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Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; APPLE, INC.; eBAY, INC.;
FACEBOOK, INC.; GOOGLE INC.;
NETFLIX, INC.; OFFICE DEPOT, INC.;
OFFICEMAX INC.; STAPLES, INC.;
YAHOO! INC.; AND YOUTUBE, LLC,

Defendants.

Case No. 2:10-cv-01385-MJP

**INTERVAL LICENSING LLC
OPPOSITION TO DEFENDANTS'
MOTION TO STAY**

JURY DEMAND
ORAL ARGUMENT REQUESTED

Plaintiff Interval Licensing LLC (“Interval”) responds to the motion to stay filed jointly by all defendants.

INTRODUCTION

Having waited over six months to file a request for reexam, the defendants now seek to force Interval and the Court to abandon the substantial work that has already been performed in this litigation and put this case on hold for an uncertain period that could very well be six years or more. The defendants understate the delay inevitably caused by a reexam stay and they overstate the probability that the asserted claims will all be materially modified. They seek this relief before the PTO has even granted the reexam requests, a step that itself will likely take sixty to ninety days. Courts have increasingly begun to recognize the reexam/litigation stay motion for what it is: a delay tactic employed by patent

1 infringement defendants who hope to put off their day of reckoning. Moreover, Defendants
2 have heightened their tactical games by having different defendants file different requests
3 for reexamination. Absent a stay, all issues will be resolved 16 months from now, which is
4 less than half the time that it will likely take the PTO to complete the reexamination process,
5 and likely six years or more before all reexamination appeals are resolved. This Court
6 should not allow the defendants to derail this litigation, but should instead continue to assert
7 its Article III jurisdiction to provide a just and expeditious resolution of these patent
8 infringement claims.
9

10 ARGUMENT

11 1. Staying Litigation Is Discretionary

12 This Court has broad discretion to decide to stay this litigation or to allow it to
13 proceed. *See, e.g., Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008).
14 Motions to stay are driven by the facts and circumstances of the individual case and a stay
15 pending reexam is anything but automatic. Indeed, other districts in this Circuit with patent-
16 heavy dockets recognize that a stay can often be counter-productive:
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19 [T]here appears to be a growing concern among at least some judges in this
20 district that, on balance, staying a case even in its early stages pending
21 reexamination has not led to the just, speedy, and efficient management of
22 the litigation, but instead has tended to prolong it without achieving sufficient
23 benefits in simplification to justify the delay. This concern stems in part
24 from the unpredictable but often lengthy duration of the stay due to the length
25 of PTO reexamination proceedings . . . in contrast to the salutary effect of
26 firm deadlines on efficient case management.

27 *Network Appliance Inc. v. Sun Microsystems Inc.*, 2008 WL 2168917 (N.D. Cal. 2008).¹

28 ¹ Although the *Network Appliance* Court granted the request for the stay with respect to one of the patents
being litigated, that decision was based in large part on the fact that the PTO had already issued an office
action rejecting all sixty-three claims in that patent. *Network Appliance*, 2008 WL 2168917 at *1. Here, by
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1 Judge LaPorte's assessment in *Network Appliance* of the Northern District of
2 California's growing concern over litigation stays appears to have been accurate: orders
3 denying stay requests have become commonplace in that Court during the past two years.
4 *See, e.g., Affinity Labs of Texas, Inc. v. Apple, Inc.*, 2010 WL 1753206 at *2 (N.D. Cal.
5 April 29, 2010); *Ultra Products Inc. v. Antec, Inc.*, 2010 WL 1688538 at *4 (N.D. Cal. April
6 26, 2010); *Wordtech Sys. Inc., v. Microboards Manufacturing, LLC*, 2010 WL 1641510 at
7 *2 (N.D. Cal. April 22, 2010); *Esco Corp. v. Berkeley Forge & Tool, Inc.*, 2009 WL
8 3078463 at *4 (N.D. Cal. Sept. 28, 2009); *Sorensen v. Ampro Tools Corp.*, 2009 WL 605831
9 *4 (N.D. Cal. March 9, 2009). An oft repeated theme of these cases is that a policy of
10 granting stays that is too liberal invites defendants to "unilaterally derail" litigation. *Esco*
11 *Corp.* 2009 WL 3078463 at *2 (quoting *Soverain Software LLC v. Amazon.Com, Inc.*, 356
12 F.Supp.2d 660, 662 (E.D. Tex. 2005)). The same concern has been recognized in the legal
13 press. *See, e.g., Exhibits 1 and 2 to Declaration of Edgar Sargent*, March 28, 2011
14 ("Sargent Decl.").

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18 When deciding a motion to stay pending reexam, courts consider three factors: (1)
19 the likelihood that issues will be simplified or clarified by the reexam process; (2) the stage
20 of the litigation; (3) prejudice to the non-moving party. *F5 Networks, Inc. v. A10 Networks,*
21 *Inc.*, 2010 WL 5138375 at *1-2 (W.D. Wash. 2010). None of these factors supports a stay
22 in this case.
23

24 **2. There Is No Basis For Concluding That A Reexam Will Simplify This**
25 **Litigation.**
26

27
28 contrast, the PTO has not even accepted the reexam request, much less issued an office action invalidating any claims.

1 The defendants make no attempt to explain how or why the asserted claims of the
2 patents in suit will be clarified or simplified as a result of the reexam. Rather than
3 identifying alleged ambiguities in the claims or explaining their assertion that certain claims
4 were anticipated by the prior art, the defendants rely on statistics and assumptions to argue
5 that modification of the claims in these patents is “likely.” This is secondary evidence at
6 best and is not sufficient to carry the defendants’ burden to justify a multi-year delay in
7 resolution of this suit.
8

9 The defendants’ statistics problem begins at the very beginning. Because their
10 reexam request *has not yet even been granted* by the PTO, the defendants ask the Court to
11 issue a stay based only on the probability that the PTO will grant the request. (D. Br. at 4.)
12 But the defendants’ probability argument is misleading. There are four patents in suit here,
13 yet the statistics cited by the defendants describe the chances that a reexam request for a
14 single patent will be granted. The odds that all four reexam requests will be granted are
15 substantially worse than the odds for a single patent. And, in this case, those odds are
16 further reduced by the fact that two of the reexam requests are *ex parte*, which the PTO
17 grants less frequently than *inter partes* requests.
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20 Even if the Court were to overlook the fact that the PTO has not yet granted reexam
21 requests for any of these patents, the argument that any eventual reexam will simplify issues
22 in this litigation is unsupported by any explanation tied to *these* patents, *these* claims, or *this*
23 prior art. Instead, again, the defendants simply cite statistics. The defendants have made no
24 attempt to demonstrate that any particular claims are likely to be invalidated or modified
25 based on the asserted prior art. *See F5 Networks, Inc. v. A10 Networks, Inc.*, 2010 WL
26 5138375 at *2 (W.D. Wash. 2010) (denying a motion for stay because “it is not possible to
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1 predict whether a successful reexamination request will simplify the issues in the case if the
2 Court does not know what they are.”).

3 The statistics on canceled and modified claims cited by the defendants in lieu of
4 case-specific evidence are even more misleading than their statistics concerning the granting
5 of reexam requests. The defendants lump together reexams that result in canceled claims
6 with those that result only in amendments, claiming that 77% of *ex parte* and 90% of *inter*
7 *partes* reexams result in one or the other. (D Br. at 4.) There is no indication in these bare
8 statistics of how significant the amendments are, or what the “odds” would be that an
9 amended or canceled claim would also be one of the claims asserted in this litigation.
10 Without more detailed information, the defendants’ data is almost meaningless.
11

12
13 The chances that amendments would impact every claim being litigated are simply
14 too small to justify a stay of up to six years. Again relying solely on the statistics cited by
15 the defendants, the chances are approximately 63% that *at least one* of the patents will have
16 *no claims* amended or cancelled.² This is, in fact, the relevant metric for evaluating the
17 potential benefit from the reexam because a judgment of patent infringement does not
18 require finding infringement on all claims in all of the asserted patents, but only on one
19 claim from one patent. If, as the defendants’ statistics suggest, the chances are nearly 63%
20 that at least one of the patents will emerge unchanged, then infringement of any claim in this
21 patent will be no different after the reexam than it would have been before.
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25 ² According to the defendants statistics, the chances that a patent undergoing *ex parte* reexam will emerge
26 with all claims unchanged is 23% and the chances that a patent undergoing *inter partes* reexam will emerge
27 unchanged is 10%. (D. Br. at 4.) The defendants have sought *ex parte* reexam of two patents and *inter partes*
28 reexam of the other two. Thus the chances that at least one of the four patents will emerge with all claims
unchanged is $1 - (.77*.77*.9*.9)$ or just over 51%. Taking into account the possibility that reexam will not
even be granted for at least one of the patents increases the chances that at least one patent will not be changed
to nearly 63% [$1 - (.77*.77*.9*.9*.92*.92*.96*.96)$].

1 The defendants' response to the likelihood that the litigation will ultimately have to
2 resume based on at least some unmodified claims is to argue that the court will benefit from
3 representations made by Interval to the PTO during the reexam. This justification is
4 specious. At this point, the defendants are free to submit the same prior art in this litigation
5 as they are to the PTO and any claim construction positions or other representations that
6 Interval takes in response to any claimed prior art would be the same in the litigation as it
7 would be before the PTO. Any benefit that the Court or the parties would receive from
8 having these positions hashed out in advance in another proceeding is more than offset by
9 the years of delay required.
10

11
12 Moreover, although this motion was signed by all defendants, none of the reexam
13 requests were joined by all of the defendants who are accused of infringing the patent in
14 question. The defendants have provided no explanation for this tactic but it suggests that
15 some defendants will argue that they are not bound by the results of reexams in which they
16 did not participate (an argument that should not be sustained). This potential multi-party
17 evidentiary tangle would further complicate, rather than simplify, issues of claim
18 construction and validity. This Article III Court is fully capable of resolving this issues
19 based on the evidence presented in this case and there is no practical justification for ceding
20 jurisdiction over these issues to a parallel proceeding before the PTO, only to revisit many
21 of the same issues in the subsequent litigation.
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24 **3. The Parties And The Court Have Expended Significant Resources In This**
25 **Litigation.**

26 This case has advanced significantly in this Court and a stay pending reexam would
27 inevitably cause much of the benefit of that work to be lost. Both the parties and the Court
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1 have invested substantial resources in resolving preliminary issues, framing the
2 infringement case and defenses, establishing a court calendar, and making progress in
3 discovery. Given that the case has advanced this far, the “stage of litigation” factor does
4 not support a stay. *See, e.g., Output Technology Corp. v. Dataproducts Corp.*, 1991 U.S.
5 Dist. LEXIS 20168 at *7 (W.D. Wash. 1991) (denying a stay pending reexam when
6 “discovery is well underway” based on service of interrogatories and requests for
7 production and defendant “has not made out a case of hardship in going forward.”)

9 The defendants emphasize the work that remains to be done in the litigation,
10 including the Markman hearing and the trial, and argue that the harm from a stay is
11 minimal because these proceedings have not yet occurred. (D. Br. at 8.) This argument
12 has things backwards; the “stage of litigation” factor is intended to address harm from a
13 stay caused by losing the benefit of the effort that has already been expended if the parties
14 and the Court must wait several years to proceed. From that perspective, a stay in this case
15 would be demonstrably wasteful.

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18 The defendants waited seven months from the time they were served with the
19 Complaint before filing their petitions for reexam. During those seven months much
20 progress has been made in the litigation:

- 21 • Several motions to dismiss have been briefed and resolved and a renewed
22 motion to dismiss or sever is pending;
- 23 • Preliminary infringement contentions have been prepared and served;
- 24 • Preliminary non-infringement contentions have been prepared and served;
- 25 • Defendants have served interrogatories and over 450 document requests,
26 and Interval has already served responses to over 280 of them;
- 27 • Interval has served document requests and interrogatories, to which
28 defendants have served responses and supplement responses;
- All parties have produced documents;
- Lists of terms for claim construction have been exchanged and Interval’s
experts are working on an expert report, which is due on April 4.

1 In addition to the time, fees, and expenses incurred by the parties, the Court has
2 held a status conference to address the best approach to this case and, after receiving
3 briefing, issued a detailed scheduling order setting out an approach to coordinated
4 discovery and a two-track plan for trial on the merits. All of this work by the parties and
5 the Court would need to be revisited, and much of it entirely re-done, if the progress of this
6 litigation is interrupted for several years.
7

8 The defendants cite several cases where stays were issued at even later points in the
9 progress of the litigation than is at issue here. (D. Br. at 9). Of course these are
10 discretionary decisions for the individual court and none of these decisions are binding
11 here. A number of these cases are over ten years old and pre-date the current reexam
12 workload of the PTO (which has been brought on in large part by defendants' use of the
13 reexam stay as a litigation tactic). And, most importantly, these cases involved other
14 factors making the stay less prejudicial but found that the "stage of litigation" factor
15 *disfavored* a stay.³
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20 ³ See, *3M innovative Prods. Co. v. DuPont Dow Elastomers LLC*, 2005 WL 2216317 at *3 (D. Minn.
21 2008) (finding that the stage of litigation "weighs against granting a stay" but issuing a stay nevertheless
22 because reexam had been underway for over six months and the party opposing the stay was also the party that
23 had filed the reexam request); *Middleton, Inc. v. Minnesota Mining & Mfg. Co.*, 2004 WL 1968669 at *5, 8
24 (S.D. Iowa 2004) (finding that the status of the litigation weighed against a stay but granting the stay "under all
25 of the unique circumstances of this case" as a result of substantial amounts of foreign and domestic prior art
26 that had been uncovered in discovery and that had been submitted to the PTO with the reexam request);
27 *Softview Computer Prods. Corp. v. Haworth, Inc.*, 2000 WL 1134471 *1 (S.D.N.Y. 2000) (entering no finding
28 on the "status of litigation" factor but staying litigation involving a single patent when the PTO had already
granted reexam request and begun the reexam process); *Loffland Bros. Co. v. Mid-Western Energy, Corp.*,
1985 WL 1483 *2 (granting a stay when the party opposing was simultaneously asking for an extension of the
pre-trial schedule); *Grayling Industries, Inc. v. GPAC, Inc.*, 1991 WL 236196 at *2-3 (granting a stay despite
finding that "the interests underlying the reexam procedure doubtless would have been served better by an
earlier filing of the petition" based in part on the understanding that the reexam action had already been
proceeding and might conclude within two months); *Lentek Int'l Inc. v. Sharper Image Corp.*, 169 F. Supp.
1360, 1363 (M.D. Fla. 2001) (granting stay when party opposing it was the party who filed the reexam
petition).

1 Even if the defendants were correct and this case were in an early stage for
2 purposes of this inquiry, this fact would not weigh heavily in favor of a stay. “Although
3 the advanced nature of a case approaching trial may weigh heavily against granting a stay,
4 the opposite inference—that a suit in the early stages should weigh heavily in favor of a
5 stay—is not true.” *Sighting System Instruments, LLC. v. Prestige Law Enforcement, Inc.*,
6 2006 WL 2642184 (N.D. Tex. 2006). The focus of the inquiry is on the efforts that would
7 be lost if a stay were granted, there is no countervailing policy favoring a stay if the Court
8 concludes that such waste would be minimal. *Id.*

10 **4. Interval Would Suffer Significant Prejudice From The Delay Caused By A**
11 **Stay.**

12 The defendants understate the length of the delay that is likely to result from a stay.
13 Once again, they have ignored the fact that they seek reexam of four patents, not one, and
14 the stay will presumably be in force until all four have emerged from reexam. Two of the
15 reexam requests are *inter partes* and the current statistics from the PTO indicate that the
16 average length of an *inter partes* reexam is over three years. Ex. I to Decl. of M. Walters
17 (Doc. No. 199-14) at #6. Given that this is a mean, the odds are high that at least one of the
18 reexams will take longer than three years to emerge from the PTO. This delay appears
19 likely to increase given the ever increasing volume of reexam requests filed with the PTO
20 each year. *Id.* at #3. The statutory mandate that the PTO complete reexams of patents in
21 litigation “with special dispatch” provides no true benefit given that 70% or more of the
22 patents in reexam are also involved in litigation. *Id.* at #4. In addition, the stay should
23 factor in the possibility of an appeal from the reexam results, which typically adds three
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1 years to the time needed to complete a reexam. Thus, it is possible that at least one of the
2 patents in suit would be in reexam for more than six years.

3 By contrast, this Court has established a very efficient schedule for the completion of
4 this litigation, including the first of two trials scheduled to begin approximately one year
5 from now. There can be no doubt that the litigation in this Court would likely be concluded
6 years before the completion of any reexam. The ever increasing length of the delay caused
7 by the backlog of reexam requests at the PTO has been a substantial factor in leading courts
8 in this Circuit to deny motions for a stay pending reexam. *See, e.g., Affinity Labs of Texas,*
9 *Inc. v. Apple, Inc.*, 2010 WL 1753206 at *2 (N.D. Cal. 2010) (denying a motion to stay
10 pending reexam in part because the three year time frame for reexams is “likely to increase
11 given the steady rise in the number of reexam requests in recent years” and finding that
12 delay of such length to be unduly prejudicial to the plaintiff). Here, as in the *Affinity Labs*
13 litigation, the prejudice caused by the delay has been compounded by the defendants’
14 (including Apple, represented by the same counsel it had in *Affinity Labs*) having waited for
15 months to serve their reexam requests. *Id.* (noting the additional prejudice imposed as a
16 result of Apple’s seven-month delay in filing the reexam request).
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20 The prejudice to which Interval would be subjected by having to wait six years to
21 pursue this litigation is undeniable. A delay of this length cannot be considered even
22 roughly equivalent to the one or two year delays contemplated in some of the older cases
23 cited by the defendants. *See e.g. Donnelly Corp. v. Guardian Industries Corp.* 2007 WL
24 3104794 at *8 (one and one-half years or less); *Grayling Industries, Inc. v. GPAC, Inc.*,
25 1991 WL 236196 at *3 (delay of two months). Six years of delay raises serious concerns
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1 about loss of evidence as witnesses become unavailable or their memories fade and records
2 in the hands of third-parties are destroyed. *See, e.g., Affinity Labs*, 2010 WL 1753206 at *2.

3 Moreover, the parties to a PTO proceeding do not have subpoena power. Though the
4 PTO's patent expertise is often cited as benefit to the courts and a justification for staying
5 litigation, perhaps just as frequent, though less frequently mentioned, is the benefit that the
6 PTO receives by having access to evidence obtained through discovery in patent litigation.
7 Documents obtained from third-parties and deposition transcripts of inventors of alleged
8 prior art are regularly submitted as part of the reexam process, but such evidence would be
9 unavailable here if a stay is granted.
10

11
12 The defendants argue that Interval waited for years before filing suit and thus cannot
13 be prejudiced by additional delay. The implication that Interval simply sat on its rights
14 without making any effort to protect them is false. As explained more fully in the
15 Declaration of Davina Inslee filed in conjunction with this opposition, the small staff
16 employed by Interval spent years reviewing the patents and other intellectual property in an
17 effort to determine the value of the portfolio and its various components. Declaration of
18 Davina Inslee, March 28, 2011, at ¶ 12-16. Moreover, even if true, whether Interval waited
19 to bring suit is irrelevant to the question at hand – whether a stay of up to 6 years would
20 materially benefit this litigation due solely to the fact that defendants have filed requests for
21 reexamination.
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24 CONCLUSION

25 Congress has not indicated that reexaminations are the exclusive mechanism for
26 enforcing a patent. Just the opposite. The right given to a patent holder is a right to exclude
27 – a right that must be enforced through litigation if infringers do not take a license.
28

1 Delaying enforcement of that right for an indeterminate period of years and years on the
2 mere filing of a request for reexamination or even a granting of a request for reexamination
3 would substantially weaken patent rights. For good reason, more and more courts across the
4 country have rejected stays pending reexamination and have viewed these requests for what
5 they really are – litigation ploys designed to indefinitely delay litigation and final resolution
6 of the parties’ rights.
7

8 Belying claims that the delay would be harmless, the consequences of the relief
9 sought by the defendants would be an uncertain delay that could very well last six years or
10 more, the results of which are more likely than not to return at least one of the patents in suit
11 entirely unchanged. The prejudice is obvious and it is extreme. The request for a stay
12 should be denied and this Court should proceed with this litigation according to the schedule
13 that has now been in place for over two months, and that will resolve all issues within 16
14 months.
15

16
17 Dated: March 28, 2011

/s/ Edgar Sargent

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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