

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Ohio Willow Wood Company,

Plaintiff,

-vs-

Alps South, LLC,

Defendant.

) Case No. 2:04-cv-1223
) Judge Gregory L. Frost
) Magistrate Judge Mark R. Abel

) Case No. 2:05-cv-1039
) (Consolidated with Case No. 2:09-cv-1027)
) Judge Edmund A. Sargus, Jr.
) Magistrate Judge Terence P. Kemp

) **STIPULATION TO DISMISS COUNTS I,
) II, III OF THE COUNTERCLAIM OF
) ALPS SOUTH, LLC WITHOUT
) PREJUDICE, RELATED
) AGREEMENTS AND ORDER**
)

In accordance with the schedule ordered by the Court in Case No. 2:04-cv-1223 (ECF No. 119), plaintiff, The Ohio Willow Wood Company ("OWW"), amended its complaint on November 18, 2011 (ECF No. 120) to assert that defendant, Alps South, LLC ("Alps"), is infringing the new claims that were about to issue as part of a new reexamination certificate that ultimately issued on November 29, 2011. Also in accordance with the Court's schedule, on December 2, 2011, Alps filed its answer and counterclaims in response to OWW's amended complaint (ECF No. 127). Counts 1, II and III of Alps' counterclaims allege that OWW violated the antitrust laws of the United States (Count I), that it violated the Lanham Act (Count II), and

that it is engaged in unfair competitive practices in violation of Ohio law (Count III) (collectively referred to as "trade regulation counterclaims"). Although Alps' trade regulation counterclaims in large part overlap the trade regulation claims Alps asserted in Case Nos. 2:05-cv-1039 and 2:09-cv-1027, which are currently pending before Judge Sargus ("Sargus cases"), Alps asserted them in Case No. 2:04-cv-1223 to avoid any question that it would waive its trade regulation claims by not asserting them in Case No. 2:04-cv-1223 as part of its response to OWW's amended complaint. On December 8, 2011, OWW filed a motion to dismiss Alps' trade regulation counterclaims in Case No. 2:04-cv-1223 pursuant to Fed. R. Civ. P. 12(f), on the grounds that these counterclaims were redundant because they had already been asserted in the Sargus cases.

Counsel for OWW and Alps have discussed the most appropriate way to deal with the issues raised above concerning duplicative litigation and waiver, and as a result, agree and stipulate as follows:

1. Counts I, II, and III, Alps' trade regulation counterclaims asserted in Case No. 2:04-cv-1223, will be and hereby are by this stipulation and order dismissed without prejudice;
2. By stipulating to the above dismissal without prejudice of its trade regulation counterclaims in Case No. 2:04-cv-1223 and by not pursuing those claims in that case, Alps has not waived any of the claims asserted by it in the Sargus cases, Case Nos. 2:05-cv-1039 and 2:09-cv-1027, and that all of Alps' trade regulation claims, i.e., its antitrust claims, its Lanham Act claim, and its unfair competition claim under Ohio law, will proceed in Case No. 2:05-cv-1039 and 2:09-cv-1027, the Sargus cases;

3. Although the Court has continued the stay of Alps' trade regulation claims in Case Nos. 2:05-cv-1039 and 2:09-cv-1027, Alps may amend its pleadings in the Sargus cases relating to its trade regulation claims to include the additional matter that was set forth in Alps' trade regulation counterclaims filed in 2:04-cv-1223 on December 2, 2011, in accordance with the schedule set forth in the Court's December 14, 2011 Order; and

4. OWW need not file a pleading responsive to Alps' amended trade regulation claims in the 2:05-cv-1039 and 2:09-cv-1027 cases until 14 days after the Court enters an order lifting the stay as to Alps' trade regulation claims.

/s/Michael Stonebrook

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IT IS SO ORDERED.



Judge Gregory L. Frost



Judge Edmund A. Sargus, Jr.