

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 11-cv-62591**

ACR ELECTRONICS, INC.,  
a Florida Corporation,

Plaintiff,

v.

DME Corporation, a Florida corporation,  
CCK ELECTRONICS LLC,  
a Florida limited liability company,  
CHUNG T. TONG,  
CLAUDIO CASSINA, and  
KAIYU WU,

Defendants.

**ACR ELECTRONICS, INC.'s**  
**PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

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KAIYU WU,

Defendants.

**PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

**PROPOSED FINDINGS OF FACT**

**I. BACKGROUND**

1. Plaintiff ACR Electronics, Inc. designs and develops sophisticated safety and survival products, and has provided safety equipment to the aviation and marine industries, as well as to the United States military, since 1956. Wilkerson PI Decl., ¶ 1. One piece of portable emergency equipment designed and manufactured by ACR is a 406 MHz PLB that transmits a distress signal to search and rescue (SAR) organizations to aid SAR teams in tracking and locating ships or individuals in jeopardy as rapidly as possible. Wilkerson PI Decl., ¶ 2.

2. ACR has developed and sold a variety of personal locator beacons over the years, including the PLB-300, the AquaLink PLB-350, and the ResQLink PLB-375. ACR had 10-12 engineers working on the development of its PLB-375 product, who collectively devoted approximately 17,785 hours to create the product. Pack PI Decl., ¶ 18 and Ex. D. The PLB-375

is the smallest and lightest PLB approved by the FCC and on the market today. Pack PI Decl., ¶ 2.

3. Until late July 2010, Defendants Chung Tong, Claudio Cassina, and Kaiyu Wu (the “Individual Defendants”) were employed by ACR. Horn PI Decl., ¶¶ 2-4 and Exs. A-C. They all were involved in the development of several of ACR’s PLBs, including its PLB-300, AquaLink PLB-350, and the ResQLink PLB-375, except Mr. Wu was not involved in the development of the PLB-300. PI Testimony at 430:12-16, 455:1-20, 512:5-12, 589:8-10, 690:7-10; Pack PI Decl., ¶ 9, Exs. C and D. ACR’s PLB-375 was still under development at the time the Individual Defendants left ACR in July 2010. PI Testimony at 171:4-18.

4. Defendant DME is in the business of providing safety equipment to the aviation and marine industries in Florida and around the world, and is a direct competitor with ACR. Within a month of their departure from ACR, DME was in discussions with the Individual Defendants to develop a product that would directly compete with the PLB-375. Zelek PI Dec., Ex. D, Cassandra Dep., 19-20, 25-26; Zelek PI Dec., Ex. A, Tong Dep., 42, 131; Horn PI Decl., ¶¶ 2-4 and Exs. A-C; PI Testimony at 384:2-25; Tong’s PI Decl., ¶ 13. DME had not previously sold personal locator beacons. PI Testimony at 402:7-9. In October 2011, DME publicly announced the SATRO, a product that would compete directly with the PLB-375.<sup>1</sup> Wilkerson PI Decl., ¶ 5; PI Testimony at 387:7-10.

5. Defendant CCK Electronics LLC is in the business of beacon technology and is a direct competitor with ACR. CCK and Individual Defendants’ Answer (Dkt. No. 36), ¶ 4.

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<sup>1</sup> As of the hearing on ACR’s motion for preliminary injunction, the SATRO had not yet been submitted to the FCC for approval. PI Testimony at 794:7-795:1. FCC approval is required for the product to be sold or leased in the United States. *See* 47 C.F.R. §2.803, Pack PI Ex. 8; *see also*, FCC Letter to Nexus Engineering Corp., DA 92:473, 1992 WL 695421 \* (F.C.C. Apr. 13, 1992) (radio frequency device may not be made available for sale, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained).

6. It was undisputed that, throughout their employment at ACR and solely for the purposes of fulfilling their job duties at ACR, the Individual Defendants had access to ACR's confidential and trade secret source code and documents, as well as ACR's secured computer servers, which contained ACR's confidential documents, copyright-protected materials, and trade secrets -- including but not limited to source code, customer lists, marketing strategies, and pending projects, including the PLB-375 development work, research strategies, engineering data, technological data, and schematics ("Confidential Information"). Pack PI Decl., ¶ 14. The Individual Defendants were given access to this valuable trade secret information and to ACR's copyright-protected works only to enable them to further ACR's interests as ACR employees. Horn PI Decl., ¶ 8. ACR took precautions to prevent unauthorized access to this Confidential Information by requiring a user name and password to access ACR's computer servers and file structures and prohibiting unauthorized copying, distribution, and use of its copyright protected and confidential documents, software, and technical drawings and schematics. Horn PI Decl., ¶ 8.

7. On July 19, 2010 – just three days after Mr. Wu left his employment at ACR, and while Messrs. Tong and Cassina were still ACR employees – the Individual Defendants registered CCK as a limited liability company with the Florida Secretary of State and listed all Individual Defendants as officers. Pack PI Decl., ¶ 24; PI Ex. Cassina #2. Although Mr. Tong admitted at the hearing that he and Mr. Cassina discussed forming a company together, he denied any knowledge that CCK had already been formed before his last day of work at ACR. PI Testimony at 675:16-676:4.<sup>2</sup>

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<sup>2</sup> Mr. Tong testified at his deposition that he, Mr. Cassina and Mr. Wu each owned of "33.3 percent" when the company was formed. PI Testimony at 676:9-12. In fact, when Mr. Tong

8. A team of ACR employees – at great investment and expense to ACR and over an extended period of time – developed the trade secret and copyright-protected works at issue here, including its source code, its source code specifications, its various circuit designs individually and combined, certain of its component selections individually and as combined, the schematics for its various PLBs, and the extensive research, development, and testing efforts, and documentation thereof, all of which are detailed further below. Pack PI Decl., ¶ 17. All of these things are highly confidential and valuable tools to enable the design and manufacture of PLBs. ACR’s Director of New Product Development, Thomas Pack, testified that if ACR’s competitors had ACR’s copyrighted works and knew of ACR’s confidential information, it would provide them with an unfair competitive advantage because it would save them tens of thousands of dollars in equipment and development costs and dramatically shorten the time it would take them to develop, test, certify, and launch a PLB device, and would place ACR at an unfair competitive disadvantage. Pack PI Decl., ¶ 25.

9. ACR acted reasonably to try to protect its trade secrets. ACR tried to prevent defendants from using, copying, and benefiting from ACR’s confidential and proprietary information and trade secrets. Horn PI Decl., ¶ 11. Less than two months after the Individual Defendants’ resignations, on September 15, 2010, ACR sent letters via certified mail to each of the Individual Defendants enclosing copies of the “Employee Confidential Information & Assignment of Invention Agreement” and reminding them of their contractual obligations. Horn PI Decl., ¶ 11. ACR further put the Individual Defendants on notice that if ACR became aware of a violation of their agreements, ACR would seek all remedies available. Horn PI Decl., ¶ 11.

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email ACR confidential documents to his personal email account he owned a controlling interest of 34 percent, and the others each owned 33 percent. PI Testimony at 470:19-22, 676:5-24.



**A. DME Turns A Blind Eye**

10. Although Mr. Cassandra stated in his sworn declaration that he instructed *all three* of the Individual Defendants in the Fall of 2010 not to disclose any ACR confidential information or any patented intellectual property (Cassandra Decl., ¶ 8), he contradicted this statement at the hearing when he admitted that he *never* admonished Mr. Wu to respect ACR's intellectual property, and that the only time he told this to Messrs. Tong and Cassina was at their initial meeting in August 2010. PI Testimony at 386:1-22 (“Q: And at that August meeting, you told Mr. Tong and Mr. Cassina that they could not disclose any ACR IP or patented information? A: Yes. Q: And that’s the only time you ever told anyone from CCK anything about ACR intellectual property or patented or confidential information? A: Yes. Q: So you never told Mr. Wu about ACR’s IP or patented information? . . . A: Not that I recall.”).

11. Mr. Wu confirmed he was never told by anyone at DME that he should not use ACR proprietary information in the course of his work on the SATRO code. PI Testimony at 656:6-9. Moreover, neither Mr. Tong nor Mr. Cassina ever told Mr. Wu that they thought it was important that he not use any ACR proprietary information in the course of his work for DME. PI Testimony at 656:10-13. No one from DME ever asked Mr. Wu about his approach for writing the software. PI Testimony at 656:14-16. No one from DME ever asked Mr. Wu whether the source code he had written was all original. PI Testimony at 656:17-19. No one reviewed Mr. Wu’s work, and he did not document his software development process. PI Testimony at 620:9-16.

12. In addition, although DME knew its planned PLB would compete with ACR in the beacon market (PI Testimony at 387:7-10) and knew that CCK could develop a beacon based on their past development experience at ACR (PI Testimony at 387:17-388:1), DME never asked or even considered asking anyone at CCK to sign an agreement obligating them not to use ACR

information or technology. PI Testimony at 386:24-387:3. DME also never provided anything in writing to CCK instructing them not to use any ACR proprietary information. Cassina Dep. at 107.

13. DME was aware that Mr. Cassina relied on some of his work from ACR, but did not do anything about it. Cassandra Dep. at 85-86.

14. Mr. Cassina could only remember one instance when Mr. Cassandra told him not to use ACR proprietary information, but Mr. Cassina does not recall responding to Mr. Cassandra and he made no notes of Mr. Cassandra's statement. Cassina Dep. 104-106. Although Mr. Tong claims that CCK did not disclose or use any ACR confidential or proprietary information (Tong Decl., ¶ 32), he clearly lacked personal knowledge of how Mr. Cassina and Mr. Wu worked (PI Testimony at 707:23-708:10) and his conclusion is not credible in light of his own actions and his admitted knowledge of the ACR design choices and schematics, as compared to the CCK design choices and schematics, discussed further below.

15. Dr. Stephen B. Hepe, ACR's expert opined that the development schedule proposed by CCK was unrealistically short given the size of the development team (4 men working out of their homes) and the absence of an existing product portfolio on which CCK could properly rely for their development work. Hepe Decl., ¶ 51.

**B. ACR's Motion for Preliminary Injunction Was Timely Filed**

16. Although ACR discovered in early August 2010 that Mr. Tong sent emails containing ACR's confidential information from his ACR e-mail account to his personal e-mail account and to Mr. Cassina and Mr. Wu's ACR e-mail accounts, the evidence is clear that ACR in August 2010 had no reason to believe that Mr. Tong (or Messrs. Cassina and Wu) had or would in the future disclose or use that information, much less to unfairly compete with ACR. Pack PI Decl., ¶ 16; and PI Testimony at 228:14-22. ACR did not have reason to believe that

Mr. Tong, Mr. Cassina, Mr. Wu and CCK misappropriated its trade secrets until Mr. Pack was able to review sales brochures and a press release regarding the SATRO on October 24, 2011. PI Testimony at 230:4-232:24.

17. The Individual Defendants intentionally concealed their plan to form CCK and to compete directly with ACR. Mr. Pack further testified that the Individual Defendants left ACR in good standing, departing after a farewell lunch and best wishes. PI Testimony at 228:14-22. The Individual Defendants did not tell Mr. Pack or any other ACR manager that they were planning to work together, much less form their own competing company. To the contrary, Mr. Tong informed Mr. Pack that he was resigning because he was stressed, that he planned to go back to Vietnam, and he did not know what he was going to do. PI Testimony at 216:3-13. Mr. Cassina told Mr. Pack he was going to take a trip to Argentina. PI Testimony at 228:14-22; *see also* PI Testimony 472:1-6. Mr. Wu told Mr. Pack that he did not have another job lined up and that he planned to rest after leaving ACR's employment due to his physical condition. PI Testimony at 216:14-19.

18. Mr. Cassina arranged for CCK to be created while still employed at ACR. PI Testimony at 467:12-468:7. He and Mr. Wu discussed leaving ACR at least one month prior to leaving, and they discussed forming a company when they resigned. PI Testimony at 467:4-11.

19. In the Spring of 2011, Mr. Tong contacted ACR Director of Sales Ron Crowder, and expressed interest in doing some work for ACR. PI Testimony at 677:23-678:1. To facilitate their discussions, Mr. Pack sent a non-disclosure agreement ("NDA") for Mr. Tong to sign. Thereafter, Mr. Pack met with Mr. Tong for lunch in June 2011 and, to Mr. Pack's surprise, Mr. Cassina joined them. PI Testimony at 218:7-19. At the beginning of their lunch meeting, Mr. Pack asked Mr. Tong to sign the NDA but, since he refused to sign, they had just a

social lunch. PI Testimony at 182:15-19. At no time did Mr. Tong or Mr. Cassina mention that they and/or CCK were working with DME on the development of a personal locator beacon. PI Testimony at 216:23-217:7. When Mr. Pack met with Messrs. Tong and Cassina for lunch, he was not aware of any of their meetings with DME or their work for DME. PI Testimony at 219:14-18, 220:1-12. That would have been important information for Mr. Pack to have. PI Testimony at 219:21-25, 220:13-18. If Mr. Pack had known these facts, he would not have had lunch with them and “[he] would have been put on guard that possible unfair competition was happening.” PI Testimony at 220:17-18.

20. On October 24, 2011, Mr. Pack reviewed a press release and brochures announcing DME’s intention to launch the SATRO in December 2011, which was *the first time* that ACR discovered that:

- CCK and the Individual Defendants were working on DME’s personal locator beacon product (SATRO);
- The SATRO design has similarities with ACR’s proprietary design in its PLB-375 device which first became available for sale to the public in July 2011, including the fact that it has three batteries and those batteries were two-thirds A (assuming they are lithium) like ACR’s PLB-375; the GPS antenna is of a size and nature that is very similar to the GPS module ACR used and had to test extensively in the design and development of the PLB-375; the antenna is a wraparound, lock-in, deployable-type antenna; and the microcontroller appeared to be the same as or similar to the one ACR used in its PLB-300 and PLB-350, for which Defendant Kaiyu Wu wrote some of the source code; and
- According to DME’s press release, the SATRO would be launched in December 2011, which means that the device was conceptualized, designed, and developed within one year of the Individual Defendants’ departure from ACR – a highly unlikely scenario without defendants’ misappropriation and use of ACR’s proprietary information and trade secrets.

Wilkerson PI Decl., ¶ 5; Pack PI Decl., ¶ 6.

21. In the Fall of 2011 and in light of DME’s press release and sales brochure, ACR conducted a second review of the Individual Defendants’ e-mail accounts at ACR, carefully

assessed the impact of their acts, and consulted with legal counsel before filing this lawsuit a mere 43 days later, on December 6, 2011.

22. Fifteen days later, on December 21, 2011, ACR filed an Amended Complaint and Motion for Preliminary Injunction with supporting evidence.

23. While ACR's witnesses testified consistently and forthrightly throughout these proceedings, the defendants' witnesses repeatedly changed their testimony or otherwise caused doubt with respect to the veracity of their testimony. These inconsistencies include those noted in the Statement of Facts paragraphs 7, 10, 11, and 14 above, in paragraphs 30, 42, 46, 54, 55, 56, 71, 81, 91, 95, and 108-11, Conclusions of Law paragraph 26 below, and footnotes 6, 13, 15, 20-23, and 28 below, and the following examples:

- Defendants' expert, professor frederic j harris, suggested in his declaration submitted in advance of the hearing that Mr. Cassina likely selected a particular driver device used by ACR in its PLB-375 because it was a favorite component. Harris Decl., p. 54. But professor harris at the hearing conceded that he did not know whether Mr. Cassina had ever used the component and, after looking at the schematics, agreed that the component had not, in fact, been used in the PLB-300 or the PLB-350. PI Testimony at 312:11-315:10.
- At his deposition, professor harris described the ACR and the SATRO 121.5 MHz gate oscillator circuit as similar except for minor differences, but by the time of the hearing he changed his mind and stated that they have significant differences. PI Testimony at 327:16-328:12.
- In his declaration submitted for the PI hearing, Mr. Cassina states that he did not work on the PLB-350 and was only involved in "training and troubleshooting" (Cassina Decl., ¶ 28), but this is inconsistent with ACR's time records. Pack PI Decl., Ex. C (showing more than 340 hours for Mr. Cassina). Mr. Cassina ultimately admitted that he "put some time in the 350, for sure," and also that he needed to review the PLB-350 schematics for his work and had that schematic on his computer at work. PI Testimony at 455:15-456:1.
- In an effort to explain Mr. Tong's July 14, 2010, email to Mr. Cassina, which attached the power amplifier design for the PLB-350 and PLB-375 and a graph showing battery life performance, Mr. Cassina testified that Mr. Tong was concerned about a jump in power and that he told Mr. Tong it was not important. PI Testimony at 512:5-12. But Mr. Tong testified at his deposition that he was concerned about a

droop, not a jump, and also that Mr. Cassina had never responded to the email because he was too busy. PI Testimony at 718:18-24, 719:22-720:5. Further, Dr. Heppe opined that the graph did not, in fact, show a problem but rather showed that Mr. Lizandro had successfully designed the power amplifier to achieve results better than the SATRO. PI Testimony at 755:21-756:25.

- Mr. Wu stated in his declaration that the “code detail is defined” by the data sheets for various components, including those he attached to his declaration, and that the code was “dictated by regulation.” Wu Decl., ¶¶ 28, 32, 34-36, 38. But Dr. Heppe testified that none of the data sheets or regulations dictated how the code was written and Mr. Wu ultimately admitted that the data sheets did not provide C-language code, but rather provide guidelines for writing the code and limited assembly code (“It can’t be the same”), and also that the regulations only specified the function, not how the code was written. PI Testimony at 611:7-613:3, 614:8-15, 626:8-19.
- Mr. Wu in his deposition claimed to have written all the text of the source code specifications from scratch, but then in his declaration admitted that the Figures 3a and 3b of Dr. Heppe’s initial report (Figures 4-11a and 4-11b of his final declaration) showed text used from an ACR document: “I used a file I created when I worked at ACR.” Wu Decl., ¶ 54. Further, although Exhibit E to Dr. Heppe’s report identified substantial identical or very similar text, Mr. Wu maintained that only one or two words might be the same. PI Testimony at 647:16-19.

## **II. ACR IS LIKELY TO PREVAIL ON ITS CLAIM FOR TRADE SECRET MISAPPROPRIATION.**

### **A. Defendants Misappropriated ACR’s Trade Secrets.**

24. The evidence presented in connection with ACR’s motion for preliminary injunction established that ACR is likely to succeed in proving that defendants misappropriated ACR’s trade secrets. CCK and the Individual Defendants have admitted that ACR took steps to maintain the claimed trade secrets as confidential, and that they were obligated to maintain ACR’s trade secrets confidential and to use them only in connection with their work for ACR. CCK and Individual Defendants’ Answer (Dkt No. 36), at ¶¶ 16, 18-20, 23.

**B. ACR's Trade Secret Source Code.**

25. The evidence established that the source code that operates ACR's PLB-350 product is proprietary and a valuable trade secret of ACR.<sup>3</sup> PI Testimony at 112:15-25, 355:13-356:16; Pack PI Decl., ¶ 12. Even defendants' expert agreed that the code "has value" and that, "[i]n its current form it's essential, yes." PI Testimony 287:15-288:20; 349:21-350:5. Defendant Wu admitted that the source code for the PLB-350 worked perfectly for that product. PI Testimony at 589:15-17.

26. ACR's PLB-350 source code is the culmination of the work of various ACR employees over the years. Pack PI Decl., ¶ 12. Some of the code for ACR's PLB-350 was written by Defendant Wu when he was employed by ACR, but many of the source code functions were written by other ACR employees. Pack PI Decl., ¶ 12. ACR's time records confirmed substantial hours on the PLB-350 by a software programmer other than Defendant Wu. Pack PI Decl., Ex. C (showing 348 hours for Frank Wissinger and 510 hours for Mr. Wu).

27. Mr. Wu admitted that some of the code for the PLB-350 was written by ACR employee Frank Wissinger, and that he was able to reference earlier versions ACR source code before working on the PLB-350 source code and the RLB 36 code. PI Testimony at 590:5-15 and 591:4-13; *see also* PI Testimony at 596:3-10 (Mr. Wissinger's name is reflected in the code itself).

28. Mr. Wu admitted that, in violation of his contractual and legal obligations to ACR, he had ACR's trade secret code at the time he was working on source code for the SATRO. Wu Dep., at p. 69 ("I may have some – some dot h or dot c files, you know, which I may work on that, so it could be saved on my computer . . ."), p. 77 and p. 78\*\* ("I may have a

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<sup>3</sup> Computer programs are initially written in source code, which is a symbolic language often using English words and common symbols, such as the "C" programming language. The source code is translated through a mechanical process known as compilation or assembly into object code or machine readable code (a series of 1s and 0s that is readable by a computer). Heppe Decl., ¶ 27.

reference to some h files that I have from ACR.”) and p. 79 (the c400.h file also may have been based on an ACR .h file); PI Testimony at 596:21-597:2; and Wu Decl., ¶ 21 (admitting that he had ACR files on his home computer after he resigned). Mr. Wu did not delete the ACR code files until after he started work on the code for the SATRO. PI Testimony at 597:14-16.

29. Mr. Wu was able to use the ACR source code with limited modifications because CCK elected to use effectively the same microcontroller for the SATRO as ACR uses for the PLB-350. Heppe Decl., ¶ 28 and Ex. C (List of Similarities, Item 3b).

30. While Mr. Wu claimed that changes to the COSPAS-SARSAT standards required substantial changes to the code used for the PLB-350 (PI Testimony at 608:14-20), both experts agreed that the changes impacted “only a very small amount of the code.” PI Testimony at 352:21-353:1 (harris); and 768:21-769:20 (Heppe). Although Mr. Wu said that the code was based on data sheets (e.g., Wu Decl., ¶¶ 28, 34-36, 38, 44), he admitted that none of the data sheets provided the C programming language or dictated how the source code was written. PI Testimony at 594:13-25 (“data sheet wouldn’t tell you what the comments you’re gonna write the code for”); 611:10-13 (you have some flexibility in how you create the code); 611:24-613:3 (data sheet attached to declaration only has low-level assembly code, which has different syntax and “can’t be the same” as the C-language of the SATRO code); *see also* PI Testimony at 614:1-22, 615:3-18, 620:21-621:24, 622:5-12, 622:22-25, 626:12-19, 628:13-629:9.

31. The COSPAS-SARSAT standards and component data sheets do not account for the identical and substantially similar code identified by Dr. Heppe. Dr. Heppe explained that, although the products must meet certain standards and the software must comply with requirements in the data sheets for specific components, those are like a dictionary and grammar rules. “That doesn’t allow you to write a novel.... [C]onstructing the actual instructions to say



this is how we want you to behave in order to create a personal locator beacon, that's not in the standard. It's not in the data sheet. That requires creative work." PI Testimony at 354:22-355:8; *see also* PI Testimony at 69:2-71:10 (regarding the microcontroller data sheet: "[T]his book does not tell you how to write a PLB code stack." and "It tells you the syntax. It's like giving someone a grammar book, says here's how to write English sentences. ... And yet you still have to write the story." and "It doesn't tell you how to write a story, it tells you how to construct a well-constructed sentence."); and PI Testimony at 77:4-19 ("[W]hat you're given is a dictionary and a grammar, and it's still up to you to write the story. And so the fact that you have similar words, you know, there are nouns and verbs in the sentences, doesn't get to the fact that if the sentences are identical and the storyline is identical, that that is substantial similarity that is actually meaningful as opposed to something that is required, mandated.").

32. Even Mr. Wu eventually admitted that the COSPAS-SARSAT standards only provide the required functions, but do not specify how to write the code: "Based on the function, I have to figure out, you know, how to write the software code." PI Testimony at 608:3-8; *see also* PI Testimony at 637:14-22, 638:7-17 (stating that the standards do not tell you how to write the comments or dictate the order of the functions within the code or the variables).

33. Both experts opined that having the ACR code in hand would be beneficial to someone writing the code for the SATRO. PI Testimony at 344:20-347:2 (harris); 353:24-355:12 (Heppe). For example, Dr. Heppe testified that reusing software that is proven to work is beneficial since coding is a laborious process during which mistakes are commonly introduced. PI Testimony at 354:5-12; 355:9-12. Dr. Heppe also testified that a programmer can save "an enormous amount of time" by using existing code and only changing a few files, as happened here. PI Testimony at 354:13-20. Likewise, professor harris testified that the programmer

would not need to build the “whole frame” as is necessary when starting from scratch, and also that the programmer would benefit because he (i) would know what the variables were, (ii) would not have to establish naming criteria, (iii) would know what the weaknesses are in the code that need to be replaced or enhanced, and (iv) would know where to focus attention. PI Testimony at 344:20-347:2.

34. The ACR and the SATRO source code is divided into files, depending on the function of the code. Dr. Heppe’s initial affidavit dated January 20, 2011, noted identical and very similar code in the “Initialize,” “ReadEE,” “WriteEE,” “rwspi,” “ProgramPLL,” and “send\_signal” function files; the “selftest.h” and “testmode.h” files; the “c400.h” and “plb350.h” files; and in the “interrupt” routines files. *See* Heppe First Affidavit, dated Jan, 20, 2011, at pp. 25-37 (the affidavit is attached as Ex. D to the Kelkenberg Decl.); PI Ex. Wu #1 (Dr. Heppe’s initial software comparison). DME’s own expert, professor harris, testified at his deposition that the source code in all nine of these files is valuable and used for functions that are essential to the operation of the beacon. Harris Dep. at pp. 228-240, 242. Professor harris also admitted that the code could have been written in a variety of different ways. Harris Dep. at pp. 241\*\* and 242.<sup>4</sup>

35. After completing his initial affidavit, Dr. Heppe reviewed additional files and found substantial additional evidence of misappropriated source code. Heppe Decl., ¶¶ 33, 44-45. Dr. Heppe compared ACR’s code for the PLB-350 to two versions of the code prepared for the SATRO, namely, the version provided to DME in August of 2011 (called the “DME code”) and the version that existed as of November 2011 (called the “CCK code”). PI Testimony at

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<sup>4</sup> ACR has moved to supplement the record with a limited number of deposition pages, a single-page deposition exhibit referenced the deposition testimony, and an oversized schematic (if of value to the Court). All evidence cites that are the subject of ACR’s motion are marked with a double asterick, \*\*, so that the Court can readily identify such evidence.

635:15-24; *compare* PI Testimony at 634:19-21 (although Mr. Wu did not dispute the August 2011 date, Mr. Wu testified that code was provided to DME in June or July 2011).

36. The evolution of the source code is evidence of its heritage, with the ACR code as the obvious starting point. Mr. Wu did not deny that the version of the source code provided to DME had substantial identical or similar code to the ACR code, but instead said that the DME code was much more similar to the ACR code than the CCK code because he deleted some code lines that turned out to be unnecessary. Wu Decl., ¶¶ 31, 51; PI Testimony at 597:24-598:10, 636:12-16.

37. Notwithstanding Mr. Wu's effort to strip the code of ACR code lines that ultimately were not essential for the SATRO, he did not succeed in removing them all, leaving behind telltale signs of his initial copying. For example, the "test\_mode" file from the CCK code includes code for a function called "stuck," just as in the ACR code, but this code in the CCK file does not operate that function anymore; rather, the operative "stuck" function in the CCK code now is in the interrupt file. PI Testimony at 631:15-633:23, 634:7-18.

38. Dr. Heppe prepared numerous side-by-side examples of code that is either identical or very similar in nearly all of the code files. PI Exs. Wu #1 and Wu #2; Heppe Decl., ¶¶ 27-45 and Ex. D. The identical and similar code included both executable code (that which operates the device) and the comments found in source code that have value to the programmers and people managing the business. PI Testimony at 358:17-360:8 (Heppe); *see also* Harris Dep. at pp. 167-68 (code comments are valuable); Pack PI Decl., ¶ 12 (comments in source code are valuable ACR trade secrets). In the source code at issue here, including with respect to the roughly 350-400 lines of identical or substantially similar code shown as examples of copying in Dr. Heppe's comparisons, the comments and executable code were mixed and were often on the same line. PI Testimony at

60:23-61:3, 360:22-362:15. In making his comparison, Dr. Heppe did not focus on individual names or functional similarities that would be expected, but rather focused on “similarities in there that are completely unexpected . . . . I took pains to assess those similarities and not weight my opinion based on a superficial similarity that could be expected.” PI Testimony at 114:15-116:21; *see also* PI Testimony 73:15-19.<sup>5</sup>

39. Among the files analyzed by Dr. Heppe were the “c400.h” file in the source code that DME produced and ACR’s trade secret “plb350.h” file. Heppe Decl., ¶¶ 37-40 and Ex. D; PI Ex. Wu #2 at pp. 10-18. Professor harris did not find any errors in this comparison. PI Testimony at 284:21-285:4. These files contain “#define statements” that are important and contribute to the overall performance of the system, but could have been written in many other ways. PI Testimony at 365:12-366:25; Heppe Decl., ¶ 37; Harris Dep. at p. 176\*\*.<sup>6</sup> As stated by Mr. Pack, the source code with the “#define statement” in ACR’s code “were mostly written by people other than Kaiyu [Wu]. In fact, these parts of the source code had been written before Kaiyu started working on ACR’s source code.” Pack PI Decl., ¶ 12.

40. Dr. Heppe found near identity in the listing of these “#define statements.” Even accounting for 26 logical groupings, Dr. Heppe opined that:

the probability that these unrelated items will appear in exactly the same order, by pure chance, is less than  $10^{-26}$ . ***This is less than one chance in a trillion trillion.***

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<sup>5</sup> Although Mr. Wu testified that terms written in solid caps were mandated by the microcontroller data sheet (PI Testimony at 659:11-19), Dr. Heppe testified that was not the case. PI Testimony at 75:11-19. For example, a comparison of the [REDACTED] data sheet (PI Ex. Heppe #3) and Dr. Heppe’s source code comparison (PI Ex. Wu #2) reveals at least 160 all upper case terms that are not predefined by the data sheet and at least 15 mnemonics with a mixture of upper and lower case letters that also are not predefined by the data sheet (these 175 terms are found in PI Ex. Wu #2 at pages 6, 7, 9, 10-12, 14, 16-18, 21-23, 25, 28 and 31).

<sup>6</sup> Professor harris agreed with Dr. Heppe at his deposition (Harris Dep. at pp. 167, 169\*\*, 176\*\*, 244\*\*), but then initially changed his opinion at the hearing. PI Testimony at 285:5-286:23. He ultimately admitted, however, that it was necessary to have names established for this particular code. *Id.* at 286:22-287:6.

Heppe Decl., ¶ 37. Professor harris did not doubt this calculation. PI Testimony at 283:6-10.

Neither Defendant Wu nor professor harris challenged Dr. Heppe's 26 logical groupings and both agreed they could be in different order. PI Testimony at 83:6-10 (harris) and 602:7-603:8 (Wu).

41. In responding to a question from defendants' counsel regarding the scope of copying, Dr. Heppe further testified that:

The pound define statements are essentially a fingerprint. The fact that there are 26 blocks of code that occur in the same order in both sets of code is absolutely clear indication that the code was copied. Beyond this block of code, you've quickly flipped through 10 other pages ... showing substantial identical – some are identical letter for letter. Others are similar, substantially similar in naming convention, function, style, comment lines. All of this is indicative of copying. ***None of this should have ever happened. This is inappropriate. ... None of this should be here.***

PI Testimony at 376:22-377:8 (emphasis added).

42. Mr. Wu admitted that he did not need to use “#define statements” for the SATRO code, but could have used hard coding; he did not, however, use that alternative design approach. PI Testimony at 603:20-25. Instead, he agreed that he “decided to use the exact same define statements as had been used for the ACR code.” PI Testimony at 604:1-4. Mr. Wu further admitted that, contrary to the suggestion in his declaration (Wu Decl., ¶ 41), textbooks did not teach the specific ordering of the groups of “#define statements” found in the code, but only provided “general guidelines.” PI Testimony at 606:4-18. While Mr. Wu ultimately deleted some definitions that were the same as in the ACR code, a substantial 60-70 percent of the original “#define statements” remained in the CCK code. PI Testimony at 661:25-662:20; 672:8-21.

43. Likewise, Mr. Wu testified that he could have written the “self\_test” file only as a “.c” type of file, but he used a “.h” file for the code for the SATRO, just as in the ACR code. PI Testimony at 630:3-23

44. The “morse\_code.c” file produced by CCK included the exact same typographical error as the equivalent ACR file. As Dr. Heppe demonstrated, these files include three identical lines (including their use of an unnecessary exclamation point) and then both incorrectly state that they are “morse\_code.h” files – when they are actually “morse\_code.c” files. Heppe Decl., ¶ 35; PI Testimony at 364:2-8.

45. The “morse\_code.h” error is only one of several duplicated errors. Heppe Decl., ¶ 35 (noting errors “access” instead of “access,” “maximun” instead of “maximum,” and “minimun” instead of “minimum”); *see also* PI Ex. Wu #2 (identifying errors in green on pages 3, 4, 17 and 24 [“psuedo” instead of “pseudo”]). Dr. Heppe also noted the highly unexpected duplication of the comment: “kw add remove latter,” which is remarkable not only for its copied misspelling of “later,” but also that Mr. Wu inserted this comment into code he alone was writing for the SATRO product. Heppe Decl., ¶ 36; PI Ex. Wu #2 at p. 22. Professor harris admitted that he did not know what this unusual comment meant, and had made no effort to inquire. PI Testimony at 282:4-13. Mr. Wu had no explanation for this in his declaration; his declaration was silent as to this point. *See generally* Wu Declaration.

46. Professor harris agreed during his deposition that errors in both code files could indicate copying. Harris Dep. at p. 173. But in his later testimony, professor harris changed his mind simply because he found one error in the ACR code that was not repeated in the CCK code. Harris Decl., p. 33; PI Testimony at 279:7-16. He nonetheless conceded at the hearing that a copied error could be evidence of copying. PI Testimony at 280:7-12. Professor harris also admitted that Mr. Wu might have corrected the error in the CCK code if he had seen it. PI Testimony at 279:17-280:6.

47. Dr. Heppe also identified numerous other identical and highly similar aspects of the source code that are additional evidence of defendants' unlawful use of ACR's trade secret source code. Heppe Decl., ¶¶ 44-45 and Ex. D (also in evidence, with pages numbered, as PI Wu #2); *see also* Harris Dep. at pp. 173-74 (admitting that the existence of the same or nearly identical comments within the code may be evidence of copying). For example, Dr. Heppe identified segments of code where groups of individual variables were combined into a "struct" (data structure) in the CCK source code, with variables listed in the same order, although they could have been written in different ways. Heppe Decl., ¶ 44.

48. Dr. Heppe opined that there "is a surprising degree of similarity through the entirety of the source code for the two products (the SATRO and the PLB-350), from the overall hierarchy, to the organization and arrangement of sub-functions and to the individual lines of code and comments." Heppe Decl., ¶ 45. He went on to say: "A significant portion of the original ACR source code, both quantitatively and qualitatively, remains unmodified, or only superficially modified, in the source code for the SATRO." Heppe Decl., ¶ 45.

49. The similarities found between the ACR source code and the code for the SATRO were of a type and quantity that they could not be explained solely by the fact that the same person wrote some or all of the code. PI Testimony at 362:17-364:19.

50. Dr. Heppe found identical and substantially similar code in both ".c" files, as well as ".h" files. PI Ex. Wu #2 at pages 1-4, 19-31 (".c" files) and pages 5-18 (".h" files). Dr. Heppe testified:

***My opinion is that the entirety of the code was copied and then modified.***

PI Testimony at 369:25-370:10 (emphasis added).

51. ACR maintains the source code as confidential and is not aware of a single instance of a third party extracting any version of the code from its PLB-350. Pack Decl., ¶ 12. Based on expert testimony, ACR's C language source code could not be readily ascertained from the PLB-350. PI Testimony at 108:12-110:14, 134:2-138:14; Heppe Decl., ¶ 49d. Even defendants' expert admitted that it would not be possible to discern the comments, unselected compile time options, or variable names from machine code copied from a microcontroller. PI Testimony at 292:24-293:9. There was no evidence that the defendants or their expert reverse engineered the ACR source code to obtain C language source code, nor would it have been possible. PI Testimony at 290:15-20; Heppe Decl., ¶ 49d.<sup>7</sup>

**C. ACR's Trade Secret Source Code Specifications**

52. The uncontradicted evidence established that defendants misappropriated ACR's trade secret source code specifications.

53. Source code specifications are, effectively, the graphical and textual roadmap that is used by a computer programmer to guide the writing of the code. Pack PI Decl., ¶ 13; PI Testimony at 78:25-80:4 and 105:4-16 (source code specification "tells the software engineers what they need to do and what requirements they have to satisfy."); Harris Dep. at pp. 182-83\*\*. The specifications would be valuable to a competitor. PI Testimony at 107:2-7 (Dr. Heppe: "design documents and the software are what many engineers refer to as the crown jewels"); Pack PI Decl., ¶ 13.

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54. ACR's source code specifications were maintained as confidential. Pack PI Decl., ¶ 13. While Mr. Wu claimed in his declaration that a flow chart from ACR's source code specifications was disclosed in ACR's manuals and test results (Wu Decl., ¶ 54), the evidence was to the contrary. PI Testimony at 106:18-107:11 (Dr. Heppe testified that software specification flow chart not revealed in manuals or publicly available test reports); Wu Decl., Ex. F (testing report and manual, neither of which includes the flow chart). Moreover, as discussed below, the evidence established that more than just a single flow chart was referenced and copied.

55. CCK provided to DME a "Design Review" document for a meeting on February 16, 2011, which included source code specifications. Zelek PI Decl., Ex. H; PI Testimony at 644:4-21; Cassandra Dep. at 54-55, 72-74, 158, 167. Mr. Wu presented the specifications to DME at the February 2011 Design Review meeting, describing how the source code would be written, evidencing the value of such specifications. Cassandra Dep. at pp. 54-55; PI Testimony at 673:11-15. DME reviewed source code specifications and its General Manager understood that DME was signing off on them before work commenced on coding for the SATRO. Cassandra Dep. at p. 72 ("Q: Do you know if ... the requirements for the software was prepared before the code was written? A: Yes, those flow charts and the design documents.") and p. 73 ("Q: Did DME approve those flow charts before the coding started? A: Yes."). This contrasts with Mr. Wu's position now that the specifications do not represent the SATRO. Wu Decl., ¶ 54.

56. Defendant Wu admitted copying flow charts from ACR's trade secret specifications to create the source code specifications that were provided to DME. PI Testimony at 646:17-24 ("Q: And some of the references that you used, those were ACR documents, correct? A: Those are – yes,

those are ACR documents.”); and 648:2-25 (describing use of ACR’s “design specs for one of the beacons”); *see also* Wu Dep. at 66-67. Although Mr. Wu initially denied copying any text from an ACR document, he admitted in his declaration copying certain text. Wu Decl., ¶ 54 (referring to Figures 3a, 3b and 3c of Dr. Heppe’s Jan. 20, 2012, affidavit, which are Figures 4-11a, 4-11b and 4-11c of Dr. Heppe’s final declaration). Also, a comparison of an ACR specification (Pack PI Decl., Ex. F) to the specification that CCK provided to DME (Zelek PI Decl., Ex. H at bates pp. 1022-33) shows extensive copying, including copying of various grammatical mistakes. Heppe Decl., ¶¶ 46-47, Ex. E. Mr. Wu admitted having an ACR source code specification document in his possession when he was writing the specification provided to DME, and admitted the text could be the same. PI Testimony at 655:6-17 (Wu testifying regarding Dr. Heppe’s comparison, Ex. E).<sup>8</sup>

57. It was undisputed that ACR’s source code specifications would be very valuable to a competitor. Pack PI Decl., ¶ 13. Indeed, during the initial stages of the design process for the SATRO, DME approved specifications that were copied from ACR’s source code specifications. Cassandra Dep. at p. 73. DME has never denied that the specifications were of value to it.

**D. ACR’s Trade Secret Schematics, Design, Selection of Components and Circuits, and Testing**

58. ACR considers its schematics for its various personal locator beacons and its design and development efforts, including the selection and design of certain circuits, the selection of components, and the results of testing and experimentation, to be trade secrets. Pack PI Decl., ¶¶ 4,

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<sup>8</sup> Professor harris did not even address the issue of defendants’ use of ACR’s source code specifications in his direct testimony, although he was aware that Dr. Heppe had addressed Mr. Wu’s use of ACR’s source code specifications in his analysis. PI Testimony at 296:22-297:4; *see generally* Harris Declaration.

7, 8, 25. All of this information is confidential and would be valuable to competitors.<sup>9</sup> Pack PI Decl., ¶¶ 4, 7, 8, 25; PI Testimony at 131:17-132:10 (engineering process and testing that leads to design are “crown jewels”). As detailed below, the evidence established that the defendants used ACR’s schematics and the results of its confidential design and development work, including test results, in connection with development of the SATRO. *See, e.g.*, PI Testimony at 131:13-133:8; Heppe Decl., ¶¶ 23-26.

59. Mr. Cassina admitted that he knew ACR’s proprietary schematic for its PLB-300 from memory (Cassina Dep. at p. 165; PI Testimony at 435:15-17) so that he did not even need a physical copy to misappropriate it. He described the schematic as “my baby,” since he had spent so much time working with it. Cassina Dep. at 165; PI Testimony at 435:18-20. While Mr. Cassina downplayed his role on the PLB-350 in his declaration (Cassina Decl., ¶ 28), time records show he put in at least 350 hours on that line of products. Pack PI Decl., Ex. C. Mr. Cassina worked on the PLB-350 and had access to the schematic on his computer. PI Testimony at 455:5-456:5; Cassina Decl., ¶ 29 (describing similarity between schematics for the PLB-300 and PLB-350). Mr. Tong also knew the ACR beacons well enough that he did not need to reverse engineer them to know their design. Tong Dep. at 164; Tong Decl., ¶¶ 8, 9. Mr. Tong had twelve engineers working for him on the PLB-375 when he left ACR. Pack PI Decl., Ex. D. Engineers sent him and reported to him about the results of their work. *See, e.g.*, PI Testimony at 684:8-11.

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<sup>9</sup> Consistent with ACR’s treatment of its schematics as confidential, Mr. Cassina testified that it was his desire that the schematic for the SATRO remain confidential and private. PI Testimony at 484:10-485:2. Until he attached the Docking Master schematic to his declaration filed in connection with the preliminary injunction hearing, that schematic also was claimed to be confidential and was designated as “Attorneys Eyes Only.”

60. Before working at ACR, Mr. Cassina had never worked on any GPS devices. PI Testimony at 428:7-9. He learned a lot from his five years at ACR and, while he downplays the value of the ACR beacon designs throughout his testimony, Mr. Cassina believes that he did some “very creative work” during his time there. PI Testimony at 428:19-21, 429:1-6.

61. Dr. Hepe provided a list of similarities based on his analysis of the schematic for the SATRO and the schematics for ACR’s PLB-350 and its PLB-375, including ten different blocks of circuitry and numerous individual components. Hepe Decl., ¶¶ 23-26 and Ex. C; PI Testimony at 123:22-130:4. At least as of his deposition, professor harris largely agreed that the schematics are similar in the ways identified by Dr. Hepe and also agreed that there were other design choices available to CCK. Harris Dep. at pp. 73-75, 132-34, 139-40.<sup>10</sup>

62. While the types of many of the circuits included in the ACR and the SATRO schematics, such as filters, phase lock loops, power supplies and power amplifiers, are known in the field, “there are multiple realizations of each one of those circuits.” PI Testimony at 36:15-37:6. The “particular solution to a particular problem as it relates to a particular device is not generally well-known in the industry.” PI Testimony at 36:15-37:6, 46:23-47:5, *see also* PI Testimony at 123:22-127:17 (circuits identified as identical or similar represent “engineering challenges that need to be addressed” and “different engineers will solve these problems in slightly different ways or in violently different ways”), 125:20-22 (multiple ways to address problems for all circuits identified on List of Similarities), 128:5-12 (“the ultimate design that emerges is [an] outcome of a creative

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<sup>10</sup> ACR does not contend at this time that the proprietary designs of its printed circuit boards (the “PCBs”) also were used by defendants, and, therefore defendants’ testimony regarding the PCBs is irrelevant. Likewise, it is irrelevant that the SATRO design uses a different number of boards than is used in the PLB-375, as even Mr. Cassina admitted that the schematic does not dictate the number of boards. PI Testimony at 576:19-578:15. In all events, the number of boards used in any of the products does not impact whether defendants used ACR’s proprietary information and designs at issue here, as defendants offered no evidence to establish that any of them is dependent on the number of boards.

process that took real effort that doesn't happen accidentally"). For example, the particular circuit identified as Item 2a on Dr. Heppe's List of Similarities (Heppe Decl., Ex. C) is part of the power supply that takes the current from the battery and provides a stable voltage to the rest of the device. PI Testimony at 31:15-20. While using this type of circuit to maintain a stable voltage level is known, "there are certainly alternatives in how the design would be laid out." PI Testimony at 32:1-3, 17-22.

63. The data sheets for the components identified on Dr. Heppe's List of Similarities did not dictate the circuitry used by ACR or CCK. PI Testimony at 125:23-126:24; Heppe Decl., ¶ 26f.

64. It was undisputed that roughly 75 percent of the components used in the SATRO were the same or similar to those used in the ACR beacons.<sup>11</sup> Heppe Decl., ¶ 25. The similarities identified by Dr. Heppe were not dictated by standards or functional limitations of the products, and are both qualitatively and quantitatively significant. Heppe Decl., ¶¶ 25, 50. Further, there were design alternatives available. Heppe Decl., ¶ 25. While the components identified as being identical or similar are publicly available parts and it is not surprising to find them in a personal locator beacon, the experts agreed that "there are multiple choices that one could make." PI Testimony at 45:15-46:4, 128:13-130:4, 317:1-4. For example: "So the actual solution of a power amplifier that actually achieves the desired result with very high efficiency and very good stability, using these particular parts, that's something that doesn't happen randomly. It takes effort, it takes engineering effort." PI Testimony at 46:7-20.<sup>12</sup>

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<sup>11</sup> Professor harris agreed that there were multiple other different components that could have been selected in place of those identified on Dr. Heppe's List of Similarities. PI Testimony at 317:1-4. He had no view about how many components would have to be identical or similar for him to conclude that the device designs were substantially similar. PI Testimony at 317:5-8.

<sup>12</sup> While Mr. Cassina suggested that determining the values for various components is done simply by using software for the calculations (PI Testimony at 557:2-11), it is clear that alternative software programs may yield different values to solve the same design problem and

65. Since the PLB-375 has been publicly available (July 2011), it now would be possible to determine readily that it uses a GlobalTop PA6B component and that it has three batteries. PI Testimony at 133:20-24. The other aspects of the electrical design, however, cannot be ascertained easily, but would take substantial time and effort. Heppe Decl., ¶¶ 49c (“it would be very difficult to determine all the component values, their tolerances, their interconnections through a multi-layer board, and their transient and RF interactions as an operating device”). As Dr. Heppe stated: “In my opinion, even the effort necessary to determine the full schematic, component values, and tolerances (i.e., excluding RF and other interactions), extends well beyond the threshold of ‘readily ascertainable.’” The evidence was undisputed that none of the ACR testing activities or test results could have been discerned by any amount of reverse engineering. Heppe Decl., ¶ 49c.

66. Moreover, there was no evidence that any of the defendants, or anyone else, ever reverse engineered an ACR beacon in connection with the SATRO development work.<sup>13</sup>

67. The following addresses certain of the individual blocks of circuitry and components in the parties’ respective products.

**1. GlobalTop GPS Component (Heppe List of Similarities Item 3a)**

68. ACR selected the GlobalTop GPS receiver to use in its PLB-375 product. Pack PI Decl., ¶¶ 6, 7; Heppe Decl., ¶ 19. While he was at ACR, Mr. Tong and others working for him had done extensive research and testing to determine the acceptability of the GlobalTop GPS component. Pack PI Decl., ¶¶ 6, 7; PI Testimony at 697:4-15. For example, Mr. Tong spent several days researching potential candidates. PI Testimony at 697:12-17. Thereafter, ACR engineer Carlos Lizandro conducted some tests, reporting the results to Mr. Tong, including results of his tests on 12

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that it is still necessary to do engineering work from there, including testing (PI Testimony at 765:17-766:5).

<sup>13</sup> Professor harris’ testimony regarding reverse engineering was inconsistent at best and, overall, unreliable. PI Testimony at 300:5-9, 14-20 and 301:1-3.

different components from various manufacturers. PI Testimony at 697:18-698:2, 699:10-16 and PI Ex. Tong #1 (email with test results). Mr. Lizandro also conducted a variety of tests of GlobalTop GPS components, including two GlobalTop components, which Mr. Tong received. PI Testimony at 700:8-701:17 and PI Ex. Tong #2 (compilation of engineering notebook pages and various test results for GlobalTop GPS components). This type of analysis and testing takes time and skill, and incurs costs as well, and was well-documented at ACR. Pack PI Decl., ¶ 7; PI Exs. Tong #1 and #2; *see also* PI Testimony 129:1-7.

69. Mr. Tong maintained the GlobalTop GPS component test results on his ACR computer up until the time he left ACR and was aware of the results of Mr. Lizandro's extensive testing of the GlobalTop GPS component before he left ACR. PI Testimony at 701:11-17. ACR selected the GlobalTop GPS PA6B for the PLB-375 because of its small size and relatively low power consumption, and the fact that it had demonstrated, through testing performed by the ACR design team, that it satisfied performance requirements. PI Testimony at 772:9-773:3. Extensive ACR testing was completed before the component was selected and before the first schematic was completed. PI Exs. Tong #1 and #2; PI Ex. Heppe #1 (first PLB-375 schematic, dated June 30, 2011).

70. At the time Mr. Tong and others went through this extensive testing process at ACR, no other personal locator beacon on the market used that particular component. Pack PI Decl., ¶ 7. There are multiple other GPS components that would have been suitable. Heppe Decl., ¶ 19.

71. For the SATRO development, Mr. Tong testified that he selected the identical component after about 12 hours of internet product research, but he has no documentation of even that limited research. PI Testimony at 704:17-21, 706:22-24; *see also* Tong Dep. at p. 104\*\* ("Q: How long did you spend researching the Global Top product on the internet? A: About a couple of

days. Q: How many hours? A: Twelve hours. Twelve hours.”). CCK selected the GlobalTop GPS component before testing it. PI Testimony at 707:6-15. Although Mr. Cassina claims to have conducted some limited testing to decide between two GlobalTop components (PI Testimony at 479:16-21, 564:9, 574:4-6),<sup>14</sup> this claimed activity was considerably less extensive than the research and testing conducted by ACR under Mr. Tong’s direction and was done *after* the initial SATRO schematic already had been prepared using the GlobalTop GPS component. PI Testimony at 574:7-11, 20-23; Tong Dep. at p. 106\*\*. The decision to use the GlobalTop GPS component in the SATRO was made in 2010, long before the PLB-375 was available on the market.<sup>15</sup> PI Testimony at 474:24-475:2. Mr. Cassina had no prior experience with any GlobalTop GPS component prior to his work on the SATRO. PI Testimony at 481:22-482:3.<sup>16</sup>

72. The experts agreed that any engineer would reasonably conduct testing before selecting a component as important as the GPS receiver. Heppe Decl., ¶¶ 19-20; Harris Decl., p. 20; PI Testimony at 331:22-332:8.

73. Defendants conceded that no other PLB on the market used this component before ACR introduced its PLB-375. PI Testimony at 475:6-9, 476:4-7; Tong Dep. at p. 94. Mr. Tong told

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<sup>14</sup> Mr. Cassina attached a single-page document to his declaration that is identified as test results (Cassina Decl., Ex. D), but this document is undated and untitled, and was not provided in advance of his deposition and was not disclosed during his deposition. PI Testimony at 575:13-576:5, 477:10-478:5; 478:15-17. In contrast to the twelve components from multiple vendors tested by ACR (PI Ex. Tong #1), Mr. Cassina looked at only two GlobalTop components. PI Testimony at 574:4-6.

<sup>15</sup> Since the decision was made in 2010, the Spring 2011 GlobalTop news release (included in PI Ex. Cassina #5) could not have “tipped [Mr. Tong] off” about the product or have been a “part of [his] process,” as Mr. Tong testified. PI Testimony at 734:6-18.

<sup>16</sup> Although Mr. Tong testified that the fact that the GlobalTop GPS component had 66 channels made it desirable “to enhance the accuracy” (PI Testimony at 724:16-725:8), there were no documents to substantiate that this was a consideration when CCK or ACR selected the component, and Dr. Heppe opined that 66 channels were entirely unnecessary from a technical standpoint (PI Testimony at 766:10-767:12).



Mr. Cassina about ACR's decision to use the GlobalTop GPS component in the PLB-375, and understood that it was information known only within ACR. PI Testimony at 475:10-16, 476:8-20.

74. Dr. Heppe opined (Heppe Decl., ¶ 20):

It is my opinion that the individual defendants relied on the valuable and proprietary test results from the testing conducted at ACR, which was not generally known, to gain confidence that the GlobalTop product would be suitable for the SATRO.

75. The evidence thus established that CCK used valuable ACR trade secrets in deciding to use the identical GlobalTop GPS component for the SATRO as ACR selected for its PLB-375 product that was not introduced until July 2011 and was still confidential. Heppe Decl., ¶¶ 19-20; Pack PI Decl., ¶¶ 6, 7.

**2. Phase Lock Loop Design (Heppe List of Similarities Items 2e and 3g)**

76. The design of the Phase Lock Loop ("PLL") in the PLB-350 and PLB-375 (including the analog circuitry [REDACTED] – the resistors, capacitors and inductor) "has a functionally similar electrical structure and *identical or similar component values*" as the design of the PLL in the SATRO. Heppe Decl., ¶ 26c (emphasis added). ACR's testing, verification, and design of the PLL is confidential information that would be valuable to a competitor. Pack PI Decl., ¶ 8.

77. As shown in Figure 4-4 in Dr. Heppe's declaration, the schematic for the SATRO not only utilizes the same structure and component values, but it also depicts them in the exact same stylistic and creative manner, which would not have been necessary. A key component (Heppe List of Similarities, Item 3g) and other circuitry in this Figure 4-4 is not found anywhere in the Docking Master schematic. Cassina Decl., Ex. C. Dr. Heppe opined that "it is unlikely that CCK, working independently, would have generated a circuit so similar to that of the PLB-350 and PLB-375." Heppe Decl., ¶ 26c. As to this analog circuitry, Dr. Heppe opined that there are many other design options. PI Testimony at 34:11-16 ("there are many ways to implement a phase lock loop"). "The

high degree of similarity is consistent with the conclusion that this portion of the schematic was edited from the original schematic from ACR.” Heppe Decl., ¶ 26c. “In my opinion, the most likely explanation for these similarities is that CCK started with ACR’s proprietary data and then modified it for their own use.” Heppe Decl. at ¶ 24.

78. While the PLL for the ACR beacons and for the SATRO all used one of the same components that Mr. Cassina used in his Docking Master, even that shared component was used differently by ACR [REDACTED] and everything else about the design had to be changed. PI Testimony at 561:10-19. All of these modifications were done while Mr. Cassina was at ACR. PI Testimony at 92:8-9, 442:24-443:5. For example, the Docking Master did not have [REDACTED] [REDACTED] was not of concern for the Docking Master. PI Testimony at 443:20-444:16. There were no documents to establish that Mr. Cassina had ever even considered using [REDACTED] on the Docking Master. PI Testimony at 318:15-25; *see generally* Cassina Declaration (no documents of such research or testing). Mr. Cassina admitted that about 60 percent of the values had to be changed. PI Testimony at 443:6-19. It was necessary to do calculations and testing to change all these values at ACR. PI Testimony at 445:19-23, 446:23-447:24, 448:21-449:8.

79. Mr. Cassina admitted that he was able to design the phase lock loop 3-4 times faster for the SATRO because he relied on results of testing he did while at ACR over a period of 2-3 weeks or possibly a month. Cassina Dep. at 147-154, 157-160; PI Testimony at 451:9-12. Mr. Cassina also admitted that, because he was aware that the particular circuitry worked well in the ACR products, he did not have to go through nearly as much testing and calculations as when he was at ACR. PI Testimony at 495:23-496:10. Likewise, implementing [REDACTED]



██████████ *including the exact same values*. PI Ex Heppe #4 (PLB-350 schematic), Heppe #5 (CCK schematic) and Harris #1 (PLB-375 schematic).<sup>19</sup>

81. Professor harris and Mr. Cassina agreed at their depositions that design options other than a ██████████ filter were available.<sup>20</sup> Harris Dep. at pp. 113\*\*, 116-18\*\* (discussing alternatives to the ██████████ filter); Cassina Dep. at 208\*\* (“Q: Could you achieve a result that was functionally adequate using a different circuit design? A: Yes.”); *see also* Heppe Decl., ¶ 26d (discussing alternatives). Dr. Heppe identified a number of alternative design options, including use of SAW filters and printed filters (with which he has personal experience). PI Testimony at 124:21-125:19, 763:12-765:13. The experts also each proposed designs for a ██████████ filter that used different values from those used by ACR and in the SATRO (which were identical). Harris Decl., pp. 9-10; PI Testimony at 125:10-19, 763:9-19.<sup>21</sup>

82. While defendants contend that the filter design came from Mr. Cassina’s Docking Master design or, alternatively, from the data sheet for one component, it was undisputed that the filter used by ACR and in the SATRO was different from that found in either of these references. Heppe Decl., ¶ 26(f) and Ex. H (Figure 4-6); Cassina Decl., Ex. C (Docking Master schematic).

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<sup>19</sup> Even if Mr. Cassina obtained the values using a computer program, absent information from ACR that the values would work, he still would have had to conduct tests to confirm that the values were acceptable. PI Testimony at 765:20-766:5. There is no evidence of such testing for the SATRO.

<sup>20</sup> By the time professor harris submitted his declaration for the PI hearing, however, he changed his mind. PI Testimony at 324:13-19. He also rejected the option of a printed filter, not based on his personal experience, but based on input from other faculty members. PI Testimony at 327:4-13. Likewise, as of the PI hearing, Mr. Cassina changed his mind, saying he now longer thought another design would work. PI Testimony at 489:2-4.

<sup>21</sup> In connection with his analysis of this filter, professor harris in his declaration recited a series of values on page 4 that supposedly were from page 20 of Exhibit A to his declaration, but at the hearing he conceded that the values were not found in Exhibit A and he had no explanation for the version of the data sheet attached to his declaration, other than that it was supplied by the lawyers. PI Testimony at 321:25-323:15.

Professor harris concluded that the design used in the ACR and SATRO products included an “important modification” from the data sheet due to the [REDACTED] (Harris Decl., p. 3); he just thought it was a different modification than Dr. Heppe identified, namely, the [REDACTED] (PI Testimony at 323:16-324:5). As Mr. Cassina said, he had to change the [REDACTED] “hundred percent” (PI Testimony at 451:20-24) and, also, that he could have designed a [REDACTED] (PI Testimony at 585:25-596:2),<sup>22</sup> but obviously he did not.

**4. Additional Circuits (Heppe List of Similarities Items 2d, 2f and h)**

83. The phase modulation circuit (Item 2f) and output power divider circuit (Item 2h) are of the type that are generally known in the industry, but each one “has multiple design realizations, and different engineers would choose different ways to resolve the particular problems represented by those portions of the circuit. PI Testimony at 35:15-22. The phase modulation circuit is designed in a “very clever way” that ACR developed after “trial and error” using software combined with the circuits, and the results of this testing were used by CCK. PI Testimony at 132:11-133. Professor harris agreed that these were the same in the parties’ products. PI Testimony at 330:3-17. Also, professor harris agreed that the modulation circuitry in the PLL for the SATRO and ACR beacons is not in the Docking Master. PI Testimony at 319:5-11.

84. Both of these circuits are identical in the SATRO schematic as compared to the ACR schematics. Specifically, [REDACTED]

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<sup>22</sup> Mr. Cassina testified that he knew from his work at ACR that a [REDACTED] filter would work and that at ACR he had tested [REDACTED] [REDACTED] PI Testimony at 587:15-23. But there are no documents to substantiate this testimony and it is inconsistent with his deposition testimony. Cassina Dep. at 209\*\* (“Q: Did you actually attempt any other circuitry for the output? A: No.”).

[REDACTED]

[REDACTED]

[REDACTED] PI Exs. Heppe #4 (PLB-350 schematic), Heppe #5 (CCK schematic) and Harris #1 (PLB-375 schematic). Likewise, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PI Exs. Heppe #4 (PLB-350 schematic), and Heppe #5 (CCK schematic); Heppe Decl., ¶ 26d. Mr. Cassina offered no documents or explanation for how these circuits were designed. *See generally* Cassina Declaration.

85. The experts also agreed that the circuitry for the 12 MHz oscillator divided down by two (Item 2d) is basically the same circuitry except for how it connects to the power supplies. PI Testimony at 331:9-12 (harris); Heppe Decl., Ex. C (List, Item 2d). Mr. Cassina offered no documents or explanation for how this circuit was designed. *See generally* Cassina Declaration.

**5. Power Amplifier (Heppe List of Similarities Items 2i, 3d and 3e)**

86. The power amplifier for the PLB-350 differed significantly from the power amplifier for the PLB-300. PI Testimony at 741:15-742:22, 747:18-748:2. The power amplifier was a primary difference between the PLB-300 and the PLB-350. Cassina Dep. at p. 40; PI Testimony at 681:23-682:1. The power amplifier was designed by ACR engineer Carlos Lizandro. PI Testimony at 456:11-13. Mr. Lizandro was a specialist in the area of power amplifiers and was hired specifically to design that part of the product's design. PI Testimony at 456:14-18, 682:2-11; Pack PI Decl., ¶¶ 5, 8. There are unique characteristics of a personal locator beacon that create challenges for designing an efficient power amplifier. PI Testimony at 742:1-22.

87. Although Mr. Lizandro reviewed the results of reverse engineering of the power amplifier in a McMurdo (hereinafter “Competitor”) product, the design he created for the PLB-350 is different and the design required substantial design and engineering work. PI Testimony at 747:18-748:10, 748:16-20; Hepe Decl., ¶ 17. Even Mr. Tong admitted that it would not be possible to use the Competitor’s design without testing, modification, and optimization. PI Testimony at 685:5-23. Indeed, Mr. Lizandro disagreed with the Competitor’s design approach. PI Testimony at 695:5-16. The design of the power amplifier for the PLB-375 was an even further improvement over the PLB-350, as Mr. Lizandro was able to [REDACTED] which required substantial effort and ingenuity over an extended period of time, and notwithstanding various design challenges. PI Testimony at 748:22-749:14, 750:6-751:5, 752:16-22; PI Ex. Pack #1 and PI Ex. Tong #3. ACR designed a very efficient power amplifier for the PLB-375, which was important to reducing the number of batteries required for the device. PI Testimony at 753:23-754:9; *see also* PI Testimony at 133:2-8 (discussing effort involved in designing the power amplifier section).

88. Mr. Cassina had not designed a specialized, “discrete” power amplifier for the PLB-300 that was optimized for a PLB, but instead [REDACTED] [REDACTED] that was not the best choice. PI Testimony at 456:22-23; 741:15-25. Before the SATRO, Mr. Cassina had never designed a power amplifier for a beacon. PI Testimony at 456:24-457:6.

89. Mr. Cassina saw schematics for the PLB-350 and PLB-375 power amplifiers as late as his last two weeks at ACR. PI Testimony at 457:23-25. Mr. Tong had emailed to him a copy of the PLB-350 and the PLB-375 power amplifiers, as well as flow chart depicting them, on July 14,

2010, after both had submitted their resignations.<sup>23</sup> PI Testimony at 458:1-9, 459:4-22, and PI Ex. Pack #1. Mr. Cassina had some conversations with Mr. Lizandro regarding the PLB-375 power amplifier. 461:21-462:2.

90. Mr. Lizandro reported to Mr. Tong and Mr. Cassina that he identified a new driver device that would [REDACTED] [REDACTED] and would work with the final device.<sup>24</sup> PI Ex. Cassina #1; Pack PI Decl., ¶ 8. This new component (Heppe List of Similarities Item 3d) was selected by ACR for the PLB-375 after extensive research and testing, all of which was confidential and would be valuable to a competitor. Pack PI Decl., ¶ 8; PI Testimony at 129:7-22 (“ACR went through a fairly significant engineering exercise to determine the best combination of parts in that power amplifier section”).

91. There is no evidence as to how Mr. Cassina selected *the exact same new first stage amplifier component* for the SATRO. PI Testimony at 130:20-24 (no evidence of testing by CCK

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<sup>23</sup> Mr. Tong emailed the power amplifier schematics to Mr. Cassina *just before they were leaving ACR with a plan to compete with ACR and after Mr. Tong had begun emailing ACR confidential documents to his personal email account for reference after his departure*, and the testimony about why Mr. Tong sent the email was not credible. The battery performance graph attached to the email does not reveal a problem with jumping or drooping, as claimed, but rather demonstrates that Mr. Lizandro created a successful design. PI Testimony at 755:21-756:10, 756:20-22. Further, Mr. Tong never reported any perceived problem to his manager, Mr. Pack, although he was leaving the company within days. PI Testimony at 717:18-19; 227:2-7, 13-18. He also conceded that the graph showed better performance than that achieved by the SATRO power amplifier. PI Testimony at 716:9-12. Also, while Mr. Cassina supposedly reported to Tong that the graph did not reveal a problem, Mr. Tong testified that Mr. Cassina had never reported back because he was too busy. PI Testimony at 512:5-12, 717:25-718:13, 718:18-719:20.

<sup>24</sup> Mr. Cassina suggested that the selection of this new first stage amplifier (Heppe List of Similarities, Item 3d) had something to do with a Competitor product (PI Testimony at 465:4-10), but there is no reference at all in the email to any Competitor components. This new first stage amplifier component was, in fact, recommended by a vendor. PI Testimony at 749:14-16. Also, the only drawing in the record of the Competitor power amplifier, does not indicate what component was used for the first or final stage of the amplifier. PI Ex. Cassina #5 (at CCK 1).



regarding this component); Heppe Decl., Ex. C (List of Similarities, Item 3d). Mr. Cassina's declaration is silent. While professor harris stated in his declaration that it was selected because it was a "favorite" component (Harris Decl., p. 54), professor harris admitted that he did not know whether Mr. Cassina had any prior experience with the component at all since it had not been used in the PLB-350. PI Testimony at 312:11- 315:10. Since the PLB-375 was not publicly available until at least July, defendants could not have ascertained this important component through reverse engineering.

92. There are no documents as to how Mr. Cassina designed the power amplifier for the SATRO and his declaration is also silent regarding the design of this important aspect of the SATRO design. Mr. Cassina testified at the hearing only that he started from the Competitor's design, and then changed the design somehow. PI Testimony at 562:3-8. Even as to that process, Mr. Cassina admitted that he relied on the results of a couple of days of work at ACR in order to create the Competitor's design. Cassina Dep. at pp. 176-77, 181-83. Mr. Cassina did not contend that the power amplifier derived from the Docking Master design, nor could he, as the Docking Master did not include a power amplifier. Cassina Decl., Ex. C.

93. The two-stage power amplifier of the SATRO is very similar to the two-stage power amplifier of the PLB-375, *with many of their components and their values identical*, including [REDACTED] (as identified on the CCK schematic), as well as two key components – the first stage and final stage amplifiers (Heppe List of Similarities Items 3d and 3e). PI Exs. Heppe #5 and Harris #1 (ACR and CCK schematics). By using the identical driver device (the first stage amplifier), Mr. Cassina was able to [REDACTED] just as he knew ACR did for the PLB-375 based on Mr. Lizandro's extensive work. Also, the CCK schematic has a resistor identified in a functionally identical position as in the PLB-375 (R408), but the CCK resistor (R301)

is designated “DNP” (meaning “do not populate”), so that it has no effect at all. This, too, is an indicator that the design started with the PLB-375, and was modified from there.

**6. 121.5 MHz Circuitry (Heppe List of Similarities Items 2c and 3f)**

94. In working on the schematic for the SATRO, Mr. Cassina used values for some of the 121.5 circuitry that he had memorized from the PLB-300. Cassina Dep. at 250-52, 256. While the circuit may have been based on one he found in a book (PI Testimony at 560:5-18), the book did not provide the values for the components. Rather, Mr. Cassina identified certain values “that are *from the circuitry of the PLB-300*” and he circled them in red on PI Ex. Cassina #4. Cassina Dep. at 251:25-252:12 (emph. added) (regarding the red circled values: “Q: And that’s based on your memory of the 300 PLB, correct? A: Yes.”). Another drawing for the 121.5 circuit for the SATRO was also based on the PLB-300. Cassina Dep. at 256:2-18 (“Q: Did you use any references for your second drawing drawing – or, sorry, for your first drawing? A: I believe so. Q: What reference? A: PLB-300.”).

95. The resistors, capacitors, and inductors, their values, and how they are electrically arranged, *all are identical on the SATRO schematic as compared to the schematics for the ACR beacons*, as can be seen by comparing [REDACTED]

[REDACTED] PI Exs. Heppe #1, #4, #5; PI Ex. ACR #1\*\* (oversized PLB-375 schematic); Heppe Decl., Ex. C (List of Similarities, Item 2c). While he appeared to change his mind at the hearing (PI Testimony at 328:6-12), professor harris initially opined that the ACR and SATRO designs for this 121.5 circuitry were “similar except for minor differences,” that “many different oscillators could have been used,” and that “there are always acceptable alternatives.” Harris Dep. at 144-146\*\*, 148\*\*.

96. The experts agreed that the SATRO uses the exact same 121.5 MHz NPN transistor as ACR used for its beacons. Heppe Decl., Ex. C (List of Similarities, Item 3f); Harris Decl., p. 55.

97. The solution adopted by ACR and the nearly identical design used in the SATRO was not the only design available for the 121.5 MHz gate oscillator circuit (Heppe List of Similarities, Item 2c); there were alternative design options available, it was “one of many.” PI Testimony at 32:4-16.

**7. 3-Batteries and 9 Volts**

98. As Dr. Heppe stated, ACR’s design choice of using 3 batteries (for a total of 9 volts) “would, in my opinion, represent valuable proprietary data.” Heppe Decl., ¶ 21. Indeed, the ability to rely on only three cells was non-obvious, and would have been unknown to someone without access to the valuable engineering efforts taking place at ACR. Pack Decl., ¶ 6 (use of three battery cells is PLB-375 required “significant design and testing effort to prove out the power management scheme, the power amplification design, the phase lock loop design, and the GPS receiver module implementation.”). Heppe Decl., ¶ 21. Mr. Cassina testified about ACR’s confidential engineering efforts related to this critically beneficial design choice. Cassina Dep. at pp. 77-79. He then made the same choice for the SATRO, but long before ACR’s selection of this design was publicly known.

**III. ACR IS LIKELY TO PREVAIL ON ITS COPYRIGHT INFRINGEMENT CLAIM.**

**A. Defendants Infringed ACR’s Copyright in its Schematics.**

99. It is undisputed that Defendants Tong and Cassina had access to ACR’s copyrighted schematics. Pack PI Decl., ¶ 14. Further, Mr. Cassina had memorized the schematic for the PLB-300, which was identical to the schematic for the PLB-350 except for the

power amplifier section. Cassina Dep. at pp. 40, 165. Cassina had the PLB-350 schematic on his computer. PI Testimony at 455:5-456:5; Cassina Decl., ¶ 29 (describing difference between PLB-300 and PLB-350 schematics). Mr. Tong also knew the schematics well enough such that he would not have to reverse engineer the ACR products to know their design. Tong Dep. at p. 164; Tong Decl., ¶¶ 8, 9.

100. While there are differences,<sup>25</sup> there are extensive similarities between protectable elements<sup>26</sup> of ACR's copyrighted schematics and the schematics for the SATRO. Dr. Heppe identified various annotations, stylistic features, and nine complete blocks of circuitry that account for the vast majority of the circuitry on CCK schematic. Heppe Decl., ¶¶ 25, 26 (pp. 10-19) and Ex. C; PI Testimony at 121:9-11, 121:18-128:12, 760:12-761:13. In addition to identical and very similar designs overall and for these nine blocks of circuitry, the schematics also share a variety of other creative features that compel the conclusion of copying. Heppe Decl., ¶¶ 23-26; Pack PI Decl., ¶ 4. Dr. Heppe opined that "*the CCK schematic started out as a copy of the ACR schematic and was then modified.*" PI Testimony at 84:9-14 (emphasis added). These identical and very similar designs were not compelled by standards or functional requirements of the devices, and there are many different ways to design them. Heppe Decl., ¶¶ 23-26.

101. Mr. Cassina admitted that he created the SATRO schematic by using a template that he used for ACR schematics, and merely changed the logo in the title block from ACR Electronics to CCK Electronics, and changed the company name in the "proprietary notices" text

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<sup>25</sup> For example, the PLB-375 schematic identified components in nine categories for numbering the individual components, the PLB-350 used seven categories, the PLB-300 used five categories, and the CCK schematic identified components in four categories. PI Exs. Heppe #1 and Heppe #6. But the fact that the components were numbered differently did not eliminate the similarities in design of the circuitry or impact how the circuits were arranged in the schematic.

<sup>26</sup> The title block in the lower right corner and the revisions block in the upper right corner, for example, are not unique to ACR or considered proprietary. PI Testimony at 16:5-18.

in the upper left hand corner. Cassina Dep. at pp. 194-97. The software used to create the schematic did not mandate a particular style, but rather allowed for a variety of design styles, so that “you can customize the way you like it.” PI Testimony at 568:5-12.

102. The proprietary rights language was not something that Mr. Cassina used prior to his time at ACR, but rather was added to PLB-300 schematic by ACR personnel. PI Testimony at 438:13-439:9 (comparing PLB-300 schematic to the Docking Master schematic, Cassina Decl., Ex. C). He carried this over to the CCK schematic, using the exact same text that ACR provided. *Compare* PI Exs. Heppe #4 and #6 to Heppe #5.

103. Like chapters of a book arranged in a slightly different order, there are four blocks of circuitry in different locations in the schematics (power supply circuitry, the detection circuits for the different signals, the strobe circuitry, and the antenna circuitry), with all of the other blocks of circuitry in the same or similar locations. PI Testimony at 22:2-23:11, 24:12-277:16; PI Exs. Heppe #1, #4-#6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic). Also, “if you look at individual circuits, what you will find is that individual circuits are laid out identically, right down to the shape, to the font of the annotation, the spacing of the elements, the topology on the page.” PI Testimony at 85:16-23; *see also* PI Testimony at 87:17-18 (“[T]here are individual circuits within this diagram where, in fact, they look like direct copies.”).

104. Although the type of shape used to depict components is standard (such as zig-zags for a resistor, three semi-circles for inductors, or two slash lines for a capacitor), there are aspects of schematic design that are creative. PI Testimony at 88:13-89:1. As Dr. Heppe testified, “[t]he arrangement of them on the page, where you put the annotations, the topology of the circuit, those are the creative process that we’re talking about here.” PI Testimony at 89:2-5.

105. The use of the “TP4” annotation on the schematic for the SATRO is a dramatic indication of copying since the annotation of a “test point,” using exactly ACR’s stylistic manner of noting such test points, was completely superfluous and, as detailed below, was never used by Mr. Cassina prior to his work at ACR. Heppe Decl., ¶ 26a; *see also* PI Testimony at 305:19-21 (harris stated that “TP4” is a designation for a test point).

106. All of the other test points on the SATRO schematic are triangles with a single letter (such as A, B or C),<sup>27</sup> and the schematic identifies the triangle symbol in a legend as designating “test points.” PI Ex. Heppe #5. On his Docking Master schematic, Mr. Cassina did not use triangles or TP designations, but rather used things like the word “Battery,” the annotation “AX1,” and the word “ANTENA” [sic], and some arrows. PI Testimony at 439:24-441:13; Cassina Decl., Ex. C.

107. In addition to the exact same annotation and stylization, the “TP4” designation on the SATRO schematic *is in the same location* as on the schematic for ACR’s PLB-375, dated September 15, 2010. Heppe Decl., ¶ 26a; PI Ex. Heppe #1 (pg. 1); PI Ex. ACR #1\*\* (oversized PLB-375 schematic). The June 30, 2010, version of the PLB-375 schematic has the “TP4” notation in the upper right instead of the upper left, but it is unclear whether engineers at ACR moved the “TP4” notation before or after the defendants left ACR. PI Ex. Heppe #1 (pg. 3)

108. At the time of his deposition, professor harris agreed that the TP4 designation was “an anomaly,” superfluous, served no function, could not be explained, and it may have resulted from copying. Harris Dep. at pp. 138-40; PI Testimony at 305:22-306:12. He conceded at the hearing that it may have been the result of using the copy/paste function on a computer. PI Testimony at 308:13-21.

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<sup>27</sup> The CCK schematic has the triangles labelled with letters; the DME version of the schematic has fewer triangles and they are not yet identified by letter. PI Ex. Heppe #1 (pp. 2 and 4).

109. Although professor harris did not correct his deposition testimony or provide an explanation for the “TP4” designation in his declaration filed in advance of the hearing, professor harris testified at the hearing that Mr. Cassina told him a few days earlier that he used “TP4” for the power supply and that he had always used “TP4” for the power supply. PI Testimony at 306:13-307, 309:4-8. Professor harris remarkably considered this to be a sufficient explanation for use of “TP4” (PI Testimony at 307:2-3, 309:9-10), even though Mr. Cassina did not, in fact, use the TP4 – or any TP designation – for the power supply in his Docking Master schematic. Rather, in that schematic he apparently used the designation “Battery.” PI Testimony at 439:24-441:13; Cassina Decl., Ex. C. Professor harris had to admit, however, that the CCK schematic included a legend for the use of triangles to connote test points, but inconsistently did not indicate in the legend that TP4 would also connote a test point. PI Testimony at 309:17-311:16.

110. While professor harris believed “TP4” designated a test point, Mr. Cassina was not so sure in his deposition what it meant:

Q: Why did you call it TP4? I don’t see any TP1, 2 or 3

A: I like it. I don’t know. I – actually don’t know.

Cassina Dep. at 200:12-201:8.

111. Mr. Cassina did not correct or change this deposition testimony in advance of the hearing. Further, although Mr. Cassina had testified about use of TP4 at his deposition and had reviewed Dr. Heppe’s report as it pertained to the schematic design, Mr. Cassina did not in his declaration provide any explanation regarding use of the identical “TP4” designation. *See generally* Cassina Declaration.

112. The SATRO schematic employs the exact same creative choices with respect to the annotations for the 121.5 MHz section of the schematic and also for the 406.037 MHz section, although there were many creative alternative choices.<sup>28</sup> PI Testimony at 27:17-28:24, 96:21-99:11; PI Ex. Heppe #1 (schematics); Heppe Decl., ¶¶ 26b, 26f and Figures 4-2, 4-3 and 4-6. Indeed, the style for the 406.037 MHz annotation in the CCK schematic, which was drawn by Mr. Cassina, is more similar to the ACR PLB-350 schematic drawn by Mr. Lizandro than the ACR PLB-300 schematic that was drawn by Mr. Cassina, which evidences copying rather than simply a continuation of Mr. Cassina's drafting style. Heppe Decl., ¶ 26f and Figure 4-6.

113. Mr. Cassina did not include any megahertz annotation at all above the filter on the Docking Master schematic, although the style at ACR was to annotate that section with **406.028 MHz** (or **406.037 MHz** for the PLB 375) placed above the filter on each of the PLB-300, PLB-350, and PLB-375 beacon schematics. Cassina Decl., Ex. C; PI Exs. Heppe #1, #4, #6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic); PI Testimony at 441:18-442:6.

114. Mr. Cassina also opted for the SATRO schematic to use an annotation for the output power divider (shown in italic bold as [REDACTED]), using the exact same font and placement as used on the PLB-300 and PLB-350 schematics. PI Exs. Heppe #1, #4-#6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic). In addition, instead of using this same style of annotation where the [REDACTED] oscillator output is divided, he opted to use the same style of annotation that ACR used at that location too (namely, displaying the resulting frequency "[REDACTED]"). PI

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<sup>28</sup> Although professor harris stated that placement of the 121.5 MHz and the 406.037 MHz annotations indicated the source of the signal, he conceded that if the drafter intended the annotation to connote the *circuit* rather than the *source*, then the annotations could logically be in a variety of places, as suggested by Dr. Heppe. PI Testimony at 334:13-335:8. There is no evidence that Mr. Cassina intended these annotations to identify the source rather than the circuit. Significantly, Mr. Cassina's declaration is silent on his rationale for these annotations in the SATRO or the PLB-300 schematics.



Exs. Heppe #1, #4-#6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic). The only difference is that Mr. Cassina added an arrow to this annotation. PI Exs. Heppe #1, #4-#6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic).

115. The CCK schematic also uses the same design element to connote a shield as is used in the ACR schematics, and it is placed in the same location although it does not need to be. PI Exs. Heppe #1, #4-#6 and PI Ex. ACR #1\*\* (oversized PLB-375 schematic).

116. There are myriad ways to identify test points and to annotate schematics, but the SATRO schematic includes these identical stylistic elements and in the same place. These shared creative elements are strong evidence of copying. In this regard, Dr. Heppe opined that the:

SATRO notations are also similar in style, font and placement to the notations in the PLB-350 schematic, even as to the slightly smaller font for the [REDACTED]” annotation . . . . These similarities are consistent with the conclusion that this portion of the SATRO schematic was edited from an original schematic for the PLB-350.

Heppe Decl., ¶ 26d.

117. Given the quality and quantity of the identical and very similar creative elements of the schematics, Dr. Heppe opined as follows:

In my opinion, the most likely explanation for these similarities is that CCK started with ACR’s proprietary data and then modified it for their own use.

Heppe Decl., ¶ 24.<sup>29</sup>

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<sup>29</sup> A month after ACR filed this action asserting a claim for infringement of its copyright in its schematics, Mr. Cassina filed an application to register the claimed copyright in the schematics for the SATRO, without disclaiming or acknowledging any pre-existing works incorporated into the schematic. Cassina PI Testimony at 482:25-484:7; Cassina Decl., Ex. A. While the question of the proprietary of such a filing is not currently before the Court, the filing itself is evidence that defendants consider such schematics – like those claimed by ACR – to be protectable.

**IV. ACR IS LIKELY TO PREVAIL ON ITS LANHAM ACT CLAIM**

**A. Prior to the Filing of This Lawsuit, DME Actively Advertised the SATRO Without Advising Retailers That It Was Not FCC Approved Or That Such Information Is Required in All Advertisements.**

118. Prior to December 8, 2011, DME did not advise its retail customer, Aircraft Spruce, of the need to include in advertisements for the SATRO the FCC required disclosure that the SATRO had not yet been approved by the FCC. Cassandra's Dec., Ex. L. Moreover, Mr. Cassandra admitted that he does not know whether he advised any retailers of the required FCC disclosure or gave them the FCC required language prior to December 8, 2011. PI Testimony at 406:9-14.

119. DME was aware that testing of the SATRO must be completed before it could apply to the FCC for product approval for the SATRO, and that the FCC approval process could take thirty to ninety days. PI Testimony at 426:3-19.

120. Despite that knowledge, DME issued a press release on October 10, 2011, announcing DME's intention to launch the SATRO in December 2011. Pack PI Decl., Ex. G. In fact, as late as January 27, 2012, DME's press release on its own website still stated that the SATRO would be available for sale in December 2011. Pack Decl. at ¶ 22.

121. In October 2011, the TUV testing laboratory informed DME that the testing of the SATRO would not be completed in November either. PI Testimony at 407:11-22; *see also*, Cassandra Dep. at p. 76. In late October 2011, DME was informed that testing would be complete before Thanksgiving. PI Testimony at 408:11-16. Shortly before Thanksgiving, however, DME learned that the testing would not be completed that month. PI Testimony at 408:17-19.

122. Notwithstanding this information, it was not until January 2012 -- after the holiday shopping season -- that DME changed its own website to reflect that the SATRO would

not be launched into the marketplace in December 2011. Cassandra PI Dec. at ¶ 25. Nor did DME's website contain the required FCC disclosure. Pack PI Decl., Exs. B and G.

123. In addition, DME continued to promote and exhibit the SATRO at industry shows for retailers, vendors, and consumers, including the NBAA, Outdoor World (January 2012), and the Miami International Boat Show (February 2012). Wilkerson PI Decl., ¶11.

124. On February 13, 2012, Mr. Pack went to Bass Pro's retail store located at 200 Gulf Stream Way, Dania Beach, Florida and picked up a copy of the Offshore Angler 2012 Saltwater Specialist Catalogue. In fact, there was a whole stack of that catalogue which customers could take with them at no charge, and the Bass Pro salesperson told Mr. Pack that anyone can order a catalogue by calling 1-800-basspro. On page 274 is the ad offering the SATRO for sale with a listed price of \$299 with no FCC disclosure. See Pack PI Decl., Ex. I.

125. In February 2012, Mr. Pack called 800-BASSPRO and asked about availability of the SATRO. The Bass Pro salesperson looked up the product number and told him it was out of stock but he could backorder one. She also told Mr. Pack that the SATRO is expected to be available in early April 2012.

126. On February 13, 2012, Mr. Pack purchased a SATRO from Bass Pro's Offshore Angler 2012 Saltwater Specialist Catalogue, which is on backorder "to be shipped as soon as they are restocked."

127. The SATRO was also advertised in Bass Pro Shop's Master Catalog 2012. Wilkerson Decl. ¶ 9, Ex. C; PI Testimony at 241:11-242:9. Mr. Wilkerson testified that that Catalog is currently being distributed to consumers, as evidenced by the fact that Mr. Pack picked one up at a Bass Pro retail location in Miami on March 16, 2012. PI Testimony at 241:11-242:3.

128. DME offered no evidence that they made any effort to ensure that the required FCC disclosures were included in SATRO advertisements in the Bass Pro Catalogue. Cassandra Decl. at ¶ 26. Rather, DME simply argues that the advertisement in that catalogue is moot since it is a November/December issue.

**B. DME's Claim that ACR Did Not Comply With FCC Requirements is Irrelevant and Misleading.**

129. DME seeks to excuse its improper advertising by offering evidence of advertising by ACR and its retailers. The evidence is neither relevant nor persuasive.

**1. West Marine's Advertisement of the PLB-375 Without a Disclaimer Occurred Notwithstanding Affirmative Steps Taken by ACR to Ensure That a Disclaimer Be Included.**

130. Although an advertisement for ACR's PLB-375 appeared in the 2011 West Marine Catalog without the required FCC disclaimer, the evidence established that ACR took reasonable precautions to make sure that West Marine published that advertisement with the FCC disclaimer. ACR's then-Regional Sales Manager Darwin Brown reviewed West Marine's Safety Catalog proofs and made numerous comments regarding the PLB-375 advertisement, the most notable of which was *to instruct WestMarine to include* the FCC's required disclosure:

NOTE. Because the ResQLink is pending FCC approval, the following statement is required by the FCC to be included with the product description. It must be printed exactly as it appears below.

This device has not been authorized as required by the Rules of the FCC. This device is not, and may not be offered for sale or lease, or sold or leased, until authorization is obtained. Expected Spring 2011.

Wilkerson Dec. at ¶ 10. Mr. Brown followed-up with West Marine regarding these changes prior to the catalog being published.

2. **ACR's Alleged Taking of Preliminary Orders From Retailers Before the PLB-375 Was FCC Approved is Permissible Under FCC Rule 2.803.**

131. DME introduced into evidence an ACR power point marketing presentation (“the ACR presentation”) to its customers (which are *not* consumers/end users) featuring ACR’s PLB-375. Notably, *each and every* page of that presentation except a single page featuring accessories for the device (as opposed to the device itself) clearly sets forth the FCC required disclaimer by stating, “[t]his device has not been authorized as required by the Rules of the FCC. This device is not, and may not be offered for sale or lease, or sold or leased, until authorization is obtained.” Unlike the ACR presentation, the SATRO advertisements are directed *to consumers* and do *not* contain the FCC required disclosure.

132. ACR’s acceptance of conditional sales contracts between ACR and retailers such as West Marine are *not* prohibited where, as with ACR’s conditional sales contracts, *delivery is contingent upon compliance* with the applicable equipment authorization and technical requirements. ACR took a proactive approach to ensure compliance by its customers by, among other things, including the following notice to vendors on page ten of the presentation discussing the topic of placing preliminary orders, “[t]he following FCC Disclaimer must be present on all marketing and selling materials until the proper FCC approval has been obtained by ACR. Once ACR has informed you of FCC approval, then and only then may the following statement be removed from all marketing and sale material. **This device has not been authorized as required by the Rules of the FCC. This device is not, and may not be offered for sale or lease, or sold or leased, until authorization is obtained.**” ACR’s presentation also directed its customers to include on their purchase order the following statement:

“[Dealer Company Name Here] acknowledges that the sale of this product is contingent upon compliance with the applicable FCC equipment authorization and technical requirements to produce and

manufacture in accordance with designated specifications. This order is cancelable by either party without penalty.”

Please note that any purchase order received without the above copy clearly added to the purchase order will not be accepted by ACR under any circumstances prior to attaining FCC approval for the sale of the ResQLink P/N 2880.

See Wilkerson’s Decl., Ex. F.

133. The FCC rule regarding preliminary orders for personal locator beacons not yet approved by the FCC was admitted into evidence as Pack Ex. 8, and section 2.803 states, “[t]he provisions of paragraph A of this section *do not prohibit* conditional sales contracts *between manufacturers and wholesalers or retailers* where delivery is *contingent* upon compliance with applicable equipment authorizations and technical requirements.” DME presented no evidence demonstrating that ACR did not comply with this FCC rule.

**3. ACR’s PLB-375+ Was A Class I Permissive Change Variant For Which FCC Approval Was Not Required.**

134. The PLB-375+, which ACR launched in November 2011, was a Class I permissive change variant for which no FCC approval is required. Wilkerson PI Decl., ¶ 14. In particular, the PLB-375 was originally approved by the FCC under Grant of Equipment Authorization B66ACR-PLB-375 as a PLB. *Id.* Although not noted on the grant, this original approval for the non-floating (RTCM Category 2) variant sold under the trade name ResQLink. ACR found, however, that there was customer demand for a Category 1 (floating) PLB. *Id.* Thus, it developed a floating variant that had the same model number (PLB-375), but had a new trade name (ResQLink+). *Id.* COSPAS-SARSAT approved the ResQLink+ variant under the same Type Acceptance Certificate: 219. Wilkerson’s PI Decl., ¶ 14.

135. In addition, ACR’s determination that the PLB-375+ was a Class I permissive change and, therefore, required no FCC filing and could be marketed immediately, was guided

by previous communications ACR had with the FCC pertaining to ACR's Class I permissive change to the PLB-350C in 2009, and is internally documented. Wilkerson PI Decl., ¶ 15. Specifically, the PLB-350C is identical to the PLB-350B except that an ancillary display was added so the only changes were those necessary for the ancillary display, the addition of the display itself, the addition of the connector to interface with the display, and software changes to drive the display. *Id.* At that time, FCC Representative Andy Leimer confirmed to ACR that Class I permissive changes do not require a filing with the FCC and can be marketed immediately. *Id.*; *see also*, Wilkerson Decl., Ex. G.

**V. ACR IS LIKELY TO PREVAIL ON ITS STATE LAW CLAIM**

136. The Individual Defendants were placed on notice of their obligations concerning confidential or trade secret information through the policies of ACR. For example, ACR's Employee Handbook (Section 112 Non-Disclosure) provided:

The protection of confidential business information and trade secrets is vital to the interests and the success of ACR. Such confidential information includes, but is not limited to, the following examples:

- compensation data;
- computer processes, programs or codes;
- customer lists or preferences;
- financial information;
- marketing strategies or new materials research;
- pending projects and proposals;
- proprietary production processes;
- research and development strategies;
- engineering data, formulae or prototypes; and

- technological data or prototypes.

Employees may be required to sign a non-disclosure agreement as a condition of employment. Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Horn PI Decl., ¶ 6 and Ex. G. In addition, ACR's IT Policy makes clear that email is intended to be a business tool, to be used by employees for business purposes only.<sup>30</sup> Horn PI Decl., ¶ 8.

137. Messrs. Tong, Cassina and Wu also signed an agreement with ACR regarding non-disclosure and assignment of inventions at the beginning of their employment on December 8, 2004, July 5, 2005, and Nov. 6, 2006, respectively. Horn PI Decl., ¶ 5 and Exs. D-F.

138. Paragraph 1 of the non-disclosure agreements signed by each of the Individual Defendants states:

I will not disclose to anyone outside of the Company, or use in other than Company business, any confidential information or material relating to the business of the Company, whether owned by the Company or someone else, either during or after my employment, except with the Company's written permission.

In addition, ACR's Employee Conduct and Work Rules policy provided to each of the Individual Defendants at the beginning of their employment with ACR, strictly prohibits:

- Theft or inappropriate removal or possession of Company property, equipment, materials, products, documents or records.
- Unauthorized use of telephones, mail system, or other Company-owned equipment.
- Unauthorized disclosure of business "secrets" or confidential information.

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<sup>30</sup> ACR is a business unit of Cobham plc, and its IT policy is applicable to ACR employees. Ex. 4 ¶ 8. All of ACR's employees are reminded each time they log onto the computer system that they are agreeing to abide by the IT policy, by the following pop-up screen:

"Please be aware that by logging into this workstation/domain, you are agreeing to the terms of all of the IT policies in effect at ACR Electronics, Inc. You should only use your own username and password and should not divulge them to anyone. If you have any questions, call the IT department."



Horn PI Decl., ¶ 7.

139. In addition, each of the Individual Defendants acknowledged, in writing, his assignment of all right, title and interest in any invention, discovery, improvement or idea, patentable or not, in Paragraph 4 of his non-disclosure and assignment of invention agreement signed at the beginning of his employment. Horn PI Decl., at ¶ 11. ACR had a strict policy regarding visitors in the workplace that was in effect at all times that the Individual Defendants were employed by ACR. Horn PI Decl., ¶ 9.

140. Paragraph 1 of the non-disclosure agreements signed by each of the Individual Defendants states:

I will not disclose to anyone outside of the Company, or use in other than Company business, any confidential information or material relating to the business of the Company, whether owned by the Company or someone else, either during or after my employment, except with the Company's written permission.

In addition, ACR's Employee Conduct and Work Rules policy provided to each of the Individual Defendants at the beginning of their employment with ACR, strictly prohibits:

- Theft or inappropriate removal or possession of Company property, equipment, materials, products, documents or records.
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- Unauthorized disclosure of business "secrets" or confidential information.

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141. In addition, each of the Individual Defendants acknowledged, in writing, his assignment of all right, title and interest in any invention, discovery, improvement or idea, patentable or not, in Paragraph 4 of his non-disclosure and assignment of invention agreements signed at the beginning of his employment. Horn PI Decl., ¶ 11. ACR had a strict policy

regarding visitors in the workplace that was in effect at all times that the Individual Defendants were employed by ACR. Horn PI Decl., ¶ 9.

142. On July 6, 2010, Mr. Wu informed ACR that he was resigning his employment. Horn PI Decl., ¶ 3 and Ex. B; PI Testimony at 216:14-19. That same day, Mr. Cassina informed ACR for the first time that he also was resigning. Horn PI Decl., at ¶ 2 and Ex. A; PI Testimony at 228:14-22, 472:1-6. Three days later, on July 9, 2010, Mr. Tong informed ACR for the first time that he too was resigning. Horn PI Decl., at ¶ 4 and Ex. C; PI Testimony at 216:3-13. They each left ACR about fourteen days or less after turning in their letters of resignation. Horn PI Decl., Exs. A-C.

143. In the weeks immediately before the Individual Defendants formed CCK and left ACR's employment, Defendant Tong emailed certain ACR confidential documents to his personal email account. Pack Decl., ¶ 15. For example:

- On June 9, 2010, Mr. Tong forwarded to his personal e-mail address ([cttong9889@bellsouth.net](mailto:cttong9889@bellsouth.net)) a list of customers for an ACR product under development, which he obtained from an ACR sales manager. This list included Bass Pro. Wilkerson PI Decl., ¶ 16a; Pack PI Decl., ¶ 15a. Mr. Tong admitted that he never interacted with customers and he did not need the list for his work. Tong Dep., at 228-29 and 230\*\*; PI Testimony at 712:2-713:4.
- On June 30, 2010, Mr. Tong forwarded to his personal e-mail address an e-mail from ACR's vendor with an attached quotation for PLB components. Mr. Tong's e-mail contained sensitive information regarding ACR and Rakon's confidential supplier agreement(s). Wilkerson PI Decl., at ¶ 16e; Pack PI Decl., ¶ 15e. Mr. Tong admitted that specialized pricing information is confidential to ACR. Tong Dep. at 197-98.
- On July 19, 2010, the date CCK was created (PI Ex. Cassina #2 [Articles of Incorporation]) and while still employed by ACR, Mr. Tong sent an e-mail from his ACR e-mail account to his personal e-mail account an unauthorized copy of ACR's "Next Generation Beacon Core Technology and Product Development Plan." This highly confidential document describes ACR's collaborative development plan to produce a Core Beacon reference design and identified the features to be included in the PLB-375 design. Wilkerson PI Decl., ¶ 16h; Pack Decl., ¶ 15h. Mr. Tong had no legitimate business reason to do so, and his actions violated ACR's policies. Pack's PI Decl., ¶ 17; PI Testimony at 711:14-712:1, 713:1-4. Mr. Tong admitted

that he sent this document to himself because he might want to use it after he left the company. Tong Dep., at 215-19; PI Testimony at 736:22-737:14.

144. Mr. Tong admitted that he was not authorized to email ACR's confidential and trade secret documents to his personal email account. Tong Dep. at pp. 191, 197-98, 210, 216-17, 219, 232, 246; *see e.g.*, PI Testimony at 712:2-11. In his declaration filed with the Court, Mr. Tong admitted that emailing the aforementioned ACR confidential and proprietary documents to his personal email was a "rash and stupid mistake." Dkt. No. 29-1, Tong Decl., ¶ 20. By doing so, Mr. Tong violated ACR's policies. Pack PI Decl., ¶ 17.

145. When questioned by the Court during the hearing, Mr. Tong conceded that he "made a big mistake" by forwarding ACR's proprietary and confidential information to his personal email account and that he should not have done that. PI Testimony at 710:18-22, 712:23. When pressed by the Court on that issue, Mr. Tong further admitted that he did that because "he thought some day he might use that information." PI Testimony at 737:2-9.

146. On July 14, 2010, after Defendants Tong and Cassina announced their resignations and less than two weeks before they left the company, Mr. Tong sent to Mr. Cassina a copy of the technical drawings for the power amplifier used in the PLB-375 and results of battery testing using the newly designed power amplification system (PI Ex. Pack #1; PI Ex. Tong #3), which is relevant to how power is used and how long the device works, as well as the results of testing the life of the battery, both of which are very important for a safety device such as a PLB. Wilkerson PI Decl., ¶ 16g; Pack PI Decl., ¶ 15g.

147. As an ACR employee, Mr. Tong was aware that ACR's review and analysis of the Competitor's power amplifier was ACR's confidential and proprietary information. PI Testimony at 687:10-21. Mr. Cassandra testified in his deposition, however, that DME learned that information from CCK. Cassandra Dep., 85:12-86:12. Mr. Cassandra also testified that he

learned from the Individual Defendants that they had reverse engineered the Competitor product while employed at ACR. Cassandra Dep., 85:12-86:12.

**VI. ACR WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED**

148. The evidence was undisputed that ACR has suffered and will continue to suffer irreparable harm, including injury to customer and vendor relationships, and injury to its goodwill. Pack PI Decl., ¶ 26.

149. If ACR's competitors, including defendant DME, knew of ACR's Confidential Information, it would provide them with an unfair competitive advantage, and place ACR at an unfair disadvantage. Wilkerson PI Decl., ¶ 18; Pack PI Decl., ¶ 25.

150. Generally speaking, ACR's PLB products are sold through three different retail channels: (i) retail locations; (ii) catalogs and mailers; and (iii) internet advertising.

151. Retail locations have a finite amount of floor and shelf space, and retailers are forced to select a limited number of models of any particular type of product. Each product that is selected for the shelf represents several other company's products that are *not* selected and, therefore, are never seen by the ultimate consumer. The SATRO could directly threaten ACR's retail position and either replace it entirely or minimize its inventory locations, causing ACR to lose sales and also lose consumer "mind share." Moreover, retailers only sell a limited number of products, and losing even one account can cause significant harm to ACR's business reputation and sales, which is far greater than simply lost profits and cannot easily be remedied. Moreover, PLB devices like those at issue in this lawsuit are typically one-time purchases for the end user (consumer), who is not likely to replace the device for approximately five years. Wilkerson PI Decl., ¶ 7.

152. Catalogs and mailers also inherently have a limited amount of space available and have the added distinction of featuring a key item such as using a “tag line.” A “tag line” is something that draws one’s attention to the device or the product for sale. The promoter of sales such as Bass Pro determines whether a particular product will have a tag line. Factors influencing the selection of items to be highlighted include price, and also offering the “latest and greatest” of a particular type of product. If ACR were to lose its early key positions in catalogs and mailers, as has occurred in Bass Pro’s Offshore Angler 2012 Saltwater Specialist and 2012 Master Catalogs, ACR stands to lose considerable revenue and goodwill *which could not be replaced*.

153. Finally, internet sites are the 24/7/365 tool retailers use to educate the marketplace and create sales. While websites will often display a wider range of products, retailer placement of products and associated promotions are key, and retailers frequently influence purchase decisions by directing consumers to one company’s item over its competitor’s product. Wilkerson PI Decl., ¶ 4.

154. In addition, Bass Pro’s 2012 Master Catalog, a copy of which was picked up by Mr. Pack at Bass Pro’s retail location as recently as March 16, 2012, contains an advertisement for the SATRO directed to consumers and does not have the FCC required disclaimer. That advertisement touts the SATRO as the “world’s slimmest, smallest, and lightest PLB” and is offered for sale to consumers for \$299.99.

155. Similarly, Bass Pro’s Offshore Angler 2012 Saltwater Specialist Catalogue, a copy of which was picked up by Mr. Pack at Bass Pro’s retail location as recently as February 13, 2012, also advertised the SATRO without the required FCC disclaimer and offered it for sale to consumers for \$299.99. That SATRO advertisement appeared in a prominent position at the

top of the page and has a tag line that reads, “NEW”. In that same catalog, ACR’s PLB-375, which is actually *the* world’s smallest and lightest PLB *lawfully* offered for sale to consumers in the market today, is reduced to the bottom of the page with no tag line.

156. In addition, the SATRO was advertised in the March issue of Boating Magazine with the required FCC disclaimer and no price. In that advertisement, the SATRO was touted as the “world’s thinnest, floating PLB,” and next to a depiction of ACR’s PLB-375+, the advertisement claims that the SATRO is “50% thinner than the competition.” Wilkerson PI Decl., ¶ 9.

157. Mr. Pack’s testimony is uncontroverted that, without the use and benefit of ACR’s confidential and proprietary information, copyrighted materials, and trade secrets, it would typically take a competitor approximately two years to conceptualize, design, certification test, and obtain product approval by appropriate government agencies for a PLB. This assessment is based on ACR’s experience in the industry and Mr. Pack’s discussions with competitors at industry events. This is because typically it will take up to 6 months to create a product definition and build a business plan; 12-18 months of product development; and up to 6 months or more for certification testing and regulatory approvals. In fact, DME’s Eric Hiner told Mr. Pack that DME had started in 2007 to develop a COSPAS-SARSAT ELT but eventually had given up because they could never get the product to pass certification testing. Pack PI Decl., ¶ 20.

## **PROPOSED CONCLUSIONS OF LAW**

### **I. ACR’S MOTION FOR PRELIMINARY INJUNCTION WAS TIMELY FILED**

1. ACR acted promptly to address defendants’ wrongful acts as soon as their long-secret activities were disclosed, and requires urgent relief *before* its customers are irretrievably diverted and *before* the defendants obtain FCC certification.

2. Despite ACR's prompt request for preliminary injunction made soon after learning of defendants' wrongful acts, DME nonetheless has argued that ACR unreasonably delayed in seeking injunctive relief. DME's PI Brief at pp. 5-9. This argument is inconsistent with DME's previous position that ACR's allegations "against DME are slim, and arise only from suspicion and surmise." Subjeck Decl., Dkt. No. 18-1 at ¶ 25. DME has also argued both that ACR filed this lawsuit based on speculation and that such speculation would somehow have been sufficient to seek relief from the Court seventeen months ago. DME cannot have it both ways. Not only is the position taken by DME on this issue inherently contradictory, but it also ignores the substantial evidence presented thus far (based only on limited discovery) demonstrating defendants' unlawful conduct.

3. The uncontroverted evidence demonstrates that ACR did *not* have reason to believe that the Individual Defendants misappropriated its trade secrets until Mr. Pack was able to review sales brochures and a press release regarding the SATRO on October 24, 2011. Mr. Pack made clear that ACR had no reason prior to October 24, 2011, to believe that Mr. Tong (or Messrs. Cassina and Wu) had or would in the future disclose or use that information, much less to unfairly compete with ACR.<sup>31</sup> Pack's Dep. pp. 102-04; *see also* PI Testimony at 230:4-

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<sup>31</sup> DME's further argument that a vendor's disclosure to ACR that Mr. Tong was working in some capacity at Astronics DME in August 2011, without more, is irrelevant. ACR has not alleged that Mr. Tong was constrained by a non-compete or other restrictive covenant which would restrict his ability to work with a competitor, including Astronics DME, *so long as he was not misappropriating ACR's proprietary information or trade secrets*. Of course, had Mr. Tong been honest and forthright and told Mr. Pack that he was working with DME on its PLB project when Mr. Tong requested to have a meeting with ACR to supposedly discuss doing contract work together, Mr. Pack would have been informed earlier about Mr. Tong and the other Individual Defendants' involvement in DME's PLB development. Instead, Mr. Tong refused to sign a non-disclosure agreement when they met for lunch in June 2011 and he peppered Mr. Pack with numerous questions about the state of ACR's PLB-375 program (unbeknownst to Mr. Pack at that time, he was talking to a direct competitor who misappropriated ACR's trade

232:24. The reasonableness of ACR's expectation in this regard (at least until it learned otherwise in October 2011) is supported by CCK and the Individual Defendants' own filings in this case in which they insist "that *although Tong transferred certain files from ACR...[e]ach of the [I]ndividual Defendants have declared that they have not transferred the files to any other person or party....*" Dkt. No. 29, p. 4 (emphasis added). In all events, ACR sent a registered letter to each of the Individual Defendants enclosing a copy of his non-disclosure agreement and reminding his of his obligation under his agreement. Horn's PI Decl., Exs. J-L.

4. Thus, DME's argument that ACR unreasonably delayed in taking action to protect its trade secrets and proprietary information is without merit. *Ameritech, Inc. v. Am. Info. Techs. Corp.*, 811 F.2d 960, 963 (6th Cir. 1987) (district court's order granting summary judgment based on plaintiff's delay of six months in filing lawsuit after learning of defendant's announcement of its adoption of trade name was reversed, finding that plaintiff is entitled "to some latitude to assess both the impact of another's use of an allegedly infringing trademark as well as the wisdom of pursuing litigation on the issue"), *quoting Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366, *reh'g denied*, 777 F.2d 1130 (6th Cir. 1985). To the contrary, ACR timely filed this lawsuit after it became aware of defendants' misappropriation of ACR's trade secrets and their intention to unfairly compete against ACR on or about October 24, 2011.<sup>32</sup>

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secrets), then he refused to tell Mr. Pack what he himself was working on "because we don't have an NDA agreement." Zelek's PI Decl., Ex. G, at pp. 161-62.

<sup>32</sup> The cases cited by DME do not suggest otherwise. In addition to being factually distinguishable, the cases DME relies upon involve significant delays by plaintiffs between the time of filing their lawsuit and their motion seeking a preliminary injunction. *See e.g., Lawler Mfg. Co. v. Bradley Corp.*, No. 98-1660, 2000 U.S. Dist. LEXIS 14197 (S.D. Ind. Apr. 26, 2000) (one year); *Burger v. Hartley*, No. 11-62037, 2011 WL 6826645, at \*2 (S.D. Fla. Dec. 28, 2011) (two months); and *Structural Tenting Corp. v. Termite Doctor*, No. 09-21285, 2010 U.S. Dist. LEXIS 80034 (S.D. Fla. June 30, 2010) (eight months). Here, ACR sought a preliminary injunction *within fifteen days* of filing this lawsuit. Other cases relied upon by DME involve plaintiffs who waited significant periods of time after discovering defendant's unlawful activity.



## **II. STANDARD FOR PRELIMINARY INJUNCTION**

5. “There is a need for immediate injunctive relief when employers are threatened by conduct of former employees that would irreversibly alter the status quo.” *See Mech. Servs., Inc. v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2008 WL 4613046, at \*15 (M.D. Fla. Oct. 15, 2008) (internal quotations and citation omitted). That is the case here.

6. To prevail on a motion for a preliminary injunction, the party seeking the injunction must demonstrate: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) that it will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs the potential harm to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *See Charles Schwab & Co., Inc. v. McMurry*, No. 2:08-cv-534-FTM-29SPC, 2008 WL 5381922 at \*1 (M.D. Fla. Dec. 23, 2008).

## **III. ACR IS LIKELY TO PREVAIL ON ITS CLAIM FOR TRADE SECRET MISAPPROPRIATION.**<sup>33</sup>

### **A. Standards for Trade Secret Misappropriation.**

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*See e.g., Badillo v. Playboy Entm't Grp., Inc.*, No. 8:04-591, 2004 WL 1013372 (M.D. Fla. Apr. 16, 2004) (eight months). Here, ACR timely filed this lawsuit after it became aware of defendants' misappropriation of ACR's trade secrets and their intention to unfairly compete against ACR on or about October 24, 2011. PI Testimony at 230:4-232:24; *see also, ACR Ameritech, Inc. v. Am. Info. Techs. Corp.*, 811 F.2d 960, 963 (6th Cir. 1987) (finding that plaintiff is entitled “to some latitude to assess both the impact of another's use of an allegedly infringing trademark as well as the wisdom of pursuing litigation on the issue”), *quoting Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366, reh'g denied, 777 F.2d 1130 (6th Cir. 1985).

<sup>33</sup> DME incorrectly states in its PI hearing brief at p. 12 that only three claims are asserted against it, ignoring the trade secret misappropriation claim in Count IV. But Count IV is plainly alleged against all defendants and DME answered the claim. *See* First Amended Complaint, Count IV (¶¶ 74-79), and DME's Amended Answer, at ¶¶ 74-79 (responding to the allegations with denials); *compare* DME's Amended Answer at ¶¶ 81-83 (expressly stating that no response is required as Count V is directed solely to Mr. Tong). In all events, DME's brief addresses ACR's trade secret claim at pages 18-26.

7. To prove a violation of the Florida Uniform Trade Secrets Act (“FUTSA”), ACR must demonstrate that defendants misappropriated trade secret information from ACR and that ACR made reasonable efforts to maintain the secrecy.<sup>34</sup> See Fla. Stat. § 688.001 *et seq.*; *Lee v. Cercoa, Inc.*, 433 So.2d 1, 2 (Fla. 4th DCA 1983). Misappropriation of a trade secret occurs where a person who knows or has reason to know that the trade secret was acquired by improper means acquires the trade secret of another or where a person who has obtained the trade secret by improper means discloses or uses the trade secret of another without express or implied consent. See Fla. Stat. at § 688.002(2); *Del Monte Fresh Produce Co. v. Dole Food Co.*, 136 F.Supp.2d 1271, 1291 (S.D. Fl. 2001).

8. ACR has identified numerous trade secrets, including its source code, its source code specifications, its various circuit designs individually and as combined, certain of its component selections individually and as combined, the schematics for its various PLBs, and the extensive research, development, and testing efforts, and documentation thereof. There is no requirement that ACR establish that each of these qualifies as a trade secret or was misappropriated; the law only requires that a trade secret be misappropriated for ACR to be entitled to relief.

**B. Trade Secret Misappropriation.**

9. Contrary to an argument advanced by defendants, trade secret protection is not lost just because it theoretically may have been possible to reverse engineer the information. *Reingold v.*

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<sup>34</sup> DME’s argument (DME Brf. at pp. 9-10) that ACR failed to act promptly to protect its trade secrets upon learning that Mr. Tong emailed certain confidential materials to his personal email account is irrelevant because none of those materials are at issue in this motion. The only questionable email relevant to this motion is Mr. Tong’s July 14, 2010, email to Mr. Cassina’s ACR email account, which included the power amplifier schematics, flow chart and graph. That email was not distributed outside of ACR and ACR had no reason to assume the information was misused until the October 2011 announcement regarding the SATRO.

*Swiftships, Inc.*, 126 F.3d 645, 652 (5th Cir. 1997) (holding that “protection will be accorded to a trade secret holder against disclosure or unauthorized use gained by improper means, even if others might have discovered the trade secret by legitimate means” such as reverse engineering).

“Theoretical independent development is not a defense.” *Milgrim on Trade Secrets*, §7.02[1][b].

Once any misappropriation is established, as is the case here, a defendant cannot claim “independent development.” *Id.*; see also *Pioneer Hi-Bred Int'l v. Holden Found. Seeds*, 35 F.3d 1226, 1237 (8th Cir. 1994) (holding that the fact that one “could” have obtained a trade secret lawfully is not a defense if one does not actually use proper means to acquire the information); *Cemen Tech, Inc. v. Three D Industries, L.L.C.*, 753 N.W.2d 1, 9-10 (Sup. Ct. Iowa 2008) (under UTSA, “the fact that information may be obtained by lawful means, including reverse engineering, is not necessarily dispositive of the trade-secret issue.”).<sup>35</sup> In *Cemen Tech*, the court relied on the plaintiff’s expert’s report in concluding that, although the plaintiff’s machine and component parts could be reverse engineered, plaintiff’s claims were not necessarily defeated due to the difficulty of the reverse engineering process. *Id.*; see also *La Calhene, Inc. v. Spolyar*, 938 F.Supp. 523 (W.D. Wis. 1996) (granting preliminary injunction and finding that plaintiff’s engineering drawings, results of tests it ran on components, and information about past mistakes all were protectable trade secrets,

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<sup>35</sup> There was no evidence or even a claim that any defendant reverse engineered any ACR products in connection with the SATRO development work, nor is ACR seeking to prevent honest reverse engineering of its products. As a result, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), cited by DME for the proposition that reverse engineering is lawful, is irrelevant. Further, DME’s “head start” argument (DME Brief at pp. 10-11) must be rejected because certain of the claimed trade secrets could never be ascertained by reverse engineering (such as ACR’s research activities and testing results and its C language source code), other trade secrets could not be reverse engineered so easily as to make them readily ascertainable (such as ACR’s unique circuitry designs), and other trade secrets could not have been ascertained at least until the PLB-375 was publicly available in July 2011 (such as its selection of the GlobalTop GPS component or three batteries).

notwithstanding defendant's claim that many of plaintiff's products could be reverse engineered).<sup>36</sup>

10. There is no requirement that any elements of ACR's schematics, source code, specifications, or other trade secrets be filtered out or disregarded, as suggested by DME.<sup>37</sup> Even if certain components may be known in the industry, it is well-established that compilations of supposedly "public" components or other trade secrets can qualify as a trade secret. *See AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 971-74 (8th Cir. 2011) (discussing broad range of information entitled to trade secret protection, including compilations of publicly available information); *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1129-30 (10th Cir. 2003) (under UTSA, method for teaching babies to swim protectable as a trade secret even though components may be in the public domain and are known in the field); *Savor, Inc. v. FRM Corp.*, 812 A.2d 894, 897 (De. 2002) (under UTSA, even if the basic components are well known, program may still be protectable combination of components); *Essex Group, Inc. v. Southwire Co.*, 501 S.E.2d 501 (Ga. 1998) (finding trade secrets even though most, if not all, of the hardware components and warehouse equipment were commercially available); *see also E.I. duPont deNemours & Co., Inc. v. Christopher*, 431 F.2d 1012, 1014-16 (5th Cir. 1970) (applying Texas law and Restatement of Torts,

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<sup>36</sup> *Walker Mfg v. Hoffmann, Inc.*, 261 F.Supp.2d 1054 (N.D. Iowa 2003), cited by DME, is inapposite because the plaintiff in that case failed to offer expert opinion to rebut the defendant's expert's opinion that the claimed trade secret designs were readily ascertainable through reverse engineering once the products were sold to the public. Here, Dr. Heppe opined that ACR's claimed trade secrets would not be readily ascertained through reverse engineering. Heppe Decl., ¶¶ 49c and 49d. Likewise, *Levenger Co. v. Feldman*, 516 F.Supp.2d 1272 (S.D. Fla. 2007), is irrelevant as the trade secret claims were dismissed on the grounds that they were "all extremely vague and all attempts to clarify have been in vain," and it is not at all clear which claimed trade secrets the court said in dicta might be ascertainable through reverse engineering.

<sup>37</sup> DME improperly cites *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996), and *Mitek Holdings, Inc. v. ARCE Eng'g Co., Inc.*, 89 F.3d 1548 (11th Cir. 1996), in its trade secret argument. DME Brief at 22, 24, 25. The cases do not stand for the propositions asserted.

plaintiff stated a claim for misappropriation based on defendant's acquisition of trade secret information even though the information was obtained from aerial photographs of plaintiff's plant).<sup>38</sup>

11. ACR's trade secrets need not be novel or non-obvious, and it is irrelevant that the circuitry and source code at issue could be designed by someone with reasonable skill. *See Kewanee Oil Co. v. Bicron Corp.*, 416 US 470, 476 (1974) (holding "[n]ovelty, in the patent law sense, is not required for a trade secret.") (citing *W. R. Grace & Co. v. Hargadine*, 392 F. 2d, 9,14 (6th Cir. 1968); *Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293-94 (5th Cir. 1970) (discussing the difference between trade secret and patent protection and holding novelty and invention are not requisite for a trade secret as they are for patentability); *Forest Lab., Inc. v. The Pillsbury Co.*, 452 F.2d 621, 624 (7th Cir. 1971) (holding that "[a]s distinguished from a patent, a trade secret need not be essentially new, novel or unique"). Indeed, even if other companies independently created the same trade secret designs, they may still qualify as trade secrets absent evidence that every competitor used the designs such that they were "generally known" and "readily ascertainable." *Bestechnologies, Inc. v. Trident Environmental Systems, Inc.*, 681 So.2d 1175, 1176 (Fl. 2d Dist. 1996); *see also All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So.2d 363 (Fl. 5th Dist. 1999) (reversing dismissal and holding that there is no novelty requirement and that the concept of a sports complex may not be generally known, even if many multi-purpose sports complexes exist and can be easily viewed).

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<sup>38</sup> *Amer. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407 (11th Cir. 1998), cited by DME, is inapposite as that case involved donor lists that appeared to have been posted on computer bulletin boards and donors themselves revealed publicly that they were sponsored. Even then, the court remanded for further findings as to whether the lists were sufficiently secret to qualify as trade secrets. Here, as detailed below, ACR took steps to maintain the secrecy of its claimed trade secrets.

12. While ACR may not prevent defendants from using their general knowledge and skills (*Lee*, 433 So.2d at 2 n. 1), the law plainly prohibits defendants from misappropriating the specific circuit designs, research data, test results and source code at issue here. *Id.* at 2.<sup>39</sup>

13. Defendants' use of ACR's trade secrets is prohibited even if they use them with modifications or improvements based on their own efforts, as long as the substance of the designs used by them "is derived from" an ACR trade secret. *Real-Time Lab., Inc. v. Predator Sys.*, 757 So. 2d 634, 637 (Fla. Dist. Ct. App. 2000) (citing *Forest Labs., Inc. v. Pillsbury Co.*, 452 F.2d 621, 625 (7th Cir. 1971)); *see also Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) (holding that "if trade secret law were not flexible enough to encompass modified or even new products that are substantially derived from the trade secret of another, the protections that law provides would be hollow indeed"); *Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1294-95 (5th Cir. 1970) (defendant may be liable for misappropriation even if he modifies or improves on the trade secret, and even if the changes required skill and knowledge); *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 Del. Ch. LEXIS 242, \*64-67 (Del. Ch. 1999) (a "process developed with 'explicit reference' to the trade secrets is substantially derived from the trade secrets," that misappropriation occurs "even where the trade secret is used only as a starting point or guide in developing a process," or where a defendant uses a trade secret to understand what pitfalls to avoid); *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 653-55 (5th Cir. 1997) (the user of another's trade secret is liable even if he uses it with

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<sup>39</sup> Contrary to DME's suggestion (DME Brief at 21), ACR is not seeking to prevent use of general knowledge about the "best" way to accomplish something, but rather is seeking to protect specific designs, research activities, test results and source code. In addition, *Colucci v. Kar Kare Auto.*, 918 So.2d 431 (Fla. App. Ct. 2006), cited by DME (DME Brief at 22), is irrelevant as the question in that case was whether the expertise and reputation of an individual and customer goodwill (when there were no customers) constituted a business interest protectable pursuant to a non-compete agreement.

modifications or improvements, so long as the substance of the process used by the actor is derived from the other's secret); *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 683 (N.D. Ill. 1997) (for a trade secret claim, it is not necessary that defendant copied plaintiff's ballast design exactly; liability possible even if the defendant used the plaintiff's trade secrets "only to demonstrate what pitfalls to avoid").

14. ACR's source code, including the comments in the code, constitutes a protectable trade secret.<sup>40</sup> See *Telex Corp. & Telex Computer Prods. Inc. v. Int'l Bus. Machs., Corp.*, 367 F. Supp. 258, 325-26 (N.D. Okla. 1973) (finding that Telex misappropriated IBM's trade secret source code and comments); *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1123 (9th Cir. 2010) (describing the role of comments in source code and finding the source code as a whole, to be a trade secret); see also *Jamison Bus. Sys. v. Unique Software Support Corp.*, 2005 U.S. Dist. LEXIS 45480, \*31 (E.D.N.Y. 2005) (in copyright case, court considered the comments and the fact that the comments were similar was a factor in finding substantial similarity between the source code).<sup>41</sup>

15. If defendants or anyone else somehow managed to extract ACR's C language source code from the microcontroller in its products (although there was no evidence that it would even be possible), that would constitute copyright infringement. See *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539 n.18 (11th Cir. 1996) (reverse engineering constitutes infringement unless there is a

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<sup>40</sup> The comments in source code are textual statements by the programmers that are included to document changes and additions to the code, and also to reflect who has made the changes. These are valuable both to the programmer who makes the comments, and also to others who will have a need to work on the code, providing critical insight to the code's development. Pack PI Decl., ¶ 12; Heppe Decl., ¶ 34; PI Testimony at 358:17-360:8.

<sup>41</sup> DME cites *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 1993 WL 414724 (D.N.J. 1993), for the proposition that source code comments are not protectable trade secrets. This case is not controlling or persuasive. *Unix* applied the law from two non-Uniform Trade Secret Act states and is easily distinguished. Unlike here, there was no evidence that anyone considered the comments to be valuable and there was substantial evidence that much, if not all, of the code was publicly available and not secret. The decision also is inconsistent with holdings by many other courts, cited above.



legitimate “fair use,” such as ensuring product compatibility); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (no fair use where code was wrongfully obtained from the Copyright Office, even if it could have been reverse engineered).<sup>42</sup>

16. The evidence established that the source code that operates ACR’s PLB-350 product is proprietary and a valuable trade secret of ACR.<sup>43</sup> PI Testimony at 112:15-25, 355:13-356:16 (Heppe); Pack PI Decl., ¶ 12. Even defendants’ expert agreed that the code “has value” and that, “[i]n its current form it’s essential, yes.” PI Testimony 287:15-288:20; 349:21-350:5.

17. Finally, DME cannot escape liability by turning a blind eye to unlawful acts of those working on its behalf. *See Computer Assocs. Int’l v. Altai Inc.*, 982 F.2d 693, 718-20 (2d Cir. 1992) (employer on inquiry should have known of possession and possible use of trade secrets); *Carter Prods. Inc. v. Colgate-Palmolive Co.*, 130 F.Supp. 557 (D.Md 1955) (defendant should have known of the misappropriation); *Milgrim on Trade Secrets*, §7.02[2][c] (one cannot insulate against liability by studiously achieved ignorance).

#### **IV. ACR IS LIKELY TO PREVAIL ON ITS COPYRIGHT INFRINGEMENT CLAIM.**

##### **A. Standards for Copyright Infringement.**

18. ACR has asserted a claim for copyright infringement with respect to its schematics for its PLBs. To prevail on its claim, ACR must demonstrate: (i) that it owns a valid copyright in the works at issue; and (ii) that the infringer copied original elements of those

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<sup>42</sup> ACR has registered the copyright in its PLB 350 source code, and has provided to defendants the registration certificate as well as the code. Pack PI Decl., ¶ 12 and Ex. E (Reg. No. Txu 1-784-361). ACR has not yet moved to amend its claims to include a claim of copyright infringement with respect to this source code. That claim is not, however, necessary for this motion.

<sup>43</sup> Computer programs are initially written in source code, which is a symbolic language often using English words and common symbols, such as the “C” programming language. The source code is translated through a mechanical process known as compilation or assembly into object code or machine readable code (a series of 1s and 0s that is readable by a computer). Heppe Decl., ¶ 27.



works. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S.Ct. 1282, 113 L. Ed. 2d 358 (1991); *Montgomery v. Noga*, 168 F.3d 1282, 1288 (11th Cir. 1999). Anyone who violates any of the exclusive rights of the copyright owner, including the exclusive rights to reproduce, distribute or make derivative works, is an infringer of the copyright. *Montgomery*, 168 F.3d at 1292-93. A work may be infringed by reproducing it in whole or in any substantial part, or by incorporating a portion of the copyrighted work in some form into the defendant's work. *Id.* at 1292.<sup>44</sup>

19. A copyright registration certificate is “prima facie proof of the existence of a valid copyright.” 17 U.S.C. § 401(c); see *C.B. Fleet Co., Inc. v. Unico Holdings, Inc.*, 510 F. Supp. 2d 1078, 1081 (S.D. Fla. 2007).

20. It is well settled that the creative expression of even a functional work, such as a schematic, is protectable by copyright. See *Oldcastle Precast, Inc. v. Granite Precasting & Constr. & Concrete, Inc.*, 2011 U.S. Dist. LEXIS 20977 (W.D. Wash. Mar. 2, 2011) (finding that defendant's technical drawings of vaults shared similarities of an expression as compared to plaintiff's drawings, and on that basis denied defendant's motion for summary judgment); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2011 U.S. Dist. LEXIS 112846 (D. Md. Sept. 30, 2011) (finding for plaintiff on claim of infringement of technical drawings); *McIntosh v. Northern California Universal Enterprises Co.*, 670 F.Supp.2d 1069 (E.D. Cal. 2009) (subdivision map and improvement plan designs in technical drawings protected by copyright); see also *McIntosh v. Northern California Universal Enterprises Co.*, 2010 U.S. Dist. LEXIS 76611 (E.D. Cal.

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<sup>44</sup> Liability may attach for direct or indirect infringement. *McIntosh v. Northern California Universal Enterprises Co.*, 670 F.Supp.2d 1069, 1084, 1102-1105 (E.D. Cal. 2009) (discussing requirements for contributory or vicarious liability for infringement of maps and technical drawings, and noting that defendant's “wink and nod approach” to its contractor's use of the plaintiff's works suggests a basis for contributory liability).

2010) (sustaining jury verdict of infringement of map and improvement plans, but orders new trial on damages).<sup>45</sup>

21. Since there is rarely evidence of direct copying, courts have developed various tests to determine whether there is circumstantial evidence of copying. *See Calhoun v. Lillenas Publishing*, 298 F.3d 1228, 1232-33 (11th Cir. 2002) (access and substantial similarity establishes presumption of infringement; even absent access, infringement may be established where works are strikingly similar); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936 (10th cir. 2002); *see also Range Road Music, Inc. v. East Coast Foods, Inc.*, 2012 U.S. App. LEXIS 3173 (9th Cir. 2012) (“substantial similarity” is not an element of the claim, but a doctrine to assess infringement). Evidence of direct copying can obviate the need to go through a substantial similarity analysis altogether. *Tracfone Wireless, Inc. v. SND Cellular, Inc.*, 715 F.Supp.2d 1246 (S.D. Fla. 2010) (evidence of literal or verbatim copying establishes infringement).<sup>46</sup>

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<sup>45</sup> DME repeatedly cites *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996), for the proposition that a functional design cannot be protected by copyright. This is not correct. *Bateman* clearly stands for the proposition that something functional, like the source code and hardware logic diagrams at issue in that case, are protected by copyright. Functionality challenges only prevent copyright protection *if they are found to be applicable because of external design constraints*. 79 F.3d at 1546 n.28 (emph. added). That, of course, is not the case here since there were no compatibility issues that mandated use of ACR’s designs and the COSPAS SARSAT specifications did not require defendants to use same designs as those created by ACR. DME also cites the discussion in *Bateman* regarding the undisputed rule that methods of operation and processes are not covered by copyright, which also is irrelevant here as ACR is not seeking copyright protection for a method of operation or a process.

<sup>46</sup> DME argues that only thin protection should apply to the schematics, which is not correct since both experts agree that there are many ways in which a PLB can be designed and many options for drawing the schematics. *Oldcastle*, at \*20-21. For similar reasons, neither the merger nor *scenes a faire* doctrine applies here. *Id.* at \*21-24; *McIntosh*, 670 F.Supp.2d at 1095-97. In particular, under the merger doctrine, courts will not protect a work from infringement if the idea underlying the work can be expressed in only one way. *McIntosh*, 670 F.Supp.2d at 1095 (rejecting merger doctrine where defendants did not need to take advantage of existing improvements made to the land, but chose to take advantage of existing improvements, and could have subdivided the parcels differently). Under the *scenes a faire* doctrine, where similar

22. Where, as here, there is a “high degree of access” shown, there is a lower standard of proof required for substantial similarity. *Oldcastle Precast*, \*16-17; *McIntosh*, 670 F.Supp.2d at 1087.

23. In determining whether there is substantial similarity, it is important to consider the quality of what was copied, not just the quantity. *See Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 564-566 (1985) (use of even a very small percentage of plaintiff’s unpublished work may constitute copyright infringement); *United States v. O’Reilly*, 794 F.2d 613, 615 (11th Cir. 1986) (court did not need to review all aspects of the defendant’s game to find substantial similarity where it found enough in the aspects reviewed); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 945 (10th Cir. 2002) (“catalogue of differences” between the plaintiff’s and the defendant’s work is “largely irrelevant”). As the Eleventh Circuit said in *Bateman*, “even a qualitatively small amount of copied material which remains unfiltered may be sufficiently important to the operation of [the program] to justify a finding of substantial similarity.” 79 F.3d at 1548-49. As the court also said, “a small portion of a structure or code of a program may nonetheless give it its distinctive features.” *Id.* at 1548 (remanding due to the district court’s failure to instruct the jury regarding the need for a qualitative assessment). *See also* Nimmer on Copyright § 13.03 [F][5] at 13-146 (quantitatively small amount may constitute infringement if it is important to the operation of the program). As Dr. Heppe opined, both the quality and quantity of defendants’ copying was substantial.<sup>47</sup>

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features are indispensable to the work, such as using overlapping windows for a computer display, copyright protection is denied. *Oldcastle*, at \*22-\*24.

<sup>47</sup> DME’s argument that Dr. Heppe failed to filter out unprotected elements and that he only identified a small percentage of identical or similar designs grossly misrepresents his declaration and his testimony at the hearing. Further, DME’s argument ignores the fact that an original arrangement of even public domain elements is entitled to protection.

24. The fact that there are differences between the ACR schematics and the schematic for the SATRO does not defeat ACR's claim. *U.S. v. Kim*, 307 F. Appx. 321 (11th Cir. 2009) (infringement not excused by showing how much of defendant's work was not lifted from the plaintiff). "Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity." *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987); *see also McIntosh*, 670 F.Supp.2d at 1089 (quoting *Baxter* and denying defendants' motion for summary judgment based on their failure to sufficiently identify claimed differences).<sup>48</sup>

25. Even if the Court applies the "access and substantial similarity" test (*Bateman v. Mnemonics*, 79 F.3d 1532 (11th Cir. 1996)), the evidence supports a finding of likelihood of success on ACR's copyright infringement claim. Where, as here, there is a "high degree of access" shown, there is a lower standard of proof required for substantial similarity. *Oldcastle Precast*, \*16-17. Indeed, Mr. Cassina has memorized the schematics and Mr. Tong knew them

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<sup>48</sup> The cases cited by DME are irrelevant or easily distinguished. For example, the *Lil'Joe Wein Music, Inc. v. Jackson*, 2008 WL 2688117 (S.D. Fla. 2008), case pertains to music and pertains to an award of attorneys' fees; the discussion about the expert report is all dicta. *Baby Buddies, Inc. v. Toys R Us, Inc.*, 611 F.3d 1308 (11th Cir. 2010), involves a pacifier with a ribbon and a bow, hardly comparable to the technical drawings at issue here. The *Corwin v. Walt Disney Co.* and *Peter Gaito Architecture, LLC v. Simone Development Corp.* cases both reject copyright protection for concepts and ideas, which is not at issue here as Dr. Heppie has identified substantial actual expression copied by the defendants, including the overall layout and design of the schematics, numerous circuits and circuit "topologies," and individual component selections, none of which were dictated by industry requirements or product limitations. The case of *Green Bullion Financial Services, LLC v. Money4Gold Holdings, Inc.*, 639 F.Supp.2d 1356 (S.D. Fla. 2009), likewise is inapposite because it involved a comparison of web sites that shared only the words and stylized font and colors of the mark "Cash4Gold" and certain generic terms. *MiTek Hldgs, Inc. v. ARCE Eng'g Co., Inc.*, 89 F.3d 1548 (11th Cir. 1996), involved the nonliteral elements of software, which the court found to be unprotectable since they were a method of operation, which is not an issue here. Finally, *Home Design Services, Inc. v. David Weekley Homes, LLC*, 548 F.Supp.2d 1306 (M.D. Fla. 2008), is easily distinguished as it involved architectural drawings where the court found that there were only a finite number of ways a rectangle can be divided into the required number of rooms, which also is not the case here.

so well that he would not need to reverse engineer them to know them. Cassina Dep. at pp. 164-65; Tong Dep. at 164. As Dr. Heppe explained, in reaching his conclusion that the CCK schematic is identical and very similar to ACR's schematics, he filtered out that which was not protectable and also confirmed that the similarities were not dictated by the COSPAS-SARSAT or RTCM standards. Heppe Decl., ¶¶ 23-26, 51; *see, e.g.*, PI Testimony at 84:9-20, 85:10-25, 86:25-89:5.<sup>49</sup>

26. Once infringement is established, the burden shifts to the defendants to prove independent creation. *McIntosh*, 670 F.Supp.2d at 1094-95. Defendants offered no evidence of independent development, and what was offered was not credible. For example:

- Professor harris testified at his deposition that he did not have the slightest idea why Mr. Cassina used the “TP4” designation in the upper left corner of the schematic for the SATRO, and he could not explain it and considered it an anomaly. Harris Dep. at 140; PI Testimony at 305:22-306:6. Professor harris never corrected this deposition testimony and did not address it in his direct testimony in advance of the hearing. At the hearing, he testified that Mr. Cassina used “TP4” for the power supply and that Mr. Cassina had always used “TP4” for the power supply. PI Testimony at 306:13-307, 309:4-8. This new testimony was based on information he learned from Mr. Cassina days earlier. PI Testimony at 306:13-15. Professor harris remarkably considered this to be a sufficient explanation for use of “TP4” (PI Testimony at 307:2-3, 309:9-10), even though the CCK schematic included no other TP designations and Mr. Cassina had not, in fact, used the TP4 – or any TP designation – for the power supply in his Docking Master schematic. Rather, in that schematic he used the designation, “Battery.” Cassina Decl., Ex. C.
- Mr. Cassina stated in his declaration that the CCK schematic simply carried on his personal design style (Cassina Decl., ¶ 56), but then he admitted at the hearing that ACR personnel added the proprietary rights text that he copied for the CCK schematic and that there were many purely stylistic features developed at ACR that he did not previously use on his Docking Master – the only evidence of his schematic drafting style prior to ACR. PI Testimony at 439:6-440:25, 441:8-442:6; Cassina PI Decl., Ex. C.

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<sup>49</sup> As a result, *Liberty Am. Insur. Group, Inc. v. West-Point Underwriters, L.L.C.*, 199 F.Supp.2d 1271, 1288-90 (M.D. Fla. 2002), is inapposite. In that case, the plaintiff failed to filter out aspects of the claimed source code that were not protectible due to the merger and/or *scènes a faire* doctrines, neither of which apply to ACR's schematics. *See* footnote 46, above.

V. **ACR IS LIKELY TO PREVAIL ON ITS LANHAM ACT CLAIM AND, GIVEN THE ONGOING PROMOTION AND SALE OF THE SATRO IN VIOLATION OF FCC REGULATIONS AND REPRESENTATIONS TO THIS COURT, IS CONTINUING TO SUFFER IRREPARABLE HARM**

27. To prevail on its false advertising claim under the Lanham Act (15 U.S.C. § 1125), ACR must establish that: (1) the advertisements of the opposing party were false or misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception has a material effect on purchasing decisions; (4) the misrepresented product affects interstate commerce; and (5) the movant has been – or is likely to be – injured as a result of the false advertising. *Hickson Corp. V. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004).

28. Since the inception of this lawsuit, DME repeatedly has given assurances to the Court that the SATRO is no longer being advertised in violation of federal law, which has been demonstrated to be untrue and made without proper diligence. Had DME bothered to check after ACR squarely brought this issue to its attention, DME would have learned that its customer, Bass Pro, as recently as March 16, 2012 was still distributing to customers a catalog with a SATRO advertisement with no FCC required disclaimer. DME is hardly an innocent bystander caught up in a dispute between ACR and its co-defendants, as it has tried to argue. DME assured the Court at the January 4 hearing that DME would not market or sell the SATRO devices until after the Court ruled on ACR's Motion for Preliminary Injunction. DME has not acted consistent with these assurances, as confirmed by Mr. Pack's recent order of a SATRO. *See Frank Cassandra's Dep.* at pp. 113 and 117-20; *see also* Ex. 3 ¶ 20.

29. On February 13, 2012, Mr. Pack went to BassPro's retail store and picked up a copy of the Offshore Angler 2012 Saltwater Specialist Catalogue, which advertised the SATRO for sale for \$299 with no FCC disclosure. Moreover, there was a whole stack of that catalogue

being offered to customers for free, and the Bass Pro salesperson told Mr. Pack that anyone can order a catalogue by calling 1-800-basspro. Mr. Pack called that number and asked about availability of the SATRO, and was told by the Bass Pro salesperson that it was out of stock but he could backorder one. That salesperson also told Mr. Pack that the SATRO is expected to be available in early April 2012. At no time was Mr. Pack advised that the SATRO was not yet FCC approved and could not be offered for sale. Mr. Pack was able to purchase a SATRO from Bass Pro, and was informed that it was on backorder “to be shipped as soon as they are restocked.” By definition, to “restock” would suggest to an ordinary consumer that it was at one point *in* stock, but ran out. That is not the case here, yet customers such as Mr. Pack who are unknowingly placing orders for a SATRO and giving their credit card number to do so, are not being informed in any way or at any time during their sales transaction that the SATRO is not FCC approved and therefore, cannot be offered for sale without a disclaimer. *See* 47 C.F.R. §2.803.

30. ACR’s retail position in the marketplace continues to be threatened and harmed by DME’s acts and omissions as DME is well aware through Mr. Wilkerson’s deposition testimony. Wilkerson Dep., p. 24 (“In the Bass Pro catalog, [the SATRO PLB] was given a prominent position and [ACR was] reduced to the bottom of the page. SATRO has a tag line. We no longer have a tag line”). DME continues to promote and exhibit the SATRO at industry shows for retailers, vendors and consumers, including the NBAA, Outdoor World (January 2012), and the Miami International Boat Show (February 2012). Wilkerson PI Decl., ¶11. Many consumers and at least one vendor (Bass Pro) have expressed interest in the product at these shows. Cassandra’s Dep. at p. 123. Mr. Cassandra also testified that DME had already accepted orders from Bass Pro, which he considers (incorrectly) to be fine so long as DME does



not actually deliver the product prior to obtaining FCC approval. *Id.* at pp. 101-02 and 113.

That explains why DME has done nothing to stop the unlawful activity of retail establishments despite being fully aware that the SATRO has been *and continues* to be offered for sale *with no FCC disclaimer*.

31. In response to arguments recently made by DME, ACR's acceptance of conditional orders for its PLB-375 fully complies with FCC requirements because unlike DME, ACR's marketing materials, including the power point presentation shown to Mr. Wilkerson during his deposition and purchase orders, clearly contain the FCC disclaimer. PI Testimony at 212:12-215:24; *see also*, Wilkerson's PI Decl., ¶ 12 and Ex. E. ACR's marketing of the PLB-375+ in November/December 2011 also fully complies with FCC requirements because, as Mr. Pack testified, the PLB-375+ is a Class I permissive change variant *for which no FCC approval is required*. Wilkerson PI Decl., ¶ 14.

## **VI. ACR IS LIKELY TO PREVAIL ON ITS REMAINING STATE LAW CLAIMS**

### **A. Breach of Contract**

32. To prevail on its claim for breach of contract, ACR must establish: (i) the existence of a contract; (ii) material breach; and (iii) damages resulting from the breach. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009). The Employee Confidential Information & Assignment of Invention Agreements signed by the Individual Defendants are valid and enforceable contracts, which the Individual Defendants materially breached by copying, distributing, and disclosing ACR's confidential information, copyrighted material, and trade secrets to CCK and Astronics DME and by using that information for the use and benefit of defendants, thereby resulting in damage to ACR. Ex. 2 ¶¶ 18-19. Therefore, ACR is likely to prevail on its breach of contract claim.



**B. Duty of Loyalty**

33. It is well-established under Florida law that an employee owes a duty of loyalty to his or her employer. *See, e.g., Life Mktg. of Fla., Inc. v. A.I.G. Life Ins. Co.*, 588 So.2d 663, 665 (Fla. 5th DCA 1991); *McMurry*, 2008 WL 5381922 at \*1. To meet the obligations of that duty, “an employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment.” *Furmanite Am., Inc.*, 506 F. Supp.2d at 1149 (citations omitted); *Ins. Field Servs., Inc.*, 384 So.2d at 307-308; *Think Vacuums, Inc. v. March*, No. 09-cv-61883, 2011 U.S. Dist. LEXIS 12558 at \*6-7 (S.D. Fla. Feb. 9, 2011). Nor may an employee “carry on a rival business during his employment” and/or “engage in disloyal acts in anticipation of his future competition.” *Id.* The Individual Defendants engaged in precisely the types of disloyal acts prohibited under Florida law when they engaged in activities for their own self-interest and adverse to ACR, as described above, for CCK and/or Astronics DME’s benefit while still employed by ACR.

34. Where an employee uses confidential information gained during his employment in breach of his duty of loyalty, it is appropriate to preliminarily enjoin the employee from further use of that information by prohibiting the employee from soliciting former clients. *Ins. Field Servs., Inc.*, 384 So.2d at 307-309 (affirming grant of injunction and award of damages where employees had breached duty of loyalty by competing with their former employer while still employed by the former employer); *McMurry*, 2008 WL 5381922 at \*4 (finding that former employer would be irreparably harmed if former employee who took former employer’s confidential client contact information were permitted to continue to solicit former clients while working for a competitor, and granting preliminary injunction to former employer). Therefore, ACR is likely to prevail on this claim.

**C. Unfair Competition**

35. Florida courts have also recognized that “the Florida common law of unfair competition is an ‘umbrella for all statutory and non-statutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.’” *Exch. Int’l, Inc. v. Vacation Ownership Relief, LLC*, No. 6:10-cv-1273-Orl-35DAB, 2010 U.S. LEXIS 127414 at \*12-13 (M.D. Fla. Oct. 27, 2010) (citation omitted). Defendants’ misappropriation of ACR’s Confidential Information, copyrighted materials, and trade secrets constitutes unfair competition. For the reasons set forth above, as a result of the unfair advantage obtained by defendants by the Individual Defendants’ misappropriation of ACR’s Confidential Information, copyrighted materials, and trade secrets, defendants have and continue to unfairly compete with ACR and infringe on its copyright rights.

36. DME’s argument that this claim is preempted is without merit. Section 688.08 of the FUTSA expressly provides that preemption does not apply to “other civil remedies that are not based upon misappropriation of trade secrets” such as false advertising claims. “Thus, the issue becomes whether allegations of trade secret misappropriation alone comprise the underlying wrong.” *Allegiance Healthcare Corp. v. Coleman & PSS/World Med., Inc.*, 232 F.Supp.2d 1329, 1335-36 (S.D. Fla. 2002), citing *Coulter Corp. v. Leinert, et al.*, 869 F.Supp. 732, 734 (E.D. Mo. 1994).

37. Here, ACR’s allegations of unfair competition are distinguishable from the allegations of trade secret misappropriation and, therefore, the FUTSA does not preempt ACR’s unfair competition claim. ACR incorporates the same general allegations into Count XI (unfair competition) and Count IV (misappropriation of trade secrets), but ACR does not incorporate the allegations of Count IV into Count XI. In its general allegations, ACR claims that defendants engaged in business conduct which is contrary to honest business practices, and the theft of trade

secrets is included in those allegations. In Count XI, in addition to the general allegations, ACR also incorporates paragraphs 68-73, the allegations dealing with Count III, violations of the Lanham Act. Although there are common factual allegations in Counts IV and XI, ACR does *not* specifically allege that the misappropriation of trade secrets forms the basis of the unfair competition claim. Therefore, the FUTSA does *not* preempt ACR's unfair competition claim. *Alphamed Pharms. Corp. v. Arriva Pharms., Inc.*, 391 F. Supp. 2d 1148, 1167 (S.D. Fla. 2005) (district court denied a motion to dismiss an unfair competition claim on preemption grounds based on its finding that the allegations dealing with a claim for tortious interference with business relationships was incorporated into the unfair competition claim). As such, Plaintiff has a substantial likelihood of success on this claim.

**VII. THE REMAINING REQUIREMENTS FOR A PRELIMINARY INJUNCTION HAVE BEEN MET.**

**A. ACR is Entitled to An Injunction to Prevent Further Irreparable Harm.**

38. The remaining requirements for a preliminary injunction are satisfied. Once the moving party has demonstrated a likelihood of success on the merits of a trade secret claim, irreparable harm is presumed. *Lovell Farms, Inc. v. Levy*, 641 So. 2d 103, 105 (Fla. 3d DCA 1994). Significantly, irreparable harm is *presumed* in cases of breach of non-compete agreements and confidentiality provisions where, as here, the employee revealed specific trade secrets to his new employer. *Southeastern Mechanical Service, Inc. v. Brody*, 2008 WL 4613046 (M.D. Fla. 2008) (irreparable harm is presumed in trade secret cases).<sup>50</sup>

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<sup>50</sup> That ACR also includes a prayer for damages is not inconsistent with irreparable harm, as the claim for damages addresses different harms. *Charles Schwab & Co., Inc. v. McMurry*, 2008 WL 5381922 (M.D. Fla 2008) (finding defendant's contact with plaintiff's customers in violation of agreement may cause irreparable harm and that claim for damages does not prevent a claim for injunctive relief where claim for damages goes to past conduct).

39. As a result of defendants' unlawful conduct, ACR will continue to suffer substantial injury, including damage to ACR's goodwill, by the continued infringement of ACR's copyright rights and use of misappropriated trade secret information. *Hatfield v. AutoNation, Inc.*, 939 So.2d 155, 157 (4th DCA 2006) (where plaintiff could only speculate as to amount of damage from disclosure of secrets, this supported finding of irreparable harm to grant preliminary injunction); *Bimbo Bakeries USA, Inc.*, 613 F.3d 102, 118 (3rd Cir. 2010) (threat of irreparable harm flowing from trade secret misappropriation justified enjoining competitor's employment of plaintiff's former employee); *McMurry*, 2008 WL 5381922 at \*4 (granting injunction because of threat of irreparable harm from misappropriation of trade secrets).

40. There could be no doubt that ACR has been and will continue to be irreparably harmed if an injunction is not issued precluding the sale of the SATRO or any other device derived from the misappropriation of ACR's copyrighted works, confidential information, or trade secrets and from engaging in further false and/or misleading advertising, or causing third parties to do so. *See Brake Parts, Inc. v. Lewis, et al.*, No. 10:6531, 2011 U.S. App. LEXIS 16720, \*15 (6th Cir. Aug. 11, 2011) ("...an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate"), *quoting Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). As pointed out by Mr. Wilkerson, the SATRO could directly threaten ACR's retail position and either replace it entirely or minimize its inventory locations, causing ACR to lose sales and also lose consumer "mind share." Wilkerson PI Decl., ¶ 4. Catalogs and mailers also inherently have a limited amount of space available and have the added distinction of featuring a key item such as using a "tag line." Wilkerson PI Decl., ¶ 4. Factors influencing the selection of items to be highlighted include price, and also offering the "latest and greatest" of a particular type of product. Wilkerson PI

Decl., ¶ 4. If ACR were to lose its early key positions in catalogs and mailers, as has occurred in Bass Pro's Offshore Angler 2012 Saltwater Specialist and 2012 Master Catalogs, ACR stands to lose considerable revenue and goodwill which could not be replaced. Wilkerson PI Decl., ¶ 4. In addition, DME continues to promote and exhibit the SATRO at industry shows for retailers, vendors, and consumers, including the NBAA, Outdoor World (January 2012), and the Miami International Boat Show (February 2012). Wilkerson PI Decl., ¶11. Retailers only sell a limited number of products, and losing even one account can cause significant irreparable harm. Wilkerson PI Decl., ¶ 4. Likewise, PLB devices like those at issue here are typically one-time purchases for the end user, who is not likely to replace the device for several years. Wilkerson PI Decl., ¶2. Such evidence sufficiently demonstrates that ACR would suffer irreparable injury absent an injunction. *Brake Parts, Inc. v. Lewis et al.*, 2011 U.S. App. LEXIS 16720 at \*15 (finding loss of goodwill, loss of competitive advantage, and loss or research incentives to be sufficient evidence of irreparable injury); *see also, Berster Technologies, LLC v. Christmas*, No. 11-1541, 2012 U.S. Dist. LEXIS 1950 at \*31 (E. D. Cal. Jan. 5, 2012) (finding that intangible injuries such as lost or damaged goodwill and other intangibles such as lost business, lost business opportunities, and lost economic value of protected previously confidential and proprietary information).

**B. The Injury to ACR Outweighs the Potential Harm to Defendants.**

41. Granting an injunction will do no more than compel defendants to comply with their obligations under the law and their contracts. Such relief cannot be said to harm the defendants as it would simply restore the status quo. *Pharmerica, Inc. v. Arledge*, No. 8:07-cv-486, 2007 U.S. Dist. LEXIS 19992, \*23 (M.D. Fla. Mar. 21, 2007). Defendants have no right to falsely advertise a product that is not FCC certified or to keep ACR's information, much less use it for their own benefit to unfairly compete with ACR. *Id.*

42. ACR, on the other hand, has a statutorily protected right to preserve its most confidential, copyrighted, and proprietary information in a manner that shields ACR from damage that could be caused by someone acquiring or disclosing the information through improper means. *Id.* This is particularly true where, as here, the relief sought is extremely narrow, and would not limit the Individual Defendants' employment with CCK or DME except as related to the misappropriated proprietary information and materials. Nor would the issuance of a preliminary injunction prohibit defendants from conducting any business with truthful advertising, or selling any product that is not derived from the misappropriation and infringement of ACR's proprietary information and materials.

43. On the other hand, the denial of a preliminary injunction would cause ACR to lose customers, business opportunities, copyright protection, and trade secrets, which cannot be compensated by an award of damages. ACR acted promptly to address the defendants' wrongful acts as soon as their long-secret activities were disclosed, and requires immediate relief before its customers are irretrievably diverted and before the defendants obtain FCC certification for a product based on ACR's proprietary information and works. This potential harm clearly and greatly outweighs the consequences of the preliminary injunction to defendants.

**C. Issuance of an Injunction Promotes The Public Interest.**

44. Finally, the public interest weighs in favor of injunctive relief. The public interest will not be harmed by granting this Motion because the public's enjoyment of the products and the business services at issue does not depend upon who provides those services. Moreover, the public interest is served by protecting the trade secrets, copyrighted materials, and confidential and proprietary information of businesses such as ACR which invest a great deal of resources in developing intellectual property to serve its customers. *Id.* The public has an interest in protecting business from theft of confidential information such as what occurred here.

*Pharmerica, Inc. v. Arledge*, No. 8:07-cv-486, 2007 U.S. Dist. LEXIS 19992, \*23 (M.D. Fla. Mar. 21, 2007). The public likewise has an interest in being protected from false and misleading advertising, and from the further unlawful promotion for the sale of a safety product that is not FCC certified.

45. Granting equitable relief thus will serve, rather than hinder, the public interest and is appropriate here not only because it would help protect ACR from the harm that its competitors could inflict by granting an unfair advantage, but also because it protects the advancement of honest business enterprises and the economic well-being of the nation as a whole.

46. Accordingly, defendants, and anyone acting with or on their behalf, hereby are preliminary enjoined as follows:

- (a) Defendants must immediately stop all use of the source code and schematics for the SATRO, including all design, development and testing work with respect to the SATRO product;
- (b) Defendants are enjoined from making any copies or derivatives of the schematics for the SATRO, and enjoined from any further distribution of such schematics;
- (c) Defendants are enjoined from promoting, marketing or selling the SATRO, and must cancel all outstanding orders for the product, and shall take reasonable measures to correct its past marketing and also to ensure that their customers, including BassPro, cease all promotions, marketing, or sales of the SATRO products (including taking orders for the products); and
- (d) Defendants are enjoined from disclosing the source code or the schematics for the SATRO, and shall take all reasonable measures to remedy any past disclosures, and are

enjoined from disclosing or using any trade secret ACR documents or information related to the design, development or testing of any ACR personal locator beacons.

Dated this 20th day of April, 2012.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via ECF, on April 20, 2012 on all counsel or parties of record on the Service List below:

**SERVICE LIST**

**ACR Electronics, Inc. v. DME Corporation et al.  
Case No. 8:11-c-v-62591-MARRA  
United States District Court, Southern District of Florida**

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