IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DDC TECHNOLOGY, LLC, **Plaintiff,** **v.** **ORORA PACKAGING SOLUTIONS,** **Defendant.**	**Case No.: 3:22-cv-01263-B**

PLAINTIFF DDC TECHNOLOGY, LLC'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY LAWSUIT PENDING PATENT OFFICE'S *INTER PARTES* REVIEW

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Plaintiff DDC Technology, LLC ("DDC") hereby responds in opposition to Defendant Orora Packaging Solutions's ("OPS") motion to stay lawsuit pending Patent Office's *Inter Partes* Review (ECF 142).

As DDC previously represented to this Court, DDC and OPS have a written settlement agreement to resolve this dispute, last edited by OPS (see ECF 143, p. 1), and which is now signed by DDC. (Ex. A, Haller Dec., A002-A003, ¶¶ 6-7 and Ex. 1, A004-A026, filed separately with a contemporaneous motion for leave to file *ex parte*). When DDC responded to OPS's motion to modify the scheduling order, final settlement was awaiting resolution of two issues: (1) OPS's signing of declarations with *verbatim* representations to which OPS already agreed in the final settlement agreement; and (2) approval of the settlement agreement by Google LLC ("Google"). (See ECF 143, p. 7, fn. 1). The only issue now remaining is Google's approval of the settlement agreement that DDC executed and transmitted to OPS's counsel on June 5, 2023. (Ex. A, Haller Dec., A002, ¶ 6). DDC is now only waiting on confirmation from OPS that Google has "approved" the settlement agreement (a highly unusual condition to settlement, especially under the present circumstances).

OPS's request for a stay of this litigation would prejudice DDC and delay rather than motivate prompt resolution, which is now apparently being delayed by Google, a third party that sought and received severance from this action and transfer to the Northern District of California.

I. RESPONSE TO OPS'S "RELEVANT BACKGROUND"

The "relevant background" section of OPS's motion relies on numerous incorrect factual contentions and speculation that DDC addresses below.

A. DDC Is *Not* A "Non-Practicing Entity" As OPS Asserts Without Factual Support

Despite OPS's continued claim that DDC is a non-practicing entity ("NPE"), without any factual basis or support, DDC is a practicing entity. Consistent with DDC's previous representations to the Court, DDC is now the owner of inventory of virtual reality viewers that practice various claims of the patents asserted in this litigation and is finalizing agreements to facilitate the sale of those units throughout the United States. Continued infringement (including by OPS and/or related entities that continue to offer infringing products for sale in the United States) makes it difficult for DDC to compete in the relevant market with products practicing its own patented inventions.

B. This Case Is Not In Its "Early Stages" And Claim Construction Is Unnecessary

While OPS was only added to this case in January, the parties have consumed tremendous resources in attempts to reach resolution, including mediation in Dallas, numerous draft agreements, exchanges of supporting documents, phone calls, and exchanges with the mediator (former Judge Kaplan) post-mediation. The lack of discovery-related filings is merely a reflection of DDC's efforts to focus resources on resolution rather than extensive litigation efforts.

OPS argues that a stay is appropriate because "the only discovery … is DDC's single set of fourteen document requests to OPS," to which OPS contends it "timely responded … and produced responsive documents." (See ECF 142, p. 2). While OPS is correct that DDC has only served 14 document requests to date, it misrepresents its compliance therewith. In response to those requests, which specifically sought relevant agreements and sales information, OPS

produced a mere 60 pages of documents. Those documents are demonstrably deficient in view of other documents produced in this litigation. Despite the deficiencies, DDC has expended its resources working towards resolution with OPS rather than burdening the Court with a motion to compel. Based on OPS's representations in the settlement agreement DDC has executed, *which agreement was finalized by OPS and submitted as a "last and final" version*, DDC is willing to forego any additional discovery in this litigation in reliance on those representations. (See Ex. 1, A004-A026).

OPS also contends, again without any bases or support, that DDC will serve numerous subpoenas if this matter is not stayed. This is mere speculation fabricated by OPS to support its motion to stay. DDC has no intention to serve any additional discovery, let alone subpoenas on third parties, as such efforts would be unnecessary in view of the settlement agreement between the parties.

