IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

RETRACTABLE TECHNOLOGIES, INC., et al.	§	
	§	
v.	§	Case No. 2:08-CV-16-LED-RSP
	§	
BECTON, DICKINSON AND CO.	§	

REPORT AND RECOMMENDATION

Before the Court is the Motion for Partial Summary Judgment on Patent Infringement as an Antitrust Violation (Dkt. No. 372) filed by Defendant Becton, Dickinson & Company ("BD") on March 25, 2013. Having considered the summary judgment evidence and the arguments, the Court **RECOMMENDS** that BD's Motion for Partial Summary Judgment be **DENIED**.

BD filed this motion seeking a ruling that, as a matter of law, patent infringement is not anticompetitive conduct and, thus, cannot be the basis for a monopolization claim under Section 2 of the Sherman Act.

APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any evidence must be viewed in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is proper when there is no genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement

is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. The substantive law identifies the material facts, and disputes over facts that are irrelevant or unnecessary will not defeat a motion for summary judgment. *Id.* at 248. A dispute about a material fact is "genuine" when the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party must identify the basis for granting summary judgment and identify the evidence demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party does not have the ultimate burden of persuasion at trial, the party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

B. Sherman Act, Section 2

Section 2 of the Sherman Act reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §2. Liability under Section 2 of the Sherman Act requires some affirmative conduct. It is longstanding law that the Sherman Act covers "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911).

Here, the question posed by BD is whether patent infringement cannot, as a matter of law, ever be considered exclusionary conduct. "'Exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (quoting 3 P. Areeda and D. Turner, ANTITRUST LAW 78 (1978)).

Analysis under the Sherman Act is fact-sensitive. *Eastman Kodak Co. v. Image Technical Servs.,* 504 U.S. 451, 467 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts' disclosed by the record.") (citing *Maple Flooring Manufacturers Assn.* v. *United States*, 268 U.S. 563, 579 (1925); *United States* v. *E. I. du Pont de Nemours & Co*., 351 U.S. 377, 395 n. 22 (1956)).

ANALYSIS

A. BD's Argument Regarding Lack of Supporting Precedent for Patent Infringement as an Anticompetitive Act

BD's argument is premised in large part on their allegation that "[n]o court, anywhere, has ever found patent infringement to be an 'anticompetitive' act for purposes of Section 2." (Mot. at 6.) Even assuming BD's proposition arguendo, the lack of such a conclusive holding is far from, as BD suggests, "precedent" that patent infringement can never, as a matter of law, be anticompetitive conduct. (Mot. at 1.) "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,* 331 U.S.

App. D.C. 226, 148 F.3d 1080, 1087 (D.C. Cir. 1998); s*ee also Conwood Co., L.P. v. U.S. Tobacco Co.,* 290 F.3d 768, 784 (6th Cir. 2002) (quoting *Caribbean Broad*).

B. BD's Argument that Courts have Rejected Claims Like RTI's

BD argues that "the courts to have considered claims like RTI's have rejected them, as a matter of law." (Mot. at 6.) But the cases BD cites are inapposite.

In *Masimo v. Tyco Health Care*, the Court stated in dicta "…this Court has not found any case where patent infringement has been considered anticompetitive conduct." 2004 WL 5907538, *12 (C.D. Cal. June 10, 2004). But that Court's decision turned on the fact that "[Plaintiff's] argument that [Defendant's] patent infringement amounts to anticompetitive conduct was not a claim asserted in [Plaintiff's] Complaint or in any filing prior to its opposition to [Defendant's] Motion for Summary Judgment." *Id*. at *13. Similarly, the Court's decision in *Eatoni Ergonomics, Inc. v. Research in Motion Corp.* was premised entirely on the fact that "any antitrust violation stemming from RIM's alleged patent infringement is plainly encompassed by the terms of the releases." 826 F. Supp. 2d 705, 709 (S.D.N.Y. 2011).

BD also states "[a]s the Fifth Circuit described its own holding in *Kinnear-Weed*, 'patent infringement is not an **injury** cognizable under the Sherman Act.' *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 88 (5th Cir. 1978)." (Mot. at 6 (emphasis added).) This Court notes that *Kinnear-Weed* turned on "the complaint [being] fatally defective because it alleges no facts which show **injury** to the public," and had nothing at all to do with patent infringement as anticompetitive *conduct*. 214 F.2d 891, 894 (5th Cir. 1954). Thus, just as BD claims it was unable to find a case where a Court has found patent infringement to be an 'anticompetitive' act, BD has also been unable to cite a a single case for the proposition that patent infringement cannot, ever, as a matter of law, be "anticompetitive conduct" for purposes of the Sherman Act.

C. BD's Argument that RTI's Claim Makes No Economic Sense

BD also argues that RTI's claim "makes no economic sense," alleging that "patent infringement actually increases competition by making more products available to consumers." The Court notes that in the vast majority of cases, patent infringement might fail as an antitrust theory for exactly the reason that BD sets forth: it traditionally increases competition and benefits the end consumer despite its harm to a given competitor. But BD ignores RTI's actual allegations in this case. This Court fully recognizes that the allegations here are unique. As RTI notes, the "… allegations here on the effect of BD's patent infringement are the exact opposite. Instead of increasing the 'flow of such products in commerce' BD used patent infringement to suppress, impede, and impair any rapid adoption of 'such products' (retractable syringes) by purposefully keeping bad ones in the market." (Resp. at 11.) Thus, BD's allegation that "the corresponding increase in competition forecloses any antitrust injury" ignores RTI's actual allegations – that the infringement has, in this case, caused a *decrease* in competition rather than an *increase*. This Court is not entitled to disregard the actual theories and evidence set forth by RTI in favor of the abstract approach advanced by BD, especially in the context of a motion for summary judgment.

D. BD's Argument Regarding Willfulness

BD argues that RTI is collaterally estopped from showing that BD acted willfully in this case because of the finding of no willful infringement in the prior patent case. (Mot. at 10-14.) The Court notes that the standard for willful infringement in a patent case (clear and convincing evidence) is substantially different than the relevant standard here (preponderance of the evidence). The difference in standards alone is enough to defeat BD's argument.

E. BD's Argument that Thomas Shaw has not Suffered Harm

BD also reiterates a position similar to the one advanced in its Motion for Judgment on the Pleadings Against Plaintiff Thomas J. Shaw, which this Court denied on March 26, 2013. (*See* Dkt. No. 379.) Under the theories advanced by RTI, the Court finds that there exist genuine issues of material fact as to whether Mr. Shaw suffered harm as the result of BD's alleged actions.

CONCLUSION

As noted above, BD has asked this Court for an incredibly broad holding: that patent infringement can never, as a matter of law, serve as anticompetitive conduct under Section 2 of the Sherman Act. Such a sweeping holding would be inappropriate in light of the fact-sensitive nature of the determination of whether a given act qualifies as anticompetitive conduct. *See United States v. American Tobacco Co.*, 221 U.S. at 181; *see also Eastman Kodak Co. v. Image Technical Servs.,* 504 U.S. at 467. Similarly, the record as a whole does not support a summary judgment finding as to the conduct in question here, as genuine issues of material fact exist as to all the grounds raised by BD.

For the foregoing reasons, the Court **RECOMMENDS** that BD's Motion for Partial Summary Judgment on Patent Infringement as an Antitrust Violation (Dkt. No. 372) be **DENIED.**

A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report within fourteen days after being served with a copy shall bar that party from de novo review by the district judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings, and legal conclusions accepted and adopted by the district court. Fed. R. Civ. P. 72(b)(2); see *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 5th day of August, 2013.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE