

A. Staying the BSI Cases Will Simplify the Issues.

Staying the BSI cases pending resolution of the knee patent IPRs will simplify the issues to be litigated in several significant respects, including by eliminating certain claims from consideration if the PTO cancels them and clarifying the scope of the remaining claims—which will necessarily impact discovery, infringement, invalidity, and damages issues in these cases.

1. The Issue Simplification Resulting from a Stay Is Well-Recognized.

As the Federal Circuit has stated, “in a stayed infringement proceeding, ‘if the [patentee’s] claims were canceled in the reexamination, [it] would eliminate the need to try the infringement issue.’” *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 721 F.3d 1330, 1340 (Fed. Cir. 2013) (quoting *Slip Track Sys., Inc. v. Metal Lite, Inc.*, 159 F.3d 1337, 1342 (Fed. Cir. 1998)). Indeed, there is a high probability that the claims undergoing IPR will be canceled or amended. The PTO canceled several claims in its two IPR decisions to date and canceled or narrowed claims in 92% of granted reexaminations under the prior *inter partes* reexamination procedure. (See Ex. U; Ex. V at 49; Ex. W at 38-39.) Moreover, “the higher standard to initiate an IPR [compared to reexamination] gives at least some promise that certain challenged claims will be struck down or amended if the PTO grants the petitions.” *Software Rights Archive, LLC v. Facebook, Inc.*, Nos. C-12-3970 RMW, C-12-3971 RMW, C-12-3972 RMW, 2013 WL 5225522, at *5 (N.D. Cal. Sept. 17, 2013). These statistics showing a high probability of cancellation or amendment weigh in favor of a stay, *Davol, Inc. v. Atrium Med. Corp.*, No. 12-cv-958-GMS, 2013 WL 3013343, at *5 n.7 (D. Del. June 17, 2013), as they support “a fair inference that the issues in [these] case[s] are apt to be simplified and streamlined to some degree,” *Ever Win Int’l Corp. v. Radioshack Corp.*, 902 F. Supp. 2d 503, 506 (D. Del. 2012). In contrast, if there is no stay and claims are canceled, “the Court will have wasted time and the parties will have spent additional funds addressing an invalid claim or claims.” *Textron*

Innovations Inc. v. Toro Co., No. 05-486 (GMS), 2007 WL 7772169, at *2 (D. Del. Apr. 25, 2007) (internal quotation marks omitted).

Any amendment of the claims or narrowing statements made by BSI during the IPRs will affect claim construction and narrow the scope of discovery and damages (at a minimum). *See, e.g., Krippelz v. Ford Motor Co.*, 667 F.3d 1261, 1266 (Fed. Cir. 2012) (“A patentee’s statements during reexamination can be considered during claim construction, in keeping with the doctrine of prosecution disclaimer.”); *Round Rock Research LLC v. Dole Food Co.*, Civil Action Nos. 11-1239-RGA, 11-1241-RGA, 11-1242-RGA, 2012 WL 1185022, at *1 (D. Del. Apr. 6, 2012) (“even if [the claims are] neither rejected nor modified, [they] will garner additional prosecution history that may be relevant to claim construction”).¹³ To avoid conducting a “significantly wider scope of discovery than necessary” and “examining the validity of claims which are modified or eliminated altogether during [IPR],” it only “makes sense to ascertain the ultimate scope of the claims before trying to figure out whether defendants’ products infringe the patent-in-suit.” *Target Therapeutics, Inc. v. SciMed Life Sys., Inc.*, No. C-94-20775 RPA (EAI), 1995 WL 20470, at *2 (N.D. Cal. Jan. 13, 1995).

Even in the unlikely event that every challenged claim in every patent undergoing IPR is upheld, “the court would benefit from the expert analysis the PTO conducts, thus further simplifying issues before the court.” *Celorio*, 2013 WL 4506411, at *1 n.1. Moreover, “the[se] case[s] will still be simplified” as a result of statutory estoppel to the extent it should apply to Zimmer or Wright Medical. *See Davol*, 2013 WL 3013343, at *5 (internal quotation marks

¹³ “Prosecution disclaimer . . . affects claim construction and applies where an applicant’s actions during prosecution prospectively narrow the literal scope of an otherwise more expansive claim limitation.” *Trading Techs. Int’l, Inc. v. Open E Cry, LLC*, 728 F.3d 1309, 1322 (Fed. Cir. 2013). The doctrine of prosecution disclaimer “serve[s] to constrain the enforceable scope of patent claims commensurate with any subject matter surrendered during prosecution to obtain the patent.” *Id.*

omitted) (citing cases); *see also* 35 U.S.C. § 315(e)(2).

2. Staying the BSI Cases Will Simplify the Issues Even if Not Every Asserted Claim Undergoes IPR.

Faced with the indisputable simplification that would result from a stay pending resolution of the IPRs, BSI's primary argument is that a stay is not appropriate because not every claim that BSI **may** ultimately assert is undergoing IPR. (*See, e.g.*, D.I. 28, Nov. 26, 2013 Tele. Conf. Tr. at 8:14-21, 9:18-19.) This argument fails for numerous reasons.

First, BSI's "every claim" argument ignores the fact that BSI has failed to identify any other asserted claims, despite the Defendants' requests that BSI do so. Indeed, the Court acknowledged that the Defendants' concerns about BSI's failure to do so "have merit." (*Id.* at 17:20-18:12, 30:16-31:14). As another Court explained when rejecting this type of argument, "[the patent owner] has not identified the claims which it contends are infringed. While not required to do so at this time, we note that it is unhelpful in its opposition to the motion for stay to simply point out that there are 61 claims, only three of which are challenged in the *inter partes* review application." *SSW Holding Co. v. Schott Gemtron Corp.*, No. 3:12-cv-661-S, 2013 WL 4500091, at *1, *3-4 (W.D. Ky. Aug. 21, 2013) (staying case where only 3 of 61 potential asserted claims were subject of IPR petition). Having made a strategic decision to withhold this information, BSI cannot legitimately argue that a stay is inappropriate on the ground that not every potentially asserted claim is the subject of an IPR petition. Denying a stay on this ground would only reward BSI for withholding the claims it intends to assert until after the one-year deadline for filing an IPR petition, *see* 35 U.S.C. § 315(b), and impeding the Defendants' abilities to fairly avail themselves of the IPR process.

Moreover, if the BSI cases are not stayed, BSI's apparently strategic delay in identifying the allegedly infringed claims does not necessarily preclude the Defendants from seeking IPR as

to additional claims of patents for which stand-alone¹⁴ IPR petitions were timely filed. This is because “the one-year time bar [under § 315(b) for filing an IPR petition] does not apply to a request for joinder.” *Microsoft Corp.*, 2013 WL 5947704, at *2; *see* 35 U.S.C. §§ 315(b), (c). Accordingly, if these cases were to go forward, the Defendants would still have time to file IPR petitions on additional claims asserted by BSI (if the claims are in a patent already undergoing IPR) and request joinder of such petition with the corresponding pending petition(s)—whether filed by the Defendant seeking joinder or another party. *See* 35 U.S.C. §§ 315(b), (c); 37 C.F.R. §§ 42.101(b), 42.122(b); *Microsoft*, 2013 WL 5947704, at *2 (granting motion for joinder as to a second IPR petition filed over a year after service of complaint alleging infringement of the IPR patent where patent owner asserted “additional claims” in concurrent district court litigation after original IPR petition had been timely filed). This is yet another reason why BSI’s “every claim” argument does not justify denial of a stay.

Second, BSI’s “every claim” argument is wrong as a matter of law. Even where “the issues that would remain for litigation do exceed those that might be resolved through the reexamination process,” simplification of the issues “is undeniably a benefit of the requested stay and should be recognized as such.” *ImageVision.Net, Inc. v. Internet Payment Exchange, Inc.*, No. 12-054-GMS-MPT, 2012 WL 5599338, at *4 (D. Del. Nov. 15, 2012). “[T]he ‘issue simplification’ factor does not require complete overlap.” *Neste Oil*, 2013 WL 3353984, at *5.

Third, BSI’s “every claim” argument ignores the relatedness of the patents and claims at issue in the BSI cases and the pending IPR petitions. Numerous courts have found that the scope of claims not undergoing PTO review can still be clarified by PTO proceedings as to other claims in the same or a related patent. *See, e.g., Software Rights Archive*, 2013 WL 5225522, at

¹⁴ *See supra* note 8 and accompanying text.

