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11 Atari Games Corporation and Tengen, Inc.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15
16 ATARI GAMES CORPORATION AND)
TENGEN, INC.,)
17)
Plaintiffs,)
18)
v.)
19)
NINTENDO OF AMERICA INC., and)
20 NINTENDO CO. LTD.,)
21 Defendants.)
22)
23)
24)
25)
26)

Case No. C 88-4805 FMS
AMENDED AND SUPPLEMENTAL
COMPLAINT FOR:
(1) SHERMAN ACT § 2
VIOLATION;
(2) SHERMAN ACT § 1
VIOLATION;
(3) INTENTIONAL INTERFER-
ENCE WITH CONTRACTUAL
RELATIONS;
(4) INTENTIONAL INTERFER-
ENCE WITH PROSPECTIVE
ECONOMIC ADVANTAGE;
(5) TRADE LIBEL;
(6) PATENT INFRINGEMENT;
AND
(7) UNFAIR COMPETITION
DEMAND FOR JURY TRIAL

27 --
28 --

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AMENDED AND SUPPLEMENTAL COM-
PLAINT AND DEMAND FOR JURY TRIAL

1 Plaintiffs Atari Games Corporation ("Atari") and Tengen, Inc.
2 ("Tengen"), through their attorneys, Irell & Manella, make the
3 following allegations against defendants Nintendo of America Inc.
4 ("Nintendo-US") and its Japanese parent, Nintendo Co., Ltd.
5 ("Nintendo-Japan") (Nintendo-US and Nintendo-Japan are collectively
6 referred to as "Nintendo");

7 JURISDICTION

8 1. Atari and Tengen are asserting claims under the Sherman
9 and Clayton Antitrust Acts, 15 U.S.C. §§ 1 et seq., the Patent Act,
10 35 U.S.C. §§ 271 and 281, and laws of the State of California.
11 This Court has jurisdiction of this action pursuant to sections 4
12 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22; 15 U.S.C.
13 § 1121; 28 U.S.C. §§ 1331, 1332, 1337 and 1338 and principles of
14 pendent and ancillary jurisdiction.

15 PARTIES

16 2. Plaintiffs Atari and Tengen are corporations organized
17 under the laws of the State of California, having their principal
18 places of business in Milpitas, California. Tengen is a wholly
19 owned subsidiary of Atari.

20 3. This case involves home video game systems, the
21 widely-publicized home recreation product now sweeping the nation.
22 Home video game systems are comprised of three major components:
23 (i) a base unit or video game machine, (ii) video game cartridges;
24 and (iii) video game software. Video game machines are essentially
25 special purpose computers designed to be connected by the user to
26 the user's home television which then functions as a monitor for
27 the system. Video game cartridges are inserted into the

1 base unit and each contains one of the games which is played by the
2 user. Video games are software programs written to run on the
3 hardware of particular game machines.

4 4. Defendant Nintendo-US is a corporation organized under
5 the laws of the State of Washington, having its principal place of
6 business in Redmond, Washington. Defendant Nintendo-Japan is a
7 Japanese corporation, and is the parent of Nintendo-US. Nintendo
8 has manufactured and sold to millions of consumers a home video
9 game base unit referred to as the Nintendo Entertainment System
10 ("NES base unit or game machine"). Through its two companies,
11 Nintendo controls more than eighty percent (80%) of the home video
12 game machine market in the United States and has heretofore con-
13 trolled one hundred percent (100%) of the market for the manufac-
14 ture of video game cartridges sold in the United States that will
15 play on Nintendo home video game machines. The installed base of
16 NES base units in American homes is huge, far exceeding the
17 installed base of any other modern system. Both Nintendo-US and
18 Nintendo-Japan transact business in the Northern District of
19 California, as well as throughout the United States.

20 VENUE

21 5. Venue of this action is proper in the Northern District
22 of California pursuant to 15 U.S.C. §§ 15 and 22 and principles of
23 pendent and ancillary venue, in that Nintendo is found, has agents,
24 and does substantial business in the Northern District of
25 California, and many of the unlawful acts alleged herein were per-
26 formed and had effects in the Northern District of California.

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1 FIRST CAUSE OF ACTION

2 (Violation of Sherman Act § 2, 15 U.S.C. § 2--

3 Monopolization and Attempt to Monopolize)

4 6. Atari and Tengen repeat and reallege paragraphs 1 through
5 of this Complaint as though fully set forth hereat.

6 7. Atari and Tengen bring this suit to seek redress for
7 Nintendo's illegal monopolization and attempt to monopolize the
8 following product markets, each of which is a relevant product
9 market for the purpose of analyzing Nintendo's anticompetitive
10 conduct. Nintendo's 1989 revenues in these markets are expected to
11 exceed \$2 billion. As further described below, in large part
12 because of the conduct of Nintendo, barriers to entry into each of
13 these markets are extremely high:

14 (a) The market for home video game machines (the "Home
15 Video Game Machine Market"). Nintendo controls more than eighty
16 percent (80%) of the Home Video Game Machine Market in the United
17 States and controls more than ninety percent (90%) of the Home
18 Video Game Machine Market in Japan;

19 (b) The market for home video games (the "Home Video
20 Game Market"). Through sales of its own games and games that it
21 controls through exclusive dealing arrangements and other con-
22 straints described below, Nintendo controls at least eighty percent
23 (80%) of the Home Video Game Market;

24 (c) The market for the manufacture of game cartridges
25 that will operate with NES game machines (the "Compatible Cartridge
26 Manufacture Market"). Nintendo has heretofore controlled

27 --

1 one hundred percent (100%) of the Compatible Cartridge Manufacture
2 Market;

3 (d) The market for video games that will play on
4 Nintendo home video game machines (the "NES-compatible Home Video
5 Game Market"). Through sales of its own games, and games that it
6 controls through exclusive dealing arrangements and other con-
7 straints discussed below, Nintendo has heretofore controlled one
8 hundred percent (100%) of the NES-compatible Home Video Game Mar-
9 ket.

10 8. The relevant geographic market is the United States.

11 9. Nintendo manufactures, sells and distributes its home
12 video game machines and video game cartridges in and through the
13 interstate and foreign commerce of the United States.

14 10. In violation of Section 2 of the Sherman Act, 15 U.S.C.
15 § 2, Nintendo has acquired, maintained and extended its monopoly
16 power in each of the relevant markets described in paragraphs 7(a)
17 through 7(d), above, through the acts described below, among other
18 wrongful acts.

19 11. The "Lock-out System"--Through the use of a technologi-
20 cally sophisticated "Lock-out System" built into all of its home
21 video game machines, Nintendo has, for the past several years,
22 prevented all would-be competitors, including Atari and Tengen,
23 from freely competing with Nintendo in the manufacture of video
24 game cartridges that will operate with NES game machines, and
25 Nintendo has controlled and limited for its own monopolistic bene-
26 fit the sale of NES-compatible video games and NES-compatible home
27 video game cartridges. This Lock-out System consists of a highly

1 sophisticated "master" computer chip built into NES game machines
2 that will only allow video game cartridges to play if they are
3 equipped with a complex "slave" computer chip that will communicate
4 in a synchronized fashion with the master chip. In addition to the
5 enormous barrier imposed by the task of reverse engineering this
6 device, a potential competitor who would design around the Lock-out
7 System faces the barrier of Nintendo's assertions of copyright and
8 patent protection for the Lock-out System. The sole purposes of
9 the Lock-out System are: (i) to exclude and render impossible
10 competition in the manufacture of NES-compatible video game
11 cartridges; and (ii) to control and limit the sale of
12 NES-compatible video games. The Lock-out System has no other
13 functions or purposes, and it does not play any artistic or quali-
14 tative part in the actual operation of the video game machine or
15 the cartridge. The Lock-out System prevents all cartridges not
16 equipped with the device, and all other video games no matter how
17 good their quality, from working on the NES base unit. The
18 Lock-out System prevents anyone from writing, making and selling
19 cartridges and video games that will work on an NES machine unless
20 they obtain the "key" or password to unlock the system, which
21 Nintendo controls to its own purpose of maintaining its monopoly.
22 Through the use of the Lock-out System, Nintendo has maintained its
23 monopoly in the manufacture of NES-compatible cartridges and
24 thereby its monopoly in other relevant markets by refusing to allow
25 any firm other than Nintendo to manufacture NES-compatible
26 cartridges which have this device. NES base unit consumers have
27 been ignorant of the existence of the Lock-out System and unaware

