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NINTENDO CO., LTD.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

GAMEVICE, INC.,
Plaintiff,
v.
NINTENDO CO. LTD., and
NINTENDO OF AMERICA INC.,
Defendants

NINTENDO OF AMERICA INC.,
Counterclaim Plaintiff,
v.
GAMEVICE, INC.
Counterclaim Defendant.

Case No. 3:18-cv-1942-RS
**Motion and Order
to Extend Schedule in View of
COVID-19 Travel Restrictions
AS MODIFIED BY THE COURT**

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NOTICE OF MOTION AND MOTION

Pursuant to Civil L.R. 6-3, Nintendo of America Inc. (“NOA”) respectfully moves for an approximately three-month extension of the schedule in this matter in view of the difficulties of both domestic and international travel as a result of COVID-19 travel restrictions. This motion is supported by the following Memorandum of Points and Authorities, as well as the Declaration of Grant E. Kinsel, filed herewith, which sets forth with particularity the reasons for the requested schedule extension, and further complies with Civil L.R. 6-3(a)(1)–(6).

Gamevice is expected to oppose this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The COVID-19 pandemic and related travel restrictions make conducting a fair trial in this matter on the currently set schedule of July 6, 2020 both dangerous and not feasible. Trial in this case will necessitate both interstate (Washington State and Wisconsin to California) and international (Japan to US and US to Japan) travel for witnesses and counsel alike. It will require hotel stays, and food delivery. It will require witnesses, lawyers, and staff to leave home where they may be taking care of young children. It will require a jury panel in close quarters with each other, and unable to maintain social distancing. It will require close contact between lawyers, witnesses, and court staff. And it will require international travelers to be quarantined for 14 days, unable to work and indeed, required to get to and from that quarantine on their own. All of this is risky.

NOA requests an approximately three-month continuance to the trial schedule in view of the uncertainty—and risk—associated with a jury trial in early July. The requested three-month continuance will, hopefully, allow a new “normal” to emerge so that the parties, and the Court, can better understand how a jury trial will work in the age of COVID-19. Gamevice will say that there is no guarantee that things will be different in three months, and that NOA’s request merely exchanges uncertainty now for uncertainty later. And it is certainly true that no one can know what the future holds. It may be better. It may be worse. But we do know the situation now. And right now—and at least for the immediate future—interstate and international travel to and from California is risky.

This is a short five-day trial. The parties are not competitors, and NOA has not sought injunctive relief. Thus, this is a straightforward dam-

1 ages case that can be conducted virtually anytime. Simply put, there is no
2 urgency such that the Court, the parties, and counsel should risk their
3 lives to attend trial in early July. Therefore, NOA respectfully requests
4 that the Court grant a three-month continuance of the trial.

5 A SHORT CONTINUANCE IS APPROPRIATE

6 Trial in this matter is currently scheduled for July 6, 2020, and it is
7 not at all clear that the Court will be open to the public by then.¹ Current-
8 ly, the Court is closed to the public, and on April 30, 2020, the District is-
9 sued General Order No. 72-2, precluding jury trials before June 1, 2020.
10 The General Order says that it may be extended. That uncertainty—will
11 the General Order be extended or won't it—makes travel and trial plan-
12 ning very difficult, particularly in view of the fact that many of NOAs
13 witnesses and all of its counsel reside outside the district, and would need
14 to make travel and living arguments within the district for trial.

15 The burden falls hardest on the witnesses. NOA's trial witnesses
16 will likely come from Japan, Northern California, Washington State, and
17 Florida. Both Washington and Florida are under stay-at-home orders, pre-
18 cluding non-essential travel.

19 Travel for NOA's Japanese witness (or witnesses) is a particular
20 hardship. Travel from Japan to the United States is not currently restrict-
21 ed, but the State Department has canceled all "routine" visa services.²
22 While there is a visa-waiver program for short-term travel to the United
23 States, that program may be inapplicable here. But even if travel to the
24 United States from Japan was technically feasible, any witness returning
25 to Japan from the United States—including Japanese nationals—will be

26 ¹ ECF No. 100.

27 ² <https://travel.state.gov/content/travel/en/News/visas->
28 [news/suspension-of-routine-visa-services.html](https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html).

1 subject to disruptive fourteen-day quarantine. Even getting to and from
2 the quarantine is burdensome as public transportation cannot be used.³

3 Gamevice will say that a Japanese witness is unnecessary because
4 the “Court must construe the claims and the experts will opine on non-
5 infringement, invalidity and damages.”⁴ But Gamevice misses the point.
6 NOA—not Gamevice—determines who its important trial witnesses are,
7 and NOA has a right to bring relevant witnesses who it deems important
8 to its case. As just one example, a Japanese witness may be required to tes-
9 tify regarding conception and reduction to practice. Gamevice contends
10 that NOA cannot prove its claimed April 19, 2005 conception and reduc-
11 tion to practice date for one patent,⁵ and thus, live trial testimony could be
12 important to establish this date. And this is no minor technical issue be-
13 cause at least one reference that Gamevice asserts is anticipatory, would
14 not be prior art based on an earlier conception and reduction to practice
15 date.⁶

16 Like the witnesses, NOA’s counsel are also located outside the
17 Northern District of California, and would need to travel to California and
18 take up residence in a hotel in the district. NOA’s counsel is located in Se-
19 attle, Washington, Madison, Wisconsin, and San Diego, California. Both
20 Washington and Wisconsin have stay-at-home orders, closing all non-
21 essential businesses, including schools, and non-essential travel to and
22 from these states is limited.

23
24 ³ Exhibit 2 to Declaration of Grant E. Kinsel, filed herewith (“Im-
25 portant Guidance on Japan’s Border Control Measures Related to COVID-
19 For Entrants from the United States.”).

26 ⁴ Exhibit 1 to Declaration of Grant E. Kinsel, filed herewith.

27 ⁵ ECF No. 129-2 (“Visser Invalidity Report”), ¶¶ 104–105.

28 ⁶ See ECF No. 136-03 at 12–13.

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Dated: May 11, 2020

PERKINS COIE, LLP

By: /s/ Grant E. Kinsel
Grant E. Kinsel, Bar No. 172407
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Attorneys for NINTENDO OF
AMERICA INC., and NINTENDO CO.,
LTD.

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ORDER

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Before the Court is Nintendo of America Inc.'s ("NOA's") Motion to Extend Schedule in View of COVID-19 Travel Restrictions. Having fully considered the matter, IT IS HEREBY ORDERED that the motion is GRANTED. The parties shall adhere to the following schedule for the remainder of this matter, barring any subsequent modification by the Court:

Event	Date
Pretrial trial disclosures under FRCP 26(a)(3)	August 21, 2020
Final Pretrial Conference	September 23, 2020
Trial	October 26, 2020

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All other deadlines set in relation to the above dates by the Federal Rules of Civil Procedure, the Civil Local Rules, and the Guidelines for Final Pretrial Conference in Jury Cases Before District Judge Richard Seeborg shall be reset based on the above dates.

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

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Dated: May 19, 2020

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 UNITED STATES DISTRICT JUDGE
 RICHARD SEEBORG