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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH**

DERIVE POWER, LLC; and DERIVE  
SYSTEMS, INC.;

Plaintiffs,

v.

EZ LYNK, SEZC; H&S PERFORMANCE,  
LLC; THOMAS WOOD; LANCE HUNTER,  
TECHIT, LLC; GDP TUNING, LLC; and  
POWER PERFORMANCE ENTERPRISES,  
INC.;

Defendants.

**PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Case No. 2:16-cv-01066-DS

Judge David Sam

**STATEMENT OF RELIEF SOUGHT AND GROUNDS FOR MOTION**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Derive Power, LLC and Derive Systems, Inc. (together, “Derive”), hereby move this Court for a Temporary Restraining Order (“TRO”) and Preliminary Injunction (“PI”) against Defendants EZ LYNK, SEZC (“EZ LYNK”), H&S Performance, LLC (“H&S”), Thomas Wood (“Wood”), TechIT, LLC (“TechIT”), GDP Tuning, LLC (“GDP”), and Power Performance Enterprises, Inc. (“PPEI”) (collectively, “Defendants”), prohibiting the disclosure of Derive’s trade secrets, and prohibiting any further sales or distribution of EZ LYNK’s Auto Agent device and derivative products, and H&S devices that appear similar to Derive’s products. A TRO and preliminary injunction are necessary to prevent irreparable harm to Derive through the continued disclosure of Derive’s trade secrets, through the use of Derive’s copyrighted software code in products that allow automobile emissions to be improperly manipulated, and through the use of Derive’s trade dress.

The motion is based on Derive’s Complaint, this Statement of Relief Sought and Grounds for Motion, and the attached Declaration of David Thawley. A Proposed Order is attached.

**INTRODUCTION**

This case involves the theft of Derive’s trade secrets and infringement of Derive’s copyrights by Defendants for their own use in illegal products. Derive is a major developer and supplier of hardware and software solutions aimed at improving the performance of automotive vehicles. Derive’s devices are “performance programmers” that can be plugged into a vehicle’s computer system to allow the legal customization and modification of certain parameters of the vehicle and its performance. Derive’s devices are marketed under the Bully Dog brand.

Defendants have, individually and collectively, engaged in a scheme to misappropriate and infringe upon Derive's intellectual property. Defendants are involved, either directly or indirectly, in the development, marketing, and sale of their own "performance programmer" devices. These devices, however, utilize and incorporate Derive's intellectual property. Also, Defendants have manipulated some of their devices so that vehicles using them may evade emissions requirements mandated by the U.S. Environmental Protection Agency ("EPA") and the California Air Resources Board ("CARB"). These so-called "defeat devices," or "no emission" devices, are developed by EZ LYNK, with information taken from Derive by Defendants Wood and TechIT, and sold by Defendants GDP and PPEI.

By this Motion, a TRO and PI are sought against the following Defendants:

- Defendant EZ LYNK is marketing and selling performance programmer devices under the name "Auto Agent." These devices utilize copies of Derive's copyrighted source code.
- Defendants PPEI and GDP are distributors who sell EZ LYNK's Auto Agent device that utilize copies of Derive's copyrighted source code. In addition, both PPEI and GDP have placed additional software on the Auto Agent device that allows a user to illegally circumvent a vehicle's emission control systems. This additional code was created using Derive's trade secret support software in an improper manner.
- Defendant Wood, by himself and through his company TechIT, had access to Derive's copyrighted software and trade secrets. Wood has transferred Derive's copyrighted software and trade secrets to Defendants H&S and EZ LYNK.
- Defendant H&S has improperly copied, distributed, and used Derive's software in its activities. In addition, H&S is selling "copycat" performance programmer devices that look identical to Derive's devices. These "copycat" devices contain Derive's copyrighted software, and contain additional software that can illegally circumvent a vehicle's emission control system with code created using Derive's trade secret support software in an improper manner.

Derive is suffering irreparable harm by the improper use of its intellectual property. In addition, EZ LYNK—the defendant who manufactures a device that is manipulated to become a “defeat device”—has been incorporated in the Cayman Islands, presumably for the purpose of avoiding the regulatory laws of the United States. As a result, Derive is facing the continued use and disclosure of its trade secrets, and the use of its copyrighted software in an illegal manner, by an entity incorporated outside the United States. Derive also has suffered harm and the loss of goodwill by the disruption in its workplace caused by Defendants’ acts. The harm faced by Derive by virtue of these acts is immeasurable and irreparable, and Defendants should be enjoined from continuing such behavior.<sup>1</sup>

### **STATEMENT OF MATERIAL FACTS**<sup>2</sup>

Derive’s performance programmers allow users to maximize vehicle power, improve fuel efficiency, enable vehicle customization, and perform similar modifications. Attachment A, Declaration of David Thawley (“Thawley Decl.”) at ¶ 3. Derive’s intellectual property includes, but is not limited to, (a) performance programmer firmware source code, which is protected by registered copyrights, (b) performance programmer software support code, which Derive maintains as a trade secret, and (c) Derive’s trade dress for its performance programmers. *Id.* at ¶¶ 3, 7. Derive’s copyrighted firmware generally operates the hardware of Derive’s performance

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<sup>1</sup> The improper and illegal “defeat devices” are particularly worrisome given the public awareness of this issue through the reported activities of Volkswagen to bypass software emissions controls in vehicles sold in the United States. As reported, in addition to the injury to its business reputation, Volkswagen is facing EPA scrutiny, massive fines, and exposure to civil liability. Derive could face similar issues should the sale of “defeat devices” that in part utilize or rely upon Derive’s intellectual property continue.

<sup>2</sup> The facts in this section are set forth in the Declaration of David Thawley. *See* Thawley Decl., ¶¶ 6-41.

programmer devices and allows the devices to upload and download other software to a vehicle engine control unit (or “ECU”). This firmware is loaded directly on the devices for use by the devices. *Id.* at ¶ 7.

Derive’s trade secret support software is not provided to its customers, but is maintained by Derive for use on a separate device, such as a PC, to support the performance programmer devices and its firmware. This support software includes, only by way of non-limiting example, software that allows the creation of calibration, or “tune,” files. These “tunes” are the specific pieces of code, created independently by individuals through the use of the support software, that are uploaded onto a vehicle’s ECU by the Derive performance programmer devices to actually make modifications to the vehicle (*i.e.*, to provide the actual functionality that the ultimate consumer is looking for). While these “tune” files are loaded on the device, the support software used, in part, to create them is not, and the secrecy of the support software is valuable to Derive. *Id.* at ¶ 7.

As set forth in more detail in the Complaint and herein, Defendants have engaged in a scheme to use Derive’s software in their own devices. *See, e.g.*, Complaint at ¶¶ 51-65. Defendant Wood, either by himself or through his company TechIT, has provided Derive’s intellectual property to H&S. In turn, H&S has continued to infringe and misappropriate Derive’s intellectual property to market “copycat” devices, which have an additional (and illegal) enhancement to allow a user to defeat mandated emission control systems.

Defendant Wood and others have also infringed and misappropriated Derive’s intellectual property by their formation of EZ LYNK. EZ LYNK transfers performance programmer devices to Defendants GDP and PPEI. GDP and PPEI then, with the full knowledge and acquiescence of

EZ LYNK, sell EZ LYNK devices that infringe Derive's intellectual property and also contain additional software that they market to the public as emissions "defeat devices" in violation of law. Absent Court intervention, there is a real risk that Derive's trade secrets will be disclosed or will be continued to be disclosed, both domestically and internationally, thus resulting in immeasurable damage to Derive. In addition, further distribution of H&S "copycat" performance programmer devices that are modified to defeat emissions control systems will cause harm to Derive, as well as the entire legitimate performance programmer industry, that cannot be compensated by monetary damages. The danger caused by Defendants' acts is real and imminent, and a TRO (and subsequent PI) is necessary to prevent this irreparable harm to Derive.

**I. H&S Obtains, and Improperly Uses, Derive's Intellectual Property**

In 2008, Bully Dog Technologies, LLC ("BDT") and H&S entered into a software license agreement that allowed H&S to use BDT's copyright and trade secret software in and to support H&S devices (the "H&S License Agreement"). Around the same time that Derive was conducting due diligence to purchase substantially all of the assets of BDT, BDT informed Derive that H&S was involved in marketing "defeat devices" and was the target of investigations by both the U.S. Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB"). Shortly after the February 28, 2014 transaction, and based on information that was not disclosed by the former owners of BDT in connection with the transaction, Derive terminated the relationship with H&S. Thereafter, H&S was no longer authorized to use, upload, or market any Derive or BDT software or hardware.

Despite this termination, H&S has continued to market and sell devices that utilize Derive's intellectual property. Derive obtained samples of H&S devices manufactured in 2016 and marketed on various Internet websites. These 2016 H&S devices contain the copyrighted firmware that H&S had previously licensed from BDT under the now-defunct H&S License Agreement, in violation of that agreement. In addition, these devices had actual Derive parts (LCD screens and printed circuit boards) and embedded software, even though these components were not sold by Derive to H&S. The devices look identical to devices sold by Derive: the external shells are manufactured to look exactly like Derive's devices, with the same display shape and the same buttons on each side of the device. From those buttons to the LCD screen to the shape of the units to the operating software, these H&S devices were built to be difficult to distinguish from the market-leading Derive products sold under the "Bully Dog" brand. Finally, the H&S devices sold after the termination of its license with Derive include additional emissions cheating software, which is created by individuals using, in part, Derive's trade secret support software in an inappropriate manner.

