

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ASSA ABLOY AB, ASSA ABLOY INC., ASSA ABLOY RESIDENTIAL
GROUP, INC., AUGUST HOME, INC., HID GLOBAL CORPORATION,
ASSA ABLOY GLOBAL SOLUTIONS, INC.,
Petitioner,

v.

CPC PATENT TECHNOLOGIES PTY LTD.,
Patent Owner.

Case IPR2022-01089
Patent 9,269,208

**PATENT OWNER'S SUR-REPLY TO PETITIONER'S PRELIMINARY
RESPONSE REPLY**

Petitioners contend that Apple cannot be an RPI because it purportedly has no control over the Petition. Reply at 2, 8. However, the Board has repeatedly made clear that “a non-party may be a real party-in-interest *even in the absence of control or an opportunity to control.*” *Cisco Sys., v. H.P Enter. Co.*, IPR2017-01933, Paper 9 at 13 (PTAB Mar. 16, 2018) (emphasis added). Key to the RPI analysis is whether Apple and Petitioners have a structured, preexisting business relationship and whether Apple would receive more than a merely generalized benefit if trial is instituted. *AIT, LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018). Petitioners’ own Exhibit Nos. 1023-1027 demonstrate the specially structured nature of the business relationship with Apple concerning the relevant products.¹ Petitioners admit that the ASSA ABLOY products identified in the Parallel Litigation were sent to Apple for compliance or certification purposes. *See* EX2032. According to Petitioners, the HID and Hospitality products were submitted to Apple because they work in conjunction with Apple Wallet. Reply at 8. Petitioners admit

¹ Exhibit Nos. 1023-1027 are bare screenshots with no supporting declaration or other evidence to verify their authenticity or reliability and are therefore inadmissible under at least FRE 802, 901. Petitioners cannot satisfy their burden of persuasion with inadmissible evidence. *See Bungie v. Worlds Inc.*, IPR2015-01264, Paper 64 at 38 (PTAB Jan. 14, 2020) (“it was incumbent upon Petitioner to provide persuasive argument *supported by evidence* to reduce or remove any speculation” regarding the relationship between the Petitioner and the RPI) (emphasis in original).

that only 56 out of the purported 34 million application developers (or 0.00017%) make similar product submissions to Apple. *Id.* at 1, 8.

Petitioners also admit that relevant Yale and August products were submitted to Apple to ensure compliance. *Id.* at 8. Petitioners submit that Apple requires similar product submissions from “hundreds” of MFi participants. *Id.* “Hundreds” is ambiguous, but even assigning it the largest possible value (999), then only 0.003% of the purported 34 million developers make similar submissions. Petitioners are amongst an infinitesimally small percentage of developers that have such a close partnership with Apple that Apple inspects their physical products. As in *Ventex*, Apple and Petitioners have a “specially structured, preexisting, and well-established business relationship with one another” with respect to the technology at issue. *Ventex*, IPR2017-00651, Paper 148 at 10 (PTAB Jan. 24, 2019).

Petitioners speculate that a finding that Apple is an RPI here would have an unfairly deleterious effect on the purported 34 million app developers. Reply at 1. But there is no evidence that all app developers share the exact same relationship with Apple and, as demonstrated above, Petitioners’ relationship with Apple is relatively unique. The Board can only be expected to consider the facts presented in this case and the specific relationship between Petitioners and Apple, and not some unidentified 34 million others. Petitioners’ due process argument also fails because

they had ample time to file their Petition before the § 315(b) time bar expired on March 1, 2022. Their lack of diligence does not equate to a violation of due process.

Petitioners' effort to distinguish the Apple Agreement from the DevPub agreement in *Bungie* also fails. Reply at 5-6. The Apple Agreement requires Petitioners to warrant that “none of the Licensed Applications...violate or infringe any patent...or other intellectual property or contractual rights of any other person.” EX2009 at 77. *See also id.* at 16 (to the best of developer's knowledge, the relevant products “**do not and will not**” violate or infringe any patents.) The warranties are not merely opinions on *whether* the rights are clear. Rather, as in *Bungie* they are stated with certainty, for the purpose of *ensuring* that the rights are cleared for use.

Next, *Ventex* does not require an “exclusivity-plus-indemnity arrangement.” *See* Reply at 6. The Apple indemnity provision must be considered along with all other relevant facts in the “flexible approach” and “expansive formulation” required under *AIT*. *See AIT* at 1351. Under *AIT*, Apple is clearly an RPI.

Petitioners rely on *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308 (Fed. Cir. 2018) to support its argument that Apple is not a privy under Taylor Factor 2. However, in *WesternGeco*, the Board rejected privity “based on the ambiguous, undefined nature of the underlying [indemnity] agreements.” *Id.* at 1321. As discussed in the Preliminary Response, the indemnity clauses in the Apple Agreement are in no way ambiguous or undefined. Prelim. Resp. at 26-29.

Respectfully submitted,

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