UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

FLYPSI, INC.,
Patent Owner.

Case IPR2023-00359
Patent 11,012,554

PETITIONER'S REPLY TO
PATENT OWNER'S PRELIMINARY RESPONSE

Petitioner submits this reply to Patent Owner's ("PO") preliminary response (Paper 6) ("POPR"). As explained in the Petition (Paper 1, 52-54), and further below, the *Fintiv* factors favor institution.

As to **factor 1 (stay)**, Judge Albright, the presiding judge in district court, has previously granted motions to stay pending instituted IPRs. *See, e.g.*, *Kuster v. Western Digital Tech., Inc.*, WDTX-6-20-cv-00563 (March 12, 2021); *Xylon Licensing LLC v. Lone Star National Bancshares-Texas, Inc.*, WDTX-6-21-cv-00302 (June 8, 2022). Thus, this factor weighs against denial as Judge Albright may stay the litigation after the IPR institution. At a minimum, PO acknowledges that this factor is at least neutral. (POPR, 19-20.)

Factor 2 (trial proximity) weighs against denial or is at least neutral. PO points to the trial date set for February 19, 2024. (POPR, 20.) But the scheduled trial date cannot be reliably used here. Trial has already been postponed several times, from October 11, 2023 (June 14, 2022 Scheduling Order), to November 15, 2023 (Ex. 1013 (November 17, 2022 Scheduling Order), 3), to November 27, 2023 (March 6, 2023 Scheduling Order), and then to February 19, 2024 (Ex. 2003 (April 21, 2023 Scheduling Order), 3), which only signifies that the trial could be further postponed.[1]

[1] If permitted, Petitioner can provide copies of the case docket entries cited herein.

As to **factor 3 (investment in parallel proceedings)**, PO is wrong that the litigation will be at an extremely advanced stage by the Board's August institution deadline. (POPR, 21-22.) Indeed, as PO acknowledges, fact discovery and expert discovery do not close until after the institution deadline. (Ex. 2003, 1-2.) As such, this factor favors institution or is at least neutral.

As to **factor 4 (overlap)**, Petitioner stipulated that it "will not pursue the IPR grounds in the district court litigation."[2] (Pet., 53) While Petitioner acknowledges that this would leave open in district court the use of grounds other than those at issue in this proceeding, in challenging the stipulation PO itself acknowledges that such a stipulation mitigates the concern of overlap "to some degree." (POPR, 22.) And indeed the Board has relied on such stipulations to institute review over *Fintiv*

[2] To clarify, the scope of Petitioner's stipulation is limited to those IPR grounds expressly stated in Section V of the Petition, *i.e.*, Ground 1: Claims 1, 2, and 4 are unpatentable under 35 U.S.C. § 102 as being anticipated by Backhaus; Ground 2: Claim 3 is unpatentable under 35 U.S.C. § 103 as being obvious in view of Backhaus and Saksena; Ground 3: Claims 1, 2, and 4 are unpatentable under 35 U.S.C. § 103 as being obvious in view of Backhaus and Taylor; and Ground 4: Claim 3 is unpatentable under 35 U.S.C. § 103 as being obvious in view of Backhaus, Saksena, and Taylor.

concerns in the past. *See* Pet. 53-54 (citing cases).

As to **factor 6**, Petitioner's arguments are compelling. The petition is based on an anticipation ground and buttressed by obviousness grounds. Indeed, PO focuses much of its attention on whether Backhaus discloses the claimed "switch" (POPR, 5-12), and while PO's complaints are deficient, what is notable here is that the Petition presented alternative obviousness analysis for that limitation (Pet., 47-51). *CommScope Techs. LLC. v. Dali Wireless, Inc.*, IPR2022-01293, Paper 18 at 17 (Mar. 9, 2023) (finding compelling merits in petition where backup grounds buttress the initial grounds where each claimed element is shown). The Petition addresses each limitation as recited, and is supported by expert testimony and state-of-the art references, much of which PO ignores. Indeed, PO's arguments on the merits, not backed by any expert or state-of-the-art reference(s), are merely attorney arguments and should be given little to no weight.

Respectfully submitted,

Dated: June 9, 2023

By: /Naveen Modi/
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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2023, I caused a true and correct copy of the foregoing Petitioner's Reply to Patent Owner's Preliminary Response to be served electronically on counsel for Patent Owner at the following addresses:

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