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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

GAMEVICE, INC.,

Plaintiff,

v.

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

Defendants.

NINTENDO OF AMERICA INC.,

Counter-Claimant,

v.

GAMEVICE, INC.,

Counter-Defendant.

CASE NO. 3:18-cv-1942-RS

**GAMEVICE, INC.'S SUPPLEMENTAL
OPPOSITION TO NINTENDO'S
MOTION FOR SUMMARY JUDGMENT**

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1 **I. INTRODUCTION**

2 Nintendo’s “supplemental” summary judgment brief is essentially round two of its effort to
 3 impose narrow claim constructions on several of the claim terms the Court has already addressed in
 4 its *Markman* decision. Nintendo’s written description and anticipation arguments, which relate to the
 5 constructions of the “structural bridge” and “computing device” terms, should be rejected because
 6 the claims, when applying the constructions announced in the Court’s *Markman* ruling, are
 7 supported by the specification of the application that led to U.S. Patent No. 9,126,119 (“’119
 8 patent”) and are, therefore, entitled to a priority date that precedes the alleged prior art, the Nintendo
 9 Switch. Nintendo’s non-infringement argument based on the construction of “fastening mechanism,”
 10 which is essentially just a request that the Court reconsider that claim construction, should be
 11 rejected out of hand since it is beyond the scope of the Court’s instructions with respect to this round
 12 of supplemental briefing and violates the Civil Local Rules regarding reconsideration requests.

13 **II. Nintendo Is Not Entitled to Summary Judgment of Invalidity With Respect to**
 14 **Any of the Asserted Patents**

15 As fully briefed in Gamevice’s original opposition to Nintendo’s motion for summary
 16 judgment, (Dkt. 233), Nintendo’s motion based on alleged anticipation should be denied because
 17 there are, at a minimum, genuine issues of material fact as to whether the asserted claims are entitled
 18 to priority dates earlier than the first sale of the accused Nintendo Switch. Nintendo failed to sustain
 19 its ultimate burden of proving by clear and convincing evidence that the ’119 patent claims are
 20 invalid, particularly when the evidence must be viewed in Gamevice’s favor.

21 During claim construction, Nintendo argued that the specifications of the three asserted
 22 patents described only certain possible configurations for the claimed “structural bridge” and
 23 “computing device” elements that, therefore, narrowly limited the meaning of those otherwise
 24 common terms. The Court rejected those narrow readings, concluding that the term “structural
 25 bridge” should be construed as “a physical apparatus that secures two or more components to each
 26 other across a distance” and that “computing device” should be construed as “electronic equipment
 27 controlled by a CPU.” Nintendo’s supplemental brief gives lip service to those adopted
 28 constructions, but then immediately reverts to the same basic argument—that the specification (this

time of the priority application that led to the '119 patent) discloses only certain configurations of the claimed “structural bridge” and “computing device” elements and, therefore, cannot provide written description support for anything other than the specific configurations set forth in the preferred embodiments. But that is not what the law requires, particularly in a predictable field like the largely mechanical environment of the claimed inventions. The written description requirement does not require a specification to identify every possible version of a well-understood claim element. *See Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1378 (Fed. Cir. 2000) (holding that the earlier-filed application that only includes drawings of identical half-shells provides sufficient written description support for the later-filed patent claims directed to non-identical half-shells for priority purposes). Moreover, even assuming that Nintendo has come forward with a *prima facie* presentation of anticipation,¹ Gamevice has responded with evidence in the form of specification excerpts and expert testimony that persons of ordinary skill in the art would understand that the inventors had possession of an invention that included a structural bridge and computing device in configurations beyond the narrow descriptions of the preferred embodiments.

Nintendo’s summary judgment motion with respect to the “structural bridge” and “computing device” elements argues that the asserted patent claims are invalid as anticipated because the alleged written description deficiencies prevent Gamevice from claiming priority to an earlier application that pre-dates the accused Nintendo Switch. In that invalidity argument, Nintendo ultimately bears the burden of proving it by clear and convincing evidence, even if Nintendo’s *prima facie* case of anticipation requires Gamevice to come forward with evidence and argument that the claims are entitled to a priority date earlier than the alleged prior art. *Plexxikon Inc. v. Novartis*

¹ In Gamevice’s original opposition brief, Gamevice took issue with Nintendo’s position that it could assert that the accused Nintendo Switch was invalidating prior art while simultaneously claiming that it was not covered by any of the asserted claims or even conceding that point for purposes of this motion. *See* Dkt. 233 at 3-5. In its supplemental brief, Nintendo has at least purportedly conceded, for purposes of this motion, that the Nintendo Switch infringes all the asserted claims, while, at the same time, continuing to deny that is true. Dkt. 243 at 10. Gamevice maintains its position that a finding of invalidity would require the Court to actually find the Nintendo Switch met all claim limitations, but for purposes of this supplemental brief, Gamevice will treat Nintendo’s concession as sufficient to raise the Switch as potential prior art.

1 *Pharm. Corp.*, 525 F. Supp. 3d 1104, 1112 (N.D. Cal. 2021) (even where the burden of production
 2 may shift based on a *prima facie* showing of invalidity, the “ultimate burden of persuasion—and
 3 thus the ‘risk of decisional uncertainty’—never shifts from the party challenging validity.”); *Tech.*
 4 *Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1329 (Fed. Cir. 2008) (clarifying the effect of the
 5 decision in *Power Oasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299 (Fed. Cir. 2008) on which
 6 Nintendo relies, and confirming that “it is a long-standing rule of patent law that, because an issued
 7 patent is by statute presumed valid, a challenger has the burden of persuasion to show by clear and
 8 convincing evidence that the contrary is true. That ultimate burden never shifts, however much the
 9 burden of going forward may jump from one party to another as the issues in the case are raised and
 10 developed.”).

11 Further, the Court must view the evidence in the light most favorable to Gamevice, the non-
 12 movant in this summary judgment motion, drawing all reasonable inferences in its favor. *T.W. Elec.*
 13 *Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). “Summary
 14 judgment is not appropriate if the nonmoving party presents evidence from which a reasonable jury
 15 could resolve the disputed issue of material fact in the nonmovant’s favor.” *Plexxikon*, 525 F. Supp.
 16 at 1109. As Gamevice noted in its original opposition to Nintendo’s motion, compliance with the
 17 written description requirement is a question of fact. *See* Dkt. 233 at 5-6; *see, e.g., Vas-Cath, Inc. v.*
 18 *Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991); *Danmark A/S v. CMI USA, Inc.*, 100 F. Supp. 3d
 19 871, 891 (N.D. Cal. 2015) (“The [written description] issue is a question of fact. Because the issue is
 20 one of fact, it is generally tried to a jury.” (Citations omitted)). As a result, if there is “decisional
 21 uncertainty” on the factual question of whether a person of ordinary skill in the art would understand
 22 the ’119 patent specification to disclose sufficient information to support a structural bridge and
 23 computing device configuration beyond just the precise examples shown in the preferred
 24 embodiments, summary judgment in Nintendo’s favor is inappropriate.

25 Nintendo relies on two additional cases in its supplemental brief that were not previously
 26 discussed in its original motion², *Evans Cooling* and *Benedict*, both of which are inapposite. In
 27

28 ² Other cases cited in Nintendo’s supplemental brief that are not expressly addressed in this brief are
 addressed in Gamevice’s opposition (Dkt. 233).

1 *Evans Cooling*, the Federal Circuit affirmed the district court’s on-sale bar. *Evans Cooling Sys., Inc.*
 2 *v. Gen. Motors Corp.*, 125 F.3d 1448, 1451 (Fed. Cir. 1997). The plaintiff in *Evans Cooling*, unlike
 3 Gamevice, did not argue that the asserted claims were entitled to a priority date earlier than the date
 4 on which the accused product was first offered for sale. *See id.* at 1451. Instead, the plaintiff only
 5 argued that there was no sale or offer for sale of the accused product before the critical date of the
 6 patent. *Id.* Once the court found that there was “a specific and definite offer for sale of a successfully
 7 tested device,” there was no other genuine issue of material fact left for the court to consider.

8 In *Benedict*, the district court held, based on undisputed, clear and convincing evidence, that
 9 the asserted patent was invalid under 35 U.S.C. § 102(g) because a GM employee, who was not the
 10 listed inventor, conceived of the claimed invention and built and tested it before the critical date of
 11 the asserted patent. *Benedict v. General Motors Corp.*, 184 F. Supp. 2d 1197, 1199 (N.D. Fla. Jan.
 12 15, 2002). Like in *Evans Cooling*, the plaintiff in *Benedict* never argued that the asserted patent was
 13 entitled to a priority date earlier than the date on which the GM employee conceived and reduced the
 14 earlier invention to practice. Thus, once the court found that GM did not abandon, suppress, or
 15 conceal the earlier invention, there was no other genuine issue of material fact for the court to
 16 address.

17 In contrast, here, Gamevice is arguing, with supporting evidence including expert testimony,
 18 that the asserted claims are entitled to a priority date earlier than the date on which the accused
 19 products were first sold. *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 683 (Fed.
 20 Cir. 2015) (“As a general rule, summary judgment is inappropriate where an expert’s testimony
 21 supports the non-moving party’s case.”) (quoting *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir.
 22 1996)). This raises numerous genuine issues of material fact, including whether the asserted claims
 23 are entitled to the claimed priority date, which implicate written description issues as set forth in the
 24 parties’ briefs. For the reasons explained in Gamevice’s opposition (*see* Dkt. 233 at 5-20) and in this
 25 brief, Nintendo failed to meet the high burden of clear and convincing evidence to show that the
 26 asserted ’119 patent claims are invalid.

A. The '119 Patent Provides Ample Written Description Support for the Claimed Structural Bridge Under the Court's Adopted Construction

The crux of Nintendo's argument is that the claimed structural bridge must be limited to one external to the computing device because every figure in the patent shows a structural bridge that spans the exterior back surface of the computing device. *See generally* Dkt. 243 at 12-13. But that argument misses the point of the written description inquiry and this supplemental brief, which is to compare the Court's adopted claim construction (which was neither Gamevice's nor Nintendo's proposed construction) to the disclosures in the specification, and determine whether those disclosures reasonably convey to those skilled in the art the inventors had possession of as the claimed subject matter as of the filing date. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). In other words, would a person of skill in the art reading the specification of the '119 patent have believed that the inventors had possession of a structural bridge that "secures two or more components to each other across a distance," Dkt. 241 at 15, only as depicted in the preferred embodiments, or would such skilled artisans have believed that the inventors were describing a broader range of possibilities despite the limited number of embodiments? Although Dr. Singhose's declaration was addressing Gamevice's original proposed construction of structural bridge, his comments are equally applicable to the more refined construction the Court adopted—the specification of the '119 patent "provides adequate written description support for the claimed combination of a 'structural bridge' and a 'computing device,' regardless of their locations relative to each other." Dkt. 233, Brittingham Ex. 4 (Singhose Dec.) at ¶ 33; *see generally* ¶¶ 30-38. Just as the '119 patent does not place any limit on how the computing device and the structural bridge must physically interact, persons of skill in the art would not have discerned any specific limits on the nature or location of the distance across which the structural bridge must secure the two components.

