

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO. LTD. and SAMSUNG ELECTRONICS
AMERICA, INC.,
Petitioners,

v.

MOBILE DATA TECHNOLOGIES LLC,
Patent Owner

IPR2025-00535
U.S. Patent No. 9,032,039

**PETITIONERS' REQUEST FOR DIRECTOR REVIEW OF DECISION
DENYING INSTITUTION OF *INTER PARTES* REVIEW**

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I. INTRODUCTION

This IPR should have been referred to a panel for decision on institution because of the clear Examiner error that led to its issuance, a factor which has led to referral in numerous other proceedings. There can be no dispute the Board found a reasonable likelihood existed that all the challenged claims were unpatentable in a prior IPR that was terminated by settlement. The Board's refusal to grant discovery into the terms of that settlement obfuscated PO's intent. But, the timing of PO's settlement alone demonstrates the settlement was an attempt to insulate the patent from review of the clear Examiner error and to allow PO to continue its assertion of a patent it knows was erroneously issued.

The PO of the '039 patent is MDT, a patent assertion entity with no products or services of its own, which only acquired the patent from its prior owner in April 2022—just over three years ago. PO first asserted the patent against Meta, which responded with a petition for IPR of five of the thirty issued claims. The Board instituted IPR on June 11, 2024, determining that at least one claim of the '039 patent is likely unpatentable. At that point, with only two years elapsing between its acquisition of the '039 patent and the Board's institution decision, PO could have had no real settled expectations in the patent. One day before the Board's decision instituting IPR, PO sued Petitioners. Because Petitioners would not receive infringement contentions for months, the timing of PO's filing deprived

them of the ability to join the instituted Meta IPR. After being served with infringement contentions, Petitioners filed their own IPR petition, using the same art as Meta. But on the eve of the trial in the Meta IPR, PO dropped its claims against Meta as part of a settlement that cancelled the trial and so avoided an adverse FWD. Soon after, institution in Petitioners' IPR was discretionarily denied.

The Decision granting discretionary denial of review was wrong and should be reversed. Contrary to the Decision's findings, settled expectations do not weigh in favor of discretionary denial; they weigh heavily against it. PO has no settled expectations in a patent it owned for only two years before IPR was instituted against it. PO's strategic settlement with Meta does not change that. Petitioners, on the other hand, had no reason to think the '039 patent would be enforced against them, not only because the patent's prior owner never enforced the patent but also because the '039 patent's parent with similar claims was invalidated in another proceeding. Petitioners' views were confirmed by the institution of the Meta IPR.

In cases just like this one the Acting Director has declined to grant discretionary denial, and the Decision reflects significant inconsistency with those prior Board proceedings. The Decision moreover denied review based on factually erroneous findings regarding expected time to trial and the likelihood of a stay, which is an abuse of discretion. The Decision below should be reversed to ensure

the Acting Director’s guidance is being properly and consistently applied, and to correct the incentives this Decision creates for patent owners to game the system.

II. ARGUMENT

A. The Decision’s Reliance On “Settled Expectations” Is Factually Unfounded And An Abuse of Discretion

1. PO Has No Legitimate Settled Expectations

PO has not owned the ’039 patent long enough to have developed any “settled” expectations about it. PO acquired the patent in April 2022, only three years ago. That short time period itself precludes any claim of “settled” expectations. *See Embody, Inc. v. Lifenet Health*, IPR2025-00248-249, P. 13, 2-3 (Stewart June 26, 2025) (referring where patents in force for 3 and 7 years); *Cambridge Indus. v. Applied Optoelectronics, Inc.*, IPR2025-00434, -436-437, P. 11, 2-3 (Stewart June 26, 2025) (referring where patents in force for 5-6 years).

PO could not have had any settled expectations that the ’039 patent was valid based on both the PTAB’s prior rejection of the parent patent claims and events after PO acquired the ’039 patent. For example, just two years after PO acquired the patent, the Board determined in the Meta IPR that there was a reasonable likelihood at least one claim of the patent was unpatentable, and instituted IPR against five claims. *Meta Platforms, Inc. v. Mobile Data Techs. LLC*, IPR2024-00248, P. 11, 26 (PTAB June 11, 2024). As the Board consistently has found, two years is not long enough for a party to develop “settled

expectations” that could weigh in its favor on a request for discretionary denial.

Embody, IPR2025-00248, P. 13, 2-3; *Cambridge*, IPR2025-00434, P. 11, 2-3.

PO has argued that because the patent issued in 2015 it had settled expectations. That is wrong as a matter of law—what matters are PO’s expectations for its 2022 investment, not the prior owner’s expectations between 2015 and the sale. *See Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1350-51 (Fed. Cir. 2020) (noting that “the timing” of a purchase of property and the “knowledge of the purchaser” are relevant considerations in determining whether a purchaser had reasonable investment-backed expectations).

The facts also contradict PO’s argument. The ’039 patent was not “in force” in any meaningful way before 2022. The prior owner never tried to exclude anyone from practicing the patent; it never asserted, licensed, or used the ’039 patent in any way that could support an expectation of enforcement. That was the case even though Samsung’s conduct MDT accuses of infringement began in 2016.

The Director has noted that years of non-enforcement, as in this proceeding, weigh *against* the patent owner’s claim to “settled expectations” of enforceability. *Intel Corp. v. Proxense LLC*, IPR2025-00327-329, P. 12, 2-3 (Stewart June 26, 2025) (“[t]here may be persuasive reasons why the Board should review challenged claims several years after their issuance date,” including when “a patent may have been in force for years but may not have been commercialized, asserted,

marked, [or] licensed.”); *Shenzhen Tuozhu Tech. Co., Ltd. v. Stratasy, Inc.*, IPR2025-00438, -531-532, -585, -611, P. 10, 3 (Stewart July 17, 2025) (referring petitions based in part on evidence that the challenged patents, which had been in force for approximately 10 years, had “never been commercialized, asserted, marked, licensed, or otherwise applied” in petitioner’s “technology space”—a factor that weighed against patent owner’s claim of settled expectations).

Consistent with the Board’s prior rulings, and contrary to the decision here, the period of dormant existence since the ’039 patent’s issuance does not support PO’s claim to any positive “settled expectations,” and instead weighs against discretionary denial. *Id.*; see also *Tesla, Inc. v. Intell. Ventures II LLC*, IPR2025-00217, -219-222, -339, P. 9 (Stewart June 13, 2025); *Tesla, Inc. v. Navy*, IPR2025-00341, P. 12 (Stewart June 13, 2025).

Moreover, had PO conducted a diligent inquiry into the ’039 patent before acquiring it, it would have found only reasons to expect that the ’039 patent is invalid. That is because, just before the ’039 patent issued in 2015, the PTAB invalidated all claims of its parent patent with a similar specification and similar claims—U.S. Patent 8,135,801 (“the ’5801 patent”). The Federal Circuit affirmed that decision in a Rule 36 opinion five months after the ’039 patent issued. See *Wireless Ink Corp. v. Facebook, Inc.*, 620 F. App’x 955 (Fed. Cir. 2015).

A reasonable acquirer should have expected the '039 patent to be susceptible to the same fate as its parent if it were ever challenged. Indeed, the Federal Circuit has held in no uncertain terms that patent owners receive their patents with the knowledge and expectation that those patents may be subject to post-issuance reconsideration proceedings by the PTO, including IPRs. *See Celgene Corp. v. Peter*, 931 F.3d 1342, 1361-63 (Fed. Cir. 2019). The PTO intervened in *Celgene*, and repeatedly advanced the position that patent owners lack a settled expectation that their patents will not be subject to post-issuance challenges, including IPRs. *See* Brief for Intervenor at 42-43, *Celgene Corp. v. Iancu*, No. 2018-1167 (Fed. Cir. Aug. 30, 2018) (Doc. No. 43). Having prevailed by making this argument in *Celgene*, the PTO is judicially estopped from taking the opposite position in later proceedings, including this one. *See Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010).

On the record here, PO should have anticipated a high likelihood the '039 patent would be challenged in an IPR and invalidated—as likely would have happened in the Meta IPR but for PO's strategic settlement. PO has argued it had settled expectations based on a reexam proceeding regarding a great-grandparent patent to the '039 patent. (P. 11, 5.) That argument makes no sense. The reexam decision issued only in March 2024. Even assuming PO could reasonably form any new expectations concerning the '039 patent based on a decision concerning its

mere great-grandparent, those expectations had no time to become “settled”; the Board instituted IPR of the ’039 patent *itself* only three months later.

