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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RUGGED CROSS HUNTING BLINDS, LLC

CASE NO.: 1:23-cv-02231-JPC

Plaintiff,

v.

DBR FINANCE, INC.,

Defendant.

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I. INTRODUCTION

Rugged Cross Hunting Blinds, LLC (hereinafter “RCHB” or “Plaintiff”), by and through its undersigned attorneys, hereby submits this Response in Opposition to dismiss Defendant DBR Finance, Inc.’s (hereinafter “DBR” or “Defendant”) Motion For Stay Pending Resolution of *Inter Partes* Review (“Motion For Stay”). Despite DBR’s attempt to convince this Court to mechanistically apply the motion for stay factors in their favor, the circumstances in which this case was brought to Ohio – including DBR’s relationship with its former codefendant, FeraDyne Outdoors, LLC (hereinafter “FeraDyne”) – necessitate a deeper analysis of whether a stay is appropriate. Because granting such a stay would unduly prejudice RCHB, without any assurance that issues in this case would be simplified, this Court should deny DBR’s Motion or Stay.

II. FACTUAL BACKGROUND

RCHB is the owner of U.S. Patent 11,399,535 (the “’535”) entitled “Camouflage Material, for a Hunting Blind,” which issued August 2, 2022. DKT 27, ¶¶ 1 and 12. On August 25, 2022, RCHB sent a letter to DBR (f/k/a Outdoor Products Innovations, Inc.) alleging DBR had infringed one or more claims of the ‘535 Patent by virtue of DBR making and selling the Rhino 180 hunting blinds. DKT 27, ¶34. A month later, on October 24, 2022, DBR sold substantially all of its assets to FeraDyne Outdoors, LLC (“FeraDyne”), including an inventory of the Rhino 180 blinds. (Ex. A, FER-0000054).

RCHB filed its original Complaint on December 5, 2022, against FeraDyne for patent infringement of the ‘535 Patent in the Western District of Wisconsin where FeraDyne is located. Dkt. 1, *Rugged Cross Hunting Blinds, LLC v. FeraDyne Outdoors, LLC*; Case No.: 3:22-cv-00690-jdp, Western District of Wisconsin (also referred to as the “Wisconsin case”).

The Court in Wisconsin entered its Preliminary Pretrial Conference Order, including a deadline of March 31, 2023, to amend pleadings and add parties without leave of court. Dkt. 20. Responding to RCHB's discovery requests, FeraDyne, on April 13, 2023, produced an Asset Purchase Agreement (the "Agreement") entered between FeraDyne and DBR regarding DBR's sale of substantially all of its assets to FeraDyne. Based information detailed in the Agreement and correspondence, dated May 5, 2023, from DBR's counsel on June 28, 2023, RCHB filed its Second Amended Complaint in the Wisconsin court, including DBR as a Defendant and alleging a single count of patent infringement against DBR. Dkt. 27.

In response, DBR filed a motion to dismiss for improper venue on August 28, 2023, to which RCHB filed both its brief in opposition as well as its motion for leave to file for a third amendment to its complaint, five days later on October 2, 2023. Dkt. 35-36; Dkt. 45-46. In its third amended complaint, RCHB added a count for DBR's active inducement of FeraDyne's direct infringement. Dkt. 45-46. On that same date, the Wisconsin court entered an Amended Scheduling Order setting a date of June 16, 2025, for jury selection and trial. Dkt. 48. Two days later, on October 4, 2023, RCHB and DBR filed a Joint Unopposed Motion to Transfer the action as to DBR to the Northern District of Ohio, which was granted via Order. Dkt. 51. In its order, the Wisconsin court denied DBR's motion to dismiss and RCHB's motion for leave as moot. As this Court is aware, the case as to DBR was transferred back to Wisconsin where that court properly severed the Count II against DBR and transferred it to this court. Dkt. 69.

On December 8, 2023, RCHB renewed its Motion for Leave to file an Amended Complaint to include a Count II against DBR for its active inducement of FeraDyne's direct infringement of the '535 Patent. Dkt. 74. Two weeks later, on December 22, 2023, DBR filed its Response in

Opposition to RCHB's motion for leave. Dkt. 77. On that same day, DBR filed its Motion for Stay Pending Resolution of *Inter Partes* Review. Dkt. 78.

III. LEGAL STANDARD

In deciding whether to grant a stay of litigation pending reexamination of patents-in-suit by the Board, "courts commonly consider three factors: '(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving part[y]; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.'" *PDS Elecs., Inc. v. Hi-Z Antennas*, No. 5:10-cv-2806, 2011 U.S. Dist. LEXIS 29211, 2011 WL 1097745, at *1 (N.D. Ohio Mar.22, 2011) (*quoting Xerox Corp. v. 3Com Corp.*, 69 F.Supp. 2d 404, 406 (W.D.N.Y. 1999)). However, the Court is not restricted to considering only these factors and must base its decision upon the totality of the circumstances. *Id.* (citing *Universal Elecs., Inc. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 2013 U.S. Dist. LEXIS 64154, at *6 (C.D. Cal. 2013)).¹

IV. ARGUMENT

A. DBR's Motion For Stay Should Be Denied

i. Granting A Stay Will Unduly Prejudice RCHB and Presents a Clear Tactical Disadvantage to RCHB

In examining whether a party will suffer undue prejudice or a clear tactical disadvantage, courts look to four subfactors: (1) the timing of the request for IPR; (2) the timing of the request

¹ Nevertheless, there is no per se rule that patent cases should be stayed pending PTO proceedings, because such a rule "would invite parties to unilaterally derail litigation." *Soverain Software LLC v. Amazon.Com, Inc.*, 356 F.Supp.2d 660, 662 (E.D. Tex. 2005); *See also Comcast*, 2007 U.S. Dist. LEXIS 103309, 2007 WL 1052883, at *1 ("If litigation were stayed every time a claim in suit undergoes reexamination, federal infringement actions would be dogged by fits and starts. Federal court calendars should not be hijacked in this manner.").

for stay; (3) the status of the IPR proceedings; and (4) the relationship of the parties. *Becon Med., Ltd. v. Bartlett*, No. 18-4169, 2019 U.S. Dist. LEXIS 218336, at *3 (E.D. Pa. Dec. 17, 2019).

The Patent Act does **not** “give[] parties one-year from the date they were served with a complaint to file an IPR.” Dkt. 79 at 9². The one-year limitation acts as a bar, not an enablement. Furthermore, the one-year ceiling does not change the fact that delay in seeking the PTO's review of a patent within that year can adversely affect a district court's view of a request for a stay pending review. *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1030 (C.D. Cal. 2013). In arguing that a stay of this case will not prejudice RCHB, DBR glosses over the inextricable link between RCHB's claims for patent infringement in this case and its claims for direct patent infringement against FeraDyne in the Wisconsin case. To that end, DBR suggests that it has acted diligently in filing its IPR within six months of RCHB joining DBR as a Defendant in the Wisconsin, and this factor should weigh in favor of granting a stay, because RCHB will not be prejudiced by a stay entered at this stage of litigation. Dkt. 79 at 9-10.

RCHB has made clear in its motion (and reply) for leave to amend its complaint, that its claim for DBR's active inducement of FeraDyne's direct infringement covers not only FeraDyne's sale of inventory it purchased from DBR, which FeraDyne has presumably sold, but also any of FeraDyne's subsequent sales of the Rhino 180 blinds. Dkt. 85 at 3-6. DBR's sale of its assets to FeraDyne and active involvement in management of FeraDyne's sales of the infringing Rhino 180 blinds, and its agreement to indemnify and defend FeraDyne against RCHB's claim for patent infringement, have put FeraDyne in position to continue infringing conduct that DBR started.

[REDACTED]

[REDACTED]

² Referring to page 9 of document filed on EMCF docket. This is page 5 of the Memorandum.

[REDACTED] Thus, not only has DBR encouraged and assisted in FeraDyne's infringing sales of the Rhino 180 hunting blinds, DBR has agreed to indemnify and defend FeraDyne for any losses incurred or sustained resulting from this lawsuit.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on the DBR's duties to, and control over, FeraDyne arising from the Agreement, as well as DBR's provision of services to FeraDyne in accordance with the TSA, the PTAB could reasonably determine that FeraDyne is a real party in interest relative to DBR's request for *inter partes* review under the courts' adoption of a broad interpretation of the RPI paradigm, *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1358 (Fed. Cir. 2018).

In addition, or alternatively, the Board may find there exists sufficient privity between DBR and FeraDyne under 35 U.S.C §315 to consider the stage of the litigation of the Wisconsin. When the patent owner raises an argument for discretionary due to an earlier trial date, 8 the Board's decisions have balanced the following factors: 1) whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted; 2) proximity of the court's trial date to the Board's projected statutory deadline for a final written decision; 3) investment in the parallel proceeding by the court and the parties; 4) overlap between issues raised in the petition and in the parallel proceeding; 5) whether the petitioner and defendant in the parallel proceeding are the same; and 6) other circumstances that impact the Board's exercise of discretion, including the merits. See, *Apple Inc., v. Fintiv, Inc.*, IPR2020-00019 at pg. 5-6. Of course, in this case if the Board finds privity between DBR and FeraDyne, or that DBR and FeraDyne are substantially related

which RCHB believes likely, factor 5 would way in favor of the Board declining to institute proceedings.³

Assuming the Board institutes IPR proceedings, the proceedings may extend into the middle of **2025** with a final decision being rendered by June 8, 2025. *See* 37 C.F.R. § 42.107 (preliminary response must be filed no later than three months after the date of notice of petition) *and* 35 U.S.C. § 314(b) (institution decided by USPTO three months after receiving preliminary response) *and* 35 U.S.C. § 316(a)(11) (requiring final determination in an inter partes review be issued not later than 1 year after institution). Allowing the instant case to languish while the IPR is decided has been held to weigh against a granting of a stay. *See Becon Med., Ltd.* at *6.

In the meantime, the Wisconsin case will proceed because FeraDyne is not named as a real-party-in-interest in the IPR.⁴ Jury selection and trial for the Wisconsin case is scheduled for June 16, 2025, at 9:00 a.m. Dkt. 48. If the Board rules in RCHB's favor then RCHB will have to litigate its claim against DBR for inducing FeraDyne's direct infringement. Should DBR be found guilty, it will be joint and severally liable with FeraDyne. *Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1361 (Fed. Cir. 2001) ("A party that induces or contributes to infringement is jointly and severally liable with the direct infringer for all general damages.").

According to DBR, it had until June of 2024 to file an IPR within the one-year time limit provided under 35 U.S.C. §314. Dkt. 79 at 9. Instead, DBR filed its IPR petition on December 8,

³ The Office is contemplating omitting *Fintiv* factor 5 in favor of considering real parties in interest and privies, or alternatively parties that are substantially related. 37 C.F.R. Part 42, Proposed Rule Change, Federal Register, Vol. 88, No. 77, pg. 24503, 24516 (April 2, 2023).

⁴ RCHB intends on seeking dismissal of the IPR, at least on the basis that FeraDyne may be a real-party-interest in the IPR and because the trial date of the Wisconsin case is set for the same time the Board must render a decision in the IPR, the Board should decline from instituting the IPR proceedings.

2023, a mere four days prior to the one-year anniversary of December 12, 2022, when FeraDyne was served with the complaint of the Wisconsin case. Filing a petition for IPR mere days before the deadline has been held to unduly prejudice the non-movant. *See Rensselaer Polytechnic Inst. v. Apple Inc.*, Civil Action No. 1:13-CV-0633 (DEP), 2014 U.S. Dist. LEXIS 5186, at *15 (N.D.N.Y. Jan. 15, 2014) (Court held filing the IPR petition two days before the expiration of the deadline under the AIA weighed against a stay).

DBR was well aware of the complaint RCHB filed against FeraDyne and has been since at least as early as service of the complaint on FeraDyne. In fact, on August 25, 2022, RCHB sent a cease-and-desist letter to DBR (f/k/a Outdoor Product Innovations, Inc.) explaining RCHB's claim for patent infringement of the '535 Patent for DBR's sale of the Rhino 180 hunting blinds. Dkt. 27, ¶34. In October 2024, DBR sold substantially all of its assets to FeraDyne. On December 5, 2022, RCHB filed suit in Wisconsin against FeraDyne, and eventually added DBR in June 2023. Dkt. 1.

While RCHD did not add DBR as a defendant in the Wisconsin case until June 2023, DBR was well aware of its potential exposure as to RCHB's claims for infringement against FeraDyne well over a year before it filed the IPR, due to its obligations to indemnify and defend FeraDyne. A request for IPR "made well after the onset of litigation followed by a subsequent **request** to stay may lead to an inference that the moving party is seeking an inappropriate tactical advantage." *Belden Techs. Inc. v. Superior Essex Commc'ns LP*, No. CIV. 08-63-SLR, 2010 U.S. Dist. LEXIS 90960, 2010 WL 3522327, at *2 (D. Del. Sept. 2, 2010). Accordingly, DBR's delay in filing its petition for IPR suggests that DBR is seeking an inappropriate tactical advantage over RCHB in this case. *See, Becon Med. at *4-*5.*

ii. The PTAB Has Not Yet Granted DBR's Petition Which Weighs Against Granting A Stay

DBR argues that this is exactly the type of case in which courts “routinely” grant stays in view of IPR proceedings considering the stage of litigation. Dkt. 79 at 9. To that end, DBR cites *Bio-Rad Laboratories, Inc. v. 10X Genomics, Inc.*, Civ. A. No. 18-1679, 2020 WL 2849989 at *1 (D. Del. Jun. 2, 2020). *Id.* DBR fails to note that one factor considered by the Court in the *Bio Rad* case was the fact that **the PTAB had already instituted the IPR proceedings**. This is an important distinction in this case, because DBR filed the IPR on December 8, 2024, and RCHB's preliminary response is not due until March 8, 2024. In fact, the PTAB will likely not decide whether to institute proceedings until June 8, 2024.

Motions to stay district court patent infringement litigation are often denied when the PTAB has not yet ruled whether to institute proceedings. *See, True Position, Inc. v. Polaris Wireless, Inc.*, C.A. No. 12-646, 2013 U.S. Dist. LEXIS 150764, 2013 WL 5701529, at *6 (D. Del. Oct. 21, 2013); *Realtime Data LLC v. Actian Corp.*, Civil No. 6:15-cv-463, 2016 U.S. Dist. LEXIS 77566, 2016 WL 3277259, at *2 (E.D. Tex. June 14, 2016); *Otto Bock HealthCare LP v. Össur HF*, No. SACV 13-891, 2013 U.S. Dist. LEXIS 188428, 2013 WL 12313020, at *2 (C.D. Cal. Dec. 16, 2013). Indeed, this Court has denied a motion to stay when the PTAB has not yet instituted an IPR proceeding, reasoning that granting a stay is mere speculation as to the IPR process and the possible outcome is an insufficient basis upon which to stall progress in this case. *See, Lincoln Electric Co. v. Seabery Soluciones SL*, Case No. 1:15 CV 1576, 2016 U.S. Distr.

Lexis 184317 at 7.⁵ Regardless of the stage of this litigation, given the uncertainty of whether the PTAB will even institute IPR proceedings this factor weighs against granting a stay.

DBR argues that an IPR decision will simplify issues for trial because if the PTAB invalidates the '535 Patent, RCHB's claim for direct and presumably indirect infringement "disappear." DBR cites *The Noco Company*, Case No. 1:17-cv-2209, Dkt. 62 at *5-6 and *Monterey Research, LLC v. Nanya Tech. Corp.*, Case No. 1:19-cv-2090, Dkt. 84 at 2, n.1. In each of these cases the PTAB had already granted petitions for the IPR. Accordingly, the courts had the benefit knowing that one way or another, if the PTAB invalidated claims then issues for trial would be simplified or even if the PTAB did not invalidate claims, its decision could potentially provide some guidance to the district court on those issues. However, given the present stage of the IPR proceedings there is no way this Court knows if the PTAB will even grant DBR's IPR petition.

Here, the undecided status of the petition clouds the simplification inquiry. *See Universal Elecs., Inc.* 943 F. Supp. 2d at 1033 ("...the fact that the petitions have not yet been granted or denied makes it more difficult to predict whether the issues are likely to be simplified."). Indeed, the PTAB may dismiss the proceeding without ever reaching the invalidity of the claims. For example, the PTAB may find that FeraDyne is a real party in interest in the IPR, or there exists privity between FeraDyne and DBR, and given the stage of litigation of the FeraDyne Wisconsin case, the PTAB may decline to institute proceedings because its final decision will not issue until June 2025 when the FeraDyne case is scheduled for trial. In such a scenario, there is no simplification of issues as to validity of the '535 Patent.

⁵ In the *Becon* case a court, denying a motion to stay, found that because an IPR had been recently filed relative to the motion to stay, that the fact the Board had not instituted IPR proceedings weighed against granting a stay.

DBR also suggests that RCHB will not be prejudiced because RCHB and DBR are not active competitors. Dkt. 79 at 10-11. More specifically, DBR represents that it stopped selling the Rhino 180 blinds over a year ago, so there is no urgency for RCHB to enforce its rights against DBR. *Id.* at 6. At best, according to DBR, RCHB's claim for a reasonable royalty is limited to "a modest two months' of sales" that occurred prior to October 24, 2022, the date DBR sold substantially all of its assets to FeraDyne. *Id.* at 7.

This reasoning begs the following questions: 1) If DBR has stopped selling the Rhino 180 blinds, and DBR's exposure is limited to a mere two months of sales, why did DBR go to the expense and trouble of preparing and filing an IPR? 2) That is, if DBR's potential exposure is so trivial, why did DBR pay a forty-one thousand dollars (\$41,500.00) filing fee plus attorneys' fees and an expert fee for filing the IPR. (Ex. C, ¶5, and Ex. C-1). This filing fee is a cost exclusive of any attorneys' fees or expert fees. The IPR included a 100-page expert report and the petition itself was ninety-four (94) pages. (Ex. C, ¶6). RCHB has not crunched the numbers, but it is safe to say, the amount of money that DBR spent on the preparation and filing of the IPR far exceeds what DBR perceives as RCHB's potential recovery for DBR's "modest two months' of sales."

RCHB proposes that DBR understands that its exposure to RCHB's claims for infringement far exceeds the "modest two months' of sales," and, it may be liable for more than a reasonable royalty of its "modest two months' of sales." That is, DBR realizes that it is liable for FeraDyne's sales either by virtue of its obligations to indemnify and defend FeraDyne, or by virtue of RCHB's claim for active inducement. The only explanation, then, for DBR's filing of the IPR and subsequent request for the stay is that such machinations are a delay tactic.

In addition, RCHB has four licensees, three of whom are selling hunting blinds that incorporate the technology of the '535 Patent and are competitors of FeraDyne. All of these

licensees are paying RCHB a reasonable royalty. RCHB will be prejudiced by a stay in this case because as long as FeraDyne continues to infringe, it has an unfair advantage of pricing of its Rhino 180 blinds over RCHB's licensees, because FeraDyne is not paying royalties for its infringing sales.

RCHB understands that its remedy for the infringement is at least a reasonable royalty, but who pays that may be at issue. If this case is stayed, RCHB will still be left pursuing its claim against DBR for inducing infringement, which will further delay RCHB from recovering what it is owed. According to the Agreement, DBR agreed to pay to RCHB any award that RCHB may obtain against FeraDyne in the Wisconsin case, by virtue of DBR's obligation to indemnify FeraDyne; however, DBR and FeraDyne believe that a third party, Tru-View LLC is obligated to indemnify and defend pursuant to a license agreement between Tru-View and DBR. (Ex. C, ¶¶7-8; and Ex. C-2). In fact, DBR and Tru-View are currently involved in an arbitration over whether Tru-View is obligated to indemnify and/or defend DBR and FeraDyne pursuant to that license agreement. See, Ex. C, ¶¶9-12; and Ex. C-3.⁶ Therefore, RCHB's avenue for redress here is stymied by internal conflict amongst DBR, FeraDyne and Tru-View, causing a grant of stay in the instant case to impose a severe disadvantage to RCHB because it allows this group of infringers more time to draw out their own conflicts.

V. CONCLUSION

For the reasons stated above, RCHB respectfully requests that the Court deny Defendant DBR's Motion For Stay in this matter.

DATED this 5th day of January, 2024.

⁶ An arbitration hearing is scheduled for February 7, 2024, in Dallas Texas. Ex. C-3, ¶6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been served this 5th day of January, 2024 by electronic mail to: Dennis J. Abdelnour, Esquire (dabdelnour@honigman.com), HONIGMAN LLP, 155 N. Wacker Dr., Ste. 3100, Chicago, IL 60606, E. Roger Stewart, Esquire (ers@mccarthylebit.com); David M. Cuppage, Esquire (dmc@mccarthylebit.com); and Michael Vary, Esquire (vary.michael@gmail.com), MCCARTHY, LEBIT, CRYSTAL & LIFFMAN, CO., LPA, 1111 Superior Avenue East, Suite 2700, Cleveland, OH 44114.

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