

No. 24-1467

**In the United States Court of Appeals
for the Federal Circuit**

GAMEVICE, INC.,

Plaintiff-Appellant

v.

NINTENDO CO., LTD., NINTENDO OF AMERICA, INC.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District
of California, No. 18-cv-01942-RS

**PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number: 24-1467

Short Case Caption: Gamevice, Inc. v. Nintendo Co., Ltd.

Filing Party/Entity: Gamevice, Inc.

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Name: Erik R. Puknys

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. Whether, contrary to longstanding rules of judicial estoppel and law of the case, a party who obtains summary judgment that its product practices a patent limitation for purposes of anticipation may subsequently seek and obtain a judgment that the same product does not practice that limitation for purposes of infringement—in conflict with the legal and factual basis for the original summary judgment order.

2. Whether a court of appeals may properly affirm an inconsistent judgment without resolving the inconsistency by extracting agreement at oral argument that a non-appealing party will seek to vacate a portion of the district court's judgment in its favor.

/s/ Erik R. Puknys
Erik R. Puknys

Counsel for Gamevice, Inc.

INTRODUCTION

The panel’s actions here radically extended the reach of this Court’s patent anticipation precedents, in conflict with settled principles of judicial estoppel and law of the case. It is blackletter law that a party who persuades a court of its litigation position is bound to that position as the case proceeds. *See Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Winning on anticipation is no exception. So when Nintendo obtained summary judgment that its “Switch” gaming device anticipated several Gamevice patent claims, it was bound to that position, and could not later switch horses to contend that the Switch did not practice the very same limitations in Gamevice’s unanticipated claims.

Yet the district court allowed Nintendo to do just that. It issued two plainly inconsistent summary judgment orders—first finding that the Switch practiced claim limitations for purposes of anticipation and then finding that it did not practice the identical limitations for purposes of infringement.

The panel recognized the problem, but brushed past it. At oral argument, Chief Judge Moore explained that there was “surely an inconsistency” in the positions Nintendo had advanced and won on. Oral

Arg. 29:58-30:10. It was “not fair,” Chief Judge Moore observed, for Nintendo “to invalidate claims by virtue of saying [the] device has all of the elements and then avoid infringement of the same patent by saying [its] device does not have all the elements.” *Id.* at 32:06-20. Nonetheless, the panel affirmed *without even addressing* the argument that dominated the parties’ briefing. An unusual footnote explained that, at oral argument, “Nintendo agreed to file a motion on remand, asking the district court to reconsider its invalidity ruling and simply adopt the alternative non-infringement ground.” Panel Op. 6 n.4.

That result was unlawful, and it authorized a novel patent-specific exception to generally applicable estoppel principles that is manifestly unfair to patentholders and unworkable in practice. To defend the inconsistent orders in its favor, Nintendo relied on two decisions about the burden of proof for anticipation defenses—*Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1366 (Fed. Cir. 2000), and *Evans Cooling Systems, Inc. v. General Motors Corp.*, 125 F.3d 1448 (Fed. Cir. 1997). But neither opinion supports Nintendo’s heads-I-win, tails-I-also-win theory, under which a patentholder is bound to its “allegation that the accused [products] infringe” for purposes of anticipation, *Vanmoor*, 201

F.3d at 1366, but accused infringers remain free to switch arguments when convenient. With summary judgment in hand that its product practices a claim limitation for purposes of anticipation, an accused infringer can now still insist that its product *does not practice the same limitation* for purposes of infringement.

The panel's affirmance condones Nintendo's anomalous reading of *Vanmoor* and *Evans Cooling* and invites accused infringers to switch positions in precisely the way Nintendo did below. And the panel's extra-legal fix—affirming an indisputably inconsistent judgment by soliciting Nintendo's promise to seek partial reconsideration below at some unspecified later date—exceeded the Court's jurisdiction, violates basic notice obligations, and is just profoundly unfair. In patent cases, like all others, parties cannot be expected to litigate under the specter that their adversary may evade the consequences of its litigation tactics with a post-appeal “just kidding” motion. The panel's mid-argument bargain with Nintendo's counsel was not a lawful basis to affirm a district court judgment the panel recognized was flawed. Rehearing is urgently needed to correct the panel's departure from settled law and to confirm that accused infringers must follow the same rules that apply to all litigants.

ARGUMENT

In two ways, the panel’s decision conflicts with settled law on a matter of exceptional importance. First, by allowing an accused infringer to obtain flatly contradictory summary judgment decisions on anticipation and infringement, the panel decision creates a special exception to judicial estoppel and law of the case in patent cases. Such a sui generis exception to ordinary procedural rules is unsupported by this Court’s precedents and creates an unequal playing field for patentholders and accused infringers.

