IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

PONANI SUKUMAR, and individual, and SOUTHERN CALIFORNIA STROKE REHABILITATION ASSOCIATES, INC., a California corporation, *Plaintiffs,* v. NAUTILUS, INC., a Washington corporation, *Defendant.*	Case No. 7:11-cv-00218-jct

DEFENDANT NAUTILUS INC.'S MOTION AND MEMORANDUM IN SUPPORT OF STAY OF PROCEEDINGS

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INTRODUCTION

The Plaintiff Ponani Sukumar's lawsuit against Nautilus is based entirely on alleged violations of a single federal statute, 35 U.S.C. § 292 (herein "Section 292"). Sukumar alleges that Nautilus has attached stickers or labels to its exercise machines that identify patent numbers which have expired or do not apply to the machine it is stuck on. If Sukumar can prove that Nautilus put those "false" numbers on the labels and further prove Nautilus did so with the intent to the deceive the public, Section 292 lets Sukumar recover one-half of a statutory fee for every single machine with the "false" label. The other half goes to the United States Government. Sukumar does not need to prove standing or actual harm; if successful, he simply receives half the recovery.

The constitutionality of Section 292 however, has been challenged directly and is now the sole issue in a case pending before the United States Court of Appeal for the Federal Circuit. Specifically, a United States District Court in Ohio has held that this specific statute violates the "Take Care" clause of the United States Constitution. If the Federal Appellate Court affirms the District Court's decision and finds 35 U.S.C. section 292 unconstitutional, Plaintiff's Complaint must be dismissed and this case is over. Accordingly, if this Court grants Nautilus' Motion to stay these proceedings pending the Federal Circuit's ruling, one of two possible scenarios must necessarily occur:

(1) First, if Federal Circuit affirms the District Court's ruling and finds the statute unconstitutional, the stay of this action will not only have saved judicial resources, but both parties will have been spared from what is certain to be an astonishing financial expenditure for both sides in connection with litigating this case in the coming months; including but not limited to the numerous expert and

witness depositions around the country (which according to current filings, number well over 30); multiple anticipated motions, extensive written discovery (conceivably costing the parties hundreds of thousands of dollars), cross-country travel, and possibly a lengthy trial.

(2) Alternatively, if this Court grants the requested stay but the Federal Circuit overturns the lower court and finds the statute to be constitutional, all that has been lost is a comparatively short amount of time, nothing else. A stay does not cost any party anything in this case, and nor does the mere passage of time which is likely to be a relatively short period of time. Moreover, this case involves matters which relate back to 2006 and thus there is simply no tenable argument to suggest the evidence in this case exists now, but might "decay" in just a few months; or that memories strong today would fade over the next few months. To the contrary, as Plaintiff has repeatedly pointed out in his various filings in this case, they believe they have the evidence even now to demonstrate liability. Any faded memories are faded already; any evidence lost has been lost for some time.

Equally as compelling, current legislation that would drastically amend 35 U.S.C. section 292 and effectively require a dismissal of Plaintiff's claim has now passed the United States Senate and is currently pending before the United States House of Representatives. This legislation appears likely to pass in the near future and will have a dramatic and dispositive impact on this case.

This is neither an arbitrary request nor one based upon some uncertain event at some ambiguous time in the future. The Federal Circuit's ruling on the Constitutionality of the Section 292 certain and forthcoming. The legislation at issue has passed the Senate and is poised to pass the House of Representatives at any time. A stay of this case therefore could result in the savings of hundreds of thousands of dollars in litigation and potentially millions of dollars in damages to which it may be soon determined that Plaintiff Sukumar was never entitled.

Accordingly, Nautilus respectfully requests this Court grant its request to stay these proceedings until the Federal Circuit rules upon the constitutionality of 35 U.S.C. section 292 in the matter of *Unique Product Solutions, LTD. v. Hy-Grade Valve Inc.*, Fed. Cir. Case No. 2011-1254 (on appeal from U.S. Dist. N. Ohio, Case No. 5:10-CV-1912). Alternatively, Nautilus requests this Court stay this matter pending the outcome of pending legislation that will materially affect the burden of proof as provided in the underlying statute.

II.

RELEVANT PROCEDURAL HISTORY

Sukumar has been continuously suing Nautilus in both state and federal courts for over 11 consecutive years. (*See*, Docket ("Dkt") Entry No. 20 at Attachment No. 1 (memorandum) at factual background; *see also,* Dkt. 20 at Notice of Lodgment.) [1] While many of the cases that he has filed against Nautilus over the years have come and gone, Sukumar still has two other active cases against Nautilus not including the instant matter: one pending in the U.S. District Court for the Southern District of California originally filed in 2009; and another currently on appeal for the second time in the California Court of Appeal; a case originally filed in 2005 and one which has had two jury verdicts against Sukumar to date.

This current matter, a *qui tam* "false marking" case pursuant to Section 292, was originally filed in the Central District of Los Angeles in October, 2010. (Dkt. No. 1.) On March 24, 2011, Defendant Nautilus Inc. filed a Motion to Transfer the

[1] The Memorandum (attachment No. 1) to Docket Entry No. 20, which is Nautilus' moving papers in Support of its Motion to Transfer this case to Virginia, contains a detailed discussion on the long history between the parties and the many lawsuits Sukumar has brought against Nautilus for over 11 years.

case to the Western District of Virginia, largely based on the number of witnesses to the actual "marking" of the machines being located at Nautilus' longtime domestic manufacturing plant in Independence Virginia. (Dkt. No.20.) The Central District Court granted Nautilus' Motion to Transfer this case and denied Plaintiff's motion to for summary judgment. (Dkt. No. 34.) The case was transferred on Wednesday, May 11, 2011. (Dkt. No. 35.)

III.

THE COURT SHOULD BRIEFLY STAY THESE PROCEEDINGS PENDING THE OUTCOME OF DISPOSITIVE APPEALS IN THE FEDERAL CIRCUIT AND LEGISLATION PENDING BEFORE CONGRESS

This matter should be stayed for two primary reasons, both are compelling and both will likely result in substantial savings of the parties' and the court's time, effort, and resources:

First (1) The Federal Circuit is currently considering the Constitutionality of Section 292 and thus it is sensible that this matter should be stayed until those decisions are rendered, and;

Second (2) legislation that drastically impacts Section 292 and almost certainly be dispositive in this case has recently passed in the United States Senate in March, 2011, and has already made it to committee in the United States House of Representatives. The bills appear poised to become law in the near future and this Court would not be the first to appropriately stay this case pending the outcome of that litigation.

A. The Court Has the Authority To Stay a Case Pending the Outcome of Another Court's Decision

Nearly 75 years ago the United States Supreme Court recognized the inherent power of district courts "to stay proceedings in one suit until the decision

of another" in furtherance of the fair and efficient administration of justice. (*Landis v. N. Am. Co.* (1936) 299 U.S. 248, 249, 254.) Justice Cardozo explained "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (*Id.* at 254.) The Supreme Court delineated two basic requirements for the grant of a discretionary stay. First, a party that seeks such a stay "must make a clear case of hardship or inequity in being required to go forward." (*Id.*) Second, such a stay must have time limit that is reasonable under the circumstances. (*Id* at 257.) The high Court made it clear however, there is nothing *per se* impermissible about staying a lawsuit until the outcome of another related action has been determined. (*Id*. at 258.)

Nautilus respectfully submits that all necessary elements exist for a reasonable stay to be put in place in this matter.

B. The Federal Circuit Will Soon Determine The Constitutionality Of 35 U.S.C. 292; Therefore A Brief Stay Makes Sense In This Case

A reasonable, comparatively brief stay in this case has very little risk of prejudice and an indisputable likelihood to save the parties untold sums of legal fees in costs in the event the statute is found unconstitutional.

