UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS, LLC

Petitioner

v.

GESTURE TECHNOLOGY PARTNERS, LLC

Patent Owner

IPR2021-00917

U.S. Patent 7,933,431

PETITIONER'S AUTHORIZED REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

Petitioner Unified Patents, LLC ("Unified") submits this authorized reply in response to Patent Owner Gesture Technology Partners, LLC's ("GTP") Preliminary Response ("POPR", Paper 6). GTP asks the Board to use its discretion to deny institution based on its speculation that "several of the *Fintiv* factors **might** weigh in favor of the Board denying institution" if certain defendants were Unified members, or that the identification of Unified's members "is material to several of the *General Plastic* factors." POPR, 33 (emphasis added). Neither contention has merit. Unified is the sole petitioner and properly certified itself as the sole real party-in-interest (*see* Petition, 1). Moreover, as demonstrated below, the *Fintiv* and *General Plastic* analyses do not compel denial under § 314(a), irrespective of Unified's membership. The Board should continue to institute trial.

I. THE *FINTIV* FACTORS WEIGH TOWARDS INSTITUTION

As a preliminary matter, only one *Fintiv*[1] factor (factor 5) considers an overlap between the petitioner in *inter partes* review and the defendants in litigation.[2] The

[1] *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (Mar. 20, 2020) (precedential).

[2] Apple, Inc. and Samsung Electronics Co., Ltd. are members of Unified Patents. Huawei and LG Electronics are not direct members of Unified Patents; however, Huawei and LG are members because they are Licensees of Unified member Open Invention Network ("OIN") (*see* EX1032). Had GTP asked Unified, Unified would

other six factors **do not consider** the identity of the defendants. Of those remaining factors, GTP presented argument on only one: the "proximity of the court's trial date to the Board's projected statutory deadline for a final written decision." *See* POPR, 32–33. GTP does not analyze the remaining factors, suggesting they weigh against the exercise of discretion, and GTP's complaint that it could not analyze the *Fintiv* factors without Unified's membership information does not hold water. GTP had the ability to fully analyze each *Fintiv* factor, but its silence as to the remaining factors is telling. A holistic evaluation of the *Fintiv* factors, given publicly-available information, supports institution and not the exercise of discretion.

A. *Fintiv* Factor 1: Potential for Stay

This factor is neutral. GTP presents no arguments or evidence regarding any party's plans for a stay, though it was likely in possession of such evidence. GTP had ample opportunity to brief this factor and should not be permitted to do so on sur-reply. The dockets of the pending litigations reflect no motions for stay. *See*

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have provided such information. Further, Apple and Samsung have been acknowledged as Unified members in non-confidential, publicly-available briefing prior to the POPR filing, and OIN's membership in Unified is likewise public knowledge (as is OIN's own licensee list listing Huawei and LG). If GTP had done its research, it would have been easily able to find such information.

EX1024–EX1028. Without "specific evidence" of how the court would rule on any stay motion, this factor is neutral. *Sand Revolution II, LLC v. Cont'l Intermodal Grp.–Trucking LLC*, IPR2019-01393, Paper 24, 7 (June 16, 2020) (informative).

B. *Fintiv* Factor 2: Timing of Trial

The estimated trial date in the Western District cases[3] weighs significantly in favor of institution. Although the scheduling order is not yet approved by the judge, the parties filed an agreed-upon proposed scheduling order that proposes an estimated trial date of **March 27, 2023** – four months **after** a final written decision would be statutorily due here (November 2022).[4] *See* EX1029, p. 4.

In the Eastern District cases, according to GTP's evidence, jury selection is set for March 7, 2022. *See* EX2001, p. 1. But even that date in the Eastern District case is, at best, uncertain, being more than six months away; given such uncertainty, this factor is at worst neutral. *See also* Petition, 54 (*citing In re Apple Inc.*, 979 F.3d

[3] The "Western District cases" hereinafter refers to the three now-consolidated cases in the Western District of Texas involving GTP's lawsuits against LG, Apple, and Lenovo; the "Eastern District cases" refers to the two now-consolidated cases in the Eastern District of Texas involving GTP's lawsuits against Huawei and Samsung.

[4] Though this document was filed on August 6, 2021, well before GTP's POPR, GTP did not submit it.

1332, 1344 n. 5 (Fed. Cir. 2020). Evaluation of this factor thus either weighs in favor of institution or is at worst neutral.

C. *Fintiv* Factor 3: Investment in Parallel Proceeding

This factor, which focuses on work invested "in the merits of the invalidity positions" (*Sand Revolution*, 10) as measured "at the time of the institution decision" (*Fintiv*, 9–10) favors institution.

Here, the Board's institution decision should issue by November 2021. In the Western District cases, only the opening claim construction brief is due in November 2021 (*see* EX1029, p. 3), and all other substantive deadlines relevant to the merits of the invalidity positions (e.g., *Markman* hearing, expert/fact discovery, etc.) are scheduled in 2022; thus, most of the substantive work will occur **after** institution.

In the Eastern District cases, the *Markman* hearing occurred September 21, 2021, but there is no certainty that an order will issue by institution (about two months later). Judge Gilstrap's median time to a claim construction determination is 14.5 months from complaint filing (*see* EX1030, p. 2); the Eastern District cases were filed in February 2021, suggesting that any claim construction order would likely issue after institution. GTP had the opportunity to provide evidence suggesting an earlier *Markman* order but did not. Moreover, GTP proposes only one term for construction here (claim 7's preamble), but that term is not proposed for construction in the Eastern District cases (*see* EX1033), suggesting claim

construction does not and will not impact any invalidity positions. Thus, as in *Sand Revolution*, "much work remains in the district court case as it relates to invalidity," including filing dispositive motions on validity issues. *Sand Revolution*, 10–11; EX2001, p. 3.

Accordingly, because little relevant investment will have occurred in either case by the time of institution here, this factor favors institution.

D. *Fintiv* Factor 4: Overlap of Issues

This factor favors institution for two reasons. *First*, there is no conclusive evidence of overlap between the grounds in this proceeding and the invalidity challenges in either the Western District or Eastern District cases. In the Western District cases, preliminary invalidity contentions are not due until October 1, 2021, with final invalidity contentions not being due until April 2022, well after institution; thus, there is no evidence of overlap for those cases. *See* EX1029, p. 2. In the Eastern District cases, only an excerpt of the invalidity challenges is publicly available, but that excerpt is, at best, ambiguous as to any overlap between the Petition's grounds and the invalidity grounds in litigation. *See* EX1031. The full contentions were in GTP's possession (not Unified's), and GTP's failure to submit them suggests there is little or no overlap between the Petition's grounds and the Eastern District cases' invalidity contentions. *See also* Petition, 55. Unified is not a defendant in any case and does not know any defendant's litigation strategies, so

Unified has no way of knowing the issues in the contentions. Thus, the fact that there is little or no evidence of overlap between the proceedings favors institution. *See Apple Inc. v. Seven Networks, LLC*, IPR2020-00506, Paper 11 at 15 (PTAB Sept. 1, 2020) (factor 4 weighed in favor of institution when "little to no overlap exists between this IPR and the District Court Action").

E. *Fintiv* Factor 5: Unified is not a Party to the District Court Actions

This factor favors institution. "If a petitioner is unrelated to a defendant in an earlier court proceeding, the Board has weighed this fact against exercising discretion to deny institution." *Fintiv*, 13–14. Panels applying *Fintiv* have held accordingly. *See, e.g.*, *NuVasive, Inc. v. Acantha LLC*, IPR2020-00684, Paper 11, 30–32 (Aug. 25, 2020); *Kavo Dental Techs., LLC v. Osseo Imaging, LLC*, IPR2020-00659, Paper 10, 17–18 (June 10, 2020). Unified is not a party to any case (or any other litigation involving this patent). Although GTP suggests nefarious intent, the unrebutted record shows that Unified: filed this Petition at its own direction and control; funded the entire proceeding; does not have agreements with its members to file IPRs; and did not discuss the preparation of the petition, or the litigations, with any member. *See* EX1020, ¶¶ 13–14, 8, 10, 5–6. Unified likewise has no ability to control the district court litigants' actions. *See id.*, ¶ 6. The Board should give little weight to GTP's unfounded suggestions and find this factor to favor institution.

F. *Fintiv* Factor 6: Other Circumstances

This factor favors institution. As the Petition shows, the challenged claims are unpatentable under multiple grounds, which weighs against denial. *See Apple Inc. v. Maxell, Ltd.*, IPR2020-00204, Paper 11, 19 (June 19, 2020) ("[T]he strength of [the] patentability challenges . . . favors institution.").

G. *Fintiv* Factors – Conclusion

Based on a holistic view of the evidence, the *Fintiv* factors favor institution.

II. *GENERAL PLASTIC* IS NOT APPLICABLE HERE

GTP also lobs an unfounded assertion that the *General Plastic* analysis should apply here. *See* POPR, 33 (*citing General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 15-19 (September 6, 2017) (precedential)). GTP is incorrect. The *General Plastic* factors apply to "the Board's considerations in evaluating **follow-on petitions**." *General Plastic*, 16 (emphasis added). Unified's petition is not a follow-on petition; it is the first challenge filed against the '431 Patent. *See* Petition, 53–54. Thus, at least *General Plastic* factors 1–5 do not apply here, where there is no previous petition. Moreover, multiple *General Plastic* factors do not consider the petitioner's identity, yet GTP failed to analyze these in its POPR and should not be permitted to do so in sur-reply. The Board should not exercise discretion under § 314(a) based on *General Plastic*.

III. CONCLUSION

The Board should reject GTP's arguments and institute review.

Respectfully submitted,

September 22, 2021

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Raghav Bajaj
Counsel for Petitioner
Registration No. 66,630

PETITIONER'S EXHIBIT LIST

EX1001	U.S. Patent 7,933,431 to Timothy R. Pryor
EX1002	Prosecution File History of U.S. Patent 7,933,431 ("'431 PH")
EX1003	Declaration of Mr. Christopher Schmandt
EX1004	U.S. Patent Application Publication 2005/0013462 to Geoffrey B. Rhoads ("*Rhoads*")
EX1005	U.S. Patent 6,266,061 to Doi et al. ("*Doi*")
EX1006	U.S. Patent 6,417,797 to Cousins et al. ("*Cousins*")
EX1007	U.S. Patent 6,144,366 to Numazaki et al. ("*Numazaki*")
EX1008	U.S. Patent 5,666,159 to Parulski et al. ("*Parulski*")
EX1009	U.S. Patent 5,768,163 to Smith
EX1010	Eric R. Fossum, "Digital Camera System on a Chip," IEEE, 1998
EX1011	Microsoft Computer Dictionary (excerpts)
EX1012	Prosecution File History of U.S. Application No. 11/980,710
EX1013	CNN.com, "First mobile videophone introduced," May 18, 1999
EX1014	PCMag, "The Golden Age of HP Palmtop PCs," August 18, 2016
EX1015	U.S. Patent 6,118,653 to Jung-Ho Kim
EX1016	U.S. Patent 5,719,799 to Yasuo Isashi
EX1017	Webster's Unabridged Dictionary of the English Language (excerpts)
EX1018	Prosecution File History of U.S. Patent 6,417,797
EX1019	Starner et al., "Wearable Computing and Augmented Reality," MIT Media Lab, Nov. 1995
EX1020	Declaration of Kevin Jakel
EX1021	Prosecution File History of U.S. Application No. 10/893,534
EX1022	Prosecution File History of U.S. Provisional Application No. 60/092,798
EX1023	E-mail from Andrew Kellogg Authorizing Reply
EX1024	Civil Docket for 2:21-cv-00040-JRG
EX1025	Civil Docket for 2:21-cv-00041-JRG
EX1026	Civil Docket for 6:21-cv-00121-ADA
EX1027	Civil Docket for 6:21-cv-00122-ADA
EX1028	Civil Docket for 6:21-cv-00123-ADA
EX1029	[Proposed] Agreed Scheduling Order, Case 6:21-cv-00122-ADA,

	Dkt. 30
EX1030	DocketNavigator, Judge Gilstrap – Time to Milestones Search
EX1031	Defendants' Invalidity and Subject-Matter Eligibility Contentions, Case 2:21-cv-00040-JRG, Dkt. 76-3.
EX1032	Open Invention Network Community List
EX1033	Joint Claim Construction Chart Pursuant to Rule 4-5(d), Case 2:21-cv-00040-JRG, Dkt. 73 and 73-1.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Unified Patents, LLC	§	Petition for *Inter Partes* Review
Petitioner	§	
	§	U.S. Patent 7,933,431
	§	
	§	

CERTIFICATE OF SERVICE

The undersigned certifies, under 37 C.F.R. § 42.6, that service was made on the Patent Owner as detailed below.

Date of service	September 22, 2021
Manner of service	Electronic Service by E-mail
Documents served	Petitioner's Reply to Patent Owner's Preliminary Response Exhibits 1023–1033
Persons served	Todd E. Landis (tlandis@wsltrial.com; IPRGTPWSL@wsltrial.com) John Wittenzellner (johnw@wsltrial.com)

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