

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

KONE CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 11-465-LPS-CJB
	)	
THYSSENKRUPP USA, INC.,	)	
THYSSENKRUPP ELEVATOR AMERICAS	)	
CORPORATION,	)	
THYSSENKRUPP ELEVATOR	)	
CORPORATION,	)	
THYSSENKRUPP ELEVATOR CAPITAL	)	
CORPORATION, AND	)	
THYSSENKRUPP ELEVATOR	)	
MANUFACTURING CORPORATION,	)	
	)	
Defendants.	)	

**REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S  
MOTION FOR A PRELIMINARY INJUNCTION<sup>1</sup>**

Plaintiff Kone Corporation ("Plaintiff" or "Kone") brought the present action on May 25, 2011, alleging infringement of U.S. Patent No. 6,685,002 ("the '002 patent"). (D.I. 1) On June 20, 2011, Plaintiff filed an amended complaint, again asserting infringement of the '002 patent, and adding a count of false advertising under the Lanham Act. (D.I. 6) On that same date, Plaintiff moved for a preliminary injunction ("motion" or "motion for a preliminary injunction") barring Defendants from "infringing [the '002 patent] litigation." (D.I. 7at 1) On September 2, 2011, Plaintiff moved to obtain limited, expedited discovery from Defendant relating to the issues at play in the preliminary injunction motion. (D.I. 42) After reviewing the parties'

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<sup>1</sup> Absent unanimous consent of the parties to the jurisdiction of a United States Magistrate Judge, a Magistrate Judge's authority to resolve a motion for a preliminary injunction is limited to making a Report & Recommendation to the District Court. 28 U.S.C. § 636(b)(1)(B); D. Del. LR 72.1(a)(3).

submissions and holding a teleconference, the Court granted-in-part Plaintiff's motion for expedited discovery, and outlined the permissible categories of such discovery. (D.I. 51) On November 14, 2011, the Court held an evidentiary hearing and heard oral argument on Plaintiff's motion for a preliminary injunction. (D.I. 88)

After carefully reviewing the extensive record developed to date, and for the reasons that follow,<sup>2</sup> I recommend that this Court DENY Plaintiff's motion.

## **I. BACKGROUND**

### **A. The Parties**

Plaintiff is a Finnish corporation "specializing in the manufacturing and service of elevators and escalators," and which also provides escalator modernization solutions. (D.I. 6 at ¶ 19) Defendants are all U.S.-based corporations that are residents of this judicial district; each has appointed a resident agent in Delaware. (D.I. 27–31) Among other things, Defendants design, sell, and install escalator products, including upgrades to existing escalator systems. (D.I. 25 at 7) At least certain of Defendants appear to be direct competitors with Plaintiff in the U.S. escalator modernization market. (See D.I. 6 at ¶ 20; D.I. 77 at 4; *id.*, ex. 1 at 149–50)

### **B. The Asserted Patent**

The '002 patent is entitled "Method of Escalator Modernization," and was filed on

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<sup>2</sup> Where the facts discussed in this Report & Recommendation were disputed, the facts stated herein constitute my findings based on the record at this stage. Although the parties have conducted expedited discovery and the Court has held an evidentiary hearing, the record is less complete than it will be following a full trial on the merits. Thus, all of the findings and conclusions contained in this Report & Recommendation are subject to further review at later stages in these proceedings. See *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1363 (Fed. Cir. 2001) ("[A]ll findings of fact and conclusions of law at the preliminary injunction stage are subject to change upon the ultimate trial on the merits.").

October 15, 2002. (D.I. 6, ex. 2) The '002 patent issued on February 3, 2004 to Plaintiff, which continues to hold all right, title, and interest in and to the patent. (D.I. 6 at ¶ 16) The '002 patent includes 14 claims, three of which (claims 1, 13, and 14) are independent. Claim 1 of the '002 patent, which describes a five-step escalator-modernization process, is representative:

1. A method of modernizing an escalator comprising:

removing mechanical and electrical components from an existing escalator system, leaving a truss framework including cross members from the existing escalator system;

installing a first module in said truss framework at a top of the escalator;

installing a second module in said truss framework at a bottom of the escalator;

installing a plurality of incline modules between said first module and said second module, along an incline portion of said escalator, including placing each incline module just inside said truss framework and attaching a horizontal portion of each incline module to one of said cross members; and

installing track between said first and second modules on said plurality of incline modules.

('002 patent at col. 5:32–49) Claims 13 and 14 generally recite analogous structures and steps to those from claim 1. (*Id.* at col. 6:27–52) Specifically, claim 13 describes a modernized escalator system, which includes "a plurality of incline modules placed inside [the existing] truss framework, each having a horizontal portion connected to a cross member of said truss framework." (*Id.* at col. 6:27–40) Similarly, Claim 14 describes a kit for modernizing an escalator system, including "a plurality of incline modules[,] each of said incline modules including two upstanding elements and a horizontal element joining said upstanding elements with said horizontal element being attached to a cross member of a truss framework of an existing escalator." (*Id.* at col. 6:41–49)

### C. Background on Escalator Modernizing

There are more than 40,000 operating escalators in the United States, with an average commercial life expectancy of 25 years. More than half of the escalators in the U.S. are at least 20 years old, so finding cost-effective ways to replace and/or update these systems is important. (D.I. 8 at 3 (citing Andrews Decl. ¶¶ 3–4))

Plaintiff alleges that prior to the invention described in the '002 patent, there were only two ways to replace or update an existing escalator at the end of its operational life: (1) total replacement; or (2) creating a new truss within the existing truss framework.<sup>3</sup> (D.I. 8 at 3–4) As for option (1), Plaintiff claims that the expense, inconvenience, and time required to completely remove and re-construct an escalator are significant drawbacks to modernization. (*Id.* at 3–4) Defendants dispute this characterization, noting that "ripping out and replacing an existing escalator system is generally about half as expensive as modernizing." (D.I. 25 at 23 n.23) As for option (2), any new truss that is installed must fit within the existing truss "shell," which results in a narrower step width on the escalator in question. (D.I. 8 at 4) This reduces passenger capacity, and restricts the number of installations where such a modification would even be possible. (*Id.*)

Plaintiff contends that the '002 patent overcomes these drawbacks of prior modernization options by utilizing an existing escalator's truss structure and three standard, pre-fabricated types of modules. (*Id.* at 6) In an exemplary embodiment of the '002 patent, the method of

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<sup>3</sup> The "truss" of an escalator generally refers to the metal structure extending the diagonal length of the escalator, and which provides the underlying framework for its operation. As such, it also provides a framework on which the modules described in the '002 patent are mounted. ('002 patent at col. 2:47–58)

modernizing utilizes a single upper module 20, a single lower module 30, and a plurality of identical "incline" modules 40, which span the intervening diagonal length of the escalator between the upper and lower modules. (See '002 patent at FIG. 1) Plaintiff maintains that a modernization process utilizing the existing truss and these three types of modules results in less construction time while preserving the original passenger capacity of the pre-existing system.

Plaintiff contends that its EcoMod™ system and methods of installing it embody one or more claims of the '002 patent. (See, e.g., D.I. 8 at 5; D.I. 33 at 7) The EcoMod™ system was introduced to the U.S. market in 2003; since that time, more than 450 units have been installed in the U.S. (D.I. 6 at ¶¶ 21, 22) Plaintiff describes this system as "without parallel," and notes that the EcoMod™ system has won six of the last seven Project of the Year Awards from industry publication *Elevator World*. (D.I. 8 at 1, 5)

#### **D. The Accused Products/Methods**

The sole accused product is Defendants' I.MOD Escalator Modernization System. (D.I. 6 at ¶ 31) Like the system described in the '002 patent, the I.MOD uses standard, modular units of three varieties (an upper module, lower module, and central module)<sup>4</sup> to update an existing escalator system. (See D.I. 77, exs. 7, 9) According to Defendants, there are two versions of the central module that could be used in I.MOD systems: (1) an H-shaped module with two vertical members joined by a connecting member ("I.MOD Version I"); or (2) a set of two vertical members with no permanent horizontal connection between them ("I.MOD Version II"). (D.I. 25 at 8–10) Both versions of the I.MOD appear to have been on sale in the United States. (D.I. 77,

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<sup>4</sup> The "central module" identified in Defendants' I.MOD installation manuals corresponds generally to what is termed an "incline module" in the '002 patent.

ex. 1 at 110) As is discussed more fully below, the manner in which these central modules interact with other portions of an escalator is of particular significance to Plaintiff's motion.

The first U.S. I.MOD product was sold to Phoenix Sky Harbor Airport in 2011. (D.I. 8, Wigley Decl. at ¶ 6)<sup>5</sup> This installation appears to involve two different I.MOD units. (D.I. 82 at A 568, ¶ 3) Installation on the first I.MOD unit is complete, while the second I.MOD unit has not yet been installed. (*Id.*; *see also* D.I. 77, ex. 1 at 117)

#### **E. Procedural Posture**

Briefing pursuant to D. Del. LR 7.1.2(b) on Plaintiff's motion for a preliminary injunction was completed on August 11, 2011.<sup>6</sup> On August 26, 2011, Defendants filed an unopposed motion for leave to file a sur-reply to Plaintiff's Reply Brief (D.I. 39), which was granted on September 1, 2011 (D.I. 41). The following day, on September 2, 2011, Plaintiff filed its motion for expedited discovery, which Defendants timely opposed. (D.I. 42, 44) After reviewing the parties' briefing and hearing oral argument on the motion for expedited discovery, the Court granted-in-part Plaintiff's motion in an Order dated September 26, 2011. (D.I. 51)

Following the Court's Order, Defendants produced several thousand pages of documents,

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<sup>5</sup> Kevin Wigley is Plaintiff's Regional Escalator Modernization Sales Manager for the West Region.

<sup>6</sup> Plaintiff does not specifically identify the contours of the injunction sought; however, the Court interprets Plaintiff's motion as seeking to enjoin Defendants from making, using, selling, or offering for sale any version of the accused I.MOD system in the U.S. In addition, although Plaintiff's Amended Complaint also prays for a preliminary injunction barring Defendants from making false and misleading statements concerning the products at issue (D.I. 6 at 10), Plaintiff does not explicitly seek such relief in the present motion (D.I. 7).

and also produced Richard A. Glanzmann for a Rule 30(b)(6) deposition,<sup>7</sup> held on October 25, 2011. On November 14, 2011, after receiving additional briefing from the parties regarding the impact of this new discovery on Plaintiff's motion, the Court held an evidentiary hearing and heard oral argument regarding the motion. (D.I. 77, 81, 88)

## II. STANDARD OF REVIEW

"[A] preliminary injunction is a drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993); *accord Cordis Corp. v. Medtronic, Inc.*, 780 F.2d 991, 996 (Fed. Cir. 1985) ("Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined.") (internal quotation marks and citations omitted). However, the Patent Act provides that injunctions "may" issue "in accordance with the principles of equity." 35 U.S.C. § 283. A movant for a preliminary injunction pursuant to 35 U.S.C. § 283 must establish: "(1) a reasonable likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) a balance of hardships tipping in its favor; and (4) the injunction's favorable impact on the public interest." *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). No one of these factors is dispositive; "rather, the district court must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested." *Id.* (quoting *Hybridtech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988)). However, "a movant cannot be granted a preliminary injunction unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable

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<sup>7</sup> Mr. Glanzmann is the General Manager of the Escalator Planning Group in North America for Defendant ThyssenKrupp Elevator Corporation. (D.I. 26 at A 165)

harm." *Id.* (emphasis in original).

### III. DISCUSSION

#### A. Likelihood of Success on the Merits

In order to carry its burden at this stage of the proceedings, Plaintiff must demonstrate that it will "likely prove" that Defendants infringe the '002 patent and that Plaintiff's infringement claims "will likely withstand" Defendants' challenges to the validity of the '002 patent. *See Amazon.com, Inc.*, 239 F.3d at 1350. "A preliminary injunction should not issue if an alleged infringer raises a substantial question regarding either infringement or validity, i.e., the alleged infringer asserts an infringement or invalidity defense that the patentee has not shown lacks substantial merit." *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, 431 F. App'x 884, 886 (Fed. Cir. 2011) (quoting *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1050 (Fed. Cir. 2010)).

#### 1. Infringement

Assessing whether Plaintiff will likely prove that Defendants have infringed any claim of the '002 patent requires a two-step analysis. First, the Court must determine "the meaning and scope of the patent claims asserted to be infringed." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 2005). Second, the Court must compare the properly construed claims to the accused device or method. *Id.* Plaintiff asserts infringement of claims 1–14 of the '002 patent; a likelihood of success for any single valid claim would be sufficient to satisfy the first factor in the preliminary injunction analysis.<sup>8</sup> *Kimberly-Clark*, 431 F. App'x at 886.

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<sup>8</sup> Because dependent claims are construed to incorporate by reference all the limitations of the independent claims from which they depend, the Court's analysis focuses on independent claims 1, 13, and 14. 35 U.S.C. § 112. If an independent claim is not infringed,



**a. Claim Construction**

**(1) Legal Standard Governing Claim Construction**

A district court need not conduct a comprehensive and final claim construction at the preliminary injunction stage. *See, e.g., Sofamor Danek Group, Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996). However, if the question of whether the movant is likely to succeed on the merits "turns on a contested issue of claim construction, the court must give the claim construction issue the attention necessary to determine the likelihood of success," even if the court's constructions are "abbreviated, preliminary, or tentative." *Shuffle Master, Inc. v. VendingData Corp.*, 163 F. App'x 864, 868 (Fed. Cir. 2005).

In construing claim terms, courts should look first and foremost to the language of the claims themselves. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). Claim terms generally should be given their "ordinary and customary meaning[,]"" which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Id.* at 1312–13 (citations omitted). That said, a patentee may function as a lexicographer by expressing a "special definition" in the patent specification "that differs from the meaning [that a given term] would otherwise possess." *Id.* at 1316. Even if the patent specification does not contain a special definition, it "is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Id.* at 1315 (internal citations and quotation marks omitted). A court should also consider the patent's prosecution

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then there can be no infringement of a claim that depends from it. *See Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 798 (Fed. Cir. 1990).

history if it is in evidence because it "can often inform the meaning of the claim language by demonstrating how the inventor understood the invention." *Id.* at 1317 (citations omitted).

Although the Federal Circuit has repeatedly emphasized the importance of the intrinsic record (consisting of the claim language, patent specification, and prosecution history), extrinsic evidence, "including expert and inventor testimony, dictionaries, and learned treatises," can also "shed useful light on the relevant art." *Id.* (internal citations and quotation marks omitted). However, any such evidence is "less significant than the intrinsic record in determining the legally operative meaning of claim language." *Id.* (internal citations and quotation marks omitted); *accord Markman*, 52 F.3d at 981 (noting that evidence extrinsic to the patent and prosecution history "is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims").

## (2) "Attaching"/"Being Attached"/"Connected"

In response to the Plaintiff's contention that it will likely prove that Defendants infringe the '002 patent (D.I. 8 at 7–10), Defendants asserted an infringement defense that relates to the attachment or connection between two elements in a modernized escalator (D.I. 25 at 17–19). All claims of the '002 patent require that a horizontal portion of each incline module be attached or connected to a cross member of the pre-existing escalator truss framework.<sup>9</sup> For instance, the fourth step of the method recited in claim 1 requires:

installing a plurality of incline modules between said first module and said second module, along an incline portion of said escalator, including placing each incline module just inside said truss framework *and attaching a horizontal portion of each incline module to one of said cross members*

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<sup>9</sup> According to the patent, a "cross member" is a metal element that extends across from one side of an escalator to another, linking the two sides of the truss. (*Id.* at col. 2:59–3:3)

('002 patent at col. 5:42–47 (emphasis added); *see also id.*, claim 14, col. 6:45–49 (referring to a "horizontal element [of an incline module] *being attached*" to an existing truss cross member) (emphasis added)) Claim 13 slightly modifies this limitation by requiring that the claimed modernized escalator system comprise "a plurality of incline modules placed inside [the existing] truss framework, *each having a horizontal portion connected to a cross member of said truss framework.*" (*Id.* at col. 6:35–37 (emphasis added))<sup>10</sup> Defendants assert that neither I.MOD version attaches or connects a horizontal portion of an incline module to a truss cross member.

**(a) The Parties' Proposed Constructions**

Both parties initially appeared to agree that—at least for purposes of the preliminary injunction analysis—the claim terms of the '002 patent should be given their ordinary and customary meaning, and that no special definitions are required for any terms. (D.I. 8 at 8; D.I. 25 at 13–17) Although Defendants did not clearly identify a specific proposed construction for the attach/connect terms in their briefing, they suggested at various times that these terms mean "affixed, secured or fastened to another" or "joined or linked together." (D.I. 25 at 13–17) At oral argument, counsel for Defendants indicated that the attach/connect terms should be construed to mean that the horizontal portion of the incline module and the truss cross member are "physically and directly affixed or joined to each other." (D.I. 88 at 139)

It is even more difficult for the Court to determine what Plaintiff's proposed construction for these terms is, because Plaintiff's proposal appears to have changed several times during the

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<sup>10</sup> For ease of reference, the limitations from claims 1, 13 and 14 that refer to "attaching," "being attached," or "connected" are collectively referred to as "the attach/connect terms."

pendency of its motion. Plaintiff initially did not propose a construction for the attach/connect terms. (See D.I. 8) In its Reply Brief, Plaintiff argued that because "the word 'join' is commonly understood to mean 'adjacent to[,]'" and because the concept of joining is inherent in the concept of attaching, the term "attach" should merely "connote[] some spatial relationship" that "does not necessarily require immediate adjacency or the use of bolts or welding." (D.I. 33 at 12) Instead, Plaintiff suggested that "in the setting of a horizontal piece of metal resting on or against a horizontal cross member, attachment can occur through the pressure of gravity." (*Id.*) Plaintiff also argued that the term "connect" should "include 'associat[ion]' or 'relat[ion].'" (*Id.*)

In a later filed brief, Plaintiff asserted that "[c]ourts have consistently held that, unless the claim specifically recites the requirement of a direction [*sic*] connection, there is no requirement of an immediate, direct connection between . . . two elements." (D.I. 77 at 8) Specifically, Plaintiff cited one instance where the Federal Circuit construed the term "attached" to mean "a direct series connection." (*Id.* (citing *Jurgens v. McKasy*, 927 F.2d 1552 (Fed. Cir. 1991))) Plaintiff also noted that in another instance, a district court interpreted the term "connected" to mean "operatively interact." (*Id.* (citing *Hay & Forage Indus. v. New Holland N.A., Inc.*, 25 F. Supp. 2d 1170 (D. Kan. 1998)))<sup>11</sup>

