

BRIODY - ACTIVISION 1985
LEVY

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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?

1 A. WELL, I STARTED WITH THE MAGNAVOX COMPANY IN SEPTEMBER OF
2 1972. AND AS I RECALL, IN 1974 NORTH AMERICAN PHILIPS
3 CORPORATION, THROUGH A SUBSIDIARY BY THE NAME OF NORTH AMERICAN
4 PHILIPS DEVELOPMENT CORPORATION, BOUGHT THE MAGNAVOX COMPANY.

5 SO CONSIDERING MY EMPLOYMENT WITH MAGNAVOX STARTING IN
6 1972, I HAVE BEEN WITH THE TWO COMPANIES NOW FOR ALMOST 13
7 YEARS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 I THINK THE FIRST NUMBER OF LAWSUITS IN CHICAGO
23 INCLUDED AS DEFENDANTS SEEBURG, ATARI, CHICAGO DYNAMICS. A
24 LITTLE BIT LATER, AS I SAID, ALLIED LEISURE AND BALLY MIDWAY.
25 Q. AT THE SAME TIME, OR IN THAT TIMEFRAME, WAS THERE ANY

1 ACTIVITY THAT YOU WERE INVOLVED IN ABROAD?

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

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

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

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

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

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

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

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

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

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

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

11 A. REPEAT IT.

12 (RECORD READ)

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

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

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

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

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

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

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

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

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

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

25 A. YES.

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

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

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

8 A. SOME OF THEM WERE MAKING VARIOUS GAMES.

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

11 A. I CAN'T ANSWER THAT QUESTION ACCURATELY.

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

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

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

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

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

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

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

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

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

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

21 (FOLLOWING PROCEEDINGS UNDER SEAL)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 IN THE MATTEL CASE, WAS ANY PATENT OTHER THAN THE RUSCH
14 507 PATENT LITIGATED, IF YOU KNOW?

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

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

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

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

25 A. NO.

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

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

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

8 THE COURT: ALL RIGHT.

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

14 A. THE GROSS ROYALTY INCOME AS OF MAY THE 25TH WAS IN EXCESS OF
15 40 MILLION DOLLARS, SOMEWHERE BETWEEN 40 AND 43 MILLION DOLLARS.

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

19 A. THIS IS A LISTING OF MAGNAVOX VIDEO GAME PATENT ROYALTY
20 INCOME AS A STATUS REPORT THROUGH APRIL THE 15TH, 1985. AND IT
21 LISTS THE AMOUNT OF INCOME EACH YEAR FROM 1975 TO 1985,
22 PRESUMABLY UP UNTIL APRIL THE 15TH. AND THE TOTAL IS
23 \$37,721,125. DID YOU WANT ME TO GIVE YOU ANYMORE INFORMATION?

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

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

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

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

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

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

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

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

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

1 PROGRAM AT MAGNAVOX AS HEAD OF THE PATENT GROUP?

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

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

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

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

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

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

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

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

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

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

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

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

24 THE WITNESS: YES, YOUR HONOR.

25 THE COURT: DO YOU GET INFORMATION ON GROSS SALES OF

1 ODYSSEY?

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

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: IN THIS CASE?

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

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

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

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

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

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

4 MR. GLICK: YES, YOUR HONOR.

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

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

9 THE COURT: WHAT TIME, PLEASE?

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

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

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

18 Q. WHY DIDN'T YOU SUE IMAGIC?

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

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

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

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

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

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

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

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

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

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

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

1 YOU AWARE OF THOSE ALLEGATIONS GENERALLY?

2 A. YES, I AM.

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

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

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

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

17 THE COURT: WHERE ARE WE, MR. ANDERSON?

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

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

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

25 THE WITNESS: YES.

1 THE COURT: THEN A DOCUMENT ENTITLED "AGREEMENT."

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

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

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

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

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

12 THE WITNESS: COULD YOU REPEAT THE QUESTION, PLEASE.

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

15 A. YES, I WAS.

16 Q. WHAT WAS YOUR INVOLVEMENT?

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: THE OBJECTION IS NOTED AND OVERRULED.

4 MR. GLICK: THANK YOU, YOUR HONOR.

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

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

11 A. NO.

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

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

18 Q. PAGE FIVE?

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

23 Q. DO YOU RECALL AT THE TIME---

24 THE COURT: JUST A MOMENT.

25 THE WITNESS: IT IS J, YOUR HONOR.

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

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

5 A. YES, I WAS.

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

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

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

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

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

24 Q. IS THAT IN PARAGRAPH SMALL "E"?

25 A. YES.

1 Q. DOTS THAT SPECIFICALLY MENTION MICROPROCESSOR?

2 A. YES, IT DOES.

3 Q. THAT'S, WHAT, THE THIRD LINE FROM THE BOTTOM; IS THAT
4 CORRECT?

5 A. YES.

6 Q. I WOULD LIKE TO DIRECT YOUR ATTENTION TO PARAGRAPH 4.01 OF
7 THIS LICENSE AGREEMENT WHICH APPEARS AT PAGE SEVEN.

8 A. YES. 4.01, AS I RECALL, WAS PROBABLY ASKED FOR BY ATARI
9 BECAUSE THEY WERE BUYING A PAID UP LICENSE UNDER PATENTS OF OURS
10 AND GIVING A LICENSE BACK UNDER THEIRS AND PAYING A SUBSTANTIAL
11 AMOUNT OF MONEY.

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

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

21 Q. THAT WOULD BE LICENSED PRODUCTS AS DEFINED IN PARAGRAPH
22 2.01?

23 A. YES.

24 Q. I AM SORRY. IT IS SUBPARAGRAPH J.

25 A. PAGE FIVE, J.

1 Q. YES. DID MAGNAVOX EVER HAVE ANY INTENTION UNDER THE CLAUSE
2 4.01 OF THE CROSS-LICENSE AGREEMENT IN THE 1976 AGREEMENT TO
3 GIVE ATARI OR ITS CUSTOMERS A PERPETUAL PAID UP LICENSE UNDER
4 ALL OF MAGNAVOX AND SANDERS PATENTS THROUGHOUT THE WORLD?

