

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

X2Y ATTENUATORS, LLC,
Plaintiff-Appellant

v.

INTEL CORPORATION,
Defendant-Appellee

APPLE INC., HP INC., HEWLETT-PACKARD
ENTERPRISE COMPANY,
Defendants

2018-2248, -2249

Appeals from the United States District Court for the
Western District of Pennsylvania in Nos. 1:11-cv-00117-CB and
1:11-cv-00218-CB, Judge Cathy Bissoon.

**PLAINTIFF-APPELLANT X2Y ATTENUATORS, LLC'S
OPENING BRIEF**

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant X2Y Attenuators, LLC certifies the following:

1. The full name of every party or *amicus* represented by us is: X2Y Attenuators, LLC.
2. The names of the real party in interest represented by us is: n/a.
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:
None.
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 (and who have not or will not enter an appearance in this case) are:

DOVEL & LUNER LLP: Jonas Jacobson, Christin Cho, Richard Lyon, Julien Adams, Simon Franzini

HOUSTON HARBAUGH (FORMERLY PICADIO SNEATH MILLER & NORTON, P.C.): Henry Sneath, Amber Reiner Skovdal

ALSTON & BIRD LLP (PRIOR COUNSEL): Michael J. Chapman

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

X2Y and Intel are in litigation in *X2Y Attenuators, LLC v. Intel Corporation*, No. 3:18-cv-01394-SB (D. Or.). However, X2Y does not presently foresee that case directly affecting, or being directly affected by, this Court's decision.

November 14, 2018

Respectfully submitted,

/s/ Jeff Eichmann

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STATEMENT OF RELATED CASES

This is a consolidated appeal arising from the dismissal of two district court cases filed in Western Pennsylvania. Neither case has been the subject of an appeal to this or any other appellate court. This Court previously heard an appeal of an ITC determination regarding three of the six patents at issue in this appeal. *X2Y Attenuators, LLC v. ITC*, 757 F.3d 1358 (Fed. Cir. 2014). Two additional X2Y patents are asserted against Intel in a pending district court action in Oregon. *X2Y Attenuators, LLC v. Intel Corporation*, No. 3:18-cv-01394-SB (D. Or.).

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over the two patent infringement cases X2Y filed under 28 U.S.C. § 1338(a). The cases were stayed pending an ITC proceeding and administratively closed. On August 23, 2017, X2Y moved to reopen the cases and lift the stay. On July 13, 2018, the district court denied X2Y's motion and granted Defendants' cross-motion to dismiss with prejudice for failure to prosecute. The district court enter a final judgment on that same date. X2Y timely filed a notice of appeal on August 9, 2018. This Court has jurisdiction under 28 U.S.C. §§ 1292(c) and 1295(a)(1).

STATEMENT OF THE ISSUES

An involuntary dismissal is an extreme sanction reserved for an incorrigible plaintiff that has failed to comply with case deadlines to the demonstrated prejudice of a diligent defendant. Here the Plaintiff moved to reopen two stayed cases that neither side was actively litigating, and in response the district court dismissed the cases for failure to prosecute. The court did so in the absence of (a) any violation of a court order or deadline or any bad faith by the Plaintiff; (b) any showing that Defendants had actually been prejudiced; (c) any concern for the merits of Plaintiff's claims; or (d) any attempt to consider alternative sanctions short of dismissal. Was that an abuse of discretion?

STATEMENT OF THE CASE

I. X2Y Attenuators and its pre-suit dealings with Intel.

A. X2Y invents award-winning technology for reducing electromagnetic interference and is awarded 70 U.S. patents.

X2Y Attenuators, LLC was founded in 1996 by lead inventor Tony Anthony and his business partner Don Harris. Appx39 (Anthony decl. ¶1). The company was created to invent and develop energy conditioning products, such as chip capacitors, that reduce electromagnetic interference in electronics equipment. X2Y licenses its technology to third parties that manufacture X2Y-branded components, which are then incorporated in various commercial products, such as Bose noise cancelling headphones, Sirius satellite radios, and Altera integrated circuit designs.

X2Y's licensed manufacturers include industry leaders Samsung, Yageo, and Johanson Dielectrics. Appx209 (Anthony reply decl. ¶8). In 2003, the IEEE's EMC (Electromagnetic Compatibility) Society gave Mr. Anthony a Technical Achievement Award in recognition of his 38 years of engineering contributions and X2Y's technology. In the U.S. alone, Mr. Anthony and his co-inventor—son Bill Anthony—have been awarded over 70 patents relating to X2Y's inventions, including the six at issue here. Appx371-406 ('249 patent); Appx407-439 ('227 patent); Appx440-475 ('500 patent); Appx476-515 ('621 patent); Appx516-546 ('444 patent); Appx552-584 ('241 patent).

B. Intel discovers X2Y's inventions, leading to a decade of technical discussions and data sharing.

In July 1999, two separate groups of Intel engineers approached X2Y without solicitation. Appx201-203 (Anthony reply decl. ¶¶2-5). The first group consisted of Chee Yee Chung, David G. Figueroa, and Yuan-Liang Li (these names will reappear below), three microprocessor packaging engineers at Intel's Chandler Arizona facility. Appx203 (¶4). They directly emailed X2Y with questions about X2Y's technology on July 21, 1999. *Id.* The second group was from Intel's facility in Folsom, California. Appx203 (¶5). Without any awareness that their colleagues in Arizona had already been in contact, the California group contacted X2Y by phone and later sent a non-disclosure agreement that Intel and X2Y entered on July 30, 1999. Appx203-204 (¶¶5-6).

What followed was a ten-year period of on-again/off-again meetings, emails, telephone discussions, and testing data exchanges between X2Y and no fewer than 40 Intel engineers and employees. Appx204-208 (¶7). The parties even collaborated to coauthor and publish a technical article relating to X2Y's technology in 2005. Appx207. But while Intel gladly consumed X2Y's research and testing data, and vast amounts of time from X2Y's personnel, Intel never agreed to purchase or license X2Y's technology from X2Y or its manufacturer-licensees.

C. X2Y discovers that Intel has copied its technology into its own patent filings. The Patent Office resolves the issue in X2Y's favor, granting X2Y's '227 patent with the claims Intel drafted.

In 2002, in the middle of the parties' years-long discussions, X2Y inventor Bill Anthony made a troubling discovery. He learned that in September 2000, Intel had filed for two patents that included content that was proprietary to X2Y and subject to the parties' 1999 non-disclosure agreement. Appx210 (¶10). Those filings later issued to Intel as U.S. Patent Nos. 6,559,484 and 6,509,640, naming as inventors Chee Yee Chung, David G. Figueroa, and Yuan-Liang Li. *Id.* These are the same three Intel engineers that first contacted X2Y in July 1999.

X2Y did not know what to make of this discovery. It did not know whether Intel was actually practicing what was described in its own patents, and X2Y did not want to file a lawsuit—against an industry-leading company that it was still trying to do business with—if it could avoid it. Appx210-211 (¶11). But X2Y also wanted to make certain that the Patent Office—and the industry—knew that what was described in Intel's patent filings was invented not by Intel in 2000 but by X2Y in 1996. *Id.*; Appx328 (Anthony Witness Statement, Q427-Q428). X2Y decided to file an interference proceeding at the Patent Office and to amend one of its pending patent applications to recite the same claims recited by Intel in its patents. Appx210-211 (¶11). This process led to the Patent Office granting X2Y U.S. Patent No. 7,110,227 in September 2006. *Id.* The '227 patent issued with all

of the same claims that had been recited by the Intel patents, word for word, because X2Y had the earlier priority. *Id.*; Appx407-439 ('227 patent).

D. X2Y attempts to license the '227 patent to Intel.

After obtaining the '227 patent, and while technical discussions were still ongoing between the parties, X2Y decided to approach Intel about licensing the '227 patent and certain continuation patents. This led to a series of discussions between X2Y principals Bill and Dave Anthony and Intel Licensing Manager Pamela Hays beginning in September 2008 and ending in July 2009. Appx151 (Hays Witness Statement, Q224). The discussions were amicable but unproductive. Intel asserted that it “did not believe” it was using the technology it had copied from X2Y and put in its own patent filings but provided no concrete support for this belief. Appx152 (Q229); Appx209 (¶9). And for its part, X2Y did not have any evidence of infringement at this time. *Id.*; Appx161 (Bill Anthony ITC Testimony, ll. 1-23).

E. X2Y discovers Intel's infringement and retains Alston & Bird.

X2Y decided to obtain samples of Intel microprocessors and take them apart for inspection. Appx209 (¶9). This was now August 2009, the month after the last discussion with Ms. Hays. *Id.* X2Y's inspection revealed that several Intel microprocessors contained the structures invented and patented by X2Y. *Id.* This was the first actual confirmation that Intel had not only copied X2Y's patented

inventions into its patent filings but had also used the X2Y inventions in its actual products. *Id.* X2Y sought counsel and in 2010 retained the firm of Alston & Bird, which had a well-regarded ITC practice group. Appx40 (¶3).

II. The ITC investigation and appeal.

A. Alston & Bird files at the ITC complaint and in the district court. The district court cases are stayed at Defendants' request.

On May 31, 2011, Alston & Bird filed a complaint for X2Y at the International Trade Commission, asserting the '227 patent and four others. Appx40 (¶4). They named as Respondents Intel, various Intel affiliates, and Intel customers Apple and HP. On July 7, 2011, the ITC instituted an investigation. *In the Matter of Certain Microprocessors, Components Thereof and Products Containing the Same*, Investigation No. 337-TA-781.¹

On the same date the ITC complaint was filed, Alston & Bird also filed a district court complaint in Erie, Pennsylvania, where X2Y was founded and is based. The complaint asserted the same five patents against Intel, Apple, and HP that were asserted at the ITC. *X2Y Attenuators, LLC v. Intel Corporation, et al.*, case 1:11-cv-00117-CB (W.D. Pa.) (the "117 case"). Soon thereafter X2Y was issued an additional patent, the '241 patent, which was added to the ITC

¹ Less than two months after institution, Alston & Bird's core ITC group—including the lead partner on X2Y's case, Paul Brinkman—was poached by Quinn Emanuel. But Alston & Bird did not release X2Y from its contract.

investigation and asserted in a separate district court case filed on September 22, 2011. *X2Y Attenuators, LLC v. Intel Corporation, et al.*, case 1:11-cv-00218-CB (W.D. Pa.) (the “218 case”). Defendants moved to stay the 117 case under 28 U.S.C. §1659(a). Appx334-337 (Motion and Proposed Order). The court granted their motion on August 1, 2011. Appx338 (Order). Defendants also moved to stay the 118 case and the court granted their motion on October 26, 2011. Appx346-350; Appx351. On June 1, 2012, newly assigned Judge Cathy Bissoon issued “text-only” orders in both dockets, ordering the cases administratively closed “for statistical purposes.” Appx342-43 (117 case docket); Appx355-56 (218 case docket). The orders provided: “if and when appropriate, any party may restore this action to the Court’s active calendar by application or motion.” *Id.*

B. Alston & Bird narrows the ITC assertions.

During the course of the ITC investigation, Alston & Bird decided to narrow the scope of the investigation, ultimately asserting just 11 claims from three of the six patents that were initially asserted: the ’500 and ’444 patents (which were also asserted in the 117 case), and the ’241 patent (which was asserted in the 218 case). As a result, none of the claims of X2Y’s ’227, ’249, and ’621 patents were ever construed or adjudicated at the ITC.

C. The ALJ rules overwhelmingly in favor of Respondents.

The ITC investigation was ultimately assigned to Administrative Law Judge

David Shaw, who presided over an evidentiary hearing in August 2012. Prior to that hearing, there had been no claim construction rulings. On December 14, 2012, Judge Shaw issued an Initial Determination. *Certain Microprocessors, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-781, Initial Determination, 2012 ITC LEXIS 2658 (Dec. 14, 2012). Judge Shaw adopted Respondents' narrow claim constructions for the 11 claims that were then asserted and ruled in favor of Respondents almost across the board, finding no infringement, invalidity under Section 102 and 103, indefiniteness, and a failure to meet the technical prong of the domestic industry requirement. *Id.*

D. The Commission reverses most of the ALJ's findings but not the key claim construction and non-infringement rulings.

On March 4, 2013, the Commission issued an Opinion in which it reversed many of the administrative law judge's determinations—including those concerning invalidity and indefiniteness. Appx585-607 (Commission Opinion). The Commission did not, however, decide to review or reverse the narrow claim construction ruling that led to the finding of non-infringement. *Id.*

E. Alston & Bird drops X2Y after the Federal Circuit affirms.

Alston & Bird filed an appeal, seeking to reverse the ITC claim construction

and resulting finding of non-infringement.² The Federal Circuit affirmed. *X2Y Attenuators, LLC v. Int'l Trade Comm'n*, 757 F.3d 1358 (Fed. Cir. 2014). The Court found that the asserted claims of two of the three patents—the '500 and '444 patents—were subject to disavowing statements made in their specifications (or incorporated by reference) that warranted the narrow claim constructions issued at the ITC. *Id.* at 1362-63. But for the third patent—the '241 patent—the Court made no such finding. The Court found no such disavowing statements but nonetheless affirmed the narrow ITC construction based on an alleged litigation agreement between the parties. *Id.* at 1362, n.2 (“The parties chose to treat the electrode terms across the three asserted patents as rising and falling together. *See* J.A. 131-32. Therefore, we do not separately address the '241 patent.”).

Alston & Bird filed a petition for rehearing en banc. Appx40 (Anthony decl. ¶6). The petition was denied on September 24, 2014. *Id.* On September 26, 2014, Alston & Bird notified X2Y that it would not seek Supreme Court review and furthermore would no longer represent X2Y in the stayed district court cases. *Id.* The mandate issued to the ITC on October 1, 2014, thus finally concluding the ITC investigation. Appx608.

² On appeal, Alston & Bird abandoned the contention that Respondents nonetheless infringed under the ITC’s construction—a contention for which substantial evidence existed.

III. The post-ITC proceedings in the district court.

A. X2Y diligently attempts to secure new counsel.

Immediately after being dropped by Alston & Bird, X2Y principals Bill and Dave Anthony began to seek new counsel to represent the company in the district court. Appx41 (Anthony decl. ¶7). On October 16, 2014, they contacted Dovel & Luner about taking over the stayed district court cases. *Id.*; Appx54 (Eichmann decl. ¶11). This led to an in-person meeting at the Dovel firm in California on December 9, 2014, followed by a months-long process of due diligence by several attorneys at the Dovel firm. Appx55-57 (Eichmann decl. ¶¶14-17); Appx46-47 (Cho decl. ¶¶4-7); Appx69-70 (Luner decl. ¶¶4-5).

1. After months of due diligence the Dovel firm decides it wants the case.

It was a complicated new matter to evaluate. The record from the ITC investigation was extensive (with over 600 docket entries representing many thousands of pages), and much of the record was not available for review by X2Y itself or any new counsel, due to the ITC protective order. The X2Y patents asserted at the district court are part of a family of more than 70 U.S. patents that have complicated chains of priority and cross-references to each other's specifications that need to be understood for purposes of validity and claim construction. The claimed technology is not simple. Nor was the factual background between X2Y and the Defendants, or the legal issues that needed to be

researched before the firm could agree to take over the district court matters.

After three firm-wide meetings at the Dovel firm—and many more informal meetings and reviews by the attorneys that were aided by constant communication with X2Y’s principals—the Dovel firm notified X2Y that it wanted to take on the matter. Appx41 (Anthony decl. ¶7); Appx55-57 (Eichmann decl. ¶¶14-17); Appx46-47 (Cho decl. ¶¶4-7); Appx69-70 (Luner decl. ¶¶4-5). This was on August 24, 2015. Appx47 (Cho decl. ¶6). The firm would still need to perform additional diligence before entering an appearance in the district court. Appx57 (Eichmann decl. ¶17). But the focus at this point turned to negotiating a retainer agreement between X2Y and the Dovel firm. *Id.* A draft agreement was sent to X2Y on August 25, 2015. *Id.*

2. The Dovel firm insists that X2Y renegotiate its still-operative contracts with Alston & Bird and a litigation funder that financed that firm. This takes many months.

By the end of October 2015, X2Y and the Dovel firm had agreed in principle to the terms of a retention agreement. Appx70-71 (Luner decl. ¶6). But neither party signed. *Id.* The Dovel firm came to realize that X2Y had complicated (and problematic) contracts not just with Alston & Bird but also with a litigation funder that had financed that firm’s representation of X2Y. *Id.*; Appx71-72 (¶¶9-10). The Dovel firm determined that it could not ethically or effectively represent X2Y in the district court matters unless these prior contracts were either terminated or

amended. Appx70-72 (Luner decl. ¶¶6-10). The firm insisted that this be done as a precondition to signing its own retention agreement with X2Y and proceeding in the district court. Appx71-72 (¶8, ¶10).

X2Y therefore set out to renegotiate its contracts, a difficult process that took far longer than anyone had ever anticipated due the complexity of the agreements and the strong resistance X2Y encountered in its negotiations with the litigation funder. Appx41-43 (Anthony decl. ¶¶8-11); Appx71-73 (Luner decl. ¶7, 9-13); Appx57-63 (Eichmann decl. ¶¶18-38). It was not until March 8, 2017, that X2Y—with the assistance of the Dovel firm—was finally able to enter renegotiated contracts with the litigation funder and Alston & Bird, clearing the path for the Dovel firm to take on the case. Appx43 (Anthony decl. ¶11); Appx62 (Eichmann decl. ¶¶36-37).

3. The Dovel firm completes its final diligence and enters a retention agreement with X2Y.

With the contractual barriers now removed, the Dovel firm turned back to completing its diligence on the merits. Appx63-64 (Eichmann decl. ¶¶38-42). On May 15, 2017, X2Y and the Dovel firm finalized and, for the first time, signed a retention agreement. Appx64 (¶41).

B. X2Y moves to reopen the district court cases. For the first time, Defendants complain of X2Y's inaction and move for sanctions.

On June 22, 2017, the Dovel firm filed a new complaint in the Western

District of Pennsylvania against Intel, asserting two additional X2Y patents that were not asserted at the ITC. Appx609-625 (Complaint). In the complaint, which was served on June 27, 2017, X2Y also asserted that it would soon be moving to lift the stay in the pending 118 and 218 cases. Appx609 (¶1). On June 28, 2017, X2Y's newly retained local counsel entered an appearance in the stayed district court cases. Appx6-9. On June 29, 2017, X2Y's lead counsel at the Dovel firm contacted Defendants' local counsel in Western Pennsylvania to meet and confer about reopening the cases and lifting the stay. Appx65 (Eichmann decl. ¶44). This led to telephone discussions on July 11, 24, and 31. Appx65-67 (¶¶44-48). Defendants asserted that they would oppose X2Y's motion to reopen and would likely move to dismiss for failure to prosecute.³ Appx65-66 (¶¶47-48). This was the first time in the history of the district court cases that Defendants had ever raised a complaint with X2Y failing to prosecute or for otherwise causing case delays. Appx43-44 (Anthony decl. ¶12).

