

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAVIN CROSSBOWS, LLC,	)	CASE NO. 5:23-cv-598
	)	
Plaintiff,	)	
	)	JUDGE SARA LIOI
vs.	)	
	)	
HUNTER'S MANUFACTURING	)	MAGISTRATE JUDGE AMANDA M. KNAPP
COMPANY, INC. D/B/A TENPOINT	)	
CROSSBOW TECHNOLOGIES,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS
MOTION TO STAY CASE
AND
MOTION TO POSTPONE CASE MANAGEMENT CONFERENCE

INTRODUCTION

Defendant Hunter’s Manufacturing Company, Inc. d/b/a TenPoint Crossbow Technologies (“TenPoint”) petitioned the U.S. Patent and Trademark Office’s (“USPTO”) Patent Trial and Appeal Board (“Board”) for an *inter partes* review (“IPR”) of what plaintiff Ravin Crossbows, LLC (“Ravin”) itself claims is the alleged innovation responsible for its “barrier-breaking” and “industry-redefining” crossbows. Because the USPTO’s expert views on this core technology claimed by each of Ravin’s six patents-in-suit would assuredly simplify the issues in this case and concomitantly reduce the burdens of litigation on the Court and the parties – regardless of who prevails – without any undue prejudice to Ravin, TenPoint moved to stay this case pending resolution of the requested IPR. (“Mot.,” Doc. No. 86.) Ravin apparently is fine with incurring legal fees in litigating the same issues on two parallel fronts, because it opposed a stay. (“Opp’n,” Doc. No. 89.) But because Ravin’s arguments fall far short of rebutting the clear case for a stay – supported by each factor – the stay motion should be granted.

I. APPLICABLE LAW

TenPoint’s Motion listed the factors that courts often use in deciding whether to grant a stay: (1) whether a stay would unduly prejudice or tactically disadvantage the non-movant, (2) whether a stay will simplify the issues in question, (3) whether discovery is complete and whether a trial date has been set, and (4) whether a stay would potentially reduce the burden of litigation for the parties and the court. (Mot., Doc. No. 86 at 5.¹) Ravin quibbles with including this last factor. (See Opp’n, Doc. No. 89 at 5.) But the Federal Circuit has explained, in response to a similar complaint, that in deciding whether to grant a stay, a court may consider factors beyond

¹ Page citations to the record in this case (including exhibits to this Reply) are to the page numbers in the ECF header. (See Initial Standing Order, Doc. No. 81 at 4.)

just the first three listed above, and that reduction in litigation burdens “is one such consideration that district courts may rightfully choose to weigh.” *Murata Mach. USA v. Daifuku Co.* 830 F.3d 1357, 1362 (Fed. Cir. 2016). Even Ravin’s cited cases allow as much. *See Lincoln Elec. Co. v. Seabery Soluciones, S.L.*, No. 1:15 CV 1575, 2016 U.S. Dist. LEXIS 184317, at *7 (N.D. Ohio June 17, 2016) (“However, the court is not restricted to considering only these factors and must base its decision upon the totality of the circumstances.”); *Procter & Gamble Co. v. Team Techs., Inc.*, No. 1:12-cv-552, 2013 U.S. Dist. LEXIS 128949, at *5 (S.D. Ohio Sep. 10, 2013) (same). Moreover, this Court has considered “whether the burden of litigation will be reduced for both the parties and the court” in evaluating stay requests, as cited in TenPoint’s Motion. (Doc. No. 86 at 5 (citing *Cybergenetics Corp. v. Inst. of Envtl. Sci. & Research*, No. 5:19-CV-1197, 2020 U.S. Dist. LEXIS 20305, at *5 (N.D. Ohio Jan. 27, 2020)).) Because TenPoint’s Motion correctly set forth the applicable factors, TenPoint will reply to Ravin’s Opposition using that framework.

