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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FISHER-PRICE, INC. and MATTEL, INC.

Plaintiffs,

v.

DYNACRAFT BSC, INC.

Defendant.

Case No. 4:17-cv-03745-PJH

PLAINTIFFS' OPPOSITION TO DYNACRAFT'S MOTION TO STAY AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Date: November 15, 2017
Time: 9:00 a.m.
Courtroom: 3, 3rd Floor
Hon. Phyllis J. Hamilton

Plaintiffs Fisher-Price, Inc. ("Fisher-Price") and Mattel, Inc. ("Mattel") (collectively, "Plaintiffs") respectfully submit this response to Defendant Dynacraft BSC, Inc.'s ("Dynacraft") Motion to Stay (D.I. 44) .

I. INTRODUCTION

This is a case for patent infringement in which Plaintiffs allege that their direct competitor in the children's battery-powered ride-on vehicle market, Dynacraft, infringes U.S. Patent No. 7,222,684 ("the '684 patent"), U.S. Patent No. 7,487,850 ("the '850 patent"), U.S. Patent No. 7,621,543 ("the '543 patent"), and U.S. Patent No. 7,950,978 ("the '978 patent") (collectively, the "patents-in-suit"). The patents-in-suit are generally directed to various safety features in battery-powered ride-on toy vehicles, including soft-start speed control technology, gearshift technology, and wheel construction technology.

Dynacraft's motion to stay this lawsuit, which comes ten months after the case was filed and prior to the Patent Trial and Appeal Board ("PTAB") having acted on any of Dynacraft's four petitions for *inter partes* review ("IPR"), should be denied. The PTAB is not expected to act on the IPR petitions for nearly six months. Thus, any potential benefits of a stay at this stage of the case are entirely speculative. It is unknown whether the PTAB will institute any of the IPRs, and even if any are instituted, what the scope of those IPRs might be.[1]

In addition, Dynacraft is a direct competitor of Plaintiffs in the battery-powered ride-on market and the harm to Plaintiffs by the requested delay will be both substantial and irreparable. Plaintiffs' right to proceed on their causes of action has already been delayed by a transfer of this case based on the Supreme Court's decision in *TC Heartland, LLC v. Kraft Foods Group Brands LLC*, No. 16-341, 137 S. Ct. 1514 (May 22, 2017). Now, Dynacraft seeks an immediate stay based on petitions for IPR it waited nearly ten months to file after Plaintiffs brought this case.

[1] Adding to the uncertainty, the Supreme Court has granted certiorari to review whether *inter partes* review violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury. *Oil States Energy Services LLC v. Greene's Energy Group, LLC.*, 639 Fed. App'x 639 (Fed. Cir 2016), *cert. granted*, 198 L. Ed. 2d 677 (Jun. 12, 2017) (No. 16-712). So, it is unclear whether the PTAB's IPR program will even exist through the resolution of Dynacraft's IPR petitions.

Dynacraft should not be permitted to delay this case further with a stay before the PTAB even decides whether to proceed on the IPR petitions.

II. STATEMENT OF THE ISSUES

1. Whether this litigation should be stayed pending Dynacrafts' IPRs, where the PTAB has not yet decided whether to institute any of the IPRs and is not expected to make the decision for nearly 6 months.

III. STATEMENT OF FACTS

Plaintiffs filed this suit on January 17, 2017 in the United States District Court for the District of Delaware seeking recourse for Dynacraft's infringement of the four patents-in-suit. On May 22, 2017, the Supreme Court issued its *TC Heartland* decision and on June 27, 2017, the case was transferred to this Court. (D.I. 14-16.)

On October 9, 2017, on the eve of the case management conference, more than three months after this case was transferred and nearly ten months after this case was filed, Dynacraft filed four petitions for IPR challenging the validity of each of the patents-in-suit before the PTAB. (*See* IPR Nos. 2018-0038, 2018-0039, 2018-0040, and 2018-0042.) Dynacraft filed the instant motion to stay the next day on October 10, 2017. (D.I. 44.)

Mattel's preliminary responses to each of those petitions are not due until January 2018. *See* 37 C.F.R. § 42.107. The PTAB's decisions whether to institute the IPRs will not issue until approximately three months later, in April 2018. *See* 35 U.S.C. § 314(b).

IV. ARGUMENT

The three-factor test this Court uses to evaluate stay motions counsels against a stay in this case because Dynacraft's motion is premature. "The factors that courts in this district considers when determining whether to stay litigation are: '(1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party.'" *Dicon Fiberoptics, Inc. v. Preciseley Microtechnology Corp.*, No. 15-cv-01362-BLF, 2015 U.S. Dist. LEXIS 188626, at *2 (N.D. Cal. 2015).

This Court is under no obligation to stay proceedings pending parallel litigation in the

PTAB. *Dicon Fiberoptics*, 2015 U.S. Dist. LEXIS 188626, at *2. This is especially true where, as here, the PTAB has not yet decided whether it will even institute any review proceeding. *Aylus Networks, Inc. v. Apple, Inc.*, No. 13-cv-4700, 2014 U.S. Dist. LEXIS 157228, at *2 (N.D. Cal. 2014). In fact, "the most important factor in determining whether to stay litigation pending *inter partes* review [is] whether the PTAB has acted on the defendants' petition for review." *Trover Grp., Inc. v. Dedicated Micros USA*, No. 2:13-CV-1047-WCB, 2015 U.S. Dist. LEXIS 29572, at *12, *14 (E.D. Tex. 2015) (Bryson, J., sitting by designation). "[T]he 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." *Id*. at *15-*17.

This practice has been followed in numerous cases in this district, particularly where, as here, the parties are competitors. *See, e.g.*, *Hewlett-Packard Co. v. ServiceNow, Inc.*, No. 14-cv-00570-BLF, 2015 U.S. Dist. LEXIS 47754, at *10 (N.D. Cal. Apr. 9, 2015) ("The Court is reluctant to derail an infringement action by a patentee against a direct competitor when, as here, the Court can only speculate as to whether the PTAB will institute IPR or CBM review."); *Sage Electrochromics, Inc. v. View, Inc.*, No. 12–cv–06441-JST, 2015 U.S. Dist. LEXIS 1056, at *17 (N.D. Cal. 2015); *Boundaries Solutions, Inc. v. Corelogic, Inc.*, No. 5: 14–cv–00761–PSG, 2014 U.S. Dist. LEXIS 175590, at *1-*4 (N.D. Cal. 2014) (stay denied when PTAB had not yet acted on IPR petition and parties were competitors).

A. Dynacraft Cannot Establish That a Stay Will Simplify Any Issue In This Case

First, the "simplification of the issues" factor weighs against a stay because Dynacraft's *inter partes* review petitions were filed only recently. Courts have repeatedly held that this factor does not weigh in favor of a stay where the PTAB has yet to decide whether to institute review proceedings. *See Dicon Fiberoptics*, 2015 U.S. Dist. LEXIS 188626, at *2 ("Until the PTAB makes a decision on whether to grant the IPR petition, any argument about whether the IPR process will simplify issues in this litigation is highly speculative."); *Sage*, 2015 U.S. Dist. LEXIS 1056 at *8 ("SAGE's first argument—that the potential for simplification does not weigh in favor of a stay when the PTO has yet to decide whether to institute IPR proceedings—is persuasive").

As Federal Circuit Judge Bryson recently explained, sitting by designation in the Eastern District of Texas, "the 'simplification' factor does not cut in favor of granting a stay prior to the time the PTAB decides whether to grant the petition for *inter partes* review." *Trover Group*, 2015 U.S. Dist. LEXIS 29572, at *14. As Judge Bryson also noted, whether the stay will lead to simplification of the issues "depends very much on whether the PTAB decides to grant the petition." *Id.* at *12. "[A] stay could simplify the issues in this case and streamline the trial—or even obviate the need for a trial—but only if the PTAB grants the petition." *Id.*; *see also Capella Photonics, Inc. v. Cisco Sys.*, No. 14-cv-03348-EMC, 2014 U.S. Dist. LEXIS 147258, at *6 (N.D. Cal. 2014); *TPK Touch Solutions, Inc. v. Wintek Electro-Optics Corp.*, No. 13-cv-02218-JST, 2013 U.S. Dist. LEXIS 162521, at *11 (N.D. Cal. 2013) ("[T]he filing of an IPR request by itself does not simplify the issues in question and trial of the case. Ultimately, the PTO may not institute IPR proceedings. Even if it does, the Court and the parties cannot know now whether the claims subject to IPR will be the same claims that Plaintiff asserts here.")

Dynacraft urges that the USPTO's statistics regarding *inter partes* review proceedings favor a stay. (D.I. 44 at 4.) That is incorrect. "[T]he overall statistics for the number of petitions that are reviewed and the number of claims that are invalidated 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." *Trover Group*, 2015 U.S. Dist. LEXIS 29572, at *13. As Judge Bryson explained in circumstances similar to those here, "it would be speculative for the Court to extrapolate from the statistics and conclude that it is likely that the PTAB will institute inter partes review in this case and invalidate some or all of the claims of the [patent-in-suit]." *Id.* at *13-14*; see also Boundaries Solutions*, 2014 U.S. Dist. LEXIS 175590, at *3 ("While appreciating the statistical rate at which petitions have been granted to date, this court is unwilling to assume the PTO and its Administrative Law Judges are nothing more than well-educated, well-trained rubber stamps.").

Moreover, the only statistics to which Dynacraft does point concern *inter partes* review proceedings that have resulted in a written decision. By necessity, those proceedings must have first been instituted by the PTAB. Dynacraft's petitions, however, were just recently filed and will

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