

*In the Matter of*

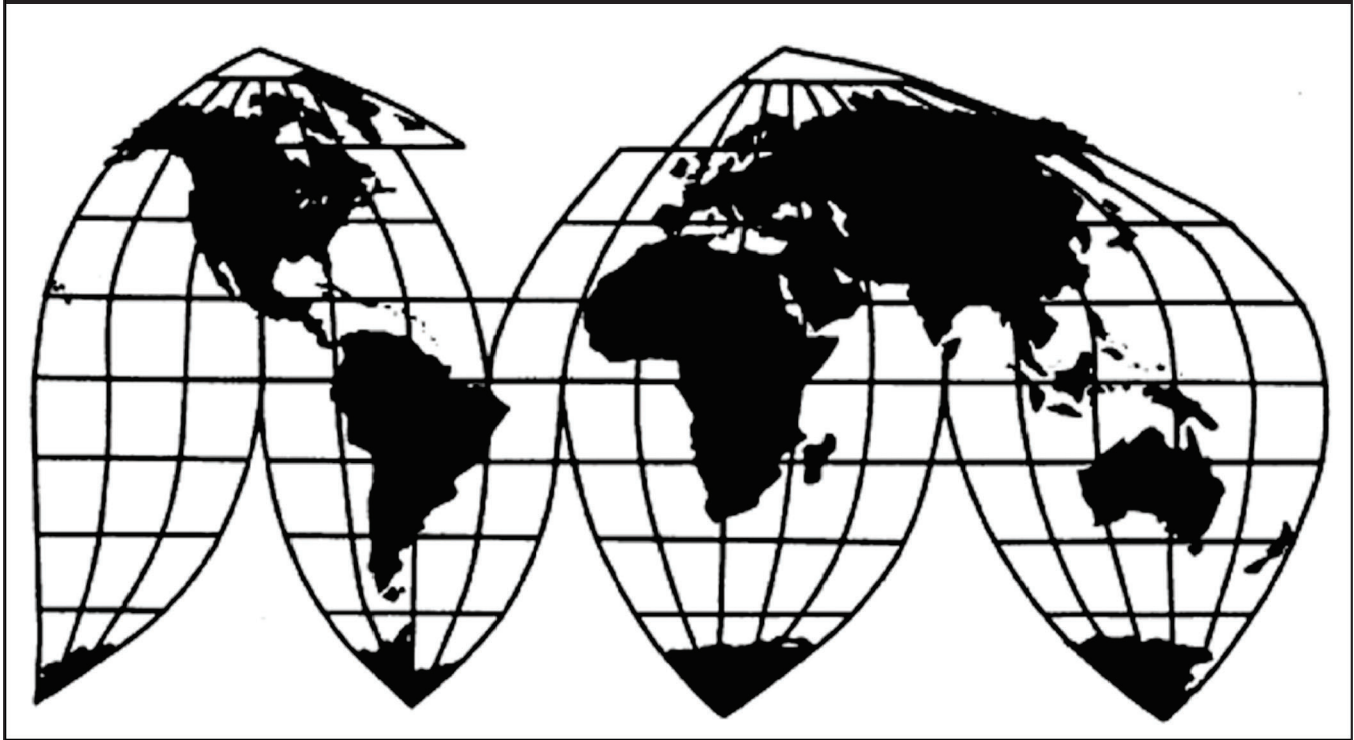
**CERTAIN PORTABLE GAMING CONSOLE  
SYSTEMS WITH ATTACHABLE HANDHELD  
CONTROLLERS AND COMPONENTS  
THEREOF**

337-TA-1111

Publication 5026

February 2020

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

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Washington, DC 20436**

# U.S. International Trade Commission

Washington, DC 20436  
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## **CERTAIN PORTABLE GAMING CONSOLE SYSTEMS WITH ATTACHABLE HANDHELD CONTROLLERS AND COMPONENTS THEREOF**

337-TA-1111



**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 FINDING NO VIOLATION  
OF SECTION 337; TERMINATION OF THE INVESTIGATION**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to affirm the conclusion of the presiding administrative law judge's ("ALJ") initial determination ("ID") that no violation of section 337 has occurred. The investigation is terminated.

**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 ("section 337"), 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 ALJ issued an ID in this investigation, finding no violation of section 337 by Nintendo. 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, that claim 10 of the ’713 patent is invalid, and that the technical prong of the domestic industry has not been met for claim 10 of the ’713 patent. 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.

On April 25, 2019, the Commission determined to review Order No. 21 in the entirety. The Commission also determined to review the three claim constructions, discussed in Order No. 20, on which Order No. 21 is based. Notice, Commission Determination to Review Order No. 21 in its Entirety; Request for Briefing (April 25, 2019). The Commission also asked the parties to brief two issues on review. *Id.* On May 6, 2019, the parties submitted their opening response to the Commission’s notice of review. On May 13, 2019, the parties submitted their responsive submissions.

After considering Order Nos. 20 and 21, the parties’ written submissions, and the record in this investigation, the Commission has determined that the terms “fastening mechanism[s],” “a pair of modules,” and “retention member” are subject to means-plus-function treatment on modified grounds. The Commission affirms Order No. 21’s findings on non-infringement, invalidity of the ’713 patent, and Gamevice’s failure to establish that its products practice the ’713 patent to satisfy the domestic industry requirement. Accordingly, the Commission finds that no violation of section 337 has occurred. The investigation is terminated. The Commission’s reasoning in support of its determinations is set forth in its concurrently issued opinion.

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: October 4, 2019

**CERTAIN STRONTIUM-RUBIDIUM RADIOISOTOPE  
INFUSION SYSTEMS, AND COMPONENTS THEREOF  
INCLUDING GENERATORS**

**Inv. No. 337-TA-1111**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served on the following parties as indicated, on **October 4, 2019**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

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

**In the Matter of**

**CERTAIN PORTABLE GAMING  
CONSOLE SYSTEMS WITH  
ATTACHABLE HANDHELD  
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**COMMISSION OPINION**

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## I. Introduction

On February 14, 2019, the presiding administrative law judge (“ALJ”) issued an initial determination (“ID”) (Order No. 21) 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 respondents Nintendo Co., Ltd. of Kyoto, Japan and Nintendo of America, Inc. of Redmond, Washington (collectively, “Nintendo”). Specifically, the ID grants a motion for summary determination that Nintendo does not infringe claims 1, 10, 16, and 17 of U.S. Patent No. 9,808,713 (“the ’713 patent”) and claims 1 and 16 of U.S. Patent No. 9,855,498 (“the ’498 patent”).<sup>1</sup> ID at 7. The ID also finds that claim 10 of the ’713 patent is invalid and that the complainant failed to satisfy the technical prong of the domestic industry requirement for claim 10 of the ’713 patent. *Id.* at 7-8. Accordingly, the ID concludes that no violation of section 337 has occurred. The ID’s finding of no violation flows from its findings in Order No. 20, construing certain limitations in the asserted claims of the ’498 and ’713 patents.<sup>2</sup> On April 25, 2019, the Commission determined to review the ID in the entirety, including the constructions of the claim limitations “fastening mechanism[s],” “pair of modules,” and “retention member” recited in various asserted claims. Comm’n Notice (April 25, 2019). The Commission asked the parties for additional briefing regarding the proper construction of the limitation “retention member” recited in claim 16 of the ’498 patent. The Commission finds that the three disputed claim constructions on review for the terms “fastening mechanism[s],” “pair of modules,” and “retention member,” are all subject to means-plus-function treatment and affirms, with modification discussed herein, Order No. 20’s claim

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<sup>1</sup> We collectively refer to these patents as the “asserted patents.” These are the only patents at issue in this investigation.

<sup>2</sup> Order No. 20 (Dec. 7, 2018).



construction for these terms. Based on these claim constructions, the Commission affirms the ID's finding of no violation with the modified reasoning provided in this Opinion. The Commission adopts the ID's findings in Order Nos. 20 and 21 that are not inconsistent with this opinion.

## II. Procedural History

The Commission instituted the investigation on May 4, 2018, based on a complaint filed on behalf of Gamevice, Inc., of Simi Valley, California ("Gamevice"). 83 Fed. Reg. 19821 (May 4, 2018). The complaint alleges violations of section 337 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 certain claims of the '713 patent and '498 patent.<sup>3</sup> *Id.* The complaint names Nintendo as the respondents. The Office of Unfair Import Investigations is not participating in this investigation.

The ALJ held a *Markman* hearing on August 23, 2018. The parties disputed eight claim terms from the asserted patents. ID at 1. On December 7, 2018, the ALJ issued Order No. 20, the *Markman* Order ("Order") construing those eight terms. The construction of the following three terms are relevant to the subject ID, as summarized below:

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<sup>3</sup> Gamevice originally asserted claims 1–4, 6–9, 16, 21, and 22 of the '498 patent and claims 1–4, 6–10, and 16–19 of the '713 patent. 83 Fed. Reg. 19821 (May 4, 2018). Gamevice is no longer asserting claims 2, 3, 4, 6, 7, 8, 9, 18, and 19 of the '713 patent and claims 2, 3, 4, 6, 7, 8, 9, 21 and 22 of the '498 patent. *See* Unopposed Motion to Partially Terminate the Investigation as to Allegations of Infringement Relating to Certain Claims No Longer Being Asserted (Motion Docket No. 1111-17) (Nov. 27, 2018); Order No. 20 at 1, 4 n.2, 8 n.4.; *see also* Gamevice Opening Claim Construction Br. at 2-3. Claims 1, 10, 16, and 17 of the '713 patent and claims 1 and 16 of the '498 patent remain asserted.

Claim Term	ALJ's Construction
<p><b>“fastening mechanism[s]”</b></p> <p>(Claims 1, 10, and 16 of the '713 patent; claim 1 of the '498 patent)</p>	<ul style="list-style-type: none"> <li>• <b>Subject to § 112(f)<sup>4</sup> treatment</b></li> <li>• <b>For claims 1 and 16 of the '713 patent and claim 1 of the '498 patent, the relevant function and corresponding structure are:</b>  <i>Function:</i> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.  <i>Structure:</i> a soft draw latch and equivalents thereof.</li> <li>• <b>For claim 10 of the '713 Patent, the relevant function and corresponding structure are:</b>  <i>Function:</i> unifying the pair of modules with the structural bridge.  <i>Structure:</i> undeterminable.</li> </ul>
<p><b>“a pair of modules”</b></p> <p>(claim 10 of the '713 patent)</p>	<ul style="list-style-type: none"> <li>• <b>Subject to § 112(f) treatment</b>  <i>Function:</i> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) providing a communication link.  <i>Structure:</i> the specification does not disclose sufficient structure for the term.</li> </ul>
<p><b>“retention member”</b></p> <p>(claim 16 of the '498 patent)</p>	<ul style="list-style-type: none"> <li>• <b>Subject to § 112(f) treatment</b>  <i>Function:</i> interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining [sic] the structural bridge to a control module of the pair of control modules.  <i>Structure:</i> a cylindrical post or column that secures a catch or lever and equivalents thereof.</li> </ul>

Order 33-44, 49-59, and 71-81. On December 20, 2018, Nintendo filed a motion for

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<sup>4</sup> 35 U.S.C. § 112(f).

summary determination that: (1) it does not infringe claims 1, 10, 16, and 17 of the '713 patent and claims 1 and 16 of the '498 patent; (2) claim 10 of the '713 patent and claim 21 of the '498 patent are invalid; and (3) Gamevice failed to satisfy the technical prong of the domestic industry requirement for claim 10 of the '713 patent. Respondents' Unopposed Motion For Summary Determination of Non-Infringement Of U.S. Patent Nos. 9,808,713 And 9,855,498, Invalidity, And No Violation Of Section 337 at 1,4 ("Motion"). Thus, Nintendo asserted that Gamevice has failed to show a violation of section 337. Gamevice did not oppose the motion for summary determination but reserved its right to challenge the underlying claim constructions.

On February 14, 2019, the ALJ issued the subject ID (Order No. 21) finding that no violation of section 337 has occurred with respect to the asserted patents. On February 22, 2019, Gamevice petitioned for review of the ID's findings.<sup>5</sup> Also on February 22, 2019, Nintendo contingently petitioned for review.<sup>6</sup> The parties filed responses to the respective petitions on March 4, 2019.<sup>7</sup>

On April 25, 2019, the Commission determined to review the ID in the entirety and requested briefing from the parties. Notice, Commission Determination to Review Order No. 21

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<sup>5</sup> Complainant's Petition for Review of Initial Determination Granting Summary Determination of Non-Infringement of U.S. Patent Nos. 9,808,713 and 9,855,498, Invalidity, and No Violation of Section 337 (Feb. 22, 2019) ("Gamevice. Pet.").

<sup>6</sup> Contingent Petition of Respondents Nintendo America Inc. and Nintendo Company Ltd. (Feb. 22, 2019) ("Nintendo Pet.").

<sup>7</sup> Complaint's Response to Respondents' "Contingent" Petition for Review (March 4, 2019); Response of Respondents Nintendo America Inc. and Nintendo Co., Ltd. to Complainant's Petition for Review of Initial Determination of No Violation (March 4, 2019) ("Nintendo Resp.").

in its Entirety; Request for Briefing (April 25, 2019) (“Review Notice”). On May 6, 2019, the parties submitted their opening responses to the Commission’s notice of review.<sup>8</sup> On May 13, 2019, the parties submitted their responsive submissions.<sup>9</sup>

### III. THE ID

The ID explains that Gamevice accuses the Nintendo Switch Console and the Nintendo Joy-Con Controllers of infringing claims 1, 10, 16, and 17 of the ’713 patent and claim 1 of the ’498 patent. ID at 6. Gamevice also accuses the Joy-Con Controllers, Joy-Con Grip, and Joy-Con Charging Grip of infringing claim 16 of the ’498 patent. *Id.* The ID finds that none of the accused products literally infringe under the ALJ’s constructions of the claim limitations “fastening mechanisms” and “retention member” as set forth in the Order. *Id.*, *see supra* at §III. Specifically, the ID finds:

The accused products do not include the “soft draw latch” or its equivalent as required by the undersigned’s construction of “fastening mechanisms” for claims 1, 16, and 17 of the ’713 patent or claim 1 of the ’498 patent, or the “cylindrical post or column that secures a catch or lever” or its equivalents as required by the proper construction of “retention member.” Gamevice agrees, and has stipulated to, these facts, which are adopted by the administrative law judge.

*Id.* at 6-7.

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<sup>8</sup> Complainant’s Written Submission in response to Commission’s Request for Briefing on Initial Determination Grating Summary Determination of Non-Infringement of U.S. Patent Nos 9,808,713 and 9,855,498, Invalidity, and No Violation of Section 337 (May 6, 2019) (“Gamevice Br.”); Response of Nintendo of America Inc. and Nintendo Co., Ltd. to Commission’s Questions 1 and 2 (May 6, 2019) (“Nintendo Br.”).

<sup>9</sup> Complainant’s Reply to Respondents’ Brief on Commission Review of Initial Determination Written Submissions (May 13, 2019) (“Gamevice Reply Br.”); Reply Submission of Respondents Nintendo of America Inc. and Nintendo Co., Ltd. in Response to the Commission’s Questions 1 and 2 (May 13, 2019) (“Nintendo Reply Br.”).

The ID further finds that no accused product can be found to infringe the asserted claims under the doctrine of equivalents given the ALJ's construction of "fastening mechanism[s]" and "retention member." *Id.* at 7. Gamevice stipulated that the accused products do not meet these limitations under the doctrine of equivalents. *Id.*

The ID explains that with respect to claim 10 of the '713 patent, the Order determined that "fastening mechanism" and "a pair of modules" are means-plus-function terms for which the specification does not disclose adequate structure to perform the recited function. *Id.* Therefore, the ID concludes that claim 10 of the '713 patent is invalid as indefinite under 35 U.S.C. § 112(f).

Turning to domestic industry, the only claim that Gamevice asserted for domestic industry of the '713 patent is claim 10 of the '713 patent. Because the ALJ found claim 10 invalid, the parties stipulated for the purpose of summary determination that Gamevice is precluded from establishing the technical prong of the domestic industry requirement for the '713 patent. *Id.*

We address the construction of the three claim terms leading to the ID's finding of no violation in turn below.

#### **IV. U.S. Patent No. 9,808,713 and U.S. Patent No. 9,855,498<sup>10</sup>**

##### **A. Technology Overview**

The technology in this investigation relates to gaming console systems with attachable handheld controllers. *See* Compl. at ¶ 15. More specifically, the patents relate to a combination of a computing device with a display (*e.g.*, a tablet computer) and an input device, in the form of

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<sup>10</sup> The parties often address these two patents together because they share a specification. We will do the same unless we specifically note otherwise.

control modules (*e.g.*, attachable controllers). *Id.* at ¶ 33, 35. The control modules include instructional input devices (*e.g.*, buttons and joy-stick controls) for providing inputs to the computing device for various purposes, including for playing games. *Id.* The inventions claimed in the asserted patent enable a user to interact with an application running on the computing device, such as a game, without being limited to screen-based touch controls. *Id.* at ¶ 34, 36.

## B. Overview of the '713 Patent

The '713 patent, entitled "Game Controller With Structural Bridge," issued on November 7, 2017. Gamevice asserts claims 1, 10, 16, and 17 of the '713 patent. The asserted claims follow with the disputed limitations bolded:

### 1. A combination comprising:

a computing device, the computing device providing an upper, lower, left and right side, collectively the sides of the computing device, and an electronic display screen, the electronic display screen having a corresponding side adjacent each of the sides of the computing device;

a pair of confinement structures, the pair of confinement structures adjacent to and confining the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device, and in which a first confinement structure of the pair of confinement structures provides a first communication link, while a second confinement structure of the pair of confinement structures provides a second communication link;

a structural bridge disposed between the pair of confinement structures, the structural bridge comprising, a passageway between the pair of confinement structures, the passageway promotes communication between the first communication link and the computing device, the passageway further promotes communication between the second communication link and the computing device;

**fastening mechanisms**, the **fastening mechanisms** secure the first confinement structure to a first side of the structural bridge, and further in which the **fastening mechanisms** secure the second confinement structure to a second side of the structural bridge; and

an input device, the input device comprising a pair of control modules, each control module of the pair of control modules secured to a corresponding confinement structure of the pair of confinement structures, each control module in electronic communication with the communication link of its corresponding confinement structure, each of the pair of control modules providing input module apertures, each input module aperture secures an instructional input device, wherein said input module apertures are adjacent each of the at least two opposing sides of the sides of the computing device, and wherein the input device is a separate and distinct structure from either of the pair of confinement structures, forming no structural portion of either of the pair of confinement structures, and in which the confinement structures are separate and distinct structures from the structural bridge, forming no structural portion of the structural bridge.

\* \* \*

10. A combination comprising:

a computing device, the computing device providing an upper, lower, left and right side, collectively the sides of the computing device, and an electronic display screen, the electronic display screen having a corresponding side adjacent each of the sides of the computing device;

**a pair of modules**, the **pair of modules** adjacent to and confining the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device, a module of the pair of modules providing a communication link;

a structural bridge disposed between the pair of modules, the structural bridge includes, but is not limited to, a passageway between the pair of modules, and a **fastening mechanism**, the passageway promotes communication between the communication link and the computing device, while the **fastening mechanism** unifies the pair of modules with the structural bridge, and in which the structural bridge provides a void in the midsection of the structural bridge, the void having right, left, upper, and lower sides, each side communicating with a material of the structural bridge; and

a pair of instructional input devices, each instructional input device of the pair of instructional input devices interacting with a corresponding module of the pair of modules, each instructional input device in electronic communication with the communication link, each of the pair of instructional input devices adjacent a corresponding side of the at least two opposing sides of the sides of the computing device.

\* \* \*

16. A combination comprising:

a pair of confinement structures;

a first communication link, the first communication link confined by a first confinement structure of the pair of confinement structures;

a second communication link, the second communication link confined by a second confinement structure of the pair of confinement structures;

a structural bridge disposed between the first confinement structure and the second confinement structure, the structural bridge comprising an electronics communications passageway between the first and second confinement structures;

**fastening mechanisms**, the **fastening mechanisms** secure each the first confinement structure and the second confinement structure of the pair of confinement structures to the structural bridge; and

a pair of control modules, a first control module of the pair of control modules attached to the first confinement structure, and a second control module of the pair of control modules attached to the second confinement structure, the first control module in electronic communication with the first communication link, the second control module in electronic communication with the second communication link, each the first and the second control modules comprising a plurality of input module apertures, each input module aperture secures an instructional input device, and in which neither the first nor the second control module from a structural portion of either the first or second confinement structures.

\* \* \*

17. The combination of claim 16, further comprising a computing device, the computing device comprising an upper, lower, left and right side, collectively the sides of the computing device, the computing device disposed between and in contact adjacency with each the first and second confinement structure of the pair of confinement structures, the pair of confinement structures engaging the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device, said pair of confinement structures are separate and distinct structures from the computing device.

See '713 patent at 17:44-20:36 (emphasis added).



### C. Overview of the '498 Patent

The '498 patent, entitled "Game Controller With Structural Bridge," issued on January 2, 2018. Gamevice asserts claims 1 and 16 of the '498 patent. The asserted claims follow with the disputed limitations bolded:

#### 1. A combination comprising:

a computing device, comprising an electronic display screen;

a pair of confinement structures, the pair of confinement structures interacting with the computing device and adjacent at least two opposing sides of the computing device, but not more than three sides of the sides of the computing device, the at least two opposing sides of the computing device support the electronic display screen, each of the pair of confinement structures comprising a communication link, each of the communication links configured for electronic communication with the computing device;

a rigid structural bridge disposed between the pair of confinement structures, the rigid structural bridge comprising a passageway between the pair of confinement structures, the passageway promotes electrical communication between the communication link of a first confinement structure of the pair of confinement structures and the computing device, the passageway further promotes electrical communication between the communication link of a second confinement structure of the pair of confinement structures and the computing device;

**fastening mechanisms**, the **fastening mechanisms** secures the first confinement structure to the rigid structural bridge, the **fastening mechanisms** further secure the second confinement structure to the rigid structural bridge; and

a pair of control modules, each control module of the pair of control modules interacting with a corresponding confinement structure of the pair of confinement structures, each control module in electronic communication with the communication link of its corresponding confinement structure, each of the pair of control modules providing input module apertures, each input module aperture secures an instructional input device, wherein said input module apertures are adjacent each of the at least two opposing sides of the computing device, and wherein the input device is a separate and distinct structure from the pair of confinement structures, forming no structural portion of the pair of confinement structures, and in which each of the pair of confinement structures are

separate and distinct structures from the structural bridge, forming no structural portion of the structural bridge.

\* \* \*

**16.** A combination comprising:

a first control module of a pair of control modules, and a second control module of the pair of control modules each the first and the second control modules comprising a plurality of input module apertures, each input module aperture supports an instructional input device, at least one of the first and the second control modules further comprising a fastening detent; and

a structural bridge disposed between said first and second control module, said structural bridge comprising a first side, said first side of said structural bridge in contact adjacency with said first control module, said structural bridge further comprising a second side, said second side of said structural bridge in contact adjacency with said second control module, said structural bridge still further comprising a **retention member**, the **retention member** interacts with the fastening detent, the interaction of the fastening detent with the **retention member** restrains the structural bridge to a control module of the pair of control modules.

*See* '498 patent at 17:46-20:10 (emphasis added).

**V. DISPUTED CLAIM CONSTRUCTIONS**

**A. “fastening mechanism[s]”**

“Fastening mechanism,” singular and plural, appears in asserted claims 1, 10, and 16 of the '713 patent and asserted claim 1 of the '498 patent.<sup>11</sup> For claims 1 and 16 of the '713 patent and claim 1 of the '498 patent, the parties proposed the following constructions for “fastening mechanism” before the ALJ:

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<sup>11</sup> “Fastening mechanism” also appears in claims 9 and 20 of the '713 patent and claims 9, 21, and 22 of the '498 patent, which are not asserted in this investigation. *See* Order No. 20 at 1, 4 n.2, 8 n.4.

Gamevice's Proposed Construction	Nintendo's Proposed Construction
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not Indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.</p> <p><b>Structure:</b> '713 patent - 9:47-10:12, 11:3-5, 12:32-13:16, 15:47-16:20; Figs. 16 (item 320), 17 (item 320), 21 (item 320), 24 (item 320), 25 (item 320), 26 (item 448), 37 (item 548); claims 2, 9, 10, 16, 20, and equivalents thereof</p>	<p>This term "must be construed under 35 U.S.C. § 112(f)."</p> <p><b>Function:</b> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.</p> <p><b>Structure:</b> Limited to # 320 Fig. 16, soft draw latch provided by Southco, of 210 N. Brinton Lake Rd, Concordville, PA 19331, Fig. 24 (and known equivalents thereof).</p>

Order at 33. For claim 10 of the '713 patent, the parties proposed the following constructions for "fastening mechanism" before the ALJ:

Gamevice's Proposed Construction	Nintendo's Proposed Construction
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not Indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> Unifying the pair of modules with the structural bridge.</p> <p><b>Structure:</b> '713 patent - 9:47-10:12, 11:3-5, 12:32-13:16, 15:47-16:20; Figs. 16 (item 320), 17 (item 320), 21 (item 320), 24 (item 320), 25 (item 320), 26 (item</p>	<p>This term "must be construed under 35 U.S.C. § 112(f)."</p> <p><b>Function:</b> Unifying the pair of modules with the structural bridge.</p> <p><b>Structure:</b> Limited to # 448 Fig 26, and # 548 Fig. 37; indefinite because the structure "is not clearly linked to performing the function of unifying the two control modules (or the pair of modules) with the structural bridge"</p>

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
448), 37 (item 548); claims 1, 2, 9, 16, 20, and equivalents thereof	

*Id.* at 33-34.

1. **The *Markman* Order**

<b>Claim Term</b>	<b>ALJ’s Construction</b>
<p><b>“fastening mechanism[s]”</b></p> <p>(Claims 1, 10, and 16 of the ’713 patent; claim 1 of the ’498 patent)</p>	<ul style="list-style-type: none"> <li>• <b>Subject to § 112(f) treatment</b></li> <li>• <b>For claims 1 and 16 of the ’713 patent, claim 1 of the ’498 patent, the relevant function and corresponding structure are:</b>  <i>Function:</i> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.  <i>Structure:</i> a soft draw latch and equivalents thereof.</li> <li>• <b>For claim 10 of the ’713 patent, the relevant function and corresponding structure are:</b>  <i>Function:</i> unifying the pair of modules with the structural bridge.  <i>Structure:</i> undeterminable.</li> </ul>

*Id.* at 38.

(a) **Whether 35 U.S.C. § 112(f) Applies**

The Order explains that “[t]he term ‘fastening mechanism’ (in the singular and plural) appears in claims 1, 9, 10, 16, and 20 of the ’713 Patent and claims 1, 9, 21, and 22 of the ’498 Patent. The specification also discusses fastening mechanisms (*e.g.*, 320, 448, 548), which are shown at least in Figures 16-18, 21, 24-26, and 37.” *Id.* at 34.

The Order finds that § 112(f) applies to the term “fastening mechanism.” *Id.* at 38-39. The Order determines that the term “fastening mechanism” is functional because a person of

ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for a structure. *Id.* at 39. The Order explains:

Claims 1 and 16 of the ‘713 Patent and claim 1 of the ‘498 Patent use the “fastening mechanism” term to describe a result—securing confinement structures—that must be achieved. These claims (along with the other claims in the patents) do not require the fastening mechanism to include any particular structure. In particular, the phrases describing the term “fastening mechanism” (in all of the claims of both patents) are verb phrases. Thus, the claims do not suggest that “fastening mechanism” of claims 1 and 16 of the ‘713 Patent and claims 1 and 22 of the ‘498 Patent carries a sufficiently definite meaning as the name for structure.

Similarly, claim 10 of the ‘713 Patent also uses the “fastening mechanism” term to describe a result—unifying modules—that must be achieved. None of the claims (in all of the claims of both patents) require the unifying fastening mechanism to include any particular structure. Further, the “unifying” phrases of claim 10 are verb phrases, which indicates the term “fastening mechanism” is functional. Thus, the claim does not suggest that “fastening mechanism” of claim 10 of the ‘713 Patent carries a sufficiently definite meaning as the name for structure.

The specification also lacks any meaningful discussion of the fastening mechanism that would indicate the term has a sufficiently definite meaning as the name for structure. Indeed, apart from a latch, the specification does not provide any examples of fastening mechanisms that would confirm the term is structural.

With regard to the prosecution history, Gamevice’s counsel represented that “There were no discussion in the file history about distinguishing or disparaging prior art over other prior art fastening mechanisms.” Tr. (Mathews) 10.

*Id.* at 39-40.

