

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

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

Inv. No. 337-TA-770

**ORDER NO. 33: GRANTING COMPLAINANTS CREATIVE KINGDOMS, LLC
AND NEW KINGDOMS, LLC'S MOTION FOR LEAVE TO
SERVE SUPPLEMENTAL EXPERT REPORT; DENYING
COMPLAINANTS' MOTION TO STRIKE SUPPLEMENTAL
EXPERT REPORT OF DR. NATHANIEL POLISH**

(January 9, 2012)

On November 22, 2011, Complainants Creative Kingdoms, LLC and New Kingdoms, LLC (collectively, "CK") moved (770-028) for leave to serve a supplemental expert report. On December 2, 2011, Respondents Nintendo Co., Ltd. and Nintendo of America, Inc. (collectively, "Nintendo") filed their response to CK's motion. The Commission Investigative Staff ("Staff") does not oppose CK's motion for leave. (See 11/22/11 Mot. at 1.) Additionally, on December 8, 2011, CK moved (770-031) to strike the supplemental expert report of Dr. Nathaniel Polish. On December 19, 2011, Nintendo filed its opposition to that motion. The Commission Investigative Staff did not file a response to CK's motion to strike.

CK seeks to serve a supplemental expert report of Dr. Vojcic because it asserts that Nintendo introduced certain claim construction arguments for the first time in the rebuttal expert report of Dr. Subramanian. (11/22/2011 Mem. at 2.) CK asserts that the procedural schedule set October 13, 2011 as the deadline for "responses to contention interrogatories regarding issues on which the party bears the burden of proof," which CK claims applies to the parties' positions on claim construction. (*Id.* at 4-5.) CK states that Nintendo improperly refused to agree to a mutual

exchange of claim constructions and signaled an intent to withhold its claim construction until the due date for rebuttal expert reports and the close of fact discovery. (*Id.* at 5.) CK further claims that Dr. Subramanian, Nintendo's expert on infringement, served a rebuttal expert report in which he disclosed Nintendo's proposed claim constructions for the first time. (*Id.* at 7.) Because Nintendo's proposed claim constructions were revealed for the first time in Dr. Subramanian's rebuttal expert report, CK argues that it did not have an opportunity to take fact discovery on those constructions and its expert, Dr. Vojcic, did not have an opportunity to analyze those constructions. (*Id.* at 8-9.)

CK also seeks to strike Dr. Polish's supplemental report because it was untimely and Nintendo failed to move for leave to serve the supplemental report. (12/8/2011 Mem. at 1.) CK claims that Nintendo served Dr. Polish's supplemental expert report on December 2, 2011, long after the due date for opening and rebuttal expert reports. (*Id.* at 4.) CK further claims that Nintendo failed to seek leave to file the supplemental report, even though it was outside of the time permitted by the procedural schedule.¹ (*Id.*) In addition, with respect to Dr. Polish's opinions on CK's claim construction, CK asserts that Nintendo should have supplemented his report at least by November 17, 2011 because CK provided its claim constructions on November 3, 2011 in Dr. Vojcic's opening expert report. (*Id.* at 6.) Thus, CK claims that there is no reason why Nintendo could not have addressed CK's claim constructions within the time permitted by the procedural schedule. (*Id.* at 7.)

In response to CK's motion for leave, Nintendo argues that because both sides did not exchange claim constructions prior to the exchange of opening expert reports, both sides are required to submit supplemental expert reports. (Resp. at 1-2.) Nintendo claims that even

¹ CK notes that while Nintendo purported to seek leave to serve the supplemental expert report in its responsive brief to CK's motion for leave to serve a supplemental expert report, this was not a request made in a written motion. (*Id.* at 4-5.)

though it made clear to CK that it disagreed with CK's interpretation of the procedural schedule and would not provide claim constructions until November 17, 2011, CK did not move to amend the procedural schedule. (*Id.* at 3.) Moreover, Nintendo asserts that claim constructions were not due before the November 17, 2011 because they are not responses "regarding issues on which the party bears the burden of proof." (*Id.* at 5-6.) Nintendo also contends that, contrary to CK's assertions, its expert was not required to analyze invalidity based on Nintendo's own proposed claim constructions. (*Id.* at 7.) Nintendo further claims that because supplementation is allowable under the Ground Rules and Commission Rules, CK does not need to seek leave to supplement Dr. Wojcic's expert report. (*Id.* at 9.) Thus, Nintendo contends that because both sides' positions on claim construction have now been disclosed, both sides are obligated to supplement their expert reports. (*Id.*)

In response to CK's motion to strike, Nintendo contends that there is no deadline for supplemental reports in the procedural schedule. (*Opp.* at 2.) As noted above, Nintendo asserts that both parties were permitted to supplement their expert reports without motions practice. (*Id.*) In addition, Nintendo claims that CK has not suffered any prejudice from the timing of Dr. Polish's supplemental expert report and thus, it should not be struck. (*Id.* at 8.)

Having reviewed the pleadings and arguments contained therein, the undersigned finds CK's arguments persuasive with respect to CK's motion for leave to serve a supplemental expert report. The undersigned rejects Nintendo's argument that CK's motion is unnecessary. While Nintendo is technically correct that Commission Rule 210.27(c) imposes a duty to seasonably supplement discovery, in practice, the undersigned generally requires parties to move for leave to serve supplemental expert reports. Thus, given the timing of disclosure of Nintendo's proposed claim construction, the undersigned finds that CK has good cause to supplement its expert

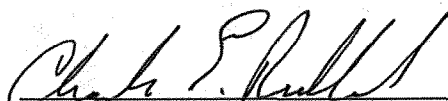
report.² Accordingly, CK's motion (770-028) for leave to serve a supplemental expert report is hereby granted.

With respect to CK's motion to strike, the undersigned finds Nintendo's arguments persuasive. Contrary to CK's assertions, the procedural schedule does not set forth any deadline for serving supplemental expert reports. Thus, while the undersigned typically requires parties to move for leave to serve supplemental expert reports, the undersigned does not find that Nintendo's supplemental expert report is untimely. Accordingly, CK's motion (770-031) to strike the supplemental expert report of Dr. Polish is hereby denied.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submission may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.



Charles E. Bullock
Chief Administrative Law Judge

² The undersigned sees no reason why the parties could not have mutually agreed upon dates for exchanging proposed claim constructions and supplemental expert reports. The undersigned expects the parties to make every effort to resolve such disputes in the future.

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CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **PUBLIC VERSION ORDER NO. 33** has been served upon, **Bryan Moore, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on January 31, **2012**.



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