At the preliminary injunction hearing, Plaintiff offered two still different proposed definitions for the attach/connect terms, arguing first that they should be construed to connote "functional" attachment, and then arguing later that two objects should be considered attached or

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<sup>11</sup> It is unclear whether Plaintiff was formally proposing that the Court should construe the attach/connect terms to mean "a direct series connection" and/or "operatively interact," or whether Plaintiff simply sought to have the Court consider these two opinions as extrinsic evidence supporting another suggested construction.

connected when there is a link that "limits the movement [of them] in one or more degrees of freedom." (D.I. 88 at 87, 176, 180) Although some of Plaintiff's prior proposed constructions suggested otherwise, at the hearing Plaintiff appeared to acknowledge that these two new proposed constructions would require either that (1) a horizontal portion of an incline module and the cross member physically touch each other (though not that they necessarily must be physically affixed to each other in a manner similar to bolting or welding); or (2) the module must physically touch another element or elements of the escalator, which, in turn must physically touch a cross member. In other words, at the hearing Plaintiff appeared to concede that its proposed definitions of the attach/connect terms would not allow for an incline module to be attached or connected to a cross member if the two were simply near to each other, as opposed to physically touching each other (directly or indirectly). (D.I. 88 at 103, 107, 180)

**(b) Consideration of Intrinsic Evidence**

Following the guidance of the Federal Circuit, the Court looks first to the claim language of the '002 patent, which provides considerable context for the meaning of the attach/connect terms. The step of "installing" the "incline modules" in claim 1 includes two separate actions: (1) "placing" the module "inside the truss framework," and then (2) "attaching a horizontal portion" of that module to a truss cross member that is retained "from the existing escalator system." ('002 patent, claim 1) Claim 13 similarly refers to a step of "plac[ing]" a plurality of incline modules inside the existing truss framework, followed by a separate act of "connect[ing]" a horizontal portion of those modules to the cross members. (*Id.*, claim 13) "Placing" the modules "inside a truss framework" suggests only putting the modules in a position where they are adjacent to or are touching another part of the escalator, but are not physically affixed to that part.

In contrast, the separate process of "attaching" or "connect[ing]" the modules to a cross member connotes a more significant kind of physical contact between the modules and the cross member, such as physical affixation. The '002 patent claims thus distinguish merely "placing" a module in a particular location from the separate and independent action of "attaching" or "connect[ing]" a part of the module to a cross member.

In addition, each of the claims of the '002 patent refers specifically to attaching or connecting a horizontal portion of the incline module "to" a cross member of the truss framework. (*Id.*, claims 1, 13, 14 (emphasis added)) The '002 patent does not claim attachment "to" another item that, in turn, is indirectly related to the cross member. Instead, the reference to modules being attached "to" a cross member suggests that there is a direct physical bond between (1) the incline module and (2) the cross member itself.

After the claim language, the Court then turns to the specification of the '002 patent, the "single best guide to the meaning of" the attach/connect terms. *Phillips*, 415 F.3d at 1315. The '002 patent specification strongly supports Defendants' proposed construction. Indeed, while Defendants cite numerous portions of the specification where the attach/connect terms are used in a manner consistent with their proposed construction (D.I. 25 at 14–16), Plaintiff cites no instance where the '002 patent specification supports any of its proposed constructions.

In describing the "present invention,"<sup>12</sup> the '002 patent specification notes that an incline module "is placed in the existing truss framework *and attached thereto using bolts, welding or other traditional methods.*" ('002 patent at col. 3:20–27 (emphasis added)) Indeed, the '002

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<sup>12</sup> When a feature is characterized as part of the "present invention," courts typically include it as part of the construction for the claims-at-issue. *See, e.g., SciMed Life Systems, Inc. v. Advanced Cardiovascular Systems, Inc.*, 242 F.3d 1337, 1343 (Fed. Cir. 2001).

patent repeatedly refers to the use of bolting or welding as means of attachment, including the attachment of an incline module to a cross member:

This truss arrangement is made of metal pieces welded together or otherwise attached in a structural fashion. (*Id.* at col. 2:53–55);

Cross members are welded or otherwise attached to the truss in a known manner. (*Id.* at col. 2:63–65);

These [incline] modules are placed and attached at every cross member using bolts or welding or other similar standard techniques. (*Id.* at col. 3:66–4:1);

As can be seen [in Figure 4], various bolts are placed in the [incline module] for attaching to the existing cross member . . . . (*Id.* at col. 4:37–38).

The specification also uses the term "connected" interchangeably with the terms "attaching" and "being attached," as in the following example:

This module is placed *in the existing truss framework and attached thereto using bolts, welding or other traditional methods*. Since all of these parts within the module are built, assembled and tested in the factory before being moved onto the job site, it is only necessary to move the module into position and *connect it to the truss framework*. It is not necessary to individually connect separate parts, to set tolerances and test the device before it can be used.

(*Id.* at col. 3:25–33 (emphasis added))

These references in the '002 patent specification inform the Court's construction of the attach/connect terms in two respects. First, the specification specifically distinguishes simply *placing* the horizontal portion of the incline module inside the truss framework from the process of *attaching* the two together. (*Id.* at col. 3:20–27) In fact, the '002 patent goes so far as to differentiate the situation where one element of the escalator "lies against one of the pieces of the truss," from the separate circumstance where that element "is attached [to the truss]." (*Id.* at col. 2:64–67) In light of this clear guidance from the '002 patent specification, it would be

inappropriate to collapse these two separate concepts (*i.e.*, placing or lying against, as opposed to actual attachment and connection) into a single construction for the attach/connect terms. The Court thus finds no evidence in the '002 patent that, as Plaintiff suggests, these terms were intended to connote a type of "functional" attachment that requires only that the two elements touch each other directly or indirectly so as to limit their movement in "one or more degrees of freedom." (D.I. 77 at 180) The '002 patent requires more.

Second, the only examples of attachment or connection given in the '002 patent specification are through bolting, welding, or other "similar" or "traditional" techniques. (*See, e.g., id.* at col. 2:56–58) Moreover, Figure 4 of the '002 patent—the only figure which shows a close-up, clear view of the incline module and the truss framework—shows that "various bolts are placed in the [incline module] *for attaching to the existing cross member.*" (*Id.* at FIG. 4; col. 4:37–39 (emphasis added)) Thus, both the description and the depictions in the '002 patent indicate that only methods of physical affixation, whether through an external means of joinder (like a bolt) or through means of construction (like welding), constitute the type of attachment and connection encompassed by the '002 patent claims.

Without citing to the '002 patent specification, Plaintiff makes two arguments in support of its alternative proposed constructions. First, Plaintiff suggests that the truss cross member and horizontal portion of the incline module could be "attached" merely "through the pressure of gravity." (D.I. 33 at 12) But Plaintiff offers no evidence that a person of ordinary skill in the relevant art would understand the force of gravity to be a "traditional" method for attaching these escalator components, nor that the pressure of gravity could properly be deemed "similar" to bolting or welding—both of which involve physical affixation. Thus, although the '002 patent



specification offers a non-exhaustive list of means for attaching or connecting the incline modules to the truss cross members, Plaintiff offers no evidence to suggest that mere touching or the force of gravity could be counted among those other "similar" means of attachment or connection. Plaintiff's suggestion is therefore both at odds with the specific teachings of the '002 patent specification and unsupported by any other evidence.

Plaintiff's second argument is that it would be inappropriate for the Court to construe the attach/connect terms to allow only for "physical affixation or fastening" because this would be tantamount to importing a limitation from the specification into the '002 patent claims. (D.I. 33 at 11) Plaintiff correctly notes that the Federal Circuit has repeatedly cautioned against confining a claim to the exemplary embodiments depicted or described in the specification. *See, e.g., Phillips*, 415 F.3d at 1323 (citing cases). However, nothing in this line of cases suggests that the Court should, in attempting to discern the meaning of a claim term, ignore any guidance that might be gleaned from the patentee's listing of such examples. Here, the Court cannot disregard the fact that, whenever the concepts of attachment and connection are discussed in the specification, the accompanying examples require physical affixation of the incline modules to the cross member. While it might be inappropriate to require attachment or connection *only* by means of bolting or welding, any construction for the attach/connect terms must account for the explicit teachings of the '002 patent specification, which refer exclusively to physical affixation as the means through which attachment or connection is achieved.

The final piece of the intrinsic record that the Court must consider is the '002 patent's prosecution history, which similarly emphasizes that the '002 patent claims require direct, physical affixation between the horizontal portion of incline modules and a cross member. As

originally drafted, step 4 of claim 1 described merely "installing a plurality of incline modules . . . along an incline portion of [the] escalator, each incline module being attached to one of [the existing truss] cross members." (D.I. 26 at A 55) However, after the examiner rejected claim 1 as anticipated by a European prior art reference (GB 2,121,748, hereinafter "Saito"), the applicant amended step 4 of claim 1 to include and emphasize the separate actions of first "placing" each incline module "inside [the] truss framework" and then "attaching a horizontal portion of each incline module" to the truss cross member. (*Id.* at A 83) Similar language was added to the other independent claims so as to traverse the examiner's rejection in light of Saito. (*Id.* at A 85) This clarifying amendment confirms that the attach/connect terms, in the context of the '002 patent claims, must mean something more than just placement near or on the truss cross members, and instead refers to a separate step of physical affixation.

