

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

01 COMMUNIQUE LABORATORY, INC.,

Plaintiff,

vs.

CITRIX SYSTEMS, INC., and
CITRIX ONLINE, LLC

Defendants.

CASE NO. 1:06-CV-0253

JUDGE LIOI

**PLAINTIFF'S MOTION TO REOPEN THE CASE AND
TO LIFT THE STAY**

In this patent infringement case, filed in February of 2006 by patent owner 01 Communique Laboratory, Inc. ("01"), against Citrix Systems, Inc. and Citrix Online, LLC (together, "Citrix"), 01 contends that Citrix infringes U.S. Patent No. 6,928,479 ("the '479 patent"). Two years into the conduct of the case, Citrix filed a motion to stay pending a reexamination petition it had filed with the Patent Office regarding the '479 Patent. ECF 162. Weeks before trial, Judge Aldrich granted the stay. ECF 215.

Over the five years during which the stay has been in effect, 01 has requested several times that the case be reopened and the stay lifted. In August of 2010, after the Patent Office Examiner had determined that the '479 Patent was valid despite Citrix' arguments, 01 sought reassignment of the case and a lifting of the stay. ECF 225. On October 27, 2010, this Court conducted a telephone conference and ordered the parties to brief the issue of the stay, which they did. ECF 230, 231 and 232. The Court did not rule on the motion.

Two years later, in August of 2012, 01 again asked this Court to lift the stay after a case against another infringer of the '479 Patent was reinstated by the Court of Appeals for the Federal Circuit and set for trial in the Eastern District of Virginia. ECF 234. This Court asked for a response brief from Citrix, which it filed (ECF 235), but this Court did not rule on that motion, either.

Now, the validity of all claims of the '479 Patent has been affirmed on appeal by the Patent Trial and Appeal Board ("PTAB"). 01 again asks that the case be reopened and the stay be lifted so that it may finally proceed to trial.

When a stay was initially granted by this Court's predecessor, the Court believed that a twenty-nine month delay was the likely result, and it suspected that claims of the patent at issue would be declared invalid, streamlining the matter. Sixty-eight months later, it is now clear that the Court grossly underestimated the delay that would be occasioned by the reexamination; and the recent appellate decision by the PTAB has confirmed that the reexamination is extremely unlikely to remove any claim from this litigation. There has been a fundamental change in the equities upon which this Court originally based its grant of the request for stay., and the reasoning of this Court's 2011 decision in *Lincoln Electric Co. v. Miller Electric Mfg. Co.*, 2011 U.S. Dist. LEXIS 27578 (March 17, 2011), argues that this case should be reopened, the stay lifted, and the matter set for trial.

Dated: November 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing PLAINTIFF'S MOTION TO REOPEN THE CASE AND TO LIFT THE STAY was served this 13th day of November, 2013, by action of the Court's electronic docketing system upon all counsel of record.

_____/s/ Thomas H. Shunk_____
an attorney for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
TO REOPEN THE CASE AND TO LIFT THE STAY**

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01 filed this patent litigation in early 2006, months after its U.S. Patent No. 6,928,479 (the “479 Patent”) had been issued by the U.S. Patent Office. Citrix sought a stay of the matter, two years later, shortly before the trial date, and long after exchange of documents and contentions, long after the claim construction hearing in the matter, and long after the completion of depositions. At that time, opposing the stay, 01 warned:

As to the question of prejudice, to stay the litigation now, so close to trial, would be highly prejudicial to plaintiff. 01 is a small company and has a significant share of its resources invested in this litigation. 01’s main product is covered by the patent-in-suit (the ’479 patent) and the ’479 patent is one of 01’s most valuable assets. All of 01’s efforts and resources to enforce its patent are centered on this litigation. Granting Citrix’s motion to stay the litigation would delay enforcement of the ’479 patent for several more years, and would impose a tremendous burden on a small company such as 01.

ECF 162 at 1.

Nevertheless, Judge Aldrich granted the stay, finding:

This is a close case. Although the issue of prejudice to Communique weighs against a stay, a stay would simplify the issues and trial of the case, and the litigation is not so advanced as to weigh against granting a stay. However, in light of the absence of dilatory motives, the court finds that the alleged prejudice to Communique is not so great as to outweigh the benefit to the parties, and to the court, in granting a stay.

ECF 215 at 6.

Though Judge Aldrich at the time found that the “litigation was not so advanced as to weigh against granting a stay,” the later-adopted Local Patent Rules of this District argue otherwise: today, under Local Patent Rule 3.11, no such motion can be filed subsequent to service of final contentions, as it was in this case by Citrix.

Though Judge Aldrich at the time found that “the alleged prejudice to Communique is not so great,” the lengthy period during which 01 has been unable to stop Citrix has left 01 with few assets other than its patents.

The '479 patent was applied for in 2000 and, as acknowledged by the Patent Office on the face of the patent, would have issued in 2003 had it not been for lengthy delays, including the loss of the application file, by the Patent Office. Citrix' predecessor-in-interest is alleged to have begun infringing the patent in 2003. 01 was diligent in bringing suit against Citrix, filing this action only seven months after the issuance of the patent in August 2005. Due to the delays by the Patent Office and the stay of this action, however, 01 has been unable to gain the benefit of its patent against its largest competitor for more than ten years.

Though Judge Aldrich at the time perceived a benefit from the fact that claims of the patent might be cancelled, the validity of the claims has now been repeatedly confirmed.

These issues of equity, which were perhaps speculative in 2008, are now matters of fact and they weigh strongly in favor of reopening the case and lifting the stay. Now that the Patent Trial and Appeal Board has confirmed the '479 Patent's validity on reexamination, there is no reason to delay further this seven-year old case.

I. The '479 Patent Has Been Found Valid Upon Appeal To The PTAB And The Factors Supporting Judge Aldrich's Grant Of Stay No Longer Apply

A. Citrix' Representations Leading To Judge Aldrich's Original Stay Order Have Been Proved Wrong

Citrix obtained the stay of this case in 2008, by representing to Judge Aldrich that the reexamination process would not require much time and that it was likely that some or all of the claims would be invalidated, thereby streamlining, or eliminating the need entirely for, a trial.

Citrix represented to Judge Aldrich:

It is highly likely that the requested reexamination will result in the cancellation of 01 Communique, Inc.'s ("01") asserted claims. PTO statistics strongly suggest that the reexamination of all asserted claims will be granted and that 01's claims will be invalidated or significantly amended. (Exh. B, PTO Inter Partes Reexamination Filing Data – September 30, 2007). The PTO has granted 96% of all inter partes reexamination requests. (Id.). Furthermore, these same statistics

establish an 82% probability that none of 01's twenty-seven asserted claims will survive at all. (*Id.*). (ECF 162, Brief at 3.)

“Moreover, Congress has provided that ‘reexamination proceedings, . . . including any appeal to the Board of Patent Appeals and Interferences, will be conducted with special dispatch.’ *Id.* (quoting 35 U.S.C. § 305 (emphasis added)). (*Id.* at fn. 8, p. 10)

01's argument that the Patent Office statistics suggest that the reexamination requested by Citrix will take twenty-nine months plus additional time for an appeal is incorrect. (See *Opp.* at 9 n.5). First, the twenty-nine month average cited by 01 includes all appeal time; it does not exclude appeal time as 01 has misrepresented. Second, the twenty-nine month average does not apply to Citrix's requested reexamination, but to reexaminations in general. Because the patent-in-suit is the subject of pending litigation, the Patent Office will conduct its reexamination with “special dispatch.” (ECF 176 at 4)

Judge Aldrich relied on these representations by Citrix when she granted the stay:

Here, reexamination is likely to simplify the current litigation. First, the cancellation of claims contained in the '479 patent may eliminate the need to litigate infringement issues. Second, amendment of the claims during reexamination could also moot litigation of the infringement issues. Statistically speaking, there is a very small chance that all of the claims will survive reexamination without amendment. Accordingly, reexamination will likely simplify trial by eliminating the need to litigate Communique's infringement claim, thus weighing in favor of a stay.

ECF215 at 4.

While Judge Aldrich's speculation in 2008 about the possible outcome of the reexamination proceeding, fueled by Citrix' incorrect predictions, was perhaps justified, the passage of time has now discredited that speculation. All of the patent claims have been reexamined by the panel of patent examiners at the Patent Office, without cancellation or amendment of any claim, and they have been again confirmed on appeal by the PTAB. No amendment of the claims was made that would moot litigation of the infringement issues. Though there may have been statistically only “a very small chance” that the claims would survive the reexamination intact, in fact they have. Finally, 01's complaint that the average reexamination proceeding required twenty-nine months grossly underestimated the actual time

taken up by the proceeding in this case. The reexamination has now been pending for sixty-eight months.

B. The Recent PTAB Affirmance And Confirmation Of The '479 Patent's Claims Requires A Re-Evaluation Of The Grounds On Which The Stay Was Based.

On October 29, 2013, the Patent Trial and Appeal Board ("PTAB") affirmed the validity of all claims of the '479 patent in reexamination. EXHIBIT A, The PTAB Decision On Appeal. Affirmance means that every claim of the '479 patent that had been asserted against Citrix by 01 in this matter has been confirmed to be patentable. Citrix had asserted all of the significant prior art that it had uncovered during the litigation process in the Reexamination Petition, and none of that art was determined to invalidate any claim of the '479 Patent.

The '479 Patent's claims have also been found valid by a jury in the Eastern District of Virginia. *01 Communique Lab., Inc. v. LogMeIn, Inc.*, 2013 U.S. Dist. LEXIS 89969 (E.D. Va. June 25, 2013).

Citrix has the right to appeal the PTAB's decision to the Court of Appeals for the Federal Circuit, and can be expected to assert (as it has in the past) that this case should be reopened and the stay lifted if and only if all appeals are exhausted and the final Certification of Reexamination has issued. It is, however, statistically highly unlikely that the Federal Circuit will disturb the reasoned decisions of the reexamination panel of examiners and PTAB.¹ The process of seeking an appeal to the Federal Circuit, and an expected unsuccessful petition for

¹ As of January 2013, the Federal Circuit had decided fifteen *inter partes* reexamination appeals on substantive validity grounds and had affirmed fourteen. See, Robert Greene Sterne and Jonathan M. Strang, *Federal Circuit Standard of Review for Inter Partes Patentability Challenges*, USPTO Post Grant Patent Trials 2013, Practising Law Institute (January 14, 2013). The Federal Circuit views the scope of its review in an appeal from a Board decision as "limited." *PlaSmart, Inc. v. Kappos*, 482 Fed. Appx. 568, 572 (Fed. Cir. 2012)

certiorari to the U.S. Supreme Court will require an additional two and one half years. The increasingly unlikely possibility of a change in the patent claims does not warrant further delay.

The consistent and repeated affirmation of the validity of the claims of the '479 Patent, both from the Patent Office and from other federal litigation, signals that the equities of this matter have shifted strongly in 01's favor. Consistent with this Court's 2011 decision in *Lincoln Electric Co. v. Miller Electric Mfg. Co.*, 2011 U.S. Dist. LEXIS 27578 (March 17, 2011), it is time to reopen the matter and lift the stay.

II. *Lincoln Electric* And Other Recent Case Law Support Lifting The Stay At This Time

"The same court that imposes a stay of litigation has the inherent power and discretion to lift the stay." *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp.2d 64, 74 (D.D.C. 2002).

"When circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay." *Id.*

A. The *Lincoln Electric* Analysis Requires The Stay In This Case To Be Lifted

This Court has considered the question of the propriety of continuing a stay pending reexamination – although in a significantly different factual setting – in the *Lincoln Electric* case. That case involved a declaratory judgment plaintiff that filed a petition for reexamination contemporaneously with its declaratory judgment action. The defendant sought an immediate stay of the litigation prior to the first case management conference. Later a motion to lift the stay was filed by the plaintiff before the Patent Office had concluded its deliberations at the Office level and well before any appellate action on the patent. This Court declined to lift the stay while there was uncertainty about the Patent Office's decision, but also indicated that the mere possibility of appeal of that decision would not deter it from lifting the stay:

[T]he Court does not intend to impose a stay of indefinite duration. However, it does intend to await a ruling from the PTO so that it may have a basis upon which to proceed with this matter. Should the parties then choose to appeal from that ruling, the parties may seek to have the appeal run concurrently with these proceedings.

Lincoln Electric at *10.

The present case of course involves a reexamination petition filed three weeks before trial by the defendant. Here, the Patent Office acted in favor of the patent in 2010, and that action has been affirmed on appeal to the PTAB. Nevertheless, the law and reasoning of *Lincoln Electric* can be applied to this case to show that lifting of the stay is proper. This Court noted that

A court weighs three factors in considering a motion to stay proceedings pending reexamination: “(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.”

Lincoln Elec., at * 5 (quoting *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999)). This Court applied those same three factors in considering a motion to lift the stay. *Accord, Telemac Corp. v. Teledigital, Inc.*, 490 F. Supp.2d 1107, 1111 (N.D. Cal. 2006).

Continuing the stay at this point presents a clear tactical disadvantage to 01, the non-moving party. The facts of this case concern activity in 1997 by 01 to invent and reduce to practice a system of remote access, and activity in 2003 and thereafter by Citrix’ predecessor in interest, to include the 01 invention in its products. Those facts are already ten years old and more, and witness memory continues to fade. Indeed, the technology changes that have occurred in the fast-paced world of Internet technology make 01’s 1997 invention appear less and less revolutionary as time goes by. Further passage of time may severely limit 01’s ability to present its case in court.

The final ruling from the Patent Office confirming the validity of the '479 patent makes remote the possibility that a “stay will simplify the issues in question and trial of the case” in the way that Judge Aldrich speculated it might. All claims will likely be assertable by 01 against Citrix. The possibility of the patent being invalidated by art that has been considered and rejected by two levels of reviewing examiners at the Patent Office is extremely remote. *See* citations at footnote 1, *supra*. This Court acknowledged, in *Lincoln Electric*, that once a reexamination proceeding had moved to the stage of possible appeal, the equities may require lifting a stay:

The Court acknowledges that, in its original order denying Plaintiff's motion to lift the stay, it expressed an intention to await the completion of the appeals process before the Board. See Doc. 65 at 4. However, it is aware that the proceedings before the PTO have pended for some time and it does not intend that these proceedings will pend indefinitely. Therefore it does not foreclose the possibility of commencing discovery as the parties pursue any appeals they may wish to bring.

Lincoln Electric at fn. 3.

Discovery was complete and a trial date had been set at the time of Judge Aldrich's Stay Order.² That factor has always supported denial of the stay, and does so *a fortiori* today. Indeed, this District's Local Patent Rules, adopted after the original Stay Order, would not have permitted Citrix to request a stay in 2008. L. P. R. 3.11 and 1.6. Citrix is likely to argue that discovery is incomplete and will require substantial additional effort because new versions of its products have become relevant to this case over the passage of time. (Citrix made this point in arguing against lifting the stay in 2010; *see* ECF 231 at 10.) However, the additional relevant

² Citrix will likely point to Judge Aldrich's comment in her Stay Order that the case was not so far advanced because she was planning to reopen discovery in view of a motion to compel filed by Citrix. Although not specified, it is believed that the motion to compel Judge Aldrich was referring to was ECF-124, which had been filed eight months earlier, in July of 2007. That motion had long been moot by the time of the Order, however, because the discovery Citrix had sought had been provided to Citrix long prior to that time.

products use the same technology that has been at issue in this case all along, and essentially rely on the same source code and have the same functionality. Given that the stay has been in effect for five years, it is not surprising that additional applications of the accused technology have become important; what is surprising is that Citrix would argue that it needs substantial additional discovery concerning the details of its own products.

Citrix is also likely to argue that all depositions need to be retaken, contentions “updated” and expert reports rewritten, because it has new legal defense theories, but any such claim should be closely scrutinized by this Court for evidence of good grounds. The pendency of the stay is not in itself grounds for a “do-over” of Citrix’ contentions. As this Court has elsewhere held, “The Court has broad discretion over discovery matters. The party seeking to reopen discovery must indicate to the court the need for more discovery, what material facts it hopes to uncover and why it has not previously discovered the information.” *Laukus v. Rio Brands, Inc.*, 2011 U.S. Dist. LEXIS 51001 (N.D. Ohio May 12, 2011) (citations and quotation marks omitted).

Though this Court declined to lift the stay in *Lincoln Electric*, the analysis of that case, when applied to the present facts, requires that this stay be lifted.

B. The Possibility Of Further Appeals Does Not Require Or Support Continuance Of The Stay

Citrix is expected to argue that the stay should not be lifted because the reexamination is not “final” until all appeals have been exhausted and the Certificate of Reexamination has issued. Recent district court cases have, to the contrary, found that it is appropriate to lift a previously-ordered stay when it becomes clear that it is likely that the challenged claims will be confirmed, even when the possibility for appeal remains and the technicality of the issuance of a reexamination certificate has not yet occurred.

A recent decision from the Western District of Pennsylvania, *Air Vent, Inc. v. Owens Corning Corp.*, 2013 U.S. Dist. LEXIS 35864 (W.D. Pa. Mar. 15, 2013), provides useful present-day insight into the claims of “efficiency” that were raised by Citrix in this case in 2008. There, the Court lifted the stay prior to the conclusion of the reexamination process, noting that “[t]his case has been stayed for over ten (10) months. While the Court was hopeful that the PTO would resolve the matter quickly, the end of that procedure is not in sight.” *Id.* at *7. The Court expressed grave concern that the “lengthy delay” created by the reexamination, including possible appeals, would have the result that “evidence could be lost and witnesses’ memories could fade.” *Id.* at *8. Addressing the charge that the reexamination and the litigation might produce inconsistent results if allowed to proceed simultaneously, the Court quoted the Federal Circuit’s 1988 decision in *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1428 (Fed. Cir. 1988): “[T]he thought that a PTO decision may unnecessarily complicate the litigation and could create an awkward situation if different conclusions are reached overlooks that challenging validity in a court and requesting PTO reexamination ‘are concepts not in conflict.’” *Id.*

In *Kolcraft Enterprises, Inc. v. Chicco USA, Inc.*, Slip Op., Case No. 1:09-cv-03339 (N.D. Ill., March 7, 2012) (EXHIBIT D), the Northern District of Illinois gave little weight to the possibility that a PTO result might be appealed. Granting plaintiffs’ renewed motion to lift a stay pending reexamination even though the right to appeal notice had not yet issued, the court held:

[T]he parties and the Court now have the benefit of the PTO examiner’s reexamination, whereas continuing the stay until the issuance of the right to appeal notice (which has still not issued almost 2 months after the Office Closing Action), and the additional appeal process, will likely require a years-long additional delay. The recently-filed information disclosure by [plaintiff] does not require re-opening of the reexamination, and indeed simply cites back to the PTO what the PTO cited in a related proceeding.

Accord, Pragmatus Telecom LLC v. Alcatel-Lucent USA, Inc., Slip Op., Case No. 12-1534 (Del. Dist., July 3, 2012) (“Two of the three patents are free of re-exam. The third has survived thus far, and my impression is that it is not an insignificant step that it has survived.”) (EXHIBIT F); *Cheetah Omni, LLC v. Level 3 Communications, Inc.*, Slip Op., Case No. 5:06-cv-101 (E.D. Tex. January 8, 2013) (lifting the stay after the Patent Office had denied a request for rehearing in an *inter partes* reexamination of a decision favorable to the patent) (EXHIBIT B).

Recent court opinions have made it clear that a Patent Office decision favorable to the patentee is a sufficient change in circumstances to justify lifting a stay, even when appeals remain possible. In *Kim Laube & Company, Inc. v. Wahl Clipper Corporation*, Slip Op., Case No. 2:09-cv-00914 (C.D. Cal., January 23, 2012) (EXHIBIT C), the court reasoned that “[a]lthough the reexamination decision has been appealed, the entry of a final decision constitutes a substantial change in circumstance from the time when the initial stay was entered in this action by a prior bench officer.” In *Cross Atl. Capital Partners, Inc. v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 124120 (E.D. Pa. Nov. 22, 2010), the court offered a similar explanation for its lifting of a stay:

[R]eexamination...already has taken over twenty-seven months and has resulted in a RAN affirming the patentability of the claims at issue in this litigation...[G]iven the various appeal rights it must be recognized that the reexamination proceeding is not yet substantially complete. The Examiner’s decision, however, constitutes a substantial change in circumstances diminishing the basis for any further continuance of the stay. It is not fair to continue to deny Plaintiff the opportunity to proceed with its claims, after already waiting over two years, while concurrent proceedings continue before the BPAI and possibly the Federal Circuit.

Id. at *10.

Within this District, the trend toward lifting a stay once the direction from the Patent Office becomes clear was recently underscored in *Ohio Willow Wood Company v. DAW Industries, Inc.*, Slip Op., Case No. 2:04-cv-1222 (S.D. Ohio, November 3, 2011) (EXHIBIT E).

In that case, the Court lifted the stay on the case after affirmance on appeal by the PTAB (then referred to as the “BPAI”), among other reasons because of the limited effective time period of the patent:

Two of these cases have been pending before this Court for seven years and the third case has been pending for six years. The Board of Patent Appeals and Interferences has upheld the validity of the ‘237 and the ‘688 patents. The parties indicated at the November 2, 2011 status conference that the life of the patents is nearing extinction. The Court concludes that justice requires the lifting of the stay in this action.

Id. at 3. In the case of the ‘479 Patent, given the fast-changing pace of Internet technology, the effective life of the patent (the period of time during which it has economic value) may be far less than the patent’s full lifetime. Because the Patent Office had lost the patent’s application papers during its prosecution, 01 had to wait five years (from 2000 to 2005) for the issuance of the ‘479 Patent; 01 has been waiting almost eight years since it filed this action to have its day in Court. It should not have to wait longer.

III. Conclusion

For at least the foregoing reasons, taken together with those stated in its prior motion papers, 01 respectfully requests that this case be reopened and that the current stay of the litigation be lifted so that the matter can proceed to trial.

Dated: November 13, 2013

Respectfully submitted,

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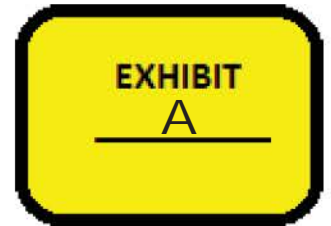
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REOPEN THE CASE AND TO LIFT THE STAY was served this 13th day of November, 2013, by action of the Court's electronic docketing system upon all counsel of record.

_____/s/ Thomas H. Shunk_____
an attorney for Plaintiff



UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CITRIX SYSTEMS, INC.
Requester and Appellant

v.

01 COMMUNIQUE LABORATORY, INC.
Patent Owner and Respondent

Appeal 2013-004565
Reexamination Control 95/001,018
Patent 6,928,479 B1¹
Technology Center 3900

Before HOWARD B. BLANKENSHIP, STANLEY M. WEINBERG, and
JOHN A. EVANS, *Administrative Patent Judges*.

WEINBERG, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The patent involved in this reexamination appeal proceeding (the “479 Patent”) issued to Meyer et al. on August 9, 2005.

Appeal 2013-004565
Reexamination Control 95/001,018
Patent 6,928,479 B1

A. STATEMENT OF THE CASE

Introduction

This reexamination proceeding arose from a third party request for *inter partes* reexamination filed on December 7, 2007. Requester Citrix Systems, Inc. (“Requester”) appeals under 35 U.S.C. §§ 134(c) and 315(b) from the Examiner’s final decision refusing to adopt any of Requester’s proposed rejections under §§ 102 and 103 of claims 1-11, 20-33, and 42-46 of the ‘479 Patent. These proposed rejections are based on Crichton,² Remer,³ BuddyHelp,⁴ NetMeeting,⁵ ILS,⁶ PhonePatch FAQ,⁷ PhonePatch HIW,⁸ NAT P2P,⁹ NAT P2P Games,¹⁰ LapLink,¹¹ and RemotePassage.¹² July 6, 2010 Right of Appeal Notice (“RAN”) 7-8; Notice of Appeal.

² Crichton et al., U.S. 6,104,716, issued August 15, 2000 (“Crichton ‘716”); and GB 2323757 A, published September 30, 1998 (“Crichton ‘757”).

³ Remer et al. (“Remer”), US 6,742,039 B1, issued May 25, 2004.

⁴ BuddyHelp "buddyhelp - How it works." URL:<http://web.archive.org/web/19991010222933/http://www.buddyhelp.com/how.tmpl>. Webpage [online]. expertcity.com, published October 10, 1999.

