

O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|-------------------------------|-------------------------|
| NANO-SECOND TECHNOLOGY CO.,) | CV 10-9176 RSWL (MANx) |
| LTD., a Taiwanese) | |
| Corporation) | |
| | ORDER Re: Plaintiff |
| Plaintiff,) | Nano-Second Technology |
| | Co., Ltd.'s Preliminary |
| v.) | Injunction Motion |
| | Against Defendant |
| | Dynaflex International |
| | [18] |
| DYNAFLEX INTERNATIONAL,) | |
| a California Corporation) | |
| | |
| Defendant.) | |

On September 14, 2011, Plaintiff Nano-Second Technology's ("Plaintiff") Motion for Preliminary Injunction Against Defendant Dynaflex International ("Defendant") [18] came on for regular calendar before this Court. 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 hereby **DENIES** Plaintiff's Motion for Preliminary Injunction against Defendant Dynaflex International.

1 **I. LEGAL STANDARD**

2 When a patentee sues an alleged infringer for
3 patent infringement and moves under 35 U.S.C. § 283 for
4 the extraordinary relief of a preliminary injunction,
5 the patentee's entitlement to such an injunction is a
6 matter largely within the discretion of the district
7 court. Genetech, Inc. v. Novo Nordisk A/S, 108 F.3d
8 1361, 1364 (Fed. Cir. 1997). In assessing the merits
9 of a patentee's request, trial courts consider the
10 traditional equitable considerations for preliminary
11 injunctions. eBay, Inc. v. MercExchange, LLC, 547 U.S.
12 388 (2006).

13 The traditional equitable criteria for granting
14 preliminary injunctive relief require a plaintiff
15 seeking a preliminary injunction to establish "[1] that
16 he is likely to succeed on the merits, [2] that he is
17 likely to suffer an irreparable harm in the absence of
18 preliminary relief, [3] that the balance of equities
19 tips in his favor, and [4] that an injunction is in the
20 public interest." Winter v. Natural Res. Def. Council,
21 Inc., 555 U.S. 7, 20 (2008). These four factors "taken
22 individually, are not dispositive, rather, the district
23 court must weigh and measure each factor against the
24 other factors and against the form and magnitude of the
25 relief requested. Hybritech, Inc. v. Abbott Labs., 849
26 F.2d 1446, 1451 (Fed. Cir. 1988).

27 ///

28 ///

1 **II. ANALYSIS**

2 **A. Evidentiary Objections**

3 As a preliminary matter, the Court evaluates
4 Evidentiary Objections submitted by both parties.

5 1. Defendant's Evidentiary Objections

6 First, the Court **SUSTAINS in part and OVERRULES in**
7 **part** Defendant's Evidentiary Objections pertaining to
8 portions of the Declaration of Pei Sung Chuang. The
9 Court:

- 10 - **OVERRULES** the Evidentiary Objection as to ¶ 20.
- 11 - **OVERRULES** the Evidentiary Objection as to the
12 statements in ¶21 regarding the sales of
13 Plaintiff's patented products in Europe; **SUSTAINS**
14 the Evidentiary Objection as to the statement in
15 ¶21 that "the annual sales of the patented products
16 made by infringer Dynaflex alone are estimated to
17 be \$8 million USD" because it lacks foundation.
- 18 - **SUSTAINS** the Evidentiary Objection as to ¶22
19 because the statements lack foundation.
- 20 - **OVERRULES** the Evidentiary Objection as to ¶25.
- 21 - **SUSTAINS** the Evidentiary Objection as to ¶26
22 because the statements lack foundation.
- 23 - **OVERRULES** the Evidentiary Objection as to ¶¶ 30-32.
- 24 - **SUSTAINS** the Evidentiary Objection as to ¶33
25 because the statements lack foundation.
- 26 - **OVERRULES** the Evidentiary Objection as to the
27 statements in ¶38 regarding the sales and marketing
28 efforts of Plaintiff as well as the statements

1 pertaining to Defendant's distribution of
2 Plaintiff's products in the U.S. market from 2000
3 to 2010; **SUSTAINS** the Evidentiary Objection as to
4 the statement in ¶38 regarding Defendant's
5 activities in registering the word "Powerball" with
6 USPTO because the statement lacks foundation.

7 - **SUSTAINS** the Evidentiary Objection as to ¶39
8 because the statements lack foundation.

9 - **OVERRULES** the Evidentiary Objections as to ¶40.

10 - **SUSTAINS** the Evidentiary Objections as to ¶41
11 because the statements lack foundation.

12 - **SUSTAINS** the Evidentiary Objections as to ¶42
13 because the statements lack foundation.

14 - **OVERRULES** the Evidentiary Objections as to ¶43.

15 - **OVERRULES** the Evidentiary Objections as to ¶44.

16 Further, the Court **OVERRULES AS MOOT** Defendant's
17 Evidentiary Objections pertaining to portions of the
18 Declaration of Yun Lu. More specifically, the
19 statements in ¶¶ 7-11 are not necessary to the Court's
20 analysis, and Exhibit J, referred to in ¶13, has been
21 withdrawn by Plaintiff.

22 2. Plaintiff's Evidentiary Objection

23 Plaintiff makes an Evidentiary Objection pertaining
24 to the admissibility of Dr. Vijay Gupta Ph.D.'s expert
25 report on the invalidity of Plaintiff's patent. The
26 Court finds that this expert report, titled "Invalidity
27 Declaration of Vijay Gupta Ph.D.," is unreliable
28 pursuant to the standards set forth by the Supreme

1 Court in Daubert v. Merrell Dow Pharms., Inc., 509 U.S.
2 579, 589 (1993).

3 More specifically, the Court finds that the expert
4 report is unreliable because it fails to contain any
5 analysis on claim construction. Smiths Indus. Med.
6 Sys. v. Vital Signs, Inc., 183 F.3d 1347, 1354 (Fed.
7 Cir. 1999)("It is well established that the first step
8 in any validity analysis is to construe the claims of
9 the invention to determine the subject matter for which
10 patent protection is sought."). Accordingly, the Court
11 **SUSTAINS** Plaintiff's evidentiary objection and does not
12 consider the "Invalidity Declaration of Vijay Gupta
13 Ph.D."

14 **B. Preliminary Injunction**

15 Plaintiff has sought a preliminary injunction to
16 enjoin Defendant from selling two types of products:
17 (1) products that have been manufactured by Plaintiff
18 ("Plaintiff-manufactured products") and (2) certain
19 products manufactured by Defendant ("Defendant-
20 manufactured products").

21 The Court **DENIES** Plaintiff's Motion for Preliminary
22 Injunction for both categories of products because the
23 Court finds that the balance of the four traditional
24 equitable factors weigh in favor of Defendant.

25 1. Likelihood of Success on the Merits

26 In order to satisfy the first equitable factor for
27 preliminary injunction, the moving party must
28 demonstrate that, "[the accused infringer's] product

1 infringes the [asserted] patent and that it will
2 withstand [the accused infringer's] challenges to the
3 validity and enforceability of the . . . patent."
4 Sanofi-Synthelabo v. Apotex, Inc., 470 F.3d 1368, 1374
5 (Fed. Cir. 2006) (internal citations omitted).

6 Applying this standard, the Court must (1) look at the
7 validity of Plaintiff's patent and (2) examine whether
8 Defendant's activities infringe on Plaintiff's patent.

9 First, the Court finds that Plaintiff's patent is
10 valid for the purposes of analyzing the merits of
11 Plaintiff's claims against Defendant. Though the
12 burden is generally on a movant to establish the merits
13 of a claim in a preliminary injunction, if the alleged
14 infringer responds to the preliminary injunction motion
15 "by launching an attack on the validity of the patent
16 [as Defendant has in this case], the **burden is on the**
17 **challenger** to come forward with evidence of
18 invalidity." Titan Tire Corp. v. Case New Holland,
19 Inc., 566 F.3d 1372, 1377 (Fed. Cir. 2009) (emphasis
20 added). Here, the Court finds that Defendant has not
21 come forward with sufficient evidence to raise
22 substantial questions regarding the validity of
23 Plaintiff's patent. As such, the Court finds
24 Plaintiff's patent valid for the purpose of this
25 Motion.

26 Addressing the merits of Plaintiff's patent
27 infringement claims, the Court finds that Plaintiff has
28 met its burden for demonstrating a likelihood of

1 success on its claim against Defendant for selling
2 Plaintiff-manufactured products. For these products,
3 Plaintiff has made a sufficient showing that Defendant
4 violated 35 U.S.C. §271(b) by inducing infringement of
5 Plaintiff's patent. More specifically, Plaintiff has
6 proffered evidence that Defendant sold unauthorized
7 speedometer accessories with Plaintiff's product and
8 encouraged customers to equip Plaintiff-manufactured
9 products with these speedometers.

10 The Court, however, finds that Plaintiff has not
11 met its burden for showing a likelihood of success on
12 the merits of its infringement claim against Defendant
13 for selling Defendant-manufactured products. Defendant
14 has proffered evidence that Defendant does not
15 manufacture any products "sold with a string/cord" or
16 products containing "circumferential grooves or a
17 driving hole." Declaration of Floyd T. Smith ["Smith
18 Decl."], ¶30; Infringement Declaration of Vijay Gupta
19 Ph.D.¹ ("Gupta Infringement Decl.") ¶¶24, 35. The Court
20 finds that because Defendant-manufactured products must
21 contain these features in order for Plaintiff to
22 maintain a successful infringement claim², Defendant has

24 ¹This Gupta Infringement Decl. is different from
25 the Gupta Invalidity Decl., which the Court finds
inadmissible.

26 ²The two independent claims on Plaintiff's patent
27 (Claims 1 and 15), both require: "the rotor having an
28 outer surface on which a circumferential groove is
formed with a driving hole formed in the groove, a

1 raised a "substantial question" regarding infringement.
2 Genetech, Inc. v. Novo Nordisk A/S, 108 F.3d 1361, 1364
3 (Fed. Cir. 1997)(holding that if the accused infringer
4 raises a "substantial question concerning the . . .
5 infringement, the preliminary injunction should not
6 issue"). As such, the Court finds that Plaintiff
7 cannot meet its burden regarding the likelihood of
8 success on the merits of Plaintiff's infringement claim
9 pertaining to Defendant-manufactured products.

10 2. Irreparable Harm

11 As a threshold issue, the Court finds that the
12 burden remains on Plaintiff to show that it will suffer
13 irreparable harm absent a preliminary injunction.
14 Though the Federal Circuit has previously shifted the
15 burden to defendants by finding a rebuttable
16 presumption of irreparable harm in cases where a
17 plaintiff could establish a likelihood of success on
18 the merits, the Court finds that such a shift is now
19 inappropriate in light of the Supreme Court's decision
20 in eBay, Inc. v MercExchange, LLC, 547 U.S. 388 (2006).
21 See Pefect 10, Inc. v. Google, Inc., 2011 WL 3320297,
22 at *4 (9th Cir., Aug. 3, 2011) (holding that a
23 presumption of irreparable harm "is clearly
24 irreconcilable with the reasoning of the Court's
25 decision in eBay and has therefore been effectively
26 overruled"). As such, the Court finds that Plaintiff
27 _____
28 flexible rope having a rigid end receivable in and
engageable with the driving hole." (emphasis added)

1 has the burden of making an affirmative showing of
2 irreparable harm in order to warrant a preliminary
3 injunction. Here, the Court finds that Plaintiff has
4 not met its burden for demonstrating irreparable harm
5 absent a preliminary injunction enjoining the sale of
6 either Plaintiff-Manufactured goods or Defendant-
7 Manufactured goods.

8 First, though Plaintiff has been able to
9 show a likelihood of success on the merits for its
10 claim regarding Plaintiff-Manufactured products, the
11 Court finds that Plaintiff cannot meet its burden for
12 demonstrating irreparable harm absent a preliminary
13 injunction pertaining to these products. Plaintiff
14 primarily argues that it will suffer irreparable harm
15 because Defendant's alleged infringement on these
16 products will result in a permanent change in market
17 conditions, leading to irreparable future loss of
18 revenue, loss of market share, and price erosion.

19 The Court, however, finds Plaintiff's argument
20 unpersuasive. First, Plaintiff has not proffered any
21 evidence to show how future loss of revenue and market
22 share cannot be compensated with money damages. Abbott
23 Labs. v. Andrx Pharms., Inc., 452 F.3d 1331, 1348 (Fed.
24 Cir. 2006). Second, as Defendant has been selling
25 allegedly infringing products for over ten years, it is
26 likely that any price erosion from Defendant's conduct
27 has already happened. Plaintiff has offered no
28 evidence as to why an injunction is necessary or how an

1 injunction would ameliorate the alleged price erosion.
2 As such, the Court finds that Plaintiff has not met its
3 burden to show irreparable harm absent an injunction
4 pertaining to Plaintiff-manufactured products.

5 Second, as to Defendant-manufactured products,
6 Plaintiff does not offer any additional evidence in
7 support of irreparable harm. Therefore, per the above
8 analysis, the Court finds that Plaintiff also cannot
9 meet its burden to show why irreparable harm would
10 occur absent a preliminary injunction on the sale of
11 Defendant-manufactured products.

12 3. Balance of the Hardships

13 The Court finds that the balance of hardships
14 weighs against the issuance of a preliminary injunction
15 that would enjoin the sale of either Plaintiff-
16 manufactured products or Defendant-manufactured
17 products.

18 The Court finds that issuing a preliminary
19 injunction against Defendant would effectively stop
20 Defendant from operating its business given that the
21 majority of Defendant's business stems from the sales
22 of both Plaintiff-manufactured products and Defendant-
23 manufactured products. Plaintiff, on the other hand,
24 has only been in the U.S. Market as an independent
25 seller for close to a year. As such, the Court finds
26 that any effect that the alleged infringing activity
27 may have on Plaintiff's business will be minimal in
28 comparison to the loss of a major portion of

1 Defendant's business that has been built up over twenty
2 years. Accordingly, the Court finds that the balance
3 of hardships weighs in favor of Defendant.

4 4. Public Interest

5 The Court finds that the public interest does weigh
6 in favor of granting a preliminary injunction for
7 enjoining the sale of Plaintiff-manufactured products.
8 Plaintiff has shown a likelihood of success on the
9 merits for its claim pertaining to these products and a
10 preliminary injunction would support the public's faith
11 in the patent system. Eli Lilly Co. v. Premo
12 Pharmaceutical Labs, 630 F.2d 120, 137 ("Congress has
13 determined that it is better for the nation in the
14 long-run to afford the invents of novel, useful, an
15 non-obvious products short-term monopolies" through the
16 patent system).

17 The Court finds that the public interest, however,
18 does not support a granting of a preliminary injunction
19 for enjoining the sale of Defendant-manufactured
20 products. The public interest in continued market
21 competition for these products disfavors a preliminary
22 injunction, especially in light of Plaintiff's small
23 likelihood of success in proving infringement for these
24 products. Illinois Tool, Inc. v. Grip-Pak, Inc., 906
25 F.2d 679, 684 (Fed. Cir. 1990)(finding that the public
26 interest in the "continuing right to compete, which
27 must be seen as legitimate in [the preliminary
28 injunction] stage," disfavors preliminary injunction

1 when there is only a small likelihood of success in
2 proving infringement at trial).

3 IV. CONCLUSION

4 On balancing the four traditional factors, the
5 Court finds that Plaintiff has not met its overall
6 burden to support the issuance of a preliminary
7 injunction to enjoin Defendant from selling either
8 Plaintiff-manufactured products or Defendant-
9 manufactured products.

10 For Plaintiff-manufactured products, although
11 Plaintiff can show a likelihood of success on the
12 merits and public interest favors a preliminary
13 injunction, Plaintiff ultimately cannot show that it
14 will suffer irreparable harm absent such an
15 "extraordinary remedy." Lerner Germany GmbH v. Lerner
16 Corp., 94 F.3d 1575, 1577 (Fed. Cir. 1996). Moreover,
17 the balance of equities weigh in favor of Defendant.
18 As such, the Court **DENIES** Plaintiff's Motion for
19 Preliminary Injunction as it pertains to the sale of
20 Plaintiff-manufactured products. Amazon.com, Inc v.
21 Barnesandnoble.com, Inc., 239 F.3d 1343, 1350 (Fed.
22 Cir. 2001)("[M]ovant cannot be granted a preliminary
23 injunction unless it establishes both of the first two
24 factors," which are the likelihood of success on the
25 merits and irreparable harm).

26 For Defendant-manufactured products, all four
27 factors point toward a denial of a preliminary
28 injunction. As such, the Court finds that a

1 preliminary injunction is not appropriate and **DENIES**
2 Plaintiff's Motion for Preliminary Injunction to enjoin
3 Defendant's sale of Defendant-manufactured products.

4 Accordingly, the Court **DENIES** Plaintiff's Motion
5 for Preliminary Injunction in its entirety.

6

7 DATED: September 28, 2011

8 **IT IS SO ORDERED.**

9

10

RONALD S.W. LEW

11

HONORABLE RONALD S.W. LEW

12

Senior, U.S. District Court Judge

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28