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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUIDETECH, INC.,

Plaintiff,

v.

BRILLIANT INSTRUMENTS, INC.,

Defendant.

No. C 09-5517 CW

ORDER ON MOTIONS
FOR JMOL, NEW
TRIAL OR
ADMINISTRATIVE
RELIEF, TO STRIKE,
FOR PRELIMINARY
INJUNCTION, AND TO
SEAL

(Docket Nos. 322,
324, 330, 331)

After a trial held from March 31, 2014 to April 7, 2014, the jury determined that Defendant Brilliant Instruments, Inc.'s products infringe Plaintiff GuideTech, Inc.'s patent. Now, Brilliant renews its motion for judgment as a matter of law (JMOL). GuideTech moves for a permanent injunction against Brilliant. After briefing was completed, GuideTech filed a reply asking the Court to grant a new trial on infringement of the BI221, or to grant "administrative relief" and alter the jury's verdict on that product. On July 3, 2014, the Court held a hearing. Having considered the papers and the arguments of counsel, the Court DENIES Brilliant's renewed motion for JMOL, DENIES GuideTech's motion for new trial or administrative relief, DENIES as moot Brilliant's motion to strike, DENIES GuideTech's motion for preliminary injunction, and DENIES GuideTech's motion to seal.

BACKGROUND

A. Brief Background of the Patent and the Accused Products

In 1998, Shalom Kattan founded Guide Technology, Inc., the predecessor entity to GuideTech, which is in the business of manufacturing and selling precision time and frequency measurement instruments. Docket No. 35 ¶ 3. Mr. Kattan is the sole named inventor for several patents asserted in this litigation. Chin Decl., Exs. 1-3, 12. In 2004, Mr. Kattan left GuideTech to establish Brilliant, a one-man company comprised of Mr. Kattan himself. Id. at 42:12-25; Chin Decl., Ex. 9. Brilliant also manufactures and sells measurement instruments. Docket No. 39 ¶ 4. On May 23, 2008, Guide Technology sold its assets, including the patents at issue, to Ronen Sigura, who then founded GuideTech. Chin Decl., Ex. 24.

On November 20, 2009, Brilliant initiated this suit seeking declaratory judgment that its accused products, including BI200 and BI220, do not infringe GuideTech's patents. The patents concern time interval analyzers, testing instruments used in the semiconductor industry to detect timing errors in integrated circuits. In early 2011, Brilliant filed a motion for summary judgment of non-infringement and GuideTech filed a motion for summary adjudication on the issue of assignor estoppel. The Court granted Brilliant's motion for summary judgment, finding Brilliant's products did not infringe the patents-in-suit, and denied GuideTech's motion on assignor estoppel as moot. See Docket No. 137. On October 4, 2011, GuideTech filed an appeal to the Federal Circuit from the summary judgment order. Docket No. 166. The Federal Circuit reversed the Court's summary judgment

1 order and remanded, finding disputed issues as to whether
2 Brilliant's products infringe the patents-in-suit under the
3 doctrine of equivalents. Brilliant Instruments, Inc. v.
4 GuideTech, LLC, 707 F.3d 1342, 1348-49 (Fed. Cir. 2013). After
5 the case returned to the district court, the Court granted summary
6 judgment on the issue of assignor estoppel, barring Brilliant's
7 invalidity case. Shortly before trial began, GuideTech dropped
8 its claims based on two of the patents-in-suit, leaving only U.S.
9 Patent No. 6,226,231 (the '231 patent).

10 B. Pretrial Conference

11 On March 19, 2014, the Court held a pretrial conference and
12 heard arguments on motions in limine and pretrial motions. At the
13 pretrial conference, the Court required GuideTech to disclose to
14 Brilliant its theory of damages, including a narrative or chart of
15 the products for which profits were lost, when the profits were
16 lost, and cites to the record so Brilliant could check the
17 numbers. Docket No. 283 (Pretrial Conference Transcript) at
18 37:22-38:16. However, the Court declined to exclude GuideTech's
19 lost profits theory because, while GuideTech had no damages
20 expert, it had disclosed at least some evidence in support of the
21 theory. Docket No. 276 at 1-2. A motion in limine is generally
22 not the proper vehicle for challenging the sufficiency of the
23 plaintiff's case. See Bowers v. Nat'l Collegiate Athletic Ass'n,
24 563 F. Supp. 2d 508, 532 (D.N.J. 2008). The Court ruled that
25 GuideTech could "only present evidence it has disclosed to
26 Brilliant and must cite before trial where such evidence was
27 disclosed." Docket No. 276 at 2.

1 C. Trial - Infringement

2 On March 31, 2014, before jury selection, it became apparent
3 that GuideTech had failed pursuant to the Court's pretrial orders
4 to disclose to Brilliant a narrative or chart describing its
5 damages calculations. Docket No. 299 (March 31, 2014 Transcript)
6 at 6:8-7:21. At the Court's request, GuideTech disclosed the
7 chart. Id. at 8:7-9:14; 12:4-16:20. Because the chart was not
8 timely disclosed to Brilliant, the Court sought to minimize
9 prejudice and costs to both sides by bifurcating the liability and
10 damages portions of the trial, which would allow Brilliant to
11 review GuideTech's damages calculations. Id. at 18:11-15; 26:1-
12 13.

13 The jury first heard evidence on liability. After
14 deliberating, the jury returned a verdict finding that the BI200
15 and BI220 infringed claims 1, 2, 4, and 5, but could not agree on
16 infringement of claim 3. Docket No. 300. As for the BI201 and
17 BI221, the jury agreed that these products did not infringe any of
18 the asserted claims. Id. The jury did not find induced or
19 willful infringement. GuideTech withdrew claim 3 so that the
20 Court could accept the incomplete verdict. Docket No. 310 (April
21 3, 2014 Transcript) at 466:10-14.

22 D. Trial - Damages

23 On the following day, April 4, 2014, the jury heard the
24 parties' respective positions on damages. GuideTech did not have
25 an expert to testify as to lost profits, but relied on its CEO,
26 Mr. Sigura, to testify as to lost sales and costs. Docket No. 311
27 (April 4, 2014 Transcript) at 500. Mr. Sigura testified that,
28 through his experience managing GuideTech, he was familiar with

1 both the market and GuideTech's own sales and costs. Id. at 500-
2 02. Mr. Sigura concluded that GuideTech had been damaged by the
3 infringing products in the sum of \$5,754,567. Id. at 523:8-9.
4 Brilliant likewise did not have a damages expert, but relied on
5 its CEO, Mr. Kattan, to rebut Mr. Sigura's testimony. Id. at 540.

6 After the presentation on damages concluded, the jury began
7 deliberations. The jury asked whether it was limited to awarding
8 lost profits based on GuideTech's Femto 2000 and GT 568 products,
9 or whether it could consider lost sales of other products, such as
10 the GT 4000 which replaced the Femto 2000. Id. at 591:21-25. The
11 parties agreed that no evidence had been presented on the GT 4000,
12 so it could not be considered. Id. at 592. Accordingly, the
13 Court advised the jury that it was limited to the Femto 2000 and
14 GT 658, and it could not include the loss of sales of other
15 products in its calculation. Id. at 594:25-595:1-2. After a
16 couple of more hours of deliberation, the jury passed a note
17 asking to speak to the Court. The jury foreperson expressed
18 frustration that the jury could not "come up with a decision."
19 Id. at 596:5-9. The Court responded by asking the jury to
20 continue deliberating, and advising that if there was a problem
21 relating to the evidence, the jury should "study the jury
22 instructions again" to see "what needs to be proved and by whom."
23 Id. at 596:12-22. The Court further instructed the jury to think
24 about it over the weekend and reconvene on Monday to continue
25 deliberations. Id. at 599:7-11.

26 On Monday, the jury reconvened to deliberate for about five
27 hours before delivering their damages verdict. The jury returned
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1 a verdict assessing damages for GuideTech and against Brilliant in
2 the amount of \$342,229.23. Docket No. 312, 605:6.