1 that their purchase of an NES base unit renders them subject to the
2 monopoly power of Nintendo as the exclusive controller of the
3 supply of NES-compatible games. In the absence of the Lock-out
4 System, Tengen and other firms would have been able to enter and
5 would have entered the Compatible Cartridge Manufacture Market long
6 ago.

7 12. The Restrictions on Game Developers--Because of its
8 monopoly position in the markets described in paragraphs 7(a)
9 through 7(d), above, and its total control of the manufacture of
10 NES-compatible cartridges through the use of its Lock-out System,
11 Nintendo has been able to force and maintain anticompetitive
12 restrictions on developers of home video games. Because of
13 Nintendo's Lock-out System and Nintendo's monopoly in the Compati-
14 ble Cartridge Manufacture Market, firms that would develop and sell
15 home video games for use on NES base units heretofore have been
16 able to do so only as Licensees of Nintendo, paying exorbitant,
17 supra-competitive prices for Nintendo's manufacture of game
18 cartridges. Nintendo has required that its Licensees have their
19 games incorporated into game cartridges manufactured exclusively by
20 Nintendo in Japan and sold at unreasonable, monopolistic prices.
21 In addition to its exclusive position as a cartridge manufacturer
22 and the supra-competitive prices Nintendo has charged, Nintendo has
23 imposed on its Licensees additional restrictions which have the
24 purpose and effect of further extending and maintaining Nintendo's
25 monopoly power in the markets described in paragraphs 7(a) through
26 7(d), above in violation of Section 2 of the Sherman Act, 15 U.S.C.
27 § 2:

1 (a) Licensees have been arbitrarily restricted in the
2 number of different NES-compatible games that they can develop,
3 have incorporated into cartridges by Nintendo, and sell each year.
4 For example, Tengen was arbitrarily restricted to the development
5 of no more than five NES-compatible games in each twelve-month
6 period, despite its large portfolio of video games which otherwise
7 could be converted to run on Nintendo systems.

8 (b) Licensees have been prohibited from shipping
9 NES-compatible games outside the United States and Canada. Through
10 this restriction, Licensees have been cut off from the extremely
11 lucrative opportunity to export games to be sold in Japan and
12 elsewhere. In those overseas markets there is no Lock-out System
13 in the NES base units.

14 (c) Once a game has been developed and licensed for sale
15 as an NES-compatible game, Licensees have been prohibited for a
16 two-year period from selling the same game (or any derivative)
17 written to run on any other type of base unit. This exclusive
18 dealing provision has had the effect of forcing game developers
19 like Atari and Tengen to develop games only for NES users--because
20 the consequence of licensing a game for use on another type of base
21 unit would be that the game could not be sold to the users of NES
22 base units, which represent eighty percent (80%) of the Home Video
23 Game Machine Market. This provision and Nintendo's Lock-out System
24 also erect enormous barriers to entry into the Home Video Game
25 Machine Market.

26 (d) Nintendo has restricted and limited the number of
27 NES-compatible cartridges that it has manufactured for its

1 Licensees. In so doing, Nintendo has controlled and continues to
2 control for its own monopolistic purposes, and in a manner which
3 discriminates against competitors, the number and nature of games
4 available for purchase by video game consumers.

5 13. The Restrictions on Sales Representatives--Given its
6 dominance in the markets described in paragraphs 7(a) through 7(d)
7 above, Nintendo has been able to exact exclusive dealing agreements
8 with its sales representatives. Under these agreements, Nintendo
9 sales representatives commit that they will not handle any products
10 that compete with Nintendo products.

11 14. Nintendo's conduct is and has been unlawful and calcu-
12 lated solely to cripple Atari, Tengen and other would-be competi-
13 tors by preventing full and fair competition on the artistic,
14 qualitative and competitive merits of competing products.
15 Nintendo's illegal purpose is and has been to slam the door shut on
16 the manufacture and sale -- by any competitor -- of video game
17 cartridges compatible with NES game machines, and to limit and
18 control the sale of video games which run on any other type of home
19 video game machine. Nintendo thereby has been able to control and
20 limit the supply and prices of home video games and home video game
21 cartridges available to consumers. In the process, Nintendo has
22 created, enhanced, maintained and extended its monopoly power in
23 each of the relevant markets described in paragraphs 7(a) through
24 7(d), above.

25 15. For the past several years, Atari and, more recently,
26 Tengen, have wanted to compete with Nintendo by developing (free of
27 Nintendo's unreasonable license restrictions) NES-compatible

1 video games and to manufacture NES-compatible cartridges. Had it
2 not been for Nintendo's unlawful conduct as described herein, and
3 particularly its unlawful conduct in designing and implementing the
4 Lock-out System, Atari and Tengen would have developed and sold
5 such products and services in competition with Nintendo long ago.
6 Having been unlawfully locked out of these businesses for several
7 years, Atari has finally developed the functional equivalent of a
8 "key" that will unlock the Lock-out System, and, together with
9 Tengen, has just now begun to freely compete with Nintendo.
10 However, in the further unlawful exercise of its monopoly power,
11 and to maintain its monopoly, Nintendo has wrongfully and without
12 justification attempted to interfere with and stamp-out this
13 competition by the following acts:

14 (a) Through published threats and through litigation
15 Nintendo has invoked purported patent, trademark and (threatened)
16 copyright protection, and the specter of burdensome litigation to
17 discourage and prevent Atari, Tengen and others from developing and
18 utilizing the "key" that will unlock the Lock-out System. In each
19 instance Nintendo knows or has reason to know that its purported
20 patent, trademark and copyright rights are invalid, not infringed,
21 or both.

22 (b) Through published threats, letters and statements,
23 Nintendo has threatened retailers, sales representatives and others
24 that they will suffer dire legal and economic consequences if they
25 deal in Atari and Tengen products in competition with Nintendo.

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1 (c) Through published threats and false and misleading
2 statements, Nintendo has disparaged Atari's and Tengen's products
3 in the marketplace and indicated to consumers that their purchase
4 of these products threatens the warranty and support services that
5 they otherwise could receive from Nintendo and that Atari's and
6 Tengen's products may cause damage to NES base units.

7 16. Nintendo's unlawful conduct as alleged herein has had the
8 purpose and effect of monopolizing the markets described in
9 paragraphs 7(a) through 7(d), above, and eliminating competition in
10 at least the following respects:

11 (a) Consumers have paid monopoly prices for home video
12 game cartridges, including NES-compatible cartridges;

13 (b) Consumers have been limited in the number and types
14 of video games available for their purchase;

15 (c) To their great damage, Video game suppliers such as
16 Atari and Tengen have had to pay to Nintendo monopoly prices for
17 the manufacture of NES-compatible cartridges.

18 (d) To their great damage, video game suppliers such as
19 Atari and Tengen have been restricted in the number and types of
20 game cartridges they have been able to develop and sell.

21 (e) Despite having the technical capability to do so,
22 Tengen, Atari and other firms have been foreclosed (to their great
23 damage) from entering the business of manufacturing NES-compatible
24 game cartridges.

25 (f) Entry into the Home Video Game Machine Market has
26 been prevented.

27 --

1 17. Nintendo's unlawful conduct, as alleged above, consti-
2 tutes monopolization and attempted monopolization in violation of
3 section 2 of the Sherman Act, 15 U.S.C. § 2. Nintendo-US and
4 Nintendo-Japan have combined to monopolize the markets identified
5 above. Nintendo-US and Nintendo-Japan have combined to acquire and
6 maintain, willfully and unlawfully their monopoly power and to
7 extend and leverage their monopoly power throughout the markets
8 identified above. The conduct described above has been and is an
9 abuse of monopoly power, even if Nintendo's monopoly power other-
10 wise has been lawfully obtained. The conduct described above has
11 caused a dangerous probability of success of monopolizing the mar-
12 kets described in paragraphs 7(a) through 7(d), above, and was done
13 by Nintendo with the specific purpose and intent of attaining and
14 maintaining such monopoly.

15 18. As a direct and proximate result of Nintendo's unlawful
16 conduct, Atari and Tengen have suffered substantial damages,
17 including loss of profits and revenues that would have been real-
18 ized had Atari and Tengen not been subjected to Nintendo's wrongful
19 practices.

20 SECOND CAUSE OF ACTION

21 (Violation of Sherman Act § 1, 15 U.S.C. § 1 -- Contracts,
22 Combinations and Conspiracies in Restraint of Trade)

23 19. Atari and Tengen repeat and reallege paragraphs 1 through
24 17 of this Complaint as though fully set forth hereat.

25 20. Beginning at a time unknown to Atari and Tengen, Nintendo
26 and others have entered into the following contracts, combinations
27 and conspiracies, in addition to those pleaded above,

1 which have the purpose and effect of unreasonably restraining trade
2 in the markets described in paragraphs 7(a) through 7(d), above:

3 (a) Nintendo has forced its Licensees to agree that the
4 Licensees would be arbitrarily restricted in the number of differ-
5 ent NES-compatible games that they can develop and have manufac-
6 tured into game cartridges by Nintendo each year.

7 (b) Nintendo has forced its Licensees to agree that
8 Licensees would be prohibited from shipping NES-compatible games
9 for sale outside the United States and Canada.

10 (c) Nintendo has forced its Licensees to agree that once
11 a game has been developed and licensed for sale as an
12 NES-compatible game, Licensees are prohibited for a two-year period
13 from selling the same game (or any derivative) written to run on
14 any other type of base unit.

15 (d) At Nintendo's insistence as a matter of the combi-
16 nation and agreement between Nintendo and its Licensees, Nintendo
17 has purported to reserve for itself the sole right to manufacture
18 compatible cartridges and has restricted and limited the number of
19 NES-compatible cartridges that it manufactures for Licensees.

20 (e) Nintendo has exacted exclusive dealing agreements
21 from its sales representatives under which they have committed that
22 they will not handle any products that compete with Nintendo
23 products

24 21. Through the use of the Lock-out System and contractual
25 restrictions Nintendo has effected tying arrangements which

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1 appreciably restrain competition in all of the markets described in
2 paragraphs 7(a) through 7(d), above:

3 (a) Nintendo possesses unique market power in the Home Video
4 Game Machine Market by virtue of the huge installed base of NES
5 machines in the homes of consumers, Nintendo's control over the
6 design and manufacture of the NES base unit and the Lock-out System
7 it contains, and further by virtue of Nintendo's exclusive control
8 over a host of unique copyrighted video games. NES compatibility
9 and the NES base units necessary for NES compatibility are unique
10 (or at least materially desirable) to millions of video game
11 consumers, an appreciable number of customers.

12 (b) By virtue of Nintendo's market power in the Home Video
13 Game Machine Market, and through the use of the Lock-out System,
14 Nintendo can and has forced consumers to buy video games exclu-
15 sively created, licensed and controlled by Nintendo and contained
16 in cartridges exclusively manufactured by Nintendo.

17 (c) Through its use of the Lock-out System and the contrac-
18 tual restrictions on game suppliers, Nintendo has effected the
19 bundling together of hardware and software home video game compo-
20 nents formerly and traditionally sold as separate products.

21 (d) Nintendo's tie of separate products affects not an
22 insubstantial amount of commerce. As a result of Nintendo's ille-
23 gal tying conduct, Atari and Tengen have been injured by their
24 inability to sell video games to persons required by Nintendo to
25 buy only Nintendo-owned or controlled video games, Nintendo-manu-
26 factured NES base units and Nintendo-manufactured cartridges.

