UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

01 COMMUNIQUE LABORATORY, INC.,	)	CASE NO. 1:06CV253
	)	
	)	
	)	
PLAINTIFF,	)	JUDGE SARA LIOI
	)	
vs.	)	
	)	
	)	ORDER REGARDING
CITRIX SYSTEMS, INC., et al.,	)	MOTION IN LIMINE
	)	DOC. NO. 405
	)	
	)	
DEFENDANTS.	)	

During the time leading up to trial in this patent infringement case, both defendants Citrix Systems, Inc. and Citrix Online, LLC (collectively, "Citrix" or "defendants"), and plaintiff 01 Communique Laboratory, Inc. ("plaintiff" or "01 Communique"), filed multiple motions in limine. The Court conducted hearings on the motions after they were fully briefed, beginning on December 21, 2015, and continuing December 28 and 29, 2015, and on January 4 and 6, 2016. In addition to the reasons and rulings stated by the Court on the record with respect to Citrix's motion in limine number 1 (Doc. No. 405), the Court finds and rules as provided herein.

Pursuant to Federal Rule of Evidence 403, the Court finds that the limited probative value, if any, of reference to the prosecution history involving the reexamination requested by Citrix, as a "reexamination" and that it was requested by Citrix, is substantially outweighed by the risk of unfair prejudice to Citrix, especially the risk of confusion of the jurors.

Permitting use of the term "reexamination" and reference to Citrix's involvement would entail a mini-trial on the difference between the review that the United States Patent and Trademark Office ("PTO") performs versus the adjudication of the infringement of the patent and validity of the patent in a court of law.

As the parties have acknowledged, the PTO utilizes a different legal standard for evaluating patentability than is used in court. Additionally, the PTO is only permitted to review and consider a certain limited type of information when considering the validity of a patent.

As it stands now, as to the issue of invalidity, the 479 patent has been presumed valid since its issuance and through the completion of the reexamination process. Citrix will have the burden, by clear and convincing evidence, to establish invalidity. As to the issue of infringement, 01 Communique will have the burden of establishing infringement by the preponderance of the evidence.

In advancing their claims, the parties are certainly entitled to introduce the prosecution history in this case and include all prior art that the examiners considered. The parties may also rely upon certain information in the prosecution history as to the claims of the patent and as to prior art. It is of very minimal, if any, probative value as to who brought the prior art to the attention of the examiner. It fact, given the role of the jury in this case, it would be unfairly prejudicial to Citrix to attribute the reexamination request to Citrix or to indicate that it was Citrix that advanced certain arguments in the reexamination process. This is especially true since Citrix is only permitted to rely on a very limited type of evidence (patents and printed articles) when taking a position with the PTO during reexamination. The jurors may put undue weight on the fact that it was Citrix who advanced the arguments which, in the end, were

rejected by the PTO, even though the PTO does not make its decision based upon the same standard as used in an infringement/invalidity lawsuit, nor does it have the benefit of the full array of evidence that will be presented to a jury for its consideration.

Thus, the Court finds the "reexamination record" shall be redacted as follows:

1. The term "reexamination" and the phrase "Request for *Inter Partes* Reexamination" and the parties shall generally refer to the entirety of the proceedings before the PTO as the "prosecution history."
2. References of the 01 Communique vs. Citrix litigation in this Court.
3. References that it was Citrix who requested the reexamination.
4. References that it was Citrix who raised certain arguments for the PTO to consider; however, the parties may discuss the arguments and information that the PTO was asked to consider and those items will remain in the record.
5. References that certain arguments are attributable to a former Citrix expert who is not testifying in this case; however, the parties may need to put into context statements that a witness testifying in this case made to the PTO, *e.g.*, Dr. Ganger, and the parties will be permitted to identify the question or statement the witness was responding to, without attributing the statement to a former expert of Citrix. That is, the parties will be permitted to put the statement of the witness into context.

As a general matter, the parties may reference the prior art that was considered by the PTO and the patents and printed publications presented with respect to the prior art, but they will not be permitted to reference how many time that prior art was considered by the PTO.

IT IS SO ORDERED.

Dated: January 9, 2016

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE