

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

FORD MOTOR COMPANY,

CASE NO. 15-10628-MFL-EAS

Plaintiff/Counter-Defendant,

(Consolidated with  
Case No. 15-11624-MFL-EAS)  
Hon. Matthew F. Leitman

v.

VERSATA SOFTWARE, INC., F/K/A  
TRILOGY SOFTWARE, INC., TRILOGY  
DEVELOPMENT GROUP, INC. AND  
TRILOGY, INC.,

Defendants/Counter-Plaintiffs.

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**VERSATA'S RESPONSE IN OPPOSITION TO FORD'S MOTION FOR  
STAY PENDING INTER PARTES REVIEW [DKT #108]**

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### **CONCISE STATEMENT OF ISSUES PRESENTED**

Ford seeks to stay its own lawsuit based on IPR petitions it delayed filing for sixteen months. Ford's IPR petitions (a) are irrelevant to Versata's trade secret, copyright, and breach of contract claims; (b) address only a subset of patents; (c) are not dispositive as to patent validity and leave many validity issues for the Court; and (d) may never receive Patent Office review. Ford's proposed stay would result in certain delay and prejudice to Versata and unfair advantage to Ford. Ford could have avoided all this by filing its IPR petitions in a timely manner.

Under these circumstances, should the Court allow Ford to stay the lawsuit it filed?

Versata's answer: No.

Ford's answer: Yes.

## I. INTRODUCTION

Ford as the plaintiff filed this lawsuit in February 2015. Ford chose, and fought to secure, a Michigan forum for this case. Now, sixteen months later, Ford has asked the Court to stay its lawsuit indefinitely so it can shop for a different forum – this time, the United States Patent and Trademark Office in Washington, D.C.

Ford is trying to use the Court to gain a tactical advantage through an indefinite delay. There is no guarantee that the Patent Office will ever agree to review Ford's IPR petitions. Even if the Patent Office did grant review of some claims, Ford's IPR petitions are incapable of resolving all, or even most, of the issues in the case. Indeed, Ford's IPRs are totally irrelevant to Versata's trade secret, copyright, and breach of contract claims, as well as to two patents that Ford did not challenge through IPRs.

On top of all this, Ford waited *sixteen months* to file any IPRs at all. Obviously, Ford considers its IPRs a low priority. Yet Ford wants this Court to stop everything, rescind its scheduling order, and stay the entire case indefinitely based on petitions that Ford apparently views as little more than an afterthought.

If Ford's IPR petitions were really a silver bullet for simplifying this case (as opposed to a delay tactic), it is inconceivable that Ford would have waited so long to file them. Ford has not identified a single case in which a Court allowed a plaintiff to stay its own lawsuit under similar circumstances. Not surprisingly, none exists.

What has Ford been doing for the last sixteen months? During this time, Ford has taken advantage of liberal federal discovery practice to obtain almost 140,000 pages of documents, thousands of pages of source code materials, and over 2300 pages of infringement contentions. In contrast, Ford has produced only a small number of emails—most, if not all, involving the same person. Having conducted sweeping discovery that IPR procedures do not allow, Ford now wants to shut down this discovery process before it has to reciprocate.

Why does Ford suddenly want to stay the very lawsuit it filed? The most plausible answer is that Ford has gotten caught stealing Versata's trade secrets, copyrights, and software technology. Before Ford filed suit, Ford claimed that it had put a "Chinese wall" in place to protect Versata's software against copying and reverse engineering. Now discovery has shown that at least forty Ford personnel were on both sides of this "wall" – meaning that they worked on the development of Ford's PDO software after, or even during, the time that they had access to Versata's ACM software. Given this evidence, it is not surprising that Ford now seeks to avoid a trial of these issues.

Ford's proposed stay would be highly prejudicial to Versata and would not simplify the issues that the Court must decide. Ford has already selected this Court as the forum for this dispute. Discovery is well underway. Versata has a strong interest in addressing Ford's theft of its software, including the many non-patented

elements, in this Court. This Court should not take the unprecedented step of allowing Ford to stop the important truth-seeking process it started.

## II. STANDARD OF REVIEW

Ford bears the burden of persuasion in seeking a stay. Although litigation stays are discretionary, the Supreme Court has said that a “stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify the exercise of that discretion.” *Everlight Elecs. Co. v. Nichia Corp.*, 2013 WL 1821512, at \*6 (E.D.Mich. Apr. 30, 2013) (quoting *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (citations omitted)). “The propriety of a stay is dependent upon the circumstances of the particular case, and the traditional stay factors contemplate individualized judgments in each case.” *Id.*

District courts normally consider three factors in determining whether to grant a stay: (1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party.

### **III. ARGUMENT**

Ford seeks to stay its own lawsuit because of IPR petitions that Ford delayed filing for sixteen months. It is undisputed that the Patent Office may not grant review; that Ford's IPR petitions would not dispose of all, or even most, issues; and that Ford has conducted discovery that it could not have obtained through IPR proceedings.

Ford's extreme delay has prejudiced Versata and is tantamount to an admission that its IPR petitions are of low importance. Versata is not aware of, and Ford does not cite, any precedent for granting a stay under similar circumstances. This Court should not be the first to grant a stay based on Ford's dilatory tactics.