3 DISCUSSION

4 A. Judgment as a Matter of Law

5 1. Legal Standard

6 The standard for evaluating a motion for JMOL is similar to
7 that of a motion for summary judgment, albeit at a later stage of
8 the proceeding. Lies v. Farrell Lines, Inc., 641 F.2d 765, 772
9 (9th Cir. 1981). To prevail on a renewed motion for JMOL
10 following a jury verdict, the moving party "must show that the
11 jury's findings, presumed or express, are not supported by
12 substantial evidence or, if they were, that the legal conclusions
13 implied by the jury's verdict cannot in law be supported by those
14 findings." Pannu v. Iolab Corp., 155 F.3d 1344, 1348 (Fed. Cir.
15 1998). "Substantial evidence" means evidence that is sufficient
16 "to support the jury's conclusion, even if it is also possible to
17 draw a contrary conclusion." Harper v. City of Los Angeles, 533
18 F.3d 1010, 1021 (9th Cir. 2008). If the jury was properly
19 instructed and there is substantial evidence, then the court must
20 sustain the jury's verdict. Id. The court must review the record
21 as a whole, but disregard evidence favorable to the moving party
22 that the jury is not required to believe. Johnson v. Paradise
23 Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001).

24 2. Infringement

25 Brilliant contends that the jury's verdict on infringement is
26 contrary to evidence that the BI200, BI201, BI220, and BI221 are
27 all equivalent for purposes of infringement, and thus that a
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1 verdict that the BI200 and BI220 infringed is inconsistent with
2 one that the BI201 and BI221 did not.

3 As a preliminary matter, GuideTech argues that Brilliant
4 waived this issue. On the second day of the liability phase, the
5 Court gave both sides the opportunity to object to its proposed
6 verdict form, which asked the jury to decide infringement as to
7 each accused product, allowing them to find infringement of some
8 products but not others. See Docket No. 303 (April 1, 2014
9 Transcript) at 369:14-21 ("THE COURT: Then I handed you that
10 verdict form . . . It occurred to me that they could conceivably
11 find that at least that the 221 didn't infringe, even if the
12 others did."). Both Brilliant and GuideTech agreed that the
13 proposed verdict form was proper. At the time the parties
14 approved the verdict form, however, Brilliant did not know whether
15 GuideTech would present sufficient evidence to support its
16 allegations. Brilliant's assent to the verdict form does not
17 preclude its argument at JMOL that GuideTech failed to present
18 evidence showing that the two sets of products were distinct.

19 GuideTech next maintains that Brilliant waived this argument
20 because it failed to raise it in its initial JMOL motion at trial
21 under Rule 50(a), and so it cannot renew the argument now under
22 Rule 50(b). Fed. R. Civ. P. 50. The "ground that there was not
23 substantial evidence to support the jury's verdict is not before
24 this court unless the appellant, at the close of the evidence or
25 case, interposed a motion for directed verdict." Gilchrist v. Jim
26 Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986)
27 (internal punctuation omitted). GuideTech's second waiver
28 contention is unavailing. The basis of this JMOL argument is

1 GuideTech's alleged failure to meet its burden of proof, which
2 Brilliant raised in its initial JMOL. Docket No. 303, 265:2-9.

3 On the merits of the motion, GuideTech presents the testimony
4 of Mr. Kattan, designer of the accused products, to show that the
5 products are not distinct:

6 Q: Couple of follow-up questions, Mr. Kattan. Do you know
7 what the difference is between the brilliant instruments BI
8 200 and BI 201?

8 A: The frequency range is lower on the 201.

9 Q: And what structurally, if anything, is different about
10 those products?

10 A: Well, I'll make it short for you. For the purpose of this
11 discussion, it's the same architecture.

11 Q: Okay. So for purposes of this discussion, and I want you
12 to be clear, this goes to the infringement analysis. Is the
13 BI 200 the same as the BI 201 for purposes of infringement?

13 A: It's materially the same, yes.

14 Docket April 1, 2014 Transcript at 335:16-336:3. When asked about
15 the BI220 and BI221, Mr. Kattan stated they were substantially
16 identical, but pointed out several differences, such as the use of
17 a PXI bus as opposed to a PCI bus, the range of frequency, the
18 components of the measurement circuit, a different prescaler,
19 additional clocks, and different reference voltages. Id. at
20 336:11-343:12. When asked if any of those differences would
21 affect infringement, he said he did not know for sure, but
22 "probably not." Id. at 341:24-342:1.

23 Dr. West, GuideTech's own infringement expert, then testified
24 that the BI220 and BI221 were identical for purposes of
25 infringement. Regarding Mr. Kattan's testimony as to certain
26 differences between the BI220 and BI221, Dr. West stated, "The
27 very specific things that he mentioned, none of them would have
28 anything to do with those -- those claims." Id. at 345:10-22.

1 Even if GuideTech's infringement expert testified that the
2 products were identical for purposes of infringement, the jury
3 could properly have found that GuideTech failed to meet its burden
4 of proof of infringement by the BI201 and the BI221. Dr. West
5 specifically analyzed, limitation by limitation, infringement by
6 the BI200 and BI220. Regarding the BI201 and the BI221, however,
7 his testimony was by his own admission speculative. He
8 acknowledged that he had not heard of the BI201 and BI221 at all
9 before the trial:

10 Q: Now, Dr. West, have you heard of a -- Brilliant
11 Instruments' BI221 product?

12 A: I hadn't heard of it until this case -- this trial.

13 Q: Okay. What about the -- what about the BI201? Have you
14 heard of that?

15 A: Once again, I hadn't heard of it until this trial.

16 April 1, 2014 Transcript at 247:7-17. Because Dr. West lacked
17 personal knowledge regarding the BI201 and BI221, and did not
18 analyze the products limitation by limitation, the jury could have
19 chosen to disregard his legal conclusion that the two sets of
20 products are identical for purposes of non-infringement. Because
21 Mr. Kattan pointed out several differences between the products,
22 the jury could have chosen to disregard his statement that the
23 products were identical, which was far from certain. Thus, the
24 jury could have reasonably concluded that while GuideTech met its
25 burden of proving infringement by the BI200 and BI220, it failed

1 to do so for the BI201 and BI221. The jury verdict is
2 reconcilable on this point.¹

3 3. Damages

4 Brilliant challenges the jury's verdict awarding damages
5 because GuideTech failed to prove lost profits. To be entitled to
6 lost profits, GuideTech must prove that there is a reasonable
7 probability that the patentee would have made the infringer's
8 sales "but for" the infringement. DSU Med. Corp. v. JMS Co.,
9 Ltd., 296 F. Supp. 2d 1140, 1148 (N.D. Cal. 2003) (citing State
10 Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1577 (Fed.
11 Cir. 1989)). "To prevent the hypothetical from lapsing into pure
12 speculation, this court requires sound economic proof of the
13 nature of the market and likely outcomes with infringement
14 factored out of the economic picture." Grain Processing Corp. v.
15 Am. Maize-Products Co., 185 F.3d 1341, 1350 (Fed. Cir. 1999).

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18 ¹ For the same reason that Brilliant's argument regarding
19 "identical" products is denied, GuideTech's motion for new trial
20 is DENIED. GuideTech's motion is based on a April 21, 2014
21 statement by Brilliant's CEO Mr. Kattan to a customer that the
22 BI221 is identical to the BI220. GuideTech argues that this "new"
23 evidence warrants a new trial under Rule 59. While Rule 59
24 permits a new trial on certain issues if new evidence comes to
25 light, not any evidence will do. The movant must show (1) the
26 probability that the evidence would have changed the outcome of
27 the trial; (2) the evidence could not have been discovered earlier
28 had the moving party been diligent; and (3) the evidence is not
merely cumulative or impeaching. Advanced Display Systems, Inc.
v. Kent State University, 212 F.3d 1272, 1284 (Fed. Cir. 2000).
Here, Mr. Kattan's statement is consistent with his testimony at
trial. GuideTech's own expert, Dr. West, stated the same opinion,
although that opinion was ultimately not accepted by the jury.
Accordingly, this information does not warrant a new trial.
Brilliant's request to strike this motion is DENIED as moot.

1 The Federal Circuit has adopted a four-factor test, which is
2 a useful but nonexclusive way for patentees to prove they are
3 entitled to lost profits: (1) demand for the patented product; (2)
4 absence of acceptable non-infringing substitutes; (3)
5 manufacturing and marketing capability to exploit demand; and (4)
6 the amount of profit that the patentee would have made. Rite-Hite
7 Corp. v. Kelley Co., Inc., 56 F.3d 1538, 1545 (Fed. Cir. 1995)
8 (citing Panduit Corp. v. Stahl Bros. Fibre Works, Inc., 575 F.2d
9 1152, 1156 (6th Cir. 1978)). An alternative to the Panduit test
10 is the two-supplier market test. The two-supplier market test
11 requires the patentee to show: (1) the relevant market contains
12 only two suppliers; (2) the patentee has the marketing and
13 manufacturing capacity to make the sales that were lost to the
14 infringer; (3) the amount of profit that the patentee would have
15 made. Micro Chem., Inc. v. Lextron, Inc., 318 F.3d 1119, 1124
16 (Fed. Cir. 2003). "In essence, the two-supplier market test
17 collapses the first two Panduit factors into one 'two suppliers in
18 the relevant market' factor." Id.

- 19 a) Absence of acceptable non-infringing substitutes;
20 two suppliers in the market

21 Brilliant contends that GuideTech did not conduct an analysis
22 of acceptable non-infringing substitutes. However, GuideTech's
23 CEO, Mr. Sigura, testified that in his years of experience in the
24 field, he observed that there were only two competitors in the market of
25 high-frequency time interval analyzers -- Brilliant and GuideTech.
26 This is evidence that there were no acceptable non-infringing
27 substitutes and that the market consisted of only two suppliers.
28 Although Brilliant points out contrary evidence, the Court cannot

1 weigh this against GuideTech's evidence. Because there is
2 substantial evidence to support the jury's finding on this factor,
3 the Court cannot substitute its judgment for the jury's.

4 b) Manufacturing and marketing capability to exploit
5 the demand

6 In its damages case, GuideTech claimed that but for
7 Brilliant's infringement, it would have sold fifty-nine Femto 2000
8 products in 2009 instead of the one Femto 2000 it did sell. April
9 4, 2014 Transcript at 527:1-12. Brilliant argues that GuideTech
10 failed to present evidence to the jury showing it had both the
11 manufacturing and marketing capacity to meet this demand.

12 Brilliant continues that GuideTech conceded that it did not
13 have enough employees to manufacture additional Femto 2000's.
14 Prior to the infringement, GuideTech's final assembly and testing
15 occurred in-house. Id. at 499:6-15. But Mr. Sigura admitted that
16 at the time of the infringement, GuideTech had no full-time, in-
17 house employees. Id. at 500:21-25. During this period, Mr.
18 Sigura did everything himself: the day-to-day management,
19 production, sales and marketing, and shipping. Id. at 500:21-
20 501:1-3. Accordingly, Brilliant reasons GuideTech would not have
21 been able to meet increased demand for Femto 2000's.

22 As Mr. Sigura explains, however, GuideTech was unable to pay
23 full-time employees because of lack of business due to Brilliant's
24 infringement. Id. If it had not been for Brilliant's
25 infringement, GuideTech could have hired employees or contracted
26 others to meet demand. Mr. Sigura testified that GuideTech could
27 have done so:
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1 Q: [. . .] Is it your -- Could GuideTech have made those
sales?

2 A: Absolutely.

3 Q: And why do you say that?

4 A: Because I can manufacture as many as -- as I get purchase
orders. I mean, we have a manufacturing plant 15 minutes
5 down the street, and they'll be super happy if I give them an
order for a thousand unit. That's their livelihood. That's
our livelihood. So, yeah, I can make as many as -- there is
demand for.

6 Id. at 512:25-513:8. Mr. Sigura's testimony is sufficient to
7 support a finding that GuideTech would have had the manufacturing
8 and marketing capacity if the infringement had not occurred.

9 c) Accounting of the profit that would have been made
10 Brilliant claims that GuideTech's accounting is riddled with
11 numerous fatal errors. Calculations of damages must be based on
12 "sound economic proof." Grain Processing Corp., 185 F.3d at 1350.
13 In particular, Brilliant takes issue with the fact that GuideTech
14 used an average fixed cost of \$368,760.00, computed from 2008 to
15 2010 data, and assumed that these fixed costs would be enough to
16 support the manufacture of fifty-nine Femto 2000's instead of the
17 one Femto 2000 GuideTech did sell.

18 Under the generally accepted incremental accounting approach,
19 fixed costs, or "costs which do not vary with increases in
20 production, such as management salaries, property taxes, and
21 insurance," are excluded when determining profits. Paper
22 Converting Mach. Co. v. Magna-Graphics Corp., 745 F.2d 11, 22
23 (Fed. Cir. 1984). Put another way, variable costs must be
24 deducted from revenue to arrive at profit, but fixed costs need
25 not be deducted. While "the damages may not be determined by mere
26 speculation or guess, it will be enough if the evidence shows the
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1 extent of the damages as a matter of just and reasonable
2 inference, although the result be only approximate.” Id.

3 According to Mr. Sigura’s testimony, GuideTech deducted both
4 fixed and incremental costs from revenue. April 4, 2014
5 Transcript at 517-520 (explaining that he first calculated average
6 profit per product by subtracting incremental costs from revenue,
7 then deducted average annual fixed costs). GuideTech therefore
8 deducted more costs from revenue than was required by law, which
9 cannot justify granting JMOL in favor of Brilliant.

10 Brilliant also contends that GuideTech improperly used data
11 from 2008 to 2010 to compute average fixed costs, ignoring data
12 from 2011 and 2014. But Mr. Sigura explained his reasoning for
13 doing so:

14 The actual fixed costs are a lot smaller because by that
15 time, I didn’t have employees, I lost my admin -- I lost my
16 one engineer that I had that I was paying measly salary, and
I didn’t have any money to pay anybody. So my costs were
down to nothing. We moved to a -- a low-cost facility . . .

17 Id. at 522:9-15. In other words, he deducted the higher 2008 to
18 2010 figure from his profit calculation, rather than the lower
19 2011 to 2014 figure incurred while his company was producing less,
20 in a low cost facility. This higher cost figure is conservative
21 and more accurately depicts what would have occurred if Brilliant
22 had not infringed and GuideTech were able to produce more units to
23 meet demand. Thus, the choice to use the 2011 to 2014 cost figure
24 is actually more favorable to Brilliant. Separately, Brilliant’s
25 suggestion that litigation costs incurred by GuideTech from 2011
26 to 2014 should be deducted from revenue is unavailing because
27 GuideTech would not have incurred those litigation costs had it
28 not been for Brilliant’s infringement.

1 Overall, GuideTech presented sufficient evidence to sustain
2 the jury's award of lost profits. Although the jury awarded
3 \$342,229.23, which is less than six percent of GuideTech's
4 requested sum, the jury could have done so because it doubted
5 GuideTech would have made all of the sales that it claimed it lost
6 to Brilliant. This is not surprising because the products are
7 different and not perfect substitutes. The Femto 2000 has as many
8 as eight channels that can measure pulse width simultaneously,
9 while Brilliant's products have only two channel devices that can
10 only make one pulse width measurement at a time. Id. at 498:6-11.
11 The pricing of the two products is different. Id. at 518, 551.
12 The jury could have concluded that, because of the greater scale
13 and higher price of GuideTech's products, only some of the demand
14 for Brilliant's products would translate into demand for
15 GuideTech's products.

16 B. Permanent Injunction

17 1. Legal Standard

18 A plaintiff seeking a permanent injunction barring patent
19 infringement must demonstrate that four factors are present before
20 the court may grant such relief: (1) it has suffered an
21 irreparable injury; (2) legal remedies, including monetary
22 damages, are inadequate; (3) the balance of the hardships between
23 the plaintiff and the defendant weighs in favor of granting an
24 injunction; and (4) the public interest would not be impacted
25 negatively by an injunction. eBay Inc. v. MercExchange, L.L.C.,
26 547 U.S. 388, 391 (2006).
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1 2. Irreparable Injury and Inadequacy of Legal Remedies

2 The “issues of irreparable harm and the adequacy of remedies
3 at law are inextricably intertwined.” ActiveVideo Networks, Inc.
4 v. Verizon Comms., Inc., 694 F.3d 1312, 1337 (Fed. Cir. 2012).
5 After eBay, there is no presumption of irreparable harm upon a
6 showing of patent infringement. Id. at 1341. To prove
7 irreparable injury, a patentee must prove that (1) absent an
8 injunction, it will suffer irreparable harm and (2) there is a
9 sufficiently strong “causal nexus” connecting the alleged harm to
10 the alleged infringement. Apple Inc. v. Samsung Electronics Co.,
11 Ltd., 735 F.3d 1352, 1360 (Fed. Cir. 2013).

12 As a preliminary matter, GuideTech conducts no analysis of
13 whether there is a causal nexus between the infringement and the
14 alleged irreparable harm. To establish a causal nexus, GuideTech
15 must show “that the infringing feature drives consumer demand for
16 the accused product.” Id. at 1364. While the ‘231 patent covers
17 a time interval analyzer, the infringing products might include
18 other popular benefits that contribute to demand.

19 GuideTech argues that it will continue to lose good will,
20 market position, and revenue absent an injunction. GuideTech’s
21 arguments in this regard are speculative because they offer little
22 more than attorney argument in support. Evidence of loss of some
23 sales in the past, without more, is insufficient to show that
24 GuideTech is likely to lose sales and market share due to
25 Brilliant’s infringing conduct in the future. There is evidence
26 that the opposite is true. Brilliant shows that it is no longer
27 selling the infringing products, instead focusing on the non-
28 infringing ones. GuideTech presents no compelling evidence

1 establishing otherwise. If GuideTech were to lose good will or
2 market position to non-infringing products, then that harm is not
3 sufficiently tied to the infringement and does not justify
4 injunctive relief.

5 GuideTech also cannot argue that loss of exclusivity
6 justifies an injunction. In 2011, GuideTech licensed its patents
7 to a third party, TimeMetrics. Docket No. 235, 13:13-15. This
8 willingness to license indicates that legal remedies, such as
9 money damages, would be adequate to compensate GuideTech.

10 3. Balance of the Hardships

11 The balance of the hardships involves the consideration of
12 "the relative effect of granting or denying an injunction on the
13 parties" with regards to the parties' sizes, products, and revenue
14 sources. i4i Ltd. Partnership v. Microsoft Corp., 598 F.3d 831,
15 862 (Fed. Cir. 2010).

16 GuideTech asserts that its patents cover the cornerstone of
17 the products it manufactures, and so its entire business rests on
18 this injunction. GuideTech also states that if it does not get an
19 injunction, other companies will likely be encouraged to infringe
20 GuideTech's patents, causing it harm. These arguments are again
21 speculative and conclusory. GuideTech has not shown that the harm
22 alleged to continue in the future is tied to Brilliant's
23 infringing activity. The Court cannot issue an injunction
24 protecting GuideTech from any competition, regardless of whether
25 it is infringing, solely because it may harm GuideTech's business.

26 4. Public Interest

27 "The touchstone of the public interest factor is whether an
28 injunction, both in scope and effect, strikes a workable balance

1 between protecting the patentee's rights and protecting the public
2 from the injunction's adverse effects." i4i Ltd. Partnership, 598
3 F.3d at 863.

4 GuideTech argues that consumers "need clear direction from
5 this Court so that they will not unwittingly purchase infringing
6 products." Docket No. 322-5 at 10; see also Docket No. 327 at 22.
7 The public has already been notified by judgment entered in this
8 case.

9 GuideTech further argues that, because GuideTech has the
10 capability to serve the market even if Brilliant ceased to exist,
11 the public will still benefit from the technology embodied by the
12 '231 patent. The two products are different, however, and may
13 provide differing utilities to the public. GuideTech has not
14 shown that the public interest would be served by issuing an
15 injunction.

16 In sum, GuideTech has not proved that any of the eBay factors
17 weigh in favor of granting a permanent injunction.

18 C. Motions to Seal

19 GuideTech moves to seal portions of its motion for permanent
20 injunction and supporting exhibit, the deposition of Mr. Kattan.
21 GuideTech asserts they include information designated by Brilliant
22 as "Highly Confidential." See Docket No. 322. Brilliant never
23 filed a supporting declaration as required by Civil Local Rule
24 79-5(e). The motion to seal therefore must be DENIED.

25 If it is obvious that the information was accidentally
26 overdesignated and should not be sealed, as a matter of common
27 sense, the parties should confer before filing an unnecessary
28 motion to seal. If the motion has already been filed, then the

1 designating party may file a declaration withdrawing its
2 designation for purposes of the motion. This would save the
3 parties the trouble of drafting an unnecessary motion and the
4 Court the trouble of reviewing it.

5 CONCLUSION

6 Brilliant's motion for JMOL (Docket No. 324) is DENIED
7 because the jury was properly instructed, there is sufficient
8 evidence to support the verdict, and the verdict is not
9 irreconcilably inconsistent.

10 GuideTech's motion for new trial or administrative relief
11 (Docket No. 330) is DENIED because the claimed new evidence is
12 cumulative. Brilliant's motion to strike that motion as untimely
13 (Docket No. 331) is DENIED as moot.

14 GuideTech's motion for a permanent injunction (Docket No.
15 322) is DENIED for failure to show that the eBay factors are met.

16 GuideTech's motion to seal (Docket No. 322) is DENIED.
17 GuideTech shall file unredacted versions in the public docket no
18 later than seven days after the issuance of this order.

19 IT IS SO ORDERED.

20
21 Dated: 08/22/2014



CLAUDIA WILKEN
United States District Judge