

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

Civil Action No.: 21-cv-02112-CMA-SKC

SMITH SPORT OPTICS, INC., a Delaware company,
and KOROYD SARL, a Monaco company,

Plaintiffs,

vs.

THE BURTON CORPORATION, a Vermont company,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION¹

Plaintiffs Smith Sport Optics, Inc. (“Smith”) and Koroyd SARL (“Koroyd”) (collectively, “Plaintiffs”) hereby move this Court to preliminarily enjoin The Burton Corporation (“Burton”) from infringing Plaintiffs’ U.S. Patent No. 10,736,373 entitled “Helmet with Shock Absorbing Inserts” (“the ’373 patent”).²

¹ Plaintiffs’ counsel previously communicated with Defendant’s counsel concerning the relief requested. Defendant’s counsel indicated that Defendant intends to oppose such relief.

² The ’373 patent is attached as Exhibit A to the Declaration of Graham Sours [Dkt. 8] and will be cited herein as “the ’373 patent.”

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I. INTRODUCTION

About eight years ago, Plaintiffs reshaped the ski and snowboard industries with new groundbreaking helmets using shock absorbing inserts made of Koroyd's lightweight cellular Koroyd® material. Smith's and Koroyd's joint helmet inventions are now protected by the '373 patent. In January 2021, Smith's competitor Burton introduced helmets under its Anon brand that infringe the '373 patent by using a copycat impact protection material called WaveCel® to compete head-to-head with the patented Smith-Koroyd® helmets. Burton introduced these helmets into the U.S. market with full knowledge of Plaintiffs' '373 patent and over Plaintiffs' objections. Burton is not only knowingly violating Plaintiffs' patent rights, but it and WaveCel (maker of the WaveCel® material) also appropriated the aesthetic marketing scheme used by Plaintiffs in an effort to misappropriate the goodwill and innovative reputations Plaintiffs have built with their patented technology for the past several years. If Burton is allowed to continue its infringing activities, Plaintiffs will suffer an irreparable and irretrievable loss of market position, loss of business opportunities, harm to business relationships, and damage to their reputations as industry-leading innovators in impact protection for ski and snowboard helmets.³

II. FACTUAL BACKGROUND

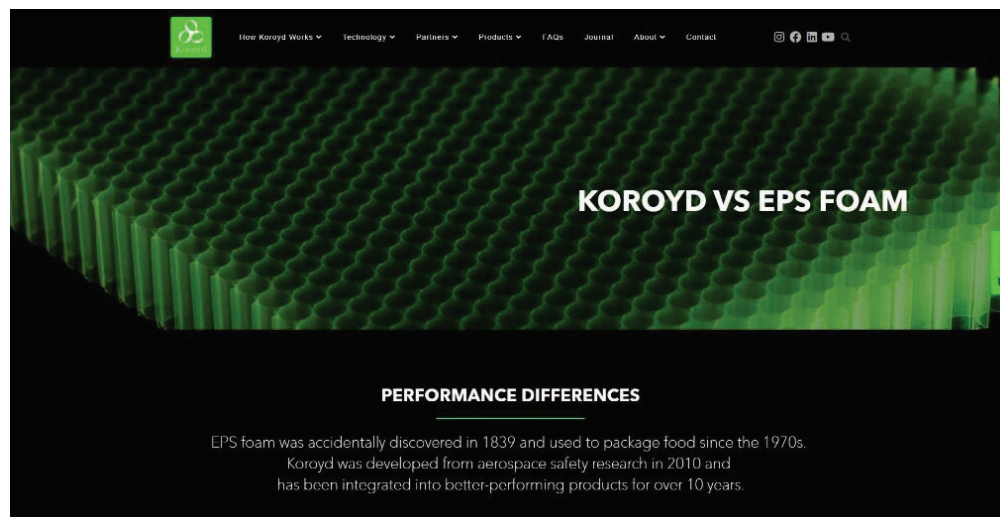
A. Plaintiffs' Collaboration and Patent Application

Smith's beginnings can be traced back to 1965, when the company's namesake,

³ Plaintiffs filed this lawsuit only after trying unsuccessfully for months to stop Burton's commercialization of the infringing Anon-WaveCel® helmets without court intervention.

Dr. Bob Smith, began selling hand-built, anti-fogging, double-lens ski goggles out of his van on weekend trips to Utah and Colorado. See Declaration of Graham Sours ([Dkt. 8]; “Sours Decl.”), ¶¶2. After introducing a series of innovations in the ski and snowboard industry, Smith entered the ski and snowboard helmet industry in 2006. *Id.* at ¶¶2-3.

Koroyd was established in 2010 and designs and engineers advanced innovative impact protection technology to reduce the risk of suffering life-affecting injury. See Declaration of John Lloyd [Dkt. 7] (“Lloyd Decl.”), ¶¶11-13. Koroyd developed its flagship product, an impact protection material called Koroyd®, shown below, in view of aerospace safety research. *Id.* at ¶¶14, 8.



Plaintiffs’ shared drive to innovate brought them together in 2013 to build better helmets for the snow sports and biking industries. *Id.* at ¶¶13-15; Sours Decl., ¶14.

Traditionally, snow and bike helmets relied on expanded polystyrene (“EPS”) liners for impact protection. *Id.*; Lloyd Decl., ¶¶20-25. EPS is a relatively cheap foam made of pre-expanded polystyrene beads and is commonly used in a wide variety of applications, from food packaging to building insulation. *Id.*

Plaintiffs' collaboration produced revolutionary innovations in the sports helmet space that allowed Smith to improve the impact-absorbing performance of a vented helmet without sacrificing desired ventilation. As the '373 patent explains, design criteria such as impact-absorption, light-weight, and ventilation often "compete with one another" such that "a helmet that is light in weight and provides adequate ventilation is generally less impact resistant," while "[a] helmet may be designed to have less ventilation cavities to improve coverage of the head in the event of an impact, but this results in a helmet having less ventilation than is desirable." '373 patent at 1:11-30. Plaintiffs' joint invention permits one to use shock-absorbing inserts within a cavity that coincides with the area of vents, so that impact absorption can be increased without reducing the size or number of vents. See Lloyd Decl., ¶¶9-12, 16; Sours Decl., ¶4. On August 13, 2013, Plaintiffs applied to patent their collaborative inventions by filing U.S. Patent Application No. 13/965,703, which later matured into the '373 patent in August, 2020. See Sours Decl., ¶5; Lloyd Decl., ¶¶15-17.

B. Smith-Koroyd® Helmets Are a Collaboration Success Story

In 2013, Smith introduced the improved "Vantage" helmet, its first snow helmet using Koroyd®, and also launched its first bike helmet ever—the "Forefront". Sours Decl., ¶7. As illustrated below, both the Vantage and the Forefront were marketed using Koroyd's signature green color and using "crumple zone" and similar language to describe the revolutionary impact-absorption properties that Koroyd® adds to a helmet without sacrificing ventilation. *Id.* at ¶¶9, 15; Lloyd Decl., ¶¶11, 18.

KOROYD CRUMPLE ZONE

Traditional energy absorbers (like foams) act like a spring, storing the energy from an impact and releasing it over a micro-moment of time. Due to this, more energy could be transferred to the head, increasing the risk of injury.

When Koroyd is impacted, energy is better-absorbed through sacrificial plastic deformation (as seen in this video). The material acts as a true energy absorber (rather than a spring), controlling and dissipating a larger amount of energy before it's transferred to the head.

The result? A far more advanced structure to help reduce the risk of suffering a life-changing injury. But that's not all...



Both the Vantage snow helmet and the Forefront bike helmet received widespread acclaim in their respective industries. Sours Decl., ¶¶10-20; Lloyd Decl., ¶¶18-19. The Forefront bike helmet stole the show at the 2013 Interbike International Bicycle Expo in Las Vegas, causing Mountain Flyer Magazine to rave that it was “like nothing we’ve seen before.” Sours Decl., ¶10. In 2014, it also won several awards, including the International Design Excellence Award and resulted in P being recognized as leading innovators alongside other leading innovation brands such as Tesla and Nokia. *Id.* at ¶¶12-13.

Smith exhibited the Vantage snow helmet with Koroyd® at the SIA Snow Show in February 2013, to similar industry acclaim. *Id.* at ¶14. The Vantage was ranked by On The Snow among “The Best New Ski & Snowboard Helmets for 2013/2014” stating, “The Smith Vantage Helmet utilizes Aerocore technology with Koroyd for increased airflow and protection.” *Id.* at ¶16. A December 9, 2013 review published on blisterreview.com wrote that “[t]he Vantage is the top-of-the-line helmet from Smith Optics, and it’s the best helmet I have ever used . . .” *Id.* at ¶17. And on December 16, 2013, powder.com published an article declaring that “[t]he Vantage is arguably the highlight of the helmet market this season.” *Id.* at ¶18.

The industry-wide kudos have continued over the years as Smith has expanded its line of Koroyd® snow helmets. Smith’s Quantum helmet was launched in the 2016-2017 snow season, which also obtained significant positive reviews, including those highlighting the aesthetic style of the Quantum with its “meticulously placed vents” showing the signature Koroyd green. *Id.* In 2019, Bestgamingpro.com ranked Smith’s

Vantage snow helmet No. 1 for Best Ski Helmet, stating, “You have a material called koroyd used, the 30% can absorb more energy effects on other foam materials. This makes it one of the ski slopes safer helmets around. ... Koroyd is also fully breathable open cell design allows the fresh air while expelling hot air and prevents overheating.” *Id.* at ¶20. In 2020, GearLab published its “Best Ski Helmet of 2021” review identifying the Smith Vantage helmet as the “Best Overall Ski and Snowboard Helmet.” *Id.* at ¶27.

