

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Vermont Safety Developments,)
 LLC,)
)
 Plaintiff,)
)
 vs.) CASE NO. 2:23-cv-89
)
 Head Sport GmbH,)
)
 Defendant.)
 -----)

Hearing on Motion to Stay Case (Doc. 39) and
 Motion for Reconsideration of Order Granting Motion
 for Protective Order to Stay Claim Construction
 Deadlines (Doc. 44), held on August 2, 2024, at
 9:58 a.m. before the Honorable Gregory Crawford,
 Federal District Court Judge.

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P R O C E E D I N G S

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4 THE CLERK: Your Honor, the matter before
5 the court is Case No. 23-CV-89, Vermont Safety
6 Developments, LLC, vs. Head Sport GmbH.

7 Present on behalf of the plaintiff are
8 Attorneys Matthew Borick, Taylor Hallowell, and
9 Thomas Kohler.

10 Present on behalf of the defendant are
11 Attorneys Aaron Parker, Anthony Berlenbach, and
12 David Pocius.

13 We are here on a hearing on Motion to
14 Stay Case and Motion for Reconsideration of
15 Order Granting Motion for Protective Stay to
16 Claim Construction Deadlines.

17 THE COURT: All right. Good morning.
18 Nice to see everybody.

19 Who's going to take the laboring floor
20 for the defendant?

21 MR. PARKER: I am, your Honor.

22 THE COURT: Come on up. It's nice to see
23 you. Where did you come from?

24 MR. PARKER: From Washington, D.C.

25 THE COURT: Great. I appreciate it.

1 MR. PARKER: Would you like me to come up
2 there?

3 THE COURT: It's easier, yes. It's a
4 long way. I was noticing how far away you were.

10:02 5 THE CLERK: Counsel, if you wouldn't mind
6 stating your name for the record.

7 MR. PARKER: I'm Aaron Parker from
8 Finnegan, representing Head Sport GmbH.

9 Would you like me to just jump right in,
10:02 10 or is there anything --

11 THE COURT: Just jump right in. I've
12 read the papers so I know the problem, but I'd
13 be glad to discuss it with you.

14 MR. PARKER: Okay. Thanks, your Honor.

10:02 15 THE COURT: I put my cards on the table
16 often in cases like this. Usually the defendant
17 comes forward and asks for bifurcated discovery
18 or something to be stayed. And they have super
19 good reasons in theory, but in practice it just
10:03 20 seems I lose a year or two and then I'm kind of
21 back where we were. And that's what I'd like to
22 avoid, just not having the thing on ice for two
23 years and everybody go back and say, well, now
24 we've got to start finding this engineer in
10:03 25 Austria and that expert kind of work.

1 MR. PARKER: Yeah, we definitely
2 understand and I think I can present our
3 positions, but we're not necessarily asking you
4 to put this on ice for two years.

10:03 5 Really we're asking for a temporary stay
6 through January, mid-January when the PTAB will
7 make its decision on whether to institute the
8 IPR or not.

9 THE COURT: Right.

10:03 10 MR. PARKER: We can explain the reasons
11 for all of that, but at the -- you know, at the
12 least it would be five months but then if we get
13 past that hurdle, as we will discuss, there's a
14 very strong likelihood that the whole case could
10:04 15 go away. We never would be back, assuming we
16 get past that five-month hurdle and the IPR is
17 instituted.

18 THE COURT: If the IPR is instituted,
19 that's a clear signal that they see something
10:04 20 wrong with the patent that may well result in
21 its -- what's the right word -- extinguishment?

22 MR. PARKER: Use whatever word you want
23 but, yeah, cancellation of the claims.

24 So if the IPR is instituted, I think the
10:04 25 statistics show that nearly 70 percent of claims

1 that are instituted are actually cancelled at
2 the end of the day.

3 So the statistics are in favor of the
4 stay. I can just jump right in and talk about
10:04 5 that, but even for institution I know VSD has
6 argued that it's speculation, it's too early to
7 stay the case now because the IPR hasn't been
8 instituted.

9 THE COURT: Right.

10:04 10 MR. PARKER: But setting all other issues
11 aside, institution occurs in nearly 70 percent
12 of IPRs, so the statistics are on our side.
13 That's really speculation, and that's not even
14 getting into the merits of our arguments.

10:05 15 Moreover, we have challenged all of the
16 asserted claims. That is something that courts
17 look at, and some courts -- well, most courts
18 favor that, put that in favor of a stay.

19 If all asserted claims could be
10:05 20 extinguished, to use your term, then -- you
21 know, we talked about the simplification of
22 cases. If all the claims go away, then the case
23 goes away.

24 THE COURT: Right.

10:05 25 MR. PARKER: So we would be preserving

1 judicial resources. You wouldn't have to go
2 through issues that may never have to see the
3 light of day.

4 THE COURT: I struggled for a while and
10:05 5 I'm not sure I succeeded, but I wanted to
6 understand the overlap between the construction
7 issue, which is the next step here if the case
8 goes forward, and PTAB's evaluation of prior
9 art. I mean, that's kind of what they're
10:06 10 focused on.

11 MR. PARKER: Correct, your Honor. And as
12 we filed our IPR, we did not define the claims
13 in a specific way. We essentially -- we
14 provided VSD's construction to the PTAB, but we
10:06 15 said under that construction, under a broader
16 construction, really under any construction the
17 PTAB choses, and that's their job. Their job is
18 to construe their claims. We believe very
19 strongly that the claims are all going to be
10:06 20 found invalid based on the prior art that we've
21 advanced and the arguments that we've provided.

22 THE COURT: Yeah, somebody attached your
23 PTAB application, if that's the right word.

24 MR. PARKER: Pieces of it. It was much
10:06 25 longer than that, I promise you.

1 THE COURT: I sort of read the whole
2 thing. I found my way, which was probably
3 unwise, but I did do the Marker/KneeBinding line
4 of litigation. It was here in this court, a
5 little bit similar.

6 Is the PTAB proceeding like the Marker
7 cases?

8 Have you read that administrative ruling?

9 MR. PARKER: I have read it. I'm
10 familiar with that case.

11 What do you mean, is the PTAB -- so the
12 PTAB -- I guess I'm not sure I understand.

13 THE COURT: Well, as I read the really
14 very impressive, I thought, for a technical
15 ruling from the administrative law judge, he
16 said that plates and contact points and bindings
17 that let go under excessive force have been
18 around for a long time and this is nothing new.

