UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

T-MOBILE USA, INC.,
Petitioner,

v.

VOIP-PAL.COM, INC.,
Patent Owner.

Case No. IPR2023-00641
U.S. Patent No. 10,880,721

PETITIONER'S REQUEST FOR REHEARING BY THE DIRECTOR

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I. IMPORTANT ISSUE OF LAW AND POLICY

Petitioner respectfully requests rehearing of the Board's decision discretionarily denying institution under 35 U.S.C. § 314(a) pursuant to 37 C.F.R. § 42.71(d) and the Revised Interim Director Review Process adopted on July 24, 2023.

This Request raises an important question of law and policy. The Board here used its discretionary power to deny institution of a "copycat" petition after Patent Owner strategically settled with (and dismissed infringement claims against) both the lead petitioner and the first back-up petitioner precisely so that it could skirt PTAB review. The Board had discretion under 35 U.S.C. § 317(a) to proceed with the IPR, but denied Petitioner's petition under *General Plastic*, ostensibly because Petitioner had previously filed an IPR petition. But, importantly (and not addressed by the Panel), that prior petition had also been a "copycat" petition, conditioned on institution of the lead petition. This earlier petition required and received no separate merits analysis by the Board and should fall within the Director's *Code200* precedent for second-filed petitions. Instead, the Board treated this as a "serial" petition.

As explained below, the policy concerns that *General Plastic* is intended to address do not apply here. Petitioner is not using the Board's decisions as a "roadmap" (nor could it have done so, given the timing of its petitions) and merely seeks to ensure the Board can complete its review of challenged claims for which the Board has ***already*** found a reasonable likelihood of invalidity. The Patent Act

contemplates the need and importance for interested parties like Petitioner to join IPR proceedings and empowers the Director to join petitioner under 35 U.S.C. § 315(c). Petitioner respectfully requests the Director reverse the discretionary denial and provide further clarifying guidance regarding the application of *Code200*, *General Plastic*, and discretionary denial to copycat petitions.

This is an important issue of first impression and review should be granted.

II. BACKGROUND

Patent Owner has asserted U.S. Patent No. 10,880,721 ("the '721 patent") in numerous patent infringement actions, including against Petitioner T-Mobile USA, Inc. (and others) in the Western District of Texas. Paper 3 at 3-5 (list of district court actions). No trial date is currently set. As explained below, Petitioner has—twice now—filed copycat petitions and moved to first join a petition and now an instituted proceeding to ensure that the '721 patent is reviewed by the Board.

A. Petitioner First Conditionally Sought To Join Google's Petition Before Its Statutory Bar Date And Was Denied

Google LLC ("Google") filed the first petition for review of the '721 patent in June 2022. *Google LLC v. VoIP-Pal.com, Inc.*, IPR2022-01075, Paper 1 (PTAB June 3, 2022) ("Google petition").[1] Petitioner joined with co-defendant,

[1] Google and Meta each filed two petitions challenging non-overlapping subsets of the dozens of asserted claims of the '721 patent because of petition word limits. Petitioner will refer only to the single petition in this specific case and file a

Amazon.com, Inc., to file a copycat petition and moved to join any instituted proceedings on June 27, 2022, before Petitioner's one-year statutory bar date under Section 315(b). *Amazon.com, Inc. v. VoIP-Pal.com, Inc.*, IPR2022-01181, Paper 5 (PTAB June 27, 2022), at 1 (requesting motion be held in abeyance until Google petition instituted). Meta Platforms, Inc. ("Meta") had not filed any petition at that point—it did not file until several days later, after Petitioner's statutory bar date.

The Board denied institution of the Google petition (IPR2022-01075, Paper 10 (PTAB Dec. 19, 2022), at 2-3), and denied institution of Petitioner's copycat petition shortly thereafter based on its "denial of institution on the merits in the [underlying] proceeding." IPR2022-01181, Paper 11 (PTAB Dec. 22, 2022), at 2-3. The Board did not reassess the merits of the underlying petition; Petitioner's first copycat petition therefore created only minimal administrative work.

