ordinary skill in the art know how to do that?

3 A. To -- they would -- sure, they would know, like,
4 be able to create a SAP that's not that size.

5 Q. So as of 2010, a person of ordinary skill in the
6 art knew how to make a SAP projectile that's spherical and
7 soft that would fit inside a Airsoft gun, correct?

8 A. Those didn't exist at the time, but I think a
9 person of ordinary skill would be able to make one, if you
10 asked them to.

11 Q. As of 2010.

12 A. Sure.

13 Q. Okay. Let's pull up the '282 patent. If I could
14 just see the exhibit number on it. JX-0001.0002.

15 Now let's go to column 1, line 56 to 60 of the
16 '282 patent.

17 I'll read it to you. It says, there are also
18 small projectile systems for gaming and professional
19 training purposes. These include paintball guns and Airsoft
20 guns, but these systems are for adult use only and only
21 due -- adult use only due to the energy imparted to the
22 projectile and the ability of the projectile to do serious
23 harm.

24 Do you see that?

25 A. Yes.

1 Q. So the asserted patents were recognizing that
2 Airsoft guns were a problem in 2010 because they could do
3 serious harm, correct?

4 A. It just says these are for -- these are for adult
5 use because they could do serious harm, not that they're
6 problematic.

7 Q. You don't think doing serious harm was a problem?

8 A. Well, I mean, some of the Airsoft guns, the
9 purpose of them is to hunt and harm things so...

10 Q. But you don't think that the fact that an Airsoft
11 gun could do serious harm was a problem; is that what you're
12 saying?

13 A. No, I think what this is saying here is that
14 Airsoft guns or some Airsoft guns and paintball guns can do
15 harm, and that's why they're for adults.

16 Q. Okay. And do you agree that a person of ordinary
17 skill in the art knew prior to 2010 that Airsoft guns could
18 cause serious harm for those who get hit by the ammunition?

19 A. I think people would know that you could -- you
20 could be harmed by the ammunition.

21 Q. Earlier today you testified that one way to
22 prevent injury with Airsoft guns is to lower the muzzle
23 velocity. Do you recall that?

24 A. Yes.

25 Q. And a person of ordinary skill in the art would

1 have known in 2009 that another way to make a projectile
2 less likely to cause injury would be to make it softer,
3 correct?

4 A. I believe I testified to that.

5 Q. So you agree that a person of ordinary skill in
6 the art would have known in 2009 that another way to make a
7 projectile less likely to cause injury would be to make it
8 softer.

9 A. That's another way to do it.

10 Q. In 2009 was it within the technical grasp of a
11 person of ordinary skill in the art to modify Airsoft guns
12 such as Peev to launch soft SAP projectiles in place of the
13 hard plastic spheres?

14 A. Can you say that again?

15 Q. Sure. In 2009 was it within the technical grasp
16 of a person of ordinary skill in the art to modify Airsoft
17 guns such as Peev to launch soft SAP projectiles in place of
18 the hard plastic spheres that the Airsoft guns used?

19 A. I see. If someone was asked to do so, they would
20 have the ability to do that.

21 Q. It was in their technical skills to do that,
22 correct?

23 A. Sure.

24 Q. Can we please call up CDX-0005C.32?

25 Do you recall discussing this slide this morning?

1 A. Yes.

2 Q. This is a slide that you created to show where
3 breakage of the skin occurs from Airsoft guns and where it
4 won't occur, correct?

5 A. Yes.

6 Q. And this chart that you created indicates that
7 Airsoft guns with a muzzle velocity of 350 feet per second
8 or higher will break the skin, correct?

9 A. Correct.

10 Q. In your chart you state that the skin will not
11 break if the muzzle velocity of the Airsoft gun is less than
12 350 feet per second, correct?

13 A. That's what I'm getting from these sources.

14 Q. Are you saying that a muzzle velocity below 350
15 feet per second, there's no chance of injury?

16 A. No, that's not what I'm saying.

17 Q. There could be injury caused by Airsoft hard
18 plastic pellets that cause injury below 350 feet per second,
19 correct?

20 A. It's possible, but from my understanding the
21 motivation provided by Mr. Delman was specific to the
22 breakage of skin.

23 MR. COMACK: I move to strike. That was not
24 responsive to my question.

25 JUDGE MCNAMARA: I'm going to allow it, and it

1 will go to the weight of the evidence.

2 MR. COMACK: That's fine.

3 Q. So putting aside Mr. Delman's opinions that
4 you're trying to characterize, are you saying that below 350
5 feet per second there is no chance of injury when someone is
6 hit by a hard plastic sphere shot out of an Airsoft gun?

7 A. No, that's not what I'm saying.

8 Q. You agree that there could be injury that's
9 caused by a hard plastic sphere that's shot out of an
10 Airsoft gun below 350 feet per second, correct?

11 A. Sure.

12 Q. Injury could be bruising, right?

13 A. Yes.

14 Q. There could be black and blue marks below 350
15 feet per second?

16 A. Yes.

17 Q. Welts?

18 A. Yes.

19 Q. Let's call up CDX-0005.31.

20 I'm sorry. Let me repeat that. Let's call up
21 CDX-0005C.31. Thank you.

22 All right. In the top box you've cited the
23 California Senate document. Do you see that?

24 A. Yes.

25 Q. And do you see where it says that penetration of

1 the skin and bone can occur at 350 feet per second?

2 A. I see that.

3 Q. Bone is harder to penetrate than skin, correct?

4 A. I would imagine so.

5 Q. But it's your opinion that, if you go just below
6 350 feet per second where penetration of the bone can occur,
7 there's no chance of injury; is that right? I withdraw it.

8 Is it your opinion that if you go just below 350
9 feet per second where penetration of the bone and skin
10 occur, that there can be no chance of the sphere penetrating
11 only the skin?

12 A. I'm only going based on these articles that
13 Mr. Delman provides. I don't know enough about ballistics
14 and skin properties to make that determination.

15 Q. You agree that the 350 feet per second is not
16 talking about just skin; it's talking about skin and bone,
17 right?

18 A. That's what this says.

19 Q. Okay. Now do you see where it says that various
20 references, largely agree that, at a minimum, damage to the
21 human eye can occur from a gun discharging a pellet or BB at
22 a muzzle velocity of 130 feet per second?

23 A. Yes, I see that.

24 Q. So let's go back to your chart on CDX-0005C.32.

25 Isn't it true, based on what the California

1 Senate said, that there's a chance of injury at 130 feet per
2 second?

3 A. This chart is just specific to breakage of skin.
4 So, yes, there could be injury at 100 and whatever number
5 you said.

6 Q. One of those injuries that the California Senate
7 Committee was discussing was eye injuries, correct?

8 A. Correct.

9 Q. And that's because children play with Airsoft
10 guns and don't always wear goggles, correct?

11 A. I don't think I can comment on that. Like, I
12 don't know. I don't know.

13 MR. COMACK: Excuse me for one second.

14 Q. Isn't it true that a super absorbent polymer --
15 I'm sorry. Isn't it true that a person of ordinary skill in
16 the art --

17 Isn't it true that a person of ordinary skill in
18 the art refers to super absorbent polymer as gel materials?

19 A. I don't know.

20 Q. Don't you refer to super absorbent materials as
21 gel beads?

22 A. Oh, maybe in the context of Gel Blasters.

23 Q. Right. So in your infringement report you
24 referred to super absorbent ammo as gel beads, correct?

25 A. I don't have reason to disagree, but I don't -- I

1 don't recall calling them that.

2 Q. Let's put up RX-0617C.0039.

3 Is this your opening expert report?

4 JUDGE MCNAMARA: What is the date?

5 MR. COMACK: You know what, there was another
6 version -- there was a mistake and it was signed. We'll
7 come back to it. I don't have that right now.

8 Thank you, Your Honor.

9 Q. Are the asserted claims of the asserted patents
10 limited to toys?

11 A. I think the title is a device. So it could
12 potentially apply beyond.

13 Q. Okay. Can we pull up the '683 patent, which I
14 believe is JX-2? Start with the cover page. See the full
15 exhibit number.

16 So we're looking at JX-0002.0001. This is the
17 '683 patent asserted in this case, correct?

18 A. Yes.

19 Q. Okay. Can we go to claim 1 of the '683 patent?
20 Do you see the word "toy"?

21 A. No.

22 Q. Let's look at claim 3 of the '683 patent.
23 Do you see the word "toy"?

24 A. Yes.

25 Q. Right. Do you understand that claim 1 of the

1 '683 patent covers all projectile launchers, whether they
2 are toys or not?

3 A. Yes.

4 Q. Let's put up the '282 patent, please, JX-1, and
5 just go to the first page.

6 Okay. This is JX-0001.0001. Do you recognize
7 this as the asserted '282 patent in this case?

8 A. Yes.

9 Q. Let's go to claim 1 of the '282 patent.

10 Do you see the word "toy"?

11 A. No.

12 Q. Let's take a look at claim 9 of the '282 patent.

13 Do you see the word "toy"?

14 A. Yes.

15 Q. Do you understand that claim 1 of the '282 patent
16 covers all projectile launchers whether they -- I'm sorry --
17 let me start over.

18 Do you understand that claim 1 of the '282 patent
19 covers all projectile launchers whether they are toys or
20 not?

21 A. This is one where claim 8 depends on 1 also?

22 Q. Claim 8 does depend on 1.

23 A. Yes, that's my understanding.

24 Q. Let's go to CDX-0005C.22.

25 Okay. So we talked about this slide before, and

1 I have some follow-up questions. Here you say Clear Spheres
2 or Spit Balls are not sized for Airsoft guns. Do you see
3 that?

4 A. Yes.

5 Q. And earlier do you recall testifying that a
6 person with a bachelor's degree in chemistry would be able
7 to adjust the properties of the Clear Spheres or Spit Balls
8 to fit inside a NERF soft gun?

9 A. They would have those abilities to do so.

10 Q. And if we can put up slide CDX-0005C.23.
11 Do you recall talking about this slide this
12 morning?

13 A. Yes.

14 Q. And you testified that the Clear Spheres at 6mm
15 is not soft; isn't that right?

16 A. Yes.

17 Q. And then you cited to some testimony from
18 Mr. Delman saying that it was fairly firm at that size. Do
19 you ever recall that?

20 A. Yes.

21 Q. But you agree that a person with a bachelor's
22 degree in chemistry would be able to adjust the softness of
23 the SAP projectile, correct?

24 A. If they were asked to do so, they would be able
25 to do that.

1 Q. Let's put up slide CDX-0005C.52.

2 Here this morning you testified about this slide
3 where you talked about how PTT looked at the Xploderz X2
4 product when it designed the Hydro Strike product. Do you
5 recall that?

6 A. Yes.

7 Q. PTT's Hydro Strike products have a trigger,
8 correct?

9 A. The Hydro Strike products have a trigger.

10 Q. And when you pull that trigger, the product is
11 launched, correct?

12 A. Yes.

13 Q. And the Xploderz X2 product that PTT looked at
14 did not have a trigger, correct?

15 A. Some of the X Blasters had triggers.

16 Q. I'm asking you about the one that PTT looked at.

17 A. Oh. Yeah, I don't -- I guess I don't know which
18 specific blaster that he looked at.

19 Q. You don't know which blaster PTT looked at when
20 it designed its Hydro Strike products?

21 A. It just says Xploderz on the shelf.

22 Q. Did you bother to look into -- for further
23 information to see which product they looked at?

24 A. Well, maybe it was -- well, I put X2, so I must
25 have pulled that from the testimony.

1 Q. Okay. So if you put the X2, do you know if the
2 X2 Xploderz that PTT looked at had a trigger?

3 A. No, the X2 did not.

4 Q. It had a device that you pull back on to create
5 air pressure then release it to fire the ammo, right?

6 A. That's how that worked, yes.

7 Q. PTT's Hydro Strike product does not have an arm
8 that you pull back on to create air pressure and then
9 manually release it to launch the ammo, correct?

10 A. That's correct.

11 Q. Let's call up CDX-0005.26.

12 Do you recall discussing this slide this morning?

13 A. Yes.

14 Q. And you say using SAP ammo fundamentally changes
15 air guns. Do you see that?

16 A. Yes.

17 Q. And then you list some downsides of using
18 Clear Spheres with Spit Balls, correct?

19 A. Correct.

20 Q. And you say that combinations cannot be used for
21 hunting purposes. Do you see that?

22 A. Yes.

23 Q. Let's call up CDX-0005C.24.

24 Do you recall discussing this Bleacher Report
25 article this morning?

1 A. Yes.

2 Q. This is an article entitled "Airsoft Guns: A
3 Double-Edged Sword," and it's RX-0841.0003.

4 Do you see any mention of hunting in this
5 article?

6 A. This is only a short blurb, but I don't recall if
7 hunting is mentioned in the rest of the article.

8 Q. Do you see where the article says, "I imagine
9 it's a lot of fun to shoot Airsoft guns with your friends in
10 the backyard. It doesn't take a rocket scientist to figure
11 out why young boys like them so much."

12 A. I see that.

13 Q. Is this a description of hunting?

14 A. It's a description of what?

15 Q. Hunting.

16 A. I guess it could be, but it doesn't necessarily
17 need to be.

18 Q. You think that someone saying it's a lot of fun
19 to shoot Airsoft guns with your friends in the backyard, it
20 doesn't take a rocket scientist to figure out why young boys
21 like them so much, refers to hunting?

22 A. I don't know. Are you shooting squirrels in your
23 backyard? I don't know.

24 Q. Does this article refer to hunting?

25 A. It doesn't -- well, the stuff I see on the screen

1 doesn't explicitly say "hunting".

