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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DDC TECHNOLOGY, LLC

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 3:23-cv-01160-VC

GOOGLE'S REPLY IN SUPPORT OF ITS MOTION TO STAY PENDING DETERMINATION OF *INTER PARTES* REVIEW OF THE PATENTS-IN-SUIT

Date: May 11, 2023
Time: 10:00 a.m.
Place: Courtroom 4, 17th Floor
San Francisco Courthouse
Judge: Hon. Vince Chhabria

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I. INTRODUCTION

DDC agrees to a stay of this case pending resolution of Google's pending IPR Petitions. But DDC proposes that the Court permit DDC to proceed with certain requested discovery during the stay. As explained in detail below, DDC's proposal should be denied. This Court and others in this District have consistently rejected similar requests to permit discovery during a stay pending PTO proceedings, and DDC cites no contrary precedent or unique facts supporting its request for an exception in this case.

Moreover, because the discovery DDC requests relates to privileged and irrelevant materials, granting DDC's request would undoubtedly lead to discovery disputes that would be presented to this Court, thereby defeating a key purpose of a stay—to conserve both the Court's and the parties' resources. As an example, DDC seeks discovery into privity issues that it concedes are not relevant to this litigation and are instead only intended for use in the IPR proceedings. Not only are DDC's theories regarding privity issues without merit, but such discovery is for the PTAB to handle, not this Court.

Despite agreeing to a stay, DDC nonetheless takes issue with Google's analysis of the three stay factors. DDC's arguments, however, fail to refute that this case is in its early stages, or that issue simplification will result from the PTAB's rulings, even if the PTAB does not ultimately cancel all of the asserted claims. At the same time, DDC misreads the PTAB's statistics, which, contrary to DDC's allegations, demonstrate that there is a high probability that Google's five IPR Petitions will result in cancellation of at least some of the challenged claims. Finally, DDC's claims of prejudice are based mainly on the delay inherent to a stay, which is insufficient to show prejudice, and its unsupported claim that it is "trying" to sell products.

DDC has failed to rebut Google's strong showing that all of the relevant factors favor a stay, and its requested discovery seeks materials that are privileged, irrelevant, and contrary to this District's precedent. The Court should, therefore, grant Google's Motion to Stay in its entirety and stay all proceedings in this case.

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II. DDC FAILS TO REBUT GOOGLE'S STRONG SHOWING THAT ALL RELEVANT FACTORS FAVOR A STAY

As Google explained in its Motion, all of the relevant factors weigh in favor of a stay. Nothing in DDC's Response shows otherwise.

A. There Is No Real Dispute That This Case Is In Its Early Stages

DDC does not dispute that, before transfer out of the NDTX, (i) this case was in the early stages of written discovery and document production; (ii) no depositions had been noticed by either party; (iii) claim construction briefing had not yet begun, and the *Markman* hearing was still several months away; and (iv) trial was over a year away. Now, following transfer, this case is stayed, and no deadlines (including a trial date) have been set. Because the "costlier stages of pretrial preparation remain," the early stage of this case irrefutably weighs in favor of a stay. *Contour IP Holding, LLC v. GoPro, Inc.*, No. 17-cv-04738-WHO, 2018 WL 6574188, at *3 (N.D. Cal. Dec. 12, 2018); *see also* D.I. 157 (Google's Motion to Stay) at 5-6.

Despites these uncontroverted facts, DDC argues that the case is not at an early stage because "this lawsuit has proceeded with extensive filings over the last ten months (with 139 docket entries before transfer)." D.I. 159 (DDC's Response to Motion to Stay) at 3. But the majority of those filings that pertain to the parties to this action—DDC and Google—were tied to Google's motion to transfer, which was necessitated by DDC refusing to agree to transfer the case to the most appropriate venue, not to substantive progression of the case. And as DDC acknowledges and the case docket shows, discovery did not even start until the end of November 2022, due to many extensions to the answer deadlines for the six different defendants DDC initially sued.

