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10 NINTENDO CO., LTD.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 GAMEVICE, INC.,

14 *Plaintiff,*

15 *v.*

16 NINTENDO CO., LTD., and
17 NINTENDO OF AMERICA INC.,

18 *Defendants*
19
20

Case No. 3:18-cv-1942-RS

NINTENDO'S NOTICE OF
MOTION AND MOTION FOR
RULE 11 SANCTIONS

Date: May 5, 2022
Time: 1:30 p.m.
Place: Crt #3
Hon. R. Seeborg

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NOTICE OF MOTION

Please take notice that on May 5, 2022, at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 3 of the United States District Court for the Northern District of California, Nintendo of America Inc. and Nintendo Co., Ltd (“Nintendo”) will, and hereby do, move this Court for an order imposing sanctions on Gamevice and its attorneys pursuant to Federal Rule of Civil Procedure 11. Nintendo respectfully requests that if the Court agrees that Rule 11 sanctions are warranted, that the Court set a further briefing schedule for the parties to brief issues associated with (1) the amount of appropriate fees, and (2) the allocation of those fees between Gamevice (and any individual at Gamevice), Gamevice’s Finnegan attorneys, and any other third party responsible for the fees.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Gamevice claims that the Nintendo Switch infringes its patents. This case represents the third time Gamevice has made that assertion. The two times prior—both before the International Trade Commission (the “ITC” or “Commission”)—the Commission rejected Gamevice’s claims. But the Commission did not reject Gamevice’s two previous cases as a result of legal error, or based on some narrow, Commission-specific grounds. Instead, both cases represented complete repudiations of Gamevice’s theories. For instance, in the first case before the Commission, the Commission told Gamevice that the Nintendo Switch could not infringe its patents as a matter of law. That determination was based on claim constructions entered by the ALJ, affirmed by the full Commission, and then later affirmed by the Federal Circuit. In the second case, the Commission told Gamevice that the Nintendo Switch does not infringe because it is missing most of the elements required by the asserted claims, and moreover, that the asserted claims are invalid on multiple

1 grounds. This repudiation was so complete, wide-ranging, and overwhelming
 2 that Gamevice abandoned its appeal to the Federal Circuit before briefing,
 3 effectively conceding that it had no hope to win a reversal.

4 Gamevice presents this Court with the same infringement theories that
 5 the Commission has rejected twice. Yet, Gamevice does not—because it can-
 6 not—justify relitigating before this Court on the pretense that there has been
 7 some change in law or fact that makes its theories viable here when they were
 8 not viable before the Commission or Federal Circuit. Instead, Gamevice’s ap-
 9 parent justification for relitigating its claims for the third time, exclusively
 10 rests on the naked assertion that Commission determinations are not, techni-
 11 cally, *res judicata* in a subsequent district court case. Resting on this thin reed
 12 alone, Gamevice believes that it is entitled to accuse the same technology for
 13 a third time with impunity. Gamevice and its Finnegan¹ lawyers are wrong.

14 For Rule 11 (and 35 U.S.C. § 285) purposes, it does not matter
 15 whether Commission findings are or are not *res judicata*. What matters, in-
 16 stead, is whether Gamevice can articulate an objectively reasonable basis for
 17 proceeding despite objective evidence—namely, two adverse rulings by the
 18 Commission and one by the Federal Circuit—that Gamevice’s theories are
 19 wrong both in law and in fact. Put differently, to avoid sanctions, Gamevice
 20 cannot merely regurgitate its previously rejected theories, and blindly hope
 21 for a better result. Instead, Gamevice must articulate an objectively reasona-
 22 ble basis for *why* it believes this case is different from the other two—*why*,
 23 for instance, this Court will flip claim constructions that have been affirmed
 24 by the Federal Circuit and enter new, favorable-to-Gamevice constructions
 25 that both the Federal Circuit and the Commission have already rejected. Or

26
 27 ¹ Two other law firms have withdrawn from representing Gamevice. Nin-
 28 tendo does not seek sanctions against these firms that, consistent with their
 Rule 11 obligations, withdrew from this case.

1 *why* Gamevice believes that all of the limitations that the Commission found
 2 missing (virtually all of the limitations of the patents) are, in fact, present.

3 In the absence of some objectively reasonable basis for proceeding,
 4 Rule 11 sanctions are both appropriate and necessary. If Gamevice, thus, fails
 5 to articulate an objectively reasonable basis for proceeding—something be-
 6 yond the facile observation that it is technically legally permissible to do so—
 7 then the Court should find that Gamevice’s filing of its amended complaint
 8 and continued pursuit of its infringement allegations does not satisfy the
 9 standards of Rule 11. Should the Court so find, Nintendo requests that the
 10 Court set a separate briefing schedule for the parties to address the amount
 11 of fees and the parties responsible for them.

12 **FACTS**

13 **1. The parties and the accused product**

14 **1.1. Nintendo and the Nintendo Switch**

15 Nintendo Co., Ltd. (“NCL”) is based in Kyoto, Japan and has been
 16 designing and selling video games and video-game systems for decades. Nin-
 17 tendo of America Inc. (“NOA”) is based in Redmond, Washington and sells
 18 Nintendo products in the United States. NCL and NOA are collectively re-
 19 ferred to as “Nintendo.”

20 The accused product is the Nintendo Switch video-game system, and
 21 for a subset of claims, an accessory used with the system called the “Joy-Con
 22 Grip.” Nintendo designed the Nintendo Switch and the Joy-Con Grip in late
 23 2014 or early 2015, and in March 2017—several months before the issue
 24 date of the earliest asserted patent—began selling the systems in the U.S.

25 The accused Nintendo Switch is like nothing described in Gamevice’s
 26 patents. That much is apparent simply by looking at the two. Below on the
 27 left, is an image of the Nintendo Switch, and on the right, is Figure 31 from
 28 the asserted patents. As shown below, Gamevice’s patents are about a clamp-

on accessory for a conventional smartphone or tablet. The Nintendo Switch is nothing like that.



The Nintendo Switch is a full fledged video-game system with an innovative design. The system includes two controllers, called “Joy-Con”—one for the left side and one for the right side of the console. Each Joy-Con includes a rail that fits into a matching rail on either side of the console, allowing the Joy-Con to be freely and independently attached to, and removed from, the console by sliding them up or down on the rail (right).



The ability to freely, easily, and individually remove Joy-Con controllers allows for unique ways to play this integrated video-game system. For instance, a player can actively control a game by freely swinging or moving around with one Joy-Con in each hand. And two players can simultaneously play together, each with his or her own Joy-Con. Both Joy-Con can be removed, and the console can be docked to allow for gameplay on a television set, or the Nintendo Switch can be played in handheld mode with both Joy-Con attached to the console using the rails. Game play in the three modes of the Nintendo Switch—TV, tabletop, and handheld—are shown below.



The Joy-Con Grip (right) is a separate product from the console.² A Joy-Con Grip is included in the box with a Nintendo Switch console sold at retail. Joy-Con Grip have rails like the Nintendo Switch console that allow Joy-Con to be slid onto and off of each side of the Joy-Con Grip.

1.2. Gamevice

In 2017 when Gamevice first accused Nintendo of infringement, Gamevice sold a product called the “Gamevice.” The Gamevice was a clamp-on accessory for iPhones and iPads (and other similar smartphones and tablets). Gamevice’s iPhone accessory clamped onto a standard iPhone to add game controls for gameplay and could be removed for typical operation of the iPhone when no longer needed.

But Gamevice was no innovator. Gamevice came late to the crowded smartphone-controller-accessory market with a conventional take on conventional technology. The evidence in the ITC investigations (described below) established that Gamevice’s product was not materially different from the



² Gamevice also accused a different product called the “Joy-Con Power Grip,” but the parties agreed that the Joy-Con Power Grip and the Joy-Con Grip were the same as it pertained to the asserted patents. Below, “Joy-Con Grip” is used for both products, unless context dictates otherwise.

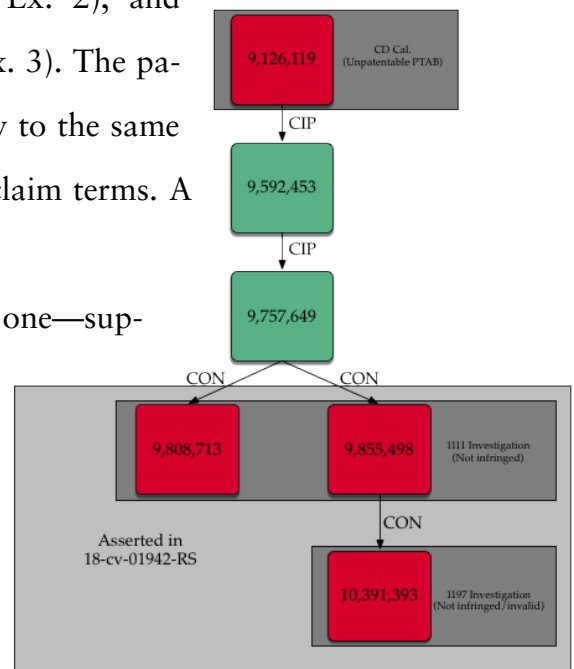
many other products that existed long before (and after) the Gamevice. For instance, right is an image showing the PhoneJoy (from 2012) and the Moga (from 2013), each of which were in the market long before Gamevice (2015).

1.3. Gamevice’s patents describe and claim something fundamentally different from the Nintendo Switch.

Gamevice asserts three patents—U.S. Patent Nos. 9,808,713 (the “’713 patent”) (Kinsel Decl. Ex. 1), 9,855,498 (the “’498 patent”) (Kinsel Decl. Ex. 2), and 10,391,393 (the “’393 patent”) (Kinsel Decl. Ex. 3). The patents share the same specification, claim priority to the same seminal patent, and include many of the same claim terms. A partial family tree for the patents is to the right.

All three patents describe one—but only one—supposed invention: An accessory, like the Gamevice product, that can be clamped onto a smartphone or tablet for gameplay and then removed to return the smartphone or tablet to normal use. The claims recite this supposed invention as a combination of two things: (1) A controller; and (2) what the patents call a “computing device”—a conventional smartphone or tablet.

The first part of the patents’ combination—the controller—is made up of what the patents call “modules” (where the joysticks and buttons are) tethered together by a central structure called the “structural bridge.” The patents describe different configurations for the controller—sometimes it is U-shaped (Figures 1–5, 8–12), sometimes it includes “confinement structures” that



squeeze the smartphone or tablet (Figures 14-25), and other times it is made up of modules with a “tensioning mechanism” that allows the controller to fit different sized smartphones or tablets (Figures 26–44). But in all cases—in every embodiment, in every figure, and as described in every claim—the two modules of the controller are forever and for all times tethered together by a physical structural bridge. Figure 31 (right) is illustrative, and like the other figures of the patent, show the “structural bridge” (element 422) as a part of the controller, tethering the left and right modules together.

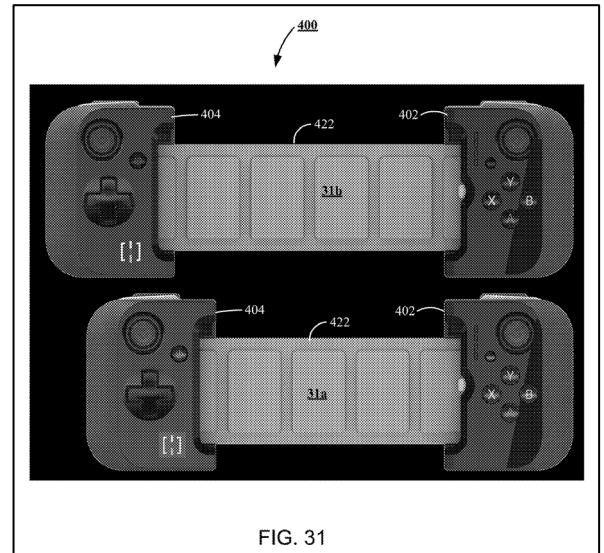


FIG. 31

The second part of the combination is what the patents call the “computing device.” The specification does not disclose a new type of computing device. Nor does the specification suggest that the inventors contemplated some specialized definition of “computing device” that would capture merely disconnected components of a smartphone or tablet. Instead, the specification is explicit that the inventors were using the term “computing device” in its plain and ordinary way, as meaning a smartphone, tablet, notebook computer, or other portable computing device. This is shown in every figure in the patents that shows a computing device, including, for instance, Figure 30 (right, elements 418 and 406 showing two different sized iPhones).

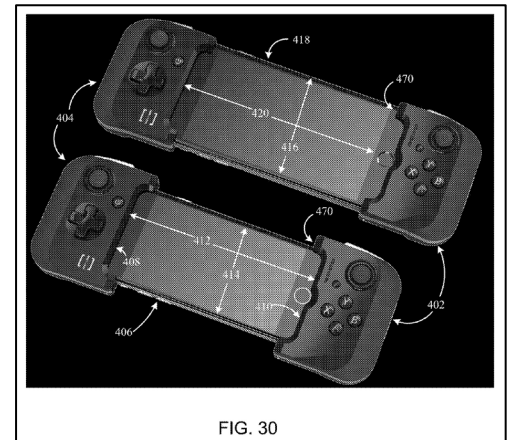


FIG. 30

2. Gamevice’s litigation campaign against Nintendo.

In 2017, Gamevice kicked off its now five-year long litigation campaign against Nintendo by filing a first complaint for patent infringement in

1 the Central District of California. That complaint asserted that the Nintendo
 2 Switch infringed U.S. Patent No. 9,126,119 (the “’119 patent”)—this is the
 3 seminal patent to which the patents asserted here claim priority. After filing
 4 its complaint, Gamevice demanded that Nintendo meet with Gamevice. Nin-
 5 tendo agreed. At the meeting that followed, Nintendo informed Gamevice
 6 that its infringement allegations were frivolous and that the Nintendo Switch
 7 did not—and, in fact, could not—infringe the ’119 patent since it lacked crit-
 8 ical elements, including the structural bridge required by every claim. Shortly
 9 after the meeting, Gamevice dismissed its Central District of California case.

10 Soon after dismissing its Central District case, Gamevice filed this case
 11 and then two follow-on complaints in the ITC—the first in 2018, and the
 12 second in 2020. Nintendo, for its part, filed petitions with the Patent Trial
 13 and Appeals Board (the “PTAB”) for *Inter Partes* Reviews (“IPR”) of the
 14 seminal ’119 patent, and later, one of the patents asserted here, the ’393 pa-
 15 tent. Each action—Gamevice’s two cases in the ITC and the IPRs—is dis-
 16 cussed in more detail below.

17 **2.1. The 1111 Investigation³ resulted in a stipulated finding of non-**
 18 **infringement, and an affirmance by the Federal Circuit.**

19 Gamevice filed its first ITC complaint in March 2018, asserting that
 20 the Nintendo Switch and the Joy-Con Grip infringed claims of the ’713 and
 21 ’498 patents. Gamevice asserts both patents here.

22 The ’713 and ’498 patents describe the same purported invention out-
 23 lined above—that is, a controller with two modules tethered together by a
 24 structural bridge that could clamp onto a separate smartphone or tablet com-
 25 puting device. These patents also claimed specific ways by which the

26
 27 ³ *In the Matter of Certain Portable Gaming Console Systems with At-*
 28 *tachable Handheld Controllers and Components Thereof*, Inv. No. 337-TA-
 1111, referred to as the “1111 Investigation.”

1 controller could hold the computing device in place—via “fastening mecha-
 2 nisms,” *see e.g.*, ’713 patent, Claim 1 (“fastening mechanisms secure the first
 3 confinement structure to a first side of the structural bridge ...”), and a “re-
 4 tention member,” *see e.g.*, ’498 patent, Claim 16 (“... the retention member
 5 interacts with the fastening detent. ...”). Constructions for “fastening mech-
 6 anisms” and “retention member” proved decisive in the 1111 Investigation,
 7 precluding Gamevice’s infringement claims.

8 Before the ITC, Nintendo contended that the claim terms “fastening
 9 mechanisms” and “retention member” were means-plus-function terms sub-
 10 ject to construction under 35 U.S.C. § 112(f). For the “fastening mecha-
 11 nisms” claim term, Nintendo contended that the corresponding structure was
 12 a soft draw latch disclosed in the specification. For the claim term “retention
 13 member,” Nintendo contended that the specification failed to disclose ade-
 14 quate corresponding structure, and thus, claims reciting the term were indef-
 15 inite. Gamevice opposed these means-plus-function constructions, arguing
 16 that section 112(f) did not apply to either “fastening mechanisms” or “reten-
 17 tion member.”