5 A. CERTAINLY NOT.

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

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

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

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

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

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

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

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

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

14 Q. ALL RIGHT. I WOULD LIKE TO SHOW YOU A LETTER DATED JUNE
15 8TH, 1976, WHICH IS PLAINTIFFS' EXHIBIT 281. CAN YOU IDENTIFY
16 281, PLEASE.

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

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

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

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

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

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

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

17 A. COULD YOU REPEAT THAT QUESTION, PLEASE?

18 MR. ANDERSON: CAN YOU READ IT.

19 (RECORD READ)

20 MR. ANDERSON: BEYOND THE RIGHTS.

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

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

1 NEEDED UNDER SECTION 401 OF THE AGREEMENT?

2 A. NO.

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

5 (CONTINUED ON NEXT PAGE)

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1 Q. DID ATARI RESPOND TO YOUR OFFER OF THE OPTION LICENSE?

2 A. YES. THIS IS THE LETTER OF SEPTEMBER 30, '76. IT IS FROM
3 MR. KENEN, WHO I THINK WAS THE PRESIDENT OF ATARI AT THAT TIME,
4 ADVISING THAT ATARI EXERCISED ITS OPTION UNDER SECTION 19 OF THE
5 CROSS LICENSE WHICH, IN ESSENCE, WAS THE KIT OPTION.

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

10 Q. NOW, I NOTICE MENTIONED IN THE LETTER, EXHIBIT 281, THERE
11 ARE JUST FOUR U.S. PATENTS. U.S. PATENT P-365984, THAT IS THE
12 ORIGINAL FROM WHICH THE RUSCH PATENT 28507 REISSUED; IS THAT
13 RIGHT?

14 A. THAT'S MY UNDERSTANDING, MR. ANDERSON.

15 Q. SO THEY ARE ONE AND THE SAME PATENT ESSENTIALLY?

16 A. YES.

17 Q. OF COURSE, THE NEXT ONE IS THE BAER 480 PATENT. AND IS IT
18 CORRECT THAT THE OTHER PATENTS, THE 3659285 AND RE-28598, WERE
19 THE RUSCH-HARRISON-BAER PATENT THAT WAS HELD INVALID IN CHICAGO?

20 A. YES.

21 Q. WERE THERE ANY OTHER TRANSACTIONS--- BEFORE GOING ON, HAS
22 ATARI PAID ROYALTIES OVER THE YEARS UNDER THE AGREEMENT THAT IS
23 SET FORTH IN THE JUNE 8, 1976 LETTER?

24 A. I DON'T BELIEVE THEY PAID SPECIFICALLY UNDER THIS OPTION.
25 THEY HAVE PAID ROYALTIES UNDER A LATER LICENSE AGREEMENT THAT

1 HAS A SIMILAR ROYALTY SCHEDULE.

2 Q. ARE THERE ADDITIONAL EVENTS AFTER 1976 THAT BEAR ON WHETHER
3 OR NOT ATARI HAD A BLANKET LICENSE UNDER THE 4.01 SECTION OF THE
4 1976 AGREEMENT?

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

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

16 CAN YOU IDENTIFY PLAINTIFFS' EXHIBIT 284?

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

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

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

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

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

11 AND WE AGREED TO THE CHANGES OR THE SMALL VARIANCES HE
12 HAD IN THE LANGUAGE OF THE PRINCIPAL LICENSE AGREEMENT BECAUSE
13 IT LOOKS LIKE I SIGNED THE AMENDMENT LETTER ON NOVEMBER 20,
14 1981.

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

17 A. YES.

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

22 A. COULD REPEAT THAT QUESTION.

23 MR. ANDERSON: PLEASE REREAD IT.

24 (RECORD READ)

25 THE WITNESS: NO.

1 Q. (BY MR. ANDERSON) MR. BRIODY, HAS ATARI PAID ROYALTIES TO
2 MAGNAVOX UNDER THE AGREEMENT, PLAINTIFFS' 284?

3 A. YES. THEY PAID OVER 3 MILLION DOLLARS THUS FAR. I DON'T
4 KNOW THE EXACT NUMBER, BUT I KNOW IT IS OVER 3 MILLION DOLLARS
5 UNDER THIS SECOND ROYALTY BEARING LICENSE AGREEMENT.

6 Q. I'D LIKE TO RETURN NOW TO THE 1976 AGREEMENT WHICH IS
7 EXHIBIT DN AND DIRECT YOUR ATTENTION FIRST TO THE DEFINITIONS
8 PAGE 2, SECTION 1.01 WHERE THE SUB-HEADING "A" IS MAGNAVOX
9 PRINCIPAL PATENTS.

10 ARE THOSE THE SAME THREE PATENTS I ASKED YOU ABOUT WITH
11 RESPECT TO THE SIDE LETTER OF PLAINTIFFS' EXHIBIT 281?

12 A. YES. THE 480 PATENT IS ONE OF THE MAGNAVOX PRINCIPAL
13 PATENTS, AND SO IS THE RUSCH 507 REISSUE AND THE EARLIER PATENT,
14 THE 284 PATENT.

15 Q. I'D LIKE TO DIRECT YOUR ATTENTION TO SECTION 13.01 WHICH I
16 THINK APPEARS AT PAGE 17, WHICH IS A PATENT MARKING REQUIREMENT.

17 WAS ATARI REQUIRED TO MARK WITH THE PATENT NUMBERS THE
18 APPLICABLE PATENTS UNDER THE AGREEMENT?

19 A. YES.

20 Q. DID ATARI MARK CONSOLES WITH THOSE PATENT NUMBERS?

21 A. MY BELIEF IS THEY WERE OBLIGATED TO MARK THEIR PRODUCTS AND
22 DID MARK THE PRINCIPAL PATENT NUMBERS OF SANDERS ASSOCIATES ON
23 THEIR CONSOLE UNITS AND THEIR PRODUCTS.

24 Q. I WOULD NOW LIKE TO SHOW YOU A DOCUMENT, DEFENDANTS EXHIBIT
25 EG.

1 ARE YOU FAMILIAR WITH THAT SETTLEMENT AGREEMENT?

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

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

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

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

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

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

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

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

21 MR. GLICK: NO OBJECTION.

22 THE COURT: MAY BE ADMITTED IN EVIDENCE.

23 (PLAINTIFFS' EXHIBITS 100, 261, 21,
24 82, 283 AND 284 RECEIVED IN
25 EVIDENCE)

CROSS-EXAMINATION

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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)?

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

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

6 MR. ANDERSON: ARE YOU REFERRING TO HIS DEPOSITION?

7 MR. GLICK: YES.

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

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

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

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

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

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

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

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

17 WOULD THAT STILL BE CONSISTENT WITH YOUR TESTIMONY

18 TODAY?

19 A. YES.

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

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

1 WAS INTENDED TO BE A MASS MARKETED PRODUCT.

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

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

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

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

19 A. I DON'T RECALL THAT SPECIFICALLY.

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

23 A. YES.

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

1 A. I RECALL THAT.

2 Q. THAT THE POPULARITY, THEN, OF THIS TYPE OF INTERACTIVE GAME
3 CAME FROM ITS POPULARITY IN THE ARCADE TYPE GAMES WHERE PEOPLE
4 WERE ABLE TO GET EXPOSURE TO THEM?

5 A. I THINK IT WAS A HELPFUL INFLUENCE, YES.

6 Q. NOW, THE MAGNAVOX GAME CAME WITH OVERLAYS THAT WERE PLACED
7 OVER THE SCREEN; IS THAT CORRECT--THE INITIAL GAMES?

8 A. I RECALL, YES.

9 Q. DID THOSE PROVE TO BE IMPRACTICAL?

10 A. WELL, I WOULDN'T SAY THEY PROVED TO BE IMPRACTICAL. BUT
11 THEY WERE IMPROVED UPON. AT THE TIME THERE WAS STILL A LARGE
12 NUMBER OF THEM SOLD; BUT WHEN THEY WERE IMPROVED UPON, THE
13 PRODUCT WAS MUCH BETTER.

14 Q. LET ME READ YOU WHAT MR. FRITCHIE'S TESTIMONY WAS ON THIS
15 AND ASK YOU IF YOU AGREE OR DISAGREE WITH HIM. AT PAGE 537 IN
16 THE CDI SUIT:

17 "THERE IS STILL SOME ENJOYMENT FOR THE GAMES IN THE ITL
18 200 THAT HAD OVERLAYS AND ALL OF THAT, BUT WE WERE
19 RUNNING INTO TOO MANY PROBLEMS BECAUSE THE TV
20 MANUFACTURERS WERE TRYING TO KEEP CURRENT WITH THE BEST
21 KINDS OF TV TUBES, THOSE TV TUBES THAT CONSTANTLY
22 HAD DIFFERENT SIZES ON THEM, AND OUR OVERLAYS WERE
23 RUNNING INTO PROBLEMS.

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

1 MADE A CHANGE IN THE PRODUCT."

2 IS THAT STATEMENT---

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

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

6 A. NO, I DON'T.

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

9 A. NO, I DON'T.

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

13 A. THAT'S TRUE.

14 Q. DO YOU KNOW WHAT MAGNAVOX'S COST OF DISTRIBUTION WAS FROM
15 1972 TO 1975?

16 A. NO, I DON'T.

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

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

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

1 A. NO, I DON'T.

2 Q. SO YOUR JOB DOES NOT INVOLVE SUPERVISING OR TRACKING
3 PROFITABILITY OF THE MAGNAVOX ODYSSEY LINE?

4 A. THAT'S CORRECT.

5 Q. IT NEVER DID INVOLVE THAT? YOUR JOB WAS WORKING ON
6 LICENSING?

7 A. THAT'S CORRECT.

8 Q. OF COURSE, MAGNAVOX MADE INVESTMENTS TO UPDATE THE
9 TECHNOLOGY IN ITS LATER UNITS; THAT IS TRUE, ISN'T IT?

10 A. YES.

11 Q. DO YOU HAVE ANY PARTICULAR FAMILIARITY WITH THE CIRCUIT
12 ARRANGEMENTS CONTAINED IN THE VARIOUS ODYSSEY PRODUCTS?

13 A. NO, I DON'T.

14 Q. DO YOU KNOW ONE WAY OR THE OTHER WHETHER THE ITL 200, FOR
15 EXAMPLE, HAS A SLICER CIRCUIT IN IT OR NOT?

16 A. NO, I DON'T.

17 Q. DO YOU KNOW ONE WAY OR ANOTHER WHETHER THE CIRCUITRY IN THE
18 ITL 200 IS OF THE TYPE FIRST DEvised BY RALPH BAER'S 480 PATENT
19 AND LATER MODIFIED BY HE AND MR. HARRISON AND DISCLOSED IN THE
20 598 PATENT?

21 A. NO, I DON'T.

22 Q. YOU TESTIFIED TODAY IN REGARD TO MICROPROCESSOR GAME
23 LICENSES; IS THAT CORRECT?

24 A. YES.

25 Q. AND YOU MENTIONED THAT IN THE UNITED STATES THERE ARE

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

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

6 A. YES, THAT'S CORRECT.

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

8 A. YES.

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

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

15 (CONTINUED ON NEXT PAGE)

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1 Q. NOW, YOU WERE INTERESTED IN ACQUIRING THE MICROPROCESSOR
2 TECHNOLOGY THAT ATARI POSSESSED AT THAT TIME; IS THAT TRUE?

3 A. YES. AND ATARI WAS INTERESTED IN GIVING CERTAIN TECHNOLOGY
4 RIGHTS TO MAGNAVOX TO REDUCE THE AMOUNT THAT THEY WOULD HAVE TO
5 PAY FOR A PAID UP LICENSE.

6 Q. EXACTLY. THEY WEREN'T JUST INTERESTED IN GIVING
7 INFORMATION, BUT IN THE COURSE OF NEGOTIATION THERE WAS
8 DISCUSSION AS TO THOSE TWO ITEMS; IS THAT CORRECT?

