

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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<p><b>GLOBAL TRAFFIC TECHNOLOGIES LLC,</b></p> <p>Plaintiff,</p> <p>vs.</p> <p><b>TOMAR ELECTRONICS, INC.</b></p> <p>Defendant.</p>	<p>Civil No. 05-756 MJD/AJB</p> <p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR INJUNCTIVE RELIEF</b></p>
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Pursuant to the Order of this Court dated December 27, 2007, the Court (1) granted default judgment of direct, induced, and contributory infringement of claims 22, 23, 24, 25, 26, 38, 39, 40 and 41 of U.S. Patent No. 5,172,113 (“’113 Patent”) against Defendant Tomar Electronics, Inc.’s (Tomar”) accused Strobecom II Systems, consisting of certain components, and (2) found the asserted claims of the ’113 Patent to be valid and enforceable. Having thus

adjudicated Tomar's liability, the Court held a jury trial from October 2, 2008 to October 22, 2008 to determine the amount of damages Tomar owed Plaintiff Global Traffic Technologies, LLC. ("Global Traffic") for Tomar's infringement. At trial, the Court received testimony from ten witnesses and received more than 500 exhibits, including demonstrative exhibits. On October 22, 2008, the jury awarded damages to Global Traffic in the amount of \$6,750,000. On October 21, 2008, while the jury deliberated, the Court held an injunction hearing at which it received testimony from three witnesses and received more than twelve exhibits.

Based on the full record developed during these proceedings, including the evidence supporting the Court's default judgment order, the evidence adduced at trial, and the evidence adduced at the injunction hearing, the Court finds and concludes that Global Traffic is entitled to a permanent injunction prohibiting Tomar from manufacturing, selling, offering for sale, using, or importing Tomar's accused StrobeCom II systems and certain components as identified in the Court's injunction order. Because of the particular circumstances of this case, the Court also finds and concludes that Global Traffic is entitled to an injunction prohibiting Tomar from infringing the '113 Patent by manufacturing, selling, offering for sale, using, or distributing, software,

hardware, and/or instructions (whether in person or through manuals, advertisements, websites, or otherwise), for the purpose of programming or enabling coding in Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are merely colorably different and/or Tomar phase selector models 2080, 2140, and/or phase selectors that are merely colorably different.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court makes the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

#### **I. THE PARTIES AND THE OPTICAL TRAFFIC PREEMPTION MARKET**

##### **A. GLOBAL TRAFFIC**

Global Traffic is a company based in Oakdale, Minnesota that develops, markets, and sells traffic preemption systems and traffic sensing systems. Global Traffic was formed in 2007 as part of the divestiture of a 3M business unit. As part of the divestiture, Global Traffic obtained all right and title to the patent-in-suit—the ‘113 patent—and all rights to the claims and remedies in this litigation.

Global Traffic is the sole assignee of the ‘113 patent and has not licensed the ‘113 patent. Global Traffic sells an optical traffic preemption system under the brand Opticom™. All current versions of the Global Traffic’s optical Opticom products

employ the coded vehicle identification feature covered by the '113 patent. The president of Global Traffic, Rick Sachse, and the vice president of sales at Global Traffic, Paul Powell, testified on behalf of Global Traffic at trial and at the injunction hearing.

**B. TOMAR**

Tomar is a company based in Gilbert, Arizona. Tomar sells an array of traffic-related products that are not accused of infringement in this case, including light bar and siren products. A minor part of its business revolves around the sale of optical traffic preemption products, including the Strobecom II systems that were found to be infringing in this case. Scott Sikora, Tomar's president and CEO, did not appear at trial or at the injunction hearing.

**C. THE OPTICAL TRAFFIC PREEMPTION MARKET**

The Court finds that the relevant market for purposes of analyzing injunctive relief is the optical traffic preemption market. Global Traffic's damages expert, Donald Gorowsky, and Tomar's damages expert, Dwight Duncan, both considered this to be the relevant market for purposes of evaluating damages. (Tr. 520-21, 847-48.)

The Court also finds that Global Traffic and Tomar are direct competitors in this market. Every witness asked about the competitive relationship between Global Traffic and Tomar at trial agreed that Global Traffic and Tomar competed directly against one another in a two-supplier market. These witnesses included both damages experts, Global Traffic witnesses Mr. Sachse and Mr. Powell, and Tomar witnesses Tom Kay (the eastern regional sales manager for Tomar's Strobecom II products) and Bill Taylor (the western regional sales manager for Tomar's Strobecom II products). (Tr. 191, 207, 213, 279, 403-04, 497, 520-21, 847-48.)

## **II. FACTS SUPPORTING A FINDING OF IRREPARABLE HARM AND THE INADEQUACY OF MONETARY DAMAGES**

At trial and during the injunction hearing, Global Traffic provided essentially undisputed evidence of facts that support entry of irreparable harm. The evidence of irreparable harm came primarily through the testimony of Global Traffic employees Mr. Sachse and Mr. Powell during the trial and the injunction hearing. The Court found the testimony of Mr. Sachse and Mr. Powell to be credible and consistent with other evidence in the record.

In contrast, Tomar proffered almost no testimonial evidence relating to irreparable harm or other preliminary injunction considerations. The only

Tomar witness who testified at the injunction hearing was Tom Sikora, who stepped down from his role as president of Tomar years ago. Tom Sikora conceded at trial and at the injunction hearing that he did not have direct knowledge of the development, marketing, and use of the infringing StrobeCom II systems and did not have direct knowledge of the development, marketing, and use of the new StrobeCom II systems that Tomar alleges do not contain the patented invention. (Tr. 709-13, Inj. Tr. 35.) The Court finds it significant that Tomar did not produce Scott Sikora to testify in person at the trial or at the injunction hearing. Scott Sikora is the president and CEO of Tomar and the person at Tomar with the most knowledge of most of the key facts relevant to the issue of injunction: development of the infringing system, sales and marketing of the infringing system, market effects of the infringing system, and Tomar's purported cessation of infringement. The Court also notes that there is evidence in the form of a declaration from Global Traffic witness Paul Powell that Scott Sikora was present in the courthouse during the injunction hearing on October 21, 2008. Scott Sikora's decision not to testify during that hearing leaves Tomar with significant evidentiary gaps with respect to the questions of whether Tomar has stopped its infringing conduct, whether there is no threat that Tomar will

engage in infringement in the future, and whether it is not a threat to inflict irreparable harm on Global Traffic through continued infringement.

Accordingly, the Court finds the following facts support an overall finding that Global Traffic will suffer irreparable harm if an injunction does not issue in this case:

1. Global Traffic and Tomar compete directly against one another in a two-supply market, as discussed above.

2. Global Traffic (and 3M before it) has never licensed the '113 patent to a third party, much less a direct competitor such as Tomar. 3M once entered into licensing negotiations with a third party with respect to a license for emitter manufacture, but the third party was not a direct competitor and those negotiations did not result in a license. (Inj. Tr. 70, 73-75.)

3. Global Traffic invests significant time and resources in (1) educating the public and potential customers about the benefits of its coded optical traffic preemption systems, (2) assisting potential customers in drafting bidding specifications for coded optical traffic preemption systems, and (3) teaching the public how to use its coded optical traffic preemptions systems. (Tr. 267-69, 275-77.) The time and money that Global Traffic invests in educating and developing

relationships with customers and potential customers based on coding is an important aspect of Global Traffic's reputation and goodwill in the optical traffic preemption market. (Inj. Tr. 56-58.)

4. The patented invention is a critical component of Global Traffic's business model. Global Traffic has integrated the patented coding feature into all the optical traffic preemption products that it sells. Global Traffic's optical Opticom system, which embodies the patented invention, constitutes approximately two-thirds of all the products sold by Global Traffic. Moreover, the Opticom system embodying the patented invention provides the revenue platform for much of Global Traffic's investment in research and development. (Inj. Tr. 70-72.)

5. Global Traffic brought this lawsuit promptly after (1) confirming through field observations—including a side-by-side test with Tomar in Phoenix, Arizona in 2004—that Tomar was employing StrobeCom II systems that were capable of performing vehicle identification through optical coding and (2) learning that Tomar was advertising its ability to use StrobeCom II systems to detect 3M emitters. (Tr. 291-94; DTX 142.) Moreover, Tomar's affirmative



defense of laches was stricken by this Court as part of the default judgment sanction imposed in this case.

6. Tomar's sales of infringing systems have caused Global Traffic to lose substantial sales of its optical Opticom products and have thus taken market share away from Global Traffic. (Inj. Tr. 56-57.)

7. Tomar's sales of infringing systems has undermined a number of Global Traffic's existing customer relationships after Global Traffic has spent significant time—sometimes years—educating those customers and persuading them about the benefits of coded optical traffic preemption systems. (Inj. Tr. 57-58.) Tomar's sale of infringing systems has also undermined Global Traffic's ability to develop new customer relationships. (Inj. Tr. 57-58.)

8. The Opticom brand has long been connected with high-quality, innovative traffic preemption products. Tomar's sales of infringing systems undermines Opticom's reputation for innovation and the goodwill associated with that reputation. Tomar's sales of infringing systems also undermines Global Traffic's ability to differentiate Opticom from other traffic preemption systems. (Inj. Tr. 58.)

9. The presence of Tomar's infringing system has eroded the price that Global Traffic is able to obtain for its products with many customers, sometimes by as much as 50%. (Inj. Tr. 57; Tr. 314-15.)

10. The denial of a request for injunction would create an environment that encourages other third parties to infringe of the '113 patent. Currently, there are other companies in the intelligent transportation issue that have the capital, the technical ability, and the marketing capacity to compete directly against Global Traffic in the market for optical preemption products. (Inj. Tr. 70-71.) A significant barrier to entry for these companies is the '113 patent and other intellectual property owned by Global Traffic. (Tr. 190-91.) If companies were to learn that they could enter this market and use one of Global Traffic's patented inventions without consequence, it would raise the risk of infringement by such companies. (Inj. Tr. 70-71.)

### **III. FACTS RELEVANT TO THE BALANCE OF HARDSHIPS**

Tomar has repeatedly represented to the Court that it can quickly and easily implement substitute (and purportedly non-infringing) phase selectors and has taken the position that its current eLock product is a reasonable alternative for infringing StrobeCom II systems. Tomar continues to be able to

sell systems based on its 2070 phase selector (i.e., a non-code-capable product).

Tomar also has a wide range of products and business areas beyond its accused optical traffic preemption systems. In fact, the accused products accounted for only about 10-15% of Tomar's sales during the damages period. (Tr. 523-24.)

Thus, the Court finds that the impact of any injunction on Tomar's business is minimal.

#### **IV. FACTS RELEVANT TO THE PUBLIC INTEREST**

Global Traffic presented undisputed evidence that it has the capacity to meet the entire market's demand for coded optical preemption products. (Inj. Tr. 59.) Global Traffic also presented undisputed evidence of a discount product exchange program that Global Traffic would employ if any Tomar customer wanted to switch a Tomar system with a Global Traffic system. (Inj. Tr. 72-73.) In contrast, Tomar proffered no evidence that any customers for optical traffic preemption systems would be inconvenienced or harmed by a permanent injunction. In fact, Tomar's witness at the injunction hearing testified that an uncoded emitter could achieve the goal of getting a green light for an emergency vehicle in all intersection and traffic preemption systems that are or have been sold by Tomar, including (1) all Strobecom II systems based on the 2070 OSP, the

2080 OSP, the 2140 OSP, the 3080 OSP, and the 3140 OSP, (2) all Strobeswitch systems, and (3) all Strobecom I systems. (Inj. Tr. 51-54.) Thus, based on Tomar's testimony, an injunction that prohibited new sales of coded systems and coded emitters would not prevent third parties from employing already-installed traffic preemption technology.

#### **V. TOMAR'S LITIGATION MISCONDUCT**

The Court incorporates the findings it has made in prior court orders in this case with respect to Tomar's litigation misconduct, including its comprehensive sanctions order dated July 21, 2006 and the default judgment sanctions order dated December 27, 2007. Among the most important aspects of those orders are the findings that Tomar engaged in litigation conduct that "was an abuse of the discovery process," that Tomar "exhibited a complete disregard for the authority of this Court," that "Tomar's conduct has undermined the integrity of this Court and our judicial system," and that "the Court has no confidence that Tomar would finally begin to comply with Court orders, or the Federal Rules of Evidence." (7/21/2006 Sanctions Order (Dkt. No. 72) at 22; 12/27/2008 Default Judgment Order (Dkt. No. 207) at 16.)

