BRIODY - ACTIVISION 1985
LEVY 6-136

THE COURT: THANK YOU, DOCTOR. YOU MAY STEP DOWN.

(WITNESS EXCUSED)

MR. ANDERSON: OUR NEXT WITNESS IS MR. THOMAS BRIODY.

THOMAS A. BRIODY,

CALLED AS A WITNESS, BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE COURT: WOULD YOU STATE YOUR NAME FOR THE RECORD AND SPELL YOUR FULL NAME.

THE WITNESS: THOMAS A. BRIODY, B-R-I-O-D-Y.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q. MR. BRIODY, STATE YOUR HOME ADDRESS?

A. I RESIDE AT 225 THAYER POND ROAD. THAYER POND IS TWO WORDS. T-H-A-Y-E-R, IN WILTON, CONNECTICUT.

Q. BY WHOM ARE YOU EMPLOYED?

A. BY NORTH AMERICAN PHILIPS CORPORATION.

Q. WHAT IS YOUR POSITION WITH NORTH AMERICAN PHILIPS CORPORATION?

A. I AM THE CORPORATE PATENT COUNSEL FOR NORTH AMERICAN PHILIPS.

Q. WOULD YOU PLEASE DESCRIBE GENERALLY YOUR RESPONSIBILITIES AT NORTH AMERICAN PHILIPS AS CORPORATE PATENT COUNSEL?

A. I AM RESPONSIBLE FOR ALL THE INTELLECTUAL PROPERTY ACTIVITIES OF NORTH AMERICAN PHILIPS.

Q. HOW LONG HAVE YOU BEEN EMPLOYED BY THAT COMPANY?

A. WELL, I STARTED WITH THE MAGNAVOX COMPANY IN SEPTEMBER OF 1972. AND AS I RECALL, IN 1974 NORTH AMERICAN PHILIPS CORPORATION, THROUGH A SUBSIDIARY BY THE NAME OF NORTH AMERICAN PHILIPS DEVELOPMENT CORPORATION, BOUGHT THE MAGNAVOX COMPANY.

SO CONSIDERING MY EMPLOYMENT WITH MAGNAVOX STARTING IN 1972, I HAVE BEEN WITH THE TWO COMPANIES NOW FOR ALMOST 13 YEARS.

Q. HAVE YOUR DUTIES BEEN SUBSTANTIALLY THE SAME DURING THE ENTIRE EMPLOYMENT BY MAGNAVOX AND THEN BY NORTH AMERICAN PHILIPS?

A. WELL, DURING ALL THAT TIME, MR. ANDERSON, I HAVE BEEN A PATENT ATTORNEY, PATENT LAWYER. BUT WHEN I STARTED WITH MAGNAVOX IN 1972, THERE WAS ONLY ONE OTHER PATENT ATTORNEY BESIDES ME, AND NOW I HAVE TWO PATENT ATTORNEYS WHO REPORT TO ME AS CORPORATE PATENT COUNSEL OF NORTH AMERICAN PHILIPS.

Q. WILL YOU JUST DESCRIBE YOUR GENERAL RESPONSIBILITIES AS THEY HAVE CHANGED OVER THE PERIOD OF TIME FROM 72 TO THE PRESENT?

A. WELL, THEY HAVE ALWAYS BEEN INTELLECTUAL PROPERTY, MEANING PATENTS, TRADE MARKS AND COPY RIGHTS. IT INCLUDES THE PROCESS OF OBTAINING PATENTS, TRADE MARKS AND COPYRIGHTS, PROTECTING THEM, UTILIZING THE PATENTS BY LICENSING AND LITIGATION RELATING TO PATENTS TRADEMARKS AND OTHER FORMS OF INTELLECTUAL PROPERTY.

MY DUTIES IN THE PAST 13 YEARS HAVE CHANGED A LITTLE BIT WITH RESPECT TO MANAGEMENT RESPONSIBILITIES THAT HAVE BEEN ADDED TO MY EARLIER RESPOSIBILITIES. I NOW HAVE FOUR GROUP

GAME MARKET IN THE UNITED STATES BLOSSOMING, HAD TO GO INTO STORES AND ACTUALLY INTERACTIVELY PLAY THE GAME TO GET ENTHUSED AND ENJOY ITS PLAYABILITY AND THEN GO HOME TO THEIR PARENTS AND SUGGEST TO THEM THAT THEY BUY ONE.

AS I RECALL, THE INITIAL ODYSSEY GAME SOLD FOR ABOUT A HUNDRED DOLLARS AT RETAIL. AND ONE OF THE PROBLEMS IN SELLING IT AT FIRST, AND I AM TALKING ABOUT HOME VIDEO GAMES, WAS THAT THE DEALERS MAINLY SPECIALIZED IN SELLING TELEVISION SETS AND AUDIO CONSOLES. AND THEY MADE A SIGNIFICANTLY GREATER MARGIN OF PROFIT ON SELLING THESE OTHER DEVICES.

SO IT WAS RATHER DIFFICULT TO GET THEM ENTHUSED IN SELLING VIDEO GAMES WHEN IT FIRST HIT THE MARKETPLACE.

DO YOU WANT ME TO CONTINUE, MR. ANDERSON OR AM I---

Q. WHAT WAS YOUR PERSONAL INVOLVEMENT IN ALL OF THIS ACTIVITY THAT YOU HAVE JUST DESCRIBED?

A. WELL, I BECAME INVOLVED IN LICENSING THE VIDEO GAME PATENTS OF SANDERS, AS I RECALL, SHORTLY AFTER THE ODYSSEY VIDEO GAME APPEARED ON THE MARKET, BECAUSE THERE WAS A GAME THAT CAME OUT--I RECALL SEEING IT FIRST AFTER I ARRIVED IN FORT WAYNE IN SEPTEMBER OF '72-- WHICH WAS CALLED PONG.

IT WAS A COIN-OPERATED VIDEO GAME. AND WHEN IT APPEARED ON THE MARKET--SHORTLY AFTER THAT--THERE WAS A BLOSSOMING OF OTHER ARCADE TYPE COIN-OPERATED VIDEO GAMES THAT WERE SOMEWHAT SIMILAR IN TYPE. AND THEY WERE MAINLY THE HIT AND HITTING KINDS OF VIDEO GAMES.

SO WHAT WE DID, WE TOOK A LOOK AT THE PATENTS AND WE WENT TO AN OUTSIDE COUNSEL IN FORT WAYNE AND ASKED FOR AN OPINION AS TO WHETHER OR NOT THEY WERE GOOD PATENTS. AND THEY SAID THEY WERE.

AND WE NOTIFIED A NUMBER OF ARCADE VIDEO GAME COMPANIES THAT THEY INFRINGED THE PATENTS AND WE INITIATED NEGOTIATIONS FOR LICENSES WITH THESE COMPANIES.

AS I RECALL, ONE OF THEM WAS ATARI. ONE WAS BALLY-MIDWAY. ANOTHER ONE WAS SEEBURG. AND CHICAGO DYNAMICS.

A LITTLE BIT LATER ON ALLIED LEISURE APPEARED ON THE SCENE. AND WE UNDERTOOK NEGOTIATIONS TO OBTAIN LICENSES UNDER THE PATENTS. AND THEY WEREN'T VERY SUCCESSFUL.

AFTER A NUMBER OF MONTHS HAD PASSED, IT BECAME SOMEWHAT APPARENT THAT THE ARCADE GAME COMPANIES WERE NOT INTERESTED IN TAKING A LICENSE. AND WE HAD SENT OUT LICENSING DRAFTS TO THEM AND PROPOSED LICENSING ARRANGEMENTS.

SO, AS I RECALL, WE THEN WENT TO OUTSIDE COUNSEL IN CHICAGO, YOUR LAW FIRM, AND ASKED FOR AN OPINION ON WHETHER OR NOT WE WOULD BE JUSTIFIED IN SUING UNDER THE PATENTS; AND NOT LONG AFTER THAT WE COMMENCED LAWSUITS IN CHICAGO AGAINST A NUMBER OF THESE ARCADE GAME COMPANIES.

I THINK THE FIRST NUMBER OF LAWSUITS IN CHICAGO INCLUDED AS DEFENDANTS SEEBURG, ATARI, CHICAGO DYNAMICS. A LITTLE BIT LATER, AS I SAID, ALLIED LEISURE AND BALLY MIDWAY.

Q. AT THE SAME TIME, OR IN THAT TIMEFRAME, WAS THERE ANY

ACTIVITY THAT YOU WERE INVOLVED IN ABROAD?

A. YES. AS I RECALL, TOWARD THE END OF 1974, I THINK IT WAS, WE STARTED LICENSING OUTSIDE THE UNITED STATES. WE LEARNED THAT THERE WERE COIN-OPERATED VIDEO GAMES APPEARING IN ENGLAND. AND SOME OF THE EUROPEAN COUNTRIES.

SO OUR FIRST LICENSE WAS WITH A COMPANY IN ENGLAND AT THAT TIME BY THE NAME OF BLEWNEWT, B-L-U-E-N-E-W-T, I BELIEVE. IT NO LONGER EXISTS. IT CHANGED ITS NAME TO ANOTHER COMPANY, WHICH IS, I THINK, STILL A LICENSEE TODAY.

SO WE SIMULTANEOUSLY WERE ENDEAVORING TO LICENSE THE SANDERS VIDEO GAME PATENTS IN EUROPE AND ABROAD AS WELL AS IN THE UNITED STATES.

Q. DID ALL OF THE GAMES THAT YOU ARE TALKING ABOUT INVOLVE GAMES WHERE THERE WAS A PLAYER AND A MACHINE SYMBOL AND INTERACTION WITH A CHANGE OF MOTION, WHAT IS SOMETIMES CALLED HIT AND HITTING GAMES?

A. IT IS A LONG TIME AGO, BUT THE MOST SIGNIFICANT GAMES I RECALL WERE HIT AND HITTING KIND OF GAMES, THE TYPE THAT WE CONSIDERED TO BE COVERED BY THE RUSCH REISSUE PATENT.

AT THAT TIME MOST OF THE GAMES ON THE MARKET, THE ARCADE GAMES THAT WERE REALLY SELLING AND WERE POPULAR, WERE SPORTS KIND OF GAMES THAT INVOLVED HIT AND HITTING, LIKE SOCCER AND BASEBALL AND FOOTBALL.

Q. WHAT WAS THE GENERAL REACTION, AS YOU OBSERVED IT, IN YOUR WORK ON THE ODYSSEY AND VIDEO GAMES WITH RESPECT TO THE CONSUMER

REACTION TO THE HIT AND HITTING GENERAL TYPE OF GAMES AND OTHER GAMES?

MR. GLICK: I OBJECT TO THAT, YOUR HONOR. THERE IS ABSOLUTELY NO FOUNDATION FOR HIS OBSERVATION OF HOW CONSUMERS REACTED. WE HAD TESTIMONY THAT I OBJECTED TO PREVIOUSLY AS TO ITS QUESTIONABLE NATURE.

THE COURT: WELL, IF THE WITNESS HAS KNOWLEDGE OF CONSUMER REACTION, I WILL PERMIT HIM TO TESTIFY TO IT. AND THE FACT OF HIS BEING PATENT COUNSEL GOES TO WEIGHT.

Q. (BY MR. ANDERSON) WOULD YOU LIKE THE QUESTION REREAD?

A. REPEAT IT.

(RECORD READ)

THE COURT: I THINK, UPON REREADING, IT IS TERRIBLY COMPOUND AND AMBIGUOUS. BRAKE IT DOWN.

Q. (BY MR. ANDERSON) MR. BRIODY, DID YOU, IN YOUR DEALINGS WITH THESE VARIOUS MANUFACTURERS, COME IN CONTACT WITH MANUFACTURERS THAT WERE MAKING BOTH HIT AND HITTING TYPE OF GAMES, AS WE HAVE GENERALLY DESCRIBED THEM, AND OTHER GAMES WHICH DIDN'T INVOLVE IMPARTING DISTINCT MOTION OF PLAYER AND MACHINE?

A. YES. I THINK THERE WAS A GREAT AMOUNT OF POPULARITY FOR AT IT, AT LEAST AMONG THE ARCADE GAME MANUFACTURERS, FOR THIS TYPE OR KIND OF GAME. IT WAS NEW ON THE SCENE. IT WAS INTERACTIVE AND YOU COULD PLAY A SPORTS KIND OF A GAME OR HIT AND HITTING KIND OF A GAME ON THE SCREEN. AND IT WAS A NEW KIND OF A GAME

BOARD THAT BECAME VERY VERY POPULAR. THE COIN-OPERATED GAMES REALLY TOOK OFF.

(CONTINUED ON NEXT PAGE)

MR. GLICK: YOUR HONOR, THE ANSWER WAS NOT RESPONSIVE TO THE QUESTION. TO THE EXTENT THAT IT IS INTENDED TO REFLECT THE HEARSAY OPINION OF MANUFACTURERS FOR THE TRUTH OF THE PROPOSITION STATED, I MOVE TO STRIKE IT. IF IT IS OFFERED ONLY AS BACKGROUND FOR WHAT THIS WITNESS DID NEXT, I HAVE NO OBJECTION.

THE COURT: I THINK IT IS BACKGROUND. OBVIOUSLY, HE IS NOT AN EXPERT.

Q. (BY MR. ANDERSON) YOU MENTIONED THAT MAGNAVOX AND NORTH AMERICA PHILLIPS HAVE PURSUED LICENSEES. AND HAVE THEY OBTAINED LICENSEES?

A. YES. WE HAVE OBTAINED A LARGE NUMBER OF LICENSEES OVER A PERIOD OF TIME. THE NUMBER OF LICENSEES TODAY, ACCORDING TO OUR ADMINISTRATOR'S RECORDS THAT WERE RECENTLY BROUGHT UP-TO-DATE, IS 42 LICENSEES--42 LICENSES THAT ARE ACTIVE AND 22 THAT ARE INACTIVE. SO TOTALLY THAT WOULD MEAN THAT THERE WERE AT ONE TIME 64 LICENSES.

THE INACTIVE LICENSEES ARE MAINLY BECAUSE OF BANKRUPTCY OR COMPANIES THAT WERE IN THE BUSINESS AND THEN WENT OUT OF THE BUSINESS, AND THE NUMBER INCLUDES HOME VIDEO GAME LICENSES AND COIN-OPERATED VIDEO GAME LICENSES AND SOME WHICH ARE A COMBINATION OF BOTH.

Q. HAVE YOU AND YOUR DEPARTMENT BEEN INVOLVED IN ALL OF THESE LICENSES AND LICENSE NEGOTIATIONS?

A. YES.

Q. APPROXIMATELY HOW MANY OF THE LICENSEES THAT YOU HAVE MENTIONED WERE MAKING THE HIT AND HITTING TYPE OR THE RUSCH TYPE OF GAME?

A. I THINK ALL OF THEM WERE, MR. ANDERSON.

Q. WITH RESPECT TO THE RELATIONSHIP OF THOSE GAMES TO OTHER GAMES, WERE SOME OF THEM MAKING ONLY HIT AND HITTING OR RUSCH TYPE GAMES OR WERE THEY MAKING VARIOUS THINGS?

A. SOME OF THEM WERE MAKING VARIOUS GAMES.

Q. WERE SOME MAKING ONLY HIT AND HITTING GAMES, AS FAR AS YOU KNOW, AT SOME STAGE?

A. I CAN'T ANSWER THAT QUESTION ACCURATELY.

Q. APPROXIMATELY HOW MANY LICENSES HAVE YOU, MAGNAVOX, AND NORTH AMERICA PHILLIPS ENTERED INTO THAT INVOLVE A LICENSE FOR MICROPROCESSOR GAMES?

A. I CAN'T GIVE YOU AN EXACT NUMBER, BUT I WILL SAY A DOZEN OR MORE.

Q. CAN YOU NAME SOME OF THE LICENSEES THAT MAGNAVOX AND NORTH AMERICA PHILLIPS HAVE ENTERED INTO LICENSES FOR MICROPROCESSOR TYPE GAMES?

A. WELL, IN THE UNITED STATES THERE IS ATARI AND MATTEL AND THERE IS A TOY COMPANY IN CONNECTICUT, THE NAME OF WHICH ESCAPES ME FOR A MOVEMENT. I WILL PROBABLY RECALL IT--COLECO.

WE AT ONE TIME GRANTED A LICENSE, BUT PERHAPS IT WAS JUST FOR PAST INFRINGEMENT TO RCA AND FAIRCHILD. THEY HAD MICROPROCESSOR GAMES AT ONE TIME ON THE MARKET.

IN EUROPE NV PHILLIPS HAS A MICROPROCESSOR LICENSE, MICROPROCESSOR GAME LICENSE. SABVA (PHONETIC) I BELIEVE, GRUENDIG.

THERE ARE SEVERAL COMPANIES IN FRANCE, I DON'T KNOW THEIR NAMES, THAT HAVE MICROPROCESSOR GAME LICENSES. AND I THINK THERE ARE ABOUT THREE OR FOUR THAT ARE IN HONG KONG THAT HAVE MICROPROCESSOR GAME LICENSES.

SO, IN A NUTSHELL, I THINK I HAVE COVERED THE FIELD ON MICROPROCESSOR--- THERE WAS ANOTHER COMPANY THAT HAD A MICROPROCESSOR GAME LICENSE, PERHAPS A PF. I AM NOT SURE WHETHER THAT COVERED MICROPROCESSOR OR THAT WAS FOR PAST INFRINGEMENT.

Q. YOU MENTIONED MATTEL AS HAVING A LICENSE FOR MICROPROCESSOR GAMES, WHEN DID MATTEL TAKE ITS LICENSE, APPROXIMATELY?

A. IT WAS A COUPLE OF YEARS AGO. AND AFTER THE DISTRICT COURT IN CHICAGO RULED IN FAVOR OF MAGNAVOX, THEY HAD THE CASE ON APPEAL TO THE COURT OF APPEALS TO THE FEDERAL CIRCUIT AND THE CASE WAS ARGUED, AND BEFORE THE DECISION CAME DOWN THERE WAS A SETTLEMENT AGREEMENT AND THEY TOOK A LICENSE, A PAID UP LICENSE FOR---

(FOLLOWING PROCEEDINGS UNDER SEAL)

Q. WHAT WAS THE TOTAL SUM MATTEL AGREED TO PAY FOR THE PAST AND THE FUTURE LICENSE AFTER THEY LOST THEIR CASE?

A. MR. ANDERSON, I'M NOT SURE WE ARE SUPPOSED TO REVEAL THE TOTAL NUMBER. IS IT ALREADY AVAILABLE TO EVERYONE? WE DID HAVE AN AGREEMENT WITH MATTEL THAT THERE WAS A CERTAIN CONFIDENTIALITY ATTACHED TO THE TOTAL NUMBER.

MR. ANDERSON: WE WILL TAKE IT UNDER THE PROTECTIVE ORDER, YOUR HONOR. THEY HAVE THE INFORMATION AND IT IS UNDER THE ORDER.

MR. GLICK: YES, WE HAVE THE INFORMATION. I THINK PURSUANT TO THAT ORDER THAT YOU ARE REFERRING TO, I THINK IT DOES NEED TO BE SEALED.

THE COURT: YES. THIS LAST QUESTION, THE WITNESSES ANSWER TO IT WILL BE SEALED IN THIS TRANSCRIPT.

THE WITNESS: THE ANSWER IS 16 MILLION DOLLARS OVER A PERIOD OF TIME.

Q. (BY MR. ANDERSON) 16 MILLION DOLLARS. I WOULD LIKE TO HAND YOU A COPY OF PLAINTIFFS' EXHIBIT 261, WHICH HAS PREVIOUSLY BEEN PRODUCED FOR THE OTHER SIDE.

WILL YOU LOOK AT PLAINTIFFS' EXHIBIT 261 AND TELL ME IF YOU CAN IDENTIFY THAT, AND IDENTIFY IT, IF YOU CAN.

A. YES. THIS IS A COPY OF THE PAID UP LICENSE AGREEMENT WITH MATTEL BETWEEN MAGNAVOX AND SANDERS ASSOCIATES AND MATTEL THAT BEARS AN EFFECTIVE DATE OF JANUARY 24, 1983. AND WHICH I EXECUTED ON BEHALF OF MAGNAVOX.

Q. I WOULD LIKE TO REFER YOU TO PARAGRAPH SIX AT PAGE EIGHT OF THE MATTEL AGREEMENT.

A. YES. THIS PARAGRAPH REQUIRED MATTEL TO PAY 16 MILLION DOLLARS IN DIFFERENT PAYMENTS OVER A PERIOD OF TIME. WOULD YOU LIKE ME TO RECITE THE PAYMENT SCHEDULE?

Q. NO. I JUST ASK YOU IF, IN FACT, THEY HAVE MADE THE PAYMENTS THAT HAVE FALLEN DUE?

A. THEY HAVE MADE ALL OF THE PAYMENTS THAT HAVE BEEN THUS FAR DUE, WHICH IS 12 MILLION DOLLARS.

Q. NOW, I NOTE AT THE BACK OF THE PATENT--AT THE BACK OF THE AGREEMENT IS A SCHEDULE OF PATENTS IN VARIOUS COUNTRIES OF THE WORLD.

IN THE MATTEL CASE, WAS ANY PATENT OTHER THAN THE RUSCH 507 PATENT LITIGATED, IF YOU KNOW?

A. NO, NO OTHER PATENT WAS LITIGATED AGAINST MATTEL.

Q. WITH RESPECT TO THE PATENTS THAT MAGNAVOX WAS ASSERTING AGAINST MATTEL AT THIS TIME, WERE THERE ANY OTHER PATENTS INVOLVED, OTHER THAN THE RUSCH PATENT, THE 507 PATENT, IN THE UNITED STATES AND ELSEWHERE IN THE WORLD, AND THE 480 BAER PATENT IN THE UNITED STATES AND ELSEWHERE IN THE WORLD?

A. I DON'T UNDERSTAND YOUR QUESTION, MR. ANDERSON.

Q. HAD MAGNAVOX ASSERTED THAT MATTEL HAD VIOLATED OR INFRINGED THE OTHER PATENTS THAT ARE LISTED IN THIS SCHEDULE, AS FAR AS YOU KNOW, OTHER THAN THE 507 PATENT AND PERHAPS THE 480 PATENT?

A. NO.

Q. WITH RESPECT TO THE ROYALTY INCOME THAT MAGNAVOX HAS REALIZED IN LICENSING ITS PATENTS, INCLUDING THE RUSCH 507 PATENT---

THE COURT: ARE WE NOW AT A POINT WHERE WE CAN TERMINATE THE SEAL IN THE CASE?

MR. ANDERSON: WE WOULD LIKE TO STAY UNDER SEAL FOR THE NEXT FEW QUESTIONS, TOO, YOUR HONOR.

THE COURT: ALL RIGHT.

Q. (BY MR. ANDERSON) I WILL START OVER. WITH RESPECT TO THE TOTAL LICENSING INCOME THAT MAGNAVOX HAS REALIZED ON BEHALF OF MAGNAVOX AND SANDERS UNDER YOUR LICENSING PROGRAM OF THE TELEVISION GAME PATENTS, INCLUDING THE RUSCH 507 PATENT, WHAT IS THAT TOTAL NUMBER, IF YOU KNOW?

A. THE GROSS ROYALTY INCOME AS OF MAY THE 25TH WAS IN EXCESS OF 40 MILLION DOLLARS, SOMEWHERE BETWEEN 40 AND 43 MILLION DOLLARS.

Q. I WOULD LIKE TO HAND YOU A COPY OF PLAINTIFFS' EXHIBIT 100. THIS IS A TABLE OF ROYALTY INCOME. CAN YOU IDENTIFY IT AND EXPLAIN IT, PLEASE.

A. THIS IS A LISTING OF MAGNAVOX VIDEO GAME PATENT ROYALTY INCOME AS A STATUS REPORT THROUGH APRIL THE 15TH, 1985. AND IT LISTS THE AMOUNT OF INCOME EACH YEAR FROM 1975 TO 1985, PRESUMABLY UP UNTIL APRIL THE 15TH. AND THE TOTAL IS $37,721,125. DID YOU WANT ME TO GIVE YOU ANYMORE INFORMATION?

Q. NO. WAS THIS EXHIBIT 100 PREPARED UNDER YOUR DIRECTION, THE NUMBERS PROVIDED BY YOUR OFFICE?

A. WELL, IT LOOKS LIKE ANOTHER DOCUMENT THAT I GAVE TO YOU, MR. ANDERSON, IN PREPARATION FOR TRIAL. IT WAS RETYPED AND THE TOTAL IS THE SAME.

MR. ANDERSON: THERE IS A STIPULATION AS TO THE AUTHENTICITY OF THE DOCUMENT, YOUR HONOR.

Q. (BY MR. ANDERSON) MR. BRIODY, WITH RESPECT TO THE ODYSSEY GAMES SOLD BY MAGNAVOX, APPROXIMATELY WHAT HAS BEEN THE TOTAL SALES OF ODYSSEY GAMES AND CARTRIDGES SINCE THE FIRST INTRODUCTION OF THE ODYSSEY IN 1972?

MR. GLICK: I OBJECT TO THIS TESTIMONY. HE IS NOT IN THE MARKET DEPARTMENT. HE DOESN'T CONTROL THE EMPLOYEES WHO ARE THERE. THERE ARE MANY, MANY FACTORS THAT GO INTO PROFITABILITY.

THE COURT: I DON'T THINK HE SAID PROFITABILITY. HE SAID GROSS SALES.

MR. GLICK: EVEN AS TO THAT NUMBER IT HAS NOT BEEN PROVIDED TO US. IT IS NOT IN ANY EXHIBIT IN THIS CASE. WE ARE GOING TO HAVE A WITNESS NOT IN THAT DEPARTMENT NOW OFFER TESTIMONY ABOUT THAT WHICH I HAVE NO WAY OF DEALING WITH AND WHICH HE IS NOT RESPONSIBLE FOR IT.

THE COURT: LAY A FOUNDATION FOR IT, IF YOU WOULD, PLEASE. WHAT IS THE WITNESS'S KNOWLEDGE? WHERE DOES THE INFORMATION COME FROM? IS IT REPORTED? THE PLACE IT CAN BE REVIEWED.

Q. (BY MR. ANDERSON) MR. BRIODY, WHAT IS YOUR INVOLVEMENT WITH RESPECT TO FOLLOWING ACTUAL ODYSSEY SALES AND THE ODYSSEY

PROGRAM AT MAGNAVOX AS HEAD OF THE PATENT GROUP?

A. WELL, I MORE OR LESS MONITOR WHAT GOES ON WITH RESPECT TO SUB-LICENSING INCOME, AND I HAVE A SECRETARY WHO ALSO SERVES AS THE LICENSING ADMINISTRATOR FOR NORTH AMERICA PHILLIPS AND WHO HANDLES THE ODYSSEY LICENSING PROGRAM. SHE HAS A FILE OF EACH PARTICULAR LICENSE AND SHE RECEIVES THE CHECKS.

THE CHECKS ARE THEN FORWARDED TO NAP CONSUMER ELECTRONICS, WHICH IS IN KNOXVILLE, OR TO A BANK THAT THEY CONTROL IN NEW YORK, AND THEY RECEIVE THE MONEY. AND THEN THEY--OUT OF THAT MONEY THEY PAY SANDERS A CERTAIN AMOUNT PERIODICALLY FOR THEIR RIGHTS UNDER THE EXCLUSIVE LICENSE AGREEMENT TO MAGNAVOX.

AND SO MY SECRETARY IS INVOLVED IN THAT. BEFORE SHE TOOK IT OVER, WHICH WAS AROUND THE BEGINNING OF THIS YEAR, IT WAS DONE BY AN ELDERLY LADY IN NEW YORK CITY WHO WAS A SECRETARY. SHE WAS THE LICENSING ADMINISTRATOR.

SO I DO HAVE SOME INVOLVEMENT IN KNOWING ABOUT LICENSING INCOME. I HAVE MUCH LESS INVOLVEMENT IN KNOWING ON A PERIODIC BASIS WHAT SALES ARE.

HOWEVER, I RECENTLY MADE AN INQUIRY REGARDING SALES, WHICH I WOULD BE HAPPY TO SHARE WITH THE COURT IF THE COURT WANTS TO HEAR IT.

Q. BEFORE THAT, DOES MAGNAVOX ACCOUNT IN A PART OF THE LICENSING PROGRAM TO SANDERS FOR ODYSSEY GAMES THAT WERE MADE STARTING IN 1972?

A. YES. MAGNAVOX WOULD HAVE HAD TO DECLARE ON A CUMULATIVE BASIS, THEN ON PERIODIC BASIS HOW MANY GAMES IT HAD MADE. I DO NOT HAVE A NUMBER, HOWEVER, I COULD GIVE ON THAT. I DON'T HAVE ANY ANSWER TO THAT QUESTION.

MR. ANDERSON: YOUR HONOR, ALSO THESE NUMBERS HAVE BEEN AVAILABLE THROUGHOUT THIS LAWSUIT. THEY WERE IN INTERROGATORY ANSWERS IN BOTH OF THE EARLIER CASES. AND ACTIVISION HAS HAD ACCESS TO THOSE NUMBERS IN THE COURSE OF DISCOVERY.

MR. GLICK: YOUR HONOR, THAT IS NOT ACCURATE. WE DO NOT HAVE ANY CURRENT NUMBERS ON SALES. WE DIDN'T GET ANY NUMBERS AS TO THE DETAILS THAT WOULD ALLOW ONE TO MAKE ASSESSMENT ON PROFITABILITY. I SUBMIT THAT THE FOUNDATION HAS NOT BEEN LAID HERE FOR THIS WITNESS TO GIVE---

THE COURT: MR. BRIODY, WHERE DO YOU GET YOUR INFORMATION ON THE SALES OF ODYSSEY GAMES? WHO DOES THAT COME TO YOU FROM?

THE WITNESS: THE SALES NUMBER FOR ODYSSEY GAMES, YOUR HONOR, I GET FROM A FELLOW WHO IS IN ACCOUNTING AT KNAPSACK IN KNOXVILLE WHO IN ESSENCE KEEPS TRACK OF THE ROYALTY INCOME AND ALSO KEEPS TRACK OF THE PAYMENTS THAT ARE REQUIRED TO BE MADE TO SANDERS ON A PERIODIC BASIS.

THE COURT: AS I UNDERSTAND YOUR COUNSEL'S QUESTION HE WAS GOING TO ASK YOU ABOUT THE GROSS SALES OF THE ODYSSEY GAMES.

THE WITNESS: YES, YOUR HONOR.

THE COURT: DO YOU GET INFORMATION ON GROSS SALES OF

ODYSSEY?

THE WITNESS: I OBTAINED THAT FROM THE PERSON I AM TALKING ABOUT IN KNOXVILLE, TENNESSEE, WHO ALSO KEEPS TRACK OF THE AMOUNT OF REPORTING ROYALTIES THAT GO TO SANDERS ASSOCIATES AND WHO BOOKS THE INCOME FOR KNAPSACK.

I SPECIFICALLY ASKED HIM A QUESTION RECENTLY REGARDING WHAT THE SALES WERE TO DATE OF MAGNAVOX VIDEO GAMES. I HAVE THAT ANSWER IN MY HEAD, APPROXIMATELY WHAT IT IS, FROM THIS PERSON.

THE COURT: ARE THOSE GROSS SALES FIGURES REPORTED TO YOU PERIODICALLY OR IS THIS SOMETHING YOU ACCUMULATED FOR PURPOSES OF THIS CASE?

THE WITNESS: NO, GROSS SALES ARE NOT REPORTED TO ME PERIODICALLY.

THE COURT: I WILL PERMIT THE WITNESS TO TESTIFY. I WILL TAKE INTO CONSIDERATION--- LET ME ASK YOU ONE MORE QUESTION. ARE THESE GROSS SALES FIGURES WRITTEN DOWN SOMEWHERE?

THE WITNESS: NOT IN A FORMAL DOCUMENT, YOUR HONOR. I OBTAINED THE INFORMATION A FEW DAYS AGO FROM A TELEPHONE CALL.

THE COURT: OKAY. I WILL PERMIT THE WITNESS TO TESTIFY. THE LACK OF A WRITTEN DOCUMENT WILL BE CONSIDERED IN CONNECTION WITH THE WEIGHT OF THE EVIDENCE.

THE WITNESS: YOUR HONOR, I DID WRITE IT DOWN ON A PIECE OF PAPER I HAVE IN MY POCKET, BUT YOU DON'T MEAN THAT.

THE COURT: NO. I MEAN WRITTEN DOWN IN THE SENSE OF

INTERDEPARTMENTAL P AND L, OR REPORTING FORM, OR SOME GROSS SALES FIGURES ON YOUR QUARTERLIES OR MONTHLIES, OR SOMETHING LIKE THAT.

THE WITNESS: THAT DOCUMENT MAY BE AVAILABLE, BUT SHALL I ANSWER THE QUESTION?

MR. ANDERSON: YOUR HONOR, WE DO HAVE THE RESPONSE TO THE INTERROGATORY HERE.

THE COURT: IN THIS CASE?

MR. ANDERSON: NO. THAT WAS PROVIDED TO THE OTHER SIDE FROM THE OTHER CASES. THIS WAS SPECIFICALLY IN THE MATTEL CASE.

IT COVERS THE PERIOD FROM 1972 THROUGH 1981, AND IT IS BROKEN DOWN BY MAIN UNITS, OLD TYPE MAIN UNITS, WHICH WERE THE ORIGINAL GAMES, CARTRIDGES FOR THOSE OLD GAMES, MAIN UNITS NEW, WHICH I BELIEVE ARE ALL THE MICROPROCESSOR UNITS, AND CARTRIDGES NEW. AND THAT IS IN UNITS AND IN DOLLARS AND THAT HAS BEEN AVAILABLE TO ACTIVISION THROUGHOUT THIS LITIGATION FOLLOWING THE INITIAL DISCOVERY. I WILL HAND THIS UP OR---

MR. GLICK: I WILL SUBMIT TO THE COURT THAT WE DON'T HAVE THAT. WE DON'T HAVE THOSE INTERROGATORY RESPONSES. IT IS NOT A DESIGNATED DOCUMENT ON THE EXHIBIT LIST.

BUT AS I UNDERSTAND THE COURT'S RULING, YOU ARE GOING TO NOW GIVE THE CURRENT INFORMATION---

THE COURT: YES. YOU GIVE THAT INFORMATION TO MR. GLICK AND HE CAN CONDUCT WHATEVER CROSS-EXAMINATION IS APPROPRIATE AND ASK YOU--IF HE HAS NOT HAD THE INFORMATION, HE

CAN ASK YOU AN INTERROGATORY THAT WILL BE RESPONDED TO IMMEDIATELY OF SOURCE INFORMATION FOR THE FIGURE THAT MR. BRIODY IS GOING TO GIVE TO US.

MR. GLICK: YES, YOUR HONOR.

Q. (BY MR. ANDERSON) MR. BRIODY, WHAT IS THE GROSS SALES OF ODYSSEY GAMES AND CARTRIDGES THAT MAGNAVOX AND NORTH AMERICA PHILLIPS HAVE SOLD?

A. 297TWO 97 MILLION DOLLARS. THAT IS A ROUNDED NUMBER.

THE COURT: WHAT TIME, PLEASE?

THE WITNESS: THAT WAS THROUGH MAY--THROUGH THE MIDDLE OF MAY OF THIS YEAR, YOUR HONOR.

Q. (BY MR. ANDERSON) MR. BRIODY,, ARE YOU AWARE OF ANY COMPANIES, OTHER THAN ACTIVISION, THAT HAS SOLD OR IS SELLING CARTRIDGES FOR ATARI OR COLECO OR MATTEL CONSOLES?

A. NO, I AM NOT. I DO REMEMBER THERE WAS A COMPANY THAT WE TOOK A LOOK AT ONCE BY THE NAME OF IMAGIC, BUT I DON'T KNOW WHO THEY SOLD THE CARTRIDGES TO.

Q. WHY DIDN'T YOU SUE IMAGIC?

A. I THINK IT WAS OUR CONCLUSION THAT THERE WAS NO SIGNIFICANT INFRINGEMENT INVOLVED BY IMAGIC.

Q. WHY HAVE MAGNAVOX AND SANDERS ELECTED TO SUE ACTIVISION FOR INFRINGING THE 507 PATENT?

A. BECAUSE WE THINK THAT ACTIVISION HAS INFRINGED THE SANDERS RUSCH REISSUE PATENT TO A SUBSTANTIAL DEGREE AND IN A SUBSTANTIAL WAY AND THAT THE CARTRIDGES--SOME OF THE CARTRIDGES

THAT THEY SELL WHICH ARE ACCUSED IN THIS CASE REPRESENT THE HEART OF THE RUSCH PATENT INVENTION.

WE LOOK UPON THE MATTER, REALIZING THAT IT IS A CONTRIBUTORY INFRINGEMENT, AS ANALOGOUS TO THE IDEA OF HAVING A THEATER AND THE THEATER IS THE CORELATIVE OF THE CONTROL UNIT OF THE VIDEO GAME AND THE PLAYERS---

MR. GLICK: EXCUSE ME. I OBJECT. I BELIEVE WE ARE NOW GETTING AN ARGUMENT FROM THE IN-HOUSE WITNESS ON THE STAND RATHER THAN A RESPONSE TO A QUESTION RELEVANT TO THE ISSUES.

THE COURT: I AM UNDERSTANDING WHAT THE WITNESS IS TESTIFYING TO IS MANAGEMENT'S VIEW OF THIS.

I AM NOT ACCEPTING IT AS TESTIMONY DEALING WITH THE TECHNOLOGY AND INFRINGEMENT OF THE PATENT, BUT MERELY HOW MANAGEMENT VIEWS--MANAGEMENT OF THE PLAINTIFF VIEWS THE ACTION OF ACTIVISION. I WILL ACCEPT IT FOR THAT PURPOSE.

Q. (BY MR. ANDERSON) CAN YOU COMPLETE YOUR ANSWER?

A. WE LOOK UPON THE INFRINGEMENT, THE CONTRIBUTORY INFRINGEMENT OF ACTIVISION, AS BEING ANALOGOUS TO THE PLAYERS IN A PLAY AND THE THEATER OR THE BACKDROP OF THE THEATER IS CORELATIVE TO THE CONTROL UNIT AND THE PLAYERS ARE IN ESSENCE PROVIDED BY THE ACTIVISION CARTRIDGE IN THE FORM OF THE ACTIVISION GAME, WHICH IS PLAYED THROUGH A CONSOLE OR CONTROL UNIT.

Q. DO YOU KNOW IF THE CONTROL UNITS OR CONSOLES OF ATARI AND COLECO ARE USED TO PLAY GAMES THAT MAGNAVOX HAS NOT ASSERTED AND DOES NOT BELIEVE INFRINGE THE RUSCH 507 PATENT?

YOU AWARE OF THOSE ALLEGATIONS GENERALLY?

A. YES, I AM.

Q. I WOULD LIKE TO HAND YOU A COPY OF THAT AGREEMENT, WHICH IS DEFENDANT'S EXHIBIT DN. I WOULD LIKE YOU TO VERY BRIEFLY REVIEW THOSE AND IDENTIFY THEM--THE DOCUMENTS THAT MAKE UP DN, IF YOU CAN.

A. APPARENTLY DN INCLUDES BOTH THE SETTLEMENT AGREEMENT BETWEEN MAGNAVOX, SANDERS AND ATARI. AND THIS WOULD HAVE RELATED TO THE LAW SUIT AGAINST ATARI THAT WAS SETTLED I BELIEVE IN 1976 AND A NONEXCLUSIVE CROSS-LICENSE FOR VIDEO GAMES THAT IS REFERRED TO IN THE SETTLEMENT AGREEMENT.

Q. I WOULD LIKE TO DIRECT YOUR ATTENTION IN PARTICULAR TO THE SETTLEMENT AGREEMENT, PARAGRAPH ROMAN NUMERAL FIVE, AT PAGE FOUR.

WOULD YOU READ THROUGH THAT RELEASE PARAGRAPH AND THEN I WOULD LIKE TO ASK YOU A QUESTION.

THE COURT: WHERE ARE WE, MR. ANDERSON?

THE WITNESS: WE ARE ON PAGE--THE FOURTH PAGE, YOUR HONOR. MINE DOESN'T HAVE A PAGE NUMBER ON IT. IT IS THE FOURTH PAGE OF THE SETTLEMENT AGREEMENT. I THINK MR. ANDERSON IS REFERRING TO ROMAN NUMERAL FIVE, WHICH IS A RELEASE.

Q. (BY MR. ANDERSON) MR. BRIODY---

THE COURT: WAIT A MOMENT. I HAVE GOT A NONEXCLUSIVE CROSS-LICENSE FOR VIDEO GAMES.

THE WITNESS: YES.

THE COURT: THEN A DOCUMENT ENTITLED "AGREEMENT."

THE WITNESS: THIS IS THE SETTLEMENT AGREEMENT. IT SAYS "SETTLEMENT" AT THE TOP.

MR. ANDERSON: DO YOU HAVE THE SETTLEMENT AGREEMENT, YOUR HONOR?

THE COURT: I THINK I AM GETTING TO IT HERE.

MR. ANDERSON: IT IS LISTED ON THE DEFENDANT'S EXHIBIT LIST AS A PART OF DN, THE SETTLEMENT AGREEMENT. I AM NOT CERTAIN WHETHER IT IS IN THERE OR NOT.

THE COURT: YES. I HAVE IT. THERE IS A DESIGNATION DN2. YES. GO AHEAD.

THE WITNESS: COULD YOU REPEAT THE QUESTION, PLEASE.

Q. (BY MR. ANDERSON) LET ME ASK A NEW QUESTION FIRST. WERE YOU INVOLVED IN THE NEGOTIATIONS OF THESE AGREEMENTS WITH ATARI?

A. YES, I WAS.

Q. WHAT WAS YOUR INVOLVEMENT?

A. AS I RECALL, I WAS THE PRINCIPAL NEGOTIATOR OF MAGNAVOX IN SETTLING THIS PARTICULAR LAWSUIT.

Q. WHAT DID THAT INVOLVE? WERE THERE MEETINGS, DISCUSSIONS?

A. THAT INCLUDED HAVING MEETINGS WITH MR. BUSHNELL OF ATARI ON SEVERAL OCCASIONS AND TOWARD THE END I THINK WITH MR. ETTINGER OF SANDERS. AND AS I RECALL, THIS CASE WAS SETTLED LIKE THE DAY BEFORE IT WAS DUE TO GO ON TRIAL IN CHICAGO.

Q. AS TO PARAGRAPH ROMAN NUMERAL FIVE OF THE SETTLEMENT AGREEMENT, A PART OF DEFENDANT'S EXHIBIT DN, HAS ANYONE AT ANY

TIME WHO IS ASSOCIATED WITH ATARI OR MAGNAVOX OR SANDERS SUGGESTED THAT THAT RELEASE CONTAINED IN THE SETTLEMENT AGREEMENT IS FOR ANYTHING OTHER THAN THE PAST SALES AND OTHER ACTS OF INFRINGEMENT IN THE EQUIPMENT INVOLVED THEREIN?

MR. GLICK: YOUR HONOR, I WILL LODGE AN OBJECTION, ALTHOUGH FROM THE COURSE OF THE TRIAL I CLEARLY UNDERSTAND HOW YOU ARE HANDLING THIS SORT OF EVIDENCE.

