

BIG RIVER RESOURCES SUED BY GREENSHIFT SUBSIDIARY FOR PATENT INFRINGEMENT

Files for Injunctive Relief to Cease and Desist Unlicensed Use of Patented Corn Oil Extraction Technology

NEW YORK, N.Y., February 16, 2010 – GreenShift Corporation (OTC Bulletin Board: GERS) today announced that its wholly-owned subsidiary, GS CleanTech Corporation (“GreenShift”), has commenced legal action in the United States District Court, Northern District of Illinois against Big River Resources Galva, LLC and Big River Resources West Burlington, LLC (collectively, “Big River”) for infringing on GreenShift’s U.S. patent covering corn oil extraction technology.

The complaint alleges that Big River is infringing U.S. Patent No. 7,601,858, titled "*Method of Processing Ethanol Byproducts and Related Subsystems*" (the “858 Patent”). The '858 Patent covers processes for recovering corn oil by evaporating and mechanically processing thin stillage, a precursor to the distillers grain co-product of corn ethanol production (“DGS”).

A motion for preliminary injunction was also filed with the complaint. In its motion, GreenShift argues that it has sufficient evidence to prove that Big River is infringing GreenShift’s patented corn oil extraction technology and this infringement has caused and will continue to cause irreparable harm to GreenShift.

Use of GreenShift’s patented and patent-pending corn oil extraction technologies is proven to provide licensed producers with significant competitive advantages over their competitors, including increased profit, reduced energy costs, a smaller carbon footprint, and lower risk.

Additional information is available online at www.greenshift.com.

About GreenShift Corporation

GreenShift Corporation (OTC Bulletin Board: GERS) develops and commercializes clean technologies designed to address the financial and environmental needs of its clients by decreasing raw material needs, facilitating co-product reuse, and reducing the generation of wastes and emissions.

GreenShift’s mission is to build shareholder value by using its technologies to catalyze disruptive environmental gain. GreenShift believes that the first, best and most cost-effective way to achieve this is to develop technology-driven economic incentives that motivate large populations of people and companies to make incremental environmental contributions that are collectively very significant.

With adoption by most of the U.S. ethanol industry, GreenShift’s commercially-available technologies can give way to disruptive gains by enabling sustainably increased production of globally-meaningful quantities of renewable fuels for distribution through existing supply chains.

GreenShift also maintains its strong commitment to continued innovation and has many additional patents pending for its *Backend Fractionation*[™] portfolio of strategically-compatible cleantech designed to continue driving the corn ethanol industry into increased sustainability and global competitiveness.

Additional information on GreenShift and its technologies is available online at www.greenshift.com.

Safe Harbor Statement

This press release contains statements that may constitute "forward-looking statements" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995. Those statements include statements regarding the intent, belief or current expectations of GreenShift Corporation and members of its management as well as the assumptions on which such statements are based. Prospective investors are cautioned that any such forward-looking statements are not guarantees of future performance and involve risks and uncertainties, and that actual results may differ materially from those contemplated by such forward-looking statements. Important factors currently known to management that could cause actual results to differ materially from those in forward-statements include fluctuation of operating results, the ability to compete successfully, and the ability to complete before-mentioned transactions. The company undertakes no obligation to update or revise forward-looking statements to reflect changed assumptions, the occurrence of unanticipated events or changes to future operating results.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GS CLEANTECH CORPORATION,)	
)	
Plaintiff,)	
)	Case No.
v.)	
)	JURY TRIAL DEMANDED
BIG RIVER RESOURCES GALVA, LLC)	
and BIG RIVER RESOURCES WEST)	
BURLINGTON, LLC,)	
)	
Defendants.)	

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff, GS CleanTech Corporation, does hereby, through its attorneys, allege as follows:

THE PARTIES

1. Plaintiff, GS CleanTech Corporation (hereinafter “GS CleanTech”), is a Delaware corporation having its principal place of business at 1 Penn Plaza, Suite 1612, New York, New York 10119. GS CleanTech is a wholly-owned subsidiary of GreenShift Corporation (hereinafter “GreenShift”), a Delaware corporation having its principal place of business at 1 Penn Plaza, Suite 1612, New York, New York 10119.

2. Upon information and belief, Defendant Big River Resources Galva, LLC (hereinafter “BRR Galva”) is an Illinois limited liability company having its principal place of business at 1100 SE 2nd Street, Galva, Illinois 61434.

3. Upon information and belief, Defendant Big River Resources West Burlington, LLC (hereinafter “BRR West Burlington”) (BRR Galva and BRR West Burlington collectively hereinafter “Big River”) is an Iowa limited liability company having its principal place of business at 15210 103rd Street, West Burlington, Iowa 52655, and is registered with the Illinois Secretary of State’s Office as a foreign limited liability company transacting business in Illinois.

JURISDICTION

4. This is a claim for patent infringement and arises under the patents laws of the United States, Title 35 of the United States Code. This Court has original jurisdiction over the subject matter of this claim under 28 U.S.C. §§ 1331 and 1338(a).

5. The Court has personal jurisdiction over Big River because, upon information and belief and among other things, it resides in and/or directly, or indirectly through its agents, transacts business in this judicial District, has committed acts within this judicial District giving rise to this action and/or at least by offering to sell, selling, purchasing, and/or advertising the infringing products and/or placing them into the stream of commerce in such a way as to reach customers in this judicial District, and/or because it has sufficient minimum contacts with this judicial District. The Illinois long-arm statute, 735 ILCS § 5/2-209(a), also permits personal jurisdiction over Big River because the claims arise from its transaction of business within this state, commission of tortious acts within this state, ownership, use, or possession of real estate situated within this state, and the making or performance of any contract or promise substantially connected with this state. Big River is amenable to service of process pursuant to the Illinois long-arm statute and Fed. R. Civ. P. 4(e). Requiring Big River to respond to this action will not violate due process.

VENUE

6. Upon information and belief, Big River resides in this judicial District, directly, or indirectly through its agents, transacts business in this judicial District and/or has committed acts within this judicial District giving rise to this action. Venue is proper in this judicial District under 28 U.S.C. §§ 1391(b), (c) and 1400(b).

BACKGROUND FACTS

7. GS CleanTech is the owner by assignment of United States Patent No. 7,601,858, entitled “Method Of Processing Ethanol Byproducts And Related Subsystems,” issued on October 13, 2009 (the “ ‘858 patent”). A true and correct copy of the ‘858 patent is attached hereto as Exhibit A. The ‘858 patent issued from a patent application originally filed on May 5, 2005 as Serial No. 11/122,859 (the “ ‘859 application”) and published on February 23, 2006 as U.S. Patent Application Publication 2006/0041152. *See* Exhibit A. Both the ‘858 patent and the ‘859 application claim priority to GS CleanTech’s first patent application related to its novel corn oil extraction methods and systems, which was filed in August of 2004 as a provisional application (Serial No. 60/602,050) (the “ ‘050 provisional application”). *Id.* The ‘858 patent and the ‘859 patent application are generally directed to the recovery of corn oil from the byproducts produced during the manufacture of ethanol from corn. *Id.*

8. GS CleanTech has standing to sue for infringement of the ‘858 patent because it owns all right, title and interest in and to the ‘858 patent, including the right to collect for past and future damages. GS CleanTech has suffered injury from Big River’s acts of patent infringement.

9. GS CleanTech invented a novel patented process to extract corn oil from the byproducts created during the manufacture of ethyl alcohol. This process is claimed in GS CleanTech's '858 patent and pending patent applications.

10. Recently, significant attention has been given to the production of ethyl alcohol, or "ethanol," for use as an alternative fuel. Ethanol not only burns cleaner than fossil fuels, but also can be produced using grains such as corn, which are abundant and renewable domestic resources.

11. In the United States, ethanol is typically produced from corn. Corn contains significant amounts of sugar and starch, which are fermented to produce ethanol.

12. A popular method of producing ethanol is known as "dry milling," whereby the starch in the corn is used to produce ethanol through fermentation. In a typical dry milling method, the process starts by grinding each kernel of corn into meal, which is then slurried with water into mash. Enzymes are added to the mash to convert the starch to sugar. Yeast is then added in fermentors to convert the sugar to ethanol and carbon dioxide. After fermentation, the mixture is transferred to distillation columns where the ethanol is evaporated and recovered as product, leaving an intermediate product called "whole stillage." The whole stillage contains the corn oil and the parts of each kernel of corn that were not fermented into ethanol.

13. Despite containing valuable corn oil, the whole stillage has traditionally been treated as a byproduct of the dry milling fermentation process and used primarily to supplement animal feed mostly in the form of a product called "dried distillers grains with solubles" (hereinafter "DDGS").

14. Prior to GS CleanTech's invention, efforts to recover the valuable corn oil from the whole stillage had not been successful in terms of efficiency or economy. A need therefore existed for a more efficient and economical manner of recovering corn oil. GS CleanTech has filled that need with its novel and inventive process.

15. The inventors of the novel process, David Cantrell and David Winsness, completed feasibility testing with an early-stage corn oil extraction prototype in 2004 and demonstrated, for the first time, that efficient extraction of the corn oil trapped in the dry milling byproducts was economically feasible.

16. In August of 2004, the inventors filed the '050 provisional application directed to their novel corn oil extraction methods and systems. The '858 patent claims priority back to the '050 provisional application.

17. In one embodiment, GS CleanTech's patented method comprises initially processing the whole stillage by mechanically separating (such as by using a centrifugal decanter) the whole stillage into distillers wet grains and thin stillage, and then introducing the thin stillage into an evaporator to form a concentrated byproduct or "syrup." Prior to recombining the now concentrated syrup with the distillers wet grains, the syrup is introduced into a second mechanical separator, such as a second centrifuge, which is different from the centrifuge that mechanically separated the whole stillage into distillers wet grains and thin stillage. This second centrifuge separates corn oil from the syrup thereby allowing for the recovery of usable corn oil. The syrup that exits the centrifuge is then recombined with the distillers wet grain and dried in a dryer to form the DDGS. The corn oil that is extracted from the syrup can be used for various purposes such as feedstock for producing biodiesel.

18. After filing the '050 provisional application in 2004, the inventors of GS CleanTech's novel corn oil extraction method began to engage the ethanol manufacturing industry to explain and market the corn oil extraction method itself and the benefits to be had by ethanol manufacturers if they were to install these systems in their facilities. In fact, in 2005, the inventors invited ethanol manufacturers to a symposium to hear about the advantages of this method and about 30 percent of the industry attended.

19. On or about October 14, 2009, ICM, Inc. (hereinafter "ICM"), a Kansas corporation having its principal place of business at 310 North First Street, Colwich, Kansas, filed its First Amended Complaint against GS CleanTech and GreenShift in U.S. District Court for the District of Kansas, No. 09-cv-01315-WEB-KMH (the "ICM Lawsuit"). A true and correct copy of the First Amended Complaint in the ICM Lawsuit (without exhibit) is attached hereto as Exhibit B. ICM's claims against GS CleanTech and GreenShift include a claim for declaratory judgment of non-infringement and invalidity of the '858 patent. *See* Exhibit B.

20. In its First Amended Complaint in the ICM Lawsuit, ICM admits that it "designs and builds ethanol production plants for customers and promotes, sells and installs centrifuge equipment to such customers for recovering oil from corn byproducts." Exhibit B, ¶ 9. ICM further admits that it "sell[s] and/or use[s] equipment to practice corn oil recovery methods that are in part the subject of the claims of the '858 Patent." *Id.* at ¶ 8.

21. On or about October 15, 2009, GS CleanTech filed its First Amended Complaint against ICM in U.S. District Court for the Southern District of New York, No. 09-cv-08642-LMM. GS CleanTech added ICM as a defendant in this pending action and asserted a claim for infringement of the '858 patent against ICM.

22. Upon information and belief, ICM sold products and equipment to Big River that infringe one or more of the claims of the '858 patent.

23. Upon information and belief, ICM sold products and equipment to Big River which Big River uses to infringe, and will continue to use to infringe, one or more of the claims of the '858 patent.

24. The process used by Big River, as described by ICM in its First Amended Complaint in the ICM Lawsuit, infringes, and will continue to infringe, the claims of GS CleanTech's patent applications as published and as issued in the '858 patent.

25. GS CleanTech is entitled to provisional rights under 35 U.S.C. § 154(d) because Big River makes, uses, offers for sale, or sells in the United States the invention as claimed in the published '859 application; Big River had actual notice of the published '859 application; and the issued claims in the '858 patent are substantially identical to the originally published claims in the '859 application.

COUNT I
(Infringement of U.S. Patent No. 7,601,858)

26. GS CleanTech repeats and realleges paragraphs 1-25, above, as though fully set forth herein.

27. Big River infringes and will continue to infringe one or more of the claims of the '858 patent by, among other activities, practicing the claimed methods and/or processes.

28. Big River's infringement has injured GS CleanTech, and GS CleanTech is entitled to recover damages adequate to compensate it for such infringement.

29. Big River's infringement has been willful, deliberate, and objectively reckless.

30. Big River's infringing activities have injured and will continue to injure GS CleanTech, unless and until this Court enters an injunction prohibiting further infringement and, specifically, enjoining further manufacture, use, sale, importation, and/or offer for sale of products or practice of any methods and/or processes that come within the scope of the claims of the '858 patent.

PRAYER FOR RELIEF

WHEREFORE, GS CleanTech respectfully asks this Court to enter judgment against Big River and against its respective subsidiaries, successors, parents, affiliates, officers, directors, agents, servants and employees, and all persons in active concert or participation with it, granting the following relief:

- A. The entry of judgment in favor of GS CleanTech and against Big River;
- B. A preliminary injunction prohibiting further infringement of the '858 patent;
- C. A permanent injunction prohibiting further infringement of the '858 patent;
- D. An award of damages adequate to compensate GS CleanTech for the infringement that has occurred, but in no event less than a reasonable royalty for the use made of the inventions of the '858 patent as provided in 35 U.S.C. § 284, together with prejudgment interest from the date the infringement began;
- E. An award to GS CleanTech of all remedies available under 35 U.S.C. § 284;
- F. An award to GS CleanTech of all remedies available under 35 U.S.C. § 285;
- G. An award to GS CleanTech of all remedies available under 35 U.S.C. § 154(d);
and
- H. Such other relief to which GS CleanTech is entitled under law, and any other and further relief that this Court or a jury may deem just and proper.

In further support of this Motion, CleanTech refers to and incorporates herein its Memorandum In Support, its Complaint, and the Declaration of David Winsness filed contemporaneously herewith.

WHEREFORE, for all of the above reasons, CleanTech respectfully requests that this Honorable Court preliminarily enjoin defendants from infringing the '858 Patent.

Respectfully submitted,

GS CLEANTECH CORP.

Date: February 15, 2010

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GS CLEANTECH CORPORATION,)
)
 Plaintiff,)
) Case No. 10-990
 v.) Honorable Wayne R. Anderson
) Magistrate Judge Geraldine Soat Brown
BIG RIVER RESOURCES GALVA, LLC)
 and BIG RIVER RESOURCES WEST)
 BURLINGTON, LLC,)
)
 Defendants.)

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

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II. INTRODUCTION

GS CleanTech Corporation ("CleanTech"), a subsidiary of GreenShift Corporation, is in the business of developing and commercializing clean technologies that facilitate the efficient use of natural resources. In October 2009, the '858 patent issued to CleanTech which covers novel methods to extract corn oil from the by-products formed during ethanol production. (Ex. A, the '858 patent¹). This extracted corn oil is sold as a commodity and is used as a feedstock for the production of biodiesel.

It is important to highlight at the very outset that prior to the invention of the subject corn oil extraction technology, dry mill ethanol manufacturers were not extracting corn oil from the by-products formed during ethanol production. There simply was no market for corn oil extraction from ethanol by-products.

Today however several ethanol manufacturers employ the subject technology, many of whom are infringing the '858 patent - including Big River Resources Galva, LLC ("Galva") and Big River Resources West Burlington, LLC ("West Burlington") (Galva and West Burlington may collectively hereinafter be referred to as "Big River"). Looking beyond today, the EPA just last week released its estimate that by 2022 "approximately 70% of projected total ethanol production will implement some type of corn oil extraction system."

