

I. INTRODUCTION.

Defendant Facebook, Inc. (“Facebook”) has filed a request for *inter partes* reexamination by the United States Patent and Trademark Office (“PTO”) of the only patent Plaintiff Indacon, Inc. (“Indacon”) has asserted in this action that is eligible for *inter partes* reexamination, based on invalidating prior art Facebook recently obtained that the PTO did not consider during the original prosecution of the patent.

Congress created the *inter partes* reexamination process as an efficient alternative way to assess patent validity without the expense of district court litigation. Courts routinely stay litigation pending reexamination. In this case, the reexamination will almost certainly affect the claim construction issues in this case, including the issues to be heard at the upcoming November 2, 2011 claim construction hearing. Facebook accordingly requests that the Court temporarily stay this action until Indacon files its response to the PTO’s first Office Action in the reexamination. The parties and Court can assess the reexamination’s likely impact at that time—including any statements by Indacon relevant to claim construction—and evaluate whether the case should be further stayed to avoid a waste of resources regarding claims that may be in flux. Facebook also requests expedited briefing on the present motion as set forth in the Motion to Expedite Briefing Schedule filed concurrently herewith.

The relevant factors that courts consider in determining whether to stay litigation all strongly support a stay. This case is early in its fact discovery phase and the Court has not scheduled a trial date. It would not make sense to proceed through claim construction, summary judgment or an eventual trial on claims and issues that may later change or vanish.

Furthermore, the issues in this lawsuit will be narrowed by the reexamination. In particular, parties and Court will benefit from a temporary stay to assess the likely impact on this case, including as a starting point, claim construction issues. It would conserve valuable party and Court resources to stay this case prior to the November 2, 2011 hearing, rather than hold the hearing on an incomplete record that may substantially change and for which claim and claim terms may not even exist as the reexamination progresses.

Finally, Indacon will not be unfairly prejudiced by a stay, especially the modest, temporary stay Facebook requests. Indacon seeks only monetary damages in this case and will have the same opportunity for monetary relief if it prevails after a stay pending reexamination.

II. BACKGROUND.

A. Status of the Present Action.

Indacon brought this action against Facebook on December 1, 2010. Indacon alleges that Facebook infringes claims 19 and 21 of U.S. Patent No. 7,836,043 (“’043 patent”) and certain claims of U.S. Patent No. 6,834,276 (“’276 patent”).

The case is still in its early stages. The parties have produced some documents and exchanged written discovery, but no fact depositions have been noticed or taken. The Court’s claim construction hearing is not scheduled until November 2, 2011. The close of fact discovery, all of expert discovery, dispositive motions, and the trial date, are all unscheduled, and will only be scheduled following the Court’s issuance of a claim construction order.¹

B. Facebook Requests *Inter Partes* Reexamination of the ’043 Patent.

After learning how broadly Indacon applies its claims in its supplemental infringement contentions and recent *Markman* briefing, Facebook was able to narrow and target its prior art searching. Doing so allowed Facebook to identify several pieces of prior art that alone, and in combination, invalidate both of the asserted ’043 patent claims (claims 19 and 21) and three related claims (claims 20, 22, and 23). On October 14, 2011, Facebook filed a 75-page *inter partes* reexamination request showing why ’043 patent claims 19-23 are invalid. *See* Declaration of Lowell D. Mead (“Mead Decl.”), Ex. A (“Request”).²

1. Summary of the *inter partes* reexamination procedure.

Congress enacted patent reexamination as an efficient alternative to expensive, time-consuming patent litigation.³ The first step in an *inter partes* reexamination is for the challenger

¹ Dkt. No. 32.

² The prior art references (submitted to the PTO as exhibits to the Request) total several hundred pages. Should the Court desire to review those exhibits, Facebook would be pleased to provide copies to the Court.

³ *See Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 601-02 (Fed. Cir. 1985) (purposes include “settle validity disputes more quickly and less expensively than ... protracted litigation,” “allow courts to refer patent validity questions to

to file a written request for reexamination.⁴ The PTO must decide whether to grant that request within three months.⁵ Here, the PTO must act on Facebook's request no later than January 10, 2011. Recent PTO statistics, however, suggest the order is likely to issue in around 60 days.⁶ It is highly likely Facebook's request will be granted, particularly in view of the strength of the new prior art, as discussed below. In fact, since the advent of the *inter partes* reexamination through June 30, 2011, the PTO has granted 95% of requests.⁷

Inter partes reexaminations typically result in cancellation or amendment of the claims being reexamined. The most recent statistics show that 44% of *inter partes* reexaminations result in all claims canceled or disclaimed, 43% result in changed claims, and only 13% confirm all claims.⁸ While the standard for granting *inter partes* reexamination was recently changed,⁹ even a cursory review of Facebook's Request shows the high likelihood that '043 patent claims 19 and 21 will be reexamined and likely rejected in an Office Action.

2. The invalidating prior art cited in Facebook's reexamination requests.

Facebook's Request presents three prior art references (Weitzman, ZyINDEX, and Hall) that render invalid claims 19-23 of the '043 patent.¹⁰

During the original prosecution of the '043 patent, the key feature of these claims that Indacon argued was not present in the prior art was the step of "incorporating any user-generated custom annotations into the index."¹¹ But the PTO did not consider the references presented in

the expertise of the Patent Office," and "reinforce 'investor confidence in the certainty of patent rights' by affording the PTO a broader opportunity to review 'doubtful patents'"). There are two types of reexamination: *ex parte*, in which the reexamination requester does not thereafter participate in the reexamination, and *inter partes* (requested here), where the requester participates in the reexamination along with the PTO and the patentee.

⁴ See 35 U.S.C. § 311.

⁵ 35 U.S.C. § 312.

⁶ Mead Decl. Ex. B at 1.

⁷ Mead Decl. Ex. C.

⁸ *Id.*

⁹ Requesters must now show a "reasonable likelihood that the requester will prevail," rather than a "substantial new question of patentability." 35 U.S.C. § 312(a).

¹⁰ The references are *Computer Programs for Qualitative Data Analysis*, by Eben A. Weitzman and Matthew B. Miles (1995) ("Weitzman"); *ZyINDEX For Windows User's Guide* (1992) ("ZyINDEX"); and *Rethinking Hypermedia: The Microcosm Approach*, by Wendy Hall et al (1996) ("Hall").

¹¹ See Request at 8-10. Ironically, this step is not described in the '043 patent specification itself, but was apparently added to the claims by Indacon in an attempt to avoid the prior art.

Facebook's reexamination request. All three of the references located by Facebook describe this exact feature along with the other limitations of the claims.¹² Thus, Indacon will have to amend its claims, cancel them in favor of new ones, or make arguments narrowing the definition of claim terms to overcome this invalidating art. Each of these results will render any claim construction of this stage of the case a wasted exercise, strongly supporting at least the temporary stay requested by Facebook. For example:

- Weitzman: "The program supports annotation in two ways. You can attach pop-up 'note' windows to words or phrases in the text. . . . Notes can be searched, but first they must be added to the index."¹³
- ZyINDEX: "Annotate text files without modification to the file itself. Attach note to specific place in file; add it into the same index as the file. Search for note; print note."¹⁴
- Hall: "[U]sers may connect information together using links, or may annotate information . . . Users may assign keywords to a document. It will then be possible to retrieve all documents with the given keyword."¹⁵

Considering the strong similarities between the claims and the prior art, it is highly likely the PTO will grant the Request and simultaneously reject the claims in its first Office Action.¹⁶

III. THE COURT SHOULD TEMPORARILY STAY THIS LITIGATION

A. Courts Apply a "Liberal Policy" of Granting Stays Pending Reexamination.

"Courts have inherent power to manage their dockets and stay proceedings, including the authority to order a stay pending conclusion of a PTO reexamination." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) (internal citations omitted). Courts recognize a "liberal policy in favor of granting motions to stay proceedings pending the outcome of [USPTO] reexamination proceedings." *Broad. Innovation, LLC v. Charter Commc'ns, Inc.*, Civ. A. No. 03-cv-2223-ABJ-BNB, 2006 U.S. Dist. LEXIS 46623, at *12 (D. Colo. July 11, 2006). "The stay of pending litigation to enable PTO review of contested patents was one of the specified purposes of the reexamination legislation." *Patlex*, 758 F.2d at 606; *see also Canady v. Erbe*

¹² See Request at 20-74 (claim charts mapping Indacon's claims to the cited references).

