

Nos. 2013-1527, 2014-1121, -1526, -1528

**United States Court of Appeals
For The Federal Circuit**

WESTERNGECO L.L.C.,

Plaintiff-Cross-Appellant,

v.

ION GEOPHYSICAL CORPORATION,

Defendant-Appellant.

**Appeals from the United States District Court for the Southern District of
Texas in case no. 09-cv-1827, Judge Keith P. Ellison.**

**APPELLANT'S OPPOSED MOTION TO STAY PENDING INTER
PARTES REVIEW**

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Appellant ION Geophysical Corporation (“ION”) moves to stay this appeal and the conditional cross-appeal of Appellee and Cross-Appellant WesternGeco L.L.C. (“WG”) based on the Patent Trial and Appeal Board’s (“PTAB”) December 15, 2014 decisions initiating *inter partes* review (“IPR”) in Case IPR2014-00687, Case IPR2014-00688, and Case IPR2014-00689. (Exs. 1-3, respectively). These initiation decisions granted Petroleum Geo-Services, Inc.’s (“PGS”) petitions for review of the same claims as in three of the four patents in suit: claims 1 and 15 of U.S. Patent No. 7,080,607 B2; claims 1 and 15 of U.S. Patent No. 7,162,967 B2; claims 1, 2, 6, 18, 19, and 23 of U.S. Patent No. 7,293,520 B2.¹ These patents have been referred to throughout the litigation and briefing as the “Bittleston patents”, and are the overwhelming focus of this appeal.²

¹ PGS was separately sued by WG on the same patents in a later lawsuit in 2013. PGS is a separate company, it has been a customer of ION, but it has not been indemnified by nor is it indemnifying ION, nor has ION coordinated with PGS the defense of this lawsuit or PGS’s lawsuit or PGS’s IPRs, nor has ION paid in whole or in part for PGS’s defense or IPRs.

² Institution was denied as to the one asserted claim from the fourth patent in suit, which is not related to the Bittleston patents, claim 14 of U.S. Patent No. 6,691,038 B2 (the “Zajac ‘038 Patent”). WG’s damages expert at trial only attributed about \$300,000 in royalties and no lost profits to that claim (A003439-40; A013657), out of the \$105.9 million ultimately awarded by the jury. Copies of the non-confidential pages from the Appendix are attached for the Court’s convenience as Ex. 7; A013657 is confidential and for that document ION refers the Court to the filed confidential appendix (Dkt. 86).

On January 14, 2015, ION filed motions to join each of the pending IPRs, together with its own petitions for IPR on the same claims. *See* Exs. 4, 5 and 6.³

This Motion, however, is not contingent on whether the PTAB permits joinder so long as concurrent proceedings on the claims in suit of the Bittleston patents are ongoing in both forums.

Oral argument is currently set in this appeal for March 5, 2015.

This Motion is supported by the grounds and legal arguments below, the record of this case, the attached exhibits, and the attached declaration of David Healey verifying the attached exhibits.

A ruling is respectfully requested prior to oral argument.

GROUND FOR THE PRESENT MOTION

If the claims in the initiated IPRs are found unpatentable (which occurs in nearly 80% of initiated IPRs), and are subsequently cancelled by the PTO, any cause of action based on them will be eliminated as a matter of law. *Fresenius U.S.A. v. Baxter International*, 721 F.3d 1330 (Fed. Cir. 2013). Cancellation of the Bittleston patents' claims effectively resolves the case since only one unrelated

³ Each motion is attached with an excerpt from the PTO's public website showing its filing and that of the respective IPR on January 14, 2015. The IPRs are described in the motions, but not attached due to volume. ION's petitions for IPRs and related filings in support are available on the PTO's public website.

patent—to which WG attributed minimal damages at trial—would remain in suit. *See* footnote 2, *infra*. Most of the appellate issues only relate to the Bittleston patents.

Staying this appeal will streamline this case should the claims subject to the institution decisions be cancelled, will prevent waste of public resources, and will not prejudice WG. ION, on the other hand, will be prejudiced if a stay is not granted, since its rights will not be determined by orderly review of the merits of the issues on appeal and the patentability of the claims in the IPRs, but rather by which of two disconnected proceedings first reaches final conclusion. ION believes it will prevail in this appeal, but even so, it should not be put to any risk that it may have to pay on claims that never should have issued in the first place.⁴

RELIEF SOUGHT

ION respectfully asks this Court to stay the present appeal pending resolution of the initiated IPRs of the claims of the Bittleston patents in suit, Case IPR2014-00687, Case IPR2014-00688, and Case IPR2014-00689 (Exs. 1-3); and

⁴ The amount of the judgment is now in excess of **\$123,000,000**, of which less than one percent can be attributed to the Zajac '038 patent. ION's 10-K for year end 2013 filed on February 14, 2014 shows equity of **\$257,885,000** as of December 31, 2013 and net revenue for 2013 of \$549,167,000. *See* Exhibit 8, excerpt from ION's 10-K filed February 14, 2014.

disposition of ION's motions for joinder and its own IPRs on those same claims. (Exs. 4-6).

LEGAL ARGUMENT

I. Introduction

This Court should use its discretion in managing its docket to stay this appeal. The IPR process was enacted to create an efficient, fair and effective forum to eliminate claims that should not have issued. This process should be used to preserve scarce judicial resources. Further, a stay prevents waste of public resources by simultaneous proceedings on the same claims, and protects ION and the public from risk of inconsistent consequences. WG cannot claim any significant prejudice from a stay.

Despite the stage of this case, substantial work remains to be done. Some issues on appeal could result in remand for further proceedings in the trial court and potentially a second appeal. There is an issue on appeal based on controlling law of this Court now under review by the Supreme Court in *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361 (Fed. Cir. 2013). Despite the lack of any legal or factual foundation in this case to do so, WG filed a conditional cross-appeal to overrule *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assoc., Inc.*, 682 F.3d 1005, 1007 (Fed. Cir. 2012) in light of *Octane Fitness LLC v. ICON Health &*

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