Finally, the Order turns to the extrinsic evidence upon which Gamevice relied and notes that it views the evidence with caution. *Id.* at 40. The Order considers the declaration of Mr. Stubben (Gamevice’s expert) that the “fastening mechanism” could include various specific structures, but concludes that the declaration is unsupported.<sup>12</sup> *Id.* at 40-41. The Order explains

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<sup>12</sup> Mr. Stubben provided an expert declaration in support of Gamevice’s Opening Claim

that the declaration, for example, lacks any discussion of whether the prior art uses the term with “identified structures.” *Id.* at 41. The Order further finds that Mr. Stubben’s supplemental declaration is also not helpful because it refers back to his original declaration. *Id.* The Order also notes that Gamevice’s counsel represented that the “fastening mechanism” could even include Scotch tape. *Id.* The Order notes that this argument “underscores the reality” that “fastening mechanism” lacks a sufficiently definite meaning as the name for structure. *Id.* Therefore, the Order concludes that the term is subject to means-plus-function treatment. *Id.*

**(b) Identification of the Function**

The Order explains that the first step in the process of construing means-plus-function terms is to identify the function. *Id.* at 41-42 (citing case law). The Order states that the parties agree on the relevant functions if § 112(f) is found to apply:

For claims 1 and 16 of the ‘713 Patent and claims 1 and 22 of the ‘498 Patent, the parties agree the relevant functions are: (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge. *See* Gamevice OCCB at 21-22; Nintendo OCCB at 17, 23-29; Joint Chart of Agreed and Disputed Constructions at 6-10. For claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent, the relevant function is unifying the pair of modules with the structural bridge. *Id.* The administrative law judge notes that these functions, which appear in the claims, are undisputed. *See, e.g.,* ‘713 Patent at 18:4-8; 19:12-13; 20:9-12; 20:48-50; ‘498 Patent at 18:4-8; 20:52-61; 21:16-22:2. Having reviewed the asserted patents, the undersigned accepts the undisputed functions.

*Id.* at 42.

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Construction brief (Declaration of David R. Stubben Regarding Claim Construction, attached as Exhibit 4 to Gamevice’s Opening Claim Construction Brief (EDIS Doc. ID No. 651884) (“Stubben Opening Dec.”)), and an expert declaration in support of Gamevice’s Responsive Claim Construction brief (Supplemental Declaration of David R. Stubben Regarding Claim Construction (EDIS Doc. ID No. 653112) (“Stubben Suppl. Dec.”), attached as Exhibit A to Gamevice’s Responsive Claim Construction Brief).

### (c) Identification of the Structure

The Order notes that the second step in construing a means-plus-function claim is the identification of the structure. *Id.* at 42-43. The Order finds:

For claims 1 and 16 of the '713 Patent and claim 1 of the '498 Patent, the corresponding structure is a soft draw latch and equivalents thereof. The specification explains that the fastening mechanism can be a soft draw latch. *See, e.g.*, '713 Patent at 9:47-52 (“In one embodiment, a soft draw latch, such as that provided by Southco, of 210 N. Brinton Lake Road Concordville, P.A. 19331, have been shown to be a useful fastening mechanism 320.”). The specification also generally associates latches with the fastening mechanism. *Id.* at 11:3-5 (“FIG. 24 provides a more insightful presentation of a latch portion 358, of the fastening mechanism 320, relative to the attachment member 332, of the fastening mechanism 320.”). Limiting the corresponding structure to a Southco soft draw latch, as Nintendo suggests, does not give significant weight to the disclosure pertaining to Figure 24.

In contrast, for claim 10 of the '713 Patent, the structure corresponding to the function cannot reasonably be determined. In particular, the structure must correspond to the function, *i.e.*, “unifying the pair of modules with the structural bridge.” The specification, however, fails to describe how any structure unifies a module with the structural bridge. Indeed, Gamevice has not explicitly named or proposed any structure that performs the recited functions with sufficient explanation.

*Id.* at 43. Accordingly, the ID finds that claim 10 of the '713 patent is invalid. ID at 7.

## 2. Analysis

### (a) Whether 35 U.S.C. §112(f) Applies

To determine whether §112(f) applies to a claim limitation, the Court first considers the presence or absence of the word “means.” *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348-49 (Fed. Cir. 2015) (*en banc*). When a claim limitation does not use the word “means,” there is a rebuttable presumption that § 112(f) does not apply. *Id.* However, this presumption can be overcome, and §112(f) will apply, “if the *challenger* demonstrates that the claim term fails to recite sufficiently definite structure or else recites function without reciting sufficient structure for performing that function.” *Id.* (internal quotation marks, brackets, and citation

omitted)(emphasis added). *Williamson* explains that the inquiry is “whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.” *Id.*; Order at 38-41. The burden is on Nintendo to establish that this term is subject to means-plus-function treatment, and the Commission finds that Nintendo has met that burden after considering all of the evidence presented by both parties.

We find, contrary to Gamevice’s assertion, that the term “fastening mechanism” is not understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure. *See id.* The term “fastening mechanism” does not itself recite any definite structure. Inspecting the claims that use the “fastening mechanism[s]” term illustrates that the claims discuss what the “fastening mechanism[s]” do but not what they are. For example, claim 1 of the ’713 patent recites:<sup>13</sup>

*fastening mechanisms, the fastening mechanisms secure the first confinement structure to a first side of the structural bridge, and further in which the fastening mechanisms secure the second confinement structure to a second side of the structural bridge....*

’713 patent at 18:4-8. Claim 10 of the ’713 patent recites the function of “unifying” the “structural bridge” and the “control modules.” Specifically, claim 10 recites:

*... a fastening mechanism, ... the fastening mechanism unifies the pair of modules with the structural bridge ....*

*Id.* at 19:8-12. The claims do not provide any information regarding the physical structure of the “fastening mechanism[s].” In *Williamson*, the Federal Circuit explained that “mechanism” is a nonce word that can be tantamount to “means.” *Williamson*, 792 F.3d at 1350. We find that the term “fastening” does not add any significant structure to this nonce word. Therefore, the

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<sup>13</sup> In addition to claims 1 and 10 of the ’713 patent, claims 9, 16, and 20 also recite “fastening mechanism[s].”



Commission agrees with the ALJ's finding that the language used in the claims is purely functional.

We next turn to the specification for guidance. As the Order finds, the specification “lacks any meaningful discussion of the fastening mechanism that would indicate the term has a sufficiently definite meaning as the name for structure.” Order at 40.

Next, the parties rely on expert testimony to support their positions. Gamevice points to testimony from Mr. Stubben to argue that the term “fastening mechanism” has a specific structure. *See e.g.*, Gamevice Pet. at 26-27. However, Mr. Stubben did not testify that the structure was known in the art but instead testified that a person of skill in the art could identify a number of “fastening mechanism[s]” that could perform the functions. The testimony that Gamevice seeks to rely on is as follows:

51. As described in claim 1 of the '713 patent, the fastening mechanisms secure the confinement structures to their respective sides of the structural bridge. One of ordinary skill in the art would understand the types of fastening mechanisms that could be used to secure a confinement structure to a structural bridge, whether the bridge is formed from a rigid material, such as rigid polymer, or formed from a flexible material, such as a flexible polymer. *See, e.g.*, '713 patent at 9:1-4. Examples of fastening mechanisms that a skilled artisan would consider when securing a confinement structure to a bridge include screws and corresponding threaded holes to accommodate the screws, pins and corresponding holes that accommodate the pins, rivets and corresponding holes that accommodate the rivets, cam locks and corresponding holes that accommodate the cam locks, a slot and key, and other similar types of fasteners, as well as other methods for fastening including welding and heat staking.

Stubben Opening Dec. at ¶ 51. This list of examples of possible structures is not sufficient to avoid the invocation of § 112(f) as the Federal Circuit held in *Robert Bosch, LLC v. Snap-On Inc.*, 769 F.3d 1094, 1101 (Fed. Cir. 2014) (stating, while referring to expert testimony, “merely listing examples of possible structures is insufficient to avoid invocation of § 112, ¶ 6.”). Mr.

Stubben’s testimony, as shown in his declaration and deposition testimony,<sup>14</sup> is that *any possible* mechanism that fastens, which is a function, would be acceptable. Stubben Dec. at ¶¶ 51, 53; Stubben Depo. at 378:18-379:1; 88:6-11, 16-19; 152:23-153:6; *see also* Cagan Dec. ¶ 81. The Commission has considered all of Mr. Stubben’s testimony and the evidence relied on by Nintendo, including the declaration of Dr. Cagan, and finds that the testimony supports finding that anything that fastens could be the “fastening mechanism[s].”

In its petition for review, Gamevice now seeks to make new arguments and rely on evidence not previously before the ALJ. *See e.g.*, Gamevice Pet. at 31-32, 22-24; Nintendo Resp. at 27-31. These new arguments (*e.g.*, “fastener” and “fastening mechanism” are the same) and new evidence (*e.g.*, patents, etc.) were not timely raised and the Commission finds them waived. *See e.g.*, *Ajinomoto Co. v. Int’l Trade Comm’n*, 597 F.3d 1267, 1277-78 (Fed. Cir. 2010) (affirming Commission’s finding of waiver regarding appellant’s argument that was not raised in its pre-hearing brief before the ALJ).

Accordingly, for the forgoing reasons, the Commission finds that the term “fastening mechanism(s)” is not sufficiently understood by a person of ordinary skill in the art as the name for structure. Thus, the Commission finds that this term, as recited in claims 1, 10 and 16 of the ‘713 patent and claim 1 of the ‘498 patent, is subject to means-plus-function treatment.

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<sup>14</sup> Following claim construction briefing, but before the ALJ issued Order No. 20, Nintendo filed a Notice of Additional Evidence In Support of Nintendo’s Claim Construction Positions and Motion for Summary Determination (Nov. 13, 2018) (“Notice”) that included Mr. Stubben’s deposition testimony as Exhibit 3. Gamevice did not object to the filing, and the ALJ expressly considered it. *See*, Order No. 20 at 41, n. 22.

**(b) Identification of the Structure and Function**

As Nintendo notes in its response, Gamevice does not contest any of the ALJ’s findings as to the identified function and/or corresponding structure for claims 1, 10, and 16 of the ’713 patent and claim 1 of the ’498 patent, including the lack of structure for claim 10 of the ’713 patent if the limitation is construed as a means-plus-function term. *See* Gamevice Pet. at 20-35; Nintendo Resp. at 31-32. The Commission affirms the ALJ’s identification of the structure and function for claims 1, 10, and 16 of the ’713 patent and claim 1 of the ’498 patent. Order at 41-44. Accordingly, the Commission affirms the ID’s findings that claim 10 is invalid based on the construction of the “fastening mechanism” limitation. ID at 7.

**B. “a pair of modules”**

The term “pair of modules” appears only in asserted claim 10 of the ’713 patent and non-asserted claim 21 of the ’498 patent. The parties proposed the following constructions for the term “pair of modules” before the ALJ:

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not indefinite. If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) a module providing a communication link.</p> <p><b>Structure:</b> ’713 patent - 8:4-47, 9:14-46, 11:10-43; Figs. 13 (item 252), 14 (item 252), 16 (item 252), 26 (items 402, 404); 30 (items 402, 404, 408, 410); claim 11; ’498 patent - claims 10, 11, 12, 16, 17; and equivalents thereof</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) a module providing a communication link.</p> <p><b>Structure:</b> None (indefinite).</p>

Order at 49.

1. The *Markman* Order

Claim Term	ALJ's Construction
"a pair of modules"  (claim 10 of the '713 patent)	<ul style="list-style-type: none"><li>• <b>Subject to § 112(f) treatment</b> <i>Function:</i> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) providing a communication link. <i>Structure:</i> the specification does not disclose sufficient structure for the term.</li></ul>

*Id.* at 54-59.

(a) Whether 35 U.S.C. § 112(f) applies

The Order first considers whether §112(f) applies to the term "pair of modules" and finds that the term is functional because a person of ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for structure. *Id.* at 54.

The Order finds that the surrounding text in claims 10 and 21 does not inform one of ordinary skill in the art the scope of the term with reasonable certainty. *Id.* at 54-55. Specifically, the Order finds that "module, "without more," is a generic descriptor that does not convey structure." *Id.* The Order explains that the term only appears in claim 10 of the '713 patent and claim 21 of the '498 patent, but does not appear in the patents' specification. *Id.* at 54.

The Order also considers the remaining claims and finds that they do not convey a structure for the "pair of modules" of claims 10 and 21 because the remaining claims do not further define, explain, or limit the "pair of modules" term. *Id.* at 55. The Order explains that the only other claim that references the modules is claim 11 of the '713 patent, which depends from claim 10 and requires the input device to be "a separate and distinct structure from the pair

of modules.” *Id.* The Order finds that claim 11 does not provide any “meaningful clarification” as to what structure a “pair of modules” might entail. *Id.*

As the Order explains, the remaining claims refer to five types of modules:

- control modules – *see* ’713 patent, claims 1 and 16 and ’498 patent, claims 1, 6, 7, 10, 11, 12, 16-18, and 22;
- input module apertures – *see* ’713 patent, claim 1 and ’498 patent, claims 1 and 16;
- game control modules – *see* ’713 patent, claim 7 and ’498 patent, claims 7 and 13;
- communication modules – *see* ’713 patent, claim 8 and ’498 patent, claim 8; and
- a keyboard module – *see* ’498 patent, claim 14.

*Id.* The Order finds that these five types of modules contain limiting language that provide at least some guidance that conveys structure. *Id.* By contrast, the Order explains:

The specification does not show that the term “a pair of modules” would be understood to have a sufficiently definite meaning as the name for structure because the specification does not use the term “pair of modules.” Here, the applicant’s failure to provide any example of a “module” (without guidance) is another indication that the term lacks a sufficiently definite meaning as the name for structure.

The parties have not identified any portions of the prosecution history that apply to the term “a pair of modules.” A review of the prosecution history attached to the complaint does not appear to include a rejection stating that a “pair of modules” was known in the art or that the term conveyed structure. Thus, the prosecution history does not elucidate the meaning of the disputed term. The parties have also offered expert declarations in support of their arguments. *See, e.g.,* Stubben Decl., ¶¶ 78-86; Cagan Decl., ¶¶ 103-107, Stubben Supp. Decl., ¶¶ 46-52. Mr. Stubben’s declaration conflates “a pair of modules” and “a pair of control modules.” *See, e.g.,* Stubben Decl., ¶¶ 83-85. The control modules are explained in the specification and depicted in several figures, while the “pair of modules” is absent from the specification and figures. Thus, Mr. Stubben’s declaration is viewed with caution for the reasons discussed in *Phillips*. *See Phillips [v. AWH Corp.]*, 415 F.3d [1303,] 1318-19 [(Fed. Cir. 2005 (*en banc*))]. Dr. Cagan, on the other hand, opines that “[t]o a person or ordinary skill in the art, the term ‘module’ does not provide a definite meaning as the name for structure”

and provides a short explanation supporting this opinion. Cagan Decl., ¶¶ 104-105. Thus, for this term, Dr. Cagan’s declaration is given slightly more weight than Mr. Stubben’s declaration.

*Id.* at 56-57.

**(b) Identification of the Function**

The Order notes that the parties agree, and the Order finds, that if § 112(f) applies to the “pair of modules” term, then the claims require two relevant functions: (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device and (2) providing a communication link. *Id.* at 58 (citing Gamevice Opening Claim Construction Brief at 33; Nintendo Opening Claim Construction Brief at 17, 33; Joint Chart of Agreed and Disputed Constructions at 10-11).

**(c) Identification of the Structure**

The Order concludes that the specification does not adequately link or associate structure to the recited functions. *Id.* Specifically, the Order explains:

In particular, the specification does not use the term “pair of modules,” nor does it use synonyms or other descriptors that clearly link or associate a structure to the recited functions. As noted above, the specification uses the term “modules” with a modifier just once. *See, e.g.*, ‘713 Patent at 4:61-66. However, this single instance does not provide a clear link to structure because the “modules” are described in relation to a particular embodiment involving removable modules. Likewise, the “modules” described in the ‘713 Patent at 4:61-66 are silent on providing a communication link, which is the second recited function. Similarly, a “module” (without limiting language) or “pair of modules” (also without limiting language) are not shown in the figures. Thus, the administrative law judge has determined that claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent cannot be construed.

*Id.* at 58-59.

## 2. Analysis

### (a) Whether 35 U.S.C. §112(f) Applies

As discussed above, we first must determine whether the rebuttable presumption that §112(f) does not apply to the limitation “pair of modules” in claim 10 of the ‘713 patent is overcome. *Williamson*, 792 F.3d at 1348. The burden is on Nintendo to establish that this term is subject to means-plus-function treatment, and the Commission finds that Nintendo has met that burden after considering all of the evidence presented by both parties.

The Commission finds that the language of claim 10 itself, along with the teachings in the specification, do not connote a sufficiently definite name for structure to one of ordinary skill in the art. While claim 10 requires that the pair of modules be located “adjacent” to the “computing device” and states that a “passageway” runs between the pair of modules, it recites no structure for the pair of modules itself. Moreover, the requirements in claim 10 that the “pair of modules” confine the “computing device” and provide a “communication link” are both merely functional requirements.

“Module” is a nonce word that is often used as a generic stand-in for function, as the Federal Circuit expressly recognized in *Williamson*. Specifically, the Court explained in *Williamson*, that “[m]odule’ is a well-known nonce word that can operate as a substitute for ‘means’ in the context of § 112, para. 6 . . . ‘module’ is simply a generic description for software or hardware that performs a recited function.” *Williamson*, 792 F.3d at 1350. Thus, we find that the “pair of modules” term itself does not connote structure.

The Commission further finds that the specification provides no meaningful guidance in determining the structure of “pair of modules.” *See* Order at 55-56. While the specification describes many different types of modules (*e.g.*, control modules, wireless communication

modules, etc.) it does not describe the “pair of modules” that performs the claimed function. Indeed, the specification does not even use the term. The specification does not provide a meaning of “modules” generically, without a modifier (*e.g.*, control, input, etc.). Gamevice argues that the “pair of modules” are “control modules” but the specification provides no guidance on this point.

Gamevice also relies on expert testimony in an effort to support this argument. *See* Order at 57. As the Order explains, Dr. Stubben conflates “a pair or modules” and “a pair of control modules.” *See id.* However, as Nintendo contends, the claim language supports that the “pair of modules” and “control modules” are different. *See e.g.*, Nintendo Resp. at 44. Specifically, the claims, which recite the “control modules” terms, also recite a separate “confinement structure,” which performs the function of “confining” the “computing device.”<sup>15</sup> However, in claim 10, the “pair of modules” performs the function of confining the “computing device.” Therefore, equating “pair of modules” with “control modules” as Gamevice suggests would be in error. In addition, Dr. Cagan testified that “module” does not provide definite meaning for the name for structure. *Id.*; *see also* Cagan Opening Dec. ¶¶ 104-05. Based on the lack of structure included in the claim language and further lack of disclosure in the specification, the Commission finds that the “pair of modules” claim term does not connote the name for a sufficiently definite structure to a person of ordinary skill in the art, and, thus, is subject to means-plus-function treatment.

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<sup>15</sup> *See, e.g.*, ’713 patent, claim 1 (“a pair of confinement structures . . . confining the computing device”)



**(b) Identification of the Structure and Function**

The parties agree on the function identified in the Order, and the Commission affirms the function identified by the ALJ. Order at 57-58. However, the parties dispute whether the specification identifies a corresponding structure. For the reasons discussed below, the Commission affirms the ALJ's finding that the specification does not adequately link or associate structure to the recited function for both the reasons discussed below and those identified in the Order that are not inconsistent with this discussion. *See id.* at 58-59.

Gamevice argues that the structure disclosed in the specification for “control modules” is the structure for the “pair of modules.” Gamevice’s argument appears to be that, because the disclosed structure for “control modules” performs functions similar to the functions recited for the “pair of modules,” the structure for the “control modules” should be also be the structure for the “pair of modules.” Gamevice Pet. at 45.

Claims 1 and 16 of the '713 patent and claims 1, 6, 7, 10-12, 16-18, and 22 of the '498 patent recite the “control modules” limitation while claim 10 of the '713 patent recites the “pair of modules” limitation. Different claim terms are presumed to have differing meaning and scope. *Innova/Pure Water Inc. v. Safari Water Filtration Sys., Inc.* 381 F.3d 1111, 1119-20 (Fed. Cir. 2004). This presumption has not been overcome. As Nintendo argues in response to Gamevice’s petition:

The Federal Circuit requires structure from the specification to be “clearly linked” to the functions recited in the claim. As the *Williamson* court put it, “[s]tructure disclosed in the specification qualifies as ‘corresponding structure’ if the intrinsic evidence clearly links or associates that structure to the function recited in the claim.” Gamevice can point to nothing in the specification that clearly links the structure describing “control modules” to the functions performed by the “pair of modules.” Without that intrinsic-evidence linkage, Gamevice cannot rely on the structure disclosed for “control modules” for the “pair of modules” recited in the claims. Indeed, the case Gamevice cites—*Nystorm v. TREX CO.*—says exactly that: “[d]ifferent terms or phrases in separate claims may be construed to cover

the same subject matter *where the written description and prosecution history indicate that such a reading of the terms or phrases is proper.*” Gamevice does not, because it cannot, offer anything from the written description or file history to indicate that “pair of modules” should be read to cover the same subject matter as “control modules.” Indeed, “pair of modules” is never used in the specification at all, and nothing in the file history discusses them. It would be error, therefore, to accept Gamevice’s invitation to construe “pair of modules” as though it was “control modules,” which is what Gamevice seeks to do.

Nintendo Resp. at 46-47 (emphasis in original). Accordingly, the Commission affirms the Order’s findings that the specification does not adequately link or associate structure to recited functions and, thus, the term a “pair of modules” recited in claim 10 of the ‘713 patent does not disclose sufficient structure for the term and cannot be construed . Order at 58-59. Accordingly, the Commission affirms the ID finds that claim 10 in invalid based on the construction of the “a pair of modules.” ID at 7.

**C. “retention member”**

The term “retention member” appears in just one claim, claim 16 of the ’498 patent. The parties proposed the following constructions before the ALJ:

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
<p>a component with a recess or opening for securely receiving or catching the fastening detent</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term</p> <p><b>Function:</b> Interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> Interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.</p> <p><b>Structure:</b> Limited to #266 Fig. 14</p> <p>Indefinite 35 U.S.C. § 112(2)/(b)</p>

Gamevice's Proposed Construction	Nintendo's Proposed Construction
<b>Structure:</b> '713 patent - 8:31-39; Fig. 14 (items 266, 268), and equivalents thereof	

Order at 71. The term appears in only one paragraph of the specification and only one figure (Figure 14). The relevant portion of the specification follows:

FIG. 14 further shows that the pair of control modules **252** provide a confinement boss **262**, and the confinement boss **262** provides a fastening detent **264**. The fastening detent **264** interacts with a *retention member 266*, to secure the structural bridge **258**, to the pair of control modules **252**. In a preferred embodiment, the *retention member 266* is responsive to a catch **268**, which preferably is a spring activated catch **268**, and the *retention member 268* is preferably a spring loaded *retention member 268*. Still further, FIG. 14 shows that in a preferred embodiment, the structural bridge **258** provides a communication link **270**, which passing signals between the pair of control modules **252**.

'498 patent at 8:28-39 (emphasis added). Figure 14 is reproduced below:

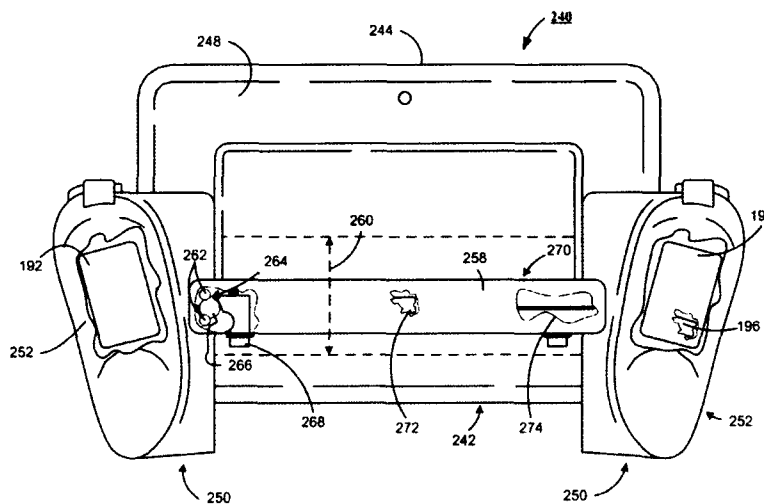


FIG. 14

'498 patent at Fig. 14.

## 1. The *Markman* Order

Claim Term	ALJ's Construction
<p><b>“retention member”</b>  (claim 16 of the '498 patent)</p>	<ul style="list-style-type: none"> <li>• <b>Subject to § 112(f) treatment</b>  <i>Function:</i> “interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining [sic] the structural bridge to a control module of the pair of control modules”  <i>Structure:</i> a cylindrical post or column that secures a catch or lever and equivalents thereof.”</li> </ul>

Order at 76-81.

### (a) Whether 35 U.S.C. § 112(f) Applies

The Order first considers whether § 112(f) applies and concludes that it does. *Id.* at 76. The Order finds that “the term ‘retention member’ is functional because a person of ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for a structure.” *Id.*

In reaching this conclusion, the Order considers the claim language and finds that the phrases that follow the “retention member” term are verb phrases (*e.g.*, “‘interact’ with other components and thereby ‘restrain’ different components.”). *Id.* at 76-77. The Order finds that this would not be understood as structure. *Id.* The Order explains that neither claim 16 nor any of the other claims impose any structural attributions to the “retention member” and therefore, the claims do not convey structure. *Id.*

The Order next considers the specification and finds that it fails to provide a sufficient description of the structure because the specification describes what the retention member does, rather than describing the physical attributes. *Id.* The Order explains that the “specification states that the retention member ‘interacts’ with the fastening detent and ‘is responsive to a

catch.’ While the specification references a ‘spring loaded retention member 268,’ it is not clear where the spring is located and how it works, and how a device having two retention members (266 and 268) is arranged.” *Id.* The Order further finds that Figure 14 also does not convey structure. *Id.* at 77-78.

The Order considers the structures illustrated in Figure 14 and finds that the basic shapes (*e.g.*, circle, rectangle) do not convey structure, especially because the specification states that the “detailed description is illustrative only, and changes may be made in detail, especially in matters of structure and arrangements of parts within the principles of the present invention to the full extent indicated by the broad general meaning of the terms in which the appended claims are expressed.” *Id.* at 78 (quoting ’498 patent at 17:32-44) (emphasis omitted). The Order notes that the parties have not identified anything in the prosecution history that applies to this term. *Id.* at 79.

Turning to the extrinsic evidence, the Order considers the declaration of Mr. Stubben (Gamevice’s expert) and finds that the structure of the retention member described in his declaration is consistent with Figure 14. *Id.* Finally, the Order considers Mr. Stubben’s deposition and finds that it supports concluding that the term is functional. *Id.* After considering all the evidence, the Order determines that the evidence supports Nintendo’s position that the term “retention member” must be construed under § 112(f). *Id.*

#### **(b) Identification of the Function**

The Order explains that the parties agree that, if the term “retention member” is found to be subject to § 112(f) treatment, the relevant function is “interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining [sic] the structural bridge to a control module of the pair of control modules.” *Id.* at 80.

### (c) Identification of the Structure

The Order finds that Figure 14 of the '498 patent depicts the retention member as a circle. *Id.* at 80. The Order explains that Figure 14 is a two-dimensional back view of the combination computing device and electronic game control, and “it is reasonable to attribute a height to element 266, such that a person of ordinary skill in the art would understand that the retention member is a cylindrical post or column.” *Id.* at 80-81 (citing '498 patent at 2:29-30, Fig. 14; Stubben Opening Dec. at ¶ 69). The Order further determines “[a] person of ordinary skill in the art, based on the claim language as reflected in the parties’ agreement concerning the ‘fastening detent’ term, would further understand that the cylindrical post or column secures a catch or lever. Thus, the corresponding structure is a cylindrical post or column that secures a catch or lever and equivalents thereof.” *Id.* at 81.

## 2. Analysis

### (a) Whether 35 U.S.C. §112(f) Applies

As discussed above, we first must determine whether the rebuttable presumption that §112(f) does not apply to the limitation “retention member” is overcome *Williamson*, 792 F.3d at 1348. The burden is on Nintendo to establish that this term is subject to means-plus-function treatment, and the Commission finds that Nintendo has met that burden after considering all of the evidence presented by both parties.

Gamevice argues that the claim language, specification, and Figure 14 clearly describe and illustrate the structure of the “retention member” and the term should not be subject to means-plus-function treatment.

Claim 16 recites, *inter alia*:

a structural bridge disposed between said first and second control module, said structural bridge comprising a first side, said first side of said structural bridge in

contact adjacency with said first control module, said structural bridge further comprising a second side, said second side of said structural bridge in contact adjacency with said second control module, said structural bridge still further comprising a **retention member**, the **retention member** interacts with the fastening detent, the interaction of the fastening detent with the **retention member** restrains the structural bridge to a control module of the pair of control modules.