I DO WANT TO LODGE AN OBJECTION FOR THE RECORD TO PAROL EVIDENCE AS TO THE MEANING OF THIS DOCUMENT AND THE LICENSE DOCUMENT, WHICH I'M SURE WE ARE GOING TO COVER IN A MOMENT.

THE COURT: THE WITNESS HASN'T BEEN ASKED TO INTERPRET ANYTHING. HE WAS ASKED WHETHER HE RECEIVED AN EXTERNAL COMMUNICATION FROM SOMEBODY. I NOTE YOUR OBJECTION. I DON'T THINK IT IS REALLY APPLICABLE TO THIS QUESTION.

MR. GLICK: I WILL RISE AT THE APPROPRIATE MOMENT.

THE WITNESS: I DON'T BELIEVE THAT ATARI EVER RAISED THIS, AFTER THE SETTLEMENT AGREEMENT WAS ENTERED INTO, AS IN ANY WAY SUGGESTING THAT THEY HAD FUTURE RIGHTS. THIS LOOKS TO ME AS THOUGH IT WAS CLEARLY A RELEASE FOR PAST INFRINGEMENT.

Q. (BY MR. ANDERSON) DURING THE NEGOTIATIONS OF THIS SETTLEMENT AGREEMENT THAT YOU WERE INVOLVED IN DID YOU OR ANYONE ASSOCIATED WITH ATARI OR MAGNAVOX OR SANDERS EVER INDICATE THAT THERE WAS ANY INTENTION TO GRANT ANYTHING OTHER THAN A RELEASE FOR THE PAST UNDER ROMAN NUMERAL FIVE OF THE SETTLEMENT AGREEMENT?

MR. GLICK: I BELIEVE THIS IS THE APPROPRIATE TIME THEN TO LODGE AN OBJECTION.

THE COURT: THE OBJECTION IS NOTED AND OVERRULED.

MR. GLICK: THANK YOU, YOUR HONOR.

THE WITNESS: NO. IT BEING NOTED THAT THIS RELEASE GOES TO ATARI AND ITS CUSTOMERS, MR. ANDERSON.

Q. (BY MR. ANDERSON) DID MAGNAVOX EVER INTEND TO GIVE A RELEASE UNDER THE SETTLEMENT AGREEMENT WITH ATARI THAT WENT BEYOND A RELEASE FOR THEIR PAST ACTS OF INFRINGEMENT PRIOR TO THE DATE OF THE AGREEMENT IN 1976?

A. NO.

Q. I WOULD LIKE YOU NOW TO DIRECT YOUR ATTENTION TO THE NONEXCLUSIVE CROSS-LICENSE FOR VIDEO GAMES, WHICH IS DEFENDANT'S EXHIBIT DN, AND IN PARTICULAR THE DEFINITION OF A LICENSED PRODUCT WHICH I THINK IS IN PARAGRAPH 2.01.

A. YES. LICENSE PRODUCT IS DEFINED IN THIS LICENSE AGREEMENT AS BEING---

Q. PAGE FIVE?

A. IT IS ON PAGE FIVE. ANY COMPLETE VIDEO GAME PRODUCT THAT IS COVERED BY ONE OR MORE OF THE MAGNAVOX PATENTS, AND IT SPECIFICALLY EXCLUDES CHIPS OR INTEGRATED CIRCUITS THAT ARE USEABLE IN THE VIDEO GAME.

Q. DO YOU RECALL AT THE TIME---

THE COURT: JUST A MOMENT.

THE WITNESS: IT IS J, YOUR HONOR.

THE COURT: YES. OKAY. GO AHEAD, MR. ANDERSON.

Q. (BY MR. ANDERSON) WITH RESPECT TO THE NONEXCLUSIVE CROSS-LICENSE AGREEMENT WERE YOU EQUALLY INVOLVED IN THAT AS YOU WERE IN THE SETTLEMENT AGREEMENT?

A. YES, I WAS.

Q. DO YOU RECALL WHETHER AT THAT TIME MAGNAVOX AND SANDERS WERE MADE AWARE OF THE FACT THAT ATARI WAS DELEVOPING A MICROPROCESSOR TYPE VIDEO GAME WITH A CONTROL AND DISPLAY SYSTEMS?

A. YES, I BELIEVE THAT MR. BUSHNELL MENTIONED IT AND EXPLAINED IT. THAT WAS A PLAN THAT ATARI HAD.

Q. WAS, IN FACT, MAGNAVOX CONSIDERING ACCESS TO THEIR MICROPROCESSOR TECHNOLOGY AT THAT TIME?

A. YES, MR. ANDERSON, THERE IS A PROVISION IN THIS CROSS-LICENSE. IT INVOLVES PATENTS OF ATARI LICENSES UNDER ATARI PATENTS THAT GO TO MAGNAVOX. I'M NOT SURE WHETHER OR NOT THEY ALSO GO TO SANDERS. I COULD CHECK THAT IF YOU WANT ME TO.

YES, THE ATARI LICENSE ALSO GOES TO MAGNAVOX AND SANDERS. SO ATARI PATENTS ARE LICENSED BACK TO SANDERS AND MAGNAVOX. AND ALSO ATARI KNOW-HOW IS CALLED TECHNOLOGY IN THIS PARTICULAR AGREEMENT, BUT SOMETIMES WE CALL IT KNOW-HOW, SPECIFIC KNOW-HOW WAS MADE AVAILABLE TO MAGNAVOX AS A RESULT OF THIS AGREEMENT AND IT IS DESCRIBED ON PAGE FOUR.

Q. IS THAT IN PARAGRAPH SMALL "E"?

A. YES.

Q. DOTS THAT SPECIFICALLY MENTION MICROPROCESSOR?
A. YES, IT DOES.
Q. THAT'S, WHAT, THE THIRD LINE FROM THE BOTTOM; IS THAT CORRECT?
A. YES.
Q. I WOULD LIKE TO DIRECT YOUR ATTENTION TO PARAGRAPH 4.01 OF THIS LICENSE AGREEMENT WHICH APPEARS AT PAGE SEVEN.
A. YES. 4.01, AS I RECALL, WAS PROBABLY ASKED FOR BY ATARI BECAUSE THEY WERE BUYING A PAID UP LICENSE UNDER PATENTS OF OURS AND GIVING A LICENSE BACK UNDER THEIRS AND PAYING A SUBSTANTIAL AMOUNT OF MONEY.

AND AS I READ THIS, THIS WAS--THIS IS A NON-ASSERTION UNDER BACKGROUND PATENTS THAT PERHAPS MIGHT NOT HAVE BEEN COVERED BY THE DEFINITION OF LICENSED PATENTS, MAGNAVOX PRINCIPAL PATENTS, OTHER PATENT DEFINITIONS.

ATARI WANTED TO MAKE SURE THAT THEY HAD A LICENSE THAT COVERED THEIR CUSTOMERS UNDER ANY KIND OF PATENT, IRRESPECTIVE OF WHAT THE SPECIFIC PATENTS ARE THAT WERE REFERRED TO HERE FOR LICENSED VIDEO GAMES THAT THEY SOLD UNDER THIS AND DO SELL UNDER THIS LICENSE.

Q. THAT WOULD BE LICENSED PRODUCTS AS DEFINED IN PARAGRAPH 2.01?
A. YES.
Q. I AM SORRY. IT IS SUBPARAGRAPH J.
A. PAGE FIVE, J.

Q. YES. DID MAGNAVOX EVER HAVE ANY INTENTION UNDER THE CLAUSE 4.01 OF THE CROSS-LICENSE AGREEMENT IN THE 1976 AGREEMENT TO GIVE ATARI OR ITS CUSTOMERS A PERPETUAL PAID UP LICENSE UNDER ALL OF MAGNAVOX AND SANDERS PATENTS THROUGHOUT THE WORLD?

A. CERTAINLY NOT.

Q. ARE THERE OTHER CLAUSES IN THE AGREEMENT OR EVENTS THAT YOU ARE AWARE OF THAT WOULD REFLECT UPON THE MEANING OF THIS CLAUSE IN PART?

A. YES, MR. ANDERSON. THIS AGREEMENT REQUIRED QUITE A FEW HOURS OF NEGOTIATION WITH ATARI, AS I RECALL--A LOT OF LATE HOUR WORK.

AND THERE IS AN OPTION ON PAGE 20, 19.01, WHERE MAGNAVOX GIVES ATARI AN OPTION FOR A NONEXCLUSIVE LICENSE TO MAKE, USE AND SELL COIN-OPERATED VIDEO AMUSEMENT GAMES THAT ARE MADE FROM A KIT IN THE UNITED STATES AND SOLD BY ATARI IN COUNTRIES OUTSIDE THE UNITED STATES.

AND THEN THERE ARE FURTHER RAMIFICATIONS OF THE LIMITATION OF THE OPTION. THERE IS ANOTHER--THERE WAS AN OPTION, AS I RECALL, THAT WAS ENTERED INTO CONTEMPORANEOUSLY WITH THIS AGREEMENT. IT IS NOT ATTACHED TO MY COPY OF THE EXHIBIT.

BUT THERE WAS AN OPTION LETTER THAT WAS SIGNED AND SENT TO ATARI I THINK ON THE SAME DATE, JUNE THE 8TH, 1976, WHICH I DON'T HAVE A COPY HERE--THERE WAS ANOTHER OPTION THAT I BELIEVE INVOLVED THE RIGHT TO MANUFACTURE OUTSIDE OF THE UNITED STATES

AND SELL GAMES ELSEWHERE. IT WAS REALLY A LICENSE UNDER OTHER PATENTS THAN THE UNITED STATES PATENTS. SO THERE WAS ANOTHER OPTION.

AND THEN ALSO THERE ARE SOME CLAUSES IN HERE THAT RELATE TO WHAT HAPPENS IN THE EVENT THAT ATARI LEAVES THE HOME VIDEO GAME BUSINESS. IF YOU GIVE ME A MOMENT I WILL FIND IT--8.01. IT STARTS ON THE BOTTOM OF PAGE 13.

IF ATARI LEAVES THE HOME VIDEO GAME MARKET--IT MAINLY PICKED UP IN 8.03. IT REFERS TO HOW THEY WOULD PAY ROYALTIES IN THAT CATEGORY.

THEY IN ESSENCE WOULD HAVE A LICENSE THAT IS ROYALTY BEARING IF THEY LEFT THE HOME VIDEO GAME MARKET FOR COIN-OPERATED VIDEO GAMES UNDER PARAGRAPH 8.03.

Q. ALL RIGHT. I WOULD LIKE TO SHOW YOU A LETTER DATED JUNE 8TH, 1976, WHICH IS PLAINTIFFS' EXHIBIT 281. CAN YOU IDENTIFY 281, PLEASE.

A. PLAINTIFFS' EXHIBIT 281 IS A LETTER TO ATARI, MR. STEVEN BRISTOL, VICE-PRESIDENT OF ENGINEERING, WHICH WAS A GRANT OF AN OPTION TO ATARI THAT WAS EXERCISEABLE IN SIX MONTHS AND I PREVIOUSLY ALLUDED TO IT.

IT WOULD GIVE THEM A SEPARATE LICENSE TO MAKE, USE AND SELL HOME VIDEO GAMES IN HONG KONG, JAPAN OR FRANCE UNDER CERTAIN PATENTS, INCLUDING THE RUSCH REISSUE. AND THEN THERE IS A ROYALTY SCHEDULE THAT THEY WOULD HAVE TO PAY UNDER.

MR. ANDERSON: YOUR HONOR, I MIGHT---

THE WITNESS: MR. ANDERSON, ON SECOND THOUGHT, I AM NOT CERTAIN I WANT TO GIVE AN ANSWER BEFORE I CONFUSE THE COURT REGARDING THIS MATTER.

IT MAY BE 8.03 ON PAGE 14 WOULD BE CONSIDERED AS PART OF THIS AGREEMENT, BECAUSE--IF ATARI WENT OUT OF THE HOME VIDEO GAME BUSINESS, THEY HAVE TO PAY RUNNING ROYALTIES, BUT STILL THERE IS A MAXIMUM OF ONE AND A HALF MILLION DOLLARS THAT THEY WOULD EVENTUALLY HAVE TO PAY.

SO I AM NOT EXACTLY SURE HOW THAT RELATES TO THE FACT THAT 401 WOULD BE UNREASONABLY INTERPRETED AS GIVING ANY FUTURE LICENSE BEYOND THE VIDEO GAME PATENTS IN THIS LICENSE AGREEMENT.

Q. DID ANYONE ASSOCIATED WITH ATARI OR MAGNAVOX OR SANDERS DURING THIS PERIOD OF TIME EVER SUGGEST THAT--OR ASSERT THAT PARAGRAPH 401 GAVE ATARI BLANKET RIGHTS UNDER THE MAGNAVOX PATENTS UNDER THE U.S. RIGHTS GRANTED UNDER THE AGREEMENT ITSELF?

A. COULD YOU REPEAT THAT QUESTION, PLEASE?

MR. ANDERSON: CAN YOU READ IT.

(RECORD READ)

MR. ANDERSON: BEYOND THE RIGHTS.

THE WITNESS: NO, I DON'T SEE HOW THEY REASONABLY WOULD HAVE, IN VIEW OF THE OTHER PROVISIONS OF THE AGREEMENT.

Q. DO YOU KNOW IF ANY REASONS--OR WERE ANY REASONS EVER STATED TO YOU WHY ATARI WOULD BE WILLING TO TAKE THIS OPTION LICENSE UNDER EXHIBIT 281 IF THEY HAD THE--ALL OF THE RIGHTS THAT THEY

NEEDED UNDER SECTION 401 OF THE AGREEMENT?

A. NO.

MR. ANDERSON: I WOULD LIKE TO HAND YOU PLAINTIFFS' EXHIBIT 282 A LETTER OF SEPTEMBER 30, 1976.

(CONTINUED ON NEXT PAGE)

Q. DID ATARI RESPOND TO YOUR OFFER OF THE OPTION LICENSE?
A. YES. THIS IS THE LETTER OF SEPTEMBER 30, '76. IT IS FROM MR. KENEN, WHO I THINK WAS THE PRESIDENT OF ATARI AT THAT TIME, ADVISING THAT ATARI EXERCISED ITS OPTION UNDER SECTION 19 OF THE CROSS LICENSE WHICH, IN ESSENCE, WAS THE KIT OPTION.

I WILL REFER TO IT AS THAT. AND ATARI ALSO PROPOSED TO EXERCISE THE OPTION SET FORTH IN THE JUNE 8 LETTER WHICH WAS PREVIOUSLY REFERRED TO RELATIVE TO THE MANUFACTURE'S USE AND SALE OF HOME VIDEO GAMES ABROAD.

Q. NOW, I NOTICE MENTIONED IN THE LETTER, EXHIBIT 281, THERE ARE JUST FOUR U.S. PATENTS. U.S. PATENT P-365984, THAT IS THE ORIGINAL FROM WHICH THE RUSCH PATENT 28507 REISSUED; IS THAT RIGHT?
A. THAT'S MY UNDERSTANDING, MR. ANDERSON.
Q. SO THEY ARE ONE AND THE SAME PATENT ESSENTIALLY?
A. YES.
Q. OF COURSE, THE NEXT ONE IS THE BAER 480 PATENT. AND IS IT CORRECT THAT THE OTHER PATENTS, THE 3659285 AND RE-28598, WERE THE RUSCH-HARRISON-BAER PATENT THAT WAS HELD INVALID IN CHICAGO?
A. YES.
Q. WERE THERE ANY OTHER TRANSACTIONS--- BEFORE GOING ON, HAS ATARI PAID ROYALTIES OVER THE YEARS UNDER THE AGREEMENT THAT IS SET FORTH IN THE JUNE 8, 1976 LETTER?
A. I DON'T BELIEVE THEY PAID SPECIFICALLY UNDER THIS OPTION. THEY HAVE PAID ROYALTIES UNDER A LATER LICENSE AGREEMENT THAT

HAS A SIMILAR ROYALTY SCHEDULE.

Q. ARE THERE ADDITIONAL EVENTS AFTER 1976 THAT BEAR ON WHETHER OR NOT ATARI HAD A BLANKET LICENSE UNDER THE 4.01 SECTION OF THE 1976 AGREEMENT?

A. YES. THERE WAS A LATER LICENSE THAT WAS NEGOTIATED, I THINK, THAT HAD AN EFFECTIVE DATE LIKE--- WELL, I THINK IT WAS ENTERED INTO IN 1981 THAT WAS A UNILATERAL, NOT A CROSS-LICENSE AGREEMENT WITH ATARI THAT REQUIRED THEM TO PAY ROYALTIES FOR MICROPROCESSOR GAMES THAT WERE MANUFACTURED OUTSIDE OF THE UNITED STATES AND WHICH, IN EFFECT, INCLUDED CONSOLE UNITS OR CONTROL UNITS THAT WERE MANUFACTURED IN ANY ONE OF 21 PATENT BEARING COUNTRIES OUTSIDE OF THE UNITED STATES IN CONJUNCTION WITH CARTRIDGES THAT ARE COVERED BY THE PATENTS AND WHICH WERE SOLD WITH THE CONSOLE UNITS OUTSIDE OF THE UNITED STATES.

Q. I'D LIKE TO HAND YOU PLAINTIFFS' EXHIBIT 284.

CAN YOU IDENTIFY PLAINTIFFS' EXHIBIT 284?

A. PLAINTIFFS' EXHIBIT 284 IS A NON-EXCLUSIVE SUBLICENSE AGREEMENT FOR HOME VIDEO GAMES BETWEEN MAGNAVOX AND ATARI WITH AN EFFECTIVE DATE OF OCTOBER 1, 1981. IT IS SIGNED BY ME FOR MAGNAVOX AND MR. PAUL FOR ATARI.

AS I RECALL, IT RELATES TO MICROPROCESSOR GAMES WHICH, AS I SAID, ARE MANUFACTURED IN TOTAL OUTSIDE OF THE UNITED STATES, EXCEPT FOR THE CARTRIDGES WHICH WOULD BE SOLD OR MANUFACTURED IN THE UNITED STATES AND JOIN THE CONSOLE UNITS ABROAD.

Q. I WOULD LIKE TO HAND YOU PLAINTIFFS' EXHIBIT 283, A LETTER DATED NOVEMBER 11, 1981.

A. YES. THIS LETTER OF NOVEMBER 11, 1981 IS ADDRESSED TO MR. MAYER (PHONETIC) FROM MR. PAUL OF ATARI, AND MR. MAYER WAS THE PRINCIPAL NEGOTIATOR OF THIS AGREEMENT FOR MAGNAVOX. HE WORKS IN MY OFFICE AND IS ONE OF MY GROUP PATENT COUNSEL.

IT APPEARS THAT THIS LETTER IS ESSENTIALLY A SHORT AMENDMENT TO THE LICENSE AGREEMENT, PLAINTIFFS' EXHIBIT 284, WHICH MR. PAUL SIGNED ON BEHALF OF ATARI, AND THEN HE SENT THIS AMENDMENT LETTER.

AND WE AGREED TO THE CHANGES OR THE SMALL VARIANCES HE HAD IN THE LANGUAGE OF THE PRINCIPAL LICENSE AGREEMENT BECAUSE IT LOOKS LIKE I SIGNED THE AMENDMENT LETTER ON NOVEMBER 20, 1981.

Q. DID YOU ALSO SIGN NON-EXCLUSIVE SUBLICENSE AGREEMENTS FOR HOME VIDEO GAME DEVICES, PLAINTIFFS' EXHIBIT 284?

A. YES.

Q. MR. BRIODY, DO YOU KNOW OF ANY REASON OR HAVE YOU BEEN GIVEN OR TOLD ANY REASON WHY ATARI WOULD HAVE TAKEN THE 1981 LICENSE IF THEY HAD HAD A PAID UP LICENSE UNDER SECTION 4.01 OF THE 1976 AGREEMENT?

A. COULD REPEAT THAT QUESTION.

MR. ANDERSON: PLEASE REREAD IT.

(RECORD READ)

THE WITNESS: NO.

Q. (BY MR. ANDERSON) MR. BRIODY, HAS ATARI PAID ROYALTIES TO MAGNAVOX UNDER THE AGREEMENT, PLAINTIFFS' 284?
A. YES. THEY PAID OVER 3 MILLION DOLLARS THUS FAR. I DON'T KNOW THE EXACT NUMBER, BUT I KNOW IT IS OVER 3 MILLION DOLLARS UNDER THIS SECOND ROYALTY BEARING LICENSE AGREEMENT.
Q. I'D LIKE TO RETURN NOW TO THE 1976 AGREEMENT WHICH IS EXHIBIT DN AND DIRECT YOUR ATTENTION FIRST TO THE DEFINITIONS PAGE 2, SECTION 1.01 WHERE THE SUB-HEADING "A" IS MAGNAVOX PRINCIPAL PATENTS.

ARE THOSE THE SAME THREE PATENTS I ASKED YOU ABOUT WITH RESPECT TO THE SIDE LETTER OF PLAINTIFFS' EXHIBIT 281?
A. YES. THE 480 PATENT IS ONE OF THE MAGNAVOX PRINCIPAL PATENTS, AND SO IS THE RUSCH 507 REISSUE AND THE EARLIER PATENT, THE 284 PATENT.
Q. I'D LIKE TO DIRECT YOUR ATTENTION TO SECTION 13.01 WHICH I THINK APPEARS AT PAGE 17, WHICH IS A PATENT MARKING REQUIREMENT.

