

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOVER NETWORK, LLC

Petitioner

v.

CLOUDOFCHANGE, LLC

Patent Owner

IPR2023-00287

U.S. Patent No. 11,226,793

**PETITIONER'S REPLY IN SUPPORT OF ITS
MOTION FOR JOINDER OF IPR2022-01143
UNDER 35 U.S.C. § 315(c) AND 37 C.F.R. §§ 42.22 AND 42.122(b)**

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I. INTRODUCTION

On December 1, 2022, Petitioner Clover Network, LLC (“Clover”) filed a petition for *inter partes* review, IPR2023-00287 (the “Clover IPR”) and a motion for joinder of IPR2022-01143, which was filed by Lightspeed Commerce Inc. (the “Lightspeed IPR”). On December 30, 2022, Patent Owner, CloudfChange, LLC (“CloudfChange”) filed an Opposition to Petitioner’s Motion for Joinder. There is no dispute that the Clover Petition is identical to the Lightspeed IPR in all substantive respects, including presenting the same invalidity grounds challenging the same claims. Further, Petitioner has agreed to play the understudy role and adhere to the current schedule of the Lightspeed IPR. Under these conditions, the Board has routinely agreed to grant joinder.

Patent Owner’s opposition to this motion reflects a misunderstanding of the joinder process. Joinder of Petitioner with the Lightspeed IPR will not complicate the proceeding or delay its resolution. Clover’s expert Dr. Mowry’s declaration is substantively identical to the declaration from Lightspeed’s declarant. Moreover, Dr. Mowry would only participate in this proceeding should Lightspeed and its declarant withdraw. Absent joinder, the parties will litigate the same invalidity grounds in parallel proceedings. Joinder is appropriate in this case because it is the

most expedient way “to secure the just, speedy, and inexpensive resolution” of the two related proceedings. 37 C.F.R. § 42.1(b); *see also* 35 U.S.C. § 316(b).

II. ARGUMENT

The statutory provision governing joinder in *inter partes* review proceedings is 35 U.S.C. § 315(c), which reads:

If the Director institutes inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

A motion for joinder should (1) set forth “the reasons why joinder is appropriate;” (2) “identify any new grounds of unpatentability” asserted in the petition; (3) explain what impact (if any) joinder would have on the trial schedule for the existing review; and (4) “specifically address how briefing and/or discovery may be simplified.” *See Kyocera Corp. v. SoftView LLC*, IPR2013-00004, Paper No. 15, at 4 (P.T.A.B. Apr. 24, 2013).

Here, Patent Owner does not dispute that the grounds on which Petitioner seeks institution are identical to those upon which the Lightspeed IPR was instituted. Instead, the Opposition contends without evidence that joinder will (i) increase the complexity and costs of the IPR proceedings; and (ii) delay the schedule of the Lightspeed IPR. Patent Owner is wrong on both arguments.

**A. JOINDER WILL NOT INCREASE THE COMPLEXITY AND
COST OF THE IPR PROCEEDINGS**

Patent Owner’s concern that joinder would increase the complexity and costs of the proceeding is misplaced. The only difference between the Lightspeed Petition and the Clover Petition that Patent Owner can identify is that Clover “presented testimony from a *different* expert” and included three new exhibits, Exs. 1027-1029 (Opposition at 6). While Patent Owner concludes that “by relying on the testimony of Dr. Mowry, Petitioner has improperly expanded the scope of the Lightspeed IPR that Petitioner seeks to join” (*id.*), Patent Owner does not explain how.

Dr. Mowry’s opinions are substantively identical to Mr. Gray’s. The three additional exhibits not included in the Lightspeed IPR are citations to the district court proceedings and are included solely for completeness of the record. *Facebook, Inc. v. Windy City Innovations, LLC*—which Patent Owner cites for support—is not analogous. 973 F.3d 1321 (Fed. Cir. 2020). The Court in *Facebook* found that Facebook should not have been allowed to join *new claims* to the joined proceedings. *Id.* at 1348, 1332 (“315(c) does not authorize joinder of new issues material to patentability, *such as new claims or new grounds*”) (emphasis added). Here, unlike in *Facebook* and unlike in *Microsoft Corp. v. Uniloc 2017 LLC* and *ZTE Corp., v. Adaptix, Inc.*—upon which Patent Owner also relies—Petitioner is not offering any new evidence in support of its grounds and does not present any new

grounds or new claims. *Microsoft Corp. v. Uniloc 2017 LLC*, IPR2019-00744, Paper No. 11, 2019 WL 4200452 (P.T.A.B. Sept. 4, 2019); *ZTE Corp. v. Adaptix, Inc.*, IPR2015-01184, Paper No. 10, 2015 WL 4550392 (P.T.A.B. July 24, 2015).

In contrast, the Board routinely grants joinder of IPR petitions where the two Petitions are substantively identical but for the reliance on a different expert. *See, e.g., Sun Pharm. Indus. Ltd. v. Merck Sharp & Dohme Corp.*, IPR2020-01072, Paper No. 12, 2020 WL 5221759 at *3, *5 (P.T.A.B. Sept. 1, 2020) (granting joinder where “Petition does not contain any additional arguments or evidence (except for reliance on a different expert [offering identical opinions])”; *Everlight Electronics Co., Ltd. v. Document Security Sys., Inc.*, IPR2018-01225, Paper No. 14, 2018 WL 4693859 at *3-*4 (P.T.A.B. Sept. 27, 2018) (rejecting Patent Owner’s argument that joinder “will complicate the proceeding” where Petitioner relied upon a different expert).

Patent Owner further criticizes Dr. Mowry’s declaration for “not stat[ing] or acknowledg[ing] the opinions set forth in the Stephen Gray Declaration.” Opposition at 7. But there is no requirement that the declarant in the joinder petition state or acknowledge opinions that are set forth in an earlier declaration. As in *Everlight*—which Patent Owner also cites—Clover has “agree[d] to rely entirely on, and be bound by, the expert declaration(s) and deposition[s]” in Lightspeed’s IPR,

provided that Lightspeed does not terminate its IPR before its expert is finally deposed. *Everlight*, 2018 WL 4693859 at *3. Only if Lightspeed withdraws or becomes otherwise unavailable *before Mr. Gray is finally deposed* would Dr. Mowry step in to provide testimony. The reservation of rights to respond would only be operative if the Petitioner were no longer in an understudy role. Further, Petitioner agrees to be bound by the deposition testimony of Stephen Gray that was given on December 21, 2022. As a result, joinder will not complicate the Lightspeed IPR proceedings in any way.

B. JOINDER WILL NOT DELAY THE SCHEDULE OF THE LIGHTSPEED IPR (IPR2022-01143)

Patent Owner has acknowledged Clover's agreement to be bound by the Trial Schedule of the Lightspeed IPR. Opposition at 11-12. Again, Patent Owner's unsupported assertion that Joinder will delay the schedule of the Lightspeed IPR misunderstands the nature of joinder and the understudy role. Petitioner and its declarant Dr. Mowry will only take an active role in the Lightspeed IPR proceeding should Lightspeed withdraw or otherwise become unavailable. If Lightspeed does not withdraw prior to filing its Reply briefing and prior to the second declaration and deposition of Mr. Gray, Petitioner agrees to be bound by those filings and testimony. Accordingly, no further discovery would be necessary.

Reply in Support of Motion for Joinder of IPR2022-01143
Patent No. 11,226,793

Respectfully submitted,

Dated: January 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I caused a true and correct copy of the foregoing “PETITIONER’S REPLY IN SUPPORT OF ITS MOTION FOR JOINDER OF IPR2022-01143 UNDER 35 U.S.C. § 315(c) AND 37 C.F.R. §§ 42.22 AND 42.122(b)” to be served via electronic service by email to the email addresses provided below:

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