

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioners

v.

BRIGHT DATA LTD.,

Patent Owner

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Case IPR2022-01109

Patent No. 10,257,319

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**PATENT OWNER'S PRELIMINARY SUR-REPLY<sup>1</sup>**

Mail Stop PATENT BOARD  
Patent Trial and Appeal Board  
United States Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

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<sup>1</sup> Authorized via e-mail on September 28, 2022. EX. 3001.

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**I. INTRODUCTION**

On June 14, Petitioners filed IPR2022-01109 against Patent No. 10,257,319 (“the ‘319 Patent”) and a motion to join IPR2022-00135. Papers 1 and 7. As of June 14, Petitioners had already filed IPR2020-01266 and IPR2022-00861 against the ‘319 Patent. Petitioners filing this IPR represents their third IPR challenge against the ‘319 Patent. On October 14, Petitioners filed IPR2023-00038 which represents their fourth IPR challenge against the ‘319 Patent.

As explained in Patent Owner’s Opposition (Paper 13), the Patent Owner Preliminary Response (Paper 16)<sup>2</sup>, and this Sur-Reply, institution and joinder should be denied in this IPR. As further discussed herein, the Board should exercise its discretion based on the *General Plastic* and/or *Fintiv* factors.

**II. GENERAL PLASTIC FACTORS 2 AND 6**

Patent Owner addressed the “other concerns” under *General Plastic* Factor 2 in its preliminary response. Paper 16 at 7-8; *see also* Paper 13 at 7-9. Additionally, Patent Owner addressed efficiency and fairness concerns under *General Plastic* Factor 6 in its preliminary response. Paper 16 at 9-12; *see also id.* at 12-17.

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<sup>2</sup> Patent Owner addressed Director Vidal’s August 23 Decision vacating/remanding the institution decision in the -861 IPR in its preliminary response. *E.g.*, Paper 16 at 3-6 and 10-11.

Moreover, on October 19, the Board granted institution in the -861 IPR and joinder to IPR2021-01492. Petitioners now assume the lead role in challenging the '319 Patent in the -1492 IPR. Many of Petitioners' arguments in support of joinder in this IPR are therefore moot. *E.g.*, Paper 14 at 2-4. The Board previously noted that the claims challenged in this IPR significantly overlap with the claims challenged in the -861 IPR (and the -1492 IPR). *See* -861 IPR, Paper 17 at 9. Petitioners fail to explain why the Board should expend its resources to institute multiple IPRs by the same petitioners against the same patent.

#### **A. GUIDANCE IN TPG RELATED TO RANKING OF PETITIONS**

Petitioners unilaterally created their own exception to the guidance in the TPG for joinder petitions. Petitioners failed to rank the concurrently-pending petitions in the -861 IPR, the -1109 IPR, and the -038 IPR. Excusing Petitioners' failure to rank the concurrently-pending petitions does not serve the interests of efficiency or fairness.

Petitioners' Reply (Paper 17) was filed on October 11, 2022. At that time, the -861 IPR was on remand and therefore pending. Petitioners did not rank the petitions in the -861 IPR and this IPR.

The -038 IPR was filed on October 14, 2022. At that time, the -861 IPR and this IPR were still pending. Petitioners still did not rank the petitions in the -861 IPR, this IPR, and the -038 IPR. *See* -038 IPR, Paper 13.

Instead of ranking the concurrently-pending petitions, Petitioners attempt to distinguish the guidance in the TPG. Paper 17 at 3-4. Petitioners' arguments fail for at least three reasons.

First, the petitions in the -861 IPR, the -1109 IPR, and the -038 IPR were filed on April 18, June 14, and October 14 of 2022, respectively. Given the concurrent pendency, Patent Owner respectfully submits that these petitions were filed at about the same time and should have been ranked.

Second, the -1109 IPR places a substantial and unnecessary burden on the Board and Patent Owner, at least because Petitioners should not be given multiple bites at the invalidity apple. *See* Paper 13 at 1-2 and 7-14; Paper 16 at 9-17. The Board continues to expend resources to evaluate institution and joinder in multiple IPRs, including on remand. The Board is already evaluating the primary reference, Plamondon, in the -135 IPR. Patent Owner continues to expend resources defending the '319 Patent **against the same petitioners**, including, at minimum, briefing oppositions and preliminary responses.

Third, the -1109 IPR raises efficiency and fairness concerns, as discussed above. Also, as discussed under *General Plastic* Factor 2, Petitioners missed their opportunity to challenge the '319 Patent based on Plamondon. Paper 16 at 7-8; *see also* Paper 13 at 7-9.

### III. **FINTIV FACTORS**

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