UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JIAWEI TECHNOLOGY (HK) LTD., JIAWEI TECHNOLOGY (USA) LTD., SHENZHEN JIAWEI PHOTOVOLTAIC LIGHTING CO., LTD., ATICO INTERNATIONAL (ASIA) LTD., ATICO INTERNATIONAL USA, INC., CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN FLORIDA), CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN CHINA), COLEMAN CABLE, LLC, NATURE'S MARK, RITE AID CORP., SMART SOLAR, INC., AND TEST RITE PRODUCTS CORP.
Petitioner,

v.

SIMON NICHOLAS RICHMOND
Patent Owner.

Case No. IPR2014-00938
Patent 7,429,827

PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO THE PENDING MOTION TO TERMINATE THIS PROCEEDING FOR PETITIONER'S FAILURE TO IDENTIFY ALL REAL PARTIES IN INTEREST

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I. Coleman's February 20, 2014 LLC Agreement – Giving Southwire "Full, Exclusive, and Complete...Control" Over Coleman's "Business, Operations and Affairs" – Leaves No Doubt That Southwire Was An RPI When The Petition Was Filed.

There is no dispute that, under applicable law, a non-party's status as a real-party-in-interest ("RPI") turns on whether there was "actual control or the opportunity for control" over the decision to file the *inter partes* review (IPR) petition and/or the arguments in it. See Ppr. 44, p. 2, 3, 6, 9, 13; *see also Zoll Lifecor Corp. v. Philips Elec. North America Corp. et al.*, IPR2013-00616, Ppr. 17 at 10 ("Factors for determining actual control or the opportunity for control include existence of a financially controlling interest in the petitioner [; …] the non-party's relationship with the petitioner; the non-party's relationship to the petition itself, including the nature and/or degree of involvement in the filing; and the nature of the entity filing the petition.")

Here, Southwire Company LLC's ("Southwire's) "control or the opportunity to control" over the IPR is definitively established by Coleman Cable LLC's (Coleman's) Limited Liability Company Agreement (the "LLC Agreement"), signed on Feb. 20, 2014 by Floyd Smith as Southwire's "Secretary," and disclosed for the *first time* in Petitioner's opposition as Exhibit 1015. The LLC Agreement (1) names Southwire as Coleman's *sole* managing "Member" and (2) provides:

> "The Member [Southwire] shall have *full, exclusive and complete discretion to manage and control* the business and affairs of the Company, *to make all decisions affecting the business, operations and affairs of the Company* and

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> to take all such actions as it deems necessary or appropriate to accomplish the purpose of the Company as set forth herein. Subject to the provisions of this Agreement, the Member shall have *general and active management* of the business and operations of the Company." *Id.* at ¶ 7. (Emphasis added).

Since "full, exclusive, and complete…control…to make all decisions affecting [Coleman's] business, operations and affairs" certainly includes Coleman's legal "affairs," such as deciding whether to file an IPR petition and what arguments to advance, it could hardly be clearer that when the Petition was filed, Southwire possessed the "actual control or the opportunity for control" over Coleman's decisions necessary to establish Southwire's RPI status. *Id.* The "full, exclusive, and complete…control" language, ignored by Petitioner, renders moot the question of whether Smith was wearing a Coleman "hat" or a Southwire "hat" when he executed the Power of Attorney ("POA") that authorized the filing of the IPR petition; under either scenario, that "decision" was under Southwire's "full, exclusive and complete . . . control." *Id.*

Petitioner's other newly-introduced evidence is fully consistent with Southwire possessing the "control or opportunity for control" necessary to establish RPI status. Petitioner admits that: (1) when Southwire acquired Coleman in February 2014, it immediately replaced Coleman's Directors and Officers with Southwire's Officers. Ex. 1044, ¶¶ 5-7; (2) From February 11, 2014, when Southwire acquired Coleman, through February 20, 2014, when Southwire's Smith

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executed the LLC Agreement, Ex. 1015, p.3; through June 2014, when Smith signed the POA authorizing the filing of the IPR Petition; and through January 2015, when Smith retired, Smith was responsible for handing legal affairs for both Coleman and Southwire. Ex. 1044, ¶ 13; (3) In March 2014, Southwire adopted a Resolution (also signed by Smith) granting certain of Southwire's officers power to bind the companies managed by it, including Coleman.[1] Ex. 1044, ¶ 9, citing Ex. 1016; (4) Coleman's agreement to participate in and contribute $150,000.00 toward the IPRs was *after* its acquisition by Southwire and thus under Southwire's control. Ex. 1044, ¶ 16; and (5) The stubs for checks used to pay for the IPR, Ex. 1042, though drawn from an account nominally bearing Coleman's name, bore *Southwire's* name and address.

Southwire's control of Coleman's bank accounts is inherent to Southwire's "full, exclusive, and complete" control over Coleman's "business, operations, and affairs." *Id.* Thus, the decision to contribute $150,000.00 toward the IPRs is attributable "full[y], exclusive[ly], and compete[ly]" to Southwire. *Id.* The printing of Southwire's name and address on checks ostensibly drawn on accounts in

[1] The Resolution adds further proof of Southwire's exclusive control and whether or not Coleman "approved" it is irrelevant: Since Southwire was in "full, exclusive and complete . . . control" of all decisions by Coleman, Southwire's passing of the Resolution in the first place made Coleman's "approval" a *fait accompli*.

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Coleman's name is further proof of such control, not a software "glitch" happening without Southwire's direction. Ex. 1042. The admitted sharing of employees, the joint press releases (on Southwire letterhead), and additional evidence discussed in Patent Owner's moving papers, likewise support Southwire's exercise of its control over Coleman in all aspects of its "business, operations and affairs."

This case presents an even clearer cut picture of control by an unnamed RPI than ZOLL, IRP2013-00616, ppr. 17 at 5, 10, 12, where the evidence was indirect. Here, Southwire's control is established by direct evidence (i.e., the LLC Agreement). The indirect evidence merely confirms Southwire's control already definitively established by the LLC Agreement.

Southwire's "full, exclusive, and complete" control over Coleman as its sole managing member renders Petitioner's "changing hat" argument legally irrelevant. *See Direct Marketing Concepts, Inc. v. Trudeau*, 266 F.Supp.2d 794, 797 (N.D. Ill., 2003) (An argument that a sole managing-member "has somehow worn one hat individually and has worn another hat in his exclusive and total control of [his LLC] companies, is precisely the kind of manipulative litigation tactic that justifies judicial rejection."); *see also Kramer v. Stelter*, 588 F. Supp.2d 862, 867 (N.D. Ill. 2008) (LLCs "are in privity with their individual owners, particularly, as is the case here, when the owner has exclusive control over the LLC.")

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