

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

FONTEM VENTURES B.V., a  
Netherlands company; and FONTEM  
HOLDINGS 1 B.V., a Netherlands  
company,

Plaintiffs,

v.

R.J. REYNOLDS VAPOR COMPANY, a  
North Carolina company,

Defendant.

Case No. 1:16-CV-01255-CCE-JEP

**DEFENDANT R.J. REYNOLDS VAPOR COMPANY'S AMENDED  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS  
MOTION TO STAY LITIGATION PENDING INTER PARTES REVIEW**

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## **I. INTRODUCTION**

Fontem Ventures B.V. and Fontem Holdings 1 B.V. (collectively “Fontem”) filed three lawsuits against R.J. Reynolds Vapor Company (“Reynolds”) asserting 53 claims from seven patents. Fontem is asserting those same patents (as well as additional patents) against Nu Mark LLC (“Nu Mark”) in two co-pending litigations. Within about two months of answering the complaints in the second and third actions, petitions for *inter partes* review (“IPR”) of each asserted claim of the seven patents-in-suit were filed with the Patent Trial and Appeal Board (“PTAB”). More specifically, Reynolds and Nu Mark have filed a combined 17 IPR petitions with respect to the seven patents asserted against Reynolds. *See* Declaration of Robert S. Mallin (“Mallin Decl.”) ¶2. These petitions provide multiple grounds explaining why all asserted claims in the seven patents are invalid, and are accompanied by thousands of pages of exhibits, expert testimony and analysis. *Id.* ¶ 4. Institution decisions for nine of the petitions are expected to be issued no later than January 9, 2017, and decisions on the other 8 will be issued in February and March, 2017.<sup>1</sup> If the PTAB agrees with the grounds in the petitions, then it will cancel the claims in a final decision and no trial will be necessary.<sup>2</sup>

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<sup>1</sup> A table setting out a full list of the petitions and their expected institution decision dates is attached at Ex. K to the Mallin Declaration. As can be seen, the first institution decision is expected no later than December 30, 2016.

<sup>2</sup> Upon an institution of an IPR, the PTAB will conduct the proceeding and issue a final decision within a year. 35 U.S.C. § 316(a).

This motion to stay was pending in the Central District of California when that Court transferred this case (and the other two co-pending cases) to this Court. Reynolds files this amended brief in order to provide this Court with an update of the relevant facts and to address those facts under the relevant law.<sup>3</sup>

In considering a motion to stay, courts will consider three factors: (1) the stage of the proceedings, (2) whether the stay will unduly prejudice or tactically disadvantage the nonmoving party, and (3) whether the stay will simplify the issues in question. *Collectis S.A. v. Precision Biosciences, Inc.*, No. 5:08-cv-00119-H, 2010 WL 3430854, at \*2 (E.D.N.C. Aug. 31, 2010). Because of the extremely early stage of these proceedings, the lack of any prejudice and tactical disadvantage to Fontem, and the potential to simplify or eliminate the need for litigation by decisions rendered in IPR proceedings, the Court should stay this litigation pending *inter partes* review.

First, this motion presents the unusual circumstance that the Court can predict with reasonable certainty that at least one IPR for the ‘628 patent will be instituted because the PTAB previously instituted a petition containing the same grounds for review (that petition was withdrawn when prior defendants settled with Fontem). Mallin Decl. ¶ 3.

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<sup>3</sup> Reynolds’ motion to stay was filed only in one of the three transferred cases. However, the facts and arguments for a stay apply to all three pending cases. Thus, in addition to filing the amended brief in Case No. 16-1255-CCE-JEP, Reynolds will concurrently file motions to stay using this this same brief in Case Nos. 16-1257-CCE-JEP and 16-1258-CCE-JEP.

Second, the 17 petitions were filed extremely early in the proceedings, and in advance of the initial pretrial conference for these cases and prior to any party serving any discovery or providing initial disclosures. Indeed, nine of the institution decisions are due no later than January 9, 2017, which is only one month after the scheduled initial pretrial conference. Mallin Decl. ¶ 2, Ex. K.

