

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.,
Petitioner,

v.

BLACKBIRD TECH LLC,
Patent Owner.

Case IPR2017-02012
Patent 6,434,212

**PETITIONER'S UNOPPOSED MOTION FOR DISTRICT COURT-TYPE
CLAIM CONSTRUCTION UNDER 37 C.F.R. § 42.100(b)**

I. Statement of Precise Relief Requested

Petitioner Fitbit, Inc. (“Fitbit”) respectfully requests that the Board apply a district court-type claim construction in this proceeding because U.S. Patent No. 6,434,212 (“the ’212 Patent”) will likely expire before the Board issues a final written decision. The Board should grant this motion because it is unopposed and it complies with the requirements set forth in 37 C.F.R. § 42.100(b).

II. Fitbit’s Certification Required by 37 C.F.R. §42.100(b)

Fitbit hereby certifies that U.S. Patent No. 6,434,212 will expire within 18 months from the entry of the Notice of Filing Date Accorded to Petition because the ’212 Patent expires on October 28, 2018 and the Notice of Filing Date Accorded to the Petition was mailed on September 14, 2017. *See* Paper No. 3.

III. Statement of Reasons for Relief Requested

A. Legal Standard

“The claim construction standard to be applied during [an] *inter partes* review[] depends upon whether the patent is expired or unexpired.” *Samsung Elecs. Co. v. Elm 3DS Innovations, LLC*, Case No. IPR2016-00386, slip op. at 2 (PTAB Aug. 11, 2016) (Paper 28). “[W]hen a patent expires *during* an *inter partes* review, the Board has applied the district court-type construction.” *Id.* at 3 (emphasis in original) (citations omitted). A request for the Board to apply a district court-type claim construction must be made in the form of a motion filed within thirty days of the filing of the petition. 37 C.F.R. § 42.100(b). The motion

must include a party's certification that "the involved patent will expire within 18 months from the entry of the Notice of Filing Date Accorded to Petition." *Id.*

B. Petitioner's Motion is Timely and Authorized

This Motion for a District Court-Type Claim Construction is timely because it is being filed less than thirty days after the petition for *inter partes* review was filed on August 29, 2017. *See* 37 C.F.R. § 42.100(b). The Board authorized the filing of this motion on September 25, 2017.

C. A District Court-Type Claim Construction is Appropriate

Because the '212 Patent's parent application was filed on October 28, 1998, the '212 Patent will expire on October 28, 2018. *See* 35 U.S.C. § 154(a)(2). Fitbit filed its petition for *inter partes* review on August 29, 2017. Thus, the '212 Patent will expire approximately 14 months after the filing date of Fitbit's petition. It is unlikely that the Board will issue a final determination prior to the '212 Patent's expiration, given that the proceedings could take 18 months. Therefore, it is appropriate for the Board to apply a district court-type claim construction. *See Samsung Elecs. Co.* at 3 ("[W]hen a patent expires during an *inter partes* review, the Board has applied the district court-type construction."). The Patent Owner does not oppose this motion.

Dated: September 27, 2017

Respectfully submitted,

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*ATTORNEYS FOR PETITIONER
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 27, 2017, a true and correct copy of the foregoing motion was served via electronic mail to:

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