¹³ Request at 21, 23 (quoting Weitzman at 91 (emphasis added)).

¹⁴ Request at 30 (quoting ZyINDEX at 81 (emphasis added)).

¹⁵ Request at 35-36, 39 (quoting Hall at 36 and 53 (emphasis added)).

¹⁶ See Mead Decl. Ex. E at 126 ("In almost all cases where the Patent Office finds a substantial new question of validity, it will also reject the claims.").

Elektromedizin GmbH, 271 F. Supp. 2d 64, 78 (D.D.C. 2002) (“Congress instituted the reexamination process to shift the burden of reexamination of patent validity from the courts to the PTO”). Although the PTO has not yet acted on Facebook’s Request, courts often order at least temporary stays prior to the PTO’s formal grant of the request.¹⁷

B. All of the Relevant Factors Favor a Stay in This Case.

In determining whether to grant a stay of proceedings pending reexamination, courts consider three factors: (1) whether discovery is complete and a trial date has been set; (2) whether a stay will simplify the issues; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party. *See, e.g., Cameras Onsite, LLC v. Digital Mgmt. Solutions, Inc.*, Civ. A. No. H-09-2528, 2010 WL 1268054, at *2 (S.D. Tex. Mar. 24, 2010) (citations omitted). These factors strongly support a stay—both the temporary stay Facebook requests and a full stay pending completion of the reexamination.

1. Discovery is far from complete and a trial date has not been set.

The parties are in the early stage of fact discovery. No fact depositions have been noticed or taken. Though the parties have submitted claim construction briefs, the Court has not yet held a claim construction hearing. Expert discovery, dispositive motions, further discovery deadlines, and the scheduling of trial will not take place until after the Court issues a claim construction order. This is, thus, the perfect stage to stay the case, before the Court or the parties expend any further resources regarding claims that may not even exist in a few short months.

Courts have even stayed cases pending reexamination after they have progressed much further than the current case, recognizing the significant benefit of letting the PTO proceed so the Court may avoid needlessly construing or otherwise dealing with claims that may not remain in

¹⁷ *See, e.g., Tse v. eBay, Inc.*, No. C-11-01812 WHA, 2011 U.S. Dist. LEXIS 90285 (N.D. Cal. Aug. 12, 2011) (ordering stay before reexamination was granted); *Graphon Corp. v. Juniper Networks, Inc.*, No. C10-1412 JSW, 2010 WL 3619579 (N.D. Cal. Sept. 13, 2010) (same); *Akeena Solar Inc. v. Zep Solar Inc.*, No. C 09-05040 JSW, 2010 WL 1526388 (N.D. Cal. Apr. 14, 2010) (same); *Pactool Int’l Ltd. v. DeWalt Indus. Tool Co.*, Case No. C06-5367 BHS, 2008 U.S. Dist. LEXIS 11276 (W.D. Wash. Feb. 1, 2008) (same); *Magna Donnelly Corp. v. Pilkington N. Am., Inc.*, File No. 4:06-cv-126, 2007 U.S. Dist. LEXIS 17536 (W.D. Mich. March 12, 2007) (same); *see also ASCII Corp. v. STD Entm’t USA, Inc.*, 844 F. Supp. 1378, 1381 (N.D. Cal. 1994) (ordering stay before reexamination request was even filed).

their current form. *See, e.g., Collectis S.A. v. Precision Biosciences, Inc.*, No. 5:08-cv-00119-H, 2010 U.S. Dist. LEXIS 91043 (E.D.N.C. Aug. 31, 2010) (ordering stay where case was two years old, and discovery was almost complete); *eSoft, Inc. v. Blue Coat Sys., Inc.*, 505 F. Supp. 2d 784 (D. Colo. 2007) (ordering stay when discovery was “at or near completion”); *Broad. Innovation*, 2006 U.S. Dist. LEXIS 46623 (ordering stay after dispositive motions had been filed and only three months prior to trial); *Motson v. Franklin Covey Co.*, Civ. No. 03-1067 (RBK), 2005 U.S. Dist. LEXIS 34067, at *2 (D.N.J. 2005) (granting stay despite discovery being complete and summary judgment decided); *Middleton, Inc. v. Minn. Mining & Mfg. Co.*, No. 4:03-cv-40493, 2004 U.S. Dist. LEXIS 16812, at *35 (S.D. Iowa 2004) (ordering stay when case had been going on for eight years, discovery was complete, and trial was seven weeks away).

2. A stay will simplify the issues, particularly claim construction issues.

A major “purpose of the reexamination procedure is to eliminate trial of that issue (when the claim is canceled) or to facilitate trial of that issue by providing the district court with the expert view of the PTO (when a claim survives the reexamination proceeding).” *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983). It follows that, even if the PTO were to leave all claims of the ‘043 patent unchanged (only a 13% likelihood), a stay would be warranted because the Court would benefit from the PTO’s expert analysis and from the new prosecution history created during the reexamination that could alter the meaning of existing claim terms. *See, e.g., K.G. Motors, Inc. v. Specialized Bicycle Components, Inc.*, No. 08-cv-6422T, 2009 WL 2179129, at *4 (W.D.N.Y. July 22, 2009); *EchoStar Techs. Corp. v. TiVo, Inc.*, No. 05:05 CV 81 DF, 2006 WL 2501494, at *4 (E.D. Tex. July 14, 2006); *In re Cygnus Telecomm. Tech. LLC Patent Litig.*, 385 F. Supp. 2d 1022, 1024 (N.D. Cal. 2005).

The present stage of this case – before the claim construction hearing – is a particularly appropriate time for a temporary stay. No matter the outcome of the reexamination, claim construction will surely be affected. Once “the reexamination train has left the station, all claim construction bets are off.” *Richtek Tech. Corp. v. UPI Semiconductor Corp.*, No. C 09-05659 WHA, 2011 U.S. Dist. LEXIS 14095, at *9 (N.D. Cal. Feb. 3, 2011). For example, if claims 19

and 21 are canceled, some of the disputed claim terms identified in the parties' claim construction briefs would not need to be construed at all.¹⁸ If claims are amended or added, claim construction might have to be repeated to account for the new claim language. And even if the claims emerge intact, Indacon's arguments distinguishing the claims from the prior art become part of the prosecution history and must be used by the Court and the parties in claim construction. *See, e.g., Am. Piledriving Equip., Inc v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011) (the patentee "unambiguously argued that 'integral' meant 'one-piece' during reexamination and cannot attempt to distance itself from the disavowal of broader claim scope"). If the Court were to proceed with *Markman* now, it would likely have to do serial additional *Markman* hearings to accommodate the growing record—certainly a waste of time. Recognizing this efficiency, courts often order stays at stages similar to the current stage of this case.¹⁹

Notably in this case, reexamination on the '043 patent may also affect the '276 patent because the patents share the same specification and many claim terms. Four of the terms that the parties dispute in their claim construction briefs are shared between the asserted '043 and '276 patent claims,²⁰ and the patents' asserted claims share many other terms.²¹ Indacon's statements about those shared terms during reexamination must also be considered for the '276 patent.²² It would not make sense for the Court to proceed through claim construction when the meaning of both patents' claim terms could be materially affected by the reexamination. Instead,

¹⁸ The disputed phrases "custom annotations" and "incorporating any user-generated custom annotations into the index" appear only in '043 patent claims 19 and 21. *See* ECF No. 41 (Facebook's claim construction brief) at 21. It would not make sense to proceed with claim construction when these claims may be canceled or changed.

¹⁹ *See, e.g., Microsoft Corp. v. TiVo, Inc.*, Case No. 10-cv-00240-LHK, 2011 U.S. Dist. LEXIS 52619 (N.D. Cal. May 6, 2011) (ordering stay where parties had filed claim construction briefs but court had not held a claim construction hearing); *Protectconnect, Inc. v. Leviton Mfg. Co., Inc.*, Case No. 10cv758 AJC (BGD), 2011 U.S. Dist. LEXIS 44045 (S.D. Cal. Apr. 22, 2011) (same); *AT&T Intellectual Prop. v. TiVo, Inc.*, 774 F. Supp. 2d 1049 (N.D. Cal. 2011) (same).

