UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

BABBAGE HOLDINGS, LLC
Patent Owner

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Case IPR2015-00568
Patent 5,561,811

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BABBAGE HOLDINGS, LLC'S OPPOSITION TO PETITIONER'S
MOTION FOR JOINDER

This paper responds to the Motion for Joinder (the "Motion") filed by Petitioners, Nintendo Co., Ltd., and Nintendo of America Inc. (collectively, "Nintendo").

## I. INTRODUCTION

The statutory provision governing joinder of *inter partes* review proceedings is 35 U.S.C. §315(c). As the movant, Nintendo bears the burden to show that joinder is appropriate. *See*, 37 C.F.R. §42.20(c). As will be seen, Nintendo's motion has not established entitlement to the requested relief.

Moreover, and as the Board's website notes: "the rules governing the filing and progress of IPRs, including the rules relating to joinder, are meant to 'secure the just, speedy, and inexpensive resolution of every proceeding'." *See*, 37 C.F.R. §42.1(b) (emphasis supplied). Because the parties to the underlying proceeding, (IPR2014-00954) indeed have resolved their differences and are settling the associated district court litigation, the grant of joinder here will frustrate that express purpose.

## II. STATEMENT REGARDING MATERIAL FACTS

The motion identifies eleven (11) material facts. Whether the last sentence in Material Fact No. 4 (namely, that "Sony does not oppose Nintendo's Motion for Joinder") is true, is unknown; thus, for present purposes the fact is disputed. The

remaining facts asserted by Nintendo, and as stated, are true, but the listing is incomplete. The following additional material facts are submitted per 37 C.F.R. §42.23(a):

12. On February 2, 2015, Patent Owner and Defendants' Activision Publishing, Inc. and Blizzard Entertainment, Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2002.

13. On February 2, 2015, Patent Owner and Defendant Square Enix, Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2003.

14. On February 3, 2015, Patent Owner and Defendant Riot Games, Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2004.

15. On February 5, 2015, Patent Owner and Defendant Capcom U.S.A., Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2005.

16. On February 6, 2015, Patent Owner and Defendant Electronic Arts, Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2006.

17. On February 9, 2015, Patent Owner and Defendant Bandai Namco Games America, Inc. filed a stipulated motion for dismissal with prejudice in the related district court litigation. *See,* Exhibit 2007.

18. Nintendo filed the Petition in IPR2015-00568 on January 14, 2015, but it did not provide the Petition to the Patent Owner's litigation counsel until later the next day, January 15th.[1] By that time, however, Patent Owner and Defendant Sony Computer Entertainment America LLC had already agreed in principle to settle the related district court litigation. Sony executed a settlement agreement on February 13, 2015, and the parties are now in the process of executing the settlement, which includes the filing of a motion for dismissal with prejudice in the related district court litigation.

19. With the exception of an action against Petitioner Nintendo of America, Inc. (No. 5:14-cv-04822), and an action against Konami Digital Entertainment, Inc. (No. 13-cv-754), all of the related district court litigation is now settled. Defendant Konami has not joined either IPR2014-00954 or IPR2015-00568.

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[1] Although Nintendo sought to join IPR2014-00954, it did not provide the Patent Owner's Lead Counsel (the undersigned) with either the Petition or the Motion at any time.

## III. THE MOTION SHOULD BE DENIED

### A. Nintendo has not met its burden to establish entitlement to relief

As the movant, Nintendo bears the burden to show that joinder is appropriate. See, 37 C.F.R. §42.20(c).

A motion for joinder should: (1) set forth the reasons why joinder is appropriate; (2) identify any new grounds of unpatentability asserted in the petition; (3) explain what impact (if any) joinder would have on the trial schedule for the existing review; and (4) specifically address how briefing and discovery may be simplified. *See e.g.*, *Kyocera Corp. v. Softview LLC*, Case IPR2013-00004, slip op. at 4 (PTAB Apr. 24, 2013).

Regarding points (1) and (2), Nintendo contends that its Petition here "is in all material respects the same as Ground I" in IPR2014-00954. Superficially, and at present, Nintendo's statement is true, however, the Motion also states that "Nintendo will continue [following along with the other petitioners] unless and until the '954 IPR is terminated as to all other petitioners." (*See*, Motion, at 2, FN1, emphasis supplied). Also, Nintendo wants the right to submit "separate filings" if its "position differs from the position of the '954 IPR petitioners." (*Id.*, at 2). Nintendo did not identify in its Motion what this different "position" might entail, only that it might need to pursue it. As noted below, however, the '954 IPR

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