On August 23, 2017, X2Y filed its motions to reopen the district court cases and lift the stay. Appx14-21 (Motions and Proposed Orders); Appx22-38 (Brief). The motions were supported by detailed declarations from X2Y's managing member Dave Anthony (Appx39-44) and from Dovel & Luner partners Christin

³ Defendants also stated that they might move for alternative sanctions, such as a limitation on the period of past damages that could be obtained. Appx66 (¶48).

Cho (Appx45-49), Jeff Eichmann (Appx50-67), and Sean Luner (Appx68-73).

On September 19, 2017, Defendants filed an opposition and a cross-motion to dismiss for failure to prosecute. Appx90-92. They did not submit any declarations from any employee or in-house counsel of Defendants to support any of their assertions of prejudice. Nor did they seek to depose X2Y's declarants to challenge their sworn statements.

C. The district court denies X2Y's motion to reopen, finds a failure to prosecute, and issues the most extreme sanction possible.

Nearly a year after X2Y's motion is filed, and without holding a hearing on the parties' motions, the district court issued an order. Appx1-4. The court granted Defendants' motion to dismiss with prejudice and denied X2Y's motion to reopen as moot. *Id.* In its order, the court declared that "Plaintiff's arguments do not pass the 'smell-test'" (Appx1), suggesting that the court disbelieved the sworn statements of X2Y and its new counsel. The court criticized X2Y for providing explanations that "are too inwardly-focused, and beg too much forgiveness." *Id.* Like Defendants, the court overstated the period of delay at issue, suggesting it could be counted as "six years since the lawsuits initially were filed." Appx2.

In response to Defendants' claims of prejudice, the court wholesale "incorporate[d] their arguments and evidence as if fully restated." Appx2. The court did not find any violation by X2Y of a court order, any missed deadline, or any other prior "history of dilatoriness" by X2Y. Appx1-4. Nor did the court find

that X2Y or its counsel had acted in bad faith, or attempted to gain any unfair advantage by delaying in moving to reopen the case. *Id.* But the court did not credit this in favor of X2Y.

The court largely agreed with Defendants on the issue of case merits, stating the “objective realities” of X2Y’s affirmed loss at ITC show X2Y is likely to lose in the district court as well. Appx2. The court gave no apparent credit to X2Y’s showing that the ITC outcome was irrelevant as a matter of Third Circuit law, that the ITC outcome has no preclusive effect on any of X2Y’s claims, and that three of the six asserted patents were never actually adjudicated by the ITC. *Id.*

Finally, and most significantly, the district court failed to give any consideration to alternative sanctions and instead decided to issue the most extreme sanction possible—a dismissal with prejudice. Appx2-3. The result was to effectively extinguish the six X2Y patents that were asserted in the district court and their combined 307 claims, most of which have never been adjudicated.

SUMMARY OF THE ARGUMENT

Plaintiff X2Y moved to reopen two stayed district court cases that neither side had been litigating. In response Defendants moved to dismiss for failure to prosecute. Defendants had never previously raised a complaint with X2Y's inaction in the district court cases, nor had the court. Faced with Defendants' motion, the district court was required to carefully consider and balance six factors:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

The district court did not do so. The court recited the factors and applied most of them, but its three-page analysis was not careful and was clearly incorrect.

First, the court found X2Y personally responsible for the delay in moving to reopen the cases, even though the sworn declarations of X2Y and its counsel established the opposite. X2Y could not have earlier moved to reopen the cases because it did not have counsel, and X2Y acted diligently and in good faith to secure new counsel. Responsibility for the delay rests not with X2Y but with its prior and current counsel, and a previously engaged litigation funder that financed prior counsel at the ITC.

Second, the court wholesale adopted Defendants' unsupported claims of prejudice. Theoretical assertions of prejudice are insufficient under Third Circuit law, but that was all that Defendants offered. They provided no evidence that they would be prejudiced if the cases were reopened in 2017 rather than at some earlier date in the prior two and a half years.

Third, the court found no history of dilatoriness—no prior violations of case deadlines or discovery obligations—and no willfulness or bad faith by X2Y or its counsel; yet the court failed to credit this in X2Y's favor.

Fourth, in addressing the merits standard, the court disregarded its duty to look solely to the pleadings, which on their face establish that X2Y's claims have merit under *Poulis*. Instead the court credited Defendants' reliance on the ITC outcome and failed to acknowledge X2Y's showing that the ITC outcome (a) does not preclude any of X2Y's district court claims and (b) did not even address three of the patents asserted in the district court.

Fifth, and most significantly, the district court failed to meaningfully consider alternative sanctions that could have been tailored to any specific risks of prejudice. Instead the court went ahead to adopt what is supposed to be a sanction of last resort, a dismissal with prejudice.

ARGUMENT

I. Standard of review.

This Court reviews the imposition of sanctions under regional circuit law for an abuse of discretion. *Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1298 (Fed. Cir. 2016) (reversing default sanction issued under *Poulis*). “While this standard of review is deferential, a district court abuses its discretion in imposing sanctions when it ‘base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.’” *Bowers v. NCAA*, 475 F.3d 524, 538 (3d Cir. 2007) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *Adams v. Trs. of the N.J. Brewery Employees' Pension Tr. Fund*, 29 F.3d 863, 867 (3d Cir. 1994) (reversing dismissal under *Poulis* despite “a four and one-half year hiatus” by the plaintiff).

II. X2Y was not personally responsible for the delay in reopening the stayed cases and did not deserve a dismissal with prejudice.

When a court orders a dismissal with prejudice for failure to prosecute, it extinguishes the legal rights of the plaintiff. The dismissal is thus a sanction against the plaintiff personally, not a sanction against its counsel. The *Poulis* test therefore requires determining “the extent of the party’s personal responsibility.” *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

If the plaintiff personally engaged in the conduct claimed to warrant dismissal, then the plaintiff will be found personally responsible and this finding

will weigh in favor of sanctioning the plaintiff personally with a dismissal.

Adesanya v. Novartis Pharm. Corp., 2018 U.S. App. LEXIS 28638, at *4 n.4 (3d Cir. Oct. 11, 2018) (“Adesanya argues that she should not have been sanctioned because she was represented by an attorney during most of the litigation.

However, it was she, and not her attorney, who refused to turn over documents and gave false testimony at her deposition”); *Adkins v. Reynolds*, 725 F. App'x 83, 84 (3d Cir. 2018) (“Adkins is ‘solely responsible for the progress of his case,’ as he proceeded pro se.”); *Sloan v. Pitkins*, 2017 U.S. Dist. LEXIS 131220, at *12 (W.D. Pa. Aug. 17, 2017) (“Sloan engaged in this behavior of his own volition and made the conscious choice to do so. The personal-responsibility factor therefore favors dismissal.”).

Conversely, if there is no showing of personal misconduct by the party itself, then this weighs against dismissal. *Poulis*, 747 F.2d at 868 (“There has been no suggestion by any party or by the district court that the Poulis plaintiffs are personally responsible... This is therefore unlike the National Hockey League case where... there had been ‘flagrant bad faith’ on the part of the plaintiffs” (quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976))).

In this case, there was no conduct of X2Y itself that merited a finding of personal responsibility under *Poulis* or warranted the personal sanction of dismissal. To the contrary, X2Y’s principals did everything they could to retain

new counsel to represent X2Y in the district court and move the cases forward.

A. X2Y was not responsible for the delay in moving to reopen the stayed district court cases.

At issue is the delay between the final conclusion of the ITC investigation on October 1, 2014, and June 2017, when X2Y's new counsel contacted Defendants about reopening the stayed district court cases and entered appearances at the district court. X2Y was not personally responsible for that delay. X2Y had every intention and desire to promptly move forward in the district court, and X2Y's principals Dave and Bill Anthony worked diligently and in good faith to accomplish that. Appx41 (Anthony decl. ¶7), Appx43-44 (¶12). The delay was caused by the combination of X2Y's prior and new counsel, and a litigation funder that financed prior counsel.

Within just a few days of losing the ITC appeal and getting unexpectedly dropped by prior counsel Alston & Bird, the Anthonys contacted its new counsel Dovel & Luner about representing the company at the district court. *Id.* They then spent the next several months doing everything they could to assist the Dovel firm during the firm's lengthy, multi-phased period of due diligence. Appx41 (Anthony decl. ¶7). They answered an endless series of questions by phone, email, and in person; they provided documents about X2Y's products and licensees, the Defendants and their products, and the ITC investigation; and they attempted to facilitate the planned transition from Alston & Bird to the Dovel firm. *Id.*;

Appx46-47 (Cho decl. ¶4-5); Appx55-57 (Eichmann decl. ¶¶14-16), Appx63-64 (¶¶38-39), Appx69-70 (Luner decl. ¶4).

