IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUNOCO PARTNERS MARKETING & TERMINALS L.P.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 17-1390-LPS-CJB
POWDER SPRINGS LOGISTICS, LLC and MAGELLAN MIDSTREAM PARTNERS, L.P.,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Presently before the Court is Plaintiff Sunoco Partners Marketing & Terminals L.P.'s ("Sunoco" or "Plaintiff") Motion for Preliminary Injunction (the "Motion"). (D.I. 6) Sunoco seeks to enjoin Defendants Powder Springs Logistics, LLC ("Powder Springs") and Magellan Midstream Partners, L.P. ("Magellan," and collectively with Powder Springs, "Defendants") from using in the United States an automated in-line pipeline butane blending system that allegedly infringes Sunoco's United States Patents Nos. 9,494,948 (the "'948 patent") and 9,606,548 (the "'548 patent") during the pendency of this litigation. (D.I. 6-1 at 1) For the reasons set out below, the Court recommends that Sunoco's Motion be DENIED.

I. BACKGROUND

A. Factual Background

1. Overview of the Technology at Issue

The technology at issue in this case comprises systems and methods for automated in-line blending of butane into gasoline along petroleum pipelines. (D.I. 1, exs. 4, 9)[1] Pipelines are the foundation of the nation's gasoline distribution system, with gasoline traveling through these pipelines from ports and refineries to predetermined storage facilities known as "terminals" or "tank farms." (D.I. 1 at ¶ 11; '948 patent, col. 1:29-35) Some tank farms simply store the gasoline until it is redistributed to other tank farms, while other tank farms known as "terminal tank farms" dispense gasoline to tanker trucks in what is known as a "rack[.]" ('948 patent, col. 1:35-44) After the gasoline is loaded onto tanker trucks, it is then delivered to retail gas stations. (D.I. 1 at ¶ 12; '948 patent, col. 1:37-38)

An important physical property of gasoline is its volatility, or its ability to combust. ('948 patent, col. 1:49-50) This property of gasoline helps ensure that vehicles will perform at a consistent level during a given year. (*Id.*, col. 1:50-54) Gasoline marketers blend butane into gasoline to reach the desired level of volatility, especially during the colder months. (*Id.*, col. 1:51-54) Blending butane into gasoline also reduces the cost of the gasoline. (*Id.*, col. 1:54-55) This is because butane is cheaper than gasoline, and when butane is blended into gasoline, this increases the overall volume of the gasoline. (D.I. 8 (hereinafter, "Krill Decl."), ex. 3 at ¶ 4) And since blended gasoline generally sells for the same unit price as unblended gasoline meeting the same specifications, blending can thus increase the amount of available petroleum product at an average unit cost that is lower than the unit cost of the unblended petroleum product. ('948 patent, col. 1:54-55; Krill Decl., ex. 3 at ¶ 5; *id.*, ex. 7 at A073)

Butane can be blended into gasoline downstream of a refinery. This blending can occur

---

[1] The asserted patents are found in a number of places in the record, including as Exhibits 4 and 9 of D.I. 1. Further citation will simply be to the "'948 patent" or the "'548 patent."

directly in a pipeline that is transporting gasoline ("in-line"), or it can occur within a storage tank after the gasoline has been delivered to the tank farm by the pipeline. ('948 patent, cols. 1:29-36, 55-58, 2:50-51)

The United States Environmental Protection Agency ("EPA") and most states have promulgated regulations regarding the volatility of gasoline (which, in turn, impact how much butane can be blended with gasoline). (*Id.*, col. 1:59-64; Krill Decl., ex. 3 at ¶¶ 7-8) Volatility must be regulated, because too much volatility can cause excess emissions into the atmosphere, and can also cause problems in older vehicles such as vapor lock. ('948 patent, col. 1:59-61; Krill Decl., ex. 3 at ¶ 6) The volatility of gasoline is commonly measured by determining the Reid vapor pressure ("RVP") of the gasoline. ('948 patent, col. 2:5-9)

The regulations regarding gasoline volatility are the strictest during the summer months (from May 1 through September 15), when gasoline is warm and most volatile. (*Id.*, col. 1:64-66; Krill Decl., ex. 3 at ¶ 7) EPA regulations are more relaxed during the period from September 16 through April 30 (known as the "blend season" or "blending season"), when temperatures are cooler; as a result, most butane blending occurs during the blend season. (Krill Decl., ex. 3 at ¶¶ 9-10) (In 2017, Sunoco obtained a waiver to begin the blend season even earlier than September 16, due to a gasoline supply problem caused by Hurricane Harvey in the Gulf Coast.). (D.I. 65 (hereinafter, "Tr.") at 64) The blend ratio of butane to gasoline still must be carefully monitored and controlled during the blend season, however, to ensure, *inter alia*, that volatility limits comply with state regulations (which can vary greatly from state to state). (Krill Decl., ex. 3 at ¶ 10) Exceeding state or EPA volatility limits could result in significant fines, remediation costs, and reputational harm throughout the industry. (*Id.*)

2. Sunoco's Asserted Patents

Sunoco owns seven patents relating to automated butane blending (the "Sunoco Patents"),[2] and also has related patent applications still pending. (*Id.* at ¶ 11) The first of these patents, United States Patent No. 6,679,302 ("'302 patent"), issued on January 20, 2004. (*See* '948 patent, col. 1:7-18; '302 patent) The asserted patents claim priority to the '302 patent and have been assigned to Sunoco. ('948 patent at 1 & col. 1:7-18; '548 patent at 1 & col. 1:7-18)

The asserted patents, both of which are entitled "Versatile Systems for Continuous In-Line Blending of Butane and Petroleum[,]" share a common specification and relate to systems and methods for automating the blending of butane into gasoline at any point along a petroleum pipeline. ('948 patent at 1; '548 patent at 1) The inventors described their inventions in the asserted patents as follows:

> By combining the advantages of in-line vapor pressure monitoring both upstream and downstream of a butane blending operation, the inventors have developed a tightly controlled butane blending system with surprising versatility that can be used to blend butane with petroleum products at practically any point along a petroleum pipeline, regardless of variations in the flow rate of gasoline through the pipeline, the time of year in which the gasoline is delivered, or the ultimate destination to which the gasoline is delivered. For the first time, petroleum vendors and distributors are able to take optimum advantage of the many cost saving and performance benefits that butane blending offers, and to do so without regard to the location where the blending occurs along the pipeline.

('948 patent, col. 3:18-31)

3. Sunoco's Butane Blending Business

---

[2] In addition to the asserted patents, these patents include United States Patent Nos. 6,679,302; 7,023,629; 7,631,671; 8,176,951 and 9,207,686. (Krill Decl., ex. 3 at ¶ 11)

In July 2010, Sunoco acquired a butane blending business from Texon L.P. ("Texon"), as well as rights to the Sunoco Patents and other assets, for approximately $152 million; $140 million of this purchase price was allocated to the blending business and the Sunoco Patents. (Krill Decl., ex. 23 at 6; *id.*, ex. 24 at 3) At the time of the acquisition, Texon had three issued patents and had executed agreements to utilize the patented technology to supply butane to at least nine third-party terminals. (*Id.*, ex. 3 at ¶ 12) Subsequently, four more patents have issued, and Sunoco has executed butane supply agreements with an additional 61 third-party terminals; thus, there are a total of 70 third-party terminals that either have incorporated Sunoco's patented butane blending technology or will do so in the future. (*Id.* at ¶ 14) Owners of these third-party terminals include [redacted], Chevron, Marathon, [redacted], as well as many other entities. (*Id.*) Sunoco also currently blends butane with gasoline utilizing the patented systems and methods at 18 of its own terminals. (*Id.*) Thus, at present, there are 88 terminals nationwide that utilize or will utilize Sunoco's patented butane blending technology. (*Id.*)

With the butane supply agreements, Sunoco and the third-party terminal operators separately execute construction agreements for the construction of the automated butane blending system that practices the patented technology from the Sunoco Patents. (*Id.* at ¶ 17) Each butane blending system today costs from [redacted] to build, and in any given case such costs may be bourne by Sunoco, the terminal operator, or both. (*Id.*) Sunoco installs, on average, eight to 12 butane blending systems at terminals (either third-party terminals or Sunoco's own terminals) per year. (Tr. at 63) These systems, once installed, are not replaced frequently. (*Id.*)

Under Sunoco's butane supply agreements with third-party terminals, Sunoco supplies the butane, services the automated blending systems, and shares in the profits made from use of Sunoco's technology. (Krill Decl., ex. 3 at ¶ 15) Sunoco maintains and remotely monitors the butane blending facilities at these terminals to ensure compliance with regulations. (*Id.*; *see also* Tr. at 61)

Generally, the profits earned from the third-party butane blending operations are split between Sunoco and the third-party licensees. (Krill Decl., ex. 3 at ¶ 16) From July 2010 through the end of 2016, Sunoco's butane blending operations earned approximately [redacted] million. (*Id.*) Sunoco's butane supply agreements with the third-party terminals [redacted] (*Id.* at ¶ 24)

These butane supply agreements include limited licenses to the Sunoco Patents. (*Id.* at ¶ 15) However, those licenses were negotiated and agreed upon only in connection with the broader agreements between Sunoco and the third-party licensees, and they are limited to certain identified terminals. (*Id.*) Outside of the context of these butane supply agreements, Sunoco has not entered into any licenses to the Sunoco Patents. (*Id.*)

One of Sunoco's butane supply agreements was with [redacted]; in May 2015, Magellan [redacted] (*Id.* at ¶ 25) [redacted]

(D.I. 26 at ¶¶ 4-8) [redacted]. (*Id.* at ¶ 8) [redacted]. (*Id.*)

4. Defendants' Powder Springs Butane Blending Facility

Non-party Colonial Pipeline Company ("Colonial") operates a 5,500 mile pipeline known as Colonial Pipeline that extends from Texas to New Jersey. (D.I. 1 at ¶ 10; Krill Decl., ex. 7 at A069-70; *id.*, ex. 11 at A107) The Colonial Pipeline connects to over 260 terminals. (Krill Decl., ex. 11 at A107) Some of the terminals along the Colonial Pipeline are owned and operated by Colonial—such as a terminal called the Atlanta Junction facility in Austell, Georgia—while others are owned and operated by various third-party shippers, including Sunoco, certain of Sunoco's licensees, and Defendant Magellan. (D.I. 1 at ¶ 13) Magellan owns and operates a 9,700 mile pipeline in the United States, as well as independent terminals that are connected to the Colonial Pipeline and to other third-party pipelines. (Krill Decl., ex. 6 at A056.1)

Around 2012, Colonial solicited proposals to form a joint venture to build a facility at its Atlanta Junction terminal capable of in-line blending of butane with the gasoline that travels through Colonial's pipeline. (Krill Decl., ex. 7 at A060; *id.*, ex. 13 at ¶ 5; D.I. 23 (hereinafter, "Huff Decl.") at ¶ 3) Sunoco and Magellan each submitted proposals. (Krill Decl., ex. 13 at ¶ 5; Huff Decl. at ¶ 3) Had Sunoco been selected, Sunoco would have used its automated blending technology at the facility. (Krill Decl., ex. 13 at ¶ 6; *id.*, ex. 18 at A215; D.I. 24 at ¶ 9) Colonial instead chose Magellan, and Magellan and Colonial have subsequently investe[redacted]to construct and operate the blending facility at issue in this case, which is known as PSL. (Huff Decl. at ¶ 4)

PSL's butane blending system became operational in March 2017, and has operated continually since then. (*Id.* at ¶ 6) The sole function of PSL is to blend butane into gasoline. (D.I. 31 (hereinafter, "Lassman Decl.") at ¶ 3) Current 2018 forecasts for PSL's blending operations shows sales of more than [redacted] and operating profits of [redacted] (*Id.* at ¶ 12)

When Defendants at PSL blend butane into gasoline traveling through the Colonial Pipeline, the blended gasoline then travels downstream to terminals and to other pipelines. (*See, e.g.*, Krill Decl., ex. 9 at A093) Of Sunoco's total of 88 nationwide terminals in which it has or will automatically blend butane into gasoline, 28 of these terminals are downstream of PSL. (*Id.*, ex. 3 at ¶ 19) Of these 28 terminals, 18 (two Sunoco terminals and 16 third-party terminals) have their gasoline exclusively supplied by the Colonial Pipeline, while 10 terminals (one owned by Sunoco and nine by third parties) are downstream of PSL but are not exclusively supported by the Colonial Pipeline. (*Id.*)

B. Procedural Background

On October 4, 2017, Sunoco brought the present action, alleging that Defendants infringe the asserted patents. (D.I. 1) Two days later, Sunoco filed the instant Motion. (D.I. 6)

On October 16, 2017, Chief Judge Leonard P. Stark referred this case to the Court to hear and resolve all pretrial matters, up to and including the resolution of case-dispositive motions. (D.I. 15) Following the completion of briefing, (D.I. 7, 22, 43), the Court held an evidentiary hearing and heard oral argument on Sunoco's Motion on December 8, 2017.

II. STANDARD OF REVIEW

"[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); *accord Cordis Corp. v. Medtronic, Inc.*, 780 F.2d 991, 996 (Fed. Cir. 1985) ("Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined.") (internal quotation marks and citations omitted). However, the Patent Act provides that injunctions "may" issue "in accordance with the principles of equity[.]" 35 U.S.C. § 283.

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 an 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). No one of these factors is 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." *Id.* (quoting *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988)). However, "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." *Id.* (emphasis in original). Moreover, "[w]hile granting a preliminary injunction requires analysis of all four factors, [] a trial court may . . . deny a motion based on a patentee's failure to show *any* one of the four factors—especially either of the first two—without analyzing the others[.]" *Jack Guttman, Inc. v. KopyKake Enters., Inc.*, 302 F.3d 1352, 1356 (Fed. Cir. 2002) (emphasis added); *see also Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 953

(Fed. Cir. 1990) ("If the injunction is denied, 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.").

III. DISCUSSION

A. Reasonable Likelihood of Success on the Merits

The first preliminary injunction factor is whether Sunoco has established a reasonable likelihood of success on the merits. As to that factor, Sunoco must show that: (1) Defendants likely infringe at least one of the claims of the asserted patents; and (2) the infringed claim(s) will likely withstand Defendants' challenge to validity. *Amazon.com, Inc.*, 239 F.3d at 1350. Defendants do not contest infringement on this Motion; instead, they argue, for various reasons, that Sunoco cannot meet its burden to show that the claims will likely be found valid. (*See* D.I. 22 at 7-14; D.I. 43 at 1)

Here, the Court will assume *arguendo* that Sunoco could prove a likelihood of success on the merits, and will thus go on to assess the second factor, irreparable harm. The Court proceeds in this fashion because it is legally unnecessary to do otherwise. In light of the Court's conclusion below that Sunoco has not sufficiently demonstrated that irreparable harm will befall it in the absence of the requested relief, no injunction could issue. And so, an assessment of Sunoco's likelihood of success on the merits is not required for purposes of resolving the Motion. *See Jack Guttman, Inc.*, 302 F.3d at 1356; *see also Chestnut Hill Sound Inc. v. Apple Inc.*, Civil Action No. 15-261-RGA, 2015 WL 6870037, at *2 (D. Del. Nov. 6, 2015) (taking this same approach under similar circumstances); *Depuy Synthes Prods., LLC v. Globus Med., Inc.*, C.A. No. 11-652-LPS, 2013 WL 4509655, at *2 (D. Del. Aug. 22, 2013) (same).

B. Irreparable Harm

A party seeking a preliminary injunction "must make a clear showing that it is at risk of irreparable harm, which entails showing a likelihood of substantial and immediate irreparable injury." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012) ("*Apple II*") (internal quotation marks and citation omitted); *Chestnut Hill Sound Inc.*, 2015 WL 6870037, at *3. To demonstrate irreparable harm, a plaintiff must establish that it is subject to harm that can not be adequately compensated though monetary damages. *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) ("[T]he irreparable harm inquiry seeks to measure harms that no damages payment, however great, could address."). A plaintiff satisfying the irreparable harm factor must also demonstrate a causal nexus relating the alleged harm to the alleged infringement. *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1324 (Fed. Cir. 2012) ("*Apple I*"); *Chestnut Hill Sound Inc.*, 2015 WL 6870037, at *3.

In the instant Motion, Sunoco asserts that it is being irreparably harmed on two fronts. First, it asserts that Defendants' infringement harms Sunoco's relationships with its current customers and will likely cause a loss of these customers. (D.I. 7 at 14-16; D.I. 43 at 9-10) Second, it argues that Defendants' infringement has caused or will likely cause Sunoco to lose future business opportunities and thus deprive it of further market share. (D.I. 7 at 16-17; D.I. 43 at 10)

For the reasons discussed below, the Court finds that the record is insufficient to make out a showing of irreparable harm on both of these fronts. In explaining why this is so, the Court will first discuss how Sunoco premises its assertions that it will face irreparable harm (as to both fronts) on the same unsupported hypothetical. Then, it will go on to address Sunoco's remaining arguments as to why it will suffer irreparable harm, noting why it finds these arguments wanting.

1. Sunoco's Irreparable Harm Argument was Premised on Defendants' Blending the Maximum Amount of Butane

In the "Statement of Facts" section found at the beginning of Sunoco's opening brief, it described the irreparable harm that it anticipated as follows:

> *If Defendants are allowed to blend butane to the maximum extent permitted by regulations*, Sunoco and its licensees can blend only minimal amounts of butane, if any, into the gasoline delivered by Colonial's pipeline. [citing Krill Decl., ex. 3 at ¶ 20]. Their butane blending business will effectively be shut down. *Id.* []. This harms the existing terminals, and irreparably harms Sunoco's customer relationships and any chances for future business. *Id.* at ¶ 21.

(D.I. 7 at 7-8 (emphasis added) (certain internal citations omitted)) Later, in the "Argument" section of that same brief, Sunoco reiterated this same position with respect to irreparable harm:

> *[I]f Defendants begin to blend the maximum amount of butane into the pipeline*, then none of the 18 downstream terminals exclusively supplied by the Colonial pipeline will be able to blend additional butane into the gasoline, because that would exceed allowable limits. [citing Krill Decl., ex. 3 at ¶ 20] And to the extent the other 10 terminals do rely on the Colonial pipeline as a source, they will be unable to blend.

(*Id.* at 14 (emphasis added) (certain internal citations omitted))[3]

---

3 Sunoco cites for support in both instances to the Declaration of James Daniel Myers, who is the Vice President - Refined Products at Energy Transfer Partners, L.P., a company that recently merged with Sunoco Logistics Partners L.P. (Krill Decl., ex. 3 at ¶ 2) In the key cited paragraph of Mr. Myers' declaration, his statement largely mirrors the wording that Sunoco used in its opening brief:

> If Magellan and Powder Springs . . . *are allowed to blend butane up to the maximum extent permitted by regulations*, Sunoco and its licensees can blend only minimal amounts of butane, if any, into the gasoline delivered by Colonial's pipeline. Otherwise, they would exceed allowable limits. Their butane blending business

An overarching problem with Sunoco's position here is that it is entirely premised on a contingency. That is, Sunoco is arguing that its relationships with its current licensees and prospective customers will be irreparably harmed *if Defendants begin to blend the maximum amount of butane into the pipeline* at the PSL facility. (*See* D.I. 22 at 16) As a result, in order for the Court to weigh the impact of *that* type of harm in undertaking its preliminary injunction calculus, Sunoco would need to demonstrate that Defendants actually have blended to the maximum levels allowed by law at PSL, or that they likely will do so. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (holding that a plaintiff must demonstrate more than the mere possibility of irreparable harm, and instead must "demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis in original); *see also, e.g.*, *Feit Elec. Co., Inc. v. Cree, Inc.*, 1:15CV535, 2016 WL 1057039, at *7-8 (M.D.N.C. Mar. 14, 2016) (finding that plaintiff's position with respect to irreparable harm (i.e., that it believes defendant is attempting to sell its product to more retailers, and that "if" retailers begin to buy the infringing product, it is "likely" that those retailers will also buy other of defendants' products) was "tenuous at best, and *entirely* hypothetical") (certain emphasis in original).

But Sunoco has not done that. It has not pointed to any evidence that Defendants are in fact blending the maximum amount of butane into the gasoline flowing through the PSL facility. Nor does has it identified any evidence suggesting that Defendants will likely do so in the future. Indeed, the evidence of record (largely submitted by Defendants) clearly demonstrates

---

> will be greatly diminished, which in turn will degrade the investments made by Sunoco and its customers along the Colonial pipeline.

(*Id.* at ¶ 20 (emphasis added))

Defendants have *not* been blending to anywhere near the maximum levels allowable under the law.

