

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORD MOTOR COMPANY
Petitioner,

v.

VERSATA DEVELOPMENT GROUP, INC.
Patent Owner.

U.S. Patent No. 6,675,294 to Gupta et al.

IPR Case No.: IPR2017-00149

**REQUEST FOR REHEARING
UNDER 37 C.F.R. § 42.71(d)**

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I. Introduction

Pursuant to 37 C.F.R. § 42.71(d), Ford Motor Company (“Ford”) respectfully requests a rehearing of the United States Patent Trial and Appeal Board (“Board”) decision denying Ford’s petition for *inter partes* review (“IPR”) of U.S. Patent No. 6,675,294 (the ‘294 Patent). (Paper 7.)

A. Issues

(1) Whether the Board misapplied the binding Federal Circuit and PTAB precedent by refusing to hold that the dismissal without prejudice of the *Versata* action has no legal effect under 35 U.S.C. § 315(b) and must be treated as if the action had never been filed.

(2) Whether the Board misapplied the law in holding that there is a “continuous chain of assertion” exception to the precedential rule that a complaint dismissed without prejudice has no legal effect under 35 U.S.C. § 315(b).

B. Summary of Basis for Reconsideration

Petitioner submits that the Board misapplied binding precedent to the undisputed facts. The Federal Circuit has held that the *effect* of a dismissal without prejudice is that it leaves the parties as if the underlying complaint had never been filed. *Graves v. Principi*, 294 F.3d 1350, 1356 (Fed. Cir. 2002); *Bonneville Assoc., Ltd. P’ship v. Baram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999). The PTAB has recognized, quoted, and adopted this law as precedent, reiterating

that the *effect* of a dismissal without prejudice is to leave the parties as if the case had never been filed. *Oracle Corp. v. Click-To-Call Tech's LP*, IPR2013-00312, slip op. at 17 (Oct. 30, 2013) (Paper 26) (“The Federal Circuit consistently has interpreted the *effect* of such dismissals [without prejudice] as leaving the parties as though the action had never been brought.”) (precedential as to quoted section) (citations omitted).¹

But in this proceeding, the Board has flipped the analysis. It has turned the *effect* of a dismissal without prejudice into a test for determining whether to treat the dismissal as one without prejudice. However, binding precedent from the Federal Circuit and the PTAB requires the Board give effect to the Texas court’s dismissal without prejudice by treating it as though the *Versata* action had never been brought. Instead, the Board incorrectly held that Ford failed to show that the dismissal had left the parties as though the *Versata* action had never been brought.

A dismissed-without-prejudice complaint is treated as if it had never been brought as a matter of law, not from the several factors considered by the Board. An exception arises in cases consolidated under Rule 42 because the defendant remains answerable to the original complaint – a circumstance that does not apply here. The authority for the precedential *Oracle* rule arises from the *law* that a dismissed-without-prejudice complaint has no legal effect at all, and therefore no

¹ Throughout this document, all emphasis is added unless otherwise noted.

legal effect under § 315(b). Because Patent Owner's dismissed-without-prejudice complaint had no legal effect after its dismissal, the Board should have reached the merits of Ford's IPR petition.

II. Undisputed Facts

On February 19, 2015, Ford filed a declaratory judgment action ("the *Ford* action") against Versata in the Eastern District of Michigan. (Ex. 1132 at 1-2, "the Michigan case.") On May 7, 2015, Versata filed a separate action ("the *Versata* action") against Ford in the Eastern District of Texas alleging infringement the '294 Patent. (See IPR2017-00150, Ex. 1323 at 17-18, "the Texas case.")

Ford moved to dismiss Versata's retaliatory Texas complaint for violation of the first-to-file rule, and Versata moved to dismiss the *Ford* action. On October 14, 2015, the Michigan court ruled against Versata and exercised jurisdiction over the *Ford* action under the Federal Circuit's first-to-file rule. (Ex. 1132 at 6-17.) Four days later, Versata filed a counterclaim in the *Ford* action asserting infringement of the '294 Patent. (Ex. 1130 at 39-40.)

On November 5, 2015, in an order recognizing the Michigan court's first-to-file jurisdiction, the Texas court declined to exercise jurisdiction and ordered the parties to provide "any good faith reasons" that the *Versata* action should not be dismissed. (Ex. 1131.) In response to that order, Versata agreed to dismissal: "Versata is not opposed to dismissal of [the *Versata*] action without prejudice."

(Ex. 1133.) Three days later, the Texas court dismissed the *Versata* action “without prejudice to [Versata’s] ability to assert its claims in the Michigan court.”

(Ex. 1134.) Versata neither opposed nor appealed that dismissal.

On October 28, 2016, one year after Versata’s only valid claim asserting infringement of the ‘294 Patent (*i.e.*, its counterclaim in the *Ford* action), Ford filed its petition for IPR of the ‘294 Patent.

III. Argument

A. Binding precedent requires that the Board treat the *Versata* action as having never been filed

In its Petition, Ford argued that, because the Texas court’s dismissal was without prejudice, the PTAB’s precedential *Oracle* decision necessitates that Versata’s Texas complaint be treated as if it had never been filed. (Pet. at 2-3.) The Board rejected Ford’s argument, concluding that “the dismissal without prejudice was not pursuant to Rule 41(a), was not ‘voluntary,’ and, most importantly, did not leave the parties as though the action had never been brought.” (Paper 7 at 7.) Relying on *Apple II* and similar cases, the Board took Versata’s lead to find that the dismissal was more akin to consolidation of two cases under Rule 42. (*See id.* at 13, “[W]e agree that the relevant factor in determining whether the earlier complaint in the *Versata* action is operative for purposes of § 315(b) is the continuous assertion of the patent against Ford, not whether the case was formally consolidated.”)

Ford submits that the Board's determination was erroneous on both points. As explained below: (1) under binding precedent, when actions, such as the *Versata* action, are dismissed without prejudice, "the effect of such dismissals [is] as leaving the parties as though the action had never been brought," and (2) the facts here are not analogous to cases involving a Rule 42 consolidation because "continuity" is not the proper legal test and there was, in fact, no continuity between the Texas and Michigan cases.

1. The Board was required by precedent to accept that the effect of the Texas court's dismissal without prejudice left "the parties as if the action had never been brought"

In the relevant precedential cases, the Federal Circuit and the PTAB have explained that a dismissal without prejudice has the effect of leaving the parties in the same position as if the action had never been brought. *Graves*, 294 F.3d at 1356; *Oracle*, IPR2013-00312, slip op. at 17. Importantly, it is irrelevant *why* a court dismissed the action if it was dismissed without prejudice.

In *Graves*, a veteran appealed an adverse board decision to the Veteran's Court. *Graves*, 294 F.3d at 1353. His counsel then asked the Veteran's Court to dismiss the appeal without prejudice and returned to the board, seeking reconsideration. *Id.* After failing to convince the board to reconsider his case, Graves again appealed to the Veteran's Court. The Federal Circuit held that the

appeal was time-barred. *Id.* at 1356-57. As relevant here, the Federal Circuit explained:

A dismissal without prejudice is a dismissal that occurs without an adjudication on the merits. ***The dismissal of an action without prejudice leaves the parties as though the action had never been brought.***

Id. (citations omitted).

Graves establishes two basic tenets: (1) a dismissal without prejudice “is a dismissal that occurs without an adjudication on the merits” and (2) the effect of such a dismissal is that it “leaves the parties as though the action had never been brought.” *Id.*

The PTAB adopted these tenets in *Oracle*. There, the exclusive licensee of the Patent Owner sued the Petitioner for patent infringement. *Oracle*, IPR2013-00312, slip op. at 15. Two years later, after the licensee was acquired by a new owner, the parties jointly stipulated to dismissal of the lawsuit without prejudice. *Id.* at 15-16. Nine years later the Patent Owner sued the Petitioner for infringement of the same patent. *Id.* at 15. The Board considered the relevant authorities and held, “[t]he Federal Circuit consistently has interpreted the effect of such dismissals as leaving the parties as though the action had never been brought.” *Id.* at 17. In addition to citing Federal Circuit cases, the Board also quoted 9 Wright, Miller, Kane, and Marcus, *Federal Prac. & Proc. Civ.* § 2367

(3d. ed.): “[A]s numerous federal courts have made clear, a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action never had been filed.”

As these precedents make clear, the phrase “leaving the parties as though the action had never been brought” is a statement, not a question. It is the *effect* of a dismissal without prejudice, not a threshold *inquiry*.

In *Atlanta Gas Light*, the PTAB criticized the Patent Owner for “turn[ing] the Federal Circuit’s statement about the *effect* of a dismissal without prejudice on its head by attempting to elevate it to a threshold *requirement*.” *Atlanta Gas Light v. Bennet Regulator Guards, Inc*, IPR2015-00826, slip op. at 14 (PTAB Sept. 1, 2015) (Paper 12) (emphasis in original). Respectfully, the Board has made the same error in the present case.

In *Atlanta Gas Light*, the Board began its analysis by explaining that “[w]hen considering the statutory bar under § 315(b), the Board has consistently held that dismissal without prejudice of a party from district court litigation nullifies the effect of service on that party of the underlying complaint.” *Id.* at 12 (numerous citations omitted). The Board noted that the phrase “leaving the parties as though the action had never been brought” means the parties are left to pursue the *available* courses of action:

The Federal Circuit has characterized the effect of dismissals without prejudice as “leaving the parties as though the action had never been brought.” [Citations omitted.] ***This is, of course, a legal fiction***—the initiation of even procedurally defective proceedings have certain effects, and ***the Federal Circuit's statement is understood properly as referring to the restored ability of parties to pursue courses of action available to them before the action had been brought.***

Id. at 13. It is undisputed that the *Versata* action was dismissed without an adjudication on the merits. The Texas court declined jurisdiction over the *Versata* action under the Federal Circuit’s first-to-file rule. (Ex. 1134.) As a result, *Versata*’s Texas complaint went unanswered and had no substantive legal effect on the parties. After the dismissal, *Versata* was free to pursue the same courses of action available to it as before, namely, it could file counterclaims against Ford in the first-filed Michigan case. As *Atlanta Gas Light* makes clear, precedent requires that the *Versata* action must be treated as if it had never been filed, which is the effect of a dismissal without prejudice.

When the Board turned the Federal Circuit’s dismissal effect into a question, it arrived at the wrong answer. The Board held that *Versata* was not left in the same position after the dismissal because *Versata* could not re-file its complaint in Texas: “there is no evidence suggesting that the parties could have refiled the action in the Texas court as if the *Versata* action had never occurred.” (Paper 7 at 10.) But that is not a relevant factor, as other IPR decisions confirm. *See, e.g.,*

Atlanta Gas Light, IPR2015-00826, slip op. at 13-14 (Paper 12) (complaint dismissed for lack of personal jurisdiction could not be refiled in Ohio court); *InVue Sec. Prods., Inc. v. Merch. Techs., Inc.*, Case IPR2013-00122, 2013 WL 5947707, at *4–5 (PTAB June 27, 2013) (Paper 17) (complaint dismissed for lack of subject matter jurisdiction could not be refiled in North Carolina court); *Gordon Howard Assocs., Inc. v. LunarEye, Inc.*, Case IPR2014-01213, slip op. at 12 (PTAB Feb. 3, 2015) (Paper 11) (complaint dismissed for lack of personal jurisdiction could not be refiled in Texas court).

The Board also erred when it distinguished *Oracle*, *Bonneville*, and *Graves* because the dismissal of the *Versata* action “was not pursuant to Rule 41(a)” and “was not ‘voluntary.’” (Paper 7 at 7.) In *Graves*, the dismissal was of an appeal and not a dismissal under Fed. R. Civ. P. 41(a). *Graves*, 294 F.3d at 1353. In *Atlanta Gas Light*, the dismissal was involuntary based on the Patent Owner’s lack of personal jurisdiction. *Atlanta Gas Light*, IPR2015-00826, slip op. at 12-14; see also *InVue*, IPR2013-00122, 2013 WL 5947707, at *4–5 (involuntary dismissal), *Gordon Howard*, IPR2014-01213, slip op. at 12 (involuntary dismissal). These cases show that the effect of a dismissal without prejudice does not depend on Rule 41(a) or the “voluntariness” of the dismissal.

The Board also distinguished some cases Ford cited noting that they were decided under § 315(a) rather than § 315(b). (Paper 7 at 9.) The Board did not

explain why that distinction matters. Both subsections of § 315 use, and their analysis pertains to, the same language (*i.e.*, when an action is deemed “filed”) and the same legislative history. The other textual differences are not relevant to the issue at hand, namely, treating an action dismissed without prejudice as if it had never been filed, as confirmed by *Oracle* and *Atlanta Gas Light*, both of which were decided under § 315(b).

Had the Board applied Federal Circuit and PTAB precedent, it would have concluded that because it was dismissed without prejudice, the *Versata* action should be treated as if it had never been filed for purposes of § 315(b).

B. The Texas court’s dismissal was not akin to consolidation

The Board analogized the complaints in the *Versata* and *Ford* actions to consolidation cases, where the PTAB has held *Oracle* does not apply. (Paper 7 at 13, “the relevant factor in determining whether the earlier complaint in the *Versata* action is operative for purposes of § 315(b) is the continuous assertion of the patent against *Ford*, not whether the case was formally consolidated.”) But the “continuity” concept the Board used in the present IPR is not the proper touchstone. **First**, as *Graves* and *Oracle* confirm, the proper focus is on the “action,” not specific patents within the action—it is the “action” that is treated as if it had never been filed. In *Graves*, for example, *Graves* was continuously asserting his rights at the board and Veteran’s Court levels. *Graves*, 294 F.3d at

1353. Nevertheless, the Federal Circuit held that the dismissal of Graves’ appeal was treated as if the “action” had never been brought. *Id.* at 1356-57. In contrast, the Board in the instant IPR looked not at the *Versata action*, but incorrectly at a specific infringement allegation in that action, and asserted that the *allegation* (not the action) was asserted continuously. The Board did not address the undisputed fact that the *Versata action* did not continue in Michigan. Versata asserted 16 patents in the *Versata action*, but only 8 patents in Michigan. (Ex. 1130; *see also* IPR2017-00150, Ex. 1323.) Also, the Versata parties in the Texas action are different than the Versata parties in the Michigan action. (*Id.*)

Second, the three 2014 IPR decisions, which the Board cited to support its analogy, are readily distinguishable. (Paper No. 7 at 11-12.) In each instance, an action was consolidated such that the alleged infringer *remained answerable to the original complaint*.

In *Histologics, LLC v. CDX Diagnostics, Inc.*, IPR2014-00779, slip op. at 4-5 (PTAB Sept. 12, 2014) (Paper 6), the original action was *transferred* and *consolidated* with the subsequent action. The Board explained that “the action was not dismissed but, rather, consolidated” and that the alleged infringer “remain[ed] answerable to the U.S. District Court for the Central District of California for the allegations made in the complaint.” *Id.* In the present case, however, the *Versata*

action was **not** transferred to Michigan or consolidated with the *Ford* action, and Ford never answered Versata's Texas complaint – in Texas or in Michigan.

In *Apple, Inc. v. Rensselaer Poly. Inst. & Dynamic Advances, LLC*, IPR2014-00319, slip op. at 3 (PTAB June 12, 2014) (Paper 12), Apple answered the original complaint, and the original action was later consolidated with a subsequent action under Rule 42 by stipulation of the parties. The Board noted that the court's order "specifically bound the parties to positions taken" in the original case. *Id.* at 7. The Board distinguished cases involving "a complaint dismissed without prejudice and without consolidation." *Id.* In contrast to *Apple*, Ford did **not** answer Versata's Texas complaint, and the *Versata* action was **not** consolidated with the *Ford* action.

In *eBay, Inc. v. Advanced Auctions, LLC*, IPR2014-00806, slip op. at 3 (PTAB Sept. 25, 2014) (Paper 14), eBay answered the complaint in the first action.² Following the filing of the second action, the parties filed a joint motion requesting that only the second action proceed, and that "the work from the First

² The Board's opinion in *eBay* states that the Rule 16 scheduling conference and the Rule 26(f) conference had already occurred in the first action. *Id.* at 3. These statements confirm that eBay answered the complaint in the first action. See *Advanced Auctions LLC v. eBay Inc.*, Civil Action No. 13-cv-00360, Docket No. 19 (Answer, Defenses, and Counterclaims) (May 15, 2013).

Action should carry over the Second Action.” *Id.* In the present case, Ford ***did not*** answer Versata’s Texas complaint, Ford ***did not*** file a motion to consolidate, and the *Michigan* and *Texas* actions ***were never*** consolidated.

The *Versata* and *Ford* actions cannot be viewed like consolidated actions. Ford did ***not*** remain answerable in the *Versata* action. This was not a scenario where Versata’s pending claims in Texas were transferred to Michigan, or consolidated with the Michigan action. The dismissed complaint had no legal effect, and thus operated as if it had never existed.

Hamilton Beach Brands, Inc. v. f’real Foods, LLC, Case No. IPR2016-01105 (PTAB Nov. 30, 2016) (Paper 10) confirms that continuous assertion of a patent does not change the effect of a dismissal without prejudice. f’real Foods filed a complaint in 2014 for infringement of the ‘658 patent. *Id.* at 8. The case continued for two years before it was discovered that f’real Foods had not owned the patent when it filed the 2014 complaint. *Id.* f’real Foods filed a second complaint for infringement of the ‘658 patent on January 26, 2016. It dismissed without prejudice the 2014 complaint on February 26, 2016. *Id.* Thus, f’real Foods continuously had asserted infringement of the ‘658 patent by the Petitioner since the filing of the 2014 complaint, and the district court consolidated the 2014 and the 2016 cases “for all purposes.” *Id.* Nonetheless, the Board held that the correct date for applying § 315(b) was the filing of the 2016 complaint. *Id.* at 12.

The Board explained, “the allegation of infringement of the ’658 patent in the 2014 Complaint was not a proper federal pleading and did not trigger the one-year time period under 35 U.S.C. § 315 (b).” *Id.* at 10. Likewise, Versata’s complaint in the Texas case was not a proper federal pleading under the well-established first-to-file rule. *Futurewei Tech., Inc. v. Acacia Res. Corp.*, 737 F.3d 704, 707 (Fed. Cir. 2013) (“[T]he first-to-file rule . . . ‘permits a district court to decline jurisdiction when a complaint involving substantially similar parties and issues has already been filed in another district court.’”); *Burger v. Am. Mar. Offs. Union*, 170 F.3d 184 at *2 (5th Cir. 1999) (unreported) (“It was therefore within the district court’s broad discretion to decline jurisdiction over Burger’s claims, and to defer to the first-filed court in order to avoid unnecessary litigation and the risk of an inconsistent result.”).

When considering § 315(b), the Patent Owner’s defective complaint (for lack of standing) in *Hamilton Beach* and Versata’s defective complaint (for lack of jurisdiction under the first-to-file rule) are indistinguishable. As in *Hamilton Beach*, Versata’s patent claims in Texas “were jurisdictionally defective, and the defect could not be cured after the filing date of the complaint.” *Hamilton Beach*, slip op. at 9. But unlike in *Hamilton Beach*, no substantive activity of any kind occurred in the *Versata* action, meaning the *Hamilton Beach* case involved actions significantly more “continuous” than those in the Texas and Michigan cases. The

Hamilton Beach decision confirms that “continuity” is not a proper basis for refusing to treat the *Versata* action as if it had never been filed.

As added support for its “continuity” analysis, the Board quoted two excerpts from a 2016 hearing transcript in the *Ford* action cited by Patent Owner. (Paper 7 at 8, 13.) Those excerpts were **not** from the Michigan court’s September 22, 2015 hearing on whether it would retain jurisdiction over the *Ford* action. (Ex. 1132, p. 6.) The excerpts were from a much-later August 2016 hearing where the Michigan court was considering a motion to stay the *Ford* action after Ford filed its IPR petitions. (Ex. 2311, p. 1.) The excerpts from the August 2016 hearing are out of context and irrelevant to the issue of whether the Ford action was a consolidation of the *Versata* action, which had been dismissed in 2015.

IV. Conclusion

Federal Circuit and PTAB precedent require that the Board treat an action dismissed without prejudice as if it had never been filed. The Board misapplied this precedent when it declined to institute the present IPR. Ford asks the Board to reconsider its denial, and institute trial on the ’294 Patent.

Respectfully submitted,

Dated: May 31, 2017

/John S. LeRoy/
John S. LeRoy (Reg. No. 48,158)
Christopher C. Smith (Reg. No. 59,669)
Thomas A. Lewry (Reg. No. 30,770)
Frank A. Angileri (Reg. No. 36,733)
John P. Rondini (Reg. No. 64,949)

Jonathan D. Nikkila (Reg. No. 74,694)
Brooks Kushman P.C.
1000 Town Center, 22nd Floor
Southfield, MI 48075

Attorneys for Petitioner

Certificate of Service

The undersigned hereby certifies that the foregoing **REQUEST FOR REHEARING UNDER 37 C.F.R. § 42.71(d)**, was served in its entirety on **May 31, 2017**, upon the following parties by electronic mail at PTAB@skgf.com:

<u>Lead Counsel</u> Robert Greene Sterne Reg. No. 28,912 rsterne-PTAB@skgf.com STERNE, KESSLER, GOLDSTERN & FOX P.L.L.C. 1100 New York Avenue, N.W. Washington, D.C. 20005	<u>Back Up Counsel</u> Salvador M. Bezos, Reg. No. 60,889 Michelle K. Holoubek, Reg. No. 54,179 Joseph E. Mutschelknaus, Reg. No. 63,285 Jonathan Tuminaro, Reg. No. 61,327 STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C. 1100 New York Avenue, N.W. Washington, D.C. 20005
<u>Back Up Counsel</u> Kent B. Chambers Reg. No. 38,839 kchambers@tcchlaw.com TERRILE, CANNATTI, CHAMBERS, HOLLAND, L.L.P. 11675 Jollyville Road, Suite 100 Austin, TX 78759	<u>Back Up Counsel</u> Sharoon Saleem, Reg. No. 63,711 Sharoon.saleem@jonesspross.com JONES & SPROSS, P.L.L.C. 1605 Lakecliff Hills Ln., Suite 100 Austin, TX 78732-2437

Respectfully submitted,

/John S. LeRoy/
John S. LeRoy (Reg. No. 48,158)
Brooks Kushman P.C.
1000 Town Center, 22nd Floor
Southfield, MI 48075

Attorneys for Petitioner