IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRIGGS & STRATTON CORP.,

Plaintiff,

OPINION AND ORDER

v.

KOHLER CO.,

05-C-0025-C

Defendant.

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In an order dated May 30, 2006, I ruled on the parties' post-verdict motions and concluded that defendant's Courage engine infringed plaintiff's '166 patent. In addition, I held that the '166 patent was not invalid as a matter of law and upheld the jury's verdict that the '502 patent was invalid as obvious. In the same order, I scheduled a trial on damages to be held August 14, 2006. That date was selected without prior consultation with the parties. Today, I issued an injunction prohibiting defendant from making, using, importing or offering for sale the infringing Courage engine. In anticipation of its appeal from that decision, defendant has filed a motion to stay the trial on damages pending appeal, or in the alternative, to reschedule the trial for a time that will not interfere with the schedules of defendant's attorneys, many of whom have previously scheduled family

vacations throughout the month of August. Plaintiff opposes defendant's motion and contends that delaying the trial would "prejudice[] Briggs and Stratton, ignore its appellate rights, increase[] the expense of trial, and would result in multiple appeals." Dkt. #382, at 1.[1] I am not convinced by plaintiff's objections. Instead, I believe that staying the trial will conserve resources and will not prejudice either party. Accordingly, I will grant defendant's motion.

Rule 62(a) of the Federal Rules of Civil Procedure confers discretion on courts to stay an order directing an accounting in an action for patent infringement during the pendency of an appeal. In re Calmar, Inc., 854 F.2d 461, 464 (Fed. Cir. 1988). Plaintiff contends that decisions to stay accountings must be premised upon consideration of four factors: (1) whether the applicant for stay has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Although these are the factors courts consider when determining whether to stay injunctive orders, generally, they are not factors that control the decision to stay an accounting pending

[1]In addition to its brief in opposition to defendant's motion, plaintiff has filed a motion to file a surreply brief. That motion will be granted; I have considered the surreply in ruling on defendant's pending motion.

appeal in a patent case.

Defendant suggests that the a decision to grant a stay pending appeal is entirely within the court's "broad discretion" and, like a decision to grant a trial continuance, "will only be reversed when the district court 'chooses an option that was not within the range of permissible options from which we would expect the trial judge to choose under the given circumstances.'" Dkt. # 383, at 2 (citing United States v. Depoister, 116 F.3d 292, 294 (7th Cir. 1997). Although the decision to stay an accounting is a discretionary one, it is not impulsive: discretion "precludes whimsy or caprice" and requires courts "to weigh contending considerations and conflicting evidence as a matter of judgment." United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 359 (1961).

The parties agree that defendant's appeal in this case does not fall under the provisions of 28 U.S.C. § 1292(c)(2), which provides for interlocutory appeals from judgments in civil actions for patent infringement that are final except for accounting. Because antitrust claims remain unresolved in this case, the judgment here cannot be "final" but for the accounting until judgment has been entered on the antitrust claims. Although defendant may not take appeal from the judgment in the patent case under § 1292(c)(2), defendant has a right to interlocutory appeal of the injunction entered against it. Therefore, regardless of the route the case takes to the court of appeals, it will be on appeal during the time the damages trial is scheduled to occur. Therefore, the policies that undergird §

1292(c)(2) apply with equal force to the issues in dispute here and guide the decision whether to stay an accounting under Rule 62(a):

> The purpose of authorizing an appeal after a decree of validity and infringement and before an accounting is to prevent the useless waste of time and money for an accounting before the Court of Appeals has had an opportunity to pass on the propriety of the lower court's finding of validity and infringement, which, of course, will definitively determine whether there will in fact be an accounting.

Beaver Cloth Cutting Machines, Inc. v. H. Maimin Co., 37 F.R.D. 47, 49-50 (S.D.N.Y. 1964); see also 20 Moore's Federal Practice § 308.21 n. 2. (3d ed. 2005). Of course, acknowledging the reasons for granting a stay does not mean that a stay should be automatic:

> As is obvious from the fact that [orders directing an accounting in a patent case] are excepted from the automatic stay of Rule 62(a), the court should not grant a stay in these cases as a matter of course but should consider carefully the harm that a stay might cause to the party who has obtained judgment and balance this against the harm that denial of a stay would cause the losing party.

11 C. Wright & A. Miller, Federal Practice & Procedure § 2902 (1995).

In this case, the balance weighs in favor of staying the trial on damages. Although plaintiff contends that it would be unfair to delay the trial because of the effort it has put into preparing its witnesses, it concedes that both parties have been prepared to try damages since November 28, 2005, the originally scheduled trial date for this lawsuit. Plaintiff contends that it has invested time and money updating its expert reports and preparing for

trial; however, it has not provided any revised expert reports to defendant. Although plaintiff asserts that granting the stay will result in piecemeal litigation, there is no reason to believe that multiple appeals are not inevitable in this case already. Until the antitrust claims are resolved, plaintiff will not be free to take an appeal of its challenges to the jury's finding of invalidity with respect to the '502 patent. Plaintiff's remaining objections are merely speculative. (Take, for example, the allegation that "delay also raises the risk of prejudice to Briggs & Stratton as witnesses may move away, die, or otherwise become unavailable for trial." Dkt. #382, at 4.) Staying the trial on damages will not prejudice plaintiff and it will avert the need to reschedule the trial to avoid defendant's counsel's scheduling conflicts and avoid the potential waste of judicial resources inherent in performing an accounting that may be invalidated on appeal.

ORDER

IT IS ORDERED that

1. Plaintiff Briggs and Stratton's motion to file a surreply is GRANTED.

2. Defendant Kohler, Co's motion to stay the damages trial pending appeal is GRANTED.

Entered this 12th day of July, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge