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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

DISH TECHNOLOGIES L.L.C. and SLING
TV L.L.C.,

Plaintiffs,

v.

AYLO FREESITES LTD and 9219-1568
Quebec Inc.,

Defendants.

**DEFENDANTS' EXPEDITED MOTION
TO STAY PENDING *INTER PARTES*
REVIEW**

Case No. 2:24-cv-00066-DAK-JCB

Judge: Hon. Dale A. Kimball

Magistrate Judge: Hon. Jared C. Bennett

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Defendants Aylo Freesites Ltd (“Aylo Freesites”) and 9219-1568 Quebec Inc. (“Quebec”) (collectively, “Defendants”) respectfully move this Court to stay this case pending *inter partes* review (“IPR”). The United States Patent and Trademark Office’s (“USPTO”) Patent Trial and Appeal Board (“PTAB”) has instituted IPR on nearly all asserted claims of five patents asserted here by Plaintiffs DISH Technologies L.L.C. and Sling TV L.L.C. (collectively, “DISH”) and additional IPR petitions are pending challenging all asserted claims of all asserted patents. Additionally, given the upcoming deadline for Defendants to answer or otherwise respond to DISH’s First Amended Complaint in this action (D.I. 18, “FAC”), and in the interest of conserving Court and party resources, Defendants respectfully request that the Court enter an expedited briefing schedule on the instant motion, as set forth below.¹

I. INTRODUCTION

A stay is appropriate here. This case is at its earliest stages, the case would be simplified by the IPR proceedings, and DISH would not be unduly prejudiced by a stay. Indeed, this Court reached the same conclusion just weeks ago, when it stayed DISH’s other lawsuit against Aylo entities involving overlapping patents and IPRs. *See DISH Techs. LLC et al. v. MG Premium Ltd et al.*, Case No. 2:23-cv-00552-HCN-DAO (D. Utah) (the “Aylo Premium Suit”), D.I. 101 (submitted herewith as Exhibit A).² As Magistrate Oberg found in the Aylo Premium Suit, all three factors weighed in favor of a stay there. The same is true here, and the Court should likewise stay this case pending these IPRs.

In 2012, Congress established the IPR process in an effort to “improve patent quality and limit unnecessary and counterproductive litigation costs.” *Sec. People, Inc. v. Ojmar US, LLC*,

¹ Defendants are filing a motion to extend the deadline to respond to DISH’s Amended Complaint to 30 days from a decision on this motion or the lifting of a stay of the case.

² Unless noted otherwise, cited exhibits refer to those accompanying the Declaration of Dennis J. McMahon submitted with this motion.

No. 14-cv-04968-HSG, 2015 WL 3453780, at *1 (N.D. Cal. May 29, 2015). An IPR is an administrative proceeding conducted by the PTAB, where a panel of expert Administrative Patent Judges is tasked with resolving the validity of a patent without the significant expenses routinely incurred during district court litigation. By statute, the PTAB can only institute an IPR if it determines that there is a “reasonable likelihood” that one or more claims of a challenged patent are invalid. 35 U.S.C § 314(a). That is precisely what the PTAB found here by instituting IPRs on five of DISH’s asserted patents.

Under these circumstances, courts routinely grant requests to stay cases pending instituted IPRs to promote judicial efficiency, conserve resources, and avoid costly litigation over patents likely to be found invalid. *See, e.g., Lifetime Prods. v. Russell Brands, Ltd. Liab. Co.*, No. 1:12-cv-00026-DN-EJF, 2016 WL 5482226, at *2 (D. Utah Sep. 29, 2016) (“Claims currently under reexamination should not be considered by this court. Other cases have illustrated the need for a district court to stay its consideration of claims under reexamination because of the prospect of inconsistent rulings.” (citations omitted)); *see also* 157 Cong. Rec. S1363 (daily ed. Mar. 8, 2011) (“Litigation over invalid patents places a substantial burden on U.S. courts and the U.S. economy.”). Further, in addition to the five instituted IPRs, Aylo Freesites also has an additional ten pending IPR petitions covering all asserted claims of all asserted patents in this case. Additionally, parties unrelated to Defendants, fuboTV Media Inc. and Yanka Industries Inc., have filed IPR petitions against most of the asserted patents.

There are compelling reasons to stay this case pending the outcome of all fifteen of Aylo’s IPRs pending against DISH’s patents. Indeed, each factor courts consider in granting a stay pending IPRs weighs heavily in favor of a stay. ***First, a stay will simplify the issues.*** For example, the PTAB invalidating asserted claims of the five asserted patents for which IPRs have been

instituted would eliminate those claims and possibly entire patents from the case. And given the numerous additional IPR petitions still pending against all asserted claims of all asserted patents, the IPRs may result in not just five asserted patents being invalidated but all nine of them. Thus, the IPRs could render the entire case moot. ***Second, this case is in its infancy.*** Defendants were just served and have not even responded to DISH's complaint. ***Third, a stay would not unduly prejudice DISH*** given that the IPRs and this motion were filed timely and in good faith, the parties are not competitors, and monetary damages are compensable. As noted above, this Court recently stayed, pending the outcome of these IPRs, DISH's initial retaliatory lawsuit against Aylo Premium *et al.* with six overlapping patents finding all three factors favored a stay. *See* Ex. A.

The instant motion should not have even been necessary but for DISH's procedural maneuvering. Prior to filing this motion, Defendants asked DISH to agree to a stay of this action in view of the instituted and pending IPRs and the Court's order staying the Aylo Premium Suit. *See* Ex. B. DISH refused and instead insisted that, in exchange for a three month stay in this case, Aylo Freesites dismiss its first-filed lawsuit in the District of Delaware and modify the stay in the Aylo Premium Suit to be lifted and re-briefed in just a few months. *See id.* DISH's tactics only serve to burden the Court and the parties with unnecessary motion practice. DISH itself has touted, in seeking and obtaining stays pending IPR from this very Court, "[t]here is a liberal policy in favor of granting motions to stay proceedings pending the outcome of USPTO reexamination proceedings." *ClearPlay v. Dish Network LLC*, No. 2:14-cv-00191-DN-CMR, 2021 WL 2515008, at *2 (D. Utah June 18, 2021). Now, having turned to patent assertion as a means to support its struggling business, DISH suddenly has no interest in this liberal policy or in reducing costs and burdens on the Court and parties. DISH's strategic change of heart should be given no credence, and the Court should grant the requested stay.

Finally, in view of the efficiencies of staying the case, Defendants respectfully request that, if the Court does not first grant Defendants' motion to extend the deadline to respond to DISH's FAC, the Court enter the following expedited briefing schedule on the instant motion: DISH's response due by June 12, and Defendants reply due by June 14.

II. BACKGROUND

On July 25, 2023, Aylo Freesites filed an action in the Northern District of California seeking a Declaratory Judgment of non-infringement of U.S Patent Nos. 10,469,555 ("the '555 Patent"), 10,757,156 ("the '156 Patent"), and 11,470,138 ("the '138 Patent") in response to DISH's attempts to extract a license by accusing Aylo of infringing those patents. *MG Freesites Ltd v. DISH Techs. LLC et al*, Case No. 3:23-cv-03674-EMC (N.D. Cal.) (the "NDCA Action"), D.I. 1. A month later, DISH filed its initial retaliatory Aylo Premium Suit in Utah against different, but related, Aylo entities (Aylo Premium Ltd and Aylo Billing Limited) as well as several non-Aylo entities, alleging infringement of the '138 Patent and U.S. Patent Nos. 11,677,798 ("the '798 Patent"), 10,469,554 ("the '554 Patent"), 10,951,680 ("the '680 Patent"); 9,407,564 ("the '564 Patent"), and 8,868,772 ("the '772 Patent"). Aylo Premium Suit, D.I. 1. On January 24, 2024, DISH's motion to dismiss the NDCA Action for lack of personal jurisdiction was granted. NDCA Action, D.I. 67. That same day, Aylo Freesites filed a Declaratory Judgment action for non-infringement of the '555, '156, and '138 Patents in the District of Delaware—the jurisdiction where DISH had filed the majority of its lawsuits asserting the patents-in-suit and their family members (DISH's so-called "ABR Patents"). *Aylo Freesites Ltd v. DISH Techs. LLC et al.*, Case No. 1:24-cv-00086-GWB (D. Del.), D.I. 1. Aylo Premium and Aylo Billing also moved to dismiss DISH's Aylo Premium Action under Rule 12(b) or transfer to Delaware under 28 U.S.C. § 1404(a). *See* Aylo Premium Suit, D.I. 58 at 6-15. Much later that same day, DISH filed the instant second retaliatory lawsuit this time against Aylo Freesites and Quebec asserting the '138, '798, '554, '680,

'564, and '772 Patents. D.I. 1. DISH's recent FAC added the '156 and '555 Patents and the recently-issued U.S. Patent No. 11,991,234 ("the '234 Patent") (collectively, "the Asserted Patents"). D.I. 17.

Meanwhile, Aylo Freesites petitioned the USPTO for *inter partes* review of the '798, '138, '554, '680, '564, '772, '555, and '156 Patents based on a primary prior art reference referred to as "Ogdon". IPR Nos. IPR2024-00043, -00044, -00045, -00046, -00047, -00048 -00146 -00147 (the "Ogdon IPR petitions"). Later, on January 30, 2024, Aylo Freesites filed a second set of IPR petitions challenging all asserted claims of those patents based on a different primary prior art reference, "Leaning." IPR Nos. IPR2024-00512, -00513, -00514, -00515, -00516, -00517, -00518, -00519 (the "Leaning IPR petitions"). In mid-April, the PTAB granted five of Aylo Freesites' Ogdon IPR petitions, on the '798, '138, '554, '555, and '680 Patents, finding there was a "reasonable likelihood" that one or more asserted claims in each patent are unpatentable in view of Ogdon. *See* Exs. C-G. The PTAB did not institute IPRs for the '772, '564, and '156 Patents. *See* Exs. H-J. The '234 Patent issued on May 21, 2024, and on the same day, Aylo Freesites filed two IPR petitions each challenging all claims of the '234 Patent based on Ogdon and Leaning. IPR2024-00940 ("the '234 Patent Leaning IPR petition") and IPR2024-00941 ("the '234 Patent Ogdon IPR petition"). The Leaning IPR petitions, the '234 Patent Ogdon IPR petition, and the '234 Patent Leaning IPR petition, collectively challenging all asserted claims of all Asserted Patents, are still pending before the PTAB with institution decisions due beginning no later than August 13, 2024. Exs. K-T. On April 17, 2024, the day after the PTAB's decisions instituting IPRs on most of the Ogdon IPR petitions, defendants Aylo Premium Ltd, Aylo Billing Limited, and Yellow Production s.r.o. in the Aylo Premium Suit filed a motion to stay the case pending the Ogdon- and Leaning-based IPRs. Aylo Premium Suit, D.I. 79. On May 24, 2024 Magistrate Judge

Oberg ordered the Aylo Premium Suit stayed pending IPRs, *finding that all three factors weighed in favor of a stay*. Ex. A. DISH objected on June 7 to Magistrate Oberg’s stay order (Aylo Premium Suit, D.I. 106), but must overcome a “clearly erroneous” standard for reversal by the District Court Judge.³ The very same day, the Court granted DISH’s motion for alternative service in the instant lawsuit. D.I. 18. Rather than stipulate to a stay of this action and the pending Delaware action in light of the Court’s order staying DISH’s Aylo Premium Suit—especially since every asserted claim of every Asserted Patent in this action is currently being challenged by an instituted or still-pending IPR petition—DISH chose to push forward with its forum shopping and gamesmanship thus necessitating this motion. Ex. B.

III. LEGAL STANDARD

“[D]istrict courts have broad discretion to manage their dockets, including the power to grant a stay of proceedings.” *Murata Mach. USA v. Daifuku Co., LTD.*, 830 F.3d 1357, 1362 (Fed. Cir. 2016); *see also Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963) (“It is well settled that the district court has the power to stay proceedings pending before it and to control its docket for the purpose of ‘economy of time and effort for itself, for counsel, and for litigants.’” (citation omitted)). This Court has repeatedly acknowledged that “[t]here is a liberal policy in favor of granting motions to stay proceedings pending the outcome of USPTO reexamination proceedings.” *ClearPlay*, 2021 WL 2515008, at *2. “There is no rule requiring that a stay only be granted in situations where the IPR includes the potential for resolution of all issues in the case.” *ESIP Series I, LLC v. doTERRA Int’l, LLC*, No. 2:15-cv-00779, 2017 WL 11474146, at *2 (D. Utah Dec. 5, 2017). Courts consider three factors when deciding whether to stay a case in favor of IPR

³ DISH’s objection to the stay order is entirely inapplicable here, as it is based upon a preliminary injunction (“PI”) motion DISH filed several months ago in the Aylo Premium Suit. Aylo Premium Suit, D.I. 106. No such PI motion is pending in this case.

proceedings: “(1) whether a stay will simplify the issues in question and trial of the case; (2) whether discovery is complete and a trial date has been set; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party.” *ClearPlay*, 2021 WL 2515008, at *1.

IV. ARGUMENT

A. A Stay Will Simplify the Issues

A stay pending IPRs will simplify the issues here because a majority of the Asserted Patents already have IPRs instituted. Exs. D-G. And the remaining pending IPRs ***challenge every asserted claim of every Asserted Patent***—including the not-yet-instituted ’156, ’564, ’772, and ’234 Patents.⁴ Even absent further institutions, the issues in this case will be simplified. For example, if any asserted claims are invalidated there will be no discovery or arguments regarding those claims. And even if asserted claims survive the IPRs, there still will be simplification of the issues because estoppel may apply pursuant to 35 U.S.C. 315(e)(2). *See Larson Archery Co. v. Mathews, Inc.*, No. 1:11-cv-126 TS, 2013 WL 139472, *1 (D. Utah Jan. 10, 2013) (holding that IPR estoppel provisions weigh in favor of granting a stay).

Even in the very unlikely event that all claims survive IPR, the issues still will be simplified because the Court will benefit from the record developed during the IPR proceedings. *ClearPlay*, 2021 WL 2515008, at *2 (“[E]ven if the reexamination did not lead to claim amendment or

⁴ As to the newly-issued ’234 Patent, given that the PTAB instituted IPRs on most of the first round of Ogdon IPR petitions, it is highly likely that IPR will be instituted on the ’234 Patent Ogdon IPR petition for similar reasons. In testament to the strength of Leaning as an invalidating reference for all Asserted Patents, in every Preliminary Response to a Leaning IPR petition DISH only urged the PTAB to discretionarily deny institution and ***has not attempted to challenge the merits of Leaning***. *E.g.*, Ex. U. And, in a parallel litigation in the United Kingdom involving a related European patent with similar claims, DISH stated on the record that it “likely” will need to amend its patent claims to try to overcome an invalidity challenge including Leaning. Ex. V.

cancellation, it could still provide valuable analysis to the district court.”); *Longhorn Vaccines & Diagnostics, LLC v. Spectrum Sols., LLC*, No. 2:20-cv-00827, 2022 WL 204591, at *1 (D. Utah Jan. 24, 2022) (“[A]llowing the PTAB to apply its expertise in completing the IPR proceedings will simplify the issues in this case, clarify relevant issues, and, therefore, make future litigation more efficient.”). Even if there are no further institutions the issues will be simplified because “the mere fact that [a USPTO proceeding] is not likely to dispose of the case completely does not mean that issues will not be simplified.” *Donnelly Corp. v. Guardian Indus. Corp.*, No. 05-74444, 2007 WL 3104794, at *5 (E.D. Mich. Oct. 22, 2007); *see also ESIP Series I*, 2017 WL 11474146, at *2 (granting stay where only half of the asserted patents were challenged via IPR because the potential invalidation would reduce the number of claims for construction and summary judgment challenges).

Moreover, it is likely that the PTAB’s analysis with respect to the instituted IPRs will be relevant to all Asserted Patents given that the patents are all related and have similar specifications and share common claim terms. *See IOENGINE, LLC v. Paypal Holdings, Inc.*, No. 18-452-WCB, 2019 WL 3943058, *8-12 (D. Del. Aug. 21, 2019) (granting stay due to similarity of three patents, even though only one was subject to IPR). Therefore, no matter the final resolution of the five instituted IPRs and the ten pending IPR petitions, a stay will simplify the issues in this case, as Magistrate Judge Oberg found when staying DISH’s Aylo Premium Suit. *See* Ex. A at 5 (“Here, where the case may be narrowed if any of the patents are invalidated, all asserted patents in this case are related, and IPR petitions are pending for the [] remaining patents, this factor weighs in favor of a stay.”).

B. The Nascent Stage of This Litigation Weighs Heavily in Favor of a Stay

The factor of “whether discovery is complete and a trial date has been set” indisputably weighs in favor of a stay, as this case is in its infancy. DISH just amended its complaint on May

21, 2024 (D.I. 17) and only served Defendants on May 31, 2024 (D.I. 19). There has been no discovery, no response to a complaint, no scheduling order, and no trial date set. The very early stage of this case thus weighs heavily in favor of a stay. *See, e.g., Destination Maternity Corp. v. Target Corp.*, 12 F. Supp. 3d 762, 770 (E.D. Pa. 2014) (“Staying a case that is in an early stage of litigation ‘advance[s] judicial efficiency and maximize[s] the likelihood that neither the Court nor the parties expend their assets addressing invalid claims.’”) (citation omitted); *ClearPlay*, 2021 WL 2515008, at *2 (DISH obtaining a stay despite “the parties hav[ing] spent substantial resources litigating th[e] case for seven years”); *Corel Software, LLC v. Microsoft Corp.*, No. 2:15-cv-528-JNP-PMW, 2016 WL 4444747, at *2 (D. Utah Aug. 23, 2016) (granting stay even though parties nearly completed fact discovery). Indeed, Magistrate Oberg in the Aylo Premium Suit found that this factor weighed in favor of a stay, even though that case was filed five months before this lawsuit. Ex. A at 5-6.

C. A Stay Will Not Unduly Prejudice DISH or Provide DISH a Clear Tactical Disadvantage

As an initial matter, “the delay inherent to the [IPR] process does not constitute, by itself, undue prejudice.” *ClearPlay*, 2021 WL 2515008, at *2. Rather, a stay is favored “where the movant promptly moved for reexamination and has not used dilatory tactics or demonstrated bad faith.” *Polaris Indus. v. BRP US Inc.*, No. 12-01405 ADM/SER, 2012 WL 5331227, *2 (D. Minn. Oct. 29, 2012). Here, Aylo Freesites filed the Ogdon IPR Petitions *before* DISH filed this lawsuit, Aylo Freesites filed the Leaning IPR petitions *mere days after* DISH filed this lawsuit, and Aylo Freesites filed the ’234 Patent IPR petitions the *same day* the ’234 Patent issued and DISH amended its complaint to add that patent. And Aylo Freesites filed all of its IPR petitions well under any 12-month statutory period to do so. *See* 35 U.S.C. § 315(b). DISH cannot plausibly argue dilatory tactics or bad faith based on the timing of filing of the IPRs. Defendants

also promptly filed the present motion soon after being served with DISH's FAC, before the deadline for Defendants' to respond, and promptly after DISH's refusal to agree to a stay. Even if there was the potential for "prejudice resulting from postponing the resolution of the case" such prejudice is outweighed by the benefits of a stay where IPRs have been instituted. *Customedia Techs., LLC v. Dish Network Corp.*, No. 2:16-cv-129-JRG, 2017 WL 3836123, at *2 (E.D. Tex. Aug. 9, 2017); *see also Intellectual Ventures II LLC v. SunTrust Banks, Inc.*, No. 1:13-cv-02454-WSD, 2014 WL 5019911, at *3 (N.D. Ga. Oct. 7, 2014) ("[A]ny delay that may occur while the PTAB review is processed is outweighed by the benefits of awaiting PTAB review.").

Finally, DISH and Defendants are not competitors. Monetary relief will be sufficient to compensate DISH for any damages it is able to prove, and a "stay will not diminish the monetary damages to which [DISH] will be entitled if it succeeds in its infringement suit." *VirtualAgility Inc. v. Salesforce.com*, 759 F.3d 1307, 1318 (Fed. Cir. 2014). Magistrate Oberg in the Aylo Premium Suit also found this factor favored a stay. Ex. A at 6-8 (rejecting DISH's "conjectural" arguments regarding the capitalization of Aylo entities and declining to "wade into DISH's speculations regarding Defendants' corporate structure or financial position.").

V. CONCLUSION

Because all three factors strongly favor a stay, Defendants respectfully request that this motion be granted. Further, given the upcoming deadline for responding to DISH's FAC, Defendants respectfully request that Plaintiffs be ordered to respond to this motion by no later than June 12, 2024, with Defendants' reply being due no later than June 14, 2024.

DATED this 10th day of June 2024.

/s/ Erik A. Christiansen

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CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of June 2024, I caused to be electronically filed and served the foregoing **DEFENDANTS' EXPEDITED MOTION TO STAY PENDING *INTER PARTES* REVIEW** with the Clerk of the Court using the Court's electronic filing system, which sent notification of such filing to all attorneys listed on the docket.

/s/ Erik A. Christiansen