9 A. CORRECT.

10 Q. DID YOU SUCCEED IN OBTAINING THE TECHNOLOGY FOR THE
11 MICROPROCESSOR THAT ATARI USED FROM ATARI?

12 A. YES.

13 Q. IN FACT, DIDN'T YOU ENDEAVOR FOR SOMETIME TO OBTAIN THAT
14 TECHNOLOGY AND HAD DIFFICULTY IN GETTING IT?

15 A. WELL, I KNOW THAT WE SENT PEOPLE TO VISIT ATARI, TECHNICAL
16 PEOPLE, WHO DID FIND OUT THE INFORMATION THAT ATARI WAS REQUIRED
17 TO GIVE US AND DID CONSIDER IT WITH RESPECT TO FUTURE PRODUCTS
18 OF MAGNAVOX.

19 Q. IS IT TRUE THAT THE ATARI VIDEO COMPUTER SYSTEM 2600 TURNED
20 OUT ON THE MARKET TO BE A SUPERIOR PRODUCT TO THE MAGNAVOX
21 ODYSSEY II PRODUCT?

22 A. I DON'T THINK I AM QUALIFIED TO ANSWER THAT QUESTION.

23 Q. YOU ARE NOT QUALIFIED TO ANSWER IT IN TERMS OF ITS
24 CAPABILITIES---

25 A. THAT'S RIGHT.

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

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

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

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

9 A. THAT'S RIGHT.

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

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

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

19 THE COURT: DN?

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

23 MR. ANDERSON: 1981 LICENSE ALSO INCLUDES---

24 THE WITNESS: COULD YOU REPEAT THE QUESTION, PLEASE?

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

1 A. YES, I DO.

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

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

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

8 MR. GLICK: YES.

9 A. COULD YOU REPEAT THE QUESTION?

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

14 THE COURT: OF WHAT?

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

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

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

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

1 A. YES, FOR COMPLETE VIDEO GAMES.

2 Q. DO YOU YOURSELF ATTEND CES CONFERENCES, TRADE CONFERENCES?

3 A. I HAVE IN THE PAST, MR. GLICK, BUT NOT IN RECENT YEARS.

4 Q. SOMEONE AT MAGNAVOX HAS RESPONSIBILITY TO KEEP UP WITH THE
5 MARKET AND LOOK FOR POTENTIAL LICENSEES?

6 A. YES.

7 Q. DOES SOMEONE EXAMINE GAMES RELEASED TO DETERMINE WHETHER
8 PARTICULAR GAMES HAVE FEATURES INVOLVED IN EITHER THE 480 BAER I
9 PATENT OR THE 507 RUSCH II PATENT?

10 A. WELL, I HAVE ONE OR MORE ATTORNEYS IN MY OFFICE WHO ARE
11 ASSIGNED TO KEEPING ABREAST OF THE BUSINESS OF VIDEO GAME
12 LICENSING TO KEEP THEMSELVES INFORMED. BUT THEY HAVE SELDOM
13 GONE TO THE CES SHOW.

14 Q. DO YOU KNOW IF THEY READ TRADE MAGAZINES THEMSELVES TO BE
15 INFORMED OF THE PRODUCTS THAT ARE COMING OUT?

16 A. WELL, THEY READ TELEVISION DIGEST, WHICH HAS INFORMATION OF
17 THAT NATURE IN IT, AND PLAYMETER, WHICH IS A COIN-OPERATED VIDEO
18 GAME KIND OF MAGAZINE. AND THEY READ OTHER PUBLICATIONS SIMILAR
19 TO THAT.

20 Q. THEY ALSO VISIT STORES FROM TIME TO TIME TO SEE WHAT IS OUT
21 THERE ON THE MARKET?

22 A. VERY SELDOM. UNLESS IT IS TO TRACK DOWN A PRESUMED
23 INFRINGER WHO WE HAVE READ ABOUT SOMEWHERE ELSE THAT HE MAY BE
24 MANUFACTURING A VIDEO GAME OR A CARTRIDGE THAT IS CONSIDERED TO
25 COME WITHIN THE CLAIMS OF THE RUSCH REISSUE PATENT.

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

4 A. THERE HAVE BEEN, YES.

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

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

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

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

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

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

1 IN 1978.

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

6 A. NO, I AM NOT.

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

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

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

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

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

17 A. NO.

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

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

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

1 A. IS THE QUESTION HAVE WE EVER ASSERTED?

2 Q. YES.

3 A. WE DO HAVE ONE LICENSEE OF SOFTWARE, MILTON BRADLEY. NOW, I
4 HAVE THE FEELING THAT WE DIDN'T ASSERT IT; THAT PERHAPS THEY
5 CAME TO US AND SAID "WE WANTED A LICENSE."

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

10 Q. THE MILTON BRADLEY LICENSE AGREEMENT IS EFFECTIVE JANUARY
11 1ST 1983. DO YOU HAPPEN TO KNOW THAT BY MEMORY?

12 A. NO, I DON'T.

13 Q. WERE YOU AWARE THAT DURING 1982 MILTON BRADLEY WAS IN THE
14 PROCESS OF DELEVOPING ITS OWN COMPLETE SYSTEM, BOTH SOFTWARE AND
15 CONSOLE UNITS, WHICH THEY AT THAT TIME HAD ANNOUNCED THEY WERE
16 GOING TO BRING ONTO THE MARKET?

17 A. NO, I AM NOT SPECIFICALLY AWARE OF THAT.

18 Q. NOW THAT I HAVE MENTIONED IT, DOES THAT STRIKE A RESPONSIVE
19 CORD IN YOUR THINKING?

20 A. I DON'T HAVE ANY REASON TO DISAGREE WITH WHAT YOU SAID, BUT
21 I JUST DON'T KNOW.

22 Q. THE LICENSE THAT WAS ACTUALLY ENTERED INTO WITH MILTON
23 BRADLEY IS NOT RESTRICTED TO SOFTWARE ONLY; IT WOULD INCLUDE
24 CONSOLE?