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1 22. As a direct and proximate result of Nintendo's unlawful
2 conduct, Atari and Tengen have been injured in their business and
3 have suffered substantial damages, including loss of profits and
4 revenues that would have been realized had Nintendo not contracted,
5 conspired, or combined to restrain trade in the manner alleged.

6 THIRD CAUSE OF ACTION

7 (Intentional Interference With Contractual Relations)

8 23. Atari and Tengen repeat and reallege paragraphs 1 through
9 22 of this Complaint as though fully set forth hereat.

10 24. Beginning on or about December 12, 1988, and continuing
11 through the present, Tengen, for and on behalf of itself and as the
12 marketing "arm" of Atari, entered into valid and binding contracts
13 with a number of its customers located throughout the United States
14 for the sale of independently produced NES-compatible video game
15 cartridges.

16 25. Nintendo, without justification and with knowledge of
17 Tengen's contracts, intentionally interfered with said contracts
18 with the sole purpose of inducing their breach. Nintendo's
19 unlawful interference includes, but is not limited to,
20 (i) threatening the prosecution of lawsuits against third
21 parties -- under circumstances where Nintendo knew that such law-
22 suits would have no legal basis and/or had no intention of carrying
23 out the threats -- unless such third parties would stop selling the
24 Atari/Tengen cartridges, return unsold inventory of the cartridges
25 and refuse in the future to accept delivery of any cartridges,
26 (ii) improperly and maliciously threatening distributors,
27 --

1 retailers and the consuming public that product warranties that
2 would otherwise apply to Nintendo video game machines would be
3 rendered ineffectual upon the use of Tengen and Atari products, and
4 (iii) otherwise wrongfully and maliciously threatening dire
5 economic consequences to entities that would do or would continue
6 to do business with Tengen and Atari.

7 26. Nintendo's unlawful interference directly and proximately
8 caused some of Tengen's customers to breach their contracts,
9 thereby depriving Tengen of the benefits it would have enjoyed had
10 the contracts been performed. In other cases Atari and Tengen have
11 been damaged by being required to devote their limited resources to
12 preventing contract breaches.

13 27. In committing the despicable acts alleged above, Nintendo
14 acted with oppression and malice and with the sole purpose of
15 injuring Atari and Tengen.

16 28. There exists a substantial likelihood that, unless
17 enjoined by this Court, Nintendo will continue to interfere with
18 Tengen's contractual relationships with its existing customers.

19 29. As a direct and proximate result of Nintendo's conduct,
20 Tengen and Atari have suffered substantial damages, including the
21 loss of profits and revenues from the sale of NES-compatible video
22 game cartridges pursuant to contracts with existing customers, and
23 Tengen and Atari will suffer irreparable injury for which they have
24 no adequate remedy at law.

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1 FOURTH CAUSE OF ACTION

2 (Intentional Interference With
3 Prospective Economic Advantage)

4 30. Atari and Tengen repeat and reallege paragraphs 1 through
5 29 of this Complaint as though fully set forth hereat.

6 31. Beginning on or about December 12, 1988, and continuing
7 through the present, Tengen, for and on behalf of itself and as the
8 marketing "arm" of Atari, formed prospective economic relationships
9 with many customers located throughout the United States for the
10 sale of NES-compatible video game cartridges. Such relationships
11 contained the probability of future economic benefit to Tengen.

12 32. Nintendo, without justification and with knowledge of
13 these existing prospective economic relationships, intentionally
14 disrupted Tengen's prospective economic relationships with the
15 purpose of preventing the sale by Tengen of NES-compatible video
16 game cartridges. Nintendo wrongfully disrupted Tengen's prospec-
17 tive economic relationships in the manner set forth in paragraph 25
18 herein.

19 33. Nintendo's unlawful acts directly and proximately caused
20 prospective Tengen customers to refrain from purchasing Tengen
21 products and have damaged Tengen and Atari in this and other ways.

22 34. In committing the despicable acts alleged above, Nintendo
23 acted with oppression and malice and with the sole purpose of
24 injuring Atari and Tengen.

25 35. There exists a substantial likelihood that, unless
26 enjoined by this Court, Nintendo will continue to interfere with

27 --

1 Tengen's prospective economic relationships with customers for the
2 sale of NES-compatible video game cartridges.

3 36. As a direct result of Nintendo's conduct, Tengen and
4 Atari have suffered substantial damages, including the loss of
5 profits and revenues from the sale of NES-compatible video game
6 cartridges, and will suffer irreparable injury for which they have
7 no adequate remedy at law.

8 FIFTH CAUSE OF ACTION

9 (Trade Libel)

10 37. Atari and Tengen repeat and reallege paragraphs 1 through
11 36 of this Complaint as though fully set forth hereat.

12 38. Beginning in or about December, 1988, Nintendo willfully,
13 without justification, and without privilege, communicated or
14 caused to be communicated through written and/or verbal means to
15 existing and prospective Tengen and Atari customers certain false,
16 misleading and disparaging information to the effect that the sale
17 by such parties of Tengen products is a violation of the law, would
18 nullify Nintendo product warranties, and/or would result in other
19 dire economic consequences.

20 39. These statements were false and disparaged both the
21 services offered by Tengen and Atari and the NES-compatible video
22 game cartridges sold by Tengen.

23 40. Nintendo made these statements with knowledge of the
24 statements' falsity or with reckless disregard of the statements'
25 truth or falsity.

26 41. A reasonable person would have foreseen under the cir-
27 cumstances that the conduct of existing and prospective Tengen and

1 Atari customers would be determined by the statements made by
2 Nintendo, and that Nintendo made the statements with the purpose of
3 inducing existing and prospective Tengen customers to refrain from
4 purchasing NES-compatible video game cartridges manufactured by
5 Tengen.

6 42. Nintendo's false and disparaging statements caused
7 existing and prospective customers of Tengen not to purchase
8 Tengen's NES-compatible video game cartridges.

9 43. In committing the despicable acts alleged herein,
10 Nintendo acted with oppression and malice.

11 44. There exists a substantial likelihood that, unless
12 enjoined by this Court, Nintendo will continue to communicate to
13 existing and prospective Tengen customers some or all of the above-
14 alleged false and disparaging statements, further decreasing
15 Tengen's sales of NES-compatible video game cartridges.

16 45. As a direct and proximate result of Nintendo's conduct,
17 Tengen and Atari suffered substantial damages, including the loss
18 of profits and revenues from the sale of NES-compatible video game
19 cartridges, and will suffer irreparable injury for which they have
20 no adequate remedy at law.

21 SIXTH CAUSE OF ACTION

22 (Patent Infringement)

23 46. Atari repeats and reallege paragraphs 1 through 45 of
24 this Complaint as though fully set forth hereat.

25 47. On April 24, 1984, United States Patent No. 4,445,114,
26 entitled "Apparatus For Scrolling A Video Display" (the "'114

27 --

1 Patent"), was duly and legally issued in the name of David R.
2 Stubben.

3 48. Atari has been assigned the entire right, title and
4 interest in, to and under the '114 Patent and has all rights of
5 recovery thereunder.

6 49. Nintendo has willfully and deliberately directly
7 infringed the '114 Patent by manufacturing, offering for sale and
8 selling, within this judicial district and elsewhere, the Nintendo
9 home video game machine and compatible cartridges (the "products"),
10 which embody the method and system that constitute a material part
11 of the invention. Atari and Tengen are informed and believe, and
12 on that basis allege, that Nintendo knows that the products are
13 especially made for use in an infringement of the '114 Patent. The
14 products are not staple articles or commodities of commerce
15 suitable for substantial noninfringing use.

16 50. Nintendo has actively induced infringement of the '114
17 Patent in this judicial district and elsewhere.

18 51. Unless enjoined by this Court, Nintendo will continue to
19 willfully and deliberately infringe and induce infringement of the
20 '114 Patent.