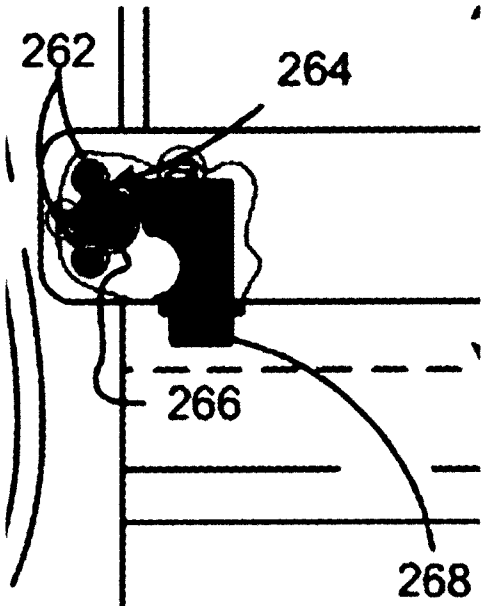
'498 patent at 19:58-20:10 (emphasis added). The language of claim 16, while using functional descriptors, provides some defining features of the structure of the "retention member."

Specifically, the structural bridge includes a "retention member" that interacts with the fastening detent to restrain the structural bridge to a control module. '498 patent at 8:28-39.

The parties both note that the specification identifies 266 and 268 in Figure 14 as retention members. The parties disagree on whether this was a mistake. *See* Gamevice Pet. at 40, n.18; Nintendo Resp. at 35-36. Gamevice asserts that reading the entire passage one must conclude that the retention mention is referenced as item 266 and the catch is referenced as 268 and the identification of "retention member" as 268 is an obvious typographical error. Gamevice Pet. at 40, n.18. Nintendo asserts that there is no actual evidence that this was a mistake, and as the ALJ pointed out, the specification does not limit itself to the figures. Nintendo Resp. at 35-36. Nintendo also argues that Gamevice's position that the specification includes a typographical error is inconsistent with Gamevice's construction for "retention member," because Gamevice's proposed construction is "a component with a recess or opening" and the only component with a "recess or opening," is element 268, which is not the retention member. Nintendo Br. at 19-21. The Commission agrees with Gamevice that the specification appears to include a typographical error. However, we do not take Gamevice's proposed construction into account when trying to understand the disclosure of the specification.

The specification describes some characteristics of the structure of the "retention

member,” explaining that in a preferred embodiment the “retention member” structure is responsive to a spring activated catch and the “retention member” is preferably a spring loaded retention member. ’498 patent at 8:28-39. Figure 14, reproduced *supra* at 27, illustrates these interactions in two dimensions. The mere fact that these structures are two dimensional and shown as simple shapes does not by itself establish that this term is not understood by a person of ordinary skill in the art. A close up of these elements, as shown in Gamevice’s petition and reproduced below, is illustrative of the interaction of the various components:<sup>16</sup>



Gamevice Pet. at 37. Testimony from the parties’ experts interpreting the specification and figures is helpful in this instance to determine whether the term is sufficiently understood by a person of ordinary skill in the art as a name for structure and whether Nintendo has met its burden. *See e.g.*,

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<sup>16</sup> The coloration and red circles were added in Gamevice’s petition. Element 262 (confinement boss) is shown in yellow, element 266 (retention member) is blue, and element 268 (catch) is green. Gamevice Pet. at 36-37. The red circles represent springs. *Id.* at 36.



Turning to the testimony relied on by the parties, we start with Gamevice’s expert, Mr.

Stubben. Specifically, Mr. Stubben testified in his opening declaration:

67. It is my opinion that Gamevice’s proposed construction—“a component with a recess or opening for securely receiving or catching the fastening detent”—is consistent with how that term is used in the claims and specification and properly captures the scope the invention of claim 16 of the ‘498 patent. I understand that Nintendo has not proposed a construction if the Court determines that “retention member” is not a means-plus-function term.

68. As described in claim 16 of the ‘498 patent, a “retention member” is a component of the structural bridge that “interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module of the pair of control modules.”

69. I understand that the parties agree that “fastening detent” should be construed as “a catch or lever that is securely held by the retention member.” I further understand that Nintendo does not contend that “fastening detent” is a mean-plus-function term. As I understand it, that means Nintendo believes that “fastening detent” has sufficiently definite structure when read in view of the complete language of the claims and the specification, but “retention mechanism” does not. I do not understand this distinction. One of ordinary skill in the art would understand a “retention mechanism” that securely holds a catch or lever to restrain structural bridge to a control module as having sufficiently definite structure. For example, a suitable “retention member” for securely holding a catch or lever would include a component with a hole, a component with a slot, or a boss.

70. A person of ordinary skill in the art reading the claim term in light of the ‘498 patent specification would also understand the term “retention member” to have a sufficiently definite structure. The patent describes that “[t]he fastening detent 264 interacts with a retention member 266, to secure the structural bridge 258, to the pair of control modules 252.” ‘498 patent at 8:30-32. It further describes that in a preferred embodiment, the “retention member” is responsive to a catch (one example of a “fastening detent”), and that the “retention member” and the catch are preferably spring-loaded and spring-activated, respectively. ‘498 patent at 8:32-36.

71. In my opinion, the description in claim 16 and in the specification of the ‘498 patent provide sufficiently definite structure for the term “retention member.”

Stubben Opening Dec. at ¶¶ 66-71.

However, Mr. Stubben stated in his deposition, which was conducted after the submission of claim construction briefs:

Q. Okay. What is a retention member?

A. A retention member is something that retains or holds.

Q. Anything that retains or holds?

A. Well, let's see if we have a definition of it in the constructions. A machine or mechanical appliance that secures components in a particular relationship.

Q. Is that the common and ordinary meaning of the term "retention member"?

A. That's at least the agreed construction for which --

Q. I -- I don't think so. I can tell you Nintendo did not agree to that for retention member.

A. No?

Q. No.

\* \* \* \* \*

Q. Is the phrase, the words, "retention member," is that the name of a structure or particular class of structures in the art?

A. Not necessarily, no.

Q. When you say "not necessarily," what does that mean? -- is the answer just "no"?

A. I think the answer is "no."

Q. Okay. And so, in your view, a retention member is anything that interacts with the fastening detent to restrain the structural bridge to the control module or the pair of control modules, right?

A. Yes.

\* \* \* \* \*

Q. Is there any structure that can interact with the fastening detent to restrain the structural bridge to a control module of the pair of control modules that is not a retention member?

A. No.

\* \* \* \* \*

Q. So the answer is "no," there are no structural limitations as long as it performs the function, right?

A. Well, I believe that structure is the function in this case.

\* \* \* \* \*

Q. [The specification is] missing information that would tell a person of skill in the art how to design the retention member to perform the function that's claimed, right?

A. I agree.

Stubben Dep. Tr. at 462:1-16, 462:20-463:7, 465:25-466:4, 467:9-13, and 473:1-5.

Thus, while Mr. Stubben states in his testimony that a “person of ordinary skill in the art reading the claim term in light of the ’498 patent specification would also understand the term ‘retention member’ to have a sufficiently definite structure,” he appears to state the opposite in his subsequent deposition.

Dr. Cagan, Nintendo’s expert, also provided the following testimony in a declaration to support Nintendo’s position during claim construction briefing:

123. The term “retention member” [is] not defined in the asserted patents. To a person of [f] ordinary skill in the art, the claim term “retention member” does not provide a definite meaning as the name for structure. As used in the Claim 16 of the ’498 patent, the “retention member” is used with functional language: “the retention member interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module.”

124. Thus, this term “retention member” is a means-plus-function limitation and its recited function is “interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.”

125. The only recited structure for “retention member” in the specification of the asserted patents is reference **266** of Figure 14, and the accompanying specification text description for reference **266**.

**FIG. 14** further shows that the pair of control modules **252** provide a confinement boss **262**, and the confinement boss **262** provides a fastening detent **264**. The fastening detent **264** interacts with a retention member **266**, to secure the structural bridge **258**, to the pair of control modules **252**. In a preferred embodiment, the retention member **266** is responsive to a catch **268**, which preferably is a spring activated catch **268**, and the retention member **268** is preferably a spring loaded retention member **268**. Still further, **FIG. 14** shows that in a preferred embodiment, the structural bridge **258** provides a communication link **270**, which passing signals between the pair of control modules **252**.

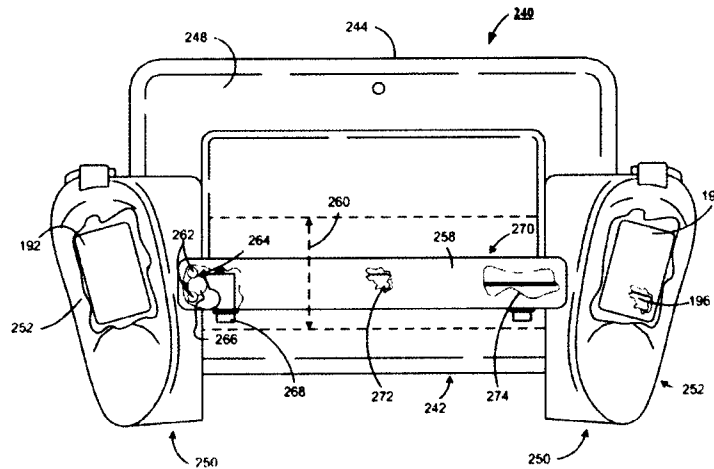


FIG 14

126. However, the structure does not perform the recited function of “interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.” The specification text merely restates the function of the claim, without describing a structure, and describes that the retention member **266** may be spring loaded, without explaining the structure. Figure 14 shows a circle labeled reference **266**.

127. The actual functioning of the mechanism is not described in enough detail to understand how it works and whether it meets the function of the claim term. It is not clear whether the retention member (**266**) is included on, or part of, the structural bridge or the control modules. If the retention member **266** along with the catch member **268** are both part of the structural bridge **258**, then it is not apparent what parts would move relative to the others to enable a connection.

128. If the catch member **268** is part of the structural bridge but the retention member **266** is part of the control modules **252**, then it is not apparent how the retention member **266** would be secured into the catch member **268** (this is not described in the description), how it would be released (this is not described in the description), and what would retain it from sliding vertically to the figure and thus make the retention secure.

129. The retention member is also indicated on Figure 27. However, the elements in the figure are not visibly clear and there is no description of how the retention mechanism (**424**) actually works, or how the pieces interact to meet the function required by the claim.

130. A person of ordinary skill would not understand how to implement a retention mechanism to perform the recited function based on the information provided in Figures 14 or 27. Thus, there is insufficient disclosed structure, and the claim term is indefinite.

Cagan Opening Dec. at ¶ 123-130.

Based on the testimony from both experts and the intrinsic record, the Commission finds that this term should be subject to means-plus-function treatment. Dr. Cagan's testimony, recited above, clearly supports Nintendo's position. In addition, portions of Mr. Stubben's testimony is consistent with Dr. Cagan's testimony, recited above. For example, Mr. Stubben testified that the term "retention member" was not understood by a person of ordinary skill in the art to have sufficiently definite meaning as the name for structure. First, Mr. Stubben testified that the words "retention member" was not a name of a structure or particular class of structures in the art. When asked if the words "retention member" were "the name of a structure or particular class of structures in the art," Mr. Stubben eventually answered with a blanket "no." Stubben Dep. Tr. at 462:20-463:7. Because the standard by which one determines whether §112(f) applies is "whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure," this answer supports the Order's determination that the term is subject to means-plus-function treatment. *See Williamson*, 792 F.3d at 1349.

In addition, Mr. Stubben further testified that the only limitation on a "retention member" was functional and failed to offer structural limitations. Examining Mr. Stubben's deposition transcript regarding his explanation of "retention member," Mr. Stubben appears to have confused the term "retention member" and "retention mechanism" as it relates to the accused Joy-Cons controllers. *See Stubben Dep. Tr. at 462:7-467:18* (When initially asked to define "retention member," Mr. Stubben stated the definition of "retention *mechanism*," *Id.* at 462:7-8. When he was asked whether a "retention member" was anything that could perform the stated function of a "retention member," Mr. Stubben answered, "well, the rails are the retention

*mechanism.*” *Id.* at 464:15-19. When further asked if there was any device that can perform the function of the “retention member and not be a retention member,” Stubben responds, “are we talking about the Joy-Cons here and the rails?” *id.* at 465:14-15, and “anything that can perform a retention member function. In other words, fasten the Joy-Con to the rail.” *Id.* at 465:21-23). Nevertheless, Mr. Stubben testified that any structure that can perform the function recited in the claim for a “retention member” is, by definition, a “retention member.” *Id.* at 463:2-7. When Mr. Stubben was asked “is any structure that can perform the function of interacting with a fastening detent to restrain the structural bridge to a control module of the pair of control modules a retention member,” Mr. Stubben answered “yes” again. *Id.* at 464:23-465:2. Mr. Stubben also confirmed the converse that no structures existed which could perform the function recited in the claim for a “retention member” but not be a “retention member.” *Id.* at 465:25-466:4. Mr. Stubben also failed to offer “any structural limitation that might serve to cabin the scope of the functional term.” *Diebold Nixdorf, Inc. v. Int’l Trade Comm’n*, 899 F.3d 1291, 1300-01 (Fed. Cir. 2018; Stubben Dep. Tr. at 466:17-467:13).

Additionally, Mr. Stubben listed examples of possible structures for suitable “retention members,” including “a component with a hole, a component with a slot, or a boss.” Stubben Opening Dec. at ¶ 69. However, merely listing examples of possible structures is insufficient to avoid invocation of § 112(f). *Bosch*, 769 F.3d at 1101. Further, Gamevice’s proposed construction (“a component with a recess or opening for securely receiving or catching the fastening detent”) and Mr. Stubben’s testimony could be interpreted as contradictory, since Gamevice’s construction requires that “retention member” have a recess or opening, while Mr. Stubben testified that “retention member” could have a “boss,” the literal opposite of a recess or opening. Nintendo Reply Br. at 4.

The recitation of structure in the claim sufficient to avoid application of § 112(f) need not recite every detail of structure disclosed in the specification as performing the claimed function so long as the recited structure is sufficient to accomplish the claimed function. *Rodime PLC v. Seagate Technology, Inc.*, 174 F.3d 1294, 1304 (Fed. Cir. 1999). However, in discussing Figure 14, Mr. Stubben testified that that the limited disclosure found in the patent’s specification was inadequate to design the claimed “retention member.” Stubben Dep. Tr. at 472:10-473:5. Mr. Stubben generally relies on the interaction between “retention member” and other components found in the claim language and patent specifications to provide alleged structure for “retention member.” The description in the claim language and the specification regarding the interaction between the “retention member” and other elements, combined with Mr. Stubben’s admissions, and Dr. Cagan’s testimony, that the specification does not describe the corresponding structure, leads the Commission to the conclusion that the “fastening mechanism” is not a sufficiently definite name for structure to a person of ordinary skill in the art. The specification simply restates the function recited in claim 16 that a retention member interacts with the fastening detent “to secure the structural bridge **258**, to the pair of control modules **252**,” ’498 patent at 8:28-39, and does not provide guidance on the retention member’s structural arrangement.

Based on the above analysis, the Commission finds that the term “retention member” in claim 16 of the ’498 patent is subject to means-plus-function treatment.

**(b) Identification of the Structure and Function**

Gamevice’s petition does not appear to challenge the Order’s identification of the function and structure, should the Commission determine that the “retention member” is subject to means-plus-function treatment. *See* Gamevice Pet. at 35-41. However, in its response to

Gamevices's petition, as well as in its contingent petition for review, Nintendo argues that the Order improperly identifies the structure in the specification and that the identified structure is not capable of performing the identified function, relying on testimony from experts from both sides. *See e.g.*, Nintendo Resp. at 37-41; Nintendo Pet. at 45-52. Specifically, Nintendo argues that the identified structure must be expressly disclosed in the specification. Nintendo Resp. at 39-40. Nintendo argues that the evidence does not support the Order's finding that a person of ordinary skill in the art would read circular element 266 as a "cylindrical post or column." *Id.* at 39-40. However, regardless of whether the Commission agrees with the structure identified in the Order or finds that the term is indefinite, there is no dispute that there is no violation if this term is subject to means-plus-function treatment. *See e.g.*, Respondents' Statement of Undisputed Material Facts in Support Of Their Unopposed Motion For Summary Determination Of Noninfringement and Invalidity of U.S. Patent Nos. 9,808,713 and 9,855,498 and No Violation Of Section 337 (Dec. 20, 2018) at ¶¶8-13; Stipulation Regarding Noninfringement Based on the Construction of the Claims (Order No. 20) (Dec. 20, 2018) at ¶¶1-5; Gamevice Pet. at 48.

Nevertheless, an examination of the specification shows that it describes and illustrates the mechanisms that together act to "restrain[] the structural bridge to a control module of the pair of control modules," as the claim requires. Specifically, Figure 14 shows that the pair of control modules "provide a confinement boss **262** and the confinement boss **262** provides a fastening detent **264**. The fastening detent **264** interacts with a retention member **266**, which must be part of the structural bridge, to secure the structural bridge **258**, to the pair of control modules **252**." '498 patent at 8:30-32 and Fig. 14. The '498 patent describes that the "retention



member 266” is responsive to a “catch 268,” and that the “retention member” and the catch are preferably spring-loaded and spring-activated, respectively.” *See* ’498 patent at 8:32-36.

Figure 14 illustrates structures capable of performing the claimed function. Figure 14 illustrates, as explained in the specification, that the spring-activated catch 268 holds the spring-loaded retention member 266 in place against the confinement boss 262 and the fastening detent 264. In this position, retention member 266 is held in place such that fastening detent 264 interacts with the indentations in retention member 266 to restrain the structural bridge to the control module. Retention member 266 can be released by pushing catch 268 upwards so that the retention member fits into the catch’s semi-circular cutout. As retention member 266 moves into this cut-out, it is released from its interaction with fastening detent 264 and thereby releases the control module from the structural bridge. *See* ’498 patent at 8:28-38; Stubben Supp. Dec. at ¶¶ 60-63.

The structure for performing the function of interacting with the fastening detent to restrain the structural bridge to a control module is the recess or opening of “retention member” 266 that captures the fastening detent 264. This recess or opening is depicted in Figure 14 at the interface where the confinement boss 262 meets the retention member 266. These indentations can be identified as part of the retention member that actually interacts with the fastening detent to perform the claimed function. Based on the disclosure and Figure 14, the Commission finds that the corresponding structure for the limitation “retention member” is the structure identified in the Order at pages 80-81 as the cylindrical post or column, including the recesses, depicted in Figure 14, at the interface between the confinement boss and the retention member. Therefore, the Commission finds that the term is not indefinite under § 112(f).

As noted above in §III, the parties represent that the accused products do not include the “cylindrical post or column that secures a catch or lever” or its equivalents as required under the Order’s construction and identified structure. The Commission’s minor modification to the Order’s identified structure does not change the requirement that the accused products must have a “cylindrical post or column that secures a catch or lever” or an equivalent, and thereby the Commission finds that claim 16 of the ’498 patent is not met. Respondents’ Statement of Undisputed Material Facts in Support Of Their Unopposed Motion For Summary Determination Of Noninfringement and Invalidity of U.S. Patent Nos. 9,808,713 and 9,855,498 and No Violation Of Section 337 (Dec. 20, 2018) at ¶¶8-13; Stipulation Regarding Noninfringement Based on the Construction of the Claims (Order No. 20) (Dec. 20, 2018) at ¶¶1-5

## **VI. CONCLUSION**

The Commission finds that the claim limitations “fastening mechanism[s],” “pair of modules,” and “retention member” terms are subject to means-plus-function treatment as discussed above. The parties, before the ALJ, stipulated that under the Order’s construction of these three terms as means-plus-function terms, there is no infringement of the asserted claims. Because the Commission finds that these three terms are means-plus-function for similar reasons to those articulated the Order, the Commission affirms the ID’s findings that no violation of section 337 has occurred and adopts the portions of the Order that are not inconsistent with this opinion.

By order of the Commission.



Lisa R. Barton  
Secretary to the Commission

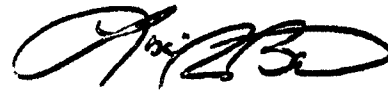
Issued: October 16, 2019

**CERTAIN STRONTIUM-RUBIDIUM RADIOISOTOPE  
INFUSION SYSTEMS, AND COMPONENTS THEREOF  
INCLUDING GENERATORS**

**Inv. No. 337-TA-1111**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **OPINION, COMMISSION** has been served on the following parties as indicated, on **October 16, 2019**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

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**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](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,<sup>1</sup> 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

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<sup>1</sup> All contract personnel will sign appropriate nondisclosure agreements.

**CERTAIN STRONTIUM-RUBIDIUM RADIOISOTOPE  
INFUSION SYSTEMS, AND COMPONENTS THEREOF  
INCLUDING GENERATORS**

**Inv. No. 337-TA-1111**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served on the following parties as indicated, on 4/25/2019



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainants Gamevice, Inc.:**

Jeffrey S. Gerchick  
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1300 I Street NW, Suite 900  
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- Via Hand Delivery
- Via Express Delivery
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- Other: \_\_\_\_\_

**On Behalf of Respondents Nintendo Co., Ltd. and Nintendo  
of America, Inc.:**

Grant Kinsel, Esq.  
**PERKINS COIE, LLP**  
1201 Third Avenue, Suite 4900  
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- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
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**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**

**Order No. 21 (Initial Determination)**

On December 20, 2018, respondents Nintendo Co., Ltd. and Nintendo of America Inc. (collectively “respondents” or “Nintendo”) filed a motion for summary determination that they do not infringe claims 1, 10, 16, and 17 of U.S. Patent No. 9,808,713 (“the ‘713 patent”) and claims 1 and 16 of U.S. Patent No. 9,855,498 (“the ‘498 patent”) (collectively the “asserted claims” and the “asserted patents”) and that there has been no violation of section 337. Motion Docket No. 1111-021. On January 31, 2019, complainant Gamevice, Inc. (“Gamevice”) filed a response stating that it does not oppose the pending motion.

For the reasons discussed below, Motion No. 1111-021 is granted.

**I. BACKGROUND**

A *Markman* hearing was held on August 23, 2018. Counsel for complainant and counsel for respondents appeared at the hearing. The parties disputed eight claim terms from the ‘713 patent and the ‘498 patent. The eight disputed terms are:

- 1) “computing device”
- 2) “a pair of confinement structures” / “confinement structure[s]”
- 3) “fastening mechanism[s]”



- 4) “input device”
- 5) “a pair of modules”
- 6) “passageway”
- 7) “structural bridge”
- 8) “retention member”

On December 7, 2018, the administrative law judge issued Order No. 20 (“*Markman* Order”) construing those claim terms.

## **II. LEGAL STANDARD**

### **A. Summary Determination**

Section 337 prohibits “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that (i) infringe a valid and enforceable United States patent ....” 19 U.S.C.

§ 1337(a)(1)(B). A complainant need only prove importation of a single accused product to satisfy the importation element. *Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, Comm’n Op. at 7-8, USITC Pub. No. 1605 (Nov. 1984).

The Commission Rules provide that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or part of the issues to be determined in the investigation. 19 C.F.R. § 210.18(a). Summary determination “shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” 19 C.F.R. § 210.18(b).

## **B. Infringement**

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. The complainant in a section 337 investigation bears the burden of proving infringement of the asserted patent claims by a “preponderance of the evidence.” *Certain Flooring Products*, Inv. No. 337-TA-443, Comm’n Notice of Final Determination of No Violation of Section 337, 2002 WL 448690, at \*59, (Mar. 22, 2002); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376 (Fed. Cir. 1998).

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.<sup>1</sup> *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed Cir. 1995).

## **C. Invalidity Under 35 U.S.C. § 112(f)**

Where a claim term is determined to be subject to 35 U.S.C. § 112(f), the specification must disclose adequate structure for performing the functions recited in the claims. Disclosed structure is adequate if the specification clearly links the structure to the performance of the recited functions, and if the disclosed structure performs all of the recited functions. *Williamson v. Citrix Online LLC*, 792 F.3d 1339, 1351–52 (Fed. Cir. 2015) (*en banc* as to Section II.C).

Where the specification does not disclose adequate structure, either because the structure is not clearly linked to the recited functions or because the structure does not perform all of the recited functions, the claim term is indefinite under 35 U.S.C. § 112(b). *Id.*

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<sup>1</sup> Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). If an accused device lacks a limitation of an independent claim, the device cannot infringe a dependent claim. See *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.9 (Fed. Cir. 1989).

### III. VIOLATION OF SECTION 337

Gamevice asserts claims 1, 10, 16, and 17 of the ‘713 patent and claims 1 and 16 of the ‘498 patent (collectively, the “asserted claims”). The terms “fastening mechanism[s],” “retention member,” and “a pair of modules” are recited in one or more of the asserted claims, and all of the asserted claims recite at least one of these terms. *See Markman* Order at 4, 8; Mot. Ex. A, Stipulation, ¶ 3.

In order to find infringement of the asserted claims, it must be shown that respondents’ accused products practice every element of valid asserted claims as properly construed. As discussed below, pursuant to the constructions of “fastening mechanism[s]” and “retention member” set forth in the *Markman* Order, the accused products do not infringe. Indeed, based on the construction of “fastening mechanism[s]” and “retention member,” terms required by one or more asserted claims,<sup>2</sup> complainant agrees that the moving parties do not infringe the asserted claims of the asserted patents.<sup>3</sup> All parties agree that no accused product practices the “fastening mechanism[s]” or “retention member” limitation of each asserted claim. *See* Mot. Ex. A, Stipulation, ¶ 4-5.

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<sup>2</sup> Claims 1, 10, and 16 of the ‘713 patent and claim 1 of the ‘498 patent include the term “fastening mechanism[s].” Claim 16 of the ‘498 patent includes the term “retention member.”

<sup>3</sup> Complainant argues:

Respondents’ motion, and Gamevice’s non-opposition, is premised on the ALJ’s operative constructions of the terms “fastening mechanism[s],” “retention member,” and “a pair of modules.” Gamevice has consistently disputed and disagreed with the ALJ’s constructions of these terms. Thus, while Gamevice acknowledges that under the ALJ’s claim constructions the asserted claims are not infringed and certain asserted claims are rendered invalid, and so there is no violation of Section 337, under a proper construction of those terms Gamevice does not consent to the ultimate finding of invalidity, non-infringement, and no violation.

Response at 1-2.

In addition, complainant relied only on claim 10 of the '713 patent to establish domestic industry. In the *Markman* Order, the undersigned did not reach a conclusion on invalidity. Yet, the parties agree that under the administrative law judge's construction of "fastening mechanism" and "a pair of modules," claim 10 of the '713 patent is invalid. Thus, Gamevice cannot establish domestic industry.

**A. Claim Construction**

The administrative law judge construed "fastening mechanism[s]," as recited in claims 1, 10, and 16 of the '713 patent and claim 1 of the '498 patent, "retention member," as recited in claim 16 of the '498 patent, and "a pair of modules" as recited in claim 10 of the '713 patent and claim 21 of the '498 patent. *See* Statement of Undisputed Material Facts ("SUF"), ¶ 7. Dependent claim 17 of the '713 patent is dependent from claim 16, and, therefore, also includes the "fastening mechanisms" limitation as recited in claim 16. The administrative law judge determined the following constructions of "fastening mechanism[s]," "retention member," and "a pair of modules":

Claim Term	Proper Construction
"fastening mechanisms"	Subject to 35 U.S.C. § 112(f). For claims 1 and 16 of the '713 patent and claim 1 of the '498 patent:  Function: (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.  Corresponding Structure: a soft draw latch and equivalents thereof.
"fastening mechanism"	Subject to 35 U.S.C. § 112(f). For claim 10 of the '713 patent:

	<p>Function: unifying the pair of modules with the structural bridge.</p> <p>Corresponding Structure: Undeterminable.</p>
“retention member”	<p>Subject to 35 U.S.C. § 112(f).</p> <p>Function: interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining the structural bridge to a control module of the pair of control modules.</p> <p>Corresponding Structure: a cylindrical post or column that secures a catch or lever and equivalents thereof.</p>
“a pair of modules”	<p>Subject to 35 U.S.C. § 112(f).</p> <p>Function: (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) providing a communication link.</p> <p>Corresponding Structure: the specification does not disclose sufficient structure for the term.</p>

*See Markman Order at 43-44, 58-59, 81.*

**B. Literal Infringement**

Gamevice accused the Nintendo Switch Console and Joy-Con Controllers of infringing claims 1, 10, 16 and 17 of the ‘713 patent and claim 1 of the ‘498 patent, and the Joy-Con Controllers and Joy-Con Grip and Joy-Con Charging Grip (all products collectively the “accused products”) of infringing claim 16 of the ‘498 patent. None of the moving parties’ accused products infringe under the constructions of “fastening mechanisms” and “retention member” set forth in the *Markman* Order. The accused products do not include the “soft draw latch” or its equivalent as required by the undersigned’s construction of “fastening mechanisms” for claims 1, 16 and 17 of the ‘713 patent or claim 1 of the ‘498 patent, or the “cylindrical post or column that secures a catch or lever” or its equivalents as required by the proper construction of “retention

member.” Gamevice agrees, and has stipulated to, these facts, which are adopted by the administrative law judge. *See* SUF, ¶¶ 8-12, Mot. Ex. A, Stipulation, ¶ 4.

