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

AGIS SOFTWARE DEVELOPMENT, LLC,	§	
	§	
Plaintiff,	§	**Case No. 2:17-cv-00513-JRG**
	§	**(Lead Case)**
	§	
v.	§	**JURY TRIAL DEMANDED**
	§	
HUAWEI DEVICE USA INC., HUAWEI DEVICE CO., LTD., AND HUAWEI DEVICE (DONGGUAN) CO., LTD.,	§	
	§	
Defendants.	§	
	§	

PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS HUAWEI DEVICE USA INC., HUAWEI DEVICE CO., LTD. AND HUAWEI DEVICE (DONGGUAN) CO., LTD.'S AND LG ELECTRONICS INC.'S MOTION TO STAY (DKT. 102) PENDING RESOLUTION OF HUAWEI'S MOTION TO TRANSFER (DKT. 36) AND LGEKR'S MOTION TO DISMISS OR TRANSFER (DKT. 46)

Plaintiff AGIS Software Development, LLC ("AGIS"), by and through its undersigned counsel, hereby submits this sur-reply in support of its opposition to Huawei Device USA Inc., Huawei Device Co., Ltd., and Huawei Device (Dongguan) Co., Ltd.'s (collectively, "Huawei") and LG Electronics Inc.'s ("LGEKR," and together with Huawei, "Defendants") motion to stay (Dkt. 102) pending resolution of Huawei's motion to transfer (Dkt. 36) and LGEKR's motion to dismiss or transfer (Dkt. 46).[1]

I. A STAY IS NOT WARRANTED

Defendants are not entitled to a stay merely because their motions to transfer or dismiss are pending. *Stanissis v. Dyncorp. Inter. LLC*, No. 3:14-cv-2736, 2014 WL 7183942, at *1 (N.D. Tex. Dec. 17, 2014). Defendants have failed to meet their burden to demonstrate that a stay pending their motions is warranted. Defendants' Reply argues: (1) AGIS's reliance on the "good cause" standard is misguided because Defendants are seeking a stay of the entire litigation, not just a stay of discovery (Dkt. 128 at 1-2); (2) the "imminent" claim construction deadlines provide the "strongest" support for a stay because the parties' efforts *might* need to be duplicated if the cases are transferred (*id.* at 2-3); and (3) a stay of discovery is "*likely* to be short," and therefore will not unduly prejudice AGIS (*id.* at 4-5). All of these arguments are fundamentally flawed, and none support granting a stay pending resolution of the motions to transfer or dismiss.

A. None of the Factors Considered In Determining Whether to Stay Discovery or Stay the Entire Litigation Warrant a Stay

Defendants do not contest that they bear the burden to establish why a stay should be granted. Dkt. 128 at 1-2; *see also Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Retractable Techs., Inc. v. Becton Dickinson & Co.*, No. 2:08-cv-16, 2011 WL 13134434, at *2 (E.D. Tex.

[1] Although HTC Corporation, ZTE (TX), Inc., and ZTE (USA), Inc. joined in Huawei's and LGEKR's Motion (Dkts. 107, 120), they did not submit a reply.

Mar. 15, 2011). Rather, Defendants argue that they are not required to demonstrate "good cause" for the stay, a standard they claim is only required when seeking to stay discovery, because Defendants are seeking to stay the entire litigation. Dkt. 128 at 1-2. This argument is nonsensical—requesting a stay of discovery will by its nature affect all deadlines in the litigation. Moreover, courts examine numerous factors on a case-by-case basis in determining whether to exercise their discretion to grant a stay of discovery and/or a stay of the litigation. *See Moser v. Navistar Int'l Corp.*, No. 4:17-cv-00598, 2018 WL 1169189, at *2 (E.D. Tex. Mar. 6, 2018); *Retractable Techs.*, 2011 WL 13134434, at *2; *Griffin*, 2015 WL 11019132, at *3. In its opposition, AGIS analyzed each of the factors this Court may consider in granting a stay for discovery *or for an entire litigation* (Dkt. 122 at 4-11) and showed that *none* of the factors support a stay. Defendants' Reply does not alter this conclusion.

