

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS**

Neurografix, et al.,	)	
Plaintiffs,	)	Case No: 12 C 6075
	)	
v.	)	
	)	Judge Kennelly
Brainlab, Inc., et al.,	)	
Defendants.	)	

**ORDER**

The hearing date of 8/8/2018 is vacated. The Court denies plaintiffs' motion for leave to file a surreply [106] because they have failed to show that a surreply is necessary or appropriate. For the reasons stated below, the Court denies plaintiffs' motion for reconsideration of the granting of summary judgment of non-infringement [84], grants defendants' motion to dismiss their invalidity claim without prejudice [91], and grants Aaron Filler's motion to appear *pro hac vice* [87]. Defendants have filed a motion for attorney's fees. Plaintiffs are directed to file a response to the motion by 9/5/2018, and defendants are directed to file a reply to the response by 9/19/2018.

**STATEMENT**

This case was filed in this district but was transferred to the District of Massachusetts for consolidated pretrial proceedings as part of a multidistrict litigation (MDL) proceeding, *In re Neurografix ('360) Patent Litigation*. The MDL transferee judge granted summary judgment of non-infringement in favor of the defendants, leaving only defendants' counterclaim for a declaratory judgment of invalidity. The case was then remanded to this Court. Before the remand, the plaintiffs moved for reconsideration of the grant of summary judgment. The MDL transferee judge considered and denied the motion.

Plaintiffs have now renewed their motion for reconsideration. They contend, among other things, that the MDL transferee judge entered summary judgment against them *sua sponte*. The record does not support that. Plaintiffs also contend that the MDL transferee judge denied their motion to reconsider without permitting full briefing. That is technically true, but it completely misses the point: the judge had a full and complete motion for reconsideration filed by plaintiffs, see Pls.' Renewed Mot. for Reconsid., Ex. OO, in which he could reasonably expect them to have raised all of their grounds for reconsideration. The "full briefing" that he did not permit was a response *by defendants*. Plaintiffs were in no way deprived of an opportunity to be heard, because it is readily apparent from the judge's docket entry denying the motion that he reviewed and considered it. The Court also notes, as an aside, that in the first motion for reconsideration, plaintiffs did not contend that summary judgment was improperly granted *sua sponte*, which supports the proposition that this is not what happened,

despite what plaintiffs contend now. What is left in plaintiffs' renewed motion is simple disagreement with the MDL transferee judge's ruling, which is not an appropriate ground for a motion for reconsideration. The Court has considered the motion and denies it. If plaintiffs want to challenge the summary judgment ruling, they may do so via appeal.

Defendants have moved to dismiss their invalidity counterclaim without prejudice in order to permit finality that will enable plaintiffs to appeal the granting of summary judgment. Plaintiffs object, asking the Court to impose various conditions on the dismissal. For the most part, plaintiffs' proposed conditions are aimed at ostensibly making sure that if the non-infringement decision is overturned on appeal, they will be able to pick up where they left off on the question of invalidity and will not have to go back to square one or even square two or three. The Court declines to impose the conditions that plaintiffs have identified, because without a ruling on appeal it would be premature to say whether, in the event of a reversal, matters can simply pick up where they left off. That is an issue best left for remand if there is one.

Finally, Aaron Filler, one of the inventors of the patent in suit who is also an attorney, has moved to appear *pro hac vice*. Defendants objected, citing the bar against a witness appearing as an advocate. Because the case has now been concluded before this Court, that objection is on the one hand moot and on the other hand premature—because it will become an issue only in the event of a remand by the court of appeals. The Court therefore grants the motion, subject to reconsideration if the case is remanded.



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MATTHEW F. KENNELLY  
United States District Judge

Date: 8/7/2018