Filed on behalf of: Unified Patents, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS, LLC
Petitioner,

- vs. -

MEMORYWEB, LLC
Patent Owner.

Case IPR2021-01413
U.S. Patent 10,621,228

PETITIONER'S REQUEST FOR DIRECTOR REVIEW OF FINAL WRITTEN DECISION

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I. INITIAL PROCEDURAL MATTER

Unified seeks Director Review or POP Review in the alternative. The panel addressed the RPI issue in a separate order (Paper 56, "Order"), and revisited RPI in the final decision (Paper 58, "Decision," 3-5). Unified therefore timely requested rehearing and POP Review of the Order (Papers 62, 63), and now timely requests Director Review of the RPI portion of the Decision to ensure that Unified may obtain judicial review of the RPI determination (if needed). In view of the tangled posture, Unified asks the Director (or POP) to make clear that the time for appeal is tolled under 37 C.F.R. § 90.3(b).

II. SUMMARY OF THE ARGUMENT

Director review is appropriate for two reasons. ***First***, the panel erred by addressing in **this** proceeding whether Apple and Samsung were RPIs as "a necessary precursor" to determining whether they would be estopped in a **subsequent** proceeding. Order, 6. Doing so in this IPR, with no bar or estoppel at issue and without Apple and Samsung's participation, violated their due process rights, contravened this Board's precedential *SharkNinja* decision, and created a procedural morass.

Second, the panel is incorrect on the merits. It created a Board split because all previous panels have determined that Unified is the sole RPI based on essentially the same evidence. This panel came to the opposite conclusion than previous panels

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because it failed to properly apply binding precedent. This decision is also arbitrary and capricious because it lacks a reasoned explanation for arriving at the opposite result. *Vicor Corp. v. SynQor, Inc.*, 869 F.3d 1309, 1322-23 (Fed. Cir. 2017) (Board must provide "rational explanation" for "reaching inconsistent conclusions in similar, related cases"). Unified filed this IPR to deter future assertions of this and other invalid patents. Unified did so of its own accord; it did not seek to extricate anyone from litigation. It had no pre-filing communications with Apple or Samsung regarding the '228 patent or those parties' litigations, and there is no rational reason to suspect (or evidence to support a conclusion) that those parties wanted Unified to file its petition challenging the '228 patent—especially since they each filed their own, with divergent arguments and different claims.

Accordingly, the Director should reverse, or at least vacate, the portion of the Decision referencing the Order and the Order itself. Apple, Samsung, and other future petitioners should not be prejudiced by this improper, incorrect determination.

III. ARGUMENT

A. The panel decided the RPI issue in the wrong proceeding, misallocated the burden and unfairly prejudiced later petitioners

The Decision erred in reaching the RPI issue because there was no allegation that any party would be "barred or estopped from **this** proceeding." *SharkNinja*, 18-20 (emphasis added). While "'patent owners should not be forced to defend against later judicial or administrative attacks on the same or related ground,'" *SharkNinja*

deferred the RPI issue because that "[wa]s not the case before [the Board]." *Id.*; *Fat Statz*, Paper 51, 6-9; *Engle Grange*, Paper 37, 4-7. Even if *SharkNinja* applies only at the institution stage, the Director should extend it to also apply post-institution to avoid the wasteful and harmful results exhibited here.

Here, the panel erred by issuing a non-binding advisory opinion that prejudices non-parties to this proceeding. Specifically, it prejudices Apple and Samsung because it prejudged the RPI issue without their participation. After applying *SharkNinja* at institution, the panel reached the RPI issue post-institution despite the lack of any allegation that any party would be estopped in this IPR. Decision 4-5. The panel cast aside *SharkNinja* but did not give Apple or Samsung, the parties it seeks to estop, any opportunity to participate. Even worse, this process wrongfully shifted the burden of proof. Rather than properly litigating the RPI and estoppel issues in the other IPRs, MemoryWeb litigated it where it would have no effect. Now MemoryWeb seeks to bind Apple and Samsung with the decision in this case, estopping Apple and Samsung in their later-filed IPRs (which are themselves past oral argument). MemoryWeb (as the movant seeking to terminate) bears the burden in each case of showing that Apple/Samsung ***is*** an RPI. 37 C.F.R. § 42.20(c) (movant bears the burden); *Taylor v. Sturgell*, 553 U.S. 880, 906-907 (2008) (burden lies with party asserting "nonparty preclusion"); *Ironburg Inventions Ltd. v. Valve Corp.*, -- F.4th ----, 2023 WL 2749199 at *14 (Fed. Cir. Apr. 3, 2023) (citing cases).

