UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.

FLYPSI, INC. (D/B/A FLYP),
Patent Owner.

Case No. IPR2023-00359
U.S. Patent No. 11,012,554

PATENT OWNER FLYPSI, INC.'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

Pursuant to the Board's authorization, Patent Owner submits this Sur-Reply to Petitioner's Reply (Paper 7) regarding the *Fintiv* factors. Here, the *Fintiv* factors support that the Board should deny institution of the Petition.

As to **factor 1 (stay)**, Petitioner cites two cases where Judge Albright granted stays, but neither case is comparable. The first case involved a *joint* motion to stay and is thus inapplicable. *See Kuster v. Western Digital Tech., Inc.*, WDTX-6-20-cv-00563 (March 12, 2021), Dkt. 65. In the second case, Judge Albright granted a stay because "[t]he case is still in its infancy, having not progressed beyond the pleading stage," no *Markman* hearing had occurred, no scheduling order had issued, and the trial (which "might not occur until the end of 2023") and *Markman* hearing were both expected to occur *after* the PTAB's final written decision deadline (which was due "in just a few months, by September 7, 2022"). *Xylon Licensing LLC v. Lone Star National Bancshares-Texas, Inc.*, No. 6:21-cv-00302-ADA, 2022 WL 2078030, at *2-3. Here, the facts are the exact opposite of *Xylon*: substantial discovery has taken place, the Court held a *Markman* hearing and construed the claims, the Court issued scheduling orders, and the PTAB's final written decision is expected *after* the trial date (and after *Markman*, which has already occurred). *See* POPR, 20-22. Thus, Petitioner's cases do not show that a stay is likely here, and factor 1 is, at most, neutral.

As to **factor 2 (trial proximity)**, Petitioner speculates about potential future postponement of the trial date but offers no response to the fact that average time to trial statistics (which would include any postponements to the trial date) show that trial is expected to occur before a final written decision here. *See* POPR, 20-21.

For **factor 3 (investment in parallel proceedings)**, Petitioner does not deny that the parties have engaged in significant discovery and the Court has also invested significant time and resources, including by issuing a Markman order and deciding motions to transfer and stay. *See* POPR, 21-22. Petitioner merely contends that fact and expert discovery will not be closed as of the institution date. Reply at 2. While true, fact discovery will close only weeks later (August 22) and expert discovery will close in October 2022, both well before any final written decision here. Because of the substantial progress in the litigation, Factor 3 weighs in favor of denying institution.

For **factor 4 (overlap)**, Petitioner admits it offered only a narrow stipulation, which is unlikely to prevent duplication of work, as the Board has previously recognized. *See* POPR, 22-23.

For **factor 6 (compelling merits)**, Petitioner fails to show that the merits of its Petition are compelling. Petitioner alleges that the POPR focused on "whether Backhaus discloses the claimed 'switch'" and further contends that the Petitioner

"presented alternative obviousness analysis for that limitation." Reply at 3. But this reply ignores the specific requirements of the claim in the same way the Petition did. The claims do not merely require a switch. Instead, they recite multiple specific functions that must be performed by the *same* switch. Neither the Petition nor this Reply show that using the *same* switch to perform each recited function was anticipated or obvious, and it was not. Moreover, the Reply says nothing about the Petition's failure to show anticipation of limitation [1.b]'s requirement to transmit certain information "via a data channel." This alone would be enough to conclude that Petitioner has failed to meet the compelling merits standard.

In sum, the *Fintiv* factors weigh in favor of denying institution, particularly given the advanced stage of the litigation, the fact that average time-to-trial statistics show trial is expected *before* any final written decision in this IPR, the significant resources that both the parties and the Court have investigated in litigation, Petitioner's refusal to offer a broad stipulation to avoid duplication of work, and the Petition's weak merits. The Board should thus deny institution.

Dated: June 16, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PATENT OWNER FLYPSI, INC.'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE was served electronically via email on June 16, 2023, in its entirety on the following counsel of record:

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