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HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.,

Defendant.

CASE NO. C10-1385-MJP

**DEFENDANTS' JOINT RESPONSE TO
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
STAYING CASES PENDING
REEXAMINATION**

Note on Motion Calendar: July 5, 2011

INTERVAL LICENSING LLC,

Plaintiff,

v.

APPLE, INC.,

Defendant.

CASE NO. C11-708-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

EBAY INC.,

Defendant.

CASE NO. C11-709-MJP

LEAD CASE NO. C10-1385-MJP

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INTERVAL LICENSING LLC,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

CASE NO. C11-710-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

CASE NO. C11-711-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

NETFLIX, INC.,

Defendant.

CASE NO. C11-712-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

OFFICE DEPOT, INC.,

Defendant.

CASE NO. C11-713-MJP

LEAD CASE NO. C10-1385-MJP

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INTERVAL LICENSING LLC,

Plaintiff,

v.

OFFICEMAX, INC.,

Defendant.

CASE NO. C11-714-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

STAPLES, INC.,

Defendant.

CASE NO. C11-715-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

YAHOO! INC.,

Defendant.

CASE NO. C11-716-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

YOUTUBE, LLC,

Defendant.

CASE NO. C11-717-MJP

LEAD CASE NO. C10-1385-MJP

1 Pursuant to the Court’s Minute Order dated June 29, 2011 (Dkt. 255), Defendants
2 respectfully file this joint response to Plaintiff’s motion for reconsideration. (Dkt. 254.)
3 Plaintiff’s motion should be denied because Plaintiff has not presented a proper basis for
4 reconsideration of the Court’s order staying this action. The Court’s order was correct and based
5 on a reasoned analysis. Plaintiff does not identify any error, let alone any “manifest error,” in the
6 Court’s reasoning or analysis. The Court considered the same three factors used by district
7 courts throughout the United States (factors not disputed by Interval), and properly granted a stay
8 in this case following the PTO’s decision to order reexamination of all four patents-in-suit. (Dkt.
9 251.) Plaintiff does not identify new legal authority to alter that outcome, and Plaintiff’s
10 purported “new facts” are neither new nor provide a basis to alter the Court’s Order.

11 **I. Legal Standard for Motions for Reconsideration**

12 “Motions for reconsideration are disfavored” and will ordinarily be denied “in the
13 absence of manifest error in the prior ruling or a showing of new facts or legal authority which
14 could not have been brought to [court’s] attention earlier with reasonable diligence.” L.R.
15 7(h)(1); *Avocent Redmond Corp. v. Rose Elecs., Inc.*, No. C 06-1711 MJP, 2008 WL 3875869, at
16 *1-2 (W.D. Wash. Aug. 18, 2008) (Pechman, J.) (denying motion for reconsideration of order
17 staying patent litigation pending reexamination). Failure to “point out with specificity the
18 matters which the movant believes were overlooked or misapprehended by the court [and] any
19 new matters being brought to the court’s attention for the first time” may be grounds for denial
20 of the motion. L.R. 7(h)(2). Interval’s motion does not meet these requirements for
21 reconsideration.

22 **II. Interval Fails To Identify Any New Facts, New Legal Authority or Manifest Error**

23 Interval’s argument that a stay would be inappropriate given its allegedly significant
24 investment in the litigation is not a basis for reconsideration. As reflected in the Order, the Court
25 considered the current stage of the litigation and that the parties were about to submit claim
26 construction briefs and argue claim construction. (Dkt. 251 at 2:2-4, 2:16-3:1.) The Court
27 specifically rejected the argument that work done on the case to date would be wasted. (*Id.* at

1 2:22-3:1.) Moreover, the “work” Plaintiff claims to have done is typical of patent litigation,
2 certainly could have been (and was) raised by Plaintiff earlier, and was consistent with the
3 Scheduling Order in place during the original briefing on the Motion to Stay.

4 Interval has made no credible showing that any of the work of its experts would be
5 “wasted,” and its argument provides no basis for reconsideration. The Protective Order
6 expressly allows Interval’s experts to memorialize the results of their analysis by taking notes
7 and printing out portions of the Defendants’ source code to the extent necessary to prepare expert
8 reports or infringement contentions. (Dkt. 222, at 15:16-20, 15:24-26.) Interval’s experts could
9 simply pick up where they left off in the unlikely event the patents-in-suit survive reexamination
10 in their current form. None of the purportedly “additional work” identified by Plaintiff (Dkt. 255
11 at 4:1-5:25) was unexpected or unknown to Interval when it opposed the Defendants’ initial
12 motion or when it filed a further opposition on June 7, 2011. (Dkt. 246.)

13 Interval’s allegedly wasted effort pales in comparison to the enormous waste of judicial
14 resources that might have resulted had the Court proceeded with claim construction while all
15 four patents-in-suit are under reexamination. Claim construction would waste the Court’s and
16 parties’ time and resources if even one of the following events takes place: (1) the claims do not
17 survive reexamination, (2) the claims are amended, or (3) Interval makes arguments to the Patent
18 Office attempting to distinguish its purported inventions from the prior art. (Dkt. 198 at 6:15-
19 8:13, 11:5-12:2; Dkt. 211 at 4:14-5:15.) The Court’s Order came just in time to eliminate this
20 potential waste by saving the Court and the parties from investing further resources in claim
21 construction and the work that would follow.

22 Interval does not dispute that the PTO has issued Office Actions rejecting nearly all of the
23 asserted claims (29 of 31 claims rejected) of two of the patents-in-suit. (Dkt. 247-2 at p. 26
24 (rejecting 14 of 16 claims at issue in ’682 patent); Dkt. 247-5 at p. 15 (rejecting all 15 claims at
25 issue in the ’314 patent).) Interval is now obligated to concede the invalidity of those claims,
26 amend them, or make arguments to the PTO as to their validity that will necessarily affect claim
27 scope. *See, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 36 F. Supp. 2d 440, 442 (D.N.H. 1997)

1 (“Because determining the scope of the disputed claim is central to the resolution of this case, it
2 would be inefficient for the court to expend time and resources engaging in claim interpretation
3 while the scope of the claim is still under review at the PTO.”). Nor does Interval dispute that
4 the PTO has also ordered a reexamination of all asserted claims of the other two patents-in-suit
5 (the ’507 and ’652 patents). Interval’s re-argument that certain defendants joined particular
6 petitions (Dkt. 206, at p. 6) misses the point. The proper construction of the patents-in-suit
7 necessarily affects all defendants, and there is no doubt that the intrinsic record that the Court
8 must consult to construe those patents will change as a result of the ongoing reexaminations.

9 The first argument in the only claim construction brief Interval filed (for the ’652/’314
10 patents) is an example of the reasons that a stay was appropriate here. In that claim construction
11 brief, Interval argued that the asserted claims of the ’314 patent do not cover the screen saver
12 embodiment disclosed in the specification. (Dkt. 251, at pp. 4-5.) In ordering reexamination and
13 rejecting the ’314 patent claims over Kjorsvik’s disclosure of a screen saver, the Examiner
14 appears to have reached exactly the opposite conclusion. (Dkt. 247-5 at p. 7.) Thus, contrary to
15 Interval’s arguments (which it could have raised before), the PTO’s actions confirm that
16 pursuing litigation while the intrinsic record remains in flux is certain to waste judicial and party
17 resources.

18 Interval’s assertion that the Patent Office has not adopted the Defendants’ invalidity
19 proposals is misleading. All four orders granting reexamination and the two Office Actions
20 issued to date rely exclusively on the prior art cited in the reexamination requests. That the
21 Examiner used somewhat different grounds for the rejections does not change the fact that the
22 claims were rejected, or that Interval is now obligated to respond to those rejections. Interval’s
23 related contention that the Examiner used only a subset of the prior art identified in the
24 reexamination requests is also irrelevant, and Interval concedes that the Examiner is free to use
25 that art later in the reexaminations. (Dkt. 254, at 6:13-14, 6:22-24.)

26 Interval’s argument that the stay imposes an undue burden on its experts due to their
27 continuing obligations under the Protective Order is not a “new” fact and has no bearing here.

1 Interval has been on notice that Defendants were likely to pursue reexamination since the parties
2 submitted their first Joint Status Report. Interval’s experts voluntarily undertook paid positions
3 knowing that there would be restrictions on their participation in patent prosecution matters
4 going forward, and they knew that there were no guarantees as to how long those obligations
5 would continue. In fact, the Protective Order makes clear that the prosecution bar does not
6 expire until a full year “after the final resolution of this action, including all appeals.” (Dkt. 222,
7 at 5:24-6:1.) Interval has not approached any defendant seeking release from these provisions,
8 nor has it explained why relief as to a particular individual is presently required.

9 Finally Interval’s suggestion of a recent trend denying stays pending reexamination
10 despite the resulting waste of judicial resources and prejudice to defendants is unsupported and
11 raises no new facts or law. In their original moving papers, Defendants detailed both the
12 potential for undue prejudice to the Defendants and the inaccuracy of Interval’s argument about
13 any “trend” to deny stay motions. (Dkt. 198 at 10:27-12:2; Dkt. 211 at 5:16- 6:24 and 2:20-
14 3:19.) Further, upon a brief review, Defendants have identified several new cases confirming
15 that district courts continue to routinely grant stays pending reexamination. *See, e.g., Ohio*
16 *Willow Wood Co. v. Alps South LLC*, No. 2:05-cv-1039, 2011 WL 2358649, at *5 (D. Ohio June
17 9, 2011); *LMT Mercer Group, Inc. v. Maine Ornamental, LLC*, No. 10-4615, 2011 WL
18 2039064, at *13 (D.N.J. May 24, 2011); *Microsoft Corp. v. TiVo Inc.*, No. 10-CV-00240, 2011
19 WL 1748428, at *7 (N.D. Cal. May 6, 2011). There simply is no “trend” against granting stays.

20 CONCLUSION

21 Interval’s request for reconsideration should be summarily denied because it fails to meet
22 the requirements for reconsideration. Interval does not identify a manifest error, nor does it
23 identify new facts or new legal authority. Moreover, the “facts” Interval does rely upon and the
24 arguments it makes were either considered by the Court, confirm the Court’s decision was
25 correct – or both. Defendants respectfully request that the Court deny Plaintiff’s motion for
26 reconsideration.

1 DATED this 5th day of July, 2011.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 5, 2011, I caused the foregoing Defendants' Joint Response to
3 Plaintiff's Motion for Reconsideration to be:

4 electronically filed with the Clerk of the Court using the CM/ECF system which will send
5 notification of such filing to the following:

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