UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,

Petitioner,

v.

DDC TECHNOLOGY, LLC,

Patent Owner.

IPR2023-00711

U.S. Patent 11,093,001

PATENT OWNER
DDC TECHNOLOGY, LLC'S SUR-REPLY
IN SUPPORT OF ITS PRELIMINARY RESPONSE

Unable to confront the facts, Google asks the Board to ignore evidence showing the impropriety of its Petition. Google has consistently attempted to conceal its relationships with third parties that bear on the timeliness of its Petition, first opposing discovery in NDCAL and the PTAB, and now asking the Board to strike evidence while "disputing" the clear record. When all relevant evidence is properly considered, as it should be, Google's Petition should be dismissed based on statutory provisions regarding privity and real parties in interest ("RPIs"). Institution should also be denied because the POPR shows that no claim is likely unpatentable by distinguishing the prior art and showing lack of motivation to combine under Section 103. Notably, DDC did not disclaim any claims of the '001 Patent.

DDC cannot respond point by point to Google's Reply due to page limits. However, Google's Reply is replete with errors of fact and law that are clear from the record, *e.g.*, there *are* [redacted] that bear on RPI/privity.

I. Google's Evidentiary Arguments Should Be Disregarded

Without discovery, DDC still demonstrates that Google's Petition is procedurally improper. Unable to overcome the *facts*, Google improperly seeks to strike evidence based on a mediation agreement ("Agreement") and Rule 408. DDC did not violate the Agreement; nor did DDC's filing offend Rule 408. Google also cites no authority for the proposition that breach of the Agreement would justify

striking relevant evidence. In fact, the Board has held that it "will not be pressed upon to enforce" district court confidentiality provisions. *Skechers U.S.A., Inc. v. Nike, Inc.*, No. IPR2017-00620, 2017 WL 4277684, at *2 (P.T.A.B. Sept. 25, 2017); *see also Rohm Semiconductor Usa, LLC v. Maxpower Semiconductor, Inc.*, No. IPR2020-01674, 2021 WL 1433266, at *6 (P.T.A.B. Apr. 15, 2021) (holding that the Board "do[es] not have jurisdiction to resolve contract disputes"). The Board could not strike evidence under the Agreement even if a breach could be shown.

Google cannot show breach of the Agreement because [redacted] (Ex. 1019) [redacted]. DDC filed under seal per the Agreement (while Google immediately breached its terms by [redacted]).

The protections of Rule 408 preclude only "the use of settlement negotiations 'to prove or disprove the validity or amount of a disputed claim.'" *Ebay Inc. & Paypal, Inc., Petitioner, v. Purple Leaf, LLC, Pat. Owner.*, No. CBM2015-00052, 2015 WL 13846150, at *7-8 (P.T.A.B. July 30, 2015) (quoting Fed. R. Evid. 408). Settlement-related evidence is admissible before the Board for other purposes. *Id.* Because DDC seeks to use these materials to address RPI/privity issues, rather than

the validity or amount of a disputed claim, Rule 408 is inapplicable.

II. OPS is an RPI or Privy of Google

"Determining whether a party is an RPI demands a flexible approach" and "has no bright-line test." *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.3d 1018, 1027-28 (Fed. Cir. 2021) (cleaned up). DDC's POPR shows [redacted] and thus was the driving force behind Google's Petition, making it an RPI under *Uniloc*.

The Board has not already dismissed DDC's RPI argument as Google suggests – it was not (and could not have been) presented in full prior to the POPR. Google's reliance on OPS's settlement is irrelevant because the OPS case was active with a May 2024 trial date when Google filed its Petition (and not yet dismissed when DDC filed its POPR). Google's intentional concealment of its relationship to avoid *Fintiv* is properly considered. Neither *SharkNinja* nor the *Unified Patents* cases are applicable because they did not involve intentionally concealing relationships to gain strategic advantage as Google did here. Indeed, *SharkNinja* even recognized that such intentional conduct would be an explicit exception to the rule allowing correction of misnamed RPIs while preserving the filing date.

While Google contends that there is "no evidence" to support DDC's RPI theory, DDC's POPR cites numerous documents and a declaration showing a closely entwined business and legal relationship between Google and OPS and [redacted]

[redacted]. Google now admits to a Joint Defense Agreement with OPS, clear indication of actual cooperation regarding defenses to patent infringement (*i.e.*, invalidity) that combined with other evidence shows RPI status.

Google does not refute the critical evidence from mediation, namely, that [redacted]. (Ex. 2017, ¶ 6 and ¶ 9). Google is not "precluded from responding substantively" to these arguments but chose not to because it has no argument. Google leaves DDC's RPI arguments largely uncontested in hopes that the Board will ignore the relevant facts.

After finding that OPS is an RPI, Google should not be granted leave to update its mandatory notices due to its intentional conduct based on *SharkNinja*. IPR2020-00734, 2020 WL 5938681, at *8 (P.T.A.B. Oct. 6, 2020) (updates will not be allowed where "Petitioner purposefully omitted [the RPI] to gain some advantage").

III. UC is an RPI or Privy

Without discovery, DDC still marshalled extensive evidence, which need not be repeated here, showing that Google had extensive legal and business involvement with prior defendants in DDC's litigations. Google cannot deny that the prior defendants' products – all accused of infringing the '001 Patent – were either based

on Google's specifications or designed in direct collaboration with Google. Thus, substantial overlap exists in the incentives to invalidate DDC's patents.

[redacted]. Ex. 2035 at 2 (*Google's counsel* stated that Google would be [redacted]).

UC was a WWGC member, [redacted], and made its infringing product from Google's specifications.

Google's response to this evidence consists of conclusory attorney denials, without declarations or other contrary evidence. DDC's POPR cites evidence – with sworn declarations – establishing a consistent pattern of Google's involvement and interference with litigations involving WWGC and other VR partners. Thus, the Board should find that Mattel, MerchSource, and UC are RPIs/privies as well.

Respectfully submitted,

Dated: September 8, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that **PATENT OWNER DDC TECHNOLOGY, LLC'S SUR-REPLY IN SUPPORT OF ITS PRELIMINARY RESPONSE** complies with the Patent Trial and Appeal Board's Order of August 28, 2023 allowing for a preliminary sur-reply that includes the relevant portions of its sur-replies from IPR2023-00707 and IPR2023-00708, which were not to exceed five pages, as determined by the word-processing program used to prepare the brief, excluding the parts of the brief exempted by 37 C.F.R. § 42.24(a)(1).

Dated: September 8, 2023

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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 September 8, 2023, a true and accurate copy of this paper, **PATENT OWNER DDC TECHNOLOGY, LLC'S SUR-REPLY IN SUPPORT OF ITS PRELIMINARY RESPONSE**, 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: September 8, 2023

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