The Anthonys also worked diligently to renegotiate the complicated and problematic contracts with Alston & Bird and the litigation funder that had financed that firm at the ITC. Appx41-43 (Anthony decl. ¶¶8-11); Appx71 (Luner decl. ¶7), Appx72 (¶¶11-12), Appx60-63 (Eichmann decl. ¶¶26-38). They did so only at the insistence of the Dovel firm, which conditioned its retention on the successful renegotiation of these contracts. Appx71-72 (Luner decl. ¶8, ¶10).

One can credibly (and perhaps fairly) fault X2Y's prior counsel, litigation funder, and new counsel for the delay in seeking to reopen the cases. Prior counsel should not have waited until the conclusion of the ITC appeal to tell X2Y it planned to drop them as a client and had no intention of pursuing the district court cases. Nor should it have insisted on retaining any of the rights with respect to cases it was not going to pursue as counsel for X2Y. The litigation funder can also be faulted for periods of unresponsiveness during the negotiations with X2Y, and for a prolonged insistence on original deal terms that would be unworkable going forward in the district court. And X2Y's new counsel may also be faulted for being too conservative (or simply too slow) in its protracted due diligence, or for insisting that X2Y renegotiate its contracts. But X2Y itself cannot and should not be personally faulted for the delays of these other parties. And as a family-run

business with no in-house counsel, X2Y had no ability to move forward with the district court cases without counsel.

B. Defendants erroneously assign personal blame to X2Y for a delay it neither wanted nor caused.

1. Defendants reformulate the personal responsibility factor to change its outcome.

In one line of argument, Defendants asserted that “X2Y and its affiliated parties bear full responsibility for its failure to prosecute” and that “the delay was attributable to the very parties that presumably stand to gain from reopening the 2011 actions (X2Y, Alston & Bird, Kingfisher, and Dovel & Luner).” Appx119. Defendants similarly asserted that “[t]he burden of any delay should fall on X2Y and its agents, not Defendants.” *Id.* These arguments divide up the world into two groups, “X2Y and its affiliated parties” (i.e., its former and new counsel and a previously engaged litigation funder) and Defendants, and then assign blame to the first group. That is not the analysis required or allowed by *Poullis*.

The personal responsibility factor explicitly requires determining who is to blame as between (1) the party facing a dismissal and (2) its counsel, it is not about assigning blame to one side of litigants over the other side. *Adesanya*, 2018 U.S. App. LEXIS 28638, at *4 n.4 (3d Cir. Oct. 11, 2018) (“Adesanya argues that she should not have been sanctioned because she was represented by an attorney during most of the litigation. However, it was she, and not her attorney, who

refused to turn over documents and gave false testimony at her deposition”); *Adkins*, 725 F. App'x 83 at 84 (3d Cir. 2018) (“Adkins is ‘solely responsible for the progress of his case,’ as he proceeded pro se.”). Moreover, Defendants mischaracterize the plaintiff’s side of this case. X2Y’s former counsel, litigation funder, and current counsel are not merely “agents” or “affiliated parties” of X2Y. These were entities that were at odds with each other (and, to varying degrees, with X2Y) during the period of delay, as they were engaged in arms-length negotiations about whether and on what terms the district court cases were to go forward. Lumping them all together as one unified group that jointly deserves blame thus ignores the individualized inquiry required by *Poulis* and contradicts the sworn and undisputed evidence presented to the district court.

2. Defendants project their own internal expertise on X2Y.

Defendants asserted that “a seasoned litigant like X2Y” would have known it could not “let a case linger for a period of years and then restart the action.” Appx119. They argued that “it would have taken no more than a quick review of Rule 41(b) case law to discover that three-year or shorter delays are routinely grounds for dismissal.” Appx119-120. These arguments fail. X2Y is not a “seasoned litigant.” Prior to filing an ITC complaint X2Y had no prior experience with patent litigation. Nor was X2Y “seasoned” by an ITC investigation that its principals were largely excluded from participating in due to the protective order.

And unlike Intel, Apple, and HP—some of the most sophisticated and experienced litigants in the world, with scores in-house attorneys—X2Y is a family-run business with no in-house counsel. Their two principals during the period at issue—brothers Dave and Bill Anthony—are not lawyers, have no legal expertise, and cannot be faulted for not having personally reviewed (or even known about) Rule 41(b) case law. Moreover, the Third Circuit does not, as Defendants contend, “routinely” dismiss cases before they have been heard on the merits. It does so only as a last resort, even where there have been very long delays. *Poulis*, 747 F.2d at 869 (“Dismissal must be a sanction of last, not first, resort.”); *Adams v. Trs. of the N.J. Brewery Employees' Pension Tr. Fund*, 29 F.3d 863, 867 (3d Cir. 1994) (reversing dismissal under *Poulis* despite “a four and one-half year hiatus” by the plaintiff).

3. Defendants urge faulty notions of common sense over sworn statements of fact.

According to Defendants, “[c]ommon sense indicates it should not have taken X2Y nearly three years to retain the same counsel with whom X2Y had worked in 2008 and to renegotiate a few contracts, unless X2Y was dilatory.” Appx119. This logic is faulty. The length of a delay does not by itself indicate who is responsible for the delay. Nor does the number of contracts to be negotiated (“a few”) say anything about the complexity or importance of those contracts or who was responsible for the negotiations taking so long.

Moreover, conclusory assertions of common sense are insufficient to overcome actual facts that are known and sworn to in detailed declarations. Here the sworn facts demonstrate that X2Y was not, as Defendants assert, simply trying to rehire the “same counsel with whom X2Y had worked in 2008.” X2Y had never previously retained the Dovel firm and had only contacted the firm in 2008 to have high level discussions, long before X2Y had ever even discovered infringement by Defendants. Appx41 (Anthony decl. ¶7); Appx54-55 (Eichmann decl. ¶¶12-13). The sworn declarations further establish that X2Y did everything it could to retain the Dovel firm, working diligently to meet the firm’s continuous requests for information and even setting out to renegotiate complicated preexisting contracts at the insistence of the Dovel firm. Appx41 (Anthony decl. ¶7), Appx41-43 (¶¶8-11); Appx46-47 (Cho decl. ¶4-5); Appx55-57 (Eichmann decl. ¶¶14-16), Appx60-64 (¶¶26-39); Appx69-72 (Luner decl. ¶4, ¶7, ¶¶11-12).

C. The district court’s analysis was flawed and was not fair.

The district court found that “Plaintiff has not convincingly explained-away its personal responsibility in occasioning the years-long delay.” Appx1. As shown below, that conclusion was based on a clearly erroneous analysis that dismissed X2Y’s sworn declarations while wholesale adopting unsupported claims of prejudice by Defendants that are not relevant to the personal responsibility factor.

1. The district court’s “smell-test” unfairly discredited X2Y’s sworn declarations.

The district court asserted that “Plaintiff’s arguments do not pass the ‘smell-test’” (Appx1) and made similar suggestions that it disbelieved X2Y’s sworn declarations. Allusions to the court’s subjective ability to smell out the right result do not inspire confidence and should not be invoked, especially when something as serious as a case-terminating sanction is being considered. Moreover, the district court had no basis for suggesting that the detailed explanations offered by X2Y and its counsel under oath were in any way untrue—particularly in the absence of any cross-examination undermining any of X2Y’s declarants.

2. The district court’s “inwardly-focused” criticism fails.

The district court stated that X2Y’s “explanations are too inwardly-focused.” Appx1. The court also criticized X2Y for discussing “self-identified obstacles.” Appx2. These criticisms are without merit.

The first *Poulis* factor concerns who, as between the plaintiff and its counsel, is responsible. That is necessarily an “inwardly-focused” inquiry for the plaintiff—one that requires looking inward at its own actions and those of its counsel. To the extent the court was suggesting that X2Y’s explanation of the delay needed to focus *outwardly* on other parties (such as the Defendants) or external events (such as a force majeure), that is not the inquiry of the “personal responsibility” factor under *Poulis*. Nor is the court’s implied criticism of “self-

identified obstacles” well-founded. No one other than X2Y itself is better able or even capable of identifying the obstacles it encountered in its attempt to retain new counsel and move to reopen the stayed district court cases.

3. The district court’s assessments of “too much” delay are not relevant.

In addressing the first factor, the district court stated that Plaintiff’s explanations for the delay “beg too much forgiveness,” and “while the Court reasonably might accept Plaintiff’s explanations for a lesser duration, the three- (or six-) year delay, under the circumstances, proves too much.” Appx1-2. The district court further asserted that “[a]t some point during the months and years of delay, Plaintiff should have appreciated that its chosen-course was problematical, and that solutions were required and/or that alternatives needed to be considered.” Appx2, n.2. These assertions are not relevant to the “personal responsibility” factor. That the period of delay was long does not suggest, much less conclusively demonstrate, that it was the party itself that was responsible for the delay.

Moreover, it is inaccurate to refer—even in a parenthetical—to a “six year” delay. Appx2. It is undisputed that the first three years of the referenced six year period coincided with the active ITC investigation and its appeal. That the district court made this “six year” delay reference, twice, suggests an effort to reach a result rather than provide a careful analysis of the facts.

4. The district court’s reliance on Defendants’ claims of prejudice is irrelevant and unfounded.

In applying the personal responsibility factor, the district court credited Defendants’ claims of prejudice. Appx2 (“Defendants had no control over Plaintiff’s machinations – nor were they even awareness [sic] of their existence – and Plaintiff’s explanations, all these years later, should hardly assuage Defendants, in terms of their reasonable expectations and resulting-prejudice to their ability to defend”); *id.* n.2 (“That Defendants, the whole time, remained completely in the dark only exacerbated the risk; as, with the passage of time, so too increased the obvious likelihood of prejudice.”). That was clear error.

Whether Defendants knew that X2Y was working to retain new counsel so that it could restart the stayed cases is irrelevant to the personal responsibility factor, and so is the question of whether Defendants were prejudiced by the delay. Moreover, as explained further below—in addressing the prejudice factor under *Poulis*—Defendants failed to support their theoretical assertions of prejudice and are not entitled to a dismissal based on “reasonable expectations” alone.

5. The district court’s hypothetical concern with “indefinite delay” should carry no weight in analyzing a definite delay that was truthfully explained.

Finally, we turn to this stated concern, which again echoed the Defendants: “Even accepting Plaintiff’s version of events, its reasoning would permit an indefinite delay, of any duration, so long as it plausibly could claim to have been

‘working hard’ to clear self-identified obstacles.” Appx2. X2Y did more than simply claim to be “working hard,” it showed that it diligently attempted to secure new counsel over the lengthy period of time at issue. Moreover, concerns with a theoretical future case in which there is an “indefinite delay” cannot take primacy over the court’s duty to objectively assess the actual case before it, in which a definite period of delay is explained in detail, under oath, and without any genuine challenge to the detail or veracity of the explanation.

III. There was no actual prejudice to Defendants, nor any potential prejudice that would warrant the extreme sanction of dismissal.

A. There was no prejudice under *Poulis* because X2Y did not violate a court order or fail to respond to discovery.

The second *Poulis* factor considers “the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery.” *Poulis*, 747 F.2d at 868. X2Y did not fail to comply with any court order or fail to respond to any discovery. Therefore there cannot be any resulting prejudice (i.e. prejudice caused by such a failure) that would entitle Defendants to a dismissal under *Poulis*.

The district court cases were active for a short period of time before being stayed and then administratively closed. During that period X2Y did not violate any court order or fail to respond to any discovery in the district court (and no discovery was served). Nor did X2Y violate any court order or fail to respond to discovery during the stay. The district court’s stay and administrative closing

orders required that the cases remain stayed and closed during the pendency of the ITC investigation. X2Y complied with those orders in taking no action in the district court cases prior to the final conclusion of the ITC investigation.

Furthermore, the district court orders did not require X2Y (or Defendants) to take any affirmative steps upon the conclusion of the ITC investigation (such as meeting and conferring, submitting a joint status report or notice to the Court, or moving to reactivate or dismiss the case within a certain period of time).

Appx338, Appx351 (Stay Orders); Appx342-43, Appx355-56 (Closing Orders).

Rather, the administrative closing orders provided that “if and when appropriate, any party may restore this action to the Court’s active calendar upon application or by motion.” Appx342 (emphasis added). That was not a mandate for the parties as a group—or for X2Y individually—to bring such a motion within any particular period of time. It was an order granting leave to bring a motion to reactivate the case “if and when appropriate.” Moreover, it would not have been appropriate (or even possible) for X2Y to move to reactivate the case when it did not even have counsel to bring such a motion or to resume active prosecution of the cases.

B. Defendants were not prejudiced by the delay to reopen the cases.

1. Defendants’ ability to defend has not been prejudiced.

Defendants claimed their ability to defend was prejudiced by the delay because the “named X2Y inventors passed away during the pendency of the 2011

actions.” Appx114. Defendants acknowledged that lead inventor Tony Anthony died in 2012—i.e., two years before the conclusion of the ITC appeal and prior to the period of delay at issue. *Id.* Defendants also acknowledged that they deposed co-inventor Bill Anthony for three days during the ITC investigation, concerning the same six patents at issue in the district court cases. *Id.* But they nonetheless claimed prejudice because “Defendants never will get the opportunity to depose these key witnesses on any new X2Y theories of infringement or validity, or on issues not litigated in the ITC (such as damages),” and they will not be able to present live testimony from the inventors. Appx114-15. These arguments fail.

If any party is prejudiced by the inability to present live testimony from the named inventors at trial it is X2Y. Defendants have three days of videotaped cross-examination of Bill Anthony to use at trial, while X2Y has no video of direct examination of Bill Anthony to use as a substitute for his trial testimony. As to “any new X2Y theories of infringement or validity,” those would be the subject of expert reports and expert testimony. Any such theories would not be the subject of testimony from X2Y’s inventors, who are fact witnesses and would have been barred under the protective order (as they were at the ITC) from even seeing the confidential technical materials needed to assert “new theories of infringement.”

In addition, Defendants did in fact cover the issue of damages in their ITC depositions of Bill Anthony—questioning him at length about X2Y’s licensing

program (because it was relevant to the domestic industry issue) and X2Y's pre-suit licensing negotiations with Intel. Both of those topics were also addressed in Defendants' ITC depositions of Dave Anthony, who continues to serve as X2Y's managing member and is available for further deposition and trial testimony.

Defendants also claimed that "[o]ther potential witnesses' recollections of critical events inevitably will have become hazier," and that "prior-art products may no longer be available for Defendants to find." Appx115. These conclusory assertions are insufficient to show prejudice under *Poulis. Adams*, 29 F.3d at 874 (3d Cir. 1994) (rejecting claims of prejudice that were "possible" where "there has been no testimony to this effect"); *Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992) ("Conclusory statements that there are missing witnesses, that witnesses' memories have lessened, and that there is missing documentary evidence, are not sufficient" to establish evidentiary prejudice [under the doctrine of laches].").

The reason Defendants could not concretely identify any lost evidence or faded memories is apparent. They had every incentive to scour the Earth for prior art products and witnesses in defending against the ITC complaint and they did. They cannot now credibly claim they overlooked something important in their search and now that evidence has gone missing as a result of X2Y not having sooner moved to reopen the district court cases following the ITC appeal.

2. Defendants failed to show any “continued investment” resulting from X2Y’s delay in reopening the cases.

Defendants also argued that “X2Y allowed Defendants to continue to invest in the manufacture and sale of products the ITC and Federal Circuit found to be non-infringing.” Appx116; Appx99 (“X2Y lulled Defendants into continuing to invest billions of dollars”). This was a factual assertion with no factual support.

Defendants were asserting that they actually went ahead and made investments in, and sales of, accused products because X2Y did not earlier move to reopen the district court cases. They submitted no evidence to support this assertion—no documentary proof and not even a declaration from in-house counsel, much less from a product manager, engineer, or sales executive.

Moreover, the notion that Defendants would have changed their manufacturing or sales processes to avoid infringement if X2Y had earlier moved to reopen the district court cases cannot be reconciled with Defendants’ assertion that the district court claims have no merit. If Defendants were so unshakably confident that the ITC outcome was correct and that their products do not infringe, they would have had no need to redesign or stop selling their products in response to an earlier effort by X2Y to reopen the district court cases.

3. Defendants’ ongoing exposure for past damages is not a cognizable form of prejudice.

Defendants also argued that “permitting X2Y to reopen the 2011 actions

after six years of dormancy would effectively allow X2Y to double the statute of limitations on patent damages.” Appx115. This argument fails on multiple levels.

The Patent Act expressly allows the patentee to collect damages for infringement occurring up to six years before the filing of its complaint. 35 U.S.C. §284. There is no exception for cases that are filed and then stayed—whether for an ITC investigation or any other reason (*e.g.*, pending related litigation in court or arbitration, or pending IPR proceedings). Indeed, the very reason an ITC plaintiff files a parallel district court action at the same time as the ITC complaint, knowing the case will be almost invariably be stayed, is to preserve the ability to collect damages for infringement occurring prior to the initiation of the ITC litigation. In addition, had X2Y earlier moved to reopen the district court cases Defendants would still be subject to the same period of exposure—damages for infringement occurring up to six years prior to the filing of the complaints and continued infringement occurring through the remaining term of the patents.

If Defendants wanted to eliminate the risk of facing damages for infringement going back six years before the district court complaints were filed, they should have attempted to promptly dispose of the cases after the ITC investigation concluded. Instead, they too let the cases remain pending and unadjudicated, knowing full well that the natural consequence of their own

inaction was that their potential exposure for past damages would remain unless and until a dismissal was obtained.⁴

4. Defendants are not entitled to a presumption of prejudice.

Having no proof of prejudice, Defendants argued that “courts apply a rebuttable presumption of prejudice to the defendant when the plaintiff unreasonably delays prosecuting its case.” Appx114. This argument also fails.

In the Third Circuit, courts do not dismiss cases based on presumptions of prejudice and instead reject claims of prejudice that may be “possible” but are unsupported. *Adams*, 29 F.3d at 874 (3d Cir. 1994) (“It is possible the Breweries may suffer some prejudice from this delay, in the form of additional costs or lost information. But there has been no testimony to this effect, and such prejudice, if it exists, would be minor and appropriately addressed by more modest sanctions than dismissal”); *Falor v. G&S Billboard*, 2007 U.S. Dist. LEXIS 33290, at *17 (D.N.J. May 7, 2007) (applying *Poullis* in denying motion for default: “Thus, the undersigned cannot countenance Plaintiff’s contention that the mere passage of time, without more, is prejudicial for purposes of this analysis...[T]he Third Circuit **does** require more.” (emphasis in original)).

⁴ Defendants’ argument also fails mathematically as to the 218 case. The sole patent in that case is X2Y’s ’241 patent, which issued on September 20, 2011 (two days before the 218 case was filed). Appx552. Allowing that case to be reopened would have exposed Defendants to no greater liability for past damages than if the ’241 patent had been asserted for the first time in a new complaint filed in 2017.

5. Defendants’ “upset understanding” argument also fails.

Defendants also argued that “X2Y’s belated attempt to reopen the 2011 actions upsets Defendants’ reasonable understanding that the 2011 actions were completed.” Appx116. It is not reasonable to conclude that a district court action is “completed” when the asserted causes of action have never been adjudicated and the case remains stayed but nonetheless pending. Moreover, Defendants’ “upset understanding” does not by itself constitute prejudice.

Had Defendants submitted a declaration from in-house counsel swearing that Defendants genuinely believed X2Y had forever abandoned its district court claims *and as a result* Defendants took detrimental actions—e.g., ending their litigation hold and thus destroying important evidence concerning the accused products—then this would be cognizable prejudice. But to simply assert (without any supporting declaration) that Defendants thought the case was over and it would upset their understanding of things if the case were allowed to proceed is insufficient. That may show grounds for disappointment or annoyance, but it does not constitute any type of prejudice recognized under *Poulis*.

C. The district court was wrong to summarily adopt Defendants’ unsupported assertions of prejudice.

The district court made passing reference to Defendants’ “reasonable expectations and resulting-prejudice to their ability to defend” and then broadly adopted the entirety of their contentions as to prejudice: “As to prejudice,

Defendants convincingly have shown theirs to have been substantial, and the Court incorporates their arguments and evidence as if fully restated.” Appx2. That was clear error. Defendants’ claims of prejudice were theoretical, not factual, and were contrary to law. Moreover, by failing to provide any discussion of Defendants’ individual claims of prejudice, the district court not only reached the wrong conclusion for the prejudice factor, it avoided performing the underlying analysis needed to identify and consider alternative sanctions that could be tailored to any specific prejudice found to exist.

IV. There was no history of dilatoriness.

A. X2Y had no history of causing delays in the district court.

The district court was required to consider whether there had been “a history of dilatoriness,” *Poulis*, 747 F.2d at 868, “such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders.” *Adams*, 29 F.3d at 874. The reason *Poulis* looks not just for dilatoriness but a *history* of it is because the court is determining whether to dismiss the case as a sanction. A plaintiff that has repeatedly missed deadlines and repeatedly shown itself to be unwilling or unable to move the case forward—even in the face of warnings of dismissal—is one that has used up its second and subsequent chances and may deserve to see its case terminated. In contrast, a plaintiff that has no prior history of causing delays or missing deadlines and has received no prior complaints or

warnings about its conduct or inaction, does not deserve to see its case thrown out. *Briscoe v. Klaus*, 538 F.3d 252, 260-262 (3d Cir. 2008) (“the plaintiff had not engaged in any dilatory tactics during the first two-and-a-half years that the case had been pending, and thus ‘the district court should not have applied the harsh penalty of dismissal’” (describing and quoting *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146, 149 (3d Cir.1968))).

Here there was no history of dilatoriness. X2Y did not fail to meet any deadline or discovery request in the district court cases, or even at the ITC, much less do so repeatedly. Nor did X2Y receive any warning from the court or Defendants that its inaction in the stayed district court cases, if not corrected, would lead to a case-terminating sanction. To the contrary, the first time X2Y heard any complaint about its failure to prosecute the stayed district court cases was in response to X2Y’s attempt to do just that—to lift the stay and resume actively prosecuting the cases with newly retained counsel.

B. Defendants fail to show a “history of dilatoriness.”

Having no prior infractions to point to, Defendants argued that X2Y’s delay in seeking to reopen the cases after the conclusion of the ITC appeal itself constituted a “history of dilatoriness.” Appx111. That theory fails.

Again, the purpose of the “history of dilatoriness” factor under *Poullis* is not to determine whether there have been delays. The purpose is to determine whether

the complained-of delay (i.e. the delay in moving to reopen) is an isolated instance or is instead part of a broader history or pattern of delay. *Briscoe*, 538 F.3d at 260-61 (3d Cir. 2008) (“[T]he District Court should not have utilized a single instance of dilatory behavior in balancing the Poulis factors... [C]onduct that occurs one or two times is insufficient to demonstrate a ‘history of dilatoriness.’” (internal citation omitted)); *Poulis*, 747 F.2d at 868 (“[T]his litigation has been characterized by a consistent delay by plaintiffs’ counsel... [T]here has been a pattern of dilatoriness.”); *Broncho-Bill v. Mid-Ohio Contracting, Inc.*, 2017 U.S. Dist. LEXIS 100896, at *5-6 (W.D. Pa. June 29, 2017) (“There has been a pattern of dilatoriness by Plaintiff in this case; he has missed several deadlines and taken little action beyond filing his complaint.”).

Defendants also attempted to show a history of dilatoriness by alleging pre-litigation delays by X2Y. Appx113. They claimed X2Y was advised in 2002 to sue Intel but decided to wait to file suit until 2011 so Intel would be locked into using X2Y’s patented technology. These assertions are irrelevant and false.

The “history of dilatoriness” factor concerns “behavior over the life of the case” not before the case. *N’Jai v. Floyd*, No. 07-1506, 2009 U.S. Dist. LEXIS 45130, at *63 (W.D. Pa. May 29, 2009) (quoting *Adams*, 29 F.3d 863, 875 (3d Cir. 1994) (ellipses in original)); *Emerson v. Thiel Coll.*, 296 F.3d 184, 191 (3d Cir. 2002) (“The procedural history of this case reflects continuous dilatoriness”

(emphasis added)). It makes sense that only conduct during the course of the litigation is considered because Rule 41(b) concerns an alleged failure to prosecute an existing action; it does not concern an alleged delay in filing the action in the first place. That is the province of statutes of limitation and other defenses.

Moreover, X2Y was never advised to sue Intel for patent infringement in 2002. X2Y did not discover Defendants' infringement of any of its patents until August 2009, and that discovery soon led to the May 2011 filings at the ITC and district court. Appx209 (Anthony reply. decl. ¶9). What happened in 2002 was X2Y's discovery that Intel had breached the parties' non-disclosure agreement by copying X2Y's technology into Intel's own patent filings—a violation that X2Y promptly and successfully addressed at the Patent Office. Appx210-11 (¶¶10-11).

C. The court did not find a history of dilatoriness but failed to weigh that in X2Y's favor.

The district court did not find a history of dilatoriness by X2Y but failed to actually say so or to credit this against a dismissal. Appx1-4. There is no discussion of this factor, other than its listing as one of the *Poullis* factors at the beginning of the court's order (Appx1). That was clear error. By failing to address the factor and to affirmatively state that there was no history of dilatoriness the court deprived X2Y of an important finding in its favor that weighed against the sanction of dismissal.

V. There was no bad faith.

A. X2Y acted in good faith to retain new counsel and resume active prosecution in the district court.

Poulis also considers “whether the conduct of the party or the attorney was willful or in bad faith,” *Poulis*, 747 F.2d at 868, such as “repeated and self-serving instances of flouting court authority and professional irresponsibility.” *Adams*, 29 F.3d at 876. A party that has acted in bad faith and has willfully violated court orders or missed deadlines is unlikely to remedy its ways if given a second chance. That party is therefore more deserving of a case-terminating sanction. In contrast, a party that has acted in good faith but has been neglectful or simply moved too slowly in prosecuting the case should be given a second chance and should not be sanctioned with a dismissal. *Id.* (Finding that a “failure to move with the dispatch reasonably expected of a party prosecuting a case” and an “absence of a good faith effort to prosecute” does not constitute willfulness or bad faith).

Here there was no evidence of willfulness or bad faith by X2Y or its counsel in the district court or even at the ITC. X2Y diligently prosecuted its claims before the ITC and then eagerly attempted to retain new counsel and resume prosecution of the district court cases. X2Y and its new counsel acted in good faith to complete the diligence and contract negotiations that were necessary for the district court cases to be ready for further prosecution. That process took far longer than initially anticipated, but it was not the intent of X2Y or of its new counsel to delay

reopening the cases any longer than was necessary. Appx43-44 (Anthony decl. ¶12); Appx48 (Cho decl. ¶11); Appx53 (Eichmann decl. ¶7); Appx73 (Luner decl. ¶14). Nor did X2Y expect to obtain or actually obtain any benefit from the delay.

B. Defendants fail to show bad faith.

In an attempt to show bad faith, Defendants argued that X2Y “ignored” the district court’s orders, which they said made “clear that the stay and administrative closing were to last only as long as required for the ITC proceedings to conclude.” Appx119. This argument fails.

The purpose of the district court’s orders was to stay and close the cases pending the ITC proceeding. But the orders did not state (clearly or otherwise) that the stay would immediately dissolve upon the conclusion of the ITC proceedings, as Defendants suggest. Indeed, if the stay had immediately dissolved following the ITC appeal Defendants would be in default, having never answered or responded to either district court complaint. Nor did the district court’s orders instruct the parties to immediately resume prosecution of the district court cases or do so by any particular deadline (and again, if the orders had provided such an instruction Defendants would be equally in violation). To the contrary, the administrative closing orders provided that “if and when appropriate, any party may restore this action to the Court’s active calendar upon application or by motion.” Appx342, Appx355. X2Y did not interpret that to (a) require X2Y (rather than any or all

other parties) to move to reopen the case when (b) it did not even have counsel.

Defendants also claimed that X2Y acted in bad faith because its “refusal to notify the Court or Defendants of its intent to move to reopen the 2011 actions was itself strategic, not inadvertent or unknowing.” Appx122. This argument also fails. A “refusal” implies silence or inaction in response to a court order or a request from Defendants; it does not describe the absence of a notice that was not required and not requested. Moreover, Defendants cannot establish bad faith by showing X2Y failed to remind them that two district court cases remained pending against them, unresolved, or that X2Y was in the process of securing new counsel.

Indeed, Defendants’ arguments fail to appreciate that X2Y and Defendants are adversaries, they are not fiduciaries of each. X2Y had no duty to protect the interest of Defendants, who were and are ably represented by counsel who know the difference between a stayed case and one that is terminated. And X2Y’s protection of its own interests at a time when it was not represented by counsel, rather than those of Defendants, does not show bad faith.

C. The court found no bad faith but failed to weigh that for X2Y.

The district court addressed this factor as follows: “Regarding Plaintiff’s state of mind, although the Court is not prepared to say that it acted willfully or in bad faith, it certainly would not characterize the delay as excusable.” Appx2. The absence of willful or bad faith conduct by X2Y should have been affirmatively

counted in X2Y's favor and weighed against dismissal. Instead the district court, almost begrudgingly, finds that while there was no bad faith or willfulness the delay was not "excusable," impliedly adding an additional requirement to this *Poulis* factor. That was clear error.

VI. X2Y's claims have merit and deserved full consideration by the court.

A. The merits factor is directed to the pleadings, which adequately allege X2Y's right to recovery.

The *Poulis* factors include "the meritoriousness of the claim or defense" whose dismissal is sought. *Poulis*, 747 F.2d at 868. "A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff." *Id.* at 869-70. If the plaintiff's claims would survive a Rule 12(b)(6) motion, they are deemed to have merit under *Poulis* and the factor weighs against dismissal. *Briscoe v. Klaus*, 538 F.3d 252, 263 (3d Cir. 2008) ("Generally, in determining whether a plaintiff's claim is meritorious, we use the standard for a Rule 12(b)(6) motion to dismiss for failure to state a claim"); *Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1303 (Fed. Cir. 2016) ("The district court did not need to fully assess the merits of the parties' claims and defenses; it only needed to look to the pleadings" (applying *Poulis* and vacating default judgment)).

The only pleadings filed in the district court were the two original complaints X2Y filed, which collectively asserted that Defendants infringe six

patents and owe damages for their infringement. Appx359-370 (Complaint); Appx547-551 (Complaint). The pleaded allegations of these complaints, “if established at trial, would support recovery by plaintiff” and therefore establish that X2Y’s claims have merit under *Poulis*. *Poulis* at 870. Defendants did not challenge the sufficiency of X2Y’s pleaded allegations at any point in the case (nor did they ever move for summary judgment of any claim on any basis). The district court similarly did not identify any deficiency in the pleadings or assert any reason why X2Y’s claims could not succeed as a matter of law. Accordingly, under Third Circuit law, the merits factor favors X2Y and weighs against dismissal.

B. Defendants erroneously urged the district court to rely upon the ITC outcome.

Defendants argued that the ITC decision and its affirmance by the Federal Circuit “establish conclusively that X2Y’s claims are without merit.” Appx117. That argument immediately fails under *Poulis* because it does not concern the pleadings. Moreover, Defendants’ argument fails on its own terms because the ITC outcome does not, as a matter of law, “establish conclusively” that X2Y’s district court claims are without merit.

1. The ITC did not adjudicate three of the patents asserted in the district court (the ’249, ’227, and ’621 patents).

At the ITC X2Y initially asserted the same six patents asserted in the district court complaints, but three of those patents were never construed and never

adjudicated by the ITC or the Federal Circuit. Prior to the time of any claim construction or merits-based ruling at the ITC, X2Y's prior counsel had narrowed the investigation by removing the '249, '227, and '621 patents. The ITC and Federal Circuit decisions therefore did not contain any analysis of the claims of these patents (or their prosecution histories and specifications), any construction of their claim terms, or any finding as to whether their claims were infringed by Defendants' accused products. *Certain Microprocessors, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-781, Initial Determination, 2012 ITC LEXIS 2658 (Dec. 14, 2012). Accordingly, the ITC and Federal Circuit decisions do not "establish conclusively" that X2Y's claims for infringement of the '249, '227, and '621 patents are without merit, not under *Poulis* or any other standard.

2. The ITC outcome has no preclusive effect for the three patents that were adjudicated.

The ITC narrowly construed 11 claims of three X2Y patents (the '500, '444, and '241 patents) and determined that Defendants' accused products did not infringe under the narrow construction. *Id.* The Federal Circuit affirmed. *X2Y Attenuators, LLC v. ITC*, 757 F.3d 1358 (Fed. Cir. 2014). That result did not, however, entitle Defendants to the same result in the district court—not as to those 11 claims or any others among these three patents (which collectively recite a total of 153 claims).

It is well established that ITC determinations—even those affirmed on appeal—do not have preclusive effect in the district court. *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 851 F.2d 342, 344 (Fed. Cir. 1988) (“[T]he ITC’s determinations regarding patent issues should be given no res judicata or collateral estoppel effect”). Accordingly, even for the patents that were adjudicated by the ITC and the Federal Circuit, the prior decisions do not “establish conclusively” that X2Y’s claims are without merit. This is exactly why Defendants did not move to dismiss the district court cases based on a preclusion defense following the ITC appeal or at any point thereafter. Defendants instead sat back silently, hoping the district court cases would go away if they simply ignored them.

3. The ITC’s substantive analysis of the ’241 patent was rejected by the Federal Circuit.

At the ITC, Defendants argued that the ’241 patent’s specification contained and incorporated by reference disclaiming language that required its claims to be construed narrowly, like the other two patents on appeal (the ’500 and ’444). The ITC agreed, but the Federal Circuit did not.

The Federal Circuit rejected Defendants’ contentions about the ’241 patent’s specification during the oral argument⁵ and did not find any disclaimer in the ’241

⁵ Appx237 (Transcript of Oral Argument, March 2, 2014) at 22:3-4 (Judge Moore: “the 241 patent reads so much like its parent, except that they purposely didn’t include the disclaimer language in here”); Appx238 at 23:12-22 (“You don’t think it’s enough that they removed all the disavowing language from the patent? They

patent in its opinion. Instead, the court stated: “The parties chose to treat the electrode terms across the three asserted patents as rising and falling together. *See* J.A. 131–32. Therefore, we do not separately [i.e., substantively] address the ’241 patent.” *X2Y Attenuators, LLC v. Int’l Trade Comm’n*, 757 F.3d 1358, 1363 n.2 (Fed. Cir. 2014). That was the sole basis for the affirmance on the ’241 patent—a purported agreement made at the ITC that was never made at the district court.

C. The district court improperly credited the ITC outcome.

The district court asserted that Plaintiff “cannot ignore the objective realities” that it had lost at the ITC and that loss was affirmed. Appx3. “No matter how early and often Plaintiff may have declared and/or insinuated, ‘all rights reserved,’” the district court concluded, “the meritoriousness factor cannot, under the circumstances, be viewed as favoring Plaintiff.” *Id.* It is unclear whether that was a conclusion by the district court that the merits factor was neutral, or a conclusion that it affirmatively favored Defendants. Either way the conclusion was clearly wrong.

The district court relied on matters outside of the pleadings, which *Poullis* does not allow. The district court also failed to acknowledge the clear flaws in

clearly and unmistakably excised it surgically out... all the language that you can point to in the other patents that supports what the ITC did here isn’t present here. And another crucial thing, notice in the 241, they didn’t incorporate by reference any of the parents that have that disclaiming language.”).

Defendants' analysis that X2Y had exposed concerning the three unadjudicated patents and the '241 patent. Moreover, the district failed to acknowledge that the ITC outcome has no preclusive effect at all—not even for the 11 adjudicated patent claims. To the contrary, the district court suggested X2Y's arguments simply amounted to lawyers making boilerplate claims of “all rights reserved,” Appx3, when instead they were based on established Federal Circuit precedent.

VII. Alternative sanctions could address any potential prejudice but were not even considered. Instead the district court selected the most extreme sanction possible, a dismissal with prejudice.

A. Alternative sanctions were available.

Poulis also considers “the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions.” *Poulis*, 747 F.2d at 868. This is because “dismissals with prejudice or defaults are drastic sanctions, termed ‘extreme’ by the Supreme Court, and are to be reserved for comparable cases.” *Id.* at 867–68 (3d Cir. 1984) (internal cite omitted); *Lopez v. Cousins*, 435 F. App'x 113, 116–17 (3d Cir. 2011) (“Dismissal is a harsh sanction which should be resorted to only in extreme cases.”); *Briscoe*, 538 F.3d at 257 (3d Cir. 2008) (“dismissal with prejudice is only appropriate in limited circumstances and doubts should be resolved in favor of reaching a decision on the merits”). Here there were a number of alternative sanctions that could have been issued by the district court and narrowly tailored to address Defendants' claims of prejudice.

- For example, if the district court were convinced Defendants were prejudiced because they would never be able to depose inventor Bill Anthony about any “new infringement or invalidity theories” asserted in this case (Appx114), the court could have sanctioned X2Y by precluding it from asserting any such theories.
- If the district court were convinced that important product prior art or witness testimony had been overlooked during the ITC investigation and then lost in the last few years (Appx115), the district court could have sanctioned X2Y by precluding it from presenting expert testimony on the subject of validity.
- If the district court were convinced that it was unfair that Defendants were potentially liable for past damages going back prior to the 2011 filings in the district court (Appx101), it could have precluded X2Y from seeking damages for the pre-filing time period. Alternatively, if the district court were persuaded that Defendants would have immediately redesigned or stopped selling their accused products if X2Y had brought its motions to reopen earlier, the court could have ordered that none of Defendants’ post-ITC sales could be included in X2Y’s damages calculations.

The above examples are all potential sanctions the district court could have issued against X2Y—serious sanctions that would have significantly damaged

X2Y's case. But these sanctions would have at least been tailored to the specific claims of prejudice made by Defendants, and they would have at least provided X2Y with a chance to prove its claims in the district court.

B. Defendants did not address alternative sanctions because they were solely interested in a case-terminating sanction, not in preventing prejudice.

Defendants argued that “[n]o sanction short of dismissal with prejudice could undo damage to Defendants’ ability to mount a defense, or account for Defendants’ continued investment in manufacturing and sales of their products.” Appx120. This argument again relied on unsupported assertions of prejudice and was not accompanied by any genuine assessment of alternative sanctions.

With the exception of a passing reference to fees and costs, the only alternative sanction Defendants identified was for the court keep the district court cases administratively closed indefinitely. Appx121, n.19 (“[A]t a minimum, the Court should deny X2Y’s motion to reopen and keep the actions administratively closed.”). Such a ruling would be just as harsh and inappropriate as a dismissal.

The reason Defendants did not genuinely attempt to identify or address alternative sanctions is that they were not concerned with preventing or addressing any actual or potential prejudice—they were solely interested in obtaining a case-terminating sanction, whether they were entitled to it or not.

C. The district court avoided any discussion of alternative sanctions and dismissed the case with prejudice.

The district court ruled that “[n]o effective alternative has been identified” and no sanction “other than dismissal would be effective and/or appropriate.”

Appx2. The district court further asserted that “the general interests of finality, and promoting litigants’ reasonable expectations” supported its decision to dismiss the case, because “[l]itigation, as all things, eventually must come to an end.” Appx3.

The district court’s analysis and conclusion were wholly inadequate under Third Circuit law. The court had a duty to consider alternative sanctions (whether identified by the parties, the Federal Rules,⁶ or otherwise formulated by the court) and to avoid issuing a case-terminating sanction unless absolutely necessary.

Poulis, 747 F.2d at 869 (3d Cir. 1984) (“Dismissal must be a sanction of last, not first, resort.”); *Lopez*, 435 F. App’x at 116–17 (3d Cir. 2011) (“Dismissal is a harsh sanction which should be resorted to only in extreme cases.”). The district court also had the duty to put aside any misgivings it might have had about the ultimate merits of the case and allow X2Y an opportunity to prove its claims in the district court rather than declaring “an end” to two district court cases that had never actually begun. *Briscoe*, 538 F.3d at 257 (3d Cir. 2008) (“doubts should be resolved in favor of reaching a decision on the merits”).

⁶ See Fed. Rule of Civ. P. 16(f) and 37(b)(2)(A).

CONCLUSION

The judgment of the district court should be reversed. Both cases should be returned to the court's active docket, unstayed, and scheduled for proceedings on the merits.

November 14, 2018

Respectfully submitted,

/s/ Jeff Eichmann _____

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ADDENDUM

(Order Granting Defendants' Motion to Dismiss and Denying Plaintiff's Motions to Reopen – 7/13/2018)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

X2Y ATTENUATORS, LLC,)	
)	
Plaintiff,)	Civil Action Nos. 11-117E <i>and</i>
)	11-218E
v.)	
)	Judge Cathy Bissoon
INTEL CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER¹

Defendants’ Motions to Dismiss under Federal Rule 41(b) will be granted, and Plaintiff’s Motions to reopen will be denied as moot.

In determining whether to dismiss these cases for failure to prosecute, the Court considers: (1) the extent of Plaintiff’s personal responsibility; (2) prejudice to Defendants; (3) Plaintiff’s history of dilatoriness; (4) whether Plaintiff’s conduct was willful or in bad faith, as opposed to excusable neglect; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of Plaintiff’s claims. Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

As was true regarding the patent-venue decision in 17-164E, the Court does not believe this to be a close case. As to personal responsibility, Plaintiff’s arguments do not pass the “smell-test.” Although counsel references complicated-scenarios regarding Plaintiff’s need to renegotiate contracts in order to retain new counsel, before it could move to reopen, its explanations are too inwardly-focused, and beg too much forgiveness.

¹ Although the parties’ Motion papers have been filed under seal, the Court is convinced that no confidential information is revealed in this Order. Accordingly, the filing has been made on the public docket.

Even accepting Plaintiff's version of events, its reasoning would permit an indefinite delay, of any duration, so long as it plausibly could claim to have been "working hard" to clear self-identified obstacles. Plaintiff admits – as it must – to having delayed its request to reopen for nearly three years since the ITC proceedings ended; and six years since the lawsuits initially were filed. And, while the Court reasonably might accept Plaintiff's explanations for a lesser duration, the three- (or six-) year delay, under the circumstances, proves too much. Defendants had no control over Plaintiff's machinations – nor were they even awareness of their existence – and Plaintiff's explanations, all these years later, should hardly assuage Defendants, in terms of their reasonable expectations and resulting-prejudice to their ability to defend. Were the Court to accept even a fraction of Defendants' assertions, regarding Plaintiff's other pre- and post-suit delays (whether tactical or otherwise), the determination would be all the more obvious. In any event, Plaintiff has not convincingly explained-away its personal responsibility in occasioning the years-long delay.²

As to prejudice, Defendants convincingly have shown theirs to have been substantial, and the Court incorporates their arguments and evidence as if fully restated. Regarding Plaintiff's state of mind, although the Court is not prepared to say that it acted willfully or in bad faith, it certainly would not characterize the delay as excusable. Regarding alternative sanctions, the Court agrees with Defendants that none other than dismissal would be effective and/or appropriate. Although Plaintiff focuses on whether it engaged in sanctionable-behavior –

² Given the sophistication of the parties, and the putative-liability at stake, Plaintiff had no reasonable expectation that its efforts ultimately would be deemed sufficient. At some point during the months and years of delay, Plaintiff should have appreciated that its chosen-course was problematical, and that solutions were required and/or that alternatives needed to be considered. That Defendants, the whole time, remained completely in the dark only exacerbated the risk; as, with the passage of time, so too increased the obvious likelihood of prejudice.

and highlights that none of its prior conduct was sanctioned – this does not answer the question at hand, namely, what should be the consequence(s) of the years-long delay. No effective alternative has been identified, and the Court agrees with Defendants that dismissal is appropriate.

The final consideration is the meritoriousness of Plaintiff’s claims. Although the Court need not take quite as dim a view of Plaintiff’s claims as Defendants, Plaintiff – again – cannot ignore the objective realities. By mutual agreement, the parties’ embarked on a three-year course of intensive litigation before the ITC, and Plaintiff lost. Plaintiff appealed the unfavorable decision to the Court of Appeals for the Federal Circuit, again to no avail. No matter how early and often Plaintiff may have declared and/or insinuated, “all rights reserved,”³ the meritoriousness factor cannot, under the circumstances, be viewed as favoring Plaintiff.

In sum, the Court concludes that a dismissal under Rule 41(b)/Poulis is warranted. This result – too – is consistent with the general interests of finality, and promoting litigants’ reasonable expectations (in this case, regarding litigation that, by all available indications, appeared to have ended long-ago). *Cf. Anderson v. X.H. Aponte*, 2017 WL 3047885, *6 (C.D. Cal. May 22, 2017) (acknowledging interconnectedness between Rule 41(b) dismissals and “the [d]efendants[’] the Court[’s], and the public[’s] deserv[ing] finality”); King v. Garrett, 1998 WL 483008, *1 (9th Cir. Aug. 12, 1998) (affirming dismissal under Rule 41(b), in recognition of “the defendant’s right to eventual repose”). Litigation, as all things, eventually must come to an end; and, under the circumstances presented, that time is now.

³ *Cf. generally* Compl. in 17-164E (Doc. 1, therein) at ¶ 7 (indicating that Plaintiff chose to “streamline[]” the ITC litigation by eliminating certain of its patent-claims, and positing that “many of the strongest claims . . . were ultimately not asserted [in the ITC proceeding] because of practical considerations”).

Consistent with the foregoing, Defendants' Motions to Dismiss (**Doc. 35** in **11-117E**; and **Doc. 37** in **11-218E**) are **GRANTED**; and Plaintiff's Motions to reopen (**Doc. 14** in **11-117E**; and **Doc. 17** in **11-218E**) are **DENIED AS MOOT**.

IT IS SO ORDERED.

July 13, 2018

s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record

Certificate of Service

I certify that today, November 14, 2018, I electronically filed the foregoing Plaintiff-Appellant X2Y Attenuators, LLC's Opening Brief with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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November 14, 2018

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November 14, 2018

/s/ Jeff Eichmann
Counsel for Plaintiff-Appellant
X2Y Attenuators, LLC