

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RAVIN CROSSBOWS, LLC,

Plaintiff,

v.

HUNTER'S MANUFACTURING
COMPANY, INC. d/b/a TENPOINT
CROSSBOW TECHNOLOGIES,

Defendant.

) Case No. 5:23-cv-00598-SL
)
) JUDGE SARA LIOI
)
)
)
) RAVIN CROSSBOWS, LLC'S MOTION
) FOR LEAVE TO FILE SUR-REPLY IN
) RESPONSE TO DEFENDANT'S REPLY
) IN SUPPORT OF ITS MOTION TO STAY
) CASE AND MOTION TO POSTPONE
) CASE MANAGEMENT CONFERENCE

Plaintiff Ravin Crossbows, LLC (“Ravin”) respectfully requests leave to file a sur-reply¹ to Defendant Hunter’s Manufacturing Company, Inc. d/b/a TenPoint Crossbow Technologies’ (“TenPoint”) Reply in Support of Its Motion to Stay Case and Motion to Postpone Case Management Conference (“Reply”), (Doc. No. 90), to address the at least four arguments TenPoint raised for the first time in its Reply. “Although the Federal Rules of Civil Procedure do not expressly permit the filing of sur-replies, such filings may be allowed in the appropriate circumstances, especially ‘[w]hen new submissions and/or arguments are included in a reply brief, and a nonmovant’s ability to respond to the new evidence has been vitiated.’” *Key v. Shelby Cnty.*, 551 F. App’x 262, 265 (6th Cir. 2014) (quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003)); *see also Filtrex Int’l, LLC v. Truelsen*, No. 5:12CV58, 2013 WL 587582, at *1 n.1 (N.D. Ohio Feb. 13, 2013) (Lioi, J.) (finding good cause to grant leave to file sur-reply “[b]ecause the defendants make new arguments . . . in their reply brief”); *Eldridge v. Cardif Life Ins. Co.*, 266 F.R.D. 173, 175 (N.D. Ohio 2010) (“This Court grants leave to file a sur-reply to afford a party an opportunity to address new issues raised for the first time in the reply.”).

Specifically, in its proposed Sur-Reply, Ravin addresses:

- (1) TenPoint’s distortion of legal authorities relating to claim and issue preclusion in view of Ravin’s long ago filed terminal disclaimers during prosecution of five of the six asserted patents;
- (2) Ravin’s choice to forgo an expert declaration with its Patent Owner Preliminary Response (“POPR”) says nothing about the likelihood of success (or not) of TenPoint’s IPR Petition directed to the patentability of claim 1 of the ’015 patent;

¹ Ravin’s proposed Sur-Reply is attached as Exhibit 1.

- (3) the unsubstantiated claim that the Nevada Court was unable to act on claim construction or other issues while TenPoint's convenience Motion to Transfer was pending, thereby condoning the delayed Motion to Stay; and
- (4) Velocity Outdoor Inc.'s ("Velocity") purchase of Ravin and Velocity's corporate parent, Compass Diversified, are irrelevant to any stay analysis relating to undue prejudice to Ravin.

1. Terminal Disclaimers Filed in Related Patents Are a Factor for Claim Preclusion Analysis – Not Issue Preclusion – Undercutting Any "Simplification of the Case" Arguments

In Reply, TenPoint raises – for the first time – an argument that the terminal disclaimers filed during the prosecution histories of the related patents-in-suit are a key factor to its "issue preclusion" argument. (Doc. No. 90 at 7-9.) However, the authority TenPoint relies on does not support its position; any terminal disclaimers do not simplify the case in the way TenPoint contends.

First, *Indivior Inc. v. Dr. Reddy's Lab's*, 752 F. App'x 1024, 1034-35 (Fed. Cir. 2018) and *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1165-1169 (Fed. Cir. 2018) address **claim preclusion only** and do not implicate or discuss any use of terminal disclaimers in an issue preclusion analysis. "Issue preclusion prohibits a party from seeking another determination of the litigated issue in the subsequent action." *Soverain Software LLC v. Victoria's Secret Direct Brand Mgmt., LLC*, 778 F.3d 1311, 1315 (Fed. Cir. 2015). "[C]laim preclusion forecloses successive litigation of the same cause of action whether or not relitigation of the cause of action involves the same issues as the earlier suit." *SimpleAir*, 884 F.3d at 1165.

Second, TenPoint's cited cases did not originate from within the Sixth Circuit or apply relevant Sixth Circuit law, but instead, apply the law of the Third Circuit (*Indivior*) and the Fifth Circuit (*SimpleAir*). When determining whether claim preclusion applies, the Federal Circuit

applies “the law of the regional circuit in which the district court sits, here the Fifth Circuit.” *SimpleAir*, 884 F.3d at 1165; *see also Indivior, S.A.*, 752 F. App’x at 1034 (“In determining whether claim preclusion applies, we apply the law of the regional circuit in which the district court sits, here the Third Circuit.”).

Third, TenPoint’s selective quotations regarding the purported significance of terminal disclaimers create an incomplete picture. The “strong clue” and the “concession” by the patent owner that a terminally disclaimed patent is not patently distinct, (Doc. No. 90 at 8), says nothing about the presumed validity of each claim of a patent independent of the validity of other claims – a fundamental principle of patent law that TenPoint ignores in its entirety. *See* 35 U.S.C. § 282(a). There is no “inference that filing a terminal disclaimer functions as an admission regarding the patentability of the resulting claims.” *SimpleAir*, 884 F.3d at 1167.

[T]hat strong clue **does not give rise to a presumption** that a patent subject to a terminal disclaimer is patentably indistinct from its parent patents. It follows that a court may not presume that assertions of a parent patent and a terminally-disclaimed continuation patent against the same product constitute the same cause of action. Rather, the claim preclusion analysis requires comparing the patents’ claims along with other relevant transactional facts.

Id. at 1168 (emphasis added) (remanding to district court to compare the asserted claims to claim asserted in earlier case); *id.* at 1169 (“a district court cannot presume that a terminally-disclaimed continuation patent presents the same cause of action as a parent patent based on the filing of the terminal disclaimer alone.”).

2. ***Inter partes* Review Rules Do Not Require Expert Testimony with a POPR to Thwart a Petition**

TenPoint’s distorts the *inter partes* review process in its Reply. Specifically, TenPoint suggests by Ravin offering “only attorney argument” in its POPR explaining why the Board

should deny the Petition, TenPoint's likelihood of success in having the IPR instituted is somehow increased. (Doc. No. 90 at 10.) TenPoint is wrong.

As a threshold matter, a patent owner preliminary response is optional. *See* 35 U.S.C. § 313; 37 C.F.R. § 42.107(a).

Second, even if a patent owner elects to submit a preliminary response, there is no requirement to submit expert testimony. Indeed, "[n]o negative inference will be drawn if a patent owner decides not to present testimonial evidence with a preliminary response." (*See* Ex. A, Excerpts from PTAB Consolidated Trial Practice Guide November 2019 at 10 of 10.)

Third, that TenPoint submitted an expert declaration to support its substantive arguments, (Doc. No. 90 at 10), does not – standing alone – weigh in favor of an IPR trial being instituted. As Ravin provides in its POPR, (*see e.g.*, Doc. No. 88-1 and 89-1 at 23-24, 26-27, 34, 36, 43, 53), the sections of TenPoint's cited expert report merely parrot, *verbatim*, the assertions in the Petition. In these circumstances, the Board is unlikely to give TenPoint's expert's opinion much weight, if any, in its decision to institute, or any final written decision. Such "evidence" is entitled to no meaningful weight. (*See* Ex. B, *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9, 15 (PTAB Aug. 24, 2022) (precedential) (the cited "declaration . . . merely repeats, *verbatim*, the conclusory assertion for which it is offered to support . . . [because] the cited declaration testimony is conclusory and unsupported, [and] adds little to the conclusory assertion for which it is offered to support, [it] is entitled to little weight") (*citing* 37 C.F.R. § 42.65(a) ("Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight."))).)

Finally, TenPoint's argument regarding the percentage of instituted challenged claims that Ravin provided misstates Ravin's position. (Doc. No. 90 at 10-11.) At the time of

TenPoint's Motion to Stay and Ravin's Opposition, the sole claim challenged in TenPoint's Petition is simply a "challenged claim." Thus, the correct statistic to use is the percentage of challenged claims that are found unpatentable: 29%. Should the IPR be instituted, then the denominator would change to instituted claims, but as of now, that has not happened.

3. The Nevada District Court Could Have Addressed Claim Construction Before Deciding TenPoint's Motion to Transfer

Another new assertion TenPoint raises in its Reply to justify its delay in filing its Motion to Stay was that the Nevada Court could not act on claim construction until TenPoint's Motion to Transfer was decided. (Doc. No. 90 at 4, 16.) This was certainly TenPoint's wish, but this is not the law within the Ninth Circuit. (*See* at Doc. No. 49 at 5-7; Doc. No. 52; Doc. No. 59; Doc. No. 70 at 8-9 ("Equally unavailing is TenPoint's reliance on mandamus decisions from cases in either the Western District of Texas, or the Eastern District of Texas where the Federal Circuit applies Fifth Circuit law.").) Moreover, notwithstanding TenPoint's Motion to Stay Claim Construction in Nevada, the Court neither stayed the parties' claim construction briefing, (*see* Doc. Nos. 47, 50, 56, 57), nor the *Markman* hearing. This new excuse for not filing its Motion to Stay predicated on its IPR Petition sooner is indefensible.

4. Ravin's Sole Member and Corporate Parent Entities Are Not Parties to this Action and Are Irrelevant to a Motion to Stay

TenPoint's arguments that the purchase of Ravin by Velocity, and financial information regarding Velocity's parent company, Compass, are somehow pertinent to a motion to stay, (Doc. No. 90 at 14), are unsupported and irrelevant. Neither Velocity nor Compass is a party to this litigation. It is the undue prejudice to Ravin that is at issue.

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For the reasons set forth above, Ravin respectfully requests that the Court grant its Motion for Leave to File its Sur-Reply.

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Respectfully submitted,

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