2 Q. Do young boys typically go hunting in their
3 backyard?

4 A. I know -- I do know some people who shoot
5 squirrels in their backyard.

6 Q. Young boys?

7 A. Young adults.

8 MR. COMACK: Your Honor, I pass the witness.

9 JUDGE MCNAMARA: Thank you, Mr. Comack.

10 Mr. Taylor?

11 EXAMINATION BY COUNSEL FOR ITC STAFF

12 BY MR. TAYLOR:

13 Q. Your Honor, I'm going to bring the realtime over
14 here.

15 JUDGE MCNAMARA: That's fine.

16 Q. Good afternoon, Mr. Kudrowitz. Did I say that
17 properly?

18 A. I say Kudrowitz, but, you know, fine.

19 Q. I'm sorry.

20 A. No worries.

21 Q. Good to see you again. We met at your deposition
22 here in D.C., correct?

23 A. Yes.

24 Q. It was a fun deposition, huh?

25 A. That is not how I would classify that.

1 JUDGE MCNAMARA: Fair enough.

2 Q. I need to ask you a few questions this afternoon.

3 First, looking at CX-518, some questions were
4 asked about this earlier. This is an article about the
5 Xploderz product, and it was pointed out that, if you look
6 at page 2 of CDX-518, page 2, that the source was The Maya
7 Group. Do you remember questions on this?

8 A. I do.

9 Q. If we go back to page 1, do you see where I've
10 highlighted that Xploderz were named a Best New Toy of 2011?

11 A. Yes.

12 Q. By the British Toy and Hobby Association during
13 the London Toy Fair, correct?

14 A. Correct.

15 Q. Regardless of who wrote this article, isn't the
16 underlying fact the same, that the Xploderz did indeed win a
17 New Toy Award in 2011?

18 A. That is correct.

19 Q. I'd like to take a look at SDX-1, which is the
20 Staff's opening presentation. I'm going to go to this chart
21 I created.

22 And it's amazing how long it takes to create a
23 PowerPoint, Your Honor, so I'd like to get my money's worth.
24 It's incredible. Sixteen slides can take me all day. I
25 only have so many hours.

1 So here I have a continuum going from tubes on
2 the left to BB guns on the right, and I kind of put the SAP
3 launcher between NERFs and water guns.

4 Were you here when I did my opening argument?

5 A. Yes.

6 Q. Did you kind of understand this?

7 A. I did.

8 Q. Okay. Do you agree where I put the SAP launcher
9 on this continuum?

10 A. Yes. I had one thought on modification, though.

11 Q. Please.

12 A. If I were making this, I just wouldn't have water
13 guns on here.

14 Q. What else would you have?

15 A. I'm not sure actually. I would leave everything
16 else where it was. But I was thinking -- when I saw this, I
17 thought we were talking about like launching sort of like --
18 or shooting individual bullet item things, and so water sort
19 of was -- maybe there would be like a -- where NERF was I
20 kind of viewed it like a two-prong thing, like water and
21 super soaker and NERF were like here, but, other than that,
22 that's -- I agree with this chart.

23 Q. Fair enough. You have experience with water
24 guns, correct?

25 A. Yes.

1 Q. Or water projectile projecting systems, I would
2 say.

3 Do SAP launchers, does it really fit separately
4 from these other categories of products?

5 A. Yes, I think it's a new category. I think it
6 really is, as you said, kind of like this in between NERF
7 and paintball.

8 Q. And I believe on your CV there's an indication
9 that you have experience with toy design -- one second, I
10 want to mention the -- if we could go to, please, CX-15 --
11 you don't need to pull this up -- CX-1545, which is your CV.
12 I believe on there there's an indication that you have
13 experience with toy design, right?

14 A. Yes.

15 Q. And you gave a lecture on the process of
16 designing a toy.

17 A. Yeah, lots of lectures.

18 Q. How does this happen that these inventors come up
19 with a new toy design that's non-obvious or is obvious or --
20 have you seen something like this before?

21 A. No, I have not seen -- coming up with something
22 in general new, is that what you're saying, or specific to
23 this?

24 Q. Specific to this. Well, let me ask you an easier
25 question.

1 So the toy design process, where does it begin?

2 A. Sure. So it's the same -- sort of similar to how
3 general design process begins with research, market research
4 and user research and studying what's out there, and then
5 there's ideation and testing with children and parents.

6 Q. So you have -- so typically a toy design process
7 starts with a company, like Mattel or Gel Blaster, and they
8 say we want to design a new toy?

9 A. It works different ways. So in our class we
10 start with industry sponsors. So like last year we worked
11 with Plant Toys in Thailand, and they would come in with a
12 specific challenge, and they would say we want to use rubber
13 wood and we want to come up with certain toys in this theme.

14 But that's -- that's how I run my class. That's
15 not necessarily how invention happens in the wild.
16 Sometimes you're just messing around and you say, oh, my
17 gosh, why hasn't that existed, or what happens in this case,
18 you know, going through the flower market and saying, you
19 know, that's an interesting new material, I wonder how we
20 can launch these things. So there's lots of different ways
21 new toy concepts can come about.

22 Q. In today's market does -- I'm not sure you're the
23 right one to actually ask this question. The SAP launchers
24 that you have investigated here, have they been accepted by
25 the market?

1 A. Yeah, I think, I mean, from -- from the data that
2 I've seen, it does sound like people are buying them and a
3 lot of them. And now, you know, we had Splat-R-Ball making
4 them and Prime Time Toys and Hasbro. And so it definitely
5 seems like people want them.

6 Q. But does it seem like it's a new product that
7 actually many people have never heard of or seen before?

8 A. That's -- yes.

9 Q. Why do you say that?

10 A. Well, you're -- it sort of goes back to your
11 graph here.

12 Q. Feel free to use my graph.

13 A. Yeah. Like, it is somewhere in this intermediate
14 between what NERF can offer and what paintball offers, and
15 it strikes that interesting balance, and that's -- you get a
16 little bit more thrill maybe, but it's still a little bit
17 more safe. So it's balancing those elements.

18 Plus the clean -- sorry. An additional thing
19 that both NERF and paintball don't have that this one does
20 provide is the clean-up element. So with NERF you have to
21 go and pick up all the ammo, right. With paintball, you're
22 all covered in paint, right. And this is a clean -- it's
23 like a very clean way -- anyway, it has some of the benefits
24 of Airsoft and paintball, but it also has some of the
25 benefits of NERF.

1 Q. In view of -- as part of your work in this
2 investigation, you have become familiar with Airsoft guns,
3 correct?

4 A. Yes.

5 Q. Yes. Are you aware where we can purchase Airsoft
6 guns?

7 A. Online you can get -- that's how I bought them.

8 Q. I know there was one of the articles earlier was
9 mentioning an award by Toys "R" Us. I'm not sure they even
10 exist anymore. I'm not sure. But could you have purchased
11 an Airsoft gun at a Toys "R" Us?

12 A. I don't believe Toys "R" Us would sell Airsoft
13 guns.

14 Q. So kind of your overall opinion regarding the
15 combination of an SAP, spherical SAP, with a launcher, and I
16 believe you testified that there was commercial success,
17 you've seen evidence of some commercial success in some of
18 the articles we've seen, and I guess is it fair to say that
19 the underlying commercial success is due to the combination
20 of SAP with toy gun components but there may be other
21 elements, of course, that certain consumers may be attracted
22 to, correct?

23 A. Sure. I think there could be, you know, some
24 people might like the Glow in the Dark ones or ones that are
25 bigger form, for example, but the underlying essence is

1 still the same -- they're blasters that shoot SAP.

2 Q. Can you please pull up CX-1635C, please? Sorry.

3 This is a deposition transcript of
4 Mr. Higginbotham dated December 13th, 2022, and you were
5 asked some questions about this, correct?

6 A. Correct.

7 Q. And I believe the question was along the lines of
8 asking -- this is a representative from Splat-R-Ball,
9 correct?

10 A. Correct.

11 Q. And you understand this deposition was on
12 December 13th, 2022? Do you see that?

13 A. I see that.

14 JUDGE MCNAMARA: Confidential? We haven't gotten
15 there yet.

16 MR. TAYLOR: That's a good question. I think we
17 better. Then I'll finish up on confidential, Your Honor.

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

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

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3 JUDGE MCNAMARA: Thank you.

4 REDIRECT EXAMINATION

5 BY MR. ZHANG:

6 Q. Dr. Kudrowitz, do you remember being asked about
7 your testimony as it relates to whether you voted for the
8 TOTY Awards?

9 A. Yes.

10 Q. And specifically whether you voted for the
11 Xploderz products?

12 A. I recall that.

13 Q. And do you remember testifying that you believe
14 you did, but you weren't 100 percent sure?

15 A. Yes, that's what I said.

16 Q. I'd like to show that testimony to you.

17 Mr. Lee, could I have page 301 and 302 of
18 Dr. Kudrowitz' testimony?

19 JUDGE MCNAMARA: Mr. Zhang, would you just repeat
20 the exhibit number, please?

21 MR. ZHANG: Sure. I believe it's RX-102.

22 JUDGE MCNAMARA: Thank you.

23 Q. And starting on page 301, do you remember being
24 asked, starting at line 10, to line 15, about your
25 testimony?

1 A. I remember that.

2 Q. And specifically the testimony is, and so you
3 don't know whether you voted for the Xploderz XBlaster 200
4 by The Maya Group as being an Outdoor Toy of the Year?

5 Do you see that?

6 A. Yes.

7 Q. And you said, I can't -- I can't tell you for
8 certain if I voted -- if I ranked -- where I ranked or if in
9 the -- or if I ranked it in there --

10 A. Yes.

11 Q. And so that was the testimony that counsel showed
12 you, counsel for PTT showed you, right?

13 A. Yes.

14 Q. But later on, on page 302, do you see, starting
15 on line 3 and ending at line 8, is that the testimony you're
16 referring to?

17 A. Yes, that's the testimony I was referring to.

18 Q. And specifically you were asked, that you
19 actually voted for the Xploderz?

20 And, answer, I mean, I imagine I would given some
21 of the other things in this category.

22 But you don't know?

23 Yes, I can't tell you -- like I can't tell you
24 100 percent for sure right now.

25 A. Right, that's my testimony.

1 Q. Was that your -- and is that testimony consistent
2 with your testimony here today?

3 A. Yes.

4 MR. ZHANG: I have no further questions.

5 JUDGE MCNAMARA: Thank you, Mr. Zhang.

6 Mr. Comack?

7 MR. COMACK: Nothing further, Your Honor.

8 JUDGE MCNAMARA: Mr. Taylor?

9 MR. TAYLOR: Nothing further, Your Honor.

10 JUDGE MCNAMARA: Thank you.

11 Dr. Kudrowitz, you may step down.

12 THE WITNESS: Thank you.

13 JUDGE MCNAMARA: All right.

14 Are we sticking to the schedule that I was given
15 this morning? We skipped, for example, this morning we
16 skipped PTT's Veronica Wong, and so I'm wondering are we
17 doing Lynn Rosenblum now? No?

18 MR. RUBEN: Your Honor, in my understanding
19 Frances Chia and Veronica Wong are not testifying.

20 JUDGE MCNAMARA: Okay. Thank you.

21 MR. RUBIN: Your Honor, Ethan Ruben with Fish &
22 Richardson on behalf of Complainants. We call Lynn
23 Rosenblum to the stand.

24 JUDGE MCNAMARA: Very good. Thank you.

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LYNN ROSENBLUM,

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

JUDGE MCNAMARA: Please state your full name.

THE WITNESS: Lynn Ann Rosenblum.

JUDGE MCNAMARA: Thank you very much. Please be seated.

DIRECT EXAMINATION

BY MR. RUBIN:

Q. Good afternoon, Professor Rosenblum.

A. Thank you. Good afternoon.

Q. Where are you from?

A. San Diego, California.

Q. And what do you do for work in San Diego?

A. I am a full-time professor of toy design and I work at Otis College of Art and Design in Los Angeles.

Q. What are you here to testify about today?

A. The commercial success of Xploderz.

Q. Now I want to be clear. Are you testifying about how the Xploderz commercial success relates to the asserted patents?

A. No. I'm not here to testify about the patents.

Q. Did you prepare some slides today?

1 A. I did.

2 Q. So turning to CDX-0004C.2, let's talk about your
3 background.

4 A. Okay.

5 Q. Could you tell us about your educational
6 background?

7 A. So I have an MBA from USC Marshall School of
8 Business.

9 Q. And as a professor at Otis College of Art and
10 Design, what do you teach?

11 A. So I teach classes related to toy design, the toy
12 business, product development, some of the classes you'll
13 see listed here on the slide.

14 Q. And when did you start teaching?

15 A. 1997.

16 Q. Do you teach any classes related to the
17 commercial success of toys?

18 A. Yes.

19 Q. And what is that course?

20 A. Business methods.

21 Q. Turning to slide 3, what do you teach in your
22 business methods course?

23 A. So we teach how to see a successful brand. We do
24 that a whole number of ways. It's a very unique class. I
25 actually created it. And it's so students can see all the

1 different ways that a brand might be created.

2 Q. And does slide 3 here, does that show some of the
3 topics you teach in the toy business methods course?

4 A. Yes, that shows some of the topics.

5 Q. How do you teach the class?

6 A. So we teach the class a variety of ways. We
7 bring in a lot of -- I should say I bring in a lot of guest
8 speakers. I don't want the students just to hear my opinion
9 on subjects, so I like to get a real range of ideas and
10 opinions.

11 And then we also do a lot of case studies,
12 similar to law school, but a little bit more fun. So we
13 look at those case studies. We also look at successes and
14 failures of products. So we look at the failures too to
15 make sure that we're looking all across the board for all
16 ideas.

17 Q. How long have you been working in the -- actually
18 turning to slide 4, please -- how long have you been working
19 in the toy industry?

20 A. Thirty-seven years.

21 Q. And, again, this is CDX-4C.4. I see Mattel on
22 this slide. How long did you work at Mattel?

23 A. It was about eight years in total. I kind of
24 went to Mattel and came back a few times but doing different
25 things.

1 Q. Tell us, what did you do in your eight years at
2 Mattel?

3 A. My primary job was looking at P&Ls, so profit and
4 loss for all the different brands. There were about 20
5 different brands that I worked on in my time, all of my time
6 there.

7 Q. And tell us, yeah, what were some of the brands
8 that you worked on while you were at Mattel?

9 A. So brands -- I'm going to try to do the ones you
10 may have heard of. So there's Barbie, Polly Pocket,
11 Nickelodeon, Disney, some of the other ones you might not
12 have so...

13 Q. Have you worked on any unsuccessful toys?

14 A. Yes, many.

15 Q. Any that come to mind?

16 A. I think one we were discussing the other day was
17 Warmup Bears. It was a stuffed animal and you made it out
18 of old athletic clothes, and it didn't do very well. Kind
19 of -- (gesturing).

20 Q. So after you left Mattel, what did you do?

21 A. I started teaching, and then I also became a
22 consultant in the toy industry.

23 Q. What are some of the -- or who have you worked
24 with as a consultant?

25 A. Yeah, so I'm kind of unique. I've worked with

1 most of the major toy companies, some of the ones that you
2 see on the slide here -- Mattel, Disney, Spin Master,
3 Hasbro. There's a lot of other smaller toy companies that
4 aren't on here, too, but just doing different kinds of
5 projects for all of them.

6 Q. Have you received any awards?

7 A. Yes. I won the national Wonder Women of Toy
8 Award in 2006. I was also nominated in 2017. I didn't win.
9 And I won two Mattel Worldwide Excellence Awards. Those are
10 given to top employees for different projects.

11 MR. RUBIN: Your Honor, we offer Lynn Rosenblum
12 as an expert in the toy industry, including as a business
13 and product development aspects.

14 JUDGE MCNAMARA: Mr. George?

15 MR. GEORGE: Could I hear the offer again?

16 MR. RUBIN: We offer Lynn Rosenblum as an expert
17 in the toy industry including as to business and product
18 development aspects.

19 MR. GEORGE: I'm going to object. I don't
20 believe she is not an expert in the entire toy industry. If
21 you want to limit it to what she just talked about, I could
22 consider that.

23 MR. RUBIN: Your Honor, she has had nearly 40
24 years of experience in the toy industry from a range of
25 studies. I'm sure counsel, if he wants, can cross-examine

1 her regarding those -- that experience.

2 JUDGE MCNAMARA: Would you like to conduct some
3 voir dire, Mr. George, when you're up on cross and do the
4 same thing, for example, that Mr. Cordell did?

5 MR. GEORGE: Thank you, Your Honor.

6 JUDGE MCNAMARA: Okay.

7 Q. Let's get right to it. What is your opinion
8 regarding whether the Xploderz were a commercial success?

9 A. So the Xploderz, in fact, were a commercial
10 success.

11 Q. Turning to slide 5, how did you reach that
12 conclusion?

13 A. Well, I looked at sales and financial data,
14 multiple extensions over multiple years, and finally just
15 knowing the fact that it created a brand-new category in the
16 toy industry. It was not something that had been seen
17 before. It was not something retailers had seen before. So
18 all of these together I believe are what made Xploderz a
19 commercial success.

20 Q. Turning to slide 6, what are the Xploderz?

21 A. So the Xploderz are blasters that shoot SAP
22 ammunition.

23 Q. Are three of the Xploderz products shown here on
24 your slide CDX-4C.6?

25 A. Yes.

1 Q. And, for the record, that's CPX-35, CPX-33, and
2 CPX-37.

3 Before this investigation had you ever heard of
4 The Maya Group?

5 A. Yes.

6 Q. Before this investigation had you ever heard of
7 Xploderz?

8 A. Yes.

9 Q. When did you first hear of Xploderz?

10 A. End of 2010, early 2011.

11 Q. Did you ever use Xploderz?

12 A. Yes, and I was really wowed by the product.

13 Q. Tell us more. What did you think of the product?

14 A. I just -- I had never seen a blaster that shot
15 SAP ammunition, and it was just amazing how far it went.
16 Everything I had seen before had like foam darts. And I had
17 worked on some NERF products in the past. So, you know, I
18 was familiar enough to know that I was seeing something that
19 was going to make a difference, that was going to be
20 successful.

21 Q. Let's change gears. In analyzing whether
22 Xploderz were a commercial success, did you look at the Maya
23 Group's sales data?

24 A. I did.

25 Q. Turning to slide 7.

1 JUDGE MCNAMARA: Sorry. I think we are going on
2 to the confidential record.

3 MR. RUBIN: Your Honor, we've gotten consent from
4 Maya Group to show the sales information.

5 JUDGE MCNAMARA: All right. Thank you.

6 Q. Professor Rosenblum, what does this slide show?

7 A. So there is two tables here. The top one shows
8 just blaster products. It's 2011 to 2012, and the units
9 sold were 1.2 million units -- that will be a little easier
10 to see -- so for 2011, 1.2 million units, and then sales of
11 \$16 million for 2011 -- just blasters.

12 Q. And for 2012?

13 A. So that, again, is about 1.2 million units, and,
14 again, we have \$16 million in 2012.

15 Q. And in calculating these numbers, did you rely on
16 the Maya sales spreadsheet marked as CX-165C?

17 A. Yes, I did.

18 Q. Where were the Xploderz sold?

19 A. So all the major places that basically sold
20 toys -- Target, Walmart, Toys "R" Us, those kinds of stores.
21 Really the big, the big ones.

22 Q. What did it mean for a company like Maya Group to
23 get Xploderz on the shelves of major retailers like the ones
24 shown here on CDX-4C 7?

25 A. So I think the way to explain this is to think

1 about Maya Group at the time. It was a relatively new
2 company, these parties coming together to form a company,
3 and then beyond that they had no awareness, no product
4 whatsoever in the blaster category. And so they didn't have
5 that going for them.

6 Now certainly I know some relationships happen
7 and they may get you that phone call or even that meeting,
8 but to have a product where you get it in the door, you have
9 a meeting, you get an order, and then you go literally from
10 zero to, you know, two million units in a year, that, like,
11 just doesn't happen.

12 So, again, that's I really think the commercial
13 success and how impressive it was to get in with these
14 retailers. Because they, you know, they have a lot of
15 people coming to their door, but in order to get this far
16 and sell this much product was pretty extraordinary.

17 Q. Turning to slide 8, what did The Maya Group think
18 about their sales?

19 A. They were -- and I remember, so this is a quote
20 that kind of sums it up for me for Mr. Ben-Ezer -- and he
21 calls it a phenomenal success. But I think it's important
22 here to read the quote.

23 It says, if you have a line that is 3 or 4
24 million, that is a good brand. And probably in parentheses
25 there it should say "the toy industry," so I'm going to add

1 that.

2 And then it says, and we sold in 2011 and 2012 in
3 excess of 15 million or 17 million, which is a phenomenal
4 success for the product. So I completely agree.

5 Q. For the record, that's CX-1634C, the Oded
6 Ben-Ezer deposition from December 13th, 2022, at page 285.

7 Turning to slide 9, could you tell the Court what
8 a line extension is?

9 A. So a line extension, you have to think about just
10 how it sounds. If a toy company has a successful line, you
11 want to extend it, you want to keep it going, you want to
12 keep those dollars going, you want to keep your shelf space,
13 you want to add more products. So you do what are called
14 line extensions.

15 There can be a variety of ways to do that. You
16 can make a very minor revision. You can do -- change some
17 packaging, or you can do something really major where you
18 might expend money on tooling.

19 The point is it's an investment when you do a
20 line extension. And you don't make that investment in the
21 toy industry, in a small company, relatively, to a Mattel or
22 some other large company, when you have, you know, you only
23 do it when you have a successful line you want to keep it
24 going and you're going to make those investments in the
25 future.

1 Q. Did Xploderz have any line extensions?

2 A. Yes, it had many line extensions.

3 Q. Turning to slide 10, so let's look at the year
4 2012, in particular, and focus on the X2 series and the
5 Night Fighterz series.

6 When we're talking about this extension, are we
7 talking about just one product?

8 A. Well, in fact here, and, you know, some companies
9 do do one product, but what was so brilliant, what was done
10 about Xploderz is here you see just with the X2 series and
11 Night Fighterz, you've got 12 additional products, so that
12 means you're going to get additional shelf space with
13 putting these out there.

14 Q. Turning to slide 11, now in addition to the X2
15 series and the Night Fighterz series, were there any -- were
16 there any other line extensions?

17 A. Yes, there were. So there was a Blaster Pro in
18 2012; 2013 was X3. And then Night Fighterz were in 2014.
19 Excuse me. Firestorm. Sorry.

20 Q. What do these line extensions tell you about
21 whether the Xploderz were commercially successful?

22 A. Well, again, it's as I explained. Line
23 extensions mean a couple things. One is usually you have
24 your retail customers asking for additional products. When
25 you have a successful line, you say to yourself, how can I

1 extend that line and how can I do it in the most efficient
2 way. Line extensions are a great way, because you can do
3 very minor things or you can do things where you have
4 investment.

5 Either way you're making an investment in your
6 line. You're putting more costs, more time into it. So
7 when I see line extensions, extensive, over a four-year
8 period, I know that brand has been successful for the toy
9 industry.

10 Q. Did Xploderz create a new product category?

11 A. Absolutely.

12 Q. And what product category is that?

13 A. Blasters that shoot SAP ammunition.

14 Q. Was that the product proposition for the
15 Xploderz, blasters that shoot SAP ammunition?

16 A. So it's what we call in the industry unique
17 selling proposition, USP, and it's really what
18 differentiates that particular toy in the toy industry. It
19 could be a product anywhere else. It's what differentiates
20 that product, why is it unique, why is it different than
21 anything else out there. A blaster that shoots SAP
22 ammunition has a unique selling proposition that
23 differentiates it from all other toys at the time.

24 Q. While Xploderz were on the market, were there any
25 other products in that category?

1 A. No.

2 Q. How about today?

3 A. Yes, the Respondents' products would be those.

4 Q. And turning to slide 12, do Respondents agree
5 that this is a new product category?

6 A. So if you see Thomas Roeder, the -- I believe
7 this is the deposition, the corporate witness -- when he
8 answers about the product category being new, he says it's a
9 new type of product. So I would see that as agreeing with
10 me.

11 Q. And specifically regarding the Splat-R-Ball
12 Respondents here, what is shown on the right side of this
13 slide?

14 A. So the right side is marketing materials. So
15 it's a little different than, you know, maybe his opinion,
16 but I'm assuming it's approved by the organization, and it
17 says right there, entirely new category.

18 So, again, I see the marketing materials as
19 agreeing with me as well. It's, you know, yeah, it's a new
20 category.

21 Q. All right.

22 MR. RUBIN: Your Honor, we would like to go on
23 the confidential record.

24 (Whereupon, the hearing proceeded in confidential
25 session.)

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

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3 CROSS-EXAMINATION

4 BY MR. GEORGE:

5 Q. Do you have an accounting degree?

6 A. I do not.

7 Q. You're not a CPA?

8 A. I am not.

9 Q. And you don't -- do you have an industrial design
10 degree?

11 A. I do not.

12 Q. Is it fair to say your expertise in the toy
13 industry is sort of limited to marketing?

14 A. I would disagree with that.

15 Q. So what else do you feel you have expertise in?
16 You don't have it in accounting, you don't have it in
17 industrial design, so...

18 A. How -- how much would you like me to --

19 Q. If you can do it broad brushstrokes, only because
20 it's late.

21 A. Okay. Well, I'm here. I'm willing to stay.

22 Q. Okay. Good.

23 A. Let's see. Product development, touring
24 factories, some experience in legal, some experience in
25 packaging -- gosh. I mean, I always say there's about 38

1 factors.

2 Q. But, I mean, you don't -- you're not a lawyer
3 either, are you?

4 A. No.

5 Q. You just said --

6 A. No, I'm not a lawyer, but I'm an expert witness,
7 so -- and I've done, gosh, ten cases, children's and toy
8 products.

9 Q. Sure. You just said in your last answer that you
10 had legal experience. I just wanted to make sure you're not
11 saying that you're a lawyer.

12 A. I am not saying that I am a lawyer.

13 Q. And then about walking through the factories, I
14 mean, you don't know how -- you've never had a job as sort
15 of a plant manager in a factory or anything like that, have
16 you?

17 A. No, but would you like me to explain?

18 Q. Well, let me ask you a different question. Do
19 you have an engineering degree?

20 A. No.

21 Q. Okay.

22 A. No, I don't.

23 Q. You wouldn't characterize yourself as an
24 economist either, would you?

25 A. No. No, I'm not an economist.

1 Q. Did you, either yourself or through somebody
2 else, conduct a consumer survey to see what actually drove
3 customer purchase decisions for the Xploderz and Blaster Pro
4 products?

5 A. No, I didn't conduct a survey.

6 Q. I believe you said you have not looked at the
7 asserted patents in this case.

8 A. That's not my area.

9 Q. So I'd like to go to CX-0 -- wait. Hold on a
10 second.

11 I have to see if we have to go on the
12 confidential record.

13 A. Okay.

14 JUDGE MCNAMARA: Whose confidential again,
15 Mr. George?

16 MR. GEORGE: I think Maya Group, but I'm not
17 sure. Is this confidential? It's not.

18 MR. RUBIN: No.

19 JUDGE MCNAMARA: Okay. I think you can tell your
20 client representatives to stay.

21 MR. GEORGE: Yes. Very good.

22 Q. So if we could put up slide CDX-0004C, page 7.
23 So do you see this slide?

24 A. I do.

25 Q. Great. And this just shows sales in 2011 and

1 2012, correct?

2 A. Correct.

3 Q. Okay. Do you know that there were sales in 2013
4 and 2014?

5 A. Yes.

6 Q. Okay. And did you know that the Xploderz revenue
7 declined from \$17 million in 2012 to \$12 million in 2013?

8 A. Yes.

9 Q. And did you know that the Xploderz revenue
10 declined again to \$7 million in 2014?

11 A. Yes.

12 Q. And again in 2015 to just \$500,000, did you know
13 that?

14 A. Yes.

15 Q. And to zero in 2016?

16 A. Yes, I knew all of that.

17 Q. So do you remember that you put in an expert
18 report in this case? And it's dated January 6th, 2023.

19 Could we pull that up? Do we have an exhibit for
20 that? Very good. Thank you. What's the exhibit?

21 While we're waiting for the exhibit number, maybe
22 we'll go on with the question.

23 I don't really have many questions about this. I
24 would just like to go to page 9 of your report. Let's look
25 at paragraph 26.

1 And you say here, the second sentence, it is also
2 my opinion that the packaging and advertising focus of the
3 Xploderz and Blaster Pro products was on the apparent
4 product differentiators of these products, i.e., their
5 firing distance, ammunition capacity, and ease of use.

6 Do you see that?

7 A. I see it.

8 Q. Is that an accurate statement?

9 A. Let me just read it real quick here. Yes.

10 Q. Okay. And for the record, this is RX-578C.

11 MR. GEORGE: I pass the witness.

12 JUDGE MCNAMARA: Thank you, Mr. George.

13 Mr. Taylor?

14 EXAMINATION BY COUNSEL FOR ITC STAFF

15 BY MR. TAYLOR:

16 Q. Good afternoon, Ms. Rosenblum.

17 A. How are you?

18 Q. I'm fine. Thank you.

19 A. Nice to see you again.

20 Q. Pardon me?

21 A. Nice to see you again.

22 Q. Nice to see you again.

23 I want to ask you a couple questions from your
24 demonstrative. This is -- you talked about how Xploderz,
25 Maya Group was successful in getting their product into

1 major retailers like Target, Toys "R" Us. And what is your
2 experience doing that? Do you have any experience getting a
3 product to the shelf?

4 A. Yes, a lot.

5 Q. Can you be -- can you give me a little
6 background?

7 A. Sure. You know, it really depends how large or
8 small your company is, the way you do it. Obviously I've
9 done it at Mattel, but I've also done it at much smaller
10 companies where you go in and, you know, you're making that
11 cold call, trying to get that meeting, first of all.

12 There's so many different sections in toys, and
13 it's so sliced and diced. And so, you know, let's just say
14 something like this where you have a new category, you've
15 got to figure out who to talk to. You can guess who you
16 might talk to, but you've got to figure out that.

17 Then -- and I'm trying to think back to 2011,
18 because I think 2011 was different than now. Now it's hard
19 to get anybody on the telephone. They really want you to
20 use email or text them or whatever, but, back then, you
21 know, it was reasonably easy to get someone on the
22 telephone. You know, you would ask, maybe if they had a
23 receptionist, you know, where -- you know, kind of what you
24 were looking for. So you have to -- the phone call is
25 first.

1 The second thing is a meeting. And usually, in
2 2011, a lot of times you would go down to Walmart in
3 Bentonville, or you would go up to Target in Minneapolis, or
4 you would go out to New Jersey to see Toys "R" Us.
5 Sometimes those customers would all come to the West Coast
6 for previews. And it was a big vetting process, you know, a
7 lot of discussion about all the different variables. It
8 took a long time.

9 And that was another thing that really impressed
10 me about Xploderz. Again, zero to 100. Because I do
11 believe, from my own experience, looking at it, that some of
12 the milestones were just pushed out of the way because the
13 retailers were really wowed by it and really thought it was
14 something different.

15 So that's my experience with the process. It can
16 take a very long time or it can be short. Just depends on
17 the product timing, everything.

18 Q. So in 2011, you would call up on the retailers
19 and hopefully get a contact, and then you would do a vetting
20 process. Was that typically successful, when you were
21 approaching these companies? Or what's the --

22 A. It's typically unsuccessful, I would say, because
23 they only have so much room. They have -- you know, going
24 into those Walmart vendor meetings, you see hundreds and
25 hundreds and hundreds of people coming through on the vendor

1 days, and you'd go out -- they had actually a mock showroom,
2 and you could go out and see how few actually got on the
3 shelves.

4 So, you know, again, one thing that you keep
5 trying to do is you keep coming out with those line
6 extensions, new products. You're always looking for that
7 new category. And to have that unique selling proposition
8 so that you can get -- because that's really the best way to
9 catch attention in the toy industry. It's kind of a little
10 bit of a fashion business. So you want to, you know --

11 Q. Have you done these -- this work yourself? You
12 have personal experience going to these retailers, trying to
13 get a product to the shelf?

14 A. Yes. And going to Bentonville is not much fun,
15 so... I can tell you right now.

16 Q. Could you please pull up CDX-4 --

17 Let me see if it's confidential, Your Honor,
18 first.

19 JUDGE MCNAMARA: Sure.

20 MR. TAYLOR: This is not confidential,
21 Your Honor.

22 Q. Please pull up CDX-4, slide 13, please. This is
23 the Xploderz market share in blaster category.

24 A. Yes.

25 Q. I'm just a little confused about what we're

1 talking about. What market are we talking about?

2 A. We're just talking about the blaster market in
3 general, because that's what I had.

4 Q. When you say "blaster market," what are we
5 talking about?

6 A. So anything else that shoots any kind of --
7 anything, obviously darts or what we're all familiar with,
8 but there were a number of blasters in the market, so...

9 Q. I know you have some exhibits at the bottom
10 there. Does it include products besides NERF?

11 A. I used NERF to do this example. So this one
12 actually does not. But NERF was 80 percent so, you know,
13 had to make some assumptions with, you know, the data that I
14 had, knowing that NERF was -- it doesn't include, you know,
15 like, water or, like, Super Soakers.

16 Q. It does not include water, Super Soakers?

17 A. Yes.

18 Q. So NERF launchers that shoot foam or the balls?

19 A. Shoot darts, yeah, that shoot anything. And,
20 again, you know, it's -- for NERF, themselves, they're
21 always looking for a new category that shoots something
22 that's safe. I mean, it's a -- it's a new way of doing it,
23 so it would add to their product line.

24 Q. Just to be clear, does it include anything else,
25 any other companies' products besides Mattel's, NERF's

1 product?

2 A. No. No, it does not.

3 Q. So if you have a new category of products,
4 wouldn't it actually, potentially, the market share be 100
5 percent?

6 A. It certainly could. It's kind of semantics. I
7 mean, you know, obviously it was part of the blaster
8 category, but think about it -- I think the best way to
9 explain it is when you think about it, you're a retailer and
10 you've got shelf space, and you've got only so much of it.
11 And you've got to divide it in a way that works for you
12 profitability-wise, but you also have to do it in a way that
13 the customer is going to know that there's differentiation
14 as well.

15 And so -- and it's also how you look at it from
16 the mind of a retail buyer. And someone who is an expert in
17 the toy industry, it's something different. It's completely
18 new and it can offshoot, and it's got line extensions of its
19 own, et cetera.

20 So me, I definitely see it as a new category.
21 The Splat-R-Ball witness agreed with me, and I've seen a
22 couple other places where people agreed. And that's what
23 Ron Brawer was saying in 2011, so...

24 Q. When you say "toy industry," what do you mean by
25 "toy industry"? Can you somehow define that?

1 A. I'm sorry? Give me a little more here.

2 Q. Pardon me?

3 A. Give me a little more. I'm not sure I understand
4 the question, when you say -- just how people in the toy
5 industry reviewed it? Is that what you mean?

6 Q. What is the toy industry?

7 A. Well, just --

8 Q. Or your experience, what segment of the toy
9 industry?

10 A. Oh, I've worked in every -- almost every category
11 once. Maybe die cast cars, I don't have a lot of
12 experience, so...

13 Q. So kids' toys --

14 A. Yeah, kids' toys. Sometimes some teenage
15 products will kind of go in there. Like Monster High dolls
16 sell more to teenagers. It's more collectability. So it's
17 kind of -- kids are getting older, younger, but at the same
18 time, I think the toy industry is trying to appeal to an
19 older audience so the toy industry doesn't go out of
20 business.

21 Q. How about Airsoft guns?

22 A. No, that's -- and, again, let's go back to 2011,
23 2012. I mean, I think at that time there were a lot of
24 events happening, world events and things, that -- no,
25 Airsoft, no.

1 Q. You don't have experience marketing Airsoft guns?

2 A. No. No.

3 Q. Do you consider that to be part of the toy
4 industry?

5 A. No.

6 MR. TAYLOR: No further questions. Thank you.

7 JUDGE MCNAMARA: Thank you, Mr. Taylor.

8 Any redirect?

9 MR. RUBIN: Just briefly.

10 REDIRECT EXAMINATION

11 BY MR. RUBIN:

12 Q. Ethan Rubin, Fish & Richardson, on behalf of
13 Complainants.

14 Professor Rosenblum, you said earlier that you
15 reviewed a Maya sales spreadsheet?

16 A. I'm sorry. I couldn't hear you on that one.

17 Q. You said earlier that you reviewed a Maya sales
18 spreadsheet?

19 A. Yes.

20 Q. And that was CX-165C, the same -- the same
21 exhibit number that was on the slides.

22 A. Yes. The 0011.

23 Q. And did that document include wholesale prices
24 for all of The Maya Group blasters from 2011 -- 2011, 2012?

25 A. Yes, that included all the -- I don't know what

1 to call it, but kind of the granular data of, like, every
2 invoice. There was -- it included like everything, so...

3 Q. And did you review similar data for Hasbro?

4 A. Yes. Yes.

5 MR. RUBIN: No further questions. Thank you.

6 JUDGE MCNAMARA: Thank you very much.

7 Mr. George?

8 MR. GEORGE: Just a few. Thank you, Your Honor.

9 RE-CROSS-EXAMINATION

10 BY MR. GEORGE:

11 Q. Do you recall how many Maya documents you
12 reviewed in connection with preparing your report?

13 A. Oh, gosh. I really don't. I don't recall. I'm
14 sorry.

15 Q. I was looking at your report. I only saw one.
16 Does that sound right?

17 A. You mean for my report?

18 Q. Yes, that you said you reviewed.

19 A. When you say "documents," I'm not sure what you
20 mean.

21 Q. Like a document that comes from the Maya company.

22 A. I think there were other things in there. I'm
23 not sure. I don't recall.

24 Q. I didn't see any cites to emails or
25 communications between Maya and retailers. Were you given

1 access to any of that?

2 A. Well, some of the things were mentioned in their
3 depositions and some --

4 Q. I was talking about documents. I'm sorry to
5 interrupt you, but I was just talking about documents.

6 A. I'm not sure I understand the question.

7 Q. So you've just testified that Maya bypassed
8 milestones. Did that come from a review of the Maya
9 documents that were produced to you or --

10 A. That came from my understanding of being in the
11 toy industry for 37 years and how long it takes from a
12 meeting to -- an initial meeting to introducing a product.
13 It seemed fast to me.

14 Q. Okay. So that's --

15 A. My expert opinion.

16 Q. That's your only basis.

17 A. Correct.

18 Q. So you didn't talk to Mr. Ben-Ezer and he didn't
19 tell you that they bypassed milestones.

20 A. No.

21 Q. Okay. And you didn't talk to Mr. Brawer and
22 Mr. Brawer -- he didn't tell you that they bypassed
23 milestones, correct?

24 A. No, I don't think so.

25 Q. Okay. I'm sorry. Were you finished?

1 A. Yeah. I said I don't think so.

2 Q. Thank you.

3 I just noticed you didn't include any packaging
4 for NERF products that were available in 2011 or 2012 in
5 your report.

6 A. Correct.

7 Q. Okay.

8 A. It wouldn't have affected my opinion.

9 Q. I'm sorry?

10 A. It wouldn't have affected my opinion.

11 Q. Uh-huh. Do you know how much The Maya Group
12 spent on travel for the vendor meetings you talked about?

13 A. I don't.

14 Q. Okay. And do you know how many stores were there
15 that the products were sold in for Walmart, Target, or Kmart
16 in 2011?

17 A. I don't.

18 Q. You don't know.

19 A. I don't.

20 Q. Do you know how many stores, how many Walmart
21 stores or Target stores or Kmart stores the Xploderz
22 products were sold in 2012?

23 A. I don't.

24 Q. Okay.

25 MR. GEORGE: I'm done. Thank you, Your Honor.

1 JUDGE MCNAMARA: Thank you, Mr. George.
2 Mr. Taylor?
3 MR. TAYLOR: Nothing further, Your Honor.
4 JUDGE MCNAMARA: Thank you very much.
5 Professor Rosenblum, you may step down. Thank
6 you very much.

7 THE WITNESS: Thank you.

8 JUDGE MCNAMARA: All right. So at this point my
9 question is, do we have an exhibit list from the witnesses
10 who have finished testifying? Not this afternoon, but at
11 least this morning.

12 Anything yet, Mr. Cordell?

13 MR. CORDELL: We do, Your Honor, but I think it
14 probably behooves us to meet and confer and make sure that
15 we're all on the same page before we proceed.

16 JUDGE MCNAMARA: Yes. I would assume that would
17 be part of any process. Good.

18 All right. So is there any other business this
19 afternoon which you would like me to address before we
20 adjourn?

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

23 JUDGE MCNAMARA: Thank you.

24 MR. GEORGE: Not from Respondents, Your Honor.
25 Thank you.

1 JUDGE MCNAMARA: Thank you, Mr. George.

2 MR. TAYLOR: No, Your Honor.

3 JUDGE MCNAMARA: Thank you, Mr. Taylor.

4 All right. Then I will see you tomorrow morning
5 at 9:30. Have a good evening. Thank you.

6

7 //

8 (Whereupon, the proceedings adjourned at
9 5:36 p.m. to reconvene the following business day May 23,
10 2023, at 9:30 a.m.)

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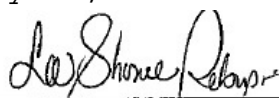
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2 TITLE: IN THE MATTER OF CERTAIN SOFT PROJECTILE LAUNCHING
3 DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS
4 CONTAINING SAME
5 INVESTIGATION NO.: 337-TA-1325
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8 NATURE OF HEARING: Evidentiary Hearing

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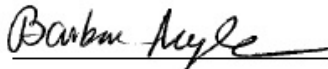


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