



3rd chamber 1st  
section

Docket №: **14/05090**

Original copy №:

Summons of:  
24 March 2010

**JUDGMENT**  
**handed down on 26 May 2016**

**CLAIMANT**

**Ms Nicole WALTHERT**

6 rue de Jargeau  
45000 ORLEANS

**S.A.S FRANCE BREVETS**

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75009 PARIS

represented by Mr Denis MONEGIER DU SORBIER of the AARPI  
HOYNG ROKH MONEGIER LLP, attorneys-at-law, members of the  
PARIS bar,  
Courthouse box #P0512

**DEFENDANTS**

**S.A.R.L. NINTENDO FRANCE**

6 boulevard de l'Oise  
Immeuble le Montaigne  
95031 CERGY PONTOISE

**NINTENDO OF EUROPE**

Nintendo Center  
63762 GROBOSTHEIM (GERMANY)

represented by Ms Sabine AGE of the SCP D'AVOCATS  
VERON & ASSOCIES, and Mr Pierre VERON, attorneys-at-law,  
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**COMPOSITION OF THE TRIBUNAL**

Marie-Christine COURBOULAY, Vice Presiding Judge  
Carine GILLET, Vice Presiding Judge  
Julien RICHAUD, Judge

assisted by Marie-Aline PIGNOLET, Court Clerk

**Original  
copies  
issued on:**

## **DISCUSSION**

At the hearing of 4 April 2016  
held in open court

## **JUDGMENT**

Pronounced publicly by making the judgment available at the court clerk's office

After having heard all the parties  
In first instance

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## **FACTS AND CLAIMS**

### **Parties to the dispute**

Ms Nicole WALTHERT, a retired physical therapist and osteopath; acquired, over the course of her career, knowledge of the role that walking and underfoot contact play in allowing the human body to maintain balance and dynamic movement, as well as vast experience in the methods intended to improve the latter.

In this context, she developed her knowledge in the field of balanced biped posture detection.

She claims to have developed several inventions in this field.

In the 1980s, she developed the "Bull-test", a device which "looks like a bathroom scale: the upper mobile plate on which the marks are provided for foot placement has a round spirit level, designed to detect balance and its anomalies. When the bubble is accurately centred, the person is balanced and the centre of gravity is in place."

She also published a piece in 1986 entitled "Walking, Source of Health", in which she presents, *inter alia*, exercises for obtaining balance using the Bull-test.

Several of Ms Nicole WALTHERT's inventions are protected by patents, including patent FR 06 08323, the subject matter of these proceedings, for which an application was made on 22 September 2006. This patent was the subject of a European extension filed on 13 September 2007 under number EP 07 848 230, and published under number EP 2 067 009, designating France.

By declaration to the European Patent Office of 20 December 2013, the designation of France was withdrawn from this European patent application, which was published in the European Patent Bulletin number 2014/10 of 5 March 2014.

FRANCE BREVETS is a company dedicated to the development of patents in Europe. It was created in March 2011 in connection with the Future Investments program, and is held equally by the State and the Caisse des dépôts et consignations (Deposits and Consignments Fund).

Its mission is supporting innovation by assisting private and public research to better protect and develop its patents.

By non-notarial deed dated 18 December 2013, Ms WALTHERT assigned half of her rights to the French patent № 06 08323 to FRANCE BREVETS, which accordingly became a 50% co-owner of the patent.

This partial transfer of rights was recorded in the National Patents Register on 16 January 2014 under № 0 199 006 and was published in the Official Journal of Industrial Property № 08/2014.

NINTENDO FRANCE and NINTENDO OF EUROPE GmbH are subsidiaries of the Japanese company Nintendo Co. Ltd., which was one of the main precursors of video games and remains a leader in the industry.

NINTENDO FRANCE is responsible for the distribution of the products of the Nintendo group in France while NINTENDO OF EUROPE, a company governed by the laws of Germany, coordinates the distribution of the products in Europe.

### **The dispute**

As of the end of 2006, NINTENDO has marketed a new video game console in France named Wii.

Since then several versions have been made available:

- \*the Wii U, marketed since November 2012, and
- \*the Wii Mini, marketed since March 2013.

On 25 April 2008, NINTENDO launched an accessory of the Wii console in France: the Wii Balance Board, and its game software, Wii Fit.

Since its launch in April 2008, the Wii Fit software has been available in several versions:

- \*the Wii Fit Plus software, an improved version of the Wii Fit game, marketed since October 2009, and
- \*the Wii Fit U software, adapted to the Wii U console, marketed since December 2013.

Since their marketing, the Wii Fit game and the Wii Balance Board have been extraordinarily successful, leading to record sales.

The Wii Balance Board is "peripheral equipment which determines changes of posture by the user when the user plays the games or performs the proposed exercises" with the Wii Fit software.

The Wii Balance Board makes it possible to detect the center of gravity of the users standing on the board and the Wii Fit software proposes balance games using this accessory.

Considering that the Wii Balance Board and the Wii Fit software, associated with the Wii console, reproduced the characteristics of her patent FR 06 08323 and that the presentation of the activities proposed with this accessory and this software was similar to the balance exercises proposed and represented in her work "Walking, Source of Health",

published in 1986, Ms WALTHERT, by a letter of 7 July 2008, delivered through her industrial property counsel, put NINTENDO FRANCE on notice with respect to the risk of infringement of her patent FR 06/08323.

On 24 March 2010, considering that the infringement continued, she had a writ of summons served on NINTENDO FRANCE to appear before this Court for infringement of her French patent № 06 08323 and her copyrights.

By order of 11 January 2011, the judge in charge of the case preparation ordered a stay of proceedings up until the date on which the French patent ceased being effective pursuant to the terms of Article L. 614-13 of the French Intellectual Property Code or up until the date on which the application for the European patent would be denied, withdrawn or deemed withdrawn, or the European patent revoked; and the withdrawal of the matter from the case list.

As the designation of France has been withdrawn from the European patent application, Article L. 614-13 of the French Intellectual Property Code ceased to be applicable since the French patent shall continue to be effective up until 22 September 2026, independently of the European patent application.

Since the reason for the stay has disappeared, by a pleading of 26 March 2014, Ms WALTHERT requested that the matter be reinstated on the case list.

By a pleading of 9 April 2014, FRANCE BREVETS voluntarily intervened in the thus reinstated proceedings and the claimants filed a pleading on the merits on 11 July 2014.

By a pleading of 11 July 2014, Ms Nicole WALTHERT abandoned her claim lodged in respect of her copyrights.

Authorised by orders of 3 October 2014 of the President of the 3rd chamber, 1st section of the *tribunal de grande instance de Paris*, Ms WALTHERT and FRANCE BREVETS carried out two *saisies-contrefaçon*:

- \*the first one on NINTENDO FRANCE's premises on 9 October 2014,
- \*the second one in a Micromania store, on 14 October 2014.

On 29 October 2014, in the presence of the bailiff Mr Jourdain, the patent attorney Mr Alain Collet performed supplementary tests relating to:

- \*a Wii Mini console seized during the *saisie-contrefaçon* of 14 October 2014,
- \*a Wii Fit Plus software program and a Wii Balance Board accessory purchased on 27 October 2014 in an Auchan store, according to the bailiff's report drafted by Mr Sebban.

By an act of 7 November 2014 and in response to the arguments put forward by NINTENDO FRANCE in a pleading served on 6 November 2014, Ms Nicole WALTHERT and FRANCE BREVETS sued NINTENDO OF EUROPE as an obligatory party.

By an order of 20 January 2015, the judge in charge of the case preparation consolidated the two proceedings.

Nintendo first sent its new pleading, as a confidential document, to Ms WALTHERT and FRANCE BREVETS's attorney-at-law, on 10 March 2015.

This pleading included technical and commercial information on the Wii Balance Board, which Nintendo did not wish to disclose to third parties foreign to the proceedings.

It notified, consequently, on 22 April 2015, a version of this pleading, in which the aforementioned information had been redacted, pending an agreement with the claimants for preserving confidentiality against third parties.

Such an agreement having been concluded on 10 June 2015, Nintendo then notified the full version of its pleading on 12 June 2015.

In their last e-pleading of 15 February 2016, Ms Nicole WALTHERT and FRANCE BREVETS request that the *tribunal*:

Pursuant to Articles L. 611-1 *et seq.*, L. 613-1 *et seq.*, and L. 615-1 *et seq.* of the French Intellectual Property Code, as well as in view of the exhibits enumerated in the statement attached to this pleading,

Declare Ms WALTHERT and FRANCE BREVETS admissible and founded in their claim for infringement, Dismiss all the claims lodged by NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, in particular the counterclaims, as being, if not inadmissible, at least deprived of any basis in law or in fact,

Declare that claims 1, 2, 3, 7, 8, 9, 10, 12, 14, 15, and 16 of patent FR 06 08323 are valid,

Declare that NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, by importing, offering, putting on the market, using or stocking for the aforementioned purposes devices reproducing claims 1, 2, 3, 7, 8, 9, 10, 12, 14, 15, and 16 of patent FR 06 08323, owned by Ms WALTHERT and FRANCE BREVETS, without their consent, engaged in infringement within the meaning of Article L. 616-3 a) or, at the least, of Article L. 613-4 of the French Intellectual Property Code,

Consequently,

Enjoin NINTENDO FRANCE and NINTENDO OF EUROPE GmbH from importing, offering, putting on the market, using or stocking for the aforementioned purposes the devices in dispute (consoles, accessories and games), as well as any other device (consoles, accessories and games) having the same characteristics, regardless of the references or trade names, subject to a penalty of 50,000 euros per day of delay beyond a period of eight days as of service of the judgement to be entered.

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, pursuant to Article L. 615-7-1 of the French Intellectual Property Code, to recall from commercial channels all of the infringing products delivered on the date of service of the judgement to be entered, regardless of their

holders and their location, in order that they be remitted to FRANCE BREVETS and Ms Nicole WALTHERT, subject to a penalty of 10,000 euros per day of delay beyond a period of eight days as of service of the judgement to be entered.

To order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH to pay, jointly and severally, to FRANCE BREVETS and Ms Nicole WALTHERT, by reason of the commercial harm caused by the infringement,

\*the interim payment of €81.46 million in damages due to the negative economic consequences of the infringement for the claimants;

\*the interim payment of €1 million in damages due to the profits that the defendants generated with the infringement, subject to being increased and converted to current value;

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH to pay, jointly and severally, to Ms Nicole WALTHERT the sum of 150,000 euros in damages to remedy the moral prejudice caused by the infringement, subject to being increased and converted to current value.

Order the publication of the judgment to be handed down on the homepage of NINTENDO FRANCE's website (<http://www.nintendo.fr>), mentioning "La société NINTENDO a été condamnée en France pour contrefaçon du brevet FR 2 906 365 au profit de Madame Nicole WALTHERT et de la société FRANCE BREVETS / NINTENDO judged to infringe Madame Nicole WALTHERT and FRANCE BREVETS's patent FR 2 906 365 in France" and on the homepage of NINTENDO OF EUROPE GmbH's website, mentioning "Die Gesellschaft NINTENDO OF EUROPE in Frankreich wegen Verletzung des Patents FR 2 906 365 zugunsten von Frau Nicole WALTHERT und der Gesellschaft FRANCE BREVETS verurteilt worden ist / NINTENDO OF EUROPE judged to infringe Madame Nicole WALTHERT and FRANCE BREVETS's patent FR 2 906 365 in France", in a font of at least 20 points, for a period of six months, at the defendants' exclusive expense, subject to a penalty of €10,000 per day of delay as of the service of the judgment to be handed down,

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, pursuant to Article L. 615-7-1 of the French Intellectual Property Code to assume, jointly and severally, the costs of publication of the judgment to be handed down in 10 newspapers or reviews of the claimants' choice, the cost of each publication being set at the sum of €5,000 (five thousand euros), excluding tax,

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, pursuant to Article L. 615-5-2 of the French Intellectual Property Code, subject to a penalty of €10,000 per day of delay as of service of the judgment to be handed down, to produce forthwith:

\*the quantities of infringing products marketed, delivered, received and ordered in France since 25 April 2008,

\*the sale price of such products,

\*the turnover resulting from the marketing of the goods in question,

\*all commercial or accounting documents capable of justifying the above elements.

Declare that the tribunal shall reserve the assessment of the pronounced penalties,

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, jointly and severally, to pay FRANCE BREVETS and Ms WALTHERT the sum of 200,000 euros pursuant to Article 700 of the French Civil Procedure Code.

To order the provisional enforcement of the judgment to be handed down notwithstanding appeal and without furnishing any security.

Order NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, jointly and severally, to pay all costs, from which a deduction shall be made for the benefit of Denis Monégier du Sorbier, attorney-at-law, pursuant to Article 699 of the French Civil Procedure Code.

In their recapitulative pleading of 25 March 2016, NINTENDO FRANCE and NINTENDO OF EUROPE request that the *tribunal*:

Considering Articles L. 611-11, L. 611-14, L. 613-3, L. 613-4, L. 615-7, L. 615-8 of the French Intellectual Property Code, Article 1382 of the French Civil Code, and Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights,

\*hold invalid claims 1 to 3, 7 to 10, 12 and 14 to 16 of French patent № 06 08323 jointly owned by Ms WALTHERT and FRANCE BREVETS;

\*order that the decision to be handed down be sent to the French Institute of Industrial Property (*Institut national de la propriété industrielle*) to be recorded in the French patents register;

In the alternative,

\*hold that the Wii Balance Board marketed by NINTENDO FRANCE and NINTENDO OF EUROPE GmbH does not reproduce the features of the apparatus the subject-matter of claims 1 to 3, 7 to 10, 12, 14 and 15, and is not assembled according to the process the subject-matter of claim 16 of French patent № 06 08323 jointly owned by Ms WALTHERT and FRANCE BREVETS;

In the very alternative,

\*dismiss Ms WALTHERT and FRANCE BREVETS's request for the injunction sought against the Wii Fit, Wii Fit Plus and Wii Fit U games, and the Wii, Wii Mini and Wii U consoles;

\*dismiss Ms WALTHERT and FRANCE BREVETS's request for a recall from the commercial channels and for publication, owing to their being disproportionate;

\*dismiss Ms WALTHERT and FRANCE BREVETS's request for damages and advance on damages, owing to their being insufficiently justified and, in any case, overestimated with regards to the harm actually caused by the alleged infringement;

\*dismiss the request for the provisional enforcement of the judgment to be handed down and, if against all possibility, it should be issued, condition it to the payment by Ms WALTHERT and FRANCE BREVETS, jointly and severally, of a guarantee that cannot be lower than the possible interim payment on damages or the damages granted to the latter, and, in any case, €3,000,000, to be deposited with the Bâtonnier de l'Ordre des avocats de Paris, and which should be kept until a final judgment is handed down on the infringement with no injunction being ordered against NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, or, failing that, until a final judgment is handed down on the possible requests for restitution or compensation that NINTENDO FRANCE and NINTENDO OF EUROPE GmbH might lodge against Ms WALTHERT, in any case;

\*order Ms WALTHERT and FRANCE BREVETS, jointly and severally, to pay a sum of €100,000 in damages to NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, together, in compensation for the harm caused to their image;

\*order France Brevets to pay a sum of €150,000 to NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, together, for the damage suffered as a result of the State's financial aid to Ms WALTHERT with no regard for the usual competition rules;

\*dismiss Ms WALTHERT and FRANCE BREVETS's requests;

\*order Ms WALTHERT and FRANCE BREVETS, jointly and severally, to pay a sum of €200,000 in damages to NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, together, on the basis of Article 700 of the French Intellectual Property Code, subject to review;

\*order Ms WALTHERT and FRANCE BREVETS, jointly and severally, to pay the entire costs of the proceedings and hold that the said costs will be recovered pursuant to Article 699 of the French Civil Procedure Code.

The closing was pronounced on 29 March 2016.

The discussion on the information continued in chambers at the parties' common request and in accordance with the provisions of Article 435 of the French Civil Procedure Code.

## **GROUND**

### **The patent**

French patent FR 06 08323 was filed on 22 September 2006 and granted on 6 March 2009.

It is entitled "*Pèse-personne postural dynamique permettant une détection d'une posture bipède équilibrée*" that is, in English: "*Dynamic postural personal scale for detecting balanced biped posture*".

The fees to maintain this patent in effect were paid.

## **THE TECHNICAL DOMAIN**

The invention involves a device and a process for detecting and improving the vertical posture (standing, half squatting or squatting) of an individual.

The vertical standing or squatting balance of a biped results from reflex muscle contractions whereby the antigravity muscles stop their activity as soon as balance is re-established (p. 1, line 10 to p. 3, line 2).

Underfoot contact plays a major role in these reflexes (p. 3, lines 3 to 11). Sedentary living leads to a reduction in the tactile sensitivity of the underfoot load-bearing points and in particular, interferes with the balance reflexes and causes a loss of postural dynamism (p. 3, line 12 to p. 4, line 9).

This is why one of the purposes of the invention is to restore to sedentary individuals the desire to move, walk, squat or engage in a sport without risk and thereby avoid the risks of obesity, by reactivating the perception of the tactile sensitivity of all his underfoot supports, starters of the dynamism



of vertical posture (p. 4, lines 10 to 14).

A subject matter of the invention is to give a user the possibility of focusing on the distribution of the weight of his body on his plantar supports in a situation of verticality (supported on a plane, mobile surface), by having him become aware of his disequilibrium. (p. 4, lines 15 to 18).

But the main subject of the invention, which is scales, is to overcome one or more of the drawbacks of the prior art by defining a device provided with additional indicator functions which may be activated depending on whether balance is reached or not, the device remaining of simple design and with which the balance in the distribution of the weight on the plantar supports may be specifically accounted for (p. 5, lines 15 to 21).

#### THE PROBLEM AT THE ORIGIN OF THE INVENTION

The prior state of the art knows, among other things, about systems with two mobile plates providing a display of the distribution of all the user's weight on each of its legs (p. 4, lines 19 to 21).

In addition, the state of the art knows about a device with a single mobile plate mounted on springs and provided with a horizontality indicator for this mobile plate (international patent WO 87/01923, which Ms Nicole WALTHERT holds) (p. 4, line 21 to p. 5, line 2).

However, this device does not allow for an interactive indication of the balance, which is necessary in order for the user to be sufficiently incited to adopt good posture for which the balance is achieved.

Furthermore, in another domain, the resistance tiles depend on the FSR (Force Sensitive Resistance) used, for instance to modulate sound and light (patent, p. 5, lines 3 to 15).

When they have two similar outputs, these tiles are sensitive to the distribution of an individual's weight in space.

However, they cannot be used for establishing balance diagnoses.

Finally, Ms Nicole WALTHERT is also designated as inventor in an application for a certificate of addition № 89 06707 published on 30 November 1990, which relates to an apparatus was also known for detecting and correcting equilibrium anomalies composed of a mobile plate resting on a base through elastic deformable members, like springs, and enabling the user to determine if he is in equilibrium thanks to a bubble level.

This application for a certificate of addition is not mentioned in French patent FR 06 08323.

#### THE SUBJECT OF THE INVENTION

Claim 1 is worded as follows:

“An apparatus for detecting and correcting equilibrium anomalies of a human body, comprising a support plate on which a user can stand, and at least one reference system part which can be placed on a substantially planar surface, the plate being superimposed relatively to the reference system part,

**characterized in that** the said plate is supported by at least three elastic deformable members each oriented along a direction orthogonal to a plane defined by the said reference system part, the deformable members being symmetrically distributed relatively to the central axis of symmetry of the plate, the apparatus comprising:

\*a processing unit with a processing circuit;

\*a force sensor at one of the ends of each of the deformable members, each sensor delivering a signal to the processing circuit, the processing circuit detecting equilibrium between the signals representing the forces and corresponding to a position of equilibrium relatively to the centre of symmetry of the plate, or detecting disequilibrium between the signals; and

\*means for generating the display of information in response to equilibrium and a modified visual and/or sound indication when a poor distribution of the forces is detected by the processing circuit, the visual and/or sound indication providing the user with an indication of equilibrium anomalies.”

