

UNITED STATES INTERNATIONAL TRADE COMMISSION

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In the Matter of

Investigation No.

CERTAIN SOFT PROJECTILE LAUNCHING

337-TA-1325

DEVICES, COMPONENTS THEREOF,

AMMUNITION, AND PRODUCTS

CONTAINING SAME

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OPEN SESSIONS

Pages: 599 through 773 (with excerpts)

Place: Washington, D.C.

Date: May 23, 2023

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Before the Honorable MaryJoan McNamara
Administrative Law Judge

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In the Matter of Investigation No.

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

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

Evidentiary Hearing
Tuesday, May 23, 2023
Volume IV of IV

The parties met pursuant to notice of the
Administrative Law Judge at 9:33 a.m. Eastern.

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23 *** Index appears at end of transcript ***

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P R O C E E D I N G S

(In session at 9:33 a.m.)

JUDGE MCNAMARA: Good morning, everyone. Please be seated.

Is there any business that needs to be addressed before we get started this morning?

MR. CORDELL: I think we have yesterday's exhibits, Your Honor.

JUDGE MCNAMARA: We do? Very good.

MR. CORDELL: Mr. Wilson will handle that for us.

JUDGE MCNAMARA: All right. Good morning, Mr. Wilson.

MR. WILSON: Good morning, Your Honor. Jeff Wilson. Similar to yesterday, we have a list of exhibits.

JUDGE MCNAMARA: Okay. Who is going to confirm from Respondents?

MR. WESP: Sean Wesp for Respondents.

JUDGE MCNAMARA: Good morning, Mr. Wesp.

All right. Mr. Taylor?

MR. TAYLOR: We agree with the list, Your Honor.

JUDGE MCNAMARA: Good. All right.

So go ahead, Mr. Wilson.

MR. WILSON: Thank you, Your Honor. At this time we would move for the admission of the exhibits listed in the document that I'll pass to the reporter with the caption

1 of the case and a title Exhibits Admitted During the
2 Evidentiary Hearing on May 22, 2023.

3 JUDGE MCNAMARA: Very good. They are admitted.

4 (Whereupon, the exhibits as recited by counsel
5 and reflected in the attached index were submitted and
6 received in evidence.)

7 MR. TAYLOR: Your Honor, in talking with
8 Ms. Kinkade, I believe she said she would like the exhibit
9 list emailed to a certain address.

10 JUDGE MCNAMARA: Sure.

11 MR. TAYLOR: We can do that also.

12 JUDGE MCNAMARA: Sure, that would be great. I
13 think we send it to LaShonne Robinson, but we'll make sure
14 that you have the email that is the correct email to which
15 you should send the lists. It is at Heritage Reporting, but
16 that is our contact person. We will make sure that you have
17 that. We will send you an email probably at lunchtime,
18 something like that, or at the end of the day, and it will
19 have the contact person at Heritage.

20 You should have it, because it is the person to
21 whom you send your emails for purposes of receiving the --
22 oh, we are not doing a Webex.

23 MR. WILSON: We do have it. I think we sent the
24 exhibits for Mr. Tino from the first day of the hearing.
25 I'm not sure that those made it all the way through, but if

1 they did...

2 JUDGE MCNAMARA: We will still send you the
3 email. I guess I am still thinking Webex. We always get
4 the emails from all of the parties, all of the attendees and
5 participants. I am still, I guess, in that mode a lot of
6 the time. I am glad we are in person.

7 All right. Thank you, Mr. Wilson. Is there
8 anything else?

9 MR. CORDELL: Just yesterday, Your Honor, I
10 neglected to note that Mr. Ethan Rubin is NEXT Gen, and that
11 was the first time he had presented experts.

12 JUDGE MCNAMARA: Very good. That is good to
13 know. And welcome. How did it feel?

14 MR. RUBIN: Felt great, Your Honor.

15 JUDGE MCNAMARA: Well, what I say to
16 less-experienced attorneys, are you excited? Are you
17 terrified? And if you have both, it is a good situation.

18 MR. RUBIN: Precisely the case.

19 JUDGE MCNAMARA: Good. But you should end up on
20 the excited side and just feeling really good about finding
21 your own style. Very good. Good news. Thank you.

22 All right. So are we ready to get started?

23 MR. TAYLOR: Your Honor, I believe the
24 Respondents are not going to call Mr. Delman, which may be
25 on your last version of the schedule.

1 JUDGE MCNAMARA: Yes, it was. So I think we
2 finished with Ms. Rosenblum yesterday. So the next person
3 would be Julia Rowe? Is that --

4 MR. GEORGE: That's correct, Your Honor. Thank
5 you.

6 JUDGE MCNAMARA: All right. I saw her in the
7 courtroom the last couple of days. Is she here now?

8 Okay. You are way at the back. I could not see
9 you. Come on up.

10 MS. PETERSON: Good morning, Your Honor.

11 JUDGE MCNAMARA: Good morning. Would you
12 introduce yourself, just for the courtroom?

13 MS. PETERSON: Lauren Peterson for the Prime Time
14 Toys Respondents.

15 JUDGE MCNAMARA: Yes. Okay.

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

20 JUDGE MCNAMARA: Please state your full name.

21 THE WITNESS: Julia Rowe.

22 JUDGE MCNAMARA: I am sorry. I know that it is
23 Rowe, and I was mispronouncing it. I am sorry about that.

24 And Ms. Peterson, of course. You did not have
25 your glasses on, and I did not have mine on, so there we go.

1 Thanks very much. You may be seated. Thank you.

2 DIRECT EXAMINATION

3 BY MS. PETERSON:

4 Q. Good morning, Ms. Rowe.

5 A. Good morning.

6 Q. What was your assignment in this investigation?

7 A. I was asked to review various financial and
8 economic issues, such as the economic prong of the domestic
9 industry requirement, bond, and commercial success.

10 Q. First this morning, let's focus on commercial
11 success.

12 A. Okay.

13 Q. Did you prepare any demonstratives for your
14 testimony today?

15 A. I did. I believe they are marked RDX-7.

16 Q. Thank you.

17 And do you have any prior experience working in
18 Section 337 investigations?

19 A. Yes. I have been offered as an expert in several
20 Section 337 investigations.

21 Q. And have you offered opinions on commercial
22 success in the past?

23 A. I have.

24 MS. PETERSON: Your Honor, Respondents would like
25 to offer Ms. Rowe as an expert in economics, financial

1 analysis, and accounting.

2 JUDGE MCNAMARA: Any objections?

3 MR. SHNEIDMAN: Subject to cross-examination,
4 that's acceptable.

5 JUDGE MCNAMARA: So are you accepting her or is
6 this going to be another voir dire situation with
7 credibility?

8 MR. SHNEIDMAN: We'll accept her as offered.

9 JUDGE MCNAMARA: Thank you.

10 Ms. Rowe is then accepted as an expert witness on
11 the topics on which she has been called to testify.

12 Q. Ms. Rowe, were you here when Ms. Rosenblum
13 testified?

14 A. Yes, I was.

15 Q. Were you here when Dr. Kudrowitz testified?

16 A. No.

17 Q. Did you review the transcript of his testimony?

18 A. Yes, I reviewed at least parts of it.

19 Q. So to clarify, the products that are being
20 alleged to be commercially successful in this investigation,
21 are those Complainants' products?

22 A. No, these are products that were sold by The Maya
23 Group, which is the original assignee of the asserted
24 patents.

25 Q. And what is the relationship between The Maya

1 Group and Complainants?

2 A. So The Maya Group sold the asserted patents and
3 its business to Spin Master in 2019, and Spin Master entered
4 into an exclusive license with Hasbro in 2022.

5 Q. Does Spin Master have any products that practice
6 the asserted patents?

7 A. No. Mr. Ben-Ezer testified that when they sold
8 the business to Spin Master, Spin Master was not interested
9 in the Xploderz or Blaster Pro product lines.

10 Q. And in this investigation, have you seen any
11 information about Hasbro's sales of the domestic industry
12 products?

13 A. Very limited. I believe there's one document
14 that shows sales through about October 2022, but that was
15 pretty limited data.

16 Q. And when did The Maya Group sell its patented
17 products?

18 A. So my understanding is that The Maya Group
19 started selling the Xploderz line in late 2010, and
20 Ms. Rosenblum and Dr. Kudrowitz focused on the 2011 and 2012
21 time frame.

22 MS. PETERSON: Your Honor, the next exhibit I'd
23 like to put up, I believe Complainants said that the Maya
24 Group sales information was allowed to stay on the public
25 record, but I'd just like to confirm.

1 JUDGE MCNAMARA: Sure.

2 MR. SHNEIDMAN: Your Honor, I should have
3 introduced myself as well. Jeffrey Shneidman for
4 Complainant Hasbro.

5 Yes, the slides themselves can be on the public
6 record that we showed, but many of the spreadsheets should
7 go on to the confidential record.

8 MS. PETERSON: Okay. Thank you.

9 Mr. Sayres, can you please pull up CDX-004C,
10 slide 7? Can you put that up side by side with CDX-005,
11 slide 50? Thank you.

12 Q. Ms. Rowe, do you recognize the two slides that we
13 have up on the screen here?

14 A. Yes, I do.

15 Q. And these two slides -- CDX-4 was a demonstrative
16 from Ms. Rosenblum's testimony; is that correct?

17 A. Yes, that's right.

18 Q. And CDX-5 is from Dr. Kudrowitz' testimony?

19 A. Yes.

20 Q. And you mentioned a moment ago that both of their
21 analyses in this case focused on the years of 2011 and 2012?

22 A. That's right.

23 Q. Did either of Ms. Rosenblum or Dr. Kudrowitz
24 consider any other years of Maya Group sales?

25 A. No. Ms. Rosenblum testified that she was aware

1 that the product was discontinued after four years, but
2 neither she nor Dr. Kudrowitz cited to any of the sales data
3 after 2012. They only focused on these two years.

4 Q. In the slide CDX-5C, slide 50, on the right-hand
5 side here, lists a number of SKUs.

6 While I have this up on the screen, Ms. Rowe, can
7 you tell me anything about any information you reviewed
8 regarding the pricing of these products?

9 A. Yes. So overall -- I believe Your Honor asked a
10 question about pricing of the products yesterday, and the
11 wholesale prices -- so the prices that Maya Group received
12 from the retailers was anywhere from about seven fifty for
13 the more simple models and it ranged up to about \$25 or so
14 for the more complicated models that had longer barrels and
15 more ammunition.

16 The suggested retail prices were about double
17 those figures. So about \$15 to \$50, depending on the
18 functionality and features of the products.

19 Q. And backing up a bit, you just mentioned about
20 the sales dropping off after 2012, correct?

21 A. That's right.

22 Q. Okay. Mr. Sayres, can you please pull up RDX-7,
23 slide 2, please. Thank you.

24 Ms. Rowe, what are you showing on this
25 demonstrative here?

1 A. So this demonstrative summarizes the gross
2 revenue or gross sales that the Maya Group claims to have
3 made from the Xploderz and Blaster Pro product lines. I've
4 highlighted 2011 and 2012 because those are the years that
5 Complainants' experts focused on. And, as you can see,
6 after 2012 there's a fairly sharp dropoff in sales, and the
7 products were discontinued in 2015.

8 Q. And Mr. Sayres, can you please flip to the next
9 slide? Thank you.

10 Ms. Rowe, what are you showing on slide 3?

11 A. This is an illustration of the sales of the
12 patented products, Xploderz and Blaster Pro, compared to
13 another one of Maya Group's products, which was the Orbeez.
14 Orbeez are, as I understand it, the super absorbent polymer,
15 just the balls themselves. It doesn't include any blasters,
16 and it's advertised in a different way.

17 I have a Spin Master logo around the 2019 time
18 frame, because after Spin Master acquired Maya Group,
19 Spin Master continued to sell the Orbeez product. And as I
20 testified before, they had no interest in the Xploderz or
21 Blaster Pro product lines that were discontinued years
22 earlier.

23 Q. Mr. Sayres, can you please pull up CDX-4 at
24 slide 9.

25 Ms. Rowe, do you recall yesterday that

1 Ms. Rosenblum testified about line extensions?

2 A. I do.

3 Q. And are you aware if the additional line
4 extensions shown here on slide 4 were -- continued to be
5 sold after 2014?

6 A. So the bar chart that I showed in my
7 demonstrative, it would include the line extensions. So to
8 the extent the line extensions were sold in 2013 and 2014,
9 they would have been part of that sales dropoff that you saw
10 on that previous slide, and they were not continued to be
11 sold after 2015.

12 Q. In her analysis, did Ms. Rosenblum rely on any
13 sales data regarding the sale of these line extensions?

14 A. No, the source that Ms. Rosenblum referred to
15 only included 2011 and 2012 data. So the products
16 introduced after 2012 would not have been included in the
17 sales data that she looked at.

18 Q. Do you agree with the sales figures that
19 Ms. Rosenblum and Dr. Kudrowitz used to quantify the sales
20 of The Maya Group products?

21 A. I think there are some serious issues with using
22 that sales data, because it includes several overstatements
23 that, basically, overstate the true level of sales of the
24 Xploderz and Blaster Pro products.

25 Q. What type of overstatements are you referring to?

1 A. So there's a few issues. The first is that the
2 sales data did not account for a recall of the first version
3 of the Xploderz product. When it was first introduced,
4 there was an issue with the mechanism and there was a recall
5 of the product, and that's not accounted for in the sales
6 data.

7 There is also an element of returns. So any
8 returns made to the retailers or returns made to Maya Group,
9 neither was accounted for in the sales spreadsheets provided
10 by The Maya Group.

11 There's an issue with the SKUs, in that The Maya
12 Group actually used a single SKU to refer to multiple
13 different products, and there are some non-patented
14 products, such as targets or vests, that were included in
15 the SKUs that, my understanding, are not patented products.

16 And then there's other discounts, markdown money,
17 allowances that wouldn't have been included in the
18 documents.

19 So Mr. Ben-Ezer testified that, for example, if
20 there was a markdown, that might be reflected on a later
21 invoice from The Maya Group as a credit against amounts
22 owed, but that type of a discount would not be included in
23 the sales data.

24 So there's a number of adjustments that would
25 lead me to conclude that the sales figures cited by

1 Ms. Rosenblum and Dr. Kudrowitz are overstated.

2 Q. Are you aware of any information regarding the
3 quantitative impact of the issues you just outlined?

4 A. There is very limited information. I'm not able
5 to perform a specific quantitative adjustment, because that
6 information just wasn't provided by The Maya Group.

7 My understanding is that Complainants cite to
8 Mr. Ben-Ezer's testimony that there was a 3 to 5 percent
9 return rate associated with the patented products. That's
10 not quite how I read that testimony, not quite how I
11 understood it.

12 But even if that's right, Mr. Ben-Ezer testified
13 that the returns to the retailers were so significant that
14 some retailers didn't want to keep stocking the Xploderz and
15 Blaster Pro products. So that, to me, is an indication that
16 the quantitative impact of these adjustments that I'm
17 referring to could be quite significant and more significant
18 than the 3 to 5 percent that's associated with returns for
19 defective products.

20 Q. Did you also consider Ms. Rosenblum's testimony
21 about the profitability of The Maya Group products?

22 A. I did.

23 Q. Setting aside your concerns about the revenue
24 data that you just mentioned, do you otherwise agree with
25 her estimates of the profits derived from these products?

1 A. I don't. The overall formula for profitability
2 is, of course, revenue minus costs equals profits. And even
3 if I set aside any concerns I have with the revenue data,
4 the cost data is also understated, which means that the
5 profits are overstated.

6 Q. And what types of costs do you believe are
7 understated?

8 A. So Ms. Rosenblum cited in the documents something
9 called landing costs or total costs, which essentially
10 accounted for the costs of manufacturing the product and
11 transporting it.

12 She didn't account for any of the selling,
13 marketing, or advertising costs associated with the
14 products. And Mr. Ben-Ezer testified that there was an
15 extensive marketing and advertising campaign, there were
16 commercials, and that The Maya Group spent millions of
17 dollars on advertising these allegedly patented products.

18 None of those costs were accounted for, which
19 means that the profitability margins that she cited are
20 overstated, and ultimately it's not clear if these allegedly
21 patented products were even profitable to begin with. And
22 we know that, of course, The Maya Group stopped selling them
23 after only a couple of years.

24 Q. Are you able to estimate how much the profits are
25 overstated?

1 A. No. As I said, Mr. Ben-Ezer testified that they
2 spent millions on advertising, but the exact figure was not
3 provided in the documents.

4 Q. Does the product have to be profitable in order
5 for there to be commercial success?

6 A. So I'm not a lawyer and I'm not aware of any
7 threshold that says that you absolutely have to have a
8 profitable product, but the fact that the products were
9 discontinued relatively quickly and that sales dropped off
10 quickly, despite these large expenditures on advertising and
11 other things, is an indication of a lack of commercial
12 success to me.

13 Q. Are there any other issues with what
14 Ms. Rosenblum and Dr. Kudrowitz presented in their testimony
15 with respect to the commercial success of The Maya Group
16 products?

17 A. Yes. So we've been talking about financial and
18 accounting issues. I understand that there's a technical
19 issue as well as that there's a test that the commercial
20 success must have a nexus to the asserted patents, and I
21 understand from Mr. Delman that that nexus requirement is
22 not met.

23 Q. So based on everything we've discussed this
24 morning, do you believe there is evidence supporting a
25 finding of commercial success attributable to the asserted

1 patents?

2 A. I would not conclude that, based on the
3 information available.

4 Q. Thank you, Ms. Rowe.

5 MS. PETERSON: Your Honor, I pass the witness.

6 JUDGE MCNAMARA: Thank you, Ms. Peterson.

7 Mr. Shneidman?

8 CROSS-EXAMINATION

9 BY MR. SHNEIDMAN:

10 Q. Good morning. Jeffrey Shneidman for the
11 Complainants.

12 I'd like to ask you a few questions to help the
13 Commission better understand the content of your testimony,
14 if that's okay.

15 You aren't a toy industry expert, right?

16 A. That's right.

17 Q. You don't have any education specifically related
18 to the toy industry, correct?

19 A. Yeah, I wouldn't describe it as specific to the
20 toy industry.

21 Q. And you don't have any training in the toy
22 industry, right?

23 A. That's fair.

24 Q. You've never worked on the marketing or the
25 advertising of toys, right?

1 A. That's right.

2 Q. You've never worked on the branding of toys,
3 correct?

4 A. Correct.

5 Q. You don't claim to be an expert on how to market
6 toys, correct?

7 A. No, I do not.

8 Q. And you've never worked on the research and
9 development of toys, correct?

10 A. That's right.

11 Q. And you've never designed any toys; is that
12 correct?

13 A. Not in a professional capacity, no.

14 Q. Well, have you ever worked on the design of any
15 toys?

16 A. I have a toddler and I have made toys for my
17 toddler before, but I don't claim to be a professional toy
18 designer.

19 Q. Can we open up Exhibit 1642C, the Rowe
20 deposition, January 31st, 2023? Just go to page 27, lines
21 11-13.

22 Do you agree that -- have you ever worked on the
23 design of any toys? And the answer was no, correct?

24 A. Okay.

25 Q. You've never taught any classes relating to

1 commercial success in the toy industry, correct?

2 A. No.

3 Q. And you've not been proffered as a toy industry
4 expert in this case, right?

5 A. Correct.

6 Q. And you're not a person of ordinary skill in the
7 art for the purposes of this case, correct?

8 A. I'm not offering opinions on that, no.

9 Q. And you're not a person of ordinary skill in the
10 art in this case, correct?

11 A. Probably not. I'm not that familiar with the
12 definition of that term in this case.

13 Q. Okay. So you don't know what the person of
14 ordinary skill in the art is in this case, correct?

15 A. That's outside the scope of my work.

16 Q. Okay. And you had not been familiar with The
17 Maya Group before this investigation, correct?

18 A. Correct.

19 Q. And you were not familiar with Xploderz before
20 this investigation either, correct?

21 A. Correct.

22 Q. And you're not offering any technical expert
23 testimony with respect to Xploderz and the asserted patents,
24 right?

25 A. Correct.

1 Q. So you're not offering any technical opinion as
2 to whether or not there is or is not a nexus between the
3 commercial success and the technical patented claims,
4 correct?

5 A. That's right, I'm not offering any technical
6 testimony.

7 Q. You would agree, I think as you testified,
8 there's no single way, no single accepted way, to
9 demonstrate commercial success to the Commission?

10 A. I think generally that's fair.

11 Q. So you would agree that there's no single
12 accepted way to demonstrate commercial success to the
13 Commission, right?

14 A. Yes.

15 Q. And you agree that commercial success should be
16 evaluated in the context of the relevant industry, right?

17 A. I think that's fair.

18 Q. So ten million dollars in sandwiches is different
19 than ten million dollars in airplanes, for example, if
20 you're trying to determine if something is a commercial
21 success?

22 A. That's not quite how I think about it. But I see
23 your point.

24 Q. Now you were here for Professor Rosenblum's
25 testimony, correct?

1 A. Yes.

2 Q. And you agree that Ms. Rosenblum opined that the
3 Xploderz products were commercially successful based on the
4 Maya sales data, correct?

5 A. Yes, for the two years.

6 Q. And you agree that Ms. Rosenblum -- Professor
7 Rosenblum opined that the Xploderz products were
8 commercially successful based on market share and review of
9 sales data of the Xploderz products in comparison with the
10 product sales of the NERF product line, correct?

11 A. I believe that's what she testified to.

12 Q. And you agree that Ms. Rosenblum opined that
13 products -- the Xploderz products were commercially
14 successful based on the line extensions, correct?

15 A. She did.

16 Q. And Professor Rosenblum opined that the Xploderz
17 products were commercially successful based on reviewed
18 profitability data, correct?

19 A. She did.

20 Q. And Professor Rosenblum opined that Xploderz
21 products were commercially successful based on her view that
22 the Xploderz products created an entirely new product
23 category, right?

24 A. I believe she said that.

25 Q. Earlier you testified about what you said were

1 issues with the Maya sales data, which was in CX-0165C,
2 correct?

3 A. CX-0165C is one of the documents of sales data.

4 Q. The spreadsheet, right.

5 And you mentioned returns of products in your
6 testimony, right?

7 A. I did.

8 Q. I just want to clear up. You reviewed the
9 deposition testimony of Oded Ben-Ezer, right?

10 A. I did.

11 Q. Do you remember who Oded Ben-Ezer is?

12 A. I do.

13 Q. Who is he?

14 A. He is the founder of The Maya Group. One of at
15 least two.

16 Q. And Mr. Ben-Ezer testified that the returns of
17 the Xploderz products were less than 5 percent, correct?

18 A. I don't think that's quite right.

19 Q. Let me pull up the Ben-Ezer deposition at page
20 277, lines 1-4.

21 JUDGE MCNAMARA: May I have the date of that,
22 please? And if you have the exhibit number, if that is not
23 the exhibit number that was provided previously.

24 MR. SHNEIDMAN: Yes. That would be the Exhibit
25 CX-1634C, and that would be December 13, 2022, Your Honor.

1 JUDGE MCNAMARA: Thank you.

2 MR. SHNEIDMAN: Thank you.

3 Q. The question he was asked was: Were returns
4 within an acceptable range, to you, for the Xploderz
5 product?

6 And he answers: Yeah, which was, you know, less
7 than 5 percent.

8 A. I recall this testimony. There is some other
9 testimony that I recall that he said that The Maya Group
10 didn't actually track the returns and they surveyed one
11 customer.

12 Q. You reviewed the deposition testimony of Ron
13 Brawer as well, correct?

14 A. I did.

15 Q. And Mr. Brawer said that The Maya Group did not
16 have a major return problem with the Xploderz, right?

17 A. I don't specifically recall that testimony, but I
18 did review his testimony.

19 Q. Can we bring up CX-1852C, the March 31st, 2023
20 deposition of Ron Brawer, at lines 209, 15-19.

21 The question he was asked is: Did you ever hear
22 from retailers about concerns they had with the product or
23 getting too many returns on the product?

24 The answer was: I don't recall us having a major
25 return problem, no.

1 Do you see that?

2 A. I do.

3 Q. Let's bring up Ms. Rosenblum's summary slide,
4 which is CDX-4C, at 7.

5 You showed this slide in your direct examination,
6 correct?

7 A. Yes.

8 Q. So even if we assume the returns were the worst
9 case of 5 percent, that reduces the number of units sold in
10 2011 and 2012 by about 63,000 each year, right?