Third, the 17 pending petitions address every asserted claim in all three cases. *Id.*

Finally, after years of litigating its patent portfolio, Fontem now has an established practice of licensing the patents in suit to its competitors, undercutting any claim of prejudice to Fontem resulting from a stay. Mallin Decl. ¶ 5, Exs. A-I.

Staying this case will prevent redundancy, conserve judicial resources, avoid inconsistent results, and promote the “liberal policy in favor of granting motions to stay proceedings pending the outcome of re-examination, especially in cases that are still in the initial stages of litigation and where there has been little or no discovery.” *See Sealy Tech. LLC v. Simmons Bedding Co.*, No. 1:10CV702, at 2 (M.D.N.C. Sept. 11, 2012) (quoting *Collectis S.A.*, 2010 WL 3430854, at \*2). Reynolds therefore respectfully requests that its motion be granted.

## **II. BACKGROUND**

### **A. The Patents In Case No. 16-1255-CCE-JEP**

On April 4, 2016, Fontem filed its first action against Reynolds alleging infringement of U.S. Patent Nos. 8,365,742 (“the ’742 patent”); 8,893,726 (“the ’726

patent”); 8,899,239 (“the ’239 patent”); and U.S. Patent No. 8,490,628 (“the ’628 patent”).

Reynolds answered the complaint on June 27, 2016 (Dkt. 27). Less than a week later, on July 2, 2016, Reynolds filed three petitions for *inter partes* review with the United States Patent and Trademark Office for the ’742 Patent, the ’726 Patent, and the ’239 Patent. On July 25, 2016, Reynolds filed an amended answer (Dkt. 33). About one week later, on August 3, 2016, Reynolds filed a fourth petition for *inter partes* review for the ’628 Patent (the PTAB previously instituted review for the ’628 Patent based on the same grounds raised in Reynolds’ petition). Reynolds then filed another petition for review of the ’742 patent on August 5, 2016. Mallin Decl. ¶ 2, Ex. K (*Inter Partes* Review Chart). In addition, Nu mark has filed petitions for each of these patents. *Id.*

**B. The Patents In Case No. 16-1257-CCE-JEP**

On May 3, 2016, Fontem filed its second action against Reynolds alleging infringement of U.S. Patent Nos. 9,326,548 (“the ’548 patent”) and 9,326,549 (“the ’549 patent”). Reynolds answered the complaint on July 25, 2016. Shortly after, Reynolds filed two petitions for review of the ’548 patent on August 30, 2016 and a petition for review of ’549 patent on September 23, 2016. Mallin Decl. ¶2, Ex. K. In addition, Nu mark has filed petitions for each of these patents. *Id.*

**C. The Patent In Case No. 16-1258-CCE-JEP**

On June 22, 2016, Fontem filed its third action against Reynolds alleging infringement of U.S. Patent No. 9,370,205 (“the ‘205 patent”). Reynolds answered the complaint on July 25, 2016. While Reynolds has not yet filed a petition for review of the ‘205 patent, Nu Mark did file a petition on August 18, 2016.<sup>4</sup> Mallin Decl. ¶2

**D. The Status of the Pending IPRs**

As mentioned above, collectively there are 17 petitions for review of the asserted claims in the 7 patents-in-suit. *Id.* Fontem has already filed preliminary patent owner responses to 9 of the 17 petitions and the rest are due by various dates between November 16, 2016 and December 29, 2016. *See* 37 CFR 42.107(b) (preliminary response due three months after petition is accorded filing date); Mallin Decl. ¶2, Ex. K. Additionally, the PTAB will issue 9 institution decisions by no later than January 9, 2017; 5 institution decisions in February 2017; and will issue the remaining 3 institution decisions by the end of March 2017. 35 U.S.C. § 314(b) (institution decision must be made no later than three months after preliminary response is due); Mallin Decl. ¶2, Ex. K.

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<sup>4</sup> Reynolds intends to make a final decision of whether to file a petition for review of the ‘205 patent after Fontem files its preliminary patent owner response to Nu Mark’s petition on November 25, 2016.

For the reviews that are instituted, the PTO has one year to issue its final determination in accordance with 35 U.S.C. § 316(a). Thus, a final determination is expected by early January 2018 for 9 of the petitions, end of February 2018 for 5 of the petitions, end of March 2018 for 3 of the petitions.

### **III. QUESTION PRESENTED**

Should the Court stay this litigation pending the resolution of *inter partes* review?

### **IV. LEGAL STANDARD**

District courts have discretion to stay litigation pending the outcome of USPTO proceedings. *Collectis S.A.*, 2010 WL 3430854, at \*2. Courts in this district consider three factors when determining whether to stay proceedings pending *inter partes* review: “(1) the stage of the litigation, including whether discovery is or will be almost completed and whether the matter has been scheduled for trial; (2) whether a stay will unduly prejudice or tactically disadvantage the nonmoving party; and, (3) whether a stay will simplify the issues in question and streamline the trial, thereby reducing the burden of litigation on the parties and on the court.” *Id.*

Courts have recognized “a liberal policy in favor of granting motions to stay proceedings pending the outcome of PTO reexamination or reissuance proceedings.” *Biogaia AB v. Nature's Way Prods., Inc.*, No. 5:10-CV-449-FL, 2011 WL 3664350, at \*1 (E.D.N.C. Aug. 18, 2011) (quoting *Collectis S.A.*, 2010 WL 3430854, at \*2). It is appropriate to stay litigation prior to an institution decision by the PTAB. *See, e.g.*,

*Limestone v. Micron Tech.*, 2016 WL 3598109, at \*4 (C.D. Cal. Jan. 12, 2016) (granting stay prior to institution of IPR); *Wonderland Nursery Goods Co. v. Baby Trend, Inc.*, No. EDCV 14-01153-VAP, 2015 WL 1809309, at \*2 (C.D. Cal. Apr. 20, 2015) (same); *Star Envirotech, Inc. v. Redline Detection, LLC*, No. SACV 12- 01861 JGB (MLGx), 2013 WL 1716068, at \*2 (C.D. Cal. Apr. 3, 2013) (same); *Inogen, Inc. v. Inova Labs, Inc.*, No. 11-cv-1692-JST, 2012 WL 4748803, at \*2-\*4 (C.D. Cal. Mar. 20, 2012) (same).

## V. ARGUMENT

### A. Discovery Has Not Begun, and No Trial Date Has Been Set

Because this case is still in its infancy, a stay pending the resolution of the IPRs is especially appropriate. *See Collectis S.A.*, 2010 WL 3430854 (granting a stay despite the fact that discovery was nearly complete and claim construction had already been briefed); *Sealy Tech. LLC*, No. 1:10CV702 (granting a stay despite the fact that discovery had closed, with summary judgment and trial still lay ahead.); *See Biogaia AB*, 2011 WL 3664350, at \*2 ("The fact that discovery has just begun makes a stay particularly attractive, as the parties can conserve resources while awaiting the determination of the PTO, resources that otherwise would be spent on what is likely to be lengthy and costly discovery.").

*Collectis* is instructive. In *Collectis*, the court granted a stay even though substantial discovery had occurred, claim construction briefs had been filed and experts were deposed. The court reasoned that even though much had been done, there was still

much to do, and cutting off further, and potentially futile, expenditures of the court's and the parties' time and resources weighed in favor of a stay. *Collectis S.A.*, 2010 WL 3430854 at \*3. Likewise, in *Sealy Tech. LLC v. Simmons Bedding Co.*, even though discovery was closed, the court nonetheless granted a stay because additional significant proceedings remained, including trial. *Sealy Tech. LLC*, No. 1:10CV702 at 3. By comparison, in Fontem's three cases against Reynolds, there is no scheduling order in place; no trial date has been set; initial contentions have not been exchanged, Markman briefs have not been prepared or filed, no experts have been deposed and no discovery has occurred. Under these circumstances, this factor weighs heavily in favor of a stay.

**B. A Stay Will Not Unduly Prejudice Or Present A Clear Tactical Disadvantage To Fontem**

The second factor in considering a stay pending IPR proceedings is “whether a stay will unduly prejudice or tactically disadvantage the nonmoving party.” *Collectis S.A.*, 2010 WL 3430854, at \*2. Delay is inherent in PTO proceedings and “does not constitute, by itself, undue prejudice.” *See Id.* Indeed, “[d]elays based on statutory frameworks, such as those pursuant to IPR proceedings under [the America Invents Act] § 18(b), do not normally cause undue prejudice.” *Audio MPEG, Inc. v. Hewlett-Packard Comp.*, No. 2:15CV73, 2015 WL 5567085, at \*4 (E.D. Va. Sept. 21, 2015). In order for the second factor to weigh in Fontem's favor, any prejudice must go beyond “what any plaintiff necessarily experiences when its suit is stayed pending IPR. “The general

prejudice of having to wait for resolution is not a persuasive reason to deny the motion for stay.” *Wonderland*, 2015 WL 1809309, at \*4; *see, e.g., Univ. of Va. Patent Found. v. Hamilton Co.*, No. 3:13-CV-00033, 2014 WL 4792941, at \*3 (W.D. Va. Sept 25, 2014) (“Plaintiff will not suffer undue prejudice or tactical disadvantage from a stay because it can be fully compensated if necessary with money damages, the stay will be relatively short and for a definite amount of time, and Defendant acted diligently in filing its IPR petitions and moving for the stay.”).

Fontem may argue that it would be prejudiced by delay because it competes in the market with Reynolds. While the parties are competitors in the market, they are not the only competitors. Direct competition alone is not enough to establish that the plaintiff will suffer undue prejudice from the stay; rather, courts look at the market as a whole to see if plaintiff would suffer irreparable harm from the stay. *Wonderland*, 2015 WL 1809309, at \*4 (granting stay despite the fact that parties were “direct competitors” due to inadequate showing that monetary damages are inadequate). There are many competitors in the electronic cigarette market, and Fontem has an established practice of licensing its patents to competitors. Mallin Decl. ¶ 5, Exs. A - I (Fontem press releases announcing license agreements with Ten Motives Limited, VMR Products LLC, Nicoventures Holdings, NJOY, Inc., Spark Industries LLC, Ballantyne Brands LLC, Vapor Corp., CB Distributors Inc., DR Distributors LLC, and Electronic Cigarettes International Group, Ltd.). The large number of competitors and established licensing

practice establish that Fontem will not be prejudiced by a stay. *See Wonderland*, 2015 WL 1809309, at \*2 (finding no prejudice in staying patent suit against competitor where there were at least eleven competitors in the marketplace); *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. 12-CV-05501-SI, 2015 WL 435457, at \*4 (N.D. Cal. Feb. 2, 2015) (granting stay in case between direct competitors where patent owner had a strategy of licensing, holding that “[c]ourts have consistently found that a patent licensor cannot be prejudiced by a stay because monetary damages provide adequate redress for infringement.”).

Moreover, Fontem did not seek preliminary or permanent injunctions against any of the defendants in the numerous prior Fontem litigations. Mallin Decl. ¶ 6. Nor has it sought a preliminary injunction against Reynolds in any of the three lawsuits pending in this Court or against Nu Mark in the co-pending proceedings. Fontem’s failure to seek injunctive relief further undermines any claim of prejudice. *See Autoalert, Inc. v. Dominion Dealer Sols., LLC*, No. SACV 12-1661-JST, 2013 WL 8014977, at \*3 (C.D. Cal. May 22, 2013) (failure to seek injunctive relief weighs against finding of prejudice).

Thus, the absence of demonstrable undue prejudice to Fontem also weighs in favor of a stay.