The argument that the specifications of the asserted patents or the priority '119 patent identify only a limited number of structural bridge configurations is well-trod ground. Indeed, this is precisely the argument that Nintendo advanced during claim construction here, which the Court already rejected. Dkt. 241 at 14-15. Nintendo unsuccessfully argued that the term should be

1 construed as “a component of the game controller that connects its two sides,” a clear attempt to
2 limit the term to a component that is part of the unclaimed external “game controller” element and
3 located somewhere other than inside the computing device. And as Gamevice noted in its original
4 opposition to Nintendo’s summary judgment motion, Nintendo’s structural bridge argument has
5 been rejected before. Nintendo failed to convince the ITC ALJ on this same argument during the
6 claim construction phase of the 1111 Investigation, and then again after trial in the 1197
7 Investigation in the context of a written description argument. *See* Dkt. 233 at 19-20 (noting the prior
8 ITC rulings, including the ALJ’s rejection of Nintendo’s argument that there was no written
9 description supporting a structural bridge that was not external to the computing device). Nintendo
10 now trots out the same argument once more, repackaged as the basis for arguing that Gamevice is
11 not entitled to claim priority to the ’119 patent, but relying on the same essential facts.

12 Nintendo spends much of its energy focusing on Gamevice’s supposed infringement
13 contentions regarding the structural bridge and arguing that the alleged structural bridge of the
14 accused Switch product is not found in the specific disclosures of the ’119 patent. But that is not the
15 correct inquiry here. Specifically, the test is not whether the exact structure used in the accused
16 product is described in the patent. *See Lampi Corp.*, 228 F.3d at 1378 (“In order for satisfy the
17 written description requirement, the disclosure as originally filed need not provide *in haec verba*
18 support for the claimed subject matter at issue); *see also Rexnord Corp. v. Laitram Corp.*, 274 F.3d
19 1336, 1344 (Fed. Cir. 2001) (“Our case law is clear that an applicant is not required to describe in
20 the specification every conceivable and possible future embodiment of his invention.”) Instead, the
21 correct inquiry is whether the ’119 patent provides sufficient written description support for the
22 structural bridge as it was construed by the Court. As to that issue, the answer is clearly “yes.”

The Court construed “structural bridge” as “a physical apparatus that secures two or more components to each other across a distance.” Dkt. 241 at 15. The ’119 patent provides ample support for this. For example, referring to Figure 1, the ’119 patent discloses that “a bridge structure 124” is “disposed between the pair of side structures 116 and 118, and the adjacent third side 126, of the plurality of sides 104, 106, 108, and 126, of the computing device 102.” ’119 patent at 3:34-42; Dkt. 233-5, ¶¶ 30-31. Thus, the bridge structure secures two side structures to each other across a distance, as shown below

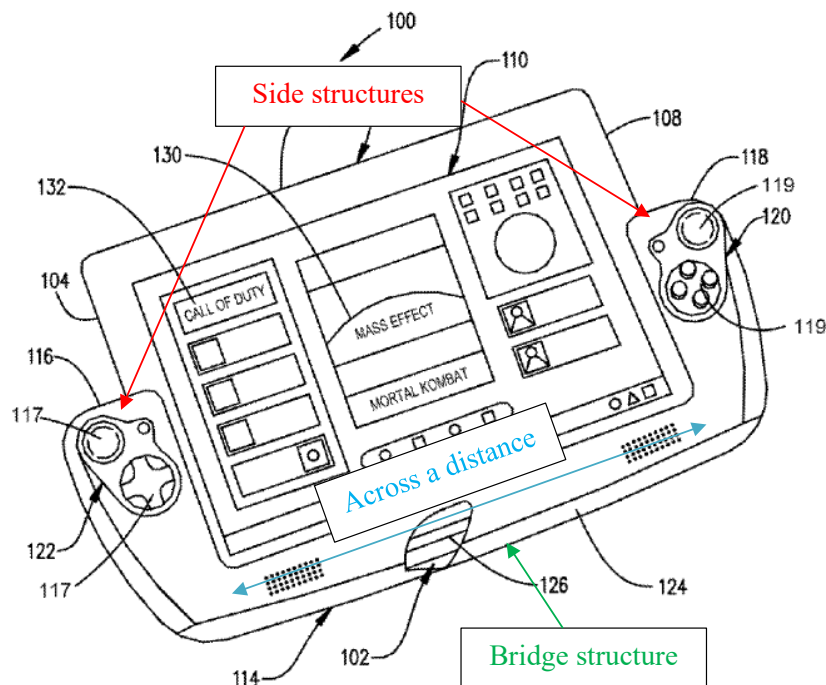


FIG. 1

In another embodiment, the ’119 patent discloses, referring to Figure 14, “a structural bridge 258, securing the pair of control modules 252, one to the other, and communicating with the back 248, of the computing device....” ’119 patent at 6:66-7:5. Thus, the structural bridge in this embodiment secures the pair of control modules to each other across a distance, as shown below. Thus, the structural bridge recited in the asserted claims is entitled to the priority date of the ’119 patent, which provides ample written description support for the term under the Court’s construction.

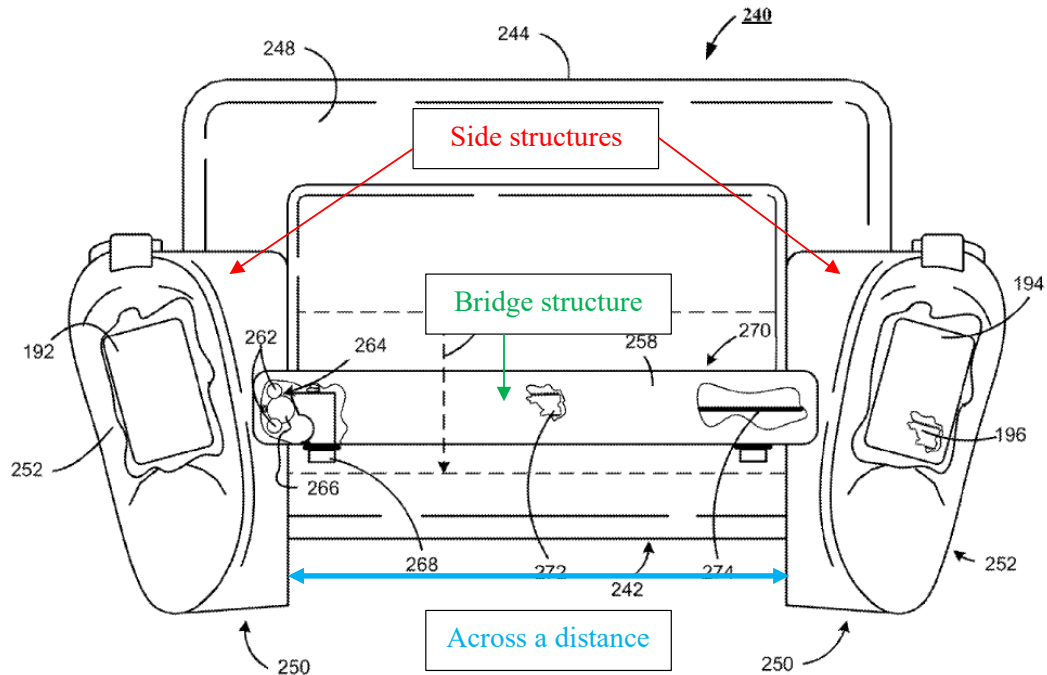
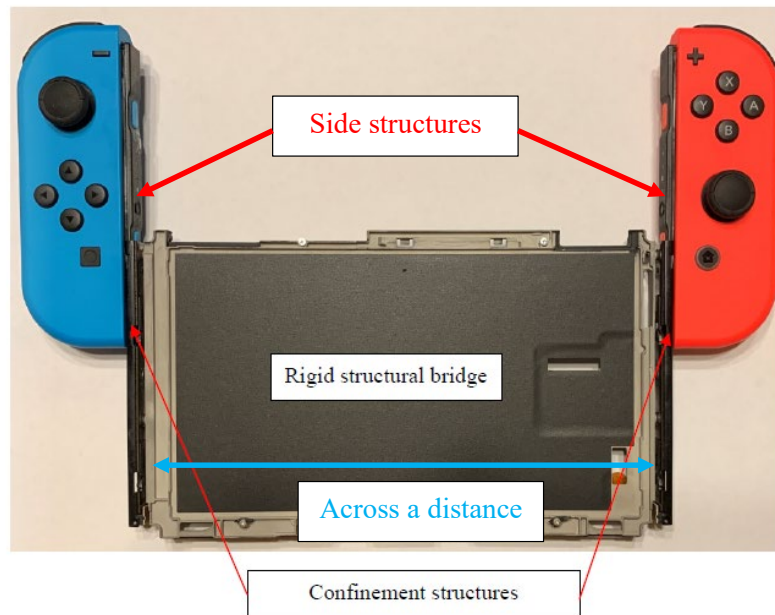


FIG. 14

Nintendo's focus on Gamevice's infringement contentions as opposed to the Court's adopted claim construction is inconsistent with the written description analysis. But it bears noting that the structural bridge in the accused Nintendo Switch system also satisfies the Court's claim construction of a structure that secures two or more components to each other "across a distance." *See, e.g.*, Dkt.243-9, Hawkins Decl Ex. 16 at 29:



1 Nintendo’s argument conflicts with, and indeed would essentially vitiate, the fundamental
 2 claim construction principle that a claim is not limited to a preferred embodiment absent any words
 3 manifesting “a clear intention to restrict the scope of the claims to that embodiment.” *Info-Hold, Inc.*
 4 *v. Applied Media Techs., Corp.*, 783 F.3d 1262, 1267 (Fed. Cir. 2015). This is true even if the
 5 specification discloses only one preferred embodiment. *Id.* (“we have ‘expressly rejected the
 6 contention that if a patent describes only a single embodiment, the claims of the patent must be
 7 construed as being limited to that embodiment.’”). As explained in Gamevice’s opposition, Nintendo
 8 failed to identify a single instance where the ’119 patent disclaimed a structural bridge that is
 9 internal to the computing device. Dkt. 233 at 15-16. In fact, Gamevice and Dr. Singhose proffered
 10 evidence that the ’119 patent provides adequate written description support for a structural bridge
 11 that is internal to a computing device because it is replete with references to a structural bridge
 12 without placing any constraints on its location relative to the computing device. *Id.* at 16-17. This
 13 indicates that the patentee intended not to limit the geometric relationship between the structural
 14 bridge and the computing device to a preferred embodiment. *Id.* at 17-18.

15 Even if the ’119 patent were understood to only depict or discuss a structural bridge that is
 16 external to the computing device, a person of ordinary skill in the art would have reasonably
 17 understood that the inventor had possession of a structural bridge that is internal or partially internal
 18 to the computing device. Where, as here, the art at issue is predictable, the Federal Circuit has held
 19 that disclosure of a species provides sufficient written description support for a later claimed genus,
 20 including that species. *Bilstad v. Wakalopulos*, 386 F.3d 1116, 1123-26 (Fed. Cir. 2004)
 21 (summarizing prior decisions and reversing PTO determination that disclosure of “manipulating
 22 objects in only a small number of directions” could not support “manipulation of objects in a range
 23 bounded by two and infinity” without considering knowledge of one skilled in the art and the level
 24 of predictability in the field); *see Lampi Corp.*, 228 F.3d at 1377-78 (written description of identical
 25 half-shells was sufficient to support claim scope to non-identical half-shells); *Ethicon Endo-Surgery,*
 26 *Inc. v. United States Surgical Corp.*, 93 F.3d 1572, 1582 n.7 (Fed. Cir. 1996); *Ralston Purina Co. v.*
 27 *Far-Mar-Co, Inc.*, 772 F.2d 1570, 1575-77 (Fed. Cir. 1985); *In re Rasmussen*, 650 F.2d 1212, 1215
 28 (C.C.P.A. 1981); *In re Smythe*, 480 F.2d 1376, 1382-83 (C.C.P.A. 1973); *see also* Dkt. 233 at 18. In

light of this evidence, and drawing all inferences in Gamevice’s favor, Nintendo failed to prove by clear and convincing that the asserted claims are invalid because the claimed priority document, the ’119 patent, lacks written description support for the claimed structural bridge under the Court’s construction.

Nintendo relies on *Rivera v. ITC*, 857 F.3d 1315 (Fed. Cir. 2017) to argue that the specification’s silence on the internal structural bridge is “fatal” to the written description inquiry. Dkt. 243 at 14. Nintendo is wrong, for *Rivera* does not support its argument. In *Rivera*, the Federal Circuit held that the specification’s disclosure of a pod placed inside a brewing cartridge does not provide written description support for the claimed container with an integral filter because the claimed configuration eliminated a “fundamental component” (i.e., pod) of the invention. *Id.* at 1321. That is not the case here. First, as explained above, nothing in the specification limits the location of the structural bridge external to the computing device. Second, unlike the patent-at-issue in *Rivera*, nothing in the Asserted Patents nor the ’119 patent indicates that an external structural bridge, as opposed to an internal one, is a fundamental component of the claimed invention.

B. The ’119 Patent Provides Sufficient Written Description Support for the Claimed Computing Device Under the Court’s Construction

Nintendo’s written description argument for the computing device claim element also suffers from the same basic flaw—it fails to apply the Court’s adopted construction and is essentially just a re-statement of Nintendo’s original claim construction position. Nintendo’s entire argument boils down to whether the computing device should be limited solely to “a structurally complete, functional device complete with screen and back,” such as a smartphone, a tablet computer, and a notebook computer. (Dkt. 243 at 16). This has already been addressed extensively in Gamevice’s opposition to Nintendo’s motion for summary judgment (*see* Dkt. 233 at 9-14) and claim construction briefs (*see* Dkt. 228 at 8-11, Dkt. 232 at 7-10). Moreover, in the context of the claim construction ruling, the Court rejected Nintendo’s argument, noting that figure 6 of the asserted patents—which is identical to Figure 6 of the ’119 patent—“shows that the computing device includes ‘at least a CPU’ and it can control ‘attendant electronics.’” Dkt. 241 at 6. And the Court held that the second portion of Gamevice’s proposed construction, “not limited to a complete,

finished device,” is “unnecessary since additional features are often provided by the claim language.” *Id.* In other words, the Court deemed that statement unnecessary because the term itself is well-understood to persons of ordinary skill in the art and the claims identify which components are part of the computing device for that particular claim and, at times, do not list every single component that might be present in a typical commercial electronic device, indicating that the claimed computing device is not limited that way.

Contrary to Nintendo’s argument, the ’119 patent provides ample written description support for the Court’s adopted construction. As the Court observed, Figure 6 of the ’119 patent (copied below) discloses a computing device with a CPU and its attendant electronics (e.g., device driver and a screen):

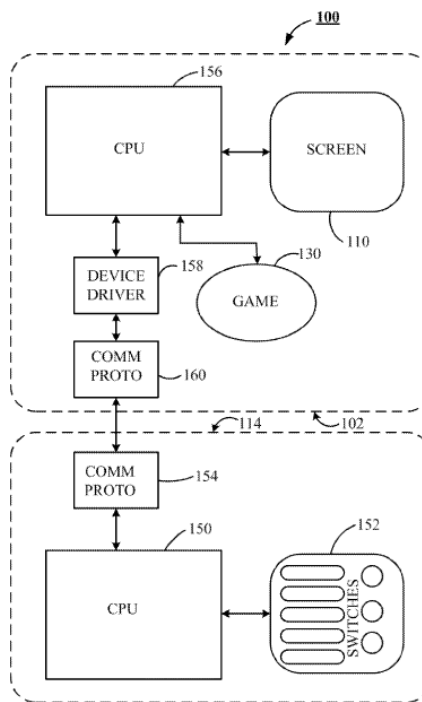


FIG. 6

It does not include all of the components that are typically found in structurally complete, finished products, such as smartphones, tablets, and laptops, indicating that the patentee did not intend to limit the computing device in that way. For example, there is no reference in Figure 6 to a back, or sides, or other common structures like a battery or charging port or antenna. In fact, the specification of the ’119 patent confirms as much, stating, “[t]he computing device 102 *may* take the form of a

1 tablet computer, smart phone, notebook computer, or *other portable computing device*.” ’119 patent
 2 at 3:17-19. A person of skill in the art would have understand that disclosure to include many
 3 portable devices, such as the single-board computers of the day that had no backs and no screens.
 4 The specification also states “that the computing device 102 preferably includes at least a CPU 156,
 5 interacting with the electronic display screen 110, the video game 130, a device driver 158,” which
 6 includes a subset, but not all, of the components of structurally complete, finished devices. *Id.* at
 7 4:54-67. Thus, Nintendo’s argument that “every computing device shown in the ’119 patent’s
 8 specification is a structurally complete, functional device complete with screen and back”
 9 contradicts the express disclosures of the ’119 patent.

10 Much of Nintendo’s argument rests on the fallacy that the claimed subject matter of the ’119
 11 patent is wildly different from the claimed subject matter of the three asserted patents. Indeed,
 12 Nintendo states “the ’119 patent’s disclosure and claims are *remarkably different from—and much*
 13 *narrower than*—the later filed, asserted patents” Dkt. 243 at 16 (emphasis added).
 14 Specifically, Nintendo points to claim 1 of the ’119 patent and its requirements for a computing
 15 device with “a plurality of sides, each of the plurality of sides are disposed between an electronic
 16 display screen of the computing device and a back of the computing device,” suggesting that all
 17 those requirements are lacking from the claims of the asserted patents. *Id.* But that is simply
 18 incorrect—the computing device limitation is consistently claimed throughout the priority patents
 19 and the asserted patents.

20 As previously discussed in Gamevice’s original opposition, and as the Court has recognized
 21 in its claim construction ruling, all of those supposedly critical elements are actually called for in the
 22 claims of the asserted patents, if not in the independent claims than certainly in one or more
 23 dependent claims. For example, claim 1 of the asserted ’713 patent calls for every element of claim 1
 24 of the ’119 patent except a back, including a computing device “providing an upper, lower, left and
 25 right side, . . . , and an electronic display screen, the electronic display screen having a corresponding
 26 side adjacent each of the sides of the computing device;” Hawkins Dec. Ex. 2 (’713 patent) at
 27 17:48-53. It is difficult to understand how leaving out a single element having no computing
 28 function—a plastic back—somehow makes the claim scope “remarkably different” from claim 1 of

1 the '119 patent. At any rate, as Nintendo admits, claim 3 adds the limitation of a back with an
 2 “internal surface, an external surface, and upper, lower, left and right sides, collectively the sides of
 3 the back of the computing device, the back of the computing device cooperating with the sides of the
 4 computing device.” *Id.* at 18:31-36. Similarly, claim 1 of the '498 patent includes “a computing
 5 device, comprising an electronic display screen” where “at least two opposing sides of the
 6 computing device” must interact with the confinement structures and support the electronic display
 7 screen. Hawkins Dec. Ex. 3 ('498 patent) at 17:48-55. Again, only the back is absent. The '393
 8 patent distributes the limitations between more claims, but claim 1 still requires a computing device
 9 where “at least two opposing sides of the computing device, but not more than three sides of the
 10 sides of the computing device” interact with the confinement structures. Ex. 4 ('393 patent) at 17:54-
 11 59. The back and screen are added in dependent claims 3 and 6, respectively. *Id.* 18:25-28 and 36-
 12 37.

13 So, even accepting Nintendo’s unconvincing argument that the subject matter of the
 14 independent claims of the three asserted patents is broader than claim 1 of the '119 patent as it
 15 relates to the computing device limitation, Nintendo must still admit that the '119 patent
 16 specification fully supports the dependent claims that collectively add the same limitations found in
 17 the computing device of claim 1 of the '119 patent, i.e. sides, a back, and a screen. Nintendo
 18 recounts all this to set up the illusion that Gamevice needed to broaden claim 1 of the '119 patent in
 19 order to present viable infringement claims against the Switch, supporting that false assertion with
 20 truncated versions of Gamevice’s infringement contentions that suggest Gamevice is *only* asserting
 21 independent claim 1 from each asserted patent. That is incorrect—Gamevice is also asserting
 22 dependent claims that include all the same computing device limitations found in claim 1 of the '119
 23 patent, such as claim 3 of the '713 patent and claim 6 of the '393 patent. *See* Dkt. 230, Hawkins
 24 Decl., Ex. 1 at 1. Thus, Nintendo’s accusations of a “transparent ploy to manufacture a broader”
 25 claim and “gamesmanship” fall flat. *See* Dkt. 243 at 17. Moreover, while Nintendo attempts to paint
 26 a picture that the claims of the asserted patents are *broad*er than claim 1 of the '119 patent, in fact
 27 the claims of the three asserted patents are *narrower* because they include the additional limitations
 28 that the input devices, confinement structures, and structural bridge must be separate and distinct

1 structures and form no structural portion of one of the other elements. *Compare, e.g.*, Dkt. 243,
 2 Hawkins Dec. Ex. 9 ('119 patent), claim 1 with Hawkins Decl., Ex. 2 ('713 patent), claim 1, 18:21-
 3 27.³

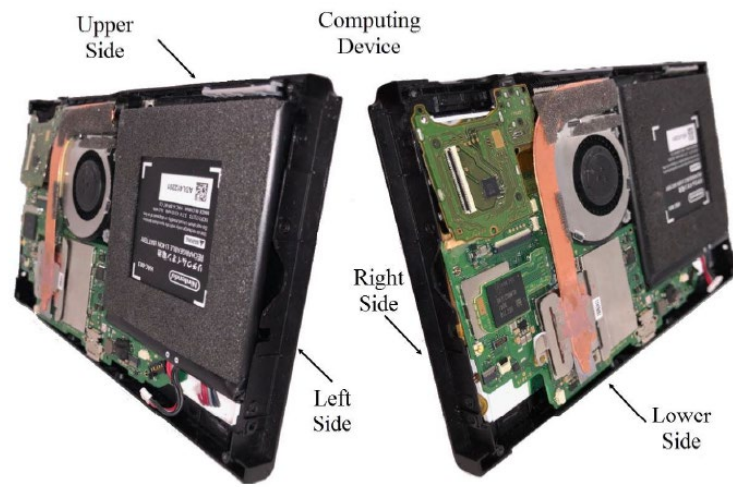
4 For this reason, Nintendo's reliance on *Gentry Gallery* is misplaced. There, the Federal
 5 Circuit held that the location of the claimed recliner control is limited to the console based on clear
 6 statements in the specification, prosecution history, and the inventor's trial testimony. *Gentry*
 7 *Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998). The specification repeatedly
 8 stated the object of the invention is to provide a console positioned between the reclining seats that
 9 accommodates the controls, indicating that "locating the controls anywhere but on the console is
 10 outside the stated purpose of the invention." *Id.* During prosecution, the applicant distinguished cited
 11 prior art by arguing that freestanding retractable structures disclosed in the prior art are not the
 12 consoles required by the claim, indicating that controls must be placed on a console fixed between
 13 the recliners. *Id.* at 1477. Lastly, the inventor in that case "admitted at trial that he did not consider
 14 placing the controls outside the console until he became aware that some of Gentry's competitors
 15 were so locating the recliner controls." *Id.* at 1479. Based on the totality of the evidence, the Federal
 16 Circuit concluded that the disclosure of the patent "is limited to sofas in which the recliner control is
 17 located on the console." That is not the case here. As explained above, the specification of the
 18 Asserted Patents, as well as the priority patent (the '119 patent), unambiguously disclose that the
 19 computing device is not limited to structurally complete, functional computing devices. Also, unlike
 20

21 ³ Nintendo provides a fanciful account of how Gamevice first filed a case against Nintendo based on
 22 the '119 patent in August 2017, was forced to withdraw that case once Nintendo demonstrated that
 23 the case was frivolous, and then went off to the PTO to draft new broader claims that resulted in the
 24 asserted patents. *See* Dkt. 243 at 1, 4, and 16-17. Nintendo fails to provide any evidentiary citation
 25 supporting the fundamentals of that story, and the actual facts do not match Nintendo's narrative.
 26 Contrary to the timetable Nintendo presents, Gamevice had already filed the application leading to
 27 the '713 patent before it filed its first complaint against Nintendo on August 9, 2017. The initial set
 28 of claims filed with that application included claims 1 and 3 where the "computing device"
 limitations were claimed exactly as they appear in issued claims 1 and 3 of the '713 patent, with
 claim 1 requiring sides and a display screen and claim 3 adding in the requirement of a back.
 Brittingham Decl. Ex. 6 at GV0000152-53. Nintendo's supposedly vigorous response to Gamevice's
 lawsuit had nothing to do with Gamevice's patent prosecution activities. In fact, the '713 patent
 claims were allowed before Gamevice even dismissed its first complaint. *Id.* at GV0000330.

1 *Gentry Gallery*, there is nothing in the file history indicating that the inventor disclaimed the scope
 2 of computing device to structurally complete, functional computing devices. In fact, the “additional
 3 features” of the computing device recited in the dependent claims of the Asserted Patents indicate
 4 that the inventor did *not* intend the computing device to be so limited. Dkt. 233 at 9-10.

5 When the Court’s construction is properly applied, Gamevice’s infringement contentions
 6 demonstrate that the accused Nintendo Switch includes the claimed computing device. The Court
 7 construed computing device as “electronic equipment controlled by a CPU.” Dkt. 241 at 6. The
 8 Gamevice infringement contentions that Nintendo attaches to its supplement brief clearly show a
 9 CPU in the Nintendo Switch and associated electronics.⁴ *See, e.g.*, Dkt. 243-11, Hawkins Decl. Ex.
 10 18 (’713 patent infringement contentions) at 1 and 2:

21 ⁴ Nintendo attaches limited excerpts from Gamevice’s initial infringement contentions served in the
 22 two ITC investigations as evidence of Gamevice’s contentions in this case. That is not exactly
 23 correct. The parties agreed to treat “Gamevice’s *expert reports* submitted during the ITC cases...as
 24 the initial infringement contentions under L. Pat. R. 3-1.” Dkt. 218 (Joint Case Management
 25 Statement), at 2. The claim charts that Nintendo attached to its submission are not from the expert
 26 reports and those expert report claim charts are more detailed. Further, the parties’ stipulation
 27 permits each party to seek to amend those contentions to account for “claim construction positions
 28 raised by either party or adopted by the Court that were not contemplated when the infringement and
 invalidity contentions, expert reports, or declarations were exchanged in the ITC cases,” *id.* at 3,
 something that has happened here with respect to some of the limitations. Finally, Nintendo attached
 only the contentions with respect to claim 1 of each asserted patent and left out the contentions for
 the dependent claims that include additional limitations also found in claim 1 of the ’119 patent.
 Nonetheless, those initial contentions are instructive for purposes of this discussion.



Nintendo accuses Gamevice of dividing the Switch up into “a jumble of non-functioning parts from inside of the Nintendo Switch console” (Dkt. 243 at 16), but that is not a fair characterization. It is hardly unusual to disassemble a complex device in order to point to the components within that device that satisfy various claim elements. The same technique would be used to identify the

1 processor inside a smart television or a control module inside an automobile. Even a device as small
 2 as a chip might have different sections that satisfy different claim limitations, like a memory, a filter,
 3 and a controller. The fact that the product has been partially disassembled, either physically or
 4 conceptually, for purposes of presentation does not turn the accused components into a “jumble of
 5 non-functioning parts.” When fully assembled, the product works as intended.

6 Moreover, Nintendo’s argument is little more than a tautological result of its overarching
 7 contention that only the entire Switch with all of its internal and external parts can satisfy the
 8 computing device limitation because only a fully finished, complete device can be a “computing
 9 device.” Assuming that to be true, then of course Nintendo would complain that some portions of the
 10 Switch are being ignored. But the proper view is that the Switch console as a whole is a combination
 11 of various claim elements, including components that make up a computing device, a structural
 12 bridge, and confinement structures.

13 **III. Nintendo’s Request to Reconsider the Court’s “Fastening Mechanism”**

14 **Construction Should be Disregarded**

15 The portion of Nintendo’s supplemental brief addressing its “fastening mechanism” non-
 16 infringement argument should be ignored since it is not, as the Court directed, an attempt to “provide
 17 supplemental briefing as to the disposition of the [summary judgment] motion based on the adopted
 18 constructions.” Dkt. 241 at 18. Nintendo essentially concedes that it has no argument “based on the
 19 adopted construction” since the Court rejected the underlying premise of Nintendo’s non-
 20 infringement argument—that “fastening mechanism” is a means-plus-function claim element. That
 21 was the sole basis to limit the scope of the claim term to the specific fastening mechanism disclosed
 22 in the specification, and Nintendo states that the Court’s contrary claim construction of fastening has
 23 ‘mooted” this portion of its motion. In fact, the Court’s claim construction removes the condition
 24 precedent for Nintendo’s entire argument, so this portion of the summary judgment motion is not
 25 simply moot, it lacks merit and should be denied.

26 Nintendo, however, continues and asks the Court to reconsider that claim construction, citing
 27 grounds the parties and the Court already addressed during the Markman briefing, argument, and
 28 ruling. *See* Nintendo Suppl Mot. at 19 (“Nintendo respectfully requests that the Court reconsider its

construction on three grounds”). That argument is not just beyond the scope of the Court’s direction in the claim construction order, it also fails to comply with the local civil rules regarding motions in general, *see* Civil L.R. 7-2, as well as the very specific local rules regarding motions for reconsideration. The local rule governing reconsideration motions requires Nintendo to first seek leave to even file a motion for reconsideration, *see* Civil L.R. 7-9(a) (“No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion.”), and requires Nintendo to allege that some new material difference in fact or law exists or has emerged or that there was a “manifest failure by the Court” to consider material facts or legal arguments. Civil L.R. 7-9(b). Nintendo has done none of that. Worse, Nintendo’s reconsideration request simply repeats the same arguments it made during the Markman proceeding, which is expressly prohibited by rule and could subject Nintendo to sanctions. Civil L.R. 7-9(c) (“No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party Any party who violates this restriction shall be subject to appropriate sanctions.”). Thus, Nintendo’s reconsideration request should be disregarded.⁵

IV. CONCLUSION

For the foregoing reasons, Nintendo’s Motion for Summary Judgment should be denied.

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⁵ Even if Nintendo had properly filed a request for leave to file a motion for reconsideration, Gamevice would not be required to respond to that motion until the Court ordered it to do so. Civil L.R. 7-9(d). Accordingly, Gamevice has not provided any substantive response to Nintendo’s arguments.

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