II. DISCUSSION

A. This Case Should Be Stayed at least Until the Board’s Institution Decision.

TenPoint explained that the Board’s decision whether to institute the requested IPR is due no later than July 11, 2023. (Mot., Doc. No. 86 at 6.) Other than stray remarks that institution is speculative (*see* Opp’n, Doc. No. 89 at 2-3), Ravin does not offer any specific reasons why this case should not be stayed at least until the institution decision. Therefore, before proceeding with the rest of the case and all of its issues (discussed further below), it makes sense to wait just a little over one month until the Board’s institution decision, which will reinforce the appropriateness of a stay during the rest of the IPR. *See Automated Packaging Sys. v. Free-Flow Packaging Int’l*, No. 5:14CV2022, 2016 U.S. Dist. LEXIS 194647, at *9 (N.D. Ohio Apr. 15, 2016) (staying case even before institution of IPR).

B. No Trial Date Has Been Set, and Discovery Has Not Closed.

In discussing the stay standard, Ravin recites this factor as “whether discovery is complete and whether a trial date has been set.” (*Id.* at 5.) But when it comes down to applying this factor, Ravin broadens the inquiry to “[t]he stage of litigation and the parties’ investment to date.” (*Id.* at 14.) This shift in focus is understandable: because no trial date has been set and discovery has not closed,² Ravin must find its arguments on this factor elsewhere.

Thus Ravin focuses on the mere passage of time since the case was filed. (*Id.* at 15.) But apparently because of its workload, the Nevada Court took over a year to decide the transfer motion that TenPoint filed mere days after being served with process. (*See* Mot., Doc. No. 86 at 2, 7.) And while that Court was considering the transfer motion, which had to take top priority, it simply could not address any substantive portions of the case (*e.g.*, claim construction, discovery disputes), as TenPoint previously explained. (*See* Mot. to Stay Claim Construction, Doc. No. 48 at 3 (citing, *inter alia*, *In re Apple Inc.*, 979 F.3d 1332, 1337-38 (Fed. Cir. 2020); *In re SK Hynix Inc.*, 835 F. App’x 600, 601 (Fed. Cir. 2021); *In re Google Inc.*, No. 2015-138, 2015 WL 5294800, at *1 (Fed. Cir. July 16, 2015)).) Thus, while *time* may have passed, only a limited number of *activities* have been performed, with many more still to be done.

In preparation for the previously scheduled Case Management Conference (“CMC”), the parties were exchanging drafts and revisions of their Joint Planning Report, which discusses the

² Ravin mentions “the May 23, 2023 fact discovery deadline” previously set by the Nevada Court. (Opp’n, Doc. No. 89 at 15.) But TenPoint explained that the Nevada Court’s Scheduling Order expressly stated in its opening paragraph that it is entered “until that motion [to transfer] is decided” and by its own terms no longer applies in light of the transfer. (Mot., Doc. No. 86 at 3, 7.) Even Ravin does not really believe that the Nevada Court’s Scheduling Order still governs. For example, Ravin recognizes that the prior Scheduling Order set April 24, 2023, as the deadline by which opening expert reports were to be exchanged. (*See* Opp’n, Doc. No. 89 at 15.) And Ravin even states that it “was prepared to timely serve” them on that date. (*Id.*) Yet it did *not* serve them, evidencing Ravin’s belief that the prior Scheduling Order no longer governs.

activities that each party believes will still need to be completed. The latest draft of this Report is attached herein as Exhibit A.³ As can be seen therefrom, there is a lot of work remaining. (*See* Ex. A at 6-8, 10-11, 13-21.)

As TenPoint explained, the parties have exchanged their initial patent contentions and conducted some discovery. (Mot., Doc. No. 86 at 7.) But more discovery still needs to be completed. Both parties still have depositions to take. (Ex. A at 15.) Apparently Ravin still has a considerable amount of email to be requested and produced. (*See* Mot., Doc. No. 86 at 8-9; Opp'n, Doc. No. 89 at 15-16.) And the parties still need to resolve a dispute regarding Ravin's deficient discovery responses.⁴ (*See* Ex. A at 15.)

Ravin does not understand how the claim construction order can impact fact witness depositions. (Opp'n, Doc. No. 89 at 16 n.3.) The answer is straightforward. Should the construction be broader, more prior art will be encompassed by the claims, opening up more third parties and Ravin itself regarding information about such prior art. Conversely, if the construction is narrower, less prior art will be encompassed by the claims, thus eliminating the need to depose third parties on such no-longer-encompassed prior art, and reducing the scope of questioning for Ravin on it. The same is true for infringement: should less of TenPoint's bows be encompassed by the claims, TenPoint will need less information from Ravin about *its* bows for which it allegedly lost profits because of TenPoint. (*See* Compl., Doc. No. 1 at 29 (seeking lost profits).)

³ The CMC was previously scheduled for May 25, with the Joint Planning Report due by May 18. (CMC Scheduling Order, Doc. No. 84 at 1, 4.) This latest draft of the report was exchanged on May 18. While this draft was subject to further revision before filing, the bulk was unlikely to change due to the filing deadline being that day.

⁴ The parties held a meet-and-confer back in March 2023, and Ravin subsequently supplemented some interrogatory answers and continued to produce documents on a rolling basis; however, earlier this month, Ravin informed TenPoint that it has substantially completed the requested document production, thus ripening the parties' discovery dispute.

As far as claim construction, Ravin's failure to abide by the Nevada Court's rules, coupled with its assertion of over one hundred claims, resulted in 43 disputed terms that need to be construed – an unwieldy amount that will require a hearing lasting several days. (*See* Mot., Doc. No. 86 at 7, 13; Ex. A at 6, 8.) Despite Ravin's arguments to the contrary (*see* Opp'n, Doc. No. 89 at 16), it does not get to unilaterally choose which disputed terms will be construed and which will not. Ravin cannot simultaneously disagree with TenPoint's proposed construction for a claim term (showing that the parties dispute its scope or meaning) and refuse to engage in the claim construction process for that term. "When the parties present a fundamental dispute regarding the scope of a claim term, it is the court's duty to resolve it," *i.e.*, through claim construction. *Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1318 (Fed. Cir. 2016). To make claim construction more manageable, Ravin should reduce the number of asserted claims (which would inherently reduce the number of disputed terms), after which the parties would redo the claim construction briefing (with Ravin actually complying with the Local Patent Rules this time), and then the case would be ready for a claim construction hearing. (*See id.*)

In addition to the above issues (on which Ravin focuses), the parties will still need to conduct expert discovery (reports and depositions), prepare and serve final patent contentions after the claim construction order issues, conduct any advice-of-counsel discovery, brief dispositive motions, and prepare for and conduct trial, aside from dealing with any other issues that come up throughout the case. (*See* Mot., Doc. No. 86 at 53; Ex. A at 14, 16-17.) There is unquestionably more work ahead than behind, which favors a stay.

C. A Stay Will Result in Simplification of the Issues.

The Motion explained how the IPR is focused on what Ravin itself repeatedly said is the heart of the asserted patents, the result of which will resolve the bulk of the asserted claims. (*See*

Doc. No. 86 at 3-4, 9-12.) Seeing the writing on the wall, Ravin backpedals and now calls the “HeliCoil technology” merely “marketing terms.” (*See* Opp’n, Doc. No. 89 at 4.) Ravin also repeatedly argues that, as a formal matter, only one claim is challenged and will be reviewed in the IPR. (*See id.* at 2-4, 11-14.) But this is not new information. TenPoint’s Motion explained that, formally, the IPR Petition challenges one claim, but that this claim goes to the core of what Ravin itself alleged is the innovation captured by the patents-in-suit (all of which are related in the same patent family). Not only are the helical journals encompassed by, and central to, most of the asserted claims, thus able to benefit from the USPTO’s expert views, but issue preclusion will take care of the bulk of the claims because they are substantially the same invention and not patentably distinct. (*See* Mot., Doc. No. 86 at 4, 9-12.)⁵

Ravin relegates its discussion of issue preclusion to a single paragraph, merely reciting the legal standard (including the well-known proposition that it is the subsequent tribunal that determines the preclusive effect of the prior adjudication) and simply asserting that there is no support that the claim differences do not materially alter the question of invalidity, despite TenPoint’s specific cataloging of claims from each patent and citation to their prosecution history

⁵ This is why Ravin’s chart (colored in blood-red for effect, no doubt) is inapposite. (*See* Opp’n, Doc. No. 89 at 12.) TenPoint’s initial invalidity contentions did not present invalidity arguments based on issue preclusion because a decision giving rise to such effect does not yet exist. As for other prior art, L. P. R. 3.10(a) treats the initial contentions like interrogatory answers that “may be amended or supplemented without leave of court until the Final Contentions are due.” *Cf.* L. P. R. 3.10(e) (setting standard to amend final contentions). The parties agreed to virtually the same provision when the case was still in Nevada, which the Nevada Court did not countermand. (*See* Disputed Disc. Plan, Doc. No. 34 at 6; Scheduling Order, Doc. No. 36 at 3 (allowing parties to modify the discovery plan and scheduling order by stipulation).) As TenPoint explained in its initial contentions, Ravin asserted over one hundred claims from six patents with voluminous prosecution histories. Despite TenPoint’s request (*see* Disputed Disc. Plan, Doc. No. 34 at 6, 13), the Nevada Court declined to extend TenPoint’s contention deadlines from those for a single-patent case (even though six were asserted here), perhaps in reliance on the parties’ agreement regarding contention amendments (*see id.* at 6). Thus, TenPoint intends to supplement its contentions (if this Motion is denied), as previously stated.

(*see id.* at 9-10). (*See* Opp’n, Doc. No. 89 at 14.) None of this undermines TenPoint’s argument. The burden will be on *Ravin* to explain how the claim differences are patentably significant. (*See* Mot., Doc. No. 86 at 11.) And *Ravin* will struggle on this point.

The Federal Circuit has explained that if two related patents are tied by a terminal disclaimer (*i.e.*, if the patentee submits a terminal disclaimer in one patent over another patent), then, while not conclusive, the terminal disclaimer “is a strong clue” that both the patent examiner and, by concession, the patentee thought the claims between the two patents were not patentably distinct. *Indivior Inc. v. Dr. Reddy’s Labs.*, 752 F. App’x 1024, 1034-35 (Fed. Cir. 2018) (citing *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1168 (Fed. Cir. 2018)). This is because “[w]e do not lightly presume that patent applicants forfeit the right to alienate their patents, and in certain cases years of exclusivity, as a mere procedural expedient”; rather, terminal disclaimers are typically filed to overcome obviousness-type double-patenting rejections. *SimpleAir*, 884 F.3d at 1168. In prosecution, every one of the patents-in-suit after the first U.S. Patent 9,354,015 (the “’015 Patent,” which TenPoint challenged in its IPR Petition) received an obviousness-type double-patenting rejection over one or more patents-in-suit (*i.e.*, that one patent was obvious over the other), and *Ravin* submitted a terminal disclaimer in *each* case to overcome that rejection. (*See* U.S. Patent 9,494,379 (the “’379 Patent”) Prosecution History, excerpts attached herein as Exhibit B, at 3-4, 6-7, 9, 11 (terminal disclaimer over ‘015 Patent); U.S. Patent 9,897,936 (the “’936 Patent”) Prosecution History, excerpts attached herein as Exhibit C, at 3, 5-6, 9 (terminal disclaimer over ‘015 Patent and ‘379 Patent); U.S. Patent 10,254,073 (the “’073 Patent”) Prosecution History, excerpts attached herein as Exhibit D, at 2, 4, 6-7, 10 (terminal disclaimer over ‘015 Patent, ‘379 Patent, and ‘936 Patent); U.S. Patent 10,712,118 (the “’118 Patent”) Prosecution History, excerpts attached herein as Exhibit E, at 3-6, 9, 11 (terminal disclaimer over

‘015 Patent, ‘379 Patent, ‘936 Patent, and ‘073 Patent); U.S. Patent 11,085,728 Prosecution History, excerpts attached herein as Exhibit F, at 4, 6-8, 14-18, 20-21, 23, 25 (terminal disclaimer over ‘379 Patent, ‘936 Patent, ‘073 Patent, and ‘118 Patent).) Ravin will now be hard-pressed to explain how exactly the claims of the other patents-in-suit materially alter the question of patentability in a patentably significant manner.

Ravin also tries to distinguish based on the Board and the Court “apply[ing] different evidentiary standards,” calling it “a critical fact.” (*See* Opp’n, Doc. No. 89 at 13.) However, this does not help Ravin. The Supreme Court has confirmed that the standards differ but explained that this is by “Congress’ regulatory design.” *Cuozzo Speed Techs. v. Lee*, 579 U.S. 261, 279, 282-83 (2016). And the Federal Circuit has applied issue preclusion in just such a situation – from a Board’s decision in an IPR (using the preponderance standard) to a suit in a district court (which uses the clear-and-convincing-evidence standard) – over the very same argument by the dissent that different burdens of proof apply. *Compare XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1294 (Fed. Cir. 2018); *with id.* at 1300 & n.1 (Newman, J., dissenting); *see also Intellectual Ventures I, LLC v. Lenovo Grp.*, 370 F. Supp. 3d 251, 256-57 (D. Mass. 2019) (noting same). Additionally, Ravin’s cited *Malibu Boats* decision issued in 2015 (*see* Opp’n, Doc. No. 89 at 14), when the Board used a different claim construction standard than in district courts; that is no longer the case. *See Polaris Innovations Ltd. v. Brent*, 48 F.4th 1365, 1373 n.3 (Fed. Cir. 2022).

Ravin cites cases that have criticized IPRs that reviewed less than all of the asserted claims. (*See* Opp’n, Doc. No. 89 at 11.) However, the Federal Circuit rejected “a categorical rule that if any asserted claims are not also challenged in the [Board] proceeding, this factor disfavors a stay.” *Versata Software, Inc. v. Callidus Software, Inc.*, 771 F.3d 1368, 1371 (Fed. Cir. 2014) *vacated as moot*, 780 F.3d 1134 (Fed. Cir. 2015). “Certainly this simplification factor weighs more strongly

in favor of a stay when *all* of the litigated claims are undergoing [Board] review. . . . But there can still be a simplification of the issues when only some, but not all, of the claims asserted in litigation are challenged” before the Board.” *Id.* at 1372; *see also Transtex LLC v. Wabco Holdings*, No. 2:17-cv-12793, 2018 U.S. Dist. LEXIS 204810, at *4 (E.D. Mich. Dec. 4, 2018) (finding this factor to favor a stay even though the IPR does not cover all the patents in suit).

That leaves one final point to address under this factor. Ravin points to its Preliminary Response as explaining why the Board should not institute the IPR. (*See* Opp’n, Doc. No. 89 at 3.) But then, apparently aware of the high rate of institution (*see* Mot., Doc. No. 86 at 6), Ravin quickly moves on and argues that “in IPRs that go to a final written decision, the Board has found that only 29% of challenged claims are unpatentable.” (*See* Opp’n, Doc. No. 89 at 3.) First, as far as institution, the substantive arguments in TenPoint’s Petition are supported by an expert declaration, while Ravin’s Preliminary Response relied just on attorney argument. (*Compare* TenPoint’s Petition, Doc. No. 86-1 (citing to its Ex. 1016 throughout its §§ V.D-VI) *with* Ravin’s Prelim. Resp., Doc. No. 88-1.) That coupled with the historically high rate of institution is likely why Ravin does not really argue that institution will be denied (the best is a half-hearted assertion that institution is speculative, *see* Opp’n, Doc. No. 89 at 3).

Second, Ravin’s “29%” statistic shows either an attempt to deceive the Court or a fundamental misunderstanding of the IPR process or basic arithmetic. That statistic, from page 13 of the Opposition’s Exhibit D (Doc. No. 89-4 at 13), is calculated by dividing the total number of claims found to be unpatentable (3,256) from 11,335 claims. But that denominator is best explained by looking at the following page (14) of Exhibit D. That denominator (11,335) represents the total number of claims *challenged* in an IPR petition during fiscal year 2023 so far. From that total number, 206 claims were unilaterally disclaimed by the patentee before a decision

on institution, and 1,777 additional claims never reached the institution decision (due to settlement or dismissal). Thus, from the remaining 9,352 claims that reached the institution decision, 6,709 claims were instituted, reflecting a 72% institution rate. From the 6,709 claims for which review was instituted, 371 claims were disclaimed by the patentee before reaching a final written decision (“FWD”), and 2,041 additional claims never reached the FWD (e.g., due to settlement). That leaves 4,297 claims that reached the FWD. Of these, 3,256 claims – a whopping 76% – were found to be unpatentable and only 1,041 claims (a mere 24%) were upheld as patentable. Thus, not only is Ravin flat wrong in its characterization of the 29% statistic, but the statistics actually *underscore* just how likely the challenged claim is to be found unpatentable, all of which supports granting a stay.

D. A Stay Will Reduce the Burden of Litigation for Both Parties and the Court.

TenPoint’s Motion explained the considerable litigation activity remaining in this case. (*See* Mot., Doc. No. 86 at 13.) The discussion above in § III.B further discussed this activity (including continuing and finishing fact discovery, conducting claim construction, conducting expert discovery, preparing final patent contentions, conducting any advice-of-counsel discovery, briefing dispositive motions, and preparing for and conducting trial). The parties are also in disagreement on a number of issues, all of which will need the Court’s involvement to resolve. (*See* Ex. A at 3, 6-8, 10-21 (*e.g.*, when Ravin should reduce the number of asserted claims, whether claim construction briefing should be reworked, what is the proper construction of the many disputed claim terms, what the post-transfer case schedule should be, and whether TenPoint may add a counterclaim for inequitable conduct, in addition to resolving discovery disputes, disputes over a replacement protective order and an e-discovery order, dispositive motions, and any other disputes that will inevitably arise, and conducting trial).) The list of already-ripe actions combined

with the soon-to-come actions represents a considerable litigation burden for the Court to work through, not even mentioning the parties.

Yet staying the case will redirect the litigation activity (in a much reduced form due to the nature of the IPR) to the Board, providing additional time and opportunity for the parties to possibly settle the case and thus eliminate the above-discussed burden altogether. If the IPR does not settle, the Board will likely confirm TenPoint's position that Ravin's HeliCoil technology is not patentable, which would considerably simplify the issues and scope as explained in the preceding section, correspondingly reducing the remaining litigation burden. And in the unlikely event that the claim survives the IPR, the Court will be able to take advantage of the Board's work in developing its views on the relevant technology and prior art. Regardless of who wins the IPR, the result will certainly change the relevant settlement calculus, thus facilitating any Alternative Dispute Resolution methods. *See Evolutionary Intelligence LLC v. Yelp Inc.*, No. C-13-03587 DMR, 2013 U.S. Dist. LEXIS 178547, at *18-19 (N.D. Cal. Dec. 18, 2013).

Ravin does not mind litigating patentability on two fronts in parallel. (Opp'n, Doc. No. 89 at 9.) But the fact that Ravin does not want to take advantage of the reduction in litigation burden (and wants to impose the burden on the Court and TenPoint) is separate from the fact that the litigation burden will indeed be reduced should a stay be granted such that patentability need not be litigated on two fronts in parallel. In summary, this factor also favors staying the case.

E. A Stay Will Not Unduly Prejudice or Disadvantage Ravin.

In its Opposition, Ravin hangs its hat on the fact that the parties are competitors. (*See* Doc. No. 89 at 2, 5-9.) Yet "this Court has granted stays in patent infringement cases, even when the parties are direct competitors." *Automated Packaging*, 2016 U.S. Dist. LEXIS 194647, at *13; *see also EO Mfg. v. Ridge Tool Co.*, No. 1:08 CV 1528, 2009 U.S. Dist. LEXIS 147086, at *5 (N.D.

Ohio May 18, 2009) (concern of competitor about loss of patent exclusivity is not unduly prejudicial). There is no per-se rule that just being direct competitors is enough to defeat a stay. Furthermore, the fact that Ravin and TenPoint are participants in a multi-competitor market (*see* Opp’n Ex. C, Doc. No. 89-3 at 6) reduces the risk of loss of market value. *See Synkloud Techs. v. Cartessa Aesthetics, LLC*, No. 21-CV-4423 (GRB) (JMW), 2022 U.S. Dist. LEXIS 64080, at *12-13 (E.D.N.Y. Apr. 6, 2022). Moreover, Ravin’s argument presumes “that Defendant does, in fact, infringe the Patents-in-Suit. However, infringement has yet to be determined by this Court.” *Procter & Gamble Co. v. CAO Grp.*, No. 1:13-cv-337, 2014 U.S. Dist. LEXIS 98739, at *3 (S.D. Ohio July 21, 2014). Likewise, Ravin’s argument presumes that the asserted claims are indeed valid, which, again, has yet to be determined.

In any case, the question is not whether Ravin will be prejudiced, but whether it will be *unduly* prejudiced. *See id.* And here, any potential loss from infringement can be fully mitigated by monetary damages. *Id.*; *see also VirtualAgility Inc. v. Salesforce.com, Inc.*, 759 F.3d 1307, 1318 (Fed. Cir. 2014). Ravin’s own actions belie any claims of undue prejudice, as it delayed filing suit for almost *four years* after learning of the alleged infringement; and when it did file, apparently it was not concerned with any irreparable harm (*i.e.*, that could not be compensated by monetary damages) because it did not move for a preliminary injunction. (Mot., Doc. No. 86 at 14-15.) Ravin cites a couple of cases in its defense for not moving for a preliminary injunction. (*See* Opp’n, Doc. No. 89 at 9-10). The Federal Circuit recognized that there might be “rational reasons for not pursuing a preliminary injunction.” *VirtualAgility*, 759 F.3d at 1319. But the fact that Ravin decided not to request one “contradicts [its] assertion that it needs injunctive relief as soon as possible.” *Id.*; *see also id.* at 1318 (“whether the patentee will be *unduly prejudiced* by a

stay . . . , like the irreparable harm-type inquiry, focuses on the patentee’s need for an expeditious resolution of its claim”).

As to its delay in waiting *years* before filing suit, Ravin argues that “[a]s a start-up, [it] had many demands on its capital and had to make choices as to how to deploy its resources.” (Opp’n, Doc. No. 89 at 9.) Reading this carefully worded statement, one would think that Ravin was strapped for cash in 2018 (when it first found out about TenPoint’s alleged infringement). But the facts do not bear this out. Ravin is owned by Velocity Outdoor Inc. (“Velocity”), which is ultimately owned by Compass Diversified (“Compass”), a publicly traded company. (Corporate Disclosure Statement, Doc. No. 80 at 1-2.) According to Compass’s 2018 annual report (SEC Form 10-K, excerpts attached herein as Exhibit G), Velocity acquired Ravin in 2018 for “approximately \$98.0 million, net of transaction costs, plus a potential earn-out of up to \$25.0 million” (Ex. G at 4.) And Velocity was itself acquired by Compass the prior year (2017) “for approximately \$150.4 million.” (*Id.* at 3.) This does not reflect a company barely making it.