MemoryWeb's strategy of litigating RPI here, where no estoppel can take effect, saddles Unified with the burden of proving a negative. *SharkNinja* should have precluded such tactics, which created a procedural morass that is still unfolding. As it discussed during its March 31, 2023 conference call with the parties to all three IPRs, the panel is considering whether to circumvent the Board's discovery rules by issuing an unprecedented protective order granting non-parties Apple and Samsung permission to "inspect" Unified's protected Attorneys' Eyes Only information. But permitting "inspection" *is* document production (*e.g.*, Fed. R. Civ. P. 34), and Apple/Samsung have not moved for discovery from Unified. MemoryWeb should have properly raised this issue where it matters—the Apple and Samsung IPRs—and properly obtained discovery from Apple and Samsung (e.g., membership agreements, communications) under 37 C.F.R. § 42.51; *Netlist*, 4-5 (Director Vidal granting RPI discovery post-institution). And to the extent the parties needed information solely in Unified's possession, they could have sought it via 37 C.F.R. § 42.52. That MemoryWeb chose not to pursue the correct path is no reason to throw the discovery rules out the window.

B. Samsung and Apple are not RPIs

This panel got it wrong: Unified is the sole RPI of this proceeding. The Board has issued over two dozen RPI decisions involving Unified and its members and—until now—it has always arrived at the same correct result on effectively the same

facts: Unified is the sole RPI. *See* Table of Authorities (TOA), supra, Case Nos. 12-21, 23-38. Nothing material has changed, and this panel would have arrived at the correct result, too, had it followed binding precedent. It did not and as a result has created a split in the Board not only in its conclusion but also in its flawed analysis of the *RPX* factors.

The Order purportedly applied the *RPX* factors (Order, 20 n.7), but did so incorrectly and without applying all of the facts of record. This panel failed to heed the Federal Circuit's instructions that the "heart of the inquiry focuse[s] on whether a petition has been filed at a party's behest," and a "key consideration of the RPI analysis is control." *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.3d 1018, 1028 (Fed. Cir. 2021) (cleaned up). There was no evidence of any overt or hidden control here.

The case-specific RPI analysis demands a "**constrained** approach to non-party preclusion." *Taylor*, 553 U.S. at 899 (emphasis added). The Board's precedential *Ventex* decision provides an example of the required constraint sorely lacking from the panel's opinion. In particular, the Board "must be cautious not to overextend the reasoning set forth in *AIT*," as this panel did, "to any situation where 'a party benefits generally from the filing of a Petition and also has a relationship with the Petitioner.'" *Ventex* at 10 (quoting Unified case *Realtime* at 14-15); *see also Taylor*, 553 U.S. at 901 ("identity of interests and some kind of relationship" is insufficient).

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The Board "must" also "ask who, from a practical and equitable standpoint, will benefit from" the IPR-at-issue. *RPX*, 8 (quoting *AIT*, 897 F.3d at 1349). There is no evidence that Apple and Samsung obtained any meaningful benefit from Unified's IPR, other than the same diffuse benefits provided by Unified's deterrence efforts that are also enjoyed by anyone that participates in the relevant technology zone. The panel was also required to determine "whether [Unified] can be said to be representing [Apple/Samsung's] interest after examining its relationship with [them]." *Id*. (quoting *AIT*, 897 F.3d at 1353 and citing *Ventex* at 8). Again, there is no evidence that Unified represented anyone's interests beyond a general interest in deterring assertions of invalid patents.

At bottom, this panel—unlike all that came before it—concluded that other parties are RPIs to Unified's IPR without any different evidence that could justify its different result. To the contrary, the Board acknowledged the same key facts that that have always correctly supported a finding that Unified is the only RPI: Unified did not communicate with Apple and Samsung about the '228 patent or their litigations before filing the IPR (Order, 22-24, 26-27); Apple/Samsung "may not," and did not, "decide which patents Unified challenges" (Order, 30); Unified's business model is not, like RPX's, to extricate clients from existing litigations—Unified instead seeks to "deter [NPEs] who assert bad patents" and "to reduce NPE activity" in technology zones. Order, 21. This panel arrived at the opposite

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conclusion of the many panels that came before by failing to follow the law and misinterpreting evidence in ways that no panel has done before.

1. Unified did not file this IPR at the behest of, or on behalf of, Apple or Samsung IPR

The "heart of the [RPI] inquiry focuse[s] on whether a petition has been filed at a party's behest." *Facebook*, 989 F.3d at 1027-28 (internal quotations omitted). And here, Unified did not file its IPR at anyone's behest or on behalf of anyone. The panel should have agreed with the panels that came before it. The panel acknowledged that Unified had no pre-filing discussions regarding the '228 patent or MemoryWeb's litigation with Apple or Samsung (Order, 22-24), there were no meetings or any opportunity for direction or control over this IPR (Order, 26-27), and no Unified members, including Apple and Samsung, "decide which patents Unified challenges." Order, 30, 22-24, 26-27.

In stark contrast, RPX regularly and frequently communicated with Salesforce regarding the challenged patents, failed CBMs, and "effectively act[ed] as if Salesforce had requested" RPX to file its three IPRs to "extricate" Salesforce from its litigation with AIT. *RPX*, 26, 33-34

Searching for some evidence of control to support its RPI conclusion, the panel cherry-picked an inapplicable [redacted] in [redacted] decade-old [redacted] providing for an [redacted] and from that [redacted] alone, *sua sponte* concluded that there is an [redacted]

[redacted] and its members in the form of an [redacted] Order, 24-26. But it is undisputed that **this** [redacted] **never existed**. EX1023, ¶19 n.1. [redacted] and, as a previous Board panel noted, the [redacted] was [redacted] *CCE*, Paper 33, 14-15. Even worse, the panel found that this [redacted] tended to show that Apple/Samsung are RPIs without any evidence of the non-existent [redacted] control of Unified's IPR. This contradicts *RPX*, where the Board found that the existence of an actual common board member was a neutral fact because there was no evidence of control by the board member. *RPX*, 28-29.

The panel wrongly concluded that the lack of communications—Unified's attempt to carefully follow the law—indicated that Unified engaged in "a willful blindness strategy[.]" Order, 28 (quoting *RPX*, 17-20). "The Board neither acknowledged nor explained this apparent Catch-22, which is a telltale sign of arbitrary and capricious agency action." *Everport Terminal Services, Inc. v. NLRB*, 47 F.4th 782, 794 (D.C. Cir. 2022). Indeed, the Board did not even find that RPX was willfully blind, despite the egregious facts of that case. *RPX*, 34-35. Rather, the Board found that RPX was merely complying with the wrong law, namely *VirnetX's* "unduly restrictive" test for RPI. *Id*. In contrast, Unified meets and exceeds the **correct** legal requirements to avoid even the appearance of an *RPX*-like situation.

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Unified, *inter alia*, forbids pre-filing communications with its members about any of its plans or their desires regarding filing challenges. Reply, 25-27, 33. Indeed, the only communications regarding this IPR were post-filing transmissions of public information sent to all members and the public, including an email that was received even by MemoryWeb, and the same public information was posted on Unified's website and broadcast via social media. *Compare* EX1026/2014 (email received by all subscribers, including MemoryWeb) and EX1027 *with* EX1028 and 1029 (email sent to large members); Reply, 30 (citing EX2036, 55:2-56:5, explaining why separate mailing lists exist); EX1021 (public blog post); EX1023 ¶17.

In sum, this panel should have—like many panels before it—found that Unified's lack of any pre-filing communications, the lack of any overt or covert control, and innocuous post-filing communications all indicated that Unified is the only RPI of this IPR. *E.g.*, *American*, Paper 115, 47-49; *Barkan,* Paper 57*,* 10-12, *IV II*, Paper 12, 7-11; *Uniloc-02148*, Paper 82, 20-23; *Realtime*, Paper 37, 14-17. Not doing so has created a panel split regarding how to apply at least *RPX* factors c, d, h, and i as well as willful blindness.

2. Unified's business model deters future NPEs from obtaining bad patents and asserting them (*RPX* factors a-d)

The panel acknowledged that "[t]he evidence [] shows that Unified seeks to 'deter [NPEs] who assert bad patents (aka Patent Trolls)'" and "'benefits' [] its member companies by 'working to reduce NPE activity through monitoring … and

USPTO challenges.'" Order, 21 (quoting EX2017 at 1). Mr. Jakel further explained in unrebutted testimony exactly how Unified decides to take deterrence action. Unified [redacted] EX2036, 38:19-39:19. Next, Unified [redacted] *Id.*, 39:20-40:7. Ultimately, Unified [redacted] *Id.*, 40:7-41:16. Finally, such action can take many forms solely at Unified's discretion, including publishing prior art, reissue protests, *ex parte* reexaminations, and *inter partes* reviews. Reply, 28-29 (citing EX1024, 4.2, EX1025, 3.2.).

Unified stands in stark contrast to RPX, which decided to file IPRs based on factors that "benefit *specific* clients," e.g., "the number of patents asserted in the campaign" and "the number of RPX clients…in suit." *AIT*, 897 F.3d at 1352 (italics in original). In contrast, Unified's factors focus on the zones and the patents themselves.

Further, RPX advertised that it helps its clients "quickly and cost-effectively extricate themselves from [NPE] lawsuits …, *acquire a license* to the litigated patent and *selectively clear our clients from the suit*." *RPX*, 14 (internal quotations omitted, original emphases). The Board therefore concluded that RPX "exists in part to file

IPR petitions" to extricate its clients from existing lawsuits, and this "is indicative of an RPI relationship" with Salesforce. *Id*., 26.

In contrast, Unified advertises deterrence, not extrication from existing litigation. Seeking to draw a parallel to *RPX*, the panel pointed to a decade-old version of Unified's website stating that there is "complete alignment between Unified Patents and its member companies." Order, 21 (citing EX2016); *see AIT*, 897 F.3d at 1357 (RPX advertised that "its interests are 100% aligned with those of its clients"). But even Unified's old website shows that Unified and its members are "aligned" in a completely different manner—they seek future deterrence in technology zones, as Mr. Jakel explained above, not extrication from an existing suit. EX2016 ("deterring NPEs from encroaching on a [zone] in the first place" to provide "greater freedom to operate"). Unified further explained in its current website that, "Unified exists to break the cycle of [invalid] patent assertion." EX2018, 2-3; *see also* EX2019, 1 ("Unified is a deterrence entity that seeks to deter the assertion of poor quality patents in certain technology zones.").

The panel also misleadingly cites Mr. Jakel's testimony as showing that Unified chose to challenge the '228 patent "precisely because" it was asserted against Samsung and Apple in particular. Order, 28, 31 (citing EX2036, 62:19-63:10, 99:16-101:14). Not so. Mr. Jakel merely testified that [redacted]

[redacted] EX2036, 62:19-63:10. As already explained, Unified [redacted] *Id*. 39:10-15. Samsung was the tripwire in this case only because MemoryWeb sued them first.

The panel assigned significant importance to [redacted], e.g., Order 23-24), and they demonstrate the same thing—[redacted]. EX2033, 18-38. [redacted]. EX2033, 18-38. [redacted] it would be odd if they did not show up at all. EX2036, 117:20-118:1 [redacted]. The panel arbitrarily brushed off this evidence with a conclusory statement that it does not "detract from [its] finding" that Unified challenges patents because they are asserted against its members in particular. Order, 31. No evidence supports the panel's unreasoned conclusion. And yet again, previous panels have uniformly and correctly concluded that a sued party merely receives the same diffuse deterrence benefit enjoyed by others in its zone—there are no "specific benefits … in return for its membership payments." *Realtime*, Paper 36, 18; *American Patents*, Paper 115, 48-49; *Uniloc-02148*, Paper 82, 21-22.

The panel also stated that "it is not credible to suggest that Apple and Samsung do not expect Unified to file petitions for IPRs against patents they are accused of infringing" in exchange for their membership dues. Order, 30 (citing nothing but dues amount at EX2036, 75:7-10, 89:16-20). The panel's analysis is legally flawed and ignores the record. The issue is whether Apple/Samsung expected Unified to file an IPR challenging the '228 patent, like Salesforce expected RPX to file three IPRs to extricate it from AIT's lawsuit. It is patently unreasonable to conclude that, of the hundreds of patents asserted against Apple and Samsung (including the others filed by MemoryWeb), Apple and Samsung wanted Unified to challenge some claims of this patent. And the record is replete, including in the [redacted], with many deterrence activities and tools Unified provides all of which provide value and were ignored by this panel which wrongly solely focused on just one—IPRs. Reply, 24 (citing EX1023, EX2033, EX2036). Indeed, previous panels unanimously disagreed with this panel. *E.g.*, *Uniloc-02148*, Paper 82, 19-21 ("[T]he evidence shows Petitioner is representing the general interest that all subscribers to Petitioner's [zones] have in mitigating litigation risk from patents in those zones."); *CCE*, EX1039, 12-14 ("[Unified's] business model … does not indicate that it acts as a proxy for its members."); *Realtime*, Paper 36, 12-16; *IVII*, Paper 12, 11.

In sum, myriad panels that have considered Unified's business model, and they unanimously concluded that it tends to show that Unified is the only RPI in its IPRs. No evidence supports this panel's conclusion to the contrary.

3. Apple and Samsung did not desire, or benefit from, Unified's IPR (*RPX* factors e-g)

The only reasonable conclusion supported by the evidence is that, while Apple and Samsung wanted to challenge the '228 patent **themselves**, they did not want **Unified** to challenge the '228 patent, too. Apple and Samsung filed their own IPRs shortly after Unified. Unlike Unified, they challenged all of the asserted patents, and for the '228 patent, they challenged all 19 claims (not just claims 1-7) using their own art and their own claim constructions. Reply, 25-27; *Barkan*, Paper 57, 7-8 (later-filed IPR supporting this conclusion); *Streck*, 62 (challenge to only some asserted claims indicating a lack of coordination).

This panel, however, incorrectly found that the fact that Apple and Samsung filed their own IPRs of the '228 patent "supported a conclusion that [Apple/Samsung] are RPIs in this proceeding." Order, 32-33. That analysis is legally flawed. The Board "must ask 'who, from a practical and equitable standpoint, will benefit from **Unified's IPR**. *RPX*, 8 (quoting *AIT*, 897 F.3d at 1349). A general desire for **an IPR** on a patent is not enough. The proper inquiry is whether Apple and Samsung desired Unified to file **this IPR** for their specific benefit. *Facebook*, 989 F.3d at 1028; *RPX*, 30-31 (an interest in and a benefit from an IPR is not

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enough). In contrast to the situation here, Salesforce desired, and stood to directly benefit from, **RPX's three IPRs** to help "extricate" it from AIT's lawsuit, exactly as RPX had promised and Salesforce could not do for itself. *RPX*, 23-26, 31-33.

Also contrary to the panel's findings, Apple and Samsung gained little from Unified's **successful** IPR. They are still "incur[ring] the expense" (Order, 29) of proving that independent claim 1 and the vast majority of the dependent claims are unpatentable for the different reasons set forth in their own IPRs and under a different claim construction. And unlike *RPX*, they were not extricated from anything, nor could they be, by Unified's IPR. They must (and did) challenge the other asserted claims and patents. At most, Unified's IPR provides them with the same diffuse deterrence benefits also enjoyed by anyone else practicing in the zone.

In short, Apple and Samsung each wanted IPRs filed against MemoryWeb's asserted patents—so they each filed their own. They did not want, or stand to benefit from, Unified's IPR of the '228 patent, as previous panels have found. *Barkan*, Paper 57, 7-8. No evidence supports this panel's opposite result nor the split it created.

IV. CONCLUSION

The Director should reverse, or at least vacate, the portion of the Decision referring to the Order and the Order itself.

Respectfully submitted,

Dated: April 13, 2023 By: / Jonathan M. Strang /

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REQUEST FOR DIRECTOR REVIEW** was filed on P-TACTS and served on April 13, 2023, via electronic mail, as agreed to by counsel, upon the following counsel for Patent Owner:

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