18 Following claim-construction briefing and a full-day hearing, the ALJ
 19 entered his claim-construction order. The order rejected Gamevice’s proposed
 20 constructions and found that both “fastening mechanisms” and “retention
 21 member” were means-plus-function terms as Nintendo had argued. Kinsel
 22 Decl. Ex. 4 at 33–44 (“fastening mechanisms”), 71–81 (“retention member”).
 23 The ALJ further agreed with Nintendo that the disclosed structure for the
 24 “fastening mechanisms” was a soft-draw latch, and thus, entered a construc-
 25 tion limiting “fastening mechanisms” to soft draw latches and their equiva-
 26 lents. *Id.* at 43–44.⁴ As to “retention member,” while the ALJ found that

27 ⁴ “Fastening mechanism” (singular) was recited in Claim 10 of the ’713
 28 patent and Claim 21 of the ’498 patent as performing a different function

1 Nintendo was correct that 112(f) applied, he determined that there was ade-
 2 quate disclosed structure for performing the recited retention-member func-
 3 tion. *Id.* at 81.

4 The ALJ’s means-plus-function constructions gutted Gamevice’s in-
 5 fringement claims against Nintendo, as even Gamevice was forced to admit.
 6 Indeed, Gamevice stipulated that the Nintendo Switch and Joy-Con Grip, “do
 7 not include either ‘fastening mechanisms’ or a ‘retention member’ or their
 8 equivalents under the ALJ’s constructions,” Kinsel Decl. Ex. 5 at Ex. A
 9 at ¶ 11, and further that Gamevice was “unable to establish that any of the
 10 Accused Products satisfy the ‘fastening mechanisms’ or ‘retention member’
 11 limitations literally or under the doctrine of equivalents when those terms are
 12 construed as set forth” by the ALJ, *id.* at ¶ 12. Based on Gamevice’s stipula-
 13 tions, the ALJ entered a Summary Determination of Non-Infringement, and
 14 entered an Initial Determination of No Violation. Kinsel Decl. Ex. 6.

15 Gamevice appealed the constructions of “fastening mechanisms” and
 16 “retention member” first to the full Commission, and then to the Federal
 17 Circuit—and lost at both levels. The Commission rejected Gamevice’s argu-
 18 ments, affirmed the ALJ’s determination, and entered a Final Determination
 19 of No Violation.⁵ Kinsel Decl. Ex. 7 at 11–20 (“fastening mechanisms”), 27–
 20 43 (“retention member”). As for the Federal Circuit, Gamevice argued that
 21 the Commission erred by affirming the ALJ’s means-plus-function

22
 23 than in the other claims of the patents. For Claims 10 and 21, Nintendo con-
 24 tended that the specification failed to disclose adequate structure and that the
 25 claims were indefinite. The ALJ found Claim 10 indefinite for lack of corre-
 26 sponding structure, Kinsel Decl. Ex. 4 at 43–44, and the parties stipulated to
 27 apply that holding to Claim 21, Kinsel Decl. Ex. 5, Ex A at ¶ 8.

28 ⁵ The Commission slightly modified the required structure for “retention
 member,” found that Claim 10 of the ’713 patent was invalid as indefinite,
 and held that Gamevice could not establish the domestic industry require-
 ment.

1 constructions. Before the Federal Circuit, Gamevice argued that neither “fas-
 2 tening mechanisms” nor “retention member” were subject to construction
 3 under 35 U.S.C. § 112(f), and requested that the Federal Circuit return the
 4 case to the Commission for entry of what Gamevice considered proper con-
 5 structions. The Federal Circuit rejected Gamevice’s argument out of hand. In
 6 fact, the Federal Circuit entered a Rule 36 summary affirmance of the Com-
 7 mission’s constructions without finding it necessary to address Gamevice’s
 8 arguments. Kinsel Decl. Ex. 8. The Federal Circuit’s judgment is final, and
 9 the 1111 Investigation is now closed.

10 **2.2. The 1197 Investigation⁶ resulted in a total repudiation of**
 11 **Gamevice’s infringement and validity theories.**

12 Gamevice was not satisfied that it had its full day in court in the 1111
 13 Investigation. So, Gamevice set out to try again. But this second time,
 14 Gamevice asserted a patent—the ’393 patent, which Gamevice also asserts
 15 here—that it had specially prosecuted to avoid the problems in the 1111 In-
 16 vestigation by excising claim references to “fastening mechanisms.”⁷ But re-
 17 moving these references did not change the basic fact that the invention de-
 18 scribed in the patent is fundamentally different from the Nintendo Switch,
 19 which is precisely what the ALJ—and later the full Commission—ultimately
 20 found in the second investigation.

21 Gamevice’s infringement allegations for the key limitations were the
 22 same for the overlapping limitations in the two investigations. Those
 23

24 ⁶ *In the Matter of Certain Portable Gaming Console Systems with At-*
 25 *tachable Handheld Controllers and Components Thereof II*, Inv. No. 337-
 26 TA-1197 (the “1197 Investigation”).

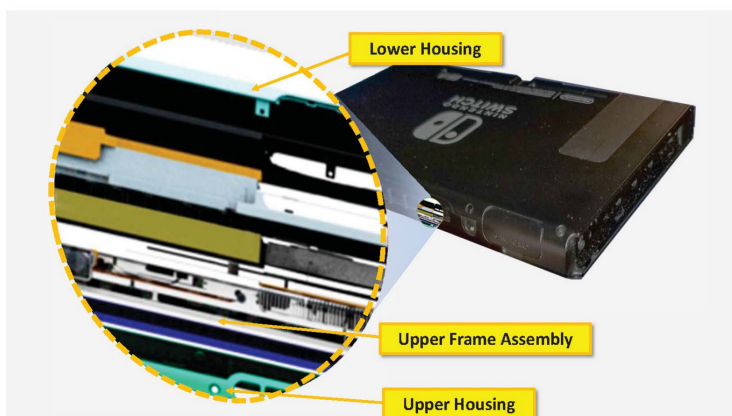
27 ⁷ In fact, Gamevice filed the application that became the ’393 patent on
 28 December 21, 2018—one day after stipulating to Nintendo’s noninfringe-
 ment of the ’713 and ’498 patents.

allegations remain the same here. Both the ALJ and the full Commission rejected essentially all of Gamevice’s allegations.