25 A. THAT IS CORRECT. MY RECOLLECTION WAS THAT IT WAS MAINLY FOR

1 SOFTWARE OR MAINLY FOR CARTRIDGES.

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

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

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

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

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

20 A. I DON'T KNOW.

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

25 A. NOT THAT I RECALL.

1 Q. THAT INCLUDES IMAGIC?

2 A. MIGHT POSSIBLY HAVE SENT THEM A LETTER. I DON'T RECALL IT.
3 BUT THE UPSHOT OF IT WAS THAT WE FELT THAT THERE WAS NO
4 SIGNIFICANT INFRINGEMENT.

5 Q. PARKER BROTHERS MADE A NUMBER OF GAMES FOR VCS. DID YOU
6 SEND A LETTER OR PURSUE DISCUSSIONS WITH PARKER BROTHERS?

7 A. NO, WE DIDN'T. WE DIDN'T HAVE ANY REASON TO FEEL THAT THEY
8 INFRINGED THE RUSCH REISSUE PATENT.

9 Q. BRODERBUNDT, B-R-O-D-E-R-B-U-N-D-T?

10 A. NO.

11 Q. SYNATSE, S-Y-N-A-T-S-E?

12 A. NO.

13 Q. EPYX, E-P-Y-X?

14 A. I RECALL HAVING HAD A CONVERSATION WITH SOMEONE IN MY OFFICE
15 ABOUT THEM, BUT I DON'T THINK WE HAD ANY EVIDENCE THAT CAUSED US
16 TO FEEL THAT THEY WERE INFRINGING THE PATENT.

17 Q. SIERRA, S-I-E-R-R-A?

18 A. NO, I DON'T THINK SO.

19 Q. ELECTRONIC ARTS?

20 A. I DON'T THINK SO.

21 Q. SPINNAKER, S-P-I-N-N-A-K-E-R?

22 A. NO.

23 Q. YOU ARE FAMILIAR WITH THE LAW, ARE YOU NOT, THAT REQUIRES
24 YOU TO GIVE TIMELY NOTICE TO ONE THAT YOU CONTEND INFRINGES A
25 PATENT?

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

2 THE COURT: WELL, IT IS A PRELIMINARY FOUNDATION

3 QUESTION. I WILL PERMIT THE QUESTION.

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

5 Q. (BY MR. GLICK) YES.

6 A. YES.

7 Q. THERE IS A REQUIREMENT THAT ONCE YOU ARE AWARE, OR SHOULD BE

8 AWARE, OF INFRINGEMENT THAT YOU TIMELY TELL THE PERSON THAT YOU

9 CONTEND WHAT THEY ARE DOING IS INFRINGING?

10 MR. ANDERSON: I OBJECT.

11 THE WITNESS: LET EXPLAIN TO YOU, MR. GLICK, I

12 INTERPRET THE LAW IN A SLIGHTLY DIFFERENT WAY.

13 IF SOMEONE IS INFRINGING A PATENT AND YOU ARE NOT A

14 MANUFACTURER, LET'S SAY YOU GIVE THEM NOTICE AND THEN THE

15 LIABILITY STARTS TO ACCRUE AS OF THE DATE OF NOTICE, BUT THERE

16 ARE NO RIGHTS THAT ARE LOST BY WAITING AWHILE UNTIL YOU KNOW.

17 AND WE, TO THE BEST OF MY KNOWLEDGE, WE HAD NO REASON

18 TO BELIEVE THAT THERE WAS ANY SIGNIFICANT INFRINGEMENT OF ANY

19 OTHER CARTRIDGE ONLY KINDS OF MANUFACTURERS OF VIDEO GAMES OTHER

20 THAN THE DEFENDANT IN THIS CASE.

21 Q. LET ME PHRASE IT IN A WAY THAT SOUNDS LIKE YOU WILL AGREE

22 WITH, AND THAT IS, THAT YOU WILL NEED TO GIVE NOTICE IN ORDER TO

23 START THE CLOCK RUNNING ON DAMAGES TO ANY PARTICULAR

24 INFRINGEMENT?

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

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

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

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

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

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

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

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

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

4 A. YES, I AM.

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

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

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

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

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

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

22 Q. INDEPENDENT OF THAT FACT?

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

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

1 A. THAT'S CORRECT. BUT WE HAVE AN EXCLUSIVE LICENSE.

2 Q. YOU HAVE HAD THAT FOR SOMETIME?

3 A. YES.

4 Q. SINCE THE ORIGINAL EXCLUSIVE LICENSE AGREEMENT WAS ENTERED
5 INTO?

6 A. THAT'S CORRECT.

7 MR. GLICK: MAY I HAVE A COPY OF THAT? YOUR HONOR, I
8 WILL BE REFERRING TO CLAIM ONE OF THE 480 PATENT.

9 THE COURT: WHAT IS THE NUMBER?

10 MR. GLICK: IT IS NUMBERED DA. WE HAVE A COPY FOR THE
11 WITNESS TO FOLLOW.

12 Q. (BY MR. GLICK) MR.. BRIODY, I WOULD LIKE YOU TO REVIEW THAT
13 CLAIM. I THINK THAT IS WHAT YOU ARE DOING RIGHT NOW. CLAIM ONE
14 IN COLUMN 13, YOUR HONOR.

15 THE WITNESS: I HAVE READ IT.

16 MR. GLICK: YOUR HONOR, HAVE YOU HAD A CHANCE---

17 THE COURT: YES.

18 Q. (BY MR. GLICK) I THINK YOU WOULD AGREE THAT THAT IS A VERY
19 BROAD CLAIM, WOULD YOU NOT?

20 A. RELATIVELY BROAD, YES.

21 Q. IT COVERS GENERATION OF DOTS ON THE SCREEN TO BE MANIPULATED
22 BY A PARTICIPANT AND THEN STATES WHAT FOLLOWS; IS THAT CORRECT?

23 A. YES.

24 Q. ARE YOU AWARE OF ANY ACTIVISION GAME THAT WOULD NOT INFRINGE
25 THIS CLAIM, CLAIM ONE?

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

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

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

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

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

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

22 A. AGAINST WHOM? AGAINST ANYBODY?

23 Q. YES.

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

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

1 IS THE ONE THAT IS READ.

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

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

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

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

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

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

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

20 A. YES.

21 Q. AND THE MATTEL LICENSE INCLUDES THE 480?

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

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

1 480 PATENT IS ALSO COVERED.

