UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. AND HP INC.,
Petitioners

v.

XR COMMUNICATIONS, LLC, D/B/A VIVATO TECHNOLOGIES,
Patent Owner

IPR2022-00367
Patent No. 10,715,235

PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY

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Exhibits

Exhibit No.	Description
2009	Judge Albright's April 14, 2022, Standing Order Governing Proceedings in Patent Cases
2010	Joint Claim Construction Statement, *XR Communications v. HP Inc.*, W.D. Tex. Case No. 21-cv-00694-ADA, Dkt. No. 48
2011	Joint Claim Construction Statement, *XR Communications v. Apple Inc.*, W.D. Tex. Case No. 21-cv-00620-ADA, Dkt. No. 49

I. The *Fintiv* Factors Continue to Support Discretionary Denial

Petitioners' Reply fails to present new information on the *Fintiv* factors, much less show that the factors favor institution. Reply at 1. Instead, Petitioners rely on speculation while disregarding the district court's schedule. But as explained in the POPR, the *Fintiv* factors continue to support discretionary denial here.

***Fintiv* Factors 2 and 3:** Substantial investment in the parallel proceedings continues even though the *Markman* hearing was postponed by two weeks. POPR at 25-27. For example, the hearing date has no effect on the opening of fact discovery, still on June 17, 2022. Ex. 2009 (ordering that "Fact Discovery will begin one day after the originally scheduled Markman hearing date"). Nor does the modest adjustment on the *Markman* hearing affect any subsequent dates in the previously entered scheduling orders. *See* EX-1039; EX-1040. And importantly, there is no evidence of any change to the district court's June 2023 trial date.

Petitioners' contrary arguments amount to speculation. Because the Board consistently rejects such arguments, Factors 2 and 3 weigh against institution. *See Canon Inc. v. Optimum Imaging Tech. LLC*, IPR2020-01322, Paper 9 at 5-6 (Mar. 2, 2021) (denying institution and declining to "speculate about whether there may be further delays"); *Cellco Partnership v. Huawei Tech. Co.*, IPR2020-01352 (Mar. 5, 2021), Paper 13 at 9-11 (denying institution because "apart from speculation, we have no reason to believe that the scheduled trial date will be postponed").

***Fintiv* Factor 4:** Petitioners stipulate that if the IPR is instituted, "the same invalidity issues and grounds will not be litigated in the district court." Reply at 2-3; EX-1033; EX-1044. But overlapping issues remain. Petitioners assert Burke and Shull on obviousness grounds in this IPR. Pet. at 1-2. But Petitioners assert Burke as an anticipatory reference in district court. EX-2007 at 1. Thus, regardless of this IPR, the Burke reference—and whether that reference discloses all limitations of the asserted claims—will continue to be litigated in district court. Further, Petitioners' stipulation fails to alleviate the overlap between the challenged limitations at issue here that are also at issue in the district court litigation.

Petitioners also fail to address the potential for conflicts arising from their district court claim construction positions. *See* POPR at 27-29. While apparently maintaining their position that "no formal claim constructions are necessary for this petition," Petitioners have now fully briefed five separate terms in the district court litigation involving the same claim terms at issue here. POPR at 30; Ex. 2010; Ex. 2011. Petitioners' inconsistent approach to claim construction will allow Petitioners to shift positions, obtain multiple bites at the same apple, and lead the Board and the district court into potentially conflicting decisions. This implicates concerns under Factors 4 and 6 and thus weighs against institution.

***Fintiv* Factors 1, 5, and 6:** Petitioners fail to address Factors 1, 5, and 6, and so they weigh against institution for reasons explained. *See* POPR at 23-24, 29-30.

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