

BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:) Investigation No.
CERTAIN VIDEO GAME) 337-TA-743
SYSTEMS AND CONTROLLERS)

Hearing Room A

United States
International Trade Commission
500 E Street, Southwest
Washington, D.C.

Wednesday, August 3, 2011

VOLUME III

The parties met, pursuant to the notice of the
Judge, at 8:00 a.m.

BEFORE: THE HONORABLE ROBERT K. ROGERS, JR.

1 APPEARANCES:

2 For Complainant Motiva, LLC:

3 W. MARK LANIER, ESQ.

4 DARA G. HEGAR ESQ.

5 ROBERT LEONE, ESQ.

6 The Lanier Law Firm, P.C.

7 6810 FM 1960 West

8 Houston, Texas 77069

9

10 CHRISTOPHER D. BANYS, ESQ.

11 DANIEL W. BEDELL, ESQ.

12 DANIEL M. SHAFER, ESQ.

13 NICK S. MANCUSO, ESQ.

14 RICHARD C. LIN, ESQ.

15 RYAN SMITH, Paralegal

16 The Lanier Law Firm, P.C.

17 2200 Geng Road, Suite 200

18 Palo Alto, CA 94303

19

20 LYLE VANDER SCHAAF, ESQ.

21 JAY REIZISS, ESQ.

22 CARL C. CHARNESKI, ESQ.

23 Brinks Hofer Gilson & Lione

24 1850 K Street, N.W., Suite 675

25 Washington, D.C. 20006

1 APPEARANCES (Continued):

2 For Complainant Motiva, LLC:

3 J. JAMES LI, ESQ.

4 LiLaw - Attorneys at Law

5 1000 Elwell Court, Suite 115

6 Palo Alto, CA 94303

7

8 KRISTA SCHUCHARD, ESQ.

9 32775 Whitehead Lane

10 Fremont, CA 94555

11

12 For Respondent Nintendo Co., Ltd., and Nintendo of

13 America, Inc.:

14 STEVEN E. ADKINS, ESQ.

15 JORDAN L. COYLE, ESQ.

16 LAUREN B. MULDOON, ESQ.

17 Orrick, Herrington & Sutcliffe, LLP

18 1152 15th Street, N.W.

19 Washington, D.C. 20005

20

21

22

23

24

25

1 APPEARANCES (Continued):

2

3 For Respondent Nintendo Co., Ltd., and Nintendo of

4 America, Inc.

5 PETER A. BICKS, ESQ.

6 ALEX V. CHACHKES, ESQ.

7 ELYSE D. ECHTMAN, ESQ.

8 NICHOLAS LAM, ESQ.

9 SARAH E. WALCAVICH, ESQ.

10 Orrick, Herrington & Sutcliffe LLP

11 51 West 52nd Street

12 New York, New York 10019

13

14 JOSEPH S. PRESTA, ESQ.

15 RON FARIS, ESQ.

16 Nixon & Vanderhye P.C.

17 901 N. Glebe Road, 11th Floor

18 Arlington, VA 22203

19

20

21

22

23

24

25

1 APPEARANCES (Continued):

2 For ITC Staff:

3 MATTHEW N. BATHON, ESQ.

4 Investigative Attorney

5 DAVID O. LLOYD, ESQ.

6 Supervisory Attorney

7 U.S. International Trade Commission

8 500 E Street, S.W.

9 Washington, D.C. 20436

10

11

12 Attorney-Advisor:

13 MICHAEL FORMAN, ESQ.

14 Attorney-Advisor

15 Office of Administrative Law Judges

16 U.S. International Trade Commission

17 500 E Street, S.W.

18 Washington, D.C. 20436

19

20 For Witness Ferguson:

21 BRIAN A. ROSENTHAL, ESQ.

22 Mayer Brown LLP

23 1999 K Street, N.W.

24 Washington, D.C. 20006

25

EXCERPT

1 JUDGE ROGERS: All right.

2 Cross-examination?

3 MR. BICKS: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. BICKS:

6 Q. Good morning, Mr. Ferguson. How are
7 you?

8 A. Doing well.

9 Q. You and I met at your deposition. It
10 is nice to see you again.

11 Question right off the bat,
12 Mr. Ferguson. Mr. Hoerberlein is an expert that
13 Motiva has presented in this case. Do you know
14 that?

15 A. Yes, I do.

16 Q. And have you ever spoken with Mr.
17 Hoerberlein on the phone before?

18 A. Mainly salutations.

19 Q. You have never had any substantive
20 discussions with him?

21 A. He may have asked a couple questions.
22 I don't recollect beyond that.

23 Q. In fact, you don't remember whether or
24 not you have spoken with him on the phone
25 before, right?

1 A. Yes.

2 Q. All right. And are you aware that he
3 came into this Court yesterday and told us that
4 he had interviewed you? Did you know that?

5 A. I don't know what he said to you
6 yesterday.

7 Q. All right. But you don't have any
8 recollection of any such interview, do you?

9 A. Not with him directly.

10 Q. You used the word directly. Did you
11 speak to him on the phone indirectly?

12 A. No. I spoke to an associate of his by
13 the name of Josh, his first name.

14 Q. All right. But, sir, straight
15 question to you: Did you speak with Motiva's
16 expert in this case, Mr. Hoerberlein?

17 A. I at least said high, hello, on the
18 telephone.

19 Q. And that's it?

20 A. That's all I remember.

21 Q. All right. Now, I want to show you
22 SX-1, which is the Staff's response to
23 interrogatories. And the question that I want
24 to speak with you now is about when you
25 conceived of the invention at issue in this

1 case.

2 Can we pull up SX-1, Tom. And can we
3 highlight response to 14.

4 JUDGE ROGERS: Are you saying that
5 this is Staff's responses to interrogatories or
6 that this is responses to Staff's
7 interrogatories?

8 MR. BICKS: This is Motiva's responses
9 to the Staff interrogatories, Your Honor.

10 JUDGE ROGERS: All right.

11 BY MR. BICKS:

12 Q. I want to focus us in terms of time
13 here, Mr. Ferguson. It is true that you and
14 Mr. Gronachan conceived of the subject matter
15 of the asserted claims of the patents at issue
16 in or around October 2003. Is that a true
17 statement?

18 A. Yes.

19 Q. And I asked you at your deposition,
20 any question in your mind about that? And you
21 said that's when you all conceived of the
22 subject matter of the asserted claims. True?

23 A. Are you paraphrasing me?

24 Q. Yeah, that's what you told me. I can
25 show it to you, but I am trying to move us

1 along.

2 A. Yes.

3 Q. All right. And indeed you said at
4 your deposition that throughout 2003, Dave
5 Smith, Don Gronachan, and myself got together
6 and Don and I formed this invention, the Motiva
7 invention, with the intent of licensing
8 partners.

9 Is that a true statement?

10 A. Yes.

11 Q. All right. You also know, sir, that
12 you signed an employment agreement with a
13 company called Arena. Do you recall that?

14 A. Yes, I do.

15 Q. And that's RX-682C, which I have up on
16 the screen. And I should pull it down just for
17 a minute because it says confidential -- it has
18 a C stamp on it, but, Mr. Banys, is that a
19 document that I can use here, even though it
20 has a C stamp? It is a document that we got
21 from you all.

22 MR. BANYS: I believe this is to
23 protect a third party's confidential
24 information, Your Honor. The third-party, I
25 don't know if they are here.

1 JUDGE ROGERS: All right, then.

2 Everyone on both sides of the room that is not
3 subject to the protective order, please leave.

4 Let's go on the confidential record.

5 (Whereupon, the trial proceeded in
6 confidential session.)

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

2 MR. BICKS: And, Your Honor --

3 JUDGE ROGERS: What was that?

4 MR. BICKS: I guess my crackerjack
5 patent team is pointing out that my comment
6 that this doesn't have anything to do with
7 invalidity, I guess technically inventorship
8 and ownership, particularly inventorship, could
9 go to invalidity, but we're not -- this is not
10 prior art. That's the point.

11 JUDGE ROGERS: No, it is not prior art
12 and you are not talking about this patent,
13 apparently, until you get to the bottom of that
14 page.

15 MR. BICKS: Correct.

16 JUDGE ROGERS: And that's not one of
17 the patents I think Mr. Lanier was addressing
18 when he stood up. He was addressing all the
19 other ones that you were listing that he wanted
20 to be sure you were not trying to slip them in
21 as prior art.

22 MR. BICKS: I am not. I am not.

23 JUDGE ROGERS: All right.

24 BY MR. BICKS:

25 Q. So back to where we were,

1 Mr. Ferguson. Are you with me? We just went
2 back to the '432 patent so that we could
3 confirm that that's one where both you and
4 Mr. French are listed as the inventor? Are you
5 with me?

6 A. Yeah.

7 Q. All right. So what we're -- do you
8 see here that tracking the position of a person
9 as he moves about an area approximately 15 by
10 15, that in the '432 patent, it talks about
11 tracking the orientation of the player's body,
12 as well as his or her position? Right?

13 A. Does the second block say that? Is
14 that the question?

15 Q. Yeah.

16 A. Yes.

17 Q. And then that concept -- and we have
18 been talking to it -- about it a lot in this
19 case, that's also in the '151 patent, the
20 system and methods for setup and measuring
21 position and orientation, otherwise called as
22 pose there, right?

23 A. Measuring the position and/or
24 orientation.

25 Q. Yeah. For purposes of this, I know

1 that's an issue in the case. I am not fussing
2 with you on that. I am just saying your
3 consulting agreement where you were hired to
4 develop something conceived by Impulse, talked
5 about tracking the position of a person as he
6 moves in an area approximately 15 by 15, and
7 the '432 patent you are a coinventor with
8 Mr. French, there is tracking the orientation
9 of a player's body, as well as his or her
10 position. And then in your '151 patent, it
11 talks about measuring position and orientation
12 and it says pose, right?

13 A. Those are the words.

14 Q. So this '151 patent, you did not
15 assign that patent to Impulse, right?

16 A. That's correct.

17 Q. What you did was you assigned it to
18 Motiva a month before a lawsuit was filed in
19 Texas, right?

20 A. That's correct.

21 Q. Now, in your consulting agreement at
22 RDX-56, there was also the concept of a
23 wireless position tracker conceived of by
24 Impulse that you were hired to develop, right?

25 A. Yes.

1 Q. And in the '432 patent, where you and
2 Mr. French are coinventors, there is disclosure
3 of use of a wireless position tracker. True?

4 A. Yes.

5 Q. And then in the '151 patent, there is
6 reference to wirelessly receiving transmitted
7 signals from a first communication device,
8 right?

9 A. Yes.

10 Q. Now, the consulting agreement at
11 RDX-57 talks about realtime measurement. True?

12 A. It says essentially realtime.

13 Q. And look what is said in the '432
14 patent that you and Mr. Ferguson -- I'm sorry,
15 you and Mr. French are coinventors on. It says
16 essentially realtime, right?

17 A. Yes.

18 Q. And then your '151 patent talks about
19 algorithm calculations personal to a user in
20 realtime. Right?

21 A. Yes.

22 Q. If we look at RDX-58, it talks about
23 software, bilateral movements in 3D perspective
24 in an interactive game-like format. Right?

25 A. Yes.

1 Q. Then in the '432 patent, where you and
2 Mr. French are the coinventors, it talks about
3 an interactive game-like format, right?

4 A. It says in an interactive game-like
5 format, yes.

6 Q. And then in the '151 patent, there is
7 talking about display for an interactive
8 interface for the user, right?

9 A. A display for providing interactive
10 interface for the user, yes.

11 Q. All right. Now, I want to talk a
12 little bit about handheld. Do you recall
13 whether or not in the '432 patent, there was
14 disclosure of -- taking the Trazer beacon,
15 right? You are familiar with what the Trazer
16 beacon was?

17 A. Yes.

18 Q. And so we're clear, the Trazer beacon
19 in one of the uses, it was put around a belt
20 that somebody wore. Right?

21 A. That's a use I am familiar with.

22 Q. And do you recall when you were at
23 Trazer that there is documentation talking
24 about taking that beacon and putting it in the
25 hand?

1 A. I don't remember.

2 Q. Do you remember if that was in the
3 '432 patent that you and Mr. French were
4 coinventors on?

5 A. I don't remember.

6 Q. Well, let's look at RDX-62. On the
7 one side is the '432 patent and on the other
8 side is the '151 patent.

9 Does this help your memory, sir, that
10 in the '432 patent, there was discussion about
11 taking the beacons and placing them on the
12 hands?

13 A. That's what it says, yes.

14 Q. All right. And remember I asked you
15 whether or not you remember at Trazer when you
16 were an employee responsible for development of
17 this tracking system, that there was discussion
18 about handhelds. Do you have any memory of
19 that?

20 A. Except from the first deposition you
21 showed me a document from the NIH, I believe.

22 Q. All right. And let me show you that.
23 This is Exhibit 135. JX-135.

24 Have you seen this, by the way,
25 before?

1 A. I don't remember.

2 Q. Well, let's go back just to set
3 context before we come back to 135. Let's go
4 back to JX-136.

5 This is a letter -- by the way, have
6 you seen this before?

7 A. I don't remember.

8 Q. And just so we're clear, we know at
9 Trazer -- how many people worked at Trazer
10 during 2001?

11 A. Myself, his wife, he, of course, and I
12 think Don Gronachan was still there.

13 Q. And so when you say he, that's
14 Mr. French?

15 A. Yes.

16 Q. So four people?

17 A. Yes.

18 Q. All right. So -- and this is a letter
19 dated December 1st, 2001 to the NIH from
20 Mr. French who was the CEO, right?

21 A. Yes.

22 Q. And if we go to the third page and
23 look at the folks who were involved there, you
24 are listed as the engineer, right?

25 A. Yes.

1 Q. And Mr. French is one of the
2 investigators, right?

3 A. Yes.

4 Q. And this is a grant application to get
5 money to do some research. Right?

6 A. I'm not sure.

7 Q. Well, let's just go to the cover page,
8 the cover letter. It is a fast track grant
9 application.

10 And that's what is going on here,
11 right, someone is trying to get some money to
12 do some research, right?

13 A. It looks like it, yes.

14 Q. And I want to just go back to 135 now.
15 And what was going on here, right, do you
16 remember that if we just look at the goals of
17 this phase 2 proposal in the second paragraph,
18 that there was discussion about taking the
19 Trazer technology and getting it into the
20 medical and rehab area, right?

21 A. That section says disease management.
22 I guess that's medical.

23 Q. Well, that's what I -- that's the
24 medical area, right? Are you with me?

25 A. Yeah, I presume it is medical.

1 Q. Right. And just so we're also clear,
2 there is phase 1 and phase 2 of these
3 proposals. Let's just look quickly at
4 RX-138 -- JX-138. I'm sorry. Thank you.

5 And you are familiar with this
6 application, right?

7 A. No, I am not.

8 Q. You haven't looked at it in connection
9 with this case?

10 A. No.

11 Q. So I went to your deposition and I
12 asked you questions. Was there information at
13 Trazer about an NIH grant application that
14 talked about using the beacon and handhelds,
15 and you are telling us that you haven't even
16 looked at that grant application where you are
17 listed as the engineer?

18 A. You mean since that deposition?

19 Q. Right.

20 A. No.

21 Q. All right. Let's see -- well, I am
22 not even going to refresh your memory then. I
23 want to show you RX-135 at page -- JX-135 at
24 page 26.

25 Can we just highlight the sentence in

1 that third big paragraph that starts out "the
2 visual spatial neglect."

3 And I take it in looking at this,
4 Mr. Ferguson, your memory is not refreshed that
5 during the time period that you were a
6 full-time employee at Trazer, that Trazer was
7 applying to the NIH for funds to do research in
8 the medical and rehabilitation space to use the
9 Trazer technology and take a beacon in this
10 module and put it on either one or two hands?

11 A. I don't remember, but I see it now.

12 Q. So the one thing we can be sure of as
13 we are here today is you didn't invent that
14 idea in 2001, did you?

15 A. What's the idea?

16 Q. The idea of taking the Trazer beacon
17 and putting it on one or two hands. This is
18 reflected in here, this is not your idea, is
19 it?

20 A. I don't recall.

21 JUDGE ROGERS: Let me know when you
22 are ready to break, Mr. Bicks. We're going to
23 break at noon.

24 MR. BICKS: Your Honor, maybe this is
25 a convenient time, or I can go a couple more

1 minutes, whatever is your pleasure.

2 JUDGE ROGERS: Whenever you get a spot
3 where you are going to shift gears.

4 MR. BICKS: I have probably, Your
5 Honor, probably 15 minutes more in this area.

6 JUDGE ROGERS: All right, then, we
7 will break. Mr. Banys, you don't look anything
8 like Mr. Lanier. Mr. Lanier's hard luck.

9 MR. BANYS: I'm glad you said that.

10 JUDGE ROGERS: So, Mr. Bicks, we will
11 break for lunch, come back at 1:00 o'clock and
12 you can pick it up right here.

13 Mr. Ferguson, you are going to be
14 returning to the stand. You will still be
15 under oath. And I will ask you whether anyone
16 has attempted to discuss the substance of your
17 testimony or this case with you on the break.

18 THE WITNESS: All right.

19 JUDGE ROGERS: All right. We're at
20 lunch until 1:00 o'clock.

21 (Whereupon, at 11:57 a.m., a lunch
22 recess was taken.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 JUDGE ROGERS: Mr. Ferguson, you are
4 still under oath. Has anyone attempted to
5 discuss the substance of this case or your
6 testimony with you on the break?

7 THE WITNESS: No.

8 JUDGE ROGERS: All right. Mr. Bicks,
9 you may continue.

10 MR. BICKS: Thank you, Your Honor.

11 BY MR. BICKS:

12 Q. Good afternoon, Mr. Ferguson.

13 If we can, let's just go back to
14 JX-135. This was the NIH grant application
15 that we were talking about. And if you -- Tom,
16 can you go to 0013? And let's focus if we may
17 on that paragraph under hardware architecture
18 overview.

19 And, therefore, proprietary positions,
20 at the bottom of the paragraph, are being
21 developed in-house? And that next bullet point
22 down, Tom. Thank you.

23 Mr. Ferguson, to reorient ourselves,
24 we're back in the year of 2001, which is the
25 date of this application. Are you with me?

1 A. Yes.

2 Q. And at that time you were a full-time
3 employee of Arena, whose name became Trazer,
4 right?

5 A. Yes.

6 Q. And at that time, you had the contract
7 in place, your employment agreement that I
8 showed you that had that ownership of work
9 product provision that pertained to ideas,
10 unpatented or patented. Are you back with me
11 where -- before we broke?

12 A. Yes.

13 Q. All right. Now, this application that
14 was given to the NIH says that proprietary
15 position tracking electronics are being
16 developed in-house to satisfy these hardware
17 requirements.

18 And it talks about those hardware
19 requirements up top. Do you see that?

20 A. Yes.

21 Q. And it says that there was --
22 in-house, work was being done to develop
23 proprietary electronic position tracking, and
24 then it says, "low-cost, 3D positional tracking
25 of a single reference point, with potential for

1 multi-positional tracking." Do you see that?

2 A. Yes.

3 Q. And were you -- we talked about Trazer
4 being four people, right, Mr. French, his wife
5 Mary Ellen, yourself and at one point
6 Mr. Gronachan, right?

7 A. That's true.

8 Q. All right. So my question is to you,
9 were you one of the folks in-house who was
10 working on developing this tracking of a single
11 reference point with potential for
12 multi-positional tracking?

13 A. No.

14 Q. But you were the chief technology
15 officer -- by the way, do you know who was
16 working on that?

17 A. I think that statement is incorrect.

18 Q. All right. This application, you
19 don't think that that was actually going on?

20 A. At least the end, the last clause
21 starting with "with."

22 Q. Oh, "with the potential for
23 multi-positional tracking." You don't think
24 that's right?

25 A. That's true.

1 Q. All right. Well, I am going to come
2 back and I am going to show you some e-mails,
3 but let's cut to the chase here. During the
4 early part of 2003, you were working on
5 multi-positional tracking, you were working on
6 orientation, and you were working on various
7 beacons, right?

8 A. For what time period?

9 Q. In 2003, starting in January.

10 A. I'm sorry, please repeat the whole
11 list.

12 Q. All right. I was saying beginning in
13 early January, you were working on questions
14 about whether orientation could be tracked, you
15 were working on multiple beacons, right, and
16 you were working on multi-positional tracking
17 in the beginning of 2003? Do you remember any
18 of that?

19 A. No, I don't.

20 Q. Okay. When we talk about your
21 responsibilities, you were directly and
22 indirectly responsible for all phases of
23 product conceptualization, specification,
24 design, manufacturing, and production as the
25 chief technology officer. Do you remember

1 that?

2 A. Yes, it sounds like it is from my
3 resume.

4 Q. And because the company had limited
5 financial resources, that role required
6 efficient management of software, hardware,
7 optical engineering contractors, right?

8 A. Yes.

9 Q. And we know, do we not, that at the
10 time that you were at Trazer, you were working
11 with a company like Burton Industries, right?

12 A. Yes.

13 Q. And a company -- is it called Dark
14 Basic? Does that name ring a bell?

15 A. Yes.

16 Q. And you were working with both of
17 those companies when you were at Trazer and
18 working on the development and improvement of
19 the Trazer technology, right?

20 A. Not quite. Dark Basic is a company
21 that makes software tools.

22 Q. And, as a matter of fact, you e-mailed
23 with Dark Basic to look at software when you
24 were at Trazer for use in the medical
25 application and rehabilitation. Do you

1 remember that?

2 A. No, I don't.

3 Q. Okay. I will show you an e-mail on
4 that in a moment. Back to the company called
5 Burton Industries, what was the name of the
6 company that worked with you on the Motiva
7 prototype?

8 A. In what respect?

9 Q. What role did Burton Industries play,
10 were they involved with you in putting together
11 the Motiva prototype?

12 A. Yes.

13 Q. And that was the same Burton
14 Industries that you were working with at
15 Trazer, right?

16 A. Yes.

17 Q. And Dark Basic that did the software
18 and you worked with at Trazer, did they also
19 work with you in connection with work that you
20 did on Motiva?

21 A. Sorry, your question is not clear.

22 Q. My apologies. When you were at
23 Trazer, you were working with Dark Basic on
24 software that might work in the medical and
25 rehabilitation field, right?

1 A. I don't remember.

2 Q. All right. We will come back to that.

3 Now, let's look at where we were. Remember we
4 were going through language in the consulting
5 agreement and then working through the '432
6 patent and then did the '151 patent.

7 Are you with me?

8 A. Yes.

9 Q. All right. So let's, please, go to
10 RDX-66. And the topic that I have up here is
11 ultrasonic waves and signals. That is in the
12 '432 patent that lists you and Mr. French as
13 inventors, correct?

14 A. Ultrasonic waves is how it is stated,
15 but yes.

16 Q. Right. And because you can use
17 infrared and you can also use ultrasonic,
18 right?

19 A. Those are a couple choices, sure.

20 Q. Right. And my observation here is
21 that both in the '432 patent, the use of
22 ultrasonic waves and signals is also in the
23 '151 patent in the claims that are indicated
24 there, correct?

25 A. Ultrasonic signals is mentioned in

1 both, ultrasonic waves.

2 Q. And do you recall in the '432 patent
3 whether or not radio signals were also
4 disclosed as in the '151 patent?

5 A. Electromagnetic signals would be radio
6 signals.

7 Q. Well, let's go -- thank you. Let's
8 just -- so we're on the same page, to RDX-67.
9 So we see there radio signals, that's talked
10 about in the '432 patent, and then radio
11 frequency signals are also in the '151 patent.

12 A. Yes.

13 Q. Are you with me? Now, I had asked you
14 about the question of multiple sensors, right?
15 Are you with me?

16 A. Yes.

17 Q. And multiple sensors, that concept,
18 that idea, that is in the '432 patent that you
19 and Mr. French are identified as the
20 coinventors on, right?

21 A. Can you help me with that passage?

22 Q. Absolutely. Let's go to RDX-68. We
23 have from the '432 patent the reference that
24 the player has an upper beacon or reflector on
25 each of his or her upper extremities. Right?

1 A. Yes.

2 Q. And then in the '151 patent, there is
3 discussion about a second communication device
4 and then the second communication device
5 relative to the first communication device.
6 Right?

7 A. Yes.

8 Q. All right. And acceleration and
9 determining acceleration was a concept that was
10 in the '432 patent just as it was in the '151
11 patent. Do you know that?

12 A. I don't know that.

13 Q. Well, let's look at RDX-69. And these
14 are the passages reflected. Does this help you
15 remember that determining acceleration and
16 quantifying it was an idea disclosed in the
17 '432 patent as well as in the '151 patent?

18 MR. BANYS: Your Honor, if I may,
19 counsel is talking about ideas disclosed in the
20 '432 and '151 patent. I'd like to just remind
21 every one of the stipulation. I also think it
22 is an inaccurate characterization to say that
23 things are just as they are in one and the
24 other when the words are different in the
25 patents.

1 JUDGE ROGERS: I'm not picking the
2 nits that closely, Mr. Banys. He is talking
3 about they exist here and they exist there. He
4 is not saying they are just exactly the same.

5 MR. BANYS: Thank you, Your Honor.

6 BY MR. BICKS:

7 Q. The idea of movement efficiency,
8 Mr. Ferguson, that phrase is used both in the
9 '432 patent and in your -- the '151 patent,
10 right?

11 A. I don't believe it is used in the '151
12 patent.

13 Q. All right. Let's go to RDX-70. And I
14 am not sure if -- 70A on mine. And so I have
15 the '432 patent and then claim 31 of the '151
16 patent.

17 And my question to you is whether or
18 not the phrase movement efficiency was in both
19 of these patents? Does this help you remember
20 that it is in the '151 patent?

21 A. You are right, the word is in both
22 patents.

23 Q. All right. And the '432 patent uses
24 the word assessment of movement skills and
25 movement efficiency and the '151 patent says,

1 "wherein a user's movement efficiency can be
2 determined," right?

3 A. That's right.

4 Q. We have talked a little bit about -- I
5 don't know if you were here -- but the Court --
6 we talked about this concept of a reference
7 movement trajectory. You know that concept out
8 of your patent, right?

9 A. Yes, I do.

10 Q. And let me show you the '432 patent
11 and the '151, and this is 71A. And I have some
12 language here highlighted. And I guess it is
13 probably best to focus on the language down at
14 the bottom.

15 It is at the top, it talks about a
16 dimensional contour pattern, right?

17 A. Yes, it does.

18 Q. And then in that second paragraph, it
19 says that the device records the movement
20 contour, right, of the trainer for later
21 playback, right?

22 A. Yes.

23 Q. And then when you go down, it says,
24 the player may be trained to emulate the
25 trainer's movements by attempting to maintain

1 synchronicity with the avatar's movements and
2 then a measure of compliance may be made
3 between the player's motion and the prerecorded
4 motions of the trainer. Right?

5 A. That's what it says.

6 Q. Right. And then in the '151 patent,
7 there is reference in claim 55 to error between
8 the actual movement information and a reference
9 movement trajectory. Do you see that?

10 A. Yes, I do.

11 Q. And the concept of control of virtual
12 objects, that is referenced in both the '432
13 and the '151 patent, correct?

14 A. I believe so, yes.

15 Q. And if we look at, as an example,
16 RDX-72, we will see that in the '432 patent
17 where you and Mr. French are coinventors, there
18 is reference to the overall position of the
19 player in the physical space, and that it is
20 represented and correctly referenced in the
21 virtual space by a player icon.

22 You are familiar with that, right?

23 A. That's what it says, yes.

24 Q. And then if we look at the '151
25 patent, it talks about an object in a computer

1 generated virtual environment. Right?

2 A. Yes.

3 Q. Now, do you recall whether or not the
4 '432 patent and the '151 patent also dealt with
5 heart rate measurement and monitoring?

6 A. I know the '151 does. I think the
7 '432 may have.

8 Q. And so we may, if we look at RDX-73,
9 there is disclosure there about measurement of
10 heart rate by commercially available wireless
11 telemetry device and realtime monitoring of
12 heart rate.

13 And then heart rate signals are also
14 referenced in the '151 patent, correct?

15 A. '151 says transmit heart rate signals.
16 It doesn't say realtime monitoring.

17 Q. Well, actually, when we took a
18 photograph of your -- of the prototype, it
19 actually had a belt with it that had the word
20 polar on it. Does that ring a bell, that kind
21 of a belt?

22 A. Yes.

23 Q. And what is the polar on the belt for?

24 A. The polar measures your EKG signal
25 around your chest and uses a proprietary, I

1 think it is, 10 megahertz transmitter to send
2 that information wirelessly to a little module
3 that can interpret the data.

4 Q. And the EKG, can we assume that has to
5 do with the measuring of the heart?

6 A. Yes.

7 Q. And the belt with the polar, and I
8 know it is not a button, but the polar button
9 on it, was that also used with the Trazer
10 device?

11 A. That is one of the manufacturers, yes.

12 Q. All right.

13 MR. BICKS: I think, Your Honor, I am
14 going to have to go back on the confidential
15 record.

16 JUDGE ROGERS: And what are you
17 protecting?

18 MR. BICKS: There are documents, and
19 maybe it won't be confidential, but it is the
20 Dark Basic and the Burton Industries e-mails
21 that you all have designated confidential.
22 These are -- Motiva's counsel would like to be
23 on the confidential record. They are their
24 documents, Your Honor.

25 JUDGE ROGERS: This is Motiva's

1 documents?

2 MR. BICKS: Yes.

3 JUDGE ROGERS: Motiva's information,
4 Mr. Banys?

5 MR. BANYS: That's what counsel has
6 represented to me, Your Honor.

7 JUDGE ROGERS: All right. Nintendo's
8 folks will now leave the room, if you are not
9 on the protective order.

10 (Whereupon, the trial proceeded in
11 confidential session.)

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