While the Vantage was Smith’s only Koroyd® helmet from 2013 to 2016, Plaintiffs invested in developing and promoting a variety of other Smith-brand snow helmets covered by the ’373 patent from 2016 to the present, including the Quantum, Mission, Mirage, Level, Liberty, Survey, Survey Jr., Prospect Jr., Altus, Icon, and Icon Jr. helmets. *Id.* at ¶6; see also Confidential Declaration of Graham Sours [Dkt. 9] (“Sours Conf.Decl.”) at ¶6, Ex. D. Not surprisingly, the patented Smith-Koroyd® helmets have been a huge commercial success. In its first year, the Vantage helmet generated more sales revenue than any other helmet in Smith’s snow helmet lineup and accounted for 23% of Smith’s snow helmet sales despite being only one of about 20 Smith snow helmets that season. *Id.* Since then, Smith’s revenues from patented Koroyd® snow helmets have grown an average of over 90% per year and today account for about 70% of all Smith snow helmet sales. *Id.* For the last three snow seasons, Smith was the number one snow sports helmet maker in the U.S. (in terms of sales revenues), and Smith’s patented Koroyd® helmets accounted for six of the top ten best-selling snow sport helmets in the country. Sours Decl. at ¶22.

C. Koroyd Tried To Stop Burton’s Launch of its Infringing Helmets

On December 29, 2020, Plaintiffs learned that Burton was preparing to introduce snow helmets using impact protection material called WaveCel® under Burton's Anon brand in the U.S. to compete with Smith's Koroyd® helmets. Lloyd Decl., ¶¶30. Burton even used the same factory that builds the Smith-Koroyd® helmets in China to build the competing Anon-WaveCel® helmets. *Id.* On January 8, 2021, Koroyd's counsel wrote Burton to inform Burton of the '373 patent, explain with detailed analysis that the forthcoming Anon-WaveCel® helmets will infringe the '373 patent, and request that Burton not move forward with the infringing helmets. *Id.* at ¶¶31-32. Despite receiving notice of the '373 patent and Burton's likely infringement, Burton chose to launch its infringing Anon helmets even before providing Koroyd any substantive response to its demand letter. *Id.* The infringing Anon helmets are named the Merak and Logan, depicted below (hereafter referred to collectively as the "Anon-WaveCel® helmets"). *Id.*

Anon Logan



Anon Merak

D. WaveCel® Was Developed To Compete With Koroyd® in the Helmet Industry but Carried Negative PR Baggage

There is no doubt WaveCel has taken an interest in Koroyd throughout its development and marketing of WaveCel®. A YouTube video titled “What is WaveCel” references Koroyd® in three separate instances and shows WaveCel co-founder Michael Bottlang handling a piece of Koroyd®. Lloyd Decl., ¶¶42. Koroyd’s records show that WaveCel employees tried to order Koroyd® material from Koroyd in November 2020. *Id.* at ¶¶43-44. Before Burton began selling the Anon-WaveCel® helmets, WaveCel partnered with Trek Bicycle Corporation (“Trek”) in 2019 and introduced new bike helmets sold by under the Bontrager brand. *Id.* at ¶34; Sours Decl., ¶¶29-31. By all appearances, the Bontrager WaveCel® bike helmets were made and marketed to mimic the revolutionary Smith-Koroyd® helmets that had taken the industry by storm for several years at that point. *Id.* at ¶¶34-44. Media outlets had no trouble linking WaveCel® and Koroyd® as similar technologies with statements like, “Bontrager’s WaveCel material looks a lot like Koroyd, the honeycomb plastic you’ll find in Smith helmets. It’s even the same identifiable green color,” *id.* at ¶35, and “WaveCel is a collapsible cellular material, visually similar to the Koroyd crumple-zone sections you can find in Smith helmets,” *id.* at ¶38. *See also id.* at ¶¶35-40. In 2019, one of Smith’s largest retail partners informed Smith there was no opportunity for in-store promotion of Smith-Koroyd® snow and bike helmets because they had decided to promote WaveCel® helmets instead. Sours Decl., ¶36; Sours Conf. Decl., ¶¶2-4.

Trek’s Bontrager-WaveCel® helmets not only impacted Smith’s retail position for bike helmets, it stirred up legal controversy based on claims of being “up to 48x more

effective than traditional foam helmets in protecting [one's] head from injuries caused by certain cycling accidents.” Lloyd Decl., ¶41. In March 2020, the BBB National Advertising Division (“NAD”), which “provides independent self-regulation overseeing the truthfulness of advertising across the U.S.,” recommended that Trek discontinue making that claim because NAD was “concerned about whether [the study that Trek relied on in making the claim] was a good fit for [Trek's] claim.” *Id.* This resulted in a highly-publicized class-action lawsuit against Trek, and by proxy WaveCel®, in New York based on the allegedly false safety claims. Sours Decl., ¶¶33.

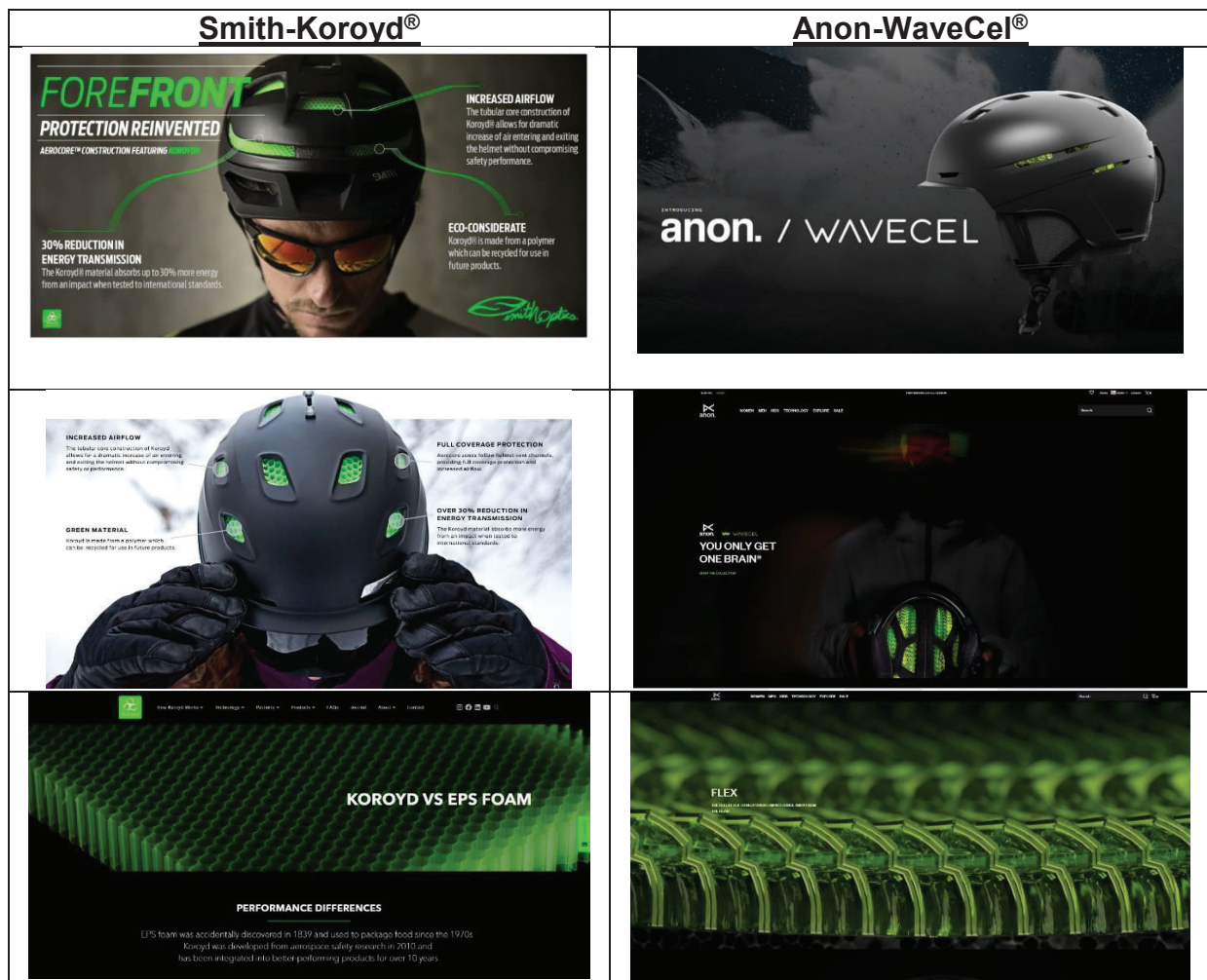
Because Burton is also partnering with WaveCel®, the legal controversy triggered by the Bontrager-WaveCel® bike helmets has already spilled over into the snow helmet space, forcing Burton to address the class action lawsuit publicly: “Anon is aware of the recent class action suit being brought against Trek. We are proceeding with the launch of WaveCel because it is a sound technology” *Id.* at ¶34. This spill-over effect is starting to impact Koroyd® products as well. In fact, Koroyd has already lost one partnership opportunity, because the prospective partner was concerned that the WaveCel lawsuit reflected negatively on Koroyd due to perceived similarities between Koroyd® and WaveCel®, even though Koroyd is not a party to the lawsuit and does not make the same overreaching claims as WaveCel. Lloyd Decl., ¶66.

E. Burton's Marketing Blurs the Lines Between Infringing WaveCel® Helmets and Patented Smith-Koroyd® Helmets

Burton's marketing campaign for the infringing Anon-WaveCel® helmets mimics the aesthetic scheme Smith uses to promote the Koroyd® snow helmets, blatantly capitalizing on the similarities that the biking industry observed with respect to the

Bontrager WaveCel® and Smith-Koroyd® bike helmets. See Lloyd Decl., ¶¶9-10, 46-53.

As illustrated below, Burton has employed the same green insert/black helmet scheme.⁴



⁴ WaveCel originally considered using red to market the WaveCel material, but ultimately opted to copy Koroyd's color scheme. Lloyd Decl., ¶¶56.



III. ARGUMENT

The Patent Act provides a patentee with the “right to exclude others from making, using, offering for sale, or selling the [patented] invention.” 35 U.S.C. § 154(a)(1). To protect this right, courts “may grant injunctions in accordance with the principals of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283.

