UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD AND DELL TECHNOLOGIES INC.

Petitioners

v.

MYPAQ HOLDINGS LTD.

Patent Owner

Case No. IPR2022-00311

U.S. Patent No. 8,477,514

SUR-REPLY IN SUPPORT OF PATENT OWNER'S PRELIMINARY RESPONSE

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Patent Owner ("PO") replies to the arguments in Petitioners' Reply (Paper No. 9) concerning PO's request for a 35 U.S.C. 314(a) discretionary denial.

Factor 1. Here a motion to stay has not been sought because Petitioners know it would be denied. PO's Preliminary Response cites recent public remarks from the presiding judge indicating his clear preference not to stay lawsuits pending IPR outcomes. POPR, 13 (citing Ex. 2004). The article is the ***only evidence*** from the presiding judge explaining that the "one or two" cases previously stayed involved a "plaintiff [who] has first sued other companies over a patent in a different district, and the defendant in that case has initiated a PTAB review that is well underway by the time another company is sued in the Western District of Texas." Ex. 2004. The underlying litigation was initially filed in the Western District of Texas. This is not an earlier filed IPR already "well under way." It is speculation to ignore the evidence and assume a stay will be sought when the presiding judge has informed the world he denies stays in all but a very few, exceptional situations involving conditions not present here.

Sand Revolution II, LLC is distinguishable. There, the Board rejected a PO's generic argument that the relevant district court routinely denied stays "in the absence of specific evidence." *Id.* Here, PO has provided the most relevant and specific evidence possible: a statement from the presiding judge addressing the issue. Importantly, the presiding judge made this statement knowing his words

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were to be published so they could be relied upon by IPR Panels like this one making institution decisions. There is no evidence that the presiding judge has ever granted a stay in any case similarly postured to this one.

Petitioners argue "a stay is more likely here because PO has admitted that it would not face any particularized prejudice from a stay." Reply, 1. *First*, Petitioners mischaracterize the record. There has been no such admission. *Second*, PO stated that it has a "strong interest in the prompt vindication of its patent rights." Ex. 1021, 6. Petitioner's own cited case—*CyWee Group Ltd*—confirms "the interest in prompt enforcement of patent rights is entitled to weight" against a stay. *Id.* at *3. PO's stated interest in prompt enforcement weighs against a stay.

No stay has been granted. None will. This supports discretionary denial.

Factor 2. Petitioners concede the scheduled May 2023 trial date is almost two months prior to the current deadline for a FWD. Reply, 2-3. Petitioners ask the Panel to assume the schedule is likely to slip due to foreign discovery issues[1] or speculate that the case may be transferred (within the same District). Reply, 2-3.

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[1] Petitioners' footnote that PO "has not yet started the foreign discovery process" (Reply, 3 n.2) is incorrect. PO has been working diligently to prepare these requests and even corresponding with one of Petitioners for information relevant to completing them.

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Petitioners' speculative arguments are contrary to the known ***facts***. The presiding judge granted MyPAQ early discovery "to be able ***to keep this case on track***" (Ex. 1022, 19). The presiding judge has made clear he is going to do what it takes to avoid foreign discovery delaying trial. *Id.*

The transfer motion will be denied (or granted) before an institution decision. Speculation on whether a transfer will occur is unnecessary when the Board will have the transfer decision before an institution decision is made. Further, the court recently appointed a technical advisor to advise on the technical aspects of the case, including summary judgment motions on invalidity. Ex. 2015 [Order Appointing Technical Advisor]. This, along with the court's efforts to keep the current *Markman* hearing date, suggest a transfer (and any delay) is unlikely.

Petitioners cite *Micron Technology, Inc.* and *Google LLC* to argue that a trial date set a few months before a FWD is due makes this factor neutral. Neither case supports Petitioners' assertion. In *Micron*, the court had not set a trial date due to COVID-19 delays. *Micron*, 12-13. In *Google*, the Board discussed COVID-19 delays and court closures as the primary reason for the unpredictability in the district court schedule. *Google,* 12-14. Without the same concerns regarding the global pandemic as were present in 2020, *Fintiv*'s instructions to weigh this factor in favor of denial of institution should be taken at face value.

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Factor 3. By the time of institution, preliminary invalidity and infringement contentions will have been served, the *Markman* hearing completed, and discovery (foreign and domestic) well under way. As to the issue of validity, final invalidity contentions are due on June 29, 2022. Ex. 1014, 4. Fact and expert discovery will close well before a FWD issues.

Petitioners argue that "[i]t was reasonable [ ] to wait to know which independent claims PO was asserting to ensure all claims could be addressed efficiently in a single Petition." Reply, 4. Petitioners' excuse for delaying is illusory. Petitioners challenged *all* claims, not just the asserted claims. POPR, 17-18. There was no reason to wait.

Factor 4. Petitioners' Reply does not address the arguments presented in the POPR. Instead, Petitioners argue that their stipulation "is broader than the stipulation approved of in *Sand Revolution* . . . and ensures that there will be no overlap between the PTAB and district court invalidity arguments." Reply, 5. However, Petitioners' stipulation falls far short of that required in *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020) (Precedential as to § II.A). Even without the prior art asserted in this IPR, Petitioners' stipulation would do little to eliminate or simplify the numerous invalidity issues already before the district court, or to preclude additional issues that Petitioners could have but did not raise in its Petition. POPR, 19.

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