

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AMAZON.COM, INC., AMAZON.COM SERVICES LLC,  
AMAZON WEB SERVICES, INC., and AUDIBLE, INC.,  
Petitioner

v.

AUDIO POD IP, LLC,  
Patent Owner

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Case IPR2025-00774  
U.S. Patent No. 8,738,740

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**PATENT OWNER PRELIMINARY RESPONSE  
UNDER 37 C.F.R. § 42.107(a)**

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## I. INTRODUCTION

Patent Owner Audio Pod IP, LLC (“Audio Pod”) respectfully requests that Board deny institution of Petitioner Amazon.com, Inc.’s Petition for *inter partes* review (IPR) of U.S. Patent No. 8,738,740 (“the ’740 patent”). Three entrepreneurial brothers and a friend, all with software backgrounds, invented server-based, segmented streaming for use with audio book technology. They did so to make it possible for the brothers’ aging mother to continue to enjoy her passion for reading as her eyesight failed. Realizing their inventions represented fundamental technology breakthroughs, they sought patent protection for their inventions and formed Audio Pod to bring their technology to market. Amazon met with Audio Pod and expressed interest in the technology. But Amazon then incorporated the technology into their products without even speaking with Audio Pod after the meeting. It established and expanded its dominant e-reader Kindle market position. That market presence thwarted all of Audio Pod’s efforts to build its business following its meeting with Amazon. Those realities, and the related IPRs, result from Amazon’s approach to use its nearly unlimited resources to best small, innovative entities.

The merits of the Petition are weak. Amazon did not even attempt to make the required minimum showing *in the Petition* that one non-patent literature reference included in nine of the asserted grounds was even a prior art printed

publication. Moreover, the proposed invalidity grounds are premised on claim construction positions that conflict with constructions that Amazon took in the parallel district court proceeding for related patents in the Eastern District of Virginia (EDVA). Amazon does not acknowledge that discrepancy. It does not provide any justification for the inconsistency. Amazon's conclusory assertions regarding motivation to combine and reasonable expectation of success throughout the Petition only exacerbate the weakness of the challenge.

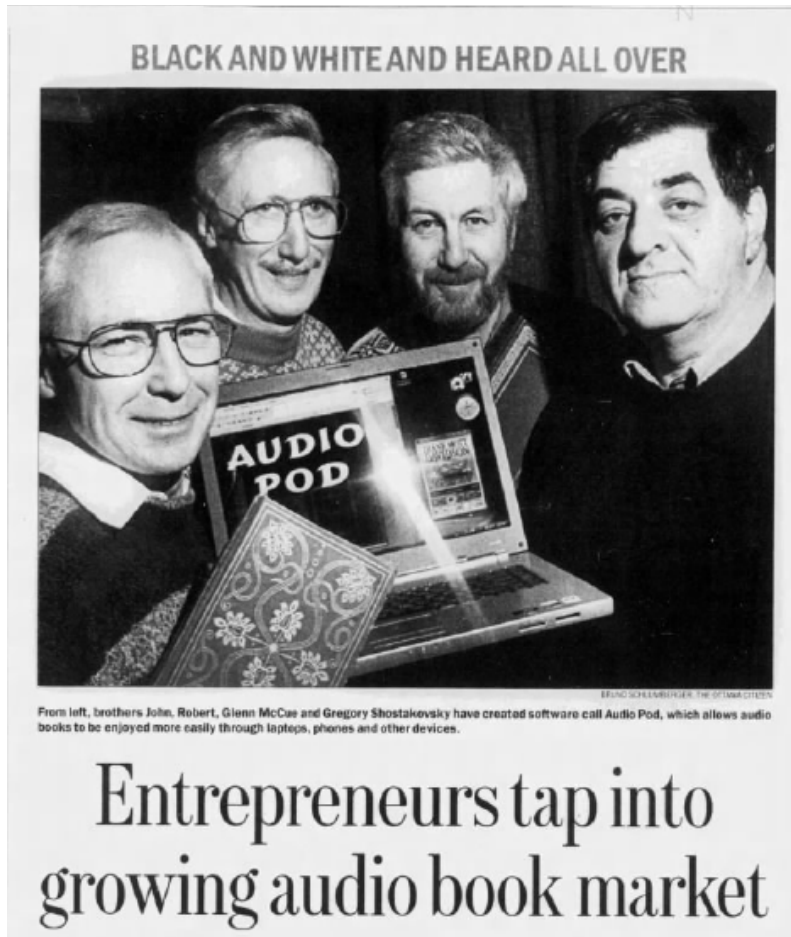
Further still, for each of the asserted grounds challenging the independent claims, Amazon has failed to show at least one element of the claims. This is true for many of the dependent claims as well, where Amazon provides only perfunctory discussion, or simply refers back to earlier claims while ignoring much of the claim language in the dependent claims.

Finally, given the many deficiencies affecting the asserted grounds, even if the Board were to agree that Amazon has met its burden for a single claim or ground, the Board should exercise its discretion under the Board's informative *Chevron* and *Deeper* decisions, and deny institution here.

## **II. BACKGROUND**

### **A. Audio Pod's founders invented key early media streaming technologies, including the inventions claimed in the '740 patent.**

Audio Pod's innovative concepts and early technology development was headlined in The Ottawa Citizen newspaper in January 2008.



EX2003, 1.

The news story recounts that, in the late 1990s, “John McCue began looking for a way to help his mother, Monica, continue her lifelong love affair with literature in spite of her failing eyesight.” EX2003, 1; EX2015, ¶6. He teamed up with senior software architect, and co-founder, Gregory Shostakovsky, as well as his brothers, Robert McCue and Glenn McCue. EX2003, 1; EX2015, ¶6. All four had computer science backgrounds. EX2003, 1.

They created a brilliant solution—a server-based, virtual approach to streaming audio across multiple devices:

Say, for example, you are in an airport departure lounge in a WiFi hotspot listening to a podcast or an audio book....

... Then your flight is called and you may lose your wireless Internet service while airborne.

But even without a wireless connection, Audio Pod’s technology will allow you to pick up that story again on the plane exactly where you left off.

This is possible because Audio Pod’s memory manager retains the content and is able to deliver it to the user seamlessly, even on a different device.

The technology is unique because it utilizes a digital virtual representation of the audio stream. This virtual approach eliminates the delays associated with mass downloads that could easily take eight to 10 hours for larger books, and it also eliminates the network dependence used by streaming technologies

EX2003, 2; *see also* EX2015, ¶6.

According to Mr. McCue’s 2008 interview, “[t]he hardest part in developing th[e] technology was devising a way to break up a media stream into a large number of manageable audio chunks that can then be played in perfect sequence.”

EX2003, 2. Solving that problem unlocked a world of possibilities. “[T]he

successful result provides users with a seamless audio experience for bookmarking and memory management in a way that allows the delivery of ‘many, many media streams through very small devices using limited network resources’ ....” *Id.* That benefit extended to any type of media stream, including, for example, handheld messaging. *Id.*

The patent claims constitute foundational technology that make multi-media, multi-device streaming possible.

**B. Audio Pod disclosed their innovative technology to Amazon, but Amazon ignored their subsequent outreach attempting to partner or license, and Amazon instead implemented Audio Pod’s technology on its own.**

The inventors formed Audio Pod Inc. in 2005. EX2015, ¶7; EX2001, ¶64; EX2002, ¶56. They had a working product, and in July 2007, the inventors had a lengthy meeting with Amazon and Brilliance Audio (an audiobook publisher acquired by Amazon in May 2007), who had expressed interest in Audio Pod’s technology. EX2015, ¶¶9-10; EX2001, ¶¶68-69; EX2002, ¶¶60-61.

A small group from Amazon and Brilliance agreed to meet with Audio Pod. EX2015, ¶9. The meeting was originally scheduled for one hour; in fact, the Amazon team initially expressed disbelief that the technology would work. EX2015, ¶¶9-11. But, when Audio Pod presented a working product, the meeting extended to the entire day—with more and more Amazon/Brilliance representatives joining as the day went on. EX2015, ¶¶10-11. By the end, there

was acknowledgement from the Amazon team that they had “never thought of using a central server.” EX2015, ¶11.

After the meeting, beyond a brief acknowledgement of a “thank you” email sent by the Audio Pod team, Amazon broke contact with Audio Pod, ignoring repeated attempts by Audio Pod to follow up after the meeting. EX2015, ¶12.

Amazon acquired Audible in 2008, and subsequently released “Whisper Sync for Voice” Kindle technology. *See* EX2013; EX2016. Through 2013, Audio Pod continued its efforts to partner with Amazon.

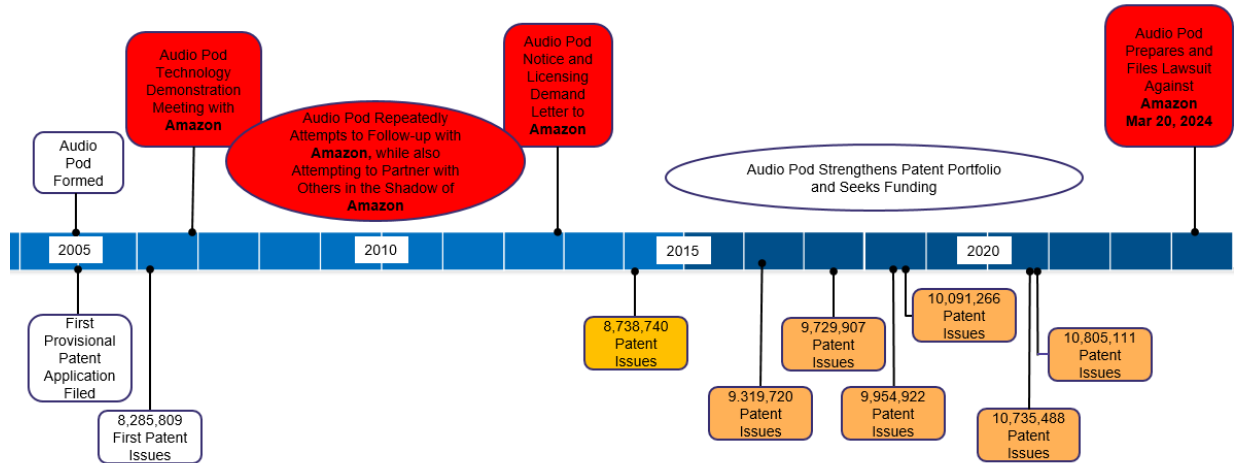
Audio Pod also marketed its technology to other companies in the industry, but Amazon, already a market giant, had cornered the market, limiting Audio Pod’s ability to compete. As Mr. McCue testifies:

It was common for us to present our technology and get the response “Amazon is already doing that” or concerns about having to compete with Amazon as a direct competitor.

EX2015, ¶17.

In sum, Amazon’s disregard for Audio Pod’s intellectual property led to Audio Pod’s infringement suit—a suit Audio Pod tried to avoid. The following timeline portrays the long road taken by Audio Pod to attempt to realize the benefit of its inventions in the face of Amazon’s stonewalling Audio Pod’s attempt to work

together, while bringing Amazon's strikingly similar and infringing audio book products to market. *See* EX2015, ¶¶6-17.



### III. THE PETITION FAILS TO ESTABLISH A REASONABLE LIKELIHOOD OF PREVAILING ON ANY CHALLENGED CLAIM

Amazon cobbles together ten references into eighteen alleged grounds of rejections. The Petition is fundamentally flawed, as Amazon has not even attempted to show *in the Petition* that one of the asserted references used in half of the asserted grounds is a prior art printed publication. In addition, Amazon improperly advances claim construction positions in this IPR inconsistent with positions taken in the parallel district court proceedings for related patents. Further, Amazon's obviousness analysis is fundamentally lacking. Amazon does not present a proper analysis under the *Graham* factors, nor does Amazon provide any reasoned analysis for its alleged motivations to combine the various references or as to a reasonable expectation of success in making the combinations.

As to the specific challenges, Amazon fails to show that the asserted

combinations teach or render obvious “maintain[ing] service level statistics for each library server in the list of library servers,” “select[ing] a first library server from the list of library servers in dependence upon the service level statistics,” and “download[ing] a second other digital audio file from the second library server” as recited in the independent claim. EX1001, 17:4-27. Further still, Amazon gives short shrift to the majority of the dependent claims, presenting only cursory analysis, if any at all, in alleging the dependent claims are obvious.

Based on the many deficiencies in the Petition described below, this IPR should be denied.

