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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WHITEWATER WEST INDUSTRIES,
LTD., a Canadian corporation,

Plaintiff,

v.

PACIFIC SURF DESIGNS, INC., a
Delaware corporation, and FLOW
SERVICES, a California corporation,

Defendants.

Case No.: 3:17-cv-01118

**ORDER DENYING RENEWED
MOTION FOR PRELIMINARY
INJUNCTION
(Dkt. No. 62)**

Plaintiff Whitewater West Industries, Ltd. (“Plaintiff” or “Whitewater”) renews its motion for a preliminary injunction, pursuant to 35 U.S.C. § 283 and Federal Rule of Civil Procedure 65(a), on the ground that Defendants manufacture, sell, offer for sale, use, import, or supply in or from the United States certain surfing attractions and related components that infringe Whitewater’s exclusive patent, U.S. Patent No. 6,491,589 (the “’589 Patent”). Defendants Pacific Surf Designs (“PSD”) and Flow Services, Inc. (“Flow”) oppose the motion. Whitewater’s renewed motion is denied.

BACKGROUND

As mentioned previously, the ’589 Patent, entitled “Mobile Water Ride Having Sluice Slide-Over Cover,” generally relates to an artificial surfing water ride usually

1 constructed for entertainment, often in a water park setting. The patent claims sheet-
2 wave technology, in which a thin flow of water moves over a stationary surface at a high
3 velocity, recreating something like ocean waves in an enclosed system that riders may
4 surf. The '589 Patent improves on prior art by reducing the footprint of the ride through
5 shortening the transition surface between the water-injecting components and the lower
6 end of the ride surface. In the absence of an extended transition surface, the Patent
7 includes a cover over the water-injecting components to prevent rider contact. The
8 smaller size of the attraction reduces manufacturing and shipping costs, allowing the ride
9 to be installed in spaces previously not possible, while improving rider performance and
10 safety. The '589 Patent is embodied in the "FlowRider" line of products sold by
11 Whitewater and its subsidiary and licensee.

12 As mentioned previously, the '589 Patent has 57 total claims. Whitewater still
13 alleges that Defendants infringe at least claims 1, 3, 13, 15-17, 24-27, 29-38, 41-43, 50,
14 and 54-55 (the "Asserted Claims"). For purposes of this motion, Whitewater uses
15 independent claim 17 to establish that Defendants literally infringe at least one of the
16 Asserted Claims. Claim 17 recites:

17 17. A cover for a water ride sluice gate from which a flow of water jets out,
18 comprising a contoured flexible pad, a connector configured to removably
19 affix the cover to said sluice gate, a flexible tongue at a downstream end of
20 the cover, the tongue configured to extend over the water that jets from said
21 sluice gate, and a generally flat portion at an upstream end of the cover, said
22 tongue being urged downward against the flow of water jetting from said
23 sluice gate.

24 ('589 Patent, Claim 17).

25 PSD is Whitewater's competitor. Defendants' allegedly infringing products
26 include the "ProFlow" line of surfing attractions, the Supertube attraction, and
27 refurbishment or replacement of the patented features existing in the FlowRider surfing
28 attractions. Whitewater's previous motion for a preliminary injunction was denied
without prejudice. Whitewater now seeks to renew its motion by providing evidence of
causal nexus -- evidence that was previously insufficient.

LEGAL STANDARD

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2 The legal standard has not changed. “A preliminary injunction is an extraordinary
3 and drastic remedy.” *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir.
4 2014) (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). A plaintiff seeking a
5 preliminary injunction must establish that he is: (1) likely to succeed on the merits; (2)
6 that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the
7 balance of equities tips in his favor; and (4) that an injunction is in the public interest.
8 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *eBay, Inc. v.*
9 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (applying the four factor test to patent
10 disputes). The *Winter* factors are considered in conjunction with the Ninth Circuit’s
11 “sliding scale” approach, which provides that “the elements of the preliminary injunction
12 test are balanced, so that a stronger showing of one element may offset a weaker showing
13 of another.” *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739 (9th Cir.
14 2011).

DISCUSSION

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16 Previously, the Court found that a preliminary injunction was unwarranted because
17 Plaintiff could not establish a necessary requirement to show irreparable harm: *i.e.*, that
18 there is *a causal nexus* between Whitewater’s harm and Defendants’ infringing product.
19 “A party seeking a preliminary injunction must establish that it is likely to suffer
20 irreparable harm if the preliminary injunction is not granted and there is *a causal nexus*
21 between the alleged infringement and the alleged harm.” *Metalcraft*, 848 F.3d at 1368
22 (citing *Apple, Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1360 (Fed. Cir. 2013) (“*Apple*
23 *III*”)) (emphasis added). The causal nexus requirement requires “proof that the
24 infringement causes the harm.” *Apple, Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 639
25 (Fed. Cir. 2015) (“*Apple IV*”). This requirement “ensures that an injunction is only
26 entered against a defendant on account of a harm resulting from the defendant’s wrongful
27 conduct, not some other reason.” *Id.* at 640.
28

1 To satisfy the causal nexus requirement, a patentee must show that there is “some
2 connection” between the patented feature and the demand for the infringing product. *Id.*
3 at 642. In other words, the patentee must present evidence that the patented feature
4 “impact[s] consumers’ decision to purchase the accused” product. *Id.* A patentee may
5 satisfy the requirement by showing “that the infringing feature drives consumer demand
6 for the accused product.” *Apple, Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1375 (Fed.
7 Cir. 2012) (“*Apple IP*”). However, the patentee need not show that the infringing feature
8 is the exclusive or predominant reason why consumers purchased the accused product.
9 *Apple IV*, 809 F.3d at 642, 644. Rather, “it is enough” for the patentee to show that the
10 infringing feature is “related to infringement” and is “important to customers when”
11 examining their choices. *Id.* For instance, in *Apple IV*, the Federal Circuit held that
12 Apple demonstrated irreparable harm where it presented evidence that the patented
13 feature was one of several features that caused consumers to make their purchasing
14 decisions.

15 Previously, Whitewater had not presented any evidence that the patented feature
16 influences consumer demand for Defendants’ infringing products. Whitewater had
17 presented evidence that PSD advertises that its products contain a sluice gate cover.
18 However, Whitewater had not put forth any evidence that consumers value the cover
19 when making their purchasing decisions. There was no evidence that consumers would
20 not have purchased Defendants’ products if they lacked the cover claimed by the ’589
21 Patent. Nor was there any evidence about consumers’ preferences or desire for the
22 sluice gate cover. Consequently, Whitewater had not demonstrated that the patented
23 feature has caused and is causing harm.

24 Now, Whitewater offers the testimony of two witnesses who are consumers as
25 evidence of a causal nexus. *See* Declarations of Tim Gantz and Arthur Berry, III.
26 Whitewater also offers as evidence copies of emails between other persons not offered
27 under the penalties of perjury and without much context. *See* Exhibts 66-70 to
28

1 declaration of Plaintiff's counsel Leanna Costantini, Esq. This evidence is also
2 insufficient to support a preliminary injunction.

3 The two witness declarations are virtually identical. In the penultimate paragraph
4 (¶3) each of the six sentences are identical, including an unusual phrase ("rider
5 throughput") and a grammatical error ("it is desirable to maintain a [sic] small a footprint
6 as possible"). While the similarities do not necessarily mean that the declarations lack
7 truthfulness, it does mean that at least one of the witnesses is not testifying in his own
8 words. More importantly, however, both witnesses declare that they are decision-makers
9 in purchasing water park attractions for their respective businesses. They both declare
10 that they decided to purchase the Plaintiff's FlowRider product. This proves the opposite
11 of a causal nexus. It proves that they decided to not purchase the allegedly infringing
12 product sold by the Defendants. More convincing evidence would be declarations from
13 purchasers who explained that the sluice gate cover is important and because Defendants'
14 product has it, they decided to buy the Defendants' product instead of the Plaintiff's
15 FlowRider. This type of evidence is absent.

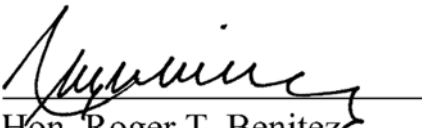
16 Plaintiff also offers evidence of the number of FlowRider installations extant as
17 compared to other those of other makers and suggests that an inference of a causal nexus
18 may be drawn. Perhaps, but the inference would be based on too much speculation to
19 warrant a preliminary injunction.

20 CONCLUSION

21 Because evidence of a causal nexus remains insubstantial, Plaintiff's renewed
22 motion for a preliminary injunction is **DENIED with prejudice.**

23 **IT IS SO ORDERED.**

24 Dated: September 26, 2018

25 
26 Hon. Roger T. Benitez
27 United States District Judge
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