UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ATOPTECH, INC.
Petitioner

v.

SYNOPSYS, INC.
Patent Owner

_____

Case IPR2015-00760
Patent 6,237,127

_____

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR JOINDER TO RELATED INTER PARTES REVIEW OF U.S. PATENT NO. 6,237,127 (CASE NO. IPR2014-01145) UNDER 37 C.F.R. § 42.122(b)

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I. INTRODUCTION

35 U.S.C. §315(c) gives the Board discretion to grant joinder. Petitioner ATopTech Inc.'s ("ATopTech") opening brief in support of joinder (Paper 3) argued that, on the facts of this case, the Board should exercise that *discretion* to grant joinder under §315(c). Synopsys Inc.'s ("Synopsys") opposition brief (Paper 9), on the other hand, largely claims that the Board has no such discretion; Synopsys claims that there are, or should be, bright-line rules barring joinder when it involves the same petitioner. As discussed in Petitioner's opening, Synopsys' interpretation is not what Congress intended when it drafted the joinder statute of the AIA. The joinder statute allows anyone, including the initial petitioner, to file a subsequent petition and joinder motion; the joinder statute, by its terms, applies to "*any person* who properly files a petition"; *not* "any person other than the original petitioner." Indeed, the AIA and agency rules implementing §315(c) go even further, as both contemplate and allow for such joinder petitions to be filed *after* the Board institutes the initial IPR. *See* 35 U.S.C. §315(b) (carving out an exception to the one year time bar for joinder petitions); 37 C.F.R. 42.122(b). Thus, the joinder statute and the Board's rules plainly contemplate the scenario presented here, where the initial petitioner files a subsequent petition and a motion for joinder within one month of the Board's decision to institute the initial IPR.

II. THE BOARD ***SHOULD*** JOIN THESE IPRs

Synopsys does not deny that there is substantial overlap between the two IPRs (*e.g.*, both IPRs involve the same subject matter, parties, patent, expert, prior art and exhibits), that joinder would be the most efficient way to resolve the

patentability of all the challenged claims of the '127 patent, and that joinder would not materially affect trial, discovery or briefing in the earlier granted '1145 IPR. *See* Paper No. 3 ("Opening") at 4-6, 8, 11-13.

Instead, Synopsys' argues that there is a *de facto* rule precluding joinder when the subsequent petition makes arguments that "could have been made in the initial Petition." Opp. at 4-5. Synopsys is wrong. While it is true the Board has exercised its discretion and denied joinder in certain cases, it is also true that the Board has exercised that same discretion to grant joinder motions in instances where the arguments in the new petition could have been made in the initial petition. *See, Samsung Elecs. Co. Ltd. v. Virginia Innovation Sciences, Inc*. ("*Samsung*"), IPR2014-00557, Paper No. 10 (P.T.A.B. June 13, 2014) (instituting trial and granting joinder even though grounds in second petition were based on the same prior art references in the initial petition). *See also Ariosa Diagnostics v. Isis Innovation, Ltd*., IPR2013-00250, Paper 25 (P.T.A.B. Sept. 3, 2013); *Microsoft Corp. v. Proxyconn, Inc.*, IPR2013-00109, Paper 15 (P.T.A.B. Feb. 25, 2013).

Synopsys argues that as a matter of public policy, any subsequent petition addressing claim construction should be denied because it is supposedly a "second bite at the apple." Opp. at 11. However, as ATopTech pointed out (and Synopsys ignored), the legislative history of the AIA shows that one of the reasons Congress made joinder available was for cases where claim construction was an issue in the earlier petition. *See* 157 Cong. Rec. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl).

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