**C. A Stay Will Significantly Simplify The Legal Issues And Trial Of The Case**

The potential for the IPR proceedings to simplify issues in this case also strongly favors a stay. Every asserted patent claim in all three cases is subject to one or more petitions for review, and the IPR proceedings could thus dispose of the case entirely. *See Wonderland*, 2015 WL 1809309, at \*3 (“[B]ecause Defendants have petitioned for review of all claims asserted in this action, the outcome of the IPR has the potential to be case-dispositive.”); *see also Finjan, Inc. v. Symantec Corp.*, 139 F. Supp. 3d 1032, 1036 (N.D. Cal. 2015).

In *Pleasurecraft*, the court explained that “[i]n almost any case, reexamination by the USPTO will simplify the matters at issue because the PTO’s expertise provided will assist the Court in evaluating claims at issue in the underlying litigation.” *Pleasurecraft Marine Engine Co. v. Indmar Products Co., Inc.*, 2015 WL 5437181, at \*2 (D.S.C. Sept 15, 2015). Even if all 17 of the IPR petitions are denied (which is extremely unlikely given the PTAB’s previous decision to institute review of the ‘628 patent on the same grounds presented in Reynolds’ petition), the Court will benefit from the PTAB’s views as to the scope of the claims. *Id.* And, if review is instituted, questions of validity will be decided by the PTAB, resulting either in cancellation of claims or estoppel of certain invalidity defenses that might otherwise be raised by Reynolds. The court in *Collectis* found that, even though certain claims would still exist after reexamination was complete, “narrowing of these [validity] issues through conclusion of the reexamination process

would be of great value to the parties and to the Court relative to claim construction and the trial of these issues and, not inconsequentially, in potential settlement of this case.” *Collectis S.A.*, 2010 WL 3430854, at \*5.

Moreover, if the PTO only institutes review as to some patents, a stay will still simplify the case. For example, the asserted patents claim priority to three different Chinese applications filed between 2003 and 2006, which are focused on different features and alleged inventions. If the claims asserted from one or more of these three “families” are found unpatentable, there will be correspondingly fewer specifications for the Court and jury to understand, fewer dates of invention to establish, and a likely reduction in scope of the relevant prior art. Thus, courts stay cases when review is instituted as to fewer than all asserted claims. *See Evolutionary Intelligence, LLC v. Sprint Nextel Corp.*, No. C-13-04513, 2014 WL 4802426, at \*4 (N.D. Cal. Sept. 26, 2014) (maintaining stay granted prior to initiation of IPR, where PTO subsequently initiated IPR for only some claims and only one of two patents in suit); *see also Lilly v. Accord Healthcare Inc.*, No. 1:14-CV-00389-SEB-TAB, 2015 WL 8675158, at \*1 (S.D. Ind. Dec. 11, 2015); *Finjan*, 139 F. Supp. at 1037.

A stay *before* any claim construction proceedings will also assist in developing a record for this Court to consider. An IPR would add to the prosecution history, which will in turn aid in claim construction. *See, e.g., Evolutionary Intelligence*, 2014 WL 4802426, at \*4. For example, “[s]tatements made by [Fontem] during the IPR could

disclaim claim scope, aid the court in understanding the meaning of the terms, or otherwise affect the interpretation of key terms.” *Id.* Furthermore, the IPR petitions include grounds and prior art that has never before been considered by the Patent and Trademark Office or this Court. Mallin Decl. ¶ 5. A stay would give the Court the benefit of the PTO’s view on that art. Indeed, “an auxiliary function [of the IPR process] is to free the court from any need to consider prior art without the benefit of the PTO’s initial consideration.” *In re Etter*, 756 F.2d 852, 857 (Fed. Cir. 1985).

Thus, the third factor also strongly favors a stay.

## **VI. CONCLUSION**

All three stay factors strongly weigh in favor of a stay. Thus, and for the foregoing reasons, R.J. Reynolds Vapor respectfully requests that the Court enter a stay of litigation pending the *inter partes* review of the asserted claims of the ‘742, ‘726, ‘239, ‘628, ‘548, ‘549 and ‘205 patents.

DATED: November 2, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was filed using the Court's CM/ECF filing system, which will provide notice of the filing to all counsel of record.

DATED: November 2, 2016

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