

Filed: December 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COOLPAD TECHNOLOGIES, INC. AND ZTE (USA), INC.,

PETITIONERS,

V.

BELL NORTHERN RESEARCH, LLC,

PATENT OWNER.

Case No. IPR2019-01365

U.S. Patent No. 7,039,435

**PATENT OWNER'S PRELIMINARY SUR-REPLY TO
PETITIONERS' PRELIMINARY REPLY**

Petitioner admits that the district court has scheduled the final pretrial conference—meaning that by that point, the parties will have completed all expert discovery, summary judgment briefing, motions *in limine*, and exhibit and witness lists exchanges—for **March 20, 2020 at 2:30 p.m.** (Ex. 2001, ¶29.) It strains credibility that the Court, having had the parties be trial-ready by that date, would then wait **ten months** or more to actually conduct the trial. Lest there be any doubt, the default scheduling rules in the Southern District of California for patent cases call for “[a] trial date...within twenty-four (24) months for complex cases.” (Ex. 2007 (SDCA Patent Local Rules) at Patent L.R. 2.1(a)(3).) Twenty-four months from Patent Owner’s original complaint filing is July 31, 2020. (*See* Pet., 3.)

Moreover, the schedule is unlikely to change. Petitioner’s former co-defendant Huawei has already tried—and failed—to modify the schedule. Despite the court’s warning in the scheduling order that “[t]he dates and times set forth herein will not be modified except for good cause shown” (Ex. 2001, ¶30), Huawei filed a request to extend the case deadlines due to anticipated discovery delays. The court denied Huawei’s request for extensions of deadlines, stating that “[a]ll of the current dates and deadlines will remain as set.” (Ex. 2008, at 2.)

Petitioner misconstrues the district court’s comments on PTAB proceedings. First, as Petitioner’s first block quote shows, in June of 2019, the court shares the Board’s concern regarding parallel proceedings. (*See* Rep., 1 (quoting district

court's statement asking first whether any IPRs had been instituted and then stating "I'm rather loathe to go on parallel tracks with the Patent Office.") The Board's analogous statements in *NHK* in very similar circumstances are precisely why Patent Owner seeks denial of the Petition under § 314(a). (*See* POPR at 26-28.) While the court stated that it would "consider the efficiencies of proceeding" (Rep., 2) if an IPR is instituted, it is highly probable that the court would consider it efficient to continue to trial when the most significant costs of litigating—all costs except for the actual trial expenses, and likely some of those too—will already have been incurred, and the case will be nearly trial ready. This situation is the opposite of "an inexpensive substitute for district court litigation." Instead, it would derail an already costly process that is near completion.

Second, nowhere does *NHK* state that the Board should consider the district court's views on IPRs in exercising its discretion under § 314(a). Such a holding would lead to wild inconsistencies, depending on the views of which judge happened to preside over a related litigation, rather than objective facts such as the case schedule and overlap between the two tracks—which is what *NHK* focuses on. *See NHK Spring Co., Ltd. v. Intri-Plex Technologies, Inc.*, IPR2018-00752, Paper No. 8 at 19-20 (PTAB Sept. 12, 2018).

Petitioner's equity argument also finds no basis in fact or law. The '435 patent only has nine claims and Petitioner's argument that it needed to wait for

final asserted claims in the litigation to file its petition is unpersuasive. Petitioners routinely file petitions challenging all claims in a patent without awaiting district court infringement contentions, which can usually be modified during discovery for “good cause” during litigation. Further, Petitioner’s argument that it delayed filing because “claim construction remained fluid” is not explained. (Rep., 3.) To the extent Petitioner waited to see how the claim construction process played out before deciding to file its “copycat” Petition, that delay does not justify any equitable relief since the petition is “identical” to an earlier filed one. (*See* Pet., 2.)

Finally, Petitioner does not contest that in *Fractus* the Board considered the posture of the related district court litigation and determined that “granting institution would require the Board to consider the same prior art and essentially identical evidence and arguments already under consideration by the district court” resulting in an inefficient use of Board, judicial, and party resources. *ZTE (USA), Inc. v. Fractus S.A.*, IPR2018-01461, Paper 10 at 17 (PTAB Feb. 28, 2019). As for *General Plastics*, Petitioner admits that it filed its petition “a month after separate petitioner.” (Rep., 3.) This is indicative of the “abuse of the review process by repeated attacks on patents” concerns expressed in *General Plastics*, and the reply does nothing to alleviate those worries.

Petitioner’s reply does not change the compelling arguments favoring denying institution under § 314(a) or § 325(d).

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Respectfully Submitted,

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