

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

POWER INTEGRATIONS, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 07-633-JJF-LPS
	:	
BCD SEMICONDUCTOR	:	REDACTED PUBLIC VERSION
CORPORATION and SHANGHAI	:	
SIM-BCD SEMICONDUCTOR	:	
MANUFACTURING CO., LTD.	:	
	:	
Defendants.	:	

**REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION¹**

This is a patent infringement action. Plaintiff Power Integrations, Inc. ("PI") seeks a preliminary injunction enjoining defendants Shanghai SIM-BCD Semiconductor Manufacturing Co., Ltd. and BCD Semiconductor Corporation (collectively, "BCD") from:

inducing, contributing to, or otherwise causing the infringement of claim 1 of U.S. Patent No. 6,249,876 B1 by (1) making, using, selling, offering to sell in the United States, or importing into the United States infringing devices, including specifically the AP3700, AP3700A, AP3700E and any other integrated circuit products not more than colorably different from these products, and/or power converters or other components or products containing such an integrated circuit, and (2) inducing, contributing to, or otherwise causing the same by third parties.

(D.I. 12)

For the reasons that follow, I recommend that the Court deny PI's motion.

¹Absent unanimous consent of the parties to magistrate jurisdiction, a magistrate judge's authority is limited to making a Report and Recommendation regarding a preliminary injunction motion. See 28 U.S.C. § 636(b)(1)(B); Local Rule 72.1(a)(3).

BACKGROUND²

PI's '876 Patent

On June 19, 2001, the United States Patent and Trademark Office ("PTO") issued U.S. Patent No. 6,249,876 (the "876 patent"), to which PI is and at all relevant times has been the assignee and sole owner. (D.I. 1 ¶ 16) The '876 patent is entitled "Frequency Jittering Control for Varying the Switching Frequency of a Power Supply." *Id.* Relevant here is claim 1 of the patent, which describes:

1. A digital frequency jittering circuit for varying the switching frequency of a power supply, comprising:
 - an oscillator for generating a signal having a switching frequency, the oscillator having a control input for varying the switching frequency;
 - a digital to analog converter coupled to the control input for varying the switching frequency; and
 - a counter coupled to the output of the oscillator and to the digital to analog converter, the counter causing the digital to analog converter to adjust the control input and to vary the switching frequency.

(D.I. 1 Ex. B at 12)³

²Where the facts discussed in this Report and Recommendation were disputed by either party, the facts as stated herein constitute my findings based on a careful review of the extensive record the parties have placed before me.

³PI asserts three patents in this action, but does not seek to preliminarily enjoin BCD from infringing any of the claims of U.S. Patent Nos. 6,107,851 or 5,313,381, the other two patents-in-suit.

PI and BCD are Direct Competitors in the Market for ICs

PI is a leader in the market for power supply controller integrated circuits (“ICs” or “chips”). (D.I. 20 Compton Decl. Ex. I (“Power Integrations, the leader in high-voltage analog integrated circuits for power conversion, has been named one of the top 30 companies in the power electronics industry by Power Electronics Technology magazine.”))

One of PI’s most significant customers has been the Korea-based Samsung Electronics, through its Samsung Wireless division. (D.I. 17 Renouard Decl. ¶ 3) Samsung is one of the world’s leading manufacturers of cellular phones. (D.I. 34 Compton Decl. Ex. K (noting that Samsung had 16% of U.S. market of wireless handsets sold in United States in third quarter of 2007)) At one time, PI held 100% of the business of supplying ICs for Samsung cell phone chargers, which are manufactured for Samsung by various off-shore subcontractors.⁴ (D.I. 17 Renouard Decl. ¶ 3)

BCD is a more diversified company, manufacturing IC products including AC-DC converters, DC-DC converters, Linear Regulator and Standard Linear products, audio power amplifiers, motor drivers, and discrete devices including transistors and SB Schottky Barrier Rectifiers; it also provides foundry and production process services. (D.I. 20 Compton Decl. Ex. N) Among BCD’s IC products are those that compete directly with PI’s ICs. In particular, BCD

⁴In previous opinions, I described the system by which BCD’s chips end up in the United States (including in Delaware) via the stream of commerce, through their incorporation into Samsung cellular phone chargers available for sale here. (D.I. 67 at 5; D.I. 119 at 6) BCD designs its ICs for integration into Samsung chargers, manufactures them in China, and sells them to its Korean distributors, who in turn sell the chips to the Korean manufacturers of Samsung chargers.

In a separate lawsuit pending before this Court, PI has accused another manufacturer, Fairchild Semiconductor International, Inc., of infringing its patents and siphoning off Samsung’s business prior to BCD. *See* Civ. No. 04-1371-JJF.

manufactures an IC with the name AP3700.⁵ (D.I. 61 Ex. O) In or around March - April 2007, BCD began offering the AP3700 for sale to Samsung's subcontractors as a lower-priced alternative to PI's product, at a price REDACTED (D.I. 17 Renouard Decl. ¶ 5) At the time, PI was selling its ICs to Samsung's subcontractors at an average price of REDACTED *Id.*

PI Begins to Lose Market Share to BCD in the Second Quarter of 2007

In the first quarter of 2007, PI's sales to Samsung's subcontractors accounted for approximately REDACTED of PI's sales within the cell phone charger market. *Id.* In March and April 2007, PI sold between REDACTED ICs each month to Samsung's subcontractors. *Id.* Thereafter, PI's sales to Samsung steadily declined, such that in June 2007 PI sold fewer than REDACTED ICs to Samsung's subcontractors. *Id.* ¶¶ 5, 7. PI continued to suffer a rapid decline in sales to Samsung throughout the remainder of 2007, selling fewer than REDACTED ICs to Samsung subcontractors in both October and November 2007. *Id.* ¶ 7. However, sometime in 2008 PI began to recover some of its lost market share. (D.I. 144, Tr. at 56)

PI Files Suit Against BCD in the Northern District of California in June 2007

On June 14, 2007, PI filed a patent infringement suit against BCD in the Northern District of California. (D.I. 61 Ex. A at D.I. 1) BCD did not contest the jurisdiction of the Northern

⁵BCD manufactures a series of AP3700 chips – the AP3700, AP3700A, AP3700E – and a distinct chip, the AP3710. (D.I. 67 at 1) PI accuses both the A3700 series and the AP3710 of infringement and seeks to enjoin BCD from selling either type of chip. (D.I. 91 at 7)

District of California. After some delays, including one incurred solely at PI's request,⁶ the parties exchanged initial disclosures in advance of an Initial Case Management Conference scheduled for October 17, 2007. (D.I. 61 Ex. R at 4) As further explained below, the Case Management Conference never occurred.

