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 IPR2022-01094
Patent 8,620,039

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 PTAB 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 in original).[1] 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. 1024-1028 demonstrate the specially structured nature of the business relationship with Apple concerning the relevant products.

Petitioners admit that the ASSA ABLOY products identified in the Parallel Litigation were sent to Apple for compliance or certification purposes. EX1023 (Rog. 1). Petitioners also admit that only *56* out of the purported *34 million* application developers (or *0.00017%*) make similar product submissions to Apple. Reply 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.*

[1] The Board's institution decisions in related IPR2022-01006, -01045, -01089 does not appear to acknowledge this principle.

"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.

In its prior institution decisions in the related IPRs, the Board apparently accepted Petitioners' assertion that they "have a standard business relationship [with Apple] like that of over 34 million application developers … and hundreds of MFi Program12 participants." *See e.g.*, IPR2022-01006, Paper 27 at 17. However, it appears that the Board did not consider that Petitioners are amongst an infinitesimally small percentage of developers that have such a close partnership with Apple that Apple inspects their physical products, including those implicated by the patented technology at issue here. 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 2. 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 specific relationship between Petitioners and Apple, and not some unidentified 34 million others.

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.) Contrary to the Board's finding in the prior institution decisions, the warranties are not merely opinions on *whether* the rights are clear. *See e.g.*, IPR2022-01006, Paper 27 at 23-24. Rather, 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 27-29.

Respectfully submitted,

Dated: January 11, 2023

By: /Andrew C. Ryan/

Andrew C. Ryan
Reg. No. 43,070
Steven M. Coyle (*pro hac vice*)
Nicholas A. Geiger (*pro hac vice*)
CANTOR COLBURN LLP
20 Church Street, 22nd Floor
Hartford, CT 06103
Tel: (860) 286-2929
Fax: (860) 286-0115
ryan@cantorcolburn.com
scoyle@cantorcolburn.com
ngeiger@cantorcolburn.com

Attorneys for Patent Owner
CPC Patent Technologies Pty Ltd.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.