

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WAVELYNX TECHNOLOGIES CORP.
Petitioner,

v.

ASSA ABLOY IDENTIFICATION TECHNOLOGY GROUP AB
Patent Owner.

Case No. IPR2023-00730
Patent No. 7,439,862

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

As authorized by the Board’s June 26, 2023, email, Petitioner files this reply to Patent Owner (“PO”)’s Preliminary Response (“POPR”, Paper 6). Since the filing of the Petition, (1) the District Court Litigation has been transferred to the District of Colorado; (2) no activity has taken place in the District Court Litigation; and (3) it is clear that, as PO concedes, any Final Written Decision (“FWD”) in this proceeding would issue before any yet unscheduled trial in the District Court Litigation. For these reasons and as explained below, discretionary denial is not appropriate.

Each of *Fintiv* factors 2 through 6 disfavor discretionary denial. For factor 2, the parties agree that the Board would issue its FWD before the district court reaches trial. *See* POPR at 62. On May 19, 2023, the District Court Litigation was transferred to the District of Colorado. The District of Colorado’s median time-to-trial of 35.9 months would place trial 6 months after the Board issues its FWD in September 2024. *See* Petition, at 84; EX1037, at 79. Moreover, because no activity has taken place in the litigation since the transfer, any trial date would likely occur later than September 2024. For example, if the time-to-trial period were applied starting from the date the litigation was transferred, the trial would not occur until May 2026, 20 months after any FWD. Either way, there can be no dispute that any FWD would come long before any trial in the District Court Litigation, which “weighs strongly against discretionary denial.” *See, e.g., Autostore Sys. Inc. v. Ocado Innovation Ltd.*, IPR2022-00673, Paper 7, at 10-11 (PTAB Sept. 14, 2022).

For factor 3, the District Court Litigation remains at its earliest stages: neither a scheduling conference (much less a scheduling order) nor a trial date has been set, and no discovery has taken place. PO's insistence that "the parties will begin making substantial investments in that proceeding shortly" (POPR at 62), "dwells on future investment that is speculative" and thus has no bearing on this factor. *F5, Inc. v. Sunstone Info. Defense Inc.*, IPR2022-00483, Paper 13, at 13 (PTAB Aug. 12, 2022).

For factor 4, to the extent that any issues overlap between this proceeding and the District Court Litigation, "given that the trial will occur after [the] Final Written Decision, the overlap is not likely to lead to any inconsistent results" because 35 U.S.C. § 315(e) estoppel will attach, which disfavors discretionary denial. *See Autostore*, IPR2022-00673, Paper 7, at 12-13; 88 Fed. Reg. 24503, at 24515 ("The Office notes that concerns regarding overlapping issues and duplicative efforts are greatly mitigated when a district court trial will not take place until after the Board issues a final written decision."). Further, PO's argument that potential § 102(g) arguments in the district court will somehow overlap the grounds in this proceeding is not only speculative and unsupported, but ignores the fact that to the extent there is any such overlap, the district court will have the FWD and can evaluate whether estoppel may attach.

Factor 5 also disfavors discretionary denial because § 315(e) estoppel will apply to the district court before trial. *See, e.g., Siemens Gamesa Renewable Energy, Inc. v. General Elec. Co.*, IPR2022-01479, Paper 11, at 17 (PTAB Mar. 7, 2023).

For factor 6, that the Petition’s arguments are based on the claim terms’ plain and ordinary meanings does not detract from the Petition’s merits because (1) the intrinsic record does not compel other constructions, and (2) PO has not provided any arguments for its purported constructions (instead simply incorporating by reference briefs and court documents from a litigation to which Petitioner was not a party), nor shown that its constructions are not taught by Petitioner’s grounds. Further, PO’s argument that instituting trial would be inefficient because the ’862 patent will expire 6 months after the Board issues its FWD is “undercut [both] by the six-year statute of limitations” for infringement damages and by the fact that PO currently asserts the ’862 patent against Petitioner. *Samsung Elecs. Co., Ltd. v. Acorn Semi, LLC*, IPR2020-01282, Paper 20, at 48 (PTAB Feb. 10, 2021).

Fintiv factor 1 remains neutral because PO does not provide any “specific evidence” as to whether the district court would grant a stay or not. *See Sand Revolution II, LLC v. Cont’l Intermodal Grp. – Trucking LLC*, IPR2019-01393, Paper 24, at 7 (PTAB June 16, 2020) (informative) (“In the absence of specific evidence,” the Board will not attempt to predict whether the district court will enter a stay).

Dated: July 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below true copies of the foregoing PETITIONER’S REPLY TO PATENT OWNER’S PRELIMINARY RESPONSE were served on Patent Owner’s counsel at the following email addresses:

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Date: July 5, 2023

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