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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	92063134
Party	Defendant IP Services International Inc. and Sycuan Tribal Development Corporation
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Attachments	PHILIP MORRIS - PUBLIC Suppl Briefing on Jurisdiction.pdf(298887 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark
Registration No. 3172861
Mark: CROSSROADS & Design
Filed: February 28, 2005
Registered: November 21, 2006

In the matter of Trademark
Registration No. 3140971
Mark: NYC CLASSIC & Design
Filed: April 25, 2005
Registered: September 12, 2006

In the matter of Trademark
Registration No. 4218677
Mark: CARPE DIEM & Design
Filed: February 15, 2011
Registered: October 2, 2012

In the matter of Trademark
Registration No. 4261884
Mark: CARPE DIEM & Design
Filed: February 15, 2011
Registered: December 18, 2012

PHILIP MORRIS USA INC.,

Petitioner,

v.

IP SERVICES INTERNATIONAL, INC.
and SYCUAN TRIBAL DEVELOPMENT
CORPORATION,

Respondents.

Cancellation No.: 92063134

**RESPONDENT SYCUAN TRIBAL
DEVELOPMENT CORPORATION'S
SUPPLEMENTAL BRIEF ON TRIBAL
SOVEREIGN IMMUNITY**

Specially appearing Respondent, Sycuan Tribal Development Corporation ("STDC"), a
tribal corporation chartered under section 17 of the Indian Reorganization Act (25 U.S.C. § 5124

[formerly 25 U.S.C. § 477]) and approved by the Bureau of Indian Affairs as a legal entity wholly owned by the Sycuan Band of the Kumeyaay Nation (the “Sycuan Band” or the “Band”), respectfully submits this supplemental brief as requested by the Board. 98 TTABVUE 1. For the reasons set forth below, and in the record, STDC is an arm of the Sycuan Band and thus immune from suit and there has been no waiver of that immunity in this case as a matter of law. Thus, STDC respectfully requests the Board GRANT STDC’s motion to dismiss for lack of subject matter jurisdiction. 54 TTABVUE.

I. INTRODUCTION

This supplemental brief addresses the two issues raised by the Board: (1) whether STDC is an entity that may claim tribal sovereign immunity and, if so, (2) whether there has been a waiver of any such immunity in this case. 98 TTABVUE 1.

As discussed below, the undisputed record shows STDC is an “arm” of the Sycuan Band and thus immune from suit. The Band created STDC to acquire and manage non-gaming business assets and enterprises for the sole benefit and general welfare of the Band and its members. STDC is solely owned by the Band which intentionally shares its immunity with STDC. STDC is managed by a 5-member board of directors that regularly reports to the Band’s elected governing body, known as the “Business Committee” or “Tribal Council.” All directors are appointed by the Tribal Council, and the majority of directors must be members of the Band.

Based on the foregoing, STDC is an “arm” of the Sycuan Band under well-established federal law and immune from suit under the doctrine of tribal immunity.

The undisputed record also shows that there has been *no waiver* of STDC’s immunity in this case. Under well-established federal law, tribal immunity may only be waived by a clear,

unequivocal, and express waiver, and that any doubts on the issue must be resolved in favor of immunity. Moreover, STDC's charter states that its immunity may only be waived by an official vote of its 5-member board. The record shows that no such waiver occurred in this case.

Based on the foregoing, STDC is an entity that may claim tribal sovereign immunity and there has been no waiver of that immunity in this case. Thus, STDC respectfully requests the Board grant STDC's motion to dismiss for lack of subject matter jurisdiction.

II. PROCEDURAL BACKGROUND

On November 16, 2018, STDC filed a Motion for Summary Judgment based on tribal immunity. 54 TTABVUE. In an Order dated January 30, 2021, the Board found “limited, jurisdictional discovery” to be warranted and allowed Petitioner Philip Morris USA Inc. (“Petitioner”) to conduct discovery “directed **solely** to the issues of whether Sycuan TDC is an entity that may claim tribal sovereign immunity and, if so, whether there has been a waiver of any such immunity in this case” and that, upon conclusion of this discovery, the parties will submit supplemental briefs to address these issues. 66 TTABVUE 4-5. Petitioner completed its jurisdictional discovery in December 2024. Thereafter, the Board issued a scheduling order for the supplemental briefing. 99 TTABVUE 1.

III. FACTUAL BACKGROUND

A. The Formation, Nature, and Status of STDC

The Sycuan Band formed STDC under the Band's laws in 1990 to operate as the non-gaming economic and business development arm of the Band. A true and correct copy of STDC's *Articles of Incorporation* were filed in this case at 53 TTABVUE Exhibit 4A.¹ Section

¹ As discussed below, the Sycuan Band caused STDC to become a federally chartered corporation under section 17 of the *Indian Reorganization Act* (25 U.S.C. § 5124) in 2015. The Federal Charter (53 TTABVUE Exhibit 4C) supersedes the *Articles of Incorporation*.

III of the Articles stated, [REDACTED]

[REDACTED] 53

TTABVUE Exhibit 4A. Since 1990, STDC has operated for the purpose of acquiring and developing land, investing funds, developing business ventures on and off the Sycuan Indian Reservation, enhancing the economic welfare of the Band, and supporting the Band's self-governance. *Declaration of Troy Graves in Support of Respondent's Motion For Summary Judgment Based on Tribal Immunity*, ¶¶ 3, 5, and 10 ("Graves Decl.") 53 TTABVUE Exhibit 4.

STDC is owned entirely by the Sycuan Band. (*Id.*, ¶ 16.) [REDACTED]

[REDACTED] 53 TTABVUE Exhibit 4A.

STDC's office is located on the Sycuan Band's reservation, within the tribal administrative offices, and holds its Board of Directors meetings at the Band's offices. (Graves Decl., ¶6. 53 TTABVUE Exhibit 4.) [REDACTED]

[REDACTED] 53 TTABVUE Exhibit 4A.

[REDACTED]

[REDACTED]

[REDACTED]

53 TTABVUE Exhibit 4A.

On April 18, 2001, the Sycuan Band adopted the *Tribal Corporation Ordinance*, ratifying STDC's charter, and delegating authority to the Band's Business Committee (aka Tribal Council) to fill any Board of Director vacancies. (Graves Decl., ¶ 12. 53 TTABVUE Exhibit 4 and 4B.)

On October 29, 2015, Sycuan's General Council passed Resolution No. 2015-20GC,

[REDACTED]

[REDACTED]

[REDACTED] A true and correct copy of this resolution was filed in this case at 59 TTABVUE Exhibit 2. (Graves Decl., ¶¶ 9 and 15.) See also accompanying *Declaration of Joshua Muse In Support of Respondent Sycuan Tribal Development Corporation's Supplemental Brief On Tribal Sovereign Immunity*, ¶ 5 ("Muse Decl.")

On January 26, 2017, Sycuan's General Council passed Resolution No. 2017-01GC,

[REDACTED]. A true and correct copy of the Resolution was filed in this case at 70 TTABVUE Exhibit A3 to the Declaration of James J. Cekola (the "Cekola Decl."), 61-62. (See also Muse Decl., ¶ 6.)

A true and correct copy of the Federal Charter was filed in this case at 53 TTABVUE Exhibit 4C (Graves Decl., ¶ 15.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 53 TTABVUE Exhibit 4C.

STDC was, and is, capitalized by the Sycuan Band and STDC's revenue from operations. (Graves Decl., ¶18. 53 TTABVUE Exhibit 4.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 53 TTABVUE Exhibit 4C.

STDC is governed by a 5-member board of directors that regularly reports to the Band's elected governing body, known as the "Business Committee" or "Tribal Council." All directors

are appointed by the Tribal Council, and the majority of directors must be members of the Band, all of which ensures STDC's structure, ownership, and management are controlled by the Band. (Graves Decl., ¶ 7.) 53 TTABVUE Exhibit 4. *See also* Article XI(B) of the Federal Charter. 53 TTABVUE Exhibit 4C.

On March 8, 2017, the Band's Business Committee duly adopted a new set of bylaws for STDC. A true and correct copy of the Resolution approving the bylaws and the bylaws are attached as **Exhibit 1** to Decl. of Justine Wong.) (See also Muse Decl., ¶ 8.) As set forth in the bylaws, the members of STDC's board of directors are appointed by the Band's Business Committee or Tribal Council.

B. STDC Purchase of the Trademarks

STDC was engaged in the smoke shop / cigarette business well before it acquired the registered trademarks at issue in this matter in March of 2018. STDC opened "UP smoke shop" on the Sycuan reservation selling tobacco products manufactured and distributed by sovereign tribal nations in North America on October 26th, 2012. (58 TTABVUE Exhibit 1.)

[REDACTED]
[REDACTED]
[REDACTED] (Deposition of Troy Graves ("Graves Depo."), 13: 11 – 23.

A true and correct copy of excerpts of Graves Depo. are submitted herewith as **Exhibit 2** to Decl. of Justine Wong.)

STDC never agreed to waive its sovereign immunity in connection with the acquisition of these trademarks or in any other manner in this case. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In this case, there was no vote by STDC's board to waive immunity. (Graves Decl., ¶ 13. 53 TTABVUE Exhibit 4; Graves Depo., 75:22 to 76:15, and Muse Decl., ¶ 9.)

IV. DISCUSSION

This section will set forth the controlling, well-established legal authority to determine (1) whether an entity is an “arm of the tribe” that may claim tribal sovereign immunity and (2) whether there has been a waiver of such immunity. As discussed below, under those standards, STDC is clearly an arm of the Sycuan Band and immune from suit and that there has been no waiver of STDC's immunity in this case.

A. STDC is an Arm of the Sycuan Band and Immune from Suit

Under well-established federal law, the factors courts apply to determine whether an entity is an “arm-of-the-tribe” that may claim tribal sovereign immunity include: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; and (5) the financial relationship between the tribe and the entity. *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citing *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010)). Under those standards, STDC is clearly an arm of the Sycuan Band and immune from suit

a. The Method of STDC's Creation

As discussed above, the undisputed facts in the record show the Sycuan Band created STDC in 1990 pursuant to its powers of self-government and to function as the non-gaming economic and business development arm of the Band. The Sycuan Band caused STDC to

become a federally chartered corporation under section 17 of the Indian Reorganization Act (25 U.S.C. § 5124) in 2015, approved by the Bureau of Indian Affairs as a legal entity wholly owned by the Band. These types of tribally owned and operated business arms are treated as immune under federal law. See *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) (recognizing that “[s]everal courts have recently recognized that § 477 corporations [i.e., tribal corporations chartered under section 17 of the Indian Reorganization Act (25 U.S.C. § 5124 [formerly cited as 25 U.S.C. § 477]),] are entitled to tribal sovereign immunity” and citing *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-921 (6th Cir. 2009); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1304 (D.N.M. 2009); and *Sanchez v. Santa Ana Golf Club, Inc.*, 136 N.M. 682, 104 P.3d 548, 551 (2004)).

b. The Purpose of STDC.

The purpose of STDC, as articulated in the original Articles of Incorporation and the superseding Federal Charter, is to enhance the welfare of the Sycuan Band through the acquisition and development of real and personal property, investment of funds and other lawful activities and in general to further the economic well-being of the Sycuan Band and its members. (See Section III of the Articles of Incorporation, and Article VII of the Federal Charter.) Since 1990, STDC has operated for the purpose of acquiring and developing land, investing funds, developing business ventures on and off the Sycuan Indian Reservation, enhancing the economic welfare of the Band, and supporting the Band's self-governance.

c. STDC's Structure, Ownership and Management

As set forth above, STDC is wholly owned by the Sycuan Band, and its place of business is the Band's tribal offices. STDC is governed by a 5-member board of directors that regularly reports to the Band's elected governing body, known as the “Business Committee” or “Tribal

Council.” All directors are appointed by the Tribal Council, and the majority of directors must be members of the Band, all of which ensures STDC’s structure, ownership, and management are controlled by the Band. (Graves Decl., ¶ 7.) 53 TTABVUE Exhibit 4. *See also* Article XI(B) of the Federal Charter. 53 TTABVUE Exhibit 4C.

d. The Sycuan Band Intended to Share its Sovereign Immunity with STDC.

Both the original Articles of Incorporation and the superseding Federal Charter confirm that STDC is immune from suit and that to be sued it must give consent on a transaction by transaction basis. The procedure for how STDC's board may waive such immunity is detailed above. These rules make it clear the Sycuan Band understood and intended for STDC to share in its immunity and be allowed to independently make determinations (through a duly enacted board resolution) to waive such immunity on a transaction by transaction basis.

e. The Financial Relationship Between the Sycuan Band and STDC

STDC was, and is, capitalized by the Sycuan Band and STDC’s revenue from its operations. (Graves Decl., ¶18. 53 TTABVUE Exhibit 4.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 53 TTABVUE Exhibit 4C.

Based on the foregoing, it is beyond dispute that STDC is an arm of the Sycuan Band and thus immune from suit.

B. Waiver Of Tribal Sovereign Immunity

Under well-established federal law, a waiver of tribal sovereign immunity must be clear and unequivocally expressed by Congress or the immune party. *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (held that filing lawsuit did

not waive immunity with respect to compulsory counterclaims). To be valid, a waiver by a tribal sovereign entity also must be officially authorized in accordance with the entity's governing documents. *Memphis Biofuels*, 585 F.3d at 920–21.

In this case, as discussed above, STDC's governing documents clearly require waivers to be duly considered and passed by a resolution of STDC's board. In this case, it is beyond dispute that no such waiver was ever voted on or passed by STDC's board at any time. There is simply no evidence in the record of any waiver of immunity by STDC's board.

C. Sycuan Cannot Impliedly Waive its Immunity as a Matter of Law

Petitioner will incorrectly argue that STDC *impliedly* waived its immunity from suit by acquiring the registered trademarks from Respondent IP Services International, Inc. (“IP Services”) with the knowledge of the dispute with Petitioner. This argument fails as a matter of law. “It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). “Nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation.” *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985). Plaintiffs bear the burden of demonstrating there was an express and unequivocal waiver of tribal sovereign immunity. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011).

Petitioner's argument that Sycuan waived its immunity from suit when it acquired the registered trademarks is the sort of “waiver-by implication” that was rejected in *Santa Clara Pueblo*, *Standing Rock Sioux*, and many other decisions. If further authority is needed, *Amerind Risk Management Corp.* is directly on point. There, *the court held that a sovereign entity does not waive its immunity simply because it takes an assignment of rights from a non-immune*

party. Id. at 686, n.7; *see also Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49-50 (1st Cir. 2003) (holding that immune governmental agency did not waive its immunity by stepping into the shoes of a non-immune litigant in federal court).

Likewise, in *Memphis Biofuels*, the United States Court of Appeals for the Sixth Circuit rejected the idea that a tribal entity could validly waive tribal sovereign immunity by entering an agreement when the entity's charter required board approval to waive sovereign immunity and there was no such board approval:

CNI's charter requires board approval to waive sovereign immunity... Here, the parties agree that the board of directors did not pass a resolution waiving sovereign immunity. The parties did, however, sign a waiver provision whereby both parties waived all immunities. MBF believed that CNI obtained the required approval for this waiver provision—but regardless of what MBF may have thought, board approval was not obtained, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact.

Memphis Biofuels, 585 F.3d at 921-22.

This principle—that a tribal sovereign entity may only waive its immunity by an officially approved express waiver—is well-established and repeatedly upheld. *See, e.g., Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (holding that tribal entity was not equitably estopped from asserting immunity because “misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit”); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal representative had actual or apparent authority to waive immunity because “[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution”); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000) (holding that a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity because that right was reserved exclusively to the tribal

council); *Danka Funding Co. v. Sky City Casino*, 329 N.J. Super. 357, 747 A.2d 837, 841–42, 844 (1999) (holding that a controller's signature on a contract containing a forum selection clause was insufficient to waive sovereign immunity, in part, because the right to waive immunity was reserved to the tribal council).

Here, STDC's corporate charter sets forth the only procedure by which STDC could have waived its immunity in this case. The process set forth in STDC's corporate charter *is controlling on the issue on waiver in this case*. *Memphis Biofuels*, 585 F.3d at 919. The March 2018 Assignment (54 TTABVUE Exhibit 1) is even more clearly not a waiver than the agreement in *Memphis Biofuels*. It is indisputable that the March 2018 Assignment lacks any provision waiving STDC's sovereign immunity. It is also indisputable that STDC's charter provides the only process by which STDC can waive its sovereign immunity for a transaction and that no such official action occurred with respect to the March 2018 Assignment. In contrast, the agreement in *Memphis Biofuels* contained an express waiver of immunity. Yet even that express waiver was ineffective under the controlling charter. Just like the lack of official action under the controlling charter in *Memphis Biofuels* meant that the agreement in that case was not a waiver, the lack of any officially approved waiver under STDC's charter means that the March 2018 Assignment—and any conduct connected to it—also could not constitute waiver.

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V. CONCLUSION

For the foregoing reasons, STDC respectfully requests the Board find STDC is an arm of the Sycuan Band and thus immune from suit, and there has been no waiver of that immunity in this case as a matter of law. Thus, STDC respectfully requests the Board GRANT STDC's motion to dismiss for lack of subject matter jurisdiction.

Dated: April 14, 2025

Respectfully submitted,

/Phillip C. Samouris/

Phillip C. Samouris

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ATTORNEYS FOR SPECIALLY-APPEARING

RESPONDENT SYCUAN TRIBAL

DEVELOPMENT CORPORATION

In the matter of Trademark
Registration No. 3172861
Mark: CROSSROADS & Design
Filed: February 28, 2005
Registered: November 21, 2006

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Registration No. 3140971
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In the matter of Trademark
Registration No. 4261884
Mark: CARPE DIEM & Design
Filed: February 15, 2011
Registered: December 18, 2012

Respondents.

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Cancellation No. 92063134

I, Justine K. Wong, do hereby declare:

1. I am an attorney at Higgs Fletcher & Mack LLP, counsel of record for Respondent Sycuan Tribal Development Corporation (“STDC”) in the above-captioned matter. I am admitted to practice law in the State of California. I submit this declaration in support of Respondent STDC’s Supplemental Brief on Tribal Sovereign Immunity. I have personal knowledge of the matters stated herein and could and would testify competently thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Resolution of the Business Committee of the Sycuan Band of the Kumeyaay Nation approving the bylaws of the Sycuan Tribal Development Corporation.

3. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts of the deposition transcript of Troy Graves.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this April 14, 2025 at San Diego, California.

/justinekwong/
JUSTINE K. WONG

EXHIBIT 1

Redacted in its entirety for confidentiality

EXHIBIT 2

Redacted in its entirety for confidentiality

2. I have personal knowledge of the facts stated herein, am over the age of 18 years, and am otherwise competent to testify as to such facts if called upon to do so.

3. STDC was organized as a tribally-formed and owned corporation under the Band's laws on or about February 2, 1990. A true and correct copy of STDC's *Articles of Incorporation* were filed in this case at 53 TTABVUE Exhibit 4a.

4. A true and correct copy of the *Sycuan Tribal Corporation Ordinance* was filed in this case at 53 TTABVUE Exhibit 4b. This ordinance was duly enacted by the General Council on April 18, 2001.

5. On October 29, 2015, Sycuan's General Council passed Resolution No. 2015-20GC, approving and causing STDC to become a federally chartered Section 17 corporation approved by the Bureau of Indian Affairs as a legal entity wholly owned by the Band. A true and correct copy of this resolution was filed in this case at 59 TTABVUE Exhibit 2. I signed the resolution, as a member of Tribal Council, certifying that the General Council duly adopted it on October 29, 2015. 59 TTABVUE Exhibit 2.

6. On January 26, 2017, Sycuan's General Council passed Resolution No. 2017-01GC, ratifying the federal charter of STDC. A true and correct copy of the Resolution was filed in this case at 70 TTABVUE Exhibit A3 to the Declaration of James J. Cekola (the "Cekola Decl."), 61-62. I signed the resolution, as a member of Tribal Council, certifying that the General Council duly adopted it on January 26, 2017. 70 TTABVUE Exhibit A3 of the Cekola Decl., 62.

7. STDC has operated as the non-gaming economic and business development arm of the Tribe continuously since 1990. The Band has intended to share, and apply its sovereign immunity to STDC at all times.

8. On March 8, 2017, the Band's Business Committee duly adopted a new set of bylaws for STDC. (A true and correct copy of the Resolution approving the bylaws and the bylaws are attached as Exhibit 1 to Decl. of Justine Wong.)

9. STDC's Board of Directors has not waived STDC's immunity in this case, nor has it consented to jurisdiction in this proceeding before the Board or in a cancellation proceeding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: 3/28/25

s/ Joshua Muse
JOSHUA MUSE

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **RESPONDENT SYCUAN TRIBAL DEVELOPMENT CORPORATION'S SUPPLEMENTAL BRIEF ON TRIBAL SOVEREIGN IMMUNITY** in Cancellation No. 92063134 was served on April 14, 2025 via email to:

J. Kevin Fee
DLA Piper LLP (US)
500 8th St NW
Washington, DC 20004
Kevin.Fee@us.dlapiper.com and Jane.Wise@us.dlapiper.com

as Petitioner Philip Morris USA Inc.'s counsel

and

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as Respondent IP Services International, Inc.'s counsel

Dated: April 14, 2025

By: /justinekwong/
Justine K. Wong