

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

PARKERVISION, INC.,)
)
 Plaintiff,)
)
 v.)
)
 APPLE INC., et al.,)
)
 Defendants.)
 _____)

Case No. 3:15-cv-01477-BJD-JRK

**PLAINTIFF PARKERVISION, INC.’S OPPOSITION TO
APPLE INC.’S MOTION TO SEVER AND STAY
PARKERVISION’S CLAIMS AGAINST APPLE**

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A	<i>Cal. Inst. Of Tech. v. Broadcom Ltd.</i> , No. 2:16-cv-03714-GW-AGR, 1-2 (N.D. Cal. Aug. 8, 2019)
B	Kieren McCarthy, <i>Apple loses FaceTime patent appeal again</i> , The Register (Aug. 2, 2019), https://www.theregister.co.uk/2019/08/02/apple_facetime_virnetx_patent_appeal/
C	ParkerVision, Inc., Quarterly Report (Form 10-Q) (Nov. 14, 2019)
D	Jason Aycock, <i>ParkerVision loss grows as it awaits litigation results</i> , Seeking Alpha (Apr. 1, 2019), https://seekingalpha.com/news/3447489-parkervision-loss-grows-awaits-litigation-results
E	Will Robinson, <i>ParkerVision lays off 30 employees, pivots to focus on patent lawsuits</i> , Jacksonville Bus. J. (Aug. 23, 2018), https://www.bizjournals.com/jacksonville/news/2018/08/23/parkervision-lays-off-30-employees-pivotsto-focus.html .
F	<i>ParkerVision's Final Infringement Contentions</i> (Nov. 20, 2019)
G	Mike Spector, <i>Can Bankruptcy Filing Save Kodak?</i> , Wall Street Journal (Jan. 20, 2012), https://www.wsj.com/articles/SB10001424052970204555904577169920031456052
H	Adam Mossoff, <i>Apple Pays for Its Patent Infringement, But Important Legal Cases Continue</i> , IP Watchdog (Mar. 19, 2019), https://www.ipwatchdog.com/2019/03/19/apple-pays-patent-infringement-important-legal-cases-continue/id=107425
I	<i>Rules to Curb Frivolous Patent Claims May Encourage Infringement</i> , The Economist (Dec. 14, 2019), https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting

Apple previously filed a motion to sever and stay ParkerVision’s infringement case against Apple, and the Court previously denied that motion. Apple’s renewed motion simply restates arguments the Court has already rejected—the “customer-suit exception” and, in the alternative, the Court’s inherent powers—and the Court should deny it once again.

The Customer-Suit Exception: The “customer-suit exception” applies only to defendants who merely resell products manufactured by one or more other defendants; it does not apply to manufacturers of accused products. The exception, thus, does not apply here because Apple is not a “mere reseller” of accused products, **Apple itself manufactures accused products**, specifically all of the accused Apple products. Not one of the twenty-six decisions identified in Apple’s motion finds that the “customer-suit exception” applies to a defendant that, like Apple, manufactures one or more of the accused infringing products.

Despite citing and attempting to rely on twenty-six inapplicable decisions, Apple chose **not** to cite and disclose the *Cal. Inst. Of Tech. v. Broadcom Ltd.* decision, in which the District Court denied **Apple’s** own prior motion to sever and stay on the same exact arguments that Apple repeats here. No. 2:16-cv-03714-GW-AGR, 1-2 (N.D. Cal. Aug. 8, 2019) (tentative ruling, ECF No. 1392) (hereinafter “*CIT*”). The *CIT* Court correctly found that (as is also true here) infringement disputes could not be resolved if the case against Apple were stayed, and that the two trials proposed by Apple would not “advance concerns of judicial economy.” *Id.* The *CIT* Court’s reasoning and decision applies equally here, but although Apple knew of this decision and its relevance, Apple did not provide it to the

Court. ParkerVision provides it as Exhibit A hereto.

The Court's Inherent Power: Apple argues in the alternative that the Court should exercise its discretion to sever and stay ParkerVision's infringement claims against Apple to "simplify the issues for trial" and "reduce the burden on the Court and the parties." (Doc. No. 211 at 13). But Apple identifies no such simplification and no such reduction. Rather, the only result of Apple's proposed severance and stay would be (1) the extra expense and resources needed to conduct a second trial on the same issues and evidence presented in a first trial, and (2) delaying ParkerVision's recovery of damages from Apple.

And this delay is the real purpose of Apple's motion. As a recent news article described Apple's patent litigation approach:

Apple has adopted a legal strategy of stringing the case out for as long as humanly possible... presumably in the hope that [Patent Owner] goes out of business before it gets any money out of the computing giant."

Ex. B, Kieren McCarthy, *Apple loses FaceTime patent appeal again*, The Register (Aug. 2, 2019), https://www.theregister.co.uk/2019/08/02/apple_facetime_virnetx_patent_appeal/.

This is precisely what Apple hopes to achieve here: in light of the effect continued infringement has had on ParkerVision's business and the mounting legal costs incurred in trying to prevent powerful companies like Apple and Qualcomm from unjustly benefiting from their unauthorized use of ParkerVision's inventions, ParkerVision is struggling to stay afloat. According to recent reports:

- "ParkerVision, the Jacksonville-based wireless technology maker, is laying off about 30 employees";

- “ParkerVision reached an all-time high share price of \$564.40 in 2000 ... but it was trading at 21 cents before it was delisted Aug. 17[, 2018]”;
- ParkerVision “saw wider losses again in Q4 [2019] as it continues pursuing patent litigation and looks to contain costs against essentially no revenue”;
- “These circumstances raise substantial doubt about [ParkerVision’s] ability to continue to operate as a going concern within one year following [November 14, 2019.]”

Ex. C, ParkerVision, Inc., Quarterly Report (Form 10-Q) (Nov. 14, 2019); Ex. D., Jason Aycock, *ParkerVision loss grows as it awaits litigation results*, Seeking Alpha (Apr. 1, 2019), <https://seekingalpha.com/news/3447489-parkervision-loss-grows-awaits-litigation-results>; Ex. E., Will Robinson, *ParkerVision lays off 30 employees, pivots to focus on patent lawsuits*, Jacksonville Bus. J. (Aug. 23, 2018), <https://www.bizjournals.com/jacksonville/news/2018/08/23/parkervision-lays-off-30-employees-pivotsto-focus.html>.

Apple’s motion does not serve the equitable interests of simplifying issues at trial or reducing the burden of the Court and the parties. Rather, granting Apple’s motion would serve only one goal, helping Apple’s efforts to drive ParkerVision “out of business before it gets any money out of the computing giant.” Ex. B.

I. The Customer-Suit Exception Does Not Apply To Apple

The “customer-suit exception justifies a stay as to **retailer** defendants while litigation continues against a **manufacturer** defendant.” Ex. A. *CIT*, ECF No. 1392 at 1 (quoting *Mirror Worlds Techs. v. Dell, Inc.*, No. 6:13-cv-941 RWS, 2014 WL 11268268,

at *1 (E.D. Tex. Sept. 29, 2014) (citing *Spread Spectrum Screening LLC v. Eastman Kodak Co.*, 657 F.3d 1349, 1357 (Fed. Cir. 2011)) (denying **Apple's** motion to sever and stay under the “customer-suit exception”). The “customer-suit exception” does not **require** a court to sever and stay counts against a mere reseller, but a “court **may** apply the customer-suit exception if it would ‘facilitate just, convenient, efficient, and less expensive determination’ of the issues.” *Id.*

The Court need not determine whether to exercise its discretion to sever and stay under the “customer-suit expectation” because that exception does not even apply here: Apple is not a mere reseller of the accused products, Apple itself is the sole manufacture of the accused Apple products.

