UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,

Petitioner,

v.

DDC TECHNOLOGY, LLC,

Patent Owner.

IPR2023-00709

U.S. Patent 10,528,199

PATENT OWNER DDC TECHNOLOGY, LLC'S LIMITED MOTION REGARDING DISCOVERY

PATENT OWNER'S EXHIBIT LIST

Exhibit Number	**Description**
2001	Google's Reply in Support of its Motion to Stay Pending Determination of *Inter Partes* Review of the Patents-in-Suit Case No. 3:23-cv-01160, N.D.Cal., filed April 27, 2023, ECF 160
2002	Email dated June 5, 2023 from Michael Kiklis to Matt Holohan regarding Discovery

Incident to DDC Technology, LLC ("DDC" or "Patent Owner") seeking limited discovery, the Board stated on a June 13, 2023 telephonic conference that it "would not grant a motion for additional discovery because patent owner has failed to satisfy *Garmin* factor 1, based on the information that we have available today." (Petitioner Ex. 1013, p. 37). Since that time, Patent Owner has obtained additional evidence strongly suggesting that Petitioner Google intentionally omitted Orora Packaging Solutions ("OPS") as a real party in interest or privy in these proceedings in order to avoid acknowledging the scheduling order in co-pending litigation – *DDC Technology, LLC v. Orora Packaging Solutions*, Case No. 3:22-cv-01263 (N.D. Tex.), a case that originally included Google before it was severed and transferred to the Northern District of California (the "Texas Case") – which would significantly impact the *Fintiv* analysis. Such a finding would amount to Google having "purposefully omitted [OPS] to gain some advantage," which would warrant dismissal of the Petitions. *See SharkNinja Operating LLC v. iRobot Corp.*, IPR2020-00734, Paper 11 (PTAB Oct. 6, 2020) (precedential) at 19.

Accordingly, DDC submits that *Garmin* factor one is satisfied at least as to OPS, and thus the requested discovery is warranted. The Board did not express concerns regarding the remaining *Garmin* factors on the conference call. However, those factors favor discovery as well. DDC's discovery requests do not seek Google's litigation positions and underlying basis. DDC attempted to seek discovery

by other means through the district court, but Google represented to the district court that DDC could and should seek discovery here (before refusing to produce discovery in these proceedings). (Ex. 2001, p. 1, ll. 11-14.)[1] DDC provided advance notice of its proposed discovery requests to Google (Ex. 2002), and Google has not raised any concerns based on understandability or burden. Thus, all *Garmin* factors favor discovery.

Additionally, DDC is in possession of evidence obtained in the pending and prior litigation proceedings. In compiling those materials in advance of the discovery motion deadline, DDC believes that the existing evidence and information is sufficient alone to strongly support summary denial of Petitioner's IPR filings and, accordingly, intends to present the arguments for denial in its Patent Owner's Preliminary Responses ("POPRs"). However, DDC is not comfortable presenting this additional evidence to the Board due to limitations on the use of designated information produced under protective order. Specifically, Google (and OPS) produced Google documents in the Texas Case (and in a prior litigation against

[1] Now that the Parties are before the PTAB, Google claims that the limited discovery produced in the Texas case "show[s] and demonstrat[es] there were no communications with MerchSource whatsoever, and this is at the district court." (Petitioner Ex. 1013, p. 18). The evidence confirms the opposite, and the documents in DDC's (and Google's) possession will show and demonstrate that Google's discovery responses in the Texas case were deficient, limited to only certain Google entities, and evasive – which DDC raised with Google in the Texas case but could not resolve before Google obtained transfer and stay.

MerchSource, LLC – *DDC Technology LLC and DODOcase VR, Inc. v. MerchSource, LLC, et al.*, Case No. 3:17-cv-07088 (N.D. Cal.) (the "MerchSource Case") pursuant to a protective order limiting use of designated material to that litigation.

Therefore, to the extent the Board determines that *Garmin* factor 1 remains unsatisfied, DDC requires Google to permit DDC to use, in this proceeding (as well as related proceedings IPR2023-00707, -00708, -00710, and -00711), evidence in its possession (and, ideally, to de-designate anything that was over-designated initially so that such materials may be filed in the public record) to further develop the record supporting additional discovery.

Thus, to the extent the Board denies additional discovery at this time, DDC requests the limited relief of compelling Google to permit use of Google documents produced in prior litigations concerning infringement of the patents subject to these IPR proceedings.[2] After the use restrictions are modified or otherwise resolved, DDC (in the interests of potentially avoiding a prolonged PTAB process) will

[2] Prior to filing this motion, Patent Owner's counsel sought Petitioner's counsel's consent to this relief, i.e., consent to use Google-confidential documents from district court litigations in this proceeding. Petitioner's counsel declined to provide blanket consent as requested but stated that he would consider future requests on a case-by-case basis.

introduce such evidence in its POPRs. The specific prior litigations at issue in this request are the Texas Case and the MerchSource Case.

In order for DDC to present its evidence and arguments adequately (whether in a further motion for discovery or in POPRs), DDC needs to rely substantially on evidence that exists from prior and current litigations related to infringement of the patents subject to these IPR proceedings. Erring on the side of caution, DDC cannot even present its available evidence – including evidence that rebuts certain representations of Google's counsel made at the June 13 telephonic conference – until Google agrees that all Google documents from prior litigations may be used in these PTAB proceedings. Alternatively, Google can and should re-produce the documents from all prior proceedings in these PTAB proceedings to obviate any issues and limitations created by district court protective orders.

Should the IPR petitions not be dismissed after consideration of DDC's POPRs – and/or Google does not cooperate in permitting the use of Google

documents produced incident to prior litigations in this proceeding before the PTAB – DDC reserves its right to seek appropriate discovery.

Respectfully submitted,

Dated: June 30, 2023

/Matthew C. Holohan/

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), we certify that this **PATENT OWNER DDC TECHNOLOGY, LLC'S LIMITED MOTION REGARDING DISCOVERY** complies with the type-volume limitation of 37 C.F.R. § 42.24(b) because it contains 900 words, as determined by the word-processing program used to prepare the motion, excluding the parts of the motion exempted by 37 C.F.R. § 42.24(a)(1).

Dated: June 30, 2023

/Lori R. Brown/

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(a) and (b), I certify that on June 30, 2023, a true and accurate copy of this paper, **PATENT OWNER DDC TECHNOLOGY, LLC'S LIMITED MOTION REGARDING DISCOVERY**, was served on the following counsel for Petitioner via e-mail, pursuant to Petitioner's consent to e-mail service:

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Dated: June 30, 2023

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