

Transcript of Telephonic Court Call

Date: October 15, 2024
Case: Nintendo -v- American GNC (PTAB)

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NINTENDO CO., LTD. AND NINTENDO OF AMERICA, INC., Petitioner,	:	CASE NUMBER IPR2024-0067 (Patent 6,508,122 B1)
v.	:	IPR2024-00668
AMERICAN GNC CORPORATION, Patent Owner.	:	(Patent 6,671,648 B2)

Telephonic Court Call

Before the Honorable BRIAN J. McNAMARA

SCOTT A. DANIELS, and

LISA L. TSANG, Administrative Patent Judges.

Tuesday, October 15, 2024

12:33 p.m.

Job No.: 557648

Pages 1 - 27

Reported by: Cynthia Lichtman, CSR No. 14601, CVR

Call with the Court held telephonically:

Pursuant to agreement, before Cynthia Lichtman, Notary Public in and for the State of California.

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A P P E A R A N C E S

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THE COURT: Good afternoon, everyone. This is Judge McNamara. This is a conference call in IPR 2024-00667 and 00668. The case is, I guess, the petitioner in this case is Nintendo, and the patent owner is GNC. Let me first begin by asking if we have a court reporter on the line.

THE REPORTER: Yes, you do, sir. My name is Cynthia Lichtman. You can call me, Cindy. Will there be other judges here?

THE COURT: I was about to get to that. Judge Scott Daniels and Lisa Tsang, T-S-A-N-G, are on the line with me as well. Got that?

THE REPORTER: Yes, sir, thank you.

THE COURT: Okay. Great. Thank you very much. Can you please tell me who's on for the petitioner?

MR. BRIGHAM: Yes, this is Matt Brigham.

THE COURT: I can hear something -- excuse me just a second. Let me interrupt you for just a second. I hear someone speaking in the background very low. I don't know if it's from one of you or what, but I just want to ask you to try to avoid that, if you can.

THE REPORTER: That's me. I'm a Voice Writer. I thought I was quieter. Okay.

THE COURT: Okay. Great. Thank you. All

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right. Let me have it, again, appearance by the petitioner.

MR. BRIGHAM: Yes, this is Matt Brigham, from Cooley, on behalf of the petitioner. Also on the line is Andrew Mace and Patrick Lauppe, also from Cooley.

THE COURT: Okay. And Mr. Brigham, will you be doing most of the speaking today?

MR. BRIGHAM: I will.

THE COURT: Okay, great. And for the patent owner, who do we have on the line?

MS. ENTZMINGER: Good afternoon, Your Honor. This is Brenda Entzminger, lead counsel for patent owner, of the law firm of Bunsow De Mory. I have with me on the line my co-counsel, Corey Johanningmeier. And Corey will be doing the argument today, most of the speaking.

THE COURT: Oh, okay. Great. Thank you so much. And is that Mister -- and let me get that name again?

MR. JOHANNINGMEIER: Johanningmeier. Yeah.

THE COURT: Okay. Great. Thank you. All right. I believe this call was requested by the patent owner as a -- I guess, it's a motion -- who wants to file a motion for additional discovery; is that correct?

MR. JOHANNINGMEIER: Yes, Your Honor, that is

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correct. And so, you know, we met and conferred but couldn't come to agreement on it. So we're doing that.

The motion is just for additional discovery, and it's directed to basically two things that go to the real party in interest issue that was discussed already in the institution decisions. But we are seeking discovery into an agreement between Nintendo and STMicro. There's an agreement that has already been produced in the District Court case, but we just want to go forward with discovery here.

And also, we are seeking communications between Nintendo and STMicro about the challenge patents and petitions board, if they're going to assert privilege over those communications and privilege logs.

And so, you know, I don't know to the extent that you just want me to launch into a -- the justification for this. But this goes, you know, this is really just we are asking for authorization to file the motion where we would detail our good cause at length and explain why, but, you know, as we will show in that motion, the discovery goes to relevant issues.

It goes to, you know, whether the petition is defective for failing to list an RPI. It goes to whether or not STMicro would be estopped under 315(e) because they are an RPI or privy. And it goes to

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whether the petitioner is actually time-barred pursuant to 315(b) because STMicro is a real party in interest or privy.

