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Paper No. __

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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THE DATA COMPANY TECHNOLOGIES INC.,
Petitioner,

v.

BRIGHT DATA LTD.,
Patent Owner.

_____

Case No. IPR2022-00135
Patent No. 10,257,319

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PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

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Plamondon, which the Petition shows renders every challenged claim unpatentable, is not at issue in any other IPR, and there is no evidence it will be at issue in any jury trial. Accordingly, there is no basis for discretionary denial.

Patent Owner ("PO") elected not to address the *Fintiv* factors individually. Instead, Patent Owner broadly suggests that the '319 patent has been challenged too many times, citing *Adobe v. RAH Color Techs.*, IPR2019-00627, Paper 41 (Sep. 10, 2019). *Adobe*, however, did not even address the *Fintiv* factors—it instituted trial over a patent owner's objection under Section 325(d). *Id.*, 16-20.

There is no bright-line test for the number of proceedings in which a patent can be challenged—particularly here, since PO has sued on the '319 patent repeatedly. Rather, discretionary denial is evaluated based on the *Fintiv* factors.

1. *Fintiv* Factors 5 and 4 Strongly Favor Institution

a. Factor 5: Overlap—or Lack Thereof—of Parties

Petitioner reiterates that it is a new startup, incorporated in June 2021, and is an independent company with no involvement in any of the pending litigations concerning the '319 patent. Patent Owner admits Petitioner is not a defendant and admits it is "not currently aware of any relationship that would result in denial of institution." POPR (Paper 7), 7. Accordingly, there is no dispute that this factor "strongly weighs against…exercising discretion to deny institution." *Kavo Dental Techs. v. Osseo Imaging*, IPR2020-00659, Paper 10, 18 (June 10, 2020).

b. Factor 4: Overlap—or Lack Thereof—of Issues

Patent Owner focuses on the NetNut case ("the 225 case," Petition, xv). In particular, Patent Owner emphasizes NetNut's purported inclusion of Plamondon in its invalidity contentions after this Petition was filed—but PO declined to file a copy of those contentions. POPR, 5. This Board has repeatedly found that mere inclusion of a reference in invalidity contentions does not make overlap at trial likely enough to favor discretionary denial. In *Bose v. Koss*, IPR2021-00680, Paper 15 (Oct. 13, 2021), Koss argued, as Patent Owner does here, that a different party (Apple) had cited Bose's primary reference in its invalidity contentions, with a district court trial scheduled before the FWD. *Id.*, 17-18. The Board recognized that "Apple's invalidity theories are subject to narrowing so that Apple may not rely on [the overlapping reference]" at trial—and also noted that, as here, the IPR challenged claims not asserted in the litigation. *Id.*, 18. The Board thus found that Factor 4 "weighs against exercising our discretion to deny institution." *Id.* *See also Applied Materials v. Ocean Semiconductor*, IPR2021-01339, Paper 14, 11-12 (Feb. 9, 2022) (Factor 4 weighed against exercising discretion: "Considering that Petitioner is a non-party to the litigation … even if Breka is identified as prior art in the invalidity contentions, there is no evidence that Petitioner has had or will have any control over whether and how Breka will be presented to the jury."); *Lab. Corp. Am. Holdings v. Ravgen*, IPR2021-01026, Paper 11, 24 (Dec. 14, 2021)

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