IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MATTHEW A. PEQUIGNOT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 1:07-CV-00897-LMB-TCB
	)	
SOLO CUP COMPANY,	)	
	)	JURY TRIAL DEMANDED
Defendant.	)	

MEMORANDUM IN SUPPORT OF SOLO CUP COMPANY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)

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I. SUMMARY OF THE ARGUMENT

The Court should dismiss Matthew A. Pequignot's ("Plaintiff") Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiff does not meet the case or controversy requirement of the U.S. Constitution Art. III and therefore lacks standing to bring this lawsuit. The statute at issue in this case provides, "Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States."[1] Although this language appears broad on its face, the wording of the statute alone does not resolve the issue of standing because every plaintiff must satisfy the Article III "case or controversy" requirement in order to bring a lawsuit, regardless of the wording of any applicable statute.

To satisfy the "case or controversy" requirement, a plaintiff must plead and prove that he has suffered an injury in fact, which is a harm that is both concrete and actual or imminent, and is not conjectural or hypothetical. The plaintiff must also plead and prove causation, which requires a traceable connection between the alleged injury in fact and the alleged conduct of the defendant. In most instances, these requirements are satisfied only where a plaintiff alleges that he has personally suffered an injury as a result of a defendant's actions. In some limited situations, a plaintiff can rely upon an injury suffered by another to provide standing to bring an action where the plaintiff has not personally suffered any injury. In these limited situations, the party filing the complaint has been found to have standing only as the assignee of the injury suffered by another.

As explained in more detail below, the plaintiff in this case, Matthew A. Pequignot, has brought this case in his own name and on his own behalf, but has not pled any injury in fact that he has personally suffered as a result of Solo Cup's actions. As also explained in more detail

[1] 35 U.S.C. § 292(b) (2000).

below, Plaintiff in this case is not the assignee of an injury suffered by another. As such, he lacks standing to bring this action, and his Amended Complaint must be dismissed.

The only allegations of injury pled in the Amended Complaint are (*i*) harm to "the United States" as a result of "quelled competition" (Am. Compl., ¶¶ 57 and 58) and (*ii*) harm to the "public" (*id.* ¶¶ 60 and 61). Neither of these alleged harms constitutes an injury in fact suffered by Plaintiff that is concrete and actual or imminent and is not conjectural or hypothetical. Accordingly, Plaintiff does not have standing to bring the current action based on an injury in fact that he himself has allegedly suffered. Similarly, Plaintiff cannot rely upon the harm allegedly suffered by the "public" to provide him with standing to bring the current action against Solo Cup Company ("Solo Cup").[2]

The only other injury pled by Plaintiff that could possibly provide him standing to bring this action is the harm allegedly suffered by the United States.[3] Generally, courts have held that a plaintiff cannot rely upon an injury to another, including the United States, to provide them with standing.[4] However, in some limited circumstances, courts have held that an injury suffered by the United States can be assigned to an individual such that the individual is allowed to bring an action even though they have not personally suffered any injury.[5] In those limited situations,

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[2] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

[3] As a threshold matter, it is not clear that the harm allegedly suffered by the United States is concrete, actual, and not conjectural so as to satisfy the "case or controversy" requirements. While Solo Cup acknowledges that a violation of Section 292 could constitute harm to the United States sufficient to provide the United States with standing to bring an action, Solo Cup does not concede it has violated any legal right established by Section 292. Moreover, Solo Cup expressly reserves the right to challenge the adequacy of plaintiff's pleading of harm allegedly suffered by the United States.

[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

[5] One line of cases is which such an assignment of harm has been recognized involves claims filed under the False Claims Act, 31 U.S.C. §§ 3729-3733. *See, Vt. Agency of Natural Res. v.*

the statute at issue has (*i*) expressly authorized an individual to bring an action on behalf of the United States, (*ii*) expressly authorized an individual to bring an action in the name of the United States, and (*iii*) allowed an individual to proceed on behalf of the United States – only *after* first giving the United States notice of the lawsuit.[6]

The statute at issue in this case, 35 U.S.C. § 292, contains none of these characteristics. The statute: (*i*) does not authorize Plaintiff to bring the present suit on behalf of the United States, indeed it was brought on behalf of the Plaintiff alone; (*ii*) does not authorize Plaintiff to bring the present suit in the name of the United States, indeed it was brought in Plaintiff's own name; and (*iii*) does not require Plaintiff to provide the United States with any advance notice of the present lawsuit. Accordingly, Plaintiff cannot be an assignee of any injury suffered by the United States as a result of Solo Cup's alleged false marking, and he, as an individual plaintiff,

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United States ex rel *Stevens*, 529 U.S. 765, 768 n.1 (2000) (holding that a *qui tam* plaintiff/relator has standing only as a partial assignee of the government interest/injury and negating the various methodologies by which lower courts had previously granted standing under *qui tam* lawsuits). *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." *Id.*

[6] Other than the False Claims Act, Solo Cup knows of only two other statutes currently in force that have been referred to as creating a *qui tam* cause of action: (1) 25 U.S.C. § 201, which provides a cause of action and share of recovery against a person violating Indian protection laws; and (2) 35 U.S.C. § 292, which Solo Cup disputes properly creates a *qui tam* cause of action. *See, e.g., Vt. Agency,* 529 U.S. at 768-69 n.1 (listing four statutes with *qui tam*-type provisions, one of which, 25 U.S.C. § 81, has since been repealed by amendment).

There are decisions from various courts stating, in dictum, that lawsuits under 35 U.S.C. § 292(b) are "*qui tam*" actions. *E.g., Vt. Agency of Natural Res. v. United States* ex rel *Stevens,* 529 U.S. 765, 768 n.1 (2000) (holding that a *qui tam* plaintiff/relator has standing only as a partial assignee of the government interest/injury and negating the various methodologies by which lower courts had previously granted standing under *qui tam* lawsuits). Regardless of whether actions under Section 292 are truly *qui tam* actions, the Article III standing requirements must still be satisfied. *See id.* at 771-72.

lacks standing to bring the current lawsuit. For these reasons, as well as those discussed below, the Amended Complaint should be dismissed with prejudice.

In the event that this Court does not dismiss Plaintiff's Amended Complaint based on a lack of standing, it should dismiss the Amended Complaint because Plaintiff's *pro se* status prevents him from asserting claims on behalf of the United States.

II. INTRODUCTION

False marking lawsuits typically arise between business competitors either as a cause of action directly related to the parties' competing interests, *see, e.g., D.P. Wagner Mfg., Inc. v. Pro Patch Sys., Inc.*, 434 F. Supp. 2d 445 (S.D. Tex. 2006); *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1351 (Fed. Cir. 2005), or during a patent or trademark infringement lawsuit or other business dispute-related litigation when a patent owner or an accused infringer raises false marking as a claim or counter-claim, *see, e.g., Brose v. Sears Roebuck & Co.*, 455 F.2d 763, 765 (5th Cir. 1972); *FMC Corp. v. Control Solutions, Inc.* 369 F. Supp. 2d 539 (E.D. Pa. 2005); *Sadler-Cisar, Inc. v. Commercial Sales Network, Inc.*, 786 F. Supp. 1287, 1296 (N.D. Ohio 1991); *Smith Welding Equip. Corp. v. Pearl*, 21 F.R.D. 196 (W.D. Pa. 1956) . In contrast, the present case presents a nearly unique circumstance under the modern Patent Act (enacted in 1952) of a private individual who has suffered no injury bringing a lawsuit solely on the basis of alleged false marking under Section 292. For the reasons detailed here, Solo Cup submits that this case has been improperly brought.

III. PLAINTIFF LACKS STANDING TO BRING THIS LAWSUIT BECAUSE HE HAS NOT PLED AN INJURY IN FACT THAT SATISFIES THE ARTICLE III CASE OR CONTROVERSY REQUIREMENT.

The question of standing is a threshold question. If Plaintiff lacks standing, then the Court lacks subject matter jurisdiction to hear this case. *See Steel Co. v Citizens for Better Env't*,

523 U.S. 83, 109-10 (1998) (refusing to reach merits of case based upon lack of subject matter jurisdiction due to plaintiff not having standing). Upon a finding that it lacks jurisdiction, the Court must dismiss the case. *See id.*; *see also* Fed. R. Civ. P. 12(h)(3).

To determine whether Plaintiff has standing, the Court must first determine whether Section 292 provides a cause of action for which Plaintiff can pursue a lawsuit. Section 292 states that "[a]ny person may sue for the penalty." While this phrase may seem broad on its face, courts have interpreted similarly worded statutes to be much more restrictive than they may initially appear.[7] Also, in determining whether Plaintiff has standing to bring an action under Section 292, the statute cannot be interpreted in a manner that would trump the constitutional "case or controversy" requirement for standing. *See Johnson v. Robison*, 415 U.S. 361, 367 (1974) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question(s) may be avoided." (internal citations and quotation marks omitted)). When the Article III requirements are applied to the

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[7] Courts have found that "any person" under the false advertising provision of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) , excludes individual consumers. Instead, "any person" under section 43(a) is limited to competitors whose commercial interests have been injured. *See, e.g.*, *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278 (4th Cir. 2004) (holding "that a consumer does not have standing under the Lanham Act to sue for false advertising"); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3rd Cir. 1998) (holding that, notwithstanding the plain language of § 43(a), consumers lack standing to bring false advertising claims under the Lanham Act); *Colligan v. Activities Club of New York*, 442 F.2d 686 (2d Cir. 1971),; *see also Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561 (5th Cir. 2001), (finding that the Lanham Act "limit[s] standing to a narrow class of potential plaintiffs possessing [competitive or commercial] interests" harmed by the targeted conduct); *Stanfield v. Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995) (holding that "to have standing for a false advertising claim [under the Lanham Act], the plaintiff must be a competitor of the defendant and allege a competitive injury"); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1179 (3d Cir. 1993) (noting that when Congress passed the Lanham Act, it "did not contemplate that federal courts should entertain claims brought by consumers"); *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989) (same); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (same).

current statute and the current plaintiff, it is clear that Plaintiff lacks standing to bring the current action.

A. Every Plaintiff Must Satisfy the Article III Standing Requirement in Order to Bring a Lawsuit.

Section 292 is fairly unique among statutes of the United States Code because it has been characterized as a *qui tam* statute. *See supra* footnote 6. Although Solo Cup disputes whether Section 292 is a proper *qui tam* statute, regardless of the label applied to Section 292, it is clear that Plaintiff must satisfy the Article III standing requirement in order to bring the present lawsuit. The issue of whether an individual has standing to bring an action – including under a *qui tam* statute – was addressed by the Supreme Court in *Vermont Agency*, 528 U.S. 765.[8] In *Vermont Agency*, the Supreme Court held that every plaintiff (including a *qui tam* plaintiff) must meet the irreducible constitutional minimum of standing under Article III of the Constitution: (1) "he must demonstrate an injury in fact – a harm that is both concrete and actual or imminent, not conjectural or hypothetical"; (2) "he must establish causation – a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and (3) "he must demonstrate redressability – a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Id.* at 771 (internal citations and quotation marks omitted).

B. Because He Cannot Establish an Injury In Fact, Plaintiff Lacks Standing.

The first and threshold prong of the well-established test for determining Article III standing is that the plaintiff "must demonstrate an injury in fact – a harm that is both concrete

[8] 529 U.S. 765 (2000).

and actual or imminent, not conjectural or hypothetical;"[9] Plaintiff in the present case has failed to meet this requirement.

1. Plaintiff Has Not Pled an Injury In Fact to Himself.

Plaintiff does not contend that he has personally suffered any actual injury. None of Plaintiff's allegations of harm recite any injury that he has personally suffered. (Am. Compl. ¶¶ 20, 24, 32, 53-61.) Moreover, even if his allegations of harm could somehow be read to allege an injury that he personally had suffered, the allegations do not recite an injury in fact because they are conjectural or hypothetical rather than being concrete and actual or imminent.[10] Prospective, theoretical, or otherwise unrealized harms, such as those alleged by Plaintiff, do not provide standing. *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

2. Plaintiff Cannot Rely Upon Alleged Injury to the "Public" to Confer Standing.

Plaintiff's pleadings of alleged harm to the "public" also do not provide him with standing to bring the present suit because these alleged harms are not actual or imminent. Instead, Plaintiff's allegations of harm to the "public" are expressly conjectural or hypothetical. (Am. Comp. ¶¶ 20, 24, 32, 53-61.) These prospective, theoretical, or otherwise unrealized harms are not sufficiently actual or imminent for Article III standing. *See, e.g., Los Angeles*, 461 U.S. at 101-102; *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *See also generally, Hein v. Freedom From Religion Foundation*, 127 S. Ct. 2553, 2562-63 (2007) (discussing in detail the bar to

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[9] 529 U.S. at 768. (internal cites removed); *cf. Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[10] Plaintiff relies upon conjectural language, (*e.g.*, Am. Comp. ¶¶ 20, 24, 32 (alleging Solo Cup's actions are "likely" to harm the public); *id.* ¶¶ 53-61 (alleging "potential" or "likely" harms)), without ever stating any actual harm.

Article III standing for the public/taxpayers, but for a narrow Establishment clause exception). Moreover, even if Plaintiff were able to adequately plead an actual or imminent injury suffered by the "public," he has no standing to bring suit on the public's behalf. *Lujan*, 504 U.S. at 573-74 (holding that a plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see* footnote 11, *supra*.

3. Plaintiff Cannot Rely Upon The Assignment of any Injury Allegedly Suffered by the United States to Confer Standing.

Plaintiff has not alleged injury in fact to the United States, nor has he alleged that he is a proper assignee of any interest that the United States may have in the present case. The only injury to the United States alleged by Plaintiff is "quelled competition . . . to an immeasurable extent." (Am. Compl. ¶¶ 57-58.) This alleged harm is not concrete, actual, or imminent, and is precisely the type of conjectural or hypothetical allegation that will not satisfy the injury prong of the test for standing. Even if Plaintiff were able to allege an injury in fact to the United States, Plaintiff cannot rely upon this alleged injury to support standing because, as the Supreme Court has noted, "the Art. III judicial power exists only to redress or otherwise protect against an injury to the complaining party." *Warth v. Seldin*, 422 U.S. at 499. Accordingly, Plaintiff, as the sole complaining party, cannot rely upon any alleged injury to the United States to provide standing in this case.

Solo Cup notes that there appears to be at least one partial exception to the injury requirement stated in *Warth*, upon which courts have relied to find standing where the complaining party has not alleged a personal injury, but has alleged injury to the United States.[11]

[11] Solo acknowledges that, if false marking were found, the Government may be perceived to have suffered injury due to a statutory violation. *See Warth*, 422 U.S. at 500 (noting that the government enacts "statutes creating legal rights, the invasion of which creates standing").

However, Solo Cup submits that the reasoning articulated for finding standing in those limited circumstances does not apply to the present case.

In *Vermont Agency*, the Supreme Court addressed the issue of whether a private individual could bring a suit in federal court on behalf of the United States under the FCA. 529 U.S. at 768. In deciding the issue, the court first noted the strict requirements that a plaintiff under the FCA (sometimes referred to as a "relator") must follow before proceeding with a lawsuit – namely: (*i*) the complaint must be filed under seal and served, together with written disclosure of substantially all material evidence and information the plaintiff possesses, upon the United States; (*ii*) the U.S. must be given a minimum of 60 days – plus potential extensions of time –to determine whether it wishes to intervene; and (*iii*) the U.S. then has a right of refusal under which it may take over the case or decline to do so, after which – if it intervenes – it may limit the role of the original plaintiff. *Id.* at 769-770. The court then held that the only basis for finding that the plaintiff is that case had standing to proceed with the action was because he was deemed to be the partial assignee of the Government's damages claim under the FCA. *Id.* at 773-774. The court based its decision on the conclusion that the FCA "effect[ed] a partial assignment of the Government's damages claim." *Id.* at 773.

The reasoning of the Supreme Court's decision in the *Vermont Agency* case does not apply to the present case because the statute at issue in this case is markedly different from the FCA, and as such, the present statute cannot be found to effect a partial assignment to Plaintiff of any harm allegedly suffered the United States. Unlike the present statute, the FCA contains provisions consistent with an assignee-assignor relationship between a *qui tam* plaintiff and the

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However, Plaintiff has not pled or alleged any concrete injury to the government. Therefore, upon the current facts and pleadings, the alleged injury has no bearing on Plaintiff with regard to the Article III requirements for direct injury (or government assignment), causality, and redressability.

United States. As noted above, the FCA, explicitly allows an individual to bring suit "for the person and for the United States Government . . . in the name of the Government."[12] 31 U.S.C. § 3730. Moreover, an individual can proceed with a suit on behalf of the Government only after first giving the Government notice of the suit and waiting for the Government's authorization to proceed on its behalf.[13]

In contrast, Section 292 does not expressly authorize Plaintiff to bring suit on behalf of the United States or in the name of the United States, and this case has been brought on behalf of Plaintiff alone. Section 292 also lacks any provision for providing the United States with notice of the lawsuit such that it could authorize Plaintiff to proceed on its behalf, and there is no indication that the United States even has any awareness of, much less has authorized, the present lawsuit. Thus, unlike a plaintiff under the FCA, a plaintiff under Section 292 cannot be said to be a partial assignee of United States based on the wording of the statute at issue or based on some affirmative action toward the party from the United States.[14] Accordingly, Plaintiff

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[12] This provision of the FCA was added by amendment in 1986. The Supreme Court's decision in *Vermont Agency* did not address whether a relator who had suffered no personal injury could bring a claim as a government assignee under the FCA prior to 1986.

[13] Under the FCA, (*i*) the complaint must be filed under seal and served, together with written disclosure of substantially all material evidence and information the plaintiff possesses, upon the United States; (*ii*) the U.S. must be given a minimum of 60 days – plus potential extensions of time –to determine whether it wishes to intervene; and (*iii*) the U.S. then has a right of refusal under which it may take over the case or decline to do so, after which – if it intervenes – it may limit the role of the original plaintiff. 31 U.S.C. § 3730(b-c).

[14] This reading of Section 292 is especially appropriate in light of the principle that Section 292 is a penal statute that must be strictly construed. *See Mayview Corp. v. Rodstein*, 620 F.2d 1347, 1359 (9th Cir. 1980); *Brose v. Sears Roebuck & Co.*, 455 F.2d 763, 765 (5th Cir. 1972) ; *Ansul Co. v. Uniroyal Inc.*, 306 F. Supp. 541, 566 (S.D.N.Y. 1969). With regard to the interpretation of who has standing to sue, it is appropriate to construe Section 292 strictly for the additional reason that suits under Section 292 may bind the Government's legal rights. Indeed, statutes effecting a waiver of the Government's sovereign immunity are strictly construed to preserve the rights of the sovereign. *See United States v. Nordic Village*, 503 U.S. 30, 34 (1992). Likewise, statutes authorizing suit on behalf of the government, thereby affecting the government's legal

cannot rely upon any alleged injury on behalf of the United States to establish standing to bring this action.

Without his own injury, and without any right to allege that he is a partial assignee of a purported injury to the United Stated, Plaintiff is left with no basis for standing.

IV. ALLOWING PLAINTIFF TO BRING THIS SUIT UNDER SECTION 292 WOULD VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.

The Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1, cl. 1. In order for Plaintiff to have standing, the Court must make one of two conclusions: (1) the Plaintiff has a direct injury to himself; or (2) the statutory text authorizes Plaintiff to demonstrate a basis for being a partial assignee of the Government's interest. With regard to the former, Plaintiff has not alleged a direct injury. (*See* Am. Compl. ¶¶ 20, 24, 32, 53-61.) With regard to the latter, there is no language in Section 292 that authorizes Plaintiff to sue on behalf of the United States. Reaching the latter conclusion would thus require this Court to exceed its Article III powers of interpretation by adding in such a nonexistent provision and thereby infringing upon the Article I powers conferred upon Congress for drafting a statute.

Not only does Section 292 lack any basis for Plaintiff to claim to be an assignee of the United States, there is no evidence that the Executive Branch of the United States Government, which has the Article II power of statutory enforcement relevant to the present case,[15] is even

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rights, should be strictly construed to protect the Government's legal interests. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1127 (9th Cir. 2007) (requiring that a statute "expressly authorize" an individual to sue on the Government's behalf). Section 292 does not expressly authorize a person who lacks an injury to sue and therefore should be construed strictly to disallow such a suit by a person like Plaintiff who lacks any such injury.

[15] Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

aware of this case, much less any purported injury due to alleged false marking. Consider by way of contrast the FCA, with its regimented format of how a Plaintiff representing the interests of the United States must proceed: (*i*) the complaint must be filed under seal and served, together with written disclosure of substantially all material evidence and information the plaintiff possesses, upon the United States; (*ii*) the U.S. must be given a minimum of 60 days – plus potential extensions of time –to determine whether it wishes to intervene; and (*iii*) the U.S. then has a right of refusal under which it may take over the case or decline to do so, after which – if it intervenes – it may limit the role of the original plaintiff. 31 U.S.C. § 3730(b-c).

Each of these procedural requirements safeguards the right of the United States to make certain that its rights and wishes will best be represented in the litigation, including that it will not be bound by a settlement or judicial decision that would not redress its injury or that would fall irrevocably short of its desired redress. Moreover, many of these provisions were added to the statute in an effort to reduce abuses of the statute by individuals seeking financial windfalls. *See, e.g., United States* ex rel. *McKenzie v. Bellsouth Telcoms.*, 123 F.3d 935, 938 (6th. Cir. 1997). Not only does Section 292 fail to provide the contractual *quid pro quo* of consideration upon a meeting of the minds that is a black-letter law requirement for assignment, it also fails to provide any procedural framework for protecting the interests of the United States if it is to be deemed an assignor of its injury. Indeed, allowing the plaintiff in this case, or any other similarly situated plaintiff, to proceed without the oversight or even knowledge of the United States, would be inviting the abuses previously seen in conjunction with the False Claims Act.

V. PLAINTIFF LACKS STANDING FOR THE ADDITIONAL REASON THAT HE CANNOT SHOW CAUSATION OR REDRESSABILITY FOR ANY ALLEGED INJURY.

The only injury to the public alleged by Plaintiff is a hypothetical injury – specifically deterring or discouraging potential competitors of Solo Cup. (Am. Comp. ¶¶ 20, 24, 32, 53-61.) Even if this were a sufficient injury in fact for standing, Plaintiff lacks standing because he cannot show causation or redressability for this injury. *See Vt. Agency*, 529 U.S. at 771.

A. Plaintiff Cannot Demonstrate That Any Alleged Injury To The Public Is Caused By Solo Cup.

Plaintiff has not alleged any stifling of competition in the relevant market for disposable cups, lids, and utensils, nor has he alleged (much less proposed any means of proving) that such a hypothetical injury was caused by the false marking he alleges in the amended complaint. Any proposed link between the alleged injury to the public and the alleged false marking offense is purely speculative – a gossamer thread of imagination connecting a pipe dream to a delusion – and is therefore insufficient for Article III standing.

B. Plaintiff's Requested Relief Provides No Legally Justiciable Redress.

Plaintiff's claim fails to meet the redressability requirement for standing because, even if Plaintiff prevails and Solo Cup is ordered to pay damages that will be split between Plaintiff and the United States, the damages will not remedy any injury in fact. The only allegedly injured persons are potential competitors. (Am. Compl. ¶¶ 20, 24, 30, 53-61.) Even if Solo Cup had falsely marked a product under Section 292, and some unknown third party competitors were actually deterred from competing by Solo Cup, the parties in need of redress would receive none. Instead, Plaintiff would receive a windfall – any interest in which is not sufficient to provide him

with standing. *See Valley Forge*, 454 U.S. at 486 (1982) (finding that an interest unrelated to injury in fact is insufficient to give a plaintiff standing).[16]

VI. PLAINTIFF'S PROPER RECOURSE FOR ADDRESSING THE ISSUES COMPLAINED ABOUT IN THE AMENDED COMPLAINT IS THE FEDERAL TRADE COMMISSION.

Plaintiff is not left without any recourse to address the issues complained about in the Amended Complaint. Plaintiff is able to file a complaint with the Federal Trade Commission, which is responsible for addressing complaints from the public about alleged false advertising. *See, e.g., Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993) ("The public as such, i.e., the individual consumer, will have no right of action under [the 'any person' language of the Lanham Act] and there is no need of such right. Its interest can be protected by the Federal Trade Commission, which has been authorized by section 5 of its Enabling Act to take action on its behalf." (quoting 1 R. Callmann, Unfair Competition, Trademarks and Monopolies, § 18.2(b) at p. 626 (3d ed. 1967))); *cf.* 15 U.S.C. §§ 5, 12, 15 (2000); *see also* footnote 7 *supra.*

Indeed, every circuit that has ruled on the issue – including the Fourth Circuit – has found that there is not an individual right to sue for false advertising under the Lanham Act, notwithstanding its provision that the alleged false advertiser "shall be liable in a civil action by *any person* who believes that he or she is or is likely to be damaged by such act." 15 U.S.C.

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[16] Additionally, if the United States was injured by the alleged false marking (see fn. **Error! Bookmark not defined.**, *supra*), because it would have no involvement in the case, it would be unable to receive redress in an amount and/or manner that it desired – a situation that the procedural guidelines of the FCA makes clear that it is unwilling to accept. *See* 31 U.S.C. § 3730 (2000). This does not touch upon other apparent infirmities of Section 292, including that it provides no procedure whereby Plaintiff could even give the United States its portion of any "redress," which points are not addressed in the present motion, but are expressly preserved for future argument.

§ 1125(a)(1) (2000) (emphasis added).[17] Instead, these courts have held that the individual's recourse is to file a complaint with the Federal Trade Commission. *See e.g., Serbin*, 11 F.3d at 1177; *Colligan*, 442 F.2d at 694. Accordingly, to the extent that Plaintiff believes that Solo Cup has committed acts of false advertising in connection with certain patent markings, he can file a complaint with the Federal Trade Commission.

VII. IF PLAINTIFF IS FOUND TO HAVE STANDING TO PURSUE THIS ACTION AS AN ASSIGNEE OF HARM ALLEGEDLY SUFFERED BY THE UNITED STATES, HE CANNOT MAINTAIN THIS ACTION AS A PRO SE PLAINTIFF.

If this Court determines that Plaintiff has standing to bring this action as a partial assignee of the United States, then this lawsuit should be dismissed without prejudice, or Plaintiff must, at a minimum, retain counsel who is a member of the bar of this Court. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1128 (9th Cir. 2007); *United States* ex rel. *Timson v. Sampson*, No. 07-12797, 2008 U.S. App. LEXIS 4149, at *4-9 (11th Cir. Feb. 27, 2008) (Ex. 1). In *Stoner*, an attorney who was not a member admitted to practice before the district court attempted to bring a suit *pro se* under the FCA. *Stoner*, 502 F.3d at 1126. The Court held that it was impermissible for the relator to represent the United States *pro se* because there was no statutory language expressly authorizing *pro se* representation of the United States. *Id.* at 1127; *see also United States* ex rel. *Friedrich LU v. v. Ou*, 368 F.3d 773, 775-76 (7th Cir. 2004) (Posner, J.); *Timson*, 2008 U.S. App. LEXIS 4149, at *4-6. Likewise, Section 292 does not expressly authorize *pro se* persons to represent the government's interest. Given the lack of explicit authorization, and that a *pro se* party such as Plaintiff may lack the necessary litigation skills and knowledge of local rules and procedures, Plaintiff is not a proper representative of the

[17] *See* footnote 7 *supra*.

United States' interest under Section 292. *See United States v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 17-18 (D.D.C. 2003).

In cases in which a *pro se* party improperly attempts to bring suit on behalf of the government's interests, the courts typically have dismissed the case. *E.g.*, *Timson*, 2008 U.S. App. LEXIS 4149, at *6; *United States* ex rel. *Rogers v. County of Sacramento*, No. S-03-1658, 2006 WL 1748415, at *3 (E.D. Cal. June 23, 2006) , (Ex. 2); *United States* ex rel *Mergent Svcs. v. Flaherty*, No. 05 Civ. 4921 (HB), 2006 WL 880044, at *5 (S.D.N.Y. Apr. 6, 2006) ,Flaherty (Ex. 3); *Westinghouse*, 274 F. Supp. 2d at 19. Likewise, the Court should dismiss Plaintiff's amended complaint without prejudice. At minimum, Plaintiff should be compelled to obtain local counsel admitted to practice before the Court. *See Stoner*, 502 F.3d at 1128.

VIII. CONCLUSION

For the aforementioned reasons, Solo Cup respectfully requests that the Court dismiss Plaintiff's claims for false marking because Plaintiff lacks standing to bring this case such that its content is not within the subject matter jurisdiction of this Court. If Plaintiff is found to have standing, Solo Cup respectfully requests that the case be dismissed for lack of a proper plaintiff, or in the alternative that Plaintiff be enjoined to retain counsel certified to practice in this Court.

Respectfully submitted,

Dated: March 21, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF). And I hereby certify that I will electronically mail and mail the document by U.S. mail to the following non-filing user:

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