

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOUDFLARE, INC. AND SONICWALL INC.
Petitioners

v.

SABLE NETWORKS, INC.
Patent Owner

Case IPR2021-00909
Patent No. 8,243,593

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

Patent Owner’s argument for discretionary denial should be rejected because, among other reasons, the district court has not set a trial date before the final written decision in this proceeding. Rather, Patent Owner acknowledges that the deadline for a final written decision in this IPR (if instituted) would be November 21, 2022, while the district court trial is “estimated” to begin *almost two months later* on January 12, 2023. Paper 8 at 67. This strongly favors institution because the Board’s final decision may obviate the need for trial on the challenged patent and if any claims survive this IPR then Section 315 estoppel will apply. *See* IPR2020-00138, Paper 20 at 13-14 (PTAB June 26, 2020) (“*Fintiv* Factor 2 also favors institution, especially given that the trials in the district court cases will not likely take place until after we issue our Final Written Decisions in these proceedings.”).

Further, Patent Owner relies on an “estimated” trial date as no specific trial date has been set. Patent Owner cites a portion of an email exchange with the court clerk in which the clerk states that “the Markman hearing will be scheduled for January 12, 2022.” EX2002 at 1. From there, Patent Owner estimates a trial date based on the district court’s default schedule, which has already been extended in the related lawsuit.¹ The judge’s “Order Governing Proceedings” (OGP) makes clear

¹ Patent Owner provides (without explanation) only a portion of the exchange with the court clerk. The entire exchange, submitted by Petitioner, shows that the judge

that the estimated trial date is at most a placeholder, stating that trial will be “52 weeks after *Markman* hearing (or as soon as practicable)” and that the “Court expects to set these dates at the conclusion of the *Markman* Hearing.” EX2003 at 11. The OGP further contemplates that “the actual trial date” may “materially differ[] from the Court’s default schedule....” *Id.* at 11 n.11.² The Board has recognized in prior decisions that the district court’s OGP creates at most a placeholder for trial—it does not establish a trial date. *See, e.g.*, IPR2021-00279, Paper 12 at 29-30 (PTAB June 11, 2021) (“We determine there is no trial date scheduled for the parallel proceeding.”); IPR2020-01449, Paper 13 at 15 (PTAB Mar. 3, 2021) (“[T]here is no trial date scheduled for the parallel district court proceeding. The Amended Scheduling Order does not set a trial date, and the email from the District Court, which was sent prior to the Amended Scheduling Order, indicates that the November 8, 2021 date is ‘estimated’ and may be changed.”).

agreed to extend the default deadlines for invalidity contentions by four weeks and the *Markman* hearing by five weeks despite Patent Owner’s argument that the extensions would push the estimated trial date past the final written decisions in defendant’s IPRs. EX1061 at 1-2.

² The parties have submitted a proposed scheduling order with identical language regarding trial. EX1067.

There is no reason to believe the trial will be any earlier than the estimate given the judge's heavy docket of nearly 900 pending patent lawsuits. EX1068.

Further, the *Markman* hearing is scheduled for a week in which the district court has scheduled at least four other cases for *Markman* hearings. EX1062, EX1063, EX1064, EX1065. It will not be feasible for the court to conduct trials 52 weeks later in all of these cases starting the same week of January 2023, as the Board has recognized in similar situations. *See, e.g.*, PGR2020-00065, Paper 10 at 26 (PTAB Dec. 3, 2020). And even the *Markman* hearing date in this case is uncertain because Petitioner recently filed a motion to transfer the action to a different district court. EX1066; EX1069 at 1 (standing order stating *Markman* hearing may be postponed until after a pending transfer motion is resolved).

In addition, the related litigation is in the earliest stages with no significant investment in that proceeding. Petitioner's invalidity contentions are not due until September 15, 2021, and claim construction proceedings have not begun. The Board has found that even when claim construction briefs have *already* been submitted (not so here) "the related litigation is at a very early stage and the investment by the court and the parties therein is relatively minimal...[t]hus, *this factor weighs strongly against exercising our discretion* to deny institution." IPR2020-01302, Paper 9 at 14 (PTAB Jan. 28, 2021) (emphasis added).

Dated: September 9, 2021

Respectfully submitted,

/James L. Day /

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