DDC also argues that this factor does not favor a stay because Google had commercial relationships with prior defendants to DDC litigations (MerchSource, Unofficial Cardboard, and Mattel) and those relationships create alleged privity issues that bar Google's IPR Petitions. D.I. 159 (Response) at 4-5. But such alleged privity issues are entirely irrelevant to the stay factors or to this district court litigation, and are instead matters for the PTAB to resolve. *See, e.g.*, *Largan Precision Co. v. Motorola Mobility LLC.*, No. 21-CV-09138-JSW, 2022 WL 2954935, at *3 (N.D. Cal. July 26, 2022) (holding that plaintiff's arguments related to "real parties in interest . . . are not

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relevant to this Court's determination of whether to stay this matter pending IPR review[, and that] [plaintiff] can present these arguments to the PTAB during the IPR review process"). Indeed, the fact that privity issues are only relevant to the IPR proceedings is all the more reason why this case should be stayed in favor of those proceedings, so those privity issues can be addressed by the PTAB.

Further, on the merits of DDC's privity arguments, DDC cites no precedent to suggest that mere commercial relationships are sufficient for a finding of privity. Indeed, the PTAB has repeatedly found the opposite, namely that "having a long-standing commercial relationship alone does not show whether the parties have a substantial 'legal relationship' sufficient for a finding of privity." *See, e.g.*, *Ecobee Techs. ULC v. Causam Enterprises, Inc.*, IPR2022-01339, Paper 20 at 9 (PTAB Mar. 22, 2023). To the extent DDC argues Google is in privity with MerchSource, DDC has already received discovery responses from Google unequivocally denying that Google has had any communications with MerchSource regarding MerchSource's prior IPR Petitions, or even any of the asserted patents. Liang Decl., Ex. O (Google's Suppl. Responses to DDC's First Set of Requests for Admission (Nos. 1-16)).

B. <u>Google's IPRs Will Resolve, Or At Least Simplify, the Issues for Trial</u>

As Google explained in its Motion, current PTAB statistics show that each of Google's pending IPR petitions has at least a 66% chance of institution, and, if instituted, an 82% chance of resulting in cancellation of at least some of the challenged claims. D.I. 157 (Motion) at 7-8. While DDC alleges that these statistics are misleading, D.I. 159 (Response) at 6,[1] it is DDC who has misinterpreted the PTAB's data. In particular, in arguing that across all IPRs, only 10-12% of all challenged patents or claims are invalidated, DDC ignores the fact that a significant portion of IPR

[1] DDC alleges that "Google selectively removes data to skew the actual PTAB statistics," to arrive at the 66% institution probability. D.I. 159 (Response) at 6. Untrue. In its PTAB Trial Statistics FY22 End of Year Outcome Roundup, the PTAB presents "Institution rates by technology," grouping IPR petitions into five technology buckets: (1) "Bio/Pharma," with a 77% institution rate; (2) "Chemical," with a 48% institution rate; (3) "Design," with a 33% institution rate; (4) "Electrical/Computer," with a 68% institution rate; and (5) "Mechanical & Business Method," with a 66% institution rate. D.I. 157 (Motion), Liang Decl., Ex. N. In selecting the 66% institution rate, Google selected the lowest rate, omitting the technology categories of "Chemical" and "Design" that are clearly not relevant to the asserted patents.

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challenges never even reach a Final Written Decision, often for reasons unrelated to the merits (for example, because the parties reach a settlement during the proceedings). *See* D.I. 159-4 at 15-16. This is reflected in the PTAB's "Outcomes by petition" data page of the statistics cited by DDC. *Id*. at 11-13. Those statistics further show that, of the petitions that reached final written decision, 66% (305/464) resulted in cancellation of all challenged claims, and 82% (379/464) resulted in cancellation of at least some of the challenged claims—consistent with the data cited in Google's opening brief. *Id*. at 11. Thus, there is a high probability that Google's five IPR Petitions will result in cancellation of at least some of the challenged claims.

DDC is also wrong when it asserts that "the PTAB will only narrow issues for this Court if it institutes the petitions and invalidates *every single claim* of the asserted patents." D.I. 159 at 8. Clearly, invalidation of *any* of the asserted claims will reduce the number of claims at issue, thereby simplifying the case. And as DDC does not meaningfully dispute, the merits of Google's IPR Petitions are particularly meritorious, as they include grounds that are even stronger than those of the previously instituted MerchSource petitions. *See, e.g.*, D.I. 157 (Motion) at 7-8. Thus, there is a strong chance of cancellation of many, if not all of the claims asserted in this case.

