

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUHTAMAKI FLEXIBLE PACKAGING GERMANY GMBH & CO. KG,
Petitioner

v.

DANAPAK FLEXIBLES A/S,
Patent Owner

Case No. PGR2023-00008
U.S. Patent No. 11,260,624 B2

**PETITIONER'S REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE**

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I. INTRODUCTION

Pursuant to the Board’s email on May 5, 2022, Huhtamaki Flexible Packaging Germany GmbH & Co. KG (“Petitioner”) timely submits this Reply addressing the real party-in-interest (“RPI”) under 35 U.S.C. § 322 raised in the Preliminary Response. An Updated Table of Exhibits is filed concurrently herewith.

Danapak Flexibles A/S (“Patent Owner”) argues Petitioner has failed to list non-participating entities as RPIs, namely Huhtamäki Oyj (“Huhtamaki Parent”) and Huhtamaki, Inc. (“Huhtamaki NA”). Patent Owner Prelim. Resp. (“POPR”), 56–60. For at least the following reasons, Patent Owner’s challenge fails, and Petitioner respectfully requests that the Board institute a trial on the merits in this proceeding.

II. PETITION CORRECTLY IDENTIFIES HUHTAMAKI FLEXIBLE PACKAGING AS THE REAL PARTY IN INTEREST

The relationship among the entities Patent Owner asserts should be RPIs shows that each entity is distinct with distinct operations. Petitioner and Huhtamaki NA are both wholly owned subsidiaries of Huhtamaki Parent, yet each operate in a distinct business segment separate from each other and separate from Huhtamaki Parent. EX2010, 113. Patent Owner has failed to adequately support and justify that Huhtamaki NA and/or Huhtamaki Parent should be named RPIs in the Petition.

A. Huhtamaki NA is not an RPI

Patent Owner acknowledges Huhtamaki NA and Petitioner operate in different business segments within the Huhtamaki enterprise. POPR, 58. Huhtamaki

NA specifically operates in the North America market manufacturing, selling, and distributing retail tableware, foodservice, and consumer goods packaging materials. EX2010, 42. Patent Owner's evidence fails to indicate or suggest that Huhtamaki NA manufactures, sales, or distributes an aggressive chemical resistant film that is resistant to nicotine, fentanyl, rivastigmine, or lidocaine as used in the pharmaceutical packaging industry and at issue in this proceeding. Patent Owner has not shown any cognizable interest in the outcome of this proceeding by Huhtamaki NA, and instead reduces its arguments to superficial observations regarding related corporate ownership by Huhtamaki Oyj. See *Bowtech, Inc., v. MCP IP, LLC*, IPR2019-00379, Paper 14 at 25 (PTAB July 3, 2019) (finding an entity must be more than merely one who will benefit from a favorable result to be named as an RPI).

Huhtamaki NA and Petitioner have no business relationship outside of being two companies owned by a parent corporation. Petitioner solely manages the production, sale, and distribution of flexible packaging materials for pharmaceutical products and barrier packaging in North America. EX1024, ¶¶5, 7. Patent Owner's statement that Huhtamaki NA "controls the business operations" of Huhtamaki in North American markets is incorrect. See POPR, 60. The pharmaceutical packaging products made and sold by Petitioner are not directed through a North America subsidiary or sister Huhtamaki entity. EX1024, ¶¶5, 7.

B. Huhtamaki Parent is not an RPI

Huhtamaki Parent is a corporate governance entity that merely holds ownership of its subsidiaries and conducts no independent operations. *See Test Right Products et al. v. Simon Nicholas Richmond*, IPR2014-00938, Paper 57 at 6, 8 (PTAB June 11, 2014) (citing multiple Board decisions finding simple parent-subsidary relationship is insufficient to warrant RPI designation). Huhtamaki Parent includes over 65 subsidiary entities with over 19,000 employees across the various companies. EX2010, 113, 61. Patent Owner fails to offer credible evidence that Petitioner is acting as a proxy for Huhtamaki Parent, or that Huhtamaki Parent has exercised control over the Petition and this proceeding. Instead, Patent Owner merely evidences a traditional parent/subsidiary business relationship.

Petitioner—alone—has funded and controlled this proceeding, including preparation and filing of the Petition. EX1024, ¶10. Huhtamaki Parent does not conduct business and does not manufacture, distribute, or sell such flexible packaging products as compared to Petitioner. EX1024, ¶¶2–9. The inclusion of a single executive of Petitioner on the Global Executive Team does not provide adequate support for being an RPI, especially in light of nine total members of the Team which represent various entities within the Huhtamaki enterprise. *See* EX2009; EX2010, 133, 140 (stating “The GET has no formal status under company law”), and 144 (identifying Marco Hitly and Ann O’Hara owning zero shares); *see*

also Butamax Advanced Biofuels LLC v. Gevo, Inc., IPR2013-00215, Paper 47 at 6 (PTAB Sept. 23, 2014) (finding that Board membership of two directors in both parent and subsidiary insufficient to make the parent an RPI). The inclusion of financial statements and subsidiary reports in a parent corporation’s annual report is also insufficient to establish the requisite control. *See TRW Auto.*, IPR2014-01499, Paper 7 at 11. Ultimately, Patent Owner fails to make a showing that both Huhtamaki Parent and Huhtamaki NA “possessed effective control over the petitioner relating to [this post grant review].” *Zoll Lifecor Corp. v. Philips Elecs. N. Am. Corp.*, IPR2013-00609, Paper 15 at 10 (PTAB Mar. 20, 2014).

III. THE BOARD NEED NOT DECIDE WHETHER ALL RPI’S ARE NAMED IN ITS INSTITUTION DECISION

This RPI analysis is not necessary at institution, because Patent Owner has not alleged Petitioner would be time barred or otherwise estopped based on unnamed RPIs. *SharkNinja Operating LLC v. iRobot Corp.*, IPR2020-00734, Paper 11 at 18 (PTAB Oct. 6, 2020) (precedential). Further, such an alleged deficiency can be easily corrected by amending Mandatory Notices. *Adello Biologics LLC v. Amgen Inc.*, PGR2019-00001, Paper 11 at 3–5 (PTAB Feb. 14, 2019) (precedential).

Date: May 26, 2023

Respectfully submitted,

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CERTIFICATION OF SERVICE (37 C.F.R. §§ 42.6(e) and 42.105(a))

The undersigned hereby certifies that, on May 26, 2023, true and correct copies of the foregoing **PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE** and all associated exhibits were served in their entirety on Patent Owner via email as follows:

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