

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2 _____
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4 _____
5 GOOGLE LLC

6 Petitioner

7 v.

8 DDC TECHNOLOGY, LLC

9 Patent Owner

10 _____
11 IPR 2023-00707, IPR 2023-00708

12 _____
13
14 CONFERENCE CALL before VICE CHIEF JUDGE KAL DESHPANDE,
15 PATRICK BOUCHER, SHEILA MCSHANE, and JULIET DIRBA,
16 Administrative Patent Judges.

17
18 Tuesday, June 13, 2023

19 Telephonic Conference

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A P P E A R A N C E S

(All appearances via telephonic means.)

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P R O C E E D I N G S

JUDGE DIRBA: Good afternoon. This is a conference call in IPR 2023 -- and I'm sorry -- IPR 2023-00707 and IPR 2023-00708. My name is Judge Dirba, and I'm joined today by Judges -- Judge Deshpande, Boucher, and McShane.

I heard at the beginning that we have a court reporter on the line; is that correct?

THE COURT REPORTER: Yes, your Honor.

JUDGE DIRBA: Very good. And were you retained by counsel for petitioner or counsel for patent owner?

MR. KIKLIS: Petitioner, your Honor.

JUDGE DIRBA: Thank you very much. So let's begin with appearances. Who is on the call for petitioner?

MR. KIKLIS: Michael Kiklis of Kiklis & Clark, your Honor, for petitioner, Google.

JUDGE DIRBA: And Mr. Kiklis, will you be speaking on petitioner's behalf today?

MR. KIKLIS: I'm sorry. Will be speaking what?

JUDGE DIRBA: On petitioner's behalf today?

1 MR. KIKLIS: Of course, yes, your Honor.

2 JUDGE DIRBA: Will anyone else be
3 speaking for petitioner?

4 MR. KIKLIS: No.

5 JUDGE DIRBA: Very good. And counsel
6 for patent owner?

7 MR. HOLOHAN: This is Matt Holohan from
8 Sheridan Ross for patent owner. I'm the only one
9 on for patent owner, your Honor.

10 JUDGE DIRBA: Thank you for anticipating
11 my next question. The purpose for the call today
12 is to discuss patent owner's request for
13 additional discovery in this matter.

14 Actually, before I begin, I should ask
15 can you -- can you hear me okay, Madame Court
16 Reporter?

17 THE COURT REPORTER: I can, your Honor.
18 Thank you.

19 JUDGE DIRBA: Okay. Very good. The
20 purpose of the call is to discuss patent owner's
21 request and how the call today will proceed. I
22 will begin and allow counsel for patent owner, Mr.
23 Holohan, to explain patent owner's request,
24 briefly.

25 I'll turn it back to Mr. Kiklis to

1 address petitioner's response to that, and then
2 we'll turn back to patent owner to reply to what
3 petitioner had to say.

4 I'll ask for each of the counsel to mute
5 their lines while the opposing counsel is speaking
6 so that we can more -- so the court reporter can
7 more accurately transcribe the record. I will
8 also instruct petitioner to provide a transcript
9 of the proceeding today as -- of the record at the
10 earlier opportunity.

11 MR. KIKLIS: Yes, your Honor. Before --

12 JUDGE DIRBA: I will ask for each side
13 to see if there are any questions. Mr. Kiklis,
14 for petitioner?

15 MR. KIKLIS: Yes, your Honor. I just
16 want to -- should I use one of our exhibit
17 numbers? Or would you prefer that it's a Board
18 exhibit number for the transcript?

19 JUDGE DIRBA: It should be a party
20 exhibit number.

21 MR. KIKLIS: Yes. Will do.

22 JUDGE DIRBA: Thank you. Any other
23 initial questions before we begin?

24 MR. HOLOHAN: No, your Honor.

25 JUDGE DIRBA: Okay. With that, I'll

1 turn it over to counsel for patent owner to
2 provide the explanation of your request and the
3 basis for it.

4 MR. HOLOHAN: Thank you, your Honor.
5 This is Matt Holohan from Sheridan Ross just for
6 the court reporter's benefit.

7 So the patents at issue in the two IPRs
8 for which this panel has been -- has been named
9 have been litigated previously including in one
10 IPR proceeding brought by a company called
11 MerchSource, which was also the defendant in a
12 district court proceeding.

13 There were also district court
14 proceedings against Mattel, Merge Labs, DPI,
15 Sanho, DGL, Unofficial Cardboard, and there's a
16 current district court case pending against
17 Landsberg Orora.

18 So the basis for the request is that
19 through litigation, prior litigation, we've become
20 aware of certain collaborations or indemnification
21 agreements and coordination between Google, the
22 petitioner, in these proceedings and the parties
23 in the previous proceedings including, as you
24 know, for example, a -- a collaboration with
25 Mattel regarding similar products that was

1 actually referred to as a partnership in some of
2 the press coverage.

3 So in terms of the -- the first Garmin
4 factor, we believe there's far more than a mere
5 possibility. We know that there have been
6 communications. There have been business
7 agreements and business arrangements that
8 certainly raise serious concerns about RPI and
9 privacy issues.

10 The other sort of kind of -- skipping
11 ahead to the third Garmin factor, in one of the
12 pending district court lawsuits, there was a
13 motion to stay, and DDC raised the issue that they
14 wanted to seek discovery on RPI issues in the
15 district court, and Google said, well, you should
16 get that in the PTAB instead. So -- so that's
17 what we're doing here as suggested by Google.

18 In terms of the other Garmin factors,
19 this is not an attempt to seek out litigation
20 positions or under -- any other underlying basis.
21 This is a very clearly delineated set of discovery
22 requests to explore targeted RPI and privacy
23 issues.

24 We've made significant efforts to
25 construct narrow requests, narrow instructions,

1 that are really geared toward these specific
2 entities with which we know Google has
3 relationships with prior arrangements, and because
4 the end results of this discovery could be
5 dispositive of the IPRs on an estoppel basis, we
6 think that the discovery is appropriate.

7 JUDGE DIRBA: Let me ask you a few
8 questions about that, and I think it would be
9 helpful to break out the different parties. If I
10 understood your summary correctly, the different
11 entities that's you identified in your request
12 were sued in different lawsuits, and I don't
13 understand that there's necessarily a relationship
14 between them.

15 When you say that -- let me begin by
16 asking -- you mentioned that you have become aware
17 of collaboration between Google, petitioner here,
18 and some of those other entities. Do you have any
19 reason to believe that there was any participation
20 between Google and any of those other entities
21 that related to any of the pasts in suit or to any
22 of the district court litigation mentioned or any
23 of the prior PTAB proceedings you mentioned? Or,
24 instead, do you simply have reason to believe that
25 there was a business relationship between Google

1 and some of those other entities?

2 MR. HOLOHAN: So there are two issues
3 that I would raise in response to that. The first
4 is that we are aware of indemnity obligations
5 which have been cited as evidence of RPI.
6 Obviously, that is not in itself dispositive, but
7 that has been cited as evidence that Google had
8 input and availability to control and direct or at
9 least influence prior proceedings.

10 And then there are -- there were
11 communications between at least MerchSource and
12 Google's counsel by e-mail about these products,
13 and the patents did come up. I'm not aware of any
14 e-mails where it was specific direction or
15 specific input, but I do know that there were
16 conversations between Google and at least
17 MerchSource about the DDC patents and the DDC
18 portfolio.

19 JUDGE DIRBA: So the -- so if I
20 understood your answer, you identified two -- two
21 sort of different categories of evidence that
22 you've become aware of or reasons that you have to
23 suspect that there's more than a possibility and a
24 mere allegation that there be would something
25 useful to be found with this discovery, and the

1 first thing is the indemnity obligation that
2 Google allegedly or potentially has with these
3 entities.

4 And you -- let me ask are those
5 indemnity obligations specifically related to
6 patent infringement? Or are they more -- again,
7 my question and where I'm trying to get to is
8 whether the evidence you have indicates that
9 Google had a business relationship with these
10 other entities, which is not particularly germane
11 to the proceedings that we have here, or whether
12 your evidence instead relates to the patents that
13 are being challenged in these proceedings and/or
14 at least the district court litigations that
15 allege infringement of those patents?

16 MR. HOLOHAN: So I -- I don't have the
17 documents in front of me, your Honor. I'm not --
18 I'm not litigation. I wasn't litigation counsel
19 in the prior proceedings. So I don't know the
20 specific, you know -- if the indemnity -- I don't
21 think the indemnity obligations specifically
22 targeted these patents. I believe they did cover
23 claims of intellectual property infringement, you
24 know, more broadly.

25 JUDGE DIRBA: Okay. And then as far as

1 the e-mails, you said the e-mails that you're
2 aware of are only e-mails between -- you mentioned
3 Google and MerchSource, if I got that correct; is
4 that right?

5 MR. HOLOHAN: Yes, your Honor.

6 JUDGE DIRBA: Are you aware of any
7 e-mails between Google and any of the other
8 entities that you listed?

9 MR. HOLOHAN: I don't think we have the
10 specific e-mails from prior discovery, no.

11 JUDGE DIRBA: I'm sorry. I spoke over
12 you. So I'll restate my question to make sure
13 that I get a clear answer.

14 Are you aware of any e-mails between
15 Google and any of these other entities other than
16 MerchSource that relate to the patents that
17 are challenged in these proceedings or the patents
18 at issue in the district court litigation that you
19 referenced?

20 MR. HOLOHAN: I don't believe so, your
21 Honor.

22 JUDGE DIRBA: And so your -- the reason,
23 if I understand -- actually, I'll ask you to tell
24 me more about what the RPI allegations that you --
25 what RPI allegations you're suspecting the

1 evidence to reveal.

2 In other words, you mentioned the 315
3 bar, I believe, or at least that's what I thought
4 I had heard. So tell me more about what your --
5 what substantive contention these -- this evidence
6 is going to relate to.

7 MR. HOLOHAN: The substantive contention
8 would be that Google is -- was a real party
9 interest -- or there was a real party interest in
10 the prior litigation and in the prior proceedings,
11 or those prior petitioners, those prior litigants,
12 would be a real party interest here or that there
13 was privity such that Google would be precluded by
14 the one year time bar from proceeding with these
15 petitions.

16 JUDGE DIRBA: Okay. And if I understand
17 correctly, because I did happen to pull up the --
18 the -- some of the -- the -- the dockets or the
19 district court records for some of those prior
20 proceedings, and, for example, the one that
21 involved Mattel was dismissed with prejudice.

22 So if Google was an RPI in that
23 proceeding and they alleged infringement of at
24 least some of these patents and it was dismissed
25 with prejudice, can you tell me about why Google

1 would then be sued later? In other words, Google
2 is an RPI. Why are they being sued again if the
3 whole case was dismissed with prejudice?

4 MR. HOLOHAN: Your Honor, I am afraid
5 I'm not familiar with the details of that case and
6 the specific circumstances under which there was
7 -- it was prejudice. It may have been -- I -- I
8 thought it was a settlement which would -- if it
9 appeared there were different issues, then there
10 were different -- there would be different
11 products involved now. Google would still have
12 been on notice of the potential allegations.

13 I think the -- the broader issue is that
14 the products in issue here kind of all relate
15 similar to a VR technology using this kind of
16 Google Cardboard technology. So the specific
17 Mattel products may have been at issue in that
18 case, but there are other products at issue now.

19 JUDGE DIRBA: Okay. And final question
20 on the indemnity obligations that you mentioned
21 that Google has: Which of the entities that you
22 listed in your discovery requests -- for which of
23 those entities does Google have such an indemnity?
24 Or is there a contract that provides them
25 indemnity for -- for patent infringement?

1 MR. HOLOHAN: Let me look at my notes,
2 if I may, your Honor. Oh, so the -- there is a
3 co-pending district court action involving
4 Landsberg Orora, O-R-O-R-A, and I believe Google
5 has an indemnity agreement with them.

6 JUDGE DIRBA: Is there any known
7 agreement with Mattel, MerchSource, Unified
8 Cardboard, or Orora Packaging Solutions?

9 MR. HOLOHAN: There are -- there are
10 agreements. I don't know that there were
11 indemnity provisions in those agreements.

12 JUDGE DIRBA: Okay. I think that's --
13 I'll -- or I may as well have additional questions
14 and additional questions to turn to the panel. I
15 suppose I -- no, I do have one final question.
16 Let me ask this.

17 The other three cases, the 709, 710, and
18 711 cases, are -- are substantially the same
19 issues presented in those three cases? I
20 understand that counsel was instructed that we
21 will only be discussing the 707 and the 708 cases
22 today. So if you're not prepared with an answer
23 for those other three cases, that's fine, but if
24 there are, I would like to hear if it's the same
25 issues that are presented there or if it is a

1 different sent of issues.

2 MR. HOLOHAN: It would be the same
3 issues just because the three patents were not
4 asserted against the same entities but they are
5 asserted against Landsberg Orora and unofficial
6 Cardboard. So there's overlap -- there's overlap
7 in that regard.

8 JUDGE DIRBA: Okay. Mr. -- Mr. Kiklis,
9 if you'd like to respond for petitioner?

10 MR. KIKLIS: Yes, your Honor. First of
11 all, I would like to mention that seven -- cases
12 709, 7010 -- 710, and 711 are related, very
13 closely related, to these two, and I'm mentioning
14 this because the Board could conserve a lot of
15 resources here.

16 These are -- these five patents are all
17 continuations of one another, and the petitions
18 all use the same prior art. So I just want to
19 make it very clear to the Board that there's an
20 opportunity to conserve resources.

21 First, my colleague on the other side
22 mentioned a relationship, and let me explain what
23 -- what the relationship is. Google had a program
24 called WWGC, which stands for "Work With Google
25 Cardboard." Google has its own virtual reality

1 viewer. That's what these cases are all about.

2 So Google's virtual reality viewer is
3 called Google Cardboard, and so they have this
4 program that would allow developers of their own
5 virtual reality viewers to be compatible with
6 Google Cardboard, which would allow them to use
7 this badge, logo, and say "WWGC Compatible,"
8 which, you know, they could promote on their
9 product.

10 Compatibility meant that their product,
11 again, separate and different than Google
12 Cardboard, would be compatible with the Google
13 Cardboard application ecosystem, and there were
14 some design guidelines, one of which being there
15 should be only single input, but the guidelines
16 don't specify what it could be.

17 It could be any kind of an input. It
18 could be done through magnet, capacitive
19 conductive input screen, touch, Bluetooth,
20 whatever. So there's just some broad categories
21 there.

22 Each WWGC participant made its own
23 viewers, sold its own viewers, and had
24 extraordinary flexibility on the design. So
25 that's the relationship which my colleague on the

1 other side is referring to.

2 Now, importantly, DDC, the patent owner,
3 was a member of WWGC. So they have all of the
4 agreements that anyone signing up for this program
5 would have. That's important. MerchSource,
6 Mattel, Unofficial Cardboard are all members of
7 WWGC. In their -- in DDC's request for
8 production, they mentioned Orora Packaging
9 Solutions.

10 Now, I don't know if they're a
11 predecessor company to Orora Landsburg or a
12 subsequent company or what have you, but they're
13 not listed, as I'm aware, WWGC member. They might
14 be. I'm just not 100 percent sure.

15 So what my colleague on the other side
16 did not mention -- and let me just be very clear
17 about this. It looks like this is just a fishing
18 expedition. They don't have anything specific,
19 and it seems like they claim to have an
20 indemnification agreement. So I don't understand
21 what their request would be for looking for more
22 information. This, rather, seems like a fishing
23 expedition.

24 What they didn't mention to the Board is
25 that there was already discovery taken at the

1 district court. There was an interrogatory
2 propounded which asked for all WWGC members. That
3 was supplemented and that was given and served on
4 -- provided to DDC.

5 Importantly, there -- you heard opposing
6 counsel mention that they're aware of
7 communications between MerchSource and Google.
8 They had propounded 16 RFAs, I believe, requesting
9 for an admission for communications, whether --
10 admit Google communicated with MerchSource, and
11 then they would have the opposite, admit that
12 Google did not communicate with MerchSource. And
13 they asked for both the challenged patents and
14 what have you in the prior PTAB cases.

15 Google responded, of course, and said
16 there was no communications whatsoever. That was
17 supplemented and still the same. So discovery has
18 already been provided showing and demonstrating
19 there were no communications with MerchSource
20 whatsoever, and this is at the district court. So
21 their -- their request for duplicative discovery
22 out of hand has to be rejected.

23 They mention and they seek discovery on
24 Orora Packaging Solutions. Now, Orora Packaging
25 Solutions was sued on the same day as Google.

1 Therefore, it is not a possibility of any time bar
2 issue whatsoever. So I believe that this Board's
3 precedent in Shark Ninja would preclude the Board
4 from even rendering a decision on whether there
5 was a time bar or -- whether there was an RPI or
6 whether there was privity because it just doesn't
7 matter here, right?

8 Unofficial Cardboard is simply a WWGC
9 participant, and Mattel was a WWGC participant, as
10 well, but I really don't understand what the
11 theory of the other side is here. Because Mattel
12 and Unofficial Cardboard and MerchSource were sued
13 on their own products, right? So they're sued on
14 their own products. They weren't sued on Google's
15 product, and there's no evidence that the other
16 side even discusses or mentions that Google was
17 somehow involved with those cases at all. So I'm
18 not sure where I see this -- any kind of RPI or
19 privity. Now, Google has been sued, but it's on
20 its own product which is completely different.
21 So, again, it just seems like this is a fishing
22 expedition, your Honor.

23 Oh, I would want to mention one thing.
24 I was counsel in the WesternGeco -- PGS v.
25 WesternGeco PTAB cases, went up to the federal

1 circuit. WesternGeco v. ION, 899 F.3d 1308, where
2 RPI and privity went up to the federal circuit.
3 It's a precedential decision.

4 And in those cases, there was -- ION was
5 the producer of a product. They were sued. PGS
6 was a customer that used that product. PGS was
7 sued years later. There was evidence of an
8 indemnification agreements. We had
9 indemnification agreements from discovery. There
10 was evidence of additional indemnification
11 agreements, and the Board said, you need something
12 more than this to get additional discovery.

13 That went up to the federal circuit.
14 PGS and ION were not found to be in privity or
15 IPRs, and, as I mentioned, there were evidence of
16 indemnification agreements, and the Board just
17 didn't provide additional discovery on that.

18 And if you look at the WesternGeco v.
19 ION federal circuit case, even if there were
20 indemnification agreement in place, that's just
21 not enough. Federal circuit was pretty clear on
22 that.

23 So in sum, your Honor, this just looks
24 like a fishing expedition, which is not what the
25 PTAB is set up for.

1 JUDGE DIRBA: Let me ask a few follow-up
2 questions to make sure that I understood what you
3 said, Mr. -- am I pronouncing your name correctly,
4 Mr. Kiklis? Or could you -- could you help me out
5 some?

6 MR. KIKLIS: Yeah, Kiklis, just the way
7 it's spelled, K-I-K-L-I-S. Yes, Kiklis, your
8 Honor.

9 JUDGE DIRBA: Okay. Thank you, Mr.
10 Kiklis. If I understood you correctly -- and I'll
11 take the four entities in -- one at a time.

12 So for MerchSource, Google has
13 represented in discovery and in this report that
14 there were no communications between Google and
15 MerchSource that related to any of the patents
16 that are challenged in these five proceedings; is
17 that correct?

18 MR. KIKLIS: Whatever patents were at
19 issue in the MerchSource proceeding.

20 JUDGE DIRBA: I see.

21 MR. KIKLIS: We, yeah -- they're -- I'm
22 sorry.

23 JUDGE DIRBA: Go on.

24 MR. KIKLIS: No, I'm sorry. It's the
25 five patents at issue here in this five PTAB

1 proceedings, yes. If I could just expand, Google
2 admitted there were no communications with
3 MerchSource, its general counsel, affiliates,
4 shareholders, regarding MerchSource's PTAB cases
5 or the patents at issue in these proceedings.

6 JUDGE DIRBA: Okay. And for
7 MerchSource, also, MerchSource was sued on its own
8 products which are different than Google's
9 products; is that correct?

10 MR. KIKLIS: Your Honor, that's my --
11 that's my understanding. I haven't studied that
12 complaint, but that's my understanding.

13 JUDGE DIRBA: And then as far as OPS,
14 Orora Packaging Solutions, the -- that entity was
15 sued on the same day as Google and was not
16 previously sued before that lawsuit, and so
17 there's no basis for there being a 315 bar; is
18 that correct?

19 MR. KIKLIS: That's -- yes, your Honor,
20 that's true.

21 JUDGE DIRBA: And then for Unofficial
22 Cardboard, the -- did you speak to whether or not
23 there were any communications between Google and
24 Unofficial Cardboard related to these five
25 patents?

1 MR. KIKLIS: I'm not aware of any, your
2 Honor. I can't say -- I'm not aware of it.

3 JUDGE DIRBA: Okay.

4 MR. KIKLIS: Unofficial Card --
5 Unofficial Cardboard is simply a WWGC participant.
6 I'm not aware of any agreements or any involvement
7 that Google had with Unofficial Cardboard in its
8 litigation.

9 JUDGE DIRBA: And the Unofficial
10 Cardboard products or, rather, Unofficial
11 Cardboard was sued on its own products, and those
12 are different than the Google products; is that
13 correct?

14 MR. KIKLIS: That's my understanding,
15 your Honor, yes.

16 JUDGE DIRBA: And then as far as Mattel,
17 are you aware of any communications between Mattel
18 and Google related to any of the five patents at
19 issue in these proceedings?

20 MR. KIKLIS: And here, this is one I did
21 delve into, and I can represent that there are no
22 communications between Mattel and Google about DDC
23 v. Mattel.

24 JUDGE DIRBA: Related to that lawsuit or
25 the patent asserted in the lawsuit; is that

1 correct?

2 MR. KIKLIS: My understanding is that
3 there were no communications at all.

4 JUDGE DIRBA: Okay.

5 MR. KIKLIS: About their litigation.

6 JUDGE DIRBA: And then the -- and then,
7 to your knowledge, the products of Mattel's that
8 were accused in that lawsuit are different than
9 the Google products?

10 MR. KIKLIS: In this, I did study the
11 complaint, and yes, they are different. The
12 products at issue in the Mattel case are different
13 from Google cardboard, yes.

14 JUDGE DIRBA: Okay. I think that
15 answers my questions for now.

16 Mr. Holohan, am I saying your name
17 correctly?

18 MR. HOLOHAN: Holohan, yes, yes, your
19 Honor. Thank you.

20 JUDGE DIRBA: Holohan. Okay. Mr.
21 Holohan, let's talk about each of these entities
22 one at a time.

23 So let's start with Orora Packaging
24 Solutions, OPS. Petitioner's counsel said that
25 they were sued on the same day as Google was sued

1 and thus within the year time period provided by
2 statute. If I understood your argument correctly,
3 you were saying that this discovery was needed
4 because you believe that Google would be barred
5 under 315(b), that if OPS was sued within one year
6 from when Google filed its petitions, how could
7 even -- whether or not OPS is an RPI, whether
8 Google is an RPI with OPS, why does that have
9 anything to do with whether or not there is a 315
10 bar?

11 MR. HOLOHAN: Well, so in this instance,
12 the issue would be failure to join a real party
13 interest or privity, and the PTAB's decisions
14 state that, you know, there's certain -- there's
15 -- there's certain principles as to when the
16 failure to name an RPI could be corrected, and we
17 think that, you know, Google would have to show
18 that that -- that error is correctible, and we
19 don't think that they would be able to.

20 JUDGE DIRBA: Are you familiar with that
21 certain entity?

22 MR. HOLOHAN: I don't remember the case
23 names offhand, your Honor, but I did look into
24 this issue.

25 JUDGE DIRBA: So the -- I would

1 encourage you to look at the Board's precedential
2 decision. There's a precedential decision that --
3 that begins Shark Ninja, and the long and short of
4 it is the Board typically does not evaluate or
5 investigate an RPI issue if it doesn't -- if it's
6 not germane or it doesn't matter to the case at
7 all.

8 I'll also say that as far as a discovery
9 request like this, we also have the Garmin factors
10 where you, in order to get discovery, need to show
11 that there's a -- there's a substantive
12 contention.

13 That's the issue here in arguing that
14 Google should have named OPS and that failure to
15 name that party, they should have -- they should
16 have put them on there. It doesn't make any
17 difference to the case at the end of the day. I
18 don't see how you would be able to satisfy that
19 first factor of the Garmin test or -- for that
20 purpose.

21 MR. HOLOHAN: Understood, your Honor.

22 JUDGE DIRBA: And then as far as -- I
23 should ask first is there anything else about OPS
24 that -- that you would like to address? Or is
25 there any other reason why that -- why -- what --

1 evidence related to them or discovery related to
2 that particular entity would be relevant to a
3 substantive contention of patent owners?

4 MR. HOLOHAN: No, your Honor. Like I
5 said, when I looked at this, when I did the
6 research and looked at the case law on this, my
7 understanding is that failure to name an RPI is an
8 issue and that it would -- it can only be
9 corrected under certain -- under certain
10 circumstances. But if your -- if the Board is
11 telling me that I'm wrong on that, then I'll
12 accept that.

13 JUDGE DIRBA: And I'll point you to the
14 Shark Ninja case as -- as -- and I'll give you the
15 general guidance that if it's not going to make
16 any difference to the proceeding, if you don't
17 have any evidence that Google was fraudulent or
18 was somehow lying to the Board with their
19 representations that they made, it -- it -- I
20 struggle to understand why it would matter to the
21 case, I suppose, is where I'm coming from on that.

22 So as far as the -- let's take the
23 MerchSource next. Opposing counsel or
24 petitioner's counsel, I should say, represented
25 that in the district court discovery, or, rather,

1 in their district court discovery, that Google has
2 represented there were no communications with
3 MerchSource related to that prior MerchSource
4 litigation or any of the five patents that -- that
5 are being challenged in these five proceedings.

6 Is that accurate? Do you have any
7 reason to -- do you have any reason to contradict
8 his representation?

9 MR. HOLOHAN: I don't have any reason
10 here to, you know, assert that that was a false
11 representation. Again, there were -- there were
12 e-mails regarding cases involving this portfolio
13 and the previous owner of these patents. So that
14 raises suspicion that there would be other
15 communications and potentially agreements that
16 would -- that would be at issue.

17 JUDGE DIRBA: So in your opening
18 statement, you made the comment that you did
19 believe that there were e-mails between Google and
20 MerchSource that are relevant here. Can you tell
21 me more about those e-mails?

22 MR. HOLOHAN: There were e-mails -- I'm
23 looking at it now -- back in 2016 where
24 MerchSource had said, you know, there are these
25 patents being raised in this DODOcase, which is

1 the predecessor to our clients. And Google is on
2 those e-mails, and this was in the context of
3 discussing the Google Cardboard system and, you
4 know, these sort of design and input issues that
5 Mr. Kiklis referenced.

6 So that was -- my understanding was that
7 there were -- you know, there were communications
8 that were germane here that would indicate the
9 financial RPI or privity issue.

10 JUDGE DIRBA: And so I --

11 MR. KIKLIS: May I interrupt for a
12 second?

13 JUDGE DIRBA: In a moment. In a moment.

14 So Mr. Holohan, it's your position that
15 those e-mails are -- that something in those
16 e-mails indicates that there is -- rather, I
17 should say that those e-mails are evidence that
18 there -- that something useful will be uncovered
19 by searching through additional communications
20 between Google and -- and MerchSource; is that
21 correct?

22 MR. HOLOHAN: Yes, your Honor. Under
23 the first Garmin factor, that was our theory.

24 JUDGE DIRBA: And without knowing what
25 those e-mails are, it's very difficult for me to

1 speak about it. It does sound, though, that if it
2 -- the communications didn't relate to the patents
3 -- and I -- I do question whether or not you would
4 satisfy the first Garmin factor even if our --
5 with MerchSource with regards to these e-mails.

6 But then again, not having the e-mails
7 and without having additional details about what
8 those e-mails are, I can just give you the -- I
9 can just reflect to you that -- that there needs
10 to be something in there. And the reason that the
11 Board has rules like this is, in part, to prevent
12 the types of fishing expeditions that petitioner
13 was concerned about.

14 Is there anything else in the -- as far
15 as MerchSource that leads you to believe that
16 there will be relevant evidence or, rather,
17 evidence that is related to a substantive
18 contention of one of the parties in this
19 proceeding?

20 MR. HOLOHAN: No.

21 JUDGE DIRBA: Okay. And then as far as
22 Unofficial Cardboard and Mattel, petitioner's
23 counsel represented that there -- that they were
24 not aware of any communications between Google and
25 either of those two entities related to the

1 lawsuits, related to the patents that are being
2 asserted and those products accused in those
3 proceedings are different from Google's. Do you
4 have any reason to doubt any of those
5 misrepresentations?

6 MR. HOLOHAN: The only thing I would
7 say, your Honor, is -- well -- well, a couple of
8 things.

9 On Unofficial Cardboard, I thought --
10 Mr. Kiklis, I may have heard this wrong and he may
11 have wanted to correct himself -- that he hadn't
12 looked, but he isn't aware of any communications.

13 On Mattel, though, the Mattel
14 relationship does seem to be more substantive than
15 simply membership in -- in this Cardboard program
16 because there was this collaboration between
17 Mattel and Google regarding this relaunch of a
18 classic Mattel product to incorporate Google's
19 technology, and, again, in certain of the press
20 that surrounded this announcement by Mattel, it
21 was referred to as a partnership. So we think
22 that there's likely other agreements there that
23 would shed light on this.

24 JUDGE DIRBA: And I should clarify for
25 you, counsel, that -- that the patent owner is

1 obligated to show that it's entitled to this
2 discovery in order for us to -- in order for the
3 Board to grant the -- the motion that you're --
4 that you're proposing filing.

5 And so whether or not petitioner comes
6 forward with evidence about there not being such
7 agreements is not really the issue. You need to
8 have evidence or reasoning that tends to show
9 beyond speculation that some -- that something
10 useful will be uncovered.

11 And then as far as Mattel, if I
12 understood you correctly, you're referring to the
13 fact that there might have been a business
14 relationship or a business partnership between
15 Google and Mattel related to a particular product.
16 But -- but I don't understand why that necessarily
17 leads you to believe that there were any
18 communications about these patents or about the
19 prior lawsuits, or I don't -- I don't -- can you
20 connect that final dot for me?

21 MR. HOLOHAN: Well, your Honor, I --
22 like I said, I mean, I -- it struck me as a
23 collaboration more than simply a membership in a
24 -- in a one-way design contract. So it did seem
25 like that there was -- you know, they would have

1 been collaborating on product design and that
2 would have triggered the sort of obligation that
3 has influences over a legal proceeding, but I have
4 nothing more than that.

5 JUDGE DIRBA: Okay. And then a final
6 question. You had mentioned that the -- I believe
7 this is in your -- your beginning presentation.
8 You mentioned that the district court had -- some
9 question presented to the district court about --
10 about RPI issues, and either the courts said to
11 proceed with discovery before the PTAB or Google
12 suggested proceeding with discovery before the
13 PTAB. Can you provide additional information and
14 context about that?

15 MR. HOLOHAN: Yes, ma'am. There was a
16 -- so Google filed a motion to stay its lawsuit,
17 which was opposed by DDC. I'm looking at Google's
18 reply brief in that case -- and this is taken from
19 Google -- and so one of the issues was that DDC
20 said that it wanted discovery in the district
21 court case to assist in developing arguments to
22 present to the PTAB that would implicate the RPI
23 and privity issues.

24 And on page 5 of Google's reply brief,
25 Google says further that "PTAB has procedures that

1 allow for discovery on privity issues, and DDC can
2 and should avail itself of those procedures as
3 part of the IPR proceedings rather than burdening
4 the Court with its requests."

5 JUDGE DIRBA: I understand. Actually,
6 one final question, Mr. Holohan. Is any of the
7 information that we've discussed today
8 confidential?

9 MR. HOLOHAN: Oh, I would defer to Mr.
10 Kiklis on that question because I think it
11 involves his client's issues.

12 JUDGE DIRBA: Okay. And then Mr.
13 Kiklis, I'll ask you to answer my question about
14 the confidentiality first, and then I know that
15 there was another matter that you wanted to
16 address earlier.

17 MR. KIKLIS: Yes, your Honor. In terms
18 of confidentiality, I will need to discuss it with
19 my client, and, you know, let's see where we end
20 up here. But so let me get the rough draft of the
21 transcript, discuss it with my client before we --
22 before we have to go down that road, okay?

23 JUDGE DIRBA: Yes, and if you do decide
24 that it is confidential, then the appropriate
25 course would be to file a motion to seal.

1 MR. KIKLIS: Yes, your Honor.

2 JUDGE DIRBA: And then turning -- I
3 don't -- I did not make a note about which of the
4 -- the points I was discussing with opposing
5 counsel that you wanted to address, but if you
6 recall what it was that you wanted today, we can
7 walk through the different -- the different
8 entities we've been discussing.

9 MR. KIKLIS: I just wanted to make sure
10 that I was very clear, your Honor, about a couple.

11 With Mattel, I know that there was -- I
12 know for a fact that there were no other
13 discussions or communications with Google about
14 their case with DDC. That I can represent.

15 In terms of Unofficial Cardboard,
16 Unofficial Cardboard was simply a WWGC member. So
17 was Mattel and so was MerchSource. Unofficial
18 Cardboard was simply a WWGC member. I'm not aware
19 of anything beyond that. I haven't done an
20 investigation. So I want to be very clear with
21 the Board on that.

22 Mattel, they were a WWGC member, but
23 they -- their product was also sold on the
24 Google's store. So there's that, but that's all
25 that I'm aware of there.

1 In terms of MerchSource, I told you
2 about the RFAs. They were -- the RFAs dealt with
3 MerchSource's PTAB cases for the patents at issue
4 and -- and those are available. They're public or
5 whatever. Well, they are -- should be available
6 to my -- the opposing counsel.

7 And so they make it pretty clear that --
8 that there were no discussions with MerchSource
9 about the PTAB cases or the patents. You know,
10 your Honor, full disclosure, I need to make sure
11 that you're aware that MerchSource used prior
12 versions of Google Cardboard for their prior art.

13 If you look at their PTAB cases, it's in
14 there, and I think in -- and so -- so that's that,
15 but I'm not aware of anything. Again, the -- the
16 -- there were no discussions from the RFAs about
17 MerchSource and its PTAB cases or the patents.

18 So I just want to be very clear and be
19 up front with the Board on that, but it seems like
20 Mr. Holohan has some e-mails back and forth, but
21 if he's already got the discovery, then if he's
22 already got them, then there's no need for
23 anything else.

24 JUDGE DIRBA: Mr. Holohan, any --
25 anything that you want to respond to in what

1 petitioner's counsel said?

2 MR. HOLOHAN: No, your Honor.

3 JUDGE DIRBA: Okay. Please hold while
4 the panel confers.

5 (Brief recess in the proceedings.)

6 JUDGE DIRBA: This is Justice Dirba.
7 Thank you all for your patience. I have conferred
8 with my colleagues and I have the following
9 information.

10 So Mr. Holohan, based on the information
11 that you provided on this call today, the Board
12 would not grant a motion for additional discovery
13 because patent owner has failed to satisfy Garmin
14 factor one, based on the information that we have
15 available today. Would you still like
16 authorization to file a motion for additional
17 discovery?

18 MR. HOLOHAN: Would I be able to have
19 the opportunity to confer with my client, your
20 Honor? Or do I need to make a decision now?

21 JUDGE DIRBA: You don't need to make a
22 decision now. I'll say that if you'd like to file
23 or if your client would like to file a motion for
24 additional discovery on -- on these matters, that
25 motion is authorized. I provide the guidance to

1 you so that your client can make an informed
2 decision about whether or not that's the best use
3 of resources.

4 It may be that there is additional
5 evidence that you have that you can bring or
6 convey to the Board today, and it may that be you
7 want to put that motion on the record for whatever
8 reason. Should you -- should you or your client
9 want to put that motion on the record, you are
10 authorized to do so, but based on the information
11 that we have received, the Board will deny it.

12 MR. HOLOHAN: I understand that, your
13 Honor, and I appreciate that guidance.

14 JUDGE DIRBA: A motion for that
15 additional discovery would need to be filed within
16 two weeks of today's date. So by the end of the
17 day on Tuesday, June 27th. If patent owner does
18 file a motion for additional discovery, then
19 petitioner will have two weeks to file an
20 opposition to that motion. The -- there would be
21 no reply authorized for that.

22 This ruling applies to all five of the
23 proceedings. So that's IPR 202300707, 00708,
24 00709, 0070 -- 710 and 00711.

25 Before we adjourn today, are there any

1 additional questions from either side, Mr.
2 Holohan?

3 MR. HOLOHAN: No, your Honor.

4 JUDGE DIRBA: And Mr. Kiklis?

5 MR. KIKLIS: Yes, your Honor, I did -- I
6 just want to confirm I understood you correctly
7 that you did grant authorization for briefing on
8 additional discovery, but you provided some
9 guidance that it appears that factor one of the
10 Garmin factors has not been met. Did I understand
11 that correctly?

12 JUDGE DIRBA: Yes, that's correct.

13 MR. KIKLIS: Okay. Ma'am -- so two
14 things more, your Honor. First, there was a
15 discussion about the stayed briefing at the
16 district court. The stay has been granted. So
17 effectively Fintiv should be off the table.

18 And then, your Honor, the -- since we're
19 now discussing all five proceedings, can I file
20 the transcript in all five proceedings?

21 JUDGE DIRBA: Yes, please do.

22 MR. KIKLIS: Okay. Thank you, your
23 Honor.

24 JUDGE DIRBA: I should -- for -- to make
25 sure the record is perfectly clear, I'll ask each

1 side whether there's anything from those other
2 proceedings -- we spent most of the time
3 discussing the two proceedings, but if I
4 understood correctly, the other three proceedings
5 present a subset of the same issue. I would like
6 each counsel to confirm that that's a correct
7 understanding or will clarify if it's not a
8 correct understanding.

9 Mr. Holohan, is that a correct
10 understanding that those other these three
11 proceedings, the 709, 710, and 711, are -- all
12 raised issues that are a subset of the ones we
13 discussed for the 707 and 708?

14 MR. HOLOHAN: Yes, your Honor.

15 JUDGE DIRBA: And Mr. Kiklis; is that
16 correct?

17 MR. KIKLIS: Your Honor, I would say
18 they're the same issues. Different patents but
19 same issues, yeah.

20 JUDGE DIRBA: One final issue to raise
21 for -- for Mr. Holohan's benefit. If -- if you or
22 your client decide that you would like to file a
23 motion for additional discovery, I'll recommend
24 that you review the Shark Ninja -- that's
25 S-H-A-R-K N-I-N-J-A, and Lumentum,

1 L-U-M-E-N-T-U-M, decisions of the PTAB for those
2 findings on the panel here and are available on
3 the PTAB precedential and informative decisions
4 page.

5 Any final questions before we adjourn,
6 Mr. Holohan?

7 MR. HOLOHAN: No, your Honor.

8 JUDGE DIRBA: And Mr. Kiklis?

9 MR. KIKLIS: Nothing, your Honor. Thank
10 you very much.

11 JUDGE DIRBA: Thank you, all, for your
12 time. We're adjourned.

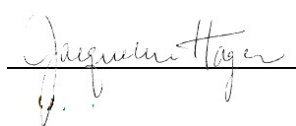
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14 (Proceedings concluded at 2:54 p.m.
15 EST.)
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CERTIFICATE OF COURT REPORTER

I, Jacqueline Bennett, RPR, do hereby
 certify that I recorded verbatim the proceedings
 in the Patent Trial and Appeal Board, via
 teleconference, in the captioned cause, on June
 13, 2023.

I further certify that the foregoing
 pages, numbering 1 through 42 inclusive,
 constitute a true, accurate, and complete
 transcript of said proceedings.

Given under my hand this 19th day of
 June 2023.



Jacqueline Bennett, RPR

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