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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REVOLUTION EYEWEAR, INC.,)	Case No. CV 02-01087-VAP
)	(CWx)
Plaintiff,)	[Motion filed on June 12, 2009]
v.)	
ASPEX EYEWEAR, INC.; and)	ORDER DENYING MOTION TO STAY
THIERY IFERGAN,)	EXECUTION OF JUDGMENT
Defendants.)	PENDING REEXAMINATION
<hr/>		[Term and Link Doc. No. 636]

Revolution Eyewear, Inc.'s ("Plaintiff") Motion for Stay of Execution of Judgment Pending Reexamination ("Mot.") came before the Court for hearing on July 6, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the motion, as well as the arguments advanced by counsel at the hearing, the Court DENIES the Motion.

Plaintiff moves for a stay of judgment as it has secured ex parte reexamination by the United States Patent and Trademark Office ("PTO") of claim 22 of United

1 States Patent No. RE37,545 ("claim 22" and "'545 patent",
2 respectively) as of May 29, 2009. (Mot. 1.) Plaintiff
3 sought reexamination based on four United States patents
4 and one Japanese patent, which Plaintiff describes as new
5 prior art references, "some" of which are "newly
6 provided, not of record in the file of the '545 Patent,
7 and not cumulative . . . Some [of which] . . . were
8 disclosed during prosecution of the '545 Patent, but were
9 never cited or relied upon" by the applicant or the
10 patent examiner during prosecution. (Mot. 3; Request for
11 Ex Parte Reexamination of U.S. Patent No. RE37,545 at
12 Declaration of R. Joseph Trojan ("Trojan Decl.") Ex. A-0
13 at 6, 9, 22 (listing prior art references and describing
14 relevance).) Plaintiff's other grounds for seeking
15 reexamination include obviousness under 35 U.S.C. section
16 103 and the extent to which claim 22 is anticipated under
17 35 U.S.C. section 102 by the Japanese patent described as
18 new prior art above. (Mot. 7; Trojan Decl. Ex. A-0 6,
19 19, 22.)

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I. BACKGROUND

On April 30, 2007, the Court granted Counterclaimant
Contour Optik, Inc.'s ("Contour") Motion for Partial
Summary Judgment on the issue of Infringement, holding
that Plaintiff infringed claim 22. (See Order Granting
Counterclaimant's Motion for Summary Judgment on
Infringement, April 30, 2007 ("Infringement MSJ Order").)

1 On the same day, the Court denied Plaintiff's Motion for
2 Partial Summary Judgment on the issue of invalidity,
3 holding that Plaintiff failed to establish claim 22 was
4 invalid. (See Order Denying Counter-Defendant's Motion
5 for Summary Judgment of Invalidity, April 30, 2007
6 ("Invalidity MSJ Order").)

7
8 This case was tried to a jury in September 2007 on
9 Contour's claim for damages for patent infringement
10 against Plaintiff. The jury returned a verdict awarding
11 damages of \$4,319,530.70 to Contour.

12
13 Plaintiff's intervening rights defenses were tried
14 to the Court; on January 3, 2008, the Court issued a
15 Memorandum and Opinion on Equitable Issues, Findings of
16 Fact and Conclusions of Law ("Op. of January 3, 2008"),
17 concluding that Plaintiff was entitled to absolute
18 intervening rights and reducing the damages awarded by
19 the jury by \$125,964. Accordingly, on February 25, 2008,
20 the Court issued a judgment in favor of Contour awarding
21 damages of \$4,193,567. On April 24, 2008, the Court
22 denied Plaintiff's motions for judgment as a matter of
23 law, for new trial, and for remittitur. (See Order
24 Denying Motion for Judgment as a Matter of Law, for New
25 Trial, and for Remittitur, April 24, 2008 ("Remittitur
26 Order").)

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1 On May 27, 2008, Plaintiff filed a Motion for Stay of
2 Execution of Judgment Pending Appeal, challenging the
3 results of the Invalidity MSJ Order, the Infringement MSJ
4 Order, and the Remittitur Order; the Court denied the
5 motion on July 14, 2008.