### **C. Doctrine of Equivalents**

No accused product can be found to infringe the asserted claims under the doctrine of equivalents given the administrative law judge’s construction of “fastening mechanism[s]” and “retention member” in the *Markman* Order. Gamevice has not argued that these limitations are practiced under the doctrine of equivalents, and has stipulated that the accused products do not meet these limitations under the doctrine of equivalents. The administrative law judge adopts the stipulated facts. *See* SUF, ¶¶ 8-12, Mot. Ex. A, Stipulation, ¶ 4.

### **D. Invalidity**

With respect to claim 10 of the ‘713 patent, the *Markman* Order found that “fastening mechanism” and “a pair of modules” as used in that claim are means-plus-function terms subject to construction under 35 U.S.C. § 112(f). The administrative law judge determined that the specification does not disclose adequate structure to perform the functions for these two terms recited in claim 10. *See* Order No. 20 at 43-44, 58-59; Mot. Ex. A, Stipulation, ¶ 4. Thus, the parties stipulated that the *Markman* Order rendered claim 10 of the ‘713 patent invalid.

### **E. Domestic Industry**

Gamevice asserted claim 10 of the ‘713 patent as its only domestic industry claim for the ‘713 patent. The parties have stipulated that for the purpose of the summary determination the *Markman* Order invalidates claim 10 of the ‘713 patent, and precludes Gamevice from establishing the technical prong of the domestic industry requirement. *See* Mot. Ex. A, Stipulation, ¶ 5; *Vision-Based Driver Assistance Systems Camera and Components Thereof*, USITC Inv. No. 337-TA-907, Comm’n Op. at 36 (Dec. 1, 2015) (public version) (finding no

technical domestic industry for practice of invalid claim). Therefore, summary determination of no domestic industry is appropriate.

\* \* \*

For the reasons discussed above, under the claim constructions determined in the *Markman* Order, Gamevice cannot show infringement of any valid asserted claim of the asserted patents, and Gamevice cannot establish a violation of section 337.

Accordingly, it is the initial determination of the undersigned that Motion No. 1111-021 is granted. This initial determination has the effect of terminating this investigation in its entirety.

Pursuant to 19 C.F.R. § 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the initial determination or certain issues contained herein.



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David P. Shaw  
Administrative Law Judge

Issued: February 14, 2019

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

**INV. NO. 337-TA-1111**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Order No. 21 (Initial Determination)** has been served upon the following parties as indicated, on \_\_\_\_\_.

**FEB 14 2019**



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street SW, Room 112A  
Washington, DC 20436

<b>FOR COMPLAINANT GAMEVICE, INC.:</b>	
Jeffrey S. Gerchick, Esq. <b>QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP</b> 1300 I Street, NW, Suite 900 Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<b>FOR RESPONDENTS NINTENDO CO. LTD.; AND NINTENDO OF AMERICA, INC.:</b>	
Grant Kinsel, Esq. <b>PERKINS COIE LLP</b> 1201 Third Avenue, Suite 4900 Seattle, WA 98101	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____



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

**Order No. 20: Markman Order**

A Markman hearing was held on August 23, 2018. Counsel for complainant Gamevice, Inc. (“Gamevice”) and counsel for respondents Nintendo Co., Ltd. and Nintendo of America Inc. (collectively, “Nintendo”) appeared at the hearing. The parties disputed eight terms from U.S. Patent Nos. 9,808,713 and 9,855,498. The eight disputed terms are:

- 1) “computing device”
- 2) “a pair of confinement structures” / “confinement structure[s]”
- 3) “fastening mechanism[s]”
- 4) “input device”
- 5) “a pair of modules”
- 6) “passageway”
- 7) “structural bridge”
- 8) “retention member”

The administrative law judge’s constructions for these terms are provided herein. Briefing in this investigation shall be governed by the constructions provided in this Order.

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## I. BACKGROUND

By publication of a notice in the *Federal Register* on May 4, 2018, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or 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 of claims 1–4, 6–9, 16, 21, and 22 of [U.S. Patent No. 9,855,498] and claims 1–4, 6–10, and 16–19 of [U.S. Patent No. 9,808,713]; and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

83 Fed. Reg. 19821 (May 4, 2018).

The complainant is Gamevice, Inc., of Simi Valley, California. The respondents are Nintendo Co., Ltd., of Kyoto, Japan and Nintendo of America, Inc., of Redmond, Washington. The Office of Unfair Import Investigations is not a party in this investigation. *Id.* at 19821-19822.

The target date for completion of this investigation was set at 16 months, and the due date for the final initial determination on violation is May 3, 2019. *See* Order No. 5 (Setting Target Date). A *Markman* Hearing was scheduled for August 23, 2018. *See* Order No. 6 (Procedural Schedule).

On August 1, 2018, the parties submitted opening claim construction briefs, which were accompanied by expert declarations (from Mr. David R. Stubben, for Gamevice, and Dr. Jonathan Cagan, for Nintendo) and supporting exhibits. The parties submitted reply claim construction briefs, including supporting exhibits (including a supplemental expert declaration

from Mr. Stubben), on August 15, 2018. The *Markman* Hearing was held on August 23, 2018. *See Markman* Tr. (Aug. 23, 2018) (hereinafter “Tr.”).

On September 18, 2018, the investigation was reassigned to the undersigned, Administrative Law Judge David P. Shaw. *See* Notice to the Parties (EDIS Doc. ID No. 656085) (Sep. 18, 2018). A status conference was held on October 3, 2018, and the administrative law judge stated a *Markman* order would be provided. *See* Status Conf. Tr. 27 (Oct. 3, 2018) (EDIS Doc. ID No. 658022).

On November 13, 2018, Nintendo filed a “Notice of Additional Evidence in Support of Nintendo’s Claim Construction Positions and Motion for Summary Determination” (“Notice of Additional Evidence”) (EDIS Doc. ID No. 661705). The Notice of Additional Evidence presents excerpts from Mr. Stubben’s deposition transcript. *See* Notice at 2-3, Ex. 1. With regard to claim construction, the Notice of Additional Evidence is limited to five terms: computing device, confinement structure, fastening mechanism, input device, and retention member. *See id.*, Ex. 1.

## **II. ASSERTED PATENTS**

### **A. U.S. Patent No. 9,808,713**

U.S. Patent No. 9,808,713 (the “713 Patent”), which is titled, “Game controller with structural bridge,” issued on November 7, 2017. The ‘713 Patent claims priority to multiple applications, the earliest of which is a provisional application that was filed on December 20, 2011. Figure 1 of the patent shows one embodiment of a game controller disclosed in the ‘713 Patent:

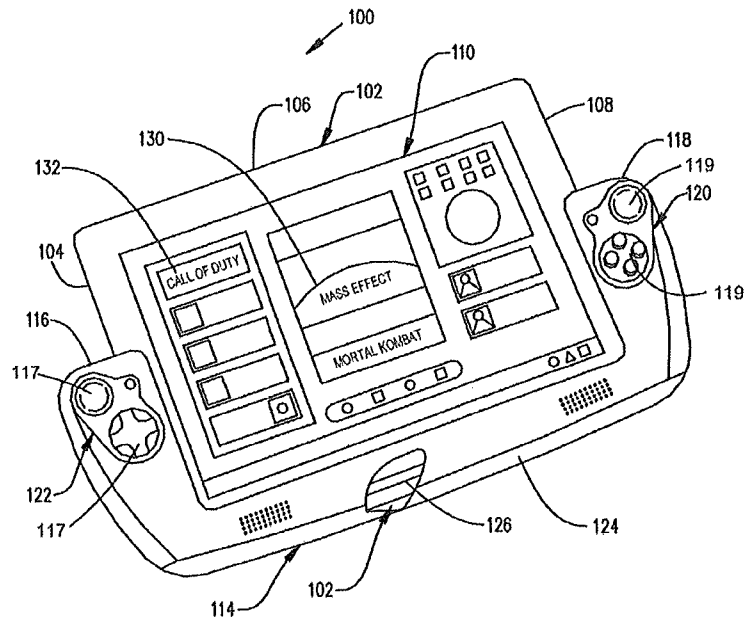


FIG. 1

See, e.g., ‘713 Patent, Fig. 1. Figures 41-43 show alternative embodiments that explicitly depict a “structural bridge,” which appears, directly or indirectly, in every claim. *Id.*, Figs. 41-43; 3:52-63 (describing Figs. 41-43); 18:46-20:51 (claims 1-20). Fig. 43 is reproduced below:

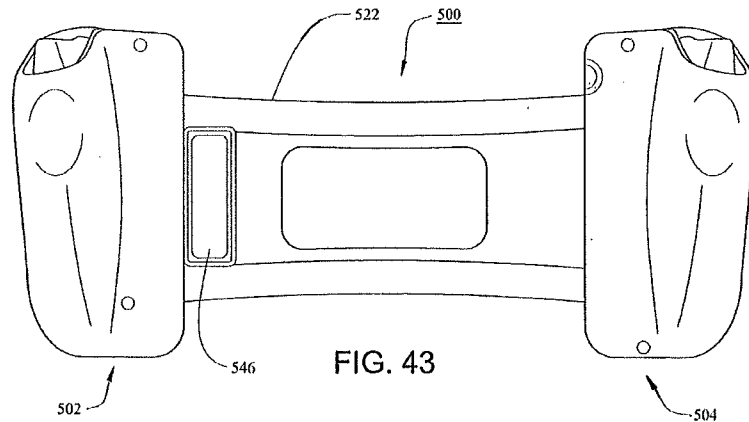


FIG. 43

*Id.*, Fig. 3.

Gamevice provides the following introduction to the ‘713 and ‘418 Patents:

The ‘713 and ‘498 patents share the same specification, and relate generally to a combination of a computing device with a back and a display (e.g., a tablet computer), and an input device, in the form

of control modules (*e.g.*, attachable controllers). (Exs. 2-3). The control modules include instructional input devices (*e.g.*, buttons and joy-stick control) for providing inputs to the computing device for various purposes, including for playing games. The combination includes a structural bridge, specified in some claims as rigid, in others flexible. In some claims the computing device is confined by confinement structures attached to the structural bridge with fastening mechanisms. In other claims, the control modules confine the computing device. In certain claims the confinement structures provide a communication link while in others the control modules provide a communication link. In certain claims, the structural bridge provides a passageway that promotes communication between the communication link and the computing device. In another claim, the combination is limited to a pair of control modules and a structural bridge where a fastening detent on at least one control module interacts with a retention member on the structural bridge to restrain the structural bridge to the control module.

The inventions claimed in the asserted patents enable a user to interact with an application running on the computing device, *e.g.* a game, without being limited to screen-based touch controls. The various claimed features, for example, enable the control modules to be secured alongside the computing device providing a solid physical and electronic connection between the control modules and the computing device, and mitigating against inadvertent removal of the computing device from the input device.

Gamevice OCCB at 8-9.

Gamevice asserts claims 1, 10, 16, and 17 of the ‘713 Patent.<sup>1</sup> *See* Gamevice Opening Claim Construction Br. (“Gamevice OCCB”) at 2-3; Compl., ¶¶ 3-5.<sup>2</sup> The asserted claims follow:

---

<sup>1</sup> Gamevice is no longer asserting claims 2, 3, 4, 6, 7, 8, 9, 18, and 19 of the ‘713 Patent. *See* Unopposed Motion to Partially Terminate the Investigation as to Allegations of Infringement Relating to Certain Claims No Longer Being Asserted (Motion Docket No. 1111-17) (Nov. 27, 2018).

<sup>2</sup> Gamevice states it is no longer asserting claim 9 of the ‘713 Patent. *See* Gamevice OCCB at 3.

1. A combination comprising:

a computing device, the computing device providing an upper, lower, left and right side, collectively the sides of the computing device, and an electronic display screen, the electronic display screen having a corresponding side adjacent each of the sides of the computing device;

a pair of confinement structures, the pair of confinement structures adjacent to and confining the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device, and in which a first confinement structure of the pair of confinement structures provides a first communication link, while a second confinement structure of the pair of confinement structures provides a second communication link;

a structural bridge disposed between the pair of confinement structures, the structural bridge comprising, a passageway between the pair of confinement structures, the passageway promotes communication between the first communication link and the computing device, the passageway further promotes communication between the second communication link and the computing device;

fastening mechanisms, the fastening mechanisms secure the first confinement structure to a first side of the structural bridge, and further in which the fastening mechanisms secure the second confinement structure to a second side of the structural bridge; and

an input device, the input device comprising a pair of control modules, each control module of the pair of control modules secured to a corresponding confinement structure of the pair of confinement structures, each control module in electronic communication with the communication link of its corresponding confinement structure, each of the pair of control modules providing input module apertures, each input module aperture secures an instructional input device, wherein said input module apertures are adjacent each of the at least two opposing sides of the sides of the computing device, and wherein the input device is a separate and distinct structure from either of the pair of confinement structures, forming no structural portion of either of the pair of confinement structures, and in which the confinement structures are separate and distinct

structures from the structural bridge, forming no structural portion of the structural bridge.

\* \* \*

**10.** A combination comprising:

a computing device, the computing device providing an upper, lower, left and right side, collectively the sides of the computing device, and an electronic display screen, the electronic display screen having a corresponding side adjacent each of the sides of the computing device;

a pair of modules, the pair of modules adjacent to and confining the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device, a module of the pair of modules providing a communication link;

a structural bridge disposed between the pair of modules, the structural bridge includes, but is not limited to, a passageway between the pair of modules, and a fastening mechanism, the passageway promotes communication between the communication link and the computing device, while the fastening mechanism unifies the pair of modules with the structural bridge, and in which the structural bridge provides a void in the midsection of the structural bridge, the void having right, left, upper, and lower sides, each side communicating with a material of the structural bridge; and

a pair of instructional input devices, each instructional input device of the pair of instructional input devices interacting with a corresponding module of the pair of modules, each instructional input device in electronic communication with the communication link, each of the pair of instructional input devices adjacent a corresponding side of the at least two opposing sides of the sides of the computing device.

\* \* \*



**16.** A combination comprising:

a pair of confinement structures;

a first communication link, the first communication link confined by a first confinement structure of the pair of confinement structures;

a second communication link, the second communication link confined by a second confinement structure of the pair of confinement structures;

a structural bridge disposed between the first confinement structure and the second confinement structure, the structural bridge comprising an electronics communications passageway between the first and second confinement structures;

fastening mechanisms, the fastening mechanisms secure each the first confinement structure and the second confinement structure of the pair of confinement structures to the structural bridge; and

a pair of control modules, a first control module of the pair of control modules attached to the first confinement structure, and a second control module of the pair of control modules attached to the second confinement structure, the first control module in electronic communication with the first communication link, the second control module in electronic communication with the second communication link, each the first and the second control modules comprising a plurality of input module apertures, each input module aperture secures an instructional input device, and in which neither the first nor the second control module from a structural portion of either the first or second confinement structures.

\* \* \*

**17.** The combination of claim 16, further comprising a computing device, the computing device comprising an upper, lower, left and right side, collectively the sides of the computing device, the computing device disposed between and in contact adjacency with each the first and second confinement structure of the pair of confinement structures, the pair of confinement structures engaging the computing device on at least two opposing

sides, but not more than three sides of the sides of the computing device, said pair of confinement structures are separate and distinct structures from the computing device.

*See* ‘713 Patent at 17:44-20:36.

**B. U.S. Patent No. 9,855,498**

U.S. Patent No. 9,855,498 (the “‘498 Patent”), which is titled, “Game controller with structural bridge,” issued on January 2, 2018. The ‘498 Patent claims priority to the same continuation, non-provisional, and provisional applications as the ‘713 Patent. *Compare* ‘498 Patent at 1-2 *with* ‘713 Patent at 1-2. The ‘713 and ‘498 Patents share the same specification.<sup>3</sup> *See* Gamevice OCCB at 8.

Gamevice asserts claims 1 and 16 of the ‘498 Patent.<sup>4</sup> *See* Gamevice Opening Claim Construction Br. (“Gamevice OCCB”) at 2-3; Compl., ¶¶ 3-5.<sup>5</sup> The asserted claims follow:

1. A combination comprising:

a computing device, comprising an electronic display screen;

a pair of confinement structures, the pair of confinement structures interacting with the computing device and adjacent at least two opposing sides of the computing device, but not more than three sides of the sides of the computing device, the at least two opposing sides of the computing device support the electronic display screen, each of the pair of confinement structures comprising a communication link, each of the communication links configured for electronic communication with the computing device;

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<sup>3</sup> Accordingly, this Order generally refers to the specifications as a singular document.

<sup>4</sup> Gamevice is no longer asserting claims 2, 3, 4, 6, 7, 8, 9, 21 and 22 of the ‘498 Patent. *See* Unopposed Motion to Partially Terminate the Investigation as to Allegations of Infringement Relating to Certain Claims No Longer Being Asserted (Motion Docket No. 1111-17) (Nov. 27, 2018).

<sup>5</sup> Gamevice states it is no longer asserting claims 3 and 9 of the ‘498 Patent. *See* Gamevice OCCB at 3.

a rigid structural bridge disposed between the pair of confinement structures, the rigid structural bridge comprising a passageway between the pair of confinement structures, the passageway promotes electrical communication between the communication link of a first confinement structure of the pair of confinement structures and the computing device, the passageway further promotes electrical communication between the communication link of a second confinement structure of the pair of confinement structures and the computing device;

fastening mechanisms, the fastening mechanisms secures the first confinement structure to the rigid structural bridge, the fastening mechanisms further secure the second confinement structure to the rigid structural bridge; and

a pair of control modules, each control module of the pair of control modules interacting with a corresponding confinement structure of the pair of confinement structures, each control module in electronic communication with the communication link of its corresponding confinement structure, each of the pair of control modules providing input module apertures, each input module aperture secures an instructional input device, wherein said input module apertures are adjacent each of the at least two opposing sides of the computing device, and wherein the input device is a separate and distinct structure from the pair of confinement structures, forming no structural portion of the pair of confinement structures, and in which each of the pair of confinement structures are separate and distinct structures from the structural bridge, forming no structural portion of the structural bridge.

\* \* \*

**16. A combination comprising:**

a first control module of a pair of control modules, and a second control module of the pair of control modules each the first and the second control modules comprising a plurality of input module apertures, each input module aperture supports an instructional input device, at least one of the first and the second control modules further comprising a fastening detent; and

a structural bridge disposed between said first and second control module, said structural bridge comprising a first side, said first side of said structural bridge in contact adjacency with said first control module, said structural bridge further comprising a second side, said second side of said structural bridge in contact adjacency with said second control module, said structural bridge still further comprising a retention member, the retention member interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module of the pair of control modules.

See '498 Patent at 17:46-20:10.

### **III. GENERAL PRINCIPLES OF LAW**

#### **A. Claim Construction**

Claim construction begins with the plain language of the claim.<sup>6</sup> Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent.<sup>7</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1170 (2006).

In some instances, claim terms do not have particular meaning in a field of art, and claim construction involves little more than the application of the widely accepted meaning of

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<sup>6</sup> Only those claim terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int'l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

<sup>7</sup> Factors that may be considered when determining the level of ordinary skill in the art include: "(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field." *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

commonly understood words. *Phillips*, 415 F.3d at 1314. “In such circumstances, general purpose dictionaries may be helpful.” *Id.*

In many cases, claim terms have a specialized meaning, and it is necessary to determine what a person of skill in the art would have understood the disputed claim language to mean. “Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’” *Phillips*, 415 F.3d at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). The public sources identified in *Phillips* include “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116).

In cases in which the meaning of a claim term is uncertain, the specification usually is the best guide to the meaning of the term. *Phillips*, 415 F.3d at 1315. As a general rule, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996). The specification is, however, always highly relevant to the claim construction analysis, and is usually dispositive. *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Moreover, “[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.* at 1316.

Claims are not necessarily, and are not usually, limited in scope to the preferred embodiment. *RF Delaware, Inc. v. Pacific Keystone Techs., Inc.*, 326 F.3d 1255, 1263 (Fed. Cir. 2003); *Decisioning.com, Inc. v. Federated Dep't Stores, Inc.*, 527 F.3d 1300, 1314 (Fed. Cir. 2008) (“[The] description of a preferred embodiment, in the absence of a clear intention to limit claim scope, is an insufficient basis on which to narrow the claims.”). Nevertheless, claim constructions that exclude the preferred embodiment are “rarely, if ever, correct and require highly persuasive evidentiary support.” *Vitronics*, 90 F.3d at 1583. Such a conclusion can be mandated in rare instances by clear intrinsic evidence, such as unambiguous claim language or a clear disclaimer by the patentees during patent prosecution. *Elekta Instrument S.A. v. O.U.R. Sci. Int'l, Inc.*, 214 F.3d 1302, 1308 (Fed. Cir. 2000); *Rheox, Inc. v. Entact, Inc.*, 276 F.3d 1319 (Fed. Cir. 2002).

If the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence may be considered. Extrinsic evidence consists of all evidence external to the patent and the prosecution history, and includes inventor testimony, expert testimony, and learned treatises. *Phillips*, 415 F.3d at 1317. Inventor testimony can be useful to shed light on the relevant art. In evaluating expert testimony, a court should discount any expert testimony that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent. *Id.* at 1318. Extrinsic evidence may be considered if a court deems it helpful in determining the true meaning of language used in the patent claims. *Id.*

## **B. Indefiniteness**

The definiteness requirement of 35 U.S.C. § 112 ensures that the patent claims particularly point out and distinctly claim the subject matter that the patentee regards to be the

invention. See 35 U.S.C. § 112, ¶ 2; *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1366 (Fed. Cir. 2004). If a claim’s legal scope is not clear enough so that a person of ordinary skill in the art could determine whether or not a particular product infringes, the claim is indefinite, and is, therefore, invalid. *Geneva Pharm., Inc. v. GlaxoSmithKline PLC*, 349 F.3d 1373, 1384 (Fed. Cir. 2003).<sup>8</sup> Thus, it has been found that:

When a proposed construction requires that an artisan make a separate infringement determination for every set of circumstances in which the composition may be used, and when such determinations are likely to result in differing outcomes (sometimes infringing and sometimes not), that construction is likely to be indefinite.

*Halliburton Energy Servs. v. M-I LLC*, 514 F.3d 1244, 1255 (Fed. Cir. 2008).

The Supreme Court addressed the issue of indefiniteness, and stated that a finding of indefiniteness should not be found if the claims, “viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014) (“*Natutilus*”).

A patent is not indefinite if the claims, “viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus*, 134 S. Ct. at 2124.

The burden is on the accused infringer to come forward with clear and convincing evidence to prove invalidity. See *Young v. Lumenis, Inc.*, 492 F.3d 1336, 1344 (Fed. Cir. 2007) (“A determination that a patent claim is invalid for failing to meet the definiteness requirement in 35 U.S.C. § 112, ¶ 2 is a legal question reviewed de novo.”).

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<sup>8</sup> Indefiniteness is a question of law. *IGT v. Bally Gaming Int’l, Inc.*, 659 F.3d 1109 (Fed. Cir. 2011).

#### IV. CLAIM CONSTRUCTION

##### A. The Level of Ordinary Skill in the Art

Gamevice argues:

A POSITA in the field of the asserted patents at the time of the inventions would have had at least a bachelor's degree in computer science, electrical engineering or mechanical engineering, or equivalent experience, and at least two years of industry or research experience in video game, game controller and/or remote controller technology. Additional experience can compensate for a lack of formal education, or vice versa. (Ex. 4, Declaration of David R. Stubben Regarding Claim Construction ("Stubben Dec.") ¶ 14).

Gamevice OCCB at 10. Mr. Stubben opines:

14. In order to understand the disclosure and to make and use the claimed inventions without undue experimentation, one of ordinary skill in the art would need to have a bachelor's degree in computer science, electrical engineering or mechanical engineering, or equivalent experience, and at least two years of industry or research experience in video game, game controller and/or remote controller technology. Additional experience can compensate for a lack of formal education, or vice versa.

Gamevice OCCB, Ex. 4 ("Stubben Dec."), ¶ 14.

Nintendo does not explicitly address the level of ordinary skill in the art. *See generally*

Nintendo Opening Claim Construction Br. ("Nintendo OCCB") (no argument is provided);

Nintendo Reply Claim Construction Br. ("Nintendo RCCB") (same).<sup>9</sup> However, in the "Level of Skill" section of his declaration, Nintendo's expert, Dr. Jonathan Cagan, opined:

22. It is my understanding that the patents and the prior art must be evaluated from the perspective of a hypothetical person of ordinary skill in the art with respect to the subject matter.

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<sup>9</sup> The parties are reminded of Ground Rule 7.c. (which corresponds to GR 11.2 from Order No. 2), which provides that any contention not set forth in detail in the prehearing brief shall be deemed abandoned or withdrawn.



23. In my opinion, a person of ordinary skill in the art would have an undergraduate degree in mechanical, electrical, or computer engineering or other technical training in product design or equivalent work experience in the development of interactive products. Such a person would possess at least one year of experience in developing and/or evaluating interactive products.

See Nintendo OCCB, Ex. A (“Cagan Decl.”) (EDIS Doc. ID No. 651866, Attachment ID No. 1311472), ¶¶ 22-23.

Mr. Stubben’s supplemental declaration opines, *inter alia*, that “one would not achieve ordinary skill in the art with just one year of industry or research experience. In my opinion, at least two years is required.” Stubben Supp. Decl., ¶ 9.

Mr. Stubben’s opinion addresses the skill one would need to make and use the claimed inventions without undue experimentation, while Dr. Cagan declaration does not explicitly explain the basis for his opinion.<sup>10</sup> Thus, Mr. Stubben’s opinion is afforded slightly more weight than Dr. Cagan’s.<sup>11</sup> Neither Mr. Stubben or Dr. Cagan have provided an explanation as to how much experience or training would be necessary in lieu of a bachelor’s degree, so the finding above does not contain an alternative conclusion regarding the “equivalent experience” that the experts have mentioned.

Having considered Mr. Stubben’s and Dr. Cagan’s declarations, and Mr. Stubben’s supplemental declaration, the administrative law judge has determined that a person of ordinary skill in the art would have (1) a bachelor’s degree in computer science or a bachelor’s degree in computer, electrical, or mechanical engineering and (2) at least two years of industry or research

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<sup>10</sup> It appears that neither expert has explicitly addressed the factors that may be considered when determining the level of ordinary skill in the art. See *Environmental Designs*, 713 F.2d at 696.

<sup>11</sup> Both experts appear to have relevant experience, which they presumably drew upon in formulating their respective opinions. See Stubben Decl., ¶¶ 4-10; Cagan Decl., ¶¶ 4-12.

experience (e.g., in a private, public, or academic setting) in a setting that focuses on video game, game-controller and or remote-controller technology. See Stubben Decl., ¶ 14; see also Cagan Decl., ¶ 23.

**B. Agreed Constructions**

The parties have agreed on constructions for the following nine terms:

<b>Claim Term</b>	<b>Agreed Construction</b>
“adjacent”	nearby but not necessarily next to
“communicating with”	touching
“communication link”	a component for the reception and transmission of data
“contact adjacency”	next to and touching
“cooperate” / “cooperating”	work with / working with
“fastening detent”	a catch or lever that is securely held by the retention member
“promotes communication” / “promotes electrical communication”	helps bring communication into being / helps bring electrical [ <i>sic</i> ] communication into being
“retention mechanism”	a machine or mechanical appliance that secures components in a particular relationship
“support[s]” / “supported”	to hold up or serve as a foundation or prop for

See Joint Chart of Agreed and Disputed Constructions (EDIS Doc. ID No. 651076) (Gamevice OCCB, Ex. 1) at 1-2.

**C. Constructions for Disputed Terms**

The parties disputed the following eight terms from the asserted patents:

- 1) “computing device”
- 2) “a pair of confinement structures” / “confinement structure[s]”
- 3) “fastening mechanism[s]”
- 4) “input device”

- 5) “a pair of modules”
- 6) “passageway”
- 7) “structural bridge”
- 8) “retention member”

These terms are discussed below.

**1. “computing device”**

The parties have proposed the following constructions:

Gamevice’s Proposed Construction	Nintendo’s Proposed Construction
plain and ordinary meaning, for example, electronic equipment controlled by a CPU	a tablet computer, smart phone, notebook computer, or other portable computing device

See Gamevice OCCB at 9; Nintendo OCCB at 16; Joint Chart of Agreed and Disputed Constructions at 3. The term “computing device” appears in claims 1-4, 6-8, 10, 17-19 of the ‘713 Patent and claims 1, 2, 4, 6-8, 10, 21 of the ‘498 Patent. The term also appears throughout the specification.

Gamevice argues that the claims treat the term broadly, requiring only that the computing device have sides and a display. See Gamevice OCCB at 9-10. Gamevice further argues that the specification provides examples that the computing device “*may take the form* of a tablet computer, smart phone, notebook computer, or other portable computing device.” *Id.* at 10 (emphasis added by Gamevice, quoting ‘713 Patent at 4:34-36). Gamevice critiques Nintendo’s proposed construction for “improperly limit[ing] this term to one disclosed embodiment[.]” *Id.*<sup>12</sup>

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<sup>12</sup> Gamevice also argues that Nintendo’s proposed construction “improperly read[s] a device ‘back’ into the term [which] is separately claimed in dependent claims.” Gamevice OCCB at 6-7; see also Gamevice RCCB at 6-7 (arguing that Nintendo’s “proposed construction also violates claim differentiation because ‘a tablet computer, smart phone, note-book computer, or other portable computing device’ would read into the independent claims a ‘back’ of the computing

Gamevice explains that it has offered its proposed construction, which it acknowledges is taken from PC Magazine's Encyclopedia, as an example only. *Id.* at 11.

Nintendo's entire argument is:

Nintendo proposes that the term "computing device" be construed according to the specification's explicit definition: "computing device 102 may take the form of a tablet computer, smart phone, notebook computer, or other portable computing device." The history of how that sentence appeared in the specification leaves no doubt that it was intended by the inventors as a definition.

During prosecution of one of the original patents in the family—the '026 patent—the patent examiner rejected the then-pending application based on prior art disclosing a "portable computing device" and game controller combination. The applicants responded, expressly "limit[ing] the invention to include a tablet computer, excluding other computer form factors" and expressly disclaiming smart phones, portable computers, and laptop computers. In a later continuation application—the '912 patent—the applicants added "computing device" as a synonym for "tablet computer." Finally, during prosecution of the '119 patent, the patentees again redefined "computing device," this time to recapture those other computer form factors they previously disclaimed. The inventors defined "computing device to mean "tablet computer, smart phone, notebook computer, or other portable computing device."

In contrast to Nintendo's definition relying on the inventors' explicit definition for the term, Gamevice essentially makes up its own definition to serve its infringement purposes, claiming that "computing device" means "electronic equipment controlled by a CPU." No portion of the specification uses the term that way. In addition to being unsupported in the intrinsic record, Gamevice's proposed construction is hopelessly vague, as virtually every component of a tablet computer or smart phone is controlled by a CPU, and thus, by itself could be a "computing device." This is clearly not contemplated by the specification or claims, and should be rejected.

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device even though a 'back' appears separately in dependent claims.")). Nintendo's construction, however, does not contain the word, "back," and Gamevice has not sufficiently clarified how the alleged addition is improper. In any event, as Nintendo points out, there are other bases for distinguishing the independent and dependent claims. *See* Nintendo RCCB at 3-4.

Nintendo OCCB at 16.<sup>13</sup>

Gamevice replies that the specification and prosecution history do not explicitly define the term as Nintendo suggests, that the prosecution history from the related patents does not relate to a “computing device”—the term at issue, and that the amendments and arguments made in the portions of the prosecution history that Nintendo cites were not made to avoid prior art. Gamevice OCCB at 5-6. Gamevice argues that the specification supports its proposed construction because Figure 6 depicts a computing device that contains a CPU. *Id.* at 7.

Nintendo replies that Gamevice’s proposed construction is unsupported and suggests that the PC Magazine Encyclopedia may not be reliable. Nintendo RCCB at 2. Nintendo then argues that the “*full* entry in the encyclopedia supports Nintendo’s—not Gamevice’s—construction.” *Id.* at 2-3 (emphasis added by Nintendo). Nintendo provides the “full” definition, which follows:

Any electronic equipment controlled by a CPU, including desktop and laptop computers, smartphones and tablets. It usually refers to a general-purpose device that can accept software for many purposes in contrast with a dedicated unit of equipment such as a network switch or router.

*Id.* Nintendo notes that the full entry is “almost identical” to its proposed construction. *Id.* at 3.

For the reasons discussed below, the administrative law judge has determined that disputed claim term “computing device” as recited in the context of the ‘713 and ‘498 Patents, should be construed according to its plain and ordinary meaning, *e.g.*, “electronic equipment controlled by a CPU.”

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<sup>13</sup> All footnotes and emphasis from the parties’ briefs have been omitted from this Order unless otherwise noted.

The claims indicate that the computing device includes tangible structure, at least because claims 1, 10 and 17 teach that the device has sides. Claim 2, which indicates that the computing device is associated with electronics, provides support for the “electronic equipment” aspect of Gamevice’s construction.

The specification also provides support for the construction. In particular, Figure 6 shows that a computing device (102) includes at least a CPU (156). Figure 6 is reproduced below:

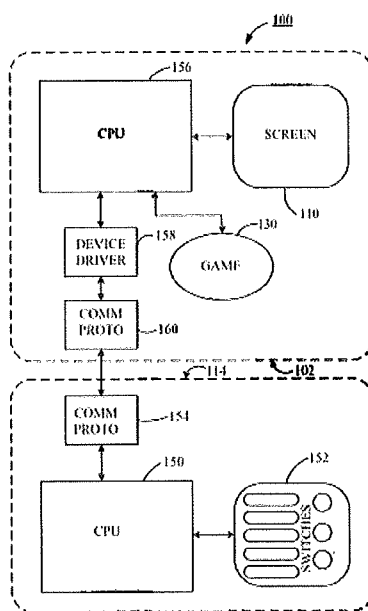


FIG. 6

The specification explains:

FIG. 6 further shows that the computing device 102 preferably includes at least a CPU 156, interacting with the electronic display screen 110, the video game 130, a device driver 158, which facilitates the interaction between the computing device 102 and the input device 114, and a communications protocol 160 providing the communication link between the computing device 102, and the input device 114. In a preferred embodiment, a Universal Serial Bus (USB) communications protocol is utilized. However, as those skilled in the art will recognize, the communications protocol 160 is not limited to a USB protocol.

'713 Patent at 5:60-6:5. This portion of the specification shows that the CPU can controls attendant electronics.<sup>14</sup>

The prosecution history does not support the construction (nor has Nintendo argued that it does). *See Phillips*, 415 F.3d at 1317 (the Federal Circuit has explained that “[i]n addition to consulting the specification, we have held that a court ‘should also consider the patent’s prosecution history, if it is in evidence.’” (quoting *Markman*, 52 F.3d at 980)). Indeed, Nintendo has not sufficiently explained how the prosecution history requires its proposed construction. *See Nintendo OCCB* at 16-17.

With regard to extrinsic evidence, the administrative law judge notes that the parties have not cited to the expert declarations in relation to this term.

Nintendo’s proposed construction improperly seeks to import a limitation from the specification (*e.g.*, the tablet computer, smart phone, notebook computer, or other portable computing device disclosed at ‘713 Patent at 4:34-36) into the claim. Nintendo’s proposed construction also lacks clarity insofar as Nintendo has not explained what could constitute an “other portable computing device[.]” Moreover, Nintendo’s assertions that the specification explicitly defines the term and that the prosecution history supports finding disclaimer fail to satisfy the exacting standards required to find a special definition or disclaimer. *See Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (“To act as its own lexicographer, a patentee must “clearly set forth a definition of the disputed claim term” other than its plain and ordinary meaning.”); *see also GE Lighting Sols., LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014) (“To act as its own lexicographer, a patentee must “clearly set

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<sup>14</sup> To the extent extrinsic evidence is necessary, the PC Magazine definition provides support for the construction.

forth a definition of the disputed claim term,” and “clearly express an intent to [re]define the term.”); *Luminara Worldwide, LLC v. Liown Elecs. Co.*, 814 F.3d 1343, 1353 (Fed. Cir. 2016) (“The standards for finding lexicography and disavowal are ‘exacting.’”). With regard to special definition, Nintendo has not shown that the inventor intended to define the term as Nintendo suggests, at least because there is no punctuation or words indicating a particular definition. With regard to disclaimer, Nintendo’s sparse argument does not explain how the three related applications are relevant to the disputed term or how the amendments and arguments presented in the file wrappers amount to a disclaimer in the asserted patents.

Nintendo’s Notice of Additional Evidence claims that “Gamevice’s definition of ‘computing device’ is arbitrary and unworkable.” Notice of Additional Evidence, Ex. 1 at 5-6. The exhibit cites 15 lines of deposition testimony, with the questioning pertaining to whether “bezel and housing” could meet the definition of a computing device. *See id.* Ex. 1 at 5-6. The administrative law judge has reviewed the evidence, and has determined that it goes more to infringement issues in this investigation. Indeed, it is noted that Nintendo’s opening and reply claim construction briefs do not mention bezels or housings.

\* \* \*

Accordingly, the administrative law judge has determined that disputed claim term “computing device” as recited in the context of the ‘713 and ‘498 Patents, should be construed according to its plain and ordinary meaning, *e.g.*, “electronic equipment controlled by a CPU.”



2. “a pair of confinement structures” / “confinement structure[s]”

The parties have proposed the following constructions:

Gamevice’s Proposed Construction	Nintendo’s Proposed Construction
No construction necessary	This term “must be construed under 35 U.S.C. § 112(f).”  <i>Function:</i> varies by claim  <i>Structure:</i> for all claims, “Limited to #316 Figs. 16, 17, 19, 20, 21, 22, 23.”

See Gamevice OCCB at 14-15; Nintendo OCCB at 17, 20-23; Joint Chart of Agreed and Disputed Constructions at 3-6.<sup>15</sup> The term “confinement structure” appears in claims 1, 9, 16,

<sup>15</sup> In the Joint Chart of Agreed and Disputed Constructions, Nintendo presents pertinent functions on a claim-by-claim basis:

Claim	Nintendo’s Proposed Function
‘713 Patent, claim 1	Function: (1) confining the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device; and (2) providing a first communication link, and providing a second communication link.
‘713 Patent, claim 16	Function: (1) confining the first communication link; and (2) confining the second communication link.
‘713 Patent, claim 17	Function: (1) confining the first communication link; (2) confining the second communication link; and (3) engaging the computing device on at least two opposing sides, but not more than three sides of the sides of the computing device.
‘498 Patent, claim 1	Function: (1) interacting with the computing device; and (2) comprising a communication link.
‘498 Patent, claim 22	Function: (1) supporting a first communication link; and (2) supporting a second communication link.

See Joint Chart of Agreed and Disputed Constructions at 3-6. Gamevice’s alternative constructions, offered under § 112(f), identify the exact same functions as Nintendo does. *Id.*; see also Gamevice OCCB at 14-16; Nintendo OCCB at 19 (“the parties agree about the recited

17, and 20 of the '713 Patent and claims 1, 9, and 22 of the '498 Patent. The term also appears throughout the specification (particularly in relation to the description of Figures 16, 17, 19, and 20-23).

Gamevice argues that no construction is necessary and that § 112(f) does not apply. *See* Gamevice OCCB at 16-21. Gamevice argues, in part:

Complainant's position is that because the claim language does not explicitly invoke § 112(f) and is not written in standard means-plus-function format (*i.e.*, use the words "means for"), and because the "confinement structure" would be understood by a POSITA as a structural limitation, Respondents' argument must fail.

...

A POSITA reading the claim terms in light of the shared specification of the Asserted Patents would also understand the term "confinement structure" to connote structure. (Ex. 4, Stubben Dec. ¶¶ 41-47). Figure 16 shows an example of confinement structures 316 "which are preferably adjacent to and confining the computing device 302 on at least two opposing sides of the plurality of sides 304 of the computing device 302." (Ex. 2, '713 patent at 9:28-31).

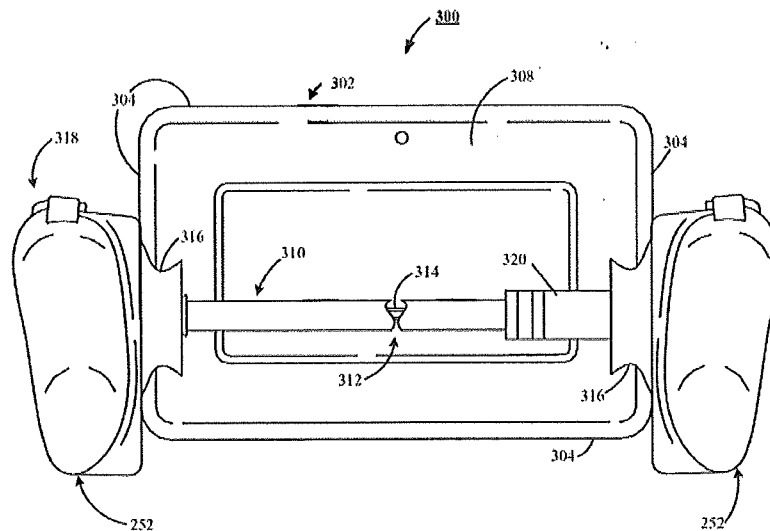


FIG. 16

functions"). Having reviewed the asserted patents, the undersigned accepts the undisputed functions.

*Id.* at 16-17, 20.

Nintendo argues that claims 1, 16, and 17 of the ‘173 Patent and claims 1 and 22 of the ‘418 Patent “recite ‘confinement structures’ as pure function without describing any structure that performs the recited functions” and concludes that the term “confinement structure” “must be construed under 112(f).” Nintendo OCCB at 20, 22. Nintendo discusses the functions performed by the confinement structures as follows:

The claim term “a pair of confinement structures” and “confinement structure[s]” is used in ‘713 patent, Claims 1, 16, and 17, and ‘498 patent, Claims 1 and 22. These claims recite “confinement structures” as pure function without describing any structure that performs the recited functions. The asserted claims ascribe a couple of functions to the confinement structures. For instance, Claim 1 of the ‘713 patent describes two functions performed by the confinement structures: (1) “confin[ing] the computing device on at least two opposing sides”; and (2) “provid[ing] a first [and second] communication link.” Other claims recite similar functions like, “support[ing]” the communication link or “interact[ing]” with the computing device.

Nintendo OCCB at 20-21; *see also id.* at 22 (discussing function in the context of invalidity).

Nintendo then argues that the claims are indefinite because they do not sufficiently disclose pertinent structure:

The term “confinement structure,” by itself, does not denote any particular and definite structure or even a class of definite structures in the way, say, “screw” does. Instead, “confinement structure” is a coined term, used as a generic stand-in for any structure that performs the function of confining, supporting, interacting, or providing. “Structure” is a classic nonce word like “device,” “mechanism,” or “element,” that could mean anything from a skyscraper to a cell membrane—each can be described as a structure. Defining something as structural merely because it uses the word “structure” in the name is, at best, circular logic—akin to arguing “I win” because I said “I win.” Appending “confinement” to “structure” does not make the resulting term more definite, as “confinement” only serves to identify the function the generic “structure” performs. Indeed, “confinement structure” could be

replaced by “confinement means” and the claims would suffer no loss. . . .

*Id.* at 20-21. Nintendo then argues that apart from the generic shapes shown as “element 316 in Figures 16, 17, 19, and 20-23,” the “specification fails to describe any structure by which the confinement structures supposedly provide, support, or confine the multiple communication links as required by the recited functions.” *Id.* at 23.

Gamevice replies, in part, that “a POSITA would understand ‘confinement structures,’ in the context of the claims and the specification of the Asserted Patents, to connote sufficiently definite structure to avoid the application of § 112(f).” Gamevice RCCB at 9. Gamevice further replies:

Respondents also argue that “confinement structure” is “used as a generic stand-in for any structure that performs the function of confining, supporting, interacting, or providing.” (RB at 21). But again, the claim language provides a series of structural limitations that the “confinement structure” must meet to satisfy the claims.

*Id.* Gamevice relies on *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1230 (Fed. Cir. 2011) in arguing that the confinement structures’ interaction with other structural components shows that the “structures” are structural in nature. *Id.* at 8-9.

Nintendo replies that Gamevice has not offered a proposed construction and that “neither Gamevice nor its expert” have described what particular structure constitutes a confinement structure:

. . . Gamevice and its expert merely point-out that the claims require the confinement structures—whatever they are—to be adjacent to the computing device, provide communication links, and confine the computing device. But being adjacent, confining, and providing a communication link are the recited functions performed by the confinement structures, not the structure of the “confinement structures.” Nor does the fact that a structural bridge runs between the confinement structures, that fastening mechanisms secure the confinement structures, or that control

modules are attached to the confinement structures provide a structural definition for what confinement structures are. Stating where the “confinement structures” are or what they connect to does not provide structure for them.

Nintendo RCCB at 9. Nintendo relies on *Diebold Nixdorf, Inc. v. Int’l Trade Comm’n*, 899 F.3d 1291 (Fed. Cir. 2018). *Id.*

For the reasons provided below, the administrative law judge has determined to construe “confinement structures” as “components that hold a computing device.”

Gamevice’s “no construction necessary” proposal is not helpful because the specification does not define the term and because “confinement structure” does not have a commonly understood meaning to one of ordinary skill in the art. *See, e.g.*, Stubben Decl., ¶¶ 31-47 (Mr. Stubben does not identify a commonly understood meaning that is associated with the term); Cagan Decl., ¶ 75 (“‘confinement structure’ is not a term of art that a person of ordinary skill would be familiar with.”). Further, neither Gamevice nor Mr. Stubben has cited any extrinsic evidence—*e.g.*, prior patents, prior articles, pictures of prior products, product manuals, marketing materials, bill of materials, parts lists, applicable governmental regulations (if any), relevant industry standards, or dictionaries—to show that the term has ever been used in relation to a portable gaming console system.<sup>16</sup> Thus, because the term does not have a commonly understood meaning, the administrative law judge finds that a construction is necessary to assist in resolving the parties’ dispute. *See O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360-62 (Fed. Cir. 2008).

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<sup>16</sup> Indeed, neither Gamevice nor Mr. Stubben has cited any extrinsic evidence showing that the term has ever been used before (in any context). Nintendo, on the other hand, has identified “confinement structures” in two prior art products, which suggests that the term is not indefinite. *See, e.g.*, Nintendo OCCB at 15 (identifying confinement structures in the Moga and Phonejoy).

Nintendo’s proposed construction—that the term is indefinite for failing to disclose structure—is also unhelpful because the figures clearly depict a confinement structure, and the specification provides sufficient description of confinement structures. In particular, Nintendo’s construction, and the arguments presented for it, do not extend sufficient weight to the teachings of Figures 16, 17, 19, and 20-23, which clearly depict the confinement structures. Additionally, Nintendo’s complaint that the specification shows “generic shapes” that do not provide “any guidance as to a structure” invokes an overly rigorous demand for certainty. *See Nautilus*, 134 S. Ct. at 2128-29 (The Supreme Court has explained that “the definiteness requirement must take into account the inherent limitations of language” and that the definiteness requirement “mandates clarity, while recognizing that absolute precision is unattainable.”); *see also In re Packard*, 751 F.3d 1307, 1313 (Fed. Cir. 2014) (The definiteness “requirement is not a demand for unreasonable precision. The requirement, applied to the real world of modern technology, does not contemplate in every case a verbal precision of the kind found in mathematics.”). Thus, as both parties have presented untenable proposals, the administrative law judge has analyzed the term below.

The claims and the specification do not provide an explicit definition of the term “confinement structure.” The claims, however, indicate that a confinement structure is a physical component of the claimed apparatus that holds the computing device. For example, claim 1 indicates that the confinement structure is a component because (1) the claims require it to be “adjacent to” two opposing sides of the computing device; (2) the confinement structure “provides” a communication link (which the parties agree is “a *component* for the reception and transmission of data” (emphasis added)); and (3) the confinement structure is a “separate and distinct structure[] from the structural bridge” that “form[s] no structural portion of the structural

bridge.” ‘713 Patent at 17:55-62, 18:21-27. The claim’s use of the phrase “adjacent to and confining the computing device” is consistent with the confinement structure as a component that holds the computing device. Furthermore, the claims do not use the word “means,” which is one indication that the component is not functionally claimed.

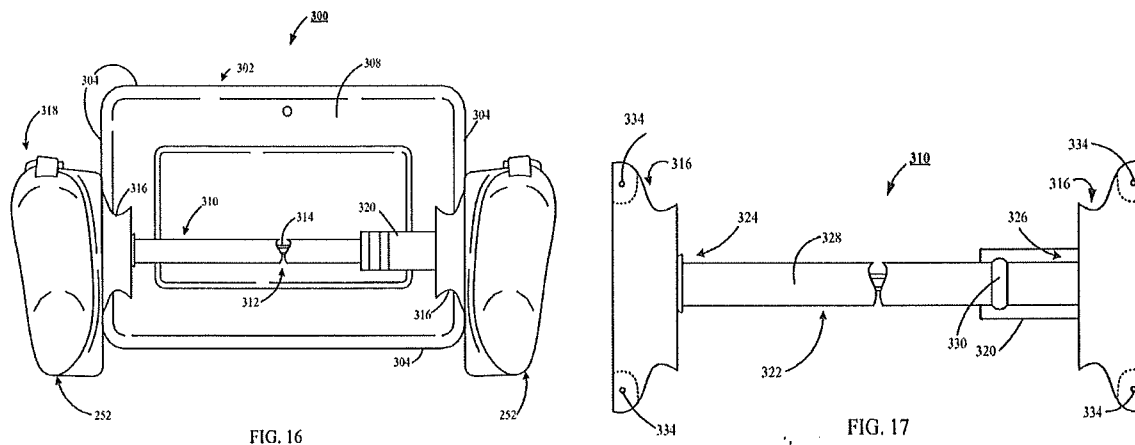
The specification also indicates that the confinement structure is a component that holds the computing device. The specification discusses confinement structures in detail:

FIG. 17 shows a top view of the communication port 310 that preferably includes a structural bridge 322, securing the pair of confinement structures 316, one to the other. The structural bridge 322 is preferably secured to a select confinement structure of the pair of confinement structures 316 by way of a solid connection 324, and to remaining confinement structure of the pair of confinement structures 316 by way of a slip fit 326. The fastening mechanism 320, is preferably securely fastened to [] a conduit 328, of the structural bridge 322, by way of a[n] anchor member 330, the anchor member 330 is preferably positioned in a location adjacent the slip fit 326, and by way of an attachment member 332 (shown in FIG. 18), securely attached to the remaining confinement structure of the pair of confinement structures 316. The attachment member 332 is preferably positioned in a location adjacent the slip fit 326. Operation of the fastening mechanism 320 facilitates an expand and contract of the distance between the pair of confinement structures 316. The expansion and contraction of the distance between the pair of confinement structures 316, facilitates placement of the computing device 302 between the pair of confinement structures 316, the application of sufficient compressive load being placed on the computing device 302 to securely **hold the computing device between the pair of confinement structures 316**, and an ability to remove the compressive load and allow removal of the computing device from the communication port 310.

FIG. 17 further shows that each of the pair of confinement structures 316, provide a pair of controller docking pins 334, while FIG. 18 shows that each of the pair of confinement structures 316 further provide a computing device cradle 336, and that a select confinement structure of the pair of confinement structures 316 provides a computing device interface feature 338. The interface feature 338, facilitates at least, but not limited to, the provision of power to the computing device 302.

'713 Patent at 9:53-10:21 (emphasis added). The above excerpt of the specification indicates that the confinement structures are physical components in light of the discussion concerning "slip fit," fastening mechanism, attachment member, and controller docking pins. Further, the above excerpt informs the reader, and a person of skill in the art, that a confinement structure holds the computing device, which is reflected in the construction.<sup>17</sup>

The Figures also inform the reader, and a person of skill in the art, that a confinement structure is a component that holds the computing device. Figures 16 and 17, which show the confinement structures, are reproduced below:



<sup>17</sup> The specification also indicates that the terms used have a broad general meaning:

It is to be understood that even though numerous characteristics and configurations of various embodiments of the present invention have been set forth in the foregoing description, together with details of the structure and function of various embodiments of the invention, this detailed description is illustrative only, and *changes may be made in detail, especially in matters of structure and arrangements of parts within the principles of the present invention to the full extent indicated by the broad general meaning of the terms in which the appended claims are expressed.* For example, the particular elements may vary depending on the particular computing device without departing from the spirit and scope of the present invention.

'713 Patent at 17:32-44 (emphasis added).



As shown in Figure 16, the confinement structures clearly hold the computing device. And as shown in Figures 16 and 17, the confinement structures are apparatus components that are not limited to a specific shape (the contours of the confinement structures differ in the figures).

The parties have not identified any portions of the prosecution history that apply to the term “confinement structures.” A review of the prosecution history attached to the complaint does not appear to include a rejection stating that a “confinement structure” was known in the art.<sup>18</sup> Thus, the prosecution history does not elucidate the meaning of the disputed term.

As noted above, the parties submitted expert declarations opining on the term. *See, e.g.*, Stubben Decl., ¶¶ 31-47; Cagan Decl., ¶ 75; Stubben Supp. Decl., ¶¶ 25-30. The declarations are extrinsic evidence and are viewed with caution for the reasons discussed in *Phillips*. *See Phillips*, 415 F.3d at 1318-19. Additionally, during the *Markman* hearing, Nintendo’s counsel acknowledged that the “ordinary meaning of the word ‘confine,’ exactly as it’s used here, is to hold in place, and that’s how it was used throughout the specification.” *See* Tr. (Kinsel) 37; *see also* Tr. (Mathews) 31-33 (conceding that “holding” “may be” a purpose of the confinement structure and arguing that the confinement structure “provides a boundary”). Nintendo’s Notice of Additional Evidence cites a portion of Mr. Stubben’s deposition transcript where Mr. Stubben testifies that the confinement structure encloses or partially encloses another component, which comports with the “holding” aspect of the construction, as “holding” and “enclosing” have similar meanings. *See* Notice of Additional Evidence, Ex. 1 at 1. Thus, nothing in the expert

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<sup>18</sup> Ex. 12 to the Haskins Decl. is an office action from a related patent. The rejection indicates that U.S. Patent No. 7,733,637 (Lam) U.S. Pat. Pub. No. 2010/0081505 (Alten) and may disclose “side structures [that are] adjacent to and confining the tablet computer[.]” Ex. 12 at 5-7. Neither party, however, relates this rejection to “confinement structures.”

declarations, counsel's arguments, or Mr. Stubben's deposition transcript appears to counsel against construing "confinement structures" as "components that hold a/the computing device."

Further, although Nintendo's invalidity arguments are not extrinsic evidence as outlined in *Phillips*, the arguments indicate that "confinement structures" existed in the prior art (which can be extrinsic evidence). See Nintendo OCCB at 15 (identifying confinement structures in the Moga and Phonejoy). Nintendo's ability to identify confinement structures in the prior art suggests that the term is not indefinite.

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Accordingly, the administrative law judge has determined that disputed claim term "confinement structures" as recited in the context of the '713 and '498 Patents, should be construed to mean "components that hold a computing device."

\* \* \*

3. “fastening mechanism[s]”

For claims 1 and 16 of the ‘713 Patent and claim 1 of the ‘498 Patent, the parties have proposed the following constructions:

Gamevice’s Proposed Construction	Nintendo’s Proposed Construction
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not Indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.</p> <p><b>Structure:</b> ‘713 patent - 9:47-10:12, 11:3-5, 12:32-13:16, 15:47-16:20; Figs. 16 (item 320), 17 (item 320), 21 (item 320), 24 (item 320), 25 (item 320), 26 (item 448), 37 (item 548); claims 2, 9, 10, 16, 20, and equivalents thereof</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.</p> <p><b>Structure:</b> Limited to # 320 Fig. 16, soft draw latch provided by Southco, of 210 N. Brinton Lake Rd, Concordville, PA 19331, Fig. 24 (and known equivalents thereof).</p>

See Gamevice OCCB at 21-22; Nintendo OCCB at 17, 23-29; Joint Chart of Agreed and Disputed Constructions at 6-10.

For claim 10 of the ‘713 Patent, the parties have proposed the following constructions:

Gamevice’s Proposed Construction	Nintendo’s Proposed Construction
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not Indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> Unifying the pair of modules</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> Unifying the pair of modules with the structural bridge.</p> <p><b>Structure:</b> Limited to # 448 Fig 26, and # 548 Fig. 37; indefinite because the structure “is not clearly linked to</p>

<p>with the structural bridge.</p> <p><b>Structure:</b> ‘713 patent - 9:47-10:12, 11:3-5, 12:32-13:16, 15:47-16:20; Figs. 16 (item 320), 17 (item 320), 21 (item 320), 24 (item 320), 25 (item 320), 26 (item 448), 37 (item 548); claims 1, 2, 9, 16, 20, and equivalents thereof</p>	<p>performing the function of unifying the two control modules (or the pair of modules) with the structural bridge”</p>
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See Gamevice OCCB at 21-22; Nintendo OCCB at 17, 23-29; Joint Chart of Agreed and Disputed Constructions at 6-10.