1. <u>The *Unique Product Solutions* Case Directly Confronts the Constitutionality of 35 U.S.C. 292</u>

On February 23, 2011, in the matter of *Unique Product Solutions, LTD. v. Hy-Grade Valve Inc.*, Case No. 5:10-CV-1912 (U.S. Dist. N. Ohio); United States District Judge Dan Polster, for the Northern District of Ohio, Eastern Division, determined that the false marking, *qui tam* provision set forth in 35. U.S.C. §292 was unconstitutional as it violated Article II of the Constitution and the "Take Care" clause. The Appeal was docketed in the United States Court of Appeals for the Federal Circuit on March 16, 2011, and opening briefs have been filed. (*See*,

Fed. Cir. Case No. 2011-1254.) Judge Polster held that Section 292 does not allow for oversight required by the Take Care clause of the U.S. Constitution [2], and stated:

> "[Section 292] is unlike any statute in the Federal Code with which this Court is familiar. Any private entity that believes someone is using an expired or invalid patent can file a criminal lawsuit in the name of the United States, without getting approval from or even notifying the Department of Justice. The case can be litigated without any control or oversight by the Department of Justice. The government has no statutory right to intervene nor does it have a right to limit the participation of the relator. The government does not have the right to stay discovery which may interfere with the government's criminal or civil investigations. The government many not dismiss the action. Finally, the relator may settle the case and bind the government without any involvement or approval by the Department of Justice." (Notice of Lodgment, "NOL", Ex. A, p. 13, Polster's Order.)

The question of Section 292's Constitutionality in *Unique Product Solutions* case is currently pending before the Federal Circuit.

2. The *Unique Production Solutions* Case Is Particularly Important and Will Likely Be Decided Soon

Notably, the opening brief has already been filed in *Unique Product Solutions* and the responding brief is due on June 27, 2011, before this Motion to Stay will be heard. (NOL at Ex. B.) Thus, the case is nearly fully briefed and therefore the Federal Circuit's ruling on the issue will be forthcoming in a relatively short time. Certainly the short time the parties must "wait" for the decision is outweighed by the incredible savings of judicial and parties' resources that will be expended in the meantime.

[2] U.S. Const. Art. II, § 3, requires the President of the United States to "take Care that the Laws be faithfully executed."

Moreover, it is important to note that unlike the many other cases which may have addressed various aspects of Section 292—even Constitutional aspects—the Federal Circuit (who has exclusive jurisdiction in these patent matters) has not had any case before it where the *sole issue* was the Constitutionality of this statute under the "Take Care" clause. This makes *Unique Product Solutions* in fact, unique in its own right, and makes a stay of these proceedings even more compelling.

3. The *Wham-O* Case May Also Result in a Finding of Unconstitutionality by the Federal Circuit

Another case currently before the Federal Circuit which is even closer to resolution may also deem Section 292 unconstitutional. The case of *FLFMC LLC v. WHAM-O* (Fed. Cir. Case No. 2011-1067), is an appeal from an Order granting a motion to dismiss in the United States District Court for the Western District of Pennsylvania. One of the questions certified for appeal in the *FLFMC* matter is the Constitutionality of 35 U.S.C. §292. (*See*, NOL Ex. "C".) The *Wham-O* matter has been fully briefed and oral arguments before the Federal Circuit are currently scheduled for July 7, 2011. (NOL Ex. "D".) Thus, a decision in the Wham-O case is likely to issue even sooner than in *Unique Products*.

Even the United States Chamber of Commerce has filed an *Amicus* brief requesting the Federal Circuit declare Section 292 to be unconstitutional under the Take Care clause. (NOL Ex. "E".)