Thus, at a minimum H&S has: (1) infringed upon Derive's copyrights by using, selling, copying, and distributing that software without a license; (2) misappropriated Derive's trade secret support software by using it in an inappropriate manner to create "tunes" that allow the circumvention of emissions control systems; and (3) infringed upon Derive's trade dress by marketing and selling a performance programmer that is identical to those sold by Derive, and copies Derive's trade dress.

## **II. Wood Reveals Derive's Intellectual Property and Establishes EZ LYNK**

Defendant Wood was formerly employed by BDT, and had broad access to BDT's confidential and proprietary information, including the source code for its firmware and trade secret support software. During much of his employment with BDT, Wood was working almost exclusively on servicing H&S. He spent large portions of his time at H&S facilities in St. George, Utah. In 2014, shortly after Derive acquired the BDT assets, Wood resigned and began working for his own company, TechIT (Wood formed TechIT while he was still employed at Derive). After Wood left, Derive sought assurances from Wood that he was not revealing Derive's intellectual property, including its trade secrets. Wood entered into an agreement wherein he stated that he had not transferred or used BDT (and thus Derive) information and devices. Wood also represented that he had returned all BDT (and thus Derive) information and devices, and reaffirmed his obligations to protect Derive's confidential information.

Derive now knows that Wood, in fact, has been and is continuing to misappropriate and infringe upon Derive's intellectual property. Around July 2014—before Wood resigned from Derive—Wood and other individuals formed a company known as EZ LYNK in the Cayman Islands. EZ LYNK's technology centers on a performance programmer device named Auto Agent. That device allows the upload of programs, called "tunes", into vehicle systems. These tunes modify how a vehicle operates. While there are many legal and legitimate uses of this technology, these tunes can also be used as to facilitate the overriding, removing, or otherwise tampering with emissions control systems.

Thus, at a minimum Wood (and/or TechIT) has: (1) infringed upon Derive's copyrighted software by using, copying, selling, and distributing that software without a license; and (2)

misappropriated Derive's trade secret support software by disclosing it to H&S, EZ LYNK, and others, allowing them to create independently the "tunes" that allow the circumvention of emissions control systems.

### III. EZ LYNK Sells Infringing Auto Agent Devices

Defendant EZ LYNK markets, sells, and distributes a performance programmer called Auto Agent. These EZ LYNK performance programmers contain copies of Derive's copyrighted software. They also include "no emission" tunes that were created using Derive's trade secret support software.

For example, a comparison of the software used in an EZ LYNK Auto Agent device shows that the EZ LYNK device uses software with identical source code, as well as organization and logic, to Derive's copyrighted software. The software also produces the exact same vehicle-interaction messages that the copyrighted Derive firmware produces. Thawley Decl. at ¶ 18.

In fact, the only change EZ LYNK made was to *remove* a comment marker in the firmware source code that states "Copyright Bullydog 2010." *Id.* at ¶ 19. These comment markers, which are routinely inserted into computer software programs, are akin to the footer in certain published documents that provide the copyright symbol and the name of the publisher/copyright holder. EZ LYNK's removal of nomenclature signifying another's ownership is also evidence of EZ LYNK's copying of Derive's computer code, as well as evidence showing EZ LYNK's intent to hide its theft. Derive's stolen copyrighted code provides key functionality to the devices that EZ LYNK produces. *Id.* at ¶ 20.

As another example, EZ LYNK has copied Derive software code that relates to “on the fly” shifting, which allows a driver to shift between power modes (or different tunes) while driving the vehicle. *Id.* at ¶ 21. A character-by-character analysis of that firmware source code shows that the EZ LYNK firmware is identical to the Bully Dog firmware that had been licensed to H&S, under the License and Purchase Agreement, exclusively for use in devices sold to H&S by Bully Dog. *Id.*

Thus, at a minimum EZ LYNK has: (1) infringed upon Derive’s copyrighted software by using, copying, selling, and distributing that software without a license; and (2) misappropriated Derive’s trade secret support software by disclosing it to PPEI and GDP, and perhaps others, allowing them to create independently the “tunes” that allow the circumvention of emissions control systems.

#### **IV. GDP Tuning and Power Performance Sell EZ LYNK “Defeat Devices”**

Defendants GDP Tuning and Power Performance are the two primary dealers that offer custom calibrations for EZ LYNK devices. PPEI and GDP have also jointly marketed the EZ LYNK hardware, and their associated calibrations, to PPEI’s and GDP’s followers via podcasts, videos, and through social media. The EZ LYNK devices are marketed and sold with emissions “defeat device” software in violation of EPA regulations. EZ LYNK is well aware of the “no emissions” purpose and uses of its devices and in fact acts in concert with third parties, including GDP and PPEI, to develop and market such “no emissions” features.

