JUDGE CARTER

13 CV 0240

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COOPERSURGICAL, INC.,

Plaintiff,

v.

TELEFLEX MEDICAL INCORPORATED and TELEFLEX, INC.,

Defendants.

Civil Action No. _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Edmond R. Bannon (EB0494)
FISH & RICHARDSON P.C.
601 Lexington Avenue, 52nd Floor
New York, New York 10022
Tel: (212) 765-5070
Fax: (212) 258-2291
Email: bannon@fr.com

Attorneys for Plaintiff
CooperSurgical, Inc.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. The '758 Patent 2

B. The Patented Carter-Thomason I Products 3

C. The Accused Weck EFx Device 4

D. Efforts To Resolve The Dispute 5

III. STATEMENT OF LAW 9

IV. ARGUMENT 9

A. CSI Has More Than A Reasonable Likelihood Of Success On The Merits 10

1. The Weck EFx Device Infringes At Least Claim 1 Of The '758 Patent 10

2. The '758 Patent Is Presumptively Valid 14

B. CSI Will Be Irreparably Harmed Without A Preliminary Injunction 15

1. Teleflex Is Causing CSI Irreparable Harm 15

2. There Is A Direct Casual Connection Between The Harm To CSI And Teleflex's Infringement 17

C. The Balance Of Hardships Favors Entry Of A Preliminary Injunction 18

D. The Public Interest Will Be Served By Entry Of A Preliminary Injunction 19

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Andrx Pharms., Inc.,
452 F.3d 1331 (Fed. Cir. 2006).....19

Abbott Labs. v. Sandoz, Inc.,
544 F.3d 1341 (Fed. Cir. 2008).....17

Apple, Inc. v. Samsung Electronics Co., Ltd.,
695 F.3d 1370 (Fed. Cir. 2012).....15, 17

Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.,
134 F.3d 1085 (Fed. Cir. 1998).....14

Canon, Inc. v. GCC International Ltd., et al.,
450 F. Supp. 2d 243 (S.D.N.Y. 2006), *aff'd*, No. 2006-1615, 2007 U.S. App. LEXIS 26584 (Fed. Cir. Nov. 16, 2007).....17

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006).....9

H.H. Robertson Co. v. United Steel Deck, Inc.,
820 F.2d 384 (Fed. Cir. 1987).....15, 16

Impax Lab., Inc. v. Aventis Pharm., Inc.,
235 F. Supp. 2d 390 (D. Del. 2002).....19

New England Braiding Co., Inc. v. A.W. Chesterton, Co.,
970 F.2d 878 (Fed. Cir. 1992).....14

Pfizer, Inc. v. Teva Pharm. USA, Inc.,
429 F.3d 1364 (Fed. Cir. 2005).....10, 18, 19

Philips v. AWH Corp.,
415 F.3d 1303 (Fed. Cir. 2005).....10

Polymer Techs., Inc. v. Bridwell,
103 F.3d 970 (Fed. Cir. 1996).....9, 15, 17

PPG Indus., Inc. v. Guardian Indus. Corp.,
75 F.3d 1558 (Fed. Cir. 1996).....17

Revision Military, Inc. v. Balboa Mfg., Co.,
700 F.3d 524 (Fed. Cir. 2012).....9

Teleflex, Inc. v. Ficosa North Am. Corp.,
299 F.3d 1313 (Fed. Cir. 2002).....10

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008).....9

STATUTES

35 U.S.C. § 282.....10, 14

35 U.S.C. § 283.....9

35 U.S.C. § 285.....8

I. INTRODUCTION

Plaintiff CooperSurgical, Inc. ("CSI") seeks a preliminary injunction to prevent defendants Teleflex Medical Incorporated and Teleflex, Inc. (collectively "Teleflex") from further infringement of United States Patent No. 5,507,758 ("the '758 Patent"). Left unabated, Defendants' sale and distribution of its infringing EFx Endo Fascial Closure System ("the EFx Device") will cause CSI irreparable harm.

CSI is in the final year of the term of exclusivity for the '758 Patent. CSI made a substantial investment in capital and resources to introduce a new and improved closure device during this final year of exclusivity. Teleflex's willful infringement is disrupting the market and delaying CSI's efforts to have its new product qualified. Monetary damages alone cannot remedy this harm. Teleflex is also clearly relying on the fact that the likelihood of trial and the imposition of a permanent injunction before the patent expires is remote.

Plaintiff has attempted to resolve this dispute amicably. CSI placed Benson Smith, the President and CEO of Teleflex, on notice of the '758 Patent after Teleflex agreed to buy the company that designed the accused product. Mr. Smith and his counsel ignored CSI's letters for four months before providing a non-substantive response. Teleflex never even responded to CSI's detailed explanation as to why the EFx Device infringed the '758 Patent. Rather than trying to justify its willful infringement, in November 2012, Teleflex launched a full-fledged introduction of its infringing EFx Device. Since monetary damages are inadequate to compensate CSI for Teleflex's infringement, and since entry of a permanent injunction before the '758 Patent expires is unlikely, a preliminary injunction is critical to protect CSI's patent rights.