It is anticipated, like they did in their opposition to vacating the dates in this matter, that Plaintiff Sukumar will provide a list of District Court rulings that did not stay proceedings pending the resolution of the *Wham-O* case. These rulings however, are inapposite and do not control for one simple reason: unlike in *Unique Products Solutions Ltd*., the constitutionality of Section 292 is not the *only* question presented in the Wham-O case that has been appealed. Thus, Nautilus

agrees that if the sole basis for requesting a stay was to await the outcome of only the *Wham-O* case, it would be less compelling if the Federal Circuit, as it has in the past in cases involving section 292, decides the case but passes on the Constitutional issue entirely. The stay would therefore be for naught. Because the *Unique Products Solutions Ltd* case only addresses Constitutionality; however, a stay is very appropriate here and the *Wham-O* case simply provides additional support for such an Order.

C. The Court Should Stay This Case Until The Outcome Of Currently Pending Legislation Which Would Drastically Impact Section 292

A bill that would virtually eliminate the issues in cases such as the instant one and drastically limit the ability of "drive by" Plaintiffs with no standing to sue Companies on behalf of the Government has (i) already passed in the United States Senate; (ii) been introduced into the United States House of Representatives; and (iii) has already been sent to committee for approval. (*See*, NOL Ex. F, and NOL Ex. "G".)

Given the history of this legislation and the smooth passage in the Senate, the changes to Section 292 appear poised to soon become law and would invalidate the vast majority of the Plaintiff's claims and available remedies in this case. Again, therefore, it would appear sensible and reasonable to stay this matter for what appears to likely be a comparatively short time while the legislation is decided.

1. <u>The Changes to Section 292 As Set forth In the Pending Legislation will Have a Dramatic Impact on this Case</u>

The pending legislation would effectively require dismissal of this action and thus, given the substantial resources the parties will expend litigating this case, a stay is a practical solution.

Senate Bill 23[3], which passed the United States Senate on March 8, 2011, alters Section 292 in two material ways: First, Section 292 is amended by defining that only the United States may sue for the penalty authorized by that subsection. In short, this amendment would eliminate *qui tam* actions by private citizens. Second, Section 292(B) is amended to permit only persons who have suffered a competitive injury as a result of a violation of Section 292 the right to sue for compensatory damages. Thus, a person may only initiate a civil suit in federal court by alleging the *additional* elements of competitive injury and damages. (*See*, SB 23, Sec. 2, subsection (k), attached as an excerpt with NOL Ex. "F".)

Similarly, the version introduced in United States House of Representatives, HR 243 is currently in committee awaiting approval and would limit the damages recoverable by an individual such as the Plaintiff to **$500** in the aggregate, rather than $500 for every single machine falsely marked. (NOL Ex. "G".) This would, of course, effectively put an end to the instant case and similar "bounty hunter" cases around the country.

2. At Least One Other District Court Has Stayed A Similar Case Awaiting the Outcome of this Pending Legislation In Congress Regarding 35 U.S.C. Section 292

Not only is an Order staying this case to await the Congressional changes to section 292 appropriate, it has been done by at least one other District Court just two months ago. The honorable District Judge John Grady, from the United States District Court for the Northern District of Illinois, issued an Order staying

[3] The Status Report for SB 23 is attached as NOL Ex. "F". The text of the actual Bill that passed the Senate is not attached, due to its large size. An Excerpt from the pertinent portion is included in Ex. "F"; however, Nautilus will gladly provide a full copy of the Bill Text should the Court request it.

proceedings in *Simonian v. Edgecraft Corp*., on March 17, 2011. (NOL Ex. "H".) The Court's Order states:

> "In light of the possible passage of legislation that will require false-marking claimants to show competitive injury, defendant's obligation to plead to the amended complaint is stayed until further order of the court."
>
> (District Judge Grady, Order dated 3.17.11, N.Dist. Illinois, NOL Ex. "H".)

Although this Court is not obligated to follow such an Order from a District Judge in Illinois, it nevertheless highlights the fluctuating and questionable viability of the Section 292, pursuant to which Sukumar is now suing; and illustrates the importance of awaiting the decision of the ultimate "voices": (1) Congress and (2) the Courts of Appeal. It is clear from the appellate dockets and the legislative status that we are currently in "the calm before the storm" and substantial changes—what appear likely to be substantial *limitations*—to this statute are imminent and this Court should not allow Sukumar to "sneak in" his claims and attempt to recover what could be millions of dollars in free money in the hopes of doing so before our governing bodies confirm that he has no right to do so. This Court should therefore grant a reasonable stay and await these essential decisions.

D. No Identifiable Prejudice of Any Kind would Result From the Court Issuing A Stay In This Case

There is no evidence or even reasonable argument that the passage of additional time in this case will result in any prejudice to the Plaintiff. To the contrary, "mere delay in any eventual monetary recovery is not sufficient to require going forward where [a] threshold issue…can be conclusively resolved by waiting for the Federal Circuit to rule." (*San Francisco Technologies, Inc. v. Adobe Sys. Inc.*, No. C 09-6083 (N.D. Cal. 2010); Lodged as NOL Ex. "J".)

This case involves whether (1) incorrectly marked stickers were placed on Nautilus machines dating back to 2006; and (2) whether those stickers were incorrectly marked with the intent to deceive the public. (*See,* Complaint.) Thus, at this very moment every witness will need to "remember" all the way back to 2006; there is no basis to suggest that any such witness will not remember in six months what they remember now. Moreover, each and every document or evidentiary "exhibit" that currently exists or may be produced in discovery in this case either exists, or it does not. There is no support for the proposition that documents will "disappear" over the next 6 months. Simply stated: Sukumar can only present conjecture that he will suffer an prejudice.

1. Other Courts have Granted Similar Stays and Found No Prejudice

As noted by the *San Francisco Technologies, Inc* Court above, when, as here, the Federal Circuit is going to rule on a central issue in the case, "mere delay" is insufficient to overcome the appropriateness of an Order staying the case. (*See*, NOL, Ex. "J".) Notably, the *San Francisco Technologies Inc.* case, stayed those proceedings pending the Federal Circuit's ruling on "standing" in the *Stauffer v. Brooks Brother's Case* involving Section 292. Numerous other District Courts have found it appropriate to Stay the proceedings in cases involving Section 292 while the elements of the statute are determined in the Federal Circuit. (*See*, *e.g.*, *Simonian v. Bunn-O-Matic Corp.* (N.D. Ill., Aug. 23, 2010, 10 c.v. 1203) 2010 WL 3385468, attached as NOL Ex. "K".) The Court in *Simonian v. Bunn-O-Matic* stayed its false marking proceedings pending the outcome of the Federal Circuit, stating: Such a **stay** would also be in keeping with many recent decisions in this and other district courts." (*Id*. at FN 9.)

A stay of these proceedings is appropriate and not uncommon, particularly with respect to this very statute. Moreover, Sukumar cannot assert a reasonable basis for prejudice, a fact that is all the more compelling when the anticipated costs

of litigation are considered in this matter. Accordingly, Nautilus respectfully requests this Court stay proceedings.

2. Sukumar's "Divestment" and "Third Party" Argument Is Without Merit.

Sukumar's basis for claiming a stay would cause him prejudice is not realistic and contrary to the evidence in this case. In his papers opposing Nautilus' ability to file this motion (Dkt. No. 46.) Sukumar asserted that because Nautilus Divested itself of its commercial strength division, any delay will result in the loss of evidence in this case. The Plaintiff's assertion to the Court in this regard is disingenuous.

Nautilus divested itself of its commercial division in early 2010, long before this lawsuit was ever filed. (*See*, Dkt. No. 20, Ex. 4, Declaration of Kenneth Fish, ¶¶ 2-9.) No portion of the company was sold to China as Plaintiff suggests. (*Id*.) Accordingly, any "difficulty" in obtaining documents from former employees or former custodians who are now third-parties existed from the moment the Complaint was filed and is no more prejudicial one year from now than it would be today.

3. Any Prejudice that Can Be Articulated Is Far Outweighed By the Reasonableness and Practicality of a Stay in this Case.

The parties' long and contentious history speaks for itself. (*Cf.* Dkt. No. 20, Motion to Transfer, at Attachment No. 1, Memorandum, at Factual Recital, pp. 3-13.) In the more than 11 years that Nautilus has been defending Sukumar's multitude of vexatious lawsuits brought against it, untold sums of money—millions of dollars—have been spent by all sides from legal fees, litigation costs, depositions, motions, travel, trials, appeals, and the like. The 9th Circuit Court of Appeals has visited these cases twice; as has the California Court of Appeals. Two

juries have rendered verdicts in favor of Nautilus in a single case which is still ongoing.

Stated plainly, the long history between these parties evidences the type of costly litigation that can be expected from this case; all of which can potentially be avoided by staying this matter until we are certain of the parameters of the underlying law.

The potential benefits of a stay are clear: all parties save thousands, perhaps hundreds of thousand of dollars in litigation expenses and resources;

The consequences of granting a stay are minimal: the parties must wait a relatively short period of time until litigation resumes.

Any conceivable prejudice from mere delay is outweighed by the incredible cost of defending the type of scorched-earth litigation Sukumar has demonstrated and perpetuated for the last 11 years against Nautilus.

E. This Case is Not About Vindicating Plaintiff Sukumar's Rights or Compensating his "Loss"; It is Instead about Sukumar's Attempt to Punish Nautilus and Use a *Qui Tam* Statute to Do So

Sukumar is a prodigious litigant who has not only filed numerous lawsuits against Nautilus since 2000, but who also has filed more than **twenty-five** lawsuits in San Diego County in just the last 15 years. (*See*, *e.g.* NOL Ex. "I".) Following a recent jury trial where Nautilus again prevailed over Mr. Sukumar, the trial Judge expressly held in a Court Order that Sukumar is more interested in punishing Nautilus that achieving resolution. In his December 10, 2010, Order, the honorable Superior Court Judge Timothy Taylor stated:

> "The court did not believe any of [Sukumar's] testimony [at trial], and believed instead that [Sukumar] **engaged in serial litigation in a quixotic effort to punish the defendants…the court believes he was obsessed with continuing his decade-long litigation against**

Med-Fit and Nautilus." (Superior Court Judge Taylor, Dkt. No. 20, at Notice of Lodgment Ex. 1, emphasis added.)

Section 292 unfortunately, provides an opportunity for Sukumar to continue suing Nautilus without reason, without standing, without injury. Shortly before Judge Taylor issued the above statement and Order, Sukumar filed yet another lawsuit against Nautilus; the instant litigation.

Ultimately, the *qui tam* nature of Section 292 and the abundantly clear motive of Mr. Sukumar's most recent lawsuit against Nautilus should compel this Court to conclude that there is no injury that will worsen, nor a right that will decay, nor a loss that will go uncompensated during a relatively brief stay. To the contrary, even if the results of all the appeals and all of the legislation merely confirm the Section 292 "as is", Sukumar will have only had to wait a little longer for his windfall damages if successful.

IV.

CONCLUSION AND REQUEST

Based upon the foregoing, in the interests of justice, fairness, and judicial economy, Nautilus respectfully requests the Court issue an Order staying all proceedings in this case until the outcome of (1) the *Unique Products Solutions Ltd* matter pending before the Federal Circuit; (2) the passage of the currently pending legislation before Congress, or alternatively (3) for a specified period of time between 120 and 180 days.

Respectfully submitted,

Dated: June 2, 2011

By: /s/ Walter H. Peake

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which then sent notification of such filing (NEF) to the following:

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