

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GPS INDUSTRIES, INC. AND
OPTIMAL I.P. HOLDINGS, L.P.,

Plaintiffs,

v.

ALTEX CORPORATION,
DECA INTERNATIONAL CORP.,
GOLFLOGIX, INC.,
GPS GOLF PRO, LLC,
GPS TECHNOLOGIES, INC.,
KARRIER COMMUNICATIONS,
L1 TECHNOLOGIES, INC.,
LINKS POINT, INC.,
SKYHAWKE TECHNOLOGIES, INC.,
AND TEE2GREEN TECHNOLOGIES,
PTY LTD.

Defendants.

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§ CASE NO. 3:07-CV-0831-K
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§ PATENT CASE
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§ JURY DEMANDED
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**REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Submitted on November 6, 2007

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TABLE OF CONTENTS

I. **INTRODUCTION**..... 1

II. **INFRINGEMENT**..... 1

 A. “Storing” And “Memory Means for Storing”1

 B. “Position of the Cup”2

III. **VALIDITY**..... 2

 A. Legal Standards for Anticipation And Obviousness under 35 U.S.C. §§ 102, 103.....3

 B. SkyHawke’s Prior Art Do Not Anticipate or Render Obvious The Claims of the '093 Patent.....4

 1. The Brunshnighan Article..... 4

 2. Colonel Green’s Alleged Prior Public Use 4

 3. U.S. Patent No. 5,270,936 (“Fukushima”)..... 5

 4. U.S. Patent No. 5,056,106 (“Wang”)..... 5

 5. Japanese Patent Application No. Hei 1[1989]-272656 (“Takahata”)..... 6

IV. **ENFORCEABILITY** 6

V. **IRREPARABLE HARM**..... 7

 A. Plaintiffs Diligently Pursued a Business Solution to Their Dispute With SkyHawke Prior to Filing Suit.....7

 B. Plaintiffs and SkyHawke Share the Same Market7

 C. Plaintiffs’ Licensing Efforts.....8

VI. **BALANCE OF HARDSHIPS** 9

VII. **PUBLIC INTERESTS**..... 9

VIII. **CONCLUSION** 10

TABLE OF AUTHORITIES

Cases

<i>Advanced Display Sys., Inc. v. Kent State University</i> , 212 F.3d 1272 (Fed. Cir. 2000).....	3
<i>Boston Scientific Corp. v. Cordis Corp.</i> , 422 F. Supp. 2d 1102 (N.D. Cal. 2006).....	3
<i>Connell v. Sears, Roebuck & Co.</i> , 722 F.2d 1542 (Fed. Cir. 1983).....	3
<i>Crown Operations Int'l v. Solutia Inc.</i> , 289 F.3d 1367 (Fed. Cir. 2002)	3
<i>CVI/Beta Ventures, Inc. v. Custom Optic Frames, Inc.</i> , 859 F. Supp. 945 (D. Md. 1994).....	10
<i>Diomed, Inc. v. AngioDynamics, Inc.</i> , 450 F. Supp. 2d 130 (D. Mass. 2006).....	3
<i>Eli Lilly and Co. v. Barr Labs</i> , 251 F.3d 955 (Fed. Cir. 2001).....	3
<i>Ferag AG v. Grapha-Holding AG</i> , 905 F. Supp. 1 (D.C.D.C. 1995)	3
<i>Finnigan Corp. v. International Trade Commission</i> , 180 F.3d 1354 (Fed. Cir. 1999)	4
<i>Halliburton Co. v. Schlumberger Tech. Corp.</i> , 925 F.2d 1435 (Fed. Cir. 1991).....	6
<i>High Tech Medical Instrumentation v. New Image Indus., Inc.</i> , 49 F.3d 1551 (Fed. Cir. 1995) ...	8
<i>In re Fine</i> , 837 F.2d 1071 (Fed. Cir. 1988).....	4
<i>In re Gurley</i> , 27 F.3d 551 (Fed. Cir. 1994).....	3
<i>In re Huston</i> , 308 F.3d 1267 (Fed. Cir. 2002)	5
<i>In re Paulsen</i> , 30 F.3d 1475, (Fed. Cir. 1994)	3
<i>In re Rouffet</i> , 149 F.3d 1350 (Fed. Cir. 1998)	3
<i>Juicy Whip, Inc. v. Orange Bang, Inc.</i> , 292 F.3d 728 (Fed. Cir. 2002).....	4
<i>McGinley v. Franklin Sports, Inc.</i> , 262 F.3d 1339 (Fed. Cir. 2001).....	3
<i>Molins PLC v. Textron, Inc.</i> , 48 F.3d 1172, 1178 (Fed. Cir. 1995).....	6
<i>Optimal Recreation Solutions LLP v. Leading Edge Technologies, Inc.</i> , 6 F. App'x 873 (Fed. Cir. 2001).....	1, 2, 6
<i>Tec Air, Inc. v. Denso Mfg. of Michigan, Inc.</i> , 192 F.3d 1353 (Fed. Cir. 1999).....	3
<i>TechSearch, L.L.C. v. Intel Corp.</i> , 286 F.3d 1360, 1372 (Fed. Cir. 2002)	2
<i>Teledyne Indus., Inc. v. Windmere Prods., Inc.</i> , 433 F. Supp. 710 (S.D. Fla. 1977).....	10
<i>United States Surgical Corp. v. Ethicon, Inc.</i> , 103 F.3d 1554 (Fed. Cir. 1997).....	3

Woodland Trust v. Flower Tree Nursery, 148 F. 3rd 1368 (Fed. Cir. 1998)..... 4

Statutes

35 U.S.C. § 102..... 4

35 U.S.C. § 103..... 4

35 U.S.C. § 282..... 4

I. **INTRODUCTION**

The issues before the court are narrow and clear. SkyHawke does not dispute Plaintiffs' construction of any claim terms of the '093 Patent. Thus, the Court should construe the '093 Patent's claim terms in accordance with the Federal Circuit's ruling in *Optimal v. Leading Edge*¹ and as supplemented by the Expert Reports of Len Jacobson.²

II. **INFRINGEMENT**

SkyHawke's only non-infringement argument focuses on Claim 1's "storing the position of the cup" and Claim 15's "memory means for storing the position of the golf cup."³ These arguments are factually unsupported and incorrect.

A. "STORING" AND "MEMORY MEANS FOR STORING"

SkyHawke argues that its SG Devices do not "store" the position of the golf cup. Contrary to SkyHawke's argument, when the SG Device's screen cursor is moved to represent the approximated flag/cup/target position, the screen's displayed intersection point is in fact the location of the flag/cup/target.⁴ To accomplish this, the SG Device necessarily stores the approximated flag/cup/target position in memory at least long enough to compute the distance from the user to the flag/cup/target.⁵ If this position was not stored, a calculation would be impossible. This is clearly shown by SkyHawke's own patent and promotional video covering the "Intelligreen" function of the SG Devices.⁶ Given the SG Device's ability to store the golf cup's position in memory, the SG Devices quite distinctly perform the step of "storing" and have

¹ See generally Plaintiffs' Appendix in Support of Motion for Preliminary Injunction ("Mot. App.") at 1107-1114, *Optimal Recreation Solutions LLP v. Leading Edge Technologies, Inc.*, 6 F. App'x 873 (Fed. Cir. 2001).

² See Mot. App. at 0001-0027, Expert Report of Len Jacobson ("Jacobson Report"); Plaintiffs' Appendix in Support of Reply Brief for Preliminary Injunction ("Rep. App.") at 0001-0011, Rebuttal Expert Report of Len Jacobson ("Jacobson Rebuttal Report").

³ Defendant's Brief in Support of its Opposition ("Def. Opp.") at 6-7.

⁴ Rep. App. at 0004, Jacobson Rebuttal Report.

