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1 UNITED STATES PATENT AND TRADEMARK OFFICE
 2 _____
 3 BEFORE THE PATENT TRIAL AND APPEAL BOARD
 4 _____
 5 APPLE INC.,
 6 Petitioner,
 7 v.
 8 RFCYBER CORP.,
 9 Patent Owner.
 10 _____
 11 Inter Partes Review Case No. IPR2022-00412, -00413
 12 U.S. Patent No. 9,189,787
 13 IPR HEARING
 14 MAY 19, 2022
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 5 APPLE INC.,
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 7 v.
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 9 Patent Owner.
 10 _____
 11 REMOTE TELECONFERENCE IPR HEARING taken on
 12 MAY 19, 2022, between the hours of two o'clock in the
 13 afternoon and three o'clock in the afternoon of that
 14 day, taken remotely with all parties attending from
 15 various locations via teleconference, before Penny J.
 16 Mullen, a Certified Court Reporter (MO #808), within
 17 and for the State of Missouri, in a certain cause now
 18 pending in the United States Patent and Trademark
 19 Office, Before the Patent Trial and Appeal Board
 20 between APPLE INC., Petitioner, vs. RFCYBER CORP.,
 21 Patent Owner; on behalf of the Petitioner.
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 24
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 7 EXHIBITS
 8
 9 (None marked or identified.)
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1 APPEARANCES
 2
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 20
 21
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1 IT IS HEREBY STIPULATED AND AGREED by and
 2 between counsel for the Petitioner and counsel for the
 3 Patent Owner that this hearing may be taken in
 4 shorthand by Penny J. Mullen, a Certified Court
 5 Reporter, and afterwards transcribed into typewriting.
 6 * * * * *

7 INTER PARTES REVIEW HEARING
 8 (Starting time of the hearing: 2:00 PM.)
 9 * * * * *

10 THE COURT: Good afternoon, everyone. This
 11 is Judge Cherry. With me on the line are co-panelists
 12 Scanlon and Turner. Would the parties please make
 13 your appearances.

14 MR. SEITZ: Good afternoon, Your Honor.
 15 This is Adam Seitz for Petitioner Apple. With me also
 16 is my partner, Paul Hart. And I also asked for a
 17 court reporter to take this down who is on the phone
 18 as well.

19 THE COURT: Thank you very much. Would the
 20 Patent Owner representative like to introduce
 21 yourself?

22 MR. COWELL: Good afternoon, Your Honor.
 23 This is Richard Cowell on behalf of the Patent Owner,
 24 RFCyber.

25 THE COURT: Would you like to make your

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1 So now I'm left in a little bit of a lurch
 2 on procedurally what happens to our Motions For
 3 Joiner. I don't know whether the underlying Samsung
 4 proceedings were meant to have been terminated only as
 5 to Petitioner Samsung, or if those entire proceedings
 6 have been terminated.

7 And if that's the case, it leaves me in
 8 just a little bit of a question as to what happens to
 9 our pending proceedings which, Your Honor, were filed
 10 as substantively identical copycat proceedings to
 11 Samsung's Petition proceedings seeking to joiner.

12 So I had a secondary request that really is
 13 contingent on the answer to the first question, that
 14 would be to address by way of a reply and potential
 15 supplemental declaration to arguments that were made,
 16 because my hands were tied in filing a copycat
 17 petition.

18 But before I get into that, I did want to
 19 address just a confusion that was procedurally for
 20 what we do with the posture of our Petition which
 21 specifically sought to joint Samsung's proceedings
 22 which have now been terminated.

23 THE COURT: Well, I think I can answer that
 24 question. I mean those proceedings were terminated.
 25 My understanding, though, is that neither of these two

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1 request? Let us know exactly what you want to do.
 2 MR. SEITZ: Thank you, Your Honor. The
 3 Petitions that Apple filed, the 00412 and 00413
 4 proceedings, both of them were copycat substantively
 5 identical proceedings that have sought to join
 6 Samsung's Petitions, the 2021-980 and -981
 7 proceedings.

8 We filed a Motion For Joiner within the
 9 appropriate timeframe. There has been oppositions to
 10 those Motions for Joiner after the opposition and the
 11 reply brief was set in motion. The Motion For Joiner
 12 was fully briefed.

13 The Motion to Terminate was filed and then
 14 in April the board terminated the -- the board
 15 terminated both of the proceedings to which we sought
 16 to join.

17 This caused a small amount of confusion on
 18 my end, Your Honor. Looking through your precedent, I
 19 understand the termination of proceedings was
 20 discretionary. But looking through the precedent, it
 21 appears that the board typically would dismiss either
 22 the Petitioner only or holding the decision on
 23 termination of the proceeding that is sought to be
 24 joined so that the underlying Motion For Joiner be
 25 addressed.

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1 Petitions, the 00412 or the 00413, are barred under
 2 the, what is the section, Section 315B. So in that
 3 case, then, I think that the Petition would just
 4 proceed normally to an institution decision.

5 MR. SEITZ: I may have to ask for a
 6 clarification on that, Your Honor.

7 THE COURT: Sure.

8 MR. SEITZ: That certainly is correct.
 9 We're not barred and if that's how you're proceeding,
 10 I understand that. But my confusion, rather, arose
 11 from the precedent that's out there.

12 In this instance we filed a copycat
 13 Petition seeking to join which was substantively
 14 identical to that which Samsung filed to obviously to
 15 take an understudy role. We can't raise any
 16 objections. We can use substantive arguments.

17 We have the patent now where RFCyber has
 18 sought to raise a new argument in its patent under
 19 preliminary response that we could not have addressed
 20 in any way, shape or form in our original Petition
 21 because of descriptions on the understudy role in
 22 filing a copycat Petition.

23 So if this proceeding is going to proceed
 24 as normal now, I would like permission to file a reply
 25 that addresses those new arguments that I would have

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1 been precluded in raising otherwise in the context of
2 a copycat Joiner Petition.
3 THE COURT: Well, I mean there's nothing
4 that restricts the Patent Owner from filing new
5 arguments even though the Joiner Petition makes no --
6 it still proceeds with them filing a preliminary
7 response; right?
8 MR. SEITZ: I don't disagree with that
9 point, Your Honor. I'm just saying procedurally I
10 could have prejudiced my client to file a Petition for
11 Joiner that seeks to state substantively identical to
12 what was done by Samsung. New arguments have been
13 raised, but they don't disagree that RFCyber has the
14 right to raise an argument.
15 I'm just asking for an ability to cure that
16 prejudice now, because in the underlying proceeding to
17 terminate, there's new arguments that have never been
18 raised in either one and that I was precluded from
19 raising in my original one. So I was asking for the
20 right to address those new arguments.
21 THE COURT: I just don't see how that's any
22 different than any other Petition. I mean we don't
23 grant petitions -- there has to be good cause. How is
24 that good cause?
25 MR. SEITZ: The good cause here, Your

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1 Honor, is that if I had filed my own Petition that did
2 not seek to join another party's Petition, I certainly
3 could have addressed every argument that I think the
4 Patent Owner would have raised, and I would be held to
5 that. That is absolutely right.
6 But here, we filed a Motion to Join and
7 filed a copycat Petition. I sought to join as an
8 understudy role. That meant that I was precluded from
9 adding any new substantive arguments.
10 I could not have addressed any arguments
11 that the Patent Owner may have raised, because I was
12 restricted to raising only the issues that were raised
13 in Samsung's Petition. So that's a different
14 (unintelligible).
15 THE COURT: What specifically are you
16 intending is the new argument that could be responded
17 to?
18 MR. SEITZ: Your Honor, on that point, if I
19 may defer to my partner, Paul Hart, I believe he may
20 have those substantive arguments in front of him, if
21 you give me just the ability to do that. I may have
22 lost him, Your Honor.
23 MR. HART: I am here. I'm just pulling it
24 up. There are new arguments in the 009 patent proffer
25 that were not raised in Samsung's proffer that the

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1 board did not address related to the claims' secure
2 element.
3 And there are also arguments in that 009
4 patent proceeding related to eliminating the combined
5 and related to the standard comments about the
6 standards in the base reference.
7 Those are two sets of arguments that were
8 not raised in Samsung's proffer that the board did not
9 consider in Samsung's (unintelligible) but that had
10 advanced in the 009 patent proffer against us for
11 which we have not yet had an opportunity to respond.
12 Obviously, those are arguments that had we
13 been joined to an active proceeding, we could have
14 addressed in our patent reply and entered supplemental
15 expert declaration. But because we joined via copycat
16 petitions, we had no ability to address them up front.
17 Similarly, in the 77 patent proceedings
18 there is an argument about the claim language for,
19 quote, getting the fund stored in the emulator, end
20 quote, related to E-post transactions that are the
21 subject of those claims.
22 That is another argument, another
23 substantive argument patent related (unintelligible)
24 called a heater that was not advanced to the proffer
25 in Samsung, and so the board has not considered or had

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1 an opportunity to address.
2 THE COURT: I mean, I guess so if we
3 decided to (unintelligible) you would be able to
4 respond to those, right?
5 MR. SEITZ: Absolutely, Your Honor; yes.
6 THE COURT: But we don't normally grant
7 discretions because Patent Owner already raised
8 arguments about, I mean, about the claims and about
9 the motivation to bind. We don't normally in normal
10 situations grant replies to preliminary response; do
11 we? Have you identified any?
12 MR. HART: No. We don't normally seek to
13 file preliminary replies on substantive arguments.
14 We've never been placed in the current situation where
15 we asked to join an existing active proceeding and
16 could have addressed in a substantive argument in a
17 Petitioner reply through a supplemental declaration.
18 So here we're kind of put in a tough spot
19 where we could not address any argument because it's a
20 copycat. We (unintelligible) Patent Owner to present
21 to you to deny instituting identical grounds that were
22 previously instituted which would deprive us of the
23 opportunity to address these arguments in a Petitioner
24 reply and supplemental expert declaration.
25 THE COURT: Okay. That doesn't really

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1 answer my question. But let's listen to the Patent
2 Owner.
3 MR. COWELL: Your Honor, this is Richard
4 Cowell on behalf of the Patent Owner. We believe
5 Apple's request needs to be denied, because they have
6 not shown good cause and can't show good cause.
7 As Your Honor said, I think several times,
8 this has always been the case or is often the case
9 that a Petitioner raises the Petition and then a
10 Patent Owner may listen to argument. And if the
11 Petition doesn't have the information to overcome that
12 argument, then that Petition shouldn't be instituted
13 such as Apple's Petition.
14 I understand they're saying the copycat
15 Petition, but that was their strategic choice and
16 they're bound by that choice. Case law is very clear
17 that, you know, the IPR proceeding is defined by the
18 content of that Petition.
19 And what Apple is seeking to do here -- and
20 they're calling it a reply, but it's actually a
21 supplement -- they want to add new arguments and they
22 want to add new evidence in the form of a declaration.
23 That's just not contemplated by the rules,
24 and I don't think it's covered by the rules. Apple
25 could have addressed -- they're saying, no, we didn't

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1 have any opportunity; our hands have been tied to
2 address the arguments that Patent Owners have made in
3 this IPR.
4 But again, they certainly could have done
5 that. They chose to limit the Petition to the exact
6 grounds that Samsung did. And they were not forced to
7 do that.
8 They had the opportunity to respond to
9 these arguments that they had and could have done so.
10 So we think there is no good cause. And this is the
11 same as every other case when there's a Petition, and
12 it has to stand or fall on its own merits. And a
13 reply is generally not granted to respond to
14 substantive arguments.
15 And I further note that allowing us to
16 claim declaration certainly is an end around word
17 limits in the Petition, because now they're putting in
18 substantively new arguments, substantively new
19 evidence that if instituted would raise practical
20 problems.
21 Would those be considered part of the
22 Petition a Patent Owner needs to respond to on its POR
23 or are they some sort of nebulous problem? Briefly
24 that's -- so for all those reasons, there was no good
25 cause, and we ask that the request be denied.

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1 THE COURT: Okay. Do you have anything
2 else you would want to say? And I have one question
3 for you, Apple counsel.
4 MR. SEITZ: Yes, Your Honor.
5 THE COURT: Are you still within the
6 one-year time limit?
7 MR. SEITZ: I believe so, Your Honor. I
8 should have pulled up the dockets. But I believe the
9 answer to that is yes. If you give me a moment, I can
10 pull up the docket very quickly.
11 MR. HART: I can confirm that we are within
12 our one-year limit.
13 THE COURT: And I guess the other question
14 is, I mean, were you aware of these arguments when you
15 filed your copycat Petition?
16 MR. SEITZ: No. These arguments had not
17 been raised in the POPR and Samsung's Petition, and
18 had not been raised after institution of the Samsung
19 proceedings, either.
20 THE COURT: Okay. I mean let me talk to my
21 co-panelists. Let me mute for a minute while I speak
22 with them and I'll get back to you.
23 (WHEREIN, a recess was taken.)
24 THE COURT: Counsel, are you there?
25 MR. SEITZ: Yes, Your Honor.

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1 MR. COWELL: Patent Owner is here, Your
2 Honor.
3 THE COURT: We are going to take it under
4 advisement. But I would say that we're unlikely to
5 grant this request, because, I mean, there's no normal
6 requirement that we grant a reply. There has to be
7 good cause shown.
8 You know, Patent Owner is free to make any
9 arguments in opposition to a Joiner Petition, and a
10 Joiner Petition does not necessarily limit their
11 argument that they can raise.
12 I have had a number of cases where the
13 Patent Owner raises completely different arguments,
14 and the Patent Owner preliminarily responds to the
15 Joiner Petition. So I don't think this is that
16 unusual of a situation as you're suggesting, Mr.
17 Seitz.
18 The other issue, I mean, there's always the
19 opportunity for you to withdraw your Petition and
20 refile a Petition that is more to your liking.
21 Also, you know, we haven't even considered
22 your Petition yet, so it may be instituted; it may not
23 be. I mean, so I think any ruling -- and if we
24 institute, you will have the opportunity to respond to
25 all these arguments in your reply.

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1 So I think that those are what's weighing
2 on our consideration. But we would like to have the
3 parties file the transcript with the board and we'll
4 issue an order after we receive the transcript.
5 MR. SEITZ: Your Honor, may I ask a
6 question? This is a sidetrack, if that's okay.
7 THE COURT: Of course.
8 MR. SEITZ: So in the event where if we
9 were to, for example, withdraw our Petition like you
10 noted, my concern would be the gotcha case that has
11 now arisen here with the board's ability to deny under
12 General Plastics.
13 Like I anticipate that the Patent Owner
14 would argue that we would join additionally after
15 seeing substantive arguments and that should then be,
16 the subsequent Petition, should be subject to either
17 discretionary denial or under General Plastic.
18 I mean I think that same issue applies if
19 the board were to deny based on arguments that we
20 could not have raised because of the posture of the
21 Joiner Motion.
22 If, for example, relying on the new
23 arguments, if I were to attempt to file a second
24 Petition, I also could envision a Patent Owner arguing
25 that General Plastics would bar that scenario as well,

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1 which is part of the prejudice that I'm referring to
2 here which is why I believe there is good cause.
3 I think this has put us behind, put
4 Petitioner Apple in a darned-if-you-do,
5 darned-if-you-don't scenario if you're given a
6 discretionary denial of claims that General Plastics
7 with any sort of follow-on petitions or withdrawal of
8 Petition or follow-on Petition.
9 THE COURT: I mean I can't issue rulings on
10 things that haven't happened yet. You know, I think
11 that those are all considerations for you and your
12 client to deal with. I can't give advice or any
13 rulings.
14 MR. SEITZ: I understand, Your Honor. I
15 wanted the prejudice that Apple is going to be subject
16 to in the event of a denial, the arguments to be clear
17 on the record.
18 THE COURT: No, I understand that. But I
19 would like to note that that same kind of prejudice
20 exists in every single Petition where the Patent Owner
21 raises arguments in a preliminary response, but we
22 don't grant replies as a matter of course.
23 So I think that that's the way the game is
24 played here. So I think that's, you know, I don't see
25 how this situation differs that much from any other

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1 situation.
2 MR. SEITZ: I understand, Your Honor. And
3 I've stated my point, that the only difference here is
4 the point of context and we have not found a single
5 case at all that was given this exact procedural
6 context.
7 So in that regard it's unique, but I
8 certainly understand what you're saying with regards
9 to the routine practice. And that's all I have to
10 say.
11 MR. COWELL: Your Honor, may I say
12 something?
13 THE COURT: Sure.
14 MR. COWELL: Your Honor, I just want to put
15 on the record as to Mr. Seitz's prejudice to
16 adherence. Here it's caused by its own choice,
17 strategic choice made freely to file a copycat
18 Petition rather than a conventional Petition.
19 And I would note that we cite in the case
20 in our opposition to Apple's Motion For Joiner where a
21 Motion For Joiner was made, the underlying original
22 Petition was terminated, and then the board went on to
23 evaluate the new joiner Petition on its own merits.
24 And that's IPR2020-108.
25 THE COURT: Okay. Thank you very much.

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1 Anything else you wish to raise?
2 MR. SEITZ: No, Your Honor.
3 MR. COWELL: Nothing for Patent Owner, Your
4 Honor.
5 THE COURT: We have no other questions, and
6 I thank the parties for their agreeing to this call.
7 MR. SEITZ: Thank you, Your Honor.
8 COURT REPORTER: Okay. So Adam, what would
9 you like me to do with this? Are you on the phone,
10 Adam? Is anyone there?
11 (WHEREIN, the hearing was concluded at 2:20
12 PM.)
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