⁵ NetMeeting, Official Microsoft NetMeeting Book 2.1, Summers, R., Microsoft Press, 1998.

⁶ ILS, Microsoft Internet Locator Server Operations Guide Version 1.0. Microsoft Corporation, 1996.

⁷ PhonePatch FAQ, "Phone Patch Frequently Asked Questions." URL:<http://web.archive.org/web/19981207050230/www.equival.com/phonepatch/faq.html>. Webpage [online]. Equivalence Pty Ltd., December 7, 1998.

⁸ PhonePatch HIW, "Phone Patch - How it works." URL:<http://web.archive.org/web/19981206010333/www.equival.com/phonepatch/howitworks.html>. Webpage [online]. Equivalence Pty Ltd., December 6, 1998.

⁹ NAT P2P, "NAT and Peer-to-peer networking." URL:<http://web.archive.org/web/19990420024156/http://www.alumni.caltec.edu/~dank/peer-nat.html>, Webpage [online]. Dan Kegel, April 20, 1999.

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Requester contends that the challenged claims are unpatentable under 35 U.S.C. §§ 102 and/or 103 on the following specific grounds (RAN 7-21; *See also* App. Br. 8-10).

Reference(s)	Basis	Claims challenged
Crichton '716	§ 102	1-7, 9-11, 20-30, 32, 33,
Crichton '757	§ 102	and 42-46
Remer	§ 102	1-11, 20-33, and 42-46
BuddyHelp	§ 102	1-11, 20-33, and 42-46
NetMeeting	§ 102	1-11, 20-33, and 42-46
ILS	§ 102	1-11, 20-33, and 42-46
PhonePatch	§ 102	1-11, 20-33, and 42-46
NAT P2P	§ 102	1, 2, 5-7, 10, 20-27, 30, and 32
NAT P2P Games	102	1, 2, 5-7, and 10-20
LapLink in view of RemotePassage	103	1-7, 9-11, 20-30, 32, 33, and 42-46
PhonePatch in view NetMeeting and ILS	103	1-11, 20-33, and 42-46

¹⁰ NAT P2P Games, "NAT support for peer-to-peer games: a proposal." In linux IP NAT Forum, Kegel, Dan, URL:<http://web.archive.org/web/19981206184416/http://www.csn.tu-chemnitz.de/HyperNews/get/linux-ip-nat/97.html>, [online]: June 18, 1998, 15:38:56 GMT.

¹¹ LapLink, Laplink Professional User's Guide. Traveling Software, Inc., 1998.

¹² RemotePassage, RemotePassage™ For Solaris Administration Guide. i-Planet, 1998.

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Requester asserts that it is also appealing the Examiner's refusal to adopt the following rejections, even though the original Request did not include the rejections:

Reference(s)	Basis	Bases not proposed or reexamination ordered
Crichton '716 and Crichton '757 (<i>See App. Br. 9</i>)	§ 102	Claim 8: Request 91-93; March 4, 2008 reexamination order 4 Claim 31: Request 378-379; reexamination order 4. <i>See also RAN 9, 11</i>
NAT P2P and NAT P2P Games (<i>See App. Br. 9</i>)	§ 102	Claim 8: Request 91-93; Claim 33: Request 252-255 Reexamination order 5
LapLink in view of RemotePassage and further in view of any of Remer, NetMeeting, or ILS (<i>See App. Br. 9</i>)	§ 103	Claims 8 and 31-33 Reexamination order 4-5
Each of Remer, NetMeeting, and ILS in view of any of Crichton '716, Crichton '757, BuddyHelp, PhonePatch, NAT P2P, and NAT P2P Games (<i>See App. Br. 10</i>)	§ 103	Claims 8 and 31-33. Reexamination order 4-5

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Requester contends that the proposed rejections are based on the original Request, “or as proposed in Requester’s comments filed October 19, 2009 (at pg. 7-8).” Notice of Appeal 6. However, Requester does not demonstrate error in the Examiner’s not designating the remarks in the referenced “comments” as formally proposed grounds of rejection. *See Manual of Patent Examining Procedure* (MPEP) §§ 2666.05 and 2617, Eighth Ed., Rev. 7, July 2008 (a newly proposed ground of rejection in the written comments must comply with the guidelines for an original request for *inter partes* reexamination). A requester may appeal only decisions not to make a proposed rejection. *See* 37 C.F.R. § 41.61(a)(2), (d). Therefore, we do not consider appeals of claims on bases that were not properly proposed.

Claims 12-19 and 34-41 are not subject to reexamination. RAN 1; Appeal Brief (“App. Br.”) 2.¹³ Claims 47-100, added during this proceeding, have been canceled. RAN 2.

The ‘479 Patent is owned by 01 Communique Laboratory, Inc. (“Patent Owner”).¹⁴

An oral hearing was conducted on May 8, 2013. A transcript of the hearing was made of record on July 15, 2013.

¹³ Throughout this opinion, we refer to Requester’s Appeal Brief (“App. Br.”) filed on September 29, 2010; 01’s Respondent Brief (“Resp. Br.”) filed on October 29, 2010; and Requester’s Rebuttal Brief (“Reb. Br.”) filed on September 17, 2012 following the Examiner’s Answer (“Ans.”) that was mailed on August 15, 2012.

¹⁴ *See* Patent Assignment Abstract of Title, Reel 010934 Frame 0133 recorded June 16, 2000 and entered into the record of this proceeding as “Title Report” on December 19, 2007.

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We have jurisdiction under 35 U.S.C. §§ 134 and 315.

We affirm the Examiner's decision not to adopt any of Requester's proposed rejections and to confirm the patentability of claims 1-11, 20-33, and 42-46.

Related Proceeding

Requester and Patent Owner have informed us about the following related proceedings:

01 Communique Laboratory Inc. v. Citrix Systems, Inc. et al., Civil Action No. 1:06-CV-0253 (N.D. Ohio) (stayed as of September 29, 2010) ("the Ohio Litigation"). App. Br. 1; Resp. Br. 3.

01 Communique Laboratory Inc. v. LogMeIn, Inc. et al., Civil Action No. 1:10-CV-01007-CMH-TRJ (E.D. VA 2010). App. Br. 1; Resp. Br. 3. Owner has also informed us that (1) a decision was rendered by the United States Court of Appeals for the Federal Circuit on July 31, 2012 (Case No. 2011-1403);¹⁵ (2) a Judgment was entered in the District Court on April 2, 2013. The District Court Judgment states: "Judgment is hereby entered in favor of the Defendant, LogMeIn, Inc. on the issue of infringement, and in favor of the Plaintiff, 01 Communique Laboratory, Inc. on the issue of validity" (3) a Memorandum Opinion and Order were entered in the District Court on June 25, 2013; and (4) an appeal was docketed in the U.S. Court of Appeals for the Federal Circuit at No. 2013-1479. See Notices filed on July 31, 2012; June 26, 2013; and July 15, 2013.

The Invention

¹⁵ We have determined that this Federal Circuit opinion has been reported at 687 F.3d 1292 (Fed. Cir. 2012). We will refer to this citation in other parts of our opinion.

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The invention involves “a system, computer product and method for accessing and managing data remotely, even when the Internet Protocol address of a user’s computer changes from time to time.” Spec. col. 3, ll. 20-23.

Claim 1 is illustrative of the appealed subject matter and is reproduced below (App. Br. Claims App’x):

1. A system for providing access to a personal computer having a location on the Internet defined by a dynamic IP address from a remote computer, the system comprising:
 - (a) a personal computer linked to the Internet, its location on the Internet being defined by either (i) a dynamic public IP address (publicly addressable), or (ii) a dynamic LAN IP address (publicly unaddressable), the personal computer being further linked to a data communication facility, the data communication facility being adapted to create and send a communication that includes a then current dynamic public IP address (publicly addressable) or dynamic LAN IP address (publicly un-addressable) of the personal computer;
 - (b) a locator server computer linked to the Internet, its location on the Internet being defined by a static IP address, and including a location facility for locating the personal computer; and
 - (c) a remote computer linked to the Internet, the remote computer including a communication facility, the communication facility being operable to create a request for communication with the personal computer, and send the request for communication to the locator server computer; wherein the data communication facility includes data corresponding to the static IP address of the locator server computer, thereby enabling the data communication facility to create and send on an intermittent basis one or more communications to the locator server computer that include the then current dynamic public IP address or dynamic LAN IP address of the personal computer;

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and

wherein the locator server computer is operable to act as an intermediary between the personal computer and the remote computer by creating one or more communication sessions there between, said one or more communication sessions being created by the location facility, in response to receipt of the request for communication with the personal computer from the remote computer, by determining the then current location of the personal computer and creating a communication channel between the remote computer and the personal computer, the location facility being operable to create such communication channel whether the personal computer is linked to the Internet directly (with a publicly addressable) dynamic IP address or indirectly via an Internet gateway/proxy (with a publicly un-addressable dynamic LAN IP address).

