UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK, INC.,

Petitioner,

v.

CELLSPIN SOFT, INC.,

Patent Owner

IPR2024-00757

U.S. Patent No. 8,756,336 B2

PATENT OWNER'S REPLY

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I. PATENT OWNER DID NOT WAIVE THE RPI ISSUE

Patent Owner ("Cellspin") diligently raised concerns regarding the CCP's control over Petitioner ("TikTok") in its Patent Owner's Preliminary Response ("POPR"), stating "TikTok openly states that the Chinese Communist Party will not allow TikTok to be sold." POPR at 24. However, at the time Cellspin did not feel it had sufficient evidence to raise the RPI issue. Although information about "golden shares" was available as early as March 29, 2023, Cellspin did not feel that this *by itself* constituted sufficient evidence to raise the RPI issue. This changed on **January 17, 2025** when the U.S. Supreme Court, in *TikTok, Inc. v. Garland*, 145 S. Ct. 57 (2025), affirmed the CADC's ruling that the Protecting Americans from Foreign Adversary Controlled Applications Act ("Act") is constitutional. In its decision, the Supreme Court confirmed the CCP's control over TikTok, noting that "[t]he Act's prohibitions and divestiture requirement are designed to prevent China – a designated foreign adversary – from *leveraging its control over ByteDance Ltd. . . .*" *TikTok Inc. v. Garland*, 145 S.Ct. 57, 69 (2025) (emphasis added).

The Supreme Court issued the *Garland* decision *14 days after Cellspin filed its Patent Owner Response*. After the *Garland* decision, Cellspin further researched

the RPI issue and then contacted TikTok's counsel on February 21, 2025 to inform them that Cellspin intended seek leave to file a Motion to Terminate the Proceeding and Vacate the Decision on Institution. TikTok's reliance on waiver cases like *Apple Inc. v. MemoryWeb, LLC*, IPR2022-00031, Paper 85 (PTAB Dec. 2023), and *Unified Patents Inc. v. MobilityWorkx, LLC*, IPR2018-01150, Paper 26 (PTAB Dec. 2019), is misplaced. Those cases involved failures to raise known RPI issues without new developments, whereas Cellspin acted promptly after the *Garland* decision, which fundamentally altered the evidentiary landscape with respect to TikTok and the CCP. This satisfies the "good cause" and "interests of justice" standards under 37 C.F.R. § 42.5(c)(3).

II. CELLSPIN HAS MET ITS BURDEN OF PRODUCTION TO ESTABLISH THAT THE CCP IS AN UNNAMED RPI

TikTok cites *Hughes Network Systems, LLC v. California Institute of Technology* (IPR2015-00059, Paper 42 at 10-11 (PTAB April 21, 2016)) for the proposition that "Cellspin bears the burden of production in establishing that an RPI is unnamed." Opposition at 3. As TikTok points out, *Hughes Network* also states that the "key to a real party-in-interest inquiry is the relationship between the potential unnamed real party-in-interest and the proceeding, not the relationship between

parties." *Hughes Network* at 11. However, TikTok conveniently leaves out the following sentence in *Hughes Network*, which is: "A common consideration is whether the non-party exercised *or could have exercised control over a party's participation in a proceeding*." *Hughes Network* at 11 (*quoting* 77 Fed. Reg. at 48,759) (emphasis added). Cellspin has provided ample evidence in its Patent Owner's Motion to Terminate ("Motion") of the CCP's pervasive control over TikTok and thus has met its burden of production in establishing that the CCP is an unnamed RPI. *See* Motion at 2-3. This evidence included conclusions reached in a Data Security Business Advisory issued by the Office of Strategy, Policy and Plans at the Department of Homeland Security. *See* Motion at 2-3, and Exh. 2024.

In addition, the United States Court of Appeals for the District of Columbia ("CADC") and the U.S. Supreme Court have confirmed the CCP's pervasive control over TikTok. *See* Motion at 3-5. In its Opposition, TikTok asserts that neither of the *TikTok v. Garland* cases "found that the CCP had control over TikTok Inc.'s operations or directs the filing of IPR petitions." Opposition at 7 (footnote 1). To the contrary, with regards to the CCP's control over TikTok's operations, the CADC found that the Government's conclusion that ByteDance and TikTok entities "would

try to comply if the PRC asked for specific actions to be taken" is "evidenced by the fact that the PRC maintains a powerful Chinese Communist Party committee 'embedded in ByteDance' through which it can 'exert its will on the company.'" *TikTok Inc. v. Garland*, 122 F.4th 930, 954-955 (CADC 2024). The CADC also noted that "[a]s of 2022, that committee 'was headed by the company's chief editor and comprised <u>at least 138 employees</u> at its Beijing office, including senior company managers." *Id.* at 955 (emphasis added). In affirming the CADC, the Supreme Court stated that "[t]he Act's prohibitions and divestiture requirement are designed to prevent China – a designated foreign adversary – from *leveraging its control over ByteDance Ltd. . . . .*" *TikTok Inc. v. Garland*, 145 S.Ct. 57, 69 (2025) (emphasis added). So, contrary to TikTok's assertions, the CADC and the U.S. Supreme Court clearly found that the CCP exercises control over TikTok. This pervasive control clearly demonstrates that the CCP has likely exercised *or could have exercised* control over TikTok's participation in this IPR. *See Hughes Network* at 11.

III. FAILURE TO NAME THE CCP AS AN RPI SHOULD RESULT IN TERMINATION

With regards to the *Proppant Express Investments* Board decision that Cellspin cites to, TikTok states that this "precedential opinion confirms that the RPI

identification requirements are 'not jurisdictional' and a failure to name an RPI may be 'rectified.'" Opposition at 10 (*citing Proppant Express Investments, LLC et al. v. Oren Technologies, LLC*, IPR2017-01917, Paper 86 at 6-9 (PTAB Feb. 13, 2019)). However, what TikTok ignores in that precedential opinion is that the Board laid out certain factors that the Board will consider in determining whether to permit a petitioner to amend its identification of real parties in interest *while maintaining the original filing date*. Thus, contrary to TikTok's assertions, failure to name an RPI is not *automatically* curable without amending the original filing date. As Cellspin showed in its Motion, the factors discussed in *Proppant Express Investments* weigh against allowing TikTok to cure its failure to name the CCP as an RPI *without also changing the original filing date of its Petition*. Motion at 9-10.

IV. THE FACT THAT TIKTOK IS A "PERSON" UNDER § 311 IS NOT DISPOSITIVE VIS-À-VIS *RETURN MAIL*

TikTok argues that it, as a corporation, is a "person" permitted to file an IPR petition under Section 311. With regards to Cellspin's reliance on *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) for the proposition that "the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy," TikTok asserts that Cellspin

provides no analysis as to how TikTok Inc. is being used "to defeat an overriding public policy" or that disregarding TikTok Inc.'s corporate form would be "in the interests of justice." Opposition at 12. This is incorrect. Cellspin argues, *inter alia*, that allowing foreign government-controlled corporations to use IPRs invites strategic abuse and undermines the integrity of the U.S. Patent System. *See* Motion at 13-14. Further, allowing a CCP-controlled entity, such as TikTok, to file IPRs grants the CCP the benefits of IPRs while shielding them from estoppel or time-bar consequences, thus enabling them to file future IPRs against the same patent through other CCP-controlled entities.

V. THE "CLEAR STATEMENT RULE" APPLIES

In its Opposition, TikTok states that "[a]s *Return Mail* explains, the 'clear statement rule' provides 'that Congress must unequivocally express any waiver of sovereign immunity for that waiver to be effective' and 'applies only when a party seeks to hold the Government liable for its actions; otherwise immunity is generally irrelevant.'" Opposition at 16-17 (*citing Return Mail*, 587 U.S. at 627). However, the material that TikTok cited to and quoted from *Return Mail* is actually the Court's explanation of what the Postal Service's position was, *which the Court rejected*.

Indeed, in rejecting this interpretation of the clear statement rule, the Court stated that "although the presumption against treating the Government as a statutory person is 'particularly applicable where it is claimed that Congress has subjected the [sovereign] to liability to which they had not been subject before,' *it is hardly confined to such cases*." *Return Mail*, 587 U.S. at 628. (emphasis added). In *Bozeman Financial LLC*[1], the Federal Circuit held that Federal Reserve Banks are "persons" because they are operationally distinct from the government, lacking government ownership, presidentially appointed officials, or regulatory authority. In contrast, the CCP is not a corporate entity.

Date: May 19, 2025

Respectfully submitted,

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[1] *Bozeman Financial LLC v. Fed. Reserve Bank of Atlanta et al.,*955 F.3d 971 (Fed. Cir. 2020).

CERTIFICATION OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(b), the undersigned certifies that on May 19, 2025, a copy of the foregoing document was served by electronic mail on the following:

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