WAS ATARI REQUIRED TO MARK WITH THE PATENT NUMBERS THE APPLICABLE PATENTS UNDER THE AGREEMENT?
A. YES.
Q. DID ATARI MARK CONSOLES WITH THOSE PATENT NUMBERS?
A. MY BELIEF IS THEY WERE OBLIGATED TO MARK THEIR PRODUCTS AND DID MARK THE PRINCIPAL PATENT NUMBERS OF SANDERS ASSOCIATES ON THEIR CONSOLE UNITS AND THEIR PRODUCTS.
Q. I WOULD NOW LIKE TO SHOW YOU A DOCUMENT, DEFENDANTS EXHIBIT EG.

ARE YOU FAMILIAR WITH THAT SETTLEMENT AGREEMENT?

A. YES. I RECALL THIS SETTLEMENT AGREEMENT. IT IS BETWEEN MAGNAVOX-NORTH AMERICAN PHILIPS CORPORATION, SANDERS ASSOCIATES AND APF ELECTRONICS AND BEARS AN EFFECTIVE DATE OF JUNE 1, 1982. I RECALL THIS WAS SETTLEMENT OF A LAWSUIT THAT TOOK PLACE IN CHICAGO WHERE APF HAD INTERVENED INTO THE CASE.

Q. UNDER THIS AGREEMENT AS PART OF THE CONSIDERATION, DID MAGNAVOX ACCEPT OWNERSHIP OF THE SPIEGEL PATENT, DO YOU RECALL?

A. I RECALL THAT THEY DID. I AM NOT SURE WHAT THE PATENT NUMBER OF THE SPIEGEL PATENT IS.

MR. ANDERSON: I HAVE NO FURTHER DIRECT EXAMINATION, YOUR HONOR.

THE COURT: HOW LONG DO YOU THINK THE CROSS-EXAMINATION WILL TAKE.

MR. GLICK: YOUR HONOR, I WOULD IMAGINE 15 TO 20 MINUTES.

THE COURT: LET'S GIVE OUR COURT REPORTER A RECESS THEN. RECESS UNTIL 11:35.

MR. ANDERSON: YOUR HONOR, I WOULD OFFER THE EXHIBITS, WHICH WERE 100, 261 AND 21, 82, 283 AND 284.

MR. GLICK: NO OBJECTION.

THE COURT: MAY BE ADMITTED IN EVIDENCE.

(PLAINTIFFS' EXHIBITS 100, 261, 21, 82, 283 AND 284 RECEIVED IN EVIDENCE)

CROSS-EXAMINATION

BY MR. GLICK:

Q. MR. BRIODY, YOU JOINED MAGNAVOX IN ROUGHLY 1972; IS THAT RIGHT?

A. YES.

Q. THAT WAS DURING SOME OF THE INITIAL MARKETING DAYS OF THE ODYSSEY 200 EQUIPMENT; IS THAT CORRECT?

A. YES.

Q. IF YOU ARE NOT FAMILIAR WITH THE MODEL NUMBER---

A. I DON'T KNOW THE MODEL NUMBER, BUT IT WAS THE INITIAL MARKETING DAYS.

MR. ANDERSON: DID YOU SAY ODYSSEY 200?

MR. GLICK: ITL 200.

Q. (BY MR. GLICK) ARE YOU FAMILIAR WITH THE ORIGINAL RECOMMENDATION THAT THE MAGNAVOX MARKETING DEPARTMENT GOT AT ABOUT THAT TIME FROM SANDERS AS TO THE AMOUNT WHICH THE UNIT SHOULD BE SOLD FOR?

A. NO, I AM NOT SPECIFICALLY FAMILIAR WITH THE INITIAL MARKETING RECOMMENDATION.

Q. IF I TOLD YOU THERE WAS A RECOMMENDATION AT 19.95 AS THE SELLING PRICE, DOES THAT REFRESH ANY RECOLLECTION OF YOURS?

A. NO, MR. GLICK. I RECALL THAT WHEN THE ODYSSEY PRODUCT ORIGINALLY WENT TO MARKET THAT IT SOLD WITH A BUNCH OF GAMES, A VARIETY OF GAMES, FOR 99.95 OR CLOSE TO A HUNDRED DOLLARS.

Q. DO YOU KNOW A MR. FRITCHIE (PHONETIC)?

A. FRITCHIE, ROBERT FRITCHIE. HE IS A FORMER EMPLOYEE OF MAGNAVOX. HE LEFT MANY YEARS AGO. AND I RECALL WORKING WITH HIM AND KNOWING HIM WHEN HE WAS WITH MAGNAVOX.

MR. GLICK: MR. FRITCHIE'S TESTIMONY WILL BE OFFERED SEPARATELY, YOUR HONOR, ON THIS POINT.

MR. ANDERSON: ARE YOU REFERRING TO HIS DEPOSITION?

MR. GLICK: YES.

MR. ANDERSON: IT IS ONE OF OUR LISTED EXHIBITS, YOUR HONOR. IT IS IN THE BOOK.

MR. GLICK: WE HAVE COUNTERDESIGNATIONS. IT IS IN THE COUNTERDESIGNATIONS, AN INDICATION THAT SANDERS WAS RECOMMENDING SALES FOR 19.95 AT THAT TIME, BUT IT WAS IMPOSSIBLE TO MAKE A PROFIT AT LESS THAN THE 99.95 AMOUNT FOR WHICH THE PRODUCT WAS INITIALLY OFFERED FOR SALE.

Q. (BY MR. GLICK) I BELIEVE YOU TESTIFIED THE ODYSSEY GAMES DID NOT CATCH ON AT THE BEGINNING; IS THAT CORRECT?

A. WELL, I WOULD SAY THEY CAUGHT ON SLOWLY. THE SALES WERE SLOWER THAN ANTICIPATED AT FIRST BECAUSE IT WAS A NEW PRODUCT ON THE MARKET AND IT WAS NOT EASY TO SELL IT THROUGH THE MAGNAVOX DEALER DISTRIBUTION.

Q. LET ME READ YOU YOUR PRIOR TESTIMONY IN THE MATEL LITIGATION ON DIRECT AND ASK YOU IF IT IS A FAIR REPRESENTATION OF YOUR CURRENT OPINION:

"I RECALL THAT WHEN ODYSSEY VIDEO GAMES WERE FIRST ON THE MARKET THEY WERE VERY SLOW IN CATCHING ON. THERE

WAS A GREAT DEAL OF DIFFICULTY AT FIRST IN SELLING HOME KINDS OF VIDEO GAMES. PARTICULARLY WE FOUND THAT FROM A MARKETING POINT OF VIEW THEY WERE VERY DIFFICULT TO SELL BECAUSE CONSUMERS JUST DIDN'T UNDERSTAND WHAT THEY COULD DO AND HOW THEY COULD WORK.

"ALSO MAGNAVOX STARTED OUT SELLING THEM THROUGH THEIR NORMAL DISTRIBUTION CHANNELS OF TELEVISION AND RADIO RECEIVER STORES WHERE THE ACTUAL PROFIT INVOLVED IN A TELEVISION SET WAS MUCH GREATER THAN THE AMOUNT OF PROFIT A SALESMAN WOULD GAIN FROM SELLING A VIDEO GAME. SO THEY STARTED VERY SLOWLY. AND I REMEMBER I WAS LIVING IN FORT WAYNE AT THE TIME, AND THEY HAD TO HAVE DEMONSTRATIONS IN STORES OF A SPECIAL TYPE WHERE CHILDREN COULD COME AND PLAY THEM INTERACTIVELY AND SEE HOW THEY WORKED AND HOW YOU MOVED THE DOTS AROUND THE TELEVISION SCREEN. SO THEY STARTED OUT VERY SLOWLY."

WOULD THAT STILL BE CONSISTENT WITH YOUR TESTIMONY TODAY?

A. YES.

Q. IN FACT, THE FIRST SUCCESS IN THIS GENERAL INDUSTRY WAS BUSHNELL'S ARCADE GAME; IS THAT CORRECT. I BELIEVE THAT IS WHAT YOU TESTIFIED TO?

A. I WOULDN'T SAY IT THAT WAY, MR. GLICK, BECAUSE WHEN MAGNAVOX FIRST STARTED MAKING HOME VIDEO GAMES, THEY WERE PLANNING TO MAKE THEM OR SELL THEM IN THE HUNDREDS OF THOUSANDS. AND THIS

WAS INTENDED TO BE A MASS MARKETED PRODUCT.

AND SO WHEN I SAID THEY DIDN'T CATCH ON VERY FAST AT FIRST, THAT MEANT THEY DIDN'T SELL AS MANY AS THEY HAD ORIGINALLY HOPED FOR.

AS I RECALL, DURING THE FIRST YEAR THEY EXPECTED TO SELL SEVERAL HUNDRED THOUSAND. AND THEY JUST STARTED IN LIKE THE FALL OF 1972.

THE PONG GAME, WHEN IT HIT THE MARKET, WAS IN PUBLIC PLACES. SO THE COIN OPERATED GAMES--- I AM TRYING TO MAKE A DISTINCTION. THERE MIGHT HAVE BEEN MUCH LESS OF THEM THAT HAD SOLD, BUT THEY HAD A TENDENCY TO TURN ON THE CONSUMER IN A KNOWLEDGEABLE WAY THAT THAT WAS THE KIND OF PRODUCT THAT WAS AVAILABLE TO VIDEO GAMES AT THE HOMES OR IN HOMES.

Q. LET ME SEE IF I CAN BREAK DOWN YOUR ANSWER. YOUR FIRST ANSWER WAS AN EXPECTATION OF SELLING SEVERAL HUNDRED THOUSAND UNITS AT THE BEGINNING. I BELIEVE YOU TESTIFIED PREVIOUSLY IN THE RANGE OF 60,000 WAS THE ACTUAL EXPERIENCE IN SALES, DO YOU RECALL THAT?

A. I DON'T RECALL THAT SPECIFICALLY.

Q. PERHAPS I WILL FIND THAT IN A MOMENT. THEN AS TO THE ARCADE GAMES, YOU WOULD AGREE, WOULD YOU NOT, THAT THE ARCADE GAMES BECAME VERY POPULAR?

A. YES.

Q. THIS WAS IN THE PERIOD AFTER, OR SHORTLY AFTER, MAGNAVOX HAD PUT OUT ITS HOME VIDEO VERSION?

A. I RECALL THAT.
Q. THAT THE POPULARITY, THEN, OF THIS TYPE OF INTERACTIVE GAME CAME FROM ITS POPULARITY IN THE ARCADE TYPE GAMES WHERE PEOPLE WERE ABLE TO GET EXPOSURE TO THEM?
A. I THINK IT WAS A HELPFUL INFLUENCE, YES.
Q. NOW, THE MAGNAVOX GAME CAME WITH OVERLAYS THAT WERE PLACED OVER THE SCREEN; IS THAT CORRECT--THE INITIAL GAMES?
A. I RECALL, YES.
Q. DID THOSE PROVE TO BE IMPRACTICAL?
A. WELL, I WOULDN'T SAY THEY PROVED TO BE IMPRACTICAL. BUT THEY WERE IMPROVED UPON. AT THE TIME THERE WAS STILL A LARGE NUMBER OF THEM SOLD; BUT WHEN THEY WERE IMPROVED UPON, THE PRODUCT WAS MUCH BETTER.
Q. LET ME READ YOU WHAT MR. FRITCHIE'S TESTIMONY WAS ON THIS AND ASK YOU IF YOU AGREE OR DISAGREE WITH HIM. AT PAGE 537 IN THE CDI SUIT:

"THERE IS STILL SOME ENJOYMENT FOR THE GAMES IN THE ITL 200 THAT HAD OVERLAYS AND ALL OF THAT, BUT WE WERE RUNNING INTO TOO MANY PROBLEMS BECAUSE THE TV MANUFACTURERS WERE TRYING TO KEEP CURRENT WITH THE BEST KINDS OF TV TUBES, THOSE TV TUBES THAT CONSTANTLY HAD DIFFERENT SIZES ON THEM, AND OUR OVERLAYS WERE RUNNING INTO PROBLEMS.

SECONDLY, A LOT OF CONSUMERS DIDN'T LIKE ALL THE OVERLAY GAMES THAT THE ITL 200 HAD AND, THEREFORE, WE

MADE A CHANGE IN THE PRODUCT."

IS THAT STATEMENT---

A. I HAVE NO REASON TO DISAGREE WITH WHAT MR. FRITCHIE SAID.

Q. DO YOU KNOW HOW MUCH MAGNAVOX INVESTED IN DOLLARS IN THE PROCESS OF TOOLING UP FOR THE PRODUCTION OF ODYSSEY?

A. NO, I DON'T.

Q. DO YOU KNOW WHAT MAGNAVOX'S TOTAL COST OF MANUFACTURING WAS FOR 1972 OR '72 THROUGH '75 OR ANY PARTICULAR YEAR?

A. NO, I DON'T.

Q. OF COURSE, IN ANY GIVEN YEAR IT IS POSSIBLE TO SELL A LARGE NUMBER OF PRODUCT--UNITS, BUT, NEVERTHELESS, GIVEN THE COSTS THAT ARE INVOLVED, NOT MAKE MONEY, ISN'T THAT ACCURATE?

A. THAT'S TRUE.

Q. DO YOU KNOW WHAT MAGNAVOX'S COST OF DISTRIBUTION WAS FROM 1972 TO 1975?

A. NO, I DON'T.

Q. ARE YOU AWARE THAT THERE WAS SOME EARLY DIFFICULTIES REPORTED WITH THE IMPRINTING OF THE MAGNAVOX GAME ON THE TV TUBE IF THE TELEVISION SET WAS LEFT ON FOR TOO LONG A PERIOD OF TIME?

A. NO, I DON'T HAVE ANY UNDERSTANDING OF THAT. I DO HAVE A HAZY RECOLLECTION THAT THAT WAS A CONCERN AT ONE TIME, BUT THAT IT WAS AN UNJUSTIFIED CONCERN.

Q. DO YOU HAVE ANY PERSONAL KNOWLEDGE OF MAGNAVOX'S COSTS IN THE EARLY PERIOD THAT YOU WERE IN FORT WAYNE FOR REPAIR OR MAINTENANCE OF REFURBISHED ITEMS IN ANY GIVEN YEAR?

A. NO, I DON'T.
Q. SO YOUR JOB DOES NOT INVOLVE SUPERVISING OR TRACKING PROFITABILITY OF THE MAGNAVOX ODYSSEY LINE?
A. THAT'S CORRECT.
Q. IT NEVER DID INVOLVE THAT? YOUR JOB WAS WORKING ON LICENSING?
A. THAT'S CORRECT.
Q. OF COURSE, MAGNAVOX MADE INVESTMENTS TO UPDATE THE TECHNOLOGY IN ITS LATER UNITS; THAT IS TRUE, ISN'T IT?
A. YES.
Q. DO YOU HAVE ANY PARTICULAR FAMILIARITY WITH THE CIRCUIT ARRANGEMENTS CONTAINED IN THE VARIOUS ODYSSEY PRODUCTS?
A. NO, I DON'T.
Q. DO YOU KNOW ONE WAY OR THE OTHER WHETHER THE ITL 200, FOR EXAMPLE, HAS A SLICER CIRCUIT IN IT OR NOT?
A. NO, I DON'T.
Q. DO YOU KNOW ONE WAY OR ANOTHER WHETHER THE CIRCUITRY IN THE ITL 200 IS OF THE TYPE FIRST DEVISED BY RALPH BAER'S 480 PATENT AND LATER MODIFIED BY HE AND MR. HARRISON AND DISCLOSED IN THE 598 PATENT?
A. NO, I DON'T.
Q. YOU TESTIFIED TODAY IN REGARD TO MICROPROCESSOR GAME LICENSES; IS THAT CORRECT?
A. YES.
Q. AND YOU MENTIONED THAT IN THE UNITED STATES THERE ARE

LICENSES BY ATARI, MATEL AND COLECO. THAT IS AT LEAST THREE, IS THAT TRUE?

Q. BOTH COLECO AND ATARI'S LICENSES PREDATE THE PLACING ON THE MARKET OF MICROPROCESSOR GAMES, IS THAT TRUE, BY THOSE TWO COMPANIES?

A. YES, THAT'S CORRECT.

Q. AND MATEL'S LICENSE OCCURRED AFTER THE LAWSUIT IN QUESTION?

A. YES.

Q. I BELIEVE YOU SAID THAT YOU WERE AWARE THAT ATARI PLANNED TO RELEASE A MICROPROCESSOR GAME AND THAT THAT CAME UP DURING THE COURSE OF YOUR DISCUSSIONS IN THE NEGOTIATIONS THAT LED TO THE SETTLEMENT OF THE CASE?

A. I MENTIONED THAT BUSHNELL BROUGHT THAT UP DURING THE NEGOTIATIONS.

(CONTINUED ON NEXT PAGE)

Q. NOW, YOU WERE INTERESTED IN ACQUIRING THE MICROPROCESSOR TECHNOLOGY THAT ATARI POSSESSED AT THAT TIME; IS THAT TRUE?
A. YES. AND ATARI WAS INTERESTED IN GIVING CERTAIN TECHNOLOGY RIGHTS TO MAGNAVOX TO REDUCE THE AMOUNT THAT THEY WOULD HAVE TO PAY FOR A PAID UP LICENSE.
Q. EXACTLY. THEY WEREN'T JUST INTERESTED IN GIVING INFORMATION, BUT IN THE COURSE OF NEGOTIATION THERE WAS DISCUSSION AS TO THOSE TWO ITEMS; IS THAT CORRECT?
A. CORRECT.
Q. DID YOU SUCCEED IN OBTAINING THE TECHNOLOGY FOR THE MICROPROCESSOR THAT ATARI USED FROM ATARI?
A. YES.
Q. IN FACT, DIDN'T YOU ENDEAVOR FOR SOMETIME TO OBTAIN THAT TECHNOLOGY AND HAD DIFFICULTY IN GETTING IT?
A. WELL, I KNOW THAT WE SENT PEOPLE TO VISIT ATARI, TECHNICAL PEOPLE, WHO DID FIND OUT THE INFORMATION THAT ATARI WAS REQUIRED TO GIVE US AND DID CONSIDER IT WITH RESPECT TO FUTURE PRODUCTS OF MAGNAVOX.
Q. IS IT TRUE THAT THE ATARI VIDEO COMPUTER SYSTEM 2600 TURNED OUT ON THE MARKET TO BE A SUPERIOR PRODUCT TO THE MAGNAVOX ODYSSEY II PRODUCT?
A. I DON'T THINK I AM QUALIFIED TO ANSWER THAT QUESTION.
Q. YOU ARE NOT QUALIFIED TO ANSWER IT IN TERMS OF ITS CAPABILITIES---
A. THAT'S RIGHT.

Q. (CONTINUED) --FROM TECHNICAL POINT OF VIEW?

HOW ABOUT FROM A MARKET POINT OF VIEW, WAS THE ATARI VIDEO COMPUTER SYSTEM 2600 THE LEADER IN THE MARKETPLACE IN TOTAL SALES OF CONSOLES, OR ARE YOU FAMILIAR WITH THAT?

A. I REALLY DON'T KNOW. I DON'T KNOW.

Q. AGAIN YOUR DATA WOULD BE BASICALLY RESTRICTED IN THE ORDINARY COURSE OF YOUR BUSINESS TO INCOME THAT RELATES TO THE LICENSES?

A. THAT'S RIGHT.

Q. NOW, IN THE SETTLEMENT AGREEMENT WITH ATARI, ATARI OBTAINED, DID THEY NOT, A FULLY PAID UP LICENSE FOR UNITED STATES SALES OF CONSOLE AND SOFTWARE MANUFACTURED IN THE UNITED STATES, INCLUDING MICROPROCESSOR GAMES?

MR. ANDERSON: I OBJECT ONLY IN THERE ARE TWO ATARI LICENSES. I DON'T KNOW WHICH OR BOTH MR. GLICK IS REFERRING TO.

MR. GLICK: ALL THE OTHER ATARI LICENSES REFER TO FOREIGN SALES AND MANUFACTURERS. THERE IS ONE DOCUMENT, WHICH IS THE ORIGINAL LICENSE ENTERED INTO IN 1976.

THE COURT: DN?

MR. GLICK: DN, EXHIBIT DN. AND IT GIVES A FULLY PAID UP LICENSE FOR ALL UNITED STATES MANUFACTURED AND SALE OF VIDEO GAME PRODUCTS.

MR. ANDERSON: 1981 LICENSE ALSO INCLUDES---

THE WITNESS: COULD YOU REPEAT THE QUESTION, PLEASE?

Q. (BY MR. GLICK) DO YOU HAVE THE EXHIBIT IN FRONT OF YOU?

A. YES, I DO.

MR. ANDERSON: THE 1981 LICENSE ALSO INCLUDES PROVISION FOR U.S. MANUFACTURE, JUST SO THE RECORD IS STRAIGHT.

MR. GLICK: UNITED STATES MANUFACTURE FOR SALE IN FOREIGN COUNTRIES.

THE WITNESS: YOUR QUESTION IS ADDRESSED TO THE LICENSE OF JUNE 8, 1976?

MR. GLICK: YES.

A. COULD YOU REPEAT THE QUESTION?

Q. (BY MR. GLICK) ISN'T IT A FACT THAT IN THE 1976 AGREEMENT WHICH YOU HAVE IN FRONT OF YOU THAT ATARI ENTERED INTO AGREEMENT WITH MAGNAVOX TO PERMIT THE MANUFACTURE AND SALE IN THE UNITED STATES OF VIDEO GAMES WITHOUT THE PAYMENT OF RUNNING ROYALTIES?

THE COURT: OF WHAT?

MR. GLICK: RUNNING ROYALTIES. OR, IN OTHER WORDS, THAT IT WAS FULLY PAID UP.

A. YES, EXCEPT FOR THE OPTIONS--THE OPTIONS OR RAMIFICATIONS OF THE FULLY PAID UP LICENSE.

Q. YOU HAVE TESTIFIED TO THOSE, AND WE WILL HAVE AN OPPORTUNITY LATER TO INFORM THE JUDGE WHAT WE EACH THINK IS THE SIGNIFICANCE OF THE ADDITIONAL OPTIONS WHICH EXIST HERE.

BUT AS TO THE MATTERS WHICH I HAVE SPECIFIED, UNITED STATES SALE AND MANUFACTURE, A FULLY PAID UP LICENSE WAS GIVEN TO ATARI AS A RESULT OF THIS SETTLEMENT AGREEMENT FOR THOSE ITEMS; IS THAT CORRECT?

A. YES, FOR COMPLETE VIDEO GAMES.
Q. DO YOU YOURSELF ATTEND CES CONFERENCES, TRADE CONFERENCES?
A. I HAVE IN THE PAST, MR. GLICK, BUT NOT IN RECENT YEARS.
Q. SOMEONE AT MAGNAVOX HAS RESPONSIBILITY TO KEEP UP WITH THE MARKET AND LOOK FOR POTENTIAL LICENSEES?
A. YES.
Q. DOES SOMEONE EXAMINE GAMES RELEASED TO DETERMINE WHETHER PARTICULAR GAMES HAVE FEATURES INVOLVED IN EITHER THE 480 BAER I PATENT OR THE 507 RUSCH II PATENT?
A. WELL, I HAVE ONE OR MORE ATTORNEYS IN MY OFFICE WHO ARE ASSIGNED TO KEEPING ABREAST OF THE BUSINESS OF VIDEO GAME LICENSING TO KEEP THEMSELVES INFORMED. BUT THEY HAVE SELDOM GONE TO THE CES SHOW.
Q. DO YOU KNOW IF THEY READ TRADE MAGAZINES THEMSELVES TO BE INFORMED OF THE PRODUCTS THAT ARE COMING OUT?
A. WELL, THEY READ TELEVISION DIGEST, WHICH HAS INFORMATION OF THAT NATURE IN IT, AND PLAYMETER, WHICH IS A COIN-OPERATED VIDEO GAME KIND OF MAGAZINE. AND THEY READ OTHER PUBLICATIONS SIMILAR TO THAT.
Q. THEY ALSO VISIT STORES FROM TIME TO TIME TO SEE WHAT IS OUT THERE ON THE MARKET?
A. VERY SELDOM. UNLESS IT IS TO TRACK DOWN A PRESUMED INFRINGER WHO WE HAVE READ ABOUT SOMEWHERE ELSE THAT HE MAY BE MANUFACTURING A VIDEO GAME OR A CARTRIDGE THAT IS CONSIDERED TO COME WITHIN THE CLAIMS OF THE RUSCH REISSUE PATENT.

Q. OF COURSE, THERE ARE MARKETING AND SALESPEOPLE IN THE MAGNAVOX ORGANIZATION WHO ARE IN AND OUT OF RETAIL STORES FROM TIME TO TIME?

A. THERE HAVE BEEN, YES.

Q. ARE THERE PEOPLE IN THAT ORGANIZATION WHO HAVE BEEN INFORMED TO STAY AWARE OF VIDEO GAMES THAT ARE BROUGHT OUT ON THE MARKET AND HOW THEY ARE SOLD?

A. OVER A PERIOD OF YEARS, YES. BUT I HAVE NOT BEEN--- SINCE I MOVED AWAY FROM FORT WAYNE, WHICH WAS ABOUT NINE YEARS AGO NOW, AND THE MAGNAVOX VIDEO GAME BUSINESS MOVED FROM FORT WAYNE, INDIANA TO KNOXVILLE, TENNESSEE, I REALLY AM NOT DIRECTLY INVOLVED WITH KNOWING HOW THEY KEEP ABREAST OF THE COMPETITION OR WHAT IS GOING ON AT THE MARKETPLACE.

Q. MR. BRIODY, WHEN YOU WEREN'T HERE THERE HAS BEEN SOME TESTIMONY IN THIS LITIGATION CONCERNING THE VARIOUS ITERATIONS OF GAMES AND HOW THEY HAVE EVOLVED.

I AM GOING TO SHOW YOU A COPY OF A MEMORANDUM TO A MR. STOUT (PHONETIC), FROM A MR. MICHELSON (PHONETIC). DO YOU KNOW EITHER MR. STOUT OR MR. MICHELSON?

A. YES, I HAVE KNOWN THEM IN THE PAST. I THINK THAT MR. MICHELSON HAS RETIRED AND I THINK MR. STOUT IS NO LONGER WITH NORTHERN AMERICA PHILLIPS. BUT I DID KNOW THEM IN THE PAST. I KNEW THEM WHEN THEY WERE IN FORT WAYNE.

Q. WE HAVE MARKED AS EXHIBIT IC A MEMORANDUM THAT HAS BEEN PRODUCED IN THIS LITIGATION BETWEEN MR. MICHELSON AND MR. STOUT

IN 1978.

ARE YOU FAMILIAR WITH ANY EFFORT THAT WAS MADE AT MAGNAVOX TO CATCH UP ON MORE POPULAR GAMES BY UNDERTAKING AN EFFORT TO MAKE GAMES THAT ARE SIMILAR TO GAMES OF OTHER MANUFACTURERS THAT MIGHT BE MARKETED?

A. NO, I AM NOT.

Q. ARE YOU AWARE THAT THERE WAS LITIGATION BETWEEN ATARI AND MAGNAVOX IN WHICH ATARI ACCUSED MAGNAVOX OF INFRINGING THE PAC MAN COPY RIGHT WITH A MAGNAVOX GAME CK MUNCHKIN?

A. YES, I AM AWARE OF THAT LITIGATION AND I HELPED SETTLE THAT LAWSUIT A FEW MONTHS AGO.

Q. WERE YOU INVOLVED IN THE PURCHASE OF THE SPIEGEL PATENT?

A. WELL, ONE OF THE FELLOWS IN MY OFFICE WAS INVOLVED IN IT. I AM GENERALLY AWARE OF IT.

Q. TO THE BEST OF YOUR KNOWLEDGE HAS THE SPIEGEL PATENT EVER BEEN ASSERTED BY MAGNAVOX SINCE ITS ACQUISITION AGAINST ANYONE?

A. NO.

Q. WERE YOU AWARE AT THE TIME OF ITS ACQUISITION THAT IT HAD EXPIRED AND THEREFORE HAD APPLICATION ONLY, IF AT ALL, TO THE PAST?

A. I SEEM TO RECALL THAT. I WOULD HAVE TO LOOK UP THE DATES. BUT I HAVE THE FEELING THAT IT WAS NEAR THE END OF ITS TIME AT THE TIME THAT WE PURCHASED IT.

Q. HAVE YOU EVER ASSERTED EITHER THE 507 OR THE 480 PATENT AGAINST ANY SOFTWARE ONLY MANUFACTURER OTHER THAN ACTIVISION?

A. IS THE QUESTION HAVE WE EVER ASSERTED?
Q. YES.
A. WE DO HAVE ONE LICENSEE OF SOFTWARE, MILTON BRADLEY. NOW, I HAVE THE FEELING THAT WE DIDN'T ASSERT IT; THAT PERHAPS THEY CAME TO US AND SAID "WE WANTED A LICENSE."

BUT IF YOU CONNOTE THAT AS MEANING ASSERTED, BECAUSE WE DID HAVE NEGOTIATIONS WITH THEM, SERIOUS NEGOTIATIONS, BEFORE THEY TOOK THE LICENSE, THEN WE ASSERTED THE PATENTS AGAINST MILTON BRADLEY.

Q. THE MILTON BRADLEY LICENSE AGREEMENT IS EFFECTIVE JANUARY 1ST 1983. DO YOU HAPPEN TO KNOW THAT BY MEMORY?
A. NO, I DON'T.
Q. WERE YOU AWARE THAT DURING 1982 MILTON BRADLEY WAS IN THE PROCESS OF DELEVOPING ITS OWN COMPLETE SYSTEM, BOTH SOFTWARE AND CONSOLE UNITS, WHICH THEY AT THAT TIME HAD ANNOUNCED THEY WERE GOING TO BRING ONTO THE MARKET?
A. NO, I AM NOT SPECIFICALLY AWARE OF THAT.
Q. NOW THAT I HAVE MENTIONED IT, DOES THAT STRIKE A RESPONSIVE CORD IN YOUR THINKING?
A. I DON'T HAVE ANY REASON TO DISAGREE WITH WHAT YOU SAID, BUT I JUST DON'T KNOW.
Q. THE LICENSE THAT WAS ACTUALLY ENTERED INTO WITH MILTON BRADLEY IS NOT RESTRICTED TO SOFTWARE ONLY; IT WOULD INCLUDE CONSOLE?
A. THAT IS CORRECT. MY RECOLLECTION WAS THAT IT WAS MAINLY FOR

SOFTWARE OR MAINLY FOR CARTRIDGES.

Q. ARE YOU AWARE THAT IN THE FALL OF 1982 MILTON BRADLEY BOUGHT A COMPANY CALLED GCE WHICH MADE A COMPLETE SYSTEM CALLED VEXTREX (PHONETIC), WHICH INCLUDED SOFTWARE CONSOLES AND JOYSTICKS AND A POINT PLOTTER MONITOR FOR PLAYING VIDEO GAMES?

A. I AM NOT AWARE OF THIS. SOMEONE ELSE IN MY OFFICE WAS INVOLVED IN THAT MATTER.

Q. CERTAINLY IF EITHER OF THESE TWO THAT I HAVE TOLD YOU IS TRUE, THAT IS, THAT THEY OWNED A WHOLE UNIT THROUGH VEXTREX AND MAKING THEIR OWN WHOLE UNIT, THEN IT WOULDN'T BE CORRECT THAT THEIR LICENSE WITH YOU WAS AS A SOFTWARE ONLY MANUFACTURER, ISN'T THAT ACCURATE?

A. WELL, WHAT YOU SAY COULD BE TRUE. BUT I JUST REALLY DON'T KNOW THAT MUCH ABOUT THE SITUATION. MY RECOLLECTION FROM TALKING TO PEOPLE IN MY OFFICE--AND PRESUMABLY I SIGNED THE MILTON BRADLEY LICENSE AGREEMENT--WAS THAT IT PRINCIPALLY--THEIR PRINCIPAL CONCERN WAS TO TAKE A LICENSE FOR SOFTWARE.

Q. TO YOUR KNOWLEDGE, DID MILTON BRADLEY ACTUALLY MAKE SOFTWARE FOR VCS?

A. I DON'T KNOW.

Q. OTHER THAN THIS POSSIBILITY OF MILTON BRADLEY, WHICH WE HAVE COVERED, HAVE YOU ASSERTED THE--EITHER THE 507 OR THE 480 PATENT AGAINST ANY SOFTWARE ONLY MANUFACTURE OTHER THAN PERHAPS MILTON BRADLEY?

A. NOT THAT I RECALL.

Q. THAT INCLUDES IMAGIC?
A. MIGHT POSSIBLY HAVE SENT THEM A LETTER. I DON'T RECALL IT. BUT THE UPSHOT OF IT WAS THAT WE FELT THAT THERE WAS NO SIGNIFICANT INFRINGEMENT.
Q. PARKER BROTHERS MADE A NUMBER OF GAMES FOR VCS. DID YOU SEND A LETTER OR PURSUE DISCUSSIONS WITH PARKER BROTHERS?
A. NO, WE DIDN'T. WE DIDN'T HAVE ANY REASON TO FEEL THAT THEY INFRINGED THE RUSCH REISSUE PATENT.
Q. BRODERBUNDT, B-R-O-D-E-R-B-U-N-D-T?
A. NO.
Q. SYNATSE, S-Y-N-A-T-S-E?
A. NO.
Q. EPYX, E-P-Y-X?
A. I RECALL HAVING HAD A CONVERSATION WITH SOMEONE IN MY OFFICE ABOUT THEM, BUT I DON'T THINK WE HAD ANY EVIDENCE THAT CAUSED US TO FEEL THAT THEY WERE INFRINGING THE PATENT.
Q. SIERRA, S-I-E-R-R-A?
A. NO, I DON'T THINK SO.
Q. ELECTRONIC ARTS?
A. I DON'T THINK SO.
Q. SPINNAKER, S-P-I-N-N-A-K-E-R?
A. NO.
Q. YOU ARE FAMILIAR WITH THE LAW, ARE YOU NOT, THAT REQUIRES YOU TO GIVE TIMELY NOTICE TO ONE THAT YOU CONTEND INFRINGES A PATENT?

MR. ANDERSON: I OBJECT, YOUR HONOR. WHAT LAW IS THAT?

THE COURT: WELL, IT IS A PRELIMINARY FOUNDATION QUESTION. I WILL PERMIT THE QUESTION.

THE WITNESS: AM I FAMILIAR WITH THE LAW OF LACHES?

Q. (BY MR. GLICK) YES.

A. YES.

Q. THERE IS A REQUIREMENT THAT ONCE YOU ARE AWARE, OR SHOULD BE AWARE, OF INFRINGEMENT THAT YOU TIMELY TELL THE PERSON THAT YOU CONTEND WHAT THEY ARE DOING IS INFRINGING?

MR. ANDERSON: I OBJECT.

THE WITNESS: LET EXPLAIN TO YOU, MR. GLICK, I INTERPRET THE LAW IN A SLIGHTLY DIFFERENT WAY.

IF SOMEONE IS INFRINGING A PATENT AND YOU ARE NOT A MANUFACTURER, LET'S SAY YOU GIVE THEM NOTICE AND THEN THE LIABILITY STARTS TO ACCRUE AS OF THE DATE OF NOTICE, BUT THERE ARE NO RIGHTS THAT ARE LOST BY WAITING AWHILE UNTIL YOU KNOW.

AND WE, TO THE BEST OF MY KNOWLEDGE, WE HAD NO REASON TO BELIEVE THAT THERE WAS ANY SIGNIFICANT INFRINGEMENT OF ANY OTHER CARTRIDGE ONLY KINDS OF MANUFACTURERS OF VIDEO GAMES OTHER THAN THE DEFENDANT IN THIS CASE.

Q. LET ME PHRASE IT IN A WAY THAT SOUNDS LIKE YOU WILL AGREE WITH, AND THAT IS, THAT YOU WILL NEED TO GIVE NOTICE IN ORDER TO START THE CLOCK RUNNING ON DAMAGES TO ANY PARTICULAR INFRINGEMENT?

A. NOT IF THE INFRINGER KNOWS HE IS INFRINGING. IF THE

INFRINGER KNOWS HE IS INFRINGING, YOU DON'T HAVE TO GIVE HIM NOTICE AND IT CAN BE DETERMINED IN LITIGATION THAT HE KNEW. AND SO THERE WAS NO NEED TO GIVE HIM NOTICE IN THE FIRST PLACE.

Q. TO PUT IT MILDLY, IN THE EXERCISE OF DUE DILIGENCE AND BEING A PATENT COUNSEL, IF YOU ARE AWARE THAT THERE IS SOMEONE OUT THERE WHO YOU BELIEVE INFRINGES YOUR PATENT, YOU ARE GOING TO TAKE STEPS TO NOTIFY THEM AS EARLY AS POSSIBLE IF YOU CAN DO SO. THAT IS CERTAINLY FAIR, ISN'T IT?

A. WELL, I CAN'T ANSWER YOUR QUESTION THAT WAY, MR. GLICK, BECAUSE IF I AM A MANUFACTURER AND I MARK MY PATENT NUMBERS ON MY PRODUCT, THEN THE LAW CONTRUES THAT AN INFRINGER SHOULD KNOW BY LOOKING AT MY PRODUCT, AND I DON'T HAVE TO GIVE HIM NOTICE IN THE FIRST PLACE.

Q. MY QUESTION WAS WHETHER IN THE EXERCISE OF DUE DILIGENCE UPON HAVING NOTICE IT WOULD BE YOUR ADVICE TO GO AHEAD AND GIVE NOTICE THAT YOU CONTEND SOMETHING INFRINGES TO THE ALLEGED INFRINGER?

A. IF WE ONLY--ONLY IF WE HAVE CONSIDERED THAT THERE IS INFRINGEMENT, WE ARE CERTAIN THERE IS INFRINGEMENT, AND WE FEEL THAT WE WANT TO ASSERT OUR CLAIMS UNDER THE PATENTS.

THERE MAY BE A SITUATION WHERE THERE IS A VERY SMALL KIND OF INFRINGEMENT OR VERY LITTLE INFRINGEMENT AND SO WE ARE--WE WON'T BOTHER WITH THE MATTER AS OF THEN.

WE WILL WAIT UNTIL WE BECOME AWARE OF THE FACT THAT THERE IS A SIGNIFICANT INFRINGEMENT INVOLVED.

Q. YOU ARE AWARE, ARE YOU NOT, THAT THERE ARE INDEPENDENT MANUFACTURERS OF THE JOYSTICK COMPONENT THAT ARE USED WITH COMPLETE SYSTEMS; IS THAT CORRECT?

A. YES, I AM.

Q. AND YOU HAVE NOT GIVEN CONSIDERATION, I TAKE IT, TO PURSUING ANY OF THE JOYSTICK ONLY MANUFACTURERS; IS THAT TRUE?

A. NO. WE HAVEN'T. WE HAVE NEVER CONSIDERED IT. THE FIRST TIME I EVER HEARD OF IT WAS I THINK I READ SOMEWHERE IN DEFENDANT'S PRETRIAL BRIEFS SOMETHING ABOUT JOYSTICKS. AND I WOULD CONSIDER IT WOULD BE OUTLANDISH TO EVER GIVE INFRINGEMENT NOTICE TO A JOYSTICK MANUFACTURER.

MR. GLICK: YOUR HONOR, MAY I ASK THAT THE WITNESS---

THE COURT: JUST RESPOND TO THE QUESTION. IF YOU WANT TO EXPLAIN YOUR ANSWER, YOU CAN FOLLOW-UP AND DO SO. PLEASE JUST RESPOND TO THE QUESTION FRAMED.

Q. (BY MR. GLICK) THE NEXT QUESTION IS GOING TO BE: IS THE REASON YOU HAVEN'T PURSUED THE JOYSTICK ONLY MANUFACTURERS SEPARATELY BECAUSE JOYSTICKS CAN BE PLAYED IN CONSOLES WITH A WHOLE VARIETY OF DIFFERENT KINDS OF SOFTWARE?

A. YES. AND ALSO WE DON'T THINK THERE IS ANY CONTRIBUTORY INFRINGEMENT OF JOYSTICKS.

Q. INDEPENDENT OF THAT FACT?

A. WELL, BOTH FACTS ARE RELEVANT. WE DON'T THINK THERE WOULD BE ANY CONTRIBUTORY INFRINGEMENT OF THE RUSCH REISSUE PATENT.

Q. YOU ALSO OWN THE 480 PATENT; IS THAT CORRECT?

A. THAT'S CORRECT. BUT WE HAVE AN EXCLUSIVE LICENSE.
Q. YOU HAVE HAD THAT FOR SOMETIME?
A. YES.
Q. SINCE THE ORIGINAL EXCLUSIVE LICENSE AGREEMENT WAS ENTERED INTO?
A. THAT'S CORRECT.
MR. GLICK: MAY I HAVE A COPY OF THAT? YOUR HONOR, I WILL BE REFERRING TO CLAIM ONE OF THE 480 PATENT.
THE COURT: WHAT IS THE NUMBER?
MR. GLICK: IT IS NUMBERED DA. WE HAVE A COPY FOR THE WITNESS TO FOLLOW.
Q. (BY MR. GLICK) MR.. BRIODY, I WOULD LIKE YOU TO REVIEW THAT CLAIM. I THINK THAT IS WHAT YOU ARE DOING RIGHT NOW. CLAIM ONE IN COLUMN 13, YOUR HONOR.
THE WITNESS: I HAVE READ IT.
MR. GLICK: YOUR HONOR, HAVE YOU HAD A CHANCE---
THE COURT: YES.
Q. (BY MR. GLICK) I THINK YOU WOULD AGREE THAT THAT IS A VERY BROAD CLAIM, WOULD YOU NOT?
A. RELATIVELY BROAD, YES.
Q. IT COVERS GENERATION OF DOTS ON THE SCREEN TO BE MANIPULATED BY A PARTICIPANT AND THEN STATES WHAT FOLLOWS; IS THAT CORRECT?
A. YES.
Q. ARE YOU AWARE OF ANY ACTIVISION GAME THAT WOULD NOT INFRINGE THIS CLAIM, CLAIM ONE?

MR. ANDERSON: YOUR HONOR, I OBJECT TO INTERROGATION ABOUT INFRINGEMENT OF A CLAIM IN ANOTHER PATENT UNINVOLED HERE. IT IS AN EVALUATION THAT TAKES A LOT OF STUDY AND CONSIDERATION. IT AMOUNTS TO GIVING A LEGAL AMOUNT.

THE COURT: WHAT ARE YOU DOING, MR. GLICK? THE WITNESS HASN'T BEEN QUALIFIED AS AN EXPERT. HE HASN'T GIVEN ANY TESTIMONY ON INFRINGEMENT. HE HAS EXPRESSED CERTAIN COMMENTS OF MANAGEMENT ABOUT ENFORCEMENT OF THEIR LICENSING AND PATENT PROGRAM.

MR. GLICK: I AM TRYING TO DEMONSTRATE DURING THIS PERIOD OF TIME IN WHICH I BELIEVE THIS WITNESS HAS TESTIFIED TO THE VARIOUS MOTIVATIONS AND THEIR RELEVANCE ABOUT WHO WAS PURSUED AND WHO WASN'T.

