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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COPYTELE, INC.,

No. C-13-0380 EMC

Plaintiff,

v.

AU OPTRONICS CORP., *et al.*,

Defendants.

**ORDER CONDITIONALLY GRANTING  
DEFENDANT E INK’S MOTION TO  
STAY, AND DEFERRING RULING ON  
DEFENDANT E INK’S MOTION TO  
DISMISS**

**(Docket Nos. 50, 52)**

Currently pending before the Court are (1) E Ink’s motion to stay claims pending the arbitration between AUO and CopyTele and (2) E Ink’s motion to dismiss for failure to state a claim for relief. Having considered the parties’ briefs and accompanying submissions, the oral argument of counsel, and the parties’ joint letter of July 3, 2013, the Court hereby conditionally **GRANTS** the motion to stay. Because the Court is granting the motion to stay, it shall **DEFER** ruling on the motion to dismiss pending the results of the arbitration.

**I. DISCUSSION**

A. Motion to Dismiss

As a preliminary matter, the Court acknowledges that E Ink has asked the Court to dismiss all claims asserted against it with prejudice and that it has asked for a stay pending the AUO/CopyTele arbitration only as alternative relief. This approach, however, does not make sense as it would have the Court opining on the merits of claims asserted against both E Ink and AUO even though the claims against AUO are subject to arbitration. Moreover, even if the claims against

1 E Ink should be dismissed,<sup>1</sup> that does not automatically mean that they should be dismissed with  
2 prejudice; futility would need to be established which is a fairly high threshold, particularly given  
3 that this is E Ink’s first motion to dismiss. The Court, therefore, concludes that the more reasonable  
4 approach is to address first the motion to stay. Only if the Court finds that a stay pending the  
5 AUO/CopyTele arbitration is not warranted shall it address E Ink’s motion to dismiss.

6 B. Motion to Stay

7 In the motion to stay, E Ink argues that, because the claims against AUO are arbitrable, the  
8 claims against E Ink should be stayed pending the resolution of that arbitration. E Ink argues that  
9 the claims against it are inextricably intertwined with the claims against AUO, and thus, there should  
10 be a stay either under the Federal Arbitration Act (“FAA”), *see* 9 U.S.C. § 3, or pursuant to the  
11 discretionary powers of this Court to control its own docket.

12 The Court need not address the issue of whether § 3 allows a court to issue a stay when the  
13 party moving for the stay is not a signatory to the arbitration agreement.<sup>2</sup> This is because, at the  
14 very least, a discretionary stay is warranted pursuant to *Landis v. North American Co.*, 299 U.S. 248  
15 (1936). *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n.23, (1983)  
16 (recogniz[ing] that, “[i]n some cases, . . . it may be advisable to stay litigation among the  
17 nonarbitrating parties pending the outcome of the arbitration[;] [t]hat decision is one left to the  
18 district court (or to the state trial court under applicable state procedural rules) as a matter of its  
19 discretion to control its docket”).

20 Under *Landis* and its progeny, a court must examine

21 the competing interests which will be affected by the granting or  
22 refusal to grant a stay . . . . Among those competing interests are the  
23 possible damage which may result from the granting of a stay, the  
24 hardship or inequity which a party may suffer in being required to go  
25 forward, and the orderly course of justice measured in terms of the  
26 simplifying or complicating of issues, proof, and questions of law  
27 which could be expected to result from a stay.

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28 <sup>1</sup> The Court expresses no opinion on the matter at this juncture.

<sup>2</sup> As the Court noted at the hearing, the Fifth Circuit has applied § 3 in certain circumstances where the moving party is a nonsignatory to the arbitration agreement. *See, e.g., Waste Mgmt. v. Residuous Indus. Multiquim, S.A.*, 372 F.3d 339, 342-43 (5th Cir. 2004); 282 F.3d 343, 347-48 (5th Cir. 2002). The Ninth Circuit, however, has not squarely addressed the issue.

1 *Lockyer v. State of Cal.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (internal quotation marks omitted).

2 1. Hardship to Parties

3 In its papers, CopyTele suggests that a stay of the claims against E Ink will cause hardship to  
4 CopyTele because it will be “forced to wait years to obtain redress for the wrongful conduct that has  
5 brought it to the brink of insolvency.” Opp’n at 6. There are several problems with this argument.  
6 First, CopyTele has not provided any evidence to support its claim that the arbitration will take  
7 years. Indeed, one of the alleged benefits of arbitration is that it is a speedier process. Second,  
8 CopyTele has never submitted any evidence that it is on the “brink of insolvency,” Opp’n at 16, as  
9 claimed. In its complaint, CopyTele does allege that “AUO’s fraud and breaches of the Agreements  
10 have caused significant hardship to CopyTele, resulting in the layoff of many employees, a decrease  
11 in its stock price, and the near bankruptcy and liquidation of the company.” Compl. ¶ 51.  
12 Nevertheless, allegations are not evidence. Third, if CopyTele obtains relief in arbitration,  
13 presumably that will afford it financial benefit. Accordingly, there is little in the record before the  
14 Court to establish hardship on the part of CopyTele if it were forced to resolve the arbitration first  
15 before litigating its claims against E Ink.

16 To be sure, the hardship claimed by E Ink if a stay were to be denied is also problematic.  
17 The only hardship asserted by E Ink is the “significant expense, time, and effort” that litigation  
18 would entail when the arbitration might moot out or at least streamline all or a number of the claims.  
19 Reply at 4. The problem for E Ink is that “being required to defend a suit . . . does not constitute a  
20 clear case of hardship or inequity within the meaning of *Landis*.” *Dependable Highway Express,*  
21 *Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (internal quotation marks omitted).

22 Nonetheless, as this Court has noted in a prior case, a party seeking a stay must show  
23 hardship only if the party opposing the stay first demonstrates that it is a fair possibility that the stay  
24 will cause it injury. *See ASIS Internet Servs. v. Member Source Media, LLC*, No. C-08-1321 EMC,  
25 2008 U.S. Dist. LEXIS 109241, at \*6 (N.D. Cal. Sept. 8, 2008); *see also Dependable Highway*, 498  
26 F.3d at 1066 (stating that, “‘if there is even a fair possibility that [a] stay . . . will work damage to  
27 some one else,’ the stay may be inappropriate absent a showing by the moving party of ‘hardship or  
28 inequity’”). CopyTele has failed to make that demonstration.

1           2.       Judicial Economy

2           Because the record before the Court says little about hardship to the parties, the Court is  
3 ultimately left with a decision about judicial economy – *i.e.*, if the Court were to stay the claims  
4 against E Ink to await the results of the arbitration between AUO and CopyTele, would that simplify  
5 any issues, proof, and/or questions of law in the pending litigation?

6           Given CopyTele’s allegations – *i.e.*, concerted action on the part of AUO and E Ink – rulings  
7 made in the AUO arbitration clearly have the potential to simplify the rulings here with respect to  
8 the claims against E Ink. If, for example, AUO never fraudulently induced CopyTele into entering  
9 the EPD and nFED Agreements, then CopyTele’s claim against E Ink for aiding and abetting  
10 fraudulent inducement could not be sustained. Similarly, if AUO did not fraudulently induce  
11 CopyTele to enter into the contracts, that would likely impact the antitrust claims (attempted  
12 monopolization and conspiracy to monopolize) against E Ink – as alleged in the complaint. *See*,  
13 *e.g.*, Compl. ¶ 83 (in claim for conspiracy to monopolize, alleging that “E Ink and AUO committed  
14 overt acts in furtherance of the conspiracy to monopolize, including but not limited to AUO agreeing  
15 to sell SiPix, and E Ink agreeing to buy SiPix, AUO defrauding and inducing CopyTele to license  
16 CopyTele’s EPD Patents to AUO under the guise of a joint development arrangement, and AUO’s  
17 clandestine sublicense of CopyTele’s EPD Patents to E Ink”). CopyTele’s arguments to the contrary  
18 are not convincing.<sup>3</sup>

19           In its papers, CopyTele argued that there is still a way that judicial economy can be served  
20 by allowing both the arbitration and the litigation to take place at the same time. In other words,

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22           <sup>3</sup> For example, CopyTele notes that only E Ink, and not AUO, has been sued for attempted  
23 monopolization. *See* Opp’n at 4. But clearly AUO is being sued along with E Ink for conspiracy to  
24 monopolize, and there is no real dispute that both monopolization claims are predicated on the same  
25 facts. *Compare, e.g.*, Compl. ¶ 75 (in claim for attempted monopolization, alleging that “E Ink and  
26 AUO agreed, combined, and conspired to attempt to acquire and maintain monopoly power in the  
27 market for [EPD] products” and that, “[p]ursuant to these agreements, accommodations, and  
28 conspiracy, E Ink attempted to acquire monopoly power and maintain it by acquiring, sublicensing,  
and cross-licensing CopyTele’s and others’ [*i.e.*, SiPix] [EPD] patents”), *with* Compl. ¶ 83 (in claim  
for conspiracy to monopolize, alleging that “E Ink and AUO committed overt acts in furtherance of  
the conspiracy to monopolize, including but not limited to AUO agreeing to sell SiPix, and E Ink  
agreeing to buy SiPix, AUO defrauding and inducing CopyTele to license CopyTele’s EPD Patents  
to AUO under the guise of a joint development arrangement, and AUO’s clandestine sublicense of  
CopyTele’s EPD Patents to E Ink”).

1 according to CopyTele, there is a way to coordinate the litigation and the arbitration. While, in its  
2 papers, CopyTele did not give any specifics as to how this coordination could be effected, it did  
3 provide some details at the hearing on E Ink's motion. More specifically, it argued that discovery in  
4 the litigation and arbitration could be coordinated so as to avoid duplication of discovery in the two  
5 fora. Because this argument had some merit, the Court asked the parties to meet and confer to  
6 determine whether they could reach an agreement as to coordination of discovery.

7 As reflected by the parties' joint letter of July 3, 2013, the parties were not able to reach  
8 agreement. Having reviewed the joint letter, the Court concludes that E Ink's position has more  
9 merit. That is, E Ink has stated that it will participate in the AUO/CopyTele arbitration for purposes  
10 of discovery and that the discovery developed in arbitration may be used in this litigation. This  
11 agreement will likely decrease the chance of discovery being duplicated in this litigation. The Court  
12 acknowledges that it will not foreclose the possibility of additional discovery taking place in this  
13 litigation post-arbitration, particularly because discovery rules in courts tend to be more liberal than  
14 discovery rules in arbitration.<sup>4</sup> However, that is largely unavoidable. The Court is not inclined to  
15 open discovery in this case which would end run the arbitration to which CopyTele agreed.

16 CopyTele argues that E Ink's agreement still is not enough and contends that, at the very  
17 least, this Court

18 should maintain the power to resolve any disputes that arise regarding  
19 E Ink's failure to comply with the arbitrator's discovery decisions. If,  
20 for example, the arbitrator allows CopyTele to depose E Ink  
21 employees, but E Ink refuses to allow the deposition on the grounds  
22 that it is not subject to the arbitrator's rulings because it is not a party  
to the arbitration, or that the request is burdensome or unreasonable,  
the Court should maintain the power to compel E Ink to engage in  
such discovery in order to effectuate the Court's goal of requiring  
efficient and non-duplicative discovery.

23 Docket No. 90 (Letter at 2). While the Court is not unsympathetic to CopyTele's position, it does  
24 not agree that this is a role that the Court should adopt. CopyTele is essentially asking the Court to  
25 oversee the arbitration (even if only for discovery purposes), which is not proper. Moreover,  
26 CopyTele's concern is at least for the moment speculative. Nothing in E Ink's portion of the letter

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28 <sup>4</sup> Thus, for example, a person deposed in the arbitration may be deposed a second time as a  
part of this litigation.

1 suggests that it would not comply with the arbitrator’s discovery decisions. Finally, there is an  
2 easier way to address CopyTele’s concern – *i.e.*, a conditional stay, as discussed below.

3 The Court therefore concludes that a stay of this litigation pending the AUO/CopyTele  
4 arbitration is justified, but it shall conditionally grant the stay in order to promote judicial economy.  
5 That is, the stay is granted upon the following conditions: (1) E Ink shall participate in the  
6 AUO/CopyTele arbitration (as a third party) for purposes of discovery; (2) the parties agree that the  
7 discovery developed in the arbitration may be used in this litigation; and (3) E Ink shall comply with  
8 the arbitrator’s discovery decisions. If E Ink disobeys an order of the arbitrator, this Court may then,  
9 and only then, entertain a motion to lift the stay and enforce such order. If these conditions are not  
10 satisfied, then CopyTele may also move for relief from the stay.


11 **II. CONCLUSION**

12 For the foregoing reasons, the Court conditionally grants E Ink’s motion to stay and defers  
13 ruling on the motion to dismiss until after the arbitration between AUO and CopyTele is resolved.

14 This order disposes of Docket Nos. 50 and 52.

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16 IT IS SO ORDERED.

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18 Dated: July 9, 2013

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22 EDWARD M. CHEN  
23 United States District Judge  
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