For instance, for the the key “structural bridge” element, Gamevice pointed to (and continues to point to) a component buried deep inside of the Nintendo Switch console—called the “upper frame.” But the upper frame does not tether Joy-Con together like the structural bridges shown in the patents tether modules together. Instead, the upper frame is a functional component inside the Nintendo Switch console itself. In fact, it was undisputed throughout the investigations that the Nintendo Switch console would not function without the upper frame. Below, on the left, is an image of an upper frame that has been extracted from inside of a console, and on the right, is an illustration of where inside the console the upper frame can be found.



Upper Frame



Upper frame within console

Gamevice’s position on structural bridge—that the structural bridge could be part of the console itself—had downstream consequences for other limitations, including Gamevice’s position on the “computing device” limitation. This is so because the patents exclusively recite the “structural bridge” and “computing device” as separate elements of the recited combination. *See e.g.*, ’393 Patent, Claim 1 (“A combination comprising: a computing device; [and] ... a rigid structural bridge ...”). When elements are

separately recited like this, it is the “clear implication” that they are “distinct components of the patented invention.” *See e.g., Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1254–55 (Fed. Cir. 2010) (internal quotation marks and alternation in original omitted); *see also HTC Corp. v. Cellular Commc’ns Equip., LLC*, 701 F. App’x 978, 982 (Fed. Cir. 2017) (non-precedential). As a result, since Gamevice pointed to a component of the console as the supposed structural bridge, Gamevice could not point to the console itself as the “computing device”—the structural bridge and computing device have to be separate.

So, to conjure the required two separate elements, Gamevice completely disassembled the console and sorted the disassembled pieces into two different piles: One pile of disassembled parts Gamevice said was the computing device, while the other pile of disassembled parts Gamevice said was not the computing device. For instance, Gamevice contended that the parts shown to the right were a “computing device” within the meaning of the claims, while the left-over components of the console were *not* a computing device.

Gamevice was never able to explain why some parts were in one pile but not the other—for example, the supposed computing device pile included inert pieces like the black plastic back cover (right), while the not-computing-device pile included functionally necessary components like the upper frame, battery, and on/off button.



The 1197 Investigation proceeded to final hearing. Several months later, the ALJ issued a nearly 500-page Initial Determination finding no infringement and that all claims asserted against Nintendo (except claim 12) were invalid as obvious. Kinsel Decl. Ex. 9. While the ALJ adopted several of

Gamevice’s own constructions, he rejected Gamevice’s infringement theories, and in particular, Gamevice’s central theory of the “structural bridge” and “computing device” limitations.

For the “structural bridge” limitation, the ALJ found that while Gamevice pointed to an internal component of the console, “[o]ne of ordinary skill in the art would understand that [a structural bridge] in view of the specification could only include a component that is part of the input device [that is, the controller] and is not part of or integrated with the computing device.” Kinsel Decl. Ex. 10 at 133–34. The ALJ distinguished the console’s upper frame that Gamevice contended was the structural bridge from every other structural bridge shown in the specification: “Unlike all the structural bridges shown in the specification, the upper frame is part of the Nintendo Switch console itself.” *Id.* at 134. As for the “computing device” limitation, the ALJ rejected Gamevice’s contention that this limitation could be met by a random assortment of parts: “The administrative law judge finds that one of ordinary skill in the art would not understand a ‘computing device’ to be a selection of parts, as Gamevice asserts. Gamevice’s interpretation is in conflict with the plain language of the claim.” *Id.* at 114 (citations omitted).

Gamevice’s loss was not limited only to these key deficiencies. Kinsel Decl. Ex. 10 is a table summarizing the ALJ’s findings on noninfringement for asserted independent Claims 1, 8, and 12. What is immediately obvious from the table is that Gamevice lost, not only on the central “structural bridge” and “computing device” elements, but on every other contested limitation, and in most cases, on multiple grounds. Claim 1, for example, includes thirteen separate limitations. Of those, the ALJ found that the Nintendo Switch did not meet nine. *Id.*, elements 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.11, 1.13. The four limitations the ALJ found present in the Nintendo Switch were limitations—including the preamble “a combination comprising”—that

1 the ALJ said were uncontested. *Id.*, elements 1.1, 1.9, 1.10, 1.12. The same
2 is true of Claim 8, where the only limitation the ALJ found to be present was
3 the uncontested preamble requiring a “combination.” *Id.*, elements 8.2, 8.3,
4 8.4, 8.5. For Claim 12—which was the claim Gamevice asserted against the
5 Joy-Con Grip—the ALJ found multiple grounds on which the Joy-Con Grip
6 did not infringe. *Id.*, elements 12.6, 12.7.

7 The ALJ not only comprehensively rejected Gamevice’s infringement
8 theory, he also found that all of the claims asserted against Nintendo (except
9 Claim 12) were invalid as obvious in view of both product and written prior
10 art, and that several were also invalid as indefinite. Kinsel Decl. Ex. 11 sum-
11 marizes the ALJ’s invalidity findings. As to Claim 12, while the ALJ found
12 that claim survived Nintendo’s invalidity challenge, he so found because he
13 properly adopted a means-plus-function construction, Kinsel Decl. Ex. 10 at
14 41–57, requiring structures Nintendo did not contend could be found in the
15 prior art, but which also eliminated the accused product.

16 Gamevice appealed the ALJ’s Initial Determination to the full Com-
17 mission. Gamevice argued that the ALJ made a number of errors—including
18 in his findings regarding the “structural bridge” and “computing device” lim-
19 itations—that resulted in his noninfringement and invalidity findings. But the
20 full Commission disagreed. The Commission summarily adopted the ALJ’s
21 Initial Determination as the Final Determination of the Commission without
22 modification of the noninfringement or invalidity findings, and saw no need
23 to bother even addressing Gamevice’s arguments. Kinsel Decl. Ex. 12.
24 Gamevice initially appealed the ITC’s Final Determination to the Federal Cir-
25 cuit, but later dismissed its appeal before briefing, thereby allowing the Final
26 Determination to become final and non-appealable.