Even if none of the challenged claims are canceled, the PTAB proceedings will still simplify the issues for this Court by providing it with the PTAB's expertise and guidance on issues such as claim interpretation, prior art, and invalidity. D.I. 157 (Motion) at 9; *see also Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No. C-09-1360-MMC, 2009 WL 4981164, at *1 (N.D. Cal. Dec. 15, 2009) ("One purpose of the reexamination procedure is to eliminate trial of the issue of patent claim validity (when the claim is canceled) or to facilitate trial of that issue by providing the district court with the expert view of the PTO (when a claim survives the reexamination proceeding) (quoting *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983)). If the PTAB issues any final written decisions affirming the patentability of any of the challenged claims, estoppel will apply to prevent Google from arguing invalidity on any ground that Google "raised or reasonably could have raised" during the IPRs. *Id.*; 35 U.S.C. § 315(e)(2). DDC does not meaningfully dispute either of these points. The simplification factor thus strongly favors a stay.

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C. DDC Will Not Suffer Tactical Disadvantage or Undue Prejudice

DDC's allegations of prejudice relate entirely to the supposed "tactical" advantage that Google sought by pursuing proceedings at the PTAB and then seeking a stay pending the result of those proceedings. D.I. 159 (Response) at 9. DDC's allegations fail to show prejudice. Google's decision to seek relief at the PTAB is entirely proper and consistent with "Congress's intent to provide [] parties with a more efficient and less costly alternative to civil litigation." *Advanced Analogic*, 2009 WL 4981164 at *2. And DDC's argument that it will be disadvantaged by the delay inherent in any stay (D.I. 159 (Response) at 9-12) is insufficient as a matter of law to show prejudice under this factor. *Uniloc U.S., Inc. v. Apple Inc.*, No. 18-cv-00361-PJH, 2018 WL 2387855, at *3 (N.D. Cal. May 25, 2018) ("Courts have repeatedly found no undue prejudice unless the patentee makes a specific showing of prejudice beyond the delay necessarily inherent in any stay.").

DDC also argues prejudice from (1) an inability to obtain discovery it could use in developing "arguments it could raise at the PTAB to oppose institution," (D.I. 159 (Motion) at 10), (2) its unsupported suggestion that it is not a non-practicing entity (*id.*), (3) employees leaving Google (*id.* at 11), and (4) insufficient and unsupported allegations of spoliation (*id.* at 11-12). Each of these arguments also fails.

First, DDC's arguments relating to evidence for use in developing arguments to present before the PTAB (e.g., arguments related to privity issues) does not show prejudice *in this case*. Again, privity issues are not relevant to any issue in this district court litigation and are relevant only to the IPR proceedings, further supporting that this case should be stayed in favor of those proceedings. Indeed, as the court in *Roche Molecular Systems* explained, "[w]hile civil discovery conducted for litigation purposes may also be used in an IPR to the extent that the PTAB is willing to consider it, that does not confer on any party a right to develop discovery in federal court to be used in another forum." *Roche Molecular Sys., Inc. v. Cepheid*, No. C-14-3228-EDL, 2015 WL 124523, at *7 (N.D. Cal. Jan. 7, 2015). Further, the PTAB has procedures that allow for discovery on privity issues, and DDC can and should avail itself of those procedures as part of the IPR proceedings, rather than burdening Court with its requests. *See, e.g.*, 37 C.F.R. § 42.51(b).

Second, DDC cites no support for its assertion that it is "actively trying to sell products,"

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implying that it is a practicing entity. D.I. 159 at 10. Indeed, in discovery responses, DDC concedes the opposite, stating that it "has not produced, developed, or sold any commercial embodiments of any Asserted Patents." D.I. 158-2 (Liang Decl., Ex. B (DDC Response To Google Interrogatory No. 5)) at 12. In opposing transfer to this District, DDC made the same unsupported assertions that it makes now, and the NDTX court rejected DDC's claims and found that DDC is a non-practicing entity. D.I. 157 (Motion) at 12; D.I. 95 (DDC's Opposition to Transfer) at 19 (DDC alleging that "DDC has taken affirmative steps to acquire and sell products covered by the Asserted Patents); *DDC Tech., LLC v. Google, LLC*, No. 3:22-CV-1263-B, 2023 WL 2518846, at *7 (N.D. Tex. Mar. 14, 2023) (Judge Boyle stating in this case, before transfer, that "DDC itself only acquired the Asserted Patents for purposes of litigation.").

Third, while DDC argues that "relevant witnesses are disappearing from Google and may not be available for deposition testimony if DDC is forced to wait months, or years, to pursue discovery" (D.I. 159 (Response), at 11), it is well established that "concerns that discovery may be hard to acquire from employees who leave the company . . . are consequences that apply to any case where reexamination is sought and cannot alone demonstrate undue prejudice." *Longitude Licensing Ltd. v. Apple Inc.*, No. 14-CV-04275-EDL, 2015 WL 12778777, at *8 (N.D. Cal. Oct. 29, 2015) (quoting *Evolutionary Intel., LLC v. Apple, Inc.*, No. C 13-04201 WHA, 2014 WL 93954, at *8 (N.D. Cal. Jan. 9, 2014)). With respect to the specific former Google employees that DDC identifies—Messrs. Clay Bavor and Alex Kauffmann—DDC identifies no reason it cannot avail itself of discovery procedures available for third parties after the stay concludes. That said, it is unclear why DDC is now concerned about the preservation of these individuals' testimony, given that DDC did not include either Messrs. Kauffmann or Bavor in its initial disclosures (despite identifying several other Google employees). Liang Decl., Ex. P (DDC's Initial Disclosures). And in opposing transfer to this District, DDC specifically ***denied*** that either Messrs. Kauffmann or Bavor would be relevant, stating that "[t]rial testimony from Kauffman and Bavor would likely be unnecessary[.]" D.I. 95 at 7.

DDC's allegations of spoliation are likewise without merit. With respect to the personal webpage of Mr. Plagemann, DDC has not presented any evidence that the removed videos are

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relevant to this case, or even that they were removed only after the filing of its Complaint. D.I. 159 (Response) at 11 (showing only that the videos were available in February 2022, months before DDC filed its Complaint). In any case, to the extent DDC believes public webpages are relevant to this case, a stay will not impede DDC's ability to download those webpages now, or while the stay is in place. DDC's reliance on findings from a separate, unrelated antitrust litigation is also insufficient to establish spoliation. DDC has not—and cannot—provide any evidence to support its meritless assertions of spoliation and lost evidence in this case, and thus its argument fails. *See, e.g.*, *Evolutionary Intel.*, 2014 WL 93954, at *3 ("Without specific evidence based on sworn testimony that spoliation has in fact occurred, a vague generalized 'loss of evidence' argument is unpersuasive.").

Finally, DDC fails to address why—despite knowing of Google's Cardboard viewer since its inception in 2014-15—DDC waited until years later, long after both Google's sale of those products and its administration of the Works With Google Cardboard program had ended, to initiate this lawsuit. D.I. 157 (Motion) at 12. Given its own years-long delay in bringing suit, DDC's allegations of prejudice from a shorter delay pending resolution of the IPRs fall on deaf ears.

III. THE DISCOVERY SOUGHT BY DDC IS UNNECESSARY, IRRELEVANT, AND/OR PRIVILEGED

The Court should deny the discovery burdens that DDC requests to impose on this Court and on Google while the stay is in place. Notably, DDC fails to cite any precedent permitting discovery during a stay pending IPRs. Rather, courts in the NDCA—including this one—have repeatedly denied similar requests to allow discovery to proceed during a stay. *See, e.g.*, *Largan Precision Co. v. Motorola Mobility LLC.*, No. 21-CV-09138-JSW, 2022 WL 2954935 at *4-5 (N.D. Cal. July 26, 2022) (granting motion to stay pending IPR, before institution, and denying Largan's alternative requests to grant stay with the exception of discovery); *Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No. C-09-1360 MMC, 2009 WL 4981164 at *2-3 (N.D. Cal. Dec. 15, 2009) (granting a stay pending reexamination and refusing to exempt all outstanding discovery requests from the stay); *F5 Networks, Inc. v. Radware, Inc.*, No. 3:17-CV-03166-VC, Dkt. 136 at 1 (N.D. Cal. November 8, 2017) (Chhabria, J.). In *F5 Networks*, for example, this Court denied a request

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to allow discovery on patent claims that were asserted in the litigation but were ***not*** challenged as part of the IPR proceedings. *F5 Networks*, 3:17-CV-03166-VC, Dkt. 136 at 1.

Moreover, contrary to DDC's assertion, the discovery it seeks is not "limited," but is broad and designed to harass Google, including by seeking information that is privileged or unrelated to any claims and defenses in this case. With respect to DDC's request for discovery into Google's preservation and litigation hold protocols, such documents are privileged. *See, e.g.*, *PersonalWeb Techs., LLC v. Google Inc.*, No. C13-01317 EJD (HRL), 2014 WL 4088201, at *4 (N.D. Cal. Aug. 19, 2014) ("[T]he Court agrees with Google that the litigation hold notice itself is protected as attorney-client communications and/or work product . . ."); *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007) ("[T]he [document retention notice] documents themselves include material protected under attorney client privilege and the work product doctrine. . ."). And, as explained above, there is no suggestion or evidence of spoliation in this case to compel their production despite their status as privileged materials.

Google's prior art search protocol and results are also privileged. *See, e.g.*, *Bos. Sci. Corp. v. Cordis Corp.*, No. C02-1474JW (RS), 2008 WL 1766757, at *1 (N.D. Cal. Apr. 15, 2008) (denying motion to compel letters exchanged between attorneys and client documenting prior art search efforts in part because "[the movant] makes no suggestion that the letters were not subject to the attorney-client privilege . . ."); *Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc.*, 224 F.R.D. 644, 655 (N.D. Cal. 2004) (stating that prior art searches are protected work product if "the discovery sought is: 1) a document or tangible thing; 2) that was prepared in anticipation of litigation; 3) by or for a party, or by or for its representative"). And even if they were not subject to privilege, there is no urgency or relevance to Google's prior art searches at this time. DDC seeks discovery of the prior art search materials to evaluate the scope of IPR estoppel, which, as DDC admits, "only applies after a final written decision" that is about 18 months away, and only if those decisions "do[] not invalidate all challenged claims." D.I. 159 at 7, 13. DDC's request is therefore premature by at least 18 months.

And as discussed above, discovery into Google's relationships with former co-defendants or business partners is not relevant to any issue in this case. DDC itself characterizes such evidence

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as relevant only to the PTAB proceedings. D.I. 159 (Response) at 15 ("Google should not be permitted to use a stay to shield the very discovery that DDC could use to terminate the PTAB petitions."). If DDC believes such discovery is relevant to the IPR proceedings, the PTAB has procedures that allow for discovery on privity issues, and DDC can and should avail itself of those procedures, not try to burden this Court with these requests. *See, e.g.*, 37 C.F.R. § 42.51(b); *K. J. Pretech Co., Ltd. v. Innovative Display Techs. LLC*, IPR2015-01866, Paper 13 at 2 (PTAB Jan. 5, 2016) (authorizing "Patent Owner to file a motion for additional discovery limited to the issue of privity. . ."). At the same time, and as explained above, DDC's allegations of privity issues are meritless, as mere commercial relationships are not sufficient for privity findings. *See, e.g.*, *Google LLC v. Seven Networks, LLC*, IPR2018-01118, Paper 22 at 1 (PTAB Jan. 11, 2019) ("[H]aving a long-standing commercial relationship alone does not show whether the parties have a substantial 'legal relationship' sufficient for a finding of privity.").

Finally, with respect to the requested depositions of Messrs. Kauffman and Bavor, as noted above, DDC itself has stated that their testimony is irrelevant, in opposing transfer. D.I. 95 at 7.

Given that the discovery DDC requests is irrelevant and privileged, DDC's contention that the Court will not be burdened if this discovery is allowed to proceed is simply wrong. Allowing DDC to request such discovery during the stay will clearly result in discovery disputes that the parties will ultimately need to bring to the Court, thereby defeating one of the main purposes of the requested stay—conserving the resources of both the Court and the parties.

IV. CONCLUSION

For the foregoing reasons and those stated in Google's opening brief, Google's motion to stay should be granted in its entirety and DDC's request for discovery during the stay should be rejected.

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Dated: April 27, 2023

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