

THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROPES COURSES, INC., a Michigan Corporation,)	
)	Civil Action No.:
)	
Plaintiff,)	
)	
vs.)	MOTION FOR A PRELIMINARY
)	INJUNCTION
WHITEWATER WEST INDUSTRIES, LTD., d/b/a PRIME PLAY, a Canadian corporation, Defendant.)	
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Plaintiff, ROPES COURSES, INC. (“ROPES COURSES”), by and through its attorney, ROBERT J. SAYFIE P.C., hereby request that the Court grant ROPES COURSES a temporary restraining order against Defendant for Defendant’ acts of patent infringement against ROPES COURSES.

ROPES COURSES bases this Motion on the following Memorandum of Points and Authorities, on the pleadings and papers of record in this matter, on the oral argument of counsel at the time of hearing, if any, and on any additional information that this Court wishes to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is absolutely imperative that Defendant be immediately enjoined from causing ROPES COURSES further injury through Defendant’s trampling on ROPES COURSES valuable exclusive rights in ROPES COURSES’S United States patent, number 7,175,534, for a CHALLENGE COURSE (the “534 Patent”), to which ROPES COURSES has dedicated

substantial time, effort, and monetary investment. Indeed, all factors and considerations with respect to this Court's granting of equitable relief support a grant of preliminary injunction in favor of ROPES COURSES. First, ROPES COURSES is likely to succeed on the merits of its patent infringement claim because ROPES COURSES'S '534 Patent is valid and is entitled to a presumption of validity, and Defendant has infringed, and continues to infringe, ROPES COURSES '534 Patent. Second, ROPES COURSES will be irreparably harmed if injunctive relief is not granted and Defendant is allowed to continue to infringe on ROPES COURSES rights in the '534 Patent. Third, ROPES COURSES will suffer significant hardship if preliminary injunctive relief is not granted, whereas Defendant will suffer little or no hardship if preliminary injunctive relief is not granted. Finally, the public is best served by issuance of a preliminary injunction here, due to the public's interest in protecting patent rights and enforcing the patent laws. Thus, ROPES COURSES respectfully requests that this Court issue the preliminary injunctive relief that ROPES COURSES seeks.

II. FACTS

ROPES COURSES is the current owner of all right, title, and interest in the '534 patent, lawfully issued on 13 February 2007. *See* Complaint, Exhibit 1. Early in its development, ROPES COURSES realized the potential value the invention protected by the '534 Patent and sought patent protection for that invention. ROPES COURSES has practiced, and continues to practice, the invention protected by the '534 Patent. ROPES COURSES' sales of the invention grow each year. The invention allows users to safely traverse challenging elements, terrains or surfaces while being securely fastened to a safety cable that is movably positioned in a track above the user.

Defendant is in the water park creation industry. Defendant has a booth at the IAAPA show at the Las Vegas Convention Center, and has in infringing product called the “adrena LINE” (“the accused device”) on display, A picture of the accused device is reproduced below on page 9.

III. ARGUMENT

A. Standards for Granting Preliminary Injunctive Relief

District Courts are authorized by 35 U.S.C. § 283 to issue preliminary injunctions in patent cases: “The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. The Federal Circuit has stated that “[b]ecause the issuance of an injunction pursuant to [§ 283] enjoins ‘the violation of any right secured by a patent, on such terms as the court deems reasonable,’ a preliminary injunction of this type, although a procedural matter, involves substantive matters unique to patent law and, therefore, is governed by the law of this court.” *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed.Cir.1988) (quoting § 283). As such, each of the four factors comprising the standard for issuance of a preliminary injunction, as stated by the Federal Circuit in *Abbott Labs. v. Andrx Pharmaceuticals, Inc.*, 473 F.3d 1196, 1200-01 (Fed.Cir.2007), favor ROPES COURSES: “the four factors relevant to the district court's decision to grant or deny a preliminary injunction are (1) the likelihood of the patentee's success on the merits; (2) irreparable harm if the injunction is not granted; (3) the balance of hardships between the parties; and (4) the public interest.” 473 F.3d 1196 (*quoting Oakley, Inc. v. Sunglass Hut Int’l*, 316 F.3d 1331, 1338-39 (Fed.Cir.2003)). These four factors, “taken individually are not dispositive; rather, the district court must weigh and measure each factor against the other factors and against

the form and magnitude of the relief requested,” citing *Amazon.com, Inc. v.*

Barnesandnoble.com, Inc., 239 F.3d 1343, 1350 (Fed.Cir.2001). In this case, ROPES COURSES can easily demonstrate a clear entitlement to preliminary injunctive relief based on each of the four factors.

B. Ropes Courses is Likely to Succeed on the Merits of its Patent Infringement Claims

Given Defendant’s infringing acts, Ropes Courses will succeed on the merits of its patent infringement claims against Defendant. In order to demonstrate a likelihood of success, a patent infringement plaintiff must show that its patent is valid and that it will likely prove that Defendant infringes the patent. See *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1364 (Fed Cir. 1997). Further, “[w]hen the patentee clearly shows that his patent is valid and infringed, a court may, after a balance of all the competing equities, preliminarily enjoin another from violating the rights secured by the patent.” *Atlas Powder Co. v. Ireco Chemicals*, 773 F.2d 1230, 1233 (Fed.Cir.1985). Additionally, at the preliminary injunction stage of a lawsuit, as here, the plaintiff need only demonstrate a “reasonable likelihood of success on the merits both with respect to validity and infringement of its patent,” *Reebok Int’l. Ltd. v. J. Baker, Inc.*, 32 F.3d 1552 (Fed.Cir.1994), and “not a legal conclusion as to the ultimate issue of infringement,” *Amazon.com*, 239 F.3d at 1355-56. In this case, the ‘534 Patent is valid beyond question, and clearly infringed by Defendant, and thus, ROPES COURSES is at least reasonably likely to succeed on the merits of ROPES COURSES’s patent infringement claims. This factor, therefore, supports ROPES COURSES’s entitlement to preliminary injunctive relief.

1. The ‘534 Patent is Valid.

ROPES COURSES is likely to succeed on the merits of ROPES COURSES’s patent infringement claims because there is no present basis upon which to question the validity of the

'534 Patent, nor could ROPES COURSES surmise any basis upon which Defendant could possibly question the validity of the '534 Patent.

Federal statute provides that that "[a] patent shall be presumed valid." 35 U.S.C. § 282. Indeed, a "patentee need do nothing to establish its rights under [an issued] patent." *New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed.Cir.1992). Here, as evidenced by a certified copy of the duly issued '534 Patent, *see* Complaint, Exhibit 1, the '534 Patent is valid and, therefore, is entitled to a presumption of validity⁴. § 282.

2. *Defendant has Infringed, and Continues to Infringe, the '534 Patent.*

a. The Standard for Infringement Analysis.

Defendant has unequivocally infringed, and continues to infringe, ROPES COURSES's rights in the '534 Patent, and therefore, ROPES COURSES is, at least, reasonably likely to succeed on the merits of ROPES COURSES's patent infringement claims. Establishing a basis for granting a preliminary injunction does not require that a patent infringement plaintiff demonstrate infringement beyond all question or that there be a total absence of evidence supporting a defendant's position. *Atlas Powder*, 773 F.2d at 1233. Further, the extent of infringement is immaterial for preliminary injunction purposes. *Smith Intern., Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1580, 534 U.S.P.Q. (BNA) 686, 692 (Fed.Cir.1983). Rather, "the grant [of a preliminary injunction] turns on the likelihood that [a plaintiff] will meet its burden at trial of proving infringement." *Atlas Powder*, 773 F.2d at 1233. Thus, ROPES COURSES need only demonstrate that Defendant likely infringes ROPES COURSES's rights in the '534 Patent, and the measure of Defendant's infringement is not material for the purposes of this Motion. *Id.* In this case, as further developed, *infra*, ROPES COURSES is at least reasonably likely to carry its burden of proving infringement at trial.

All evidence regarding the likelihood of Defendant's infringement of the '534 Patent weighs in favor of the grant of a preliminary injunction. Courts have repeatedly found that an infringement analysis is a two-step process in which "the court first determines, as a matter of law, the correct claim scope, and then compares the properly construed claim to the accused device to determine, as a matter of fact, whether all of the claim limitations are present, either literally or by a substantial equivalent, in the accused device." *Johnson Worldwide Associates, Inc. v. Zebco Corp.*, 174 F.3d 985, 988 (Fed.Cir.1999). Here, after determining the scope of the asserted claims contained in the '534 Patent, comparison of those claims to the accused device must be undertaken to determine whether each of those claim limitations are present. *Id.*

Due to the presumption of validity accorded to the '534 Patent, Defendant bears the burden of establishing invalidity of each claim of the '534 Patent by clear and convincing evidence. *Nystrom v. Trex Co.*, 424 F.3d 1136, 1149 (Fed.Cir.2005), *cert. denied*, 547 U.S. 1055 (2006).

As developed more fully, *infra*, each and every limitation of claim 1 of the '534 Patent ("Claim 1") literally and clearly read on the accused device.

Due to the potentially incomplete record presented to the court at the preliminary injunction stage of litigation, "district courts can issue 'tentative' or 'rolling' claim constructions when 'faced with construing highly technical claim language on an expedited basis...'" *Oakley*, 316 F.3d at 1345. Based on the following, however, ROPES COURSES believes that evidence in a greater quantum than is necessary exists to establish a proper construction of Claim 1, and a clear finding of Defendant's infringement of the '534 Patent such that a likelihood of infringement exists. Claim 1 sets forth:

1. A challenge course (10) comprising: a frame (20) having a substantially horizontally oriented track (120), a vertically oriented member (60) fixed to and extending

downwardly from said substantially horizontally oriented track (120), said vertically oriented column (60) terminating in a bottom portion (61) that is fixed to a substantially horizontally oriented foundation (40); said track (120) having a channel (150) adapted to slideably receive a moveable member (360), said track (120) further having a track slot (140) to receive a safety cable (350) therethrough, said safety cable (350) extending downwardly through said track slot (140) from said moveable member (360); a horizontally oriented platform (170) fixedly disposed said to widthwisely opposed vertically oriented column (60) bottom portions (61); and a supporting element (300) fixed at two ends between two lengthwisely adjacent bottom portions (61).

b. Construction of Claim 1

In this case, the Construction of Claim 1 is a relatively mundane and simple task. Indeed, “[courts] begin, as with all claim interpretation analyses, with the language of the claims,” *Johnson* at 989, and that “[in claim construction] [t]he general rule is, of course, that terms in the claim are to be given their ordinary and accustomed meaning.” *Id.* As such, “a court must presume that the terms in the claim mean what they say, and, unless otherwise compelled, give full effect to the ordinary and accustomed meaning of claim terms.” *Id.* There is, therefore, a “heavy presumption in favor of the ordinary meaning of the claim language,” *Id.*, which translates to a strong presumption in favor of the ordinary meaning of the terms used in the claims of the ‘534 Patent. Likewise, a complementary canon of claim construction is that “a patentee may be his or her own lexicographer by defining the claim terms,” *Oakley* at 1341, and, additionally, that “[i]n such a case, the definition selected by the patent applicant controls.” *Reinshaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243 (Fed.Cir.1998). Thus, a meaning that ROPES COURSES attributed to a term in the ‘534 Patent should also receive a similar favorable presumption due to this well-established rule, and the fact that such a term would be understood by one skilled in the art. *Johnson* at 989.

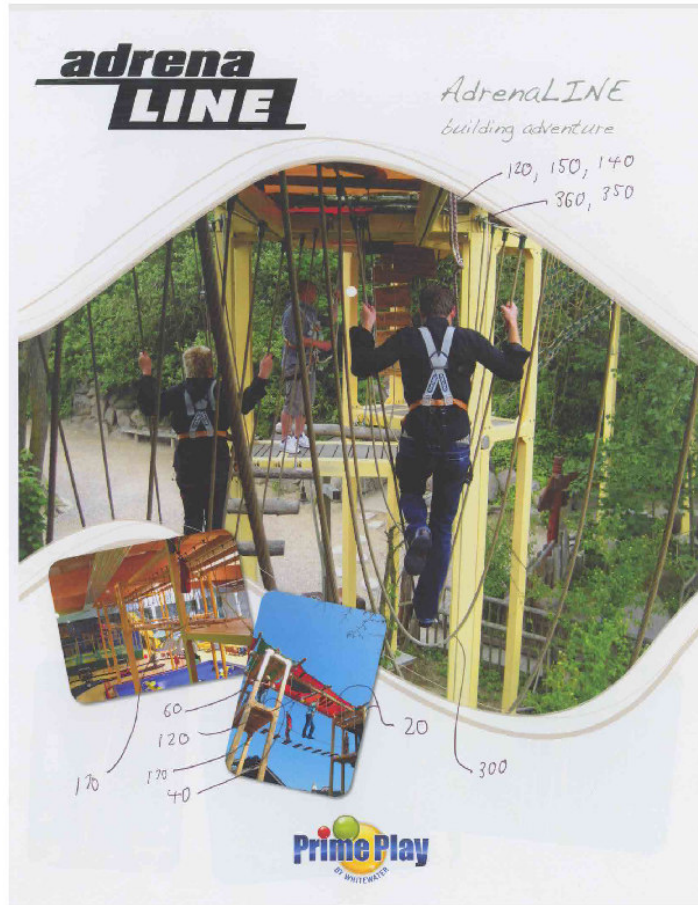
In this case, ROPES COURSES has discerned no present basis from which to require the entry of a definition of a claim term other than terms’ ordinary accustomed meanings or the

definitions attributed to such terms by the patentee. Furthermore, ROPES COURSES has been unable to discern any basis from which Defendant could be in a position to rationally challenge the ordinary meaning, or the patentee's meaning, as the case may be, of any term throughout the '534 Patent. Thus, the scope of Claim 1 is clear and unambiguous, as defined in the '534 Patent.

c. All Claim 1 Limitations are Present in Defendant's accused device

Every limitation of Claim 1 has been drawn onto the picture of the accused device on page 9. For example, Claim 1 identifies the frame as (20), and that reference numeral has been drawn on the picture of the accused device with a reference line to illustrate that the accused device reads on Claim 1. This can be done with each reference numeral in the above claim to easily see how the defendant's accused product infringes the '534 patent. The accused product has: a frame (20), a substantially horizontally oriented track (120), a vertically oriented member (60), fixed to and extending downwardly from said substantially horizontally oriented track (120), said vertically oriented column (60) terminating in a bottom portion (61) that is fixed to a substantially horizontally oriented foundation (40); said track (120) having a channel (150) adapted to slideably receive a moveable member (360), said track (120) further having a track slot (140) to receive a safety cable (350) therethrough, said safety cable (350) extending downwardly through said track slot (140) from said moveable member (360); a horizontally oriented platform (170) fixedly disposed said to widthwisely opposed vertically oriented column (60) bottom portions (61); and a supporting element (300) fixed at two ends between two lengthwisely adjacent bottom portions (61).

Defendant's accused device reads on Plaintiff's Claim 1 Limitations



The numbers above written on the picture of the accused device illustrate how the accused device reads on Claim 1. Thus, the accused device likely infringes ROPES COURSES’s rights in the ‘534 Patent.

Even assuming *arguendo* that Defendant’s infringing accused device does not literally infringe the ‘534 Patent as each of the findings above dictate, Defendant’s infringement of ROPES COURSES’s rights in the ‘534 Patent is clear under the doctrine of equivalents. To be sure, “[a] device that does not literally infringe a claim may nonetheless infringe under the doctrine of equivalents if every element in the claim is literally or equivalently present in the accused device.” *Sage Prods. Inc. v. Devon Indust., Inc.*, 126 F.3d 1420, 1423 (Fed.Cir.1997). Here, the differences, if any differences at all, “distinguish [some] missing claim element from the corresponding aspects of the [accused device]”, and (b) the accused device must logically

and necessarily contain each and every limitation present in Claim 1 so as to “perform substantially the same function in substantially the same way to obtain the same result.” *Graver Tank & manufacturing Co. v. Linde Air Prods. Co.*, 229 U.S. 605, 608, 70 S.Ct. 854, 856, 94 L.Ed. 1097 (1950).

Moreover, the first office action from the patent office allowed claim 1, among other claims. Exhibit 1 is a reproduction of the first two pages of the first office action.

Because there was no narrowing amendment in this patent, the patentee is entitled to claim infringement under the doctrine of equivalents.

Moreover, even if there is some basis from which to discern differences in the accused device from Claim 1, such differences are merely illusory, and those differences do not in any way prevent a finding that Defendant’s accused device infringes the ‘534 Patent, and a likelihood of infringement for purposes of granting a preliminary injunction.

ROPES COURSES’s well founded and unambiguous claim construction, and comparison of the ‘534 to the accused device therefore, firmly establishes that Defendant’s accused device infringes the ‘534 Patent without question. As such, because ROPES COURSES has presented evidence sufficient to establish a strong likelihood of infringement, a preliminary injunction is warranted.

C. ROPES COURSES Will be Irreparably Harmed if Injunctive Relief does not Issue

1. ROPES COURSES is Entitled to a Presumption of Irreparable Harm.

There can be no doubt that ROPES COURSES will suffer irreparable injury if Defendant is permitted to continue to engage in unlawful conduct during the pendency of this case. Indeed, ROPES COURSES could never be made whole by monetary damages alone. In the preliminary injunction context, a patentee is entitled to a rebuttable presumption of irreparable harm where

patent validity and infringement are demonstrated. *See Reebok*, 32 F.3d at 1556-57 (stating, “a movant who clearly establishes the first factor [of likelihood of success] receives the benefit of a presumption on the second [of irreparable harm]”). *See also Abbott Labs v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1347 (Fed.Cir.2006) (finding that a presumption of irreparable would have applied if Abbot had established a likelihood of success on the merits). As ROPES COURSES benefits from a presumption of validity of the ‘534 Patent, and Defendant is at least reasonably likely to have infringed, at least Claim 1, thereby demonstrating at least a reasonable likelihood of success on the merits of ROPES COURSES’s patent infringement claims, both addressed *supra*, ROPES COURSES should thereby be entitled to a presumption of irreparable harm here.

2. The Presumption of Irreparable Harm is Well-Founded in this Case.

The presumption of irreparable harm to ROPES COURSES is well founded in this case because ROPES COURSES can independently demonstrate that it will suffer irreparable harm, and because Defendant is unlikely to find any basis for asserting that ROPES COURSES will not be irreparably harmed by Defendant’s infringing acts. Firstly, “[t]he patent statute provides injunctive relief to preserve the legal interest of the parties against future infringement which may have market effects never fully compensated in money.” *Hybritech*, 849 F.2d at 1457. In this case, as developed more fully, *infra*, it is absolutely true that any future infringements of ROPES COURSES’s rights in the ‘534 Patent will have far-reaching effects on the market for, at minimum, ROPES COURSES’s embodiment of the ‘534 Patent, for which ROPES COURSES could never be accurately or completely compensated. Indeed, “[w]hile monetary relief is often the sole remedy for past infringement, it does not follow that a monetary award is also the sole remedy against future infringement,” *Atlas Powder*, 773 F.2d at 1233, and as such, in this case,

preliminary injunctive relief is absolutely warranted against Defendant's ongoing and future acts of infringement against ROPES COURSES.

Furthermore, it is well established that, "[i]n view of the fact that the principal value of a patent is its statutory 'right to exclude,'" courts have repeatedly held that "the nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole." *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1549-1550 (Fed.Cir.1994). As developed more fully *infra*, this case is clearly one in which Defendant has trampled upon ROPES COURSES's right to exclude, and monetary damages cannot make ROPES COURSES whole.

ROPES COURSES will be irreparably harmed if Defendant's infringement is not ceased by preliminary injunction for the following reasons: (1) the '534 Patent relates to a product that plaintiff has been selling in the United States, and defendant alleges¹ to have not sold any in the United States, so the status quo would remain, (2) there is a substantial amount of competition in the field, (3) Defendant has a very large presence in the field, (4) the field is one in which technology changes rapidly, (5) the amount of research being done in the field is great, (6) the '534 Patent has in the past, and will continue to help ROPES COURSES establish a market position and create business relationships in the market, (7) by the time the litigation is finished, it is entirely possible that the value of the '534 Patent will be diminished and that technology might well bypass it, (8) the potential injury to ROPES COURSES is largely unpredictable, and (9) in the absence of the injunction, other potential infringers would be encouraged to infringe. *See generally Hybritech* at 1456-57 (discussing favorably the district court's analysis of the irreparable harm factors). *See also Hybritech*, 4 U.S.P.Q.2d (B.N.A.) 1001, 1014-15, 1987 WL

¹ Defendant's representative, believed to be Mr. Doug Smith told this to Plaintiff's counsel on 18 November 2009 at the IAAPA trade show in Las Vegas, NV.

123997 (C.D.Cal.). Additionally, courts have considered whether the infringement effects a large proportion of the patentee's overall activities in the market in issuing preliminary injunctions. *See e.g., Cordis Corp. v. Boston Sci. Corp.*, 99 Fed. Appx. 928, 932 (Fed.Cir.2004).

In this case, these types of challenge courses is a relatively new field of technology, particularly with regard to the tracking system and safety cables, and competition is particularly substantial, thereby increasing the value of the ROPES COURSES's rights in the '534 Patent, *Hybritech* at 1456, which protects novel subject matter in the field of challenge courses.

Likewise, Defendant has a very large presence on the field of waterpark creation and installation. *See also* Defendant's website (<http://www.whitewaterwest.com/>), attached hereto as Exhibit 2 which puts Defendant in a position to abuse its power by ignoring the patent rights of other smaller entities, such as ROPES COURSES. *Id.* Indeed, this is precisely the case here, where Defendant has ignored, and continues to ignore, ROPES COURSES's exclusive rights in the '534 Patent, thereby undermining the '534 Patent's principal value in the right to exclude. *See Hybritech* at 1456-57.

Further, the technology relating to challenge courses and their safety systems and the structures that allow people to quickly move through the course does indeed change quickly. This quickly shifting technology paradigm dictates that the '534 Patent will be of greatest value early in its existence. *Hybritech* at 1456.

Likewise, the value of the '534 Patent has helped ROPES COURSES to establish market share and create valuable business relationships, which value is likely to be reduced in the absence of preliminary injunctive relief, particularly in a case where Defendant will likely be purposefully targeting ROPES COURSES's customers. Additionally, it is unknown what

ROPES COURSES's market position will be if ROPES COURSES is unable to exclusively exploit ROPES COURSES's rights in the '534 Patent, as it will be difficult, if not impossible, to measure what ROPES COURSES's market position will be if ROPES COURSES's rights in the '534 Patent are not protected against Defendant's infringement.

Additionally, other potential infringers of the '534 Patent will likely be dissuaded from undertaking infringing activities if Defendant is stopped from infringing. Likewise, if Defendant is not stopped from infringing ROPES COURSES's rights in the '534 Patent, other potential infringers are likely to believe that those potential infringers too may infringe without giving any thought to the potential for adverse consequences. *See, e.g., Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corporation*, 106 F.Supp.2d 696, 703 (D.N.J. 2000) (“[I]f this Court does not grant [plaintiff's] request for an injunction at this time, other would-be infringers will no doubt be invited to infringe on [plaintiff's] '778 Patent which would further erode [plaintiff's] market share and reputation.”). Thus, issuance of preliminary injunctive relief in this case dictates that the potential for further infringements of the '534 patent by other parties is likely reduced, thereby sustaining ROPES COURSES's rights to exclude others from practicing the invention protected by the '534 Patent.

Significantly, ROPES COURSES and Defendant are now direct competitors in the challenge course field, therefore, the likelihood of irreparable harm to ROPES COURSES is even more tangible and imminent. This fact weighs heavily in favor of a finding of irreparable harm, and, thus, strongly supports a grant by this Court of injunctive relief. *See, e.g., Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F.Supp.2d 978, 982-83 (W.D.Tenn.2006) (finding that because “[plaintiff] has shown that direct competition exists between the infringing products and [plaintiff's] own products...[t]he loss of market share and the resulting lost profits and loss of

brand name recognition which [Plaintiff] suffered because of [Defendant's] continued sale of the infringing products constitute injuries that are both incalculable and irreparable.”). Indeed, “intellectual property enjoys its highest value when it is asserted against a direct competitor in the plaintiff’s market.” *Visto Corp. v. Seven Networks Inc.*, 2006 U.S. Dist. Lexis 91453 at *12 (E.D. Tex. Dec. 19, 2006) (finding that where parties to the case are direct competitors, that fact weighs heavily in the court’s analysis of irreparable harm, and therefore, of the propriety of a preliminary injunction). Here ROPES COURSES and Defendant are direct competitors, at minimum, in the field of challenge courses. This situation may render monetary remedies inadequate, particularly because of the indefinite degree to which ROPES COURSES will be harmed through Defendant’s detrimental impact on ROPES COURSES’s market position due to Defendant’s infringement of ROPES COURSES’s rights in the ‘534 Patent. Thus, because the parties are direct competitors, irreparable harm to ROPES COURSES is especially palpable.

Likewise, because ROPES COURSES pioneered an invention in the marketplace for challenge courses, and Defendant is riding ROPES COURSES’s coattails, and will continue to ride ROPES COURSES’s coattails, with respect to ROPES COURSES’s investment in patent protection, this is a clear case of irreparable harm to ROPES COURSES. “Irreparable harm flows from a competitor's attempts to usurp the pioneering company's market position and goodwill.” *800 Adept, Inc. v. Murex Securities, Ltd.*, 2007 WL 1101238, * 6 (M.D. Fla. 2007). ROPES COURSES spent a significant amount of time and resources developing the invention protected by the ‘534 Patent only to have Defendant market its infringing accused device, potentially to ROPES COURSES’s very customers.

Defendant’s infringing acts threaten to make an immediate and impactful mark in the acquisition equipment market, which presents a quintessential situation where irreparable harm is

highly likely and tangible. *See TiVo Inc. v. Echostar Communicators Corp.*, 446 F.Supp.2d 664, 669-670 (E.D. Tex. 2006) (“The availability of the infringing products leads to loss of market share for Plaintiff’s products. Loss of market share in this nascent market is a key consideration in finding that Plaintiff suffers irreparable harm – Plaintiff is losing market share at a critical time in the market’s development, market share that it will not have the same opportunity to capture once the market matures.”). Because Defendant’s infringement of ROPES COURSES’s rights in the ‘534 Patent effects a substantial portion of ROPES COURSES’s overall activities in the market, Defendant’s wrongful acts are particularly harmful. *Cordis Corp.* 99 Fed. Appx. at 932. To be sure, the presence of Defendant’s infringing products will likely lead to loss of market share for ROPES COURSES, irreparably harming ROPES COURSES, to a largely incalculable extent.

3. Any Doubt as to the Sufficiency of Money Damages to make ROPES COURSES Whole Should be Resolved in Favor of ROPES COURSES.

Where there is even a modicum of doubt as to the sufficiency of money damages to make a patent infringement plaintiff whole, irreparable harm is highly likely. *Norwich Pharmacal Co. v. Veterinary Corp. of America*, 296 F.Supp. 937, 941-42 (M.D. Ga. 1968). Indeed, “[i]f monetary relief were the sole relief afforded by the patent statute then injunctions would be unnecessary and infringers could become compulsory licensees for as long as the litigation lasts.” *Atlas Powder*, 773 F.2d at 1233. Thus, it is logical that ROPES COURSES be granted preliminary injunctive relief in this case to avoid rendering Defendant a mere compulsory licensee, where in fact, ROPES COURSES is being irreparably harmed by Defendant’s infringing activities. Additionally, courts have held that where there is at least some reasonable doubt as to the adequacy of money damages, the “correct balancing of equities” favors a preliminary injunction. *Norwich* at 941-42.

Here, at minimum, ROPES COURSES presents as least some reasonable doubt as to the sufficiency of money damages to make ROPES COURSES whole, and thus, irreparable harm to ROPES COURSES is present, and weighs in favor of preliminary injunctive relief in ROPES COURSES's favor.

Thus, for each of these reasons, ROPES COURSES would be irreparably harmed absent preliminary injunctive relief, and where even slight doubt exists as to the sufficiency of money damages to compensate ROPES COURSES, the Court should find in favor of ROPES COURSES's position with respect to the presence of irreparable harm, and issue a preliminary injunction against Defendant.

D. The Balance of Equities Tips in ROPES COURSES's Favor

The balance of equities in this case tips sharply in ROPES COURSES's favor and warrants immediate preliminary injunctive relief against Defendant. The loss of "goodwill, potential revenue, and the very right to exclude that is the essence of the intellectual property at issue" have been found as sufficient bases to find in favor of a patent infringement plaintiff with respect to the balance of equities. *Visto* 2006 U.S. Dist. Lexis 91453 at *14. Here, ROPES COURSES's hardships in these exact respects, and in others, serve as the basis for finding that this factor weighs in ROPES COURSES's favor, and that a preliminary injunction should issue. Defendant's continued infringement seeks to detract from ROPES COURSES's goodwill through use of ROPES COURSES's invention, as well as effectively reducing ROPES COURSES's revenue by providing ROPES COURSES's customers and potential customers with an alternative outlet to fulfill their requirements for ROPES COURSES's patented inventions. Likewise, the invention protected by the '534 Patent is at the core of

ROPES COURSES's business, and comprises a substantial portion of ROPES COURSES's overall market activity.

Through Defendant's actions, ROPES COURSES has been deprived, and will continue to be deprived, of ROPES COURSES's rights in the '534 Patent. As such, because Defendant treads on the goodwill of ROPES COURSES, reduces ROPES COURSES's potential revenue, and tramples on ROPES COURSES's right to exclude others from practicing the invention otherwise protected by the '534 patent, the balance of equities tips in ROPES COURSES's favor.

Furthermore, Defendant cannot reasonably be expected to experience any hardship whatsoever through the issuance of a preliminary injunction. The Federal Circuit has found that "[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed.Cir.1986). Here, Defendant cannot rationally claim that Defendant will experience any sort of hardship because the infringing products do not necessarily come from any significant part of Defendant's business, given the breadth of Defendant's market activity. Thus, Defendant will experience *de minimis*, if any, loss of business, at worst. Even assuming, however, that Defendant will experience a great loss of business, which it likely will not, even "putting a defendant out of business is not enough to preclude preliminary injunction, when the infringement and validity issues are clear..." *Total Containment, Inc. v. Environ Prods., Inc.*, 23 U.S.P.Q.2d 1305. Likewise, the Defendant's infringement of ROPES COURSES's rights in the '534 patent are illegal acts. Surely, Defendant can claim no hardship when such a claim is rooted in acts of patent infringement—such illusory hardship, if any at all, is self-inflicted by Defendant. *ALM Surgical Equipment, Inc. v. Kirschner Medical Corp.*, 15 U.S.P.Q.2d 1241, 1255, 1990 WL 123996 (D.S.C. 1990).

Here, Defendant's infringements of the validly issued '534 Patent are clear, and the balance of equities, therefore, favors ROPES COURSES. Even if the Court considers this factor as neutral with respect to issuance of a preliminary injunction, however, the Federal Circuit "never ha[s] required, as a prerequisite to awarding preliminary injunctive relief, that the district court expressly find the existence of this factor." *Hybritech* at 1457-58. Thus, even the complete absence of hardship to either party in this case, or equal hardship to both parties, situations that are clearly not reflected by the reality of this case, as discussed, *supra*, does not weigh against issuing preliminary injunctive relief to ROPES COURSES.

Indeed, this case is much more transparent with respect to the balance of hardships, which clearly weigh in ROPES COURSES's favor on account of Defendant's acts of infringement of ROPES COURSES's rights in the '534 Patent. Thus, this factor weighs in favor of preliminary injunctive relief against Defendant.

E. The Public Interest Supports Granting Preliminary Injunctive Relief to ROPES COURSES

The strong public interest in maintaining the soundness of the patent system weighs in favor of issuing a preliminary injunction in ROPES COURSES's favor. To be sure, courts have repeatedly found that the public interest is best served by enforcing patent-holders' rights to their patents. To be sure, "the public is best served by enforcing patents that are likely valid and infringed," *Abbott Labs*, 452 F.3d at 1348 (Fed.Cir.2006), and only in "rare and limited circumstances" will the court find that an injunction is contrary to the public interest," *Commonwealth Scientific and Industrial Research Organisation v. Buffalo Technology Inc.*, 492 F.Supp.2d 600, 607.

Likewise, because "[t]he public has an interest in maintaining a strong patent system...[t]his interest is served by enforcing an adequate remedy for patent infringement—in this

case, a permanent injunction.” *TiVo*, 446 F.Supp.2d at 670. The case here is no different: the public interest favors enforcement of ROPES COURSES’s rights in the ‘534 Patent.

Defendant has infringed, and continues to infringe, those rights. The public thus has a strong interest in seeing that ROPES COURSES’s rights are protected, not only for ROPES COURSES’s benefit, but also for the integrity of the patent system in general. Thus, a preliminary injunction should issue against Defendant to uphold the overwhelming public interest in favor of protection of ROPES COURSES’s rights in the ‘534 Patent.

IV. CONCLUSION

As ROPES COURSES has met the standard for preliminary injunction based on the reasons set forth above, ROPES COURSES respectfully requests that this Court enter a preliminary injunction enjoining Defendant and those acting in concert with Defendant from further infringement of the ‘534 Patent.

18 November 2009

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EXHIBIT 1



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