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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 MOTION FOR
SUMMARY JUDGMENT OF
INFRINGEMENT**

Date: September 21, 2023

Time: 1:30 p.m.

Place: Courtroom 3

Judge: Hon. Richard Seeborg

GAMEVICE'S MOTION FOR SUMMARY
JUDGMENT OF INFRINGEMENT
CASE No. 3:18-cv-1942-RS

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 21, 2023, 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, Plaintiff Gamevice, Inc. will and hereby does move for summary judgment pursuant to Federal Rule of Civil Procedure 56 that the accused Nintendo Switch game system infringes claims 3, 4, 7, and 16 of U.S. Patent No. 9,808,713 and claim 6 of U.S. Patent No. 10,391,393. In Nintendo of America Inc. and Nintendo Co., Ltd.’s (“Nintendo”) motion for summary judgment of invalidity, Nintendo conceded that the accused Nintendo Switch “satisfies each limitation of the asserted claims.” Dkt. 243 at 10. The Court relied on that representation, and Nintendo gained a significant advantage from that representation, when the Court granted summary judgment that many of the asserted claims—the ones that have a priority date after the date the Switch was introduced—are invalid as anticipated by the Switch. The doctrine of judicial estoppel prevents Nintendo from abandoning that position now in contesting infringement. But putting the doctrine of estoppel aside, there are no non-frivolous non-infringement arguments left for Nintendo to make. The finding of invalidity necessarily establishes that the Switch satisfies those same claim limitations for any claims that pre-date the Switch, and there are no material disputes regarding the few remaining minor limitations. Accordingly, Gamevice is entitled to judgment as a matter of law that claims 3, 4, 7, and 16 of the ’713 patent and claim 6 of the ’393 patent are infringed.¹

I. INTRODUCTION

It has long been accepted in patent law that “[t]hat which infringes, if later, would anticipate, if earlier.” *Peters v. Active Manufacturing Co.*, 129 U.S. 530, 538 (1889); *see also Upsher-Smith Labs v. PamLab, LLC*, 412 F.3d 1319, 1322 (Fed. Cir. 2005) (“A century-old axiom of patent law holds that a product ‘which would literally infringe if later in time anticipates if earlier.’” (citations

¹As discussed below, claim 6 of the ’713 patent is one of the claims that pre-dates the Switch and, therefore, was not found invalid. However, it is very similar to claim 7 of the ’713 patent, which was also not found invalid. To streamline the issues, therefore, Gamevice is limiting this motion for summary judgment to claims 3, 4, 7, and 16 of the ’713 patent, and claim 6 of the ’393 patent, and does not currently seek summary judgment of infringement for claim 6 of the ’713 patent.

omitted)). In this case, where some patent claims have a priority date *before* the accused product and other patent claims have a priority date *after* the accused product, the Nintendo Switch does both—it anticipates some claims but infringes others. This conclusion is inescapable for two reasons.

First, Nintendo’s admission that the Switch is covered by the asserted claims led to a Court ruling that the Switch anticipates claims 1, 2, 8, and 17-19 of U.S. Patent No. 9,808,713 (the “713 patent”), claims 1 and 2 of U.S. Patent No. 9,855,498 (the “498 patent”), and claims 1-4, and 7 of U.S. Patent No. 10,391,393 (the “393 patent”). Nintendo cannot avoid the import of that ruling with the excuse that it was just a form of “alternative pleading” for purposes of its summary judgment motion. That ruling not only materially benefitted Nintendo, it also adversely affected a property right belonging to Gamevice. Accordingly, Nintendo is judicially estopped from reversing course at this point and attempting to argue that the Switch does not meet all the elements of the remaining claims. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012) (“[J]udicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’” (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), and *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000))).

Second, even without the judicial estoppel doctrine, the Court’s ruling that the Switch meets all the limitations of the invalidated claims is now the “law of the case”—for both parties and for all purposes. *See generally Pepper v. U.S.*, 131 S. Ct. 1229, 1250 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983) (the law of the case doctrine “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case”)); 18 Moore’s Federal Practice – Civil § 134.20 (2023) (“The doctrine of the law of the case is similar [to issue preclusion] in that it limits relitigation of an issue once it has been decided, but the law of the case doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages.”). That anticipation ruling means that all the relevant claim limitations that are present in the Switch for purposes of invalidating claims lacking the earlier priority date are equally present in the Switch for purposes of infringing the claims that have the earlier priority date. That, in turn, means there is no genuine issue

1 of material fact preventing the Court from granting summary judgment of infringement. Every
 2 limitation in the later invalidated claims that was found in the invalidating prior art, the Nintendo
 3 Switch, can also be found in an earlier priority claim that avoids that same art, and to the extent there
 4 are minor limitations that have not already been adjudicated, they are also clearly present in the
 5 Switch.

6 **II. LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if “there is no
 8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 9 Fed. R. Civ. P. 56(a). While the moving party has the initial burden of identifying the portions of the
 10 record which demonstrate the absence of a genuine issue of material fact, the non-moving party must
 11 set forth “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v.*
 12 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must view the facts and draw all
 13 reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S.
 14 372, 378 (2007). However, “[w]here the record taken as a whole could not lead a rational trier of fact
 15 to find for the non-moving party, there is no ‘genuine issue for trial,’” *Matsushita*, 475 U.S. at 587,
 16 and “a scintilla of evidence in support of the [non-moving party’s position] will be insufficient” for
 17 the case to withstand summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

18 **III. BACKGROUND**

19 Soon after filing its amended complaint in this case, Gamevice disclosed that the following
 20 patent claims were at issue:

- 21 • ’713 patent, claims 1-4, 6-8, and 16-19;
- 22 • ’498 patent, claims 1-2; and
- 23 • ’393 patent, claims 1-4, 6, 7, and 12.

24 The parties then proceeded to *Markman* briefing. At the same time, Nintendo moved for summary
 25 judgment of invalidity, arguing that the asserted claims were anticipated by the accused Nintendo
 26 Switch device because, under Gamevice’s proposed constructions of “structural bridge” and
 27 “computing device,” the claims supposedly were not entitled to a priority date that preceded the
 28 Switch’s first sales. In its initial motion, Nintendo relied on Gamevice’s mere allegations of

1 infringement to support its anticipation argument, while simultaneously contending that the Switch
2 does not infringe any claim. Dkt. 230 at 9-10. In opposition, Gamevice argued, among other things,
3 that relying on mere infringement allegations to support an anticipation argument was not
4 sufficient—there must at least be a concession of infringement for purposes of the summary
5 judgment motion, otherwise the Court would not have the clear and convincing evidence needed to
6 invalidate the claims based on anticipation. Dkt. 233 at 3-5.

7 The Court’s *Markman* decision found that claim 12 of the ’393 patent was invalid as
8 indefinite, eliminating that claim from the remainder of the case. Dkt. 241 at 8-9. The Court also
9 adopted, for the most part, Gamevice’s claim constructions of “structural bridge” and “computing
10 device.” *Id.* at 6, 15, 19. The Court ordered supplemental briefs on the summary judgment motion to
11 address what effect, if any, the claim construction decisions had on the summary judgment motion.
12 *Id.* at 19.

13 In its post-*Markman* supplemental summary judgment brief, Nintendo clarified its reliance
14 on Gamevice’s infringement allegations, stating that “for purposes of this motion **only**, and expressly
15 and specifically denying infringement for any and all other purposes—Nintendo pleads in the
16 alternative and ***accepts Gamevice’s allegations that the Nintendo Switch satisfies each limitation of***
17 ***the asserted claims.***” Dkt. 243 at 10 (emphasis added). That brought Nintendo more in line with
18 precedent that allowed a movant to rely on, by accepting, a patent owner’s infringement contentions
19 to establish anticipation by the accused product if it pre-dated the asserted claims. *See, e.g., Vanmoor*
20 *v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1366 (Fed. Cir. 2000) (Wal-Mart satisfied its burden of
21 proving invalidity based on prior sales of accused product “by conceding infringement for purposes
22 of the summary judgment motion and [its] on sale defense, properly pled in the alternative.”),
23 quoting *Evans Cooling Sys., Inc. v. General Motors Corp.*, 125 F.3d 1448, 1451 (Fed. Cir. 1997).

24 The Court disagreed with Nintendo’s “structural bridge” priority argument, but agreed with
25 Nintendo that claims using the term “computing device” were not entitled to the earlier priority date.
26 With that decision, the Court noted Nintendo’s alternative pleading and its acceptance of
27 Gamevice’s infringement allegations for purposes of the motion and determined that it “suffices to
28 establish a prima facie showing of invalidity.” Dkt. 245 at 3. The summary judgment order went on

to invalidate all but one of the asserted claims because the Nintendo Switch was anticipating prior art. Following that order, the only surviving claim was claim 16 of the '713 patent, which did not use the term "computing device."²

Gamevice successfully moved for reconsideration of the summary judgment ruling as to five additional claims. Specifically, the Court amended a portion of the ruling and found that several asserted patent claims—specifically claims 3, 4, 6 and 7 of the '713 patent and claim 6 of the '393 patent—were entitled to a priority date before the Switch's introduction because, although the claimed priority document, U.S. Patent No. 9,126,119, disclosed only computing devices with both a back and a screen, several of the asserted dependent claims were similarly limited to computing devices with both a back and a screen. *See generally*, Dkt. 250. Following that reconsideration order, the disposition of the claims thus far is as follows:

Invalid	Not Invalid
'713 patent – claims 1, 2, 8, 17-19 (anticipated by Nintendo Switch)	'713 patent – claims 3, 4, 6, 7 and 16 (priority date earlier than Nintendo Switch)
'498 patent – claims 1 and 2 (anticipated by Nintendo Switch)	'498 patent – none
'393 patent – claims 1, 2, 3, 4, and 7 (anticipated by Nintendo Switch); claim 12 (indefinite)	'393 patent – claim 6 (priority date earlier than Nintendo Switch)

IV. ARGUMENT

Nintendo admitted for purposes of its summary judgment motion that the accused Nintendo Switch satisfied each and every limitation of all 20 asserted claims, and the Court's anticipation ruling confirmed and formalized that admission into a judicial determination that the accused Nintendo Switch reads on each and every limitation in the 13 anticipated, and now invalid, claims. If those claim limitations cannot be found in the Switch, there would be no anticipation and those claims would still be valid today. Those findings, reached at Nintendo's urging and based on

²The "computing device" element is introduced in claim 17, which depends from independent claim 16 and was found invalid..

1 Nintendo’s admissions concerning its own accused product, also dictate the result for the related
 2 issue of infringement, since “[t]hat which infringes, if later, would anticipate, if earlier.” *Peters*, 129
 3 U.S. at 538. In short, since the Switch anticipates the later, now invalid claims, the Switch also
 4 infringes the remaining claims that pre-date the Switch.

5 The doctrine of judicial estoppel prevents Nintendo from abandoning its prior admission that
 6 its own product “satisfies each limitation of the asserted claims.” If Nintendo is held to that
 7 admission and cannot argue non-infringement, there are no remaining issues with respect to
 8 infringement of any claim that has a priority date before the Switch was introduced. But even if
 9 judicial estoppel does not apply here, the law of the case doctrine does apply and compels a finding
 10 of infringement. The Court’s anticipation ruling established that the Switch satisfies all limitations of
 11 any claim that was held invalid, and those determinations apply equally with respect to the same
 12 claim limitations in the infringement context. With respect to claim 16 of the ’713 patent, there can
 13 be no dispute at all—since the Court has ruled that the Switch anticipates dependent claim 17, it
 14 follows that the Switch must necessarily have all the limitations of independent claim 16. As for
 15 claims 3, 4, and 7 of the ’713 patent and claim 6 of the ’393 patent, nearly all the limitations are
 16 undisputed in light of the anticipation ruling, and the two remaining limitations are minor and are
 17 clearly present in the Switch.

18 **A. Judicial estoppel prevents Nintendo from reversing its position that the**
 19 **Switch satisfies each claim limitation of all the asserted claims.**

20 To support its motion for summary judgment of invalidity, Nintendo represented to this
 21 Court that the accused “Nintendo Switch satisfies each limitation of the asserted claims.” Dkt. 243 at
 22 10. The Court relied on that representation and found it “suffices to establish a prima facie showing
 23 of invalidity.” Since Nintendo passed that hurdle, the Court took the next step and analyzed whether
 24 any claims could avoid that prior art by virtue of an earlier priority date. Some did, but 13 of
 25 Gamevice’s patent claims did not survive and are currently invalid because the Court accepted
 26 Nintendo’s representation. Under those circumstances, the judicial estoppel doctrine prevents
 27 Nintendo from simply withdrawing from its original representation and taking the opposite
 28 position—that the Switch “*does not* satisfy each limitation of the asserted claims.” Allowing

1 Nintendo to now argue that some limitations are lacking in the Switch would completely undermine
 2 the Court’s anticipation determination, a ruling Nintendo sought and obtained through its
 3 representation, and could conceivably result in contradictory rulings. Judicial estoppel should apply
 4 to prevent Nintendo from prevailing on one position and trying to prevail again on a diametrically
 5 opposed position.

6 As Nintendo noted in its summary judgment motion reply, when it argued that Gamevice
 7 could not abandon its admission in the ITC that there could be no infringement of any claim of the
 8 ’713 or ’498 patents under the ITC’s construction of fastening mechanism (a construction this Court
 9 rejected), “[t]he doctrine of judicial estoppel ‘is an equitable doctrine that precludes a party from
 10 gaining an advantage by asserting one position, and then later seeking an advantage by taking a
 11 clearly inconsistent position.’ *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.
 12 2001).” Dkt. 235 at 4. In Nintendo’s words, when Gamevice said it could not prove infringement
 13 under the ITC’s claim construction, “Gamevice made affirmative factual representations about the
 14 Nintendo Switch that it is not free to walk away from.” Dkt. 235 at 2. But Nintendo did the same
 15 when it asserted for purposes of its summary judgment motion that “the Nintendo Switch satisfies
 16 each limitation of the asserted claims.” Those are “affirmative factual representations about the
 17 Nintendo Switch,” made to support what turned out to be a winning anticipation argument.
 18 Nintendo’s “affirmative factual representations about the Nintendo Switch,” moreover, caused a
 19 very real adverse result for Gamevice. Thirteen of its patent claims are invalid because Nintendo
 20 made them. Nintendo is not free to walk away from them now.

21 Nintendo’s reply brief set forth the governing Ninth Circuit law regarding application of
 22 judicial estoppel, noting that courts in the Ninth Circuit would look to (1) whether the party’s later
 23 position is clearly inconsistent with its earlier position, (2) whether the party succeeded in
 24 persuading a court to accept that party’s earlier position, and (3) whether the party seeking to change
 25 positions would derive an unfair advantage or impose an unfair detriment on the opposing party if
 26 not estopped. Dkt. 235 at 4, citing *Hamilton*, 270 F.3d at 782-83. Each factor supports estoppel in
 27 this situation. First, Nintendo’s later position—which presumably would be that some claim
 28 elements are missing from the Switch and the Switch does not infringe—is plainly inconsistent with