**A. Grounds 1B-1I and 2I: Amazon fails to demonstrate in the Petition that Yoshimura is a prior art printed publication.**

Amazon has not even attempted to make the required minimum showing *in the Petition* that one of the asserted references—Yoshimura (EX1006)—is a prior art printed publication. This is particularly remarkable in that Yoshimura is relied upon in half of Amazon’s asserted grounds. *See* Pet., 5-6.

Board precedent requires that a petitioner establish a reasonable likelihood *in the petition* that a reference is a printed publication. *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13 (P.T.A.B. Dec. 20, 2019) (precedential). Amazon has not met that burden here. Amazon provides *no* discussion supporting the alleged “publication date” of this reference, Pet., 6, nor does Amazon “discuss in the Petition *any* evidence supporting the implicit position

that the [reference] was *publicly accessible* prior to the critical date of the claimed invention.” *BabyBjörn AB v. The ERGO Baby Carrier, Inc.*, IPR2025-00110, Paper 20 at 14 (P.T.A.B. Apr. 22, 2025) (emphasis in original). In *BabyBjörn*, as here, petitioner submitted a declaration allegedly supporting the publication date and public accessibility of the reference at issue. *Id.* The Board declined to “search through the record to develop [p]etitioner’s arguments on th[e] issue.” *Id.* (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (“Judges are not like pigs, hunting for truffles buried in briefs.” (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991))))).

The *only* evidence cited by Amazon in support of the publication date is a bare citation of “*see* EX-1097.” Pet., 6. Exhibit 1097, however, is a 30-page declaration from Sylvia D. Hall-Ellis, Ph.D. Not only does citing to the *entire declaration* with no accompanying explanation fall short of the requirement that “the petition identif[y] [the supporting evidence], in writing and *with particularity*,” 35 U.S.C. § 312(a)(3) (emphasis added). It also runs afoul of 37 C.F.R. § 42.6(a)(3), which provides that “[a]rguments must not be incorporated by reference from one document into another document.” *See also Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that

supports the grounds for the challenge to each claim.” (quoting 35 U.S.C. § 312(a)(3)).

Amazon simply has not met its burden under *Hulu* to show, *in the Petition*, a reasonable likelihood that Yoshimura is a prior art printed publication. Therefore, Grounds 1B-1I and 2I, each of which relies on Yoshimura, must fail.

**B. All Grounds: Amazon advances inconsistent claim constructions here and in the District Court.**

Claims must be interpreted the same for invalidity and infringement: “It is axiomatic that claims are construed the same way for both invalidity and infringement.” *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003) (citing *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1279 (Fed. Cir. 1988)). “A patent may not, like a ‘nose of wax,’ be twisted one way to avoid anticipation and another to find infringement.” *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) (citing, among other cases, *White v. Dunbar*, 119 U.S. 47, 51 (1886)). Yet, Amazon attempts to do just that—applying a broader plain and ordinary meaning construction in this and related IPRs, while simultaneously proposing narrower constructions for several terms in the district court.

In particular, in this IPR, filed on March 24, 2025, Amazon asserted that “[n]o claim terms require construction.” Pet., 5. Just one month later, in the -406/-

407 EDVA consolidated proceeding<sup>1</sup>, the parties jointly submitted their claim construction positions. *See generally* EX2007. Unlike in the Petition which argues no construction is necessary,<sup>2</sup> in the district court, Amazon proposed constructions

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<sup>1</sup> The '740 patent is asserted in *Audio Pod IP, LLC v. Amazon.com, Inc., et al.*, CA No. 2:24-cv-00185 (E.D. Va. March 20, 2024) (“the -185 EDVA proceeding”). EX2001. Other patents related to the '740 patent also are involved in *Audio Pod IP, LLC v. Amazon.com, Inc., et al.*, CA No. 3:24-cv-00407 (E.D. Va. May 30, 2024) (transferred from Alexandria Division Case No. 1:24-cv-00915) and *Audio Pod IP, LLC v. Amazon.com, Inc., et al.*, CA No. 3:24-cv-00406 (E.D. Va. May 30, 2024) (transferred from Alexandria Division Case No. 1:24-cv-00914). EX2002; EX2005; EX2006; EX2021. These proceedings have been consolidated (collectively, “the -406/-407 EDVA consolidated proceeding”). EX2005, ECF No. 51; EX2006, ECF No. 49.

<sup>2</sup> Across all of the IPRs filed against Audio Pod’s patents, Amazon has not proposed construction for a single claim term. *See* IPR2025-00757 Pet., 12; IPR2025-00765 Pet., 7-8; IPR2025-00768 Pet., 6; IPR2025-00769 Pet., 6; IPR2025-00777 Pet., 5; IPR2025-01003 Pet., 4; IPR2025-01041 Pet., 6. In the district court proceedings on the other hand, Petitioner contends many terms

for several claim terms and argued that others are indefinite.<sup>3</sup> *E.g.*, EX2007, 4-15.

In fact, the EDVA court set a longer time-to-trial schedule based on Amazon's representation that it would conduct extensive claim construction proceedings, including introducing expert testimony.<sup>4</sup> *See* EX2019 (-407 proceeding); EX2010 (-406 proceeding).

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require construction. *See, e.g.*, EX2007. Notably, some of these petitions were filed *after* Amazon's claim construction positions were submitted in the district court.

<sup>3</sup> The parties have not yet submitted claim construction positions in the -185 EDVA proceeding in which the '740 patent is asserted. However, there is overlap between the claim terms of the '740 patent and the claim terms included in the joint claim construction chart for the -406/-407 EDVA consolidated proceeding, such as "descriptor file," "bookmark," "segment." *Compare* EX2007, with EX1001, 17:4-19:14 (the '740 claims).

<sup>4</sup> The parties initially negotiated a schedule around an August 2025 *Markman* hearing and early 2026 trial. That schedule was pushed out when the Court could not schedule a *Markman* hearing until October 2025, and then a medical issue with Audio Pod's expert necessitated an additional extension to November 2025.

Amazon provides no explanation to justify the different positions taken in the two forums. This is improper. *Cf. Cambridge Mobile Telematics, Inc. v. Sfara, Inc.*, IPR2024-00952, Paper 12 at 5-9 (P.T.A.B. Dec. 13, 2024) (informative) (denying institution where petitioner argued for a means-plus-function construction in district court and a plain and ordinary meaning construction in the petition, but failed to explain the difference in claim construction positions).

Amazon puts Audio Pod and the Board in the untenable position of assessing Amazon's asserted grounds without an understanding Amazon's true position as to the scope of the challenged claims. Amazon's approach is fundamentally unfair, and results in a certainty of inconsistent results between the Board and the district court. *See Kiosoft Techs., LLC v. PayRange, Inc.*, IPR2021-00086, Paper 12 at 15-16 (PTAB Mar. 22, 2021) (agreeing with petitioner and its expert that the different constructions at the district court and the PTAB favors denying institution).

Amazon's inconsistent claim construction positions is likely one of the reasons Amazon relies on a different expert for the IPRs (Ketan Mayer-Patel, Ph.D) than it does in the underlying litigation (Dan Schonfeld, Ph.D). *See, e.g.*, EX1002 (relying on testimony of Ketan Mayer-Patel, Ph.D for the IPRs); EX2007, (relying on testimony of Dan Schonfeld, Ph.D for the underlying litigation). Audio Pod's expert (Kevin Almeroth, Ph.D) provided an expert declaration addressing

claim construction in the underlying litigation (for related patents). He was deposed for the better part of a day on those issues on July 9. And Dr. Schonfeld already provided two declarations related to claim construction. He will be deposed on July 22. All that testimony arose from Amazon's positions on claim construction. Amazon neither identified nor addressed any of those positions in its various petitions.

**C. All Grounds: Amazon's obviousness analysis is fundamentally lacking due to conclusory assertions regarding reasonable expectation of success and motivation to combine.**

In addition to specific reasons discussed below (Sections III.D-F), Amazon's asserted grounds are deficient for failing to establish a *prima facie* case of obviousness for the combination of references it presents. To show obviousness, Amazon must "demonstrate *both* that a skilled artisan would have been *motivated to combine* the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a *reasonable expectation of success* in doing so." *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367–68 (Fed. Cir. 2016) (internal citations omitted, emphasis added). To satisfy its burden, a petitioner must "articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness"—"mere conclusory statements" will not suffice. *In re Magnum Oil Tools Int'l, Ltd.*, 829

F.3d 1364, 1380 (Fed. Cir. 2016). Here, Amazon’s allegations both for motivation to combine and reasonable expectation of success are conclusory and insufficient.

**1. Amazon’s contentions regarding reasonable expectation of success are insufficient.**

Amazon’s contentions regarding reasonable expectation of success are insufficient. For example, as to claim 2, Amazon asserts:

A POSITA would have reasonably expected success because ISBNs were well understood as content identifiers and because Kate uses the ISBN in a system similar to Leighton’s [modified URL]. ([EX1002, ¶254.]

Pet., 64-65 (discussing Ground 2C).

As an initial matter, the allegation of reasonable expectation is legally insufficient. Even if there were any basis for concluding that a modified URL is equivalent to an ISBN, “[m]ere compatibility of references is ... not sufficient” to support obviousness. *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2018-00827, Paper 9 at 10-11, 17 (P.T.A.B. Oct. 16, 2018) (denying institution based on lack of showing of expectation of success; citing *Personal Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 994 (Fed. Cir. 2017)). Likewise, “[i]t does not suffice to simply be known. A reason for combining must exist.” *Virtek Vision Int’l ULC v. Assembly Guidance Systems, Inc.*, 97 F.4th 882, 888 (Fed. Cir. 2024) (reversing the Board’s obviousness determination).

Despite Amazon's contentions that ISBNs are content identifiers similar to a modified URL, Amazon fails to explain how Leighton's system would be modified using Kate's ISBNs. Pet., 64-65; EX1002, ¶¶253-54 (mirrors petition). Further, even if ISBNs were "well understood as content identifiers," Pet., 65, Amazon fails to describe how an ISBN would be a "simple substitution" for Leighton's modified URL. *See* Pet., 64-65. Kate describes an ISBN number as a part of a URL, rather than a separate identifier. EX1041, 12:30-13:1. Conversely, Leighton describes dynamically modifying the URL when information changes. EX1032, 8:20-28. Amazon does not address this distinction in discussing the reasonable expectation of success, and provides insufficient evidence to support that a POSITA would have been able to implement Kate's ISBN in Leighton's system.

Amazon's contentions regarding reasonable expectation of success are similarly conclusory and deficient throughout the Petition's other 17 asserted grounds. *See, e.g.*, Pet., 40 (Ground 1D: claim 5, "A POSITA would have reasonably expected success because bookmarks were well understood, and further because both Young and Sull use a URL or URI as a unique identifier of media content."), 43 (Ground 1E: claim 18, "A POSITA would have reasonably expected success in segmenting the audio files in Grounds 1A and 1B based on throughput (as taught by Ganesan) because such segmentation was widely known, as was choosing the size of those files based on network performance."), 45 (Ground 1H:

claim 10, “A POSITA would have reasonably expected success in making the combination because including login information in a request was trivial, well-known, and explained by Shapiro.”), 49 (Ground 1I: claim 11, “A POSITA would have reasonably expected success in using a time offset (as taught by Lindahl) in the Young-Yoshimura system at least because using such bookmarks was routine, trivial to implement, and widely used.”), 58 (Ground 2A: claim 6, “A POSITA would have reasonably expected success in maintaining historical transfer rates and using them in Leighton's system because maintaining and using such statistics for this purpose was well known.”).

Amazon’s conclusory statements regarding a reasonable expectation of success are insufficient for institution. *See, e.g., NJOY, LLC v. JUUL Labs, Inc.*, IPR2024-00536, Paper 17 at 36-38, 47-49 (P.T.A.B. Aug. 12, 2024) (denying institution where petitioner did not show a reasonable expectation of success in combining the asserted references); *Honeywell Int’l Inc. v. DSM IP Assets, B.V.*, IPR2024-00493, Paper 7 at 19-23 (P.T.A.B. Aug. 21, 2024) (same).

**2. Amazon fails to perform a proper motivation to combine analysis under *Graham* for many dependent claims.**

Likewise, Amazon fails to explain how or why a POSITA would have been motivated to implement the teachings of the additional references into the *combination* asserted against claim 1. Instead, the Petition only addresses the combination with only a single reference of the combination asserted against the

independent claims. *See, e.g.,* Pet., 25-35 (Ground 1B: claims 1, 6, and 11, failing to describe how to combine Copley *and* Yoshimura together with Young) 36-37 (Ground 1C: claim 2, discussing only how to combine Kate with Young), 38-40 (Ground 1D: claim 5, discussing only how to combine Sull with Young), 43 (Ground 1F and 1G, claims 3-4, respectively, failing to discuss how any of the references could be combined together), 44-45 (Ground 1H: claim 10, discussing only how to combine Shapiro with Young), 62-64 (Ground 2B: claims 2 and 10, discussing only how to combine Lindahl with Leighton), 64-65 (Ground 2C: claim 2, discussing only how to combine Kate with Leighton), 65-66 (Ground 2D: claim 5, discussing only how to combine Sull with Leighton), 66 (Ground 2E: claim 18, discussing only how to combine Ganesan with Leighton), 67-68 (Ground 2H: claim 10, discussing only how to combine Shapiro with Leighton).

As such, Amazon has failed to perform a proper motivation to combine analysis under *Graham*. *See Graham v. John Deere Co.*, 383 U.S. 1 (1966) (“*Graham*”). The three key factual inquiries set forth in *Graham* for establishing obviousness under 35 U.S.C. § 103(a) are: (1) determining the scope and content of the prior art, (2) ascertaining the differences between the prior art and the claims at issue, and (3) resolving the level of ordinary skill in the pertinent art. *Graham* at 17-18. These factual inquiries must be tied together by “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”

*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Here, Amazon's motivation to combine arguments—or lack thereof—run afoul of the bedrock principles set forth in *Graham*. They fail to set forth the differences between the art and the claims, as required by the second factual inquiry under *Graham*. The second *Graham* factor necessarily involves an analysis of what the references and claims teach, and what is missing, and “requires a comparison of the properly construed claim to the prior art.” *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010). When a petitioner seeks to rely on a three reference combination (References A, B, and C, for example), the second *Graham* factor requires an analysis of what is missing from the combination of References A and B compared to the claims before determining whether a motivation exists to add Reference C to that existing combination. *See, e.g., Palo Alto Networks, Inc. v. Centripetal Networks, LLC*, 122 F.4th 1378, 1386 (Fed. Cir. 2024) (*citing Randall Mfg. v. Rea*, 733 F.3d 1355, 1362 (Fed. Cir. 2013) (holding that when analyzing a proposed combination of references, the references sought to be combined “must be read together, not in isolation.”)). Those differences are necessary to articulate which portions of the references a POSITA would have sought to combine or modify. For example, the motivation to use a different memory storage device in reference B with reference A would be far

different than the motivation to use a transmission protocol in reference B with reference A.

If a proposed ground of invalidity fails to identify the differences between the existing combination of prior art references (e.g., combination of References A and B) and the claimed invention, then such a ground has necessarily failed to establish a *prima facie* case of obviousness, and the petition should be denied. *See id.*; *see also Apple, Inc. v. ContentGuard Holdings, Inc.*, IPR2015-00355, Paper 9 at 9 (P.T.A.B. June 26, 2015) (finding no reasonable likelihood of prevailing because “the Petition does not identify sufficiently the differences between the claimed invention and the prior art, or how the prior art teachings are to be modified or combined, if at all.”). Therefore, the Board should deny institution because the Petition fails to satisfy at least the second factual inquiry under *Graham*. *See Enzo Biochem*, 599 F.3d at 1332.

**3. Other alleged motivations are purely conclusory.**

Unpatentability determinations on obviousness grounds “cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *TQ Delta, LLC v. Cisco Sys.*, 942 F.3d 1352, 1359 (Fed. Cir. 2019) (quoting *KSR*, 550 U.S. at 418)). “This requirement is as much rooted in the Administrative Procedure Act, which ensures due process and non-arbitrary decisionmaking, as it

is in § 103.” *Id.* (citing *Kahn*, 441 F.3d at 988). “Accordingly, ‘a conclusory assertion with no explanation is inadequate to support a finding that there would have been a motivation to combine’ because ‘[t]his type of finding, without more, tracks the *ex post* reasoning *KSR* warned of and fails to identify any actual *reason* why a skilled artisan would have combined the elements in the manner claimed.’” *Id.* (quoting *In re Van Os*, 844 F.3d 1359, 1361-62 (Fed. Cir. 2017)).

Amazon’s motivations for many of the dependent claims in Ground 1 reduce to an assertion that the additional feature “was known in the art” or generic statements not providing any motivation at all. A non-exhaustive list of examples of the Petition’s perfunctory analysis is provided below:

- Claim 6, Ground 1B, the Petition provides *no motivation*; it simply concludes as follows: “Thus, Young, Yoshimura, and Copley render claim 6 obvious for the reasons discussed above. (*Supra* §§VII.B, VIII.A.1; EX-1002 ¶¶110-11.)” Pet., 30; *see also* EX1002, ¶¶110-11 (repeating petition).
- Claim 11, Ground 1B, the Petition provides *no motivation*; it simply concludes as follows: “Together, Yoshimura and Young render obvious downloading a descriptor (SMIL) file from the first library server (e.g., Young’s optimal server) for ordering the plurality of digital audio files (e.g., audio segments) that includes at least one of a

start time, an end time, and a play time (e.g., duration) of each digital audio file in the plurality of digital audio files within the audio stream.

(EX-1002 ¶¶112-16.)” Pet., 32-33; *see also* EX1002, ¶¶112-16 (repeating petition).

- Claim 3, Ground 1F, the Petition provides *no motivation*; it simply concludes as follows: “The references presented in Ground 1A or 1B, in further view of Kate and Ganesan, therefore render claim 3 obvious. (*Supra* §XI; EX-1002 ¶156.)” Pet., 43; *see also* EX1002, ¶156 (repeating petition).
- Claim 4, Ground 1G, the Petition provides *no motivation*; it simply concludes as follows: “Accordingly, the references presented in Ground 1A or 1B, in further view of Kate, Ganesan, and Sull, render claim 4 obvious. (*Supra* §X; EX-1002 ¶157.)” Pet., 43; *see also* EX1002, ¶157 (repeating petition).
- Claim 11, Ground 1I, the entire motivation to combine analysis with respect to the combination with Sull alleges: “Thus, Sull discloses the additional limitation of element 11[b] and Sull, in combination with the references in Ground 1B, render claim 11 obvious. ([EX1002] ¶¶177-79.) A POSITA would have been motivated to implement Sull's bookmark to enable the user to start playback at a particular position

and would have reasonably expected success for the same reasons as discussed for Lindahl. (*Id.* ¶178.)” Pet., 49; *see also* EX1002, ¶¶177-78 (repeating petition).

None of these statements is sufficient to meet Amazon’s burden regarding motivation to combine. *See TQ Delta, LLC v. Cisco Sys.*, 942 F.3d at 1359. “It does not suffice to simply be known. A reason for combining must exist.” *Virtek Vision Int’l ULC v. Assembly Guidance Systems, Inc.*, 97 F.4th 882, 888 (Fed. Cir. 2024) (reversing the Board’s obviousness determination).

For the claims in Ground 2, the lack of explanation is even more egregious. In addition to the problems identified above, they also often refer back to the motivation discussed with respect to Ground 1. But Ground 1 *is based on different references*. A further non-exhaustive list of examples is below:

- Claim 6, Ground 2B, the Petition provides *no motivation*; it simply concludes as follows: “Leighton discloses the additional limitation of claim 6, and therefore Leighton, Seed, and Lindahl render this claim obvious for the reasons set forth in Grounds 2A (claim 6) and 2B (claim 1). (EX-1002 ¶248; *supra* §§XVI.B, XVII.A.)” Pet., 63; *see also* EX1002, ¶248 (repeating petition).
- Claim 10, Ground 2B, the entire motivation to combine analysis alleges: “A POSITA would have been motivated to implement this

feature in Leighton’s CDN to provide access control, and would have reasonably expected success in doing so given the similarity of the systems and that such access control was widely known.” Pet., 64; *see also* EX1002, ¶¶249-51 (repeating petition).

- Claim 18, Ground 2E, the entire motivation to combine analysis alleges: “A POSITA would have been motivated to combine the teachings of Leighton and Ganesan to determine the size of media content segments based on throughput in Leighton’s system, and would have reasonably expected success in doing so, for the same reasons that a POSITA would have been motivated to do so for Young. (Supra §XI; EX-1002 ¶263.)” Pet., 66; *see also* EX1002, ¶263 (repeating petition).

Accordingly, Amazon has not met its burden to show a motivation to combine the references in any of these grounds. *See Magnum Oil*, 829 F.3d at 1380.

**D. Grounds 2A-2I: Amazon fails to meet its burden to establish that Ground 2 teaches claim 1.**

Independent claim 1 is challenged in both Grounds 2A and 2B. Each primarily relies on a combination of Leighton and Seed. In both grounds, Amazon relies entirely on primary reference Leighton as allegedly teaching claim elements 1[c] (“maintain[ing] service level statistics for each library server in the list of

library servers”) and 1[d][i] (“select[ing] a first library server from the list of library servers in dependence upon the service level statistics”). Pet., 51-52.

The ’740 patent describes maintaining data that tracks the historical performance of the servers on the server list. EX1001, 10:16-28. The ’740 patent describes that “maintain[ing]” may be done by having a file that maintains the historical performance data of each server. EX1001, 10:16-22. The “performance data” or “service level statistics” includes historical information about the servers, such as which server is historically the fastest, rather than current performance of the servers. EX1001, 10:16-28, Table 1 (“Contains a list of historical throughput performance and failure rate metrics for the library primary and mirror sites.”).

Amazon points to a disclosure in Leighton that allegedly describes “select[ing] a first library server” based on “service level statistics.” Pet., 51-52. But none of those citations expressly disclose statistics or how they are used. And the Petition, along with mirrored statements in the expert declaration, fail to explain how those concepts are disclosed. They provide no support or reasoned analysis, just a conclusion and a string cite.

Amazon has thus not shown that Leighton teaches either (1) “maintain[ing] service level statistics for each library server in the list of library servers” or (2) “select[ing] a first library server from the list of library servers in dependence upon the service level statistics.”

**1. Amazon fails to meet its burden to establish that the Ground 2 teaches “maintain[ing] service level statistics for each library server in the list of library servers.”**

Independent claim 1 recites “*maintain[ing] service level statistics* for each library server in the list of library servers.” EX1001, 17:4-27. Leighton describes “a network architecture” for “hosting and content distribution.” EX1032, Abstract. Amazon points to Leighton’s network map to teach “maintain[ing] service level statistics.” Pet., 51-52. Leighton’s network maps describe how the system may contact a specific server. *See* EX1032, 10:1-11. Amazon does not explain how Leighton’s network maps “maintain service level statistics” as recited by claim 1. Because Leighton fails to disclose “maintaining service level statistics,” Amazon has failed to meet its burden. *See* 35 U.S.C. §312(a)(3) (a petition must “identif[y], in writing and *with particularity*, each claim challenged, the grounds on which the challenge to each claim is based, and *the evidence that supports the grounds for the challenge to each claim*” (emphasis added)).

In Ground 2A, Amazon argues that Leighton’s network maps teach “*maintain[ing] service level statistics* for each library server in the list of library servers.” Pet., 51-52. However, Leighton describes network maps as tools to help the top level DNS server determine how to route a user request. EX1032, 10:1-11. Network maps themselves do not maintain performance data on servers and instead provide a map for connections between servers. *Id.* Leighton describes how a top

level DNS server may “formulate[] the response based on the address according to a network map.” EX1032, 10:4-5. Amazon does not explain how Leighton’s network map “*maintains* service level statistics.” Pet., 51-52.

Moreover, Amazon relies on parts of Leighton that are not even related to the network map. For example, Amazon points to Leighton’s disclosure about how low level servers then use a “table lookup” to direct a user request to a server that is not overloaded. Pet., 52; EX1032, 11:35-37. However, the “table lookup” that Amazon references is different from the network map previously pointed to. The network map is used by the top level DNS server to map a user’s request through lower level servers. EX1032, 10:1-11. The low level servers then use a “table lookup,” which is described separately from the network map. EX1032, 10:54:61, 11:7-10. The low level servers do not use the network map to monitor the servers. Rather, the low level servers are described as internally monitoring other servers’ loads. EX1032, 11:35-37. Amazon does not acknowledge or address these distinctions.

Further, Amazon does not explain how Leighton’s server load information collected by the table lookup are “service level statistics.” *See* Pet., 52. Leighton’s “load” on each server is calculated “based on [the] number of user requests.” EX1032, 11:24-26, 11:42-44. Leighton’s “load” is not based on the historical performance of the server. In Leighton, current load information is based only on

projected conditions of the servers based on user requests. EX1032, 11:7-26, 11:41-49. Amazon does not explain how projected conditions meet the claimed “service level statistics” nor how Leighton’s network maps “maintains” any such information.

Therefore, Amazon fails to establish that Ground 2 teaches “maintain[ing] service level statistics for each library server in the list of library servers.”

**2. Amazon fails to meet its burden to establish how Ground 2 teaches “select[ing] a first library server from the list of library servers in dependence upon the service level statistics.”**

Similar to above, because Amazon argues without explanation or support that Leighton’s load information teaches “service level statistics,” Amazon also fails to establish how Ground 2 teaches “select[ing] a first library server from the list of library servers *in dependence upon* the service level statistics,” as recited in element 1[d][i].<sup>5</sup>

The Petition briefly addresses server-selection. Pet., 56. There it lists a number of discrete disclosures from Leighton. *Id.* But it does not explain how they relate to one another or how they relate to maintaining service level statistics. *Id.* Nor does it tie any of those to limitation addressing maintaining service level

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<sup>5</sup> Amazon does not rely on Ground 2B for claim element 1[d][i]. Pet., 58-61. Thus, Ground 2B is deficient for the same reasons as Ground 2A.

statistics. *Id.* Amazon thus does not explain how selecting a server based on the number of user request received, as in Leighton, allegedly teaches “select[ing] a first library server...in dependence upon the service level statistics.”

Therefore, Amazon fails to establish how Ground 2 teaches “select[ing] a first library server from the list of library servers in dependence upon the service level statistics.”

**E. Ground 1A-II: Amazon fails to meet its burden to establish how Ground 1 teaches “download[ing] a second other digital audio file from the second library server.”**

Independent claim 1 is challenged in both Grounds 1A and 1B. Each primarily relies on Young. Pet., 5. In both grounds, Amazon relies primarily on Young as allegedly teaching claim element 1[g] (“download a second other digital audio file from the second library server”). Pet., 22-23.

Claim element 1[g] recites “download[ing] a *second other* digital audio file from the second library server.” EX1001, 17:20-21 (emphasis added). The ’740 patent describes a system that enables a user “to download a small digital audio file” and, after playing the small digital audio file, “to download ... the logical next small digital audio file.” EX1001, 7:54-61.

Amazon argues Young teaches “download[ing] a *second other digital audio file* from the second library server” because Young discloses downloading a second portion of the same file from a second server. Pet., 22-23. In Young, the

“second portion” of a single file is downloaded only in response to that file’s download being interrupted. EX1008, 2:7-10, 4:48-54. Young specifically sets out to describe how “identical or contiguous portions of a file are downloaded from different servers.” EX1008, Abstract (emphasis added). Amazon then merely concludes, without any explanation or support, that it would be obvious to a POSITA that “identical or contiguous portions” are equivalent to *separate audio files*. Pet., 23. And it simply provides conclusory assertions, citing to the reference without any additional explanation. Pet., 22-23.

The addition of Yoshimura in Ground 1B does not remedy the deficiencies of Ground 1A. Amazon asserts it would have been obvious based on Yoshimura’s teachings that Young’s file would be a segmented audio stream stored as a plurality of audio files, Pet., 28, but provides no explanation of *how* this teaching would be implemented in Young to arrive at the claimed invention—or why a POSITA would have sought to do so. *See* Pet., 27-29.

Therefore, Amazon fails to establish how Ground 1 teaches “download[ing] a second other digital audio file from the second library server.”

**F. Amazon gives the dependent claims short shrift.**

Making matters worse, Amazon’s analysis for many of the dependent claims is completely lacking, providing only perfunctory discussion and ignoring much of the claim language. Patent Owner provides a non-exhaustive list of examples here.

For several dependent claims, the Petition provides little to no independent analysis, simply referring back to prior discussion provided in connection with the independent claims, to other dependent claims, or to grounds based on combinations with different primary references. *See* Pet., 43 (grounds 1F and 1G, claim 3-4, respectively), 63 (ground 2B, claim 6), 66 (ground 2E, claim 18), 66 (ground 2F, claim 3), 67 (ground 2G, claim 4). “The presence of a particular limitation in a dependent claim raises a presumption that the limitation in question is not found in the independent claim.” *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 806 (Fed. Cir. 2007) (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004)). But Amazon provides little to no additional explanation for these dependent claims. It is Amazon’s burden to show each element of the claim is taught or suggested in the prior art and they have not done so here.

**IV. THIS PETITION SHOULD BE DENIED AS AN UNNECESSARY PARALLEL PETITION.**

**A. Amazon’s alleged reasons for the parallel petitions is insufficient.**

The instant Petition is the second petition filed by Amazon challenging the ’740 patent. *See* Pet., 76-77 (identifying IPR2025-00765). Amazon has ranked the concurrently-filed petition in IPR2025-00765 first. Pet., 77. The Petition here should be denied as an unnecessary parallel petition.

The Board's Trial Practice Guide recognizes:

Based on the Board's experience, *one petition should be sufficient* to challenge the claims of a patent in most situations. Two or more petitions filed against the same patent at or about the same time (e.g., before the first preliminary response by the patent owner) may place a substantial and unnecessary burden on the Board and the patent owner and could raise fairness, timing, and efficiency concerns. See 35 U.S.C. § 316(b). In addition, *multiple petitions by a petitioner are not necessary in the vast majority of cases.*

Patent Trial and Appeal Board Consolidated Trial Practice Guide, November 2019, 59 (Nov. 20, 2019)<sup>6</sup> ("CTPG") (emphasis added); *see also Comcast Cable Commc 'ns, LLC v. Entropic Commc 'ns, LLC*, IPR2025-00183, Paper 11 at 2 (P.T.A.B. June 25, 2025) (Acting Director Stewart) (denying institution and indicating "[n]otably, the practice of the same party filing multiple petitions challenging the same patent, as Petitioner has done here ... is disfavored").

According to Amazon, a second petition was necessary to "challenge different claims" that "are directed to different subject matter." Pet., 76. Amazon asserts that "[e]ach petition addresses one lengthy independent claim (and its dependents)," and that "[e]ach petition is based on different prior art references." *Id.* But there is no reason that Amazon could not have challenged all claims of the

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<sup>6</sup> Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

'740 patent in a single petition. The '740 patent contains only 18 claims, spanning barely more than one page. *See* EX1001, 17:3-19:14. The prior Board cases that Amazon cited in support of having two petitions for patents having lengthy claims are distinguishable. In *Align Tech., Inc. v. 3Shape A/S*, IPR2021-01309, Paper 11 (P.T.A.B. Feb. 9, 2022), the challenged patent included *51 claims*, spanning nearly three full pages. Likewise, in *Samsung Elecs. Co., Ltd. v. Mojo Mobility Inc.*, IPR2023-01089, Paper 11 (P.T.A.B. Jan. 11, 2024), the challenged patent included *30 claims*, also spanning nearly three full pages. The '740 patent's claims are nowhere near as extensive. Amazon provides no other justification that necessitates a second petition here. This Petition should be denied.

