Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC, Plaintiff, v. AOL, INC., Defendant.	Case No. 2:10-cv-01385-MJP **REPLY TO INTERVAL'S MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING MOTIONS TO STAY**
INTERVAL LICENSING LLC, Plaintiff, v. APPLE, INC., Defendant.	Case No. 2:11-cv-00708 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. EBAY, INC., Defendant.	Case No. 2:11-cv-00709 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. FACEBOOK, INC.,	Case No. 2:11-cv-00710 MJP Lead Case No. 2:10-cv-01385-MJP

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Defendant.	
INTERVAL LICENSING LLC, Plaintiff, v. GOOGLE, INC., Defendant.	Case No. 2:11-cv-00711 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. NETFLIX, INC., Defendant.	Case No. 2:11-cv-00712 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. OFFICE DEPOT INC., Defendant.	Case No. 2:11-cv-00713 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. OFFICEMAX INC., Defendant.	Case No. 2:11-cv-00714 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. STAPLES INC., Defendant.	Case No. 2:11-cv-00715 MJP Lead Case No. 2:10-cv-01385-MJP

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INTERVAL LICENSING LLC, Plaintiff, v. YAHOO! INC., Defendant.	Case No. 2:11-cv-00716 MJP Lead Case No. 2:10-cv-01385-MJP
INTERVAL LICENSING LLC, Plaintiff, v. YOUTUBE LLC, Defendant.	Case No. 2:11-cv-00717 MJP Lead Case No. 2:10-cv-01385-MJP

Interval respectfully files this Reply to its Motion for Reconsideration of the Court's Order Granting Defendants' Motions to Stay (Dkt. # 254; the "Motion"). Defendants filed a joint opposition to the Motion on July 5, 2011. (Dkt. # 256). Interval files this short Reply to respond to two of the arguments raised in defendants' opposition.

Defendants argue that "district courts continue to routinely grant stays pending reexaminations." Opposition at 4. But none of the three cases that defendants cite supports their position that a stay is appropriate here. In *LMT Mercer Group v. Maine Ornamental, LLC*, 2011 WL 2039064, *4 (D.N.J. May 24, 2011), the parties had not produced a single document, had not responded to discovery requests, and no trial date had been set. Similarly, the *Ohio Willow Wood Co. v. Alps South LLC* action had not proceeded past the initial stages of discovery—the parties had only recently exchanged infringement and validity contentions and no *Markman* hearing or trial date had been set. 2011 WL 2358649, *4 (S.D. Ohio June 9, 2011). Likewise, there was no trial date set in *Microsoft Corp. v. TiVo Inc.*, 2011 WL 1748428, *3, *6 (N.D. Cal. May 6, 2011), and the parties had exchanged a *total* of 834 documents. In addition, Microsoft had filed a

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complaint with the International Trade Commission in which it accused the same TiVo products and asserted patents that are related to the patents asserted in the district court. *Id.* at *2.

Unlike the cases cited by defendants, two recent cases denying motions to stay pending reexamination are on point. The Northern District of California recently denied Apple's request for a stay pending reexamination in *Affinity Labs of Texas, LLC v. Nike, Inc. and Apple Inc.*, 2011 WL 1833122 (N.D. Cal. May 13, 2011). In that action, Apple moved to stay the case at a time when the parties had "exchanged very little discovery," "[n]o trial date ha[d] been set, and the parties ha[d] not yet appeared for a case management conference." *Id.* at *1. But Judge Wilken denied the stay because she concluded that the "second factor—whether a stay would simplify the issues presented in this action—is neutral." *Id.* As Judge Wilken correctly noted, "it is unlikely that the reexamination proceeding will resolve all of the issues regarding the two patents in question in this lawsuit. Thus, the Court would be left to adjudicate the remaining issues." *Id.* In addition, the court noted that "[a] stay may prejudice Affinity's ability to enforce and license its patents, and could lead to a loss of evidence." *Id.* at 2. The court also pointed out that "Apple waited nine months after Affinity filed the present suit before requesting the reexaminations." *Id.* Here, the facts supporting a denial of the stay are even more compelling than in *Affinity Labs* because the parties have engaged in substantial discovery and the actions are set for trial in approximately one year.

Similarly, the District of Delaware recently denied a motion to stay in *Nokia Corp. v. Apple Inc.*, 2011 WL 2160904 (D. Del. June 1, 2011). Importantly, in that case Apple <u>opposed</u> the stay, relying on many of the same arguments that Interval has asserted here. Apple argued that "[a]s to the five re-examination requests that the Patent Office has granted, they are weak on the merits. Thus, the likelihood that re-examination will eliminate or narrow Apple's

infringement claims is very low and, at this point, speculative." Ex. 1 at p. 5 of 23 (Apple's Opposition to Motion for a Stay)[1]. Similar to Interval's argument here, Apple pointed out that "[t]he whole re-examination process can thus be expected to take at least two years and perhaps over six years. By that time, the district court trial and appeal should be long finished." *Id.* at 12 of 23. Apple also noted that "Nokia has sought ex parte re-examination, and therefore, even if Nokia loses completely on every argument before the Patent Office, it will no doubt seek to return to this Court and repeat the same losing arguments based on the same prior art." *Id.* at 14 of 23. The same is true here. Two of the four reexaminations are ex parte reexaminations, and not all of the defendants against whom the patents are asserted signed on to the two inter partes reexaminations. Finally, Apple argued that the reexamination would not necessarily simplify the case because the "Patent Office review on a re-examination is limited to a narrow scope of issues; specifically whether prior art or printed publications are invalidating. *See* 35 U.S.C. §§ 301, 302. Nokia can lose on those issues and still return to this Court and continue to litigate the validity of the patents under different theories and evidence." *Id.* at 15 of 23. Apple is absolutely correct, and that argument applies with equal weight here.

Defendants contend that "Interval's re-argument that certain defendants joined particular petitions [] misses the point." Opposition at 3. Not true. Despite multiple opportunities, defendants have made no attempt to explain why only certain defendants signed the requests for reexamination. As Interval made clear in its motion, the only explanation for such conduct is gamesmanship. Interval will vigorously oppose any attempt by defendants (1) to evade the results of the reexamination by arguing that a particular defendant did not sign a particular request

[1] When the District of Delaware denied the stay, the PTO had issued a notice of allowance of one patent and issued three rejections of the other patents. *See* Ex. 2 (Jan. 3, 2011 Letter to The Honorable Gregory M. Sleet.). Relevant portions of Exhibits 1 and 2 are highlighted in yellow.

or (2) to perpetuate the stay by having a party who did not originally sign the request for reexamination submit a new request for reexamination.

CONCLUSION

For the reasons set forth in its Motion, Interval respectfully requests that this Court reconsider its Order staying the actions pending reexamination, and order that they proceed to trial on a schedule consistent with the Court's revised scheduling order (Dkt. # 248).

Dated: July 6, 2011

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