

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

vs.

GOOGLE LLC,

Defendant.

CIVIL ACTION NO. 6:21-cv-735-ADA

JURY TRIAL DEMANDED

**DEFENDANT GOOGLE LLC'S REPLY IN SUPPORT OF ITS  
OPPOSED MOTION TO STAY**

## I. INTRODUCTION

Ancora cannot justify denying Google's motion to stay pending *ex parte* reexamination ("EPR"). First, Ancora claims a stay will not simplify the issues in this case, but this case is particularly ripe for issue simplification from the EPR, as every asserted claim is challenged in the EPR. Because the patent is expired, the PTO will either cancel or confirm the claims in the EPR; the PTO will not allow amendments. Next, Ancora claims it will be prejudiced by the delay inherent in a stay, but Ancora waited *seventeen years* to bring this case. Any delay is of Ancora's own making. And Ancora cannot dispute that discovery is not complete and a trial date has not been set. Therefore, every factor weighs in favor of a stay.

## II. ARGUMENT

### A. The EPR May Eliminate This Case Altogether

Ancora incorrectly argues that the EPR is "extremely unlikely to invalidate or even reach the merits of any of Ancora's patent claims." Dkt. 29 ("Opp.") at 5. Ancora's cited evidence contradicts its position. Almost 80% of EPRs result in all claims being cancelled or with claim changes. Dkt. 29-6 at 3. Given that the patent is expired, the claims can *only* be canceled and cannot be amended. *See* 37 C.F.R. § 1.530. Thus, there is a higher than normal chance that the EPR here will completely resolve all of the issues in this case.

Ancora argues that an EPR is less likely than an IPR to simplify the issues for trial because EPRs do not result in estoppel. Opp. at 4–5. Ancora ignores that the issues unquestionably will be simplified if the patent claims are ultimately cancelled. Ancora cites cases from other districts (*see id.* at 4) but ignores that this Court recently found this factor favored a stay because "in 80% of *ex parte* reexaminations, the claims are cancelled or amended. And because the [ ] Patent expired, it cannot be amended and can only be cancelled." *TC Tech. LLC v. T-Mobile USA, Inc.*, No. 6:20-cv-899-ADA, Dkt. 44 at 7 (W.D. Tex. Dec. 7, 2021) (citations omitted). Moreover, in the cases

cited by Ancora (Opp. at 4), the patents had not expired as it has here. Ancora's position is essentially that this factor can never weigh in favor of a stay pending EPR. Such position should be rejected.

Next, Ancora speculates that the EPR will be dismissed. Opp. at 5–6. According to Ancora, the PTO cannot further consider the EPR because it presents the exact same form of “undesirable, incremental petitioning” that was found impermissible in *In re Vivint, Inc.*, 14 F.4th 1342, 1346 (Fed. Cir. 2021). This argument fails for numerous reasons. First, as Ancora concedes, it has not even raised this argument with the PTO. Opp. at 3. Further, the *Vivint* decision is premised on the same petitioner filing serial, similar petitions. Although Ancora claims HTC requested the EPR at issue, the request was anonymous and simply identifies a law firm partner as the official requester. *See* Ex. 5 at 1. Ancora's argument that the EPR will be dismissed based on HTC's involvement is unsupported by evidence and purely speculative.

Even if HTC did file the request, it does not constitute the impermissible “incremental petitioning” seen in *Vivint*. In *Vivint*, the requester filed two IPR petitions that were denied on the merits. *See Alarm.com Inc. v. Vivint, Inc.*, IPR2016-01091, Paper 11 at 2, 8–9 (P.T.A.B. Nov. 23, 2016). Then, the requester filed a third IPR petition that the PTO characterized as “fixing deficiencies, noted by the Board, that were within the petitioner's capacity to avoid in the earlier petition or petitions.” *Id.* at 12. The Federal Circuit held that it was arbitrary to grant a fourth-filed EPR after the PTO already found that the third-party requester had engaged in “undesirable, incremental petitioning.” *In re Vivint*, 14 F.4th at 1354. *Vivint*'s reasoning does not apply to the pending EPR here. HTC's CBM and IPR petitions were denied on procedural grounds, without any discussion of the merits of the prior art challenges. *See* Ex. 6 at 11 (concluding that the '941 Patent is not a covered business method patent), Ex. 7 at 8–14 (denying institution based on

*General Plastics* factors). Those previous decisions could not have served as a roadmap for the reexamination request because those decisions did not address the merits. Moreover, HTC's prior petitions were not characterized as an example of incremental petitioning. Thus, there is no reason to believe the PTO must dismiss the EPR under *Vivint* as Ancora argues. Notably, the Federal Circuit's decision repeatedly stated that the ruling was limited and made clear that it was "not holding that the Director may never launch a reexamination even when a particular challenger has engaged in improper serial filing." *In re Vivint*, 14 F.4th at 1354.

Last, Ancora relies on a string of speculations to support that the stay should be denied. First, it claims that the IPR petitions filed by Nintendo and Roku *may* be dismissed. Opp. at 6. Then, it states that the PTO *may* take into account these rejections and *may* use them as a basis to dismiss the EPR that it has already instituted. *Id.* These speculations cannot justify continuing to litigate this case when it is irrefutable that the PTO confirms all claims of only 21% of EPRs. Dkt. 29-6 at 3.

This most important factor therefore weighs in favor of a stay. A third party requested an EPR challenging all asserted claims, the PTO granted the request, and Google promptly moved to stay this case. Because the EPR challenges all claims asserted in this case, a stay pending the EPR is likely to result not only in a simplification of the issues, but a resolution of the issues in their entirety. *See AGIS Software Dev. LLC v. Google LLC*, No. 2:19-CV-00359-JRG, 2021 WL 465424, at \*2 (E.D. Tex. Feb. 9, 2021) (staying litigation and explaining: "where the . . . PTO has granted EPR[]s as to all claims of all asserted patents, this Court has likewise routinely stayed cases . . .").

**B. Ancora Will Suffer No Prejudice or Clear Tactical Disadvantage Due to a Stay, as Shown by Ancora's Seventeen Year Delay in Bringing This Case**

Ancora does not dispute that it is a non-practicing patent assertion entity but insists that it has an interest in timely enforcing its patents rights. But this interest “is present in every case where a patent owner resists a stay, [and] that alone is insufficient to defeat a motion to stay.” *TC Tech.*, No. 6:20-cv-899-ADA, Dkt. 44 at 4 (citation omitted).

Ancora argues it will suffer prejudice due to a risk of a loss of evidence during the stay. *Opp.* at 7–8. Ancora argues that there is a particular risk here where evidence relating to the accused OTA updates allegedly “rests with third parties.” *Id.* at 7. It is not clear what Ancora is referring to, but its seventeen-year delay in filing this case undermines its argument. *TC Tech.*, No. 6:20-cv-899-ADA, Dkt. 44 at 4. “[E]ven if there is a risk of a loss of evidence or witnesses’ memories were to fade, that loss is likely marginal” in light of this delay. *Id.* This factor therefore weighs in favor of a stay.

**C. Discovery Is Not Complete and a Trial Date Has Not Been Set**

Ancora does not dispute that discovery is not complete and a trial date has not been set. The cases Ancora cites in its opposition are factually distinct from the case at hand. In each, the court considered that the defendant had delayed in filing the petition for the reexamination. *See Trover Grp., Inc. v. Dedicated Micros USA*, No. 2:13-CV-1047, 2015 WL 1069179, at \*3–4 (E.D. Tex. Mar. 11, 2015); *Tessera Advanced Techs., Inc. v. Samsung Elecs. Co.*, No. 2:17-CV-00671-JRG, 2018 WL 3472700, at \*3 (E.D. Tex. July 19, 2018). That is not the case here, where Google did not even file the EPR. Google did not delay in filing this motion either; it was filed within four weeks of the EPR being instituted (including an intervening holiday). Thus, this factor clearly weighs in favor of a stay.

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