UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMCAST CABLE COMMUNICATIONS, LLC,
Petitioner,

v.

VEVEO, INC.,
Patent Owner.

Case Nos.
IPR2019-00290, IPR2019-00291, IPR2019-00292,
IPR2019-00293
Patent No. 7,937,394 B2

PATENT OWNER'S RESPONSE
TO PETITIONER'S NOTICE RANKING PETITIONS
(As Authorized by the Board's Order Dated April 26, 2019)

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Comcast has ranked its petitions: (1) Howard; (2) Gross; (3) Zigmond; and (4) Venkataraman. The Board should take Comcast at its word that Howard is its leading challenge and deny the rest. And if the Board finds that Howard is insufficient to institute trial, it should deny all four. Comcast is not entitled to *inter partes* review on any one petition, let alone *four* attacking the same claims on duplicative grounds. As in any complex patent dispute, it is often necessary for the parties to narrow the issues so that the tribunal can better focus its attention and resources. Consistent with this, the AIA gives the Board plenary discretion to deny institution and requires it to consider "the efficient administration of the Office, and the ability of the Office to timely complete proceedings . . . ." *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1368 (Fed. Cir. 2016) (quoting § 316(b)). The Board should exercise its discretion and deny at least three of Comcast's petitions.

Comcast argues that multiple petitions are necessary because of "Veveo's uncertain positions and aggressive litigation strategy," Paper 11 at 5, but Comcast has seen Veveo's preliminary responses: none takes a position requiring Comcast to hedge. Veveo properly identified short-comings in the art and other deficiencies in Comcast's petitions, none of which depend upon how the claims are construed.

And if what happened before the ITC has caused Comcast to worry that it may need more back-up positions, that is not Veveo's fault: having the weaknesses of its case exposed is the natural result of Comcast delaying so long to seek IPR.

I. Comcast's claim that "it is impossible to predict" Veveo's arguments does not justify instituting multiple trials against the same patent.

Distracting from the merits and attempting to avoid the consequences of its petition-filing strategy, Comcast repeatedly accuses Veveo of taking "inconsistent positions." *Id.* at 2. These accusations do not bear scrutiny. Veveo has taken clear and consistent positions in its preliminary responses, which Comcast has now had the unfair benefit of previewing in advance of ranking its petitions. Comcast is not entitled to preempt every possible position that might lead to success for Veveo. If the Board heeds that desire of all petitioners, then this exercise is largely pointless.

And Veveo has not taken "inconsistent positions." Comcast does not point to any inconsistencies; rather, it provides a confusing discussion of the "determining" step that shows, on the contrary, that Veveo's position regarding "determining" has remained entirely consistent before the ITC and the Board. Specifically, Veveo has always argued, including in its preliminary responses, that the "determining" and the "indexing" steps are inter-related processes, both of which must occur prior to searching. The fact that an item is grouped with the subset of items associated with the string of unresolved overloaded keystrokes is the determination that such letters caused the item to be associated with the string of unresolved overloaded keys, and that determination is always reflected in the indexing. Ex. 1016, ¶241. Comcast had notice of this position, itself relying on Ex. 1016, ¶241 in its petitions. Veveo has maintained that position in its preliminary responses. To the extent it simplifies

matters for the Board, Veveo stipulates that this is what the claims require.

As stated in Veveo's preliminary responses, Comcast's grounds are deficient based on the short-comings of the art and Comcast's articulation of its challenges. Had Comcast sought IPR promptly, and not at the tail-end of an ITC investigation, presumably it would have no "positions" to argue about and no foresight into what Veveo might argue. Comcast cannot use its *own delay* to justify its tactics. That Comcast is more uncertain today about whether its grounds are sufficient is just the natural consequence of having already litigated the same issues before the ITC.

II. The "different approaches" identified by Comcast are not material and, if anything, reinforce why the Board should deny institution in all four.

Comcast's attempt to justify the "different approaches" taken in its multiple petitions only reinforces why the Board should just deny all four. Paper 11 at 1.

"Determining" – Comcast alleges that Howard shows that the "determining" step is met when the system "accesses" a search index. *Id.* In other words, Howard does not expressly disclose the "determining" step, but Comcast would have the Board assume that it must because it "accesses" a search index. Comcast then alleges that, in its Zigmond and Gross grounds, "determining" is "part of the highlighting" step allegedly present in the *hypothetical* system resulting from the combination (i.e., Zigmond with Payne; Gross with Smith). Comcast also concedes that Venkataraman is not prior art if the '394 patent is entitled to its priority date. Because Comcast's priority challenge fails, so too does its Venkataraman ground.

Thus, regardless of what "approach" Comcast takes, the differences are immaterial because Comcast has not met its burden to show this feature in *any* of its petitions.

"Form" of the Index – Comcast argues that it needs a ground having a "trie" index so that it can exploit the testimony of Veveo's expert before the ITC. *Id.* at 4. Comcast also complains that "Veveo has not taken a position on the form of the 'index' required by the claims." *Id.* Tellingly, Comcast fails to identify any reason why the structure of the index (trie or inverted) impacts the merits. Comcast is not entitled to multiple duplicative trials solely so that it can hedge against phantom arguments and exploit testimony that would not exist but for Comcast's delay.

Highlighting – Comcast argues that it is entitled to multiple trials against the same patent because some of its petitions "rely on single references" while another "relies on a combination of references." *Id.* Comcast makes no attempt to explain how this impacts the merits. As explained in Veveo's preliminary responses, all of Comcast's attempts to identify "highlighting" in the art fail and warrant denial.

III. Neither the "type of prior art" nor whether it was cited to the Office during prosecution justifies multiple trials against the same patent.

Comcast also argues that its reliance on § 102(e) art justifies allowing it to pursue multiple challenges against the same patent. But Comcast was not required to rely on art that Veveo can antedate—Comcast *chose* to. Antithetically, Comcast has ranked Howard as its leading ground in a transparent attempt to steer the Board towards instituting on more than one petition. The Board should not allow Comcast

to use a situation of its own making to justify multiple trials on the same patent. Nor is Comcast required to rely on art that was cited to the Office; it *chose* to.

IV. Veveo takes no position on the relative weaknesses of the petitions beyond what Veveo has explained in its preliminary responses.

Veveo takes no position on the relative weaknesses of Comcast's multiple duplicative petitions. Rather, as explained in Veveo's preliminary responses, all four of Comcast's petitions are fatally deficient and should be denied institution.

The Board's approach of allowing Comcast to rank its multiple petitions to minimize redundancy may be a sensible one if it results in most or all of Comcast's petitions being denied institution. The Board's approach would appear inequitable and its purpose unclear, however, if Comcast is not held to the ranking it advances.

The Board should also consider that Comcast has had the unfair opportunity to rank its petitions after seeing Veveo's preliminary responses. Indeed, Comcast should have done a better job of explaining why its multiple petitions are not redundant *in its petitions*. The Board has thus given Comcast another opportunity to defend its approach—one that has not consumed any portion of its word count.

In conclusion, filing multiple concurrent petitions is abusive and wasteful for the same reasons as filing serial petitions, a practice the Board has rightly tried to curb via its decision in *General Plastics*. In this case, the Board is well-justified in exercising its discretion to deny Comcast's multiple petitions challenging the same patent as "inefficient" and a "waste [of] resources." IPR2019-00062, Paper 11, 15.

Respectfully submitted,

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CERTIFICATION OF SERVICE (37 C.F.R. § 42.6(e))

The undersigned hereby certifies that the above-captioned **PATENT OWNER'S RESPONSE TO PETITIONER'S NOTICE RANKING PETITIONS** was served electronically in its entirety on May 24, 2019, upon the following parties by email:

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