⁵ *Id.*

⁶ See Mot. App. at 0747-0778, Exhibit F of the Jacobson Report at 6-8; Mot. App. at 0779-0810, Exhibit G of the Jacobson Report at 5-7; Mot. App. at 0902.

a “memory means for storing the position of the golf cup” as called for by the '093 Patent’s claims.⁷

B. “POSITION OF THE CUP”

SkyHawke argues that the “position of the cup” is never stored in the SG Device’s memory because the exact position, without any variance or error, is never ascertained. But, according to the Federal Circuit in *Optimal v. Leading Edge*, “position” is a relative term that requires only approximately locating the “position of the cup” relative to other features or locations on a golf course.⁸ Moreover, a person skilled in the art would recognize that any geographic position necessarily has a degree of variance associated with it.⁹ The SG Device measures the position of a flag/cup to about 5 yards from the front of the green using the cursor function.¹⁰ This position is known to be within about +/-3 yards because of the accuracy of GPS system. Thus, the “position of the cup” is located in a manner consistent with the Federal Circuit’s construction.¹¹

**III.
VALIDITY**

SkyHawke challenges the '093 Patent’s validity by asserting that all claims are anticipated, or least made obvious, by six references in its conclusory expert report.¹² As shown below and explained in greater detail in the Jacobson Rebuttal Report, the asserted claims will withstand these challenges.

⁷ Rep. App. at 0004, Jacobson Rebuttal Report.

⁸ Mot. App. at 1107-1114

⁹ Rep. App. at 0005, Jacobson Rebuttal Report.

¹⁰ SkyHawke makes another unpersuasive argument that the “cursor” function of the SG Devices somehow does not infringe under the doctrine of equivalents. SkyHawke attempts to read limitations into the claims of the '093 Patent where none exist.

¹¹ Rep. App. at 0004, Jacobson Rebuttal Report; *see also* Mot. App. at 1110-1111, Federal Circuit construction of this terms “location” and “position” in the *Optimal* case.

¹² Conclusory expert reports are “devoid of facts upon which the affiant[s]’ conclusion, as experts, were reached.” *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1372 (Fed. Cir. 2002).

A. LEGAL STANDARDS FOR ANTICIPATION AND OBVIOUSNESS UNDER 35 U.S.C. §§ 102, 103

In order to anticipate a patent, the four corners of a single prior art reference must disclose each and every element of the claimed invention, as they are construed by the court, and enable a person of ordinary skill in the art to practice the invention.¹³ If a single element of the claimed invention is missing, then the prior art is not anticipatory.¹⁴ In arguing anticipation, *SkyHawke has the burden of proof to establish by clear and convincing evidence* that alleged prior art references disclose each and every element of the '093 Patent.¹⁵

There are three distinct requirements for a *prima facie* case of obviousness under 35 U.S.C. § 103. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success that the references, when modified or combined, will function as in the claim. Third, the references, when modified or combined, must teach or suggest *all* the claim limitations.¹⁶ A reference that teaches away from the claimed invention cannot be modified or combined to establish a *prima facie* case of obviousness.¹⁷

¹³ *In re Paulsen*, 30 F.3d 1475, 1478-79 (Fed. Cir. 1994); *Advanced Display Sys., Inc. v. Kent State University*, 212 F.3d 1272, 1282 (Fed. Cir. 2000) (material not explicitly contained in the prior art document may only be considered if it is incorporated by reference).

¹⁴ *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) ("Anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim. A prior art disclosure that 'almost' meets that standard may render the claim invalid under § 103; it does not 'anticipate.'") (internal citations omitted); *Ferag AG v. Grapha-Holding AG*, 905 F. Supp. 1, 7 (D.C.D.C. 1995) ("If even a single element or limitation required by the claim is missing from the disclosure of the reference, there can be no anticipation.") (citing *Connell*, 722 F.2d at 1548).

¹⁵ *See United States Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1563 (Fed. Cir. 1997); *see also* 35 U.S.C. § 282; *Eli Lilly and Co. v. Barr Labs*, 251 F.3d 955, 962 (Fed. Cir. 2001); *see also Crown Operations Int'l v. Solutia Inc.*, 289 F.3d 1367, 1377-78 (Fed. Cir. 2002); *Boston Scientific Corp. v. Cordis Corp.*, 422 F. Supp. 2d 1102, 1104, 1108 (N.D. Cal. 2006); *Diomed, Inc. v. AngioDynamics, Inc.*, 450 F. Supp. 2d 130, 138 (D. Mass. 2006).

¹⁶ *McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339 (Fed. Cir. 2001).

¹⁷ *Tec Air, Inc. v. Denso Mfg. of Michigan, Inc.*, 192 F.3d 1353, 1359-60 (Fed. Cir. 1999); *In re Rouffet*, 149 F.3d 1350, 1355-56 (Fed. Cir. 1998); *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

B. SKYHAWKE’S PRIOR ART DO NOT ANTICIPATE OR RENDER OBVIOUS THE CLAIMS OF THE '093 PATENT

1. The Brunshnighan Article

The Brunshnighan article does not anticipate, or makes obvious, every claim of the '093 Patent. The Brushnighan article only speculates applications that could be possible in the future using GPS technology, and specifically toward applications to aid the blind. This reference does not have the ability to teach or suggest any of the independent claim elements of the '093 Patent, including the ability to locate the position of a golf cup/flag/target; store these positions; and determine the distances between the stored position and the GPS receiver.¹⁸ Furthermore, this reference does not teach a person skilled in the art how to make or use its speculated system or teach a person skilled in the art how to make a system for the use on a golf course.¹⁹ Because there is not complete identity between this reference and the claims of '093 Patent, the Brushnighan article cannot, as a matter of law, anticipate or render obvious Claims 1 or 15.²⁰

2. Colonel Green’s Alleged Prior Public Use

SkyHawke argues that Colonel Green’s alleged prior public use anticipates, or at least makes obvious, every claim of the '093 Patent. However, uncorroborated testimony about the prior art cannot be used to support an invalidity claim.²¹ Furthermore, testimony in the *Optimal v. Leading Edge* litigation directly contradicts Colonel Green’s assertions of his alleged prior public use.²² Moreover, Colonel Green’s briefings do not teach any of the claims of the

¹⁸ Rep. Mot. at 0007, Jacobson Rebuttal Report.

¹⁹ *Id.*

²⁰ Because dependant Claims 8-14, and 16-18 each depend from and incorporate all the limitations and elements of Claims 1 or 15, it follows logically that the reasons why Claims 1 or 15 are not anticipated also apply to these dependant claims. *See In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

²¹ *Woodland Trust v. Flower Tree Nursery*, 148 F. 3d 1368, 1371 (Fed. Cir. 1998) (“throughout the history of the determination of patent rights, oral testimony by an alleged inventor asserting priority over a patentee’s rights is regarded with skepticism, and as a result, such inventor testimony must be supported by some type of corroborating evidence.”); *Finnigan Corp. v. International Trade Commission*, 180 F.3d 1354, 1366-69 (Fed. Cir. 1999); *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 737-43 (Fed. Cir. 2002).

²² Rep. App. at 0073-0081, Deposition Transcripts of Howard Israel and Lawrence Molanar which refute Colonel Green’s assertion of his public use prior to the filing date of the '093 Patent.

'093 Patent²³ – they merely speculate and cannot, as a matter of law, anticipate or render obvious the claims of the '093 Patent.²⁴

3. U.S. Patent No. 5,270,936 (“Fukushima”)²⁵

Fukushima is only directed toward a “simplified navigation apparatus” and does not suggest an application for distance determination on a golf course, nor any application that would require accuracy less than 5 meters as asserted in the claims of the '093 Patent.²⁶ Furthermore, the system embodied in Fukushima would not have been considered practical on a golf course in 1991 due to its inability to locate the position of the golf cup/flag/target; store the position; determine the distance between the stored position and the GPS receiver; and lack of continuous GPS satellite coverage.²⁷ Because there is not complete identity between this reference and the claims of '093 Patent²⁸, Fukushima, as a matter of law, cannot anticipate or render obvious the claims of the '093 Patent.

4. U.S. Patent No. 5,056,106 (“Wang”)²⁹

Wang has nothing to do with GPS. Wang is only directed toward “Golf Course Ranging and Direction-Finding Systems Using Spread-Spectrum Radiolocation Techniques.”³⁰ Furthermore, even if motivated to combined GPS with Wang – a completely different technology – the system embodied would be deficient in its inability to locate the position of the cup/flag/target; store the position; determine the distance between the stored position and GPS

²³ See *supra* note 20.

²⁴ Rep. App. at 0007, Jacobson Rebuttal Report.

²⁵ SkyHawke incorrectly relies on *In re Huston*, 308 F.3d 1267 (Fed. Cir. 2002) for the proposition that Fukushima in combination with Wang invalidate the claims of the '093 Patent. The Federal Circuit relied on the Paul reference to affirm the Board’s rejection of the ‘081 Application for obviousness – not Fukushima and Wang. See *In re Huston*, 308 F.3d at 1279. However, the Paul reference (a 1994 patent) is inapplicable to the claims asserted in this suit. In another continuation Application, 09/454,813 off the parent '093 Patent, the Board specifically rejected the Examiner’s rejection based on Fukushima in view of Wang. See Rep. App. at 0027, *Ex Parte Huston and Cornish*, Appeal No. 2005-2769, Application No. 09/454,813 at 11.

²⁶ Rep. App. at 0007-0008, Jacobson Rebuttal Report.

²⁷ *Id.*

²⁸ See *supra* note 20.

²⁹ See *supra* note 25.

³⁰ Rep. App. at 0008-0009, Jacobson Rebuttal Report.

receiver; or accurately determine any distances.³¹ Because there is not any, much less complete, identity between this reference and the claims of '093 Patent,³² Wang, as a matter of law, cannot anticipate or render obvious the claims.

5. Japanese Patent Application No. Hei 1[1989]-272656 (“Takahata”)³³

Takahata is only directed toward “a golf cart management method.”³⁴ Furthermore, even if motivated to modify Takahata beyond its original teaching, such an imaginary system would be deficient in that it would not be able to locate the position of the cup/flag/target; store the position; determine the distance between the stored position and GPS receiver; and the lack of differential error correction would render the application unreliable.³⁵ Takahata, as a matter of law, cannot anticipate or render obvious the claims of the '093 Patent.

IV. **ENFORCEABILITY**

SkyHawke attempts to re-argue a stale issue raised in the prior *Optimal v. Leading Edge* litigation – inequitable conduct by the inventor in the prosecution of the '093 Patent.³⁶ To prove inequitable conduct, SkyHawke must establish by clear and convincing evidence proof the inventor, Charles D. Huston, with the intent to mislead or deceive, withheld information or submitted false information that was known to be material to the Examiner’s evaluation of the '093 application.³⁷ As the Jacobson Rebuttal Report and declaration of Charles D. Huston demonstrate, the Takahata reference is not material and the conduct of Mr. Huston hardly

³¹ *Id.*

³² *See supra* note 32.

³³ SkyHawke claims Takahata in view of Storms renders the claims of the '093 Patent obvious. However, as Mr. Jacobson states in his rebuttal report, nothing in Takahata or Storms suggest or teach a person skilled in the art to combine these references at the time of the filing of the '093 Patent. Storms teaches away from the use of GPS as it concerns the use of remote transmitters and was already found by the Examiner in the '093 Patent’s original prosecution not to anticipate its claims. Rep. App. at 0009-0010, Jacobson Rebuttal Report.

³⁴ Rep. App. at 0009-0010, Jacobson Rebuttal Report.

³⁵ *Id.*

³⁶ *See* Order denying Motion for Summary Judgment for Inequitable Conduct in *Optimal*.

³⁷ *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178 (Fed. Cir. 1995); *Halliburton Co. v. Schlumberger Tech. Corp.*, 925 F.2d 1435, 1439 (Fed. Cir. 1991).

qualifies as intent to deceive the PTO.³⁸ Moreover, the fact that the defendant in the prior litigation chose not to appeal the unenforceability defense demonstrates that SkyHawke will not prevail on this issue.

V.
IRREPARABLE HARM

SkyHawke argues that Plaintiffs have not been irreparably harmed because: (1) Plaintiffs delayed in bringing suit, (2) Plaintiffs do not share the same market as SkyHawke; and (3) Plaintiffs' can be adequately compensated with money damages because of their licensing efforts.

A. PLAINTIFFS DILIGENTLY PURSUED A BUSINESS SOLUTION TO THEIR DISPUTE WITH SKYHAWKE PRIOR TO FILING SUIT

Plaintiff GPSI acquired the rights of the '093 Patent in late November 2004.³⁹ When Plaintiffs learned of SkyHawke's infringement of the '093 Patent in 2005, they attempted to reach an amicable business solution *without the need of filing a lawsuit*.⁴⁰ After SkyHawke's rejection of a mutual agreement, Plaintiffs were forced to file this lawsuit in early 2007. Immediately thereafter, Plaintiffs filed for preliminary injunction within three (3) months after careful review and investigation of the SG Devices.⁴¹ Plaintiffs have demonstrated that they did not delay in seeking relief for a preliminary injunction.⁴²

B. PLAINTIFFS AND SKYHAWKE SHARE THE SAME MARKET

SkyHawke argues that it does not compete in the same market as the Plaintiffs by attempting to parse out consumer handheld golf GPS devices. This is simply incorrect.

³⁸ Rep. App. at 0010-0011, Jacobson Rebuttal Report; Rep. App. at 0031-0068, Declaration of Charles D. Huston ("Huston Decl.") at 0033-0036.

³⁹ Mot. App. at 0811-0812, McGill Decl. at ¶ 2.

⁴⁰ Mot. App. at 0812, McGill Decl. at ¶ 7.

⁴¹ See generally Mot. App. at 0001-1119 (over 1000 pages of evidence demonstrating SkyHawke's infringement and irreparable harm to Plaintiffs).

⁴² See *High Tech Medical Instrumentation v. New Image Indus., Inc.*, 49 F.3d 1551, 1558 (Fed. Cir. 1995) (requiring a "good explanation" for delay in filing a preliminary injunction).

SkyHawke all but concedes that the golf-cart mounted GPS systems developed and sold by Plaintiff GPSI or licensed to other companies are covered by the '093 Patent.⁴³ Furthermore, SkyHawke's continuing infringement of the '093 Patent with its SG Devices places both Plaintiff GPSI and its current licensees at an economic disadvantage⁴⁴ – *i.e.*, creating a diminution in market share as consumers begin to relay on handheld devices over the golf-cart mounted systems.⁴⁵ Moreover, SkyHawke neglects to acknowledge in its Opposition that Assistant Pro, Plaintiff Optimal's licensee which *markets and sells consumer handheld golf GPS devices*, is also placed at an economic disadvantage by SkyHawke's continuing infringement.⁴⁶ Clearly, Plaintiffs and their licensees share the same market as SkyHawke.

C. PLAINTIFFS' LICENSING EFFORTS

SkyHawke argues that “Plaintiffs have failed to demonstrate any non-economic harm” because of their licensing program. SkyHawke's assertion is contradicted by the law. In the *High Tech* case relied on by SkyHawke, the Federal Circuit held that “risk of loses in sales or goodwill in the market” and infringing activity which “preclude[s] [the patentee] from licensing its patent or entering the market” are factors to consider in granting a preliminary injunction.⁴⁷ As shown above, Plaintiffs have zealously protected their patent rights through their licensing program while developing golf GPS systems for the marketplace.⁴⁸ Furthermore, Plaintiffs licensees who develop and sell golf GPS systems/devices will also be irreparably harmed as a result of SkyHawke's infringement.⁴⁹ Plaintiffs will be irreparably harmed without a preliminary

⁴³ Mot. App. at 0812, McGill Decl. at ¶ 4.

⁴⁴ See *High Tech*, 49 F.3d at 1556 (“commercial activity” by patentee and “licensees who could be injured by competition from [infringer]” significant factors in irreparable harm calculus).

⁴⁵ Mot. App. at 0812-0814, McGill Decl. at ¶ 6.

⁴⁶ Mot. App. at 0816-0817, Huston Decl. at ¶ 4; Rep. App. at 0038-0039, Huston Decl. at ¶ 4.

⁴⁷ *Id.*

⁴⁸ GPS Golf Pro, LLC, a named Defendant in this lawsuit, recently stipulated that the '093 Patent as valid and enforceable and entered into a license agreement with the Plaintiffs. See Doc. No. 147 (Order Granting Amended Joint Stipulation of Dismissal of Defendant GPS Golf Pro, LLC).

⁴⁹ Mot. App. at 0812, 0814, McGill Decl. at ¶ 6; Mot. App. at 0816-0817, Huston Decl. at ¶ 4; Rep. App. at 0038-

injunction.

VI. BALANCE OF HARDSHIPS

SkyHawke makes self-serving statements in its Opposition that Plaintiffs attempted “to adopt a strategy of ambush rather than providing fair notice” by filing for a preliminary injunction to “shut-down” SkyHawke; thus, the balance of hardships should tip in SkyHawke’s favor.⁵⁰ The test here is not whether there will be hardships inflicted upon SkyHawke. The test is whether the balance of the hardship tips in Plaintiffs’ favor as the holder of exclusive patent rights, and it clearly does.

Without a preliminary injunction, Plaintiffs and their licensees would not be able to develop and market their golf-cart mounted and handheld golf GPS systems/devices and would lose, and likely never recover, critical market share. The longer this infringement is allowed to continue, the less likely Plaintiffs and their licensees will ever be able to recover any of the money they invested in their systems and devices. These opportunities will be lost forever.

VII. PUBLIC INTERESTS

SkyHawke finally argues the public interest is best served because there are issues regarding the infringement and validity of the '093 Patent and that its resellers and customers will be affected if SkyHawke is enjoined. These arguments are unpersuasive. First, SkyHawke fails to show with clear and convincing evidence that Plaintiffs cannot prevail. Furthermore, consumers of any SkyHawke product can utilize golf-cart mounted GPS systems or older range finding methods, such as, optical range finders or the sprinkler heads on the golf course. There is little doubt that if SkyHawke is found to be infringing, that infringement will also be found to be

0039; Huston Decl. at ¶ 4.

⁵⁰ SkyHawke knew of the '093 Patent when cited as a prior art reference in 2003 for its own patent and as early as 2005 when Plaintiff GPSI approached for a business solution – hardly constituting a “strategy of ambush.” *See* Mot. App. at 0103-0173, 0811-0813.

deliberate.⁵¹ Deterring this type of flagrant violation of intellectual property rights is strongly in the public interest.⁵²

VIII. **CONCLUSION**

For these reasons and the reasons set forth in its moving papers, Plaintiffs respectfully request that their Motion for Preliminary Injunction be granted and Defendant SkyHawke's SG Devices be preliminarily enjoined during this lawsuit.

Dated: November 6, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the clerk of court for the United States District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means as well as to the following pro se representative.

November 6, 2007

/s/ Michael W. Shore
Michael W. Shore

⁵¹ See *Teledyne Indus., Inc. v. Windmere Prods., Inc.*, 433 F. Supp. 710, 740 (S.D. Fla. 1977).

⁵² See, e.g., *CVI/Beta Ventures, Inc. v. Custom Optic Frames, Inc.*, 859 F. Supp. 945, 946-51 (D. Md. 1994).