Tomar's trial counsel has made repeated reference to the fact that Tomar's original counsel—Tom Watkins—has been disbarred, and has suggested that Tomar's litigation misconduct is the fault of a rogue lawyer who was acting beyond the control of Tomar and its corporate representatives. The record does not support this view. The individual misconduct of Tomar's president and CEO—Scott Sikora—constituted a substantial portion of the litigation record.

This Court found that:

- “Scott Sikora as the representative for Tomar clearly gave false and misleading discovery responses,” 7/21/2006 Sanctions Order at 22;
- “Sikora acted inappropriately during depositions and guided a witness’ answer,” 7/21/2006 Sanctions Order at 22;
- “Tomar failed to conduct a reasonabl[e] inquiry or investigation for information or documents responsive to 3M’s discovery requests,” 7/21/2006 Sanctions Order at 22.
- “Tomar failed to instigate a litigation hold on relevant documents after being notified of pending litigation,” 7/21/2006 Sanctions Order at 22;
- “[R]elevant and discoverable documents have been destroyed [by Tomar],” 7/21/2006 Sanctions Order at 22; and
- “Tomar has yet to inform its employees to retain possible relevant documents,” 7/21/2006 Sanctions Order at 22.
- “The Court has thoroughly reviewed the Sikora Declaration and finds that such declaration is, in fact, an expert opinion that was submitted in violation of the deadlines set forth in the PSO. . . . Even if not

considered an expert opinion, the Court finds that the Sikora Declaration was submitted in violation of previous discover and sanction orders” 12/27/2007 Default Judgment Order at 14.

Equally important, nothing that occurred in this case can have come as a surprise to Tomar and its president, Scott Sikora. It is clear that Mr. Sikora knew exactly what was happening in this litigation, and that he played a direct role in this litigation. Scott Sikora submitted multiple declarations throughout the proceedings. He attended the Markman hearing and the summary judgment hearing. He served as the technical expert for Tomar and was Tomar’s corporate representative on all Rule 30(b)(6) topics. As Mr. Watkins testified in his deposition in this case, Tomar was “totally” aware of Mr. Watkins’ disciplinary proceedings and the potential that he may have to be removed as counsel from the beginning of this case. (Dkt. No. 196, at Ex. 1 pp. 126-27.) In fact, Scott Sikora served as Mr. Watkins’ expert in the litigation that led to Mr. Watkins’ discipline and Mr. Sikora testified during the disciplinary proceedings.

Thus, Tomar’s attempt to blame Mr. Watkins for Tomar’s litigation misconduct in this case is misguided. Here, where Mr. Sikora not only chose Mr. Watkins, but also participated directly in the litigation, it is especially

appropriate to hold Tomar responsible for the consequences of its litigation misconduct.

**VI. THERE IS A SUBSTANTIAL QUESTION AS TO WHETHER TOMAR HAS CEASED INFRINGEMENT.**

The Court also finds that there remains a substantial question as to whether Tomar has ceased its infringement. Tomar's own witness at the injunction hearing was unable to confirm that Tomar has ceased its infringement of the '113 patent:

Q. Mr. Sikora, you're retired from Tomar, correct?

A. Correct.

Q. We talked about this during the other part of the trial, right?

A. That's correct.

Q. And you weren't involved in making the 3080, correct?

A. That's correct.

Q. You weren't involved in make the 3140, correct?

A. That's correct.

Q. You weren't involved in marketing the 3080 or 3140, correct?

A. That's correct.

Q. You weren't involved in sales of the 3080 or 3140, correct?

A. That's correct.

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Q. Mr. Sikora, based on your personal knowledge, you personally do not know whether Tomar has stopped selling a Strobecom II optical traffic preemption product that is capable of recognizing unique vehicle identification, correct?

A. I never look at that information.

(Inj. Tr. 35-36.)

Moreover, the Court finds that Tomar has been evasive and less than candid about the facts surrounding its purported cessation of infringing activity. First, Tomar failed to present a witness at the injunction hearing who is able to confirm that Tomar has stopped engaging in activity that is covered by the '113 patent. Tomar submitted a self-styled "Certificate of Noninfringement" months ago, asserting to the Court that it had replaced the infringing systems with a new system that does not infringe the '113 patent. (DTX 245.) Tomar submitted an offer of proof during the damages trial that made the exact same claims. (Dkt. No. 307.) That Tomar cannot bring a live witness to the injunction hearing who can confirm the accuracy of Tomar's assertion is cause for concern.



Second, it is equally troubling that the signatory of Tomar's "Certification of Noninfringement," Scott Sikora, did not testify at the injunction hearing. The fact that Mr. Sikora chose not to appear for examination and cross-examination on this issue calls into substantial question the veracity of Tomar's claims that it has stopped infringing the '113 patent. The fact that Mr. Sikora was present in the courthouse during the injunction hearing, but nonetheless chose not to testify, only compounds the Court's concern.

Third, both Tomar's Certificate of Noninfringement and its offer of proof make statements about cessation of infringement that are directly contradicted by the advertising and technical literature that appeared on Tomar's website as late as October 20, 2008. Tomar's Certificate states: "In Tomar's new 3080 and 3140 OSPs that feature uniquely identifying an emitter transmitting information has been removed." (DTX 245.) Tomar's offer of proof makes a similar statement: "In Tomar's new 3080 and 3140 OSPs, any code capable of uniquely identifying an emitter transmitting information has been removed. (Dkt. No. 307.) Both documents state: "Consequently, the identification code cannot be extracted from the signal received by the 3080 or 3140 OSP's and unique

identification of the emitter transmitting the preemption request cannot be performed.” (DTX 245, p. 5; Dkt. No. 307 at p. 6.)

However, at the injunction hearing, Global Traffic demonstrated that Tomar was making directly contradictory statements in its 2008 system manuals and advertising material on its website, including the following:

- “A fully expanded StrobeCom II system has the capability to individually identify up to 130,000 vehicles at distances from about 300 to 2,500 feet. Vehicle codes are communicated over two optical bands.” (PTX 248 at 5.)
- “The 3080 shall be jumper configurable to accept or reject older nonidentifying emitters.” (PTX 248 at 22.)
- “Typical signal acquisition time [for the 3080] shall be approximately 2.5 seconds. Acquisition time will vary depending on the number of identification codes present simultaneously and on the density of optical noise.” (PTX 248 at 22.)
- “The 3080 shall respond to any of 65,000 unique identification codes available in each signal band.” (PTX 248 at 22.)
- “The 3140 shall be software configurable to accept or reject older nonidentifying optical signals.” (PTX 248 at 23.)
- “Typical signal acquisition time [for the 3140] shall be approximately 2.5 seconds. Acquisition time will vary depending on the number of identification codes present simultaneously and on the density of optical noise.” (PTX 248 at 23.)
- “The 2060-LBUG and 2061-LBUG systems can upgrade the 781-1228-PRE2 to a coded system by plugging in the 2060-CODE coding module, which allows the user to access up to 65,000 individual system vehicle emergency

and transit band ID security codes for use on the StrobeCom Model 3080 and 3140 OSP's." (PTX 249 at 22.)

Tomar's witness, Tom Sikora, testified that these repeated claims about the ability of the 3080 and 3140 OSPs to perform vehicle identification were "typos." (Inj. Tr. 17, 25, 31, 40.) However, Tom Sikora conceded that he had no foundation to make such a claim. (Inj. Tr. 17, 25-26, 31-32.) He also conceded that he had no role in the creation of the documents with these claims or the design and development of the 3080 and 3140 OSPs. (Inj. Tr. 33, 35.) Moreover, Mr. Sikora testified that the person with editorial control over these documents was Scott Sikora. (Inj. Tr. 19, 22, 26, 30.)

Fourth, Tomar continues to offer to sell and sell the code-capable emitters that were specifically identified in the Court's Default Judgment Order. (Inj. Tr. 26-33; PTX 8, 249, 271, 272, 273, 274.) It appears that Tomar's position is that it is appropriate to sell and offer to sell such code-capable emitters as long as Tomar does not sell or offer to sell those emitters in combination with the detectors and phase selectors named in the Court's Default Judgment Order. However, as Mr. Powell testified at the injunction hearing, there are only two purposes for selling a code-capable emitter into the market: to replace an existing code-capable emitter in an infringing system or to add an additional code-capable emitter into

an infringing system. (Inj. Tr. 63.) Either scenario would constitute infringement under the Court's Default Judgment Order.

In sum, the Court finds that Tomar has not shown that it has ceased its infringing conduct. The Court also finds that Tomar has not been as candid as it should have been with the Court about the evidence surrounding its purported cessation of infringing activity. Tomar has shown that it is inclined to do as little as possible to follow this Court's infringement order and to pursue any potential loophole that it sees in this Court's orders. These findings provide further support for the entry of a stringent injunction in this case.

## CONCLUSIONS OF LAW

### **I. THE LAW OF INJUNCTIVE RELIEF**

Under 35 U.S.C. § 283, courts "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." Permanent injunctions in patent cases are granted in accordance with the traditional four-part test for awarding permanent injunctions in other areas of the law. Thus, to obtain a permanent injunction, the patentee must show:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to

compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (U.S. 2006). “The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court.” *Id.*; see also *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1334 (Fed. Cir. 2006) (same). A finding that a valid, enforceable patent has been infringed neither gives rise to a presumption of irreparable harm, nor creates a situation in which permanent injunctions are to be denied only in “exceptional circumstances” or “rare instances.” *Id.*, at 1841. Rather each case must be judged according to its own merits, and the trial court may not apply broad, categorical rules. *Id.*

To ensure that an injunction is effectual, “otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.” *United States v. Lowe’s, Inc.*, 371 U.S. 38, 53 (1962). In the patent context, an injunction may reach activities that do not themselves constitute infringement, so long as it is necessary to prevent infringement. *John Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1366-67 (Fed. Cir. 1998); see also *Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1317 (Fed. Cir. 2004); *Smith & Nephew, Inc. v. Synthes U.S.A.*, 466 F.Supp.2d

978, 988 (W.D. Tenn. 2006) (“A district court . . . can enjoin activities that ‘do not themselves constitute infringement’ if necessary to prevent infringement.”) (citation omitted); *National Instruments Corp. v. Mathworks, Inc.*, 2003 WL 24049230, \*5 (E.D. Tex. 2003) (Issuing an injunction despite “the ancillary (but unavoidable) effect of enjoining sales of a product with non-infringing capabilities and functionality” because “the scope of the injunction remains that which is necessary to deter future infringement”). Thus, “[g]iven its broad discretionary powers in shaping the scope of an injunction, the district court must ensure that the injunctive relief granted is effective, and the court is permitted to proscribe activities that, standing alone, are allowed, if those activities are connected to the infringing conduct and the proscription is necessary to correct or mitigate the effects of past infringement.” *Smith & Nephew*, 466 F.Supp.2d at 988 (citation omitted).

This is especially so where, as here, the infringer has taught the market how to infringe or facilitated infringement by end-users. *Id.* at 988-90. Moreover, where, as here, the defendant has engaged in misconduct and the Court cannot trust the infringer not to infringe in the future, the equities favor granting a broad or stringent injunction. *See, e.g., Commodity Futures Trading Com’n v. Wilshire Inv. Management Corp.*, 531 F.3d 1339, 1346-1347 (11th Cir. 2008)

(affirming broad injunction because “the court specifically found that their ‘lack of candor . . . demonstrated at trial belies any intent of making good faith efforts to comply with restrictions in the future.’”). Where the defendant engaged in misconduct or evasive action, courts should craft broad injunctions, so as to avoid creating loopholes that the defendant can exploit to undermine the force of the injunction. *See, e.g., 3M v. Pribyl*, 259 F.3d 587, 598 (7th Cir. 2001) (“[T]he court determined that, in part to curb ‘the misconduct and evasive action of defendant Pribyl,’ no opportunity for loopholes should be allowed. We agree with the district court’s decision that more specificity in the injunction is not mandated.”)

## **II. GLOBAL TRAFFIC IS ENTITLED TO A PERMANENT INJUNCTION**

### **A. IRREPARABLE INJURY AND INADEQUACY OF REMEDIES AVAILABLE AT LAW.**

The Court concludes that Tomar’s infringement has caused Global Traffic irreparable harm for which monetary damages are inadequate compensation.

