UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ANCORA TECHNOLOGIES, INC. Plaintiff, vs. GOOGLE LLC, Defendant.	NO. 6:21-cv-00735-ADA JURY TRIAL DEMANDED

DEFENDANT GOOGLE LLC'S OPPOSED MOTION TO STAY

I. INTRODUCTION

Defendant Google LLC respectfully moves to stay all deadlines in this case pending resolution of the *ex parte* reexamination ("EPR") of all asserted claims, granted on November 17, 2021.[1] A stay is appropriate given that all the asserted claims stand to be invalidated by the patent office in the pending EPR. It thus does not make sense to proceed on the merits of this case when all claims may be rendered moot. Indeed, all of the factors courts consider in staying a case pending EPR favor a stay. A stay is therefore appropriate.

II. FACTUAL BACKGROUND

A. A Request for EPR of All Asserted Claims Has Been Granted

On November 17, 2021, the PTO granted a request for *ex parte* reexamination of the sole asserted patent in this case, finding that a substantial new question of patentability affecting the patent claims was raised. Ex. 1. The EPR covers all asserted claims in this case. Declaration of Robert W. Unikel ("Unikel Decl.") ¶ 2.

B. This Case Is in Its Early Stages

Ancora Technologies, Inc. filed its complaint against Google on July 16, 2021 asserting U.S. Patent No. 6,411,941. *See* Dkt. 1. On October 28, 2021, the parties filed a joint proposed schedule. Dkt. 22. The Court has not yet addressed the proposed schedule or otherwise entered a schedule in this case. Google filed a motion to transfer to the Northern District of California on November 23, 2021. Dkt. 23. Ancora then filed a notice of intent to proceed with venue discovery.

[1] There are also two pending *inter partes* review ("IPR") petitions against the asserted claims. In August 2021 Roku and Nintento filed these IPR petitions based on the same references that were the grounds for a previously instituted IPR. *Compare* IPR2020-01609, Paper 7 (listing references Hellman, Chou, and Schneck as asserted grounds of unpatentability), *with* IPR2021-01406 and IPR2021-01338 (listing the same). An institution decision on these newly filed IPRs is expected in February 2022. The previously instituted IPR has since been voluntarily dismissed by the parties before the final written decision pursuant to settlement. IPR2020-01609, Paper 21.

Dkt. 26. In addition to the venue discovery, in the next few months, there is much substantive work to be done including preparing the claim construction statement and briefing leading up to the Markman hearing. Extensive fact and expert discovery will commence after that hearing.

III. LEGAL STANDARD

The "power to stay proceedings" is part of a district court's "inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005) (citation omitted); *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426–27 (Fed. Cir. 1988) ("Courts have inherent power to manage their dockets and stay proceedings, including the authority to order a stay pending conclusion of a PTO reexamination." (internal citation omitted)).

In deciding whether to stay litigation pending reexamination, courts consider: "(1) whether the stay will unduly prejudice the nonmoving party, (2) whether the proceedings before the court have reached an advanced stage, including whether discovery is complete and a trial date has been set, and (3) whether the stay will likely result in simplifying the case before the court." *Kirsch Research & Dev., LLC v. IKO Indus., Inc.*, No. 6:20-cv-00317-ADA, 2021 WL 4555610, at *2 (W.D. Tex. Oct. 4, 2021) (citation omitted). "A stay is particularly justified when 'the outcome of a PTO proceeding is likely to assist the court in determining patent validity or eliminate the need to try infringement issues.'" *Ericsson Inc. v. TCL Commc'n Tech. Holdings, Ltd.*, No. 2:15-cv-00011-RSP, 2016 WL 1162162, at *1 (E.D. Tex. Mar. 23, 2016) (citation omitted).

IV. A STAY PENDING RESOLUTION OF THE EPR IS WARRANTED

Every factor that courts consider in determining whether to grant a stay pending EPR also favors a stay here.