Second, the panel went equally wrong in holding that an invalid judgment can be affirmed if one party acquiesces to a judge’s suggestion to seek post-affirmance partial reconsideration of the aspect of the judgment it won but no longer likes. Only the judgment the district court issued, faults and all, was properly before the panel—not some hypothetical future judgment. And that matters. Gamevice’s appeal challenged only the non-infringement holding, and Nintendo did not cross-appeal the invalidity holding. The decision to affirm the inconsistent judgment on the possibility that an unappealed portion

might later be reconsidered exceeded the panel’s jurisdiction, was unfair to Gamevice, and opens the door to mischief by future accused infringers.¹

I. The Panel’s Extension of *Vanmoor* and *Evans Cooling* Conflicts with Bedrock Principles of Judicial Estoppel and Law of the Case

There is no question that the district court’s summary judgment of noninfringement conflicted with its summary judgment that the Switch practiced identical limitations in anticipated claims. *See* Appx12-13 (finding that several of Gamevice’s claim “limitations[] are not infringed by the Switch”); Appx16 (finding that earlier claims containing the same limitations “are all anticipated by prior art—that is, by the Nintendo Switch. Anticipation occurs when a single prior art reference expressly or inherently describes each and every limitation set forth in the patent claims”) (cleaned up); *see also* Oral Arg. 29:58-30:10 (recognizing inconsistency). Nor is there any dispute that Nintendo urged the district

¹ The opinion’s publication status should not insulate it from en banc review. This case has been widely publicized and is well-known in the patent bar. *See, e.g.,* Garrett Lee & Andrew Velzen, *Federal Circuit Refuses to Switch District Court’s Finding for Nintendo*, PatentDocs (Jan. 21, 2026), <https://patentdocs.org/2026/01/21/federal-circuit-refuses-to-switch-district-courts-finding-for-nintendo/>. Whether in a published opinion or not, the perverse incentives generated by the decision will only encourage future litigants to repeat Nintendo’s gambit.

court to find that the Switch anticipated Gamevice’s patent claims, pivoting to the opposite position—that the Switch did not practice those claim limitations—after it obtained summary judgment that several of Gamevice’s claims were anticipated and thus invalid. *See* Appx16, Appx832. Despite Gamevice’s objection that *at minimum* the invalidity decision needed to be vacated before the district court entered final judgment, Dkt. 272, Nintendo insisted on (and obtained) a final judgment declaring various Gamevice patents invalid as anticipated and simultaneously declaring that the Switch did not practice the patent limitations. Appx965-66.

Under established rules of judicial estoppel and law of the case, that should have resolved this appeal. Judicial estoppel “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (cleaned up); *see also Cent. Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983) (“law of the case doctrine ... ‘expresses the practice of courts generally to refuse to reopen what has been decided.’” (citation omitted)). And because Nintendo’s arguments for summary judgment turned on

inconsistent assertions with respect to the same basic fact—whether the Switch practiced identical limitations—the district court’s summary judgment order adopting Nintendo’s position on anticipation barred Nintendo’s about-face on infringement. *See* Gamevice Br. 24-31; *id.* at 34 (“the rule is well established ‘that which infringes, if later, would anticipate, if earlier’”) (quoting *Knapp v. Morss*, 150 U.S. 221, 228 (1893)). The panel’s affirmance condones a novel exception to this bedrock procedural rule for patent cases that is unlawful, unfair, and unwise.

A. The Panel Decision Conflicts with Settled Law

Both judicial estoppel and law of the case ensure basic fairness and safeguard litigants’ reliance interests. Recognizing judicial estoppel is critical “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749-50 (citations and quotation marks omitted). Once a party prevails on its litigation position, he “may not thereafter, simply because his interests have changed, assume a contrary position.” *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010) (quoting *New*

Hampshire, 532 U.S. at 749). Law of the case similarly bars a party from contesting “issues that were actually decided, either explicitly or by necessary implication” in an earlier unchallenged judicial decision. *Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2004).

These principles fully apply to Nintendo’s litigation conduct here. As the district court recognized, a grant of summary judgment on anticipation is a ruling of fact: Nintendo “b[ore] the burden to prove facts establishing anticipation by clear and convincing evidence.” Appx16 (quoting *Mentor H/S, Inc. v. Med. Device All., Inc.*, 244 F.3d 1365, 1377 (Fed. Cir. 2001)). And because anticipation is the mirror image of infringement, Nintendo’s successful assertion that the Switch practiced Gamevice’s claim limitations precluded its later—directly contrary—position that the Switch did not practice the very same claims. *See* Gamevice Br. 24-31. “A patent may not, like a ‘nose of wax,’ be twisted one way to avoid anticipation and another to find infringement,” or vice versa. *Sterner Lighting, Inc. v. Allied Elec. Supply, Inc.*, 431 F.2d 539, 544 (5th Cir. 1970) (quoting *White v. Dunbar*, 119 U.S. 47, 51 (1886)). “It is well-established that a party who successfully argues one position is estopped from later adopting a contrary position in a case involving the

same patent.” *Organic Seed Growers & Trade Ass’n v. Monsanto Co.*, 718 F.3d 1350, 1358 (Fed. Cir. 2013).

The panel decision abandons this well-established law. At bottom, judicial estoppel means that a party is bound by its successful litigation position *even when that litigation position becomes inconvenient* at a later phase of the case. *New Hampshire*, 532 U.S. at 749-50. As Chief Judge Moore put it, a party does not “get to switch horses halfway through the race.” Oral Arg. 32:26-33. That is no less true when, as Nintendo did here, a party decides after winning one way that it would have preferred to win on a contradictory alternative ground. Nor can a party attempt to achieve that end by seeking reconsideration of the original order in its favor—a step Nintendo has not even taken here.

Avoiding that sort of gamesmanship lies at the heart of judicial estoppel. By affirming in full, after soliciting Nintendo’s promise to try to undo the judgment in its favor, the panel allowed Nintendo to do precisely what the Supreme Court has held impermissible: “deliberately chang[e] positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 750 (citation omitted).

B. Neither *Vanmoor* nor *Evans Cooling* Authorizes an Exception to Ordinary Estoppel Rules in Patent Cases

Nintendo's only defense of its litigation conduct below was to advocate a dramatic extension of two of this Court's anticipation precedents—a novel end-run around judicial estoppel that the panel decision effectively invites accused infringers to replicate in future cases. For Nintendo, a so-called “*Evans/Vanmoor* motion” is exempt from ordinary judicial-estoppel rules, even when the accused infringer then obtains summary judgment invalidating another party's patent claims. Nintendo Br. 29. But no Federal Circuit precedent authorizes a litigant to first obtain summary judgment that it practices the limitations of a patent for anticipation and then seek a ruling that it does not practice those very same limitations for purposes of infringement. In affirming Nintendo's inconsistent summary judgment orders, the panel decision works a significant—and unsupportable—change in Circuit law.

Both *Evans Cooling* and *Vanmoor* were narrow burden-of-proof decisions. To obtain a ruling that a patent is invalid as anticipated, an accused infringer must prove as much by clear and convincing evidence. *Mentor H/S*, 244 F.3d at 1376-77. Recognizing that priority rather than embodiment is often the primary dispute when an accused infringer

contends that its own product anticipates a patent claim, this Court authorized an alternative route of proof. The accused infringer may satisfy its burden by relying on the patentholder’s “allegation that the accused [products] infringe.” *Vanmoor*, 201 F.3d at 1366. That is, the accused infringer may in essence stipulate to the allegation of infringement that is “the entire basis of the lawsuit.” *Evans Cooling*, 125 F.3d at 1451.

Nothing in *Evans Cooling* or *Vanmoor* purports to—or could—alter the standard for summary judgment or the estoppel effect of a party obtaining summary judgment based on an *Evans Cooling/Vanmoor* stipulation. To be sure, parties may plead inconsistent defenses in the alternative. *See id.*; *see also* Fed. R. Civ. P. 8(d) (permitting inclusion of alternative or inconsistent defenses in a pleading); Fed. R. Civ. P. 7(a) (defining a “pleading” to include only complaints and answers). But summary judgment is a merits determination that must rest on facts supportable by admissible evidence (including the parties’ mutually binding stipulations). *See* Fed. R. Civ. P. 56(a), (c). Nintendo “bore the burden of proving” that the Switch “embodied” Gamevice’s patents. *Evans Cooling*, 125 F.3d at 1451.

When a party prevails on a position on a dispositive motion like a motion for summary judgment, it is estopped from taking a contrary position in the same case. *See, e.g., Rockwood v. SKF USA Inc.*, 687 F.3d 1, 11 (1st Cir. 2012) (party bound to position taken on first summary judgment motion for purposes of second summary judgment motion); *Occidental Petroleum Corp. v. Wells Fargo Bank, N.A.*, 117 F.4th 628, 638 (5th Cir. 2024) (party bound to position taken on motion to dismiss); *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 34 (1st Cir. 2004) (same). Yet the panel’s decision permits Nintendo to have its cake and eat it too—winning anticipation on one set of facts and non-infringement on a second, inconsistent set of facts. “This type of bait-and-switch is the exact behavior judicial estoppel seeks to prevent.” *Occidental*, 117 F.4th at 638.²

If anything, the entire premise of *Evans Cooling* and *Vanmoor* depends on accepting ordinary estoppel principles. The reason accused infringers can rely on the plaintiff’s assertions to prove embodiment is

² Nor may accused infringers avoid estoppel so long as they state that they are conceding infringement only for their own limited purposes. If admissions are only binding when they advance a party’s position, estoppel would be no constraint at all.

that the plaintiff is bound by its own allegations. *See Evans Cooling*, 125 F.3d at 1451.

Indeed, if *Evans Cooling* or *Vanmoor* abrogated the typical rules for summary judgment or the estoppel effect of summary judgment decisions in patent cases, they would likely exceed this Court's authority. By their terms, the Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1. And this Court applies regional circuit law on general issues of estoppel, *see Aspex Eyewear, Inc. v. Zenni Optical Inc.*, 713 F.3d 1377, 1380 (Fed. Cir. 2013), particularly "when there exists expressed uniformity among the circuits," *Manildra Mill. Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1181 (Fed. Cir. 1996). Gamevice is aware of no case, and the panel cited none, holding that a party that succeeded on a motion for summary judgment was not bound by that victory.

If left uncorrected, the panel decision opens the door for accused infringers to assert that their products anticipate patent claims and, after obtaining a ruling that the other party's claims are invalid, subsequently contend that their products do not practice those very same

claim limitations. That radical extension of *Evans Cooling* and *Vanmoor* is a matter of exceptional importance, is wrong, and warrants rehearing.

C. The Panel Decision’s Result is Unfair and Unworkable

The panel’s decision also carries significant practical consequences, both for Gamevice and for future patent litigants. As Chief Judge Moore observed at argument, “it’s not fair for [Nintendo] to invalidate claims by virtue of saying [the] device has all of the elements and then avoid infringement of the same patent by saying [Nintendo’s] device does not have all the elements.” Oral Arg. 32:07-20. The impact for Gamevice is substantial: there is now a final judgment holding that many of its patent claims are invalid as anticipated.

More broadly, the regime Nintendo advocated, and the panel accepted, creates a fundamentally unfair playing field for patentholders and accused infringers. Under *Evans Cooling* and *Vanmoor*, a patentholder is bound by its allegations of infringement in a complaint. *See Vanmoor*, 201 F.3d at 1366; *Evans Cooling*, 125 F.3d at 1451. And if a court rules that its patents are invalid, the patentholder will be bound by that ruling in future litigation, most likely including future litigation involving *different* accused infringers. *See Blonder-Tongue Lab’ys, Inc. v.*

Univ. of Illinois Found., 402 U.S. 313, 350 (1971). Yet under the panel's decision, an accused infringer that asserts invalidity and obtains a ruling that a patent is invalid *is not likewise bound* by its own successful litigation position.

This estoppel-for-patentholders-only rule turns ordinary principles of judicial estoppel upside down. Without even discussing the problem, just wishing it away in a footnote, the panel decision relieves one side, and one side only, of the consequences of its litigation choices. And it does so even where, as here, Nintendo knowingly declined ample opportunities to avoid an inconsistent result. Nintendo steadfastly insisted that the district court should rule *both* that many of Gamevice's claims were invalid as anticipated *and* that the Switch did not practice those claims' limitations. Dkt.271. A fair system of procedure demands rules that apply equally to both sides.

II. The Panel's Affirmance of an Inconsistent Judgment Based on a Promise to Seek Reconsideration Was Unlawful

Separately and independently, the panel's affirmance of the district court's inconsistent judgment, apparently because Nintendo's counsel acquiesced at oral argument to seek reconsideration below, was an end-run around the panel's jurisdiction, and warrants rehearing. Whether

Nintendo’s successful pursuit of summary judgment on anticipation barred it from later seeking an inconsistent judgment of noninfringement was a central issue in this appeal. *See* Gamevice Br. 21-22, 24-35; Nintendo Br. 28-48; Gamevice Reply Br. 1-9; Oral Arg. 27:50-55 (calling this a “big issue”). But at oral argument, after expressing serious skepticism of Nintendo’s position, Chief Judge Moore struck what she called a “compromise” with Nintendo’s counsel. Oral Arg. 33:00-20. As explained in a footnote—the opinion’s only mention of this issue—“Nintendo agreed to file a motion on remand, asking the district court to reconsider its invalidity ruling and simply adopt the alternative non-infringement ground.” Panel Op. 6 n.4.

Nintendo’s off-the-cuff agreement to seek partial reconsideration below does not cure the legal defects in the district court’s inconsistent rulings, and the panel’s affirmance on that ground was unlawful. As discussed above, *see supra* pp.7-8, judicial estoppel binds a party to the positions it has advanced even when—indeed, especially when—“the exigencies of the moment” favor abandoning its prior position, *New Hampshire*, 532 U.S. at 750 (citation omitted). It makes things worse, not better, to reward the horse-switching party on appeal simply because

it promises to try to undo the victories it now regrets. For at least two reasons, the panel could not lawfully affirm an inconsistent judgment simply because Nintendo agreed to later seek a revision of that judgment.

First, the panel's reliance on Nintendo's promise to seek reconsideration violated the final judgment rule. This Court's jurisdiction in patent cases extends only to appeals "from a final decision of a district court ... in any civil action ... relating to patents." 28 U.S.C. § 1295(a)(1). An appellate court's jurisdiction is limited to a final judgment or parts thereof designated in the notice of appeal, and does not include subsequent post-judgment orders. *See Wall Guy, Inc. v. Fed. Deposit Ins. Corp.*, 95 F.4th 862, 870-71 (4th Cir. 2024) (holding that notice of appeal from final judgment did not confer appellate jurisdiction to review post-judgment order); *Pelletier v. United States*, 588 F. App'x 784, 788 (10th Cir. 2014) (same); *Bogle v. Orange Cnty. Bd. of Cnty. Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998) (same). Here, the panel affirmed based on a hypothetical future revision to the order under review that Nintendo has not yet even sought. No statute or rule confers jurisdiction on this Court to do so. If the orders under review were fatally

inconsistent (they were), the proper course was to vacate or reverse, not to sustain a counterfactual ruling the district court has not issued.

There are obvious practical reasons why appellate courts' jurisdiction is limited to reviewing past decisions that district courts have actually rendered, rather than affirming on the hope that the decision will be amended. The decree does not require Nintendo to seek the reconsideration Chief Judge Moore suggested; nothing in the panel decision compels the district court to grant such a motion if made; and there is no guarantee that any revised judgment will address the "potentially inconsistent" findings that the panel opinion noted. Panel Op. 6 n.4.

Procedural fairness and sound judicial decisionmaking also demand that parties to an appeal have notice and an opportunity to present argument on the issues before the Court. Gamevice had no opportunity to address in its briefing whether a belated, post-appeal motion for reconsideration would remedy the district court's inconsistent orders or excuse Nintendo from the ordinary rules of judicial estoppel. It would not.

Second, absent a cross-appeal, the Court lacked jurisdiction to review any portion of the district court's orders that Gamevice declined to challenge in its briefing. If "the appellee seeks to change or modify the judgment rather than just affirm it, the appellee must file a cross-appeal." *Granite Mgmt. Corp. v. United States*, 416 F.3d 1373, 1378 (Fed. Cir. 2005). Where the appellee declines to cross-appeal, "[he] may not attack the decree with a view to either enlarging his own rights thereunder or of lessening the rights of his adversary" even if "what he seeks is to correct an error." *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976).

Here too, the well-settled rule follows from principles of basic fairness: the issues under review should not be a moving target for the parties. On appeal, Gamevice chose—as was its right—to accept and rely on the earlier invalidity finding, rather than to challenge it, and Nintendo did not cross-appeal that finding. The panel lacked the power to disturb the invalidity finding or sua sponte relieve Nintendo of the consequences of its choices. An "appellate court may not alter a judgment to benefit a nonappealing party," *Greenlaw v. United States*, 554 U.S. 237, 245 (2008), such as by proposing the withdrawal of the aspect of the

judgment that should have estopped Nintendo from winning on infringement.

Finally, while the panel's decision affirming a fatally flawed judgment on the promise of a yet-unfiled motion to reconsider would warrant rehearing in any appeal, it is likely to be particularly damaging given the merits issues in this case. Accused infringers may now prevail on anticipation, pivot to flatly contradictory arguments on infringement, and maintain those inconsistent positions—and the benefit of inconsistent summary judgment orders—through appeal. At worst, apparently, they may be asked to seek partial reconsideration from the district court after a full affirmance in their favor. That is not how litigation is supposed to work. The Court should grant rehearing and hold Nintendo to its strategic litigation choices consistent with longstanding precedent.

CONCLUSION

The Court should grant panel rehearing or rehearing en banc.

February 17, 2026

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on February 17, 2026 and will, therefore, be served electronically upon all counsel.

/s/ Erik R. Puknys

Erik R. Puknys

Counsel for Gamevice, Inc.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rule 40(d)(2)(I), that the foregoing petition contains 3,897 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f). I further certify that the document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365, in 14-point Century Schoolbook font.

/s/ Erik R. Puknys
Erik R. Puknys

Counsel for Gamevice, Inc.

ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

GAMEVICE, INC.,
Plaintiff-Appellant

v.

**NINTENDO CO., LTD., NINTENDO OF AMERICA,
INC.,**
Defendants-Appellees

2024-1467

Appeal from the United States District Court for the
Northern District of California in No. 3:18-cv-01942-RS,
Judge Richard Seeborg.

Decided: January 16, 2026

ERIK R. PUKNYS, Finnegan, Henderson, Farabow, Gar-
rett & Dunner, LLP, Washington, DC, argued for plaintiff-
appellant. Also represented by JAMES R. BARNEY, SMITH
BRITTINGHAM, IV.

DAN L. BAGATELL, Perkins Coie LLP, Hanover, NH, ar-
gued for defendants-appellees. Also represented by GRANT
EDWARD KINSEL, THERESA H. NGUYEN, Seattle, WA.

Before MOORE, *Chief Judge*, CHEN, *Circuit Judge*, and
ANDREWS, *District Judge*.¹

CHEN, *Circuit Judge*

Gamevice, Inc. (Gamevice) appeals a decision by the United States District Court for the Northern District of California granting summary judgment of noninfringement in favor of Nintendo of America, Inc. and Nintendo Co., Ltd. (collectively, Nintendo). *Gamevice, Inc. v. Nintendo Co.*, No. 18-CV-01942-RS, 2023 WL 7194871 (N.D. Cal. Oct. 31, 2023) (*Summary Judgment Order*). The district court determined that the Nintendo Switch console (Switch) did not infringe claims 3, 4, 6, 7, and 16 of U.S. Patent No. 9,808,713 ('713 patent) and claim 6 of U.S. Patent No. 10,391,393 ('393 patent) because the Switch does not have (1) “confinement structures” that hold a computing device and (2) “apertures” that “secure an instructional input device.” *See id.* at *7. For the reasons explained below, we *affirm and remand*.

BACKGROUND

Gamevice brought this case against Nintendo, alleging that Nintendo infringed three of its patents—the '393 patent, the '713 patent, and United States Patent No. 9,855,498 ('498 patent)—all of which have the same title: “Game Controller with Structural Bridge.” During the course of the litigation, the district court invalidated all the asserted claims of the '498 patent,² narrowing the dispute to claims 3, 4, 6, 7, and 16 of the '713 patent and claim 6 of the '393 patent. *See Gamevice, Inc. v. Nintendo Co.*, 661 F.

¹ Honorable Richard G. Andrews, District Judge, United States District Judge for the District of Delaware, sitting by designation.

² The invalidated asserted claims of the '498 patent are not on appeal.

Supp. 3d 971, 980 (N.D. Cal.), *on reconsideration*, 677 F. Supp. 3d 1069 (N.D. Cal. 2023); *Gamevice, Inc. v. Nintendo Co.*, 677 F. Supp. 3d 1069, 1075 (N.D. Cal. 2023).

The '713 and '393 patents (asserted patents) disclose an accessory device that attaches to a handheld computing device and enables users to play games. *See* '713 patent at Abstract; '393 patent at Abstract. Specifically, the asserted patents describe a combination of (1) a “computing device” with a display screen, such as a smartphone or tablet, and (2) an accessory that can be attached to opposing sides of the computing device to provide controls for gameplay—buttons and joysticks—and can be removed to return the device to normal operation. *See* '713 patent, col. 1 ll. 24–46; '393 patent, col. 1 ll. 32–54.

