UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC

Petitioner

v.

DDC TECHNOLOGY, LLC,

Patent Owner

U.S. Patent No. 10,528,199

Case No.: IPR2023-00709

PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

The Board should reject DDC's desperate attempts to avoid the Petition's strong prior art by making baseless misconduct allegations and violating a mediation agreement's confidentiality terms. DDC does not raise a single distinction over the prior art. Instead, DDC focuses its efforts on flawed procedural arguments, including (1) a real-party-in-interest (RPI) argument about Orora Packaging Solutions (OPS) that the Board already dismissed and (2) a groundless RPI/privity argument for a former defendant of DDC's that is a member of Google's Work-With-Google-Cardboard program (WWGC). DDC additionally disclaims some claims and makes only weak motivation-to-combine arguments for the others. See IPR2023-00710, EX2003; IPR2023-00708, EX2049. Per the Board's authorization in an email dated August 28, 2023, this Reply addresses DDC's RPI/privity arguments.

I. <u>Real Party in Interest and Privity</u>

The Federal Circuit's most recent RPI/privity case explains that determining whether a party is an RPI focuses on "whether a petition has been filed at a [ ] party's behest." *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.2d 1018, 1028-29 (Fed. Cir. 2021). Relevant considerations may include "whether a [ ]party exercises [or could exercise] control over a petitioner's participation in a proceeding, or whether a [ ]party is funding the proceeding or directing the proceeding." *Id.* at 1029.

As to privity, the Federal Circuit explains that it is also "a highly fact-based inquiry, similarly 'focus[ing] on the relationship between the named IPR petitioner and the party in the *prior* lawsuit.'" *Id.* (emphasis in original). Whether a party is in privity with another "depends on the nature of the relationship between the two; 'it is important to determine whether the [parties'] relationship—as it relates to the lawsuit—is sufficiently close that it can be fairly said that the petitioner [already] had a full and fair opportunity to litigate' the issues it now seeks to assert." *Id.*

DDC focuses its analysis using the factors discussed in *RPX v. AIT*, IPR2015-01750, Paper 128, at 10 (precedential), a remand from a Federal Circuit case issued before *Uniloc*. Those factors are more relevant to the unique facts of that case, and indeed, the *Uniloc* court did not address them.

II. <u>OPS is not an RPI or Privy of Google</u>

DDC's primary argument has already been heard and dismissed by the Board: that Petitioner intentionally omitted identifying OPS as an RPI to gain a *Fintiv* tactical advantage. See Order Denying Patent Owner's Motion for Additional Discovery (Order), paper 11, n. 7 ("we are not persuaded that the [*Fintiv*] evidence would be useful."); see also p. 9 ("Patent Owner argues that Petitioner's relationship with OPS affects the [*Fintiv*] analysis … These are two different theories — both of which we are not persuaded by."). Indeed, *Fintiv* is

not an issue here. The co-pending litigation involving Petitioner has been stayed, and DDC's case against OPS has settled. EX1016; Order, n. 7.

Similarly unavailing is DDC's attempt to avoid the Board's precedential *SharkNinja* decision. Here, as in *SharkNinja*, there is no reason for the Board to address RPI because there are no time-bar or estoppel issues: OPS was sued on the same day as Petitioner. See EX1017, pp. 10-11; *SharkNinja Operating LLC v. iRobot Corp.,* IPR2020-00734, Paper No. 11 (precedential). DDC attempts to avoid *SharkNinja* by accusing Petitioner—without any evidence—of intentionally omitting OPS as an RPI in this proceeding "to prevent the Board from conducting a proper analysis of the *Fintiv* factors…." POPR, at 15. DDC does not cite any legal authority for support, just as it failed to do in its motion for additional discovery. See Mot., paper 8, at 1. In Petitioner's opposition to that motion (see Opp., paper 9, at 7), Petitioner identified cases where this Board, citing *SharkNinja*, has at least twice declined to perform an RPI/privity analysis when there were no time-bar or estoppel issues even though there was a *Fintiv* issue related to a third party. *See Unified Patents, LLC v. JustService.Net LLC*, IPR2020-01258, Paper No. 18; *Unified Patents, LLC v. Monarch Networking Solutions LLC*, IPR2020-01708, Paper No. 28, Appendix A. DDC does nothing in its POPR to respond to these cases, thus conceding the point.

Regardless, OPS is not an RPI. Google designed and sold the Google Cardboard product and contracted with OPS to manufacture the product on its behalf.[1] Although the Google/OPS agreements include [redacted] DDC presents no evidence that: [redacted] (2) OPS controlled Google's defense; (3) OPS funded Google's defense; and (4) OPS was involved in any way with this IPR or the related IPRs. OPS had no involvement in Google's IPRs. Google and OPS were merely co-defendants, using separate counsel, and while Google and

[1] DDC again misrepresents the record to accuse Petitioner of misconduct: specifically concealing or misrepresenting its relationship with OPS at the June 13, 2023 teleconference. POPR, at 3, 15; see EX1013. For support, DDC refers to EX1013 at 25-26, but that portion of the transcript is DDC's counsel, not Petitioner's, conversing with the Board. Petitioner only represented that "Google has its own virtual reality viewer." EX1013, 15:25-16:1; see also 19:19-20. This is true; Google Cardboard was so named and was sold by Google. Petitioner's discussion of OPS was limited to advancing a *SharkNinja* argument. EX1013, 18:23-19:7. DDC's misconduct allegations are newly fabricated and unfounded because, at the June 13 teleconference, DDC chose not to even address the Google/OPS relationship when prompted by the Board. EX1013, 26:22-27:4.

OPS were members of a joint defense group, that is insufficient to find an RPI relationship. See Consolidated Trial Practice Guide, Nov. 2019, at 17 (joint-defense-group participation alone does not create an RPI/privity relationship).

Moreover, the bulk of DDC's so-called evidence, which itself is insufficient to show RPI, is inadmissible and should be stricken because it violates a mediation agreement.[2] See EX1019. [redacted] This, of course, is exactly what DDC has done on pages 11-

[2] Petitioner is precluded from responding substantively to DDC's statements and evidence from the mediation, since doing so would violate the mediation agreement. Nevertheless, DDC's statements are inaccurate.

14 of the POPR as well as in exhibits 2017 and 2020. Therefore, DDC's arguments and evidence about the mediation are inadmissible, violate the mediation agreement, and should be given no weight. Petitioner further respectfully requests that the Board strike this offending material or, alternatively, provide authorization to file a motion to strike.

Lastly, should the Board find that OPS is an RPI, Petitioner requests authorization to update its mandatory notices without losing the Petition's filing date, because there are no time-bar or estoppel issues, Petitioner has not engaged in bad faith or gamesmanship, and DDC will not be prejudiced. See *Proppant v. Oren Tech. LLC*, IPR2017-01917, paper 86 (precedential).

III. Unofficial Cardboard (UC) is not an RPI or Privy of Google

DDC alleges that UC is an RPI or privy of Google. UC was previously sued by DDC and that case settled. UC is a member of the WWGC program. Importantly, Google did not fund, control, or even have the authority to control UC's litigation, and DDC does not suggest otherwise. Also, Google had no involvement in that litigation. Thus, Google did not have "a full and fair opportunity to litigate" that case. *Uniloc,* 989 F.2d at 1019. And, UC had no involvement in this or the related proceedings. Thus, UC is not an RPI or privy of Google.

a. Works With Google Cardboard (WWGC)

WWGC was a program that allowed developers of their own VR viewers to be compatible with Google Cardboard, permitting them to promote their product as "WWGC compatible." EX2004, ¶41. Compatibility meant that a member's product would be compatible with the Google Cardboard application ecosystem. *Id.* ¶43. To be compatible, a VR viewer followed high-level design guidelines, one of which required only a single input. *Id.* ¶58; EX2031, at 3. But the guidelines did not specify what the input should be; the input could be of any type, such as magnet,[3] capacitive, Bluetooth, etc. *Id.* Each WWGC participant made its own viewers, sold its own viewers, and had considerable design flexibility. And, most importantly, these guidelines disclaim any indemnity relationship with WWGC members: "Google … will not indemnify any manufacturers for these designs or for third-party viewers generally." EX2031, at 7.

b. <u>DDC's RPI/Privity Argument for UC Should be Rejected</u>

As an initial matter, the Board should ignore DDC's argument that UC's VR viewer was similar, although not identical, to Google's viewer. DDC fails to provide any explanation of the relevance of the similarities to an RPI/privity analysis, because there is none. See, *e.g.*, POPR, at 19.

[3] Magnets are important because the '199 patent basically disclaims them from claim scope. EX1001, 2:13-39; 3:48-53.

UC was simply a WWGC member. All of DDC's evidence only serves to confirm this. The collaboration was part of the WWGC program and has no bearing on an RPI/privity analysis.

DDC nonetheless relies on the current Google standard Terms of Service to suggest an indemnity relationship. POPR, at 20; EX2033. But DDC provides no evidence that they were in effect during the WWGC program, and in any event, they are irrelevant because they apply to end users of Google products, not WWGC members. *Id.* at 1 ("these Terms of Service help define Google's relationship with you as you interact with our services."). Moreover, as discussed above, the WWGC guidelines themselves disclaimed any indemnity obligations.

Lastly, DDC relies on settlement discussions, which are covered under F.R.E. 408, and are thus inadmissible. POPR, at 20-21. [redacted] UC is not an RPI or privy of Google.

IV. <u>Conclusion</u>

For the foregoing reasons, Petitioner respectfully requests the Board reject DDC's RPI/privity arguments.

Respectfully Submitted,

Dated: September 1, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. §§ 42.6(e) of PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE and Exhibits 1019 and 1020 by filing these documents through the USPTO Patent Trial and Appeal Case Tracking System and by emailing a copy to the following email addresses:

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Respectfully Submitted,

Dated: September 1, 2023

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