Furthermore, despite hinting that money troubles might have constrained Ravin from suing TenPoint in 2018, Ravin in fact *did* sue TenPoint in 2018 (case no. 5:18-cv-01729 (N.D. Ohio)). Despite the ability to assert and join as many claims against TenPoint as it had, *see* Fed. R. Civ. P. 18(a), Ravin intentionally chose to not pursue those claims when it filed suit in 2018, or in its first amended complaint a few months later, or even in its second amended complaint for which it requested leave at the end of August 2019 (case no. 5:18-cv-01729 (N.D. Ohio), Doc. No. 62). Ravin’s own choices and decision to delay undercut any claims of undue prejudice now.

Lastly on this factor, Ravin complains about TenPoint trying to “leverage” a tactical advantage in this case procedurally, palpably unhappy about TenPoint’s transfer motion (and the requirement for the Nevada Court to address it before any substantive part of the case), when

TenPoint filed the IPR, and when TenPoint filed this Motion. (*See* Opp’n, Doc. No. 89 at 10-11.) First, “[t]here is nothing unusual about filing a motion to transfer,” nor is the motion improper. *NFC Tech. LLC v. HTC Am., Inc.*, No. 2:13-CV-1058-WCB, 2015 U.S. Dist. LEXIS 29573, at *8-9 (E.D. Tex. Mar. 11, 2015) (responding to similar argument under this factor); *see also Versata Software*, 771 F.3d at 1375 (same). In fact, the transfer motion was *granted*, vindicating its propriety. (*See* Doc. No. 74.)

Second, TenPoint properly filed its IPR Petition well within the one-year statutory period. *See Procter & Gamble*, 2014 U.S. Dist. LEXIS 98739, at *4 n.1 (“Congress recognized that a one year period after service of a litigation provides a ‘reasonable opportunity’ for a defendant to evaluate the case and file an IPR.”). TenPoint initially focused its efforts on the transfer motion and related briefings. *See Evolutionary Intelligence*, 2013 U.S. Dist. LEXIS 178547, at *29 (noting that defendant understandably concentrated its resources on preliminary matters, including motion to transfer, before invalidity arguments and petitions to the USPTO). Then, when the Nevada Court set the Scheduling Order with deadlines tracking a one-patent case, TenPoint had to analyze the half-dozen patents with 103 asserted claims (comprising thousands of pages of prosecution history) and prepare contentions with non-infringement arguments and invalidity arguments, engage in claim construction in light of Ravin’s responses, and respond to discovery requests. In its contentions, TenPoint explained that it was still conducting its analysis and thus did not yet know then whether it would petition the Board for review. (*See* TenPoint’s Contentions, attached herein without supporting claim charts as Exhibit H, at 35.) When its analysis was complete, TenPoint informed the Nevada Court (*see* Doc. No. 60) and subsequently filed its IPR Petition. There is nothing improper in any of this, and it strains credulity to hint that

had Ravin known of the intended Petition a few months earlier, it would have ceased its litigation efforts and investing resources into this case. (*See* Opp'n, Doc. No. 89 at 10.)

Lastly, there was no need to move for a stay pending the IPR earlier because TenPoint already had a fully briefed motion to stay claim construction. (*See* Doc. No. 48.) As explained above in § III.B, the Nevada Court could not address any substantive portions of the case until it resolved the transfer motion, so that coupled with TenPoint's prior stay motion rendered another stay motion (this one in light of the IPR) unnecessary. But when the case was transferred in late March and the predicate for the prior stay motion no longer applicable, TenPoint prepared and filed this Motion. Again, there is nothing improper about this. As with the other factors, this one also favors a stay.

CONCLUSION

Therefore, for all of the reasons expressed in TenPoint's Motion and this Reply, TenPoint respectfully requests that the Court stay this case until the Board's institution decision on TenPoint's IPR Petition, and if instituted, then until completion of the requested IPR.

Dated: May 26, 2023

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