The term “fastening mechanism” (in the singular and plural) appears in claims 1, 9, 10, 16, and 20 of the ‘713 Patent and claims 1, 9, 21, and 22 of the ‘498 Patent. The specification also discusses fastening mechanisms (e.g., 320, 448, 548), which are shown at least in Figures 16-18, 21, 24-26, and 37.

Gamevice’s entire argument is:

The claim term “fastening mechanism” appears in claims 1-4, 6-8, 10, 16-19 of the ‘713 patent and claims 1-2, 4, 6, 8, 21-22 of the of the ‘498 patent. In all but two of these claims, the “fastening mechanism” is generally described as securing as securing the confinement structures to their respective sides of the structural bridge. In claim 10 of the ‘713 patent and claim 21 of the ‘498 patent that do not include the term “confinement structures” the “fastening mechanism” is described as “unif[ying] the pair of modules with the structural bridge.”

The dispute between Complainant and Respondents involves whether a “fastening mechanism” as recited in the claims of the Asserted Patents is a means-plus-function limitation governed by § 112(f). Because the claim language does not explicitly use the term “means” and because “fastening mechanism” as used in the claims would be understood by a POSITA as a structural limitation, the Court should find that Respondents have not met their burden and that § 112(f) does not apply.

The exact same term was found not to be within the scope of 35 U.S.C. § 112(6), the pre the pre-American Invents Act equivalent of § 112(f), in *Blackbird Tech LLC v. ELB Electronics*, Case No. 15-cv-56, 2016 WL 7451622 (D. Del. Dec. 28, 2016) (rev’d on

other grounds, 2018 WL 3421094 (Fed. Cir. July 16, 2018)). There, the court was asked to determine whether the claim phrase “a fastening mechanism for securing the attachment surface of the lighting apparatus to the illumination surface” was a means-plus-function claim. *Id.* at \*4. Although the court acknowledged that under *Williamson*, 792 F.3d at 1350, the term “mechanism” “may be used in a claim in a manner that is tantamount to using the word ‘means’...”, it nevertheless found “the term ‘fastening’ provides sufficient structure when modifying the term mechanism to place the claim outside the scope of [§ 112(f)].” *Id.* at \*5. It further explained:

A person of ordinary skill in the art would understand a “fastening mechanism” to be a fastener. Fasteners are a generally understood class of physical structures. “Fastening mechanism” is sufficient structure even though it invokes a class of structures, rather than a specific structure, and it uses a functional name to do so.

*Id.* Similarly, in *Greenberg*, the Federal Circuit explained why the similar term “detent mechanism” is also not a means-plus-function term:

It is true that the term “detent” does not call to mind a single well-defined structure, but the same could be said of other commonplace structural terms such as “clamp” or “container.” What is important is not simply that a “detent” or “detent mechanism” is defined in terms of what it does, but that the term, as the name for structure, has a reasonably well understood meaning in the art.

91 F.3d at 1583.

The same result should follow here. A skilled artisan would reasonably understand in the context of the claims and the specification of the Asserted Patents that “fastening mechanism” has sufficiently definite meaning as the name for structure that can secure a confinement structure or a control module to the structural bridge. (Ex. 4, Stubben Dec. ¶¶ 51-54). The Court should find that “fastening mechanism” is not a means-plus-function term.

Gamevice OCCB at 22-23.<sup>19</sup> In a footnote, Gamevice adds:

Respondents agrees with Complainant that the claim terms “fastening detent” and “retention mechanism” are not means-plus-function terms. There is no sound reason for Respondents to seek a different outcome with respect “fastening mechanism.” The only apparent difference is that “fastening mechanism” appears in more asserted claims.

*Id.* at 23, n.6.

Nintendo argues, in part:

The claims recite “fastening mechanism” as pure function, reciting two functions the “fastening mechanisms” perform: (1) securing the confinement structures to the structural bridge (Claims 1, 16 of the ‘713 patent; Claims 1 and 22 of the ‘498 patent); and (2) unifying either the “control modules” or the “pair of modules” with the structural bridge (Claim 10 of the ‘713 patent; Claim 21 of the ‘498 patent). Beyond performing these functions, the claims fail to offer any structural definition of what a fastening mechanism is.

Nintendo OCCB at 24. Nintendo further argues:

‘713 patent, Claims 1 and 16, and ‘498 patent, Claims 1 and 22 requires the fastening mechanisms to secure the confinement structures to the structural bridge, while ‘713 patent, Claim 10, and ‘498 patent, Claim 21 requires the fastening mechanisms to “unify” the control modules (or the pair of modules) with the structural bridge. As shown below, the specification does disclose structure associated with fastening the confinement structures to the structural bridge as recited in ‘713 patent, Claims 1 and 16 and ‘498 patent, Claims 1 and 22. But the specification does not disclose a structure capable of performing the functions recited in ‘713 patent, Claim 10 and ‘498 patent, Claim 21.

*Id.* at 25. As noted above, Nintendo identifies fastening mechanism 320, which is described as a soft draw latch, as “the only structure linked to fastening[.]” *Id.* at 25-26. Nintendo argues that

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<sup>19</sup> Gamevice’s statement that “The claim term ‘fastening mechanism’ appears in claims 1-4, 6-8, 10, 16-19 of the ‘713 patent and claims 1-2, 4, 6 2, 4, 6-8, 21-22 of the of the ‘498 patent.” appears to be wrong.

“There is no structure disclosed to perform the functions recited in ‘713 patent Claim 10 and 498 patent, Claim 21.” *Id.* at 27.

Gamevice’s entire reply is:

**1. “Fastening Mechanism” is not a Means-Plus-Function Term**

Respondents have not rebutted the presumption (and considerable authority) that § 112(f) does not apply to the term “fastening mechanism,” which does not use the term “means” and is not written in standard means-plus-function format (*i.e.*, “fastening mechanism for”).

This term conveys to a POSITA a variety of fastening structures. Respondents argue that “fastening mechanism” “does not denote to a [POSITA] any particular structure other than one that performs the function of fastening.” (RB at 25). This precise argument has been squarely rejected by a district court. *See Blackbird Tech. LLC v. ELB Elec.*, Case No. 15-cv-56, 2016 WL 7451622, at \*4-5 (D. Del. Dec. 28, 2016) (rev’d on other grounds, 895 F.3d 1374 (Fed. Cir. 2018)). The Federal Circuit found a similar claim limitation reciting “a connector assembly for connecting each pair of adjacent support members” to not be a means-plus-function limitation because it did not use the term “means for,” and intrinsic evidence and dictionary definitions showed that the term “connector” was a noun that connoted a meaning to a generic structure. *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1359-61 (Fed. Cir. 2004); *see also Personalized Media*, 161 F.3d at 705 (“[N]either the fact that a ‘detector’ is defined in terms of its function, nor the fact that the term ‘detector’ does not connote a precise physical structure in the minds of those of skill in the art detracts from the definiteness of structure. Even though the term ‘detector’ does not specifically evoke a particular structure, it does convey to one knowledgeable in the art a variety of structures known as ‘detectors.’”)

**2. “Fastening Mechanism” is Not Indefinite Under § 112(f)**

Respondents concede that the element 320 is the corresponding structure for the alleged function performed by the “fastening mechanism” recited in claims 1 and 16 of the ‘713 patent, claims 1 and 22 of the ‘498 patent, and therefore the term is not indefinite as used in those claims or their dependents.

Respondents argue, however, that fastening mechanism 448 is not linked to performing the function of unifying the two control

modules with the structural bridge, and therefore “fastening mechanisms” is indefinite in Claim 10 of the ‘713 patent and Claim 21 of the ‘498 patent. (RB at 27, 29). But, as explained by Complainant’s expert, the specification links fastening mechanisms 448 and 548 with that function. (Ex. A, Stubben Supp. Decl. ¶¶32-37).

Gamevice RCCB at 11-12.

Nintendo’s Reply contends that Mr. Stubben’s declaration shows that the term “fastening mechanism” is functional because it “merely list[s] examples of possible structures” rather than explaining which structures fall within the term. Nintendo RCCB at 11-12.

For the reasons discussed below, the administrative law judge has determined that the term “fastening mechanism” is subject to § 112(f). For claims 1 and 16 of the ‘713 Patent and claim 1 of the ‘498 Patent, the relevant functions and the corresponding structure are:

- **Function:** (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.
- **Structure:** a soft draw latch and equivalents thereof.

For claim 10 of the ‘713 Patent, the relevant function and corresponding structure are:

- **Function:** unifying the pair of modules with the structural bridge.
- **Structure:** undeterminable.

**a) Whether § 112(f) Applies**

As a threshold issue, the administrative law judge must determine whether § 112(f) applies to the disputed term. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347-48 (Fed. Cir. 2015). The Federal Circuit has explained:

In making the assessment of whether the limitation in question is a means-plus-function term subject to the strictures of § 112, para. 6, our cases have emphasized that the essential inquiry is not merely the presence or absence of the word “means” but whether the words of the claim are understood by persons of ordinary skill in



the art to have a sufficiently definite meaning as the name for structure.

*Id.* at 1348; *see Diebold Nixdorf, Inc. et al. v. Int’l Trade Comm’n*, Case No. 2017-2553 (Fed. Cir. Aug. 15, 2108); *see also* The Manual of Patent Examining Procedure § 2181 (Ninth Edition, Revision 08.2017, Last Revised January 2018) (“To determine whether a word, term, or phrase coupled with a function denotes structure, examiners should check whether: (1) the specification provides a description sufficient to inform one of ordinary skill in the art that the term denotes structure; (2) general and subject matter specific dictionaries provide evidence that the term has achieved recognition as a noun denoting structure; and (3) the prior art provides evidence that the term has an art-recognized structure to perform the claimed function.”).

Here, the term “fastening mechanism” is functional because a person of ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for a structure.

Claims 1 and 16 of the ‘713 Patent and claim 1 of the ‘498 Patent use the “fastening mechanism” term to describe a result—securing confinement structures—that must be achieved. These claims (along with the other claims in the patents) do not require the fastening mechanism to include any particular structure. In particular, the phrases describing the term “fastening mechanism” (in all of the claims of both patents) are verb phrases.<sup>20</sup> Thus, the claims do not suggest that “fastening mechanism” of claims 1 and 16 of the ‘713 Patent and claims 1 and 22 of the ‘498 Patent carries a sufficiently definite meaning as the name for structure.

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<sup>20</sup> The parties have not addressed claim 9 of the ‘713 Patent or claim 9 of the ‘498 Patent. These claims require the fastening mechanism play a role in forming a communication port. *See, e.g.*, ‘713 Patent at 18:57-60.

Similarly, claim 10 of the '713 Patent also uses the “fastening mechanism” term to describe a result—unifying modules—that must be achieved. None of the claims (in all of the claims of both patents) require the unifying fastening mechanism to include any particular structure. Further, the “unifying” phrases of claim 10 are verb phrases, which indicates the term “fastening mechanism” is functional. Thus, the claim does not suggest that “fastening mechanism” of claim 10 of the '713 Patent carries a sufficiently definite meaning as the name for structure.<sup>21</sup>

The specification also lacks any meaningful discussion of the fastening mechanism that would indicate the term has a sufficiently definite meaning as the name for structure. Indeed, apart from a latch, the specification does not provide any examples of fastening mechanisms that would confirm the term is structural.

With regard to the prosecution history, Gamevice’s counsel represented that “There were no discussion in the file history about distinguishing or disparaging prior art over other prior art fastening mechanisms.” Tr. (Mathews) 10.

The extrinsic evidence that Gamevice relies on—Mr. Stubben’s declarations—is viewed with caution for the reasons discussed in *Phillips*. See *Phillips*, 415 F.3d at 1318-19. Mr. Stubben opines that a fastening mechanism could include:

... screws and corresponding threaded holes to accommodate the screws, pins and corresponding holes that accommodate the pins, rivets and corresponding holes that accommodate the rivets, cam locks and corresponding holes that accommodate the cam locks, a

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<sup>21</sup> Gamevice’s footnoted argument (see Gamevice OCCB at 23, n.6) concerning the “retention mechanism” and the “fastening detent” involve terms that are distinguishable from “fastening mechanism.” Additionally, the administrative law judge does not need to construe the “retention mechanism” and the “fastening detent” terms to resolve the disputed term, “fastening mechanism.” See *O2 Micro*, 521 F.3d at 1360.

slot and key, and other similar types of fasteners, as well as other methods for fastening including welding and heat staking.

Stubben Decl., ¶ 51; *see also id.*, ¶ 53 (presenting the same list as “unifying” structures). Mr. Stubben’s declaration, however, is unsupported. For example, the declaration lacks any discussion of whether any prior art associated the term “fastening mechanism” with the identified structures. Mr. Stubben’s supplemental declaration is not helpful in determining whether § 112(f) applies because it simply refers back to his opening declaration. *See* Stubben Supp. Decl., ¶ 31.<sup>22</sup>

Finally, the administrative law judge notes that Gamevice’s counsel represented that the fastening mechanism could even include scotch tape. *See* Tr. (Mathews) 8-9 (“It could include Scotch tape . . . [although] Scotch tape would probably not be the fastener of choice[.]”). Counsel’s argument underscores the reality that the “fastening mechanism” term lacks a sufficiently definite meaning as the name for structure.

**b) Identification of Function**

In *Williamson*, the Federal Circuit explained:

Construing a means-plus-function claim term is a two-step process. The court must first identify the claimed function. *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012). Then, the court must determine what structure, if any, disclosed in the specification corresponds to the claimed function. Where there are multiple claimed functions, as we have here, the patentee must disclose adequate corresponding structure to perform all of the claimed functions. *Id.* at 1318-19. If the patentee fails to disclose adequate corresponding structure, the claim is indefinite. *Id.* at 1311-12.

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<sup>22</sup> Nintendo’s Notice of Additional Evidence claims that Mr. Stubben’s testimony further shows that this term is functional. *See* Notice of Additional Evidence, Ex. 1 at 2-5. The administrative law judge has reviewed the evidence and determined that it supports Nintendo’s arguments and the construction provided in this Order.

792 F.3d 1339 at 1351-52.

Here, the parties agree on the relevant functions if § 112(f) applies to the “fastening mechanism” terms. For claims 1 and 16 of the ‘713 Patent and claims 1 and 22 of the ‘498 Patent, the parties agree the relevant functions are: (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge. *See* Gamevice OCCB at 21-22; Nintendo OCCB at 17, 23-29; Joint Chart of Agreed and Disputed Constructions at 6-10. For claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent, the relevant function is unifying the pair of modules with the structural bridge. *Id.* The administrative law judge notes that these functions, which appear in the claims, are undisputed. *See, e.g.*, ‘713 Patent at 18:4-8; 19:12-13; 20:9-12; 20:48-50; ‘498 Patent at 18:4-8; 20:52-61; 21:16-22:2. Having reviewed the asserted patents, the undersigned accepts the undisputed functions.

**c) Identification of Structure**

In *Williamson*, the Federal Circuit explained:

Structure disclosed in the specification qualifies as “corresponding structure” if the intrinsic evidence clearly links or associates that structure to the function recited in the claim. [*Noah Sys.*] (citing *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997)). Even if the specification discloses corresponding structure, the disclosure must be of “adequate” corresponding structure to achieve the claimed function. *Id.* at 1311-12 (citing *In re Donaldson Co.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994) (en banc)). Under 35 U.S.C. § 112, paras. 2 and 6, therefore, if a person of ordinary skill in the art would be unable to recognize the structure in the specification and associate it with the corresponding function in the claim, a means-plus-function clause is indefinite. *Id.* at 1312 (citing *AllVoice Computing PLC v. Nuance Commc’ns, Inc.*, 504 F.3d 1236, 1241 (Fed. Cir. 2007)).

792 F.3d 1339 at 1352.

For claims 1 and 16 of the ‘713 Patent and claim 1 of the ‘498 Patent, the corresponding structure is a soft draw latch and equivalents thereof. The specification explains that the fastening mechanism can be a soft draw latch. *See, e.g.*, ‘713 Patent at 9:47-52 (“In one embodiment, a soft draw latch, such as that provided by Southco, of 210 N. Brinton Lake Road Concordville, P.A. 19331, have been shown to be a useful fastening mechanism 320.”). The specification also generally associates latches with the fastening mechanism. *Id.* at 11:3-5 (“FIG. 24 provides a more insightful presentation of a latch portion 358, of the fastening mechanism 320, relative to the attachment member 332, of the fastening mechanism 320.”). Limiting the corresponding structure to a Southco soft draw latch, as Nintendo suggests, does not give significant weight to the disclosure pertaining to Figure 24.

In contrast, for claim 10 of the ‘713 Patent, the structure corresponding to the function cannot reasonably be determined. In particular, the structure must correspond to the function, *i.e.*, “unifying the pair of modules with the structural bridge.” The specification, however, fails to describe how any structure unifies a module with the structural bridge. Indeed, Gamevice has not explicitly named or proposed any structure that performs the recited functions with sufficient explanation. *See* Gamevice OCCB at 22-23; Gamevice RCCB at 11-12; *see also* Stubben Supp. Decl., ¶ 33 (“If the Court determines that “fastening mechanism” is a means-plus-function term, it should find the corresponding structure for the function of securing the confinement structures to the structural bridge to be fastening mechanism 320 and equivalents.”).

\* \* \*

Accordingly, the administrative law judge has determined that disputed claim term “fastening mechanism” as recited in the context of the ‘713 and ‘498 Patents, is subject to § 112(f).

For claims 1 and 16 of the '713 Patent and claim 1 of the '498 Patent, the relevant functions and the corresponding structure are:

- **Function:** (1) securing the first confinement structure to a first side of the structural bridge, and (2) securing the second confinement structure to a second side of the structural bridge.
- **Structure:** a soft draw latch and equivalents thereof.

For claim 10 of the '713 Patent, the relevant function and corresponding structure are:

- **Function:** unifying the pair of modules with the structural bridge.
- **Structure:** undeterminable.

#### 4. "input device"

The parties have proposed the following constructions:

Gamevice's Proposed Construction	Nintendo's Proposed Construction
Not indefinite; the claims, read in light of the specification and the prosecution history, would inform a POSITA that this phrase refers to "instructional input device"	"The input device,' as used in Claim 1 of the '498 patent, lacks antecedent basis, and is, thus, indefinite."

See Gamevice OCCB at 31; Nintendo OCCB at 37; Joint Chart of Agreed and Disputed Constructions at 10.

The term "input device" (that lacks the "instructional" adjective) appears in claims 1, 10, 13, 14 of the '498 Patent. The term "instructional input device" appears in claims 1, 16, 21, and 22 of the '498 Patent.

The relevant portion of claim 1 follows:

a pair of control modules, each control module of the pair of control modules interacting with a corresponding confinement structure of the pair of confinement structures, each control module in electronic communication with the communication link of its corresponding confinement structure, each of the pair of control modules providing

input module apertures, each input module aperture secures ***an instructional input device***, wherein said input module apertures are adjacent each of the at least two opposing sides of the computing device, and wherein ***the input device*** is a separate and distinct structure from the pair of confinement structures, forming no structural portion of the pair of confinement structures, and in which each of the pair of confinement structures are separate and distinct structures from the structural bridge, forming no structural portion of the structural bridge.

*See* '498 Patent at 18:9-25 (emphasis added).

Claim construction begins with the plain language of the claim. Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent. *Phillips*, 415 F.3d at 1312-13. Thus, in order to construe the meaning of the disputed claim term “input device” as recited in claim 1 of the '498 Patent, it is helpful to read the term as it is recited in the context of that claim.

The antecedent basis for the term “input device” in claim 1 is the term “instructional input device.” In claim 1, the phrase “each input module aperture secures an instructional input device” is immediately followed by two “wherein” clauses. The first clause provides requirements for the location of the “input module apertures,” while the second wherein clause recites that “the input device is a separate and distinct structure from the pair of confinement structures.” A person skilled in the art would understand that the “wherein the input device” clause refers to the “instructional input device” in the phrase immediately preceding the two wherein clauses. *See Energizer Holdings, Inc. v. Int'l Trade Comm'n*, 435 F.3d 1366, 1371 (Fed. Cir. 2006) (finding term not indefinite because “anode gel” is the antecedent basis for “said zinc anode” by “implication”); *Krausz Indus. Ltd. v. Smith-Blair, Inc.*, 122 F.Supp.3d 381, 399-401 (E.D.N.C. 2015) (finding “said seal” not indefinite because the antecedent reference, “a

sealing ring as claimed in claim 1,” is plain from the language of the claim); Ex. 4, Stubben Dec. ¶¶ 74-77).

Nintendo argues that adopting Gamevice’s argument would require re-writing the claim, which contravenes Federal Circuit precedent. Nintendo RCCB at 17. Nintendo argues, in part, that:

. . . The claims provide no basis on which to re-write the term, and the specification does not provide any basis to identify which of the many “input devices” disclosed in the specification is “the input device” recited in the claim. Indeed, the specification describes many different “input devices,” anyone of which could be “the input device” of the claim. Thus, construing “the input device” is pure guesswork as neither the specification nor the claims provide any basis to rule in or out any of the many disclosed “input devices.” Thus, ‘498 patent, Claim 1 (and its dependents) is indefinite as a matter of law.

Nintendo OCCB at 38.

As discussed above, the antecedent basis for the term “input device” in claim 1 is the term “instructional input device.” The only other recitation of “input device” in claim 1 is the term “instructional input device” that appears three lines before “the input device” is recited. ‘498 Patent at 18:16. Indeed, the specification refers to the element 356 as the “instructional input device” and “the input device”:

The alternative combination 300, further preferably includes an input device 318 (also referred to herein as input device 114), attached to and in electronic communication with the communication port 310. The input device 318 providing a pair of control modules 252, the pair of control modules 252 providing input module apertures 224 (of FIG. 12), each input module aperture 224 secures *an instructional input device 356* (of FIG. 23), or such as 120 of FIG. 11, or 256 of FIG. 13. Preferably, the input module apertures 224, are adjacent each of the at least two opposing sides of the plurality of sides 304, of the computing device 302, and wherein *the input device 356*, or such as 120 of FIG. 11, or 256 of FIG. 13, is a separate and distinct structure from

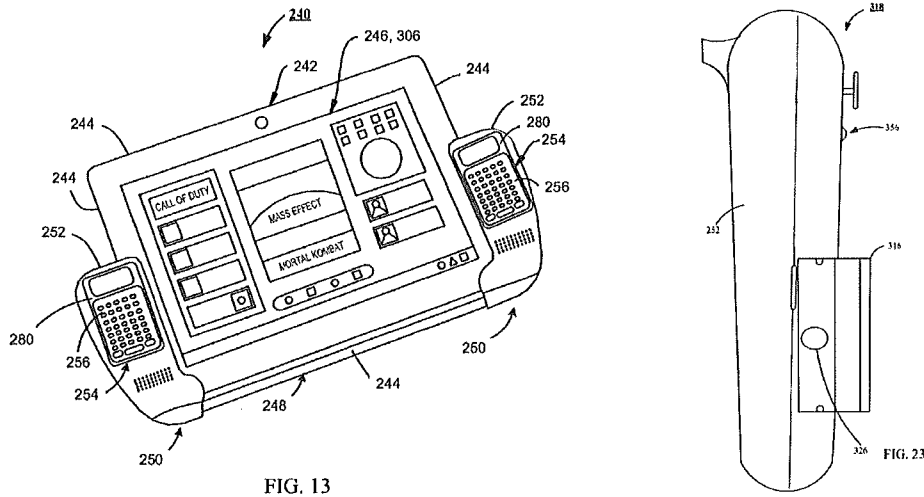


the communication port 310, forming no structural portion of the communication port 310.

See '498 Patent at 9:29-43 (emphasis added).<sup>23</sup>

The specification, however, also discloses embodiments that include an input device and an instructional input device. For example, Figures 13 and 23 show devices that feature input devices (250 and 318, respectively) and instructional input devices (256 and 356, respectively).<sup>24</sup>

Figures 13 and 23 are reproduced below:



In resolving ambiguity in the claim language, The Federal Circuit provides this guidance:

While we have acknowledged the maxim that claims should be construed to preserve their validity, we have not applied that principle broadly, and we have certainly not endorsed a regime in which validity analysis is a regular component of claim construction. See *Nazomi Communications*, 403 F.3d at 1368–69. Instead, we have limited the maxim to cases in which “the court

<sup>23</sup> The remaining uses of “356” refer to an “instructional input device.” The specification does not appear to show or describe an embodiment that includes an “instructional input device” but lacks an “input device.”

<sup>24</sup> The term “input device” is associated with elements 114, 220, 250, 318, 356, 400, and 500, which are shown or described in relation to at least Figures 1-9, 12, 16, 19-23, 25-28, 31, 35, 36 and 38-44. The term “instructional input device” is associated with elements 256 and 356, which are shown or described in relation to at least Figures 13, 15, 16, and 22.

concludes, after applying all the available tools of claim construction, that the claim is still ambiguous.” *Liebel–Flarsheim*, 358 F.3d at 911; *see also Generation II Orthotics Inc. v. Med. Tech. Inc.*, 263 F.3d 1356, 1365 (Fed.Cir.2001) (“[C]laims can only be construed to preserve their validity where the proposed claim construction is ‘practicable,’ is based on sound claim construction principles, and does not revise or ignore the explicit language of the claims.”); *Elekta Instrument S.A. v. O.U.R. Scientific Int’l, Inc.*, 214 F.3d 1302, 1309 (Fed.Cir.2000) (“having concluded that the amended claim is susceptible of only one reasonable construction, we cannot construe the claim differently from its plain meaning in order to preserve its validity”); *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1434 (Fed.Cir.1988) (rejecting argument that limitations should be added to claims to preserve the validity of the claims). In such cases, we have looked to whether it is reasonable to infer that the PTO would not have issued an invalid patent, and that the ambiguity in the claim language should therefore be resolved in a manner that would preserve the patent’s validity.

*Phillips*, 415 F.3d at 1327.

In this instance, it is reasonable to conclude that in the claim phrase “each input module aperture secures *an instructional input device*, wherein said input module apertures are adjacent each of the at least two opposing sides of the computing device, and wherein *the input device* is a separate and distinct structure from the pair of confinement structures” as recited in claim 1, the claim term “input device” refers to the previously recited “instructional input device.”

\* \* \*

Accordingly, the administrative law judge has determined that disputed claim term “input device” as recited in claim 1 of the ‘498 Patent is “instructional input device.”

5. “a pair of modules”

The parties have proposed the following constructions:

Gamevice’s Proposed Construction	Nintendo’s Proposed Construction
<p>No construction necessary</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not indefinite. If construed as a 35 U.S.C. § 112(6)/(f) term:</p> <p><b>Function:</b> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) a module providing a communication link.</p> <p><b>Structure:</b> ‘713 patent - 8:4-47, 9:14-46, 11:10-43; Figs. 13 (item 252), 14 (item 252), 16 (item 252), 26 (items 402, 404); 30 (items 402, 404, 408, 410); claim 11; ‘498 patent - claims 10, 11, 12, 16, 17; and equivalents thereof</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) a module providing a communication link.</p> <p><b>Structure:</b> None (indefinite)</p>

See Gamevice OCCB at 33; Nintendo OCCB at 17, 33; Joint Chart of Agreed and Disputed Constructions at 10-11. The term “pair of modules” appears only in asserted claim 10 of the ‘713 Patent and non-asserted claim 21 of the ‘498 Patent; the term does not appear in the specification.

While Gamevice proposes that it is not necessary to construe this phrase, it does not articulate why no construction is necessary. See Gamevice OCCB at 33-35. Indeed, Gamevice’s entire argument for this term is devoted to heading off Nintendo’s means-plus-function argument. *Id.* Gamevice’s entire argument follows:

The term “a pair of modules” appears in asserted claim 10 of the ‘713 patent and asserted claim 21 of the ‘498 patent. The only dispute with regards to this term is whether it is a means-plus-function limitation governed by § 112(f). Because the term does not use “means” and its use in the claims would be understood by a

POSITA to have a sufficiently definite meaning as the name for structure, the Court should find that Respondents have not met their burden to overcome the presumption that § 112(f) does not apply.

Although the term “module” by itself has been found to be a nonce word, that is not dispositive as to whether it should be construed as a means-plus-function term. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1299 (Fed. Cir. 2014) (“Even if a patentee elects to use a ‘generic’ claim term, such as ‘a nonce word or a verbal construct,’ properly construing that term (in view of the specification, prosecution history, etc.) may still provide sufficient structure such that the presumption against means-plus-function claiming remains intact.”). Here, both asserted claims provide numerous structural limitations to describe the “pair of modules.” Each “module” is adjacent to the computing device, confines the computing device on at least two but not more than three sides, provides a communication link to promote electronic communication with the computing device, and interacts with instructional input device that is in electrical communication with the computing device. Accordingly, given the context of the limitations in which the claim term appears, this term—despite the use of the word “module”—recites sufficiently definite structure to avoid application of § 112(f). (Ex. 4, Stubben Dec. ¶¶ 81-82).

Notably, Respondents do not contend that a similar claim term, “pair of control modules,” is subject to § 112(f). The “pair of control modules” of claim 1 of the ‘713 patent, for example, are described by the claim language in a similar manner to “pair of modules.” Each “control module” is secured to a confinement structure, is in electronic communication with the communication link of the confinement structure, and provides input module apertures that secures an instructional input device. *See* ‘713 patent, claim 1.

The conspicuous difference between the claim phrase “a pair of modules” and “a pair of control modules” is that the former lacks a modifier before “module.” But, even if the claim drafter had inserted the word “control” before “module” in claim 10 of the ‘713 patent and claim 21 of the ‘498 patent, that addition would not provide more structure than the rest of the claim language that describes in considerable detail the location and interaction of the “module” with other components of the claimed combination. (Ex. 4, Stubben Dec. ¶¶ 83-86); *see M2M Solutions LLC v. Sierra Wireless America, Inc.*, Case No. 12-32-RGA, 2015 WL 5826816, at \*4-5 (D. Del. Oct. 2, 2015) (finding “processing module” not a

means-plus-function term even though “it is probably the case that the word ‘processing’ by itself fails to provide sufficient structure in the term ‘processing module.’”)

The Court should find Respondents have not met their burden of overcoming the presumption that § 112(f) does not apply, because they cannot demonstrate that “the claim term fails to recite sufficiently definite structure or else recites function without reciting sufficient structure for performing that function.” *Williamson*, 792 F.3d at 1349.

Gamevice OCCB at 33-35.

Nintendo argues that the “pair of modules” terms from claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent<sup>25</sup> “are functional and must be construed under 112(f), but because the specification does not even use the term—much less provide adequate structure for it—‘pair of modules’ is indefinite.” Nintendo OCCB at 29. Nintendo argues that “under claim differentiation, the ‘pair of modules’ must be different from the ‘control modules.’” *Id.* at 30. Nintendo then argues that claims 10 and 21 are invalid because the claims and specification “are silent as to what the structural differences might be.” *Id.* at 30-31.

Gamevice replies that the term “pair of modules” is not functional and not indefinite. Gamevice RCCB at 12-14. As in its opening brief, Gamevice fails to explain why it is not necessary to construe this phrase, nor does it provide a construction for the phrase. *Id.*

Gamevice’s entire argument follows:

**1. “A Pair of Modules” is not a Means-Plus-Function Term**

Respondents have not rebutted the presumption that § 112(f) does not apply to the term “a pair of modules,” which does not use the term “means” and is not followed by any transition language to

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<sup>25</sup> Gamevice is no longer asserting claim 21 of the ‘498 Patent. *See* Unopposed Motion to Partially Terminate the Investigation as to Allegations of Infringement Relating to Certain Claims No Longer Being Asserted (Motion Docket No. 1111-17) (Nov. 27, 2018).

make it clear that the claim element is reciting a function. *See* MPEP § 2181(I)(B).

Respondents argue that the “claims do not recite any structure at all for the ‘pair of modules. Instead, the claims recite ‘pair of modules’ only in terms of what they do.” (RB at 29). This is untrue. As shown in the first column of the table in Mr. Stubben’s Supplemental Declaration, the limitations of Claim 10 of the ‘713 patent describe the “pair of modules” by what they are—namely, their relationship to the computing device, communication link, instructional input device, structural bridge, passageway and fastening modules—rather than what they do. (Ex. A, Stubben Supp. Decl. ¶48). Similarly, the second column of the table shows how claim 1 of the ‘713 patent describes the “pair of control modules”—which both parties agree is not subject to § 112(f)—by what they are, also describing them in relation to the communication link and instructional input device, as well as the confinement structures. *Id.* But, Respondents’ unprincipled analysis leads them to conclude that “[p]air of modules’ is purely functional” while simultaneously agreeing that “a pair of control modules” is “structurally [] recited.” (RB at 29-31). This makes no sense.

Respondents also argue that “under claim differentiation, the ‘pair of modules’ must be different from the ‘control modules.’” (RB at 30). They fail to show how a POSITA interpreting a “pair of modules” to have the same meaning as a “pair of control modules” would render independent claims 1 or 10 of the ‘713 patent superfluous. Indeed, that claim 1 requires confinement structures while claim 10 does not renders the doctrine inapplicable. *See Andersen Corp. v. Fiber Composites, LLC*, 474 F.3d 1361, 1370 (Fed. Cir. 2007) (“A further reason for not applying the doctrine of claim differentiation in this case is that the [claims at issue] are not otherwise identical.... Instead, there are numerous other differences varying the scope of the claimed subject matter.”).

## **2. “A Pair of Modules” is Not Indefinite Under § 112(f)**

Respondents’ indefiniteness argument rests on the faulty premise that “pair of modules” is not used in the specification. Respondents also contend, without any authority, “the structure recited in the specification for ‘control modules’ cannot, as a matter of law provide structure for the *different* claim term ‘pair of modules.’” (RB at 31) (emphasis in original). But, the Federal Circuit has made clear that “[d]ifferent terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a

reading of the terms or phrases is proper.” *Nystrom v. TREX Co.*, 424 F.3d 1136, 1143 (Fed. Cir. 2005). Here, the corresponding structure for the functions allegedly performed by the pair of modules is control modules 254 and equivalents. (Ex. A, Stubben Supp. Decl. ¶¶49-52).

Gamevice RCCB at 12-14. Gamevice’s identification of the “control modules 254 and equivalents” is new addition that does not appear in its Opening Brief or the Joint Chart of Agreed and Disputed Constructions. *Compare id. with* Gamevice OCCB at 33 (identifying “items” 252, 402, 404, 408, and 410); Joint Chart of Agreed and Disputed Constructions at 10-11 (identifying “items” 252, 402, 404, 408, and 410).

Nintendo replies, in part:

Gamevice is unable to say exactly what a module is other than what a module does. So, Gamevice does not offer any proposed definition of “pair of modules” that would provide structure. Instead, Gamevice merely claims that “pair of modules” is not functional because the claims require that the modules be adjacent to the computing device, confine the computing device, provide a communication link, and interact with the instructional input device. But these are just the functions the modules perform; they say nothing about the structure of the modules themselves.

Nintendo RCCB at 18-19. Nintendo then argues that while the term “control modules” is explained in the specification and shown in the figures, the term “pair of modules” is never used in the specification or shown in the figures. *Id.* at 19-20.

For the reasons discussed below, the administrative law judge has determined that the claim term “a pair of modules” is subject to § 112(f), and that the specification does not disclose sufficient structure for the term.

*a) Whether § 112(f) Applies*

As a threshold issue, the administrative law judge must determine whether § 112(f) applies to the disputed term. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347-48 (Fed. Cir. 2015). The Federal Circuit has explained:

In making the assessment of whether the limitation in question is a means-plus-function term subject to the strictures of § 112, para. 6, our cases have emphasized that the essential inquiry is not merely the presence or absence of the word “means” but whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.

*Id.* at 1348; *see also* The Manual of Patent Examining Procedure § 2181 (Ninth Edition, Revision 08.2017, Last Revised January 2018) (“To determine whether a word, term, or phrase coupled with a function denotes structure, examiners should check whether: (1) the specification provides a description sufficient to inform one of ordinary skill in the art that the term denotes structure; (2) general and subject matter specific dictionaries provide evidence that the term has achieved recognition as a noun denoting structure; and (3) the prior art provides evidence that the term has an art-recognized structure to perform the claimed function.”).

Here, the term “a pair of modules” is functional because a person of ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for a structure.

As noted above, the term “a pair of modules” appears only in claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent; the term does not appear in the specification.<sup>26</sup> The surrounding

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<sup>26</sup> The specification uses the term “modules” with a modifier just once. *See, e.g.*, ‘713 Patent at 4:61-66. However, the context of the surrounding paragraphs suggests that the unmodified “modules” refers to removable game control modules, removable keyboard modules, and “touch responsive electronic display screens.” *Id.* at 4:52-5:12.



text in claims 10 and 21 does not inform one of ordinary skill in the art of the scope of the term, with reasonable certainty, because a “module”—without more, as it is used in the asserted patents—is a generic descriptor that does not convey structure.

Further, the remaining claims (*i.e.*, claims 1-9 and 11-20 of the ‘713 Patent and claims 1-19 and 22 of the ‘498 Patent) do not convey a structure for the “pair of modules” of claims 10 and 21 because the remaining claims do not meaningfully further define, explain, or limit the “pair of modules” term. For example, claim 21 is an independent claim that does not have any associated dependent claims. Claim 10 has four associated dependent claims, but only claim 11 includes any reference to modules. Claim 11, which is directed to a specific embodiment, requires the input device to be “a separate and distinct structure from the pair of modules,” which does not provide any meaningful clarification as to what structure a “pair of modules” might entail. Thus, the only associated dependent claim does not convey structure.

Additionally, the “modules” recited in the remaining claims all contain limiting language that claims 10 and 21 lack. For example, the remaining claims refer to five types of modules:

- control modules – *see* ‘713 Patent, claims 1 and 16 and ‘498 Patent, claims 1, 6, 7, 10, 11, 12, 16-18, and 22;
- “input module apertures” – *see* ‘713 Patent, claim 1 and ‘498 Patent, claims 1 and 16;
- game control modules – *see* ‘713 Patent, claim 7 and ‘498 Patent, claims 7 and 13;
- communication modules – *see* ‘713 Patent, claim 8 and ‘498 Patent, claim 8; and
- a keyboard module – *see* ‘498 Patent, claim 14.

The five types of modules that contain limiting language (*i.e.*, control, input, game control, communication, and keyboard) provide at least some guidance that conveys structure, which the

unmodified “pair of modules” lacks.<sup>27</sup> Without at least minimal guidance (*e.g.*, guidance that is provided in the remaining claims), a person of ordinary skill in the art cannot reasonably ascribe structure to the claimed modules.<sup>28</sup>

The specification does not show that the term “a pair of modules” would be understood to have a sufficiently definite meaning as the name for structure because the specification does not use the term “pair of modules.” Here, the applicant’s failure to provide any example of a “module” (without guidance) is another indication that the term lacks a sufficiently definite meaning as the name for structure.

The parties have not identified any portions of the prosecution history that apply to the term “a pair of modules.” A review of the prosecution history attached to the complaint does not appear to include a rejection stating that a “pair of modules” was known in the art or that the

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<sup>27</sup> The Federal Circuit has noted that “module” “is a well-known nonce word that can operate as a substitute for ‘means’ in the context of § 112, para. 6.” *Williamson*, 792 F.3d at 1350.

<sup>28</sup> While the applicant may have clarified the term by explaining that an unmodified “module” should be read to encompass all types of modules discussed in the specification, the patent does not contain any such explanation. *See Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1255 (Fed. Cir. 2008) (“We note that the patent drafter is in the best position to resolve the ambiguity in the patent claims, and it is highly desirable that patent examiners demand that applicants do so in appropriate circumstances so that the patent can be amended during prosecution rather than attempting to resolve the ambiguity in litigation.”); *Nautilus*, 572 U.S. at 910 (quoting *Halliburton*). Without such an explanation, the public is left to guess whether an unmodified “module” is an umbrella-type term that defines a discrete genus or whether an unmodified “module” is distinct species (and what the scope of that species would be).

In addition, the close similarities between the confinement structures from claim 1 of the ‘713 Patent and the “pair of modules” in claims 10 and 21 further diminishes the clarity of the “pair of modules” term. In particular, by using different terms to describe similar subject matter, the applicant introduced a degree of ambiguity into the claims, which the Supreme Court and the Federal Circuit have cautioned against. *See Nautilus*, 572 U.S. at 899 (“a patent must be precise enough to afford clear notice of what is claimed” (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996))); *see also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730, (2002) (“The monopoly is a property right; and like any property right, its boundaries should be clear.”).

term conveyed structure. Thus, the prosecution history does not elucidate the meaning of the disputed term.

The parties have also offered expert declarations in support of their arguments. *See, e.g.*, Stubben Decl., ¶¶ 78-86; Cagan Decl., ¶¶ 103-107, Stubben Supp. Decl., ¶¶ 46-52.<sup>29</sup> Mr. Stubben's declaration conflates "a pair of modules" and "a pair of control modules." *See, e.g.*, Stubben Decl., ¶¶ 83-85. The control modules are explained in the specification and depicted in several figures, while the "pair of modules" is absent from the specification and figures. Thus, Mr. Stubben's declaration is viewed with caution for the reasons discussed in *Phillips*. *See Phillips*, 415 F.3d at 1318-19. Dr. Cagan, on the other hand, opines that "[t]o a person of ordinary skill in the art, the term 'module' does not provide a definite meaning as the name for structure" and provides a short explanation supporting this opinion. Cagan Decl., ¶¶ 104-105. Thus, for this term, Dr. Cagan's declaration is given slightly more weight than Mr. Stubben's declaration.

#### ***b) Identification of Function***

In *Williamson*, the Federal Circuit explained:

Construing a means-plus-function claim term is a two-step process. The court must first identify the claimed function. *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012). Then, the court must determine what structure, if any, disclosed in the specification corresponds to the claimed function. Where there are multiple claimed functions, as we have here, the patentee must disclose adequate corresponding structure to perform all of the claimed functions. *Id.* at 1318-19. If the patentee fails to disclose adequate corresponding structure, the claim is indefinite. *Id.* at 1311-12.

792 F.3d 1339 at 1351-52.

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<sup>29</sup> Mr. Stubben's supplemental declaration, at ¶¶ 46-48, largely presents the same arguments from his first declaration and from Gamevice's RCCB, both of which have been considered.

Here, the parties agree that if § 112(f) applies to the “pair of modules” term, then the claims require two relevant functions: (1) confining the computing device on at least two opposing sides, but not more than three sides of the computing device; and (2) providing a communication link. *See* Gamevice OCCB at 33; Nintendo OCCB at 17, 33; Joint Chart of Agreed and Disputed Constructions at 10-11. The administrative law judge notes that these functions, which appear in claims 10 and 21, are undisputed. *See, e.g.*, ‘713 Patent at 19:1-5; ‘498 Patent at 20:44-49. Having reviewed the asserted patents, the undersigned accepts the undisputed functions.

**c) Identification of Structure**

In *Williamson*, the Federal Circuit explained:

Structure disclosed in the specification qualifies as “corresponding structure” if the intrinsic evidence clearly links or associates that structure to the function recited in the claim. [*Noah Sys.*] (citing *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997)). Even if the specification discloses corresponding structure, the disclosure must be of “adequate” corresponding structure to achieve the claimed function. *Id.* at 1311-12 (citing *In re Donaldson Co.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994) (en banc)). Under 35 U.S.C. § 112, paras. 2 and 6, therefore, if a person of ordinary skill in the art would be unable to recognize the structure in the specification and associate it with the corresponding function in the claim, a means-plus-function clause is indefinite. *Id.* at 1312 (citing *AllVoice Computing PLC v. Nuance Commc’ns, Inc.*, 504 F.3d 1236, 1241 (Fed. Cir. 2007)).

792 F.3d 1339 at 1352.

Here, the specification does not adequately link or associate structure to the recited functions. In particular, the specification does not use the term “pair of modules,” nor does it use synonyms or other descriptors that clearly link or associate a structure to the recited functions. As noted above, the specification uses the term “modules” with a modifier just once. *See, e.g.*, ‘713 Patent at 4:61-66. However, this single instance does not provide a clear link to structure

because the “modules” are described in relation to a particular embodiment involving removable modules. Likewise, the “modules” described in the ‘713 Patent at 4:61-66 are silent on providing a communication link, which is the second recited function. Similarly, a “module” (without limiting language) or “pair of modules” (also without limiting language) are not shown in the figures. Thus, the administrative law judge has determined that claim 10 of the ‘713 Patent and claim 21 of the ‘498 Patent cannot be construed.

\* \* \*

Accordingly, the administrative law judge has determined that the claim term “a pair of modules” is subject to § 112(f), and that the specification does not disclose sufficient structure for the term.

#### 6. “passageway”

The parties have proposed the following constructions:

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
plain and ordinary meaning; <i>e.g.</i> , “a way that allows for passage” or “a way allowing for the passage of electronic communications”	“‘Passageway’ is indefinite[.]”

*See* Gamevice OCCB at 24-26; Nintendo OCCB at 35-37; Joint Chart of Agreed and Disputed Constructions at 11. The term “passageway” appears only in claims 1, 10, and 16 of the ‘713 Patent and claims 1, 21, and 22 of the ‘498 Patent; the term is not used in the specification.

Gamevice argues that “passageway” is used an ordinary, “plain English” manner, and that a person of ordinary skill in the art “would understand, with reasonable certainty, that the ‘passageway’ is a way allowing for the passage of electronic communications.” Gamevice OCCB at 24-26 (citing Ex. 6, which is an excerpt of Merriam-Webster’s Collegiate Dictionary,

Eleventh Edition; Stubben Decl., ¶ 58-60). Gamevice argues that signal pathway 274, wired connection 314, and conduit 328 are examples of passageways. *Id.* at 26-28.

Nintendo argues, in part:

As an initial matter, the claims use both “passageway” (‘713 patent, Claims 1, 10 and ‘498 patent, Claims 1, 21) and “electronics communications passageway” (713 patent Claim 16 and ‘498 patent Claim 22), but provide no guidance about what they are or what the difference in scope between them is. The claims require that the passageway “promote[]” communication, but this is purely functional, providing no structural definition at all. Thus, all the claims tell us is that a “passageway”—somehow—performs the function of promoting communication, and is—somehow—different than an “electronics communications passageway.”

The specification does not help clarify because the specification does not even use the term “passageway.” And while “passageway” has a common and ordinary meaning in common parlance, it is not a term of art to a person of skill in the art to which these patents pertain. Rather, it is a coined term of utterly speculative scope. The main problem with “passageway” is there is simply no objective way to determine what is, and what is not, a passageway.

Nintendo OCCB at 35-36. Nintendo then presents argument about *Nautilus*. *Id.* at 36-37.

Gamevice argues, in part, that Nintendo has ignored “other structural limitations” in the claims and that Nintendo’s argument is inconsistent with its expert’s declaration. Gamevice RCCB at 15-16.

Nintendo replies:

Gamevice and its own expert disagree on the meaning of the term “passageway.” Gamevice says, “a skilled artisan would understand, with reasonable certainty, that the ‘passageway’ is a way allowing for the passage of electronic communications.” But Gamevice’s “skilled artisan”—Mr. Stubben—disagrees. He says, “one of ordinary skill in the art would understand that the ‘passageway’ is a channel for routing signals, including electronic communications.” That Gamevice and its own expert disagree on

the term’s meaning demonstrates that there is no accepted meaning in the art.

Whichever definition one picks, the fundamental problem remains that both are purely functional, providing no objective boundaries for the supposed invention, and rendering the term indefinite. . . .

. . . As Gamevice and Mr. Stubben concede, the specification does not use the term “passageway.” As a result, a person of skill in the art looking to understand the scope of that term, would have nothing to go on—no examples, charts, or other hints of what would be and what would not be a “passageway.” To put it slightly differently, nothing in the specification provides a person of skill in the art with any understanding of how to determine whether a given space is a “passageway,” regardless of whether it is defined as Gamevice or its expert suggests. “The claims, when read in light of the specification and the prosecution history, must provide objective boundaries for those of skill in the art.” Neither Gamevice nor its expert’s definitions do that, and as a result, the term “passageway” is indefinite.

Nintendo RCCB at 13-14 (argument concerning *Halliburton Energy Services, Inc. v. M-I LLC*, 514 F.3d 1244 (Fed. Cir. 2008) omitted).<sup>30</sup>

For the reasons provided below, the administrative law judge has determined to construe the disputed term “passageway” to mean “a space that accommodates a communication wire.”

As an initial matter, Gamevice’s proposed constructions are not helpful because they are circular, as the constructions use the words in the terms to explain their meaning. Additionally, Gamevice’s proposed constructions are inadequate because they do not address the role of wired communication between other components, which Gamevice’s counsel and expert have indicated the term should include. *See* Tr. (Mathews) 79 (“So [the passageway] does not need to accommodate people or dogs or cars, but wired communication.”), 91 (stating that the passageway cannot be wireless); Stubben Decl., ¶ 62 (“wired connections run through

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<sup>30</sup> Nintendo’s counsel stated that “passageway” is not a means-plus-function term at the Markman Hearing. Tr. (Kinsel) 83.

‘passageways’ in the structural bridge for the promotion of electronic communication.”).

Gamevice’s proposed constructions are further problematic because its expert provided a different construction. *See* Stubben Decl., ¶ 60 (declaring “it is my opinion that one of ordinary skill in the art would understand that that the ‘passageway’ is a channel for routing signals, including electronic communications.”).

Nintendo’s arguments do not meaningfully address the claim language that places the passageway in the structural bridge. Nintendo’s counsel stated that “passageway” is “a structural word” and that a “person of skill in the art could understand that the word ‘passageway’ is a structure of some kind.” Tr. (Kinsel) 83. This statement indicates that the term is not as “purely functional” or undefined as Nintendo’s briefs suggest. Additionally, Nintendo has not responded to Gamevice’s argument that signal pathway 274, wired connection 314, and conduit 328 are examples of passageways.

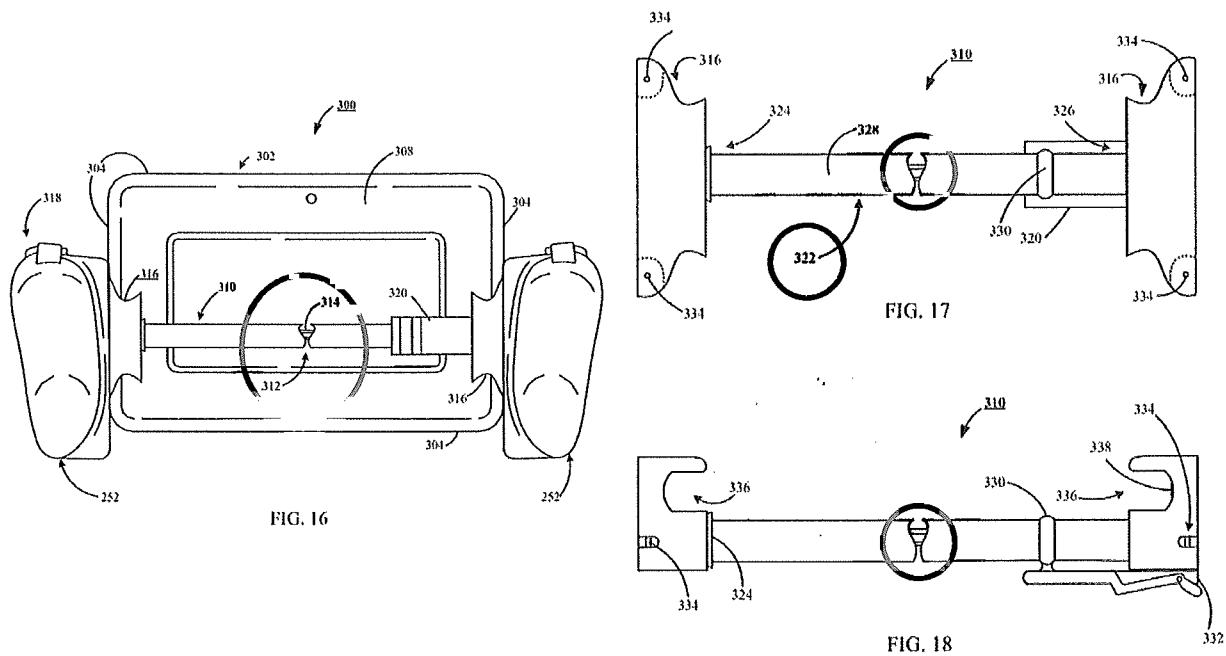
Claim 1 of the ‘713 Patent requires that the structural bridge include “a passageway between the pair of confinement structures.” The claim also requires that “the passageway promotes communication between the first communication link and the computing device,” and that the passageway “further promotes communication between the second communication link and the computing device[.]” ‘713 Patent at 17:64-18:3. Claims 10 and 16 require the structural bridge to include a passageway. *Id.* at 19:6-17; 20:4-8. Claims 1, 21, and 22 of the ‘498 Patent also require that the structural bridge includes a passageway. ‘498 Patent at 17:60-18:3; 21:50-60; 21:11-15. Thus, at a minimum, the claims indicate that the passageway must be associated with the structural bridge.



The specification does not use the word “passageway.” However, signal pathway 274, wired connection 314, and conduit 328 are associated with the structural bridge, as the claims require.<sup>31</sup> For example, for signal pathway 274, the ‘713 Patent’s specification explains:

In a preferred embodiment, when a flexible material is selected, and *the signal pathway 274 is a wired pathway*, the signal pathway 274 may be coupled externally to the structural bridge 276, as shown by FIG. 15.

‘713 Patent at 9:4-9 (emphasis added). Figures 16-18 (which the specification explains are different views of the same device) show that wired connection 314 is inside the structural bridge 322, as shown below with annotations:



<sup>31</sup> The specification’s discussion of signal pathway 523 also indicates that the passageway accommodates a wire. ‘713 Patent at 16:39-46 (“In an embodiment that utilizes the signal pathway 523, as the communication link 519, the signal pathway 523, may be in the form of a metallic conductor, a fiber optic conductor, a conductive polymer, or the conductive layer of a flex circuit.”); Stubben Decl., ¶ 61.

Likewise, the '713 Patent's specification explains that conduit 328 is part of the structural bridge:

The fastening mechanism 320, is preferably securely fastened [to] **conduit 328, of the structural bridge 322**, by way of an anchor member 330, the anchor member 330 is preferably positioned in a location adjacent the slip fit 326, and by way of an attachment member 332 (shown in FIG. 18), securely attached to the remaining confinement structure of the pair of confinement structures 316.

'713 Patent at 9:60-67 (emphasis added). Taken together, the specification and figures provide support for construing "passageway" to mean "a space that accommodates a communication wire."

The parties have not identified any portions of the prosecution history that apply to the term "passageway." The prosecution history does not elucidate the meaning of the disputed term.

With regard to the extrinsic evidence cited, the administrative law judge has determined that Dr. Cagan's declaration is deficient insofar as it does not analyze the claim's requirement that the claimed passageways are associated with the structural bridge. *See* Cagan Decl., ¶¶ 108-121. On the other hand, Mr. Stubben's declaration, which analyzes the claims and specification, supports the proper construction. *See* Stubben Decl., ¶¶ 55-58. In particular, Mr. Stubben's opinion "that one of ordinary skill in the art would understand that that the 'passageway' is a channel for routing signals, including electronic communications" supports construing "passageway" to mean "a space that accommodates a communication wire" because "space" and "channel" in this instance are synonyms. *Id.*, ¶ 60. Likewise, Mr. Stubben's analysis pathways 274 and 523 and wired connection 314 shows that a person of ordinary skill in the art would understand the term includes space for a wire. *Id.*, ¶¶ 61-62.

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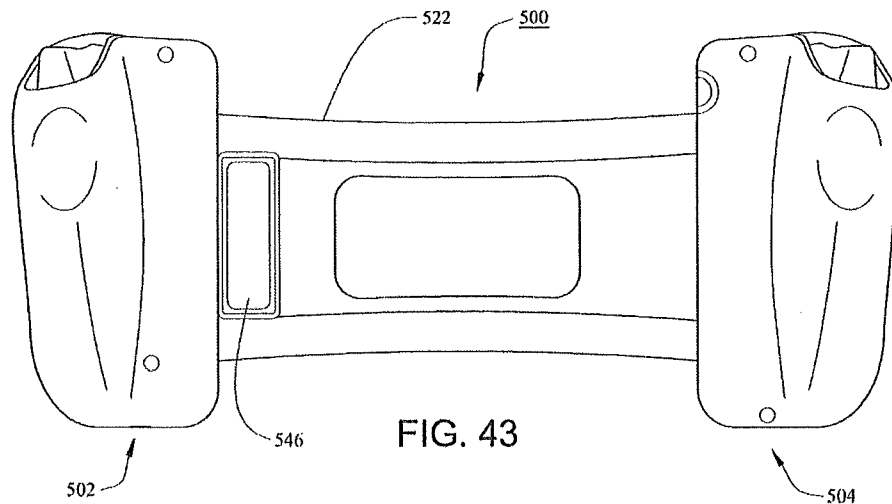
Accordingly, the administrative law judge has determined that the disputed claim term “passageway” as recited in the context of the ‘713 and ‘498 Patents, should be construed to mean “a space that accommodates a communication wire.”

**7. “structural bridge”**

The parties have proposed the following constructions:

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
plain and ordinary meaning, for example, “a physical apparatus that connects other components.”	“[T]he term ‘structural bridge’ should be construed as ‘a member that connects’ either the confinement structures, the control modules, or the pair of modules (depending on the claim) ‘one to the other whether or not a computing device is present.’”

See Gamevice OCCB at 12; Nintendo OCCB at 7-8; Joint Chart of Agreed and Disputed Constructions at 12-13. The term “structural bridge” appears in claims 1, 2, 4, 5, 8-11, 14, 16, and 18-20 of the ‘713 Patent and claims 1, 2, 4, 5, 8-12, 15, 16, and 18-22 of the ‘498 Patent. The term is used in both titles and throughout the specification. Figure 43 depicts structural bridge 522:



See '713 Patent, Figure 43.

Gamevice argues:

The parties appear to agree that the basic requirement of the “structural bridge” is that it “connects” two things together.<sup>4</sup> The claims describe what those things are, whether “confinement structures” (*see, e.g.*, Ex. 2, '713 patent, claims 11, 16; Ex. 3, '498 patent, claims 1, 11); a “pair of modules” (Ex. 2, '713 patent, claim 10; Ex. 3, '498 patent, claim 21); or a “pair of control modules” (Ex. 3, '498 patent, claims 10, 16). Although certain claims include additional features of the structural bridge, such as a “passageway,” none of those additional features are at issue here. What is at issue is Respondents’ effort to read into this term specific details pulled from the disclosed embodiments.

Throughout the specification the “structural bridge” is described in the same way it is claimed, as, for example, “securing the pair of control modules one to the other” (Ex. 2, '713 patent at 1:36-37) or “securing the pair of confinement structures, one to the other.” (Ex. 2, '713 patent at 9:54-55). Nowhere in the specification is the structural bridge described as “be[ing] separate from, and external to, the computing device” as Respondents propose, or that it performs “securing” “whether or not a computing device is present.” . . .

Gamevice OCCB at 13. Gamevice relies on claim 5 and claim differentiation to argue that the structural bridge of claim 1 does not need to be “external” to the computing device. *Id.* at 14.

Nintendo argues:

“Structural bridge” is used in all asserted claims, and is central to the supposed invention disclosed in the specification. Throughout the specification, in all of the priority applications, and in the claims themselves, the structural bridge is described as a component of the accessory, separate from the computing device, and not as part of the computing device itself. As a result, the term “structural bridge” should be construed as “a member that connects” either the confinement structures, the control modules, or the pair of modules (depending on the claim) “one to the other whether or not a computing device is present.” *Nintendo’s construction explicitly requires the structural bridge to be separate from, and external to, the computing device.*

Gamevice’s proposed construction, by contrast, seeks to detach the term from what the inventors actually invented. Gamevice claims that the structural bridge is merely “a physical apparatus that connects other components,” and that it may appear anywhere—external or internal to the computing device.

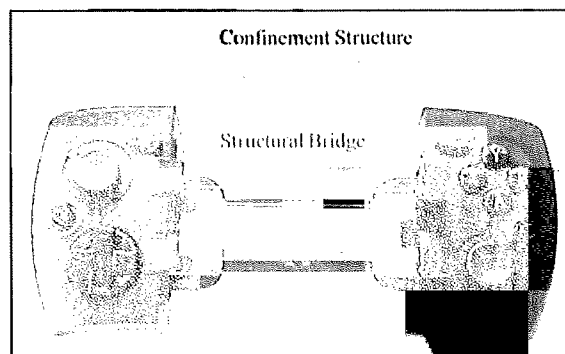
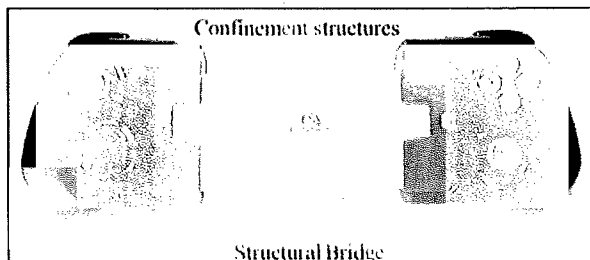
Nintendo OCCB at 7-8 (emphasis added on the “explicit” requirements of Nintendo’s construction).

Nintendo also argues that “structural bridge” is a coined term and that the claims and specification require the structural bridge be separate from the computing device. *Id.* at 9-10. Nintendo contends that “[t]he claims require that the structural bridge be separate from and external to the computing device; every embodiment shows the structural bridge as separate from and external to the computing device; and no portion of the specification describes the structural bridge as part of the computing device instead of the accessory.” *Id.* at 15. In closing, Nintendo argues:

**1.3 The prior art shows a “structural bridge,” if anything, is external to, and separate from, the computing device.**

Gamevice was not the first, by any stretch of the imagination, to describe a gaming accessory that could be attached to a smartphone or tablet. Many others described such configurations long before Gamevice. For example, both the Moga (left,

annotated) and Phonejoy (right, annotated) share the same basic configuration as the Gamevice.



Claim terms must be construed in light of the prior art, and as the prior art shows, if “structural bridge” means anything, it is the external, separate bridge structure shown in this prior art.

*Id.* at 15-16.

Gamevice replies:

Nothing in the claims compels Respondents’ proposed construction. That certain claims recite the structural bridge separately from the computing device does not mean those two claim elements must be physically separate. . . . No claims require that the structural bridge be “a separate and distinct structure” from the computing device, although a “separate and distinct” limitation does appear for other, separately recited, components. The patentee clearly understood how to recite having the structural bridge be “separate and distinct” from the computing device, had that been intended. *See Enzo Biochem v. Applera Corp*, 599 F.3d 1325, 1333 (Fed. Cir. 2010).

Gamevice RCCB at 2. Gamevice also argues that the the “specification does not describe the structural bridge as ‘be[ing] separate from, and external to, the computing device’ as Respondents propose, or as ‘securing’ ‘whether or not a computing device is present.’ The specification, just like the independent claims, does not limit the location of the structural bridge within the inventive combination.” *Id.* at 3-4.

Nintendo replies that “structural bridge” is a “coined term with no common, ordinary meaning.” Nintendo RCCB at 5-8. It is argued that Gamevice is using claim differentiation to broaden the claims, and that adopting Gamevice’s “broad construction results in invalidity” due to a written description issue. *Id.* at 5-8.

For the reasons discussed below, the administrative law judge has determined to construe “structural bridge” as “a physical apparatus that connects other components.”

The claims use the words “structural bridge” in a plain and ordinary manner. Construing “structural bridge” as “a physical apparatus that connects other components” expounds on the meaning of the term in a manner that is consistent with the specification. Nintendo’s proposed construction and accompanying arguments, on the other hand, add lengthy requirements (*i.e.*, “whether or not a computing device is present” and that “the structural bridge to be separate from, and external to, the computing device”) to the term that are not readily consistent with the claims. In particular, as Gamevice notes, the applicant used the phrase “separate and distinct” in other portions of the claims. This indicates it would be improper to impose a requirement that the structural bridge be separate from, and external to, the computing device. Similarly, a construction that requires “whether or not a computing device is present” does not clarify the meaning of the term “structural bridge” because the claims provide sufficient context on whether the claimed combinations must include a computing device.

The specification also supports construing “structural bridge” as “a physical apparatus that connects other components.” For example, the specification describes the structural bridge as a connective piece that secures the pair of control modules to each other and that secures the pair of confinement structures to each other. *See* ‘713 Patent at 1:35-38, 8:24-30, 9:54-60, 14:64-15:2. The specification does not describe the structural bridge as “be[ing] separate from,

and external to, the computing device” as Nintendo proposes, or that the bridge performs “securing” “whether or not a computing device is present.” The Figures also do not support Nintendo’s proposed construction.

The parties have not identified any portions of the prosecution history that apply to the term “structural bridge.”<sup>32</sup> The prosecution history does not elucidate the meaning of the disputed term.

With regard to the parties’ expert declarations, the administrative law judge notes that Nintendo cites to 22 paragraphs of Dr. Cagan’s declaration. *See* Nintendo OCCB at 12, n.18 (citing Cagan Decl., ¶¶ 131-153). The 22 paragraphs span 10 pages of text and contain several images of dense, single-spaced text. *See* Cagan Decl., ¶¶ 131-153 (¶¶ 135, 137, and 140 contain lengthy images of patent specifications). The 10 pages of Mr. Cagan’s declaration contain extensive legal argument that circumvents the Ground Rules that governed the claim construction briefing. *See* Order No. 2 (Ground Rules) at 16 (“The opening brief shall be no more than 10,000 words, as calculated under Ground Rule 1.6.”). Additionally, the evidence shows that a person of ordinary skill in the art would be able understand that the term “structural bridge” refers to a connective structure. *See* Stubben Supp. Decl., ¶ 24 (“One of ordinary skill in the art would understand that the term “structural bridge” describes a bridge that is structural as opposed to, for example, electrical. A bridge is a well-understood mechanical term and it is used in the patent specification in this ordinary way.”).

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<sup>32</sup> Nintendo’s reference to “the title of the grandparent’ 119 [*sic*] patent” and the “titles for the other priority patents” does not sufficiently address the prosecution history. *See* Nintendo OCCB at 13-14. Further, although Nintendo identified prior art products, its argument concerning these terms is not supported by any evidence, and the argument does not discuss the prosecution history. *See id.* at 15-16.



Thus, the claims, specification, and extrinsic evidence supports construing “structural bridge” as “a physical apparatus that connects other components.”

\* \* \*

Accordingly, the administrative law judge has determined that disputed claim term “structural bridge” as recited in the context of the ‘713 and ‘498 Patents, should be construed to mean “a physical apparatus that connects other components.”

**8. “retention member”**

The parties have proposed the following constructions:

<b>Gamevice’s Proposed Construction</b>	<b>Nintendo’s Proposed Construction</b>
<p>a component with a recess or opening for securely receiving or catching the fastening detent</p> <p>Not subject to 35 U.S.C. § 112(6)/(f); not indefinite</p> <p>If construed as a 35 U.S.C. § 112(6)/(f) term</p> <p><b>Function:</b> Interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.</p> <p><b>Structure:</b> ‘713 patent - 8:31-39; Fig. 14 (items 266, 268), and equivalents thereof</p>	<p>This term “must be construed under 35 U.S.C. § 112(f).”</p> <p><b>Function:</b> Interacting with the fastening detent, the interaction of the fastening detent with the retention member restraining the structural bridge to a control module of the pair of control modules.</p> <p><b>Structure:</b> Limited to #266 Fig. 14</p> <p>Indefinite 35 U.S.C. § 112(2)/(b)</p>

See Gamevice OCCB at 29; Nintendo OCCB at 17, 31-34; Joint Chart of Agreed and Disputed Constructions at 11-12. The term “retention member” appears in just one claim, claim 16 of the ‘498 Patent, in just one paragraph of the specification (see, e.g., ‘498 Patent at 8:28-39), and in just one figure, Figure 14.

For reference, claim 16 follows:

**16.** A combination comprising:

a first control module of a pair of control modules, and a second control module of the pair of control modules each the first and the second control modules comprising a plurality of input module apertures, each input module aperture supports an instructional input device, at least one of the first and the second control modules further comprising a fastening detent; and

a structural bridge disposed between said first and second control module, said structural bridge comprising a first side, said first side of said structural bridge in contact adjacency with said first control module, said structural bridge further comprising a second side, said second side of said structural bridge in contact adjacency with said second control module, said structural bridge still further comprising *a retention member, the retention member interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module of the pair of control modules.*

‘498 Patent at 19:58-20:10 (emphasis added). The relevant portion of the specification follows:

FIG. 14 further shows that the pair of control modules 252 provide a confinement boss 262, and the confinement boss 262 provides a fastening detent 264. The fastening detent 264 interacts with a *retention member 266*, to secure the structural bridge 258, to the pair of control modules 252. In a preferred embodiment, the *retention member 266* is responsive to a catch 268, which preferably is a spring activated catch 268, and the *retention member 268* is preferably a spring loaded *retention member 268*. Still further, FIG. 14 shows that in a preferred embodiment, the structural bridge 258 provides a communication link 270, which passing signals between the pair of control modules 252.

*Id.* at 8:28-39 (emphasis added).<sup>33</sup> Figure 14 is reproduced below:

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<sup>33</sup> It is believed that “retention member 268” should read “catch 268.” Both experts appear to follow this reading of the specification. *See, e.g.,* Stubben Decl., ¶¶ 64-71; Cagan Decl., ¶¶ 122-130; Stubben Supp. Decl., ¶¶ 58-63.

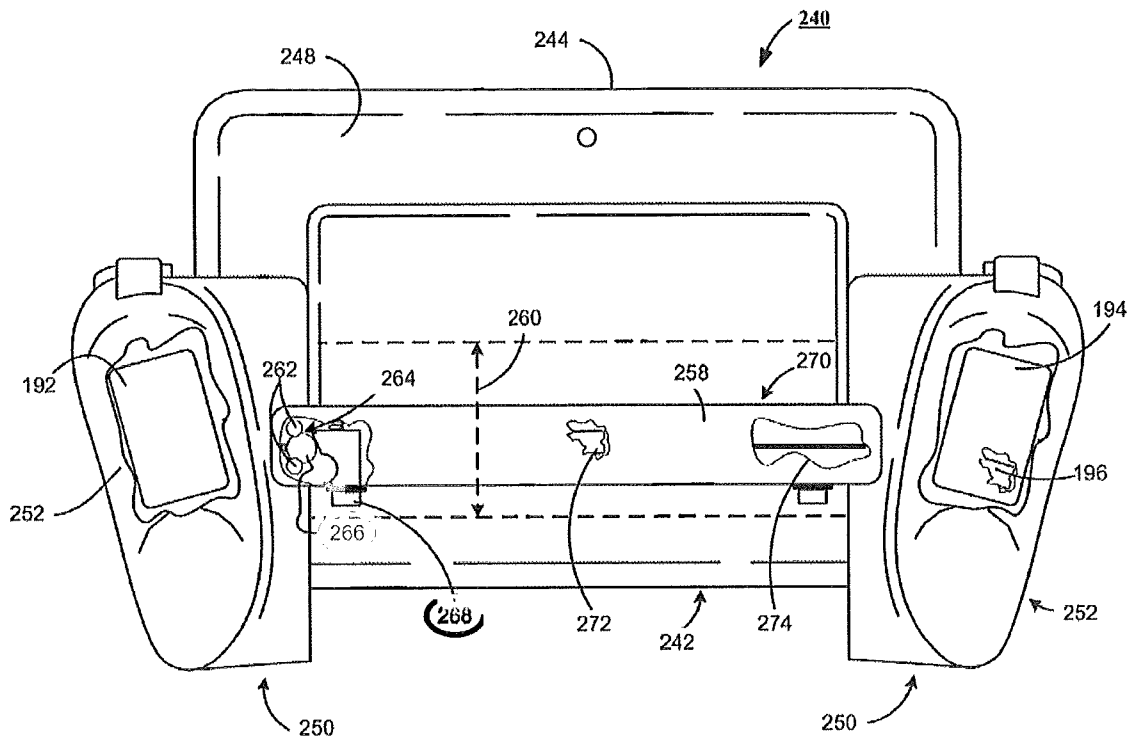


FIG. 14

*Id.*, Figure 14 (annotations added).

Gamevice argues:

Complainant’s proposed construction—“a component with a recess or opening for securely receiving or catching the fastening detent”—reflects the intrinsic record and properly captures the scope the invention of claim 16 of the ‘498 patent. As recited in claim 16 itself, a “retention member” is a component of the structural bridge that “interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module of the pair of control modules.” This language alone presents sufficient structure for § 112(f) not to apply. (Ex. 4, Stubben Dec. ¶¶ 67-68).

...

A POSITA reading the claim term in light of the ‘498 specification would also understand the term “retention member” to have a sufficiently definite structure. The patent describes that “[t]he fastening detent 264 interacts with a retention member 266, to secure the structural bridge 258, to the pair of control modules 252.” (Ex. 3, ‘498 patent at 8:30-32). It further describes that in a preferred embodiment, the “retention member” is responsive to a

catch (one example of a “fastening detent”), and that the “retention member” and the catch are preferably spring-loaded and spring-activated, respectively. (*See id.* at 8:32-36). In accordance with Complainant’s proposed construction, a skilled artisan would understand that this “retention member” would need a recess or opening for securely receiving the catch. (Ex. 4, Stubben Dec. ¶¶ 70-71).

Consequently, the term “retention member” should be construed to mean “a component with a recess or opening for securely receiving or catching the fastening detent.”

Gamevice OCCB at 30-31.

Nintendo argues, in part, that:

The claim recites “retention member” in exclusively functional language: “the retention member interacts with the fastening detent, the interaction of the fastening detent with the retention member restrains the structural bridge to a control module.” Replacing “member” with “means” leaves the Court with exactly the same information about this claim term. It would remain a black box—without any structure—for carrying out the function of interacting with the fastening detent (the interaction restraining the structural bridge to a control module). Dr. Cagan’s declaration leaves no doubt that a person in the relevant field would not associate the term with a definite structure. He opines, for example, that “retention” does not denote a structure with a generally understood meaning in the mechanical arts. “Retention member” is nothing more than a nonce word (“member”) coupled to a functional modifier (“retention”).

Nintendo OCCB at 32-33. Nintendo further argues that the specification does not sufficiently describe or disclose structure that performs the “interacting” function. *Id.* at 33-34.

Gamevice’s entire reply is three paragraphs:

### **1. Complainant’s Construction Should Be Adopted**

Claim 16 of the ‘498 patent requires the “retention member” to interact with the “fastening detent” to “restrain[] the structural bridge to a control module of the pair of control modules.” Although Respondents declare that Complainant “has a problem” with its proposed construction of “retention member,” they have it backwards. The parties have agreed to a definition of “fastening detent” as “a catch or lever that is securely held by the retention

member.” A POSITA would understand that a “retention member” that securely holds a catch or a lever would need to have “a recess or opening for securely receiving or catching” that catch or lever. (COB Ex. 4, Stubben Decl. ¶69). Accordingly, Complainant’s proposed construction makes complete sense in light of the agreed-upon construction of “fastening detent.”

Respondents are also wrong that Complainant’s proposal finds no support in the specification. The specification describes that fastening detent 264 is provided by a component of the pair of control modules 252, and interacts with a retention member 266, to secure the structural bridge 258 to the pair of control modules 252. (RB Ex 3, ‘498 patent at 8:28-32). To secure the bridge to a control module, the control module’s fastening detent must be “securely held by the retention member,” as the parties agree, and reciprocally, the bridge’s retention member must “securely receiv[e] or catch[] the fastening detent,” as Complainant’s construction provides. The specification further states that in a preferred embodiment, the retention member 266 is responsive to a catch 268. *Id.* at 8:32-36. This also is consistent with Complainant’s proposal, because the parties agree “fastening detent” includes a “catch.”

## **2. “Retention Member” is not a Means-Plus-Function Term**

“Retention member” does not use “means” and is not in means-plus-function formation. But, Respondents argue that “retention member” is a black box—without any structure—for carrying out the function of interacting with the fastening detent (the interaction restraining the structural bridge to a control module). (RB at 33). There is no dispute, however, that “fastening detent” connotes structure, and it follows that a POSITA would understand a “retention member” on a bridge that interacts with a catch or lever on a control module also connotes structure. Respondents have not overcome the presumption that § 112(f) does not apply. If the Court determines otherwise, the corresponding structure for the functions allegedly performed by the retention member is retention member 266 and equivalents. (Ex. A, Stubben Supp. Decl. ¶¶59-63).

Gamevice RCCB at 14-15.

For the reasons discussed below, the administrative law judge has determined that the term “retention member” is subject to § 112(f), that the relevant function is “interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining the

structural bridge to a control module of the pair of control modules,” and that the corresponding structure is “a cylindrical post or column that secures a catch or lever and equivalents thereof.”

*a) Whether § 112(f) Applies*

As a threshold issue, the administrative law judge must determine whether § 112(f) applies to the disputed term. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347-48 (Fed. Cir. 2015). The Federal Circuit has explained:

In making the assessment of whether the limitation in question is a means-plus-function term subject to the strictures of § 112, para. 6, our cases have emphasized that the essential inquiry is not merely the presence or absence of the word “means” but whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.

*Id.* at 1348; *see also* The Manual of Patent Examining Procedure § 2181 (Ninth Edition, Revision 08.2017, Last Revised January 2018) (“To determine whether a word, term, or phrase coupled with a function denotes structure, examiners should check whether: (1) the specification provides a description sufficient to inform one of ordinary skill in the art that the term denotes structure; (2) general and subject matter specific dictionaries provide evidence that the term has achieved recognition as a noun denoting structure; and (3) the prior art provides evidence that the term has an art-recognized structure to perform the claimed function.”).

Here, the term “retention member” is functional because a person of ordinary skill in the art would not understand the term to have a sufficiently definite meaning as the name for a structure.

With regard to the claims, the term “retention member” appears only in claim 16 of the ‘498 Patent. *See, e.g.*, ‘498 Patent at 20:5-10 (“said structural bridge still further comprising a retention member, the retention member interacts with the fastening detent, the interaction of the

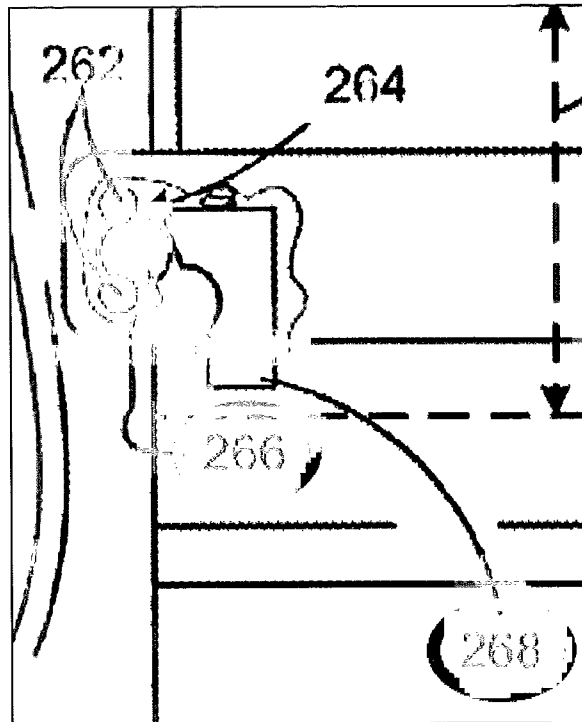
fastening detent with the retention member restrains the structural bridge to a control module of the pair of control modules.”). The phrases following the “retention member” are verb phrases—the member must “interact” with other components and thereby “restrain” different components. This indicates that the “retention member” would not be understood as a structure. Further, claim 16 and all of the other claims in the patent do not impose any structural attributions to the retention member. The claim language does not limit the shape. Thus, the claims do not convey structure.

The specification (*see* ‘498 Patent at 8:28-39) also fails to provide a sufficient description of structure. In particular, the specification describes what the retention member does, rather than describing the retention member’s physical attributes. For example, the specification states that the retention member “interacts” with the fastening detent and “is responsive to a catch.” While the specification references a “spring loaded retention member 268,” it is not clear where the spring is located and how it works, and how a device having two retention members (266 and 268) is arranged.<sup>34</sup>

Figure 14 also does not sufficiently convey structure. An excerpt of Figure 14 that focuses on elements 266 and 268 follows:

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<sup>34</sup> In any event, the claim is not limited to the “preferred embodiment.”



*Id.*, Figure 14 (annotations added). As shown above, retention member 266 is represented by a two-dimension circle, and element 268 (whether it is a catch or a retention member) is represented either by a two-dimensional rectangle or a polygon that includes a complimentary circular recess. These basic shapes fail sufficiently to convey structure, particularly where the specification teaches that the “*detailed description is illustrative only, and changes may be made in detail, especially in matters of structure and arrangements of parts*” within the principles of the present invention to the full extent indicated by the broad general meaning of the terms in which the appended claims are expressed.” See ‘498 Patent at 17:32-44 (emphasis added).



The parties have not identified any portions of the prosecution history that apply to the term “retention member.”<sup>35</sup> The prosecution history does not elucidate the meaning of the disputed term.

With regard to the extrinsic evidence, the administrative law judge notes that the parties submitted expert declarations. *See, e.g.*, Stubben Decl., ¶¶ 64-71; Cagan Decl., ¶¶ 122-130; Stubben Supp. Decl., ¶¶ 58-63. While Mr. Stubben’s declarations are generally cumulative of Gamevice’s arguments, Mr. Stubben adds some clarification to Gamevice’s argument in opining that “a suitable ‘retention member’ for securely holding a catch or lever would include a component with a hole, a component with a slot, or a boss.” *See* Stubben Decl., ¶ 69. Mr. Stubben’s opinion is consistent with Figure 14 because it requires the “retention member” to be a physical component that secures a catch or lever.

Nintendo’s Notice of Additional Evidence claims that “retention member” is functional and that Mr. Stubben’s testimony further shows that this term is functional. *See* Notice of Additional Evidence, Ex. 1 at 6-8. The administrative law judge has reviewed the evidence and determined that it supports Nintendo’s arguments that the term is functional. The evidence, however, is not sufficient to show that retention member is indefinite. *Id.*, Ex. 1 at 8.

**b) Identification of Function**

In *Williamson*, the Federal Circuit explained:

Construing a means-plus-function claim term is a two-step process. The court must first identify the claimed function. *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012). Then, the court must determine what structure, if any, disclosed in the specification corresponds to the claimed function. Where there are multiple claimed functions, as we have here, the patentee must disclose adequate corresponding structure to perform all of the claimed functions. *Id.* at 1318-19. If the patentee fails to disclose

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<sup>35</sup> The parties have not identified any prior art that would help interpret the term.

adequate corresponding structure, the claim is indefinite. *Id.* at 1311-12.

792 F.3d 1339 at 1351-52.

Here, the parties agree that if § 112(f) applies to the “retention member” term, then the relevant function is “interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining the structural bridge to a control module of the pair of control modules.” *See* Gamevice OCCB at 29; Nintendo OCCB at 17, 31-34; Joint Chart of Agreed and Disputed Constructions at 11-12. Having reviewed the asserted patents, the undersigned accepts the undisputed function. *See, e.g.*, ‘498 Patent at 20:6-10 (claim 16).

*c) Identification of Structure*

In *Williamson*, the Federal Circuit explained:

Structure disclosed in the specification qualifies as “corresponding structure” if the intrinsic evidence clearly links or associates that structure to the function recited in the claim. [*Noah Sys.*] (citing *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997)). Even if the specification discloses corresponding structure, the disclosure must be of “adequate” corresponding structure to achieve the claimed function. *Id.* at 1311-12 (citing *In re Donaldson Co.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994) (en banc)). Under 35 U.S.C. § 112, paras. 2 and 6, therefore, if a person of ordinary skill in the art would be unable to recognize the structure in the specification and associate it with the corresponding function in the claim, a means-plus-function clause is indefinite. *Id.* at 1312 (citing *AllVoice Computing PLC v. Nuance Commc’ns, Inc.*, 504 F.3d 1236, 1241 (Fed. Cir. 2007)).

792 F.3d 1339 at 1352.

Here, Figure 14 of the ‘498 Patent depicts the retention member as a circle (as discussed above). Inasmuch as Figure 14 is a two-dimensional “back plan view of the combination computing device and electronic game control” it is reasonable to attribute a height to element 266, such that a person of ordinary skill in the art would understand that the retention member is

a cylindrical post or column. *See* '498 Patent at 2:29-30, Figure 14; *see also* Stubben Decl., ¶ 69. A person of ordinary skill in the art, based on the claim language as reflected in the parties' agreement concerning the "fastening detent" term, would further understand that the cylindrical post or column secures a catch or lever. Thus, the corresponding structure is a cylindrical post or column that secures a catch or lever and equivalents thereof.

\* \* \*

Accordingly, the administrative law judge has determined that (1) the term "retention member" is subject to § 112(f); (2) the relevant function is "interacting with the fastening detent, the interaction of the fastening detent with the retention member re-straining the structural bridge to a control module of the pair of control modules"; and (3) the corresponding structure is "a cylindrical post or column that secures a catch or lever and equivalents thereof."

\* \* \*

So ordered.



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David P. Shaw  
Administrative Law Judge

Issued: December 7, 2018

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

**INV. NO. 337-TA-1111**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Order No. 20 (Markman Order)** has been served upon the following parties as indicated, on DEC - 7 2010.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street SW, Room 112A  
Washington, DC 20436

<b>FOR COMPLAINANT GAMEVICE, INC.:</b>	
Jeffrey S. Gerchick, Esq. <b>QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP</b> 1300 I Street, NW, Suite 900 Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Express Delivery <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<b>FOR RESPONDENTS NINTENDO CO. LTD.; AND NINTENDO OF AMERICA, INC.:</b>	
Grant Kinsel, Esq. <b>PERKINS COIE LLP</b> 1201 Third Avenue, Suite 4900 Seattle, WA 98101	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Express Delivery <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____