**B. The Board panel has authority to deny a parallel petition challenging the same patent.**

When, as here, multiple parallel petitions are filed by a petitioner challenging the same patent, the current Trial Practice Guide provides patent owner the right to respond, in its preliminary response or in a separate paper filed with the preliminary response, “and explain why the Board should not exercise its discretion to institute more than one petition (if it institutes at all).” CTPG, 60-61. This guidance has not been rescinded by the “Interim Processes for PTAB Workload Management” (the “Interim Processes Memo”). Indeed, the FAQs for Interim Processes for PTAB Workload Management (“FAQs”) provide for the Board panel to address discretionary considerations when authorized by the

Director and in certain circumstances. See EX2008, FAQ9.

The panel has such authority here to not institute a second petition when Amazon fails to show cause on why multiple petitions are necessary. In particular, the authority to deny a second parallel petition has been provided to the panel pursuant to the direction and authorization provided in the CTPG—issued under the Director’s authority and not rescinded under the Interim Processes Memo—to consider Amazon’s ranking “on why the Board should exercise its discretion to institute additional petitions if it identifies one petition that satisfies petitioner’s burden” and Audio Pod’s response thereto.<sup>7</sup> See CTPG, 60-61. Similar to considerations on whether a petition presents an insufficient number of challenges that meet the reasonable likelihood standard (discussed in FAQ9), it is also necessary and appropriate for the Board panel to consider whether a second petition should be instituted if it determines to institute on one of the petitions.

Because Amazon has not shown good cause (or indeed any real cause) for its multiple petitions, this Petition should be denied if the -765 IPR is instituted.

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<sup>7</sup> To the extent it is ambiguous that the authority is provided in the CTPG, should this Petition be referred to a merits panel, Audio Pod requests the Director provide explicit authority. See Paper 8, 20 n.8 (Audio Pod’s request to the Director to consider the POPR).

## V. CONSERVATION OF RESOURCES

If the Board finds that Amazon fails to meet its burden for less than all of the challenged claims and/or proposed grounds, the Board should deny the institution to conserve resources.

Audio Pod identifies numerous deficiencies in Amazon’s arguments in the discussion above. Should the Board determine that Amazon met its burden for some claims or Grounds, but failed to meet its burden for other claims or Grounds, the Board should still deny institution to conserve the Board’s valuable resources. *See* Interim Processes for PTAB Workload Management Memorandum (March 26, 2025) (“March 26, 2025 Memo”), 3; *Chevron Oronite Co. v. Infineum USA L.P.*, IPR2018-00923, Paper 9 at 10–11 (P.T.A.B. Nov. 7, 2018) (informative); *Deeper, UAB v. Vexilar, Inc.*, IPR2018-01310, Paper 7 (PTAB Jan. 24, 2019) (informative); *see also* EX2008, FAQ9 (Board panel may address discretionary considerations “where the petition presents an insufficient number of challenges that meet the reasonable likelihood standard indicating that institution is an inefficient use of resources, as explained in” *Chevron* and *Deeper*), FAQ11.

Pursuant to 35 U.S.C. § 314(a), an *inter partes* review may not be instituted “unless ... the information presented in the petition ... and any response ... shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” But even when a petitioner

demonstrates a reasonable likelihood of prevailing with respect to one or more claims, institution of review remains discretionary. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“[Section] 314(a) invests the Director with discretion on the question whether to institute review ....” (emphasis omitted)); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he PTO is permitted, but never compelled, to institute an IPR proceeding.”). 35 U.S.C. § 316(b) also provides that, when determining whether to exercise its discretion, the Board should consider the effect of any regulations on “the efficient administration of the Office [and] the ability of the Office to timely complete proceedings.”

Additionally, 37 C.F.R. § 42.1(b) provides that the Board should also take into account the requirement to construe the rules to “secure the just, speedy, and inexpensive resolution of every proceeding.” The Trial Practice Guide also explains that the Board may consider the number of claims and grounds that meet and do not meet the reasonable likelihood standard when deciding whether to institute *inter partes* review under 35 U.S.C. § 314(a). CTPG, 64 (“[T]he panel will evaluate all the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system, the entire petition should be denied.”).

Here, should the Board determine that Amazon failed to meet its burden of establishing unpatentability for some but fewer than all of the challenged claims of

the '740 patent as discussed in Section III, the Petition should still be denied in order to conserve the Board's valuable time and resources. March 26, 2025 Memo, 3; *Deeper*, IPR2018-01310, Paper 7 at 43 (finding that because petitioner only demonstrated a reasonable likelihood of prevailing with respect to a subset of the 23 challenged claims, "instituting a trial with respect to all twenty-three claims ... would not be an efficient use of the Board's time and resources."). Similarly, should the Board determine that Amazon has failed to meet its burden of establishing unpatentability for some but not all grounds, the Petition should again be denied in order to conserve the Board's valuable time and resources. March 26, 2025 Memo, 3; CTPG, 64; 35 U.S.C. § 316(b); 37 C.F.R. § 42.1(b).

## **VI. CONCLUSION**

The Petition fails to show a reasonable likelihood that any of the challenged claims is unpatentable as obvious in view of the cited art and, therefore, the Board should deny institution.

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT (37 C.F.R. § 42.24(d))**

1. This Patent Owner Preliminary Response complies with the type-volume limitation of 14,000 words, comprising 7,998 words, excluding the parts exempted by 37 C.F.R. § 42.24(a)(1).

2. This Patent Owner Preliminary Response complies with the general format requirements of 37 C.F.R. § 42.6(a) and has been prepared using Microsoft® Word 2016 in 14-point Times New Roman font.

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

I certify that the above-captioned **PATENT OWNER PRELIMINARY RESPONSE UNDER 37 C.F.R. § 42.107(a)** was served in its entirety on July 16, 2025, upon the following parties via electronic mail:

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