

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**PATENT TRIAL AND APPEAL BOARD**

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APPLE INC.,  
Petitioner,

v.

CPC PATENT TECHNOLOGIES PTY, LTD.,  
Patent Owner.

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Case IPR2022-00602  
U.S. Patent No. 9,665,705

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**SUR-REPLY OF PATENT OWNER CPC PATENT  
TECHNOLOGIES PTY, LTD.**

## **I. *Fintiv* Factor 1**

CPC does not pretend to know whether a stay will issue in the separate district court proceeding against Apple, and neither does Apple. Nonetheless, Apple contends that the district court “now appears poised to grant Apple’s request.” Paper 8 at 1. The basis for this clairvoyance is the court’s decision to expedite oral argument on Apple’s stay motion. *See id.* Of course, the court could have done so already, foregoing oral argument. *See* N.D. Cal. R. 7-1(b) (“a motion may be determined without oral argument or by telephone conference call”). In any event, Apple fails to address the Board’s consistent resistance to speculation as to how courts will rule on stay motions, and the fact that HMD has not sought a stay in the co-pending litigation. *See* Paper 7 at 5. This factor is, at worst, neutral.

## **II. *Fintiv* Factor 2**

Apple challenges the applicability of the co-pending *HMD* litigation. Apple’s principal argument is that such consideration would deprive a “petitioner of its ability to control how it chooses to challenge validity of patents, including the art, experts, and counsel.” Paper 8 at 2. Apple, identifies no daylight between what HMD purports to argue about the cited art and what Apple argues in the instant Petition.

Further, Apple’s suggestion that it is somehow at the “mercy of” HMD, which is represented by a premier patent litigation firm in the district court action, is

specious. Apple’s reasoning would preclude the Board from ever denying institution based upon prior unsuccessful invalidity challenges by other parties simply because the newest challenger wants to take its own whack at invalidating the same patent. Apple’s suggestion that it *may* see something different about the prior art does not warrant ignoring the inefficiencies of having two different forums consider the same prior art combination.

Apple also takes CPC to task for referencing the scheduled trial date in the *HMD* litigation. *See* Paper 8 at 2. However, CPC also cites to the “median time-to-trial” in the Western District of Texas, which the *Interim* Guidance deems the most relevant metric related to this factor. *See* Paper 7 at 5-6. That time to trial is approximately two years from the filing of the complaint, which, in the co-pending *HMD* litigation, would mean a trial date in February 2023 – some seven months before any final written decision in this proceeding. *See id.*

And, after invoking the *Interim* Guidance on this issue, Apple proceeds to ignore it by citing to the actual trial date in a *single* case. *See* Paper 8 at 3, *citing* Ex. 1085 (Order continuing *Fintiv* trial). Apple also cites to a recent order in the *HMD* litigation “extending the previously scheduled dates by ‘about four months.’” *Id.*, *citing* Ex. 1086. Apart from being inapplicable to the median time-to-trial in the Western District of Texas, this single-case extension still results in a trial scheduled to take place some four months before a written decision in this case.

Apple also cites to a litany of statistics regarding Judge Albright’s docket without any explanation as to how those statistics impact the median time-to-trial in the Western District of Texas. *See Interim Guidance* at 9 (“[w]here the parties rely on *time-to-trial statistics*, the PTAB will also consider additional supporting factors such as the number of cases before the judge in the parallel litigation . . .” (emphasis added)). In any event, Apple argues only that Judge Albright’s statistics suggest “no weight should be given to the HMD trial date.” Paper 8 at 4. Even so, Apple cannot dispute that the median time-to-trial in the Western District of Texas is well before the scheduled final written decision in the instant proceedings.

### III. *Fintiv* Factor 4

Apple characterizes CPC’s position regarding the *HMD* litigation as being dependent upon “speculation” regarding whether HMD will actually assert the subject prior art combination at trial. Paper 8 at 4. It is indeed Apple that speculates that HMD will jettison before trial the sole prior art combination upon which Apple chose to rely in this proceeding, implying somehow that better prior art combinations are out there, but Apple did not find them, or opted not to rely on them in this proceeding.

Further, Apple points out that HMD has relied on “at least 14 other references,” including 11 other references as “potential combinations” with *Mathiassen*, resulting in “dozens (if not hundreds) of potential combinations.” Paper

8 at 4. This, in fact, proves CPC’s case with regard to *Fintiv* factor 4. Apple, in its own district court action, has asserted 23 different grounds each for alleged anticipation and obviousness, the vast majority of which do not involve the prior art Apple cites in this Petition. *See* Paper 7 at 10. Yet, Apple’s stipulation regarding non-reliance pertains only to challenges involving such cited art. *See id.*

#### IV. *Fintiv* Factor 6

Apple implies that its merits position on obviousness is sufficiently “compelling” to avoid discretionary denial altogether. Apple’s analysis regarding element 1(d1) of the ’705 Patent is hardly compelling. That element requires that there be a “duration” with respect to each signal in a series of *biometric* signals. *See* Paper 7 at 15. As Apple recognizes, CPC points to “*Anderson*’s distinction between a digitizer pad and fingerprint sensor,” the former of which does not generate a *biometric* signal at all. Paper 8 at 5. Yet, Apple relies solely on the former as satisfying the “duration” requirement of element 1(d1). Paper 7 at 14. As such, *Anderson* fails to teach the claimed “duration” for a biometric signal. *Id.*

Apple’s single-sentence, “compelling” response regarding the distinction between *Anderson*’s digitizer pad and fingerprint sensor is that “CPC ignores the extensive motivations to combine.” Paper 8 at 5. The point, however, is that, even if *Anderson* were combined with one or more of the other cited references, further modification would be required to *Anderson* itself to yield a duration for a *biometric*

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