UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CODE200, UAB; TESO LT, UAB; METACLUSTER LT, UAB; OXYSALES, UAB; AND CORETECH LT, UAB,
Petitioners,

v.

BRIGHT DATA LTD.,
Patent Owner.

Inter Partes Review No. IPR2022-00861
Patent No. 10,257,319

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR JOINDER TO *INTER PARTES* REVIEW IPR2021-01492

I. INTRODUCTION

In two separate proceedings, the Board has determined that petitioners have "demonstrated a reasonable likelihood of prevailing" in showing that four different primary references each independently read on the '319 patent claims. *See* IPR2021-01492, Paper 12 (Crowds, Border, Morphmix); IPR2022-00135, Paper 12 (Plamondon). Petitioners seek to join each proceeding to prevent Patent Owner from avoiding trial before the Board by settling with the original petitioners. Petitioners' concern is real as NetNut has settled and subsequently terminated from IPR2021-01492. Petitioners' joinder motion is routine, and "[a]llowing Petitioner[s] the opportunity to pursue a decision on the merits from the Board at this time" is in the interests of justice, particularly "the desires to improve patent quality and patent-system efficiency." *Intel Corp. v. VLSI Tech. LLC*, IPR2022-00366, Paper 14 at 9 (PTAB June 8, 2022) ("*Intel*"). Patent Owner's arguments to the contrary are founded on mischaracterizations of prior proceedings and citations to inapplicable case law.

II. JOINDER IS PROCEDURALLY PROPER AND NEUTRAL TO THE COMPLEXITY AND SCHEDULE OF THE NETNUT IPR

Patent Owner neither disputes that Petitioners' IPR filing and joinder motion were timely, nor does it identify any complexities in granting joiner. *See* Paper 11. In fact, the Board has already entered an Order Modifying Scheduling Orders to accommodate Petitioners stepping in and continuing the NetNut IPR if the Board grants this joinder motion. *See* IPR2021-01492, Paper 19.

III. THIS PROCEEDING IS PETITIONERS' FIRST OPPORTUNITY TO PRESENT MERITS ARGUMENTS TO THE BOARD

Patent Owner argues repeatedly that the present Motion for Joinder represents a "fourth bite at the invalidity apple." Paper 11 at 1, 9, 12. This is not true. If the Board grants joinder, it would represent Petitioners' first opportunity before the Board to obtain a merits-based decision regarding the validity of the '319 patent. None of the Board precedent Patent Owner cites supports denying joinder here.

A. The Board Did Not Reach the Merits of Petitioners' Prior IPR and Has Stayed *Ex Parte* Reexamination

Patent Owner argues that, under the *General Plastic* factors, Petitioners' prior IPR challenge warrants discretionary denial, citing *Apple Inc. v. Uniloc 2017 LLC*, IPR2020-00854, Paper 9 (PTAB Oct. 28, 2020) ("*Uniloc*"). Paper 11 at 7-10. But the Board dismissed Petitioners' prior IPR challenge to the '319 patent based on *Fintiv*. *Code200, UAB et al v. Luminati Networks Ltd*., IPR2020-01266, Paper 18 (PTAB Dec. 23, 2020) (citing 35 U.S.C. § 314(a)) ("Code200 IPR").

As the Board explained in *Intel*, *General Plastics* and *Uniloc* are distinguishable from the situation here because they each addressed a situation after denial of an earlier petition ***on the merits***. *See Intel* at 9; *Uniloc* at 6. *Uniloc* is further distinguishable because, unlike here, that petitioner sought to join an IPR based on ***entirely different*** prior art and grounds, and offered ***no*** supporting evidence or argument to "explain the timing of its second petition and its knowledge of the asserted prior art."

Uniloc at 5-11. And, as the Board explained in *Intel*, even where "Petitioner has directed this Petition to the same claims and relies on the same art" as earlier petitions, "that the Board did not substantively address the merits of the prior [] petitions, in our view, weighs against discretionary denial here." *Intel* at 9.

As to *Ex Parte* Reexamination No. 90/014,875 (the "'319 EPR"), Patent Owner does not dispute that the Board has stayed that proceeding, but argues that Petitioners are not prejudiced because the '319 EPR could be restarted if the Board terminates the NetNut IPR. Paper 11 at 13. Patent Owner's argument constitutes speculation and, given that The Data Company IPR has also been instituted, it is not clear that the Board would lift the stay. Regardless, this does not address the fundamental point that, due to the prior *Fintiv* denial, Petitioners have yet to have any opportunity to present their merits-based position ***to the Board***. As the Board's decision ordering stay of the '319 EPR notes, IPR proceedings are "subject to a statutory deadline that requires a final decision within one year of institution" whereas *ex parte* reexaminations are "not subject to a specific deadline." IPR2021-01492, Paper 14 at 4. Petitioners respectfully request the opportunity to proceed with their meritorious challenge.

B. <u>The Texas Action Does Not Warrant Denial</u>

Patent Owner argues that the Texas Action was "a full and fair opportunity to litigate the validity of the '319 Patent based on the exact same prior art" and

mandates discretionary denial. Paper 11 at 13-14. Patent Owner's argument is factually incorrect and cites no case law. The NetNut IPR includes independent grounds (asserting Morphmix and Border) that were not presented to the jury (Petitioners presented only Crowds as an anticipatory reference).[1] Patent Owner dismisses this by arguing Petitioners *could* have presented additional art to the jury. Paper 11 at 13-14. The Board in *Intel* addressed a nearly identical fact pattern and rejected the same argument. The Board's reasoning in *Intel* applies with equal force here. The Board first "acknowledge[d] that [petitioner] had the opportunity to present its invalidity contentions to the jury at trial and chose not to present the grounds raised before the Board," but declined to find that fact dispositive, stating "***we will not second-guess [petitioner's] trial strategy***." *Intel* at 13 (emphasis added). Instead, the Board explained that the proper "focus" was "on the fact that [petitioner's] first petition was denied under § 314(a), and the [] litigation did not resolve issues presented by this proceeding." *Id.* The same is true here. The jury trial "did not resolve the challenges presented here" at least as to Border and Morphmix and with respect to patent claims not asserted at trial. *Id.* at 9. "Allowing Petitioner the opportunity to pursue a decision on the merits from the Board at this time . . . best balances the

[1] The NetNut IPR also challenges many more claims than the two asserted claims presented to the jury during the Texas Action.

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