I WANT TO POINT OUT THE 480 PATENT WAS POSSESSED, WAS ON THE BOOKS, WAS AVAILABLE TO ASSERT. AND WE ARE GOING TO CERTAINLY ULTIMATELY POINT OUT---

THE COURT: WHY DON'T YOU ASK IT DIRECTLY? DID THEY ASSERT CLAIMS OF INFRINGEMENT ON 480? AND IF SO, WHY AND IF NOT, WHY.

Q. (BY MR. GLICK) DID YOU ASSERT THE CLAIM, TO YOUR KNOWLEDGE, CLAIM 1 OR CLAIM 25 OF THIS PATENT?

A. AGAINST WHOM? AGAINST ANYBODY?

Q. YES.

MR. ANDERSON: I AM SORRY. DID YOU SAY CLAIM 25?

Q. (BY MR. GLICK) LET'S RESTRICT IT TO CLAIM ONE BECAUSE THAT

IS THE ONE THAT IS READ.

A. MR. GLICK, I AM NOT FAMILIAR WITH ALL THE CLAIMS OF THE 480 PATENT, BUT I RECALL THAT WE DID ORIGINALLY ASSERT THE 480 PATENT AGAINST SOME OF THE VIDEO GAME, COIN-OPERATED VIDEO GAME, PATENT INFRINGERS.

Q. IN FACT, ALL THE LICENSES THAT YOU HAVE REVIEWED, OR VIRTUALLY ALL THE LICENSES, INCLUDE A LICENSE FOR BOTH THE 480 PATENT AND THE 507 PATENT?

A. I DON'T KNOW. SOME DO AND I THINK SOME DO NOT. THE 480 PATENT, AS YOU UNDOUBTEDLY KNOW, IS IN APPLICATION FOR REISSUE IN THE UNITED STATES PATENT AND TRADEMARK OFFICE.

AND SO WE DO HAVE SOME LICENSES THAT DON'T HAVE THE 480 PATENT IN IT AND WE HAVE SOME THAT DO. I DON'T HAVE A HANDLE ON WHAT THE WHOLE SITUATION IS.

Q. YOU CAN'T TELL US--- CAN YOU ANSWER MY QUESTION AS TO WHETHER MOST INCLUDE BOTH THE 480 AND THE 507 PATENT?

A. I CAN'T ANSWER THAT ACCURATELY. I WOULD HAVE TO CHECK AND FIND OUT.

Q. THE ATARI LICENSE DOES INCLUDE THE 480, DOES IT NOT?

A. YES.

Q. AND THE MATTEL LICENSE INCLUDES THE 480?

A. ALLOW ME A MOMENT. THE 1976 ATARI LICENSE INCLUDES THE 480 PATENT AND THE REISSUE.

Q. I CAN SHOW YOU THE MATTEL LICENSE AGREEMENT AND REFER YOU TO PAGE FIVE. I THINK YOU WILL SEE THERE IN THE LISTING THAT THE

480 PATENT IS ALSO COVERED.

A. YES, I SEE THAT IT IS.

Q. THE 480 PATENT IS ALSO INCLUDED IN THE COLECO LICENSE; ISN'T THAT CORRECT?

I WILL JUST ASSERT FOR THE RECORD IT IS RATHER THAN MAKE YOU SIT THERE AND SEARCH THROUGH IT.

HAVE YOU EVER ASSERTED EITHER THE 507 THE 480 PATENT AGAINST APPLE FOR THEIR HOME COMPUTER?

A. NO, WE HAVE NOT.

Q. OR IBM?

A. WE HAVE NOT.

Q. OR COMMODORE?

A. WE HAVE NOT.

Q. HAVE YOU EVER ASSERTED THE PATENT AGAINST ACTIVISION SOFTWARE FOR USE IN HOME COMPUTERS?

A. NO, WE HAVE NOT.

Q. I SHOW YOU WHAT HAS BEEN MARKED AS EXHIBIT ID AND ASK YOU IF YOU RECOGNIZE IT? LET ME ASK IT THIS WAY: YOU HAVE TESTIFIED WHO MR. MAYER IS?

A. YES. MR. MAYER IS ONE OF MY ASSOCIATES. HE IS A GROUP PATENT COUNSEL IN MY OFFICE.

Q. THIS IS AN AFFIDAVIT WHICH HE EXECUTED IN THE 480 REISSUE PROCEEDING; IS THAT CORRECT?

A. I DON'T KNOW WHY HE EXECUTED IT, BUT IT BEARS HIS SIGNATURE. I RECOGNIZE HIS SIGNATURE AND HE DID SIGN IT, UNDOUBTEDLY.

Q. THIS WAS SUBMITTED FOR THE PURPOSE OF SHOWING THE COMMERCIAL SUCCESS OF THE 480 PATENT; ISN'T THAT CORRECT?

A. I CAN'T TELL FROM LOOKING AT THE DOCUMENT, MR. GLICK, WHAT THIS AFFIDAVIT WAS USED FOR.

MR. GLICK: THANK YOU VERY MUCH, MR. BRIODY.

THE COURT: DO YOU HAVE ANY REDIRECT, MR. ANDERSON?

MR. ANDERSON: JUST ONE QUESTION, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q. MR. BRIODY, MR. GLICK ASKED YOU IF THE ATARI LICENSE PREDATED THE MICROPROCESSOR USE FOR VIDEO GAMES, AND I THINK YOU ANSWERED IT DID.

DID THE ATARI 1981 AGREEMENT COME AFTER ATARI WAS MAKING MICROPROCESSOR GAMES?

A. YES, IT DID.

Q. THAT'S THE ONE THAT YOU SAID ATARI HAS PAID OVER THREE MILLION DOLLARS IN ROYALTIES ON?

A. YES.

Q. DO YOU KNOW HAVE THOSE ROYALTIES BEEN PRIMARILY ON MICROPROCESSOR GAMES OR OTHER GAMES OR A COMBINATION?

A. I THINK THEY HAVE ALL BEEN A MICROPROCESSOR GAMES.

Q. AND HAVE THEY PAID SPECIFICALLY A ROYALTY THAT BEARS--BASED UPON CARTRIDGES THAT ARE USED IN MICROPROCESSOR GAMES?

A. YES.

MR. ANDERSON: NO FURTHER REDIRECT, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, MR. BRIODY.

(WITNESS EXCUSED)

MR. ANDERSON: YOUR HONOR, THAT COMPLETES THE PLAINTIFFS' CASE, WITH THREE EXCEPTIONS.

FIRST, WE WOULD LIKE TO HAVE AN OPPORTUNITY TO REVIEW THE EXHIBIT LIST AND MAKE A FURTHER OFFER OF EXHIBITS THAT HAVE BEEN PRODUCED AND ARE STIPULATED AS TO AUTHENTICITY BUT HAVE NOT YET BEEN OFFERED. WE ALSO HAD PLANNED TO PUT IN MR. BUSHNELL'S DEPOSITION, BUT DEFENDANT IS CALLING HIM AND, THEREFORE, WE WILL WANT TO EXAMINE HIM.

THE COURT: SO MR. BUSHNELL WILL APPEAR AS YOUR WITNESS AS WELL AS THE DEFENDANTS?

MR. ANDERSON: YES. I WOULD THINK THAT IS A GOOD WAY TO HANDLE IT. AT LEAST WE WILL WANT TO INTERROGATE HIM.

ALSO WE WERE GOING TO CALL MR. LEVY. AND MR. GLICK AND I TALKED ABOUT THAT. AND PARTLY JUST TO SAVE TIME, ACTIVISION IS CALLING HIM. HE IS AN OFFICER OF ACTIVISION AND WE WILL INTERROGATE HIM AT THAT TIME.

THE COURT: SO I GATHER THAT YOUR INTERROGATION OF MR. BUSHNELL AND MR. LEVY MAY GO BEYOND THE SCOPE OF THE DIRECT EXAMINATION OF MR. GLICK.

MR. ANDERSON: NOT KNOWING WHAT THE DIRECT WILL BE, I CAN'T BE SURE, BUT I THINK IT MIGHT YOUR HONOR, YES. OTHER THAN THAT, WITH THOSE THREE PROVISOS, WE REST, YOUR HONOR.

THE COURT: MR. GLICK, ARE YOU READY TO BEGIN?

MR. GLICK: IF WE COULD HAVE A THREE OR FOUR MINIMUM BREAK AND THEN WE WILL BE ALL SET.

THE COURT: SURE.

(PAUSE IN PROCEEDINGS)

JAMES H. LEVY,

CALLED AS A WITNESS BY THE DEFENDANT, BEING FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE COURT: WOULD YOU PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME.

THE WITNESS: JAMES HARMON LEVY. L-E-V-Y.

DIRECT EXAMINATION

BY MR. GLICK:

Q. GOOD AFTERNOON, MR. LEVY.

A. IT IS AFTERNOON.

Q. WOULD YOU PLEASE STATE FOR THE RECORD YOUR PRESENT ADDRESS?

A. 245 PARK LANE, ATHERTON, CALIFORNIA.

Q. WHAT IS YOUR PRESENT OCCUPATION?

A. I AM THE CHAIRMAN AND CHIEF EXECUTIVE PRESIDENT OF ACTIVISION:

Q. AND HOW LONG HAVE YOU HELD THAT POSITION?

A. SINCE OCTOBER OF 1979.

Q. IS THAT THE DATE OF THE BEGINNING OF ACTIVISION?

A. SINCE THE COMPANY WAS FOUNDED, YES.

Q. WHERE IS ACTIVISION LOCATED?

A. IT IS IN MOUNTAIN VIEW, CALIFORNIA.

Q. HAS IT ALWAYS BEEN LOCATED IN THAT GENERAL AREA OF THE SAN FRANCISCO AREA?
A. IT HAS BEEN IN THE VALLEY SINCE ITS FOUNDING. IT HAS BEEN IN MOUNTAIN VIEW, SANTA CLARA, AND SUNNYVALE.
Q. ARE YOU ONE OF THE FOUNDERS OF ACTIVISION?
A. YES, I AM.
Q. I AM GOING TO ASK YOU SOME GENERAL BACKGROUND QUESTIONS FOR THE COURT. WHERE ARE YOU FROM ACTUALLY, MR. LEVY?
A. MY HOMETOWN IS SHREVEPORT, LOUISIANA.
Q. WOULD YOU PLEASE DESCRIBE WITH YOUR EDUCATIONAL?
A. I ATTENDED PUBLIC SCHOOLS, GRADUATED FROM HIGH SCHOOL IN SHREVEPORT, ATTENDED CARNEGIE INSTITUTE OF TECHNOLOGY IN 1961 THROUGH '66. I RECEIVED A BS AND MS BOTH IN INDUSTRIAL MANAGEMENT AND INDUSTRIAL ADMINISTRATION.
Q. OKAY. CARNEGIE IS IN PENNSYLVANIA?
A. PITTSBURG, PENNSYLVANIA.
Q. I WOULD LIKE YOU TO TRACE YOUR EMPLOYMENT HISTORY FROM THE TIME YOU GRADUATED FROM CARNEGIE.
A. WHEN I GRADUATED FROM BUSINESS SCHOOL, I WENT TO HERSHEY CHOCOLATE CORPORATION IN HERSHEY, PENNSYLVANIA IN THE MARKETING DEPARTMENT. I WAS A PROPERTY MANAGER, MARKETING MANAGER FROM 1966 THROUGH THE END OF 1968.

AND THEN I WENT TO TIME, INC. IN NEW YORK CITY. FOR ONE YEAR I WAS THE ASSISTANT BUSINESS MANAGER OF TIME MAGAZINE.

I THEN FORMED AN EXPERIMENTAL PUBLISHING VENTURE CALLED

TIME LIFE AUDIO WHICH WAS HOUSED AS PART OF TIME LIFE BOOKS. I RAN THAT VENTURE FOR THREE YEARS.

THEN I CAME TO THE SAN FRANCISCO AREA TO BE A MANAGER OF CORPORATE DEVELOPMENT FOR A SUBSIDIARY OWNED BY TIME, INC. CALLED HAVERHILLS (PHONETIC), MAIL ORDER MERCHANDISING COMPANY.

AFTER ONE YEAR THERE I WENT TO GRT CORPORATION IN SUNNYVALE. GRT WAS IN THE PRERECORDED MUSIC TAPE BUSINESS. AND I WAS FIRST THE MANAGER OF A MAIL ORDER MARKING DIVISION THAT I STARTED, THEN BECAME MANAGER OF BUSINESS AFFAIRS AND VICE-PRESIDENT OF BUSINESS AFFAIRS FOR THE CORPORATION, AND THEN CORPORATE VICE-PRESIDENT. AND I WAS WITH GRT UNTIL JUNE OF 1971.

Q. AT GRT WERE YOU INVOLVED IN ANY WORK THAT INVOLVED COMPUTER SOFTWARE?

A. YES.

Q. WOULD YOU PLEASE DESCRIBE THAT?

A. IN LATE 1977, EARLY 1978, IN MY CAPACITY AS VICE-PRESIDENT OF BUSINESS AFFAIRS I WAS APPROACHED BY TWO OR THREE GENTLEMEN WHO WERE INTENDING TO FORM A START-UP VENTURE WITHIN GRT TO PUBLISH SOFTWARE FOR PERSONAL COMPUTERS ON CASSETTE TAPE. THEY WERE GOING TO LICENSE COMPUTER PROGRAMS FROM INDEPENDENT DEVELOPERS, PACKAGE THEM AND MARKET THEM THROUGH COMPUTER STORES. I ASSISTED THEM IN SOME OF THEIR INITIAL PLANNING, AND THEN ABOUT A YEAR LATER AS A CORPORATE VICE-PRESIDENT WAS ASSIGNED OVERALL MANAGEMENT RESPONSIBILITY FOR THAT DIVISION AND

GUIDED THEIR DEVELOPMENT UNTIL I LEFT THE COMPANY.

Q. DID THAT DIVISION COME TO BE KNOWN AS THE G-2 GROUP?

A. THE G-2 GROUP, YES.

Q. NOW, WHAT HAPPENED THEN AT THAT POINT IN YOUR CAREER?

A. WELL, GRT WAS A COMPANY THAT HAD MANY, MANY PROBLEMS, NONE OF WHICH WERE IN THE G-2 GROUP AT THE TIME--BUT MANY PROBLEMS BECAUSE OF CHANGES IN THEIR PRIMARY MARKETS. IT WAS A COMPANY THAT EVENTUALLY WENT INTO BANKRUPTCY.

THIS WAS--A LOT OF THIS TROUBLE CROPPED UP IN EARLY 1979. I PETITIONED THE BOARD OF DIRECTORS OF THE COMPANY FOR THE RIGHT TO GO OUT AND SEEK FINANCING TO ACQUIRE THE G-2 DIVISION, SPIN IT OFF AS AN INDEPENDENT OPERATION. THE BOARD AGREED THAT THAT WOULD--THAT THEY WOULD INTERTAIN SUCH A PROPOSAL.

SO I SUBSEQUENTLY PREPARED A BUSINESS PLAN, BASED ON BUYING THE G-2 DIVISION AND TURNING IT INTO AN INDEPENDENT COMPANY AND WENT OUT AND SOUGHT TO RAISE FINANCING.

(CONTINUED ON NEXT PAGE)

Q. WHERE DID YOU GO TO SEEK THIS FINANCING?
A. I CALLED AN ATTORNEY AT WILSON SONSINI, GOODRICH AND ROSATI IN PALO ALTO. HE IS A GENTLEMAN I WORKED WITH ON CORPORATE MATTERS IN THE PAST FOR GRT. AND I GAVE HIM COPIES OF THE BUSINESS PLAN. HE MADE CONTACTS WITHIN THE VENTURE CAPITAL COMMUNITY.
Q. DID YOU IN FACT RECEIVE SOME SORT OF COMMITMENT FROM THE VENTURE CAPITAL COMMUNITY?
A. ABOUT TEN DAYS AFTER I LEFT GRT I RECEIVED HANDSHAKE COMMITMENT FROM BILL DRAPER (PHONETIC) AT SUTTER HILL VENTURES TO PROVIDE THE FUNDING TO ACQUIRE THE G2 DIVISION IF I COULD SUCCESSFULLY NEGOTIATE HIS ACQUISITION.
Q. DID YOU CONTINUE TO TRY AND NEGOTIATE THE ACQUISITION OF THE G2 GROUP?
A. YES, I DID.
Q. WHAT OCCURRED?
A. BECAUSE OF THE GENERAL PROBLEMS AT GRT, IT WAS VERY DIFFICULT TO GET ANYONE TO SIT DOWN AND FOCUS ON NEGOTIATING A DEAL.

ULTIMATELY I ABANDONED THE ATTEMPT TO BUY THAT DIVISION.

Q. WHAT OCCURRED NEXT AFTER YOU REALIZED THAT THE G2 GROUP ACQUISITION WOULD NOT GO FORWARD?
A. I WENT BACK TO SUTTER HILL AND TOLD THEM I THOUGHT I WAS GOING TO BE UNSUCCESSFUL IN ACQUIRING IT IN TIME TO REALLY SPIN

IT OFF AS AN INDEPENDENT DIVISION AND INQUIRED AS TO WHETHER THEY WERE INTERESTED IN STARTING A NEW COMPANY TO DEVELOP AND MARKET SOFTWARE FOR HOME AND PERSONAL COMPUTERS.

THEY INDICATED THEY WERE INTERESTED IN DOING SO. I SHOULD POINT OUT I HAD SIMULTANEOUSLY, DURING THIS PERIOD, THE FIRST TWO WEEKS OF JUNE 1979, HAD BEEN INTRODUCED TO FOUR GENTLEMEN WHO DESIGNED SOFTWARE, BOTH COMPUTER AND OPERATING SYSTEMS AND GAME TYPE SOFTWARE, FOR ATARI.

Q. HOW WERE YOU INTRODUCED TO THEM?

A. ART SCHNEIDERMAN, THE ATTORNEY AT WILSON SONSINI, CALLED ME. HE HAD BEEN APPROACHED BY THEM BECAUSE THEY WERE INTENDING TO LEAVE ATARI AND SET UP AN INDEPENDENT VENTURE TO DEVELOP SOFTWARE. AND HE PUT US TOGETHER, I AS THE BUSINESSMAN AND THEY AS THE CREATIVE PEOPLE.

Q. AS I UNDERSTAND YOUR TESTIMONY, YOU EACH APPROACHED SEPARATELY AND WERE INTRODUCED TO EACH OTHER?

A. YES.

Q. WHO WERE THESE FOUR INDIVIDUALS?

A. ALAN MILLER, DAVID CRANE, LARRY KAPLAN AND ROBERT WHITEHEAD.

Q. ARE THESE THE GENTLEMEN, OR AT LEAST SOME OF THEM, WHO IN FACT INITIALLY STARTED THE COMPANY?

A. THEY ENDED UP AS THE COFOUNDERS OF THE COMPANY.

Q. IF YOU WOULD DESCRIBE THE COURSE OF YOUR DISCUSSIONS THEN IN JUNE AND JULY WITH THESE INDIVIDUALS CONCERNING THE VENTURE THAT MIGHT TRANSPIRE.

A. OUR INITIAL CONVERSATIONS WERE A DEBATE OVER WHERE THE MARKET FOR SOFTWARE EXISTED AT THAT TIME.

I HAD BEEN INVOLVED, OBVIOUSLY, WITH SOFTWARE FOR PERSONAL COMPUTERS, LIKE THE RADIO SHACK TRS 80, SOME OF THE EARLY MODEL PERSONAL COMPUTERS. THEY HAD BEEN INVOLVED AT ATARI IN BOTH THE VIDEO GAME COMPUTERS, THE ATARI 2600 VIDEO COMPUTER SYSTEM, AND THE ATARI COMPUTERS, THE 400 AND 800 COMPUTERS JUST BEGINNING TO COME OFF THE LINE.

IT WAS THEIR OPINION THAT THE LONG-TIME MARKET LAY WITH THESE MORE SOPHISTICATED COMPUTERS, THE SHORT-TERM MARKET FOR SOFTWARE REALLY LAY WITH THE VIDEO GAME COMPUTERS.

AFTER WE RESOLVED THIS ISSUE BETWEEN US, WE AGREED IN LATE JULY TO WORK TOGETHER ON A BUSINESS PLAN AND TAKE THAT TO SUTTER HILL AND PERHAPS TO OTHER VENTURE CAPITALISTS TO ATTEMPT TO RAISE FUNDING TO START AN INDEPENDENT SOFTWARE COMPANY.

THAT IS ULTIMATELY WHAT WE DID.

Q. AT THE TIME YOU FIRST MET WITH THESE GENTLEMEN, WERE YOU YOURSELF VERY FAMILIAR OR FLUENT WITH THE VIDEO GAME INDUSTRY?

A. ONLY IN THE SENSE THAT I HAD SEEN AN ARCADE GAME OR TWO IN THE MOTION PICTURE THEATER OR A BAR.

I WAS FAMILIAR WITH PONG BECAUSE EVERYBODY WAS FAMILIAR WITH PONG. I HAD NEVER SEEN AN ATARI 2600 OR AN ODYSSEY MACHINE. I HAD SEEN THE ORIGINAL MAGNAVOX 1972 MODEL WITH THE OVERLAYS MANY, MANY YEARS BEFORE THAT, BUT HAD NOT KEPT TRACK OF THE INDUSTRY.

Q. IN THE COURSE OF YOUR MEETINGS WITH THE DESIGNERS, DID THEY SHOW YOU THE 2600 AND HOW IT WORKED?

A. YES. THEY SHOWED ME THE 2600, THE ATARI 800 COMPUTER AND SHOWED ME SOFTWARE THEY HAD DESIGNED FOR IT AND SHOWED ME HOW IT WORKED.

Q. SOFTWARE THEY HAD DESIGNED WHILE AT ATARI?

A. YES.

Q. HAD MARKETING WORK BEEN DONE FOR THIS VENTURE, THAT IS, HOW SOFTWARE MIGHT SUCCEED IN THE MARKETPLACE HAD RESEARCH BEEN DONE BY THESE FOUR GENTLEMEN?

A. NO. THESE FOUR GENTLEMEN WERE ENGINEERS AND CREATIVE PEOPLE AND LABORED IN THE LABS AND ONLY HAD THE FAINTEST IDEA OF WHAT MIGHT BE GOING ON IN THE MARKETPLACE. ALL THEY KNEW WAS THINGS SEEMED TO BE SELLING WELL.

I, WITH MY OWN BACKGROUND IN DEVELOPMENT OF MARKETING OF HOME ENTERTAINMENT, PUBLISHING RECORDED MUSIC AND THE LIKE, THEN APPLIED MY OWN EXPERIENCE TO GOING OUT AND RESEARCHING DEVELOPMENT OF THE MARKET FOR SOFTWARE.

Q. DID YOU ULTIMATELY TAKE A PROPOSAL TO SUTTER HILL FROM YOURSELF AND THE FOUR DESIGNERS?

A. YES. I WROTE A BUSINESS PLAN IN EARLY AUGUST OF '79 AND TOOK THAT TO SUTTER HILL IN THE LATTER PART OF THAT MONTH.

Q. DURING YOUR EARLY DISCUSSIONS WITH THE DESIGNERS, WAS THERE CONCERN ABOUT WHAT ATARI'S REACTION MIGHT TO THE BEGINNING OF THIS BUSINESS ACTIVISION?

A. YES, THERE WAS.

Q. DESCRIBE THAT FOR A MOMENT?

A. WELL, ATARI WAS OBVIOUSLY GROWING VERY RAPIDLY AND WAS VERY SUCCESSFUL. ATARI WAS OWNED BY WARNER COMMUNICATIONS. HAVING SPENT SIX YEARS IN THE RECORDED MUSIC BUSINESS, I WAS FAMILIAR WITH WARNER'S PROPENSITY FOR LITIGATION.

SO THERE WAS SOME CONCERN THAT WHEN THE FOUR CREATORS, ENGINEERS, LEFT ATARI THEY WOULD MAKE SOME ATTEMPTS TO PUT SOME HURDLES IN OUR WAY TO STARTING AND BECOMING SUCCESSFUL IN THE BUSINESS.

Q. IN FACT, HAD THE FOUR DESIGNERS SOUGHT LEGAL COUNSEL BEFORE THEY HAD HOOKED UP WITH YOU?

A. THEY HAD SOUGHT LEGAL COUNSEL BEFORE THEY HAD HOOKED UP WITH ART SCHNEIDERMAN. THEY HAD BEEN REFERRED TO HIM FOR ADVICE ON CORPORATE STRUCTURE AND SO FORTH.

THEIR ORIGINAL ATTEMPT TO SEEK COUNSEL HAD BEEN TO SEEK PATENT COUNSEL AND TRADE SECRET COUNSEL DOWN IN SANTA CLARA. AND HE HAD ALSO REFERRED THEM TO THE WILSON SONSINI FIRM FOR ADVICE ON HOW TO STRUCTURE THEIR OWN VENTURE.

MR. GLICK: EXCUSE ME FOR A MOMENT.

(PAUSE IN PROCEEDINGS)

Q. (BY MR. GLICK) I SHOW YOU A DOCUMENT THAT HAS BEEN MARKED AS EXHIBIT IF AND ASK YOU IF YOU RECOGNIZE IT?

A. YES. THIS IS A LETTER FROM TOM SHOTZEL (PHONETIC) WHO WAS A PATENT AND INTELLECTUAL PROPERTY COUNSEL IN SANTA CLARA. THIS

WAS A LETTER THAT HAD BEEN SENT TO THE FOUR GENTLEMEN WHO WERE CALLING THEMSELVES GRAPHIC SOFTWARE ENGINEERING IN RELATIONSHIP TO A CARTRIDGE PATENT THAT ATARI HELD.

Q. WAS THIS DOCUMENT PROVIDED TO YOU AND TO THE VENTURE CAPITALISTS NEAR THE TIMES OF YOUR DISCUSSIONS ABOUT INCORPORATION?

A. THIS WAS PROVIDED TO ME VERY EARLY IN MY CONVERSATIONS WITH THE FOUR DESIGNERS. ULTIMATELY IT BECAME ALSO PART OF OUR PRESENTATION TO THE VENTURE CAPITAL FIRM.

Q. ARE YOU AWARE OF ANY OTHER CONVERSATIONS THAT WERE HELD BY EITHER YOU OR THE DESIGNERS OR THE VENTURE CAPITALISTS WITH PATENT COUNSEL AT OR NEAR THE TIME OF THESE DISCUSSIONS ABOUT FINANCING WHAT BECAME ACTIVISION?

A. THE VENTURE CAPITALISTS CALLED IN THEIR OWN INTELLECTUAL PROPERTY COUNSEL, A GENTLEMEN BY THE NAME OF AL TEST, TO ADVISE THEM ON WHETHER HE FELT IT WAS APPROPRIATE FOR THEM TO MAKE AN INVESTMENT HERE AND WHAT THE IMPLICATIONS OR RISKS MIGHT BE.

Q. WERE YOU PRESENT AT A DISCUSSION IN WHICH HE REPORTED BACK TO THEM AND YOURSELF CONCERNING THAT?

A. I WAS NOT PRESENT AT THAT DISCUSSION IN WHICH HE REPORTED TO THEM DIRECTLY, ALTHOUGH HE LATER TOLD ME WHAT HE TOLD THEM.

Q. WHAT DID HE TELL YOU?

A. HE TOLD ME THAT HE TOLD THEM THAT WARNER COMMUNICATIONS WOULD UNDOUBTEDLY SUE US AT SOME POINT, BUT, IF IT WAS HIS MONEY, HE WOULD INVEST IN THE VENTURE.

Q. MR. TEST IS WITH THE FLEHR HOHBOCH FIRM IN SAN FRANCISCO?
A. YES.
Q. DID YOU YOURSELF HIRE HIM THEREAFTER?
A. YES. I HAD WORKED WITH AL TEST AT GRT ON COPYRIGHT AND TRADEMARK ISSUES AND SUBSEQUENTLY THEN HIRED HIM AS PATENT COUNSEL TO ACTIVISION.
Q. I SHOW YOU A DOCUMENT MARKED IE AND ASK YOU IF YOU RECOGNIZE THAT ONE?
A. I CERTAINLY DO.
Q. WHAT IS THAT?
A. IT IS THE BUSINESS PLAN FOR THE COMPANY THAT BECAME ACTIVISION AS PROVIDED TO SUTTER HILL ON THE 23RD OF AUGUST 1979. THIS IS A COPY OF NO. 1, WHICH WAS MINE.
Q. COPY NO. 1 IS YOURS?
A. COPY NO. 1 IS MINE.
Q. IT REFERS TO VIDEO COMPUTER ARTS.
A. YES. THAT WAS A NAME PUT ON THERE AT THE LAST MINUTE SO WE COULD CALL OURSELVES SOMETHING. IN THE BUSINESS PLAN WE DID NOT IN FACT GENERATE THE NAME ACTIVISION UNTIL SHORTLY BEFORE INCORPORATING IN LATE SEPTEMBER.
Q. REFERRING TO YOUR PLAN, CAN YOU TELL US WHAT THE BASIC PRESENTATION WAS YOU WERE MAKING AT THAT TIME AS TO WHAT THE COMPANY ACTIVISION WOULD BE?
A. ACTUALLY, ON PAGE--LAST PAGE OF THE INTRODUCTION, THE BASIC FOUNDATION OF THE COMPANY IS DEFINED IN THE LAST TWO PARAGRAPHS

OF THIS INTRODUCTION. IT IS LIKE THE THIRD PAGE IN IN WHICH WE TALK ABOUT A NEW NAME AND NEW MEDIUM.

WE DEFINED ACTIVISION AS A CREATIVE COMPANY, WORKING IN A NEW MEDIUM, THAT MEDIUM BEING THE MATING OF THE COMPUTER AND TELEVISION SET.

WE HAPPENED TO CALL IT COMPUTERVISION UNTIL WE FOUND THERE WAS A COMPANY NAMED THAT. SO WE COULDN'T DO THAT ANYMORE.

BUT WE FORESAW OURSELVES AS BASICALLY THE LEADING EDGE OF A WHOLE NEW GENERATION OF CREATIVE TECHNOLOGY, MUCH THE WAY THE ORIGINAL PRODUCERS OF PRERECORDED MUSIC OR FILMS OR PERHAPS VIDEO RECORDINGS MUST HAVE FELT IN THE EARLY DAYS OF THOSE MEDIA.

WE DEFINED OURSELVES AS A CREATIVE COMPANY. AND AS A MARKETING COMPANY THAT WOULD APPLY THIS NEW TECHNOLOGY TO CREATE NEW FORMS OF ENTERTAINMENT OR ENRICHMENT PROGRAMMING OR SELF-DEVELOPMENT OR PRODUCTIVITY PROGRAMMING FOR THE OWNERS OF HOME COMPUTERS.

WE DEFINED WITHIN THIS BUSINESS PLAN THAT THERE WERE TO BE VARIOUS STAGES OF DEVELOPMENT OF THE HOME COMPUTER MARKET. AND THE STAGE THAT EXISTED AT THAT TIME WAS IN FACT THE VIDEO GAME HOME COMPUTER, VIDEO COMPUTER SYSTEM.

Q. LET ME ALSO REFER YOU THEN TO PAGE 18 OF THIS PLAN WHICH RELATES TO WHAT IS CALLED LEGAL MATTERS, PATENT TRADE SECRETS AND COPYRIGHTS.

DO YOU RECALL THAT?

A. YES.
Q. IN THE PATENT CATEGORY, TELL US WHAT IS REFERRED TO THERE IN GENERAL TERMS AND NOT SPECIFICALLY.
A. THIS REFERS PRIMARILY TO THE RESULTS OF THE SEARCH OUTLINED IN THE LETTER FROM TOM SHOTZEL.

WE WERE AWARE OF THE EXISTENCE OF MECHANICAL USE PATENT THAT ATARI HAD ON THEIR GAME CARTRIDGE DESIGN. AND WE CONSIDERED THAT TO BE A PRIMARY ISSUE INSURING WE COULD PRODUCE A COMPATIBLE CARTRIDGE WITHOUT INFRINGING THAT PATENT, WHETHER OR NOT THE PATENT WAS VALID.

WE HAD BEEN ASSURED AT THIS POINT BY PATENT COUNSEL AND DESIGN ENGINEERS IT WAS POSSIBLE TO DESIGN A CARTRIDGE THAT WOULD NOT INFRINGE THE ATARI PATENT.

Q. IN FACT HAD YOU ASKED FOR THAT OPINION SO YOU COULD GIVE INSTRUCTIONS TO YOUR DESIGNER AS TO HOW TO PROCEED?
A. WELL, WE FIRST USED THIS OPINION FROM TOM SHOTZEL. WE LATER RECEIVED ELABORATION ON THAT OPINION FROM AL TEST DURING EARLY MEETINGS WITH OUR PLASTIC AND INDUSTRIAL DESIGN ENGINEERS TO DEFINE JUST WHAT THE BOUNDARIES WERE.
Q. HOW DID YOU UNDERSTAND THE SCOPE OF YOUR REQUEST TO MR. TEST AT THIS JUNTURE OF THE DEVELOPMENT AS TO WHAT YOU WANTED HIM TO SEARCH?
A. AT THIS POINT WHEN THE BUSINESS PLAN WAS WRITTEN, NO PARTICULAR SEARCH HAD BEEN DONE. WE WERE WORKING ONLY OFF OF THIS PATENT OPINION FROM TOM SHOTZEL.

SUBSEQUENTLY, WHEN I HIRED MR. TEST TO REPRESENT THE FIRM AS PATENT COUNSEL, I IMMEDIATELY ASKED HIM TO UNDERTAKE A BROADER SEARCH FOR THE EXISTENCE OF ANY PATENTS THAT HE FELT WE SHOULD TAKE NOTE OF IN OUR DESIGN AND ENGINEERING OF SOFTWARE.

AND HE SUBSEQUENTLY CONDUCTED SUCH A SEARCH.

Q. AND HE REPORTED BACK TO YOU?

A. YES, HE DID.

Q. DO YOU RECALL HIM MENTIONING TO YOU AS A RESULT OF THAT SEARCH--DO YOU RECALL HIM MENTIONING TO YOU THE EXISTENCE OF ANY OF THE MAGNAVOX PATENTS THAT ARE IN ISSUE?

A. NOT AT THAT TIME.

Q. EITHER THE ONE AT ISSUE IN THIS CASE OR OTHER ONES?

A. NO. WE WERE UNAWARE OF ANY MAGNAVOX PATENTS.

Q. AT THE TIME YOU RETAINED MR. TEST AT THE BEGINNING OF ACTIVISION'S EXISTENCE, WERE YOU AWARE THAT THE FLEHR HOHBACH FIRM HAD REPRESENTED ATARI IN CDI LITIGATION SOME YEARS BEFORE?

A. I DO NOT RECALL HIS HAVING BEEN INVOLVED IN LITIGATION RELATED TO THIS MATTER. I DO RECALL HE INDICATED HE AT ONE TIME REPRESENTED ATARI BECAUSE THERE WAS AN ISSUE OF WHETHER THERE WAS A CONTINUING CONFLICT.

HE ASSURED ME HE NO LONGER REPRESENTED ATARI AND THAT THERE WAS NO CONFLICT.

WE DID NOT PURSUE AT THE TIME EXACTLY WHAT THE NATURE OF HIS REPRESENTATIONS HAD BEEN.

Q. DID YOU GO AHEAD AN HIRE A DESIGNER?

A. YES. WE HIRED A PLASTIC INDUSTRIAL ENGINEER. HIS NAME WAS RON SMITH.

Q. WHAT INSTRUCTIONS DID YOU GIVE THAT ENGINEER AS TO THE DESIGN?

A. WE GAVE HIM THE PATENT. MR. SMITH HIMSELF HELD A PATENT ON A CARTRIDGE HE HAD DESIGNED FOR FAIRCHILD. SO HE WAS FAIRLY FAMILIAR WITH THE DESIGN OF INTERFACING CARTRIDGES WITH SYSTEMS.

WE GAVE HIM THE ATARI PATENT. WE GAVE HIM THE BENEFIT OF THE OPINIONS THAT WE HAD FROM MR. SHOTZEL AND MR. TEST, AND WE ASKED HIM TO DESIGN A CARTRIDGE THAT WOULD BE ABLE TO INTERFACE WITH THE ATARI 2600 VIDEO COMPUTER SYSTEM, WOULD BE FUNCTIONAL, WOULD HAVE FUNCTIONAL INTEGRITY, AND WOULD NOT INFRINGE THEIR PATENT AND COULD NOT BE OBSOLETED BY ATARI WITHOUT OBSOLETING THEIR OWN CARTRIDGE.

Q. DID THE COMPANY THEN COME TOGETHER IN THE FALL OF 1979?

A. YES. THE COMPANY WAS OFFICIALLY ORGANIZED ON THE FIRST OF OCTOBER 1979.

Q. I WILL GET TO THIS EXHIBIT IN A MOMENT. I WANT TO ASK YOU A COUPLE OF PRELIMINARY QUESTIONS.

WHEN THE COMPANY WAS ORGANIZED, WHO WERE THE FOUNDERS WHO WERE ON BOARD?

A. THREE OF THE FOUR DESIGNERS AND MYSELF. MR. KAPLAN HAD ELECTED SHORTLY BEFORE THE COMPANY WAS INCORPORATED TO PULL OUT OF THE VENTURE. HE THEN RETURNED ABOUT THREE MONTHS LATER.

Q. I WANT TO SHOW YOU WHAT HAS BEEN MARKED AS EXHIBIT IG AND IS

ENTITLED PROGRESS REPORT. I ASK YOU WHAT THAT IS.

A. TO THE BEST OF MY RECOLLECTION, THIS IS A DOCUMENT PROVIDED TO THE BOARD OF DIRECTORS TO INDICATE WHAT BEEN ACCOMPLISHED BY THE COMPANY IN ITS FIRST FIVE OR SIX WEEKS OF EXISTENCE.

Q. ITEM 1 SAYS OFFICES OPEN AND FUNCTIONING.

I TAKE IT THAT MEANS WHAT IT SAYS?

A. RIGHT.

Q. ITEM 8 IS APPROVAL OF DESIGN. YOU TESTIFIED ABOUT THAT; IS THAT RIGHT?

A. RIGHT. THIS WAS THE--- WE HAD RECEIVED SOME PRELIMINARY DRAWINGS, I BELIEVE, AT THIS POINT FROM MR. SMITH. AND WE HAD APPROVED, IN CONCEPT, HIS DESIGN.

Q. DO YOU SEE ITEM 1?

A. YES.

Q. WHAT DOES THAT REFER TO?

A. THAT REFERS TO THE SEARCH THAT I HAD ASKED MR. TEST TO CONDUCT SUBSEQUENT TO THE FOUNDING OF THE COMPANY.

AND HE HAD REPORTED BACK HE HAD UNCOVERED THE EXISTING FAIRCHILD PATENT WHICH MR. SMITH WAS ONE OF THE DEVELOPERS OF, AND PERHAPS A COUPLE OF OTHER MINOR ISSUES, BUT NO ADDITIONAL PATENTS OF ANY SIGNIFICANCE.

MR. ANDERSON: WE REQUESTED ANY OPINIONS OR LETTERS OR ANYTHING INVOLVING PATENT OPINIONS OF MR. TEST OR ANY COUNSEL. WE HAVE NO DOCUMENTATION THAT BEARS ON ANY OF THESE, AND WE ASKED FOR BILLS OF MR. TEST'S FIRM, IF THERE ARE SUCH THINGS.

WE WERE SUPPOSED TO HAVE HAD THEM SOMETIME AGO.

MR. GLICK: WE HAVE PROVIDED EVERY DOCUMENT WE ARE PRODUCING IN EVIDENCE HERE TODAY AND EVERY DOCUMENT WE COULD FIND GOING BACK THROUGH THE ARCHIVES AND SOME OLD DUSTY PLACES FROM ACTIVISION'S MOVE FROM ITS TWO OTHER HEADQUARTERS TO FIND ALL THE DOCUMENTS. SO ALL THE DOCUMENTS WE ARE INTRODUCING HERE YOU HAVE. WE ARE NOT GOING TO LAUNCH ANY SURPRISE WITH NEW DOCUMENTS.

THE COURT: UNLESS YOU OBJECT TO A PARTICULAR QUESTION OR DOCUMENT, I WILL ALLOW THE TESTIMONY TO GO AHEAD.

MR. ANDERSON: THANK YOU, YOUR HONOR.

Q. (BY MR. GLICK) NOW, WE HAVE HERE THAT THE COMPANY'S DOORS ARE OPEN.

DID YOU DECIDE AT THE OUTSET WHAT SORT OF IMAGE YOU WANTED TO PROJECT FOR ACTIVISION IN THE MARKETPLACE ITSELF?

A. YES. THE BASIC FOUNDATION OF THE COMPANY WAS AS A CREATIVE COMPANY. AND OUR FUNDAMENTAL BELIEF WAS WHAT WOULD ENABLE THE COMPANY TO SUCCEEDSS AND ESTABLISH A STRONG POSITION IN THE MARKETPLACE WOULD BE THE CREATIVE STRENGTH OF OUR PRODUCT TO THE EXTENT TO WHICH THAT PRODUCT REPRESENTED A JUMP IN THE STATE-OF-THE-ART IN THE ORIGINAL DESIGN OF SOFTWARE.

OUR WHOLE FOUNDING EFFORT WAS BASED AROUND THE TALENTS OF THE FOUR GENTLEMEN. I HAVE BEEN QUOTED AS SAYING I FELT LIKE I STARTED A RECORD LABEL WITH BARBRA STREISAND, NEIL DIAMOND AND THE ROLLING STONES AS MY FIRST ARTISTS. WHEN YOU START FROM

THAT DIRECTION, YOU LET THE PRODUCT SPEAK FOR ITSELF.

Q. DO YOU RECALL WHETHER YOU SET ANY TARGET AT THE OUTSET FOR WHEN THE FIRST GAMES MIGHT BE RELEASED?

A. OUR ORIGINAL TARGET WAS TO RELEASE TWO TITLES IN AUGUST OF 1980 AND TWO IN OCTOBER OF 1980. AND WE SUBSEQUENTLY SUCCEEDED IN RELEASING FOUR IN JULY OF 1980.

Q. WHAT SORT OF INSTRUCTIONS DID YOU GIVE TO THE DESIGNERS ABOUT WHAT SORT OF GAMES THEY SHOULD PRODUCE OR HOW THEY SHOULD GO ABOUT THEIR WORK?

A. I THINK WHAT I PROBABLY LITERALLY SAID IS: YOU GUYS KNOW WHAT YOU'RE DOING. I KNOW WHAT I'M DOING. YOU DO WHAT YOU DO BEST, I WILL DO WHAT I DO BEST, AND AT SOME POINT WE WILL GET TOGETHER AND DISCUSS WHAT WE ARE DOING.

I GAVE THEM NO INSTRUCTIONS IN CREATIVE DIRECTIONS. I TRUSTED THEIR INSTINCTS.

Q. DID THAT PROCESS CHANGE FROM THAT POINT FORWARD AS A MATTER OF THE SORT OFF LEEWAY GIVEN TO DESIGNERS AT ACTIVISION?

A. ESSENTIALLY, NO. TODAY THE SOFTWARE GROUP PRODUCES MUCH MORE COMPLICATED SOFTWARE THAN SOME OF THE EARLY VIDEO GAME COMPUTER ORIENTED WORK.

