

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

<p>FALL LINE PATENTS, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>ZOE'S KITCHEN, INC. and ZOE'S KITCHEN USA, LLC,</p> <p>Defendants.</p>	<p>CIVIL ACTION NO. 6:18-cv-407-RWS</p> <p>LEAD CASE</p> <p>JURY TRIAL DEMANDED</p>
<p>AMC ENTERTAINMENT HOLDINGS, INC. and AMERICAN MULTI-CINEMA, INC.</p>	<p>CIVIL ACTION NO. 6:18-cv-408-RWS</p> <p>JURY TRIAL DEMANDED</p>
<p>BOSTON MARKET CORPORATION</p>	<p>CIVIL ACTION NO. 6:18-cv-409-RWS</p> <p>JURY TRIAL DEMANDED</p>
<p>STARBUCKS CORPORATION</p>	<p>CIVIL ACTION NO. 6:18-cv-411-RWS</p> <p>JURY TRIAL DEMANDED</p>
<p>MCDONALD'S CORPORATION and MCDONALD'S USA, LLC,</p>	<p>CIVIL ACTION NO. 6:18-cv-412-RWS</p> <p>JURY TRIAL DEMANDED</p>
<p>PANDA RESTAURANT GROUP, INC. and PANDA EXPRESS, INC.</p>	<p>CIVIL ACTION NO. 6:18-cv-413-RWS</p> <p>JURY TRIAL DEMANDED</p>
<p>PAPA JOHN'S INTERNATIONAL, INC. and STAR PAPA, LP</p>	<p>CIVIL ACTION NO. 6:18-cv-415-RWS</p> <p>JURY TRIAL DEMANDED</p>

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY LITIGATION
PENDING INTER PARTES REVIEW OF THE PATENT-IN-SUIT**

I. THIS EXCEPTIONAL CASE WARRANTS A STAY BECAUSE THE SOLE ASSERTED PATENT ALREADY HAS CLAIMS DECLARED UNPATENTABLE.

The asserted patent just had six claims declared unpatentable last week by the Patent Trial and Appeal Board, three of which were included in Defendants' pending IPR.¹ The asserted claims here are very similar to the claims found unpatentable. Mot. at 7-8. Nevertheless, Plaintiff asks this Court to ignore that every claim in the parent patent was declared unpatentable, and now over a quarter of the claims in the present patent are unpatentable, and instead pretends this is a routine patent infringement case. It is not; it is an exceptional case – exceptional in that the same plaintiff actors are continuing a long line of litigation campaigns with the weakest of patents, and now a partially-invalidated asserted patent. This is exactly the type of case that should be stayed pending an IPR decision, and Plaintiff should not in good faith oppose. Given that three claims in Defendants' pending IPR are now unpatentable, it is a near certainty that the PTAB will institute Defendants' IPR, warranting a stay. It is also a near certainty that every challenged claim will be found unpatentable – just as the last six challenged claims were, and just as every single claim in the parent patent was. Plaintiff's efforts to oppose a stay are a blatant attempt to drive up costs to inflate settlement leverage.

II. THE COURT HAS DISCRETION TO STAY THIS CASE PRE-INSTITUTION.

Contrary to Plaintiff's suggestions, there is no requirement for a district court to wait for the PTAB to institute an IPR before staying a case. *VirtualAgility, Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1315-16 (Fed. Cir. 2014) (“a motion to stay could be granted even before the PTAB rules on a post-grant review petition”); *accord Neuro Cardiac Techs., LLC v. LivaNova, Inc.*, No.

¹ The patent has 22 claims, and thus over one-quarter of the claims in the asserted patent have now been declared unpatentable.

H-18-1517, 2018 WL 4901035, at *2 (S.D. Tex. Oct. 9, 2018). Indeed, in granting a pre-institution stay in *Realtime Data, LLC v. Hewlett Packard Enterprises Co., et al.*, this Court specifically rejected the argument that it should deny the stay because it is a “universal practice” to deny a motion to stay where IPR has not been instituted. No. 6:15-CV-86-RWS-JDL, 2017 WL 3712916 (E.D. Tex. Feb. 3, 2017); *see also Chart Trading Dev., LLC v. Tradestation Grp., Inc.*, No. 6:15-CV-1136-JDL, 2016 WL 1246579 (E.D. Tex. March 29, 2016); *Landmark Tech., LLC v. iRobot Corp.*, No. 6:13-cv-411-JDL, 2014 WL 486836 (E.D. Tex. Jan. 24, 2014). In particular, the *Realtime* Court acknowledged that while IPR had not been instituted with respect to two of the asserted patents, both shared common specifications with patents where IPR had been recently instituted. 2017 WL 3712916, at *4. As such, here, where IPR has not only been instituted on certain claims of the sole asserted patent, but has invalidated those claims, a stay is more than appropriate.