To obtain a preliminary injunction, a patentee must show (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an

injunction would be in the public interest.” *Metalcraft of Mayville, Inc. v. Toro Co.*, 848 F.3d 1358, 1363 (Fed. Cir. 2017). A patentee makes this showing where the factors above are “supported by sound evidence.” *Veeco Instruments Inc. v. SGL Carbon, LLC*, 2017 U.S. Dist. LEXIS 181935, *77-78 (E.D.N.Y. Nov. 2, 2017) (citations omitted).⁵ In addition, the Federal Circuit has made clear that district courts must consider “the fundamental nature of patents as property rights granting the owner the right to exclude.” *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011) (emphasis added). For the reasons set forth below, the Court should enter a preliminary injunction to preserve Plaintiffs’ exclusive patent rights and market position.

A. Plaintiffs Are Likely To Succeed On The Merits

To demonstrate a likelihood of success on the merits, Plaintiffs must show “that [they] will likely prove infringement, and that it will likely withstand challenges, if any, to the validity of the patent.” *Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190, 1202 (Fed. Cir. 2017). Plaintiffs are not required to prove that they are certain to win. It is enough to show that “success is more likely than not.” *Revision Military, Inc. v. Balboa Mfg., Co.*, 700 F.3d 524, 526 (Fed. Cir. 2012). Plaintiffs meet this requirement.

1. Burton’s Merak and Logan Helmets Infringe at Least Claims 1-3 and 7 of the ’373 patent

⁵ Sound evidence may include well-founded declarations of the patentee related to market conditions. See, e.g., *Metalcraft*, 848 F.3d at 1368 (irreparable harm based on senior marketing manager’s declaration that “some customers ‘prefer to purchase an entire line of products from the same manufacturer for consistency’”); *Bushnell, Inc. v. Brunton Co.*, 673 F. Supp. 2d 1241, 1262 (D. Kan. 2009) (irreparable harm found where Executive testified that “the market will not allow Bushnell to raise prices to recoup its losses”).

“An infringement analysis proceeds first to claim construction to determine the scope and meaning of the asserted claims, and second to a comparison of the properly construed claims with the allegedly infringing product to determine whether the product embodies every limitation of the claims.” *Biagro W. Sales, Inc. v. Grow More, Inc.*, 423 F.3d 1296, 1301 (Fed. Cir. 2005).

Claim Construction

Claim construction begins with the words of the claims, which “are generally given their ordinary and customary meaning.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-14 (Fed. Cir. 2015). “[T]he ordinary and customary meaning of a claim 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.” *Id.* at 1313.

Here, none of the asserted claims contain any language that requires special construction. The ordinary meaning of each claim term is “readily apparent,” and thus claim construction in this matter “involves little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314. As such, a claim construction hearing is not necessary to decide this motion and Burton’s infringement of the asserted claims is clear.

Infringement Analysis

Direct infringement consists of making, using, offering to sell, or selling a patented invention in the U.S., or importing a patented invention into the U.S., without consent of the patent owner. 35 U.S.C. § 271(a). A patentee bears the burden of proving infringement of its patent claims by a “preponderance of the evidence.” See,

e.g., *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1384 (Fed. Cir. 1998).

Literal infringement occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly. *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996).

Burton markets, offers to sell, and sells the Anon-WaveCel® helmets through its website to consumers throughout the U.S.⁶ Burton also markets, offers to sell, and sells the Anon-WaveCel® helmets through retailers, such as REI. Sours Conf. Decl., ¶5.⁷

The accused Merak and Logan helmets clearly satisfy every limitation recited in claims 1-3, and 7 of the ’373 patent, as demonstrated in the detailed claim charts provided by engineer David Smith. Declaration of David Smith [Dkt. 7] (“Smith Decl.”) at ¶¶21-24; Exs. D, E. WaveCel® indisputably satisfies claim 1’s shock absorbing insert requirement because WaveCel® indisputably comprises “an array of energy absorbing cells each having respective open first longitudinal ends and open second longitudinal ends.” WaveCel’s own website states that WaveCel “distributes the impact energy through its **network of cells**” and “distributes the crash force from the site of impact throughout the **matrix of cells**.” <https://WaveCel.com/technology> (emphasis added)). Therefore, by WaveCel’s own admissions, WaveCel® satisfies Claim 1’s requirement of a shock absorbing insert that comprises “an array of energy absorbing cells.”

While Mr. Smith’s charts provide the detail proving infringement, the following

⁶ See <https://www.burton.com/us/en/p/merak-WaveCel/H21-227331.html>;
<https://www.burton.com/us/en/p/logan-WaveCel/H21-227341.html>.

⁷ <https://www.rei.com/product/182848/anon-merak-WaveCel-snow-helmet>;
<https://www.rei.com/product/182849/anon-logan-WaveCel-snow-helmet>.

summary illustrations show the Anon Merak and Logan helmets have the claimed shell, vents, shock absorbing liner (EPS) with a cavity, and shock absorbing insert (WaveCel®) components all arranged as the '373 patent claims require: with the shell having multiple vents, the shock absorbing liner attached to the shell, the shock absorbing liner having a cavity partially aligned with the vents, and the shock absorbing insert filling the cavity and spanning across and being visible through the vents so as to allow air to flow through the vents into the helmet.

ANON LOGAN HELMET



ANON MERAK HELMET



Because the Anon-WaveCel® helmets literally satisfy every limitation recited in claims 1-3, and 7, Burton directly infringes the '373 patent.

2. The '373 patent is Presumptively Valid

Under 35 U.S.C. § 282, the '373 patent is “presumed valid . . . at every stage of the litigation.” *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998). “[A] patent enjoys the same presumption of validity during preliminary injunction proceedings” such that “the very existence of the patent with its concomitant presumption of validity satisfies the patentee’s burden of showing a likelihood of success on the validity issue.” *Titan Tire, Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009) (internal citation omitted).

“At trial, the party challenging validity must prove that the claims are invalid by clear and convincing evidence.” *Polara Eng’g, Inc. v. Campbell Co.*, 894 F.3d 1339, 1348 (Fed. Cir. 2018). To oppose a preliminary injunction with an invalidity defense, however, the accused infringer must establish a “substantial question” of invalidity, bearing in mind the clear and convincing burden that will apply at trial. *Titan Tire*, 566 F.3d at 1379-80. Accordingly, a “substantial question” of invalidity must be enough for the Court to conclude that Burton is “more likely than not” to satisfy its clear and convincing evidence burden at trial. *Id.*

The '373 patent lists well over one hundred prior art references. See '373 patent, pgs. 1-2. These references were before the Patent Office Examiner during prosecution of Plaintiffs’ patent application, and the Examiner concluded after seven years of scrutiny that the inventions claimed in the '373 patent were patentable over that art. Accordingly, Plaintiffs’ are likely to succeed in establishing infringement liability based on Burton’s sales of the Anon-WaveCel® helmets.

B. Plaintiffs Will Suffer Irreparable Harm If Burton's Infringement Is Not Stopped

To show irreparable harm, Plaintiffs must show that absent an injunction, it will suffer irreparable harm and that a causal nexus between the harm and infringement exists. See *Metalcraft*, 848 F.3d at 1368. "Where the injury cannot be quantified, no amount of money damages is calculable, and therefore the harm cannot be adequately compensated and is irreparable." *Id.* In the context of patent infringement, "[p]rice erosion, **loss of good will, damage to reputation, and loss of business opportunities** are all valid grounds for finding irreparable harm." *Celsis in Vitro, Inc., v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (emphasis added).

Before Burton began selling Anon-WaveCel® helmets, Smith was the only company offering ski and snowboard helmets that used inserts made from a breathable, cellular array for improved impact protection. By all indications, Burton's Anon-WaveCel® helmets were designed and intended to compete directly with Smith's Koroyd® helmets. Lloyd Decl., ¶¶45-57.⁸ This is "one factor suggesting strongly the potential for irreparable harm." *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 653-54 (Fed. Cir. 2015) (Reyna, J., concurring) (citation omitted); see also *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013) (harm suffered "where

⁸ The fact that Trek continues to infringe the '373 patent in the bike helmet market does not negate irreparable harm to Smith in the snow sports industry. See Sours Decl., ¶37; *Metalcraft*, 848 F.3d at 1368 ("[T]he fact that other infringers may be in the marketplace does not negate irreparable harm."); *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005) ("Picking off one infringer at a time is not inconsistent with being irreparably harmed").

two companies are in competition against one another” is “often irreparable”).

1. **Reputational Harm**

Damage to a patent owner’s reputation constitutes irreparable harm. See *Douglas Dynamics*, 717 F.3d at 1344 (irreparable injury encompasses “erosion in reputation and brand distinction”). The Federal Circuit has stated that a company’s “reputation as an innovator will certainly be damaged if customers found the same ‘innovations’ appearing in competitors’ [products].” *Id.* at 1344-45. Thus, courts have found irreparable injury where “infringing products in the marketplace would damage” a patentee’s “reputation as an innovator and diminish the appearance of viability to its customers.” *Trade Techs.*, 2008 U.S. Dist. LEXIS 86953, at *9.

As explained above, Plaintiffs have invested significantly not only to develop their patented helmet technology, but to promote it in a way that enhances their respective reputations as innovators. These efforts have resulted in widespread industry acclaim from various sources that expressly cite the patented technology when praising Plaintiffs for their ground-breaking helmets in both the bike and snow sport industries. Sours Decl., ¶¶9-20; Lloyd Decl., ¶¶9, 18-20. The ’373 patent does not expire until 2033. Until then, Plaintiffs are entitled to the exclusivity provided by the Patent Act to use their inventions to enhance their reputations in these fields. Such a reputation is critical in the snow sports industry, because major retailers will give more in-store marketing space and visibility to those who can offer “new, demonstrable technology” with their product lines. Sours Decl., ¶8. It is also critical to Koroyd’s ability to expand its business through new partnerships. Lloyd Decl., ¶¶59-62.

Burton's infringement with the Anon-WaveCel® helmets has been accompanied with an advertising campaign, explained above, that intentionally blurs the lines between the competing helmets and attempts to enhance Burton's and WaveCel's reputations as the innovators of this patented technology. If Burton is allowed to continue advertising and selling the infringing Anon-WaveCel® helmets, Plaintiffs' reputations for providing industry-changing innovation will be diluted and the market strength of their product lines will be diminished.

To illustrate the issue for Smith, the patented Koroyd® snow helmets have been a huge commercial success and occupy six of the top ten best-selling snow helmets in the U.S. Sours Decl., ¶¶21-22. In December 2020, just before the infringing Anon helmets hit the market, GearLab published its "Best Ski Helmet of 2021" review identifying the Smith Vantage helmet as the "Editor's Choice" and "Best Overall Ski and Snowboard Helmet." *Id.* at ¶27. Smith's helmets were the only helmets with the patented technology considered in the GearLab review. *Id.* But if Burton is allowed to continue selling its newly-introduced Anon-WaveCel® for the upcoming 2021-22 snow season, then the next GearLab review and all other snow helmet reviews and articles will be considering Smith's patented Koroyd® helmets alongside the Anon-WaveCel® helmets, forcing Smith to compete against its own patented technology. *Id.* at ¶¶28, 41.

For Koroyd, its success depends heavily on its reputation for innovation and trustworthiness. Lloyd Decl., ¶¶13-14, 59-60. Koroyd generally does not make end-user products, but partners with product manufacturers to find good fits where Koroyd® may improve the product's function. *Id.* Koroyd's ability to attract new partners and

develop new business opportunities depends heavily on their success and reputation in the industries Koroyd is already in. *Id.* at ¶¶61-63. With Burton infringing Anon-WaveCel® helmets in direct competition with the patented Smith-Koroyd® helmets, Koroyd loses the ability to market itself as an exclusive supplier of this technology to others. *Id.* at ¶64.

Plaintiffs' reputations also stand a serious risk of irreparable tarnishment if Burton is not stopped from marketing and selling the infringing Anon helmets, due to a spill-over effect from the bad PR that is following WaveCel with a highly-publicized pending class action lawsuit for allegedly false claims about the performance of WaveCel®. Sours Decl., ¶¶ 33-35; Lloyd Decl., ¶¶ 65-66.

The foregoing demonstrates precisely the type of harm that warrants injunctive relief. *See Douglas Dynamics*, 717 F.3d at 1345 (“erosion in reputation and brand distinction” from being “being forced to compete against products that incorporate and infringe its own patented inventions” constitutes irreparable harm).

2. Damage To Business Relationships

Burton's introduction of the Anon-WaveCel® helmets in direct competition against Smith and in violation of Plaintiffs' patent is certain to prevent Smith from enhancing its reputation with its retail partners and acquire valuable in-store marketing space. One major retailer has already told Smith there is no opportunity to highlight Koroyd in either snow or bike helmets as long as the infringing WaveCel® helmets are available. Sours Conf. Decl., ¶¶2-5. Even though the damage to Smith's business relationships from WaveCel® bike helmets began in 2019, before the '373 patent issued, it remains

relevant to proving the likelihood of irreparable harm today in the snow helmet market, which operates through many of the same retailers. *See, e.g., Tinnus*, 846 F.3d at 1207 (“Evidence of consumer confusion, harm to reputation, and loss of goodwill pre-dating the patent is, at the very least, circumstantial evidence demonstrating the possibility of harms once the patent issues.”). Consequently, if Burton is not enjoined from selling its Anon-WaveCel® helmets, Smith’s reputation with its retail partners will be diminished and Burton will strengthen its relationships on the back of Smith’s patented technology, depriving Smith of valuable in-store POP marketing opportunities to tout its own story.

In addition, Koroyd has already lost one potential partner, who was scared off by the bad PR connected to WaveCel® helmets and the perceived link between WaveCel® and products and Koroyd® products caused by Burton’s marketing of the infringing Anon-WaveCel® helmets. Lloyd Decl., ¶¶65-66. And other industry players have indicated to Koroyd that they believe that the WaveCel® claims have damaged the credibility of the entire helmet safety industry. *Id.*

The foregoing lost business opportunities and damaged relationships also represent irreparable harm that justifies injunctive relief. *See LEGO v. ZURU Inc.*, 799 Fed. Appx. 823, 832 (Fed. Cir. 2020) (affirming preliminary injunction where plaintiff would be irreparably harmed from infringer “establish[ing] relationships with customers” using the infringing technology); *Celsis*, 664 F.3d at 930, *supra*.

3. Burtons’ Infringement is the Cause of Harm to Plaintiffs

To show a causal nexus between the infringement and the stated harm, Plaintiffs must “show that the patented features impact consumers’ decisions to purchase the

accused devices.” *Apple*, 809 F.3d at 642. The “causal nexus requirement is simply a way of distinguishing between irreparable harm caused by patent infringement and irreparable harm caused by otherwise lawful competition—e.g., sales that would be lost even if the offending feature were absent from the accused product.” *Apple, Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1361 (Fed. Cir. 2013). Thus, Plaintiffs “must show some connection between the patented feature and demand for [Burton’s] products.” *Id.* at 1364.

Here, it is clear that Burton’s use of WaveCel® technology in vented helmets in an infringing way is driving consumer demand for the helmets. Indeed, Burton’s marketing efforts focus on the patented technology of the infringing Anon helmets in the very same way that Smith’s and Koroyd’s efforts do. An excerpt from Burton’s website below shows that Burton promotes the Anon helmets by focusing on how WaveCel® provide superior impact protection in a well-ventilated, lightweight helmet.

ANON MERAK WAVECEL® HELMET

The Merak WaveCel is fully loaded with 19 ventilation channels, WaveCel protection, and premium comfort and fit features in a durable hybrid molded construction.

The Anon Merak WaveCel helmet pairs WaveCel protection with the dual hybrid construction of the ding-resistant durability of an endure-shell on top and a featherweight in-mold construction on the bottom with 19 active ventilation channels. WaveCel is a collapsible cellular structure that lines the inside of the helmet and can reduce impact and rotational force by flexing to reduce initial force, crumpling to lower impact velocity, and gliding to help redirect energy away from the head. A 360° BOA® Fit System offers a quick, micro-adjustable fit with the turn of a dial, and the Fidlock® magnetic helmet strap buckle allows for easy one-hand operation, even with gloves. Polartec® Power Grid® fleece liner and ear pads maintain quick-drying warmth for all-day comfort.

<https://www.burton.com/us/en/p/merak-WaveCel/H21-227331.html?cgid=mens-anon-gear>. And Burton has been able to dramatically increase its retail sales price for the new Anon-WaveCel® helmets compared to its non-WaveCel® helmets. Sours Decl., ¶¶39. In

addition, the negative press surrounding the WaveCel® helmets that threatens to unjustly tarnish the reputations of Plaintiffs stems from Burton's use of WaveCel® in its helmets, without which it would not be infringing the '373 patent.

There can be no question that all competitive harms caused by the infringing Anon-WaveCel® helmets are intimately linked to Burton's unauthorized use of Plaintiffs' patented inventions claimed in the '373 patent.

C. The Balance of Equities Favors Entry of a Preliminary Injunction.

In balancing the parties' harms, "a district court 'must balance the harm that will occur to the moving party from the denial of the preliminary injunction with the harm that the non-moving party will incur if the injunction is granted.'" *Anderson v. TOL, Inc.*, 927 F.Supp.2d 475, 488 (M.D. Tenn. 2013) (quoting *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1457 (Fed. Cir. 1988)). The factor heavily favors a preliminary injunction.

First, as demonstrated, the likelihood of success on Plaintiffs' infringement case is very high. This is an "equitable factor" that favors Plaintiffs "in the ultimate balance of the equities." *Id.* (quoting *Revision Military, Inc. v. Balboa Mfg. Co.*, 700 F.3d 524, 526 (Fed. Cir. 2012)). Second, Plaintiffs have shown they have much to lose if preliminary injunctive relief is not granted due to the head-to-head competition with their own technology embodied in Burton's Anon-WaveCel® helmets. Third, any harm Burton may claim from entry of an injunction would be self-inflicted by the calculated risk they undertook in entering the marketplace with a copycat concept with full knowledge of the '373 patent and Plaintiffs' strong belief that commercializing the Anon-WaveCel® helmets would constitute infringement. This "natural consequence of infringing activity

... does not weigh against issuance of an injunction.” *Anderson*, 927 F.Supp.2d at 488; see also *Celsis*, 664 F.3d at 931 (injunction warranted where potential harm to infringing party was “the result of its own calculated risk in selling a product with knowledge of [the plaintiff’s] patent”). Moreover, the Anon-WaveCel® helmets became available in January of this year, so any harm to Burton would be minimal. See *Tuf-Tite, Inc. v. Fed. Package Networks, Inc.*, 2014 U.S. Dist. LEXIS 163352, at *26 (N.D. Ill. Nov. 21, 2014) (balance of harms favor patentee where infringer “has only recently entered the market” with infringing product).

D. The Public Interest Favors Entry of a Preliminary Injunction.

The Federal Circuit has indicated that courts should be more likely to grant an injunction “in traditional cases, such as this, where the patentee and adjudged infringer both practice the patented technology.” *Robert Bosch*, 659 F.3d at 1150. Further, the Patent Act “reflects a strong public policy interest in ‘promot[ing] the progress of the useful arts.’” *Anderson*, 927 F.Supp.2d at 489 (quoting *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577 (Fed. Cir. 1983)). Thus, although “the public often benefits from healthy competition . . . the public generally does not benefit when that competition comes at the expense of a patentee’s investment-backed property right.” *Apple*, 809 F.3d at 647. This factor favors entry of a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this motion and enter a preliminary injunction against Burton that (a) prohibits Burton from any further direct or indirect infringement of the ’373 patent and specifically from

making, using, offering to sell, selling, or importing the Anon Merak and Logan helmets and any other product that infringes the '373 patent, and (b) orders Burton to give written notice and a copy of the injunction to its distribution and retail partners that sell the Anon Merak and Logan helmets.

Respectfully submitted this 16th day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON August 16, 2021, I caused the foregoing document, titled **MOTION FOR PRELIMINARY INJUNCTION**, to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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