19 MR. PARKER: Yeah, okay.

20 THE COURT: It was more complicated than
21 that, but that's what I came away with.

22 Is this the same type of merits
23 arguments?

24 MR. PARKER: It's very similar. And I
25 understood; you were talking about the APJ at

1 the PTAB?

2 THE COURT: Yes.

3 MR. PARKER: Yes, yes, exactly, so that
4 is same board. I don't know if it would be the
10:08 5 same judge; there are many of them, but it's the
6 same process. And without getting into the
7 weeds right here --

8 THE COURT: Right.

9 MR. PARKER: -- it's very similar. Very
10:08 10 similar technology.

11 And our positions, if you did read any of
12 our IPR petition, we have a lot of prior art and
13 a lot of it is relatively old so this -- you
14 know, the concepts have been around for quite
10:08 15 some time.

16 THE COURT: All right. So January you
17 think is a real date?

18 We should know by January whether the
19 PTAB will accept this case?

10:08 20 MR. PARKER: Absolutely. And if -- it's
21 our position, you know, we're not trying to pull
22 the wool over anybody's eyes.

23 THE COURT: Sure.

24 MR. PARKER: If the IPR is not
10:08 25 instituted, then we would agree with VSD that

1 within five days of that, you know, decision
2 denying institution we could set forth a
3 schedule, an updated schedule and more forward
4 immediately. We are not opposed to that
10:09 5 whatsoever.

6 We just believe that the benefits of the
7 stay getting us through the next five months,
8 not having to go through costly claim
9 construction and things that, you know, could
10:09 10 ultimately end up being a waste of all of our
11 times and money. If the IPR is instituted and
12 the claims are cancelled, all of that would have
13 been for naught.

14 THE COURT: It did occur to me that's
10:09 15 kind of why PTAB was created, right?

16 MR. PARKER: Exactly. That's how I was
17 going to start in my presentation, but I enjoyed
18 this. I think we can get to the point more
19 directly, but Congress created IPR -- the PTAB
10:09 20 and the IPR process for the reason of
21 streamlining cases, to preserve the judicial
22 resources, to limit costs, and then to avoid the
23 duplicative efforts.

24 Because if the case isn't stayed, it's
10:09 25 going to move forward in both, in parallel, and,

1 you know, I don't want to -- we can get into
2 little arguments of how do we have a trial date,
3 do we not have a trial date. I think we all
4 understand we don't actually have a trial date.
10:10 5 It's, you know, subject to the timing of orders
6 and summary judgment and claim construction, so
7 in reality these things will move together.

8 They'll move forward together, probably
9 reach resolutions about the same time, to be
10:10 10 honest, and then, you know, we both -- depending
11 on what happens we could both end up at appeal.

12 Will the Federal Circuit combine the
13 cases? Sometimes they do; sometimes they don't.

14 We could end up -- you know, it's in a
10:10 15 bit of a quagmire. That's -- I think that does
16 happen sometimes, but if it can be avoided at a
17 stage like this, I think that most courts find
18 that that is beneficial and, you know, kind of
19 follows Congress's intent.

10:10 20 THE COURT: If they do accept the case in
21 PTAB, is that the one year real or is that one
22 year plus various extensions for whatever
23 reasons?

24 MR. PARKER: No, it's real. In all the
10:10 25 ones that I've ever been involved in it's real.

1 Obviously there could be appeal after
2 that, but the one year to the final written
3 decision, it's a real date.

4 THE COURT: And their appeal is to the
5 circuit, the federal circuit?

6 MR. PARKER: To the federal circuit, yes,
7 your Honor.

8 THE COURT: As would be an appeal from
9 this court as well?

10 MR. PARKER: Yes, Your Honor.

11 And so if the cases are very close in
12 time; you know, say you -- say that we get a
13 jury verdict and there's a decision here at
14 about the same time that the PTAB puts down
15 their ruling, then they could be consolidated.

16 But if they're off by a matter of several
17 months, there's a chance that that doesn't
18 happen --

19 THE COURT: Yeah.

20 MR. PARKER: -- and they go pick up
21 separately.

22 THE COURT: All right.

23 Why don't I give you the last words as
24 the moving party and hear from the friends on
25 the other side.

1 MR. PARKER: Okay.

2 THE COURT: Unless there's something
3 critical.

4 MR. PARKER: I agree, and I hope that was
10:11 5 helpful. And, again, I'm happy to jump back up
6 and discuss things at any point.

7 I did just want to point out, they cited
8 a lot of cases. We cited a lot of cases.

9 THE COURT: Right.

10:11 10 MR. PARKER: None of those cases are --
11 there's no right or wrong answer. You know,
12 it's at your discretion. You have to look at
13 the whole circumstances, and all we are asking
14 you to do is look at all the circumstances.

10:12 15 There's the three factors that all courts
16 universally agree should be analyzed to
17 determine whether a stay should be granted, and
18 they're in the papers; the stage of litigation,
19 whether issues would be simplified by the stay,
10:12 20 and whether there would be undue prejudice.

21 And, again, these are all over the
22 papers, but we think the actual circumstances
23 and the facts strongly support staying the case.

24 They pointed to -- you know, I do want to
10:12 25 address the "almost invariably" language that

1 was used quite a few times in their brief;
2 saying that almost invariably courts deny stay
3 motions pre-institution. That's not the case in
4 this circuit.

10:12 5 In fact, in the Nike vs. Lululemon case,
6 this circuit, the judge stated that waiting for
7 the PTAB's institution decision before granting
8 the motion to stay is not the majority decision
9 in the 2nd Circuit. So I really just say that
10:13 10 to let you know that it's not the case that it
11 doesn't happen.

12 We cited a dozen cases, and there are
13 many more in which stays are granted
14 pre-institution. You really have to look at, or
10:13 15 should look at the facts.

16 You know, we are very early in the case.
17 We still have nearly all the fact discovery, all
18 the expert discovery.

19 We have nearly all the claim
10:13 20 construction, at least the heavy lifting on
21 claim construction all still ahead of us. We
22 still have dispositive motions, pretrial
23 motions, trial; all very expensive, could
24 potentially be avoided for the simplification
10:13 25 issues that I mentioned.

1 I won't go back into the simplification.
2 And then prejudice.

3 THE COURT: Could I just interrupt?

4 MR. PARKER: Sure.

10:13 5 THE COURT: What does your discovery
6 preparation look like for the claim construction
7 phase?

8 MR. PARKER: Moving forward?

9 THE COURT: If we were to break off that
10:13 10 piece.

11 MR. PARKER: Yeah.

12 THE COURT: Might get it done by January,
13 but I don't know how much preparation you need.

14 MR. PARKER: For the claim construction
10:14 15 in this court?

16 THE COURT: Right.

17 MR. PARKER: I think both parties, we're
18 anticipating -- we've worked with experts, and
19 the experts provided declarations. We are to
10:14 20 the point where if things move forward, they
21 would depose our expert, we would depose their
22 expert, and then we would need a couple of weeks
23 to begin briefing.

24 And so then you would go through all of
10:14 25 the briefing. That side of things is, you know,

1 heavy lifting on our part and on their part, but
2 the most heavy lifting for the claims
3 construction is yours.

4 You know, we have to come back, hold a
10:14 5 hearing. Find a time that we could hold a
6 hearing, and at this point it would be no
7 sooner, I would assume, than mid-October based
8 on the fact that things have gotten shifted.
9 And then, you know, there's a lot -- there's a
10:14 10 lot that goes into claim construction, and then
11 it's based on --

12 THE COURT: Well, these experts are busy.
13 You would be lucky to get two depositions done
14 by mid-October.

10:14 15 MR. PARKER: Oh, yeah, I don't know about
16 the timing of the depositions, but those
17 depositions must occur before briefing. We
18 can't write the brief -- yeah.

19 THE COURT: Right.

10:15 20 MR. PARKER: So I don't know about the
21 timing. We haven't talked to our expert. I
22 don't know about the timing of their expert, but
23 things would go well into the fall.

24 THE COURT: I was thinking January --

10:15 25 MR. PARKER: Yeah.

1 THE COURT: -- it might be ready.

2 MR. PARKER: And then by that point
3 you've essentially heard from the PTAB.

4 THE COURT: Okay. Thank you.

10:15 5 MR. PARKER: Oh, can I say one thing --

6 THE COURT: Of course.

7 MR. PARKER: -- regarding prejudice?

8 Because all the factors do matter. It's
9 your job to weigh, you know, which one weighs in
10:15 10 favor, but there is no prejudice in this case.
11 There's no case they can cite to you that would
12 show that when all you're seeking is money
13 damages that a delay in the litigation does
14 not -- it does not amount to prejudice. I'm not
10:15 15 aware of any cases that would show --

16 THE COURT: I was going to save that for
17 them.

18 MR. PARKER: Okay.

19 THE COURT: You raised it. It seems to
10:15 20 me Head is a solvent manufacturer. They've been
21 making ski stuff since I was in elementary
22 school. Worst case for the plaintiff is they're
23 infringing and selling a parroted idea for which
24 they have to pay in the end.

10:16 25 MR. PARKER: Yeah.

1 THE COURT: But it isn't the two
2 companies, one side is losing sales or some
3 hardheaded position or a place in the world of
4 ski manufacturing. Only one side is making the
5 thing.

10:16

6 MR. PARKER: Yeah, correct, your Honor.

7 And one thing that wasn't in our briefs,
8 but while preparing for this I realized that the
9 more delay, the more sales there are, and
10 ultimately that means their damages number could
11 be higher if they are successful at the end, so
12 that would seem to lean in favor of them.

10:16

13 THE COURT: It also is kind of like a
14 license.

15 MR. PARKER: Yeah, if you're looking at
16 it that way; the loser at the end.

10:16

17 Thank you for your time, your Honor.

18 THE COURT: I promise I'll give you the
19 last word because it's your motion, and I know
20 you've come a long way.

10:16

21 MR. PARKER: I appreciate it. Thank you.

22 THE COURT: All right.

23 On the plaintiff's side. Nice to see
24 you. Come on up.

10:17

25 MS. HALLOWELL: Good morning, your Honor.

1 I'm Taylor Hallowell on behalf of plaintiff,
2 Vermont Safety Developments.

3 THE COURT: How do you pronounce your
4 last name?

10:17 5 MS. HALLOWELL: Hallowell.

6 THE COURT: Hallowell, of course. And
7 where do you come from?

8 MS. HALLOWELL: I'm at DRM in Burlington.

9 THE COURT: Oh, all right.

10:17 10 MS. HALLOWELL: I was just hired in May,
11 but I grew up in Vermont.

12 THE COURT: All right.

13 I'm very sorry to hear and read about
14 Mr. Ettlinger's passing. I don't think I ever
10:17 15 met him, but I certainly knew who he was and I
16 was aware of his work as early as the '80s, I
17 think, with UVMMC or whatever it was called
18 then. Try to figure these things out, and I'm
19 sorry to have read about his death.

10:18 20 MS. HALLOWELL: Thank you.

21 THE COURT: I always try to make sure I
22 have a clear conscience.

23 I certainly haven't met Mr. Dodge,
24 effectively your client, but I have seen those
10:18 25 rather racy-looking ski boots, and I think I

1 rode on the lift with his wife and admired
2 her -- they make the carbon fiber boots, right?

3 MS. HALLOWELL: Right.

4 THE COURT: And I know I spoke to
10:18 5 somebody who was close to the Dodge family and
6 said "Nice boots".

7 MS. HALLOWELL: Thank you. And
8 Mr. Ettlinger's wife, Trudee Ettlinger, is
9 actually with us here today.

10:18 10 THE COURT: Oh, okay.

11 I had such respect for your husband's
12 work, and I'm very sorry that we lost him.

13 MS. ETTLINGER: Thank you.

14 MS. HALLOWELL: Mr. Ettlinger was
10:18 15 actually just inducted into the Vermont Ski and
16 Board Hall of Fame last week for his outstanding
17 contributions to ski safety.

18 THE COURT: Right.

19 MS. HALLOWELL: I just wanted to start by
10:18 20 addressing a few points from opposing counsel.

21 THE COURT: Sure.

22 MS. HALLOWELL: First, they mentioned
23 that the institution rate is nearly 70 percent.
24 That's a statistic that also came from the
10:19 25 Exhibit 1 to their reply brief.

1 THE COURT: Right.

2 MS. HALLOWELL: But that statistic comes
3 from 2023 numbers, when the PTAB has actually
4 been updating statistics every month throughout
10:19 5 2024, and those statistics show that it's
6 actually trending down.

7 And it's actually particularly low for
8 mechanical patents, which is what we have here.
9 So the institution rate throughout 2024 for
10:19 10 mechanical has been closer to 60 percent.

11 And the 70 percent chance of it being
12 actually invalidated after institution is also a
13 statistic that they took from 2023, and that has
14 also been trending down this year.

10:19 15 Finnegan actually has a blog post that
16 went up recently that in May of this year it was
17 a 50/50 chance, where 50 percent of the time all
18 of the claims will be invalidated. 50 percent
19 of the time at least one will survive.

10:20 20 So if you multiply the 60 percent
21 institution rate by the 50 percent chance that
22 at least one claim will survive, you're down to
23 30 percent chance; so less than a third chance
24 that this case will -- that the IPR will be
10:20 25 dispositive. But VSD, of course, believes that

1 it has strong arguments that makes that
2 likelihood even lower.

3 Opposing counsel also mentioned that it's
4 the PTAB's job to construe the claims, but that
10:20 5 is directly contradictory to what they told the
6 PTAB in their petition; is that the PTAB -- they
7 told the PTAB that no construction is needed.
8 So moving forward with claim construction here
9 would not be a waste of time.

10:20 10 The parties will also be required to
11 submit this Court's claim construction opinion
12 to the PTAB as soon as it become available.

13 THE COURT: Yeah, right.

14 MS. HALLOWELL: And they'll be required
10:21 15 to consider that. So it could actually end up
16 simplifying issues for the PTAB.

17 And claim construction opinions also
18 often will prompt a settlement in patent
19 infringement cases, so moving forward with claim
10:21 20 construction would not be a waste of time here.

21 THE COURT: My concern was I didn't see
22 what your client's loss by waiting to hear what
23 PTAB has to say because, as I said to your
24 friend on the other side, you aren't making the
10:21 25 binding right now and I don't know if you have

1 any plans to make a binding. And somebody,
2 from your perspective, has stolen your idea and
3 is making a binding, but fortunately they're a
4 mighty force in the ski world and are going to
10:21 5 be around to pay the damages if you're right.

6 So in a funny, kind of left-handed way
7 isn't this just kind of giving them the license
8 and then getting the amount that they owe you at
9 the end?

10:22 10 MS. HALLOWELL: So what you mentioned is
11 true, your Honor, but that prejudice factor,
12 which is one of the three stay factors, that has
13 four sub-factors where only one of those
14 sub-factors is the relationship between the
10:22 15 parties, and that's, of course, the only one
16 that opposing counsel focuses on.

17 Two of the other factors are when the
18 petition was filed and the stage of the review
19 proceedings.

10:22 20 THE COURT: Right.

21 MS. HALLOWELL: So here they waited until
22 right up until like five days before their
23 deadline, which gives them an advantage in the
24 IPR. They essentially waited until after they
10:22 25 found out what our claim construction positions

1 were, and now they're trying to use them against
2 us in the IPR.

3 THE COURT: Okay. Well, I know there's a
4 certain amount of kicking that goes on
10:22 5 underneath the surface of the water, but
6 fundamentally your side isn't going to lose
7 money if you're right because you're going to
8 get an award.

9 MS. HALLOWELL: We wouldn't lose money,
10:23 10 but we would be put at a tactical disadvantage
11 in the IPR, not only because they're using our
12 claim constructions but because two of the
13 factors that the PTAB will consider when
14 deciding whether to institute is whether the
10:23 15 District Court has granted a stay, and the
16 difference between the anticipated trial date
17 and the projected final written decision
18 deadline.

19 So really any -- every day that this case
10:23 20 would be stayed is giving them just more of an
21 advantage in the IPR.

22 THE COURT: Have you read the PTAB ruling
23 in the Marker litigation?

24 MS. HALLOWELL: I'm familiar with the
10:23 25 KneeBinding litigation. I haven't read the

1 ruling in detail, but that case was really a
2 much different scenario than we have here.

3 The patent owner in that case didn't even
4 file a response to the petition, whereas we're
10:24 5 planning on vigorously opposing institution and
6 will be filing that response in October.

7 THE COURT: All right.

8 MS. HALLOWELL: And the Court -- the PTAB
9 had actually already instituted IPR when it
10:24 10 granted the stay in that case, too.

11 THE COURT: I wasn't thinking so much of
12 the stay as the obvious expertise that the
13 administrative law judge brought to bear.

14 I mean, it was hard for me to read it and
10:24 15 understand it because it was so technical in its
16 description of the, you know, mechanical
17 engineering issues.

18 I mean, I'm a little reluctant to sort of
19 thrust myself forward, the Court forward in
10:24 20 saying it's really here that the expertise lies
21 when there's this facility available to both of
22 you with what looked to me like someone that
23 knew an awful lot about binding release claims.

24 MS. HALLOWELL: So the PTAB does have a
10:25 25 lot of technical expertise, but petitions for

1 IPR are -- relate to a very narrow subset of
2 issues that would be litigated in district
3 court.

4 An IPR petition is limited to Section 102
10:25 5 and 103 arguments for novelty and obviousness.

6 THE COURT: Right.

7 MS. HALLOWELL: And within that it's also
8 limited to patents and publications. So the
9 PTAB, that petition doesn't involve any other
10:25 10 type of invalidity argument like indefiniteness,
11 which Head is asserting here.

12 The PTAB also won't consider infringement
13 at all. And, as we discussed earlier, it won't
14 be considered in claim construction, but Head
10:25 15 told them that it's not necessary.

16 So, yes, they have technical expertise,
17 but this IPR is a very narrow subset of the
18 issues that are here in District Court.

19 And just to get back to the factors,
10:26 20 opposing counsel focused on those factors, but
21 the vast majority of district courts would not
22 even get to the point where they're considering
23 those factors. It's the majority approach to
24 just deny as premature a motion to stay if
10:26 25 there's no institution yet.

1 And this makes sense because if it ends
2 up that the PTAB denies institution, then we
3 would have just wasted six months of time here
4 in the district court.

10:26 5 But even if this Court were to look at
6 the three factors, all three of them would still
7 weigh against a stay.

8 THE COURT: And if there is institution,
9 then do both sides agree that a stay is
10:26 10 appropriate?

11 MS. HALLOWELL: No.

12 THE COURT: Kind of go forward on our
13 parallel tracks?

14 MS. HALLOWELL: No. VSD would still
10:26 15 likely oppose a stay at that time.

16 There would be a lot of -- there would
17 be more -- this case would be farther along. We
18 would probably be post-claim construction, and
19 there still wouldn't be a guaranty that any
10:27 20 issues would be simplified.

21 THE COURT: All right. And the timing
22 for you for -- realistically for the preparation
23 briefing, decision and hearing on the
24 construction issues, you have an expert. Is it
10:27 25 the person in California?

1 I can't remember who has the --

2 MS. HALLOWELL: It's Head's expert who's
3 in California.

10:27

4 THE COURT: Head's is in California, and
5 where is yours?

6 MS. HALLOWELL: In New York.

7 THE COURT: In New York. So those
8 experts have to be deposed?

9 MS. HALLOWELL: Right.

10:27

10 THE COURT: Which -- so that would be, I
11 don't know, a project for September, October?

12 MS. HALLOWELL: The current claim
13 construction schedule is still workable, your
14 Honor.

10:27

15 THE COURT: What is that?

16 MS. HALLOWELL: Our expert, we've told
17 Head for the last month or so that he will be
18 available on the 6th or 7th of August.

10:28

19 And Head has told us that if this Court
20 were to lift the current protective order, that
21 their expert will be available on August 9th,
22 and we're prepared to take that deposition on
23 the 9th.

10:28

24 And then opening briefs would be due. I
25 think the current deadline is August 22nd.

1 Responsive briefs are September 10th, and then
2 the parties have requested a hearing on or near
3 September 23rd. So we can still make the
4 current schedule work. And that --

10:28 5 THE COURT: It just sounds like an
6 emergency. I mean, is there something on fire?

7 MS. HALLOWELL: Every day that this case
8 is stayed just gives us more of a disadvantage
9 in the IPR and would be giving Head an advantage
10:28 10 since, again, two of those factors are whether
11 this Court has granted a stay and the time
12 between the trial date in this court and a
13 hypothetical final written decision in the IPR.
14 So that's really where the heart of the
10:29 15 prejudice is coming from.

16 It's not just whether or not the parties
17 are competitors. It would be giving us a
18 disadvantage in the PTAB.

19 THE COURT: Okay.

10:29 20 MS. HALLOWELL: And, again, the vast
21 majority of courts would not even entertain a
22 motion to stay when the petition hasn't been
23 instituted.

24 Head cited a case from the 2nd Circuit
10:29 25 saying that the 2nd Circuit sometimes does

1 things differently, but that's a little bit of a
2 red herring since if this decision were appealed
3 it wouldn't be going to the 2nd Circuit. It
4 would be going to the federal circuit.

10:29 5 And the federal circuit hasn't expressed
6 an opinion on what the best approach is, but it
7 has said that, quote, No doubt the case for a
8 stay is much stronger at post-institution.

9 There's also a Trover case that we cited
10:30 10 on Page 7 of our brief, and in that case, even
11 though it's a district court case, a federal
12 circuit judge -- Judge Bryson -- was sitting by
13 designation, and so he took a look at the
14 landscape of what are courts doing when they get
10:30 15 a motion to stay pre-institution.

16 And Judge Bryson cited literally dozens
17 of cases from district courts across the country
18 deciding that it's better to deny motions to
19 stay as premature when a petition hasn't been
10:30 20 instituted.

21 And we also have some cases cited from
22 the 2nd Circuit in our brief that have also come
23 to the same conclusion; that motions to stay
24 when a petition is pre-institution should be
10:30 25 denied as premature. Since -- if there's no

1 institution, then we would have just wasted the
2 next six months.

3 THE COURT: This is sort of new territory
4 for me, but I kind of think that many of the
10:31 5 no-institution decisions come out of outlier
6 troll-type litigation.

7 This looks like a legitimate patent
8 dispute. It's not a -- nothing is frivolous,
9 right?

10:31 10 MS. HALLOWELL: Right. This is --

11 THE COURT: I mean, this is a genuine
12 dispute?

13 MS. HALLOWELL: This is definitely a
14 genuine dispute, but the majority of cases, even
10:31 15 in genuine disputes, say there should be no stay
16 when the petition hasn't been instituted yet.

17 And, again, that Trover case, it cites
18 literally dozens of cases from across district
19 courts.

10:31 20 We cited a number of cases in our brief
21 where district courts call it, quote, the
22 majority approach to deny as premature.

23 THE COURT: And then what do these courts
24 do when there isn't a favorable -- not favorable
10:31 25 but a positive institution?

1 MS. HALLOWELL: So what they'll do --

2 THE COURT: Is a decision made at that
3 point?

4 Do they say, well, we've cast our die,
10:32 5 we're going to go forward, or what?

6 MS. HALLOWELL: So what they'll normally
7 do is do an opinion that says something along
8 the lines of defendant's motion to stay is
9 denied as premature without prejudice to renew
10:32 10 if the PTAB institutes IPR.

11 THE COURT: Right.

12 MS. HALLOWELL: And so then they would be
13 able to bring a renewed motion at that time, but
14 we would be looking at the facts as they are in
10:32 15 January, not as they are today.

16 So a lot of the progress in this case
17 will be made in January. We might have a better
18 idea of the likelihood that claims will be
19 invalidated by then. So we would really just
10:32 20 reassess all of the facts in January after we
21 know whether or not there is going to be
22 institution at all.

23 THE COURT: Yes, but these other courts
24 that have said no stay until you get a favorable
10:32 25 institution, or at least until we know what the

1 outcome is going to be at PTAB, what do they
2 tend to do when PTAB does take the case?

3 MS. HALLOWELL: Well, so then they'll
4 hear the renewed briefing.

10:33 5 And then it really -- it's really just a
6 case-by-case basis where you look at the facts
7 under the three factors, and it just depends on
8 the case.

9 THE COURT: All right. A lot of us have
10:33 10 kind of a bias against doing the same thing in
11 two courts at the same time, just because it
12 seems confusing.

13 MS. HALLOWELL: It wouldn't be the same
14 thing, your Honor, since the IPR petition is
10:33 15 just a narrow subset of the issues here.

16 THE COURT: Right.

17 MS. HALLOWELL: So moving forward with
18 claim construction infringement has other
19 validity issues that aren't related to
10:33 20 Section 102 and 103. None of that would be
21 duplicative.

22 THE COURT: Okay. Thank you.

23 I wanted to give Mr. Parker a word, and
24 did we cover everything you wanted to cover?

10:34 25 MS. HALLOWELL: I think so.

1 I guess the last thing I'd like to say is
2 that if your Honor does decide to take this
3 motion under advisement, that we would
4 respectfully asked for the protective order to
10:34 5 be lifted in the meantime, just again since
6 every day that this case is stayed is giving us
7 a disadvantage in the IPR.

8 So we would like to move forward with the
9 depositions of experts who are ready to be
10:34 10 deposited next week.

11 THE COURT: All right. Are they holding
12 dates open, or is this something they set a week
13 or two ago?

14 MS. HALLOWELL: They've been holding it
10:34 15 open for a while. Our expert is available on
16 the 6th and the 7th. They've told us their
17 expert will be available on the 9th.

18 THE COURT: All right. Thanks.

19 MS. HALLOWELL: Thank you, your Honor.

10:34 20 MR. PARKER: Thanks, your Honor.

21 I want to address some of that.

22 So, first, regarding the experts, we have
23 not held any dates open, so our expert is not
24 available next week. That wasn't anything that
10:35 25 we thought the parties had agreed to do once you

1 had a stay on those dates.

2 THE COURT: Right.

3 MR. PARKER: We've been focused on this
4 and haven't spoken to our experts. So we will
10:35 5 not be -- our expert is not available next week,
6 and I obviously don't think we're available to
7 depose their experts next week either.

8 THE COURT: Okay.

9 MR. PARKER: Regarding -- so what I
10:35 10 think, I think what happened is kind of what I
11 told you what happened. It would be a lot of
12 citing cases that say one way and the other
13 cases that say the other way, but I pointed you
14 to the Nike vs. Lululemon case.

10:35 15 There's other cases; the NST Global case.
16 They're from the 2nd Circuit, but from the
17 courts in New York, for example, that have found
18 stays pre-institution are acceptable. And,
19 further, that generally speaking in this circuit
10:36 20 there is no per se rule that you should deny a
21 motion to stay just because it's
22 pre-institution.

23 I also believe in many of the cases that
24 they cited they found some -- they found dicta
10:36 25 saying, oh, most courts -- most courts don't

1 grant stays at this stage, but then they still
2 looked at the factors and they looked at the
3 circumstances.

4 So it's still -- it's still up to you.
10:36 5 You know, we believe that you may look at those
6 factors and, you know, you have the right to
7 decide one way or the other whether the factors
8 favor the stay, as Head suggests, or whether it
9 favors denying.

10:36 10 To hit on the issue regarding the other
11 issues that make this case different than the
12 PTAB, they're right; obviously infringement is
13 something that you deal with.

14 THE COURT: Right.

10:36 15 MR. PARKER: The other invalidity issues,
16 like Section 112 issues, written
17 description-type issues, those are things that
18 you will deal with.

19 However, if we are successful at the
10:37 20 PTAB, the case goes away.

21 THE COURT: Right.

22 MR. PARKER: If the claims are cancelled,
23 the case goes away, so -- and then if we
24 actually go through the IPR and we're
10:37 25 unsuccessful, we can't make these arguments

1 again. So exactly what Congress set IPR in
2 place is to simplify the case.

3 It doesn't say to get rid of the case
4 completely. I'm just saying we could do that.
10:37 5 But, regardless, the issues will be simplified
6 by letting the PTAB with their expertise go
7 ahead and hear the prior art-related invalidity
8 arguments.

9 There is no question that if it's
10:37 10 instituted, then the issues will be simplified.

11 THE COURT: So is that the core of your
12 attack on the plaintiff's patent, the prior art;
13 that other people have already patented the same
14 principals?

10:37 15 MR. PARKER: I mean, that is our --
16 obviously that's our argument at the PTAB, but
17 we have other invalidity arguments that we would
18 bring before you if we were forced to.

19 But our hope is that the case is stayed,
10:38 20 the case is taken care of by the PTAB, and then
21 you never have to go through dealing with those.

22 THE COURT: What is your strongest
23 argument?

24 MR. PARKER: Well, I think our -- I think
10:38 25 our --

1 THE COURT: Which of your children do you
2 love the most?

3 MR. PARKER: Oh, man, that is hard to say
4 up here. I don't want to tip them off too much,
10:38 5 but we do believe they're both very strong.

6 Our prior art arguments are very strong,
7 and so are our indefiniteness arguments as well.

8 THE COURT: Oh, which, the PTAB people
9 don't deal with --

10:38 10 MR. PARKER: Exactly. So those will only
11 be dealt with here if the PTAB does not cancel
12 the claims.

13 THE COURT: Okay.

14 MR. PARKER: So, again, there are a lot
10:38 15 of complexities in this case. This is a complex
16 case. That's something I didn't hit on earlier.

17 I think in their briefs they said, oh,
18 moving forward discovery will be so easy. It's
19 very simple technology.

10:38 20 I don't really think that's really the
21 case, but we also have pretty much everybody who
22 is going to be getting discovery, they're going
23 to be getting discovery from live in Austria.

24 And there's something called the GDPR
10:39 25 that protects the publicity of individuals in

1 the EEU, so that is not something that's easy to
2 deal with. So that's going to be timely --
3 time-consuming and costly as well.

4 THE COURT: Not as bad as Switzerland, I
10:39 5 hope.

6 MR. PARKER: Yeah, I don't know that none
7 of them live in Switzerland. It's possible, but
8 we'll see.

9 THE COURT: The jail. I didn't cancel my
10:39 10 vacation, but the Swiss privacy laws are fierce
11 about discovery.

12 MR. PARKER: Yeah. And to be honest, I
13 guess I haven't had a case in Austria, but I've
14 had them in Sweden and other places, and it's a
10:39 15 big deal. They take privacy very, very
16 differently. They take it more seriously than
17 we do here in the U.S.

