IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REPUTATION.COM, INC. Plaintiff, v. BIRDEYE, INC. Defendant.	)))))))))	Civil Action No. 21-129-LPS-CJB **REDACTED** **PUBLIC VERSION** Original Filing Date: January 12, 2022 Redacted Filing Date: August 16, 2022

REPORT AND RECOMMENDATION

In this patent action filed by Plaintiff Reputation.com, Inc. ("Reputation" or "Plaintiff") against Defendant Birdeye, Inc. ("Birdeye" or "Defendant"), presently pending before the Court is Plaintiff's motion for preliminary injunction (the "Motion"), (D.I. 48), filed pursuant to Federal Rule of Civil Procedure 65. With the Motion, Plaintiff seeks to enjoin Defendant from "infringing U.S. Patent Nos. 8,918,312 (the ''312 Patent'), 10,180,966 (the ''966 Patent'), 10,354,296 (the ''296 Patent'), and 10,445,794 (the ''794 Patent')." (*Id.*) For the reasons set forth below, the Court recommends that the Motion be DENIED.

I. BACKGROUND

A. Factual Background

1. Online Reputation Management Generally

In recent years, customers have increasingly used the Internet to comment on and review the experiences they have had with certain businesses; the reach of these reviews can grow quickly online and can have an impact on a business' overall reputation. (D.I. 33 at ¶¶ 12-13)[1] With so many reviews and comments spreading so quickly online, businesses face technical

[1] The First Amended Complaint ("FAC") is found at D.I. 33 and is the operative complaint in the case. (D.I. 33)

challenges in gaining intelligence regarding such reviews, addressing the reviews in a timely fashion and in managing their overall online reputation. (*Id*. at ¶ 15) The challenges associated with this space and the technological solutions needed to address them created a new industry, known as the online reputation management ("ORM") industry. (*Id.* at ¶¶ 17-18)

2. Plaintiff

Plaintiff, which was founded in 2006, is a software-as-a-service provider of business-to-business reputation and customer experience management services. (D.I. 49, Declaration of Pranav Desai (hereinafter, "Desai Decl."), ex. 1 at ¶ 4; *see also* D.I. 33 at ¶ 19) Its principal place of business is in Redwood City, California. (D.I. 33 at ¶ 2) The company was an early player in the ORM industry, and it continues to develop customer service experience and reputation management tools and platforms. (Desai Decl. at ¶ 4; D.I. 33 at ¶ 19)

a. Asserted Patents

Plaintiff is the assignee of the '312 Patent, the '966 Patent, the '296 Patent and the '794 Patent (collectively, the "patents-in-suit" or the "Asserted Patents"). (D.I. 33 at ¶¶ 7-10) The Asserted Patents are allegedly directed to four functionalities of Plaintiff's Reputation Experience Management platform ("RXE platform"). (D.I. 33 at ¶¶ 22, 26)[2]

The '312 Patent, which issued in December 2014, is entitled "Assigning Sentiment to Themes" and it issued with 17 claims. (*Id.*, ex. A) This patent relates to performing an objective sentiment analysis of online reviews available across a variety of online sources:

> Assigning sentiment to themes is disclosed. Reputation data extracted from at least one data source is received. The reputation

[2] The Court here briefly describes what the Asserted Patents are generally about, in order to provide some context for the reader. It largely relies on the allegations in the FAC and on selected content from those patents. In doing so, however, the Court does not intend to make any definitive statements about what the Asserted Patents are "directed to" that might impact an analysis of the patents pursuant to 35 U.S.C. § 101. (*See* D.I. 44)

> data includes user-authored reviews. The user-authored reviews include text and at least one rating. For a first review included in the reputation data, at least one key word is determined using the first review's text. A sentiment is assigned for a theme associated with the keyword based at least in part on the first review's rating.

(*Id.*, ex. A, Abstract; *see also* D.I. 33 at ¶ 26)

The '966 Patent, which issued in January 2019, is entitled "Reputation Report with Score" and it issued with 35 claims. (*Id.*, ex. B) This patent relates to objectively assessing online reviews available across a variety of online sources:

> An online reputation assessment of an individual is performed. A reputation score is determined based on the performed online reputation assessment. The reputation score is provided as output. In some cases, the reputation score is provided to an entity that is not the individual, for example, based on the receipt of an authorization from the individual to disclose the score to an entity.

(*Id.*, ex. B, Abstract; *see also* D.I. 33 at ¶ 26)

The '296 Patent, which issued in July 2019, is entitled "Follow-up Determination" and it issued with 26 claims. (*Id.*, ex. C) This patent relates to review generation and monitoring:

> The transmission of a review request to a potential author of a review on a review site is facilitated. A determination is made that the potential reviewer has not, subsequent to the transmission, authored a review on the review site. A follow-up action to take with the potential reviewer regarding the review request is determined.

(*Id.*, ex. C, Abstract; *see also* D.I. 33 at ¶ 26)

The '794 Patent, which issued in October 2019, is entitled "SMS-Based Review Requests" and it issued with 37 claims. (*Id.*, ex. D) This patent is similarly related to review generation and monitoring:

> Facilitating requests of reviews is disclosed. Contact information associated with a potential reviewer is obtained. A message requesting the potential reviewer to write a review for an entity is transmitted. In response to receiving an indication that the

> potential reviewer has accepted the request to write the review for the entity, a review site on which the potential reviewer should be directed to write the review for the entity is dynamically determined. A device associated with the potential reviewer is directed to a profile page of the entity on the dynamically determined review site.

(*Id.*, ex. D, Abstract; *see also* D.I. 33 at ¶ 26)

b. Plaintiff's ORM Products

Plaintiff's RXE platform is comprised of several tools, including: (1) Reputation Score X, a reputation measurement tool that provides businesses with an index of brand performance that they can utilize to make enhancements to improve their customers' experiences, (*see* D.I. 33 at ¶ 20); and (2) Conversational Surveys, a messaging-based survey tool that allows customers to provide detailed, contemporaneous feedback via mobile devices, (*see id.* at ¶ 21). Conversational Surveys allows companies to survey their customers through various messaging platforms (SMS text message, Facebook Messenger or other messaging or social media platforms). (*Id.*) As a whole, the RXE platform manages tens of millions of reviews and interactions across hundreds of thousands of customer touchpoints. (*Id.* at ¶ 22)

3. Defendant and Its Products

Defendant is an ORM company that was founded in 2012. (D.I. 60, ex. 1 (Declaration of Naveen Gupta (hereinafter, "Gupta Decl.")), at ¶ 2) It employs approximately 450 employees worldwide, and its principal place of business is in Palo Alto, California. (D.I. 33 at ¶ 3; D.I. 106 (hereafter, "Tr.") at 152))

Defendant is a software company that offers an "all-in-one experience" platform that enables business owners to "collect reviews of their businesses, convert leads, run surveys, get referrals[] and more." (D.I. 60, ex. 2 (Declaration of Ameya Virkar (hereinafter, "Virkar

Decl.”)), at ¶ 3; *see also* D.I. 33 at ¶¶ 75-79) It first launched its software in 2013. (Gupta Decl. at ¶ 5)

Currently, Defendant’s reputation management software is offered via an all-in-one platform that contains different software products; customers can pick and choose which of these products to purchase, and the products, in turn, each have various functionalities. (Virkar Decl. at ¶ 3; Tr. at 161; *see also* D.I. 59 at 2 n.2) According to Defendant, its software products that are implicated by Plaintiff’s infringement allegations are its “Campaign,” “Reviews” and Insights” software modules (the “Accused Products”). (D.I. 59 at 2 n.2) That said, and as is further discussed below, it appears that only certain functionalities or sub-components of these products (as opposed to the entire product) are being accused of infringement. (*See, e.g*., D.I. 33 at ¶¶ 82, 86, 89, 96, 101, 105, 109; D.I. 49 at 5-6; Tr. at 54, 58-59, 75)

Additional facts relevant to resolution of the instant Motion will be discussed in Section III.

B. Procedural Background

On December 21, 2020, Plaintiff sent Defendant a cease and desist letter asking it to stop infringing the patents-in-suit. (D.I. 59 at 9; Gupta Decl. at ¶ 10; Tr. at 203) Plaintiff filed its original Complaint on February 1, 2021. (D.I. 1) On March 23, 2020, Plaintiff filed its initial motion for preliminary injunction (“PI”). (D.I. 10) Thereafter, Plaintiff filed its operative FAC on April 27, 2021. (D.I. 33) On May 18, 2021, United States District Judge Leonard P. Stark referred the case to the Court to hear and resolve all pre-trial matters up to and including expert discovery matters (but not including summary judgment motions, Daubert motions, pre-trial motions in limine or the pre-trial conference), subject to 28 U.S.C. § 636(b). (D.I. 50)

The instant Motion, which is Plaintiff's renewed motion for a PI, was filed on May 17, 2021. (D.I. 48) The parties then engaged in pre-hearing discovery and extensive pre-hearing briefing on the Motion; all pre-hearing briefing was completed on September 2, 2021. (D.I. 89) The Court held an evidentiary hearing[3] and heard oral argument regarding the Motion[4] on October 29, 2021. (D.I. 106) Thereafter, the parties filed post-hearing briefs on November 10, 2021. (D.I. 110; D.I. 112)

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) (citations omitted); *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 does provide 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) (citation omitted). 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

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[3] The Court will cite to hearing exhibits as "PX-__" for Plaintiff's exhibits, and "DX-__" for Defendant's exhibits.

[4] During the hearing, the Court also heard argument on Defendant's motion to dismiss, (D.I. 44), which remains pending.

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) (citations omitted). 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) (citations omitted) (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

In this Report and Recommendation, the Court will solely address whether Plaintiff has made a sufficient showing of irreparable harm. For the reasons set forth below, the Court concludes that it has not. In light of this, the Court need not address the remaining preliminary injunction factors and will recommend that the Motion be denied. *See 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).

A. 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) (internal quotation marks and citation omitted); *see also Abbott Cardiovascular Sys., Inc. v. Edwards Lifesciences Corp.*, C.A. No. 19-149 (MN), 2019 WL 3855015, at *1 (D. Del. Mar. 5, 2019) (citation omitted) ("The moving party must demonstrate that that the irreparable harm is immediate and not merely a possibility that may occur at some point in the future."); *Chestnut Hill Sound Inc.*, 2015 WL 6870037, at *3. To demonstrate irreparable harm, a plaintiff must establish that it is subject to harm that cannot be adequately compensated though monetary damages. *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (citations omitted) ("[T]he irreparable harm inquiry seeks to measure harms that no damages payment, however great, could address."). The plaintiff 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.

With its Motion, Plaintiff asserts that it has been irreparably harmed by Defendant's alleged infringement in that it "stands to suffer continued irreparable erosion of the price of its product offerings, as well as lost business opportunities and customers." (D.I. 49 at 18) In response, Defendant attacks Plaintiff's showing in a multifaceted way. More specifically, Defendant argues that: (1) Plaintiff waited years to file an infringement lawsuit against Defendant, and otherwise delayed in bringing its PI Motion; (2) Plaintiff failed to show sufficient evidence of price erosion or lost customers; (3) even if Plaintiff could establish some amount of price erosion or lost customers, Plaintiff failed to show the required nexus between that harm and the Asserted Patents' features; (4) any loss suffered by Plaintiff is reparable. (D.I. 59 at 9-13; D.I. 82 at 1-10; D.I. 87 at 1-2; D.I. 112 at 1-7)

The Court finds merit in each of Defendant's arguments, and below it will address each of them.

1. Delay

Defendant first asserts that Plaintiff unduly delayed in seeking injunctive relief. (D.I. 59 at 9; D.I. 82 at 9-10; Tr. at 205-07) "Injunctive relief has been found to be inappropriate where a [p]laintiff has had no apparent urgency in requesting it." *Waters Corp. v. Agilent Techs. Inc.*, 410 F. Supp. 3d 702, 714 (D. Del. 2019) (citation omitted). Indeed, "delay in bringing an infringement action and seeking a preliminary injunction are factors that could suggest that the patentee is not irreparably harmed by the infringement." *Apple I*, 678 F.3d at 1325 (citing *Nutrition 21 v. United States*, 930 F.2d 867, 872 (Fed. Cir. 1991)); *see also Vertigo Media, Inc. v. Earbuds Inc.*, No. CV 21-120 (MN), 2021 WL 4806410, at *5 (D. Del. Oct. 14, 2021). In such cases, courts tend to assess the amount of delay from the date on which the plaintiff had or should have had "knowledge of the particular infringing activity that [the plaintiff] asserts gave rise to the alleged irreparable harm[.]" *Integra Lifesciences Corp. v. HyperBranch Med. Tech., Inc.*, Civil Action No. 15-819-LPS-CJB, 2016 WL 4770244, at *9 (D. Del. Aug. 12, 2016) (citing cases).[5]

There is real evidence of significant delay here. Defendant launched the Accused Products in 2013, and most of the accused functionalities have been a part of those products since that year. (Tr. at 173; Virkar Decl. at ¶ 4) The patents-in-suit issued in 2014 and 2019, respectively, and Plaintiff believes that Defendant has been infringing these patents for several

[5] Of course, a "showing of delay does not preclude, as a matter of law, a determination of irreparable harm[;]" it is simply "one factor to be considered" in the irreparable harm calculus. *Hybritech Inc.*, 849 F.2d at 1457 (citations and emphasis omitted).

years. (Tr. at 52) Moreover, Plaintiff's infringement allegations are premised on publicly-available information about how Defendant's products work. (D.I. 33, exs. E-H; Tr. at 36, 49-50, 53, 206-07) So at whatever point Plaintiff might have reasonably been expected to be aware of and be significantly impacted by Defendant's presence in the relevant market, that is the point that Plaintiff could be expected to examine whether Defendant's competition was being fueled by patent infringement (and to seek injunctive relief if so).

In that regard, there is plenty of evidence that at least by 2019, Plaintiff was: (1) well aware of Defendant's Accused Products; and (2) believed that Defendant was causing it harm via commercial competition. For example, Plaintiff's Senior Vice President of Product Innovation, Pranav Desai, testified that Plaintiff started competing with Defendant for reputation management services in 2015, and that by mid-2017 to 2018, the two companies were competing in the "enterprise" market segment (the largest market segment of the ORM marketplace, involving customer companies with more than $500 million in annual revenue). (Tr. at 85, 121-22, 146; *see also* DX-15 at 123-25) Plaintiff's Chief Scientist, Dr. Bradley Null, testified that he had seen Defendant, "a competitor, impact [Plaintiff's] business since before 2019." (Tr. at 17, 47) This testimony is underscored by e-mails in 2018 and 2019 between Plaintiff's employees (including some of Defendant's former employees who went to work for Plaintiff), in which they discuss how Defendant was then competing with Plaintiff for certain customers, and discuss strategies for combating this problem.[6] And it is confirmed by Plaintiff's briefing and its

[6] (*See* D.I. 83, ex. 17 (a February 2018 e-mail from an employee of Plaintiff, noting that he is "competing with [Defendant] at a couple places now"); *id.*, ex. 28 (an October 2019 e-mail in which a Plaintiff employee is recounting a conversation with a former Defendant employee who now works for Plaintiff, and noting that Plaintiff is "seeing BirdEye's Competitive Benchmarking capabilities come up more and more with prospects and current customers"))

arguments regarding the Motion—in which Plaintiff asserts that it was suffering irreparable harm at Defendant's hands in 2019 and 2020. (*See* D.I. 89 at 5 ("Reputation had to offer [its] [redacted] beginning [in] 2019 and 2020 . . .");[7] *see also* D.I 49 at 7 (Plaintiff pointing to examples of alleged price erosion in mid-2019 and 2020); Tr. at 120 (Mr. Desai asserting that irreparable harm has been occurring for "three or four years, at this point" due to Defendant's actions))

Now, one possible rejoinder that a plaintiff in Reputation's shoes might make is that (as the Court will detail further below) the ORM market is a crowded one. Such a plaintiff could argue that since it competes with so many different ORM providers, it cannot be expected to be assessing patent infringement as to every product sold by every possible competitor. But that type of rejoinder would not work for Plaintiff here. For one thing, it would contravene Plaintiff's entire theory of the case. Plaintiff's position is that Defendant is really the *only* ORM company that truly competes with Plaintiff's product lines. Yet if that were so, then it would only underscore that Plaintiff would have been expected to be supremely attuned to the prospect of illegal competition by Defendant, at least as of 2019 and thereafter. Additionally, such a position would contravene the real-world history between the parties. In 2019, Plaintiff made inquiries about [redacted] this led to weeks of discussion between [redacted], including conversations between [redacted] and a meeting

