

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NICHINO AMERICA, INC.,

Plaintiff,

v.

VALENT U.S.A., LLC,

Defendant.

C.A. No. 20-704-LPS

REDACTED

PUBLIC VERSION

ISSUED 4/6/21

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MEMORANDUM OPINION

March 30, 2021
Wilmington, Delaware


STARK, U.S. District Judge:

In this trademark infringement action, Plaintiff Nichino America, Inc. (“Nichino” or “Plaintiff”) seeks to preliminarily enjoin (D.I. 9) Defendant, Valent U.S.A., Inc. (“Valent” or “Defendant”) from launching Valent’s new insecticide, SENSTAR, due to the alleged infringement of Nichino’s registered CENTAUR trademark. Having considered the parties’ filings (D.I. 10, 11, 28-36, 44-50, 56, 57, 60, 61, 70-73), and having heard oral argument on October 5, 2020 (D.I. 63) (“Tr.”), the Court will deny Plaintiff’s motion.

BACKGROUND

Nichino is a leading company in the field of crop protection solutions and provides crop protection products known for their targeted performance, flexibility, and ease in application. (D.I. 10 at 2) Since at least as early as December 21, 2004, Nichino has used the CENTAUR trademark for insect growth regulation products. (*Id.*) The active ingredient in Nichino’s CENTAUR product is buprofizin; it is used to control scales and other insect pests, including San Jose scale, leafhoppers, pear psylla, and mealybugs. (*Id.*; D.I. 44 at 5) CENTAUR is sold by the pallet to distributor partners. Each pallet contains 24 cases, with each case having 6 bags, and each bag containing 4.32 pounds of CENTAUR at a gross price of \$24 per pound. (D.I. 10 at 2)

Valent is also a well-known agrochemical company dedicated to sustainable agricultural practices. (D.I. 28 at 2) In 2017, Valent began developing an insecticide that, for the first time, combines two active ingredients: Spirotetramat, a premium insecticide already on the market, and Pyriproxyfen, one of Valent’s own active ingredients and found in other Valent insecticides. (*Id.* at 2-3) In 2018, Valent began the process of selecting a brand name for its new insecticide. On February 7, 2019, Valent applied to register SENSTAR as a trademark for its new insecticide, and on June 11, 2019, the USPTO issued Valent a Notice of Allowance for

SENSTAR, after having publishing Valent's SENSTAR application for opposition in its *Official Gazette*. (*Id.* at 3-4) Valent sells SENSTAR through distributors at a price of [REDACTED] per gallon, with one case containing four one-gallon containers. (*Id.* at 7)

LEGAL STANDARDS

A preliminary injunction is “an extraordinary remedy” and “should be granted only in limited circumstances.” *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). A party seeking a preliminary injunction must satisfy the traditional four-factor test: “(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.” *Id.* Injunctive relief “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

DISCUSSION

I. LIKELIHOOD OF SUCCESS ON THE MERITS

Trademark infringement is defined under the Lanham Act as “use of a mark so similar to that of a prior user as to be ‘likely to cause confusion, or to cause mistake, or to deceive.’” *VeriFone, Inc. v. Poynt Co.*, 199 F. Supp. 3d 898, 905 (D. Del. 2016) (citing 15 U.S.C. § 1114(1)). To prevail on its claim, Nichino must show: (1) its mark is valid and legally protectable; (2) it owns the mark; and (3) defendant's use of its mark to identify goods or services is likely to create confusion concerning the origin of those goods or services. *See Checkpoint Sys. v. Check Point Software Tech.*, 269 F.3d 270, 279 (3d Cir. 2001).

A. The Mark is Valid and Legally Protectable; Plaintiff Owns the Mark

“Marks that are federally registered and have become ‘incontestable’ under 15 U.S.C. §§ 1058 and 1065 meet the first and second prongs of the standard” for finding federal trademark

infringement under the Lanham Act. *Int'l Data Grp., Inc. v. Ziff Davis Media, Inc.*, 145 F. Supp. 2d 422, 431-32 (D. Del. 2001) (citing *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 291 (3d Cir. 1991)). Nichino owns a United States trademark registration (Reg. No. 2,944,348) for the CENTAUR trademark for insecticides for agricultural use. (D.I. 10 at 6) Nichino's registration acquired incontestable status on May 26, 2010. (*Id.*) Accordingly, Nichino has adequately shown that it owns the mark and that the mark is valid and protectable.

B. Likelihood of Confusion

To prevail on its claim for trademark infringement and unfair competition under the Lanham Act, Plaintiff must show that Defendant's mark will cause a likelihood of confusion.¹ *See A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000); *see also Kos Pharms.*, 369 F.3d at 708. Plaintiff and Defendant both sell insecticides to distributors for use by growers, who are referred to as end users. To assess the likelihood of confusion, courts consider the "*Lapp* factors," which are:

- (1) the degree of similarity between the owner's mark and the alleged infringing mark;
- (2) the strength of the owner's mark;
- (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
- (4) the length of time the defendant has used the mark without evidence of actual confusion arising;

¹ The Lanham Act, and specifically 15 U.S.C. § 1114(1)(a), provides for civil liability when, without consent, a person uses in commerce a "colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive."

- (5) the intent of the defendant in adopting the mark;
- (6) the evidence of actual confusion;
- (7) whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media;
- (8) the extent to which the targets of the parties' sales efforts are the same;
- (9) the relationship of the goods in the minds of consumers, whether because of the near-identity of the products, the similarity of function, or other factors; and
- (10) other facts suggesting that the consuming public might expect the prior owner to manufacture both products, or expect the prior owner to manufacture a product in the defendant's market, or expect that the prior owner is likely to expand into the defendant's market.

A & H Sportswear, 237 F.3d at 215. "None of these factors is determinative in the likelihood of confusion analysis and each factor must be weighed and balanced one against the other."

Checkpoint, 269 F.3d at 280.

Where plaintiff and defendant deal in non-competing products or services, "the court must look beyond the trademark to the nature of the products themselves, and to the context in which they are marketed and sold. The closer the relationship between the products, and the more similar their sales contexts, the greater the likelihood of confusion." *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 462 (3d Cir. 1983). Where the products are competing products, it is

sometimes possible to limit the review simply to the marks themselves. *See Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 472 (3d Cir. 1994). It is always permissible, however, for the Court to consider all of the *Lapp* factors, and often this is necessary where the situation is complicated, as it is here. *See A & H Sportswear*, 237 F.3d at 212 (“A district court should not be foreclosed from using any factors that it deems helpful in analyzing whether a likelihood of confusion exists between given products, whether or not they directly compete.”)

In determining whether the plaintiff’s and defendant’s products and services are in competition, courts have examined whether the products and services can be substituted or interchanged for one another. *See Safeguard Bus. Sys., Inc. v. New England. Bus. Sys., Inc.*, 696 F. Supp. 1041, 1044 (E.D. Pa. 1988). One way to define “competitive” goods is that they are goods that are “reasonably interchangeable by consumers for the same purposes.” *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (finding cellophane competitive with other wrapping materials); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 574-75 (1966) (accredited central station protective services noncompetitive with other types of security and protection services); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (men’s, women’s and children’s shoes each fall within separate competitive markets). Related to the functional “interchangeability of products is whether purchasers are willing to substitute one product for the other.” *E.I. du Pont*, 351 U.S. at 395.

Here, both products are insecticides used in the same industry, and used on at least ten of the same insect pests, including San Jose scale, mealybugs, leafhoppers, Lecanium scale, Citricola scale, black scales, brown soft scales, California red scale, Florida red scale, and pear psylla. (D.I. 44 at 1) Additionally, both products can be used on some of the same crops – at least apples and pears – for the same nymphal stage of insect growth, and at the same post-petal

fall stage of crop development. (*Id.* at 5) While Valent tries to distinguish SENSTAR, in part, by contending it can be applied during all life stages of insects (*see* D.I. 28 at 14), the overlap between the parties' products leads the Court to find that, to the relevant consumers, they have reasonable interchangeability. Therefore, the Court finds them to be competing products.

(1) Degree of Similarity (*Lapp* Factor One)

"The single most important factor in determining likelihood of confusion is mark similarity." *A & H Sportswear*, 237 F.3d at 216. Marks are confusingly similar "if ordinary consumers would likely conclude that [the two products] share a common source, affiliation, connection or sponsorship." *Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 183 (3d Cir. 2010). Side-by-side comparison of the two marks is not the proper method for analysis when the products are not usually sold in such a fashion. *See A & H Sportswear*, 237 F.3d at 216. "Instead, an effort must be made to move into the mind of the roving consumer." *Id.* Courts, hence, determine similarity by evaluating the overall impression created by the sight, sound, and meaning of the marks, not a side-by-side comparison. *See Sabinsa*, 609 F.3d at 183.

"The degree of similarity required will vary, but where goods compete directly, the necessary degree of similarity will be less." *Sanofi-Aventis v. Advancis Pharm. Corp.*, 453 F. Supp. 2d 834, 848 (D. Del. 2006) (*citing Kos Pharms.*, 369 F.3d at 713). "Marks need not be identical to create a likelihood of confusion." *GOLO, LLC v. Goli Nutrition Inc.*, No. CV 20-667-RGA, 2020 WL 5203601, at *3 (D. Del. Sept. 1, 2020). "Marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words." Trademark Manual of Examining Procedure § 1207.01(b)(ii) (Oct. 2018) (citing cases). Courts have held that minor differences in spelling and appearance are insufficient to overcome the similar overall impression of competing marks. *See Sanofi-Aventis*, 453 F. Supp. 2d at 849 (AVENTIS and

ADVANCIS); *Kos Pharms.*, 369 F.3d at 713 (ADVICOR and ALTOCOR); *Lorillard Tobacco Co. v. Cal. Imports, LLC*, 886 F. Supp. 2d 529, 535 (E.D. Va. 2012) (NEWPORT and NEWPROT); *Supercuts, Inc. v. Super Clips*, 18 U.S.P.Q.2d 1378, 1990 WL 302729, at *3 (D. Mass. Oct. 26, 1990) (SUPERCUTS and SUPER CLIPS).

(i) Sound

Here, the marks' greatest degree of similarity is in how the marks sound. CENTAUR and SENSTAR create nearly an identical sound to a consumer. Although Valent contends that the suffix of "-TAUR" in "CENTAUR" is pronounced "tor," as in "Taurus" (i.e., the Ford car or astrological sign), and offers dictionary definitions directing such a pronunciation (*see* D.I. 28 at 18 & D.I. 33 Ex. T), Nichino offers stronger contrary evidence – including from three agrochemical industry professionals who have been familiar with CENTAUR for ten to twelve years, all of whom testified that the mark is pronounced as "sen-tar" (*see* D.I. 44 at 11; D.I. 47-49) Nichino has also introduced its own radio advertisements, which use the "sen-tar" pronunciation of CENTAUR. (D.I. 46 Ex. A) Indeed, in the course of this litigation, Valent's own product manager for its insecticide portfolio, Carlos Granadino, pronounced CENTAUR as "sen-tar" and admitted that persons in the agrochemical industry pronounce it the same way. (D.I. 45 Ex. A at 58)

Both CENTAUR and SENSTAR are two-syllable terms that have a common vowel sound in the middle of their first and second syllables. The only audible difference between the marks is, in Defendant's mark, the "s" sound between the two same-sounding syllables, resulting in a likelihood of confusion in the mind of the roving consumer.² The Court finds that the audible similarities favor the Plaintiff.

² For example, a court reporter could not audibly tell the difference in the two words when performing her work at a deposition in this case. (D.I. 61 (Osteen Dep. Tr.) at 78-80)

(ii) Sight

A depiction of the two logos and product packaging is shown below. (See D.I. 44 at 4)



Plainly, there is much visual similarity between the marks. Both terms are seven-letter, two-syllable words. The package logos for each use similar color schemes and similar fonts. (D.I. 44 at 4; D.I. 45 Ex. B) Below the CENTAUR mark is the wording “insect growth regulator” in capital light blue letters, and below the “SENSTAR” mark is the wording “insecticide” in capital dark blue letters. (D.I. 44 at 4) Both use some form of an arrow.

These similarities, however, are not dispositive on the issue of whether the marks are sufficiently similar in appearance as to cause the sight consideration to weigh in Plaintiff’s favor. More must be considered.

For instance, Defendant analogizes the situation here to *Aceto Agr. Chemicals Corp. v. Bayer Aktiengesellschaft*, 2012 WL 3095060, at *7 (S.D.N.Y. July 30, 2012), which involved a trademark relating to commercial insecticides for farms. In *Aceto*, the court noted differences in the pertinent logos included that “PROLINE” had a different color scheme and shape (“a large green and orange chevron shape, and the ‘O’ of ‘PROLINE’ depicted as an orange swirl”) in all capital letters followed by “480 SC Fungicide, whereas ‘PROFINE’ is entirely in lower case letters” and had other tag lines beneath it. *Id.* at *3-4. Here, the two marks are more similar to one another in appearance: both CENTAUR and SENSTAR use dark blue, white, and black

coloring on their packaging and have arrows on their labels. (D.I. 44 at 4; D.I. 45 Ex. B) On the other hand, the arrows are noticeably different from one another, as the CENTAUR logo has a cartoon image of a mythical centaur holding a bow and arrow while the SENSTAR logo has small blue arrows pointing to the right. Additionally, the CENTAUR lettering is in black with all capital letters whereas the SENSTAR logo is in blue and contains an initial capital “S” followed by the remainder of the term in lowercase lettering. (*Id.*) Overall, then, the visual look of the terms involved here is more similar than those at issue in *Aceto*. Still, though, the two terms here do present noticeable visual differences.

“Similarity in sound and spelling of the marks may be outweighed by visual packaging differences.” *Aceto*, 2012 WL 3095060 at *7. Consequently, Valent makes much of the fact that SENSTAR is packaged as a liquid product while CENTAUR is packaged as a solid. (D.I. 28 at 1, 7, 13, 26 & n.12) As Valent’s product marketing manager admits, however, both products are kept on warehouse shelves in similarly-sized cases, requiring greater customer scrutiny of the logos. (D.I. 45 Ex. C at 75) Better support for a difference in package appearance is that both packages have the house brand incorporated into the logo. (D.I. 28 at 11) Hence, the CENTAUR logo contains “NICHINO” in bold in the lower right corner of its logo, and the SENSTAR logo has “VALENT” in the upper right corner of its packaging, along with a green triangle divided into three parts. (D.I. 44 at 4; Tr. 42; *see also Aceto*, 2012 WL 3095060 at *7 (finding notable differences in packaging where one house mark was prominently featured on one product and not the other); *Pharmacia Corp. v. Alcon Labs., Inc.*, 201 F. Supp. 2d 335, 377 (D.N.J. 2002) (“[P]rominent display of the Pharmacia and Alcon house marks, along with the distinctive packaging used by each company, further weigh against likely confusion.”))

As the *Aceto* case makes clear, in the field of agricultural insecticides, the product label is

a legal document containing information on how the products should be applied, restrictions for use, pest controls, and safety information that must be followed. 2012 WL 3095060 at *3 (finding that “[a]s a legal matter, pesticides must be used according to label instructions” and “[a]s a practical matter...the label instructions must be reviewed because dosage rates and the manner of application vary depending on the crop to which the respective pesticide is applied”); *see also* D.I. 28 at 9-10. The Court in *Aceto* determined that inspection of the label would make it highly unlikely that individuals would fail to notice the pesticide they were mixing, as there, one was an herbicide and one was a fungicide. *Aceto*, 2012 WL 3095060 at *8. Here, although inspection of the label would reveal that the two products contain different active ingredients, there is a greater degree of a likelihood of confusion, as the products treat some of the same insects on the same crops at the same time. (D.I. 44 at 5) Then again, however, one is a solid and one is a liquid, reducing the likelihood of confusion.

Clearly, then, there are package similarities: a blue, white, and black color scheme, arrows against a white background, and approved overlapping label-usage. This must be balanced against the package differences, which include the use of house marks, the totality of information disclosed in the product label, the differences in font and lettering of the terms, the respective use of “insecticide” and “insect growth regulator,” and the use of the half-man/half-horse centaur on the CENTAUR label.

Overall, the Court finds that the visual similarities factor is almost evenly balanced. On the whole, this factor tips slightly in Defendant’s favor.

(iii) Meaning

CENTAUR has a known meaning as a “mythological creature that is half horse and half human” (D.I. 10 at 10), whereas SENSTAR is an invented fanciful word, intended to have a “forward-looking theme” (D.I. 28 at 3; D.I. 29 at 3). Therefore, the words have different

meaning, decreasing the likelihood of confusion. *See Kos Pharms.*, 369 F.3d at 713 (“Two names that look and sound similar will naturally seem even more similar where there are no differences in meaning to distinguish them.”)

(iv) Overall Degree of Similarity

As for the degree of similarity factor as a whole, considering that the similarity of the sounds favors Plaintiff while the similarity of appearance and meaning favor Defendant, this factor is closely-balanced but slightly favors Defendant. In the Court’s view, this factor, as a whole, does not support a likelihood of confusion.

(2) Strength of the Mark (*Lapp* Factor Two)

To determine the strength of the mark, courts look to (1) the inherent features of the mark contributing to its distinctiveness or conceptual strength and (2) the factual evidence of the mark’s commercial strength or of marketplace recognition of the mark. *See A & H Sportswear*, 237 F.3d at 221. Strong marks receive greater protection under the Lanham Act. *See id.* at 222.

(i) Conceptual Strength

“Under the Lanham Act, stronger marks receive greater protection” because they “carry greater recognition, [so that] a similar mark is more likely to cause confusion.” *Id.* The conceptual strength of a mark is determined by the classification of the mark into one of four categories: (1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful. *Id.* at 221. On this spectrum, generic marks (such as “diet chocolate fudge soda”) receive no trademark protection and arbitrary or fanciful marks (such as “Kodak”) receive the highest level of trademark protection. *See id.* at 221-22. Arbitrary or fanciful marks “bear no logical or suggestive relation to the actual characteristics of the goods.” *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 296 (3d Cir. 1986). A suggestive mark “suggest[s] rather than describe[s] the characteristics of the goods,” so “imagination, thought or perception [is required] to reach a

conclusion as to the nature of goods.” *Id.* at 296, 298. Suggestive marks “may receive lesser protection than arbitrary marks,” especially where third-party use exists. *A & H Sportswear*, 237 F.3d at 222. While generic marks do not receive trademark protection, arbitrary and suggestive marks, as well as descriptive marks with a demonstrated secondary meaning are entitled to trademark protection. *See Checkpoint*, 269 F.3d at 282-83.

Here, the CENTAUR mark is suggestive as applied to Nichino’s insecticide product. CENTAUR has a known dictionary definition of a mythological creature that is half-horse and half-human, the image of which itself is used as part of the mark. (D.I. 10 at 10) As applied to insecticide products, a centaur invokes fighting imagery, in aid of defeating various pests.

Although the CENTAUR mark is considered suggestive, it is not necessarily a “strong” mark. Valent contends that the trademark co-exists with similar sounding agrochemicals, and has provided examples of twelve names. (D.I. 28 at 20) Widespread third-party use of a mark used in a particular industry demonstrates that the mark is common, and therefore, weak. *See, e.g., GOLO*, 2020 WL 5203601, at *6; *see also A & H Sportswear*, 237 F.3d at 223; *Freedom Card, Inc. v. JPMorgan Chase & Co.*, 432 F.3d 463, 476 (3d Cir. 2005); *Accu Personnel, Inc. v. AccuStaff, Inc.*, 823 F. Supp. 1161, 1166 (D. Del. 1993). The other marks identified by Valent, however, do not have the same number of syllables and do not begin and end with the same sound.

On balance, the conceptual strength of CENTAUR weighs in favor of finding a likelihood of confusion.

(ii) Commercial Strength

The focus of the commercial strength inquiry is on consumer recognition of the mark. *See A & H Sportswear*, 237 F.3d at 224. Commercial strength or marketplace recognition can be

shown through advertising expenditures and sales figures. *See Sanofi-Aventis*, 453 F. Supp. 2d at 850. “[E]vidence of money spent does not automatically translate into consumer recognition.” *A & H Sportswear*, 237 F.3d at 224. “Merely setting forth the amount of money spent on advertising, while certainly relevant, does not suffice alone . . . to demonstrate a strong mark.” *Primepoint, L.L.C. v. PrimePay, Inc.*, 545 F. Supp. 2d 426, 438 (D.N.J. 2008).

From 2016 to 2019, Nichino spent an average of \$100,000 per year on marketing and advertising its CENTAUR products. During the same time period, Nichino’s CENTAUR products have earned net revenues of over \$26,000,000. (D.I. 10 at 10; D.I. 44 at 14) Valent argues that Nichino’s numbers “pale by comparison” to the \$100 million in sales and \$1.6 million in marketing involved in *Aceto*. (D.I. 28 at 20 n. 10) This is not an especially helpful comparison.

The Court finds that the sales and advertising figures suggest market recognition, supportive of a strong commercial mark. In addition, agrochemical industry professionals, including Valent employees (*see, e.g.*, D.I. 45 Ex. A at 58), are familiar with CENTAUR. (D.I. 47-49) This is suggestive of market recognition, and accordingly, a strong commercial mark.

Overall, the commercial strength of CENTAUR weighs in favor of finding a likelihood of confusion, as does *Lapp* factor 2 as a whole.

(3) Care and Attention Expected of Consumers (*Lapp* Factor Three)

Under the third *Lapp* factor, the Court considers “the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase.” *A & H Sportswear*, 237 F.3d at 215. The “more important the use of a product, the more care that must be exercised in its selection.” *Ford*, 930 F.2d at 293. Further, “the degree of caution used . . . depends on the relevant buying class. That is, some buyer classes, for example, professional

buyers . . . will be held to a higher standard of care than others. Where the buyer class consists of both professional buyers and consumers, . . . the standard of care to be exercised by the reasonably prudent purchaser will be equal to that of the least sophisticated consumer in the class.” *Id.* “If there is evidence that both average consumers and specialized commercial purchasers buy goods, there is a lower standard of care because of the lack of sophistication of some of the relevant purchasers.” *Checkpoint*, 269 F.3d at 285.

(i) Sophistication of the Consumer

Valent points out that selection and use of agricultural insecticides is done with a great deal of care, usually made with the advice and counsel of trained experts in the field. (D.I. 28 at 8) California, in particular, has a licensure known as a Pest Control Adviser (“PCA”) to recommend an insecticide to a grower, although a grower can write its own recommendation for an insecticide. (*Id.*) Valent further argues that the product label must be consulted to know “how the products should be applied, restrictions for use, pest controls, and safety information.” (*Id.* at 9; *see also* Tr. 40)

Nichino counters that it has a mixed buyer class of both professional buyers and end-user growers consisting of small “mom and pop” farms with “low tech” operations. (D.I. 10 at 11) Nichino contends a delivery driver or farm worker can mistakenly grab the wrong bottle, which can lead to severe crop losses.³ (D.I. 44 at 14-15) Valent responds that this position is “unreasonable given the expense, required documentation, and cross-checks built into the system for agricultural chemical purchase and use.” (D.I. 56 at 3; *see also* D.I. 34; Tr. 38-39) Beyond the PCAs and the label, Valent also suggests that individual growers can turn to many of the

³ Nichino points to a 2012 National Center of Farmworker Health study that discusses farmworkers’ country of origin and ability to speak English as evidence for its position. (D.I. 44 at 9; D.I. 52 Ex. H)

same resources as larger farms, including “trade shows, grower meetings, websites, university extension personnel, manufacturer sales representatives and promotional literature.” (D.I. 28 at 21)

As already noted, “when a buyer class is mixed, the standard of care to be exercised by the reasonably prudent purchaser will be equal to that of the least sophisticated consumer in the class.” *Ford Motor Co.*, 930 F.2d at 293. Here, however, considering the general use of PCAs or other informed professionals, distributors, sales representatives, product literature, the resources available to all growers, and the legal and practical requirement to review and observe product labels,⁴ the Court finds that the relevant consumers are sophisticated purchasers. While smaller commercial purchasers and farmworkers may not be as knowledgeable as professionals, the repercussions of using an improper insecticide will lead even these purchasers to use great care in selecting an insecticide. *See Aceto*, 2012 WL 3095060, at *3 (“[B]ecause commercial farmers rely on crop yields for their livelihood, farmers are very careful about the crop protection products that they purchase and apply to their crops.”). Nichino itself acknowledges that the result of improper substitution can cause severe and dangerous problems during growing season. (D.I. 44 at 10) Further, although both products may be available to farmworkers on the same shelves as one another as part of an integrated pest management system, Nichino has presented only minimal evidence of unsophisticated end-users; its evidence is little more than a nine-year-old report on the reading ability of farmworkers. *See generally Aceto* at *12 (“Bayer has presented no evidence that these workers are unsophisticated, incompetent, or unable to read and follow the instructions attached to every container.”).

⁴ Product labels are ubiquitous resources available through free online databases including Agrian.com and CDMS.com, and may also be available through manufacturer websites. (D.I. 28 at 10)

(ii) Price of Goods

Nichino sells CENTAUR by the pallet, containing 24 cases, with each case having six bags, and each bag containing 4.32 pounds of CENTAUR at a gross price of \$24 per pound. (D.I. 10 at 2; D.I. 44 at 6) Valent's SENSTAR is sold in one-gallon containers, with four one-gallon containers to the case, at a price of [REDACTED] per gallon. (D.I. 28 at 7) Thus, the per case cost of CENTAUR is \$622.08 while the per case cost for SENSTAR is [REDACTED]. Another way to look at it is that farms pay an average of \$54 to \$72 per acre for CENTAUR and about [REDACTED] [REDACTED] for SENSTAR, depending on the crop. (See D.I. 33 Ex. V at 148-49; D.I. 28 at 7)

Courts in this circuit have found that purchases as low as \$50-\$100 were likely to be made by sophisticated buyers. See, e.g., *A & H Sportswear*, 237 F.3d at 225 (affirming finding that \$50-\$70 swimsuit purchase was sophisticated); *GOLO*, 2020 WL 5203601 at *7 (finding \$50-\$100 vitamin purchase to be sophisticated). Additionally, where goods are set at different price points, consumers generally distinguish them. See *Kinbook, LLC v. Microsoft Corp.*, 866 F. Supp. 2d 453, 467 (E.D. Pa. 2012), *aff'd*, 490 F. App'x 491 (3d Cir. 2013); *R.J. Ants, Inc. v. Marinelli Enters., LLC*, 771 F. Supp. 2d 475, 495 (E.D. Pa. 2011). Although CENTAUR and SENSTAR are likely sold by the same distributors in their original boxes (D.I. 44 at 14) and have [REDACTED] per acre costs, the divergent price points for a full case (i.e., the package in which the competing products are sold) – \$622.08 versus [REDACTED] – decreases the likelihood of confusion. (*Id.* at 4, 14; Tr. 38)

On balance, the sophisticated nature of the consumer and the high (and divergent) price points of the products weighs against a finding of likelihood of confusion.

(4) Length of Time Defendant Used the Mark Without Evidence of Actual Confusion (*Lapp* Factor Four) and Evidence of Actual Confusion (*Lapp* Factor Six)

“Because *Lapp* factors four and six significantly overlap, this Court will address both simultaneously.” *Primepoint, L.L.C. v. PrimePay, Inc.*, 545 F. Supp. 2d 426, 441 (D.N.J. 2008). “[T]wo parties’ concurrent use of ‘similar marks for a sufficient period of time without evidence of consumer confusion about the source of the products’ allows ‘an inference that future consumers will not be confused either.’” *Kos Pharms.*, 369 F.3d at 717 (quoting *Fisons*, 30 F.3d at 476); *see also Versa Prods. Co. v. Bifold Co.*, 50 F.3d 189, 205 (3d Cir. 1995) (“If a defendant’s product has been sold for an appreciable period of time without evidence of actual confusion, one can infer that continued marketing will not lead to consumer confusion in the future. The longer the challenged product has been in use, the stronger this inference will be.”)

SENSTAR has been on the market for only a short time, amounting to a few months. (D.I. 28 at 22; D.I. 44 at 15) Although neither party is aware of any confusion, the recent launch of SENSTAR precludes this factor from favoring either side.

(5) Intent of the Defendant in Adopting the Mark (*Lapp* Factor Five)

For this factor, “courts must look at whether the defendant chose the mark to intentionally confuse consumers;” a “defendant’s intent will indicate a likelihood of confusion only if an intent to confuse consumers is demonstrated via purposeful manipulation of the junior mark to resemble the senior’s.” *Sabinsa*, 609 F.3d at 187 (emphasis omitted). “[E]vidence of intentional, willful and admitted adoption of a mark closely similar to the existing mark[] weighs strongly in favor of finding [a] likelihood of confusion.” *Kos Pharms.*, 369 F.3d at 721. As part of this inquiry, the Court must consider “[t]he adequacy and care with which a defendant investigates and evaluates its proposed mark, and its knowledge of similar marks or allegations

of potential confusion.” *Id.*

Nichino argues Valent was at least negligent in selecting SENSTAR because Valent listed CENTAUR, among other competing brands, as a reason why its pyriproxyfen business was “bleeding.” (D.I. 44 at 6, 15; D.I. 45 Ex. G) While this demonstrates Valent’s awareness of CENTAUR, it is not evidence of intent to confuse consumers. *See A & H Sportswear, Inc.* 166 F.3d 191, 196 (3d Cir. 1999) (affirming a finding of no bad faith even when defendant may have been aware of plaintiff’s mark). Valent provides a detailed explanation of how it selected its mark, including choosing SENSTAR from a list of names generated by an outside branding agency, a search and subsequent clearance of the name by Valent’s legal team, and a desire for a futuristic name and logo that complemented its other products. (D.I. 28 at 3-4; D.I. 29 Ex. A; D.I. 56 at 4; Tr. 29-30, 36) The USPTO then issued a Notice of Allowance – after publishing the mark in its *Official Gazette* and receiving no opposition. (D.I. 28 at 4) All of this is evidence of good faith.

Nichino argues that Valent acted in bad faith because it continued to use its mark after Nichino demanded that it cease doing so. (D.I. 10 at 13; D.I. 44 at 16) That is hardly evidence of bad faith. Instead, it “just as equally supports an inference that Defendant disagrees with Plaintiff’s infringement analysis.” *GOLO*, 2020 WL 5203601 at *7 (finding no bad faith where Defendant continued use of mark after receiving Plaintiff’s cease and desist letter).

As there is no evidence of bad faith, this factor weighs against a likelihood of confusion.

(6) Marketing or Advertising Through the Same Channels (*Lapp* Factor Seven) and Targets of the Parties’ Sales Efforts (*Lapp* Factor Eight)

The seventh *Lapp* factor considers “whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media.” *A & H Sportswear*, 237 F.3d at 215. This factor looks at the “media the parties use in marketing their

products as well as the manner in which the parties use their sales forces to sell their products to consumers.” *Kos Pharms.*, 369 F.3d at 722. “‘The greater the similarity in advertising and marketing campaigns, the greater the likelihood of confusion.’ A court should consider the trade exhibitions, publications, and other media the parties use in marketing their products. Similarly, when the parties target their sales efforts to the same group of consumers, there is a greater likelihood of confusion between the two marks.” *Sabinsa*, 609 F.3d at 188 (quoting *Checkpoint*, 269 F.3d at 288-89). The eighth *Lapp* factor further examines “the extent to which the targets of the parties’ sales efforts are the same.” *A & H Sportswear*, 237 F.3d at 215.

Here, both parties market their products through direct mail and radio advertising, magazine placement, digital advertising, trade shows, road shows, promotional literature, and through sales representatives. (D.I. 28 at 24; D.I. 44 at 8, 16-17; D.I. 45 Ex. C at 35, 39, 42, 50-52, 58-59) In fact, Nichino first learned of SENSTAR as a result of an advertisement in a newsletter that had previously been used to advertise CENTAUR. (D.I. 10 at 4, 14; D.I. 11 Exs. E & F) Despite Valent’s focus on the specialized nature of trade, it admits that the trade channels are identical. (D.I. 28 at 24) Thus, the Court finds that the seventh *Lapp* factor strongly weighs in Plaintiff’s favor.

Under the eighth *Lapp* factor, the target of the parties’ sales efforts largely overlap. Both parties sell to the same distributors, PCAs, and agrochemical professionals for use by the same end-use growers. (D.I. 28 at 24; D.I. 44 at 7-8) Nichino and Valent sell or intend to sell to the same 13 distributors, and in the short time SENSTAR has been on the market, Valent has sold to four distributors in common with Nichino. (D.I. 44 at 7; D.I. 45 Ex. C at 57-58)

Geographically, Valent’s projected market for SENSTAR is 9% in California; it also intends to focus on the Pacific Northwest and the Northeast, with initial sales in Florida, Georgia,

and Texas. (D.I. 28 at 6, 25; D.I. 44 at 9; D.I. 45 Ex. C at 27) Nichino sales for CENTAUR are approximately 70% in California, 15% in Washington, 7% in Texas, 3.5% in Pennsylvania, and 4.5% in all other states. (D.I. 44 at 9) Considering the large market overlap in California and Washington, and initial sales for SENSTAR already occurring in Texas, the geographic targets of the parties overlap. *See Aceto*, 2012 WL 3095060, at *4 (finding different target markets where, unlike here, there was “limited geographic overlap of the PROLINE and PROFINE 75 markets”).

Accordingly, the Court finds that the eighth *Lapp* factor weighs in Plaintiff’s favor.

(7) Perceived Relationship of the Goods in Consumers’ Minds (*Lapp* Factor Nine) and Other Factors (*Lapp* Factor Ten)

The ninth *Lapp* factor requires the Court to consider “the relationship of the goods in the minds of consumers, whether because of the near-identity of the products, the similarity of function, or other factors.” *Id.* “The question is whether the consumer might therefore reasonably conclude that one company would offer both of these related products.” *Fisons*, 30 F.3d at 481. When ruling on this factor, a court should look at “how similar, or closely related, the products are.” *Sabinsa*, 609 F.3d at 189. “*Lapp* factor nine focuses not on consumer sophistication but on the products themselves.” *Id.*

“The final factor (factor ten) of the *Lapp* test directs courts to look at other facts suggesting that the consuming public might expect the prior owner to manufacture both products, or expect the prior owner to manufacture a product in the defendant’s market, or expect that the prior owner is likely to expand into the defendant’s market.” *A & H Sportswear*, 237 F.3d at 234 (internal quotation marks omitted).

In considering *Lapp* factor nine, Valent argues that CENTAUR and SENSTAR are different products because of their different active ingredients, different application timing, and

different labeled crops. (D.I. 28 at 26-27) The Court agrees with Nichino, however, that distinguishing CENTAUR and SENSTAR based on active ingredient “is akin to arguing that Tylenol and Advil are not competitive products because they have different active ingredients, i.e., acetaminophen versus ibuprofen.” (D.I. 44 at 2) Further, while Valent may not consider CENTAUR its primary competition for SENSTAR (D.I. 28 at 4-6) due to the larger pool of crops and insects SENSTAR is labeled for, that does not mean SENSTAR is not a competitor for CENTAUR for its more limited applications, including at least pomme fruit and San Jose scale, mealybugs, leafhoppers, Lecanium scale, Citricola scale, black scales, brown soft scales, California red scale, Florida red scale, and pear psylla. (D.I. 44 at 4-5; D.I. 45 Exs. A at 63, C at 65-66 & E) Considering the overlap in geographic markets, crops, and insects, the Court concludes that *Lapp* factor nine leans in Plaintiff’s favor.

While neither party has put forth specific factors for evaluation under *Lapp* factor ten, Valent notes that it views its ESTEEM product as more of a competitor to CENTAUR than SENSTAR. (D.I. 28 at 12-13, 24) Considering Valent has developed a new product, SENSTAR, in addition to its ESTEEM product, it is not unreasonable for the consuming public to mistakenly believe that Nichino sells SENSTAR in an attempt to move from CENTAUR. As such, this factor slightly weighs in Plaintiff’s favor.

(8) Balancing the *Lapp* Factors

Balancing the *Lapp* factors is challenging here. Two factors (4 and 6, relating to the length of time Valent has been using its mark and the absence of actual confusion) are neutral and require no further consideration. Five factors – strength of the mark, the marketing and advertising through the same channels, and the perceived relationship of goods in the consumers’ mind (2, 7, 8, 9, and 10) favor Nichino, with the marketing through the same channels factor weighing heavily in Nichino’s favor. Several very important factors support Valent: factors 1

(similarity of the mark), 3 (care in purchasing decisions), and 5 (intent in selection of the mark).

Overall, then, there is not an abundance of evidence of likelihood of confusion. Still, in the Court's view, the *Lapp* factors weigh slightly toward finding a likelihood of confusion.

Therefore, the Court finds that Plaintiff has shown a likelihood of success on the merits.

II. IRREPARABLE HARM

Subsequent to the oral argument, on December 27, 2020, President Donald J. Trump signed into law the Trademark Modernization Act of 2020 ("TMA"). Prior to the TMA, the Court could only grant a preliminary injunction when a plaintiff made a clear showing of a likelihood of irreparable harm. *See Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 204 (3d Cir. 2014); *Reilly*, 858 F.3d at 179. A plaintiff had to demonstrate a likelihood – not just a possibility – of irreparable harm in the absence of an injunction. *See Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 217 (3d Cir. 2014) (citing *Winter*, 555 U.S. at 22).

The TMA amends Section 34(a) of the Trademark Act of 1946 (15 U.S.C. § 1116(a)) as follows:

A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of a likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.

See TMA at 160. The TMA further provides that the amendment "shall not be construed to mean that a plaintiff seeking an injunction was not entitled to a presumption of irreparable harm before the date of enactment of this Act." *Id.* The TMA has amended Third Circuit law so that the decision in *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006), does not now extend to trademark infringement actions.

Valent does not deny that the TMA changed the law as it applies to irreparable harm for

trademark infringement in the Third Circuit. (D.I. 71 at 1) Rather, Valent argues that it has rebutted the presumption of irreparable harm here in two ways: (1) by pointing to the lack of any actual confusion in the approximately nine months that SENSTAR has been on the market, and (2) by proving that the relevant consumers are “sophisticated about agricultural insecticides and exercise care in selecting them.” (*Id.* at 3) As to Valent’s first argument, Nichino responds that the lack of actual confusion to date is not surprising because current sales of SENSTAR are [REDACTED] of Valent’s projected sales. (D.I. 73 at 1) As to Valent’s second argument, Nichino contends “unsophisticated persons will also purchase and apply its products” and the law requires focus on the least sophisticated consumer in the purchasing class. (*Id.* at 3) (citing *Ford Motor Co.*, 930 F.2d at 293) Additionally, Nichino argues that Valent’s SENSTAR product is not yet registered for use in the largest market for both products, California. (D.I. 70 at 4) Nichino contends that once SENSTAR is registered in California, Valent – a much larger company than Nichino – “will inundate the California market with promotions and marketing activity,” leading to reverse confusion. (*Id.*)

Nichino correctly points out that actual confusion and purchaser sophistication are only two factors in the multi-factor *Lapp* test. (*Id.* at 1) That is partly why, as explained above, Nichino has succeeded in demonstrating a likelihood of success on the merits. When it comes to irreparable harm, however, not all *Lapp* factors are of equal importance. Particularly in the circumstances presented here (where the *Lapp* factors are closely balanced and where the similarity of the marks only slightly favors Plaintiff), the two factors on which Valent relies – both of which the Court has found favor Valent – are most relevant to the issue of irreparable harm. Here, these two factors do rebut the presumption that Nichino will be irreparably harmed in the absence of an injunction, in the time between now and when this case can be resolved on

the merits.

While the lack of any actual confusion does favor Valent, the Court recognizes that the products have only been on the market together for about nine months. The Third Circuit has also stated that “evidence of actual confusion ‘is difficult to find . . . because many instances are unreported.’” *Kos Pharms.*, 369 F.3d at 720 (citing *Checkpoint*, 269 F.3d at 291). Further, as Nichino points out, Valent’s sales to date are just a [REDACTED] fraction [REDACTED] of what they are projected to be (D.I. 73 at 1), so it is unsurprising that evidence of actual confusion is lacking to this point. All this leads the Court to agree with Nichino (*see id.* at 2) that the absence of actual confusion is not, on its own, sufficient to rebut the presumption of irreparable harm. But the absence of such evidence does contribute to the Court’s finding on lack of irreparable harm.

The evidence relating to purchaser sophistication, particularly in the California market, which is by far the largest market for both of the competing products, strongly supports Valent’s position on irreparable harm. California imposes significant regulations and restrictions on the use and sale of agricultural pesticides. (D.I. 34 ¶¶ 20-24, 32, 38, 41) Under California law, only PCAs and growers themselves can provide a recommendation for an agricultural pesticide; once a PCA provides that recommendation, a different product cannot be substituted by a dealer without a new recommendation. (*Id.* ¶¶ 21, 38) PCAs typically use electronic systems to handle the written recommendations California requires of them, and these systems are used for recommending, purchasing, and applying pesticides. (*Id.* ¶¶ 21, 34, 39) After a recommendation has been made, growers must have operator permits to acquire insecticide products. Then, after use, growers must submit a “Product Use Report” form to the growers’ County Agricultural Commissioner. (*Id.* ¶¶ 24, 39)

As a result, the California consumer is a highly-sophisticated customer. The ubiquity of

PCAs and California state regulations make confusion and subsequent inadvertent loss of sales and loss of goodwill unlikely in this (by far the parties' largest) market. Even without PCAs, the California grower has many resources available, such as trade shows, grower meetings, and websites, to help her understand the products on the market. (D.I. 28 at 21) The evidence is very strong that in California (at least) – which is Nichino's largest market by far and, therefore, the market where Nichino would be most likely to be harmed – the largely sophisticated purchasers of insecticides will not be confused between the parties' products. Even if Valent heavily promotes its SENSTAR product in the California market after obtaining state registration, the sophisticated, regulated California customer will be able to differentiate the newly-registered and advertised SENSTAR from Nichino's CENTAUR, which "has used its registered CENTAUR mark for over 16 years" and on which Nichino has "spent hundreds of thousands of dollars promoting." (D.I. 70 at 3) This decreases the likelihood of reverse confusion.

Nichino's argument that considering the least sophisticated consumer in the class should lead to a different conclusion (*see, e.g.*, D.I. 73 at 3) fares no better here than it did in connection with the *Lapp* factor analysis above. Nichino's argument fails for lack of evidence. Nichino has not put forth sufficient evidence to persuade the Court that any or all of the relevant class of purchasers – including migrant workers, drivers, employees at agrochemical distributors, farm owners, and crop consultants – are "unsophisticated, incompetent, or unable to read and follow the instructions attached to every container." *Aceto* at 2012 WL 3095060, at *12. Instead, as in *Aceto*, "because commercial farmers rely on crop yields for their livelihood, farmers are very careful about the crop protection products that they purchase and apply to their crops." *Id.* at *3.

Valent has persuaded the Court that the relevant consumers are sophisticated and exercise

care purchasing products pertaining to their livelihood – especially in California, but elsewhere as well. The Court agrees with Valent that “there is no evidence of confusion anywhere outside of California, and California’s regulations make confusion highly unlikely there, too.” (D.I. 71 at 5) This finding, along with the absence of any evidence (yet) of actual confusion, persuades the Court that the presumption of irreparable harm is rebutted. Nichino has failed to show that the irreparable harm factor favors granting the preliminary injunction it seeks.

III. BALANCE OF EQUITIES

“[A] movant for preliminary equitable relief must meet the threshold for the first two ‘most critical’ factors: it must demonstrate that it can win on the merits . . . and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Reilly*, 858 F.3d at 179. The Court considers the remaining two factors only if the first two “gateway factors” are satisfied. *Id.*; *see also GOLO*, 2020 WL 5203601, at *15. The third element of the preliminary injunction inquiry requires the movant to demonstrate that the balance of equities tips in its favor in granting the injunction. *See Ferring*, 765 F.3d at 210. Although unnecessary, given that Nichino has not prevailed on the irreparable harm requirement, the Court will, in the interest of completeness, address the remaining factors.

Nichino argues that the balance of equities tips in its favor because it will be irreparably harmed in the absence of an injunction. (D.I. 10 at 16; D.I. 44 at 19) Valent asserts that it invested substantial resources in researching, creating, testing, and bringing SENSTAR to market. (D.I. 28 at 28). Further, Valent contends that to change its name now would result in not selling its product for about a year while it applied for a new name with the USPTO and registration with the EPA, which would cause \$6 - \$13 million in losses, arising from repackaging or destruction of current inventory, reputational damage from changing its name post-launch, and confusion in the market. (*Id.*; Tr. 27)

As discussed above, the record does not support a finding of irreparable harm to Nichino in the absence of an injunction. Moreover, Nichino has not presented evidence proving damage to its goodwill or consumer reputation, or other non-compensable damages, as a result of SENSTAR's launch. By contrast, Valent has presented substantial evidence of the harms it will suffer if an injunction is entered. Additionally, and importantly, the Court found in connection with the *Lapp* factors analysis that Valent did not act in bad faith in adopting its mark. This contributes to the Court's conclusion that the balance of equities favors Valent.

IV. PUBLIC INTEREST

The final element of the preliminary injunction analysis requires the movant to demonstrate that it is within the public interest to grant the injunction. *See Ferring*, 765 F.3d at 210. SENSTAR is a premium blockbuster insecticide containing two active ingredients, is labeled for 17 different crop groups, and combats against 10 commonly targeted pests. (D.I. 28 at 29; Tr. 27) The public is better served by allowing continued access to an innovative product that can be used against all insect life stages. (D.I. 28 at 14) Also, and importantly, the Court has found that while there is some similarity in the marks, overall this first *Lapp* factor favored Defendant.

For both of these reasons, the public interest is better served by denying a preliminary injunction than it would be by granting one.

CONCLUSION

A preliminary injunction is "an extraordinary remedy, which should be granted only in limited circumstances." *Kos Pharms.*, 369 F.3d at 708. Here, while Plaintiff has established a likelihood of success on the merits – although not by much – the other three factors the Court must consider all disfavor the requested relief. Accordingly, the Court will deny Plaintiff's motion for a preliminary injunction. An order follows.

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

NICHINO AMERICA, INC.,

Plaintiff,

v.

VALENT U.S.A., LLC,

Defendant.

C.A. No. 20-704-LPS

ORDER

At Wilmington, this 30th day of **March 2021**, consistent with the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that Plaintiff's Motion for a Preliminary Injunction (D.I. 9) is DENIED.

IT IS FURTHER ORDERED that the parties shall meet and confer and, no later than **April 6, 2021**, submit a joint status report with their position(s) on how this case should now proceed.

In addition, because the Memorandum Opinion was issued under seal, the parties shall meet and confer and, no later than **April 1, 2021**, submit a proposed redacted version, should they believe they can meet the governing legal standards to request that any portion of the Memorandum Opinion remain under seal. In that event, any party seeking such a redaction must submit, by **April 1**, a memorandum detailing the basis for such a request. Should the Court receive no proposed redactions, or not receive a memorandum identifying meritorious support for such a request, the Court will unseal the entirety of its opinion.


UNITED STATES DISTRICT JUDGE