*5 (finding issue simplification despite the fact that the patentee might still assert 40 additional claims); *Robert Bosch Healthcare Sys., Inc. v. ExpressMD Solutions, LLC*, No. C. 12-00068 JSW, 2013 WL 752474, at *4 (N.D. Cal. Feb. 27, 2013) (issues simplified even though one of the asserted patents not subject to reexamination and the PTO had declined to reexamine some of the claims in another asserted patent). Even if BSI later asserts claims that are not the subject of IPR, simplification will still result to the extent the additional claims are related to and/or share common claim terms with the claims undergoing IPR. *See Ruckus Wireless, Inc. v. Netgear, Inc.*, No. C 09-5271 PJH, 2010 WL 1222151, *1 (N.D. Cal. Mar. 25, 2010) (simplification would result due to common claim terms). Indeed, issue simplification is a “real possibility” where, as here, patents subject to IPR have identical or near-identical specifications and share common claim terms—even if not every asserted patent and not every potentially asserted claim is the subject of IPR. *See id.*; *see also SMT Solutions, Inc. v. ExpoEvent Supply LLC*, No. 11-6225 (ES) (CLW), 2012 WL 3526830, at *4 (D.N.J. Aug. 15, 2012) (finding simplification where “not all of the patents-in-suit are under reexamination” because “the patents-in-suit all share nearly identical disclosures”); *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, No. C 08-0930 PJH, 2008 WL 3833576, at *1 (N.D. Cal. Aug. 15, 2008) (staying case because “closely related” and “sufficiently similar” patent was undergoing reexamination); *Alloc*, 2003 WL 21640372, at *2 (granting stay where “there is a sufficient correlation among all of the patents” although asserted patent not undergoing review).

Fourth, the Defendants’ willingness—in order to facilitate a stay—to subject themselves to an estoppel based on another Defendant’s or S&N’s IPR petitions on the knee patents will further simplify the issues. The Defendants’ proposed scope of estoppel is consistent with other orders issued by this Court staying litigations involving some defendants who are not IPR

petitioners. See *AIP Acquisitions*, No. 1:12-cv-00617-GMS (D. Del. Jan. 7, 2014), D.I. 62 (Ex. R); *id.*, D.I. 63 (D. Del. Jan. 9, 2014) (Ex. S); *In re Bear Creek Techs.*, 2013 WL 3789471. As this Court recognized in *AIP Acquisitions*, “a limited estoppel against [the non-IPR] defendants regarding arguments actually raised by [a petitioner-defendant] in [its] IPR proceeding would reduce prejudice against the [patentee] and simplify issues at trial.” *Id.*, D.I. 60 at 5 (Ex. T).

Other courts have also stayed actions pending third-party IPRs and applied limited or no estoppel to affected defendants who are not IPR petitioners—even where the IPR petition had not yet been instituted by the PTO. See, e.g., *e-Watch, Inc. v. Lorex Canada, Inc.*, No. 4:12-cv-03314, slip op. at 5-7 (S.D. Tex. Sept. 26, 2013) (declining to require full, statutory estoppel as to non-petitioners, granting a stay before institution of a third-party IPR, and applying limited estoppel to defendant) (Ex. X); *e-Watch, Inc. v. ACTi Corp.*, No. 5:12-cv-00695-FB-PMA, slip op. at 17 (W.D. Tex. Aug. 9, 2013) (granting a stay before institution of a third-party IPR and applying no estoppel to defendant) (Exs. Y, Z). Although not binding on this Court, these decisions further support granting a stay in light of the limited estoppel to which the Defendants in the BSI cases are willing to stipulate.

BSI, however, argues that all Defendants should be bound by the **full** scope of estoppel prescribed by 35 U.S.C. § 315(e)(2), regardless of whether the Defendant filed an IPR petition. (See D.I. 32, Dec. 12, 2013 Tele. Conf. Tr. at 15:15-16:3.) But in addition to being at odds with this Court’s previous orders imposing a stay premised in part on a limited estoppel stipulation in the *AIP Acquisitions* and *Bear Creek* cases, BSI’s position is contradicted by the statute, which expressly limits the estoppel to “the petitioner,” “the real party in interest,” or the “privy of the

petitioner.”¹⁵ 35 U.S.C. § 315(e)(2).

BSI’s argument is also contradicted by the statute’s legislative history, which makes clear that automatically extending statutory estoppel to co-defendants would be “manifestly unfair”:

Whether equity allows extending privity estoppel to codefendants in litigation, however, will depend in large measure upon the actions of the patent owner, and whether he has made it reasonably and reliably clear which patent claims he is asserting and what they mean. **If one defendant has instituted inter partes review, but other defendants do not have the opportunity to join that review before it becomes reasonably clear which claims will be litigated and how they will be construed, it would be manifestly unfair to extend privity estoppel to the codefendant.**

157 Cong. Rec. S1360-02, at *S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (emphases added), *available at* 2011 WL 797877.

In sum, there is no merit to BSI’s argument that the Defendants’ proposed estoppel is an attempt to “subvert the bargain that we came up with in the AIA,” which includes a “broad estoppel.”¹⁶ (*See* D.I. 28, Nov. 26, 2013 Tele. Conf. Tr. at 21:1-12.) Nothing in the statute,

¹⁵ The estoppel provisions of § 315(e)(2) cannot apply to ConforMIS, for example, because it: (1) has not filed an IPR petition; (2) has no control over the IPR proceedings initiated by S&N, Wright Medical, or Zimmer; and (3) is neither the real party in interest nor in privity with S&N, Wright Medical, or Zimmer in those proceedings. While statutory estoppel may ultimately apply to Zimmer with respect to the IPR petitions it filed on the ’736, ’635, and ’896 patents, no statutory estoppel applies to Zimmer with respect to S&N’s IPR petitions on the ’821, ’896, ’9229, and ’3229 patents or Wright Medical’s IPR petition on the ’896 patent. Likewise, while statutory estoppel may ultimately apply to Wright Medical with respect to the IPR petition that it filed on the ’896 patent, no statutory estoppel applies to Wright Medical with respect to S&N’s IPR petitions on the ’821, ’896, ’9229, and ’3229 patents or Zimmer’s IPR petitions on the ’736, ’635, and ’896 patents.

¹⁶ Contrary to BSI’s suggestion, the Defendants are not trying to circumvent the statutory estoppel provisions of the AIA; rather, BSI seeks to expand those provisions beyond the scope set forth in the AIA. If BSI really believes that a non-petitioner Defendant should be estopped to the same extent applicable to an IPR petitioner under § 315(e)(2), BSI may challenge the petitioner’s identification of the real party in interest by “provid[ing] objective evidence” of the real party or parties in interest. *See* Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,679, 48,695 (Aug. 14, 2012) (codified at 37

legislative history, or case law supports BSI's position that a stay is inappropriate unless each Defendant subjects itself to the full scope of statutory estoppel with respect to all of the applicable IPR petitions, regardless of whether the Defendant filed the petition, is a real party in interest to the petitioner, or is in privity with the petitioner.

Fifth, the *DePuy* and *Biomet* Actions may proceed to final judgment while the BSI cases in this District are stayed. The parties in the *DePuy* Action have exchanged preliminary infringement and invalidity contentions, *Markman* briefing has begun, the *Markman* hearing is set for March 27, 2014, and dispositive motions are due on October 23, 2014. (See Ex. F at 5-8.) *Markman* briefing in the *Biomet* Action is scheduled to conclude on May 12, 2014. (Ex. I at 2.) The more advanced stages of these actions present an additional reason for staying the BSI cases, because "should a patent or patents be found to be invalid" in the *DePuy* or *Biomet* Actions, "simultaneous progressing of litigation [in those actions] and here would be superfluous and a waste of this Court's and the attorneys' time." *Consolidated Aluminum*, 1988 WL 32213, at *1.

B. A Stay of the BSI Cases Will Not Unduly Prejudice, or Present a Clear Tactical Disadvantage to, BSI.

BSI will not be unduly prejudiced or suffer a clear tactical disadvantage if the BSI cases are stayed pending resolution of the IPR petitions. "[B]ecause [BSI] is a non-practicing entity, any prejudice that may result from a stay can be remedied by monetary damages." *Walker Digital*, 2013 WL 1489003, at *2. The lack of prejudice or tactical disadvantage is confirmed by BSI's delay of almost 120 days in serving the Complaints in the BSI cases.

When considering whether a party will suffer "undue prejudice" or a "tactical disadvantage" from a stay pending PTO review, courts in this District consider: (1) the timing of

C.F.R. §§ 42.100 *et seq.*). Alternatively, BSI may seek to have another party found to be a "privity" of the petitioner. BSI has done neither.

the request(s) for PTO review and the timing of the stay request, (2) the status of the PTO proceedings, and (3) the relationship between the parties, and the related question of whether the plaintiff may be compensated through future money damages. *Celorio*, 2013 WL 4506411, at *1 n.1. “The potential for litigation delay is not, by itself, dispositive and does not demonstrate that a party will be unduly prejudiced.” *BodyMedia, Inc. v. Basis Sci., Inc.*, No. 12-cv-133 (GMS), 2013 WL 2462105, at *1 n.1 (D. Del. June 6, 2013).