In addition, the creation of these “no emissions” tunes could only have occurred by using that Derive software that is protected as a trade secret. A review of the “tune” files used by the EZ LYNK devices clearly shows that EZ LYNK would have had to either use the proprietary

Bully Dog support software in creating those “tune” files, or disclosed those trade secrets to PPEI and GDP for their subsequent creation of “tune” files. *Id.* at ¶¶ 22, 34.

Thus, at a minimum PPEI and GDP have: (1) infringed upon Derive’s copyrighted software by using, copying, selling, and distributing devices containing that software without a license; and (2) misappropriated Derive’s trade secret support software by using it and manipulating it to create “tunes” that allow the circumvention of emissions control systems.

**V. The Inter-related Web Among Defendants**

All of the defendants in this action are closely related. Defendant Wood, who had Derive’s intellectual property, provided that intellectual property to H&S. Wood also, through his own company TechIT, serviced various performance programmers available in the industry. Defendant EZ LYNK was founded by Wood, Payton Hugie, and Daniel Shirts. Payton Hugie is a brother of the founder of H&S; Daniel Shirts is the brother of another founder of H&S.

Individuals associated with EZ LYNK’s include Jeremy Pierce. Pierce is also the owner of Defendant GDP Tuning, which sells a “defeat device.” Mr. Pierce was also a former H&S employee. Yet another individual associated with EZ LYNK is Kory Willis. Willis is also the owner of Defendant PPEI, which also sells a “defeat device.” Finally, Bradley Gintz is responsible for many of EZ LYNK’s operations, and has a role in EZ LYNK’s product development and manufacture.

Given these close relations, it is no surprise that Derive’s copyrighted software code—once licensed legitimately to H&S (and serviced by Wood)—has been found on current H&S devices (despite the fact that the license has long expired), current EZ LYNK devices, and has

been associated with “tunes” on EZ LYNK devices sold by GDP Tuning and Power Performance that allow a user to bypass a vehicle’s emission control system.

### **STANDARD OF REVIEW**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, a party is entitled to an injunction if it establishes (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury if the injunction is denied; (3) that the threatened injury to the movant outweighs the injury that the opposing party will suffer under the injunction; and (4) that the injunction would not be adverse to the public interest. *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). The same four factors are used to determine the availability of a temporary restraining order. *Populist Party v. Herschler*, 746 F.2d 656, 658 (10th Cir. 1984).

“[W]here the moving party has established that the three ‘harm’ factors tip decidedly in its favor, the ‘probability of success’ requirement is relaxed.” *Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d 639, 652-53 (10th Cir. 2004). As explained below, Derive has satisfied each of these elements and is, therefore, entitled to a temporary restraining order and preliminary injunctive relief against Defendants.

### **ARGUMENT**

#### **I. Derive Is Likely to Succeed on Each of Its Claims Against Defendants**

Derive can demonstrate a strong likelihood of success on the merits of its copyright infringement and misappropriation of trade secrets claims.

A. Derive Is Likely to Succeed on the Merits of its Copyright Infringement Claim

The Copyright Act authorizes a federal court to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). In order to prevail on a copyright infringement claim, Derive must show “(1) that it possesses a valid copyright and (2) that Defendants ‘copied’ protectable elements of the copyrighted work.” *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1292 (D. Utah 1999) (quoting *Country Kids ’N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996)); *see also Cmty. Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1197 (D. Utah 2014) (same) (citing *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 831-32 (10th Cir. 1993)). Derive can establish these elements and therefore can demonstrate a likelihood of success on the merits.

Derive has registered certain portions of its firmware source code with the United States Copyright Office and possesses certificates of registration of those copyrights. Specifically, Derive owns copyrights entitled “Ford 6.7 Liter Download Firmware v1007,” registered on September 21, 2016, and “Ford 6.7 Liter Monitor/Datalog/Power Level Adjusting Firmware v1007,” registered on September 21, 2016, for its firmware source code used in its performance programmer devices. These certificates establish that Derive possesses valid copyrights. 17 U.S.C. § 410(c) (a certificate of registration of a copyright “shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate”); *Autoskill, Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1488 (10th Cir. 1993) (“By introducing the registration certificate in which it identified itself as the author, [a party has] presented prima facie evidence that it was the owner of the copyright” (citations omitted)).

Additionally, Defendants have copied Derive's copyrighted firmware source code and incorporated protectable elements of that source code into devices sold by EZ LYNK and H&S. Thawley Decl. at ¶¶ 18-21, 25, 27, 28. "Copying" is shown "by establishing that Defendants had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material." *Sheen*, 77 F.3d at 1284. Importantly, "the degree of similarity required may vary depending on the showing of access." *Id.* Defendant Wood had unlimited access to the firmware source code while he was employed by Derive, and H&S had access to thy software code through the H&S Licensing Agreement.

