

2012-1029, -1049

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VERSATA SOFTWARE, INC. (formerly known as Trilogy Software, Inc.),
VERSATA DEVELOPMENT GROUP, INC. (formerly known as Trilogy
Development Group, Inc.), and VERSATA COMPUTER INDUSTRY
SOLUTIONS, INC. (formerly known as Trilogy Computer Industry Solutions,
Inc.),

Plaintiffs-Cross Appellants,

v.

SAP AMERICA, INC. and SAP AG,

Defendants-Appellants.

**Appeals from the United States District Court for the Eastern District of Texas in case no.
07-CV-0153, Magistrate Judge Charles Everingham.**

MOTION TO STAY OF SAP AMERICA, INC. and SAP AG

June 17, 2013

CERTIFICATE OF INTEREST

Counsel for SAP America, Inc. and SAP AG certifies the following (use “None” if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

SAP America, Inc. and SAP AG

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

SAP America, Inc. and SAP AG

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

SAP AG owns 10% or more of the stock of SAP America, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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INTRODUCTION

Last week, the PTO issued a final written decision invalidating all claims of the '350 patent at issue in the present appeal as unpatentable under 35 U.S.C. § 101. *See SAP Am., Inc. v. Versata Dev. Group, Inc.*, Case CBM2012-00001 (P.T.A.B. June 11, 2013) (“PTAB Ruling”) (Exhibit A). When it becomes final, the PTAB Ruling will moot the present appeal. Thus, SAP requests a stay to avoid the possibility that it could be forced to pay nearly \$400 million in damages for a patent that never should have issued in the first place.

SAP was the first party to file a petition under the AIA’s covered business method (“CBM”) patent procedure, and the PTAB Ruling is the first of its kind. The public’s faith in the judicial and patent systems will be undermined if courts are compelling payments of hundreds of millions of dollars for patents that the expert agency has already declared, and the judiciary later affirms as, invalid. Thus, a stay would promote the strong public policy against enforcing patents that have been determined to be invalid.

This Court, in prior cases involving similar facts, has endorsed this policy. The facts here are analogous to those in cases such as *Mendenhall* and *Translogic* and warrant a stay so that SAP receives the same benefit of the PTAB’s invalidity finding as its competitors in the industry. It would be wholly unjust if SAP were denied the benefit of its own efforts in establishing that Versata’s patent is invalid;

the fact that Versata chose to sue SAP first should not result in SAP's having to pay damages on an invalid patent while other companies offering similar products will not. Thus, SAP would be unduly prejudiced if this case is not stayed. Meanwhile, since SAP is willing to post a bond, Versata would face no prejudice, and plainly no "undue" prejudice, if this matter is stayed pending resolution of the PTAB Ruling.

SAP has discussed this motion with Versata, which stated that it objects to this motion and intends to respond to it.

I. FACTUAL BACKGROUND

The procedural history of the ongoing litigation in the district court is fully laid out in SAP's appeal briefing. *See* Blue Brief at 14-35. This Court issued a panel opinion on SAP's appeal on May 1, 2013, affirming liability and damages, but remanding on injunctive relief; the panel opinion also describes the pertinent procedural history. *Versata Software, Inc. v. SAP Am., Inc.*, --- F.3d ----, Nos. 2012-1029, -1049, 2013 WL 1810957 (Fed. Cir. May 1, 2013). SAP has sought panel rehearing and rehearing en banc on two issues, one related to § 271(a) direct infringement liability, the other related to the standard of review for damages awards premised on faulty methodologies. Dkt. 76. Amicus briefs by Microsoft, Cisco, and others supporting SAP have now been filed with the Court as well. Dkt. 80, 81, 91, 92. Those rehearing issues are currently pending before the Court.

While litigation was ongoing, Congress signed into law the Leahy-Smith America Invents Act (“AIA”). Section 18 of the AIA created a new transitional program authorizing persons who have been sued for infringing a covered business method (“CBM”) patent to seek “post-grant review” from the PTO regarding the validity of the patent. AIA § 18(a)(1), P.L. 112-29, 125 Stat. 284, 329-30 (2011). The AIA was signed into law on September 16, 2011, and the CBM review procedure in § 18 became available a year later, on September 16, 2012.