As the Court found above, Tomar and Global Traffic compete in a two-supplier market for optical traffic preemptions systems. Tomar is a direct competitor of Global Traffic, and the only company other than Global Traffic that sells coded optical traffic preemption systems. As such, Tomar’s conduct has

reduced Global Traffic's market share. *See, e.g., Smith & Nephew*, 466 F. Supp. 2d at 982-84 (finding irreparable harm based on lost market share and loss of brand recognition); *Litecubes, LLC v. N. Light Prods., Inc.*, 04-CV-00485, 2006 U.S. Dist. LEXIS 60575, \*31-32 (E.D. Mo. Aug. 25, 2006), *aff'd on other grounds*, 523 F.3d 1353, 1357 (Fed. Cir. 2008) (finding irreparable harm based on lost sales to the infringer); *3M Unitek Corp. v. Ormco Co.*, 96 F. Supp.2d 1042, 1051-52 (C.D. Calif. 2000) (finding irreparable harm based on loss of market share and goodwill).

Tomar's conduct has also undermined Global Traffic's customer relationships, both by preventing Global Traffic from establishing relationships that it otherwise would have made and by impinging upon Global Traffic's ability to sell new intersections and replacement goods to existing customers. Moreover, Tomar's sales have led to price erosion for the patented traffic preemption systems, which in some cases exceeded 50%. *See, e.g., Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310 (Fed. Cir. 2007) (finding irreparable harm based on "evidence of price erosion as well as lost opportunities to sell other services to the lost customers"). The Court concludes that these are irreparable harms for which money damages are not adequate compensation.



Further, the Court concludes that the '113 patent is very important to Global Traffic's business model. Global Traffic has never licensed the '113 patent, and Global Traffic's coded optical traffic preemption system covered by the '113 patent accounts for over two-thirds Global Traffic's product sales. *See, e.g., MGM Wells Servs., Inc. v. Mega Lift Sys., LLC*, 505 F.Supp.2d 359, 379 (S.D. Tex. 2007), *aff'd without opinion*, 264 Fed. Appx. 900 (Fed. Cir. 2008) (patentee's policy of not licensing the patent-in-suit created situation in which absence of an injunction would give rise to irreparable harm); *Novozymes A/S v. Genencor Int'l, Inc.*, 474 F. Supp. 2d 592, 612-613 (D. Del. 2007) (finding irreparable harm where absence of an injunction would undermine the ability of patentee to license its patent as it desires and consistent with its past licensing practices); *3M Innovative Props. Co. v. Avery Dennison Corp.*, 01-CV-1781, 2006 U.S. Dist. LEXIS 70263, \*4-5 (D. Minn. Sept. 25, 2006) (where patentee had made business decision not to license its patent, finding that declining to grant an injunction would do irreparable harm to the patentee). Revenue from sales of products that use the patented invention is the platform from which Global Traffic grows its business and develops new products and product features. Moreover, Global Traffic invests significant resources in (1) educating the public and potential customers

about the benefits of its coded optical traffic preemption systems, (2) assisting potential customers in drafting bidding specifications for coded optical traffic preemption systems, and (3) teaching the public how to use its coded optical traffic preemptions systems. Accordingly, the Court finds that Tomar's infringement is a particularly egregious violation of Global Traffic's right to exclude under the '113 patent, and, for this further reason, causes irreparable harm to Global Traffic for which money damages are not adequate compensation.

In sum, the Court finds that the loss of market share, loss of goodwill, damage to Global Traffic's business model, price erosion, reputational damage, and trespass on Global Traffic's patent rights are all irreparable harms for which money damages are not adequate to compensate Global Traffic for the harm that it has suffered.

#### **B. BALANCE OF HARDSHIPS**

With respect to the balance of hardships, courts generally do not take into account hardship to the infringer based on the infringer no longer being able to sell the infringing goods. *See, e.g., Windsurfing Int'l v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986); *see also Smith & Nephew*, 466 F. Supp. 2d at 984 ("Only

hardship to the defendant that is not an inseparable part of the plaintiff's right is cognizable.") (citations and internal quotations omitted); *3M Innovative Props.*, 2006 U.S. Dist. LEXIS 70263 at \*5-6 (same). Beyond the inability to sell infringing products, Tomar has not identified any hardship that an injunction would impose upon it. In fact, Tomar has repeatedly affirmed that it can quickly and easily implement replacement (and purportedly non-infringing) phase selectors and has taken the position that its current eLock product is a reasonable substitute for its accused StrobeCom II systems. Tomar continues to be able to sell systems based on its 2070 phase selector (i.e., a non-code-capable product). Moreover, Tomar has a wide range of products and business areas beyond its accused optical traffic preemption systems. In fact, the accused products only account for about 15% of Tomar's sales during the damages period. Thus, the Court finds that the impact of any injunction on Tomar's business is minimal.

On the other hand, the Court has concluded that Global Traffic would suffer considerable harm absent an injunction. Moreover, Tomar and Global Traffic are companies of similar size and annual revenue. In contrast to Tomar, however, Global Traffic has based much of its business model on the patented invention. Thus, the balance of hardship strongly favors granting an injunction.

### C. PUBLIC INTEREST

With respect to the public interest, “the public is best served by enforcing patents that are likely valid and infringed.” *Abbott Labs., Inc.*, 452 F.3d at 1348. The Court finds that such is also the case here. Global Traffic has the capacity to meet the entire market’s demand, and Tomar has introduced no evidence that any customers for optical traffic preemption systems would be harmed or inconvenienced by a permanent injunction. Accordingly, the Court finds that there would be no, or at most *de minimis*, harm to the public based on Tomar’s inability to sell the infringing products. Compare *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1547-48 (Fed. Cir. 1995) (en banc) (“in rare instances” where critical public interests would be implicated by an injunction, such as waste disposal, sewer and water, or food, courts may deny an injunction) with *Innogenetics, N.V. v. Abbott Labs.*, 2007 U.S. Dist. LEXIS 3148 (W.D. Wis. Jan. 12, 2007) (issuing an injunction against defendant’s infringing medical diagnostic product because plaintiff could supply the entire market with its diagnostic product in a relatively short period of time); see also *Smith & Nephew*, 466 F. Supp. 2d at 984. Thus, the Court finds that the public interest would not be disserved by granting an injunction in favor of Global Traffic.

In sum, all four *eBay* factors taken together favor granting Global Traffic an injunction.

**D. TOMAR HAS NOT SHOWN THAT AN INJUNCTION IS NOT WARRANTED**

The Court rejects Tomar's argument that an injunction is not necessary in this case because Tomar can adequately assure the Court that it will not infringe in the future making an injunction unnecessary.

Tomar has argued that there is no need for an injunction in this case because it has provided Global Traffic with a "Certificate of Non-Infringement" stating (1) that it has stopped selling StrobeCom II systems with 2080 and 2140 phase selectors and (2) that it has replaced the 2080 and 2140 phase selectors with 3080 and 3140 phase selectors that it claims do not infringe the '113 patent. Tomar has argued that because it has certified that it has stopped selling the 2080 and 2140 phase selectors, there is no risk of future infringement and, therefore, no injunction whatsoever is necessary.

The Court rejects this argument for several reasons. First, the Federal Circuit has held that to succeed on a no-risk-of-future-infringement argument, the infringer must present "*very persuasive evidence* that future infringement will not take place." *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281-

1282 (Fed. Cir. 1988) (emphasis added). As the Federal Circuit explained: “The argument in such circumstances is very simple. If the defendant be honest in his protestations an injunction will do him no harm; if he be dishonest, the court should place a strong hand upon him.” *Id.* (internal citations omitted); *see also Rosco, Inc. v. Mirror Lite Co.*, 2006 U.S. Dist. LEXIS 73366, \*10-11 (E.D.N.Y. Sept. 28, 2006) (same). Tomar has presented no evidence, much less “persuasive evidence,” that future infringement will not take place. Moreover, Tomar still maintains the capacity to manufacture infringing goods.

Second, in view of Tomar’s pervasive litigation misconduct, the Court cannot permit Tomar to avoid an injunction by saying “trust us, we will no longer infringe.” *See, e.g., Wilshire Inv. Management Corp.*, 531 F.3d at 1346-1347; *3M v. Pribyl*, 259 F.3d at 598. Tomar has shown a pattern and practice of disregarding discovery rules and court orders in this case. Tomar’s CEO Scott Sikora, the signatory of Tomar’s “Certificate of Non-Infringement,” has been found to have given intentionally false testimony in depositions. Furthermore, the Court notes that Scott Sikora, the most knowledgeable person regarding Tomar’s Strobecom II systems and Tomar’s business activities, did not appear at the damages trial or at the injunction hearing. If Tomar wanted to persuade the

Court that it would act in good faith and fully respect Global Traffic's patent rights going forward, the Court would have expected the most knowledgeable person about Tomar's offending activities to have appeared before the Court and explain why an injunction is not needed. In view of Tomar's repeated misconduct and less-than-forthright behavior, dating even to the present, the Court finds that an injunction is highly necessary to protect Global Traffic's patent rights.

Third, the Court heard evidence at trial and at the injunction hearing that contradicts Tomar's claim that it has ceased infringement of the '113 patent. As late as October 20, 2008, Tomar had placed on its website marketing material and system manuals that explicitly claimed that the new 3080 and 3140-based systems sold by Tomar can perform optical coding. Tomar failed to produce any witness with personal knowledge of why those documents were created and to whom they were distributed. On their face, they describe systems that are identical to the 2080 and 2140-based systems that were the subject of this Court's December 27, 2007 default judgment order. Moreover, Tomar continues to market and sell the 2060, 2061, 3060, 3065 emitter models covered by the Court's

default judgment order. Far from showing that an injunction is not necessary, it appears that Tomar's infringement may be ongoing.

Because Global Traffic has shown entitlement to an injunction under *eBay* and Tomar has failed to come forward with evidence establishing that injunction is either unfair or unwarranted, the Court will enter a permanent injunction against Tomar.

### III. THE SCOPE OF GLOBAL TRAFFIC'S INJUNCTION

#### A. GLOBAL TRAFFIC'S INJUNCTION REQUEST

Global Traffic has requested the following injunction:

Tomar, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this order by personal service or otherwise, are enjoined from infringing claims 22, 23, 24, 25, 26, 38, 39, and/or 41 of U.S. Patent No. 5,172,113 ("System and Method for Transmitting Data in an Optical Traffic Preemption System") either directly under 35 U.S.C. § 271(a), or indirectly under 35 U.S.C. §§ 271(b) or (c), by

- (i) manufacturing, selling, offering for sale, using, or importing *Tomar's StrobeCom II system*, which combines (1) Tomar phase selector models 2080, 2140, and/or phase selectors that are merely colorably different, (2) Tomar detector models 2090, 2091, and/or detectors that are merely colorably different, and (3) Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are merely colorably different;



(ii) manufacturing, selling, offering for sale, using, or importing *Tomar's StrobeCom II system with competitive code detect*, which combines (1) Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different, (2) Tomar detector models 2090, 2091, and/or detectors that are not more than colorably different, and (3) a 3M emitter and/or a Global Traffic emitter;

(iii) manufacturing, selling, offering for sale, using, or importing *Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different*;

(iv) manufacturing, selling, offering for sale, using, or importing *Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are not more than colorably different*; and/or

(v) manufacturing, selling, offering for sale, using, or distributing, *software, hardware, and/or instructions (whether in person or through manuals, advertisements, websites, or otherwise), for the purpose of programming or enabling an identification code that uniquely identifies the emitter in Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are not more than colorably different and/or Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different.*

An offer for sale is any communication—such as an advertisement, brochure, price quotation, product manual, webpage, verbal offer for sale, or the like—that contains sufficient information regarding the terms of sale for any of the above listed Tomar products, or products that are not more than colorably different from those listed above, so as to constitute an offer under the applicable law.

The Court notes that the parties have substantially agreed on the above injunction language. (Drown Decl., Ex. 1.) Apart from Tomar's argument against Global Traffic's basic entitlement to an injunction—which the Court has rejected—the parties' disagreement centers largely on prong (iv), the prohibition on activities relating to the accused emitters in this case.<sup>1</sup> For the reasons set out below, the Court believes that emitters should be specifically included within the injunction order. The Court finds that Global Traffic's proposed injunction is reasonable, provides the protection necessary in view of the facts and circumstances of this case to ensure that Global Traffic's patents rights will be given proper enforcement in the future, and conforms to the requirements of Federal Rule of Civil Procedure 65(d).

#### **B. THE COURT'S PERMANENT INJUNCTION ORDER**

The basis for this Court's injunction is its infringement finding set out in the Court's December 27, 2007 Default Judgment Order. There, the Court found that Tomar's accused Basic StrobeCom II System and StrobeCom II System with

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<sup>1</sup> Prior to the injunction hearing, Global Traffic and Tomar exchanged proposed injunction language. After the hearing, Global Traffic accepted Tomar's proposed changes with the exception of the deleting prong (iv) and adding the word "infringing" prior to the "not more than colorably different" language. (See Drown Decl., Ex. 1.) Because the introduction to Global Traffic's proposed injunction already specifies that the injunction applies only to infringing conduct, the Court declines to add the word infringing to each prong of the injunction, as doing so is unnecessary and superfluous.

Competitive Coded Detect directly infringe the '113 patent under 35 U.S.C. § 271(a) and indirectly infringe under 35 U.S.C. §§ 271(b), (c).<sup>2</sup>

Based on the Court's infringement finding, an injunction covering the accused StrobeCom II Systems and StrobeCom II Systems with Competitive Code Detect is warranted. Moreover, the Court finds that an injunction covering activities related to components of these systems that have been specifically adapted for use in code-capable traffic preemption systems is also necessary to protect Global Traffic's patent rights. The components are Tomar's accused 2080 and 2140 phase selectors and its accused 2060, 2061, 3060, and 3065 emitters.

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<sup>2</sup> Specifically, the Court found:

1. *Infringement by Basic StrobeCom II System.* Tomar has been and is directly infringing, actively inducing others to infringe, and contributing to the infringement of claims 22, 23, 24, 25, 26, 38, 39, 40 and/or 41 of U.S. Patent No. 5,172,113 in violation of 35 U.S.C. § 271, by making using, selling and offering to sell Tomar's StrobeCom II Traffic Preemption Systems that combine (1) Tomar phase selector models 2080 and/or 2140, (2) Tomar detector models 2090 and/or 2091, and (3) Tomar emitter models 2060, 2061, 3060 and/or 3065.

2. *Infringement by StrobeCom II System with Competitive Coded Detect.* Tomar has been and is directly infringing, actively inducing others to infringe, and contributing to the infringement of claims 22, 24, 26, 38 and/or 41 of U.S. Patent No. 5,172,113, in violation of 35 U.S.C. § 271, by making, using, selling and offering to sell Tomar's StrobeCom II Traffic Preemption Systems that combine (1) Tomar phase selector models 2080 and/or 2140 (2) Tomar detector models 2090 and/or 2091 and (3) a 3M emitter.

(Dkt. No. 207, Dec. 27, 2007 Default Judgment Order, slip op. at 17.)

Tomar's accused 2060, 2061, 3060, and 3065 emitters have been specifically adapted for use in coded systems. The Court has found that the only reason for Tomar to sell these code-capable emitters—as opposed to emitters with no capacity for use in coded systems—is for use by end users in a coded or code-capable system. Paul Powell, from Global Traffic, testified that Tomar's accused emitters likely end up in end-users' coded optical traffic preemption networks. Moreover, because Tomar admitted during the injunction hearing that non-code-capable emitters work equally well in all of its non-code-capable optical traffic preemption systems, non-code-capable emitters are sufficient to meet the needs of all of Tomar's customers that do not use coded systems. Thus, Tomar has no legitimate business reason to sell code-capable emitters. The Court concludes that Tomar's only apparent reason to sell code-capable emitters is for eventual use in code-capable systems, which would itself constitute an act infringement.

The Court further concludes that any ongoing or future offers to sell or sales of the accused emitters would likely induce infringement by end users. *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc in relevant part) (to prove induced infringement under 35 U.S.C. § 271(b), “a patent holder must prove that once the defendants knew of the patent, they actively and knowingly aided and abetted another's direct infringement . . . the inducer must

have an affirmative intent to cause direct infringement”). Moreover, the Court concludes that ongoing or future sales of the accused emitters is likely to give rise to acts of contributory infringement under 35 U.S.C. § 271(c). See *Preemption Devices Inc. v. 3M Co.*, 630 F. Supp. 463 (E.D. Penn. 1985), *aff’d in rel. part*, 803 F.2d 1170 (Fed. Cir. 1986) (granting and enforcing an injunction covering the individual components (i.e., phase selectors, emitters, and detectors) of the predecessor optical traffic preemption system to the ‘113 patent, because sales of those components constituted contributory infringement under section 271(c)). As described above, Tomar’s sales of emitters is likely to lead to direct infringement by end users, and Tomar has introduced no evidence that its code-capable emitters are not a material part of the patented coded optical traffic preemptions systems or that such emitters are staple articles. *DSU*, 471 F.3d at 1303-04. In fact, it is clear that code-capable emitters, being one of only three necessary components for coded optical traffic preemptions systems, are a material part of such a system.

Based on this determination of likely infringement based on Tomar’s sales or offers for sale of the accused emitters, it is appropriate and necessary to include activity based on the accused emitters within the scope of the injunction. To do otherwise would leave a major loophole in the injunction, leave Global Traffic exposed to an unjustifiably high risk of future infringement, not

adequately protect Global Traffic's patent right, and make future any future enforcement of the injunction more difficult for Global Traffic and the Court. *See, e.g., 3M v. Pribyl*, 259 F.3d at 598 (“[T]he court determined that, in part to curb ‘the misconduct and evasive action of defendant Pribyl,’ no opportunity for loopholes should be allowed.”) Moreover, the Court finds that inclusion of the accused emitters will ensure better compliance with and enforcement of the Court's injunction order. *See, e.g., Smith & Nephew*, 466 F.Supp.2d at 989 (broadly prohibiting all sales of the surgical tool at issue, even though some activity involving that tool may have been permissible, because without so prohibiting such sales, enforcement of the injunction would have been “problematic”)

The Court rejects any suggestion by Tomar that an injunction barring the sale or offers for sale of the accused emitters is overly broad because some of Tomar's accused emitters may be sold to end-users who do not have or do not operate code-capable optical traffic preemption systems, i.e., new customers who purchase non-infringing optical traffic preemption system or old customers who had previously purchased, and thus may not directly infringe the patent based on those emitter. *See, e.g., id.*

First, all of Global Traffic's optical traffic preemption systems are code-capable and, as shown at trial, about 80% of Tomar's sales of optical traffic

preemption systems during the damages period (April 13, 2005 to December 31, 2007) were code-capable. (Tr. 547-58.) Accordingly, given the prevalence of coded systems in the market, it is very likely that the sale of an accused emitter or phase selector would be used in conjunction with a code-capable system, thereby giving rise to an act of infringement. Tomar has not introduced any evidence to suggest otherwise. *See, e.g., id.* at 988-89.

Second, Tomar supplies its product to distributors who then supply the traffic preemption systems and components to end-users. Tomar presented testimony at trial that it often does not even know who the end-users are. Thus, even if Tomar had a legitimate business reason to sell code-capable components to new customers who purchase only non-code-capable optical traffic preemption systems or to existing customer who have purchased only non-code-capable systems, Tomar has not provided the Court with evidence that its code-capable emitters could be sold only to such customers and would only be sold only to such customers. Moreover, given Tomar's misconduct in this litigation, the Court has no confidence that Tomar would so limit the distribution of its coded emitters. In short, the Court finds that the risk of infringement based on the sale of the accused emitters greatly outweighs the probability that no infringement would occur as a result of such sales, and that

prohibiting the sale of all such emitters is necessary to give proper force to Global Traffic's patent rights. *Id.*

Third, through its instruction manuals, distribution of software that enables coding, and the actions of its sales representatives, Tomar has taught the market how to reconfigure non-code-capable systems into infringing systems and generally facilitated infringement by end-users. The Court simply does not find it credible that Tomar could distribute additional code-capable components into the market place without a substantial number of those components eventually being integrated into code-capable systems. *Id.* at 989.

Finally, this Court has the authority to enjoin activity to give force to the patentee's rights. *See, e.g., John Hopkins*, 152 F.3d at 1365-66 (Court may enjoin activities that "do not themselves constitute infringement" if necessary to prevent future infringement and protect the patentee's rights.). Here, even though it is theoretically possible that a limited number of activities involving code-capable emitters may have noninfringing uses, the Court finds that it is necessary to enjoin Tomar's sales of the accused phase selectors and emitters. To do otherwise would leave Global Traffic exposed to a large risk of future infringement by Tomar and not give adequate enforcement to Global Traffic's patent rights. In view of Tomar's litigation misconduct, such loopholes are not acceptable. *See, e.g., Wilshire*



*Inv. Management Corp.*, 531 F.3d at 1346-1347 (affirming broad injunction because “the court specifically found that their ‘lack of candor . . . demonstrated at trial belies any intent of making good faith efforts to comply with restrictions in the future.’”); *3M v. Pribyl*, 259 F.3d at 598 (“[T]he court determined that, in part to curb ‘the misconduct and evasive action of defendant Pribyl,’ no opportunity for loopholes should be allowed.”).

With respect to the remaining portions of the Court’s order, to protect the full scope of Global Traffic’s patent rights, the Court’s injunction includes standard language making clear that Tomar may not sell, offer to sell, etc., items that are “not more than colorably different” from those found to infringe. *Int’l Rectifier Corp.*, 383 F.3d at 1316. Moreover, because future distribution of software, hardware, or instructions by Tomar related to code-capable systems would further facilitate end-user infringement and would likely lead to acts of end-user infringement, the Court’s injunction bars distribution of such materials.

Finally, because it appears that Tomar has continued to market and offer for sale its infringing emitters, and may through its 3080 and 3140 phase selectors be offering the market infringing phase selectors, the Court has included language in the injunction to explain what constitutes an infringing “offer for sale” under Federal Circuit law and to help make clear for Tomar what it cannot do going

forward. *Rotec Indus. v. Mitsubishi Corp.*, 215 F.3d 1246, 1251-1255 (Fed. Cir. 2000).

The Court finds that such language is necessary to give adequate protection to Global Traffic's patent rights.

For the foregoing reasons, the Court grants Global Traffic a permanent injunction as follows:

### **ORDER FOR INJUNCTIVE RELIEF**

The Court hereby orders the following injunction:

Tomar, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this order by personal service or otherwise, are enjoined from infringing claims 22, 23, 24, 25, 26, 38, 39, and/or 41 of U.S. Patent No. 5,172,113 ("System and Method for Transmitting Data in an Optical Traffic Preemption System") either directly under 35 U.S.C. § 271(a), or indirectly under 35 U.S.C. §§ 271(b) or (c), by

(i) manufacturing, selling, offering for sale, using, or importing *Tomar's StrobeCom II system*, which combines (1) Tomar phase selector models 2080, 2140, and/or phase selectors that are merely colorably different, (2) Tomar detector models 2090, 2091, and/or detectors that are merely colorably different, and (3) Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are merely colorably different;

(ii) manufacturing, selling, offering for sale, using, or importing *Tomar's StrobeCom II system with competitive code detect*, which combines (1) Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different, (2) Tomar detector models 2090, 2091,

and/or detectors that are not more than colorably different, and (3) a 3M emitter and/or a Global Traffic emitter;

(iii) manufacturing, selling, offering for sale, using, or importing *Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different;*

(iv) manufacturing, selling, offering for sale, using, or importing *Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are not more than colorably different;* and/or

(v) manufacturing, selling, offering for sale, using, or distributing, *software, hardware, and/or instructions (whether in person or through manuals, advertisements, websites, or otherwise), for the purpose of programming or enabling an identification code that uniquely identifies the emitter in Tomar emitter models 2060, 2061, 3060, 3065, and/or emitters that are not more than colorably different and/or Tomar phase selector models 2080, 2140, and/or phase selectors that are not more than colorably different.*

An offer for sale is any communication—such as an advertisement, brochure, price quotation, product manual, webpage, verbal offer for sale, or the like—that contains sufficient information regarding the terms of sale for any of the above listed Tomar products, or products that are not more than colorably different from those listed above, so as to constitute an offer under the applicable law.

**IT IS SO ORDERED.**

Dated: January 21, 2009

s/ Michael J. Davis  
Michael J. Davis  
Chief Judge  
United States District Court