CleanTech's innovative technology actually created this now burgeoning market for corn oil extraction from ethanol by-products. Since 2004, CleanTech has invested many tens of millions of debt and equity capital to develop and commercialize its corn oil extraction technologies, including the '858 patent. However, the ethanol industry - including Big River -

has largely ignored CleanTech's intellectual property rights and CleanTech is quickly suffering the irreparable effects of the ethanol industry's collective brush-off.

Galva is an ethanol manufacturing facility located in Galva, Illinois that began producing ethanol in 2009. Sometime after it began ethanol production, it implemented an infringing corn oil extraction system. West Burlington is also an ethanol manufacturing facility. It began ethanol production in or around early 2008 and began using an infringing corn oil extraction system shortly thereafter.

Big River's continued infringement of CleanTech's '858 patent is causing irreparable and immediate harm to CleanTech. CleanTech earned the '858 patent and deserves to enjoy the full measure of its first-mover competitive advantage in the emerging corn oil extraction market. CleanTech will be irreparably harmed if Big River is allowed to willfully infringe CleanTech's patents. CleanTech respectfully seeks an order enjoining Big River from further infringing the '858 patent pending final adjudication of this case.

II. BACKGROUND

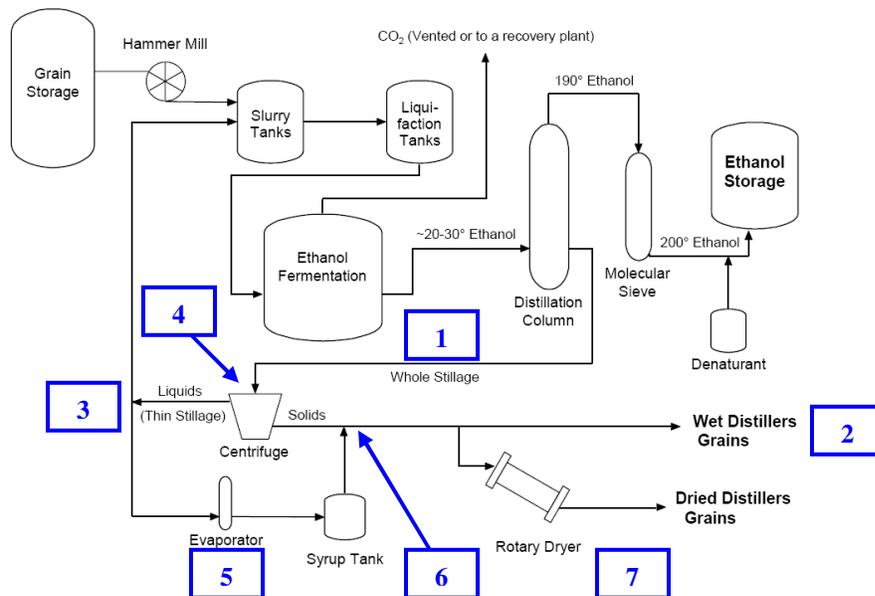
A. The Dry Milling Process

Over the past thirty years, and even more recently, significant attention has been given to the production of ethyl alcohol, or "ethanol," for use as an alternative fuel. A popular method of producing ethanol is known as "dry milling" which in the United States is typically practiced using corn. (Winsness Decl. at ¶ 4.) For example, in 2008 alone, approximately 170 dry milling plants in the United States produced approximately 10 billion gallons of ethanol. This is

¹ The application that led to the '858 patent was published on February 23, 2006 and the '858 patent itself issued on October 13, 2009. Exhibits A - Q are attached to the Declaration of David Winsness ("Winsness Decl.").

expected to increase to 15 billion gallons per year as the industry grows to meet federally mandated volumes.

Below is a figure from the EPA's Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis (which has been annotated with identifying numbers for purposes of discussion below) that describes a typical dry-mill ethanol plant without the subject corn oil extraction system installed. (Ex. B, Regulatory Impact Analysis, p. 94, Fig. 1.4-2)



The dry milling process utilizes the starch in the corn to produce the ethanol through fermentation, and creates a by-product stream termed “whole stillage” (**point 1** in the figure above). The whole stillage may be further separated into products known as “distillers wet grains” (**point 2**) and “thin stillage” (**point 3**). Despite containing valuable corn oil, this whole stillage has for the most part been treated as waste and used primarily to supplement animal feed in the form of distillers dried grains with solubles (“DDGS”).

The DDGS is created by mechanically separating, such as by using a centrifuge (**point 4**), the whole stillage into distillers wet grains and thin stillage, evaporating the thin stillage (**point 5**) to form a concentrate or syrup, recombining the resulting concentrate or syrup with the distillers wet grains (**point 6**), and drying the product to create the DDGS (**point 7**). The concentrate or syrup that exits the evaporator contains corn oil that - absent CleanTech's patented invention - is never recovered but is simply included within the by-product DDGS. (Winsness Decl. at ¶ 5.)

B. CleanTech's Corn Oil Extraction Process

CleanTech's invention comprises, without limitation², initially processing the whole stillage in the manner described above, that is, mechanically separating the whole stillage into distillers wet grains and thin stillage, and then introducing the thin stillage into an evaporator to form a concentrate or syrup. Prior to recombining the syrup with the distillers wet grains, the syrup is introduced into a mechanical processor such as a second centrifuge. (Winsness Decl. at ¶ 6.)

The second centrifuge separates corn oil from the syrup thereby allowing for the recovery of usable corn oil. The syrup that exits the centrifuge (which is free of the extracted corn oil) is then recombined with the distillers wet grains and dried to form the DDGS. The corn oil that is extracted from the syrup can be sold for various purposes such as feedstock for producing biodiesel. (*Id.*)

C. Big River's Infringing Corn Oil Extraction System

² While CleanTech describes an embodiment of its novel corn oil extraction method and system in this Memorandum, CleanTech does not intend that its invention is in any way limited to that embodiment and any statements in this Memorandum should not be construed as such.

1. West Burlington and Galva are both extracting corn oil

Both West Burlington and Galva are large ethanol manufacturers. Both extract corn oil from the by-products of the ethanol using a corn oil extraction system. This has been confirmed in various ways.

In its April 2008 newsletter, Big River Resources, LLC³ set out that in 2007 "oil extraction project began" in West Burlington. (Ex. C, "The Pipe Line", Vol. 2, Issue 2, April 2008, p. 2.) River Resources also set out that it intended to "implement [a] corn oil extraction system" at Galva in 2008. (*Id.*) Big River Resources further stated that the "oil extraction project continues to move forward as the equipment is installed and optimized for quantity and quality of nonfood grade corn oil. We anticipate full production as we move out of April and into May to provide corn oil to the bio-diesel industry." (*Id.* at p. 3).

In October 2008, Big River Resources touted the success of the corn extraction process at West Burlington by disclosing that production through September 2008 included "476,465 gallons of non-food grade corn oil", that they "have been very pleased with our corn oil extraction process as we currently produce 5 gallons per minute for a daily production of 7,000 gallons of corn oil marketed for Bio Diesel production, and that the corn oil extraction system "provides additional economic efficiency for Big River Resources." (Ex. D, "The Pipe Line", Vol. 2 Issue 4, October 2008, p. 3).

Information from Galva demonstrates that it too is extracting corn oil from ethanol by-products. Typically oil content in ethanol by-products is 10.5% to 12.5% or higher prior to corn oil extraction. (Winsness Decl. at ¶ 7.) In October 2006, before either West Burlington or

³ Big River Resources, LLC is believed to be the parent company of West Burlington and Galva.

Galva was extracting corn oil, West Burlington provided a sample of its distiller grains with solubles ("DGS") to Iowa State University for purposes of evaluating the use of the DGS for breeding heifers. (Ex. E, "Modified Distillers Grain with Solubles Stored for an Extended Period used to Develop Breeding Heifers," p. 1). The fat content of the 2006 West Burlington sample - before West Burlington was extracting corn oil - was 13.57 %. (*Id.*, Table 1). Today, with corn oil extraction now occurring at West Burlington, the fat content of the DGS is 9-10.5% fat - obviously less than the 13.57 % fat content in 2006 prior to extracting corn oil. (Ex. F, West Burlington Feed Bids). The fat content of the DGS for Galva is identical to the that of West Burlington, that is 9-10.5%. (Ex. G, Galva Feed Bids). The fact that the fat content of the DGS produced by Galva is identical to the DGS produced by West Burlington shows that Galva is extracting corn oil. (Winsness Decl. at ¶ 8.)

Lastly, just recently, Big River Resource's General Manager, Jim Leiting provided confirmation to CleanTech's Chief Technology Officer that both West Burlington and Galva are extracting corn oil. (*Id.*, ¶ 9.)

2. West Burlington and Galva are both extracting corn oil using an ICM system

In or around 2004, the inventors of the '858 patent disclosed their extraction technology to a company called ICM, Inc.⁴ ICM actually executed a Confidentiality Agreement with the inventors to protect the technology from unauthorized disclosure. Shortly thereafter, ICM actually purchased two authorized corn oil extraction system from the inventors. (*Id.*, ¶ 10.)

⁴ CleanTech and its parent GreenShift Corporation are currently involved in two litigations with ICM regarding the '858 patent. The first litigation is in United States District Court, Southern District of New York and is entitled *GS CleanTech Corporation v. ICM, Inc, et, al*, Civil Action No. 09-08642 (LMM), and the second is pending in United States District Court, District of Kansas and is entitled *ICM, Inc. v. GS CleanTech Corporation and GreenShift Corporation*, Civil Action No. 09-1315-WEB-KMH.

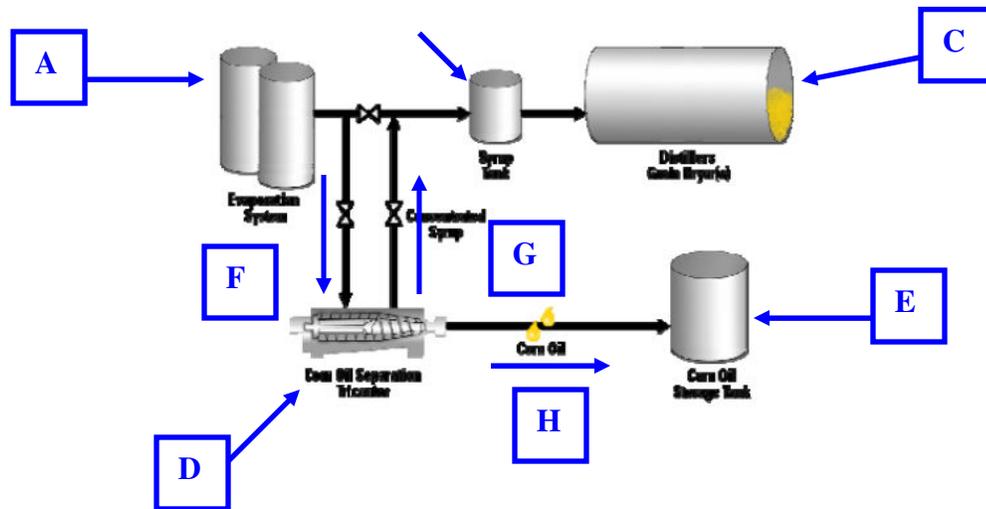
Apparently believing that the inventors would not obtain patent protection, ICM began selling its own unauthorized corn oil extraction systems to ethanol manufacturers. (*Id.*) In fact, not only did Big River Resource's General Manager just recently confirm that both Big River facilities are extracting corn oil, he also confirmed that that both extraction systems were supplied by ICM. (*Id.*, ¶ 9.)

3. The ICM corn oil extraction system

ICM describes one corn oil extraction system on its web site and marketing materials. A representative ICM system was sold to Cardinal Ethanol LLC ("Cardinal") in Indiana in 2008⁵. (Ex. H, Tricanter Agreement) Pursuant to a "Tricanter Purchase and Installation Agreement" entered into between Cardinal and ICM in June of 2008, ICM constructed and installed the corn oil extraction system at Cardinal's facility. (*Id.*) ICM's own marketing materials related to its oil extraction system provide that "[t]he oil recovery system separates corn oil from the post-fermentation syrup stream as it leaves the evaporators" and "[t]he corn oil is routed to storage tanks, and the remaining concentrated syrup is routed to your plant's existing syrup tank." (Ex.I, ICM Oil Recovery Brochure). ICM provides the following diagram (which has been annotated with identifying letters for purposes of discussion below), which describes its corn oil extraction system:



⁵ On February 12, 2010, CleanTech filed suit and a motion for preliminary injunction against Cardinal Ethanol, LLC in United States District Court, Southern District of Indiana claiming that Cardinal is infringing '858 patent.



The "Evaporation System" (**point A**), "Syrup Tank" (**point B**) and "Distillers Grains Dryer" (**point C**) are all part of the existing ethanol manufacturing facility. The Tricanter corn oil extraction system as shown includes a centrifuge (**point D**), which is called the "Corn Oil Separator Tricanter," and the "Corn Oil Storage Tank" (**point E**). (*Id.*) The corn oil extraction system connects directly into the existing Evaporation System via the centrifuge.

As set out above, prior to CleanTech's invention, the concentrated thin stillage syrup exiting from the Evaporation System was simply recombined with the distillers wet grains to create DDGS. (Ex. J, ICM Ethanol Production Process, Co-Product Processing.) In the extraction systems used by Big River, however, the concentrated thin stillage syrup exiting from the Evaporation System is instead directed into the centrifuge (**point D**) in the corn oil extraction system via the path shown by **arrow F** in the diagram above. The syrup that exits the Corn Oil Separator Tricanter (shown by **arrow G** in the diagram above), which is then free of extracted corn oil, is then recombined with the distillers wet grains and dried (**point C**) to form the DDGS. The corn oil that is extracted from the syrup via the centrifuge (**point D**) exits the centrifuge (shown by **arrow H** in the diagram above) and is stored in the Corn Oil Storage Tank (**point E**)

and can be sold for various purposes such as feed stock for producing biodiesel. (Ex. I, ICM Oil Recovery Brochure.)

ICM's corn oil extraction system is further described in the representative Tricanter Purchase and Installation Agreement. (Ex. H, Tricanter Agreement) For example, Section 5 of the Agreement provides a Performance Guarantee that includes several parameters at which the system must be running for the performance guarantee to apply. Specifically, Section 5 provides the following system parameters:

- the feed streams into the Tricanter must test between 30%-32% feed solids as determined by hot spin test conducted at the performance testing;
- the feed streams from the evaporators must be between 192 and 210 degrees F; and
- the acidic level of the feed streams into the Tricanter unit must be at least 3.8 pH or higher.

(*Id.*, Section 5).

The Tricanter Purchase and Installation Agreement also describes the equipment included within the corn oil extraction system operating at the corn oil extraction facility, which includes (among others) not only two centrifuges but also a corn oil tank as well as other related equipment including a heater, pumps, valves, and tanks. (*Id.*, Equipment List at Exhibit A.)

D. Communications Related to CleanTech's Intellectual Property

In August of 2004, CleanTech⁶ filed its first patent application related to its novel corn oil extraction methods and systems, which was in the form of a provisional application (Serial No. 60/602,050) (the “‘050 application”). (Winsness Decl. at ¶ 11.) In May of 2005, CleanTech

filed a non-provisional patent application (Serial No. 11/122,859) (the "'859 application") which claims priority to the '050 application. (*Id.*) The '859 application issued as the '858 patent on October 13, 2009. (Ex. A, '858 patent, front page)

In July of 2009, GreenShift Corporation, CleanTech's parent, sent a letter to both West Burlington and Galva (among other ethanol manufacturers) under 35 U.S.C. § 154(d) which provided each entity with actual notice of the relevant published patent applications and notice that the method of extracting corn oil employed by each falls within the scope of the published claims. (Ex. K, West Burlington July Letter; Ex. L, Galva July Letter). Neither West Burlington nor Galva - to this day - have responded to the respective July letters. (Winsness Decl. at ¶ 12.)