III. ALL FOUR FACTORS FAVOR GRANTING DEFENDANTS’ MOTION TO STAY.

A. Plaintiff will not suffer undue prejudice.

Plaintiff seeks only money damages, a remedy that “will not [be] diminish[ed]” by a stay. *VirtualAgility*, 759 F.3d at 1318. The undue prejudice factor “focuses on the patentee’s need for an expeditious resolution of its claim,” *id.*, not the length of the IPR process, or whether “a motion to stay [was filed] *after* the related post-grant proceeding had been instituted,” as Plaintiff contends. *Opp.* at 7 (emphasis in original).

Plaintiff waited more than 15 months after acquiring ownership of the ’748 Patent before filing suit against Defendants. Although Plaintiff contends a stay “would substantially prejudice Plaintiff’s ability to timely enforce its patent rights,” *Opp.* at 8, its failure to explain its own significant delay in bringing suit raises doubt as to its need for expeditious resolution.

VirtualAgility, 759 F.3d at 1319 (finding delay of nearly a year in filing suit “weigh[ed] against [plaintiff’s] claims that it will be unduly prejudiced by a stay”).

Although Plaintiff asserts that even non-practicing entities like itself can suffer prejudice by “a substantial delay of an imminent trial date,” Opp. at 6, that has nothing to do with the case at hand. Here, trial is distant, Mot. at 11-12, and Defendants, unlike those in *Tracbeam, LLC v. T-Mobile US, Inc.*, have not “waited until the last possible day to file their IPR petitions.” No. 6:14-cv-678, 2016 WL 9225574, at *1 (E.D. Tex. Mar. 29, 2016). Rather, as in *Chart Trading*, “the delay [in waiting for the PTAB’s decision] is minimal and at the earliest stages of the case, and is therefore not unduly prejudicial.” 2016 WL 1246579, at *5. In short, Plaintiff’s complaints regarding timely enforcement of patent rights are “too generic, standing alone, to defeat a stay motion.” *Realtime*, 2017 WL 3712916, at *6.

B. Simplification of the issues is highly likely.

Plaintiff urges the Court to deny a stay, citing *Freeny v. Apple, Inc.*, and *MPHJ Tech. Invs., LLC v. Research Now, Inc.* for support. Those cases are distinguishable. In *Freeny*, while the Court did find the lack of an institution decision was dispositive, it also cited an additional factor that cut against a stay: only one of the two remaining defendants was a party to the IPR, and it “waited for a year after the complaint was filed before filing its petition.” No. 2:13-cv-361, 2014 WL 3611948, at *2 (E.D. Tex. July 22, 2014). This is not a factor here. And in *MPHJ Tech.*, the Court doubted “the estoppel effect of the administrative proceeding” would “simplify the issues” because the defendant was not a party to the IPR. No. 2:13-cv-962, 2014 WL 11514323, at *2, fn. 1 (E.D. Tex. June 10, 2014). Here, 10 of the 12 Defendants are parties to the IPR petition. Mot. at 8.

Also unlike *MPHJ Tech.*, there are four reasons why the outcome of the pending IPR petition is not “wholly unpredictable, if not completely speculative.” 2014 WL 11514323, at *1; *see also Realtime*, 2017 WL 3712916, at *4 (granting pre-institution stay motion because “it [was]

highly likely that there will be at least some simplification of the issues in this case overall”). First, the PTAB issued a final written decision on Unified’s IPR on April 4, 2019. *Order regarding Public Access to the Final Written Decision*. (Exhibit A). Although under seal, Defendants understand from Unified counsel this resulted in cancellation of all six challenged claims. The Unified decision simplifies the issues because it provides: (1) guidance regarding claim terms for which Defendants seek construction, Mot. at 7-8, and (2) near certainty that Defendants’ IPR will be instituted, as three of the challenged claims have now been found unpatentable.² Second, the PTO has already cancelled all claims of the parent to the ’748 Patent, which are nearly identical to the asserted claims. Mot. at 8. This also raises the probability of institution because most elements of the ’748 Patent’s claims have already been found to be unpatentable. *Id.* Third, Defendants’ petition challenges all of the asserted claims. Mot. at 9. This simplifies the issues because, if instituted, “the outcome of [the] proceeding is likely to assist the court in determining patent validity or eliminate the need to try infringement issues.” *NFC Tech.*, 2015 WL 1069111, at *1. Fourth, the PTO recently found 11 claims of a patent application that claims priority to the ’748 Patent unpatentable under § 101. Four of those eleven claims are nearly identical to the asserted ’748 Patent claims (and indeed the PTO said that the pending claims are not patentably distinct from the ’748 Patent).³ The PTO is the best place to address this patent.

² The PTO will initiate IPR if Defendants show “a reasonable likelihood” of prevailing with respect to at least one of the challenged claims. 35 U.S.C. § 314(a); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (holding that PTAB statutorily required to address *every* contested claim once IPR is granted) (emphasis in the original).

³ Exhibit B (rejection for application 15/260,929 dated March 20, 2019 from the USPTO finding all requested claims unpatentable under Section 101); Exhibit C (requested claims). The rejection was mailed the day after Defendants filed their opening motion to stay.

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