IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

REALTIME DATA LLC d/b/a IXO,

Plaintiff,

v.

RACKSPACE US, INC.; NETAPP, INC.; and SOLIDFIRE, LLC,

Defendants.

LEAD Case No. 6:16-cv-961

DEFENDANTS NETAPP, INC. AND SOLIDFIRE, LLC'S REPLY IN SUPPORT OF MOTION TO STAY LITIGATION PENDING INTER PARTES REVIEW

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I. INTRODUCTION

The Patent Trial and Appeal Board has instituted inter partes reviews ("IPRs") on four of the six closely-related patents that Realtime has asserted against the NetApp Defendants. The record created in those IPRs will inevitably affect the proceedings in this case before the scheduled trial date, even for claims for which IPRs have not been instituted. The Court, which has not yet reviewed any substantive briefing, and the parties, who have significant work ahead, would all benefit from staying this case pending resolution of the pending petitions for IPR. The Court should grant the NetApp Defendants' stay motion.

II. ALL FACTORS WEIGH IN FAVOR OF STAYING THE CASE

A. A Stay Would Simplify the Issues in the Case

Realtime's suggestion that a stay will complicate the issues in this case fails to address at least two important points raised in the NetApp Defendants' motion. First, the PTAB instituted IPRs on two of Realtime's six asserted patents on June 27, 2016. Dkt. No. 51 at 4 (noting that IPRs for the '992 and '513 patents were instituted on June 27, 2016). Second, 35 U.S.C. § 316(a)(11) requires the PTAB to make a final determination in an IPR within one year of the date of institution, a date that can be extended by up to six months. Thus, the PTAB will likely complete its review on these two patents by June 2017, and in no event later than December 2017—approximately a month before the scheduled trial date in this case of January 2018. *See* Dkt. No. 74. Similarly, under the one-year time period, final determinations in the IPRs on the '530 and '908 patents that were instituted in November 2016 are expected by November 2017. Decisions on whether to institute IPRs related to the '728 patent are expected before the April 2017 *Markman* hearing in this case, and on November 14, 2016, defendants in a related case filed a petition for IPR directed at claims 104 and 105 of the '506 patent. *See* IPR No. 2017-00176. In fact, as of the date of this reply brief, IPR petitions directed at each of Realtime's

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asserted patents have been requested and/or instituted. A stay pending resolution of these IPRs will allow the parties and the Court to make use of the PTAB's analysis as they consider claim construction, infringement, and invalidity issues in this case. Without a stay, this Court will address claim construction in parallel to the PTAB, and the parties may be placed in the undesirable position of seeking leave to amend their contentions to account for the outcome at the PTAB.

The instant case is distinguishable from *Trover Group, Inc. v. Dedicated Micros USA*, No. 2:13-CV-1047-WCB, 2015 WL 1069179, at *6 (E.D. Tex. Mar. 11, 2015), which Realtime cites for the proposition that "when the PTAB has not yet acted on a petition for inter partes review, the courts have uniformly denied motions for a stay." In *Trover*, the district court denied a stay pending IPR without prejudice where the PTAB was months away from deciding whether to institute review on the only patent remaining in the case. *See id.* at *3. In the instant case, by contrast, the PTAB has already instituted review for the bulk of the claims that Realtime has asserted. In that respect, this case is more analogous to another case decided the same day in this District, *NFC Tech. LLC v. HTC Am., Inc.*, No. 2:13-CV-1058-WCB, 2015 WL 1069111, at *4 (E.D. Tex. Mar. 11, 2015) (granting stay where IPR proceedings had been instituted based on two of defendants' three petitions).

Because all of Realtime's asserted patents and claims are closely related, the fact that IPRs have not yet been instituted on all asserted claims does not justify denying a stay. All of the asserted patents in this case have the same inventor, and all of the asserted patents claim priority to one of two patent applications. The '530 and '909 patents claim priority to U.S. Patent No. 6,601,104, and the '506, '992, '513, and '728 patents claim priority to U.S. Patent No. 6,195,024. Within each of the two families of asserted patents, the specifications are largely the

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same. Even between the two families, the specifications have strong similarities. *Compare* '513 patent, fig. 3a *with* '530 patent, fig. 6a (both describing the steps of "receive initial data block from input data stream," "count . . . data block," "buffer data block," "compress data block with encoder(s)," and "count . . . data block," among others); *see also* '513 patent, fig. 4 *and* '530 patent, fig. 8. Realtime's opposition brief does not dispute that the arguments Realtime makes before the PTAB, and the rulings that the PTAB makes in response to those arguments, will be relevant to understanding not only the particular claims that the PTAB is considering in a given review but other, related claims as well.

Realtime's argument that a stay will not simplify the Court's consideration of claims for which no IPR has yet been instituted (including '728 patent claim 17) or claims for which no IPR has been requested (including '530 patent claim 20 and '908 patent claim 3) is thus incorrect. For example, '728 patent claim 17 is similar in substance to '513 patent claim 12, for which an IPR was instituted in June 2016. Both claims address the effectiveness of content-independent compression. Claim 20 of the '530 patent depends from claim 1 of the same patent, for which an IPR has been instituted, and the only difference between the two is that claim 20 recites two additional data blocks. Realtime's arguments and the PTAB's rulings on claim 1 of the '530 patent will inform the construction and scope of claim 20 of that patent. Finally, claim 3 of the '908 patent depends from claims 1 and 2 of that patent, and an IPR has been instituted for claims 1 and 2. The only thing that claim 3 adds to claims 1 and 2 of the '908 patent is the storage of a second data descriptor. Again, the PTAB's rulings on claims 1 and 2 of the '908 patent will inform the construction and scope of claim 3 of that patent.

Realtime's concern that the NetApp Defendants might waste time by repeating invalidity arguments in this Court that fail before the PTAB is unfounded. If the PTAB were to consider

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and reject a particular anticipation or obviousness argument, a jury would likely give strong deference to the PTAB's conclusion. Thus, even if 35 U.S.C. § 315(e)(2) does not estop the NetApp defendants from raising invalidity arguments in this Court that fail in an IPR proceeding in which the NetApp defendants are not petitioners, the NetApp Defendants would have a strong reason not to re-litigate arguments that fail during the IPR process following a stay.[1] Of course, if the PTAB invalidates Realtime's claims, then the jury would not have to consider the parties' invalidity arguments either. On the other hand, if the Court does not stay this action, inefficiencies would result because the parties would proceed on parallel paths —potentially involving the same or similar prior art. A stay would be the best way to simplify the claims in this action.

B. Realtime Fails To Show Any Concrete Prejudice That a Stay Would Cause

Realtime, like all patent owners, has a general right to timely enforcement of its patent rights. But Realtime does not articulate any specific harm that it might face from the modest delay a stay pending IPRs would cause. Even if the stay required postponing the trial date, for example, the Court and parties would be greatly aided by the additional record (and case narrowing) to be provided in the IPRs. Moreover, Realtime "has not made any showing as to particular evidence or discovery that is at risk of being lost." *NFC Tech.*, 2015 WL 1069111, at *3. "A blanket statement that evidence may become stale or be lost does not amount to a compelling showing of prejudice." *Id.* Nor does Realtime have an absolute right to have the validity of its patent claims tested before the district court rather than the PTAB. Realtime's choice of forum is entitled to little deference where, as here, Realtime filed its complaint against

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[1] In any event, consistent with the precedent in this jurisdiction, if the case is stayed, the NetApp Defendants are willing to stipulate not to raise invalidity arguments in this case that the PTAB considers and rejects during IPR proceedings that the PTAB institutes at the request of other petitioners, consistent with 35 U.S.C. § 315(e)(2).

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