UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOUDFLARE, INC. AND SONICWALL INC.,
Petitioner,

v.

SABLE NETWORKS, INC.,
Patent Owner

Case IPR2021-00909
Patent 8,243,593

PATENT OWNER'S SUR-REPLY TO PETITIONER'S PRELIMINARY RESPONSE REPLY

EXHIBIT LIST	
2001	Josh McHugh, "The *n*-Dimensional SuperSwitch," WIRED (May 1, 2001, 12:00 am) (available at *https://www.wired.com/2001/05/caspian/* (last visited Aug. 16, 2021))
2002	Email from Jun Zheng, U.S. District Court for Western District of Texas staff, to counsel for parties, with Subject "Sable Networks, Inc., et al. v. Riverbed Technology, Inc., No. 6:21-cv-00175-ADA and Sable Networks, Inc., et al. v. Cloudflare, Inc., No. 6:21-cv-00261-ADA – Request for Telephone Conference" (Aug. 20, 2021, 9:04 am)
2003	Scheduling Order, Dkt. 21, *Sable Networks, Inc., et al. v. Cloudflare, Inc.*, No. 6:21-cv-00261-ADA (June 24, 2021)

I. THE BOARD SHOULD DENY INSTITUTION UNDER § 314(a).

In Patent Owner's Preliminary Response (Paper 8, "POPR"), Patent Owner explains why the Board should exercise its discretion under 35 U.S.C. § 314(a) to deny institution of the Petition here in view of a ***holistic*** review of ***all*** *Fintiv* factors. Petitioner, on the other hand, dedicates its Reply to establishing a fact not in dispute in an effort to improperly ask the Board to disregard all *Fintiv* factors but Factor 2 (the proximity of the trial date to the statutory Final Written Decision deadline).

Patent Owner has alleged infringement of four patents covering closely related computer networking technologies by Petitioner. POPR at 66-67. There are 20 claims of U.S. Patent No. 6,954,431 asserted in the co-pending district court litigation that Petitioner has not challenged in *inter partes* review. *Id.* at 66-67. Even if Petitioner succeeded on invalidating each and every challenged claim, it would not prevent the parties and the court in the parallel proceeding from expending resources necessary to litigate substantially similar validity issues—in addition to infringement and damages issues—to a jury.

The *Fintiv* factors are non-exhaustive factors that the Board uses to take "a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review." *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper

11, 6 (Mar. 20, 2020) (precedential). The heart of Patent Owner's request that the Board deny institution under § 314(a) is that it is inefficient to litigate the validity of the claims at issue here in two parallel forums when patent claims covering closely related technology and accused products will be litigated by the same parties to a jury contemporaneous to the Final Written Decision deadline should the Board institute *inter partes* review here. POPR at 64-70.

Petitioner offers no explanation (as there is none) as to how *inter partes* review of the challenged claims here is an efficient use of Board or party resources in light of the 20 unchallenged claims of the '431 patent. Instead, Petitioner spends two and a half pages explaining that "the district court has not set a trial date before the final written decision in this proceeding." Paper 9 at 1. This fact, however, is not in dispute. *See* POPR at 67 ("the trial in the W.D. Texas litigation is estimated to begin on January 12, 2023 . . . [t]he deadline for a final written decision would not be until November 21, 2022."). Regarding *Fintiv* Factor 2, the POPR was candid – the statutory deadline for a Final Written Decision falls close to but after the trial date of the parallel proceeding. In such a situation, *Fintiv* Factor 2 is neutral. *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12, 15 (Dec. 1, 2020) (designated precedential Dec. 17, 2020) ("Here, the trial is scheduled to begin around the same time as our deadline to reach a final decision.

Thus, we find that this factor does not weigh for or against denying institution in this case.").

Petitioner suggests that the January 12, 2023 trial date may move because there are multiple cases with the same *Markman* hearing dates and because Petitioner has filed a motion to transfer in the parallel litigation. Paper 9 at 1-3. However, this is exactly the type of unsupported speculation the Board regularly disregards. *See Cisco Sys., Inc. v. Monarch Networking Sols. LLC*, IPR2020-01226, Paper 11, 10-11 (Mar. 4, 2021) ("declin[ing] to speculate" on whether a pending transfer motion or "which [of six other] trials [scheduled on the same date] will not occur on that date" when evaluating a district court's trial date under *Fintiv* Factor 2); *Supercell Oy v. GREE, Inc.*, PGR2020-00034, Paper 13, 11 (Sept. 3, 2020) ("[T]he record lacks *specific, non-speculative evidence* to suggest . . . delay of the trial date is likely in the parallel proceedings at issue here.") (emphasis added).

Petitioner fixates on comparing the timing of a final written decision against the timing of trial in the parallel proceeding. A holistic analysis of the circumstances relating to the Parties' dispute shows that the Parties here are bound for trial within two months of a final written decision. Instituting *inter partes* review here would be an inefficient use of Board resources.

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