#### **A. Ford's proposed stay would not simplify the issues for trial.**

##### **1. Ford does not regard its IPRs as important. Neither should this Court.**

Courts have expressed great reluctance to grant a stay "where the timing of the request for PTO review suggests a dilatory intent on the movant's part." *Nexans Inc. v. Belden Inc.*, 2014 WL 651913, at \*3 (D.Del. Feb. 19, 2014) citing *Belden Techs. Inc. v. Superior Essex Commc'ns LP, C.A.*, 2010 WL 3522327, at \*2 (D.Del. Sept. 2, 2010) ("A request for reexamination made well after the onset of litigation followed by a subsequent request to stay may lead to an inference that the moving party is seeking an inappropriate tactical advantage.")

Courts routinely deny motions to stay based on an accused infringer's delay in filing IPRs – in some cases, even when the delay was significantly less than a year.<sup>1</sup> Here, Ford's delay was extreme: Ford waited sixteen months after filing this

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<sup>1</sup> See, e.g., *TPK Touch Solutions, Inc v. Wintek Electro-Optics Corp.*, 2013 WL 6021324, at \*5 (N.D.Cal. Nov. 13, 2013) (denying motion to stay where movant “had enough information to request IPR immediately after [the] action was filed, but did not”); *Freeny v. Apple Inc.*, 2014 WL 3611948, \*1-3 (E.D.Tex. 2014) (Bryson, J., sitting by designation) (accused infringer delayed a year after filing complaint to seek IPR); *Rensselaer Polytechnic Institute v. Apple Inc.*, 2014 WL 201965, \*4-9 (N.D.N.Y. 2014) (accused infringer waited until two days before deadline to file IPR); *Dane Technologies, Inc. v. Gatekeeper Systems, Inc.*, 2013 WL 4483355, \*1-\*3 (D.Minn. 2013) (denying stay where accused infringer waited seven months into litigation to seek stay); *Affinity Labs of Texas v. Apple Inc.*, 2010 WL 1753206, \*2 (N.D.Cal. 2010) (accused infringer delayed 11 months in seeking stay for IPR review); *BarTex Research, LLC v. FedEx Corp.*, 2009 WL 1164567, \*4 (E.D.Tex. 2009) (Love, M.J.) (denying stay pending an inter partes reexamination where the accused infringer had not sought the stay until sixteen months after the case was filed); *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D.Tex. 2005) (denying stay where Amazon waited until the case was a year old before seeking stay); *Pentair Water Pool and Spa, Inc. v. Hayward Ind's, Inc.*, 2012 WL 6608619, \*2-\*4 (E.D.N.C. 2012) (denying stay pending an inter partes reexamination where the accused infringer had delayed for 10 months in seeking stay); *Cooper Notification, Inc. v. Twitter, Inc.*, 2010 WL 5140573, \*2-\*5 (D.Del. 2010) (denying stay where accused infringer delayed by waiting ten months after suit was filed to seek IPR review); *Advanced Cartridge Technologies, LLC v. Lexmark Intern., Inc.*, 2010 WL 3222100, \*2 (M.D.Fla. 2010) (accused infringer delayed five months after suit filed to seek IPR review); *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, 2015 WL 2454296, \*3 (E.D.Va. 2015) (“[Given] Defendants’ decision to wait nearly three months from the commencement of this litigation before seeking IPR, it is difficult to accept Defendants’ argument that efficiency and costs would be served by staying this action pending a decision by the PTAB.”); *TruePosition, Inc., v. Polaris Wireless, Inc.*, 2013 WL 5701529, \*3-6 (D.Del. 2013) (accused infringer waited until two days before statutory deadline to file IPR petition).

lawsuit and until the very last possible date allowed by statute.<sup>2</sup> Such tactical delay mandates denial of Ford's motion. *See, e.g., Stratasys, Inc. v. Microboards Technology, LLC*, 2015 WL 1608344, \*2-4 (D. Minn. 2015) (denying stay where petition was filed on last permissible day to seek an IPR); *Rensselaer Polytechnic Institute v. Apple Inc.*, 2014 WL 201965, \*4-9 (N.D.N.Y. 2014) (denying stay where accused infringer waited until two days before deadline to file IPR); *Netlist, Inc. v. Smart Storage Systems, Inc.*, 2014 WL 4145412, \*3-4 (N.D. Cal. 2014) (denying stay because “[t]he timing of Defendants’ requests raises concerns that the delay was for strategic purposes only.”). Ford has provided no explanation or justification for waiting this long to file IPRs.<sup>3</sup>

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<sup>2</sup> IPRs cannot be “filed more than 1 year after the date on which the petitioner . . . is served with a complaint alleging infringement of the patent.” 35 U.S.C. § 315(b). Here, Versata served its infringement complaint on Ford on May 7, 2015. Presumably relying on Patent Office regulations, Ford waited “more than 1 year” – until May 9, 2016, the Monday after the Saturday on which the one-year anniversary fell – to file its IPR petitions. But because this deadline is statutory and set by Congress, there is at least a question about whether Ford’s IPR filings are timely.

<sup>3</sup> Ford’s failure to explain (or otherwise justify) its delay provides additional reason to deny its motion for stay pending IPR review. *See, e.g., Cheese Sys., Inc. v. Tetra Pak Cheese & Powder Sys., Inc.*, 2014 WL 840752, at \*1 (W.D.Wis. Mar. 3, 2014) (“[P]laintiff does not explain why it waited as long as it did. If I granted plaintiff’s motion under these circumstances, it would create an incentive for patent litigants to use the reexamination process as a stalling tactic after they have run out of other options.”)



Ford's delay shows that it does not regard its IPRs as important to the merits of this case. If Ford thought its IPR petitions were likely to simplify the issues, Ford could have obtained a decision from the Patent Office by filing its IPR petitions six months ago. If Ford had done this, the Court and the parties would not have to guess about whether the Patent Office will grant review. Yet Ford offers no explanation for waiting until the last possible moment to file IPR petitions on patents that have been in dispute for over a year.

If Ford's IPR petitions were truly likely to simplify and streamline the case, Ford would have filed them early in the case – instead of devoting its time, money, and attention to a litany of other issues. The fact that Ford filed its IPR petitions as an afterthought demonstrates that the petitions are unlikely to have a major impact on the litigation.

**2. Ford's motion is speculative and premature.**

As this District recently observed, “[a] motion to stay for the duration of IPR proceedings is premature [where] review by the PTO is speculative.” *Magna Elecs., Inc. v. Valeo, Inc.*, 2015 WL 10911274, at \*1 (E.D. Mich. Sept. 30, 2015) (denying stay because “[since] an IPR is speculative at this time, a stay is not warranted”).

Review of IPR petitions is discretionary with the Patent Office. The Patent Office has not granted review on any Versata patent claim and may never do so. For this reason, “the majority of courts that have addressed the issue have postponed

ruling on stay requests or have denied stay requests when the PTAB has not yet acted on the petition for review.”<sup>4</sup> In some districts – such as the Eastern District of Texas

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<sup>4</sup> *Trover Grp., Inc. v. Dedicated Micros USA*, 2015 WL 1069179, at \*5 (E.D.Tex. Mar. 11, 2015) (Bryson, J. sitting by designation); *see also Sage Electrochromics, Inc. v. View, Inc.*, 2015 WL 66415 (N.D.Cal. Jan. 5, 2015); *Aylus Networks, Inc. v. Apple, Inc.*, 2014 WL 5809053 (N.D.Cal. Nov. 6, 2014); *Unwired Planet, LLC v. Square, Inc.*, 2014 WL 4966033 (D.Nev. Oct. 3, 2014); *CANVS Corp. v. United States*, 118 Fed. Cl. 587 (2014); *SCVNGR, Inc. v. eCharge Licensing, LLC*, 2014 WL 4804738 (D.Mass. Sept. 25, 2014); *Fontem Ventures, B.V. v. NJOY, Inc.*, (C.D.Cal. Sept. 24, 2014); *Audatex N. Am. Inc. v. Mitchell Int'l Inc.*, 2014 WL 4546796 (S.D.Cal. Sept. 11, 2014); *Straight Path IP Grp., Inc. v. Vonage Holdings Corp.*, 2014 WL 4271633 (D.N.J. Aug. 28, 2014); *Netlist, Inc. v. Smart Storage Sys., Inc.*, 2014 WL 4145412 (N.D.Cal. Aug. 21, 2014); *Malibu Boats, LLC v. Nautique Boat Co.*, 2014 WL 3866155 (E.D.Tenn. Aug. 6, 2014); *CDX Diagnostics, Inc. v. U.S. Endoscopy Grp., Inc.*, 2014 WL 2854656 (S.D.N.Y. June 20, 2014); *Segin Sys., Inc. v. Stewart Title Guar. Co.*, 2014 WL 1315968 (E.D.Va. Mar. 31, 2014); *Rensselaer Polytechnic v. Apple Inc.*, 2014 WL 201965 (N.D.N.Y. Jan. 15, 2014); *Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, 2013 WL 6044407 (W.D.Wis. Nov. 14, 2013); *Dane Techs., Inc. v. Gatekeeper Sys., Inc.*, 2013 WL 4483355 (D.Minn. Aug. 20, 2013); *Derma Scis., Inc. v. Manukamed Ltd.*, 2013 WL 6096459 (D.N.J. July 18, 2013); *Benefit Funding Sys. LLC v. Advance Am. Cash Advance Ctrs. Inc.*, 2013 WL 3296230 (D.Del. June 28, 2013); *Davol, Inc. v. Atrium Med. Corp.*, 2013 WL 3013343 (D.Del. June 17, 2013); *Automatic Mfg. Sys., Inc. v. Pimera Tech., Inc.*, 2013 WL 1969247 (M.D.Fla. May 13, 2013); *Tric Tools, Inc. v. TT Techs., Inc.*, 2012 WL 5289409 (N.D.Cal. Oct. 25, 2012); *Aquatic AV, Inc. v. Magnadyne Corp.*, No. C 14–1931 (N.D.Cal. Jan. 13, 2015)[Ex 1]; *Card–Monroe Corp. v. Tuftco Corp.*, No. 1:14–cv–292 (E.D.Tenn. Feb. 19, 2015)[Ex 2]; *In re Transdata, Inc. Smart Meters Patent Litig.*, No. 12–ml–2309 (W.D.Okla. Jan. 6, 2015)[Ex 3]; *Mimedx Grp., Inc. v. Tissue Transplant Tech., Ltd.*, No. SA–14–CA–719 (W.D.Tex. Jan. 5, 2015)[Ex 4]; *MyMedicalRecords, Inc. v. Jardogs, LLC*, No. 2:13–cv–3560 (C.D.Cal. Dec. 16, 2014)[Ex 5]; *Capella Photonics, Inc. v. Cisco Sys., Inc.*, No. C–14–3348 (N.D.Cal. Oct. 14, 2014)[Ex 6]; *RealD, Inc. v. MasterImage 3D, Inc.*, No.

– the denial of such premature stay requests is a “universal practice.” *Id.*<sup>5</sup> This reasoning applies with even greater force here because Ford is trying to stay its own lawsuit based on IPR petitions that it waited an unreasonably long period of time to file.

**3. Ford’s IPR petitions are irrelevant to many, if not most, issues in the case.**

It is well-established that “issuance of a stay pending reexamination [does] not serve Congress’ intent of simplifying the issues and reducing the complexity of trial’ where some issues would still require litigation post-reexamination.” *Shurtape*

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CV 14–2304 (C.D.Cal. Oct. 12, 2014)[Ex 7]; *CTP Innovations, LLC v. V.G. Reed & Sons, Inc.*, No. 3:14–cv–364 (W.D.Ky. July 17, 2014)[Ex 8].

<sup>5</sup> See also *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co.*, 2015 WL 627887 (E.D.Tex. Jan. 29, 2015); *Lennon Image Techs., LLC v. Macy's Retail Holdings, Inc.*, 2014 WL 4652117 (E.D.Tex. Sept. 18, 2014); *Freeny v. Apple, Inc.*, 2014 WL 3611948 (E.D.Tex. July 22, 2014); *Invensys Sys., Inc. v. Emerson Elec. Co.*, 2014 WL 4477393 (E.D. Tex. July 25, 2014) (PTAB granted review of some claims of some patents, but not other claims and patents in suit); *3rd Eye Surveillance, LLC v. Town of Addison, Texas*, No. 6:14–cv–536, 2015 WL 179000 (E.D.Tex. Jan. 14, 2015) [Ex 9]; *Gonzalez v. Infostream Grp., Inc.*, No. 2:14–cv–906 (E.D.Tex. Mar. 2, 2015) [Ex 10]; *Network–1 Sec. Solutions, Inc. v. Alcatel–Lucent USA Inc.*, No. 6:11–cv–492 (E.D.Tex. Jan. 5, 2015) [Ex 11]; *Promethean Insulation Tech. LLC v. Sealed Air Corp.*, No. 2:13–cv–1113 (E.D.Tex. Nov. 21, 2014)[Ex 12]; *E–Watch Inc. v. Apple, Inc.*, No. 2:13–cv–1061 (E.D.Tex. Nov. 21, 2014)[Ex13]; *Personal Audio, LLC v. Togi Entm't, Inc.*, No. 2:13–cv–13 (E.D.Tex. Aug. 1, 2014)[Ex 14]; *Lennon Image Techs., LLC v. Lumondi Inc.*, No. 2:13–cv–238 (E.D.Tex. Jan. 6, 2014)[Ex 15].

*Techs., LLC v. 3M Co.*, 2013 WL 789984, at \*2 (W.D.N.C. Mar. 4, 2013) (quoting *Gladish v. Tyco Toys, Inc.*, 1993 WL 625509, \*2 (E.D.Cal. Sept. 15, 1993)). Indeed, stays pending IPRs are routinely denied where—regardless of the PTO’s decision—other claims (such as Versata’s breach of contract, copyright, and trade secret theft claims) will necessarily remain for trial.<sup>6</sup>

Here, even if the Patent Office agreed to review some claims, Ford’s IPR petitions still would be far from dispositive. Even if Ford somehow prevailed on

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<sup>6</sup> See, e.g., *Gladish v. Tyco Toys, Inc.*, 1993 WL 625509, \*2 (E.D.Cal. Sept. 15, 1993) (denying stay because “[a]fter the reexamination, the parties would be right back in this court.”); *Shurtape Techs., LLC v. 3M Co.*, 2013 WL 789984, at \*2 (W.D.N.C. Mar. 4, 2013) (denying stay because “[t]he Court must also consider Shurtape’s desire to prosecute its other causes of action as quickly as possible, particularly its allegations of trademark infringement.”); *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 2013 WL 6050744, \*3 (M.D.Fla. 2013) (denying stay where IPR would not address the pending unfair competition claims); *Cognex Corp. v. Nat’l Instruments Corp.*, 2001 WL 34368283, at \*2 (D. Del. June 29, 2001) (denying stay where non-movant’s “complaint allege[d] a variety of claims which are not linked to the patent infringement claim, including claims of copyright and trademark infringement and unfair competition, all of which will require a trial.”); *CCP Sys. AG v. Samsung Elecs. Corp.*, 2010 WL 5080570, at \*4 (D.N.J. Dec. 7, 2010) (“A stay of an entire case will not reduce the burden of litigation if issues completely unrelated to patent infringement will remain after the USPTO reexamination.”); *IMAX Corp. v. In-Three, Inc.*, 385 F. Supp. 2d 1030, 1033 (C.D.Cal. 2005) (denying stay because “the Court concludes that the myriad issues in this case that will remain unresolved and unaddressed pending the (potentially) two-year examination”); *Enprotech Corp. v. Autotech Corp.*, 1990 WL 37217, 15 U.S.P.Q.2d 1319, 1320 (N.D.Ill.1990) (denying motion to stay in part because PTO would not resolve claims of inequitable conduct).

every issue raised in its IPRs, the parties would still need to have a trial on Versata's patent, copyright, trade secret, and contract claims that are unaffected by Ford's IPRs. These claims will go forward regardless of whether the Patent Office grants review of any IPR petition and regardless of the ultimate outcome. At best, Ford's IPR petitions concern a relatively limited set of issues related to a subset of Versata's patents. Ford's IPRs are irrelevant to every other issue in the case.

In fact, Ford emphasized the multi-faceted nature of this dispute in the three declaratory judgment complaints it filed between February and April 2015. In these complaints, Ford argued that it did not copy Versata's ACM software and, in fact, developed a superior software program independently of Versata and using entirely different technology. *See* Dkt. No. 6, pp. 7-11. According to Ford, "Ford's invention approaches vehicle configuration very differently, and more efficiently, than Defendants do" and was designed to "replace" Versata's "obsolete ACM software." *Id.*, pp. 9-10.

Ford asserted declaratory judgment claims related to patents, trade secrets, copyrights, and two software license agreements. Dkt. No. 1, pp. 13-14; Dkt. No. 6, pp. 13-23. Ford also asserted an affirmative breach of contract claim against Versata and purports to be seeking "damages." Dkt. No. 6, pp. 21-23 ("Versata has breached the MSSA contract and Ford is entitled to damages suffered as a result of this breach").

Ford also emphasized in venue briefing that this case encompassed a wide range of issues beyond the six patents on which Ford has filed IPR petitions. Just a few examples illustrate the point.

- Ford claimed that its declaratory judgment “action would resolve the entire dispute between the parties,” including Versata’s “allegations of *ongoing* patent infringement, misappropriation of trade secrets, and breach of contract.” Dkt. No. 31, pp. 9-10.
- Ford admitted that Versata is asserting claims under multiple license agreements and insisted that its “request for declaratory relief and contract interpretation, amidst allegations of ongoing wrongdoing, is an appropriate use of the Declaratory Judgment Act.” Dkt. No. 31, p. 10.
- Ford pointed out that its “trade secret count. . . addresses whether Ford misappropriated Versata trade secrets during development of Ford’s new configuration software.” Dkt. No. 31, p. 14.
- Ford argued that it properly stated an affirmative claim for breach of contract and damages because its complaint “identifies the particular contract documents that Versata breached, and explains precisely how they were breached.” Dkt. No. 31, p. 15.

In light of these statements, Ford’s IPRs are no more than a small subset of issues in this case.

Moreover, on the issue of patent validity (which is the only issue in Ford’s IPRs), Ford’s pleadings are notable for their silence. For sixteen months, Ford took no action at all to challenge the validity of Versata’s patents. Ford did not assert any declaratory claims in this lawsuit challenging the validity of Versata’s patents.

During this time, Ford also did not file any IPRs or other proceedings with the Patent Office.

This decision was strategic, not accidental. Ford could have challenged Versata's patents in this litigation or before the Patent Office from the date it filed suit in February 2015, and certainly was in a position to do so by May 2015, when Versata had asserted all of the patents that are now at issue against Ford. Yet Ford ignored the opportunities. Instead, Ford focused solely on denying that it had infringed or violated any of Versata's patents, trade secrets, copyrights, or contractual rights without mentioning the issue of validity. *See* Dkt. No. 6, pp. 13-23.

Ford sat on its IPR petitions because Ford considers these claims a low priority and because Ford wanted to conduct discovery. Ford's assertion that the IPRs will simplify the case – when it waited sixteen months to file them – is illogical.

**4. Ford's IPRs are not dispositive even on the narrow issue of patent validity.**

The Court should also deny Ford's motion because, in its IPRs, Ford has not challenged the validity of two of the eight patents Versata has asserted.<sup>7</sup> The

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<sup>7</sup> *See, e.g., RR Donnelley & Sons Company v. Xerox Corp.*, 2013 WL 6645472, \*3-4 (N.D.Ill. 2013) (denying motion to stay entire infringement action pending a requested inter partes review of two of six asserted patents, finding that a stay would not simplify the case since the IPR would not address four of the patents); *Unifi Sci. Batteries, LLC v. Sony Mobile Commc'ns AB*, 2014 WL 4494479 (E.D.Tex. Jan. 14,

deadline for filing IPR petitions against these patents has passed. *See* 35 U.S.C. § 315(b). This means that, whatever the outcome of Ford's IPR petitions, this Court will have to try multiple patent infringement claims – along with trade secret, copyright, and contract claims. At best, Ford's IPRs are only relevant to a subset of patents.

In the IPRs it filed, Ford also confined its invalidity arguments to the narrowest possible grounds – namely, obviousness under 35 U.S.C. § 103. By doing this, Ford has left a host of other validity issues for the Court to decide, including potential claims of invalidity under 35 U.S.C. § 112, indefiniteness, and anticipation. Incredibly, Ford even held back some of the prior art references cited in its invalidity contentions in this case instead of using these references to support its IPRs.

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2014) (denying stay where a large number of the claims at issue were not in inter partes review); *Courtesy Products, L.L.C. v. Hamilton Beach Brands, Inc.*, 2015 WL 5145526, \*2 (D.Del. 2015) (denying motion to stay infringement action pending IPR proceedings where accused infringer was a former licensee who ceased making royalty payments, IPR proceeding did not address all of the asserted patent claims, and accused infringer appeared to use all procedural devices available to it to delay or invalidate patents it previously licensed for years); *Koninklijke Philips N.V. v. Amerlux, LLC*, 2016 WL 917898, \*4 (D.Mass. 2016) (denying motion to stay infringement action pending an IPR, where IPR only addressed two of six asserted patents); *Malibu Boats, LLC v. Nautique Boat Co., Inc.*, 2015 WL 4747878 (E.D.Tenn. 2015) (denying renewed motion to stay case pending IPR review since not all patents asserted in the action were being reviewed by the PTO); *Procter & Gamble Co. v. Team Technologies, Inc.*, 2014 WL 533494, \*2-5 (S.D. Ohio 2014) (denying renewed motion to stay infringement action, filed after the PTO granted a petition for inter partes review, where the granted IPR would not address all of the asserted claims, nor address all asserted defenses).



Ford's IPRs are so limited that they will not even resolve the issue of patent validity. Rather, Ford apparently intends to litigate most of the typical invalidity issues in this Court instead of in the Patent Office. By itself, that warrants denial of any stay. *See, e.g., Largan Precision Co. Ltd. v. Fujifilm Corp.*, 2011 WL 794983, at \*3 (N.D.Cal. Mar. 1, 2011) (“[S]taying this litigation with respect to the '658 Patent would not truly simplify the issues with respect to that patent, as the reexamination would not resolve Plaintiff's claim of unenforceability of the '658 Patent due to inequitable conduct, as the only issue before the PTO in the reexamination is invalidity due to prior art.”); *Everlight Electronics Co., Ltd. v. Nichia Corp.*, 2013 WL 1821512, \*7-10 (E.D.Mich. 2013) (denying stay pending an inter partes review where court found that reexamination was not likely to simplify the issues since other defenses such as laches and equitable estoppel would remain and require two infringement trials); *Norgren Automation Solution, LLC v. PHD, Inc.*, 2015 WL 1245942, at \*2 (E.D.Mich. Mar. 18, 2015) (denying a motion stay, in part, because stay would “have no impact on [Defendant's] asserted affirmative defenses, including estoppel, inequitable conduct and validity under 35 U.S.C. § 101.”).

This District recently denied a motion by Ford to stay litigation pending IPR review on almost identical grounds in *Signal IP, Inc. v. Ford Motor Co.*, 14-CV-13729, 2015 WL 5719671, at \*4 (E.D.Mich. Sept. 30, 2015) (denying Ford's stay

motion where “the USPTO proceedings [would] not resolve the defenses of laches, waiver, estoppel, other equitable defenses, and lack of statutory subject matter under 35 U.S.C. § 101.”).

Ford is trying to hedge its bets and keep its options open by making some invalidity arguments to the Patent Office while keeping others in reserve for future litigation in this Court. Under these circumstances, a stay would simply provide Ford with two bites at the invalidity apple and further opportunities for delay.

**5. Ford has no evidence that the Patent Office will grant review.**

Although Ford attaches its IPR petitions as exhibits, it does not present any arguments – or even attempt to explain – why it believes the Patent Office will or should grant review. Despite bearing the burden of persuasion on this motion, Ford has made no attempt to show that its petitions are likely to be successful in invalidating any claims, let alone simplifying issues in the case.

Ford’s arguments about institution rates by the Patent Office are not specific to any of the patents-in-suit. Instead, Ford relies on “overall statistics for the number of petitions that are reviewed and the number of claims that are invalidated.” *Trover Grp., Inc. v. Dedicated Micros USA*, 2015 WL 1069179, at \*4 (E.D.Tex. Mar. 11, 2015). As Federal Circuit Judge William Bryson pointed out, the analysis used by Ford is essentially worthless. General statistics “are not especially enlightening as to the likely disposition of any particular patents or claims, since the likelihood of

invalidation depends entirely on the particulars of the patents and claims in dispute.”

*Id.* Ford’s prediction that the PTAB will institute review of a significant number of claims is, at best, “speculative.” *Id.*

**B. Ford’s proposed stay would severely prejudice Versata.**

**1. Ford’s proposed stay would cause a lengthy delay for Versata.**

Ford’s motion is intended to gain a tactical advantage through delay. Ford’s proposed stay is certain to prejudice Versata by delaying resolution of any issue in this case for months or years. As this Court is aware, Ford is the plaintiff and is responsible for filing this action. Ford’s efforts to stay its own lawsuit defeat the very purpose of a declaratory judgment action and are highly prejudicial:

When an accused infringer seeks the protection of the Court’s declaratory relief jurisdiction, it should be quick to open its files, saying, “See, we do not infringe.” It should not fold its arms and say, “Now that we have outmaneuvered you and anchored our dispute in a venue of our choice, we will go very slow in letting you see our files.”

*Comcast Cable Communications Corp., LLC v. Finisar Corp.*, 2007 WL 1052883, at \*2 (N.D.Cal. Apr. 5, 2007). This is especially true here because the sole basis of Ford’s declaratory judgment action was non-infringement and Ford did not even mention invalidity.

The sole reason for this predicament is Ford’s sixteen-month delay in filing IPRs. If Ford had acted sooner, the parties would know whether the Patent Office will grant review. The timing of Ford’s petitions – which Ford alone controls – has

caused severe prejudice to Versata. This Court should not reward Ford's delay tactics by permitting this unfair result.

In fact, Ford initially concealed its plans to file IPRs so it could secure Michigan venue. In briefing on the issue of jurisdiction and venue, Ford argued to this Court that Michigan was the correct forum to resolve all issues arising out of the breakdown of its twenty-year relationship with Versata. Ford claimed that it needed this Court to exercise jurisdiction to protect its business. Ford alleged that this dispute was urgent enough to justify its use of the Declaratory Judgment Act, even though Versata is the natural plaintiff.

In all of its briefing on jurisdiction and venue, Ford never mentioned its intention to seek an entirely new forum – the Patent Office – and to request a stay of the litigation. After the Court ruled on venue in September 2015, Ford disclosed its plans to file IPRs. But Ford still delayed filing its IPR petitions for almost nine additional months, delaying any possible resolution of this issue. In fact, Ford indicated as early as the January 2016 status conference that it intended to file IPRs. But before May 2016, Ford did not file these petitions or take any other action to challenge the validity of Versata's patents. Instead, Ford strategically waited as long as it could before filing IPR petitions – only doing so on May 9, 2016, just over one year after Versata filed suit against Ford on all of the eight patents-in-suit.

Even now, Ford is continuing to delay. Ford asserts in its brief that it still intends to file Covered Business Method Review petitions on other patents within sixty days. But Ford has not filed any CBM petitions. Once again, Ford could have filed these petitions early in the case so as to obtain a timely ruling from the Patent Office. But Ford chose to delay instead.

**2. Ford already has gained a strategic advantage by waiting to file IPRs.**

Ford's strategic delay has served a useful purpose for Ford. It has allowed Ford to conduct wide-ranging discovery that it could not have obtained through a Patent Office proceeding. Ford's use of the litigation process to obtain discovery weighs against a stay. *See Rensselaer Polytechnic Institute v. Apple Inc.*, 2014 WL 201965, at \*4-9 (N.D.N.Y. 2014) (denying stay where the accused infringer waited until two days before the one-year deadline for filing a request for IPR and the IPR petition appeared to be an improper tactic to get discovery from the patentee and avoid having to provide reciprocal discovery).

Ford has obtained more than 130,000 pages of documents from Versata. Ford filed and won a motion to compel access to Versata's ACM source code. Ford's technical expert has reviewed Versata's ACM source code and has obtained thousands of pages of source code and related files (including both paper and native files). Ford has obtained more than 2300 pages of infringement contentions from

Versata, detailing Versata's infringement position. The parties have also exchanged proposed constructions for claim terms, giving Ford insight into Versata's claim construction positions.

This discovery – which is unavailable in an IPR – gives Ford a significant advantage. Ford can use any of the discovery Versata has provided to bolster its invalidity arguments to the Patent Office. It is no wonder that Ford made the strategic decision to delay filing IPRs until it had conducted this discovery.

**3. Ford is seeking damages against Versata and will be able to use the proposed stay to unfairly inflate its damages.**

As Ford pointed out in its venue briefing, Ford asserted one substantive claim for breach of contract. Ford is seeking damages for this claim, including reimbursement of license fees that it paid to Versata as well as the costs that Ford has incurred in deploying its PDO software. *See* Dkt. No. 6, pp. 21-23. Although Ford has not quantified these damages in its complaint, it is reasonable to assume that Ford will claim they total millions of dollars, especially after prejudgment interest.

Versata should not have to remain in indefinite legal limbo – and face the risk of escalating damages and prejudgment interest – on a claim for which Ford has sued Versata. Ford is apparently serious about pursuing this damages claim, having emphasized its importance in venue briefing to this Court. This Court should not

allow Ford's IPRs – which are unrelated to its breach of contract claim – to delay resolution of this issue.

**4. Ford's proposed stay would deprive Versata of timely enforcement of its rights.**

Ford's IPR petitions only pertain to six of the eight patents Versata has asserted and will have no effect whatsoever on Versata's trade secret, copyright, breach of contract, or other patent claims. Yet Ford seeks to hold up the entire litigation based on this limited challenge to the validity of certain patents.

Ford's proposed stay would deprive Versata of any ability to enforce its rights in a timely manner. If the Court granted a stay, Ford's narrow challenge to a subset of Versata's patents would prevent Versata from enforcing any of its rights, including rights over which the Patent Office has no potential jurisdiction. Because IPRs can sometimes take years to resolve, Versata would have no way of stopping Ford's theft of its software for an indefinite period of time.

Versata is also seeking an injunction in this case against further unauthorized use of its patents, trade secrets, copyrights, and software by Ford. Indeed, this is the primary remedy Versata has requested in this case. Ford's propose stay would delay issuance of this injunction – and allow Ford to keep using Versata's intellectual property – for years. This exposes Versata's trade secrets, copyrights, patented technologies, and software to misuse for the indefinite future.

Furthermore, staying the litigation in favor of the IPR would give Ford a clear tactical advantage. Ford would be free to prosecute its invalidity claims in the Patent Office while Versata could not pursue any of its claims against Ford. Discovery into Ford's theft of Versata's software would come to a halt, while the parties focus all of their time and resources on litigating the validity of Versata's patents.

In effect, Ford asks this Court to forget about all the claims it filed and has litigated for sixteen months (including trade secret, copyright, and patent licensing issues) so Ford can shop for a new forum to pursue an entirely new set of issues. This is an abuse of the procedure Ford has used in this case.

**5. Ford's proposed stay would jeopardize relevant evidence.**

Ford's proposed indefinite stay risks permanently depriving Versata of relevant evidence. While the case is stayed, "witnesses may become unavailable, their memories may fade, and evidence may be lost." *Voltstar Tech., Inc. v. Superior Communications, Inc.*, 2013 WL 4511290, at \*2 (E.D.Tex. Aug 22, 2013) citing *Ambato Media, LLC v. Clarion Co., Ltd.*, 2012 WL 194172, at \*1 (E.D.Tex. Jan 23, 2012); see also *Anascape, Ltd. v. Microsoft Corp.*, 475 F. Supp. 2d 612, 617 (E.D.Tex. 2007) ("[C]rucial witnesses are more likely to be located if discovery is allowed to proceed now, rather than later. [Plaintiff] would be at a severe tactical disadvantage if the entire case were stayed").



Versata has identified more than forty people who worked on the development of PDO after using or having access to ACM. These individuals – who were on both sides of Ford’s alleged “Chinese wall” – may leave Ford, move out of subpoena range, forget relevant details, or lose key paper and electronic evidence.

The risk of losing critical evidence is especially serious here. Although Versata has produced more than 130,000 pages (including many emails), Ford has not produced a significant volume of emails to Versata at this time. These emails may be at risk of deletion. In depositions last month, a Ford witness testified that he had paper documents in his desk related to the development of PDO that Ford has not produced. Deposition testimony also revealed that Ford also has not produced key documents – including technical drawings, screen mock-ups, and use cases (i.e., documents describing important features of the software) – that are likely to show copying. Under the best of circumstances, there is always an unavoidable risk of accidents and mistakes and therefore no guarantee that these documents will survive a litigation stay.

The longer this case drags on, the more likely such evidence is to be lost. In the event of a stay, Versata will have no control over Ford’s retention and preservation of relevant documents. This Court should continue the discovery process so that Versata can obtain the same level of document discovery from Ford that Ford has requested and received from Versata. *See, e.g., Affinity Labs of Texas*

*v. Ford Motor Co.*, 2013 WL 7760958, at \*1 (E.D.Tex. Sept. 19, 2013) (denying Ford's motion for stay pending IPR review because, "[w]hile Ford's contentions have some merit, they do not outweigh the potential degradation of evidence over the time until the reexamination is complete or the resulting prejudice to Affinity").

#### IV. CONCLUSION

Ford has proposed a stay of the lawsuit it filed sixteen months ago for one reason: to prevent Versata from addressing Ford's theft and copying of its software. Ford's proposed stay would prejudice Versata without simplifying any of the issues in the case. Ford's IPRs are a low priority, as evidenced by Ford's extreme delay in filing them. For these reasons, this Court should deny Ford's Motion to Stay.

Respectfully submitted,

Dated: June 22, 2016

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

FORD MOTOR COMPANY,

CASE NO. 15-10628-MFL-EAS

Plaintiff/Counter-Defendant,

(Consolidated with  
Case No. 15-11624-MFL-EAS)  
Hon. Matthew F. Leitman

v.

VERSATA SOFTWARE, INC., F/K/A  
TRILOGY SOFTWARE, INC., TRILOGY  
DEVELOPMENT GROUP, INC. AND  
TRILOGY, INC.,

Defendants/Counter-Plaintiffs.

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**PROOF OF SERVICE**

I hereby certify that on June 22, 2016, I served the foregoing Response to Ford's Motion to Compel upon all counsel of record via electronic filing through the ECF System for the Eastern District of Michigan.

I declare under the penalty of perjury that the statements made above are true to the best of my knowledge, information, and belief.

/s/ Rodger D. Young  
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