PI's Suit Against Fairchild Reaches a Jury Verdict in September 2007

In a separate action filed in 2004, PI sued Fairchild Semiconductor International, Inc. ("Fairchild"), which had previously taken some of the Samsung business from PI. (D.I. 17 Renouard Decl. ¶ 4) PI alleged, among other things, that Fairchild infringed claim 1 of the '876 patent. (D.I. 61 Ex. I at 3-4) On September 21, 2007, a Delaware jury returned a verdict finding the '876 patent valid. (D.I. 61 Ex. M) PI contends that after it obtained a ruling that Fairchild was engaged in patent infringement, BCD stepped in to replace Fairchild as primary supplier for Samsung. (D.I. 144, Tr. at 56)

PI Files Suit Against BCD in the District of Delaware in October 2007

The October 17, 2007 Initial Case Management Conference in the California action never occurred because, on October 15, 2007, PI moved for voluntary dismissal of that action. (D.I. 61 Ex. A) On the same date, PI filed an essentially identical patent infringement action against BCD here in the District of Delaware. (D.I. 1)

⁶See D.I. 61 Ex. Q, PI's *Ex Parte* Application For Continuance of Initial Case Management Conference (August 23, 2007), in which PI sought to delay the Initial Case Management Conference from September 13, 2007 until November 7, 2007.

The Parties Complete Post-Trial Briefing in PI's Case Against Fairchild in January 2008

In PI's case against Fairchild, Fairchild filed various post-trial Motions for Judgment as a Matter of Law, on grounds including that the jury's finding that the '876 patent was valid was not supported by substantial evidence. (Civ. No. 04-1371-JJF, D.I. 613, D.I. 614, and D.I. 616) Fairchild's motions were fully briefed as of January 16, 2008. The motions remain pending.

PI Seeks a Preliminary Injunction in Late January 2008

On January 25, 2008, PI filed its Motion for Entry of a Preliminary Injunction (the "Motion"). (D.I. 12) Although the Motion was filed only nine days after completion of briefing on Fairchild's Motions for Judgment as a Matter of Law, this date was three months after PI had filed suit against BCD in this Court, four months after the Fairchild jury had ruled in favor of PI, seven months after PI had filed suit against BCD in California, and more than eight months after PI had begun losing sales to BCD.

The Court Denies BCD's Motion to Dismiss for Lack of Personal Jurisdiction

On January 21, 2008, BCD moved to dismiss this action for lack of personal jurisdiction, essentially seeking to return this case to the Northern District of California, where BCD maintains an office and where PI had initially brought suit. (D.I. 10) After first finding that PI had not met its burden of establishing jurisdiction and that jurisdictional discovery was required (D.I. 67), I later found on an expanded record that this Court has jurisdiction over BCD (D.I. 114). On September 9, 2008, my Report and Recommendation recommending that BCD's Motion to Dismiss be denied was adopted by the Court. (D.I. 124)

A preliminary injunction hearing had originally been scheduled for May 5, 2008 but was continued pending the resolution of BCD's Motion to Dismiss. (D.I. 72) The hearing was eventually held on October 3, 2008. (D.I. 144)

LEGAL STANDARDS

"[A] preliminary injunction is a drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993). A movant for a preliminary injunction pursuant to 35 U.S.C. § 283 must establish: "(1) a reasonable likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) a balance of hardships tipping in its favor; and (4) the injunction's favorable impact on the public interest." *Amazon.com, Inc., v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). The four factors "taken individually, are not dispositive; rather, the district court must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested." *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988). Thus, the trial court may grant a preliminary injunction where "the weakness of the showing regarding one factor [is] overborne by the strength of the others." *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990). However, if the trial court in its discretion denies the injunction, "the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial." *Id.* Furthermore, "a movant cannot be granted a preliminary injunction unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm." *Amazon.com*, 239 F.3d at 1350.

DISCUSSION

I. PI Has Failed to Show a Likelihood of Success on the Merits

In order to demonstrate a likelihood of success on the merits, PI must show that “in light of the presumptions and burdens that will inhere at trial on the merits,” (1) PI will likely prove that BCD infringes claim 1 of the ‘876 patent and (2) PI’s infringement claim will likely withstand BCD’s challenges to the validity and enforceability of claim 1 of the ‘876 patent. *See Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1364 (Fed. Cir. 1997). If BCD raises a substantial question concerning claim 1’s infringement or validity – that is, if BCD asserts an infringement or invalidity defense that PI cannot prove “lacks substantial merit” – the preliminary injunction will not issue. *Id.*

A. PI Has Satisfied its Burden With Respect to Infringement

Assessing whether PI will likely prove that BCD has infringed claim 1 of the ‘876 patent requires a two-step analysis. First, the Court must determine “the meaning and scope of the patent claims asserted to be infringed.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995). Second, the Court must compare the properly construed claims to the accused device. *Id.*

1. It is Not Necessary to Revisit Claim Construction at This Time

Claim 1 of the '876 patent has already been construed by the Court in the *Fairchild* litigation.⁷ (D.I. 20 Compton Decl. Ex. C-D) While BCD does not agree with the Court's claim construction – and, neither, at present, does the PTO – BCD concedes that for purposes of evaluating the instant Motion I need not re-construe the claim terms. *See* D.I. 144, Tr. at 103 (“[F]or the purposes of the preliminary injunction, those are the constructions you can apply.”). Independent of BCD's concession, I find that it is likely, though not certain, that the Court will construe the terms in the identical manner that it construed the identical terms of the identical patent in the *Fairchild* case.

Accordingly, for purposes of the instant Motion, the term “frequency jittering” is construed to mean “varying the switching frequency of a switch mode power supply about a target frequency in order to reduce electromagnetic interference.” (D.I. 20 Compton Decl. Ex. C-D) The term “coupled” is construed to mean that “two circuits are coupled when they are connected such that voltage, current or control signals pass from one to another.” *Id.*

⁷The Court's previous claim construction does not have res judicata effect, because BCD was not a party to the *Fairchild* litigation. A claim construction hearing in the instant case is scheduled for February 2009.