This claim can be broken down into 10 distinct features:

a) “An apparatus for detecting and correcting equilibrium anomalies of a human body”

b) “comprising a support plate on which the user can stand”

c) “and at least one reference part which can be positioned on a more or less flat surface with the plate superimposed with regard to the reference part”

d) “said plate is supported by at least three elastic deformable pieces each oriented in a direction at right angles with regard to a plane defined by the said reference part”

e) “the elastic deformable devices are set out symmetrically with regard to the central axis of symmetry of the plate”

f) “the apparatus comprising: a processing unit with a processing circuit”

g) “a force sensor placed at one end of each of the deformable pieces”

h) “each sensor supplying a signal sent to the processing circuit”

i) “when the processing circuit detects imbalance between the signals representing the forces and corresponding to a perfect position of balance with regard to the centre of symmetry of the plate, or when it detects an imbalance between the signals”

j) “means for generating the display of information in response to equilibrium and a modified visual and/or sound indication when a poor distribution of the forces is detected by the processing circuit, the visual and/or sound indication providing the user with an indication of equilibrium anomalies.”

Accordingly, the purpose of the invention according to claim 1 is to detect equilibrium anomalies.

The user stands on the plate, superimposed with regard to at least one reference part and supported by the deformable pieces. The deformable members are constantly called on by the weight of the user so that the latter feels the differences in reaction on its underfoot bearing points and reaches a state of equilibrium dynamically.

In addition, each deformable member is associated with a force sensor which sends a signal to a processing circuit: in this way, the processing circuit detects the state of equilibrium and the display means make it possible to display information for the user indicating equilibrium or any equilibrium anomalies that are detected.

Claim 2, depending on claim 1:

“An apparatus according to claim 1 characterized in that the information displayed in response to equilibrium is the weight of the user, the apparatus defining scales.”

The dependent claim 3:

“Device according to claim 2 comprising:

\*a module detecting disequilibrium including the said processing circuit to detect, by comparison, from the data of the sensors received by the processing unit, a poor distribution of the forces detected by each sensor; and

\*an interface for controlling the display means for modifying the display when a poor distribution of the forces is detected by the detection module.”

The dependent claim 7:

“An apparatus according to claim 3 alone or combined with any one of claims 4 to 6, in which the said control interface displays the total weight of the user of the scales in response to the issue by the detection module of information representative of a detection of equilibrium.”

The dependent claim 8:

“Device according to claim 7 comprising four deformable and elastic pieces each aligned vertically with one of the feet.”

The dependent claim 9:

“Device according to claim 7 or 8 in which the force sensors are set out in the four corners of the plate and at least one of vertical piece connected to the reference part is placed in the case in order to limit the deflection of the plate supported by deformable pieces.”

The dependent claim 10:

“Device according to claim 3 alone or combined with one of the claims 4 to 9 in which the in balance detection module has a predetermined detection threshold so that a difference between the smallest and the biggest of the measured forces, remaining less than the threshold, does not allow an imbalance to be detected.”

The dependent claim 12:

“Device according to one of the claims 1 to 11 in which the force sensor is a variable electric resistance sensor.”

The dependent claim 14:

“Device according to one of claims 1 to 13 in which the plate supports marking elements for the positioning of the 2 feet which marking elements comprise at least one centerline with respect to the two force sensors.”

The dependent claim 15:

“Device according to one of the claims 1 to 13 including a short range communication interface for the transmission of data to a freely mobile display unit with respect to the remainder of the device.”

The main claim 16 is a process claim; it is drafted as follows:

“A method for integrating into scales with a plate and a visual and/or sound indication of the weight, a function for detecting equilibrium anomalies of the human body, **characterized in that** it comprises:

\*a step for symmetrically distributing the force sensors relatively to a central axis of symmetry of the plate of the scales;

\*a step for associating with each of the force sensors a deformable member so that a portion of the plate and the associated sensor are supported along an upward direction;

\*a step for connecting to the sensors a comparison module for detecting the distribution of the forces; and

\*a step for integrating an interface for controlling the weight indication means to generate a modified visual and/or sound indication when a poor distribution of the forces is detected by the detection module, the modification providing the user with an indication of equilibrium anomalies.”

Accordingly, the combination that is the subject matter of claim 16 has 5 distinct characteristics.

a) “A method for integrating into scales with a plate and a visual and/or sound indication of the weight, a function for detecting equilibrium anomalies of the human body”

b) “characterized in that it comprises: a step for symmetrically distributing the force sensors relatively to a central axis of symmetry of the plate of the scales”

c) “a stage of association with each of the force sensors of a deformable piece to support, in an ascending direction, part of the plate and of the associated sensor”

d) “a stage of connection to the sensors of a comparison module to detect the distribution of the forces”

e) “a step for integrating an interface for controlling the weight indication means to generate a modified visual and/or sound indication when a poor distribution of the forces is detected by the detection module, the modification providing the user with an indication of equilibrium anomalies.”

**The person skilled in the art**, according to the claimants, is a massage-physiotherapist having, moreover, basic knowledge in mechanics and electronics (which fall within the academic qualifications he acquired in school and university).

The person skilled in the art to be taken into consideration, according to the defendants, is a team composed of a specialist in posturology (or the study of the "dynamic vertical posture", in the words of French patent № 06 08323) and an engineer in the field of measuring tools, in particular scales, who also has knowledge in signal processing.

According to the *tribunal*, the person skilled in the art is actually a team composed of a specialist in posturology and an engineer in the domain of measurement tools, in particular scales, who also has knowledge in signal processing.

He is aware of the apparatuses covered by Ms WALTHERT's international patent application № 87 01923 and application for a certificate of addition № 89 06707.

## INTERPRETATION OF THE PATENT TO DEFINE ITS SCOPE

The parties do not give the same definition of two features of the patent as specified above:

e) “the elastic deformable devices” (being set out symmetrically with regard to the central axis of symmetry of the plate)

g) “a force sensor placed at one end of each of the deformable pieces”

Ms Nicole WALTHERT and FRANCE BREVETS argue that:

\*the device according to the invention includes elastic deformable members and force sensors and only requires, in respect of their combination, that each sensor be placed at an end of an elastic deformable member.

\*the elastic deformable members that are the subject-matter of claim 1 are not described as comprising a determined level of deformation, in view of making the upper plate of the apparatus mobile and unstable. They can have a very small level of deformation like that of the test specimen of a force sensor.

\* the force sensors can be FSR sensors, but also strain gauges,

\* in the last-mentioned case, to fix the strain gauges on a deformable piece or test specimen, it is possible to fix them on a deformable member added to the “elastic deformable members” required by the patent, but nothing excludes affixing them directly on these “elastic deformable members” within the meaning of the patent; in this case, the test specimen constitutes such an elastic deformable member.

NINTENDO argues that:

\*the elastic deformable members must allow the user to become aware of its disequilibrium by using his/her plantar supporting sensations: their deformation must therefore be sufficient to make the support plate mobile, the said support plate resting on these elastic deformable members;

\*the force sensors, whether they are FSR force sensors or composite sensors, integrate the deformable test specimen which is not equivalent to the elastic deformable members supporting the mobile plate.

### whereon

French patent FR 06 08323 itself specifies in its description and its drawings that it is an improvement upon Ms WALTHERT's applications for a patent and a certificate of addition.

Considering this claimed prior art, it is reasonable to say that the elastic deformable members of the apparatus according to claim 1 of this patent should deform sufficiently to make the plate mobile so as to allow the user to use his/her plantar supporting sensations.

The description and the drawings refer only to springs of reference number 5 on figure 1.

If the description of the patent does not further specify these deformable members, it is because the reference to Ms Nicole WALTHERT's prior patents is sufficient for the person skilled in the art, who will refer thereto to understand which form and function they have.

Failing that, the patent would suffer a lack of description because, if these elastic deformable members are important and different from the prior art taught, Ms Nicole WALTHERT should describe them and indicate their specificities.

She cannot limit herself to saying that they “are not described as comprising a determined level of deformation, in view of making the upper plate of the apparatus mobile and unstable”.

In the light of the prior art, their function is necessarily to make the plate mobile and unstable to detect disequilibrium and correct it to reach an equilibrium point.

Regarding the answers given by Ms Nicole WALTHERT's representative in the examination of European patent № 2 067 009, which covers with certainty the same invention as it claims priority from French patent № 06 08323, they are indications that should be taken into account for the interpretation of the claims of a patent, regarding in particular its description.

The answers made in the examination proceedings enlighten the *tribunal* on the meaning that the inventor himself wishes to give to a certain number of notions and, in certain cases, explain or limit them.

Consequently, they necessarily constitute a good indicator of what the inventor wanted to protect and of what his invention really represents; they are an important indication of the extent of the invention and of the interpretation that should be made thereof.

In the present case and regarding the force sensors and their combination with the elastic deformable members, Ms Nicole WALTHERT and FRANCE BREVETS cannot support before this *tribunal* a position that is fully opposed to that which is supported before the EPO, in application of the principle “no person can contradict oneself to the detriment of another person”.

The position supported before the *tribunal* consists of saying that if the force sensor selected is a composite sensor, the elastic deformable members may be the test specimen thereof, whose deformation is measured by the strain gauge.

The letter sent to the European examiner on 25 April 2013 responded to the lack of clarity asserted against claim 1 regarding the deformable members and the force sensors:

“Document T2 does not teach deformable members and the examination division confuses the strain gauges with the force sensors by identifying the strain gauges of D6 with the force sensors of this application (underlined by the *tribunal*).

Document D6 does not teach a force sensor mounted on a deformable member, but two strain gauges mounted on two portions of a deformable member in the form of a ring forming a test specimen. A force sensor can be composed of identical deformation gauges (or strain gauges) glued on one or more test specimens.

The principle being the translation into electrical resistance variation the distortion of the test specimen, on which they are glued (article “deformation gauge” on Wikipedia). Accordingly, the force sensors of D6

are composed of sensors with strain gauges separated in two sets of four strain gauges and four test specimens.

The strain gauges of each set are mounted to form a Wheatstone bridge as represented by figures 9 and 10 of D6. In D6, a force sensor is a set of rings + strain gauges.

Furthermore, document D6 designates each set of rings (D6, 48) + strain gauges (D6, 52, 54) by references 48-1, 48-2, 48-3, 48-4 (D6, col. 4, l. 31 and 32). Then, document D6 speaks of sensors referring to these references 48-1 to 48-4 (D6, col. 4, l. 36 to 40 and l.

65 to 67).

This shows that document D6 teaches force sensors, but not deformable members in addition to force sensors. (underlined by the *tribunal*).

Ms Nicole WALTHERT stated that the deformable members (5) according to French patent № 06 08323 are distinct from the force sensors (4), which bear another reference in the text of this patent and cannot be a test specimen associated with a strain gauge.

As a result, the force sensors referred to in the patent cannot be confused with the deformable members and the two distinct elements should necessarily be present in the apparatus, which will be produced according to the claims of French patent FR 06 08323.

### **On the validity of French patent FR 06 08323**

NINTENDO claims the invalidity of claims 1, 2, 3, 7, 8, 9, 10, 12, 14, 15, and 16 of patent FR 06 08323 for:

\*insufficient disclosure, a grounds that it puts forward for the first time in its latest pleading, or

\*lack of novelty, lack of inventive step and/or patentability, depending on the claims.

In respect of novelty, they cite, first, the Multitest apparatus, which was the subject of a book published in 1999 and a thesis in 2002 by a student for the grant of the university degree “*Explorations et rééducation en oroneurologie*”, and which was presented during conferences that took place in 2002 and 2006, organised by the *Association de formation des d'explorations ORL* in Toulouse, and, second, patent application US 2004/0163855, referred to as “the Carlucci patent application”.

In respect of the inventive step, they cite the Multitest apparatus, which provided a visual or sound information to translate a poor distribution of the forces detected by the processing circuit associated with the force sensors (features e) and f), indicating a patient's equilibrium anomalies (feature g) of French patent № 06 08323), and Ms Nicole WALTHERT's previous patent, which disclosed display means. They cite also the Carlucci patent application in respect of the inventive step.

Ms Nicole WALTHERT and FRANCE BREVETS reply that both the Multitest apparatus and the Carlucci patent application do not disclose all the features of claim 1 as they do not fulfil the same function, the first one being a measurement apparatus to detect the equilibrium anomalies for a doctor in view of rehabilitation and giving no information to the user, the other being simple scales; as a result, claim 1 is novel.

They add that even combined with the prior art references mentioned in the patent, they do not destroy the inventive step of claim 1.

### **The novelty**

Article L. 611-11 of the French Intellectual Property Code sets forth:  
“An invention shall be considered to be new if it does not form part of the state of the art.

The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use or in any other way, before the date of filing of the patent application.”

“To form part of the state of the art and be deprived of novelty, an invention should be entirely disclosed in a single prior art reference of certain nature, with the same elements composing it, in the same form, the same arrangement and the same operating mode for the same technical result.”

The Multitest apparatus is a prior art reference that was not cited in the examination of the patent applications by Ms Nicole WALTHERT or NINTENDO.

It is a posturology platform and its function is to perform multisensory checks and to propose rehabilitation exercises.

It is described in Michel LACOUR's book published in 1999, the advertising brochures of the company FRAMIRAL, which exploited this apparatus, and the leaflet of May 1999, which proposes an exploded view of the apparatus.

It is also mentioned in Yves SORNAY's thesis presented at the University Claude Bernard Lyon I in May 2002. It is described therein as follows:  
“The MULTITEST-EQUILIBRE is a Computerised Dynamic Posturography platform marketed by the French company FRAMIRAL. It is a classical posturography platform with three force sensors that can be used either fixed in a horizontal position or mobile in the three directions of the space, being, consequently completely subservient to the patient's oscillations. This freedom of movement is progressively flexible.”

As a result, the existence of this apparatus and its specifications is established with certainty by the exhibits produced in court and the fact that it was known before French patent application FR 06 08323.

The Multitest apparatus is an apparatus for detecting and correcting equilibrium anomalies of the human body as its object is to perform a check of equilibrium problems in certain patients and to rehabilitate them. While this apparatus is not intended to be used directly by a person, but rather by a doctor intending to help him in the detection of disequilibrium and rehabilitation, it nonetheless pursues the same aim of detecting unbalanced and balanced.

It emerges from the user's manual that it is composed of a support plate of reference letter C, which is equipped with sensors; that it is held by springs + sensors to the upper frame and by gas-pressure shock absorbers and an electrical cylinder to the lower frame.

This plate contains the set of pressure and tilt sensors, and the electronic



module of connection of the host computer.

The user stands on this plate, as shown by the photographs of the user's manual and by the drawings.

There is also a reference system part composed of the lower frame.

The electrical cylinder system frees the plate, which then becomes subservient to the patient's movements; the three pneumatic cylinders are fed in a two-way mode by a central unit ordered by the plate.

These three pneumatic cylinders meet, for the person skilled in the art, the definition of the elastic deformable members.

They are arranged at 120°C around the mobile plane.

The plate is, accordingly, supported by three elastic deformable members; they are necessarily each oriented along a direction that is orthogonal to a plane defined by the reference system part. They enable an inclination of the plate.

The diagrams of the user's manual show that the deformable devices are set out symmetrically with regard to the central axis of symmetry of the plate.

A computer and software programs are associated with this platform to collect and analyse the information, which corresponds to feature f (the apparatus comprising a processing unit with a processing circuit).

Thanks to its sensors, the Multitest apparatus records the pressure exerted by the patient placed on the plate subservient to his/her movements.

The user's manual and the university thesis clearly explain that the plate of the Multitest apparatus can operate according to two modes, the one which does not fall within the scope of the claim as it is subject to inclinations independent from the patient, the other which falls within the scope of the claim as it is subservient to the patient's movements and detects only his/her disequilibrium excluding any other stimulation.

To note and to calculate the disequilibrium only on the basis of the impulse of the patient's movements, the plate should necessarily be mobile and disconnected from the inclinations ordered by the company thanks to the electrical cylinder.

The user's manual mentions that "an electric cylinder system allows the plate to be freed, which then becomes subservient to the patient's movements (proprioceptive weakening).

The three pneumatic actuators are fed in two ways by a power unit controlled by the plate."

In this design, the Multitest plate is placed in the same situation as that of claim 1.

The claimants' disputes on the operating mode of the plate in the subservient position, regarding the fact that the pneumatic cylinders no longer play a role and no longer have the function of elastic deformable members, are irrelevant because it emerges clearly from the leaflet, but

also from Yves SORNAY's thesis presented at the University Claude Bernard Lyon I in May 2002, that this apparatus operates in a non-subservient way thanks to its pneumatic cylinders, which are the only ones to fulfil the function of elastic deformable members, a function also necessary for the operation of the plate in a mobile way.

FRANCE BREVETS and Ms Nicole WALTHERT still allege that the force sensor cannot be considered a pressure sensor because the measurement of the force is not the measurement of the pressure.

This obviousness set aside, it is not disputed that it is known to calculate the force from the pressure according to the formula  $P = F/S$  – the surface – so that the software program calculates immediately and without difficulty the transformation of the data Force into Pressure.

A force sensor and a pressure sensor will not record, admittedly, the same measurement, but a mathematical equivalence will be calculated without difficulty and will give the same information to detect the posture disequilibrium or the posture equilibrium, without this element changing the notion of novelty.

To know if there is a pressure sensor placed at one of the ends of each deformable member, it should be noted that the diagram of the user's manual indicates that the order of the instantaneous weight measurements comes from the front left, front right, and back sensors.

These localisations correspond precisely to those of the pneumatic cylinders mentioned above and the localisation thereof in the apparatus was recalled, so that it is deduced, without it being necessary to be specified, but any person skilled in the art would have understood it, that the sensors are placed at the end of the three sensors.

It is confirmed by the drawings of the user's manual, which show the location of the sensors at the top of the electrical cylinders.

Finally, it is not disputed that the Multitest apparatus receives information, which can only be transmitted by the force sensors and which is sent to a host computer.

If the collected information is not exactly the same as that described in the patent and is in the form of columns, it remains, nevertheless, that information is sent to a computer and detects the equilibrium anomalies to reach a posture in equilibrium following rehabilitation work.

There is, consequently, a processing circuit according to feature i of claim 1 of French patent № 06 08323 and means for generating the display of information in response to equilibrium and a modified visual and/or sound indication when a poor distribution of the forces is detected by the processing circuit, the visual and/or sound indication providing the user with an indication of equilibrium anomalies, within the meaning of feature j.

As a result, the Multitest apparatus is a prior art reference with a certain date, which discloses all the features of claim 1:

- a) "Device for detecting and correcting balance anomalies in the human body"
- b) "comprising a support plate on which the user can stand"
- c) "and at least one reference part which can be positioned on a more or less flat surface with the plate superimposed with regard to the reference part"
- d) "said plate is supported by at least three elastic deformable pieces each oriented in a direction at right angles with regard to a plane defined by the said reference part"
- e) "the elastic deformable devices are set out symmetrically with regard to the central axis of symmetry of the plate"
- f) "the apparatus comprising: a processing unit with a processing circuit"
- g) "a force sensor placed at one end of each of the deformable pieces"
- h) "each sensor supplying a signal sent to the processing circuit"  
"when the processing circuit detects imbalance between the signals representing the forces and corresponding to a perfect position of balance with regard to the center of symmetry of the plate, or when it detects an imbalance between the signal"
- j) "means for generating the display of information in response to equilibrium and a modified visual and/or sound indication when a poor distribution of the forces is detected by the processing circuit, the visual and/or sound indication providing the user with an indication of equilibrium anomalies."

The Multitest apparatus is, accordingly, composed of the same elements as those claimed as composing the invention disclosed in claim 1 of French patent № 06 08323, in the same form, the same arrangement, and having at least an identical operating mode for the same technical result, and destroys the novelty of claim 1.

*On the validity of the other claims*

NINTENDO requests the invalidity of the asserted claims either for lack of novelty or for lack of inventive step or for lack of patentability (claims 7 and 10).

Ms Nicole WALTHERT and FRANCE BREVETS reply that the dependent claims are valid because claim 1 is valid and they allege, regarding claim 16, that it involves an inventive step as the integration of the invention described in claim 1 in scales was not supported by any prior art reference.

Whereon

Article L. 611-14 of the French Intellectual Property Code sets forth:  
"An invention shall be considered to involve an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. [...]"

Claim 2, depending on claim 1:

"An apparatus according to claim 1 characterized in that the information displayed in response to equilibrium is the weight of the user, the apparatus defining scales."

No inventive step can be acknowledged for this claim in the light of the cited prior art references for the very reason that the force sensors can very easily give this additional information, which does not contribute to solving the problem that the invention wishes to solve.

Furthermore, the Multitest apparatus displays the weight.

Even if this measurement is only indicative (at +/- 1 kg) and only confirms the proper operation of the pressure sensors, the collection of the information on the weight is performed by the Multitest apparatus.

Displaying the user's weight to announce that the equilibrium position has been reached is an arbitrary choice. There is no technical reason for indicating equilibrium in this way.

