

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
)
CERTAIN VIDEO GAME MACHINES)
AND RELATED THREE-DIMENSIONAL)
POINTING DEVICES)

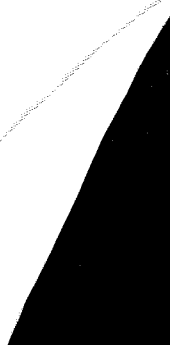
Investigation No. 337-TA-658

Order No. 21: Relating To Use Of Witness Statements And Admission Of Expert Reports

Pursuant to the procedural schedule and the ground rules, complainant Hillcrest Laboratories, Inc. (Hillcrest), in a submission dated March 20, 2009 as to use of witness statements and expert reports, argued that it intends to present the direct testimony of all its witnesses through live testimony rather than relying, in whole or in part, on written statements; that it would consider presenting certain non-controversial testimony, such as expert witness qualifications, through written witness statements, should it appear that the parties will have difficulty presenting all live testimony in the time available for the trial, although, currently Hillcrest does not anticipate that being necessary; and that Hillcrest does not intend to offer the report of any expert into evidence.

Respondents Nintendo Co., Ltd. and Nintendo of America Inc. (Nintendo), in a submission dated March 20, 2009, argued that written witness statements should be permitted in lieu of live direct testimony on matters of background, such as a witness's qualifications, educational history, or work experience, as well as any other non-controversial matters the parties agree are not in dispute; and that given the preference for live testimony, however, in all other areas of testimony, particularly in areas of dispute, live direct testimony would better permit the administrative law judge in understanding the issues and assessing the evidence, including the credibility of witnesses.

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Respondents, as to expert reports, argued that at present, Nintendo anticipates that six expert witnesses will be called to testify at the hearing in this matter; that the depositions of these experts are presently on-going, but Nintendo estimates that they will be deposed for a total of 12 to 14 days to fully explore the boundaries of their opinions; that in light of this extensive volume of information, and the fact that the hearing in this investigation is only scheduled for 5 trial days, Nintendo's position is that expert reports, as well as all exhibits and materials supporting expert reports, should be received into evidence at the hearing in this investigation; that receiving the expert reports into evidence will benefit the administrative law judge by permitting him to have before him the full scope of the expert's opinions and the grounds therefore, while at the same time permitting live testimony to be focused on critical issues in the case, including key points of dispute; that it is these areas where Nintendo respectfully submits being able to evaluate the testimony of a live witness, including their credibility, which is most essential; that mindful that there are three patents in two distinct families and dozens of patent claims still in dispute in this investigation, not permitting the expert reports to be admitted into evidence will require the expert witnesses to devote a significant portion of their testimony to establishing the existence of facts that are not "generally contested;" that given this concern, during meet and confer Nintendo asked Hillcrest to consider narrowing the scope of patent claims which remain asserted; and that Hillcrest indicated that at the present time it does not intend to narrow the scope of asserted claims, although it may determine to remove claims in the future.

The staff did not submit a written response on the matter. However, Nintendo represented that the parties generally agree with respect to the use of witness statements and that Nintendo understands that the staff's position is that expert reports should not be admitted into

evidence. In a telephone call on March 23, 2009 with the attorney advisor the staff reaffirmed that position.

Having considered the arguments of the parties, written testimony for direct testimony of witnesses will be limited to non-controversial testimony. However, the parties should exchange said witness statements before submission to the administrative law judge to assure that they contain only non-controversial testimony.

Regarding expert reports, Nintendo's arguments are confusing. Their arguments can be read such as to conclude that the administrative law judge can ignore a portion of an expert report, which has no page limitation, that does not relate to "critical issues" in the case. If that is Nintendo's position, Nintendo should have so stated. Moreover, Nintendo did not define the phrase "generally contested." Hence, based on the submission of Nintendo, the administrative law judge is rejecting Nintendo's position that expert reports should be admitted into evidence. Rather the administrative law judge agrees with complainant and the staff that expert reports are not to be admitted with evidence.


Paul J. Luckern
Chief Administrative Law Judge


Issued: March 24, 2009

**CERTAIN VIDEO GAME MACHINES AND
RELATED THREE-DIMENSIONAL POINTING
DEVICES INTERMEDIATES, AND PRODUCTS
CONTAINING THE SAME**

Inv. No. 337-TA-658

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Order** has been served by hand upon the Commission Investigative Attorney, Christopher G. Paulraj, Esq., and the following parties as indicated, on March 25, 2009.


Marilyn R. Abbott, Secretary *SWB*
U.S. International Trade Commission
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