18 So I say that as one example of what we
19 believe are going to be some of the complexities
10:39 20 in this case, so that would be -- could be
21 avoided if the case is stayed.

22 THE COURT: On the district court side?

23 MR. PARKER: Yes, your Honor.

24 THE COURT: I see. I'm catching on,
10:40 25 because the PTAB is what I'd call the record

1 review --

2 MR. PARKER: Correct.

3 THE COURT: -- mostly focused on
4 published or previously filed patent
10:40 5 applications?

6 MR. PARKER: Yeah, there's very little --
7 they call it discovery, but PTAB discovery is
8 nothing like district court discovery, and
9 there's no exchange of documents and things like
10:40 10 that.

11 It's much more limited, but we wouldn't
12 have any of those -- the similar privacy-type or
13 public/privacy issues.

14 I don't want to take up too much time --

10:40 15 THE COURT: Discovery from your
16 perspective will take how long?

17 Assuming the double-edge sword. I mean,
18 if it takes a really long time, you had better
19 get started on it soon.

10:40 20 MR. PARKER: Yeah. I mean, I don't think
21 it's going to take an excessive amount of time.
22 Maybe much more than a normal case.

23 You know, I know we have -- the other
24 thing is in the case, as it currently stands,
10:40 25 all of our deadlines are based on the claim

1 construction order, the date of the claim
2 construction order. So I think there's -- oh, I
3 have it. One second.

4 In your Honor's second amended stipulated
10:41 5 discovery schedule order, for example, let's
6 see, substantially complete document production
7 within three weeks after the Court issues its
8 opinion concerning claim construction.

9 So you said earlier, and I'm not holding
10:41 10 you to this, but you think it would be -- if we
11 move forward it would be around January. Then
12 by February we would be -- you know, the goal
13 would be that we were supposed to be done with
14 fact discovery.

10:41 15 THE COURT: Realistically, I mean, it's
16 going to take a month or two to track these
17 experts down, and are you doing this by Zoom or
18 will you fly around?

19 MR. PARKER: Oh, so I'm talking about
10:41 20 fact discovery.

21 THE COURT: Oh, okay.

22 MR. PARKER: So I guess my point is early
23 next year is when discovery would likely need to
24 be completed. You know, standing here today I
10:42 25 can't say whether that's impossible or not. If

1 that's what we need to do, then we will try to
2 do it, but I guess my point is then if we don't
3 stay the case -- if the case is not stayed and
4 then we move forward, then all of that expense
10:42 5 is going to happen late this fall, early into
6 next year, and that is potentially something
7 that could be avoided; the time that both
8 parties spend, the cost to both parties. That,
9 again, is kind of why we're here, why we filed
10:42 10 the motion to stay.

11 And I did want to -- you know, opposing
12 counsel alluded to it, but we're going to be
13 back here in five months arguing this again if
14 you deny it without prejudice. You know, if you
10:42 15 deny the stay now and the PTAB institutes the
16 IPR petition, we're going to be right back here.

17 And, like I said, all their -- their
18 difference is they're going to then get to
19 argue, Oh, we did all this stuff since we saw
10:43 20 you last, the time in August. So it's kind
21 of -- it's obviously to their advantage to do
22 that, for you to deny the stay now temporarily,
23 make us move forward with the case, and then
24 they can say, Oh, well, better now, we're so far
10:43 25 along, your Honor, you shouldn't stay the case.

1 But all of the other factors will still
2 be the same. There still will be no prejudice.
3 I still have -- there really is no issue with
4 respect to the prejudice. They're not a
5 competitor. They're not going to lose
6 market-share.

7 All they want -- all they're seeking here
8 is monetary damages.

9 THE COURT: Which you're prepared to pay
10 if you have to?

11 MR. PARKER: Absolutely.

12 THE COURT: Would you say you're quietly
13 eating their lunch by -- it's hard for me to
14 express it but that you're gaining an advantage
15 in the PTAB litigation by finding out things
16 about their construction claims in this case?

17 MR. PARKER: And I find that a little --
18 that's an interesting argument in my opinion.

19 In our IPR petition we pointed to -- we
20 pointed the PTAB to their claim construction,
21 but we told the PTAB that they don't -- we don't
22 believe they need to construe the claims; that
23 the claims can be read on their face. The PTAB
24 can understand them. In view of the prior art,
25 those claims are all invalid.

1 So we did not -- we have not used their
2 claims construction as they claimed and gained
3 information that is favorable to us; not in my
4 opinion.

10:44 5 THE COURT: All right. And that's not
6 your intent?

7 MR. PARKER: No, not at all. No.

8 We move forward. I mean, they have to
9 respond. If they choose to, they have to
10:44 10 respond to the PTAB. They don't have to, but
11 they said they would.

12 I think they mentioned in October they'll
13 have a brief that's due that they sent into the
14 PTAB, trying to tell the PTAB that they couldn't
10:44 15 institute the decision. So they're going to
16 have to go forward with that.

17 I would actually say they might be the
18 ones who will try to use what we do here on
19 claim construction and put that into their
10:45 20 response to the PTAB. I think that's way more
21 likely of an issue than -- you know, I didn't
22 bring it up earlier, but if we were forced to
23 move forward with our claim construction
24 briefing here, they're going to take things that
10:45 25 we say and they're going to put those into their

1 petition to -- or their brief to the PTAB.

2 So I think if we're worried about gaining
3 on the system, that's a lot more likely to
4 happen here if you don't stay the case and we
10:45 5 move forward with claim construction in a very
6 hurried fashion in the next couple of weeks,
7 which again we think that would be the prudent
8 thing to do.

9 So I don't know that there's anything
10:45 10 else that I really need to hit, but I'm happy to
11 answer any other -- other questions if you have
12 any.

13 THE COURT: No, thank you. It's been
14 very helpful.

10:45 15 MR. PARKER: I appreciate it. Thank you.

16 THE COURT: Ms. Hallowell, I told him he
17 could have the last words, but I can see you
18 moving in your chair. I'd be glad to hear from
19 you, of course.

10:46 20 MS. HALLOWELL: Thank you, your Honor.
21 I'll just make one brief point.

22 THE COURT: Sure.

23 MS. HALLOWELL: Opposing counsel
24 mentioned that they haven't explicitly told the
10:46 25 PTAB to apply our constructions, but I'm looking

1 at their petition, which is Exhibit 1 to our
2 brief; they say, quote, Because patent owner
3 contends in a parallel proceeding that a broad
4 construction should apply for its infringement
10:46 5 allegations, the Board should analyze
6 patentability under the same interpretation.

7 So they have told the PTAB to use our
8 constructions.

9 THE COURT: Okay. This issue may be
10:46 10 getting a bit beyond me.

11 MS. HALLOWELL: Okay.

12 THE COURT: I don't really understand the
13 prejudice that you fear. I don't understand how
14 you're disadvantaged.

10:46 15 And we have a record here. I know you'll
16 take advantage of it. You can show the PTAB
17 people that Mr. Parker has promised that he
18 doesn't seek to take some unfair advantage from
19 the construction. I don't know; the information
10:47 20 that he's learned here about your construction
21 claims.

22 I don't understand how you're being
23 wrong-footed.

24 MS. HALLOWELL: Basically so they -- they
10:47 25 waited until almost, like up until the year

1 deadline to file --

2 THE COURT: Sure.

3 MS. HALLOWELL: -- because they wanted to
4 learn as much as they could about our case.

10:47 5 If they hadn't learned our claim
6 construction positions, they would have been
7 forced to take their own positions on claim
8 construction.

9 So by waiting they avoided telling the
10:47 10 PTAB their constructions, which for purposes in
11 the district court they want constructions to be
12 narrow to avoid infringement.

13 In the PTAB they're probably going to
14 want them to be broad to -- which they might
10:47 15 think gives them a better shot at invalidity.

16 So by waiting to get our claim
17 constructions it basically made them -- they
18 avoided having to go on the record with their
19 constructions in the PTAB.

10:48 20 THE COURT: Okay. So they've kind of
21 had -- in poker they've had to put a card down?

22 MS. HALLOWELL: Exactly. They waited for
23 us to show our cards before filing.

24 THE COURT: All right.

10:48 25 MS. HALLOWELL: Thank you, your Honor.

1 MR. PARKER: Your Honor, may I briefly
2 respond to that?

3 THE COURT: Sure.

4 MR. PARKER: And I can do it from here.

10:48 5 That's -- that's not the case. They keep
6 pointing to the fact that it took us almost a
7 year to file the PTAB position, but in reality
8 the parties on multiple occasions discussed
9 settlement.

10:48 10 As you know, we had our ENE session in
11 late February of this year.

12 THE COURT: Right, right.

13 MR. PARKER: We had not been focusing
14 on -- at all on filing a PTAB petition because
10:48 15 we had hoped that that would be fruitful; the
16 parties could come to a reasonable agreement on
17 settlement. That didn't happen.

18 THE COURT: Right.

19 MR. PARKER: Then shortly after that they
10:48 20 changed the claims that were -- they asserted in
21 this case. So even if we had been preparing a
22 PTAB petition or IPR petition to file, that
23 wouldn't have actually been a big problem for
24 us.

10:49 25 So the fact that we had not done that, we

1 then would have had to start from scratch
2 anyways, and we essentially did because they
3 changed the claims that were asserted.

4 And obviously, as we discussed, we wanted
10:49 5 to file an IPR petition with all of the claims
6 that were asserted to strengthen our position as
7 to why there should be a stay and to help, you
8 know, take care of this case, hopefully through
9 the PTAB.

10:49 10 So it's -- it's disingenuous for them to
11 say that we waited until the last minute and we
12 somehow tried to gain the system by doing that.
13 That's not the case. I've been in very few
14 cases where people have changed the asserted
10:49 15 cases eight months after the complaint was
16 filed, so I take issue with that accusation.
17 That's not the case.

18 THE COURT: Okay. Well, I have great
19 respect for both of you. I don't think any game
10:49 20 is being played, but why don't we leave it
21 there, although I shouldn't let you out of the
22 room without asking you about your ENE
23 experience and making sure that you have an open
24 line of settlement discussion.

10:49 25 Who's the ENE evaluator?

1 MR. PARKER: Andrew Manitsky.

2 THE COURT: Mr. Manitsky, absolutely. We
3 see him all the time.

4 And is he an appropriate neutral to
10:50 5 continue on in that role, or did you plan to get
6 somebody else that might be more versed in
7 patent issues?

8 MR. PARKER: So I think he was great. We
9 think he did a good job.

10:50 10 The parties were just, you know, in our
11 opinion were too far off at that point.

12 THE COURT: Right.

13 MR. PARKER: I will say that over the
14 last week I understand that the business folks
10:50 15 have been talking to each other about potential
16 settlements, so that may be something else to
17 consider with respect to a decision on staying
18 the case. I don't know the outcome of that.

19 THE COURT: Right.

10:50 20 MR. PARKER: Obviously nothing has been
21 reached, but I do know that business folks from
22 our client have talked to Mr. Dodge, at least,
23 without attorneys present, so I feel that always
24 a better thing to do than get us involved.

10:50 25 THE COURT: Right. Right.

1 And how do the plaintiffs see the
2 settlement process?

3 MR. KOHLER: I would agree with
4 everything Mr. Parker said.

10:51 5 The parties are still very far apart
6 based on the recent conversations between
7 business people.

8 THE COURT: Okay.

9 And did you want to set up another
10:51 10 meeting with Mr. Manitsky, or are you sort of
11 content to roll along?

12 MR. KOHLER: I think based on what we've
13 heard so far, the parties are so far apart at
14 this point that it probably won't be useful at
10:51 15 this juncture.

16 THE COURT: Okay. That's enough for me.
17 I mean, I can tell everybody is professional;
18 it's not a personal problem. If there's an
19 opening, I expect both lawyers will take full
10:51 20 advantage.

21 MR. KOHLER: Yes, your Honor. Thank you.

22 THE COURT: Good enough. Thanks.

23 I'll get something out in the next week
24 or so.

10:51 25 MR. KOHLER: Thank you.

MR. PARKER: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:52 a.m.)

* * *

C E R T I F I C A T E

I certify that the foregoing is an accurate transcript from the proceedings in the above-entitled matter, dated this 15th day of August, 2024.

/s/ Sarah M. Bentley, RPR

Sarah M. Bentley, RPR

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