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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NANO-SECOND TECHNOLOGY CO.,)
LTD., a Taiwanese)
Corporation,)

Plaintiff,)

v.)

DYNAFLEX INTERNATIONAL,)
a California Corporation.,)
and GFORCE Corp. d/b/a DFX)
SPORTS & FITNESS, a Nevada)
Corporation,)

Defendants.)

CV 10-9176 RSWL (MANx)

**ORDER Re: Defendants'
Motion for Partial
Summary Judgment of Non-
Infringement [231]**

Currently before the Court is Defendants Dynaflex International and GForce Corporation's ("Defendants") Motion for Partial Summary Judgment of Non-Infringement [231]. The Court having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

The Court **DENIES** the Motion as **MOOT**.

This is a patent infringement case where Defendants

1 are alleged to have sold gyroscopic wrist exercisers
2 that infringe on Plaintiff Nano-Second Technology Co.'s
3 ("Plaintiff") patent, U.S. Patent No. 5,800,311 ("`311
4 patent"), issued on September 1, 1998.

5 Defendants move for partial summary judgment on the
6 grounds that none of their "Current Products" infringe
7 upon Plaintiff's `311 Patent. Defendants do not
8 address the Accused Products that Plaintiff identified
9 as A1-A9 in its Infringement Contentions [66-1].

10 Defendants claim that they focus on their "Current
11 Products" because allegedly there are "chain of custody
12 issues" with the A1-A9 Accused Products.

13 Defendants' "Current Products" were marked as
14 Exhibits 43-49 during the December 12, 2012, deposition
15 of Pei-Sung Chuang, Plaintiff's corporate designee
16 under Federal Rule of Civil Procedure 30(b)(6):

- 17 1. Dynaflex Pro Sports Gyro Exerciser
18 (Schwartz Decl., ¶ 11, Ex. 5-4, Marked As
19 Exhibit 43) ("43");
- 20 2. Powerball Lighted Gyro Exerciser (Id.,
21 Marked As Exhibits 44-45) ("44-45")
- 22 3. Sports Pro Gyro Exerciser (Id., Marked As
23 Exhibit 46) ("46")
- 24 4. Dynagrip Pro Xtreme Gyro Exerciser (Id.,
25 Marked As Exhibit 47) ("47")
- 26 5. Platinum Sports Powerball (Id., Marked As
27 Exhibit 48) ("48")
- 28 6. Dynaflex Sports Pro Gyro Exerciser (Id.,

1 Marked As Exhibit 49)("49")

2 Defendants also discuss in their Motion two
3 products identified in Plaintiff's expert report by Dr.
4 Chui On Chu: (1) a "Dynaflex Platinum Powerball" and a
5 (2) "Dynaflex Pro Gyro Exerciser", which Defendants
6 contend is an imitation product that they do not sell
7 or manufacture.

8 Defendants assert that the A1-A9 products are "not
9 the same products as [44 through 49]. Thus, any
10 attempt by [Plaintiff] to conflate the 'A1-A9' products
11 with [44-49] should be rejected out of hand. While the
12 'A1-A9' may resemble [44-49] in some ways, it cannot be
13 disputed that these groups of products are in fact very
14 different from one another in some significant
15 respects." See Defendant Dynaflex International's Ex
16 Parte Application to Strike Declaration of Plaintiff
17 Nano-Second's Declaration of Chi On Chui, Ph.D. and
18 Supplemental Expert Report of Dr. Chi On Chui Regarding
19 Infringement of U.S. Patent No. 5,800,311 Filed in
20 Support of Plaintiff's Opposition To Defendants' Motion
21 for Partial Summary Judgment of Non-Infringement ("Ex
22 Parte Application") [263].

23 The Court **DENIES** Defendants' Motion as **MOOT**. The
24 "Current Products" discussed in Defendants' Motion are
25 outside the scope of Plaintiff's Infringement
26 Contentions and thus are not at issue in this Action.
27 Both Parties assert as much in their papers. Further,
28 the "Dynaflex Platinum Powerball" and "Dynaflex Pro

1 Gyro Exerciser" are also outside the scope of the A1-A9
2 Accused Products. Plaintiff has not sought to amend
3 its Infringement Contentions to add any of these
4 products as accused products. Accordingly, Defendants'
5 Ex Parte Application [263] is also **MOOT**.

6 Further, as discussed in the accompanying order on
7 Defendants' Motion for Partial Summary Judgment of
8 Invalidity [230], the asserted claims of the '311 are
9 invalid. Invalidity of any claim in suit is a defense
10 to patent infringement. 35 U.S.C. § 282; see Typeright
11 Keyboard Corp. v. Microsoft Corp., 374 F.3d 1151, 1157
12 (Fed. Cir. 2004) ("a judgment of invalidity necessarily
13 moots the issue of infringement"); see also Sandt
14 Tech., Ltd. v. Resco Metal and Plastics Corp., 264 F.3d
15 1344, 1356 (Fed. Cir. 2001) (holding where asserted
16 claims were invalid, no judgment of liability could be
17 entered); Avago Techs. Gen. IP PTE Ltd. v. Elan
18 Microelecs. Corp., Case No. 04-05385 JW, 2008 WL
19 3842924, at * 12 (N.D. Cal. Aug 14, 2008). For this
20 additional reason, this instant Motion for Partial
21 Summary Judgment of Non-Infringement is **MOOT**.

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24 **IT IS SO ORDERED.**

25 DATED: May 10, 2013

26 RONALD S.W. LEW

27 HONORABLE RONALD S.W. LEW
Senior, U.S. District Court Judge