A. A Stay Will Not Unduly Prejudice or Present a Clear Tactical Disadvantage to Ancora, a Non-Practicing Entity

There is no prejudice to Ancora in staying this case, let alone any *undue* prejudice, and Ancora will not experience any tactical disadvantage. Ancora is a non-practicing entity and does not market or sell any products that practice the patented technologies. *Ancora Techs., Inc. v. LG Elecs. U.S.A., Inc. et al.*, No. 1:20-CV-00034-ADA, 2021 WL 3022929 (W.D. Tex. Mar. 12, 2021) (a motion in limine filed by Ancora stating that "at present, it does not practice the '941 Patent."). Thus, Ancora does not compete with Google with respect to any products or patented technologies. And Ancora seeks only monetary damages in this case, not injunctive relief (*see* Dkt. 1 at 31). "[M]ere delay in collecting those damages does not constitute undue prejudice." *Crossroads Sys., Inc. v. Dot Hill Sys. Corp.*, No. 13-ca-1025, 2015 WL 3773014, at *2 (W.D. Tex. June 16, 2015). Indeed, the Federal Circuit has held that "[a] stay will not diminish the monetary damages to which [the plaintiff] will be entitled if it succeeds in its infringement suit—it only delays realization of those damages and delays any potential injunctive remedy." *VirtualAgility Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1318 (Fed. Cir. 2014). While this Court has recognized that a patent owner has an interest in the timely enforcement of its patent rights, it has also found that this type of interest "is present in every case where a patent owner resists a stay, [and] that alone is insufficient to defeat a motion to stay." *TC Tech. LLC v. T-Mobile USA, Inc.*, No. 6:20-cv-899-ADA, Dkt. 44 at 4 (W.D. Tex. Dec. 7, 2021) (Ex. 2) (citing *NFC Tech. LLC v. HTC Am., Inc.*, No. 2:13-cv-1058, 2015 WL 1069111, at *2 (E.D. Tex. Mar. 11, 2015)) .

Further undermining any suggestion that a stay will prejudice Ancora is the fact that Ancora waited nearly seventeen years before bringing this suit against Google. *See* Ex. 3 (showing Ancora was purportedly assigned the '941 Patent in 2004); *VirtualAgility*, 759 F.3d at 1319 (undue prejudice not found where plaintiff waited nearly a year after the patent was issued before bringing

suit). And importantly, the '941 patent expired over 3 years ago. Thus, there will be no possibility of continuing harm, to the extent there was any in the first instance.

There is also a pending motion to transfer in this case (Dkt. 23). Some dates are therefore already stayed pending resolution of the transfer motion per the Court's August 18, 2021 Second Amended Standing Order Regarding Inter-District Transfer. And Ancora has requested venue discovery, further delaying the deadlines in this case.

A stay will benefit Ancora because it will avoid needless litigation in the event the claims are found unpatentable. In *TC Technology*, the Court recently found that this factor favored a stay on facts nearly identical to those here: the asserted patent was expired, plaintiff delayed at least eight years to bring the lawsuit, and plaintiff was a patent assertion entity seeking only monetary relief. No. 6:20-cv-899-ADA, Dkt. 44 at 3–4. The facts in this case present a stronger case for a stay because Ancora waited seventeen years to file its complaint. This factor therefore favors a stay.

B. Discovery Is Not Complete and a Trial Date Has Not Been Set

Fact discovery has not even begun. And a trial date has not been set. In fact, there is not yet a scheduling order governing this case. This factor therefore favors a stay. *See TC Tech.*, No. 6:20-cv-899-ADA, Dkt. 44 at 5 (finding this factor favored a stay even where infringement contentions had been served).

C. A Stay Will Simplify the Issues in Question and Trial of the Case

"The most important factor bearing on whether to grant a stay in this case is the prospect that the [invalidity] proceeding will result in simplification of issues before the Court." *Intellectual Ventures II LLC v. BITCO Gen. Ins. Corp.*, No. 6:15-CV-59, 2016 WL 4394485, at *3 (E.D. Tex. May 12, 2016) (citation omitted). Cancellation of all the asserted claims would completely resolve this case, and cancellation of some asserted claims would reduce the number of claims remaining

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