its prior representation to this Court that “the Nintendo Switch satisfies each limitation of the asserted claims.” Second, Nintendo successfully persuaded this Court to accept its earlier position, and the Court proceeded to invalidate 13 patent claims as a result. And third, Nintendo would derive an unfair advantage if it were able to simultaneously admit that its own product was anticipating prior art, thereby avoiding the burden of establishing anticipation through an element-by-element analysis of some third party patent or publication and eliminating any possible factual dispute about whether the asserted prior art meets each claim limitation, but then turn around and argue, quite to the contrary, that its own product is actually lacking the same claim limitations. Indeed, Nintendo’s own contradictory “alternative” arguments—that the Switch anticipates but does not infringe—would have doomed its summary judgment motion absent the concession because of the obvious factual dispute within those two arguments. Further, allowing Nintendo to change its position would risk an inherent inconsistency—a finding that the Switch simultaneously does and does not satisfy all the claim limitations of the asserted claims. As an example, the Court cannot find that the Switch has the claimed structural bridge of anticipated claim 1 of the ’713 patent but does not have that same structural bridge when it comes to potential infringement of dependent claims 3 and 4 of the ’713 patent. Given that Nintendo urged the Court to reach that first conclusion based on its concession, Nintendo should not be permitted to change course.

As the Ninth Circuit has observed:

The policies underlying preclusion of inconsistent positions are ‘general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.’ 1B Moore’s Federal Practice p .405, at 767. One court has stated the rule:

A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing “fast and loose with the courts” which has been emphasized as an evil the courts should not tolerate. And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

1 *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d
 2 Cir.1953) (citations omitted); see also *Konstantinidis v. Chen*, 626
 3 F.2d 933 (D.C. Cir.1980). The emphasis is not on a hard and fast rule,
 4 but rather on prevention of ‘intentional self-contradiction ... as a means
 5 of obtaining unfair advantage.’ *Scarano*, 203 F.2d at 513.

6 *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984). By asserting that its own
 7 product satisfied all the claim limitations of the 20 asserted claims, Nintendo gained an advantage,
 8 namely a ruling that 13 of the 20 patent claims it was accused of infringing were invalid. It cannot
 9 now flip its position and gain another advantage—a ruling that some of those 20 patent claims do not
 10 satisfy all the claim limitations and, therefore, are not infringed—through “self-contradiction.”
 11 Nintendo should be estopped from arguing that any of the asserted claims do not “satisfy all
 12 limitations of the asserted claims,” and Gamevice is entitled to summary judgment of infringement.

13 **B. The Court’s anticipation ruling is law of the case, and no genuine issues**
 14 **of material fact prevent a finding of infringement**

15 Even if the Court does not apply judicial estoppel here, summary judgment of infringement is
 16 appropriate. The Court’s adjudication of Nintendo’s anticipation arguments in Nintendo’s favor is
 17 now “law of the case” going forward and those findings apply equally in determining whether the
 18 Switch infringes. By finding anticipation, the Court concluded that every single limitation in the
 19 anticipated claims is present in the Switch. The Court must also conclude that those same
 20 limitations, when they appear in claims that have not been shown to be invalid, are present in the
 21 Switch for purposes of determining infringement. And as for any minor remaining limitations that
 22 are not fully resolved by the anticipation rulings, the evidence is clear that the Switch satisfies those
 23 limitations as well.

24 Simply put, the “law of the case doctrine” means that “[a] court will not generally revisit an
 25 issue once decided in the litigation.” *Mendenhall v. Barber-Green Co.*, 26 F.3d 1573, 1582 (Fed.
 26 Cir. 1994); see also *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997):

27 Under the “law of the case” doctrine, “a court is generally
 28 precluded from reconsidering an issue that has already been decided
 by the same court, or a higher court in the identical case.” *Thomas v.*
Bible, 983 F.2d 152, 154 (9th Cir.) (*cert. denied* 508 U.S. 951, 113
 S.Ct. 2443, 124 L.Ed.2d 661 (1993). The doctrine is not a limitation on
 a tribunal’s power, but rather a guide to discretion. *Arizona v.*
California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318

(1983). A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. *Thomas v. Bible*, 983 F.2d at 155.

Here, the Court ruled that the Switch meets all the elements of 13 asserted claims and, in light of the priority dates associated with those claims, found them invalid as anticipated. Anticipation is a question of fact, *see, e.g., Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1301 (Fed. Cir. 2002), so the Court’s anticipation ruling rests on factual findings that the Switch contains all elements of the anticipated claims. And where there are no genuine issues of material fact, anticipation can be ripe for judgment as a matter of law. *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1343 (Fed. Cir. 2005). That is precisely the situation here. By conceding to Gamevice’s infringement allegations for purposes of its summary judgment motion, Nintendo eliminated any possibility that there could be a genuine issue of material fact as to whether the Switch met the various claim limitations. The Court accepted that concession, finding as a matter of fact that the Switch embodied all claim limitations, and ruling there were no genuine issues of material fact on that question despite the fact that Nintendo was simultaneously attempting to preserve the “alternative” defense that the Switch did not infringe. That, in turn, allowed the Court to rule as a matter of law that the claims with a later priority date are invalid as anticipated. Indeed, if any factual issues had remained, summary judgment would have been inappropriate.

