Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC, Plaintiff, v. AOL, INC., Defendant.	Case No. 2:10-cv-01385-MJP **REPLY TO INTERVAL'S MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING MOTIONS TO STAY**
INTERVAL LICENSING LLC, Plaintiff, v. APPLE, INC., Defendant.	Case No. 2:11-cv-00708 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. EBAY, INC., Defendant.	Case No. 2:11-cv-00709 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. FACEBOOK, INC.,	Case No. 2:11-cv-00710 MJP Lead Case No. 2:10-cv-01385-MJP

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

Defendant.	
INTERVAL LICENSING LLC, Plaintiff, v. GOOGLE, INC., Defendant.	Case No. 2:11-cv-00711 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. NETFLIX, INC., Defendant.	Case No. 2:11-cv-00712 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. OFFICE DEPOT INC., Defendant.	Case No. 2:11-cv-00713 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. OFFICEMAX INC., Defendant.	Case No. 2:11-cv-00714 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. STAPLES INC., Defendant.	Case No. 2:11-cv-00715 MJP Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC, Plaintiff, v. YAHOO! INC., Defendant.	Case No. 2:11-cv-00716 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. YOUTUBE LLC, Defendant.	Case No. 2:11-cv-00717 MJP Lead Case No. 2:10-cv-01385-MJP

Interval respectfully files this Reply to its Motion for Reconsideration of the Court's Order Granting Defendants' Motions to Stay (Dkt. # 254; the "Motion"). Defendants filed a joint opposition to the Motion on July 5, 2011. (Dkt. # 256). Interval files this short Reply to respond to two of the arguments raised in defendants' opposition.

Defendants argue that "district courts continue to routinely grant stays pending reexaminations." Opposition at 4. But none of the three cases that defendants cite supports their position that a stay is appropriate here. In *LMT Mercer Group v. Maine Ornamental, LLC*, 2011 WL 2039064, *4 (D.N.J. May 24, 2011), the parties had not produced a single document, had not responded to discovery requests, and no trial date had been set. Similarly, the *Ohio Willow Wood Co. v. Alps South LLC* action had not proceeded past the initial stages of discovery—the parties had only recently exchanged infringement and validity contentions and no *Markman* hearing or trial date had been set. 2011 WL 2358649, *4 (S.D. Ohio June 9, 2011). Likewise, there was no trial date set in *Microsoft Corp. v. TiVo Inc.*, 2011 WL 1748428, *3, *6 (N.D. Cal. May 6, 2011), and the parties had exchanged a *total* of 834 documents. In addition, Microsoft had filed a

complaint with the International Trade Commission in which it accused the same TiVo products and asserted patents that are related to the patents asserted in the district court. *Id.* at *2.

Unlike the cases cited by defendants, two recent cases denying motions to stay pending reexamination are on point. The Northern District of California recently denied Apple's request for a stay pending reexamination in *Affinity Labs of Texas, LLC v. Nike, Inc. and Apple Inc.*, 2011 WL 1833122 (N.D. Cal. May 13, 2011). In that action, Apple moved to stay the case at a time when the parties had "exchanged very little discovery," "[n]o trial date ha[d] been set, and the parties ha[d] not yet appeared for a case management conference." *Id.* at *1. But Judge Wilken denied the stay because she concluded that the "second factor—whether a stay would simplify the issues presented in this action—is neutral." *Id.* As Judge Wilken correctly noted, "it is unlikely that the reexamination proceeding will resolve all of the issues regarding the two patents in question in this lawsuit. Thus, the Court would be left to adjudicate the remaining issues." *Id.* In addition, the court noted that "[a] stay may prejudice Affinity's ability to enforce and license its patents, and could lead to a loss of evidence." *Id.* at 2. The court also pointed out that "Apple waited nine months after Affinity filed the present suit before requesting the reexaminations." *Id.* Here, the facts supporting a denial of the stay are even more compelling than in *Affinity Labs* because the parties have engaged in substantial discovery and the actions are set for trial in approximately one year.

Similarly, the District of Delaware recently denied a motion to stay in *Nokia Corp. v. Apple Inc.*, 2011 WL 2160904 (D. Del. June 1, 2011). Importantly, in that case Apple opposed the stay, relying on many of the same arguments that Interval has asserted here. Apple argued that "[a]s to the five re-examination requests that the Patent Office has granted, they are weak on the merits. Thus, the likelihood that re-examination will eliminate or narrow Apple's

infringement claims is very low and, at this point, speculative." Ex. 1 at p. 5 of 23 (Apple's Opposition to Motion for a Stay)[1]. Similar to Interval's argument here, Apple pointed out that "[t]he whole re-examination process can thus be expected to take at least two years and perhaps over six years. By that time, the district court trial and appeal should be long finished." *Id.* at 12 of 23. Apple also noted that "Nokia has sought ex parte re-examination, and therefore, even if Nokia loses completely on every argument before the Patent Office, it will no doubt seek to return to this Court and repeat the same losing arguments based on the same prior art." *Id.* at 14 of 23. The same is true here. Two of the four reexaminations are ex parte reexaminations, and not all of the defendants against whom the patents are asserted signed on to the two inter partes reexaminations. Finally, Apple argued that the reexamination would not necessarily simplify the case because the "Patent Office review on a re-examination is limited to a narrow scope of issues; specifically whether prior art or printed publications are invalidating. *See* 35 U.S.C. §§ 301, 302. Nokia can lose on those issues and still return to this Court and continue to litigate the validity of the patents under different theories and evidence." *Id.* at 15 of 23. Apple is absolutely correct, and that argument applies with equal weight here.

Defendants contend that "Interval's re-argument that certain defendants joined particular petitions [] misses the point." Opposition at 3. Not true. Despite multiple opportunities, defendants have made no attempt to explain why only certain defendants signed the requests for reexamination. As Interval made clear in its motion, the only explanation for such conduct is gamesmanship. Interval will vigorously oppose any attempt by defendants (1) to evade the results of the reexamination by arguing that a particular defendant did not sign a particular request

[1] When the District of Delaware denied the stay, the PTO had issued a notice of allowance of one patent and issued three rejections of the other patents. *See* Ex. 2 (Jan. 3, 2011 Letter to The Honorable Gregory M. Sleet.). Relevant portions of Exhibits 1 and 2 are highlighted in yellow.

or (2) to perpetuate the stay by having a party who did not originally sign the request for reexamination submit a new request for reexamination.

CONCLUSION

For the reasons set forth in its Motion, Interval respectfully requests that this Court reconsider its Order staying the actions pending reexamination, and order that they proceed to trial on a schedule consistent with the Court's revised scheduling order (Dkt. # 248).

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/s/ Justin A. Nelson
Justin A. Nelson
WA Bar No. 31864
E-Mail: jnelson@susmangodfrey.com
Edgar G. Sargent
WA Bar No. 28283
E-Mail: esargent@susmangodfrey.com
Matthew R. Berry
WA Bar No. 37364
E-Mail: mberry@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1201 Third Ave, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883

Max L. Tribble, Jr.
E-Mail: mtribble@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

Oleg Elkhunovich
E-Mail: oelkhunovich@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

Michael F. Heim
E-mail: mheim@hpcllp.com

Eric J. Enger
E-mail: eenger@hpcllp.com
Nathan J. Davis
E-mail: ndavis@hpcllp.com
Niraj P. Patel
E-mail: npatel@hpcllp.com
HEIM, PAYNE & CHORUSH, L.L.P.
600 Travis, Suite 6710
Houston, Texas 77002
Telephone: (713) 221-2000
Facsimile: (713) 221-2021

Attorneys for INTERVAL LICENSING LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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:

Attorneys for AOL, Inc.

Cortney Alexander	cortney.alexander@finnegan.com
Robert Burns	robert.burns@finnegan.com
Elliot Cook	elliot.cook@finnegan.com
Gerald Ivey	gerald.ivey@finnegan.com
Scott Johnson	scott.johnson@stokeslaw.com
Molly Terwilliger	mollyt@summitlaw.com

Attorneys for Apple, Inc.

David Almeling	dalmeling@omm.com
Brian Berliner	bberliner@omm.com
George Riley	griley@omm.com
Jeremy Roller	jroller@yarmuth.com
Scott Wilsdon	wilsdon@yarmuth.com
Neil Yang	nyang@omm.com
Xin-Yi Zhou	vzhou@omm.com

Attorneys for eBay, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	Jeffrey.love@klarquist.com
Derrick Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com
Christopher Wion	chrisw@dhlt.com

Attorneys for Facebook, Inc.

Chris Durbin	cdurbin@cooley.com
Heidi Keefe	hkeefe@cooley.com
Sudhir Pala	spala@cooley.com
Michael Rhodes	mrhodes@cooley.com
Elizabeth Stameshkin	lstameshkin@cooley.com
Mark Weinstein	mweinstein@cooley.com

Attorneys for Google, Inc.

Aaron Chase	achase@whitecase.com
Dimitrios Drivas	ddrivas@whitecase.com
John Handy	jhandy@whitecase.com
Warren Heit	wheit@whitecase.com

Scott Johnson	scott.johnson@stokeslaw.com
Shannon Jost	shannon.jost@stokeslaw.com
Kevin McGann	kmcgann@whitecase.com
Wendi Schepler	wschepler@whitecase.com
Theresa Wang	theresa.wang@stokeslaw.com

Attorneys for Netflix, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derreck Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for Office Depot, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derreck Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for OfficeMax, Inc.

Kevin Baumgardner	kbaumgardner@corrcronin.com
Steven Fogg	sfogg@corrcronin.com
John Letchinger	letchinger@wildman.com
Jeffrey Neumeyer	JeffNeumeyer@officemax.com
Douglas Rupert	rupert@wildman.com

Attorneys for Staples, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhlt.com
Jeffrey Love	jeffrey.love@klarquist.com
Derrick Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com

Attorneys for Yahoo! Inc.

Francis Ho	fho@mofo.com
Richard S.J. Hung	rhung@mofo.com
Michael Jacobs	mjacobs@mofo.com
Matthew Kreeger	mkreeger@mofo.com
Dario Machleidt	dmachleidt@flhlaw.com
Eric Ow	eow@mofo.com

Mark Walters	mwalters@flhlaw.com
Gregory Wesner	gwesner@flhlaw.com

Attorneys for YouTube, LLC

Aaron Chase	achase@whitecase.com
Dimitrios Drivas	ddrivas@whitecase.com
John Handy	jhandy@whitecase.com
Warren Heit	wheit@whitecase.com
Scott Johnson	scott.johnson@stokeslaw.com
Shannon Jost	shannon.jost@stokeslaw.com
Kevin McGann	kmcgann@whitecase.com
Wendi Schepler	wschepler@whitecase.com
Theresa Wang	theresa.wang@stokeslaw.com

By: _/s/ Tammie J. DeNio_____
Tammie J. DeNio