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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 POLARIS POWERLED
11 TECHNOLOGIES, LLC,
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13 Plaintiff,
14 v.
15 NINTENDO CO., LTD., et al.,
16 Defendants.

CASE NO. C22-0386JLR

ORDER

**PROVISIONALLY FILED
UNDER SEAL**

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I. INTRODUCTION

Before the court are eight motions: (1) Defendants Nintendo Co., Ltd. and Nintendo of America Inc.’s (collectively, “Nintendo”) motion to stay this litigation pending the *ex parte* reexamination (“EPR”) of numerous claims of United States Patent No. 8,223,117 (the “’117 Patent”) by the United States Patent and Trademark Office (“USPTO”) (Stay Mot. (Dkt. # 53); Stay Reply (Dkt. # 76)); (2) Plaintiff Polaris PowerLED Technologies, LLC’s (“Polaris”) motion to strike Nintendo’s

1 non-infringement contentions (Non-Infring. Strike Mot. (Dkt. ## 61 (redacted), 63
2 (sealed))); (3) Polaris's motion to strike Nintendo's invalidity contentions (Invalidity
3 Strike Mot. (Dkt. # 56)); (4) Polaris's motion to seal its motion to strike Nintendo's non-
4 infringement contentions and certain exhibits filed in support of its motion (Non-Infring.
5 MTS (Dkt. # 59)); (5) Polaris's motion to seal an exhibit filed in support of its motion to
6 strike Nintendo's invalidity contentions (Invalidity MTS (Dkt. # 54)); (6) Polaris's
7 motion to seal its response to Nintendo's motion to stay and certain declarations filed in
8 support of its response (Stay MTS (Dkt. # 66)); (7) Nintendo's cross-motion for a more
9 definite disclosure of infringement contentions (N. Infring. Cross-Mot. (Dkt. ## 88
10 (sealed), 89 (redacted))); and (8) Nintendo's motion to seal its cross-motion (Cross-Mot.
11 MTS (Dkt. # 85)). Polaris opposes Nintendo's motion to stay.¹ (Stay Resp. (Dkt. ## 68
12 (sealed), 71 (redacted)).) Nintendo opposes Polaris's motions to strike Nintendo's
13 invalidity and non-infringement contentions. (Non-Infring. Strike Resp. (Dkt. ## 88
14 (sealed), 89 (redacted)); Invalidity Strike Resp. (Dkt. # 83).) Nintendo does not oppose
15 Polaris's motions to seal documents associated with its motions to strike Nintendo's
16 non-infringement contentions and asks the court to deny as moot Polaris's motion to seal

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21 ¹ Because Nintendo's cross-motion for a more definite disclosure and its motion to seal
22 its cross-motion do not note until February 17, 2023, Polaris has not yet responded to those
motions. (*See generally* Dkt.) However, Polaris's counsel confirmed that Polaris does not
oppose Nintendo's motion to seal. (*See* Elkman Decl. (Dkt. # 86) ¶¶ 2, 5.)

1 an exhibit filed in support of Polaris’s motion to strike Nintendo’s invalidity
2 contentions.² (Resp. to Non-Infring. MTS (Dkt. # 80); Resp. to Invalidity MTS (Dkt. #
3 78).) The court has considered the parties’ submissions, the balance of the record, and
4 the applicable law. Being fully advised,³ the court (1) GRANTS Nintendo’s motion to
5 stay; (2) DENIES without prejudice Polaris’s motions to strike Nintendo’s invalidity and
6 non-infringement contentions; (3) GRANTS Polaris’s motion to seal its motion to strike
7 Nintendo’s non-infringement contentions and certain exhibits filed in support of its
8 motion; (4) DENIES as moot Polaris’s motions to seal an exhibit filed in support of its
9 motion to strike Nintendo’s invalidity contentions; (5) GRANTS Polaris’s motion to seal
10 its response to Nintendo’s motion to stay and certain declarations filed in support of its
11 response; (6) DENIES without prejudice Nintendo’s cross-motion for a more definite
12 disclosure of infringement contentions; and (7) GRANTS Nintendo’s motion to seal its
13 cross-motion.

14 II. BACKGROUND

15 This case involves Nintendo’s alleged infringement of the ’117 Patent. (*See*
16 Compl. (Dkt. # 1) at 1; *see also id.* ¶ 8, Ex. A (“’117 Patent”).) The ’117 Patent, which
17 Polaris owns, describes a “method and apparatus to control display brightness with
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19 ² Because Polaris’s motion to seal documents associated with its response to Nintendo’s
20 motion to stay does not note until February 10, 2023, Nintendo has not yet responded to that
21 motion. (*See generally* Dkt.) However, Nintendo’s counsel has indicated that Nintendo does not
22 oppose the motion to seal. (*See* Stay MTS at 3.)

21 ³ Polaris requests oral argument (*see* Invalidity Strike Mot. at 1; Non-Infring. Strike Mot.
22 at 1), but the court finds that oral argument would not be helpful to its disposition of the motions,
see Local Rules W.D. Wash. LCR 7(b)(4).

1 ambient light correction.” (*Id.* ¶ 8 (capitalization omitted); *see also id.* (stating that Bruce
2 Ferguson invented the ’117 Patent but that Polaris now “owns by the entire right, title,
3 and interest in the ’117 Patent”).) On March 29, 2022, Polaris sued Nintendo for direct
4 and indirect infringement of the ’117 Patent. (*See generally id.* ¶¶ 11-29 (alleging that
5 Nintendo’s Nintendo Switch product infringes on the ’117 Patent)). Polaris asserts
6 claims 1, 2, 7, 9, 15, and 16 of the ’117 Patent (collectively, the “asserted claims”) in this
7 action. (*See Stay Mot.* at 4-5; *Stay Resp.* at 4.) In its answer, Nintendo denied that it
8 infringes on the ’117 Patent and asserted non-infringement and invalidity declaratory
9 judgment counterclaims. (*See generally Answer* (Dkt. # 13) at 3-5, 13.)

10 On January 5, 2023, the USPTO instituted reexamination of twelve claims,
11 including all asserted claims, of the ’117 Patent. (1/11/23 Chen Decl. (Dkt. # 53-1) ¶ 2,
12 Ex. 1 (“Order Granting Reexam.”) at 2, 5.⁴) The USPTO found five “substantial new
13 questions of patentability” based on certain prior art references. (*See id.*) Nintendo
14 subsequently filed the instant motion to stay these proceedings pending the USPTO’s
15 reexamination of the ’117 Patent. (*See generally Stay Mot.*) Shortly thereafter, Polaris
16 filed the instant motions to strike Nintendo’s invalidity and non-infringement contentions
17 and motions to seal documents relating to its motions to strike and its response to
18 Nintendo’s motion to stay. (*See generally Non-Infring. Strike Mot.; Invalidity Strike*
19 *Mot.; Non-Infring. MTS; Invalidity MTS; Stay MTS.*)

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⁴ The court uses the numbers in the CM/ECF header when citing to the parties’ exhibits.

III. ANALYSIS

The court begins by discussing Nintendo's motion to stay before turning to Polaris's motions to seal and to strike Nintendo's invalidity and non-infringement contentions.

A. Motion to Stay

A district court has the discretion to stay judicial proceedings pending reexamination of a patent by the USPTO. *See Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008); *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988). To determine whether to grant such a stay, the court considers "(1) whether a stay will simplify the issues in question and the trial of the case, (2) whether discovery is complete and whether . . . trial date has already been set, and (3) whether a stay will unduly prejudice or present a clear tactical disadvantage to the non-moving party." *Pac. Bioscience Labs., Inc. v. Pretika Corp.*, 760 F. Supp. 2d 1061, 1063 (W.D. Wash. 2011).

1. Issue Simplification

Nintendo argues that a stay will simplify the issues in this case because the pending EPR: (1) will likely result in the cancellation or amendment of the asserted claims, and thus, has the potential to reduce the number of claims at issue or moot this entire case; and (2) will generate an additional intrinsic record that will aid the parties and the court with issues such as claim construction. (*See Stay Mot.* at 3-5; *Stay Reply* at 2-5.) Polaris contends that a stay is unlikely to simplify the issues in this case, arguing that: (1) the record is already "highly developed regarding claim construction" in light of other district court cases construing the asserted claims and Patent Trial and Appeal

1 Board (“PTAB”) decisions denying *inter partes* review (“IPR”) petitions; (2) invalidation
2 of all asserted claims in the EPR is unlikely because the ’117 Patent has been the subject
3 of four prior IPR petitions that were all denied institution; and (3) if any asserted claim is
4 confirmed patentable in the EPR, “there will be no significant simplification of the
5 issues” because “[d]iscovery and infringement will . . . involve analysis of the same
6 technical documents and same source code” regardless of which claims remain and the
7 EPR will not “resolve the broader issues of validity.” (*See Stay Resp.* at 4-8.)

8 The court finds Nintendo’s arguments more persuasive. To begin, the court rejects
9 Polaris’s argument that the EPR will not resolve or significantly simplify the issues in
10 this case regarding infringement and invalidity if any asserted claim is found patentable.
11 (*See Stay Resp.* at 5-7.) “A stay request is not contingent upon the reexamination
12 proceeding being coterminous and resolving every claim and issue in this action. Rather,
13 the salient question is whether the reexamination will aid the [c]ourt or otherwise
14 streamline the litigation.” *Pragmatus Telecom, LLC v. NETGEAR, Inc.*, No. C 12-6198
15 SBA, 2013 WL 2051636, at *2 (N.D. Cal. May 14, 2013) (rejecting plaintiff’s argument
16 that stay was not warranted because reexamination of two of the patents-in-suit would not
17 address all of the defenses defendant intended to assert); *AT & T Intell. Prop. I v. Tivo,*
18 *Inc.*, 774 F. Supp. 2d 1049, 1053 (N.D. Cal. 2011) (“[I]f the reexamination proceeding
19 should narrow any of the asserted claims of the [patent-in-suit], the scope of th[e]
20 litigation may be significantly simplified.” (quoting *Ho Keung Tse v. Apple Inc.*, No. C
21 06-06573 SBA, 2007 WL 2904279, at *8 (N.D. Cal. Oct. 4, 2007))).

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1 The USPTO's statistics show that, historically, 79% of claims emerge from an
2 EPR either changed or canceled. (See 1/11/23 Chen Decl. ¶ 3, Ex. 2 at 3 (providing
3 USPTO's EPR statistics).⁵) Here all of the claims of the '117 Patent at issue in this
4 litigation are subject to the USPTO's pending EPR. (Order Granting Reexam at 2, 5.)
5 Based on the historical rate at which the USPTO changes or cancels claims, the court
6 finds that it is likely that the USPTO will alter or cancel at least some of the asserted
7 claims. "If the court were to allow the case to proceed, there is a substantial risk that both
8 the court and the parties will needlessly expend valuable resources in determining the
9 validity of patent claims that are ultimately cancelled or amended by the USPTO."
10 *Pretika Corp.*, 760 F. Supp. 2d at 1064-65; *see also, e.g., Aten Int'l Co., Ltd. v. Emine*
11 *Tech. Co., Ltd.*, No. SACV09-0843, 2010 WL 1462110, at *7 (C.D. Cal. Apr. 12, 2010)
12 ("Because [the vast majority] of patents being reexamined change in some way . . . the
13 Court risks enabling futile litigation that may have to be repeated if the patent changes.").
14 Even if some or all of the claims are found patentable, staying the case pending
15 reexamination will "facilitate trial by providing the court with expert opinion of the
16 [US]PTO and clarifying the scope of the claims." *Target Therapeutics, Inc. v. SciMed*
17 *Life Sys., Inc.*, 33 U.S.P.Q. 2d 2022, 2023 (N.D. Cal. 1995); *Pretika Corp.*, 760 F. Supp.
18 2d at 1065 (stating that "the court would still have the benefit of the USPTO's analysis of

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21 ⁵ Specifically, the USPTO's statistics indicate that 66% of such reexaminations result in
22 claims being changed and 13.1% result in all claims being canceled. (1/11/23 Chen Decl. ¶ 3,
Ex. 2 at 3.)

1 the disputed claim terms in ruling on claim construction”).⁶ The reexamination will have
2 a significant impact on the issues in this case, regardless of the outcome.⁷ Accordingly,
3 the court finds that this factor weighs in favor of granting the stay.

4 2. Early Stage of Case

5 This case has been pending for less than a year, with the most burdensome and
6 costly stages to come. Although the parties have engaged in limited discovery (*see* Stay
7 Mot. at 2-3; Stay Resp. at 3; Stay Reply at 1), no depositions have been noticed, no claim
8 construction briefs have been filed, and the claim construction hearing has not yet taken
9 place (*see* Sched. Order (Dkt. # 41) at 1-2 (claim construction briefs due in April 2023
10 and *Markman* hearing set in May 2023); Stay Mot. at 2-3)). Additionally, the trial is not
11 scheduled until February 12, 2024. (*See* Sched. Order.) Thus, “[n]either the parties, nor
12 the court, have invested the kind of resources that would render a stay pending
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14 ⁶ Although the ’117 Patent has been subject to prior IPR petitions (*see* Tonkovich Decl.
15 (Dkt. # 75) ¶¶ 7-10, Exs. 6 9), the USPTO granted the EPR request only after finding
16 “substantial new questions of patentability” based on newly presented prior art (*see* Order
17 Granting Reexam at 9 16 (noting that the prior art and arguments raised in the EPR petition are
18 not the same or substantially the same as those presented in any of the prior denied IPR
19 petitions).) Accordingly, the court agrees with Nintendo that the fact that prior challenges did
not result in the institution of IPRs has no bearing on the outcome of the present instituted EPR
and that the intrinsic record from the EPR will involve new issues that will likely be helpful to
the court and the parties. (*See* Stay Reply at 2-4); *WAG Acquisition, LLC v. Flying Crocodile,*
Inc., No. C19-1278BJR, 2021 WL 6693829, at *3 (W.D. Wash. Dec. 28, 2021) (granting stay
where “the patents at issue have been subject to prior IPR proceedings”).

20 ⁷ Polaris urges the court to consider its own view of the reexamination statistics. (*See*
21 Stay Resp. at 5 (stating that in EPRs relating to patents for which there were three or more prior
22 denials of requests for PTAB review (e.g., IPRs), “original claims were confirmed patentable in
nearly 70% (i.e., 68.75%) of the EPRs” (citing O’Neill Decl. (Dkt. # 74))).) The court does not,
however, find these statistics persuasive. Even if it did, the court’s conclusion would remain the
same.

1 reexamination untenable.” *Pretika Corp.*, 760 F. Supp. 2d at 1066. The fact that
2 substantial additional discovery, claim construction, and other issues lie ahead in this case
3 weighs in favor of a stay.⁸ *See, e.g., Zillow v. Trulia*, No. C12-1549JLR, 2013 WL
4 5530573, at *5-6 (W.D. Wash. Oct. 7, 2013) (granting stay with trial “more than ten
5 months away,” on the “eve of claim construction” and where “well over a hundred
6 thousand pages of documents” had been produced, and a Rule 30(b)(6) notice served).

7 3. Unduly Prejudice to Non-Moving Party

8 Although the court recognizes that Polaris may suffer *some* prejudice as a result of
9 the delay inherent in any USPTO reexamination or review process, Polaris fails to
10 establish that it will be *unduly* prejudiced by a stay. First, “[t]he delay inherent to the
11 reexamination process does not generally, by itself, constitute undue prejudice.”
12 *Pragmatus AV, LLC v. Facebook, Inc.*, No. 11-CV-00494-EJD, 2011 WL 4635512, at *3
13 (N.D. Cal. Oct. 5, 2011). Second, the potential for prejudice resulting from a stay is of
14 less concern in cases where, as here, the parties are not competitors. (*See* Polaris Answer
15 (Dkt. # 48) ¶¶ 6, 7, 46 (stating that Polaris does not and has not made or sold any
16 products that practice the ’117 Patent)); *see also* Stay Mot. at 5 (“[T]he parties are not
17 competitors; Plaintiff Polaris is a non-practicing entity that does not manufacture any
18 products.”)); *see, e.g., SRC Labs v. Microsoft*, No. C18-0321JLR, 2018 WL 6065635, at

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⁸ The court notes that Polaris’s arguments that infringement and non-infringement
contentions are unsettled, invalidity contentions need to be adjusted, and claim construction
disputes cannot be “readily identified” further undermine its position that the stage of this
litigation weighs against a stay. (*Compare* Stay Resp. at 1-2, *with* Non-Infring. Strike Mot.;
Invalidity Strike Mot.; 1/27/23 Chen Decl. (Dkt. # 77) ¶ 2, Ex. 1.)

1 *4 (W.D. Wash. Nov. 20, 2018); *WAG Acquisition*, 2021 WL 6693829, at *3. Indeed,
2 “[c]ourts have consistently found that a patent licensor cannot be prejudiced by a stay
3 because monetary damages provide adequate redress for infringement.” *Implicit*
4 *Networks, Inc. v. Advanced Micro Devices, Inc.*, No. C08-0184JLR, 2009 WL 357902, at
5 *3 (W.D. Wash. Feb. 9, 2009); *see also Pragmatus AV*, 2011 WL 4635512, at *3
6 (rejecting non-practicing, licensor plaintiff’s argument that because its patents expired in
7 two years, a stay would cause it undue prejudice).

8 Third, although the court acknowledges that a stay may risk the loss of live
9 testimony from two of Polaris’s witnesses (*see* Stay Resp. at 8-10; Brandi Decl. (Dkt.
10 # 69 (sealed)); Ferguson Decl. (Dkt. # 70 (sealed))), Polaris’s concerns about the
11 availability of its witnesses can be addressed by using other means to preserve their
12 testimony. *See, e.g., Confederated Tribes & Bands of Yakama Nation v. Airgas USA,*
13 *LLC*, 435 F. Supp. 3d 1103, 1128 (D. Or. 2019) (“As to possible harm to Defendants,
14 they have cited loss of evidence, but the stay should allow preservation of evidence, for
15 example through perpetuation depositions.”). Finally, Polaris’s argument regarding
16 undue prejudice is undermined “not only by its failure to seek preliminary injunctive
17 relief,” *Zillow*, 2013 WL 5530573, at *7, but also “by its own delay in pursuing its
18 infringement claim,” *Pretika Corp.*, 760 F. Supp. 2d at 1067.⁹ *See, e.g., Zillow*, 2013 WL

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⁹ Although Polaris acquired the ’117 Patent in 2017, Polaris argues that any delay in suing Nintendo “was, in part, the result of constant IPRs pending against the ’117 [P]atent.” (Stay Resp. at 11.) However, Polaris acknowledges that “the last two IPRs ended in denial of rehearing en banc in [May] 2021.” (*Id.* (citing Tonkovich Decl. ¶¶ 21-22, Exs. 20-21).) Yet even though Polaris sent Nintendo a demand later regarding its alleged infringement in February

1 5530573, at *7 (finding no undue prejudice because Zillow failed to move for
2 preliminary injunctive relief and delayed filing its patent infringement lawsuit for a year
3 after defendant launched the allegedly infringing feature of its website). Therefore, the
4 court finds that Polaris is unlikely to suffer undue prejudice if the court stays this case
5 pending the resolution of the EPR of the '117 Patent.

6 On balance, the court concludes that the factors weigh in favor of staying this case.
7 Accordingly, the court GRANTS Nintendo's motion to stay this case pending the
8 USPTO's reexamination of the '117 Patent.

9 **B. Motions to Seal**

10 During the course of briefing Nintendo's motion to stay and cross-motion for a
11 more definite disclosure and Polaris's motions to strike, the parties filed a series of
12 documents under provisional seal and, in many cases, also filed redacted versions of
13 those documents on the court's docket. (*See generally* Dkt.) In conjunction with these
14 filings, the parties also filed four motions seeking the court's authorization to place the
15 documents or portions of documents at issue under seal. First, Polaris seeks to seal
16 "information that was produced and designated by Nintendo as Highly Confidential—
17 Attorneys' Eyes Only under the terms of the protective order entered in this case." (*See*
18 Invalidity MTS at 2; Non-Infring. MTS at 2; *see also* Resp. to Non-Infring. MTS at 1-4.)
19 Second, Polaris seeks to seal declarants Ralph Brandi and Bruce Ferguson's "personal
20 and sensitive medical information." (*See* Stay MTS at 2-3.) Finally, Nintendo asks the

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2020, Polaris did not file the present suit until nearly a year after the termination of those IPRs.
(*See generally* Compl. ¶ 22.)

1 court to seal its cross-motion for a more definite disclosure of infringement contentions
2 because the motion contains Nintendo's "highly confidential source code." (*See*
3 Cross-Mot. MTS at 1-4.)

4 The court has reviewed the parties' motions and responses, as well as the
5 documents or portions of documents that the parties have placed under seal. Based on
6 that review, the court concludes that the parties have met the standard for placing the
7 documents still at issue under seal set forth in the applicable case law and Local Civil
8 Rule 5(g). *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.
9 2006); Local Rules W.D. Wash. LCR 5(g). Accordingly, the court GRANTS Polaris's
10 motion to seal its motion to strike Nintendo's non-infringement contentions and certain
11 exhibits filed in support of its motion; GRANTS Polaris's motion to seal its response to
12 Nintendo's motion to stay and certain declarations filed in support of its response; and
13 GRANTS Nintendo's motion to seal its cross-motion. The court DENIES as moot
14 Polaris's motions to seal an exhibit filed in support of its motion to strike Nintendo's
15 invalidity contentions because Nintendo states that the exhibit does not contain
16 confidential information and need not be filed under seal. (Resp. to Invalidity MTS at 1.)
17 The court DIRECTS the clerk to remove the seal on the exhibit filed at docket entry 58,
18 but to maintain the seal on all other documents that are provisionally under seal on the
19 court's docket as of this date.

20 **C. Remaining Motions**

21 Having concluded that this case should be stayed pending the *ex parte*
22 reexamination of numerous claims of the '117 Patent (*see supra* § III.A), including the

1 asserted claims, the court declines to consider Polaris's motions to strike Nintendo's
2 invalidity and non-infringement contentions and Nintendo's cross-motion for a more
3 definite disclosure of infringement contentions at this time (*see generally* N. Infring.
4 Cross-Mot.; Non-Infring. Strike Mot.; Invalidity Strike Mot.). Accordingly, the court
5 DENIES Polaris's motions to strike and Nintendo's cross-motion for a more definite
6 disclosure without prejudice. Polaris and Nintendo may refile their motions to strike after
7 the stay is lifted.

8 IV. CONCLUSION

9 For the foregoing reasons, the court:

10 1. GRANTS Nintendo's motion to stay this litigation pending the *ex parte*
11 reexamination of numerous claims of the '117 Patent (Dkt. # 53). It is hereby
12 ORDERED: (1) all proceedings in this action are STAYED until ordered otherwise; and
13 (2) within six months of the date of this order or within twenty days following the
14 conclusion of the USPTO reexamination of the '117 Patent, whichever is sooner, the
15 parties shall file a joint status report describing the status of the case, and if warranted,
16 requesting that the court lift the stay;

17 2. DENIES Polaris's motion to strike Nintendo's non-infringement
18 contentions without prejudice to refiling the motion after the stay is lifted (Dkt. ## 61
19 (redacted), 63 (sealed));

20 3. DENIES Polaris's motion to strike Nintendo's invalidity contentions
21 without prejudice to refiling the motion after the stay is lifted (Dkt. # 56);
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4. GRANTS Polaris's motion to seal its motion to strike Nintendo's non-infringement contentions and certain exhibits filed in support of its motion (Dkt. # 59);

5. DENIES as moot Polaris's motion to seal an exhibit filed in support of its motion to strike Nintendo's invalidity contentions (Dkt. # 54) and DIRECTS the clerk to remove the seal on the exhibit filed at docket entry 58;

6. GRANTS Polaris's motion to seal its response to Nintendo's motion to stay and certain declarations filed in support of its response (Dkt. # 66);

7. DENIES Nintendo's cross-motion for a more definite disclosure of infringement contentions without prejudice to refileing the cross-motion after the stay is lifted (Dkt. ## 88 (sealed), 89 (redacted)); and

8. GRANTS Nintendo's motion to seal its cross-motion for a more definite disclosure of infringement contentions (Dkt. # 85).

The court further DIRECTS the Clerk to provisionally file this order under seal and ORDERS the parties to meet and confer regarding the need for redaction of this order and file, by February 17, 2023, a joint statement indicating any such need.

Dated this 31st day of January, 2023.


JAMES L. ROBERT
United States District Judge