

1 Patricia L. Peden (SBN 2064440)
Patricia.Peden@leclairryan.com
2 LECLAIRRYAN LLP
44 Montgomery Street, Suite 3100
3 San Francisco, California 94104
Phone: 415.391.7111
4 Fax: 415.391.8766

5 Arthur Gollwitzer III(Admitted via Pro Hac Vice)
agollwitzer@michaelbest.com
6 MICHAEL BEST & FRIEDRICH LLP
Terrace 7 Building
7 2801 Via Fortuna, Suite 300
Austin, Texas 78746
8 Phone: 512.640.3161
Fax: 512.640.3170

9 Larry Saret (Admitted via Pro Hac Vice)
10 llsaret@michaelbest.com
MICHAEL BEST & FRIEDRICH LLP
11 River Point
444 West Lake Street, Suite 3200
12 Chicago, Illinois 60606
Phone: 312.661.2116
13 Fax: 312.222.0818

Kenneth M. Albridge, III (To be admitted
Pro Hac Vice)
kmalbridge@michaelbest.com
MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
P.O. Box 1806
Madison, WI 53701-1806
Phone: 608.257.3067
Fax: 608.283.2275

Rachel N. Bach (Admitted via Pro Hac
Vice)
rnbach@michaelbest.com
MICHAEL BEST & FRIEDRICH LLP
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202-4108
Phone: 414.271.6560
Fax: 414.277.0656

14 Attorneys for Defendant *DYNACRAFT BSC, Inc.*

15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19
20 FISHER-PRICE, INC. and
MATTEL, INC.,

21 Plaintiffs,

22 v.

23 DYNACRAFT BSC, INC.,

24 Defendant.

Case No. 17-CV-03745-PJH

**DEFENDANT DYNACRAFT'S REPLY IN
SUPPORT OF ITS MOTION TO STAY
LITIGATION PENDING INTER-PARTES
REVIEW AND SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: November 15, 2017

Time: 9:00 a.m.

Courtroom: 3, 3rd Floor

Judge: Honorable Phyllis J. Hamilton

1 Plaintiff Fisher-Price opposes a stay in this case, arguing that the benefits of a stay are
2 speculative, it is untimely, and that Fisher-Price will be prejudiced. None of those arguments
3 stands up to scrutiny.

4 **First**, numerous courts in this district have recognized the benefits of a stay pending IPR.
5 *See, e.g., Finjan, Inc. v. Palo Alto Networks, Inc.*, No. 14-cv-04908, 2016 U.S. Dist. LEXIS
6 69363, at *2 (N.D. Cal. May 26, 2016 (Hamilton, J.)); *Sec. People, Inc. v. Ojmar US, LLC*, No.
7 14-cv-04968, 2015 U.S. Dist. LEXIS 70011, at *3-4 (N.D. Cal. May 29, 2015); *Advanced Micro*
8 *Devices, Inc. v. LG Elecs., Inc.*, No. 14-cv-01012-SI, 2015 U.S. Dist. LEXIS 15496, at *9-11
9 (N.D. Cal. Feb. 9, 2015); *Evolutionary Intelligence, LLC v. Facebook, Inc.*, No. 13-cv-04202-SI,
10 2014 U.S. Dist. LEXIS 9149, at *2 (N.D. Cal. Jan. 23, 2014); *Brisham Solutions Ltd. v. Juniper*
11 *Networks, Inc.*, No. 13-cv-00616-JCS, 2014 U.S. Dist. LEXIS 58770, at *3-4 (N.D. Cal. Apr. 28,
12 2014); *Software Rights Archive, LLC v. Facebook, Inc.*, No. C-12-3970, 2013 U.S. Dist. LEXIS
13 133707, at *4 (N.D. Cal. Sept. 17, 2013). For example, this Court has recognized that a stay
14 pending IPR is beneficial even if the PTAB does not institute all of the requested IPR trials
15 because “proceeding in such a piecemeal fashion could lead to duplicative efforts.” *Finjan*, 2016
16 U.S. Dist. LEXIS 69363, at *2.

17 There is nothing unique to this case that differentiates it from the many cases in this
18 district that have been stayed pending IPRs. In fact, in this case, which is at a very early stage, a
19 stay offers a wide range of benefits, including avoiding inconsistent parallel proceedings, review
20 of the prior art by the PTAB and the resulting estoppel that prevents re-litigation of those issues in
21 this Court, and potentially resolving this entire matter or encouraging settlement.

22 Fisher-Price relies heavily on a few cases from the Eastern District of Texas and
23 elsewhere for the proposition that motions to stay should not be granted prior to the PTAB
24 instituting the IPRs. (Dkt. 44 at 4-5.) That approach, however, has been rejected by this Court
25 and others in this District. *Polaris Innovations Limited v. Dell Inc.*, No. 16-cv-07005, 2017 U.S.
26 Dist. LEXIS 92549, at *3 (N.D. Cal. June 15, 2017) (Hamilton, J.) (granting stay pending PTAB
27 decision to institute IPR on four petitions where motion to stay was filed two months after initial
28 case management conference and initial discovery had been served and answered); *Advanced*

1 *Connection Tech., Inc. v. Toshiba Am. Info. Sys., Inc.*, No. C 12-6489 PJH, 2013 U.S. Dist.
2 LEXIS 172989, at *2-3 (N.D. Cal. Nov. 27, 2013) (Hamilton, J.) (granting stay pending PTAB
3 decision to institute IPR due to the “potential for this case becoming moot” and “given the fact
4 that [the] case is still in its early stages”); *Advanced Micro Devices*, 2015 U.S. Dist. LEXIS
5 15496, at *14, 19 (granting pre-institution motion to stay reasoning in part that “[s]hould the PTO
6 use the full statutory six months to deny [institution], the delay caused by the stay will have been
7 relatively short”); *Finjan, Inc. v. Symantec Corp.*, 139 F. Supp. 3d 1032, 1037 (N.D. Cal. 2015)
8 (granting pre-institution stay and noting that “any concern that the motion[] [is] premature is
9 alleviated by the short time frame of the initial stay and the Court’s willingness to reevaluate the
10 stay if *inter partes* review is not instituted for all of the asserted claims”); *DSS Tech. Mgmt., Inc.*
11 *v. Apple, Inc.*, No. 14-cv-05330- HSG, 2015 U.S. Dist. LEXIS 57704, at *10 (N.D. Cal. May 1,
12 2015) (“The Court finds that staying the case for two months pending the PTO’s decision whether
13 to institute IPR is the most efficient use of resources at this juncture.”); *PersonalWeb Techs., LLC*
14 *v. Facebook, Inc.*, No. 5:13-cv-01356-EJD, 2014 U.S. Dist. LEXIS 4095, at *17 (N.D. Cal. Jan.
15 13, 2014) (finding that four-month delay before PTAB’s institution decision would issue was
16 “relatively short” and did not outweigh anticipated simplification of issues); *Delphix Corp. v.*
17 *Actifio, Inc.*, No. 13-cv-04613-BLF, 2014 U.S. Dist. LEXIS 160372, at *8 (N.D. Cal. Nov. 13,
18 2014) (“At a minimum, instituting a brief, limited stay of approximately five months to see
19 whether and how the PTAB will act on Defendant’s IPR petitions will conserve judicial resources
20 and avoid inconsistent results.”); *Coho Licensing LLC v. Glam Media*, No. C 14-01576 JSW,
21 2014 U.S. Dist. LEXIS 131284, at *11 (N.D. Cal. Sept. 17, 2014) (granting pre-institution motion
22 to stay); *Pragmatus AV, LLC v. Facebook, Inc.*, No 11-cv-02168-EJD, 2011 U.S. Dist. LEXIS
23 117147, at *11 (N.D. Cal. Oct. 11, 2011) (same).

24 Moreover, Fisher-Price attempts to discount the Patent Office statistics showing how often
25 IPRs are instituted and result in invalidation by arguing that each case is unique. But Fisher-Price
26 does not describe how this case is unique, and the overall IPR success rate undeniably
27 demonstrates the likelihood that one or more of the four IPRs will resolve this matter, making a
28 stay appropriate to conserve judicial and the parties’ resources. Moreover, if the PTAB declines

1 to institute the IPRs in this case, the parties and the Court will know that outcome in five months
2 or less, and a stay can be promptly lifted at that time, resulting in very little disruption of this case
3 at its early stage.

4 In the end, Fisher-Price's contention that this factor "cuts strongly against a stay" (Dkt. 48
5 at 6) is unsupported.

6 **Second**, Fisher-Price complains that it first filed this case ten months ago in January 2017.
7 There has been no improper delay in this case. Dynacraft promptly moved to stay this litigation,
8 this case is still in its infancy and any so-called delay is a product of Fisher-Price's own choices.

9 Fisher-Price filed this suit in the District of Delaware knowing two key facts: (i)
10 Dynacraft is not incorporated in Delaware and has no physical presence in Delaware, and (ii) the
11 Supreme Court had granted *certiorari* in the *TC Heartland* case, signaling that it would re-affirm
12 its 1952 ruling in *Fourco* that 28 U.S.C. § 1400(b) is the sole and exclusive venue rule in patent
13 cases. Indeed, the majority of courts addressing the issue since the *TC Heartland* decision have
14 held that the Supreme Court's holding was **not** a change in the law, but merely a re-affirmation of
15 its prior holding (contrary to Fisher-Price's argument at p. 6). *See, e.g., Fox Factory, Inc. v.*
16 *SRAM, LLC*, No. 3:16-cv-00506-WHO, 2017 U.S. Dist. LEXIS 126799, at *10 (N.D. Cal. July
17 18, 2017) ("*TC Heartland* did not actually change the law") (collecting cases). Moreover, Fisher-
18 Price could have dismissed its original suit without prejudice at any time and re-filed in this Court
19 without waiting for the Supreme Court's decision or Dynacraft's motion to dismiss for lack of
20 venue. In short, Fisher-Price's claim that the case has "already been forestalled by no fault" of its
21 own (Dkt. 44 at 6) is wrong.

22 Fisher-Price also engaged in settlement discussions with Dynacraft for over five months
23 after filing suit. Dynacraft believed the parties were working in good faith to resolve this matter
24 until settlement discussions broke down on July 19, 2017. Given that filing four IPR petitions
25 costs over \$92,000 in filing fees alone, without taking into account legal fees, Dynacraft can
26 hardly be faulted for waiting to prepare and file its IPR petitions until after it had exhausted
27 efforts to settle this case. After July 19, 2017, Dynacraft worked diligently to prepare and file
28 four IPR petitions by October 9, 2017 – less than three months.

1 After complaining about Dynacraft's "delay" in filing its motion for stay, Fisher-Price
2 switches to the inconsistent complaint that Dynacraft's motion is premature because the four IPRs
3 have not yet been instituted. Using Fisher-Price's logic, there is no appropriate time to seek a
4 stay: if Dynacraft waited the six months until the IPR institution decisions were made by the
5 PTAB, Fisher-Price would likely complain of a greater "delay" than has occurred to date; by
6 filing a motion to stay now, Fisher-Price alleges Dynacraft is "premature." The law does not
7 support such "heads-we-win, tails-we-win" logic.

8 Fisher-Price's inconsistent arguments and indecision about timing illustrate that there are
9 multiple appropriate times for a stay, and one of those times is now. As all parties agree,
10 discovery has not yet begun, the Court has not yet held a case management conference, and no
11 case schedule yet exists. So notwithstanding the January 2017 filing date, this case is in its early
12 stages – especially when compared to cases that have been stayed despite much greater progress.
13 *See, e.g., Polaris Innovations*, 2017 U.S. Dist. LEXIS 92549, at *3 (granting stay in June 2017
14 even though case was filed in May 2016, transferred in December 2016, initial case management
15 conference was held and discovery was served and responded to); *Finjan*, 2016 U.S. Dist. LEXIS
16 69363, at *3-4 (granting stay even though the parties had exchanged infringement contentions);
17 *see also Advanced Micro Devices*, 2015 U.S. Dist. LEXIS 15496, at *9-11 (granting stay after the
18 parties exchanged some discovery, including infringement contentions); *Sec. People*, 2015 U.S.
19 Dist. LEXIS 70011, at *5-6 (granting stay and citing cases where stays were granted after claim
20 construction briefing and even after issuance of a claim construction order).

21 **Third**, Fisher-Price concludes by asserting without evidence that it will be irreparably
22 harmed by any further delay. For example, Fisher-Price argues that it is losing market share (Dkt.
23 48 at 8), but it provides no evidence to substantiate its claim. Moreover, Fisher-Price does not
24 explain why its alleged lost market share cannot be valued in dollars and included in its damages
25 calculations if this case moves forward. Likewise, Fisher-Price makes only speculative
26 arguments about Dynacraft's ability to pay some future judgment. (*Id.*)

27 In fact, these arguments are undermined by the evidence we do have. That is, Fisher-Price
28 filed this case ten months ago but has not moved for a preliminary injunction, belying the

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.