II. STATEMENT OF FACTS

A. The '758 Patent

The application for the '758 Patent was filed on October 19, 1993 and was based in part on an earlier application, U.S. Patent Application Serial No. 112,585, filed August 25, 1993. See Auerbach Decl., Ex. A.[1] The '758 Patent, entitled "Insertable Suture Grasping Probe Guide, And Methodology For Using Same" is directed towards a surgical device that assists a surgeon in closing a wound after surgery. *Id.*, Ex. A.

More specifically, the invention of the '758 Patent relates to improvements in suturing tissue during laparoscopic surgery. *See Id.*, Ex. A, col. 1, ll. 8-10. *See also*, Chura Decl., ¶ 8.[2] A laparoscopic "procedure involves making small surgical incisions in a patient's body for the insertion of trocar tubes thereby creating access ports into the patient's body. Thereafter, various types of . . . laparoscopic instruments are passed through these access ports and the appropriate surgical procedures are carried out." Auerbach Decl., Ex. A, col. 1, ll. 13-18; Chura Decl., ¶ 8. After the laparoscopic procedure is performed, the trocar tubes are removed and the incisions are sutured closed. Auerbach Decl., Ex. A, col. 1, ll. 19-20; Chura Decl., ¶ 8. "This procedure for closure is frequently a time-consuming procedure requiring the identification of the fascia and closure of each fascial site with suture from an external point." Auerbach Decl., Ex. A., col. 1, ll. 21-24.

The necessity for closing these port sites in laparoscopic surgery is critical since not suturing or suturing the incisions improperly can lead to bowel herniation through the port sites. *Id.*, Ex. B, col. 1, ll. 25-27; Chura Decl., ¶ 8. Examples of port site hernias and the clinical and

[1] The Declaration of Dr. Robert D. Auerbach in Support of Plaintiff's Motion For Preliminary Injunction ("Auerbach Decl., ¶ __ or Ex. __") is filed concurrently herewith.

[2] The Expert Declaration of Justin Chura, M.D. In Support Of Plaintiff's Motion For Preliminary Injunction ("Chura Decl., ¶ __ or Ex. __") is filed concurrently herewith.

cost implications of these complications can be seen in Chura Decl., Ex. E. The invention that is disclosed and claimed in the '758 Patent allows for accurate closure of port site incisions thereby alleviating these problems. Chura Decl., ¶ 8.

B. The Patented Carter-Thomason I Products

The CSI products covered by the '758 Patent are called the Carter-Thomason CloseSure System (the "Carter-Thomason I Device").[3] Auerbach Decl., ¶ 5; Young Decl., ¶ 3.[4] The Procedure Guide for this device illustrates how the product is used to close port sites after laparoscopic surgery. Young Decl., Ex. A. Basically, a suture passer is used in conjunction with a suture ("pilot") guide to assist the surgeon in properly closing an opening that is generally created from insertion of a trocar in the abdomen. *See* Young Decl., ¶ 5.

In October 1996, the Journal of the American College of Surgeons published a study titled "Comparative Clinical Study of Port-Closure Techniques Following Laparoscopic Surgery." Auerbach Decl., ¶ 5 and Ex. B; Young Decl., ¶ 6 and Exs. B and C. The study examined eight different port-site closure techniques, including the Carter-Thomason I Device. Young Decl., ¶ 6. The Carter-Thomason I Device was found to be "faster overall" and "resulted in fewer port-closure-related complications and provided a leak proof closure." Young Decl., ¶ 6; Ex. B at 335.

In fact, the Carter-Thomason I Device "was used to close 11 ports with a 100% success rate. The closure was consistently precise and secure. No bleeding or gas leakage occurred, and no revisions of the closure was necessary." Young Decl., ¶ 7 and Ex. B at 341. The study

[3] Dr. James E. Carter and Rodger Thomason were two of the named inventors on the '758 Patent. *See* Auerbach Decl., ¶ 4 and Ex. A.

[4] The Declaration of James A. Young In Support Of Plaintiff's Motion For Preliminary Injunction ("Young Decl., ¶ __ or Ex. __") is filed concurrently herewith.

concluded that "[t]he Carter-Thomason device is our preferred method for the closure of port sites after laparoscopic surgery." Young Decl., ¶ 6 and Ex. B at 335; Auerbach Decl., ¶ 5.

The Carter-Thomason I Device is widely considered to have set the standard of care in the medical profession for the closure of port-site openings. Auerbach Decl., ¶ 5. Young Decl., ¶ 8. This product has captured over 90% of the market for such medical devices and is CSI's best selling product. Young Decl., ¶ 8.

C. The Accused Weck EFx Device

The Weck EFx Device directly competes with the Carter-Thomason I Device. *See* Young Decl., ¶ 11. Like the Carter-Thomason I Device, the Weck EFx System uses a "suture passer" in conjunction with a suture guide to assist the surgeon in properly closing an opening in the abdomen created from insertion of a trocar. *See* Chura Decl., ¶¶ 10-11; Exs. C and D; *see also*, Collins Decl., ¶¶ 7-8; Exs. D and E.[5] The Weck EFx suture passer and suture guide are illustrated below (*Id.*):

[5] The Expert Declaration of John Collins, Ph.D. in Support of Plaintiff's Motion for Preliminary Injunction ("Collins Decl., ¶ __; Ex. __") is submitted concurrently herewith.

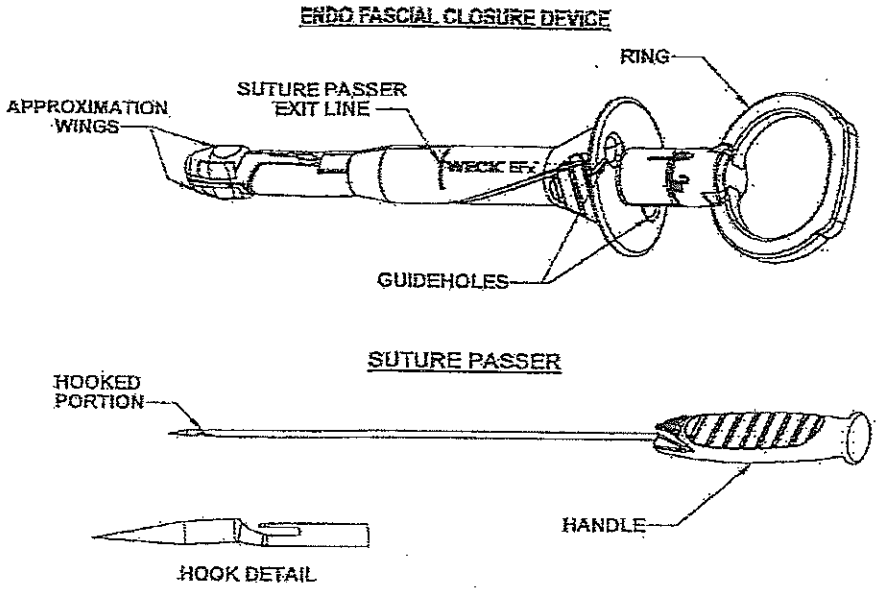


Figure 1

The company that designed the Weck EFx Device, Axiom Technology Partners, LLC ("Axiom"), filed a Section 510(k) notification ("510(k)") with the Food and Drug Administration ("FDA") in 2011. In the 510(k), Axiom advised the FDA that their closure system "is substantially equivalent with regard to indications for use, general technological characteristics, principle of operation, and materials" as compared to the predicate CSI Carter-Thomason I Device. Auerbach Decl., ¶ 10; Ex. C. To the best of CSI's knowledge, Axiom was not in the business of manufacturing and selling medical devices. Auerbach Decl., ¶ 10. In fact, Axiom offered to sell their technology to CSI. *Id.*, ¶¶ 7-9. After CSI declined, Axiom sold its technology to Teleflex in the Spring of 2012. Auerbach Decl., ¶ 11.

D. Efforts To Resolve The Dispute

On or about May 1, 2012, CSI learned that Teleflex had purchased Axiom. Auerbach Decl., ¶ 11. Therefore, on May 14, 2012, counsel for CSI sent a letter to the Chairman, President

and CEO of Teleflex, Inc. placing Teleflex on notice of the '758 Patent and advising the company that CSI believed the EFx Suture Guide infringed at least Claim 1 of the '758 Patent. Bannon Decl., Ex. 1.[6] Prior to that time, CSI did not believe the EFx Suture Guide was a concern. Auerbach Decl., ¶ 10.

CSI expected a response from Teleflex but never received one. Therefore, on June 22, 2012, counsel for CSI sent a second letter to Benson Smith, the President and CEO of Teleflex, asking for a response by July 9, 2012. Bannon Decl., Ex. 2. CSI was hoping that Teleflex would respect the '758 Patent and wait until the patent expired in October 2013.

On July 9, 2012, counsel for Teleflex finally responded that he was in receipt of both letters to Benson Smith, that he was "in the process of reviewing this matter and will provide an appropriate response in due course." Bannon Decl., Ex. 3.

By September 6, 2012, almost two months later, Teleflex still had not responded. Therefore, counsel for CSI sent another letter stating: "[i]f either you or Teleflex intends to respond, please do so by September 20, 2012. Otherwise, we will assume that no response will be forthcoming." Bannon Decl., Ex. 4.

Finally, on September 20, 2012, the long-awaited response by Teleflex on infringement of the '758 Patent by the Weck EFx Device arrived. However, after four and one-half months of study, the best that Teleflex and its counsel could come up with was the following: "We have completed our preliminary review of this matter and conclude that the '758 Patent does not contain any valid and/or enforceable claims that would read on the accused products." Bannon Decl., Ex. 5. This conclusory, boiler-plate response (i) did not identify even one ground or piece

[6] The Declaration of Edmond R. Bannon in Support of Plaintiff's Motion For Preliminary Injunction ("Bannon Decl. Ex. __") is filed concurrently herewith.

of prior art to support an invalidity defense; (ii) did not identify even one element of the patent claims that did not appear in the Weck EFx Device; and (iii) did not identify even one fact that could possibly support an unenforceability defense. It seemed to CSI after receiving this letter that the strategy being employed by Teleflex was not to address the merits, but rather, to delay for as long as possible.

Therefore, on October 2, 2012, in a final effort to reason with Teleflex, counsel for CSI provided a detailed explanation of CSI's infringement position which included the following claim chart:

CLAIM 1 OF '758 Patent		EFx Closure System
(a)	A device for accurately guiding and positioning a surgical instrument bearing suture material to a predetermined area within the body for closing an open wound, comprising:	Yes. *See* animation for the WECK EFx Endo Fascial Closure System on http://teleflex.orlive.com.
(b)	a guide means having a longitudinal axis and distal and proximal ends,	Yes. The EFx System has a longitudinal axis with distal and proximal ends. *Id.*
(c)	and further having a depth-limiting extending lip near said distal end of said guide means and being generally perpendicular to said longitudinal axis,	Yes. The EFx System has an extending lip near the distal end which is generally perpendicular to the longitudinal axis and limits the depth that the suture guide may be inserted. *Id.*
,dK	wherein said proximal end is for insertion into the wound to a depth limited and determined by said extending lip,	Yes. The proximal end is inserted into the wound and the depth is limited by the extending lip. *Id.*
(e)	said guide means defining therein at least one generally linear passageway therethrough at a first diverging angle less than 90° from said longitudinal axis,	Yes. The EFx System has two linear passageways that have diverging angles less than 90°. *Id.*

(f)	and providing for exit holes above and below said lip,	Yes. There are exit holes above and below the lip. *Id.*
(g)	wherein said proximal end of said guide is tapered and positionable within said wound with the lip portion above the wound to be closed	Yes. The proximal portion of the EFx is tapered and is intended to be positioned within the wound while the lip portion stays above the wound to be closed. *Id.*
(h)	and the surgical instrument carrying suture material passed through said passageway at said angle to the predetermined area within the body to assist in closing the open wound.	Yes. The suture passer carries suture material and passes through the linear passageway to assist in closing the wound. *Id.*

Bannon Decl., Ex. 6. At the end of that letter, CSI suggested that Teleflex discontinue its infringing activities until the '758 Patent expired and further warned that given the lack of any basis for continuing its infringing activities, if CSI was forced to pursue litigation, it would seek treble damages and an award of its attorneys' fees pursuant to 35 U.S.C. § 285. *Id.*

Teleflex never responded to CSI's October 2, 2012 letter. By November 2012, it became clear that Teleflex had no intention of respecting the '758 Patent. At the AAGL trade show in Las Vegas, Nevada, Teleflex launched a full-fledged introduction of its infringing Weck EFx Device. Auerbach Decl., ¶ 12. It became clear at that time that Teleflex had no intention of respecting the '758 Patent and was attempting to get a one-year head start on introducing a product that would compete with the patented Carter-Thomason I suture guide. *See Id.* Therefore, CSI began preparations to file this action and move for a preliminary injunction. *Id.*

III. STATEMENT OF LAW

The grant or denial of a preliminary injunction under 35 U.S.C. § 283 in a patent infringement case is within the sound discretion of the district court. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 973 (Fed. Cir. 1996). Section 283 permits the Court to grant injunctions "in accordance with principles of equity to prevent the violation of any rights secured by patent, on such terms as the Court deems reasonable." 35 U.S.C. § 283.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted). These factors "apply with equal force to disputes arising under the Patent Act." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Polymer Techs., Inc.*, 103 F.3d at 973.

The Federal Circuit recently held that the movant in a patent case "need not meet the Second Circuit's heightened 'clear or substantial likelihood' standard, but rather [should meet] the Federal Circuit's standard of whether success is more likely than not." *Revision Military, Inc. v. Balboa Mfg., Co.*, 700 F.3d 524, 526 (Fed. Cir. 2012).

IV. ARGUMENT

CSI produces and sells specialized medical devices which assist doctors in properly treating their patients. Auerbach Decl., ¶ 1. CSI has invested heavily in the exclusive rights that the government provides when it grants a valid patent. *See* Auerbach Decl., ¶ 4. Unless the Court grants the injunctive relief requested by this motion, CSI will be irreparably harmed.

A. CSI Has More Than A Reasonable Likelihood Of Success On The Merits

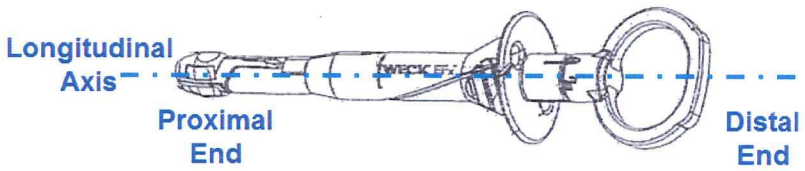
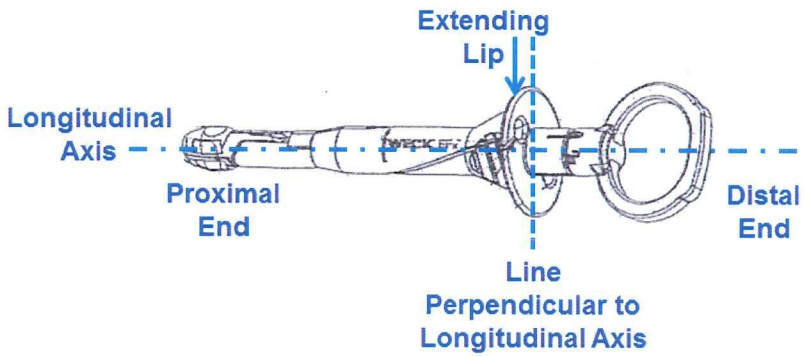
The first factor to consider is whether CSI can show that it is more likely than not that Claim 1 of the '758 Patent is valid and infringed. As discussed below, infringement in this case is straightforward. As for validity, during the communications between the parties discussed above, Teleflex did not identify any prior art or even one basis for invalidating Claim 1 of the '758 Patent; therefore, the patent is presumed valid. 35 U.S.C. § 282.

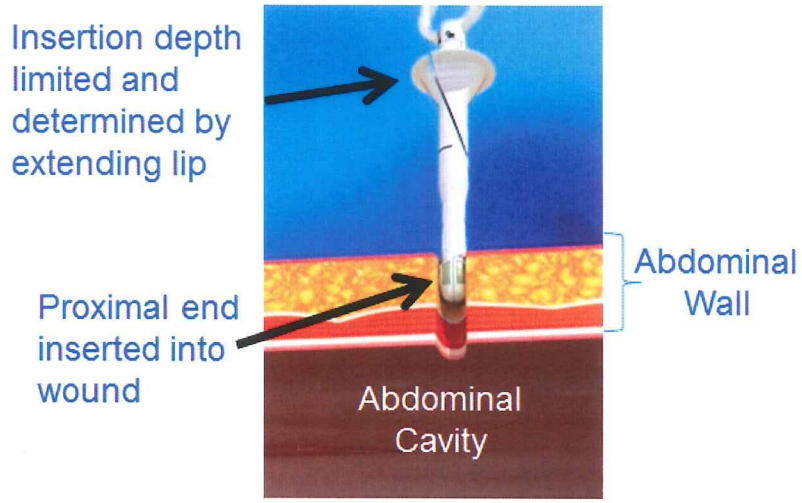
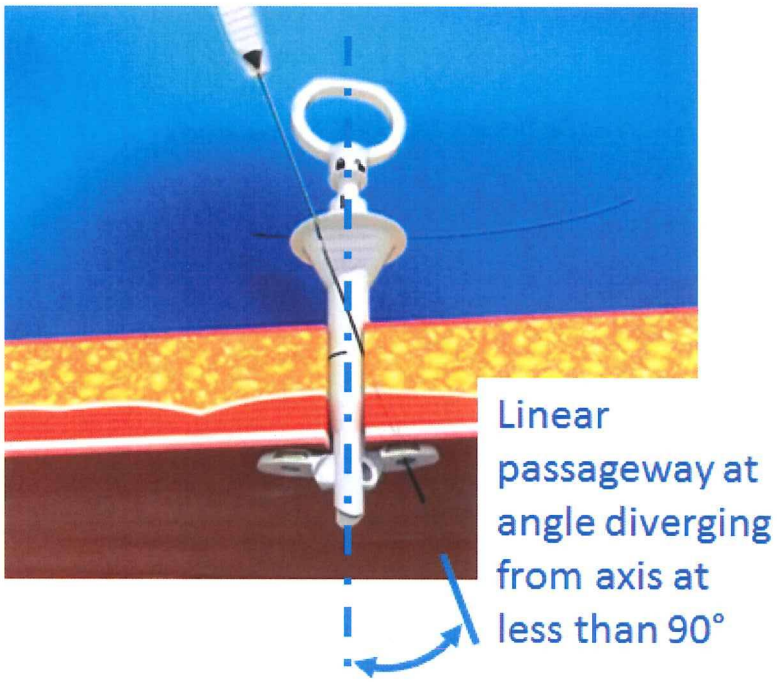
1. The Weck EFx Device Infringes At Least Claim 1 Of The '758 Patent

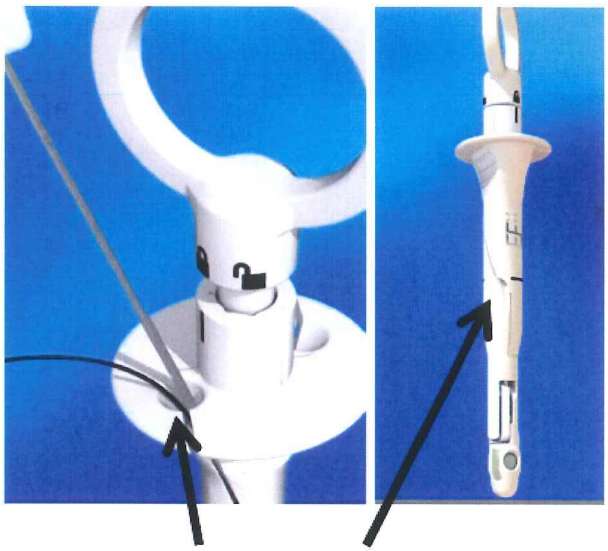
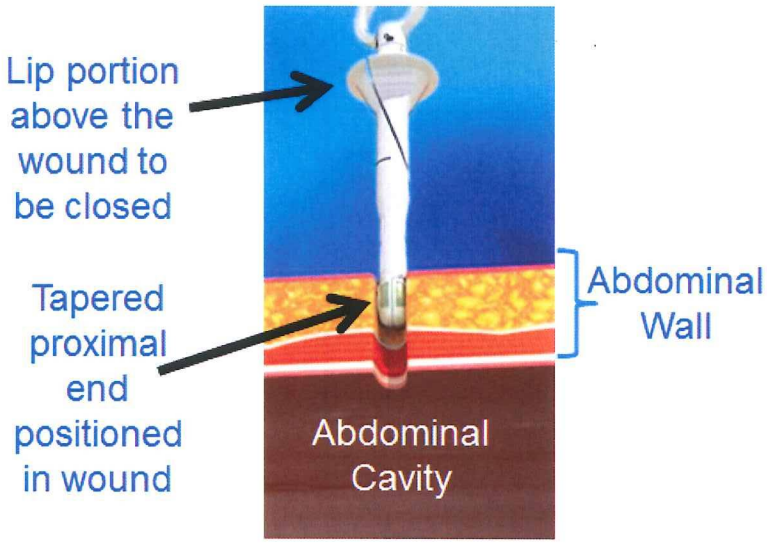
The infringement analysis is a two-step process: first, the claims must be construed and second, the properly construed claims must be applied to the accused device. *See Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1372 (Fed. Cir. 2005).

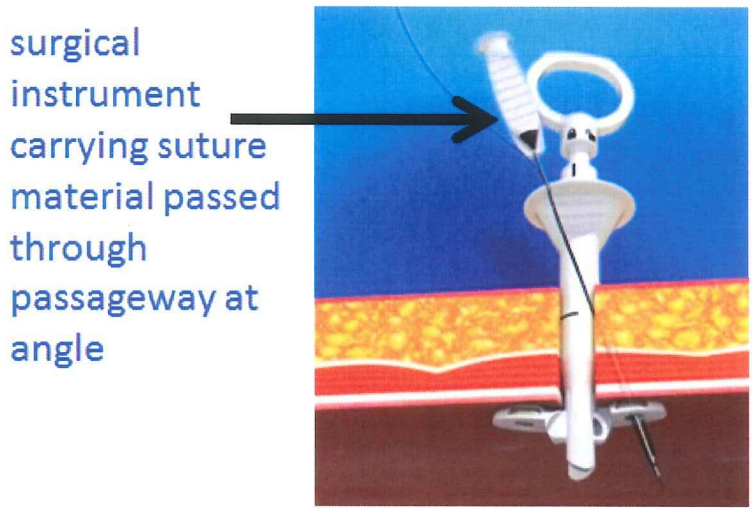
In the communications between the parties, Teleflex did not identify any terms in Claim 1 that would require construction by the Court. CSI agrees. Claims are generally given their ordinary and customary meaning as understood by one of ordinary skill in the art. *Philips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (en banc). Indeed, there is "a heavy presumption" that a claim term carries its ordinary and customary meaning. *Teleflex, Inc. v. Ficosa North Am. Corp.*, 299 F.3d 1313, 1315 (Fed. Cir. 2002). The ordinary meaning of a claim term is its meaning to the ordinary artisan after reading the entire patent. *Phillips*, 415 F.3d at 1321. Where the ordinary meaning of a claim term is "readily apparent," claim construction "involves little more than the application of the widely accepted meaning of commonly understood words." *Id.* at 1314. Therefore, in performing their infringement analyses, Dr. John Collins and Dr. Justin Chura used the plain meaning of the words appearing in Claim 1. *See* Collins Decl., ¶¶ 6-8; Chura Decl., ¶¶ 9-11.

As can be seen in the accompanying Declaration of Dr. Collins, each and every element of Claim 1 of the '758 Patent is present in the accused Weck EFx Device. Dr. Collins, provides the following claim chart in ¶ 8 of his Declaration to illustrate this point.

CLAIM 1 OF '758 Patent		**EFx Closure System**
(a)	A device for accurately guiding and positioning a surgical instrument bearing suture material to a predetermined area within the body for closing an open wound, comprising:	The EFx brochure, the EFx Instructions and the Teleflex animation show that the Weck EFx Endo Fascial Closure Device ("the EFx Device") is a device for accurately guiding and positioning a suture passer which carries suture material to a predetermined area within the body for closing an open wound.
(b)	a guide means having a longitudinal axis and distal and proximal ends,	The EFx brochure, Instructions and the Teleflex animation show that the EFx Device has a longitudinal axis with distal and proximal ends. 
(c)	and further having a depth-limiting extending lip near said distal end of said guide means and being generally perpendicular to said longitudinal axis,	The EFx brochure, Instructions and the Teleflex animation show that the EFx Device has an extending lip near the distal end which is generally perpendicular to the longitudinal axis and limits the depth that the suture guide may be inserted. 