Without an appellate ruling binding a lower court in subsequent proceedings, a lower court has the discretion to, under limited circumstances, revisit its own rulings prior to a final judgment, just as the Court did with respect to claims 3, 4, 6, and 7 of the ’713 patent and claim 6 of the ’393 patent. In this situation, however, there is no reason for the Court to revisit its legal rulings on anticipation. First, it seems doubtful that Nintendo will claim the Court’s summary judgment ruling is clearly erroneous, since that ruling was exactly what Nintendo sought in its summary judgment motion in the first place and the Court adopted Nintendo’s arguments for most of the asserted claims, including all asserted claims of the ’498 patent. Second, there has been no intervening change in the law. Third, the “evidence”—which is entirely made up of Nintendo’s concession that,

for purposes of the motion, the Switch infringes—is unchanged. Fourth, there are no other changed circumstances—nothing has happened since the Court’s summary judgment and reconsideration rulings. And fifth, no manifest justice would result if the Court maintained legal judgments that Nintendo itself asked for and applied them for the rest of the case. Failure to apply law of the case in this scenario would, therefore, be an abuse of discretion. *Thomas v. Bible*, 983 F.2d at 155.

As shown below, the anticipation ruling establishes that the Switch infringes claim 16 of the ’713 patent, and establishes that the Switch satisfies almost every limitation of claims 3, 4, and 7 of the ’713 patent and claim 6 of the ’393 patent. The remaining limitations in those claims are minor and are clearly found in the Switch.

1. The Switch infringes claim 16 of the ’713 patent

Claim 17 of the ’713 patent is a dependent claim that covers “[t]he combination of claim 16, further comprising a computing device, ...” Because claim 17 uses the term “computing device” but does not specifically call for a back and a screen, the Court’s summary judgment ruling dictates that claim 17 is not entitled to the priority date of the ’119 patent and it is, therefore, anticipated by the Nintendo Switch. Claim 16, however, does not use the term “computing device.” As a result, Nintendo’s successful anticipation theory—that the asserted patent claims cover a broader “computing device” than what was disclosed in the ’119 patent and cannot rely on the ’119 patent priority date—does not apply to claim 16. The order granting partial summary judgment explicitly carves out claim 16. Dkt. 245 at 12 (“The motion for summary judgment is granted in part, and these claims—i.e., all asserted claims except claim 16 of the ’713 patent—are therefore invalid as anticipated by the Nintendo Switch.”).

The result is clear. The Switch was released before the priority date for claim 17, so the Court found that the Switch anticipates claim 17. Claim 17 covers all the limitations of claim 16 plus some additional limitations. In other words, the Court has already found that the Switch embodies every limitation of claim 16, plus the added limitations of claim 17. Claim 16, however, has a priority date before the Switch was released. Since the Court’s ruling that the Switch anticipates dependent claim 17 necessarily incorporates a finding that the Switch has all the elements of

independent claim 16, and the Switch came after, not before, claim 16, it must infringe. There is no reasonable argument to the contrary.

2. The Switch infringes claim 3 of the '713 patent

Claim 3 of the '713 patent provides “[t]he combination of claim 2 [which depends on claim 1], in which the computing device further comprising a back, the back provides an internal surface, an external surface, and upper, lower, left and right sides, collectively the sides of the back of the computing device, the back of the computing device cooperating with the sides of the computing device.” The Court has already found that the Switch anticipates claims 1 and 2 of the '713 patent, so the Switch satisfies “[t]he combination of claim 2” language of claim 3 and has all the elements found in claims 1 and 2, such as a computing device, an electronic display screen, a pair of confinement structures, communication links, a structural bridge, a passageway that promotes communication between the communication links and the computing device, fastening mechanisms, an input device that comprises a pair of control modules in electronic communication with a corresponding communication link, and an instructional input device.

The only outstanding issue with respect to infringement of claim 3 of the '713 patent is whether the Switch has claim 3's added limitations relating to the back of the computer. The answer is largely found in the Court's ruling with respect to claim 3 of the '393 patent, which was also found to be anticipated. Claim 3 of the '393 patent calls for “the combination of claim 2, in which the computing device further comprising a back, the back provides an internal surface, an external surface and cooperates with the at least two opposing sides of the computing device,” very similar language to claim 3 of the '713 patent.

Comparing the language of claim 3 of the '713 patent to anticipated claim 3 of the '393 patent shows how the Court's anticipation ruling fills almost all the gaps:

Claim 3 of the '713 patent	Anticipated claim 3 of the '393 patent
3. The combination of claim 2, in which the computing device further comprising <i>a back</i> , the back provides an internal surface , an	3. The combination of claim 2, in which the computing device further comprising <i>a back</i> , the back provides an internal surface , an

1 external surface, and upper, lower, left and right	external surface and cooperates with the at least
2 sides, collectively the sides of the back of the	two opposing sides of the computing device.
3 computing device, the back of the computing	
4 device cooperating with the sides of the	
5 computing device.	

6

7 Combining the anticipation rulings with respect to claim 2 of the '713 patent and claim 3 of

8 the '393 patent, the Court has already found that the Switch embodies every element of claim 3 of

9 the '713 patent except the additional requirement that the back has "upper, lower, left and right"

10 sides. And Nintendo itself previously conceded that element was present for purposes of its

11 summary judgment motion, since it was seeking to invalidate all asserted claims, including claim 3

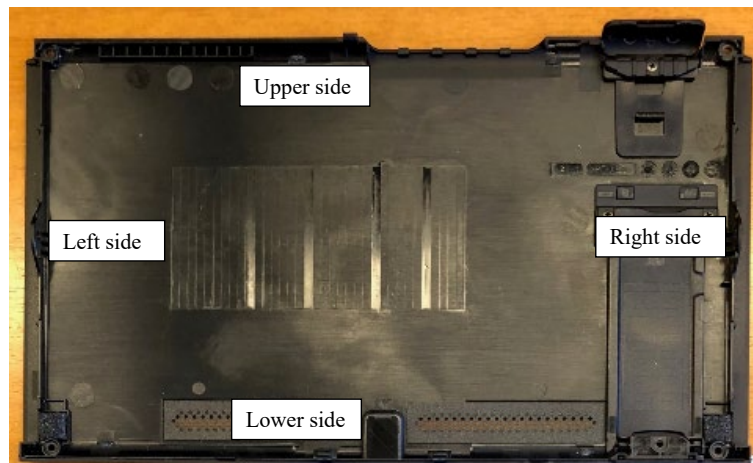
12 of the '713 patent. But even assuming Nintendo is permitted to retract that representation to the

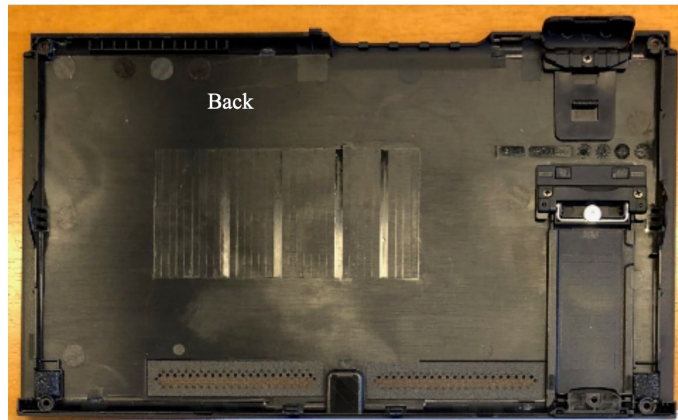
13 Court since its motion was denied with respect to this specific patent claim, a simple review of the

14 Switch demonstrates that the back of the Nintendo Switch is a rectangle and, therefore, has upper,

15 lower, left and right sides, as shown in the pictures below and discussed in the attached Declaration

16 of William Singhose (Ex. 1) at ¶ 16:





As the Court has already determined that the Switch embodies all elements of claims 1 and 2 of the '713 patent, the Court's anticipation ruling regarding claim 3 of the '393 patent establishes that the Switch also contains essentially all the elements of claim 3 of the '713 patent. The only remaining element that is not already the subject of a prior ruling relates to the four sides of the back, and there is no serious factual issue as to whether the rectangular back of the Switch satisfies that claim element. Accordingly, summary judgment of infringement with respect to claim 3 of the '713 patent is justified.

3. Claim 4 of the '713 Patent

Claim 4 of the '713 patent provides "[t]he combination of claim 3, in which the rigid structural bridge cooperates with the back of the computing device." The requirement of a rigid structural bridge comes from claim 1 (which calls for a structural bridge) and claim 2 (which specifies that the structural bridge is rigid). As discussed above, the Court has already ruled that the Switch anticipates claims 1 and 2 of the '713 patent, meaning the Switch has all the elements of claims 1 and 2, including the claimed rigid structural bridge. And as discussed in the previous section, the Switch has the additional limitation of claim 3—namely a back with four sides. So, the

only outstanding issue with respect to dependent claim 4 is whether the Switch has the additional limitation of the structural bridge cooperating with the back of the computing device. Again, the Court’s anticipation findings for the ’393 patent provide a conclusive answer. Claim 4 of the ’393 patent was ruled invalid as anticipated, and that claim calls for the same exact limitation as claim 4 of the ’713 patent:

Claim 4 of the ’713 patent	Anticipated claim 4 of the ’393 patent
4. The combination of claim 3, in which the rigid structural bridge cooperates with the back of the computing device.	4. The combination of claim 3, in which the rigid structure bridge cooperates with the back of the computing device.

Since the Switch anticipates claim 4 of the ’393 patent, the Switch satisfies the same limitation found in claim 4 of the ’713 patent. And since claim 4 of the ’713 patent has a priority date before introduction of the Switch, summary judgment of infringement on claim 4 is warranted.

4. The Switch Infringes Claim 7 of the ’713 Patent and Claim 6 of the ’393 Patent

Claim 7 of the ’713 patent and claim 6 of the ’393 patent introduce a similar new limitation—that the control modules send signals through a communication link to the computing device to control objects appearing on the display screen. That limitation is clearly found in the Switch, and both claims are infringed. The two claims are shown side-by-side below:

Claim 7 of the ’713 patent	Claim 6 of the ’393 patent
7. The combination of claim 4, in which the input device is a pair of game control modules, and in which each game control module passes signals through its corresponding communication link to the computing device, the signals controlling images displayed on the electronic display screen of the computing device.	6. The combination of claim 4, in which the computing device comprises an electronic display screen, and wherein at least one electronic game control module of the pair of electronic game control modules passes signals through its corresponding communication link to the computing device, the signals passed to the computing device controlling images

	displayed on the electronic display screen of the computing device.
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The physical requirements of claim 7 of the '713 patent—the “input device,” “pair of game control modules,” “corresponding communication link,” “computing device,” and “electronic display screen”—are found throughout claim 1 of the '713 patent and, as discussed above, the Court has already found that the Switch contains all those elements since the Switch anticipates claim 1 of the '713 patent. Indeed, as discussed in the immediately preceding section, the Switch has all the limitations of claim 4, on which claim 7 depends. So, the only issue remaining is whether the new limitations of claim 7 are met, i.e., do the control modules pass signals through the communication link to the computing device in order to control images appearing on the display screen?

Claim 6 of the '393 patent is similar, but also adds the concept of a display screen. The Court has already found that Switch anticipates several claims that also call for an electronic display screen, such as claim 1 of the '713 patent and claim 1 of the '498 patent, so it has already been conclusively established that the Switch has a display screen.³ The other physical limitations of claim 6—the “electronic game control module of the pair of electronic game control modules,” the “corresponding communication link,” and the “computing device,” already appear in invalidated claim 1 of the '393 patent, so the Switch has those limitations as well. And the Court has held that the Switch anticipates and, therefore, has all the limitations of claim 4 of the '393 patent, on which claim 6 depends. As a result, the only outstanding issue with respect to claim 6 of the '393 patent is the same as the issue with claim 7 of the '713 patent—do the control modules send signals to the computing device to control images on the display screen?

At the outset, as with the prior limitations, Nintendo conceded for purposes of its summary judgment motion that the Switch met the limitations of claim 7 of the '713 patent and claim 6 of the

³ Claim 6 of the '393 patent provides “in which the computing device comprises an electronic display screen” Anticipated claim 1 of the '713 provides “and an electronic display screen” while anticipated claim 1 of the '498 patent calls for “a computing device, comprising an electronic display screen” Thus, the Court’s prior anticipation rulings map directly onto the “electronic display screen” element of claim 6 of the '393 patent.

1 '393 patent. But even if the issue is not resolved by Nintendo's concession and the Court's reliance
 2 on it, there is no genuine issue of material fact as to whether the Switch control modules send signals
 3 through the communication links to the computing device to control objects appearing on the
 4 display. Indeed, Nintendo has not previously contested this element during the prior litigation stages.
 5 Given the opportunity to dispute this limitation in the 1197 ITC Investigation with respect to claim 6
 6 of the '393 patent, Nintendo chose not to, and the ALJ found that it was met:

7 The Nintendo Switch comprises an electronic display screen, and
 8 wherein at least one electronic game control module of the pair of
 9 electronic game control modules passes signals through its
 10 corresponding communication link to the computing device, the
 11 signals passed to the computing device controlling images displayed
 12 on the electronic display screen of the computing device. *See* CX-
 13 0001C (Singhose DWS) at Q/A 517-29. Nintendo does not contest that
 14 the Nintendo Switch includes this limitation. *See* Resps. Br. at 46-99.

15 Final ID (Public Version) at 160. The ALJ concluded that claim 6 of the '393 patent was not
 16 infringed because he found the Switch did not satisfy the limitations of claim 4 or the claims on
 17 which claim 4 depends. *Id.* But that is not relevant here, since this Court has already found that the
 18 Switch anticipates claim 4 of the '393 patent and the claims on which it depends. That determination
 19 is now law of the case and means Nintendo cannot argue that any of the limitations of claim 4 or the
 20 claims on which it depends are absent from the Switch.

21 In any event, there is little question that the Switch control modules are used to control
 22 images on the screen—that is their very purpose. As Dr. Singhose notes in his supporting
 23 declaration, the Switch Joy-Cons, which are the “control modules” for both claim 7 of the '713
 24 patent and claim 6 of the '393 patent, connect to the Switch console through corresponding
 25 communication links. *See e.g.*, Ex. 1, Singhose Dec. at ¶¶ 19-20.
 26
 27
 28

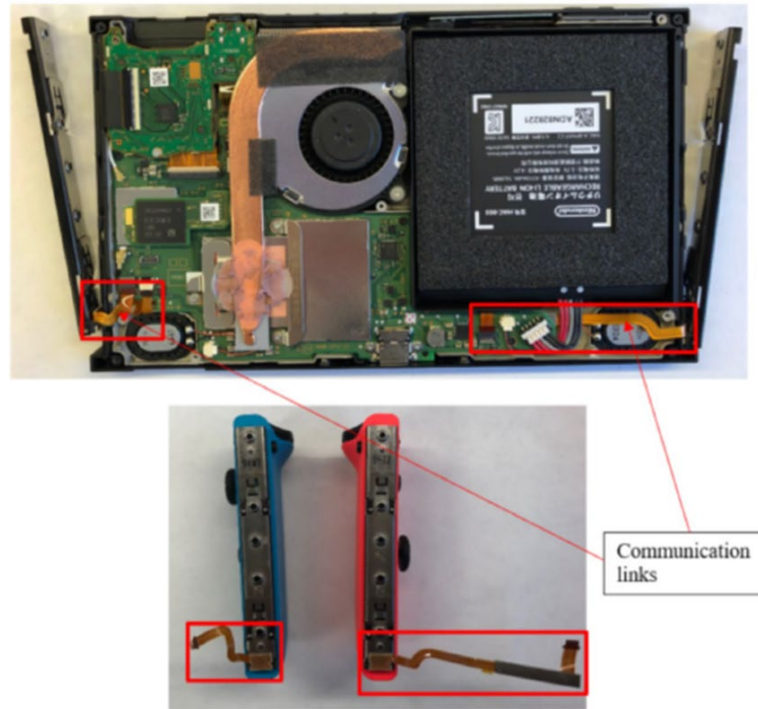


Figure 44. The Joy-Cons pass signals through the communication links of the side rails to the computing device



As explained above, the anticipation ruling has already established that those physical elements are within the Switch, so the only issue is whether that combination of elements is used to move objects on the display screen. As Dr. Singhose further explains, signals pass from the Joy-Cons to the computing device through the communication links, and users are able to move objects on the screen by manipulating the buttons and joystick on the Switch Joy-Cons. *See, e.g., Ex. 1, Singhose Dec. at ¶ 19:*

Nintendo's prior willingness to concede on this limitation, both in the 1197 ITC investigation and for purposes of its summary judgment motion in this case, is entirely understandable since there is no reasonable argument that the control modules on the Switch are not used to control objects on the display screen. Summary judgment of infringement for claims 7 of the '713 patent and claim 6 of the '393 patent is appropriate.

1 **V. CONCLUSION**

2 Nintendo’s summary judgment motion relied on a key but somewhat risky concession to
 3 create the platform for its invalidity argument. Rather than rely on some prior art patent or article or
 4 some other company’s earlier product sales, Nintendo asserted that its own accused product was, in
 5 fact, anticipating prior art. Because it was asking the Court to invalidate Gamevice’s property rights,
 6 Nintendo had to do more than just waive its hands—it had to give the Court an evidentiary
 7 foundation on which an anticipation ruling could rest. Indeed, because it sought summary judgment,
 8 there could be no genuine issue of material fact as to whether the Switch met all the limitations of
 9 any claim that was ultimately invalidated. So, even while it clung to the alternative pleading nature
 10 of its arguments, Nintendo provided what the Court needed in order to consider Nintendo’s
 11 invalidity argument—a concession that for purposes of its anticipation argument, the Switch
 12 satisfied all the claim elements.

13 And it worked, . . . mostly. What started as a concession to support an alternative argument
 14 was accepted by the Court and used to establish the necessary *prima facie* case of invalidity that
 15 ultimately prompted the priority date dispute that, in turn, has now blossomed into a Court ruling
 16 that 13 of Gamevice’s patent claims spread among the three asserted patents are invalid as
 17 anticipated because the Nintendo Switch came before those claims and embodies every limitation.
 18 That “advantage” resulted directly from the Court accepting Nintendo’s “affirmative factual
 19 representations about the Nintendo Switch,” and Nintendo should not be permitted to walk away
 20 from those representations now. Judicial estoppel should bind Nintendo to its prior representation
 21 that “the Nintendo Switch satisfies all limitations of the asserted claims,” which is an admission of
 22 infringement for any claims that were not found invalid as anticipated.

23 But even without judicial estoppel, the Court’s anticipation ruling is now law of the case and
 24 should extend throughout the remainder of the litigation. In particular, that ruling resolves the
 25 question of whether the Switch infringes the claims with earlier priority dates than the anticipated
 26 claims and cannot be anticipated by the Switch. Nintendo no longer has the option of pursuing its
 27 “alternative” argument that the Switch does not satisfy many of the claim limitations in the
 28 invalidated claims, because we are past the stage of alternative pleading—what was once a mere

1 alternative theory is now the Court's legal conclusion based on undisputed facts from Nintendo's
2 own motion and concession that those claim limitations are all present in the Switch. To argue the
3 "alternative" now would be to argue the Court's anticipation ruling was wrong. And even assuming
4 Nintendo is permitted to backtrack on its prior concession that the Switch satisfies all elements in all
5 claims and argue about the two minor claim elements in the remaining claims that are not
6 specifically addressed in the anticipation rulings, those limitations are also clearly present in the
7 Switch. A ruling that the later claims are anticipated but the earlier claims are infringed is the only
8 natural and legally sustainable result of Nintendo's strategy.

9 Accordingly, and for the reasons set forth above, Gamevice respectfully requests an order
10 granting summary judgment that the Nintendo Switch infringes claims 3, 4, 7, and 16 of the '713
11 patent and claim 6 of the '393 patent, because there are no genuine issues of material fact as to
12 whether the Switch meets all the limitations of each claim, and Gamevice is entitled to judgment as a
13 matter of law.

14 Dated: August 7, 2023

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