There are substantial similarities between Derive's software code and the code incorporated in the EZ LYNK and H&S devices. An analysis of the EZ LYNK code demonstrates that it contains complete duplication of entire sections of Derive's software code and shows identical organization/logic. Thawley Decl. at ¶¶ 18, 19, 21. The code in the EZ LYNK device also produces the exact same messages that the Derive code produces. This is because EZ LYNK leveraged an exact replica of these sections of Derive's code. *Id.* at ¶ 18, Ex. 5 (comparing side by side certain portions of Bully Dog code with the corresponding code that operates the EZ LYNK device). The only change that EZ LYNK made to the referenced Derive software code was to delete the comment marker in the code that stated, "Copyright Bullydog 2010." These comment markers are routinely inserted into computer software programs to indicate ownership. Even with the marker deleted, however, the software code is Derive Systems' copyrighted property. Similarly, the firmware used in the H&S devices is exactly the same as Derive's copyrighted firmware, with no alterations.

These substantial similarities show that Defendants have copied Derive's software, which is protected by copyright. Derive has, therefore, established a likelihood of success on the merits of its copyright infringement claim and injunctive relief is appropriate.

B. Derive Is Likely to Succeed on its Trade Dress Infringement Claim

To prevail on a claim for trade dress infringement, Derive must show that (1) its claimed dress is either inherently distinctive or has acquired secondary meaning, (2) the EZ LYNK and H&S devices create a likelihood of customer confusion, and (3) Derive's claimed dress is nonfunctional. *See Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 977 (10th Cir. 2002). The design of Derive's device is inherently distinctive and has acquired a secondary meaning as to its customers. In particular, the overall image and appearance of the Bully Dog device, including the shape of the LCD screen, the placement of specific buttons on the sides of the device, and the shape of the entire device is Derive's distinctive design and is easily identifiable by customers as a Derive device. *See Thawley Decl.* at ¶ 27, Ex. 6.

To determine when there is a likelihood of confusion, courts consider the following factors: (1) the degree of similarity; (2) the intent of the alleged infringer in designing its product; (3) evidence of actual confusion; (4) similarity in how the products are marketed; (5) the degree of care likely to be exercised by purchasers; and (6) the strength of the trade dress. *Sally Beauty*, 304 F.3d at 979. Here, these factors demonstrate that EZ LYNK and H&S are selling devices that are likely to create customer confusion with Derive's devices. The H&S and EZ LYNK devices are extremely similar in design to Derive's device, with the same display shape, LCD screen, buttons, and overall shape of the device. *Thawley Decl.* at ¶ 27.

These competing devices were intentionally designed to infringe on Derive's copyrights and to use misappropriated trade secrets; they clearly were also designed to be difficult to distinguish physically from Derive's market-leading products. *Id.* at ¶ 27, Ex. 6. Intentional copying, as demonstrated here, raises an inference of the likelihood of confusion. *See Sally Beauty*, 304 F.3d at 973; *see also Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 941 (10th Cir. 1983); *Happy Sumo Sushi, Inc. v. Yapona, Inc.*, 2008 WL 3539628, at \*3 (D. Utah Aug. 11, 2008). Additionally, the H&S devices have already created actual confusion, as Derive has received a number of broken or defective returned products from consumers. A number of those returned products were not, in fact, Derive products, but were devices labeled as H&S products. Thawley Decl. at ¶ 24. This demonstrates that consumers are confused between the H&S devices and the Derive devices. The H&S and EZ LYNK devices are marketed similarly to Derive products, being sold online through distributors and being marketed to consumers who are looking to improve the performance of their vehicles. *See id.* at ¶¶ 31-34.

Finally, Derive's trade dress is not functional, as the LCD screen and buttons can be designed in any number of ways, but Derive's specific combination is merely part of its distinctive design rather than part of its market-leading functionality. *See* Thawley Decl. at Ex. 6. Derive's specific and unique design is not functional, in part, because protecting the design will not hinder otherwise permissible competition. *See, e.g., Marche Design, LLC v. Twinpro Int'l Holdings Ltd.*, 2009 WL 37386 (D. Kan. Jan. 6, 2009) (finding that speaker design was trade dress, and that protecting the specific design did not prevent competing speaker designs). Therefore, Derive can demonstrate a likelihood of success on the merits of its trade dress claim.

C. Derive is Likely to Succeed on the Merits of Its Misappropriation of Trade Secrets Claims

Both federal and Utah law define a trade secret as “information, including . . . program devices, . . . programs, or codes” that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 18 U.S.C. § 1839(3); *see also* Utah Code Ann. § 13-24-2. Software such as the Bully Dog code has been found to be a trade secret by Utah courts. *See Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183 (10th Cir. 2014) (affirming verdict under Utah law for misappropriation of trade secrets consisting of software code). Derive uses several trade secrets in the operation of its business, including but not limited to proprietary software code used to support the Bully Dog firmware and devices. Each of these secrets was established through Derive’s employees’ skills, judgment and labor. Thawley Decl. at ¶ 7. These trade secrets were available only to Derive and its employees (including Wood) and to H&S for a period of time pursuant only to the H&S licensing agreement. *Id.* at ¶ 6, 7, 11, 38-41. The trade secrets derive value from not being generally known to, and not ascertainable by proper means. *Id.* at ¶ 7.

Derive exerted reasonable efforts to maintain the secrecy of its trade secrets by disclosing them only to individuals who signed agreements promising to keep all such information confidential, by restricting physical access to Derive’s facilities through locks and electronic security, and requiring passwords and other electronic protections on computers and electronic files. *Id.* at ¶¶ 38-41. The Derive trade secret firmware and support software code is kept strictly confidential. *See id.*

Defendants have misappropriated and/or disclosed Derive's trade secrets under both federal and Utah law through Defendants Wood and H&S. 18 U.S.C. 1839(5); Utah Code Ann. § 13-24-2(2). As an employee, Wood used his access to Derive's trade secrets to create EZ LYNK and H&S devices. Defendants have also misappropriated Derive's trade secrets by using and disclosing trade secrets obtained only through the defunct H&S Licensing Agreement, by which H&S owed a duty to maintain their secrecy and limit their use under the H&S License Agreement. Thawley Decl. at ¶¶ 6-7.

In addition, each of the Defendants, including PPEI and GDP, has used and disclosed Derive's trade secrets without Bully Dog's consent, knowing that it had been acquired by Wood and/or H&S through improper means and/or under circumstances giving rise to a duty to maintain its secrecy or limit its use. Derive is likely to prevail on the merits of its misappropriation claim, and therefore injunctive relief is appropriate.

## **II. Derive Will Suffer Irreparable Harm if the Temporary Restraining Order and Preliminary Injunction Are Not Entered**

If injunctive relief is not granted, Derive will be irreparably harmed by Defendants' infringement of Derive's copyright, misappropriation of trade secrets, and infringement of its trade dress. Derive's goodwill and reputation in the industry will be diminished and compromised, particularly because of Defendants' use of Derive's intellectual property in connection with Defendants' illegal activities related to defeating vehicle emissions controls, a harm that cannot adequately be addressed by monetary damages.

Defendants' infringement of Derive's copyrights and misappropriation of Derive's trade secrets has caused and will continue to cause irreparable harm. Infringement of copyright and misappropriation of trade secrets often cause irreparable harm and entitle a moving party to

injunctive relief. *See Sheen*, 77 F.3d at 1288-89, *MacAlmon Mustic LLC v. Maurice Sklar Ministries, Inc.*, 2015 WL 794328 (D. Colo. Feb. 4, 2015) (noting that copyright infringement is presumed to cause irreparable injury); *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 428 (Utah 1983) (“[M]isappropriation of confidential information is a serious and irreparable harm for which [a] plaintiff is entitled to injunctive relief.”); *FMC Corp. v. Taiwan Tainan Giant Industrial Co., Ltd.*, 730 F.2d 61, 63 (2d. Cir. 1984) (“the loss of trade secrets cannot be measured in money damages,” since “[a] trade secret once lost is, of course, lost forever.”). Clearly, this is the type of harm that Derive sought to prevent when it entered into agreements to protect its intellectual property, such as the H&S License Agreement and Wood’s 2012 Agreements.

Additionally, Defendants’ infringing activities have caused and will continue to cause Derive to suffer irreparable harm because of loss of control over its copyrighted software and damage to Derive’s goodwill and business relationships. This type of harm to goodwill is precisely the type of threatened harm that is “irreparable.” *Tri-State Generation and Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (“A threat to trade or business viability may constitute irreparable harm”); *see also Fitspot Ventures, LLC v. Bier*, No. 2:15-cv-06454, 2015 WL 5145513 (C.D. Cal. Sept. 1, 2015) (lack of access to misappropriated source code, causing customer complaints and loss of customers, was irreparable to harm to business reputation and goodwill); *Pixon Imaging, Inc. v. Empower Technologies Corp.*, No. 11–CV–1093, 2011 WL 3739529 (S.D. Cal. Aug. 24, 2011) (finding irreparable harm where plaintiff’s source code was misappropriated and disclosure would “severely cripple if not destroy [plaintiff’s] future business prospects”).

Defendants' behavior has also damaged Derive's goodwill with potential clients, particularly because Defendants' use of Derive's intellectual property causes confusion in the marketplace between Defendants' products and Derive's products and because Defendants' products are associated with illegal defeating of vehicle emissions controls. Such association causes Derive irreparable harm. *See, e.g., Epic Tech, LLC v. Paradise Internet Café, LLC*, 2015 WL 2342990, \*2 (M.D. Fla. May 14, 2015) (use of plaintiff's intellectual property in a way prohibited by state law caused irreparable harm to plaintiff's business reputation and good will by an association with illegal activity); *Titaness Light Shop v. Sunlight Supply, Inc.*, No. 3:12-cv-0620, 2014 WL 358406 (D. Nev. Jan. 31, 2014) (finding irreparable harm where infringing product was used for illegal purposes, and confusion between products would cause non-moving party to be associated with production of illegal substances, thereby eroding its reputation and goodwill).