2. The AP3700 and AP3710 Include All of the Elements of Claim 1 as Construed By the Court

Taking this Court's prior constructions, claim 1 of the '876 patent describes:

1. A digital **frequency jittering** circuit [that is, a digital circuit varying the switching frequency of a switch mode power supply about a target frequency in order to reduce electromagnetic interference] for varying the switching frequency of a power supply, comprising:

an oscillator for generating a signal having a switching frequency, the oscillator having a control input for varying the switching frequency;

a digital to analog converter **coupled** [that is, connected such that voltage, current or control signals pass from it] to the control input for varying the switching frequency; and

a counter **coupled** [that is, connected such that voltage, current or control signals pass from it] to the output of the oscillator and to the digital to analog converter, the counter causing the digital to analog converter to adjust the control input and to vary the switching frequency.

(D.I. 1 Ex. B at 12) (emphasis added)

BCD datasheets show that the AP3700/A features "Frequency Dithering for Low EMI" that varies by 2.5kHz and a "Fixed Switching Frequency" of 60 kHz. (D.I. 16 Blauschild Decl. Ex. A at 1) In other words, BCD's chip contains a "reference switching frequency of 60kHz" and a "deviation" of " ± 2.5 kHz." *Id.* at 7. For purposes of the instant Motion, I find the AP3700's "frequency dithering" feature,⁸ which deviates the 60kHz by 2.5kHz in either direction (above and below), to be substantially identical to the "frequency jittering circuit for varying the

⁸Both parties agree that BCD's "dithering" means the same thing as PI's "jittering." See D.I. 61 at 6; D.I. 144, Tr. at 10-11, 102)

switching frequency of a power supply” embodied by claim 1.⁹ Even BCD recognizes that its expert, Dr. Habetler, conceded that the AP3700 does “frequency jittering under the Court’s [claim] construction.” (D.I. 144, Tr. at 106) *See also* D.I. 91 at 6.

BCD’s datasheets further show that the AP3700/A includes all three elements comprising the frequency jittering circuit described in claim 1. A functional block diagram of the AP3700/A datasheet depicts an “Oscillator.” (D.I. 16 Blauschild Decl. Ex. A at 3 & fig. 3) PI’s reverse-engineered schematics show that the oscillator contains a control input labeled OREF. (D.I. 16 Blauschild Decl. Ex. D at PIB 01185) The schematics further demonstrate how the voltage at the control input varies the oscillator’s frequency, which in turn generates a signal DMAX, which has a switching frequency. (D.I. 16 Blauschild Decl. at 3, *citing* D.I. 16 Ex. D at PIB001205) By this means, the voltage at the oscillator’s control input (OREF) varies the switching frequency. *Id.*

The AP3700/A also includes a digital to analog converter (“DAC”) which is “composed of a series of current sources coupled to a pair of resistors by switching transistors.” (D.I. 16 Blauschild Decl. at 3, *citing* D.I. 16 Ex. D at PIB001198) The coupling of resistors to current sources generates a varying of voltage across the transistors, which in turn sets the control input (OREF) voltage. *Id.* By this means, the DAC takes the digital signal it receives from the counter (described below) and converts it into an analog voltage. (D.I. 16 Blauschild Decl. at 3 & fig. 2) Because the OREF signal is both the output of the DAC and the control input to the oscillator,

⁹Having assessed the datasheets for the AP3700, AP3700A, and AP3700E, I find the internal circuitry to be substantially identical for all chips in the AP3700 series. *See* D.I. 16 Blauschild Decl. ¶ 7 & Ex. A & Ex. B). BCD’s attempt to distinguish the infringement analysis for the AP3710 is discussed *infra*.

the DAC is coupled (that is, connected such that voltage, current or control signals pass from one to another) to the control input of the oscillator for the purpose of varying the switching frequency.

Finally, BCD's datasheets show that the AP3700/A includes a counter that is coupled to the output of the oscillator, the DMAX signal. (D.I. 16 Blauschild Decl. at 4 & fig. 1) PI's reverse-engineered schematics show how the counting of the AP3700/A's counter "causes transistors in the DAC to be switched on or off, which allows different amounts of current to be fed to the resistors" of the DAC. (D.I. 16 Blauschild Decl. at 4) The varying voltage produced by the counter is generated across the resistors and coupled to the control input of the oscillator (OREF), thereby changing the control input and varying the switching frequency of the oscillator. Thus, the counter of the accused product appears to be coupled (that is, connected such that voltage, current or control signals pass from one to another) to both the DAC and the oscillator, precisely like the frequency jittering circuit described by claim 1.¹⁰

¹⁰BCD's datasheets for the AP3710 confirm that it also has a "frequency dithering" feature and each of the claim limitations in claim 1. (D.I. 16 Blauschild Decl. Ex. C) The AP3710 is primarily distinguished from the AP3700 series by the former's sequential jitter pattern as compared to the latter's "pseudo-random" jitter pattern. (D.I. 143 at 1) While BCD acknowledges that PI's product also employs a sequential or deterministic jitter pattern, it argues that PI should be estopped from arguing infringement on this basis, given prior positions taken by PI in the *Fairchild* case. *Id.* At oral argument, BCD maintained that "there are additional differences between the 3710 and the 3700" that it declined to address because, in BCD's view, PI has not proven that the AP3710 is presently in the U.S. (D.I. 144, Tr. at 99-100) For the reasons discussed below, I find that the difference between the jitter patterns is irrelevant to this Motion and that PI is likely to prove that the AP3710 infringes claim 1. However, because PI has not made the necessary showing on validity or irreparable harm, I need not analyze whether an injunction would apply to the AP3710.

3. BCD's Infringement Defenses

BCD attacks PI's infringement analysis on several fronts. First, BCD argues that the oscillator of the AP3700 varies the switching signal "in pseudo-random fashion" rather in the deterministic fashion of PI's IC. (D.I. 61 at 13) As BCD does not dispute that the AP3700 has a circuit that meets the Court's definition of frequency jittering from *Fairchild* (D.I. 144, Tr. at 106) – which does not differentiate between random, pseudo-random, or deterministic frequency switching – I do not find this argument relevant to my assessment of whether PI has shown a reasonable likelihood of proving infringement. *See* D.I. 93 Blauschild Suppl. Decl. ¶ 8.

Second, BCD maintains that the AP3700 does not contain the "control input for varying the switching frequency" described by claim 1. (D.I. 61 at 16) The basis for BCD's argument is its construction of the "control input" element of claim 1 as a "means-plus-function limitation" – an argument that was not made in *Fairchild*. *Id.*

The means-plus-function clause, 35 U.S.C. §112 ¶6, provides: "an element in a claim for a combination may be expressed as a means . . . for performing a specified function without the recital of structure, material or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." Under §112, a patent applicant may "describe an element of his invention by the result accomplished or the function served, rather than describing the item or claim to be used (*e.g.*, 'a means of connecting Part A to Part B,' rather than 'a two-penny nail')." *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 28 (1997). However, one consequence of a patentee's describing an element in purely functional terms is that the claim limitation is generally construed more narrowly. *See Micro Chem., Inc. v. Great Plains Chem. Co.*, 194 F.3d

1250, 1260 (Fed. Cir. 1999). A claim limitation using a means-plus-function format covers “only the corresponding step or structure disclosed in the written description, as well as that step or structure’s equivalents.” *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1369 (Fed. Cir. 2000).

A claim limitation that does not contain the word “means” is presumed not to be a means-plus-function limitation under §112 ¶ 6. *CCS Fitness, Inc.*, 288 F.3d at 1369. In this case, BCD concedes that the “control input” limitation of claim 1 is presumptively not a means-plus-function limitation. (D.I. 61 at 17) This presumption may be overcome where “the claim itself recites sufficient structure or material for performing the claimed function.” *Al-Site Corp. v. VSI Intern., Inc.*, 174 F.3d 1308, 1318 (Fed. Cir. 1999). Specifically, “when it is apparent that the element invokes purely functional terms, without the additional recital of specific structure or material for performing that function, the claim element may be a means-plus-function element despite the lack of express means-plus-function language.” *Id.*

The parties are sharply divided as to whether the “control input” of the claimed oscillator recites what a person of ordinary skill in the art would recognize as a specific structure. Relying on definitions of “control” and “input” from a 1984 edition of an Institute of Electrical and Electronics Engineers Standard Dictionary of Electrical and Electronic Terms, BCD argues that, while “control” is a purely functional term, “input” connotes no particular structure. (D.I. 62 Habetler Decl. ¶ 24, *citing* D.I. 62 Ex. 14) BCD further maintains that the language of claim 1 does not suggest that the “input” has any particular type of structure; and that, in the event that the Court concludes the claimed “input” “connotes *some* structure” it does not recite enough structure “to perform *entirely* the claimed function of varying the switching frequency.” (D.I. 61

at 18) (internal citation and marks omitted) PI responds that a person of ordinary skill in the art of the patent would find that “the control input of the ‘876 patent has an understandable structure” and that no person of ordinary skill would believe that the term “control input” is “purely functional in the context of the ‘876 patent.” (D.I. 93 Blauschild Decl. ¶ 6)

For purposes of the instant Motion,¹¹ I find that BCD has not overcome the presumption that “control input” is not a means-plus-function term. The several factors relevant to this necessarily tentative conclusion include BCD’s failure to analyze “control input” as a single term and reliance on two separate twenty-four-year-old dictionary definitions; its further failure to analyze whether the patent specification can be reconciled with its conclusion that the limitation lacks an understandable structure; and the fact that this Court did not construe “control input” as a means-plus-function limitation in *Fairchild*. (D.I. 91 at 3 n.2) I do not find it necessary to undertake a more thorough analysis at this stage, given my further findings about validity and irreparable harm. As discussed below, PI has failed to show a reasonable likelihood of success on the merits due to a substantial question as to the validity of claim 1 of the ‘876 patent, so any further analysis on this point would not affect the outcome of my Recommendation. For the same reason, I need not address BCD’s infringement defenses that depend on the Court’s acceptance of BCD’s interpretation of “control input” or the doctrine of judicial estoppel. (D.I.

¹¹Given that I am reviewing a preliminary injunction motion, on which the record is less complete than it will be following a full trial on the merits, all of the findings and conclusions contained in this Report and Recommendation are subject to further review at later stages in these proceedings. See *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 681 (Fed. Cir. 1990) (referring to preliminary injunction findings and conclusions as “not binding at trial”); *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990) (“The district court need not make binding findings of fact, but at the very least, must find probabilities that the necessary facts can be proved.”).

61 at 18-22)

B. PI Has Failed to Demonstrate That BCD's Challenge to the Validity of Claim 1 of the '876 Patent Lacks Substantial Merit

BCD's validity challenge rests primarily on the basis of three prior art references that, it argues, anticipate claim 1 of the '876 patent.¹² BCD argues that these three prior art references – along with six other prior art references showing that “the idea of jittering or dithering a frequency to spread its spectrum was well known decades before” PI's '876 patent application was filed – render claim 1 anticipated. (D.I. 61 at 12) BCD relies heavily on the fact that, at Fairchild's request, the PTO granted re-examination of the '876 patent and, on April 7, 2008, issued an initial Office Action rejecting claim 1 under 35 U.S.C. § 102(b) as anticipated by the same three prior art references – Martin, Wang, and Habetler. (D.I. 100 Ex. A at 3-5)

PI responds that the prior art does not anticipate claim 1, that even Fairchild gave up its anticipation argument in view of the Court's claim construction order, and that the Fairchild jury rejected the argument that the Martin, Wang, and Habetler references rendered claim 1 obvious. (D.I. 91 at 10-14) PI also suggests that PTO reexaminations are not a substantial threat to patent validity, citing *Ex Parte* Reexamination Filing Data released by the PTO, which show that, as of December 31, 2007, the overwhelming majority (92%) of reexamination requests have been

¹²The three prior art references on which BCD primarily relies are: (1) Martin, Jr. et al., U.S. Patent No. 4,638,417 (“Martin”) (D.I. 62 Habetler Decl. Ex. 11); (2) Thomas G. Habetler & Deepakraj M. Divan, *Acoustic Noise Reduction in Sinusoidal PWM Drives Using a Randomly Modulated Carrier*, 6 IEEE Transactions on Power Electronics 356 (July 1991) (“Habetler”) (D.I. 62 Habetler Decl. Ex. 8); and (3) Andrew C. Wang & Seth R. Saunders, *Programmed Pulsewidth Modulated Waveforms for Electromagnetic Interference Migration in DC-DC Converters*, 8 IEEE Transactions on Power Electronics 596 (Oct. 1993) (“Wang”) (D.I. 62 Habetler Decl. Ex. 12).

granted, and that “for [third-party] requested ex parte reexamination, more than twice as many patents emerge with no claims changed at all (29%) than those for which all claims are cancelled (12%).” (D.I. 101 at 2 n.1 & Ex.1 at 2)

I find that BCD has raised a substantial question regarding the validity of claim 1 and that PI has failed to show that BCD’s challenge lacks substantial merit.¹³ As matters currently stand, the PTO has rejected claim 1 as anticipated by Martin, Wang, and Habetler. (D.I. 100 Ex. A) If the PTO adheres to this position, PI will not have any property right with respect to claim 1 of the ‘876 patent. “[A] decision by the Patent Office that the reexamined claims of an issued patent are canceled as unpatentable renders the claims unenforceable in the pending litigation and in any future disputes.” *Broadcast Innovation, LLC v. Charter Communications, Inc.*, 2006 WL 1897165, at *2 (D. Colo. July 11, 2006); *see also* 35 U.S.C. § 307(a). The PTO has the expertise to grant or deny patents and is authorized upon reexamination to cancel or modify patents it has previously granted. *See* 35 U.S.C. § 303. While a patent’s final, complete cancellation is not common, the same PTO statistics cited by PI show that, as of December 31, 2007, 59% of ex parte third-party initiated reexaminations resulted in some change to the patent’s claims. (D.I. 101 Ex. A at 2) In the context of this Motion, which involves only one claim of one patent, the statistics alone indicate there is something on the order of a 12% to 71% chance that this claim will be cancelled or modified when the PTO proceedings conclude. The possibility that the PTO will adhere to its current position raises a substantial question as to validity.

¹³While a patent is presumed valid, 38 U.S.C. § 282 (2002), “the presumption does not relieve a patentee who moves for a preliminary injunction from carrying the normal burden of demonstrating that it will likely succeed on all disputed liability issues at trial, even when the issue concerns the patent’s validity.” *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992).

PI has failed to identify any cases in which a patentee was granted a preliminary injunction at a time at which the patent claim alleged to be infringed had been rejected by the PTO in a reexamination proceeding. (D.I. 144, Tr. at 39) I have been similarly unable to locate any such authority.

By contrast, BCD has cited *DUSA Pharmaceuticals, Inc. v. River's Edge Pharmaceuticals, LLC*, 2007 WL 748448 (D.N.J. March 7, 2007), in which the District of New Jersey granted a defendant's motion to dissolve a preliminary injunction due to the PTO's grant of an *Inter Partes* reexamination and issuance of an Office Action rejecting all claims of the patent at issue. I find *DUSA* on point and persuasive. There, the Court stated:

[T]he PTO Office Action rejecting all of the claims of the '468 patent on grounds of anticipation and/or obviousness raises a substantial question as to the validity of the '468 patent. . . . The Federal Circuit has held that a validity challenge at the preliminary injunction stage may raise a substantial question of invalidity on a lesser burden of proof than is required to support a judgment of invalidity at trial, that is, less than clear and convincing evidence. While the reexamination order is not dispositive on the issue of validity, the Court does find that it is probative to the issue of whether DUSA has raised a substantial question of validity. . . . The Court recognizes that the Office Action of November 22 constituted an initial action in connection with the reexamination process and that the PTO's final word on the '468 Patent's validity has not yet issued. DUSA, however, has not shown that the validity question raised by the reexamination order and the Office Action lacks substantial merit.

Id. at *3 (internal citations and quotation marks omitted).

To PI, BCD's invalidity defense lacks substantial merit because it places undue significance on the PTO's preliminary actions. Because the Office Action "is facially inconsistent with Judge Farnan's claim construction and the jury verdict in the Fairchild case, there is no reason to expect the outcome of the PTO proceedings ultimately to differ from that reached [on a more complete record] in the Fairchild case." (D.I. 101 at 2 n.2) PI emphasizes

the higher standard of proof in the federal courts – where the presumptive validity of a patent must be overcome by “clear and convincing evidence” of invalidity – in contrast with the substantially lower “preponderance of evidence” standard in PTO reexaminations. (D.I. 144, Tr. at 35) According to PI, because it is likely that the Court will adhere to the claim construction it adopted in *Fairchild*, it is likely that in this action the Court will again find claim 1 to be valid.

PI’s position is essentially that I evaluate the Motion solely through the lens of this judicial action and ignore the ongoing PTO reexamination.¹⁴ This I cannot do. Regardless of the evidentiary standard it applies, the PTO has the authority to cancel or materially modify PI’s patent claims. If, at some point prior to trial, the PTO has issued a final determination that claim 1 is invalid, PI will no longer have a property interest it can assert is being infringed. In that scenario, the standards this Court would apply and the claim construction it would adopt would be irrelevant, because PI would have no patent to enforce.

I recognize that it is far from certain that claim 1 will be cancelled or materially modified by the PTO. But the PTO’s position today, as PI’s Motion comes to me, is that it should be rejected. Under the circumstances, I conclude that nothing about the prior litigation – including the *Fairchild* claim construction and jury verdicts – deprives BCD’s invalidity defense of substantial merit.

PI maintains that if courts regularly deny preliminary injunctions based on the pendency

¹⁴At times, PI appears to be arguing that the PTO proceeding has no bearing on the instant Motion. *See* D.I. 144, Tr. at 40 (“[T]he Patent Office’s proceedings are not really relevant to the parallel District Court proceedings.”), Tr. at 42 (“[T]he fact that the Patent Office adopted [Fairchild’s] arguments in an initial office action should not in any way, we believe, affect the issue in front of the Court . . .”). At other times, however, PI has conceded that the reexamination is a factor I may consider. *See id.*, Tr. at 67 (“[I]t’s relevant, I acknowledge it’s relevant . . .”).

of PTO reexamination proceedings, the inevitable result will be that no preliminary injunction will issue in a patent infringement case, given that nearly every reexamination request is granted. (D.I. 144, Tr. at 48) Thus, according to PI, if a grant of reexamination is the basis for denying an injunction, all alleged infringers can be expected to file such requests. While I have no desire to encourage a flood of reexamination requests, PI's worries are ultimately unpersuasive, for several reasons. First, it is the PTO's Office Action rejecting claim 1 of the '876 patent, and not merely the grant of the reexamination request, that I find raises a substantial question of validity which has not been rebutted here. Second, the substantial question as to claim 1's validity is not the only reason I am recommending denial of a preliminary injunction. PI has also failed to meet its burden of showing irreparable harm. *See infra*. Further, my treatment of the PTO's preliminary rejection of the claim on which the Motion is based as highly probative of whether a substantial question of invalidity is present is consistent with other cases, including from the Federal Circuit.¹⁵ Finally, I trust that the good faith and ethical responsibilities of counsel will keep the number of frivolous reexamination requests to a minimum.

I have also considered PI's concern that it could be months or even years before the PTO

¹⁵*See DUSA*, 2007 WL 748448, at *3. In *Standard Havens Products, Inc., v. Gencor Industries, Inc.*, 897 F.2d 511, 514 (Fed. Cir. 1990), the Federal Circuit held – in the context of considering whether an alleged infringer was entitled to stay a district court's imposition of a permanent injunction – that a reexamination order “at the very least raises a substantial question [of validity].” The applicability of the Federal Circuit's holding to a preliminary injunction motion was discussed in *Pergo, Inc. v. Faus Group*, 401 F.Supp.2d 515, 523-24 (E.D.N.C. 2005). There the district court noted that the Federal Circuit's standard of review for issuing a stay of a permanent injunction “is effectively the same standard used by this court to determine if a preliminary injunction should issue.” *Id.* In light of *Standard Havens*, the district court concluded that “while the grant of a motion for reexamination is not conclusive as to the issue of validity, it is probative to the issue of whether defendants have raised a substantial question of validity.” *Id.* at 524.

reaches a final decision on reexamination, and that the PTO's decision will be in some respects "non-final" until appellate proceedings are exhausted before the Board of Patent Appeals and the Federal Circuit. *See* D.I. 144, Tr. at 45-49. What will happen next in the reexamination process, and when, is entirely speculative. I must deal with the record before me today. Today, the PTO's position is that claim 1 of the '876 patent is rejected as anticipated. (D.I. 100 Ex. A at 3-5) That current position raises a substantial question as to validity which PI has failed to demonstrate lacks substantial merit.

C. PI Has Failed to Show a Reasonable Likelihood of Success on the Merits

Because BCD has raised a substantial question as to the validity of claim 1 of the '876 patent which PI has not shown lacks substantial merit, I find that PI has not established a likelihood of success on the merits. *See Reebok Intern. Ltd. v. J. Baker, Inc.* 32 F.3d 1552, 1555-56 (Fed. Cir. 1994) ("A movant seeking a preliminary injunction must establish a reasonable likelihood of success on the merits both with respect to validity and infringement of its patent.").

II. PI Has Failed to Show Irreparable Harm¹⁶

Although I find that PI's failure to show a reasonable likelihood of success on the merits necessarily precludes granting a preliminary injunction, *see Amazon.com*, 239 F.3d at 1350 ("[A]

¹⁶PI argues that "a movant who clearly establishes a reasonable likelihood of success on the merits receives the benefit of the presumption of irreparable harm." (D.I. 13 at 4). In the wake of the Supreme Court's decision in *ebay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), however, a number of courts, including this one, have inclined to the view that such a presumption no longer exists. *See Sun Optics, Inc. v. FGX Int'l, Inc.*, 2007 WL 2228569, at *1 (D. Del. Aug. 2, 2007). Because I find that PI has not established a reasonable likelihood of success on the merits, the presumption of irreparable harm (assuming it exists) does not arise.

movant cannot be granted a preliminary injunction unless it establishes *both* of the first two factors.”), I will address whether PI has established the second mandatory factor of irreparable harm. *See generally Pergo*, 401 F.Supp.2d at 526 (proceeding to examine irreparable harm despite movant’s failure to establish likelihood of success on the merits).

PI’s case for irreparable harm centers on the fact that it “has built a market around its patented technology, especially the jitter feature protected by the ‘876 patent.” (D.I. 13 at 11) PI argues that an industry pioneer is left particularly vulnerable to irreparable harm where an infringer attempts to usurp its market position and goodwill by directly competing against the pioneer in the marketplace, as BCD (like Fairchild before it) has done by taking the lion’s share of the Samsung charger business. PI insists that this Court must “be vigilant in preventing another, new infringer from filling a void created by a judicial determination adverse to a prior infringer [Fairchild].” *Id.* at 12. The severity of PI’s asserted harm is heightened by the fact that PI “offers only one type of product – integrated power supply controller chips;” thus, PI cannot compensate for Samsung’s loss by selling a wider range of products. *Id.* PI maintains that the loss of Samsung cannot be compensated by money damages alone, but only by the exclusion of BCD’s allegedly infringing products from the marketplace, noting that “the longer it takes for [PI] to get back the Samsung business, the more difficult the process will be.” *Id.* at 13. Finally, PI argues that “there is no guarantee that BCD will ultimately be able to satisfy an award of damages if the Court denies the injunction.” *Id.*

Below I first address PI’s purported economic harms (loss of market share, price erosion) and then its purported non-economic harms (reputational harm, loss of goodwill). I then consider PI’s delay in bringing the instant Motion and whether money damages would suffice to make PI

whole.

A. Economic Harms

PI's argument that BCD has irreparably harmed its market share by taking the Samsung business and eroding the price for "frequency jitter" ICs is contradicted by other evidence in the record. PI President and CEO Balu Balakrishnan announced in February 2008 that "2007 was an excellent year for Power Integrations, with 18 percent revenue growth. . . . The year ended on an especially high note with 28 percent year-over-year revenue growth in the fourth quarter. This growth was broad-based, with revenues from each of our major end markets growing more than 20 percent." (D.I. 61 Ex. E) (emphasis added) Further, PI acknowledged at oral argument that over the course of 2008 it has been recovering some of the market share it lost to BCD. (D.I. 144, Tr. at 56) Given that, by its own account, PI "essentially offers only one type of product" (D.I. 13 at 12), and that Samsung is one of PI's most significant customers (D.I. 17 Renouard Decl. ¶ 3), the growth PI experienced in late 2007 and 2008 – at a time it was locked out of the Samsung business due to BCD's alleged infringement – does not suggest a company facing irreparable economic harm.

While it is theoretically possible that PI could experience broad-based revenue growth and yet suffer irreparable harm by virtue of its loss of Samsung as an end-customer and the erosion in price of the ICs used in Samsung chargers, PI has not shown that this is what has happened here. *See generally* D.I. 144, Tr. at 55 (PI's counsel explaining that PI "premised the preliminary injunction on the notion" that BCD had taken away PI's business with Samsung). Similarly, while PI has alleged that BCD sells the accused chip for less than PI charged

Samsung's subcontractors

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charged by

PI) (D.I. 17 Renouard Decl. ¶ 5), it has not established that the effect of this erosion in price would not be compensable with money damages. *See Altana Pharma AG v. Teva Pharmaceuticals USA, Inc.*, 532 F.Supp.2d 666, 683-84 (D.N.J. 2007) (denying preliminary injunction motion where, *inter alia*, patentee-movant failed to prove that any lost market share or price erosion could not be calculated post-trial and compensated by money damages).

B. Reputational Harm

Neither do I find that PI's expressed concern over an irreparable harm to its pioneering reputation in the market for power supply controller chips is supported by the evidence. The record is replete with evidence attesting to recognition of PI as an innovator in the power electronics industry and as the recipient of several awards for its "integrated circuits (ICs) with EcoSmart® technology." (D.I. 20 Compton Decl. Ex. I) Although this evidence predates the entry of BCD into the U.S. market for power supply ICs, the record contains no evidence suggesting that industry perceptions of PI's pioneer status have in any way changed since BCD began supplying Samsung subcontractors with its chips.

PI further argues that BCD's continuing ability to occupy Fairchild's former role as primary supplier of ICs to Samsung subcontractors – even after PI obtained a jury verdict against Fairchild – is making PI "a bit of a laughingstock." (D.I. 144, Tr. at 62) However, there is no evidence in the record to suggest that PI's customers, prospective customers, or rivals view PI in such a damaging light. On the contrary, the evidence of PI's robust performance in 2007 and 2008, discussed above, strongly suggests that the consecutive lawsuits brought in defense of the

'876 patent have not dealt a significant blow to PI's reputation, nor irreparably devalued PI's intellectual property. It seems that PI is using "laughingstock" as a colorful term to describe other harms it claims to confront: being an industry leader that is unable to enforce its patents pending the outcome of "drawn-out" litigation (D.I. 13 at 14), and having to sell its products at lower prices even if it manages to regain the business it has lost (D.I. 17 Renouard Decl. ¶ 11). With respect to the first of these harms, the Federal Circuit has rejected the "concept that every patentee is always irreparably harmed by an alleged infringer's pretrial sales." *Illinois Tool Works*, 906 F.2d at 683. With respect to the second of these harms, I have already explained that I do not believe PI has proven that the effects of any price erosion it may be suffering would not be compensable by money damages. *See supra*.

PI also claims that it is being irreparably, intangibly harmed through loss of goodwill. This argument appears to have at least two facets. First, PI's Vice President of Worldwide Sales, Bruce Renouard, states that "BCD's sales have harmed [PI's] reputation with our customers,

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(D.I. 17 Renouard Decl. ¶ 9) No elaboration or further support for this contention appears elsewhere in the record. Second, Renouard states that BCD's sales have harmed PI's "relationships with manufacturers like the Samsung subcontractors

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Even accepting PI's arguments, I cannot conclude from them that PI's loss of goodwill and the incumbent position with Samsung's subcontractors, when weighed alongside

the overwhelming evidence that PI's market share and pioneering reputation have not been damaged by BCD's sales to those subcontractors, rises to the level of irreparable harm.

C. Delay

The three-month delay between when PI filed this lawsuit and brought the instant Motion – in addition to the more than eight-month delay between PI's actual loss of sales to BCD and PI's filing of the Motion, as well as the seven-month delay between PI's filing suit in California and the filing of the Motion – also weighs against a finding of irreparable harm. While PI correctly notes that a showing of irreparable harm is not precluded by a delay in moving for a preliminary injunction, delay is nevertheless “a factor that district courts should consider in assessing irreparable harm.” *Eaton Corporation v. Rockwell International Corporation*, 1997 WL 33708214, at *7 (D. Del. Nov. 4, 1997).

PI places considerable significance on the fact that it filed for a preliminary injunction “less than 10 days after the completion of post-trial briefing in the Fairchild case,” arguing that if it had brought its motion any earlier “BCD would no doubt have complained about the unfinished trial and post-trial briefing.” (D.I. 91 at 16) I find PI's rationale unpersuasive. By delaying its Motion, all PI gained was an answer to the argument that relief should be denied because the Fairchild motions had not been briefed; yet it still confronts the argument that the Fairchild motions have not been decided. Rather than strengthen its position, by delaying its Motion PI left itself vulnerable to BCD's contention that the seven-month delay between PI's filing suit in California and bringing the instant Motion is inconsistent with the behavior of a patentee that is being irreparably harmed. In the circumstances presented here – including the

fact that PI's case against BCD in the Northern District of California was on track to be completed more quickly than its case here, given the undisputed basis for jurisdiction in California and that the California action was on the eve of a scheduling conference before the instant action was even filed – I agree with BCD.

PI argues that BCD delayed PI's ability to move forward with this case "at the end of last year and early this year" by refusing to let PI's expert review the schematics of the accused devices, thereby necessitating that PI take additional time to hire a third party to reverse-engineer those schematics. (D.I. 91 at 16) But PI has not asserted that the decision to seek a preliminary injunction was made only shortly after the reverse-engineering purportedly confirmed infringement to PI's satisfaction.¹⁷ Rather, as already noted, PI's primary explanations for the timing of its Motion focus heavily on the status of the Fairchild case – which BCD, of course, did not impact. *See, e.g.*, D.I. 39, Tr. at 28 (PI explaining in February 2008 that "it didn't make any sense" to seek preliminary injunction before Fairchild verdict because BCD "would have said . . . [t]hese patents might be invalidated by a jury in September in Wilmington"). I conclude that PI was waiting until the Fairchild case reached a certain stage before seeking a preliminary injunction against BCD and that BCD's actions did not delay the filing of PI's Motion.