(d)	wherein said proximal end is for insertion into the wound to a depth limited and determined by said extending lip,	The EFx brochure, Instructions and the Teleflex animation show that the EFx Device has a proximal end. The proximal end is inserted into the wound and the depth is limited and determined by the extending lip. 
(e)	said guide means defining therein at least one generally linear passageway therethrough at a first diverging angle less than 90° from said longitudinal axis,	The EFx System has two linear passageways that have diverging angles less than 90°. *See* the EFx brochure, Instructions and the Teleflex animation. 

(f)	and providing for exit holes above and below said lip,	There are exit holes above and below the lip. *Id.* 
(g)	wherein said proximal end of said guide is tapered and positionable within said wound with the lip portion above the wound to be closed	The proximal portion of the EFx Device is tapered and is intended to be positioned within the wound while the lip portion stays above the wound to be closed. *Id.* 

(h)	and the surgical instrument carrying suture material passed through said passageway at said angle to the predetermined area within the body to assist in closing the open wound.	The suture passer carries suture material and passes through the linear passageway to assist in closing the wound. *Id.* 

Similarly, Dr. Chura, a surgeon who uses these types of devices in his practice, also found that each and every element of Claim 1 of the '758 Patent is present in the Teleflex Weck EFx Device. *See* Chura Decl., ¶ 11 .

2. The '758 Patent Is Presumptively Valid

Although the patentee carries the burden of establishing a likelihood of success on the validity issue, patents are presumed valid and this presumption exists at every stage of the litigation, including the preliminary injunction stage. *See* 35 U.S.C. § 282; *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998); *New England Braiding Co., Inc. v. A.W. Chesterton, Co.*, 970 F.2d 878, 883 n.4 (Fed. Cir. 1992). Thus, where the alleged infringer "fails to identify any persuasive evidence of invalidity, the very existence of the patent satisfies the patentee's burden on the validity issue." *Canon Computer Sys.*, 134 F.3d at 1088.

B. CSI Will Be Irreparably Harmed Without A Preliminary Injunction

To satisfy the irreparable harm factor in a patent infringement action, the patent owner must establish: (1) that absent an injunction, it will suffer irreparable harm, and (2) that a sufficiently strong causal nexus relates to the alleged harm to the alleged infringement. *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012).

Furthermore, many Courts have held that if the patent owner makes a clear showing of likely success on the merits, irreparable harm is presumed. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 973 (Fed. Cir. 1996); *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987). Regardless, both factors discussed in *Apple* are present here.

1. Teleflex Is Causing CSI Irreparable Harm

The exclusive rights provided by the '758 Patent was an important factor in why CSI invested in Inlet Medical, Inc. Auerbach Decl. ¶ 4. The product covered by the '758 Patent has captured over 90% of the market for port-closure devices and is CSI's best selling product. Young Decl., ¶ 8. However, the '758 Patent has less than one year of enforceability remaining on the patent term. CSI planned to use this remaining year of exclusivity to introduce a new product – The Carter-Thomason II Port Closure System. *See* Young Decl., ¶ 9. CSI made a substantial capital investment to launch this new product and to have it approved for use in hospitals. Young Decl., ¶ 10. CSI hired sixteen clinical specialists to assist in helping hospitals either add this new device or convert from the Carter-Thomason I Device to the Carter-Thomason II Device. *Id.*, ¶ 10. In order for a hospital to add or convert to a new product, the hospital will typically require that a committee of surgeons within the hospital use the product on several occasions. *Id.*, ¶ 10. This process can take two or more months in large hospitals when only one product is being evaluated. *Id.* ¶ 10. If the Committee must evaluate two products,

such as the Carter-Thomason II Device and the Weck EFx Device, then twice as many procedures are required and the qualification process will commonly take twice as long. *Id.* ¶ 10. Money damages alone cannot remedy the harm caused by this delay.

In *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987), the Federal Circuit found it significant that patent expiration is not suspended during litigation and the passage of time can work irremediable harm: "The opportunity to practice an invention during the notoriously lengthy course of patent litigation may itself tempt infringers." *Id.* That is exactly the situation here where Teleflex is clearly willfully infringing the '758 Patent in order to get a head start on competition with CSI after the patent expires. Teleflex knows that it needs many months (or longer) to have its Weck EFx Device qualified in hospitals. Since each hospital only needs a handful of infringing devices during the qualification process, any monetary damages during the evaluation period would be limited. Teleflex's willful infringement now will have a huge effect on CSI and the market later on. For example, by willfully infringing CSI's '758 Patent now, in addition to disrupting the qualification trials of the Carter-Thomason II Device, Teleflex will be in position to make significant sales immediately after the patent expires.

The Court of Appeals for the Federal Circuit has emphasized that an infringer's effect on the marketplace can cause irreparable harm:

> Competitors change the marketplace. Years after infringement has begun, it may be impossible to restore a patentee's (or an exclusive licensee's) exclusive position by an award of damages and permanent injunction. Customers may have established relationships with infringers. The market is rarely the same when a market of multiple sellers is suddenly converted to one with a single seller by legal fiat.

Polymer Techs., 103 F.3d at 975-76 (internal citations omitted). Here, a permanent injunction will not even be available because of the time that it will take to get to trial. Money damages will clearly not make CSI whole for this present breach of its exclusivity period.

Teleflex has also been targeting many of CSI's largest accounts and offering its EFx Device for 30% per unit less than CSI's Carter-Thomason I Device. Young Decl., ¶ 11. Hospitals often choose products based on price. *Id.* Therefore, if Teleflex's infringing activities are left unabated, CSI will lose market share and have to lower its prices during the patent term in order to compete. Young Decl., ¶ 11. Many courts, including this Court, have held that a patent owner is being irreparably harmed in similar circumstances because money damages would not be an adequate remedy. *See, e.g.*, *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1361-62 (Fed. Cir. 2008); *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1566-67 (Fed. Cir. 1996). *See also*, *Canon, Inc. v. GCC International Ltd., et al.*, 450 F. Supp. 2d, 243, 255-6 (S.D.N.Y. 2006), *aff'd*, No. 2006-1615, 2007 U.S. App. LEXIS 26584, at *10 (Fed. Cir. Nov. 16, 2007) ("competition from Defendants will likely result in substantial price erosion of Canon's patented product as well as loss of Canon's market share . . . an award of money damages would not be sufficient.")

2. There Is A Direct Casual Connection Between The Harm To CSI And Teleflex's Infringement

Unlike the situation in *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 695 F.3d at 1374, Claim 1 of the '758 Patent covers the entire Weck EFx Device. If the Court enjoins the sale of this positioning device, the suture passer alone would become useless and the Weck EFx System could not be sold. *See* Chura Decl., ¶ 12. Therefore, it cannot be disputed that there is a direct causal connection between the infringement of Claim 1 by Teleflex and the harm to CSI based on that infringement.

C. The Balance Of Hardships Favors Entry Of A Preliminary Injunction

In contrast to the harm to CSI discussed above, the only potential hardship that Teleflex faces if enjoined is the postponement of profits from infringement of the '758 Patent until after the patent expires in October 2013. *See, e.g.*, *AstraZeneca LP v. Apotex*, Inc., 623 F. Supp. 2d 579, 614 (D.N.J. 2009) ("if this Court issues the preliminary injunction, the only hardship Apotex faces is a loss of profits pending the outcome of a trial on the merits.") *aff'd* 633 F.3d 1042 (Fed. Cir. 2010). Since the launch of the Weck EFx Device just recently occurred at the AAGL trade show (see Auerbach Decl., ¶ 12), even that harm to a multi-billion dollar corporation[7] is de minimis.

Furthermore, since the '758 Patent expires in less than a year, the effect of a preliminary injunction to Teleflex is minimal. Any loss to Teleflex of market share or customer relationships at this time cannot "rise to the level necessary to overcome the loss of exclusivity experienced by a patent owner due to infringing conduct." *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1382 (Fed. Cir. 2005). The balance of hardships clearly favors granting a preliminary injunction.

[7] Teleflex has assets of almost 4 billion dollars. See Bannon Decl., Ex. 7.

D. The Public Interest Will Be Served By Entry Of A Preliminary Injunction

Finally, the public interest will be served by entry of a preliminary injunction against Teleflex. Courts considering this factor have consistently acknowledged the public interest in a strong patent system and public policy favoring the enforcement of patent rights. *See, e.g.*, *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006) ("the public interest is best served by enforcing patents that are likely valid and infringed."); *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1382 (Fed. Cir. 2005) ("A preliminary injunction that enforces a valid patent against an infringer does no more than further public policy inherent in the patent laws designed to encourage useful inventions by rewarding the inventor with a limited period of market exclusivity."); *Impax Lab., Inc. v. Aventis Pharm., Inc.*, 235 F. Supp. 2d 390, 396 (D. Del. 2002) ("The public has an interest in the enforcement of valid patents.").

In this case, an injunction against the sale of the Weck EFx Device cannot adversely affect the public interest. CSI will be able to meet demand as it has for many years. No surgeon will be deprived and no patient will go untreated because of the injunction.

V. CONCLUSION

CSI respectfully requests that this Court enjoin Teleflex from infringing, inducing infringement and contributing to the infringement of Claim 1 of the '758 Patent by making, using, offering to sell or selling in the United States infringing devices, including specifically the Weck EFx Endo Fascial Closure System and other substantially identical products and from inducing or contributing to such infringement by others.

Respectfully submitted,

FISH & RICHARDSON P.C.

Dated: January 10, 2013

By: Edmond R. Bannon

Edmond R. Bannon (EB0494)
FISH & RICHARDSON P.C.
601 Lexington Avenue, 52nd Floor
New York, New York 10022
Tel: (212) 765-5070
Fax: (212) 258-2291
Email: bannon@fr.com

Attorneys for Plaintiff
CooperSurgical, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 10, 2013, a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was served on the following counsel for Defendants by Federal Express priority overnight mail, upon:

Lawrence M. Sung, Esq.
Baker Hostetler
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304
lsung@bakerlaw.com

A copy of this document is also being served by hand on the Defendants with the Summons and the Complaint at the following addresses:

Teleflex Medical Incorporated
c/o Corporation Service Company
80 State Street
Albany, New York 12207

Teleflex, Inc.
155 S. Limerick Road
Limerick, PA 19468

Lisa Y. Ng

30730721.doc