21 52. Atari has given Nintendo written notice of infringement
22 of the '114 Patent and of Atari's ownership thereof. Nintendo has
23 nonetheless continued willfully and deliberately to infringe and
24 induce infringement of the '114 Patent.

25 53. As a direct and proximate result of Nintendo's conduct,
26 Atari has suffered and will continue to suffer irreparable injury,
27 for which it has no adequate remedy at law. Atari has also been

1 damaged in its business and property in an amount to be determined,
2 but not less than a reasonable royalty for sales of home video game
3 machines, and lost profits and/or a reasonable royalty for sales of
4 cartridges. Atari is entitled to three times said damages and
5 attorneys' fees and costs in view of the willful and deliberate
6 nature of said infringement, rendering this an exceptional case.

7 SEVENTH CAUSE OF ACTION

8 (Unfair Competition, California Business
9 and Professions Code § 17200, et seq)

10 54. Atari and Tengen repeat and reallege paragraphs 1 through
11 45 of this Complaint as though fully set forth hereat.

12 55. The wrongful acts alleged herein constitute unlawful,
13 unfair, unreasonable, and fraudulent business practices within the
14 meaning of the California Business and Professions Code §§ 17200,
15 et seq.

16 56. As a direct and proximate result of Nintendo's conduct,
17 Atari and Tengen have suffered substantial harm and in the past
18 have been unlawfully prevented from competing with Nintendo in the
19 manufacturing market for video game cartridges sold in the United
20 States that will play on the Nintendo home video game machine.
21 Additionally, Atari and Tengen have suffered substantial harm to
22 their reputation and goodwill and, unless Nintendo's wrongful con-
23 duct is enjoined by this Court, Atari and Tengen will suffer
24 irreparable injury for which they have no adequate remedy at law.

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PRAYER

WHEREFORE, Atari and Tengen pray for judgment against Nintendo-US and Nintendo-Japan, and each of them, as follows:

1. On the First and Second Causes of Action, for treble damages in accordance with proof at trial and in an amount not known now but believed to be in excess of \$100 million (actual compensatory damages prior to trebling are believed to be in excess of \$30-\$35 million), and for attorneys' fees;

2. On the First through Fifth and Seventh Causes of Action, for an order preliminarily and permanently enjoining Nintendo and its officers, employees and agents from:

(a) interfering in any manner with Tengen's contracts and prospective business relationships;

(b) falsely and misleadingly disparaging Tengen's and Atari's business reputation and goodwill on their NES-compatible video game cartridges;

(c) engaging in any further actions the effect of which would be to foreclose competition in the relevant markets, (including but not limited to actions such as entering into exclusive-dealing or other restrictive agreements with any entities, precluding any entities from purchasing competing products from Atari or Tengen, or disparaging newly introduced competing products), and/or engaging in any other unfair, unreasonable and fraudulent business practices with respect to Tengen's NES-compatible video game cartridges; and

1 (d) enforcing any exclusivity provisions or
2 other exclusionary requirements contained in any
3 licensing agreement.

4 3. On the Third through Fifth Causes of Action, for compen-
5 satory and punitive damages in accordance with proof of trial.

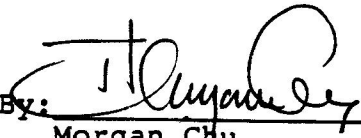
6 4. On the Sixth Cause of Action, for an order preliminarily
7 and permanently enjoining Nintendo from infringing the '114 Patent,
8 and for past damages according to proof, trebled, and for
9 attorneys' fees.

10 5. On all Causes of Action, for costs of suit and such other
11 relief as to the Court seems just and proper.

12 Dated: February 14, 1989

13 Respectfully submitted,

14 IRELL & MANELLA

15
16
17 By: 

18 Morgan Chu
19 Attorneys for Plaintiffs
20 Atari Games Corporation and
21 Tengen, Inc.

JURY DEMAND

Atari and Tengen demand a jury trial on all issues.

Dated: February 14, 1989.

Respectfully submitted,

IRELL & MANELLA

By: 

Morgan Chu
Attorneys for Plaintiffs
Atari Games Corporation and
Tengen, Inc.

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