IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SILICON GRAPHICS, INC.,

OPINION and ORDER

Plaintiff,

06-C-611-C

v.

ATI TECHNOLOGIES, INC.,
ATI TECHNOLOGIES ULC, and
ADVANCED MICRO DEVICES, INC.,

Defendants.

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In this action for patent infringement, plaintiff Silicon Graphics, Inc. contends that products made by defendant ATI Technologies Inc. infringed three of plaintiff's patents relating to advanced graphics processing technology. These patents include United States Patent Nos. 6,650,327 (the '327 patent), 6,292,200 (the '200 patent) and 6,885,376 (the '376 patent). ATI Technologies ULC is successor-in-interest to defendant ATI Technologies, Inc.

Presently before the court is defendant ATI Technologies ULC's "Motion for Certification Regarding Plaintiff's Lack of Standing to Sue for Patent Infringement." On June 14, 2007, I issued an Opinion and Order, dkt. #136, in which I found that although

plaintiff lacked prudential standing to bring infringement actions with respect to the '200 and '327 patents at the outset of this case, it cured the defect when it procured the assignment of ownership rights from three inventors. Defendant disagrees and asks that I certify the following question for immediate resolution by the Court of Appeals for the Federal Circuit: may a plaintiff who lacks prudential standing at the commencement of litigation cure the standing defect through a subsequent assignment from a co-owner of the patent?

Defendant argues that this question has not been addressed squarely and definitively by the Court of Appeals for the Federal Circuit and that if the court of appeals ruled in the negative that it would speed the resolution of this case because plaintiff would not be able to pursue its claims with respect to the '200 and '327 patents. On July 27, 2007, plaintiff advised the court that it opposed defendant's motion and proposed a briefing schedule, if necessary. A briefing schedule will not be necessary because I will deny defendant's motion.

Generally speaking, denial of a motion to dismiss is not a "final decision" over which an appellate court has jurisdiction. 28 U.S.C. § 1291, Nanda v. Board of Trustees of the University of Illinois, 303 F.3d 817, 821 (7th Cir. 2002). However, 28 U.S.C. § 1292(b) provides a limited exception to this rule:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for

> difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Id.

Such an interlocutory appeal is available only when all of the following conditions are met: (1) an appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation; and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed. Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1007 (7th Cir. 2002).

I am inclined to agree with defendant that this question meets most of the criteria for certification. However, defendant has not persuaded me that an immediate appeal would do anything to speed the resolution of this litigation. It is true that, if the court of appeals disagrees with this court's resolution of the motion to dismiss, plaintiff would have to go back to the drawing board with respect to its infringement claims related to the '200 and '327 patents. Certification of the issue would provide the parties a definitive answer to the question somewhat sooner. However, if the court of appeals affirms the decision, denying defendant's motion would insure that a resolution on the merits had been reached as well. This would avoid the need for the case to return to this court for further proceedings and the parties and the court to revisit matters that are currently pending.

In addition, under no circumstances will the standing issue related to the '200 and

'327 patents resolve all of plaintiff's claims against defendants. Defendant did not challenge plaintiff's standing to bring claims related to the '376 patent. Therefore, litigation between the parties will continue in this court in any event. It will be more efficient for this court, and the court of appeals, if necessary, to consider all of the claims together.

ORDER

IT IS ORDERED that defendant ATI Technologies ULC's "Motion for Certification Regarding Plaintiff's Lack of Standing to Sue for Patent Infringement" is DENIED because certification will not "materially advance" the resolution of this litigation.

Entered this 31st day of July, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge