

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

NEXUSCARD, INC.,

Plaintiff,

v.

DEMAND FOR JURY TRIAL

BROOKSHIRE GROCERY COMPANY

2:15-cv-00961-JRG-RSP
(LEAD CASE)

THE KROGER CO.,

2:15-cv-00968-JRG-RSP

WALGREEN CO.

2:15-cv-00971-JRG-RSP

**THE KROGER CO.'S MOTION TO STAY PROCEEDINGS
PENDING COVERED BUSINESS METHOD REVIEW OR, ALTERNATIVELY,
PENDING RESOLUTION OF ITS MOTION TO DISMISS**

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Defendant The Kroger, Co. ("Kroger") respectfully moves the Court to stay this case pending the Patent Trial and Appeal Board's ("PTAB'S") covered business method ("CBM") review of U.S. Patent No. 5,924,080 ("the '080 patent") pursuant to Section 18(b) of the America Invents Act, or in the alternative, pending resolution of Kroger's motion to dismiss NexusCard, Inc.'s ("NexusCard") claims pursuant to F.R.C.P. 12(b)(6) and 35 U.S.C. § 101 (Dkt. No. 8 in Case No. 2:15-cv-00968).

I. INTRODUCTION AND STATEMENT OF ISSUES

This case should be stayed pending resolution of a legal issue fatal to the validity of each asserted claim of the patent-in-suit: whether the claims are directed at patentable subject matter under 35 U.S.C. § 101. That legal issue will soon be resolved by either the PTAB or this Court.

On September 25, 2015, Kroger and Brookshire Grocery Company ("Brookshire") filed a petition with the PTAB seeking institution of a CBM review of claims 1 through 11 of the '080 patent on the grounds that those claims are unpatentable under 35 U.S.C. § 101. *See Ex. 1.* On Tuesday, September 29, 2015, the PTAB issued its Notice of Filing Date Accorded to Petition and required NexusCard to submit its preliminary response, if any, within three months. *See Ex. 2.* The challenged claims in the CBM petition are identical to the claims asserted against Kroger in this case. If instituted, the CBM proceeding will simplify issues and reduce burdens in this case, which has only just begun. And a stay will not prejudice NexusCard or create a tactical advantage for Kroger. Thus, the case should be stayed pending resolution of the CBM review.

Additionally, Kroger filed a motion to dismiss in this case that demonstrates how each of the asserted claims of the '080 patent are not directed at patentable subject matter under § 101. Brookshire has also filed a motion to dismiss based on § 101, as well as divided infringement. NexusCard has responded to both motions. Accordingly, the Court should stay the case pending resolution of these motions.

II. BACKGROUND

NexusCard is a non-practicing entity based in Lake Forest, California. On June 5, 2015, NexusCard filed a complaint alleging that Kroger infringed the '080 patent. Kroger filed a motion to dismiss for failure to state a claim on July 2, 2015 demonstrating that each claim of the asserted patent is invalid under § 101 for claiming non-patentable subject matter. *See NexusCard v. The Kroger, Co.*, No. 2:15-cv-00968 (E.D. Tex.), Dkt. No. 8 (“Dismissal Motion”). The briefing on the Dismissal Motion has concluded.

NexusCard’s case against Kroger has been consolidated with NexusCard’s case against Brookshire and Walgreen Co. in Civil Action No. 2:15-cv-00961. On August 18, 2015, Brookshire moved to dismiss, demonstrating that the asserted patent cannot be infringed and is also invalid under § 101. *See NexusCard v. Brookshire*, No. 2:15-cv-00961 (E.D. Tex.), Dkt. No. 10. The briefing on Brookshire’s motion to dismiss will close with the filing of NexusCard’s sur-reply in opposition on or before October 6, 2015. Brookshire has also filed a motion to stay pending resolution of its motion to dismiss. *See NexusCard v. Brookshire*, No. 2:15-cv-00961 (E.D. Tex.), Dkt. No. 15. The briefing on that motion will also close with NexusCard’s sur-reply in opposition on or before October 6, 2015.

The patentability of NexusCard’s patent is also being litigated at the PTAB. On September 25, 2015, Kroger and Brookshire filed a petition with the PTAB seeking institution of a CBM review of all claims of the '080 patent on the grounds that those claims are unpatentable under 35 U.S.C. § 101. *See Ex. 1 (CBM2015-00183)*. On Tuesday, September 29, 2015, the PTAB issued its Notice of Filing Date Accorded to Petition and required NexusCard to submit its preliminary response, if any, within three months. *See Ex. 2*.

Kroger files this motion to stay the day after the PTAB’s Notice of Filing Date and the day of the case management conference in this case. The docket control order and discovery

order have not been entered, and the parties have not exchanged initial disclosures. Although infringement contentions have been served, the parties are still negotiating a date for invalidity contentions. Discovery has not begun, and no party has served any discovery requests. Today, the court scheduled a claim construction hearing for April 27, 2016, and jury selection for November 7, 2016.

III. THE CASE SHOULD BE STAYED PENDING CBM REVIEW

The America Invents Act provides that courts should consider four factors in determining whether to stay a district court patent infringement proceeding “relating to a [CBM review] proceeding for that patent”:

- (A) whether a stay, or the denial thereof, will simplify the issues in question and streamline the trial;
- (B) whether discovery is complete and whether a trial date has been set;
- (C) whether a stay, or the denial thereof, would unduly prejudice the nonmoving party or present a clear tactical advantage for the moving party; and
- (D) whether a stay, or the denial thereof, will reduce the burden of litigation on the parties and on the court.

VirtualAgility Inc. v. Salesforce.com, Inc., 759 F.3d 1307, 1309 (Fed. Cir. 2014); Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 18, 125 Stat. 284, 329-31 (2011).

A. Issue Simplification Strongly Favors a Stay

A stay of this litigation pending the PTAB’s review of the patentability of the ’080 patent will streamline the issues in this litigation, if not resolve them completely. The petition to the PTAB seeks CBM review of all asserted claims in this case. If the PTAB institutes a CBM review on *all* of the asserted claims of the ’080 patent, the CBM review could entirely dispose of that patent in this litigation—the ultimate simplification of issues. *See VirtualAgility*, 759 F.3d at 1314. But regardless of whether the claims are ultimately cancelled, a CBM review of the ’080 patent is akin to further prosecution; the claims may be amended, and evidence and argument in

the CBM review may inform the meaning of claim terms. A stay simplifies that issue by avoiding “unnecessary claim construction of what could potentially be a moving target.” *Id.*; see also *Anascape, Ltd. v. Microsoft Corp.*, 475 F. Supp. 2d 612, 615 (E.D. Tex. 2007) (“Courts need not expend unnecessary judicial resources by attempting to resolve claims which may be amended, eliminated or lucidly narrowed by the patent reexamination process and the expertise of its officers.”); *Datatreasury Corp. v. Wells Fargo & Co.*, 490 F. Supp. 2d 749, 755 (E.D. Tex. 2006) (“Amended claims also have the potential for simplifying the issues that need to be litigated.”). If successful, “[t]his would not just reduce the burden of litigation on the parties and the court—it would eliminate it entirely.” *VirtualAgility*, 759 F.3d at 1314. Thus, a stay will undoubtedly simplify issues with respect to the ’080 patent. Accordingly, the first factor in a stay analysis weighs strongly in favor of a stay.

B. The Stage of Litigation Strongly Favors a Stay

The second factor—how far litigation has progressed—weighs heavily in favor of a stay. The proper time to measure the stage of litigation is the date the motion to stay is filed. *VirtualAgility*, 759 F.3d at 1317. Here, Kroger files its motion to stay within days of filing its petition to institute CBM review of the ’080 patent, after briefing has closed on Kroger’s motion to dismiss based on § 101, and the same day as the Court’s case management conference setting dates for claim construction hearing and jury selection. Although jury selection has been set for November 7, 2016, the case has only just begun. Other than the infringement contentions that NexusCard served last week, no other substantive discovery has taken place. There have been no interrogatory requests, no requests for admission, no deposition notices (let alone depositions), and only limited document production related to the file history of the ’080 patent. The parties have not yet negotiated—let alone agreed—on dates to be used in a proposed docketing control order. Thus, discovery has not even begun.

The case has hardly begun in other areas as well. The parties appeared today before the court for an initial case management conference and are required to submit a notice of mediator by October 3, 2015. The parties must submit a proposed docket control order by October 14, 2015, but no docket control has been entered in this case. A hearing on claim construction is not scheduled until April 27, 2016, and claim construction briefs are, at the very least, nearly seven months away. Kroger's invalidity contentions are not due until at least November 11, 2015, and the pleadings can be amended without leave for the next five months. In short, Kroger seeks to stay the litigation at the earliest possible stage—shortly after filing a petition for CBM review and before discovery advances beyond nascent stages. As a result, the stage of litigation strongly favors a stay. *See VirtualAgility*, 759 F.3d at 1317.

C. A Stay Will Not Unduly Prejudice NexusCard or Create a Clear Tactical Advantage

Because a stay will not unduly prejudice NexusCard or provide Kroger with a clear tactical advantage, the third factor favors a stay. “[W]hether the patentee will be *unduly prejudiced* by a stay in the district court proceedings during the CBM review, like the irreparable harm-type inquiry, focuses on the patentee’s need for an expeditious resolution of its claim.” *VirtualAgility*, 759 F.3d at 1318 (emphasis in original). A stay will not diminish the monetary damages to which NexusCard will be entitled if it succeeds in its infringement suit, it only delays realization of those damages. Kroger and NexusCard are not competitors. NexusCard does not seek injunctive relief, whether preliminary or otherwise. *See id.* at 1319 (“[T]he fact that it was not worth the expense to ask for this remedy contradicts [patent owner]’s assertion that it needs injunctive relief as soon as possible.”). Moreover, NexusCard waited 16 years after the ’080 patents issued before it filed suit against Kroger. *Id.* (“We also note that [patent owner], for some unexplained reason, waited nearly a year after the [] patent issued before it filed suit

against Defendants.”). Indeed, the ’080 Patent will expire on May 28, 2016, before the trial is scheduled to occur in this case. Thus, regardless of the ultimate outcome in this case, the *only* relief available to NexusCard is monetary damages, on which any delay has no impact. As in *VirtualAgility*, these facts weigh against any purported claim by NexusCard that it would be unduly prejudiced by a stay.

A stay would also not give Kroger a clear tactical advantage. As demonstrated by Kroger’s diligence in filing its motion to dismiss at the pleading stage and seeking a stay within days of its petition for CBM review, Kroger has not been dilatory in seeking resolution of the threshold § 101 patentability issue. Although the timing of CBM petitions may create a tactical advantage in some cases, *see Smartflash LLC v. Apple Inc.*, 2015 WL 4603820, *7 (Fed. Cir. 2015) (nonprecedential), that is not the case here. Accordingly, the third factor weighs in favor of granting a stay.

D. The Reduced Burdens of Litigation Strongly Favor a Stay

The fourth factor—how a stay will affect the burden of litigation on the parties and on the court—overlaps substantially with the first factor, yet is nevertheless a separate factor “which must be weighed in the stay determination.” *VirtualAgility*, 759 F.3d at 1313. Courts have recognized that “[t]he fourth factor of the test was enacted to increase the likelihood that a stay would be granted.” *Progressive Cas. Ins. Co. v. Safeco Ins. Co. of Ill.*, Case No. 1:10-cv-01370, 2013 WL 1662952, at *8 (N.D. Ohio Apr. 17, 2013).

Congress created the CBM review proceedings to stem the tide of suspect business method patents and associated patent litigation. *See* 157 Cong. Rec. S1363 (daily ed. Mar. 8, 2011) (statement of Sen. Schumer). The proceedings were intended to be a viable alternative to litigating business method patents in district court. *Id.* Thus, where the cost of defense in district

court litigation often dictates whether to take a license to an otherwise invalid patent, CBM review provides a less expensive and faster forum to resolve the dispute.

Here, a stay will have the precise effect Congress intended in establishing CBM review: avoid costly litigation of potentially invalid business method patents. By staying the case, the Court will not be required to expend substantial judicial resources in deciding claim construction, non-infringement, and invalidity if many or all of the asserted claims of the '080 patent are narrowed, changed or found invalid under § 101 through a CBM review proceeding.

Furthermore, during CBM review, NexusCard may amend any of the challenged claims of the '080 patent. A stay eliminates the substantial risk that the parties' upcoming investments in responding to written discovery, collecting and producing documents, preparing invalidity contentions, and developing claim construction positions will be wasted by a later amendment to the asserted claims. Indeed the earliest case deadlines (e.g., preparation of invalidity contentions and the exchange of claim terms) require a substantial investment of time and resources and are the most likely to be rendered moot or obsolete following CBM review. Thus, for these reasons and those identified for the first factor, the fourth factor strongly favors granting a stay.

* * *

In sum, the four statutory factors weigh heavily in favor of a stay. No exceptional circumstances offset the "heavy thumb" that Section 18(b) places in favor of a stay. Accordingly, to simplify the issues at this early stage and reduce the burden on the parties and the Court, the Court should stay this lawsuit pending CBM review of the '080 patent.

IV. THE CASE SHOULD BE STAYED PENDING RESOLUTION OF KROGER'S MOTION TO DISMISS

Federal Rule of Civil Procedure 26 provides this Court with the authority and discretion to determine the timing and sequence of discovery. Fed. R. Civ. P. 26(c). It is also well-settled

that a district court has inherent power to control its own docket, including the power to stay proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1341 (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.” *Wolf Designs, Inc. v. Donald McEvoy Ltd., Inc.*, 341 F. Supp. 2d 639, 642 (N.D. Tex. 2004) (*quoting Landis v. N. Am. Co.*, 299 U.S. at 254). “Such questions of docket management are left to the sound discretion of the district court,” and require only that the court “weigh the competing interests of the parties relating to the appropriateness of a stay.” *Id.*, 341 F. Supp. 2d at 642 (*citing Landis*, 299 U.S. at 255). A stay pending resolution of the dismissal motion is warranted here under Rule 26(c) as well as the court’s inherent power.

The Fifth Circuit has recognized that a stay is warranted on an early motion to dismiss the case because such motions “are decided on the face of the complaint,” without need for discovery, and because if granted, the motion would dispose of the entire case, thus avoiding the undue expense and burden of discovery. *See Landry v. Air Line Pilots Ass’n Int’l AFL-CIO*, 901 F.2d 404, 435-36 (5th Cir. 1990); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (“A trial court had broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (affirming a stay of any discovery unrelated to the defendant’s motion for summary judgment because if the summary judgment motion were granted, the parties will have avoided expensive general discovery); *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F. 3d 795, 804 (Fed. Cir. 1999) (“When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.”) (citing 8 Charles

Alan Wright & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE § 2040, at 521 (2d ed. 1994). “[T]he disposition of a motion to dismiss ‘might preclude the need for discovery altogether thus saving time and expense.’” *Von Drake v. Nat’l Broad Co., Inc.*, No. 3-04-CV-0652-R, 2004 U.S. Dist. Lexis 25090, at *1 (N.D. Tex. May 20, 2004). Once the moving party has shown why the discovery sought would be unduly burdensome and expensive, the non-movant must show a need for the discovery such that the burden and expense on the movant “would not be ‘undue.’” *Landry*, 901 F.2d at 436.

A stay is warranted here. First, no discovery is needed to resolve Kroger’s motion to dismiss. As detailed in Kroger’s motion, all of the asserted claims of the three patents-in-suit are invalid under § 101 because they are directed at non-patentable subject matter. *See* Dismissal Motion. Invalidity under § 101 is a pure question of law. *In re Comiskey*, 554 F.3d 967, 975 (Fed. Cir. 2009). Indeed, Kroger’s motion to dismiss relies only on the asserted patents and legal authorities. *See* Dismissal Motion. Thus, Kroger’s motion can be fully addressed without the burden and expense of discovery. *See Dietgoal Innovations LLC v. Chipotle Mexican Grill, Inc.*, Case No. 2:12-00764-WCB-RSP (E.D. Tex. Apr. 21, 2014), Slip Op., Dkt. No. 27 (staying case pending disposition of defendants’ § 101 summary judgment motions); *Prescriber, LLC v. Amazing Charts, LLC*, Case No. 6:14-cv-446-KNM (E.D. Tex. Sept. 9, 2014), Slip Op., Dkt. No. 23 (denying plaintiff’s motion for leave to take discovery on defendants’ pending motions to dismiss under § 101).

Second, if granted, Kroger’s motion to dismiss will dispose of the entire case. Kroger’s motion to dismiss demonstrates that each of the asserted claims of the ’080 patent are invalid under § 101 for claiming non-patentable subject matter. No other claims or patents are at issue in the case. In such a situation, the Fifth Circuit has instructed that a motion to dismiss should be

resolved *before* discovery begins. *Petrus*, 833 F.2d at 583 (“A trial court had broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”).

Third, the balance of hardships favors a stay. As discussed above, a stay will not unduly prejudice NexusCard. *See* Part III.C, *supra*. NexusCard and Kroger are not competitors, and a brief stay pending resolution of the motion to dismiss will have no impact on NexusCard’s case. In contrast, if the case is not stayed, Kroger faces a number of procedural and patent-related disclosure obligations that require significant investments of time and expense, in addition to any discovery requests that NexusCard propounds on Kroger, none of which is necessary if Kroger’s motion is ultimately granted.

Finally, a stay is warranted because the scheduling order and local patent rule obligations, together with any discovery from NexusCard, are unduly burdensome, time consuming, and costly in view of NexusCard’s claims. As the Supreme Court warned, motions to dismiss serve to check discovery abuse in a way that cannot otherwise be solved in later stages of litigation because “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Here, the cost of defense far outstrips the merits of NexusCard’s case. A stay pending resolution of the § 101 issue provides an important check against an unnecessary expense.

Accordingly, the court should stay proceedings and enter a protective order until resolution of Kroger’s motion to dismiss. Kroger’s motion is based on a question of law that requires no discovery and would dispose of the entire case if granted. A brief stay until the motion is resolved will not prejudice NexusCard, but will protect Kroger from the potential undue burden and expense associated with discovery and upcoming case deadlines.

V. CONCLUSION

For the foregoing reasons, Kroger respectfully requests that the Court stay this case pending the PTAB's CBM review of the '080 patent, or in the alternative, pending resolution of Kroger's motion to dismiss NexusCard's claims pursuant to Rule 12(b)(6) and § 101.

Dated: September 30, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing via the Court's CM/ECF system per Local Rule CV-5(a)(3) on September 30, 2015.

/s/ Brian Nash _____

Brian C. Nash

CERTIFICATE OF CONFERENCE

I certify that I have complied with the meet and confer requirement in Local Rule CV-7(H) and this motion is opposed.

/s/ Brian Nash _____

Brian C. Nash