B. Petitioner Then Moved To Join Meta's Instituted Petition

Meta filed its own petition on the '721 patent shortly after Petitioner's statutory bar date. *Meta Platforms, Inc. v. VoIP-Pal.com, Inc.*, IPR2022-01235, Paper 3 (PTAB June 30, 2022). Another defendant, Samsung Electronics Co. ("Samsung"), filed a copycat petition and moved to join on August 23, 2022. *Samsung Electronics Co. v. VoIP-Pal.com, Inc.*, IPR2022-01393, Papers 1 & 3 (PTAB Aug. 23, 2022).

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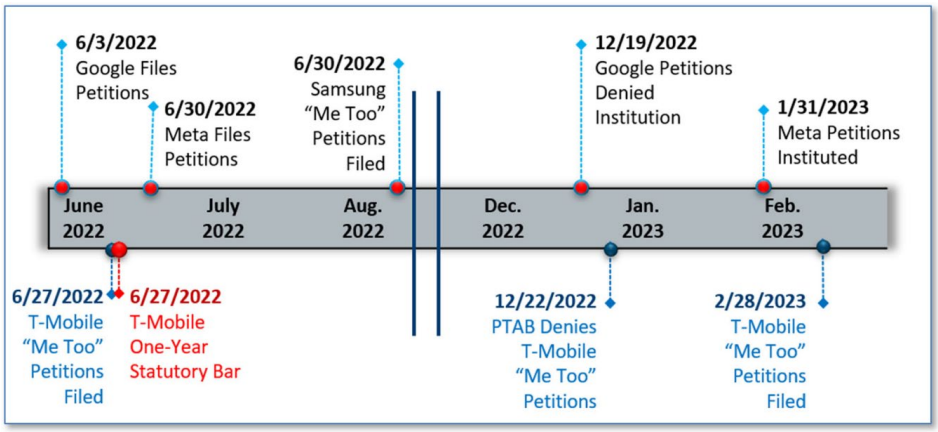
substantively similar request for the other case. *See* Paper 11 at Cover n.1 (instructing not to use a combined case caption).

Just a few weeks after the Board denied institution of the Google petition, the same Panel instituted review of the Meta petition. IPR2022-01235, Paper 10 (PTAB Jan. 31, 2023). The Board instituted and joined Samsung's copycat petition several weeks later. IPR2022-01393, Paper 12 (PTAB Mar. 16, 2023).

Petitioner, whose copycat Google petition had already been denied by that time, timely filed a copycat petition and moved to join the instituted Meta proceeding. IPR2022-00641, Papers 1 & 3 (PTAB Feb. 28, 2023). Petitioner repeatedly explained and illustrated in its papers this was its second ***copycat*** petition:



Paper 3 at 5; *see also id.* at 2-3, 10-12. Petitioner explained why joinder was appropriate and agreed to assume an "understudy" role "***so long as*** Meta remain[ed] an active party." *Id*. at 8 (emphasis added) (agreeing to conditions in *Noven Pharms., Inc. v. Novartis AG*, IPR2014-00550, Paper 38 (PTAB Apr. 10, 2015), at 5).

C. Petitioner Explained Why Its Second Set Of *Copycat* Petitions Should Not Be Discretionarily Denied

Petitioner proactively addressed discretionary denial under 35 U.S.C. §§ 325(d) and 314(a) in its papers. Petitioner addressed the six-factor *Fintiv* test and

stipulated under *Sotera* that, if the petition was instituted, Petitioner would not pursue any grounds raised or that reasonably could have been raised in the IPR in the district court litigation. Paper 1 at 5-7; Paper 3 at 13-15. Petitioner also addressed the discretionary denial factors outlined by *General Plastic*. Paper 3 at 9-13 (citing *General Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017), at 16 (precedential as to § II.B.4.i)). While Petitioner noted that the factors were not persuasive for follow-on petitions, consistent with the non-precedential decision in *Celltrion, Inc. v. Genentech, Inc.*, IPR2018-01019, Paper 11 (PTAB Oct. 30, 2018), at 9-11, Petitioner still addressed each *General Plastic* factor, repeatedly relying on the Director's precedential guidance for second-filed petitions in *Code200, UAB v. Bright Data Ltd.*, IPR2022-00861, -00862, Paper 18 (PTAB Aug. 23, 2022), at 4-5. Paper 3 at 10-13.

First, Petitioner explained that it had previously filed only ***"me-too"*** petitions. *Id*. at 10. Petitioner emphasized under *Code200* that its previous petition did not receive its own independent merits review; it had merely been denied institution without separate attention because Google's lead petition had been denied. *Id*. Petitioner also explained that its *Sotera* stipulation would further ensure no duplication of efforts with the federal court. *Id*. ***Second*** and ***third***, Petitioner confirmed that it was not involved in selecting the art presented in the Google or Meta petitions, had no opportunity to be included as a petitioner for those petitions, and was time-barred

from joining the Meta petition before institution. *Id*. at 10-12. Petitioner further explained that there could be no "road-mapping" concerns and this could not be a serial, tactical filing because Meta, without Petitioner's involvement, drafted its petition long before the Patent Owner's preliminary response or the Board's denial of the Google petition. *Id*. at 12. Turning to the ***fourth*** and ***fifth*** factors, Petitioner explained that it timely filed its copycat Meta petition within the one-month period proscribed under 35 U.S.C. § 315(c). *Id*. at 12. ***Sixth***, Petitioner explained joinder would not impact the Board's resources beyond those that would already have been expended on the instituted IPRs. *Id*. at 13. And ***seventh***, Petitioner reaffirmed its willingness to adhere to the existing Meta trial schedule. *Id*. Institution was favored.

D. Patent Owner Selectively Dismisses The Instituted Petitioners

After stipulating to delay the deadline for Patent Owner's response by two months, Patent Owner and Meta filed a joint motion to terminate lead petitioner Meta on June 14, 2023. IPR2022-01235, Papers 13, 15-17. Back-up petitioner Samsung soon followed. IPR2022-01235, Paper 20 at 2, Paper 22.

Patent Owner's settlements with lead petitioner Meta and back-up petitioner Samsung were, by Patent Owner's own admission, intended to terminate all instituted IPRs. In a July 11, 2023 press release, Patent Owner explained that "[r]ecent case dismissals in [Patent Owner]'s lawsuits against … Meta[] and Samsung have resulted in the termination of … 8 IPR petitions filed with the [PTAB]" and that

"[t]he case[] vs … [Petitioner] continue[s] to move forward …." Ex. 1027. Patent Owner's CEO celebrated, "This is all very good news!" and explained that "[a]s a result of the termination of … [the] 8 IPR's [*sic*], we have managed to consolidate our many legal battles and can focus our resources and efforts towards getting to the finish line." *Id.* In a similar June 26th press release, Patent Owner's CEO explained that the settlements "allow[] us to focus all of our attention on the upcoming trial [against Petitioner T-Mobile] … in Waco, Texas." Ex. 1028.

Patent Owner issued another press release on August 1, 2023, reporting:

> [Patent Owner] is pleased to announce the [PTAB] has terminated Samsung's involvement in Inter Partes Reviews (IPRs) filed against U.S. Patent Nos. 8,630,234 and 10,880,721 and denied [Petitioner's] request for joinder to those IPRs. The PTAB has also denied institution of [Petitioner's] corresponding IPR petition. As a result of these events, all IPR petitions against the Company have now been terminated.

Ex. 1029.[2] In short, Patent Owner dismissed its claims against Meta and Samsung

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[2] None of these press releases refer to any patent licenses or settlement payments by Meta or Samsung. They instead refer to Patent Owner's related strategy of eliminating infringement cases venued in (through declaratory judgment claims) or transferred to the Northern District of California, including cases involving Google, Meta, and Twitter. Exs. 1027-1029. Patent Owner's "stipulated" "dismissals" evaded an impending Section 101 decision. *E.g.*, Ex. 1028 at 1 ("We are very pleased to be done with the cases in California and to have the *Alice* motions behind us."). This

to avoid the Board's instituted review while continuing to assert these claims.

E. Petitioner Asks To Assume Lead Petitioner Role

After learning Patent Owner had stipulated to dismiss its pending lawsuits against Meta and Samsung, Petitioner promptly contacted the Board to request a conference call with the Board and to "ask[] to assume the lead role in the proceedings upon institution of its pending petitions…." Ex. 1030 at 2. Patent Owner opposed. *Id.* at 1-2. Petitioner repeated its request for a conference call with the Board (*id.* at 1), but the Board did not respond or schedule a conference.

F. The Board's Institution Denial Failed To Consider (a) Petitioner Had Filed Only Copycat Petitions; And (b) *Code200* Precedent

The Board denied institution on July 28, 2023. Paper 11. The Board acknowledged its previous determination that the underlying Meta petition presented a reasonable likelihood of prevailing for at least one claim, but the Board, relying on intervening and unbriefed events, concluded:

> Petitioner's understudy argument is not persuasive here, where the copied petitions are Petitioner's second set of challenges to the patents, and upon the Target IPRs settling, Petitioner would stand in to continue proceedings that would otherwise be terminated. In effect, it would be as if Petitioner had brought the second set of challenges in the first instances…. The current circumstances, in which a second

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all appears to be part of a pattern of dropping cases and proceedings in order to avoid invalidity determinations on invalid asserted claims.

> petition has been filed after the first was denied on the merits, are the particular circumstances that *General Plastic* was intended to address.

Id. at 3-4. The Board further found that "Patent Owner clearly has the better position" because Patent Owner cited the Board's precedential decision in *Apple Inc. v. Uniloc 2017 LLC*, IPR2020-00854, Paper 9 (PTAB Oct. 28, 2020). Paper 11 at 5. The Board never acknowledged Petitioner's reliance on the Director's *Code200* precedent for second-filed petitions or that Petitioner's first petition was a ***copycat*** petition that rose or fell with no separate merits analysis, unlike *Apple v. Uniloc*. The Board's total silence as to the fact Petitioner filed only follow-on petitions has led commentators to assume that Petitioner must have filed a unique petition. Ex. 1031 at 2 (incorrectly writing: "Other defendants collectively filed IPR petitions …, which were instituted, while T-Mobile opted to file its own IPR petitions … citing unique prior art that was not included in the separate, collective filings.").

III. ANALYSIS AND ARGUMENT

Requests for Director Review of the Board's institution decision may be directed to important issues of law or policy or an abuse of discretion. This request addresses both. Petitioner requests the Director's guidance on applying the *General Plastic* factors and *Code200* precedent to a petitioner who previously filed a denied copycat petition, an issue that receives *de novo* review. As explained below, follow-on petitions do not present the same policy, fairness, and burden considerations as petitions presenting original grounds. The Board's decision, if allowed to stand,

encourages gamesmanship and inefficiency by requiring petitioners to race to file separate, unique petitions, by encouraging patent owners to selectively dismiss claims against instituted parties before Board institution of pending copycat petitions, and by discouraging interested parties from filing copycat petitions.

Moreover, the Board abused its discretion when it: (a) failed to consider that Petitioner's first petition had been a copycat petition for its *General Plastic* analysis; and (b) failed to apply the precedential guidance of *Code200*. In addition, the Board further abused its discretion when it considered developments outside the petition and motion papers (specifically, the Meta and Samsung motions to terminate) without providing Petitioner with its requested opportunity to address those events.

A. Policy Considerations Require A Different Discretionary Denial Standard For Follow-On Petitions To Avoid Gamesmanship By Patent Owners To Evade Board Review

The Board's *General Plastic* analysis and discretionary denial of Petitioner's follow-on petition present an important policy issue. Petitioner's previous follow-on petition was conditioned on and therefore rose or fell based on the Board's review of a petition outside of Petitioner's control. The Board nonetheless treated Petitioner's first institution denial as if it had been on the merits. This omission and related failure to consider the Director's precedential *Code200* decision distorted the Board's *General Plastic* analysis, which does not fit for follow-on petition situations

anyway.[3] *General Plastic* was intended to address concerns that a petitioner could "strategically stage their prior art and arguments in multiple petitions, using [the Board's] decisions as a roadmap, until a ground is found that results in the grant of review." IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017), at 17-18. Those concerns are not present here where Petitioner did not select or stage any prior art or grounds; it just wants to see the review to the end. The Board's forced application of the *General Plastics* factors onto inapplicable facts misses that point entirely.

Instead, the Board's decision creates a scenario in which: (a) an unscrupulous patent owner is incentivized to selectively dismiss pending claims to avoid the Board's review; and (b) Petitioners who attempt to streamline the number of unique petitions filed through use of the Congressionally-defined joinder process are unfairly penalized. Here, Patent Owner, rather than face review, chose to dismiss its claims against lead and back-up petitioners to truncate the Board's review ahead of its response deadline. The Board then found Petitioner's "understudy argument" was not persuasive because Petitioner would assume the role of lead petitioner by

[3] The non-precedential *Celltrion* decision noted that "the factors outlined in *General Plastic*" are not "particularly persuasive for establishing abuse of the review process … where a different petitioner files a ... 'copycat' petition…." IPR2018-01019, Paper 11 (PTAB Oct. 30, 2018), at 9-10. While *Celltrion* is not precedential, the Board failed to consider the relevant policy considerations it raised.

virtue of these settlements (Paper 11 at 3-4), but those settlements were outside of Petitioner's control (and the risk of them was exactly why it had sought to join in the first place). Moreover, a joined petitioner might always assume the role of lead petitioner. This cannot be a prejudice to Patent Owner because the Patent Act specifically contemplates that "the Office may … proceed to a final written decision" even if ***no*** petitioner remains. 35 U.S.C. § 317(a); *see also Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, 625 F. App'x. 552, 556 (Fed. Cir. 2015). A patent owner does not have a right to avoid instituted review of invalid claims. To the contrary, Patent Owner's unchecked assertion of invalid claims harms interested parties like Petitioner, as well as the public interest. *See* H.R. Rep. No. 112-98, at 39-40 (2011) (purpose of the America Invents Act is "a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs" and is necessary to the U.S.'s competitive edge).

B. The Board's Failure To Consider That Petitioner's Previous Petition Was A Copycat Petition And The Precedential *Code200* Decision Was An Abuse Of Discretion

The Board abuses its discretion if its decision is, *inter alia*, "based on an erroneous conclusion of law" or "rests on clearly erroneous fact finding." *Ericsson Inc. v. Intell. Ventures I LLC*, 901 F.3d 1374, 1379 (Fed. Cir. 2018). Both are met here: the Board failed to consider and apply the precedential *Code200* authority for second-filed petitions and repeatedly made incorrect factual findings in its analysis

of the *General Plastic* factors based on its failure to acknowledge that Petitioner's first petition was a copycat petition, which led it to weigh the factors erroneously and wrongly deny institution.

The Board was persuaded by *Apple v. Uniloc*, which involved a petitioner whose petition had been denied institution "because the evidence and arguments presented failed to meet substantively the reasonable likelihood threshold required for institution." IPR2020-00854, Paper 9 at 6. The petitioner filed, and the Board denied, a request for rehearing. *Id.* Only then did the petitioner file a second petition seeking to join another, instituted IPR. *Id.* This Board then, in turn, denied this follow-on petition after a review of the *General Plastic* factors. *Id.*

Unlike in *Apple v. Uniloc*, Petitioner here had only previously filed a follow-on petition that rose and then fell with Google's early-filed petition. Petitioner had no input or control over the prior art, grounds, or timing of either that petition or Meta's later petition (which Petitioner could ***not*** have joined at the outset because of Petitioner's bar date) and had simply sought to ensure that the petition, if instituted, would be seen through to a final written decision. This created no extra work for the Board, and the Board performed no separate analysis of the merits. None of the efficiency and fairness concerns in *General Plastic* were present.

The Board ignored the more recent, precedential, and applicable Director guidance that Petitioner presented and relied on for second-filed petitions: *Code200*.

See IPR2023-00641, Paper 3 at 10-12. In *Code200*, a petitioner had first filed an original petition that was discretionarily denied and then filed a second, copycat petition to join an instituted IPR. IPR2022-00861, -00862, Paper 18 at 2-3. The Director explained there that "allowing [a petitioner] the opportunity to pursue a decision on the merits in a second-filed petition, ***when the first-filed petition was not evaluated on the merits***, best balances the desires to improve patent quality and patent-system efficiency against the potential for abuse of the review process by repeated attacks on patents." *Id*. at 4-5 (quotations omitted) (emphasis added). As is also true here, the Director explained that "[w]here the first-filed petition under factor 1 was discretionarily denied ***or otherwise was not evaluated on the merits***, factors 1-3 only weigh in favor of discretionary denial when there are 'road-mapping' concerns under factor 3 or other concerns under factor 2." *Id*. at 5 (emphasis added).

Petitioner has only ever filed follow-on petitions. The Board has therefore never therefore evaluated Petitioner's petitions on the merits; it only evaluated the merits of the Google and Meta petitions—and deemed the Meta petition worthy, granting it. The Director's guidance in *Code200*—on which Petitioner explicitly relied—was the relevant precedent here, where there was no previous decision on the merits of Petitioner's petition. The Board's refusal to consider, let alone apply, *Code200* and the relevant facts, merits reversal.

C. The Director Has Discretion To Institute Petitioner's Petition

When the Board denied Petitioner's petition, it simultaneously terminated the IPR proceedings that Petitioner had sought to join. IPR2022-01235, Paper 24 (PTAB July 28, 2023). There is therefore no pending IPR to join. The Director has discretion to initiate *sua sponte* review that decision under the Interim Process for Director Review, § 4.C, however, and continue that proceeding. While the schedule would presumably need to be adjusted due to Patent Owner's stipulated extensions of the deadline for its response, which has not yet been filed, the time period for a final written decision can be adjusted for joinder under 35 U.S.C. § 316(11), and Petitioner commits to minimizing any delay.

D. The Board's Failure To Schedule A Conference Also Deprived The Board Of A Complete Record On Discretionary Denial

Finally, consolidated Trial Practice Guide Procedure I.J. contemplates that the Board discuss timely management of joinder requests. Even though Petitioner promptly contacted the Board to request a conference to discuss Patent Owner's dismissals, the Board did not schedule a conference call or request briefing. Ex. 1030 at 2. This was a further abuse of discretion and, if the Board's denial is not reversed, Petitioner requests remand to the Board with instructions to conduct the requested conference and schedule supplemental briefing on the impact of Patent Owner's dismissals on the Board's *General Plastic* analysis.

Respectfully submitted,

Dated: August 28, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2023, I caused a true and correct copy of the foregoing **PETITIONER'S REQUEST FOR REHEARING BY THE DIRECTOR** to be served via electronic mail on counsel for Patent Owner:

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