STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

SIGNALIFE, INC.,

Plaintiff,

v.

RUBBERMAID, INC., NEWELL RUBBERMAID, INC., GARY SCOTT and DAVID HICKS

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1346

SIGNALIFE'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, Signalife, Inc., through counsel, respectfully submits the following Brief in opposition to the Defendants' Motion to Dismiss.

SUMMARY OF ARGUMENT

Relying on the "prior action pending" doctrine, the Defendants seek to have this action dismissed. The Defendants' reliance on this doctrine, however, is misplaced both because the federal action is not a "prior action pending" to this lawsuit and because different parties and issues are involved in this lawsuit.

BACKGROUND FACTS

Plaintiff Signalife, Inc. ("Signalife") is a small, startup technology company based in Greenville, SC which has developed and engineered a beyond state of the art electrocardiograph device called the "Fidelity 100", which received from Frost & Sullivan the prestigious award for technological innovation for 2006 and was also featured on the November 30, 2006 NBC Today show's segment on "Modern Medical Marvels". (Am. Compl. ¶¶ 6, 37). Signalife lost millions of dollars as a direct result of the fraud, negligent misrepresentations, and tortious interference

with actual and prospective contracts, among other things, by each of the Defendants as more fully alleged in Signalife's Amended Complaint.

Defendant Newell Rubbermaid, Inc. ("Newell") is the parent of Defendant Rubbermaid Incorporated ("Rubbermaid"), with Rubbermaid Medical Solutions ("RMS") being one of Rubbermaid's operating divisions. RMS was formed in 2003 in an effort to develop and sell products for the healthcare market which offered higher profit margins than the well known Rubbermaid kitchen and cooking products. Defendant Gary Scott has been a Vice President of Rubbermaid and the General Manager of Rubbermaid's medical products division. (Am. Compl. ¶ 4). Defendant David Hicks has been an employee of Rubbermaid reporting to Scott at Rubbermaid's Huntersville, NC office. (Am. Compl. ¶ 5).

Signalife's focus was on the technology. It had little, if any, sales capability. For that reason, Signalife sought to find a partner capable of marketing and selling its Fidelity 100 product. Starting around October 2004, Signalife and Newell began negotiations for Newell to have the exclusive rights to market and sell the Fidelity 100 in the United States. (Am. Compl. ¶ 7). During this process, Newell undertook substantial due diligence, including visiting the manufacturing facility for the Fidelity 100. (Am. Compl. ¶ 19). Signalife and Newell negotiated what became the March 26, 2006 Sales and Marketing Services Agreement (the "Agreement"). (Am. Compl. ¶¶ 16-18). Three days before the Agreement was formally executed Newell advised Signalife that rather than contracting directly with Newell, Newell wanted the Agreement for its subsidiary Rubbermaid. *Id.*

Rubbermaid proudly published a March 30, 2006 press release announcing the Agreement with Signalife and summarizing Rubbermaid's role as follows:

"Under the pact, Rubbermaid shall be responsible for substantially all marketing and

> sales efforts to vigorously market the Signalife devices nationwide, and possibly beyond, including marketing, advertising, promotions, media, trade shows, exhibits and most importantly the maintenance of a sales force commensurate with the planned sales effort."

Tragically for Signalife, Rubbermaid did none of this and, even worse, at the time it entered into the Agreement, had no ability or intention to undertake its promised vigorous marketing and sales effort.

In the Agreement, Rubbermaid promised at its sole cost to "advertise and otherwise use commercially reasonable efforts to vigorously promote the sale and marketing of the Signalife Products in the Territories, commencing with the United States of America, including the preparation and dissemination of advertising and other promotional literature and materials." Agreement, ¶ 3(A)(1). Rubbermaid also promised: "RMS shall at its cost organize and manage **all** sales activities of the Signalife Products necessary to promote sales of the Signalife Products in the Territories, including contacting targeted users of the Signalife Products through appropriate contact methodologies and media, and attending, and aggressively advertising and promoting Signalife Products, including trade shows, conventions and exhibits." Agreement, ¶ 3(B) (emphasis added).