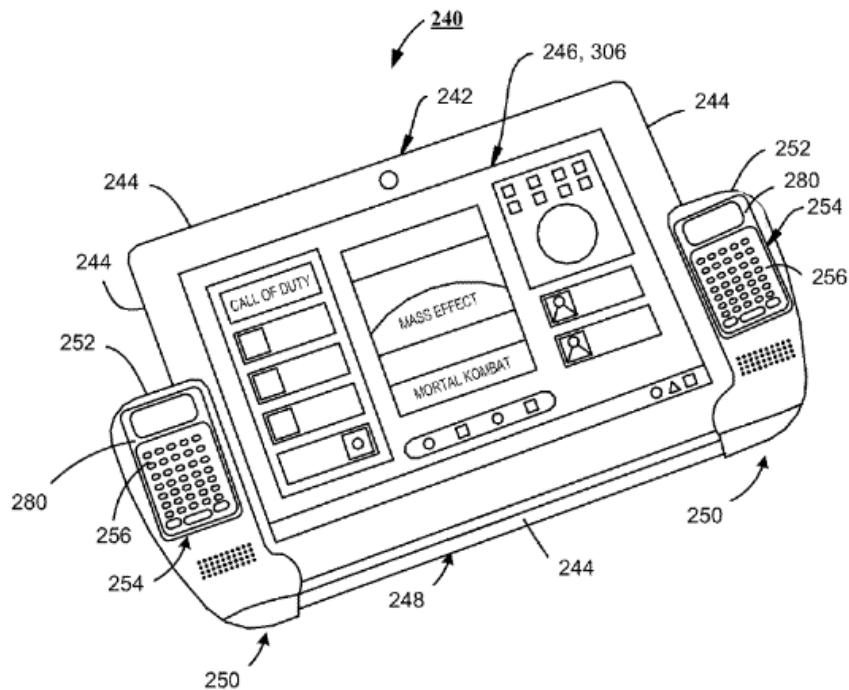


FIG. 13

'713 patent at FIG. 13; '393 patent at FIG. 13. Relevant to this appeal, the asserted patents disclose a “pair of control

modules 252” having “input module apertures 254,” each aperture securing “an instructional input device 256.” ’713 patent, col. 8 ll. 15–20; ’393 patent, col. 8 ll. 22–27. The asserted patents explain that the input device can be buttons or a joystick. *See* ’713 patent, col. 5 ll. 45–49; ’393 patent, col. 5 ll. 53–57. Before us, the parties dispute the terms “computing device,” “confinement structures,” and “input module apertures” that “secure” “instructional input devices.” *See* Appellant Br. 21–24; Appellee Br. 3–4.³

In the proceedings below, the district court construed “a pair of confinement structures/confinement structure” to mean “physical component(s) that hold[] a computing device.” *Gamevice, Inc. v. Nintendo Co.*, No. 18-CV-01942-RS, 2023 WL 322901, at *10 (N.D. Cal. Jan. 19, 2023) (*Markman Order*). The court further construed “computing device” to mean “electronic equipment controlled by a CPU.” *Id.* Although the court did not construe the term “input module apertures,” it gave “aperture” its plain and ordinary meaning—“hole”—in the summary judgment order on appeal. *Summary Judgment Order*, 2023 WL 7194871, at *6.

With these constructions, the district court granted Nintendo’s motion for summary judgment of noninfringement of all the remaining claims. It examined the alleged infringing product—the Switch—which includes a console and two “Joy-Con” controllers that slide into the side rails attached to the opposite ends of the console. It determined that there is no genuine dispute of material fact that the Switch lacks the claimed “confinement structures” that hold a “computing device,” nor does it have the required

³ Gamevice states that claims 1 and 3 of the ’713 patent are representative claims, Appellant Br. 11–13, and Nintendo does not contest such characterization, *see generally* Appellee Br. We accordingly cite to these representative claims of the ’713 patent.

“apertures” that “secure” an instructional input device. *Id.* at *6–7. The district court also held, in the alternative, that most of those claims, *i.e.*, claims 1, 2, 8, and 17–19 of the ’713 patent and claims 1–4 and 7 of the ’393 patent, were invalid as anticipated by the Nintendo Switch. *See Gamevice, Inc. v. Nintendo Co.*, 661 F. Supp. 3d 971, 980 (N.D. Cal.), *on reconsideration*, 677 F. Supp. 3d 1069 (N.D. Cal. 2023). Gamevice now appeals the district court’s rulings. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

STANDARD OF REVIEW

We review a district court’s grant of summary judgment under the law of the regional circuit. *Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1315 (Fed. Cir. 2015). The Ninth Circuit reviews a district court’s grant of summary judgment de novo. *Arconic, Inc. v. APC Inv. Co.*, 969 F.3d 945, 950 (9th Cir. 2020). “Claim construction is reviewed de novo, and any underlying factual determinations are reviewed for clear error.” *Azurity Pharms., Inc. v. Alkem Lab’s Ltd.*, 133 F.4th 1359, 1363 (Fed. Cir. 2025).

DISCUSSION

The district court granted summary judgment of non-infringement on two independent grounds, determining that no genuine issue of material fact exists as to whether the Switch has the claimed “confinement structures” or the claimed “apertures” that “secure an instructional input device.” *Summary Judgment Order*, 2023 WL 7194871, at *7. The district court held that there is no genuine dispute of material fact that the Switch does not possess “input module apertures” that secure the Switch’s buttons or joysticks for two separate reasons: (1) the Switch joysticks are secured with screws, not apertures; and (2) the 0.2mm radial clearance between the respective Switch apertures and the buttons and joysticks demonstrates that the apertures do not secure the buttons and joysticks. *Summary Judgment Order*, 2023 WL 7194871, at *6. We agree the Switch lacks

the claimed “apertures” and therefore affirm the grant of summary judgment for Nintendo on that ground alone.⁴

The asserted claims require “*each*” of the “input module apertures” to “secure[] an instructional input device.” *See, e.g.,* ’713 patent, col. 18, ll. 15–18 (emphasis added). This means all apertures must individually secure their respective input devices. *See ResQNet.com, Inc. v. Lansa, Inc.*, 346 F.3d 1374, 1379 (Fed. Cir. 2003) (claim language requiring algorithm to evaluate attributes of “each field” required the algorithm to use “all fields”). As Gamevice concedes, “instructional input devices’ include both buttons and joysticks.” Appellant Br. 45–46. Therefore, both the Switch’s buttons and joysticks must be secured by the apertures.⁵

Here, neither the Switch buttons nor joysticks are secured by the apertures. It is undisputed that “secure”

⁴ During oral argument, Nintendo conceded that we can affirm the district court’s grant of summary judgment of noninfringement without addressing the district court’s potentially inconsistent invalidity findings because the district court ruled in the alternative that the Switch also did not infringe the invalidated claims. Oral Arg. at 32:45 – 34:10 (available at https://www.cafc.uscourts.gov/oral-arguments/24-1467_09042025.mp3); *see also* J.A. 966. Nintendo agreed to file a motion on remand, asking the district court to reconsider its invalidity ruling and simply adopt the alternative non-infringement ground. *Id.*

⁵ Gamevice argues that Nintendo waived this argument on appeal because it was not raised below. Appellant Resp. 16. Not so. In its motion for summary judgment, Nintendo argued that the Switch does not meet the “input modules apertures” limitation because “[t]he buttons *and* joysticks are not secured by the holes.” J.A. 856 (emphasis added).

means “hold in place” and that “aperture” is a “hole.” *See generally*, Appellant Br.; Appellee Br.; Appellant Resp. “[T]he parties [also] agree that the buttons are held in by a flange at the bottom.” *Summary Judgment Order*, 2023 WL 7194871, at *6. That is, it is not disputed that the flange, to which the Switch buttons are attached, is secured in position by the rubber actuator, circuit board, and pins, all of which are sandwiched between the upper and lower housings of the Joy-Con controller, *see* J.A. 2503 (Nintendo engineer who designed the Switch describing how the combination of the rubber flange and the circuit board secured the buttons); J.A. 876–77. The holes, through which the Switch buttons and joysticks protrude, are larger in size than the buttons and joysticks, and thus do no work to secure these input devices in a fixed position. Summary judgment is therefore proper because the buttons are not secured by the claimed apertures.

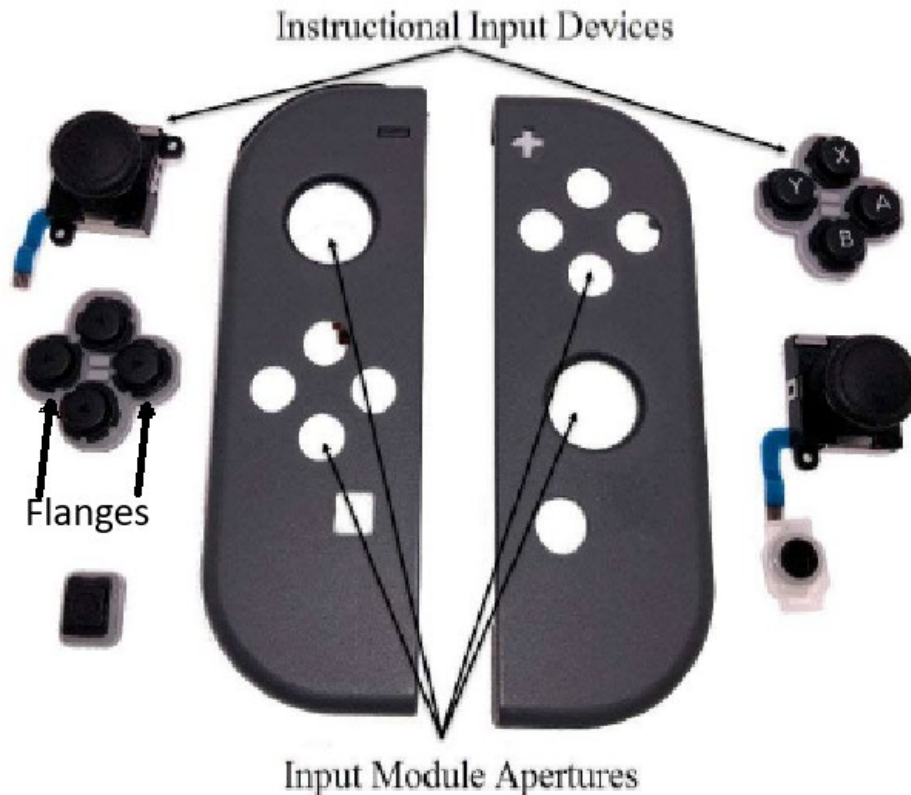
Even assuming the buttons are secured by the apertures, Gamevice still cannot prevail. Because the Switch joysticks are undisputedly secured to the upper housing with screws rather than apertures, the Switch fails to meet the “input module apertures” limitation. *See* J.A. 2503 (Nintendo engineer who designed the Switch attesting that “the joystick passes through the hole and then is secured to the upper housing with two M1.4 x 3.5 screws”). The district court thus correctly concluded that “[e]ven if the [Switch controller’s] buttons . . . comport with the claim limitation, the joysticks [of the controller] are not secured with the apertures but with screws” and therefore the Switch controller does not meet the “input module apertures” limitation. *Summary Judgment Order*, 2023 WL 7194871, at *6.

Gamevice contends the district court erred in two respects. First, the court’s statement that “apertures themselves cannot secure anything” contradicts the patent specification, which shows that “each input module aperture 254[] secures an instructional input device 256.”

Appellant Br. 43–44 (citing ’713 patent, col. 8 ll. 18–23). Second, the court improperly construed “secure” to exclude the use of additional components, such as a flange or a screw, to hold the instructional input device in place. *Id.* at 45. Because the specification is silent on how the buttons are secured, Gamevice contends the claimed inventions are agnostic as to whether additional components are used to secure the instructional input devices. *Id.* (citation omitted).

Gamevice misreads the district court’s summary judgment order. First, the district court did not say that the claimed apertures categorically “cannot secure anything.” Rather, it found that the specific apertures Gamevice identified in the accused Switch “themselves cannot secure anything [because] the parties agree that the buttons are held in by a flange at the bottom.” *Summary Judgment Order*, 2023 WL 7194871, at *6. Second, to the extent that Gamevice now construes “secure” to allow for the use of housing material surrounding the holes (and not the holes themselves) to hold the instructional input devices in place, Gamevice never requested such a construction in front of the district court. *See Markman Order*, 2023 WL 322901, at *3 (“[t]he parties present ten disputed terms for constructions,” none of which relates to the “input module apertures” limitation). Even if this argument is not waived, Gamevice does not point to any part of the specification or its expert report to support this construction. *See Appellant Br. 45.*

Gamevice’s expert did not advance such a construction, but simply identified the “multiple openings for the Joy-Con buttons and joysticks . . .” as “input module apertures . . . [that] secure[] multiple instructional input devices, including joysticks and buttons.” J.A. 2560 ¶ 81 (Gamevice’s expert report).



Id. The specification also does not define “secure” to include the use of any housing materials apart from the apertures themselves, and we see reason to do so. See *Thorner v. Sony Comput. Ent. 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 claim term other than its plain and ordinary meaning” and must “clearly express an intent to redefine the term.” (international quotations omitted)).

Gamevice alternatively contends the district court improperly discounted its expert’s testimony that the holes secure the buttons through the relative size of the holes compared to the size of the flange. *See* Appellant Br. 45. Its expert testified that “it is th[e] interaction of [the] flange with the holes, and the proper sizing of the holes, that allows the button to both protrude from the housing and yet still be secured in place. . . . [I]f the holes were bigger than the flange, the buttons would fall out, so the size of the holes secures the buttons in place.” Appellant Br. 45 (citing J.A. 941 ¶ 54). Gamevice faults the district court for focusing on the joysticks while ignoring that the buttons are secured using the input module apertures. *Id.* at 45–46. Because “instructional input devices” include both buttons and joysticks, Gamevice contends infringement is established if the apertures secure the buttons, regardless of whether they secure the joysticks. *Id.*

Gamevice is wrong. Its expert’s counterfactual—that buttons would fall out if the holes were larger—does not show that the holes secure the buttons. The problem with this argument is that it fails to acknowledge, that under this theory, it is the wall material *surrounding* the hole—not the hole itself—that performs any securing function. Here, the Switch buttons are secured by a flange on their back side that is larger than the holes through which the buttons protrude. *See* J.A. 2503 (Nintendo engineer who designed the Switch testifying that “[t]he flange on the backside of the buttons prevents the buttons from falling through the holes in the housing.”). As discussed previously, this flange is “secured and supported from behind by the . . . [rubber] Actuator Contact,” which is “sandwiched between the housing and a printed circuit board, which is fastened to the housing with screws.” J.A. 876. Accordingly, it is “the combination of the housing and actuator contact, *not* the holes . . . , [that] secures and supports the buttons when the buttons are not being pressed.” *Id.* at 877. Gamevice’s own expert does not rebut that the Switch

GAMEVICE, INC. v. NINTENDO CO., LTD.

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holes merely “allow the buttons and joysticks to pass through and move within.” J.A. 875; *see* 940–41 ¶¶ 50, 54. Neither the specification nor the prosecution history redefines “apertures” to include the surrounding housing material, and Gamevice never requested such a construction below. The district court thus correctly found no genuine dispute of material fact that the identified apertures do not “secure” the buttons. In any event, Gamevice’s argument does not address the undisputed fact that the Joy-Con’s joysticks are held in place by screws—not by the apertures through which they protrude. *See Summary Judgment Order*, 2023 WL 7194871, at *6. Gamevice therefore cannot prove that both the buttons and joysticks are secured by the Switch’s purported apertures, making summary judgment proper.

CONCLUSION

We have considered Gamevice’s remaining arguments and find them unpersuasive. For the foregoing reasons, we *affirm and remand* to permit Nintendo to move the district court to vacate its invalidity ruling and enter judgment based on noninfringement.

AFFIRMED AND REMANDED

COSTS

No costs.