UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.
Petitioner

v.

CPC PATENT TECHNOLOGIES PTY, LTD.
Patent Owner

IPR2022-00601
Patent No. 9,269,208

REPLY BRIEF OF PETITIONER APPLE INC.
TO PATENT OWNER PRELIMINARY RESPONSE

Pursuant to the Board's email dated July 29, 2022, Petitioner files this Reply to the Patent Owner's Preliminary Response ("POPR") (Paper 7).

I. THE *FINTIV* FACTORS FAVOR INSTITUTION

Due to developments in the District Court since the Petition was filed, along with Director Vidal's *Interim* Guidance, the *Fintiv* factors strongly favor institution.

A. Fintiv Should Not Be Applied Because There Is No Pending Litigation

CPC acknowledges that after the Petition was filed it "dismissed its infringement claim for the '208 Patent in the district court action." Reply, at 1. As the *Interim* Guidance makes clear, the precedential *Fintiv* case is to be used "***where there is parallel district court litigation***." *Interim* Guidance, at 1-2. Because there is no parallel district court litigation involving CPC and Apple on the '208 Patent, the Board need not conduct a *Fintiv* analysis.

The dismissal of the '208 Patent from the litigation also is not grounds for discretionary denial. CPC's withdrawal of the '208 Patent came through an email. Ex. 1081 (Email Withdrawing '208). CPC has not dismissed its allegations of infringement for the '208 Patent *with prejudice,* nor has it provided any covenant not to sue. Though it would be vigorously opposed, if the Board discretionarily denied, CPC could re-assert the '208 Patent and Apple would be precluded from filing another IPR due to the 1-year statutory bar. This is the very definition of gamesmanship and would significantly prejudice Apple.

B. The Board Should Not Analyze or Give Credence To CPC's Litigation With Third-Party HMD Under *Fintiv*

In the absence of district court litigation against Apple, CPC focuses its *Fintiv* analysis almost exclusively on its W.D.Tex litigation against third party HMD. For example, in *Fintiv* Factor 2, CPC argues exclusively about the expected trial date of its litigation against third-party HMD. POPR, at 6-8. Yet nothing in the *Fintiv* decision or the *Interim* Guidance suggests that reliance on a third-party trial date not involving the petitioner is a basis for discretionary denial. CPC fails to cite any authority for such an analysis. This is not surprising because it is highly prejudicial to petitioners. It would deprive petitioners of their ability to control how it chooses to challenge validity of patents, including the art, experts, and counsel. Instead, petitioners would be at the mercy of a third party's selection of art, counsel, experts, and forums. The Board should not adopt such a prejudicial application of *Fintiv* in this proceeding. But even if the Board were to improperly entertain the HMD trial date here, it does not compel discretionary denial.

CPC relies on the January 2023 trial date in the HMD litigation as the basis for discretionary denial. But as Director Vidal notes in the *Interim* Guidance, "scheduled trial dates are unreliable and often change." *Interim* Guidance, at 8. This is particularly true in the W.D.Tex. where 70% of trial dates change. Ex. 1068. Indeed, the *Fintiv* litigation upon which the Board's precedent was set *still* has not proceeded to trial. The June 21, 2022, trial date was, once again, continued and no

new trial date has been set. Ex. 1085 (Order continuing *Fintiv* trial). As for the HMD litigation upon which CPC relies, the trial date already has slipped. In the short time since the filing of CPC's POPR, the W.D.Tex. ordered the parties to submit an amended scheduling order extending the previously scheduled dates by "about four months." Ex. 1086 (CPC/HMD Order Extending Schedule). Thus, the January 2023 trial date is no longer valid, and no new trial date has been set.

Moreover, "additional supporting factors such as the number of cases before the judge in the parallel litigation" warrant against discretionary denial due to the HMD trial date. *Interim* Guidance, at 9. Judge Albright is presiding over the HMD litigation in the W.D.Tex. Recent statistics indicate a heavy load for Judge Albright: 793 patent cases were filed in his court in 2020, 932 cases were filed in 2021, and over 800 cases already have been filed in 2022. Ex. 1087 (J. Albright Statistics). As of July 25, Judge Albright had over 861 open patent cases and was responsible for *over 20% of all patent cases filed in the United States*. *Id.* And while cases filed in the Waco Division of the W.D.Tex. are now being randomly assigned to all W.D.Tex. judges, Judge Albright's pending caseload will continue to impact trial dates well into the future. Under Director Vidal's *Interim* Guidance, should the Board consider the proximity of third-party HMD's trial date (which already has moved once), the sheer volume of cases before Judge Albright suggests no weight should be given to the HMD trial date.

C. Factor 4 – CPC Asks the Board to Speculate that the HMD Trial Will Involve the Same Issues as this IPR

The '208 is no longer subject to district court litigation between Apple and CPC and, therefore, there will be no overlap between the Board's proceeding and Apple's litigation. Thus, CPC also asks the Board to speculate on what invalidity position HMD will present at trial (if it ever proceeds to trial). In its POPR, CPC argues with certainty that HMD's trial will present *Mathiassen/Anderson,* "the same prior art combination relied upon by Apple" in this IPR. POPR, at 10. However, it is entirely unclear what art actually will be presented at the HMD trial. CPC only provides "Exhibit B-**15** to HMD's Invalidity Contentions" (emphasis added). There are *at least* 14 other references charted and relied upon by HMD that were not identified to the Board by CPC, and possibly more. As for HMD's charting of Mathiassen, it relies on *eleven other references* as potential combinations that it may present for invalidating the '705 Patent. Ex. 2002, at 1-2. Charts B1-B14, which were not provided by CPC, presumably are similar, providing dozens (if not hundreds) of potential combinations HMD may use at trial. In advance of HMD's narrowing of its prior art references (a deadline previously set for September 28, but now extended), the Board can do nothing more than guess as to what references HMD may present at trial. It is likely that HMD itself does not know what prior art references and/or combinations it will actually present at trial, which is likely still a year away (at best).

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