In August 2009, CleanTech did receive a letter from ICM's counsel specifically addressing the letters sent to Burlington and Galva. (Ex. M, ICM August 2009 Response). First, ICM did not deny that both West Burlington and Galva are extracting corn oil nor did it deny that the extraction systems employed by both facilitates were ICM extraction systems, which is further evidence - if not a complete admission - to both points. (*Id.*) Secondly, ICM did not specifically dispute that the corn oil extraction systems infringe the then pending claims of then '859 application. (*Id.*) Instead, ICM challenged the validity of the claims, and set out prior art that it believed rendered the then pending claims of the '858 application invalid. (*Id.*)

To the extent that the prior art cited by ICM had not already been submitted by CleanTech to the patent examiner at the PTO during prosecution of the '859 application, in August of 2009, CleanTech submitted the remaining prior art cited by ICM to the patent examiner. (Ex. N, Prosecution History, August 13, 2009 IDS, pp.21-24). The examiner

⁶ The patent applications were originally filed by the inventors and have since been assigned to GS CleanTech Corporation.

considered the prior art and on August 25, 2009 issued a notice of allowance allowing all of the then pending claims. (Ex. N, Prosecution History, August 25, 2009 Notice of Allowance, pp. 3-6).

Consequently, the claims that were pending when ICM sent the August response are the same claims that ultimately issued in the '858 patent, all of which were allowed over the prior art cited by ICM.

E. Corn Oil Extraction is an Emerging Market

As confirmed only one week ago by the Environmental Protection Agency ("EPA"), extracting corn oil from the by-products formed during ethanol production is an emerging market that will significantly increase in the coming years. On February 3, 2010, the EPA issued a Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis in connection with its final rule for the expanded Renewable Fuel Standard.⁷ In the Regulatory Impact Analysis, the EPA highlights the key role that it expects corn oil extraction will play in the evolution of the U.S. renewable fuels industry. (Ex. B, Regulatory Impact Analysis, p. 2)

The incredible level of market adoption projected by the EPA wherein by 2022 approximately 70% of projected total ethanol production will implement some type of corn oil extraction system, is driven by a number of significant positive benefits enabled by corn oil extraction technology.

a. Corn oil provides a vital new biofuel feedstock

⁷ As background to the Renewable Fuel Standard Program, the Statement of Need in the RFS2 Regulatory Impact Analysis provides: "The original Renewable Fuel Standard (RFS) program was adopted by EPA to implement the provisions of the Energy Policy Act of 2005 (EPAct), which added section 211(o) to the Clean Air Act (CAA). With the passage of the Energy Independence and Security Act of 2007 (EISA), Congress made several important revisions to the renewable fuel requirements. This

The demand for corn oil as a feedstock to manufacture biodiesel is expected to significantly increase in the next decade. The EPA stated that "[a] source of feedstock which could provide significant volume is oil extracted from corn or its fermentation co-products in the dry mill ethanol production process." (Ex. B, Regulatory Impact Analysis, p. 55). More specifically, the EPA estimates that "approximately 70 percent of projected total ethanol production will implement some type of corn oil extraction system by 2022, generating approximately 680 million gallons per year of corn oil biofuel feedstock." (*Id.*, p. 56). 680 million gallons equates to about 5.2 billion pounds per year of inedible corn oil feedstock, which has a current market price of about \$0.25 per pound or about \$1.3 billion per year. (Winsness Decl. at ¶ 13)

b. Use of corn oil extraction is expected to reduce greenhouse gas emissions

Use of corn oil extraction is expected to reduce lifecycle greenhouse gas ("GHG") emissions of corn ethanol by about 18% at the EPA's estimated 70% penetration rate. (Ex. B, Regulatory Impact Analysis, p. 427, Table 2.6-1).

c. Use of corn oil extraction reduces energy

Since corn oil is an insulator, removing it improves the heating efficiency and reduces the energy demand of the corn ethanol production process. The EPA projected reductions in thermal energy use of 5.4% due to use of corn oil extraction technology. (*Id.*, Table 1.5-14, p. 145). The EPA's estimate corresponds to industry-wide savings of about \$160 million per year at current market prices at the 70% penetration rate projected by the EPA. (Winsness Decl. at ¶ 14).

d. Use of corn oil extraction ensures compliance with government regulations

rule revises the RFS program regulations to implement these EISA provisions." (Ex. B, Regulatory Impact Analysis, Statement of Need).

The EPA concluded that use of corn oil extraction technology will help the U.S. ethanol industry to reduce lifecycle “GHG emissions by more than the 20% threshold required for renewable fuels.” (Ex. O, Renewable Fuel Standard Program (RFS2) Summary and Analysis of Comments, pp. 7-374 through 7-375).

e. Use of corn oil extraction increases profitability

Use of corn oil extraction increases ethanol producer revenues in addition to reducing production costs. The EPA estimated that ethanol producers using corn oil extraction technology can increase their profit by about \$0.079 per gallon of ethanol produced. (Ex. B, Regulatory Impact Analysis, Table 4.1-3, p. 713).

According to data provided by the Renewable Fuels Association, the U.S. ethanol industry produced about 29 billion gallons of ethanol between 1980 and 2004. (Ex. P, Statistics from Renewable Fuels Association) Extrapolating from the EPA’s assumptions, more than 10 billion pounds of crude corn oil and \$2.3 billion in additional profits passed unrecovered through the U.S. ethanol industry for the want of commercially viable corn oil extraction technology between 1980 and 2004, trapped in an ethanol product called distillers grain fed to livestock for a fraction of its value. (Winsness Decl. at ¶ 15).

CleanTech is at the forefront of providing the technology to support this emerging market and will be irreparably harmed if the ethanol manufacturers are allowed to willfully infringe CleanTech's patents.

III DISCUSSION

A. The Standard for Granting a Preliminary Injunction

A patent gives its owners the fundamental right to exclude others from importing, making, using, selling, and offering to sell patented inventions for the term of the patent. See 35

U.S.C. § 271. This includes the patent owner's ability to secure a preliminary injunction to protect its patent rights during the pendency of a lawsuit. *See*, 7-20 Donald S. Chisum, Chisum on Patents, § 20.04 (2007) (preliminary injunctions are "issued to protect the patent owner's rights during the time of the lawsuit.").

The decision to grant a preliminary injunction in a patent case is well within this Court's discretion, and is based on a consideration of the following four factors: (1) CleanTech's reasonable likelihood of success on the merits; (2) irreparable harm to CleanTech; (3) the balance of hardships to the parties; and (4) the impact of the injunction on the public interest. *See Oakley Inc. v. Sunglass Hut, Int'l*, 316 F.3d 1331, 1338-39 (Fed. Cir. 2003); *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1363 (Fed. Cir. 2008) (affirming that the four factors governing a preliminary injunction in a patent case are likelihood of success on the merits, irreparable harm, balance of harms, and the public interest).

No one factor is dispositive; instead, the "court must weigh the factors against each other and against the form and magnitude of requested relief." *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1365 (Fed. Cir. 2002); *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988). A court need not find that every factor weighs in favor of the patentee to grant a preliminary injunction, but it must find at least a likelihood of success on the merits by, and irreparable harm to, the patentee. *See*, e.g., *Hybritech*, 849 F.2d at 1457 (noting that, e.g., "the balance of hardships" should be considered, but that a district court need not expressly find such factor to grant a preliminary injunction). Each one of these factors strongly favors CleanTech's requested preliminary injunction.

B. CleanTech has a Strong Likelihood of Proving Both Infringement and Validity

With regard to the first factor--a likelihood of success on the merits--the moving parties must show that “in light of the burdens and presumptions that will inhere at trial,” (1) they will likely prove that defendants infringed the patent, and (2) they will likely withstand the non-moving party’s challenges, if any, to the validity and enforceability of the patent. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376 (Fed. Cir. 2009) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (burdens at preliminary injunction stage track burdens at trial)).

1. It is very likely that Big River Infringes the ‘858 patent

At the preliminary injunction stage, CleanTech need only prove now that it is likely to succeed at trial that Big River infringes one valid claim of the '858 patent. *Abbott Labs. v. Andrx Pharm., Inc.*, 473 F.3d 1196, 1201 (Fed. Cir. 2007) (affirming grant of preliminary injunction).

Infringement is analyzed in two steps. First, the meaning and scope of the patent claims is determined; next, the properly construed claims are compared to the formulation or process. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (construction of claims is question of law for court); *Bell Atl. Network Servs. Inc. v. Covad Commc’ns Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001) (comparison of properly construed claims to accused device is question of fact).

a. The claims and their constructions

At this time, CleanTech relies on infringement of at least claims 8, 10, 12, 13, 14 and 16 of the '858 patent for the purposes of this preliminary injunction motion.⁸

Words of a claim are generally given their ordinary and customary meaning. *Phillips v. AWH Corp.* 415 F.3d 1303, 1313 (Fed. Cir. 2005) (*en banc*) (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996)). The ordinary and customary meaning of a claim term is the meaning that the term would have “to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Id.* Construction of the various limitations of the claims of the ‘858 patent is straightforward and thus the claim limitations should be accorded their usual and ordinary meanings as understood by those of ordinary skill in the art.

"When the parties raise an actual dispute regarding the proper scope of [the patent] claims, the court, not the jury, must resolve that dispute." *02 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). In the absence of a dispute over the meaning of a claim term, however, there is no need to construe the claim term. *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997); *accord 02 Micro*, 521 F.3d at 1360 n.2 (citing *Biotec Biologische Naturverpackungen GmbH & Co. KG v. Biocorp, Inc.*, 249 F.3d 1341, 1349 (Fed. Cir. 2001) (finding no error in not construing the claim term "melting"); *Mentor H/S, Inc. v. Med. Device Alliance, Inc.*, 244 F.3d 1365, 1380 (Fed. Cir. 2001) (finding no error in court's refusal to construe "irrigating" and "frictional heat").

To date, neither West Burlington nor Galva have responded respond to the July 2009 letters. Consequently, CleanTech is unaware of any actual dispute that Big River may have over

⁸ CleanTech reserves the right to also seek a preliminary injunction for additional claims under the '858 patent at an appropriate time in the future, and any claims in one or more related patents that may issue in

the meaning of any claim terms in the '858 patent. Moreover, in its August 2009 response, ICM failed to state any dispute over the meaning of any claim terms in the '858 patent but rather focused on the validity of the claims. (Ex. M, ICM August 2009 Response).

CleanTech believes that the construction of the various limitations of the claims 8, 10, 12, 13, 14 and 16 of the '858 patent is straightforward and thus the claim limitations are to be accorded their usual and ordinary meanings as understood by those of ordinary skill in the art. However, if Big River raises a dispute related to claim construction, CleanTech reserves the right to substantively respond to any such claim construction arguments.

b. Big River literally infringes at least claims 8, 10, 12, 13, 14 and 16

Big River directly infringes at least claims 8, 10, 12, 13, 14 and 16 of the '858 patent. Attached as Exhibit Q is a table illustrating Big River's infringement of claims 8, 10, 12, 13, 14 and 16. Based on the above and as set out in the claim chart, there is no doubt that Big River literally infringes at least claims 8, 10, 12, 13, 14 and 16 of the '858 patent.

2. The '858 patent is valid

CleanTech's patent is presumed to be valid at every stage of this litigation, including proceedings on CleanTech's motion for preliminary injunction. *Titan Tire*, 566 F.3d at 1377 (Fed. Cir. 2009).

But CleanTech has more than a presumption to rely upon. The validity of the allowed claims of the '858 patent have already in a sense been tested by all of the prior art that ICM could muster on behalf of Big River. As set out above, upon receipt of prior art from ICM that it considered invalidating art, CleanTech immediately submitted the prior art to the PTO examiner prosecuting the claims in the then pending '859 application. (Ex. N, Prosecution History, August

the future.

13, 2009 IDS, pp. 21-24). The examiner considered the references and allowed all of the claims - including those currently asserted for purposes of this preliminary injunction - over the ICM references. (Ex. N, Prosecution History, August 25, 2009 Notice of Allowance, pp. 3-6).

Big River cannot merely rehash the prosecution history to challenge validity. *American Hoist and Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984). As the Federal Circuit explained in *PowerOasis, Inc. v. T-Mobile USA, Inc.*:

When no prior art other than that which was considered by the PTO examiner is relied on by the attacker, he has the added burden of overcoming the deference that is due to a qualified government agency presumed to have properly done its job, which includes one or more examiners who are assumed to have some expertise in interpreting the references and to be familiar from their work with the level of skill in the art and whose duty it is to issue only valid patents.

522 F.3d 1299, 1304 (Fed. Cir. 2008) (quoting *American Hoist*, 725 F.2d at 1359).

Therefore, to raise a substantial question of validity using any piece of prior art cited or reviewed by the patent examiner during prosecution requires, Big River must overcome two presumptions. The first presumption is that the patent is valid, and the second presumption is that the USPTO properly performed its function in reviewing the patent before issuing it. *Id.*

In view of the comprehensive examination of CleanTech's patent, **post-KSR**⁹, the '858 patent should enjoy a very strong presumption of validity and thus it is extremely unlikely that Big River will be able to raise the substantial question of invalidity necessary to overcome

⁹ In *KSR*, the U.S. Supreme Court rejected an overly rigid application of the teaching-suggestion-motivation (TSM) test for obviousness under 35 U.S.C. § 103. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007) ("We begin by rejecting the rigid approach of the Court of Appeals. Throughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM test here."). Instead, obviousness can be based on common knowledge and common sense. *Id.* at 421. The Court's expansive and flexible approach has generally heightened the standard for patentability.

CleanTech's likelihood of success on the validity of its patent. *See Al-Site v. VSI Int'l Inc.*, 174 F.3d 1308, 1323 (Fed.Cir. 1999) (the burden of proving invalidity "is especially difficult when prior art was before the PTO examiner during prosecution of the application.')

CleanTech has demonstrated a clear likelihood of the success on the merits of its request for a preliminary injunction.

C. Without an Injunction, CleanTech will Suffer Immediate and Irreparable Harm

Irreparable harm is that which cannot be sufficiently quantified, or adequately compensated by money damages, or avoided by a later decision on the merits. Irreparable harm can be shown in a variety of ways. *See, e.g., Abbott Labs.*, 544 F.3d at 1362 (noting several indicia of irreparable harm including likelihood of price erosion, loss of market position, loss of revenue, loss of goodwill, loss of research and development, and loss of market opportunities); *Jacobson v. Cox Paving Co.*, 19 U.S.P.Q.2d 1641, 1653, 1991 WL 328445 (D. Ariz. May 16, 1991) (enumerating 14 separate factors capable of showing irreparable harm in the patent infringement context including "3. Will the defendant's continuing infringement erode the plaintiffs position in the market? ... 6. Does defendant's continuing infringement threaten survival of the plaintiff's business?").

The substantial evidence that Big River infringes one or more claims of the '858 patent outlined above, coupled with the strong presumption of validity of the '858 patent also outlined above, creates a presumption of irreparable harm. *Elantech Devices Corp. v. Synaptics, Inc.*, No. C 06-01839 CRB, 2008 WL 1734748, at *7 (N.D. Cal. Apr. 14, 2008) ("This presumption in patent infringement suits arises because 'the principal value of a patent is its statutory right to exclude,' therefore, 'the nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole.") (quoting *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32

F.3d 1552, 1557 (Fed. Cir. 1994)).¹⁰ Even setting aside that presumption, however, CleanTech has more than met its equitable burden of harm.

CleanTech is a pioneer in the nascent corn oil recovery market. The commercial success and desirability of CleanTech's technology is illustrated by the transformation of the corn oil extraction market for dry mill ethanol manufacturers prior to the invention - which was then non-existent - to today comprising a vibrant emerging market where there has been significant adoption of the technology by the ethanol industry (albeit in many cases an unauthorized adoption). But that's not the end of the story. The corn oil extraction market is on the verge of even more substantial growth over the coming decade during which time the EPA estimates that by 2022 "approximately 70% of projected total ethanol production will implement some type of corn oil extraction system." (Ex. B, Regulatory Impact Analysis, p. 56).

Although the market that CleanTech created is on a precipice of significant expansion, short of enjoining willful infringers like Big River from using the technology for free, CleanTech is on the precipice of moving in a direction toward financial distress. Against this landscape, the

¹⁰ In a recent non-precedential opinion, the Federal Circuit held that the presumption of irreparable harm in the preliminary injunction context was eliminated after *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). *Automated Merchandising Systems, Inc. v. Crane Co.*, Nos. 2009-1158, 2009-1164, 2009 WL 4878643, at *3 (Fed. Cir. Dec. 16, 2009) (non-precedential). District courts have split on the issue of whether the presumption of irreparable harm applies in the preliminary injunction context after *eBay*. *Voile Mfg. Corp. v. Dandurand*, 551 F. Supp. 2d 1301, 1306 (D. Utah 2008) (presumption does not survive); *Chamberlain Group v. Lear Corp.*, No. 05 C 3449, 2007 WL 1017751, at *5 (N.D. Ill. March 30, 2007) vacated on other grounds, 516 F.3d 1331 (Fed. Cir. 2008) (presumption does not survive but preliminary injunction nonetheless granted). *Cf. Christiana Indus v. Empire Elecs., Inc.*, 443 F. Supp. 2d 870, 884 (E.D. Mich. 2006) (*eBay* did not eliminate presumption); *Elantech Devices Corp.*, 2008 WL 1734748, at *8 (same). Other courts have avoided the issue. *Precision Links Inc. v. USA Prod. Group., Inc.*, No. 3:08cv576, 2009 WL 3076114, at *8, n.4 (W.D.N.C. Sept. 22, 2009) (plaintiff did not make strong showing of likelihood of success so court need not decide whether presumption of irreparable injury still valid); *Everett Labs, Inc. v. Breckenridge Pharm., Inc.*, 573 F. Supp. 2d 855, 867 (D.N.J. 2008) (in absence of explicit binding precedent, declining to find whether presumption of irreparable harm applies).

evidence shows that CleanTech has been and will continue to be irreparably harmed by Big River's continued infringement.

Specifically, CleanTech has shown the following independent and separate forms of irreparable harm:

- CleanTech is and will continue to suffer loss of market share, opportunities, revenue, and goodwill due to Big River's infringement;
- CleanTech's reputation as a technology pioneer is diminished and harmed due to Big River's infringement;
- Other parties are encouraged to infringe CleanTech's patent; and
- CleanTech will eventually be forced into financial ruin.

The evidence is clear that CleanTech's extraction process offers real tangible benefits in the form of significant additional revenues to ethanol manufacturers. The ability to offer these benefits translates into significant competitive advantages for CleanTech - advantages to reputation, with new customers and with existing customers and with investors and creditors. These advantages are completely negated by the Big River's unrepentant infringement of CleanTech's patent. In fact, Big River has cavalierly ignored CleanTech's patent rights, assuming, perhaps, that the lucrative rewards from infringement outweighed any associated risks. It is very likely that others will follow Big River's lead and adopt a "wait-and-see" approach. This "wait and see approach" was taken by Cardinal Ethanol as well, who CleanTech similarly sued yesterday, February 12. (See Footnote 5 above).

As a result, CleanTech has been harmed irreparably and monetary damages are difficult to calculate and would not adequately compensate CleanTech's loss.

- 1. CleanTech suffers irreversible loss of market share, opportunities, revenue, and goodwill due to Defendant's infringement.**

A showing of loss of market share is alone sufficient. For example, in *Abbott Labs. v. Sandoz, Inc.*, 500 F. Supp. 2d 807, 842 (N.D. Ill. 2007), the district court found irreparable harm where the patentee demonstrated that the continued sale of the accused product would cause the patentee to lose approximately 90 percent of its market share without the possibility of any market share recovery. *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001) (applying presumption of irreparable harm, but finding that evidence of price erosion and loss of market share without evidence of market expansion from introduction of infringing product supported finding of irreparable harm); *Polymer Tech., Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed. Cir. 1996) (loss of market opportunities cannot be quantified or adequately compensated, and is evidence of irreparable harm).

Moreover, in addition to loss of market share, loss of opportunities, revenue, and goodwill are also well-recognized forms of irreparable harm. *See Abbott Labs.*, 544 F.3d at 1362 (citing irreparable harm cases for price erosion, market share, reputation and goodwill); *Purdue Pharm.*, 237 F.3d at 1368 (loss of market position); *Bio-Technology General Corp. v. Genentech Inc.*, 80 F.3d 1553, 1566 (Fed. Cir. 1996) (loss of revenue and goodwill); *Polymer Tech., Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed. Cir. 1996) (loss of market opportunities cannot be quantified or adequately compensated and is evidence of irreparable harm).

Irreparable harm is also influenced by the dynamics of the industry to which the patented invention pertains. Industry dynamics that favor finding irreparable harm include: (1) the newness of the field of technology covered by the patent; (2) the patent could help the patentee establish a market position and create business relationships in the market; (3) the potential injury to the patentee is unpredictable; and, (4) in the absence of the injunction, other potential infringers will be encouraged to infringe. *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456

(Fed. Cir. 1988) (affirming a preliminary injunction enjoining accused infringer from specific infringing activity where district court found irreparable harm after considering these, and other, factors).

The loss of marketing opportunities and technological lead time is especially harmful in emerging markets. *Baker Hughes Inc. v. Nalco Co.*, Civ. No. H-09-1885, 2009 WL 4877698, *5–*7 (S.D. Tex. Dec. 11, 2009) (granting patentee’s motion for a preliminary injunction enjoining future infringement on a patent directed to a method of processing crude oil where the patented technology covered a new market the parties were seeking to develop, such that the patentee losing any sales to the accused infringer would likely cause irreparable harm in lost market share, harm to reputation, lost customer goodwill, and price erosion.).

In a case involving a permanent injunction, the district court found that the fact that it was a new market with “sticky” customers that would stay with the original manufacturer and not switch supported a finding of irreparable harm.

Loss of market share in this nascent market is a key consideration in finding that Plaintiff suffers irreparable harm--Plaintiff is losing market share at a critical time in the market’s development, market share that it will not have the same opportunity to capture once the market matures....And, as Plaintiff is a relatively new company with only one primary product, loss of market share and of customer base as a result of infringement cause severe injury.

TiVo Inc. v. EchoStar Commc’ns Corp., 446 F. Supp. 2d 664, 669 (E.D. Tex. 2006), *aff’d in part, rev’d in part and remanded*, 516 F.3d 1290 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 306 (2008).

Here, CleanTech has lost and continues to lose market share, opportunities, revenues, and goodwill due to Big River's ongoing infringement. CleanTech is losing its position as a leader in a new market that it created. (Winsness Decl. at ¶ 18.) Big River's strategy is to simply ignore CleanTech, a small, start-up, entrepreneurial company.

Big River has admitted that the extraction of corn oil adds a favorable additional economic benefit. (Ex. D, "The Pipe Line", Vol. 2 Issue 4, October 2008, p. 3) ("This is a revenue stream that provides additional economic efficiency for Rig River Resources."). If Big River can use CleanTech's technology to create an additional revenue stream by selling the extracted corn oil with impunity, what is to stop other ethanol manufacturers from doing the same without compensating CleanTech for the use of such technology? Consequently, without an injunction to stop Big River's infringement in its tracks, other ethanol manufacturers will be encouraged to follow Big River's lead and infringe CleanTech's patent.

CleanTech's harm is not simply lost royalties. The monetary losses represent only a fraction of the lasting harm suffered by CleanTech. CleanTech's harms due to Big River's infringement include lost opportunities, such as contracts for the installation of the machinery for the extraction process, long-term service and repair contracts, as well as options to purchase corn oil from the manufacturers at an agreed-upon price. The lost sales due to infringement also result in (a) decreased ability to repay debt funds used to commercialize the technology, (b) increased interest costs and penalties on that debt, (c) decreased earnings, (d) decreased shareholder value, and (e) decreased ability to provide other clients with financing options to maximize and accelerate use by the ethanol industry of CleanTech's technology. (Winsness Decl. at ¶ 19.)

Specifically, over the years, GreenShift, as the parent of CleanTech, has spent millions of dollars on research, development, commercialization of the corn oil extraction technology, and if ethanol manufacturers like Big River are allowed to freely use the technology, there is little prospect of either repaying debt accrued to fund those research, development and commercialization activities or providing any return to its shareholders. (*Id.*, ¶ 20.)

Monetary damages alone cannot compensate the above losses particularly when time is a major factor due both to limited duration of a patent timeline and the lack of financial resources to properly improve upon the technology thereby causing customers to potentially look to other technologies. Further, there is a real chance that the majority of business arrangements will be established between ethanol manufacturers, like Big River, and other service providers, during the pendency of this litigation, thereby forever shutting out CleanTech from the very market it created. (*Id.*, ¶ 21.) These harms are irreparable because they can never be recovered, and the monetary damages are difficult to predict with any certainty.

2. CleanTech's reputation as a technological leader is diminished and harmed due to Defendant's infringement.

Courts have also recognized as irreparable harm instances where the patentee's reputation or goodwill suffers as a result of the infringement. *See EyeTicket Corp. v. Unisys Corp.*, 155 F. Supp. 2d 527, 548 (E.D. Va. 2001) (granting preliminary injunction and finding irreparable harm, in part, based on the loss of time that the exclusive licensee would have enjoyed as the technology leader in the market, and finding this would attribute to noncompensable loss of market share—"Money damages alone cannot restore the technological lead-time that the Plaintiff would have enjoyed but for the infringement of the Defendant. EyeTicket paid for the exclusivity period not only with the hope of generating sales, but in order to establish a reputation for expertise and advanced products in this particular Field of Use. Therefore, a major element of the 'benefit of the bargain' of the Licensing Agreement to Eye-Ticket was the establishment of a technological lead over its rivals.").

CleanTech, a small entrepreneurial company, introduced a novel, breakthrough technology to the industry, educated all participants, and delivered realizable gains when all established participants and technology providers had previously failed to do so. Big River's

calculated infringement of CleanTech's technology after issuance of the '858 patent dilutes the significance of CleanTech's contribution and tarnishes its reputation in the eyes of the rest of the market and its shareholders. (Winsness Decl. at ¶ 22.)

Further, President Obama's Administration (through the EPA) has made it clear that extraction of this type of domestic renewable energy is a priority in the ethanol industry.¹¹ Because of Big River's infringement, it is unlikely that CleanTech's critically important contribution will be recognized or acknowledged. This injury is admittedly difficult to measure or to quantify in any terms, particularly monetarily. This is exactly why this injury is irreparable and why monetary compensation is inadequate. An injunction is required to prevent harm to CleanTech's reputation as a technical innovator in this industry. The corn oil extraction technology is relatively young and quickly evolving. With funds lacking due to willful infringers like Big River using CleanTech technology for free, CleanTech's ability to innovate substantially diminishes, and it will no longer be able to secure either its role as a partner to solve technical challenges as they emerge or its reputation as an innovator. (Winsness Decl. at ¶ 23.)

3. Other parties will be encouraged to infringe CleanTech's patent.

Courts have found irreparable harm if infringement indirectly encourages others to infringe the patent. *Hybritech*, 849 F.2d at 1456; *Rosen Entm't Syst., LP v. Icon Enters, Inc.*, 359 F. Supp. 2d 902, 910-11 (C.D. Cal. 2005). CleanTech has actively marketed its technology to the entire U.S. ethanol industry since 2004. The industry is aware of CleanTech's patented technology. Over the past year and a half however only one major industry player has taken a license from CleanTech. Instead, the industry is taking a wait-and-see approach to see if a large

¹¹ See the final rule for the expanded Renewable Fuel Standard (RFS2) published by the EPA on February 3, 2010 (available at <http://www.epa.gov/OMS/renewablefuels/>).

ethanol manufacturer, like Big River can get away with infringement without penalty, while depriving CleanTech of its ability to continue as a going concern. (Winsness Decl. at ¶ 24.)

Depending on the outcome of this test case, the other parties will decide to infringe or take a license. If an injunction is not granted, then there will be wholesale infringement of CleanTech's patent by the entire industry. This indeterminable harm soundly supports enjoining Defendant.

4. CleanTech will eventually be forced out of business.

There is a very real possibility that Big River's continued infringement coupled with the industry wide effects of the continued willful infringement will drive CleanTech out of business. "The threat of being driven out of business is sufficient to establish irreparable harm." *American Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985); *Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005) ("Financial ruin, such as driving a company out of business, qualifies as irreparable harm."). *See also Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1381 (Fed. Cir. 2006) (patentee may have to lay off employees if injunction not granted); *Bushnell, Inc. v. Brunton Co.*, 09-cv-2009 KHV/JPO, 2009 WL 4251633, at *18 (D. Kan. Nov. 25, 2009) (irreparable harm due to, *inter alia*, possibility of laying off employees and defaulting on loans).

CleanTech is a small, innovative company and one of its primary assets is its intellectual property. All of the above has a negative feedback cycle – the lost market share, opportunities, revenue, and goodwill deprives CleanTech of resources. Big River's infringement reduces CleanTech's ability to maximize the breadth of its market penetration, which reduces its ability to earn, raise and deploy more resources, which hamstringing its progress and leads to yet further

increased risks from new entrants, which all ultimately leads to an unknowable amount of reduced market share and value flowing from CleanTech's technology. (Winsness Decl. at ¶ 25)

Granting injunctive relief here would pave the way to resolving CleanTech's issues with Big River, and likely other parties. Conversely, denying both injunctive relief and allowing the free use of the technology to persist would exponentially magnify the harm already caused by Big River and eventually drive CleanTech out of business.

CleanTech will, without question, suffer irreparable harm if Big River is not enjoined now. Given this harm, and CleanTech's strong showing of likelihood of success, CleanTech's motion for a preliminary injunction should be granted.

D. The Balance of Harms Strongly Favors CleanTech

The balance of the hardships is assessed using a sliding scale approach. *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987), overruled on other grounds, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 977 (Fed. Cir. 1995). To the extent CleanTech can make a strong showing of likelihood of success, it need make a lesser showing that the balance of hardships tilts in its favor. *H.H. Robertson*, 820 F.2d at 390. The balance of hardships need not even necessarily tip in favor of CleanTech. *Hybritech, Inc., v. Abbott Labs.*, 849 F.2d 1446, 1457 (Fed. Cir. 1988). Here, however, the hardship balance clearly tips in CleanTech's favor.

CleanTech faces the irreversible loss of market share, permanent loss of long standing corn oil extraction customers, and substantial harm to its reputation if CleanTech is denied the right to enforce its patents. In sharp contrast, Big River faces only the prospect of having to return to its primary business of ethanol manufacturing. However, even if an injunction were to have the effect of removing Big River's corn oil revenue stream, it would still be proper to issue

the injunction. *Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys.*, 132 F.3d 701, 708 (Fed. Cir. 1997) (stating that harm to a company for infringing another's patent is not relevant because the company does not have the right to infringe the patent of another). Moreover, the Federal Circuit has consistently held that “[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.” *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008) (quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)).

CleanTech has been marketing its technology for years; conversely, Big River only started extracting corn oil within the last two years. Big River's recent entry into the corn oil recovery market weighs heavily in favor of CleanTech in the balance of hardships. *See Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 28 U.S.P.Q. 2d 1362, 1371, 1993 WL 330532, at *11 (D. Del. July 16, 1993) (balance of hardships is in favor of the patentee where the accused infringer is “still in the early stages of marketing its safety catheter, whereas Critikon's product has been on the market for over a year”). As the court noted, the hardship facing the new market entrant “in delaying its entry into the market three to six months is not as severe as that faced by” the patentee. *Id.*

Considering the substantial time, resources, and capital necessary to develop the patented technology, CleanTech faces a severe hardship if not allowed to enforce its patent. Big River, on the other hand, will merely be required to return to its original primary business of ethanol manufacturing. Thus, the balance of hardships strongly favors CleanTech.

E. The Public Interests Favor Enjoining Big River

In this case, the public interest also favors granting a preliminary injunction. “Public policy favors protection of the rights secured by valid patents.” *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983). Only where “there exists some critical public interest that would be injured by the grant of preliminary relief does the public interest favor denial of an injunction in a patent case. *Hybritech*, 849 F.2d at 1458. No such reason for denial of the injunction exists. Instead, the public interest favors protecting the market that CleanTech developed because such protection is merely upholding the patent system. The public’s interest lies in rewarding and fostering innovation such as CleanTech’s - it does not lie in green-lighting patent infringement. The public interest favors a preliminary injunction.

IV. CONCLUSION

The facts set out above establish that Big River's use of CleanTech’s patented corn oil extraction technology is causing irreparable harm to CleanTech. Further, CleanTech is likely to succeed on the merits of its claims; the balance of hardships favors enjoining Big River's further infringing use of CleanTech’s patented technology; and granting such an injunction will serve the public interest and promote others to invent and utilize the patent system. For all the foregoing reasons, CleanTech respectfully requests that the Court grant its motion for a preliminary injunction.

Respectfully submitted,

GS CLEANTECH CORP.

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