2 A. YES, I SEE THAT IT IS.

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

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

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

9 A. NO, WE HAVE NOT.

10 Q. OR IBM?

11 A. WE HAVE NOT.

12 Q. OR COMMODORE?

13 A. WE HAVE NOT.

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

16 A. NO, WE HAVE NOT.

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

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

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

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

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

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

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

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

7 MR. ANDERSON: JUST ONE QUESTION, YOUR HONOR.

8 REDIRECT EXAMINATION

9 BY MR. ANDERSON:

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

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

15 A. YES, IT DID.

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

18 A. YES.

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

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

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

24 A. YES.

25 MR. ANDERSON: NO FURTHER REDIRECT, YOUR HONOR.

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

2 (WITNESS EXCUSED)

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

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

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

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

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

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

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

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

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

3 THE COURT: SURE.

4 (PAUSE IN PROCEEDINGS)

5 JAMES H. LEVY,

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

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

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

11 DIRECT EXAMINATION

12 BY MR. GLICK:

13 Q. GOOD AFTERNOON, MR. LEVY.

14 A. IT IS AFTERNOON.

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

16 A. 245 PARK LANE, ATHERTON, CALIFORNIA.

17 Q. WHAT IS YOUR PRESENT OCCUPATION?

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

20 Q. AND HOW LONG HAVE YOU HELD THAT POSITION?

21 A. SINCE OCTOBER OF 1979.

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

23 A. SINCE THE COMPANY WAS FOUNDED, YES.

24 Q. WHERE IS ACTIVISION LOCATED?

25 A. IT IS IN MOUNTAIN VIEW, CALIFORNIA.

1 Q. HAS IT ALWAYS BEEN LOCATED IN THAT GENERAL AREA OF THE SAN
2 FRANCISCO AREA?

3 A. IT HAS BEEN IN THE VALLEY SINCE ITS FOUNDING. IT HAS BEEN
4 IN MOUNTAIN VIEW, SANTA CLARA, AND SUNNYVALE.

5 Q. ARE YOU ONE OF THE FOUNDERS OF ACTIVISION?

6 A. YES, I AM.

7 Q. I AM GOING TO ASK YOU SOME GENERAL BACKGROUND QUESTIONS FOR
8 THE COURT. WHERE ARE YOU FROM ACTUALLY, MR. LEVY?

9 A. MY HOMETOWN IS SHREVEPORT, LOUISIANA.

10 Q. WOULD YOU PLEASE DESCRIBE WITH YOUR EDUCATIONAL?

11 A. I ATTENDED PUBLIC SCHOOLS, GRADUATED FROM HIGH SCHOOL IN
12 SHREVEPORT, ATTENDED CARNEGIE INSTITUTE OF TECHNOLOGY IN 1961
13 THROUGH '66. I RECEIVED A BS AND MS BOTH IN INDUSTRIAL
14 MANAGEMENT AND INDUSTRIAL ADMINISTRATION.

15 Q. OKAY. CARNEGIE IS IN PENNSYLVANIA?

16 A. PITTSBURG, PENNSYLVANIA.

17 Q. I WOULD LIKE YOU TO TRACE YOUR EMPLOYMENT HISTORY FROM THE
18 TIME YOU GRADUATED FROM CARNEGIE.

19 A. WHEN I GRADUATED FROM BUSINESS SCHOOL, I WENT TO HERSHEY
20 CHOCOLATE CORPORATION IN HERSHEY, PENNSYLVANIA IN THE MARKETING
21 DEPARTMENT. I WAS A PROPERTY MANAGER, MARKETING MANAGER FROM
22 1966 THROUGH THE END OF 1968.

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

25 I THEN FORMED AN EXPERIMENTAL PUBLISHING VENTURE CALLED

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

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

6 AFTER ONE YEAR THERE I WENT TO GRT CORPORATION IN
7 SUNNYVALE. GRT WAS IN THE PRERECORDED MUSIC TAPE BUSINESS. AND
8 I WAS FIRST THE MANAGER OF A MAIL ORDER MARKING DIVISION THAT I
9 STARTED, THEN BECAME MANAGER OF BUSINESS AFFAIRS AND
10 VICE-PRESIDENT OF BUSINESS AFFAIRS FOR THE CORPORATION, AND THEN
11 CORPORATE VICE-PRESIDENT. AND I WAS WITH GRT UNTIL JUNE OF
12 1971.

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

15 A. YES.

16 Q. WOULD YOU PLEASE DESCRIBE THAT?

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

1 GUIDED THEIR DEVELOPMENT UNTIL I LEFT THE COMPANY.

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

3 A. THE G-2 GROUP, YES.

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

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

9 THIS WAS--A LOT OF THIS TROUBLE CROPPED UP IN EARLY
10 1979. I PETITIONED THE BOARD OF DIRECTORS OF THE COMPANY FOR
11 THE RIGHT TO GO OUT AND SEEK FINANCING TO ACQUIRE THE G-2
12 DIVISION, SPIN IT OFF AS AN INDEPENDENT OPERATION. THE BOARD
13 AGREED THAT THAT WOULD--THAT THEY WOULD INTERTAIN SUCH A
14 PROPOSAL.

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

18 (CONTINUED ON NEXT PAGE)

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1 Q. WHERE DID YOU GO TO SEEK THIS FINANCING?

2 A. I CALLED AN ATTORNEY AT WILSON SONSINI, GOODRICH AND ROSATI
3 IN PALO ALTO. HE IS A GENTLEMAN I WORKED WITH ON CORPORATE
4 MATTERS IN THE PAST FOR GRT. AND I GAVE HIM COPIES OF THE
5 BUSINESS PLAN. HE MADE CONTACTS WITHIN THE VENTURE CAPITAL
6 COMMUNITY.

7 Q. DID YOU IN FACT RECEIVE SOME SORT OF COMMITMENT FROM THE
8 VENTURE CAPITAL COMMUNITY?

9 A. ABOUT TEN DAYS AFTER I LEFT GRT I RECEIVED HANDSHAKE
10 COMMITMENT FROM BILL DRAPER (PHONETIC) AT SUTTER HILL VENTURES
11 TO PROVIDE THE FUNDING TO ACQUIRE THE G2 DIVISION IF I COULD
12 SUCCESSFULLY NEGOTIATE HIS ACQUISITION.

13 Q. DID YOU CONTINUE TO TRY AND NEGOTIATE THE ACQUISITION OF THE
14 G2 GROUP?

15 A. YES, I DID.

16 Q. WHAT OCCURRED?

17 A. BECAUSE OF THE GENERAL PROBLEMS AT GRT, IT WAS VERY
18 DIFFICULT TO GET ANYONE TO SIT DOWN AND FOCUS ON NEGOTIATING A
19 DEAL.

20 ULTIMATELY I ABANDONED THE ATTEMPT TO BUY THAT
21 DIVISION.

22 Q. WHAT OCCURRED NEXT AFTER YOU REALIZED THAT THE G2 GROUP
23 ACQUISITION WOULD NOT GO FORWARD?

24 A. I WENT BACK TO SUTTER HILL AND TOLD THEM I THOUGHT I WAS
25 GOING TO BE UNSUCCESSFUL IN ACQUIRING IT IN TIME TO REALLY SPIN

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

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

9 Q. HOW WERE YOU INTRODUCED TO THEM?

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

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

17 A. YES.

18 Q. WHO WERE THESE FOUR INDIVIDUALS?

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

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

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

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

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

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

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

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

16 THAT IS ULTIMATELY WHAT WE DID.

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

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

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

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

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

6 Q. SOFTWARE THEY HAD DESIGNED WHILE AT ATARI?

7 A. YES.

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

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

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

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

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

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

1 A. YES, THERE WAS.

2 Q. DESCRIBE THAT FOR A MOMENT?

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

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

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

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

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

20 MR. GLICK: EXCUSE ME FOR A MOMENT.

21 (PAUSE IN PROCEEDINGS)

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

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

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

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

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

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

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

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

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

22 Q. WHAT DID HE TELL YOU?

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

1 Q. MR. TEST IS WITH THE FLEHR HOHBOCH FIRM IN SAN FRANCISCO?

2 A. YES.

3 Q. DID YOU YOURSELF HIRE HIM THEREAFTER?

4 A. YES. I HAD WORKED WITH AL TEST AT GRT ON COPYRIGHT AND
5 TRADEMARK ISSUES AND SUBSEQUENTLY THEN HIRED HIM AS PATENT
6 COUNSEL TO ACTIVISION.

7 Q. I SHOW YOU A DOCUMENT MARKED IE AND ASK YOU IF YOU RECOGNIZE
8 THAT ONE?

9 A. I CERTAINLY DO.

10 Q. WHAT IS THAT?

11 A. IT IS THE BUSINESS PLAN FOR THE COMPANY THAT BECAME
12 ACTIVISION AS PROVIDED TO SUTTER HILL ON THE 23RD OF AUGUST
13 1979. THIS IS A COPY OF NO. 1, WHICH WAS MINE.

14 Q. COPY NO. 1 IS YOURS?

15 A. COPY NO. 1 IS MINE.

16 Q. IT REFERS TO VIDEO COMPUTER ARTS.

17 A. YES. THAT WAS A NAME PUT ON THERE AT THE LAST MINUTE SO WE
18 COULD CALL OURSELVES SOMETHING. IN THE BUSINESS PLAN WE DID
19 NOT IN FACT GENERATE THE NAME ACTIVISION UNTIL SHORTLY BEFORE
20 INCORPORATING IN LATE SEPTEMBER.

21 Q. REFERRING TO YOUR PLAN, CAN YOU TELL US WHAT THE BASIC
22 PRESENTATION WAS YOU WERE MAKING AT THAT TIME AS TO WHAT THE
23 COMPANY ACTIVISION WOULD BE?

24 A. ACTUALLY, ON PAGE--LAST PAGE OF THE INTRODUCTION, THE BASIC
25 FOUNDATION OF THE COMPANY IS DEFINED IN THE LAST TWO PARAGRAPHS

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

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

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

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

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

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

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

25 DO YOU RECALL THAT?

1 A. YES.

2 Q. IN THE PATENT CATEGORY, TELL US WHAT IS REFERRED TO THERE IN
3 GENERAL TERMS AND NOT SPECIFICALLY.

4 A. THIS REFERS PRIMARILY TO THE RESULTS OF THE SEARCH OUTLINED
5 IN THE LETTER FROM TOM SHOTZEL.

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

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

14 Q. IN FACT HAD YOU ASKED FOR THAT OPINION SO YOU COULD GIVE
15 INSTRUCTIONS TO YOUR DESIGNER AS TO HOW TO PROCEED?

16 A. WELL, WE FIRST USED THIS OPINION FROM TOM SHOTZEL. WE LATER
17 RECEIVED ELABORATION ON THAT OPINION FROM AL TEST DURING EARLY
18 MEETINGS WITH OUR PLASTIC AND INDUSTRIAL DESIGN ENGINEERS TO
19 DEFINE JUST WHAT THE BOUNDARIES WERE.

20 Q. HOW DID YOU UNDERSTAND THE SCOPE OF YOUR REQUEST TO MR. TEST
21 AT THIS JUNCTURE OF THE DEVELOPMENT AS TO WHAT YOU WANTED HIM TO
22 SEARCH?

23 A. AT THIS POINT WHEN THE BUSINESS PLAN WAS WRITTEN, NO
24 PARTICULAR SEARCH HAD BEEN DONE. WE WERE WORKING ONLY OFF OF
25 THIS PATENT OPINION FROM TOM SHOTZEL.

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

5 AND HE SUBSEQUENTLY CONDUCTED SUCH A SEARCH.

6 Q. AND HE REPORTED BACK TO YOU?

7 A. YES, HE DID.

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

11 A. NOT AT THAT TIME.

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

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

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

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

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

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

25 Q. DID YOU GO AHEAD AN HIRE A DESIGNER?

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

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

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

8 WE GAVE HIM THE ATARI PATENT. WE GAVE HIM THE BENEFIT
9 OF THE OPINIONS THAT WE HAD FROM MR. SHOTZEL AND MR. TEST, AND
10 WE ASKED HIM TO DESIGN A CARTRIDGE THAT WOULD BE ABLE TO
11 INTERFACE WITH THE ATARI 2600 VIDEO COMPUTER SYSTEM, WOULD BE
12 FUNCTIONAL, WOULD HAVE FUNCTIONAL INTEGRITY, AND WOULD NOT
13 INFRINGE THEIR PATENT AND COULD NOT BE OBSOLETE BY ATARI
14 WITHOUT OBSOLETEING THEIR OWN CARTRIDGE.

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

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

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

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

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

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

1 ENTITLED PROGRESS REPORT. I ASK YOU WHAT THAT IS.

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

5 Q. ITEM 1 SAYS OFFICES OPEN AND FUNCTIONING.

6 I TAKE IT THAT MEANS WHAT IT SAYS?

7 A. RIGHT.

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

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

13 Q. DO YOU SEE ITEM 1?

14 A. YES.

15 Q. WHAT DOES THAT REFER TO?

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

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

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

1 WE WERE SUPPOSED TO HAVE HAD THEM SOMETIME AGO.

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

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

11 MR. ANDERSON: THANK YOU, YOUR HONOR.

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

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

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

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

1 THAT DIRECTION, YOU LET THE PRODUCT SPEAK FOR ITSELF.

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

4 A. OUR ORIGINAL TARGET WAS TO RELEASE TWO TITLES IN AUGUST OF
5 1980 AND TWO IN OCTOBER OF 1980. AND WE SUBSEQUENTLY SUCCEEDED
6 IN RELEASING FOUR IN JULY OF 1980.

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

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

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

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

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

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

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

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

2 SO WE HAVE NEVER, WITH THE DESIGNERS, WENT AND SAID:

3 YOU DO SKIING, AND YOU DO BOXING AND YOU DO BRIDGE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE WITNESS: D-252753.

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

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

9 A. YES.

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

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

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

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

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

7 THE COURT: I AM GOING TO OVERRULE YOUR OBJECTION.

8 MR. ANDERSON: THANK YOU.

9 MR. GLICK: READ THE QUESTION.

10 (RECORD READ)

11 THE WITNESS: YES, I DID.

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

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

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

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

1 THEY COULD ASSIST US IN FORMULATING A RESPONSE.

2 Q. LET ME CALL YOUR ATTENTION TO THE FACT BOTH LETTERS ARE
3 DATED JANUARY 31 AND ASK YOU IF YOU HAD RECEIVED ORAL
4 COMMUNICATION FROM ATARI THAT THIS WAS COMING OR WAS THIS SOME
5 DATING PROBLEM IN THESE LETTERS, OR YOU CAN'T EXPLAIN IT?

6 A. AS BEST I CAN RECALL, WE RECEIVED THE MAIL EARLY IN THE
7 MORNING. AND I CALLED MR. SCHNEIDERMAN AND MR. TEST IMMEDIATELY
8 AND FORMULATED THIS LETTER TO THEM IN THE AFTERNOON IN RESPONSE
9 TO THEIR REQUEST. WE RECEIVED NO PRIOR NOTICE FROM ATARI THAT
10 THIS LETTER WAS ON ITS WAY.

11 Q. I SHOW YOU WHAT HAS BEEN MARKED AS EXHIBIT IJ.

12 IS THAT YOUR RESPONSE, THEN, UNDER YOUR SIGNATURE BACK
13 TO ATARI?

14 A. YES, THIS IS MY RESPONSE.

15 Q. WHILE THIS LETTER INDICATES AN OFFER TO TRY AND DISCUSS
16 MATTERS, IN FACT YOU ULTIMATELY DID BECOME INVOLVED IN
17 LITIGATION WITH ATARI, IS THAT TRUE?

18 A. YES. WE NEVER ULTIMATELY RECEIVED A RESPONSE TO THIS LETTER
19 OTHER THAN WHEN THEY FILED SUIT IN MAY.

20 Q. NOW, ATARI'S JANUARY 31 LETTER MENTIONED THE DESIGN PATENT.

21 DID YOU ASK MR. TEST TO DO FURTHER PATENT RESEARCH ON
22 THAT PATENT?

23 A. YES.

24 Q. DID YOU RECEIVE ADVICE CONCERNING THAT PARTICULAR PATENT?

25 A. YES.

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

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

8 A. IT WOULD APPEAR SO, YES.

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

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

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

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

15 MR. GLICK: THE QUESTION IS WHAT DID YOU.

16 THE COURT: REPHRASE THE QUESTION.

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

21 A. THE DESIGN PATENT?

22 Q. YES.

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

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

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

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

10 THE COURT: THEN THERE WILL BE CROSS-EXAMINATION?

11 MR. ANDERSON: YES, YOUR HONOR.

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

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

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

18 CAN YOU TELL ME WHAT IT IS?

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

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

22 A. YES, 1980.

23 Q. IT ANNOUNCES---

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

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

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

2 THE WITNESS: IT IS WRITTEN LIKE A NEWSPAPER STORY.

3 THE COURT: DATE LINE?

4 THE WITNESS: RIGHT.

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

7 A. YES.

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

10 A. NO, IT DOES NOT.

11 MR. GLICK: I CAN BREAK AT THIS POINT.

12 THE COURT: THANK YOU VERY MUCH.

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: IS IT A QUESTION OF PRIVILEGE?

8 MR. ANDERSON: NO LONGER A QUESTION OF PRIVILEGE.

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

11 MR. ANDERSON: YES. THE ISSUE GOES TO THE QUESTION OF
12 WILLFUL AND WANTON INFRINGEMENT.

13 THE COURT: I UNDERSTAND WHAT THE ISSUE IS.

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

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

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

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

1 TO MR. ANDERSON'S REQUEST.

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

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

8 MR. GLICK: WE WILL DO THAT RIGHT NOW.

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

11 MR. GLICK: YES.

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

14 (RECESS)

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