PUBLIC VERSION

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SEMICONDUCTOR COMPONENTS INDUSTRIES, LLC,
Petitioner,

v.

GREENTHREAD, LLC,
Patent Owner.

IPR2023-01244
U.S. Patent No. 11,121,222

PATENT OWNER'S PRELIMINARY RESPONSE PURSUANT TO 35 U.S.C. § 313 AND 37 C.F.R. § 42.107

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EXHIBIT LIST

Exhibit No.	Description	Submitted Previously?
Ex. 2001	*Greenthread, LLC v. Intel Corp.*, No. 6:22-cv-00105-ADA, Dkt. 7 (summons returned executed) (W.D. Tex. Feb. 7, 2022)	X
Ex. 2002	Email communication from Petitioner's counsel to Patent Owner's counsel October 16, 2023	X
Ex. 2003	Presentation entitled "Accelerating the Journey Towards a Sustainable Ecosystem" (2023) available at Petitioner's website at https://www.onsemi.com/site/pdf/2023_Analyst_Day_Presentation.pdf	X
Ex. 2004	"Clock Devices for Servers" (Aug. 2020) available at https://cdrdv2-public.intel.com/620306/620306_Clock_Devices_For_Server_Rv1p3.pdf	X
Ex. 2005	On Semiconductor Corporation Form 10-K filing with U.S. Securities and Exchange Commission for the fiscal year ended December 31, 2016	X
Ex. 2006	ON Semiconductor data sheet entitled "NCP81248 Three-Rail Controller with Intel Proprietary Interface for IMVP8 CPU Applications" (Feb. 2018) available at https://www.onsemi.com/pdf/datasheet/ncp81248-d.pdf	X
Ex. 2007	onsemi data sheet entitled "+ 1 Phase Output Controller with SVID Interface for Computer CPU Applications" (May 2023) available at https://www.onsemi.com/download/data-sheet/pdf/ncp81566-d.pdf	X
Ex. 2008	Onsemi data sheet entitled "+ 2 Phase Output Controller with SVID Interface for Computer CPU Applications (May	X

[redacted]

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	2023) available at https://www.onsemi.com/download/data-sheet/pdf/ncp81567-d.pdf	
Ex. 2009	Article entitled "If You Invested $1000 in ON Semiconductor Corp. a Decade Ago, This is How Much It'd Be Worth Now," May 8, 2023 available at https://finance.yahoo.com/news/invested-1000-semiconductor-corp-decade-123012312.html	X
Ex. 2010	Onsemi Standard Terms and Conditions of Sale, Rev.08102021 available at https://www.onsemi.com/site/pdf/ONSEMI_T&C.pdf	X
Ex. 2011	Plaintiff's First Set of Common Interrogatories to Defendants ON Semiconductor Corporation and Monolithic Power Services, Inc., Et Al., *Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA (D. Del.) (served Sept. 27, 2023)	X
Ex. 2012	Plaintiff's First Set of Common Requests for the Production of Documents to Defendants ON Semiconductor Corporation and Monolithic Power Services, Inc., Et Al., *Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA (D. Del.) (served Sept. 27, 2023)	X
Ex. 2013	Definition of "privity" in Black's Law Dictionary (11th ed. 2019) available from Westlaw at westlaw.com	X
Ex. 2014	Email communication from Petitioner's counsel to Patent Owner's counsel October 11, 2023	X
Ex. 2015	Plaintiff's Identification of Accused Products and Asserted Patents, *Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA (D. Del.) (served Oct. 12, 2023)	X
Ex. 2016	Petition (Paper 2) in *Sony Group Corp. v. Greenthread, LLC*, IPR2023-00324	X

[redacted]

Exhibit No.	Description	Submitted Previously?
Ex. 2017	Petition (Paper 1) in *Sony Group Corp. v. Greenthread, LLC*, IPR2023-00376	X
Ex. 2018	*Greenthread, LLC v. Intel Corp.*, No. 6:22-cv-00105-ADA, Dkt. 1 (Complaint) (W.D. Tex. Jan. 27, 2022)	X
Ex. 2019	*Greenthread, LLC v. Dell Inc.*, No. 6:22-cv-105-ADA, Dkt. 120 (Second Amended Complaint)	X
Ex. 2020	*Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA, Dkt. 1 (Complaint with accompanying exhibits) (D. Del. Apr. 21, 2023)	X
Ex. 2021	*Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA, Dkt. 24 (Scheduling Order) (D. Del. Sept. 11, 2023)	X
Ex. 2022	Confidential agreement	X
Ex. 2023	Petition (Paper 1) in *Intel Corp. v. Greenthread LLC*, IPR2023-00308	X
Ex. 2024	Petition (Paper 1) in *Intel Corp. v. Greenthread LLC*, IPR2023-00420	X
Ex. 2025	Petition (Paper 1) in *Intel Corp. v. Greenthread LLC*, IPR2023-00552	X
Ex. 2026	Petition (Paper 1) in *Dell Techs. Inc. v. Greenthread LLC*, IPR2023-00506	X
Ex. 2027	Petition (Paper 1) in *Dell Techs. Inc. v. Greenthread LLC*, IPR2023-00509	X
Ex. 2028	Confidential declaration	X

[redacted]

Exhibit No.	Description	Submitted Previously?
Ex. 2029	Email communication from Patent Owner's counsel to Petitioner's counsel between May 26 to June 1, 2023	X
Ex. 2030	Web pages from websites of Onsemi (www.onsemi.com), Mouser Electronics, Inc. (www.mouser.com), Rochester Electronics (www.rocelec.com), and DigiKey Corporation (www.digikey.com) (URLs for web pages are indicated on respective pages)	X
Ex. 2031	*Greenthread, LLC v. Intel Corp.*, No. 6:22-cv-00105-ADA, Dkt. 113 (Redacted Memorandum Opinion and Order) (W.D. Tex. Dec. 27, 2022)	
Ex. 2032	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 38 (First Amended Complaint for Patent Infringement) (W.D. Tex., filed Apr. 29, 2022)	
Ex. 2033	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 38-8 (Greenthread's Amended Preliminary Infringement Contentions) (W.D. Tex., filed Apr. 29, 2022)	
Ex. 2034	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 38-12 (Exs. D-1, D-2, D-3, D-6 to Greenthread's Preliminary Infringement Contentions) (W.D. Tex., filed Apr. 29, 2022)	
Ex. 2035	Plaintiff's Supplemental Identification of Asserted Patents and Accused Products in *Greenthread, LLC v. ON Semiconductor Corp.*, No. 23-443-RGA (served to Petitioner's counsel on Nov. 10, 2023)	
Ex. 2036	Webpage regarding iFixIt, PlayStation 5 Teardown (https://www.ifixit.com/Teardown/PlayStation+5+Teardown/138280)	

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Exhibit No.	Description	Submitted Previously?
Ex. 2037	Webpage from Mouser Electronics, Inc. for NCP252160 (https://www.mouser.com/ProductDetail/onsemi/NCP252160MNTWG?qs=sPbYRqrBIVkc9klNZ2pXbg%3D%3D)	
Ex. 2038	Webpage from DigiKey for NCP252160 (https://www.digikey.com/en/products/detail/onsemi/NCP252160MNTWG/15859992)	
Ex. 2039	Webpage from Mouser Electronics, Inc. for NB3L202K (https://www.mouser.com/ProductDetail/onsemi/NB3L202KMNTXG?qs=z6PAvqrnkvR8PcLN2EnUzg%3D%3D)	
Ex. 2040	Webpage from DigiKey for NB3L202K (https://www.digikey.com/en/products/detail/onsemi/NB3L202KMNTXG/7220446)	
Ex. 2041	Definition of "agent" in Black's Law Dictionary (11th ed. 2019) available from Westlaw at westlaw.com	
Ex. 2042	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 135 (Motion for Admission Pro Hac Vice of L. Popovski on Behalf of Sony) (W.D. Tex., filed January 30, 2023)	
Ex. 2043	[RESERVED]	
Ex. 2044	Email communication from Patent Owner to Petitioner's litigation counsel dated September 13, 2023	
Ex. 2045	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 49 (Notice of Appearance of Additional Counsel) (W.D. Tex., filed June 9, 2022)	
Ex. 2046	[RESERVED]	

[redacted]

Exhibit No.	Description	Submitted Previously?
Ex. 2047	[RESERVED]	
Ex. 2048	*Greenthread, LLC v. Intel Corp.*, 6:22-cv-00105-ADA, Dkt. 120-8 (Greenthread's Amended Preliminary Infringement Contentions) (W.D. Tex., filed Jan. 23, 2023)	

[redacted]

I. INTRODUCTION

Greenthread, LLC ("Patent Owner," "PO," or "Greenthread") submits this Preliminary Response in accordance with 35 U.S.C. § 313 and 37 C.F.R. § 42.107, responding to the Petition for *Inter Partes* Review ("Petition," Paper 1) of U.S. Patent No. 11,121,222 ("the Challenged Patent")) filed by Semiconductor Components Industries, LLC, d/b/a onsemi ("onsemi" or "Petitioner").

The Petition should be dismissed because it is untimely. Even though Petitioner bears the burden of proving the timeliness of its Petition under 35 U.S.C. § 315(b) and *Patent Owner* actively sought discovery of the relevant facts, Petitioner has provided *no* evidence that its Petition is timely. Moreover, ample contrary evidence shows that the Petition *is not* timely, because Petitioner is in privity with two time-barred parties under the standard set forth in *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

Petitioner admits that it makes and sells licensed products under Patent Owner's licenses to Intel Corporation ("Intel") and [redacted] ("[redacted]") (collectively "Licensees"), both of whom are time-barred. By selling licensed products to Licensees, Petitioner and Licensees become "preceding and succeeding owners of" licensed (or infringing) products. *Id.* at 894. And, by making licensed products for Licensees, Petitioner steps into their shoes, and serves as their "agent," by exercising their rights under the license. *Id.* at 895. Therefore, Petitioner

[redacted]

has a "pre-existing substantive legal relationship" with Licensees giving rise to privity. *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1360 (Fed. Cir. 2018) (hereinafter "*AIT*").

Petitioner knew or should have known of these problems with its Petition before it was filed. Patent Owner tried to provide the license to Petitioner, but Petitioner stuck its head in the sand and didn't respond. Then, when Patent Owner sought discovery on the timeliness of the Petition (even though Petitioner has the burden of proof), Petitioner stonewalled. Instituting trial on this Petition, even to give Petitioner the opportunity to introduce new evidence on the timeliness of its Petition would burden Patent Owner needlessly. The Board should not reward Petitioner for ignoring the threshold issue of timeliness in its Petition and then resisting any and all discovery. Since Petitioner has not come forward with *any* evidence to show that its Petition is timely, institution should be denied.

II. BACKGROUND

A. Prior Litigation Involving the Challenged Patent

On February 1, 2022, Greenthread served Intel Corporation ("Intel") and [redacted] (collectively, "[redacted]") with a complaint (Ex. 2018) for infringement of, *inter alia*, the Challenged Patent, triggering the clock for a one-year IPR bar under 35 U.S.C. § 315(b) regarding Intel and [redacted] Ex. 2001, 1-4. The original case against Intel and [redacted] was severed and the case against Intel was

transferred from the Western District of Texas to the District of Oregon. Ex. 2031, 22. The litigation remained in Texas and continued in parallel with the Intel litigation.

was a real-party-in-interest to the litigation. Greenthread's allegations in the First Amended Complaint against (served via ECF on April 29, 2022) were based on, among other things, components in products. Ex. 2032, ¶¶18, 60, 76-81; Ex. 2033, 8 ("Accused Products"), 18-20 (section entitled "Accused Products"); Ex. 2034, 1-34. After Patent Owner accused products, additional counsel stepped in to represent with respect to products. Ex. 2045. then filed its own IPR against the Challenged Patent, which had been asserted against products. Ex. 2016. The petition named as a real-party-in-interest. Ex. 2016, 7. Afterwards, Patent Owner added as a party to litigation. Ex. 2019. After was added to the case, counsel for products appeared in the case for Ex. 2042. other counsel did not represent

Greenthread and Intel, and settled their disputes. As part of the settlements, Greenthread granted Intel and a release for past infringement and a license to Greenthread's patents, by way of sublicense through RPX Corporation ("RPX"). Ex. 2022, 2. "By operation of their membership agreements with RPX,

Intel and [redacted] acquired the full scope of sublicensable rights Greenthread granted to RPX at the time the RPX-Greenthread Agreement was executed." Ex. 2028.

The license through RPX grants Licensees the right "to make, have made, use, have used, sell, … offer for sale, have offered for sale, have sold, … import, have imported, own, order, … purchase, … obtain, keep, acquire, receive, … and otherwise exploit or dispose of any Licensed Product and Service." Ex. 2022, 2 (definition of "Patent License"); *see also* Ex. 2028. The license defines "Licensed Product and Service" to include "any product … made, have made, used, purchased, provided, hosted, sold, leased, licensed, distributed, transmitted, exported, imported or offered for sale, lease, or import or otherwise exploited or disposed of by or on behalf of" Licensees. Ex. 2022, 2. The license covers all of Greenthread's patents, including the Challenged Patent. *See id.*, 3 ("'Patents' shall mean …."). Accordingly, "any product" Licensees "have made" by Petitioner or "purchase" from Petitioner is a "Licensed Product or Service" which Licensees have the right to "use, … sell, … obtain, … acquire, … receive, … and otherwise exploit." *Id.*, 2-3.

B. The Current and Co-Pending Proceedings

On April 21, 2023, Patent Owner filed a complaint alleging that Petitioner infringes the Challenged Patent. Ex. 2020. On May 22, Patent Owner's counsel called Petitioner's IPR counsel (who had also appeared in the district court litigation)

and offered to produce Patent Owner's prior licenses to facilitate an early settlement. Ex. 2029, 1-2 (referring to a "call from Monday of this week," i.e., May 22). IPR counsel said seeing the licenses would only be "meaningful" if Petitioner's in-house counsel could see the licenses too. *Id*., 2. Patent Owner did not object and requested RPX's permission for in house counsel to see the license (as required by the agreement).

RPX said "no." On May 31, Patent Owner wrote to Petitioner's IPR counsel: "We received the following response from RPX: '… Please do not share the RPX Licenses with OnSemi's in-house counsel.'" *Id*., 1. IPR counsel did not respond. On June 1, Patent Owner followed up and asked IPR counsel "if it would be helpful to produce the license agreements on an 'Outside Attorney Eyes Only' basis." *Id*., 1. Again, Petitioner's IPR counsel did not respond. After not hearing from Petitioner, Patent Owner produced its licenses without request from Petitioner once discovery opened in the district court case. Ex. 2044.

On July 27, 2023, more than two months after Patent Owner first offered to produce its licenses and more than one year after the complaints were served on Intel and Petitioner filed the Petition in the present IPR.

At that point Patent Owner had not (and still today has not) received any discovery that would enable it to determine that Licensees are Petitioner's customers. Nevertheless, in early October, Patent Owner discovered public

information indicating that Intel and [redacted] are both Petitioner's customers, and in fact, purchase accused products from Petitioner. As soon as Patent Owner discovered that fact, on October 5, Patent Owner informed Petitioner that its Petition is time-barred and pointed Petitioner to the relevant evidence. Ex. 2014, 3. Patent Owner requested that, if Petitioner believed the Petition was not time-barred, it provide information supporting that contention. *Id.* Petitioner refused to provide any information and opposed Patent Owner's motion for additional discovery in this IPR, including by suggesting that it was unaware of the licenses at issue when it filed its Petition. Of course, Patent Owner had expressly offered to produce the licenses to IPR Counsel two months before the Petition was filed. Paper 14 (PO's Reply in Support of Motion for Additional Discovery), 1-2.

Separately, the district court's scheduling order required Patent Owner to make its initial identification of accused products on October 12, a date to which the parties had agreed. Ex. 2021, 4.[1] Patent Owner's initial (and supplemental)

[1] The parties submitted a joint scheduling order proposal. Regarding deadlines for which the parties agreed on the date (like the initial identification of accused products) the parties submitted a single date. When the parties disagreed on the date for a deadline, the proposal included the parties' proposals. The Court then indicated its resolution of the dispute, by lining out one date and selecting the other. Ex. 2021.

identification of products includes products Petitioner sells to Licensees under the license, including products that were at issue in Patent Owner's litigation with Licensees. The products are properly accused, because Petitioner also often makes unlicensed sales of the same products to other parties. Exs. 2030, 2037, 2038, 2039, 2040 (identifying accused products sold to Licensees as also sold through third parties Mouser Electronics, Inc. and DigiKey Corporation). Additionally, Petitioner has not said whether it intends to assert the license as an affirmative defense. Petitioner's Opposition to Patent Owner's Motion for Additional Discovery ("Opp.," Paper 11), 12. Patent Owner's *initial* infringement contentions are not due until December 13, 2023, as the parties agreed, and Patent Owner may continue to supplement those contentions during discovery. Ex. 2021, 4. Patent Owner's final infringement contentions are not due until October 15, 2024.[2] *Id.*, 5.

III. The Petition should be dismissed under 35 U.S.C. § 315(b).

Section 315(b) provides that "[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on

[2] Patent Owner wanted to set an *earlier* deadline for final infringement contentions, giving itself *less* time to amend the list of accused products. Petitioner wanted to provide *more* time for discovery. The Court adopted Petitioner's deadline. Ex. 2021, 5.

which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent." 35 U.S.C. § 315(b). "[T]he IPR petitioner bears the burden of persuasion to demonstrate that its petitions are not time-barred" under § 315(b). *Samsung Electronics Co. Ltd. v. Netlist, Inc.*, IPR2022-00615, Paper 40 at 2 (PTAB Feb. 3, 2023) (quoting *Worlds Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1242 Fed. Cir. 2018)).

As a "practical" matter, a petitioner's "initial identification of the real parties in interest [and privies] should be accepted unless and until disputed by a patent owner." *Worlds*, 903 F.3d at 1244. To dispute the timeliness of the petition, "a patent owner must produce *some* evidence that" a petition is time barred—but only "*some*." *Worlds*, 903 F.3d at 1244 (emphasis in original). There is no "rebuttable presumption that formally shifts a burden of production to the patent owner" or a presumption that a petition is timely because a petitioner asserts that it is. *Id.* at 1242. Such a presumption would be unfair, because it would "disfavor the party that likely has inferior access to potential sources of proof." *Id.* at 1244. As in this case, a patent owner is unlikely to know the details (or even existence) of a petitioner's relationships that might give rise to privity. Once the patent owner has "presented evidence sufficient to put" the timeliness of the petition "into dispute," "the Board c[an] no longer merely rely upon" the petitioner's assertion that its petition is timely.

Id. at 1246. Throughout the proceeding, the "burden remains with the petitioner to establish" that its petition is timely. *Id.* at 1242.

Here, Intel and [redacted] were served with a complaint alleging infringement of the Challenged Patent on February 1, 2022. Ex. 2001, 2, 4; Ex. 2018. [redacted] was an RPI to the First Amended Complaint against [redacted] (served by ECF on April 29, 2022). Ex. 2032; Ex. 2016, 7. Thus, the Petition is untimely if Petitioner is in privity with either Intel or [redacted] Patent Owner has disputed the timeliness of the Petition with evidence showing that Petitioner is in privity with both Intel and [redacted] Petitioner has offered no evidence whatsoever to controvert Patent Owner's evidence or demonstrate the timeliness of its Petition. Accordingly, the Petition should be dismissed.

A. The Petition should be dismissed, because Petitioner has not even attempted to carry its burden to show that the Petition is timely.

1. Patent Owner has satisfied its "practical" burden under *Worlds*.

There can be no serious dispute that Patent Owner here has met its initial "practical" burden under *Worlds*. *Worlds*, 903 F.3d at 1243-44. *First*, Patent Owner provided Petitioner with evidence that [redacted] and Intel purchase accused products from Petitioner and that Petitioner indemnifies [redacted] and Intel for these sales. Ex. 2014, 3-4. Petitioner does not appear to dispute these facts. In opposing Patent Owner's motion for additional discovery, Petitioner argued that Patent Owner "is

already aware that Intel, and are customers of Petitioner" and that there was no reason that additional "information on specific products is necessary." Opp., 10. Petitioner did not deny that it has an indemnity obligation for accused products sold to Intel and

Patent Owner has provided Petitioner with its license to and Intel (granted through RPX) and a declaration from RPX demonstrating that Petitioner's sales to Intel and are licensed. Ex. 2022; Ex. 2028; Ex. 2044 (email from Patent Owner to Petitioner's litigation and IPR counsel regarding production of license). Petitioner has not disputed that it operates under Patent Owner's licenses to Intel and but instead asserted that *Patent Owner* is "the party who should determine whether Petitioner is licensed." Opp., 5. This is incorrect, because *Petitioner* has the burden to show that it is not in privity with Licensees. Regardless, as explained below, Petitioner is licensed (insofar as it is supplying products to Intel and), which puts it in privity with Licensees. Since Patent Owner has met its burden under *Worlds*, Petitioner has the burden to produce evidence supporting its assertion that the Petition is timely. It has failed—utterly—to do that.

2. Petitioner has done nothing to satisfy its burden under Section 315(b).

"Failure to prove [a] matter … means that the party with the burden of persuasion loses on that point—thus, if the fact trier of the issue is left uncertain, the party with the burden loses." *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800

F.3d 1375, 1378–79 (Fed. Cir. 2015). Here, Petitioner "loses," because (1) it has the burden to show that its Petition is timely and (2) Petitioner has introduced no relevant evidence—absolutely none—to support such a finding. *Id.* In short, Petitioner has not even attempted to meet its burden.

The Petition simply asserts, without support or explanation, that "Petitioner is not barred or estopped from requesting IPR of the Challenged Claims on the grounds identified in this Petition." Pet., 4. That is inadequate on these facts. Mere "attorney argument that itself fail[s] to cite evidence" cannot meet Petitioner's burden. *Worlds*, 903 F.3d at 1246. Further, Patent Owner provided Petitioner the opportunity to come forward with evidence or explanation for the timeliness of its Petition—and even sought to compel the production of such evidence. Paper 8 (PO's Motion for Additional Discovery). However, Petitioner refused to provide any discovery whatsoever or put into the record a single piece of evidence. Therefore, Petitioner cannot rely on its mere assertion, and in the absence of evidence to show that its Petition is timely, Petitioner "loses." *Dynamic Drinkware*, 800 F.3d at 1379.

Indeed, not only does Petitioner lose in the *absence* of any evidence, the "lack of evidence" that would presumably be in Petitioner's possession affirmatively "cuts against the party bearing the burden of proof on these issues." *Ventex Co., Ltd. v. Columbia Sportswear N. Am., Inc.*, IPR2017-00789, Paper 148 at 14, 2019 WL 858745, at *6 (PTAB Jan. 24, 2019) (precedential). Therefore, the Board can

reasonably infer from Petitioner's resistance to providing evidence to meet its burden that the evidence (not in the record) is unfavorable to Petitioner.

The statements Petitioner has made to the Board confirm that whatever evidence there might be (outside the record) would not help Petitioner. Petitioner acknowledged that it sells products to Intel and [redacted] (Opp., 10), and has not disputed that these sales are licensed. To the contrary, Petitioner said that *Patent Owner* is "the party who should determine whether" these sales are licensed. Opp., 5. Petitioner also has not denied that it indemnifies Licensees, but has nevertheless refused to produce relevant agreements. Ex. 2014, 1; *see also generally* Opp. Since Petitioner is "the party with the burden" and adduced no relevant evidence, Petitioner "loses." *Dynamic Drinkware*, 800 F.3d at 1379.

B. The Petition should be dismissed, because evidence of record shows that the Petition is time-barred.

The Board need not evaluate whether Patent Owner's evidence suffices to show that the Petition is time-barred, because Petitioner bears the burden of proof on that issue and has not even attempted to meet its burden. If the Board chooses to look at the evidence of record, however, it is clear that the Petition is time-barred.

Whether two parties are privies with respect to one another is evaluated under the "common law" framework set forth in *Taylor v. Sturgell*, 553 U.S. 880 (2008). *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1317 (Fed. Cir. 2018); *see also* Office Trial Practice Guide at 13 (citing *Taylor*). *Taylor* identifies "a variety

of pre-existing 'substantive legal relationship[s]' between" two parties that can create privity. *Taylor*, 553 U.S. at 894 (alterations in original). Among them are when two parties are "preceding and succeeding owners of property" and when one party acts as the "agent" for the other. *Id.* at 894-95. "[A]n indemnity relationship is [also] the type of relationship that can establish privity," particularly when the indemnity obligations "directly relate to the" accused products. *Ericsson Inc. v. Regents of Univ. of Minnesota*, IPR2017-01197, Paper 56 at 8, 10 (PTAB Sept. 18, 2020). Here, Petitioner is in privity with [redacted] and Intel. Since both of those parties are time-barred, Petitioner is likewise time-barred.

1. Petitioner and Licensees are "preceding and succeeding owners of property" and parties to sales of accused goods.

It is undisputed that Petitioner and Licensees are "preceding and succeeding owners of" the licensed and/or infringing products that Petitioner makes and supplies to Licensees. *Taylor*, 553 U.S. at 894. Under the America Invents Act ("AIA"), privity "extend[s] to parties to transactions and other activities relating to the property in question," i.e., infringing goods. *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1318 (Fed. Cir. 2018) (quoting legislative history of the AIA). Here, the "transactions … in question" are the sales Petitioner makes to Licensees and "the property in question" is the goods conveyed in those sales. *Id.* Indeed, some of the same products that were at issue in the litigation with Licensees are at issue again in the litigation with Petitioner. As parties to the same transactions

[redacted]

involving the same property at issue in successive litigation, Petitioners and Licensees are unquestionably in privity.

a. Petitioner supplies accused goods to Licensees.

Licensees are Petitioner's customers (Ex. 2014, 3-4; Paper 8, 4 n.3 (citing Exs. 2003-2008); Ex. 2004, 10; Ex. 2036, 11 (identifying Petitioner's products in Licensees' products), and in opposing Patent Owner's motion for discovery, Petitioner did not dispute that fact. Petitioner said that "Intel, [redacted] and [redacted] are customers of Petitioner." Opp., 10. Further, some of the same products were at issue in the litigation with Licensees and are at issue again in the litigation with Petitioner. For example, Petitioner's NCP252160 chip is a component in the [redacted]. Ex. 2036, 11. The [redacted] was accused in the [redacted] litigation. Ex. 2019, ¶¶12, 28-30, 36, 79, 85, 101-104; Ex. 2048, 18 ("Exemplary [redacted] Accused products that are gaming products include [redacted]."). Similarly, Petitioner's data sheets describe its NCP81248 product as being "optimized for Intel's … CPUs," and including an "Intel Proprietary Interface." Exs. 2006, 2015. The NCP81248 chip is accused in the current district court litigation and numerous Intel CPUs were accused in the Intel litigation. Ex. 2032, ¶¶50-52; Ex. 2035, 5. Intel's documents identify other products accused in the current district court litigation, like Petitioner's NB3L202K, NB3L204K, and NB3N1900K chips (among others), as components of

licensed Intel servers. Exs. 2004, 10-13, 21; 2035, 5. Further, it would be unfair for Petitioner to dispute that it sells accused products to Intel and [redacted] at this point, having taken the position that that additional "information on specific products is [not] necessary" to the instant proceeding. Opp., 10.

Additionally, even if none of the products currently accused by model number were sold to Licensees, the district court litigation is in its early stages. Patent Owner's initial infringement contentions are not due until December 13, 2023, and final infringement contentions are not due until October 15, 2024—more than eleven months from now. Ex. 2021, 4-5. Many more products are likely to be accused as the case progresses. *Arigna Tech. Ltd. v. Volkswagen AG*, No. 2:21-cv-00054, 2022 WL 2761288, at *2 (E.D. Tex. Jan. 19, 2022) ("'It is expected that during [] discovery, infringement contentions may be clarified or refined' based upon information produced during discovery.").

Indeed, Patent Owner's district court complaint specifically alleges that Petitioner sells additional types of infringing products that have not yet been specifically accused, because Patent Owner has not yet received relevant discovery. For example, the complaint recites that that "[t]he infringing structures within semiconductor devices have application in many types of devices designed and manufactured by ON Semiconductor, including discrete & power modules, … wireless connectivity, and timing, logic, and memory devices." Ex. 2020, ¶14. An

Intel document indicates that Petitioner is one of its suppliers of "Clock Devices," i.e., the "timing … devices" mentioned in the complaint. Ex. 2004, 1, 3, 10. Each sale of accused products to Licensees is a "transaction" regarding a piece of "property" which puts Petitioner and Licensees in privity. *WesternGeco*, 889 F.3d at 1318.

b. Petitioner is a beneficiary of Licensees' "agreement[] directly related" to the accused products.

"[A]greements directly related to the product accused of infringing the patent at issue in this proceeding" satisfy *Taylor's* "pre-existing substantive legal relationship" test. *Ventex Co. v. Columbia Sportswear North America, Inc.*, IPR2017-00651, Paper 148 (PTAB Jan. 24, 2019) (precedential)). Here, Petitioner operates under and is a beneficiary of Licensees' agreement with Patent Owner. That agreement is "directly related to" the accused products, because it licenses some of them. *Id.*

Under the license "any product" Licensees "have made" by Petitioner or "purchase" from Petitioner is a "Licensed Product or Service" which Licensees have the right to "use, … sell, … obtain, … acquire, … receive, … and otherwise exploit." Ex. 2022, 2-3. Furthermore, the license grants a limited sublicense to Licensees' "have-made vendors" (for the limited purposes of making products for Licensees). *Id.*, 5. Petitioner is one such vendor and is therefore a (limited) sublicensee of Licensees under the license. Even if that were not the case, "have-made vendors"

are entitled to a limited implied license. *See LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 73 (Fed. Cir. 2012). Therefore, Petitioner is a beneficiary of Licensees' "agreements directly related to the product accused of infringing the patent at issue in this proceeding" satisfying *Taylor's* "pre-existing substantive legal relationship" test. *Ventex Co.*, IPR2017-00651, Paper 148 (precedential).

c. Petitioner's licensed sales encumber otherwise infringing articles.

Under the doctrine of exhaustion, a licensed "sale is treated, for purposes of patent exhaustion, as if the patentee made the sale itself. The result: The sale exhausts the patentee's rights *in that item*." *Impression Prod., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 376 (2017) (emphasis added). Therefore, after Petitioner sells products under the license, any downstream user of the article sold would have an exhaustion defense against Patent Owner. Put differently, the "property" of which Petitioner and Licensees are "preceding and succeeding owners" becomes encumbered under the doctrine of exhaustion. *Taylor*, 553 U.S. at 894. Further, it does not matter whether the products were accused in the instant litigation *or whether Petitioner even asserts its license defense*. Petitioner still limits Patent owner's rights vis-à-vis the "property" it sells under the license by giving future owners an exhaustion defense. Thus, Petitioner is effectively providing rights to third-parties under the license and, therefore, is in privity with Licensees.

[redacted]

2. Petitioner's indemnity obligations to Licensees further support a finding of privity.

"[A]n indemnity relationship is the type of relationship that can establish privity," particularly when the indemnity obligations "directly relate to the" accused products. *Ericsson*, IPR2017-01197, Paper 56 at 8, 10. Petitioner's "Standard Terms and Conditions of Sale" agreement requires Petitioner "to defend any claim" that its product "infringes any patent," and "to pay settlements or costs and damages." Ex. 2010, 3. The agreement further gives Petitioner "sole control of the defense" in any action for which it will indemnify the purchaser. *Id.* Presumably, two of Petitioner's most significant customers, [redacted] and Intel, received terms at least as generous as the "Standard" conditions it offers to any purchaser. Petitioner has not disputed that they did receive at least those terms.

To distinguish cases where the Board has found that an indemnity obligation created privity, Petitioner has pointed to the supposedly "ambiguous and undefined" or "non-specific" nature of the indemnity clause in its standard terms. Opp., 9. However, Petitioner has not produced its indemnity agreements with Licensees—or even asserted that *those* agreements have "ambiguous," "undefined," or "non-specific" indemnity clauses. Petitioner has claimed only that its "standard agreement" is non-specific, which, even if true, is irrelevant. Petitioner bears the burden of proving that it is not in privity *with Licensees*, but has refused to produce the agreements *with Licensees*. *Id.* The refusal to produce documents "suggest[s]

that the [document] does not support [Petitioner] in meeting its burden regarding the" time bar. *Volkswagen Grp. of Am., Inc. v. Arigna Tech. Ltd.*, IPR2021-01263, 2022 WL 211526, at *4 n.4 (PTAB Jan. 21, 2022).

Further, assuming that there is a clause in Petitioner's agreements with and Intel similar to the one in Petitioner's standard terms, it is hardly "ambiguous," "undefined," or "non-specific." Rather, it covers the goods Petitioner sold to Licensees and at issue in both the prior and current district court litigation. It therefore "directly relate[s] to the" accused products and establishes privity. *Ericsson*, IPR2017-01197, Paper 56 at 8, 10.

3. Petitioner acts as Licensees' "agent" for Licensees' "have made" rights.

It is well established that "agents and principals are in privity for res judicata purposes 'if the prior action concerned a matter within the agency.'" *Herrion v. Children's Hosp. Nat. Med. Ctr.*, 448 F. App'x 71, 73 (D.C. Cir. 2011). The D.C. Circuit is "hardly alone in this approach to privity between principals and their agents." *Herrion v. Children's Hosp. Nat. Med. Ctr.*, 786 F. Supp. 2d 359, 371 n.9 (D.D.C.), *aff'd*, 448 F. App'x 71 (D.C. Cir. 2011). Courts around the country have held similarly and the leading treatise on Federal procedure agrees. *Id.* (citing cases from the Supreme Court, First, Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits); *Wright & Miller* § 4460 (3d ed.).

For example, in *John St. Leasehold, LLC v. Cap. Mgmt. Res., L.P.*, 283 F.3d 73, 75 (2d Cir. 2002), the FDIC contracted with asset managers to exercise its rights as receiver for a failed bank. The Second Circuit held that the asset managers were the FDIC's agents, acting within "the scope of their agency," and thus "in privity with the" FDIC. *Id.* at 75.

Likewise in, *Fiumara v. Fireman's Fund Ins. Companies*, 746 F.2d 87, 87 (1st Cir. 1984), a motel operator sued his fire insurer for denying his claim in bad faith. The motel operator lost and then sued the *contractors* the insurer used to investigate his claim. *Id.* The First Circuit affirmed summary judgment for the contractors, holding that the contractors were "acting as agents of the" insurer and therefore "clearly qualify as persons in privity" for the purposes of collateral estoppel. *Id.* at 92

Here, Petitioner is Licensees' contractor exercising their rights under the license, including by making accused products on their behalf under the "have made" clause. This is no different than the contract asset managers in *John St. Leasehold* acting on behalf of the FDIC or the contract investigators acting on behalf of the insurance company in *Fiumara*. *See also* Black's Law Dictionary (11th ed. 2019) (defining "agent" as "[s]omeone who is authorized to act for or in place of another"). Ex. 2041. Therefore, Petitioner is Licensees' agent and is in privity with Licensees. *Herrion*, 448 F. App'x at 73.

C. Basic fairness and the policy underlying the AIA support dismissing the petition.

1. Petitioner is trying to take inconsistent positions before the Board and in district court.

"[T]o protect the integrity of the judicial process," "courts have uniformly … prohibit[ed] parties deliberately changing [litigation] positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). That is what Petitioner is attempting here. Right now, Petitioner wants to claim that it is a stranger to Licensees' agreement, and therefore not in privity with them. But, Petitioner refuses to produce any evidence to support that conclusion or to say whether it will later claim the benefit of the agreement to reduce the likely damages against it in district court. Petitioner is "playing fast and loose" with the Board and the district court. *Id.* Petitioner stepped into Licensees' shoes by making and selling products under their license. Petitioner should not be able to take those shoes off when standing before the Board, only to put them back on again when it appears in district court.[3]

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[3] Patent Owner is not suggesting that Petitioner could make its Petition timely by disclaiming a license defense in district court. Whether or not Petitioner actually asserts its license defense, it still has been acting under the license and reaping benefits from it, such as not owing any indemnity to Licensees. *Supra* § III.B.2.

[redacted]

2. Petitioner's other interests are irrelevant.

"Congress 'chose language that bars petitions where proxies or privies would *benefit* from an instituted IPR, even where the petitioning party might separately have its own interest in initiating an IPR.'" *Power Integrations, Inc. v. Semiconductor Comps. Indus., LLC*, 926 F.3d 1306, 1316 (Fed. Cir. 2019) (emphasis in original); *RPX Corp. v. Applications in Internet Time LLC*, IPR2015-01750, Paper 128 at 10 (PTAB Oct. 2, 2020) (precedential) (same). Therefore, the fact that the Petitioner benefits from a license that does not cover *all* of Petitioner's sales is irrelevant. Petitioner *still benefits* from the license (and exercises Licensees' "have made" rights). Therefore, Petitioner is in privity with Licensees. Petitioner will have the opportunity to challenge the validity of the Challenged Patent in district court. The only question before the Board is whether Petitioner can avail itself of *additional* challenges here. The answer Congress provided in § 315(b) is "no."

Petitioner also has been selling goods subject to exhaustion, thereby limiting Patent Owner's rights, whether or not Petitioner disclaims any license. *Supra* § III.B.1.c. Petitioner cannot turn privity on and off at will. Patent Owner's point is simply that Petitioner's apparent strategy is unfair and the Board should not condone it.

3. Petitioner should not receive a preliminary reply or be allowed to submit new evidence.

A preliminary reply is only justified on a showing of "good cause." Office Trial Practice Guide at 13. A reply is not appropriate to address arguments "Petitioner could have reasonably foreseen" when filing its petition. *Sandoz Inc. v. Abbvie Biotechnology Ltd.*, No. IPR2018-00002, Paper 11 at 3 (PTAB Mar. 6, 2018). A reply pertaining to something that the Petitioner is "required by our rules" to address in the Petition is especially inappropriate. *Minka Lighting, Inc. v. Vaxcel Int'l Co., Ltd.*, No. IPR2019-00802, Paper 8 at 3 (PTAB June 27, 2019).

Here, there is no "good cause" for a preliminary reply because all of Patent Owner's arguments were foreseeable when the Petition was filed and the timeliness of the Petition must be addressed in the Petition. 37 C.F.R. § 42.104(a). Petitioner simply ignored Patent Owner's offers to produce the licenses at issue and decided to rest on its own assertion of timeliness. Additionally, (if a preliminary reply is permitted) there is no cause for Petitioner to submit new evidence. Petitioner resisted Patent Owner's attempts to obtain the evidence in discovery and it would be unfair for Petitioner to come forward only now with cherry-picked evidence.

First, Petitioner should have addressed the time bar issue in its Petition with any evidence or argument it had. 37 C.F.R. § 42.104(a). Petitioner knew about Patent Owner's licenses, because Patent Owner explicitly offered to provide the licenses two months before Petitioner filed the Petition. Ex. 2029, 1-2. Petitioner

also knew that Patent Owner had settled with Intel and [redacted] (and therefore likely licensed them) when Petitioner filed its Petition. Pet., § II.B (Related Matters section). The timeliness of its Petition is something that Petitioner is "required by our rules" to address in the Petition, not something for Petitioner to clean up later in reply. *Minka Lighting*, IPR2019-00802, Paper 8 at 3.

Second, even excusing Petitioner's decision not to address the time bar in its Petition, Petitioner *still* could have offered evidence in response to Patent Owner's request for discovery. Instead, Petitioner refused to provide any discovery whatsoever. It would be unfair for Petitioner to produce only evidence that supports its position and only after Patent Owner has filed its preliminary response. Petitioner did not believe evidence was necessary when Patent Owner requested it, so it should not be able to produce it now.

Further, postponing a decision on the timeliness of the Petition until the final written decision stage would prejudice Patent Owner. Defending this proceeding will be extremely costly and potentially delay resolution of the parties' dispute if Petitioner seeks to stay the district court case. Indeed, the privity issues will make this IPR more costly to litigate and time intensive for the Board to adjudicate than a normal IPR. The timeliness of the Petition is a threshold issue that Petitioner could have and should have addressed in its Petition—or at least by cooperating in discovery. 37 C.F.R. § 42.104(a). Petitioner did neither, and the Board should not

reward that strategy by giving Petitioner yet another opportunity to carry its burden. Finally, if the Board simply denies the Petition under §315(b), it could also deny Patent Owner's motion for additional discovery as moot.

IV. CONCLUSION

For the foregoing reasons, institution of the Petition should be denied. If institution is denied, the Board could deny Patent Owner's motion for additional discovery as moot.

Dated: November 14, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to 37 C.F.R. §42.24(d), Petitioner hereby certifies that the word count for the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE** is 5,754 words, which is within the limit set in 37 C.F.R. §42.24(b)(1). This word count does not include the table of contents, table of authorities, exhibit list, certificate of word count, and certificate of service. This word count was prepared using Microsoft Word.

Dated: November 14, 2023

By: */Alan Whitehurst/*
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CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of this **PATENT OWNER'S PRELIMINARY RESPONSE** has been served on Petitioner via email on the following counsel of record for Petitioner:

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