2.3. Nintendo's challenges in the PTAB.

Nintendo challenged two of Gamevice's patents—the '119 patent (the seminal patent) and the '393 patent (asserted in the 1197 Investigation and again here)—in the PTAB.

As discussed above, the asserted patents purport to claim priority to the '119 patent, and in 2017, Gamevice asserted—and then withdrew—allegations of infringement concerning the '119 patent. Nintendo filed two petitions to the PTAB seeking institution of IPRs challenging virtually all claims of the '119 patent. The PTAB instituted the IPRs, and in 2020, issued Final Written Decisions finding that all challenged claims were unpatentable. Kinsel Decl. Ex. 13, 14. Some of the prior art that the PTAB found rendered the challenged claims of the '119 patent unpatentable, was also applied in the 1197 Investigation to find the asserted claims of the '393 patent invalid.

After Gamevice filed its complaint in the ITC asserting the '393 patent, Nintendo filed an additional IPR petition in the PTAB, this time challenging the '393 patent. The PTAB declined to institute the IPR, however, because Gamevice represented that the ITC could resolve the invalidity questions more efficiently than the PTAB. As Gamevice put it, “it is the ITC, not the PTAB, that is better situated to resolve the parties’ dispute with respect to the asserted invalidity grounds.” Kinsel Decl. Ex. 15, at 16. By asserting the '393 patent here, Gamevice has demonstrated that its representations to the PTAB that the ITC could efficiently “resolve the parties’ [invalidity] dispute” were false.

ARGUMENT

1. Rule 11 requires lawyers and their clients to stop-and-think before filing—or continuing to pursue—a case.

Federal Rule of Civil Procedure 11 imposes on lawyers and their clients a duty to certify the non-frivolousness of the party's legal and factual

positions. The required certification for the legal contentions is that the “claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” Fed. R. Civ. Proc. 11(b)(2). The factual-contentions certification is that the contentions must “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Fed. R. Civ. Proc. 11(b)(3). Rule 11 “requires litigants to ‘stop-and-think’ before initially making legal or factual contentions,” and the rule is intended to “emphasize[] the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable.” Fed. R. Civ. Proc. 11 advisory committee note to 1993 amendments, 149 F.R.D. 401, 584–85.

When making a Rule 11 determination in patent cases, courts apply the law of the regional circuit. *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361, 1367 (Fed. Cir. 2012). In the Ninth Circuit, Rule 11(b) sanctions may be imposed when pleadings, papers, and the like are presented for an improper purpose or when they include frivolous legal or factual contentions. *See, Intamin Ltd. v. Magnetar Techs., Corp.*, 483 F.3d 1328, 1338 (Fed. Cir. 2007) (citing *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (*en banc*)). A frivolous argument is one that is “legally or factually baseless” under an objective standard. *Kilopass Tech., Inc. v. Sidesense Corp.*, 738 F.3d 1302, 1313 (Fed. Cir. 2013); *Raylon, LLC*, 700 F.3d at 1368. While relevant, a showing of bad faith is unnecessary for the imposition of Rule 11 sanctions. *Kilopass Tech., Inc.*, 738 F.3d at 1313. Under Rule 11(c), a district court may impose sanctions on a party, its attorneys—or both. Fed. R. Civ. Proc. 11(c).

In the context of patent-infringement actions, an objectively reasonable inquiry under Rule 11 requires that an attorney (1) perform a

nonfrivolous claim-construction analysis, and (2) apply it as part of a reasonable infringement analysis. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1301–02 (Fed. Cir. 2004). While “[r]easonable minds can differ as to claim construction positions and losing constructions can nevertheless be nonfrivolous,” *Raylon, LLC*, 700 F.3d at 1368, a claim construction position becomes frivolous—and so objectively unreasonable—when “no reasonable litigant could believe it would succeed.” *iLor, LLC v. Google, Inc.*, 631 F.3d 1372, 1378 (Fed. Cir. 2011). Should a claim-construction position meet this threshold, the claim construction is frivolous, and Rule 11 mandates sanctions. *Id.*

With respect to a reasonable infringement analysis, an attorney must show that “a good faith, informed comparison of the claims of a patent against the accused subject matter” took place. *Q-Pharma*, 360 F.3d at 1302. “[T]he presence of an infringement analysis plays the key role in determining the reasonableness of the pre-filing inquiry made in a patent infringement case under Rule 11.” *Id.*⁸

As to both claim construction and infringement contentions, Rule 11 imposes a continuing duty on an attorney to assess changed circumstances and whether a position that was not previously frivolous has become frivolous, for example, as a result of claim construction or other rulings. “[A] party cannot assert baseless infringement claims and must continually assess the soundness of pending infringement claims, especially after an adverse claim

⁸ As discussed below, Nintendo contends that Gamevice and its lawyers failed to conduct a reasonable inquiry into the basis for believing why this case could succeed when the identical litigation before the ITC failed. In addition, Nintendo understands that Gamevice has secured litigation funding. Nintendo intends to take discovery into whether Gamevice’s litigation funders undertook the appropriate pre-filing diligence, and will request that the Court permit supplemental briefing on this issue should briefing be warranted.

1 construction.” *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306,
 2 1328 (Fed. Cir. 2013).

3 **2. Gamevice has no objectively reasonable basis to believe that this time**
 4 **will be different.**

5 As Gamevice’s First Amended Complaint makes clear, Gamevice is
 6 pursuing the same infringement theory before this Court that the ITC has
 7 rejected twice. But continuing to pursue claims in a district court after the
 8 same claims have been demonstrated to be meritless in the ITC is sanctiona-
 9 ble, as Gamevice’s Finnegan lawyers should know since they were sanctioned
 10 (35 U.S.C. § 285) for this conduct in *Linex Techs., Inc. v. Hewlett-Packard*
 11 *Co.*, No. C-13-159 CW, 2014 WL 4616847 (N.D. Cal. Sept. 15, 2014).

12 In *Linex*, Linex first filed a complaint for infringement against various
 13 defendants in the Eastern District of Texas. The Texas court entered a con-
 14 struction of a key term—“spread spectrum signals”—as requiring a particular
 15 type of distributed signal. Almost immediately after the court entered the con-
 16 struction, Linex settled with the defendants. Later, after obtaining a reissuance from the PTO, Linex filed a complaint in the ITC. In the run-up to the
 17 ITC hearing, the Office of Unfair Import Investigations (“Staff”)⁹ filed a brief
 18 in which Staff took the position that “spread spectrum signals” in the asserted
 19 patent should be construed essentially the same way as the Eastern District of
 20 Texas had construed it. In view of that construction, Staff did “not expect the
 21 evidence to show infringement of the asserted claims.” *Id.* at 2. Before the
 22 final hearing, Linex dismissed its ITC complaint and turned to its complaint
 23 before Judge Wilken in the Northern District of California. Judge Wilken
 24 agreed with both the Eastern District of Texas and Staff, entered essentially
 25

26
 27 ⁹ In certain investigations in the ITC, Staff appears as an independent
 28 party to represent the public interest. Staff did not appear in the 1111 Inves-
 tigation, but did appear in the second investigation, the 1197 Investigation.

1 the same construction for “spread spectrum signals,” and then entered judg-
2 ment for the defendants. The defendants moved for fees under 35
3 U.S.C. § 285, which Judge Wilken granted.

4 Judge Wilken focused on Linex’s pursuit of the case for the third time,
5 despite “indications of substantive weakness.” *Id.* at *2. The defendants con-
6 tended that the case was objectively baseless because two other fora had pre-
7 viously decided against Linex, and Judge Wilken agreed. Judge Wilken found
8 that “[e]ven though neither forum’s determination was binding on [the]
9 Court’s determination as *res judicata*, Linex was not free to pursue another
10 case targeting the same technology with impunity. Patent litigation is a bur-
11 densome venture for all parties involved. Thus, plaintiffs must conduct care-
12 ful investigation before bringing suit.” *Id.* at *3. Given the previous results
13 before the Eastern District of Texas and the ITC, “Linex should have known
14 that its spread spectrum claims would not succeed....” *Id.* Relevant here,
15 Judge Wilken found that even if Linex could arguably have not known that
16 its claims were frivolous when filed, the previous results put Linex on notice.
17 “If Linex did not know initially that its spread spectrum cases could not be
18 stretched to cover [the accused] technology, it should have known after it
19 litigated those claims in Texas and in the ITC. Linex urged two fora to adopt
20 its overbroad definition of ‘spread spectrum signals,’ to no avail.” *Id.* at *4.

21 Like in *Linex*, Gamevice proceeds before this Court with the same case
22 that it presented to the ITC despite “indications of substantive weakness,” *id.*
23 at *2. Indeed, this case is a far stronger candidate for sanctions than *Linex*
24 because the “indications of substantive weakness” are much stronger here
25 than in *Linex*. Here, just as in *Linex*, Staff warned Gamevice that its infringe-
26 ment theories were weak and likely to lose, but unlike in *Linex* where Staff’s
27 concern related to one contested limitation, here Staff warned Gamevice that
28 it would be unlikely to prove virtually any claim limitation. More

1 importantly, unlike in *Linex* where Linex dismissed its ITC complaint before
 2 a final determination by the ITC, here Gamevice has (1) Staff’s unequivocal
 3 statement that the Nintendo Switch did not infringe, (2) an Initial Determination from the ALJ confirming the same and that the asserted claims are
 4 invalid, and (3) a Final Determination from the full Commission, affirming
 5 the ALJ. Surely, if it was objectively baseless for Linex to proceed in view of
 6 a single disputed claim construction—merely recommended by Staff—it is
 7 objectively baseless for Gamevice to proceed in view of a final and wholesale
 8 repudiation of virtually all aspects of its infringement theory by Staff, the ALJ,
 9 and the full Commission.¹⁰

11 Gamevice’s fundamental problem is it has to rely on the same factual
 12 and legal contentions that the ITC and Federal Circuit have repeatedly rejected, effectively precluding Gamevice from having an objectively reasonable
 13 basis for proceeding. For instance, there are no new facts about the Nintendo
 14 Switch that give Gamevice an objectively reasonable basis to believe that this
 15 case will come out differently than the ITC investigations. Indeed, Gamevice
 16 seems to recognize this as Gamevice’s First Amended Complaint recites the
 17 same infringement theories rejected by the ITC (and the Federal Circuit), and
 18 Gamevice has asked that discovery be stayed. Gamevice needs no new discovery because there is nothing new to discover about the Nintendo Switch
 19 that could be relevant to the asserted patents. Thus, this is not a case where
 20 some new component of the accused product changes the noninfringement
 21

22
 23
 24 ¹⁰ There is an additional parallel between *Linex* and this case. In *Linex*,
 25 after the Texas court entered the adverse claim construction, Linex went back
 26 to the PTO to seek a reissuance in which Linex deleted the critical limitation
 27 from the claims. Gamevice did the same thing here. One day after stipulating
 28 that it could not prove the “fastening mechanisms” limitation, Gamevice filed
 the application that ripened into the ’393 patent. The ’393 patent application
 did not recite “fastening mechanisms” in any of the proposed claims.

1 landscape. Instead, this is a case where Gamevice merely hopes that a do-over
2 will yield better results with no objectively reasonable factual basis for those
3 hopes.

4 Like in *Linex*, where Linex repeatedly pressed for constructions that
5 had been rejected in other fora, Gamevice will press infringement claims that
6 have already been rejected. For instance, just as it did before the ITC,
7 Gamevice will claim that the upper frame is the required structural bridge,
8 and that a pile of left-over parts is the required computing device. But as the
9 ITC has already found, neither the claims nor the specifications support
10 Gamevice’s infringement theory. As the ITC has already found, the specifica-
11 tions “only disclose[] the structural bridge as separate from the computing
12 device,” and “exclusively describe[] a structural bridge as separate from, and
13 external to, the computing device.” Kinsel Decl. Ex. 10 at 133–34. And as
14 the ITC has already found, “one of ordinary skill in the art would not under-
15 stand a ‘computing device’ to be a selection of parts, as Gamevice asserts,”
16 and “Gamevice’s interpretation is in conflict with the plain language of the
17 claim.” *Id.* at 114. Thus, nothing has changed—there are no new facts or new
18 law—to morph Gamevice’s core infringement theories from theories unsup-
19 ported by the claims, specifications, or understanding of skilled artisans, into
20 objectively reasonable theories. To paraphrase Judge Wilken in *Linex*, if
21 Gamevice “did not know initially” that its claims “could not be stretched to
22 cover” the Nintendo Switch, “it should have known after it litigated those
23 claims” twice before the ITC. *Linex Techs., Inc.*, 2014 WL 4616847 at *4.
24 Gamevice, thus, is not free to “pursue another case targeting the same tech-
25 nology with impunity,” *id.* at *3, and should be held responsible for fees un-
26 der Rule 11.

3. Gamevice does not have an objectively reasonable basis to believe that it can flip claim constructions for the '713 and '498 patents.

The Federal Circuit's affirmance of the constructions of "fastening mechanisms" and "retention member" is a separate basis to find Gamevice's infringement claims concerning the '713 and '498 patents frivolous.

Gamevice stipulated that it cannot prove infringement of the '713 and '498 patents under the Federal Circuit affirmed constructions of "fastening mechanisms" and "retention member." Kinsel Decl. Ex. 5 at Ex. A. That stipulation was accepted by the ITC as the factual basis for the ITC's determination of noninfringement. Gamevice cannot, therefore, back out of that stipulation now. *Solomon Techs., Inc.*, No. 8:05-CV-1702-T-MAP, 2010 WL 715243, *3 (applying judicial estoppel to preclude a plaintiff from taking a different position on a claim construction issue than the plaintiff took in a prior ITC action). As a consequence, Gamevice has no option but to urge this Court to enter some other non-means-plus-function constructions for these terms that differs from the constructions affirmed by the Federal Circuit. But both the ITC and the Federal Circuit have confirmed that the means-plus-function constructions for "fastening mechanisms" and "retention member" are correct, and there has been no change in law to suggest that the constructions should come out differently now. "No reasonable litigant could believe it would succeed," *iLor, LLC v. Google, Inc.*, 631 F.3d 1378, in flipping constructions affirmed by the Federal Circuit.

This is true even though the ITC's constructions may not constitute formal *res judicata*. The Federal Circuit has warned that courts may not ignore rulings by the Federal Circuit—even when those rulings do not constitute formal *res judicata*. "TI also argues that by our denying preclusive effect to the ITC determinations and to our decisions in appeals from ITC decisions, district courts would be free to ignore our decisions. That is not correct.

District courts are not free to ignore holdings of this court that bear on cases before them.” *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996).

Nor does it matter that the Federal Circuit affirmed the ITC’s construction with a Rule 36 affirmance (without an opinion). There is no doubt that the Federal Circuit affirmed the ITC’s means-plus-function constructions. The “history of [the] litigation and appeal in [cases affirmed without opinion under Rule 36] ought to leave little doubt why the decision of the lower tribunal was affirmed.” *Innovation Sciences, LLC v. Amazon.com, Inc.*, 842 Fed. Appx. 555, 558 (Fed. Cir. 2021) (unpublished). Such is the case here, as the only issue before the Federal Circuit was whether the means-plus-function constructions were correct. As Gamevice’s Statement of Issues described it, the two issues for the Federal Circuit to decide were: “1. Did the Commission err in construing ‘fastening mechanism’ in claim 1 of the ’498 patent as a means-plus-function limitation ... ?[¶] 2. Did the Commission err in construing ‘retention member’ in claim 16 of the ’498 patent as a means-plus-function limitation...?” Kinsel Decl. Ex. 8 at 2. There is little doubt that the Federal Circuit approved of—and affirmed—these constructions since, if it did not, the Federal Circuit would have either entered new constructions for the terms or sent the matter back for the ITC to do so. Indeed, that is exactly the relief Gamevice requested, *id.* at 63, which the Federal Circuit rejected.

Whether insisting that “fastening mechanisms” and “retention member” should not be construed under 35 U.S.C. § 112(f) was frivolous to begin with, there can be little doubt that in view of the Federal Circuit’s affirmance of these constructions, continuing to insist on a non-means-plus-function construction for those terms is now objectively unreasonable and sanctionable under Rule 11.

CONCLUSION

Gamevice and its lawyers should have known since 2017 that its infringement allegations against Nintendo are frivolous. Those allegations have only gotten worse with time, and now have been demonstrated to be meritless. Gamevice and its lawyers have no objectively reasonable basis to believe that a different result will obtain this time around, and therefore, attorney fees under Rule 11 are warranted. Nintendo respectfully requests that if the Court agrees that fees are warranted, the Court enter a separate briefing schedule concerning the amount of those fees and the proper allocation of the fees to the party or parties responsible for them.

Dated: March 30, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties.

/s/ Grant E. Kinsel
Grant E. Kinsel