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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

ANASCAPE, LTD.		DOCKET 9:06CV158
		MAY 13, 2008
VS.		8:51 A.M.
MICROSOFT CORP., ET AL		LUFKIN, TEXAS

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VOLUME 7 OF \_\_, PAGES 1702 THROUGH 1878

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HON. RON CLARK  
UNITED STATES DISTRICT JUDGE, AND A JURY

-----  
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PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;  
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

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1 (REPORTER'S NOTES ANASCAPE VS. MICROSOFT,  
2 JURY TRIAL VOLUME 7, 8:51 A.M., WEDNESDAY, 05/14/2008,  
3 LUFKIN, TEXAS, HON. RON CLARK PRESIDING)

4 (OPEN COURT, ALL PARTIES PRESENT, JURY NOT  
5 PRESENT)

6 THE COURT: All right. We're continuing on  
7 with the inequitable conduct case. I understand that  
8 the parties are still looking at what can be agreed to  
9 as far as facts and timelines. I don't need a -- I  
10 mean, in the end result, I don't need a PowerPoint  
11 timeline, just a list of dates and acts, would be more  
12 than enough. I mean, the PowerPoint is pretty; but what  
13 I really want, if you can agree on various dates, that  
14 will be of help.

15 Okay. We're continuing on. I think you had  
16 Mr. Armstrong on the stand. Do you have some more  
17 questions for him?

18 MR. PRESTA: Yes, sir.

19 THE COURT: Okay. Mr. Armstrong.

20 MR. PRESTA: If I could just hand up a  
21 notebook?

22 THE COURT: Please.

23 MR. PRESTA: And, your Honor, that notebook  
24 contains some of the prior art references that were in  
25 the file history for your Honor's review --

1 THE COURT: Okay.

2 MR. PRESTA: -- that will come up. It also  
3 contains in the front a timeline. It is a PowerPoint  
4 timeline, but it does have all that we believe to be the  
5 relevant dates. We did work with the other side to come  
6 up with an agreed timeline. They had certain items they  
7 wanted on the timeline, and we added all of their items  
8 to the timeline. But we didn't reach an agreement that  
9 they actually wanted to submit this timeline together.

10 THE COURT: Okay.

11 CONTINUED DIRECT EXAMINATION OF BRAD ARMSTRONG

12 BY MR. PRESTA:

13 Q. Good morning, Mr. Armstrong.

14 A. Good morning.

15 Q. I just want to ask you first, going back in time a  
16 little bit: Did you disclose any confidential  
17 information about your inventions to Logitech before you  
18 entered into the nondisclosure agreement?

19 A. I don't have a clear recollection of that.

20 Q. Okay. Would you have given them confidential  
21 information about your inventions before you signed a  
22 nondisclosure agreement?

23 A. You mean as a matter of course?

24 Q. Or --

25 A. I wouldn't -- you know, at that time I tried to get

1 companies to sign nondisclosure agreements; and if I  
2 could, that was terrific.

3 Q. Okay.

4 A. But I don't have a specific recollection.

5 Q. All right. Did you -- is it your testimony that  
6 you -- well, the nondisclosure agreement that we looked  
7 at earlier was back in December of 1992. Do you recall  
8 that?

9 A. No, sir.

10 Q. Okay. Well, I'll represent to you that the --  
11 there is a nondisclosure agreement on December 4th of  
12 1992. Did you have more than one nondisclosure  
13 agreement with Logitech?

14 A. To the best of my recollection, there were two.

15 Q. Okay. Do you know when the second one was?

16 A. No, sir.

17 Q. Now, is it your testimony that you offered your  
18 invention to Logitech sometime in 1992?

19 A. Yes, sir. And the other nondisclosure agreement  
20 was sometime in that time frame. They weren't really  
21 far apart. I don't recall when they --

22 Q. Okay. Within a few weeks or few months?

23 A. I would say within a couple months anyway.

24 Q. Okay.

25 A. I'm not sure.

1 Q. All right. Now -- so, maybe as early as October of  
2 1992?

3 A. Yes, maybe. Maybe September. I don't know when it  
4 was.

5 Q. Okay. Now, the Consumer Electronics Show that you  
6 went to in Las Vegas, that was in 1993, right?

7 A. To the best of my recollection, yes.

8 Q. Okay. And you put an affidavit in another  
9 litigation, the Immersion litigation, regarding that.  
10 Do you recall that?

11 A. Yes, sir.

12 Q. And you indicated you went to the Consumer  
13 Electronics Show in 1993 in Las Vegas, right?

14 A. I -- yes, sir, I believe that was represented --

15 Q. And that's where you saw the CyberMan product?

16 A. Yes, sir.

17 Q. And are you aware that the Consumer Electronics  
18 Show was in January of 1993?

19 A. You know, I'm not really clear exactly when or even  
20 the city. But at that time I just said -- I remember  
21 going to this show -- "Can you guys help me with the  
22 date and place," because I remembered the event but the  
23 date and place is not that clear in my mind.

24 Q. Okay. Well, you put a sworn affidavit in in the  
25 Immersion litigation saying that it was in 1993,



1 Consumer Electronics Show in Las Vegas, right?

2 A. I believe that that's what that says, yes.

3 Q. And do you believe that's inaccurate?

4 A. I don't -- I'm not really clear on the date and the  
5 place.

6 Q. Okay. So, you weren't clear when you wrote that  
7 sworn declaration?

8 A. I asked them to reassure me on that.

9 Q. Okay. Now, if, in fact, you signed that  
10 nondisclosure agreement in December of 1992 and you may  
11 have had an earlier one with them as far back as  
12 September or October, is it your testimony that they  
13 made the CyberMan product between October of 1992 and  
14 the Consumer Electronics Show in January of 1993 based  
15 on the information you gave them?

16 A. No. That wouldn't be correct.

17 Q. That would not be correct?

18 A. No, sir.

19 Q. Okay. Now, you --

20 A. I'm just -- the January of '93 is the issue date  
21 there in that question.

22 Q. Okay. So, you have an issue date of whether, in  
23 fact, the Consumer Electronics Show in Las Vegas was in  
24 January of 1993?

25 A. No. You said that they made it in January of '93,

1 and I don't think it was made by then.

2 Q. Okay. Well, the Consumer Electronics Show that you  
3 said you saw the CyberMan product in took place in  
4 January of 1993. You're aware of that, right?

5 A. No, sir.

6 Q. Okay. Now, is it your testimony that you tried to  
7 sell Logitech back in 1992 the flexible membrane sheet  
8 idea?

9 A. I mentioned it. And, you know, there's -- there  
10 are a lot of meetings when they get interested in your  
11 product, and you just go through all these different  
12 options.

13 Q. So, it's your testimony that you disclosed that  
14 flexible membrane sheet to them for the purpose of them  
15 commercializing it in a product so that you could make  
16 some money on it, right?

17 A. I think I mentioned it as an option.

18 Q. Okay. And that was in 1992, right?

19 A. I think that would have been '92, yes, sir.

20 Q. Okay. Now, you are familiar, of course, with the  
21 on-sale bar provisions of the patent law at that time,  
22 right?

23 A. No, I don't believe so.

24 Q. Now, you were familiar with what prior art -- what  
25 constituted prior art back then, right?

1 A. I think so, yes, sir.

2 MR. PRESTA: Now if we could go to Slide 60,  
3 please.

4 BY MR. PRESTA:

5 Q. Now, when you filed the 1996 application, you were  
6 aware that the CyberMan product and/or your offer to  
7 sell Logitech your technology constituted a statutory  
8 bar to that technology, right?

9 A. I'm sorry. What was the question?

10 Q. You understood, when you filed the 1996  
11 application, that your activities with Logitech in  
12 trying to sell them your invention or the fact that they  
13 actually made a product on the market in 1993, that  
14 those events constituted a statutory bar to that  
15 technology, right?

16 A. I don't think I understood that at that time, no,  
17 sir. I don't have a clear recollection.

18 Q. Now, you understood that the CyberMan product was  
19 prior art to your 1996 application, right?

20 A. I'm not sure.

21 MR. PRESTA: Could we go to Slide 60? Thank  
22 you.

23 Now, your Honor --

24 BY MR. PRESTA:

25 Q. This is where we left off yesterday, Mr. Armstrong,

1 where you had had a discussion with the examiner and you  
2 were writing back in August 4th of 2000, the '525 file  
3 history. You're saying that: The examiner indicated  
4 that while a new search would be needed, he thought that  
5 a sheet connecting both buttons and multi axis joystick  
6 would be allowable, if claimed.

7 Right?

8 A. Are you saying this is what I wrote?

9 Q. Yes.

10 A. I think that you're right. I did write that.

11 MR. PRESTA: And this is on Defendant's  
12 Exhibit 12, page 86.

13 BY MR PRESTA:

14 Q. You went on to write: The examiner agreed that  
15 Yoshida having a joystick internally connected with  
16 individual electrical wires is expensive in high volume  
17 compared to applicant's sheet-connected buttons and  
18 multi axis joystick, right?

19 A. I presume I wrote that.

20 Q. And you also wrote that: The examiner further  
21 agreed, that pending a search, the sheet integration of  
22 multi axis input devices and a plurality of buttons was  
23 likely allowable.

24 Right?

25 A. If it's in the record.

1 Q. Now, at this time you knew that, in fact, that  
2 feature was contained in the CyberMan product, right?

3 A. I think that probably CyberMan was just really not  
4 in my mind.

5 Q. Okay. But --

6 A. I think that really -- after reviewing the record,  
7 the examiner, you know, said Figure 18. And that's what  
8 I was kind of working off of.

9 Q. And Figure 18 was a picture of a flexible membrane  
10 sheet, right?

11 A. Yes, sir.

12 Q. And that flexible membrane sheet is very similar to  
13 the CyberMan product, isn't it?

14 A. Well, to the best of my recollection, Figure 18 was  
15 a keyboard sheet.

16 Q. That had integrated on it a multi-axis joystick,  
17 right?

18 A. Yes, sir.

19 Q. And buttons on the same sheet, right?

20 A. And a keyboard, yes, sir.

21 Q. Which is a feature that was in the CyberMan  
22 product, right?

23 A. CyberMan had buttons, yes, sir.

24 Q. CyberMan had -- let's just be clear. CyberMan had  
25 buttons and a multi-axis input member on the same

1 flexible membrane sheet?

2 A. I think that it did, yes, sir.

3 Q. Well, you testified yesterday that you knew it did.

4 Do you want to change that testimony?

5 A. No, I don't want to change my testimony.

6 Q. Okay.

7 A. I was pretty tired yesterday but --

8 Q. Okay. And you had a chance to talk to your lawyers  
9 about that, right?

10 A. I don't think I addressed that.

11 Q. Now, let me ask you -- let me go on to the next  
12 part of the prosecution history. After you had  
13 indicated that the examiner -- that you believed the  
14 examiner would give you a patent if you had a multi-axis  
15 joystick and buttons on the same sheet, you filed an  
16 amendment, right? In fact, you changed the title to  
17 "Image Controllers with Sheet-Connected Sensors" because  
18 you were focusing the application on that feature now,  
19 right?

20 A. Did I change the title here?

21 Q. Yeah. Well, I'll represent to you that you did.  
22 Defendant's Exhibit 12, page 87. And you added claims  
23 to the application that included that feature, including  
24 claim 38, right?

25 A. If that's what the record, you know, reflects.

1 Q. And 38 actually said that you had an input member  
2 with two axes, you had finger-depressible buttons, you  
3 had a sheet, and that the sheet was a flexible membrane  
4 sheet -- no, I'm sorry. In claim 38 it didn't claim a  
5 flexible membrane sheet, but you actually put in a  
6 dependent claim on 38 that you said: Wherein the sheet  
7 is a flexible membrane sheet. Do you recall that?

8 A. Are these the claims that are after the interview  
9 summary record?

10 Q. Yes.

11 A. I don't recall it; but if that's what it reflects,  
12 then --

13 Q. Okay.

14 A. -- I suspect I did.

15 Q. In fact, 44 and another claim, 53, you were  
16 specifically saying -- trying to claim the flexible  
17 membrane sheet that was used to connect multi-axis input  
18 member and buttons. You recall that, don't you?

19 A. Yes. I told you I don't have any specific  
20 recollections of this; but if that's what the record  
21 says, then --

22 Q. Okay.

23 A. -- okay.

24 Q. Thank you.

25 Now, in addition to that, you said -- after

1 you put those claims in, you told the examiner, in your  
2 remarks, that: New claims 38 through 60 are believed  
3 novel and inventive over the prior art and, thus,  
4 allowable.

5 Do you remember that?

6 A. If that's what the record says, I believe I wrote  
7 it.

8 Q. And you also put in a sworn declaration along with  
9 that filing, where you said: I hereby declare and swear  
10 that all statements made herein of my own knowledge are  
11 true and that willful false statements may jeopardize  
12 validity of the application or any patent that issued  
13 thereon.

14 Do you remember that?

15 A. I don't doubt it.

16 Q. And then in response to that, the examiner wrote  
17 back in an Office Action. And that is on Exhibit 12,  
18 page 120, where he rejected those claims and he rejected  
19 those claims over a reference to Sekine, I think it is.

20 Is that how you pronounce that?

21 A. Sekine sounds good to me.

22 Q. Okay. Thank you. And the examiner said your main  
23 claims were not narrow enough because this patent  
24 disclosed a sheet with conductive traces that are  
25 connected to a keyboard and a pointing stick. Do you



1 remember that patent?

2 A. I don't remember it; but I reviewed it recently,  
3 yes.

4 Q. Okay. Now, the examiner -- there's nothing in that  
5 reference, the Sekine reference --

6 MR. PRESTA: That is in your notebook, your  
7 Honor.

8 BY MR. PRESTA:

9 Q. The Sekine reference didn't disclose those two  
10 items on a flexible membrane sheet, did it?

11 A. I think it does.

12 Q. Well, the examiner was under the impression that it  
13 didn't, wasn't he?

14 A. What's the question?

15 Q. Is your position that the Sekine reference  
16 discloses these items on a flexible membrane sheet?

17 A. In retrospect, it appears to me to.

18 Q. Okay. Now, the examiner took a look at Sekine.

19 MR. PRESTA: And, in fact, if we could jump  
20 to Slide 71, please.

21 BY MR. PRESTA:

22 Q. Now, when the examiner -- you had two claims that  
23 were limited to a flexible membrane sheet, claims 44 and  
24 53, at this time. Do you recall that?

25 A. (Pausing.)

1 Q. I know it might be difficult to recall that  
2 specific, but I'll indicate to you that that was the  
3 case.

4 THE COURT: Hold up a minute, counsel. Would  
5 you?

6 MR. PRESTA: Yes.

7 THE COURT: All right. Go ahead.

8 BY MR. PRESTA:

9 Q. Now, Mr. Armstrong, the examiner indicated that  
10 claims 44 and 53, the only claims in the application at  
11 that time that were limited to flexible membrane sheet,  
12 were allowable over the Sekine reference because the  
13 prior art does not teach or suggest placing the input  
14 member movable in two axes and finger-depressible  
15 buttons on a flexible sheet.

16 You don't have any reason to dispute that, do  
17 you?

18 A. I'm sorry.

19 Q. The examiner indicated that your claims were  
20 allowable over the Sekine reference because, in the  
21 examiner's opinion, Sekine did not teach having a  
22 two-axis input member and finger-depressible buttons on  
23 a flexible sheet. Do you see that?

24 A. I see what you just said, yes, sir.

25 Q. Okay. Now, because the Sekine reference, nowhere

1 in it describes the use of a flexible membrane sheet.

2 You are aware of that, right?

3 A. Well, I think that he actually -- you know, you've  
4 got that large amount of claims that are not  
5 highlighted. I think what he's actually saying is --  
6 you know, I think that the words are kind of shorthand;  
7 but it says of claim 43, 41, 40, 39, 38 --

8 THE COURT: Wait, wait, wait. You need to  
9 slow down and say what you're saying so we can get it on  
10 the record.

11 THE WITNESS: Okay.

12 THE COURT: Go ahead and state your answer.

13 THE WITNESS: Right.

14 A. You have highlighted there this text that the  
15 examiner wrote.

16 BY MR. PRESTA:

17 Q. Yes.

18 A. (Reading) The prior art record does not teach or  
19 suggest placing an input member movable in at least two  
20 axes and finger-depressible buttons.

21 And then you didn't highlight the "of claim  
22 43/41/40/39/38 or claim 51/50/49/48."

23 And then you did highlight the "onto a  
24 flexible sheet."

25 I think what the examiner is saying is all of

1 the limitations of those claim change -- claim chains,  
2 the dependent claims, also -- I think that's what he's  
3 saying here.

4 Q. Okay. Now, he was indicating that 43 and 53 were  
5 allowable, right?

6 A. I think he's -- 44.

7 Q. I'm sorry.

8 A. And 53.

9 Q. 44 and 53. Now, those are the only two claims that  
10 said put all of these things on a flexible membrane  
11 sheet. You're aware of that, right?

12 A. (Pausing.)

13 Q. In other words -- I'll strike that.

14 None of the other pending claims listed in  
15 these numbers in any way referenced the flexible  
16 membrane sheet, did they?

17 A. I think you're right, but I'm not sure.

18 Q. Okay.

19 MR. PRESTA: Could we please jump to  
20 Slide 74?

21 BY MR. PRESTA:

22 Q. Now, in Slide 74 you were responding after you  
23 provided those new claims; and you were pointing out  
24 that the examiner said -- and you quoted the examiner.  
25 You actually quoted that section that we just referenced

1 to remind the examiner that he said that feature would  
2 be allowable, right?

3 A. That appears correct, yes, sir.

4 Q. And then you said -- you amended the claims to make  
5 it be limited to that feature and -- by including all of  
6 the elements of the dependent claims into the  
7 independent claims, right?

8 A. I think so.

9 Q. And you were moving up the feature of the flexible  
10 membrane sheet into all of those claims so that you  
11 could get them allowed, weren't you?

12 A. I think -- and I'm not sure about this. But the --  
13 what was it -- claim 44 that got added in actually had  
14 more than a flexible membrane in it. It was much more  
15 to me.

16 Q. Okay.

17 A. I think it was --

18 Q. You added the flexible membrane feature that the  
19 examiner said was allowable into the independent claims  
20 and said they were allowable, right?

21 A. I think I added a little more. I think claim 44  
22 was a flexible membrane connected to a rigid circuit  
23 board, something like that.

24 Q. Okay. Now -- in fact, this is one of the  
25 amendments that you did that ultimately turned into

1 claim 1 of the '525 patent, right? It's got a lot of  
2 stuff in it, doesn't it?

3 A. Okay.

4 Q. It's a lengthy claim. This was all the features  
5 that you were saying that -- all of those -- that chain  
6 of claim language. If you put it all together, this was  
7 the chain that you put all into the independent claim,  
8 right?

9 A. I'll accept your word for that.

10 Q. Okay. There is a lot of stuff in there. I'll  
11 agree with you.

12 Now, you also put in -- in claim 5 you added  
13 the feature of flexible membrane sheet; and there's a  
14 fair amount of stuff in there, too, isn't there?

15 A. I'll take your word for it, yes, sir.

16 Q. Now, at the same time, you also said to the  
17 examiner -- you also added a new claim, didn't you,  
18 which ultimately became claim 12 of the '525 patent that  
19 you sued Nintendo on, right?

20 A. I believe I did, yes.

21 Q. And you added this claim at this time, for the  
22 first time; and you added a claim that was an exact  
23 word-for-word description of the flexible membrane sheet  
24 in the CyberMan product, right?

25 A. I don't think I'd go that far.

1 Q. Well, you testified yesterday that this claim was  
2 anticipated by the CyberMan flexible membrane sheet.  
3 You recall that, right?

4 A. You know, honestly, I don't recall that.

5 Q. Okay. Well, the record will speak to that.

6 A. Okay.

7 Q. But you added this new claim, 61, which became  
8 claim 12 which you sued Nintendo on; and you didn't have  
9 any of those other things in the chain that you were  
10 just talking about. You actually went for a claim  
11 specifically on an input member with two axes,  
12 finger-depressible buttons, at least one sheet that  
13 connected the sensors of the input member and the  
14 sensors of the buttons, and that the sheet was a  
15 flexible membrane sheet.

16 You see that, right?

17 A. Yes, sir.

18 Q. And that is claim 12 that you sued Nintendo on that  
19 is currently issued in the '525 patent, right?

20 A. I'm not sure that it's -- did we assert that  
21 against Nintendo?

22 Q. Yes. You sure did, and we -- Nintendo actually was  
23 successful in winning that on summary judgement. Are  
24 you aware of that?

25 A. No, sir.

1 Q. And you recently filed papers to ask this court to  
2 enter that in a way that you could appeal it, right?

3 A. I have no idea.

4 Q. Is your intention to still appeal to the Federal  
5 Circuit that Nintendo infringes this claim?

6 A. I have no idea.

7 Q. Now, let me tell you what you said about this  
8 claim. You actually said that claim 61, the new one you  
9 added, is allowable over the prior art for the same  
10 reasons as claims 38 and 48, the same reasons for  
11 allowance that you were talking to the examiner about,  
12 which was the fact -- the simple matter of having a  
13 two-axis joystick and buttons integrated on a sheet,  
14 right?

15 A. I'm not sure. I --

16 Q. That's okay. The record will --

17 A. Okay.

18 Q. I know it's hard to remember all these things,  
19 but --

20 A. I don't recall --

21 Q. You don't have any reason to dispute this, though,  
22 do you?

23 A. I don't have a reason to dispute it. Is that --  
24 are those text out of my writings?

25 Q. Yes, it is. It's the file history, Defendant's



1 Exhibit 12, page 126.

2 A. I have no reason to dispute what I wrote at the  
3 time.

4 Q. Thank you. And then you asked to have allowance.  
5 You said: Now that I've done this, please allow all my  
6 claims.

7 You say: Allowance of the pending claims is  
8 respectfully requested. Thank you.

9 That's your writing, right?

10 A. It rings a bell, yes, sir.

11 Q. Okay. Now, after that, of course, you must have  
12 been excited. You got a Notice of Allowance. The  
13 examiner granted you that claim 12 on that flexible  
14 membrane sheet, the identical language that is in the  
15 CyberMan product from years earlier. You agree with  
16 that, right?

17 A. No, sir.

18 Q. Okay. Now, the examiner actually indicated that  
19 the claims were allowed, including claim 61; and he  
20 renumbered them 1 through 23.

21 You remember receiving a Notice of Allowance  
22 in this case, right?

23 A. I don't remember it, but I clearly did.

24 Q. Okay. And then the '525 patent actually issued.  
25 You remember that, right?

1 A. (Pausing.)

2 Q. You remember the '525 patent issuing, right?

3 A. It certainly did. I don't have a specific  
4 recollection of any of this.

5 Q. Okay.

6 A. But it did, and I'm sure I was elated.

7 Q. Right. Now, before it issued, you filed the '700  
8 patent, right?

9 A. I believe I did, yes, sir.

10 Q. Because you wanted to maintain the pendency between  
11 the '525 and the '700. You knew that that was  
12 important, right?

13 A. That would have been in keeping, yes, sir.

14 Q. Right, because you wanted to continue on and try  
15 and get further claims on the flexible membrane sheet,  
16 didn't you?

17 A. I don't think that was my goal, no, sir.

18 Q. Well, you filed claims in the '700 directed to a  
19 flexible membrane sheet when you filed it, right?

20 A. I can't recall doing that, no, sir.

21 Q. Okay. Well --

22 MR. PRESTA: If I could please go to slide --

23 BY MR. PRESTA:

24 Q. Well, you'll agree with me that you filed the '700  
25 that was the subject of this lawsuit while the '525 was

1 still pending and right after the examiner indicated  
2 that those claims, including claim 12, would be  
3 allowable, right?

4 A. I did file the application that became the '700  
5 patent during the pendency of the '525.

6 Q. Okay.

7 MR. PRESTA: And if we could go to Slide 85,  
8 please.

9 BY MR. PRESTA:

10 Q. Now, when you filed the '700 application, you also  
11 included claims directed to the flexible membrane sheet,  
12 right?

13 A. I'm sorry?

14 Q. When you filed the '700 application, you included  
15 claims directed to the exact same type of flexible  
16 membrane sheet with the two-axis control element and  
17 finger-depressible buttons on the same sheet, right?

18 A. Can you show me a claim like that?

19 Q. Yes.

20 Well, you filed numerous claims, didn't you,  
21 in the '700?

22 A. My recollection was that there were 38.

23 Q. Okay. And some of --

24 A. I don't recall that. Reviewing the record, I think  
25 there were 38.

1 Q. And you sued Nintendo on claims of the '700 that  
2 also were directed to a flexible membrane sheet in this  
3 case, didn't you?

4 In this litigation, you sued Nintendo in the  
5 '700 patent based on claims that issued directed to a  
6 flexible membrane sheet, didn't you?

7 A. I'm not sure that there were claims asserted  
8 against Nintendo that had a flexible membrane sheet.

9 Q. You don't have any reason to dispute -- you don't  
10 know that there were not, do you?

11 A. I think all those claims were Microsoft's claims.

12 Q. Okay. Well, don't you recall asserting that  
13 Nintendo's use of a ribbon cable infringed your patent?

14 A. Oh, okay. There might have been one, yes.

15 Q. Now, you knew that a ribbon cable, of course,  
16 wasn't a flexible membrane sheet, right?

17 A. A matter of definition, sir.

18 Q. Right.

19 Now, this is claim 12 that you got the  
20 examiner to give you. Do you recognize claim 12?

21 A. (Pausing.)

22 Q. Is that --

23 A. I'm just reading it, if that's okay.

24 Q. Please.

25 Have you read it?

1 A. Yes, sir.

2 Q. Now, yesterday I asked you which claim you thought  
3 was anticipated by CyberMan; and you volunteered  
4 claim 12, right?

5 A. I don't recall that, but I might have done that. I  
6 was kind of in a daze yesterday.

7 Q. Okay. So -- but you'll agree with me, of course,  
8 that the CyberMan is an image controller, right?

9 A. Yes, I think CyberMan is an image controller.

10 Q. You'll agree with me that it has an input member  
11 associated with sensors, said input member movable on  
12 two axes, right?

13 A. Yeah, I presume so.

14 Q. Okay. You'll agree with me that there's  
15 finger-depressible buttons on the top that you can  
16 press, right -- a plurality of them; there's actually  
17 three -- and that there are sensors associated with  
18 those buttons, right?

19 A. I think CyberMan has buttons.

20 Q. And it has sensors under the buttons, right?

21 A. Yes.

22 Q. Okay. And, in fact, you'll also agree with me,  
23 won't you, that there's a sheet that connects all of  
24 those and the sheet is a flexible membrane sheet, as we  
25 see right here (indicating)? Right?

1 A. The best of my recollection is it is. Do you have  
2 one that I could --

3 Q. Yes, I do. But there is an image of one right  
4 there (indicating). Do you see it?

5 A. Well, I can't -- to the best of my recollection, it  
6 is, yes.

7 MR. PRESTA: May I approach, your Honor?

8 THE COURT: You may.

9 A. Thank you.

10 BY MR. PRESTA:

11 Q. Now, Mr. Armstrong, you have -- what I handed you  
12 was a taken-apart CyberMan flexible membrane sheet. Do  
13 you recognize it?

14 A. Yes. It looks familiar to me.

15 Q. Can you tell me anything in claim 12 that's not  
16 found in that flexible membrane sheet -- I'm sorry.

17 Can you tell me anything in claim 12 that is  
18 not found in the CyberMan product identically?

19 A. Well, I think -- you know, all of -- you know, a  
20 claim has, of course, specific language that -- like  
21 there's things that the court construes that I don't  
22 know, you know, what -- exactly how the court might  
23 construe "an image controller" in the preamble, how it  
24 might construe an "input member" --

25 Q. That's fair enough.

1 A. -- "associated" -- all of that stuff. So, you're  
2 asking me very legalistic questions.

3 Q. That's fair enough.

4 A. And I just don't know for sure.

5 Q. Okay. Now, you also, then --

6 THE COURT: Hold up one minute, counsel.

7 May I see that exhibit, please, what you're  
8 saying is the membrane sheet from the CyberMan?

9 MR. PRESTA: Yes, your Honor. It's -- the  
10 exhibit number --

11 THE COURT: I thought you just handed it to  
12 the witness.

13 MR. PRESTA: I just handed it to the witness,  
14 yes.

15 THE COURT: Debbie, will you hand that to  
16 counsel, please?

17 DEPUTY CLERK: Yes, sir.

18 MR. PRESTA: Thank you.

19 BY MR. PRESTA:

20 Q. Now, Mr. Armstrong, when you filed your claims in  
21 the '700 that included claims directed to a flexible  
22 membrane sheet, after it was examined, you actually got  
23 a Notice of Allowance, didn't you?

24 A. That was kind of a long question, but I did get a  
25 Notice of Allowance on this.

1 Q. Okay. And, in fact, after you filed the  
2 application -- well, when you filed the '700 patent, you  
3 didn't disclose the fact that CyberMan had a flexible  
4 membrane sheet in that application, either, did you?

5 A. I think I did.

6 Q. What --

7 A. During the pendency of that application --

8 Q. Yes.

9 A. -- I believe I did.

10 Q. I'll get to that. But when you filed the  
11 application, in fact, you filed an Information  
12 Disclosure Statement disclosing this years after you  
13 filed the '700 application, right?

14 A. Yes, sir.

15 Q. And, in fact, the claims were allowed before you  
16 filed -- before you told the examiner about the flexible  
17 membrane sheet in the CyberMan -- in the '700 patent,  
18 right?

19 A. I believe that's true.

20 Q. So, you went through the entire prosecution history  
21 of the '525, which is in 1996, all the way up to the  
22 filing of the '700 application, the '525 issuing, the  
23 '700 claims granting; and then about seven years later  
24 you told the Patent Office that CyberMan had a flexible  
25 membrane sheet, right?



1 A. Yeah. How many years it was, I'm not exactly sure.

2 Q. And the '525 had already issued as a patent before  
3 you brought the examiner the attention of the flexible  
4 membrane sheet in the '700 application, right?

5 A. I believe that's true, yes, sir.

6 Q. Now, do you remember the claim -- okay.

7 Now, in the '700 application, you actually  
8 got claims directed to a flexible membrane sheet that  
9 were allowed; and then you decided to file an  
10 Information Disclosure Statement in that case, right?

11 A. There was a time that I filed an Information  
12 Disclosure Statement, yes, sir.

13 Q. Okay. And that was in the '700 application.

14 A. Yes, sir.

15 Q. In fact, that was in December 4th of 2003, ten  
16 years after the CyberMan product had come out and you  
17 had been dealing with the Patent Office, right?

18 A. CyberMan came out in '93.

19 Q. And you told the Patent Office about the flexible  
20 membrane sheet in the CyberMan product in 2003; isn't  
21 that right?

22 A. I think that's when, yes, sir.

23 Q. So, for all of the ten years and all of the cases  
24 that you were prosecuting on flexible membrane sheets,  
25 the Patent Office never knew the CyberMan product had a

1 flexible membrane sheet in it until 2003, right?

2 A. You say "all of the cases." I -- but I believe  
3 that I disclosed it thoroughly in 2003, yes, sir.

4 Q. Okay. You had a lot of pending cases with flexible  
5 membrane sheets in it, didn't you?

6 A. I don't think so.

7 Q. Well, you even had the pending case, the '606 case  
8 that Sony took a license on, that was directed to a  
9 flexible membrane sheet, right?

10 A. Yes. I believe that did have a flexible membrane  
11 sheet, yes, sir.

12 Q. Do you know if Sony ever became aware, before  
13 giving you a license and paying you \$10 million, that  
14 CyberMan had a flexible membrane sheet and you knew  
15 about it the whole time but never disclosed it to the  
16 Patent Office?

17 A. I don't know what Sony was aware of at this time.

18 Q. Okay. Now, I would like to just take you to that  
19 IDS. This is really the last thing I have for you.

20 MR. PRESTA: Could we go to Slide 98?

21 BY MR. PRESTA:

22 Q. Now, this is the IDS that you filed December 4th of  
23 2003, after the '525 had issued -- in fact, years after  
24 the '525 had issued and years after the '700 had been  
25 pending; and, in fact, the '700 patent claims had

1 already been allowed. You then filed an Information  
2 Disclosure Statement. And it's on page -- Defendant's  
3 Exhibit 2, page 488.

4 Now, you said -- you disclosed a bunch of  
5 photographs of the CyberMan. And, in fact, you told the  
6 Patent Office that the CyberMan -- the elements of the  
7 CyberMan were not disclosed back in your '828 patent.  
8 And that's true, isn't it?

9 A. (Pausing.)

10 Q. There was no flexible membrane sheet back in your  
11 '828 patent, was there?

12 THE COURT: Have you given me a copy of this  
13 Exhibit 2?

14 MR. PRESTA: I believe I have, your Honor. I  
15 apologize for all the notebooks, but it is the '700 --  
16 the prosecution history that is of the '700 patent.

17 THE COURT: I've got 12 and 12.1.

18 MR. PRESTA: That's the '525.

19 THE COURT: Here it is.

20 MR. PRESTA: Great.

21 Now, the page I was referring to is page 488,  
22 your Honor.

23 THE COURT: All right.

24 MR. PRESTA: And this is where Mr. Armstrong  
25 first disclosed the CyberMan to the Patent Office in

1 2003, and he actually said that -- he actually  
2 recognized that the CyberMan constituted a one-year bar.  
3 He states in here specifically he recognizes in the '700  
4 patent that the CyberMan -- that applicant -- (reading)  
5 it appears to applicant that the one-year bar rule  
6 applies to the membrane connection sensors disclosed in  
7 CyberMan.

8 BY MR. PRESTA:

9 Q. Mr. Armstrong, you understood what the term  
10 "one-year bar rule" means, right?

11 A. Yes. By the year 2003, I surely did.

12 Q. Now, you also disclosed photographs.

13 MR. PRESTA: And, your Honor, these  
14 photographs are Defendant's Exhibit 293, page 7, because  
15 they were not -- they were produced by Mr. Armstrong in  
16 the litigation, but they were not found in the actual  
17 records of the Patent Office. So, it's a separate  
18 exhibit.

19 BY MR. PRESTA:

20 Q. You remember submitting photographs to the Patent  
21 Office, right?

22 A. Yes. In 2003, yes, sir.

23 Q. Okay. And the photographs you actually submitted,  
24 you explained the inner workings of the CyberMan. You  
25 actually opened it up and you labeled it and you told

1 the Patent Office exactly what was in it, right?

2 A. As best I could, yes, sir.

3 Q. Okay. And you actually showed them the flexible  
4 membrane sheet that I just showed you. You labeled it  
5 "membrane." You labeled it "on/off buttons" and all the  
6 various parts, right?

7 A. Yes, sir.

8 Q. And this is a copy of those figures, isn't it?

9 A. That looks like the photographs to me.

10 Q. Okay. And, in fact, you actually detailed the  
11 flexible membrane sheet and you pointed out that it's a  
12 membrane and you gave a full disclosure in 2003 of this  
13 thing, right?

14 A. I tried to, yes, sir.

15 Q. And your claims in the '700 patent were already  
16 allowed at that time, right?

17 A. I think when I made this disclosure, I had  
18 requested that they be withdrawn and reexamined.

19 Q. Okay. Now, the '525 patent had already issued,  
20 right?

21 A. Yes, it had.

22 Q. Did you go back and ask the Patent Office to take  
23 another look at the '525?

24 A. Could I do that?

25 Q. I'm asking you: Did you do it?

1 A. No, I don't believe I did that.

2 Q. Okay. Instead, you decided to sue Nintendo on  
3 those claims, right?

4 A. I didn't make a decision on that.

5 Q. You didn't make a decision to sue Nintendo on the  
6 '525 patent?

7 A. I did make -- you know, I did make a decision to  
8 ask, you know, to litigate against Nintendo. The  
9 specific claims and patents I don't think I decided, no,  
10 sir.

11 Q. Did you try to stop whoever did decide to sue them,  
12 that Nintendo shouldn't be sued on the '525 patent  
13 because, in fact, you knew that there was nothing  
14 patentable in there?

15 A. I'm not sure that there was nothing patentable  
16 there. I don't think I'd go that far.

17 Q. Well, you know that there's nothing patentable in  
18 claim 12, right? You admitted that yesterday.

19 A. Well, yesterday I was in a daze. I was really  
20 exhausted. You know, I don't know whether claim 12 is  
21 patentable or not.

22 Q. Would you --

23 A. I just don't know for sure.

24 Q. Do you intend to pursue your lawsuit against  
25 Nintendo on claim 12 on appeal?

1 A. I have no idea.

2 Q. Knowing what you know sitting here today, you have  
3 no idea if you're going to continue to sue Nintendo on  
4 claim 12?

5 A. Well, I'll leave that to my lawyers; but my  
6 presumption would be no. But I don't know.

7 Q. Your presumption would be you would not, right?

8 A. Probably not.

9 Q. Thank you.

10 Now, ultimately, you submitted a -- you asked  
11 the examiner in the '700 to actually take a look at  
12 CyberMan, right? So, in your view, you came clean in  
13 the '700 patent. Would you say that's a fair statement?

14 A. No, sir. I don't like the words "coming clean,"  
15 no, sir.

16 Q. Okay. Well, you did disclose everything you knew  
17 about the CyberMan in the '700, right?

18 A. I tried to.

19 Q. And you'll agree with me that that was in 2003.

20 A. Yes, sir.

21 Q. And that you learned about CyberMan and the insides  
22 of exactly what was in it back in 1993, ten years  
23 earlier, right?

24 A. I took it apart in '93 or '94, yes, sir.

25 Q. Okay.

1 A. And then mostly forgot about it.

2 Q. Okay.

3 MR. PRESTA: Your Honor, I'll pass the  
4 witness.

5 MR. CAWLEY: May I proceed, your Honor?

6 THE COURT: Go right ahead.

7 CROSS-EXAMINATION OF BRAD ARMSTRONG

8 BY MR. CAWLEY:

9 Q. Mr. Armstrong, I want to show you a timeline that's  
10 not really a competing timeline to the one that the  
11 court has; but I think these dates are undisputed, as  
12 well. But the purpose of what I'd like to put up is  
13 just to keep track of where we are in our discussion  
14 about some of the patents that you filed.

15 So, let's start with the first one, the '828.  
16 The '828 was -- as we've just heard -- filed in '92 and  
17 issued in '96; is that right?

18 A. The '828 was filed in '92 and issued in '96, yes,  
19 sir.

20 Q. How did you go about prosecuting the '828 patent?

21 A. I wrote it myself. Prosecuted it myself.

22 Q. What was your general understanding at that time,  
23 at that time you were prosecuting the '828 patent, of  
24 what prior art was?

25 A. My understanding was prior art was issued patents



1 and publications of inventions that had been made before  
2 my conception.

3 Q. And what was your understanding of your duty to  
4 disclose prior art?

5 A. My understanding was that I had to disclose the  
6 most relevant prior art that I knew about.

7 Q. Now, at the time you filed the '828, were you under  
8 the impression that you, as an applicant, were supposed  
9 to search for prior art?

10 A. I don't know exactly what my impression was at the  
11 time, but I know that I did do some searching.

12 Q. Okay. Tell us -- tell the court how you went about  
13 searching for prior art in connection with your '828  
14 application.

15 A. There was -- back there -- then it was before there  
16 were Internet searches for that type of thing and -- at  
17 least I wasn't able to access that type of thing. And  
18 there were patent depository libraries. There was one  
19 in Sunnyvale, and there was one in Sacramento. And I  
20 remember going to those libraries and searching on  
21 multiple occasions. But I don't specifically remember  
22 the '828, but I suspect that I did for that.

23 Q. So, did you travel from your home in --

24 A. Chico, yes, sir.

25 Q. -- Chico to Sunnyvale and to Sacramento to search

1 for prior art in connection with your application?

2 A. I would do that, yes, sir.

3 Q. And did you typically search for prior art before  
4 filing all of your applications?

5 A. I tried to, yes, sir.

6 Q. Well, have you learned since then, Mr. Armstrong,  
7 that, in fact, under the law, an applicant does not have  
8 a duty to search for prior art?

9 A. That's my understanding now, yes, sir.

10 Q. And when did you learn that?

11 A. I think just recently.

12 Q. Okay. Now, you testified yesterday that about some  
13 meetings with Logitech, the company that eventually  
14 produced the CyberMan. And I think you said that you  
15 met with them in 1992; is that right?

16 A. Yes, sir.

17 Q. And you told us that you had a nondisclosure  
18 agreement with them, actually two, correct?

19 A. Yes, sir.

20 Q. And under that NDA, you told them about the  
21 technology that you had applied for by that time in your  
22 '828 application, correct?

23 A. I guess I don't really remember what those NDAs  
24 covered.

25 THE COURT: Wait a minute.

1 THE WITNESS: Yes, sir.

2 (Discussion off the record between the court  
3 and deputy clerk.)

4 THE COURT: Go ahead. I'm sorry, counsel.

5 MR. CAWLEY: Thank you, your Honor.

6 BY MR. CAWLEY:

7 Q. You had discussions with Logitech in -- after you  
8 filed your '828 application, correct?

9 A. Yes, sir.

10 Q. And you were discussing with them the possibility  
11 of doing business with them in connection with your  
12 technology?

13 A. Yes, sir. I was trying to license them. Yes, sir.

14 Q. And you ended up not doing a deal with them because  
15 you ended up doing a joint venture agreement with  
16 somebody else, correct?

17 A. That's correct.

18 Q. So, you were having the same kind of discussion  
19 with Logitech, proposing that you license them for your  
20 technology, correct?

21 A. Could you ask the question again?

22 Q. Yes.

23 A. Sorry.

24 Q. Who was the other entity that you finally ended up  
25 doing your deal with?

1 A. It was Logitech and Key Tronic. I made a joint  
2 venture agreement with Key Tronic.

3 Q. Okay. And, so, I think -- is it fair to say that  
4 what was going on here in '92 is that you were talking  
5 to both of these companies about the possibility of  
6 doing either a joint venture or some kind of licensing  
7 agreement --

8 A. Yes, sir.

9 Q. -- with them?

10 A. That's true.

11 Q. And you ended up going with Key Tronic?

12 A. Yes, sir.

13 Q. And then during these discussions, just so we're  
14 clear, it's true, isn't it, that Logitech had not  
15 released its CyberMan product?

16 A. Yes, sir, that's true.

17 Q. And did Logitech offer to do a deal with you?

18 A. Yes, sir, they did.

19 Q. Did you accept or decline?

20 A. I declined that offer.

21 Q. And why is that?

22 A. The terms weren't as friendly as the terms with Key  
23 Tronic.

24 Q. Okay. And then after you told Logitech that you  
25 weren't going to do a deal with them, they came out with

1 CyberMan, correct?

2 A. Yes, sir, that's correct.

3 Q. Did you feel that the CyberMan was your invention?

4 A. Yes, sir, I did.

5 Q. And did you have, as the court alluded to  
6 yesterday, extensive discussions about that with  
7 Logitech?

8 A. Yes, sir.

9 Q. And how long did those discussions last?

10 A. I don't know, but it seemed like a long time at the  
11 time.

12 Q. Years?

13 A. I think -- you know, I'm just guessing it's  
14 probably more than a year.

15 Q. And did you eventually come to some agreement with  
16 Logitech that settled that dispute?

17 A. Yes, sir.

18 Q. And you told us yesterday that they paid you money  
19 in connection with this dispute.

20 A. Yes, sir.

21 Q. When did you learn about the CyberMan product?

22 A. I think I first learned about it when the main guy  
23 who had kind of gotten me to come over to Key Tronic had  
24 some kind of a luncheon meeting with the president of  
25 Logitech and they had talked about it. The president of

1 Logitech said, "We're making Armstrong's invention  
2 anyway" -- I'm just speaking in shorthand, but that was  
3 the gist of it.

4           So, the Key Tronic guy told me about that  
5 meeting; and the people at Key Tronic were pretty upset.

6 Q.     Okay. And just so the timing is clear, by the time  
7 you learned of the CyberMan, you had already filed your  
8 '828 patent, correct?

9 A.     Yes, sir.

10 Q.    Now, did you believe that the CyberMan product was  
11 prior art to your '828 patent?

12 A.    No, sir.

13 Q.    And why is that?

14 A.    Because it was made after the filing of my '828.  
15 It was made from my designs that were described in the  
16 '828 patent.

17 Q.    Okay. And even though you believed that it was not  
18 prior art, did you disclose it to the Patent Office?

19 A.    Yes, sir, I did.

20 Q.    And that was in the brochure that we saw yesterday?

21 A.    The CyberMan brochure, yes, sir.

22 Q.    That's something you submitted to the Patent Office  
23 in June, '94, correct?

24 A.    I believe that's the correct date, yes, sir.

25 Q.    And explain to the court why -- if you didn't

1 believe it was prior art, why did you submit that  
2 CyberTech material -- or CyberMan material to the Patent  
3 Office?

4 A. I just -- I wanted to explain the situation here in  
5 the outside world, the real world, as far as I could  
6 tell; and I think -- it seemed to me at the time that  
7 the Patent Office was moving very, very slowly on my  
8 application and that I had a need to get an issued  
9 patent because the companies were starting to behave  
10 badly because I didn't have the issued patent and I was  
11 trying to get the Patent Office to move, just to  
12 process.

13 Q. Okay. Let's turn to your next patent application.  
14 That was the '891 filed in 1995, correct?

15 A. Yes, sir.

16 Q. And how did you prosecute the '891 application?

17 A. I wrote it and prosecuted it myself. Whenever I  
18 say "myself," that means I had my friend, Brian Carlson,  
19 help me.

20 Q. Well, let me ask you about your friend. Is your  
21 friend, Mr. Carlson, a patent lawyer?

22 A. No, sir.

23 Q. Is he a patent agent?

24 A. No, sir.

25 Q. Does he have any particular educational or

1 professional qualifications for prosecuting patents?

2 A. Well, he has experience with that. He understands  
3 the rules much better than I do; so -- he just helped  
4 me.

5 Q. But, like you, he's not admitted to practice before  
6 the Patent Office, correct?

7 A. That's correct. He's not.

8 Q. And, in fact, he's not a lawyer at all.

9 A. No, sir.

10 Q. Okay.

11 A. He's not.

12 Q. So, you, with Mr. Carlson's help, prosecuted the  
13 '891, correct?

14 A. Yes, sir.

15 Q. And we heard yesterday that the '891 is a  
16 continuation-in-part of the '828.

17 A. I believe it is, yes, sir.

18 Q. Now, did you also submit the CyberMan brochure  
19 during the prosecution of the second patent, the '891?

20 A. No, sir.

21 Q. Why did you not submit the CyberMan during this  
22 prosecution?

23 A. It was my understanding that the patent examiners  
24 are obligated to look at the parent file from which a  
25 continuation or continuation-in-part is -- from which it



1 comes. They are to look at that for any prior art in  
2 that file.

3 Q. And why -- how did you get that understanding?

4 A. From the MPEP manual.

5 Q. What's the MPEP?

6 A. MPEP, I think, is short for Manual of Patent  
7 Examining Procedure that's -- it's kind of the rules of  
8 how patents are to be examined.

9 Q. Okay. Had you reviewed the MPEP at this time when  
10 you were prosecuting the '891 patent?

11 A. That particular section, yes, sir. It's a large  
12 book.

13 Q. Where did you get it?

14 A. Brian Carlson had a copy.

15 Q. Did you actually have a copy?

16 A. No, sir, I didn't have a copy.

17 Q. So, did you -- where was Mr. Carlson's copy  
18 located?

19 A. In his office.

20 Q. And where is that?

21 A. In Paradise, California.

22 Q. So, you went to -- how far was Paradise from where  
23 you lived in Chico?

24 A. Ten miles.

25 Q. Ten miles?

1 A. Yes, sir.

2 Q. So, you traveled from your home to Mr. Carlson's  
3 office so that you could consult his copy of the MPEP?

4 A. Yes, sir.

5 Q. And you learned from it that since this is a  
6 continuation-in-part, that the examiners were directed  
7 to search the parent application for any relevant  
8 disclosures, correct?

9 A. Yes, sir.

10 Q. And, in fact, did the examiner in the '891  
11 examination consider the CyberMan brochure?

12 A. Yes, sir.

13 Q. Tell us about that.

14 A. He rejected my proposed claims, my invention, over  
15 the CyberMan.

16 Q. Over the CyberMan that he found from going back to  
17 the parent, correct?

18 A. Yes, sir.

19 Q. Now, did this event, the rejection of your claims  
20 by the examiner based on CyberMan that he retrieved from  
21 the parent application -- did this have any effect on  
22 confirming your understanding that, in fact, having  
23 disclosed the brochure, it was effectively disclosed in  
24 the subsequent child application?

25 A. Yes, sir. It makes it kind of crystal-clear.

1 Q. All right. Let's go now to the '525. You filed  
2 the '525, as we've heard ad infinitum, in 1996, correct?

3 A. Yes, sir.

4 Q. How did you prosecute the '525?

5 A. Again, I wrote it myself and prosecuted it myself.

6 Q. And is the '525 a continuation-in-part of the '891?

7 A. Yes, sir, it is.

8 Q. Did you submit anything about CyberMan to the PTO  
9 in the '525 application?

10 A. No, sir.

11 Q. Why not?

12 A. For the same reason as the '891. It was in the  
13 parent, and the examiner was obligated to look into the  
14 parent for prior art.

15 Q. Now, did the '525 initially include claims  
16 regarding a flexible membrane sheet?

17 A. I think that it did, yes, sir.

18 Q. And did the examiner reject those claims?

19 A. I believe so, yes, sir.

20 Q. Well, let's take a look at it.

21 THE COURT: All right. What is this from,  
22 counsel?

23 MR. CAWLEY: I'm sorry, your Honor. We've  
24 got a set here of some of the exhibits we're going to be  
25 showing, if we could provide them to the court --

1 THE COURT: Okay.

2 MR. CAWLEY: -- and opposing counsel.

3 BY MR. CAWLEY:

4 Q. Is this from the March 23, 1998, Office Action,  
5 Plaintiff's Exhibit 4?

6 A. You're asking me that question?

7 Q. Yes, sir.

8 A. I don't see the date indicated here, but I presume  
9 that you're right on that.

10 THE COURT: For purposes of this, since it's  
11 not before a jury, I'll let you state for the record  
12 what it is. You've given me a copy of it and --

13 MR. CAWLEY: Thank you, your Honor.

14 THE COURT: If defendant thinks it's  
15 incorrect, say so but --

16 THE WITNESS: Okay.

17 MR. CAWLEY: So, let me --

18 THE COURT: He doesn't have a copy. There's  
19 no way he can identify it.

20 MR. CAWLEY: Sure, your Honor.

21 BY MR. CAWLEY:

22 Q. Let me just state for you that this is from the  
23 March 23, 1998, Office Action, page 1.

24 A. Okay.

25 Q. What did the examiner tell you here about his

1 reasons for the rejection?

2 A. Oh, this appears to be a rejection of Hoyt and --  
3 in regard to Hoyt. And the yellow portion there says:  
4 This device also uses sensors printed on the circuit  
5 board.

6 Then he says: Line 61, Column 6; line 12,  
7 Column 7, claims 9, 13, 14, and 15, where it would have  
8 been inherent to have the sensors mounted on a flexible  
9 sheet.

10 My first clue there is where it says  
11 "inherent to have the sensors mounted on a flexible  
12 sheet." To me, that's saying it's inherent, that it's  
13 in there.

14 Q. Okay. Go ahead.

15 A. And continuing on, it says: Because the sensors  
16 themselves must be mounted on some material where a  
17 flexible material is only a design choice.

18 And "only a design choice" are other really  
19 key words to me. That means that -- a design choice  
20 means to me it's not patentable. It doesn't rise to the  
21 level of patentability.

22 Q. Okay. And, in fact, it says "only a design  
23 choice," correct?

24 A. Yes, "only a design choice." And, so, that makes  
25 me just, you know, think badly about it. You know, it

1 lowers its appeal to me because the Patent Office is  
2 telling me it's "only a design choice."

3 Q. Okay. He told you in this rejection, first of all,  
4 that it was inherent to have the sensors mounted on a  
5 flexible sheet, correct?

6 A. Yes, sir.

7 Q. And what did you understand that to mean,  
8 "inherent"?

9 A. It means it's -- it's just the same as being in  
10 there, that, you know, he considers it inherent, meaning  
11 just as if it's in there.

12 Q. Okay. And then he says that if it's going to be  
13 mounted, it's got to be mounted on some material, right?

14 A. Yes, sir.

15 Q. And that a flexible material is only a design  
16 choice, correct?

17 A. Yes, sir.

18 Q. And what impression did that give you about the  
19 importance of a flexible membrane sheet in your  
20 application?

21 A. It's not very important at all.

22 Q. So, what did you do in response to this rejection?

23 A. I was under the impression that Hoyt had a date  
24 that was later than my -- I think it was of the '891  
25 patent. And, so, I tried to swear behind Hoyt.

1 Q. Did you argue with the examiner in the application  
2 about whether it would be inherent to have the sensors  
3 mounted on a flexible sheet or whether the use of a  
4 flexible sheet was only a design choice?

5 A. No, sir, I did not dispute either of those things.

6 Q. Instead, did you try and swear behind the Hoyt  
7 reference?

8 A. Yes, sir, I did.

9 Q. So, in the prosecution history, is it accurate you  
10 never disagreed with the examiner about flexible  
11 membrane being inherent or being a design choice?

12 A. I believe that's true.

13 Q. Were you successful in your attempt to swear behind  
14 the Hoyt reference?

15 A. No, sir.

16 Q. So, did you get a second rejection from the  
17 examiner?

18 A. Yes, sir, I did.

19 THE COURT: All right. Counsel, we're going  
20 to go ahead and take a break at this time. I'll ask you  
21 to be back at quarter past 10:00. We'll be in recess  
22 until that point.

23 (Recess, 9:57 a.m. to 10:14 a.m.)

24 (Open court, all parties present, jury not  
25 present.)

1 THE COURT: All right, Mr. Cawley.

2 MR. CAWLEY: Thank you, your Honor.

3 BY MR. CAWLEY:

4 Q. Mr. Armstrong, we were talking about your '525  
5 application. We'd been through the first rejection that  
6 you got in which the examiner told you that the Hoyt  
7 reference showed both the flexible membrane sheet was  
8 inherent and that it was a design choice. Do you  
9 remember all that?

10 A. Yes, sir.

11 Q. And you said that whether or not you agreed with  
12 him, that you at least hadn't attempted to argue that  
13 point in the examination but instead had tried to swear  
14 behind Hoyt, correct?

15 A. That's correct.

16 Q. And you weren't successful in doing that.

17 A. Yes.

18 Q. Did you receive a second rejection?

19 A. Yes, sir, I did.

20 Q. And this is the same exhibit, pages 3 and 4,  
21 correct?

22 A. Okay.

23 Q. I'll just tell you -- I'm sorry.

24 A. Yes, sir.

25 Q. This is the same exhibit, pages 3 and 4.



1           What did the examiner tell you here in the  
2 second rejection?

3 A.     He pretty much repeated that the flexible membrane  
4 was inherent to the Hoyt device and that a flexible  
5 material is only a design choice.

6 Q.     Okay. And, in fact, did you receive yet a third --

7           THE COURT: Wait a minute. You said the same  
8 exhibit. Are you talking about Plaintiff's Exhibit 4?

9           MR. CAWLEY: Yes, your Honor. It's the  
10 June 26, '98, Office Action.

11          THE COURT: I guess I'm not picking up those  
12 paragraphs on my copy on pages 3 and 4. Maybe I'm  
13 missing -- are you sure you're talking about what you  
14 have marked as --

15          MR. CAWLEY: It's in a separate folder, your  
16 Honor, of the documents that we gave you. Each of these  
17 things that are shown --

18          THE COURT: Oh, okay. All right.

19          MR. CAWLEY: Sorry, your Honor. I guess it  
20 would have conserved some paper just to put it all in  
21 one, but that's the way we did it.

22          THE COURT: All right. So, this one was the  
23 June, '98, Office Action?

24          MR. CAWLEY: Yes, your Honor. Bottom of page  
25 3, top of page 4.

1 BY MR. CAWLEY:

2 Q. Mr. Armstrong, you received yet a third rejection  
3 of this '525 patent, didn't you?

4 A. Yes, sir, I did.

5 Q. And what did the examiner tell you this time?

6 A. Well, this was a whole new examiner; and he  
7 referred me back to the very same argument that the  
8 previous examiner had made there in paragraph 4 of Paper  
9 Number 8. That was the "inherency" and the "only a  
10 design choice."

11 MR. CAWLEY: This is on page 5, your Honor,  
12 for the court's reference.

13 BY MR. CAWLEY:

14 Q. So, did you understand the statement in paragraph 9  
15 to mean that this examiner was incorporating exactly the  
16 reasons that had been given in the reference to Hoyt in  
17 your first two rejections?

18 A. Yes, sir. I think he was reasserting the same  
19 reasoning of the Patent Office.

20 Q. And you said that this was a different examiner  
21 than had given you the first two rejections?

22 A. Yes, sir.

23 Q. Why did you think that that was significant?

24 A. Well, it just, you know, indicates to me that this  
25 is -- you know, this is the Patent Office gospel. This

1 is, you know, two different examiners saying the same  
2 thing to me.

3 Q. Okay.

4 A. And, so, I had to take it really seriously.

5 Q. So, is it fair to say by this time, September,  
6 1999, that in connection with the prosecution of this  
7 patent, two different examiners had told you a total of  
8 three times that the flexible membrane sheet was  
9 inherent and was just a design choice?

10 A. Yes, sir.

11 Q. And at some point did the examiner issue a final  
12 rejection?

13 A. Yes, sir.

14 Q. What did you do after receiving the final  
15 rejection?

16 A. I had a telephone interview with the examiner.

17 MR. CAWLEY: Slide 10.

18 BY MR. CAWLEY:

19 Q. This is a reproduction of your notes about the  
20 interview with the examiner -- is that correct -- from  
21 Plaintiff's Exhibit 4?

22 A. I believe that it is, yes, sir.

23 Q. And this is something you submitted to the Patent  
24 Office, correct?

25 A. I think so, yes, sir.

1 Q. And what did you tell the Patent Office relating,  
2 for the record, about your discussions on the subject of  
3 Hoyt?

4 THE COURT: And just for the record, out of  
5 which page is it? What page number or Bates Number  
6 or...

7 MR. CAWLEY: It's page 3 of the interview  
8 summary, your Honor.

9 THE COURT: Okay.

10 MR. CAWLEY: Interviewer summary.

11 BY MR. CAWLEY:

12 Q. I actually misstated something earlier,  
13 Mr. Armstrong. This is the examiner's summary of the  
14 discussion, not yours, correct?

15 A. I guess so. You know, I haven't -- I don't have  
16 any specific recollection from the record. If it is the  
17 examiner's, I'll take your word for that, yes, sir.

18 Q. Okay. The document that the court has speaks for  
19 itself as to what it is.

20 THE COURT: Well, I don't mind you stating  
21 for the record because someone else may have to review  
22 this and --

23 MR. CAWLEY: Fine, your Honor.

24 BY MR. CAWLEY:

25 Q. I'll represent to you, Mr. Armstrong, that this is

1 the examiner's summary of what happened in your  
2 discussion. So --

3 A. Correct.

4 Q. -- what does this tell us occurred in your  
5 discussion about Hoyt and the Yoshida reference?

6 A. Yes. I can confirm that now that I've read the  
7 sentence where it goes to that code, and I recognize  
8 that as kind of Patent Office form. So, this would be  
9 the examiner's.

10 But I think you're referring down to the  
11 underlined red text?

12 Q. Yes, sir.

13 A. It says: The examiner stated that Hoyt and Yoshida  
14 do not teach the integrated membrane shown in  
15 applicant's Figure 18 where the membrane for the  
16 alphanumeric keys and the 6 DOF joystick are the same  
17 membrane.

18 Q. All right, sir. What else did the examiner tell  
19 you in this interview?

20 A. He told me that I could either appeal his decision  
21 or I could amend the claims and that if I amended the  
22 claims in a manner that would require a new search, that  
23 it would require what they call a "CPA," which I think  
24 is something like "continuing processing application,"  
25 requires a new fee and new filing. So, that's what I

1 chose to do.

2 Q. Did he tell you that there was something that he  
3 thought was patentable in your existing application?

4 A. Yes, sir. He was -- he talked about the Figure 18  
5 of my application and said -- well, here it quotes: The  
6 examiner stated that Hoyt and Yoshida do not teach the  
7 integrated membrane shown in applicant's Figure 18 where  
8 the membrane for the alphanumeric keys and the 6 DOF  
9 joystick are the same membrane.

10 THE COURT: You need to slow down a little  
11 bit, sir.

12 THE WITNESS: Oh, sorry.

13 A. (Reading) The examiner also stated that the claims  
14 need to be narrowed, such as with the integrated  
15 membrane shown in applicant's Figure 18.

16 BY MR. CAWLEY:

17 Q. All right. So, what was your reaction to that?

18 A. I was elated.

19 Q. Why?

20 A. Because it had been pending for years with  
21 rejections, and I was glad to get something that the  
22 examiner felt was patentable.

23 Q. So, you felt that Figure 18 would be patentable if  
24 you filed a CPA?

25 A. Yes, sir.

1 Q. And did you file a CPA?

2 A. I believe I did, yes, sir.

3 Q. Let me show you, from Plaintiff's Exhibit 4, page 2  
4 from the CPA. And did you -- this time it is you as the  
5 applicant -- summarize what you believed the examiner  
6 had to say?

7 A. Yes, sir. This is, I believe, my summary of the  
8 examiner's -- of the interview with the examiner.

9 Q. All right. And did you write that: The examiner  
10 thought that a sheet connecting both buttons and  
11 multi axis joysticks would be allowable, if claimed?

12 A. Yes, sir.

13 Q. And you also wrote that: Yoshida having a joystick  
14 internally connected with individual electric wires is  
15 expensive in high volume compared to applicant's  
16 sheet-connected buttons and multi axis input devices.

17 Correct?

18 A. Yes, I wrote that.

19 Q. Now, let's pause there to take a look at this  
20 Yoshida reference just briefly.

21 Is this a copy of the first page of the  
22 Yoshida reference?

23 A. Yes, sir. I believe it is.

24 Q. Let's take a look at Figure 1. Can you describe  
25 Figure 1 for us here?

1 A. Well, Figure 1 is a housing, might be called a --  
2 the device might be called a "game pad." I'm not sure.  
3 But there are a series of buttons that -- like a  
4 touch-sensitive pad with buttons. And then there is a  
5 joystick in the lower center area.

6 Q. Okay. And, likewise, can you describe for us  
7 what's depicted in Figure 2 of the Yoshida reference?

8 A. Yes. Figure 2 shows the device opened up and the  
9 keypad or button pad, I think, is labeled 30 and 31  
10 is -- I believe 31A and 31B are flexible membrane  
11 sheets.

12 Q. And, Mr. Armstrong, we saw a minute ago that you  
13 were discussing the Yoshida reference and you criticized  
14 connection with individual electric wires. Why did you  
15 do that?

16 A. I was just trying to distinguish my Figure 18.

17 Q. Now, let's look now at some of the new claims that  
18 you added in your CPA; and I want to show you page 3  
19 from the CPA.

20 Do you remember adding these claims?

21 A. I don't specifically remember it but --

22 Q. Okay. Do you see -- whether you have an  
23 independent recollection of it now, but do you see from  
24 the record that in claim 38, that -- the language that  
25 states "at least one sheet"?



1 A. Yes, sir.

2 Q. It doesn't say "flexible membrane sheet," correct?

3 A. No, sir.

4 Q. Let's turn now to page 4 from the CPA. Is this  
5 claim 44 a dependent claim? Correct?

6 A. Yes, sir.

7 Q. And is that the first claim in your CPA to mention  
8 a flexible membrane sheet connected to a rigid circuit  
9 board sheet?

10 A. I believe it is, yes, sir.

11 Q. Now, when you were submitting these claims in your  
12 CPA, did you think that you were obligated to tell the  
13 examiner about CyberMan?

14 A. No, sir.

15 Q. Why not?

16 A. Because the examiner looked back at the prior art  
17 from the continuing -- from the parent when I filed it.

18 Q. All right, sir. And did you also, by this time,  
19 have an impression of what the examiner thought was the  
20 significance of --

21 A. Yes. That was -- yes. There were three repeated  
22 statements that a flexible membrane was only a design  
23 choice; and, so, it wasn't important.

24 Q. And you understood that because the examiners had  
25 told you repeatedly it was only a design choice, it was

1 not patentable?

2 A. That was my understanding, yes, sir.

3 Q. Let's turn now to an Office Action that you -- that  
4 was received on August 31st, 2000. All of your  
5 independent claims were rejected by the examiner,  
6 correct?

7 A. Yes, sir.

8 Q. And, among other things, they were rejected over  
9 this Sekine reference?

10 A. Yes, sir.

11 Q. Let's take a look at that quickly.

12 Is this the first page of the Sekine  
13 reference?

14 A. Yes, sir.

15 Q. Let me turn quickly to Figure 2. What does  
16 Figure 2 of Sekine show?

17 A. It shows a keyboard -- key matrix. I think that's  
18 Number 29 there. And then -- I'm starting at the top of  
19 the drawing.

20 And then Number 31 is a pointing stick.  
21 Those two are together.

22 And then below them is a set of traces that  
23 goes to a system board, and those traces -- or wires. I  
24 don't know what they would actually be. The left is  
25 labeled a "key matrix control signal lines," and on the

1 right it's labeled the "PS control signal lines." I  
2 believe that "PS" stands for "pointing stick." They're  
3 all going to the same connector, Number 102, on a system  
4 board, which I think would be a circuit board.

5           And just from my understanding -- at that  
6 time, in the early Nineties and mid Nineties, I took  
7 apart lots of keyboards; and they were -- a flexible  
8 membrane was real common. And, so, my understanding is  
9 that this is a flexible membrane with traces for the  
10 keys and the pointing stick together.

11 Q. This is already in the prosecution record, correct?

12 A. Yes, sir.

13 Q. Let me go back now to the August 31st Office  
14 Action. The only allowable subject matter indicated in  
15 this action is on this page 6, paragraph 14, correct?

16 A. Yes, sir.

17 Q. And tell us what the examiner stated, in the  
18 highlighted language.

19 A. It says: The prior art of record does not teach or  
20 suggest placing an input member movable in at least two  
21 axes and finger-depressible buttons of claim 43, 41, 40,  
22 39, 38 or claim 51, 50, 49, 48 onto a flexible sheet.

23 Q. And now here again, did you, based on your prior  
24 interaction with the examiners in connection with the  
25 prosecution of this patent -- did you understand that

1 the "onto a flexible sheet" portion of the statement  
2 related to patentability?

3 A. It appears to, yes, sir.

4 Q. Okay. Why didn't you tell the examiner about  
5 CyberMan at this time?

6 A. Well, to be honest with you, it had been many years  
7 since I had taken it apart; and I think I had pretty  
8 much forgotten about it. But, also, the Patent Office  
9 had repeatedly told me it wasn't a patentable element;  
10 and this is here a whole bunch of different elements.

11 Q. Well, now, just so your answer is clear, the Patent  
12 Office hadn't told you that CyberMan wasn't part of  
13 the -- hadn't told you anything about CyberMan in this  
14 prosecution, had they?

15 A. No, sir.

16 Q. But they had told you repeatedly that the flexible  
17 membrane sheet was inherent and was a design choice,  
18 correct?

19 A. Yes, sir.

20 Q. So, you didn't have any reason to go back and  
21 resurrect your, by now, stale memory of CyberMan in  
22 connection with that issue, did you?

23 A. That's correct.

24 Q. And, furthermore, were you still under the  
25 impression at this time, as you are today, that the

1 examiner would go back to consult prior art in the  
2 parent applications up the chain?

3 A. Yes, sir.

4 Q. All right. Let's turn now to the '700 prosecution.

5 THE COURT: Hold up just a second, please,  
6 counsel.

7 All right. Go ahead.

8 MR. CAWLEY: Thank you, your Honor.

9 BY MR. CAWLEY:

10 Q. I was about to ask you now about the prosecution of  
11 the '700 patent. The '700 is a continuation of the  
12 '525. We've heard that. You filed it in the year 2000,  
13 correct?

14 A. Yes, sir.

15 Q. And it issued in 2005?

16 A. That's correct.

17 Q. When you originally filed the CyberMan -- not the  
18 CyberMan. When you originally filed the '700  
19 application, you didn't have any claims that claimed  
20 flexible membrane sheets, did you?

21 A. I believe that's correct. Yes, sir.

22 Q. Now, did you disclose CyberMan to the Patent Office  
23 when you first filed the '700 application?

24 A. No, sir.

25 Q. And is that for the same reasons that you've

1 already given the court?

2 A. Yes, sir.

3 Q. But we've already heard -- and I want to ask you  
4 about the fact that you did disclose CyberMan later in  
5 the prosecution of the '700 patent; is that correct?

6 A. Yes, sir.

7 Q. Mr. Armstrong, would you explain to the court what  
8 happened between your initial filing of the '700  
9 application in 2000 and the time you disclosed the  
10 CyberMan in late 2003?

11 A. Yes, sir.

12 THE WITNESS: Your Honor, I started  
13 negotiating with Sony in the year 2000; and they, of  
14 course, hired very, very good litigating counsel to  
15 review my patents and the work I had done. And that  
16 negotiation went on for about four years; and it was a  
17 real education, to say the least. I learned a lot; and  
18 I certainly learned one thing, that my original  
19 understanding of the actual rule being that you have to  
20 submit everything that is the most relevant art that you  
21 know, prior art, was inadequate and that there is a  
22 practical fact that you have to just submit lots of  
23 stuff, everything that you're aware of at all.

24 So, my originally-filed patent applications  
25 had, you know, one and three and five types of pieces of

1 prior art; and then in the '700, it went up to hundreds.

2 BY MR. CAWLEY:

3 Q. That's in the -- not in the initial '700  
4 disclosure. That was still three or four or five,  
5 right?

6 A. Right. The initial '700 is before I really started  
7 getting educated by Sony's litigating lawyers, and it  
8 was -- I don't know how many but a relatively small  
9 number.

10 Q. Did you --

11 A. And then four years later, I understood at that  
12 time that prior art disclosures really needed to be  
13 extensive.

14 Q. During the course of your negotiations with Sony,  
15 did you and Mr. Tyler attend various meetings with Sony?

16 A. Yes, sir.

17 Q. About how many?

18 A. I don't know. It wasn't a whole lot of meetings,  
19 but they were certainly informative and intense.

20 Q. In addition to the meetings, did you exchange  
21 written communications back and forth?

22 A. Yes, sir, there were some.

23 Q. Did Sony bring lawyers to those meetings?

24 A. Yes, sir.

25 Q. How many?

1 A. Sometimes it would be quite a few -- well, the main  
2 person that I negotiated with was Riley Russell, who is  
3 vice-president of legal affairs; so, he was a lawyer.  
4 Then they had Jennifer Liu, L-I-U, who was an  
5 internal lawyer.

6 Q. Did Sony also bring its outside counsel --

7 A. Yes. Their outside counsel was there for sure; and  
8 that would have been Greg Gewirtz, G-E-W-I-R-T-Z, and  
9 Joseph Littenberg, L-I-T-T-E-N-B-E-R-G. I think that's  
10 from -- they were from the law firm of Littenberg -- no.  
11 I've forgotten the name of it.

12 Q. Okay. That's fine.

13 A. And I think there was also maybe some other lawyers  
14 at times.

15 Q. And did these lawyers bring to these meetings  
16 PowerPoint presentations?

17 A. At least one, yes, sir.

18 Q. And were these PowerPoint presentations over a  
19 hundred pages long?

20 A. Yes, sir. I think one of them was over 400 pages.

21 Q. 400 pages. Just imagine that.

22 And was the upshot of these PowerPoint  
23 presentations that, first of all, they didn't infringe  
24 your patents and, second of all, that your patents were  
25 invalid?



1 A. Yes. I think that's kind of normal operating  
2 procedure. Yes, sir.

3 Q. And is one of the things that they pointed out to  
4 you and that you realized as a result of these meetings  
5 is that someone in the future might criticize you for  
6 having failed to make a more full disclosure to the  
7 Patent Office?

8 A. Yes, sir.

9 Q. And is that what caused you to decide immediately,  
10 after having that realization, that you needed to do a  
11 better job than you had done to that point in making  
12 disclosures in connection with your only, at this point,  
13 pending application, the '700?

14 A. Yes, sir. I don't know if that was my only  
15 application that was pending, but certainly it was a  
16 real education as far as disclosure.

17 Q. Okay. Well, by this time the '525 had issued.

18 A. Yes, sir.

19 Q. So, there was nothing you could do about that.

20 A. Right.

21 Q. But you could do it in the '700.

22 A. Yes, sir.

23 Q. So, in addition to CyberMan, did you disclose other  
24 things?

25 A. Yes, sir. I disclosed every -- you know, I just

1 made the most thorough disclosure that I could perceive  
2 how to make.

3 Q. And by the time you were done, had you disclosed a  
4 few hundred references to the Patent Office?

5 A. I suspect I had, yes, sir.

6 Q. Well, you've looked at the disclosure sheets,  
7 haven't you?

8 A. Yes, sir. I think it's over 400, but I'm not sure.

9 Q. Well, okay. Without trying to make the number  
10 precise, it's at least in the hundreds, correct?

11 A. I think so, yes, sir.

12 Q. Let's not go through the hundreds, but let's talk  
13 about what you disclosed about CyberMan.

14 MR. CAWLEY: Let's go to Slide 12.

15 BY MR. CAWLEY:

16 Q. Is this a request for continued examination from  
17 Plaintiff's Exhibit 8?

18 A. It looks like it.

19 Q. Okay.

20 A. Yes, sir.

21 Q. I'll just tell you that's what it is.

22 And this is a page from the file history  
23 where you disclosed CyberMan in 2003, correct?

24 A. Okay.

25 Q. And if we look at Slide 13 -- we've already seen

1 this, but these are pictures of CyberMan that you  
2 disclosed to the Patent Office, correct?

3 A. Yes, sir.

4 Q. And all the labels that we see on these pictures  
5 are labels that you put on there, correct?

6 A. Yes, sir.

7 Q. And if we go to Slide 17, that's another depiction  
8 of the same thing, correct?

9 A. I think it is, yes, sir.

10 Q. And, in fact, did you go further than that?

11 A. There was some written description.

12 Q. All right. And let me show you from the file  
13 history, from Plaintiff's Exhibit 8, Bates numbered  
14 67403. Was this part of your disclosure?

15 A. Yes, sir.

16 Q. Can you tell us what you told the examiner?

17 A. Yes, sir. I believe this is after I had described  
18 the CyberMan in pictures and the writing; and I said:  
19 If the examiner needs any additional information  
20 regarding CyberMan, please contact applicant or Logitech  
21 at the above listed address; or applicant would be glad  
22 to supply a working example of the CyberMan, with  
23 screwdriver included -- smiley face -- for the examiner.

24 Q. All right. And after the phrase "with screwdriver  
25 included," what's that?

1 A. Well, it's I would be glad to give him the actual  
2 device and, you know, a screwdriver or disassembled or  
3 whatever because I just was trying to disclose it as --  
4 I didn't want what I said to be misconstrued; and, so, I  
5 was just offering the actual device to him.

6 Q. All right. And, actually, what I'm referring to is  
7 the little sideways smiley face.

8 A. Yes, sir.

9 Q. Did you include that, too?

10 A. Yes. I did do that.

11 Q. Is that referred to as a "emoticon"?

12 A. Yes, sir.

13 Q. As far as you know, has anybody else ever put an  
14 emoticon in their disclosure to the PT0 office?

15 A. I don't know.

16 Q. When you disclosed CyberMan, did you completely  
17 disclose its features to the PT0?

18 A. I certainly tried to, yes, sir.

19 Q. Let's take a look at this portion from Plaintiff's  
20 Exhibit 8, Bates Number 67402. What's this?

21 A. In yellow, it says (reading) four metal dome on/off  
22 switches on a first plane -- which is two-axis input --  
23 and two more on/off switches located on a third and  
24 fourth plane, open paren, third axis, closed paren, are  
25 all integrated with a flexible membrane. The membrane

1 further has solder connections to two metal dome on/off  
2 switches, open paren, fourth axis, closed paren, and  
3 solder connections to the three on/off microswitches  
4 associated with the finger-depressible buttons.

5 Q. So, did you tell the PTO specifically about the  
6 flexible membrane sheet in the CyberMan?

7 A. Yes, sir, I did.

8 Q. All right, sir. Now, one more thing that I want to  
9 cover with you. During this prosecution -- and, for  
10 that matter, the '828 prosecution, as well -- did you  
11 believe that CyberMan was not prior art because it was  
12 your invention?

13 A. Yes, sir.

14 Q. And, in fact -- I don't want to take the time to go  
15 back and do it. We can find it if we need to -- did you  
16 indicate that to the Patent Office, that CyberMan  
17 couldn't be prior art in your view because you had  
18 invented it?

19 A. Yes, sir, I did.

20 MR. CAWLEY: Pass the witness, your Honor.

21 MR. PRESTA: Your Honor, if I could just pass  
22 up -- I have a copy of the PowerPoint presentation that  
23 we had printed up that I forgot to give you.

24 THE COURT: All right.

25 MR. CAWLEY: Your Honor, I hate to interrupt.

1 I had meant to do that in the beginning of my  
2 examination but -- are we operating on the procedure  
3 that everything in the jury trial is also in evidence  
4 for this inequitable conduct trial?

5 THE COURT: Unless there's any objection,  
6 that would make sense. There's no point in putting in  
7 exhibits twice.

8 MR. CAWLEY: I would assume that.

9 MR. PRESTA: No objection.

10 THE COURT: On the other hand, if you don't  
11 mention it to me and show me why it's important, I'm not  
12 likely to remember all the hundreds of exhibits that  
13 were in there.

14 MR. CAWLEY: Sure. I understand, your Honor.  
15 I just didn't -- I just wanted to make sure that with  
16 Mr. Armstrong I didn't need to go back and tell his  
17 whole history and his education.

18 THE COURT: Oh. No, no, no. That would be a  
19 complete waste of time. But if there is something -- an  
20 exhibit or a piece of testimony that is pertinent to  
21 this decision, it would seem only fair and proper that  
22 you bring it to my attention. Otherwise, I'm going to  
23 consider it waived and not important. I mean, it's  
24 not -- his background doesn't really have a lot to do  
25 with --

1 MR. CAWLEY: I understand.

2 THE COURT: -- precise issues here. But if  
3 Exhibit 25 does, you'd best mention it because even  
4 between Ms. Chen and myself, we might actually miss one.  
5 Maybe no more than one, but at least one.

6 MR. PRESTA: Could I get Slide 60, please?

7 REDIRECT EXAMINATION OF BRAD ARMSTRONG

8 BY MR. PRESTA:

9 Q. Now, Mr. Armstrong, at this time, on August 4th of  
10 2000, when you were talking to the examiner about this  
11 feature being patentable, about the multi axis joystick  
12 and buttons on one sheet being something that's  
13 patentable, I just want to understand: What is your  
14 excuse for not disclosing the fact that CyberMan had  
15 that feature at that time? What are you telling the  
16 court the reason is that you did not disclose CyberMan?

17 A. I think that the CyberMan was disclosed through the  
18 examiner's obligation to look at the parent files.

19 Q. Okay. Let me clarify my question for you. Why did  
20 you not disclose the fact that CyberMan had the exact  
21 same flexible membrane sheet that you were describing  
22 and discussing with the examiner as being patentable at  
23 that time?

24 A. Well, as we just went through, there were several  
25 instances in which the Patent Office just said, you

1 know, a flexible membrane is just a design choice. At  
2 least three or four -- three at least I can recall of  
3 two different examiners saying that to me and --

4 THE COURT: Excuse me a minute. Oh, good  
5 grief.

6 This is Jury Note Number 3: We would like to  
7 see Mark Newman's testimony and Brad Armstrong's  
8 testimony from first day and Akio Ikeda's, all of his.

9 Would you get the volume dealing with that  
10 out of the O'Malley set, jury communications?

11 Any thoughts on that from plaintiff?

12 MR. CAWLEY: Your Honor, I think that the  
13 traditional theory is that it is at least risky -- I'm  
14 not sure I'd go so far as to say "error" because I'm not  
15 sure that it's error -- but that it's at least risky to  
16 provide the jury with certain pieces of written  
17 testimony and not others and that the typical response  
18 in this situation is to reply to the jury that they must  
19 rely on their collective memory of the testimony but  
20 that they are not to be provided with particular  
21 portions of the transcript.

22 THE COURT: And let me hear from defendant.

23 MR. GUNTHER: Your Honor, I think on this  
24 that the problem -- and I think this is why I'm going to  
25 ultimately agree with Mr. Cawley. The problem is at



1 this point we have, you know, sort of "We want one part  
2 of the testimony" or maybe "all of the testimony." And  
3 to me, given the question that the jury has specifically  
4 asked for part of the testimony of one witness and then  
5 for all of the testimony of others --

6 THE COURT: Excuse me one minute.

7 MR. GUNTHER: I'm sorry.

8 THE COURT: Go ahead, Mr. Gunther.

9 MR. GUNTHER: Your Honor, my point is that  
10 given that they have asked for large blocks of testimony  
11 but not complete -- I mean, I've had situations where  
12 they'll say, "We would ask for a read back of this  
13 specific aspect. This doesn't seem to be that. And  
14 given that it's so unfocused, I have a concern about  
15 just throwing a lot of testimony into the jury room at  
16 this point.

17 THE COURT: All right. You have both stated  
18 the standard rule. I guess the question would be --  
19 because there's also a necessity to help them -- do I  
20 inform them that if they have a request for a specific  
21 part of the testimony, we may be able to provide that  
22 but -- in other words, something along that line that,  
23 "You must rely on your collective memory of the  
24 testimony of the trial. If you have a question about a  
25 specific portion of a witness' testimony, let the court

1 know. "

2 I mean, I'm not trying to invite it but on  
3 the other hand, there are cases and, in fact, it is  
4 proper to try to give them a full and proper answer.  
5 What are your thoughts on that, Mr. Gunther?

6 MR. GUNTHER: Your Honor, my thought is that  
7 the way the -- could the court just read one more time  
8 what you just said?

9 THE COURT: Okay. The question is: We would  
10 like to see Mark Newman's testimony and Brad Armstrong's  
11 testimony from first day and Akio Ikeda's, all of his.

12 MR. GUNTHER: Yes, sir. And I'm sorry. I  
13 thought the court had just suggested a proposed  
14 response.

15 THE COURT: And my response would be, "You  
16 must rely on your collective memory of the testimony.  
17 If you have a request for a specific portion of a  
18 witness' testimony, let me know," something along that  
19 line.

20 MR. CAWLEY: I would have to say, your Honor,  
21 I would request that the court not do that last piece of  
22 it. I'm afraid that what's liable to come out are some  
23 questions, "Oh, we want to see all the testimony about  
24 infringement" and then where are we? Or "We want to see  
25 all the testimony about this," and then we're in a

1 dispute as to whether the testimony is really about that  
2 or not. You know, we may be confronted with that; but I  
3 would request that the court not invite it.

4 MR. GUNTHER: Your Honor, my response is that  
5 I think that as you read it, your proposed response is  
6 appropriate. You know, there may be some -- the thing  
7 that may happen after you do that, which is to give them  
8 some help, in terms of saying, "If there's something  
9 specific you want to hear, that's fine." If a question  
10 comes out along the lines that Mr. Cawley is suggesting,  
11 we can deal with it at that point. But it seems to me  
12 they want something. They're looking for some help.  
13 And it would be useful for your Honor to at least give  
14 them that bit of additional guidance.

15 Your Honor, let me just say one more thing.  
16 I think, as you're looking, the net effect of the first  
17 part of the answer without the second is to basically  
18 shut them down so that -- and if that's what ultimately  
19 the court determines to do -- but it seems to me that  
20 giving them some basis to come back with a more  
21 particularized request, if there's something that's  
22 really of interest to them and important to them, is  
23 appropriate.

24 THE COURT: All right. I realize from  
25 looking at the preliminary instructions that I did not

1 include, as I almost always do, an instruction on  
2 "Although the court reporter is here, you will not have  
3 a transcript." And, so, what I'm going to do -- or  
4 here's the proposal -- I'm going to ask for your  
5 objections, if any -- "Although the court reporter is  
6 making a record, a transcript of testimony is not  
7 available to you. You should rely on your collective  
8 memory of the testimony and evidence. If you are  
9 unclear about a specific portion of a witness'  
10 testimony, let me know."

11 Mr. Cawley?

12 MR. CAWLEY: No objection, your Honor.

13 MR. GUNTHER: No objection, your Honor.

14 THE COURT: Okay. "Although the court  
15 reporter is making a record, a transcript is not  
16 available for you. You should rely on your collective  
17 memory of all of the evidence and testimony. If you are  
18 unclear about a specific portion of a witness'  
19 testimony, let me know."

20 I'm going to send them a typed copy just  
21 because I've been told sometimes that my handwriting is  
22 a little unclear. And I'll let counsel look at both to  
23 be sure they are satisfied they say the same thing.

24 Go ahead and make a copy of that and give a  
25 copy to show each of the counsel.

1 MR. GUNTHER: Your Honor, this is fine. I  
2 share a trait with you. Maybe it's a left-hander; but  
3 my handwriting is terrible, too. The word "record," I  
4 think, is a little hard to read. Otherwise, it's all  
5 right there.

6 THE COURT: All right. Let me see that,  
7 please.

8 Okay. Go ahead and make the copies.

9 Any objection, then, having read it and  
10 looked at the note, from plaintiff?

11 MR. CAWLEY: No objection.

12 THE COURT: From defendant?

13 MR. GUNTHER: No objection, your Honor.

14 THE COURT: In fact, we've been going for  
15 about an hour now; so, let's go ahead and take a recess  
16 for about ten minutes and that will let the clerk get  
17 back in here before we proceed.

18 (Recess, 11:13 a.m. to 11:20 a.m.)

19 (Open court, all parties present, jury not  
20 present.)

21 THE COURT: Counsel.

22 MR. PRESTA: Thank you, your Honor.

23 BY MR. PRESTA:

24 Q. Mr. Armstrong, I just want to clarify. In your  
25 direct examination, you indicated that at this time when

1 you were -- in the '525 in the year 2000, your reason --  
2 was your reason for not disclosing the CyberMan's use of  
3 the flexible membrane sheet because you thought that  
4 only patents and printed publications should be titled  
5 as prior art at the Patent Office?

6 A. That was what I knew how to do or what I had done,  
7 were prior art disclosures.

8 Q. So, you thought that only patents and patented  
9 publications in 2000 constituted prior art and that's  
10 all you needed to disclose. Is that your testimony?

11 A. No. No, sir, it's not.

12 Q. You knew at that time, didn't you, that you were  
13 also supposed to disclose products?

14 A. I'm not sure exactly what I was aware of right at  
15 that time.

16 Q. Okay. But it's not your position, is it, that you  
17 didn't disclose it because you were unaware of your  
18 obligation to disclose prior art products?

19 A. That's not my position.

20 Q. Okay. Because, in fact, you did disclose prior art  
21 products in numerous other pending cases that you had at  
22 the same time at the Patent Office, right?

23 A. Don't know.

24 Q. Well, you won't dispute the fact that in many other  
25 pending cases that you had pending at the Patent Office

1 at this time, you gave detailed explanations to the  
2 examiner about the features of prior art controllers.

3 A. Yeah. I think I probably had done that, yes, sir.

4 Q. Okay. And you did that to satisfy your duty of  
5 disclosure in those cases, right?

6 A. You know, I tried to disclose everything I felt was  
7 relevant, yes, sir.

8 Q. Okay. And, so, you don't dispute that on numerous  
9 occasions at the Patent Office, before and around this  
10 2000 time period, that you gave detailed descriptions of  
11 prior art controllers that were on sale on the market in  
12 order to satisfy your duty of disclosure. You don't  
13 deny that, do you?

14 A. I may have done that.

15 Q. Okay. Do you have a specific recollection of doing  
16 it?

17 A. I think I did that in '802. I think I described a  
18 prior art controller in that.

19 Q. Okay. And, in fact, you described the Neo Geo  
20 prior art controller in the '802 application, didn't  
21 you?

22 A. To the best of my memory, I did do that, yes, sir.

23 Q. Okay. And you didn't even know -- and there was no  
24 printed publication or patent on the Neo Geo that you  
25 submitted, was there?

1 A. I don't think I had one, no, sir.

2 Q. So, you just described the nature of the controller  
3 itself in 1999 in the '802 application to satisfy your  
4 duty of disclosure in that case, right?

5 A. I believe that's correct, yes, sir.

6 Q. Okay. You also did that in the '991 application  
7 that you had pending at that time, right?

8 A. I think the '991 is continued from the '802; so, it  
9 would have...

10 Q. Okay. And you had specifically -- in that case you  
11 drew the examiner's attention to various prior art  
12 controllers that you wrote in detail what they looked  
13 like and how they operated even though you didn't have a  
14 patent or printed publication in connection with those,  
15 right?

16 A. My memory of that is a little bit -- but I'm not  
17 going to dispute it.

18 Q. Okay. The bottom -- I just want to make sure I'm  
19 clear that you're not using as an excuse for not  
20 disclosing the CyberMan that you believed it was not  
21 necessary to disclose things unless they were contained  
22 in a patent or a printed publication. That's not the  
23 excuse that you're giving the court, is it?

24 A. I'm not trying to have any excuses at all, sir.

25 Q. Okay. But it's not your position that you were



1 unaware of -- excuse me. Let me strike that.

2           It's not your position in this case that at  
3 this time in 2000, when you were prosecuting the '525  
4 application, that you were under the misimpression that  
5 you're only supposed to disclose patents and printed  
6 publications.

7 A. I think that was the bulk of my disclosure. I  
8 think it was all of my disclosures for a good while. I  
9 don't know when. You know, maybe they were in that  
10 '802. I'm just not remembering that.

11 Q. Now, did you believe at that time that something  
12 was not prior art and did not have to be disclosed if it  
13 was not contained in a patent or a printed publication,  
14 in 2000?

15 A. I'm sorry. Can you say the question again?

16 Q. Did you understand that actual controllers that are  
17 out in the market constituted prior art and needed to be  
18 disclosed to the Patent Office even though they weren't  
19 contained in a patent or a printed publication?

20 A. I certainly do understand that now, yes, sir.

21 Q. Did you understand that in 2000?

22 A. I think I did, yes, sir, because you've just  
23 pointed out to me the '802 disclosure.

24 Q. And the '991, right?

25 A. You know, I don't remember which one was which

1 but -- I mean, I know the '991 followed the '802. I  
2 don't know exactly what my prior art disclosures were.

3 Q. Now, in the jury trial in this case, you talked  
4 about this book called Patent It Yourself, right?

5 A. Yes, sir.

6 Q. And that's where you said that you learned how to  
7 deal with the Patent and Trademark Office, right?

8 A. It was a starting factor, yes, sir.

9 Q. And you read this book in great detail, didn't you?  
10 That's what you testified to in the jury trial.

11 A. I don't know that I testified to "great detail."

12 Q. Well, this is the book you said in which you  
13 learned how to deal with the Patent Office and get your  
14 own patents, right?

15 A. It's what got me started, yes, sir.

16 Q. Okay. And you read the book, didn't you?

17 A. I certainly read portions of it, yes, sir.

18 Q. Okay. Well, did you read the part about prior art?

19 A. I suspect that I probably did.

20 Q. Did you read Inventor's Commandment Number 6?

21 A. I have no idea.

22 Q. Okay. Do you recall that Inventor's Commandment  
23 Number 6 was that you have to treat the one-year bar  
24 rule as holy?

25 A. I don't recall that.

1           May I ask what version of the book you're  
2 referring to?

3 Q.     What version of the book were you referring to in  
4 your testimony in front of the jury?

5 A.     I had the, I think, 1985-1986 --

6 Q.     Well, I have the same version of the book that your  
7 counsel used in the jury trial.

8           MR. CAWLEY: Well, your Honor, I used it by  
9 holding it up to the jury to show them the title; so...

10 BY MR. PRESTA:

11 Q.     Now, let me ask you: In that Sony license -- you  
12 recall that, right?

13 A.     The Sony license?

14 Q.     Yes, where you were paid \$10 million. You remember  
15 that?

16 A.     Yes, sir. I do remember that.

17 Q.     That was a great day for you, wasn't it?

18 A.     Yes, sir.

19 Q.     Now, you said you negotiated with Sony for a while,  
20 right?

21 A.     Yes, sir.

22 Q.     And in your deposition do you remember telling us  
23 that, in fact, the problem they had with the '606 patent  
24 was they couldn't find any prior art? Right?

25 A.     I don't know if I said that.

1 Q. Well, they had found prior art to most of your  
2 other patents; but this '606 was a problem for them,  
3 wasn't it?

4 A. It was one of the patents that they infringed, and  
5 I didn't know of anybody else infringing at the time.  
6 So --

7 Q. And Sony couldn't find any good prior art on that  
8 patent. That's the reason they took a license, right?

9 A. No. I don't think that's the reason they took a  
10 license.

11 Q. Now, during that negotiation with them --

12 THE COURT: Hold up a minute, counsel. When  
13 was that license? I'm looking at the timelines here.  
14 That doesn't seem to be on there.

15 MR. CAWLEY: The Sony license, your Honor?

16 THE COURT: Right.

17 MR. CAWLEY: I think the prior testimony is  
18 2005.

19 THE WITNESS: 2004, I believe.

20 THE COURT: Okay. Sometime in 2004?

21 THE WITNESS: Yes, sir.

22 MR. CAWLEY: Mr. Armstrong should know.  
23 2004.

24 THE WITNESS: Mid 2004.

25 THE COURT: All right.

1 MR. PRESTA: It was negotiated starting in  
2 the year 2000. So, the negotiations extended from 2000  
3 to 2004.

4 THE COURT: Okay.

5 BY MR. PRESTA:

6 Q. Now, Sony couldn't find any anticipating prior art  
7 to your '606 patent, did they?

8 A. I don't recall exactly what they found and didn't  
9 find.

10 MR. PRESTA: Now, could we pull up  
11 Exhibit 248, page 57, please?

12 BY MR. PRESTA:

13 Q. Now, during those negotiations with Sony, when they  
14 were looking for prior art, did you tell them that the  
15 CyberMan contained the identical invention that you  
16 claimed in the '606 patent and were trying to get  
17 \$10 million from them for?

18 A. I told them about the CyberMan. They asked me  
19 about other inventions I had made, and I said that I  
20 hadn't invented the CyberMan.

21 Q. Did you tell them that the CyberMan constituted  
22 prior art to your '606 patent?

23 A. I don't think I -- I don't recall saying that.

24 Q. Did you take out and open up the -- did you take  
25 out this flexible membrane sheet from the CyberMan

1 product and show it to Sony when you were negotiating  
2 with them?

3 A. No, sir. But I was under the impression that they  
4 were very thoroughly aware of the CyberMan because of  
5 the Immersion issue.

6 Q. You're aware that the '606 patent claims that they  
7 paid you \$10 million for are also invalid over the  
8 CyberMan flexible membrane sheet, aren't you?

9 A. To be honest, I don't think that they paid the  
10 \$10 million for the '606 patent. I know that that's  
11 what that says but the negotiating dynamics were such  
12 that they wanted to license all of my patents and if  
13 they didn't get all of my patents, I don't think they  
14 would have paid me anything.

15 Q. Now, you remember in your deposition saying the  
16 biggest problem -- that's a quote from you -- was that  
17 they couldn't find prior art to the '606 patent? You  
18 recall that, right?

19 A. I don't recall that statement.

20 Q. Okay. Would it surprise you that that's what your  
21 deposition says?

22 A. There was something that was -- something like  
23 that, but I think there's also a statement in there that  
24 they wouldn't have licensed if they wouldn't have gotten  
25 all of my patents.

1 Q. Do you think they would have paid you the  
2 \$10 million for the '606 patent if they knew the claims  
3 in it were invalid?

4 A. I think they would have made a 10-million-dollar  
5 license for all of my patents, and the '606 was not very  
6 relevant to --

7 Q. Did you bother telling them that the '606 patent  
8 was invalid and you knew it during the entire time of  
9 your negotiations?

10 A. I don't think I said that, no, sir.

11 Q. I bet you didn't.

12 Let's take a look at --

13 MR. PRESTA: Could you blow up claim 14 of  
14 the '606 patent? And this is Exhibit 248, page 57.

15 BY MR. PRESTA:

16 Q. Now, again, you were seeking, throughout this  
17 entire time, all kinds of patents and all kinds of  
18 claims on the flexible membrane sheet, weren't you?

19 A. I don't recall.

20 Q. And this was being done in the year 2000, seven  
21 years after you learned that the flexible membrane sheet  
22 was in CyberMan, right?

23 A. If that's what you're representing to me, yes.

24 Q. And this is the claim that -- this is one of the  
25 claims and very similar to all the claims in the '606

1 that you got \$10 million from Sony based on your  
2 allegations that they were infringing it, right?

3 A. I really don't think that the \$10 million was  
4 closely related to this patent.

5 Q. Okay. Even though that's what the document says.

6 A. Yes, sir.

7 Q. Okay. Now, again, there's nothing patentable in  
8 claim 14 over the CyberMan, is there?

9 A. I don't know about that.

10 Q. Well, let's back up a minute. You were actually  
11 trying to claim in this court here today under oath --

12 THE COURT: Wait a minute. Another note from  
13 the jury. All right. This is Jury Note Number 4: What  
14 does the Patent Office investigate before determining if  
15 a patent should be issued?

16 Plaintiff wants everything in full and  
17 complete detail, which is why the patent is presumed  
18 valid; and defendant wants very little because they are  
19 well overworked and not very qualified.

20 MR. CAWLEY: Fair summary, your Honor, but I  
21 think that --

22 MR. GUNTHER: I'll take the second part.

23 MR. CAWLEY: I think the compromise is we've  
24 hashed the law out thoroughly in the jury charge, and  
25 the court has to refer them to the written charge that



1 they already have.

2 MR. GUNTHER: Your Honor, I agree with that.

3 THE COURT: Okay. Here would be my proposal  
4 then, "You must rely on the instructions I have given  
5 you and the evidence and testimony that was admitted."

6 MR. CAWLEY: No objection from the plaintiff.

7 MR. GUNTHER: No objection from the defense.

8 THE COURT: All right. Show that to counsel.

9 MR. CAWLEY: No objection from the plaintiff,  
10 your Honor.

11 MR. GUNTHER: No objections from the defense,  
12 your Honor.

13 THE COURT: Okay. Go ahead, counsel.

14 BY MR. PRESTA:

15 Q. Mr. Armstrong, in connection with the -- do you  
16 recall at your deposition that you characterized the  
17 '606 as being, quote, the biggest problem that Sony had  
18 during those negotiations with you?

19 A. There was some language like that. Can you -- you  
20 know, if you want to put up a specific transcript,  
21 I'll --

22 Q. Well, let me ask you if you recall a question that  
23 was asked to you: So, by, quote, biggest problem,  
24 unquote, did you understand that to mean that Sony could  
25 not find any good prior art on this patent?

1           Answer: Yeah. I think that -- I think  
2 that's -- that's true.

3           Do you remember that question and answer?

4 A.       Not specifically, no, sir; but I don't dispute it.

5 Q.       Thank you.

6           Now, of course, you knew the entire time that  
7 the '606 patent was invalid over the prior art CyberMan;  
8 and you didn't tell Sony about it during those  
9 negotiations, did you?

10 A.      I don't agree with your question, no, sir.

11 Q.      In fact, you ripped off Sony, didn't you? You  
12 ripped off Sony --

13 A.      No, sir.

14 Q.      -- by hiding prior art and then claiming it as your  
15 invention, just like you're doing in this case with  
16 Nintendo; isn't that true?

17 A.      No, sir.

18 Q.      You, in fact, never even invented the flexible  
19 membrane sheet, did you?

20 A.      I did not invent a flexible membrane sheet.

21 Q.      And you didn't invent the flexible membrane sheet  
22 as it's described in the claim 14 of the '606 or as it's  
23 described in claim 12 of the '525 patent, did you?

24 A.      There are issued claims. I really don't know how  
25 that all might --

1 Q. Well, we all know there's issued claims; and we all  
2 know what you did at the Patent Office. That's not my  
3 question. My question to you is: You realize, of  
4 course, that you're not the inventor of claim 14 in the  
5 '606 that Sony paid you \$10 million for; and you're not  
6 the inventor of the '525 claims that you sued Nintendo  
7 on, right?

8 A. No. I don't realize that, sir.

9 Q. Now, you told Logitech about your  
10 6-degree-of-freedom device way back in the early  
11 Nineties, right?

12 A. Yes, sir.

13 Q. And you never once had any documentation or  
14 anything else involving a flexible membrane sheet in the  
15 early Nineties, did you?

16 A. It wasn't in my '828 patent application.

17 Q. And you hadn't even ever thought of it yet, had  
18 you?

19 A. I'm not sure exactly when I thought of it.

20 Q. Okay. Isn't it true that you thought of it when  
21 you got the CyberMan product in 1993 and opened it up  
22 and saw that Logitech had used a flexible membrane sheet  
23 and you thought, "Wow, that's a great idea. I'm going  
24 to copy it and get patents on it and make a lot of  
25 money"?

1 A. No, sir.

2 Q. That's exactly what you did, isn't it,  
3 Mr. Armstrong?

4 A. No, sir.

5 Q. All of this family of patents involving the '606  
6 and the '525, all of this morass of claims that you've  
7 been prosecuting at the Patent Office, are all based on  
8 what you learned from Logitech in 1994; isn't that true?

9 A. No, sir.

10 Q. You don't have one shred of documentation that you  
11 invented the flexible membrane sheet until you filed a  
12 patent application in 1996 claiming that you invented  
13 the flexible membrane sheet, right?

14 A. No, sir.

15 Q. You don't have one single piece of documentation  
16 you can point this court to until the filing in 1996  
17 that you ever had the idea of a flexible membrane sheet,  
18 much less the specific one that you claimed as your  
19 invention in the '606, the '525, and the '700 patents,  
20 right?

21 A. That was really a long question. Can you --

22 Q. You have no documentation to point to that you ever  
23 invented the flexible membrane sheet, do you?

24 A. I did not invent the flexible membrane sheet.

25 Q. And you didn't invent it as described in claim 14

1 for use in a two-axis device with buttons on it, either,  
2 did you?

3 A. I may have.

4 Q. You may have?

5 A. Yes, sir. I don't know.

6 Q. You learned it when you opened up -- the first time  
7 you ever saw it was when you opened up the CyberMan  
8 product in 1994. We know that's the case, right?

9 A. No, sir.

10 Q. Is it your testimony that you're the one that gave  
11 Logitech the idea to put the flexible membrane sheet  
12 into CyberMan?

13 A. I believe I did, yes, sir.

14 Q. You don't have any documentation of that, do you?

15 A. No, sir.

16 Q. You claimed that as your invention for the first  
17 time in 1996, right?

18 A. Exactly what invention?

19 Q. You never had any invention at the Patent Office on  
20 a flexible membrane sheet that you claimed as your  
21 invention until 1996, right?

22 A. My '891 issued patent had sheet-connected sensors,  
23 and that was earlier than that. But I believe as far as  
24 a flexible membrane, I don't think it was disclosed  
25 until the 1996 application.

1 Q. And, in fact, you know for sure that it was not  
2 disclosed until the 1996 application, right?

3 A. I believe that's correct, yes, sir.

4 Q. And all of these flexible -- all of the claims that  
5 you've been asserting against Sony and against Microsoft  
6 and against Nintendo, they all are directed to the  
7 flexible membrane sheet; and all of the patents that you  
8 sued those parties on, the main thrust was the flexible  
9 membrane sheet; isn't that true?

10 A. No, sir.

11 Q. Sony paid you \$10 million because they thought you  
12 invented this flexible membrane sheet; and you stole it  
13 from Logitech, right?

14 A. No, sir.

15 Q. You sued Nintendo on the '525 patent knowing  
16 perfectly well that your patent was invalid based on the  
17 prior art CyberMan product, right?

18 A. No, sir.

19 Q. And you're still actually going to try and pursue  
20 an appeal on that, aren't you?

21 A. I don't know.

22 Q. Now, you said that you thought there was no reason  
23 to tell the Patent Office about the flexible membrane  
24 sheet because they had told you that it was inherent in  
25 other things and that it was a design choice. So, you

1 didn't think it was patentable, right?

2 A. I believe that they did tell me that.

3 Q. And you thought, "Well, that's not important, then,  
4 because it's not patentable; so, I don't need to  
5 disclose it." That was your testimony, right?

6 A. (Pausing.)

7 Q. That was your excuse for not disclosing it, is  
8 because you thought it was not important, right?

9 A. I wouldn't characterize it as an excuse, but the  
10 Patent Office did say those things to me.

11 Q. Right. But then that is exactly inconsistent with  
12 what you told the Patent Office to get your '606 and  
13 your '525 and your '700 patents, right?

14 MR. PRESTA: In fact, let's take a look at  
15 Slide 60 again, please.

16 BY MR. PRESTA:

17 Q. Now, here is where -- you're agreeing with the  
18 examiner. The examiner is actually saying he thinks  
19 it's allowable; and you're saying that, in fact, this is  
20 an allowable feature. Isn't your testimony that  
21 Mr. Cawley elicited from you that it wasn't important  
22 flatly contradicted by exactly what's in the Patent  
23 Office records? You were pushing that it was, in fact,  
24 patentable; and the examiner said he thought it was  
25 patentable, even though the entire time you knew

1 specifically that it was not patentable; isn't that  
2 true?

3 A. That was really a complex question. Could you  
4 parse that a little bit, please?

5 Q. I'll withdraw it.

6 Now, you said that -- let's go to -- well,  
7 this examiner didn't think it was simply a design choice  
8 or inherent, did he?

9 A. This is examiner Jeffery Brier?

10 Q. In the '525 patent.

11 A. I believe that he did reassert that in the earlier  
12 rejection.

13 Q. But you were able to convince him that it was a  
14 patentable feature and get the patent, right?

15 A. Well, my understanding is that an allowable claim  
16 is a collection of elements.

17 Q. Right. Like claim 12, right? A collection of  
18 elements that you found in the CyberMan prior art in  
19 1993 and then tried to claim as your own in 1996, that  
20 collection of pieces, right?

21 A. I don't agree with that question, no, sir.

22 Q. Okay. And also in the '606, what you got a patent  
23 on and got \$10 million from Sony, a collection of parts,  
24 none of which you had anything to do with, all of which  
25 had existed in the prior art, right?



1 MR. PRESTA: Could I go to Slide 78?

2 BY MR. PRESTA:

3 Q. Now, this is you telling the Patent Office  
4 claim 61, that became claim 12 in the '525 that you sued  
5 Nintendo on that you admitted to me was anticipated by  
6 CyberMan -- you're telling -- you told the Patent Office  
7 that 61, which is claim 12 in the '525, was allowable  
8 over the prior art of record for the same reasons as 38  
9 and 48.

10 And if you look back on that, that was  
11 because it had a two-axis device and finger-depressible  
12 buttons on the same sheet. And you actually said that  
13 you put that feature into 38 and 48, and then you told  
14 the patent examiner that all of them are allowable.

15 You remember that, right?

16 A. I don't -- I don't have a specific recollection --

17 Q. You knew the entire time that none of that was  
18 patentable, Mr. Armstrong, didn't you?

19 A. I would not agree with that, no, sir.

20 MR. PRESTA: Now let's take a look at  
21 Slide 70, please.

22 BY MR. PRESTA:

23 Q. I believe it's your excuse that your counsel has  
24 tried to get out is that you thought this was a flexible  
25 membrane sheet so that there was no reason for you to

1 disclose the fact that CyberMan had a flexible membrane  
2 sheet. Is that the position that you're taking here  
3 today?

4 A. Could you repeat that question, please?

5 Q. Do you think that this disclosure in the Sekine  
6 reference that the examiner cited discloses a flexible  
7 membrane sheet?

8 A. Do I think that it discloses a flexible membrane  
9 sheet?

10 Q. Yes.

11 A. Yes, sir, I do.

12 Q. Okay. Now, the examiner doesn't believe that, did  
13 he?

14 A. I don't know what he believed.

15 Q. And there's nowhere anywhere in that reference that  
16 says "flexible membrane sheet," is there?

17 A. I don't know.

18 Q. And, in fact -- well, if you looked -- didn't you  
19 look? Wouldn't you have been very excited if you could  
20 find that, because it would have given you a defense to  
21 inequitable conduct?

22 A. I'm trying to remember. I think that he rejected  
23 me over, you know, this as a full anticipation of a  
24 claim; but I can't remember the detail.

25 Q. And you didn't believe at the time it disclosed a

1 flexible membrane sheet, did you?

2 A. I can't recall.

3 MR. PRESTA: Could I go to Slide 71?

4 BY MR. PRESTA:

5 Q. Just to confirm, in getting over this rejection on  
6 Sekine, the examiner said (reading) the prior art of  
7 record, including Sekine, does not teach or suggest  
8 placing input members movable in at least two axes and  
9 finger-depressible buttons of these claims, which we've  
10 seen, onto a flexible sheet. Sekine didn't disclose the  
11 flexible sheet. The patent examiner believed that at  
12 the time; and so did you, right?

13 A. I don't know what the patent examiner believed.

14 Q. Do you think the patent examiner would have given  
15 you claim 12 in the '525 if you had shown him the inside  
16 of the CyberMan product that you were perfectly aware of  
17 at the time?

18 A. I don't know what the patent examiner would do.

19 Q. Okay. Now, isn't it true, Mr. Armstrong, that you  
20 took the idea from Logitech, you based all these patents  
21 on it, you got \$10 million from Sony, you're trying to  
22 get tons -- 50 million from Nintendo based on patents  
23 that you got by stealing technology from other  
24 companies? Right?

25 A. No, sir.

1 Q. And, in fact, that's the same thing you did in this  
2 case, isn't it? You got Nintendo's products. You  
3 copied them. You convinced the Patent Office to give  
4 you patents; and then you sued Nintendo hoping to make a  
5 ton of money, right?

6 A. No, sir.

7 MR. PRESTA: I'll pass the witness.

8 MR. CAWLEY: Just a couple questions, your  
9 Honor.

10 RE-CROSS-EXAMINATION OF BRAD ARMSTRONG

11 BY MR. CAWLEY:

12 Q. Just to clarify, Mr. Armstrong, was it your  
13 testimony that when you began your career as a patent  
14 prosecutor in 1993, you understood that you were only  
15 required to disclose as prior art printed publications  
16 and patents?

17 A. That was my understanding at the time, yes, sir.

18 Q. But as time went on and you got more experience  
19 with the Patent Office, you learned more, correct?

20 A. Yes, sir.

21 Q. And in the year 2000, didn't you testify that the  
22 reason you did not disclose CyberMan to the Patent  
23 Office was, I think you said, first of all, you weren't  
24 even thinking about it but, second of all, that you had  
25 been told three times by two different examiners that

1 the flexible membrane sheet was inherent and was merely  
2 a design choice? Is that accurate?

3 A. Yes, sir.

4 Q. Now, you mentioned in connection with the Sony  
5 license, where apparently Nintendo's lawyer is  
6 contending that you brought Sony to its knees by putting  
7 one over on them here -- you mentioned the Immersion  
8 issue as being part of your basis for believing that  
9 Sony was well aware of the CyberMan. Could you explain  
10 that?

11 A. Yes, sir. The CyberMan was an absolutely  
12 featured -- probably the central exhibit for the  
13 defense -- I don't know about the technical word for  
14 "exhibit" or not, but I know that Sony relied on it very  
15 heavily.

16 Q. Well, what -- we haven't even heard about this.

17 A. Okay.

18 Q. What is the "Immersion issue"?

19 A. Immersion sued Sony and, I think, Microsoft for a  
20 tactile feedback -- two patents that concerned tactile  
21 feedback that had the motor and offset weight that  
22 was -- I think there were two motors and two offset  
23 weights, the best I can recall, in the claims.

24 Q. So, at the time you were negotiating with Sony,  
25 were they involved in litigation with Immersion?

1 A. Yes, sir, they were.

2 Q. And was CyberMan a critical piece of art involved  
3 in that litigation?

4 A. I believe it was, yes, sir.

5 MR. CAWLEY: Pass the witness, your Honor.

6 THE COURT: All right. You may step down,  
7 sir.

8 Any other witnesses?

9 MR. BLANK: Yes, your Honor. Nintendo calls  
10 Mr. Ed Fiorito.

11 (The oath is administered.)

12 THE COURT: Go ahead, counsel.

13 DIRECT EXAMINATION OF ED FIORITO

14 CALLED ON BEHALF OF THE DEFENDANT

15 BY MR. BLANK:

16 Q. Mr. Fiorito, can you please briefly describe your  
17 educational background?

18 A. Yes. I have a bachelor of science degree in  
19 electrical engineering from Rutgers University and a  
20 Juris Doctorate degree from Georgetown University.

21 Q. And are you a patent attorney?

22 A. Yes, I am.

23 Q. And are you registered to practice before the PTO?

24 A. Yes, sir.

25 Q. Since when?

1 A. 1960.

2 Q. Okay. And can you just give us a brief overview or  
3 description of your experience as a patent attorney?

4 A. Yes. I've prosecuted hundreds of patent  
5 applications and had many, many interviews with  
6 examiners, made many decisions as a patent lawyer  
7 concerning prior art and what to divulge to the United  
8 States Patent Office. I've been the head of patent  
9 departments for Dresser Industries here in Texas  
10 beginning in 1983 and also the head of the patent  
11 department for BFGoodrich and supervised a group of  
12 patent attorneys and set policies concerning the  
13 appropriate prosecution procedures and, in particular,  
14 sending prior art to the Patent Office.

15 Q. Okay. And have you ever served as an expert on  
16 patent law or patent -- PT0 procedure before?

17 A. Yes, many times.

18 Q. Okay. And have you ever served as an expert in  
19 that capacity in any patent cases here in the Eastern  
20 District?

21 A. Yes, many of them.

22 Q. And those were cases before Judge Ward; is that  
23 right?

24 A. Judge Ward, Judge Davis.

25 Q. Okay. Can you see this okay, Mr. Fiorito?

1 A. Yes. That's fine.

2 Q. Okay. What is this?

3 A. This is a list of the four key patents that we have  
4 been discussing here in this proceeding. And I'm not  
5 going to review them specifically. The '828 and the  
6 '891 are two parent applications for the '525. The '525  
7 is where the alleged inequitable conduct took place, and  
8 that inequitable conduct infected the '700 patent which  
9 has the asserted claims in the validity and infringement  
10 trial.

11 Q. Okay. And have you reviewed all four of these  
12 patents as well as their prosecution histories?

13 A. Yes, sir.

14 Q. And that was in connection with your work on this  
15 case?

16 A. Yes, sir.

17 Q. Okay. Now, do the '525 patent claims have an  
18 effective filing date of either the '828 or '891  
19 patents?

20 A. No.

21 Q. Okay. And why is that?

22 A. Because the claims cannot be read on the  
23 specifications of the '828 or the '891.

24 Q. Okay. So, what's the filing date of the '525  
25 patent?



1 A. It's July 5, 1996.

2 Q. Okay. And why is it important in this case that  
3 Mr. Armstrong cannot get back from the '525 patent to  
4 either the '891 or the '828?

5 A. Because that is not a way of eliminating the  
6 CyberMan prior art. He was able to get the '891 claims  
7 back to the effective filing date of March 5th of 1992  
8 and eliminate the CyberMan reference in the '891, but he  
9 is not able to do that -- was not able to do that in the  
10 '525.

11 Q. Okay. And just so we're clear, when we're talking  
12 about the CyberMan -- when you and I are talking about  
13 that today, we're talking about the actual controller;  
14 is that correct?

15 A. Yes, the actual controller that was put on sale in  
16 1993.

17 Q. Okay. And is it your opinion that that product,  
18 the CyberMan product, was a statutory bar to the '525  
19 patent?

20 A. Yes, it was.

21 MR. CAWLEY: Your Honor, just for the record  
22 here -- I don't know if it will make any difference; but  
23 we're now getting into purely legal testimony that, it's  
24 the plaintiff's view, is unnecessary. I know that the  
25 court can hear it if the court feels that it wants to,

1 but we object to testimony on purely legal issues.

2 THE COURT: I guess my thought was -- how  
3 much time do they have left, Debbie?

4 DEPUTY CLERK: They only have about a minute  
5 and four seconds.

6 THE COURT: If you want to waste it on  
7 legalese, go right ahead.

8 MR. BLANK: Okay. That was my only question  
9 on that one. I'll move on. Okay?

10 THE COURT: It's nice of you, Mr. Cawley, to  
11 bring that up to them.

12 MR. CAWLEY: Yes, your Honor.

13 BY MR. BLANK:

14 Q. Okay. Can you briefly -- Mr. Fiorito, briefly  
15 explain what the duty of disclosure an applicant owed to  
16 the PTO during the prosecution of the '525 patent was?

17 THE COURT: Okay. Mr. Blank, I mean --

18 MR. BLANK: You don't need that?

19 THE COURT: I guess what I'm trying to warn  
20 you is if I don't know the law by now, Ms. Chen will  
21 probably give me the brief with the case on it. So, if  
22 there are some facts with this witness, that might be  
23 the better way to use your time. I mean, you're  
24 obviously well prepared. I'm not holding that against  
25 you, but you're running low on time.