PO’s claim of settled expectations therefore boils down to a bare reliance on the legal presumption of validity. But that cannot distinguish this case from others in which discretionary denial was not granted. The PTAB was created out of the recognition that sometimes the Patent Office makes an error. (EX-1052, 39-40, 48.) Congress created the PTAB to “weed out” those “bad patent claims.” *Thryv, Inc v. Click-To-Call Techs., LP*, 590 U.S. 45, 54 (2020). This is one of those cases.

2. Petitioners’ Settled Expectations Weigh Strongly Against Discretionary Denial

While PO has no legitimate settled expectations in the ’039 patent, Petitioners and the public had reasonable basis to believe that the ’039 patent would never be enforced. As recounted above, since 2015 there had been good reason to expect the ’039 patent would be invalidated if it were ever challenged, because only five months after it issued, the Federal Circuit affirmed the invalidation of similar claims of its parent patent. Perhaps for that reason, the ’039 patent’s prior owner never tried enforcing it against anyone.

Petitioners in particular had no reason to expect that the ’039 patent posed any threat worthy of a challenge at the Patent Office. Samsung introduced the presently accused technology to the U.S. in 2016, shortly after the ’039 patent issued, and Samsung’s innovative products have been in continuous use in the U.S.

market since that time. Not once did the prior owner claim to Samsung that those products infringed the '039 patent, and even MDT took two years to assert the patent against Samsung—filing its complaint in 2024 only *after* the '039 patent already had expired. This history weighs against discretionary denial for the same reasons the Board recognized in *Proxense* and *Shenzhen*: when there is no reason to challenge a patent earlier in its term, the age of the patent should not protect it from review. IPR2025-00327, P. 12, 2-3; IPR2025-00438, P. 10, 3.

B. The Director Should Review The Discretionary Denial In This Case To Establish Consistency Across Board Proceedings

“Discretion is not whim,” and must be “limit[ed]” according to “legal standards” to “promote the basic principle of justice that like cases should be decided alike.” *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). The Decision failed to consider factors that have resulted in the rejection of discretionary denial in other proceedings. That resulted in the Decision being at odds with precedent, which is itself an abuse of discretion.

The petition presents strong merits. In the context of the Meta IPR petition, the Board previously determined that Petitioners’ merits arguments are strong. Petitioners rely on the same art the Board considered in instituting the Meta IPR. In doing so, the Board found the art likely rendered unpatentable at least one of the claims Meta challenged. IPR2024-00248, P. 11. The same finding should apply here. Petitioners challenge sixteen more claims of the '039 patent that PO is

asserting against Samsung but had not asserted against Meta. As explained in Petitioners' Brief, the Board need not consider any additional art to decide Samsung also has a strong case in its challenge to the additional claims. (P. 9, 17.)

The strength of the petition's merits is further evidenced by the Board's decision rejecting similar claims of the '039 patent's parent, the '5801 patent. (*Supra*, 5.) In the reexamination proceeding on that patent, the Board rejected all claims in view of Neibauer. (EX-1024, 14.) Neibauer is also the lead reference in this petition, and it renders the similar claims of the '039 patent unpatentable too.

The Decision failed to expressly address the strength of the petition or weigh it against other factors. That failure was an abuse of discretion, as evidenced by other proceedings in which the Board properly weighed similar evidence that a petition presented strong evidence of unpatentability and found that it weighed against discretionary denial. *See, e.g., Intell Ventures*, IPR2025-00217, P. 9, 2 (declining request for discretionary denial where the Board had "previously determined there was a reasonable likelihood that similar claims of an ancestor patent were unpatentable"); *Padagis US LLC v. Neurelis, Inc.*, IPR2025-00464-466, P. 12, 2-3 (Stewart July 16, 2025) (no discretionary denial in view of factors that weighed against denial, including "in particular" the similarity of issues raised in the petition to those previously adjudicated in a prior IPR involving a related patent).

The district court proceeding involves multiple patents. In the district court litigation, PO has asserted 70 claims across five different patents. Although the subject matter is similar across the asserted patents, the sheer number of claims should weigh against discretionary denial as the Board is better suited to review alleged differences between a large number of patents. *Cf., Intell. Ventures*, IPR2025-00217, P. 9, 2-3; *id.*, P. 8, 6; *Shenzhen*, IPR2025-00438, P. 10, 3.

Petitioners offered a stipulation broader than *Sotera*. With their Petition, Petitioners offered a *Sotera* stipulation agreeing that if the Board institutes IPR in either or both of IPR2025-00535 and IPR2025-00536 concerning the '039 patent, Petitioners will not pursue in the district court litigation any invalidity defense based on the same grounds raised—or any other grounds that could have reasonably been raised—in the instituted proceeding. (EX-2032.) Petitioners then went further, extending their *Sotera* stipulation to “any commercial prior art theory that is coextensive with prior art presented to the Board.” (EX-2048.) Petitioners’ stipulation is even broader than the one Tesla offered in *Tesla, Inc. v. Intell. Ventures II LLC*, in which the Director found Tesla’s stipulation counseled against discretionary denial. IPR2025-00217, P. 9, 2; *see also Shenzhen*, IPR2025-00438, P. 10, 2; *Navy*, IPR2025-00341, P. 12, 2. The Decision here, however, made no mention of the proffered broad stipulation.

C. The Decision Relies Solely On Erroneous Factual Findings Regarding the Likely Time to Trial and Likelihood of a Stay

The Decision notes only two factors, in addition to settled expectations, supporting discretionary denial: the trial date and the likelihood of a stay of trial court proceedings. It was an abuse of discretion for the Decision to rely on those factors in granting discretionary denial. The Decision's findings on those factors are erroneous as a matter of fact and, in any event, are outweighed by the other factors discussed above.

Trial likely will happen close to the FWD date. The Decision relies on an erroneous finding of material fact in assuming that the currently scheduled trial date is likely to hold. The current scheduled trial date is April 20, 2026. As Petitioners have explained (P. 9, 40-44), that date is highly unlikely to hold. There are currently *nine* other trials scheduled for that same trial date in front of the same judge. That is not going to happen. Recent median time-to-trial statistics confirm that any trial is actually more likely to occur months later. According to the most recent data, the median time to trial in the Eastern District of Texas is 25.9 months, which would set the expected trial date at August 10, 2026. And even that date likely underestimates what the actual time to trial will be, as median times to trial have been increasing even over the past year. (P. 9, 41 & n.6.)

The FWD in this proceeding would be expected in September 2026. Had the Decision considered the actual median time-to-trial and the resulting trial date of

August 2026, consistency would require a finding that this factor neither favors nor disfavors discretionary denial. The Board repeatedly has found that a difference of one month between a trial date and a FWD date that follows trial renders this factor “neutral.” *See, e.g., Hulu LLC v. SITO Mobile R&D IP, LLC*, IPR2021-00158, P. 9, 9-10 (PTAB Apr. 20, 2021) (instituting when FWD expected 1 month after trial, reasoning that where trial date and FWD data are close, efficiency and fairness concerns are not particularly strong); *Netapp, Inc. v. Proven Networks, LLC*, IPR2020-01436, P. 11, 11-12 (PTAB Apr. 9, 2021) (instituting when FWD expected 1 month after trial). Even when the trial date is *four* months before the expected FWD date, the Board has found this factor weighs only marginally in favor of denial, and has proceeded to institute review notwithstanding the difference. *See, e.g., Zynga, Inc. v. IGT*, IPR2022-00199, P. 11, 14 (PTAB June 14, 2022) (instituting while weighing factor “slightly in favor of discretionary denial” where trial 4 months before FWD); *Samsung Elecs. Co., Ltd. v. CardWare Inc.*, IPR2023-00211, P. 13, 10 (PTAB Jun. 13, 2023) (instituting while weighing factor “marginally in favor of discretionary denial” when trial was 4 months before FWD). Here, the difference is at most five months (in the unlikely event trial happens in Apr. 2026), and is statistically and reasonably more likely to be closer to one month (statistically expected in Aug. 2026).

A stay of the district court litigation is likely. The Board abused its discretion in finding “insufficient evidence that the district court is likely to stay its proceeding even if the Board were to institute trial.” (P. 16, 2.) PO would not be able to credibly oppose a stay, as it previously admitted in the Meta litigation that a stay was warranted. (EX-1045, 5.) If PO does not oppose a motion to stay, a stay is nearly certain: Judge Gilstrap nearly always grants uncontested motions to stay pending IPR. (*See* EX-1044 (statistics showing Judge Gilstrap has granted over 88% (38/43) uncontested motions to stay pending IPR since 2014).)

Even if PO opposed a stay, it remains more likely than not that a stay would issue. Judge Gilstrap, recognizing PTAB review will likely result in simplification of issues before the court, routinely grants contested stays when all asserted claims are challenged in the instituted IPRs. *E.g., Resonant Sys., Inc. v. Samsung Elecs. Co., Ltd.*, No. 2:22-CV-00423-JRG, 2024 WL 1021023, *3 (E.D. Tex. Mar. 8, 2024). Any protestations by PO as to the timing of a stay motion would not change that likelihood. Judge Gilstrap has recognized it is more appropriate to consider a stay motion post-institution. *Tessera Advanced Techs., Inc. v. Samsung Elecs. Co., Ltd.*, No. 2:17-cv-00671, 2018 WL 3472700, *4 (E.D. Tex. July 19, 2018).

D. The Discretionary Denial Violates at Least the Due Process Clause and the Administrative Procedure Act

The Decision violates the Due Process Clause of the Fifth Amendment by retroactively applying new rules that did not exist at the time Samsung filed its

petition in January 2025. At that time, the rule was the Board “will not discretionarily deny institution of an IPR ... in view of parallel district court litigation” where a petitioner files a *Sotera* stipulation. *See* Director Vidal’s June 21, 2022 Memorandum. Petitioners were entitled to rely on that rule in preparing their arguments and strategy. But on February 28, 2025, the USPTO rescinded that rule. The Decision wrongly applies that rescission retroactively to Samsung’s petitions, discretionarily denying them based on factors that would have been prohibited under the Vidal Memo. *See Kirwa v. U.S. Dep’t of Def.*, 285 F. Supp. 3d 21, 41 (D.D.C. 2017). Moreover, the Decision’s reversal on the impact of a *Sotera* stipulation effectively deprives Petitioners of their rights and protections under the IPR statute solely because they were sued in a court that initially sets early trial dates. Both amount to a violation of Petitioners’ due process rights.

Second, the Decision is inconsistent with the governing statute. Congress was explicit on the time frame to file IPR petitions. A petition may be filed any time after the later of 9 months after the grant of a patent or the termination of any post-grant review, with no end date. 35 U.S.C. § 311(c). Petitions can also be filed after patent expiration, and have been for more than a decade. *See Apple Inc. v. Gesture Tech. Partners, LLC*, 127 F.4th 364, 368-69 (Fed. Cir. 2025). There is no *sub silentio* point when patents become immune to IPR petitions due to so-called “settled expectations.” Analogously, in *SCA Hygiene Prods. Aktiebolag v. First*

Quality Baby Prods., LLC, the Supreme Court rejected as a matter of law any attempt to limit actions based on timing where Congress was express about the time frame in which such actions are to take place. 580 U.S. 328, 346 (2017).

Third, the Decision violates the APA. The rescission affects “the substantive ... standards by which [the USPTO] examines a party’s application,” and as such could only properly issue through notice and comment rulemaking. *In re Chestek PLLC*, 92 F.4th 1105, 1109 (Fed. Cir. 2024). The new rules introduced by the February 2025 rescission and the subsequent March 2025 memorandum did not go through notice-and-comment rulemaking, and therefore violate the APA. The Director’s retroactive application of those new rules in the Decision likewise violates the APA. Moreover, the rescission changed existing policy without considering the serious reliance interests thereby affected, and without providing a reasoned explanation for the change. Under the change-in-position doctrine, the rescission is therefore arbitrary and capricious in violation of the APA. *See Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30 (2020).

III. CONCLUSION

Petitioners respectfully request that the Director withdraw the Decision and refer the matter to a panel for consideration.

Date: August 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

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