In this regard, Defendants submitted the declaration of Mark Lassman, Director of Commodities for Magellan. Mr. Lassman first noted that only "a very small fraction" of the total gasoline that flows through the Colonial Pipeline (less than 1% of the 500 million barrels of gasoline that move on the pipeline) is even blended at PSL. (Lassman Decl. at ¶ 4; *see also* D.I. 30 (hereinafter, "Maness Decl.") at ¶ 20; Tr. at 102, 229-30) And, according to Mr. Lassman, as to the "very small" portion of this gasoline into which Defendants do blend butane, Defendants blend below the maximum limits permitted by the EPA and by state and local regulations (i.e., to 0.1 psi or more below the maximum RVP allowed). (Lassman Decl. at ¶¶ 4-5) This, in turn, permits downstream terminals to "further blend[] butane to the maximum RVP allowed by EPA and their own state and local regulations (which may be higher than the maximum permitted for the applicable grade of gasoline on the Colonial pipeline system)." (*Id.* at ¶ 5; *see also* Tr. at 230 (Defendants' counsel pointing out that "even when we do blend, there's always room to blend beyond what we have done"))

To underscore that opportunities to blend downstream of the PSL facility remain, Defendants pointed out that Magellan itself continues to invest in manual blending opportunities downstream of PSL on the Colonial Pipeline. (D.I. 22 at 17) And they supported that assertion with real factual detail. For instance, Defendants stated that Magellan began to blend butane at a new terminal [redacted], and that it expects to begin butane blending operations [redacted] (Huff Decl. at ¶ 10) Defendants' damages expert, Dr. Robert Maness, opined that "[t]he fact that, despite blending at PSL, Magellan recognizes enough value in these blending opportunities to invest in more blending at downstream terminals, indicates that Sunoco's licensees are unlikely to suffer the dire consequences it claims." (Maness Decl. at ¶ 21)

Sunoco addressed Defendants' response on this point only in a footnote of its reply brief. There, it asserted that it should not be "forced to quantify" the extent of Defendants' infringement, and that "if Defendants are going to argue that not every batch of gasoline will be blended, or not blended to the maximum amount, then certainly the harm caused to Defendants by an injunction would not be significant either." (D.I. 43 at 10 n.11) But that kind of a response turns the test for obtaining a preliminary injunction on its head. If Sunoco wants to obtain a preliminary injunction, then *it bears* the burden to make out a sufficient showing of the irreparable harm that *it will face* in the absence of the imposition of such relief. And yet, instead, with this line of argument, it sounds a bit like Sunoco is saying: "Well, even if we haven't met our burden, what is the harm in granting our requested injunction anyway?"

The answer to that is that a preliminary injunction is a "drastic and extraordinary remedy"—in significant part because it deprives an accused infringer of the ability to conduct its business (here, to run an operation that Defendants say cost [redacted] to construct, and that generates yearly profits of [redacted]) before a final determination on the merits is made. If Sunoco wishes to obtain that type of significant, early relief, then it has to meet its burden under the law.

In sum, Sunoco's position on irreparable harm is flawed from the outset, as it was premised on a hypothetical—i.e., Defendants would blend butane to the "maximum" extent permitted by law—that, according to the record evidence, has simply not borne out.

Nevertheless, below, the Court will assume that Sunoco intends that its additional irreparable harm arguments are all still applicable, even if Defendants do not blend butane up to the maximum level allowed. It now takes up those additional arguments.

2. Harm to Sunoco's Relationships With Current Customers and Likely Loss of These Customers

With its Motion, Sunoco asserts that "Defendants' actions will cause Sunoco to lose market share in the long run, because Defendants' infringement will damage Sunoco's customer relationships, and will result in the loss of customers." (D.I. 7 at 16)[4] And indeed, one way a patentee could be harmed through infringement is by losing market share in this way to the accused infringer. But if loss of market share is to be a factor at all in the irreparable harm calculus, it is well-settled that the "lost market share must be proven (or at least substantiated with some evidence) in order for it to support entry of a preliminary injunction, because granting preliminary injunctions on the basis of speculative loss of market share would result in granting preliminary injunctions in every patent case where the patentee practices the invention." *Automated Merch. Sys., Inc. v. Crane Co.*, 357 F. App'x 297, 301 (Fed. Cir. 2009) (internal

---

[4] Sunoco presumably focused on these types of harm relating to its current customers—e.g., damage to Sunoco's relationships with those customers, or the likelihood that Sunoco will lose those customer relationships in the future—because Sunoco could not show that a current customer's actual loss of blend opportunity itself could somehow amount to "irreparable harm" as to that customer or to Sunoco. That is because, *inter alia*, the record clearly demonstrates that such loss *could* be quantified and compensated accordingly. (D.I. 7 at 17; Tr. at 107-08, 219-21) This is established by Sunoco's own butane supply license agreements, which preclude Sunoco from blending butane into a pipeline upstream of a third-party licensee without providing that licensee "equitable financial compensation." (Krill Decl., ex. 3 at ¶ 24; *see also* D.I. 22 at 15) During the evidentiary hearing, Sunoco's counsel acknowledged that "I would think you could ascertain how much blending Magellan is doing. There would be [a] quantifiable aspect to it," but counsel went on to explain that with respect to lost business opportunities, "you can't know how many more terminals [Sunoco] would have installed these systems at." (Tr. at 220-21)

quotation marks and citation omitted).

As to this line of argument, the Court must first identify the relevant current "customers" that Sunoco is referring to—in order to assess whether there is sufficient evidence that Sunoco's relationships with those customers have been or likely will be irreparably harmed. As was noted above, Sunoco has 28 terminals downstream of PSL that are utilizing the patented technology. Eighteen of these terminals maintain gasoline that is exclusively supplied by the Colonial Pipeline.

With respect to the 10 terminals that are *not* supplied exclusively by gasoline from the Colonial Pipeline, Sunoco stated that these terminals would impact the irreparable harm analysis "*to the extent* [that they] do rely on the Colonial pipeline as a source" and that they are rendered "unable to blend" as a result of Defendants' blending the maximum amount of butane into the pipeline. (D.I. 7 at 14 (emphasis added)) The Court agrees with Defendants, however, that these 10 terminals do not have any real relevance on this record. (D.I. 22 at 15 n.6) Not only has Sunoco failed to demonstrate that these 10 terminals are "unable to blend" as a result of the alleged infringing activity, but it has failed to provide any evidence of how much gasoline, if any, these terminals actually receive from Colonial Pipeline (as compared to any other source(s) of gasoline upstream of these terminals).[5] (Tr. at 83 (Sunoco witness Mr. Myers testifying under cross-examination at the evidentiary hearing that he understood why Sunoco had not submitted data as to decreased blend opportunity from these 10 terminals that received "gasoline from other

---

[5] In support of the proposition that these 10 licensees will be harmed, and thus that Sunoco will be irreparably harmed as a result, Sunoco cites to Paragraph 20 of Mr. Myers' declaration. (D.I. 7 at 14) But as indicated above, (*supra* note 3, at 12), Mr. Myers does not say anything specific about these 10 terminals in that paragraph, nor about the extent to which they rely on Colonial Pipeline as a source for gasoline.

sources[,]" because one would be uncertain as to whether "that [data] would lead you to any conclusions because you're not really sure where that gasoline came from")) The Court is not permitted to speculate in deciding whether the extraordinary remedy of a preliminary injunction is warranted.