²⁰ Specifically, the asserted claims from both patents include the terms "file," "term," "link term," and "display." (*See* ECF No. 41 (Facebook's claim construction brief) at 8, 14-15, 23.)

²¹ For example, '043 patent claims 19 and 21 share terms and phrases with the asserted '276 patent claims such as "generating a searchable index," "searching the searchable index according to a [selected] search criterion to locate words and phrases," "displaying at least portions of files," and others.

²² *See, e.g., NTP, Inc. v. Research In Mot., Ltd.*, 418 F.3d 1282, 1293 (Fed. Cir. 2005).

a temporary stay through Indacon's first Office Action response will allow the parties and Court to assess the likely impact, including Indacon's arguments, and then proceed accordingly.

Courts often order stays when only one of multiple patents-in-suit is subject to reexamination, because courts recognize the efficiencies to be gained.²³ That is especially true where, as here, the patents are closely related. In one case, for example, the court ordered a stay pending reexamination of one of the two patents-in-suit, reasoning that the two patents covered the same technology, "relate[d] to the same provisional patent application, and contain[ed] specification and claim language that is substantially similar." *Proctor & Gamble*, 2008 WL 3833576, at *1. Thus, reexamination of one patent "would have an effect on issues before the court relating to the [other] patent, and *in particular, claim construction.*" *Id.* (emphasis added).

Similarly, another court noted that "[d]uplicative discovery may result if only [one] patent is stayed since there are likely to be common documents and witnesses regarding the infringement litigation of [both] patents." *Method*, 2000 WL 35357130, at *3. Staying only the part of the case involving the patent under reexamination "may result in two separate tutorials and two claim construction hearings." *Id.* Likewise, in *CNS, Inc. v. Silver Eagle Laboratories, Inc.*, a number of asserted claims were not involved in the reexamination proceedings. No. Civ. 04-968 (MJD / JGL), 2004 WL 3631121, at *2 (D. Minn. Nov. 29, 2004). The court ruled that "there are few efficiencies to be found in engaging in discovery and trial on one patent, while staying the case on a second patent, particularly where there is only one accused product and where the patents share some common prosecution history." *Id.* The court found that "deference to [the reexamination] proceeding is the best use of the judicial and party resources in this case." *Id.*

²³ See, e.g., *Lifeline Tech., Inc. v. Archer Daniels Midland Co.*, No. 4:08-CV-279 CAS, 2009 U.S. Dist. LEXIS 31418 (E.D. Mo. Apr. 14, 2009) (ordering stay when one of two patents-in-suit was being reexamined); *Proctor & Gamble Co. v. Kraft Foods Global, Inc.*, No. C 08-0930 PJH, 2008 WL 3833576 (N.D. Cal. Aug. 15, 2008) (same); *Tomco Equip. Co. v. Se. Agri-Sys, Inc.*, 542 F. Supp. 2d 1303 (N.D. Ga. 2008) (same); *Method Elecs., Inc. v. Infineon Tech. Corp.*, No. C 99-21142 JW, 2000 WL 35357130 (N.D. Cal. Aug. 7, 2000) (same). See also *Card Tech. Corp. v. DataCard Corp.*, Civ. No. 05-2546 (MJD / SRN), 2007 WL 2156320, at *4 (D. Minn. July 23, 2007) (ordering stay when two of three patents-in-suit were being reexamined, and when reexamination had been denied as to the third patent-in-suit); *Pacesetter Inc. v. Cardiac Pacemakers, Inc.*, No. Civ. 02-1337 (DWF/SRN), 2003 WL 23303473 (D. Minn. Nov. 19, 2003) (ordering stay when two of four patents-in-suit were being reexamined).

In addition, if Indacon substantively narrows its claims in reexamination, Facebook will be entitled to intervening rights and cannot be liable for any alleged infringement prior to completion of the reexamination. *See, e.g., Marine Polymer Tech., Inc. v. Hemcon, Inc.*, No. 2010-1548, 2011 WL 4435986, at *8-9 (Fed. Cir. Sept. 26, 2011). If intervening rights apply, then any part of the case relating to pre-reexamination infringement or damages regarding the '043 patent would be rendered moot.