Shortly after midnight on that very day, SAP filed a petition seeking CBM review of Versata’s ’350 patent. *See* PTAB Ruling at 2-3. The PTAB granted the petition and instituted the proceeding on January 9, 2013. *Id.* at 3. The PTAB’s initial decision concluded that SAP had demonstrated that claims 17 and 26-29 were more likely than not unpatentable under 35 U.S.C. §§ 101 and 102. *Id.* To expedite the PTAB’s final decision, SAP agreed not to press its § 102 challenge in the CBM proceeding. *Id.* A hearing was held on April 17, 2013, and on June 11, the PTAB entered its Final Written Decision under 35 U.S.C. § 328 and 37 C.F.R. § 42.73, finding claims 17 and 26-29 unpatentable. *Id.* at 4, 34.

During the CBM process, Versata alleged that SAP could not pursue its challenge under the principles of issue and claim preclusion based on an allegation that validity of the ’350 patent had been “finally adjudicated” and thus any PTAB determination “would have no effect on the judgment in the litigation.” *SAP Am.*,

Inc. v. Versata Dev. Group, Inc., Case CBM2012-00001, at 19 (P.T.A.B. Jan. 9, 2013). The PTAB disagreed, holding that there was no final judgment, and that any PTAB Ruling may well impact liability in this litigation. *Id.* at 20 n.7 (citing *In re Translogic Tech. Inc.*, 504 F.3d 1249 (Fed. Cir. 2007); *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 Fed. Appx. 988 (Fed. Cir. 2007)).

II. LEGAL BACKGROUND

The Supreme Court has long recognized that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket.... How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). This inherent authority “includ[es] the authority to order a stay pending conclusion of a PTO reexamination.” *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1998) (reviewing legislative history of ex parte reexamination, which stated that the statute lacked language authorizing district courts to grant stays pending reexamination because “such power already resides with the Court.” (quoting 1980 U.S. Code Cong. & Admin. News 6460, 6463)).

A court may opt to stay a case for reexamination “in order to avoid inconsistent results, narrow the issues, obtain guidance from the PTO, or simply to avoid the needless waste of judicial resources, *especially if the evidence suggests*

that the patents-in-suit will not survive reexamination.” MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 563 (E.D. Va. 2007) (citing *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983)) (other citations omitted) (emphasis added). Additionally, “[i]n determining whether to grant a stay [pending reexamination], courts generally consider whether doing so would cause undue prejudice or present a clear tactical disadvantage to the non-moving party.” *ASCII Corp. v. STD Entm’t USA, Inc.*, 844 F. Supp. 1378, 1380 (N.D. Cal. 1994) (internal quotations omitted); *see also Abbott Labs., Inc. v. Medtronic, Inc.*, No. C-08-4962-DLJ, 2009 WL 799404, at *1 (N.D. Cal. Mar. 24, 2009) (“In exercising its discretion to stay an action, courts often consider: (1) the judicial resources that will be saved by avoiding duplicative litigation; (2) the hardship and inequity to the moving party if the action is not stayed; and (3) the potential prejudice to the non-moving party.”).

Specific to CBM reviews, the AIA enumerates similar factors for determining whether to stay a case pending post-grant review. AIA § 18(b)(1), P.L. 112-29, 125 Stat. 284, 331 (2011) (factors include “(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.”).

III. A STAY IS WARRANTED

The SAP/Versata PTAB Ruling is the first of its kind, i.e., the first disposition of a post-grant review proceeding under section 18 of the AIA. SAP also believes that its petition seeking CBM review—filed just after midnight on September 16, 2012, the day the statute went into effect—was also the first of its kind, as reflected by the PTO’s assignment of “Case CBM2012-00001.” It would be ironic if the first patent subject to the new AIA provisions, and the first patent invalidated under those provisions, nonetheless gave rise to the subsequent payment of nearly \$400 million in damages.

Further, staying this case pending resolution of the validity dispute would reinforce that the CBM review procedure has the teeth that Congress intended.

But those are not the only reasons to grant a stay. Rather, this Court’s precedent and important policy considerations also strongly favor a stay:

- SAP moved as expeditiously as possible on the CBM petition and would be greatly prejudiced if a stay is not granted now that the PTAB has provided a Final Written Decision;

- Versata would not be unduly prejudiced by a stay, as any money damages rightfully owed to Versata can and will be provided, with interest, if the PTAB Ruling is overturned;
- A stay would simplify the case, as the PTAB Ruling is dispositive unless overturned; and
- In prior cases with similar facts, this Court has demonstrated a reasonable policy of finalizing invalidity issues before affirming judgment on damages issues for invalid patents.

A. A Stay Advances Congress’s Intent to Weed out Invalid Business Method Patents Such as Versata’s ’350 Patent and Would Prevent a Highly Prejudicial Inconsistent Result

One of the AIA’s purposes, and one of the main purposes for its CBM procedure, was to expeditiously reduce the number of invalid business method patents being asserted throughout the country. Indeed, as part of the legislative history, § 18 sponsor Senator Charles Schumer stated that the CBM procedure was directly responsive to the “cottage industry” of business method patent litigation. 157 Cong. Rec. S1363 (Mar. 8, 2011). According to Senator Schumer, while federal courts have begun to address this problem by crafting more restrictive standards for issuing business method patents, this development has nevertheless left “in limbo” many then-existing patents (such as the ’350 patent) issued by the PTO that are not in fact valid. *Id.* Senator Schumer also offered that:

Litigation over invalid patents places a substantial burden on U.S. courts and the U.S. economy. Business-method inventions generally are not and have not been patentable in countries other than the United States. In order to reduce the burden placed on courts and the economy by this back-and-forth shift in judicial precedent, the Schumer-Kyl transitional proceeding authorizes a temporary administrative alternative for reviewing business method patents.

Id. Senator Schumer further noted that the amendment that was the precursor to AIA § 18 was “designed to provide a cheaper, faster alternative to district court litigation over the validity of business-method patents” and, to that end, the legislation “*places a very heavy thumb on the scale in favor of a stay being granted.*” *Id.* (emphasis added). Senator Schumer identified the fourth § 18(b)(1) factor as being consistent with this purpose:

The amendment employs the [four-factor] test, rather than other multifactor tests employed by other district courts [in deciding stay motions filed in response to PTO reexamination proceedings], because this test properly emphasizes a fourth factor that is often ignored by the courts: “whether a stay will reduce the burden of litigation on the parties and on the court.” Too many district courts have been content to allow litigation to grind on while a reexamination is being conducted, forcing the parties to fight in two fora at the same time. This is unacceptable, and would be contrary to the fundamental purpose of the Schumer-Kyl amendment to provide a cost-efficient alternative to litigation.

157 Cong. Rec. S1364 (Mar. 8, 2011). In fact, the AIA goes so far as to give parties a special avenue for immediately appealing the denial of a stay, with de

novo Federal Circuit review. AIA § 18(b)(2), P.L. 112-29, 125 Stat. 284, 331 (2011).

While AIA § 18(b)(1)-(2) explicitly relates to stay motions before a district court, the same policies apply here. Indeed, a stay in this case is even more appropriate than in the typical district court setting because the CBM proceeding is already final. SAP is not requesting a stay based on the *chance* that the PTAB will rule the patent claims invalid—the PTAB *has already done so*.

Thus, a stay here would prevent the possibility of inconsistent results and furthers Congress's stated policy regarding the public harm in asserting invalid business method patents. The AIA's creation of the CBM review process was not only to allow for conserving judicial resources (though that is certainly a part), but also to furnish a critical piece of Congress's effort to weed out the large number of patents determined to be acting as a significant drag on the economy. If a stay is denied, and a nearly \$400 million judgment is enforced on a patent that has already been invalidated via the CBM review process, Congress's intent will be severely undermined, both practically speaking (as to SAP), but also in the court of public opinion.

B. A Stay Would Simplify the Issues in This Case

Presently before this Court are SAP's petition for rehearing and rehearing en banc on direct infringement liability and the standard of review on damages

resulting from flawed methodologies, an amicus brief from Microsoft *et al.* on the liability issue, and an amicus brief from Cisco *et al.* on the subject of damages. Depending on the disposition of SAP's petition by this Court, these issues may also be the subject of a petition for writ of certiorari to the Supreme Court.