And I would also just note that recently, I guess, last year the director, on a sua sponte review, allowed identical discovery that was in the Samsung v Netlist case, IPR 2022-00614, paper 40. And there -- it is also, you know, any indemnification agreements and related communications to the litigation and the patents where discovery into that was granted on sua sponte director review.

So we think, you know, obviously, we can make the case for that. We can make the showing under the Garmin factors. I can go through those to the extent Your Honor wants to explain why these are (indiscernible) --

THE COURT: That's okay.

MR. JOHANNINGMEIER: And so, I guess, (inaudible).

THE COURT: Sure. (Inaudible.)

MR. JOHANNINGMEIER: Right. Right. I mean, so we will, of course, make the motion under Garmin of why this is relevant and can't be gotten any other way.

I think the other thing I will just preview for Your Honor is the reason I, you know, we're asking

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what should be ordinary discovery on a call with opposition is because Nintendo believes that there is a -- that they have -- essentially, there's going to be a legal problem with the ultimate time bar question. There is a disputed interpretation of the time bar statute here that we think actually is an issue of legal first impression.

We talked about this with Nintendo, and they don't agree with our read. But, you know, just to put it as simply as possible, the literal requirements of 315(b) have been met because STMicro NG [sic] and SRL were served with the complaint that alleged infringement of the challenged patents. But what actually happened in the case was STMicro's customer, Oneplus, was alleged to have infringed the challenge patents through the use of ST's chips, and then ST itself was accused of infringing two related patents. So they were co-defendants in the litigation.

But the way it came down is that the two challenge patents here were sort of against ST's customer where two different patents were sort of against ST. So we think this meets the actual legitimate -- the requirements of the statute. And, you know, we've looked at cases, and the closest case we could find is the Facebook versus Windy City case where

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it didn't matter for purposes of the time bar that the specific claim wasn't asserted in the complaint that was filed. It was ultimately barring it.

You know, we've also looked at the cases about, you know, there's plenty of cases that say you don't read additional limitations into the plain language of the statute, but it does appear to be a -- you know, there's this sort of co-defendant situation appears to be a legal question of first impression. And I think Nintendo thinks they're going to win on that, and we think we're going to win on that.

But more to the direct point of this call, we are just asking for the discovery about whether or not there's an RPI which is relevant, not only to the time bar issue but also to estoppel also to whether or not the petition itself is complete.

So we think the discovery is authorized either way. And the fact that there might ultimately be a, you know, dispute about whether or not the time bar applies, that is going to come down to a statutory interpretation, you know, might be a very interesting question. But we need to do the discovery first. That discovery comes before --

THE COURT: Okay. I appreciate that, yeah. So let me ask you this at the very beginning then. My

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understanding from what you've just said is that the document, the alleged agreement, that is at issue here, has already been produced in the District Court case; is that correct?

MR. JOHANNINGMEIER: Right. So before we filed our preliminary response, we told Nintendo that we were intending to include it as an exhibit and then file a motion to seal, but then Nintendo objected based on the protective order in the District Court case. And so --

THE COURT: Where are we going next?

MR. JOHANNINGMEIER: Yeah, so I can't -- I can't put it in without authorization. You know, Nintendo is taking the position that these are separate proceedings and that we can't -- so I -- what I ended up doing in the response is dropping a footnote and citing and mentioning that there was an agreement out there which, you know, you all noted in the --

THE COURT: Right. Right.

MR. JOHANNINGMEIER: -- the record being insufficient. But basically, we're trying to fill in the record with that, obviously under seal, with, you know, the board's protective order or whatever. The protective order we can negotiate with Nintendo.

And the only other thing we're asking for is

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the communications between the two parties, or if they're going to assert privilege then, you know, obviously, we would just want them to do so and provide a log.

THE COURT: Right. Okay. Let me ask the petitioner at this point. Counsel, it's -- the protective order, does the District Court protective order preclude use of discovery material in the District Court in another proceeding?

MR. BRIGHAM: Thank you, Your Honor. Yes, it's limited to use in that case. So there's a restriction there. And in addition, it would involve third-party confidential information. So the third party in this case, STMicro would need to give permission.

