

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Inv. No. 337-TA-1111

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW ORDER NO. 21
IN ITS ENTIRETY; REQUEST FOR BRIEFING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review Order No. 21, including the three underlying claim constructions from Order No. 20, in its entirety.

FOR FURTHER INFORMATION CONTACT: Amanda Pitcher Fisherow, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On May 4, 2018, the Commission instituted this investigation based on a complaint and supplements thereto filed on behalf of Gamevice, Inc. of Simi Valley, California ("Gamevice"). 83 FR 19821 (May 4, 2018). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain portable gaming console systems with attachable handheld controllers and components thereof by reason of infringement of one or more claims of U.S. Patent Nos. 9,855,498 ("the '498 patent") and 9,808,713 ("the '713 patent"). The Commission's notice of investigation named Nintendo Co., Ltd., of Kyoto, Japan and Nintendo of America,

Inc., of Redmond, Washington as respondents (collectively, “Nintendo”). *Id.* The Office of Unfair Import Investigations was not named as a party in this investigation. *Id.*

On February 14, 2019, the presiding administrative law judge (“ALJ”) issued an initial determination (“ID”) in this investigation, finding no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”) by the respondents. Specifically, the ID grants a motion for summary determination that Nintendo does not infringe claims 1, 10, 16, and 17 of the ’713 patent and claims 1 and 16 of the ’498 patent and that there is no violation of section 337. Order No. 21 was predicated upon the ALJ’s earlier issued *Markman* order, Order No. 20, setting forth claim constructions of disputed terms, including “retention member,” “pair of modules,” and “fastening mechanism[s].” Gamevice petitioned for review of Order No. 21. Nintendo contingently petitioned for review of the claim term “retention member” and additional claim constructions not at issue in Order No. 21. The parties responded to the respective petitions.

Having examined the record of this investigation, including Order Nos. 20 and 21, the petitions for review, and the responses thereto, the Commission has determined to review Order No. 21 in the entirety. The Commission also has determined to review the three claim constructions, discussed in Order No. 20, on which Order No. 21 is based. As to Nintendo’s contingent petition, the Commission does not reach the additional claim constructions challenged by Nintendo because those claim constructions are not at issue in Order No. 21. In connection with its review, the Commission is interested in responses to the following questions:

1. Do Mr. Stubben’s declarations and deposition testimony support finding that the term “retention member” of the ’498 patent is subject to means-plus-function treatment under 35 U.S.C. § 112(f)?
2. If the Commission finds that the “retention member” term recited in claim 16 of the ’498, patent is not subject to means-plus-function treatment, what construction should be adopted? Should the investigation be remanded to the ALJ to determine the proper construction?

The parties are requested to brief only the discrete issues above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. The written submissions must be filed no later than close of business on May 6, 2019. Reply submissions must be filed no later than the close of business on May 13, 2019. Opening submissions are limited to 25 pages. Reply submissions are limited to 15 pages. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission’s Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation

number (“Inv. No. 337-TA-1111”) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,¹ solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: April 25, 2019

¹ All contract personnel will sign appropriate nondisclosure agreements.