That leaves the 18 terminals that *do* have their gasoline supplied exclusively by the Colonial Pipeline. As described above, in Sunoco's opening brief, it premised any harm to these terminals on a hypothetical that is unsupported by the record (i.e., that Defendants would be blending butane to the maximum extent possible). Moreover, although Sunoco's opening brief was filed seven months after Defendants began blending at PSL (and more than three weeks after the blend season began), the brief did not cite to any evidence that Defendants' blending had in fact begun to have an impact on these 18 downstream terminals. After Defendants pointed this out in their answering brief, (D.I. 22 at 16-17), Sunoco submitted, in conjunction with its reply brief, the declaration of John Legge, (D.I. 44, ex. 35). Mr. Legge is an employee of Energy Transfer Partners, L.P. ("ETP"), a company that recently merged with a Sunoco entity. (*Id.* at ¶ 3)[6] In his declaration, Mr. Legge explains that, as to these 18 terminals, he "collected and reviewed the available data" from the blend season for September and October of 2015, 2016 and 2017. (*Id.* at ¶ 4) From this data, Mr. Legge concluded that eight of the 18 terminals "have experienced a noticeable decrease in blend opportunity [since PSL began operation, as compared to the same periods in prior years]." (*Id.* at ¶ 5)[7]

---

6 Plaintiff is a wholly-owned subsidiary of ETP. (Tr. at 58)

7 These eight terminals still continued to blend butane into their gasoline after PSL began its blending operations; they simply blended at a lower volume than they had in the past. (*See* Tr. at 104)

One difficulty with Mr. Legge's declaration is that he does not provide any further explanation as to (1) what Sunoco considers to be a "noticeable decrease" in blend opportunity, nor (2) how these eight terminals' profits and Sunoco's profits were affected by these decreased opportunities.[8] The Court is thus left to speculate a bit on whether these impacts were *de minimis*, or instead were in fact material to the third-party terminals and to Sunoco (and why that is).

But even assuming that these "noticeable decrease[s]" in blend opportunities at the eight terminals are material, in order for such data to be relevant to the instant Motion, Sunoco must make at least two other showings. First, it must show a connection between those decreases and Defendants' blending activity at PSL. As noted above, a showing of irreparable harm requires proof that a "sufficiently strong causal nexus relates the alleged harm to the alleged infringement." *Apple II*, 695 F.3d at 1374; *see also Apple I*, 678 F.3d at 1324 ("To show irreparable harm, it is necessary to show that the infringement caused harm in the first place.").[9] Second, Sunoco must show that *it* (as opposed to its licensee terminals, who are not parties to this suit) will be irreparably harmed as a result of the impact of any decrease in blend opportunity

---

8 The Court notes that the fact that only eight out of 18 terminals showed a "noticeable decrease" appears to further demonstrate that Defendants are not blending butane to the maximum level.

9 Although oftentimes the causal nexus requirement is disputed in circumstances where there is a product with many features and only one of those features is accused of infringing the asserted patent, *see, e.g.*, *Apple I*, 678 F.3d at 1324 ("Sales lost to an infringing product cannot irreparably harm a patentee if consumers buy that product for reasons other than the patented feature."), the Court does not understand the requirement to apply in *only* such cases. The United States Court of Appeals for the Federal Circuit has explained that "[t]he causal nexus requirement ensures that an injunction is only entered against a defendant on account of a harm resulting from the defendant's wrongful conduct, not some other reason." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 809 F.3d 633, 640 (Fed. Cir. 2015).

at the eight terminals. *See Finjan, Inc. v. Blue Coat Sys., LLC*, Case No. 15-cv-03295-BLF, 2016 WL 6873541, at *6 (N.D. Cal. Nov. 22, 2016) (explaining in denying a motion for a preliminary injunction that the "Federal Circuit has made clear that '[n]othing in [*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)] eliminates the requirement that the party seeking a permanent injunction must show that *it* has suffered an irreparable injury'" and "[t]hus harm sustained by Finjan's licensees . . . is not relevant to the irreparable harm inquiry" while "harm sustained by Finjan as a result of the impact of Blue Coat's alleged infringement on these companies is relevant") (quoting *Voda v. Cordis Corp.*, 536 F.3d 1311, 1329 (Fed. Cir. 2008) (emphasis in original)); *cf. Waterton Polymer Prods. USA, Inc. v. Edizone, LLC*, No. 2:12-CV-17 TS, 2014 WL 4922596, at *1-2 (D. Utah Sept. 30, 2014).[10]

Below, the Court will next consider each of these two requirements (causal nexus and the showing of harm to Sunoco), and Sunoco's showing as to each.

a. Causal Nexus

With respect to the causal nexus requirement, Mr. Legge's declaration does not directly address the issue of *why* there was a "noticeable decrease" in blend opportunity for the eight licensee terminals. (*See* Tr. at 233-36) Sunoco apparently intends for the Court to draw the inference that because the "noticeable decrease" occurred after Defendants began blending at PSL, there is a causal connection between these events. And at first blush, that might seem like a

---

[10] In its briefing, Sunoco seemed to suggest that harm to its licensees (standing alone) was relevant to the Court's assessment of the irreparable harm factor. (*See, e.g.*, D.I. 43 at 9 (stating that Sunoco showed much more than just lost sales of Sunoco's—it "showed the loss of sales and investment *of its licensees*" and that this harm was relevant because Sunoco "cannot recover for the lost profits of its licensees") (emphasis in original)) However, during oral argument Sunoco's counsel acknowledged that the relevant question as to irreparable harm here is "the harm that's caused to Sunoco by virtue of the impact to Sunoco's licensees." (Tr. at 218)

plausible inference to draw.

The remainder of the record, however, muddies the waters on the nexus issue. As the Court indicated above, Mr. Legge's data about the "noticeable decrease" was provided in connection with Sunoco's reply brief. At the evidentiary hearing, Defendants' expert Dr. Maness testified that Mr. Legge's data did not change his opinion that Sunoco had failed to demonstrate that it would be irreparably harmed by Defendants' blending. Dr. Maness explained that because the data showed that only eight of the 18 terminals exclusively supplied by the Colonial Pipeline experienced a noticeable decrease, that means that "10 of the 18 [terminals] continue to blend basically the same way they blended before [PSL] existed[,]" and, therefore that "the blending at [PSL] itself has not been what's reduced blend[ing] opportunities" at the 8 terminals. (*Id.* at 102-03; *see also id.* at 231 (Defendants' counsel noting that "[i]f [PSL is] blending and causing all of this trouble north of Atlanta, how come [there was not a noticeable decrease in blending opportunities for] all 18 [terminals]?")) Dr. Maness suggested that alternative reasons why the eight terminals experienced a "noticeable decrease" could include: (1) that customers of those terminals did not require or want blended gasoline, or (2) perhaps that the spread between butane and gasoline prices was not favorable at those given locations. (*Id.* at 103-04)

Defendants raise a good point here. If all 18 terminals showed a "noticeable decrease" in blending, then it would be easier for the Court to infer the necessary causal connection. But on the current state of the record, it seems at least as plausible that other explanations (particular to these eight terminals) are causing the discrepancies. Sunoco should have put evidence in the record better demonstrating a likely connection between the "noticeable decrease" for the eight terminals and the blending at PSL (or at least better articulating a theory as to why, despite the fact of the asserted causal connection, all 18 terminals were not impacted in the same way).[11] *Cf. Malibu Boats, LLC v. Nautique Boat Co., Inc.*, 997 F. Supp. 2d 866, 887 (E.D. Tenn. 2014) (concluding that a likely causal connection could not be made out between the allegedly infringing components of the accused system and the plaintiff's alleged harm of a decreased potential to gain market share, where the plaintiff argued that the system was responsible for defendant's increase in market share "because the two occurred during the same time period" but "[i]t is not enough for the patentee to establish some insubstantial connection between the alleged harm and the infringement and check the causal nexus requirement off the list") (internal quotation marks and citation omitted). Its failure to do so dooms its request for injunctive relief as to harm regarding its current customer relationships.

b. Whether Sunoco Has Sufficiently Shown That *It* Will Be Irreparably Harmed as a Result of Its Terminals' Decreases in Blend Opportunity, in the Form of Harm to Customer Relationships or Loss of Customers

Additionally, the Court concludes that even if Sunoco had demonstrated the required causal nexus between infringing activity and its current licensees' lost blend opportunity, an injunction should not issue. This is because Sunoco has also failed to sufficiently show that, as a result, *it* has suffered or will suffer irreparable harm to its relationships with these customers or to its ability to retain the customers. Rather, as discussed below, Sunoco's arguments were much too general.

---

[11] The Court notes that with respect to the 10 terminals that did not demonstrate a "noticeable decrease" in blending opportunity, Mr. Legge states in his declaration only that "on further review some may also show a decrease in blend opportunity. However, for others, there may not be sufficient data, the data may be inconclusive, or the data may appear to have anomalies that prevent a firm conclusion at this time." (Legge Decl. at ¶ 6)

For example, in Sunoco's opening brief, it broadly asserted that if its licensees' "butane blending facilities are rendered useless" then its credibility with those licensees would be harmed, and the licensees would not renew their butane supply contracts with Sunoco. (D.I. 7 at 15 (citing to Krill Decl., ex. 3 at ¶ 23)) As was previously noted, the record does not demonstrate that Sunoco's licensees' butane blending operations have become "useless." Moreover, and even assuming that Sunoco intended this argument to apply if the terminals could still do some blending, (*see* Krill Decl., ex. 3 at ¶ 23), Sunoco failed to indicate: (1) whether any of these existing butane supply contracts (which are typically for at least ten-year terms), (*id.*), are "nearing termination or close to time for renewal[,]" (D.I. 22 at 17); or (2) whether any of its licensees have threatened non-renewal (or given any indication that they may not renew), *see Waterton*, 2014 WL 4922596, at *1 (denying a request for injunctive relief in a patent case, where the movant had argued that if an injunction did not issue, its licensees may seek to terminate their license agreements, where "there [was] no evidence suggesting that any licensee ha[d] threatened to terminate its license should an injunction not be issued").

Instead, Sunoco cited only to a paragraph of Mr. Myers' declaration in support of these assertions of harm. The paragraph reads:

> 23. Sunoco has a limited number of years left for the term of these patents. Defendants' actions have already stopped licensees from investing on the Colonial pipeline and may well have stopped licensees from investing in Sunoco's patented systems elsewhere. Moreover, the majority of Sunoco's butane supply agreements with third party terminal licensees are at least ten year terms. If the butane blending facilities are greatly restrained, the customers will not renew their contracts. Sunoco will be hard pressed to convince any third party terminals to enter into a butane supply agreement and construct butane blending facilities along a pipeline given the actions by Defendants here on the Colonial pipeline.

(Krill Decl., ex. 3 at ¶ 23 (*cited in* D.I. 7 at 15)) This paragraph plainly employs a hefty amount of speculation, with its "may well have"s and its use of if/then-type phraseology. It is also notably non-specific, in that Mr. Myers does not discuss Sunoco's relationship with any *particular* licensee.

In their answering brief, Defendants pointed out these issues. (D.I. 22 at 17) And so, with its reply brief, Sunoco submitted a declaration from [redacted], an employee of one of its third-party licensees, [redacted] According to Sunoco, the [redacted] Declaration "confirms" that Defendants' actions have harmed Sunoco's relationships with its current licensees. (D.I. 43 at 10 (citing D.I. 44, ex. 34 at ¶ 3)) In the [redacted] Declaration, executed on November 20, 2017, [redacted] states, *inter alia*:

> 3. [redacted] currently has three butane blending installations with [Sunoco] as a butane supplier and blending analyzer technology provider. As part of [redacted] initial assessment for choosing a butane blending partner, we examined butane blending options including developing our own system, as well as various third party patents and technology capabilities. We decided to select [Sunoco] in part based on the strength of their patents and the company's willingness to defend those patents for our mutual commercial interests. . . .
>
> 5. One of the [redacted] that have [Sunoco's] patented blending analyzer technology installed is in [redacted], [redacted] The [redacted] terminal is supplied in part by the Colonial pipeline and is downstream of Atlanta Junction.
>
> 6. The blending of butane into the Colonial pipeline by [PSL] may negatively impact our [redacted] terminal's blend opportunity and therefore our anticipated profits from this blending operation. We invested capital into the [redacted] terminal (as well as the other [redacted] terminals [not supplied by the Colonial Pipeline]) and that investment may potentially be harmed by [PSL's] actions.
>
> 7. [redacted] may be less likely to pursue additional terminals with [Sunoco] and its patented blending analyzer technology at

> terminals along the Colonial Pipeline and at terminals along other pipelines as well, given the actions of [PSL].

(D.I. 44, ex. 34 at ¶¶ 3, 5-7)

This declaration does not do the work that Sunoco wants it to do. For one thing, the sole [redacted] terminal utilizing Sunoco's patented technology that has a relationship to the Colonial Pipeline is not supplied exclusively by that pipeline. Thus, it is one of the 10 terminals that the Court has found to be not relevant to this Motion, as Sunoco has not produced any evidence as to how much gasoline the terminal receives from the Colonial Pipeline. (*See supra* at 17-18; *see also* Tr. at 82-83) Beyond that, it does not provide enough details to persuade the Court that Sunoco has been or will likely be irreparably harmed. For example, although the [redacted] Declaration was executed over nine weeks after blend season had begun, in it [redacted] does not mention anything about any loss in blend opportunity that the [redacted] terminal has suffered during that timeframe. [redacted] does posit that: (1) blending butane at PSL "may" negatively impact the [redacted] terminal's blending opportunity; (2) [redacted] investment into that terminal (and its other two terminals) "may potentially" be harmed by PSL's actions; and (3) [redacted] "may" be less likely to pursue more automated blending opportunities with Sunoco. (D.I. 44, ex. 34 at ¶¶ 5-7) But without any further specificity, it would be unduly speculative to conclude that significant harm has or will likely befall the [redacted] terminal due to Defendants' alleged infringement, (*see* Tr. at 240), or that Sunoco has or will likely be irreparably harmed as a result, *see Johnson & Johnson Orthopaedics, Inc. v. Minn. Mining & Mfg. Co.*, 715 F. Supp. 110, 112 (D. Del. 1989) (explaining that "'irreparable injury' is pregnant with meaning. The harm must be imminent, [] not otherwise compensable by money damages, [] actual, [] and sufficiently peculiar []. The moving party must make a clear showing of immediate irreparable injury or a presently existing actual threat, but an injunction will not issue merely to assuage the fears of the movant.") (certain internal quotation marks and citations omitted).[12]

3. Harm to Sunoco's Prospective Business Opportunities and Loss of Market Share

Sunoco further argues that Defendants' infringement has or will likely cause a loss of future business opportunities for Sunoco, and that it thus has or will deprive Sunoco of market share.

In support of these alleged harms, Sunoco cites again to the Myers Declaration. (D.I. 7 at 15-17 (citing Krill Decl., ex. 3 at ¶¶ 20-23); D.I. 43 at 10 (citing Krill Decl., ex. 3 at ¶ 24)) On this topic, Mr. Myers declares that: (1) "Defendants' actions have already stopped licensees from investing on the Colonial pipeline"; and (2) "may well have stopped licensees from investing in Sunoco's patented systems elsewhere." (Krill Decl., ex. 3 at ¶ 23) Both of these assertions, however, amount to conclusions that are bereft of factual support.

---

12 Additionally, in the "Statement of Facts" section of its opening brief, Sunoco suggests that Defendants' blending will harm Sunoco's customers (and, residually, these customers' relationship with Sunoco) because the customers will lose control over blending and thus will more likely be subject to regulatory fines. (D.I. 7 at 8 (citing Krill Decl., ex. 3 at ¶ 22)) To the extent Sunoco intends this to factor into the Court's irreparable harm assessment, the Court finds it too speculative to have an impact. On this point, Mr. Myers' declaration further explained that "[w]hen Defendants blend up to the maximum RVP, the downstream terminals are at risk of receiving gasoline that already exceeds the [governmental] regulations for the particular location that the terminal intended to deliver the gasoline product." (Krill Decl., ex. 3 at ¶ 22) But as discussed above, the record evidence shows that Defendants are not blending to the maximum level. Moreover, the record suggests that such fines are not a common occurrence in the industry, as Mr. Myers testified that in his approximately 10 or 11 years in the business, he could recall only two instances of a terminal operator being fined for exceeding the volatility limit. (Tr. at 88) It is also not clear why Sunoco and its customers would fear the imposition of significant harm in the form of such fines due to Defendants' current automated blending operations, but do not fear such harm were there to be manual blending upstream from the licensed facilities. (*See id.* at 74, 76 (Mr. Myers noting that he is not opposed to manual blending at PSL))

As for Mr. Myers' first assertion—that potential licensees have already refrained from investing on the Colonial Pipeline—there is no further information in the record. There are no facts of record, for example, regarding the identity of such potential future licensees who were "stopped" from investing in Sunoco's technology or services. Nor is there any evidence of communications between such potential licensees and Sunoco. Defendants pointed out this lack of specificity in their answering brief. (D.I. 22 at 17; *see also* Maness Decl. at ¶¶ 17-18 (Defendants' expert noting that Sunoco provides no evidence of any failed attempts to convince third-party terminals to enter into butane supply agreements)) Although Sunoco had an opportunity in its reply brief to flesh out any such examples (e.g., to identify potential future licensees on the Colonial Pipeline that may have been dissuaded from investing due to Defendants' blending at PSL), it failed to do so. (*See* D.I. 43)[13]

---

[13] During the hearing on Sunoco's Motion, Mr. Myers testified that he had "a specific terminal that [he] was told is not going to be considered because of the actions going on at [PSL]." (Tr. at 96) He further testified that "there's certainly examples of sites that would be very good blend candidates that we're not pursuing because of [PSL's] blending[,] certainly." (*Id.* at 97) The Court agrees with Defendants, (*id.*), that at least the first portion of this testimony amounts to hearsay, and that Defendants' counsel's prior questions (which did not invite Mr. Myers to share such hearsay, and instead simply asked him to confirm that Sunoco did *not* include specifics in its pre-hearing submissions as to how third-party terminals were affected by PSL's blending), (Tr. at 85-86, 92-93), did not open the door to such testimony, *see, e.g.*, *Gov't of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d. Cir. 1993) ("The doctrine of 'opening the door[]' . . . provides that when one party introduces inadmissible evidence, the opposing party thereafter may introduce otherwise inadmissible evidence to rebut or explain the prior evidence."); *see also* (Tr. at 95). The Court acknowledges that there is authority for the proposition that evidentiary standards are less stringent in a preliminary injunction hearing, and that the Court may thus exercise its discretion in determining what weight to afford proffered hearsay evidence. *See, e.g.*, *United States v. James*, Civil Action No. 11-913, 2011 WL 1422894, at *3 n.7 (E.D. Pa. Apr. 13, 2011) (citing cases). Yet even were the Court to consider the entirety of Mr. Myers' testimony referenced in this footnote, it could not give either of his statements real weight. That is because they remain non-specific, vague, and not further fleshed out by anything else in the record. If there was a downstream terminal that considered investing in Sunoco's butane blending business and did not do so, or if there were examples of sites that Sunoco would

With respect to Mr. Myers' second assertion (that licensees elsewhere "may well" have refrained from investing in Sunoco's invention), it is pure speculation. Nor does Mr. Myers explain why Defendants' infringement relating to gasoline flowing on the Colonial Pipeline would prevent licensees from investing in Sunoco's technology/services at terminals that receive gasoline from other pipelines. In sum, Mr. Myers' conclusory and speculative allegations with respect to Sunoco's lost business opportunities fail to demonstrate irreparable harm. *See, e.g.*, *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990) ("[A] district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff."); *Caldwell Mfg. Co. N. Am., LLC v. Amesbury Grp., Inc.*, No. 11-CV-6183T, 2011 WL 3555833, at *4 (W.D.N.Y. Aug. 11, 2011) (finding that the declaration of the plaintiff's Vice President of Sales and Marketing could not establish irreparable harm, where its conclusory allegations were "unsupported by any evidence") (citing cases); *Voilé Mfg. Corp. v. Dandurand*, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008) (explaining that a "conclusory" affidavit offered by the movant's president with respect to irreparable harm was not enough to demonstrate such harm, as "[c]ourts require more than unsupported factual conclusions to support such a finding" and because the affiant, *inter alia*, did not "point to any potential licensees who have refused to enter agreements because of the presence of [the allegedly infringing technology]").

Aside from Mr. Myers' insufficient declaration, Sunoco does not point the Court to

---

not pursue in light of the alleged infringement here, then Sunoco had the responsibility to provide the Court with *specifics* about these situations (in the form of declarations, affidavits, testimony and the like) if Sunoco wished for this to factor into the Court's decision-making. It did not do so.

anywhere else in the record—not to any documents, plans, presentations and/or communications—that flesh out its argument that Defendants' blending at PSL will likely cause Sunoco to lose future investments or curtail its ability to "aggressively grow its market share[.]" (D.I. 7 at 16) Indeed, the gaps in its presentation as to these types of potential future losses were many. For example, Sunoco provided no facts that might sketch out the contours of the relevant available market in which it will allegedly lose market share. Indeed, Sunoco does not appear to identify exactly what that market is—is it the market for blending operations, or the market for the delivery of blended fuel, for example? (*See* D.I. 22 at 16; Maness Decl. at ¶ 17) Additionally, while Sunoco provided an overall figure representing earnings from its butane blending business, it did not articulate, *inter alia*, how much of that figure is derived from the relevant terminals downstream of the PSL facility. (*See* D.I. 22 at 16 at n.7); *cf. Brandywine Prod. Grp. Int'l v. Univ. Distribution Ctr. LLC*, Civ. No. 2:16-cv-02248 (WJM), 2016 WL 5402744, at *2 (D.N.J. Sept. 27, 2016) (finding that the plaintiff did not meet its burden of demonstrating irreparable harm where, *inter alia*, the plaintiff failed to indicate what percentage of its revenue comes from sales of the relevant product line, and the court therefore had "no basis for estimating the likely extent of [the plaintiff's] injury relative to the size of the company"). Moreover, Sunoco does nothing to establish what potential there was in the relevant market for further growth.