The applicant also highlighted the differences between the claimed invention and Saito:

In particular, Saito . . . does not teach leaving the cross members from the existing escalator system and does not teach the installation of a plurality of incline modules with each module being *attached to a cross member* at a horizontal portion.

...

[Saito] does not include a plurality of incline modules having a horizontal portion *connected to the cross member*.

...

The top, bottom and incline modules [in the instant invention] *are free standing components and do not need to be attached to a new truss framework* which allows for efficient handling and installation into an existing truss framework. . . . [T]he top and bottom modules also serve as installation fixtures for positioning and aligning within the existing truss framework. This differs in general from [Saito] where a new [truss] framework is added and new components [are] *attached to this framework*.

(*Id.* at A 88–90 (emphasis added)) These citations emphasize that, in the '002 patent, components that are attached or connected are not "free standing"—again suggesting that attaching or connecting requires physical affixation that provides permanence and solidity that is the opposite of a "free standing" item. Moreover, in distinguishing its invention from that described in Saito, the applicant characterized its invention as requiring that the incline modules be "attached to" and "connected to" a cross member—as opposed to Saito's requirement that they be "attached to" the truss framework. This emphasizes that the physical affixation in the '002 patent must be *directly* between the module and the cross member itself, so as to distinguish it from a module that is directly attached or connected elsewhere.

In contrast to Defendants' citations to the claim terms, the specification, and the prosecution history, Plaintiff has not pointed to any intrinsic evidence to support its proposed constructions of the attach/connect terms. As the above discussion makes clear, the intrinsic record leads to the inescapable conclusion that the attach/connect terms require direct joining through physical affixation. Any other definition is squarely at odds with the intrinsic record.

### (c) Consideration of Extrinsic Evidence

In addition to the intrinsic record, the Court may also look to extrinsic evidence; though of secondary importance, it nonetheless may inform the Court's claim construction inquiry. *Phillips*, 415 F.3d at 1317. Both Plaintiff and Defendants have cited extrinsic evidence, with Defendants citing dictionary definitions and case law, and Plaintiff relying exclusively on allegedly analogous instances where other courts have construed similar terms.<sup>13</sup> Neither party

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<sup>13</sup> In construing claim terms, the Court attempts to discern the ordinary and customary meaning that a disputed "term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application."

has offered any testimony from a person or ordinary skill in the art or from an expert regarding the proposed constructions for the attach/connect terms.

Defendants offer a number of dictionary definitions, each of which generally defines attaching or connecting to mean joining, fastening, or affixing. (See D.I. 25 at 13 (citing D.I. 26 at A 130, A 134, A 138, A 142, A 146, A 158)) Plaintiff offers no dictionary definitions in support of its proposed constructions. Defendants' cited dictionary definitions are generally consistent with the manner in which the attach/connect terms are used in the '002 patent, which is to connote the physical affixation of a horizontal portion of an incline module to a transversely extending truss cross member. See, e.g., *The American Heritage Dictionary of the English Language* (4th ed. 2000) (defining "attach" to mean "[t]o fasten, secure, or join"); *accord Webster's Universal College Dictionary* (2001) (defining "attach" to mean "to fasten or affix; join; connect").

Defendants also cite a number of cases (including several from this District) in which terms such as "attach" or "connect" have been construed in a manner consistent with the above-referenced dictionary definitions and in a manner consistent with each other. (D.I. 25 at 13 n.12, 16 n.16). The Court is mindful that it should not rely too heavily on such citations, as the way that district courts have construed these terms in arts other than those at issue here is entitled to minimal weight, and should not be used to vary or contradict the intrinsic use of the

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*Sun Pharm. Indus., Ltd. v. Eli Lilly & Co.*, 611 F.3d 1381, 1388 (Fed. Cir. 2010) (citing *Phillips*, 415 F.3d at 1313). In this case, the application that ultimately issued as the '002 patent was filed on October 15, 2002. Both parties cite extrinsic evidence from dates other than October 2002. (See, e.g., D.I. 25 at 13 & n.12; D.I. 77 at 8) However, because the meaning of the terms "attach" and "connect" appears to have remained generally constant over time, the Court has considered extrinsic evidence from periods other than 2002.

attach/connect terms in the '002 patent. *See Markman*, 52 F.3d at 981. However, the Court notes that the cases cited by Defendants appear generally to construe terms relating to attachment or connection in a manner similar to Defendants' proposed construction.

For its part, Plaintiff relies almost exclusively upon extrinsic evidence from two cases, which purportedly support two of its proposed constructions—those requiring only a type of indirect or functional connection between the incline module and the truss cross member. (D.I. 77 at 8) In the first of these cases, *Jurgens v. McKasy*, 927 F.2d 1552 (Fed. Cir. 1991), the patent-at-issue related to a hunting decoy windsock designed to resemble a goose. *Id.* at 1555. The *Jurgens* patent claimed a decoy windsock with a "hoop member attached to the bottom of the neck portion . . . [and] a spike attached to the bottom of the hoop." *Id.* at 1560. The defendants argued that the word "attached" in this limitation meant "directly connected or touching," while the patentee urged that this term should be construed as only requiring that "the hoop member support the neck portion, and the spike support the hoop member." *Id.* The Federal Circuit sided with the defendants, and held that the term "attached" meant "a direct series connection between neck, hoop, and spike." *Id.* at 1561.

As an initial matter, *Jurgens* concerned an art (windsock design) which bears little (if any) resemblance to the structural/mechanical arts at issue in the '002 patent. As such, the construction from *Jurgens* and the use of the term "attach" in a windsock patent is of little use in discerning the meaning of terms in a patent directed to escalator modernization. *See, e.g., Lab. Skin Care, Inc. v. Limited Brands, Inc.*, 616 F. Supp. 2d 468, 475–76 (D. Del. 2009) (noting that where a proposed definition comes from a resource "that someone of skill in the relevant art would [not] rely upon," that definition is entitled to little weight); *accord Phillips*, 415 F.3d at

1317 (noting that the primary utility of extrinsic evidence is to "shed useful light on the *relevant art*") (emphasis added) (internal quotation marks and citations omitted). Moreover, in *Jurgens*, the Federal Circuit required a direct connection between the neck, hoop, and spike of the windsock, thus rejecting the more amorphous proposed definition of "support." 927 F.2d at 1561. Defendants here have proposed that there must be direct, physical affixation of a horizontal portion of the incline module to the truss cross member, while Plaintiff has proposed the more amorphous concept of "functional" attachment between those two elements. Thus, to the extent that *Jurgens* informs the Court's interpretation of the '002 patent at all, it is consistent with the idea that there must be a "direct" physical and structural link between the horizontal portion of the incline module and the truss cross member, as Defendants propose.

The second case Plaintiff cites, *Hay & Forage Indus. v. New Holland N. Am., Inc.*, 25 F. Supp. 2d 1170 (D. Kan. 1998) (hereinafter, "*Hay*") (D.I. 77 at 8), likewise provides little support for its proposed constructions. In *Hay*, the parties disputed the meaning of the phrase "steering structure *connected between* the junction box and the tongue" in a claim for a crop harvesting machine. *Id.* at 1173 (emphasis added). The *Hay* Court rejected the defendant's proposed definition, which required "a fixed attachment of the steering structure at each terminus, such as by a bolt or pivot pin." *Id.* at 1176. The *Hay* Court noted that the claim phrase did connote being "joined or fastened together," but also indicated that it did not require a "rigid [form of] attachment that does not allow for relative movement" in the claimed machine, because the claim language "clearly contemplates some pivotal movement between the tongue and the steering structure." *Id.* at 1176–77. Thus, in the context of the *Hay* patent, the term "connected between" meant that the tongue and steering structure "operatively interact . . . with one another allowing

for some relative movement but not . . . complete freedom of movement." *Id.* at 1177. This definition makes little sense in the context of the '002 patent, where there is no "clear[] contempla[tion]" that the truss cross member and horizontal portion of the incline module should be able to "pivot" with respect to one another, as required in the *Hay* patent. In any event, the *Hay* Court affirmed the basic idea that a "connection" requires directly joining or fastening two elements together, consistent with the meaning of the attach/connect terms in the '002 patent. *Id.*

**(d) The Court's Preliminary Construction  
for the Attach/Connect Terms**

The intrinsic record (including the claim language and context, patent specification, and prosecution history) and the extrinsic record (including dictionary definitions and other courts' discussions of similar terms) before me are consistent, and reveal that the attach/connect terms should be preliminarily construed to mean "directly joined together by physical affixation." As such, all claims of the '002 patent are preliminarily construed to require that a horizontal portion of each incline module and one of the existing truss cross members are directly joined together by physical affixation.<sup>14</sup>

**b. Comparison of Claims To Accused Product/Method**

"Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device [or method], i.e., when the properly construed claim reads on the accused device [or method] exactly." *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 532 (Fed. Cir.

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<sup>14</sup> As previously noted above, Plaintiff has argued that the term "'join' is commonly understood to mean 'adjacent to.'" (D.I. 33 at 12) Plaintiff cited no evidence of any kind in support of this definition. (*Id.*) While the Court does not question that the term "join" might at times be used to connote "adjacency," it need not separately construe the term "join." The context of the Court's preliminary construction, which requires physical affixation, provides for adjacency as a necessary, but not sufficient, condition for satisfying this claim limitation.

1996).<sup>15</sup> Thus, whether Plaintiff has satisfied its burden of proving likelihood of success turns on whether it has shown that the installation of Defendants' I.MOD system includes a step of attaching or connecting a horizontal member of an incline module (referred to in the I.MOD as a "central module") to a cross member of the existing truss structure, in the manner required by the '002 patent.

As noted above, there are two versions of the central module used in the accused I.MOD system (I.MOD Version I and I.MOD Version II, respectively). Defendants have raised a single defense to infringement of the '002 patent, arguing that neither version of their I.MOD system includes a horizontal portion or element that is attached or connected to a cross member of an existing truss framework. (D.I. 81 at 1) In order to demonstrate likelihood of success on the merits, Plaintiff must provide some evidence or argument to show that this defense lacks substantial merit. *Kimberly-Clark*, 431 F. App'x at 886. Thus, the key question for the Court is whether there is any evidence that a horizontal component of the I.MOD central modules made, used, or sold in the U.S. is directly joined to a truss cross member by physical affixation.

**(a) I.MOD Version I**

Defendants' I.MOD Version I has an "H-shaped" design, with a "horizontal connecting member" serving as the mid-portion of the "H" shape.<sup>16</sup> (D.I. 25 at 8) Plaintiff relies primarily

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<sup>15</sup> A device or method that does not literally infringe a claim may nonetheless still infringe under the doctrine of equivalents, if the differences between the accused device or method and the claim limitations are "insubstantial" to one of ordinary skill in the art. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997). Plaintiff did not raise the theory of infringement under the doctrine of equivalents as a basis for its motion. (D.I. 8 at 8)

<sup>16</sup> Defendants argued in their pre-discovery briefs that I.MOD Version I "has not been offered for sale, sold, made, or used in, or imported into, the United States," and therefore that this version could not be found to infringe the '002 patent. (D.I. 39, ex. 1 at 4) However, at



on two items to support its claims of infringement regarding I.MOD Version I: (i) a video presentation on Defendant ThyssenKrupp Elevator Americas' ("TKEA") Facebook page ("the TKEA video") and (ii) an undated, untitled, eight-page PowerPoint presentation excerpt ("the I.MOD PowerPoint"). (D.I. 8, exs. G & H to Marion Decl.) The dialogue from the TKEA video, describing the I.MOD system, appears to generally track the steps of claim 1 of the '002 patent. (D.I. 8 at 9–10) However, the TKEA video does not depict or describe the installation of a central module, let alone the attachment of a horizontal member of such a module to a truss cross member. (*Id.*, ex. H) Indeed, Plaintiff's counsel has noted that "the [TKEA] video does not provide specific information regarding how the components of the I.MOD system are attached/installed on the existing truss system." (D.I. 26 at A 102)

As for the I.MOD PowerPoint, Plaintiff notes that the picture identified as the "lower module" of the I.MOD system in that presentation is actually a picture of Plaintiff's EcoMod™ lower module, which suggests that the I.MOD is a copy of Plaintiff's escalator modernization product. (D.I. 6, ¶¶ 26–28)<sup>17</sup> Plaintiff further contends that the depictions of I.MOD Version I on page 8 of the I.MOD PowerPoint satisfy the "attaching" and "connecting" limitations found in claims 1, 13, and/or 14 of the '002 patent. (D.I. 8, Appendix A at A-2, A-6, A-7)

Thus, the only document showing or describing I.MOD Version I is the PowerPoint

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his deposition, Mr. Glanzmann testified that "both version one and version two [of the I.MOD] are presently available in the United States." (D.I. 77, ex. 1 at 110) During expedited discovery, Defendants produced copies of PowerPoint presentations depicting I.MOD Version I as part of at least three different recent bids in the U.S. (D.I. 77 at 2, 4) Defendants have now conceded that when considered as part of bid presentations to prospective I.MOD customers, these PowerPoint presentations are part of offers for sale. (D.I. 88 at 156–57)

<sup>17</sup> In their respective Answers, Defendants each denied these allegations in paragraphs 26–28 of Plaintiff's Complaint. (D.I. 27–31)

presentation that Defendants have used as part of their bid packages. (D.I. 77 at 2; D.I. 88 at 111) Plaintiff concedes that, despite having received thousands of pages of documents during expedited discovery, it has put forward no photographs, installation manuals, or engineering drawings or any other documents depicting I.MOD Version I, other than the I.MOD PowerPoint. (D.I. 77 at 2) Indeed, there is no evidence that a prototype, model, or complete central module from an I.MOD Version I has ever been constructed. Thus, the Court must look solely to a single slide on page 8 of the I.MOD PowerPoint to assess whether Defendants' infringement defense for I.MOD Version I lacks substantial merit.

Defendants argue that Version I's H-shaped horizontal connecting member is not intended to be physically joined or affixed to an existing truss cross member, but instead is intended to be used in situations where the truss cross members have been removed from an escalator. (D.I. 25 at 8, 18) However, Plaintiff correctly points out that page 8 of Defendants' PowerPoint presentation includes a specific admonition that installers should "[r]etain the existing truss cross-members where possible." (D.I. 6, ex. 1 at 8; D.I. 77, ex. 2 at TKE001072) Moreover, the slide appears to show that, at least in the example of Version I set forth in the PowerPoint presentation, a truss cross member from the existing escalator is retained before the installation of I.MOD Version I. (*Id.*)

The slide in question depicts the H-shaped horizontal connecting member that is a part of Version I. (*Id.*) It also appears to show that this connecting member contains a "lip" that extends up and over the retained cross member depicted in the slide. (*Id.*) Plaintiff argues that by looking at this picture alone, the Court can determine that the "lip" of the connecting member is "physically resting on top of the cross member," and that the two are attached and connected

within the meaning of the '002 patent. (D.I. 33 at 4; D.I. 88 at 111) Defendants offer two responses. First, they note that the lip shown on this slide of the I.MOD PowerPoint has been eliminated from the current I.MOD Version I product and is no longer being offered for sale in the U.S. Second, and more significantly, they state that even when the lip was a part of the Version I design, it was not intended to and did not come into any form of contact with the truss cross member; therefore, it could not be deemed to be attached or connected to the cross member. (D.I. 39, ex. 1 at 3-4) In support of this second claim, Defendants rely on a Supplemental Declaration of Mr. Glanzmann, who has asserted that the eliminated "lip" design was not "in contact with[] the truss cross member," and that even in the diagram depicted on page 8 of the I.MOD PowerPoint, a "space or 'air gap' between the connecting member and the truss cross member is evident." (*Id.* at 3 n.3)

Using the I.MOD PowerPoint as the sole basis for this assessment, as it must, the Court concludes that Defendants have advanced a non-infringement argument that does not lack substantial merit. When viewing the rendering of the "lip" and truss cross member from I.MOD Version I, the Court discerns a noticeable gap between at least some portion of the "lip" and the cross member. (D.I. 6, ex. 1 at 8; D.I. 77, ex. 2 at TKE001072) While there might be points of contact between the contemplated central module of I.MOD Version I and the pictured cross member, that is not apparent from the Court's visual inspection. Perhaps more significantly, Plaintiff has not even asserted that the slide in question shows that the lip and truss cross member are directly joined by physical affixation, as required by the Court's preliminary construction.

Plaintiff therefore has not met its burden to marshal evidence that any I.MOD Version I central module was installed (or was intended to be installed) such that its horizontal connecting

member was directly joined to a truss cross member by physical affixation, as required by all claims of the '002 patent. Under these circumstances, the Court cannot conclude that Plaintiff will likely prove infringement of I.MOD Version I based on the evidence of record.

**(b) I.MOD Version II**

Unlike the single depiction of I.MOD Version I, there is considerable evidence relating to I.MOD Version II, which appears to have been installed at Phoenix Sky Harbor Airport as part of the sole instance of a U.S.-based I.MOD installation. (D.I. 26 at A 168, ¶ 8) During expedited discovery, Defendants produced a series of photographs of the installation in Phoenix. (D.I. 77, ex. 8) They also produced Mr. Glanzmann, who was involved in the design, development, and installation of the I.MOD, for a full-day deposition pursuant to Rule 30(b)(6). (*Id.*, ex. 1) Defendants also put forward two versions of the 91-page I.MOD installation manual, both of which relate to the installation of an I.MOD Version II.<sup>18</sup> (*Id.*, exs. 7, 9)

According to the documents that have been produced to date, I.MOD Version II does not include a prefabricated, H-shaped central module like Version I; instead, its central module includes two unconnected vertical members. (D.I. 25 at 9–10) Defendants contend that this version "uses two small tab-like rail supports which extend inwardly from each of the vertical members," and which "are used to support the moving stair rails." (*Id.* at 10) Defendants further assert that there is an "airgap" between these rail supports and the truss cross members, so that there is no attachment, connection, or contact of any kind between those two elements. (*Id.*) Plaintiff does not appear to dispute these characterizations. Instead, it makes three arguments in

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<sup>18</sup> Although these documents are labeled v1 and v1.12, respectively, it appears that v1.12 is only the second version of this document to have been created. (D.I. 77, ex. 1 at 143)

support of its position that it will likely show infringement of the '002 patent by I.MOD Version II. (D.I. 77 at 6; D.I. 88 at 114–19)

First, Plaintiff argues that installation of I.MOD Version II requires a "temporary alignment template," the use of which satisfies the attach/connect limitation in the '002 patent claims. This template is a tool used to install the central modules in I.MOD Version II. (D.I. 39, ex. 1 at 5) The template is bolted to the vertical members of the central module, which are in turn attached to the sides of the truss framework; the template is then used in conjunction with a laser to ensure that the central module is in its proper orientation as part of the escalator. (*Id.*) After that process is complete, the template "is unbolted from the [central module] members and removed." (*Id.*) Plaintiff contends that the use of the template "creates the same H-[s]haped module as shown as [*sic*] the 'version one' incline module," such that the template should be considered a "horizontal element" as recited in the claims of the '002 patent. (D.I. 77 at 6)

The Court need not resolve whether the temporary alignment template constitutes a "horizontal element," as that term is used in the '002 patent. Even assuming that it could be so considered, Defendants assert that "[a]t no time is the temporary alignment template attached or connected to, or even in contact with, the existing truss cross member." (D.I. 39, ex. 1 at 6 (citing Supplemental Glanzmann Declaration)) Plaintiff has not provided any evidence to the contrary. Instead, Plaintiff relies on the argument that the template is attached or connected to the truss cross member because there is an "indirect" connection between those two items. (D.I. 77 at 8) In other words, Plaintiff asserts that because the temporary alignment template is bolted to the vertical members of the I.MOD Version II central module, which is in turn attached to the truss framework, which is in turn attached to a retained cross member, this is sufficient to satisfy

the meaning of the attach/connect terms. Under the Court's preliminary construction, however, such a chain of intermediate attachment is insufficient to satisfy the claim limitation at issue. That limitation requires a physical affixation of the truss cross member directly "to" a horizontal portion of the incline module.

Plaintiff's second argument relates to the second draft of the I.MOD Version II installation manual. In this later version of the I.MOD installation manual (v1.12), Defendants redrafted the section dealing with the central module to include the following statement:

Please be certain that the central supports [*i.e.*, the horizontal portion of the central module] do not touch the truss crossbars [*i.e.*, the retained truss cross members]. There should always be an airgap between each central support and the corresponding truss crossbar. This ensures a better reference surface to accurately position the central supports.

(*Cf.* D.I. 77, ex. 7 at 41; ex. 9 at 41) Plaintiff also notes that during the Phoenix installation earlier this year, the installers allegedly used "a spacer between incline module and truss." (D.I. 77 at 8) This spacer is designated as Part No. 200000306100, and Defendants assert that it is positioned during installation between the vertical part of the truss member (which is connected to the truss cross member) and the central module. (D.I. 81 at 7 n.11) The spacer is apparently intended to ensure that no portion of the central module of Version II ever has any contact with the retained truss cross member. (*Id.* at 7)

The v1 manual, which was in use during the time of the first installation of an I.MOD unit in Phoenix, did not include the revised language set forth above, and contains no reference to a spacer. Plaintiff contends that the only logical conclusion to be drawn from this is that (1) since the v1 manual was used during the first installation and (2) that manual did not include the prohibition on the central modules touching the cross member; then (3) this must mean that

during the Phoenix installation, the central modules were in fact attached or connected to the cross members. (D.I. 88 at 116–19) In response, Defendants point to photographs from the first installation at Phoenix Sky Harbor Airport, which show an air gap between the central module and the cross member, as well as the use of a spacer. (D.I. 81 at 7–8 (citing D.I. 82 at A 569–70)) In other words, Defendants claim that although the v1.12 manual was not used in this installation, the practices that were later reduced to writing in v1.12 were followed.

Plaintiff has given the Court no reason to doubt the accuracy or authenticity of Defendants' photographs, several of which were identified by Mr. Glanzmann during his deposition. (D.I. 77 at 118–120) Moreover, while Plaintiff suggests that v1.12 of the manual was revised because, prior to that point, Defendant was installing Version II of the I.MOD in a way that attached or connected the central modules to cross members, the Court finds that another explanation for the redraft is just as likely: the new text was included to make clear on paper what had occurred in practice during the Phoenix installation—that the central modules installed there had no contact with the retained truss cross members. Indeed, Defendants have offered just this explanation for the inclusion of the revised text in v1.12 of the manual. (D.I. 88 at 162–64) With no other evidence to suggest any type of direct physical affixation between those two items as part of I.MOD Version II, Plaintiff's argument cannot provide the necessary support for its motion.

In its third argument, Plaintiff contends that based on the drawings and other evidence it has reviewed regarding Version II of the I.MOD, "the only logical conclusion that can be drawn is that similar processes are used to install the EcoMod and the I.MOD." (D.I. 33 at 7) As a basis for this conclusion, Plaintiff relies on a supplemental declaration from Brent Andrews,

Plaintiff's Escalator Product Manager, which includes a lengthy recitation of how the EcoMod™ is installed, apparently as evidence of how the I.MOD may be installed. (*Id.* at 7–8) Plaintiff opines that given the structural similarities between the EcoMod™ and the I.MOD, the Court should conclude that similar processes are used to install both products. However, neither a description of how the I.MOD could be hypothetically installed nor the manner in which a non-accused product (the EcoMod™) is installed constitutes sufficient evidence of infringement. *See, e.g., Johnson & Johnston Assocs., Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1052 (Fed. Cir. 2002) ("Infringement . . . does not arise by comparing the accused product with . . . a commercialized embodiment of the patentee.") (quotations omitted); *see also Lucent Techs., Inc. v. Gateway, Inc.*, 543 F.3d 710, 723 (Fed. Cir. 2008) (patentee failed to show infringement of method claim by offering circumstantial evidence showing that, at most, accused encoder was capable of performing according to claim steps). Evidence relating to the EcoMod™ system or a hypothetical means of installing the I.MOD cannot satisfy Plaintiff's burden of proof at this stage.

Thus, after carefully reviewing the evidence, the Court concludes that Defendants have raised a defense to the alleged infringement of I.MOD Version II, which Plaintiff has not shown lacks substantial merit.

**c. Plaintiff Failed to Show a Reasonable Likelihood of Success on the Merits**

Because Defendants have raised an infringement defense that applies to all claims of the '002 patent, and which Plaintiff has not shown lacks substantial merit, I find that Plaintiff has not established a likelihood of success on the merits.<sup>19</sup>

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<sup>19</sup> Defendants had also argued that Claims 13 and 14 were invalid as indefinite under 35 U.S.C. § 112, ¶ 2. (D.I. 25 at 19–20) Because of the Court's conclusion as to the non-



### **C. Irreparable Harm**

Although Plaintiff's failure to show a reasonable likelihood of success necessarily precludes granting the requested injunction, the Court will nonetheless address whether Plaintiff has established that it would suffer irreparable harm absent the requested injunction. *See Power Integrations, Inc. v. BCD Semiconductor Corp.*, Civ. No. 07-633-JJF-LPS, 2008 WL 5069784, at \*10 (D. Del. Nov. 19, 2008) (examining irreparable harm factor despite movant's failure to establish likelihood of success on the merits); *Pergo, Inc. v. Faus Group, Inc.*, 401 F. Supp. 2d 515, 526 (E.D.N.C. 2005) (same). In order to demonstrate irreparable harm, Plaintiff must establish that it is subject to harm that can not be adequately compensated through monetary damages. *See, e.g., Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006); *see also Automated Merchandising Sys. v. Crane Co.*, 357 F. App'x 297, 300–01 (Fed. Cir. 2009). Plaintiff alleges both that irreparable economic harms (including price erosion, the loss of service contracts, and loss of market share), and irreparable non-economic harms (including the loss of goodwill and reputational harm) will result absent an injunction. As discussed below, Plaintiff has provided only minimal evidence that it would suffer any such harms absent injunctive relief, and none of that evidence demonstrates that those harms would be irreparable.

#### **1. Alleged Economic Harms**

##### **a. Price Erosion**

Plaintiff argues that it would suffer "irreversible price erosion" absent the requested injunction. (D.I. 8 at 12) The Federal Circuit has established a three-part test for the monetary

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infringement defense, the Court need not consider whether Defendants have raised a substantial question as to whether claims 13 and 14 of the '002 patent are invalid.

recovery of lost profits on a theory of price erosion. A plaintiff seeking such a remedy must:

[1] [S]how that "but for" infringement, [the patentee] would have sold [its patented product] at a higher price; [2] "present evidence of the (presumably reduced) amount of product the patentee would have sold at the higher price"; and [3] "account for the nature, or definition, of the market, similarities between any benchmark market and the market in which price erosion is alleged, and the effect of the hypothetically increased price on the likely number of sales at that price in the market."

*Ericsson, Inc. v. Harris Corp.*, 352 F.3d 1369, 1378 (Fed. Cir. 2003) (internal citations omitted).

In attempting to make this showing, Plaintiff notes that for three recent bids (for escalator modernization projects in San Francisco and Portland), it was "required to reduce its bid price between 10% and 25% relative to bids made for projects prior to the introduction of the I.MOD product." (D.I. 8 at 13 (citing Wigley Decl. ¶ 5)) Plaintiff further contends that having reduced its bid price in this fashion, it cannot now revert to the higher bid price that existed prior to the entry of the I.MOD product. Therefore, it asserts that "EcoMod prices have been permanently depressed and cannot be adequately compensated for through money damages." (*Id.*) During the evidentiary hearing, Mr. Andrews testified that since the I.MOD has entered the U.S. market, Plaintiff has had to lower its EcoMod™ prices, and that he "assum[es]" that, in the future, Plaintiff would similarly need to reduce bids by 10 to 25%.<sup>20</sup> (D.I. 88 at 29, 32) Defendants offer several arguments in response, many of which persuasively highlight the ways in which Plaintiff has failed to adequately demonstrate irreparable harm due to price erosion.

First, the evidence Plaintiff has submitted on this point is not robust. For example, as Defendants have noted, prices in the escalator modernization market often vary substantially

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<sup>20</sup> Plaintiff offered no expert testimony on the subject of alleged economic or non-economic harms.

from project to project. (D.I. 25 at 23 (citing App. 169, ¶ 12)) Plaintiff does not dispute this fact, and Mr. Andrews conceded that there is no standard, baseline price for an EcoMod™. (D.I. 88 at 48) Instead, he noted that such pricing is determined on a "project-by-project" basis. (*Id.*) Thus, the evidence does not persuasively indicate that simply because Plaintiff has reduced its price by 10–25% for certain recent bids where it was in competition with Defendants' product, it will necessarily be required to reduce its price in the same fashion for future bids.

Moreover, Defendants assert that Plaintiff's recent price reductions are "not evidence that [Plaintiff] was forced to reduce its prices generally as a result of the introduction of [Defendants'] I.MOD [in the U.S.]." (D.I. 25 at 22) Indeed, the evidence shows that in at least some of the situations where the I.MOD was competing against the EcoMod™, another competitor (such as Schindler or Otis) placed a bid and offered a competing modernization solution. (D.I. 88 at 48–49) Mr. Andrews acknowledged that Plaintiff's reduced bid price in those circumstances was at least in part due to the presence of bids put forward by these other competitors. (*Id.* at 49) It is thus difficult to discern, based on the current record, what effect the introduction of the I.MOD had on the EcoMod™ price point in these bids.<sup>21</sup> As such, Plaintiff has not demonstrated a direct causal link between its alleged bid price reductions and the introduction of the I.MOD into that bidding process, rendering its claim of price erosion speculative at best. Based on the evidence discussed above, a finding of irreparable harm regarding price erosion is not warranted. *See, e.g.,*

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<sup>21</sup> Although Mr. Andrews testified generally about the reduction in the EcoMod™ bid price allegedly due to competition by Defendants' product, his knowledge on this topic was limited. For example, with regard to the projects on which both Plaintiff and Defendants placed bids, Mr. Andrews did not know the specific bid price submitted by Plaintiff in each case. This is because Mr. Andrews was not directly involved at the local level with the bidding for those projects, nor in discussions with customers about the projects' specifications. (D.I. 88 at 47–48) Instead, his knowledge derived from conversations with other Kone employees. (*Id.* at 48)

*Crane*, 357 F. App'x at 301 (affirming a district court's denial of a preliminary injunction motion where only a conclusory allegation of price erosion was made); *Caldwell Mfg. Co. N. Am., LLC v. Amesbury Group, Inc.*, No. 11-CV-6183T, 2011 WL 3555833, at \*4 (W.D.N.Y. Aug. 11, 2011) (denying a preliminary injunction where price erosion allegations were conclusory and speculative).

Second, Plaintiff has not made a sufficient showing that any price erosion ultimately attributable to Defendants' infringement could not be compensated by money damages. Plaintiff has alleged that, due to the introduction of the I.MOD, it was forced to reduce its bids (as compared to bids submitted before the introduction of the allegedly infringing product) by 10–25% in those cases where both Plaintiff and Defendants competed for a project. (D.I. 8 at 13) As noted above, because of the relatively sparse amount of information Plaintiff has put forward regarding these bids, it is unclear to the Court what amount (if any) of this reduction is directly attributable to Defendants' product. However, the fact that Plaintiff can at least quantify a range in which its bid prices have allegedly been reduced due to the infringement suggests that any price erosion may be calculable and compensable by a later monetary award. *Cf. Symbol Techs., Inc. v. Janam Techs. LLC*, 729 F. Supp. 2d 646, 664 (D. Del. 2010) (denying motion for a preliminary injunction where, *inter alia*, patentee failed to prove that any price erosion could not be compensated by money damages, as patentee was able to quantify reduction in price from almost \$1,200 to \$620 to compete with alleged infringer's product); *Power Integrations, Inc.*, 2008 WL 5069784 at \*11 (denying motion for a preliminary injunction where, *inter alia*, patentee had not sufficiently established that alleged price erosion would not be compensable with money damages).

**b. Loss of Market Share**

Plaintiff also argues that until Defendants "introduced [their] I.MOD product to the market, there was no product on the market in the United States other than [Plaintiff's] EcoMod™ that provided a complete modernization solution for existing escalators," and that therefore "the entry of the I.MOD is attempting to siphon away business" from Plaintiff and may reduce Plaintiff's market share in the future. (D.I. 8 at 15) Defendants offer three responsive arguments: (1) that Defendants have sold only one I.MOD in the United States and in that case, Plaintiff did not compete for the sale (so Plaintiff lost no market share regarding the sale); (2) that the I.MOD has never been selected over an EcoMod™ when the two have competed against each other; and (3) any loss of market share that could be attributed to infringing conduct can be compensated with monetary damages. (D.I. 25 at 23–24)

At this juncture, the evidence does not establish that Plaintiff has lost market share, or is likely to do so in the future, due to Defendants' I.MOD product. As an initial matter, Defendants have introduced evidence indicating that Plaintiff's escalator modernization and maintenance sales have generally increased during the period that the I.MOD has been on the market in the United States, and that Plaintiff's orders and income increased from 2010 to 2011. (D.I. 26 at A 105, A 108) Indeed, Plaintiff's July–September 2011 Review reports that "orders received grew in all geographical areas as well as in both the new equipment *and modernization businesses*," and that "[s]ales grew *clearly* in both maintenance and modernization." (D.I. 83 at A271–72 (emphasis added)) These revenue and sales increases do not suggest that the financial state of Plaintiff's escalator modernization business is one of "a company facing irreparable economic harm." *Power Integrations, Inc.*, 2008 WL 5069784 at \*10 (citing patentee's financial reports,

which showed increases in patentee's sales and revenue during the period of alleged infringement, in rejecting a claim of irreparable loss of market share).

Moreover, in order to demonstrate the loss of market share in the preliminary injunction context, Plaintiff must offer some evidence beyond mere speculation, because otherwise irreparable harm would be found "in every patent case where the patentee practices the invention." *Nutrition 21 v. United States*, 930 F.2d 867, 871 (Fed. Cir. 1991). Here, Plaintiff has not attempted to quantify a percentage reduction in market share that is attributable to past competition with the I.MOD. Indeed, it would appear that Plaintiff cannot do so, as it is undisputed that while Plaintiff has installed more than 450 EcoMod™ systems in the U.S., Defendants have modernized only a single U.S. escalator using the I.MOD. And because Defendants' one installation at Phoenix Sky Harbor Airport relates to a project that Plaintiff did not bid on (and because Plaintiff otherwise has not lost a project bid in competition with Defendants), Plaintiff can point to no instance where its position in the escalator modernization market was diminished due to the presence of the I.MOD. (D.I. 8, ex. E at 1; D.I. 26 at A 168) In addition, Plaintiff has not even attempted to estimate the percentage of market share it will allegedly suffer in the future due to the presence of the I.MOD, nor has it articulated a factual basis upon which it could rest such claims. As a result, Plaintiff has not met its burden to show any lost market share attributable to the I.MOD system, let alone that any such harm is irreparable.<sup>22</sup> *See, e.g., Caldwell*, 2011 WL 3555833 at \*4 (denying a preliminary injunction due

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<sup>22</sup> At the evidentiary hearing, Mr. Andrews argued that Plaintiff's experience in the separate market for machine-room-less elevators ("the MRL market") should be used to indicate that market share would be lost absent an injunction here. Plaintiff did not make this argument in any of its briefs. In any event, given that Mr. Andrews admitted under cross-examination that he had previously acknowledged that the MRL market is "not similar" to the escalator

in part to insufficient showing of lost market share, where the alleged loss was speculative, and would only occur *if* future customers purchased the defendant's allegedly infringing product).

**c. Loss of Future Service Contracts**

Plaintiff also contends that it would be irreparably harmed through the loss of contracts to service and maintain escalators that would be modernized by the EcoMod™ system, but for the existence of the I.MOD. Plaintiff claims that the loss of these service contracts is "generally unquantifiable and uncompensable through money damages alone." (D.I. 8 at 13) However, in its briefing, Plaintiff notes that "[t]he revenues of a single service contract can range from \$400 per unit per month to \$800 per unit per month, which is a lifetime amount [of] \$120,000 to \$288,000 per unit." (*Id.* at 14 (citing Andrews Decl. ¶ 13)) It is no doubt the case, as Plaintiff's counsel noted at the evidentiary hearing, that any attempt to quantify a damage amount regarding lost service contracts due to Defendants' infringement would need to incorporate a multitude of data points, beyond just the monthly cost of such a contract (such as the number of escalators impacted by any such contract, or the number of years that such contracts might run). (D.I. 88 at 124–25) Yet it is not difficult to conceive of a damages estimate that might account for these other factors. Because Plaintiff can identify clear price range for such monthly service contracts as a starting point in such an analysis, this form of alleged harm may be compensable by money damages. *Cf. Siemens Med. Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc.*, 637 F.3d 1269, 1277 n.3 (Fed. Cir. 2011) (affirming lost profits damages award that included damages for lost service contracts on scanners used in the medical industry).

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modernization market, any evidence relating to this dissimilar market cannot be used as a substitute for actual evidence of lost market share relating to the I.MOD. (D.I. 88 at 44-45)

Even more significant is Plaintiff's failure to make a sufficient evidentiary showing that it has lost (or will likely lose) service contracts to Defendants due to the alleged infringement. Plaintiff has not identified a single service contract that has been lost due to the sale of the I.MOD system. Moreover, it appears that any claim to lost future service contracts would be highly speculative, due to the nature of the elevator/escalator industry. As Plaintiff itself acknowledges, "[i]t is *common* in the elevator/escalator industry for one company to provide service and maintenance on a competitor's product," and, as a result, "[Plaintiff] has service contracts for [Defendants'] escalators, and vice versa." (D.I. 8 at 14 (citing Andrews Decl. ¶ 14) (emphasis added))<sup>23</sup> In fact, the TKEA video indicates that the I.MOD has a nonproprietary controller that prevents a customer from being locked into a maintenance contract with the original installer. (D.I. 8, ex. H) Given that it is "common" in this industry for one company to service another's escalator, that renders it more difficult for Plaintiff to make the evidentiary connection required of it here. When coupled with the lack of any other evidence put forward by Plaintiff to establish such a connection, it is clear that Plaintiff has not met its burden to show that lost service contracts would constitute a form of irreparable harm in this case.

**d. Conclusion Regarding Economic Harms**

For the reasons discussed in the preceding paragraphs, the Court finds that Plaintiff has failed to put forth evidence indicating that it would suffer irreparable economic harms absent the imposition of the requested injunction.

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<sup>23</sup> Indeed, the connection between escalator modernization and the loss of escalator service contracts is weak enough that it caused Plaintiff to question, in its opening brief, whether the loss of such contracts would even be construed as a "direct and foreseeable result of the Defendant's [*sic*] infringement" for damages purposes. (D.I. 8 at 14–15)



## 2. Alleged Non-Economic Harms

Plaintiff argues that absent an injunction, its reputation will be "irreparably harmed from [Defendants'] illegal sales of [their] I.MOD product through loss of goodwill to [Plaintiff's] name and brand." (D.I. 8 at 11) Plaintiff does not explain how its "name" or "brand" have been or will be harmed by any I.MOD sales. Indeed, the evidence indicates that Plaintiff was a "first-mover" or "pioneer" in the escalator modernization market and has garnered glowing praise and goodwill for its innovations in this regard, which in turn has generated significant revenues for Plaintiff. (*Id.* at 5 (noting that "the Kone EcoMod™ system has been recognized as pioneering and innovative in the industry, winning six of the last seven Project of the Year Awards from [industry publication] *Elevator World*"); D.I. 83 at A269) Plaintiff has submitted no evidence that this pioneering status would be adversely impacted by the entry of the I.MOD product—if anything, Defendants' late entry into the U.S. escalator modernization market may even highlight Plaintiff's reputation as a market leader.

As such, this case is similar to the situation encountered by this Court in *Power Integrations, Inc. v. BCD Semiconductor Corp.*, Civ. No. 07-633-JJF-LPS, 2008 WL 5069784 (D. Del. Nov. 19, 2008). In that case, Judge Stark recommended that this Court deny a motion for a preliminary injunction, in part because the plaintiff failed to demonstrate that it would suffer irreparable harm absent the requested injunction. *Id.* at \*10–11. In *Power Integrations*, the plaintiff "expressed concern over an irreparable harm to its pioneering reputation in the market for power supply control chips," which were allegedly covered by the asserted patent. *Id.* at \*11. As in the case of Kone's EcoMod™, the record in *Power Integrations* was "replete with evidence attesting to recognition of [the plaintiff] as an innovator in the power electronics

industry and as the recipient of several awards." *Id.* In light of that, as well as the fact that the record contained "no evidence suggesting that industry perceptions of [the plaintiff's] pioneer status have in any way changed since" the defendant's alleged infringement began, nor any evidence of loss of customer goodwill, this Court found that irreparable harm had not been established. *Id.* at \*11–12; *see also Johnson & Johnson Orthopaedics, Inc. v. Minnesota Mining & Mfg. Co.*, 715 F. Supp. 110, 113 (D. Del. 1989) (denying a preliminary injunction in part because the court could not "envision a substantial erosion of the goodwill of the leader in the [relevant] field during the pendency of th[at] action").

At the preliminary injunction hearing, Plaintiff advanced a new theory relating to loss of goodwill. Mr. Andrews testified that when Defendants have competed with Plaintiff for a modernization contract, Plaintiff has filed "bid protests." (D.I. 88 at 34–35) These bid protests appear to be an industry-specific action whereby the protestor argues that a competitor should be disqualified from consideration for a given project because it fails to meet a specified bid criteria. (D.I. 77, ex. 1 at 149–50; D.I. 88 at 33, 130–31) These bid protests were not directly related to any claim that Defendants were infringing Plaintiff's patent; instead, they appear to have involved assertions by Plaintiff that Defendants did not have the requisite experience in installing escalator modernization systems necessary to participate in the bid process. Mr. Andrews further testified that bid protests are generally disfavored in the industry, and that Plaintiff would ultimately suffer harm if it developed a reputation as a habitual bid protestor. (*Id.* at 35–36)

However, neither Mr. Andrews nor any other witness offered any evidence that Plaintiff had *in fact* suffered any loss of reputation due to the bid protests that it has filed. Indeed, Mr. Andrews testified that, even though Plaintiff and Defendants have competed against each other in

multiple bidding processes, Plaintiff's "level of bid protest" has "not yet" increased since the introduction of the I.MOD. (D.I. 88 at 34) Thus, not only would any such possible "harm" to Plaintiff's reputation be in significant part due to Plaintiff's own actions, but any suggestion that such harm has occurred or will occur is entirely speculative.

Therefore, the Court finds that Plaintiff has not put forward any evidence demonstrating that it would suffer any irreparable non-economic harms if Defendants are permitted to continue making and marketing their I.MOD system in the U.S.<sup>24</sup>

**D. Balance of Hardships and the Impact on the Public Interest**

The final two factors in the legal test regarding the issuance of a preliminary injunction are whether the balance of hardships tips in Plaintiff's favor and whether the grant of an injunction will have a favorable impact on the public interest. However, when considering whether to grant a preliminary injunction, "a trial court need not make findings concerning the third and fourth factors if the moving party fails to establish either of the first two factors" of the relevant test. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 973-74 (Fed. Cir. 1996). Given that, in my view, Plaintiff has failed to establish either a likelihood of success on the merits or irreparable harm, the Court declines to consider the remaining factors in the preliminary injunction analysis.

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<sup>24</sup> Delay in moving for a preliminary injunction is also a "factor that district courts should consider in assessing irreparable harm." *Eaton Corp. v. Rockwell Int'l Corp.*, No. 97-421-JJF, 1997 WL 33708214, at \*7 (D. Del. Nov. 4, 1997). Defendants have argued that Plaintiff impermissibly delayed in moving for a preliminary injunction, as they claim Plaintiff waited 10 months after first learning of the existence of the I.MOD system to accuse it of infringement, and then an additional two months after filing this action to seek a preliminary injunction. (D.I. 25 at 27) In light of the Court's conclusion that Plaintiff has not otherwise demonstrated irreparable economic or non-economic harm, the Court need not address this claim.

#### IV. CONCLUSION

For the reasons set forth in the above-stated findings of fact and conclusions of law, I recommend that this Court DENY Plaintiff's Motion for a Preliminary Injunction.

This Report & Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within ten (10) days after being served with a copy of this Report & Recommendation. Fed. R. Civ. P. 72(b). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987); *Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006).

The parties are directed to the Court's Standing Order In Non-Pro Se Matters For Objections Filed Under Fed. R. Civ. P. 72, dated November 16, 2009, a copy of which is available on the Court's website, <http://www.ded.uscourts.gov/StandingOrdersMain.htm>.

This Report & Recommendation includes citations to certain briefs and exhibits that were filed under seal in their entirety (D.I. 77, 81, 82). According to Section (G)(1) of the Revised Administrative Procedures Governing Filing and Service by Electronic Means, redacted versions of these sealed documents should have been filed within 7 days after each respective sealed document was filed. The parties failed to file redacted versions of these documents. Redacted versions of D.I. 77, 81, and 82 should be filed as soon as practicable, but in any event by no later than **December 12, 2011**.

Given that the Court has cited to and quoted from material that technically remains under seal, the Court is releasing this Report & Recommendation under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Report &

Recommendation should be redacted, the parties should jointly submit a proposed redacted version by no later than **December 12, 2011**. The Court will then subsequently issue a publicly available version of its Report & Recommendation.



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Christopher J. Burke  
UNITED STATES MAGISTRATE JUDGE