OPS further contends that this case is "early" because "[t]he parties have not engaged in substantive claim construction discovery." (ECF 142, p. 2). OPS's contention is false – as clearly detailed in DDC's opposition to OPS's motion to modify the scheduling order, (ECF 143), claim construction is unnecessary in this action because OPS willingly and intentionally ignored the claim construction deadlines set by this Court. Despite repeated opportunities to raise any concerns with the schedule or DDC's compliance with its obligations thereunder, OPS sat idly while deadline after deadline passed. If this case is forced to proceed based on Google's refusal to "approve" the parties' settlement agreement, this case should proceed on the same schedule

already set by this Court, including the May 2024 trial date that OPS already agreed not to move. (See ECF 141, pp. 10-11).[1]

C. The PTAB Filings Do Not Support A Stay Of *This* Litigation

Prior PTAB filings by MerchSource, LLC and the recent PTAB filings by Google do not support a stay of this litigation. As previously noted, OPS has not asserted that any claim of any of the asserted patents is invalid. OPS has never sought leave to amend its Answer so that it may allege invalidity. OPS has still never served invalidity contentions (not even attempting to copy and paste the invalidity contentions of Google, the prior PTAB filings by MerchSource, or the recent PTAB filings by Google). If OPS believes that the Google PTAB petitions – the sole basis for its motion to stay – clearly establish invalidity, its counsel would/should have formally made that position clear on the record by asserting those grounds of invalidity. Instead, OPS presents mere attorney speculation that Google's PTAB petitions are likely to result in invalidation of all asserted patent claims. Such argument ignores clear deficiencies in Google's PTAB petitions, deficiencies that DDC will be raising with the PTAB when it requests that the petitions be denied at the threshold denial/institution stage. DDC has already identified one such ground for denial – the fact that Google is time barred from challenging the asserted patents at the PTAB in view of its privy relationship with three separate former defendants (MerchSource, Mattel, and Unofficial

[1] DDC briefly addresses OPS's claim that DDC's infringement contentions must be deficient if DDC requires 21 days to supplement them. (See ECF 144, p. 8). DDC's proposal to serve "OPS-specific" infringement contentions was made to obviate OPS's unfounded concern (because the original infringement contentions are sufficient as argued in DDC's response), but with a 21-day cushion for such service so that unnecessary resources would not be consumed while the parties worked towards resolution. While DDC can serve such "OPS-specific" contentions within days rather than weeks given that the original contentions already included OPS's infringement, DDC is conserving its resources until it becomes clear that this matter will not resolve through the parties' settlement agreement (*e.g.*, if Google does not approve the settlement).

Cardboard). (See Ex. A, Haller Dec., A003, ¶ 8 and Ex. 2, pp. 4-5 and 14-15, A034-A035 and A044-A045).

While DDC and OPS are sure to disagree on the likelihood of denial of institution of the PTAB petitions, this Court need not rely on speculation. Rather, this Court should deny OPS's motion to stay so that this case may be resolved efficiently in its entirety rather than delayed.

Thus, the only practical effect of a stay is the creation of a clear tactical disadvantage to DDC and benefit to Google, which continues to operate in the background despite its severance from this action. Specifically, under the "*Fintiv* factors," the PTAB considers parallel litigation in district courts when determining whether to deny or institute PTAB proceedings. Google's PTAB petitions withheld the status of this litigation from the PTAB, including the trial date scheduled for May of 2024. While OPS's first motion to modify the schedule specifically represented that it had no intention of moving the trial date set for May of 2024, OPS (which apparently continues to operate under a joint defense/cooperation agreement with Google) now seeks to stay this entire case, which would necessarily delay trial. Any delay of this litigation's scheduled trial date (which OPS previously agreed would not move), will result in tactical disadvantage to DDC (and resulting advantage to Google) as it will diminish or even eliminate one specific ground for denial of the PTAB petitions.

Because there is a settlement signed by DDC as presented by OPS, because there are no deadlines immediately pending before the Court, and because a stay would indisputably harm DDC in its ability to defend against the Google PTAB petitions, DDC respectfully requests that this Court deny OPS's motion. Denial of a stay in this Court will allow DDC to make all available arguments at the PTAB and allow the PTAB to render a decision to deny or institute the PTAB petitions based on those arguments. ***If*** the PTAB institutes proceedings on <u>all</u> claims relevant to

this litigation (which decision would occur in or around October 2023), the Court can revisit a stay of these proceedings to conserve resources. However, any stay before an initial denial/institution decision would create a tactical disadvantage to DDC by depriving it of grounds for denial at the threshold stage in the PTAB.

II. RESPONSE TO OPS'S ARGUMENTS AND AUTHORITIES

DDC addresses OPS's arguments below.

A. A Stay Is Not Appropriate Under This Court's Legal Standard

DDC agrees that the Court has discretion to stay this case, and that other courts have stayed cases for numerous reasons. DDC disagrees, however, that the facts of this case, as properly applied to the legal standard for granting a stay, favor a stay.

