

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN VIDEO GAME SYSTEMS
AND WIRELESS CONTROLLERS AND
COMPONENTS THEREOF**

Investigation No. 337-TA-770

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART AND
REMAND-IN-PART A FINAL DETERMINATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review certain portions of the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on August 31, 2012, and to remand the investigation to the ALJ to determine the following issues: (a) direct infringement of the asserted claim of U.S. Patent No. 7,500,917 (“the ‘917 patent”) in light of the proper construction of the term “wand” as set forth in the Commission opinion; (b) whether the independently sold Wii MotionPlus and Nunchuck accessories contributorily infringe the asserted claim of the ‘917 patent and U.S. Patent No. 7,896,742 (“the ‘742 patent”); (c) anticipation and obviousness with respect to the asserted claim of the ‘917 patent; (d) obviousness with respect to the asserted claim of the ‘742 patent; (d) whether CK has satisfied the technical prong of the domestic industry requirement with respect to the ‘917 and ‘742 patents, and if necessary, whether CK has satisfied the economic prong of the domestic industry requirement with respect to the ‘917 and 742 patent in light of the ALJ’s technical prong determination. The current target date of this investigation is January 7, 2012. In light of the remand, the ALJ shall set a new target date within 30 days of this notice.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-4737. 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 April 27, 2011, the Commission instituted the subject investigation based on a complaint filed by Creative Kingdoms, LLC of Wakefield, Rhode Island and New Kingdoms, LLC of Nehalem, Oregon (collectively, “CK”). 76 *Fed. Reg.* 23624 (Apr. 27, 2011). The complaint alleges violations of Section 337 by reason of infringement of certain claims of the ‘917 patent, the ‘742 patent, U.S. Patent No. 7,850,527 (“the ‘527 patent”), and U.S. Patent No. 6,761,637 (“the ‘637 patent”). The named respondents are Nintendo Co., Ltd., of Kyoto, Japan and Nintendo America, Inc. of Redmond, Washington (collectively, “Nintendo”). The ‘637 patent was subsequently terminated from the investigation. On August 31, 2012, the ALJ issued a final ID finding no violation of section 337 by Nintendo. The ALJ found that the accused products infringe sole asserted claim 24 of the ‘742 patent, but that the claim is invalid for failing to satisfy the enablement requirement and the written description requirement under 35 U.S.C. § 112. The ALJ found that no accused products infringe the asserted claims of the ‘917 patent and the ‘527 patent. The ALJ also found that the asserted claims of the ‘917 and ‘527 patent are invalid for failing to satisfy the enablement requirement and the written description requirement. The ALJ concluded that complainant has failed to show that a domestic industry exists in the United States that exploits the asserted patents as required by 19 U.S.C. § 1337(a)(2). The ALJ did not making a finding with respect to anticipation and obviousness of the asserted patents. The ALJ also did not make a finding regarding the technical prong of the domestic industry requirement with respect to the ‘917 and ‘742 patents. Lastly, although the ALJ found direct infringement of the ‘742 patent, the ALJ did not make a finding with respect to contributory infringement of the asserted claim of the ‘742 patent.¹

On September 17, 2012, CK, Nintendo, and the IA each filed a petition for review challenging the ALJ’s findings with respect to the ‘917 and ‘742 patent. None of the parties petitioned for review of the ALJ’s final ID with respect to the ‘527 patent.

The Commission has determined to review the following issues: (1) claim construction of the limitation “toy wand” of the asserted claim of the ‘917 patent; (2) non-infringement of the asserted claim of the ‘917 patent; (3) infringement of the asserted claim of the ‘742 patent; (4) validity of the asserted claims of the ‘917 and ‘742 patent under the enablement requirement; (5) validity of the asserted claims of the ‘917 and ‘742 patent under the written description requirement; and (6) whether the domestic industry requirement is met with respect to the ‘917 and ‘742 patents. A Commission opinion with respect to the claim construction of the term “toy wand” of the asserted claim of the ‘917 patent will issue shortly.

Commission has determined to remand this case to the ALJ to determine the following issues: (a) direct infringement of the asserted claim of the ‘917 patent in light of the proper construction of the term “wand” as set forth in the Commission opinion; (b) whether the independently sold Wii MotionPlus and Nunchuck accessories contributorily infringe the asserted claim of the ‘917 patent and ‘742 patents; (c) anticipation and obviousness with respect

¹ The ALJ should have resolved these issues given the procedural posture of this investigation (*i.e.*, post-hearing), and the absence of an extraordinary fact situation that would weigh heavily against resolving these material issues presented in the record. *See Certain Stringed Instruments and Components Thereof*, Inv. No. 337-TA-586, USITC Pub. No. 4120, Comm'n Op. at 1 n.1 (Dec. 2009).

to the asserted claim of the '917 patent; (d) obviousness with respect to the asserted claim of the '742 patent; (e) whether CK has satisfied the technical prong of the domestic industry requirement with respect to the '917 and '742 patents, and if necessary, whether CK has satisfied the economic prong of the domestic industry requirement with respect to the '917 and 742 patent in light of the ALJ's technical prong determination.

Briefing, if any, on remanded and reviewed issues will await Commission consideration of the remand ID. The Commission has determined not to review the final ID with respect to the '527 patent.

The current target date of this investigation is January 7, 2012. In light of the remand, the ALJ shall set a new target date within 30 days of this notice.

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 sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46 and 210.50).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: November 6, 2012