

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

RFCYBER CORP.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 2:20-cv-00274-JRG
(Lead Case)

JURY TRIAL REQUESTED

RFCYBER CORP.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.,
and SAMSUNG ELECTRONICS
AMERICA, INC.,

Defendants.

Case No. 2:20-cv-00335-JRG
(Member Case)

JURY TRIAL REQUESTED

**GOOGLE LLC'S RENEWED MOTION TO STAY PENDING RESOLUTION OF
MOTION TO TRANSFER OR DISMISS**

I. INTRODUCTION

Defendant Google LLC moves to stay all proceedings to permit the Court to resolve Google's motion to dismiss or transfer this case to the Northern District of California. Dkt. 20. The transfer motion was filed more than eight months ago, on December 7, 2020, and the Court held a hearing on the motion almost two months ago on June 29, 2021.

The Fifth Circuit and the Federal Circuit require courts to give "top priority" to transfer motions, *In re Apple*, 979 F.3d 1332, 1337 (Fed. Cir. 2020), and to resolve such motions "before addressing any substantive portion of the case," *In re Nintendo Co., Ltd.*, 544 F. App'x 934, 941 (Fed. Cir. 2013). *See also In re TracFone Wireless, Inc.*, 848 Fed. App'x 899, 900 (Fed. Cir. 2021) ("[A] trial court's failure to act on a fully briefed transfer motion that had been pending for approximately eight months while pressing forward with discovery and claim construction issues amounted to an arbitrary refusal to consider the merits of the transfer motion."). Google seeks this stay as an appropriate means for the application of the "top priority" required by the Fifth Circuit and Federal Circuit.

In this case, key deadlines are fast approaching—the completion of claim construction discovery is on September 2, 2021; Plaintiff's opening claim construction brief is due on September 16, 2021, the same day that the parties must submit their technical tutorials; and the *Markman* hearing is scheduled for October 28, 2021. *See* Dkt. 63 (Docket Control Order). A stay is necessary to permit the Court to resolve the transfer or venue motion in advance of the completion of these substantive phases of the case. *See, e.g., In re SK hynix Inc.*, 835 F. App'x 600, 601 (Fed. Cir. 2021) (ordering a stay of proceedings where the district court "required the parties to proceed ahead with the merits" while a transfer motion "lingered unnecessarily on the docket"); *In re TracFone*, 848 Fed. App'x at 901 (ordering a district court to stay all proceedings

and rule on defendant's transfer motion, where district court allowed case to proceed to a *Markman* hearing despite a pending transfer motion).

II. ARGUMENT

In addition to the guidance provided by the Fifth Circuit and Federal Circuit law, this Court considers three factors in deciding whether to stay a case: “whether discovery is complete and whether a trial date has been set,” “whether a stay will simplify the issues in question and trial of the case,” and “whether a stay will unduly prejudice or present a clear tactical disadvantage to the nonmoving party.” *Glob. Equity Mgmt. (SA) Pty. Ltd. v. Ericsson, Inc.*, 2017 WL 365398, at *10 (E.D. Tex. Jan. 25, 2017). Given the stage of the litigation, the potential to obviate duplicative discovery and adjudications in the transferee forum, and the lack of prejudice to Plaintiff, a brief stay is appropriate.

A. The Early Stage of the Litigation Weighs in Favor of a Stay.

A stay is appropriate when “there remains a significant amount of work ahead for the parties and the court,” although “[a] case need not be in its infancy to warrant a stay.” *Norman IP Holdings, LLC v. TP-Link Techs., Co.*, No. 6:13-CV-384-JDL, 2014 WL 5035718, at *3 (E.D. Tex. Oct. 8, 2014). Although key deadlines are on the horizon, this case remains at a relatively early stage. The parties have responded to written discovery; have served their Patent Local Rule 4-1 and 4-2 claim construction disclosures; and have filed their Patent Local Rule 4-3 Joint Claim Construction and Prehearing Statement. But the most significant work will not occur for several more weeks, when the parties submit their technical tutorials (September 16), file their claim construction briefing (September 16 and September 30, respectively), and prepare for the *Markman* hearing (October 28). In addition, while the parties have noticed depositions, none have yet been scheduled.

The stage of the litigation thus supports a stay. The case is early enough that substantive issues have not been resolved. *See Secure Access, LLC v. Nintendo of Am. Inc.*, No. 2:13-CV-32-JRG, Dkt. 133 at 1 (E.D. Tex. Feb. 10, 2014) (finding in a case where claim construction briefing had just begun that “a short stay pending resolution of the severance and transfer issues” likely would simplify issues in the case). And at the same time, staying the case before the upcoming deadlines, and before the parties begin litigating substantive issues, will ensure that the venue dispute takes top priority, as provided by Fifth Circuit and Federal Circuit precedents.

B. A Stay Will Simplify and Streamline the Issues for Consideration.

A stay also will simplify the issues before this Court. There is nothing left for this Court to decide should it determine that this case should be transferred to the Northern District of California or dismissed for improper venue. And there is little to be gained by allowing the case to proceed while the transfer motion remains pending. Because transfer is assessed based on the facts at the time of filing, any familiarity that this Court acquires with the underlying litigation due to the progress of the action is irrelevant to the transfer analysis. *See In re Google Inc.*, No. 2015-138, 2015 WL 5294800, at *2 (Fed. Cir. July 16, 2016). Staying the case will streamline the issues for consideration by ensuring that threshold issues are determined first.

Without a stay, the parties will engage in litigation that may prove unnecessary or duplicative. For example, as discussed above, deadlines relevant to claim construction are fast approaching, and the Federal Circuit has held that venue motions must be resolved in advance of claim construction issues. *See In re SK hynix*, 835 F. App’x at 601; *In re TracFone*, 848 Fed. App’x at 901. Moreover, any claim construction order issued prior to transfer would be subject to revision in the transferee court. *See, e.g., Rambus Inc. v. Hynix Semiconductor Inc.*, 569 F. Supp. 2d 946, 968 (N.D. Cal. 2008) (declining to give preclusive effect to claim construction order absent a final judgment); *Jack Guttman, Inc. v. Kopykake Enters., Inc.*, 302 F.3d 1352,

1361 (Fed. Cir. 2002) (acknowledging that district courts may engage in “rolling” claim construction and “revisit[] and alter[] its interpretation” of the patentee’s claims throughout the litigation).

C. **A Stay Will Not Prejudice or Disadvantage Plaintiff.**

Finally, a stay will not prejudice or impose any tactical disadvantage on Plaintiff. Google’s proposed stay is limited to the time necessary to resolve the transfer motion, which has been pending for more than eight months. Any stay likely will be brief. Proceeding to the merits while Google’s motion remains pending benefits neither party. A short stay will benefit Plaintiff as much as Google by eliminating the need to spend time and resources litigating substantive issues prior to the Court’s decision as to whether and where the litigation should proceed.

Moreover, a stay will not impair Plaintiff’s ability to secure effective relief in this case should it ultimately prevail. Plaintiff seeks only money damages for the alleged infringement, not injunctive relief. In addition, Plaintiff does not allege that it currently offers a competing product that embodies the patents-in-suit, or that it otherwise suffers ongoing harm in the marketplace because of the alleged infringement. *See Spa Syspatronic, AG v. Verifone, Inc.*, No. 07-416, 2008 WL 1886020, at *2 (E.D. Tex. Apr. 25, 2008) (finding that the parties were not direct competitors and that a stay was therefore “unlikely to directly prejudice [patentee’s] standing in the market” during the delay). As a result, a stay pending resolution of the transfer motion “will not diminish the monetary damages to which [Plaintiff] will be entitled if it succeeds in its infringement suit—it only delays realization of those damages[.]” *VirtualAgility Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1318 (Fed. Cir. 2014). Under these circumstances, Plaintiff’s interest in avoiding delay in the vindication of its patent rights—an interest “present in every case in which a patentee resists a stay”—cannot alone defeat this stay motion. *NFC Tech.*

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