1 MR. BLANK: Okay.

2 BY MR. BLANK:

3 Q. Mr. Fiorito, is it your opinion that the CyberMan  
4 controller is prior art to the '525 patent?

5 A. Yes, it is.

6 Q. Okay. And why do you say that?

7 A. Because it was on sale and conformed to the statute  
8 concerning the definition of what prior art is and it  
9 was put into the public domain when it was on sale.

10 Q. And is it your opinion that the CyberMan controller  
11 was material to the patentability of one or more claims  
12 of the '525 patent?

13 A. Yes, it was. It was more material because it  
14 disclosed more of the subject matter of the claims than  
15 any of the other patents, which we have reviewed and  
16 which the court has copies of four of them; and none of  
17 those describe the flexible membrane with the joystick  
18 and the two buttons on it. Only the CyberMan product  
19 had the flexible member with all of the required  
20 elements of claim -- for example, particularly claim 12.

21 DEPUTY CLERK: Time is up.

22 THE COURT: Okay. Well, let me ask you a  
23 question, counsel; and you might -- the witness might be  
24 able to help you on that. Your time is up, but most of  
25 it was taken up by other counsel.

1 I mean, let's assume that you've established  
2 materiality to some degree -- and, of course, the cases  
3 talk about materiality and intent as being on a -- I  
4 guess they talk about them on kind of a sliding scale,  
5 more materiality means less intent is needed, less  
6 materiality means more intent is needed and so forth.

7 So, let's assume that some degree of  
8 materiality has been established. And just to be very  
9 careful, there are also cases that talk about if a piece  
10 of information, prior art, is merely cumulative, then  
11 it's not material at all by definition. But since the  
12 question I'm going to go to is to other items that were  
13 brought in, I'm going to talk about this as being  
14 material enough to be compared to whether it's  
15 cumulative. Do you understand?

16 In other words, I don't want to get caught up  
17 in the idea that if I assume that it's material, then I  
18 already assume it's not cumulative. What I'm saying is  
19 you've established that it's material to the extent it  
20 reads upon or it is something -- I guess a good test  
21 would be if there was nothing else, it is something that  
22 a PTO examiner would want to know about. Let's take  
23 that definition.

24 MR. BLANK: Okay.

25 THE COURT: Assuming there was nothing else.

1           So, how, then, do you get around -- I guess,  
2 one of the first arguments plaintiff is going to bring  
3 up is that given the testimony that Mr. Cawley has  
4 brought out from Mr. Armstrong, it's material  
5 cumulative? In other words, sure, if nothing else had  
6 been in there, that should have been there. But by the  
7 time the Patent Office had said three times that this  
8 flexible sheet is a design, basically nonpatentable,  
9 after they've already given him at least two rejections  
10 based on CyberMan and -- I will grant you that these  
11 other patents -- the Sekine, the Yoshida, the Hoyt, and  
12 the Engle -- may not be quite as clear. But taking them  
13 together, difficult to see how the Patent Office didn't  
14 know or weren't on notice of this.

15           So, how do you get around that?

16           MR. BLANK: Well, I -- the point of novelty  
17 that's clear from the prosecution history that the  
18 examiner suggested to Mr. Armstrong and that  
19 Mr. Armstrong agreed to was not just a flexible membrane  
20 sheet but a flexible membrane sheet used to connect a  
21 multi-axis input member and buttons. The key was  
22 buttons. And that's not shown in any of those four  
23 references that we just went through. It's not shown in  
24 Engle. It's not shown in Sekine. It's not shown in  
25 Hoyt or Yoshida.

1           The statement with respect to Hoyt about  
2 inherency had nothing to do at all with the buttons.  
3 And, so, I would submit, your Honor, that none of  
4 those -- that CyberMan is not at all cumulative of any  
5 of those, either alone or in combination.

6           THE COURT: Well, one of the facts we're  
7 dealing with right now -- and there's a debate going on  
8 up in Congress, and it's a policy decision -- is that  
9 the Patent Office is being too careless about what it  
10 issues. And that remark about, "Gee, two buttons make  
11 it somehow patentable," were someone wanting to pass  
12 legislation to crack down on the PTO, that would be a  
13 pretty obvious one to look at and say, "What do you mean  
14 it's not obvious to add a couple of buttons to this  
15 sheet?" I mean --

16           Now, the law at the time was almost any  
17 little combination, or it seems to be. And that seems  
18 to be one of the policy problems that Congress is  
19 probably now wrestling with and the higher courts may be  
20 wrestling with is almost any little tiny change in  
21 combination makes it patentable. And you see these  
22 remarks like what we saw in this prosecution history  
23 that very minute change -- which is probably why  
24 defendants can bring invalidity claims before a jury.  
25 The barrier they meet, of course, is it's under clear

1 and convincing rather than preponderance of the  
2 evidence. I'll grant you all that.

3           But that policy is set by Congress right now.  
4 I mean, they could change it but the law is there and  
5 the higher courts have said it and the PTO is doing it.  
6 And if they're willing to take these minute differences  
7 as something patentable, can you really say they weren't  
8 aware of what all of that was? I mean, how much more  
9 would they have gotten by having this other piece of --  
10 I mean, say he had brought in a CyberMan or a picture of  
11 a CyberMan. Anything in there an indication that  
12 this -- and I don't want to cast aspersions because that  
13 seems to be what they were doing at the time -- but is  
14 he even paying attention to what he's saying?

15           MR. BLANK: Well, the record is what it is  
16 before the PTO. I mean, I think it's fair to say -- and  
17 Mr. Fiorito is just going to say this. I mean,  
18 Mr. Armstrong --

19           THE COURT: Well, ask him what he's going to  
20 say. I mean, I don't mind -- I'll give you a couple  
21 more questions. If you've got some facts and you want  
22 it through evidence, ask your question.

23           MR. BLANK: No. I was going to answer your  
24 question.

25           THE COURT: All right. Go ahead.

1 MR. BLANK: I think the answer is that none  
2 of those references are those four that are argued --  
3 that Anascape argues are cumulative. None of them are  
4 anticipatory references. And CyberMan, by  
5 Mr. Armstrong's own admission, is.

6 THE COURT: Well, I thought that the PTO  
7 was -- there were several rejections in there by them.  
8 It's not just -- I mean, the PTO a couple of times  
9 rejected him, I think -- what -- once over Sekine, once  
10 over Yoshida and Hoyt. I don't remember what they did  
11 with Engle. But they brought in a couple rejections.  
12 They rejected him at least twice, I think, over CyberMan  
13 on earlier patents.

14 How many times -- I mean, is it required for  
15 the applicant to grab him by the head and rub his nose  
16 in it and say, "See this stuff? I mean, don't you  
17 understand that this is all here? Can't you put it  
18 together?"

19 I'm being a little facetious here, but it  
20 almost -- this case could almost be a poster child of --  
21 to be brought up in terms of should people be allowed to  
22 file something in 1996 and then have continuation  
23 patents years after years because of these add-ons. And  
24 it's one of the things that your client seems very  
25 frustrated with; and I can understand that frustration,



1 believe me.

2           If I was sitting as a policymaker and  
3 legislator, that's something. But I'm sitting now as a  
4 court with the law as it is, and that's allowed by the  
5 law. It was allowed for him to start off with this --  
6 you know, claiming priority back -- if he can do it --  
7 back to 1996 on something that wasn't filed until 2000.

8           MR. BLANK: Right, but --

9           THE COURT: And, then, should he be allowed  
10 to take, you know, advantage of that '525 prosecution  
11 because of a nondisclosure of the flexible membrane, two  
12 buttons, two-axes-of-control item when that really  
13 wasn't what was at issue in this case? Now, it was in  
14 other claims brought in the suit; but I think I disposed  
15 of almost all of those in my claim construction. You've  
16 already got your summary judgment on that.

17           MR. BLANK: Right.

18           THE COURT: So, you're talking about -- and  
19 Mr. Fiorito mentioned it for the first time --  
20 infection. I mean, how far does this infection go?  
21 Everything because they make a -- you have this, okay,  
22 you should have done better on one item. How does that  
23 come in on the '700?

24           MR. BLANK: It comes in like this. Some of  
25 the claims that Mr. Armstrong asserted against us in the

1 '700 patent also included as an element a flexible  
2 membrane sheet when --

3 THE COURT: Which of the ones that were in  
4 trial here?

5 MR. BLANK: The ones that are in trial here  
6 do not contain a flexible membrane sheet.

7 THE COURT: And I guess that's my point. If  
8 I've wiped out everything else -- and I think everyone  
9 pretty much agreed with the claim construction -- in  
10 fact, I think that was a stipulation, that my claim  
11 construction eliminated almost everything. That's up on  
12 appeal and there's still a summary judgement pending and  
13 I can't remember what I've done with that yet.

14 Have I signed that yet?

15 LAW CLERK: It's moot. It was only against  
16 Microsoft.

17 THE COURT: Oh, that's right. It was against  
18 Microsoft; so, that's gone.

19 And keep in mind I'm now trying to sit as a  
20 court of equity and fairness. What I'm struggling with  
21 here, I guess, is that you've got something that --  
22 okay. CyberMan, if you take it under the test, would  
23 someone at the PTO want to see it? Yes. You bet.

24 But then if it's cumulative -- and I'm taking  
25 that as a separate issue; although, I fully understand

1 some courts say if it's cumulative, by definition, it's  
2 not material.

3           But we have a bunch of other information that  
4 the PTO examiners had in there, and you want me to rule  
5 as a matter of fairness that some claims that did not  
6 involve the inequitable conduct should be kept out as a  
7 matter of justice just because -- now, you might have a  
8 real good argument had '525 still been going forward or  
9 these other flexible membrane claims been going forward.  
10 But show me where the fairness is when I'm looking at  
11 '700 other than the technical thing, well, they don't  
12 get to tag along because of this nondisclosure on these  
13 other elements.

14           MR. BLANK: Well, the test under Baxter is  
15 whether or not the '700 patent-in-suit is -- part of the  
16 test is whether or not the '700 patent-in-suit, not just  
17 the claims that are asserted or that are left here for  
18 trial -- whether the claims of that patent are related  
19 to the '525 patent and the claims in that patent. And  
20 they are because the two patents are clearly related.  
21 And I was going to ask Mr. Fiorito about it, but I can  
22 tell you why.

23           There were claims in the '700 patent that  
24 contained a flexible membrane sheet that have dropped  
25 out of the case now, given your construction; and

1 Mr. Fiorito is going to say that's a clear indication as  
2 to why they were related. And the law is that, given  
3 that relationship and given the fact that this is not a  
4 divisional patent application -- that the '700 was not a  
5 divisional, that it's infected.

6           And the law -- you know, I would respectfully  
7 inform the court the law is not that you can just look  
8 at the claims that are asserted or that are left for  
9 trial but you have to look at both of the patents and  
10 all of the claims. And the '700 patent is tainted  
11 because it's related. It has flexible membrane sheets  
12 in it. It's the same specification, the same written  
13 description; and, therefore, it's infected by what  
14 happened during the '525 under Baxter.

15           THE COURT: Well, and maybe my question is --  
16 I mean, I'm aware of what the law is; but in the end,  
17 after I decide -- tell me if this -- I mean, I decide  
18 materiality on the sliding scale and then I decide  
19 intent on the sliding scale and then I think I decide,  
20 as a matter of equity, should I declare, based on all of  
21 that, what to do with it.

22           I mean, if you think that's incorrect, tell  
23 me. But I -- you know, the cases seem to indicate that  
24 that is one of the things I have to look at, is those  
25 sliding scales, and then decide equitably what should I

1 do in the end.

2 MR. BLANK: Yeah. And I think part of that  
3 is that -- and I would submit that the CyberMan is of  
4 the highest level of materiality and the case law is  
5 quite clear that given that level of materiality -- and  
6 Mr. Armstrong has testified that it's an anticipation of  
7 claim 12. You can't get more material than that -- then  
8 intent is presumed and the burden -- given that  
9 presumption, the burden shifts to Anascape to rebut that  
10 presumption of intent; and I don't think there's been  
11 any showing of that in this case. I think, to the  
12 contrary, the testimony is, at best, in conflict over  
13 that; and I think given that high level of materiality  
14 and the lack of showing on intent, that I think that the  
15 equities weigh in our favor.

16 THE COURT: All right. You were kind of cut  
17 off since preceding counsel used up all your time just  
18 about. So, if there are -- I mean, you know some of the  
19 concerns I have; or at least that gives you an  
20 indication of some of the concerns I have. If you think  
21 there are some additional questions, I'll give you until  
22 12:30 and then we're going to break for lunch. If there  
23 are some additional questions to ask this witness. I  
24 would suggest you focus on facts in that I could  
25 probably read any cases you cite to me for the law.

1 MR. BLANK: Does the court think it would be  
2 helpful to hear some testimony from Mr. Fiorito as to  
3 why there is no -- no curing has occurred here?

4 THE COURT: I mean, it's your --

5 MR. BLANK: Okay. I'll take --

6 THE COURT: -- it's your six minutes. I just  
7 gave you a suggestion on what might be more helpful.

8 MR. BLANK: Okay. I'll take a couple minutes  
9 and just ask him for the record.

10 BY MR. BLANK:

11 Q. Mr. Fiorito, can you tell us what "infection" means  
12 in the context of what we've been talking about today?

13 A. Yes. The principle of infection is to reach out to  
14 other applications in which there is no assertion of  
15 inequitable conduct. And it's based upon the  
16 seriousness of this extremely important Patent Office  
17 principle of the duty to disclose.

18 The examiners are -- this is an ex parte type  
19 of proceeding. The examiners rely enormously on prior  
20 art coming in from the applicant.

21 Q. Okay. And is there a -- can one inoculate oneself  
22 against that type of an infection in certain limited  
23 circumstances?

24 A. Yes. The Baxter case has been mentioned, and that  
25 does give a way of inoculating a application that is not

1 supposed to be infected by the inequitable conduct  
2 conducted in another application. And that inoculation  
3 occurs if -- first, if it is a divisional, where the  
4 examiner in a divisional case requires a restriction and  
5 mandates that another application be filed because the  
6 invention is separate and distinct.

7 Of course, there was no requirement of  
8 restriction; and the '700 application is not a  
9 divisional.

10 There is also a requirement that there be a  
11 connection or a relationship between the two  
12 applications. If there is no relationship, then there  
13 is an argument that the other application in which there  
14 has been no inequitable conduct will not go down because  
15 of the inequitable conduct in the related application  
16 where the relationship is not significant.

17 Q. Okay.

18 A. Here, as you've already explained and the court has  
19 heard, there is an enormous relationship between the  
20 '700 and the '525.

21 Q. And can you just elaborate on that --

22 A. Yes.

23 Q. -- briefly?

24 A. They are the same specifications, the same  
25 drawings. We've heard lots of testimony about the

1 changes which are -- were done for particular reasons;  
2 but, fundamentally, the application is the same  
3 drawings.

4           The claims in the '700 have recitations of  
5 the flexible member, the very point that is being argued  
6 in this inequitable conduct proceeding.

7           This is not a case of a door handle on a car  
8 in one application and a carburetor in the other  
9 application. These applications are related.

10 Q.     And you're aware that during the '700 prosecution,  
11 Mr. Armstrong did disclose photos of the inner workings  
12 of the CyberMan controller; is that right?

13 A.     Yes. And that was, of course, what was absolutely  
14 needed in order to stop the issuance of the '525  
15 patents. He needed to know there was a flexible member  
16 inside and under the covers.

17 Q.     Okay.

18           THE COURT: Well, let me ask you a question  
19 there. Why didn't it stop the issuance of the '700?

20           THE WITNESS: Because the claims had other  
21 limitations, your Honor, that CyberMan could not meet  
22 and it was --

23           THE COURT: Such as? I'm not talking about  
24 all the claims. I mean, obviously, you're going to have  
25 to focus on the claims that are tied into flexible



1 membranes, as counsel just said. If the Patent Office  
2 was going to go ahead and reject '525 on this startling  
3 new revelation, why didn't they reject '700 on that same  
4 startling new revelation?

5 THE WITNESS: Well, Mr. Armstrong, of course,  
6 drafted the claims so that it would avoid the teaching  
7 in the '700 application. He knew he had to do that, and  
8 that was his purpose.

9 There are structural limitations. I don't  
10 know which one to pick, but I just opened up to  
11 claim 12, for example, of the '700 application.

12 THE COURT: Well, claim 12 wasn't one of the  
13 ones that was eliminated. What about claims 1 through  
14 11, 21, 26, 29, and 31 which, evidently, my definition  
15 of flexible membrane sheet dropped out of this case  
16 completely? So, all of those seem to have elements of  
17 flexible membrane sheet; and for some reason, with this  
18 revelation, those didn't get dropped out by the Patent  
19 Office.

20 THE WITNESS: No. They could not be rejected  
21 by the Patent Office because of the other significant  
22 limitations that are in the claims that were not shown  
23 and disclosed in CyberMan. It was eliminated through  
24 distinction and recitation of limitations that are not  
25 disclosed by CyberMan or by combinations of CyberMan

1 with other prior art.

2 BY MR. BLANK:

3 Q. Mr. Fiorito, can Mr. Armstrong's disclosure of --  
4 more detailed disclosure of CyberMan during the '700  
5 prosecution cure the conduct in the '525 patent?

6 A. No, sir, because the '525 patent had already issued  
7 and the examiner lost his opportunity to use the  
8 CyberMan disclosure -- complete disclosure.

9 MR. BLANK: I'll pass the witness.

10 THE COURT: Do you have any questions?

11 MR. CAWLEY: Good afternoon, Mr. Fiorito.

12 I'd just like to say that I've been sitting and counting  
13 and I think that in at least five previous cases I have  
14 prepared to cross-examine you and, for some reason, it's  
15 never happened and I'm not going to break the string  
16 today. So, I have no questions of this witness, your  
17 Honor.

18 THE COURT: All right. Thank you, sir. You  
19 may step down.

20 The jury is still out, right?

21 DEPUTY CLERK: Yes, sir.

22 THE COURT: What I'm planning to do is we're  
23 going to break for lunch and I do need one attorney from  
24 each side to be around. Since they're still  
25 deliberating, they may come back with a note. I mean,

1 their note may be they want to break for lunch -- or  
2 they may have brought food with them. I'm not sure  
3 what's going on in there, but I need somebody around so  
4 we can handle any question that comes up.

5 We'll go ahead and be in recess until quarter  
6 past 1:00.

7 (Recess, 12:29 p.m. to 2:45 p.m.)

8 (Open court, all parties present, jury not  
9 present.)

10 THE COURT: All right. We have another note  
11 from the jury: We cannot reach a unanimous vote. We  
12 have jurors on both total ends of request. No middle  
13 ground.

14 I would think, given the amount of time that  
15 has been -- and expense of this trial, the proper thing  
16 to do would be to present them with a modified Allen  
17 charge, as it's known. Although generally that comes up  
18 in criminal cases, I can see no authority for the  
19 proposition that I can't do that in a civil case and  
20 remind them of their responsibilities. There is  
21 basically a pattern that comes out of the Fifth Circuit  
22 that would be the one I would propose, obviously not  
23 talking about guilt and reasonable doubt but talking  
24 about proof of an issue.

25 Any comments from plaintiff?

1 MR. CAWLEY: We would request that you do  
2 that, your Honor.

3 THE COURT: From defendant?

4 MR. GUNTHER: Your Honor, we would object to  
5 an instruction.

6 THE COURT: Okay. On what basis?

7 MR. GUNTHER: On the basis that, as I  
8 understood the note as read by the court, it sounds  
9 like -- and I'm specifically focusing, your Honor -- and  
10 you can tell me if I misstate this -- on "no middle  
11 ground." I think at that point the jury has informed  
12 the court that they have an insoluble deadlock, and we  
13 don't think a modified Allen charge would be  
14 appropriate.

15 THE COURT: Well, I could also note for the  
16 record that I've had that happen at least twice; and  
17 within -- in fact, in one case, before I even could get  
18 them in for the instruction, they wound up coming up  
19 with a verdict. In another case, they decided. And I  
20 can remember the third time when they asked for some  
21 specific evidence; and by the time we got everybody  
22 agreed on what it was going to be, they said, "Oh, we've  
23 already found it. Don't bother. We've made our  
24 decision."

25 So, I can't take from just a note that there

1 is no possibility that people in good faith cannot  
2 agree.

3 Bring in the jury, please.

4 I was just reading a Fed Circuit opinion  
5 about a jury that took a week. It reminded me not to  
6 cancel my hotel room so quickly.

7 (The jury enters the courtroom, 2:50 p.m.)

8 THE COURT: All right. Ladies and gentlemen,  
9 I have received your note and it is now about five of  
10 3:00 and you have been deliberating a good long time.  
11 But I'm going to ask you to continue deliberations in an  
12 effort to agree upon a verdict and dispose of this case,  
13 and I have a few additional comments I would like for  
14 you to consider as you do so.

15 Now, this is an important case; and the trial  
16 has been expensive in time, effort, and money to both  
17 the plaintiff and the defendant. Now, if you should  
18 fail to agree on a verdict, the case is left open and  
19 must be tried again. And, obviously, another trial will  
20 only serve to increase the cost to both sides; and there  
21 is no reason to believe that it could be tried again by  
22 either side better or more exhaustively than it has been  
23 tried before you.

24 Now, any future jury must be selected in the  
25 same manner and from the same source as you were chosen;

1 and there's no reason to believe that the case could  
2 ever be submitted to men and women more conscientious,  
3 more impartial, or more competent to decide it or that  
4 more or clearer evidence could be produced.

5 I'll ask that those of you who believe that  
6 an issue has been proven should stop and ask yourselves  
7 if the evidence is really convincing enough, given that  
8 other members of the jury are not convinced. And those  
9 of you who believe that an issue has not been proven  
10 should stop and ask yourself if the evidence is  
11 sufficient, given that other members of the jury believe  
12 that it is.

13 Now, remember at all times no juror is  
14 expected to yield a conscientious opinion he or she may  
15 have as to the weight of the evidence; but remember,  
16 also, that after full deliberation and consideration of  
17 the evidence in the case, it's your duty to agree on a  
18 verdict, if you can do so, without surrendering your  
19 conscientious opinion.

20 Now, you can be as leisurely in your  
21 deliberations as the occasion may require. Take all the  
22 time you feel is necessary, and I would ask you to  
23 consider spending at least the next couple of hours  
24 looking at it. You can take as long as you want,  
25 obviously; but I would ask you to make one more effort

1 to consider this among yourselves.

2 So, at this time I'm going to ask that you go  
3 back to the jury room once again and continue your  
4 deliberations, keeping in mind these additional comments  
5 and, of course, in conjunction with all of the other  
6 instructions I have given you.

7 You can retire at this time.

8 (The jury exits the courtroom, 2:53 p.m.)

9 THE COURT: Understanding, of course, that  
10 you've objected to giving any charge at all, any  
11 specific objection to the precise wording of the charge  
12 I gave or a request for additional instruction from  
13 plaintiff -- well, plaintiff didn't object.

14 MR. CAWLEY: We didn't; and we have no  
15 objection to the charge that you gave, your Honor.

16 THE COURT: Okay. From defendant?

17 MR. GUNTHER: To the charge as given --  
18 preserving my other objection, but to the charge as  
19 given, your Honor, the wording, I don't have an  
20 objection to.

21 THE COURT: All right. We will go back into  
22 recess until we receive another note from the jury.

23 (Recess, 2:54 p.m. to 3:19 p.m.)

24 (Open court, all parties present, jury not  
25 present.)

1 THE COURT: Okay. Based on the response from  
2 Mr. Garza, I gather there's been no further work on  
3 trying to agree to timelines or stipulations or anything  
4 else. Or maybe he was on the wrong team and someone  
5 else was dealing with all of that. Do we have any  
6 further agreement?

7 MR. BOVENKAMP: No, your Honor, not at this  
8 time.

9 THE COURT: Okay. All right. The  
10 presentation has been made to me, to the bench, on the  
11 issue of inequitable conduct; and the case of Baxter  
12 International, Inc., versus McGaw, Inc., 149 F.3d 1321,  
13 at page 1327, sets out a summary of the law involved and  
14 the factors the court should take into consideration.  
15 Inequitable conduct includes affirmative  
16 misrepresentations of a material fact, which doesn't  
17 seem to be an issue here; failure to disclose material  
18 information -- that seems to be the claim in issue  
19 here -- or submission of false material information.  
20 That doesn't seem -- I haven't seen any evidence on  
21 that.

22 So, we're looking at the failure to disclose  
23 material information as the allegation. And then the  
24 court says that must be coupled with an intent to  
25 deceive.



1           Now, this involves a two-step analysis. I  
2 have to determine, first, whether the withheld reference  
3 meets a threshold level of materiality and then  
4 determine whether there is a threshold level of intent  
5 to mislead the PTO. I think I referred to this either  
6 as kind of a dual sliding scale. Once those thresholds  
7 have been met, then I have to weigh the materiality and  
8 the intent. The more material in the omission, the less  
9 evidence of intent that may be required.

10           And then, finally, in light of all the  
11 circumstances, I have to determine whether the  
12 applicant's conduct is so culpable that the patent  
13 should be held unenforceable.

14           Now, that same court also stated at the same  
15 page, 1327, a reference is deemed material if there is a  
16 substantial likelihood that a reasonable examiner would  
17 consider it important in deciding whether to allow the  
18 application to issue as a patent. There's actually  
19 been, I think, over time, four different tests that have  
20 been used; but I believe that is the one that is most  
21 used most recently, looking at it from the point of view  
22 of a reasonable examiner. And, clearly, we do not look  
23 at it from the point of view of the applicant. It's not  
24 the applicant's personal point of view of whether it's  
25 material or not when we decide materiality.

1           And the court also notes that there is not a  
2 need to cite an otherwise material reference to the PT0  
3 if that reference is merely cumulative or is less  
4 material than other references already before the  
5 examiner. I indicated earlier that there are also cases  
6 that define materiality -- or material references  
7 excluding cumulative references. That gets a little bit  
8 confusing because if, by definition, something that is  
9 material is not cumulative, then you can't really  
10 analyze is it material -- was it important -- or would  
11 it have been important to a reasonable examiner but  
12 simply cumulative. It can be circular in that regard,  
13 but I'll try to make that very clear when I'm looking at  
14 that.

15           So, in this particular case the parties have  
16 each provided a timeline. And in terms of findings of  
17 fact, the court finds that sometime in 1993 Armstrong --  
18 Mr. Armstrong saw the CyberMan product. And -- I'm  
19 sorry. Prior to that, on March 5th, 1992, the  
20 application which resulted in the '828 patent was filed.  
21 Then sometime in 1993, perhaps at a trade show,  
22 Mr. Armstrong saw the CyberMan product that -- sometime  
23 in 1994 he took it apart and saw what was inside the  
24 product. And on June 3rd of 1994, he disclosed the  
25 CyberMan product to the PT0 in the '828 prosecution --

1 the prosecution which resulted in the '828 patent;  
2 although, what he submitted, evidently, was just the  
3 brochures and not the photographs or the device itself  
4 that showed up later on.

5           Then on February 23rd, 1995, the '891 patent  
6 was filed; and on July 5th of 1995, in the first Office  
7 Action of the '891 patent, the claims were rejected as  
8 obvious over CyberMan, indicating that the Patent Office  
9 does, in fact, go back and check prior disclosures, as  
10 it is supposed to do.

11           Then -- and this is the patent that seems to  
12 be in issue. I did not hear defendants urge that there  
13 was inequitable conduct in the prosecution of the '828  
14 or the '891 patents. But now we have, on July 5th of  
15 1996, what we've heard called the "warehouse patent"  
16 filed, out of which came -- I'm sorry -- the "warehouse  
17 application" filed, out of which came the '525 patent.  
18 And in this application there were claims to a flexible  
19 membrane sheet and also references to the two-axis  
20 controller and the buttons attached to the sheet.

21           And on October 15th of 1996, the '891 patent  
22 issued; and CyberMan was actually cited on its face as  
23 one of the references, again indicating that the PT0 was  
24 at least aware of the brochure or the written literature  
25 dealing with it.

1           Then on December 31, 1996, the '828 patent  
2 issued.

3           The prosecution of the '525 patent continues;  
4 and before it is finally issued, the application for the  
5 '700 patent is issued. And that's on November 16 of  
6 2000. So, that's where there is some overlap.

7           Now, during the prosecution of the '525  
8 patent, there were rejections over various other prior  
9 art references and certain of those rejections referred  
10 to the flexible membrane member being inherent or being  
11 a design choice. And, of course, plaintiff argues that  
12 that would indicate that the reference is not material.  
13 But in the final analysis, it is difficult to see how  
14 the inside of the CyberMan device, that flexible  
15 membrane with the sensors and the buttons set up the way  
16 they are, would not be considered material, at least to  
17 some degree. Again, we're still on a sliding scale; but  
18 let me start off with the court finds that that would be  
19 material under almost any of the tests and especially  
20 the test that a reasonable examiner would consider it  
21 important and want to see it there.

22           Now, there then comes up the other question  
23 in: Is it merely cumulative, or how material is it in  
24 this sliding scale? Now, it seems quite clear that the  
25 patent examiners were aware of flexible membranes,

1 flexible membranes with buttons, flexible membranes for  
2 multi axis sensors, circuit boards with buttons, circuit  
3 boards with sensors, flexible membranes on keyboards,  
4 circuit boards with keyboards; and, in fact, at one  
5 point they're even talking about it in terms of being a  
6 design choice or inherent. And one might wonder why --  
7 or under a different system, whether slight  
8 differences -- I mean, this would be at the policy level  
9 of Congress and perhaps the higher courts -- whether a  
10 PTO should be allowing such patents with such slight  
11 differences at all. But that's really not the issue  
12 here. As a policy matter, we do allow different  
13 combinations to be patented.

14           But, nevertheless, even with all of that --  
15 and I think defendants pointed out that the CyberMan  
16 product itself does contain the elements of some of the  
17 claims of the '525 patent. Whether it would have  
18 resulted in a complete rejection of the '525 patent,  
19 thus resulting in a loss of the '700, not clear. These  
20 things went on for years. There were rejections of  
21 other claims, rejections of this, rejections of that,  
22 changes, amendments, and so on and so forth. But there  
23 is at least some degree of materiality there that goes  
24 forward.

25           Now, the other debate that we have here, of

1 course, is the Baxter test for -- since we're dealing  
2 with two different patents. There are cases where if  
3 the patent in question has been -- its claims have been  
4 separated by a divisional application, then what was  
5 called by the Baxter court the "infection of the  
6 underlying patent" doesn't transfer forward to the next  
7 one.

8           In this case an argument, I think, can be  
9 made that because the claims at issue here are not  
10 dependent on or directly related, necessarily, to the  
11 precise claims that would have been invalidated by the  
12 CyberMan product -- and I think that's indicated by the  
13 fact that defendant didn't even try to list or -- they  
14 did not bring forth CyberMan as invalidating prior art  
15 in this case, which is a pretty strong indication that  
16 they, themselves, didn't think it applied to these  
17 particular claims. But, nevertheless, that's not really  
18 the test under Baxter. It's a little more strict than  
19 that; and that is, if the underlying patent is infected,  
20 then the patent going forward is also infected.

21           I think it's -- well -- so, I don't think  
22 that the Baxter divisional application or  
23 divisional-type cure or defense fits in here.

24           And then we have the cure for inequitable  
25 conduct. And here I can compare the Rohm and Haas

1 Company versus Crystal Chemical Company, at 722 F.2d  
2 1556, Fed Circuit 1983, with the Young versus Lumenis,  
3 Inc., case, 492 F.3d 1336, Fed Circuit 2007.

4           And then the question is: Can there be a  
5 cure? Now, the Fed Circuit does indicate that there is  
6 a difference between false affidavits -- and in the Rohm  
7 and Haas Company there were six affidavits and an actual  
8 hiding of false tests and test results and a -- pretty  
9 strong evidence of a pretty deliberate attempt to  
10 mislead the PTO examiner and then an attempt to cure by  
11 saying, "Well, we put in a couple of truckloads of  
12 information; and the PTO examiner was an expert. So, he  
13 should have been able to find it and see it." And the  
14 court rejected that.

15           The more recent Lumenis case -- in fact, let  
16 me back up to the Rohm and Haas case. The applicant in  
17 such a situation to cure that material misrepresentation  
18 would, one, have to expressly advise the PTO of the  
19 existence of the misrepresentation, stating wherein it  
20 resides; and, two, if the misrepresentation is of one or  
21 more facts, the PTO is to be advised what the actual  
22 facts are; and then, three, on the basis of new and  
23 factually accurate record, the applicant must establish  
24 the patentability of the claimed subject matter.

25           But in the Lumenis case, where what was

1 involved here was the omission of a material matter as  
2 opposed to the affirmative presentation of false  
3 information, the court indicated that the test was not  
4 as rigorous. And I think that makes sense in light of  
5 the fact there is a difference between an omission and a  
6 material -- or, I mean, affirmative misrepresentation.  
7 Although, both of them can be inequitable conduct.  
8 There is a difference in the fact pattern of Rohm and  
9 Haas compared with the fact pattern in the Lumenis,  
10 Inc., case.

11           It would seem that if we were just dealing,  
12 for example, with the '700 patent -- let's say we were  
13 just looking at its original filing date and going  
14 forward. The submission by Mr. Armstrong, which was  
15 fairly complete -- we had that in evidence, where he  
16 sent in, if I recall, photographs of the membrane,  
17 described the membrane. He even offered then to provide  
18 an actual sample of the CyberMan device with a  
19 screwdriver -- would probably have cured a problem with  
20 failure to initially disclose on that particular patent.

21           The problem we deal with here, though, is  
22 that the initial failure to disclose dealt with the '525  
23 patent which had already issued. And given that we have  
24 this theory of infection coming out of Baxter, if the  
25 '525 is fatally infected and the '700 -- the prior



1 validity date of the '700 relies upon that, then the  
2 fact that the '700 patent -- or problems in the '700  
3 patent were cured during the prosecution of the '700  
4 patent doesn't really help because that's not the issue.  
5 The issue is what do we do with that '500 [sic].

6           So, then I think it becomes very important to  
7 look at the rest of the analysis set out by Baxter and  
8 many other cases. It's not just Baxter that talks about  
9 the sliding scale of material -- I'm sorry -- yes,  
10 materiality and intent to deceive. And, so, then I have  
11 to take a look at the intent to deceive.

12           We have here a layperson, although one who  
13 has educated himself in some detail. I don't think  
14 there could be much question that by 1994, he was  
15 familiar with the CyberMan product and had taken it  
16 apart.

17           But as the Baxter case itself points out --  
18 and other cases, also -- intent to deceive is -- there's  
19 hardly ever evidence of a confession. I mean, if an  
20 applicant comes in and confesses that, "Yes, I intended  
21 to deceive," that usually doesn't reach a court. It's  
22 going to have to be inferred from circumstantial  
23 evidence. But the Baxter court points out, at page  
24 1329: Mere gross negligence is insufficient to justify  
25 an inference of an intent to deceive the PT0. In a case

1 involving an omission to a material reference to the  
2 PT0, there must be clear and convincing evidence that  
3 the applicant made a deliberate decision to withhold a  
4 known material reference. So, the whole spectrum of  
5 cases where there are affirmative misrepresentations,  
6 such as the Rohm and Haas case where there were, I  
7 think, six false affidavits and a deliberate -- there  
8 was actually, I think, an email or a letter  
9 indicating -- well, in the Eighties it was a letter; it  
10 wasn't an email -- a deliberate decision to withhold  
11 tests where in one set of tests the herbicide seemed to  
12 work very well and in another set of tests it worked  
13 very poorly and there was a deliberate decision to keep  
14 out the poor test, to just put forward the good test,  
15 and then later a deliberate decision to hide the bad  
16 test in a mass of documents and then just say the PT0  
17 should find it. The court said one could infer -- and I  
18 don't think I have any problem with that idea. One  
19 could clearly infer a real intent to deceive there, and  
20 I think any fraud case or fraud theory in the world --  
21 wouldn't have to be just inequitable conduct -- would go  
22 with that.

23           But in this case we've got an omission of a  
24 material reference. There must be clear and convincing  
25 evidence. The evidence I have is that he knew about it,

1 but all he did was provide the written brochure and  
2 literature about it at the time of the '525.

3           So, then the question is: Well, is that  
4 clear and convincing evidence of intent to deceive? On  
5 his side of the ledger, we have the fact that he was  
6 already getting rejections in that period of time on the  
7 other patent -- yes. Before he filed the '525 patent  
8 July 5, 1996 -- in fact, almost one year earlier, if  
9 this timeline is correct, July 5, 1995, the -- all  
10 claims of the '891 patent were rejected as obvious over  
11 the CyberMan brochure. So, he has already had an  
12 indication that there are rejections; the Patent Office  
13 is aware of CyberMan, has taken it seriously, and is  
14 rejecting things -- or rejecting claims based on  
15 CyberMan.

16           He also gets, during this period of time and,  
17 I believe, in the '525, the rejections and indications a  
18 couple of times that this flexible membrane is an  
19 obvious design choice. So, those are factors that would  
20 weigh against a finding of clear and convincing evidence  
21 of a deliberate decision to withhold a known material  
22 reference as stated in the Baxter case and also  
23 referenced earlier in the Molins, M-O-L-I-N-S, case, 48  
24 F.3d at 1181.

25           On the other side, if you take a look at the

1 '525 patent itself, or its application -- I don't have  
2 it right here in front of me; but I think most of those  
3 claims, if not all of them, refer to features that  
4 would -- or for which the CyberMan device or product  
5 would have been material. I mean, you have that  
6 flexible membrane; you have the buttons; and you have  
7 the two-way or two-axis controller.

8           So, weighing those, the question comes down:  
9 Is there that clear and convincing evidence of  
10 deliberate decision to withhold known material  
11 reference?

12           It would be kind of risky for someone who was  
13 trying to deceive the Patent Office, having read that  
14 book as defense counsel pointed out, to kind of tease  
15 them with a little bit of information about it, know  
16 that they're reading it when they reject his prior  
17 patent, or claims in his prior patent, and then not  
18 properly disclose it later on. Typically when someone  
19 is trying to deceive or hide something, they'd hide it  
20 altogether.

21           And, I mean, I do find the testimony -- and I  
22 had a chance to observe him and watch him -- the  
23 testimony of Mr. Armstrong credible on the idea of not  
24 realizing that he had to give them the inside guts of  
25 that thing or pictures of that thing at that time,

1 especially in light of the prior rejections based on the  
2 CyberMan literature. The discussions that were going on  
3 at the time of flexible membranes being merely a design  
4 choice, the rejections based on the other references,  
5 the other three patents that were being discussed at the  
6 time -- so, it is difficult to see that that is -- on  
7 balance that there is, in fact, that clear and  
8 convincing evidence.

9           Now, defendant also tried to raise the  
10 inference, I guess under a 404(b) type analysis, that,  
11 "Well, you were trying to rip off Sony." It didn't come  
12 out too much at trial but, I mean, I read that contract  
13 myself and, yes, there was a reference in there that the  
14 sale of the '606 patent -- but there were some other  
15 paragraphs in there that I don't think were discussed  
16 much with the jury at all that talked about no one  
17 gets -- I don't have it in front of me, but it's along  
18 the lines of "You don't get paid unless we get all of  
19 your patent rights, and all of your patent rights don't  
20 get turned over until we get paid."

21           It was quite clear, regardless of how it was  
22 divided up for whatever purposes, that all of his patent  
23 rights and applications and everything else were being  
24 turned over for that \$10 million. And, in fact, I  
25 believe it was -- in fact, it would be worthwhile --

1 could someone hand me a copy of that agreement? I want  
2 to quote what I'm talking about.

3 MR. GUNTHER: Your Honor, we'll see if we can  
4 get it. I do know it's Plaintiff's Exhibit 54.

5 THE COURT: Well, in that case I can pull it  
6 up.

7 MR. GUNTHER: We got a little carried away in  
8 putting stuff away, judge.

9 THE COURT: I've got it up here.

10 Okay. Looking at Plaintiff's Exhibit 54,  
11 paragraph 2.2, which there was a lot of discussion  
12 about, talks about it being the exclusive license being  
13 transferred to Sony of all rights held in the '606  
14 patent. This transfers a capital asset by each of the  
15 Anascape parties in accordance with the United States  
16 Code, Title 26, Section 1235. That was the tax  
17 reference everyone was talking about.

18 The payment section, though, talks about  
19 \$10 million. (Reading) Receipt of all substantial  
20 rights in the Anascape patent described in paragraph 2.2  
21 above -- that's the '606 patent. But then it talks  
22 about (reading) all of the rights and releases provided  
23 in Section 2 -- which means all the other intellectual  
24 property -- are conditioned on Anascape party's timely  
25 receipt of this sum.

1           And I didn't hear that being discussed much  
2 in front of the jury.

3           I don't think we can be naive, whether  
4 lawyers bring it up to the court or not. I'm very, very  
5 familiar with working out contracts among parties and  
6 the various provisions. And the idea that that  
7 \$10 million was just for one patent, I think, is not an  
8 embarrassing argument to be made, given the language;  
9 and certainly a good lawyer would make it. But I think  
10 lawyers with sophistication in the world of contracts  
11 and agreements and so forth would understand that that  
12 money wasn't going to get paid without everything being  
13 turned over.

14           And, so, the idea that somehow they were --  
15 he was ripping off Sony, especially if Sony was involved  
16 in litigation with other people and that was just an  
17 indication that he knew his patent was fraudulent and he  
18 was ripping them off -- that, I thought, weighed very,  
19 very little or nothing in the balance that I make here.  
20 It's, I mean, not a bad argument maybe to make in front  
21 of a jury; but I find that that is little or no weight.  
22 Given everything that was going on there at the time and  
23 all of the wording of that contract and given the  
24 obvious sophistication of Sony, the idea that  
25 Mr. Armstrong was taking advantage of them and their

1 herds of attorneys, it just isn't reality. That just  
2 isn't.

3           There was also such cases as the Eagles Tool  
4 Warehouse, Inc., versus Fisher Tooling, 439 F.3d 1335,  
5 Fed Circuit 2006. (Reading) A failure to disclose a  
6 prior art device to a PTO where the only evidence of  
7 intent is a lack of a good faith explanation for the  
8 nondisclosure cannot constitute clear and convincing  
9 evidence to support a determination of culpable intent.

10           Here we could have some evidence on the part  
11 of Mr. Armstrong as to what he was thinking and what he  
12 was doing, and I do not find that incredible.

13           So, balancing out the materiality, which I  
14 think there is some there -- and I don't find it -- I  
15 can't see any analysis that it was cured by the later  
16 disclosure, and I don't see how it was eliminated by  
17 some theory of it being cumulative. But at the same  
18 time, I don't think I would call it, as in some cases,  
19 "highly material" or so material that it in and of  
20 itself gives rise to an inference of intent to deceive.  
21 I mean, it -- but it's obviously something a patent  
22 examiner would want to see.

23           Balancing that against the lack of clear and  
24 convincing evidence of intent to deceive, based on the  
25 cases I've cited and the facts I've cited, I don't think



1 there is that threshold level of intent to mislead. And  
2 even if -- I'll assume for purposes of argument, to take  
3 the analysis one step further, because I think the  
4 higher court would want to see that. Even if they are  
5 approaching it with two thresholds or are approaching  
6 close to each other, that there is a sufficient weight  
7 of materiality and sufficient weight of intent, I then  
8 still have to determine whether the applicant's conduct  
9 is so culpable that the patent -- and it's this  
10 patent -- must be held unenforceable as a matter of  
11 equity.

12           Now, if we were dealing with the '525 patent  
13 itself or the claims dealing with these particular kinds  
14 of flexible membranes, I don't know. That might be  
15 something different. But here, we're talking about the  
16 '700 patent, which was issued after a time he had made a  
17 full and complete disclosure. Again, that doesn't save  
18 the '525 patent; but now we're talking about principles  
19 of equity and overall fairness.

20           Looking first at just -- well, looking at it  
21 from that point of view, it would seem that it would not  
22 be equitable, or the equity would not demand that the  
23 '700 patent -- these claims of the '700 patent be  
24 declared invalid.

25           Looking just at the '525, which I suspect may

1 be, under the cases I've cited, the proper reference, as  
2 a matter of fairness, do I go ahead and declare the  
3 '525, even assuming, for example, that another court or  
4 I were to say that the level of intent was higher than I  
5 found it to be -- I'll assume the scale should be moved  
6 up some. In all fairness, do I go ahead, then, and  
7 cancel the '525 under these circumstances:

8           Given, one, this is not a lawyer -- which, of  
9 course, that in and of itself is no excuse. He could  
10 have had a lawyer;

11           Given that he did go ahead and cite the  
12 CyberMan in the earlier cases, the earlier patent  
13 applications, and knew, like they were supposed to, the  
14 Patent Office was looking back at them;

15           And then given the other indications he was  
16 getting dealing with the flexible membranes, the fact  
17 that it was inherent and so forth and the passage of  
18 time. As he explained, it had been -- well, it was  
19 probably two years -- right, about two years when he had  
20 actually filed the '525.

21           And we've certainly heard evidence that he  
22 had taken apart a lot of these devices and a lot of  
23 people's devices. I mean, there were points there it  
24 sounded like it would be dangerous to have him in your  
25 home and get ahold of your remote. He'd probably be

1 taking it apart on your couch.

2           And, again, I had a chance to watch him. I  
3 don't think he was -- I find that he was credible when  
4 he talks about that being a long time back. And I  
5 especially don't find him so incredible that there is  
6 clear and convincing evidence of -- that he made a  
7 deliberate decision to withhold that known material  
8 reference. I'd be more likely to find that he wouldn't  
9 have known that that was a deliberate decision to make  
10 based on what he knew at the time.

11           And the fact that he became educated over  
12 time -- and especially with his dealings with Sony --  
13 and, therefore, did start providing far more is  
14 credible, also. I certainly, over the course of my  
15 legal career, changed how I did things as I learned more  
16 from older and more experienced lawyers.

17           And that, of course, brings up one of the  
18 problems we get into in this whole area -- I'll just  
19 throw this in as an aside. And that is that, as he  
20 pointed out, he put in hundreds of references in the  
21 '700 patent. That was almost the sin of the parties in  
22 the Rohm and Haas Company case. They put in so much it  
23 would have been hard to find something. And there's  
24 actually been -- in 71 Fed Register 38, July 10 of 2006,  
25 changes to Information Disclosure Statement requirements

1 talking about "Don't give us everything." Now, I will  
2 grant that the CyberMan was not everything; and it would  
3 have been better to have been in there.

4 But in the final analysis, I don't find the  
5 necessary level of intent. And given -- even if I was  
6 to take the intent scale up a little higher, I don't  
7 find as a matter of equity that the '525 on that should  
8 be declared invalid, thus declaring these claims of the  
9 '700 patent invalid. And, so, therefore, I am going to  
10 grant judgment to plaintiff on the question of  
11 inequitable conduct.

12 Any further either findings of fact or  
13 conclusions of law that plaintiff believes I should  
14 address to preserve record from your point of view?

15 MR. CAWLEY: I don't think so, your Honor.

16 THE COURT: From defendant's point of view?  
17 Anything I've missed that you want a finding on to  
18 preserve your record?

19 MR. GUNTHER: No, your Honor.

20 THE COURT: Okay. Do we have a note from the  
21 jury?

22 COURT SECURITY OFFICER: Yes, sir.

23 THE COURT: Okay. The question is: If we  
24 vote "no" to Question Number 1A, does Nintendo and  
25 Inventor Akio Ikeda keep and have rights to Wii

1 controller?

2 MR. GUNTHER: Your Honor, could you read that  
3 again?

4 THE COURT: If we vote "no" to Question  
5 Number 1A, does Nintendo and Inventor Akio Ikeda keep  
6 and have rights to Wii controller?

7 Well, in State court the answer would be, "I  
8 can't help you." But in Federal court I think you are  
9 allowed to inform a jury of the effect of their  
10 decision, but it's not just a simple "yes" or "no"  
11 answer because they keep and have rights regardless.

12 MR. CAWLEY: That's right, judge. I mean,  
13 unless we're going to try and rewrite the jury charge, I  
14 suggest that you remind the jury to follow your  
15 instructions. I mean --

16 THE COURT: It would be a long answer because  
17 it's not just a "yes" or "no" or --

18 MR. CAWLEY: It would. I mean, just that  
19 inquiry "to keep rights," I mean, that's pretty well a  
20 tutorial on what's going on here.

21 THE COURT: Let me hear from defendant. What  
22 are your thoughts?

23 MR. GUNTHER: Your Honor, here's my thought.  
24 Here's what I would suggest. The question is an  
25 infringement question. And to the extent that there is

1 confusion about that, I believe the court can clear up  
2 that confusion without any prejudice to either side by  
3 giving the following statement in answer to the  
4 question: You would be determining -- by answering "no"  
5 to Question 1A, you would be determining that Nintendo's  
6 Wii Remote plus Wii Nunchuk does not infringe the  
7 asserted claims of the '700 patent.

8 MR. CAWLEY: Well, if that's going to be  
9 given, your Honor, we would also want an instruction,  
10 which is similar to what the court has already  
11 instructed, which is that Nintendo and Mr. Ikeda's  
12 rights are not being adjudicated in this case.

13 THE COURT: I mean, the question here is not  
14 whether they have rights in it or not. The question is  
15 is whether they have to pay Mr. Armstrong some sum for  
16 their use. That is so clear to all of us.

17 MR. CAWLEY: We would be fine with an  
18 instruction that says that, your Honor.

19 MR. GUNTHER: Your Honor, I think Mr. Cawley  
20 may have -- actually by bringing up the other issue, is  
21 that we do start into the issue of sort of rephrasing  
22 several jury instructions to the jury. And maybe the  
23 better thing is to just tell them, you know, "Look at  
24 the evidence and read the instructions."

25 THE COURT: Tell me again, Mr. Gunther, what

1 your suggestion was.

2 MR. GUNTHER: Well, your Honor, I had sort of  
3 two suggestions. The first one was to instruct them  
4 that -- they've asked a specific question about a  
5 specific answer on the verdict form and their question  
6 is what's the effect of voting "no," with answering  
7 Question 1A "no." And my first point is simply to tell  
8 them -- which I don't think is anything more than what  
9 the verdict says -- that an answer "no" to that question  
10 is a determination that Nintendo's Wii Remote plus Wii  
11 Nunchuk does not infringe the asserted claims of the  
12 patent.

13 Now, Mr. Cawley then has come back and said,  
14 "Well, if you're going to do that, you should start  
15 reading other -- sort of rephrasing other instructions  
16 to the jury." I don't think that's appropriate, and I  
17 think that -- I think either my language, which  
18 specifically answers their question, is appropriate; or  
19 if the court were inclined to think about other  
20 instructions, then I would say the better thing is to  
21 tell them, "Look at the verdict form, look at my  
22 instructions, consider the evidence, and go from there.

23 MR. CAWLEY: And, your Honor, do I remember  
24 that the question inquires into Mr. Ikeda's rights?

25 THE COURT: Yes.

1 MR. CAWLEY: He's not a party in this  
2 lawsuit. He's --

3 THE COURT: Well, there was some discussion  
4 in argument, I think by both sides, about his --

5 MR. CAWLEY: There was some discussion by the  
6 defendant that it's a matter of principle to him. But  
7 if they're asking about his rights, it's self-evident  
8 and should be pretty much a no-brainer, in terms of  
9 instruction, that the jury should be instructed that  
10 Mr. Ikeda is not a party to this lawsuit and his rights  
11 will not be affected.

12 MR. GUNTHER: There's already a jury  
13 instruction, your Honor, that you gave. You gave it  
14 twice, once when Ms. Story was on the stand and there  
15 was a discussion of patents and that was right in the  
16 middle of her testimony; you also gave a final  
17 instruction to the effect that the fact that Nintendo  
18 has patents is not a defense to infringement. That's in  
19 there. That's available for them to look at, and that's  
20 what is going on in talking about rights of the  
21 invention. That's the only thing we were talking --  
22 when we talked about rights to the invention, we talked  
23 about patents and patent applications. That's available  
24 to the jury; and, your Honor, a specific instruction  
25 saying that Mr. Ikeda has no rights in this case --



1 THE COURT: No. I'm not going to say -- I'm  
2 not going to say that.

3 All right. Let me propose this, "Question 1A  
4 does not decide the rights to the Wii. It merely asks  
5 whether claim 19 is infringed."

6 Plaintiff?

7 MR. CAWLEY: Plaintiff has no objection to  
8 that instruction.

9 THE COURT: Defendant?

10 MR. GUNTHER: Your Honor, we have an  
11 objection to it.

12 THE COURT: What is it?

13 MR. GUNTHER: The objection is that as  
14 stated -- the fact of the matter is if there is  
15 infringement, that is a -- the issue of infringement is  
16 an impingement on Nintendo's rights. As a result of  
17 that, Nintendo has to pay damages, as a result --  
18 because they are now -- the bottom line is that as a  
19 result of the infringement that's been found, that  
20 Nintendo's rights are diminished to the extent that they  
21 have to pay damages to the plaintiff. So, I don't think  
22 that's a correct statement.

23 I'd prefer that the jury be told nothing  
24 other than to look back at the instructions and the law.  
25 I think this is a very difficult question, your Honor.

1 I think it's a minefield, and the safer play here is  
2 not --

3 THE COURT: Well, I don't -- I mean, the  
4 problem is -- is that the jury is asking for  
5 clarification. I think they are entitled to some  
6 clarification under Federal law, and defendants have  
7 already made it quite clear that they are very happy  
8 with a hung jury and go home and let this thing drag on.  
9 You've already made that clear once. So, what I'm  
10 looking for now is a proper instruction to give them the  
11 clarification they need. I don't think it's --  
12 especially in a Federal case, for us to just simply  
13 leave them hanging out there after there was argument by  
14 both sides about Mr. Ikeda and what he wanted and --  
15 there was a lot of that that was brought in, nice  
16 emotional argument, little to do with the facts of this  
17 case. So, now we've got to deal with the jury in that  
18 respect.

19 MR. GUNTHER: Your Honor, in view of  
20 your Honor's statement, I believe that it would be  
21 appropriate, if something is going to be said to the  
22 jury -- and I prefer that nothing be said -- but if  
23 something is going to be said to them, I believe it  
24 ought to be along the lines of "This question deals  
25 solely with the issue of infringement," period.

1 THE COURT: All right. I will give you this  
2 proposal, "Question 1A asks only whether claim 19 is  
3 infringed by the Wii Remote controller connected to the  
4 Wii Nunchuk. You should answer the question based on  
5 the evidence and testimony, in light of all my  
6 instructions to you, and should not be concerned with  
7 the effect of your answer."

8 Let me hear from plaintiff.

9 MR. CAWLEY: Subject to actually reading it  
10 on paper, your Honor, I think that that's acceptable.

11 THE COURT: Defendant?

12 MR. GUNTHER: Your Honor, I believe the  
13 clause at the very end, "and should not be" -- I can't  
14 read my own handwriting.

15 THE COURT: "Should not be concerned with the  
16 effect of your answer"?

17 MR. GUNTHER: Yes. Because I think that --  
18 your Honor, I don't know how they will interpret that.  
19 I don't know what that means. Does that mean -- they  
20 shouldn't be concerned in terms of what? I mean, there  
21 are other issues that will flow from that in terms of --  
22 including, for example, damages. So, I would propose  
23 that that last clause be left off. That clause, I  
24 think, is subject to mischief.

25 MR. CAWLEY: Without that clause, your Honor,

1 you're not answering the question. If we want to go  
2 back to the metaphor of State court, there, informing  
3 the jury of the effect of their answer could even be  
4 error. I think instructing the jury to decide the  
5 question of infringement without worrying about the  
6 effect of their answer is perfectly proper. That's the  
7 only part of this response, with respect, that really  
8 answers the question that they asked.

9 THE COURT: Print it out for me, please.

10 All right. Here's the answer I'm going to  
11 submit to them, "Question 1A asks only whether claim 19  
12 is infringed by the Wii Remote controller connected to  
13 the Wii Nunchuk. You should answer the question based  
14 on the evidence and testimony, in light of all my  
15 instructions to you, and should not be concerned with  
16 the effect of your answer."

17 MR. CAWLEY: Your Honor --

18 THE COURT: Which is similar to the  
19 instruction --

20 Yes?

21 MR. CAWLEY: If you would indulge me one  
22 comment, now that I've heard it again. The only thing  
23 that plaintiff is worried about there is "the effect of  
24 your answer," which seems to imply that there is some  
25 effect. I'd change "the" to "any."

1 THE COURT: Actually, I don't have "the" at  
2 all. I'm glad you pointed that out because we've got a  
3 typo there.

4 MR. GUNTHER: Your Honor, that makes my  
5 point. No one can really judge what the jury's going to  
6 do with that statement.

7 MR. CAWLEY: Well, they're going to do what  
8 they are supposed to do, which is to answer the question  
9 of infringement without thinking about collateral issues  
10 such as whether it will affect Mr. Ikeda's reputation.

11 THE COURT: All right. "Question 1A asks  
12 only whether claim 19 is infringed by the Wii Remote  
13 controller connected to the Wii Nunchuk. You should  
14 answer the question based on the evidence and testimony,  
15 in light of all my instructions to you, and should not  
16 be concerned with any effects of your answer."

17 Go show that to counsel, please.

18 Any objection from plaintiff?

19 MR. CAWLEY: No, your Honor.

20 THE COURT: Any other objections from  
21 defendant?

22 MR. GUNTHER: I've stated them already, your  
23 Honor.

24 THE COURT: Okay. Go ahead and take that to  
25 the jury, please.

1 All right. I may have got the answer to this  
2 question; so, I -- I don't remember if I did or not.  
3 But are there any other areas of findings of fact or  
4 conclusions of law on which defendant would like a  
5 ruling in order to protect its record?

6 MR. PRESTA: The answer is no, your Honor.

7 THE COURT: Okay. In that case, we'll go  
8 back into recess until we receive another note from the  
9 jury.

10 (Recess, 4:30 p.m. to 4:34 p.m.)

11 (Open court, all parties present, jury not  
12 present.)

13 THE COURT: It is my practice to excuse the  
14 jury and then go into the jury room with them and thank  
15 them personally because I never particularly appreciated  
16 thanks coming from somebody up on a podium. I want them  
17 to know I mean it; so, I'm going to go in there and  
18 thank them personally. This will only take a couple of  
19 minutes, and then I'll be back to deal with any motions  
20 that we have.

21 When you go back to the jury, would you tell  
22 them when they leave, if they'll go back into the jury  
23 room, I just want to talk to them for just a couple  
24 minutes.

25 COURT SECURITY OFFICER: Yes, sir.

1 THE COURT: So, don't let them go. Ask them  
2 to go back in.

3 And for those of you who are not used to  
4 practicing in the district, it's an Eastern District  
5 rule that counsel should not talk to jurors. If you  
6 want to send some kind of a written survey form later  
7 on, if you'll let me look at it, I'll approve it; and  
8 that can be sent. But -- no, I'll mention to them if  
9 they want to talk to you, that's fine. That's up to  
10 them -- this is the United States -- but you should not  
11 be approaching them.

12 Go ahead and bring in the jury, please.

13 (The jury enters the courtroom, 4:38 p.m.)

14 THE COURT: Mr. Harshbarger, has the jury  
15 reached a verdict?

16 THE FOREPERSON: We have, sir.

17 THE COURT: Is it unanimous?

18 THE FOREPERSON: Yes, sir.

19 THE COURT: Would you please hand it to the  
20 court security officer?

21 THE FOREPERSON: (Complying.)

22 THE COURT: Now, Mr. Harshbarger, this is the  
23 unanimous verdict of each and every one of the jurors?

24 THE FOREPERSON: Yes, sir.

25 THE COURT: I'm now going to ask that it be

1 read by the deputy clerk. I would ask each of the  
2 jurors to pay close and careful attention to be sure it  
3 is, in fact, the verdict upon which you voted.

4 DEPUTY CLERK: Question 1: Do you find by a  
5 preponderance of evidence that Nintendo's Wii Remote  
6 controller, connected to the Wii Nunchuk controller,  
7 infringes the '700 patent?

8 Claim 19, no.

9 Do you find by a preponderance of evidence  
10 that Nintendo's Wii Classic Controller, connected to the  
11 Wii Remote controller, infringes the '700 patent?

12 Claim 19, yes.

13 Claim 22, yes.

14 Claim 23, yes.

15 Question 1C: Do you find by a preponderance  
16 of evidence that Nintendo's GameCube controller  
17 infringes the '700 patent?

18 Claim 14, yes.

19 Claim 16, yes.

20 Claim 19, yes.

21 Claim 22, yes.

22 Claim 23, yes.

23 1D: Do you find by a preponderance of  
24 evidence that Nintendo's GameCube Wavebird wireless  
25 controller infringes the '700 patent?



1 Claim 14, yes.

2 Question 2: Do you find by clear and  
3 convincing evidence that any of the following claims of  
4 the '700 patent are anticipated?

5 Claim 14, no.

6 Claim 19, no.

7 Claim 22, no.

8 Claim 23, no.

9 Question 3: Do you find by clear and  
10 convincing evidence that the following claim of the '700  
11 patent is invalid as obvious?

12 Claim 16, no.

13 Question 4: Do you find by clear and  
14 convincing evidence that any and all of the claims are  
15 invalid because the '700 patent fails to satisfy the  
16 written description requirement?

17 Claim 14, no.

18 Claim 16, no.

19 Claim 19, no.

20 Claim 22, no.

21 Claim 23, no.

22 If you answered "yes" to any claim in  
23 Question 1 and "no" --

24 THE COURT: You don't have to read that part.  
25 Just go to the next question.

1 DEPUTY CLERK: Question 5: What sum of  
2 money, if any, do you find is adequate to compensate  
3 Anascape, Limited, for the conduct you found to infringe  
4 from July 31st, 2006, through today?

5 21 million.

6 Signed by the foreperson on May 14th, 2008.

7 THE COURT: Mr. Harshbarger, is that, in  
8 fact, the true and correct verdict of the jury?

9 THE FOREPERSON: Yes, sir.

10 THE COURT: Does plaintiff want the jury  
11 polled?

12 MR. CAWLEY: No, your Honor.

13 THE COURT: Defendant want the jury polled?

14 MR. GUNTHER: No, your Honor.

15 THE COURT: Okay. Ladies and gentlemen, you  
16 have done a good and valuable service. At this time you  
17 are excused.

18 Debbie, are you going to have the forms that  
19 they are going to need available for them?

20 DEPUTY CLERK: Yes, sir. They should be on  
21 their table.

22 THE COURT: Okay. In that case, at this time  
23 you are excused with my thanks.

24 (The jury exits the courtroom, 4:41 p.m.)

25 THE COURT: We'll take a brief recess.

1 (Recess, 4:42 p.m. to 4:53 p.m.)

2 (Open court, all parties present, jury not  
3 present.)

4 THE COURT: One or two of them indicated that  
5 they might not mind talking to an attorney; so, if an  
6 attorney on each side wants to step outside, I don't  
7 know -- if they approach you, that's fine. Of course,  
8 once they're gone, I doubt if they're going to look you  
9 up. If there's already some counsel out there, then  
10 they already know that.

11 All right. The last issue to be dealt with  
12 at this point would be the issue of attorney's fees.  
13 The Fed Circuit in recent -- the last year or so, couple  
14 of years, has made it clear that "exceptional" does, in  
15 fact, mean "exceptional"; and they do it under a  
16 two-step process under 35 USC, Section 285. It has to  
17 be the determination that it is exceptional and then  
18 determined whether attorney's fees are appropriate,  
19 looking at the Cybor Corp. versus FAS Tech, Inc., case,  
20 18 F.3d 1448, page 1460, Fed Circuit 1998, en banc.

21 And then the kind of factors that come up  
22 are, on defendant's side, inequitable conduct might  
23 justify attorney's fees for defendant or misconduct  
24 during litigation or vexatious or unjustified  
25 litigation, frivolous suit, those kinds of things. We

1 see those factors in *McNeil-PPC, Inc., versus L. Perrigo*  
2 *Company*, 337 F.3d 1362 at 1371, Fed Circuit 2003.

3 I can't see where the defenses in this  
4 particular case were vexatious or made in bad faith. In  
5 fact, based on the *Markman* ruling, a large number of the  
6 claims came out. I don't see -- while the case was  
7 hotly contested and both sides fought hard, that's what  
8 lawyers are paid to do; and the striking of hard blows,  
9 in my mind, isn't the same as the striking of foul  
10 blows. That's just part of the business we're in.

11 It wasn't a slam dunk either way. In fact,  
12 the jury's verdict, first of all -- and I'll note for  
13 the record that that note came back right about 4:30,  
14 indicating -- and they only took about a 30-minute lunch  
15 break. They started at 8:45 in the morning, meaning  
16 they spent an hour and a half yesterday and over seven  
17 hours today deliberating and, in my opinion, paid close  
18 attention to what was going on, maybe not every single  
19 juror every single minute; but at all times one or more  
20 of the jurors was watching. They were taking notes.  
21 They deliberated long and hard, and they clearly were  
22 not just swayed by one side or the other as evidenced by  
23 the notes and their final verdict.

24 So, I can't see anything about the case on  
25 that that is exceptional to the extent that it would

1 pass muster before the Fed Circuit. And since I don't  
2 think the case has been established as exceptional, I'm  
3 going to deny the request for attorney's fees.

4 I think that covers virtually every issue  
5 other than we still have what will be going forward, the  
6 request for injunction, the request for royalty. I'd  
7 like to get this done as quickly as possible just  
8 because I know more about this case now than I probably  
9 ever will know; and if I wait a long time, I'll have to  
10 re-learn it.

11 So, I have set a date of -- and this is --  
12 when I get back to my calendar tomorrow, this might  
13 change; but right now I'm looking at Tuesday, July 22nd,  
14 2008, at 9:00 in the morning to consider any evidence or  
15 argument on:

16 One, the possibility of injunctive relief.  
17 Obviously, the law on that has changed in the last  
18 couple of years. Counsel will want to look at that  
19 very, very carefully. You may also want to look at some  
20 of the opinions I've written to get an idea of how I  
21 view that subject or how I interpret the law, unless a  
22 new case has come down.

23 And then the issue of reasonable royalty  
24 going forward. I'm also going to direct counsel --  
25 counsel with authority to settle and counsel with --

1 accompanied by corporate representative with authority  
2 to make these decisions -- and I understand that  
3 corporate decisions have to be approved. I'm not  
4 entering an order that the entire board has to show up.  
5 I mean, I do understand the realities. But on the other  
6 hand, showing up with the third assistant to the  
7 left-hand flunky to the secretary to somebody is -- I  
8 mean, that's not -- someone with some weight has to show  
9 up.

10           And I want a good-faith effort made -- and  
11 this is what the Fed Circuit has said -- to see if a  
12 reasonable business decision can't be worked out in  
13 terms of what a reasonable royalty should be. One of  
14 the possibilities to consider is, of course, some  
15 arrangement of placing it in escrow while -- assuming  
16 the case is going to be appealed. I mean, that is one  
17 possibility that could be considered. Otherwise, both  
18 sides are left with me making the determination; and,  
19 unfortunately, the way we try patent cases, there's very  
20 little I can take from the jury. There's just not a  
21 mathematical they did X; so, therefore, that means  
22 5 percent of X or 150 percent of X. It's just not easy.  
23 I'll have to re-hear the evidence of the damages experts  
24 on both sides to consider that.

25           And it would appear that a business decision

1 made by the parties might be better than a business  
2 decision made by a judge, but that's -- so, I am  
3 directing, though, that both sides meet in good faith  
4 and see if something can't be worked out along that  
5 line. If not, we'll hear that evidence, also, on  
6 July 22nd.

7 Any other issue from point of view of  
8 plaintiff that you think needs to be or would be helpful  
9 to be taken up at this time?

10 MR. CAWLEY: No, your Honor.

11 THE COURT: From defendant?

12 MR. GUNTHER: No, sir, other than we would  
13 request prior to judgment being entered that we have the  
14 ability to file appropriate motions.

15 THE COURT: Actually, don't you want to file  
16 those motions after judgment is entered?

17 MR. GERMER: Your Honor, I think we could do  
18 it either way; but we were hoping to file the motion for  
19 remittiture, which is quite obvious, before judgment.

20 THE COURT: Okay. I mean, you can talk to  
21 your -- I mean -- okay. A motion for remittiture, I  
22 guess I can see. How long do you think it will take to  
23 get that in?

24 MR. GERMER: As soon as you would want it.

25 MR. GUNTHER: We could do it in ten days,

1 your Honor.

2 THE COURT: What's today? Today's Wednesday?  
3 What about next Wednesday?

4 MR. GUNTHER: Next Wednesday?

5 THE COURT: There can't be a lot to it.

6 MR. GUNTHER: Yes, sir. Next Wednesday would  
7 be fine.

8 THE COURT: And I'll allow you to respond.  
9 That's why I didn't want the ten days, because then  
10 you're going to want to -- I want this done. I'm sorry,  
11 gentlemen. I try to move along because the further  
12 along it gets, the more I forget. I mean, that's -- I  
13 spent too much time as a trial lawyer. I have a  
14 "bathtub memory." I learn everything I can and then get  
15 rid of it for the next case. Perhaps you do the same;  
16 perhaps you remember it all. But that's just -- I'm  
17 still in that mode.

18 And, again, you might want to check with your  
19 appellate specialists; but I think you probably want to  
20 file most of your motions after I enter the judgment to  
21 perfect your rights, not that I'm going to tell you how  
22 to practice.

23 MR. GUNTHER: Thank you, your Honor. We'll  
24 do that. I think we can file the remittiture in seven  
25 days, as your Honor has stated, and then -- we'll check



1 with our appellate specialists, but I believe your Honor  
2 is right.

3 THE COURT: If you have the other ones, file  
4 them within the same period of time. I'll be glad to  
5 look at them. And then --

6 Do you think you can get in any response by  
7 the following Wednesday?

8 MR. CAWLEY: I don't see why not, your Honor.

9 THE COURT: Okay. In that case, you are  
10 excused; and the court is adjourned.

11 (Proceedings concluded, 5:02 p.m.)

12 COURT REPORTER'S CERTIFICATION

13 I HEREBY CERTIFY THAT ON THIS DATE, MAY 14,  
14 2008, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
15 RECORD OF PROCEEDINGS.

16   
17 CHRISTINA L. BICKHAM, CRR, RMR

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