[7] Indeed, in Plaintiff's briefing, it recognized that Defendant's argument here was that Plaintiff "knew about its lost sales and alleged harm by 2019." (D.I. 89 at 5 (internal quotation marks and citation omitted)) In responding to that argument, Plaintiff did not really deny the charge. Instead, it simply argued that "[e]ven if [the charge is] true, [a] showing of delay does not preclude a determination of irreparable harm as a matter of law[.]" (*Id*. (internal quotation marks and citation omitted)) That is as close to an admission as one will see in a party's briefing on a point like this.

between [redacted] software platforms. (Gupta Decl. at ¶¶ 7, 9; Tr. at 95-96, 152-53) In May 2020, Plaintiff's [redacted] again corresponded with [redacted] (Gupta Decl. at ¶¶ 7-8; Tr. at 153) While no [redacted] ever occurred, these facts further demonstrate that Defendant was very much on Plaintiff's radar screen in 2019 and thereafter. So if Defendant was infringing Plaintiff's patents and causing irreparable harm at that time, then Plaintiffs should have been ready to run to court.

But Plaintiff did not do so, and months continued to pass by. It was not until December 21, 2020 that Plaintiff sent Defendant the cease and desist letter accusing Defendant of infringing the four patents-in-suit. (Gupta Decl. at ¶ 10; Tr. at 152) Even from there, Plaintiff took its time. It did not file suit until February 1, 2021 and did not file its original PI motion until March 23, 2021. (D.I. 1; D.I. 10)[8] The instant renewed PI Motion was filed on May 17, 2021, subsequent to Plaintiff's filing of the FAC. (D.I. 48)

Ultimately, the evidence shows that, at a minimum, Plaintiff "knew about its lost sales and alleged harm by 2019 . . . and *still* waited [approximately] two years to bring suit." (D.I. 82 at 9 (emphasis in original)) That lack of urgency is a strong indicator that any harm that Plaintiff might suffer due to infringement is not irreparable (and that even Plaintiff does not truly see it as such). *See, e.g.*, *Girafa.com, Inc. v. Amazon.com, Inc.*, Civ. No. 07-787-SLR, 2008 WL

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[8] Plaintiff asserts that some of the delay between the submission of the cease and desist letter and the filing of suit was to give Defendant time to discuss the prospect of a non-litigation resolution with Plaintiff. (D.I. 89 at 5; Tr. at 203) In a vacuum, giving one's adversary some period of time to consider an out-of-court solution seems sensible. (The three-month gap between the December 21, 2020 letter and the March 23, 2021 filing of the original PI motion is a little harder to understand.). But considered along with the other evidence set out above, the record regarding delay is not favorable to Plaintiff.

5155622, at *4 (D. Del. Dec. 9, 2008) (finding evidence of delay when plaintiffs filed a motion for preliminary injunction "several years after defendants began providing the accused services"); *Power Integrations, Inc. v. BCD Semiconductor Corp.*, Civ. No. 07-633-JJF-LPS, 2008 WL 5069784, at *12 (D. Del. Nov. 19, 2008) ("The three-month delay between when [plaintiff] filed this lawsuit and brought the instant [preliminary injunction m]otion[,] in addition to the more than eight-month delay between [plaintiff's] actual loss of sales to [defendant] . . . also weighs against a finding of irreparable harm."), *report and recommendation adopted*, 2008 WL 5101352 (D. Del. Dec. 3, 2008); *see also High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995) (finding that an unjustified 17-month delay in bringing suit, along with other factors, "militate[d] against" issuance of an injunction, because it suggested there was "no apparent urgency to the request for injunctive relief").

2. Price Erosion/Lost Business Opportunities and Nexus

Defendant next argues that Plaintiff has shown little if any price erosion or lost customers due to competition with Defendant, and that, even if some such showing has been made, Plaintiff cannot demonstrate a nexus between this harm and alleged patent infringement.

Evidence of loss of business opportunities is a valid ground for finding irreparable harm. *Celsis In Vitro, Inc.*, 664 F.3d at 930. So is evidence of price erosion. *Symbol Techs., Inc. v. Janam Techs. LLC*, 729 F. Supp. 2d 646, 664 (D. Del. 2010) (citing *Sanofi–Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1382-83 (Fed. Cir. 2006)); *see also Rsch. