

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Google LLC,
Petitioner

v.

Jawbone Innovations, LLC,
Patent Owner

Case IPR2023-01131

U.S. Patent No. 8,326,611

**MOTION FOR JOINDER TO *INTER PARTES*
REVIEW IPR2023-00286**

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I. INTRODUCTION

Google LLC (“Google”) respectfully submits this motion for joinder, together with a petition for *inter partes* review of U.S. Patent No. 8,326,611 (“the ’611 patent”), and requests institution of review and joinder with IPR2023-00286 (the “Amazon IPR”) pursuant to 35 U.S.C. § 315(c) and 37 C.F.R. § 42.122(b).

Joinder is appropriate here and would be consistent with the Office’s policy of securing “the just, speedy, and inexpensive resolution” of every IPR proceeding. 37 C.F.R. § 42.1(b). Google’s petition is substantively identical to the petition in the Amazon IPR; it asserts the same prior art combinations against the same claims and introduces no new grounds or issues. To avoid any impact on discovery or the schedule, Petitioner agrees to take an understudy role unless Amazon is dismissed from the case.

The *General Plastic* factors do not warrant discretionary denial of Google’s motion. While Google previously filed a petition challenging claims 1-28 of the ’611 patent, the grounds in this joinder petition were generated by Apple (and later copied by Amazon) prior to Patent Owner filing a preliminary response or the Board issuing any decision. Thus, there are no road-mapping concerns. Google waited until now to seek joinder because Google could not join the Amazon IPR (or the preceding Apple IPR that Amazon copied) prior to institution, and Google was time-barred when its first petition was denied.

Google's joinder will ensure the Amazon IPR reaches a final written decision if Amazon settles or otherwise resolves its dispute with Patent Owner, fulfilling the Board's mission of improving patent quality—particularly now that the '611 patent's patentability is at issue. The Amazon IPR is the only instituted IPR proceeding against claims 1-28 of the '611 patent. The Board should grant Google's motion and institute review.

II. STATEMENT OF FACTS

Patent Owner filed suit against Google in the Western District of Texas on September 23, 2021, asserting the '611 patent and eight other patents. *Jawbone Innovations, LLC v. Google LLC*, No. 6:21-cv-00985, Dkt. 1 (W.D. Tex. Sept. 23, 2021). Around that time, Patent Owner asserted the '611 patent against Apple, Inc. (6:21-cv-00984, W.D. Tex.) and Amazon.com, Inc. (2:21-cv-00435, E.D. Tex.). Patent Owner continued its litigation campaign in February 2023 by asserting the '611 patent against Meta Platforms, Inc. (6:23-cv-00158 (W.D. Tex.)), ZTE Corp. (2:23-cv-00082, E.D. Tex.), Panasonic Holdings Corporation (2:23-cv-00081, E.D. Tex.), Guangdong Oppo Mobile Telecommunications Corp., Ltd. (2:23-cv-00079, E.D. Tex.), LG Electronics, Inc. (2:23-cv-00078, E.D. Tex.), HTC Corp. (2:23-cv-00077, E.D. Tex.), and Sony Electronics, Inc. (2:23-cv-01161, D.N.J.).

Petitioner filed a petition requesting *inter partes* review of claims 1-28 of the '611 patent on February 22, 2022. *Google LLC v. Jawbone Innovations, LLC*,

IPR2022-00604, Paper 1 (P.T.A.B. Feb. 22, 2022) (claims 1-28). While Google's petition was awaiting an institution decision, Apple filed a petition challenging claims 1-28 of the '611 patent on different grounds. *Apple Inc. v. Jawbone Innovations, LLC*, No. IPR2022-01085, Paper 2 (P.T.A.B. Jun. 3, 2022). Google is not a real party in interest or otherwise involved in Apple's petition. *Id.* at 98. Amazon filed a copycat of Apple's petition and requested joinder if the Board instituted review. *Amazon.com, Inc. v. Jawbone Innovations, LLC*, IPR2023-00286, Paper 1 (P.T.A.B. Nov. 28, 2022). Like the Apple petition, Google is not a real party in interest or otherwise involved in Amazon's petition. *Id.* at 97.

After Apple filed its petition, Patent Owner filed a preliminary response in Google's proceeding. *Google*, IPR2022-00604, Paper 8 (P.T.A.B. Jul. 11, 2022). The Board then denied institution of Google's petition for claims 1-28 based on a claim construction dispute. *Google*, IPR2022-00604, Paper 12 (P.T.A.B. Oct. 6, 2022). Apple subsequently settled with Patent Owner before institution in its case and agreed to jointly terminate its petition. *Apple Inc. v. Jawbone Innovations, LLC*, No. IPR2022-01085, Paper 14 (P.T.A.B. Jan. 9, 2023). The Amazon IPR continued as the only pending IPR against claims 1-28 of the '611 patent, and the Board instituted Amazon's petition on June 7, 2023. *Amazon.com, Inc. v. Jawbone Innovations, LLC*, IPR2023-00286, Paper 10 (P.T.A.B. Jun. 7, 2023). Google now seeks joinder as an understudy in the Amazon proceeding.

III. STATEMENT OF REASONS FOR REQUESTED RELIEF

A. Legal Standard

The Board has authority to join Google as a party to the Amazon IPR. 35 U.S.C. § 315(c). The Board considers several factors, including: “why joinder is appropriate, whether a new ground of unpatentability is raised in the second petition, how the cost and schedule of the first proceeding will be impacted if joinder is granted, and whether granting joinder will add to the complexity of briefing and/or discovery.” Consolidated Trial Practice Guide at 76 (P.T.A.B. Nov. 2019); *Kyocera Corp. v. Softview LLC*, IPR2013-00004, Paper 15 at 4 (P.T.A.B. Apr. 24, 2013).

For joinder petitioners that previously challenged the same claims, the Board considers the *General Plastic* factors to determine whether to institute review under 35 U.S.C. § 314(a). *Code200, UAB v. Bright Data Ltd.*, IPR2022-00861, Paper 18 (P.T.A.B. Aug. 23, 2022) (“*Code200*”) (precedential) (citing *General Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2017) (“*General Plastic*”)). The *General Plastic* factors include:

1. whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it;
3. whether at the time of filing of the second petition the petitioner

already received the patent owner's preliminary response to the first petition or received the Board's decision on whether to institute review in the first petition;

4. the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. the finite resources of the Board; and
7. the requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.

Id. at 3-4 (citing *General Plastic* at 9-10).

B. The Joinder Factors Weigh in Favor of Granting Joinder

All joinder factors weigh in favor of granting joinder. Google's petition here is substantively identical to the petition in the Amazon IPR and does not introduce new issues. Google additionally agrees to serve as an "understudy" in the proceeding to remove any impact on the current schedule. *See Sony Corp. v. Memory Integrity, LLC*, IPR2015-01353, Paper 11 at 6 (P.T.A.B. Oct. 5, 2015) ("*Sony*"). Briefing and discovery will be simplified by resolving all issues in one proceeding.

1. Joinder with the Amazon IPR Is Appropriate

The Board routinely grants motions for joinder where the party seeking

joinder introduces identical arguments and the same grounds raised in the existing proceeding. *Samsung Elecs. Co., Ltd. v. Raytheon Co.*, IPR2016-00962, Paper 12 at 9 (P.T.A.B. Aug. 24, 2016) (citations omitted). Google’s joinder petition does just that: it introduces identical arguments and the same grounds asserted in the Amazon IPR. The petition is substantively identical to the petition in the Amazon IPR with only minor differences related to listing a different petitioner and presenting petitioner-specific arguments under *General Plastic* and *Fintiv*. The facts, citations, evidence, and arguments otherwise remain the same.

Because the proceedings are substantively identical, good cause exists for joining Google as a party to the Amazon IPR. In doing so, the Board can efficiently “secure the just, speedy, and inexpensive resolution,” consistent with 37 C.F.R. § 42.1(b), by managing identical challenges in a single proceeding. *Mercedes-Benz USA, LLC v. Neo Wireless LLC*, IPR2023-00079, Paper 11 at 13-14 (P.T.A.B. May 5, 2023) (“*Mercedes*”). Given the Amazon IPR has been instituted, the patentability of the challenged claims is now in question. Patent Owner has asserted the ’611 patent against Petitioner and numerous other defendants in copending district court litigations, and the Amazon IPR is currently the only instituted IPR against claims 1-28. The Board should grant Google’s request for joinder so that a final written decision may be reached if Amazon settles or otherwise resolves its dispute with Patent Owner. This will fulfill the Board’s “mission to improve patent quality

and restore confidence in the presumption of validity that comes with issued patents.” *Code200* at 6 (citation and internal quotations omitted).

Google also stipulates that if its joinder petition is instituted, Google will not pursue the grounds identified in this joinder petition (i.e., Grounds 1-4 in the Amazon IPR based on Avendano, Visser, Bisgaard, Hou, Byrne, Burnett, and Berglund) in district court. Thus, joinder will ensure that the grounds presented in the Amazon IPR are not inefficiently and unnecessarily adjudicated in another forum.

2. Petitioner Proposes No New Grounds of Unpatentability

Google’s petition is substantively identical to the petition in the Amazon IPR (i.e., challenging the same claims of the same patent, relying on the same expert testimony, and presenting the same grounds and combinations of prior art submitted in the Amazon petition). Because Petitioner does not propose any new grounds of unpatentability, joinder is proper. *See Sony* at 5-6 (granting joinder on petition with “the same prior art, same arguments, and same evidence, including the same expert and a substantively identical declaration”); *Mercedes* at 13 (same).

3. Joinder Will Not Affect the Amazon IPR Schedule

Joinder will have little, if any, impact on the Amazon IPR trial schedule because Google’s petition presents no new issues or grounds of unpatentability. *See Sony* at 6 (“[J]oinder should not necessitate any additional briefing or discovery from

Patent Owner beyond that already required in [the original IPR].”). Google consents to the existing trial schedule. Thus, Patent Owner will not be required to present any additional responses or arguments should Google be joined, and there will be no new issues for the Board to address. Google’s petition also relies on the same expert testimony, so no additional cross-examination is necessary should Google join.

4. Procedures To Simplify Briefing and Discovery

Google agrees to take an “understudy” role in the Amazon IPR to simplify briefing and discovery. Upon joining the Amazon proceeding, Google agrees that the following conditions (previously approved by the Board in similar circumstances) shall apply so long as Amazon remains an active party:

- a. all filings by Google in the joined proceedings will be consolidated with the filings of the current petitioner, unless a filing concerns issues solely involving Google;
- b. Google shall not be permitted to raise any new grounds not already instituted by the Board in the Amazon IPR, or introduce any argument or discovery not already introduced by the current petitioner;
- c. Google shall be bound by any agreement between Patent Owner and the current petitioner concerning discovery and/or depositions; and
- d. at any deposition, Google shall not receive any direct, cross examination, or redirect time beyond that permitted under 37 C.F.R. § 42.53 or any agreement between Patent Owner and the current petitioner.

See Noven Pharm, Inc. v. Novartis AG, IPR2014-00550, Paper No. 38 at 5 (P.T.A.B. Apr. 10, 2015). Only if Amazon ceases to participate will Google assume an active role.

With this approach, Patent Owner and Amazon can comply with the existing trial schedule without duplicative efforts by the Board or Patent Owner. This minimizes any possible complications or delay. *See Sony* at 6-7 (“[J]oinder would increase efficiency by eliminating duplicative filings and discovery, and would reduce costs and burdens on the parties as well as the Board.”). Google will also agree to any other reasonable conditions deemed necessary.

C. The *General Plastic* Factors Do Not Weigh Against Joinder

The *General Plastic* factors on balance weigh in favor of institution. While Google previously challenged the '611 patent, this case is distinguishable from *Apple Inc. v. Uniloc 2017 LLC*, IPR2020-00854, Paper 9 (P.T.A.B. Oct. 28, 2020) (precedential), because Google received Patent Owner's preliminary response and the Board's decision denying its first petition after Apple's petition that Amazon copied in the Amazon IPR was filed. Google therefore could not have engaged in improper road-mapping. Google was also unaware of much of the prior art asserted in Google's copycat petition until Apple's petition was filed, and none of that art overlaps with Google's first petition. Google was also time-barred when its first petition was denied. Because Google could not file another petition until Amazon's

IPR was instituted, it was reasonable for Google to wait to file this joinder petition. Google's joinder petition will also not affect the current Amazon IPR schedule or additionally burden Patent Owner or the Board.

1. General Plastic Factors 1-3

General Plastic factor 1 (same petitioner) is generally read in conjunction with factor 2 (knowledge of prior art) and factor 3 (patent owner preliminary response or institution decision received before second petition). *Code200* at 5; *Intel Corp. v. VLSI Tech. LLC*, IPR2022-00479, Paper 13 at 8-11 (P.T.A.B. Jun. 6, 2022) ("*Intel*") (considering factors 1-3 together). These factors seek to preclude a joinder petitioner from using a prior Board decision or preliminary response as a "roadmap" to cure deficiencies in a second-filed petition. *Code200* at 5. When "the later petition is not refined based on lessons learned from later developments," road-mapping concerns are "minimized." *Id.*; *Cisco Sys., Inc. v. Centripetal Networks, Inc.*, IPR2022-01151, Paper 12 at 48-49 (P.T.A.B. Jan. 4, 2023) ("*Cisco*").

Google previously filed a petition challenging claims 1-28 of the '611 patent that was denied based on claim construction. *Google*, IPR2022-00604, Paper 12 (P.T.A.B. Oct. 6, 2022). But Google's joinder petition does not map any prior Board decision or Patent Owner paper. Google instead seeks to join an already-instituted case without altering the instituted grounds or evidence. *Code200* at 5 (road-mapping concerns are minimized when "a petitioner files a later petition that

raises unpatentability challenges substantially overlapping with those in the previously-filed petition”); *Intel* at 8-11 (“The [instituted] IPR presents challenges that are nearly identical to Intel’s initial petition, and Intel’s current petition follows them in step.”); *Cisco* at 48-49 (“[C]opying a previously instituted petition is common in the joinder context and an accepted approach” and favors institution.).

In this case, Google could not have road-mapped any prior paper in its joinder petition. Google’s petition is a copy of an Amazon petition that, in turn, is a copy of an Apple petition filed on June 3, 2022. *Apple Inc. v. Jawbone Innovations, LLC*, IPR2022-01085, Paper 2 (P.T.A.B. Jun. 3, 2022). The Apple petition was filed before Patent Owner’s preliminary response to Google’s first petition (July 11, 2022) and before the Board’s subsequent denial of institution (October 6, 2022). *See Google*, IPR2022-00604, Paper 8 (P.T.A.B. Jul. 11, 2022); *Google*, IPR2022-00604, Paper 12 (P.T.A.B. Oct. 6, 2022). With no papers available when Apple filed its petition, there was nothing to map. Google was also not aware of all art asserted in the Amazon IPR until Apple filed its petition (Google was not aware of Byrne, Bisgaard, or Berglund). The Board in *Google LLC v. Express Mobile, Inc.* granted joinder under similar circumstances for a petitioner whose first petition was denied on the merits, finding that “[a]lthough Petitioner might, in the end, benefit from the filing of [another party’s] IPR, there is no reason to conclude that Petitioner used the filings or decision . . . to obtain an unfair advantage in this [joinder] [p]etition, which

was essentially prepared by someone else.” IPR2022-00790, Paper 15 at 8 (P.T.A.B. Sept. 27, 2022) (“*Express Mobile*”).

Google similarly has not “strategically stage[d] [its] prior art and arguments in multiple petitions” to gain an unfair advantage over Patent Owner. *General Plastic* at 17. Google is not a real party in interest in either the Apple or Amazon petition. *See supra* Section II. While Google was aware of Avendano, Visser, Hou, and Burnett asserted in Apple’s petition, none of that art overlaps with Google’s first petition and Google simply seeks to join an existing proceeding.

It was reasonable for Google to wait until Apple’s petition was instituted before seeking joinder in that case. Apple settled before institution, *Apple Inc. v. Jawbone Innovations, LLC*, No. IPR2022-01085, Paper 14 (P.T.A.B. Jan. 9, 2023), so Google had no opportunity to seek joinder in that proceeding during the appropriate joinder window, *see* 35 U.S.C. § 315(c); 37 C.F.R. § 42.122(b). Google was instead obligated to wait until Amazon’s copycat petition was instituted. *See Express Mobile* at 10 (“After [petitioner’s first] IPR was denied, [p]etitioner was unable to file this [joinder] [p]etition until the Facebook IPR was instituted, and then did so within the time provided by our rules.”) (citing 37 C.F.R. § 42.122(b); 35 U.S.C. § 315(d)). Like the situation in *Express Mobile*, Google was time-barred from filing a petition after the institution decision in its first proceeding, so Google’s delay was not gamesmanship or strategic staging of prior art but the reality that

Google could not be granted joinder absent institution in the Apple (and then Amazon) proceeding. *Id.* at 10-11 (“[I]t was not unreasonable for Petitioner to not have filed an IPR using Anderson before the bar date because Petitioner had another petition pending, and [] it was not unreasonable for Petitioner to not file between the bar date and the institution of the Facebook IPR because such a filing would have been prohibited by § 315(b).”).

Because Google has not road-mapped any prior Board decision or Patent Owner paper, Google was not aware of all art asserted in the Amazon IPR until Apple’s petition, and because Patent Owner would not be prejudiced by Google seeking solely to maintain the *inter partes* proceeding instituted against claims 1-28 of the ’611 patent, the Board should find factors 1-3, taken together, do not weigh in favor of exercising discretion to deny institution. *Express Mobile* at 7-9.

This case also stands apart because Google is not filing multiple, subsequent petitions from lessons learned, or piling on to multiple IPR challenges to the same patent. Google instead is seeking to join the Amazon IPR to ensure the existing proceeding reaches a final written decision. This adds no additional burden to Patent Owner and requires no additional resources from the Board. *Express Mobile* at 9 (“This ‘me too’ Petition is not a new ‘serial attack,’ but rather an attempt to join a proceeding that has already been instituted.”); *Ericsson Inc. v. Uniloc 2017 LLC*, IPR2020-00376, Paper 16 at 14 (P.T.A.B. May 22, 2020) (“*Ericsson*”) (benefit “if

and only if Petitioner assumes a leading role is tenuous and speculative”).

2. *General Plastic* Factors 4 and 5

The Board considers factor 4 (length of time from knowledge of art) and factor 5 (explanation for time between petitions) “to assess and weigh whether a petitioner should have or could have raised the new challenges earlier.” *Intel* at 11 (quoting *General Plastic* at 18). As explained above, and like the case in *Express Mobile*, it was reasonable for Google to wait and seek joinder until after the Amazon IPR was instituted because Google could not join the proceeding before institution.

It was also reasonable for Google to file its joinder petition and seek to maintain the Amazon IPR based on the institution decision in Google’s first petition. In Google’s first petition, the Board denied institution on a claim construction issue that arose after the petition was filed. *Google*, IPR2022-00604, Paper 12 at 8-13. This claim interpretation issue arose at institution (October 6, 2022), after Apple’s petition was filed (June 3, 2022) and after Google was time-barred. *See General Plastic* at 10-11. Once institution was denied, Google reasonably waited until it could join Apple’s petition (e.g., when the Amazon IPR was instituted). *Express Mobile* at 10-11 (“it was not unreasonable for Petitioner to not file between the bar date and the institution of the Facebook IPR”). Google did not unnecessarily delay its joinder petition and it was “not unreasonable” not to have filed a separate IPR with the art from the Amazon IPR because Google’s first petition “was then

pending.” *Express Mobile* at 10.

3. General Plastic Factors 6 and 7

Factor 6 (finite resources) and factor 7 (one-year deadline) weigh in favor of institution because Google’s petition introduces no new issues that are not already in the Amazon IPR and no changes to the existing schedule. As the Board found in *Intel*, “instituting this Petition will [not] significantly affect the resources of the Board or our ability to issue a final determination within the one-year statutory timeline.” *Intel* at 14. The Board should permit joinder because it already “found the challenges reasonably likely to be successful” and it will “continue expending resources to decide the merits of the [petition] regardless of joinder.” *Id.*

The Director in *Code200* moreover found that “the one-year statutory time period may be adjusted for a joined case under 35 U.S.C. § 316(a)(11),” if necessary, and “the Board’s mission ‘to improve patent quality and restore confidence in the presumption of validity that comes with issued patents’” favors resolving a pending IPR petition. *Code200* at 6. Google seeks to join the Amazon IPR as an understudy to ensure the case reaches a final written decision. This will not unduly burden the Board or Patent Owner. *Ericsson* at 13 (“Given the conditions of joinder agreed to by Petitioner, we see no substantial burden, if any, to Patent Owner to join Petitioner to [the instituted IPR].”); *Express Mobile* at 12 (same).

Dated: July 7, 2023

By: /Daniel C. Cooley/
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MOTION FOR JOINDER TO INTER PARTES REVIEW IPR2023-00286** was served on July 7, 2023, by FedEx Priority Overnight on the following address of record for the subject patent.

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