Incredibly, Rubbermaid failed to prepare, much less disseminate, any advertising or other promotional literature or materials, and did nothing to either promote or sell Signalife's flagship Fidelity 100. (Am. Compl. ¶ 28). Not only has Rubbermaid not sold a single Fidelity 100, since the Agreement was signed, Rubbermaid has even failed to make sales calls, despite having been given over 500 leads by Signalife. *Id.*

Rubbermaid also promised: "RMS will hire, train and maintain a sufficient number of capable sales personnel and devote such portion of its corporate infrastructure to effectively and aggressively promote and effectuate sales of the Signalife Products ..." Agreement, ¶ 3(B).

Sadly, Rubbermaid never made any attempt to hire any sales personnel or do anything else to perform its obligations under the Agreement. (Am. Compl. ¶ 30).

Scott also began a campaign to discredit the Fidelity 100 by misquoting physicians and national and international authorities. (Am. Compl. ¶¶ 42-44). For example, during or around December 2006, Signalife arranged for RMS to meet with the Los Angeles plastic surgeon who had been using the Fidelity 100 since June 2006, and also with an anesthesiologist. During the meeting, which was also attended by Signalife Board member Dr. Lowell Harmison, a heart expert who formerly was the Principal Deputy Secretary of the United States Department of Health and Human Services (with supervisory authority over the Food and Drug Administration, the FDA), both Los Angeles physicians praised the Fidelity 100, with the anesthesiologist calling it his "dream equipment" on approximately four occasions during the observation period. The anesthesiologist specifically explained to Scott the significance of the Fidelity 100's accuracy in surgical environments. Nevertheless, Scott and RMS persisted with their fiction that the equipment did not operate satisfactorily.

Also during or around December 2006, Signalife arranged for RMS to meet with other renowned physicians who had used and were knowledgeable about the Fidelity 100. (Am. Compl. ¶¶ 42-44). Scott continued his campaign of outright mistruths about the statements made to him by the various physicians, and at each and every turn, RMS ratified Scott's misconduct. In one instance, Signalife, in order to assure that RMS and its affiliates were not led astray by Scott's lies, was able to obtain physician and patient consent to tape record a surgical procedure. The tape recording was shown and given to RMS. Notwithstanding the exceptional performance of the Fidelity 100, well beyond the state of the art, RMS expressly and specifically ratified and approved Scott's continuing fabrications and misconduct.

Before either RMS or Signalife could file a lawsuit, ¶ 11 of the Agreement required the parties to mediate any dispute, but if the dispute was not resolved within 120 days, then either party was free to file suit. The mediation deadline expired on January 23, 2007, and on January 24, 2007, the first day either party could file a lawsuit, RMS filed the federal action and Signalife filed this state action. After attempting to remove this case to federal court by asserting diversity jurisdiction on the grounds of fraudulent joinder, Judge Graham C. Mullen remanded this case back to this Court finding that:

> Signalife has pled each of the elements of each cause of action that they assert against the non-diverse defendants. They support each of these pleadings with facts which, when viewed in the light most favorable to the Plaintiff, shows that a valid claim against the non-diverse defendants does exist. Therefore, a federal court cannot find this joinder to have been performed fraudulently. Valid claims do exist against the non-diverse defendants.

(Order, 9/20/07; Case No. 3:07-cv-56; W.D.N.C.). After this matter was transferred back to this Court, the Defendants moved to designate this case as an exceptional and complex business case pursuant to Rule 2.1 of the General Rules of Practice and moved to dismiss this action based on the "prior action pending" doctrine.

Importantly, the federal lawsuit on which the Defendants rely as the "prior action pending" was filed on the same day as this lawsuit and is only between Rubbermaid Incorporated and Signalife. Newell, Gary Scott and David Hicks are not parties to that action. Furthermore, Rubbermaid filed the federal lawsuit at 12:25 a.m. on January 24, 2007 (25 minutes into the period in which it could first file a complaint in federal court using electronic filing). As no electronic filing of complaints is available in state court, Signalife filed its lawsuit at 9:01 a.m. on January 24, 2007 (only 1 minute into the period in which it could first file a complaint in state court).

DISCUSSION OF AUTHORITY

The Supreme Court of North Carolina has stated that under the doctrine of "prior action pending" if "there is a prior action still pending in the federal district court sitting within the territorial limits of this state on the same matter between the same parties, the [state] action is necessarily abated and the suit [is] properly dismissed." *Eways v. Governor's Island,* 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990). After reviewing case law in other jurisdictions, the Court in *Eways* adopted the minority view of courts which "maintain that where the prior pending action is in a federal court sitting in the same state as the subsequent state action, the second action is abated." *Id.* at 560, 391 S.E.2d at 187. "Thus, we hold that a prior action pending in federal court within the territorial limits of the state constitutes grounds for abatement of a subsequent state action on substantially similar grounds between the same parties." *Id.* at 561, 391 S.E.2d at 187.

1. The federal and state actions were contemporaneously filed and, therefore, application of the "prior action pending" doctrine is not proper.

Without citation to any legal authority, the Defendants cursorily state that because Rubbermaid filed its lawsuit by electronic filing in federal court in the middle of the night at 12:25 a.m. on January 24, 2007 and Signalife filed this lawsuit at 9:01 a.m. on the same day, "the federal court action by Rubbermaid was 'first-filed'. . ." (Defendants' Brief, p. 6). Courts that have considered this issue, however, have held that a 'first-filed' rule is inappropriate where the actions were filed on the same day. *See, e.g., Friedman v. Alcatel Alsthom*, 752 A.2d 544, 551 - 552 (Del.Ch. 1999); *Bartoi v. Bartoi*, 20 Misc.2d 262, 264, 190 N.Y.S.2d 257, 259-60 (1959).

In *Friedman*, the Delaware court determined that a complaint filed in the Federal District Court for the Southern District of New York several hours before the complaint was filed in the Delaware court is deemed to have been simultaneously filed:

> The first-filed rule applies when a party seeks to stay or dismiss a Delaware action in favor of a first-filed action pending in federal or another state jurisdiction. . . . A key inquiry, therefore, is to determine whether this action or the Consolidated Federal Action could be considered first-filed. The plaintiffs in the Southern District of New York filed their complaint several hours before the plaintiffs filed their complaint in this Court. When the difference in time is so close this Court generally considers the competing actions to have been filed simultaneously. The rationale for so doing stems from this Court's desire to avoid rewarding the winner of a race to the courthouse. It is fair to classify what occurred in this case on September 18, 1998 as a sprint. I must therefore consider the Consolidated Federal Action and the present action to be simultaneously filed. Since the actions must be considered simultaneously filed, neither action commands the high ground which would otherwise force the court to approach the analysis in a manner which defers to a plaintiff's choice of forum.

752 A.2d at 551-552 (footnotes and corresponding citations omitted). Similarly, in *Bartoi*, the Court found that the two actions were commenced on the same day and held that "[n]either action, therefore, has priority in time and neither may be dismissed because of the pendency of the other." 20 Misc.2d at 264, 190 N.Y.S.2d at 259-60 (citations omitted). Indeed, at least one North Carolina case has held that proceedings were initiated simultaneously where they were both filed on the same day. *Chick v. Chick,* 164 N.C.App. 444, 448, 596 S.E.2d 303, 307 at fn 1 (2004) (involving jurisdictional primacy issue in Uniform Child Custody Jurisdiction and Enforcement Act).

The same result should apply in this case.[1] Specifically, the federal action initiated by Rubbermaid and this action initiated by Signalife were simultaneously filed. Accordingly, neither action has priority in time and neither may be dismissed because of the pendency of the other.

[1] Arguably, Signalife filed its complaint in this action only 1 minute after the state court clerk's office first began accepting filings on January 24. Rubbermaid, on the other hand, filed its federal complaint 25 minutes after the first time that court began accepting electronic filings on January 24. Therefore, from the perspective of the earliest possible filing in the respective courts, Signalife filed its complaint earlier than Rubbermaid.