It will be recalled that the Carlucci patent discloses scales and the claimants refuted the relevance of this prior art reference on the grounds that it only covers scales.

The dependent claim 2 is, consequently, invalid for lack of novelty.

The dependent claim 3:

"Device according to claim 2 comprising:

\*a module detecting disequilibrium including the said processing circuit to detect, by comparison, from the data of the sensors received by the processing unit, a poor distribution of the forces detected by each sensor; and

\*an interface for controlling the display means for modifying the display when a poor distribution of the forces is detected by the detection module."

The apparatus described by claim 3 depends on claim 2, which relates to scales that display the user's weight only if the user is in equilibrium.

This claim 3 is only an explanation without novelty of the detection system associated with the information circuit, as the presence of an interface is necessary.

Claim 3 is invalid for lack of inventive step.

The dependent claim 7:

"An apparatus according to claim 3 alone or combined with any one of claims 4 to 6, in which the said control interface displays the total weight of the user of the scales in response to the issue by the detection module of information representative of a detection of equilibrium."

As claims 4 and 6 are not asserted and claim 7 is dependent thereon, the appraisal of its validity will only be in light of claim 3.

It appears that displaying the weight after the detection module has detected equilibrium does not involve an inventive step regarding the problem that the invention wishes to solve; finally, the very design of the invention and the features defined in claim 1 mean that the calculation of the weight will necessarily be made thanks to an algorithm, which will calculate it according to the information collected to detect disequilibrium and the arrival at the equilibrium point.

No inventive step appears in this claim and there no additional technical effect is required to calculate weight through a software program based on already collected information on the user's equilibrium.

This claim is also invalid for lack of inventive step without it being necessary to rule on its patentability.

The dependent claim 8:

“Device according to claim 7 comprising four deformable and elastic pieces each aligned vertically with one of the feet.”

No element makes it possible to appraise in what having at least 4 deformable members rather than 3 involves an inventive step in light of the aim pursued by the invention.

The dependent claim 9:

“Device according to claim 7 or 8 in which the force sensors are set out in the four corners of the plate and at least one of vertical piece connected to the reference part is placed in the case in order to limit the deflection of the plate supported by deformable pieces.”

This claim has two characteristics: on the one hand, the layout of the force sensors already disclosed in claim 1 and, on the other, the presence of a piece designed to limit the displacement of the plate.

The deflection is the amplitude of the movement of a mobile piece with respect to its position at rest.

According to the user's manual of the Multitest apparatus, it has an abutment limiting the lowering of the plate comprising the sensors. This abutment was, furthermore, mentioned in a presentation displayed during the conference which took place in Toulouse on 24 and 26 March 2006.

It is composed of the cylindrical element placed at the level of the pneumatic cylinders between the plate and the lower frame, which limits the displacement of the plate.

Therefore, the Multitest device discloses a vertical member, that is, the abutment placed at the level of the Multitest pneumatic cylinder, itself connected to a reference system element, that is, the lower frame of Multitest, to limit the displacement of the plate.

The dependent claim 9 is, consequently, invalid for lack of novelty.

The dependent claim 10:

“Device according to claim 3 alone or combined with one of the claims 4 to 9 in which the in balance detection module has a predetermined detection threshold so that a difference between the smallest and the biggest of the measured forces, remaining less than the threshold, does not allow an imbalance to be detected.”

No inventive step appears in this claim and there is no additional technical effect in the calculation of the threshold and ceiling values, which are only data processed with a software program based on user equilibrium information that was already collected.

This claim is also invalid for lack of inventive step without it being necessary to rule on its patentability.

The dependent claim 12:

"Device according to one of the claims 1 to 11 in which the force sensor is a variable electric resistance sensor."

The force sensors with a variable electrical resistance are known and the specification of this only feature reveals no inventive step.

The dependent claim 14:

"Device according to one of claims 1 to 13 in which the plate supports marking elements for the positioning of the 2 feet which marking elements comprise at least one centerline with respect to the two force sensors."

This specification is known from the prior art and provides no technical effect: it is only a practical specification.

This claim is also invalid for lack of inventive step.

The dependent claim 15:

"An apparatus according to one of claims 1 to 13 comprising a short distance communications interface for transmitting data to a freely mobile display device relatively to the rest of the apparatus."

According to this claim, the display unit can be independent from the remainder of the device. This additional feature is already known; it is, consequently, not novel as the Multitest apparatus has already an electronic module for the connection with the host computer, which is a communications interface to transmit the data collected by the pressure sensors to a computer, then to a display means.

Moreover, this additional feature provides no particular technical effect so that this claim is also invalid for lack of novelty and inventive step.

The main claim 16 is a process claim; it is drafted as follows:

"A method for integrating into scales with a plate and a visual and/or sound indication of the weight, a function for detecting equilibrium anomalies of the human body, **characterized in that** it comprises:

\*a step for symmetrically distributing the force sensors relatively to a central axis of symmetry of the plate of the scales;

\*a step for associating with each of the force sensors a deformable member so that a portion of the plate and the associated sensor are supported along an upward direction;

\*a step for connecting to the sensors a comparison module for detecting the distribution of the forces; and

\* a step for integrating an interface for controlling the weight indication means to generate a modified visual and/or sound indication when a poor distribution of the forces is detected by the detection module, the modification providing the user with an indication of equilibrium anomalies."

Accordingly, the combination that is the subject matter of claim 16 has 5 distinct characteristics.

a) "A method for integrating into scales with a plate and a visual and/or sound indication of the weight, a function for detecting equilibrium anomalies of the human body"

- b) symmetrically distributing the force sensors relatively to a central axis of symmetry of the plate of the scales"
- c) "a stage of association with each of the force sensors of a deformable piece to support, in an ascending direction, part of the plate and of the associated sensor"  
"a stage of connection to the sensors of a comparison module to detect the distribution of the forces"
- e) "a step for integrating an interface for controlling the weight indication means to generate a modified visual and/or sound indication when a poor distribution of the forces is detected by the detection module, the modification providing the user with an indication of equilibrium anomalies."

The process covered by this claim relates to the assembly in four steps of the elements of the scales covered by claims 1 to 14.

These elements concerning scales were known to the person skilled in the art over the apparatus covered by Ms WALTHERT's application for a certificate of addition № 89 06707.

Integrating the features of claim 1 in scales reveals no inventive step for the very reason that the Multitest apparatus already offered the possibility of displaying the weight; no inventive step is necessary in light of what was already said above to integrate into scales the features of the invention as described in claim 1.

The process covered by claim 16 of French patent № 06 08323, of which Ms WALTHERT and FRANCE BREVETS are co-owners, lacks novelty or, in any case, inventive step.

Accordingly, the claims asserted by Ms Nicole WALTHERT and FRANCE BREVETS against NINTENDO are invalid for lack of novelty or inventive step.

As a result, as they have no right and, accordingly, no standing to sue, the action for infringement brought against NINTENDO by Ms Nicole WALTHERT and FRANCE BREVETS will be held inadmissible.

#### *On the counterclaims*

NINTENDO lodges a claim for damages by reason of the disparagement suffered because Ms Nicole WALTHERT stated in the press that NINTENDO was liable for theft, a fault that may harm this company, for which she is liable, and because FRANCE BREVETS carried out, for a whole day, a *saisie-contrefaçon* in one of the main points of sale of the Wii consoles and that it multiplied by forty the amounts claimed in respect of the infringement, entailing excessive efforts devoted to its defence to resist the disproportionate claims and measures inspired by FRANCE BREVETS, by requiring internal resources to be diverted, for these needs, from their usual assignment.

It adds that FRANCE BREVETS distorted competition in this way.

Ms Nicole WALTHERT replies that only articles from the newspaper

Figaro are mentioned and that the notion of disparagement applies to relationship between competing economic agents, that she ceased any activity and is not competing with NINTENDO; that she only replied to the interest expressed by a few journalists by mentioning her career, her inventions, her victory in the Lépine competition and her helplessness in the face of the lack of credit for her invention, but by clearly indicating that she only expressed her point of view and never suggested that the case had been judged.

FRANCE BREVETS disputes that it committed a fault by carrying out a *saisie-contrefaçon* and argues that NINTENDO does not demonstrate that it suffered damage therefrom.

It adds that NINTENDO characterises no State aid incompatible with the internal market within the meaning of Article 107 of the Treaty on the Functioning of the European Union and does not give a legal basis to its claim.

whereon

The exercise of a court action is, in principle, a right and degenerates into an abuse, which may give rise to damages, only in the case of malice, bad faith or gross error equivalent to intentional fault, on the basis of Article 1382 of the French Civil Code.

In the present case, NINTENDO does not explain in what the *saisie-contrefaçon*, which was authorised by a presidential order and of which it does not claim the nullity, would have harmed its image while only one *saisie-contrefaçon* was authorised and carried out over a relatively short time.

This claim will be dismissed.

In the same way, NINTENDO does not argue that the aids granted by FRANCE BREVETS are incompatible with the internal market within the meaning of Article 107 of the Treaty on the Functioning of the European Union; without specifying the legal basis, they reproach FRANCE BREVETS for having chosen to support Ms Nicole WALTHERT to grant her an aid provided for in the national texts.

It disputes, accordingly, the choice made by FRANCE BREVETS, but without explaining in what this choice distorts competition and in favour of which competitors.

As a result, NINTENDO's claim for damages will be dismissed.

Regarding the disparaging words pronounced by Ms Nicole WALTHERT to the press, she does not dispute that she replied to journalists and that her words appeared in newspapers like Le Figaro.

Contrary to Ms Nicole WALTHERT's arguments, the disparaging words said by a person who is not in competition with the person harmed by these words, may be acts of unfair competition and entail compensation.



NINTENDO produces in court articles published on the website of the OBS on 30 August 2013, written by Ms Marie Soulez, attorney-at-law, on the website of larep.fr on 6 August 2013, written by Alexandre Charrier, and an article published in Le Figaro on 28 August 2013, written by Sophie Boutboul, and reproaches Ms Nicole WALTHERT for having said that NINTENDO had stolen her baby and her idea and was playing with time due to her age.

It should be noted that the article published on the website larep.fr is written in careful terms and Ms Nicole WALTHERT is not alleged to have said denigrating words; it summarises her work on a plate named Bull-test since 1985 and the development of this product, which does not find industrial application until ultra-soft pressure sensors are suited to it and the proceedings before the EPO and the *tribunal*, and announces only in its title that "Ms Nicole WALTHERT accuses NINTENDO of having infringed her inventions".

This announcement is not disparagement, but information given by a newspaper to readers.

The article published on the website L'Obs is equally neutral and uses the conditional in the title "*Nintendo allegedly violated a patent for the Wii Fit: let's wait before speaking of infringement*". No statement by Ms Nicole WALTHERT is quoted.

The article in Le Figaro is also written in neutral terms and does not mention the terms accused by NINTENDO. It also reports the work under the title "the court action of a physiotherapist against NINTENDO ". It is only written that Ms Nicole WALTHERT considers that "NINTENDO is playing with time, they know that I was born in 1938".

This only allegation cannot be considered as a disparaging statement and expresses only the claimant's personal opinion on what may appear to a non-professional of law to be procedural intricacies.

The bailiff's report drafted on 30 August 2013 establishes only, from a targeted research on Google.fr, that the aforementioned articles were repeated on social networks, including dailymotion, which does not demonstrate any additional act of disparagement against Ms Nicole WALTHERT.

This claim for damages is, consequently, ill-founded for the very reason that the claimants produce in court an article published in August 2008 in Le Figaro.fr mentioning trials in the United States regarding the Wii, a company named Lillcrest Labs reproaching the use without licence of 3 patents on game pads and an interface, which establishes that the launch of the Wii provoked disputes on patent rights.

Finally, NINTENDO does not demonstrate that it had to make particularly hard or disproportionate efforts compared to those usually made for an action for patent infringement so that this claim for damages will be dismissed.

*On the further claims*

The conditions are met to grant to each NINTENDO FRANCE and NINTENDO OF EUROPE the sum of 100,000 euros, on the basis of Article 700 of the French Civil Procedure Code.

The provisional enforcement is not necessary and will not be ordered.

**ON THESE GROUNDS**

**Ruling publicly by transmitting the judgment to the court clerk on the date of the pronouncement, after having heard all the parties and in first instance,**

Holds invalid for lack of novelty and/or inventive step claims 1 to 3, 7 to 10, 12, and 14 to 16 of French patent № 06 08323 jointly owned by Ms WALTHERT and FRANCE BREVETS.

Consequently,

Holds Ms Nicole WALTHERT and FRANCE BREVETS inadmissible in acting for patent infringement against NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, for lack of standing;

Holds that this decision, once become final, will be transmitted, at the request of the most diligent party, to the INPI (French patent office) to be registered in the French Patent Register;

Dismisses NINTENDO FRANCE and NINTENDO OF EUROPE GmbH's claim for damages of 100,000 euros in compensation for the damage resulting from the harm caused to their image;

Dismisses NINTENDO FRANCE and NINTENDO OF EUROPE GmbH's claim for damages of 100,000 euros in compensation for the damage resulting from the grant to Ms WALTHERT of a State's financial aid with no regard for the usual competition rules;

Orders Ms WALTHERT and FRANCE BREVETS, jointly and severally, to pay the sum of €100,000 to each NINTENDO FRANCE and NINTENDO OF EUROPE GmbH, on the basis of Article 700 of the French Civil Procedure Code;

Orders Ms WALTHERT and FRANCE BREVETS, jointly and severally, to pay the entire costs of the proceedings and holds that the said costs will be recovered pursuant to Article 699 of the French Civil Procedure Code;

Holds that this decision is not provisionally enforceable.

Done and judged in Paris on 26 May 2016