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

CLOUDOFCHANGE, LLC, Plaintiff, v. CLOVER NETWORK, INC., Defendant.	Civil Action No. 6:22-CV-00634-ADA-DTG JURY TRIAL DEMANDED

OPPOSED MOTION TO STAY PENDING *INTER PARTES* REVIEW OF U.S. PATENT NOS. '640, '793, and '012

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EXHIBITS

Exhibit A	Declaration of J. Stephen Ravel
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Exhibit A-2	Institution Decision - ’012 Patent
Exhibit A-3	Institution Decision - ’793 Patent
Exhibit A-4	Clover’s Petition for IPR - ’640 Patent
Exhibit A-5	Clover’s Motion for Joinder - ’640 Patent
Exhibit A-6	Clover’s Petition for IPR - ’012 Patent
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Exhibit A-8	Clover’s Petition for IPR - ’793 Patent
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I. INTRODUCTION

Defendant Clover Network LLC seeks a temporary stay of this litigation pending the outcome of *inter partes* review ("IPR") proceedings before the Patent Trial and Appeal Board ("PTAB") that will materially impact—and potentially resolve—this case. Plaintiff CloudofChange, LLC alleges infringement of three patents—United States Patent Nos. 9,400,640 ("'640 Patent"), 10,083,012 ("'012 Patent"), and 11,226,793 ("'793 Patent") ("Asserted Patents"). Upon the petitions of non-party Lightspeed POS Inc. ("Lightspeed"), the PTAB has instituted IPR proceedings over the same three patents and claims at issue in this suit.[1] On November 21 and December 1, 2022, Clover filed substantively identical petitions for IPR as the Lightspeed petitions—each challenging the same Asserted Patents—and corresponding motions to join the Lightspeed IPR proceedings. Lightspeed does not oppose joinder.[2]

Because the PTAB's final decisions on the Lightspeed IPRs—to which Clover is seeking joinder—will either significantly narrow the issues of this case or dispose of it altogether, Clover respectfully seeks a stay pending the PTAB's decisions. This case is in its infancy, and, absent a brief stay, the parties and the Court will waste time and resources needlessly litigating claims or issues that will be addressed by the PTAB's impending rulings. Indeed, this Court has repeatedly and recently found a stay warranted in similar circumstances, including in *Xylon Licensing LLC v. Lone Star Nat'l Bancshares-Texas, Inc.*, No. 6:21-cv-00302-ADA, 2022 WL 2078030, at *1 (W.D. Tex. June 8, 2022):

[1] Plaintiff has a lawsuit against Lightspeed pending in this Court. *See CloudofChange, LLC v. Lightspeed POS Inc.*, 6:21-cv-01102-ADA.

[2] The PTAB has not yet ruled on Clover's petitions or motions for joinder. Clover will notify the Court when the PTAB issues its rulings.

- The "case remains in its infancy, having completed no claim construction and discovery to date" (*id*. at *3);
- "Neither the *Markman* hearing nor fact discovery have been completed" (*id*.);
- The PTAB's decision will be issued long before trial (*id*. at *3);
- "Little-to-no judicial resources have been expended on this case…" (*id.*);
- "[T]he PTAB has found a likelihood that [the asserted claims of the patent] will be invalidated" (*id.*); and
- "The PTAB's final decision could provide information relevant to claim construction" (*id*).

Xylon does not stand alone.[3] In accordance with these authorities, and because a stay will substantially conserve judicial and party resources, Clover respectfully requests that the Court issue a stay pending the outcome of the IPR proceedings concerning the Asserted Patents.

II. FACTUAL AND PROCEDURAL HISTORY

A. Plaintiff sued Clover on June 17, 2022.

Plaintiff filed this suit on June 17, 2022—*after* Lightspeed filed its petitions for *inter partes review* over the same Asserted Patents—alleging that four of Clover's point-of-sale ("POS") products infringe the Asserted Patents. Dkt. 1 ¶ 8. Plaintiff claims that it is the owner by assignment of the Asserted Patents, which are generally directed to a web-based POS-building system. *Id.* ¶¶ 2, 14. Plaintiff's complaint alleges that Clover has infringed "one or more claims, including at least Claim 1 of the of the '640 patent"; "one or more claims, including at least Claim 1 of the '012

[3] *See, e.g., Sonrai Memory Ltd. v. W. Digital Techs., Inc.*, No. 6:21-cv-01168-ADA, 2022 WL 3108818, at *4 (W.D. Tex. Aug. 4, 2022); *TC Tech. LLC v. T-Mobile USA, Inc.*, No. 6-20-cv-00899-ADA, 2021 WL 8083373 (W.D. Tex. Dec. 7, 2021); *Kirsch Research & Dev., LLC v. IKO Indus., Inc.*, No. 6:20-cv-00317-ADA, 2021 WL 4555610 (W.D. Tex. Oct. 5, 2021); *Kirsch Research & Dev., LLC v. Tarco Specialty Prods., Inc.*, No. 6:20-cv-00318-ADA, 2021 WL 4555804 (W.D. Tex. Oct. 4, 2021).

patent," and "one or more claims, including at least Claim 1 of the '793 Patent (collectively, the "Asserted Claims").

B. No significant case events have occurred or are set to occur in the near future.

No significant events have occurred in the litigation to date. Both Clover's motion to dismiss and its motion for transfer remain pending; the Court has not conducted any hearings; and the Court has not issued any substantive judicial decisions. Moreover, fact discovery does not open until April 11, 2023; the Markman Hearing in this case is not set to occur until April 10, 2023; and trial is well over a year away, currently set for April 22, 2024. Dkt. 17.

C. The PTAB instituted IPR of the Asserted Patents and Asserted Claims.

Significant relevant proceedings have, however, occurred at the PTAB. In a separate proceeding pending in this Court, Plaintiff sued Lightspeed for infringing the same claims and patents at issue in this suit. *See CloudofChange, LLC v. Lightspeed POS Inc*., 6:21-cv-01102-ADA. Lightspeed, thereafter, filed petitions for IPR challenging those Asserted Patents and Claims:

IPR No. (Patent)	Petition Filed	Institution Decision	Final Written Decision Deadline
IPR2022-00779 ('640 Patent)	3/30/22	10/20/22	10/20/23
IPR2022-00997 ('012 Patent)	5/5/22	11/7/22	11/7/23
IPR2022-01143 ('793 Patent)	6/13/22	11/10/22	11/10/23

See Exs. A-1, A-2, A-3.

Lightspeed's IPRs include multiple grounds of invalidity for the Asserted Patents and Claims:

IPR No. (Patent)	Asserted Claims	Institution Decision Final Written Decision Deadline

IPR2022-00779 ('640 Patent)	1, 14	Ground 1: §103 in view of *Manno* for claims 1-23 Ground 2: §103 in view of *Woycik* for claims 1-23 Ground 3: §103 in view of *Woycik* and *Manno* for claims 1-28 Ground 4: §103 in view of *Olson* and *Woycik* for claims 1-28
IPR2022-00997 ('012 Patent)	1-2 and 6-13	Ground 1: §103 in view of *Woycik* for claims 1-20 Ground 2: §103 in view of *Woycik* and *Olson* for claims 1-20 Ground 3: §103 in view of *Tengler* for claims 1-20
IPR2022-01143 ('793 Patent)	1-14, 9-11, 42, and 44	Ground 1: §103 in view of *Woycik* for claims 1-4, 7-28, 31-44 Ground 2: §103 in view of *Tengler* for claims 1-4, 7-28, 31-44

Id. The PTAB instituted review "for all challenged claims and on all grounds" in each Lightspeed IPR, and oral argument for all IPRs is set for August 2, 2023. Ex. A-1 at 24; Ex. A-2 at 15; Ex. A-3 at 18.

D. Clover filed petitions for IPR over the same Asserted Patents and Claims at issue in the Lightspeed IPR proceedings and has moved to join in those proceedings.

On November 21, 2022, Clover filed its petition for IPR of claims 1-28 of the '640 Patent. Ex. A-4. On December 1, 2022, Clover filed its petitions for IPR of claims 1-20 of the '012 Patent and claims 1-4, 7-28, and 31-44 of the '793 Patent. Exs. A-6, A-8. In conjunction, Clover has filed motions to join the Lightspeed IPR proceedings. Exs. A-5, A-7, A-9. In its motions for joinder, Clover represented that "it will not seek to alter any grounds upon which the Board institutes the Lightspeed IPR and will seek no change in the existing schedule for that proceeding." Ex. A-5 at 1; Ex. A-7 at 1; Ex. A-9 at 1. Lightspeed does not oppose joinder. *See id.* at Ex. A-5 at 5; Ex. A-7 at 5; Ex. A-9 at 5. If Clover's motions are granted, therefore, Clover's involvement will not delay

the Lightspeed IPR proceedings, and those proceedings will continue apace, culminating in PTAB decisions no later than October 20, November 7, and November 10, 2023, respectively.

Clover now seeks a stay of this litigation pending the PTAB's decisions.

III. ARGUMENT

A. Legal Standard

This Court "has the inherent power to control its own docket, including the power to stay proceedings before it." *Xylon Licensing LLC v. Lone Star Nat'l Bancshares-Texas, Inc.*, No. 6:21-cv-00302-ADA, 2022 WL 2078030, at *1 (W.D. Tex. June 8, 2022) (granting stay pending PTAB's IPR); *see also Murata Mach. USA v. Daifuku Co., Ltd.*, 830 F.3d 1357, 1361 (Fed. Cir. 2016); *Multimedia Content Mgmt. LLC v. Dish Network L.L.C.*, No. 6:18-cv-00207-ADA, 2019 WL 11706231, at *1 (W.D. Tex. May 30, 2019) ("the question whether to stay proceedings pending *inter partes* review of a patent is a matter committed to the district court's discretion"). When, as here, "the outcome of a PTO proceeding is likely to assist the court in determining patent validity or eliminate the need to try infringement issues," this Court has held that a "stay is particularly justified." *Xylon Licensing*, 2022 WL 2078030, at *1 (quoting *NFC Techs. LLC v. HTC Am., Inc.*, No. 2:13-cv-1058, 2015 WL 1069111, at *1 (E.D. Tex. Mar. 11, 2015)).

District courts generally consider three factors to determine whether a stay is appropriate: "(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. Tarco Specialty Prods., Inc.*, No. 6:20-cv-00318-ADA, 2021 WL 4555804, at *2 (W.D. Tex. Oct. 4, 2021) (quoting *NFC Techs.*, 2015 WL 1069111, at *2). "Essentially, courts determine whether the benefits of a stay outweigh the inherent costs based

on these factors." *Tarco Specialty Prods.*, 2021 WL 4555804, at *2 (quoting *EchoStar Techs. Corp. v. TiVo, Inc.*, No. 5:05-cv-81, 2006 WL 2501494, at *1 (E.D. Tex. July 14, 2006)). Patent Office proceedings that are directed to all asserted claims and therefore can "dispose of the entire litigation" present "the ultimate simplification of issues." *See VirtualAgility, Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1318 (Fed. Cir. 2014).

B. All of the Relevant Factors Support Granting a Stay.

All of the relevant stay factors overwhelmingly support a stay of this case. A stay will not unduly prejudice Plaintiff, which has no weighty interest in speeding to trial on its money damages claim and which can only recover if its claims are valid. Second, this case is in its infancy, and the PTAB is set to issue final decisions on the validity of the Asserted Claims and Patents by October 20, November 7, and November 10, 2023, respectively—well before the April 2024 trial setting. Because this case, the instituted Lightspeed IPR proceedings (in which Clover has moved to join), and the pending Clover IPR proceedings completely overlap, the PTAB's decisions will inevitably simplify this case, if not eliminate it. A stay is therefore warranted to prevent a waste of party and judicial resources spent on issues that the PTAB's forthcoming decisions will resolve.

1. A Stay Will Not Prejudice Plaintiff.

Granting the stay will benefit Plaintiff, not prejudice it. Plaintiff does not compete with Clover and makes no products. While the "Prayer" in Plaintiff's complaint seeks injunctive relief, Plaintiff has not pursued that relief in this case or in prior proceedings asserting infringement of the same patents. *See* Dkt. 1 at 81; *NCR Corp.*, No. 6-19-cv-00513. Plaintiff presumably has not pursued that relief because it makes no products, making injunctive relief inappropriate. Because any recovery by Plaintiff is thus limited to monetary damages, the only theoretical prejudice Plaintiff may suffer is a delay of a damages award.

It is well settled, however, that such possible delay alone does not establish undue prejudice as a matter of law. *See, e.g.*, *VirtualAgility, Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1318 (Fed. Cir. 2014). This Court repeatedly has explained that "[p]arty interest is diminished where only monetary recovery is available." *Xylon Licensing*, 2022 WL 2078030, at *2; *Tarco Specialty Prods.*, 2021 WL 4555804, at *2 ("[t]he weight of Plaintiff's interest in timely enforcement is diminished here where a stay would merely delay Plaintiff's potential monetary recovery"). Even then, such delay is prejudicial *only if* the PTAB's decisions do not dispose of Plaintiff's claims. Regardless, in the unlikely event that a stay delays an award of damages, that delay is not significant, given that the PTAB's decisions will be issued no later than October 20, November 7, and November 10, 2023—well before the April 2024 trial in this case.

Regardless, Plaintiff's own actions establish that a temporary delay will not be undue or prejudicial. Plaintiff knew that IPR proceedings were potentially imminent when it filed this lawsuit, as it sued after Lightspeed filed its three IPR petitions on the same Asserted Patents and Claims. *See TC Tech. LLC v. T-Mobile USA, Inc*., No. 6-20-cv-00899-ADA, 2021 WL 8083373 (W.D. Tex. Dec. 7, 2021). Moreover, Plaintiff's complaint alleges that it sent Clover a notice letter generally referencing Clover's portfolio of products and the '640 Patent over four years ago. Dkt. 1 at ¶ 23 & Ex. 4. Yet Plaintiff waited years to sue Clover, and it filed this litigation only after it sued NCR Corporation for infringement. Given Plaintiff's own significant delays, the minor delay resulting from a stay pending the PTAB's decisions is trivial. Because a stay will not unduly prejudice Plaintiff, the first relevant factor favors granting this Motion.

2. The Early Stage of This Case Favors Granting A Stay.

The second factor also favors a stay because this case is in its infancy. *See Stragent LLC v. BMW of N. Am. LLC*, No. 6:16-cv-446, 2017 WL 3709083, at *3 (E.D. Tex. July 11, 2017)

(explaining that a stay is more likely to be granted when sought early in a case because "the majority of the expenses that the parties will incur are still in the future"). As detailed above, Clover has not yet filed an answer to the complaint, and trial is not set to begin until April 2024. *See* Dkt. 17. Fact discovery has not even opened, and the deadlines for preliminary invalidity contentions, the exchange of claim terms and constructions, and the disclosure of extrinsic evidence have not yet passed. *Id*. In other words, there has been no "protracted and expansive discovery" to date. *Sonrai Memory Ltd. v. W. Digital Techs., Inc.*, No. 6:21-cv-01168-ADA, 2022 WL 3108818, at *3 (W.D. Tex. Aug. 4, 2022) (explaining that this factor weighs against a stay if "protracted and expansive discovery has already occurred, or the court has expended significant resources") (quoting *CANVS Corp. v. U.S.*, 118 Fed. Cl. 587, 595 (2014)).

The early stage of this case also means that the parties have not yet asked the Court to expend substantial resources in analyzing the issues or deciding disputes—an important factor that justifies a stay. *See Tarco Specialty Prods.*, 2021 WL 4555804, at *2 ("If the court has expended significant resources, then courts have found that this factor weighs against a stay." (internal quotations omitted)); *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1031-32 (C.D. Cal. 2013). Here, no hearings have been held. Indeed, the only substantive filings thus far have been Clover's Motion to Dismiss, which this Court has not yet ruled on, and Clover's Motion to Transfer, for which briefing is incomplete. *See* Dkt. 9, 18. Because the parties and the Court have not yet expended significant resources on this case, the second factor significantly favors a stay. *See Xylon Licensing*, 2022 WL 2078030, at *2.

3. The PTAB's Decisions Will Either Resolve this Case or Significantly Narrow the Issues Involved.

The third and final factor also favors a stay because the PTAB's final decisions are likely to resolve or, at minimum, significantly narrow the parties' disputes. In both *Xylon Licensing* and

Sonrai Memory, this Court emphasized that the potential of the *inter partes* review to simplify the issues is the "most important factor bearing on whether to grant a stay." *Xylon Licensing*, 2022 WL 2078030, at *3 (quoting *NFC Tech.*, 2015 WL 1069111, at *4); *Sonrai Memory*, 2022 WL 3108818, at *3 ("This is the most important factor in the stay analysis." (internal quotation marks omitted)). "Under this factor, the Court will typically weigh: the scope of estoppel the movant is bound by; and the strength of the relevant IPR petition in the context of the asserted claims. As a general matter, the PTAB's suggestion that an IPR petition contains strong grounds for invalidating all the asserted claims, combined with the movant's acceptance of a broad estoppel, suggests that a stay would simplify issues." *Sonrai Memory*, 2022 WL 3108818, at *3.

Plaintiff's complaint raises the same Asserted Patents and Claims that are at issue in the Lightspeed IPRs, which Clover is moving to join, and the Clover IPRs. *Compare* Dkt. 1, *with* Exs. A-1, A-2, A-3, A-4, A-6, A-7. Thus, resolution of the pending IPR proceedings will inevitably simplify the issues before this Court. The Lightspeed/Clover petitions for IPR raise multiple grounds of invalidity for each Asserted Claim, and—in the Lightspeed IPR proceedings—the PTAB instituted on multiple distinct grounds, finding a reasonable likelihood that the Asserted Claims of the Asserted Patents are unpatentable. *See* A-1, A-2, A-3. As this Court has concluded before, there is thus a "good chance" that, in less than a year, "the PTAB will find the asserted claims unpatentable" in its final written decisions. *Sonrai Memory*, 2022 WL 3108818, at *5. If it does so, Plaintiff's claims will be disposed of entirely, and even a partial invalidation of the Asserted Claims will narrow the claims left to litigate in this case. Either way, this Court has held that such circumstances favor a stay. *Id.*

Conversely, in the unlikely event that all of the Asserted Claims survive the IPRs—and assuming the PTAB joins the Clover/Lightspeed IPRs—Clover, as a petitioner, will be subject to

the full scope of estoppel under 35 U.S.C. § 315(e). If the proceedings are not joined, Clover agrees to remain estopped under § 315(e), as if it were a petitioner in the Lightspeed IPRs. Ex. A. This is a "fairly broad estoppel" that this Court has repeatedly ruled justifies a stay. *Sonrai Memory*, 2022 WL 3108818, at *3; *see Kirsch Research & Dev., LLC v. IKO Indus., Inc.*, No. 6:20-cv-00317-ADA, 2021 WL 4555610 (W.D. Tex. Oct. 5, 2021) (same). Due to the impact of estoppel, the IPR proceedings will necessarily and substantially simplify the issues before this Court.

Granting a stay will therefore prevent wasteful, continued litigation of claims and issues that will be resolved by the PTAB's decisions. *See Kirsch*, 2021 WL 4555610, at *3 (granting stay pending resolution of the related ITC proceeding and/or IPR of the patent-in-suit where "the simplification-of-issues factor overwhelms the other two factors"); *accord Tarco Specialty Prods.*, 2021 WL 4555804, at *2. The third and most important factor therefore also favors a stay of this litigation.

IV. CONCLUSION

This case is in its infancy, and a stay pending the PTAB's decisions will not prejudice Plaintiff. Instead, the PTAB's decisions will significantly impact, if not resolve, the issues left to litigate in this Court. Because a stay pending the PTAB's decisions will conserve party and judicial resources, the Court should grant this Motion.

Dated: December 5, 2022

Respectfully submitted,

/s/ J. Stephen Ravel

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CERTIFICATE OF CONFERENCE

I certify that I contacted counsel for Plaintiff CloudofChange, LLC and asked whether Plaintiff opposes this Motion. Plaintiff's counsel has acknowledged receipt of the request but has not responded. Accordingly, the issue is presented to the Court for resolution.

/s/ J. Stephen Ravel
J. Stephen Ravel

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record are being served with a copy of the foregoing document via the Court's CM/ECF system on December 5, 2022.

/s/ J. Stephen Ravel
J. Stephen Ravel