Moreover, as the Central District of California found when denying this same motion by Apple, severing and staying this case will not increase efficiencies, and will instead only make the proceedings more burdensome on the Court and ParkerVision. Ex. A., *CIT*, ECF No. 1392 at 1-2.

A. The Customer-Suit Exception Is Limited To “Mere Resellers,” And Does Not Apply To Manufacturers Like Apple

1. The Customer-Suit Exception Is Inapplicable Because Apple Manufactures Accused Products

None of the “customer-suit exception” decisions cited by Apple support Apple’s motion. As stated repeatedly throughout those decisions, the “customer-suit exception” does not apply to a defendant who manufactures an accused product, it applies (if at all) only to customer defendants who merely resell the accused product.

For example, the *Ambrose* decision noted that the “customer-suit exception” did not apply to “manufacturers” but could be applied to “defendants who were **merely resellers** of the allegedly infringing products.” *Ambrose v. Steelcase, Inc.*, No. 02-cv-2753, 2002 U.S. Dist. LEXIS 12527, at *19-20 (N.D. Ill. July 3, 2002) (citing *Magnavox Co. v. APF Elec., Inc.*, 496 F. Supp. 29, 35 (N.D. Ill. 1980)). As a result, the *Ambrose* Court did not sever and stay the claims against any of the manufacturer defendants, it only severed and stayed the claims against the lone defendant who was “merely” a reseller. *Id.* at *21-22.

The *Thermolife* decision cited by Apple likewise acknowledges that the proper subjects of a “customer-suit exception” are “mere purchasers of the Infringing Products who resold those products.” *Thermolife Int’l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-CV-60693-UU, 2016 U.S. Dist. LEXIS 122110, at *13-15 (S.D. Fla. June 8, 2016). The *Thermolife* Court therefore applied the exception only to those defendants who did not manufacture any accused products, and declined to stay the proceedings against a manufacturer. *Id.* Just like the manufacturer defendants in *Thermolife* and *Ambrose*, Apple is also a manufacture of accused products: Apple does not merely resell the accused Qualcomm chips, it uses those chips to manufacture other accused devices, such as the infringing Apple iPhones. Thus, the “customer-suite exception” cannot apply to Apple here.

Apple tries to avoid this precedent by repeatedly identifying only the “Accused Qualcomm Chips” as the products of accused of infringement in this case. *E.g.*, ECF No. 211 at 2, 6, 8. Apple is incorrect. ParkerVision’s complaint alleges that Apple infringes

ParkerVision's patent by making and selling **Apple products**, including "smartphones and tablets such as the iPhone 6 smartphone, iPhone 6S smartphone, and iPad Air tablet ('Apple Products')." ECF No. 121 at ¶ 15. Consistent with these allegations, ParkerVision's Infringement Contentions include contentions against "the Apple Accused Products, which are designed, developed, tested, made, imported, and sold by defendant Apple, Inc." *E.g.*, Ex. F, *ParkerVision's Final Infringement Contentions*, at 1 (Nov. 20, 2019). Examples of specific accused Apple products identified in ParkerVision's Infringement Contentions include: Apple iPhone 6, Apple iPhone 6 Plus, Apple iPhone SE, Apple iPad Mini (cellular), Apple iPad Air 2 (cellular), Apple iPad Pro 12.9 inch (cellular), Apple iPhone 6S, Apple iPhone 6S Plus, Apple iPad Pro 9.7 inch (cellular), Apple iPhone 7, Apple iPhone 7 Plus, Apple iPhone 8, Apple iPhone 8 Plus, Apple iPhone X, Apple iPhone X plus, and Apple Watch. *E.g.*, *Id.*, at 2-3.

Apple admits that it designs and manufactures the accused Apple products. *E.g.*, ECF No. 211-2 at ¶¶ 4, 7, 12-13, 17. Apple also admits that it modifies the accused Qualcomm chips to some extent for use in its products, as well as assisting the design and development of Qualcomm chips by helping to debug them. ECF No. 211-2 at ¶¶ 13, 17. Thus, Apple is not a mere reseller of accused products manufactured by another; Apple itself manufactures accused products. Therefore, the "customer-suit exception" is inapplicable because, as stated in the *Nintendo* case cited by Apple, it is the manufacturer who is generally the "true defendant."

Accordingly, this case should proceed against both Apple and Qualcomm, each of which indisputably manufactures one or more accused infringing products.

2. The Customer-Suit Exception Is Inapplicable Because Apple's Infringement Liability Is Not Dependent On Qualcomm's Liability

Apple repeatedly suggests that ParkerVision's infringement claims against Apple will rise and fall with ParkerVision's claims against Qualcomm. *E.g.*, ECF No. 211 at 2-3, 6, 8-11, 13. This purported justification for Apple's motion is not true.

In fact, Qualcomm's arguments demonstrate that Apple may be liable for infringement even if Qualcomm is not. For example, ParkerVision currently asserts that Qualcomm is liable as a direct infringer for its sales to Apple as well as an indirect infringer for inducing Apple's infringing sales of accused Apple products.¹ But Qualcomm denies infringement under either of these theories **even if Apple's accused products and sales in fact infringe ParkerVision's patent.**

To illustrate, as to direct infringement, Qualcomm has not conceded that its sales of infringing chips to Apple (or others) occur **in the United States**, a prerequisite to finding that those Qualcomm sales infringe ParkerVision's U.S. patent. 35 U.S.C. § 271(a) (2018) ("whoever without authority ... sells any patented invention, in the United States ... infringes the patent"). Thus, even if ParkerVision proves that the Qualcomm chips fall within the scope of a valid asserted patent claim, Qualcomm may still not infringe if it is found that Qualcomm's sales of those chips do not occur in the United States. Such a finding would have no effect on whether Apple's sales of accused Apple products infringe.

¹ These theories of infringement are exemplary and not intended to exhaustively identify all of ParkerVision's theories of infringement against Qualcomm.

Similarly, as to indirect infringement, Qualcomm does not admit that it has induced Apple's infringing sales of Apple products. First, Qualcomm has repeatedly argued (incorrectly) that indirect infringement and inducement are not issues within this litigation (despite ParkerVision having explicitly pleaded inducement and Qualcomm itself asserting a counterclaim for a declaratory judgment of no inducement). Second, to prove inducement, ParkerVision must prove other elements in addition to Apple's infringing acts, including specific intent. *See Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1219 (Fed. Cir. 2014); *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1363-64 (Fed. Cir. 2012). Thus, ParkerVision could fail to prove that Qualcomm is liable for indirect infringement even if Apple's sales of its accused products directly infringe ParkerVision's patent.

Put simply, ParkerVision's infringement claims against Apple will **not** rise and fall with ParkerVision's claims against Qualcomm. Even if ParkerVision fails to prove that Qualcomm has infringed, ParkerVision may still show that Apple's own accused conduct infringes.

B. The Case Law Cited By Apple (And Not Cited By Apple) Confirms That The Customer-Suit Exception Does Not Apply Here

1. The *CIT v. Broadcom and Apple* Decision

Apple cites numerous "customer-suit exception" cases, none of which are relevant here because Apple manufactures and sells the accused products and is not a "mere reseller" of those products. Apple identifies not a single case finding that the "customer-suit exception" applies to the present situation.

But there are decisions addressing this situation and **denying** a motion to sever and stay under the "customer-suit exception", including *The California Institute of Technology*

v. Broadcom Limited et al. (**including Apple**), in which the District Court denied **Apple's** motion to sever and stay on the same arguments Apple presents here. Ex. A., *CIT*, ECF No. 1392 at 1. The *CIT* Court did not find that the “customer-suit exception” applied, explaining, for example, that issues relating to whether sales between Broadcom and Apple constituted sales in the United States—the same issue that exists here for the sales between Qualcomm and Apple—precluded the requested sever and stay:

[There are] questions of fact as to what constitutes a “sale” in the United States [including] facts relating to Apple’s and Broadcom’s contractual and business relationship, including contracts between the two companies executed in the United States. ... [The] **Court does not see how resolving this extraterritoriality dispute would be served by severing and staying the case against Apple.**

Id. at 1 (emphasis added).