Should the Court deny SAP's petition and issue a mandate remanding the case to the district court, that court would at the very least need to determine how the injunction must be modified to comport with the panel opinion. Given that this matter would be before a new judge who has not presided over a single issue in this case,¹ this would likely involve significant briefing and argument.

But all of these issues will be moot if the asserted claims remain cancelled. Therefore, this Court should stay the matter until there is a final resolution on the PTAB Ruling.

C. This Court's Precedent Shows a Strong Policy in Favor of Staying Litigation While Resolving Co-Pending PTO Proceedings

While this is the first case involving a cancelled patent under the CBM procedure, multiple decisions of this Court show that a stay is appropriate under these circumstances to prevent enforcement of invalid patents and avoid inconsistent results between related proceedings and similarly situated parties.

¹ Magistrate Judge Everingham, who presided over both trials and all post-trial motions at the district court level, has since left the bench.

This Court has long recognized the importance of preventing enforcement of invalid patents by giving collateral estoppel effect to an invalidity judgment, including in proceedings where the Federal Circuit had already heard appeals in which the defendant had not raised invalidity as a defense. For example, in *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573 (Fed. Cir. 1994), where plaintiff brought infringement actions against three different defendants in three different courts, this Court held that a final judgment of invalidity in one case collaterally estopped plaintiff from continuing to assert validity in the other two actions, even though those defendants had already pursued appeals in which they had not raised invalidity defenses. *See id.* at 1579-80 (“[T]he defense of collateral estoppel based on a final judgment of patent invalidity in another suit can ‘be timely made at any stage of the affected proceedings.’” (quoting *Dana Corp. v. NOK, Inc.*, 882 F.2d 505, 507 (Fed. Cir. 1989))). In *Mendenhall*, while Defendant B’s judgment was already on appeal and while Defendant A’s case remained pending in the district court on the issue of damages following remand from an appeal, a final judgment of invalidity as to all patent claims-in-suit was entered in Defendant C’s case. *Id.* After the Federal Circuit affirmed the judgment of invalidity in Defendant C’s case, it consolidated the remaining two cases for disposition. In that disposition, the Court explained that in the patent context, a defendant may assert collateral estoppel based on an invalidity holding “at any stage of the affected proceedings,”

even where that defendant did not prove invalidity in its own case. *Id.* at 1579-80. Because Defendants B and A had raised the issue as soon as possible following Defendant C's judgment, the Court deemed the defense to be timely even though it was raised for the first time on appeal in Defendant B's case and following an appeal on the determination of liability in Defendant A's case.^{2,3} *Id.* at 1580.

² The Court also noted as a policy matter that it would be unjust to uphold the liability determinations against Defendants A and B when the rest of the industry would not be similarly impeded: "It would be contrary to the policies expressed in *Blonder-Tongue* were this court now to enter the judgments Mendenhall seeks in these appeals. For this court to affirm the findings of infringement and the willfulness of conduct against one appellant, increase damages against the other, and uphold injunctions against both, appears anomalous in the extreme in connection with patents this court has just held invalid." *Mendenhall*, 26 F.3d at 1578.

³ Mendenhall also argued that the Federal Circuit decision would in effect be overturning prior determinations affirming "validity," but this Court rejected that argument on multiple bases: "[T]his court did not rule that the patents were 'valid' in its prior *Astec* judgment but rather ruled that *Astec* failed to establish the merits of its defenses of inequitable conduct and invalidity. Thus, this court did not 'overturn' its prior *Astec* rulings respecting validity by the *Cedarapids* judgment of invalidity, and it does not do so here by recognizing the overriding defense of collateral estoppel.... [T]he judgment of this court on liability in *Astec* resulted in a remand for further proceedings [on damages]. It was not the final judgment in the case. To rise to that level, the litigation must be entirely concluded so that Mendenhall's cause of action against *Astec* was merged into a final judgment. A final judgment is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A judgment on an appeal under § 1292(c)(2) allowing interlocutory appeals of liability judgments in patent cases does not end the litigation." *Id.* at 1580.

SAP's position is even stronger than the other defendants in *Mendenhall*. Here it was SAP, not a third party, who proved that the challenged claims were not drawn to patentable subject matter. And like the defendants in *Mendenhall*, SAP acted as quickly as possible, bringing a CBM petition in the first minutes of the first day such petitions were accepted, narrowing its arguments to facilitate expedition of the CBM proceedings, and swiftly moving this Court for a stay following last week's PTAB's decision that the challenged claims are invalid.