Furthermore, by requesting *inter partes* reexamination, Facebook has subjected itself to a statutory estoppel generally prohibiting it from raising validity challenges in litigation that it raised or could have raised in reexamination. 35 U.S.C. § 315(c). Thus the reexamination will, at a minimum, eliminate the need for duplicative Court proceedings in this regard.

In sum, there is no reason “to hold a Markman hearing, rule on discovery and dispositive motions, and conduct a trial, all at great expense to the parties, when the PTO’s decision could render these proceedings moot or substantially alter the claims being litigated.” *Institutiform Tech., Inc. v. Liqui-Force Servs., Inc.*, Case No. 08-11916, 2009 U.S. Dist. LEXIS 44116, at *10 (E.D. Mich. May 26, 2009).

3. A stay will not unduly prejudice or present a clear tactical disadvantage to Indacon

a. Indacon’s ultimate monetary recovery, should it prevail at the PTO and in Court, will not be affected by a stay.

Indacon will not be unduly prejudiced by a stay. Indacon does not currently practice the patents-in-suit, and does not compete with Facebook. *See, e.g., Implicit Networks, Inc. v. Advanced Micro Devices, Inc.*, No. C08-184JLR, 2009 WL 357902, at *3 (W.D. Wash. Feb. 9, 2009) (“Courts have consistently found that a patent licensor cannot be prejudiced by a stay because monetary damages provide adequate redress for infringement.”). Because Indacon has not sought injunctive relief, in the unlikely event the claims are not substantively changed in reexamination, Indacon’s monetary damages claim “will not be affected by the reexamination proceeding.” *See Nanometrics, Inc. v. Nova Measuring Instruments, Ltd.*, No. C 06-2252 SBA,

2007 WL 627920, at *3 (N.D. Cal. Feb. 26, 2007) (citing *Laitram Corp. v. NEC Corp.*, 163 F.3d 1343, 1346 (Fed. Cir. 1998)); *see also Broad. Innovation*, 2006 U.S. Dist. LEXIS 46623, at *33-34 (“this factor weighs in favor of staying the case because monetary relief – the only relief Plaintiffs seek – is fully capable of restoring Plaintiffs to the *status quo ante*”).

b. Delay alone does not constitute undue prejudice.

The PTO is required to conduct reexaminations with “special dispatch.” 35 U.S.C. § 305. According to recent studies and commentary, the PTO is picking up speed. (Mead Decl., Ex. D at 7, 9.) Although the length of reexaminations may vary, it is well-recognized that the “delay inherent in the reexamination process does not constitute, by itself, undue prejudice.” *ICI Uniquema, Inc. v. Kobo Prods., Inc.*, Civ. A. No. 06-2443 (JAP), 2009 WL 4034829, at *2 (D.N.J. Nov. 20, 2009) (internal citation omitted). *See also Speedtrack, Inc. v. Wal-Mart.com USA, LLC*, No. C 06-7336 PJH, 2009 WL 281932, at *2 (N.D. Cal. Feb. 5, 2009) (finding “no undue prejudice to plaintiff would result” from a stay, given the “real risk that were a stay not granted, the parties and the court would expend substantial resources and costs in litigating this case through trial with respect to claims that the PTO later finds disallowed”) (emphasis in original).

Indacon will especially not be prejudiced by a temporary stay to account for its first Office Action response. Indacon can file its response earlier than required if it desires. Depending on the content of Indacon’s response, the parties and the Court can assess the likely impact on claim construction and other issues and can proceed accordingly.

In sum, the applicable factors strongly support a stay pending reexamination. A stay of litigation pending completion of the reexamination is fully warranted here, and the temporary stay Facebook requests is even more strongly supported in this case.

IV. CONCLUSION.

Facebook respectfully requests that the Court enter the Proposed Order filed herewith.

Dated: October 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of October, 2011, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system which will send electronic notification to all counsel or record.

/s/ Mark W. Kiehne (by permission)

Mark W. Kiehne