Filed: June 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

MEMORYWEB, LLC,
Patent Owner.

Case No. IPR2022-00031
U.S. Patent No. 10,621,228

PETITIONER'S OPENING BRIEF IN RESPONSE TO CONDUCT OF THE PROCEEDING ORDER (PAPER 45)

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I. INTRODUCTION

There is no real-party-in-interest ("RPI") relationship between Apple Inc. ("Apple") and Unified Patents ("Unified"). That issue is not before the Board here, and the Board need not reach it.[1] The reason is simple: MemoryWeb has waived and/or forfeited its ability to raise an RPI issue in this proceeding, or to allege estoppel under 35 U.S.C. § 315(e)(1) based on an RPI issue.

MemoryWeb intentionally chose to not assert in this proceeding that there is an RPI relationship between Apple and Unified in challenging U.S. Patent No. 10,621,228 ("the '228 patent") until ***after*** this proceeding had been submitted for decision by the Board in ***March of 2023.*** EX1093, 10. MemoryWeb also cannot deny it could have raised its RPI assertions earlier: it did so in IPR2021-01413 ("*Unified*") in ***December of 2021*** and did so again in IPR2022-00222 ("*Samsung*") in ***March of 2022***. *See Unified*, Paper 8, 22-28 (Dec. 17, 2021); *Samsung*, Paper 8, 30-31 (Mar. 16, 2022).

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[1] Apple is not addressing MemoryWeb's incorrect assertion that Apple is an RPI of Unified in *Unified* in this brief. That issue would be relevant only if the Board authorizes briefing on the RPI and estoppel issues, which it has not at this stage. *See IPR2022-00031* ("*Apple*"), Paper 45, Ex. 3005. Apple expressly reserves its position on that issue.

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MemoryWeb likewise chose not to assert in this proceeding, at any time before it was submitted for decision, that Apple should be estopped under 35 U.S.C. § 315(e)(1) because of a supposed RPI relationship between Apple and Unified. Again, nothing prevented MemoryWeb from making this assertion earlier: it did so in *Unified* starting in ***June of 2022***, and it made a parallel assertion in ***September of 2022*** in *Samsung*.

MemoryWeb thus ***intentionally*** chose to not raise either an RPI or a § 315(e)(1) estoppel issue in this proceeding before it was submitted to the panel for decision, as evidenced by its actions in both of the other proceedings concerning the '228 patent. MemoryWeb now seeks to improperly capitalize on its own intentional delay.

The Board should not tolerate this gamesmanship. MemoryWeb's intentional delay in raising both issues has prejudiced Apple and wasted resources of both the Board and the parties. Had MemoryWeb timely raised the RPI issue after it first believed one existed (*i.e.*, which it did in ***2021*** when it asserted its RPI issue in *Unified*), Apple could have sought to align the schedules of this proceeding with *Unified*, thereby eliminating the possibility of estoppel under § 315(e)(1). Now that the Final Written Decision ("FWD") in *Unified* has issued, however, Apple cannot do that.

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Forfeiture and/or waiver[2] is the proper consequence of MemoryWeb's dilatory and prejudicial conduct. Specifically, the Board should find that, at this stage of the proceeding, MemoryWeb has waived and/or forfeited its ability to raise a new RPI issue or to seek estoppel under § 315(e)(1) in this proceeding.

First, MemoryWeb has waived and/or forfeited its ability to raise an RPI issue now. As the Director observed in its recent order, the proper proceeding for MemoryWeb to have raised an RPI issue was this one, not *Unified*. *Unified*, Paper 76, 5 (May 22, 2023). And as the Board has consistently held in other cases, the

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[2] Apple refers to issues as "forfeited and/or waived" throughout this brief. Generally speaking, "forfeiture is the failure to make the timely assertion of a right, [and] waiver is the 'intentional relinquishment or abandonment of a known right.'" *See*, *e.g.*, *In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020). The Federal Circuit and the Board, however, have used the terms "forfeiture" and "waiver" interchangeably. *Id.* (observing that the Court has "seemingly … used the terms interchangeably at times" and that the Court "mainly uses the term 'waiver' when applying the doctrine of 'forfeiture.'"). See also FN4, *infra*. The Board's interchangeable use of the words shows that nothing should turn on the distinction here.

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