During the evidentiary hearing, Sunoco's counsel asserted that the evidence presented by Sunoco on loss of market share is "really similar" to the evidence that was held to support a showing of irreparable harm by the United States Court of Appeals for the Federal Circuit in *Trebro Mfg., Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159 (Fed. Cir. 2014). (Tr. at 210; *see* *also* D.I. 7 at 17) The Court disagrees, as the facts in *Trebro* are distinguishable from those of the instant case.

In *Trebro*, the Federal Circuit held that the district court had abused its discretion in denying the plaintiff's motion for a preliminary injunction against defendants for infringement of plaintiff's patent, which covered a sod harvester. 748 F.3d at 1161-62. There, the president of the plaintiff's company, Steven Tvetene, testified that the sod harvester market was very small, and that the only competitors in the market were the plaintiff, the defendant, and a third company that held a license to the asserted patent. *Id.* at 1164. Mr. Tvetene explained that the plaintiff sold around eight sod harvesters a year at around $210,000 each. Furthermore, the evidence demonstrated that every sale of the defendant's product was a lost sale to the plaintiff, and that each such lost sale amounted to approximately $50,000 in lost profits, which was roughly equal to the cost of one employee. *Id.* Mr. Tvetene further testified that the lost market share was "'[p]robably not'" recoupable and that, due to the defendant's continued infringement, plaintiff would lose customers to the defendant. *Id.* (internal citation omitted). And Mr. Tvetene supported this testimony by citing to a specific example of a customer it lost to the defendant: that the defendant's first sale of its accused sod harvester was to one of plaintiff's customers. *Id.* Mr. Tvetene went on to explain that as a result of the alleged infringement, his small company would have to lay people off in the absence of an injunction. *Id.*

In finding that the district court erred in concluding that the plaintiff had failed to show a likelihood of irreparable harm, the Federal Circuit explained that Mr. Tvetene's "uncontroverted" testimony showed that the relevant market was "tiny" (having only three players) and that it established that "[t]he opportunities to attract customers and make sales are thus scarce[.]" *Id.* at

1170. The *Trebro* Court further emphasized some additional facts that were "not speculative" and that showed that that the plaintiff was "very likely" to lose "significant market share" and customers to the defendant, were an injunction not granted. *Id.* First, the Court emphasized that the record demonstrated that every sale to the defendant was a lost sale to plaintiff (and that each sale amounted to a lost customer, since a sod harvester, once purchased, would not need to be replaced for many years). *Id.* Second, the Court considered that a single lost sale was a "sizeable percentage of the yearly market in this area." *Id.* And finally, the Court reiterated Mr. Tvetene's testimony that one of its customers had already purchased one of the defendant's sod harvesters,[14] and that the defendant had already "'pre-sold'" six sod harvesters. *Id.* These facts demonstrated that money damages would not be adequate, because "a loss of market share and customers is a loss that [the plaintiff] is not likely to recover." *Id.* And the *Trebro* Court additionally took note of the fact that plaintiff, due to the alleged infringement, would have to lay off employees—in a company that had only 18 employees worldwide. *Id.*

In asserting that the facts here are similar to those in *Trebro*, Sunoco's counsel noted that the evidence in this case demonstrates that Sunoco installs only 8 to 12 automated blending systems per year, and that once a system is installed at a terminal, the licensee will likely not replace it for many years, if ever. (Tr. at 211) Thus, according to Sunoco, "the evidence shows that opportunities to attract customers and sell blending systems here do not occur frequently[.]"

---

[14] In fact, the record before the Federal Circuit (and the district court) on this point contained numerous specific details. The plaintiff identified the customer it had lost by name in Mr. Tvetene's affidavit, and Mr. Tvetene testified that he had personally visited the customer's farm and demonstrated plaintiff's own sod harvester, but that the customer instead purchased defendant's allegedly infringing product. *See* Joint Appendix at A265, A293, A731-32, *Trebro Mfg., Inc. v. Firefly Equipment, LLC*, Case No. 13-1437 (Fed. Cir. Sept. 17, 2013), ECF No. 30.

(*Id.*)

But those facts, standing alone, do not compel a finding that Sunoco has sufficiently demonstrated that it will be irreparably harmed. Instead, and unlike the case in *Trebro*, here the realities of the relevant market here are really unknown to the Court (as was previously explained above). The Court does not know (1) what Sunoco defines the relevant market to include, or (2) how many potential customers are to be found in the market, or (3) how many other entities compete with Sunoco for those customers. It does not have any information (beyond Mr. Myers' vague testimony) showing that Sunoco has actually lost sales opportunities in that market due to Defendants' alleged infringement (or whether Sunoco has even tried to make such sales since the infringement occurred). Without understanding the lay of the land with respect to that market—a market in which, according to Sunoco's opening brief, it was "aggressively" trying to grow—it is hard to know whether or how the amount of systems Sunoco installs per year (and how long these systems last) should impact the irreparable harm analysis. And unlike in *Trebro*, there is no evidence here that Sunoco will have to lay off employees as a result of Defendants' blending at PSL. For all of these reasons, the Court concludes that the facts of *Trebro* do not dictate a finding here that Sunoco has demonstrated irreparable harm. *See, e.g.*, *Cleveland Clinic Found. v. True Health Diagnostics LLC*, CASE NO. 1:15 CV 2331, 2015 WL 7430082, at *5 & n.4 (N.D. Ohio Nov. 18, 2015) (finding that the plaintiff's reliance on the *Trebro* case was misplaced, where the plaintiff "fails to point to any evidence that it lost a single customer as a result of defendant's alleged infringement[,]" offered no evidence of lost market share or loss of access to customers, and admitted that the market for the relevant products was "much larger" than the market for sod harvesters in *Trebro*).

4. Conclusion

Despite assuming *arguendo* that Sunoco demonstrated a likelihood of success on the merits, for the reasons discussed above, the Court cannot find that Sunoco has met its burden to show that, absent a preliminary injunction, it will likely be irreparably harmed. Therefore, the Court determines that entry of the "drastic and extraordinary remedy" of a preliminary injunction is not warranted here.

IV. CONCLUSION

For the reasons set out above, the Court recommends that Sunoco's Motion be DENIED.

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 fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). 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 Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878–79 (3d Cir. 1987).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Because this Report and Recommendation may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Report and Recommendation. Any such redacted version shall be submitted no later than **January 11, 2018** for review by the Court, along with a motion for redaction that includes a clear, factually-detailed explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: January 8, 2018

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE