

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before the Honorable David P. Shaw
Administrative Law Judge**

In the Matter of

**CERTAIN PORTABLE GAMING
CONSOLE SYSTEMS WITH
ATTACHABLE HANDHELD
CONTROLLERS AND
COMPONENTS THEREOF II**

Investigation No. 337-TA-1197

**RESPONDENTS NINTENDO CO., LTD. and NINTENDO OF
AMERICA INC.'S SUPPLEMENTAL RESPONSES AND OBJECTIONS
TO COMPLAINANT'S FIRST SET OF INTERROGATORIES
(NOS. 15, 24-28)**

Pursuant to 19 C.F.R. §§ 210.27 and 210.29, and the Ground Rules, Respondents Nintendo Co., Ltd. and Nintendo of America Inc. (collectively, "Nintendo") serve the following supplemental written responses and objections to Complainant Gamevice, Inc.'s First Set of Interrogatories (Nos. 15, 24-28), as served by Complainant on May 5, 2020.

PRELIMINARY STATEMENT

In responding to these Interrogatories, Nintendo does not concede the competency, relevancy, materiality, or admissibility of the subject matter of any interrogatory. Nothing contained in its objections and responses is to be construed as an admission by Nintendo concerning:

- a) the existence of any information or document;

20. Nintendo objects to the definition of the term “Identify,” and to any interrogatory incorporating the term, to the extent that it purports to impose burdens or requirements on Nintendo that exceed or differ from those permitted by 19 C.F.R. §§ 210.27 and 210.29, and the Ground Rules.

21. Nintendo objects to the definition of the terms “And,” ad “Or,” “And/Or,” as vague, ambiguous, and possibly conflicting. Nintendo will construe these terms as having their ordinary meanings.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1

For each Accused Product, identify in chart form:

- (a) the product number;
- (b) the family or series of products that the product belongs to;
- (c) the type of product it is;
- (d) any internal names, code names, or project names for the product; and
- (e) any other designations used by you to refer to the product.

Response to Interrogatory No. 1

In addition to the General Objections, Nintendo objects to this interrogatory as overly broad as it seeks information not limited to a relevant time period.

Nintendo further objects to the extent the interrogatory seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Nintendo further objects to the extent the interrogatory is duplicative of other discovery in this action.

failure to name the proper inventors. *See Pannu v. Iolab Corp.*, 155 F.3d 1344 (Fed. Cir. 1998). In its June 5, 2020 supplemental response to Nintendo's Interrogatory No. 3, Gamevice contended that claims 1–7 and 17–18 are entitled to priority based on U.S. Patent No. 9,126,119 (“the ‘119 Patent”). The ‘119 Patent names Matthew Joynes as an inventor of the subject matter claimed in that patent, but the Asserted Patent fails to include Matthew Joynes as a named inventor. Because the claims of the Asserted Patent include subject matter invented by Matthew Joynes, they are invalid for improper inventorship. Gamevice further contended that 21 and 22 were entitled to priority based on U.S. Patent No. 8,529,357 (“the ‘357 Patent”). The ‘357 Patent names Matthew Joynes and James Bower as inventors of the subject matter claimed in that patent, but the Asserted Patent fails to include Matthew Joynes and James Bower as named inventors. Because the claims of the Asserted Patent include subject matter invented by Matthew Joynes and/or James Bower, they are invalid for improper inventorship.

Interrogatory No. 25

Separately for each Asserted Claim that you contend is invalid under 35 U.S.C. § 102 and/or § 103, describe in detail the legal and factual basis for your contention that the claim is invalid, including a limitation-by-limitation claim chart with your explanation for your contention that the claim is invalid, a citation to any prior art you rely on to support your contention, a description (by page, column, figure and/or line number) of where the limitation is allegedly found or disclosed in the prior art, and, where you rely on 35 U.S.C. § 103, a description of the alleged motivation to combine prior-art disclosures, and any other documents or other evidence that you allege supports your contention.

Response to Interrogatory No. 25

In addition to the General Objections, Nintendo objects to this interrogatory as premature and unduly burdensome to the extent that it seeks contentions that are related to opinion testimony or expert testimony and discovery.

Nintendo further objects to the interrogatory to the extent it seeks a legal conclusion.

Nintendo further objects that this interrogatory is overly broad and unduly burdensome.

Subject to the foregoing and General Objections, Nintendo responds as follows: Discovery has just begun and thus, Nintendo's investigation into the information requested by this interrogatory is ongoing. Nintendo will provide its bases of invalidity under 35 U.S.C. §§ 102 and 103, including all supporting evidence according to the dates set in the procedural schedule.

First Supplemental Response to Interrogatory No. 25

Nintendo incorporates its objections and responses above. Nintendo further incorporates its Response to the Complaint and Notice of Investigation. Nintendo further incorporates its responses to interrogatory nos. 15, 24 and 26-28, including all grounds of invalidity noted therein. Subject to and without waiving any of the foregoing, Nintendo responds as follows: Nintendo's discovery and investigation in connection with this Investigation is continuing, and its supplemental response to this Interrogatory is based on information obtained to date. Thus, its response is provisional and subject to further amendment, including identifying, charting, and relying on additional references or information about the references disclosed herein.

Nintendo's supplemental response to this Interrogatory is based in whole or in part on its present understanding of the Asserted Claims and on Complainant's apparent construction of the claims, including apparent interpretations of claim limitations based on Complainant's infringement allegations. By including prior art that would anticipate or render obvious claims based on Complainant's apparent construction or any other particular claim construction, Nintendo neither adopts nor admits the accuracy of Complainant's allegations or constructions. Nintendo does not agree with Complainant's application of the claims, or that the claims satisfy 35 U.S.C. § 112. Nothing in Nintendo's supplemental response should be deemed to be an express or implied admission with respect to proper construction of the Asserted Claims, operation of the Accused Products, or the alleged infringement of that claim by the Accused Products. Nintendo's response does not represent Nintendo's agreement or view as to the patentability, meaning, definiteness, written description for, or enablement of any claim contained therein.

Nintendo further identifies and reserves the right to incorporate by reference as if set forth fully herein the prior art references, invalidity contentions, and arguments made in any other proceeding wherein invalidity contentions, have been, or will be provided regarding the Asserted Patent. Nintendo reserves the right to rely on any positions taken or statements made by Complainant during any such proceedings and, to the extent necessary, amend its response in light of such positions taken or statements made.

To the extent that Nintendo obtains additional information, Nintendo reserves the right to supplement this response. At present, Complainant has not yet provided Nintendo its infringement contentions. Nintendo

reserves the right to amend these preliminary invalidity contentions in view of Complainant's infringement contentions.

In addition, Nintendo reserves the right to amend its response to this Interrogatory in view of any positions taken by Complainant, its employees, its experts, or relevant third parties during the Investigation. *See, e.g.,* Exhibit 7 to the Complaint at 7 (admitting that computing devices, such as an iPhone, provide a central processing unit and plurality of sides). For example, Complainant has not yet disclosed its final claim construction positions or whether it contents that any prior art references disclosed by Nintendo are missing any limitations of the Asserted Claims.

Nintendo reserves the right to amend this response should its ongoing investigation reveal new prior art references or additional information about the prior art references disclosed herein. Party and third-party discovery is still in its early stages and Nintendo has not yet completed its search for, and review of, relevant prior art.

In response to any contentions by Complainant that the references discussed herein to not disclose a limitation of an Asserted Claim, Nintendo reserves the right to rely on uncited portions of the charted prior art references, other prior art references, and testimony, including expert testimony. Nintendo further reserves the right to amend its response to this Interrogatory to rely upon inventor and party admissions concerning the scope of the Asserted Claims and teachings of the prior art.

Further, Nintendo reserves the right to amend this response in view of the ALJ's construction of the Asserted Claims and any findings as to the priority date of the Asserted Claims.

The accompanying charts (Exhibits A-1 to V-1) list specific examples where prior art references disclose, either expressly, implicitly, or

inherently, each limitation of the Asserted Claims and/or examples of disclosures in view of which a person of ordinary skill in the art would have considered each limitation obvious. Nintendo endeavored to identify the most relevant portions of the references, but the references may contain additional support for particular claim limitations. Nintendo may rely on uncited portions of the prior art references, other documents and/or operational systems, and fact and expert testimony to provide context or to aid in understanding the cited portions of the references. With respect to patent prior art disclosed herein, Nintendo reserves the right to rely on related patents, patent applications, and foreign counterparts, individually and/or collectively. Where Nintendo cites to a figure in a reference, the citation should be understood to encompass the caption and description of the figure and the text relating to and/or describing the figure. Conversely, where Nintendo cites to text referring to a figure, the citation should be understood to include the figure and related figures as well.

The following table provides an identification of the prior art references and claim charts relating to each reference:

Identification of Prior Art	Exhibit Nos.
JP 2003-018275 (“Hashiguchi”)	A-1
KR 10-2011-0116892 (“Park”)	B-1
US 2001/0045938 (“Willner”)	C-1
US 2010/0195279 (“Michael”)	D-1
US 2012/0271967 (“Hirschman”)	E-1
US 2015/0273345 (“Falc”)	F-1
US 9,539,507 (“Schoenith”)	G-1
WO 2014/079264 (“Kessler”)	H-1

iPEGA PG-9023	I-1
Prior Art cited in IPR2018-01521 and IPR2018-01522 (“119 IPR References”)	J-1
MadCatz L.Y.N.X.9	K-1
MOGA Ace Power	L-1
PhoneJoy	M-1
Wikipad	N-1
Nintendo Switch	O-1
Gamevice Prototypes	P-1
Gamepad for Tablet (“Godfroid”)	Q-1
US 8,529,357 (“Joynes”)	R-1
Nintendo 3DS	S-1
US 7,733,637 (“Lam”)	T-1
US 2014/0274394 (“Willis”)	U-1
iOS	V-1

Nintendo contends that each of the prior art references identified above anticipates and/or renders obvious on its own the Asserted Claims. Nintendo further incorporates by reference each prior art reference cited in the above-identified references and each prior art reference or record in the prosecution history of the Asserted Patent, Related Patents and patent applications, including statements made in the prosecution history by the applicants.

Certain of the prior art references identified herein call for combination with a mobile phone, tablet, or other touchscreen device. In such cases, the combinations, reasons for combination, and evidence relating to

motivation to combine are provided in the accompanying claim charts or prior art references themselves.

To the extent Complainant argues that the primary reference in the above charts does not expressly disclose a claim element, it renders it obvious in view of the knowledge of one skilled in the art at the time of the alleged invention. A person of ordinary skill in the art would be familiar with a variety of possible mechanical designs to implement the features of an accessory game controller for a tablet, mobile phone or touchscreen device, and more generally, mechanical designs for one device supporting another device. One of skill in the art would understand that substituting the structure in the primary prior art reference with a chart with a structure, which is the same as the express disclosure of the claim element, would be an obvious design choice requiring no more than routine experimentation. Such a modification would simply apply one of a finite number of well-known techniques or structural features for game controller devices associated mechanical features in a predictable manner, to achieve well-known, predictable results.

Further, secondary references recited in the claim charts in the above table provide further express disclosure of a claim element. It would have been obvious to one of skill in the art to combine a primary reference in the charts above with a secondary reference described in the charts and/or with the knowledge of one of skill in the art using well-known methods, at least because they address common problems and provide overlapping teachings, such that it would have been obvious for a person of ordinary skill in the art to try, and because it is also a combination of prior art elements using known methods, or substitution of one prior art element for another, to yield predictable results.

Additional obviousness combinations are possible. For example, a person of ordinary skill in the art would have been motivated to combine the teachings of the above identified prior art references (and the knowledge of a person of ordinary skill in the art) based on the nature of the problem to be solved, design needs, and market pressures.

Several of the above identified prior art references disclose providing an attachable handheld controller that will permit more ergonomic use of gaming software incorporated into a mobile phone or touchscreen device. Common features include keypad and buttons for controlling the gaming software and a support structure for holding the mobile phone or touchscreen device. Thus, the prior art shows that these were familiar, well-known elements. A person of ordinary skill would have had a reason to combine these familiar, well-known elements with other prior art systems disclosing an attachable handheld controller because such a combination would merely be the use of familiar elements according to known methods that yield nothing more than predictable results.

Additionally, several of the above identified prior art references disclose structures for securing an attachable handheld controller to differently sized mobile phones or touchscreen devices, including those where the length of the device is greater than the width. Thus, the prior art shows that these were familiar, well-known elements as well. A person of ordinary skill in the art would appreciate that the benefits of securing differently sized devices could be incorporated into a similar system. Indeed, some of the above identified prior art devices disclose similar elements specifically in order to provide this benefit.

Some of the references refer to or discuss each other, illustrating the close technical relationship among the prior art references. A person of

ordinary skill in the art would naturally look to related patents, patent applications, publications, and commercial products to provide insight into how the inventors, authors, or companies framed and applied the inventions, teachings, and commercial products.

Some of the prior art references in the charts in the table above are prior art products, such as the iPEGA-9023, MadCatz L.Y.N.X.9, MOGA Ace Power, and PhoneJoy Gamepad. Nintendo produced images of these products in Investigation No. 337-TA-1111 and made several examples available for inspection. Evidence of the prior publication and public availability of these products includes, for example, deposition testimony from witnesses with knowledge of availability, sales, or purchases of the prior art products (*see, e.g.*, Dale Schroeder, BDA, Inc., Jason Biheller, and Jeramie Sankfield), documents used in those depositions, and documents produced by Nintendo and Complainant in Investigation No. 337-TA-1111. Discovery is ongoing in this Investigation and other depositions, document productions, and discovery responses may provide additional information about the public availability, publication, offers for sale, or sale of prior art products, and this information is incorporated by reference into this response. Claim charts relating to prior art products are illustrative of all the physical examples of these prior art products produced by Nintendo and/or Complainant in this Investigation and Investigation No. 337-TA-1111.

The evidence and arguments cited are exemplary and not exhaustive, and Nintendo reserves the right to cite, use, rely on and rebut any additional evidence or arguments that are produced in discovery by any party as it relates to invalidity. Because this Interrogatory seeks information that is and will be the subject of expert witness analysis, opinion, and testimony, Nintendo also reserves the right to cite, use, and rely on any documents,

evidence, or arguments that are identified and disclosed by any expert witness in accordance with the Procedural Schedule and deadlines concerning expert disclosures. Nintendo reserves the right to amend and/or supplement its response to this Interrogatory, including as it relates to invalidity, in light of any proposed and/or final claim constructions, or the claim construction ruling by the ALJ in the present Investigation. Nintendo also reserves the right to cite, use, and rely on any documents, testimony, or evidence that is identified, or otherwise comes to light, prior to the conclusion of fact discovery in the present Investigation. In particular, the fact depositions of each of Nintendo and Complainant witnesses, including third party witnesses, has not yet begun and Nintendo reserves the right to rely on any evidence, documents, and testimony, the relevance and applicability of which are identified or otherwise discovered prior to the conclusion of fact discovery. Accordingly, Nintendo reserves the right to cite, use, and rely on any evidence and information produced, immediately prior to, or after this Interrogatory supplementation. Nintendo incorporates by reference relevant testimony from the forthcoming corporate depositions and from the expert reports to be submitted.

Nintendo is continuing to investigate the subject matter of this Interrogatory and reserves the right to supplement its response to this Interrogatory.

Interrogatory No. 26

Separately for each Asserted Claim that you contend is invalid under 35 U.S.C. § 112, state each of your invalidity theories, describing in detail how each Asserted Claim allegedly fails to satisfy the requirements for patentability set forth in 35 U.S.C. § 112 and the documents or other evidence that you allege supports your contentions.

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Respectfully submitted,

/s/ Grant Kinsel

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