THE COURT: I see, which I'm assuming is not likely to be forthcoming.

MR. BRIGHAM: Yeah, I can't speak for them. They would need to be asked.

THE COURT: Have you asked them?

MR. BRIGHAM: We asked their approval to produce it in the underlying litigation but have not asked to be produced in this case. There are reasonings why we think we shouldn't even get to discovery that I can go through, but I'm happy to answer other questions

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first.

THE COURT: Okay. Fine. I just wanted to make sure, you know, that the District Court order does not allow -- well, there's a distinction. It can -- the documents are produced or the discovery is produced for use of the District Court case. Does it prohibit the use of the same discovery in another case?

MR. BRIGHAM: Yes, it says that the documents produced can only be used for purposes of that case.

MR. JOHANNINGMEIER: And, Your Honor --

THE COURT: I suspect -- let me say one thing to both of you -- I suspect that we probably won't make a decision on this today. But based on what I'm hearing, if we do make a decision to allow any kind of a motion, we'll need to have that protective order with us filed with anything like that so that we know what the District Court's position is this on this.

Petitioner's counsel was about to explain to me why he thinks we shouldn't have this discovery in the first place so -- and again, I -- we are not at the issue of arguing the merits of what the law actually requires or what implications of the discovery might be. So although I heard some of that from patent owner's counsel, and you can feel free to answer that if you like, but that's not the issue that we're dealing with

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today.

The primary issue we're dealing with today is whether we should allow the discovery. I do recognize to some extent to say, well, it may be purposeless if it can't be used. But we are not in a position to make that kind of decision at this stage of the game.

So please, go ahead and tell me why you think we should not -- we should not even authorize a motion for this discovery.

MR. BRIGHAM: Thank you, Your Honor. So I will not get into all the details. We think there are a number of flaws, both legally and factually, with their IPR theory. STMicro has not agreed to indemnify us. There was no coordination on IPRs. There's other legal issues. Let me focus on the one that counsel raised.

And the reason why we do not think that even discovery -- even the parties should even need to engage in discovery is that section 315(b) has not been met. There has -- there was not a complaint served on STMicro that alleges infringement of the two patents that are subject to these IPRs.

If Your Honor looks at Exhibit 2012, which is the complaint that AGNC points to as the basis for this RPI, paragraphs 47 and 48 make it clear that STMicro was accused of infringing two other patents, not these two

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patents. And to the extent there was any ambiguity at all, we asked AGNC in the underlying litigation of the Western District of Washington, and this is not before the board, but on February 13th, 2024, docket 40, in an answer to counterclaims, AGNC admitted the following: American GNC admits that it did not include allegations of infringement of the '122 patent and the '648 patent by STMicro in the 171 [sic] case.

So, again, there's a lot of flaws that I won't get into today, but this one seems to be a key gating item for 315(b) can't be triggered because the complaint was not served on STMicro alleging infringement of the patent.

THE COURT: Okay. And so your theory is then we shouldn't have any discovery because they could not possibly rely on that discovery because it doesn't -- they weren't sued on the patents that are subject to these two cases; is that correct?

MR. BRIGHAM: Correct. Correct. Reporting (indiscernible) the parties, the board, third parties, with discovery for no upside given that they can't pass this fundamental gating item.

THE COURT: Okay. And let me hear from the patent owner again on that point. I think you may have covered some of this before, but that's perhaps a bit

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more pointed analysis of it.

MR. JOHANNINGMEIER: Right. Thank you, Your Honor. Right. And so we are not asserting anything contrary to the statement that he read from our amended answer. The -- what happened in the prior litigation was -- there was -- STMicro was a co-defendant, there were four patents asserted. Two of them were against STMicro's customer, and two were against it. And the two that are challenged here are the ones that were asserted against STMicro's customers.

So, again, we've looked very closely to see whether this issue had ever come up before because the, you know, and we've read all the cases on this issue. And it turns out that it's not clear because all of the statute says is that serves was a complaint alleging infringement of the challenged patent, which is technically met.

Now, you know, one could assume, based on that, that means that the, you know, the particular co-defendant has to be accused. But the cases don't actually lead you to that conclusion. So there's an interesting legal question because the -- what -- the time bar is based on notice and STMicro clearly had notice, right? And so, you know, that it is actually an issue that's going to require statutory interpretation

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decision.

But, again, you know, so this comes up a lot in cases where people say, well, you couldn't win so we don't have to give you discovery. I mean, I think we could win this issue. I think it is a questionable -- we have her colorable argument, a good faith colorable argument that what did happen was enough to trigger their interest in moving to bring an IPR if they were going to. Right? And so that's an argument for later on.

What we are asking for now is to just take the discovery, which is relatively simple and straightforward, in order to, you know, establish the facts that we need to establish.

Again, as I said before, it isn't simply the time bar issue. I mean, American GNC is concerned about the estoppel issue as well. Because if STMicro should be an RPI in this proceeding, we want to establish that in this proceeding so that we don't get future IPRs from ST entities, right?

I mean -- and, you know, if they are really officially should have been RPI in this case, then technically, the petition is deficient now. And Nintendo may be allowed to share that. It is relevant that their representation that they're the only RPI, you

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know, we're challenging that. And we need -- this discovery would go straight to that point as well. So we think that the discovery --

THE COURT: Okay. So let me ask you this then. So as to goes to what -- what was actually served on STMicro. They were served with a complaint in which they were a co-defendant, and as a co-defendant. And as a co-defendant, there were accused -- there were four patents, let's say: A, B, C, and D. C and D are different from A and B. A and B are the two patents that are involved in these two cases. But STMicro was not accused of infringing those two patents. They were accused of infringing two different patents, C and D patents; is that right?

MR. JOHANNINGMEIER: Right. The patents that are now at issue in these IPRs were directed to STMicro's customer, OnePlus, and -- but it was related to OnePlus' misuse of STMicro components. So -- but yes, you have it right. The actual allegations of infringement that went straight to ST were on these challenge patents.

Now, they clearly had notice of everything because you can see that if you look at their objections to our subpoena at Exhibit 2014, 1 to 2. They, you know, they responded to our subpoena by saying those --

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these patents were at issue and were improperly trying to accuse them again and all sorts of comments that -- and objections that reflect knowledge that they had been implicated under these patents or these patents had been, you know, brought up in a prior case.

So, you know, I think it's, you know, but technically they were not in use of infringing these. And, again, I just go to the closest analogy of a case I could find was the Facebook versus Windy City case where, you know, the Federal Circuit said it didn't matter for purpose of the time bar that the served complainant didn't allege infringement of the claims and ultimately got challenged.

Now, that was different claims within a patent, not different patents within a family so that's where we have the distinction.

THE COURT: Right.

MR. JOHANNINGMEIER: But that -- so that's the question that I would, you know, like to get resolved. But, you know, as to whether or not --

THE COURT: Okay.

MR. JOHANNINGMEIER: -- discovery is so burdensome that it needs to be avoided. You know, we're asking for an agreement that, you know, ST has agreed to produce in the underlying litigation.

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I'm not sure. You know, we are taking it on good faith their representation that they have to get permission to produce this. But I don't see any reason why it couldn't be produced here if it was produced there.

The other point I'd make about the protective order -- I mean, obviously, we'll include that with any motion, but the protective order says, use within litigation. So, you know, they're reading that to mean just the District Court, whether or not, you know, we (inaudible) just going to assume that and essentially move discovery here in order to, you know --

THE COURT: That's obviously why we would want to see the protective order -- excuse me, Counselor -- that's exactly why we would want to see the protective order. And then so to summarize what I think I understand your position to be, is that STMicro has a co-defendant in a case where another party was being sued on these patents had notice of a suit that was filed involving these patents, and therefore, could have filed its own IPR. Is that, you know, on these things; is that my correct understanding?

MR. JOHANNINGMEIER: Right. That based -- you know, this is a fact question, obviously, and it's going to be specifically to the facts of this case.

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THE COURT: Right. Right.