B. ANALYSIS

The Parties' Disputes Regarding The Testimony Of
Dr. Gregory R. Ganger In The Related Ohio Litigation And
Dr. Ganger's Two Declarations Filed In This Reexamination Proceeding

As indicated above, Patent Owner filed suit against Requester in the U.S. District Court for the Northern District of Ohio. The parties agree that Dr. Ganger made various statements in the Ohio Litigation. App. Br. 12; Resp. Br. 1; Tr. 17:10-21; 20:16-17.¹⁶ During the current reexamination proceeding, Patent Owner filed Declarations by Dr. Ganger on September 3, 2008 ("the First Ganger Declaration") and September 19, 2009 ("the Second Ganger Declaration"). The Examiner concluded that the Second Ganger Declaration was sufficient to overcome all claim rejections. RAN 6.

After the RAN, Requester filed Petitions on September 7, 2010, to reopen prosecution, for continued prosecution, and for admission of

¹⁶ "Tr." refers to the transcript of the May 8, 2013 hearing.

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evidence. The Petitions were dismissed in a non-final decision on September 30, 2010.

On November 12, 2010, Requester filed a Petition requesting a final agency determination (in effect a Petition for Reconsideration) of whether the RAN properly entered the Second Ganger Declaration and whether the Office properly refused to enter Requester's proffered Newman Declaration and properly refused to reopen prosecution. On May 25, 2011, the Office denied the request to enter the Newman Declaration, which would have addressed the Second Ganger Declaration, as untimely (*see* May 25, 2011, decision at 5-6, 9), denied the request to reopen prosecution to provide rebuttal evidence to the Second Ganger Declaration (*see* May 25, 2011, decision at 6-7), and ruled that the September 30, 2010 decision properly dismissed the combined petition to reopen prosecution and/or to enter the Newman Declaration, and for continued reexamination. *See* May 25, 2011, decision at 8-9. The May 25, 2011, decision also concluded that the Examiner properly entered the Second Ganger Declaration. *See* May 25, 2011, decision at 8.

Requester's Appeal Brief contends that the Second Ganger Declaration and Patent Owner's representations to the Examiner "directly contradicted their earlier sworn admissions" in the Ohio Litigation and were misrepresentations. App. Br. 10, 12-13, 16-18, 23-27. In support of these assertions, the Appeal Brief purportedly quotes portions of Dr. Ganger's testimony in the Ohio Litigation. App. Br. 17-18, 24-27. Requester's Rebuttal Brief contends that Patent Owner committed fraud on the Patent Office. Reb. Br. 14-15.

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Patent Owner asserts that “the portions of the litigation record referenced in the arguments presented in Appellant’s Brief are not of record in this reexamination.” Resp. Br. 1. Requester agrees that the Markman hearing transcript in the Ohio Litigation is not part of the reexamination record. Tr. 17-18. Patent Owner does “not disput[e] that Dr. Ganger said those things, but in the context of . . . his entire testimony, they don’t mean what [Requester] says they mean . . . and so there’s no basis on which [Patent Owner] can respond to those.” Tr. 20:14-17. Therefore, “Respondent [Patent Owner] limits its response in [its] Brief to arguments presented in Appellant’s Brief that are based on the record in the reexamination” and requests the Board not to consider Requester’s arguments that are not supported by the record. Resp. Br. 1-2.

On December 29, 2010, Appellant filed a Petition in Opposition to Patent Owner’s Reply [sic] Brief and a Petition to Strike sections of Patent Owner’s brief. On May 4, 2011, the Acting Chief Administrative Patent Judge dismissed the portion of the Petition in Opposition pertaining to the “question of whether [Requester’s] citation to litigation testimony is sufficient,” holding that the question is “to be decided by the Board.” *See* May 4, 2011, Decision at 5-6, 8.

37 C.F.R. § 41.67(c)(vii) provides, in part:

Argument. The contentions of appellant with respect to each issue presented for review in paragraph (c)(1)(vi) of this section, and the basis therefor, with citations of the statutes, regulations, authorities, *and parts of the record relied on*. Any arguments or authorities not included in the brief permitted under this section or §§ 41.68 and 41.71 will be refused consideration by the Board, unless good cause is shown. (emphasis added).

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37 C.F.R. § 41.67(c)(1)(ix) provides, in part:

Evidence Appendix. An appendix containing copies of any evidence submitted pursuant to §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the examiner and relied upon by appellant in the appeal, along with a statement setting forth where in the record that evidence was entered in the record by the examiner. *Reference to unentered evidence is not permitted in the brief.* (emphasis added).

37 C.F.R. § 41.67(c)(2) provides, in part:

A brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit *or other evidence.* (emphasis added).

37 C.F.R. § 41.63(c) provides:

Affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.61 will not be admitted except as permitted by reopening prosecution under § 41.77(b)(1).

Despite the above-quoted regulations, in support of many of Requester's arguments, Requester relies upon previous statements and testimony by Dr. Ganger in the Ohio Litigation that purportedly contradict the positions he has taken in the Second Ganger Declaration. Based upon the purported contradictions, Requester contends (1) the Examiner "erred in withdrawing his prior rejections of claims 1-6, 8-11, 20-33, and 42-46" in light of a first category of prior art¹⁷ (App. Br. 11, 14-15); (2) Patent Owner

¹⁷ The first category of prior art includes NetMeeting; ILD; PhonePatch; NAT P2P Games, LapLink in view of RemotePassage, and PhonePatch in view of NetMeeting and ILS. See App. Br. 10.

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and Dr. Ganger conceded that Crichton meets various claim limitations (App. Br. 12) and the Examiner erroneously withdrew rejections based on Crichton (App. Br. 21-27); (3) the claims are invalid because of Patent Owner's and Dr. Ganger's admissions (App. Br. 12); (4) Patent Owner's and Dr. Ganger's current claim construction is much narrower than their previous claim constructions (App. Br. 13, 15); (5) Patent Owner and Dr. Ganger should be "held to their sworn representation in the [Ohio] Litigation" (App. Br. 18) which would result in findings of unpatentability over the first category of prior art (App. Br. 18; Reb. Br. 5-6) and over Crichton (App. Br. 22-23; Reb. Br. 2-3).

For example, Requester contends that applying Patent Owner's and Dr. Ganger's prior constructions, "there is no dispute that the middle proxy [of Crichton] determines the location of the X server [of Crichton]" (App. Br. 22); "the middle proxy in Crichton satisfies th[e] limitation" "by determining the current location of the personal computer." App. Br. 25; Reb. Br. 1, 3-4; "there is no dispute that th[e] limitation" "one or more communications to the Locator server computer that include the then current dynamic public IP address or dynamic IP address of the personal computer" is met by Crichton. (App. Br. 25-27; Reb. Br. 2-3).

Because no testimony or other evidence from the Ohio Litigation has been entered into the record of this reexamination proceeding, any such purported testimony and evidence is not before us and we do not consider any of Requester's above arguments, or any other arguments, that rely on such purported testimony and evidence.

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Whether Requester Has Improperly
Raised A Written Description Issue

Requester contends that the Examiner should not have allowed the claims based on the Second Ganger Declaration because the Second Ganger Declaration construed “creating a communication channel between the remote computer and the personal computer” in a way that is not supported by the written description. App. Br. 15, 18, 20; Reb. Br. 16. Patent Owner counters that Requester’s contention is an improper argument under 35 U.S.C. § 112 and should not be considered. Resp. Br. 2-3.

Requester’s December 29, 2010, Petition in Opposition requested that this part of Patent Owner’s Respondent Brief be stricken because, Requester contended, its Appeal Brief does not raise an invalidity issue under § 112. The Acting Chief Administrative Patent Judge’s May 4, 2011, decision noted that Requester’s Appeal Brief stated that Dr. Ganger’s construction “indisputably lacks any written description in the specification of the application as filed, contrary to the patentability requirements of 35 U.S.C. § 112.” May 4, 2011, Decision 7, quoting App. Br. 15 (emphasis removed). The Acting Chief Administrative Patent Judge concluded that “[b]ecause [Requester] discussed patentability requirements under § 112, [Requester’s] argument that invalidity under that section was not raised is unpersuasive” and denied Requester’s request to strike Patent Owner’s argument in Patent Owner’s Respondent Brief. May 4, 2011, Decision 7. The Acting Chief Administrative Patent Judge also left for decision by a three-judge panel of the Board the merits of Requester’s § 112 contention. May 4, 2011 Decision 6.

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The limitation at issue “creating a communication channel between the remote computer and the personal computer” is a limitation in the ‘479 Patent as issued. *See* col. 11, ll. 8-10. Because the limitation was an originally issued limitation and was not added in the reexamination proceeding, this reexamination proceeding cannot resolve whether or not the limitation has written description support. We therefore do not consider this issue. *See* 37 C.F.R. § 1.906(a), (c).

The Proposed Rejection of Claims 1-11, 20-33, and 42-46
Under 35 U.S.C. § 102(e) As Anticipated by Crichton

The Examiner has refused to adopt Requester’s proposed rejections of claim 1 as anticipated by each of the two Crichton references identified in footnote 2 above. *See* RAN 6. The two Crichton references have substantially identical disclosures. App. Br. 11; Tr. 4:16-20. Requester cites mostly to the U.S. reference. *See, e.g.*, App. Br. 11 n. 57, 58, 97, 98; Reb. Br. 2 n. 6-8; Tr. 8:5-8; 21:22-22:3. Accordingly, we will cite only to the U.S. reference.

Dynamic IP Addresses

Claim 1 recites that the location of the claimed personal computer is “defined by either (i) a dynamic public IP address (publicly addressable), or (ii) a dynamic LAN IP address (publicly unaddressable).” Requester agrees that “‘dynamic’ means not always the same” (Tr. 43:10-11) and addresses that are “subject to change.” Reb. Br. 9. Although the Examiner agrees that Crichton “do[es] not explicitly recite dynamic IP addresses and a mechanism for coping with changes to the IP addresses of either end proxies or personal

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computers,” the Examiner concludes that Crichton inherently anticipates dynamic IP addresses because “Crichton does not specify that said IP addresses could not be dynamic IP addresses, but static IP addresses.” RAN 26.

For a number of reasons, Patent Owner contends that dynamic IP addresses are neither expressly nor inherently taught in Crichton. *See* Resp. Br. 15-17; Tr. 26-27. Requester adopts the Examiner’s reasoning. Reb. Br. 9; Tr. 14.

“It is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it. Under the principles of inherency, if the prior art *necessarily* functions in accordance with, or includes, the claimed limitations, it anticipates.” *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349 (Fed. Cir. 2002) (citations and internal quotation marks omitted) (emphasis added). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations and internal quotation marks omitted) (emphasis added).

Neither the Examiner nor Requester points to anything in Crichton demonstrating that Crichton necessarily is operable when there is a dynamic IP address. Requester’s discussion of RFC 1122’s reference to keep-alives is also not persuasive because, as Requester admits, keep-alives are not always used in TCP implementations. Reb. Br. 10-11.

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We therefore agree with Patent Owner and conclude that Crichton does not explicitly or inherently disclose a dynamic IP address.

Determining The Then Current Location Of The Personal Computer

Claim 1 recites “the locator server computer is operable to act as an intermediary between the personal computer and the remote computer . . . by determining the then current location of the personal computer.” As we pointed out above, the location of the personal computer is “defined by either (i) a dynamic public IP address (publicly addressable), or (ii) a dynamic LAN IP address (publicly unaddressable).” “[T]he then current location of the personal computer” therefore must be either a *dynamic* public IP address or a *dynamic* LAN IP address.

Requester first contends that Crichton’s middle proxy correlates to the claimed locator server and determines the then current location of Crichton’s personal computer, which Requester correlates to Crichton’s server end proxy. App. Br. 21-22. That is, Requester first contends, because the middle proxy determines the location of the personal computer executing the server end proxy, Crichton discloses the limitation “by determining the then current location of the personal computer.” App. Br. 23; Reb. Br. 1-3. Requester’s discussion, however, does not address the claimed requirement that the location must be a dynamic public IP address or a dynamic LAN IP address.

Alternatively, Requester contends that Crichton’s middle proxy determines the current location of Crichton’s X server. App. Br. 23; Reb. Br. 3-4. Again, Requester does not persuasively show where this

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interpretation of Crichton discloses the dynamic address limitations of the claim. Instead, Requester points to Patent Owner's and Dr. Ganger's purported positions in the Ohio Litigation. App. Br. 23-25; Reb. Br. 3-4. As we pointed out above, however, arguments based on the Ohio Litigation are not founded on evidence in this record and therefore are not persuasive.

Third, based upon the Federal Circuit's opinion in the *LogMeIn* case, Requester's Rebuttal Brief presents, for the first time, a new interpretation of Crichton. Reb. Br. 4-5. In *LogMeIn*, the Federal Circuit construed the claimed "location facility" as "[s]oftware on a locator server computer" that performs four enumerated functions. 687 F.3d at 1299. The Federal Circuit also held that "[t]he locator server computer may comprise one or more computers, and the location facility may be distributed among one or more locator server computers." *Id.* at 1300.

Based upon the aforesaid Federal Circuit construction, Requester for the first time contends that

[T]he Crichton middle proxy and server end proxy together satisfy the requirements of the claimed location facility and locator server. Patent Owner's argument that the middle proxy does not determine the current location of the person computer (X-server) is therefore irrelevant because the server end proxy can form part of the locator server in combination with the middle proxy, and Patent Owner does not dispute that the server end proxy determines the then current location of the X-server. Accordingly, applying Patent Owner's and the Federal Circuit's *LogMeIn* claim construction, there is no dispute that Crichton teaches the supposed missing limitation, "determining the then current location of the personal computer.

Reb. Br. 4-5.

37 C.F.R. § 41.71(c) states, in part:

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- (3) No new ground of rejection can be proposed by a requester.
- (4) The rebuttal brief of a requester shall not include any new or non-admitted affidavit or other evidence.

Based upon recent precedent by our reviewing court in an analogous situation, *Rambus Inc. v. Rea*, ___ F.3d ___, 2013 WL 5312505 (9/24/2013), we conclude that the Federal Circuit's claim construction in *LogMeIn* is new evidence in this reexamination proceeding and that Requester's new interpretation of Crichton based upon the Federal Circuit's claim construction presents a new ground of rejection, which is prohibited by § 41.71(c)(3) and (4).

In *Rambus*, the Board affirmed a rejection by supplying its own reasons to combine prior references that had been relied upon by the Examiner. The Court held that the Board's findings were completely new because they provided a new motivation to combine the references. *Id.* at *7. In the present case, Requester's new application of Crichton to the claim is prohibited by our Rules and we therefore do not consider it because it relies on new facts (the *LogMeIn* decision) and rationales (the Court's claim construction in *LogMeIn*) not previously presented to Patent Owner either by Requester or by the Examiner. Patent Owner has not had a fair opportunity to respond to the Requester's new application of Crichton.

But, even if Requester's new interpretation of Crichton is considered, it is not persuasive because it still does not show where Crichton discloses a location having either a dynamic public IP address or a dynamic LAN IP address.

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*Enabling The Data Communication To Create And Send
On An Intermittent Basis One Or More Communications To
The Locator Server Computer That Include The Then Current
Dynamic Public IP Address Or Dynamic LAN IP Address
Of The Personal Computer*

Neither the Examiner nor Requester quotes this limitation accurately, relying instead on paraphrased versions. *See* RAN 25; App. Br. 25. The Examiner finds that Crichton does not meet the limitation because Crichton is “silent upon the then current dynamic public IP address or dynamic LAN IP address of the X-server (i.e., personal computer) being included in said communication.” *See* RAN 25’s discussion of Issue 6. Requester first contends that the Examiner is wrong because “as discussed above, the Crichton references explicitly teach that the server end proxy itself can reside on and also be the claimed personal computer.” App. Br. 26. This contention is not persuasive because it does not discuss the claimed dynamic IP address or the claimed dynamic LAN IP address. Requester next contends that the Examiner is wrong based upon Patent Owner’s and Dr. Ganger’s purported admissions in the Ohio Litigation. App. Br. 26-27. Again, this contention is not persuasive because the Ohio Litigation is not part of the record in this reexamination proceeding.

For all of the above reasons, we are not persuaded that the Examiner erred in refusing to reject (1) claim 1; (2) claims 7, 8, 20, 21, 24, 26, and 31 which have similar limitations; and (3) claims 2-6, 9-11, 22, 23, 25, 27-30, 32, 33, and 42-46, not argued separately with particularity as anticipated by Crichton.

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The Proposed Rejection of Claims 1-11, 20-33, and 42-46
Over the “NetMeeting et al.” References

Requester states the issues to be reviewed on appeal consist of the Examiner’s refusal to reject the claims based upon all of the references Requester has identified. *See* App. Br. 8-10, 27-28; Reb. Br. (last two pages). Nevertheless, Requester argues only a subset of the identified references which Requester refers to as “The First Category of Invalidating Prior Art: NetMeeting *et al.*,” (emphasis removed) and which Requester identifies as NetMeeting, ILS, PhonePatch, NAT P2P, NAT P2P Games, LapLink in view of RemotePassage, and PhonePatch in view of NetMeeting and ILS. App. Br. 10-11, 13-20; Reb. Br. 5-7, 11-14.

Requester does not present arguments regarding its proposed rejections involving LapLine, Remer, BuddyHelp, PhonePatch FAQ, and PhonePatch HIW. We therefore do not consider the merits of proposed rejections involving these references (37 C.F.R. § 41.67(c)(1)(vii)) and we summarily affirm the Examiner’s refusal to adopt them.

Requester contends that the Examiner erroneously concluded that each of the first category of references fails to teach the claimed locator server and its location facility software ““creat[ing] a communication channel between the remote computer and the personal computer.”” App. Br. 10-11. Requester contends that these references teach the quoted limitation because they, like Patent Owner’s system, disclose a locator server that gives a remote computer information that the remote computer can use to contact the personal computer. App. Br. 11. Requester also contends that the Examiner erred because of the purportedly contradictory position taken by Patent Owner and Dr. Ganger in the Ohio Litigation (App.

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Br. 11, 15-18; Reb. Br. 5-6) and because their interpretation lacks the required written description (App. Br. 18-20). For reasons discussed above, however, arguments based on the Ohio Litigation and arguments based upon a failure to meet the written description requirement are not persuasive.

Referring to NAT P2P and NAT P2P Games, for example, Requester contends that the references disclose the disputed limitation because a locator server sends IP addresses of a second computer to a first computer and the first computer then uses this location information to send a message to the second computer to initiate a communication channel between the two computers. App. Br. 14; Reb. Br. 5. In contrast, as Requester concedes, the claim requires “a locator server computer that acts as the man in the middle to locate the personal computer and create a communication channel between the personal and remote computers.” App. Br. 3. We agree with the Examiner’s conclusion that these references do not teach a location facility that creates the communication channel. RAN 7.

In view of our conclusion that the NetMeeting references do not teach the above-discussed limitation, we do not reach the issue of whether the NetMeeting references disclose other claim limitations. *See* Reb. Br. 11-14. *Cf. In re Gleave*, 560 F.3d 1331, 1338 (Fed. Cir. 2009).

CONCLUSION

The Examiner did not err in refusing to reject claims 1-11, 20-33, and 42-46.

DECISION

The Examiner’s decision favorable to patentability of claims 1-11, 20-33, and 42-46 is affirmed.

Appeal 2013-004565
Reexamination Control 95/001,018
Patent 6,928,479 B1

AFFIRMED

alw

Appeal 2013-004565
Reexamination Control 95/001,018
Patent 6,928,479 B1

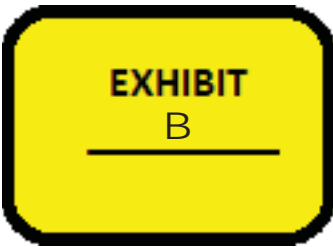
PATENT OWNER:

KENNETH J. SHEEHAN
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1050 CONNECTICUT AVE, N.W.
WASHINGTON, DC 20036

THIRD PARTY REQUESTER:

ROBERT S. BLASI
GOODWIN PROCTER LLP
EXCHANGE PLACE
53 STATE STREET
BOSTON, MA 02109

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION



CHEETAH OMNI, LLC §
Plaintiff §
V. §
LEVEL 3 COMMUNICATIONS, INC. §
and INFINERA CORPORATION §
Defendants §

No. 5:06CV101

ORDER

The above-referenced cause of action was referred to the undersigned United States Magistrate Judge for pre-trial purposes in accordance with 28 U.S.C. § 636. The following motion is before the Court: Plaintiff’s Opposed Motion to Lift Stay and Reopen Case (Docket Entry # 93). The Court, having reviewed the relevant briefing, is of the opinion the motion should be **GRANTED**.

In this patent infringement suit, Plaintiff Cheetah Omni, LLC (“Plaintiff”) asserts United States Patent Nos. 6,795,605 (“the ‘605 patent”) and 7,142,347 (“the patent-in-suit”) against Level 3 Communications, Inc. and Infinera Corporation (“Infinera”). On March 14, 2007, Infinera submitted requests to the United States Patent and Trademark Office (“PTO”) for *inter partes* reexamination of both patents. On April 12, 2007, pursuant to the parties’ agreement to stay this litigation pending the final resolution of the inter partes reexamination of the patents, the Court entered an Order granting the parties’ joint motion to stay all proceedings pending reexamination. Plaintiff now seeks to have the stay lifted. According to Plaintiff, on September 27, 2012, a panel of patent examiners issued a Denial Decision of Request for Rehearing, confirming the validity of all the original claims of the patent-in-suit.

The Court agrees with the positions stated by Plaintiff in its motion, and for the reasons stated therein, the Court lifts the stay at this time. Accordingly, it is

ORDERED that Plaintiff's Motion to Lift Stay and Reopen Case (Docket Entry # 93) is hereby **GRANTED**.

SIGNED this 8th day of January, 2013.


CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV09-00914 JAK (JCx) LA CV12-00106 JAK (JCx)	Date	January 23, 2012
Title	Kim Laube & Company, Inc., et al. v. Wahl Clipper Corporation, et al. Wahl Clipper Corporation v. Kim Laube & Company		

Present: The Honorable **JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE**

Andrea Keifer

Alexander Joko

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Kent A. Rowald

Michael J. Niborski

Levi W. Heath

Proceedings: DEFENDANT’S RENEWED MOTION TO LIFT STAY (Dkt. 112) (LA CV09-00914 JAK (JCx))

STATUS CONFERENCE RE RELATED CASE (Both Cases)

The motion hearing is held. The Court notes that this matter has been stayed pending a patent reexamination proceeding. That proceeding has concluded and the Patent Examiner has issued a final decision. Although the reexamination decision has been appealed, the entry of a final decision constitutes a substantial change in circumstance from the time when the initial stay was entered in this action by a prior bench officer. The Court states its tentative view on the record, which is that the motion to lift the stay should be granted in light of this development.

Counsel for Plaintiffs and Defendants address the Court regarding the issues it raises, including: (i) whether the parties can proceed in this matter during the reexamination appeal; (ii) the likely duration of the pending appeal; and (iii) whether unrelated claims can move forward in the absence of a final decision on the reexamination.

The Court adheres to its tentative view and GRANTS Defendant’s motion and lifts the stay. The Court will actively manage the case to avoid any duplication of efforts that might arise as a result of the reexamination. The Court is mindful that, on their face, the issues raised in this action are distinct from those raised in the patent action.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV09-00914 JAK (JCx) LA CV12-00106 JAK (JCx)	Date	January 23, 2012
Title	Kim Laube & Company, Inc., et al. v. Wahl Clipper Corporation, et al. Wahl Clipper Corporation v. Kim Laube & Company		

The status conference is held. The Court sets a scheduling conference in both related matters for March 5, 2012 at 1:30 p.m. The parties shall file a joint Rule 26(b) report in accordance with the applicable rules. Such report shall include the parties' respective views on delaying, consolidating, or separating these two related cases. To the extent that the parties contend the cases should or should not be consolidated, counsel are instructed to state their respective views on the potential efficiency to be gained or sacrificed from consolidation with respect to discovery and any other relevant matters.

IT IS SO ORDERED.

Initials of Preparer _____ : _____ 09
ak _____

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 5.0.3
Eastern Division

Kolcraft Enterprises, Inc.

Plaintiff,

v.

Case No.: 1:09-cv-03339

Honorable Edmond E. Chang

Chicco USA, Inc., et al.

Defendant.

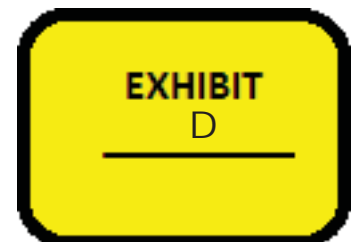
NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, March 7, 2012:

MINUTE entry before Honorable Edmond E. Chang: Status hearing held. Plaintiffs renewed motion to lift the stay is granted for the reasons stated in open court. In summary, the parties and the Court now have the benefit of the PTO examiner's reexamination, whereas continuing the stay until the issuance of the right to appeal notice (which has still not issued almost 2 months after the Office Closing Action), and the additional appeal process, will likely require a years-long additional delay. The recently-filed information disclosure by Kolcraft does not require re-opening of the reexamination, and indeed simply cites back to the PTO what the PTO cited in a related proceeding. The parties will confer and file a joint discovery plan that tracks the Local Patent Rules, and file the plan on 03/09/12. Status hearing set for 05/15/12 at 8:30 a.m. The parties may call the Courtroom Deputy, Sandra Brooks @ (312) 408-5121 for a referral to Magistrate Judge Brown for a settlement conference. Mailed notice(slb,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.



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

**THE OHIO WILLOW
WOOD COMPANY,**

Plaintiff,

v.

DAW INDUSTRIES, INC.,

Defendant.

Case No. 2:04-cv-1222

Case No. 2:05-cv-1038

JUDGE GREGORY L. FROST

Magistrate Judge Norah McCann King

**THE OHIO WILLOW
WOOD COMPANY,**

Plaintiff,

v.

ALPS SOUTH CORPORATION,

Defendant.

Case No. 2:04-cv-1223

JUDGE GREGORY L. FROST

Magistrate Judge Mark R. Abel

OPINION AND ORDER

This matter is before the Court for consideration of Plaintiff The Ohio Willow Wood Company's ("OWW") Motion for Relief from Stay (ECF No. 60 in Case No. 2:04-cv-1222; ECF No. 112 in Case No. 2:04-cv-1223; ECF No. 45 in Case No. 2:05-cv-1038) and Alps South Corporation's ("ALPS") Memorandum in Opposition to OWW's Motion for Relief from Stay (ECF No. 114 in Case No. 2:04-1223). This Opinion and Order also memorializes the status conference held in these cases on November 2, 2011.

**EXHIBIT
E**

I. Background

On December 27, 2004, OWW filed an action, Case Number 2:04-cv-1223, against ALPS. OWW alleges infringement of its patent entitled “Gel and Cushioning Devices” and numbered U.S. Patent No. 5,830,237 (“the ’237 patent”) and of OWW’s patent entitled “Open-Ended Polymeric Annular Sleeve” and numbered U.S. Patent No. 6,406,499 (“the ’499 patent”).

On December 27, 2004, OWW also commenced suit against DAW Industries, Inc. (“DAW”), Case Number 2:04-cv-1222. In that action, OWW alleges infringement of the ’237 patent. The Court subsequently consolidated that action with another action OWW filed against DAW, Case Number 2:05-cv-1038, in which OWW claims infringement of its patent entitled “Tube Sock-Shaped Covering” and numbered U.S. Patent No. 6,964,688 (“the ’688 patent”).

All three of these cases were previously stayed by this Court pending reexamination by the United States Patent and Trademark Office (“PTO”). OWW, by its motions requesting relief from the stay in the action filed against ALPS and the consolidated actions filed against DAW, informs the Court that the Board of Patent Appeals and Interferences has upheld the validity of the ’237 and the ’688 patents. OWW now requests that the Court lift the stay in these actions.

On November 2, 2011, this Court held a status conference in these actions. All parties were represented at that conference.

II. Standard

“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) (citing *Landis v. North American Co.*, 299 U.S. 248

(1936); *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983)). “ ‘The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’ ” *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quoting *Landis*, 299 U.S. at 254-55). “ ‘Logically, the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay.’ ” *Lincoln Elec. Co. v. Miller Elec. Mfg. Co.*, No. 1:06cv2981, 2011 U.S. Dist. LEXIS 27578, at *5 (N.D. Ohio Mar. 17, 2011) (quoting *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp.2d 64, 74 (D. D.C. 2002)).

III. Discussion

Two of these cases have been pending before this Court for seven years and the third case has been pending for six years. The Board of Patent Appeals and Interferences has upheld the validity of the '237 and the '688 patents. The parties indicated at the November 2, 2011 status conference that the life of the patents is nearing extinction. The Court concludes that justice requires the lifting of the stay in this action.

At the status conference, the Court informed that parties that it was inclined to lift the stay and to proceed to trial first on the action filed against ALPS and then on the consolidated actions filed against DAW. OWW and ALPS requested, and this Court granted, seven days to submit a proposed scheduling order for proceeding to trial. After the Court reviews that proposed order and issues a scheduling order with regard to Case Number 2:04-cv-1223, it will then issue a scheduling order on the consolidated cases filed against DAW. OWW and DAW should confer and inform the Court as soon as possible of any circumstances in their litigation that would necessitate a different approach than that offered by OWW and ALPS in their

proposed schedule.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** OWW's Motion for Relief from Stay. (ECF No. 60 in Case No. 2:04-cv-1222; ECF No. 112 in Case No. 2:04-cv-1223; ECF No. 45 in Case No. 2:05-cv-1038.) The Clerk is **DIRECTED** to **VACATE** the stay imposed in each action. Counsel for OWW and ALPS are **DIRECTED** to file a proposed scheduling order on or before November 9, 2011.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1534-RGA
	:	
ALCATEL-LUCENT USA, INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1538-RGA
	:	
BROTHER INTERNATIONAL CORPORATION,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1539-RGA
	:	
CDW, LLC,	:	
	:	
Defendant.	:	



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1546-RGA
	:	
HSN, INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1547-RGA
	:	
LANDS' END INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1553-RGA
	:	
ORIENTAL TRADING COMPANY INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1555-RGA
	:	
RITE AID CORPORATION,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1650-RGA
	:	
BOSCH SECURITY,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1652-RGA
	:	
ELAVON INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1654-RGA
	:	
GOEMERCHANT LLC,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1660-RGA
	:	
STAPLES, INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1682-RGA
	:	
FOOT LOCKER, INC.,	:	
	:	
Defendant.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PRAGMATUS TELECOM LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1684-RGA
	:	
REED ELSEVIER US,	:	
	:	
Defendant.	:	

ORDER

It appears that the basis for granting a stay pending re-examination is eroding away. (D.I. 17).¹ If I understand it correctly, reexamination proceedings are over, unless LivePerson, Inc., appeals the *inter partes* decision on the '286 patent. (D.I. 18, p.2).

I do not think I need any further briefing on whether to lift the stay pending re-exam. Two of the three patents are free of re-exam. The third has survived thus far, and my impression is that it is not an insignificant step that it has survived. Thus, the above listed cases stayed pending re-exam are now **UNSTAYED**. There is nothing of significance to be gained by keeping the stay in place.

This action is without prejudice to any other type of stay request that is now pending, *e.g.*, General Motors' motion in No. 12-1545, scheduled for argument on August 30, 2013.

The Court has also considered the request (D.I. 19) to strike the Defendants' response. (D.I. 18). While the Court agrees with the Plaintiff that Mr. Smith's letter, in context, appears to go out of its way to impugn the Plaintiff's behavior and to label it a "troll," and therefore should

¹ References are to filings in No. 12-1534.

have been avoided, I do not generally believe in redacting or rewriting history, and will deny the request to strike the letter.

July 3, 2013
Date

Richard G. Andrews
United States District Judge