UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,
Petitioner

v.

ORCKIT CORPORATION,
Patent Owner.

Case IPR2023-00401
Patent No. 7,545,740

**PATENT OWNER'S SUR-REPLY
IN SUPPORT OF PRELIMINARY RESPONSE**

Petitioner's Reply does not address "the changed median time-to-trial statistics in the Eastern District of Texas as it relates to the second factor of the *Fintiv* analysis" as authorized by the Board. Indeed, Petitioner does not dispute that Factor 2 strongly favors noninstitution. Instead, the Reply argues, without support, that Factor 2 is "not generally given heavy weight in the overall Fintiv analysis" and that the other factors favor institution. Paper 8. Petitioner understates Factor 2's weight. The Interim *Fintiv* Memo cautioned that "the proximity to trial should not alone outweigh" all other factors. *Id.*, 8. Thus, Factor 2, while not dispositive alone, is given substantial weight in the analysis.

Petitioner's authority is distinguishable. Both decisions are COVID-era opinions that discuss trial dates from district court scheduling orders (which the interim *Fintiv* Memo found are "unreliable and often change" (at 8)), not time-to-trial statistics. In *WSOU*, the Board held Factor 2 only slightly favored noninstitution because "there is not a definitive trial date for the [challenged patent]." IPR2021-00930, Paper 8, 9 (Dec. 2021). Further, Petitioner argued there were "months of backlogged trials" in the district court. *Id.,* 8. In *PEAG*, the other factors strongly favored institution. IPR2020-01214, Paper 8, 19-20 (Jan. 2021) ("Significant in our determination is [no] substantial investment …, Petitioner was diligent in filing [ ], the district court's willingness to reconsider a stay [ ], and [ ] a strong showing on the merits… ."). Accordingly, the Board should deny institution.

Date: July 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following document was served by electronic service, by agreement between the parties, on the date below:

PATENT OWNER'S SUR-REPLY IN SUPPORT OF PRELIMINARY RESPONSE

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