

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

APLIX IP HOLDINGS CORPORATION,

Plaintiff,

v.

SONY COMPUTER ENTERTAINMENT,  
INC. and SONY COMPUTER  
ENTERTAINMENT AMERICA LLC,

Defendants.

CIVIL ACTION NO. 1:14-cv-12745-MLW

**[LEAVE TO FILE GRANTED ON  
03/31/2015]**

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR  
MOTION TO STAY PENDING *INTER PARTES* REVIEW**

## I. INTRODUCTION

The Court should stay this case because the defendants (collectively “SCE”)<sup>1</sup> have filed *inter partes* review (IPR) petitions against all five of the patents asserted by Aplix.

Aplix originally sued on three patents. Prior to filing this motion to stay, SCE lodged five IPR petitions against the three originally-asserted patents.<sup>2</sup> Aplix amended its complaint to add two more patents, U.S. Patent Nos. 7,280,097 and 7,932,892 (the “Newly Asserted Patents”). SCE has now lodged IPR petitions against the Newly Asserted Patents as well. Thus, every asserted patent is now subject to IPR petition(s). The Patent Trial and Appeal Board (“PTAB”) will begin deciding whether to institute IPR trials by May 10, less than three months from now.

There is a greater than 75% likelihood that IPR trials will be instituted.<sup>3</sup> Only 10% of patent claims are found patentable after full IPR scrutiny by the PTAB. D.I. 33 Ex. A. Aplix’s opposition brief does not attempt to refute the strength of SCE’s prior art. Nor does Aplix dispute that the IPRs cover every patent claim that Aplix could conceivably assert against SCE in this case. Thus, the IPRs are likely to simplify this case – or even dispose of it completely.

The case is in its earliest stage (no scheduling conference has yet been held and the parties have not begun discovery). Aplix is accusing products that were on sale for years before it filed suit. Aplix does not dispute that it waited years to sue, that it failed to seek a preliminary injunction, or that it does not compete with SCE. Aplix will not be prejudiced, let alone unduly prejudiced, by a stay.

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<sup>1</sup> Sony Computer Entertainment America LLC (“SCEA”) and Sony Computer Entertainment, Inc. (“SCEI”) are referred to collectively as “SCE” in this reply and in SCE’s opening brief.

<sup>2</sup> SCEA filed one petition each against two of the originally-asserted patents and three petitions that collectively cover the relevant claims of the third originally-asserted patent.

<sup>3</sup> IPR trials are instituted more than 75% of the time when requested. *See* Ex. H at 4.

## II. UPDATE ON THE IPR PETITIONS

### A. **SCEA (and SCEI As a Named Real-Party-in-Interest) Have Now Filed IPR Petitions Against All Asserted Patents.**

On February 17 & 19, 2015, SCEA filed IPR petitions against the Newly Asserted Patents. As noted in SCE's opening brief, the Newly Asserted Patents are directed to a remote control for a hand-held electronic device like a PDA. D.I. 31 at 7. Such remote control devices were well-known at the time the Newly Asserted Patents were filed, as shown by the detailed invalidity analysis set forth in the IPR petitions. Exs. A-B (IPR petitions); Exs. C-G, K, L (prior art references). For example, Sony Ericson Mobile Communications AB filed a patent application covering such a remote control device in July 2002 (*see* Ex. C) – three years before Aplix filed the earliest of its Newly Asserted Patents.

While SCEA is the petitioner in each of the seven IPR petitions filed against the five patents-in-suit, SCEI is named as a “real-party-in-interest” in every petition.<sup>4</sup> Thus, both SCEA and SCEI (collectively, “SCE”) are subject to the IPR estoppel provision, and will be prevented from challenging, in this Court, any claims that survive a final written IPR decision based on any ground that was raised or reasonably could have been raised in the IPRs. 35 U.S.C. § 315(e)(2).

### B. **The IPRs Attack Every Conceivably Relevant Claim in the Asserted Patents.**

As with the first round of IPR petitions against the originally-asserted patents, SCE's IPR petitions against the Newly Asserted Patents attack every claim that could conceivably be relevant to the accused products in this lawsuit. The 19 claims that have not been attacked in the IPRs (out of the 149 total claims in the asserted patents) relate to features that indisputably are absent from SCE's accused products.

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<sup>4</sup> D.I. 31 Ex. E at 59; *Id.* Ex. F at 58-59; *Id.* Ex. G at 59; *Id.* Ex. H at 59; *Id.* Ex. I at 59; Ex. A at 60; Ex. B at 54.

### III. ALL FACTORS FAVOR A STAY

#### A. The IPRs Are Likely to Simplify this Case.

The IPRs are likely to simplify this case by:

- leading to dismissal of the case if all asserted claims are canceled; or
- if any asserted claims survive:
  - narrowing the scope of discovery and the issues and evidence to be presented to the Court or jury (e.g., through cancellation of some claims and/or IPR estoppel);
  - providing guidance on technical issues from an expert panel of ALJs, which will reduce the complexity and length of the litigation;
  - encouraging settlement without further involvement of the Court; and
  - reducing the cost / burden for both the parties and the Court.

See D.I. 31 at 12-16.

Aplix failed to address any of these points in its opposition. Instead, Aplix argued that the Court should ignore all potential simplification on the ground that “only SCEA [and not SCEI] will be estopped.” D.I. 33 at 9. In fact, Aplix went so far as to suggest that the *defendants themselves* were angling for SCEI not to be subject to estoppel. *Id.* It is unclear how Aplix came away with that impression since SCEI is named as a real-party-in-interest in every IPR petition, thus subjecting it to IPR estoppel under 35 U.S.C. § 315(e)(2). Moreover, defendants’ opening brief stated, on the very page cited in Aplix’s opposition brief: “*SCE* will be estopped.”<sup>5</sup> D.I. 31 at 11. Defendant’s opening brief unambiguously defined “SCE” as including *both* SCEA and SCEI.<sup>6</sup>

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<sup>5</sup> Emphasis added throughout, unless otherwise noted.

<sup>6</sup> D.I. 31 at 1 (“SCEA and Sony Computer Entertainment, Inc. (“SCEI”) (collectively, “SCE”)...”).

Aplix's opposition also pointed to a slide produced by the Patent Office concerning recent IPR statistics. D.I. 33 at 8; *Id.* Ex. A. The Patent Office data strongly support the conclusion that the IPRs are likely to simplify this case.

Aplix's Patent Office slide covers data relating to 617 IPR petitions filed against patents that included a total of 20,206 claims. D.I. 33 Ex. A. The 617 petitions attacked just under half (9,048) of those claims.<sup>7</sup> The PTAB instituted IPR proceedings on 68% of the attacked claims. *Id.* (The institution rate on a *petition* basis ranges from 75% to 87%, by year, *see* Ex. H at 4, but the PTAB sometimes institutes proceedings on less than every claim attacked in a petition).

According to Aplix's Patent Office slide (and related Patent Office slides, *see* Ex. I at 2) there are three main ways that an IPR proceeding can end for a given patent claim:

- The PTAB can issue a final written decision ("FWD") either canceling the claim as unpatentable or confirming it as patentable;
- The patent owner itself can voluntarily cancel or disclaim the claim, for example, by requesting entry of an adverse judgment ("RAJ"); or
- The patent owner and the petitioner can settle the IPR (and presumably, any co-pending district court litigation).<sup>8</sup>

According to Aplix's Patent Office slide, the PTAB's final written decisions have addressed a total of 2,819 claims, finding 2,176 unpatentable and 643 patentable. D.I. 33 Ex. A. ***Thus, the PTAB has found unpatentable, and canceled, 77% of the patent claims on which it has rendered a final written decision.***<sup>9</sup>

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<sup>7</sup> IPR petitions routinely attack less than all of the claims of a challenged patent. Many IPR petitions target patents asserted in litigation. Patent claims vary in scope, and – as in this case – patents frequently include some claims that could not conceivably be asserted against the products accused of infringement, and thus need not be attacked in IPR.

<sup>8</sup> The PTO also records dispositions by some "Other" means, which occur in 1% of proceedings. Ex. I at 2 (9 of 713 dispositions).

<sup>9</sup> (2,176 claims unpatentable) / (2,819 total claims) = 77% unpatentable.

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