The *CIT* Court also noted that (as here) Apple’s requested sever and stay would increase inefficiencies, not decrease them:

This specific [location of sales] issue and other indirect infringement concerns aside, the Court agrees with Plaintiff that, even accepting Apple’s assertion that it would be bound by non-infringement and invalidity determinations researched in a trial against only Broadcom, **the practical reality of two trials on this subject matter instead of one does not appear likely to advance concerns of judicial economy in this case.**

Id. at 1-2 (emphasis added).

The Court therefore denied Apple’s motion to sever and stay under the “customer-suit exception”. *Id.* at 2. Apple knew of this decision and its relevance, but did not provide it to the Court.

2. The *Cellular Communications* and *St. Lawrence* Decisions

Apple also fails to disclose the pertinent details of two of the “customer-suit exception” decisions on which it tries to rely, details that again confirm that the “customer-suit exception” is inapplicable to Apple. Specifically, both the *Cellular Commc’ns* and *Saint Lawrence* decisions cited by Apple concern a similar fact pattern to the one presented here. See generally *Saint Lawrence Commc’ns LLC v. Apple Inc.*, No. 2:16-cv-82-JRG, 2017 U.S. Dist. LEXIS 188593 (E.D. Tex. July 12, 2017); *Cellular Commc’ns Equipment, LLC v. Apple Inc.*, No. 6:14-cv-251, (E.D. Tex. Aug. 26, 2016). In each of those cases, Apple manufactured phones using a chip from Qualcomm, and those phones were accused of patent infringement. *Id.* And, in each of those cases, the District Court determined that the “customer-suit exception” applied. *Saint Lawrence Commc’ns*, 2017 U.S. Dist. LEXIS 188593, at *7-8; *Cellular Commc’ns*, No. 6:14-cv-251 at 6-7.

But what Apple fails to inform this Court is that in each of these actions, **Apple was not one of the customers in question and each case proceeded in full against Apple.** In *Cellular Commc’ns* and *Saint Lawrence*, the issue was not whether the “customer-suit exception” applied to Apple; rather, the issue was whether the “customer-suit exception” applied to **Apple’s customers**, customers like AT&T, Verizon, Sprint, and T-Mobile who did not manufacture the accused Apple iPhones and iPads but merely resold them after buying the packaged iPhones and iPads from Apple. *Saint Lawrence Commc’ns*, 2017 U.S. Dist. LEXIS 188593, at *2, *5-8; *Cellular Commc’ns*, No. 6:14-cv-251 at 1, 2-6.

Thus, these decisions do not stand for the proposition that the “customer-suit exception” applies to Apple. To the contrary, the *Cellular Commc’ns* and *St. Lawrence* decisions each acknowledged that Apple was the entity who manufactured the accused devices using Qualcomm chips and that **the lawsuit should therefore proceed against “the manufacturer Defendant (Apple)”**:

- “Qualcomm supplies the relevant chips containing the allegedly infringing source code, **Apple manufactures the phones with the [Qualcomm] chips**, and the Carrier Defendants ... resell the phone [Therefore,] the Court Grants the Carrier Defendants’ Motion to Sever and Stay ... **leaving the claims against Apple in the present case.**” *Saint Lawrence Commc’ns*, 2017 U.S. Dist. LEXIS 188593, at *6, *7, *8.
- Apple is “the Manufacturer,” the Carriers are the “Retailer Defendants,” and “the case against the Carriers is hereby STAYED **until completion of the trial against Apple.**” *Cellular Commc’ns*, No. 6:14-cv-251 at *2, *3.