MR. JOHANNINGMEIER: Because it wasn't -- for all we know, they weren't indemnifying in that case as well. But they were certainly a co-defendant. And they certainly had one of their customers accused under these patents and had, you know, themselves accused under patents that are, you know, total continuation in the same family. So, you know, we think that provides enough notice to start the clock, and like I said --

THE COURT: Okay. I think I understand where you're coming from.

MR. JOHANNINGMEIER: Okay.

THE COURT: And I'm going to ask for the patent owners -- I'm sorry -- for the petitioner's response to that, then I think we'll wrap it up. Okay, Counsel, can I hear what you have to say about that in response?

MR. BRIGHAM: Yeah. Just simply put, they have not met their threshold burden to establish that there's an RPI issue here. It can't be that notice is enough when you file a complaint and you tell a party you're not accused of these two patents, paragraph 47 and 48 of Exhibit 2012. If they wanted to accuse STMicro, it was easy enough. And they purposefully didn't.

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And then we asked them seven months ago, was STMicro accused of those two patents in that case? And in a filing in NWG Washington, they say -- they admitted there was no allegations of infringement of the 122 patent and 648 patent by STMicro. So any notice, if really the statute was read that far, it would implicate all sorts of parties and will have been intended, and you just can't get around the fact that they told courts and STMicro the opposite, We did not accuse you of those two patents, so (inaudible) --

THE COURT: Okay. Okay. I think I understand that. I mean, they were served with the complaint alleging infringement, but it wasn't they who are alleged to be the infringers. But they were served with the complaint that alleged infringement, right?

MR. BRIGHAM: No --

THE COURT: By a co-defendant; is that right?

MR. BRIGHAM: Well, I mentioned that there's a whole host of legal issues. We're not -- I didn't plan on getting into that today. They haven't established service either, Your Honor. So there's a whole (inaudible).

THE COURT: (Inaudible) if we -- well, that would clearly be an issue as well if we were to grant a motion for discovery. I guess, you'd want to -- you'd

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want to -- you'd want to deal with that as well. So you're saying that they weren't served. But if we assume for a moment that they were served, it was all the same complaint though, right? I mean, they were co-defendants, and they allegedly got the same complaint that -- that accused a co-defendant of infringing the patents that are subject matter of these IPRs, right?

MR. BRIGHAM: Right. There was a STMicro --

THE COURT: Okay.

MR. BRIGHAM: -- named in a complaint where that -- where they accused someone else of these patents, correct?

THE COURT: Okay. Okay. I just want to make sure I understand the facts because clearly. You know, we're only seeing this from, you know, we're not seeing all these related cases and that sort of thing, so --

MR. BRIGHAM: Understood. Understood.

MR. JOHANNINGMEIER: Your Honor, this is --

THE COURT: Yes.

MR. JOHANNINGMEIER: I just -- to say one thing in summary. I mean, this is an interesting factual dependent issue, we would like to brief it in a motion, right? I mean, just technically today is just a call seeking authorization to brief this issue. So, you know, I'm hoping that that's what we can do. And I

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think that will make the issue much easier for the board to parse and to understand.

THE COURT: So if we were to allow briefing on this, how many pages do you guys think you need? Because it sounds like it's a fairly complicated factual and legal issue. So from the petitioner -- from the patent owner's perspective since you are the one seeking the discovery, how many pages of briefing do you think you need?

MR. JOHANNINGMEIER: Well, I mean, I'm blanking on what the standard for this is, but I mean, 15 or less. I could do it in 10 easily. I mean, I think there's, you know, there's going to be some exhibits that we are going to want to attach, you know, to sort of back up the statements, but it's fairly --

THE COURT: I'm talking pages of briefs, I'm not talking --

MR. JOHANNINGMEIER: Yeah, so I mean, I'll just say 15 just to put a number out there. But, I mean, I can probably do less, you know.

THE COURT: Okay. Somewhere between 10 and 15.

MR. JOHANNINGMEIER: Yeah, we need to go to the Garmin factors, and we need to explain the sort of background issue so, you know, yeah, 10 to 15 pages

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should be enough.

THE COURT: Okay. And petitioner, do you agree if we were to allow briefing that would be adequate? 10 to 15 pages?

MR. BRIGHAM: Yes, that's fine, Your Honor.

THE COURT: Okay. Well, as I said we are -- just let me check with the panel for just a moment.

Okay. It doesn't look like any other panel members have any questions at this time. How quickly can you guys file a transcript?

THE REPORTER: Are you talking to me, the court reporter?

THE COURT: Well, yes, between you and them. You know, are we looking at five days? Are we looking at 10 days? You know, I just want to get an idea of when we can get a transcript.

THE REPORTER: Depends what you order. I'm -- how about Friday?

THE COURT: I'm not ordering it. Talk to them.

THE REPORTER: Counsel, how quickly do you need it? Can you -- is Friday okay?

MR. JOHANNINGMEIER: I mean, yeah. We can pay whatever expedited fee.

THE REPORTER: Who's speaking? Who's

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speaking?

MR. JOHANNINGMEIER: This is Corey Johanningmeier for American GNC. So yes, I'll make sure we have authorization to pay whatever fees that are required to get it done by then, if you think you can get it done by then. That'll be fine.

THE REPORTER: Okay. So Friday --

THE COURT: This is Judge McNamara -- let me interject. If you can get it to me within a week, that would be fine. So however, guys, that would be great. So however you guys want to handle that, that's fine. I guess, is there anything else from either party at this point?

MR. JOHANNINGMEIER: None from American GNC, other than just thanks to the board for your time.

THE COURT: Okay. Anything from the petitioner?

MR. BRIGHAM: Nothing from the petitioner. Thank you for your time.

THE COURT: All right. Well, I appreciate that. If you get the transcript filed within a week, we would -- we'll probably want to take a look at that transcript before we rule and to make sure that we understand everybody's arguments. I appreciate your time today. And you'll be hearing from us in an order

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of some sort sometime in the next couple weeks. Thank you all very much. We are adjourned.

(Off the record at 1:01 p.m.)

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CERTIFICATE OF REPORTER - NOTARY PUBLIC

I, Cynthia Lichtman, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me and thereafter reduced to typewriting under my direction; that reading and signing was not requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 18th day of October, 2024.

My Commission Expires: April 7, 2026

Cynthia Lichtman
_____

Notary Public in and for
the State of California

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Errata Sheet for Conference Call on October 15, 2024

NINTENDO CO., LTD. AND NINTENDO OF AMERICA, INC., Petitioner,
v.
AMERICAN GNC CORPORATION, Patent Owner.
Case Number: IPR2024-0067, IPR2024-00668

Page/Line	Description of Correction Identified by American GNC
17:20	**"ST were on" should be "ST were not on"**
20:3	**"weren't indemnifying" should be "were indemnifying"**
6:12, 8:15, 8:20, 17:21	"challenge patents" should be "challenged patents"
6:13	"petitions board, if" should be "petitions to the board, and if"
6:14	"communications and privilege" should be "communications, then privilege"
8:1	"what" should be "for what"
8:11	"NG" should be "NV"
8:20-22	"were sort of against" should be "were asserted against"
11:23	"reasonings" should be "reasons"
13:23-24	"RPI" should be "RPI argument"
14:2	"of" should be "in"
14:11	"315(b) can't" should be "315(b), which can't"
14:19	"Reporting" should be "Burdening"
15:14	"all of the" should be "all the"
15:15	"that serves was" should be "that what was served was"
16:6	"have her colorable argument" should be "have a colorable argument"
16:24	"share" should be "cure"
18:1	"and were improperly" should be "and we're improperly"
18:7	"not in use of" should be "not accused of"
18:12	"claims and" should be "claims that"
19:11	(inaudible) should be "agree, we're"
19:17	"STMicro has" should be "STMicro as"
20:7	"total continuation" should be "continuations"

20:22	“patents, paragraphs” should be “patents, like in paragraphs”
21:3	“NWG” should be “WD”
21:7	“and will” should be “that could not”
22:8	“a STMicro” should be “a STMicro entity”
22:12	“correct?” should be “correct.”

Counsel for American GNC prepared this errata sheet, in consultation with counsel for Nintendo, and hereby certifies that the above corrections are consistent with its best recollection of what was or was intended to be conveyed on the conference call.

/s/ Corey Johanningmeier