D. Compensability of Damages

"[A]n injunction is appropriate only where there exists a threat of irreparable harm such that legal remedies are rendered inadequate." *Anderson v. Davila*, 125 F.3d 148, 163 (3d Cir.

¹⁷To the contrary, PI has admitted it could have filed the instant Motion sooner. *See* D.I. 144, Tr. at 58, 60.

1997). I am unconvinced that any harm PI is suffering would not be compensable in money damages. Any economic loss arising from the loss of Samsung's business could be calculated upon a finding that the '876 patent is infringed and valid. PI's claim that BCD, through its

, is targeting other PI customers REDACTED

REDACTED (D.I. 91 at 15) – affects the *extent* of the harm PI might suffer over the course of litigation; it does not alter the *nature* of the harm or make it less repairable by money damages. PI's further argument that "there is no guarantee that BCD will ultimately be able to satisfy an award of damages if the Court denies the injunction" (D.I. 13 at 13) is unsupported by any evidence. I am not persuaded that the highly speculative prospect of BCD's future insolvency should be accorded any significant weight.

To some degree, PI is also arguing that even injunctive relief will not compensate it for the harms BCD is causing. At the October 2008 preliminary injunction hearing, PI's counsel claimed that PI is being irreparably harmed by virtue of the fact that ICs are "design[ed] in" to cell phone chargers: "you have to qualify for these programs, and your part either gets in or your competitor[']s part gets in. It's not as though people can switch over night." (D.I. 144, Tr. at 61) In counsel's view, even if PI were to obtain an injunction, PI's former customers "wouldn't switch [back to PI]. All we can do is try to win the next program. And we're locked out of the ones they've [*i.e.*, BCD] already won." *Id.* at 62. PI analogizes its situation to that confronted by the Federal Circuit in upholding a permanent injunction in *Broadcom v. Qualcomm*, 2008 WL 4330323 (Fed. Cir. Sept. 24, 2008). (D.I. 144, Tr. at 62) There the Court noted that "[t]he market for baseband chips is unlike the typical market for consumer goods where . . . competition is instantaneous and ongoing. . . . Competition for sales is not on a unit-by-unit basis, but rather

competition is characterized by competing for ‘design wins’ for the development and production of cell phones which will embody the proposed chip.” *Broadcom*, 2008 WL 4330323, at *16. PI argues that, consistent with *Broadcom*, it has suffered irreparable harm because it is in direct competition with BCD for “design wins.”

PI raised this argument for the first time at the preliminary injunction hearing. It is difficult to reconcile with other evidence in the record. In particular: VP Renouard declared in January 2008, approximately six months after BCD began offering allegedly infringing chips for sale and taking away sales from PI, that an injunction would allow PI “to regain the lion’s share of the business BCD has taken” (D.I. 17 Renouard Decl. ¶ 11); the loss in market share PI has depicted, while precipitous, was not “all or nothing” (that is, sales did not drop to zero), but a steady decline over time after BCD entered the market (D.I. 17 Renouard Decl. ¶¶ 5, 7); by early 2008 PI began to regain some of the market share it had lost to BCD in 2007 (D.I. 144, Tr. at 56); and, following BCD’s entry into the market, PI continued to meet with Samsung and its subcontractors in an ongoing effort to retain their business (D.I. 17 Renouard Decl. Ex. A). None of this appears to be consistent with a marketplace in which once a company loses a chance to place its chip in a charger that will be on the market for an extended period it has no subsequent opportunity to regain that lost business.¹⁸

Thus, weighing all the relevant evidence, I conclude that PI has not made a sufficient showing of irreparable harm to justify the extraordinary remedy of a preliminary injunction. *See*

¹⁸The evidently greater frequency with which “design win” opportunities appear to arise in PI’s marketplace is also consistent with PI’s portrayal of itself as vulnerable to a series of alleged infringers (Fairchild, then BCD) and the ease with which BCD allegedly filled the void left by Fairchild following the jury verdict against the latter.

Kyphon, Inc. v. Disc-o-tech Medical Technologies Ltd., 2004 WL 2898064, at *5 (D. Del. Dec. 10, 2004) (finding that plaintiff did not make showing of irreparable harm for reasons including delay of six months between filing suit and moving for preliminary injunction, lack of showing that damages would be inadequate as a remedy or difficult to calculate, and lack of showing that defendant would be unable to pay damages).

III. The Remaining Factors: Balance of Hardships and the Public Interest

Because PI has failed to carry its burden of showing a reasonable likelihood of success on the merits and failed to demonstrate that it is suffering irreparable harm, I need not weigh the balance of hardships or the public interest in relation to the request for a preliminary injunction. *See Polymer Technologies, Inc. v. Bridewell*, 103 F.3d 970, 973-74 (Fed. Cir. 1996) (“[A] trial court need not make findings concerning the third and fourth factors if the moving party fails to establish either of the first two factors.”).

RECOMMENDED DISPOSITION

For the reasons given in the above stated findings of fact and conclusions of law, I recommend that the Court DENY PI’s Motion for a Preliminary Injunction.

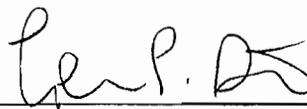
This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within ten (10) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Henderson v. Carlson*, 812 F.2d 874, 878-79

(3d Cir.1987); *Sincavage v. Barnhart*, 171 Fed. Appx. 924, 925 n.1 (3d Cir. 2006).

The parties are directed to the Court's Standing Order In Non-Pro Se Matters For Objections Filed Under Fed. R. Civ. P. 72, dated April 7, 2008, a copy of which is available on the Court's website, www.ded.uscourts.gov/StandingOrdersMain.htm.

Dated: November 4, 2008

[PUBLIC VERSION RELEASED
NOVEMBER 19, 2008]

A handwritten signature in black ink, appearing to read "L.P. Stark", written over a horizontal line.

Honorable Leonard P. Stark
UNITED STATES MAGISTRATE JUDGE