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FIRSTFACE CO., LTD.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FIRSTFACE CO., LTD., Plaintiff, v. APPLE INC., Defendant.	CASE NO. 3:18-cv-02245-JD **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I. SUMMARY JUDGMENT ON THE POWER BUTTON LIMITATIONS.

Apple fails to rebut Firstface's showing that the accused products practice the power button limitations. Instead of addressing the merits, Apple argues Firstface waived every possible theory of how its products could practice the power button limitations. Firstface has waived nothing. But the Court need not wade into these arguments. The undisputed evidence shows that Apple successfully argued to the PTAB that a device with a button identical to the accused products' power button meets the power button limitations. This estops Apple from maintaining that the accused products do not satisfy the power button limitations. The Court should grant partial summary judgment on this basis alone.

A. Judicial Estoppel Bars Apple from Disputing Infringement of These Limitations.

Apple's arguments that judicial estoppel does not apply are based on misrepresentations of the PTAB record. Apple first argues that its position on the power button limitations is consistent with its position in the IPRs because, "[b]efore the PTAB, Apple explained that Firstface's own infringement theories, if accepted, also showed invalidity." ECF 257 at 9. Apple provides the Court with a side-by-side comparison of Firstface's infringement contentions with one of Apple's IPR petitions, and argues that "[b]y pointing to Firstface's infringement theories, Apple did not concede them." *Id.* But Apple did not mention Firstface's infringement theories before the PTAB, let alone state that its arguments were based on them. The side-by-side comparison in Apple's response does not appear anywhere in the record before the PTAB. Nor do Firstface's infringement contentions. Apple argued, without reservation, that the "sleep/wake button" in the iOS 3.1 User Guide, which functioned exactly like the Accused Products, met the power button limitations. ECF 241-6 at 30-31, 66-67; ECF 241-7 at 28, 66. Apple's attempt to run from that argument smacks of the very opportunism that judicial estoppel is meant to preclude.

Second, Apple argues that it "did not persuade the PTAB to take a position regarding the 'On/Off' limitation" because "the prior art's satisfaction of that limitation was not at issue in the IPR." ECF 257. Apple does not (and cannot) dispute that the Board found that the iOS 3.1 User Guide discloses "a power button configured to turn on *and* off the terminal by pressing" because it describes "an additional 'Sleep/Wake' button that turns the power on and off." ECF 241-8 at 17-18; ECF 241-9 at 21, 54. It does not matter that Firstface did not dispute that the iOS 3.1 User Guide discloses the power button limitations—judicial estoppel does not require that an issue was contested. *See Baughman v. Walt Disney*

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