While *Mendenhall* involved a district court's judgment of invalidity, the *Translogic* and *In re Translogic* decisions—the very cases cited by the PTAB regarding why its decision might impact this matter—confirm that the logic of *Mendenhall* applies equally to a final judgment of invalidity arising out of a proceeding before the PTO. See *In re Translogic Tech., Inc.*, 504 F.3d 1249 (Fed. Cir. 2007); *Translogic Tech., Inc. v. Hitachi, Ltd.*, 250 Fed. Appx. 988 (Fed. Cir. 2007). Like *Mendenhall*, these cases make clear that courts should not aid in the enforcement of invalid patents.

In the BPAI appeal, *In re Translogic*, Translogic argued that for the reexamination, the BPAI had used the wrong construction of a key claim term, and that the BPAI should have used the construction used in the district court proceeding. 504 F.3d at 1257. This Court disagreed, noting that “during examination proceedings, claims are given their broadest reasonable interpretation

consistent with the specification.” *Id.* at 1256 (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). Based on the construction used by the BPAI, the Federal Circuit found the Translogic patents obvious. *Id.* at 1262.

After affirming the BPAI’s decision invalidating the patents in *In re Translogic*, the same Federal Circuit panel dismissed the \$86.5M verdict in *Translogic* based on collateral estoppel. *See Translogic*, 250 Fed. Appx. at 988. The Court held that the BPAI’s invalidity ruling necessitated vacating the district court’s liability judgment: “In light of this court's decision in *In re Translogic Tech., Inc.*, this court vacates the district court's decision and remands this case to the district court for dismissal.” *Id.* Notably, the Court had consolidated all three cases before the same panel, and effectively held the appeal from the district court judgment until it could be disposed of in light of the BPAI’s invalidity ruling. In this fashion, the Court ensured consistency in the various proceedings.

While *Mendenhall* and *Translogic* each gave collateral estoppel effect to a judgment of invalidity after it became final on appeal, this Court has likewise recognized that stays are appropriate in order to allow an invalidity finding to become final and thereby prevent enforcement of invalid patents.⁴ In *Standard*

⁴ Although the *Barber-Greene* litigation against *Mendenhall* was not technically stayed, it is conspicuous that the *Cedarapids* appeal, which was instituted well after the *Barber-Greene* appeal had already begun, was the first appeal to result in a panel opinion, which not coincidentally had the effect of mooted the *Barber-*
(continued on next page)

Havens, this Court reversed the district court's denial of a stay of permanent injunction and damages proceedings and ordered the district court "to stay the imposition of the permanent injunction and to stay any further proceedings respecting damages until the reexamination decision becomes final." *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, No. 93-1208, 1993 WL 172432, at *1 (Fed. Cir. May 21, 1993) (nonprecedential decision). As the Court explained:

The district court incorrectly concluded that the reexamination decision can have no effect on this infringement suit even if the reexamination decision becomes final. As a matter of law, however, and as both parties agree, if the reexamination decision of unpatentability is upheld in the court action under 35 U.S.C. § 145 (1988), the injunction would thereby immediately become inoperative. In addition, if a final decision of unpatentability means the patent was *void ab initio*, then damages would also be precluded. Therefore, the injunction should have been stayed. Thus in either event, contrary to the assumption of the trial court, the reexamination proceeding "would control" the infringement suit.

Id.

In view of these holdings, and their underlying policy considerations, this case should be stayed. First, unless Versata convinces this Court to reverse the PTO's decision, the cancellation of Versata's claims will be a proper basis to overturn liability in this case due to collateral estoppel. Second, as explained in

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Greene litigation. This further indicates the demonstrated policy of not enforcing invalid patents against some litigants (but not others) just because one litigant happens to be farther along in its case relative to a reexamination proceeding.

more detail in Section D, below, it would be inequitable for SAP to pay nearly \$400M in damages based on invalid claims.

D. SAP Will Be Severely Prejudiced If This Case Is Not Stayed

If a stay is not granted, SAP stands to be the *only* party that is *not* safe from enforcement of the claims held invalid by the PTAB. This severely prejudicial result cannot be correct.

As mentioned above, SAP proceeded as quickly as possible regarding the CBM procedure. The procedure was not even available until long after trial had concluded. SAP filed its petition immediately upon the CBM provisions becoming available, agreed not to press its § 102 argument during CBM to expedite the § 101 argument, and is filing the present motion less than a week after the PTAB Ruling. Thus, similar to the parties in *Mendenhall*, SAP raised this issue as soon as practically possible, making review appropriate. *Mendenhall*, 26 F.3d at 1580.

Requiring SAP to pay nearly \$400 million for claims held to be invalid by the agency that issued them would epitomize “undue prejudice.” The fact that the litigation proceeded before the CBM procedure existed is not SAP’s fault; the litigation is not yet “final,” and like the parties in *Mendenhall* and *Translogic*, SAP should not be treated differently than any other party just because Versata sued SAP first. Indeed, a party must first be sued for infringement before it can even bring a CBM petition. The purpose of the AIA is not to punish parties for

identifying invalid patents by disadvantaging them relative to others; rather, it is to encourage companies to do exactly what SAP did: take steps to rid the system of invalid patents, for the good not only of the public, but themselves.

E. Versata Will Not Be Prejudiced by a Stay

Versata will not be unduly prejudiced by a stay. As to the prospective relief Versata seeks (the injunction) there is nothing prejudicial about denying injunctive relief on an invalid patent. Indeed, this Court has held that a preliminary injunction should not be granted if there is a “substantial question” of patent validity. *See Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350-51 (Fed. Cir. 2001). Here, where the injunction is permanent rather than preliminary, the same logic applies with even greater force, especially since there is much more than a “substantial question” of validity here—there is a “final written decision” from the PTAB canceling the claims. It makes no sense for the parties to expend any resources fighting over the proper scope of an injunction that is unwarranted in view of the PTAB Ruling.

As to the retrospective relief Versata seeks (the damages award), a stay is not unduly prejudicial on that ground either. Versata can be made whole by money damages, and SAP is willing to post a bond for the entire award pending resolution of all appeals. *See Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 603 (Fed. Cir. 1985); *see also Standard Havens*, 1993 WL 172432, at *1 (“This stay is

conditioned on continuing deposits in the escrow account as required by our order dated February 22, 1990.”). The only potential “prejudice” to Versata is that it might not ever receive the damages award if the PTAB’s ruling is affirmed by this Court. But of course, this is no “real” prejudice, and certainly no “undue” prejudice, because if Versata’s patent claims are invalid, by definition Versata is not entitled to any money, let alone nearly \$400 million. *Mendenhall*, 26 F.3d at 1578 (“For this court to affirm the findings of infringement and the willfulness of conduct against one appellant, increase damages against the other, and uphold injunctions against both, appears anomalous in the extreme in connection with patents this court has just held invalid.”).

Moreover, any delay at this juncture regarding resolution of the PTAB Ruling is largely within Versata’s control. It is up to Versata to decide whether it wants to petition for a rehearing at the PTAB and/or appeal the PTAB Ruling to this Court. SAP’s only involvement would be to rebut any arguments Versata chooses to raise, and SAP is willing to stipulate to an expedited schedule for any briefing should Versata be amenable. In any event, courts have found that mere delay does not demonstrate undue prejudice. *See, e.g., Sorensen v. Black & Decker Corp.*, No. 06cv1572BTM, 2007 WL 2696590, at *4 (S.D. Cal. Sept. 10, 2007) (“The general prejudice of having to wait for resolution is not a persuasive reason to deny the motion for stay.”); *Nanometrics, Inc. v. Nova Measuring*

Instruments, Ltd., No. C06-2252SBA, 2007 WL 627920, at *3 (N.D. Cal. Feb. 26, 2007).

IV. CONCLUSION

For these reasons, SAP respectfully requests that the Court stay this proceeding pending resolution of the PTAB Ruling.

June 17, 2013

Respectfully submitted,

/s/ J. Michael Jakes

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION TO STAY OF SAP AMERICA, INC. AND SAP AG** was served upon registered counsel by operation of the Court's CM/ECF system on this 17th day of June, 2013.

/s/ Zachary Schanz
Zachary Schanz
Litigation Clerk