II. The Traditional Factors Weigh Against The Requested Sever-and-Stay

Because the “customer-suit exception” does not apply here, Apple also asks the Court to exercise its discretion to sever and stay ParkerVision’s claims against Apple. ECF No. 211 at 12-17. Apple’s “inherent power” arguments are again based on its repeated suggestion that: (1) ParkerVision’s infringement claims against Apple will rise and fall with ParkerVision’s claims against Qualcomm (ECF No. 211 at 2-3, 6, 8-11, 13); and (2) Apple has no evidence or information relevant to ParkerVision’s claims against Qualcomm (ECF No. 211 at 1, 6, 9, 14, 16). Neither is true.

Not only are the purported justifications for Apple’s motions not true, but motions to sever and stay are not favored where—as here—they unduly prejudice a plaintiff’s right to have its claims fully and finally adjudicated, or when granting the motion would result in inefficiencies in the adjudication of those claims. *See, e.g., Automatic Mfg. Sys. v. Primera Tech., Inc.*, No. 6:12-cv-1727-Orl-37DAB, 2013 U.S. Dist. LEXIS 67790, at *8 (M.D. Fla. May 13, 2013) (denying a motion to stay proceedings pending the Patent Office’s determination whether to institute *inter partes* review because “a stay could delay these proceedings for at least six months with little to show,” and, as such, “the Court finds that a stay would unduly prejudice or present a clear tactical disadvantage to Plaintiff.”). “The patent owner should be able, if it desires, to prosecute its claims, to take discovery, and to set its litigation positions” *Id.*

Indeed, in most of the decisions cited by Apple, any motion to sever and stay was **denied**, and Apple identifies not a single decision where an infringement case against a manufacturer defendant was severed and stayed under any circumstances, much less the ones presented here. *E.g.*, ECF No. 211 at 12, 14, 16-17.

A. The Requested Severance and Stay Would Not Simplify the Issues for Trial

As discussed, Apple’s repeated and unexplained argument that ParkerVision cannot prove infringement against Apple if Qualcomm is first found to not infringe in a separate trial is wrong. For this reason alone, Apple’s arguments concerning a simplified trial are without merit.

But also lacking merit is Apple’s repeated assertion that it “has no information that ParkerVision needs to make its case against Qualcomm.” ECF No. 211 at 1. Apple has

extensive information and evidence relevant to ParkerVision's direct and indirect infringement claims against Qualcomm and—contrary to Apple's renewed motion and representations—ParkerVision will present this Apple information and evidence regardless of whether the Apple case is severed and stayed.

For example, as to Qualcomm's direct infringement, Apple has information and evidence concerning the negotiations and circumstances of Qualcomm's sales to Apple. This evidence and information is relevant to whether those sales “occurred in the United States” as required for those Qualcomm sales to constitute direct infringement. *See, e.g., Carnegie Mellon Univ. v. Marvell Tech. Grp. Ltd.*, 807 F.3d 1283, 1305-11 (Fed. Cir. 2015). In the *CIT* decision that Apple failed to provide this Court, this was one of the reasons that the *CIT* Court denied Apple's motion to sever and stay under these very circumstances:

[There are] questions of fact as to what constitutes a “sale” in the United States [including] facts relating to Apple's and Broadcom's contractual and business relationship, including contracts between the two companies executed in the United States. ... [The] **Court does not see how resolving this extraterritoriality dispute would be served by severing and staying the case against Apple.**

Ex. A, *CIT*, ECF No. 1392 at 1 (emphasis added).

And, as to any indirect infringement claims presented at trial, to prove Qualcomm's liability for inducing Apple's direct infringement, ParkerVision would need to first prove both that Apple has directly infringed and the extent of Apple's infringement. *See Ericsson*, 773 F.3d 1201; *Toshiba*, 681 F.3d 1358. This would require ParkerVision to introduce the same information and evidence necessary to prove its claims against Apple, regardless of whether those claims are severed and stayed. Again, the *CIT* decision cites

such “indirect infringement concerns” as another reason for denying Apple’s motion to sever and stay under these circumstances. Ex. A, *CIT*, ECF No. 1392 at 1.

Thus, severing and staying the case against Apple will not simplify the trial, as ParkerVision will need to introduce Apple evidence and information concerning Apple’s activities regardless.

B. The Requested Severance and Stay Would Not Would Not Reduce The Burden On The Court and The Parties

In support of Apple’s (incorrect) argument that severing and staying the counts against Apple will reduce the burden on the Court and the parties, Apple repeats its assertions that it has no information or evidence relevant to ParkerVision’s infringement accounts. Again, this is not true, and this factor thus weighs against Apple’s requested relief.

Indeed, the only “burden” that Apple identifies as avoidable if its motion were granted is the need for Apple to serve a damages expert report and conduct a damages expert deposition.² ECF No. 211 at 15. Apple does not explain or support its unstated assertion that delaying this very limited and focused Apple damages expert discovery (which will overlap greatly with issues related to Qualcomm’s damages) is somehow more

² Apple’s complaints concerning the discovery ParkerVision sought during fact discovery are not only irrelevant to Apple’s motion (because such “burdens” have already occurred and will not be affected by any subsequent severance and stay), they also are baseless. ECF No. 211 at 1, 15. For example, after the parties met and conferred, the only depositions ParkerVision requested were directed solely to damages issues, which were not the subject of prior discovery and which Apple does not challenge as inappropriate here. The remaining depositions sought by ParkerVision became unnecessary only once Apple agreed to provide a suitable declaration and agreed that it would not be presenting trial witnesses on other topics. *See, e.g.*, ECF No. 221 at 3-4.

burdensome than forcing the Court and the parties to conduct two separate trials on the same subject matter. There is none. As the *CIT* Court correctly summarized when denying Apple's prior motion to sever and stay, Apple's requested sever and stay would increase inefficiencies, not decrease them:

This specific [location of sales] issue and other indirect infringement concerns aside, the Court agrees with Plaintiff that, even accepting Apple's assertion that it would be bound by non-infringement and invalidity determinations researched in a trial against only Broadcom, **the practical reality of two trials on this subject matter instead of one does not appear likely to advance concerns the judicial economy in this case.**

Ex. A, *CIT*, ECF No. 1392 at 1-2 (emphasis added).

C. The Requested Severance and Stay Would Unduly Prejudice ParkerVision and The Court

Apple's argument that ParkerVision will not suffer undue prejudice is baseless. Apple's proposed "lack of participation" will severely prejudice ParkerVision because, for example:

- ParkerVision (and the Court) would bear the added burden and expense of two trials on the same subject matter, requiring ParkerVision to present identical and overlapping arguments and evidence in two separate trials;
- Apple's proposed severance and stay would result in an extensive and unwarranted further delay in ParkerVision recovering any owed damages from Apple; and
- ParkerVision intends to introduce at trial Apple evidence and information to support ParkerVision's claims against Qualcomm.

Apple—one of the wealthiest companies in history—brushes off these hardships as if they were nothing. They are not. ParkerVision is being driven out of business by the

detrimental effects that defendants' conduct has had on ParkerVision's wireless technology business and the high and continued litigation costs associated with ParkerVision's ongoing attempts to prevent defendants from unjustly benefiting from their unauthorized use of ParkerVision's inventions. Exemplary reports state:

- “ParkerVision loss grows as it awaits litigation results”;
- “ParkerVision, the Jacksonville-based wireless technology maker, is laying off about 30 employees”;
- ParkerVision “is shrinking its Florida footprint to a single facility”;
- “ParkerVision reached an all-time high share price of \$564.40 in 2000 ... but it was trading at 21 cents before it was delisted Aug. 17[, 2018]”;
- ParkerVision “saw wider losses again in Q4 [2019] as it continues pursuing patent litigation and looks to contain costs against essentially no revenue”;
- “For the nine months ended September 30, 2019, we [ParkerVision] incurred a net loss of approximately \$5.8 million and negative cash flows from operations of approximately \$3.3 million. At September 30, 2019, we had a working capital deficit of approximately \$4.7 million and we had an accumulated deficit of approximately \$398.1 million. **These circumstances raise substantial doubt about our ability to continue to operate as a going concern within one year following [November 14, 2019,] the issue date of these consolidated financial statements.**”

See Ex. C – F.

And ParkerVision going out of business before it recovers damages from Apple is what Apple's motion is really about. A recent news article concerning Apple and its litigation tactics sums up Apple's purpose here:

Apple has adopted a legal strategy of **stringing the case out for as long as humanly possible... presumably in the hope that [Patent Owner] goes out of business** before it gets any money out of the computing giant.

Ex. B, McCarthy, *Apple loses FaceTime patent appeal again* (emphasis added); *see also* Ex. G, Mike Spector, *Can Bankruptcy Filing Save Kodak?*, Wall Street Journal (Jan. 20, 2012),

<https://www.wsj.com/articles/SB10001424052970204555904577169920031456052>

(reporting Kodak's court filing stating that Apple "took advantage of Kodak's weakened financial condition to drag out litigation over alleged intellectual-property violations"); Ex. H, Adam Mossoff, *Apple Pays for Its Patent Infringement, But Important Legal Cases Continue*, IP Watchdog (Mar. 19, 2019), <https://www.ipwatchdog.com/2019/03/19/apple-pays-patent-infringement-important-legal-cases-continue/id=107425/> ("Apple is engaging in a practice now called 'efficient infringement' [because too] often companies like Apple really think they can just get away with infringing others' patent rights because they have the resources to outlast patent owners in these legal challenges.").

Apple's former head of patent licensing and strategy, Boris Teksler, recently remarked that for cash-rich companies like Apple "that can afford to litigate without end," where the benefits outweigh the legal costs of defending against a lawsuit, it can be viewed as the "fiduciary responsibility" to infringe as efficiently as possible. Ex. I, *Rules to Curb Frivolous Patent Claims May Encourage Infringement*, The Economist (Dec. 14, 2019),

<https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting>.

Apple's motion does not serve the equitable interests of simplifying issues at trial or reducing the burden of the Court and the parties – its motion does not identify any such equities. Rather, granting Apple's motion would serve only one goal, helping Apple's efforts to drive ParkerVision “out of business before it gets any money out of the computing giant.” Ex. B, McCarthy, *Apple loses FaceTime patent appeal again*.

III. The Court Already Correctly Denied This Same Motion

Apple claims that its motion seeks to reduce the burden on the Court and ParkerVision, but its motion is an unnecessary use of the Court's and ParkerVision's time and resources. In this same litigation, Apple already filed a prior motion seeking the same exact remedy (sever and stay) for the same exact reasons (“customer-suit exception” and, alternatively, the Court's inherent powers). ECF No. 109, at 1, 13-20. ParkerVision already devoted time and resources opposing Apple's motion (ECF No. 122). The Court should not be burdened with reconsidering a motion it has already denied when the facts are unchanged (ECF No. 151 at 29).

The Court denied Apple's prior motion to sever and stay “without prejudice to refiling after the have had time to consider the Court's claim construction.” ECF. No. 151 at 29. But Apple refiled this motion without providing any explanation of how the Court's claim construction order justified the refiling.³ Apple simply repeats the same arguments

³ Apple mentions the Court's claim construction order in a footnote, but provides no analysis or explanation as to how the order supposedly “strengthens Apple's request to sever and stay.” ECF No. 211 at 5, n.9.

from its prior motion, none of which rely on or are affected by the Court's claim construction order.

IV. Conclusion

For the foregoing reasons, Apple's renewed motion to sever and stay this action should be denied.

Dated: February 18, 2020

**MINTZ, LEVIN, COHN, FERRIS,
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CERTIFICATE OF SERVICE

I certify that on February 18, 2020, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: none.

/s/ William A. Meunier

Attorney