



**USFC2004-1609-05**

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# **JOINT APPENDIX**

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04-1609, 05-1141,-1202

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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GOLDEN BLOUNT, INC.

Plaintiff-Appellee,

v.

ROBERT H. PETERSON CO.,

Defendant-Appellant.

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JUN 28 2005

United States Court of Appeals  
For The Federal Circuit

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS IN 3:01-CV-127-R

JUDGE JERRY BUCKMEYER

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NON-CONFIDENTIAL JOINT APPENDIX

VOLUME III, PAGES JT-APP 0934 – 1489

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NOTE ON CONFIDENTIAL MATERIAL: Pursuant to Federal Circuit Rule 30(h)(1)(B), the parties hereby state that certain material has been redacted from this version of the Joint Appendix due its confidential nature. The material generally consists of proprietary sales and pricing data.

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Doc #827599

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                        |   |                     |
|------------------------|---|---------------------|
| GOLDEN BLOUNT, INC.    | ( | CIVIL ACTION NUMBER |
| Plaintiff,             | ( |                     |
|                        | ( |                     |
| VERSUS                 | ( | 3:01-CV-127-R       |
|                        | ( |                     |
| ROBERT H. PETERSON CO. | ( |                     |
| Defendant.             | ( | July 29, 2002       |

VOLUME 1 of 3  
TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JERRY BUCKMEYER  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

|                    |   |
|--------------------|---|
| For the Plaintiff: | MR. WILLIAM D. HARRIS, JR.<br>MR. CHARLES W. GAINES<br>MR. GREG H. PARKER<br>HITT, GAINES & BOISBRUN<br>275 W. Campbell Road<br>Suite 225<br>Richardson, Texas 7575080<br>972/480-8800  |
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COPY

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214/749-7930

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JT-APP 0935

JANET E. WRIGHT, CSR, RPR  
FEDERAL DISTRICT COURT - DALLAS, TEXAS

P R O C E E D I N G S:

THE COURT: Have a seat please.

This is Civil Action 01-127, Golden Blount versus Robert H. Peterson company. If I could have appearances of counsel for the plaintiff, Mr. Harris.

MR. HARRIS: For the Plaintiff Bill Harris or William D. Harris, Jr., more formally.

THE COURT: Okay.

MR. GAINES: For the plaintiff Charles W. Gaines.

MR. HARRIS: And just admitted to the court last Friday.

MR. PARKER: Greg Parker.

THE COURT: Okay. Good to see you.

MR. MONCO: Good morning, Your Honor. For the defendant Robert Peterson, D. A. Monco.

THE COURT: Okay.

MR. McLAUGHLIN: Your Honor, for the defendant William McLaughlin.

MR. SELINGER: Good morning, Your Honor. For the defendant Jerry Selinger.

THE COURT: Okay. We're ready to get started with opening statements. Is there anything we need?

MR. HARRIS: Yes, Your Honor. We're ready when you are.

THE COURT: I'm ready.

JT-APP 0936

1                   MR. HARRIS: I'll get up thereshall. Shām I go to  
2 the lecturn?

3                   MR. SELINGER: If I may. This is a matter of  
4 formality. The court has pending the motions for admission  
5 pro hac vice of Mr. Monco and Mr. McLaughlin.

6                   THE COURT: Okay. I'll grant those.

7                   MR. SELINGER: Thank you.

8                   MR. HARRIS: , Your Honor, I had a couple of  
9 housekeeping matters I would like to take up.

10                  THE COURT: That's good.

11                  MR. HARRIS: This is a last minute thing I just  
12 thought of. So may I take the liberty of passing that up?

13                  THE COURT: Yes.

14                  MR. HARRIS: There was a protective order entered  
15 in this case. I have a copy of it. The protective order has  
16 a couple of levels of confidentiality. It seems to me that  
17 we have been filing things here at the last minute just in  
18 big old bushel baskets without any markings.

19                  Maybe the other side has marked it confidential  
20 separately. Have you?

21                  MR. McLAUGHLIN: They were marked as they were  
22 presented originally.

23                  MR. HARRIS: But the various volumes of  
24 whatever --- they're not sealed, are they?

25                  MR. McLAUGHLIN: Correct.

1 MR. HARRIS: And it says that they're supposed to  
2 be under seal in the protective order.

3 THE COURT: Okay.

4 MR. HARRIS: I propose that little order to kind  
5 of take care of all of this. And I'm willing to see it be  
6 bilateral.

7 THE COURT: I'm sorry?

8 MR. HARRIS: I'm willing to see it be bilateral.  
9 Not only for our exhibits, but for their exhibits.

10 THE COURT: Okay. Is that satisfactory?

11 MR. MONCO: That's satisfactory, Your Honor.

12 THE COURT: Good.

13 MR. HARRIS: Shall I leave that with you, Your  
14 Honor?

15 THE COURT: We'll proceed on that then. Okay.

16 MR. HARRIS: Your Honor, if I may raise one  
17 housekeeping matter.

18 THE COURT: Yes.

19 MR. HARRIS: For purposes of examination of  
20 witnesses, has the court reached a decision with regard to  
21 the claims interpretation regarding the terms that are in  
22 issue?

23 THE COURT: No. I thought we were going to decide  
24 that as we went along during the evidence of the case.

25 MR. HARRIS: Your Honor, I don't hear as well as I

1 did. Did you say during the course of the trial?

2 THE COURT: Yes, during the course of the trial.

3 MR. HARRIS: And the next thing, we have some  
4 demonstrative exhibits at this time. They have not been the  
5 subject of a foundation, and they have not been anywhere  
6 formally introduced.

7 But just so we'll know what we're talking about, we  
8 think we know what we're talking about. I would like to have  
9 those items that I have on the table where I can briefly make  
10 reference to them and the court can see them. I assure the  
11 court we'll connect up later..

12 THE COURT: Good. You're not going to burn my  
13 courtroom down, are you?

14 MR. HARRIS: This is, as the court knows, a patent  
15 suit. It's on United States Patent 5,988,159 that was issued  
16 to Golden Blount and in due course assigned to the Golden  
17 Blount Company. Now as I speak, I will try not to get into a  
18 lot of technical legalese and patentese jargon so as to tie  
19 us up a long time. I know Your Honor has had patent cases  
20 before and knows most of this stuff anyway.

21 The patent in this case relates to an apparatus and  
22 system that enhances the appearance of an ordinary gas fired,  
23 not wood fired, gas fired fireplace. In so doing, it  
24 utilized the concept of placing an auxiliary burner towards  
25 the front of the fireplace to make the appearance of glowing

1 embers as in a real wood burning fireplace. To go to the  
2 demonstrative evidence as it now stands, there's a log set  
3 that's involved in one of these units. I think you know  
4 that.

5 THE COURT: Okay.

6 MR. HARRIS: And you have your other materials,  
7 too, such as -- well, I'm trying to think of the name of the  
8 tray that holds the logs.

9 THE COURT: Okay.

10 MR. HARRIS: In any event we get down to yet  
11 another part, which is an important unit in this case, and I  
12 would like to mention a couple of things about it.

13 THE COURT: Okay.

14 MR. HARRIS: One is that it has a main burner.  
15 Two is it has a pan.

16 THE COURT: What are you referring to as a pan?

17 MR. HARRIS: What's that?

18 THE COURT: What are you referring to as the pan?

19 MR. HARRIS: The pan?

20 THE COURT: Yeah, what portion?

21 MR. HARRIS: This part right here (indicating).

22 That's the pan.

23 THE COURT: Okay.

24 MR. HARRIS: This is fixed as to the pan, and this  
25 being the main burner, as I call it.



1 THE COURT: Okay.

2 MR. HARRIS: And then there is a valve coming out  
3 through a suitable lead to a front unit which might be called  
4 various things. It's called an ember burner sometimes. It's  
5 called a coal burner sometimes.

6 It's the thing that really does the job of making  
7 these embers look beautiful.

8 Our position will be that there really wasn't  
9 anything like this before Golden Blount invented it. And our  
10 position will be that such very slight changes as you might  
11 find in a unit like the one over here, which I expect to  
12 prove up is the accused unit of Peterson, are really very  
13 superficial, and as a practical matter that the claims of the  
14 patent can be very easily read item by item on the unit.

15 THE COURT: Okay.

16 MR. HARRIS: I won't spend any more time on it now  
17 except as to say that such little differences as have been  
18 mentioned in the infringement area are units, and we have, as  
19 far as Bill Harris sees it, a virtual copy.

20 THE COURT: Okay.

21 MR. HARRIS: To go into a little background, I  
22 think every one wanted to go back a few years, make these  
23 artificial fireplaces look better, make them look more like  
24 the real wood burning item. And time passed, and I don't  
25 think anyone had done a great job of succeeding. There were,

JLAPP 0941

1 I'm sure, some gains.

2           There came a time in the fairly early nineties when  
3 Golden Blount conceived the idea that I just demonstrated to  
4 the court. That idea is such that the little front burner  
5 which can be called, as I said, an ember burner or a coal  
6 burner. The little front burner properly positioned can do  
7 the job of making it look like a real wooden fireplace is  
8 casting off and nurturing embers at that point. That's  
9 something that really was new.

10           Having thought of that, he then decided to file  
11 the patent application. After seven years prosecution, as is  
12 often the case in patent applications, well, the patent  
13 finally issued.

14           I'll summarize now to say that the new items or  
15 item, perhaps I should call it, was a commercial success.  
16 From the beginning they were saying in each year the curve  
17 went up.

18           At some point in time well after Golden Blount  
19 Company put their unit on the market, it's our position that  
20 the Peterson Company copied the item. It wasn't too long  
21 after the Peterson Company had copied the item that the  
22 Plaintiff Blount noticed that, noticed that it had been  
23 copied by Peterson and sent a so-called cease and desist  
24 letter insisting that there was infringement and that it must  
25 be stopped or action would be taken.

JT-APP 0942

1 After that, well, there was a foot dragging period  
2 when Peterson just sort of strung things out, it looked like,  
3 as long as they could. It's a little surprising because  
4 Peterson is quite a bit larger company than Blount Company,  
5 although I realize that's not a major factor perhaps in a  
6 case. You're talking about a relatively at least medium  
7 sized company versus a rather small family company here in  
8 Dallas.

9 Peterson, the point is, is a comparatively large  
10 company and can stand more attrition and litigation.

11 There has been a great deal of damage done because  
12 every artificial burner ultimately carries with it an  
13 expensive assembly, including a set of artificial logs. The  
14 Blount Company has lost these gains because of that  
15 infringement. Almost all of the market is between Blount and  
16 Peterson, so full lost profits are in order if the court  
17 should find liability.

18 When the patent issued in 1999 Blount claimed that  
19 they were absolutely flabbergasted that something that had  
20 been around 20 years could be patented. Goodness, I would be  
21 flabbergasted, too, if that were the case. The point is,  
22 that isn't the case, and it will be shown that isn't the  
23 case. I'm not even sure they got close like in horseshoes,  
24 but that only counts in horseshoes. They never got there at  
25 all.

JT-APP 0943

1 As a matter of fact, the assemblies in general that  
2 were existent over that long period of time were different.  
3 They were for different pumps. They did not achieve the same  
4 result. I'm not even sure that very many of them can be  
5 proved up to have existed.

6 In December of '99 based on the representations and  
7 assumptions from Peterson, his response to Blount was oral as  
8 was always the case thereafter. I said that wrong. What I'm  
9 trying to say is Peterson consulted a lawyer. He told the  
10 lawyer that he had this cease and desist letter. He asked  
11 sort of what to do, but more or less he said, look, this has  
12 been around for 20 years. So the lawyer told him, well, if  
13 it's been around for 20 years, at least some of the claims  
14 are going to be invalid.

15 No real work was done on the subject of an opinion  
16 at that time beyond that. Sometime later Peterson wrote a  
17 put-off letter which was the second one asking how there was  
18 infringement. Of course, the answer is because Peterson had  
19 in effect a substantial or virtual copy of the product.

20 It's obvious they hoped the matter would go away.  
21 They kept right on making the same product over this period  
22 of time, and it's quite a large period of time because over a  
23 year passed. Peterson had really done nothing at all, and so  
24 finally suit was brought by Golden Blount Company against  
25 Peterson. That suit was followed by another letter from

1 Blount pointing out that they had sued and that it would  
2 still be wise for Peterson to stop, but, of course, nothing  
3 happened.

4 Interestingly enough after suit, somebody had told  
5 Peterson that it's possible if you get in a patent suit, that  
6 you might have to pay attorney's fees or some kind of moneys  
7 extra to the other side. When he heard that, then he wanted  
8 an opinion that had a little bit more ribs to support it. So  
9 he got in touch with his lawyer who is here today, and asked  
10 him, said, is there some way that I can guard against this?  
11 And the answer to that simply was, we'll get an opinion. You  
12 know, just go down to the drug store and buy one off the  
13 shelf or whatever, I guess.

14 That's pretty much the way it was done. There was  
15 never a written opinion, never one written letter that came  
16 from the lawyer to the client. Depositions of the client  
17 will show the client didn't know what was going on.  
18 Depositions of the lawyer will show that he was not fully  
19 apprised of everything he should have known and that he  
20 wasn't in a position to give a really full opinion, even an  
21 oral one.

22 Now in some instances an oral opinion can be very  
23 helpful, but it has to be the right kind of oral opinion  
24 between the right people.

25 The opinion -- excuse me. I am a little dry here.

JT-APP 0945

1           So in any event, the oral opinion did not even  
2 cover the so-called doctrine of equivalence which I'm sure  
3 that the court is aware of. It didn't cover a lot of other  
4 things, either, but we don't know what it covered or didn't  
5 cover because it doesn't exist, unless there are sound waves  
6 out in the universe some place that can be recaptured.

7           An interesting point to me is that, while there are  
8 very minor differences between the accused structure and  
9 patent structure, while there are very minor differences, the  
10 lawyer never saw the structure. He never saw his client's  
11 structure. He had some pictures. He had some brochures, but  
12 he didn't look at the item, and he really, I think, didn't  
13 understand the item fully.

14           I'm not trying to take the position it's a real  
15 complicated item, but when we get down to these small  
16 differences we're talking about that the other side tried to  
17 make something out of, well, I think it's very very important  
18 that you go over the whole matter very carefully.

19           Now it isn't like that the Peterson contact for the  
20 lawyer lived in lower Slobovia. He lived in Chicago right  
21 where the lawyer was. And he, except years ago, had never  
22 even seen the lawyer at the time I took a deposition in I  
23 think it was October of last year. To me that is really  
24 strange.

25           It's our view that there's a total lack of

JT-APP 0946

1 diligence on the part of both the attorney and the client.  
2 They both give only lip service to what should be a serious  
3 process. We will be asking for damages. Lost profits we  
4 think will be in order. We likewise will ask for attorney  
5 fees under 35 United States Code 285 and for enhanced damages  
6 under 35 USC Section 284.

7 Are there any questions, Your Honor?

8 THE COURT: No. Thank you, Mr. Harris.

9 MR. HARRIS: Let me be sure these fellows don't  
10 want me to say something else.

11 MR. MONCO: Your Honor, if we may have a moment  
12 just to get our presentation set up.

13 THE COURT: Sure.

14 MR. MONCO: Thank you.

15 (Pause)

16 MR. HARRIS: We do ask permission to somehow keep  
17 our demonstrative exhibits in view. I understand they want  
18 to show some things, too, and they have that right.

19 THE COURT: Okay.

20 MR. HARRIS: Although I will point out that the  
21 structure I see right now, I've never seen before. I've seen  
22 pictures of it, and it's never been shown to us.

23 THE COURT: Okay.

24 MR. HARRIS: And there are other things of that  
25 nature that I'm going to complain about.

JT-APP 0947

1 MR. MONCO: We're going to use it for  
2 demonstrative purposes only, Your Honor. It's not going to  
3 be in evidence.

4 THE COURT: Okay.

5 (Pause)

6 MR. MONCO: May it please the court.

7 THE COURT: Yes.

8 MR. MONCO: My name is Dean Monco, and together  
9 with my co-counsel Bill McLaughlin and Jerry Selinger, we  
10 represent the Peterson Company in this case.

11 Plaintiff Golden Blount has charged the Peterson  
12 Company Ember Flame Booster in combination with the Peterson  
13 G4 Burner with willful infringement of Mr. Blount's '159  
14 patent in suit. Peterson Company's defenses are very simple  
15 and straightforward.

16 First, the Peterson Company accused product does  
17 not infringe any claim of the '159 patent. Each one of the  
18 Blount patent claims requires that the gas ports of the main  
19 burner be positioned to the rear and above the ports of the  
20 lower burner. If I may use one of the demonstrative  
21 exhibits.

22 THE COURT: Okay.

23 MR. MONCO: The Peterson patent has the gas ports  
24 for the main burner pointing downwardly and its ports  
25 pointing toward the rear of the fireplace. In contrast,



1 Peterson's accused product has ports going down vertically  
2 both through the front and rear burner. Because of the way  
3 Peterson's product is actually installed with this particular  
4 type of valve, the gas ports which are on the underside of  
5 the front burner are above the gas ports of the rear burner.  
6 It is the ports that are the focus of the elements of the  
7 claims. The relative position of the heights of the pipes or  
8 midlines of the pipe is irrelevant given how Mr. Peterson  
9 described the function and purpose of the position of the  
10 ports on that.

11 So with that -- and that is an element that every  
12 one of the claims in the patent in suit that are at issue  
13 here before the court today. And it is because we do not  
14 have -- the Peterson Company does not have -- in fact,  
15 because its ports and the front burner are positioned above  
16 the ports of the rear burner, we do not meet the limitation  
17 either literally or under the doctrine of equivalence, and  
18 therefore there is no infringement of any of the claims.

19 Moreover with respect to Claim 17, the Blount  
20 Patent Claim 17 requires that the gas jets of the front  
21 burner be directed rearwardly toward the fireplace. In other  
22 words, back toward the main burner. In our case we direct  
23 ours virtually downwardly, and we completely go against the  
24 teaching of the '159 patent as it's described in the  
25 specification, and therefore we believe there is no

JT-APP 0949

1 infringement for that additional reason under claim 17.

2 Second, with regard to the Blount patent, each one  
3 of the claims are invalid for obviousness and/or  
4 anticipation. The original patent application which Mr.  
5 Blount filed was filed on May 17th, 1993. The original  
6 application was followed by two continuation of part  
7 applications which issued in '159 patent in suit on November  
8 23, 1999.

9 During six years of prosecution, a patent office  
10 consistently rejected the Blount proposed claims on the basis  
11 of obviousness. And the primary reference establishing  
12 obviousness was the Iklor patent which is Exhibit  
13 D 8. And looking at that and proceeding to figures one and  
14 two, you can see in the Iklor patent that there are dual  
15 burners, No. 12 and No. 18, with the auxiliary burner 18  
16 being positioned forwardly and below the main burner, 12.  
17 The lower gas burner 18 is positioned directly above a B  
18 shaped troth, 46, which holds silica and other materials used  
19 to produce a front flame burner and wood burning ember  
20 effect.

21 In other words the Iklor patent has everything,  
22 absolutely everything, that is found in the Blount patent.

23 Now Blount argued to the patent office and was  
24 eventually successful in distinguishing -- in identifying the  
25 distinguishing feature was the secondary valve which is found

JT-APP 0950

1 on Exhibit 1, Figure 2, and essentially the element 106 down  
2 at the bottom. That is the distinguishing feature of the  
3 patent, and that is what the examiner allowed the claims  
4 over. That is the only element that was not found in Iklor.

5 I would like to quote from the last continuation in  
6 part application that was filed which resulted in the patent  
7 in suit, and that would be Exhibit D 4 and on production page  
8 number 313.

9 Mr. Blount argued, quote, "Iklor, et al, have  
10 combined with Peterson and Henry to reject the claims as  
11 originally presented. However, this combination of  
12 references in no way suggests the incorporation of an  
13 additional valve between the primary and secondary burners.  
14 The only suggestion for incorporation of the second valve  
15 necessarily comes from applicants own disclosure.

16 "Even if all the references are combined as  
17 suggested by the examiner, there is no valve disposed between  
18 the primary and secondary burner to control gas flow to the  
19 secondary burner."

20 The second gas flow is the only physical difference  
21 that was identified by Mr. Blount during the prosecution of  
22 the patent. However, the Peterson Company has been selling  
23 multiple burners in fireplace units with independent separate  
24 control valves against the 1960s. None of the Peterson  
25 references were before the patent office when the patent was

JT-APP 0951

1 being prosecuted. For example, Defendant D 45, Production  
2 No. 31, and referring specifically to Figure 3, show as top  
3 view of a circular burner set having three burner tubes with  
4 gas flowing through the main valve F down at the bottom to a  
5 cross connector.

6 At the same time gas is flowing through the valves  
7 call earth elbows, which are identified as letter C on that  
8 drawing, to each burner tube from the cross connector, and  
9 each valve has regulating screw G which controls the flow of  
10 gas to each one of the burners. A side view of the burner  
11 shows the log with three flames illustrated down at the  
12 bottom.

13 Now we have a physical model here, Your Honor, if I  
14 may point the court's attention. These are three burners  
15 identified in parallel right here. Each one of the -- the  
16 flame of each one is controlled by what's called a hearth  
17 elbow right here, which has an adjusting screw. And gas  
18 flows in through the bottom here and is disbursed through  
19 each one of the burners.

20 Now the operator of the fireplace can turn or set  
21 the screws in order to control the gas flame on each one  
22 these burners independently. So what you have here now is  
23 you have the missing valve, independent control valves on  
24 multiple burners that was not found in the prior art that was  
25 cited during the Blount prosecution.

1 Please remember that the Iklor patent as identified  
2 had every one of the elements in there. Had the burner pan,  
3 had the main burner, had the connections to the gas jets.  
4 And it also had a secondary tube, but what it was lacking was  
5 the control valve.

6 That is what this case boils down to on the issue  
7 of validity is the presence of this control valve. Those  
8 control valves were sold by Peterson Company for over 30  
9 years. This is a standard item that has been around for  
10 decades, and the use of multiple burners with independent  
11 control valves is, you know, in the fireplace industry it's  
12 as old as dirt.

13 Consequently, Your Honor, we're not dealing with  
14 the light bulb here. This is a very simple alleged invention  
15 that was patented by Mr. Blount. Had this Peterson product  
16 been present, which it was not during the prosecution of the  
17 patent application, never would have seen the light of day.

18 MR. HARRIS: Your Honor, for clarification I would  
19 like to know that this item that's been discussed is a  
20 catalog item sold today?

21 MR. MONCO: I believe it is a catalog item. I  
22 believe it is sold today, correct.

23 MR. HARRIS: Well, is it?

24 UNIDENTIFIED SPEAKER: I believe it is --

25 MR. HARRIS: Do you know?

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1 UNIDENTIFIED SPEAKER: Yes, I know.

2 MR. HARRIS: What exactly?

3 UNIDENTIFIED SPEAKER: It has been sold from 1964  
4 to 1995 or '96 in the catalog.

5 MR. HARRIS: So it's abandoned item as of 1995,  
6 and this is just a mock up. I want to be sure the court  
7 understands that.

8 MR. MONCO: . Your Honor, let's be clear. This  
9 product is sold and is continued to be sold. It is not a  
10 catalog item. This is still being sold today. I just want  
11 to make that point clear to the court.

12 THE COURT: Okay.

13 MR. MONCO: The idea this has been abandoned,  
14 it's been sold since the 1960s, Your Honor. It's still  
15 available, and it is clearly prior art. This is not some  
16 kind of one time item, catalog item. This is a catalog item  
17 and has been a catalog item.

18 If I may, Your Honor, I would like to refer to  
19 Exhibit D 49 which is, in fact, a 1977 Peterson price list.  
20 You can see the date right up on the right hand corner up  
21 there. And referring down to section Roman Numeral II F  
22 Series Log Sets with Front Flame Burners. Here again, Your  
23 Honor, you have that in front of you. Here again, Your  
24 Honor, you have a demonstration or an example of Peterson  
25 Company selling front flame burners to the 1970s.

1 This, Your Honor, is again, as I say, this is as  
2 old as the hills as far as the concept of having the front  
3 flame burners used, multiple burners, multiple independent  
4 valves. All of this was in the Peterson catalog, and the  
5 parts comprising this were sold independently in the Peterson  
6 catalog for decades.

7 Further, in an illustration which we would like to  
8 point out to the court. Turning to exhibits D 47 and 48.  
9 These are illustrations that were prepared by the Peterson  
10 Company designer, Vince Jankowski, and the date appears on  
11 Exhibit D 48 in July 1, 1983.

12 In addition to offering catalog items, Your Honor,  
13 Peterson Company has sold over the decades customized  
14 fireplace units for customers having particular needs,  
15 customer in this case being distributors who want to have  
16 particular things achieved by fireplaces that they're selling  
17 and maybe catering to particular individuals have certain  
18 effects that they want to have.

19 These particular drawings are illustrative of  
20 products that the Peterson Company designer Mr. Jankowski was  
21 preparing for the Peterson Company and sold in the  
22 marketplace, again during the 1970s, 1980s, 1990s, even  
23 currently today..

24 Again, if you take a look at this, Your Honor, this  
25 is a dual burner set, and you'll see, if I may have the

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1 illustration with the arrows, the flow of gas moves from the  
2 lower burner up through the yellow portion which again that's  
3 a hearth elbow, Your Honor. That's a controlling valve that  
4 controls the gas going to the upper burner and the quantity  
5 of gas that's being flowed there.

6 So again the operator has the ability to control  
7 the height of the gas going into the secondary burner, again  
8 using one of the hearth elbows that has been sold in the  
9 Peterson product line going back to the 1960s and 1970s.

10 With respect to the issue of willful infringement,  
11 the Peterson Company in the person of Leslie Borts will  
12 testify that upon first receiving notice of a claimed  
13 infringement in the form of -- he immediately contacted his  
14 lawyer, Bill McLaughlin, and forwarded a copy of the log gas  
15 unit with drawings of the accused product to him for  
16 examination.

17 Peterson Company, which was done in I believe  
18 December of 1999, following up on that in response to a  
19 further subsequent letter by the attorney for Mr. Blount  
20 which was, I believe, dated May 3, 19 -- or May 3, 2000, the  
21 Peterson Company wrote back and specifically requested Mr.  
22 Blount or his attorney to identify, A, how the Peterson  
23 product constitutes an infringement of any of the claims of  
24 the Blount patent.

25 I would like to simply ask if we can have Exhibit D



1 20 up on the screen for a moment, please.

2 And if you could enlarge that, please.

3 We are -- here is the letter going to them and  
4 specifically asking -- specifically stating that Peterson  
5 Company disagrees with the statement that their burner  
6 assembly is substantially similar and asks them in the last  
7 sentence, "Please explain to us and detail the dates upon  
8 which you believe that we are infringing on your client's  
9 patent."

10 We did not receive any response to that request.  
11 Instead, the next thing we have is the lawsuit filed against  
12 us. Following the filing of the lawsuit, additional  
13 materials were provided to my partner, Mr. McLaughlin, who  
14 examined the Blount patent, reviewed the file history,  
15 reviewed all the cited references.

16 In addition to that, reviewed all literature of the  
17 Peterson Company not before the patent office having to do  
18 with the products Peterson had on the marketplace in the  
19 1960s and '70s and concluded very simply, Your Honor, there  
20 is either no infringement, and if there is infringement,  
21 every one of the claims of the Blount patent is invalid for  
22 obviousness. This is not a difficult subject matter, and  
23 therefore the opinion was going to be in that nature.

24 Lastly, with regard to the claim for damages in the  
25 way of lost profits. First of all, the front flame booster

1 that is the actual accused product here is sold as an  
2 accessory, Your Honor. It's a retrofit that can be used on  
3 fireplaces that have already been sold. So -- and this is  
4 the way not only that Peterson Company sells it. It's also  
5 the way that Mr. Blount sells his product, also. And these  
6 represent, I believe, the gross sales. The gross sales, Your  
7 Honor, that we're talking about here are the front flame  
8 booster of the accused product amount to about \$90,000.  
9 That's the nature of the damages that are here.

10 And as a consequence, Your Honor, because it's sold  
11 as an optional accessory, there is not going to be any  
12 piggyback type sales having to do with logs and pans and  
13 front burners and everything else. That's not the way this  
14 product is sold, and it's not sold by either company in that  
15 way. The literature is absolutely clear this is sold as an  
16 accessory on that basis.

17 For that additional reason, Your Honor, even if all  
18 the -- even if infringement is established, we're talking  
19 about minimal lost profits. And in the case of the way the  
20 product is sold because it's sold as accessory, Peterson  
21 respectfully submits these products would not have been  
22 substituted one for the other because if you have a Peterson  
23 burner, you're going to use a Peterson front flame. If you  
24 have Blount, you're going to use Blount. So consequently the  
25 most they would be entitled to would be a reasonable royalty

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1 on \$90,000 which we think amounts to -- is going to be a  
2 relatively small amount of money.

3 Thank you, Your Honor.

4 THE COURT: Thank you. Ready for your first  
5 witness, Mr. Harris?

6 MR. SELINGER: Your Honor, with the court's  
7 permission, may I be excused?

8 THE COURT: .You're not having fun?

9 MR. SELINGER: I'm having a lot of fun, but  
10 particularly in view of the numbers I've heard, I would be  
11 better off.

12 THE COURT: Sure, you can be excused. It's good  
13 to see you.

14 MR. SELINGER: Thank you, Your Honor.

15 MR. HARRIS: Plaintiff calls Golden Blount.

16 THE COURT: Come right up this way, please. If  
17 you'll raise your right hand for an oath.

18 (Witness sworn by the court.)

19 THE COURT: Just have a seat right up there.

20 GOLDEN BLOUNT, (Sworn)

21 was called as a witness by the Plaintiff having been first  
22 duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. HARRIS:

25 Q Sir, would you state your name and address?

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1 A My name is Golden Blount, and my home address is 5310  
2 Harbortown, Dallas.

3 Q And are you the inventor of the patent in suit?

4 A Yes.

5 Q Did you assign that patent?

6 A To my company, yes.

7 Q So it is the present owner?

8 A Yes.

9 Q Would you give me a brief description of the history of  
10 your company? By the way, it is a family company, isn't it?

11 A Yes. I have two grown sons in the business, and my wife  
12 is also in the business.

13 We started in business in 1970 as a manufacturers  
14 rep agency. From there we became a distributor in the  
15 fireplace industry as well as other areas. Then ultimately  
16 we got into manufacturing products, which we sell pretty much  
17 national.

18 Q I'm sorry. I didn't hear the last thing you said.

19 A Manufacture and sell pretty much on national basis.

20 Q Could you give us a description of your invention of the  
21 patent in suit, just how it came up?

22 A Well, we got in the gas log business. We thought there  
23 was a need for a better looking burner system to enhance the  
24 appearance of burning logs, help to sell the product. And we  
25 got lucky with the different type burners on the market.

1 While others had tried, no one had come up with a front  
2 burner that would illuminate the front coals or embers. So  
3 we went through some 70 prototypes and finally hit the answer  
4 to it. We began selling almost immediately. It's been a  
5 real successful product.

6 Q Now as I understand, you have quite a few years in the  
7 business of gas fired logs?

8 A I've been selling gas logs since 1970.

9 Q How many people does your company employ?

10 A Approximately 65.

11 Q Have you ever won any kind of an award for, let's say,  
12 your company's product?

13 A Yes. Last year we won't what's called a Vested Award  
14 for the most realistic gas logs in the industry, which we  
15 still have that trophy.

16 Q Why was there a need, if there was, for your invention?

17 A Well, if you're going to sell another product, you need  
18 to enhance the appearance, make it more desirable. We had  
19 done what we could with the logs. We decided to do a  
20 different burner and do things no one else had ever been able  
21 to do. Therefore we came up with the ember bed burner.

22 Q What does it accomplish particularly?

23 A Well, if you look at the two -- the burning of two  
24 different fireplaces with gas logs with the standard burners  
25 as supplied by many people in the industry and then look at

1   ours with our ember bed burner, you see a magnificent burner,  
2   a magnificent burner that you do not get without the ember  
3   burner.

4   Q   Is it your position that the invention accomplished  
5   something that had not been done before?

6   A   No question about it.

7   Q   No question about it in what way?

8   A   It was very successful and very desirable product.

9   Q   You heard a great deal of testimony by the opposing  
10   lawyer who didn't designate himself as an expert, but you did  
11   hear it, did you not?

12   A   I heard it.

13   Q   And in that testimony did you hear some references to  
14   circular fireplaces and what would amount to see through  
15   fireplaces and all kind of specialized equipment?

16   A   I heard it.

17   Q   Did any of that have anything to do with your invention?

18   A   Absolutely nothing.  Nothing.

19   Q   Do you personally believe as an inventor that the model  
20   or the mock up that was shown by opposing counsel on the  
21   table has anything to do with your invention?

22           MR. MONCO:  I'm going to object to the question,  
23   Your Honor, as both leading and calling for this witness as  
24   an expert because this witness has not been identified as an  
25   expert witness on Peterson products.  We would object to any

1 testimony having to do with the assessment of the Peterson's  
2 products.

3 THE COURT: Okay. Response.

4 MR. HARRIS: If it was sustained, I'll reword it.

5 THE COURT: No, I was asking for your response to  
6 the objection. You want to respond to the objection?

7 MR. HARRIS: My response to the objection is that  
8 it's such a straightforward thing and save so much time that  
9 I don't think it makes much sense to have to recast it. But  
10 I will withdraw the question, and I'll reask the question  
11 with the court's permission.

12 THE COURT: Okay. That's fine.

13 Q It will simply be, you saw the mock up that was on the  
14 table, was it not?

15 A Yes, yes.

16 Q Do you think it has anything to do with your invention?

17 A It's a copy. A direct copy.

18 Q What?

19 A It's a direct copy.

20 Q Sir, I'm talking about the mock up?

21 A Is this a mock up or a real set?

22 Q No, it had three --

23 A No, that had nothing to do with my product. Nothing to  
24 do with it.

25 Q Would you explain what it is as you understand it?

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1 A The one I have I believe is for a round fireplace and  
2 perhaps one for a specific fireplace, but nothing to even  
3 come close to what we're presenting here.

4 MR. HARRIS: At this time I would like to introduce  
5 the patent. I don't believe there's any requirement that we  
6 have the sealed copy, but if there is, we will come up with  
7 one.

8 THE COURT: Okay. I'll admit the patent.

9 Q That is Exhibit 1. And what is shown as the front  
10 picture on Exhibit 1 is pretty much what was on the table  
11 adjacent the Golden Blount name, wasn't it?

12 A Yes.

13 MR. HARRIS: At this time I would like to  
14 introduce Plaintiff's Exhibit 2 A and 3 B.

15 THE COURT: Any objection?

16 MR. HARRIS: Take just a minute to get them up.  
17 It's 2 A through 3 B.

18 THE COURT: Okay.

19 MR. MONCO: Your Honor, we would object at least  
20 that there be some foundation laid for Exhibit 2 A.

21 THE COURT: I'll overrule the objection. You may  
22 go ahead.

23 Q Just to be nice about it, can you tell us what this is  
24 to provide a little foundation?

25 A Okay. It's Texas Bonfire log set burning with the ember



1 bed burner illuminating with coals as you can see in the  
2 picture in front of the log set.

3 Q We'll go on now to the next one, which is 2 B.

4 A This is the same model log set, but without the ember  
5 bed burner. So you see it does not illuminate out in front  
6 of the fireplace logs to any extent.

7 Q Can you point out to us in what area there is a very  
8 large difference between the two?

9 A One has the ember bed burner which gives you the  
10 illusion of coals burning in front, and the other is just the  
11 plain burner.

12 Q What area of ember heater are we talking about? To the  
13 back, to the front, to the top?

14 A Ember is in front of the gas log set.

15 Q So that's the place to really look to make the  
16 comparison, isn't it?

17 A Absolutely.

18 MR. HARRIS: At this time we have a video which  
19 the way it was made I think has to be cut into two parts. We  
20 would like to show one part and then a little bit later the  
21 other part.

22 THE COURT: Okay.

23 MR. HARRIS: Of course, the other side have an  
24 objection?

25 MR. MONCO: Your Honor, we reviewed the video, and

1 we would object to the video. We would object it to first of  
2 all because it has a narrative in it, and we would object to  
3 any narrative presentation being made over the video. If  
4 this witness wants to identify the video with the sound off  
5 and do his own narration on the stand here, we would have no  
6 objection to that. But we would object to the use of having  
7 this video admitted with the sound on.

8 THE COURT: . Okay. I'll overrule your objection.

9 MR. HARRIS: Excuse us just a second.

10 THE COURT: Okay.

11 MR. MONCO: Your Honor, if I may just for one  
12 further objection.

13 THE COURT: Okay.

14 MR. MONCO: It appears from what we have been  
15 able -- from what we were able to understand from the  
16 videotape is that there was another person other than Mr.  
17 Blount is narrating the first part of this videotape. So we  
18 would first object on that basis.

19 MR. HARRIS: I believe time will tell, but we will  
20 take care of that.

21 THE COURT: Okay. Good.

22 MR. HARRIS: I don't believe we're quite tooled  
23 up, yet.

24 I think we are now.

25 (Video played)

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1 BY MR. HARRIS:

2 Q What is this that's now being shown?

3 A Our ember bed burner, and he will show you how.

4 Q Your what burner?

5 A Our ember bed burner.

6 Q Ember bed burner. Okay.

7 A That's right. The person's that's the voice is Bill

8 Romas, who's worked with us 20 years.

9 Q What did you have to do with this picture?

10 A I was there. I directed it.

11 Q So you can verify that it is an authentic picture?

12 A Absolutely.

13 Q And a good showing of what happened?

14 A Absolutely.

15 Q All right. Thank you.

16 Now we'll try again.

17 (Video played)

18 Q Sir, do you suppose this valve is the one that opposing

19 counsel was making noises about to the effect that it was the

20 only thing you did?

21 A No.

22 Q Well, whatever it was or not, it's a fact you have to

23 have the valve, don't you?

24 A Yes, to make it successful.

25 Q And you're going to have an unsuccessful device without

1 it, correct?

2 A That's correct.

3 Q And while I'm amazed that's been picked up on as an item  
4 in this suit, nevertheless I want you to be clear to us  
5 there's a lot more to this invention than just a valve?

6 A Absolutely.

7 Q All right, sir. Back to the ranch.

8 (Video played).

9 Q I wanted to ask you, sir. Isn't it true that one of  
10 the items there can be removed after you've made an  
11 adjustment?

12 A That's the handle, yes.

13 Q Yes. Over to the left, isn't it?

14 A Yes.

15 Q And it can just be taken out of the way. By the way,  
16 Peterson has the same thing, don't they? I mean, it's built  
17 a little different direction, but it's the same thing?

18 A Strangely, yes.

19 Q For the same purpose and is removable likewise?

20 A Yes.

21 MR. MONCO: Your Honor, I would like to just offer  
22 a belated objection for leading the witness on his questions.

23 THE COURT: That's overruled. Go ahead.

24 MR. HARRIS: Okay.

25 BY MR. HARRIS:

1 Q Could you give us perhaps -- an outline will be  
2 sufficient, let us see -- of the history of the success, if  
3 there was one, of your invention?

4 A Well, there's no question about the success because the  
5 sales have been just wonderful. We have a lot of comments  
6 from all of our customers. It's helped them sell more  
7 product. It's helped us get additional customers away from  
8 you know who and others who do not, haven't had it before.  
9 It's just been one of the best things we could have done in  
10 our business.

11 Q Let me press you to be a little more definite than that.

12 A Yes, sir.

13 Q Would you?

14 A I'll try to.

15 Q I mean, like there was a time you sold none, correct?

16 A Correct.

17 Q There was a time you sold at least one or more, wasn't  
18 there?

19 A Absolutely.

20 Q Okay. So between now and then might be a way to present  
21 it.

22 A Well, we moved to the category of 10,000 units a year,  
23 which is a lot of burners, and it's still growing. It's  
24 getting more popular all the time, it seems, based on what  
25 customers tell us and based on the orders we receive from

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1 them.

2 Q Has it had a flat curve or sloping curve or what?

3 A Never been flat. Always been on the incline.

4 Substantially so.

5 Q On what?

6 A Incline curve, increase.

7 Q Incline curve.

8 As a matter of fact, just to direct the period of  
9 time that is more or less covered by this lawsuit, since 1999  
10 have you had growth?

11 A Absolutely.

12 Q And that was in the face of competition?

13 A Yes.

14 Q Why did you bring suit?

15 A (No response.)

16 Q Why did you bring suit against the Peterson Company?

17 A Well, because they came out with a direct copy, and  
18 that's nonsense.

19 Q Would you authenticate for us, if you're able to, the  
20 first letter that was written about infringement from you or  
21 your attorneys to Peterson?

22 A I believe it was --

23 Q We'll get it on the screen, okay? That's Exhibit 10.

24 A All right.

25 December 10, 1999 to Peterson. Basically it was a

1     cease and desist type letter.

2     Q     Is it true that you meant what you said when you said  
3     that, "The lawyers have been instructed to take whatever  
4     steps are reasonable and necessary to prevent infringement of  
5     the patent"?

6     A     You know it's true.    Yes.

7     Q     And is it true that you were sincere when you asked for  
8     their intentions regarding continued sale of the product?

9     A     Yes.   We asked for their intentions, and they didn't  
10    really respond to it.

11    Q     I know you reviewed Mr. Tucker's letter.   Was there any  
12    doubt in your mind that you were telling them they were  
13    infringing and they better quit?

14    A     I would think any normal person would say, hey, let's  
15    don't do it, and quit, but they didn't.

16                 MR. HARRIS:   By the way as a detail, I suppose I  
17    should at this time ask for a sort of a catch up on  
18    introduction of exhibits.

19                 I move the introduction of those exhibits that have  
20    been displayed.   So far to the extent that any of them have  
21    been said to be merely for demonstration purposes or the  
22    like, we will take care of them later.

23                 THE COURT:    Okay.   They are admit.

24                 MR. MONCO:   Your Honor, if I just may inquire.

25    Does the court prefer that all the exhibits be moved in at

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1 the end of the case in chief or would you prefer them moved  
2 in item by item basis?

3 THE COURT: I would rather get them all in at one  
4 time. If you will introduce all of your exhibits.

5 MR. HARRIS: Could I bring up the matter of  
6 exhibits just a moment as between the two sides and the  
7 court?

8 THE COURT: Sure.

9 MR. HARRIS: It seems to me like we must have  
10 spent half a day each or a day just making objections of  
11 every conceivable sort to every exhibit listed. That to  
12 me -- well, I wish I hadn't made so many or my people hadn't  
13 made so many. And I think they ought to feel the same way.

14 I'm wondering if we could have some kind of  
15 conference to cut down on objections to where you weren't in  
16 the position and we weren't in the position of having to just  
17 bump along.

18 THE COURT: Um-hum. I agree with you. What I  
19 would like to do is both sides just introduce -- offer their  
20 exhibits, and then I'll hear -- when we get to the exhibits,  
21 I'll hear any further objections to the exhibits at the time  
22 they come in.

23 MR. MONCO: That's fine with us, Your Honor.  
24 Thank you.

25 THE COURT: Okay. Good.

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1 MR. HARRIS: Well, I at this time then offer  
2 Exhibits 1 through 26.

3 THE COURT: They are admitted. Pardon me. They  
4 are admitted.

5 MR. HARRIS: Now I've got to get back to where I  
6 was.

7 BY MR. HARRIS:

8 Q Now this letter, Exhibit 10, did you get a response to  
9 it?

10 A Yes, we got a reply dated the December 30th, 1999, from  
11 Peterson basically brushing us off, I think.

12 Q Exhibit 11 is very brief.

13 A That's 11. What was that?

14 Q Would you call that a letter just asking for some more  
15 time to think about it?

16 A I considered it a brush off letter. Yes.

17 Q And then on May 3rd of 2000, several months later,  
18 Plaintiff's Exhibit 12 was sent, was it not?

19 A Yes.

20 Q And that was to a Peterson executive, right?

21 A Yes.

22 Q Is there any doubt in your mind but what Mr. Tucker once  
23 again was making it absolutely clear that you thought there  
24 was an infringement problem and that they had better do  
25 something about it?

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1 A As clear as you could make it. Very clear.

2 Q Did infringement activity stop?

3 A No.

4 Q We're reading Exhibits 4 A and 4 B.

5 MR. HARRIS: Excuse me just a minute.

6 Go back to 4 A and 4 B if that's fine.

7 THE COURT: Okay. They are admitted.

8 Q 4 A and 4 B are what has been previously identified as  
9 demonstrative evidence.

10 THE COURT: Okay.

11 MR. HARRIS: It's the Peterson unit and the Golden  
12 Blount unit. Now I'm not trying to tell the court that to  
13 determine infringement, you compare a thing with a thing.  
14 You compare a thing with a patent, and you know that.

15 THE COURT: Okay.

16 MR. HARRIS: But nevertheless, since we think the  
17 Golden Blount device is exactly like the patent where we  
18 think it's a good demonstration of it.

19 THE COURT: Okay.

20 MR. HARRIS: I want to be sure that you can see  
21 the --

22 MR. MONCO: Your Honor, may I come around and take  
23 a look?

24 THE COURT: Certainly.

25 MR. HARRIS: I find -- what numbers do you have

1 down, 3 A?

2 MR. PARKER: 4 A and 4 B, Mr. Harris.

3 MR. HARRIS: I hate to waste time like this, Your  
4 Honor.

5 MR. PARKER: 4 A and 4 B is Defendant Peterson's  
6 device.

7 MR. HARRIS: Is ours 3 A and 3 B?

8 MR. PARKER: Yes, sir.

9 MR. HARRIS: Okay. I would also like to draw  
10 attention, because I was wrong, to 3 A and 3 B which is the  
11 Golden Blount set, and the 4 A and 4 B I correctly  
12 identified, I believe, as the Peterson set.

13 THE COURT: Okay.

14 MR. HARRIS: Anyway, that's the way it is. Sorry.

15 THE COURT: That's all right. They are admitted.

16 MR. HARRIS: Can you see 4 A and 4 B from where  
17 you're sitting?

18 THE COURT: I can see 4 A. I can't see 4 B. I  
19 can move over and see it.

20 MR. GAINES: Excuse me, Your Honor. Would you  
21 like for us to move the table over off to your left a little  
22 better?

23 THE COURT: That would be better. I can see it  
24 from where I'm sitting.

25 MR. HARRIS: What do you want us to do?

1 THE COURT: Move the table here.

2 THE WITNESS: Watch out for your back.

3 THE COURT: Little bit more. Okay. That's fine.

4 Thank you.

5 BY MR. HARRIS:

6 Q We had a comparison video. I'm skipping again. We need  
7 to do a couple pictures. Plaintiff's 5 A and 5 B.

8 Can you tell us what 5 A is, please?

9 A This is a Peterson log set with their ember flame  
10 burner.

11 Q Does it produce embers out front?

12 A Yes.

13 Q Very, very much like yours?

14 A Close.

15 Q And have you ever seen another log set that did that?

16 A What do you mean, another log set? Another  
17 manufacturer?

18 Q Well, I mean gas fired log set?

19 A No, except ours.

20 Q Yours and Peterson's.

21 Could you tell us what 5 B is?

22 A Well, it looks like 56 exhibit on my screen, but this is  
23 the Peterson set burning without their ember booster, as they  
24 call it.

25 Q How is that again? My ears.

1 A This is a Peterson set burning without their ember flame  
2 booster.

3 Q In other words, if you look took the first one we were  
4 talking about a minute ago, you get the nice ember effect in  
5 front. And if you take just the standard and remove the  
6 assembly that goes out front, well, you wind up with the  
7 second picture?

8 A Yes.

9 Q Or another way to put it is, you wind up without having  
10 good embers out front?

11 A Correct.

12 MR. HARRIS: At this point we would like to  
13 restart the video that we had going earlier.

14 THE COURT: Okay.

15 (Video played)

16 Q That particular one is your device, is it not?

17 A Yes.

18 (Video played)

19 Q What are we looking at now on the picture frame?

20 A We're looking at burning displays of our gas logs in our  
21 showroom.

22 Q Now what are we looking at?

23 A Looks like we're looking at -- well, it's a Peterson  
24 set, of course.

25 Q Peterson is with the burner on or with the burner off?

JT-APP 0977

1 A Burner off.

2 Q And what's -- I was just going to ask what the  
3 difference is in the result?

4 A It's totally different look. One is just a gas log with  
5 a burner under it, and the other is gas log with ember bed  
6 burner in addition to the primary burner.

7 (Video played)

8 MR. HARRIS: I believe that's the end of the  
9 matinee.

10 THE COURT: Okay.

11 MR. HARRIS: I now direct attention to a literal  
12 infringement chart, Plaintiff's Exhibit 9, and would like to  
13 have it on the screen.

14 There's several pages of it, but I'll try to go  
15 through it pretty fast.

16 I want to make it clear, of course, that the  
17 lawyers drew this chart, not the client.

18 THE COURT: Okay.

19 MR. HARRIS: On the other hand, the client has  
20 some understanding, of course, of patent things, and he knows  
21 what he thinks he invented, at least, and is in a position we  
22 believe to talk about his own invention.

23 THE COURT: Okay.

24 Q Okay: Would you direct your attention to the literal  
25 infringement chart, Plaintiff's Exhibit 9, the first page.

1 And what I would like for you to do is to verify that No. 1,  
2 claim element, right out of the claim, is in both the  
3 plaintiff's claimed device and the defendants sold device.  
4 Could you do that?

5 A Yes, absolutely. Same type of basic burner system and  
6 direct copy of our ember bed burner.

7 Q And then after the introduction we come to "an elongated  
8 primary burner tube, including a plurality of gas discharge  
9 ports." Can you focus on that for us?

10 A Well, it's basically the same type burner system.

11 Q Well --

12 A Primary.

13 Q Is it painted purple or zebra color?

14 A The burner itself is blue.

15 Q It's black, it's dark, isn't it?

16 A Yes.

17 Q The primary burner tube, if you could help us in that  
18 regard as we go along, we have some colors on it.

19 A Yes, it would be black or dark blue.

20 Q Do you find the same thing present?

21 A Yes.

22 Q Go to the next page of the exhibit.

23 Then we have a secondary coals burner, elongated  
24 tube positioned forwardly of the primary burner tube.

25 Not to lead too much, but can you tell me what's

JT-APP 0979

1 red and what's blue?

2 A It's the ember bed burner in red locations.

3 Q And the primary burner is, of course, blue?

4 A Blue, correct.

5 Q So you find the same thing there?

6 A Yes.

7 Q Literally and exactly?

8 A Yes.

9 Q Then we go to a support means for holding the elongated  
10 primary burner tube in a raised level.

11 A We call it burner pans.

12 Q I'm sorry. Primary burner tube is the way it reads in a  
13 raised level relative to the forwardly positioned secondary  
14 coals burner elongated tube. You might want to read that  
15 again to yourself. It's a mouthful for me.

16 A The secondary coal burner elongated tune positioned  
17 forwardly on the primary burner tube. It's the same in both  
18 cases.

19 Q What makes you say that?

20 A Well, look at it yourself.

21 Q What is the support means for holding --

22 A It's the burner pan. It's steel pan.

23 Q The green pan; is that right?

24 A The green pan.

25 Q Both of them have the green pan. And then you have the



1 blue burner we've been to before, don't you?

2 A Absolutely. Yes.

3 Q And the blue burner is supported in both instances by  
4 the sides of the green pan, right?

5 A Yes.

6 Q Then we have the secondary coals burner elongated tube  
7 including a plurality of gas discharge ports. And I must say  
8 those are very hard to see, but it's inherently true that  
9 both of them have those ports, true?

10 A True.

11 Q You have to have the ports to get the gas out?

12 A Correct.

13 Q Going to the next element. The elongated primary  
14 burner tube and the secondary coals burner elongated tube  
15 communicating through tubular connection means wherein the  
16 gas flow to the secondary elongated coals burner tube is fed  
17 through the primary burner tube and the tubular connection  
18 means?

19 A That's correct.

20 Q Boiled down, what does that say?

21 A It's just a copy.

22 Q Well, kind of boiled down, it says something that  
23 happens, though. What happens? You have the elongated  
24 burner tube, secondary coals burner tube. That's the ember  
25 thing, isn't it?

JT-APP 0981

1 A Yes.

2 Q And they communicate where the gas can go to the  
3 secondary after it's fed through the primary. Isn't that  
4 what it says?

5 A Yes. Provides the burner system.

6 Q Right. And that true or is it true in both?

7 A Yes.

8 Q Then the element is a valve for adjusting gas flow to  
9 the secondary coals burner elongated tube position in the  
10 tubular -- I can't read it myself. I'm sorry. -- in the  
11 tubular gas connection means. Is there any question about  
12 the valve?

13 A No question. It's the same concept.

14 Q Adjustable valve in both cases?

15 A Yes.

16 Q And they show an extending or we show for them an  
17 extending stem over on the right under defendant's sole  
18 device. Do you see that?

19 A Yes.

20 Q What do you do with the stem most of the time?

21 A You pull it out when you get through adjusting the flame  
22 would be the normal thing to do.

23 Q It's just something to actuate the valve?

24 A True. Correct.

25 Q Then we come to the primary burner tube being in

JT-APP 0982

1 communication with a gas source with a gas flow control means  
2 variant for controlling gas flow into said primary burner  
3 tube.

4 A Same in both cases.

5 Q Any doubt about it?

6 A Absolutely none.

7 Q Okay.

8 MR. HARRIS: Would you give me one minute, Your  
9 Honor?

10 THE COURT: Sure. We're ready for a break,  
11 anyway. We'll take --

12 MR. HARRIS: That sounds good.

13 THE COURT: We'll take a 15 minute break.

14 (A recess was held at 10:30.)

15 (Resume at 10:45.)

16 MR. HARRIS: We now come to claim 2, though there's  
17 a point I may want to go back to on claim 1 later. I'll be  
18 quick on claim 2.

19 THE COURT: Okay.

20 MR. HARRIS: The court, of course, understands that  
21 if you have a dependent claim, it's required to have all the  
22 elements of the main claim 2.

23 THE COURT: Right.

24 MR. HARRIS: But just to remind all of us of that  
25 and the witness.

JT-APP 0983

1 BY MR. HARRIS:

2 Q No. 2, Claim No. 2, states, "The gas fired artificial  
3 logs and coals burner assembly according to claim one where  
4 in the support means for the primary burner two is comprised  
5 of an open frame pan for supporting the primary burner tube  
6 in an elevated position relative to the fireplace box."

7 Would you look at that carefully, please, and see  
8 if you can find that, that language covers the defendant's  
9 sold device?

10 A The same as ours, yes.

11 Q We jump to claim 5, and in 5, "The gas fired artificial  
12 logs and coal burner assembly according to claim one wherein  
13 the secondary coals burner elongated tube is substantially  
14 parallel to the primary burner tube and has a smaller inside  
15 diameter than the primary burner tube with the valve  
16 adjusting gas flow for coals burner and forwarding heat  
17 radiation from the fireplace. "

18 A It's the same in both cases, both our products.

19 Q In other words, the claims don't talk about just the  
20 product, the claimed device, right?

21 A The same.

22 Q Is the same as what defendant sells.

23 You will notice in this one that it talks about a  
24 smaller inside diameter. It brings up the fact that the  
25 ember burner is not as large an element, doesn't have as

JT-APP 0984

1 large a diameter as the main burner?

2 A It's smaller, yes. Quarter inch.

3 Q Going to 7. And abridging it a bit, "Wherein the  
4 elongated primary burner tube and the secondary coals burner  
5 elongated tube are spaced apart on different flames at from  
6 about 4 to about 8 inches."

7 A That's correct.

8 Q What does that mean? Does that mean they're separated?

9 A Yes. Coals --

10 Q Does that mean they're separated vertically or  
11 horizontally --

12 A Horizontally.

13 Q -- in that particular case?

14 A That's right.

15 Q By the way, there is a certain amount of vertical  
16 separation that's present in some of your claims, isn't  
17 there?

18 A Certain amount of vertical difference? Yes.

19 Q Vertical separation between the ember burner and the  
20 main burner?

21 A Yes, yes.

22 Q We'll come back to that.

23 No. 9 again is a dependent claim, and getting to  
24 the heart of it, it says, "Wherein the secondary coals burner  
25 elongated tube is adjustable in height relative to the floor

JT-ARP 0985

1 of the fireplace and the elevated primary burner tube."

2 Does that have to do with the ability to crank them  
3 or turn them up?

4 A Yes.

5 Q And by "them" I mean the ember burner?

6 A Burner, yes.

7 Q You both have that ability?

8 A Yes.

9 Q Going to 11, "Wherein the primary and secondary burner  
10 tubes have apertures from about 1/32nd inch to about one  
11 eighth of an inch." And I promise you I don't have the  
12 foggiest notion what those diameters are myself. Do you  
13 know?

14 A Ours is 32nd. I think theirs is approximately the same.

15 Q And 12, another dependent claim. "Wherein the gas flow  
16 adjustment valve has a removable handle, the gas flow  
17 adjustment allowing a variety of settings from full closed to  
18 full open."

19 That's open and shut, in fact, isn't it?

20 A Same in both cases.

21 Q Okay. I'm about to throw 13 away. Here we go.

22 "Wherein the connection means is comprised of a  
23 connector attached to the terminal end of the primary burner  
24 tube at the first end of the connector and attached to the  
25 second coals burner elongated tube to a connector second end

1 with a valve interposed between the primary burner tube and  
2 the secondary burner tube."

3 What's that language all about?

4 A Well, it's the same in both case.

5 Q It may be the same in both cases, but I asked you what  
6 it was all about or what were the same basically.

7 A I don't really understand what your question is.

8 Q All right. What does the claim say to you? What does  
9 it mean to you? That's all.

10 Let me read it again.

11 A Well, both connectors from the basic primary burner to  
12 the ember bed burner is what it means to me.

13 Q With a valve interposed?

14 A Yes, with a valve and connectors, hardware.

15 Q 15. "The gas fired artificial logs and coals burner  
16 assembly according to claim 1 wherein the open frame pan and  
17 primary elongated burner tube is positioned under an  
18 artificial logs and grate support means." Do you read that  
19 as involving logs also?

20 A Yes, it's a burner system and a log system.

21 Q Is that a claim that expands to cover full combination?

22 A I would think so, yes.

23 Q And so it covers the whole works, doesn't it?

24 A Whole ball of wax.

25 Q And do -- does the defendant's device that's sold meet

JT, APP 0987

1 that language in claim 15?

2 A The same, yes.

3 Q Claim 16, "The gas fired artificial logs and coals  
4 burner assembly according to claim one wherein the primary  
5 elongated burner tube is covered with sand and the secondary  
6 elongated burner tube is covered with sand, mica and fibrous  
7 materials which simulate coals and ember burners?

8 A You need to talk a little bit more distinctly, please.

9 Q Can you not hear me?

10 A Not too well.

11 Q Let me take this thing off. It's a trade off, it looks  
12 like.

13 A There you go.

14 Q I beg your pardon.

15 "The gas fired artificial logs and coal burner  
16 assembly according to claim one wherein the primary elongated  
17 burner tube is covered with sand and the secondary elongated  
18 burner tube is covered with sand, mica and fibrous materials  
19 which simulate coals and ember burners."

20 Does your patented system and their sold device  
21 have the same thing?

22 A Yes.

23 Q That's done by both?

24 A What?

25 Q That's done in both cases?

JT-APP 0988



1 A Yes, that's correct.

2 Q I'm happy to announce there's only one other.

3 A Thank you.

4 Q "A gas fired artificial coals and ember burning  
5 apparatus suitable for attaching to a gas fired primary  
6 artificial log burner tube, said primary artificial log  
7 burner tube having a terminal end comprising a secondary  
8 coals burner elongated tube."

9 Didn't let me confuse you. The sentence that is in  
10 the frames below 17 is a part of 17. You with me?

11 A I'm with you.

12 Q Okay. Can you make a comparison?

13 A It's the same. It's a copy of ours. The same.  
14 About as close a copy as you could possibly imagine.

15 Q What's that, sir? I'm sorry, sir.

16 A It's about as close a copy as you could imagine.

17 Q I want to revert to one point on Claim 1. May have  
18 passed over it too quickly in view of the position I've heard  
19 the other side take in this matter.

20 There is a phrase in claim one that says, "A  
21 support means for holding the elongated primary burner tube  
22 in a raised level to the forwardly positioned secondary coals  
23 burner elongated tube."

24 And when I asked you about a comparison, I think I  
25 focused on the idea that the main burner was supported on the

JT-APP 0989

1 shoulders or sides of the pan.

2 A That's correct.

3 Q Do you recall? However, reading it quite carefully it  
4 says, "In a raised position." I'm sorry. "In a raised  
5 level relatively to the forwardly positioned secondary coals  
6 burner elongated tube."

7 And my question is, is your patent and invention  
8 actually utilized to where it has a raised position for the  
9 main burner and the lower position for the forward ember  
10 burners?

11 A Yes.

12 Q This doesn't have to be six foot, does it?

13 A Absolutely not.

14 Q But it is different?

15 A It is raised, yes, higher.

16 Q In your opinion, is theirs the same?

17 A Yes.

18 MR. HARRIS: I'm not quite through, but give me  
19 one more second.

20 THE COURT: Okay.

21 (Pause)

22 MR. HARRIS: Thank you.

23 If you'll hand me what I've omitted, I'll put it  
24 here. I thought I had finished 17.

25 Is this not -- speaking to my cohort here -- part

JT-APP 0990

1 of this?

2 MR. PARKER: Yes, sir, and you start there.

3 Q What I have done is to omit the second element of claim  
4 17, for which I hope I will be forgiven.

5 It reads, "A connector means for connecting said  
6 terminal end and communication with the secondary burner  
7 tube, the secondary burner tube position substantially  
8 parallel forward and below the primary burner tube. The  
9 connector means have been interposed between the primary and  
10 the secondary burner tubes, a gas flow adjustment valve."

11 It does have color coding for it, you'll note.

12 A Yes.

13 Q Bearing in mind that we had talked earlier about the  
14 first part of the claim, can you tell me what the comparison  
15 is between the claim and the sold structure?

16 A Well, the construction is the same as the claim. I  
17 don't know what you're looking for beyond that.

18 Q Okay. Let me make it clear on Claim 17 that the reason  
19 it's so relatively wordy is because it is an independent  
20 claim. We have covered two of the elements now, and I had  
21 almost let one of them go.

22 The last element is now on the screen, and it  
23 reads, "Primary and secondary burner tubes having a plurality  
24 of gas discharge ports. A gas distribution ports of the  
25 secondary burner tube directed away from the fireplace

- JT-APP 0991

1 opening."

2 Can you make a comparison of Claim 17 as a whole to  
3 the sold structure?

4 A Well, we turn our jets away from the fireplace opening  
5 for better ignition of ember bed burner. I think I heard  
6 earlier that they said their jets are straight up for some  
7 reason.

8 Q Um-hum. Well, what did the claim say?

9 A Our claim says it's away from the opening.

10 Q And it says directed away from the fireplace opening,  
11 doesn't it?

12 A That's correct. Yes.

13 Q Can you discern a difference between toward and away?

14 A Well, towards you and away from you would be my  
15 interpretation of it.

16 Q Well, if I walked that way, I would be walking away from  
17 you, wouldn't I?

18 A That's correct.

19 Q And if I walked that way, I would be walking towards  
20 you?

21 A You're correct.

22 Q I am going to summarize the idea of function, way and  
23 result by just simply asking you a few questions rather  
24 putting a group of photos up.

25 A All right.

1 Q On an element by element basis, do you believe that  
2 they, meaning Peterson, accomplish the same thing in the same  
3 way to get the same result?

4 A Absolutely, yes.

5 Q And away from an element by element basis looked at  
6 overall, do you believe that they do the same thing in the  
7 same way to accomplish the same result?

8 A Yes, a direct copy.

9 Q I will at this time introduce an equivalence chart, but  
10 I see no reason to burden you with it.

11 MR. HARRIS: Plaintiff's Exhibit 21, Your Honor,  
12 just for your interest.

13 THE COURT: Okay.

14 Q One thing, could I direct your attention to the overall  
15 function of bringing the flame out front and doing it in such  
16 a way as to enliven the embers to make them beautiful and  
17 realistic? Is that not a major purpose --

18 A Yes.

19 Q -- of what you do?

20 A Yes.

21 Q And is that not apparently what they also do?

22 A Yes, absolutely. Yes.

23 Q I would like to change over to a rather different topic,  
24 and that has to do with the effect that the infringement may  
25 have had on your company financially. Okay?

JT-APP 0993

1 A Yeah.

2 Q My first question is, was there a demand for the product  
3 at the time their infringements became relevant?

4 A Yes.

5 Q And to make that point, we have Exhibits 15 A, 15 B, and  
6 19 A through H, which I believe are rather voluminous, and  
7 with any luck we won't have to read very much.

8 We also have a summary chart which we have made  
9 from these other materials which come from your bookkeeping.  
10 As a matter of fact, you run the company, do you not?

11 A Yes.

12 Q And you also in so doing supervise and run the  
13 accounting department, don't you?

14 A Yes.

15 Q And the records that you make regarding the sales and  
16 anything else having to do with pricing or what not, are made  
17 in the regular and ordinary course of business, are they not?

18 A Yes.

19 Q And they are made at about the time that the event  
20 occurs?

21 A Yes.

22 Q And then finally the summaries that we have or the  
23 summary that we have is something that you've been over and  
24 agree is correct?

25 A That's correct.

JT APP 0994

1 Q You can see it on the screen. CEBB, do you know what  
2 that stands for?

3 A I should. Controlled ember bed burner.

4 Q Anyway, it's their device, isn't it?

5 A Do what.

6 Q Is it yours?

7 A I didn't understand your question.

8 Q Which is CEBB? That's you, isn't it?

9 A Yes.

10 Q Okay. And they're EMB, is that it?

11 A Something like that.

12 Q Okay. It's not very important, I guess.

13 Can you give us kind of a quick run down on the  
14 quick run down that we have here?

15 A Well, it's just a breakdown of our sales by size by  
16 year.

17 Q Since 1999?

18 A Since 1999. We moved -- I don't know whether we should  
19 tell competition this or not, but we have doubled our sales  
20 in 2000 over '99. And 2001 was a little soft, but 2002 is  
21 coming back very strong.

22 Q Does this indicate to you some demand for the product?

23 A Well, there's no question about it. Why else would  
24 people want to copy us?

25 Q Is it fair to say you expected perhaps is larger demand

JT-APP 0995

1 if you hadn't had the competition from Peterson?

2 A Sure.

3 MR. MONCO: I'm going to object, Your Honor. It  
4 calls for speculation.

5 THE COURT: That's overruled.

6 BY MR. HARRIS:

7 Q Do you know of any non-infringing substitutes?

8 A Not anything that's not infringing, no.

9 Q Well, speaking of infringing substitutes, too. Have  
10 there been any significant number of those?

11 A We wrote five factories, I believe, when we sent the  
12 letter out to Peterson.

13 Q What?

14 A We sent five letters out, I believe, when we sent the  
15 letter the Peterson. We heard people were going to work on  
16 similar burners.

17 Q So who turned out to be the competitor?

18 A Peterson.

19 Q Are the others of any moment?

20 A They're moving in, yes. They all want to copy it  
21 because the demand is there for the product.

22 Q When has that happened? Recently?

23 A Fairly recently, yes.

24 Q Between you and Peterson, can you tell me what you  
25 believe your percent of the market is?

JT-APP 0996



1 A I don't know what their sales are. He wouldn't tell me.

2 Q I'm sorry?

3 A We probably do 95 percent of it at this one point and  
4 maybe more.

5 Q So you're saying between you and Peterson, it's 95  
6 percent of the market?

7 A I would say so, yes.

8 MR. MONCO: I'm going to object, Your Honor. Lack  
9 of foundation. He's speculating with Peterson sales. This  
10 witness has no knowledge of that whatsoever.

11 THE COURT: That is sustained.

12 BY MR. HARRIS:

13 Q Do you have any information from the field that gives  
14 you a basis to state what your percentage of it might be and  
15 what Peterson's might be as the total?

16 MR. MONCO: Your Honor, I would like to object to  
17 this question also. It not only calls for speculation, but  
18 it appears that counsel is trying to steer Mr. Blount into  
19 rendering some type of expert testimony as being provided  
20 with information on Blount -- on, I should say, the Peterson  
21 Company sales, and that we're now starting to get into really  
22 speculative territory.

23 Mr. Blount has not been identified as an expert,  
24 and I think where we're going is to render some kind of  
25 expert opinion under Rule 701 which I think is prohibited

JT-APP 0997

1 because we're now getting into an area -- he's getting into  
2 an area where you have to have some kind of expertise  
3 established in order to do this kind of marketing type  
4 comparison, what not. We would object to this. We have not  
5 been provided with any expert witness to be rendered by Mr.  
6 Blount which we think is required by the rules of evidence.

7 THE COURT: I'll overrule the objection. You may  
8 proceed.

9 you may proceed. I've overruled the objection.

10 BY MR. HARRIS:

11 Q Okay. Did you understand the question about inputs from  
12 the field where all your people are?

13 A The input we have from our sales people in direct  
14 contact with customers is, we have by far the lion's share of  
15 the business, but Peterson has manufactured a copy of our  
16 product and they've sold a lot of them. How many, we don't  
17 know.

18 We do know of other people who are planning on  
19 moving into this field because there is a big demand for this  
20 type of a burner and will be after this is over, I hope.

21 Q And is that information what you based your statement on  
22 earlier about having most of the business?

23 A Yes, that's correct.

24 Q As I understand it, you have testified that there aren't  
25 any acceptable non-infringing substitutes?

JT-APP 0998

1 A I haven't heard of one, nor have I seen one. Everybody  
2 seems to be wanting to copy ours as close as they can because  
3 it works.

4 Q Suppose that you had no competition from Peterson 1999  
5 on. You have the warehouse capacity and manufacturing  
6 capacity and sales capacity to handle the part of the market  
7 that Peterson had in this product?

8 A That would not be a problem.

9 Q I don't believe I understood.

10 A That would not be a problem. We have much more capacity  
11 to manufacture than we're currently running.

12 Q Well, do you have the sales capacity?

13 A Yes.

14 Q The manufacturing capacity as well as warehouse?

15 A Yes.

16 Q So it's your testimony that you could have handled that  
17 part of the market quite well?

18 A No question about it.

19 MR. HARRIS: At this time I would like to put up  
20 Plaintiff's Exhibit 18 with supporting Exhibit 16. As we get  
21 into some of these exhibits, they may get voluminous, so  
22 we'll find a way to bypass them.

23 THE COURT: Okay.

24 Q Now what we have here at the outset is a summary.  
25 Plaintiff's Exhibit 18 is before you, is it not, sir?

JT-APP 0999

1 A (No response.)

2 Q Is Plaintiff's Exhibit 18 before you, sir?

3 A Yes. I'm sorry.

4 Q You have testified earlier, I believe, that the sales  
5 figures, the manufacturing figures and in general all the  
6 financial figures of the company were something that you were  
7 ultimately responsible for and that it was in the regular  
8 course of business for you to make and go over those records?

9 A That's correct.

10 Q And that while -- you supervised some other people  
11 during that, too, didn't you?

12 A That's also correct.

13 Q All right. And that in so doing, you stayed up to date  
14 pretty well?

15 A Yes.

16 Q Made entries at about the time that things happened and  
17 generally made these records to rely on in the ordinary  
18 course of business?

19 A Yes.

20 Q Now are we looking at a summary that comes from such  
21 records here on page -- page. -- Plaintiff's Exhibit 18?

22 A Yes, sir.

23 Q Can you explain it to us?

24 A Well, we show our sales price to truckload distributors,  
25 which is our very lowest prices. We show our cost for each

1 product, and we extend out our profit when we sell the  
2 package, which is about the only way to know it's sold.

3 Q You believe this to be correct?

4 A Absolutely.

5 Q This is Exhibit 18. Let me take up a point with you. I  
6 heard it said a while back that this was just an auxiliary  
7 item and just sold by itself. What do people do, swat flies  
8 with it when they buy it or what?

9 A I don't know what they do in the California area, but  
10 not any other area I know of. It's sold always to go with  
11 the log set.

12 Q It just doesn't have any other use?

13 A I've never known of anyone selling an ember bed burner  
14 by itself or for what reason they would buy one.

15 Q Isn't it fair to say in the final analysis every time an  
16 ember burner is sold, it goes on a log set?

17 A I would say so, yes.

18 MR. MONCO: Object to the question, Your Honor, as  
19 calling for speculation as to how Peterson's products are  
20 sold. I think this is all indicated here, and again we're  
21 getting into the expert testimony opinion being rendered on  
22 the subject this witness has no knowledge whatsoever how well  
23 the Peterson items are sold. So we would lodge an objection  
24 on that basis.

25 THE COURT: Response to the objection.

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1 MR. HARRIS: Let me get this back on. Now.

2 THE COURT: Okay. Response to the objection.

3 MR. HARRIS: My response to the objection is, it  
4 is so very clear that there's no possible other use for this  
5 thing than to put on this assembly, that it's bound to go on  
6 a log set every time one is sold. At least every time it's  
7 sold by the distributor ultimately. It can go nowhere else.

8 Maybe that's an argument rather than him answering  
9 a question, but he can verify, it seems to me. That's like  
10 arguing with the law of gravity.

11 MR. MONCO: Your Honor, if I may have just a short  
12 rejoinder on that. It's not a question of whether the  
13 Peterson's accused ember plan booster is used with a pan.  
14 The question here is, how is it sold? Is it sold as retrofit  
15 unit in which case you're going to be selling approximately  
16 20 dollar unit or are you attaching it with a pan, a main  
17 burner, a log set and a grate? That is the issue here.  
18 That's where these figures are coming from as opposed to  
19 merely selling a 20 dollar item as priced here on this sheet.

20 And then what we would object to as far as Mr.  
21 Blount rendering any opinion as far as how Peterson products  
22 are sold in the marketplace. That's the underlying premise  
23 of this entire Exhibit 18.

24 There's been no foundation laid this witness has  
25 the capacity to know that. That's not the issue. The issue

JT-APP 1002

1 is, how is this document sold in the marketplace? Is it sold  
2 individually or as part of the unit? That's what we object  
3 to be as far as Mr. Blount giving any testimony on that issue  
4 as far as how Peterson products are sold.

5 THE COURT: Okay.

6 MR. HARRIS: I have a little more to say.

7 THE COURT: Okay.

8 MR. HARRIS: It seems to me that what happened is  
9 that the distributors buy this item because it helps them  
10 sell the bigger item, the log item. There in the point of  
11 this story, they show people both. And what happened is that  
12 every time that one of the ember burners is sold, it gets  
13 sold along with the log set. Does it help sell log sets?  
14 Probably very much help sell the log set. That's why there's  
15 a demand for it.

16 Do you think that people buy these things, take  
17 them home and install them themselves? The usual thing that  
18 happens is, as I hope we have other testimony on, but the  
19 usual thing that happens is people make a selection and they  
20 like the combination, but they still have a choice. You  
21 understand my point.

22 THE COURT: Okay. I do.

23 MR. MONCO: Your Honor, if I may, just a short  
24 rejoinder. As Mr. Blount has testified, the pan and the main  
25 burner have been staple articles of commerce at least forty

JT-APP 1003

1 years. People can buy these things as retrofits and put them  
2 on pans they've already sold in which case there would be no  
3 conveyed sales of the logs and the grate and the burner and  
4 the pan that counsel is attempting to introduce here.

5 The issue is, how is the Peterson product sold?  
6 That's what they have to establish in order for the plaintiff  
7 to get the kind of damages they're claiming down here. There  
8 is no foundation. This witness is not qualified to testify  
9 with regard to that, as to how Peterson product is sold in  
10 the market. Counsel here is telling Your Honor how it's  
11 sold. There is no qualification for that. This witness is  
12 not qualified to be rendering expert testimony insofar as how  
13 does the Peterson Company sell its accused unit.

14 That's why we object to this line of testimony.  
15 Mr. Blount can testify as to how he sells his product, but  
16 the basis of the damage claims here is they're claiming we  
17 have sold Peterson Company's 3,689 units and it would have  
18 sold accompanying with that the pan, the main burner, the  
19 logs and the grate.

20 There's no foundation for that this witness can  
21 testify About. That's our objection.

22 THE COURT: Okay.

23 MR. HARRIS: Your Honor, I would point out there's  
24 an inducement case here, there's contributory case here,  
25 there's claim 15 that includes the logs and everything else.

JT-APP 1004



1 And we are in an area, of course, we're looking at what size  
2 damages would be involved.

3 But it would be a travesty in my mind for somebody  
4 to take a fairly inexpensive item and that made a big  
5 difference and get away with doing that for nothing.

6 The one other thing I would say is that an  
7 executive from Peterson has testified that that's meant to go  
8 with the log, and every time you sell one of those here,  
9 there's a log that gets used with it.

10 THE COURT: Okay.

11 MR. MONCO: Your Honor --

12 MR. HARRIS: I have that testimony in his  
13 deposition.

14 MR. MONCO: Your Honor, the Peterson Company sells  
15 this unit as an accessory. It's separately boxed, and it's  
16 separately priced and sold to distributors.

17 The G core burn, which is a pan with a main burner,  
18 that's the Peterson staple article. That's separately boxed  
19 and separately sold. The logs are separately boxed and  
20 separately sold.

21 Whether or not this is used on a burner is not the  
22 issue. The issue that sustains this claim of nearly half a  
23 million dollars of damages is how is the Peterson product  
24 sold? Is it soiled as retrofit? Is it sold individually or  
25 is it sold with all these other units?

JT-APP 1005

1 And all we're saying, our objection is, that Mr.  
2 Blount is not qualified to testify. There has to be a  
3 foundation laid as to how this is sold. Mr. Blount is not  
4 in a position by actual knowledge to know how Peterson  
5 Company distributors buy and sell this product. That's what  
6 they're saying.

7 If I bought a Peterson G 4 burner 10 years ago and  
8 I've got it in my house. And I've got the grate and logs and  
9 what not. I go to the fireplace store, see the accused ember  
10 flame booster. I say, I would like to have that. I should  
11 buy that for approximately twenty dollars and bring it home  
12 and put it on.

13 Now the combination of all of that, agree on the  
14 claims if they sustain infringement? Yes. But the point  
15 we're talking about here is damages, and the damages here is  
16 a sale of the ember flame booster because Mr. Blount did not  
17 obtain a sale that I bought ten years ago.

18 That's our point, Your Honor. It's the calculation  
19 of the damages here. The figure that is used here is grossly  
20 inflated, and the focus here should be on the accused ember  
21 flame booster, which is approximately a twenty dollar item as  
22 stated in Mr. Blount's own literature.

23 THE COURT: I'm going to overrule the objection.  
24 You may proceed.

25 MR. HARRIS: Fine. I've actually forgotten where

JT-APP 1006

1 I was.

2 Where was I?

3 THE WITNESS: Danged if I know. You lost me.

4 MR. HARRIS: I think we already had the testimony.

5 The question was whether the testimony was appropriate or  
6 not.

7 THE COURT: Yeah. You were going over Plaintiff's  
8 Exhibit 18 with him.

9 MR. HARRIS: Yeah. I would like to ask my friend  
10 back here what the G 5 unit has on it.

11 THE COURT: Okay.

12 MR. HARRIS: Since we're cross examining each  
13 other's lawyers. What's the G 5 unit?

14 MR. MONCO: G 5 unit, Your Honor, is a fully  
15 assembled unit.

16 MR. HARRIS: He didn't say anything about that,  
17 did he?

18 MR. MONCO: Your Honor, if I may finish.

19 THE COURT: Okay.

20 MR. MONCO: We have a G 5 burner that includes all  
21 the logs and the grate, so on. Your Honor, we have sold  
22 about 10 of those units. That is not going to sustain this  
23 damage figure. 99 percent of the accused sales here are for  
24 the ember flame booster. 10, I mean literally 10 sales  
25 comprising probably less than \$3,000, \$3,500 comprise the

-JT-APP 1007-

1 fully assembled unit.

2 That's behind our objection. That's behind this  
3 whole -- what is being done here is an attempt to try and  
4 state the Peterson Company sells their ember flame booster as  
5 part of a whole package. It sells separately packaged ember  
6 flame boosters. It sales separately packaged G 4 burners.  
7 It sells separately logs.

8 This is very critical about this point, Your Honor,  
9 because it has to do with the whole scope of damages. And  
10 there's no evidence this witness can present on that issue.  
11 We would strongly object that this witness testifying and  
12 speculating as far as what and how Peterson Company sells its  
13 products.

14 THE COURT: The witness will be subject to cross  
15 examination.

16 MR. MONCO: He will.

17 THE COURT: You may put on additional evidence in  
18 this regard, also.

19 MR. MONCO: Thank you, Your Honor.

20 MR. HARRIS: Exhibits 15 A and 15 B and 19 A  
21 through H all relate to the back up paper that goes to this  
22 summary that we just talked about.

23 THE COURT: Okay.

24 MR. HARRIS: And so spare us, please. However, I  
25 do want them admitted just in case somebody wants them some

JT-APP 1008

1 day.

2 THE COURT: Okay. I will admit those exhibits.

3 BY MR. HARRIS:

4 Q We've discussed the point, but I would like to summarize  
5 it, that there's no other real use for your ember burner or  
6 that assembly other than a gas fired fireplace, is it?

7 A I can't think of a possible other use.

8 Q And it's not a staple article of commerce, is it?

9 A No.

10 Q And you sent notice to Peterson Company that they were  
11 infringing back when. So they knew what they were doing at  
12 least after late '99, didn't they?

13 A Absolutely, yes.

14 Q And, yes, we certainly would agree that the various  
15 claims you've gone over are such that what you do sell,  
16 whether it's a little bit or a lot of the overall  
17 combination, we can agree, can't we, that that's a very  
18 substantial part of the invention?

19 A Yes. It's getting stronger all the time.

20 Q My cohort thinks there was some confusion of the  
21 testimony about the way the gas distribution ports of the  
22 secondary burner unit were directed away from the fireplace  
23 opening.

24 How do you understand they are directed? Our  
25 ports, your ports?

1 A Do what?

2 Q How are your ports directed?

3 A Away from the front of the fireplace towards the back of  
4 the fireplace towards the primary burner for good ignition.

5 Q Is it away from the fireplace if it goes down?

6 A No. It could go either way if it's facing down.

7 Q What?

8 A If the jets are facing down, the flame could come out  
9 either side.

10 Q But if the jets are facing down, it isn't toward the  
11 front of the fireplace, is it?

12 A No.

13 Q I just want to be sure we're clear on that because it's  
14 one of their points.

15 MR. HARRIS: That's all I have of this witness  
16 for now.

17 THE COURT: Okay. Cross examination.

18 MR. MONCO: Your Honor, if I may can I request  
19 from the court maybe a three to five minute break before I  
20 start my cross examination.

21 THE COURT: We'll take a five minute break. Then  
22 we'll resume.

23 (A recess was held at 11:35.)

24 (Resume at 11:41.)

25 THE COURT: Have a seat, please. Cross

JT-APP 1010

1 examination.

2 MR. MONCO: Thank you very much, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. MONCO:

5 Q Mr. Blount, I would like to show you what's been  
6 identified as Exhibit D No. 2 which is your original patent  
7 application number 08,061,727 which was filed on May 17th,  
8 1983.

9 Do you have that on your screen in front of you,  
10 Mr. Blount?

11 A Yes, I do.

12 Q Now that original application, if I may have back to the  
13 first page, please. That application was entitled a  
14 controlled ember bed burner, correct?

15 A That's correct.

16 Q Okay. And that application, which we've identified as  
17 Exhibit D 2, was prepared by you personally without the help  
18 of an attorney; is that correct?

19 A No, it's not correct.

20 Q Who prepared Exhibit D 2, the application?

21 A Another attorney who was not a patent attorney.

22 Q Okay. And did you review the application before it was  
23 submitted to the patent office, Exhibit D 2?

24 A Yes.. But I'm not a patent attorney, either.

25 Q Had the attorney who prepared the application been

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1 admitted to practice before the patent office to your  
2 knowledge?

3 A No, not that I know of. I don't really know.

4 Q Okay. And I would like to turn now to Exhibit --

5 Defendant's Exhibit D 2 and production number 000142. And  
6 those are two claims which were the only two claims which you  
7 submitted with your original patent application, correct?

8 A I don't recall for sure.

9 Q You don't recall if those --

10 A I don't have it before me, and I don't recall everything  
11 that was in the original application.

12 Q Okay. And is it correct that both of these claims were  
13 rejected by the patent office after they were submitted?

14 A I don't know if they were rejected for this reason, no.

15 Q Okay. Why don't we turn to page 000148.

16 Do you have that in front of you now?

17 A Yes.

18 Q You see there that's a patent office action. Your name  
19 is identified up there. Could we go back to the first page,  
20 please. Your name is up there, Golden Blount, and that's  
21 your application filed May 17th, 1993, correct?

22 A Yeah.

23 Q And down below there's a summary of the action, and it  
24 has two claims pending. And both those claims were rejected,  
25 1 and 2. Do you see that?

JT-APP 1012



1 A That's correct.

2 Q If we could turn to the next page, 149. The examiner  
3 suggested to you, did he not, on there that "Applicant is  
4 advised to obtain a registered patent attorney" and suggested  
5 the location where you can obtain the services of a  
6 registered patent attorney?

7 A Yes.

8 Q Okay. And then farther down on page 149, claims one and  
9 two, third paragraph were rejected as being an improper form  
10 and being indefinite. Do you see that?

11 A I can see it, yes.

12 Q And in addition to that, the examiner rejects your  
13 claims as being obvious, so they were cited prior art  
14 references, correct? Let's turn to page 150 on that.

15 A That's what he said at the time, yes.

16 Q Okay. And let's go down to the last two paragraphs on  
17 that page. So there were three prior art references, and  
18 they were cited as the basis for rejecting your patent  
19 because they all show separate burner sections, et cetera,  
20 claim to the artificial embers, correct?

21 A The officer didn't understand.

22 Q Is that what the patent office said in this document?

23 A According to this.

24 Q Okay. Now then on April 24th, 1994, after receiving  
25 that initial rejection, did you hire a second attorney to

- JT-APP 1013

1 prosecute the next application in your file history?

2 A Yes.

3 Q Okay. And you hired Mr. David Carstons of the firm of  
4 Harris, Tucker and Hardin?

5 A That's correct.

6 Q And if we could, please, turn to Exhibit D 3. And that  
7 is the second application which you filed; is that not  
8 correct?

9 A That's correct.

10 Q Okay. Now the in the first page right there, there's a  
11 new title to your application, correct? And it's titled,  
12 Supplemental Burner for Retrofitting to an Existing Gas Log  
13 Burner Assembly. Do you see that?

14 A Yes.

15 Q So you're characterizing your invention by the title as  
16 a retrofit supplemental burner?

17 A It can be retrofitted, yes.

18 Q It can be, okay. And indeed according to this, this is  
19 the way you intended it to be used, correct?

20 A Not necessarily. This is the attorney's idea.

21 Q This was reviewed by you, was it not?

22 A I probably did, but I don't believe and I don't even see  
23 why this is important at this time. The patent was granted,  
24 you know.

25 MR. MONCO: Your Honor, I would move to strike the

JT-APP 1014

1 last portion of that answer.

2 THE COURT: That's overruled.

3 Q Okay. Now this application was characterized if we  
4 could turn to page 166 of Defendant's D 3. This is  
5 characterized as continuation-in-part application, correct?

6 A Would you repeat that, please?

7 Q I'm sorry. If you'll turn to page 166, and you'll see  
8 in front of you the first paragraph which is being enlarged.  
9 This is pair tide as continuation-in-part application for  
10 your prior application, correct?

11 A Yes.

12 Q And that is called a continuation-in-part because your  
13 second attorney added some additional disclosure in this  
14 second patent application of yours that was not in the first  
15 application, correct?

16 A It appears so.

17 Q And if we could, I would like to turn to page 167 of  
18 Exhibit D 3. And you have a reference on here down in the  
19 last paragraph to the Shimek patent 5000162. That's a patent  
20 that was disclosed or identified by the examiner of your  
21 previous application, correct?

22 A That's correct.

23 Q And here you're offering an explanation to distinguish  
24 the Shimek reference over your own applied-for invention,  
25 correct?

1 A Totally different burner.

2 Q Let's take a look at Exhibit D 7, which is the Shimek  
3 patent.

4 Q And the Shimek patent shows two burner pipes which are  
5 identified as numbers 8 and 27; is that correct?

6 A If you say so, yes.

7 MR. MONCO: May we have the next figure of the  
8 Shimek patent.

9 Q Take a look at figure 2 of the Shimek patent. There we  
10 go.

11 And so in addition to a U shaped burner which is  
12 shown in the Shimek patent, burners 8 and 27, pipe 18 is  
13 connected to the two burners; is that not correct? I'm  
14 sorry. Turn to figure 5. I apologize. Please turn to  
15 figure 5.

16 A It was a totally different burner system.

17 Q It shows a multiple burner, does it not?

18 A Yes, it does, but doesn't have ember bed burner at all.  
19 Not even similar product.

20 Q It shows a double burner --

21 A It's not even similar product.

22 Q -- with the rear burner elevated above the front burner;  
23 is that correct?

24 A Yes.

25 Q Okay. Well, that's similar to your product, is it not?

1 A No.

2 Q Wait a minute.

3 A You wait a minute.

4 MR. HARRIS: Your Honor, I object to arguing with  
5 the witness.

6 THE COURT: That is sustained.

7 MR. MONCO: I apologize, Your Honor.

8 Q Does your burner have an upper burner and lower burner?

9 A As a primary and secondary burner.

10 Q Okay. That's two burners, correct?

11 A Yes.

12 Q Okay. So in that sense it's -- it has -- the Shimek  
13 patent has those two elements the same as your patent?

14 A Not at all, not at all. Totally different application.

15 Q I'm not asking about the application. I'm asking about  
16 the elements.

17 A They had a U shaped burner. They did not have some of  
18 the other component we have in ours. It did not illuminate  
19 any coals in front. It's totally different burner. Once the  
20 patent officer understand that, he granted our patent.

21 MR. MONCO: If we could turn back to the front  
22 page of the Shimek patent, first page. If we could have an  
23 enlargement on the title.

24 Q So the title of the Shimek patent is, A Clean Burning,  
25 Glowing Ember and Gas Log Burner System, correct?

-JT-APP 1017

1 A That's what it says.

2 Q So Mr. Shimek here, his product is directed to providing  
3 a glowing ember in a gas log fire, correct?

4 A I would say that.

5 Q Now turning to page 168 of your application D 3.

6 A Sir, may I ask you a question?

7 Q No.

8 A Can I be permitted to expand on the reasons why this was  
9 not a similar product? You're picking straws here and there  
10 and trying to put it together.

11 MR. MONCO: Your Honor, that would be  
12 inappropriate.

13 THE COURT: Your attorney will ask you that on  
14 redirect.

15 THE WITNESS: Okay. Thank you.

16 MR. MONCO: If we could turn to and we have in  
17 front of you Exhibit D 3, page 138, in attempting to  
18 distinguish the Shimek patent.

19 MR. MONCO: Can I have an enlargement on the first  
20 two paragraphs, please.

21 Q The highlighted portion that you see there states, it  
22 cannot be retrofitted to an existing pan burner which by far  
23 are the most common burner in use." Do you see that?

24 A Yes.

25 Q So that's an advantage to your product that you're

JT-APP 1018

1 alleging to the examiner they can't be retrofitted; is that  
2 correct?

3 A That's true, one of the reasons.

4 Q So your product is intended to be used in a retrofit  
5 type of a manner, correct?

6 A Not necessarily.

7 Q I didn't say that. This is your attorney making these  
8 arguments to the patent office and characterizing your  
9 product as being a retrofit. And I'm asking you, isn't that  
10 the way you intended your product to be used, as a retrofit?

11 A No. Just says --

12 Q Is your attorney making a false statement here?

13 A It just says theirs cannot be retrofit.

14 Q So it says, cannot be retrofitted to and existing pan  
15 burner which are by far the most common in use."

16 A Are we talking about the Shimek burner?

17 Q That's an argument to distinguish your product over  
18 Shimek that was made by your attorney, correct?

19 A Cannot be retrofitted.

20 Q That's right, and your product could be. That's why it  
21 was titled Retrofitted Burner, correct?

22 A Can be, but not --

23 THE COURT: Let me interrupt both of you. Don't  
24 talk at the same time. The court reporter can't get you  
25 down.

- JT-APP 1019

1 Let's go ahead and break for lunch. We will resume  
2 at 1:15.

3 MR. MONCO: Thank you, Your Honor.

4 (A recess was held at 12:05.)

5 (Resume at 1:13.)

6 THE COURT: You may proceed.

7 MR. MONCO: Thank you, Your Honor. If I may.  
8 We're going to try to work with the monitor so we have all  
9 the pages for mine as well as the witness. We'll try to do  
10 that as quickly as we can.

11 THE COURT: Okay.

12 BY MR. MONCO:

13 Q When we left off, Mr. Blount, we had just gone over  
14 Exhibit D 3, page 168, which you have in front of you. And  
15 we had stated that the existing pan burners cannot be -- I'm  
16 sorry. That the Shimek patented device cannot be retrofitted  
17 to existing pan burners which are by far the most common  
18 burner in use. That's where we left off, correct?

19 A That's correct.

20 Q Okay. Now in the second paragraph also appearing down  
21 on the very last line, the last sentence reads, "Moreover the  
22 flow of gas into the second branch cannot be regulated."  
23 That refers to the fact that the Shimek patent did not have a  
24 secondary valve for the lower burner, correct?

25 A That's correct.

JT-APP 1020



1 Q And then going farther down on page 168 to the next  
2 paragraph, you distinguished the Karabin U.S. Patent number  
3 5052370 down on the last line which is highlighted there  
4 again stating that the flow of gas to the secondary burner  
5 assembly cannot be controlled. Also, the Karabin burner  
6 assembly is only sold as a unit and cannot be retrofitted to  
7 an existing pan burner, correct?

8 A Also correct.

9 Q And then turning to page 169 of Exhibit D 32 in the  
10 first paragraph, you distinguished the third reference which  
11 was to Beal U.S. Patent 5081981 looking down to the  
12 highlighted sentences again repeating for the third time that  
13 the Beal system is a complete system and not a supplemental  
14 burner which can be retrofitted to existing pan type burner  
15 system; is that correct?

16 A That's correct.

17 Q Also as with Shimek and Karabin, you distinguished Beal  
18 by the fact it did not have a second gas valve to control the  
19 gas going into the second burner, correct?

20 A Yes.

21 Q Now if we could turn to pages 175 through 177 of Exhibit  
22 D 3, and I believe those will come up on the board  
23 momentarily. You submitted with this second application a  
24 total of 18 claims, correct?

25 A I believe that's correct, yes.

- JT-APP 1021

1 Q Okay. And in the first office action for the -- for  
2 this second application of yours, the examiner rejected all  
3 18 claims, correct?

4 A I'm not sure.

5 Q Okay. If we can, may we have page 188 of Exhibit D 3.

6 Okay. Now that's -- and you recognize that as an  
7 office action from the patent office on this application and  
8 the page which has been enlarged in front of you showing all  
9 18 claims had been rejected?

10 A That's correct.

11 Q Okay. Now if we could turn to page 190 of Exhibit D 3  
12 which is in the office action. That shows that the examiner  
13 rejected your claims 1 through 18 under what's identified as  
14 Section 103 as being obvious in view of the Iklor patent in  
15 view of Peterson and Henry. Do you see that?

16 A Yes.

17 Q Now if we could have, please, could we just turn to  
18 Defendant's Exhibit D 8, which is Iklor issued July 23, 1991.  
19 And that's the Iklor patent that was cited as the main  
20 reference against you. Do you see that?

21 A Yes.

22 Q Okay. Now if we can turn -- first of all, briefly  
23 identifying. The Iklor patent shows a top burner and a lower  
24 burner, correct?

25 A Correct.

JT-APP 1022

1 Q It's got a burner pan, correct?

2 A That's correct.

3 Q Okay. And it's got a grate, correct, for the logs, to  
4 hold the logs?

5 A Yes.

6 Q Okay. And the lower burner, I should say, which is  
7 identified as 18, that's positioned below and to the front of  
8 the rear burner which is identified as 12, correct?

9 A That's correct.

10 Q Now if we could turn to column 1 which would be the  
11 third page -- first page of text back up. There we go, right  
12 there.

13 If we could have a highlight on the first three,  
14 four lines underneath Background of the Invention. Right  
15 there. Right.

16 That says, "A gas fire burner for fireplaces are  
17 well known. In a typical gas fired burner, the device  
18 comprises an upper burner including an upper tubular pipe and  
19 a lower burner including a lower tubular gas pipe."

20 Would you agree that was well known in the art at  
21 the time Mr. Iklor said that?

22 A I don't know if it was well known, but go ahead.

23 Q I'm sorry. I didn't hear your answer?

24 A I don't know if it was well known.

25 Q Well, he is identifying it in the background of the

JT-APP 1023

1 invention, so he's identifying it as being in the prior art.

2 Would you agree that was in the prior art?

3 A Yes.

4 Q And the next, if we could go down to the next maybe  
5 three or four lines down beginning with the word gas to the  
6 lower tubular pipe. Starting with that sentence reading,  
7 "gas to the lower tubular pipe is fed through the upper  
8 tubular gas pipe and then through the regulatory orifice at  
9 this junction. This regulatory orifice is most preferably at  
10 No. 53 orifice or can also be a number 56 orifice."

11 My question to you, Mr. Blount, first of all is,  
12 it's correct that Mr. Iklor is describing the same flow of  
13 gas through the upper burner down to the lower tube that you  
14 follow in your patented device correct?

15 A They don't have a valve.

16 Q I understand that, but I'm describing the flow of the  
17 gas. The flow of the gas in the Iklor patent moves from the  
18 upper tube down to transit down to the lower tube?

19 A That's correct.

20 Q And that's the same gas flow for yours, correct?

21 A Yes, it doesn't serve the same port.

22 Q Sir, referring to the orifice, a No. 53 orifice, but  
23 can also be a No. 56. So Mr. Iklor is talking about two  
24 different sizes of orifices to permit the flow of gas to the  
25 lower burner, correct?

JT-APP 1024

1 A Yes.

2 Q Okay. And then moving onto the next paragraph, which I  
3 would like to have for the entire next paragraph highlighted.  
4 This states, "The lower tubular gas pipe generally running  
5 horizontally above and along the length of the fireplace  
6 grate. Silica sand is placed on that grate in an amount  
7 sufficiently to control the lower tubular gas pipe.

8 "As the pressurized gas is discharged with the  
9 lower pipe, it moves upwardly through the channels in the  
10 stand created by the gas. After the gas is ignited, the  
11 resulting flames create with the aid of artificial logging  
12 and other visual aides the illusion of a conventional wood  
13 burning fireplace is glowing embers and sand."

14 Do you see that?

15 A Yes.

16 Q That's exactly what your device does, isn't it?

17 A Not exactly. We go out in front and eliminate the  
18 coals. Hid under the grate.

19 Q He's talking about lower burner and upper burner?

20 A That's true.

21 Q And he's illustrating in it patents and talking about  
22 having ember burners in his device, correct?

23 A Different result.

24 Q Well, I'm asking you what he shows here now?

25 A I see what you say. I can read it, too. I agree that's

-JT-APP 1025

1 what he says.

2 Q Now when Mr. Iklor discloses using No. 53 or No. 56  
3 orifice, do you agree you can vary the amount of gas that  
4 goes through the orifice to the lower burner?

5 A You can.

6 Q Right. And let me, if you know, is the number 56 larger  
7 than number 53 or vice versa?

8 A I believe it's vice versa.

9 Q Vice versa. Okay.

10 Now if we could turn to page 196 of Exhibit D 3.  
11 I believe claim one was amended up at the top -- I'm sorry.  
12 196 of D 3.

13 Okay. If we could have the entire first claim  
14 highlighted, please.

15 Okay. The top line reads, "A retrofitting assembly  
16 or adding a supplemental burner." Do you see that?

17 A Yes.

18 Q Okay. So you are now amending your claims to  
19 distinguish over the prior art by adding the limitation of a  
20 retrofitting assembly, correct?

21 A Yeah.

22 Q Now if we could turn to page 200 of Exhibit D 3. In  
23 response down at the bottom under Section C I would like to  
24 have that highlighted, please, enlarged.

25 In response to the rejection of claims 1 through 18

1 of Iklor in view of Peterson and Henry, you state that not  
2 one of the references discloses a retrofitting assembly.  
3 Also, not one was referencing, teaching or even suggest the  
4 use of a valve between the primary burner and supplemental  
5 burner to allow the user to limit the flow of gas to the  
6 supplemental burner. Do you see that?

7 A Yes.

8 Q Okay. That's how you were arguing to distinguish the  
9 Iklor reference in view of the Peterson and the Henry  
10 references, correct?

11 A Yes.

12 Q And going to page 201 and the paragraph starting with  
13 column 3, lines 9-17 right there. If we could enlarge that,  
14 please.

15 The first sentence of that section reads, "The  
16 orifice is fixed." And going down on this same further down  
17 the sentence after the next one. "The orifice 24 in Iklor is  
18 fixed preventing the user from varying the flow of gas and  
19 thrust the height of the flame from the lower burner.  
20 Moreover, the Iklor device is unsuitable as a retrofitting  
21 assembly." Do you see that?

22 A That's correct.

23 MR. MONCO: May I have just a minute, Your Honor?

24 THE COURT: Yes.

25 (Pause)

1 Q Mr. Blount, if in the Iklor patent instead of having two  
2 separate and distinct orifices on his lower burner, if Iklor  
3 had included a valve instead of different variations in the  
4 diameter of the lower burner, would he have every element of  
5 your invention?

6 A No.

7 Q Why not?

8 A He didn't eliminate the coals in the front. It's all  
9 under the grate, his burners are, nothing out in front.  
10 Haven't you seen it?

11 Q I'm asking about the elements of the device, not the  
12 effect. I'm asking the elements.

13 If the Iklor patent had a valve instead of a  
14 variable or instead of having different orifices as  
15 suggested, would the Iklor patent show every element of your  
16 claimed invention?

17 A I don't think that it would. Doesn't have a primary  
18 burner pan, for one thing. Use a grate instead of a burner  
19 plan. Ours is total unit. Theirs is another total unit.

20 Q Doesn't the Iklor patent show a burner pan?

21 A Shows a fireplace grate, as I remember, and a small pan  
22 below.

23 Q Why don't we just turn back to Exhibit No. 8, which is  
24 the Iklor patent?

25 A They have set tubes or grate.

JT-APP 1028



1 Q We have the Iklor patent right in front of you. Isn't  
2 element 46 the pan?

3 A I see it.

4 Q Isn't that a pan?

5 A It's not what they consider a burner pan. Uses a grate  
6 instead of that for the primary burner. The whole thing,  
7 flames come up through the grate, not --

8 Q I'm sorry. I couldn't hear the last.

9 A I don't agree with you.

10 Q What else did you say beside lacking a flame?

11 A Does it illuminate the embers in front of the grate in  
12 front of the logs. It's all underneath the grate itself.  
13 Like it's stacked here.

14 Q Doesn't the Iklor patent talk about illuminating embers?

15 A Not in front of the fireplace. Not the logs. No.

16 They may have it. I'm not sure.

17 Q Okay. But you don't know?

18 A I don't know. That's right.

19 Q Okay. Moving to --

20 A But they don't have a valve, do they?

21 Q Okay. Then after having submitted this, the amendment  
22 to the claims in and your arguments with the Iklor reference,  
23 the examiner again rejected your claims 1 through 18, didn't  
24 he?

25 A As I recall, we did get a patent, didn't we?

JT-APP 1029

1 Q If you would answer my question, please, I would  
2 appreciate it so we can move this along.

3 The examiner rejected those arguments, didn't they,  
4 the ones we are now reviewing?

5 A I'm not sure.

6 Q Why don't we turn to page 104 of Exhibit D 3.

7 Okay. That's the next office action dated October  
8 2, 1995. Again, that shows all 18 claims were rejected,  
9 correct?

10 A That's correct.

11 Q And turning to page 206, the top -- let's say the top  
12 paragraph up there. The examiner again states that  
13 the -- that you are claims were obvious in view of Iklor,  
14 Peterson and Henry references, correct?

15 A I'm not sure if that's on my screen. Page 3?

16 Q Yes, the element that's being highlighted right now.

17 A Yeah, it wasn't on my screen a while ago. Okay.

18 Q I'm sorry. Let me go back to page 205 so we can put  
19 this in proper context. Let's go back to page 205.

20 There's a heading there, states, Repeat of  
21 Rejections Already of Record. You have that in front of you,  
22 and the examiner states 1 through 18 are unpatentable over  
23 Iklor?

24 A Yes, I see that.

25 Q And then returning now to page 206. The examiner states

JT APP 1030

1 that, "The modification of the prior art structure is to  
2 incorporate the use of a connector for joining a small  
3 diameter supplemental burner tube with the primary burner  
4 tube and the use of a valve to control gas flow to the  
5 supplemental burner tube to control intensity of flame. It  
6 would have been obvious to one of ordinary skill in the art."

7 Isn't that what the examiner said?

8 A (No response.)

9 Q I'm sorry. Do you see where I was reading from?

10 I'm sorry. I just asked you if that's what the  
11 examiner said.

12 A Yes.

13 Q Then looking a little farther down the page the examiner  
14 made that action a final rejection, and then after the final  
15 rejection you then, turning to pages 211 and 212 of Exhibit D  
16 3, you modified and showing that modification to claim 1, you  
17 modified the supplemental burner tube elements so the  
18 connector would be attached to its proximal end, correct?

19 A I believe that's correct, yes.

20 Q Okay. Underlining, indicating you added that to further  
21 distinguish over the cited references, correct?

22 A Yes.

23 Q That's your understanding. Okay.

24 And then also on page 213 of the remarks section,  
25 you then again reargued that the combination was not obvious,

JT-APP 1031

1 and particularly you state that the -- I'm looking now at the  
2 second paragraph on page 213. It states, "Applicant still  
3 asserts that none of the references cited teach or suggest  
4 retrofitting assembly to enhance the beauty and utility of  
5 standard gas log assembly." Is that correct?

6 A That's correct. It's on the original application,  
7 right.

8 Q And then in further support of your definitions you  
9 submitted a declaration yourself, correct?

10 A I can't read what you have here.

11 Q I'm sorry. Let's turn to page 215, 216 and 217 of  
12 Exhibit D 3. If this might help you because we're looking at  
13 pages.

14 MR. MONCO: May I approach the witness, Your  
15 Honor?

16 THE COURT: Yes.

17 Q Let me give you this.

18 Q Now -- I'm sorry. Make that 215, 216 and 217.

19 Page 215, 216, and 217 are a declaration that you  
20 prepared, correct?

21 MR. HARRIS: Can we have them on the screen?

22 THE COURT: Sure.

23 MR. MONCO: Can you enlarge 215, please.

24 Q Okay. That's the first page. But you recognize pages  
25 215, 216 and 217 as your declaration, correct?

JT-APP 1032

1 A Yes.

2 Q Okay.

3 MR. HARRIS: I can't read it.

4 Q I would ask you just to turn to page 217 of Exhibit D,  
5 and that's your signature on that page, correct?

6 A Yes.

7 Q And going back to page 216, paragraph 4 of Exhibit D 3,  
8 you identify a number of invoices and show a number of sales  
9 of your CEBB which is your ember booster, correct?

10 A Right.

11 Q Okay. And attached to that -- attached to your  
12 declaration, if I could ask you now to take a look at the  
13 hard copy that's in front of you. The following pages after  
14 your declaration, starting with 218 and going forward, please  
15 take a look at these up to pages 238, those particular pages.

16 Those are additions that -- those are  
17 supplements to your declaration attesting to what you  
18 consider to be evidence of the long felt need of the product  
19 and the market demand for the product, correct?

20 A Correct.

21 THE COURT: You need to speak up.

22 A That's correct. Excuse me.

23 THE COURT: Thank you.

24 Q And following submission of these, your declaration and  
25 your amendment and then the supplements to your declaration,

1 the examiner issued an advisory action again rejecting your  
2 claims, correct?

3 A I believe that's correct.

4 Q I would like you to turn -- now we can go back to the  
5 screen or the hard copy, whichever you prefer; but it would  
6 be page 241 of Exhibit D 3.

7 That's the advisory reaction that's dated April  
8 30th, 1996. If you look down at the bottom, the examiner is  
9 again rejecting your claims 1 through 18.

10 MR. MONCO: May I have a highlight on No. 3 down  
11 there, please. Thank you.

12 A That was the original claim, I believe.

13 Q You see that? He's rejecting your --

14 A Yes, application.

15 Q He's rejecting your arguments and also your declaration.

16 If we could turn to page 242 which is the next  
17 page. Do you have that in front of you?

18 A I can't read it, but I have it in front of me, I  
19 believe.

20 Q Okay. Going down to the bottom of the page starting  
21 with secondary factors, I would like to have an enlargement  
22 on that, please.

23 Okay. Now the examiner is stating that the,  
24 "Secondary factor such as commercial success or measured in  
25 light of the differences between the prior art and the claims

1 at issue. Although applicant proposes to limit the claims to  
2 supplemental burner tube, the connector and valve attached  
3 thereto only serves to open the proposed claims to a  
4 different rejection. The essence of the invention is still  
5 embodied in the idea of a supplemental burner tube which  
6 connects to the remainder of the burner system by way of a  
7 connector and which includes a valve to control the flow of  
8 supplemental burner. The prior Iklor patent shows all of  
9 this except" -- turn to the next page "-- a distinct  
10 connector and valve. The additional applied references to  
11 Henry and Peterson teach the combination of a connector and a  
12 supplemental burner tube as well as the use of a control  
13 valve to control the flow of gas to a burner tube. The use  
14 of control valves in combination with gas burner tubes is so  
15 well known as to not even require a reference to prove its  
16 existence."

17 Do you see that, Mr. Blount?

18 A I see what it says, yes.

19 Q Then the following paragraph states, "The combination  
20 of references when compared to the claims at issue leave very  
21 little to differ over. Thus, the secondary consideration  
22 when considered in light of this difference carried very much  
23 less weight in effecting a decision on patentability."

24 Do you see that Mr. Blount?

25 A Yes.

JT-APP 1035

1 Q Okay. Then following this rejection, you filed another  
2 application, correct?

3 A That's correct.

4 Q Okay. I would like you to turn to Exhibit 4 which is  
5 your third patent application Serial Number 08/626498 filed  
6 April 2, 1996. Do you see that?

7 A Yes.

8 Q Okay. And this again is another continuation in part  
9 application of your second application, Exhibit D 3, correct?  
10 We can turn to page 275 of Exhibit D 4?

11 A That's correct, yes.

12 Q And the first paragraph up there identifies this as  
13 continuation application, correct?

14 A That's correct.

15 Q Okay.

16 Q Okay. Then now turning to page 287 of Exhibit D 4.

17 MR. HARRIS: I may have misheard something. Is  
18 that a continuation?

19 MR. MONCO: It's a continuation in part.

20 MR. HARRIS: That's not what you last said.

21 MR. MONCO: I would be happy to go over it again.

22 THE COURT: Okay.

23 BY MR. MONCO:

24 Q Turning back to page 275 of Exhibit D 4. This third  
25 application is a continuation in part application of your



1 previous application filed May 17th, 1931. I'm sorry.  
2 Strike that.

3 The present application is a continuation in part  
4 application of co-pending application 08/276894 filed July  
5 19th, 1994, titled Supplemental Burner for Retrofitting to an  
6 Existing Gas Log Burner Assembly. Do you see that?

7 A Yes.

8 Q So this is a continuation in part application again.  
9 Okay.

10 Okay. Turning to page 287 of Exhibit D 4, can we  
11 highlight claim No. 1.

12 Okay. Claim No. 1 you added three additional  
13 elements specifically to the claim. You added three  
14 additional elements specific to the claim. You added a  
15 support means, you added a secondary coals burner, and you  
16 added valves for both the secondary burner and primary  
17 burner, correct?

18 A Yes.

19 Q Now turning to page 304 and 305 of Exhibit D 4, the  
20 examiner again rejected your claims focusing now on the, in  
21 part, the quotation before the patent. If we could have  
22 enlargement starting with claims 1 through 18 and going to  
23 the bottom of the page.

24 Okay. And again the examiner is rejecting the  
25 claims based on Iklor in view of Peterson; is that correct?

JT-APP 1037

1 A Yeah.

2 Q Okay.

3 Q And again the examiner is stating in that page that the  
4 use of a connector and a supplemental gas valve would be  
5 obvious to a person of ordinary skill in the art, correct?

6 A That's what they say, but no one ever did it.

7 Q Okay. Then turning to pages -- page 309 of Exhibit D 4,  
8 you submitted an additional amendment, correct?

9 A Yes.

10 Q Okay. And if we could, I would like to turn to page 312  
11 and could we enlarge the last paragraph on exhibit of page  
12 312.

13 Okay. Starting with the third sentence it says,  
14 "As specifically claimed in all of the rejected claims, the  
15 claimed device requires a valve for adjusting gas flow to the  
16 secondary burner. This valve is disposed in the connection  
17 portion of the claimed device that connects the primary  
18 burner tube to the secondary burner tube. Thus the valve for  
19 adjusting the gas flow to the secondary burner tube is  
20 between the primary and secondary burner tube in the claimed  
21 invention."

22 And then continuing on on page 313, the second full  
23 paragraph, if we could enlarge that.

24 "Iklor, et al, have been combined with Peterson and  
25 Henry to reject the claims as originally presented. Peterson

1 does provide a valve for controlling gas flow into a single  
2 burner tube. This valve is between the gas source and the  
3 single burner tube. Henry does disclose a primary and  
4 secondary burner tube that are joined together with a  
5 connector. However, this combination of references in no way  
6 suggests the incorporation of an additional valve between the  
7 primary and secondary burner tubes. The only suggestion for  
8 the incorporation of the secondary valve necessarily (sic)  
9 comes from applicant's own disclosure. Clearly, by making  
10 the combination of references as set forth in the official  
11 action including the claimed invention, it is obvious this is  
12 classic hindsight. Even if all the references are combined  
13 as suggested by the examiner, there is still no valve  
14 disposed between the primary and secondary burner to control  
15 the gas flow to the secondary burner."

16 Do you see that?

17 A Yeah.

18 Q So your argument to the patent office is now boiling  
19 down to, there is no secondary gas valve between the primary  
20 and secondary burner, correct?

21 A That's part of it.

22 Q Well, that's what's stated here, correct?

23 A That's what's stated here, yes.

24 Q That's correct.

25 MR. HARRIS: Your Honor, if the witness would care

1 to review other subject matter in that particular document,  
2 well, I would like for him to have that chance.

3 THE COURT: Okay. Do you want to review any more?

4 THE WITNESS: Sir?

5 THE COURT: Mr. Harris is saying you should have  
6 the opportunity to review other portions of that document if  
7 you want to.

8 THE WITNESS: I don't have all the document in  
9 front of me, judge.

10 MR. MONCO: Well, let me just -- this is -- I'm  
11 going to the hard copy now of Exhibit D 4 and --

12 A What is your objective, sir?

13 Q It's not any objective. I'm responding to your  
14 counsel's request. If you want to look at more documents in  
15 connection with this, your documents are right here in front  
16 of you, and I would welcome any review that you would want to  
17 make.

18 A Well, I don't think I can just pick out one or two  
19 things. If I did, I'm not sure it would carry any weight  
20 with you. Why don't you go ahead and have your own way.  
21 We'll come back to it later.

22 This is totally different product than ours. It  
23 burns incense, for one thing. No similarity whatsoever to  
24 the burner system. It doesn't accomplish the same thing we  
25 do at all. But if you want to pick out certain excerpts from

JT-APP 1040

1 different pages, fine, go ahead. Have your way..

2 MR. HARRIS: Well, you're the witness. I would  
3 say that you're not required to parrot back everything that  
4 the lawyer says.

5 THE WITNESS: It seems I must.

6 MR. HARRIS: You don't have to parrot it back.  
7 When you say that's what it says, and if that's what you  
8 believe, well, that's fine. You verify what it says. You do  
9 not in my judgment, however, have to sit up there and make a  
10 scientific judgment of any kind about the matter because  
11 you're not a patent lawyer and you did not prosecute that  
12 application.

13 THE WITNESS: That's true.

14 BY MR. MONCO:

15 Q Along that line, Mr. Blount, did you review the  
16 submissions made by your attorneys before they went into the  
17 patent office?

18 A To some extent, yes. Not every word exactly. I'm not a  
19 patent attorney.

20 Q I understand that. But did you review the arguments? I  
21 mean, this is your invention. You know the invention. You  
22 know the arguments that are being made. You've seen the  
23 prior art that was cited, correct?

24 A Basically yes, but I can't say I crossed the Ts and  
25 dotted all the Is. The terminology you use that I use

- JT-APP 1041 -

1 sometimes.

2 Q When the patent application was being prosecuted, isn't  
3 it correct that you reviewed what your attorney was saying to  
4 make sure that he was factually correct; isn't that right?

5 A Factually correct, yes.

6 Q Okay. If you had something other than what the attorney  
7 wanted to say or you had something in supplement to what the  
8 attorney wanted to say, you would have included it in here or  
9 you would have told him to include it, correct, if they were  
10 mistaken about how he was arguing your case, correct?

11 A Maybe, maybe not. I have to lean on advice of counsel.  
12 Maybe I may have made a suggestion. If the attorney felt  
13 otherwise, I would go along with it most likely.

14 Q What's reflected here is the best argument that you and  
15 your attorney came up with regarding the objections from the  
16 patent office, correct?

17 A Sir, the best argument we have here is they did grant  
18 the patent once they understood it.

19 Q I understand that, but here the patent was actually  
20 based on certain arguments that were made. I'm not trying to  
21 argue with you.

22 THE COURT: Let me interrupt. Let's don't talk  
23 at the same time. The court reporter can't get it down.

24 MR. MONCO: I apologize, Your Honor.

25 Q All I'm trying to say is these reflect the best

-JT-APP 1042

1 argument?

2 A Sir, I know what you're trying to say.

3 Q Okay. And just for the record if we could, if we could  
4 turn to Exhibit No. 1 which is your -- which is your patent  
5 looking at the front sheet there.

6 Number 106 down in the drawing there that's shown,  
7 106, that's a secondary valve that you're talking about that  
8 distinguishes over the prior art, correct?

9 A Yes.

10 Q Now I believe you testified on direct that you have  
11 been in the gas log business, fireplace business, for about  
12 30 years?

13 A 32.

14 Q 32, okay. So you were aware of the products that the  
15 Peterson Company marketed, correct?

16 A Yes.

17 Q Okay. And you were aware of the fact that the Peterson  
18 Company had been selling a multiple burner with independent  
19 valve control since at least the 1970s, correct?

20 A Yes.

21 Q I would like you, if you would please, if we could have  
22 exhibit D 45.

23 Now that's an instruction for Peterson fireplace.  
24 Let me preface this. Isn't it correct that you used to sell  
25 Peterson products?

JT-APP.1043

1 A At one time.

2 Q Yes. How long was that for?

3 A Probably a year.

4 Q One year?

5 A Probably, yes.

6 Let me rephrase this. We did in 1970 when I bought  
7 a sales agency, the fellow I purchase the company from  
8 represented a company, that purchased Peterson logs, and we  
9 sold some Peterson logs through this other company. We did  
10 buy a few sets for one of our shops back a number of years  
11 ago, yes. I wasn't a distributor locally.

12 Q Let me ask the question more generally. From what  
13 period of time did you market in any way some Peterson  
14 products? If you could give me some years on that.

15 A Originally as a rep manufacturer sales agency, we worked  
16 for about a year with Peterson products through this other  
17 company. As far as what we bought for our own shop or shops  
18 at one time, we probably purchased them for maybe, oh, six  
19 months, maybe a year. I'm not sure. We didn't really sell  
20 that many of them to really register. But we bought them  
21 through a wholesaler.

22 Q So you bought Peterson --

23 A Well, from a local distributor. Did not buy direct from  
24 Peterson.

25 Q Maybe I asked the question poorly. Instead of buying



1 directly from Peterson Company, did you sell Peterson  
2 products retail at any time while you've been in the business  
3 of selling gas log fireplaces?

4 A I believe we sold some in our shop. I would have to  
5 confer. I'm not sure. It was such a small amount it  
6 wouldn't amount to a whole lot.

7 Q Turning to Exhibit D 45, and we also have a model on  
8 that which we identify for demonstrative purposes, Your  
9 Honor, as D 45 A.

10 Isn't it correct that what's identified down there  
11 in figure 3, if we could have an enlargement of figure 3, is  
12 a multiple burner fireplace set with multiple independent  
13 valves for controlling each burner?

14 A Yes, for see-through fire set.

15 Q That's correct. And it has what's called -- identified  
16 in the letter C something called a hearth elbow which is in  
17 effect an adjustable valve, and it adjusts the flow of gas  
18 and hence the height of the flame using a screwdriver,  
19 correct?

20 A That's correct.

21 Q Okay. And you are aware of the fact that this product  
22 was on the market by Peterson Company at least since the  
23 1970s, correct?

24 A Yes. But obviously it's a different product.

25 Q Did you while you were handling any Peterson products,

1 did you have any Peterson Company literature available to  
2 you?

3 A I don't believe so.

4 Q No price lists, no product literature, anything like  
5 that?

6 A Not that I'm aware of, no. We only bought a few sets  
7 for comparison against other set.

8 Q I'm sorry?

9 A We only bought a few sets to compare against other sets  
10 on the market.

11 MR. MONCO: Your Honor, may I just have a moment,  
12 please?

13 THE COURT: Yes.

14 MR. MONCO: Thank you.

15 (Pause)

16 MR. MONCO: Thank you very much.

17 Q Okay. Now looking at Exhibit D 45 both here -- I would  
18 like to just walk over here. We've got three burners, and we  
19 have, I understand, hearth elbows which are independent  
20 valves controlling the flow of gas to each one of those  
21 burners, correct?

22 A Yes.

23 Q Okay. Now isn't the correct that you were arguing to  
24 the patent office that none of the prior art showed  
25 independent burners being controlled by independent valves?

1 A I'm not sure.

2 Q Do you recall that we just --

3 A I said I'm not sure.

4 Q Okay. We'll take up where we left off, then.

5 If we can, let's go back to Exhibit D 4, and let's  
6 have a look at page 313. D 4, page 313.

7 Okay. Looking at enlarging that second photograph.

8 A You are correct that we did make this statement, but  
9 this is a totally, totally different product that produces  
10 totally different results.

11 Q Well, it is correct that this product has multiple  
12 burners?

13 A That's correct.

14 Q With multiple independent valves?

15 A That's correct.

16 Q Now the Iklor patent we've already talked about has an  
17 upper and lower burner, it has a pan, it has a grate, and it  
18 has logs, correct?

19 A That's right.

20 Q Okay. The distinction that you and your attorney --  
21 when I say you, I'm talking about you and your attorney --  
22 made in the patent office was that there was no prior art  
23 shown to the examiner or before the patent office which  
24 showed multiple burners with independent valves, correct?

25 A Correct.

→ JT-APP 1047

1 Q Now if this reference had been before the patent office  
2 which showed multiple burners with independent valves, that  
3 argument that you made to the patent office wouldn't have  
4 held up, would it?

5 A Like I say, it's a different product.

6 Q Well, I'm just asking you now, Mr. Blount, you made an  
7 argument to the patent office?

8 A Yes.

9 Q All the times we went over?

10 A Yes, we did.

11 MR. HARRIS: Your Honor, I object to the patent  
12 expertise that the witness is being asked about at this time.  
13 I think it's perfectly fine for him to be asked about what he  
14 thinks his invention is, various things about it. But when  
15 we get into fine details of patent law, I think it's  
16 inappropriate, and I object. There were no experts  
17 designated for this action.

18 MR. MONCO: Your Honor, if I may just have a  
19 brief response. There's a factual argument made to the  
20 patent office that there were no secondary valves controlling  
21 the flow to secondary burner. That factual argument we now  
22 know based on the testimony this witness said is incorrect.  
23 Factually there existed since the 1960s at Peterson Company  
24 multiple burners with multiple independent control valves.  
25 That factual argument was made, and that factual argument is

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1 incorrect by this witness's own testimony now.

2 THE COURT: The objection is overruled.

3 MR. MONCO: Thank you very much, Your Honor.

4 BY MR. MONCO:

5 Q My question again to you, Mr. Blount, is, if the patent  
6 office had Exhibit D 45, which is the sheet product that you  
7 have in front of you or had, this product in front of you, D  
8 45 A, which is the actual burner, having multiple independent  
9 burners and multiple independent valves, your argument that  
10 there was nothing in the prior art that showed that, would  
11 not have held up, correct?

12 A I'm not sure.

13 Q It wouldn't been factually incorrect, would it not?

14 A I'm not sure.

15 Q Does this not show --

16 A Sir, you can't make me say what I don't want to say.

17 I'm not sure whether it would held up or not.

18 Q What is it you're not sure about?

19 A I'm not sure how the patent examiner would have felt  
20 about it.

21 Q All I'm asking is factually your argument would have  
22 been incorrect --

23 A Sir, I don't have to tell you what you want to hear  
24 necessarily. I can tell you I believe it is probably legal.  
25 If it's illegal, well, tell me.

1 MR. MONCO: Your Honor, may I ask an instruction  
2 from the court to ask the witness to answer the question.  
3 It's factually incorrect, his argument that he made.

4 THE COURT: Go ahead and answer the question if  
5 you can. Can you answer it?

6 THE WITNESS: I'm not real sure how the patent  
7 attorney looked at it since you're talking about a totally  
8 different product.

9 THE COURT: Okay.

10 Q Okay. Now, Mr. Blount, I believe you just testified  
11 that you were aware that Robert Peterson Company was selling  
12 multiple burners with multiple independent gas valves at  
13 least since the 1970s. I believe that was your testimony,  
14 correct?

15 A I had heard about it. I don't think I ever saw one.

16 Q You were not aware that Peterson Company was selling  
17 multiple --

18 A I personally never saw one before, no. I personally  
19 never saw a piece of literature before.

20 Q You had been in the business for 30 years?

21 A Pardon?

22 Q You're a good businessman. You know what your  
23 competitors are selling, correct?

24 A Well, I have a pretty good track record.

25 Q And Peterson Company is a company that sells a fair

1 amount of fireplace equipment, correct?

2 A Yes.

3 Q Okay. So you would have more than just a passing  
4 knowledge of what the Peterson Company, one of your  
5 competitors, is selling on the market since you've been in  
6 the business for 30 years, correct?

7 A I knew they didn't have an ember burner.

8 Q Pardon me?

9 A I knew they didn't have an ember burner. Didn't have  
10 ember booster until they copied ours.

11 Q Let's just take a quick look at exhibit -- since you  
12 brought up an ember burner, let's look at exhibit D 52, if we  
13 could call that up, please.

14 MR. MONCO: Just provided the witness with a hard  
15 copy of the Exhibit D 52.

16 Q That's a Peterson Real-Fyre catalog. And please free  
17 to take a look at it for a second or two before I ask you  
18 questions on it.

19 A Go ahead.

20 Q Okay. Now that catalog I'll represent to you has been  
21 around since the 1970s, and for evidence of that we can turn  
22 to the last page where it says the Robert H. Peterson  
23 Company, division of Beatrice Foods. That's on the last page  
24 of Exhibit D 52.

25 And you're aware -- I don't know whether you're

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1 aware of this or not, but the Peterson Company was purchased  
2 from Beatrice Foods I believe in 1977. So this predates that  
3 purchase.

4 I would like you to turn to page 66, Exhibit D 52  
5 Now that says up on the top, the G four burner  
6 series. It's all glowing ember gas log set. Do you see  
7 that?

8 A Yes.

9 Q Okay. So your statement that the Peterson Company did  
10 not have an ember burner set is incorrect, is it not?

11 A Well, all those log sets have ember burners.

12 Q That's not exactly correct.

13 A But not a front burner at all.

14 Q Well, is it correct? I mean, take a look at the picture  
15 that's shown here on the Mountain Oak, number --

16 A Sir, if they had it then, why in the world did they copy  
17 ours now?

18 Q My question to you is very simple. Does not that show  
19 front flame and embers burning?

20 A Very little. Very little. Minimal.

21 Q Did you ever make your attorney aware of the fact by  
22 providing any literature or any information --

23 A Excuse me. What's that?

24 Q I'm sorry. Let me just back up.

25 The question is, did you ever provide to your



1 attorney at any time while you were prosecuting your patent  
2 information regarding the fact that the Peterson Company had  
3 been selling multiple burners with multiple independent  
4 control valves?

5 A Yes.

6 Q You told your attorney that?

7 A Well, we had copies of everything that's be --

8 Q I'm talking about whether you prosecuted your patent  
9 application at the patent office. Not now. I'm going back.

10 When you were prosecuting your patent, did you ever  
11 tell your attorney about the existence of that burner over  
12 there or similar products like it that Peterson Company had  
13 been selling for about 30, 35 years.

14 MR. HARRIS: Objected to as calling for and based  
15 upon fact not proved in evidence. There was some argument  
16 about that fact, but it was not established fact. If the  
17 question is asked, it should be asked on a premise.

18 THE COURT: On what? What was the last thing you  
19 said?

20 MR. HARRIS: Let me get this thing off again. If  
21 the question is asked at all, it should be asked on the  
22 premise. It says, assuming. You will recall this witness  
23 has testified that he didn't think he had ever even seen one  
24 of these things. He had heard something about them, and it's  
25 very vague at this point as to what he knows about this

1 dummied up creature.

2 THE COURT: I'll sustain the objection.

3 MR. MONCO: I'm withdraw the question, Your Honor.

4 THE COURT: Okay.

5 BY MR. MONCO:

6 Q By the way, Mr. Blount, when referring to that exhibit  
7 that you have in front of you and on that page, when it talks  
8 about the G 4 burner, it's talking about this pan and this  
9 main burner, correct?

10 A Yes.

11 Q Separate and apart from this, correct? Separate and  
12 apart from both ways?

13 A You sell it both ways, though.

14 Q But, no, I'm asking you now -- I'm not -- we're not  
15 talking about the ember flame booster right now. We're  
16 talking about just the G 4 burner. You're familiar with the  
17 G 4 burner?

18 A Not really.

19 Q You're not aware of G 4 burner?

20 A That's G 4 there, isn't it?

21 Q This is G 4 here with the pan.

22 A All right.

23 Q Isn't it correct this product has been sold by the  
24 Peterson Company for about 40 years?

25 A Yes.

1 Q Okay. Okay. Now on your direct examination, Mr.

2 Blount, you read the claims of your patent on the Peterson  
3 accused product, correct?

4 A Um-hum.

5 Q Okay. I'm sorry. That was a yes?

6 A Yes.

7 Q Now turning to Exhibit 1, D 1, which is your patent in  
8 suit. The third element, this appears on column 7, enlarging  
9 the third element on column 7, the third element.

10 MR. MONCO: Third element of claim 1. I'm sorry.  
11 Starting with the support means. No, you had the right page.

12 MR. McLAUGHLIN: I'm sorry.

13 MR. MONCO: Says the support means.

14 MR. MONCO: There we go. Thank you very much.

15 Q Now it says, "The support means for holding the  
16 elongated primary burner tube in a raised level relative to  
17 the forwardly position secondary coals burner elongated  
18 tube."

19 Do you see that?

20 A Yes.

21 Q Now I believe your interpretation or your reading of  
22 that element to the claim on the accused Peterson product  
23 means that as long as any portion of the primary burner tube  
24 is above any portion of the secondary burner tube, that  
25 limitation has been met?

1 A I don't know about any portion. Just higher, the  
2 secondary burner. Nothing was stipulated as to how much  
3 higher it had to be.

4 Q I'm not saying that. I'm just saying your  
5 interpretation if any portion of it is higher, the portion of  
6 the primary burner tube is higher than the secondary burner  
7 tube, that meets that limitation?

8 A I don't understand what you're referring to.

9 Q I'm trying to understand what you mean when you said  
10 that the primary burner tube is in a raised level relative to  
11 the lower?

12 A That's correct.

13 Q What did you mean by that?

14 A Well, it's designed so that the coals burner is lower  
15 than the primary burner so that you get upward movement of  
16 your gas fire.

17 Q I'm sorry. I apologize.

18 A It's so -- we feel the proper burner is to have the  
19 front burner -- in the first place you want the front burn to  
20 be smaller than primary burner so you can cover it up with  
21 artificial coal.

22 Q So you're trying to achieve a particular effect?

23 A That's right.

24 Q So that depends on the relationship of the primary  
25 burner and secondary burner?

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1 A Yes.

2 Q Okay. But the effect you're trying to achieve has to do  
3 not with the position of the pipe, but with the position of  
4 the gas jets, correct?

5 A I guess that would be correct.

6 Q Okay. So when you use an element -- so when you take a  
7 look at this element on Claim 1 that we just have enlarged in  
8 front of you here, when you talk about having the primary  
9 burner tube in a raised position relative to the forward  
10 position secondary to coals burner, you're talking about  
11 having the jets of the primary burner tube above the jets of  
12 the secondary burner tube, correct?

13 A That would be desirable, but it's not stipulated that  
14 way, I don't believe, in the patent claim. We're talking  
15 about the burner, not the jet.

16 Q Well, but the position of the -- let me finish my  
17 question?

18 A All right.

19 Q Isn't it correct the position of the jets produced the  
20 effect that you want to achieve, correct?

21 A That's correct.

22 Q Okay. It's not the tube -- the fire doesn't come  
23 shooting out of the tube all over the place. The fire comes  
24 shooting out of the jets, correct?

25 A Right.

1 Q Okay. If we could turn to Figure 3 of Exhibit D 1 which  
2 is your patent. Again if you feel more comfortable, please  
3 feel free --

4 A No, I can see it here. Thank you.

5 Q Now Figure 3, the position of the lower burner which I  
6 think is identified as 104; is that correct?

7 A Correct.

8 Q Isn't that entirely below the position of the upper  
9 burner?

10 A It would appear that way, yes.

11 Q So that's the way it's shown on that figure.

12 And if we could -- I'm sorry, Your Honor. May I  
13 have another moment, please?

14 THE COURT: Yes.

15 MR. MONCO: Thank you.

16 (Pause)

17 Q Okay. If we could turn now to the column 3 of the '159  
18 patent. And with respect to starting on line 54.

19 MR. MONCO: Can we have an enlargement on that,  
20 please. I'm sorry. You have to show one line up. You're  
21 missing the top line.

22 Q Okay. It says, "The present burner assembly in  
23 combination of an expensive primary gas log burner assembly  
24 in gas flow communication with a secondary coals and embers  
25 burner tube positioned forward and below the primary burner

1 which operates to enhance the natural draft of the fireplace  
2 to efficiency burner and aesthetic appeal of the gas fired  
3 artificial logs, coals and ember burners assembly."

4 You see that, correct?

5 A Yes.

6 Q Again, that description and what you're stating there  
7 that refers to the relative position of the burner ports, gas  
8 jets, gas ports on the primary tube and secondary tube,  
9 correct?

10 A Yes.

11 Q Okay. Now you've examined the Peterson accused ember  
12 flame booster product, correct?

13 A Repeat that, please.

14 Q I'm sorry. You have examined the accused Peterson ember  
15 flame booster product, correct?

16 A Yes.

17 Q Okay. I think you've had it up here on the table, and  
18 you've identified that in your examination, correct?

19 A Right.

20 Q Okay. Okay. Taking a look at -- taking a look --

21 MR. MONCO: May I approach the witness, Your  
22 Honor?

23 THE COURT: Yes.

24 Q This is what you've identified as Plaintiff's Exhibit

25 4 A, which is the Peterson ember flame booster with a G 4

1 burner attachment.

2           Isn't it correct, Mr. Blount, that the jets as the  
3 way that that is instructed to be installed, the jets of the  
4 secondary burner tube are above the jets of the primary  
5 burner tube?

6 A     I don't know what the instructions say. I haven't read  
7 them lately. But the burner tube we refer to, we don't  
8 really refer to the jets to my knowledge. We refer to the  
9 burner.

10 Q     Right. But when you say you position the burner tube as  
11 we just discussed when we -- when you mentioned the burner  
12 tube being positioned rearwardly and above the primary burner  
13 tube, you're actually talking about to achieve the effect you  
14 want it's the gas jets and the relative position of the gas  
15 jets, correct?

16 A     We don't make reference to the burners themselves. I  
17 don't believe we make any reference to the height of the jet.

18 Q     Right. But in your specification that we just talked  
19 about that was just quoted that was up on the screen here,  
20 that refers to the fact you're trying to achieve an effect on  
21 the coals, and you're trying to achieve an effect with front  
22 flame, correct? And in order to do that, it's the position  
23 of the jets, not the position of the tube, that's critical?

24 A     We make reference to the burners, not to the jets.

25           MR. HARRIS: Your Honor we would like to have

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1 just a moment to examine the item.

2 THE COURT: Okay. We'll take a 15 minute break  
3 while you do that.

4 MR. HARRIS: We're sure it was inadvertent, but we  
5 believe that the attorney adjusted the subject matter to suit  
6 himself.

7 THE COURT: Okay. We'll take a 15 minute break.

8 (A recess was held at 2:23.)

9 (Resume at 2:35.)

10 THE COURT: Have a seat, please.

11 MR. HARRIS: Your Honor, the difference that I  
12 mentioned is probably very easily solved by simply having the  
13 witness examine the subject matter on the table.

14 THE COURT: Okay.

15 MR. HARRIS: Where it's flat. Because we start  
16 talking about these small angles and degrees and what not,  
17 well, we get a big mess unless we have something to work  
18 from.

19 THE COURT: Okay. Would you like to examine the  
20 table?

21 THE WITNESS: All right.

22 BY MR. MONCO:

23 Q Now, Mr. Blount, before we adjourned, I was asking you  
24 about Plaintiff's Exhibit 4 A and the position of the gas  
25 jets of the primary burner -- and this is on the accused

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1 product now -- being below the gas jets of the secondary  
2 burner. Do you recall that testimony?

3 A Yes.

4 Q Okay. Looking at your Plaintiff's Exhibit 4 A now, is  
5 that correct?

6 A That's right.

7 MR. MONCO: I'm sorry. Your Honor, may I have  
8 just one more pause?

9 THE COURT: Yes.

10 (Pause)

11 Q Mr. Blount, how many Peterson ember flame boosters, the  
12 accused products, how many installations have you actually  
13 inspected in the field?

14 A How many installations I have personally inspected?

15 Q Right?

16 A Zero.

17 Q So you haven't seen how it's installed in the field,  
18 correct?

19 A I have not seen the installation, no.

20 Q Okay. If we could, I would like to turn to Claim 17 of  
21 your Exhibit No. 1. If we could turn to -- if we could have  
22 an enlargement on Claim 17, please.

23 Now it says there, one of the elements -- in fact,  
24 it's the last element on there, claim 17. It says, "A gas  
25 distributor ports of the secondary burner tube directed away

1 from the fireplace opening." Do you see that?

2 A Yes.

3 Q Okay. On your product, the CEBB, you direct the jets  
4 inwardly toward the fireplace, correct?

5 A That's correct, for better ignition.

6 Q Okay. I would like you to turn to, if you would,  
7 please, -- strike that.

8 If we could take a look at column 5, line 49  
9 through 58 of your patent. Let me just.

10 Okay. Your specification says, "Working apertures  
11 are located along the radial edge of the secondary burner  
12 tube along the upper ridge of the tube. In the secondary  
13 burner tube 104, the gas is discharged in a direction away  
14 from the opening of the fireplace or in another aspect it's  
15 directed somewhat toward or directly toward the primary  
16 burner tube 14."

17 A That's correct.

18 Q And then continuing on in column 6, lines 1 through 14.  
19 Get that up on the screen for you.

20 It say, "Even more importantly is that a backward  
21 direction or gas flow direction toward the primary burner or  
22 secondary burner avoids creation of pockets of gas in the  
23 sand or other coverage material of these burners which would  
24 possibly create a flash explosion due to accumulated gases.  
25 For example, if the gas is directed from the secondary burner

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1 104 toward the opening of the fireplace, then the two  
2 independent sources of gas pocketing occurs, one on the gas  
3 logs primary burner which may or may not be covered by  
4 granular material as well as that generated by the secondary  
5 burner which moves from about four to eight or 10 inches in  
6 front of the primary burner. Lighting of such gas  
7 distribution pocketing would be hazardous in uniformity.  
8 Coordination burn utilizing natural gas fireplaces would be  
9 lost."

10 Do you see that?

11 A Yes.

12 Q Now I think you already testified that the jets of the  
13 Peterson ember flame booster are directed down toward the  
14 bottom of the fireplace, correct?

15 A Yes.

16 Q So you have claims coming out both sides of the  
17 secondary burner tube, correct?

18 A I would think so.

19 Q So isn't that directly contrary to the effect that  
20 you're trying to achieve here which is for safety purposes  
21 you've got the flame going directly inward toward the  
22 fireplace?

23 A I don't understand your question. I mean, it just  
24 proves they're not engineered too well. Don't care for  
25 safety. But it's not really the same effect if you have just

1 have a burner shooting gas this way and that way and up as  
2 the gas going this way towards the back of the logs. You get  
3 a more complete coverage of the ember. Draft the fireplace  
4 so you don't have any pockets.

5 Q That's exactly right. You're trying to achieve an  
6 effect, and the safety effect is that you want the gas -- you  
7 want the fire emitted from the gas ports of lower burner  
8 directed inwardly toward the fireplace?

9 A That's correct.

10 Q Exactly. And Peterson Company's products do not do  
11 that? It has the gas coming out of it so it disburse in  
12 both directions, both the length. Fireplace and toward the  
13 fireplace, would it not?

14 A That would be correct. Bad engineering.

15 MR. MONCO: Your Honor, may I have one minute,  
16 please?

17 THE COURT: Yes.

18 (Pause).

19 Q Okay. I next like to ask you about your claim for  
20 damages, and for that I would like you, if you would, please,  
21 to turn to -- I don't know if you have --

22 (Off the record)

23 MR. MONCO: May I approach, Your Honor?

24 THE COURT: Yes.

25 MR. MONCO: Your Honor, these are plaintiffs

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1 exhibits, and we do not have them on a CD.

2 THE COURT: Okay.

3 Q Placing in front of you, Mr. Blount, Plaintiff's Exhibit  
4 15 A. Now those are your sales of the CEBB, the patented  
5 product, year by year since the patent issued?

6 A Yes.

7 Q Okay.

8 THE COURT: What exhibit?

9 MR. MONCO: I'm sorry. Plaintiff's Exhibit 15 A.

10 THE COURT: 15 A. Okay.

11 Q Okay. And for 1999 you showed a total sales of 5,753  
12 CEBBs, and for 2000 you showed 10,165, and then for 2001 you  
13 had a reduction to 7,650, correct?

14 A That's right.

15 Q Now isn't it correct that in 2001 the price of natural  
16 gas spiked to as much as 10 dollars per thousand cubic feet?

17 A I'm not sure of that, no.

18 Q You don't recall anything in the news for anything about  
19 the price of gas?

20 A I don't keep up with some utility bill.

21 Q Okay. My question was in reference to your own product  
22 which is a gas fireplace. When natural gas goes up that  
23 high, doesn't it have a negative effect on some of your  
24 sales?

25 A I haven't noticed it to any extent.

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1 Q Well, here you have a drop of approximately 2,500 units  
2 in one year, and I'm just wondering, do you think the price  
3 of natural gas might have dissuaded people from buying  
4 fireplaces of any kind, natural gas fireplaces of any kind?

5 A It could have a bearing on it, yes.

6 Q Okay. Have you ever heard of the term or familiar with  
7 the fireplaces called unvented fire logs?

8 A Yes, yes. We make them.

9 Q Now are unvented fire logs in competition with front  
10 flame ember burners?

11 A Yes.

12 Q Okay.

13 A In some market.

14 Q Are unvented fire logs -- what sort of effect -- what  
15 sort of effect do you achieve from an unvented fire logs  
16 system?

17 A What do you mean, what find of a factor?

18 Q Do you have embers burners? Do you have flame in front  
19 of gas fire logs?

20 A We have ember burning, yes. We have gas coming up  
21 through the logs, but not on the log.

22 Q Are unvented fire logs more expensive or less expensive  
23 than, let's say, a CEGB with a regular standard burner pan?

24 A They're more expensive.

25 Q More expensive. Okay.

1 Now you yourself -- whether I say you, I mean  
2 Golden Blount Inc. -- sells the CEBB as an accessory,  
3 correct?

4 A We sell it as a product.

5 Q Well, is it sold as an accessory to a regular fireplace  
6 union?

7 A I don't think we call it accessory, but it could be  
8 bought separately. But it's sold generally at the retail as  
9 a unit with gas log.

10 Q If you could turn to --

11 MR. MONCO: Could I have Exhibit D 29, please, up  
12 on the screen.

13 Q Okay. Do you recognize D 29?

14 A Well, the signature looks familiar.

15 Q Okay. Let me see.

16 A The rest is not too clear.

17 CEBB.

18 Q Let me also give you a hard copy of that.

19 A Okay.

20 Q Now Exhibit D 29 is Golden Blount advertising, correct?

21 A Yes.

22 Q Okay. If you take a look toward the center of the page,  
23 it identifies the CEBB as an optional burner, correct?

24 A That's correct.

25 Q A CEBB burner is sold at retail level and at the



1 wholesale level for retrofitting; isn't that correct?

2 A It can be retrofitted, but not sold particularly as  
3 retrofitted unit.

4 Q Okay.

5 A A few of them are sold unless they go with a set of log.

6 Q In your own patent applications that we have reviewed,  
7 in fact, you changed the title of your patent application at  
8 one time to a retrofitted burner, correct?

9 A I believe so, yes.

10 Q We had talked about that several times. So it's also  
11 sold as retrofitted unit in addition to being sold as part of  
12 a regular service?

13 A It's a product that can be sold for retrofitting.  
14 However, they're not generally sold that way.

15 Q Okay.

16 MR. MONCO: Your Honor, we're now going to move  
17 back to the plaintiff's book which is not on the screen, and  
18 I'm going to take a look at Plaintiff's Exhibit 18.

19 THE COURT: Okay.

20 Q Now, Mr. Blount, you have Plaintiff's Exhibit 18 in  
21 front of you, correct?

22 A Correct.

23 Q Okay. You're showing a damage claim here, total damage  
24 claim of \$435,007, correct?

25 A That's correct.

1 Q That's your bottom line. And you arrived at that by  
2 multiplying the profit that you made on the secondary burner  
3 tube, which is your CEBB, plus the log set pan and primary  
4 burner plus the -- or maybe let me just go over this again  
5 because I apologize. Withdraw the question. I'm a little  
6 confused.

7 You've got down here for your second item a log set  
8 including pan and primary burner.

9 Okay. So the third item down there represents the  
10 combination of your CEBB, plus the pan, plus the logs, plus  
11 the primary burner, correct?

12 A That's correct.

13 Q So you arrived at your calculation of damages by  
14 multiplying the number of Peterson Company ember flame  
15 boosters that were sold, which is 3,689, times your profit  
16 margin, correct?

17 A That's correct.

18 Q Now you know that Robert Peterson Company sells its  
19 product to distributors, correct?

20 A That's correct. Yes.

21 Q And they sell their ember flame booster package separate  
22 from their G 4 burner and pan, correct?

23 A Yes.

24 Q You know that. Just so it's clear for the record, what  
25 I mean by that is that looking at Plaintiff's Exhibit 4 A,

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1 which is the accused product, the G 34 burner goes right up  
2 to here where my hand is, and that's the G 4 burner. And you  
3 have all the attachments, which is the ember flame booster  
4 and couplings?

5 A Yes.

6 Q Those are sold separately, and they're priced  
7 separately, aren't they?

8 A That's my understanding.

9 Q Okay. And you have no knowledge whatsoever as to how  
10 Peterson's distributors sell their products, do you?

11 A Well, they sell them through their sales companies and  
12 their -- to their dealers. Beyond that I can't tell you very  
13 much about their operation.

14 Q Right. And you don't know how many of the ember flame  
15 boosters are sold as retrofits? And by retrofit, I mean sold  
16 separately to be put on fireplaces --

17 A I have no way of knowing that.

18 MR. MONCO: Your Honor, may I finish my question?

19 A I'm sorry I thought you had finished.

20 Q You have no idea how many ember flame boosters are sold  
21 separately and alone to people who want to retrofit their  
22 fireplaces with an ember flame burner as compared to those  
23 who are buying complete units, do you?

24 A I do not have that information.

25 Q So the figures that you presented here in court are

1 nothing more than your assumption that every one of the  
2 Peterson Company ember flame boosters is sold with a G 4  
3 burner and pan and log set, and you have no idea whether  
4 that, in fact, is true or not?

5 A I do not know if it's a fact.

6 MR. MONCO: Your Honor, may have a moment please?

7 THE COURT: Yeah.

8 (Pause)

9 MR. MONCO: Your Honor, I just have a couple more  
10 questions.

11 THE COURT: Okay.

12 Q Turning to Plaintiff's Exhibit 18, your third column  
13 says, Golden Blount Inc.'s Cost. What comprised those costs?

14 A Materials, direct labor and indirect labor.

15 Q Materials, direct labor and?

16 A Direct labor and indirect labor.

17 Q Do you have anything on there for -- when you say  
18 labor, what's direct labor?

19 A People actually doing the hands-on work.

20 Q The manufacturing part?

21 A And the indirect is for supervisor.

22 Q Okay. Do you have anything on there with regard to  
23 costs for sales, the salesmen, saleswomen, who sell your  
24 product?

25 A We have not had really sales reps out until this year to

1 speak of or hasn't been any sales expense plugged in.

2 Q Do you have anything in there for overhead which is  
3 attributable to the CEBB?

4 A Well, we haven't increase in our terminal staff, haven't  
5 increased it by one person even. It's the same operation.  
6 We don't have any building to pay rent on because we own the  
7 building outright. We don't have to pay the -- we have what  
8 you call overhead.

9 Q Well, you turn on the lights at the plant?

10 A There's allocation in there for utilities.

11 Q I'm sorry. There's what?

12 A There's small allocation in there for utilities.

13 MR. MONCO: Excuse me. Your Honor, may I have one  
14 moment?

15 THE COURT: Yeah.

16 (Pause)

17 MR. MONCO: Your Honor, we have no further  
18 questions.

19 THE COURT: Okay. Mr. Harris, redirect.

20 MR. MONCO: Your Honor, if this is a convenient  
21 time, we would like to move for all the exhibits that we have  
22 identified in the record, identified here into the record  
23 as --

24 THE COURT: I'm sorry.

25 MR. MONCO: Move the exhibits into evidence.

1 THE COURT: Okay. They are admitted.

2 MR. MONCO: Thank you very much, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. HARRIS:

5 Q In Exhibit 1, the patent, did you, Mr. Blount, see if  
6 there was any language that said anything about retrofitting  
7 assembly? I'm talking about the issued patent. I'm not  
8 talking about all of the things that were done before the  
9 patent was issued.

10 A What was your basic question again, please?

11 Q Is there any reference to retrofitting assembly?

12 A Where?

13 Q In the final patent.

14 A I don't believe so, but I can't tell you for a fact.

15 MR. HARRIS: Just a moment, please.

16 Q In claim 1 do you see anything about retrofitting?

17 A You better blow it up. I can't read it.

18 Q If I suggest to you that in all of the claims and  
19 challenge the other side to find to the contrary that there  
20 is no reference to retrofitting, would you agree with me?

21 A Yes.

22 Q Retrofitting was language that had its place in earlier  
23 applications, was it not?

24 A That's my understanding, yes.

25 Q And you had various continuations in part, did you not?

1 A Yes.

2 Q It's true, I believe you'll find if you check into it  
3 and I'll so represent now, that in the issued patent, the  
4 first and the second cases both had the same primary  
5 examiner, and you necessarily expect the same attitudes.

6 A That's right.

7 Q Isn't it a fact that finally the same examiner who  
8 rejected the claims also allowed the claims and passed them  
9 to issue?

10 A Yes.

11 MR. HARRIS: I would like for the witness to have  
12 the opportunity to approach the hardware table, Your Honor.

13 THE COURT: Okay. Fine.

14 Q I would like for to you take a look at D 45.

15 MR. MONCO: 45 A?

16 Q D 45 A. And I would like for to you describe for me  
17 what the purpose of it is, what type of a fireplace it was  
18 used with, sort of the history of this type of a  
19 configuration. Would you do that?

20 A Well, it's pretty obvious as far as fireplace. Double  
21 sided fireplace.

22 Q You mean it's got glass on one side and glass on the  
23 other side and you want to get a little bit of fire on both  
24 sides?

25 A Not necessarily glass. Could be wide open on both

1 sides. But you want to see a flame from both sides or in the  
2 room. You're going to use the wall for separating rooms.

3 Q D 45, I don't find a pan there. I heard you testify  
4 about a pan. You mean, you could have a pan or you see a pan  
5 or what?

6 A No pan.

7 Q So it's without a pan, and yours has pan, doesn't it?

8 A Yes, sir.

9 Q And is there any way in the world you could use that  
10 configuration for the purpose that you're now using your  
11 ember burner?

12 A No possible way.

13 Q Did you know what the detail was of this structure at  
14 the time you were prosecuting the application? I believe you  
15 said you didn't consider the structure very important as of  
16 today, but did you have any knowledge of what it really  
17 looked like then in any detail?

18 A Not really. This was ember replaced.

19 Q Would you see this is -- put words in your mouth --  
20 non-analogous art?

21 A Whatever that means.

22 MR. MONCO: I object, Your Honor, to the term.

23 THE COURT: I was going to overrule the objection.  
24 I thought it I was accurate.

25 BY MR. HARRIS:

JT-APP 1076



1 Q Let's look at Plaintiff's Exhibit 4 A and 3 A. Now, of  
2 course, I've never been able to tell which was yours and  
3 which was theirs, so you need to come over and help me do  
4 that.

5 A You're kind of slow.

6 Q Well, that's just what we wound up with.

7 A This is ours. This is the copy.

8 Q Yeah.

9 A Which is -- what else can I say?

10 Q Can do you that to raise it (indicating)?

11 A Sure.

12 Q Completely change the level if you want to? When you  
13 start talking about levels of tubes and levels of vents and  
14 levels of apertures and so on. And I suppose you could do it  
15 here, too, couldn't you?

16 A That's correct.

17 Q If you put weight on this member right here, the ember  
18 member, and I'm talking about this is theirs, isn't it, 4 A?

19 A It is.

20 Q Put weight on it there, it begins to change the relative  
21 levelness, if you will, of the two tubes, doesn't it?

22 A Correct.

23 Q Have you considered that when gas is discharged from  
24 the bottom of one of these tubes straight down, is there a  
25 draft that occurs naturally in fireplaces?

1 A Certainly.

2 Q Would some of the draft pull some of the gas or flame or  
3 whatever over to that side?

4 A Absolutely.

5 Q So you would wind up with only a fraction on the one  
6 side and a large fraction on the other side. And that  
7 doesn't take a rocket scientist to know that, does it?

8 A It shouldn't.

9 Q And so for the most part it's fair to say, as you said,  
10 I believe, that even if it goes straight down, okay, that's  
11 away from the front of the fireplace?

12 A Yeah. Are you through with me?

13 Q Oh, yeah. I'll let you go home.

14 A Let me know. I don't know this.

15 Q Okay. I'm sorry.

16 A All right.

17 Q Did you rely on your patent lawyers in the course of  
18 the prosecution of your applications?

19 A Did I rely on them?

20 Q Yeah. Did you rely on them heavily?

21 A You have to, yes.

22 Q Going back to Exhibit 45 that we were looking at over  
23 what I call the hardware table. It's not really for sale  
24 now, is it, as far as you know?

25 A What?

JT-APP 1078

1 Q Exhibit 45?

2 A I really don't know.

3 Q Aren't you under the impression that, I mean, that they  
4 had to make a special one just to bring here.

5 MR. MONCO: I'm going to object, Your Honor, to  
6 lack of foundation. The witness just testified he doesn't  
7 know, and now counsel is apparently testifying.

8 THE COURT: That is sustained.

9 MR. MONCO: Thank you.

10 BY MR. HARRIS:

11 Q Would you be surprised if you were told that they hadn't  
12 been in the catalog or sold since about 1990?

13 A Wouldn't be surprised at all.

14 Q There was some discussion about the Shimek patent. How  
15 do you pronounce it?

16 A Shimek.

17 Q Did it have a valve?

18 A No. No.

19 Q And was it really for the same purpose?

20 A Not at all.

21 Q Was the Iklor patent for the same purpose?

22 A No, not at all.

23 Q What purpose was it for?

24 A Totally different products.

25 Q What purpose was it for?

1 A So was hollow tubes. Incense to burn. Make your room  
2 smell good. They were not a successful product.

3 Q It's true, is it not, sir, that the various patents and  
4 refusals made by the United States Patent Office during the  
5 course of your patent prosecution, in the final analysis all  
6 were reversed by the patent office, and your patent issued  
7 and issued in its present form?

8 A Absolutely correct.

9 MR. HARRIS: Give me just one second.

10 THE COURT: Sure.

11 (Pause)

12 Q With reference to Defendant's Exhibit's 52 which was  
13 used, I believe, to show that many years ago there was  
14 discussion about glowing embers, can you tell me in some  
15 detail what that really illustrates and distinguish from the  
16 idea of having the ember out front?

17 A Well, it looks like basically a gas log burner.

18 Q Can you speak little more loudly, sir?

19 A It appears if it's just a --

20 MR. HARRIS: I want to get this thing on. I'm  
21 sorry. Go ahead.

22 A I'll forgive you.

23 Just a standard gas log burner with a grate and the  
24 burner pan and covered with what appears to be sand. And, of  
25 course, they put artificial ember on top of the sand so it

- JT-APP 1080 -

1 does look like ember, but it's burning ember underneath the  
2 gas log set, not out in front. No separate burner. It's not  
3 even similar to our product. Ours is totally different.

4 MR. HARRIS: I have no further questions.

5 THE COURT: Recross.

6 MR. MONCO: Just a couple of questions, Your  
7 Honor.

8 RECCROSS-EXAMINATION

9 BY MR. MONCO:

10 Q If we could return to -- if we could have Exhibit D 1  
11 which is the patent in suit. If I could have claim 17,  
12 please. It's in column eight.

13 Okay. Looking at claim 17, do you that in front of  
14 you, Mr. Blount?

15 A Yes, I do.

16 Q First line reads, "A gas fired artificial coals and  
17 ember burners apparatus suitable for attaching to a gas fired  
18 primary artificial burner tube."

19 Do you see that?

20 A Yes.

21 Q Isn't is that retrofit?

22 A You might consider that.

23 Q It would be, wouldn't it?

24 A Yes, but you would change a lot of words in the  
25 dictionary if you tried.

1 MR. MONCO: No further questions, Your Honor.

2 THE COURT: Thank you very much. You may step  
3 down.

4 THE WITNESS: Thank you.

5 THE COURT: Next witness.

6 MR. GAINES: Your Honor, plaintiff would like to  
7 call to the stand Charlie Hanft, please.

8 THE COURT: Okay.

9 (Pause)

10 Lost a witness?

11 MR. GAINES: Yes, I lost a witness. He went to  
12 use the men's room, Your Honor. Bad timing.

13 (Pause)

14 MR. GAINES: Your Honor, just as housekeeping  
15 nicety, it's a privilege to be before you for the first time  
16 in your courtroom.

17 THE COURT: It's good to see you.

18 (Pause)

19 MR. HARRIS: Here he comes.

20 MR. GAINES: We're also concerned. He almost lost  
21 his suits last night. Got them from the airline about 12  
22 o'clock midnight.

23 THE COURT: If you would raise your right hand,  
24 please.

25 (Witness sworn by the court.)

JT-APP 1082

1 THE COURT: Just have a seat right up there:

2 CHARLES A. HANFT, (Sworn)

3 was called as a witness by the Plaintiff having been first  
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. GAINES:

7 Q Mr. Hanft, would you please state your full name and  
8 residence and business address for the record, please?

9 A Charles A. Hanft, H-a-n-f-t.

10 THE COURT: I'll need to you speak you louder. If  
11 you would the get closer to the microphone.

12 A Charles A. Hanft. The spelling is H-a-n-f-t. The  
13 residence is 970 Brentwood Avenue in Lawrenceville, Georgia.  
14 And the business is 2316 Main Street in Tucker, Georgia.  
15 It's a retail store.

16 THE COURT: Okay.

17 Q Mr. Hanft, have you ever testified before in court?

18 A No.

19 Q Okay. So please feel free to ask me to repeat a  
20 question if you do not clearly understand it.

21 Mr. Hanft, what do you do for a living?

22 A I'm a specialty retailer.

23 Q In what area?

24 A Fireplaces primarily and grills in the off-season, which  
25 would be the summer.

1 Q And when did you first get into the business you're in  
2 presently?

3 A July of 1991.

4 Q And how did you come about getting into the business?

5 A I was the business broker looking to sell the business  
6 for the previous owner. And I assessed it to be a good  
7 thing, so I bought it.

8 Q So 1991 you went into the business that you're presently  
9 in; is that correct?

10 A Yes.

11 Q Okay. So how many years would that make you in the  
12 fireplace business now? About 12?

13 A Yes.

14 Q Okay. Approximately 12 years. Who was your major  
15 supplier of gas logs when you first entered the business?

16 A Peterson primarily.

17 Q Was there another supplier at the time?

18 A There was another significant one, which was the Heat  
19 Mentor.

20 Q But Peterson was one of your suppliers?

21 A Yes.

22 Q Are they still your major supplier for gas logs?

23 A No.

24 Q Okay. Who is your major supplier?

25 A Golden Blount.



1 Q Why is that? Why did you go from Peterson to Golden  
2 Blount?

3 A As they were both displayed for periods, when customers  
4 made choices, and the pricing was similar as well, they made  
5 them on appearance. And they consistently chose the Golden  
6 Blount log, and I want to go with what sells.

7 Q So then if I'm understanding you correctly, the Golden  
8 Blount logs kind of grew in number, and the Peterson's logs  
9 kind of decreased in number over a period of time?

10 A Yes.

11 Q Do you still handle products for Peterson?

12 A Very few. I can be specific if you like.

13 Q But they do still supply with you some of your products  
14 or you get it indirectly, I guess?

15 A It's all through distributors, yes.

16 Q So from 1991 to the present, then, so you've been  
17 purchasing Peterson products for about 11 to 12 years?

18 A Yes.

19 Q Okay. How do you keep up with the products for any  
20 given company from whom you buy products?

21 A They publish their offerings in a new catalog.

22 Q Is there anything else you do?

23 A Oh, yeah, the shows.

24 Q Tell us about what do you mean by shows.

25 A Trade shows. There's a national show that I try to make

1 every year. Outside of 1993 with the birth of my son, I've  
2 been to every one in my time in the business. There's a  
3 regional show that I've seen a lot, and there's manufacturers  
4 and distributors put on smaller shows. I try to get to them  
5 all.

6 Q What exactly is it that they show at these shows?

7 A Well, a distributor would show the products from the  
8 manufacturers they distribute. The national trade show,  
9 which is the big one where every one wants to show what they  
10 have or where manufacturers show what they offer.

11 Q Would this include any new products that the  
12 manufactures might be --

13 A Yes.

14 Q -- putting out that year?

15 A Yes.

16 Q Is it primarily for that or --

17 A That's featured. They have gone -- all the  
18 manufacturers have gone through efforts to bring something  
19 new. They want every one to see it.

20 Q So if they've got something new, they want it for the  
21 show to show all the potential buyers at the show?

22 A Yes.

23 Q You mentioned brochures a while ago. Are you familiar  
24 with Petersons brochures and sales catalogs?

25 A They have a product catalog that has a format that I've

1 seen over these 11 years that has basically not changed in  
2 terms of its physical nature.

3 Q Okay.

4 A But the products inside, of course, all have changed as  
5 time goes on.

6 Q All right. Mr. Hanft, I would like to direct your  
7 attention to Plaintiff's Exhibit 4 A and 4 B again or  
8 actually 4 A. If you need to come up a little closer, feel  
9 free to do so.

10 This is the Peterson ember burner. Have you ever  
11 seen this before? This product.

12 A No, I have never seen that.

13 Q You have never seen that for sale before?

14 A No.

15 Q All right. Did you see it for sale in '91?

16 A No.

17 Q How about '92?

18 A No.

19 Q What about '93?

20 A No.

21 Q '94, '95, '96?

22 A I would answer no.

23 Q Okay. What about '97?

24 A No.

25 Q Well, if you've never seen it for sale before, did you

1 hear about it along the way?

2 A Yes.

3 Q Okay. And when did you hear about it?

4 A Well, two years ago. I heard that it existed.

5 Q Okay. And how do you hear that?

6 A Through either another seller of the product or a rep  
7 that knew of it. A rep or a seller of it.

8 Q So you never saw Peterson introduce this at any of their  
9 conventions?

10 A No, I didn't see it.

11 Q You did not see it in any of their brochures, their  
12 sales product brochures?

13 A No.

14 Q But you did hear about it. Did you hear about it from  
15 '91 to '99?

16 A No.

17 Q Okay. So the first time you heard about it, then, was  
18 in the year 2000?

19 A Yes.

20 Q Okay. Do you -- just knowing the industry as you said  
21 that you do, do you believe that you would have heard of it  
22 sooner if it had been available?

23 A I think I would have heard of that sooner.

24 Q Why is that?

25 A It's not an insignificant product.

JT-APP 1088

1 Q It looks like a pretty simple pan and tubes to me.

2 A Not to the buyer. I'm close to the streets, and I know  
3 what customers want. When they see embers, more glowing  
4 embers, it's an impact.

5 Q Do you presently sell the Peterson ember burner?

6 A No.

7 Q Why not?

8 A I have the Golden Blount, and it would be superfluous to  
9 do that.

10 Q Okay. Because they're just practically the same thing?

11 A Yeah, and why stock more stuff?

12 Q Right. Okay. How would you -- you said that you came  
13 to know or came to know Golden Blount's products when or did  
14 you when did you come to know --

15 A In 1994.

16 Q 1994. And since then you have purchased gas logs from  
17 them?

18 A Yes.

19 Q On a yearly basis?

20 A Yes.

21 Q How would you characterize Golden Blount, Incorporated,  
22 within the gas log industry?

23 A Growing, inventive and a good company to do business  
24 with in the sense that you feel like you're getting a fair  
25 shot.

1 Q You said innovative, and I think we've heard some  
2 testimony here today about awards. Are you talking about  
3 perhaps the awards that Golden Blount had received on some of  
4 of his other products?

5 A In part.

6 Q When was the first time you saw Blount's -- and I'm  
7 going to call it the CEBB burner, C-E-B-B burner, because I  
8 think that's the industry name for it.

9 When was the first time that you saw the CEBB  
10 burner?

11 A It would have been the spring or summer of '94. The  
12 sales began in September, probably I would think after the  
13 delivery arrived. Usually the delivery comes in the summer  
14 if you're going to buy an early buy.

15 Q Okay. So based on your previous testimony, then, just  
16 simple mathematics. You saw them in '94 and heard of  
17 Peterson's device in 2000. That was about a space of six  
18 years, then, difference?

19 A Yes.

20 Q Okay. And were you aware that Blount's patent issued in  
21 November of 1999 on his burner?

22 A I had heard that they got the patent.

23 Q Okay. What were your impressions when you first saw the  
24 CEBB burner or Blount's burner?

25 A I ordered them. I would -- I saw it as a product that

1 would sell.

2 Q Anything else?

3 A It would sell because of its appearance. Because of  
4 what it did to a fireplace.

5 Q What exactly did it do?

6 A It increased the amount of embers, and I knew or I felt  
7 strongly that would have appeal if it's proven could be so in  
8 the marketplace. It makes them more beautiful. There's a  
9 little bit of heat thrown from it, too, which is nice.

10 Q As an added benefit?

11 A Yeah.

12 Q What would you say is the primary characteristic that  
13 makes it more appealable, I guess, to customers or to you?

14 A More glowing embers out front where they can be seen.

15 Q And why is that important?

16 A It's just a basic looking at it and liking what you see.  
17 It's more realistic.

18 Q Okay. When you first saw the Blount CEBB burner, did  
19 you think it would be commercially successful?

20 A Yes.

21 Q And you might have said that already, but tell us why?

22 A Because people would pay the money to have one. They  
23 would want one, and they would want it for its appearance.

24 Q Okay. Do you show Golden Blount's burner in your  
25 showroom?

JT-APP 1091

1 A Yes.

2 Q Explain.

3 A We have fireplaces with numerous gas log displays, and I  
4 have three different styles of log sets that have a front  
5 burner on them and presently two that do not. So presently  
6 two don't and three do.

7 Q So your testimony is that in your showroom you have some  
8 fireplaces with the front burner and some without?

9 A This is true.

10 Q Okay. In your own experience, which one is the customer  
11 drawn to?

12 A The ones with the front burner.

13 Q Have they ever expressed the reason why?

14 A Again, look at all the embers.

15 Q The glowing embers?

16 A Yes.

17 Q It just looks more like a real fireplace to them?

18 A It does. It's all about appearance. It's decorative  
19 appliance. It's not a heating device. Its visual impact is  
20 more appealing, more arresting. That's the one they want.

21 Q So they were drawn to the ones that had the burner in it  
22 versus the ones that did not have the burner?

23 A Yeah. And I might add if they liked the style of one  
24 that didn't, they volunteered the question could they have  
25 one. And, of course, we went into the explanation that it

JT-APP 1092



1 could.

2 Q Okay. We've heard a lot of testimony and dialogue from  
3 counsel regarding the way in which this burner is sold,  
4 whether it's auxiliary or whether it's sold more times than  
5 not by itself or with log sets. I would like for you to just  
6 share with us your experience when you sell or how you sell  
7 the burner.

8 A Thinking back over the years in terms of how they were  
9 sold, if I sold 40 more CEBBs from this day forward, 39 would  
10 go with a log set.

11 Q Wait, wait, wait. Hold on. 39 out of 40 would go with  
12 logs?

13 A Yes. I'm giving you two and a half percent. Yes. In  
14 other words, we will retrofit one. We can. We don't even  
15 promote that.

16 Q Now wait a minute. So you don't have -- your experience  
17 is that you don't have that many customers coming in and just  
18 asking for the CEBB burner by itself?

19 A No, they're coming in shopping for a gas log, and when  
20 they do that, they'll need a gas log as well. So that's one  
21 of the reasons why that happens. They go with the front  
22 burner.

23 Q Okay. I put the math to that, and that's about 90  
24 percent of the time, then, you sell a set of logs with a  
25 burner.

JT-APP 1093

1 A Maybe 97 and a half.

2 Q Well, your math is better than mine.

3 A With the 142 is two and a half percent.

4 Q How do you install your burners when a customer comes  
5 in and says, yes, I like that? Do you just box it up for  
6 them, say, congratulations, you've got a great little set of  
7 logs and send them on their way or what?

8 A Three out of four will want installation managed by us.

9 Q So if somebody was coming in looking for, you know,  
10 just a burner, I guess, what would be some of the impediments  
11 just buying -- you know, I like that burner, I like the look  
12 of this. I think I'll take it home and put it on my  
13 fireplace. Would that necessarily work or what kind of  
14 problems could I run into?

15 A Installation, directing, removing things that were put  
16 on the original single burner set. It's doable and has been  
17 done in a rare case. But of those that do that, they ask  
18 us.

19 Q Are there different size fire boxes, Mr. Hanft?

20 A Yes.

21 Q Will that burner fit in all fire boxes?

22 A Prefab fireplaces are often not commercial. Some of  
23 them, especially older ones, we go back and put logs in all  
24 kinds of fireplaces. Some of them don't have the depth for a  
25 front burner.

-JT-APP 1094-

1 Q So if I'm all excited after being in your show room, and  
2 I get all excited and grab one up and run out of the door  
3 with it. I would be the one, let's see, two and a half  
4 persons I guess in your experience, and I get home, it may  
5 not even work in my fireplace, mightn't it?

6 A There's a chance it wouldn't.

7 Q Thank you. Have you ever seen any other ember burners  
8 other than Peterson's that provides the same result a  
9 non-CEBB does from a 1991 up to the time that you first heard  
10 about Peterson burner?

11 A No, not to see them.

12 Q Okay. Have you ever seen any existing?

13 A No. I have heard that some exist.

14 Q Okay.

15 A And it's important to know that I have no incentive to  
16 go to try to find them. There are only --

17 Q Okay. Thank you. How would you characterize, then,  
18 just kind of wrapping up. How would you characterize the  
19 demand for the CEBB burner in your own experience?

20 A Steadily increasing.

21 Q Steadily increasing. So ever since you first introduced  
22 the burner, which was in 1994, the curve has been gradually  
23 increasing, I guess taking into account, as counsel pointed  
24 out, for sometimes warm years or what have you and that sort  
25 of thing.

JT-APP 1095

1 A Yes.

2 Q But overall if you look at it to a certain extent, it's  
3 been steadily increasing as has the stock market; is that  
4 correct?

5 A Yes.

6 Q Thank you.

7 MR. GAINES: I have no further questions at this  
8 time, Your Honor.

9 THE COURT: Okay. Thank you.

10 Cross examination.

11 CROSS-EXAMINATION

12 BY MR. MONCO:

13 Q Good afternoon, Mr. Hanft. My name is Dean Monco. I'm  
14 representing Peterson Company here.

15 Just a couple questions if I may. First of all,  
16 have you ever seen the Blount patent in suit?

17 A The patent itself I saw for the first time on Saturday.

18 Q This Saturday? Where did you see this patent?

19 A I saw it at Mr. Harris's offices.

20 Q Did Mr. Harris ask you to review it?

21 A I was asked to look at it.

22 Q Did he tell you why he asked you to look at it?

23 A No.

24 Q Okay. What else did Mr. Harris ask you to look at?

25 A Well, to look at. Mr. Gaines and Mr. Harris were

1 explaining to me what a trial like this would be like.

2 Q Now with respect to all of your testimony regarding the  
3 fact that you sell 97 percent of burners with the CEBB  
4 attachment. Do you recall that testimony?

5 A Yes.

6 Q Okay. And ALL of that testimony you're talking about is  
7 your experience in selling the Blount unit, correct?

8 A This is correct.

9 Q You have not been speaking at all about how the Peterson  
10 product is marketed, are you?

11 A I am not.

12 Q Okay. You don't have any knowledge with regard to how  
13 distributors market the Peterson product, do you?

14 A No, but I don't think it would vary.

15 Q You don't know one way or the other?

16 A It's infinity.

17 MR. MONCO: Your Honor, we have no further  
18 questions.

19 THE COURT: Thank you very much. You may step  
20 down.

21 MR. GAINES: Just a minute, Your Honor.

22 THE COURT: Okay.

23 REDIRECT EXAMINATION

24 BY MR. GAINES:

25 Q Just one quick question, maybe a couple, maybe. We did

1 meet for the first time on Saturday, didn't we?

2 A Yes.

3 Q When I handed you the Blount patent, I just said, this  
4 is the patent that's in suit; is that correct?

5 A (Witness nods head.)

6 Q I also told you we just went over some general patent  
7 law just in generalities such as, you know, this is what a  
8 plaintiff has to do, this is what a defendant has to do?

9 A Right.

10 Q But I wasn't specific with this particular case, was I?

11 A No.

12 Q All right. The other question I wanted to ask you,  
13 you've been in the business about 11 or 12 years now. And  
14 based on your own experience, would you say that it's fair to  
15 say that your business is pretty typical of the fireplace  
16 accessory business?

17 MR. MONCO: I'm going to object to that question,  
18 Your Honor. Lack of foundation, and this witness has not  
19 been identified as an expert in the area of selling  
20 fireplaces and how distributors work in selling other  
21 people's products. I think now we're again approaching into  
22 the area of expert testimony and opinion testimony that you  
23 would find outside the bounds of Rule 701.

24 THE COURT: Response.

25 MR. GAINES: Your Honor, first of all I asked Mr.

JT-APP 1098

1 Hanft his own experience, what he believes would be the case  
2 given the fact he's been in the industry for 11 to 12 years.

3 THE COURT: Objection overruled.

4 BY MR. GAINES:

5 A I feel that --

6 Q Do you need the question repeated, Mr. Hanft?

7 A No.

8 Q Okay.

9 A I feel that my experiences and I do communicate a lot  
10 with other shops, and we all sell different stuff in Georgia  
11 and elsewhere. And I feel like their experiences parallel  
12 mine. The item is meant as an initial sales appeal. And  
13 there is very little market to go back with them.

14 Q Mr. Hanft, what do you think, what is the artificial gas  
15 log industry trying to achieve as a whole?

16 A The vented logs are trying to achieve good looks and, of  
17 course, more sales plus good looks.

18 Q When you say good looks, what do you mean by that?

19 A Eye appeal, realism.

20 Q That's what it really boils down to, doesn't it?  
21 Realism?

22 A When a customer comes in, oh, my, how realistic that is.

23 Q Right. So you're trying to get it more realistically  
24 looking fireplace. That's why all the accessories, all the  
25 burners, all that sort of thing is for?

1 A Yes.

2 Q Thank you very much.

3 A Thank you.

4 MR. GAINES: No further questions.

5 THE COURT: Cross examination.

6 MR. MONCO: No further questions.

7 THE COURT: Thank you very much. You may step  
8 down. You're excused.

9 Next witness.

10 MR. HARRIS: We would like to call Mr. McLaughlin  
11 as an adverse witness.

12 THE COURT: Okay.

13 If you'll raise your right hand, please.

14 (Witness sworn by the court.)

15 THE COURT: Just have a seat right up there.

16 F. WILLIAM McLAUGHLIN, (Sworn)

17 was called as a witness by the Plaintiff having been first  
18 duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. HARRIS:

21 Q Would you state your name, please, and your address for  
22 the record?

23 A Name is F. William McLaughlin. Do you want my business  
24 address or residence?

25 Q What is your occupation, Mr. McLaughlin?



1 A I'm a patent attorney.

2 Q And indeed you served as patent attorney for the  
3 Peterson Corporation, haven't you?

4 A Yes, I have.

5 Q And you are the patent attorney that had substantially  
6 all the contact with Peterson Corporation regarding the  
7 present patent in suit, at least up until the time the suit  
8 was filed?

9 A Within my firm, yes.

10 Q And most of the time after, right?

11 A Well, I can't say that's correct or not.

12 Q I believe you began to work with Mr. Monco?

13 A Right.

14 Q It's true, is it not, that in December of 1999 that you  
15 had a contact by telephone with your client. Who was that?  
16 Mr. Bortz?

17 A Yes, it was.

18 Q And what is Mr. Bortz's position as you understand it?

19 A He is an officer and part owner of Robert H. Peterson  
20 Company.

21 Q What did he consult you about?

22 A His company had received a letter from an attorney  
23 representing Golden Blount.

24 Q Did he ask you for an infringement opinion?

25 A At that time I don't remember that he did, no.

JL-APP 1101

1 Q Did he tell you that he had received some kind of a  
2 notice regarding infringement?

3 A No.

4 Q What did he tell you?

5 A He told me he had received a letter having to do with a  
6 patent owned by Golden Blount.

7 Q And I put Plaintiff's Exhibit 10 up. Is this the letter  
8 you're talking about? I'm assuming you were forwarded a  
9 copy, right?

10 A Yes, I was.

11 Q Do you read that letter as relating in some way to  
12 patent infringement?

13 A I'm not sure what you mean by relating to patent  
14 infringement.

15 Q Well, I note in the third paragraph it says, "The  
16 purpose of this letter is to place you on notice of the  
17 issuance of the patent and inform you that our client has  
18 instructed us to take whatever steps are reasonable and  
19 necessary to prevent infringement of the patent. "

20 Don't you think that's at least a hint that there's  
21 some possibility of a charge of patent infringement?

22 A No, I do not.

23 Q Why is that?

24 A I think it's a carefully drafted letter that's intended  
25 to simply indicate that there is a patent. And they don't

JT-APP 1102

1 want anybody to infringe the patent.

2 Q So in any event, it is a letter that gave them knowledge  
3 of a given patent, correct?

4 A Yes.

5 Q So from that date, at least, they knew about the patent  
6 or the number of the patent and its issue date, correct?

7 A Correct.

8 Q And they did know that someone thought enough of their  
9 patent to mention the possibility of infringement.

10 A I can't say that's correct, no.

11 Q Hard to say it's incorrect, too, though, isn't it?

12 A No, it's not.

13 Q You like that better than the other?

14 A I'm not sure exactly what the attorney who wrote the  
15 letter meant.

16 Q What did the client ask you to do regarding the letter  
17 or regarding the situation, however you see it?

18 A Well, we discussed the situation, but beyond that I  
19 can't say that he asked me to do anything.

20 Q Didn't he tell you that he had been making devices like  
21 that or seen devices like that for 20 years and that if that  
22 was the case, did that have any effect on the situation?

23 A I wouldn't characterize it as the way you have, no, I  
24 would not.

25 MR. HARRIS: Excuse me just a minute.

- JT-APP 1103

1 I need page 25 of the deposition.

2 Q As I read it, it says, "Now what was the first opinion  
3 that you rendered to him? What did he ask you, and what did  
4 you ask him?"

5 And I read your answer to be, "Well, what the  
6 opinion was, was that if we can prove that they had been  
7 making and selling products for 20 to 30 years that were the  
8 same as the current products, he would not be liable for  
9 infringement with respect to the Blount patent.

10 "Q Did you tell him that with respect to the  
11 business, invalidity and statutory bar? Is that what you  
12 were telling him?

13 "A Not so much the form of statutory bar. It  
14 was more that if any -- if any claim was infringed by the  
15 counterproduct, that claim would be invalid.

16 "Q Why did you tell him it would be invalid?

17 "A Because if the claim covered what they were  
18 doing currently, then it would cover what they were doing 20  
19 or 30 years ago, and the claim would be anticipated."

20 Q Maybe we need to place that in time. Is that not the  
21 first time you gave him some advice?

22 A Yes, it is the first time, yes.

23 Q Did you not give him advice on three separate occasions,  
24 at least?

25 A I did.

1 Q Let's be sure you and I understand when the first time  
2 was. You see, I may have been unfair with you in saying it  
3 was December. When was it?

4 A It was in December of 1999.

5 Q So what I said a minute ago is true?

6 A No, I don't believe what you said was true.

7 Q What did I say that was untrue?

8 A I believe you asked me characterizing what was done 20  
9 or 30 years ago as relevant to the patent. That's not  
10 correct. I was characterizing 20 to 30 years ago relative to  
11 the Peterson product.

12 Q I see. What you're saying is you had given them the  
13 advice involving 20 or 30 years, but, of course, that  
14 involved whether there were prior products over that period  
15 of time such as the Peterson product?

16 A Right.

17 Q But if that were the case, that would be invalid. And  
18 you wrote him a letter to that effect, did you not, telling  
19 him that he didn't have to worry if that were the case?

20 A No, I did not.

21 Q You didn't write a thing to him, did you?

22 A No, not on that subject, no.

23 Q There does come a time that you gave him a second  
24 opinion, though, too, didn't you?

25 A Yes.

1 Q Going back to that first opinion. Didn't you tell him  
2 he needed more information -- that you needed more  
3 information?

4 A Yes.

5 Q What did he tell you?

6 A He said that they would look for prior art.

7 Q Did they send you a big bundle of it right off?

8 A No.

9 Q How long was it you got any significant pieces of paper  
10 from him?

11 A It was shortly after the lawsuit was filed.

12 Q And that was well, well over a year after the  
13 consultation in December, wasn't it?

14 A I don't know that I agree well over a year, but it was  
15 just over a year.

16 Q Well, we could nitpick each other all you like.

17 I'll retract it and say over a year. How about  
18 that?

19 A That's fine.

20 Q All right. Now what was the situation as far as the  
21 materials you had when you gave a second opinion and tell me  
22 what the second opinion was, if you'll let me compound the  
23 question?

24 A Are you finished with the question?

25 Q Can't you hear me still talking?

1 A You said -- I thought how were going to compound the  
2 question.

3 Q I had compounded it. I asked two different things in  
4 one question.

5 A Okay. I had the patent, I had some prior art, and I had  
6 some information on the Peterson product.

7 Q Where did you get the prior art?

8 A From Mr. Bortz.

9 Q Did you tell Mr. Bortz he should do a prior art search  
10 or have you do one?

11 A Yes.

12 Q What did he say? That he would do it?

13 A Yes.

14 Q Did you tell him it was wise for you to do it?

15 A I don't know. I don't remember if I told him that or  
16 not.

17 Q Mr. Bortz do a lot of prior art searching to your  
18 knowledge?

19 A Can you repeat the question?

20 Q Does Mr. Bortz do a lot of prior art searching to your  
21 knowledge?

22 A I do not know.

23 Q And you said you had the file wrapper?

24 A No, I did not say that.

25 Q You didn't get the file wrapper until after suit was

1 filed, did you?

2 A No, that's correct. I did not.

3 Q And on that first occasion, that was in December of  
4 1999. It is true that you didn't have any of that 20 or 30  
5 year art that he was talking about?

6 A That's correct.

7 Q Tell me what occasioned -- I'm not sure I picked that up  
8 a minute ago -- the second consultation?

9 A I'm not sure what you're referring to by the second  
10 consultation.

11 Q Well, I called it a consultation. It was telephone  
12 consultation you gave him, telephone opinion.

13 A Yes.

14 Q Perhaps he called you back before that. I don't know  
15 about that. But I would like to direct attention to that  
16 second telephone opinion.

17 A Okay.

18 Q What was the occasion of it?

19 A It was to discuss the materials Mr. Bortz had sent me to  
20 review in connection with this lawsuit.

21 Q Had there been at that time a second letter?

22 A This was after the lawsuit was filed.

23 Q I think you did three opinions instead of two.

24 A Yes.

25 Q Okay. I'm asking about the second opinion.

JT-APP 1108



1 A Second and third were after the lawsuit was filed.

2 Q Both of them were?

3 A Yes.

4 Q So when was it that the second opinion took place?

5 A February of 2001, I believe.

6 Q And had there been any correspondence of any kind, any  
7 follow up correspondence from Golden Blount during the  
8 meantime?

9 A Yes, there had.

10 Q And what basically was it? And I'll probably put it on  
11 the screen if you don't mind. Is that it?

12 A Yes, it is.

13 Q I ask you to suffer the little discomfort of reading  
14 that letter. It's short. Would you do it for me?

15 A Aloud?

16 Q Yeah.

17 A "Dear Mr. Corrin, On December 10, 1999, I forwarded a  
18 letter to Robert H. Peterson Company with an enclosed copy of  
19 U.S. Patent 5,988,159. On December 30, 1999, you indicated  
20 that we would be receiving some response from you regarding  
21 our earlier letter.

22 "As of this I date we have not received the  
23 response you indicated would be forthcoming.

24 "We have inspected your EMB Series ember flame  
25 booster and find it to be clearly within the scope of at

JT-APP 1109

1 least some of the claims of the subject patent. Our client  
2 views any infringement of its patent with great concern and  
3 will take necessary steps to stop any such infringement.

4 "Our client wishes to resolve the matter of the  
5 infringement of the subject patent as soon as possible.

6 "We look forward to your immediate response to our  
7 earlier letter."

8 Q Now you would agree with me that that letter very  
9 specifically charges infringement?

10 A Yeah, I do.

11 Q And that was in May 3rd, 2000. You and I may differ on  
12 whether the December does or not in '99, but we do agree this  
13 one charges it.

14 So as of May 3rd, 2002, even you believe that they  
15 had been charged with infringement.

16 Did this letter cause some action to take place on  
17 the part of your client or you?

18 A Yes.

19 Q What?

20 A The client forwarded it to me, and we discussed the  
21 letter, and the client sent a response to I think it was Mr.  
22 Tucker.

23 Q You didn't write that response, did you?

24 A No, I did not.

25 Q Who did?

JT-APP 1110

1 A I didn't hear you. I'm sorry.

2 Q Who did?

3 A I believe it was Mr. Bortz.

4 Q In other words, the client did the dirty work on this  
5 one, right? The client wrote the letter to, what, try to put  
6 off things a little bit?

7 MR. MONCO: Objection, Your Honor, to the  
8 characterization. It is also arguing with the witness.

9 THE COURT: Sustained.

10 BY MR. HARRIS:

11 Q Can you think why the client wrote that letter? There  
12 was a specific charge of infringement on an item that looks  
13 almost the same as the patented item?

14 A Because the letter simply had a broad infringement  
15 allegation, and he wanted a greater explanation from Golden  
16 Blount as to why Golden Blount thought the Peterson Company  
17 was infringing the patent.

18 Q Sir, was it not such a clear thing what the issues, at  
19 least, were that this is obviously a put off letter and has  
20 no purpose whatsoever rather than to make somebody go away,  
21 hopefully?

22 A I don't agree with that at all. It's asking a question,  
23 further explanation, which was never provided.

24 Q Oh, I think it was provided the next year. Wasn't there  
25 a lawsuit filed?

JT-APP 1111

1 A Seven or eight months after this, yes.

2 Q Yeah. I suppose that was one.

3 So what else did you do in the meantime, and what  
4 did your client do in his attorney-client relationship with  
5 you?

6 A With respect to this matter?

7 Q With respect to that or generally the infringement  
8 problem that now raised its head.

9 A I don't do anything.

10 Q Did he ask you to do anything?

11 A No. We were waiting to receive a response from Mr.  
12 Blount's attorney.

13 Q Did you follow that up with a letter?

14 A No.

15 Q Did you give him an opinion at that time?

16 A No, I did not.

17 Q When did you give him that third opinion? That was in  
18 the following year, wasn't it?

19 A Yes, the third opinion was in May --

20 Q The second and the third opinion, right?

21 A Yes.

22 Q Would you explain about the second opinion? I can't ask  
23 for a letter because you didn't write one, did you?

24 A No, I did not.

25 Q It was oral opinion again, wasn't it?

1 A Yes, it was.

2 Q And it was conducted by telephone, wasn't it?

3 A Yes, it was.

4 Q And you wrote him still another one after that, and it  
5 was also conducted by telephone, wasn't it?

6 A Yes, it was.

7 Q You and he lived in the same city even, didn't you?

8 A No, we do not.

9 Q Well, I'm not a real expert on the Chicago area, but  
10 maybe you can call it the metroplex or something. I do  
11 believe you lived just a few miles apart or worked a few  
12 miles apart. Correct me if I'm wrong.

13 A It's correct that we work in the same city, yeah.

14 Q Would it have been difficult to get together at any time  
15 to discuss this serious matter?

16 A We discussed it over the telephone.

17 Q Isn't it a fact you never talked to that man in person  
18 one time between the time when he called you about this  
19 matter in December and when I took his deposition in Chicago?

20 A That's not correct. I did tell you that in the  
21 deposition, but I did meet with him one other time.

22 Q Why don't you correct yourself, then, for me. Where was  
23 it, and what was it?

24 A It was in my office, and I don't remember -- it was  
25 probably a few months before the deposition.

JT-APP 1113

1 Q But after you had given all your opinions?

2 A Yes.

3 Q And after the suit was filed?

4 A Yes.

5 Q I see. So tell me about the details of the second oral  
6 opinion.

7 A I told Mr. Bortz that Peterson Company ember flame  
8 booster did not literally infringe any claim of the Blount  
9 patent; and at least some of the claims were invalid as  
10 obvious.

11 Q And as you did that, did you get a chance to look at his  
12 structure, the structure he was selling, the product he was  
13 selling? The product in issue?

14 A I saw a picture of the product and drawings of the  
15 product.

16 Q Did you -- you didn't see the product, did you?

17 A No, I did not.

18 Q And when you gave the third opinion, you still hadn't  
19 seen the product, had you?

20 A No, I had not.

21 Q And you didn't -- I'm going to try this again on this  
22 deposition. You didn't see the product until the time that I  
23 took the deposition in Chicago?

24 A No, it was before that.

25 Q How long after? After the first opinion?

1 A Yes.

2 Q But after the opinion. And you gave no more opinions  
3 after the third opinion; isn't that true?

4 A That's correct.

5 Q Is it your recommendation to clients to go with oral  
6 opinions?

7 A I can't say that I have a recommendation to a client on  
8 that.

9 Q You think they're better off without them maybe?

10 A I didn't say that.

11 Q That way you can say whatever you want to about that  
12 later, can't you?

13 A No, I don't agree with that.

14 Q Well, you could. I'm not suggesting that you would, but  
15 you could, couldn't you?

16 A Yes, you could.

17 Q And a written opinion ties things down and tends to bind  
18 the participants together to where they understand what's  
19 being focused on, don't they or doesn't it?

20 A Yes, it does.

21 Q Was this whole thing the sort of thing that the two of  
22 you talked about, you and Mr. Bortz, and just simply said,  
23 oh, this is a little nickel and dime affair from a little old  
24 outfit down in Dallas, and we're not going to worry much  
25 about it?

1 A No.

2 Q Was there any hint of how little exposure was in the  
3 discussion?

4 A No.

5 Q You did finally get a file wrapper, didn't you?

6 A Yes, I did.

7 Q And you got that file wrapper for your third opinion, am  
8 I correct?

9 A Well, I got it generally to represent the client in  
10 connection with the lawsuit.

11 Q But you got it in conjunction with giving the third  
12 opinion. You had it at the time of the third opinion?

13 A Yes, I did.

14 Q And you went through it, did you not, pretty carefully?  
15 And as I understand it, your conclusion ultimately was that,  
16 while there wasn't any specific file wrapper estoppel as such  
17 to cut off the doctrine of equivalence, that the doctrine of  
18 equivalence would not be applicable simply because the things  
19 didn't do the same thing in the same way to produce the same  
20 result; is that true?

21 A That's not true.

22 Q What did you say?

23 A I said it does not perform substantially the same  
24 function in substantially the same way to produce  
25 substantially the same result.



1 Q If we amended all that garbage that I just let out and  
2 changed my language about the same thing, the same way and  
3 what not. In other words, function, way and result, would  
4 you agree with what I said?

5 A No.

6 Q Why?

7 A Because you characterized it that my opinion was that  
8 there was no file wrapper estoppel, and that was not my  
9 opinion.

10 Q I believe it is your opinion. Let's go to it.

11 MR. HARRIS: Please pardon us just a minute. I'm  
12 sorry.

13 THE COURT: Okay.

14 (Pause)

15 MR. HARRIS: We may have to parse a sentence or  
16 two, but let's start.

17 MR. MONCO: Your Honor, may I inquire as to what  
18 page counsel is going to be reading from?

19 THE COURT: What page is that from?

20 MR. HARRIS: This will be page 32.

21 MR. PARKER: 37 and 38.

22 MR. HARRIS: I'm not sure how far 38.

23 Q And I asked you the question, "What was it that you  
24 found in the record of prosecution that caused you to advise  
25 him that the doctrine of equivalence wouldn't assist in this

1 case?

2 And then, Answer, "I wouldn't say that there was  
3 anything in the prosecution history that would cause the  
4 doctrine of equivalence to not apply."

5 Now you got to read that sentence very carefully,  
6 but if you read that sentence very carefully, you literally  
7 stated that the doctrine of equivalence would apply.

8 I'll read it to you again. "I wouldn't say there  
9 was anything in the prosecution history that would cause the  
10 doctrine to not apply."

11 It doesn't say, to apply. Says, to not apply.

12 Then we go down below that to get to the other  
13 portion.

14 "I didn't get you. I'm sorry. Would you repeat  
15 it?"

16 Then there was some discussion about that.

17 And why don't you just read it back and the rest of  
18 the portion of red.

19 "What then was it that made you think that the  
20 doctrine would not apply?"

21 I'm asking you why it wouldn't apply.

22 And you're saying, "The accused device did not  
23 perform substantially the same function in substantially the  
24 same way to produce the same result."

25 that's most certainly what you said, and I

1 understand that.

2 I suggest to you that you very clearly admitted by  
3 the sentences and context above that you were not going to  
4 urge that there was an estoppel problem.

5 A No, that's not correct. I was saying that my opinion  
6 did not rely on prosecution history estoppel.

7 Q I believe you're standing on the head of a pin now.  
8 What is the difference in the two?

9 A I'm not saying there's no prosecution history estoppel.  
10 I'm saying in my opinion I'm not relying on prosecution  
11 history estoppel.

12 Q But you said you didn't find anything in there that  
13 would cause there to be such estoppel?

14 A I was talking about my opinion. My opinion, I was not  
15 relying on prosecution history estoppel.

16 Q Is that what it says in your oral opinion? Why don't  
17 you give me a copy of it so I can read it?

18 MR. MONCO: Objection, Your Honor.

19 MR. HARRIS: Pardon me for being a little hard,  
20 Your Honor, but I get frustrated not being able to look at  
21 the opinion.

22 THE COURT: The objection is sustained.

23 MR. HARRIS: Okay.

24 Q I went on. Let's read a little more.

25 "What did you tell him was the difference in the

JT APP 1119

1 result produced in his structure and the claims or any claim  
2 thereof looking at the function, way and result aspect, okay?  
3 Well, the answer to that is outlined in our interrogatory  
4 answers. I want your answer."

5 All I got was reference to interrogatories, and  
6 they were very, very drawn out. I'll say no more about the  
7 subject now except I urged that you have testified there was  
8 no file wrapper estoppel as far as you're concerned, that the  
9 opinion at least didn't rely on file wrapper estoppel. And  
10 if there was file wrapper estoppel and you thought there  
11 might be, that it was because of the function, way and result  
12 test.

13 MR. MONCO: Your Honor, I'm going to lodge an  
14 objection to that, at least the initial part of that  
15 statement, which was a statement and not a question. It is  
16 clear Mr. McLaughlin did respond to the question as why claim  
17 one was not infringed. It's in the deposition and he did  
18 answer the question that Mr. Harris asked at the deposition  
19 and would be happy to answer it again now if you asked him.

20 THE COURT: The objection is overruled.

21 MR. HARRIS: I don't think there's a question  
22 pending fortunately. We'll get on.

23 THE COURT: Okay. I can't be reversed, then.

24 BY MR. HARRIS:

25 Q So this matter had been dormant well over a year when

1 you got around to your third opinion, anyway. You'll agree  
2 with that, won't you, or do we have to argue about what  
3 dormant means?

4 I'll let it go at that and say it had been well  
5 over a year before the third opinion.

6 A Yes, that's correct.

7 Q And as a matter of fact, why did he ask you for a third  
8 opinion? And I do believe you know.

9 A Well, whether it's the third opinion or the second  
10 opinion, it had to do with avoiding a charge of willful  
11 infringement in the lawsuit.

12 Q Was the charge in the lawsuit or was it not a contact  
13 that he made with you, Mr. Bortz, to the effect that he had  
14 heard from someone that you could protect yourself against  
15 paying attorneys fees or some extra fees if you had a  
16 lawyer's opinion or something?

17 A Yes, but that was in connection with the lawsuit.

18 Q Yes, I think that was in connection with the lawsuit. I  
19 misunderstood you. What did you tell me just a minute ago?  
20 I thought you told me that after the lawsuit had been filed,  
21 is what you're saying.

22 A Yes.

23 Q But he made the contact and not you, right?

24 A (No response.)

25 Q You didn't call him and tell him you needed an opinion,

1 did you?

2 A Well, I believe it was the first phone conference I had  
3 with him after the lawsuit was filed.

4 Q Well, who started it? Who called who?

5 A I don't remember.

6 Q Okay. Still hadn't seen the structure, had you, the  
7 product?

8 A I had seen a picture of it.

9 Q Still hadn't seen it, had you?

10 A Not the actual device, no.

11 Q What he hoped to do was to be able to avoid attorney's  
12 fees, perhaps willful infringement, too, I don't know, but I  
13 think his language was attorney's fees, true?

14 A Yes.

15 Q And you advised him there was a way to do it. What was  
16 it?

17 A Well, one way to do it is to not infringe the patent.  
18 Another way to do it is to have an opinion from his attorney.

19 Q Did you tell him the first would be better?

20 A Well, the first is absolute.

21 Q Okay. So he did decide to get some kind of opinion?

22 A Yes.

23 Q At that stage. And indeed you had already kind of  
24 started on it, hadn't you?

25 A I'm sorry. I didn't hear you.

1 Q You had all ready started on it to some extent, hadn't  
2 you?

3 A I'm not sure. I don't understand what you're asking me.

4 Q When did you start on this opinion, the third opinion?

5 A Well, the third opinion was a carry over from the second  
6 opinion.

7 Q When did you start on the second opinion?

8 A After I was informed that the lawsuit was filed.

9 Q And in February 2001 did I understand you that you gave  
10 the oral opinion that Peterson did not literally infringe and  
11 that at least some of the claims were invalid?

12 A Correct.

13 Q And you went ahead and told him, and you don't infringe  
14 under the doctrine of equivalence, either.

15 A (No response)

16 Q You know you didn't tell him that, don't you.

17 A In February?

18 Q Yeah.

19 A No, I did not.

20 Q As I understand it, your position was that claim 19, for  
21 example, would be invalid under 35 United States Code 102 in  
22 that one would be -- claim one would be invalid under 35  
23 United States Code 103; is that true?

24 A Are you talking about February of 2001?

25 Q Yeah. It might have been later. Why don't you

1 straighten me out if it was. You know, with these oral  
2 opinions, none of us know what really happened.

3 A Well, I do know.

4 Q Well, I don't quarrel with you about that. I just don't  
5 believe you.

6 MR. MONCO: Objection, Your Honor.

7 THE COURT: That's sustained.

8 Q Is the question one that can be answered?

9 A I'm not sure what the question was.

10 Q Maybe I need to rephrase the question. Let's see. What  
11 do I have pending?

12 Okay. Let me try again.

13 When did you tell him that claim one was 103  
14 obvious and that claim 19 was 102 knock out?

15 A I told him certainly that claim 1 was 103. That was in  
16 both February and May. And claim 19 I told him it was  
17 obvious and anticipated, subject to proving that the  
18 particular burner had been on sale previously.

19 Q There's always that if, wasn't it?

20 A Only with respect to the answer. Not at all with  
21 respect to the issue of obviousness.

22 Q And it's your position here that invalidity is basically  
23 a matter of obviousness and not a matter of anticipation,  
24 isn't it?

25 A Are you asking about what my opinion was about?



1 Q Yes.

2 A Well, with respect to the claims in suit at the present  
3 time, yes. Unless if you have a question -- if the claims  
4 are found to read on the accused device, then I would say  
5 those claims are anticipated.

6 Q Did you offer an opinion? I'm still entitled to that  
7 opinion, even this late.

8 A That's the very first opinion I gave to Mr. Bortz.

9 Q And also the very last one?

10 A That was part of it.

11 MR. HARRIS: Just a minute.

12 (Pause)

13 Q Here on line 4 the question is asked, what's the purpose  
14 of the ember burner type configuration. And the precise  
15 answer is, "To add additional flame at a more forward  
16 position in the fireplace."

17 And the question is, "To make a more realistic  
18 ember effect."

19 And your answer was neither here nor there. It was  
20 that, "I don't know." And that was as of 11 and 1901.

21 MR. HARRIS: If I could have about a five minute  
22 recess.

23 THE COURT: Okay. We'll take a five minute break.

24 (A recess was held at 4:25.)

25 (Resume at 2:32.)

1 THE COURT: Have a seat, please.

2 Mr. Harris.

3 MR. HARRIS: We have no further questions of this  
4 witness at this time.

5 We would like to ask with respect to Mr. Charlie  
6 Hanft, that he be considered to excuse him. He has business  
7 in Georgia.

8 THE COURT: . Okay.

9 MR. HARRIS: And needs to get back if he can. We  
10 don't want to put a hardship on anybody else, but I think  
11 we've all done all we can there.

12 THE COURT: Okay. Who are you asking to excuse?

13 MR. HARRIS: Charlie Hanft.

14 THE COURT: That's fine. We'll excuse you.

15 MR. HARRIS: There he is. Bye-bye.

16 That's all.

17 THE COURT: Cross examination.

18 CROSS-EXAMINATION

19 BY MR. MONCO:

20 Q Good afternoon. Mr. McLaughlin.

21 A Good afternoon.

22 Q Mr. McLaughlin, for the record would you state your age,  
23 please?

24 A 46.

25 Q Okay. And would you state for the court your education

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1 after high school?

2 A I have a Bachelor of Science Degree in electrical  
3 engineering and a law degree.

4 Q And where did you get your degree in electrical  
5 engineering?

6 A University of Notre Dame.

7 Q And where did you get your law degree from?

8 A DePaul University.

9 Q Would you briefly state your employment history for the  
10 court after your graduation from law school?

11 A When I graduated from law school, I had a job, an  
12 engineering job. Then several months later I took a job as  
13 an associate with the firm I'm presently employed with.

14 Q Approximately when did you join the Wood Phillips firm?

15 A January 1, 1985.

16 Q And over your career -- let me just back up before I go  
17 on. How long have you been with the Wood Phillips firm?

18 A Since January 1, 1985, except for a four month period in  
19 1997 that I was with another firm.

20 Q Okay. Over your career as a -- do you specialize in the  
21 area of intellectual property law?

22 A Yes, I do.

23 Q Over your career as an attorney, how many patent  
24 applications have you prosecuted?

25 A I believe it's between four and 500.

1 Q Could you just briefly describe the areas with regard to  
2 patents that you've obtained for your clients?

3 A Very wide area. A lot of the inventions were mechanical  
4 type or novelty type devices. A lot of electrical,  
5 electronic computer software.

6 Q And have you conducted any appeals in the U.S. Patent  
7 Office?

8 A Yes, I have.

9 Q And by the way, I didn't ask you this. Are you admitted  
10 to practice in the patent office?

11 A Yes, I am.

12 Q When were you admitted to practice?

13 A I believe it was 1986.

14 Q Okay. And have you prepared any infringement opinions  
15 in your career?

16 A Yes, I have.

17 Q Approximately how many?

18 A I don't know, but I would say maybe in the range of 100.

19 Q Okay. And have you prepared any invalidity opinions?

20 A Yes, I have.

21 Q And approximately how many invalidity opinions have you  
22 prepared?

23 A Two or three dozen maybe. I'm not sure.

24 Q And in the opinions that you've rendered with regard to  
25 on the issues of infringement and validity, have any of those

1 opinions been oral opinions?

2 A Yes.

3 Q Approximately how many of the total number of opinions  
4 you have rendered have been oral on the issues of invalidity  
5 and infringement?

6 A That I really don't know.

7 Q Okay. Would you describe the typical circumstances when  
8 you would provide an oral opinion as opposed to a written  
9 opinion?

10 A I don't know that there is a typical circumstance.  
11 Frequently I will supply an oral opinion initially and then  
12 sometimes reduce it to writing and sometimes not.

13 Q In the present case I believe you testified in your  
14 direct testimony that you provided three separate opinions to  
15 the Peterson company?

16 A Yes.

17 Q To whom were those opinions provided?

18 A Leslie Bortz.

19 Q Okay. And I believe you testified that the three  
20 opinions were provided, the first one being in December of  
21 1999, the second one being in February of 2001, and the third  
22 one being in May of 2001; is that correct?

23 A Yes, it is.

24 Q Okay. And would you just for the record, if you could,  
25 just briefly summarize what your opinions were, those

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1 opinions?

2 A My first opinion was that if we can prove that what the  
3 Peterson Company was doing with the present product, the  
4 ember flame booster for 20 or 30 years, then either they  
5 would not infringe any claim, which would be a different  
6 issue or if they infringed, that claim would be invalid.

7 Q Okay. Could you summarize your second opinion that you  
8 provided I believe in February of 2001?

9 A The Peterson ember claim booster did not literally  
10 infringe any claim of the Blount patent, and at least some of  
11 the claims were invalid as least as obvious and possibly in  
12 anticipation.

13 Q And could you summarize your third opinion which was, I  
14 think, in May of 2001?

15 A That none of the claims were literally infringed. That  
16 at least with respect to claims 1 through 18 they were not  
17 infringed under the doctrine of equivalence. Claim 19 was  
18 anticipated, again subject to proving prior art, and the  
19 remaining claims of the patent were all invalid as obvious.

20 Q Okay. Now if I may --

21 A And I also discussed some of the prior art, why they  
22 were invalid is obvious.

23 Q And the prior art that you identified, could you  
24 generally identify what that was?

25 A The reference was cited in the file here. Iklor

1 opponent, the Henry patent, and the Peterson patent. In  
2 combination with some of the Peterson prior art that showed  
3 individual valves for controlling burners and also some  
4 drawings that Peterson had in their file illustrating a  
5 burner with -- U shaped burner with immediate hearth elbow.

6 Q I ask you if you would, please, to take a look at  
7 Exhibit D 16.

8 MR. MONCO: I ask that be called up on the  
9 computer, please.

10 Q And I believe this was the letter of December 10, 1999,  
11 that I think you identified on your direct examination; is  
12 that correct?

13 A Yes.

14 Q Okay. And this is the letter that Mr. Blount's attorney  
15 sent to the Peterson Company, correct?

16 A Correct.

17 Q That would be the first communication?

18 A Correct.

19 Q And I believe you testified that you did not  
20 characterize this as -- well, let me just ask you. How did  
21 you characterize this letter?

22 Let me back up. You received this letter from the  
23 Peterson Company, correct? It was forwarded to you after  
24 they received it?

25 A Yes.

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1 Q After you read that letter, how do you characterize the  
2 letter?

3 A As a notice that the patent had issued, and it was being  
4 carefully crafted specifically to not be an infringement  
5 charge and that the type of letter an attorney will  
6 frequently draft to avoid the other side going ahead and  
7 filing a declaratory judgment action.

8 Q Have you drafted such letters yourself in your practice?

9 A Yes, I have.

10 Q Okay. And following receipt of this letter, you  
11 communicated with Mr. Bortz; is that correct?

12 A Yes.

13 Q And I would ask you to turn to Exhibit B 17, please.

14 MR. MONCO: May we have that.

15 Q Okay. That's a letter dated December 17, and it's from  
16 Tod Corrin. Who is Tod Corrin?

17 A He is the vice-president and general manager of the  
18 Peterson Company.

19 Q If we could have an enlargement of the text. It states  
20 that they're enclosing a copy of the December 10 letter from  
21 Golden Blount's attorneys and also they're enclosing a copy  
22 of their instructions and working drawings.

23 What were the instructions and working drawings  
24 for, what product?

25 A The ember flame booster.



1 Q Now several times on your direct examination Mr. Harris  
2 seemed to be emphasizing that you had not seen the physical  
3 product until much later to this letter. The drawings that  
4 you were provided, did they accurately reflect the actual  
5 accused Peterson product when you actually saw the Peterson  
6 product?

7 A Yes, they did.

8 Q So there was no additional information that you gleaned  
9 from the direct inspection from looking at the accused  
10 product?

11 A Well, there was additional information I gleaned.

12 Q Which was?

13 A Having to do with the relative position.

14 Q Anything else regarding the actual structure itself  
15 compared to the drawings that you were provided by the  
16 Peterson Company?

17 A Following the direction of the gas port.

18 Q Next I would ask if you would turn to Exhibit D 19. Now  
19 that was the May 3rd, 2000, letter from Mr. Blount's attorney  
20 to Tod Corrin, and you received a copy of that letter  
21 sometime after it was received by Peterson Company, correct?

22 A Yes, I did.

23 Q After reviewing this letter, how would you compare that  
24 as opposed to the letter of December 10, 1999, Exhibit D 16?

25 A This letter was an infringement charge.

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1 Q Now I would ask you to turn to Exhibit D 20. And this  
2 is a letter from May 16 from Darryl Stone at Peterson Company  
3 to Dan Tucker, the attorney for Golden Blount. Now did you  
4 see a copy of this before it was mailed or a draft of this  
5 before it was mailed?

6 A Right. I did.

7 Q Okay. In the letter identified as Exhibit D 20, Mr.  
8 Stone is requesting that Mr. Blount's letter identify in  
9 detail the basis of the infringement of the client's patent.  
10 In your practice, Mr. McLaughlin, if you -- well, let me just  
11 back up and say, have you ever sent out infringement letters  
12 on behalf of clients?

13 A Yes, I have.

14 Q Okay. When you sent out an infringement letter and you  
15 got a response back asking for more details and the nature of  
16 the infringement, how do you typically respond?

17 A Usually by providing a more detailed explanation.

18 Q So you generally describe the nature of how you could  
19 respond in detail?

20 A Cross reference the elements of the claim to the accused  
21 products.

22 Q Apologize, Your Honor.

23 Okay. So in some sense you will provide something  
24 akin to what Mr. Blount provided here today when he was  
25 comparing the elements of the claims with the accused

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1 product, correct?

2 A Correct.

3 Q To your knowledge did Golden Blount or his attorney ever  
4 provide such an analysis to the Peterson Company?

5 A Not prior to the lawsuit, no.

6 Q Next I would ask you to turn to Exhibit D 21, and I'll  
7 ask, when was the first time that you saw Exhibit D 21?

8 A It was late January, early February, I don't know.

9 Q Okay. That was forwarded to you by the Peterson  
10 Company?

11 A Yes.

12 Q And what action, if any, did you -- well, did you have  
13 any discussions with anyone at Peterson Company after this --  
14 after receiving this letter?

15 A Yes.

16 Q Okay. Who did you have discussions with?

17 A I believe Mr. Bortz.

18 Q And did you request Mr. Bortz to do anything?

19 A Well, I don't know that I asked him to do anything.  
20 Just generally what we needed to do to go forward.

21 Q Okay. And what did you need to do?

22 A We would need to obtain local counsel in Dallas to work  
23 on the case. We would need to order a file history and cited  
24 references from the patent, and we would have to do some  
25 searching for prior art.

1 Q Did you, in fact, start the search for prior art and  
2 cite the references?

3 A Yes, I did.

4 Q When did you do that?

5 A Sometime in the fall of February. I don't remember  
6 specifically.

7 Q Okay. Who was to provide prior art to you to following  
8 up on the request, if that came up in your discussions with  
9 Mr. Bortz?

10 A Initially Mr. Bortz was going to.

11 Q Okay. Now if I may ask. Did you have some -- how long  
12 had you been representing the Peterson Company at this time?

13 A Approximately -- well, I think it was around 1990.

14 Q Okay. And before 1990 did anyone at the Wood Phillips  
15 firm represent the Peterson Company?

16 A Yes.

17 Q Who was that?

18 A William Wood.

19 Q Okay. Do you recall when Mr. Wood first represented  
20 the Peterson Company?

21 A I have no idea.

22 Q Were you aware of the fact the Peterson Company had been  
23 selling fireplace equipment for several decades?

24 A Yes, I was.

25 Q And would you say that it would be logical for someone

1 such as Mr. Bortz, who had been in the fireplace business for  
2 three decades, to undertake a search for prior art regarding  
3 what was shown in the Blount patent?

4 MR. HARRIS: Unduly leading. Object to --

5 THE COURT: I'll sustain the objection since it  
6 was unduly.

7 BY MR. MONCO:

8 Q Why did Mr. Bortz undertake the search for the prior  
9 art?

10 A Well, he felt that he would have information in their  
11 records that would indicate the types of burner systems that  
12 had been sold previously, and frequently the best prior art  
13 that you have is in your own files.

14 Q Okay. I next ask if you could turn to Exhibit D 22, and  
15 could you identify Exhibit D 22, please?

16 A Yes. This is a letter I received from Mr. Bortz  
17 forwarding some prior art.

18 Q Okay. That's dated February 19th, 2001, which is  
19 approximately three weeks after the January 19th letter was  
20 sent with the notice of -- sorry. With the lawsuit being  
21 filed, correct?

22 A Correct.

23 Q Okay. If we could turn, I would just like to very  
24 briefly go through Exhibit D 22. Can we go to the next page  
25 of the exhibit? And what is shown here on Exhibit -- on the

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1 next page of Exhibit D 22?

2 A Free series circular burner of the Peterson Company.

3 Q Is that the same product that we have over on the  
4 hardware table as marked as D 45 A?

5 A I believe it is, yes.

6 Q Does that show multiple burners and multiple valves?

7 A Yes, it does.

8 Q And did you get any -- looking at Exhibit -- this page  
9 of Exhibit D 22, do you have or were you informed as to how  
10 long the Peterson Company had been selling an F 3 burner?

11 A I asked how long they had been selling it, and I was  
12 told at the bottom would indicate that this would have been  
13 in existence prior to 1977.

14 Q Okay. And was this a catalog item to your  
15 understanding?

16 A Yes, it was.

17 Q Going down to the next page of Exhibit D 22. What was  
18 your understanding of what is shown on that document?

19 A Various different Peterson Company valves.

20 Q Okay. And was it your understanding that these are  
21 catalog items?

22 A Yes.

23 Q Looking there, there's valve marked HE 1, which is a  
24 hearth elbow valve. Do you see that?

25 A Yes, I do.

1 Q Is it your understanding that it was hearth elbow valve  
2 that was used on Exhibit D 45 A?

3 A Yes.

4 Q Okay. Looking down there's copyright notice on that  
5 page down at the bottom says 1971. Do you see that?

6 A Yes, I do.

7 Q Was it your understanding that that equipment was sold  
8 by the Peterson Company as early as 1971?

9 A Well, certainly this document was published in 1971, and  
10 I understand the product was sold in 1971.

11 Q And turning to the next page of Exhibit B 22 which is  
12 another sheet that Mr. Bortz forwarded to you. This is the  
13 installation instructions for the circular burner set, and we  
14 can focusing on Exhibit 3.

15 Looking at Figure 3 did you deduce anything from  
16 Figure three, this page?

17 A Similarly to the exhibit two pages previously, it showed  
18 basically the same burner configuration with a hearth elbow  
19 connection to each of the three burners.

20 Q Going back there on the installation instructions.  
21 There are two paragraphs two and three that are next to  
22 figure 3. Do they not give a description of how each of the  
23 burner flames is adjustable with the independent hearth  
24 elbows?

25 A Yes, they do.

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1 Q And the next document that's shown is on Exhibit D 22,  
2 the next page, is a -- looks like a price list sheet. And it  
3 says down at Number II, Roman numeral II, F series log sets  
4 with front flame burners.

5 A Yes. Not very clear, but I do see it.

6 Q Could we have an enlargement on number 2 please.

7 Okay. Do you see better now?

8 A Yes.

9 Q It shows what's identified as the RF 3 burner around the  
10 golden oak. Do you see that?

11 A Yes, I do.

12 Q That's a number we establish has been sold as east as  
13 early as many 1977, correct?

14 A Yes.

15 Q And then turning to the next page of Exhibit D 22 is a  
16 memo it appears from Vince Jankowski to Leslie Bortz at R. H.  
17 Peterson Company. Do you know who Vince Jankowski is?

18 A He was an employee of the Peterson Company.

19 Q Do you know what Mr. Jankowski does?

20 A I understand he's the -- he is working around the  
21 factory, designing burner systems, communicating with  
22 clients, things like that.

23 Q Did you have conversations with Mr. Jankowski prior to  
24 forming any of your opinions?

25 A No, I did not.



1 Q Okay. Turning to the next page, we have a pipe burner  
2 operation document from Peterson products, and that -- isn't  
3 that a general description of the hearth elbow?

4 A Yes, it is.

5 Q Okay. And then turning to the last page of Exhibit D  
6 22, what was your understanding of what is shown there?

7 A It's a different version of the circular burner that the  
8 prior drawings showed an F Series burner where the three  
9 burners were parallel to one another. In this instance It's  
10 certain the burners are used three deep. For the circular  
11 burner they used three of the G 4 ember burners sort of in a  
12 triangular degree with the burner being connected parallel to  
13 one another.

14 Q You said that you ordered the file histories of the  
15 Blount patent in February of 2001. Did you order all of the  
16 copies of all of the file histories of the Blount patents,  
17 the prior histories?

18 A Yes, I did.

19 Q Do you order the art often cited?

20 A As I recall, I ordered the patent, which I think is all  
21 of them.

22 Q I would ask you to turn to Exhibit D 23. And the first  
23 page of Exhibit D 23 could you identify what that is?

24 A It is a fax cover sheet that I received from Leslie  
25 Bortz.

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1 Q Okay. What was enclosed with that fax cover sheet?

2 A Additional prior art information.

3 Q Okay. Turn to the second page of Exhibit D 23. What is  
4 shown on that page to your understanding?

5 A A burner assembly, which I guess you call it a U shaped  
6 burner, having two burners corrected in series with each  
7 other.

8 Q And generally would you describe for us what your  
9 understanding was with regard to the flow of gas in that  
10 document -- in that drawing?

11 A The lower right illustrates the connection and the  
12 adaptor to the burner. The gas would flow going to the left  
13 in the lower of the two pipes, which my understanding was  
14 that would be the rear -- in the fireplace that would be the  
15 rear burner. Then it would go up the vertical piece, and  
16 then where there's another connector, the gas would flow then  
17 to the front burner.

18 BY MR. MONCO:

19 Q Okay. If you could turn to the next page, please, and  
20 this log shown here. By the way, are these the same  
21 different views of the same double burner to your knowledge?

22 A I don't know if they are or not. When I looked at it, I  
23 didn't consider that they are. I don't think they are, but  
24 they could be.

25 Q Looking at the drawing which we have up there now which

1 is the last page of Exhibit D 23. What is shown there?

2 A It's similar configuration burner. In this instance  
3 where the front burner connects to the coupling, the vertical  
4 coupling, that was the hearth elbow.

5 Q That's the adjustable hearth elbow that controlled the  
6 amount of gas going to the upper burner as we discussed  
7 previously?

8 A Yes.

9 Q Okay. Down at the bottom it shows a date under Robert  
10 H. Peterson Company of 7-1-83. What were you advised with  
11 regard to the Peterson Company, if anything?

12 A That they had sold burner similar to this configuration  
13 around that time.

14 Q If we could have the next page Exhibit D 23. Could you  
15 just identify what's shown there to your understanding?

16 A It's F series burner similar to what you have later in  
17 February, but in this case there were two parallel burners  
18 and a hearth elbow connected to the input of each burner.

19 Q Okay. And the purposes of -- there are two hearth  
20 elbows control the flow of gas in each burner?

21 A Yes.

22 Q Was it your understanding in the Peterson Company that  
23 this product was sold in the '70s?

24 A Yes.

25 Q Around turning to the next exhibit, next portion of

1 Exhibit D 23, could you generally identify what's shown  
2 there?

3 A Catalog of the Peterson Company dated sometime prior to  
4 1977.

5 Q Okay. If you could turn to the sixth page of that  
6 catalog which is that one that's on the screen right there.  
7 It's entitled, "Glowing Ember Gas Log Sets."

8 Was this catalog to your knowledge advertising  
9 material of the Peterson Company that was on sale since the  
10 1970s?

11 A Well, it was catalog prior to 1977. So in that respect,  
12 yeah.

13 Q That's fair enough.

14 Now in looking at Exhibits D 22 and D 23. Did you  
15 consider the information provided in those two documents?

16 A You would have to show me again what 22 and 23 are.

17 Q I'm sorry.

18 MR. GAINES: Your Honor, I'm sorry. Can we have  
19 another one of these? They seemed to stop working for some  
20 reason.

21 THE COURT: Why don't we take a break for today.  
22 We'll start at 9:00 in the morning.

23 We'll stand in recess. I'll see you in the morning  
24 at 9:00.

25 (A recess was held at 5:00)

## I N D E X

## WITNESS OR PROCEEDING

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                        |   |                     |
|------------------------|---|---------------------|
| GOLDEN BLOUNT, INC.    | ( | CIVIL ACTION NUMBER |
| Plaintiff,             | ( |                     |
|                        | ( |                     |
| VERSUS                 | ( | 3:01-CV-127-R       |
|                        | ( |                     |
| ROBERT H. PETERSON CO. | ( |                     |
| Defendant.             | ( | July 30, 2002       |

VOLUME 2 of 3  
TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JERRY BUCKMEYER  
UNITED STATES DISTRICT JUDGE

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JANET E. WRIGHT CSR, RPR  
FEDERAL DISTRICT COURT - DALLAS, TEXAS

JT-APP 1147

P R O C E E D I N G S:

(Proceedings, 9:00)

THE COURT: Have a seat, please.

Ready to continue cross examination?

MR. MONCO: Thank you, Your Honor. -Your Honor, before we proceed, if I may I would just like to take care of one housekeeping matter. We have some signature pages for Defendant's Exhibit 61 which I would like to hand up to the court. We have already provided them to counsel -- opposing counsel, and there is no objection.

CROSS-EXAMINATION (continued)

BY MR. MONCO:

Q Mr. McLaughlin, I would ask you to take a look at Defendant's Exhibit D 5.

Call that up, please.

Could you identify, please, for the court Exhibit D 5?

A That's Peterson U.S. Patent Number 3,042,109.

Q And have you reviewed this patent as part of your opinions that you provided the Peterson Company?

A Yes, I did.

Q Okay. And I next ask if you would, please, to turn to Exhibit D 6. I'll ask you if you could identify Exhibit

D 6?

A Henry U.S. Patent Number 3,871,355.



1 Q Did you review this patent as part of the opinions that  
2 you rendered to the Peterson Company?

3 A Yes, I did.

4 Q Were these patents ordered as part of the -- your  
5 request for copies of the article cited in the prosecution of  
6 the Blount patent?

7 A Yes.

8 Q Okay. And next I would ask if you could please turn to  
9 Exhibit D 34.

10 Could you identify, please, what Exhibit D 34 is?

11 A It's installation and operating instructions for the  
12 Peterson ember flame booster product.

13 Q Where did you first see this Exhibit D 34?

14 A When I -- in December of 1999 when I received the  
15 correspondence from Peterson Company, this was one of the  
16 attachments.

17 Q Okay. Now did the description and drawings shown on  
18 Exhibit D 34 correspond with the actual physical embodiment  
19 which we've identified as Defendant's Exhibit D 31 and 32?

20 A Yes, it did.

21 Q Was there any additional information that you obtained  
22 from the Peterson Company in addition to what is shown on the  
23 drawings?

24 A Yes.

25 Q What was that information?

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1 A I had asked about the height of the -- when the ember  
2 flame booster is installed, the G 4 burner, the height of the  
3 ember flame booster burner relative to the burner pipe for  
4 the G 4 burner.

5 Q And when was that information provided to you?

6 A December of 1999.

7 Q Okay. Now yesterday I think you testified, and correct  
8 me if I'm wrong, but I think you stated that you prepared  
9 something like over 100 infringement opinions and maybe two  
10 or three dozen invalidity opinions; is that about right?

11 A Yes.

12 Q Okay. With regard to those combined opinions -- and  
13 we'll use a round number of 130. Of those opinions how many  
14 times did you actually -- did you review an actual physical  
15 embodiment of an accused product?

16 A Very few.

17 Q Okay. Why is that?

18 A Usually you can get enough information from drawings,  
19 photographs, things like that that you don't need the  
20 physical device.

21 Q Okay. Now I next ask you to turn to Defendant's Exhibit  
22 61.

23 Could you identify Defendant's Exhibit 61, please?

24 A It's Defendant's Answers to Plaintiff Golden Blount  
25 Inc.'s First Set of Interrogatories in this lawsuit.

1 Q Okay. And I would ask if you would, please, to turn to  
2 pages 2 and 3 of Exhibit 61, the interrogatory No. 1 and the  
3 answer to Interrogatory No. 1. Do you have those in front of  
4 you?

5 A I have page 3 which has the answer, yeah.

6 Q Okay. If we could go back to page 2 for a moment.  
7 Interrogatory No. 61 asked for an identification of claims 1,  
8 17 and 19 each claim limitation of the Peterson product  
9 not -- I'm sorry, of the Blount patent not contained in the  
10 Peterson ember flame booster. Do you see that?

11 A Yes, I do.

12 Q Okay. And in the answer to interrogatory -- did you  
13 prepare the answer to interrogatory No. 1?

14 A Yes, I did.

15 Q And what's contained in answer to interrogatory No. 1?

16 A The basis for the claim that the Peterson Company does  
17 not infringe the Blount patent.

18 Q Okay. And what was -- how did you arrive, what did you  
19 do to -- what documents did you review to prepare the answer  
20 to interrogatory No. 1?

21 A The Blount patent file history, the references, the  
22 installation instructions for the ember flame booster and the  
23 information that I obtained from the client regarding the  
24 height of the burners and the burner ports.

25 Q And I'll ask you to turn to Interrogatory No. 2 and the

1 answer that appears on page 4 and -- page 4 and 5 actually.

2 And to your knowledge who prepared the answer to  
3 Interrogatory No. 2?

4 A It was somebody at Robert Peterson Company.

5 Q With respect to interrogatory No. 3 which is on page 6  
6 of Exhibit D 61, there's the interrogatory request and  
7 identification for any contention that claims any claim of  
8 the '159 patent is invalid, and then there's an answer to  
9 Interrogatory Number 3. Did you prepare an answer to  
10 Interrogatory No. 3?

11 A Yes, I did.

12 Q What was that answer based on?

13 A It's again based on the prior art, the file history, and  
14 the opinion I had given to Peterson Company.

15 Q Okay. When was -- to your knowledge when was Exhibit D  
16 61 prepared?

17 A In May of 2001.

18 Q And does that correlate in any way with any of the  
19 opinions that you provided to the Peterson Company on a  
20 timely basis?

21 A It was the same time I gave -- right around the same  
22 time that I gave the final oral opinion.

23 Q To your knowledge were the responses -- were Peterson's  
24 responses to interrogatories forwarded to counsel for Blount?

25 A Yes, they were.

1 MR. MONCO: Your Honor, we have no further  
2 questions.

3 THE COURT: Okay. Cross examination.

4 MR. HARRIS: Thank you.

5 CROSS-EXAMINATION

6 BY MR. HARRIS:

7 Q I understand you've certainly written a lot of patent  
8 applications?

9 A Yes, I have.

10 Q Did you say 500?

11 A Said between four and 500.

12 Q And I understand that you have been in some proceedings  
13 before the patent office?

14 A I've been involved in appeals before the patent office,  
15 yes.

16 Q How many patent lawsuits have you tried?

17 A Patent lawsuits?

18 Q Yeah.

19 A I have not tried any patent lawsuits.

20 Q You don't go to court to try lawsuits, do you? That's  
21 not your job, is it?

22 A I have been involved in litigation. I have not been  
23 involved in many trials, no.

24 Q The involvement in litigation is support involvement, is  
25 it not?

- JT-APP 1153 -

1 A- Generally. This is the third trial I've been involved  
2 in.

3 Q And you're giving support, correct?

4 A Yes.

5 Q So what you basically are is a patent prosecutor and  
6 office patent lawyer, true?

7 A I'm not sure that there's any difference between the  
8 two.

9 Q Well, shall we just call it an office patent lawyer  
10 then?

11 A I'm not -- if you want to call me that, that's fine.

12 Q I'm willing to call you the name your mother called you  
13 if you like.

14 A That's fine.

15 Q I just wanted to establish that it's not the regular  
16 thing you do to go to court and fight out the invalidity and  
17 infringement and what not of patents. That your main effort  
18 is in the area of office prosecution. That is true, isn't  
19 it?

20 A Prosecution, advising, counseling, things of that  
21 nature.

22 Q Um-hum. And tell me more about the document that you  
23 examined, D 34, in the summer of 1999. That's your  
24 testimony?

25 A Yes.

1 Q In the summer of '99?  
2 A December.  
3 Q Did you say December instead of the summer?  
4 A Yes, December. 12-99.  
5 Q 12-99 then.  
6 A Yes.  
7 Q And there was a list of documents that came along at  
8 that time?  
9 A Yes.  
10 Q Or was that later?  
11 A There were some other drawings that came with it.  
12 Q Well, we don't have any other drawings. What we have  
13 are the operating instructions, as you call them. Is that  
14 really what you had was the operating instructions?  
15 A I had both, but other drawings which were provided to  
16 you and I had the operating instructions.  
17 Q I'm not aware of any other drawings that we've been  
18 provided. I'm aware of the various operating instructions  
19 and the advertisements, I might call them, brochures. Isn't  
20 that really what you work from?  
21 A No. They were provided to Mr. Hardin during discovery  
22 in this lawsuit.  
23 Q I was talking about for those three opinions that you  
24 gave orally without one scrap of paper to the client. That's  
25 what I'm talking about.

1 A You asked me what documents I received from the client.  
2 I received this brochure, and I received some drawings.  
3 Q Do you know when that you received the drawings?  
4 A December of 1999.  
5 Q And you provided them to Mr. Hardin, then; you say after  
6 the lawsuit; is that right?  
7 A Yes.  
8 Q Do you have a copy of those now?  
9 A They're in our exhibit book.  
10 Q Perhaps I should review those if you have the numbers of  
11 them?  
12 A You want me to look for them?  
13 Q If you take a quick look, I would know what it was that  
14 you looked at.  
15 I think I see what you're talking about now. Is it  
16 D 35?  
17 A Yes. And D 35 merely shows a pan.  
18 Q All I can see beside the pans, burner members. Is there  
19 anything else that's shown?  
20 A Can you repeat the question?  
21 Q Yes. What is shown beside the auxiliary burner member,  
22 the burner itself, and the pan?  
23 A The pilot, the safety pilot kit, and the knob.  
24 Q Would you call that a full set of working drawings?  
25 A Would I? Not a full set, no.



1 Q Didn't you require a full set of working drawings in  
2 order to do your job?

3 A No.

4 Q Well, all I can say is that's a matter of opinion, and  
5 my opinion is it did require that. You disagree with that,  
6 though; is that right?

7 MR. MONCO: Your Honor, I object. He's arguing  
8 with the witness now.

9 THE COURT: That is sustained.

10 MR. HARRIS: Fine. I'll drop it.

11 THE COURT: Okay.

12 BY MR. HARRIS:

13 Q I draw your attention to Exhibit D 21, a letter that's  
14 I think previously been posted to Mr. Tod M. Corrin, and it's  
15 from Mr. Roy Hardin, a lawyer for Peterson -- I beg your  
16 pardon. -- a lawyer for Golden Blount.

17 Q Did you do a written opinion of any kind before this  
18 letter of January 19th, 2001?

19 MR. MONCO: Your Honor, I'm going to object.  
20 That's been asked and answered at least four times already.

21 THE COURT: I thought he said he hadn't done any  
22 written opinions.

23 MR. HARRIS: Well, I believe that he sought to  
24 adopt his interrogatories, his written opinions a moment ago.

25 THE COURT: Okay. Go ahead.

- JT-APP 1157

1 BY MR. HARRIS:

2 Q That's all you have in the way of written opinions, is  
3 it not, is what you put in the interrogatory responses?

4 A In the way of writing that has the same basis as the  
5 opinion, yeah.

6 Q By the opinion, you mean what opinion? As the three  
7 oral opinions?

8 A Yes.

9 Q Let me see.

10 On February 9th of 2001 as shown by Exhibit D 22,  
11 there was a letter sent to you from Mr. Leslie Bortz. And as  
12 I understand it, there were several materials that were  
13 forwarded with that letter; is that true?

14 A Yes.

15 Q Would you briefly tell me what those materials were?  
16 You have it on your screen there, don't you?

17 A There's nothing on the screen.

18 Q We'll see if we can put something on it.

19 A Brochure on the F 3 series circular burner. Picture of  
20 various valves.

21 Q Just a minute now. On the F 3 series circular burner  
22 you're talking about the one on the hardware table, aren't  
23 you?

24 A Same product. Yes.

25 Q Is it the same or isn't it?

JT-APP 1158

1 A I said the same product, yes.

2 Q Is it fair to say, just the same?

3 A Well, it's not a picture of that physical piece of

4 hardware, but it's a picture of the same device.

5 Q Okay. No. 2, enclosure No. 2?

6 A A picture of valves.

7 Q And that was just routinely used valves, a large number

8 of them made by a company well known as a valve manufacturer,

9 was it not?

10 A Well, I can't say as far as -- I'm not sure what you

11 mean by valve manufacturer.

12 Q Would you think one who makes valves is a valve

13 manufacturer?

14 A I don't know who made these valves.

15 Q What's the relevance of those valves?

16 A What's the relevance? They were used in burners back in

17 the 1970s.

18 Q And that's all you know about the relevance of them?

19 A Yes.

20 Q And what is 3 -- enclosure 3?

21 A A portion of a 1977 price list for the Peterson Company.

22 Q Well, what did it cover? As a matter of fact, it's been

23 put up on the screen now under document No. OCC092?

24 A It illustrated prices for gas log systems.

25 Q Do you find anything in that exhibit that has any

JT-APP 1159

1 relevance to the question of the invalidity of the present  
2 patent?

3 A Yes.

4 Q And what would that be?

5 A In 1977 the Peterson Company was selling gas log systems  
6 using the RF 2 and RF 3 burner systems.

7 Q Yes. What they were selling, on the other hand, was see  
8 through and circular members that are identified there. Is  
9 that not so?

10 A That's correct.

11 Q And those are not the competitive structures or the  
12 patent and the competitive structure we have here today are  
13 not see through members, are they?

14 MR. MONCO: I'm going to object to that question,  
15 Your Honor. That calls for this witness having knowledge as  
16 far as what's competitive and what's not competitive in the  
17 fireplace industry, and that's not what this witness --  
18 there's no foundation for that, and I don't think this  
19 witness has the qualifications to testify on that subject.

20 MR. HARRIS: Well, Your Honor, I don't know that  
21 it's earthshaking, but the point is very simple, that he used  
22 these materials apparently in giving a so-called oral  
23 opinion.

24 THE COURT: Okay. Objection overruled.

25 A I think they're competitive to the extent they relate to

1 burner systems for gas fireplaces.

2 Q So your view would be anything that relates to that  
3 would be competitive, right?

4 A In some sense, yes. This also shows the F burner which  
5 is for just straight front flame burner.

6 Q But what does it show about it?

7 A There's three different versions: standard, see through  
8 and circular. Standard, as I understand it, is a front  
9 opening fireplace.

10 Q I see what you're drawing attention to, but it doesn't  
11 make it clear what it means by standard, does it?

12 A Well, the standard burner is shown on one of the other  
13 drawings that was with the letter.

14 Q Well, perhaps we'll run across that in a moment.

15 MR. HARRIS: Excuse me, Your Honor.

16 (Pause)

17 MR. HARRIS: We had a mechanical problem. The  
18 mechanics may have been up here, I don't know.

19 Q And so you went to a 1977 price list, right? And you  
20 did pay some attention to it, right?

21 A Yes.

22 Q And were you given a 1990 price list?

23 A Not at this time, no.

24 Q Were you told that the same products continued to exist  
25 in all instances or were you informed that in numerous

JT-APP 1161

1 instances the products have been dropped as obsolete in -- as  
2 was referred to by Mr. Bortz in his examination buggy whips?  
3 They had become buggy whips?  
4 A For my purposes it doesn't matter if it became obsolete  
5 or not.  
6 Q So that was of no interest to you one way or another?  
7 A Not at all.  
8 Q Enclosure 4 A speaks of instruction sheet and gives a  
9 date of '70, and we've got a little doubt on the date. We  
10 think '70 to '75. Would you comment on that, please?  
11 A That's what it says.  
12 Q Did you go over it?  
13 A Pardon me?  
14 Q Did you go over the instruction sheet?  
15 A Yes, I did.  
16 Q And when you mean that's what it said, were you just  
17 parroting back the idea that I had read what it said or were  
18 you trying to make a comment?  
19 A I was parroting back when you said.  
20 Q Polly wants a cracker.  
21 And in the instruction sheet, it was your  
22 understanding that it was from '70, then, probably to '75 or  
23 in the vicinity there about; is that right?  
24 A That was my understanding, yes.  
25 Q And was it explained to you why you were being sent such

JT-APP 1162

1 early materials?

2 A It was prior art illustrating the use of multiple  
3 burners with multiple valves.

4 Q Were you sent any later materials other than these early  
5 '70 things that we've been talking about at this time?

6 A Sent the 1983 drawings that I talked about yesterday.

7 Q And looking at an enclosure -- well, just a minute.  
8 Let's look at enclosure 4 A. Let's put it up.

9 We're a little uncertain which is 4 A. Can you  
10 help us?

11 A If I saw it, yeah.

12 Q I don't know we would know it if we saw it.

13 Do you have it in a copy of your deposition, which  
14 is in front of you?

15 A This isn't my deposition. This is the trial exhibit  
16 book.

17 Q Do you feel that you have that deposition cataloged in  
18 there? I don't mean deposition. I mean, that exhibit?

19 A Yes, I do.

20 Q What is it, so we can get our book straight here?

21 A My understanding, this is enclosure 4 A.

22 Q Do we have that up now?

23 A Yes, you do.

24 Q And what is this?

25 A It's an instruction sheet for hearth logs with front

JT-APP 1163

1 flame burners.

2 Q This is again a form of circular burner, is it not?

3 A Well, if you go to the top of the figure, it's not. The  
4 top of the --

5 Q You mean, the dual mix fuel burner?

6 A No, higher. Yeah, what's shown is a see through burner,  
7 my understanding.

8 Q What do you mean by see through burner?

9 A That it would go in a fireplace that you see from both  
10 sides.

11 Q That's somewhat specialized item, is it not?

12 A I don't know if it's specialized or not.

13 Q Do you see any particular relevance that it might have  
14 to what I'll now call the standard burner being the patented  
15 burner and the product that we believe infringes it?

16 A (No response.)

17 Q Could that be used as a see through burner?

18 A Which one?

19 Q Either the Peterson ember burner or the Blount ember  
20 burner?

21 A The Peterson ember burner is used as a see through  
22 burner.

23 Q In what manner?

24 A Two of the G 4 burners back to back. I know in that  
25 context it is.

UT-APP 1164



1 Q Built just like the things on the table?

2 A No, just without the ember flame booster.

3 Q So there's no ember flame booster, but nevertheless you  
4 make a likeness?

5 A I never said I did, no.

6 Q Okay. Then you're not commenting on the pertinence of  
7 this particular reference; is that correct?

8 A Other than in response to your questions, no.

9 Q To what extent did you find it pertinent?

10 A Because it discloses the use of a straight valve for  
11 controlling, in the instance of the circular set burner, a  
12 separate valve for controlling the front burner.

13 Q Going back to a piece of hardware, the other piece of  
14 hardware that's sitting on the table, right?

15 A Yes.

16 Q Same concept?

17 A Yes.

18 Q And what was the level of the two tubes in the back to  
19 back configuration?

20 A You just confused me. I'm not sure what you're talking  
21 about on the table. There's three burners. I'm not sure.

22 Q You told me that the Peterson had been used with two  
23 burners back to back, therefore making it see through, didn't  
24 you?

25 A Yes, I did.

JT-APP 1165

1 Q Okay. And I'm asking you at what levels were they as  
2 far as vertical levels. They were the same level, weren't  
3 they?

4 A That's my understanding, yes.

5 Q And they were the same size of tubing, were they not?

6 A Yes.

7 Q And to the extent they had any pan, it was a different  
8 sort of a pan, was it not?

9 A No, the two pans were the same.

10 Q But there were two pans there?

11 A Yes.

12 Q Can you recognize what enclosure 5 A is?

13 A Well, I would have to see it to know. I believe it was  
14 this sheet 00095.

15 Q And that is the one about quiet burner operation?

16 A Yes, it is.

17 Q That's the major theme of it. And it has something to  
18 do with specialized type of valve that was used some years  
19 ago, true?

20 A Well, I don't know if I characterize it as specialized.  
21 It was a valve.

22 Q What is that type of valve called?

23 A A hearth elbow, I believe.

24 Q I believe that's correct, that it was a hearth elbow  
25 valve.

1 And was the relevance of that merely that it did  
2 show a valve that perhaps to be utilized in a Peterson  
3 structure that is in issue?

4 A It showed the valve that was used in enclosures 1 and 4.

5 Q Is that the valve that's used today? Do you know?

6 A If it's used today?

7 Q Yeah.

8 A No, I don't know.

9 Q You don't know whether that valve over there is that  
10 valve or not?

11 A That's a hearth elbow on the F 3 burner, yeah.

12 Q The F 3 burner being the large piece of hardware?

13 A Yes, the one closest to me.

14 Q I'm asking you about what's on the Peterson exhibit  
15 that's next to the big piece of hardware?

16 A No, that's not a hearth elbow.

17 Q So what was the pertinence of this?

18 A It had to do with the invalidity of the Blount patent.

19 Q In what way? Simply because it was a valve?

20 A No, it showed the valve that was used on the F 3 burner  
21 which was prior art to the Blount patent.

22 Q In other words, you're tying that exhibit to the F 3, as  
23 you call it, over on the table?

24 A Correct.

25 Q Then there's an instruction sheet used with some of the

JT-APP 1167

1 sets that were sold, '72, '70 to -- we've done that one,  
2 haven't we?

3 Have we done 4 A?

4 MR. PARKER: 6 A.

5 MR. HARRIS: We're down to 6 A, aren't we. What  
6 is 6 A?

7 A It's this drawing here, page 000096, I believe.

8 Q And it's another circular type of a structure that  
9 existed some years ago, correct?

10 A That's my understanding, yeah.

11 Q Has it been on the market for the last number of years?

12 A I don't know.

13 Q Now do we have a letter that transmits the drawings to  
14 you? You know, you had identified some drawings that seem to  
15 come from Bortz. Do we have a letter?

16 A Yes, you showed it to me yesterday.

17 Q And does the letter specify just what the drawings were?

18 A I don't recall that it does, no.

19 Q And wasn't what was really sent you circulars and  
20 bulletins rather than drawings at that time?

21 A Okay. Now you're confusing me again. Which letter are  
22 you talking about?

23 Q The first time that you were sent anything by Peterson  
24 on this matter.

25 A No, it did not have any information on the circular

1 burners or any other types of burners.

2 Q It didn't have any drawing?

3 A It had information on the ember flame booster.

4 Q It didn't have any drawings?

5 A Of the ember flame booster?

6 Q Right. What did it have drawings of?

7 A The ember flame booster. We talked about it 15 minutes  
8 ago.

9 Q At the very first time that he wrote you a letter, you  
10 claim that he sent you drawings?

11 A The letter says it.

12 Q Wasn't what was really sent, though, I'm saying,  
13 circular and instruction manual material?

14 A No.

15 Q Okay.

16 A Well, there was an instruction manual on the ember flame  
17 booster, not on the circular burner.

18 Q Did you learn about the relative relation of the  
19 burner's physical consideration from the product itself or  
20 strictly from the material sent you?

21 A Neither. It was from talking to Mr. Bortz at the  
22 outset.

23 Q Mr. McLaughlin, do you remember testifying in your  
24 deposition about the heighth of the primary tube versus the  
25 secondary tube?

JT-APP 1169

1 A Yes.

2 Q Can you recall what your testimony was?

3 A That I was told the heights were the same.

4 Q And who told you that?

5 A Mr. Bortz.

6 Q So as not to waste time, let me come back to that.

7 So you do agree, though, that when you were

8 rendering your oral opinion, you had to find out from your

9 client, as to the relative heights of the two?

10 A Yes.

11 Q And you took his word for it, did you not?

12 A Yes, I did.

13 Q So your basis of the relative height, at least at that

14 time, was based solely on his representation and nothing

15 else; isn't that correct?

16 A His representation, but I also obtained additional

17 information from him regarding that.

18 Q When did you obtain the additional information?

19 A At the same time, in December of 1999.

20 Q I thought the information you obtained had to do with

21 relative height?

22 A It did.

23 Q Are you saying you obtained some other information from

24 him?

25 A More specific information on the -- not just the height

1 of the burner tube, but the height of the ports.

2 Q Oh. Is that documented in any way?

3 A (No response)

4 Q Is that conversation documented in any way?

5 A No.

6 Q Did it ever occur to you that you should have made your  
7 own determination about the relative heights and some of the  
8 other things in relation to this Peterson product?

9 A I don't recall if it occurred to me or not. I didn't  
10 need to. I had the information from the client, and I was  
11 satisfied with the information that I had.

12 Q And you're the one that told him if he got a lawyer's  
13 opinion, that he didn't have to worry about any attorney's  
14 fees, weren't you?

15 A Yes, I did.

16 Q Assuming for a moment, Mr. McLaughlin, that you took  
17 your measurements from the top of the tube. Would the top of  
18 the primary tube be above or in a raised position with  
19 respect to the top of the secondary tube in the Peterson  
20 device?

21 A It can be, yes.

22 Q If you like, we do have a device that will help us  
23 determine that, if you need to?

24 A No, I don't need it.

25 Q You're willing to agree with it?

JT-APP 1171

1 A I'm agreeing with you that it can.

2 Q Do you remember putting the pencil on the Peterson  
3 device when we took your deposition?

4 A I remember you putting the pencil on.

5 Q And you are agreeing that it wasn't level, correct?

6 A The way you had configured the burner, yes, it was.

7 Q Well, did you think it had been monkeyed with in some  
8 way?

9 A Not monkeyed with. I didn't put the burner together.  
10 You or your firm or somebody put the burner together. I did  
11 not.

12 Q Can it make a difference the way you put the burner  
13 together?

14 A You can raise the front burner up.

15 Q Um-hum. Can you do that with the Peterson burner, too?

16 A That's what I'm talking about.

17 Q Yeah. You can do it with the Peterson burner or you can  
18 do it to some extent with the patented burner, can't you?

19 A The burner described in the patent, apparently you can.  
20 Whether it will stay up or not, I don't know.

21 MR. HARRIS: Let me confer just a moment with  
22 co-counsel to find out if they think it's worth wasting the  
23 time. It may be that -- to put a level over there which will  
24 show the very thing that he agrees that it will show.

25 THE COURT: Okay. Go ahead.



1 (Pause)

2 MR. HARRIS: We would like to do that little  
3 demonstration.

4 THE COURT: Okay.

5 MR. HARRIS: If we might. And my co-workers will  
6 assist me in that regard.

7 THE COURT: Okay.

8 MR. HARRIS: And we want to use -- I hope it's  
9 okay.

10 MR. GAINES: D 30. I checked. It's D 32 and D  
11 31.

12 MR. HARRIS: D 32 and D 31. And we assume it  
13 hasn't been monkeyed with much.

14 MR. GAINES: I don't know if you can see this or  
15 not. You may. In order to get -- I don't know if you can  
16 see or not. You may have to come down and take a look, I  
17 don't know. The witness may, too. I don't know.

18 THE COURT: Okay.

19 MR. GAINES: All right.

20 MR. HARRIS: Your Honor, that high tech instrument  
21 is known as a level.

22 THE COURT: I recognize it.

23 BY MR. HARRIS:

24 Q Well, can you report on the relative positioning as  
25 shown by the level?

JT-APP 1173

1 MR. GAINES: If it is level. That's the purpose?

2 A Assuming the table is level, the top of the front burner  
3 is below the top of the rear burner.

4 Q I'm sorry. Let me get this head set. Well, you're not  
5 near a microphone, anyway. Can you speak a little louder?

6 A I said assuming the table is level, the top of the front  
7 burner is lower than the rear burner.

8 Q Do you want to check the level of the table?

9 A No.

10 Q All right.

11 MR. HARRIS: That's all. Thank you.

12 Q You will agree at your deposition, a somewhat similar  
13 thing was demonstrated just using a pencil to lie along the  
14 burners, correct?

15 A Yes.

16 Q And again there was some tilt, right?

17 A Yes.

18 Q And tilt in the same sense that the level showed?

19 A Yes.

20 Q Did you ever consider taking the measurements from the  
21 tops of the tubes?

22 A No.

23 Q Is there any particular reason?

24 A Because to me it's unimportant.

25 Q Well, I suppose anything can be unimportant. But if

1 you're trying to make a determination about the relative  
2 heights of things, why wouldn't you give consideration that  
3 the given parts of the items that you were comparing on  
4 vertical height?

5 A My understanding was that the front burner was smaller  
6 diameter than the rear burner. If you looked at a cross  
7 section, you would see that the front burner is within the  
8 horizontal plane at the top and bottom of the rear burner.  
9 In other words, that the lower part of the front burner is  
10 higher than the lower part of the rear burner. The ports on  
11 both the front burner and the rear burner are directed  
12 downwardly.

13 Q That's the Peterson structure?

14 A Yes. And as a result the ports of the front burner are  
15 at a higher level than the ports of the rear burner.

16 Q Did you find language about the relative heights of the  
17 ports in the claims?

18 A No.

19 Q Indeed there isn't a word in any of the claims about  
20 the relative heights of the ports, is there?

21 A There's language about the representative heights of the  
22 burners.

23 Q But not the ports?

24 A In the specific wording, no.

25 Q Plain ordinary language in the claims talks about the

1 relative heights of the burners, correct?

2 A Yes, and as I read, plain ordinary language, when the  
3 claim says something is below something else, it's below it.

4 Q Would you repeat that, please?

5 A I said, when the claim says that one thing is below  
6 another, I interpret that to mean just what it said, that it  
7 is below. It's lower than.

8 Q And it could be a thousandth of an inch lower than or it  
9 could be a thousand miles lower than, right?

10 A That's true.

11 MR. HARRIS: I think I'm through, but give me a  
12 moment, please.

13 THE COURT: Okay.

14 MR. MONCO: Your Honor, if I could just have a  
15 couple questions on recross.

16 THE COURT: Okay.

17 MR. HARRIS: Just a minute.

18 MR. MONCO: I'm sorry.

19 BY MR. HARRIS:

20 Q I do have one thing. Were you the one that authored the  
21 concept that a vertical aperture to discharge gas from the  
22 ember member would split the gas coming out half way toward  
23 the front and half way toward the back of the fireplace?

24 A Did I author that?

25 Q Yes.

JT-APP 1176

1 A I don't know if I authored that or not.

2 Q Who did author it?

3 A I'm not sure what you're talking about.

4 Q Oh, I believe you are. Someone has in your shop filed a  
5 brief that makes something out of the point that the gas  
6 aperture in the Peterson device is straight down, and  
7 therefore half of the gas goes to the front of the fireplace  
8 and half of the gas goes to the rear of the fireplace. Have  
9 you not seen that previously?

10 A I don't remember it says half and half. I know what  
11 you're talking about, though.

12 Q It could be 90 percent and 10 percent, couldn't it?

13 A I don't think that's very likely.

14 Q You don't have the slightest idea, do you?

15 A I have some idea.

16 Q I'm flat going to ask you how you got that idea.

17 A Because the gas pressure of the gas coming out is fairly  
18 significant and the gas pressure goes down. When it hits the  
19 bottom wall, it virtually is likely to go forward as it is to  
20 go backward.

21 Q What do you attribute to the rather large draft that's  
22 present in the fireplace that pulls nearly all of the gas  
23 somewhat to the rear?

24 MR. MONCO: I'm going to object to the question,  
25 Your Honor, as a complete lack of foundation for that.

1 THE COURT: That's overruled.

2 A I would believe that the draft is insignificant compared  
3 to the pressure of the gas that's supplied from the gas  
4 company.

5 Q Do you have any experimentation on this at all?

6 A Do I? No.

7 Q Was the work that was done in that brief based on  
8 experimentation, a well written report that thoroughly  
9 researched the point?

10 A Not that I'm aware of, no.

11 MR. HARRIS: I have no further questions.

12 THE COURT: Okay.

13 MR. MONCO: Just a couple questions, Your Honor.

14 REXCROSS-EXAMINATION

15 BY MR. MONCO:

16 Q Mr. McLaughlin, turning to Defendant's Exhibit 1 which  
17 is the patent, and we're focusing on the element talking  
18 about the representative position of the front and rear  
19 burner.

20 When you interpret patent claims, do you take a  
21 look at the specification to see how the claims should be  
22 interpreted?

23 A Yes.

24 Q Okay. I would like you to take a look at column 3,  
25 about line 54 of Defendant's Exhibit 1.

JT-APP 1178

1 MR. MONCO: May we have that up on the screen,  
2 please. Last full paragraph on that column will be fine.

3 Q First couple of sentences read, "The present burner  
4 assembly is the combination of an inexpensive gas log burner  
5 assembly in gas flow communication with a secondary coals and  
6 ember burner tube positioned forward and below the primary  
7 burner which operates to enhance the natural draft of the  
8 fireplace to improve efficiency and aesthetic appeal of the  
9 gas fired artificial log and burner assembly."

10 First of all, did you review that language when you  
11 were formulating your opinion?

12 A Yes, I did.

13 Q How did that language impact your interpretation of the  
14 positions of what to focus on with regard to the language  
15 with where the front burner tube is positioned below the rear  
16 burner tube?

17 A I think in one sense I interpreted in combination with  
18 the drawing in I think it was figure 3 that the claim should  
19 be interpreted so that the front burner has to be completely  
20 below the rear burner, but at a minimum the gas ports of the  
21 front burner have to be below the gas ports of the rear  
22 burner.

23 Q Okay. Now looking at the patented product on the  
24 drawings, the gas ports for that patented product are not in  
25 the top portion of the tube, are they?

1 A For the rear burner?

2 Q For the rear burner or for the front burner. They're  
3 not along the top ridge of either tube, are they?

4 A No, they're not.

5 Q For the rear burner the chutes are directed downwardly,  
6 are they not?

7 A I believe they're directed straight down in the patent.

8 Q Straight back in the fireplace?

9 A Straight back from the burner tube.

10 Q Okay. Where are the gas jets for the front burner?

11 A The way they're shown in the drawing, they appear to be  
12 straight back, but the specification talks about different  
13 orientations that they could be.

14 Q Okay. So the focus would not be on the top ridge of the  
15 burner. The focus of the patent itself with regard to the  
16 gas jets was not on the top ridge of the burner because  
17 that's not shown in the patent, correct?

18 MR. HARRIS: Your Honor, I realize this is a bench  
19 trial, but I would like some limitation on leading.

20 THE COURT: Okay. Go ahead.

21 BY MR. MONCO:

22 Q In the patent in suit, Mr. McLaughlin, where are the gas  
23 ports positioned? Let me just ask it this way.

24 They are not positioned on the top ridge of either  
25 tube, are they?

JT-APP 1180



1 A No, they're not.

2 Q Okay. Now counsel talked about the draft in the  
3 fireplace. Now the -- am I correct that the lower gas tube  
4 is shown in the drawings of the patent is underneath silica  
5 and mica?

6 A Yes.

7 Q Okay. Do you think there's any draft in the silica and  
8 the mica?

9 A That I don't know.

10 Q Okay.

11 Q You were asked before with regard to Defendant's Exhibit  
12 D 31 and D 32, and they took a measurement using a level.  
13 And the level that they had it at demonstrated that the top  
14 burner was -- the top of the rear burner was above the top of  
15 the front burner. Do you recall doing that?

16 A Yes, I do.

17 Q Okay. Now if this particular unit is just simply raised  
18 this amount -- I would like to you step over, please. We'll  
19 use the same high tech instrument.

20 Where is the top of the burner? Where are the  
21 relative positions of the top burner?

22 A The top of the front burner is higher.

23 MR. HARRIS: Sir, what if we put it up here?

24 BY MR. MONCO:

25 Q Same question?

JF-APP 4181

1 A Top of the front burner is higher.

2 MR. HARRIS: Known as abducteo ab insertem.

3 MR. MONCO: Your Honor, we have no further  
4 questions.

5 THE COURT: Okay. Mr. Harris.

6 MR. HARRIS: Unfortunately, I do have one.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BY MR. HARRIS:

10 Q Drawing your attention to Exhibit 1, the patent claim 9.  
11 If one someone will put that up for me.

12 Okay. I'll hold my copy. Would you read that out  
13 loud for us, please? It's short.

14 A "The gas fired artificial logs and coals burner assembly  
15 according to claim 1 were in the secondary coals burner  
16 elongated tube is adjustable in height relative to the floor  
17 of the fireplace and the elevated primary burner tube."

18 Q Does that not tell you that it can have a series of  
19 various heights?

20 A I don't know if it says series. It's adjustable. More  
21 than one.

22 Q Yeah, more than one heighth, correct?

23 A Yeah. But that's just simply a further limitation of  
24 Claim 1 which specifies the tube in a raised level relative  
25 to the forward position secondary coals burner elongated

1 tube.

2 Q But it still can be varied?

3 A It satisfied both limitations.

4 Q It still can be varied?

5 A Yes.

6 Q You referred to what, Exhibit 3? I'm sorry. Figure 3?

7 A Yes.

8 Q Of the patent?

9 A Yes.

10 Q And you said you relied some on it; is that correct?

11 A Yes.

12 Q And figure 3 could be adjusted in accordance with 9,

13 could it not, where it says if you'll look at figure 3 is

14 flat on the hearth?

15 A Yes.

16 Q And so if it were to be adjustable and that claim were

17 to have any meaning, it would have to have the capability of

18 being raised some, wouldn't it?

19 A Yes, provided that it still met the limitation of Claim

20 1. The claims are different from the specification.

21 Q That is your interpretation, correct, sir?

22 A What I just said?

23 Q Yeah.

24 A Yes, that's my interpretation.

25 MR. HARRIS: I have no further questions.

JT-APP 1183

1 THE COURT: Anything else?  
2 MR. MONCO: No, Your Honor, no more questions.  
3 THE COURT: Thank you very much. You may step  
4 down.  
5 Next witness.  
6 MR. HARRIS: The plaintiff calls Mr. Leslie Bortz.  
7 THE COURT: Okay.  
8 THE COURT: If you'll raise your right hand,  
9 please.  
10 (Witness sworn by the court.)  
11 THE COURT: Okay. Just have a seat right up  
12 there.  
13 MR. HARRIS: To be sure, I would like to at this  
14 time introduce the deposition of Robert H. Peterson Company,  
15 which was 30(b)(6) deposition taken by me of Mr. Bortz.  
16 THE COURT: Okay.  
17 MR. HARRIS: In Chicago, was it not, sir?  
18 THE WITNESS: Yes, sir.  
19 LESLIE BORTZ, (Sworn)  
20 was called as a witness by the Plaintiff having been first  
21 duly sworn, testified as follows:  
22 DIRECT EXAMINATION  
23 BY MR. HARRIS:  
24 Q When they had long airplane lines?  
25 A I'm sorry. I don't know.

JT-APP 1184

1 Q You didn't go to the airport that day?

2 A You took the airplane.

3 Q Your attorneys are the persons that are present here  
4 today as regards this present lawsuit, are they not?

5 A Yes, sir.

6 Q And you relied on information given by them and more  
7 particularly on certain opinions given by them; is that true?

8 A I relied on information given by them, yes.

9 Q And your company manufactures product in California, but  
10 it also has a location in Chicago, is that so?

11 A Yes, sir.

12 Q And your company is, what, on the order of a hundred  
13 million dollar company or what?

14 A No, sir, nowhere near that.

15 Q How big, sir?

16 MR. MONCO: Your Honor, I would like to object.

17 At least lay a foundation as to the relevance of this  
18 question. This is highly confidential business information,  
19 and the Peterson Company is in more businesses than just  
20 fireplaces, and we're focused on fireplaces right now. I  
21 really don't think that's an appropriate question unless  
22 there can be some relevance and foundation laid on that. I  
23 don't think there is.

24 THE COURT: I sustain the objection.

25 BY MR. HARRIS:

1 Q I will put it to you this way, and maybe this is  
2 satisfactory.

3 Do you employ several people?

4 A Yes.

5 Q How many?

6 A In total we employ about 160. In gas logs we employ  
7 about 75 or 80.

8 Q And in your distribution process, I take it you have a  
9 number of independent agents that work with you, too; is that  
10 true?

11 A Yes, we sell through manufacture's representatives.

12 Q Excuse me just a moment, please.

13 (Pause)

14 Q Mr. Bortz, you saw the demonstration and heard the  
15 demonstration regarding the primary burner and the secondary  
16 burner and their representative heights, did you not?

17 A Are you speaking of the demonstration today?

18 Q Yes.

19 A I saw it. May I make a comment?

20 Q I wish you would let me first ask you a question.

21 A That's fine.

22 Q And that is, in watching the demonstration, did you see  
23 anything wrong with it?

24 A May I make a comment now?

25 Q Well, yeah. I've asked you a question.

JT-APP 1186

1 A Okay. I only have one eye that sees. So although I saw  
2 it, I did not see it very well.

3 Q You heard the language that was used in conjunction with  
4 the demonstration, did you not?

5 A Yes, I did.

6 Q And that language implied that the primary burner and  
7 the secondary burner were at such levels that the secondary  
8 was somewhat lower?

9 A I'm not sure which burner you're talking about.

10 Q The secondary is the ember burner.

11 A Which product? Whose product?

12 Q Your product was the one we checked.

13 A Yes, sir. Would you repeat the question? I'm sorry.

14 Q Yes. You heard the various things said as by the  
15 witness that related to the result of the demonstration, did  
16 you not?

17 A Yes. Yes, I did.

18 Q And you heard that the demonstration indicated that the  
19 ember burner on your device was lower than the primary  
20 burner?

21 A I heard that the top of the ember burner was lower than  
22 the top of the primary burner.

23 Q Okay. Fine. And do you quarrel with that? It came  
24 from the lips of your own witness.

25 A No.

JT-APP 1187

1 Q Did there come a time that you received a letter from  
2 the Golden Blount Company by Dan Tucker, I believe it was, a  
3 lawyer serving him, that mentioned the patent that's now in  
4 suit and made reference to infringement and made reference to  
5 the fact that the company was going to protect its property  
6 rights and finally signed off by asking to hear from you  
7 promptly. Do you recall that letter?

8 A Are you speaking of the letter of December 10th, 1999?

9 Q Yeah. I could have probably shortened it all that way.  
10 Let's look at it.

11 Is it in front of you?

12 A I think so.

13 Q Did you get the idea from that letter that you were  
14 being told that you might be infringing a patent? Whether  
15 you were or not, did you get the idea that you were being  
16 told that?

17 A I don't -- what we did when we received the letter is we  
18 forwarded it to Mr. McLaughlin.

19 Q Did you get the idea, sir, that you were being told that  
20 you were perhaps infringing a patent?

21 A No, I don't think so.

22 Q Did you think the communication had some other purpose?

23 A You know, not being a patent attorney, I didn't think  
24 much about the letter. I'm sorry. I immediately referred to  
25 our patent attorney.

JT-APP 1188



1 Q And what did you ask him to do?

2 A I think we asked him how -- should we respond and how,  
3 if we should respond.

4 Q Respond regarding what particular subject?

5 A Well, it says here, "Please let us know your  
6 intentions." And it gives a date.

7 Q Does it look like they were trying to put you under the  
8 gun?

9 A I don't know that it looks that they were trying to put  
10 us under the gun.

11 Q Just a friendly date, you think, then?

12 A It's a letter from a patent attorney. I don't know if I  
13 ever get -- anybody ever gets friendly letters from patent  
14 attorneys.

15 Q Touche. In any event, you did make a contact with Mr.  
16 McLaughlin, wasn't it?

17 A Yes, sir.

18 Q And what did you say to him?

19 A I said, we received a letter. I may have read it to  
20 him. He said, please forward me a copy of the letter.

21 Q And again, what did you ask him to do regarding the  
22 letter?

23 A To -- I believe what I asked him was to read the letter,  
24 and we would talk further.

25 Q And then did you talk further?

-JT-APP 1189

1 A I believe, yes. I believe he asked for further  
2 information.

3 Q What further information do you believe he asked for?

4 A And it may have been that this conversation was  
5 before -- no, he asked for any information at the time that  
6 we had that we felt had to do with this letter. The letter  
7 had -- I believe the letter had a copy of the patent with it.

8 Q Well, were the two of you discussing or either one of  
9 you the possibility that the patent might be a problem, and  
10 you were kicking around the idea of how to meet the problem?  
11 Isn't that what happened?

12 A I don't know how you characterize it. I forwarded the  
13 letter with the patent -- excuse me. It may have been  
14 another person at the company that forwarded the letter with  
15 the patent and possibly some other information to Mr.  
16 McLaughlin. There may have been --

17 Q And then when did you get a response, if any?

18 A I believe Mr. McLaughlin told us that it was appropriate  
19 to write a response to this letter.

20 Q And what was the response? I'm assuming that you  
21 followed his advice?

22 A Of course.

23 Q What was the response? It's on the screen now.

24 A On December 30th, Tod Corrin wrote to Mr. Tucker stating  
25 that we had forwarded his letter to our attorneys for their

JT-APP 1190

1 review and consideration, and we will try to get back to you  
2 as soon as possible. And we felt, I guess, the January 14th  
3 date was a little tough. It was around Christmas time. I  
4 guess there were vacations, et cetera, that were --

5 Q So in any event, you did respond to the letter and  
6 indicate that you were trying to decide what to do, if  
7 anything, with regard to the letter; is that correct?

8 A I said, we will try to get back to you as soon as  
9 possible. Excuse me. Tod said, we will try to get back to  
10 you as soon as possible.

11 Q What kind of a subject was he going to get back on or  
12 were you going to get back on?

13 A We were trying to determine what the patent meant  
14 because we didn't see anything in the patent that wasn't  
15 things that we had done for many years. We were told to look  
16 for -- by Bill we were told --

17 Q Bill being McLaughlin?

18 A I'm sorry.

19 Q No, Bill is fine as long as we know who it is.

20 A Yes, sir. -- by Mr. McLaughlin to look for any  
21 documentation that we had for the things that we had talked  
22 about, and we had talked on the phone with Bill, about the  
23 fact that we felt that we didn't really understand the  
24 patent. We didn't understand what was being patented.

25 So we kept on forwarding or, excuse me, we

1 forwarded information or we tried to talk to Bill, I did,  
2 because we just really didn't understand. In fact, it was  
3 quite a number of months later before I really understood.

4 Q As a matter of fact, you first really understood it when  
5 you got sued over a year later, didn't you?

6 A That's not true.

7 Q Well, when did you understand it?

8 A I think I understood it before then.

9 Q And you understood it at this time it was a problem  
10 worth looking into and that you had been told that you might  
11 be infringing a patent. You understood that much, didn't  
12 you?

13 A No. I understood it was a problem worth looking into.

14 Q Well, then, why are you telling them you're going to get  
15 back with them if you don't think there's a problem?

16 A Well, because they asked us to.

17 Q And as you say, it was nearly Christmas, and so you  
18 wanted --

19 A It was in a timeframe. January. I think they asked us  
20 to get back to them by January.

21 Q Well, you say you didn't understand what it was about.  
22 You knew that Bill had written over 500 patents, didn't you?

23 A No, actually, no, I did not know the number of patents  
24 that Bill had written.

25 Q You certainly think he could interpret one to some

JT-APP 1192

1 extent, wouldn't you?

2 A It seemed to me that he understood it better than I did.

3 Q I now direct your attention to May 3rd, 2000, letter.

4 It was to Mr. Corrin, and it was from Dan Tucker again. And  
5 he referenced your letter where you indicated there would be  
6 some response to his earlier letter.

7 And then finally he says very specifically that,  
8 "We have inspected your EMB series ember flame booster and  
9 find it to be clearly within the scope of at least some of  
10 the claims of the subject patent. Our client views any  
11 infringement of its patent with great concern and will take  
12 necessary steps to stop any such infringement."

13 Now as of the date of that letter when you received  
14 it, you didn't have any doubt but what you were being accused  
15 of infringement, did you?

16 A It looks that way, yes.

17 Q And in follow up to the contact and -- well, coming from  
18 the December 10th, 1999, letter, between then and May the  
19 3rd, 2002, what did you and Bill talk about as relates to  
20 this patent in suit and possible infringement by your  
21 product?

22 A Well, we didn't talk about a suit or infringement  
23 because at least we didn't talk about a suit because there  
24 wasn't a suit.

25 Q You want me to simplify the question?

JJ-APP 1193

1 A Pardon?

2 Q I want to know what you talked about as relates to the  
3 problem of possible infringement or that relates to the  
4 problem that was raised, whatever it may be, by the letter of  
5 December the 10th, 1999?

6 A I don't remember what we talked about during that period  
7 of time specifically.

8 Q When was it that you told Bill, if you did, that, well,  
9 gee, for 20 years or more, the whole industry has been making  
10 things like this, and there's just absolutely no basis here  
11 for a patent?

12 A I believe that was in December.

13 Q Why did you tell him that?

14 A Because that's the way I looked at the drawings.

15 Q Why did you think it necessary to even go that far if  
16 you didn't think you had been accused of infringement?

17 A Why wouldn't I? It's a patent letter. Whether I was  
18 accused or not, the letter would require a response.

19 Q It gave you notice that you might have a problem, didn't  
20 it?

21 A It may have given me notice. It gave me notice that I  
22 had to send this forward to my patent attorney, and I don't  
23 mean to be a jokester, but, you know, when you send something  
24 to a patent attorney, there's the problem of the fees start.  
25 So, of course, in that sense.

1 Q You think patent lawyers are like doctors. They  
2 sometimes give you a fee cure?

3 A I'm not sure what that means. I just know that it costs  
4 a lot of money.

5 Q I understand.

6 THE COURT: Let's take a morning break. We'll  
7 take a 15 minute break.

8 (A recess was held at 10:28)

9 (Resume at 10:45)

10 THE COURT: Have a seat, please.

11 Just have a seat back on the witness stand.

12 BY MR. HARRIS:

13 Q At the break, Mr. Bortz, we were talking about letters  
14 from lawyers, and do you recall when is the first time that  
15 you got an opinion of some type from Mr. McLaughlin?

16 A I believe I got opinions throughout our conversations.

17 Q Can you be any more specific?

18 A I believe that -- I thought it was maybe sometime in  
19 2000. It may have been in December that he told me what you  
20 said. That if we had been doing these types of things for  
21 such a long period of time, that -- again, I don't know the  
22 words, that it didn't seem to be an issue that was. At the  
23 time I did not know the difference between invalidity and  
24 infringement.

25 Q Did you follow up with Mr. McLaughlin concerning the

JT-APP 1195

1 May letter from Mr. Tucker? That was May of 2000.

2 A Yes, I did. I believe I did. The May letter from  
3 Golden Blount's attorney to Peterson?

4 Q Right.

5 A Yes.

6 Q And what did you do?

7 A We sent that letter to -- sent, faxed, we forwarded that  
8 letter to Mr. McLaughlin.

9 Q And did Mr. McLaughlin give you feedback, opinion or  
10 comment at that time?

11 A As I recall, he may have been away at the time. But  
12 when he received it, he said you should write a letter back  
13 to Mr. Tucker.

14 Q He suggested the company write the letter and not him;  
15 is that right?

16 A I don't know what he suggested. The company wrote the  
17 letter.

18 Q That's Exhibit 13?

19 A Yes.

20 Q In any event, correct?

21 A He suggested that there needed to be a response.

22 Q And what was the response to be?

23 A I suspect the letter of May 16th, 2002.

24 Q In other words, a letter just said, what in the world  
25 are you talking about?

JT-APP 1196



1 A I don't read those words.

2 Q What words to you read? Please don't read every one to  
3 show you can. I know you can read.

4 A Thank you. This letter said -- our letter said that  
5 they had informed us that they believed that our product was  
6 clearly within the scope of some of the claims of the subject  
7 patent. And we responded back, please give us the basis on  
8 that because we didn't see.

9 Q You said you very much disagree with the statement, I  
10 note, at the end of the second paragraph.

11 A Right.

12 Q Did you set forward in the letter what you disagreed  
13 about?

14 A No.

15 Q Did you give the distinctions that you thought were  
16 present to keep there from being infringement?

17 A No, we asked for what the claims were that were, again,  
18 that were being discussed.

19 Q Is that all you wanted to know, then, just the  
20 particular claims?

21 A I think what we wanted to know was in detail the basis  
22 upon which it was believed by Golden Blount's attorneys that  
23 we were infringing.

24 Q Now you had received two letters from Golden Blount's  
25 lawyer at the time this letter was written, correct?

JT-APP 1197

1 A Yes.

2 Q And these letters at least added up -- certainly if you  
3 look at the final one, that you were being accused of patent  
4 infringement, correct?

5 A Can you show me -- I believe that's correct.

6 Q I'll accept that belief if you will.

7 Now with that being the case, did you consider at  
8 that time pointing out some reasons that you didn't infringe?

9 A I sent the information to Bill McLaughlin.

10 Q As a matter of fact, you didn't have a personal visit  
11 with him, did you?

12 A A personal visit? No.

13 Q Yeah. And it's also true that you did all of your  
14 business with him on this particular matter by telephone,  
15 isn't it?

16 A Well, I don't know what you mean, but at this point in  
17 time that is absolutely the case, that we had not seen each  
18 other.

19 Q And you hadn't seen each other until suit was filed,  
20 even, had you?

21 A I don't remember. But certainly through May 16th we had  
22 not seen each other.

23 Q You wouldn't quarrel with his testimony, would you, to  
24 the effect that you hadn't seen each other until suit was  
25 filed, if that is his testimony?

1 A Mr. McLaughlin tells the truth. If that is -- I thought  
2 he said that we did see each other once in his testimony.

3 Q Well, maybe he made a correction of something he said in  
4 his deposition earlier. Something dropped by the office or  
5 another. I'm not sure. I'll be honest with you on that.

6 But I was under the impression you didn't have any  
7 real conferences where face-to-face you sat down, looked over  
8 papers, looked over structures, products and tried to make  
9 decisions. That didn't happen, did it?

10 A Until this date, no.

11 Q Well, not only until this date, but until a lot after  
12 this date?

13 A That is correct. There was no get-together meeting the  
14 way you described.

15 Q And yet you spend a lot of time in Chicago, don't you?

16 A Yes, I spend about half my time in Chicago.

17 Q The other half in California?

18 A I'm sorry. I didn't hear.

19 Q But the other half in California?

20 A Or other places.

21 Q Yeah. The next time that -- well, let me put it this  
22 way instead.

23 After this May 2000 letter, what type of opinion or  
24 correspondence or discussions did you have with Mr.  
25 McLaughlin concerning the patent infringement matter?

1 A I don't remember any discussions after the May 16th  
2 letter until the lawsuit, although we may have had a few  
3 discussions.

4 Q During that period of time before the lawsuit, did he  
5 give you an oral opinion?

6 A I don't believe so.

7 Q Do you feel the first oral opinion you really got,  
8 then, was after the lawsuit?

9 A No. I think I got an oral opinion before.

10 Q When did you think you got it?

11 A I think I got it, I thought may have been January, but  
12 it may have been right after the first -- sometime very close  
13 after the first letter in December of '99.

14 Q You knew at that time that he didn't have materials from  
15 the patent office we call file wrappers or records of  
16 prosecution, that he didn't really have a search, and that  
17 all he really had were a certain number of materials you had  
18 supplied him. You knew that, didn't you?

19 A No, I didn't. I didn't know what he had. I don't know.

20 Q What did he tell you?

21 A He didn't tell me what he had.

22 Q No, no, no. What did he tell you insofar as opinion is  
23 concerned? I'm sorry.

24 A I think he said that if you have been doing this for 20  
25 or 30 years, that would be a strong argument, or words to

JT-APP 1200

1 that effect, of invalidity or infringement.

2 Again, I did not at the time know the difference.

3 Q Was that all you had at the time in the way of oral  
4 opinion which caused you to go forward all the way until you  
5 were sued?

6 A No. We had written to Mr. Dan Tucker on May 16th, 2000,  
7 requesting information.

8 Q Do you realize that he had already written you two  
9 letters, and do you realize that some people would regard  
10 this as what we call a put-off letter?

11 A I don't realize that. I mean, you may regard this as a  
12 put off letter. We were told this was the right way to  
13 respond.

14 Q And this was in, what, May?

15 A May of 2000.

16 Q Um-hum. And so from May of 2000, for how many months  
17 you waited and did nothing further? Is that what you're  
18 telling me?

19 A Yes, that's what I'm telling you except that my feeling  
20 was that Golden Blount's attorneys waited.

21 Q That what?

22 A We didn't get a response to this letter.

23 Q You put a lot of stock in that letter even after you had  
24 been warned twice.

25 A Yes.

JT-APP 1201

1 Q And even after you had sent a letter promising that you  
2 would be in touch on the matter.

3 Well, I won't quarrel with you about whether this  
4 is being in touch or not. But the months rolled on, and you  
5 did get sued, didn't you?

6 A Yes, we did get sued either January or February of 2001.

7 Q And you had no further opinion in your own mind's eye,  
8 anyway, other than what you had described to me at the time  
9 that the suit was filed in 2001?

10 A I'm not sure what your question is.

11 Q Well, what I'm saying is that the months rolled along.  
12 You told me about what Bill McLaughlin had told you about the  
13 20 years or so practice, and you left me with the opinion  
14 that that was pretty much all of the oral information you had  
15 until the time the suit was filed. Is that true?

16 A Are you asking about oral information from Mr.  
17 McLaughlin?

18 Q Yes.

19 A Yes, it is true.

20 Q That you had no more information than that until the  
21 suit was filed?

22 A Yes, sir.

23 Q And when the suit was filed, did you have occasion to  
24 contact Mr. McLaughlin?

25 A Yes, sir.

JT-APP 1202

1 Q And what did he advise you to do, if anything?

2 A Again, we sent him the papers, all of whatever we  
3 received in January of 2001.

4 Q Right, the lawsuit papers.

5 A Right.

6 Q And what did he advise you to do?

7 A Well, I was surprised to receive the lawsuit because we  
8 expected a response. . Bill, I guess, was -- I believe was  
9 surprised as well. He expected a response. And the lawsuit  
10 came from a different party, a different person. I don't  
11 know if it's the same law firm or not.

12 Q Roy Hardin, I believe, signed it. It is the same law  
13 firm.

14 A Is it?

15 Q Yes.

16 A So I thought maybe there was by some mistake nobody got  
17 our letter.

18 Q Well, we seem to be talking about two different things.

19 A I'm sorry.

20 Q Well, I appreciate your testimony, but I was trying to  
21 find out what Mr. McLaughlin suggested you do or told you to  
22 do or advised you to do at the time you were sued.

23 A He advised us to look for any kinds of information that  
24 we had in our files that would show what we had explained,  
25 that we had been doing this type of thing for many years.

JT-APP 1203

1 Q Does that include this item I have my hand on on the  
2 table that's marked D 45 A?

3 MR. PARKER: Correct.

4 Q And that is one of the items you rely on?

5 A It included a picture of that item. Excuse me.

6 A picture of the item in some sort of a document  
7 that indicated that we were selling that item. The document,  
8 I believe, indicated early 1970s.

9 Q And indeed, he didn't have the item itself. He just had  
10 the document, didn't he?

11 A Yes, he had that document, and some -- may be one or two  
12 others --

13 Q You didn't have one of those things in the shop, did  
14 you?

15 A I believe we did.

16 Q Why didn't you send it to him?

17 A Didn't ask to be sent. He didn't ask to be sent. He  
18 asked to be sent information.

19 Q And did it occur to you that it would be wise to send  
20 him a copy of the product that was accused of infringement?

21 A No, it did not.

22 Q Did he ask you some questions about how the product was  
23 built over the telephone?

24 A Yes..

25 Q Did you not volunteer to send him one of the items?



1 A I don't remember.

2 Q Did you send him a detailed set of working drawings,  
3 shop drawings of the accused product?

4 A Which product are you talking about?

5 Q I believe there's only one in suit, the ember burner and  
6 allied structure that goes with it.

7 A We had sent him our instruction sheets and some  
8 drawings.

9 Q Did you send him a full set of working drawings?

10 A I don't know that we sent him a full set of working  
11 drawings. I don't know that we had a full set of working  
12 drawings. We sent him some drawings.

13 Q You'll agree with me the drawings that he was sent were  
14 not good enough to show all the information he needed,  
15 wouldn't you?

16 A I will agree, yes, now that the information that we sent  
17 him wasn't good enough to stop this lawsuit from continuing.

18 Q Did you approach Mr. McLaughlin with the idea that you  
19 would like to avoid what you consider the unlikely chance of  
20 having to pay attorney's fees for the other side?

21 A That was a part of a conversation, yes, sir.

22 Q What was the other part of the conversation?

23 A Well, I couldn't understand the basis of the suit, the  
24 financial basis of the suit. And I just didn't see it all  
25 that there would be a reason to pursue. I didn't see any

JJ-APP 1205

1 financial basis. So during the course of that conversation I  
2 did say I have heard or have been told that in patent suits,  
3 if you lose, you may be required to pay fees of the other  
4 side.

5 Q And your concern, then, was over what could amount to  
6 those very large patent lawyer fees that you were talking  
7 about earlier. Your concern was about that rather than the  
8 fact that you might lose a rather small lawsuit; is that  
9 right?

10 A (No response.)

11 Q Isn't that fair? That's what you told me, isn't it?

12 A Well, I didn't understand the financial basis of the  
13 lawsuit.

14 Q What do you mean by that, sir?

15 A What you've brought up today. Excuse me, yesterday.  
16 I'm sorry.

17 Q You were of the opinion, were you not, sir, that the  
18 maximum that you might have to pay would be tied in to just  
19 the little ember booster item itself?

20 A That was my own thought process.

21 Q And that wasn't really much worth messing with, was it?

22 A On a financial basis, that is correct.

23 Q And so you could thumb your nose at a Dallas company  
24 that wanted to you quit infringing their patent, right?

25 A That's not the case at all.

1 Q I believe that's what you told me, but I won't argue  
2 with you about it.

3 Your real concern, though -- I'm going back in  
4 time. Your real concern was not that amount because you  
5 thought it would be a small amount, a negligible amount also.  
6 But that could be pretty big lawyer's fees. That is true,  
7 isn't it?

8 A My real concern was, I didn't understand the basis of  
9 the patent.

10 Q Go ahead, sir. You're up.

11 A My real concern was that I didn't understand the basis  
12 of the patent, and I couldn't see -- I just didn't see the  
13 basis for continuing to prosecute the patent. I felt very  
14 strongly that we had done this for years, and therefore I  
15 really honestly felt that we would show that to Golden Blount  
16 and it would be over.

17 And I'm not Golden Blount, so I can't tell you how  
18 Golden Blount or his company will respond if -- I think I can  
19 recall that he said if he doesn't respond in what we thought  
20 was logic, doesn't mean it's logic to you, to our logic, then  
21 he may continue to pursue this matter.

22 I didn't want for the matter to be pursued,  
23 obviously, because I didn't think that we were doing anything  
24 inappropriate.

25 Q Did at that time you even offer to consider a license or

JT-APP 1207

1 have a meeting or do anything of that nature?

2 A No, we were waiting for the response.

3 Q Sir, you say you were waiting for the response, but you  
4 really weren't concerned because you didn't think there was  
5 any money outstanding; isn't that true, sir?

6 A No, sir.

7 Q I believe that's what you've told me. Well, going on to  
8 something else.

9 When Bill McLaughlin got around to his wrap up of  
10 an oral opinion -- and by the way, he thinks he gave three  
11 separate ones -- what did he tell you? In as much detail as  
12 you can tell me now, tell me what he told you.

13 A At various times as he got further and more information  
14 to implement the beginning, he told me that there were  
15 reasons to believe that the patent was invalid, which phrase  
16 I now understood, and there were reasons to believe that we  
17 were not infringing.

18 Q Was that all he told you?

19 A Well, I'm sure he told me more details than that.

20 Q Well, give me those details. Tell me what it was that  
21 he based his opinion on.

22 A Well, it's difficult, but he explained to me that what  
23 mattered in a patent were the claims, and there were 19  
24 claims, and certain were dependent and certain were  
25 independent. And that he had gone over those claims and he

1 had gotten other patents that maybe were referred to in the  
2 Golden Blount patent and other patents. And he got the  
3 information that we forwarded to him in February of 2001.  
4 And then we forwarded him more information after February of  
5 2001.

6 Q That's when the suit was filed roughly, isn't it?

7 A Yes, the suit was filed.

8 Q So the -- to the extent you had a comprehensive oral  
9 opinion, that came about how long after the suit was filed?

10 A Did you see a comprehensive oral --

11 Q Yes, sir.

12 A I don't know what a comprehensive oral opinion means.

13 Q I think that's one of the troubles about this whole  
14 matter.

15 A That may be. Is that a --

16 Q Let me go on to something else.

17 By the way, when is the first time that you showed  
18 Bill McLaughlin the accused ember burner product?

19 A In 2001, I believe, sometime prior -- sometime  
20 between -- I'm not sure. Sometime between February and  
21 October of 2001. I don't know when.

22 Q I believe it was when I was there to take your  
23 deposition.

24 A It wasn't when that occurred. It was before that.

25 Q That was in October, I believe.

JT APP 1209

1 A It was before that. I don't know when before that.

2 Q It's a fact, then, is it not, that you had literature  
3 out in the trade that described your product, the ember  
4 burner product, and how it operated?

5 A We had literature in the trade about our product, yes,  
6 sir.

7 Q And it's true that you had a number of distributors that  
8 came in from time to time, and you showed them the product  
9 and how it worked and how it was meant to work in conjunction  
10 with a standard fireplace, true?

11 A I don't know if you could say a number. We had some --  
12 we have distributors visiting our factory.

13 Q And you had a set up there to show that, didn't you?

14 A I don't know whether we did or did not. I believe if we  
15 didn't have one, I'm sure we had something in our lab.

16 Q Do you want me to go to your deposition and dig it out?

17 A If you wish to.

18 Q You really don't think you had one?

19 A No, I said I don't. You said displaying -- pardon me.  
20 Maybe you didn't. I took your comment to mean displaying the  
21 product. When I said, if we didn't have one on display  
22 because we have a room where we display our products, we  
23 certainly had one in the lab.

24 Q Well, did you show that to the distributors? That's all  
25 I'm getting at.

1 A Yes.

2 Q So the distributors had the opportunity to see how the

3 item worked, how it was supposed to work, how it was hooked

4 up, so on, right?

5 A Yes, those few distributors that did come.

6 Q And you had again brochure information or catalog

7 information that showed what the product was and how it was

8 intended to be used; is that not drew?

9 A We had a catalog page that's in our --

10 MR. HARRIS: Just a minute, please.

11 A -- in this information in front of me.

12 Q While he's looking, let me do something else.

13 No, I believe we have something. Plaintiff's

14 Exhibit 7 is before you. What does -- what is it?

15 A Those are the installation and operating instructions

16 for our EMB series, ember flame booster.

17 Q And that's the product or part of the product at issue,

18 isn't it?

19 A That is a part of the product at issue, as you can see.

20 Q And indeed I can see because in the upper right, the

21 flame booster part is illustrated, isn't it?

22 A Yes.

23 Q And it tells you to read the instructions carefully

24 before starting installation of your log set, doesn't it?

25 And it tells that it's available in different sizing, doesn't

JT-APP 1211

1 it?

2 A Yes, it says, "Available for use on the following log  
3 sets: 18 inch, 24 inch, 30 inch. Right below that it says  
4 for natural gas only."

5 Q And what is it said to be used with?

6 A It's said to be used with the 24 inch log set.

7 Q How to be used with the real G 4 series burner systems  
8 up in the upper left?

9 A Yes, I'm sorry. Glowing ember burner.

10 Q That's the main line of what you say you sell in this  
11 series, isn't it, the G 4?

12 A That is our largest burner system.

13 Q And this item --

14 A Largest selling burner system, I'm sorry.

15 Q And as a matter of fact, it's intended, is it not, that  
16 this item be used on the G 4. That's its use, isn't it?

17 A Yes.

18 Q Does it have any substantial use other than with the G 4  
19 or some related set you have like the G 5? Does it have any  
20 other use?

21 A No.

22 Q You would agree with me that it's not a staple article  
23 of commerce, wouldn't you?

24 A I don't know what that means.

25 Q Well, it means like sugar and salt and big cans of flour

JT-APP 1212



1 and things like that. Something that you just buy off the  
2 shelf everyday or you buy by the bin. And now having said  
3 all that, I'm not sure I know what it means either, but it's  
4 in the law. And a stable article of commerce is something  
5 this is not. And I want to get your agreement on that.

6 A I don't think anything we sell is a stable article of  
7 commerce.

8 Q Okay. That would include this, right?

9 A Right.

10 Q Would you agree that it's especially made or adapted for  
11 use in conjunction with providing an ember burner for a gas  
12 fired log system?

13 A (No response.)

14 Q You want me to read that again?

15 A Just show me. It's easier for me if I can. Is it on  
16 this sheet?

17 Q No, no. I'll come back to that in a minute.

18 What I said was, would you agree that it's  
19 especially made or adapted for use in conjunction with  
20 providing an ember burner for a gas fired log?

21 A I'm very sorry. Would you repeat again?

22 Q Yes. Would you agree with me that it is especially made  
23 or adapted for use in conjunction with providing an ember  
24 burner for a gas fired log?

25 A The word "providing an ember burner" doesn't strike me

1 as being correct.

2 Q Why don't you correct it for me, then.

3 A It could be used with an ember burner.

4 Q I'll read it again, then. Is it especially made or  
5 adapted for use in conjunction with being used with an ember  
6 burner for a gas fired log?

7 A Yes.

8 Q I'm treating the ember burner as the auxiliary burner  
9 and the big burner as the big burner.

10 A Right. And I --

11 Q In your own words now please tell me what it's adapted  
12 for.

13 A We have had a glowing ember burner since the late  
14 sixties or early seventies so there just may be a  
15 terminology. That is what we in the industry call our basic  
16 burner that you see there or what you call the primary  
17 burner. We call that a glowing ember burner. The industry  
18 calls that a glowing ember burner.

19 Q Is it especially made or adapted for use in conjunction  
20 with operation with a ember burner for a gas fired log?

21 A Yes, sir.

22 Q It's true, is it not, that the EMB burner and the G 4 --  
23 the G 4 being the big seller, right? Right?

24 A The G 4 is.

25 Q Right. Is it true that the EMB burner and the G 4 are

JT-APP 1214

1 made to be sold together and put together by the installer,  
2 whether that be a shop, a crew, a distributor, or whatever?

3 A I don't think that's correct.

4 Q Would you correct me?

5 A I think what you said is that they're made -- I'm just  
6 having a hard time following your exact question.

7 Q Maybe I didn't write it down quite right. I'll try one  
8 more time, then I'll go to the deposition.

9 A Okay.

10 Q Isn't it true that you stated in your deposition that  
11 the EMB burner and the G 4 were intended to be sold together  
12 and put together by the installer? And you would also  
13 agree --

14 A That's --

15 Q And you would also agree, would you not, for purposes  
16 of educating your distributors and advertising your disclosed  
17 intent for your auxiliary burner. But let me get it over  
18 here if you're still having trouble with it.

19 A Would you --

20 Q I'm going to put your deposition up.

21 Okay. On page 22 of your deposition in October.

22 A Is this what I have in front of me?

23 Q Yes. I asked, "Is it ever sold with a G 4," meaning  
24 your -- what do you like to call it? Not an ember burner?

25 "A Glowing ember burner.

1 "Q Glowing ember burner. All right."

2 Is it ever sold with a G 4? Now I'm talking about  
3 the EMB.

4 A Uh-huh.

5 Q And your answer, sir, is "We do not -- we do not sell  
6 the unit with a G 4. However, we sell the unit and the G 4,  
7 and they are meant to be put together by the installer."

8 Do you agree with that? That's what you said?

9 A That is what I said. But if you look at that, that's  
10 taken out of context. Because you were asking about the G 5.

11 Q Sir, you can have the deposition and show me whether  
12 it's there or not.

13 A I would like you to go back to the previous page, then.

14 MR. HARRIS: Just give him the previous page.

15 A We were talking about the difference between a G 5 and a  
16 G 4.

17 Q And a G 5 is one that you do sell with the EMB, isn't  
18 it?

19 A Yes. A G 5 is sold preassembled. As I recollect, you  
20 -- and I can understand this -- were having trouble  
21 deciphering or determining what the difference was between a  
22 G 5 and a G 4.

23 Q Indeed, I've even been told once in this proceeding so  
24 far that the G 5 never had one on it. And I think that got  
25 modified, but the G 5 is sold usually with the --

JT-APP 1216

1 A I'm sorry. What did you say?

2 Q Never mind. The G 5 is sold with the --

3 A I don't think you've ever been told that.

4 Q You weren't. You didn't tell me that.

5 A I'm sorry.

6 Q All right.

7 A I can read this if you like.

8 Q Read it to yourself first.

9 A You said, "I'm sorry -- " on page eight, on line eight,

10 "I'm sorry. Looking at Exhibit 1 -- I'm sorry, 12, that we

11 put in front of you a minute ago, is it usually true that the

12 G 5 is sold with a preassembled EMB?"

13 My answer was, "No, sir."

14 Q I thought you just told me that it was sold with an EMB?

15 A Why don't you let me -- I'm sorry.

16 Q Go ahead.

17 A What I'm going to get to is you said, "Is it usually

18 true that the G 5 is sold with a preassembled EMB?"

19 And I answered, "No, sir."

20 Your question, "It can be, but not necessarily is,

21 is that it?"

22 My answer, "The G 5 is very seldom sold with a

23 preassembled EMB."

24 Your question, "You do see the statement I'm

25 talking about, don't you, at the bottom of the page."

1 My answer, I apologize, should have been yes rather  
2 than "Uh-huh."

3 And you said, "I'm not quarreling --"

4 I answered, "I'm sorry. It is --"

5 Your question, "I'm not quarreling about your  
6 answer. I'm just trying to get to the bottom of what that  
7 means."

8 Q Now do you want to go back to page 26?

9 A Yes, if that's the next page.

10 Q That's the way I make it out.

11 A Okay.

12 A My answer, "Extremely seldom," meaning again that we  
13 sell very few G 5s with a preassembled EMB.

14 Your question, "But sometimes it is sold with a G  
15 5. Is it ever sold with a G 4?"

16 And in order to respond to that I said, "We do not  
17 sell it with the G 4."

18 And I tried to explain to you if it is sold for the  
19 G 4, it is meant to be assembled, not preassembled, but meant  
20 to be assembled by the installer.

21 Q In other words, the G 4 and the EMB would be put  
22 together, but not by you. That would happen on down the line  
23 when the installation took place or in the store, correct?

24 A I don't think it would happen in the store, but it would  
25 be put together. That was my point. It would be -- and I

JT-APP 1218

1 think you understood that with your next question.

2 Q And you verify the G 4 is the largest seller?

3 A Yes.

4 Q That's all I have on that.

5 MR. MONCO: Your Honor, may I just request a very  
6 short break for about two or three minutes?

7 THE COURT: Sure. We'll take a three minute  
8 break.

9 MR. MONCO: Thank you.

10 (A recess was held at 11:35)

11 (Resume at 11:42)

12 THE COURT: Have a seat, please.

13 BY MR. HARRIS:

14 Q With regard to what distributors or others might do, who  
15 does the distributor sell to?

16 A A distributor would sell to dealers.

17 Q And those are the words, aren't they, in the business,  
18 the distributor and the dealer as well as the manufacturer?

19 A Those are, yes, those are normal words in the business.

20 Q And we talked about whether the distributor might make  
21 an assembly of some kind. Much more likely that the dealer  
22 would, isn't it?

23 A The distributor would be -- it would be very unlikely.

24 Q How about the dealer?

25 A In fact, there would be almost no chance.

1 Q How about the dealer, though?

2 A The dealer might. It would depend on whether the dealer  
3 was an installer or had installers.

4 Q The dealer could hire a crew, right?

5 A Right.

6 Q And as a matter of fact, do you know whether or not the  
7 EMB is normally assembled by John Doe who's buying for his  
8 own fireplace or whether it's assembled as the result of a  
9 purchase at the dealer?

10 A No, I don't know.

11 Q Do you promote or encourage the use of your flame  
12 booster with a gas log set?

13 A Do we promote it?

14 Q Yeah, do you promote or encourage the use of your flame  
15 booster with a gas log set?

16 A I don't know what we do specifically to promote it. We  
17 encourage the use of our products, of course.

18 Q That being one of them?

19 A That is one of our products.

20 Q Now the ember flame booster does get connected to the  
21 pan sooner or later if it is used for its intended purpose  
22 for the primary dual main gas source and is finally put in  
23 use along with a grate and a log set, true?

24 A Yes.

25 Q Sir, when was it that you began to market the EMB



1 burner system?

2 A I believe we began to market it in season of '96.

3 Q Did you put it in a catalog at that time?

4 A I believe we put it in the catalog the next time we had  
5 that catalog produced, which would have been, I believe,  
6 March of '97.

7 Q So '96, '97, that framework right?

8 A Yes, sir.

9 Q On the other hand, the way you look at it, you had  
10 already had it 20 years, right?

11 A Actually now I look at it, that we've had it for over 30  
12 years.

13 Q Why did you put in it the catalog and start selling it  
14 for the first time, then, when you just told me?

15 A Well, as a part of our normal way of doing business, we  
16 have different products that we put in the catalog, that we  
17 take out of the catalog. It's our -- our distribution, and  
18 customers like to see different things.

19 Q As a matter of fact, those things that you referred to  
20 20 or 30 years ago have likenesses, but they're not really  
21 the same, exactly the same, are they, as the EMB booster?

22 A The items that I'm referring from 30 years ago are not  
23 the same as the EMB booster in terms of -- they're not the  
24 exact same product as the EMB booster.

25 Q And what happened is most of these old things just fell

JT-APP 1221

1 by the wayside. Did you tell me it was like, I can't  
2 remember, was it a blacksmith shop or what it was? Horse and  
3 buggy, that's what it was.

4 A I don't remember that.

5 Q Would you like to see it?

6 A Yes, if you would like to show it to me.

7 Q Well, I really won't quarrel with you about it unless  
8 you quarrel with me about it. If you tell me, I didn't say  
9 that, I won't find it.

10 A I didn't say I didn't say it. I said I don't remember  
11 saying that. I don't remember that.

12 Q That was the situation, though, wasn't it? All those  
13 old things went by the wayside?

14 A I don't think that's true at all.

15 Q Excuse me just a moment, please.

16 (Pause)

17 Q Page 20 -- page 20. I'm sorry. I was having trouble  
18 seeing it. Now I have a better image of it.

19 Would you look over that page, sir?

20 A Yes, sir.

21 Q Of your deposition. Well, you're absolutely right. It's  
22 buggy whip instead of horse and buggy.

23 A Where is that?

24 Q On page 21, which we now have up. And you see that your  
25 answer again at lines 5 and 6 was, "Well, you see buggy whips

1 performed a function." And you were explaining to me, and  
2 if you read in context that a lot of these things went by the  
3 boards because they were like buggy whips?

4 A I would like to again go back to review the  
5 documentation here because I know again, I'm sorry, I believe  
6 you're taking my words out of context.

7 Q Well, I will not let you do that, but the judge may.

8 THE COURT: . Let's go on.

9 MR. HARRIS: Shall we go on?

10 THE COURT: Yeah, go on.

11 Q Probably not the end of the world either way.

12 Okay. As I understand it, in your marketing of the  
13 EMB you did use efforts to sell through your distributors and  
14 dealers to the public the EMB item for use of it would be  
15 with the G 4. That part's true, isn't it?

16 A The same efforts that we would use with trying to sell  
17 products. That's the business we're in.

18 Q And you would describe how this was done as you did, I  
19 think, in one circular we looked at. You would describe the  
20 way to use the EMB, right?

21 A I would -- I'm sure that we would describe the way to  
22 use it.

23 Q Yes.

24 A Yes.

25 Q And there's really only basically one way, wasn't there?

1 A There's only one way to use the product, yes.

2 Q And while you were doing this over a period of time  
3 beginning as early as December 1999 and running no later than  
4 May of 2000, you knew that you were accused of infringing a  
5 product that was the EMB and that such -- and if some  
6 accusation was true, that you had no right to sell it, you  
7 were aware of the patent over the period of time that I just  
8 described and --

9 A I was aware of the patent when we received the letter of  
10 December 10th.

11 MR. HARRIS: Your Honor, I need just a couple of  
12 minutes, and then I don't think I'll take over 10 more.

13 (Pause)

14 Q We put up on the screen Plaintiff's Exhibit 18 which has  
15 previously been discussed, but I need your general comment on  
16 its accuracy. Would you please go over it?

17 A I can't comment on the accuracy of Golden Blount's  
18 costs.

19 THE COURT: I can't hear the objection.

20 MR. MONCO: I'll object, Your Honor, to this  
21 exhibit. Lack of foundation. This document reflects figures  
22 coming from the Golden Blount Company and not R. H. Peterson.  
23 And now this witness, Mr. Bortz, is being asked to confirm  
24 figures coming from Golden Blount's Company, and he's not in  
25 a position to do that.

JT-APP 1224

1 So to the extent that counsel is requesting Mr.  
2 Bortz to render some kind of a confirmation or opinion or  
3 whatever on figures provided by Mr. Blount and the Blount  
4 Company. We would certainly object to that.

5 THE COURT: Response.

6 MR. HARRIS: Yes, the response is shown number of  
7 ember boosters sold by H. R. Peterson Company, 3,689. And  
8 that's been said is completely mistaken.

9 THE COURT: Okay. The objection is overruled.

10 BY MR. HARRIS:

11 Q You have one number really to address. Do you see it?  
12 It's the number of ember boosters sold by R. H. Peterson  
13 Company --

14 (Pause)

15 Q That goes to April 30th of this year. That's the most  
16 updated we have it.

17 THE COURT: Okay.

18 Q All I'm asking you is not dollars, cents or anything  
19 else, but the number of units.

20 A Is that -- are you asking is that a correct number of  
21 units?

22 Q Yes.

23 A It is -- it looks like it is a correct number of units.  
24 Yes.

25 MR. HARRIS: No further questions.

1 THE COURT: Okay. We'll take a luncheon break.  
2 We'll take one hour. We'll be in recess.

3 (Recess at 12:00)

4 (Resume at 1:05)

5 THE COURT: Have a seat, please.

6 MR. MONCO: Your Honor, I have conferred with  
7 plaintiff's counsel. We were just concerned about the  
8 scheduling, making sure we finish by tomorrow. And I had  
9 initial inquiry. Is Your Honor going to want closing  
10 arguments tomorrow?

11 THE COURT: Yes, I would like to finish the whole  
12 thing.

13 MR. MONCO: Okay. Your Honor would like closing  
14 arguments.

15 THE COURT: Yes, I would like closing arguments.

16 MR. MONCO: Second of all, we were wondering if  
17 the court's schedule would permit we might go perhaps half  
18 hour or hour longer tonight.

19 THE COURT: Sure.

20 MR. MONCO: I'm very confident we will be able to  
21 finish everything up tomorrow, but if we could do an extra  
22 half hour or hour tonight, that would be helpful.

23 THE COURT: You want to start at six o'clock in  
24 the morning?

25 MR. MONCO: I don't know about that, judge. Maybe

JT-APP 1226

1 we could talk about that at the end of the day. Thank you.

2 CROSS-EXAMINATION

3 BY MR. MONCO:

4 Q Mr. Bortz, I think on your direct testimony you stated  
5 that you were the vice-president of Peterson Company and that  
6 you were also co-owner, correct?

7 A Yes, sir.

8 Q Okay. When did you become a co-owner of Peterson  
9 Company?

10 A In 1977 when the Peterson Company was purchased. We  
11 purchased it.

12 Q Who did you purchase that from?

13 A Beatrice Foods.

14 Q Okay. On your direct testimony you stated that Mr.  
15 McLaughlin provided three opinions to you. Do you recall  
16 that testimony?

17 MR. HARRIS: Object, Your Honor. There was no  
18 such testimony. The three opinion testimony came instead  
19 from Mr. McLaughlin, and I never could get the witness to say  
20 that there were three opinions.

21 MR. MONCO: I'll withdraw the question, judge.

22 THE COURT: Okay.

23 BY MR. MONCO:

24 Q Did you receive opinions from Mr. McLaughlin on the  
25 issues of invalidity and non-infringement?

JT-APP 1227

1 A Yes, I did.

2 Q And did you rely on those opinions?

3 A Absolutely.

4 Q Okay. I would like you to turn, if you would, please,  
5 to Defendant's Exhibit 61. And do you recognize that  
6 document?

7 A I recognize it.

8 Q And what is Exhibit 61? Could you --

9 A Defendant's Answer to Plaintiff Golden Blount Inc.'s  
10 First Set of Interrogatories.

11 Q Okay. Those are the answers of Robert Peterson Company,  
12 correct?

13 A Yes.

14 Q Turning to interrogatory No. 2 and the answer appearing  
15 on page 4 and 5.

16 MR. MONCO: Your Honor, may I approach the witness  
17 for a moment?

18 THE COURT: Yes.

19 Q Okay. If you take a look at the answer to Interrogatory  
20 No. 12, do you have that in front of you?

21 A I do.

22 Q Okay. Who prepared the answer to Interrogatory No. 2?

23 A I did.

24 Q Okay. And what -- could you just summarize what's  
25 described in the answer to interrogatory No. 2?

JT-APP 1228



1 A It's a history of our company's multiple burner type of  
2 log sets with multiple valves.

3 Q Okay. And I would ask you to take a look at  
4 Interrogatory No. 12 and the answer. And have you seen that  
5 answer before?

6 A Yes, I have seen that answer.

7 Q Okay. And Mr. McLaughlin stated on his examination  
8 earlier today that he prepared the answer to that  
9 interrogatory. And does that interrogatory reflect the oral  
10 opinions that Mr. McLaughlin gave to you which you previously  
11 referred to on your direct testimony?

12 MR. HARRIS: Objected to, Your Honor. There's no  
13 way in the world the witness can answer about an  
14 interrogatory that was filed long after the question of oral  
15 opinions.

16 I don't know what to call the objection except  
17 there's no foundation that shows he knows anything about it.  
18 He would need to be taken on voir dire at great length to try  
19 to make an interrogatory and litigation into written opinion  
20 or the substance of a written opinion of a number of years  
21 ago is, in my judgment, not proper and just.

22 THE COURT: Okay. Response.

23 MR. MONCO: Response is, Your Honor, that Mr.  
24 McLaughlin testified on direct that this interrogatory was  
25 answered about the time that he rendered his third opinion to

JT-APP 1229

1 Mr. Bortz, and those are more or less concurrent responses  
2 that were provided -- not concurrent responses, but  
3 concurrent analyses that were provided both to Golden Blount  
4 in response to the interrogatories as well as the oral  
5 opinion provided by Mr. McLaughlin and Mr. Bortz. We  
6 certainly think Mr. Bortz is certainly in a position to  
7 confirm if this answer reflects the analysis that was  
8 provided by Mr. McLaughlin to him.

9 THE COURT: Okay. When are these dated?

10 MR. MONCO: I'm sorry. Let me just lay a little  
11 bit of foundation here, Your Honor.

12 BY MR. MONCO:

13 Q Take a look at that document, Mr. Bortz. Go to the end  
14 of it. Do you see your signature?

15 A Unfortunately, I don't see -- I'm sorry.

16 This is my signature, was dated June 5th, 2001.

17 Q 2001, correct?

18 A Yes, sir.

19 Q Okay. And Mr. McLaughlin testified on direct  
20 examination that he provided you with a third opinion  
21 regarding non-infringement and invalidity sometime on or  
22 about May of 2001; is that correct?

23 A Yes.

24 Q Okay.

25 THE COURT: The objection is overruled.

1 MR. MONCO: Thank you, Your Honor.

2 BY MR. MONCO:

3 Q Returning to my question, Mr. Bortz, does the answer  
4 provided in interrogatory No. 1 accurately reflect the  
5 opinion which Mr. McLaughlin provided to you on or about May  
6 of 2001 regarding the issue of non-infringement?

7 A Yes.

8 Q Turning to the answer to interrogatory No. 3, if you  
9 would do that, please.

10 A (Witness complies)

11 Q Do you have that in front of you?

12 A Yes.

13 Q Does the answer provided in interrogatory No. 3, which  
14 Mr. McLaughlin testified that he prepared, does that  
15 accurately reflect the oral opinion that was provided to you  
16 in May of 2001 regarding the issue of invalidity?

17 A Yes.

18 MR. MONCO: May I have a moment, Your Honor,  
19 please?

20 THE COURT: Yes.

21 (Pause)

22 Q Mr. Bortz, just quickly. On your direct examination  
23 there were questions asked with regard to the sale of the  
24 ember flame booster together with the G 4 burner. Does  
25 Peterson Company sell the ember flame booster separately

1 packaged to its distributors?

2 A Yes.

3 Q And it's separate from the G 4 burner?

4 A Yes.

5 Q Is it separately priced?

6 A Yes.

7 MR. SELINGER: We have no further questions, Your  
8 Honor.

9 THE COURT: Okay. Redirect.

10 REDIRECT EXAMINATION

11 BY MR. HARRIS:

12 Q Would you tell us, please, what Mr. McLaughlin advised  
13 you about the doctrine of equivalence applicability in this  
14 case at the time that he gave you this advice that has now  
15 been put into an interrogatory? What did he tell you about  
16 the application of the doctrine of equivalence?

17 A I don't know the terminology.

18 Q Did he tell you about the doctrine of equivalence?

19 A Not to the best of my knowledge.

20 Q If I said something about a function, way and result,  
21 would you understand what that had to do with the patent law?

22 A If you -- what I said to you was, I don't understand the  
23 doctrine of equivalence. I don't know what that term means.

24 Q I see. And he didn't mention that to you, did he?

25 A Not to the best of my knowledge.

1 Q And did he go over with you the history of prosecution  
2 of the patents? In other words, like sitting down at a table  
3 and going over the record of prosecution?

4 A I'm sorry. Going over?

5 Q The record of prosecution.

6 A We did not sit down at a table and go over the record of  
7 prosecution.

8 Q Some call it the file wrapper, some the history of  
9 prosecution, and so on.

10 A I'm just not familiar with those terms.

11 Q You don't know anything about it.

12 A I'm not sure. I'm not familiar with those terms.

13 Q Let me try this term. What did he tell you about the  
14 prosecution?

15 A I'm not familiar with the term prosecution.

16 Q What did he tell you about the various patent  
17 applications that had been filed by Golden Blount that  
18 finally matured into the patent in suit?

19 A He mentioned to me that we would have to prove that we  
20 had done certain things on the product, I believe it's before  
21 1993 or 1994, because that was, for lack of a better term,  
22 the important date.

23 Q And what were those things?

24 A That we would have to show that whatever we -- whatever  
25 was done, whether by us or by others, to show either

1     invalidity or infringement again -- I get confused -- would  
2     have to be shown to have been done before '93 or '94.

3     Q     Is that all that you've learned about the record of  
4     prosecution from speaking with him?

5     A     He mentioned to me that the reason was that -- again, my  
6     knowledge of terminology is not strong -- was that Golden  
7     Blount first -- I'm not sure of the words. First submitted,  
8     maybe, is the right word? Submitted some sort of patent  
9     application on that date.

10    Q     What did he tell you that the record of prosecution  
11    showed or proved?

12    A     Again, I don't know what record of prosecution.

13    Q     You know that you -- it's been introduced, the record of  
14    prosecution has, indirectly at least, in this proceeding, and  
15    it has to do with the various applications, continuations or  
16    continuations in part that are filed before the patent  
17    office. And in some cases culminates in the issuance of a  
18    patent. And that is what I'm asking you about.

19           What did he tell you about all that?

20    A     Well, he told me that the submission of the first patent  
21    was in, again, 1993 or 1994. And he told me that there were  
22    again rejection -- I don't know what the right word is again,  
23    but certain of the patent applications were rejected. Is  
24    that the right word?

25    Q     I believe you did get the right word.

1 A Thank you. And that then there were more submissions.

2 Q Yes. As so what did he tell you the bottom line was out  
3 of all that? Did he tell you there's any file wrapper  
4 estoppel?

5 A I have not heard those terms.

6 Q Did he tell you that there was something done in the  
7 prosecution that was severely limiting to how the patent  
8 claim might be expanded? If so, please tell me what.

9 A I don't believe he told me those types of words.

10 Q In answer to interrogatory No. 1, now, this is one you  
11 were involved in or you discussed with your lawyer, right?

12 A May I see that?

13 Q Sure.

14 MR. MONCO: Your Honor, I'm going to object to the  
15 question. I believe the witness testified that he prepared  
16 the answer to interrogatory No. 2 and that the answer to  
17 interrogatory No. 1 was prepared by Mr. McLaughlin.

18 THE COURT: Okay.

19 BY MR. HARRIS:

20 Q Is it fair to say, then, that you know nothing about the  
21 response to interrogatory No. 1?

22 I'll yield to their objection.

23 You know nothing about the response to  
24 interrogatory No. 1?

25 A It's not fair to say that.

JT-APP 1235

1 Q It's true, is it not, that most of the things in answer  
2 to interrogatory No. 1, if you now read it, many of them are  
3 not even in issue in this lawsuit?

4 A I don't know that.

5 Q Well, do you know either way?

6 A I don't know.

7 Q You have an opinion, and you don't know?

8 A I don't have an opinion.

9 MR. MONCO: Your Honor, the answer to  
10 interrogatory No. 1 was prepared by Mr. McLaughlin. It's in  
11 response to a question to identify the areas of  
12 non-infringement. This is a legal opinion that's being  
13 provided in interrogatory No. 1. Mr. Bortz is not an  
14 attorney, and counsel is now asking him for his opinion in  
15 regard to what patent law states with regard to the issue of  
16 non-infringement. I think that's totally unfair.

17 THE COURT: Okay.

18 MR. HARRIS: Well, let me withdraw that and go to  
19 Interrogatory No. 2.

20 Q I understand you prepared it.

21 A I prepared Interrogatory No. 2.

22 Q And it does not contain a legal opinion that was given  
23 you, does it?

24 MR. MONCO: Your Honor, I'll object to the  
25 question. The interrogatory doesn't ask for a legal opinion.

JT-APP 1236



1 The interrogatory asking for a chronicle of the history of  
2 the development of the product -- of the accused product.  
3 This is what Mr. Bortz provided. I believe counsel's  
4 questions are misleading to a gross extent.

5 THE COURT: I'll overrule the objection.

6 You understand the question?

7 THE WITNESS: No.

8 A Would you repeat, please?

9 Q Yes. I think what I asked you is that, is Interrogatory  
10 No. 2 a legal opinion? Does it contain any legal opinion?

11 A I'm not sure. I prepared it. I'm not a lawyer.

12 Q And you didn't have any knowledge by which you could  
13 have prepared a legal opinion at that time, did you?

14 A I'm not a lawyer.

15 Q I would like to go to interrogatory No. 3 now. Do you  
16 adopt any knowledge of Interrogatory No. 3 or do you just say  
17 it's something that your lawyer wrote?

18 A I think I said to you that I thought I had a little bit  
19 of knowledge on Interrogatory No. 1.

20 Q I'm not asking about No. 3.

21 A Yes, sir, and I think I have some knowledge of  
22 Interrogatory No. 3.

23 Q And the timeframe this was prepared, which is in fairly  
24 early 2001, right?

25 A This was prepared --

1 Q June the 5th, 2001?

2 A My signature was dated June 5th, 2001.

3 Q And explain to me what anticipated means in the answer  
4 to Interrogatory No. 3.

5 MR. MONCO: Object, Your Honor. That calls for a  
6 legal conclusion that this witness is not competent to  
7 provide. Again, the answer to Interrogatory No. 3 was  
8 prepared by Mr. McLaughlin and submitted in response to legal  
9 inquiry contained in the interrogatory itself.

10 THE COURT: Okay.

11 MR. HARRIS: Well, Your Honor, of course, that's  
12 correct, what was stated there. What's bad here is the  
13 effort, then, to attribute this work done at this time by Mr.  
14 McLaughlin to this witness or to even acknowledge that was  
15 transferred to this witness.

16 THE COURT: Okay.

17 MR. HARRIS: I should have a right to test him  
18 fully on it.

19 THE COURT: Okay.

20 MR. MONCO: Your Honor, I just simply respond that  
21 the witness stated he reviewed and signed these  
22 interrogatories on his cross examination which I submitted to  
23 him, and that's the extent of it as far as I know. And the  
24 question that I asked him was, did the answer to  
25 Interrogatory No. 3 conform with what Mr. McLaughlin had told

1 him previously? That's all the examination stated.

2 We're not offering Mr. Bortz as a lawyer because he  
3 simply is not a lawyer. I think the question that counsel is  
4 asking him, he's supposed to now explain the meaning of the  
5 word anticipation.

6 MR. HARRIS: I move to strike that language that  
7 opposing counsel just used.

8 THE COURT: That's overruled, but I overrule the  
9 objection, also. So you go ahead.

10 BY MR. HARRIS:

11 Q Sir, what does anticipation mean?

12 A I do not know.

13 Q What does obvious mean, and what is the test for  
14 obviousness?

15 A I think I understand the word obvious. I do not  
16 understand the test for obviousness.

17 Q You understand obvious as it's used in the dictionary,  
18 is that what you mean?

19 A I understand the word obvious, correct.

20 Q As it's used in the dictionary?

21 A If there is a specific legal meaning to the word  
22 obvious, I don't know that that would be different in my  
23 mind.

24 Q I assure you there is, and thank you for telling me you  
25 don't know.

1 A If it's different, I don't know.

2 Q Now let's go to that point in time, June the 5th, 2001.

3 And tell me at that point in time who the others were in this  
4 country that knew or used the purported invention before it  
5 was invented. Who were those persons as you then knew?

6 MR. MONCO: Your Honor, I'm going to object to  
7 this interrogatory. As we indicated previously, Mr.  
8 McLaughlin prepared the interrogatory. Counsel had Mr.  
9 McLaughlin on the stand. He should have asked Mr. McLaughlin  
10 who Mr. McLaughlin was referring in that answer, and I'm sure  
11 Mr. McLaughlin could have identified for him.

12 This witness did not prepare the answer, and we  
13 would object to this line of questioning.

14 THE COURT: Okay. Overruled.

15 You need the question repeated?

16 BY MR. HARRIS:

17 Q Can you answer?

18 A (No response.)

19 Q Put yourself back in the shoes of June the 5th, 2001.

20 A Right. I think there were many, many people.

21 Q Would you name at least 19 of them?

22 A Yes, if you can give me my file, I brought some  
23 information.

24 Q You have information telling us who knew or used the  
25 subject matter; is that right? That's not --

JT-APP 1240

1 A Not the subject matter. Who used multiple burners and  
2 multiple valves or multiple burners at least.

3 Q What you're talking about is they used things that you  
4 thought were close or what somewhat close to the invention;  
5 is that right?

6 A I think so, like what is on the table.

7 Q You mean like the one piece of hardware that's been  
8 added to the table?

9 A Yes.

10 Q Now, then, you've indicated you didn't know anything  
11 about the prosecution history of the patent; is that correct?

12 A I don't think so. I think I didn't know the term  
13 prosecution history.

14 Q Well, then, tell us what you know about the prosecution  
15 history?

16 A Well, I think I mentioned that Mr. McLaughlin told me  
17 that a patent was submitted, and a patent submission was  
18 submitted in 1993 to the patent office and was rejected. And  
19 there were other submissions. And at least one other  
20 rejection, and a patent was issued in 1999.

21 Q Would you explain to me, then, the second paragraph in  
22 answer to interrogatory No. 3, the culmination of references  
23 that were cited in the prosecution history of the patent  
24 together with Peterson F 3 series and related publication and  
25 Peterson HE 1 adjusting hearth elbow and installation and

JT-APP 1241

1 instructions therefor.

2 Please focus on that paragraph and explain to me  
3 what that combination was that's being talked about in the  
4 record of prosecution.

5 A I can tell you what's being talked about. What's being  
6 talked about is that product on the table.

7 Q Can you unravel that from a point of view of giving us a  
8 pretty good explanation what that paragraph means?

9 A Yeah. It says in combination with at least the Peterson  
10 F 3 series circular burner -- that's that -- and related  
11 publications. And I would imagine that would be the  
12 instructions and drawings that have been shown here and --

13 Q Did they exist then?

14 MR. MONCO: Your Honor, I'm going to object. He's  
15 interrupting the witness.

16 THE COURT: Yeah, he hasn't finished.

17 MR. HARRIS: I beg your pardon.

18 THE COURT: Go ahead and finish your answer.

19 A Pardon?

20 Q Go ahead.

21 A Did they exist then? Yes. They existed since the  
22 1960s.

23 Q And let me ask you if you can tell me how those  
24 references cited in the prosecution history combine with that  
25 other subject matter?

JT-APP 1242

1 A Again, when you say the prosecution history, I don't  
2 know -- I don't know what you mean.

3 Q When did your attorney first get a prosecution history?

4 A I don't know.

5 Q Did you know that prosecution histories are often very  
6 valuable in patent litigation?

7 A No, I did not.

8 Q And an evaluation as to whether there's an infringement  
9 or invalidity, did you know that?

10 A Did I know that an --

11 Q They were often very valuable in making an evaluation  
12 for an infringing opinion or invalidity opinion?

13 A No.

14 MR. HARRIS: I think I had one more. Let me look.

15 (Pause)

16 MR. HARRIS: Good news. I don't. Pass the  
17 witness.

18 THE COURT: Okay.

19 MR. MONCO: Your Honor, we have no questions of  
20 the witness.

21 THE COURT: Thank you very much. You may step  
22 down.

23 THE WITNESS: Thank you, sir.

24 THE COURT: Next witness.

25 MR. HARRIS: Give us just a moment, Your Honor, to

1 see if we have another witness.

2 THE COURT: Okay.

3 MR. MONCO: Your Honor, if I may just for  
4 housekeeping purposes. I would like to move into evidence  
5 all of the exhibits that have been presented by the defendant  
6 during the direct examination, presented by our cross  
7 examination of the witness presented on plaintiff's case.

8 THE COURT: They are admitted.

9 MR. MONCO: Thank you, Your Honor.

10 MR. HARRIS: I'll make the flip side of the coin  
11 in the way of a motion for our subject matter.

12 THE COURT: Okay. That is granted.

13 MR. HARRIS: I'll be quick, Your Honor.

14 THE COURT: Okay.

15 (Pause)

16 THE COURT: Let's just take a five minute break  
17 while they confer.

18 (A recess was held at 1:35)

19 (Resume at 1:40)

20 THE COURT: Have a seat, please.

21 MR. HARRIS: Your Honor, as a prelude to resting  
22 or closing, I will first make a motion for judgment as a  
23 matter of law.

24 THE COURT: Okay. I'll just carry that motion.

25 MR. HARRIS: Thank you, Your Honor.

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1 THE COURT: Okay.

2 MR. HARRIS: Now I will close for the plaintiff.

3 THE COURT: Okay. Thank you, Mr. Harris.

4 How many witnesses do we have left?

5 MR. MONCO: We probably would have four, maybe  
6 five, but I suspect four witnesses.

7 THE COURT: Okay.

8 MR. MONCO: . Your Honor, at this time we would like  
9 to make a motion for judgment as a matter of law on the issue  
10 of invalidity, non-infringement on the issue of lost profits,  
11 and also on the issue of willful infringement. May I present  
12 it to the court now?

13 THE COURT: Okay. I'll just carry that motion,  
14 also.

15 MR. MONCO: Oh, you will? Okay.

16 At this time, Your Honor, we would like to call Mr.  
17 Vince Jankowski.

18 THE COURT: Okay. If you'll come forward, please.

19 THE COURT: If you'll raise your right hand,  
20 please.

21 (Witness sworn by the court.)

22 THE COURT: Good. Just have a seat right up  
23 there.

24 VINCENT PAUL JANKOWSKI, (Sworn)

25 was called as a witness by the Defendant having been first

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1 duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. MONCO:

4 Q Mr. Jankowski, would you state your full name for the  
5 record and spell your last name?

6 A My name is Vincent Paul Jankowski. J-a-n-k-o-w-s-k-i.

7 Q How old are you, Mr. Jankowski?

8 A I'm 76.

9 Q Okay. And, Mr. Jankowski, could you briefly state what  
10 your education is following completion of high school?

11 A I had one year of business administration plus some more  
12 company administration.

13 Q Okay. And could you briefly describe your work history  
14 following graduation from high school?

15 A My -- pardon?

16 Q Your work history.

17 A My work history has been mainly in production management  
18 with company in Cleveland, Ohio, for nine years. Axle  
19 Manufacturing for five years in Cleveland, Ohio, and about  
20 one year here in California with an axle manufacturing  
21 company and 42 and a half years with Robert H. Peterson  
22 Company.

23 Q Could you briefly identify what positions you've held  
24 with the Robert H. Peterson Company over those 42 years?

25 A I was hired mainly as production and -- production

JT-APP 1246

1 control, manufacturing, designing of products.

2 Q And could you briefly describe what you did as a  
3 designer of products for Robert H. Peterson Company?

4 A Main products were in the designing of the gas logs  
5 themselves and some of the burner systems.

6 Q And I would like you, if you would, please, to take a  
7 look at Exhibit D 45, and we'll put that up on the screen in  
8 front of you.

9 Okay. Could you identify what Exhibit D 45 is?

10 A It's an installation instructions for front flame  
11 burners.

12 Q Okay. Is that known as the F 3 burner?

13 A Pardon?

14 Q Is that known as the F 3 burner?

15 A Well, the third one down is known as the F 3 burner.

16 Q Okay. Those identified as figure 3, the circular set  
17 burner?

18 A That's correct.

19 Q Okay. And could you briefly describe the operation of  
20 the F 3 burner?

21 A The F 3 burner was really designed for a circular  
22 fireplaces. It could also be used in see through fireplaces.  
23 It consisted because it had depth, so that it would take the  
24 full inside area of a fireplace. This has three burners on  
25 the figure 3 that you see supplied from a gas line hooked up

JT-APP 1247

1 to the fireplace supply. And when the burner is in  
2 operation, all three burners are fed from the gas line in the  
3 fireplace.

4 Q Okay. And if I may ask you, Mr. Jankowski, could you  
5 step off the witness stand and step over to the table,  
6 please? I would like to you identify, if you would, please,  
7 what's been identified as Defendant's Exhibit 45 A.

8 What is Exhibit 45 A?

9 A Exhibit 45 A is the F 3 burner.

10 Q Okay. And could I ask you, if you would, please, to  
11 trace for the court how gas is moved through the F 3 burner,  
12 Exhibit D 45 A?

13 A Yes. The gas valve is attached to the supply line in  
14 the fireplace itself. When the burner is in operation, to  
15 ignite the burner you have to open up the gas valve which  
16 supplies gas (indicating) through all three burners. All  
17 three burners have individual hearth elbows.

18 Q What is a hearth elbow?

19 A A hearth elbow is an adjustment valve to control the  
20 flow of gas to the burner.

21 Q Okay. And in controlling the flow of gas to the burner,  
22 can the gas be shut off to any one of the individual burners  
23 in D 45 A?

24 A Yes.

25 Q It can be also adjusted upwardly?

1 A Yes.

2 Q Why don't you return to the stand, please.

3 I would like you, if you would, please, to take a  
4 look at Exhibit D 45 which is appearing in front of you. I'm  
5 sorry. D 44.

6 And could you identify what D 44 is?

7 A That's the hearth elbow.

8 Q Okay. Is that a description of the operation of the  
9 hearth elbow?

10 A Yes, it is.

11 Q Okay. And to your knowledge -- is that the hearth elbow  
12 that was identified on Exhibit D 45 A?

13 A Yes.

14 Q I'm sorry. Okay. To your knowledge when did Peterson  
15 Company begin selling the F 3 burner as hearth elbows?

16 A Bob Peterson designed this burner and the component  
17 parts in 1964.

18 Q And was it on sale in the 1960s for Peterson Company?

19 A About that time, yes.

20 Q Okay. I next like you to turn to Exhibit D 49, please.

21 THE COURT: What number?

22 MR. MONCO: I'm sorry, Your Honor. D 49. If I  
23 may approach the witness to get the hard copy.

24 THE COURT: Yes.

25 Q Mr. Jankowski, could you identify Exhibit D 49, please?

1 A It's the Peterson Real-Fyre phrase list for 1977.

2 Q Okay. And looking down at Roman numeral II under the  
3 heading F entitled, Log Sets with the Front Flame Burner, do  
4 you see that?

5 A Yes.

6 Q Looking further down under the heading entitled golden  
7 oak does that show the F 3 burner there?

8 A No.

9 Q What is shown for Golden -- oh, okay. If you would,  
10 please, turn to the third page of Exhibit D 49, please.

11 A Yes.

12 Q Is the F 3 burner shown on the third page of Exhibit D  
13 49?

14 A Yes, it's shown under F series front flame burner only,  
15 and it's called circular F3ST.

16 Q Okay. Now returning back to the front page of Exhibit D  
17 49 under the golden oak down under Roman numeral II. Do you  
18 have that in front of you?

19 A Yes.

20 Q Okay. What is referred to under -- by RF 3 under golden  
21 oak?

22 A RF 3 is the circular log set.

23 Q So that would include what?

24 A That would include the burner assembly that you see  
25 there on the table plus the logs.

JT-APP 1250

1 Q Okay. And referring up above that to Roman numeral I  
2 that's entitled G 4 series, what does the G 4 refer to?

3 A G 4 refers to -- G 4 refers to a by reason of assembly  
4 which is the -- is the -- is the custom glowing ember burner.

5 Q And I would like to show you what has been marked as  
6 Plaintiff's Exhibit D 31. And I would ask you to identify --  
7 if you could step off the witness stand, please?

8 A (Witness complies).

9 Q And identify for the court what is the G 4 burner, if  
10 that's shown here.

11 A The G 4 burner itself is this portion (indicating).

12 Q Okay.

13 A The pan, the injector, and then it would have a cat bite  
14 on the end of it.

15 Q Would it also include this burner?

16 A Yes.

17 Q Okay. When did Peterson Company begin selling the G 4  
18 burner?

19 A The G 4 burner became available roughly about in the  
20 seventies.

21 Q Thank you.

22 MR. MONCO: I'm sorry, Your Honor. May I have one  
23 moment, please?

24 THE COURT: Yes.

25 (Pause)

-JT-APP 1251-

1 Q Mr. Jankowski, will you please turn to Exhibit D 46.

2 Please would you identify what's shown on Exhibit D 46?

3 A This again is the front flame burner. The assembly that  
4 you see on the table there can be used as a -- for a 30 inch  
5 log set or 36 inch log set. The burner that you see on  
6 Exhibit D 46 was designed also for circular setting and 24  
7 inch size.

8 Q It shows two burners instead of three?

9 A That's correct.

10 Q Did Peterson Company sell two burner sets as opposed to  
11 three burner sets during the 1970s?

12 A Yes.

13 Q Okay.

14 A Late sixties and seventies.

15 Q Okay. And looking down at the bottom portion of Exhibit  
16 D 46, there's a reference to if we could have an enlargement  
17 down at the bottom portion here where I'm pointing. There's  
18 a reference to Charmglow Peterson products. Does that help  
19 date this document for you?

20 A Pardon?

21 Q Can you put a date on this document with reference to  
22 Charmglow Peterson products, the one that's highlighted on  
23 the screen?

24 A Yes.

25 Q When would this document have been available?



1 A It was available also in the late sixties and seventies.  
2 Q Thank you. Now does this document also -- now there's  
3 some handwriting on this document. Whose handwriting is it?  
4 A That's mine.  
5 Q Okay. And there's a reference to hearth elbow, hearth  
6 elbow shown on that. Do you see that?  
7 A Yes.  
8 Q Is that the same hearth elbow we've talked about with  
9 respect to the other F 3 burner?  
10 A Yes, it is. Yes.  
11 Q And that adjusts -- how many hearth elbows are shown on  
12 Exhibit D 46?  
13 A There are two burners, there are two hearth elbows.  
14 Q For multiple burner was it standard to use multiple  
15 valves?  
16 A Yes.  
17 Q If you would, please, I would ask you next to turn to  
18 Exhibit D 43, please?  
19 A (Witness complies).  
20 Q What is shown on Exhibit D 43?  
21 A D 43 also is an assembly that was designed for a  
22 circular fireplace having three G 4 burners.  
23 Q Is that your handwriting?  
24 A Yes.  
25 Q Do you recall when you prepared that design?

1 A It was in the seventies.

2 Q And you said that that shows three G 4 burners in a  
3 series?

4 A That's correct.

5 Q Okay. Are there hearth elbows shown on that or any type  
6 of adjustable valve?

7 A Yes, to each burner.

8 Q To each G 4 burner there is an individual hearth elbow?

9 A That's right.

10 Q Okay.

11 Q Do you recall who or what this design D 43 was for?

12 A Yes, I do. This -- I recall that this was designed for  
13 Malm Fireplace for Mr. John Palaski who was our distributor  
14 in New Jersey.

15 Q And in the course of your work for Peterson Company  
16 were these type of designs that you've done here such as  
17 shown on Exhibit D 43 routine for you?

18 A Yes. In my 42 years I also took care of customer  
19 service and probably had hundreds of calls for special  
20 installations trying to use our component burners and things  
21 and assembling these in different types of fireplaces.

22 Q And could you generally describe who would call you for  
23 this? Would this be distributor of Peterson or who would be  
24 calling you for this type work?

25 A Dealers, installers, distributors.

JT-APP 1254

1 Q I next ask you to turn to Exhibit D 51 and ask you if  
2 you can identify that, please.

3 A Yes.

4 Q What does Exhibit D 51 show?

5 A The F 3 series circular burner.

6 Q Okay. Does that have the multiple hearth elbows that  
7 you referred to previously?

8 A Yes, it does.

9 Q Okay. It would be a hearth elbow for each burner,  
10 correct?

11 A That's correct.

12 Q Up in the top paragraph there's a reference to a type B  
13 installation. What is a type B installation?

14 A A type B installation would be component parts available  
15 to connect all three burners to the gas line which would  
16 consist of three installation kits, each one containing the  
17 hearth elbow and the compression sleeves and nuts.

18 Q I would next ask you to turn to Exhibit D 50.

19 A Yes.

20 Q And could you identify what is shown on Exhibit D 50?

21 A These are various connector valves plus the hearth  
22 adjustment elbow.

23 Q Okay. And it states down at the bottom Robert H.  
24 Peterson Company. Were these valves that were sold by Robert  
25 H. Peterson Company?

1 A That's right. Yes.

2 Q And when do you recall these valves being sold by the  
3 Robert H. Peterson Company?

4 And I would invite you to take a look at the  
5 screen in front of you. There's shown a copyright date of  
6 1971.

7 A Yes, they were in the late sixties.

8 Q I next ask you to turn to Exhibits D 47 and D 48 and  
9 ask if you can identify those drawings, please.

10 First of all, let's start with Exhibit D 47. Can  
11 you identify that, please?

12 A That's a U shaped burner that I drew and designed for,  
13 if I can recall, again I believe it was for Malm Spinna  
14 Fireplace.

15 Q I'm sorry. Is it Malm?

16 A Malm, M-a-l-m.

17 Q M-a-l-m. And were they a distributor for Robert  
18 Peterson?

19 A Yes. They were not a distributor. They were our  
20 dealers and distributors handle some of the products. Some  
21 of Malm's product.

22 Q So Malm was a dealer? I'm just trying to understand the  
23 relationship. Was Malm a dealer of Peterson products?

24 A Malm was not a dealer, but our distributors carried some  
25 of the Malm product.

1 Q Oh, I see. Okay. Okay.

2 How did it come that you made this drawing shown on  
3 Exhibit D 47? What caused this to occur?

4 A They wanted to put a U shaped burner in their fireplace.

5 Q Do you recall what type of fireplace it was?

6 A Yes. That was the Malm Spinna Fire.

7 Q Oh, that's a specific name of a type of fireplace?

8 A Yes.

9 Q Was it see through or circular?

10 A It was circular.

11 Q Circular fireplace?

12 A Um-hum.

13 Q Okay. I next ask you to take a look at Exhibit D 48,  
14 please. And what is Exhibit D 48?

15 A That's the same burner. I must explain on that.

16 Q Please. When you say the same burner, it's the same  
17 burner shown in D 47?

18 A Same burner configuration which made an addition to.

19 Q Okay. Please explain --

20 A I made an addition to print No. 47.

21 Q Okay. Then please explain the addition that you made.

22 A The reason I made the change is that we are putting two  
23 burners together and connecting it with an elbow and a  
24 connector. By injecting the gas into the lower burner from  
25 the right hand side, the gas will flow through the burner to

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1 the secondary burner. But in this configuration I found out  
2 I was getting a staircase effect where the flame was all  
3 brought to the back side and very little to the front side.  
4 Q Okay. When you use the term back, and grant since we're  
5 looking at this drawing in two dimensions, which one are you  
6 referring to as the front side and which one as the back  
7 side?  
8 A Where the gas started was into the bottom burner which  
9 was the main burner.  
10 Q Okay.  
11 A Going to the secondary burner which is on the top.  
12 Q Okay.  
13 A The force of gas causes the gas to go to the far end to  
14 burn at that high point and lower at the entrance of the main  
15 burner.  
16 Q So there was more flame coming out of, looking at this  
17 drawing, the top burner as opposed to bottom burner?  
18 A That's right at the end of the burner there.  
19 Q What did you do to correct that problem?  
20 A After testing it, I went to item No. D 48.  
21 Q And what did you change on D 48?  
22 A I took the 90 degree elbow out where the two burners are  
23 connected.  
24 Q Okay.  
25 A At the upper top left.

1 Q Okay.

2 A And I put the adjustment hearth elbow on there.

3 Q I believe you've indicated that there is shown in the

4 left hand -- upper left hand corner a reference to a hearth

5 elbow. Is that what you're referring?

6 A Yes.

7 Q Is that the adjustable hearth elbow that we've talked

8 about previously on your testimony?

9 A Yes.

10 Q Okay. And again, what effect does the hearth elbow have

11 on controlling the flow of gas in the --

12 A Several --

13 Q Wait. Let me finish my question. What effect does the

14 hearth elbow have on controlling the flow of gas in the

15 design shown on Exhibit D 48?

16 A I was able to adjust the adjusting screw inside the

17 elbow to change the flow of the gas to the secondary burner.

18 Q Okay. Now down at the bottom there is shown the date of

19 July 1, 1983. Do you see that?

20 A Yes.

21 Q Is that your handwriting?

22 A Yes.

23 Q Were the drawings shown on Exhibits D 47 or D 48 created

24 on or about July 1, 1983?

25 A That's right.

1 Q Okay. What did you do with D 48, the drawing?

2 A I sent the drawings to the dealer who requested them.

3 Q Okay.

4 A The reason --

5 Q Sure. Please continue.

6 A The reason they are marked CGA. Canadian Gas  
7 Association was an organization that had -- we had to have  
8 certification in certain areas to put these burners. And the  
9 two burners that you see there was a burner that they were  
10 manufacturing at that time for Canada.

11 Q Okay. So the double burner set was something  
12 Peterson Company was already manufacturing?

13 A Well, I took the two burners to make these.

14 Q Let me back up and ask this question. Were all the  
15 components that were used on Exhibits D 47 and D 48  
16 manufactured by or for Peterson Company?

17 A Yes.

18 Q Were they products available from Peterson Company's  
19 catalog?

20 A Yes.

21 MR. MONCO: May I have just a moment, Your Honor?

22 THE COURT: Yes.

23 (Pause)

24 Q Mr. Jankowski, would you next please turn to Exhibit D  
25 52?



1 A Yes.

2 Q I'll ask you if you could identify Exhibit D 52 for the  
3 record, please?

4 A This is a Robert H. Peterson Company catalog.

5 Q Okay. I would ask you to take a look at the very last  
6 page of Exhibit D 52?

7 A Yes.

8 Q Okay. Down at the bottom it says Robert H. Peterson  
9 Company, a division of Beatrice Foods Company. Do you see  
10 that?

11 A Yes.

12 Q Okay. Mr. Bortz testified that he purchased Robert H.  
13 Peterson Company from Beatrice Foods in approximately 1977.  
14 Would this catalog identified Exhibit D 52 be dated prior to  
15 1977?

16 A Yes.

17 Q Turning to page 6 of Exhibit D 52, please. We talked  
18 just briefly about the G 4 burner. Do the two illustrations  
19 shown both in the drawing and in color on the screen that you  
20 have in front of you, does that accurately reflect the  
21 application of a G 4 burner?

22 A Yes.

23 Q And what -- I take it there appears to be something on  
24 the screen. The reddish material is shown at the bottom.

25 That's shown on the bottom of page 66, Exhibit D 52, in those

1 two pictures?

2 A It's difficult to see. Usually -- Peterson Company --  
3 the burner is filled with sand, and then embers sprinkled on  
4 the sand.

5 Q At least in the color -- I know you have a black and  
6 white, but at least shown on the screen in front of you there  
7 appears to be some color. Are those what you refer to as the  
8 flowing embers produced by the G 4 burner?

9 A Yes.

10 Q Okay.

11 MR. MONCO: May I have another moment, Your Honor,  
12 please?

13 THE COURT: Yes.

14 (Pause)

15 Q Mr. Jankowski, are you familiar with a Peterson product  
16 called an ember flame booster?

17 A Yes.

18 Q What is the ember flame booster?

19 A The ember flame booster is an accessory that can be  
20 assembled to a G 4 burner to give it front flame and ember  
21 icing in front of the log set.

22 Q And you did design the ember flame booster for the  
23 Peterson Company?

24 A No, I didn't.

25 Q Okay.

1 Q I next like to present to you what we previously have  
2 been talking about which is Exhibit D 31 and D 32 and would  
3 you identify for me on this. If you want to step down.

4 Is there an ember flame booster shown on Exhibit D  
5 31 and D 32?

6 A Yes.

7 Q Would you identify what it is?

8 A The attachment here.

9 Q That's identified as Exhibit D 32, correct?

10 A Yes.

11 Q Would you just briefly describe the flow of gas in this  
12 combined G 4 with ember flame booster, please?

13 A Yes. The G 4 burner is attached as -- is attached to  
14 the fireplace gas line. And the gas goes to the burner, to  
15 the G 4 burner, and into the ember burner.

16 Q Okay. Now is there an adjustment valve on these D 31 or  
17 D 32?

18 A Yes, there is.

19 Q Where is that?

20 A Right here.

21 Q Okay. And the valve that you identified, has that been  
22 sold previously by Peterson Company?

23 A Yes.

24 Q How long has that valve been sold?

25 A That style of valve has been sold since late sixties.

1 Q Has that been a catalog item of Peterson Company?

2 A Yes.

3 Q We'll leave that sit there. You may go back to the  
4 witness stand.

5 Now with respect to the G 4 ember flame booster,  
6 which we identified as Exhibit D 31 and D 32, how does that  
7 compare to the flow of gas shown in Exhibits D 47 and D 48,  
8 the drawings that you have front of you? How did that  
9 compare?

10 A It would be in the same manner.

11 Q Please continue.

12 A Your gas would flow through the main burner. On the  
13 assembly that we see here in front, the gas would flow into  
14 the main burner, as I described, through the ember burner  
15 with the adjustment to higher or lower the flame for the  
16 ember burner.

17 Now when you higher the flame, it steals from the  
18 main burner. When you lower the flame, it gives more flame  
19 to the ember burner.

20 Q Okay. So if you increase the flow of gas flowing to  
21 this secondary burner to Exhibit D 32, the ember flame  
22 booster, that necessarily lowers the flow of gas to the main  
23 burner?

24 A Yes, it would.

25 Q If you cut down the flow of gas on the front burner

1 D 32, you would increase the flow of gas?

2 A Yes, sir.

3 Q And does that operate what you just described as far as  
4 the flow of gas and control of gas, if that rate in the same  
5 basis as the kind you described in Exhibit D 48?

6 A Yes.

7 MR. HARRIS: Objection to as leading. Move to  
8 strike the response.

9 THE COURT: It is leading, but I'll overrule the  
10 objection.

11 MR. MONCO: Thank you, Your Honor.

12 BY MR. MONCO:

13 Q How do you compare the flow of gas in Exhibit D 48 with  
14 what is shown on Exhibit D 31 and 32?

15 A By the adjustment elbow, the hearth elbow.

16 Q Okay. And does the operation -- how do you compare the  
17 control of the flow of gas? Do both control the flow of gas?

18 A Well, technically the screw inside the hearth elbow's,  
19 you would put gas flow to the ember burner. And by opening  
20 the screw in the hearth elbow, you will have more flame into  
21 your -- by opening the hearth elbow, you will allow more  
22 flame into the rear -- the main burner.

23 Q So correct me if I'm wrong, but what you seem to be  
24 saying is that the valve shown here on Exhibit D 32 controls  
25 the flow of gas to the secondary burner, and that is the same

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1 flow of gas to the secondary burner on Exhibit D 48?

2 MR. HARRIS: I rise to object, and it's getting out  
3 of hand.

4 THE COURT: That was leading. I'll sustain the  
5 objection.

6 BY MR. MONCO:

7 Q In both Exhibit D 32 and the secondary burner shown on  
8 Exhibit D 48, do the valves shown -- what burner is -- let me  
9 withdraw the question.

10 THE COURT: Okay.

11 Q Please turn to Exhibit D 48, please?

12 A Yes, I have it here on the screen.

13 Q Now on Exhibit D 48 there's a hearth elbow shown in the  
14 upper left hand corner, correct?

15 A Yes.

16 Q Does that hearth elbow control the flow of gas to the  
17 primary or secondary burner?

18 A To either burner.

19 Q The hearth elbow?

20 A Right.

21 A Right. But flame can be supplied to. Your main gas  
22 comes into the lower main burner from the lower right hand  
23 side. And it goes through the hearth elbow into the  
24 secondary burner, your gas flow. Now by adjusting the hearth  
25 elbow, you can higher or lower the flame to the secondary

1 burner.

2 Q How would you compare that operation of gas flow control  
3 with what's shown on Exhibit D 31 and 32?

4 A The same way.

5 Q Same way. Thank you.

6 Q Just for the record, Mr. Jankowski, could you turn to  
7 Exhibit D 34, please?

8 A Yes.

9 Q Could you identify what Exhibit D 34 is?

10 A That's the installation and operating instructions for  
11 the EMB series ember flame booster.

12 Q That's what we have on the table identified as D 32?

13 A Yes, connected to the G 4 burner.

14 MR. MONCO: May I have one moment, Your Honor,  
15 please?

16 THE COURT: Yes, you may.

17 (Pause)

18 BY MR. MONCO:

19 Q Mr. Jankowski, I believe in your testimony you referred  
20 to a gentleman by the name of John Palaski. John Palaski was  
21 our distributor in New Jersey for Robert H. Peterson  
22 products, a Peterson Company distributor?

23 A Yes.

24 Q Okay. Mr. Jankowski, I next ask you to turn to Exhibit  
25 D 56?

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1 A (Witness complies)

2 Q And I specifically ask to you turn to what's been  
3 identified as Exhibit A to Exhibit D 56.

4 MR. HARRIS: Your Honor, if I may.

5 THE COURT: Yes.

6 MR. HARRIS: I object to the effort to introduce  
7 this affidavit through this witness. If the client is here  
8 in court today, well, he can speak to it. If he's not, it's  
9 nothing other than a regular piece of paper that was prepared  
10 in various ways that we can't examine and certainly can't use  
11 at a full blown trial.

12 There's not only this Palaski piece of paper and  
13 affidavit, but I forget the other fellow's name, but there's  
14 another one they come up with at the last minute long, long  
15 after discovery closed. They're trying to put in some after  
16 acquired ideas that in effect go back for 10, 15 or 20 years  
17 and then treat it as reconstructed pictures in the light that  
18 have something to do with relevance. I therefore object to  
19 that.

20 THE COURT: Response.

21 MR. MONCO: Our response, Your Honor, is that this  
22 drawing, if I may be permitted to question the witness, was  
23 provided to Mr. Jankowski by Mr. Palaski. Mr. Jankowski can  
24 testify that he received it.

25 Mr. Jankowski, if I am permitted to ask him, can



1 identify for the record a model of the drawing that is shown  
2 in Exhibit A to Exhibit D 56, and that, in fact, was a burner  
3 system that was installed at Mr. Palaski's place of business  
4 in New Jersey in the eighties when Mr. Jankowski saw at the  
5 store.

6 THE COURT: You're not seeking to introduce the  
7 declaration?

8 MR. MONCO: Not through this witness, but simply  
9 to refer to this drawing. That's all I'm going to talk to  
10 him about.

11 THE COURT: What do you mean, not through this  
12 witness?

13 MR. MONCO: Well, I have Mr. Palaski, who was the  
14 affiant on that declaration is here in court, and I intend to  
15 call him later.

16 THE COURT: Okay.

17 MR. HARRIS: Your Honor, I still suggest the  
18 witness can't discuss this affidavit or do anything with  
19 respect to this evidence since it's not his affidavit.

20 If the drawing is his drawing, and it looks like it  
21 probably is, he might have collaborated some. If that's  
22 true, then I'll have to figure that out.

23 THE COURT: Okay.

24 MR. MONCO: The drawing is Mr. Palaski's. It was  
25 forwarded to Mr. Jankowski. I only intend to ask him

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1 questions on the drawing. I'm not going to talk about the  
2 affidavit.

3 THE COURT: Okay. I'll overrule the objection.

4 MR. HARRIS: Including the drawing?

5 THE COURT: No.

6 BY MR. MONCO:

7 Q Mr. Jankowski, looking at Exhibit A to Exhibit D 56, do  
8 you recognize that drawing?

9 A Yes.

10 Q And what is that drawing, Exhibit A?

11 A It's a G 4 burner with a connector ember booster.

12 Q Okay. When was the first time you saw this drawing?

13 Let me back up. Is this a drawing that was prepared by you?

14 A No.

15 Q To your knowledge who prepare this drawing?

16 A Mr. Palaski.

17 Q When was the first time that you saw this drawing?

18 A About October '91.

19 Q I'm sorry. Did you say October of '91?

20 A I'm sorry. 2001.

21 Q Okay. And was this drawing forwarded to you by Mr.  
22 Palaski?

23 A Yes.

24 Q Okay. And what, if anything, did you do with this  
25 drawing?

1 A I put a unit together with the components shown on the  
2 drawing.

3 Q Mr. Jankowski, I'll ask you to step down, please, and  
4 I'll ask you, if you would, please, to identify Exhibit  
5 D 56 A.

6 MR. HARRIS: We likewise object to the unit. The  
7 unit has not been available to us. And we have had no  
8 opportunity to do anything with this, to cross examine  
9 anybody about it, to take any depositions on it. And while I  
10 think we can show in the final analysis there it's of very  
11 little consequence, I don't like to take the risk.

12 THE COURT: Okay.

13 MR. MONCO: Your Honor, Mr. Palaski was identified  
14 on our witness list, and the subject matter of his testimony  
15 was identified on our witness list in the pretrial affidavit.  
16 There was never a request for deposition of Mr. Palaski made  
17 by opposing counsel as far as I know.

18 MR. HARRIS: When was Mr. Palaski placed on your  
19 witness list? And when did you put the exhibit number --

20 MR. MONCO: Your Honor, my understanding is that  
21 the identification of this witness or any witness in a  
22 similar capacity was never asked for in any discovery.

23 Second of all, I was advised by my co-counsel that  
24 counsel had spoken with Mr. Palaski by telephone sometime  
25 during the course of this proceeding, and nothing further was

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1 done with it as far as I know.

2 MR. HARRIS: It's true about the telephone  
3 conversation, but that was quite long after discovery closed  
4 and approaching trial.

5 The second point that I stand to be corrected on  
6 is, I have not seen a full identification of the exemplary  
7 member that has been made or product that has been made as a  
8 model apparently of the drawing.

9 THE COURT: Okay.

10 MR. MONCO: Your Honor, if I'm permitted that this  
11 witness can identify the construction how this came about,  
12 what the components were, so on, so forth. That can being  
13 done by this witness.

14 MR. HARRIS: The witness may be able to do it, but  
15 we don't see why you're entitled to have him do it. You're  
16 trying to treat it as prior art.

17 THE COURT: I'll overrule the objection.

18 MR. MONCO: Thank you, Your Honor.

19 BY MR. MONCO:

20 Q Mr. Jankowski, could you identify Exhibit D 56 A,  
21 please?

22 A Yes. This is Peterson G 4 burner with an ember booster  
23 attached.

24 Q How does Exhibit 56 A relate to -- I'm sorry.

25 -- Exhibit D 56 A relate to the drawing shown on Exhibit D

1 56?

2 A The same.

3 Q Okay. And did you prepare exhibit D 56 A in conformance  
4 with what was shown on exhibit -- by the drawing on Exhibit D  
5 56?

6 A Yes, I did.

7 Q Okay. You identified the G four burner here which is  
8 the main burner and the pan. Could you identify what the  
9 other components are, please, for the court?

10 A The other components parts are the connector coming off  
11 the main burner with a control valve connected to the front  
12 ember booster.

13 Q And what is a front ember booster?

14 A It's an attachment that could be attached to the G 4  
15 burner to give it flame and embers in front of the fireplace.

16 Q Now this -- when did you actually prepare this Exhibit  
17 D 56 A?

18 A I prepared it after I received the drawing from Mr.  
19 Palaski.

20 Q So it would be sometime after October 2001?

21 A 2001, yes.

22 Q Did you ever see a burner like this in operation before  
23 October of 2001?

24 A Yes.

25 Q Where did you see it in operation?

JT-ARP 1273

1 A I saw it in Mr. Palaski's warehouse when I was visiting  
2 in Bayonne, New Jersey.

3 Q Okay. What caused you to visit Mr. Palaski in Bayonne,  
4 New Jersey?

5 A I was making a business trip on product identification  
6 and product knowledge and visiting several of our  
7 distributors.

8 Q And did Mr. Palaski point out the G 4 burner with this  
9 additional pipe when you were there.

10 MR. MONCO: I'll withdraw the question, Your  
11 Honor. Let me just ask this question.

12 Q How did you come to see the burner in the 1980s which  
13 you described as being similar to Exhibit D 56 A?

14 A When I was visiting with Mr. Palaski, he made the  
15 statement that in certain style fireplaces, the draft was so  
16 direct that it was taking all the flame in the G 4 burner to  
17 the back of the fireplace. And they weren't able to get any  
18 flame in front.

19 So what he did is he used some component parts that  
20 he had in his warehouse stock and connected a log lighter  
21 with a connector valve to the front of the fireplace -- to  
22 the front of the G 4 burner to give the flame effect.

23 Q Okay.

24 MR. HARRIS: Your Honor, I hate to rise to object  
25 again, but we now have hearsay. We have the witness here to

1 testify.

2 THE COURT: That is sustained. The witness can  
3 cover this.

4 BY MR. MONCO:

5 Q Okay. Mr. Palaski (sic), the G 4 or the burner that you  
6 saw in Mr. Palaski's showroom, did it have an adjustable  
7 front valve similar or identical to the one that you are  
8 showing here?

9 A Yes.

10 Q And the component parts that are used here on Exhibit  
11 D 56 A, how long had those component parts been sold by the  
12 Peterson Company?

13 A Through the seventies.

14 Q And would all of these be catalog items?

15 A Yes.

16 MR. MONCO: Your Honor, may I have a moment,  
17 please?

18 THE COURT: Yes.

19 MR. MONCO: Thank you.

20 (Pause)

21 MR. MONCO: Your Honor, we have no further  
22 questions.

23 THE COURT: Okay. Cross examination.

24 CROSS-EXAMINATION

25 BY MR. HARRIS:

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1 Q Good afternoon, sir, and I'm Bill Harris. You may know.

2 And your name, sir, for the record is what, sir?

3 A Vincent Jankowski.

4 MR. HARRIS: May I stand here since my first  
5 question will relate to what was discussed earlier?

6 THE COURT: That's fine.

7 Q Where do you live, sir?

8 A Presently I live in San Gabriel, California.

9 Q You're just a little bit older than I am. I heard that  
10 a little bit ago.

11 A I'm still going, too. Trying to.

12 Q You are. We'll stay with it.

13 A Exactly.

14 Q While we stay with it, give me a general answer. Nearly  
15 all of the subject matter that we have been talking about,  
16 you've been identifying and defining, it goes back to the  
17 sixties, the seventies and the eighties. You don't talk  
18 about catalogs in the eighties, though, up in the eighties,  
19 the nineties. Is there some reason for that?

20 A No. I was just trying to identify when these parts,  
21 these units were in effect and during those years. But they  
22 have continued through the eighties.

23 Q You wouldn't represent to me that every one of them is  
24 still alive today, would you?

25 A Of those components? Yes.



1 Q No, not components, sir. I'm talking about assemblies.  
2 Aren't these assemblies that we're looking at here?  
3 A Yes.  
4 Q That's not a component, is it?  
5 A No, that's an assembly. Um-hum.  
6 Q That's not a component, is it?  
7 A No, that's assembly.  
8 Q That's a log lighter, isn't it?  
9 A That's right.  
10 Q What's a log lighter?  
11 A The log lighter is a pipe that is used in a fireplace to  
12 start a wood fire.  
13 Q Where are the holes in here? I'm trying to find out  
14 just how this is built.  
15 A The port holes are pointed downwards.  
16 Q And is it true that the two tubular members are the same  
17 size roughly?  
18 A Yes.  
19 Q And what's the log lighter supposed to do?  
20 A The log lighter is attached to the main burner to -- and  
21 it's then covered with embers to give it a glowing  
22 impression, emberizing effect on the burner while it's in  
23 flame.  
24 Q Yes, sir. And how many artificial logs does it burn?  
25 A Does it burn?

JT-APP 1277

1 Q How many artificial logs does the log lighter burn?

2 A Well, the log sits on a grate which is placed over the  
3 top of the G 4 burner.

4 Q Are these real logs or artificial logs?

5 A They're refractory log.

6 Q What's a refractory log?

7 A It's high luminate cement product that our logs are made  
8 out of.

9 Q It's not your standard artificial log you're talking  
10 about, then; is that correct? That the log lighter is used  
11 with?

12 A It doesn't do anything to burn the logs. It just gives  
13 effect in front of the log set sitting on top of the grate.

14 Q Why do they call it a log lighter?

15 A They call it a log lighter because that is the term that  
16 is used -- that is sold separately as a log lighter also that  
17 can be put into fireplaces where a person wants to start a  
18 wood fire on his grate.

19 Q Yes, sir. And that's what it's really used for, isn't  
20 it?

21 A That's right.

22 Q It's not really used in the artificial log world back in  
23 those days, is it?

24 A Yes, it was.

25 Q It was used to start wood fires, wasn't it?

JT-APP 1278

1 A That's right.

2 Q And that was its main purpose, wasn't it?

3 A That's correct.

4 Q And whether it had an ancillary use or not, I'm going to

5 ask you. When you saw it working -- did you say you saw it

6 working?

7 A Yes, sir.

8 Q Was it working on wood or stone or what?

9 A No, it was working with our ceramic gas logs, our

10 refractory gas log.

11 Q So you say it can work that way. How many times did you

12 see it work that way?

13 A I saw it work that one time in Palaski's home, and I

14 mean in his warehouse, and that was the only time I saw it.

15 Q That was in 1980?

16 A No, that was in late seventies.

17 Q In the late seventies. Have you seen one since?

18 A Lately, yes.

19 Q Well, the lately is in this lawsuit, isn't it.

20 A Well, that's correct, but Mr. Palaski was selling these

21 component parts to make these units.

22 Q Do you know how many of these units were sold?

23 A I have no idea.

24 Q You don't even know if one was sold, do you?

25 A I was told that they were sold.

1 Q Maybe I asked for it, but that's really hearsay, isn't  
2 it? You don't know for a fact?

3 A No.

4 MR. MONCO: Objection, Your Honor.

5 Q You don't know for a fact?

6 THE COURT: Just one second.

7 MR. MONCO: Objection, Your Honor. Thank you.

8 THE COURT: That's overruled. Go ahead.

9 BY MR. HARRIS:

10 Q I'll go for the third time. You don't know for a fact,  
11 do you?

12 A For a fact? No. I was just told that.

13 Q Is this not just an artifact of the past that has no  
14 application at all today and hadn't had for years?

15 A Would you repeat that, please?

16 Q Is this not just an artifact of the past that has no  
17 application today and hasn't had for years?

18 A It has had application for years, and it's being used  
19 today.

20 Q How do you know that? You just told me that you didn't  
21 know how many had been sold. You didn't know anything about  
22 that. You're just talking about with wood fires, aren't you?

23 A No. When I said this statement, I meant that it was  
24 being used as the ember booster. The present ember booster  
25 is what I've seen lately.

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1 Q In other words, you've now seen this and this, meaning  
2 Exhibits D 56 A and D 31. You've equated them to make them  
3 the same thing; is that right? They're not, are they?

4 A That's what I was told was being done.

5 Q Who told you?

6 A Mr. Palaski.

7 Q Mr. Palaski told you what about D 31? And when did he  
8 tell you? D 31 is the infringing device, and D 56 A is the  
9 pretender.

10 MR. MONCO: Objection, Your Honor, to the  
11 characterization.

12 THE COURT: That's overruled.

13 A All the component parts that were used to make that  
14 emberizing booster on the front burner here was catalog parts  
15 that were available.

16 Q What's that got to do with it? Practically everything  
17 in the world is catalog parts. You can take enough catalog  
18 parts and put a jillion things together, can you not?

19 A That's right. That's what he did.

20 Q What who did?

21 A Mr. Palaski and his distributors, his dealers.

22 Q When?

23 A Back in the seventies, eighties.

24 Q You told me a minute ago you didn't know he had sold a  
25 one?

1 A I don't know any proof on that. But I'm going by his  
2 statement that he did that.

3 Q You're going by his statement he did that?

4 A Yes.

5 Q And he went out and installed these things himself; is  
6 that the way it was?

7 A No.

8 Q Well, just what did he do then?

9 A He asked his dealers what could be done to get flame in  
10 front of the logs and these drawing fireplaces, to make this  
11 attachment you get flame in front of the log set.

12 Q How big a business did you develop with him? He was a  
13 distributor of yours, wasn't he?

14 A He was one of our biggest distributors.

15 Q He bought a lot of these from you, didn't he?

16 A Component parts, yes.

17 Q Only component parts, though, right?

18 A There was not a complete assembly.

19 Q It was not sold not only as complete assembly, but it  
20 wasn't sold as a two component assembly, was it? He just  
21 bought the parts, didn't he?

22 A Yes, and stocked it.

23 Q You don't know what he did with those parts for sure,  
24 did you? We'll have to get that from him, if it's gotten,  
25 won't we?

1 A That's right.

2 Q All the sales you said and your record to copy his  
3 drawing are pretty much just hearsay from what you've heard  
4 here and from Mr. Palaski?

5 A What I've seen in this fireplace -- his warehouse, what  
6 he did to get the front flame.

7 Q Well, we'll get back to the front flame and everything  
8 else with the request, which of these are for logs and if any  
9 are for something else, won't we? I'm talking about real  
10 logs.

11 A When I first started with Bob Peterson, if I may, the  
12 log lighter itself had been used with artificial gas logs.  
13 It was called a candle light burner. This was placed on the  
14 grate to give it flame and, artificial gas logs were placed  
15 in front and behind and across the top to make it look like a  
16 real wood fire burning.

17 Q And this is something you hadn't brought up previously?

18 A Well, I just wanted to explain regarding the log  
19 lighter, that it had been used with artificial gas logs also.

20 Q That it had been used, this precise device with  
21 artificial logs?

22 A Not in that respect, no.

23 Q Well, what was it used like then? You must have a very  
24 fine memory that goes back to 1960, '65, so on. So tell us  
25 about it. What was it like? How was it built? How did it

1 work, the one you just described to me?

2 A He built it just similar to what you see there on the  
3 front table, and he attached it through the G 4 burner that  
4 he had in his fireplace and showed me the way that it was  
5 operating and how he got flame in front of the log.

6 Q And who is the he?

7 A John Palaski.

8 Q So it wasn't you, Peterson, back at your place. It was  
9 something that Palaski did at his place where he was  
10 experimenting with this concept, true?

11 A That's right, sure.

12 Q Would it be fair to say he was interested in  
13 experimenting with such a concept?

14 A He did those things, yes.

15 Q But you don't know over the years whether a market ever  
16 really developed for these things substantially, sir, do you  
17 now?

18 A No, I just heard that they were put together that way to  
19 some of his dealers.

20 Q And that was from Palaski?

21 A Yes.

22 Q Let me get a picture of what we're talking about here.

23 Do you have Exhibit A before you now?

24 A Yes, I do.

25 Q And is it your testimony that you provided no writing,



1 no suggestions, no drawings, nothing whatsoever to Mr.  
2 Palaski in the development of this exhibit?  
3 A No.  
4 Q No, what?  
5 A No, I did not supply anything to him.  
6 Q He volunteered it to you?  
7 A That's right.  
8 Q How did you get it? How did you get him to volunteer  
9 it?  
10 A I asked him for it.  
11 Q What did you ask him for?  
12 A I asked him to -- I remembered seeing this unit in his  
13 fireplace and asked him to make a drawing and a sketch of it  
14 to send to me, and he did.  
15 Q Why did you ask him to send one to you?  
16 A Because he had been retired. He had sold his business  
17 at that time.  
18 Q Did he make an effort to get one from his business?  
19 A I imagine he could have, sure.  
20 Q Do you think you can lay hands on one of these today?  
21 A On the parts I could.  
22 Q Sir, the parts are pipes and elbows and joints and  
23 things like that.  
24 A That's right.  
25 Q We're not talking about the parts. We're talking the

1 assemblies and subassemblies.

2 Now again why did they call that a log lighter?  
3 There it is right on the drawing, log lighter. One half inch  
4 log lighter, it says.

5 A It's a product that we carried in our catalog and sold.

6 Q Why do you call it a log lighter?

7 A Because it's used as log lighter to start wood fires.

8 MR. MONCO:. Your Honor, I'm going to object. That  
9 question has been asked and answer about four times now.

10 THE COURT: It has been.

11 MR. HARRIS: Okay. If I wound up with the  
12 agreement that it was a log lighter.

13 BY MR. HARRIS:

14 Q Sir, then, look at sand and embers up here of B one.  
15 What's B one? Is it some kind of a fan or what? Pretty  
16 crude looking, isn't it?

17 A B 1 is the tube and in the main burner.

18 Q I see.

19 Q And what is the flat portion that surrounds B 1? It's  
20 rectangular more or less.

21 A That's the G 4 burner.

22 Q How do you know that's a G 4 burner?

23 A From the picture it resembles a G 4 burner. I know  
24 that's the way it's used.

25 Q Are you talking about you know something the way it's

1 used or you're looking at the picture and you can tell me  
2 from the drawing that that's what it is? How do you know  
3 that's a G 4 burner?

4 A Because I asked them to send me a drawing of the  
5 original installation that he had in his fireplace.

6 Q In other words, you did give him some help in what to  
7 draw, huh? You told him to put a G 4 burner there or you  
8 told him just to -- .

9 A No, I ask --

10 MR. MONCO: I object, Your Honor. That's  
11 mischaracterization what the witness just said. He's arguing  
12 with the witness now.

13 THE COURT: That's overruled.

14 A I told him to send me a drawing of the installation that  
15 he showed me in Bayonne, New Jersey, of a front flame with a  
16 G 4 burner.

17 Q And you told him about the front flame and the G 4  
18 burner and the conversation. And tell me now that did you  
19 not give him any input?

20 A That was the only way I could describe it to him of what  
21 to send me.

22 Q Well, that was a big help, wasn't it? Won't you agree?

23 A Pardon?

24 Q That was a pretty big help to him, wasn't it? He then  
25 knew what you wanted, right?

1 A That's right.

2 Q And so that was his way to show you a G 4 pan, right, or  
3 G 4 assembly?

4 A That's right.

5 Q It doesn't show anywhere on that sketch that the main  
6 burner assembly is attached to the G 4 pan, does it, if  
7 that's a G 4 pan?

8 A The main burner assembly is the G 4 pan.

9 Q Sir, I'm of the opinion that on each side on these  
10 shoulders that there is an attachment, welding or otherwise,  
11 to hold the main burner, am I right?

12 A Yes, that's right.

13 Q All right, sir. Where is that on the diagram?

14 A It's just a rough sketch of the burner pan.

15 Q He was able to remember a one half inch elbow and three  
16 half inch and so on. I see some precise sizes here. Where  
17 did those come from?

18 A He put those on.

19 Q You didn't have any suggestion there like you did for  
20 the G 4 and the front burner, right?

21 A That's right. I didn't.

22 Q And as far as -- can you tell whether the units are  
23 meant to be flat, one with respect to another or whether one  
24 is supposed to be at a higher elevation and the other.

25 Go ahead. I'm sorry?

1 A Go ahead. I'm sorry, too. From the drawing, no, I  
2 can't tell that.

3 Q So it could be either way, couldn't it?

4 A It could be.

5 Q All right.

6 Q Oh, and you say that you were not involved in the design  
7 of this unit; is that right?

8 A In the ember booster.

9 Q Well, sir, I believe that's what your boss calls it.

10 A I was not involved in that, no.

11 Q And I trust that -- well, let me try it differently.

12 Why did the company begin to sell this particular  
13 item -- and I'm talking about D 31 -- in about '96 or '97?  
14 You agree that's when the company started trying to sell it,  
15 don't you?

16 A Would you ask that again, please?

17 Q Yes. I would like to know if you can explain why it was  
18 that the company started trying to sell D 31 in about 1996 or  
19 '97. You say you didn't design it, right?

20 A That's right.

21 Q But you might be able to answer the question I just  
22 asked you, huh?

23 A I'm trying to see what D 31 is. I don't have a --

24 Q Let me help you. D 31 was really a misnomer on my part  
25 because you have to have D 32 with it. My apologies. It's D

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1 31 and D 32 combination. Let me come over here and show you  
2 the other one, too.

3 Pick out which is which.

4 A This is Peterson.

5 Q This is what?

6 A This is Peterson's product.

7 Q How do you know?

8 THE COURT: . You need to speak up louder.

9 Q How can you tell?

10 A I can tell about the assembly.

11 THE COURT: Yeah, you need to speak up louder so  
12 the court reporter can get your testimony.

13 THE WITNESS: Pardon?

14 THE COURT: Speak up louder.

15 THE WITNESS: Yes, sir.

16 MR. HARRIS: Maybe I need to loan him my gizmos.

17 THE COURT: Maybe I need it, too.

18 Q How do you know that 4 A is Peterson?

19 A I know the component parts. I've seen them.

20 Q The parts is what really tells you, isn't I?

21 A The valve, really Peterson never was involved in the  
22 valve.

23 Q It's the parts. But the parts are different, aren't  
24 they?

25 A Yes, sir.

1 Q Could you say -- would you say the devices are different  
2 since the parts are different?  
3 A Yes, they are.  
4 Q What?  
5 A Are they different? Yes.  
6 Q I'm going to have to take this thing off. What did you  
7 say, sir?  
8 A Yes, they look differently.  
9 Q What do you find is the principle difference?  
10 A The connectors, the valves.  
11 Q The connectors and valves are different. What else?  
12 A The tube is different. This one.  
13 Q The tube is a little different. Okay. What else?  
14 A And the positioning of the --  
15 Q You what?  
16 A The attachment. It's -- the difference in the  
17 attachment. The position of the front booster compared to  
18 this one. This one is closer to the ground, and this one is  
19 above the ground.  
20 Q You say 4 A is a bit above the ground, and you say 3 A  
21 is closer to the ground, right? Would you tell me now, sir.  
22 I've raised one up. You agree you can articulate them like I  
23 did, can't you?  
24 A Yes.  
25 Q And I can articulate this one, too, can't I?

JT-APP 1291

1 A Right.

2 Q And then your comment doesn't have much meaning, does  
3 it?

4 A But when you put them back down, there's a difference,  
5 also.

6 Q Well, what happens if you load this one?

7 A This portion is still a little higher.

8 Q Do you see anything else?

9 A Offhand, no.

10 Q Not offhand. Okay.

11 Q Going back to Palaski. Was that his name?

12 A Yes.

13 Q Going back to Palaski, how did he market or sell his  
14 devices, if at all?

15 A I'm not -- I don't have full information on that. I  
16 don't know. That's marketing or sales.

17 Q If I told you that he told me over the telephone, if I  
18 told you that, that he just gave the components or sold the  
19 components and let customers put the item together as they  
20 would, and he wasn't sure how they put them together or if  
21 they had ever put one together.

22 Now if he's here today, he may deny that, I don't  
23 know, but that's what he told me.

24 And what did he tell you? Did he tell anything  
25 similar to you?

JT-APP 1292



1 A No, he told me the same thing. He said he sold  
2 component parts to make these units to his dealers.

3 Q Why did Mr. Palaski send you the picture that's marked  
4 Exhibit A to that affidavit? When did he send it to you, and  
5 why?

6 A I asked him to send it to me, and it was 2002, early.  
7 Probably after October 2001 sometime.

8 Q Did you ever involve yourself in sales?

9 A No. Well, I was a sales manager for Peterson Company  
10 for about a month or two.

11 Q Did you ever sell one of these items, the D 56 A?

12 A I didn't sell. Sales was really not my bag.

13 Q So you wouldn't be able to tell us about whether there  
14 had been any sales by Peterson over the years of this item?

15 A Of the component parts, yes, I could. But again,  
16 Palaski sold these from -- as component parts to make these  
17 assemblies.

18 Q How do you know that? Because Palaski told you so,  
19 right?

20 A Because I saw what was in his fireplace and because he  
21 told me that that's what he was doing for his dealers.

22 Q I see. And so he told you that. As far as the one in  
23 his fireplace, if you saw it, well, perhaps it was for real.  
24 You have no idea about the others, do you?

25 A That's right. I don't.

JT-APP 1293

1 MR. HARRIS: I certainly would appreciate a bit of  
2 a break.

3 THE COURT: You're reading my mind.

4 MR. HARRIS: Thank you.

5 THE COURT: We'll break for fifteen minutes.  
6 Stand in recess.

7 (A recess was held at 3:22.)

8 (Resume at 3:35)

9 THE COURT: Be seated, please.

10 BY MR. HARRIS:

11 Q In discussing the Palaski matter, whatever it may be,  
12 and the log lighter, whatever it may be, I asked one question  
13 that I believe somehow I didn't get an answer to. You just  
14 overlooked it, I believe.

15 Why did you ask Mr. Palaski for a drawing or an  
16 affidavit or for information?

17 A I was asked to get information on anything that I had  
18 possibly done in the past in regards to the ember booster  
19 that operated in the same manner with a main burner, having  
20 attached a secondary burner.

21 Q When?

22 A Around October. October of 2001.

23 Q October of this year?

24 A 2001.

25 Q October 2001?

1 A Yes, sir.

2 Q I'm get these back on.

3 And did you at the same time ask him for everyday  
4 such as drawings, sketches, sales slips, invoices, anything  
5 whatsoever that could corroborate this incident that took  
6 place way back in the seventies?

7 A No, I didn't.

8 Q Did you discuss with him whether he had any or not?

9 A Any what?

10 Q Any evidence.

11 A No, I didn't ask him.

12 Q So what he's doing is based on memory; is that correct?

13 A Well, I've known Palaski for many, many years, and I  
14 accept his word, what he told me.

15 Q What he's doing is based on memory, is it not?

16 A Memory and his information that he gave me that he had  
17 sold these units, components in this manner to make the  
18 assembly in front of the burner.

19 Q Okay. Then it's based on hearsay plus his memory,  
20 correct?

21 A Yes.

22 Q Why do you believe it was that in 1996 and '97 the EMB  
23 or EFB, isn't it? Is it the EFB? Is that --

24 A EMB.

25 Q EMB or EFB?

JT-APP-4295

1 A Why was it?

2 Q Well, is it EFB or EMB?

3 A EMB.

4 Q EMB. Why do you think it was that it became a sales  
5 item all at once?

6 A I think from what I understand is the dealers,  
7 distributors asked for something like that.

8 Q Do you know if there was anybody else out on the market  
9 that caught the attention of the dealers and distributors and  
10 so on to cause them to ask for such an item?

11 A No, I don't.

12 Q And now you did make it clear early, did you not, that  
13 your primary area of endeavor is in logs?

14 A That's correct.

15 Q So what we are we're talking about now is more of a  
16 hardware item, isn't it?

17 A At this moment, yes, yes.

18 Q On D 45 you indicated the F 3. The F 3 I believe is  
19 sitting over there on the table or at least it's a model?

20 A Yes.

21 Q That's a model, isn't it? Did you make it?

22 A I put that together.

23 Q Why didn't you just pull one out of the shop instead of  
24 put it together?

25 A I had to take all the parts -- component parts to make

1 one.

2 Q Well, weren't there any in stock?

3 A No, we don't stock specialty items like that and some of  
4 our other product.

5 Q And how long had it been that that was a specialty item?

6 A I have no idea what our sales is on that.

7 Q For years? You hadn't sold one of those in a long time,  
8 had you?

9 A It's been taken off our price list, I believe.

10 Q And that particular item, the F 3 item that we're  
11 talking about on the table.

12 A Yes.

13 Q That's designed for circular fireplaces, really, isn't  
14 it?

15 A That was designed for circular fireplace and can be used  
16 in a see through also.

17 Q Well, would you explain to the court, although the court  
18 probably knows better than you and I right now, what a  
19 circular fireplace is and just what a see through fireplace  
20 is and distinguish that from a good old fashioned fireplace?

21 A A standard fireplace has -- is a one sided fireplace  
22 that can be seen from one side. See through usually goes  
23 into two rooms into a home where the fire can be seen from  
24 one room or the other room.

25 A circular fireplace in most cases is in a center

-JT-APP 1297

1 of a room where it can be seen in a 360 degree circle from  
2 any angle.

3 Q So the D 3 -- or let me try it again. The F 3 really  
4 wasn't designed or adapted for an old fashioned single  
5 fireplace?

6 A That's right.

7 Q And the various circular fireplace and see through  
8 fireplace items that we've seen might have components of  
9 interest on them, but they weren't designed either for the  
10 good old fashioned one sided fireplace, were they?

11 A Not really, no.

12 Q Would you direct your attention, please, to Defendant's  
13 Exhibit 47 and 48.

14 I'm not sure which one I have there. You know,  
15 though, don't you? Which one is that? Do you have a screen  
16 there?

17 A Yes. That's 47.

18 Q 47?

19 A Yes, sir.

20 Q And 48 is one that you doctored up some from 47, right?

21 A After testing it, I made a change in the construction of  
22 the burner.

23 Q Did this become a big sales item?

24 A I have no idea.

25 Q Do you know if one was ever sold?

JT-APP 1298

1 A One was sent to a dealer. I don't know if he continued  
2 with that or not.

3 Q Whether he sold it or not?

4 A Yeah.

5 Q Let me ask you a little bit more. Isn't this  
6 primarily -- both of these as far as that's concerned, aren't  
7 they primarily for see through fireplaces?

8 A Yes.

9 Q And from looking, the pipes or the tubes, the burner  
10 tubes are basically the same size, true?

11 A Yes. They're identical burners.

12 Q Right. And the elevations are the same on them?

13 A Yes.

14 Q And they, if they have a pan, it's a different sort of  
15 thing than we've been looking at in other subject matter?

16 A That's right, um-hum.

17 Q So to the extent they have any relevance, it either has  
18 to do with alleged direction of gas flow or some component or  
19 another; is that true?

20 A Well, it has an adjustment valve in there that can be  
21 adjusted -- you can adjust the flow to both burners -- the  
22 amount of gas to both burners.

23 Q You're talking about the elbow?

24 A Yes, sir.

25 Q What kind of elbow do you call it?

1 A Hearth elbow. Hearth elbow and adjustment elbow.  
2 Q Right. But you don't use a hearth elbow on your current  
3 EMB, do you?  
4 A On which one?  
5 Q On your current EMB, the one you're selling; the one  
6 this lawsuit is about?  
7 A No, sir.  
8 Q Why is that, sir?  
9 A We no longer carry the hearth elbow.  
10 Q Why is that?  
11 A I don't recall when it was, but the hearth elbow was  
12 manufactured for compression fitting, and the building  
13 associations made -- disallowed compression fittings some  
14 years back. So we went to pipe fitting thread on our  
15 connectors and we went to -- we discontinued that elbow.  
16 Q Did you make a trip up -- is it New Jersey where Mr.  
17 Palaski lives?  
18 A That's right.  
19 Q Did you make a trip up there recently?  
20 A To his home several years ago.  
21 Q Just recently was all I was asking about.  
22 A No.  
23 Q But you have been to his home before?  
24 A Oh, yes.  
25 Q And he's been to yours?



1 A Oh, yes.

2 Q And you're good friends?

3 A Very good.

4 Q And you have been for many years?

5 A Pardon?

6 Q And you have been for many years?

7 A Many years.

8 Q Has Mr. Palaski made any statements to you concerning

9 second thoughts about the structure that's illustrated in the

10 exhibit we've been discussing?

11 A Has he made what?

12 Q Any comment showing second thoughts or wishing he had

13 drawn it different or having some misgivings?

14 A No.

15 Q Where is Mr. Palaski staying while he's here?

16 A Where is he staying?

17 Q Yes.

18 A At the Stoneleigh Hotel.

19 Q Is that close to where you live?

20 A I'm in the Stoneleigh Hotel.

21 Q You live there?

22 A I'm staying there during this trial.

23 Q Oh, you stay there. Well, then, where do you live?

24 A I live in San Gabriel, California.

25 Q Are you retired?

JT-APP 1301

1 A No, I'm still working.

2 Q You're working, but in the California operation, right?

3 A Yes, Peterson Company.

4 Q Um-hum. Who was it that asked you to make the Palaski

5 contact?

6 A Nobody. I remembered seeing this and that he had done

7 these things as he told me. And some of the other

8 information that we were using as secondary burners and if I

9 had any drawings on that, well, I got those together also.

10 Q And did you that all of your own notion, not knowing

11 there was a lawsuit --

12 A No --

13 Q Nobody had to ask you to do anything; is that right?

14 A Mr. Bortz asked me to do that.

15 Q Okay. When?

16 A When he -- when the competitor's product was --

17 regarding the ember burner came into effect.

18 Q When do you believe that to be?

19 A Must have been 2001 sometime.

20 Q How long?

21 A 2001, I'm guessing. I don't know.

22 Q That's when the lawsuit started, isn't it?

23 A (No audible response)

24 Q Let me tell you.

25 A Yeah, I wasn't --

JT-APP 1302

1 Q I'll represent to you the lawsuit was filed relatively  
2 early to do one.

3 A Okay.

4 Q And you think it was in that year that you were asked.

5 Why did it take you so long to make the contact  
6 with Palaski?

7 A I wasn't asked till later, till about that time.

8 Q That's what I asked you when you were asked, and I'm  
9 asking you again.

10 A It was in October of 2001.

11 Q Were you asked to contact Palaski or were you asked to  
12 contact anyone you knew that might be of assistance or what?

13 A Well, I was asked to go through my files to see if we  
14 had done something similar like the F 3 assembly. And with  
15 all the requests that I had for custom fireplaces or if I  
16 knew of anybody that had been doing main burners with  
17 attachments put on them.

18 Then I remembered Palaski had shown me something  
19 similar to that.

20 Q What did you see that reminded you of that?

21 A In 2001.

22 Q Palaski matter, yeah, when you were going through your  
23 files and trying to find what you could, what if anything did  
24 you see that reminded you of the Palaski matter back in '70?

25 A When I was asked to look for things like that.

1 Q What reminded you? Anything?

2 A What reminded me of seeing his unit?

3 Q Yes. Did you run across a piece of paper? Do you have

4 a drawing?

5 A No.

6 Q Do you have any kind of record whatsoever or note that

7 shows this matter?

8 A No. I remembered seeing it, what he had done.

9 Q And that's the extent of it?

10 A And I asked him to send a print on what he had done.

11 That's what he did.

12 Q A print?

13 A A drawing or sketch or something.

14 Q Did you ask him for everything that he had on the

15 subject?

16 A No.

17 Q Do you think he has anything else?

18 A He was out of business then.

19 Q Other than having asked him for something with the G 4

20 and with something out front, did you give him any more

21 inputs?

22 A No.

23 Q Can you tell me if he described the fact that in large

24 measure, this item was used with wooden fireplaces?

25 A No.

JT-APP 1304

1 Q You don't remember one way or another?

2 A No. They weren't used in wooden fireplaces for burning  
3 wood.

4 Q I don't remember the fireplace was made of wood.

5 A No, for burning wood.

6 Q Fire brick?

7 A It was used with artificial gas logs.

8 Q So he didn't have anything to do with wood fireplaces,  
9 and if he testified that people used it for that purpose, he  
10 would be lying; is that right?

11 A He dealt with wood burning fireplaces, but he wouldn't  
12 use them. He will be lying if he said he used them for  
13 burning wood.

14 Q Why would that be?

15 A Because there's no need for this for burning wood.

16 Q Well, I guess I need to know again why it says wood  
17 lighter out front on the front burner.

18 MR. MONCO: Objection, Your Honor. I believe it  
19 says log lighter.

20 MR. HARRIS: Okay. Log lighter.

21 THE COURT: Okay.

22 A Because it was a component part that can be adapted to  
23 do that, and the log lighter was a part of our product, was  
24 one of our available products.

25 Q For wood purposes?

JT-APP 1305

1 A That's right. But it can be adapted for what it's doing  
2 now.

3 Q It's not doing anything now except laying on the table,  
4 is it? Can you tell me where one in the United States exists  
5 except the mock up that you've done?

6 A No, I can't.

7 MR. HARRIS: Just a moment please.

8 THE COURT: Okay.

9 (Pause)

10 MR. HARRIS: I pass the witness.

11 THE COURT: Okay.

12 Redirect.

13 MR. MONCO: Just a question or two, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. MONCO:

16 Q Mr. Jankowski, when you said that you saw the exhibit or  
17 what is represented by 56 D in Mr. Palaski's fireplace, where  
18 was this fireplace located that you saw it at?

19 A It was in his showroom in Bayonne, New Jersey.

20 Q Was Mr. Palaski's showroom open to the public to your  
21 knowledge?

22 A Yes.

23 MR. MONCO: No further questions, Your Honor.

24 THE COURT: Okay.

25 Thank you very much. You may step down.

JT-APP 1306

1                   You didn't get away quick enough. Just one  
2 second.

3                   RECROSS-EXAMINATION

4 BY MR. HARRIS:

5 Q     Did you discuss the subject matter that was in the  
6 showroom with several other people in there?

7 A     (No response.)

8 Q     I understand that you viewed this subject in the  
9 showroom that Mr. Palaski had.

10 A    That's right.

11 Q    Right. How many other people were there?

12 A    At the time I was there myself.

13 Q    Well, do you know if anybody else ever went there? Of  
14 your own knowledge do you know?

15 A    I didn't see anybody there.

16 Q    As far as you know personally, nobody ever went there  
17 again, did they?

18 A    I'm sure they had.

19 Q    Wait a minute. You're sure they had, but you don't know  
20 that, do you?

21 A    No, I can't say that I did, no.

22                   MR. HARRIS: No further questions.

23                   THE COURT: Okay. Thank you very much. You may  
24 step down, and you're excused.

25                   MR. MONCO: Your Honor, we would like to next

JT-APP 1307

1 call Mr. Tod Corrin to the stand.

2 THE COURT: Okay. If you'll raise your right  
3 hand, please.

4 (Witness sworn by the court.)

5 THE COURT: Good, just have a seat right up there.

6 TOD MICHAEL CORRIN, (Sworn)

7 was called as a witness by the Defendant having been first  
8 duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. MONCO:

11 Q Mr. Corrin, could you state your full name for the  
12 record and spell your last name, please?

13 A Yes, it's Tod Michael Corrin, C-o-r-r-i-n.

14 Q How old are you, Mr. Corrin?

15 A 52.

16 Q And would you state for the record your education after  
17 high school, please?

18 A Yes, I graduated from Lewis and Clark College in  
19 Portland, Oregon, with a Bachelor of Science. Taken a few  
20 courses since then.

21 Q Okay. Could you briefly describe your work experience  
22 since graduating from college, please?

23 A Yes. I worked for the YMCA in Downey for seven years,  
24 and since that time I've been employed by the Robert H.  
25 Peterson Company since 1979.



1 Q And since beginning with the Robert Peterson Company in  
2 1979, what positions have you held and the date that you held  
3 them?

4 A Well, I was hired as a management trainee and shortly  
5 thereafter took over management of the office. I supervised  
6 the office most of the time I've been there. I've held the  
7 titles of assistant controller, controller, treasurer,  
8 vice-president and general manager and am currently senior  
9 vice-president. And marketing responsibilities at this point  
10 in time.

11 Q Are you familiar with the Peterson Company's line of  
12 product line during your employment?

13 A Yes, absolutely.

14 Q Okay. And are you involved in any way with customer  
15 service?

16 A Yes. I've supervised customer service most of the time  
17 I've been with the Peterson Company. In the early years I  
18 actually did the customer service.

19 Q Okay. What is involved in dealing with customer service  
20 at Peterson Company?

21 A Well, you get all kinds of requests from customers to  
22 explain your products or to identify your products or to help  
23 them in their installation of the products. I'm talking  
24 about distributors, dealers and consumers.

25 Q What is the nature of the customers of Peterson Company?

1 A We sell primarily to distributors. We also sell to  
2 dealers in certain areas of the country who the distributors  
3 would then sell to dealers in their areas of the country. Is  
4 that what you --

5 Q Yes. Maybe we can explain to you. What do you mean by  
6 a distributor?

7 A A distributor would be someone who then additionally  
8 sells to dealers. It would be what we call two step  
9 distribution. In other words, we as the manufacturer sell to  
10 the distributor who primarily would be a warehouse type  
11 operation, and then they would sell to the dealers in their  
12 local geographic area retail shores.

13 Q Does Peterson Company sell to the end purchaser?

14 A No.

15 Q In the course of providing customer service, do  
16 customers ever ask for any design work by Peterson Company?

17 A Yes, absolutely. Every fireplace in the United States  
18 is different, so some of them have different needs and  
19 desires. Gas supply comes up in different locations or is in  
20 different locations, so they need to have customer burner  
21 options many time.

22 Q Since your beginning of employment with the Peterson  
23 Company in 1979, typically on an annual basis how many  
24 requests does Peterson Company get for doing design work?

25 A Oh, in the hundreds.

1 Q In the hundreds per year?

2 A Per year, yes.

3 Q These would be coming from dealers and distributors?

4 A Mostly from distributors, sometimes from dealers  
5 directly.

6 Q If you could give general categories, what general  
7 types of design work is done, and why is that being requested  
8 of Peterson Company?

9 A Sometimes that's just to come up with a unique log set,  
10 something that's different than what someone else has. Other  
11 times it's a combination of accessories or combination of  
12 parts that we have.

13 And then often it's a fireplace that has unique  
14 characteristics that has to have a unique burner and log set  
15 design for it. Those are the more difficult ones that take  
16 the longer time to work on.

17 Q I would ask you, if you would, please, to turn to  
18 Exhibit D 52 and ask if you're familiar with that exhibit, if  
19 you've seen that exhibit before?

20 A Yes. That's a Peterson catalog from 1974.

21 Q If you would turn, please, to page 6 of the Peterson  
22 catalog, what's shown there?

23 Q That's your G 4 series glowing ember burner series gas  
24 log sets and burner.

25 Q Was the G 4 sold during the period of time when you've

1    been employed by the Peterson Company?

2    A    Yes, it had already been sold when I came to the company  
3    in 1979, and we've sold it ever since.

4    Q    Okay. Looking at the pictures that are appearing on the  
5    screen in color, which are the pictures that are shown in  
6    black and white on page 6 on your copy? What is shown down  
7    at the bottom of the fireplace beneath the logs?

8    A    It's the model numbers. Golden Oak Number RG 424 and  
9    Mountain Oak Number KG 424.

10   Q    What is the material shown in the actual picture down in  
11   the bottom below the logs?

12   A    Okay. In the picture that's the ember bed. It's the  
13   glowing embers. It consists of sand and then the embers on  
14   top of the sand. They glow. That's why it's called the  
15   glowing ember set.

16   Q    Now over the course of your employment with the Peterson  
17   Company, have there been any changes in the nature of  
18   fireplaces that have been used in the marketplace?

19   A    Yes. Primarily when I came to the Peterson Company,  
20   most of the fireplaces were masonry fire boxes. Now the  
21   majority probably that we sell gas logs to are what we call  
22   zero clearance fireplaces. They're manufactured fireplaces.

23   Q    What's the difference in those fireplaces?

24   A    Well, they're both for wood burning. They're both  
25   designed to accept wood burning products. For gas logs, the

1 draft is different in the fireplaces generally. The zero  
2 clearance fireplaces have a stronger draft that pulls the  
3 flame towards the back of the logs primarily because they're  
4 designed specifically, and they don't vary. Masonry  
5 fireplaces vary a lot. The masons don't build the same  
6 fireplace twice.

7 Q And are masonry fireplaces still being built?

8 A Oh, yes. There are masons, and they still build  
9 fireplaces, but it's far fewer -- it's so much easier for a  
10 contractor to put in a zero clearance fireplace that can put  
11 right up to combustible walls, so forth. So most of what  
12 gets installed more is zero clearance, and they're fairly  
13 inexperienced in the ways of fireplaces.

14 Q How did the change in manufacture of fireplaces impact  
15 the sale of the type of product that Peterson Company sells?

16 A Well, it made it more important to have a display of the  
17 embers. It was probably what eventually got to the ember  
18 booster here more reasonable in the last 10 years because  
19 people wanted to have a good display of embers and the strong  
20 drafted cut down on the amount of glowing embers.

21 Q If you would, please, would you turn to Exhibit D 49,  
22 please?

23 A Yes.

24 Q And what is Exhibit D 49?

25 A It's a Peterson real fireplace list from 1977.

1 Q Okay.

2 Q Item one is G 4 Series of log sets, glowing ember  
3 burners.

4 Q Is that what we just covered to the previous set you  
5 were talking about?

6 A Yes, it shows the different model logs that we sold at  
7 that time for G 4 burner system.

8 Q Looking down at the second Roman numeral says F series  
9 log sets with front flame burner, what is that referring to?

10 A Again, it was the different style of log sets that we  
11 sold with the front flame burner system.

12 Q Looking at Exhibit D 45 A which is on what's been  
13 designated as the hardware table. Do you recognize that  
14 item?

15 A Yes, that's the F 3 burner system that would go with the  
16 Golden Oak R 3 logs.

17 Q And could you please turn to Exhibit D 25, please.

18 A (Witness complies)

19 A Yes.

20 Q And what is Exhibit D 25?

21 A It's the Peterson Real-Fyre price list from 1992.

22 Q And was this price list, Exhibit D 25, circulated to  
23 Peterson Company's distributors on or about that time?

24 A Yes.

25 Q And looking at Exhibit D 25, does it show the G 4

1 series burner being on sale at that time?

2 A Yes, that's what's in Roman numeral No. 1.

3 Q Okay. Turning to the second page of Exhibit D 25 it  
4 shows F series radiant heat gas log sets with front flame  
5 burner down at the bottom half of the page. Do you see that?

6 A That's right.

7 Q Is that the same F series burners that were identified  
8 in the previous exhibit we talked about, D 49, the catalog  
9 price?

10 A Yes, we've been selling them --

11 Q Let me finish my question.

12 A I'm sorry.

13 Q That's okay. Is that the same item that was shown in  
14 the 1977 price list that we just referred to as D 49?

15 A Yes.

16 Q Okay. Thank you.

17 Now turning to the next page of Exhibit D 25, there  
18 shows what's called an F series front flame burner assembly.  
19 If we can get that up on the screen.

20 MR. MONCO: Below that. It's being enlarged now.

21 Q What is a front flame burner assembly?

22 A It's a burner system that sits on top of the grate in a  
23 fireplace controlled normally by a valve. We sold them, as  
24 you can see there, as standard see through or circular log  
25 sets.

JT-APP 1315

1 Q And was that F series front flame assembly being sole  
2 on the price list 1977, Exhibit D 49?

3 A Yes.

4 Q Turning to the page with the heading Roman numeral 4  
5 entitled Safety Control Systems Valves and Log Lighters.  
6 Looking at that page of Exhibit D 25. What is shown on that  
7 page generally?

8 A That's our valves and log lighters page. At the bottom  
9 is the accessories that we sell for gas logs. It shows the  
10 control valves, manual and then safety pilot kit and remote  
11 control valves.

12 Q Okay. There's something identified there on a list as a  
13 gas log lighter kit. Do you see that?

14 A Yes.

15 Q What is that?

16 A That's a log lighter that can be installed in a  
17 fireplace connected to a gas supply as was previously  
18 testified normally designed to burn wood.

19 Q And there's also a log -- well, okay. Is there any  
20 difference between the gas log lighter kit and the log  
21 lighter shown on the highlighted portion that's in front of  
22 you there down on the front portion of the page?

23 A I'm sorry there's nothing highlighted.

24 Q I'm sorry it's not highlighted.

25 A Yes, that's the log lighter. That's the similar log

JT-APP 1316



1 lighter that's on the exhibit here.

2 Q Mr. Corrin, I would next like to invite your attention  
3 to Exhibit D 31 and 32 which I'm now putting on the table in  
4 front of you. I'll ask if you can identify that.

5 A Yes, I can.

6 Q What is that?

7 A That's the G 4 glowing ember burner with an EMB ember  
8 booster attached to it.

9 Q And when did the Peterson Company begin selling the  
10 ember flame booster with the G 4 burner?

11 A The ember flame booster was sold as accessory starting  
12 in I think it was 1996 to be attached to a G 4 burner when  
13 consumers wanted that front flame.

14 Q When you say sold as an accessory, what do you mean  
15 accessory?

16 A It was packaged separately. We sell lots and lots and  
17 lots of accessories, things that get added on to log sets.

18 Q I would next ask if you would please to turn to Exhibit  
19 D 30, please.

20 A Yes.

21 Q What is Exhibit D 30?

22 A Exhibit D 30 is a drawing of this -- what this is, D 31  
23 and 32 that's assembled together. It's the ember booster  
24 assembled on to the G 4 burner pan. It's the side drawing of  
25 that.

1 Q Did you have any responsibility for preparing exhibit  
2 D 30?

3 A Yes, I requested that it be prepared.

4 Q Who prepared the actual drawings?

5 A One of our CAD computer drawing people in the office.

6 Q What is being shown on Exhibit D 30?

7 A It's the relationship of the ember booster which is also  
8 called the secondary burner to the primary burner that's in  
9 the glowing ember burner G 4.

10 Q Would you more precisely show what's actually being  
11 shown in the drawing here?

12 A It shows that the ember booster is generally level to  
13 the main burner tube.

14 Q Let me stop you right there. Could you identify first  
15 of all what is the ember booster on this drawing and what is  
16 the main burner?

17 A The ember booster is the smaller round circle on the  
18 left hand side of the drawing. The main burner pipe is the  
19 larger circle in the center of the drawing.

20 Q Okay. And then I would ask you then, please, to  
21 continue with your explanation of what's shown on the  
22 drawing.

23 A So it shows the ember booster tube normally would be  
24 installed just slightly below the top of the main burner tube  
25 and would be about a quarter of an inch above the bottom of

JT-APP 1318

1 the main burner tube.

2 Q Okay. And what's the basis for your statement that this  
3 is -- this is how the ember flame booster would be installed?

4 A Anytime a dealer or distributor would ask for a way to  
5 install the ember booster, this along with the instructions  
6 would be provided to them. So this is a drawing giving them  
7 the dimensions so they would know how to do that based on our  
8 recommendation.

9 Q And why are the two burners oriented as they are?  
10 What's the purpose of that?

11 A Just to give good -- really to give good ember glow in  
12 front of the log set.

13 Q And looking at this drawing Exhibit D 30, what is the  
14 representative relationship of the gas jets in the primary  
15 burner on the right and the ember flame booster on the left?

16 A It doesn't show it in the drawing, but the gas jets go  
17 straight down in both situations.

18 Q And if they go straight down on both, then what is the  
19 relative position of the gas jets on the main burner  
20 representative to the --

21 A The main burner gas jets would be below the ember burner  
22 gas jets.

23 Q Now looking at the physical exhibit ember flame booster  
24 set, D 32, could you identify what this log set is that I've  
25 just been pointing to?

JT-APP 1319

1 A That's the handle or knob extension.

2 Q What is that used for?

3 A It's for turning the ember booster on and off.

4 Q And what position is that intended to have in a normal  
5 installation relative to the ground or to the floor?

6 A It should be about level to the floor of the fireplace.

7 Q Okay. Why have that?

8 A Just for convenience and also you want it to be  
9 relatively low so it is not obvious to, you know, friends and  
10 family when they come into the room. You don't want this  
11 knob sticking up in the air.

12 Q I next ask, if you would, please, to turn to Exhibit D  
13 33. And could you identify that, please?

14 A D 33 is our catalog sheet from the Peterson Company  
15 showing the ember flame booster, the EMB.

16 Q Okay. And the second sentence reads, "This adds  
17 dramatic gas flames to our gas log set and magnifies its  
18 beauty."

19 What's the purpose of adding front flame?

20 A To give additional glowing embers to the set. It's one  
21 of the things that we get requested from consumers and  
22 dealers to provide.

23 Q Now does the Peterson Company sell the ember flame  
24 booster to its distributors?

25 A It's packaged separately, so they buy it as an accessory

JT-APP 1320

1 that can be retrofitted to existing G 4 burner systems or  
2 could be sold as an accessory to go with a new sale.

3 Q Let me just ask you this question. You've been with the  
4 Peterson Company since 1979. Approximately how many G 4  
5 burners has the Peterson Company sold throughout the United  
6 States since 1979?

7 A I'm not sure. Thousands and thousands, hundreds of  
8 thousand.

9 Q Hundreds of thousands?

10 A What.

11 Q I'm sorry. You said hundreds of thousands?

12 A Yes.

13 Q And when you say retrofit ember flame booster, what do  
14 you mean by that?

15 A Well, the ember flame booster is an accessory. It comes  
16 in a separate carton. Many of the dealers actually sold to  
17 it people who had previously purchased G 4 burner systems and  
18 had those installed. It was a way to get the consumer to  
19 come back into their store to buy more products.

20 Q And can you turn to Exhibit D 34 and identify that,  
21 please?

22 A Yes. That's the installation instructions for a  
23 Peterson Real-Fyre ember booster.

24 Q And do the instructions -- how does the Peterson Company  
25 -- who receives these instructions?

- JT-APP 1321 -

1 A These would be packed in with each box, each ember flame  
2 booster in the carton. So the consumer would receive them  
3 ultimately after they have purchased the product.

4 Q If you would, please, I would ask if you would turn to  
5 Exhibit D 55?

6 A Yes.

7 Q And could you identify Exhibit D 55, please?

8 A D 55 is a catalog sheet that we have that shows a lot of  
9 accessories that the Peterson Company offers to basically as  
10 add-on sales for someone that was buying Peterson gas log  
11 set.

12 Q Now how are these accessories sold by the dealers to  
13 your knowledge?

14 A In general, as I say, it's an add-on sale. Once they've  
15 made the sale and had someone that wants to buy a Peterson  
16 log set, then this is an opportunity for them to sell pine  
17 cones or wood chips or lava granules or lava coals to be  
18 added to the sale just to boost the amount of the sale a  
19 little bit higher.

20 Q Are you familiar with the term, after-market?

21 A Yes.

22 Q What is after-market in the context of these?

23 A Well, after-market I think we probably refer to it as  
24 retrofit here. It's to get someone to come into the store to  
25 sell accessories to them to improve their fireplace.

JT-APP 1322

1 Q To your knowledge do customers who purchased an original  
2 gas log set G 4 set come back in to purchase, let's say, new  
3 logs over a period of time?

4 A Yes, they do. Even though our logs are warranted for a  
5 lifetime, we have people that want to upgrade to the newer  
6 style logs or newer design of logs. Our dealers are  
7 constantly trying to promote to satisfy customers to come  
8 back into the store.

9 Q Would what you just said also apply to how the ember  
10 flame booster is sold?

11 A Yes, it would. I know of several dealers who actually  
12 promoted it that way when we came out with it.

13 Q In what way to your knowledge did they promote it?

14 A They promoted it to the previous customer to come back  
15 into the store to buy the ember booster. They said Peterson  
16 has come out with this new item gives you more front flame  
17 and enhances your log set. In fact, they also would sell new  
18 ember and pine cones or wood chips at the same time.

19 Q Now I think you -- I believe your testimony was you said  
20 the ember flame booster is packaged separately. The ember  
21 flame booster is intended to be used with the G 4 burner,  
22 correct?

23 A Yes, that's how it's designed.

24 Q G 4 burner stands separately itself?

25 A Yes. The G 4 burner is separate from the logs.

JT-APP 1323

1 Q Okay. And what is a G 5 burner?

2 A A G 5 burner is very small. G 4 only it has all the gas  
3 connections and valves preassembled by us at the factory.  
4 Has ANSI standard approval by CSA on that burner.

5 Q That's ANSI. I think that's A-N-S-I?

6 A Yeah, it's American National Standards Institute. It's  
7 a group that sets standards for different kinds of products,  
8 all different kinds of products from child car seats to, you  
9 know, gas log sets.

10 Q And I think you also touch the -- is it CSI?

11 A CSA is the current standard testing agency that we use  
12 at the Peterson Company. It's Canadian Standards  
13 Association, I think it is.

14 Q In a G 5 burner set, is an ember flame booster included  
15 in that?

16 A Not in most of them. It can be requested by the dealer  
17 or distributor to have us preassemble a front flame ember  
18 booster on to a G 5 log set. But most of the G 5s do not  
19 have them on. We've sold very few with ember boosters on  
20 them.

21 Q I next ask you, if you would, please, to turn to  
22 Exhibit D 53?

23 A Yes.

24 Q And what is Exhibit D 53?

25 A It's a list of the ember boosters sales that we've had



1 since the beginning of this lawsuit or since the beginning of  
2 the patent, I'm sorry.

3 MR. MONCO: Your Honor, I apologize. This is a  
4 housekeeping matter. We have a supplement to Exhibit D 53  
5 which has been previously provided to defense counsel which I  
6 think should be added to your book. If I may hand it up.

7 THE COURT: That's fine.

8 Q And looking at Exhibit D 53, could you just briefly  
9 describe what's shown in each of the columns?

10 A Yes. We changed computer systems on August 1st of 2001.  
11 So this is up through August 1st of 2001 or July 31st of  
12 2001, and it shows the date of the sale and the quantity sold  
13 and then the net sales amount for the ember flame booster  
14 product. It also includes any G 5 burner that had ember  
15 flame booster attached.

16 Q Okay. What is the reference to detail count in the last  
17 column?

18 A That's the number of line items that were on that  
19 particular date. Number of the different lines that  
20 contained ember boosters on that date. For instance, the  
21 first line that there were probably three orders that  
22 amounted to those 30 ember boosters.

23 Q Okay. Turning to just so we get this added on. There  
24 was a supplement to Exhibit D 51 which we've added to it and  
25 which we provided to counsel for Blount Company and also to

JT-APP 1325

1 the court. And I think that's also in your book. Could you  
2 identify what that is?

3 A That's simply when we went to the new computer system.  
4 That's the totals of the ember boosters since August 1st,  
5 2001, until April 30th of 2002.

6 Q And turning -- if you could, please, could you just  
7 identify how many total ember boosters have been sold by the  
8 Peterson Company from the issue date of the patent, which was  
9 November 23, 1999, which by the way was my 20th wedding  
10 anniversary, and up to April 30th?

11 A Well, it's 2,592 plus a 1,057. Someone is going to have  
12 to add those two numbers together for me. I'm not that good  
13 in my head. It's 3,649? I think it says 1,057 on the second  
14 page.

15 Q And you came up with 3,669; is that right?

16 A Yes, or 49. 3,649. I think it's 1,057. It's a little  
17 blurry in this book on the second page. Looks like 1,057.

18 Q Okay. Taking a look at Exhibit D 51, can you tell where  
19 Peterson Company sold G 5 units which would include all of  
20 the elements that you've --

21 A Which exhibit now?

22 Q I'm sorry. D 51, the one we're looking at.

23 A That's D 53 we're looking at.

24 Q I apologize. There's production number of 51. I  
25 apologize. Exhibit D 53. Can you identify on that list

-JT-APP 1326

1 where the sales of the G 5 units with the ember flame  
2 boosters?

3 A Not really. Occasionally when there was only one unit,  
4 I can tell you that one unit was a G 5, but for the most part  
5 I can not give you that information from this report.

6 Q Okay. Does Exhibit D 53 include the total cost of the  
7 G 5 with the ember flame booster on it shown in these  
8 figures?

9 A Yes, it does. That's how I can determine it in a couple  
10 cases because the dollar amount is higher. If you would  
11 like, I can give you an example of that.

12 Q Please.

13 A Okay. On the second page of that, two thirds of the way  
14 down, December 19th, 2000, there was one unit for \$133.20.  
15 That's obviously a G 5 with the ember booster on it.

16 Q The net sales price, that's the sales price to your  
17 distributors, correct?

18 A Right. Right below that there's also one from December  
19 20th of 2000 for \$141.20, one unit, so that's also a G 5.  
20 Probably a different size of G 5 or to a different discounted  
21 customer. Customer with a different discount.

22 Q Can you turn to Exhibit D 54 and identify that, please?

23 A That's a very simplified bill of materials for our ember  
24 flame booster showing the material cost -- material, labor  
25 and burden costs for our product.

JT-APP 1327

1 Q And using a total sales figure of 3,669 ember flame  
2 booster and that would include G 5 burner also, what is the  
3 total dollar -- gross dollar sales of these units from the  
4 issue date of the patent to April 30th, 2002?

5 A I'm not sure I understand your question, but I think we  
6 have to add up stuff from those other two.

7 Q Right. I'm sorry. Go back to Exhibit 53. I apologize.

8 A Yeah. There was \$6,254 on one report and 29,052 dollars  
9 on the other report. So it's the total of those two.  
10 Somewhere around 96,000, 95,000 dollars.

11 MR. MONCO: Your Honor, may I have a moment,  
12 please?

13 THE COURT: Yes, you may.

14 (Pause)

15 Q If I can ask you. I apologize. Could we just return  
16 to Exhibit D 30 for one moment, please.

17 A Certainly.

18 Q Was D 30 distributed to anyone or drawings like D 30  
19 distributed to any Peterson customer to your knowledge?

20 A Yes, it has been.

21 Q How was it provided to the customers?

22 A Well, when we ask the orientation of the two different  
23 burners, we would provide a drawing like this. Generally  
24 they're satisfied with the installation and operating  
25 instructions that's provided with the product.

JT-APP 1328

1 Q Do you know Mr. Charlie Hanft?  
2 A No. I've seen him at a couple trade shows prior to in  
3 the courtroom this week.  
4 Q To your knowledge was Charlie Hanft ever a distributor  
5 or dealer of Peterson products?  
6 A I really don't have that knowledge.  
7 Q Okay.  
8 Q Mr. Corrin, could you turn to Exhibit D 26, please?  
9 A Yes.  
10 Q Could you identify what Exhibit D 26 is?  
11 A D 26 is our installation and operating instructions that  
12 come with the front flame director.  
13 Q What's a front flame director?  
14 A That's an accessory that goes in a G 4 glowing ember  
15 burner, and that is to give additional front flame. The  
16 purpose of it is to give additional front flame.  
17 Q Does it provide the same function as an ember flame  
18 booster?  
19 A Same end function. It doesn't have a valve that allows  
20 you to turn it on or turn it off.  
21 Q But it provides the same effect?  
22 A Yes.  
23 Q Is it more expensive or less expensive than an ember  
24 flame booster?  
25 A It's less expensive.

JT-APP 1329

1 Q Could you just generally describe how it works?

2 A Yes. Prior to putting the standard ember into the  
3 burner pan of the G 4 burner, this front flame director is  
4 placed in the burner pan in front of the burner pipe, and  
5 then there are some holes in the front flame director that  
6 allow the gas to come into it.

7 So then when you fill the whole thing with sand and  
8 embers, it dispenses the flame further forward than the  
9 normal burner pipe does.

10 Q To your knowledge would your distributors purchase a  
11 front flame director instead of an ember flame booster?

12 A You wouldn't have both, if that's what you're asking.

13 Q No. I'm saying, would your distributors purchase one or  
14 sell one in lieu of another?

15 A No, they sell both. Different customers want it  
16 differently. And price is often -- you know, this is a less  
17 expensive item.

18 MR. MONCO: Your Honor, may I have another moment,  
19 please?

20 THE COURT: Yes.

21 (Pause)

22 Q Turning back to Exhibit D 54, please, if you would for a  
23 moment.

24 A Yes.

25 Q Okay. Could you briefly identify what each of the items

1 is in the column shown on Exhibit D 54?

2 A As I explained, this is a simplified materials, and it  
3 show what is our material cost is for the different  
4 components, and then the labor and the burden and outplant  
5 cost that we have associated with it.

6 So the bottom right hand number \$14.23, 23.25,  
7 seven cents is what we show in our computer system as our  
8 cost for ember flame booster, our cost to produce one.

9 Q Generally could you describe what you mean by burden  
10 cost?

11 A Burden. Burden is like overhead. Would be our overhead  
12 cost.

13 Q What is an outplant cost?

14 A Outplant is something that we subbed out to someone else  
15 and did not do ourselves. Probably in this case it's the  
16 painting, the black painting of the tube.

17 MR. MONCO: Your Honor, we have no further  
18 questions.

19 THE COURT: Cross examination.

20 CROSS-EXAMINATION

21 BY MR. HARRIS:

22 Q Afternoon, Mr. Corrin.

23 A Good afternoon.

24 Q I'm Bill Harris, as you've probably learned.

25 I want to start off talking a little bit about your

JT-APP 1331

1 Exhibit D 30.

2 A Okay.

3 Q I notice that it's pretty recent product.

4 A No, our computer -- our new computer system for the cat  
5 creates a date on the drawing every time you print it,  
6 whatever date that is. So, for instance, I had this printed  
7 on February 15th of 2002. If I printed it today, that date  
8 would come up with today's date.

9 Q I hear exactly what you're saying, but what is the date  
10 of the drawing?

11 A You mean the date that it was actually originally drawn?

12 Q Yes.

13 A It's not dated at the bottom, so I do not know that.  
14 Normally that would be the approved by and approval date, so  
15 it's not dated on there.

16 Q You don't know how recent the item is; is that right?

17 A No.

18 Q And this is an item that you say that you're supplying  
19 customers to show them how to handle installations; is that  
20 right?

21 A Upon their request, yes.

22 Q And how long have you been doing that?

23 A Well, it would be just anyone that has requested it. I  
24 don't know how long we've been doing it.

25 Q It's absolutely after this lawsuit was filed, isn't it?

JT-APP 1332



1 A Could be.

2 Q Not only could it be, but it is, isn't it?

3 A Are you answering the question or am I?

4 Q Well, let's both answer it the same way. I say you did  
5 it after the suit to try to do repair work.

6 A I had the -- it drawn by our CAD computer people, and  
7 I'm not sure when that was, but it could have been after the  
8 lawsuit, after January of 2001, yes.

9 Q Who made the decision to have such a drawing?

10 A I did. I had this drawn.

11 Q Were you the one that made the decision to eliminate a  
12 valve?

13 A The valve isn't eliminated. This drawing is only to  
14 show the relationship of the two burner pipes to each other,  
15 no the to eliminate anything.

16 Q I see. I misunderstood. I thought you said you had a  
17 cheaper one now that didn't have a valve.

18 A That's that front flame director. Those a different  
19 item, and that's been in existence longer than the ember  
20 booster.

21 Q I see.

22 A That's a different product.

23 Q Well, I'm glad to get that straighten out.

24 So you can't tell me how long D 30 has existed and  
25 that you have been trying to advise customers on this form of

JT-APP 1333

1 installation. That's true, isn't it?

2 A I can't tell you, no, not exactly.

3 Q Secondly, I got the idea from your testimony that, you  
4 know, everything you have in the way of instructions is in a  
5 box. So when one goes in, a customer goes in to a store to  
6 purchase one of your items, they're left with no information  
7 except what they get out of the box when they get home?

8 A The installation and operating instructions are in the  
9 carton, whichever carton, whichever item they buy, yes.

10 Q But what really happens? Do they get assistance,  
11 information, sketches, brochures, something from the one that  
12 sells the item?

13 A They've made the decision to buy. Often that's using  
14 our literature that the store would have or seeing the  
15 product in the display room. Then when they buy the product,  
16 if the consumer actually takes it home themselves, they would  
17 have the installation and operating instructions that would  
18 be provided in the carton.

19 Q Now let's go to your if. How many do take it home  
20 themselves and assemble?

21 A I don't know the percentage, but a great deal of our  
22 products are installed by the consumer, by the end user  
23 themselves. But also in many areas of the country most of  
24 them are installed by an installer. So they would -- either  
25 the consumer would hire an installer or sometimes the dealers

1 provide that service from someone from their store.

2 Q Do we wind up with the answer? I don't know.

3 A No.

4 Q You do know, then?

5 A I did answer. I don't know the percentage difference  
6 between having a professional installer doing it and the home  
7 owner doing it themselves. I don't know the percentages.  
8 But both cases happen.

9 Q Well --

10 A Routinely.

11 Q The store itself might even do the installation, though  
12 I agree they would usually hire a crew?

13 A Did you say the store themselves?

14 Q Yeah.

15 A Yeah, the store -- some stores have their own employees  
16 that do installations. Probably more commonly they sub that  
17 out to a local installer. But they actually arrange for  
18 that.

19 Q We can agree that many instances that the installation  
20 is done somehow through the store or the arrangement it makes  
21 or by a contractor, sub-contractor, can't we?

22 A We can agree that that happens regularly, but it also  
23 happens regularly that the consumer does their own  
24 installation.

25 Q Where do you get your numbers?

JT-APP 1335

1 A What?

2 Q Where did you get your numbers? How do you know your  
3 numbers? You tell me you know percentages. Where do they  
4 come from?

5 A I said I don't know percentages. I don't know the  
6 percentages. But it happens very regularly that a consumer  
7 does it just like it happens regularly that an installer does  
8 it.

9 Q There was some discussion, if I can find it.

10 Let me draw your attention to -- we'll have a  
11 number up here in a minute.

12 52.

13 A Okay.

14 Q You testified with regard to -- I'm sorry -- 52, did you  
15 not?

16 A Yes.

17 Q And you would agree with me that in 52 you're just  
18 talking about a single burner in every instance, aren't you?  
19 Look it over carefully.

20 A The D 52 shows that we sold the glowing ember burner in  
21 1974.

22 Q What is the glowing ember burner?

23 A It is also what we have as Exhibit D 31. It's the main  
24 burner pipe of the exhibit that's down here in front of me.

25 Q But it is a single pipe, is it not?

JT-APP 1336

1 A Yes, it's single burner.

2 Q So this is not any type of an item that has an ember

3 burner tube out front?

4 A No, it does not, not by itself.

5 Q Now looking at D 17.

6 A Yes, sir.

7 Q It appears to be a letter that you sent to Bill

8 McLaughlin, correct?

9 A That's correct.

10 Q And that was December the 17th, 1999, isn't it?

11 A Yes.

12 Q And you characterize the letter that had been sent and

13 the text of your letter to Bill McLaughlin as, "Enclosed is a

14 patent infringement letter we received from Golden Blount's

15 attorney." Is that what you thought you were sending?

16 A That's right.

17 Q D 25.

18 A Yes.

19 Q D 25 makes reference to a log lighter, does it not?

20 A Yes. It was one of the accessories that we sold that's

21 on page 5.

22 Q Would you explain to me that in the form you sell it or

23 have sold it, what is a log lighter?

24 A What is a log lighter?

25 Q Yes, sir.

1 A Here is a log lighter that attaches to a gas-supply in a  
2 fireplace generally designed to burn wood.

3 Q Well, is the purpose, then, to convert somehow from  
4 burning wood to gas or the purpose from -- to use gas to  
5 light wood with?

6 A Yes, it's to use gas to light wood. It's to supply the  
7 gas to light the wood.

8 Q So if you see one who identifies a log lighter as a  
9 particular item, if there's nothing else to alert to you the  
10 contrary, would you not assume that's exactly what you would  
11 be talking about?

12 A Well, the name is log lighter. That doesn't mean that  
13 it's a function to light wood any more than it's a function  
14 to light artificial gas logs.

15 Q I see. But, if anything, lighting the artificial gas  
16 logs is not the same thing as laying down a set of artificial  
17 embers, is it?

18 A No, the embers is an item that goes underneath the log  
19 set, usually on top of sand or some other media.

20 Q So in general it's true, is it not, that the log lighter  
21 would not be an appropriate item to try to use as an ember  
22 enhancer out front?

23 A No, that's not true.

24 Q Can you explain more to me about it?

25 A Well, actually originally we started with a log lighter

JT-APP 1338

1 as our ember booster and using that item as your ember  
2 booster. We were not as successful as we would have liked to  
3 have been. That's why we changed to the smaller tube. But  
4 originally we started with the log lighter.

5 Q So you're telling me that you made one more or less  
6 unsuccessful effort to make this EMB product, right?

7 A Sir, I'm not the engineer. I don't know how many  
8 efforts we made.

9 Q You just made a statement to me.

10 A I know we started with that and tried that first.

11 Q And selected something else, right?

12 A Yes.

13 Q Was that selection made with the knowledge that Golden  
14 Blount was on the market?

15 A I don't know.

16 Q Could have been?

17 A I wasn't involved in that selection, so I don't know.

18 THE COURT: Let's take a 10 minute break.

19 MR. HARRIS: Okay. With any luck I think I can  
20 wind up the cross examination in another 10 or 15 minutes.

21 THE COURT: Okay. We're going to run to right  
22 around six o'clock tonight.

23 Okay. We'll stand in recess.

24 (A recess was held at 4:45.)

25 (Resume at 5:00.)

JT-APP 1339

1 THE COURT: Be seated, please.

2 BY MR. HARRIS:

3 Q I'm directing your attention to Exhibit 26.

4 A Yes.

5 Q Ask that you tell me what it is.

6 A This is a front flame director. That's another

7 accessory that Peterson sells in order to get front flame on

8 a G 4 ember burner, additional front flame.

9 Q How long has it been around?

10 A I'm sorry. I'm not prepared to tell you the date we

11 started, but it's been quite a while. More than 10 years.

12 Q Yeah.

13 Q Does it do the same job as the ember burner?

14 A The same type of job, yes. There would be a question of

15 whether it's as good as or not as good as. But my opinion,

16 it's not as good as the ember booster.

17 Q How does it compare in cost?

18 A I'm sorry?

19 Q How does it compare --

20 A Cost? It's less expensive.

21 Q Does it involve an additional valve?

22 A No. There's no plumbing hook up.

23 Q Does it involve more than one ember pipe?

24 A No. It's an accessory that sits in the ember pan in

25 front of the ember pipe in front of the main ember that we've



1 been referring to.

2 Q Thank you. There was some discussion about retrofit,  
3 and we seem to focus finally on it. But in your original  
4 answer you made the observation that some of the ember  
5 burners were sold for retrofit and some were sold along with  
6 new equipment. That's true, isn't it?

7 A Yes.

8 Q And we've agreed that it's a little bit difficult to  
9 come up with the exact ratio, haven't we?

10 A I don't think we could come up with the exact ratio,  
11 yes. That would be difficult.

12 Q Have you made an effort to come up with that ratio ever  
13 since this suit was filed?

14 A No. I know when we initially came out with it, we came  
15 out and produced retrofit for people that had previously  
16 purchased G 4 burners. Then it's now sold as an accessory  
17 which people can add on or as an add-on sale to the G 4  
18 burner.

19 Q Now I understood that the G 5 involved some extra  
20 equipment of some type or extra grade, higher grade  
21 equipment.

22 A No, sir.

23 Q Would you explain what you said to me?

24 A A G 5 is a preassembled burner system. So the initial  
25 valve, safety pilot kit valve, and if it has an ember booster

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1 on it, the ember booster would be preassembled by the  
2 Peterson Company at the factory.

3 Q You said something about Canadian law in that regard.  
4 Would you explain?

5 A It has --

6 Q I'm sorry. We're talking at the same time. I'll shut  
7 up and let you try.

8 A It has CSA approval on it, which is Canadian Standards  
9 Association of approval on the G 5 burner system.

10 Q Does that take some particular effort?

11 A Yes, and money.

12 Q Are they not the same?

13 If I have anything, it's just one or two more.

14 (Pause)

15 MR. HARRIS: Pass the witness again.

16 THE COURT: Redirect.

17 MR. MONCO: Okay.

18 REDIRECT EXAMINATION

19 BY MR. MONCO:

20 Q Mr. Corrin, looking at Defendant's Exhibit 31 A -- D 31  
21 -- let me start over.

22 Looking at Exhibits D 31 and D 32, which is the G 4  
23 burner and the ember flame booster, is there a particular  
24 orientation between the main burner, the G 4 burner, and the  
25 ember flame booster?

1 A Yes. You would want both burners to be parallel.

2 Q And why would you want the burners to be parallel?

3 A So that you would get even ember glow in front in the  
4 front set.

5 Q If you pushed the end portion of D 32 down in the  
6 ground, what effect -- down toward the base of the fireplace,  
7 what effect would that have on its operation?

8 A You would probably have less glow on that side.

9 Q And would that result in an uneven appearance in the  
10 fireplace?

11 A Yes.

12 Q Okay. Now in installing or putting in the ember flame  
13 booster, is there a limit as to how low the ember flame  
14 booster can go toward the fireplace floor?

15 THE COURT: Yeah, Mr. Harris.

16 MR. HARRIS: I would like to take this witness on  
17 voir dire. I have a notion that he doesn't know anything  
18 about the subject.

19 THE COURT: Okay. Go ahead. You may do so.

20 VOIR DIRE EXAMINATION

21 BY MR. HARRIS:

22 Q Sir, have you performed the experiment that you just  
23 testified to?

24 A Yes.

25 Q About pushing a part down or about keeping a part

1 unlevel with respect to the two burners?

2 A No, I don't believe I have personally done that. I've  
3 seen that done in our lab.

4 Q Tell me more about it.

5 What did you observe? How long you were there?  
6 How was it done? Who controlled it?

7 A I visit our lab for many minutes everyday working on  
8 products as part of my marketing production. So I go in our  
9 testing lab and work with our products and work with our  
10 engineers everyday.

11 Q But you didn't do this experiment, did you?

12 A I personally did not do it, but I've seen them adjust  
13 the ember booster in different orientations.

14 MR. HARRIS: I take the position this witness is  
15 not qualified to testify on this rather technical point.

16 THE COURT: Okay. Response.

17 MR. MONCO: Your Honor, the witness has just  
18 testified that he's observed in the laboratory at Peterson  
19 Company this very testing procedure to determine what would  
20 happen when you change the orientation of the front flame  
21 burner. And he observed this and then recounted his -- the  
22 results of his observations to the court. I think he's fully  
23 capable of factually testifying as to what he saw and  
24 observed.

25 THE COURT: I'll overrule the objection.

1 MR. MONCO: Thank you, Your Honor.

2 DIRECT EXAMINATION (continued)

3 BY MR. MONCO:

4 A You'll have to restate the question. I'm sorry.

5 Q Okay. My question is if you lowered the what I'll call  
6 the distal or far end of the upper flame booster or control  
7 valve, what effect does that have if it's lowered toward the  
8 fireplace floor?

9 A That burner tube is going to be covered with the sand  
10 and the glowing embers, and you would have an uneven glow for  
11 the glowing ember if it was deeper in the sand.

12 Q Now my question that I asked you previously which you  
13 were not able to answer. Is there a limiting factor on the  
14 chief burner as to how far it can get to the ground -- how  
15 close it can get to the ground and remain parallel?

16 A You mean on the ember booster?

17 Q I'm sorry. The ember booster.

18 A On the ember booster it's limited to the valve itself.  
19 It would hit the floor, the fireplace.

20 Q That's what I'm pointing to right here, correct?

21 A That's correct, yes.

22 Q And if the ember flame booster is lowered as far as it  
23 can go so the valve is actually touching the ground -- if the  
24 ember flame booster is lowered as far as it can go so the  
25 valve is touching the ground and the ember flame booster

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1 remains parallel to the ground in the orientation that it  
2 should to provide the even burner, what is the representative  
3 position of the gas jets from the main burner with respect to  
4 the ember flame booster?

5 A The ember flame booster burner ports should still be  
6 above the main burner.

7 MR. MONCO: May I have a moment, Your Honor?

8 THE COURT: Yes.

9 (Pause)

10 MR. MONCO: Your Honor, we have no further  
11 questions.

12 THE COURT: Okay. Mr. Harris.

13 RECROSS-EXAMINATION

14 BY MR. HARRIS:

15 Q The very last comment you made, did you observe it, too,  
16 or did you do it yourself?

17 A I did -- actually did measurements on this for this  
18 lawsuit, in preparation for this lawsuit. Did measurements.

19 Q Where are the measurements, sir?

20 A That's the drawing that's Exhibit 30 to make sure that  
21 those dimensions that I was testifying to in Exhibit 30, the  
22 drawing was accurate.

23 Q And does it give a report on what happens under the  
24 circumstances that there's inaccuracy? It's just a drawing,  
25 isn't it, sir?

1 A Yes. We're just talking about the relationship of the  
2 burner ports. When you say what happens, I don't know what  
3 you're referring.

4 Q Well, you were talking about bad results, I believe.

5 A No, sir. I think you're going back to the previous part  
6 where he was talking about pushing the end of the burner  
7 down. Is that what you're referring to?

8 Q Yes, that's what I'm referring first of all. Then you  
9 were asked a question about how much tolerance there was in  
10 being parallel. That's the way I understood the question.

11 A If you push the end of the burner, the ember booster  
12 burner tube down deeper into the sand, you will not get as  
13 even a glow. That was my observation in our testing lab.

14 Q That's true. That's the first thing that you testified.

15 A Yes.

16 Q That I questioned. And now I'm questioning your last  
17 response.

18 A Which was the restriction if you -- the lowest spot you  
19 can place the ember booster, the valve would hit the floor.  
20 When that occurs the burner ports of the ember booster are  
21 still above the burner ports of the main burner tube.

22 Q Sir, if the valve hits the floor and you still put a  
23 weight on the extending cantilever, it will go down, won't  
24 it?

25 A It will, yes.

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1 Q So that's not really strictly right, is it?

2 A Yes, but that's not what I was asked. I was asked if  
3 the burner tube stayed level parallel to the main burner tube  
4 where were the ports be.

5 Q If the question -- I'm sorry. If the question hadn't  
6 been so artful, though, it would be possible to agree you  
7 could still have a problem with the valve going down against  
8 the hearth or the ground?

9 A That's not a problem, but, yes, the burner valve could  
10 go down on the hearth or the ground.

11 Q And extending end could be downward?

12 A Yes.

13 Q And cause a problem?

14 A Not cause a problem. Cause uneven burning. Uneven  
15 glow.

16 Q So it wouldn't be a big problem. It just wouldn't be as  
17 good?

18 A That's correct.

19 Q If it were the other way?

20 A That's correct.

21 MR. HARRIS: That's all I have. Thank you.

22 THE COURT: Anything else?

23 MR. MONCO: We have no further questions, Your  
24 Honor.

25 THE COURT: Thank you very much. You may step



1 down.

2 THE WITNESS: Thank you.

3 THE COURT: Next witness.

4 MR. MONCO: Your Honor, we next like to call John  
5 Palaski to the stand, please.

6 THE COURT: Okay. If you'll raise your right  
7 hand, please, for an oath.

8 (Witness sworn by the court.)

9 THE COURT: Good. Just have a seat right up  
10 there.

11 JOHN PALASKI, (Sworn)  
12 was called as a witness by the Defendant having been first  
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. MONCO:

16 Q Good afternoon, Mr. Palaski.

17 A Good afternoon.

18 Q Would you state your full name for the record and spell  
19 your last name, please?

20 A John Palaski. P-a-l-a-s-k-i.

21 Q And how old are you, Mr. Palaski?

22 A I'll be 75 August 13th.

23 Q And could you briefly state for the record your  
24 education after high school?

25 A After high school I did some schooling in electrical and

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1 blueprints and schematic rather and circuitry. That's about  
2 it.

3 Q Okay. And did you spend any time in the military  
4 service?

5 A During the second war I was in the merchant service,  
6 then I went into the Army.

7 Q How long were you in the service for?

8 A Total of about little over, oh, about two and a half  
9 years.

10 Q Okay. And after your return from service and graduating  
11 from, could you just briefly describe what your work  
12 experience has been?

13 A I went back to work at Texas Oil Company on tug boats  
14 and barges and worked up the old Erie Canal plus Halment  
15 work. Then I worked until 1952. Then from '52 to '72 -- or  
16 '53 to '71 or, I'm sorry, '72 I worked for Westinghouse  
17 Elevator as electrician and test the elevator controllers.  
18 Then I went into business 1970. Then I resigned from  
19 Westinghouse in '72.

20 Q And what type of business did you go into?

21 A Fireplace accessories and mostly retail.

22 Q Okay. And what was the name of your business?

23 A The Fire Side Shop.

24 Q And where was the Fire Side Shop located?

25 A In Bayonne, New Jersey.

1 Q How long did you own the Fire Side Shop?

2 A Until 1987.

3 Q What happened in 1987?

4 A In 1987 I sold it to Darryl.

5 Q Darryl? What's Darryl's last name?

6 A Darryl.

7 Q Is the Dworkin?

8 A Dworkin, I think.

9 Q In your Fire Side Shop what type of products did you

10 carry?

11 A All fireplace related equipment. Pipes, chimney pipes,

12 glass enclosures, recess screens, gas logs, tool sets and

13 accessories.

14 Q Okay. And did any of those products that you carried at

15 the Fire Side Shop include products made by the Robert H.

16 Peterson Company?

17 A Yes. We started -- actually I started out with my

18 partner in business, and he had the gas logs in Long Island,

19 and we were acting as quasi distributor until about 1974 we

20 started to sell more than him. So we started to get -- we

21 got the distributorship in New Jersey.

22 Q And you became a distributor for Robert H. Peterson

23 product in New Jersey?

24 A Yes.

25 Q How long did you remain a distributor for R. H. Peterson

1 Company?

2 A Until I sold the business.

3 Q In 1987?

4 A In 1987.

5 Q Could you just briefly describe what you did in your  
6 ownership role, what your tasks were as in your ownership  
7 role for the Fire Side Shop?

8 A There were many. Basically I managed and in the  
9 beginning I did all our deliveries. Made recessed screens  
10 and answered the phone and answered all complaints, which  
11 were many. And I did some installations of retail because we  
12 did retail up until as long as we were in Bayonne. We did  
13 some retail, but retail was very minimal. When we started  
14 wholesale, it was about 90 percent wholesale until we moved  
15 to Piscataway. Then it was about 100 percent.

16 Q Did you have an actual plant or facility in the Bayonne,  
17 New Jersey?

18 A We had retail. We had the showroom, and we had a little  
19 warehouse in the back. Then I rented a warehouse up on 26th  
20 Street about a block and a half up. Then we purchased a  
21 building downtown for warehousing.

22 Q Okay. Was your showroom open to the public?

23 A Showroom was open to the public.

24 Q In your capacity with the Fire Side Shop, did you ever  
25 do any design work on fireplace assemblies?

1 A In design work?

2 Q Right, designing fireplace installations?

3 A Well, yes. I did a lot of -- not a lot, but I did some.

4 For instance, whenever there was a unit like a circular

5 fireplace, I tried to get the correct type of burner to put

6 into it. Many times I had to redesign what we had available

7 because the designs that we had weren't working. And some

8 cases, instead of putting a circular in, I put in a see

9 through.

10 Q And in selling Robert H. Peterson Company products, did

11 you do any work or work with or coordinate with anyone from

12 the Robert H. Peterson Company in designing fireplaces?

13 A Mr. Jankowski.

14 Q Vince Jankowski?

15 A Vince Jankowski, yeah.

16 Q Mr. Palaski, I would ask you to turn to Exhibit D 56.

17 Q I'll ask you if you can identify Exhibit D 56, please.

18 A Yeah. That's a declaration I made.

19 Q And I would ask you if you would please to turn to page

20 2 of Exhibit D 56. And is that your signature down at the

21 bottom?

22 A Yes, that's my signature.

23 Q And turning to Exhibit A, what is Exhibit A? What is

24 that drawing?

25 A That is a log lighter that I hooked up with ACA valve.

1 MR. GAINES: Your Honor, we would like to object  
2 to this declaration again. It was presented to us long after  
3 discovery had closed and well past beyond that time.

4 THE COURT: Okay. The witness is here for  
5 testimony, though. So it's different than the other one.  
6 Thank you.

7 MR. MONCO: Thank you, Your Honor.

8 BY MR. MONCO:

9 Q May I have the last question read back, please? I lost  
10 my train of thought.

11 (The last question was read aloud.)

12 Q Could you identify what Exhibit A is to your  
13 declaration, please?

14 A It's a design of the accessory to the G 4 burner.

15 Q Okay. Did you prepare that drawing?

16 A I made this up, yes.

17 Q Okay. And referring to paragraph 5 of your declaration,  
18 it says that that was a dual burner system that you designed;  
19 is that correct?

20 A Yes.

21 Q When did you first design the system that's illustrated  
22 in Exhibit A to your declaration?

23 A Oh, that was probably between 1975 and '76. About '75,  
24 '76. That's after we had some complaints.

25 Q And why did you -- could you just elaborate. Why do you

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1 design the system illustrated in Exhibit A in 1975?

2 A Back in the those years in '74 '75, the tristate area  
3 was inundated with a lot of different shapes, sizes  
4 fireplaces. And there was different results when we put gas  
5 logs into them. Some of them drafted too much and some not  
6 enough.

7 And the complaints I was getting was larger ones  
8 like, for instance, the Venus or the Athena logs or openings  
9 with the log and chimney pipe, it was drafting more. People  
10 wanted more flame in the front. I told them to get a front  
11 flame burner. They said, no, they wanted both. They want  
12 more flame in the front and they wanted the ember.

13 Q So what do you do to respond to that customer request?

14 A What did I do?

15 Q Yes.

16 A Well, I went to work on the unit I had in the showroom,  
17 and, in fact, I installed the unit in the front, which was a  
18 larger unit. Majestic Venus.

19 Q What was the unit that you said you worked on? What was  
20 that unit?

21 A Venus.

22 Q Okay.

23 A It was a metal fireplace.

24 Q What was the burner unit that you were working on?

25 A G 4-18. RG 4-18. Golden Oak, 18 inch.

1 Q Okay. Is that a G 4 burner by Peterson Company?  
2 A G 4, yes.  
3 Q Okay. And what did you do, if anything, to modify that  
4 G 4 burner?  
5 A Well, at first I talked to my partner about it. He  
6 says, why don't you try to put a front flame burner in the  
7 front. So I said, that sounds pretty good. So what I did  
8 was, I took pipe -- some pipe, I had some nipples and elbows.  
9 I put a gas cock up on top and tried that out. Well, the  
10 flame came up. It was very symmetrical.  
11 So then I put sand on it. Well --  
12 Q I'm sorry. Go ahead.  
13 A What happened was the parts were all upside. Blew the  
14 sand aside. So that wasn't such a good idea.  
15 Q Okay. If I may just ask -- just interrupt for one  
16 second for that first design that you said, you said you used  
17 a front flame burner initially, correct?  
18 A Right.  
19 Q If I can ask you to turn to Defendant's Exhibit 49 for a  
20 second, please.  
21 A (Witness complies)  
22 Q Do you have that in front of you?  
23 A Yes.  
24 Q Okay. I would like you to turn, if you would, please,  
25 to the third page of Exhibit D 49, and there's a heading



1 that's entitled Front Flame Burner F. Do you see that?

2 A Right.

3 Q Is that the front flame burner that you originally tried  
4 to use?

5 A Yes.

6 Q Okay.

7 A F 18.

8 Q And after you put the sand in with the --

9 A I put the sand on it, and I lit it. And flame came up  
10 through the sand. Well, gas came up through the sand. Then  
11 when I lit it, it blew all the sand aside. So I didn't think  
12 that was such a good idea.

13 Q Okay. What do you do after that?

14 A So then I went and got off the wall, I had a roof flame  
15 log lighter, and I put that on. And then I put that on and  
16 turned that inward and put sand on that. Then I got some  
17 success. I got a decent, not the way I liked it, but it was  
18 a decent flame.

19 Q Okay. And what did you do with that unit after you had  
20 put that second unit with the log lighter together?

21 A Well, then I went to work, and I modified it. I got  
22 some other parts that I had there in stock and such as the  
23 hearth elbow, tubing and the AB 8 valve. I put the AB 8  
24 valve with the injector and put that in the front just as I  
25 put it on the front here.

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1 Q So are you referring to the AV 8 valve and ~~hearth~~ elbow?  
2 Are you referring to parts that were sold -- that you sold  
3 that were manufactured by the Peterson Company?  
4 A That's right.  
5 Q And were they in your stock?  
6 A They were in my stock.  
7 Q In your inventory?  
8 A Yes, in the inventory. Now the log lighter, like I say,  
9 was not Peterson's at first.  
10 Q Okay. Did you eventually change the blue flame log  
11 lighter to another type of log lighter?  
12 A Later on I put the Venus in.  
13 Q Turning back to Exhibit A if we can just briefly. What  
14 do -- I just want to go over some of the symbols that are  
15 used there. What do B 1 and B 2 represent on that Exhibit A  
16 of your declaration?  
17 A B 1 is the G 4 burner.  
18 Q Okay. And what does B 2 represent?  
19 A The B 2 is the AV 8 valve.  
20 Q Okay. And then over in the right hand -- upper right  
21 hand side, there's an initial V 1. What does that refer to?  
22 A That -- originally I had an AV 8 valve, but we weren't  
23 using too many 60 pounds, but later on that was changed.  
24 Q Okay. And then down toward the lower left portion of  
25 that drawing there's a reference to a V 2. What was the V 2

1 referring to?

2 A The V 2?

3 Q V 2, correct.

4 A That's the AV 8 valve and key. That was a removable

5 key. That was taken off when not in use.

6 Q Okay. After you assembled this new design, what did you

7 do with the assembly? Where did you put it?

8 A It stayed there.

9 Q Stayed where?

10 A In the unit in the fireplace.

11 Q Right. Where was the fireplace located?

12 A In the showroom.

13 Q Okay. You said the showroom was open to the public?

14 A Right, in front.

15 Q How long did you maintain that design shown --

16 illustrated in Exhibit A in your showroom?

17 A That stayed there until I moved. Until I left.

18 Q So from approximately --

19 A In other words I guess it stayed in there.

20 Q Okay. So do you recall when you moved?

21 A It was after -- I think we moved around 1980 or '81, I

22 think. I'm trying to remember.

23 Q I think your previous testimony was you first assembled

24 this in approximately '75 or '76, and it stayed there until

25 you moved in '80 or '81?

1 A It was there the whole time.

2 Q Okay.

3 MR. MONCO: May I have a moment, please, Your  
4 Honor?

5 THE COURT: Go ahead.

6 (Pause)

7 BY MR. MONCO:

8 Q Mr. Palaski, I would like to place before you what has  
9 been identified as Defendant's Exhibit D 56. I'll ask if you  
10 can identify that unit.

11 A It's G 4 burner.

12 Q Is there anything -- please, you may step down off the  
13 stand.

14 A This is G 4 burner.

15 THE COURT: You need to turn around this way. You  
16 have to look toward the court reporter.

17 A It's G 4 burner, tubing, the valve. I don't know, looks  
18 like, but it's not like the one I had. A valve. And this is  
19 a log lighter.

20 Q And does what is shown in Exhibit D 56 A represent  
21 accurately what was in your display room in Bayonne, New  
22 Jersey, from 1975 or '76 to '80 or '81?

23 A Except for a different valve. You know, the key.  
24 Basically that's it.

25 Q Okay.

1 Q Mr. Palaski, when you were working with fireplace units  
2 and designing fireplace units and what not, did you commonly  
3 use valves to control the flow of gas through burner tubes?

4 A I don't get that. What did you say?

5 Q I said, during your work in designing fireplace units  
6 and installing fireplace units and so on, did you commonly  
7 use valves to control the flow of gas through burner units?

8 A Mostly valves.

9 Q Okay.

10 A Until a little later on, later seventies that we tried  
11 to use strictly safety pilots.

12 MR. MONCO: Your Honor, may I have a moment  
13 please?

14 THE COURT: Yes.

15 (Pause)

16 BY MR. MONCO:

17 Q Mr. Palaski, referring to the item that was in your shop  
18 that we have just been discussing, the dual burner system  
19 that you set up in your showroom, did you ever sell that to  
20 any customers?

21 A Dealers. Not as a unit, though.

22 Q What did you -- how did you sell it to dealers?

23 A Whenever they had a problem or they were asking how to  
24 enhance that flame in the front, I explained to them what I  
25 had in the showroom. Some of them seen it. Like for

1 instance, Statton Island, this fellow from Fire Glow. He saw  
2 the unit, and he liked it. He put one in his showroom. In  
3 fact, he had it in the front window.

4 Q Did you see it in his front window?

5 A I saw it. Then later on, maybe around '77 or so, he  
6 called me and asked me about -- I was selling see through  
7 fireplaces by Best Metals, and he had purchased the 40 inch,  
8 and he had put a -- had installed that. But then he was  
9 having problems with it, and it was overheating. The pipe  
10 was overheating because the opening was too large for the  
11 size of the pipe. So he said he was going to put a see  
12 through log in there, and he was going to put that set up in.

13 Q The set up that you had in your showroom?

14 A Yeah, but he was going to put it on both sides. And I  
15 saw that one.

16 Q You saw that one also?

17 A I delivered that fireplace directly to him. Then when  
18 it was done, I went back to look at it. And it was nice set  
19 up.

20 Q And when was that done, if you can recall?

21 A I think that was around '78 or '79, I believe.

22 Q Okay. And any other installations that you participated  
23 in that you can recall?

24 A The place down in Maplewood, he had one in his showroom,  
25 and his installer had put that in.

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1 Q Okay. Did you see that one also?

2 A I saw that, yes.

3 MR. MONCO: Your Honor, we have no further  
4 questions.

5 THE COURT: Cross examination.

6 MR. GAINES: Yes, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. GAINES:

9 Q Mr. Palaski, my name is Charles Gaines. Thank you very  
10 much for coming here today. And I need to ask you, have you  
11 ever had your testimony -- have you ever given testimony  
12 before in a court proceeding?

13 A No.

14 Q No. First time today?

15 A Except for divorce.

16 Q Okay. All right. Well, we won't go there.

17 A Not again.

18 Q Please feel free to ask me to repeat any question that  
19 you do not understand. I'll be happy to do so.

20 Q Mr. Palaski, do you remember a telephone call that you  
21 received from me sometime late last fall?

22 A Yes, I vaguely remember that, yeah.

23 Q Okay. We discussed an affidavit or this declaration  
24 that you have made here and presented to the court today; is  
25 that correct?

1 A Yes.

2 Q And can you recall what that conversation was exactly?

3 A You were asking me questions about the affidavit, I  
4 believe.

5 Q And do you remember talking about the reasons why you  
6 came up with the fireplace -- I mean, the burner that you  
7 did, and you said that it was -- in your testimony you said  
8 it was in your showroom; is that correct?

9 A Yes.

10 Q Now I thought I had understood that it was in a  
11 warehouse, too. Was it ever in a warehouse?

12 A I had a place in the back that had zero clearance in,  
13 which is a metal fireplace. That's where I had the log  
14 burner, in there.

15 Q You had a log burner in your warehouse?

16 A Log lighter, rather. I had that in the back.

17 Q You had that in the back?

18 A Yes.

19 Q Now is that different -- is the warehouse different from  
20 your showroom?

21 A Yes, there was a different unit.

22 Q It was a different unit?

23 A Yes, a different set up.

24 Q How so was it a different set up?

25 A Well, it was a log lighter because it was wood burning.



1 Q So it was for wood burning logs?

2 A Yes.

3 Q Okay. Mr. Palaski, do you remember us discussing about  
4 the fact that you really did not sell a great number of  
5 these? Do you remember saying that?

6 A That's true. I remember saying that.

7 Q Do you remember why that was?

8 A We had some success, very small success. Maybe, you  
9 know, few numbers. Some of the installers that I explained  
10 it to or the ones that saw it in a showroom. But later on  
11 about 1975, '76, '77, when we were selling some of these  
12 units, we were having problems with public service. And --

13 Q Problems with what, sir?

14 A With public service, local inspectors. And they were  
15 red tagging the gas units. In many cases they were saying  
16 the gas units were illegal, you know. And if you had two  
17 burners and, in fact, I had a couple units up north that the  
18 installer had put in, and he said that there should be a  
19 safety pilot on both burners.

20 Q So suffice it to say there were problems with it  
21 passing inspection and that sort of thing in that general  
22 area?

23 A Right.

24 Q Is that correct?

25 A Yes.

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1 Q You also mentioned something about difficult to put  
2 together. Do you remember that?

3 A Difficult to put what together?

4 Q Difficult to put it together, you said, is what my notes  
5 say here. Do you remember saying that?

6 A Not difficult in putting it together, no.

7 Q So did you have any instructions with it of how to put  
8 it together?

9 A No. It was explained to the -- you know, if a dealer  
10 called and I explained to him, you know, what to do, I said  
11 all you have to do --

12 Q What about --

13 MR. MONCO: Your Honor, I just request that if the  
14 witness is in the middle of an answer, that he be permitted  
15 to finish.

16 THE COURT: That is sustained.

17 BY MR. GAINES:

18 Q Go ahead, sir. I'm sorry?

19 A Well, if installer -- most at a installers would call.  
20 I told them that, well, all you have to do is put a log  
21 lighter in series with the end of the G 4 burner. And  
22 anybody, installer or plumbers, they're knowledgeable of the  
23 log lighter.

24 Q Okay. But nevertheless, though, you do remember telling  
25 me that these things were sold as component parts; is that

1 correct?

2 A That's right.

3 Q And in most of the cases you never really saw whether or  
4 not they were put together or not; is that correct?

5 A No, most cases, no, I never did.

6 Q So they could have come in and done anything with that  
7 collection of pipes ultimately; isn't that correct?

8 A Yeah. Every week when we made deliveries, if a dealer  
9 called for a --

10 Q Sir, just say -- answer my question. My question was  
11 just yes or no.

12 So you never knew -- they could have done anything  
13 with those component parts; is that correct?

14 A That's correct.

15 Q Okay. Thank you.

16 Did you also use this device for a wood -- a  
17 natural wood burning fireplace as well?

18 A No.

19 Q Okay.

20 Q All right. Mr. Palaski, you said that you came up with  
21 this configuration in '75, did you say or about that? '74,  
22 75?

23 A '75, '76, yeah.

24 Q '75, '76?

25 A Yeah.

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1 Q So let's see. How many -- as far as today goes, how  
2 many years, then, ago was it that you came up with this?

3 A How many years ago?

4 Q Yeah. From today.

5 A A long time.

6 Q About 30 -- well, maybe about 28 29 years; is that  
7 correct?

8 A Oh, yeah.

9 Q Okay. You said that you were a retailer for Peterson  
10 product or distributor?

11 A No, I was a retailer regionally.

12 Q You were originally a retailer for Peterson product

13 A Yeah, and for Peterson right up until about 1974. Then  
14 I went into the wholesale.

15 Q And at one point in time you became a distributor for  
16 Peterson products?

17 A Correct.

18 Q All right. Mr. Palaski, you know by your own admission  
19 you sold this thing as component parts. It wasn't terribly  
20 successful. And so I'm just -- can you explain perhaps why  
21 the thing never made it to the market in a big way? I mean,  
22 because the burners that we're talking about today have sold  
23 a number of units within a relatively short timeframe. Can  
24 you explain why that your configuration was, you know, didn't  
25 kind of catch on the same way that these have done?

1 A Look at it this way. The fellow I bought the business  
2 off probably sold twice as many gas logs as I did. Gas logs  
3 were practically unknown --

4 Q Sir, I'm sorry. I'm just talking about the burner now,  
5 not the gas logs right now.

6 A Oh, burners, yeah, same thing.

7 Q There weren't that many people burning gas logs in those  
8 days?

9 A Not in the early seventies, no.

10 Q So the demand for the product just kind of died out?

11 A It didn't die out. It started to grow after '75 and  
12 '76.

13 Q I'm sorry, sir?

14 A The product started to grow, but there wasn't that many.

15 Q Okay. Had started to grow, but there weren't that many.

16 A That's right. There weren't that many.

17 Q But it certainly didn't gain national wide or nationwide  
18 coverage, did it, to your knowledge?

19 A Not that I know of.

20 Q So I'm just trying to figure out what the gap is between  
21 the time that whenever your product disappeared and Golden  
22 Blount's product appeared.

23 A I don't know anything about Golden Blount, but it wasn't  
24 that great of an idea. And what I was selling the gas log in  
25 its entirety, the way it was was nice enough, as far as I was

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1 concerned. I didn't really need that set up.

2 Q So you don't really have an explanation as to why your  
3 product just kind of disappeared on the market and that  
4 between the time it disappeared and Golden Blount's arrived,  
5 there's no explanation for its absence from the market?

6 A There was no demand for it. I didn't market it.

7 Q Okay. Thank you very much.

8 Do you remember, Mr. Palaski, roughly how many  
9 customers of yours commented about this product or purchased  
10 the product as -- I mean, or said, hey, give me the component  
11 parts for that?

12 A There weren't that many.

13 Q Weren't that many. Okay. Thank you very much.

14 Did you have any personnel that would go install  
15 the burner unit for anybody?

16 A No.

17 Q Okay. Mr. Dworkin -- excuse me, Mr. Palaski, I'm sorry.

18 Mr. Palaski, when did you make the drawing for Mr.  
19 Jankowski?

20 A Last year sometime. Around September, October. I  
21 believe it was about that time. September, October.

22 Q September or October of?

23 A '99 -- back in the nineties.

24 Q Did Mr. Jankowski tell you what the reason for this  
25 request was?

1 A He had told me that they were getting sued, and I said,  
2 for what? And he had mentioned that somebody had invented.  
3 Or -- I asked what they were getting sued for. He said  
4 product -- not product, but patent infringement. I said,  
5 what for? And he explained to me.

6 And I told him, I said, you mean that was like a  
7 log lighter in the front? And he said, well, basically, yes.  
8 I said, well, hell, I was doing that 20 years ago.

9 Q Well --

10 MR. MONCO: Your Honor --

11 MR. GAINES: Sir, I know what you're going to  
12 object to, and the witness is going far too far into his  
13 answer. I have the question --

14 THE COURT: The objection is overruled. Go ahead  
15 and ask the question.

16 MR. MONCO: May I make my objection?

17 THE COURT: Yes. I think the question was, could  
18 you explain how you became -- why you came into or to create  
19 this drawing, and Mr. Palaski was explaining how it came into  
20 existence. And I think he was trying to finish his answer,  
21 and I don't think he was finished.

22 MR. GAINES: No, Your Honor, I was actually --

23 THE COURT: I overrule the objection. Go ahead.

24 BY MR. GAINES:

25 Q Mr. Palaski, so the reason that Mr. Jankowski called you

1 was for the purpose of the lawsuit; is that correct?

2 A He called me for the purpose of whether or not I had  
3 done anything similar to that idea.

4 Q Because his company had been sued; is that correct?

5 A Well, that was the reason.

6 Q Okay. Thank you.

7 MR. GAINES: One moment, Your Honor. I'm sorry.

8 THE COURT: . Okay.

9 (Pause)

10 BY MR. GAINES:

11 Q During your discussions with Mr. Jankowski, Mr. Palaski,  
12 did Mr. Jankowski mention anything to you about a G 4 pan  
13 burner series?

14 A About a G 4?

15 Q Because it was Mr. Jankowski's testimony, I believe,  
16 that he had mentioned something to you about a G 4 pan series  
17 in drawing up this diagram?

18 A Well, when he asked me if I had done anything like that  
19 and I told him, yes, and I told him I did it with a G 4  
20 series.

21 Q Okay. Do you recall the time when Mr. Jankowski came to  
22 your shop?

23 A Oh, that was way back. I remember when he was -- I  
24 don't know whether he was sales manager at that time, but he  
25 was making the rounds in Jersey, yes.



1 Q Do you remember when that was?

2 A Not exactly.

3 Q Okay.

4 A I can't remember that.

5 Q Did Mr. Jankowski ever see the burner?

6 A Well, he saw it. He saw the display, yes.

7 Q How did you have it displayed, Mr. Palaski?

8 A How I had it displayed?

9 Q Yes. What could you see about it?

10 A Well, it was up against the unit, was close to the wall,

11 and the G 4 burner was in there in the sand or vermiculite

12 and granules all set up right in the front of the showroom.

13 Q So can you see either one of the burning tubes at all?

14 A You can see one or both of them burning, yes.

15 Q Could you see the tubes?

16 A No.

17 Q Could you see the pan?

18 A Well, you could see the ends sticking up.

19 Q You could see the ends of the pan?

20 A Right.

21 Q But you could have had three tubes underneath there; is

22 that correct?

23 A Could have had three what?

24 Q You could have had three tubes underneath there, and

25 somebody observing it would not have known; is that correct?

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1 A I guess I could have if I knew how to hook it up.

2 Q Well, no, that's not the answer to my question. I asked  
3 you that as far as an observer, he didn't know how many tubes  
4 was under there; is that correct?

5 A I guess so.

6 Q Okay. Thank you.

7 Mr. Palaski, the unit that we see over here, which  
8 is marked Defendant's Exhibit D-56. Is it correct, sir, that  
9 it is your testimony that this is not exactly like the unit  
10 that you had?

11 A It is like it except for the valve.

12 Q So it is different?

13 A The valve is different.

14 Q The valve is different. Is the front tube different?

15 A Well, looks the same.

16 Q All right. But it's from there you can not tell whether  
17 it is or not. Are these tubes about the same diameter?

18 A They're close to it. Yeah, they were about the same,  
19 yeah.

20 Q Is that what your unit was or are you just looking at  
21 this and recalling?

22 A Mine was about the same -- it was the same size, half  
23 inch pipe.

24 Q Do you have any idea as to the representative height of  
25 the one tube versus the other tube?

1 A I wasn't paying much attention to that, but I think it  
2 was a little lower.

3 Q Okay.

4 A You know --

5 Q Now you said you weren't really paying much attention to  
6 that, but I think it was a little lower?

7 A I remember it was lower on the bottom. It was touching.

8 Q The pipe was touching --

9 A The injector was touching.

10 Q Well, wasn't this --

11 A The pipe was bent down, yes.

12 Q So this was bent down?

13 A That's it now you got it.

14 Q Like that?

15 A Right.

16 Q Okay. But basically, though, this is a different unit  
17 than the one that you -- the one that you came up with in  
18 your shop?

19 A It's different because of the valve, yes.

20 Q Okay.

21 Q I'm going to turn your attention now to Exhibit A which  
22 is the Exhibit A to your declaration.

23 I would like to address your attention to first of  
24 all the rectangular drawing that you have there. Do you the  
25 rectangular drawing outline, Mr. Palaski?

JT-APP-1375

|    |   |  |
|----|---|--|
| 1  | A | Yes.   |
| 2  | Q | What is that?  |
| 3  | A | You mean the pan?  |
| 4  | Q | I don't know. That's what I'm asking?                    |
| 5  | A | Yeah, that's the pan.                                    |
| 6  | Q | What kind of pan was it?                                 |
| 7  | A | The G 4 pan.   |
| 8  | Q | It was G 4 pan?.   |
| 9  | A | Right.   |
| 10 | Q | And see the half inch elbow that you have designated,    |
| 11 |   | half inch elbow to three eighth comp?                    |
| 12 | A | Right.   |
| 13 | Q | Is that the same kind of elbow that's on there today?    |
| 14 | A | No.  |
| 15 | Q | Okay.  |
| 16 | A | The one I had had the adjust screw on the back. It was   |
| 17 |   | the old type.  |
| 18 | Q | What about the connectors that's connecting the elbow to |
| 19 |   | the aluminum tubing? Are those the same?                 |
| 20 | A | The adapter, the injectors.                              |
| 21 | Q | What about the valve?                                    |
| 22 | A | The injectors. The valve is different all together.      |
| 23 | Q | Okay. And how about the -- what is this PN injector      |
| 24 |   | right there?   |
| 25 | A | That's the injector. Injector.                           |

1 Q Is that injector? I'm sorry?

2 A Yeah.

3 Q And you came up with that -- you came up with this

4 drawing after how many years?

5 A Since 1975, '76, yeah.

6 Q So again about 27, 28 years, somewhere in that

7 neighborhood?

8 A But I had, you know, I had no problem with the parts.

9 Q That's fine. You answered my question. Thank you.

10 On this drawing, Mr. Palaski, you don't have any

11 representative height positioning on there at all, do you?

12 A Representative what.

13 Q Representative height positions as far as there's no way

14 you can tell how far the log lighter is above or below the

15 B 1 tube that you've got designated there. So there's

16 nothing there to indicate how the tubes are positioned; is

17 that correct?

18 A That's correct.

19 Q Okay. Thank you.

20 A No way.

21 Q Mr. Palaski, did you draft the declaration that you

22 signed?

23 A I did what?

24 Q Did you draft the declaration that you signed?

25 A The declaration?

1 Q Yes, sir. It's exhibit --

2 A No.

3 Q -- Exhibit -- Defendant's Exhibit 56, that declaration

4 right there. Did you draft that?

5 A No, I didn't draft that.

6 Q Who drafted that for you?

7 A That was sent to me.

8 Q Sir?

9 A That was sent to me.

10 Q From whom?

11 A From the attorney.

12 Q Which attorney?

13 A From -- who the heck was it? Woods and whoever it was.

14 Those gentlemen here.

15 Q You don't know which attorney, but it was from the

16 defendant's law firm?

17 A From their law firm, yeah.

18 Q Okay. Mr. Palaski, did you meet with any attorneys in

19 preparation for your testimony today?

20 A Yes.

21 Q Who did you meet with?

22 A The gentlemen over there.

23 Q Which gentleman is that, sir?

24 A The one on the left and the right. Both of them.

25 Q Would that be --

1 A You can't remember, either.

2 Q Sir? No, I can't. I wanted to call Dan Morales for a  
3 minute. Dean Monco and Bill McLaughlin?

4 A Right.

5 Q Are those the gentlemen that you met with? What did  
6 they say to you?

7 A Well, they asked the questions that they would be asking  
8 me about the -- where I worked and in that relationship.

9 Q Did they tell you what the issues were in this lawsuit?

10 A I don't know anything about the issues.

11 Q They just asked you a series of questions?

12 A Series of questions, but had nothing to do with the  
13 lawsuit.

14 Q Lawsuit at all?

15 A No.

16 Q Okay. Did they ask you about your -- did they ask you  
17 about your declaration?

18 A They asked about the declaration, right.

19 Q And the contents in it?

20 A And the contents of it, yes.

21 Q Okay. Thank you.

22 Mr. Palaski, going back to the time that you were  
23 in business, did you keep any sales records or anything of or  
24 any drawings or anything like that on your device that you've  
25 shown in --

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1 A I had a lot of records. That was destroyed; you know.

2 I had kept a lot of that in my barn after I sold the  
3 business, and some I left with Darryl.

4 Q Okay. So did you have records pertaining to the sale of  
5 this device, then?

6 A I had sales records and all.

7 Q But it really wouldn't have shown the sale of the  
8 device, would it?

9 A No..

10 Q It would have shown the sale of just component parts,  
11 wouldn't it?

12 A That's right.

13 Q Okay. And you had no other drawings of this device?

14 A No. I never drew anything on it.

15 Q So the only embodiment of this thing was the one that  
16 was in your showroom that was covered up with sand and other  
17 types of materials and no one could really know what it was  
18 by looking at it; is that correct?

19 A Except it had two valves.

20 Q Except that it had two valves?

21 A Right.

22 Q How would you know that it had two valves for sure?

23 A They were visible.

24 Q The valves were visible?

25 A The valves were visible.

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1 Q Okay. To your knowledge, Mr. Palaski, are there any of  
2 your devices in existence presently?

3 A I have no idea.

4 Q You have no idea. Okay. Thank you.

5 All right.

6 MR. GAINES: Give me one moment, Your Honor. Let  
7 me make sure Mr. Harris doesn't have something else he wants  
8 me to cover.

9 THE COURT: All right.

10 (Pause)

11 BY MR. GAINES:

12 Q Okay. Let's go back to your meeting with the attorneys.  
13 I want to know a little bit more specifics as to what was  
14 said by either Mr. Monco or Mr. McLaughlin to you in  
15 preparation for your testimony here today specifically?

16 A Specifically.

17 Q You can give a narrative answer like you were doing a  
18 while ago.

19 A Well, I was just asking about the declaration.

20 Q What did they ask you about the declaration?

21 A For me to go through the, you know, the list. He showed  
22 it to me.

23 Q What list, sir?

24 A The declaration.

25 Q Each point in the declaration?

1 A Pointed out the declaration.

2 Q What did he ask you about each one of those?

3 A Asked me the questions whether or not these were the

4 facts and all, you know. I said yes.

5 Q What else was discussed?

6 A And I'll tell you, nothing of any significance that I

7 can remember.

8 Q I'm just asking. I'm really not concerned whether you

9 felt that it was significant or not. I would just like to

10 know what was said.

11 A All the questions about they asked me about this unit.

12 They asked me about the unit that I had devised, you know.

13 And explained it to them again and how it came about and that

14 was the basic part of that meeting.

15 Q How long were you with them?

16 A Oh, maybe half hour.

17 Q About half an hour, and that's it?

18 A Probably, yeah.

19 Q Okay. Did you and Vince -- did you and Mr. Jankowski

20 talk at all about the lawsuit?

21 A Rarely.

22 Q Well, but you did?

23 A Well, yes, I talked to him.

24 Q And what does Mr. Jankowski tell you?

25 A Nothing to any significance. He didn't know what was

JT-APP 1382

1 going on, really.

2 Q He didn't know what was going on?

3 A No. I asked him, you know. He says he didn't know.

4 Q Did -- would your burner -- excuse me.

5 Did Mr. Jankowski bring the patent up to you at  
6 all, Mr. Blount's patent?

7 A About the patent?

8 Q Yes.

9 A He mentioned to me originally that there was a patent.

10 Q That there was a patent?

11 A Yes.

12 Q What else did he say about that?

13 A No more than that. Just that there was a patent.

14 Q Okay. Do you remember Mr. Jankowski testifying that he  
15 said that your device would work on wood?

16 A What?

17 Q Work with a wood burning fireplace?

18 A It would work with a wood burning fireplace?

19 Q Would it?

20 A No.

21 Q Sir?

22 A No.

23 Q Why not?

24 A Because the tube would burn up.

25 Q Because the tube would burn up?

J-APP 1383

1 A It would melt. The aluminum tube.

2 Q Why would the tube melt?

3 A The heat from wood burner fireplace.

4 Q Around there gas log lighter for wood burner fireplace?

5 A That's a gas log. You're talking about this set up.  
6 That's different thing.

7 Q What's different? They're both metal, aren't they?

8 A I'm telling you, if you're going to put that particular  
9 unit in a fireplace, you're going to burn it up. You're  
10 going too burn up the tubing.

11 Q Let's see. Mr. Palaski, just a few more questions.

12 You said that you did some design work with Mr.  
13 Jankowski; is that correct?

14 A We worked hand in hand on some jobs, you know. I called  
15 him or he called me back with the ideas.

16 Q Okay. Okay. So you just -- you guys just exchanged  
17 ideas over a period of time, then?

18 A Yeah, you know --

19 Q Okay.

20 A -- for a reason.

21 Q All right. Sure.

22 You said that you talked with your partner about  
23 this device, is that correct, your partner at the time?

24 A When initially started working on it, yes. He was the  
25 one that suggested I put that log lighter in to try to get a

JT-APP 1384

1 front flame on it.

2 Q Okay. So really it was more his device, I guess, than  
3 yours?

4 A Well, initial idea, yeah.

5 Q His idea initially, then.

6 Now, I'm sorry Mr. Palaski. Just to make sure that  
7 I'm clear on this. You -- with the exception of the few  
8 instances that you mentioned, you never saw one of those  
9 devices put together; is that correct? With the exception of  
10 the few instances you mentioned?

11 A I never seen that many. I didn't know.

12 Q Okay. You sold it as component parts; is that correct?

13 A I sold parts that I didn't know where they were going,  
14 for what.

15 Q You had no instructions for installation or anything  
16 like that?

17 A No instructions whatsoever.

18 Q And you didn't sell very many component parts for the  
19 purposes of those burners; is that correct?

20 A An order came in for say AV 8 burner, I wasn't sure what  
21 it was for.

22 Q So you really had no idea what that part was for?

23 A That's right.

24 Q And you don't know of any of your burners in existence  
25 today; is that correct?

-JJ-APP 1385-

1 A Not today. I don't know if anybody is still alive.

2 MR. GAINES: Pass the witness, Your Honor.

3 THE COURT: Redirect.

4 MR. MONCO: Thank you, Your Honor. I'll be very  
5 brief considering the hour. Appreciate it very much.

6 THE COURT: Okay. Magic words.

7 REDIRECT EXAMINATION

8 BY MR. MONCO:

9 Q Mr. Palaski, I think you said that the valve on this  
10 unit, Defendant's Exhibit D 56 A, is different than the one  
11 that was actually in your showroom?

12 A Yes. It's basically the same, but it's a different  
13 design.

14 Q Okay. Does the valve in your showroom perform the same  
15 function as this valve?

16 A Same function.

17 Q Thank you. Now I think you said that you together with  
18 your partner came up with the design which is shown in  
19 Exhibit 56 A, that drawing, in response to I believe it was a  
20 complaint from your customer?

21 A There were a few complaints on the wood burning and  
22 mental fireplaces.

23 MR. HARRIS: Your Honor, I do object to the  
24 leading of the witness that has been taking place.

25 THE COURT: Okay.

1 MR. HARRIS: I will rise if I get excited.

2 THE COURT: Okay. That's sustained.

3 BY MR. MONCO:

4 Q Okay. Could you just repeat again how -- the reason why  
5 you came up with the design shown in your Exhibit eight?

6 A Why I came up?

7 Q What were the circumstances surrounding this design that  
8 you came up with?

9 A For that unit, was the complaints on the wood burner  
10 metal fireplace.

11 Q Okay. Having received those complaints, how long did it  
12 take you to come up with the design that you had?

13 A Well, let's see. It was probably after we had about a  
14 half a dozen or so complaints on the front flame and that we  
15 were -- they were going too far to the back that I started to  
16 talk to my partner. So it wasn't that long.

17 Q Are we talking months, years?

18 A Oh, no, no. It was probably within a couple months  
19 probably.

20 Q I'm sorry. How long?

21 A Couple months maybe.

22 Q Month to a couple months you came up with that design?

23 A Right.

24 MR. HARRIS: Your Honor, I object to the  
25 speculation that's being obtained from the witness.

1 THE COURT: That's overruled.

2 MR. MONCO: Thank you, Your Honor. We have no  
3 further questions.

4 THE COURT: Okay. Any cross examination, recross?

5 MR. GAINES: No, Your Honor, we don't have any  
6 more.

7 THE COURT: Thank you very much. You may step  
8 down, and you're excused. You're free to go.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Have a good trip home.

11 THE COURT: Thank you. Glad to get back.

12 THE COURT: How many more witnesses do we have?

13 MR. MONCO: I think we probably only have one,  
14 Your Honor. I think that'll be it. I think it's relatively  
15 brief, about the same length as Mr. Palaski was today on our  
16 direct. So I think we should be finished fairly promptly  
17 tomorrow and be able to present closing arguments to Your  
18 Honor.

19 THE COURT: Okay.

20 MR. HARRIS: May we ask who the witness might be  
21 in order that we might be prepared to be as quick as possible  
22 in our preparation?

23 MR. MONCO: The witness will be Mr. Darryl  
24 Dworkin.

25 MR. HARRIS: Thank you.



1 THE COURT: Okay.

2 MR. MONCO: Your Honor, if I may ask. May I  
3 inquire how long would Your Honor wants closing arts? Is  
4 there a time limit?

5 THE COURT: How long would y'all like to argue?  
6 How much longer would you like to argue?

7 MR. HARRIS: You know I love to argue. But  
8 actually I could go as much as half an hour.

9 THE COURT: Okay. That's fine. Half an hour.  
10 Fine.

11 MR. MONCO: I think half hour, 40 minutes, judge.  
12 In that range, Your Honor.

13 MR. HARRIS: I'll go 40 minutes.

14 THE COURT: Okay. I'll just give you 40 minutes.

15 MR. GAINES: Your Honor, we may want a very brief  
16 rebuttal.

17 THE COURT: Okay. That's fine.

18 MR. GAINES: Okay. It will be brief.

19 MR. HARRIS: Your Honor, I do propose to turn in  
20 sometime in the morning a very brief memo having to do with  
21 the law that relates to rather remote testimony on things  
22 that happened a long time ago and maybe so, starting with  
23 what's called the Barbed Wire Case. It goes back to the  
24 Supreme Court all the way to when Glidden invented it in  
25 about 1890, and there were 24 or six people who claimed that

1 they had done the same thing.

2 THE COURT: Okay.

3 MR. HARRIS: There's a series of cases after that.  
4 I would like for you to have that.

5 THE COURT: I look forward to reading that.

6 MR. MONCO: Your Honor, if I may further inquire.  
7 Is Your Honor going to request findings of fact and  
8 conclusions of law?

9 THE COURT: You've already filed findings and  
10 conclusions. Unless you want to supplement those, that's  
11 fine.

12 MR. MONCO: May we just confer tonight and maybe  
13 let Your Honor know.

14 THE COURT: Let me know in the morning then.  
15 That'll be fine. We'll get started at nine o'clock in the  
16 morning, and we'll stand adjourned.

17 MR. MONCO: Thank you very much, Your Honor.

18 (A recess was held at 6:25.)  
19  
20  
21  
22  
23  
24  
25

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## I N D E X

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JT-APP 1391

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                        |   |                     |
|------------------------|---|---------------------|
| GOLDEN BLOUNT, INC.    | ( | CIVIL ACTION NUMBER |
| Plaintiff,             | ( |                     |
|                        | ( |                     |
| VERSUS                 | ( | 3:01-CV-127-R       |
|                        | ( |                     |
| ROBERT H. PETERSON CO. | ( |                     |
| Defendant.             | ( | July 31, 2002       |

VOLUME 3 of 3  
TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JERRY BUCKMEYER  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: MR. WILLIAM D. HARRIS, JR.  
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COPY

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2 P.O. Box 50854  
3 Dallas, Texas 75250  
4 214/749-7930

5 Proceedings reported by mechanical stenography,  
6 transcript produced by computer.  
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P R O C E E D I N G S:

(Proceedings, 9:00)

THE COURT: Have a seat, please. Good morning.

MR. MONCO: Good morning, Your Honor. May we proceed?

THE COURT: Yes.

MR. MONCO: Thank you, Your Honor. We would next like to call Darryl Dworkin to the stand.

THE COURT: Okay.

THE COURT: If you'll raise your right hand, please.

THE WITNESS: Yes, sir.

(Witness sworn by the court.)

THE COURT: Good. Just have a seat right up there.

THE WITNESS: Thank you, sir.

DARRYL RICHARD DWORKIN, (Sworn)  
was called as a witness by the Defendant having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MONCO:

Q Good morning, Mr. Dworkin.

A Mr. Monco.

Q Would you state your name and spell your last name?

A Darryl Richard Dworkin, D-w-o-r-k-i-n.

1 Q How old are you, Mr. Dworkin?

2 A 60.

3 Q And would you please recount for the court your  
4 education after high school, please?

5 A I have a bachelor's degree in mechanical engineering,  
6 University of Southern California. I have some postgraduate  
7 work, not a lot.

8 Q Have you yourself been the recipient of any patents?

9 A Yes, sir, I have. Four mechanical patents and one  
10 design patent.

11 Q Could you briefly recount your work experience after  
12 graduating from Southern California?

13 A Initially I went to work for Matel Toys. During my  
14 tenure at Matel Toys, I rose to the Director of Engineering,  
15 also Chief of Engineering for Fargo Company. Vice-president  
16 for CBA, division of CBS. After CBS I went to LJN. 1980 I  
17 went kind of nuts and bought by my own company.

18 Q Would you briefly describe for the judge the matter of  
19 your four patents?

20 A One of them is the world's smallest changeable record  
21 phonograph. One of them is a -- simulates a golf ball hole  
22 without putting a hole in the carpet. It's kind of  
23 interesting.

24 One of them is Barbie's Friendship Airplane which  
25 is a case that changes to assimilating an airplane for

1 Barbie. The design patent is on the log hearth for the  
2 hearth industry. And the fourth patent is Clip Clop, which  
3 was the world's first simulation of natural sounds by  
4 electronic devices.

5 Q Following -- how long were you with Matel?

6 A Eight and a half years.

7 Q And after leaving Matel what did you do?

8 A First Knickerbock, then CBA, then LJN, three other toy  
9 companies.

10 Q At some point in time did you become involved with the  
11 fireplace industry?

12 A Since 1980.

13 Q 1980. And could you briefly describe how you became  
14 involved in the fireplace industry?

15 A We saw -- my wife and I saw an advertisement in the Wall  
16 Street Journal to purchase a retail store. We subsequently  
17 purchased that retail store, closing on February 1st of 1980.  
18 That store, approximately 30 percent of its volume at that  
19 time was hearth industry, fireplace equipment.

20 Q Okay. And what was the name of the store, and where was  
21 it located?

22 A The Bright Acres in Shrewsbury, New Jersey.

23 Q And subsequent to the purchase of that store, did you  
24 make any other purchases of any other stores or  
25 establishments?



1 A In 1982 we purchased a location in Wall Township and  
2 opened a second Bright Acres Store, and in 1987 we purchased  
3 our largest supplier and became a distributor by purchasing  
4 Fire Side Shop from John Palaski.

5 Q And that was in 1987?

6 A Yes, June 1st of '87.

7 Q And could you identify for the court the line of  
8 products that your retail -- let me just back up make it  
9 clear for the record.

10 You said you had two retail establishments. And  
11 then what was the nature of the fire side shop?

12 A Fire Side Shop was a wholesale distributor. True two  
13 step wholesale distributor. Did not have a retail outlet of  
14 its own. We maintained separation between the Bright Acres  
15 Store and Fire Side Shop, primarily because we had hearth  
16 competition in the local area, and we didn't want the hearth  
17 competition that we were selling to as wholesalers to be  
18 upset that we also were retailers.

19 Q Could you identify the line of products and the type of  
20 products that you carried in your retail store and wholesale  
21 distributor shop?

22 A Both the retail stores and the wholesale distributors  
23 shops were full line hearth products. We had literally  
24 everything for the fireplace. We were not stove shops. We  
25 did not have contained burner wood stoves per se, but we did

1 have everything for fireplace, aesthetic fireplace.

2 Q What manufacturers line did you carry?

3 A Robert H. Peterson. Portland, Willamette, Heat and  
4 Flow, Adams Tools, Century Screens, and on and on.

5 Q And since getting in in 1980 and purchasing the  
6 businesses that you've identified, what roles have you played  
7 in operation of your businesses, if any?

8 A I am the primary consultant and operating person of the  
9 business. My wife runs the inventory control. Her expertise  
10 is in inventory control. She runs purchasing and inventory  
11 control and office staff. I run the warehouse, the  
12 operation, the deliveries, the answering of questions of  
13 customers, the consulting when need be done, the problem  
14 solving.

15 Q As part of your duties have you done any design work on  
16 fireplaces?

17 A Many times.

18 Q Okay. Could you just generally describe the nature of  
19 the design work that you perform?

20 A Every fireplace, particularly masonry fireplaces, are  
21 different. There's no two masonry fireplaces that are the  
22 same. And depending on the installation, metal box  
23 fireplaces are different. And depending on the requirements  
24 of the fireplace, we've done some rather unusual things  
25 actually to try and solve the particular difficulties of that

1 installation.

2 In the case of glass doors for Portland Willamette,  
3 I made some very unusual modifications to fully cover without  
4 blocking the air flow all of the black of the metal box  
5 fireplace to give it more aesthetic appearance and not  
6 violate the codes and the laws.

7 In hearth products we have, as I say, everything is  
8 different. So if the retail store, our own or somebody  
9 else's, said, I have a see through fireplace, for example,  
10 that's unusually deep. How can we put gas logs into it? We  
11 would approach that and come up with a solution.

12 Q Okay.

13 A Which we've done.

14 Q If you would, please, Mr. Dworkin, I would ask if you  
15 would turn to exhibit D 57. That's in front of you.

16 A D 57. Okay.

17 THE COURT: What exhibit number?

18 MR. MONCO: I'm sorry. D 57.

19 THE COURT: Okay.

20 A Yes, sir, I have it.

21 MR. HARRIS: Your Honor, I renew my objection that  
22 the affidavit which was late supplied and didn't really give  
23 us an opportunity to follow up on it.

24 THE COURT: Okay. I'll overrule the objection.

25 MR. MONCO: Thank you, Your Honor.

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1 BY MR. MONCO:  
2 Q Could you identify Exhibit D 57, please, Mr. Dworkin?  
3 A D 57 is my declaration to the court on this matter.  
4 Q Okay. And could you turn to the third page of Exhibit D  
5 57. And is that your signature?  
6 A Yes, sir, that is my signature.  
7 Q And then if you would, please, Mr. Dworkin, would you  
8 turn to what are identified as Exhibit A and Exhibit B of  
9 Exhibit D 57. And first of all, could you identify what  
10 Exhibit A is?  
11 A In the case of a fire pit or a large circular fireplace,  
12 generally free standing, that would be three Peterson G 4  
13 burners combined with three valves.  
14 Q Did you prepare Exhibit A?  
15 A I did. I prepared the initial sketch.  
16 Q Okay.  
17 A And it was modified a little bit. Then I made a change  
18 to that. This is the end result.  
19 Q Okay. And --  
20 A That is not my handwriting, but this is the end result.  
21 Q Could you identify the elements identified as B1, B2 and  
22 B3?  
23 A Well, this was typical, as I said, a circular fireplace  
24 or a fire pit. V1, 2 and 3 involve AV 8 valves from Robert  
25 H. Peterson Company. B1, B2, and B3 would be G 4 burners

1 from Robert H. Peterson Company.

2 Q And could you identify what V1, V2, and V3 are?

3 A AV 8 valves. They were manual regulation valves that  
4 controlled the gas flow first to the primary burner, then in  
5 series each to the secondary and third burner.

6 Q Who manufactured B1 and B2 and B3?

7 A We purchased them from the Robert H. Peterson Company.  
8 I don't know the manufacturer.

9 Q Okay. And where did you purchase V1, V2, and V3 from?

10 A From the Robert H. Peterson Company.

11 Q Okay. Now the drawing shown in Exhibit A2 Exhibit 57,  
12 was that fireplace that's shown on that drawing actually  
13 installed by you?

14 A I would have not done the installation. I would have  
15 done the design. In the case of this type of fireplace,  
16 Peterson actually made the connections and shipped them to  
17 us. I would have supplied the connections, probably gone out  
18 with the installer. But I frankly don't remember going out  
19 on any installations, but I would have prepared the installer  
20 as to how to install them and one --

21 THE COURT: Just one second.

22 MR. HARRIS: Objected to as speculative by the  
23 very language used by the witness. I would have done this, I  
24 would have done that, and I think I did so and so. I object.

25 THE COURT: Okay. That's sustained.

1 MR. MONCO: Okay.

2 A Am I to restate that? I can do that.

3 BY MR. MONCO:

4 Q Please do.

5 A I did work with Robert H. Peterson Company. Sent them  
6 and talked with Vince Jankowsky to prepare larger circular  
7 fireplace of this nature. I would have ordered and paid for  
8 the parts.

9 MR. HARRIS: Same objection, Your Honor. I would  
10 have.

11 THE COURT: Well, I'll overrule that objection.

12 MR. MONCO: Thank you.

13 A Ordered and paid for the parts. Received the parts. In  
14 turn, turned them over to who did the actual installation,  
15 which would have been a licensed plumber. In the State of  
16 New Jersey, we require a licensed plumber to install gas  
17 products or a gas appliance technician, which is not a  
18 specified term. We work with licensed plumbers. Turned it  
19 over to a licensed plumber who would have done the  
20 installation.

21 Generally 80 percent of the time or more on  
22 something of this nature, I would have gone out and been  
23 there at the time of installation, but not have performed the  
24 installation.

25 Q Okay. Now you said that you used licensed plumbers to

1 be installations. Why do you use licensed plumbers?

2 A It's required by the state. Licensed plumbers are gas  
3 appliance technicians which is not a clear -- there's no  
4 clear code definition as to what a glass appliance technician  
5 is.

6 Q When were you paid for the work that you did and the  
7 products that you provided?

8 A We would receive a down payment at the time that the  
9 work initiated. Final payment would not be done until the  
10 customer was satisfied that the unit was operating properly.

11 Q Okay. Did you follow up with customers after  
12 installations to determine their satisfaction?

13 A As I said before, about 80 percent of the time I would  
14 be there on something like this to make sure that it was  
15 correctly installed and correctly done.

16 Q Okay. And I would ask you if you would, please, to turn  
17 to Exhibit B of your declaration, Exhibit D 57, and ask if  
18 you can identify what Exhibit B is.

19 A Exhibit B is a typical large see through fireplace. See  
20 through fireplace, again Masons don't build things in any  
21 normal -- normal is the wrong word.

22 Masons don't build things the same time and time  
23 again. In New Jersey we have some very large houses, and it  
24 would not be uncommon to find a see through fireplace 40  
25 inches, 48 inches, even, face-to-face.

1 The see through gas log sets as normally supplied  
2 by the Robert H. Peterson Company have a front to rear  
3 spacing of approximately 15 inches. 15 inches inside of a 40  
4 or 48 inch deep opening kind of disappears.

5 So what I would do to solve these particular  
6 problems, either for our own retail store on many occasions  
7 or for our customers for the wholesale business, would be to  
8 suggest or tell them how to prepare something as in exhibit B  
9 so that we could space two regular G 4 pan flame burners and  
10 gas logs. That's two separate gas log sets connected again  
11 in series with secondary valve to B2 through V2.

12 Q Okay. Did you prepare the drawing on Exhibit B 2. I'm  
13 sorry. Exhibit B?

14 A The drawing was initially done by someone else. I saw  
15 it. I made some changes. On this particular one the  
16 placement of the valve I had moved. I actually have the  
17 original notes in my briefcase if you care to see them, but  
18 they're there.

19 Q Okay. Could you identify what B1 and B2 are?

20 A Again V2 would have been in every case a manual valve  
21 touch as --

22 Q I'm sorry. Let me back. I said B as in boy.

23 A Oh. B1 and B2 are representative of G 4 series.

24 Q Thank you. Could you identify what V1 and V2 are?

25 A V1 could have been a number of types of valves from an



1 AV 8 on to in some cases and SPK, Safety Pilot Kit. V2 would  
2 have been in every case a manual valve like an AV 8.

3 Q Okay. Why did you -- let me just back up. Were there  
4 actual fireplaces to your knowledge installed with the design  
5 reflecting the design shown in Exhibit B?

6 A Yes, sir.

7 Q Okay. Why did you use valve V2?

8 A If you have a typical fireplace of this type where the  
9 face opens for 40 to 48 inches would generally be between a  
10 den and a living room of a rather large house. The den side  
11 would always be used. People use their dens. People don't  
12 use their living rooms as much. I don't know about you. My  
13 living room is used 10 times in the last 20 years.

14 The living room side, if you're not going to use  
15 it, there's no reason to run the gas to it and no reason to  
16 have a secondary fire on that side. So I had it so you could  
17 turn it off. Not turn it on unless you wanted it.

18 Q At the time that you designed the fireplace reflected in  
19 Exhibit B and the actual installation, did you consider  
20 the -- let me just back up.

21 At the time that you designed the fireplaces and  
22 installed or had installed the fireplaces reflected in  
23 Exhibit B, how did you regard the use of a second valve to  
24 control the flow of gas going into that second burner?

25 A Series flow goes back -- to my own knowledge it goes

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1 back to Roman antiquity. I visited Adrian's Villa outside of  
2 Rome where the fountains, we would call water goes through  
3 these fountain that flows one to another controlled by  
4 valves. It's series flow. It just is common practice.

5 Q Mr. Dworkin, would you turn to Exhibit D 4, please, and  
6 specifically to page 3-1-3.

7 A Do I have D? I see. No, those are 64s.

8 Q Do you have that now in front of you?

9 A Not just yet.

10 Q Okay.

11 A I just found the page.

12 I can't read the screen. Now I've got it.

13 MR. HARRIS: Your Honor, at this time it appears  
14 that the witness is going to be asked questions about details  
15 in the patent. We've heard that this witness has a certain  
16 background in that area. This witness, when he gets outside  
17 of the area that he's actually worked and described, becomes  
18 therefore an expert witness. No such expert witness was  
19 designated in this particular case. Indeed, none was  
20 designated.

21 So outside of the area of his work, we object to  
22 his testimony and any opinions offered.

23 THE COURT: Okay. Response.

24 MR. MONCO: Response to that, Your Honor, is that  
25 there were certain factual statements made in the prosecution

1 of the patent in suit by Mr. Blount, and I would simply like  
2 to ask this witness to read a statement made by Mr. Blount to  
3 the patent office of a factual nature and ask him to his  
4 knowledge based on his own experience is that statement  
5 factually correct.

6 THE COURT: Okay.

7 MR. HARRIS: That, Your Honor, is nothing other  
8 than an expert's opinion.

9 THE COURT: I'll overrule the objection. Proceed.

10 MR. MONCO: Thank you, Your Honor.

11 BY MR. MONCO:

12 Q If we could have an enlargement on the second paragraph,  
13 please.

14 A Oh, that's nice.

15 Q If you go down to, I think, about the fourth sentence  
16 there's a statement, "However, this combination of references  
17 in no way suggests the incorporation of an additional valve  
18 between primary and secondary burner tubes. The only  
19 suggestion for the incorporation of the secondary valve  
20 necessarily comes from the applicant's own disclosure.  
21 Clearly by making the combination of references as set forth  
22 in the official action and concluding the claimed invention  
23 is obvious is classic hind hindsight. Even if all the  
24 references are combined as suggested by the examiner, there  
25 is still no valve disposed between the primary and secondary

1 burner to control the gas flow to the secondary burner."

2 My question to Mr. Dworkin is in view of your own  
3 personal experience, are the statements made there correct?

4 MR. HARRIS: Your Honor, again I must at least put  
5 on the record an objection. He's being asked for an opinion  
6 about what was said there, and he had nothing to do with that  
7 matter. And he's serving in that regard, if he so serves, as  
8 an expert witness. And that is not proper. I object.

9 THE COURT: Okay.

10 MR. MONCO: Your Honor, again this statement was  
11 made as a factual matter to the patent office, and I'm asking  
12 this witness based on his experience in designing and  
13 installing fireplaces. He's not testifying now as an expert.  
14 He's simply recounting and contrasting this statement which  
15 is a factual statement, factual argument made to the patent  
16 office in contrast to his own experience in the field in  
17 designing and installing. I think that is not -- that simply  
18 asking is that statement correct, yes or no, that is not an  
19 opinion.

20 THE COURT: Okay. I'll overrule the objection.

21 MR. MONCO: Thank you, Your Honor.

22 BY MR. MONCO:

23 Q Mr. Dworkin, having read that statement, is that  
24 statement correct?

25 A From my experience having put secondary valves and even

1 third valves in series flow, no, it is not correct.

2 Q How long have you been putting secondary valves in  
3 series flow since becoming involved in fireplace industry?

4 A Probably the first time I did it was '83. It was fairly  
5 common practice between '83 and roughly 1990, at which time  
6 the codes changed to require safety pilot kits on both the  
7 second and any additional burners. And that kind of stopped  
8 directly, the type of application shown in A and B.

9 Q Now switching subjects for a moment, Mr. Dworkin, you  
10 said that you have retail shops and wholesale shops. Could  
11 you generally describe for the court when a buyer comes in to  
12 buy a fireplace set, what is a buyer looking for?

13 A That's usually the first thing we try and find out. In  
14 our retail shops we've trained our people, and our people are  
15 asking questions, they're trying to find out what the buyer  
16 is looking for.

17 Somebody comes into the shop and they say they want  
18 gas logs. Many times they don't really want gas logs, and we  
19 can perhaps sell them an insert, which is several times the  
20 price of gas logs. We're looking for what does the customer  
21 want.

22 So the first thing we would do is ask the customer,  
23 do you really want gas logs? What are your uses? Are you  
24 looking for primarily heat or primarily aesthetics. If  
25 they're look are for primarily heat, then we're going to look

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1 for fireplace insert. It may be gas fired insert, but it's  
2 fireplace insert. If they're looking primarily for  
3 aesthetics. No, I'm having a party in three weeks, and my  
4 wife likes to have a fire every now and then. Or the wife  
5 comes and says, I'm just tired of my husband burning wood, at  
6 that time we will sell them gas logs. Gas log are primarily  
7 an aesthetic product.

8 Q Now I think you refer to a two step distribution, and  
9 could you describe what a two step distribution is and maybe  
10 contrast it with what a direct distribution system is?

11 A We are true two step distributors. Fire Side, which is  
12 now called Fire Side New Jersey or Summit Fire Side is a true  
13 two step distributor. The manufacturer makes the product,  
14 ships us boxes. We are a large warehouse. They are 33,000  
15 square foot warehouse. We warehouse that product.

16 We have two trucks run five routes delivering  
17 throughout the state of New Jersey on a weekly basis. So our  
18 dealers in the state of New Jersey know that on a given day,  
19 our truck is in their area. If they order up to noon of the  
20 day before, sometimes even two or three o'clock the day  
21 before, the merchandise they're asking for will be on the  
22 truck, and we will deliver to them.

23 So we're warehousing as an intermediate warehouse,  
24 that's two step. A direct distribution, which is not as  
25 common in our area, direct distribution is where the

1 manufacturer -- let me rephrase that. Direct distribution is  
2 where the retail store has large enough storage facilities or  
3 warehouse facilities to bring merchandise direct from the  
4 manufacturer, act as their own warehouse, and then sell it.  
5 So the merchandise is leaving from the manufacturer directly  
6 to the retailer.

7 Q When a customer comes in and if after you've determined  
8 what they want and let's move this instead of the parties  
9 that are seeking fireplace to provide heat and go to one that  
10 provides the aesthetics, which is the fireplaces we've been  
11 talking about in this case.

12 Based on your experience, what drives the sale or  
13 what drives the purchase that the customer is going to make?

14 A The look of the product. Gas logs are, as I said  
15 before, an aesthetic product.. And it truly is. What does  
16 this product look like? In our store we have, I believe,  
17 five gas log fireplaces, probably six or seven gas fireplaces  
18 because we're also very large full fireplace dealers.

19 The gas fireplaces will be different styles of  
20 logs, different styles of configurations so that the consumer  
21 can select what appeals to them aesthetically.

22 Q Now when you're displaying your fireplaces to the  
23 customers, are the fireplaces on or off or both or how does  
24 that work?

25 A Generally we'll have one or two fireplaces on. We

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1 generally won't be spending the gas for all of the fireplaces  
2 on. The consumer may or may not see a given gas log set  
3 burning when they first walk up to it. We will ignite them  
4 and let them look at them both burning and not burning.

5 Q In your experience how much useage or how often is a gas  
6 fireplace actually on based on your interaction with your  
7 customers?

8 A Gas fireplace or gas log?

9 Q Gas log. I'm sorry.

10 A 20 percent of the time. 80 percent of the time is  
11 pretty much off.

12 Q Okay. How would you describe the quality of the gas  
13 logs which are manufactured by Robert H. Peterson Company?

14 A I believe that the quality of the gas logs manufactured  
15 by Robert H. Peterson are of the highest quality. We've been  
16 representing them for over 20 years. They've been in  
17 business for well over 40 years.

18 The primary reason for their success, I believe --  
19 and this is just my opinion -- is the look of the log. It is  
20 a hand painted log. It is highly detailed. Some people say  
21 it's a work of art.

22 Q And getting back to when a customer is making a sale.  
23 What is it that will actually drive the sale to completion?  
24 What is the customer based on your interaction with your  
25 customers, what is the customer really looking for when they



1 come in with regard to the purchase of a gas log fire set?

2 A They want a gas log fire set that meets their aesthetic  
3 requirements. They're looking at a look. They want the look  
4 both burning and non-burning. ...

5 Q Why would they want to look at it when it's non-burning?

6 A As I said before, about 80 percent of the time the  
7 fireplace is just sitting there with the gas logs in it.  
8 That's where Peterson details its logs as much as they do.

9 MR. MONCO: May I have a moment, Your Honor,  
10 please?

11 THE COURT: Yeah.

12 THE COURT: Thank you.

13 (Pause)

14 MR. MONCO: Your Honor, we have no further  
15 questions.

16 THE COURT: Okay. Cross examination.

17 MR. HARRIS: We're bargaining around for a piece  
18 of paper, Your Honor.

19 THE COURT: Okay.

20 CROSS-EXAMINATION

21 BY MR. HARRIS:

22 Q In the meantime, I'm sure you know my name is Bill  
23 Harris, and I learned that I believe you're Mr. Dworkin,  
24 correct?

25 A Yes.

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1 Q It's a pleasure to meet you.

2 A Nice meeting you in person, sir. We spoke on the phone  
3 almost a year ago, I guess.

4 Q It's been some time. Hasn't been a year, but that's my  
5 testimony versus yours, isn't it, sir.

6 As a matter of fact, how did these drawings Exhibit  
7 A and B get made?

8 A I'm sorry.

9 Q How did the drawings Exhibit A and Exhibit B to Exhibit  
10 D 37 get made? That's your declaration.

11 A I described to an attorney who had called me what I had  
12 done, and he prepared initial sketches. He faxed those  
13 sketches to me. I modified them. I do have the initial  
14 sketches and modifications, as I say, in my briefcase if you  
15 would like to see them. I modified the initial sketches and  
16 faxed them back to him.

17 Q You're saying you have in your briefcase is the initial  
18 sketches that he sent to you, correct?

19 A Yes, sir.

20 Q And the initial sketches that you made a number of years  
21 ago of Exhibits A and Exhibit B, where are they?

22 A No, sir, I did not make those sketches a number of years  
23 ago. The sketches that he's faxed to me were made from my  
24 description to him. He drew up to sketches, faxed them to me  
25 in I believe it was January. I'm not quite sure of the date.

1 It is on the top of the fax. I could get it. I modified  
2 them and faxed them back to him.

3 Q I guess I'm trying to find, sir, what happened to your  
4 original drawings of these structures of Exhibit A and  
5 Exhibit B? Where are they?

6 A There may not have been original drawings.

7 Q What?

8 A There may not have been original drawings. It wasn't  
9 necessary.

10 Q You just didn't do any drawings?

11 A Did not need to do it.

12 Q Uh-huh. Do you have any evidence other than your memory  
13 of what you've testified about Exhibit A and Exhibit B?

14 A As I said in my testimony, the period of time that we're  
15 talking about is 1983, '82, to 1990 roughly. And not knowing  
16 that I was going to be in court 10 years later or 12 years  
17 later, no, sir, I did not retain any of the documents or  
18 sales slips or any other physical proof that this was done.

19 Q And, sir, as to the modifications you made, let's don't  
20 go to your briefcase if we can avoid it because I haven't had  
21 a chance to inspect that at all previously.

22 A Okay.

23 Q Could you tell me what changes you made in what the  
24 lawyer did?

25 A Initially Exhibit B had the valve B2 on the output side

1 of B1 rather than the input side of B2. I moved it from the  
2 output side of B 1 to the input side of B2.

3 Q How could that possibly make a difference where it was?

4 A Because that's where it was.

5 Q How could it possibly make a difference such that you  
6 would want to move it? Just because your memory was that  
7 that's where you had it?

8 A That is correct, sir. My memory and my knowledge is  
9 that's where I had it.

10 Q And looking at Exhibit B, those were Peterson hardware,  
11 were they not?

12 A Yes, sir.

13 Q And the pans, there were two pans, weren't there?

14 A Yes, sir, they were both G 4 burner.

15 Q Identical pans?

16 A Yes, sir.

17 Q And one was really to serve one side of the fireplace,  
18 so to speak, is that not so?

19 A Yes, sir.

20 Q And the other to serve the other side of the fireplace,  
21 right?

22 A Exactly.

23 Q And you indicated that you in general used two sets of  
24 logs in that connection, did you not?

25 A That's correct. There were two complete log sets.

1 Q So the general purpose of Exhibit B wasn't to bring  
2 embers way out front of the logs, was it?

3 A No, sir.

4 Q Let's look at Exhibit A, now. Oh, and by the way, the  
5 tubes were all the same size, weren't they?

6 A Yes, sir, except for the connection tube. The  
7 connection tube between the two burners.

8 Q I understand. That's the vertical tube?

9 A That's correct.

10 Q As we look here. And as a as a matter of fact, these  
11 pans in general set on a flat plane, did they not? They were  
12 planar?

13 A As flat as a mason would build a fireplace. It could be  
14 one side could be somewhat higher or lower than the other,  
15 but it was not designed to be higher or lower than the other.  
16 Again it's a handmade fireplace.

17 Q And looking again at Exhibit A, it's fair to say, is it  
18 not, that it was for a so-called circular fireplace?

19 A Or a fire pit, yes, sir.

20 Q Yes. And you don't see those much any more?

21 A No, the codes have changed. The law has changed.

22 Q How many years has it been since you've sold one of  
23 those?

24 A Approximately 1990 of this nature.

25 Q Of the nature of Exhibit A?

1 A Of the nature of Exhibit A. There are still fire pits  
2 made, but they are now made and there are specific circular  
3 burners, a single burner with a single safety pilot, that  
4 would supply it.

5 Q Did the circular fireplaces -- I'm sorry. Did the  
6 hardware as shown assembled on Exhibit A for the circular  
7 fireplaces involve pans?

8 A B1, B2, and B3 were Peterson G 4 burners complete.

9 Q So again we just have a series of these burners with the  
10 pans, correct?

11 A Correct.

12 Q With G 4 being welded to the sides of the pan?

13 A Yes.

14 Q And they all sit at the same level within the skill of  
15 the mason, did they not?

16 A Exactly.

17 Q And the purpose wasn't to bring out front an ember  
18 effect, was it?

19 A I'm having a problem with that statement. The problem  
20 I'm having with the statement is that contrasting it to the  
21 ember booster, the ember booster does not bring forward more  
22 embers. It enhances the front look, but there are no more  
23 embers coming forward per se.

24 Q I understand my mistake in your eyes, then, and would  
25 put it that that enhancement was not the purpose, was it?

1 A No, sir.

2 MR. HARRIS: Would you give me two or three  
3 minutes, Your Honor? I would like to make an end to this as  
4 quick as I could.

5 THE COURT: I'm sorry.

6 MR. HARRIS: Would you give me two or three  
7 minutes, Your Honor? I would like to make an end to the  
8 examination. I think I can end it quicker if I have that two  
9 or three minutes.

10 THE COURT: Sure. We'll take a five minute break.

11 MR. HARRIS: What?

12 THE COURT: We'll take a five minute break.

13 (A recess was held at 9:42.)

14 (Resume at 10:48.)

15 THE COURT: Have a seat, please. Mr. Harris.

16 MR. HARRIS: May it please the court, I'll  
17 proceed.

18 BY MR. HARRIS:

19 Q Mr. Dworkin, how is it that you were contacted in  
20 connection with ultimately giving this testimony after giving  
21 an Exhibit A and B in an affidavit?

22 A Actually I was initially contacted by the Golden Blount  
23 Company. I received notification of the patent infringement  
24 in the December 19th letter of 1999 as a distributor. They  
25 apparently sent that letter to various distributors. I

1 received the letter the day before the Robert H. Peterson  
 2 Company received it.

3 Q I see. And so you received the letter not as a  
 4 manufacturer, but as a distributor?

5 A As a distributor.

6 Q As a matter of fact, a large distributor for Peterson?

7 A Yes, sir.

8 Q Are you one of their largest?

9 A I believe so.

10 Q Are you the largest?

11 A I have no knowledge of that. They will never tell me.

12 Q Will they tell you that you're 80 percent the largest?

13 A They won't even tell me that. I would like to know, but  
 14 they won't tell me.

15 Q So you were contacted originally by Golden Blount  
 16 Company, but the question I asked you wasn't that, was it? I  
 17 asked you how you had a contact with the defendant in this  
 18 case.

19 A Actually when I received the letter, which was the day  
 20 before they received the letter, I called Leslie. Leslie  
 21 Bortz, excuse me. Having worked with him for many years and  
 22 been close with the Peterson Company, I called them and  
 23 expressed some opinions and discussed it with first Leslie  
 24 and then other people.

25 Q And what were those opinions, assuming they're factual

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1 opinions?

2 A I'm going to ask you, sir, do you really want me to  
3 answer that?

4 Q No, not if it's an expert opinion.

5 A It's not an expert opinion. It's personal knowledge  
6 of -- my understanding of a patent is that it requires  
7 something to be non-obvious to someone knowledgeable in the  
8 state of the art. And my first contact with Leslie was, I  
9 don't understand how this got to be a patent. It is obvious  
10 to anyone knowledgeable in the state of the art.

11 Q You had already invented yourself this item, sir?

12 A At that point in time I had five patents, sir. I did  
13 not invent this item. I had already done as shown in  
14 Exhibits A and B series flow of ember burner.

15 Q While we discuss obviousness and non-obviousness, are  
16 you familiar with the term Monday morning quarterbacking?

17 A Yes, sir, I am, and I don't believe I was being one.

18 Q So what did you do after the contact?

19 A I spoke to Leslie when I received the letter. I think I  
20 spoke to Leslie, and this has to be from my memory. When he  
21 received the letter maybe three or four days after he  
22 received it, he called me back. I don't believe anything was  
23 done by either them or myself. At some point in time I spoke  
24 with you.

25 Q That was last year, wasn't it?

1 A That was last year, I believe. I don't remember the  
2 exact time. I thought it was 2001. I thought it was around  
3 February or March of 2001 that you and I spoke.

4 But other people are telling me it couldn't have  
5 been then because the suit was wasn't filed then. I don't  
6 know. Time flies when you're having fun, and lately I've  
7 been having a little bit too much fun maybe.

8 Q Was it a lot of fun to be the recipient of that letter  
9 mentioning possible infringement?

10 A Since the letter did not impact me directly and I was  
11 not a party of the suit, it was not particularly fun or not  
12 fun.

13 Q In other words, you got the letter after the suit had  
14 been filed?

15 A No, sir, I received the letter on December something of  
16 1999.

17 Q Well, did it suggest that you might be infringing by  
18 some of your activities?

19 A No, sir, it did not.

20 Q Did the letter strike you as any threat to you?

21 A It did not strike me as a threat to me, sir.

22 Q Did it strike you as a threat to any other distributors?

23 A It did not strike me as a threat to distributors because  
24 we are strictly warehouses.

25 Q And are you --

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1 A Two step distributors. Let me put it that way.

2 Q All right, sir. What steps did you take in follow up  
3 to your conversation with Mr. Corrin?

4 A At some point in time, I don't recall if it was Mr.  
5 Bortz who contacted me back or someone else, either from the  
6 Peterson organization or the attorneys for the Peterson  
7 organization. But I was contacted as to what I knew about  
8 this type of series flow and multiple valves and resulted in  
9 my deposition. I say deposition. I don't know what you call  
10 this.

11 Q I believe an affidavit is what you took, sir.

12 A Thank you. Resulted in my affidavit. Resulted in my  
13 receiving the facts of the conversation where they out laid  
14 what I basically said to them. Correcting the drawings and  
15 making some changes to the affidavit, faxing it back.  
16 Receiving a final version, signing the final version and  
17 sending it back to them.

18 Q I have no further questions.

19 A Thank you, sir.

20 Q Thank you.

21 THE COURT: Redirect.

22 REDIRECT EXAMINATION

23 BY MR. MONCO:

24 Q Mr. Dworkin, I think you testified that you had in  
25 designing Exhibit, I'm not sure if it was Exhibit A or

1 Exhibit B, but you had enlarged the pans of the G-4 burner.

2 Am I correct on that recollection?

3 A I enlarged the spacing between the pans of the Exhibit  
4 B, for example.

5 Q Why did you do that?

6 A As I mentioned in my testimony, the normal distance  
7 front to rear of a see through G 4 set is roughly 15 inches.  
8 If you put it inside of a fireplace, that's 40 inches between  
9 the two faces. It's gone, it's lost, you couldn't see it.  
10 So in order to see ember, see the fire, see the logs even  
11 when they're not burning, any of the reasons for having a  
12 simulated wood fireplace there, we needed to have increased  
13 spacing and enlarged the distance between the pans.

14 MR. MONCO: We have no further questions, Your  
15 Honor.

16 THE COURT: Okay. Thank you very much. You may  
17 step down.

18 THE WITNESS: Thank you.

19 MR. MONCO: Your Honor, if I may. At this time we  
20 would like to move the exhibits of the Peterson Company which  
21 have been identified on our case in chief into evidence.

22 THE COURT: They are admitted.

23 MR. MONCO: Thank you.

24 MR. HARRIS: Just to be certain. Any additional  
25 exhibits we have used up to this time or discussed, we move

1 the admission of.

2 THE COURT: They are admitted.

3 MR. HARRIS: And I -- are you closing?

4 MR. MONCO: We're prepared to do a closing, Your  
5 Honor.

6 THE COURT: Okay.

7 MR. HARRIS: Well, are you resting?

8 MR. MONCO: Oh, I apologize. Yes, Your Honor,  
9 that was our last witness. Peterson Company rests.

10 THE COURT: Okay.

11 MR. HARRIS: The plaintiff never rests.

12 THE COURT: I thought that was the court.

13 MR. HARRIS: I believe it's the court.

14 I at this time again move for judgment as a matter  
15 of law.

16 THE COURT: I'll just carry that and hear  
17 arguments.

18 Do y'all need a break before argument?

19 MR. HARRIS: I believe we have one bit of  
20 testimony we want by way of rebuttal.

21 THE COURT: Oh, okay.

22 MR. GAINES: Your Honor, we call to the stand  
23 Golden Blount.

24 THE COURT: Okay.

25 THE COURT: If you'll raise your right hand again,

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1 please.

2 (Witness sworn by the court.)

3 THE COURT: Okay.

4 GOLDEN BLOUNT, (Sworn)

5 was called as a witness by the Plaintiff having been first  
6 duly sworn, testified as follows:

7 REBUTTAL EXAMINATION

8 BY MR. GAINES:

9 Q Good morning, Mr. Blount.

10 A Good morning.

11 Q I would like for you to turn your attention to  
12 Defendant's Exhibit 30. You may recall this from yesterday,  
13 I believe, in connection with Tod Corrin's testimony. Do you  
14 recall seeing this?

15 A Yes.

16 Q Do you know what this is representation of, Mr. Blount?

17 A Two burner tubes, primary burner, secondary burner.

18 Q All right. Which is the primary and which is the  
19 secondary?

20 A Primary would be the larger tube. Smaller would be the  
21 secondary.

22 Q Okay. Do you see a series of horizontal lines going  
23 across from left to right?

24 A Yes, I do.

25 Q Okay. I would like to draw your attention to the bottom

1 of each one of the tubes.

2 A All right.

3 Q What is the relative position of the bottom -- excuse  
4 me. The bottom of the secondary tube with respect to the  
5 bottom of the primary tube?

6 A Secondary burner is higher off the hearth.

7 Q With respect to the bottom, right?

8 A Correct.

9 Q Okay. Now I want you to take a look at the top of each  
10 of the respective tubes, Mr. Blount.

11 A Yes.

12 Q And what is the representative position of the secondary  
13 tube with respect to the primary tube?

14 A It's lower.

15 Q It is lower?

16 A Yes.

17 Q All right. Now in your patent, claim 1 requires that  
18 the secondary tube be positioned forward and -- excuse me.  
19 That the primary tube be raised representative to the  
20 forwardly positioned secondary burning tube; is that correct?

21 A That's correct.

22 Q Would you consider the primary tube to be raised  
23 relative to the secondary tube, given this picture?

24 A No.

25 Q Sir?

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1 A The primary burner here is not really raised at all.

2 Q No, I don't think you understood my question, Mr.  
3 Blount.

4 MR. MONCO: I'm going to object, Your Honor. I  
5 think the witness did, in fact, understand the question. In  
6 fact, he was giving his answer and gave his answer to the  
7 question.

8 THE COURT: Okay.

9 MR. GAINES: No, I would like to chance to reask  
10 the question, Your Honor, because there is a point of  
11 confusion on this matter.

12 THE COURT: That's fine. Go ahead.

13 BY MR. GAINES:

14 Q Mr. Blount, would you consider the primary tube raised  
15 relative to the secondary tube when you look at the tops of  
16 the tubes? Which one is higher? Let me put it to you that  
17 way. Which one is higher?

18 A The primary tube.

19 Q Is that important in your patent?

20 A Well, yes. You want to cover up the primary -- the  
21 secondary tube with embers and such. If you raise it too  
22 high, there's no way you're not going to see the tube.

23 Q So if you're measuring, then, from these things, it's  
24 the top that matters; is that correct?

25 A That's right.



1 Q And the reason for it is, as you just stated, if I'm  
2 understanding you correctly and I want to make sure I  
3 understand you correctly, is that when you have the primary  
4 here and the secondary here, you've got to fan those  
5 materials out? Is that what you just said?

6 A Absolutely. You want to cover the secondary tube.

7 Q It's the top, then, of the tubes that matter the most,  
8 not the bottoms?

9 A Absolutely. You want to cover the tube totally so  
10 people won't see the burner there.

11 Q Okay. Thank you very much.

12 MR. GAINES: We have no further questions, Your  
13 Honor.

14 THE COURT: Okay. Cross examination.

15 MR. MONCO: May we have one second, Your Honor,  
16 please?

17 THE COURT: Okay.

18 (Pause)

19 CROSS-EXAMINATION

20 BY MR. MONCO:

21 Q Good morning, Mr. Blount.

22 A Good morning.

23 Q Isn't it a fact, Mr. Blount, that if you wanted to cover  
24 both burners so they wouldn't be seen, you wouldn't raise the  
25 primary burner above the secondary burner? Don't you want to

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1 keep both of them concealed?

2 A Yes, as much as you can.

3 Q Okay. So the actual function of where the top is is of  
4 no relevance; isn't that correct?

5 A Yeah. If you raise it too high, you can't cover it up  
6 with ember bed material.

7 Q Right. But you would want to have both of them as low  
8 as possible so there's --

9 A That's correct.

10 Q Let me finish my question. There's no point in having  
11 the top of the primary burner above the top of the secondary  
12 burner if you want to cover it up. You would have both  
13 burners as low as possible, correct?

14 A That's not correct. You want the primary burner up  
15 closer to the log set itself, and the primary burner you want  
16 to get it as low as possible -- the secondary as low as  
17 possible so you can cover it with ember bed material.

18 Q If you want to cover it up, isn't it also a fact that  
19 you want to have the ember effect as produced by the gas and  
20 by the fire coming out of the gas ports, is it not?

21 A Sir, you can not cover that primary burner up to save  
22 your life because the gas pressure blows it away. The flames  
23 come out.

24 Q I'm asking, isn't it a fact the ember effect comes out  
25 where the gas exits the lower part, correct -- the lower

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1 tube, correct?

2 A That's true.

3 Q So in the effect that you wanted to achieve, it's the  
4 position of the jets that's the critical matter and not the  
5 top of the pipes, correct?

6 A That's not correct. You know very little about gas logs  
7 apparently.

8 MR. MONCO: Your Honor, we have no further  
9 questions.

10 MR. GAINES: Your Honor, just one redirect.

11 THE COURT: Okay.

12 REDIRECT EXAMINATION

13 BY MR. GAINES:

14 Q Mr. Blount, I've put one of the pages from Defendant's  
15 Exhibit 1 up on the screen.

16 A Yeah.

17 Q Do you recognize this figure?

18 A Yes, I do.

19 Q Where is it from?

20 A We've drawn in our establishment.

21 Q In your patent?

22 A Yes.

23 Q Okay. Let me ask you to explain the layout of the  
24 embers and the sand as you see it there.

25 A Well, we've got in this case --

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1 MR. MONCO: Your Honor, if I may offer belated  
2 objection. This is beyond the scope of the cross  
3 examination.  
4 THE COURT: That's overruled.  
5 MR. GAINES: Thank you, Your Honor.  
6 BY MR. GAINES:  
7 Q Go ahead, Mr. Blount.  
8 A Repeat your question, please.  
9 Q I said, would you please explain the layout of the sand  
10 and the embers as you see it there?  
11 A We have the sand covering the ember bed burner. On top  
12 of that we have the artificial coals on top of that. And as  
13 you can see, you need to cover the secondary burner up.  
14 Otherwise it's not going to be very nice in appearance.  
15 Q And what is the distribution of the materials there as  
16 you see it as far as thickness goes?  
17 A Well, we had a lot more sand back on the primary burner  
18 than we do over the secondary burner.  
19 Q So it kind of fans out?  
20 A Fans out like burning coals in the fireplace, ashes.  
21 Q And so if the primary -- if the top of the primary -- I  
22 mean, excuse me, if the top of the secondary tube is up too  
23 high, it's going to stick out of those materials, isn't it?  
24 A Absolutely.  
25 Q So according to your testimony, then, that is why the

1 representative heights as measured from the top of primary  
2 and secondary burner tubes are the most important aspect?

3 A Absolutely.

4 Q Thank you very much.

5 THE COURT: Cross examination.

6 MR. MONCO: Just one or two questions, Your Honor.

7 RECROSS-EXAMINATION

8 BY MR. MONCO:

9 Q Mr. Blount, didn't you just tell me on cross examination  
10 that there's no way you could cover up the primary burner?

11 A Well, you can cover it, yes.

12 Q That's not what you told me. You told my there's no way  
13 you could cover the top of primary burner because it would  
14 just blow all the covering away, correct, because of the  
15 pressure?

16 A Well, flames come up through the sand, yes.

17 Q Isn't this drawing on Figure 3, then, incorrect? It  
18 shows the primary burner covered up, doesn't it?

19 MR. GAINES: Your Honor, he's arguing with the  
20 witness.

21 MR. MONCO: I apologize, Your Honor. I'll simply  
22 ask the question.

23 BY MR. MONCO:

24 Q Isn't it correct that figure shown on figure 3 is  
25 incorrect based on what you just told me on cross

1 examination?

2 MR. GAINES: Your Honor, we object to the form of  
3 that question. This is a patent -- United States issued  
4 patent. It is has a presumption of invalidity, and the  
5 picture speaks for itself and clearly shows what's going on.

6 THE COURT: The objection is overruled.

7 MR. MONCO: Thank you, Your Honor.

8 THE COURT: Go ahead.

9 A Well, perhaps I should stand corrected. Obviously you  
10 can cover the primary burner.

11 Q So your previous testimony was incorrect?

12 A Apparently so, yes.

13 MR. MONCO: Thank you, Your Honor.

14 THE COURT: Anything else.

15 MR. GAINES: Nothing further, Your Honor.

16 THE COURT: Thank you very much. You may step  
17 down.

18 THE WITNESS: Thank you.

19 THE COURT: Plaintiff rest?

20 MR. GAINES: Plaintiffs rest, Your Honor.

21 THE COURT: Okay.

22 MR. MONCO: Your Honor, at this point we would  
23 move for judgment as a matter of law.

24 THE COURT: Okay. I'll take that under  
25 advisement, and we will handle that with the opinion.

1 MR. HARRIS: I will also move for judgment as a  
2 matter of law, but I assume you will take it under  
3 advisement.

4 THE COURT: I'll take that under advisement of.  
5 How much time y'all need for closing arguments?

6 MR. HARRIS: I've come to think that we can do  
7 ours in less than 30 minutes.

8 THE COURT: Okay.

9 MR. HARRIS: And may be in as little as 25.

10 THE COURT: Okay.

11 MR. HARRIS: I would like to split it up such that  
12 about five minutes of it can be handled by my cohort.

13 THE COURT: Okay. That'll be fine.

14 MR. MONCO: Your Honor, I would estimate probably  
15 about 30, 35 minutes.

16 THE COURT: Okay. That'll be good. Let's take a  
17 10 minute break, and then we'll come back for closing  
18 argument.

19 (A recess was held at 10:10.)

20 (Resume at 10:25.)

21 THE COURT: Have a seat, please. Mr. Harris.

22 MR. HARRIS: Thank you, Your Honor.

23 As the court knows, this has been the trial of a  
24 patent infringement action with the Plaintiff Golden Blount,  
25 and that is his company actually, Golden Blount Company, and

1 the defendant being Peterson Company.

2 I will try to do a great deal of generalizing since  
3 you've heard a lot of detail.

4 THE COURT: That's true.

5 MR. HARRIS: And unless I see something extremely  
6 interesting and tend to refer to that detail.

7 THE COURT: Okay.

8 MR. HARRIS: The patent, as you know, relates to  
9 an apparatus and system for enhancing the appearance of an  
10 ordinary gas fired fireplace. In so doing, it utilized the  
11 concept of placing an auxiliary burner toward the front of  
12 the fireplace to make the appearance of glowing embers as in  
13 a real wood burning fireplace.

14 By way of background, for years people had been  
15 trying to enhance the appearance of these artificial  
16 fireplaces, and Golden Blount thought of a way to do it, and  
17 he did it. Filed a patent application, and he got a patent.

18 The new item that was made in accordance with that  
19 patent was a commercial success and continues to be so today.

20 We believe that the record shows the Peterson  
21 Company copied the item. The copying took place before the  
22 patent officially issued, but they copied. Soon after the  
23 patent issued, well, Peterson was sent a cease and desist  
24 letter. They like to read it as being a friendly letter, but  
25 I think it was plain enough that it was charging



1 infringement. And just a few months later in May after that  
2 proceeding February, well, one was written that no one could  
3 mistake it. So they were on notice of infringement.

4 It is our position that the Peterson Company paid  
5 very little attention. They did not think that this was a  
6 big deal from a financial point of view the way they figured  
7 potential damages and from the size of their company. We  
8 think it's shown that they just drug their feet.

9 You recall there was a series of letters and  
10 finally some year and a couple of three months after the  
11 initial letter, Golden Blount filed suit.

12 Peterson has caused the plaintiff a lot of damage  
13 because in general auxiliary burner sets ultimately involve  
14 an expensive assembly as well as this somewhat more  
15 economical ember burner item, and they in general go  
16 together. We think we have testimony that shows that in some  
17 depth. I recall 49 out of 50 coming from our witness on the  
18 point of when the two are sold together. And when I say the  
19 two are sold together, I'm talking about the log set being  
20 sold along with the ember burner.

21 When Blount (sic) did react, their reaction was a  
22 very minor one. It was just to tell the lawyers, well, we've  
23 been doing that for 20 years. I think the court knows and we  
24 all know that's not so. They hadn't been doing that for 20  
25 years. That was the first ember burner in the sense of

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1 enhancing the ember appearance out front that existed.

2 I'll take up some of their consultations with  
3 counsel in a little bit, but at this time, as I had told the  
4 court, I have asked Charles Gaines to give a brief run down  
5 on the infringement issue.

6 THE COURT: Okay.

7 MR. HARRIS: May I yield to him?

8 THE COURT: Certainly.

9 MR. GAINES: Your Honor, the plaintiff and I'm  
10 sure the defendant would join me in this statement, but we do  
11 want to thank you for your patience and graciousness  
12 throughout these proceedings.

13 THE COURT: Thank you.

14 MR. GAINES: The record in this case, Your Honor,  
15 clearly shows that the plaintiff Golden Blount has proven  
16 that defendant Peterson's ember burner infringes at least  
17 claims 1 and 17 of the Blount patent. Literally, be it  
18 direct or by contributory or induced infringement, and then  
19 if not literally, then certainly under the doctrine of  
20 equivalence because each element of the defendant's device  
21 substantially functions in substantially the same way to  
22 achieve substantially the same result as has been established  
23 in these proceedings. Just a mere examination of the two  
24 devices that you see there on the table suggests a very close  
25 comparison in almost every detail.

1           The fact that Peterson's device has elongated  
2 primary tube is undisputed. It is equally undisputed that  
3 the primary burner tube includes a plurality of discharge  
4 ports as required by the claims.

5           As has been clearly establishd, Peterson's device  
6 has a secondary coals burner tube positioned in front of the  
7 primary burner tube and that the secondary tube has a  
8 plurality of discharge ports as well.

9           The record also clearly shows that the connection  
10 means is certainly present as represented by the tube and  
11 connectors that connect the primary tube to the secondary  
12 tube, and the defendant also clearly has a secondary valve  
13 located between the primary and secondary tubes.

14           By the defendant's own admission, this is hooked up  
15 to a main gas source that has its own separate valve, all of  
16 which are required by claim 1. While the defendant has  
17 strongly contested that its primary tube in a position raised  
18 compared to secondary tube, the facts in this case contradict  
19 this strained position and interpretation. The defendant has  
20 attempted to lead this court to believe that the relative  
21 heights of the burners should be determined by the relative  
22 positions of the bottom of the tubes, but the evidence is to  
23 the contrary for the following reasons.

24           First, there is nothing in the prosecution history  
25 or the patent itself, of itself, that suggests that the

1 raised position is determined by looking at the bottoms of  
2 the tube. Second, as we just heard just a few moments ago,  
3 Mr. Blount testified that the relative heights of the tops of  
4 the tubes is what is important because the way the ember  
5 materials is fanned out over the two tubes to give the  
6 appropriate effect.

7 Third, such an interpretation as suggested by the  
8 defendant is incongruent with the presence of claim 9 that  
9 specifically allows the heighth of the secondary tube to be  
10 altered because such a strained interpretation would place a  
11 limitation in claim 9 that is simply not there.

12 The plaintiff has already clearly proven that the  
13 logs and grate which are both sold by defendants are included  
14 in the claim subject matter as clearly recited in claim 1.  
15 Claim 15 is directed -- it's a dependent claim wherein it  
16 brings in additional elements of fire logs and the grate.  
17 Other than that, it makes no other addition to the elements  
18 already recited in claim 1. Therefore, it must have had a  
19 purpose. Therefore, it must also more narrowly or more  
20 specifically, I might say, define the invention. So it has a  
21 purpose, and it's presumption of invalidity goes right along  
22 with it.

23 The plaintiff has also established the presence of  
24 all the elements of claim 17 in defendant's flame booster.  
25 Although claims 17 and one are very similar, there are

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1 differences. As stated, the second coal burner tube is  
2 present in the defendant's device, and the connection means  
3 for connecting the secondary to the primary is also present.

4 The valve, the defendant itself carefully laid out  
5 how the valve is located between the tubes and how it can be  
6 adjusted to allow the gas flow to flow between the primary  
7 and the secondary. We heard a lot of testimony from the  
8 defendant itself regarding such matters.

9 Both tubes in the defendant's device are parallel  
10 as required by claim 17. And the secondary is located below  
11 the primary tubes as clearly demonstrated yesterday by the  
12 level being placed on the two tubes. Even their own device  
13 which they brought into these proceedings, Your Honor, was  
14 placed on the table. A level was placed on it, and it  
15 clearly showed how the primary tube was raised with respect  
16 to the secondary tube.

17 During this trial defendants attempted to introduce  
18 limitations into this claim that were not even present in the  
19 specification, and that is with respect to the direction of  
20 the ports. The defendant would have this court believe that  
21 away from the opening of the fireplace does not include  
22 directly downward. Such a construction is simply not  
23 supported by the specification or the prosecution history.

24 The specification states in column 57, lines 58  
25 through 62, and I quote, "In the secondary burner tube 104,

JT-APP 1441

1 the gas is discharged in a direct away from the opening of  
2 the fireplace or in another aspect is directed somewhat  
3 toward or directly toward the primary burner tube."

4 Your Honor, there is no other claim construction  
5 that can be put upon that except that that allows for the  
6 ports to be pointed in directions other than just toward the  
7 primary burner tube which, of course, would include  
8 vertically downward.

9 This clearly conveys the intention of other  
10 embodiments other than the one that the defendant is  
11 suggesting to this court. The present case presents the  
12 clearest form of infringement, one in which the defendant's  
13 device and one embodiment of the plaintiff's device as  
14 covered by the claims are so close in practically every  
15 detail, even down to the size -- the general size of the  
16 secondary burner tube, that it could be led -- it could lead  
17 one to the inescapable conclusion that the defendant copied  
18 the plaintiff's device. Clearly, the plaintiff has  
19 established its case of infringement and requests the relief  
20 prayed for.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. HARRIS: The nature of the infringement, Your  
24 Honor, we allege was willful. We believe that the letter  
25 writing back and forth, the foot dragging that took place,

JT-APP 1442

1 the lack of communication between the lawyer and the client,  
2 the whole picture of how they interacted and the sheer  
3 ignorance of what the client finally came up with in the way  
4 of what the lawyer said and also the lack of the lawyer's  
5 ability to document in any way what he had said.

6 We do not say that it's impossible to have an oral  
7 opinion that has some merit, but we say it's very difficult  
8 to have one, and it takes a good relation with the client.  
9 Here we had them in the same town, and all they did was have  
10 a few telephone conversations.

11 Moreover, the amount of material that was sent to  
12 the lawyer was just dribbled in, and nothing really happened  
13 of any significance until suit was filed. And you heard that  
14 while the lawyer thought he had given three oral opinions,  
15 the client thought he had only gotten one, and that was after  
16 suit was filed. And that's probably closer to the truth, in  
17 a sense, because of the limited material up until that point  
18 that the lawyer had.

19 We believe that to allow one to go forward with  
20 their copying and their infringement under a set of  
21 circumstances where there's a pretension that something is  
22 happening, but that it's an illusion is just not right. And  
23 we think that is willful.

24 We think that that and related conduct in this case  
25 also brings forward the need for enhanced damages as well as

1 for attorney's fees under 284 and 285 of Section 35-United  
2 States Code.

3 I will not, as I said, try and go into great detail  
4 about those discussions between the lawyer and the client and  
5 their misunderstandings and the inconsistent answers because  
6 you've got a record that you can read if you want to go into  
7 all that stuff. And I'm not even sure I could remember all  
8 of it now.

9 It is clear that Mr. Peterson began -- Mr.  
10 Peterson. Mr. Bortz began to think about Peterson's pocket  
11 book after suit was filed because somebody told him that if  
12 he didn't have an opinion, that he might have a problem and  
13 that he needed something to protect him from attorney's fees.

14 That while he characterized, you will recall, in a  
15 rather vague way, the suit as being very small or very hard  
16 to understand or -- it was clear what he was saying was that  
17 it didn't amount to a hill of beans as far as money is  
18 concerned. But then he began to think about what lawyers  
19 fees were and was kind enough to remind us how much  
20 intellectual property lawyers get when they're lucky.

21 He then asked his lawyer what to do, and his lawyer  
22 said, you need an opinion and basically I'm ready to give you  
23 one. So he did give him opinion of some kind after a period  
24 of time, and I don't think today we know exactly what that  
25 opinion was.

JT-APP 1444



1 We wouldn't expect the client to have been a patent  
2 expert, but to try to put him on the stand and show that he  
3 was some kind of a student of interrogatory responses that  
4 related to any subject matter of the lawsuit was absurd thing  
5 to do unless the client had really gone over that material in  
6 some depth.

7 Turning from that, I would like to refer to the  
8 types of infringement that we might have. There is 271, 35  
9 United States Code, Sections A, B, and C is what I'll focus  
10 on. A is direct infringement, and I think we're all aware of  
11 what that is. Your Honor probably also knows that B has to  
12 do with inducement, and to induce, well, we've shown those  
13 factors. You know, we've shown they knew about the patent.  
14 We've shown they tried to talk people into buying their  
15 device. We've shown that they were putting literature and  
16 information out through distributors and otherwise on just  
17 how to use the device. And so if there is a case of  
18 inducement, this is certainly inducement.

19 There's some talk to what extent the logs and allied  
20 material that go with the ember burner might be involved. I  
21 will certainly tell you as far as inducement is concerned,  
22 the inducement was to use those materials all together, and  
23 that would be adequate to find infringement of the whole ball  
24 of wax.

25 Claim 15 -- let me. Claim 15 likewise we believe

- JT-APP 1445

1 carries those other items for a direct infringement reading  
2 as opposed to the inducement reading.

3 Then finally this contributory infringement. If  
4 one argues that something isn't present there like the main  
5 house valve for gas or something, well, what they have done  
6 is to, knowing about the patent, sell a significant part of  
7 the patented thing that's not a staple article of commerce  
8 and has no other substantial use than that of the patent.

9 So those are the types of infringement. Now then  
10 there's one other thing, and that is the doctrine of  
11 equivalence. If for some reason one finds a little hitch  
12 here or there, there's not been any showing that the doctrine  
13 of equivalence couldn't be used in this case, and I think we  
14 have established that these things do the same thing in the  
15 same way to get the same result. So that would pretty well  
16 meet the doctrine of equivalence down to a T.

17 And particularly it is so when the differences are  
18 insubstantial that involved according to most recent case law  
19 the original case or I guess I would say the flagstone case  
20 or flagship case goes all the way back into the mid-fifties.  
21 It's still probably good law, and the recent changes by the  
22 Supreme Court had been extremely subtle, if at all different.  
23 And as long as the differences are really insubstantial,  
24 well, they fully adopt the function, way and result that I  
25 spoke of in slightly different words a moment ago.

JT-APP 1446

1 Now let's go to the question of invalidity. I have  
2 been amazed at how far off the art has been. There was some  
3 discussion about the art that was in the patent application  
4 itself which went forward several years. But the patent  
5 examiner certainly found out that or reached the conclusion,  
6 I should say, that the subject matter was certainly  
7 patentable. I'll also point out that there were different  
8 versions that were offered under the continuations in part,  
9 and that the final version is pretty much its own thing, and  
10 it doesn't have anything to do with questions as  
11 retrofitting. That didn't even appear in it. That was the  
12 thing of the past at that time.

13 So in going to the record before the patent office,  
14 you don't find anything. It's argued that, well, there was  
15 only a valve there. That made all the difference. I don't  
16 think that's at all clear from reading it, but even if there  
17 were only a valve and you took all those other well known  
18 elements and assembled them with a valve for this particular  
19 purpose in getting the beautiful effect out front from the  
20 fireplace, you would still have a patentable invention.

21 Everything is a culmination, so to speak. We do  
22 not see that the -- I'm trying to think -- D 3 or whatever it  
23 is that's sitting over on the table, the thing that stands up  
24 high. We do not see that it has anything to do with the  
25 invention. We don't think that any of the circular fireplace

JT-APP 1447

1 subject matter has anything to do with the invention? It  
2 just doesn't have the elements, and it's not for the purpose.  
3 We don't think that the see through fireplace elements have  
4 any particular purpose.

5 We have looked at their Exhibits -- I believe we  
6 called them 33 and 34. Their Exhibits 33 and 34 which at one  
7 time they were proud of before the Johnny-come-lately people  
8 here showed up. And the 33 and 34 are just flat -- I'm  
9 sorry. -- are like flat pipes lying down that have a valve  
10 in between them and don't have any of these other things and  
11 are certainly not for the purpose and can't achieve the  
12 purpose of the invention.

13 I now, then, would like to make some comment about  
14 the testimony we've had today. Insofar as the last testimony  
15 that related to the see through fireplace, I think it's plain  
16 that's not going to do with this invention. That was just  
17 two pans, one on one side, one on the other side. And the  
18 purpose wasn't to bring that enhancement forward. And I  
19 believe the witness agreed with me on that point when asked.

20 Now, then, let's back up to the item that goes  
21 back to over 30 years, something like that. Something like  
22 30 years. And that the good friends testified about sort of  
23 sequentially. They had known each other for years, were very  
24 close. It was that old I'll-go-over-to-your-house,  
25 you-come-over-to-my-house type thing. And I'm not saying

JT-APP 1448

1 that the witness didn't have something, but I don't think the  
2 witness knows what he had. I think what the witness had was  
3 an experimental item, if anything, that was this shop, and  
4 his friend when he came there was not even able to see all of  
5 it because as was agreed, embers covered a portion.

6 Years later a reconstruction was made. As a matter  
7 of fact, that reconstruction on the drawing didn't tell you  
8 anything. It doesn't depend on the drawing. It's not clear  
9 that there's a tray on the drawing. It's not clear what the  
10 relative heights or sizes are of the subject matter. It's  
11 not clear what this -- I'm saying wood lighter, but that's  
12 not the right word.

13 MR. GAINES: Log.

14 MR. HARRIS: Log lighter. Log lighter. And it  
15 appears to me there's even confusion between what the log  
16 lighter was used for.

17 And I don't think there was ever a good explanation  
18 given of that fact. I would comment that when you go that  
19 many years and make a sketch, that's a very vague sketch.  
20 And someone tries to make the device, and you have to get  
21 down off the stand and say, yeah, but this isn't really what  
22 I did. I did something a little different than this, and  
23 points to valves and various hardware in that regard.

24 Did he do something? Probably. I don't know what.  
25 Did he sell it to anybody? I have no idea.

JT-APP 1449

1 He did indicate to the extent that he made any  
2 sales, those sales were made by way of components rather than  
3 the testimony. In other words, it wasn't put together his  
4 own valves and tubes, pipes, whatever.

5 And the final analysis is very vague indeed. We  
6 have, Your Honor, somewhat summarized brief on what I call  
7 the barbed wire case and those following it up until recent.  
8 And the barbed wire case is the one where all of these  
9 ancient claimants came up, and with very, very little back up  
10 of any kind, sought to show they had invented the barbed wire  
11 fence rather than Glidden, and they fell on their face. The  
12 court held that it took plenty of good, solid evidence to  
13 establish a prior use when you were trying to do it under  
14 such circumstances.

15 Then there's a Federal Circuit case that in essence  
16 follows that case, and there's a CCPA case that likewise  
17 follows it.

18 So all the way from about 1880 until now, it's been  
19 the law that it's awful tough to try to prove a prior use by  
20 simply trying to get a couple of people to stand up and said,  
21 I did something like this and made a sketch 30 years ago.

22 Turning away from the prior art, we do have  
23 commercial success, as you know, and what we think is a long  
24 felt need as additional items to buttress up the invalidity  
25 of the patent. We all know it's the burden of our opponents

JT-APP 1450

1 to show invalidity, and we know it has to be by clear and  
2 convincing evidence.

3 We can't help but observe for whatever it's worth  
4 that everything shown is real old. There's nothing out there  
5 within recent years. I'm not sure that's even a pertinent  
6 point, but I couldn't help but notice it. And I think what  
7 it does is support the point somewhat that those things were  
8 for something else, and they got to the point of the buggy  
9 whip, if you will remember the buggy whip.

10 And then in the final analysis as relates to the  
11 invalidity of this patent, we believe that not only is it  
12 valid, but it is a nice strong patent that's made a  
13 contribution, and it deserves responsible damages, that it  
14 deserves the type of damages I mentioned earlier by way of  
15 enhancement, and it deserves the concept of convoying these  
16 other bacon and egg items along.

17 Let me see if there's anything else to suggest.

18 THE COURT: Okay.

19 (Pause)

20 MR. HARRIS: Thank you.

21 THE COURT: Thank you, Mr. Harris.

22 Closing arguments.

23 MR. MONCO: Thank you, Your Honor.

24 May it please the court. Your Honor, first of all  
25 own behalf of Mr. McLaughlin and myself, we would certainly

JT-APP 1451

1 like to join our opposing counsel in thanking Your Honor for  
2 your consideration, courtesy in this case, and your patience  
3 also. As enjoyable as three day trial can be in a patent  
4 case, this has been enjoyable. Appreciate it.

5 THE COURT: Thank you.

6 MR. MONCO: Your Honor, the defenses of Peterson  
7 Company are very simple and straightforward. The Blount  
8 patent is invalid for obviousness. It is not infringed by  
9 the accused product. If infringement is found and the patent  
10 is valid, there's certainly no entitlement to any claim for  
11 lost profits, and there is certainly no willful infringement  
12 present in this case.

13 I think the question to ask here is, how did this  
14 case get so far that we wind up at trial? And I think after  
15 listening to the testimony in the case, I think I understand  
16 and I think Mr. Blount just does not understand what legally  
17 his invention is.

18 In the court we heard testimony time and time again  
19 and plaintiff or counsel's arguments with regard to front  
20 flame burners, ember flames, all of these things. They're of  
21 no significance, Your Honor. They're not in the claims.  
22 They're in the elements of the claims.

23 The claims, these are product claims, Your Honor,  
24 and the product claims comprise elements. And Mr. Blount is  
25 entitled to a patent if his invention distinguishes over the

JT-APP 1452



1 prior art by specific elements. And during the prosecution  
2 of this case the only time that front flames and embers and  
3 sales were mentioned to the patent office occurred in Mr.  
4 Blount's declaration found in Exhibit D 3 on page 215, and  
5 specifically in paragraph 4 on page 217 where Mr. Blount is  
6 recounting the experiences of various witnesses -- not  
7 witnesses, but customers of their product, that the front  
8 flame to be enhanced, we have substantial sales. What did  
9 the examiner do? The examiner rejected that entire argument  
10 as stating that because the prior art was so close, that none  
11 of those factors that were identified in Mr. Blount's lengthy  
12 declaration amounted to anything.

13 And, in fact, I think it's important to keep in  
14 mind the entire perspective of this patent prosecution. This  
15 patent was filed in 1993, and it was prosecuted for over six  
16 years which there were three applications. There were total  
17 of five rejections issued by the patent office on all of the  
18 claims. That's what I think is important. All of the cited  
19 references that were made against this patent contained all  
20 of the elements in each and every one of not only the  
21 dependent -- not only the independent claims, but the  
22 dependent claims.

23 The only element that was not found in the prior  
24 art that was identified by Mr. Blount was the intermediate  
25 valve going to the lower burner. This could not have been

JT-APP 1453

1 stated more clearly than in the last -- what I would call the  
2 last ditch argument made to the examiner in the amendment of  
3 July 10, 1998, which was found in Exhibit D 4 on page 309 in  
4 the remark section on that found beginning on page 312, Mr.  
5 Blount stated, quote, "As specifically claimed in all of the  
6 rejected claims, the claimed device requires a valve for  
7 adjusting the flow -- adjusting gas flow to the secondary  
8 burner. This valve is disposed in the connection portion of  
9 the claimed device that connects the primary burner tube to  
10 the secondary burner tube. Thus, the valve for adjusting the  
11 gas flow is between the primary and secondary tube between  
12 the claimed invention."

13           Going on in the same amendment. "However, this  
14 combination of references --" meaning the Iklor reference and  
15 Henry and Peterson reference -- "this combination of  
16 references in no way suggests the incorporation of an  
17 additional valve between the primary and secondary burner  
18 tubes. The only suggestion for the incorporation of the  
19 second valve necessarily comes from applicant's own  
20 disclosure. Clearly by making the combination of references  
21 as set forth in the official action and including the claimed  
22 invention is obvious is classic hindsight. Even if all of  
23 the references are combined as suggested by the examiner,  
24 there is still no valve disposed between the primary and  
25 secondary burner tube to control the gas flow to the

1 secondary burner.

2 Finally, and also in the same amendment. "With  
3 these variables, the claimed invention provides for an  
4 apparatus for carefully adjusting the amount of gas to be  
5 fashioned to secondary burner tube once the primary burner is  
6 properly adjusted. These advantages are important for fine  
7 tuning combustion efficiency as well as providing the desired  
8 aesthetic effect of the gas fired artifical log and coal  
9 elements of the fireplace."

10 It was the valve, the secondary valve, which  
11 distinguished it, and that is -- that valve that we're  
12 referring is visible on Figure 2 of the patent. It's element  
13 106. That's it. That was the distinguishing feature that  
14 they were able to identify and thus were able to obtain the  
15 claims.

16 But the problem -- not the problem, but the prior  
17 art which was not before the patent office was Peterson  
18 Company's own prior art. I would ask if we could have  
19 Exhibit D 45 pulled up on the screen. I would like, if I  
20 may, Your Honor, just to walk over here again.

21 THE COURT: Sure.

22 MR. MONCO: D 45 A is the F 3 burner sold by  
23 Peterson Company on sale for over 30 years. And what does it  
24 have? It has multiple burners that parallel. It has  
25 connecting tubes, and we have the hearth elbow on each one of

JT-APP 1455

1 these burners for independently controlling the gas so gas  
2 coming through this source is disbursed to anyone of the  
3 desired burners at the level that the user want to have.

4 It's adjusted by a screw. That's beyond dispute.  
5 As I said, this has been in existence for over 30 years, and  
6 you can do it with three burners, you can do it with two  
7 burners. The whole set up itself, if you even remove just  
8 one burner here and left two burners, the whole set up is  
9 very similar to what Mr. Blount has in his patent.

10 Now what I would like to do is correct a misleading  
11 argument that maybe has crept into the case here. The  
12 Peterson Company is not relying on the F 3 burner as the  
13 primary reference to cite against the Blount patent. The  
14 primary reference that we're relying on is the primary  
15 reference that the patent examiner is relying on which is the  
16 Iklor reference, which was Exhibit D 8.

17 Exhibit D 8 shows a dual burner. It shows the  
18 burner is positioned in upper and lower orientation. The  
19 upper burner is positioned in back of the lower burner. The  
20 gas flow flows exactly the same way as the burner described  
21 in the Blount patent.

22 The only difference was that there was no connector  
23 independent valve -- not connector, but independent valve  
24 between the upper primary burner of the Iklor patent, and we  
25 have that hopefully on the screen Exhibit 8, and then the

1 lower burner. The only difference is that there was no  
2 connecting valve with the lower burner showing. The examiner  
3 said, and they said -- I shouldn't say the examiner said.

4 Mr. Blount argued that there was no valve shown in  
5 the prior art that was before the patent office. That's  
6 exactly right, Your Honor; there wasn't. It's here.

7 The F 3 burner in two or three burners clearly  
8 showed the interimmediate valve that was missing from the  
9 prior art. And the Iklor patent also talked about burning  
10 embers. It even described in the background of the invention  
11 in column 1 the fact that, if I may simply refer to what's  
12 being highlighted there on the screen in front. It says,  
13 "The upper burner including upper gas tube and lower burner  
14 including lower gas tube, that's in the background of the  
15 invention. That's prior art according to Mr. Iklor. If the  
16 court would take a -- if the court chose to take a quick  
17 look. Mr. Iklor's patent was on a very narrow metal strip  
18 that was inserted in. That's what he identified himself as  
19 being the difference in the prior art.

20 Mr. Iklor's patent also talks about sand and silica  
21 and providing burning embers and all of the things which Mr.  
22 Blount claims as being new and innovative and no one ever  
23 heard before. It's clearly described in the background of  
24 the invention of the Iklor patent itself. And that would be  
25 found in column 1, lines 34 to 43.

1 So that Peterson Company's argument is clear. The  
2 primary reference that we're relying on is the same one the  
3 examiner relied on which is the Iklor reference. To  
4 supplement the Iklor reference, we referred to Peterson's own  
5 prior art which shows the F 3 burner which shows series  
6 burners hooked up with independent valves to each one of the  
7 burners to permit independent adjustment of the flame.

8 Now with respect to the issue of non-infringement,  
9 Peterson Company's claim interpretation as set forth in is  
10 Markman brief which has been presented to the court, and we  
11 will stand on that interpretation. The main points being is  
12 that we believe that interpreting, if we refer to column one  
13 of the patent -- I'm sorry. Column 7 of the patent in suit  
14 D 1, the second element -- if I may call that up into on to  
15 the screen.

16 Be lines 3 through 5. We believe that element  
17 requires that it is the burners of the main burner be  
18 positioned above the burners of the lower secondary coals  
19 burner for the simple reason that there's no other way to  
20 interpret this claim. That is demonstrated in the  
21 specification of the claim which is found in column 3 --  
22 specification of the patent application which is found in  
23 column 3, lines 54 through 60. And I would read it as  
24 follows.

25 "The present burner assembly is the combination of

1 an inexpensive primary gas log burner item and gas flow  
2 communication with the secondary coal and ember burners to  
3 position forward and below the primary burner which operates  
4 to enhance the natural draft of the fireplace to improve  
5 efficiency of burner and aesthetic appeal of gas fired  
6 artificial logs, coal burner, and ember burner."

7 Your Honor, it's gas and where it flows that cause  
8 us the effects to be produced. That language right out of  
9 their own specification requires that it is the jets of the  
10 lower burner which must be positioned below the jets of the  
11 upper burner.

12 And what we respectfully submit to the court is  
13 that the Peterson burner is not -- does not have, in fact --

14 The jets of the lower burner are positioned above the jets  
15 of the main burner. And that is so even in the worse case  
16 scenario where you've got the front burner pushed all the way  
17 down to the ground of the fireplace in a horizontal position.  
18 The jets of the lower burner are above the jets of the upper  
19 burner. And therefore that element is not met, and that  
20 element is part of every one of the claims.

21 And there's no equivalence to that element, Your  
22 Honor. If the claim requires that it be above, if it's below  
23 that is not -- that is simple not an equivalent. Okay.  
24 Equivalence requires substantially the same function,  
25 substantially the same weight and substantially same result.

JT-APP 1459

1 You can't read black is white, yes is no. Those are not  
2 equivalent terms.

3 And with respect to claim 17, the direction of the  
4 gas flow or the gas fire moving toward the fireplace opening,  
5 we would respectfully submit that gas flowing directly  
6 downwardly to the floor of the fireplace out of the lower  
7 burner is going to move in a 360 degree direction. And that,  
8 Your Honor, does not require any scientific demonstration.

9 Anyone going home can turn on the sink in their  
10 kitchen. When the water hits the floor of the basin in the  
11 sink in the kitchen, what does it do? It scatters at 360  
12 degrees.

13 In our particular case, then, because he have the  
14 jets going down correctly, vertically downwardly, the flame  
15 is going to move backward and forward. And by doing that,  
16 that directly contradicts the operation described in the  
17 specification of the Blount patent. I would respectfully  
18 invite the court's attention to column 6, lines 1 through 20.

19 Let me have that up.

20 Quote, "Even more importantly is that the backward  
21 direction or gas flow direction toward the primary burner  
22 from the secondary burner avoids creation of pockets of gas  
23 in the sand and other coverage material of these burners  
24 which could possibly create a flash explosion due to  
25 accumulated gas. For example, if the gas is directed from



1 the secondary burner toward the opening of the fireplace,  
2 then two independent sources of gas pocketing occurs, one on  
3 the gas log primary burner which may or may not be covered by  
4 the granular material as well as that generated by the  
5 secondary burner which is removed from about four to eight or  
6 10 inches in front of the primary burner."

7 Your Honor, that's saying our position or our  
8 product, rather, with the gas flowing downwardly, with the  
9 gas flow moving both forward and to the rear, it directly  
10 contradicts what they're claiming to be a dangerous  
11 situation. So the operation of our product itself directly  
12 contradicts their own language in their own specification.

13 And therefore, Your Honor, we would respectfully  
14 submit that the direction of our jets avoid infringement of  
15 claim 17 for that additional reason in addition to the fact  
16 that our burner jets of the front burner are above the burner  
17 jets of the main burner.

18 And again, Your Honor, there would be no  
19 equivalence of that element in -- no equivalence of our  
20 accused set up because you can not directly contradict the  
21 way the specification is laid out by the inventor himself.  
22 If the inventor says that you must not do that because it's a  
23 dangerous situation and we go ahead and do that, they could  
24 not be considered equivalent. We are doing something that's  
25 directly taught away from that specification.

JT-APP 1461

1 Now with respect to the issue of claim for lost  
2 profits. Your Honor, we would respectfully submit that there  
3 is absolutely no evidence in the record that has been  
4 presented to this court to sustain lost profits. There has  
5 been no expert evidence entered into -- entered before the  
6 court by competent testimony that would describe the sales  
7 made by the Peterson Company at the retail level, how  
8 purchasers make those purchases, and how -- if at all they  
9 are in competition with the Blount product.

10 There is simply no evidence before the court that's  
11 been presented by anyone. Mr. Blount testified he had no  
12 idea about how the Peterson products are sold. Mr. Hanft,  
13 the other witness, testified he had no knowledge with regard  
14 to how the Peterson products are sold. And the burden of  
15 proof is on plaintiff to establish lost profits, and there  
16 simply has been no evidence presented to this court, none.

17 And it is further fact, Your Honor, that because of  
18 the way the manufacturers specify their product, that if the  
19 customer buys a Peterson gas log set, they're not going to  
20 buy a Blount front burner and vice versa. If you buy a  
21 Blount burner you're not going to buy -- if you buy a Blount  
22 log set, you're not going to buy a Peterson front burner.  
23 Those products -- so the customer making the determination is  
24 not going to buy one or the other. So that's basically it.

25 And, again, there's been no evidence presented as

1 to the buying patterns of these customers. There's been no  
2 evidence presented that these products are sold side by side.  
3 In fact, I don't think there's any evidence they've been sold  
4 side by side by the same retailer. There's no evidence to  
5 show how the customer will drive fifteen miles to buy a  
6 Blount product if he see as Peterson product. There's been  
7 no evidence presented on any of these issues whatsoever. And  
8 these are the basics, the absolute basics that have to be  
9 presented in order to sustain a claim for lost profits.

10 As Mr. Dworkin testified today, Your Honor,  
11 customers come in and they buy the product, but they buy a  
12 log set based on the appearance of the log set. And they buy  
13 it on the appearance of the log set when the fire is on and  
14 when the fire is off because most of the time in anyone's  
15 house the fire is off. And Peterson's product, Peterson log  
16 sets are themselves, as he said and identified, works of art.  
17 They are handpainted. They're elaborate. There's been no  
18 testimony with regard to any competition on that particular  
19 product by the Blount log set.

20 Again, there's just simply nothing in the record  
21 that could even begin to sustain a claim for lost profits.

22 And I would like to respectfully, if I may, invite  
23 the court's attention to Exhibit D 33, if we could have that  
24 on the screen, please.

25 Your Honor, this is a sales flyer for Peterson

ember flame booster, and the second sentence of that reads,  
"This easy to install accessory adds dramatic front flames  
to your gas log set and magnifies its beauty."

Your Honor, this product is sold as an accessory.  
It's an add-on. One of the important things to keep in mind  
is we have a difference in companies here. Peterson Company  
has been in existence for 40 years. The G 4 burner, the  
basic pan and burner, have been on sale for almost 40 years.  
That's a lot of G 4 burners out in the marketplace. In fact,  
I think Mr. Corrin testified that there are literally  
hundreds of thousands of these out in the marketplace.

When Peterson brought out the accused product, it  
went right after a retrofit market, which means people that  
have already got the burner simply want to add this product  
on. That is not going to allow for lost profits or convoyed  
sales on log sets, on grates, on, you know, burner pans.  
That is -- that sale has already been made. That's an  
installation that's already in the house. They're buying the  
20 dollar ember flame booster. That's what they're buying.  
And that is the basic -- that's the accused product, Your  
Honor, and that's all that it is.

Again, turning to Exhibit D 55. This, Your Honor,  
is another Peterson advertisement, and this shows a number of  
accessories that you can add to your fireplace. And again  
about the middle of the page downward, there's an ember flame

JT-APP 1464

1 booster. This is exactly how this product is sold. It's  
2 sold as an accessory. It's sold as add on. You've got a  
3 fireplace. You want to come in and enhance its beauty. You  
4 buy some ceramic pine cones, buy some scent. You buy an  
5 ember flame booster, if you want it, if you see it  
6 demonstrated. That's the way this product is sold.

7 As a matter of fact, if we could have Exhibit D 29.  
8 This is the Golden Blount advertisement for its CEBB product,  
9 and that on the middle of the page on the right hand side  
10 describes that as an optional item. Your Honor, this is an  
11 accessory. The accused product is simply the ember flame  
12 booster, and that's it. It is not the tag along, the add-on  
13 sales.

14 Another factor that was lacking in the plaintiff's  
15 presentation of its case, they never read their claims on  
16 their patented product. To this date this court does not  
17 know by presentation of evidence whether each and every  
18 element of those claims have been met by the patented  
19 product. And without that, that is further grounds for no  
20 lost profits.

21 In addition to that, Your Honor, there are clearly  
22 non-infringing alternatives available. If we could have  
23 Exhibit D 49, page 3, please. This is the 1977 catalog of  
24 the Peterson Company. And if you notice, Your Honor, about  
25 in the middle of the page, F series, what is it entitled?

JT-APP 1465

1 Front Flame Burner.

2 That catalog item was also found on Exhibit D 25 on  
3 page 3. We've gone now from the 1977 catalog moving forward  
4 to the 1992 catalog -- I should not say catalog, but price  
5 list D 25. What does it offer? Front flame burner.

6 We also have on Exhibit D 26 is a front flame  
7 director. Less expensive, not as efficient in the words of  
8 Mr. Corrin, but nevertheless an alternative and a clear  
9 alternative to enhance front flame. That is the essence of  
10 what is being achieved here, and that's that Peterson has to  
11 enhance its front flame. The front flame director doesn't  
12 have any lesser price than does the ember flame booster.  
13 This again is perfect grounds to establish no lost claims for  
14 profits present.

15 An additional item that we would like to add in is  
16 that any damages can only run from May 3, 2000, which is the  
17 date of the actual what you would consider the concrete  
18 letter from Golden Blount's attorneys to the Peterson  
19 Company. And I believe it's been established on the  
20 testimony of witnesses and even I suspect has been conceded  
21 by plaintiffs counsel itself, that the initial letter that  
22 was written in December 1999 to the Peterson Company was a  
23 very carefully crafted letter not charging infringement, but  
24 instead advising of the existence of the patent, but being  
25 very careful to avoid grounds that would enable the Peterson

JT-APP 1466

1 Company to file declaratory judgement action possibly in  
2 Chicago or some other venue.

3 And again there has been no evidence presented to  
4 the court whatsoever that the Blount Company marketed its  
5 products so that from the issue date of the patent forth to  
6 the first date will be considered as a matter of law of any  
7 damages will be May 3, whether it be lost profits or  
8 attorneys fee, it would be May 3 of 2000.

9 Again, going back to the issue of convoyed sales of  
10 burners and logs and pans and so on. Plaintiff's Exhibit 18  
11 which we saw there with this figure of \$435,000 is just  
12 identified as -- bring that into focus, Your Honor.

13 This is the sole presentation of evidence that they  
14 have. It's simply a conclusory sheet, and what I would  
15 characterize as very wishful thinking. All that is presented  
16 here is that they took the ember flame booster of 3,689 and  
17 multiplied it by Mr. Blount's patent -- Mr. Blount's profit  
18 margin, and came up with a lost profits of \$435,000.

19 Assuming that every one of the accused ember flame  
20 boosters is sold with a complete set of grates, burner pans,  
21 logs, soup to nuts. No evidence of that whatsoever in the  
22 record, Your Honor. Nothing could sustain this claim for  
23 damages as presented at this trial. There's been no expert  
24 testimony or no fact testimony to sustain that.

25 Now with regard to the issue of willful

JT-APP 1467

1 infringement. First of all, Your Honor, the burden of proof  
2 is on the Blount Company to establish willful infringement by  
3 clear and convincing evidence. And that would be shown --  
4 that would be established if it were shown that the Peterson  
5 Company was aware of the Blount patent and had no reasonable  
6 basis for reaching its good faith conclusion that in making,  
7 using or selling its device, it would avoid infringement of  
8 the patent. In making that determination, Your Honor, the  
9 court must consider the totality of the circumstances, and  
10 there's no one factor that should control the determination  
11 on the issue of willful infringement.

12 In considering this issue, the following points  
13 must be kept in mind. Did the Peterson Company independently  
14 design the accused product as opposed to copying the  
15 embodiment disclosed in the '159 patent?

16 The closeness of the legal and factual questions  
17 presented by both Golden Blount's applications of patent  
18 infringement and, of course, our defense of invalidity, the  
19 complexity of the issues involved, and whether Peterson  
20 obtained and followed confidently the advice of counsel in a  
21 timely fashion after having actual notice of the Blount  
22 patent, which we believe would not be contained in that  
23 letter if it's under 1999.

24 Competent legal advice meaning opinion of counsel  
25 based on reasonable examination of facts and law regarding

JT-APP 1468



1 validity and infringement with the standard practices--  
2 certainly followed by competent lawyers.

3 Now let's go, if we may, Your Honor, I would like  
4 to go over details, some of the facts of the case.

5 First of all, if we may I would like to have  
6 Exhibit D 16 pulled up on the screen, please. This again,  
7 Your Honor, was the letter -- first letter that was sent by  
8 Blount's attorney, Mr. Tucker, to the Peterson Company. And  
9 as expressed by several witnesses and even alluded to by Mr.  
10 Blount's counsel, this was a very carefully crafted letter to  
11 avoid possible declaratory judgement action by the Peterson  
12 Company. There is no direct charge of infringement, no  
13 demand or cease and desist in this letter. It simply does  
14 not meet the legal standard required to put Peterson Company  
15 on notice.

16 Now what was Peterson Company's response in Exhibit  
17 D 17 which was dated December 17, forwarded to Peterson and  
18 Company's attorney, Bill McLaughlin, a copy of the Blount  
19 letter, a copy of the patent and also enclosed instructions  
20 and working drawings for the G 4 burner with the ember flame  
21 booster attached to it.

22 This is precisely what the Peterson Company should  
23 have done, forwarded to it Mr. McLaughlin. And what did Mr.  
24 Bortz in his discussions with Mr. McLaughlin say? We have  
25 been making products like this for 20 to 30 years. And Mr.

1 McLaughlin's response is, if that can be proven, there is no  
2 infringement, so patent claims are invalid.

3 And, Your Honor, Mr. Bortz' beliefs were true, but  
4 not quite correct. It wasn't 20 to 30 years. It was more  
5 like 30 to 40 years they've been making it.

6 I would like to turn to the D 45 which is a  
7 multiple burner we've talked about in this case with  
8 instruction sheet showing the operation of multiple circular  
9 burner set parallel with burner valves. We need not go over  
10 that in more detail. That product goes back to the 1970s.

11 D 46 again illustrating the F 3 burner, but in that  
12 particular case we show the two burner set up, independent  
13 valves, correctors. In fact, it is very similar to what was  
14 shown in the Blount patent versus the orientation of the  
15 burners.

16 The burner pan itself, G 4, if we could have  
17 Exhibit D 52. That is the catalog for the Peterson Company,  
18 or not catalog, but sales brochure. And turning to page 6, I  
19 believe, of that document we have the G 4 glowing ember  
20 burner gas log set being sold. Again, this goes back to the  
21 1970s.

22 So the burner pan, the use of parallel burners,  
23 valves, all these things were being sold by Peterson itself  
24 for 30 or 40 years.

25 And then further evidence of this we turn to

1 Exhibit D 47 and D 48. If we may have those up on the  
2 screen, please.

3 These are drawings by Mr. Vince Jankowsky, the  
4 designer for Peterson Company. And particularly noting in  
5 this is very interesting because Mr. Jankowsky said he  
6 initially set this up, and is shown in Exhibit D 47, with no  
7 valve at the top left hand corner of the U shaped burner  
8 system shown there. And he found that he had some drafting  
9 trouble with the flow of the gas through there.

10 So what did he do? He look out the elbow in the  
11 upper left hand corner and inserted a hearth elbow. This is  
12 shown in D 48, if we could have enlargement on that, please.

13 The highlighted portion shows Mr. Jankowsky very  
14 logically used an adjustable valve to control the flow of the  
15 gas. As described here, the gas came through the lower  
16 burner, the main burner, up through the hearth elbow and to  
17 the upper burner.

18 So to that extent Mr. Jankowsky's diagram right  
19 here follows exactly the same gas flow as described in the  
20 patent. This drawing was prepared July 1 of 1983. So when  
21 Mr. Corrin in looking at this initial letter says we've been  
22 doing this for 20 or 30 years, he's absolutely correct and  
23 has every right to believe that.

24 Then after receiving the actual notice of  
25 infringement which was dated May 3, 2000, which is

JT-APP 1471

1 Defendant's Exhibit D 19. Why does Mr. Blount do that?

2 I'm sorry. Apologize, Your Honor. I got my names  
3 confused here.

4 What did Mr. Bortz do? As shown in Exhibit D 20,  
5 he forwarded it to his -- I apologize. He contacted his  
6 attorney, forwarded the letter to Mr. McLaughlin and asked  
7 Mr. McLaughlin what should be done. Mr. McLaughlin suggests,  
8 write a letter to the attorney, have him explain in detail  
9 the nature of the product. That we have here on May 16th  
10 2000 letter.

11 They don't understand the nature of the  
12 infringement, Your Honor. They've got all this prior art  
13 that we've just explained to the court. They can't figure  
14 out how in the world Mr. Blount thinks that there's  
15 infringement here:

16 So what does the Peterson Company reasonably ask?  
17 Last sentence, quote, "Please explain to us in detail the  
18 basis upon which you believe that we are infringing on your  
19 client's claim."

20 Your Honor, that's a perfectly reasonable request  
21 to make since the burden of proving infringement is on the  
22 patentee.

23 Now how did Mr. Blount and his attorneys respond?  
24 Well, they didn't. They let eight months lapse. There's no  
25 response to this letter of May 16th. Then suit's filed in

JT-APP 1472

1 January of 2000 as reflected in the letter dated -- I'm.

2 sorry. 2001. Letter dated January 19, 2001, Exhibit D 21.

3 And going back to the difference in dates between  
4 May and January, we heard opposing counsel question the  
5 witnesses, asking them, well, you didn't call up Mr. Blount  
6 or you didn't call up his attorneys.

7 Your Honor, that's their burden to follow up on  
8 that letter. If they choose not to do so, that's the  
9 position that they take on this. We would respectfully  
10 submit that it is totally improper for them to take some sort  
11 of advantage of their own lack of response to in some way  
12 impugn Peterson Company in this litigation.

13 Then after receiving the letter of January, 2001,  
14 what did Peterson Company do? They contacted Bill  
15 McLaughlin. What did Bill McLaughlin say? Please forward to  
16 me all the prior art you have available. What did Mr.  
17 McLaughlin also do? He ordered all the file histories of the  
18 patent and all the cited references.

19 On February 9th 2001 in response to Mr.  
20 McLaughlin's request, as shown on Exhibit D 22, Mr. Bortz  
21 forwards to Mr. McLaughlin a series of documents establishing  
22 the prior art products of the Peterson Company. Mr.  
23 McLaughlin looks at these documents and states that there is  
24 no infringement present in this document, and in addition if  
25 there is infringement, the claims are invalid.

JT-APP 1473

1 Subsequent to that on March 16th, Mr. McLaughlin  
2 receives the drawings which are identified as Exhibit D 47  
3 and D 48. They were further located in the files of the  
4 Peterson Company. Mr. McLaughlin is provided with those  
5 drawings. He subsequently receives from the patent office  
6 the file history and all the cited references.

7 And in May of 2001 Mr. McLaughlin provides an  
8 opinion to Mr. Bortz after having examined all the documents  
9 which I previously referred to, stating that this patent is  
10 invalid for obviousness and the patent claims themselves are  
11 not infringed based on the requirements of the orientation of  
12 the gas jets.

13 And Mr. McLaughlin's oral opinion to Mr. Bortz, the  
14 substance of it is set forth in response to interrogatory  
15 submitted by Golden Blount which is also dated in May of  
16 2001.

17 As Mr. Bortz testified, he relied on each one of  
18 the statements and opinions made by Mr. McLaughlin in  
19 conducting his business in this case. There was no blow off.  
20 There was no disregard of the Blount claims. We proceeded  
21 cautiously and carefully, but also at the same time with full  
22 knowledge of the prior art that we've had in this case since  
23 30 or 40 years ago.

24 And with that we would also respectfully submit  
25 that Peterson had every right to rely on its own prior art.

1 And indeed, Your Honor, we would submit that if the the  
2 patent office may very well not even have allowed the claims  
3 had it had just simply the G 4 burner and the multiburner, 3  
4 burner in front of it with the parallel burners and adjust  
5 hearth elbow and the connectors on it. That's all of the  
6 elements that are in these patent claims.

7 Your Honor, may I have a moment please?

8 THE COURT: Sure.

9 MR. MONCO: Thank you.

10 (Pause)

11 MR. MONCO: In conclusion, Your Honor, we simply  
12 submit that the plaintiff has not met its burden on any of  
13 the issues that it has to carry forward, and that Peterson  
14 Company has fully met its burden to establish the invalidity  
15 of the patent in suit.

16 Thank you very much.

17 THE COURT: Okay.

18 Mr. Harris.

19 MR. HARRIS: My only statement is that esteemed  
20 and able counsel has made about as many misstatements as I  
21 have ever heard in my life in a closing, and he should be  
22 ashamed.

23 THE COURT: Okay. That's all you have?

24 MR. HARRIS: That's all.

25 THE COURT: Okay. We will be getting an opinion

JT-APP 1475

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out and we will stand adjourned.

(A recess was held at 11:43.)

JT-APP 1476

JANET E. WRIGHT CSR, RPR  
FEDERAL DISTRICT COURT - DALLAS, TEXAS



## I N D E X

| WITNESS OR PROCEEDING  | PAGE |
|------------------------|------|
| DARRYL RICHARD DWORKIN |      |
| Direct - Mr. Monco     | 3    |
| Cross - Mr. Harris     | 22   |
| Redirect - Mr. Monco   | 32   |
| GOLDEN BLOUNT          |      |
| Direct - Mr. Gaines    | 35   |
| Cross - Mr. Monco      | 38   |
| Redirect - Mr. Gaines  | 40   |
| Recross - Mr. Monco    | 42   |


JT-APP 1477

C E R T I F I C A T I O N

I, JANET E. WRIGHT, RPR/CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 16th day of August, 2002.

  
JANET E. WRIGHT, CSR NO. 1532  
Official Court Reporter  
The Northern District of Texas  
Dallas Division

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US005988159A

## United States Patent [19]

Blount

[11] Patent Number: 5,988,159

[45] Date of Patent: Nov. 23, 1999

## [54] GAS-FIRED ARTIFICIAL LOGS AND COALS-BURNER ASSEMBLY

[76] Inventor: Golden Blount, 5310 Harbor Town, Dallas, Tex. 75287

[21] Appl. No.: 08/626,498

[22] Filed: Apr. 2, 1996

## Related U.S. Application Data

[63] Continuation-in-part of application No. 08/276,894, Jul. 19, 1994, abandoned, which is a continuation-in-part of application No. 08/061,727, May 17, 1993, abandoned.

[51] Int. Cl.<sup>6</sup> F23C 1/18

[52] U.S. Cl. 126/512; 126/500; 126/540; 431/125

[58] Field of Search 431/125; 126/512, 126/500, 524, 540, 503

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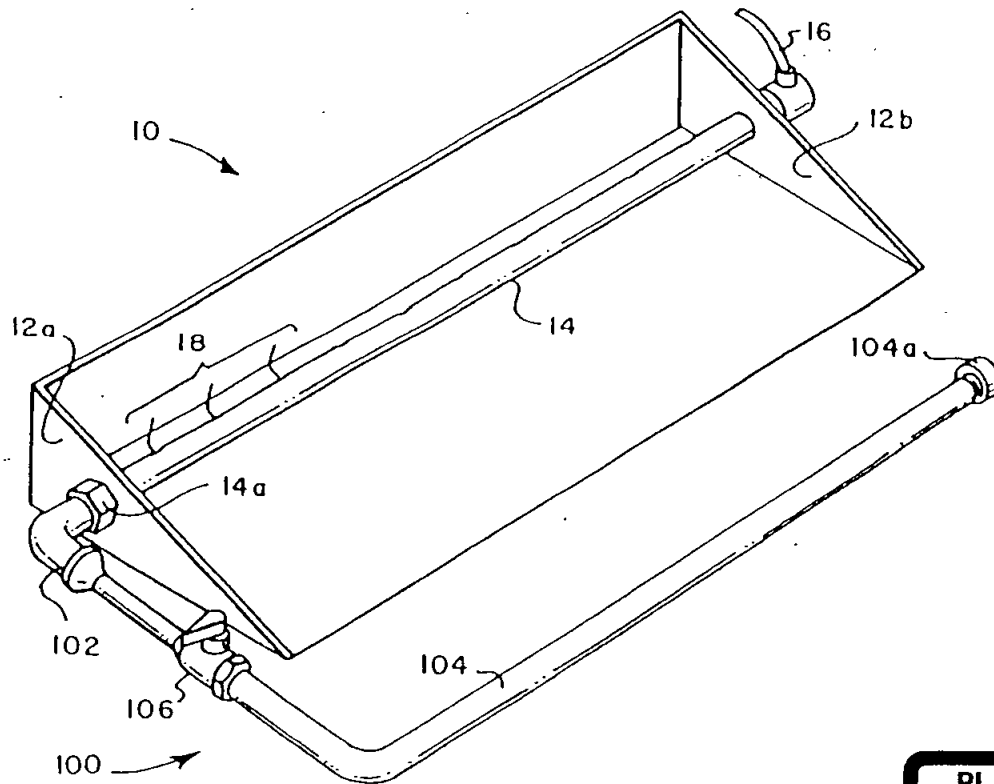
Primary Examiner—Larry Jones

Attorney, Agent, or Firm—L. Dan Tucker

## [57] ABSTRACT

A gas-fired artificial logs and coals-burner assembly is provided for fireplace use in cooperation with decorative gas logs, and artificial coals and embers decorative items by placement forward of the gas logs in the fireplace arrangement, a secondary elongated coals- and embers-burner tube apparatus. The assembly provides gas-fired artificial logs, coals- and embers-burner apparatus for fireplaces wherein gas flow through primary burner tube is the source of gas flow to a secondary coals- and embers-burner tube positioned forward and below the primary burner tube with multiple discharge ports in the secondary tube directed away from the front of the fireplace, thus enhancing the natural burn in cooperation of the fireplace draft as well as the aesthetic beauty of the imitation burning logs, coals and embers.

19 Claims, 3 Drawing Sheets

PLAINTIFF'S  
EXHIBIT

4

JT-APP 1479

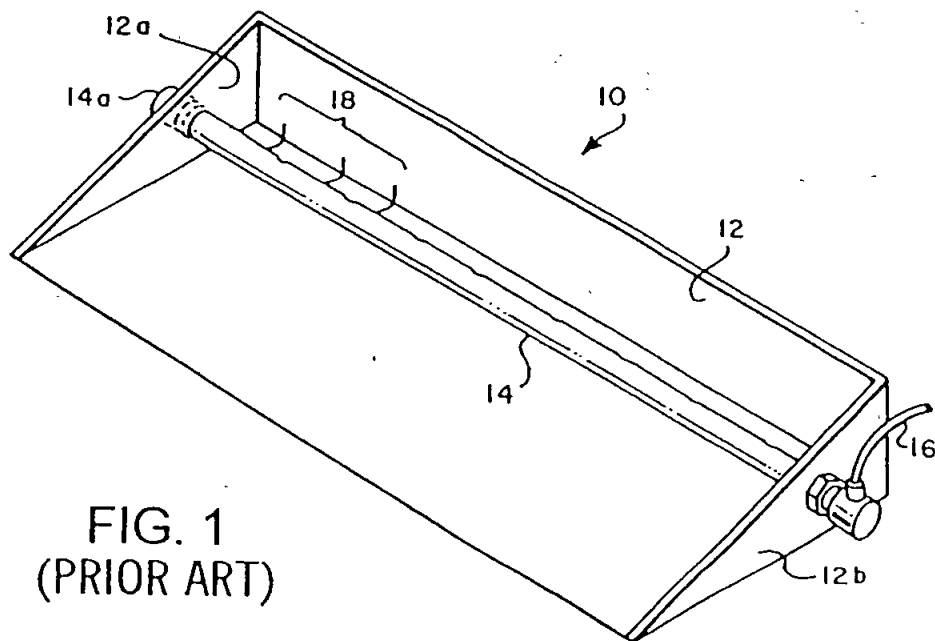


FIG. 1  
(PRIOR ART)

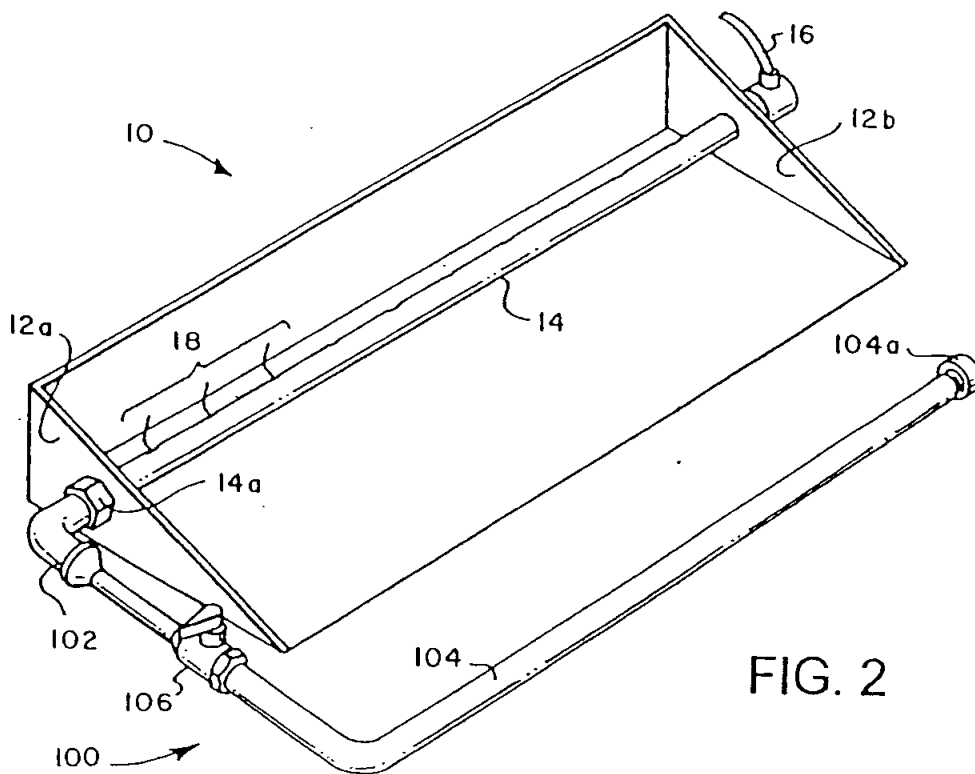


FIG. 2

FIG. 3

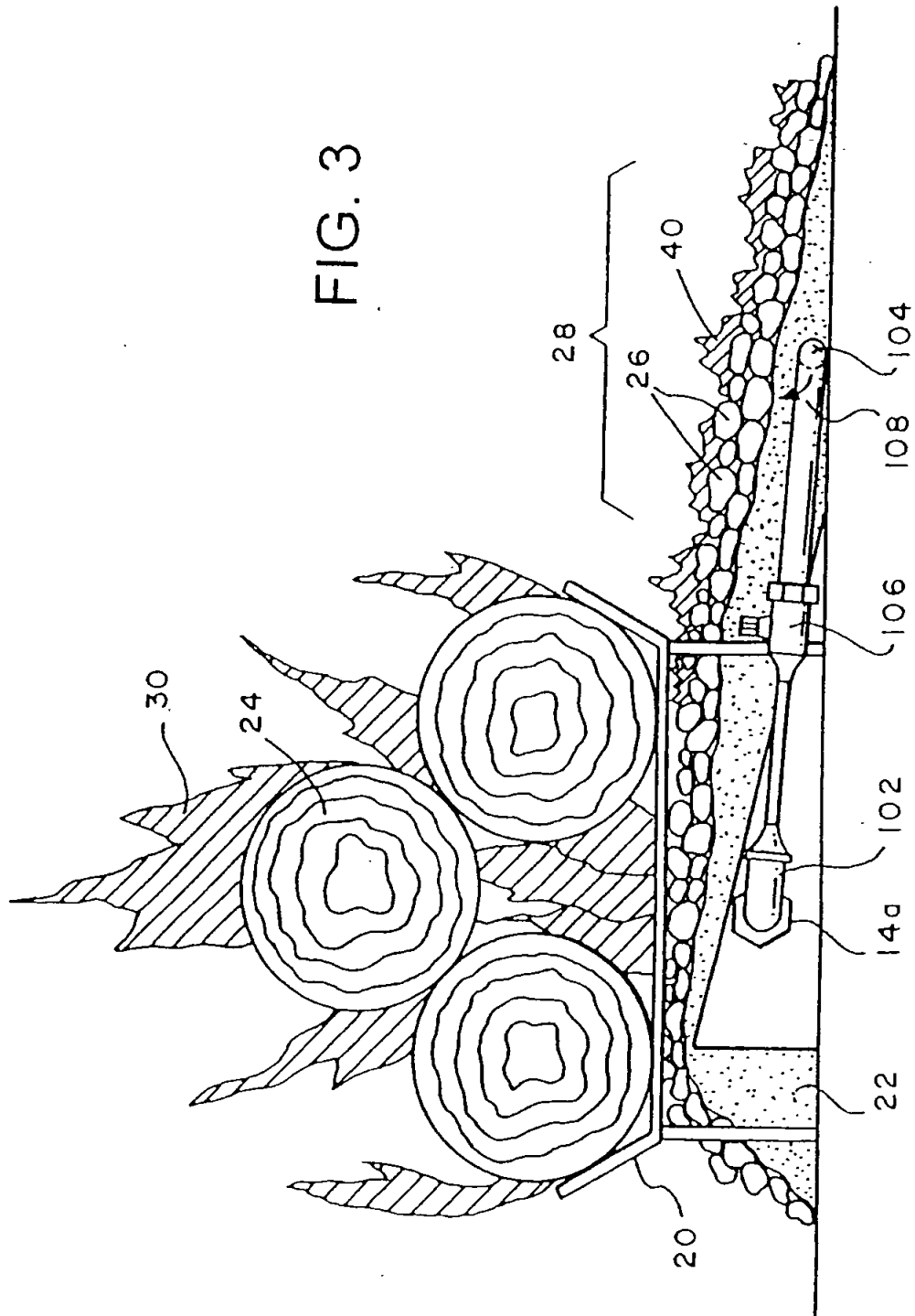
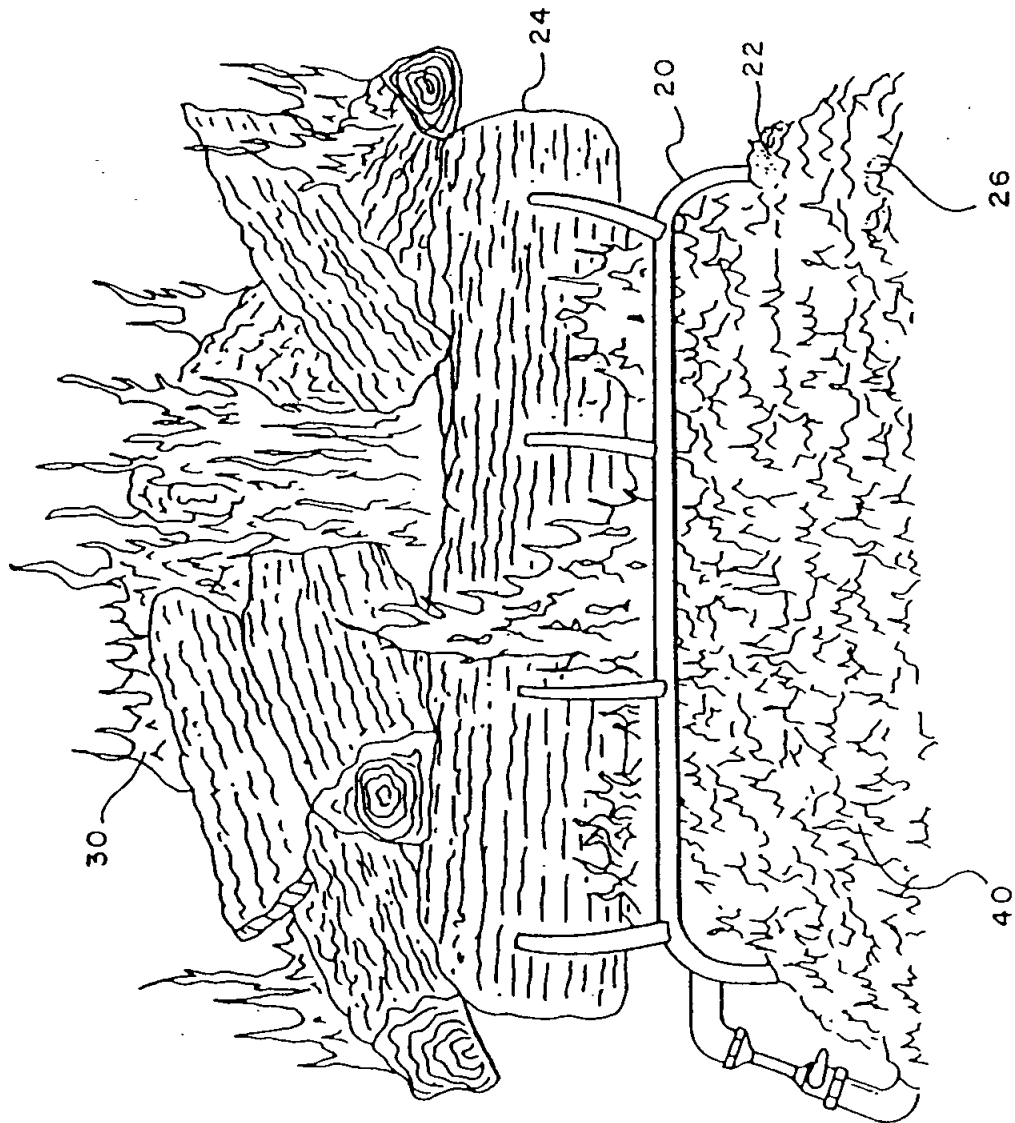


FIG. 4



# GAS-FIRED ARTIFICIAL LOGS AND COALS-BURNER ASSEMBLY

The present application is a continuation-in-part application of U.S. patent application Ser. No. 08/276,894, filed Jul. 19, 1994, now abandoned, entitled "A Supplemental Burner for Retrofitting to an Existing Gas Log Burner Assembly" which is a continuation-in-part application of U.S. patent application Ser. No. 08/061,727, filed May 17, 1993, entitled "Controlled Ember Bed Burner" which is now abandoned.

## TECHNICAL FIELD OF THE INVENTION

The present invention relates to a gas-fired artificial logs and coals-burner assembly for a fireplace to be used with decorative gas logs and coals or embers decorative items placed forward of the gas logs in the fireplace arrangement. In another aspect, the invention relates to coals- and embers-burner apparatus suitable for attaching to a terminal end of a gas-fired primary artificial burner, the coals- and embers-burner assembly utilizing a valve between the primary artificial logs burner and the coals- and embers-burner.

In yet another aspect, the invention relates to a gas-fired artificial logs, coals- and embers-burner assembly for fireplace wherein gas flow through a primary burner tube is the source for gas flow to a secondary coals burner tube positioned forward and below the primary burner tube with the multiple discharge ports in the secondary tube directed away from the front of the fireplace.

The present further relates to efficient gas burners for burning natural gas, manufactured gas and propane gaseous fuels within a fireplace environment. In addition, the invention provides an efficient burner system for burning gaseous fuels in a manner which provides decorative flames and decorative coals and embers which simulate wood burning.

Gas logs are usually made of a fire resistant ceramic material; however, when gas flames are directed against such ceramic materials, the gas flame is cooled by the artificial logs and many times produces a highly inefficient and dirty yellow flame. Such a flame further indicates incomplete burn of the gaseous materials due to a lack of sufficient burn temperature and oxygen supply thus creating excessive soot and carbon monoxide. Various attempts have been made in correcting these decorative fireplace gas log deficiencies.

Further it is known that gas burners or gas nozzles can be buried below a level of sand and vermiculite. These burner systems are referred to as sand pan burners which disburse the gasses through the fireproof material and permit the gas permeating through the porous material to ignite upon entering the atmosphere. Such systems allow disbursement of the flames over a large area or bed of material. Such disbursement of flames creates a more efficient burn which further simulates the action of burning wood, ashes and embers in a fireplace.

Prior art burner systems for artificial decorative logs and sand pan type burners are incorporated in various prefabricated fireplaces or existing masonry fireplaces; however, such systems are required to meet the ANSI emission standards which have been adapted by the American Gas Institute. Accordingly, it is very desirable to provide a clean burning gas-fired artificial logs and coals-burner assembly which meet the present ANSI emission standards.

Gas logs are increasingly popular in homes. Decorative artificial logs are placed on a grate which is located over a gas burner. The burner is typically a tube with spaced

apertures. Sand is poured over the gas burner to hide it from sight. Artificial embers are then spread across the sand. In use, gas flows through the burner and escapes through the spaced apertures. The gas filters up through the sand underneath the artificial logs. The gas is ignited and creates flames between the logs. The height of the flame is controlled by a primary valve which can be manipulated by the user.

Gas logs can, under these conditions, provide a great deal of heat to a room. Also, gas logs require virtually no effort to light. Natural logs, on the other hand, must be properly cured before burning. Even then, kindling is usually needed. And once lit, it is difficult to control the rate of burning. Beyond convenience, gas logs are also aesthetically pleasing. However, the standard gas logs burner only creates flames around the artificial logs. Natural logs, when burned will break apart to produce beautiful burning embers in front of the main log stack. A need exists to produce a more realistic aesthetic burn with gas logs.

Due to the popularity of gas logs, a number of advances have been patented. For example, U.S. Pat. No. 5,000,162 to Shimek et al. discloses a "Clean Burning Glowing Ember and Gas Log Burner System." This unit is marketed under the trademark Heat-N-Glow as the Model 5000GDVMH as a self-contained fireplace and wall heater for mobile homes. The system is a low-BTU system whose main objective is to minimize carbon monoxide creation and soot deposit on the logs. A burner system is provided with a first branch and a second branch. The first branch is supported on a prefabricated grate between a first and second decorative log. The second branch is forward of the logs and is protected under a metal mesh. A very light layer of special ember material is spread on top of the mesh. Shimek et al. '162 is only sold as a complete system of logs, burner and special ember material. It cannot be fitted to existing pan burners which are by far the most common burner in use, the combination resulting in the assembly of the invention. Thus, the Shimek burner system is an expensive option.

The Shimek burner system provides a metal trim piece or refractory material in front of the second burner pipe branch so that it is not easily viewed by a person standing in front of the fireplace. The second branch only illuminates a thin line of ember material. Neither the first or second branch can be covered by sand as is common in other units. The gas apertures in the branches are located on the upper surface of both branches. Thus, sand could easily clog the apertures. Moreover, the flow of gas into the second branch cannot be regulated.

U.S. Pat. No. 5,052,370 to Karabin discloses a "Gas Burner Assembly Including Emberizing Material." The gas burner comprises a first and second gas-burner assembly. The first gas-burner assembly is formed by a pair of parallel burner tubes connected by a third burner tube. The second gas-burner assembly is located forward of the first assembly and is generally T-shaped. The second burner only illuminates a thin line of ember material. A single gas source supplies both burner assemblies. An igniter is provided to ignite the gas from the main burner assembly. The flame from that burning gas ignites the gas from the second burner assembly. As with the Shimek et al. burner assembly, the flow of gas to the second burner assembly cannot be controlled.

Finally, U.S. Pat. No. 5,081,981 to Beal discloses yet another burner and is entitled "Yellow Flame Gas Fireplace Burner Assembly." The Beal reference is primarily concerned with producing a clean yellow flame. The burner assembly includes a U-shaped burner tube. The front portion

of the burner tube is forward of the artificial logs and provides flame for ember material. However, as with the Shimek reference above, the forward portion of the burner tube is hidden from view by a portion of the grate. The Beal system does not contemplate the present assembly. Furthermore, as with both the Shimek and Karabin references, there is no means provided to control separately the flow of gas into the front burner tube.

A need exists for an inexpensive assembly for improving the performance and aesthetic appeal of pan-type gas burners. The assembly should distribute gas under artificial coals or embers in front of the gas-fired logs. The assembly should also provide a method of controlling the flow of gas to a secondary burner, thus controlling the height of the coals and embers bed flames and the amount of heat radiated into a room. A need further exists for an assembly which can safely operate even if completely covered by sand and enhances gas burn of both primary log burner and secondary coals and embers burner by gas flow control and burn direction.

These present and long-felt needs for gas logs and glowing coals- and embers-burner systems will burn clean and closely simulate the natural flames produced by burning wood logs have not yet been met by the art. Therefore, it is desirable to produce a reliable and efficient gas logs and glowing coals- and embers-burner assembly which produces the desired efficiency of burn while providing decorative flames that closely simulate burning wood logs while at the same time providing useable heat and still meet EPA regulations and the ANSI emissions and safety standards.

#### SUMMARY OF THE INVENTION

It is a primary object of the present invention to provide a highly efficient gas-burner assembly for use with artificial, decorative logs and glowing coals and embers wherein the assembly provides control for the glowing coals and embers independently of the gas logs burn.

It is another primary object of the present invention to provide a novel burner assembly which closely simulates the flames, embers and coals of natural wood logs burn.

It is another principle object of the present invention to provide a novel burner assembly which has low carbon monoxide emission characteristics.

It is yet another object of the present invention to provide an efficient low carbon monoxide emission burner assembly that combines long decorative gas flames with short or low smoldering glowing embers and coals in the same assembly.

It is another object of the present invention to provide a gas flow communicating primary and secondary burner tubes with the gas distribution ports of the secondary burner tube directed away from the opening of the fireplace and utilizing the natural draft of the fireplace to enhance the overall efficiency of the burn of the two burners.

The present burner assembly is the combination of an inexpensive primary gas logs burner assembly in gas flow communication with a secondary coals- and embers-burner tube positioned forward and below the primary burner which operates to enhance the natural draft of the fireplace to improve efficiency of burn and aesthetic appeal of the gas-fired artificial logs, coals- and embers-burner assembly. The secondary burner can distribute gas under artificial coals and embers in front of the gas logs with control of the gas flow to the secondary burner being readily adjustable by a valve in the connection means between the primary and secondary burners. The secondary burner receives gas through the primary burner, the connection means, and the gas flow is regulated selectively by the valve which is

interposed between the primary and secondary burners in the connection means. The control of gas flow thus controls the height of the coals and embers bed flames and the amount of radiant heat which is produced in the front of the fireplace and is distributed into the room. The amount of radiant heat can be enhanced by utilizing the control valve for increasing the amount of gas being burned in the secondary burner or the utilization of even a tertiary burner along with the secondary burner which are provided forward of the gas logs arrangement in the fireplace. The secondary burner can operate efficiently when completely covered with sand and artificial coals and embers materials, there being no need for a new grate to hide the secondary burner.

The ability to regulate the flow of gas to the secondary burner is an especially important feature. In addition, the gas flow from the secondary burner away from the opening of the fireplace and, in effect, toward the primary burner is also of special importance because of the utilization of the fireplace natural draft and direction of flames to more completely burn the gas, avoid any pockets of gas in front of the gas logs. The direction of the gas dispersion from the secondary burner ensures that through the action of the natural draft of the fireplace and the burning logs from the primary burner that complete and total combustion in an efficient manner will be achieved of the gas flowing from the secondary burner which is positioned somewhat forward of the primary burner.

People buy gas logs primarily for convenience, but this does not mean that they want to give up on the beauty of burning real logs. Standard pan burners only provide part of that beauty. Having roaring flames throughout the logs is greatly complemented by lower flames in front of the gas logs throughout a coals and embers bed. None of the prior art references above feature or even suggest a variable control means for accomplishing lower flames in the coals and embers bed. Moreover, every fireplace drafts differently. Such differences in fireplace construction and drafting, i.e., fireplace draft, as well as sizing and manufacture of present artificial fireplace burner apparatus dictates that variable control of the secondary burner, the coals and embers burner which operates independently of the primary logs burner is necessary. Volume and velocity of air entering the firebox varies according to the size of the room, height of the ceilings, and size of the firebox. None of the prior art references compensate for the varying drafts of fireplaces and therefore fail to accommodate all fireplaces while attempting to provide the maximum aesthetic beauty desired and efficiency of burn.

Most importantly, the gas-fired artificial logs, coals- and embers-burner assembly through the secondary burner control afforded by the valve, allows the user to selectively increase the amount of gas being burned forward of the artificial logs. This control also affords a greater introduction of radiant heat to the room as desired on colder days. As previously discussed, artificial gas logs can act as a heat sink and absorb heat produced by the flames. The heat generated by the secondary burner is largely radiant and is projected into the room, which affords quick heating of the room while also providing the aesthetic beauties of a gas-fired artificial logs, coals- and embers-burner assembly operation.

#### BRIEF DESCRIPTION OF THE DRAWINGS

For a more complete understanding of the present invention, and for further details and advantages thereof, reference is now made to the following Detailed Description taken in conjunction with the accompanying drawings, in which:



FIG. 1 provides a perspective view of a prior art pan burner used with artificial gas logs;

FIG. 2 provides a gas-fired artificial logs primary pan tube burner and secondary coals and embers tube burner;

FIG. 3 illustrates the effect of the present assembly in providing logs, coals and embers flames; and

FIG. 4 is a front view of the assembly illuminating the coals and embers bed and gas logs flames.

#### DETAILED DESCRIPTION OF THE DRAWINGS

The present assembly provides a number of advantages over the burner assemblies disclosed in the prior art. FIG. 1 illustrates a standard pan burner 10 which is used in the vast majority of artificial log sets. The pan burner 10 has an open frame 12 which supports a burner tube 14. An inlet 16 is connected to a gas source (not shown). A plurality of apertures, as evidenced by gas plumes 18, are spaced along the length of the burner tube 14. Gas escapes through the apertures and filters through sand (not shown). Gas which escapes from the sand is initially ignited to create flames. These flames are continually fed by the escaping gas. The burner tube 14 is supported by the side walls 12a, 12b of the frame 12. The burner tube 14 extends beyond the side wall 12a and is capped.

FIG. 2 illustrates a secondary burner apparatus 100 which embodies the present invention in combination with primary burner tube 14. The secondary burner apparatus 100 can be retrofitted to the terminal end 14a of the burner tube 14 in the pan burner 10. The cap must be removed from the terminal end 14a. A connector 102 is then attached to the uncapped end of burner tube 14. The connector 102 is fitted to the secondary burner tube 104 creating an enclosed fluid path for the gas. The connections between the connector 102 and the terminal end 14a should be adequately sealed to prevent leakage. Likewise, the connection between the connector 102 and the secondary burner tube 104 should also be properly sealed. A valve 106 is interposed in this fluid path. The valve 106 can be variably positioned to give the user the ability to select the amount of gas entering the secondary burner. The secondary burner tube 104 is generally parallel to the primary burner tube 14. The terminal portion of the secondary burner tube 104a is closed. The primary and secondary burner tubes are typically made of steel.

A plurality of apertures 108 are along the length of the secondary burner tube 104. The apertures 108 can be evenly spaced or clustered. The apertures 108 are typically between  $\frac{1}{32}$  and  $\frac{1}{16}$  inch in diameter, but are preferably  $\frac{1}{16}$  of an inch in diameter. More importantly, the apertures are located along the radial edge of the secondary burner tube 104, below the upper ridge of the tube. By avoiding the upper ridge, the apertures are less likely to be clogged by sand. Gas passing through the valve 106 enters the secondary burner tube 104 and escapes through the spaced apertures. The apertures can be evenly spaced or clustered.

These various spaced apertures or gas discharge ports are most important in their position in regard to both the primary and secondary tube burners. In the secondary burner tube 104, the gas is discharged in a direction away from the opening of the fireplace or in another aspect is directed somewhat toward or directly toward the primary burner tube 14. The effects of such gas burn direction enhances the aesthetic beauty of the overall logs, coals, and embers burn, but, more importantly, provide several safety features of the gas-fired artificial logs, coals- and embers-burner assembly. First, the natural draft of the fireplace provides a more efficient burn of the gas and avoids high or intolerable levels

of carbon monoxide. Even more importantly is that the backward direction or gas flow direction toward the primary burner from the secondary burner avoids creation of pockets of gas in the sand and other coverage material of these burners which could possibly create a flash explosion due to accumulated gas. For example, if the gas is directed from the secondary burner 104 toward the opening of the fireplace, then two independent sources of gas pocketing occurs—one on the gas logs primary burner which may or may not be covered by granular materials as well as that generated by the secondary burner which is removed from about four to eight or ten inches in front of the primary burner. Lighting of such gas distribution pockets would be hazardous and uniformity of coordinated burn utilizing natural draft of the fireplace would be lost. If the secondary burner 104 discharges gas in a vertical direction, apertures in the sand or coverage granular material will occur and one would lose the aesthetic beauty of the applications of distribution of gas for burning and creating flame coals' and embers' appearance.

In the gas-fired artificial logs, coals- and embers-burner assembly of the invention, the primary elongated burner tube can be comprised of a one-half inch pipe while the secondary coals- and embers-burner elongated tube can be of a one-quarter inch pipe. These dimensional relationships can be varied depending on the needs for gas volume and the size of the fireplace. The spacing between the primary and secondary burner tubes can also be varied within reasonable lengths of from about four to eight or ten inches depending on the size and depth of the coals and embers bed one requires. The secondary elongated burner tube can also have adjustments for height, meaning distance elevated from the floor of the fireplace, again depending on the depth and size of the coals and embers fire bed. In all of these dimensional relationships, the present invention provides an adjustable burn facility for the secondary elongated burner tube which controls the amount of coals and embers flame and glow, again depending on the individual's desires, size of the room, size of the fireplace and the amount of natural draft through the fireplace.

FIGS. 3 and 4 illustrate the effect of the secondary burner apparatus 100 once connected to the pan burner 10. As discussed, a grate 20 is located above the pan burner which is covered with sand 22. The grate 20 can hold at least one artificial log 24. Artificial ember material 26 which glows when heated can be strewn under and around the artificial logs and on top of the sand. Flames 30 fed by gas from the primary burner tube 14 rise through the artificial logs 24. Flames 40 fed by gas from the secondary burner tube 104 can rise through the artificial ember bed 28. As illustrated, the flames 40 can be lower than the flames 30, thus providing an aesthetically pleasing sight.

Although preferred embodiments of the invention have been described in the foregoing Detailed Description and illustrated in the accompanying drawings, it will be understood that the invention is not limited to the embodiments disclosed, but is capable of numerous rearrangements, modifications, and substitutions of parts and elements without departing from the spirit of the invention. Accordingly, the present invention is intended to encompass such rearrangements, modifications, and substitutions of parts and elements as fall within the scope of the invention.

What is claimed is:

1. A gas-fired artificial logs and coals-burner assembly for fireplace comprising:
  - a) an elongated primary burner tube including a plurality of gas discharge ports;

a secondary coals burner elongated tube positioned forwardly of the primary burner tube;

a support means for holding the elongated primary burner tube in a raised level relative to the forwardly positioned secondary coals burner elongated tube;

the secondary coals burner elongated tube including a plurality of gas discharge ports;

the elongated primary burner tube and the secondary coals burner elongated tube communicating through tubular connection means wherein the gas flow to the secondary elongated coals burner tube is fed through the primary burner tube and the tubular connection means;

a valve for adjusting gas flow to the secondary coals burner elongated tube positioned in the tubular gas connection means; and

the primary burner tube being in communication with a gas source with a gas flow control means therein for controlling gas flow into said primary burner tube.

2. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the support means for the primary burner tube is comprised of an open frame pan for supporting the primary burner tube in an elevated position relative to the fireplace floor.

3. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube discharge ports are directed toward the primary burner elongated tube at an angle of from about 5 to about 75 degrees based on the plane of the fireplace floor.

4. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube discharge ports directed toward the primary burner tube utilizes the fireplace natural draft in achieving combustion of both gas sources in sufficient air to maintain satisfactory levels of CO.

5. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is substantially parallel to the primary burner tube and has a smaller inside diameter than the primary burner tube with the valve adjusting gas flow for coals burn and forwarding heat radiation from the fireplace.

6. The gas-fired artificial logs and coals-burner assembly according to claim 4 wherein the primary burner tube is comprised of a standard half-inch pipe and the secondary burner tube is comprised of a standard quarter-inch pipe.

7. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the elongated primary burner tube and the secondary coals burner elongated tube are spaced apart on different planes at from about four to about eight inches.

8. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is of a smaller diameter than the primary burner tube which allows for a lower profile of coals and sand coverage.

9. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the secondary coals burner elongated tube is adjustable in height relative to the floor of the fireplace and the elevated primary burner tube.

10. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein at least two secondary coal burner elongated tubes are utilized for artificial coal burn and radiant heat generation.

11. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary and secondary burner tubes have apertures of from about  $\frac{1}{32}$  inch to about  $\frac{1}{4}$  inch.

12. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the gas flow adjustment valve has a removable handle, the gas flow adjustment allowing a variety of settings from full closed to full open.

13. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the connection means is comprised of a connector attached to the terminal end of the primary burner tube at a first end of a connector and attached to the secondary coals burner elongated tube to a connector second end with the valve interposed between the primary burner tube and the secondary burner tube.

14. The gas-fired artificial logs and coals-burner assembly according to claim 13 wherein the connector generally is shaped outward from the first end connected to the primary burner tube, directed generally perpendicular to the burner tubes alignment and inward to the second end connected to the secondary burner tube, the valve and connector being positioned generally exterior of the primary and secondary burner tube fire zones.

15. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the open frame pan and primary elongated burner tube is positioned under an artificial logs and grate support means.

16. The gas-fired artificial logs and coals-burner assembly according to claim 1 wherein the primary elongated burner tube is covered with sand and the secondary elongated burner tube is covered with sand, mica, and fibrous materials which simulate coals and ember burn.

17. A gas-fired artificial coals- and embers-burner apparatus suitable for attaching to a gas-fired primary artificial log burner tube said primary artificial log burner tube having a terminal end comprising:

a secondary coals burning elongated tube;

a connector means for connecting said terminal end in communication with the secondary burner tube, the secondary burner tube positioned substantially parallel, forward and below the primary burner tube, the connector means having interposed between the primary and secondary burner tubes a gas flow adjustment valve, the primary and secondary burner tubes having a plurality of gas discharge ports, the secondary burner tube being in gas flow communication with the primary burner tube being the connection means, a gas distribution ports of the secondary burner tube directed away from the fireplace opening.

18. The gas-fired artificial coals- and embers-burner apparatus according to claim 1, wherein the gas distribution ports of the secondary burner tube are directed toward the primary burner tube at from about 5 degrees to about 75 degrees elevation from the fireplace floor.

19. A gas burner assembly for use in a fireplace comprising:

a primary burner tube having a first end and a second end, said first end adapted to be connected to a gas source with a gas flow control means for controlling the amount of gas flowing into said primary burner tube;

a second burner tube;

a connector tube attached to said second end of said primary burner tube and to said second burner tube to provide fluid communication between said primary burner tube and said second burner tube; and

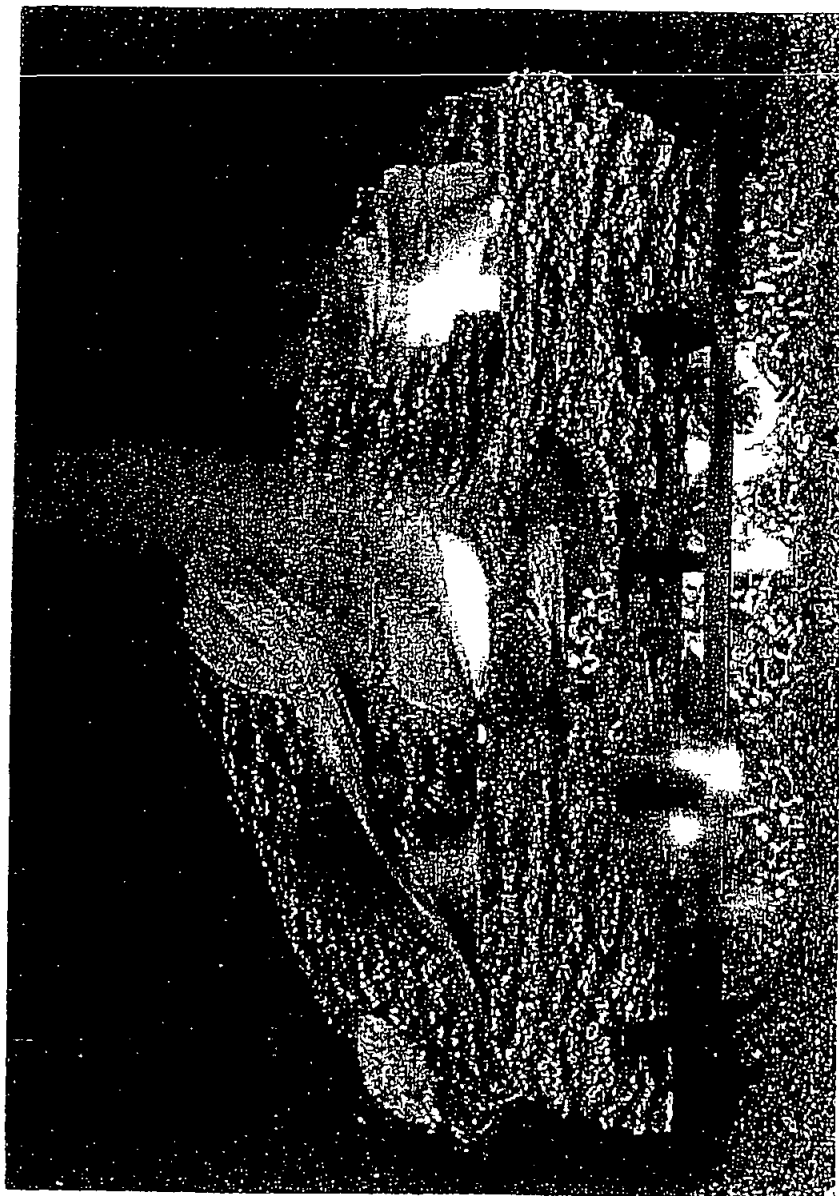
a valve disposed in said connector tube for selectively controlling the flow of gas from said primary burner tube into said second burner tube.

Plaintiff's Log Set With Secondary Coals Burner



PLAINTIFF'S  
EXHIBIT  
2a

Plaintiff's Log Set Without Secondary Coals Burner



PLAINTIFF'S  
EXHIBIT  
26

**EXHIBIT 3a.**

**Plaintiff's Coals Burner Assembly and Grate**

(In a box separate from exhibits)