2. This state action involves different issues and different parties than the federal action.

According to the North Carolina Supreme Court, "a prior action pending in federal court within the territorial limits of the state constitutes grounds for abatement of a subsequent state action on substantially similar grounds between the same parties." *Eways,* 326 N.C. at 561, 391 S.E.2d at 187. Signalife believes that the federal action (Case No. 3:07-cv-33; W.D.N.C.) the Defendants are relying upon as the "prior action pending" in support of its Motion to Dismiss is part of an ongoing scam by Rubbermaid, initiated by Gary Scott and approved by RMS, to attempt to excuse RMS and Scott's failure to even begin to perform RMS' obligations under the Agreement. Having been preoccupied with closing and then selling Rubbermaid's home décor businesses in Europe from before the Agreement and for at least six months afterward, Scott apparently realized that RMS had not performed any of its obligations under the Agreement and, in a letter to Signalife dated August 4, 2006, he concocted the claim that Signalife had breached the Agreement because it had not sold at least 300 of the Fidelity 100 monitors by June 30, 2006. (Am. Compl. ¶¶ 36, 39, 40). However, nowhere in the Agreement, which contains a broad integration clause (Agreement, ¶ 25(E)), is there any requirement that Signalife sell any of the Fidelity 100 monitors. Indeed, the expectation of the parties, and the Agreement itself, was that RMS would be responsible for **all** sales and marketing of the Fidelity 100. Indeed, in its press release announcing the Agreement, Rubbermaid stated it would be responsible for "substantially all marketing and sales efforts."

Subsequently, on August 31, 2006, Scott wrote Signalife concocting a substitute claim that Signalife's sales of the Fidelity 100 were a breach of the Agreement. (Am. Compl. ¶ 41). However, ¶ 1(D) of the Agreement specifically gave Signalife the right to sell the Fidelity 100. Signalife had not expected to have to sell the Fidelity 100 - that was the whole purpose of the

Agreement with Rubbermaid. However, when Rubbermaid failed to do anything, Signalife had no choice but to attempt to mitigate its damages. Signalife had to either attempt to sell the Fidelity 100 as best it could itself, or fold the company. The first units of the Fidelity 100 were shipped in June 2006 to a respected plastic surgeon in Los Angeles, who continues to use them today.

Frustrated that his previous claimed breaches of the Agreement by Signalife had been discredited, Scott, together with others at RMS, then concocted a third claim that the Fidelity 100 did not work properly, despite all of the due diligence undertaken by RMS for more than one year before entering into the Agreement. (Am. Compl. ¶ 42). Based on this concocted claim, Rubbermaid raced to the federal courthouse and electronically filed its complaint just after midnight on January 24, 2007 in an apparent attempt to thwart Signalife from bringing this action in state court.

Because only Rubbermaid is the plaintiff in the federal action, Signalife cannot obtain true relief against Newell, Gary Scott and/or David Hicks by a counterclaim against Rubbermaid. Rather, this state court action initiated at the same time as the federal action is substantially more complete in terms of the claims and parties involved. In fact, Rubbermaid has asserted all of the claims in the federal action as a counterclaim in this action. Rubbermaid's argument that the additional parties involved in this action are merely nominal parties added "in an effort to avoid removal" has already been rejected by the federal court. Judge Mullen, in remanding this case after Rubbermaid removed it to federal court alleging fraudulent joinder, specifically found that "[v]alid claims do exist against the non-diverse defendants." (Order, 9/20/07; Case No. 3:07-cv-56; W.D.N.C.).

CONCLUSION

The Defendants' Motion to Dismiss based on the "prior action pending" doctrine, should be denied both because the federal action is not a "prior action pending" to this lawsuit and because different parties and issues are involved in this lawsuit.

This the 14th day of January, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of January, 2008, a copy of the foregoing was served upon all counsel of record by hand delivery to:

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