Additionally, Derive can demonstrate irreparable harm because Wood has already expressly acknowledged and agreed that violation of the confidentiality of Derive's information will cause irreparable injury to Derive, and that Derive would be entitled to seek injunctive relief. *See* Thawley Decl. at ¶ 13, Ex. 3. Wood's own recognition of the likelihood that Derive will suffer irreparable harm from the disclosure of its information must be given weight. *See System Concepts*, 669 P.2d at 429 (“[W]e note that defendant has specifically agreed and acknowledged in the agreement that injunctive relief is an appropriate remedy.”).

**III. The Threatened Injury to Derive Far Outweighs Any Harm That the Temporary Restraining Order or Preliminary Injunction May Impose on Defendants**

Derive seeks simply to prohibit Defendants from disclosing or using its copyrighted material, trade secrets, and trade dress. There is no justifiable reason for Defendants to use Derive's intellectual property to compete with Derive.

If Defendants are allowed to continue their copyright infringement, the public is likely to continue to be confused about the origin of the EZ LYNK and H&S devices, and Derive will continue to lose customers and goodwill. Moreover, Derive's reputation will be damaged beyond repair by the continued association with Defendants' illegal activities to defeat vehicle emissions controls. Any injury to Defendants cannot outweigh the harm to Derive. "[T]he potential injury to an allegedly infringing party caused by an injunction 'merits little equitable consideration and is insufficient to outweigh the continued wrongful infringement.'" *Autoskill*, 994 F.2d at 1498 (citation omitted). This is because "a knowing infringer cannot be 'permitted to construct its business around its infringement.'" *Id.* (citation omitted).

**IV. The Temporary Restraining Order and Preliminary Injunction Sought by Derive Are in the Public Interest**

Granting a temporary and preliminary injunction here serves the public interest. Where there is likelihood of success on the merits of a copyright claim, the public interest "normally weighs in favor of the issuance of an injunction because the public interest is the interest in upholding copyright protections." *Autoskill*, 994 F.2d at 1499 (citing 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* 14.06[A], at 14-80 (1992)). Because granting an injunction would uphold the rights of a copyright holder, an injunction would not be adverse to the public interest.

Similarly, granting an injunction would also uphold the rights of the owner of trade secrets, and an injunction would not be adverse to the public interest. Although the law encourages competition, the public also has an interest in granting “established businesses reasonable protection against unfair trade practices,” including the misappropriation of trade secrets. *Utah Med. Prods., Inc. v. Clinical Innovations Assocs., Inc.*, 79 F. Supp. 2d 1290, 1312 (D. Utah 1999) (citing *Microbiological Res. Corp. v. Muna*, 625 P.2d 690, 697 (Utah 1981)).

Finally, an injunction protects a company’s substantial investment in product development and goodwill. The public interest is served by recognizing the important economic interests of companies such as Derive, by protecting their confidential and proprietary information, their relationship with prospective clients, and the goodwill they have established. Therefore, an injunction is not adverse to the public interest and the injunction should be granted.

#### **V. Derive is Entitled to Expedited Discovery**

The Court may authorize expedited discovery in aid of a request for preliminary injunctive relief, particularly where, as here, the contemplated discovery (as set forth in the accompanying Proposed Order) is narrow and essential. The Court has wide discretion to manage the discovery process, and expedited discovery may be granted where “good cause” is shown. *See* Fed. R. Civ. P. 26(d); *Living Scriptures v. Doe(s)*, 2010 WL 4687679 (D. Utah Nov. 10, 2010)(noting courts have wide discretion regarding discovery, and granting expedited discovery). Good cause exists here, as the discovery is necessary to prepare for a preliminary injunction hearing and because Derive alleges infringement of its copyrights and unfair competition. *See Living Scriptures*, 2010 WL 4687679 (“Good cause exists ‘where a party seeks a preliminary injunction ... or where the moving party has asserted claims of infringement and

unfair competition.”) (quoting *Qwest Communications Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003)); *Crazy ATV, Inc. v. Probst*, 2014 WL 201717 (D. Utah Jan. 16, 2104) (granting expedited discovery because Plaintiff’s claims of unfair competition and infringement on intellectual property demonstrated good cause). The requested discovery outlined in the attached order meets these criteria.

### CONCLUSION

In sum, Derive meets the requirements for the issuance of a temporary restraining order and a preliminary injunction. Without the Court’s issuance of an injunction, Derive will suffer irreparable harm, while no legitimate threat of damage to Defendants exists and the public has an interest in the entry of an injunction and the protection of Derive’s rights. Derive is likely to prevail on the merits of its claims related to the injunction. Therefore, Derive respectfully requests that the Court issue an injunction to preserve Derive’s copyrights, trade secrets, and goodwill.

DATED this 18<sup>th</sup> day of October, 2016

Respectfully submitted,

By: /s/ Phillip J. Russell  
Brent O. Hatch  
Phillip J. Russell  
HATCH, JAMES & DODGE, P.C.

Mark A. Klapow  
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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH**

<p>DERIVE POWER, LLC; and DERIVE SYSTEMS, INC.;</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>EZ LYNK, SEZC; H&amp;S PERFORMANCE, LLC; THOMAS WOOD; LANCE HUNTER; TECHIT, LLC; GDP TUNING, LLC; and POWER PERFORMANCE ENTERPRISES, INC.;</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>[Proposed] TEMPORARY RESTRAINING ORDER</b></p> <p style="text-align: center;">Case No. 2:16-cv-01066-DS</p> <p style="text-align: center;">Judge David Sam</p>
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Having considered Plaintiff s Derive Power, LLC’s and Derive Systems, Inc.’s (together, “Derive’s”) Motion for Temporary Restraining Order and Preliminary Injunction with attached exhibits, this Court states as follows:

The four factors courts consider in deciding temporary relief strongly favor granting this motion: (1) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued; (2) the likelihood that the party seeking the injunction will prevail, (3) the risk that the party seeking the injunction would be harmed more by its absence than the opposing party would be by the injunction, and (4) the harm to the public interest if the injunction is issued.

The Court GRANTS Derive’s Motion and enters this Temporary Restraining Order.

IT IS FURTHER ORDERED that:

A. Defendants EZ LYNK, SEZC; H&S Performance, LLC; Thomas Wood; TechIT, LLC; GDP Tuning, LLC; and Power Performance Enterprises, Inc., and all of their agents, servants, representatives, employees, and attorneys are each hereby temporarily enjoined, restrained and prohibited, directly or indirectly, from:

1. Infringing on Derive's copyrights, including but not limited to its copyrighted firmware;

2. Infringing on Derive's trade dress, namely the unique look and design of Derive's device;

3. Disclosing, using, and/or making publicly available Derive's trade secrets and/or confidential information, whether in original, copied, computerized, handwritten or any other form;

4. Purging, destroying, altering, modifying or concealing any of Derive's trade secret and/or confidential information, whether in original, copied, computerized, handwritten or any other form;

B. Within three (3) days of this Order, Defendants EZ LYNK, SEZC; H&S Performance, LLC; Thomas Wood; TechIT, LLC; GDP Tuning, LLC; and Power Performance Enterprises, Inc. shall turn over to counsel for Derive any and all materials, including physical objects, handwritten or printed documents, computer disks, databases, and/or other retrievable data, that reflect, refer, or relate to Derive's intellectual property, including but not limited to Derive's confidential, proprietary, or trade secret information, copyrighted software, and/or trade dress.

C. Derive is entitled to the following expedited discovery:

1. Within seven (7) days of this Order, Defendants EZ LYNK, SEZC; H&S Performance, LLC; Thomas Wood; TechIT, LLC; GDP Tuning, LLC; and Power Performance Enterprises, Inc. must each submit to counsel for Derive any and all of the following documents:

a. Documents sufficient to show the firmware used in EZ LYNK and H&S performance programmer devices;

b. Documents sufficient to show the software used to support EZ LYNK and H&S performance programmer devices;

c. Documents sufficient to show the physical design of EZ LYNK and H&S performance programmer devices;

d. Documents sufficient to show every sale or transfer of devices containing or utilizing Derive's software, trade secrets, or trade dress;

e. Any and all documents reflecting or regarding communications with any current or former Derive and/or BDT employee; and

f. Any and all documents regarding the formation, registration, and/or incorporation of EZ LYNK.

2. Within seven (7) days of this Order, Defendants shall each submit to counsel for Derive responses, under oath, to the following interrogatories:

a. Identify all communications you have had with any current or former employees of Derive and/or BDT;

b. Identify any and all Derive property that has been in your possession, custody, or control at any time between January 1, 2014 and the present; and

c. Identify each and every instance in which you acquired, used, modified, shared, and/or disclosed Derive's software, trade secrets, or trade dress.

3. Within twelve (12) days of this Order, Defendants shall each submit to a three-hour deposition by oral examination regarding the allegations herein.

D. Derive shall post a nominal bond in the amount of \$500.00.

E. This Court sets a hearing on \_\_\_\_\_, 2016 at \_\_\_\_\_ .m., on Derive's Motion for Preliminary Injunction, pursuant to Fed. R. Civ. P. 65(b)(3). This Order shall remain in full force and effect pending that hearing.

SO ORDERED ON THIS \_\_\_\_\_ of \_\_\_\_\_, 2016.

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U.S. DISTRICT COURT JUDGE