TODAY OUR SOFTWARE INTENDS TO BE MUCH LARGER AND TENDS TO BE MORE PEOPLE INVOLVED IN THE PROJECTS. THEY TEND TO REQUIRE MORE SPECIFICATION UP FRONT AND DIRECTION.

BUT IN TERMS OF LAYING OUT GUIDELINES FOR THE KIND OF WORK WE WANT TO PRODUCE, WE HAVE NEVER REALLY GONE TO CREATIVE

PEOPLE AND SAID: WRITE ME A ROCK AND ROLL SONG THAT SAYS THIS.

SO WE HAVE NEVER, WITH THE DESIGNERS, WENT AND SAID: YOU DO SKIING, AND YOU DO BOXING AND YOU DO BRIDGE.

Q. APPROXIMATELY HOW LONG DOES IT TAKE A DESIGNER OR DID IT TAKE A DESIGNER AT THE INCEPTION FROM START OF WORK FOR FINISHED PRODUCT?

A. SOMETIMES AS LITTLE AS THREE MONTHS AND SOMETIMES AS LONG AS A YEAR.

Q. DID THAT AMOUNT OF TIME CHANGE OVER THE YEARS TO DID IT GET LONGER OR SHORTER?

A. GOTTEN LONGER. WHEN WE FIRST STARTED WRITING WORK, WE WERE WORKING IN 2,000 BYTES OF CODE ON A READ ONLY MEMORY. BEFORE WE MOVED FROM CARTRIDGE BASED GAMES INTO DISK BASED SOFTWARE OVER THE LAST 18 MONTHS, WE GOT UP AS HIGH AS 3K BYTES OF CODE OR 16 TIMES THE SIZE OF THE ORIGINAL PROGRAMS.

NOW, SOME OF THE WORK WE DO IS 125,000 BYTES OF CODE. AND ONE PARTICULAR PRODUCT WE WILL RELEASE THIS FALL IS THREE FULL DISKS BACK AND FRONT. IT IS AN ENORMOUS PROGRAM.

Q. FROM YOUR OBSERVATION OF PRODUCT IN THE INDUSTRY AND YOUR OBSERVATIONS OF THE INDUSTRY, WAS THE TIME SPENT IN PRODUCT DESIGN AT ACTIVISION GREATER OR LESS THAN THAT SPENT AT OTHER HOUSES THAT PRODUCED SOFTWARE?

A. I THINK IT WAS GENERALLY GREATER. BUT IT WAS NOT JUST THE TIME THAT WAS SPENT. IT WAS THE WAY THE TIME WAS SPENT THAT ENABLED OUR PRODUCT TO STAND HEAD AND SHOULDERS ABOVE MOST OF

THE COMPETITIVE PRODUCT ON THE MARKET. THE RIGOR WITH WHICH THE PRODUCT WAS DESIGNED AND THE QUALITY CONTROL THAT THE DESIGNERS EXERTED ON THEMSELVES MEANT THAT THE PRODUCT WE ULTIMATELY TURNED OUT WOULD SEEM TO BE THE BEST BEING DEVELOPED IN THE INDUSTRY AT THE TIME.

Q. MEANWHILE AS WORK IS PROCEEDING AGAIN, DRAWING YOUR ATTENTION TO SOME OF THE BEGINNING MONTHS, AND DRAWING YOUR ATTENTION TO JANUARY OF 1980, DID THERE COME A TIME WHEN YOU IN FACT DID HEAR FROM ATARI?

A. YES. SHORTLY AFTER THE JANUARY 1980 CONSUMER ELECTRONICS SHOW, AT WHICH ACTIVISION DID NOT EXHIBIT, WE RECEIVED A LETTER WHICH HAS JUST BEEN PLACED IN FRONT OF ME DATED 31 JANUARY 1980 FROM RAYMOND KASSAR, WHO WAS THE CHAIRMAN OF ATARI--I GUESS HE WAS OFFICE OF THE PRESIDENT AT THE TIME--HE ULTIMATELY BECAME CHAIRMAN--IN WHICH HE ALERTED US TO THE EXISTENCE OF CERTAIN ATARI PATENTS AND WARNED US IF WE ABUSED ANY OF THEIR TRADE SECRETS OR DID ANYTHING THAT THEY FELT WAS AN INFRINGMENT OF THEIR RIGHTS THAT THEY WOULD PURSUE US.

Q. THIS LETTER, BESIDES THE PATENT I THINK YOU HAVE ALREADY DISCUSSED, ALSO DRAWS OR DREW THEN YOUR ATTENTION TO A DESIGN PATENT, IS THAT TRUE?

A. THAT'S CORRECT. WE WERE AWARE OF THE MECHANICAL USE PATENT AND WE WERE AWARE THAT THEIR MAY HAVE EXISTED A DESIGN PATENT. AND THEY DREW OUR ATTENTION TO THE DESIGN PATENT.

THE COURT: WHERE ARE YOU THERE, MR. GLICK.

MR. GLICK: THE DESIGN PATENT IS ON THE FIRST PAGE U.S. DESIGN PATENT--SECOND PARAGRAPH?

THE WITNESS: D-252753.

SO WE MADE SURE THAT THE CARTRIDGE THAT WE WERE DESIGNING COULD NOT BE MISTAKEN COSMETICALLY FOR THE ATARI CARTRIDGE SO THAT THERE WAS NOT AN INFRINGMENT OF THAT DESIGN.

Q. (BY MR. GLICK) DID YOU ALSO CONTACT YOUR LAWYERS CONCERNING THE CONTENT OF THIS LETTER, INCLUDING THIS PARTICULAR PACKAGE?

A. YES.

MR. ANDERSON: I DON'T KNOW WHERE THIS LINE OF QUESTIONING IS GOING. I OBJECT. THESE ARE ALL NEW DOCUMENTS AS FAR AS THEY ARE ACTIVISION DOCUMENT EXHIBIT LISTINGS. ALL OF THESE I'S WERE NOT IN THE FINAL PRETRIAL REPORT. THEY HAVE BEEN ADDED RECENTLY AND ON AN ONGOING BASIS. WE SHOULD HAVE KNOWN BEFORE TRIAL WHAT EXHIBITS ACTIVISION PLANNED TO USE.

MR. GLICK: ALL OF THESE EXHIBITS ARE FROM MR. LEVY'S DEPOSITION OF SOME TWO OR THREE YEARS AGO. THE WAY IT HAS WORKED OUT, MR. ANDERSON TOLD ME YESTERDAY: LOOK, YOU'RER GOING TO BRING JIM. YOU PUT HIM ON FIRST. SO THERE IS NO COHERENT WAY TO DO IT WITHOUT PUTTING ON EACH OF THESE EXHIBITS. I AM NOT PRODUCING SOMETHING THAT THEY HAVE NOT SEEN FOR A LONG PERIOD OF TIME.

THE COURT: I AM GOING TO ALLOW THIS EXHIBIT IN EVIDENCE AND THE QUESTIONING TO CONTINUE. IF YOU HAVE OBJECTIONS AS TO A PARTICULAR DOCUMENT OR ARE CLAIMING SURPRISE,

WE WILL DEAL WITH IT ON A DOCUMENT BY DOCUMENT BASIS.

MR. ANDERSON: I DON'T BELIEVE THEY ARE DEPOSITION EXHIBITS. MR. GLICK SUGGESTS THEY ARE. I ALSO OBJECT--- I DON'T THINK THIS IS RELEVANT, WHAT THEY WERE FIGHTING WITH ATARI ABOUT OR WHAT ATARI WAS SAYING TO THEM ABOUT ATARI'S PATENTS. I DO OBJECT TO THE QUESTIONS ALONG THAT LINE.

THE COURT: I AM GOING TO OVERRULE YOUR OBJECTION.

MR. ANDERSON: THANK YOU.

MR. GLICK: READ THE QUESTION.

(RECORD READ)

THE WITNESS: YES, I DID.

Q. (BY MR. GLICK) FOR THE RECORD, THE FIRST DOCUMENT I SHOWED YOU MY CO-COUNSEL TELLS ME I DIDN'T SERVE BY NUMBER. THAT IS IH. THAT IS THE LETTER YOU RECEIVED FROM ATARI.

THE DOCUMENT YOU HAVE IN FRONT OF YOU NOW IS NUMBER II. I ASK YOU IS THAT THE LETTER YOU SENT TO MR. SCHNEIDERMAN AT WILSON SONSINI AND MR. TEST?

A. YES. THIS DOCUMENT, AS I RECALL, WAS AT THE REQUEST OF MR. SCHNEIDERMAN AND MR. TEST. SUBSEQUENT TO THE RECEIPT OF THE DOCUMENT, OF THE LETTER, FROM MR. KASSAR, I PHONED MR. TEST AND MR. SCHNEIDERMAN AND TOLD THEM WE HAD RECEIVED THE LETTER.

THEY ASKED ME TO PREPARE FOR THEM A SUMMARY OF THE ACTIVITIES OF THE COMPANY WITH RESPECT TO ISSUES RAISED BY ATARI IN THEIR LETTER. SO THAT THEY WERE AWARE OF THE STEPS WE HAD TAKEN TO INSURE WE WOULD NOT INFRINGE ANY OF ATARI'S PATENTS AND

THEY COULD ASSIST US IN FORMULATING A RESPONSE.
Q. LET ME CALL YOUR ATTENTION TO THE FACT BOTH LETTERS ARE DATED JANUARY 31 AND ASK YOU IF YOU HAD RECEIVED ORAL COMMUNICATION FROM ATARI THAT THIS WAS COMING OR WAS THIS SOME DATING PROBLEM IN THESE LETTERS, OR YOU CAN'T EXPLAIN IT?
A. AS BEST I CAN RECALL, WE RECEIVED THE MAIL EARLY IN THE MORNING. AND I CALLED MR. SCHNEIDERMAN AND MR. TEST IMMEDIATELY AND FORMULATED THIS LETTER TO THEM IN THE AFTERNOON IN RESPONSE TO THEIR REQUEST. WE RECEIVED NO PRIOR NOTICE FROM ATARI THAT THIS LETTER WAS ON ITS WAY.
Q. I SHOW YOU WHAT HAS BEEN MARKED AS EXHIBIT IJ.
IS THAT YOUR RESPONSE, THEN, UNDER YOUR SIGNATURE BACK TO ATARI?
A. YES, THIS IS MY RESPONSE.
Q. WHILE THIS LETTER INDICATES AN OFFER TO TRY AND DISCUSS MATTERS, IN FACT YOU ULTIMATELY DID BECOME INVOLVED IN LITIGATION WITH ATARI, IS THAT TRUE?
A. YES. WE NEVER ULTIMATELY RECEIVED A RESPONSE TO THIS LETTER OTHER THAN WHEN THEY FILED SUIT IN MAY.
Q. NOW, ATARI'S JANUARY 31 LETTER MENTIONED THE DESIGN PATENT.
DID YOU ASK MR. TEST TO DO FURTHER PATENT RESEARCH ON THAT PATENT?
A. YES.
Q. DID YOU RECEIVE ADVICE CONCERNING THAT PARTICULAR PATENT?
A. YES.

MR. GLICK: YOUR HONOR, EXHIBIT IK IS A BILLING WITH CERTAIN MATTERS DELETED WHICH WAS PRODUCED AT THE REQUEST OF COUNSEL FOR PLAINTIFFS CONCERNING OUR REVIEW OF BILLINGS AT THAT FIRM.

Q. (BY MR. GLICK) IS THIS THE BILLING THAT REFERS TO THE ORDERING OF THE DESIGN PATENT THAT WAS MENTIONED IN THE ATARI LETTER?

A. IT WOULD APPEAR SO, YES.

Q. DID YOU RECEIVE ADVICE ON THE VALIDITY OF THE DESIGN PATENT?

A. I DO NOT RECALL SPECIFICALLY RECEIVING ADVICE ON VALIDITY.

Q. DO YOU RECALL WHAT YOU DECIDED TO INSTRUCT YOUR PEOPLE TO DO ONCE YOU WERE FULLY AWARE OR MORE FULLY AWARE OF THE DESIGN PATENT.

MR. ANDERSON: I OBJECT TO HIM LEADING THE WITNESS.

MR. GLICK: THE QUESTION IS WHAT DID YOU.

THE COURT: REPHRASE THE QUESTION.

Q. (BY MR. GLICK) UPON RECEIPT OF THE--EITHER BOTH THE LETTER FROM ATARI OR ADVICE FROM YOUR COUNSEL, WHAT INSTRUCTIONS, IF ANY, DID YOU GIVE TO YOUR DESIGN PEOPLE IN REGARD TO THIS PATENT THAT HAD BEEN CALLED TO YOUR ATTENTION?

A. THE DESIGN PATENT?

Q. YES.

A. I GAVE THEM A COPY OF THE PATENT. THIS WAS RON SMITH. AND WE REVIEWED THE STATUS OF THE DESIGN OF OUR CARTRIDGE AND COMPARED IT TO AN ACTUAL ATARI CARTRIDGE. AND I RECEIVED

ASSURANCES FROM MR. SMITH THAT WHEN HIS DESIGN WAS COMPLETE THAT AN UNINFORMED CONSUMER WOULD NOT BE ABLE TO MISTAKE OUR CARTRIDGE FOR AN ATARI CARTRIDGE AND, THEREFORE, IN THE OPINION, I BELIEVE, OF COUNSEL AT THAT TIME THAT WOULD NOT CONSTITUTE ANY POTENTIAL INFRINGMENT OF THE DESIGN PATENT.

THE COURT: HOW LONG WILL YOUR EXAMINATION OF MR. LEVY TAKE.

MR. GLICK: IT WILL TAKE, YOUR HONOR, PROBABLY ANOTHER HALF HOUR TO 45 MINUTES, I WOULD GUESS.

THE COURT: THEN THERE WILL BE CROSS-EXAMINATION?

MR. ANDERSON: YES, YOUR HONOR.

THE COURT: YOU SAY THAT WITH ANTICIPATION. I THINK WE SHOULD TERMINATE AS SOON AS YOU REACH A BREAKING POINT SINCE WE WILL HAVE TO BRING MR. LEVY BACK IN ANYWAY.

MR. GLICK: LET ME PROCEED WITH THIS EXHIBIT, AND I WILL REACH A CONVENIENT BREAKING PLACE.

Q. (BY MR. GLICK) THIS IS DEFENDANT'S EXHIBIT IL.

CAN YOU TELL ME WHAT IT IS?

A. THIS IS THE FIRST PUBLIC PRESS RELEASE ANNOUNCING THE FORMATION OF THE COMPANY.

Q. IT IS DATED FEBRUARY 14; IS THAT CORRECT?

A. YES, 1980.

Q. IT ANNOUNCES---

THE COURT: WHERE DO YOU SEE A DATE ON THERE?

MR. GLICK: YOUR HONOR, YOU SEE SUNNYVALE, CALIFORNIA

AT ABOUT THE FIFTH LINE DOWN FROM THE TOP OF THE PRESS RELEASE.

THE WITNESS: IT IS WRITTEN LIKE A NEWSPAPER STORY.

THE COURT: DATE LINE?

THE WITNESS: RIGHT.

Q. (BY MR. GLICK) AND THIS ANNOUNCES THAT YOU WILL BE MAKING GAMES FOR THE ATARI VIDEO COMPUTER SYSTEM; IS THAT CORRECT?

A. YES.

Q. THIS PARTICULAR RELEASE DOES NOT ANNOUNCE AT THIS TIME WHAT THE GAMES WILL BE, IS THAT TRUE?

A. NO, IT DOES NOT.

MR. GLICK: I CAN BREAK AT THIS POINT.

THE COURT: THANK YOU VERY MUCH.

MR. ANDERSON: YOUR HONOR, IN VIEW OF THIS LINE OF TESTIMONY, I WOULD LIKE TO REPEAT OUR PRIOR REQUEST THAT WE HAVE COPIES OF ALL DOCUMENTS THAT RELATE IN ANY WAY TO OPINIONS OR COMMUNICATIONS BETWEEN PATENT LAWYERS OR LAWYERS IN ACTIVISION WITH RESPECT TO PATENT INFRINGMENT OR THE POSSIBILITY OF IT.

THE EARLIEST BILL WE RECEIVED WAS A FEBRUARY 1980 BILL, WHICH HAS JUST BEEN HANDED UP TO THE COURT, FROM MR. TEST. THE TESTIMONY SEEMS TO INDICATE MR. TEST WAS INVOLVED BACK IN NOVEMBER IN GIVING OPINIONS. AND WE WANT--- I THINK WE ARE ENTITLED TO THOSE DOCUMENTS. THERE MUST BE MORE BILLS, I WOULD THINK, PRIOR TO FEBRUARY 1980. THE FEBRUARY BILL SAYS SERVICES DURING THE MONTH OF FEBRUARY.

THE COURT: AS I UNDERSTOOD FROM WHAT MR. GLICK SAID,

HE BELIEVES YOU HAVE, IN FACT, DESIGNATED SOME OF THESE DOCUMENTS YOURSELF.

MR. GLICK: SOME ARE DESIGNATED, SOME ARE CONTAINED IN A RECENT SET OF DOCUMENTS WE PROVIDED AT MR. ANDERSON'S REQUEST.

I WILL AGAIN STATE FOR THE RECORD I UNDERSTAND AND HAVE ALWAYS UNDERSTOOD WHAT HE HAS ASKED FOR IN THE NATURE OF SUCH BILLS AND OTHER DOCUMENTS.

I WILL CONFER WITH HIM AGAIN. BUT TO THE BEST OF OUR ABILITY TO LOCATE ANY BILLS OR WRITTEN OPINIONS, WE HAVE SEARCHED HARDER THAN HE WOULD HAVE BECAUSE WE WANT THEM, TOO, AND WE HAVE GIVEN HIM EVERYTHING WE CAN LOCATE.

THE COURT: APPARENTLY MR. ANDERSON BELIEVES HE HAS IN HIS HAND SOME THINGS HE HASN'T RECEIVED BEFORE.

MR. ANDERSON: NO, YOUR HONOR. I'M SORRY. WE HAVE THIS FEBRUARY 1980 BILL. WE CONTENDED THERE HAS BEEN A WAIVER OF PRIVILEGE. I WON'T SAY MR. GLICK AGREED WITH THAT BUT AT LEAST HE GAVE ME QUITE A FEW DOCUMENTS THAT MIGHT HAVE BEEN CONSTRUED AS PRIVILEGE.

THE EARLIEST ONE WE HAVE EVER RECEIVED REGARDING MR. TEST'S SERVICES IN REGARD TO THE TESTIMONY THAT HAS BEEN GIVEN HERE IS FEBRUARY 1980. AND THE TESTIMONY SAYS THAT MR. TEST WAS GIVING OPINIONS BACK IN 1979.

AND I THINK THERE MUST BE MORE DOCUMENTS, UNLESS MR. TEST WORKED FOR NOTHING AND UNLESS MR. TEST DIDN'T SEND REQUESTS TO WASHINGTON TO HAVE HIS SEARCHES MADE, WHICH I THINK WAS

PROBABLY TRUE. I THINK WE ARE ENTITLED TO THOSE DOCUMENTS AND WOULD LIKE TO AGAIN ASK FOR FURTHER AND EXTENDED SEARCH BE MADE FOR WHEREVER THEY MIGHT BE IN THE FLEHR HOHBACH RECORDS, ACTIVISION RECORDS THE PREDECESSOR'S RECORD OF THAT DIVISION, OR WHATEVER. I THINK WE ARE ENTITLED TO THESE PRIVILEGED, FORMERLY PRIVILEGED DOCUMENTS.

THE COURT: IS IT A QUESTION OF PRIVILEGE?

MR. ANDERSON: NO LONGER A QUESTION OF PRIVILEGE.

THE COURT: THE ISSUE IS WHETHER SUCH PIECES OF PAPER EXIST.

MR. ANDERSON: YES. THE ISSUE GOES TO THE QUESTION OF WILLFUL AND WANTON INFRINGMENT.

THE COURT: I UNDERSTAND WHAT THE ISSUE IS.

MR. GLICK: MR. HOVER-SMOOT, WHO IS PART OF OUR TRIAL TEAM AND IS A PARTNER FROM THE FLEHR HOHBOCK FIRM WE WILL ASK TO ONCE AGAIN CHECK.

THE COURT: DOCUMENTS THAT YOU HAVE PRODUCED SO FAR, HAVE THEY COME FROM THE FILES OF FLEHR HOHBACH OR COME FROM THE FILES OF ACTIVISION?

MR. GLICK: IT IS MIXED. THE BILL CAME FROM THE FILES OF, I BELIEVE, FLEHR HOHBACH, I BELIEVE. I AM NOT A HUNDRED PERCENT CERTAIN.

THE COURT: ALL I CAN SAY AT THE MOMENT IS I THINK BETWEEN NOW AND TOMORROW YOU SHOULD CONDUCT A GOOD-FAITH SEARCH TO DETERMINE WHETHER THERE IS ADDITIONAL MATERIAL IN RESPONDING

TO MR. ANDERSON'S REQUEST.

MR. GLICK: WE WILL DEFINITELY DO THAT. I WILL GO OVER WITH MR. ANDERSON THE FURTHER EXHIBITS TO BE INTRODUCED THROUGH THIS WITNESS.

THE COURT: YES. I THINK MR. ANDERSON SHOULD HAVE THOSE EXHIBITS AHEAD OF TIME, THAT IS, EXHIBITS THAT MR. LEVY IS GOING TO BE QUESTIONED ON.

MR. GLICK: WE WILL DO THAT RIGHT NOW.

THE COURT: I ASSUME TOMORROW MORNING WE WILL ALSO BE IN A POSITION TO DISCUSS A DATE FOR RESUMPTION?

MR. GLICK: YES.

THE COURT: WE WIL BE IN RECESS UNTIL 8:00 O'CLOCK TOMORROW MORNING.

(RECESS)