1. The three factors do not support a stay.

First, a stay of this litigation will unduly prejudice DDC and create a clear tactical disadvantage to DDC. At present, this case is scheduled for trial in May of 2024. That fact is relevant to the PTAB's decision whether to deny or institute the PTAB proceedings at the threshold. Grant of a stay would deprive DDC of a clear ground for denial of the Google PTAB petitions. Google and OPS have allegedly been operating under a joint defense/cooperation agreement and it appears that OPS brought this motion to stay – **after explicitly representing to the Court that it would *not* seek to move the trial date in its original motion to modify**, (ECF 141, pp. 10-11) – for the primary purpose of depriving DDC of an argument for denial of the PTAB petitions based on the *Fintiv* factors. This clear tactical disadvantage necessitates denial of OPS's motion. Google's interference in this action, to disadvantage DDC and create tactical advantage for itself, is obvious.

Second, OPS's arguments that a stay will simplify the issues is entirely speculative. DDC intends to seek denial of the PTAB petitions on several procedural grounds (including the *Fintiv*

factors and the fact that Google is prohibited from pursuing its PTAB petitions in view of at least the 1-year time bar in view of its privy relationship with three separate defendants sued more than a year before Google filed its PTAB petitions). Denial of the PTAB petitions on procedural grounds will provide no guidance to this Court. Moreover, OPS contends that the PTAB will likely provide guidance on the issue of "claim construction"; however, as demonstrated in the briefing on OPS's motion to modify the scheduling order, there is no need for claim construction in this case.

Third, discovery is not yet complete, but **a trial date has been set**. Any stay of this case will likely result in a delay of that trial date, not only depriving DDC of prompt resolution of this dispute (given that the trial date precedes the time by which the PTAB could ever issue a final ruling), but also creating a clear tactical disadvantage as discussed above.

In short, all three factors demonstrate the impropriety of a stay of this litigation.

2. The Google PTAB petitions do not support a stay here.

While some courts have granted a stay where a third party brings a PTAB petition, OPS omits citation to any decision from *this* Court granting a stay under such circumstances. Regardless, the existence of the Google PTAB petitions is irrelevant to this case because **OPS still has not asserted any defense of invalidity of any of the asserted claims**. OPS/OPS's counsel appear unwilling to sign off on any affirmative defense of invalidity or serve invalidity contentions (despite ample templates to work from). Without an invalidity defense, there are no reasonable grounds for a stay with respect to OPS – rather, OPS seeks to delay this case for the sake of delay and Google's benefit. As detailed in DDC's opposition to OPS's motion to modify the scheduling order, OPS sat on its hands until the 13th hour, intentionally missing deadlines set by this Court, failing to raise any concerns with DDC or this Court for months, and should not be rewarded now for its own delays.

3. The California grant of a stay for Google does not support a stay here.

While the Northern District of California granted Google's request for a stay without detailed reasoning, it is likely that the court gave significant weight to the fact that there was no schedule in that case, including: no local patent rule compliance (including no infringement contentions or invalidity contentions yet served), no discovery, and no trial date set. This case is fundamentally different. Here, the parties have engaged in discovery, infringement contentions have been served, local patent rule deadlines have passed (with claim construction rendered unnecessary), and a trial date is set for May of 2024. The California court's decision is (a) non precedential on this Court and (b) based on a significantly different procedural posture. This Court should assess the factors for a stay based on the facts of *this* case and render a decision accordingly.

B. DDC Will Suffer Undue Prejudice And Tactical Disadvantage From A Stay

OPS ignores the facts of this case and the procedure of the PTAB to argue for a stay, focusing almost exclusively on its unfounded and incorrect assertion that DDC is a "non-practicing entity."

1. DDC will suffer undue prejudice from a stay.

First, DDC did not delay filing this lawsuit. DDC (and its predecessor-in-interest, DODOcase) has been actively litigating its patents since 2017 (shortly after the first asserted patent issued, and years before the most-recent patents issued). Early litigation efforts against MerchSource resulted in extensive multi-front litigation in district court, state court, the PTAB, and the Federal Circuit. Once that matter concluded, DDC promptly enforced its intellectual property against another defendant, and then another, and then another… until ultimately, less than two weeks after concluding litigation with Mattel on May 31, 2022, DDC filed the present lawsuit on June 10, 2022.

Second, DDC never sought a preliminary injunction in this case because OPS has represented that it ceased selling the accused products in 2017. Since that representation, it has come to DDC's attention that OPS (or a related entity) is still offering for sale accused products through the website at landsbergpromotions.com. However, rather than seek a preliminary injunction after that discovery, DDC has actively sought to resolve this dispute with OPS. The agreement executed by DDC (based on OPS's final version), would obviate the need for any additional motion practice.

Third, DDC does practice the asserted patents as it is the owner of virtual reality viewers that practice claims of the asserted patents, and is in the process of finalizing agreements regarding the sale of those viewers. While OPS claims that this Court "pointed out" that "[DDC] only acquired the Asserted Patents for purposes of litigation," OPS has never presented any evidence to support that claim but has relied, instead, on speculation.

Fourth, DDC (as an owner/seller of virtual reality viewers that embody the claims of the asserted patents) is presently in competition with OPS (the apparent operator of the landsbergpromotions.com website that continues to offer infringing products for sale).

Finally, OPS references a "potential" delay, yet its motion necessarily seeks a significant delay of months. DDC does not rely on the mere delay of months while the PTAB decides to deny or institute Google's PTAB petitions but, rather, DDC relies on the delay of the scheduled trial date, which has direct and immediate prejudicial consequences to DDC in even arguing for denial of the PTAB petitions at the threshold stage.

These factors all demonstrate prejudice to DDC that this Court should consider in denying OPS's request for stay.

2. DDC will suffer tactical disadvantage from a stay.

OPS again misrepresents the facts of this case in arguing that DDC will not suffer tactical disadvantage. As discussed above, the most immediate tactical disadvantage is that grant of a stay will likely eliminate entirely one of the grounds that DDC currently possess at the PTAB to procedurally terminate the PTAB proceedings based on the *Fintiv* factors. As far as "dilatory motive," it appears that OPS is seeking this stay – **after it initially sought modification of the scheduling order explicitly representing that it would not seek modification of the trial date** – based on a motive to assist Google with its PTAB proceedings. By seeking to move the trial date under the guise of its new motion to stay, OPS is attempting to provide tactical advantage to Google by eliminating one of the grounds for denial – that tactical advantage to Google results in a necessary tactical disadvantage to DDC. The relationship between Google and OPS is well documented in this case including apparent joint defense/cooperation agreements (that OPS and Google refused to produce) and further agreements regarding manufacture of the accused products that established joint and several liability between them. Most recently, OPS intimated that Google has "veto power" over the very settlement efforts between DDC and OPS that should result in resolution of this case in an efficient manner.

OPS contends that it sought this stay diligently, but ignores the fact that the PTAB petitions were filed on March 29th (and that it was informed of the intent to file such petitions at least as early as mediation a week earlier). The filing of the PTAB petitions, not any subsequent event, is the basis for its entire motion, yet it waited until nearly two months later, after filing a first motion to modify the scheduling order (regarding which DDC had to consume resources responding).

DDC would not normally contend that a stay would result in the loss of evidence; however, OPS's motion raises a concern given that it suggests that it would be DDC's obligation to preserve

website data that OPS may remove – the litigation hold obligation belongs to OPS.[2] Thus, unless OPS acknowledges its (and its relevant affiliates) obligation to preserve the documents and represents to the Court that such obligation will be honored, it is possible that a stay will result in further disadvantage to DDC due to the loss of evidence.

Finally, OPS argues that unnamed third parties will benefit from a stay as they will not receive subpoenas in the meantime. Again, DDC has no present intention to seek discovery from any third parties – its singular focus is resolution of this lawsuit via the agreed upon terms in the DDC-executed settlement agreement. (See Ex. 1, A004-A026).

Accordingly, DDC will immediately be subject to clear tactical disadvantage if this Court enters a stay of these proceedings.

C. Guidance From The PTAB Is Entirely Speculative

OPS's argument that the PTAB will either resolve or simplify issues relevant to this case is speculative at best. As stated above, DDC intends to seek denial of Google's PTAB petitions on procedural grounds, which would result in no rulings from the PTAB regarding the substantive aspects of those petitions. Moreover, OPS has not challenged validity of the asserted patents and has studiously avoided all claim construction deadlines. Thus, there are no issues upon which the PTAB could rule that would benefit OPS.

The only potential result from the PTAB that would affect this case is the invalidation of claims; however, the PTAB has not even decided whether it will allow the Google PTAB petitions to proceed to a final written decision. ***If*** the PTAB decides to institute trial (a decision expected months from now), the parties and Court could revisit the propriety of OPS's stay request for the

[2] Notably, website pages from OPS-related entities were deleted shortly after this lawsuit was filed, an issue raised with the Court previously. (See ECF 72, pp. 9-12).

convenience of the parties and the Court. Any grant of a stay sooner than that date would be premature and will result in the aforementioned prejudice and tactical disadvantage to DDC.

OPS's reliance on the rate of institution or the rate of cancellation of claims is irrelevant because those statistics (misleadingly cited by OPS[3]) address patents unrelated to the asserted patents in this case. The PTAB could institute on 99% of cases (it does not) – such theoretical statistic still wouldn't provide any support for the unfounded speculation that the PTAB will institute proceedings on *these* asserted patents.

The Court can ignore OPS's speculation and accept only one "fact" from OPS's brief: "the PTAB *may* resolve this patent infringement case." (ECF 142, p. 13, emphasis added). The reality is that, in all litigation, there are many events that *may* resolve the matter. In this case, DDC remains optimistic that the parties' extensive settlement efforts will not be wasted by a Google "veto" and that OPS will execute the settlement agreement (that it proposed and DDC accepted) and resolve this case before any further resources are consumed unnecessarily. While the parties continue towards resolution on their own, this Court should deny the requested stay so as not to prejudice and tactically disadvantage DDC at the PTAB where it will soon present its procedural grounds for denial of Google's PTAB petitions.

D. The Stage Of These Proceedings Cautions *Against* A Stay

OPS is incorrect in arguing that limited discovery and anticipated future events favor a stay. The parties have engaged in significant discovery efforts incident to seeking resolution through settlement. Further, OPS cannot rely on its own refusal to produce more than 60 pages of

[3] For example, OPS contends that "it is far more likely than not that the PTAB will grant all five of Google's IPR petitions." Yet, OPS claims that "the PTAB grants 66% of IPR petitions." Thus, basic math would confirm that the chance of all five petitions being granted would be 13% (0.66 x 0.66 x 0.66 x 0.66 x 0.66). Accordingly, even based on OPS's own select statistics, there is a far greater chance (87%) that at least one patent will not be instituted.

documents as grounds for granting a stay. If anything, the limited discovery served in this case shows that DDC is litigating reasonably and avoiding the unnecessary consumption of resources of the parties and the Court. While DDC could have moved to compel discovery, it has opted to focus on resolving this matter through settlement agreement.

OPS's argument also fails in that it continues to pretend that there are numerous upcoming deadlines for the parties and the Court when, as explained in DDC's response to OPS's motion to modify the scheduling order (ECF 143), there are no upcoming claim construction deadlines. At this point it is becoming clear that OPS and its counsel have engaged in a dilatory strategy from the outset to delay this case – refusing to negotiate a protective order or ESI order, failing to provide requested discovery, intentionally avoiding complying with the local patent rule deadlines set forth in the Court's scheduling order, and refusing to raise any concerns with DDC or the Court until after several deadlines had passed[4] – so that it could now argue that "this case is at its early stages" and encourage grant of a stay. This conduct should be condemned, not condoned.

As set forth in DDC's opposition to OPS's motion to modify the scheduling order, OPS should bear the consequences of its intentional refusal to comply with Court-ordered deadlines. If OPS refuses to execute the settlement agreement (as a result of a Google veto or otherwise), the Court should motivate the parties to prepare this case for trial in May of 2024 on the issues of infringement and damages, with limited discovery necessary for DDC to present its case. A stay of this case would reward OPS for its delays and obstruction (and reward Google for its interference in these proceedings), to the clear prejudice and disadvantage of DDC. The legal

[4] Notably, while OPS argues repeatedly that it was only added to this action in January of 2023, its intertwined child/affiliate entity, Landsberg Orora, was originally named in this action when filed in June of 2022. OPS, at least through its officers/directors/etc. that also operate in the same roles for Landsberg Orora, has been well advised of this action and these proceedings since the outset. (ECF 143, pp. 1-2, 4-6 and ECF 143-1).

standard for a stay cautions against such a result and DDC respectfully requests that the Court deny OPS's request.

III. CONCLUSION

For the foregoing reasons, DDC respectfully requests that this Court deny OPS's request for a stay so as not to prejudice and tactically disadvantage DDC. ***If*** the parties cannot resolve this matter on their own through settlement, and ***if*** the PTAB institutes proceedings after DDC has an opportunity to present the arguments available to it, the parties and Court should revisit the potential for a stay and assess the relevant factors at that time.

Dated: June 7, 2023

Respectfully submitted,

/s/ Timothy J. Haller

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CERTIFICATE OF SERVICE

On June 7, 2023, I filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or *pro se* parties of record by a manner authorized by Fed. R. Civ. P. 5(b)(2).

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