11 A. For that one issue, potentially.

12 Q. And so that would account for -- instead of
13 \$32.8 million in sales, it would become \$31.2 million in
14 sales, correct, just doing the math?

15 A. If you adjust for that one assumption that you're
16 asking me to make, that's correct mathematically.

17 Q. You can take that down.

18 There was a small recall of the Xploderz products
19 at the beginning of its launch, its life cycle, correct?

20 A. There was a recall. I don't know if I -- we
21 haven't seen the data of the extent of the recall, so
22 "small" is -- I don't know if I can agree to that word
23 "small," but I understand there was a recall.

24 Q. That recall only affected Xploderz that were
25 shipped to -- the initial shipment of Xploderz to a very

1 specific set of retailers in January of 2011, correct?

2 A. I believe that's what Mr. Ben-Ezer testified to.

3 Q. If we could pull up, again, the Brawer
4 deposition, CX-1852C, March 31st, 2023, at lines 70 through
5 20, through 74, 17.

6 73, 20, if you could extract out through 74, 13.

7 You would agree Mr. Brawer is testifying that
8 there is a 30-day period of time in which the recall
9 affected sales, correct?

10 A. I see the testimony that you're referring to. It
11 seems to be a partial answer that you're showing on the
12 screen, but I see what you're referring to.

13 Q. We can pull up the rest of the answer.

14 Can you pull up through the rest of his testimony
15 there?

16 Just to confirm, we're talking about the time
17 frame of January 2011, right?

18 A. Okay. I'll accept your representation on that.

19 Q. Okay. Removing the Xploderz products, all the
20 sales that were made in January 2011, assuming all of them
21 were cancelled out, that would reduce the gross revenue in
22 2011 by \$800,000, correct?

23 A. I don't have that figure in front of me, but I
24 can accept your representation on that.

25 Q. All right. Can we pull up your expert report,

1 RX-710C, at page 12, paragraph 21?

2 This is your expert report, correct?

3 A. Yes.

4 Q. And in the expert report you wrote, removing
5 Xploderz products dated 2011 in the Maya Group's sales
6 reduces the 2011 gross revenue by nearly \$800,000, correct?

7 A. Yes.

8 Q. You can take that down.

9 Can we bring up CDX-4C at slide 7, which is a
10 summary of the '11-'12 Maya Group sales data?

11 It's your understanding, I think, from your
12 direct testimony, that The Maya Group invoice-level
13 financial data was available for 2011 and 2012, correct?

14 A. I'm sorry. Can you please repeat the question?

15 Q. Sure. It's your understanding that the
16 invoice-level financial data was produced from The Maya
17 Group for the years 2011 and 2012, correct? That's the data
18 you reviewed.

19 A. That's some of the data I reviewed, yes.

20 Q. Okay. And do you recall how many invoices that
21 data summarized?

22 A. No.

23 MR. SHNEIDMAN: Can we briefly go on the
24 confidential record?

25 JUDGE MCNAMARA: Yes.

1 (Whereupon, the hearing proceeded in confidential
2 session.)
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MR. TAYLOR: Good morning, Your Honor. I'd like to note the Staff brought reinforcements this morning. We have three interns that joined us just on Monday, I believe, so they are here.

JUDGE MCNAMARA: Good. Welcome. Where are you from? Would you introduce yourself for the record?

UNIDENTIFIED SPEAKER: Your Honor, my name is --

JUDGE MCNAMARA: I don't think our reporter could hear you.

MR. TAYLOR: Come on up.

JUDGE MCNAMARA: Might as well.

MR. WARD: Your Honor, my name is Justin Ward. I am a rising 3L student at the George Washington University Law School.

JUDGE MCNAMARA: Good morning. And welcome.

MR. WARD: Thank you.

MR. SOIFER: Your Honor, I'm Spencer Soifer. I'm a rising 2L at the American University Washington College of Law.

JUDGE MCNAMARA: Also welcome. This is great.

Ms. Lee: Thank you. Good morning, Your Honor. My name is Monica Lee, and I am a rising 2L at the George Washington University Law School.

1 JUDGE MCNAMARA: Also welcome.

2 This is great. The more young attorneys in
3 process we have coming and watching hearings, the earlier
4 they will get started and move up in their careers, right?

5 MR. TAYLOR: Just to hear your voice in the
6 courtroom is actually valuable.

7 Your Honor, does the Staff get 15 extra minutes
8 now?

9 JUDGE MCNAMARA: We will make adjustments.

10 MR. TAYLOR: Just joking.

11 JUDGE MCNAMARA: I know.

12 EXAMINATION BY COUNSEL FOR ITC STAFF

13 BY MR. TAYLOR:

14 Q. Good morning, Ms. Rowe. Sorry for the delay.

15 A. Good morning.

16 Q. I just want to ask you a quick question. So this
17 is your Demonstrative RDX-7 at slide 3, and I just want to
18 ask about the distinction between Xploderz and Blaster Pro.
19 Is there a significance to that distinction?

20 A. My understanding is that they have -- there were
21 two different brand names. And in terms of significance
22 from a technical perspective, that's not something that was
23 within the scope. I've assumed that both the Xploderz and
24 Blaster Pro product lines were patent-practicing for
25 purposes of my work.

1 Q. Okay. So when we say "Xploderz," you're
2 including both Xploderz and Blaster Pro? Or is there a
3 different word I should be using?

4 A. That would be fine if you want to use that for
5 your questioning. I tried to try -- to say "Xploderz" and
6 "Blaster Pro" during my testimony when I was referring to
7 both, but if I misspoke at any point, then I was referring
8 to the patented products generally.

9 Q. Okay. Thank you.

10 Is The Maya Group incorporated as a functioning
11 company today?

12 A. I'm not sure about that. I know that there is a
13 representation that Mr. Ben-Ezer is the only remaining
14 employee of The Maya Group, so that would lead me to
15 indicate that there is some continuing concern. But much of
16 The Maya Group products and patents were sold to
17 Spin Master, is my understanding.

18 Q. Do you know when The Maya Group was founded?

19 It's okay. Let me ask a different question.

20 So in the 2010 to 2014 time frame, do you know
21 how many employees The Maya Group had?

22 A. I don't recall.

23 Q. So you don't know whether it was a small company,
24 a large company, a medium-sized company?

25 A. It depends how you measure it. I have

1 information about The Maya Group's revenues during that time
2 frame of 2010 to 2014, but I don't recall information about
3 the number of -- the total number of employees that they
4 employed.

5 Q. So let's talk about revenue. How did the -- in
6 this time frame, how did the revenue of the Xploderz and
7 Blaster Pro products compare to the overall revenue of the
8 company?

9 A. So the gross revenue for The Maya Group that I'm
10 aware of was ranging from about \$20 million to about \$50
11 million annually in the 2010 to 2014 time frame.

12 Q. Thank you.

13 MR. TAYLOR: Your Honor, I'm just going to
14 quickly get some water here.

15 JUDGE MCNAMARA: Sure.

16 Q. You testified earlier that the Xploderz, Blaster
17 Pro products were discontinued, correct?

18 A. Yes.

19 Q. Did you see evidence in the record, or any
20 evidence that you looked at, as to why the product was
21 discontinued?

22 A. So the testimony included some references to
23 that. There were some references to returns, some retailers
24 not wanting to deal with the returns that The Maya Group's
25 products had, and there was some testimony about the

1 mechanism being less than brilliant, I think is the quote
2 that Mr. Ben-Ezer had.

3 So there is some context on that. I don't think
4 that there's a single reason that was articulated, but,
5 clearly, we do see the sales declining over time.

6 Q. I believe you testified earlier that you don't
7 have specific experience in the toy industry, correct?

8 A. I've not worked at a toy company. I have been
9 involved in other -- other litigation involving toy and
10 games.

11 Q. I'd like to show CDX-4, slide 7, which was
12 Ms. Rosenblum's demonstrative exhibits. I'll put it on the
13 ELMO.

14 And do you recall from her testimony that she
15 seemed to be impressed that this company was able to get on
16 the shelves in Toys "R" Us, Walmart, Target?

17 Do you have any opinion on that, for this size of
18 a company?

19 A. So my opinions are not dependent on the size of
20 The Maya Group. I don't think that that's necessarily a
21 determining factor, one way or the other.

22 I would say that merely having a presence on a
23 shelf is not necessarily indicative of commercial success,
24 and that there are lots of products sold in stores, just
25 very, very generally, that are not commercially successful.

1 I think that further work, further financial analysis is
2 required to reliably get an estimate -- or a conclusion
3 about commercial success.

4 Q. Actually, you, I believe -- do you have any
5 experience that would support your opinion as to whether
6 this was a success for this company to achieve certain sales
7 in these large retailers?

8 You wouldn't have any expertise in that area,
9 correct? Specifically with the toy industry.

10 A. I wouldn't agree with that. I think that looking
11 at gross sales is one consideration, but my background and
12 training is in accounting and financial analysis, and I
13 think that there is further analysis that is required to
14 reliably get an estimate on -- or a conclusion on commercial
15 success.

16 Q. I'd like to move to CDX-4, slide 14.

17 Do you remember seeing this demonstrative from
18 Ms. Rosenblum?

19 A. I do.

20 Q. And I believe it shows Xploderz slotted, in
21 comparison to NERF lines in 2011, showing, for example,
22 XBlaster 200 would be 38 out of 250 compared to the NERF
23 products, correct?

24 A. That's what she testified to.

25 Q. Did you look at any of this underlying data? Do

1 you have any reason to dispute this?

2 A. I think that this is incomplete, but I don't
3 dispute the mathematics of her ranking of products.

4 Q. Thank you.

5 I just want to go back to your demonstrative,
6 which is RDX-7 at page 3.

7 I want to ask you a hypothetical question --
8 wait. Is it your opinion that there is no evidence of
9 commercial success?

10 A. My opinion is that there isn't sufficient
11 evidence of commercial success, and that when you look at
12 sales data that is overstated and you don't have a good
13 understanding of the overall economics of the product, in
14 terms of being able to assess its profitability, and when
15 you compare that with the relatively short lifespan of the
16 product, these indications, in my opinion, are informative
17 towards an opinion that there is not commercial success.

18 But, ultimately, there is just not enough
19 information to demonstrate that there is commercial success,
20 in my opinion.

21 Q. What if we just looked at one year, 2011, do you
22 have an opinion whether this Xploderz, Blaster Pro product
23 would have been -- would be considered commercially
24 successful in 2011?

25 A. I don't think that limiting the scope to a single

1 year addresses the issues. One of the most salient issues,
2 in my mind, is the lack of information regarding
3 profitability.

4 I think that there is serious issues with, not
5 only the sales data, but also the incompleteness of the
6 profit data. And without being able to reliably evaluate
7 the profits of the product, to me, it would be premature or
8 unreliable to conclude that they were a commercial success
9 without understanding those considerations.

10 Q. So if we're dealing with smaller companies that,
11 you know, have one employee left today, and we don't have
12 every single financial datapoint from that company from
13 years ago, you can never make a determination about
14 commercial success, is what it sounds like.

15 A. No, I wouldn't agree with the way that you
16 phrased it.

17 The way that I see it is that, in order to show
18 that there's commercial success, you need to have some
19 baseline of information that's available. And one of the
20 things that I would like to see in this case is whether or
21 not these accused products -- or, I'm sorry -- patented
22 products were profitable, but we can't evaluate that based
23 on the information that we have.

24 We know that both the revenue data is overstated
25 and the cost data is understated. And I think it would

1 be -- I think that the analysis is incomplete enough in this
2 instance that, regardless of the overall size of The Maya
3 Group, there isn't sufficient information to conclude that
4 these products specifically were commercially successful.

5 Q. What if we subtract out \$800,000 that was
6 discussed before from the calculation, and The Maya Group,
7 instead of having declining sales, had the same roughly
8 \$17 million in sales going across into the future, would
9 that represent commercial success to you?

10 A. I want to be open to what you're suggesting,
11 because you're essentially asking me to assume that, despite
12 what actually happened with The Maya Group, that there were
13 continued sales of a certain level, that the sales were
14 reliably set forth, and that they were profitable enough to
15 sustain operations for more years than they were actually
16 able to sustain.

17 So there are a lot of assumptions that would go
18 into that. I'm open to the idea that there could be
19 commercial success if you see multiple years of data showing
20 market share and profits and revenues, but in this case
21 that's just not the information that we have.

22 Q. Thank you.

23 MR. TAYLOR: I have no further questions.

24 JUDGE MCNAMARA: Thank you, Mr. Taylor.

25 Ms. Peterson, any redirect?

1 REDIRECT EXAMINATION

2 BY MS. PETERSON:

3 Q. Ms. Rowe, you were asked about whether
4 Mr. Ben-Ezer was the only remaining employee in The Maya
5 Group. Do you recall that?

6 A. Yes.

7 Q. And that's your understanding?

8 A. I think that's right.

9 Q. Mr. Sayres, could you please pull up CDX-4 at
10 slide 8?

11 Ms. Rowe, you were shown this slide 8 during your
12 cross-examination, which includes testimony from
13 Mr. Ben-Ezer about what he considered commercial success.

14 A. Yes.

15 Q. Is it your understanding that Mr. Ben-Ezer has a
16 financial interest in the outcome of this litigation?

17 A. I believe that he may receive some of the
18 proceeds should there be any financial outcome associated
19 with this investigation.

20 Q. You were also asked in your cross-examination
21 about The Maya Group's ability to get on the store shelves
22 at major retailers. Do you recall that?

23 A. I do.

24 Q. And did you see any other evidence of how The
25 Maya Group was able to do this?

1 A. So I do recall testimony about Mr. Brawer's
2 relationships with retailers and the positive experience
3 that some retailers had had with the Orbeez product.

4 Q. Mr. Sayres, can you please pull up the Brawer
5 deposition, which is CX-1852C? And I'm looking for page 52.

6 Ms. Rowe, you mentioned testimony by Mr. Brawer
7 about retailers. Is this the testimony you're referring to?

8 A. This is part of it. I think Mr. Ben-Ezer
9 testified to it, or maybe it was in a public news article
10 about the products, but I do recall this.

11 Q. At the bottom of the page here, line 52 -- I'm
12 sorry -- page 52, line 18-22, is that what you were
13 referring to?

14 A. That's part of it, yes.

15 Q. Okay.

16 MS. PETERSON: All right. I have no further
17 questions.

18 JUDGE MCNAMARA: Thank you, Ms. Peterson.

19 Mr. Shneidman?

20 MR. SHNEIDMAN: Very briefly, Your Honor.

21 JUDGE MCNAMARA: Sure.

22 RE CROSS-EXAMINATION

23 BY MR. SHNEIDMAN:

24 Q. Ms. Rowe, can I -- go ahead, and let's pull up
25 CX-1644C, which is Mr. Delman's deposition transcript. If

1 you can put the cover page first, so we can see the date.
2 This was January 24, 2023. And can I please have page 188,
3 lines 9-23.

4 Question: You'd agree with me that there are
5 toys that are commercially successful for a very brief
6 period of time, right?

7 Mr. Delman testified: Speaking as someone in the
8 industry --

9 JUDGE MCNAMARA: I am sorry. Okay. Go ahead and
10 read it, and then I will wait and hear what the objection
11 is. I apologize for interrupting.

12 Q. -- and familiar with the industry, there are some
13 short-lived fads that disappear and then come back again.
14 There are some shorter-lived products than others that might
15 be considered a success.

16 Question: Fidget spinners, for example?

17 They had their time, yes.

18 Question: It was all the rage for two years,
19 right?

20 Answer: Yes.

21 JUDGE MCNAMARA: So what is the question?

22 Q. The question is, do you disagree that a toy
23 that's on the market for a limited period of time can be
24 considered a commercial success?

25 MS. PETERSON: Your Honor, I just want to object

1 as outside the scope of redirect.

2 JUDGE MCNAMARA: I am sorry. Go ahead.

3 MR. SHNEIDMAN: I believe that Mr. Taylor
4 directly raised this question with respect to the duration
5 of time that something was on --

6 JUDGE MCNAMARA: I think he did, and I am going
7 to allow this.

8 THE WITNESS: Would you please repeat the
9 question?

10 BY MR. SHNEIDMAN:

11 Q. Do you disagree with Mr. Delman, that a product
12 that is a short-lived product might be considered a success?

13 A. I'm open to the idea that there could be a
14 product that was available for a short period of time that
15 was commercially successful, but I think that more analysis
16 is required to draw that conclusion.

17 I think that looking at things such as profit
18 share and profitability and overall sales is sort of a
19 complete picture. And it's my opinion that there hasn't
20 been sufficient evidence shown in this case.

21 MR. SHNEIDMAN: I have no further questions.

22 I did want to get back to Your Honor about what
23 "SOP" means. We believe it means sales order processing
24 from a Microsoft software export.

25 JUDGE MCNAMARA: I appreciate that. Thank you.

1 Mr. Taylor?

2 MR. TAYLOR: No further questions, Your Honor.

3 JUDGE MCNAMARA: All right. Ms. Rowe, you may
4 step down. Thank you very much.

5 THE WITNESS: Thank you.

6 JUDGE MCNAMARA: I have as our next witness
7 Mr. Charles Taylor.

8 MR. CORDELL: I don't think Mr. Taylor is being
9 called to testify, unless I missed something.

10 JUDGE MCNAMARA: Mr. George?

11 MR. GEORGE: Yes. Mr. Taylor is not being called
12 to testify.

13 JUDGE MCNAMARA: So have we finished?

14 MR. GEORGE: Have we?

15 MR. SMITH: The Respondents have finished their
16 rebuttal case, but we still have the economic domestic
17 industry experts to put on, which we're going to do right
18 now.

19 JUDGE MCNAMARA: Okay. Who are you calling
20 first?

21 MR. WILSON: Your Honor, the Complainants will
22 call Ms. Carla Mulhern. We think her testimony may go for
23 30, 45 minutes. Would now be an okay time to take a short
24 break?

25 JUDGE MCNAMARA: It would be a great time to take

1 a break. I will see you back here in 15 minutes.

2 (Whereupon, the proceedings recessed at 10:49
3 a.m.)

4 (In session at 11:05 a.m.)

5 JUDGE MCNAMARA: I gather that Ms. Carla Mulhern
6 is being called.

7 MR. WILSON: That's correct, Your Honor. Jack
8 Wilson from the Complainants. We will call Ms. Carla
9 Mulhern as the next witness.

10 JUDGE MCNAMARA: Very good. Good morning,
11 Ms. Mulhern.

12 CARLA MULHERN,

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

16 JUDGE MCNAMARA: Please state your full name.

17 THE WITNESS: My name is Carla S. Mulhern.

18 JUDGE MCNAMARA: Very good. Thank you.

19 DIRECT EXAMINATION

20 BY MR. WILSON:

21 Q. Good morning, Ms. Mulhern. Before we get started
22 on the testimony today, did you prepare any demonstratives?

23 A. Yes, I did.

24 Q. Mr. Lee, if we could please bring up CDX-0003C.

25 Ms. Mulhern, are these the demonstratives that

1 you prepared?

2 A. Yes, they are.

3 Q. Let's turn to the first slide, please.

4 Can you briefly describe your background?

5 A. Yes. I have a bachelor's degree in mathematics
6 from Bucknell University, and a master's degree in economics
7 from the London School of Economics and Political Science.
8 I am currently a managing principal at Analysis Group, which
9 is an economic and financial consulting firm. I'm based
10 here in D.C.

11 I've worked over the past 30 plus years now in
12 analyzing economic issues arising in the context primarily
13 of intellectual property matters. And I've testified
14 frequently at the International Trade Commission in section
15 337 investigations.

16 Q. What kind of issues have you provided testimony
17 on in 337 investigations?

18 A. So here at the ITC I've testified on the full
19 range of economic issues: economic prong of the domestic
20 industry requirement, amount and significance of inventories
21 as it relates to CDO, bond, public interest, and commercial
22 success.

23 MR. WILSON: Your Honor, at this time we would
24 tender Ms. Mulhern as an expert in the economic issues
25 related to section 337 investigations.

1 MR. SMITH: No objection, Your Honor.

2 JUDGE MCNAMARA: Then Ms. Mulhern is accepted as
3 an expert on the topics for which she has been called to
4 testify.

5 MR. WILSON: Thank you, Your Honor. I think at
6 this time we should move to Hasbro confidential record.

7 (Whereupon, the hearing proceeded in confidential
8 session.)

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

2 AFTERNOON SESSION

3 (In session at 1:30 p.m.)

4 JUDGE MCNAMARA: Good afternoon, everyone. I'm
5 sure you might have been surprised knowing that your case --
6 please be seated. Thank you so much.

7 You finished your case, and I was a little
8 surprised actually. I shouldn't have been but I was. I
9 think I was expecting maybe some testimony at least
10 initially on remedy and bond.

11 MR. SMITH: We do have one more witness,
12 Your Honor.

13 JUDGE MCNAMARA: Oh, yay. I was thinking this is
14 a little truncated.

15 Pardon me just a moment. I'm going to go get my
16 glasses.

17 So "oh yay" means, both, oh yes, and oh yay, so
18 take it as a double meaning, whichever you want.

19 All right. So who is our next witness?

20 MR. WILSON: Your Honor, if I may. On the
21 question about remedy and bond and cease and desist orders,
22 the parties agreed to streamline the econ DI experts. We
23 have submitted a motion for the admission of their expert
24 reports and demonstratives, deposition designations, and
25 exhibits cited in those reports. We filed that with

1 Your Honor last night.

2 The motion also includes some tech DI and
3 infringement issues, but that was submitted last night and
4 would cover those two issues in particular.

5 JUDGE MCNAMARA: That's good to know. Obviously
6 I didn't see that last night. That's good to know. We'll
7 take care of that, and that will be fine.

8 The other thing I wanted to mention to you all, I
9 am going to give you now before we leave, we have some other
10 business in addition to the witness to take care of, but I
11 have picked -- my staff and I got together last week and we
12 talked about possible timelines for the infringement
13 component of the case, depending on how the Commission
14 rules, of course. It won't be necessary if they agree with
15 the Motion for Summary Determination Order. It will be
16 necessary, obviously, if they don't.

17 So what we're looking at, given the schedule and
18 given time and people's vacations and so forth, the last
19 week of October, pick any two days. If you all could get
20 together with your witnesses, and just for the time being
21 just pick two days, the last week of October, and we'll put
22 it on the schedule for the infringement case. And we may
23 not need it. And it will be far enough out. And given,
24 again, schedules and so forth, that we'll certainly know
25 sooner rather than later whether we're going to need -- the

1 Amgen case came down, so I've been sort of watching that as
2 well.

3 So that gives you some range within at least that
4 week to pick two days that you all can agree upon. Okay?

5 Mr. Smith?

6 MR. CORDELL: Before we do that, Your Honor,
7 could I do one little housekeeping thing?

8 JUDGE MCNAMARA: Sure.

9 MR. CORDELL: It may not be apparent to any of
10 us, but Jack Wilson is also a NEXT Advocate.

11 JUDGE MCNAMARA: Oh, I think that's wonderful.
12 It was not apparent, and good for you, and well done.

13 MR. CORDELL: And then I would also like to
14 recognize Irene Hwang and Autumn Wu, who were both slated to
15 do witnesses that unceremoniously were withdrawn. So they
16 didn't get a chance.

17 JUDGE MCNAMARA: So next time. At least you're
18 in it now, you know. You're here to do it, so that's a good
19 thing. That's very good. We'll see you the next time.

20 MR. CORDELL: Thank you.

21 JUDGE MCNAMARA: Much appreciated.

22 MR. SMITH: We start with Ms. Rowe. You
23 mentioned yesterday about PTT Respondents filing updated
24 lists of the invalidity, obviousness assertions that we were
25 making. We filed it on EDIS this morning, and I have a

1 paper copy, if you would like it.

2 JUDGE MCNAMARA: Would love it. Thank you.

3 MR. TAYLOR: Your Honor, we're on confidential.

4 JUDGE MCNAMARA: I think we can be on public.

5 Ms. Kinkade? Okay.

6 All right. We'll take care of exhibits, then,
7 after we're done. I'll give you some time after we're done
8 with the witness. I usually go back into the back and we
9 sit and we kibbutz for a little while, while we're waiting
10 for the exhibits. That way we can get the exhibit lists in
11 today and everything can be finished and concluded except
12 for waiting for the infringement.

13 Ready to go, Mr. Smith?

14 MR. SMITH: Sure. Prime Time Toys calls Julia
15 Rowe.

16 JUDGE MCNAMARA: Okay. Very good. You're still
17 under oath, so you're fine.

18 JULIA ROWE,

19 having been previously duly sworn or affirmed
20 on their oath, was thereafter examined and testified further
21 as follows:

22 DIRECT EXAMINATION

23 BY MR. SMITH:

24 Q. Good afternoon, Ms. Rowe.

25 A. Good afternoon.

1 Q. You mentioned to Ms. Peterson this morning that
2 you essentially had two assignments in this investigation.
3 One was to opine on the economic aspects of domestic
4 industry and remedy and commercial success. So let's talk
5 today about your domestic industry opinions.

6 A. Okay.

7 Q. You understand that the parties have agreed to
8 focus your testimony today on just the significance of
9 Hasbro's claim and that a domestic industry is in the
10 process of being established. Do you understand that?

11 A. That's my understanding.

12 Q. Did you prepare any demonstratives for your
13 testimony today?

14 A. I did. I believe they are marked RDX-6C.

15 Q. Do you have prior experience working on section
16 337 investigations, particularly with domestic industry?

17 A. Yes. I've done this many times.

18 Q. And you were here when Ms. Mulhern testified this
19 morning?

20 A. I was.

21 MR. SMITH: Your Honor, in case we need to, Prime
22 Time Toys offers Ms. Rowe as an expert in economics, finance
23 and accounting for this part of her testimony.

24 JUDGE MCNAMARA: Mr. Boyd?

25 MR. BOYD: No objection, Your Honor.

1 JUDGE MCNAMARA: All right. Then Ms. Rowe is
2 accepted as an expert for the topics on which she has been
3 called to testify.

4 MR. SMITH: Your Honor, at this point I believe
5 we need to move onto the Hasbro confidential record.

6 (Whereupon, the hearing proceeded in confidential
7 session.)

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3 JUDGE MCNAMARA: So I understand the cases are in
4 except for, of course, the unknown result yet with
5 infringement. Is that accurate?

6 Mr. Cordell?

7 MR. CORDELL: Yes, Your Honor.

8 JUDGE MCNAMARA: Very good. Mr. Smith?

9 MR. SMITH: Yes, that's our understanding as
10 well.

11 JUDGE MCNAMARA: All right.

12 MR. CORDELL: Except, Your Honor, I think we have
13 three exhibits to admit.

14 JUDGE MCNAMARA: Okay. And you've agreed upon
15 these?

16 MR. CORDELL: We have.

17 JUDGE MCNAMARA: Okay. And does that include the
18 exhibits that Ms. Rowe relied upon in her testimony? Is
19 this it, then, for all of the exhibits that are coming in?

20 MR. WILSON: Yes, Your Honor. This is Jack
21 Wilson. This should be all the exhibits, given the motion
22 that was filed last night, that will cover Ms. Rowe's
23 exhibits for domestic industry as well as Ms. Mulhern's,
24 some depo designations and the issues that I spoke about
25 earlier.

1 The three exhibits we need to admit -- we
2 conferred over lunch -- relate to Ms. Rowe's testimony for
3 commercial success. Those exhibits are RDX-0007C, and that
4 should be admitted for demonstrative purposes only, CX-0165C
5 and CX-1854C. And those are -- that should be all of the
6 exhibits left for Your Honor.

7 (Whereupon, the exhibits as recited by counsel
8 and reflected in the attached index were submitted and
9 received in evidence.)

10 JUDGE MCNAMARA: Okay. Very good. And then
11 since -- if this afternoon you could present a written
12 exhibit list, I think you all have -- you can send that to
13 the contact, we'll let you know, I think it's LaShonne
14 Robinson at Heritage, and I think you have all been given
15 Box or you've been told how to submit exhibits through Box
16 as well.

17 MR. WILSON: That's correct.

18 JUDGE MCNAMARA: Have you given Ms. Muhammad
19 contacts? I think she contacted you. If not, she will this
20 afternoon.

21 MR. WILSON: I think we received that, but we
22 will verify.

23 MR. SMITH: I believe so.

24 JUDGE MCNAMARA: Very good. Then you know how to
25 provide the exhibits. Make sure you have very clear tables

1 of contents when you submit your exhibits. Make sure also,
2 please, that if any exhibit have been withdrawn that you no
3 longer are relying upon, that that's also very clear.
4 Because there are sometimes exhibits in prehearing briefs
5 and sometimes exhibits that are going to be relied upon in
6 post-hearing briefs that have been withdrawn, or there may
7 be a discrepancy. Double-check those lists to be sure that
8 they are accurate so that, as we start to look at the
9 exhibits and start to prepare to write, that we don't run
10 into a problem with that. I have in the past. So just be
11 very careful about that.

12 The other issue, of course, is the briefing
13 schedule.

14 MR. SMITH: Your Honor, can we go on the public
15 record?

16 JUDGE MCNAMARA: Sure.

17 MR. SMITH: I think we can probably backdate to
18 the end of Ms. Rowe's testimony.

19 JUDGE MCNAMARA: I think that's right. Thank
20 you. What we're going to do, I'm going to set up the
21 briefing schedule so that you are briefing all of the issues
22 that were addressed during the trial this past week, last
23 week and this week. Depending upon what happens with
24 infringement, there would be a different briefing schedule
25 for just the infringement portion of it, not surprisingly.

1 Right now we think we can keep the target date in
2 place. We think that with a divided briefing schedule that
3 we can keep the ID date, the ID due date in place, but I'm
4 not quite sure yet. We will wait and see if the decision
5 from the Commission comes down before October and they
6 uphold the Order on Motion for Summary Determination and
7 Infringement, then obviously there is no need for any
8 further briefing. There would be no need for the October
9 dates for an infringement case. So essentially we would be
10 done. And that's how we will work it.

11 I'll issue an order on a briefing schedule from
12 just the trial. I think the schedule is already in place,
13 and I think we could probably use that schedule that's in
14 place.

15 Mr. Smith?

16 MR. SMITH: Just one point of clarification.
17 Given the way that we structured expert reports in this case
18 where we had initial with burden and then non-burden, but
19 during the non-burden time the Complainants put in their
20 secondary considerations and then there was a rebuttal to
21 that. I don't know, do we want to -- I don't want to
22 suggest a three-tiered briefing process.

23 JUDGE MCNAMARA: No, it's not necessary. I give
24 you an opportunity to submit post-hearing briefs and
25 post-hearing reply briefs.

1 MR. SMITH: Okay.

2 JUDGE MCNAMARA: And typically the parties have
3 broken that up as they have chosen, and so you can do that.
4 It would be typical to in a reply brief respond to, for
5 example, some of the secondary considerations. You can
6 break it up. This was an unusual presentation, to say the
7 least.

8 MR. CORDELL: It really was, Your Honor. I feel
9 a little bit had here, I have to confess, and I think this
10 is part of the Kirkland folks. This is the trail that they
11 have blazed.

12 Because, remember, I was forestalled from
13 examining Mr. Delman about secondary considerations because
14 he was supposed to reappear and he didn't.

15 JUDGE MCNAMARA: Good point.

16 MR. CORDELL: So, again, we'll brief it. We
17 understand where we are. We understand the Respondents'
18 decision not to put him up again, but, again, that was just
19 not kind of what --

20 JUDGE MCNAMARA: What you had anticipated.

21 MR. CORDELL: So we think we can do it in an
22 opening brief with a reply and --

23 JUDGE MCNAMARA: I guess I'm curious, though.
24 Since I wasn't informed until this morning that Mr. Delman
25 was not being called again, did you all know that last

1 night?

2 MR. CORDELL: We heard it late last night. They
3 sent us an email saying that they would not present him.

4 JUDGE MCNAMARA: And so did you raise an issue
5 with them last night saying, hey, we would really like to
6 bring him back?

7 MR. CORDELL: Well, we did, and we actually toyed
8 with calling him ourselves, although it's a little odd for
9 me to call their witness.

10 JUDGE MCNAMARA: There might have been, but,
11 under the circumstances, I probably would have allowed it.

12 MR. CORDELL: Well, and they bear the burden. So
13 validity always remains to them. We have a burden of
14 production, which I think we have clearly met, and so the
15 burden of persuasion is with them. If they make the
16 decision not to recall him, that's really --

17 JUDGE MCNAMARA: That's true, but you said you
18 feel a little bit had, and that is sort of what I am
19 addressing. Because if you had the opportunity to actually
20 bring him back or let me know that this had occurred -- I
21 was just presented with a fait accompli.

22 MR. SMITH: Your Honor, if I may, you asked
23 Mr. Cordell if they raised this with us last night and
24 Mr. Cordell said we did. They did not that I can tell. I
25 did not see a response about us not calling Mr. Delman

1 today.

2 MR. CORDELL: We were just informed x capitra
3 that they would not be calling him is what happened. And if
4 you recall the exchange that I had with Mr. George on Friday
5 and he forestalled my examination of Mr. Delman promising
6 and telling us all, I heard him say that he had given us
7 exhibits and then had withdrawn them. We rushed back to the
8 office and looked and could find no such exhibits.

9 And I think what he meant to say is that they
10 pulled them out of the set before they gave them to us,
11 which I think was his prerogative, but it's -- we are where
12 we are.

13 JUDGE MCNAMARA: We are where we are.

14 MR. CORDELL: We're prepared to brief it on the
15 record we have developed. But, for example, we firmly
16 believe that a complete obviousness analysis on the part of
17 a patent challenger involves secondary considerations, and
18 there's a big hole in what Respondents have done. But,
19 again, I let them make their own decisions.

20 JUDGE MCNAMARA: Mr. George, do you have a
21 response?

22 MR. GEORGE: It sounds like we're just
23 complaining about things, and that's okay. My response is
24 the commercial success -- Mr. Delman gave testimony about
25 secondary considerations in the form of the Carlson patent

1 and the Korean reference, and he was cross-examined on that.

2 The remaining testimony about commercial success,
3 I don't know what they were expecting, really goes to nexus.
4 And, frankly, we established that through Mr. Kudrowitz.
5 There was no reason to put Mr. Delman on the stand and say
6 is more ammo covered by claim 1. Just, to me, it seemed a
7 waste of time.

8 But they can write their brief. They can say we
9 didn't meet our burden. I really don't understand what the
10 complaint is.

11 JUDGE MCNAMARA: I think part of what at least
12 I'm hearing is there may not have been a mutuality in the
13 communication, let me -- or a mutuality of understanding.

14 MR. CORDELL: I think that's right, Your Honor.
15 And I think it may be the thing that makes it, again, a
16 little hard for me to see is that Respondents chose the
17 secondary considerations that they wanted to advance in the
18 first presentation promising that the rest of them would be
19 dealt with in the second, and then they withdrew the second.

20 So, again, everybody has strategic ideas and
21 pathways that they choose, but that's what happened. I'm
22 not asking to go back and redo anything. We're prepared to
23 brief it on this record. But I just want to note that,
24 again, we were promised something that just didn't happen.

25 JUDGE MCNAMARA: So I guess my question at this

1 point is what can I do to --

2 MR. GEORGE: He is not asking you to do anything,
3 Your Honor. He is just complaining.

4 MR. CORDELL: I would ask you to find against
5 Respondents.

6 MR. GEORGE: Very good.

7 JUDGE MCNAMARA: That was certainly expected, you
8 know. I would expect that you would want that.

9 So I think at this point -- and I think it's
10 something that I hear a little bit too infrequently where
11 there has not been a meeting of the minds on some of these
12 things, and so it does create some difficulties. I have
13 seen it in a lot of different circumstances. Not
14 surprisingly, you all have been part of it.

15 If there is nothing I can do now, then the only
16 question I have is, again, you are free to divide up your
17 briefing. Again, everything came in a little bit in an
18 unusual fashion in this case.

19 So the way I look at it is you have got -- do you
20 need more pages to brief, to use in your post-hearing briefs
21 and reply briefs? Do you need more pages? Is there
22 anything you're suggesting that I can do that can make sure
23 that, you know, everyone's rights are protected at this
24 point other than just -- both sides can brief on your
25 burdens. You can have reply briefs. And then what, if

1 anything?

2 MR. CORDELL: It is an intriguing possibility,
3 Your Honor, for an additional reason, which is so much of
4 the record was submitted on paper.

5 JUDGE MCNAMARA: It was, which is unusual for me
6 as well.

7 MR. CORDELL: And in fairness to Your Honor and
8 to your staff, a few extra pages in the brief might actually
9 assist with the resolution of the case.

10 MR. GEORGE: That's fine, Your Honor.

11 JUDGE MCNAMARA: You're easy, Mr. George.

12 MR. GEORGE: What's that?

13 JUDGE MCNAMARA: You're easy.

14 MR. GEORGE: I try. I try.

15 JUDGE MCNAMARA: Okay. So why don't you give me
16 a proposal on that. Why don't you all get together and talk
17 and agree, all right, and let me know the number of pages
18 that you think might be helpful in this set of
19 circumstances.

20 Again, this was a little unusual. I don't, as
21 you know, make a practice of relying on expert witness
22 reports. I haven't done that typically. And I think we
23 probably have more coming in on the paper in this case than
24 I often do so we can accommodate that.

25 MR. GEORGE: Thank you, Your Honor. I would just

1 like to say one more thing. I would like to thank you and
2 your staff for giving us those two days after they settled
3 at the last moment. We really appreciate it. And we know
4 it's not just you, there's a staff behind you, and we thank
5 them too.

6 JUDGE MCNAMARA: And they are good.

7 MR. GEORGE: We thank the staff and we thank
8 opposing counsel for working with us to really narrow this
9 case to where we were able to do it in three days. I want
10 to thank you all.

11 JUDGE MCNAMARA: I appreciate that. I appreciate
12 what you all did too, because it is very hard in trial.
13 Your heads are so focused on what you need to do and get
14 done and get in, and to have everything disrupted is -- can
15 be a real burden, and yet, on the other hand, it also shows
16 your measure as attorneys that you were able to turn that
17 around and get this in and get it in well. That's a hard
18 thing to do and you did it.

19 MR. CORDELL: On behalf of Complainants, we also
20 appreciate all the time and attention you and your staff
21 have given us. It's been a pleasure.

22 JUDGE MCNAMARA: We enjoy this. In case it isn't
23 clear, we all enjoy this and we really get to see really
24 fine work. And that makes practicing law really enjoyable
25 for us.

1 So thank you very much. We will send you an
2 order on the briefing schedule, which I think is already in
3 place, but we will reaffirm that and any other instructions,
4 but I'll include in that order, once you submit to me, let
5 me know, if you will, by Friday how many pages you think you
6 may need, and then you can split it up between your
7 post-hearing brief and your reply brief, as you choose.
8 Okay?

9 MR. CORDELL: Thank you.

10 JUDGE MCNAMARA: And then you have the freedom to
11 do that. Thank you very much.

12 MR. CORDELL: Thank you, Your Honor.

13 MR. GEORGE: Thank you.

14 JUDGE MCNAMARA: And make sure you get the list
15 into us and the three exhibits for today. Thank you again.

16 (Whereupon, the proceedings concluded at 2:41
17 p.m.)

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6 Exhibits from Lynn Rosenblum Direct

7 CDX-0004C (for demonstrative purposes only)

8 CX-0531C

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10 CPX-0032 to CPX-0069

11 CPX-0072 to CPX-0074

12 CX-0165C

13 CX-1634C

14 CX-0173C

15 CX-1631C

16

17 Exhibits admitted during the evidentiary hearing

18 on May 23, 2023

19 Exhibits from Ms. Rowe

20 RDX-0007C (for demonstrative purposes only)

21 CX-1854C

22 CX-0165C

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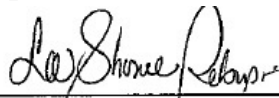
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3 DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS
4 CONTAINING SAME
5 INVESTIGATION NO.: 337-TA-1325
6 HEARING DATE: May 23, 2023
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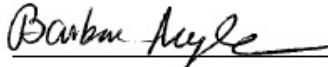


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