6
7 The next spring, on May 29, 2009, the PTO granted
8 Plaintiff's ex parte reexamination request regarding
9 claim 22. (Mot. 2; Trojan Decl. Ex. B.)

10
11 On June 5, 2009, the Federal Circuit affirmed the
12 judgment entered by this Court.

13
14 On June 12, 2009, Plaintiff brought the instant
15 Motion, as well as an ex parte application for an order
16 shortening time and an ex parte application for a
17 temporary restraining order. The Court denied the latter
18 two applications in a minute order dated June 17, 2009.
19 Contour, Manhattan Design Studio, Inc., and Asahi Optical
20 Co., Ltd. (collectively "Defendants") timely filed
21 opposition to the Motion. Plaintiff filed no Reply.

22 23 **II. DISCUSSION**

24 **A. Relief under Rule 62 of the Federal Rules of Civil** 25 **Procedure**

26 "Stays of monetary judgments are ordinarily sought
27 under either Fed. R. Civ. P. 62(d) or 62(f)." Acevedo-

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1 Garcia v. Vera-Monroig, 296 F.3d 13, 17 (1st Cir. 2002).
2 Plaintiff concedes there are no grounds for relief
3 pursuant to Rule 62 of the Federal Rules of Civil
4 Procedure because the stay sought is premised on
5 proceedings before the PTO, rather than appeal. (See
6 Mot. 5 ("this motion does not fall within the provisions
7 of the F.R.C.P. 62 . . ."); citing Katz v. Feinberg, 2001
8 WL 1132018 at *2-4 (S.D.N.Y 2001) (relief under Rule 62
9 improper where stay is sought because of proceedings in
10 another action).) Accordingly, the Court does not grant
11 relief under Rule 62.

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13 **B. Relief pursuant to the Court's Inherent Power**

14 Plaintiff asks the Court to use its inherent
15 authority to grant a stay of execution of judgment for
16 the duration of reexamination proceedings. (Mot. 5.)
17 "The district court has the inherent power to control and
18 manage its docket, which includes the authority to order
19 a stay pending the outcome of reexamination proceedings
20 in the PTO." Xerox Corp. v. 3Com Corp., 69 F. Supp. 2d
21 404, 406 (W.D.N.Y. 1999) (citing Gould v Control Laser
22 Corp, 705 F.2d 1340 (Fed. Cir. 1983).) Nevertheless
23 "[t]he court is not required to stay judicial resolution
24 in view of the reexamination[]." Vikase Corp. v.
25 American Nat'l Can Co., 261 F.3d 1316, 1328 (9th Cir.
26 2001). Accordingly, the requested relief is
27 discretionary.

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1 Plaintiff suggests the factors considered when
2 granting relief under Rule 62 are instructive and that
3 they favor granting a stay here. (Mot. 5-6.) The Rule
4 62 factors are: (1) likelihood of success on the merits;
5 (2) threat of irreparable injury; (3) little likelihood
6 the proposed stay will harm other parties; (4) the public
7 interest. (Mot. 6 citing Katz, 2001 WL 1132018 at *3-4.)
8 Assuming for the sake of argument these factors should
9 apply, Plaintiff cannot satisfy even the first two
10 accordingly we need not reach the third and fourth. The
11 Court declines to exercise its discretion to stay
12 execution of the judgment.

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14 **1. Success on the merits**

15 Plaintiff offers several unconvincing arguments
16 regarding success on the merits.

17

18 First, Plaintiff asks the Court to find in its favor
19 based on the strength of the prior art, including the
20 four United States patents and the Japanese patent, as
21 well as the arguments it presented to the PTO when
22 seeking reexamination. Although the Motion makes clear
23 that only "some" of the prior art is "newly provided, not
24 of record in the file of the '545 Patent, and not
25 cumulative," Plaintiff fails to address adequately why it
26 did not discover or present the prior art on which it now

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1 relies during the extensive proceedings before this
2 Court. (See Mot. 3.)

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4 Plaintiff's second argument, i.e., that it will
5 succeed at reexamination because the patent examiner
6 placed undue weight during prosecution on the requirement
7 that prior art suggest combining certain elements, in
8 contravention of KSR Int'l Co. v. Teleflex Inc., 550 U.S.
9 398 (2007), is unconvincing as well. (See Mot. 11 citing
10 KSR, 127 S. Ct. 1731-31 [550 U.S. at 401-02].) The
11 Supreme Court decided KSR on April 30, 2007, the very day
12 the Court issued the Infringement MSJ Order and the
13 Invalidity MSJ Order. (See Opp'n 3.) Plaintiff does not
14 satisfactorily explain why it waited more than two years
15 to seek relief pursuant to KSR. Plaintiff's delay
16 undermines the seriousness with which it predicts success
17 on the merits at the PTO.

18
19 Third, Plaintiff relies on statistics untethered to
20 the facts of this case about the general rate of success
21 during reexamination at the PTO. (Mot. 7.) This is
22 unpersuasive. (See Opp'n 11.)

23
24 Finally, Plaintiff urges the Court to issue a stay
25 because it claims the '545 patent loses its presumption
26 of validity and has no legal existence as an issued claim
27 during reexamination. (Mot. 6.) This is more properly

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1 true of a claim found invalid not only during
2 reexamination but also at the completion of all appeals.
3 (See Opp'n 11-12 citing Standard Haven Products, Inc. v.
4 Gencor Industries, Inc., 953 F.2d 1360, 1366 n.2) (Fed.
5 Cir. 1991) (reexamination a preliminary step); In re
6 American Academy of Science Tech Center, 367 F.3d 1359,
7 (Fed. Cir. 2004) (ten year period between request for
8 examination and final decision).) Accordingly,
9 Plaintiff's prediction of success on the merits amounts
10 to nothing more than speculation.

11

12 **2. Threat of irreparable injury**

13 Plaintiff also claims it will suffer irreparable
14 pecuniary loss if the judgment is not stayed because the
15 Court could not retroactively modify its judgment if the
16 PTO, at reexamination, finds claim 22 invalid. (See Mot.
17 13-14.) Plaintiff asserts it would be "practically
18 impossible" for Plaintiff to recover money from Contour,
19 a Taiwanese corporation; Plaintiff cites no authority for
20 this proposition. (Mot. 13.)

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22 Plaintiff's argument seems to be that because a
23 finding of invalidity during reexamination, had it
24 occurred before trial, might have prevented the judgment
25 against it, the Court should now hold the judgment, which
26 was imposed after significant motion practice,
27 interlocutory appeal, a jury trial, and appeal, hostage

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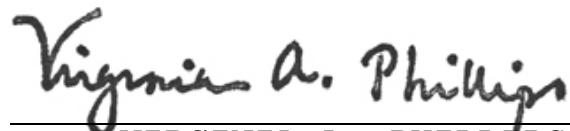
1 to Plaintiff's tactical choice to seek reexamination long
2 after trial. (See Mot. 13 citing Inland Steel Co v. LTV
3 Steel Co., 364 F.3d 1318, 1320 (Fed. Cir. 2004).)

4
5 Just as "injury resulting from attempted compliance
6 with government regulation ordinarily is not irreparable
7 harm," so too is injury resulting from an affirmed
8 judgment not harm on which the Court is inclined to grant
9 relief. See American Hospital Ass'n v. Harris, 625 F.2d
10 1328, 1331 (7th Cir. 1980). Plaintiff's choice to pursue
11 compatible forms of review of the '545 patent
12 sequentially rather than concurrently does not persuade
13 the Court to use its inherent power to grant relief. See
14 Vikase, 261 F.3d at 1328 (concurrent judicial resolution
15 and reexamination proceedings do not require stay).

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17 **III. CONCLUSION**

18 For the reasons set forth above, the Court DENIES the
19 Motion.

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23 Dated: July 8, 2009



VIRGINIA A. PHILLIPS
United States District Judge