B. Upcoming Claim Construction Deadlines Do Not Support A Stay

Defendants' argument that the "strongest support" for the stay is the need to avoid duplication of claim construction (Dkt. 128 at 2-3) is unpersuasive.[2] This argument presupposes the occurrence of several future events that have not yet occurred, and which may never occur. Specifically, Defendants assume that: (1) they have met their burden to show that the Northern District of California ("NDCal") is a clearly more convenient district than this District and that this Court will grant their motion to transfer; (2) a transfer will occur *after* the completion of claim construction; (3) NDCal will require the parties to duplicate all claim construction efforts

[2] Defendants Reply does not contest that they will not suffer undue harm by conducting discovery in this District even if the case is ultimately transferred. Dkt. 128 at 2-3; *see Edward D. Ioli Trust v. Avigilon Corp.*, No. 2:10-cv-605, Dkt. 279 at 3 (E.D. Tex. Nov. 16, 2012) (Gilstrap, J.) (explaining that the scope of NDCal's local patent rules governing discovery are nearly identical to this District's local patent rules); *Moreno v. Marvin Windows, Inc.*, No. 07-cv-91, 2007 WL 2060760, at *1 (W.D. Tex. July 17, 2007) (explaining that the parties will need to engage in discovery on the exact same patents, allegations, and claims of infringement regardless of where the case is pending).

completed in this District; and (4) NDCal will require a second claim construction hearing, wasting this Court's claim construction efforts.[3]

It is undisputed that the Court has not determined that Defendants demonstrated that NDCal is a clearly more convenient forum than this District and that it has not granted Defendants' motions to transfer. Even assuming *arguendo* that this case is transferred, it does not render useless claim construction efforts rendered in this District. While NDCal is not bound by a claim construction ruling issued by this Court, NDCal recognizes the "importance of uniformity of claim construction" and considers a claim construction ruling from a transferor court "as a thoughtful and thorough analysis of the parties' arguments involving the same patent and the same claim." *Visto Corp. v. Sproqit Techs., Inc.*, 445 F. Supp. 2d 1104, 1108–09 (N.D. Cal. 2006). Indeed, courts in NDCal have adopted claim construction orders rendered by other jurisdictions, including this District, to arrive at the same construction. *Id.* at 1108 (granting deference to claim construction order issued this District.); *Comcast Cable Commc'ns Corp., LLC v. Finisar Corp.*, No. 06-cv-04206, 2007 WL 1052821, at *3 (N.D. Cal. Apr. 6, 2007) (adopting claim construction order rendered by this District); *see also Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1329 (Fed. Cir. 2008) (relying on claim construction order from NDCal).

Moreover, impending claim construction deadlines are not a reason to grant a stay. *See, e.g., Cummins-Allison Corp. v. SBM Co.*, No. 9:07-cv-196, 2008 WL 11348281, at *2 (E.D. Tex. May 21, 2008) (denying stay prior to completion of claim construction).

Defendants' argument that a stay may result in judicial efficiency even though Apple Inc., a defendant in one of the consolidated cases, did not join the motion to stay because the

[3] This argument directly contradicts Defendants' argument that any stay is "*likely* to be short" (addressed *infra*) as it assumes the Court will not render a decision on the motions until after the *Markman* hearing, which is scheduled for August 31, 2018.

court *might* stay the Apple case *sua sponte* (Dkt. 128 at 3) is again based on the occurrence of an unknown, future event. Indeed, courts in this District have declined to grant a stay sought by only some of the consolidated defendants because such a stay would "not result in judicial economy and would only complicate litigation." *Cellular Comm'cs Equip. LLC v. HTC Corp.*, No. 6:13-cv-507, 2015 WL 11118110, at *9 (E.D. Tex. Mar. 27, 2015).

C. A Stay Will Prejudice AGIS

Defendants do not contest that AGIS is entitled to timely enforcement of its patent rights. Dkt. 128 at 4. Nor do Defendants contest that a stay will delay AGIS's timely enforcement of its patent rights and that a delay will prejudice AGIS. *Id.* Rather, Defendants argue that a "short" stay would not impose a prejudice on AGIS other than a delay. Dkt. 128 at 4. This argument is fundamentally flawed.

First, Defendants' argument improperly assumes that a stay will be "short." But the timing on a decision for the motions to transfer is unknown.

Second, Defendants argue that a delay of the enforcement of AGIS's patent rights is not a valid prejudice *if* the stay is short. But a stay of any length of time prejudices AGIS's right to a just and speedy resolution of its claims, delaying AGIS's day in court to prosecute its claims while permitting Defendants' infringement to continue unabated causing significant harm to AGIS. *Cummins-Allison Corp. v. SBM Co.*, No. 9:07-cv-196, 2008 WL 11348281, at *2 (E.D. Tex. May 21, 2008).[4] That Defendants have been infringing AGIS's patents for years prior to AGIS initiating this lawsuit is irrelevant to whether a stay will prejudice AGIS's right to a

[4] While the fact that a stay will delay a litigation *alone* may not be sufficient to defeat a motion to stay, AGIS has shown it will suffer additional prejudices (well-developed posture of the case and seeking a permanent injunction) if a stay is granted (Section I.C *infra*), and has shown that the other factors considered in granting a stay—the hardship to Defendants if the action is not stayed; the judicial resources that would be saved by avoiding duplicative litigation; the breadth of discovery sought and the burden of responding to such discovery; and the strength of the dispositive motion filed by Defendants—weigh against a stay (Dkt. 122 at 4-11).

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