Relationship Between the Parties. The relationship between the Defendants, who are participants in the knee-replacement market, and BSI, “a non-practicing entity, which does not manufacture or sell the products covered by the patents in suit and seeks to collect licensing fees,” favors a stay. *See Mission Abstract Data L.L.C. v. Beasley Broadcast Grp.*, No. 11-176-LPS, 2011 WL 5523315, at *4 (D. Del. Nov. 14, 2011). “Since [BSI] is a technology licensing company, monetary damages can adequately compensate it for any potential infringement. Courts have consistently found that a patent licensor cannot be prejudiced by a stay because monetary damages provide adequate redress for infringement.” *Implicit Networks, Inc. v. Advanced Micro Devices, Inc.*, No. C08-184JLR, 2009 WL 357902, at *3 (W.D. Wash. Feb. 9, 2009) (emphasis added) (collecting cases); *see also In re Bear Creek Techs.*, 2013 WL 3789471, at *3 n.8 (no prejudice to non-practicing entity because monetary damages sufficient to compensate). BSI certainly will not be **unduly** prejudiced by a stay. *See Celorio*, 2013 WL 4506411, at *1 n.1 (no undue prejudice where patentee could be compensated with money damages).

The Timing of the IPR Petitions and this Motion Favor a Stay. Zimmer, Wright Medical, and S&N filed their respective IPR petitions, and the Defendants jointly filed this stay motion, before a schedule has been set in any of the BSI cases, before any substantive activity

has occurred in any of those cases, and before discovery has commenced. Under these circumstances, the applicable IPR petitions and this motion were filed “in a timely fashion.” *See Ever Win Int’l Corp. v. Radioshack Corp.*, 902 F. Supp. 2d 503, 508-09 (D. Del. 2012) (timing of requests for PTO review and stay made over six months after filing of complaint favored a stay). Further, the Defendants have no dilatory motive and were not “motivated by inappropriate litigation tactics” or “a case event that harmed [their] litigation position” in their independent filing of IPR petitions and subsequent joint filing of this motion. *See id.*; *see also BodyMedia*, 2013 WL 2462105, at *1 n.1 (no evidence of “dilatory motive” where request for PTO review and stay motion were filed before entry of scheduling order and before any discovery). This sub-factor favors a stay.

The Status of the PTO Proceedings. The early stage of the PTO proceedings does not weigh against granting a stay. First, “[i]t is not uncommon for courts to grant stays pending” PTO review even before the PTO has decided to grant review.¹⁷ *Air Vent, Inc. v. Owens Corning Corp.*, No. 02:10-cv-01699, 2012 WL 1607145, at *3 (W.D. Pa. May 8, 2012); *see also, e.g., Software Rights Archive*, 2013 WL 5225522, at *1-6 (granting stay before IPR instituted); *Princeton Digital Image Corp. v. Konami Digital Entm’t, Inc.*, No. 1:12-cv-01561-LPS-CJB, slip op. at 5 (D. Del. Jan. 15, 2014) (Ex. AA) (granting stay before IPR instituted; defendants not estopped). In the case of IPRs, the PTO is statutorily obligated to decide whether to grant review within six months of a petition being filed and complete its review and issue a final

¹⁷ As this Court recognized during the November 26 hearing, other courts have been granting stays pending IPR before the PTO actually grants the underlying petition. (*See* D.I. 28, Nov. 26, 2013 Tele. Conf. Tr. at 11:1-6.)

determination within 18 months of filing.¹⁸ *See* 35 U.S.C. §§ 314(b), 316(a)(11). Consequently, the early stage of the IPR petitions does not “overcome the weight of th[o]se other sub-factors” with respect to undue prejudice. *See Neste Oil*, 2013 WL 3353984, at *4.

For all of these reasons, this factor favors a stay.

C. The Early Stage of this Litigation Strongly Favors a Stay.

Although more than 16 months have passed since BSI filed the BSI cases, they are still in their earliest stages. Indeed, despite the passage of time, the true stage of these cases is apparent in view of the dearth of activity to date. The parties have not exchanged any discovery; the Court has deferred setting a schedule until it decides the present motion to stay;¹⁹ and the Court has not issued any substantive rulings on issues of claim construction, infringement, invalidity, or damages. In short, very little has happened in these cases—either procedurally or substantively. Because the BSI cases are at such an early stage, this factor weighs “strongly” in favor of granting a stay. *Neste Oil*, 2013 WL 3353984, at *5.

V. CONCLUSION

For all of the foregoing reasons, the Defendants respectfully request that the Court stay the BSI cases pending resolution of Zimmer’s, Wright Medical’s, and S&N’s IPR petitions.

¹⁸ The PTO’s one-year decision-making period may be extended for good cause by not more than six months, 35 U.S.C. § 316(a)(11); 37 C.F.R. § 42.100(c), although “[e]xtensions of the one-year period are anticipated to be rare,” 77 Fed. Reg. at 48,695.

¹⁹ *See supra* note 5 and accompanying text.

Dated: January 22, 2014

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I hereby certify that on January 22, 2014, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

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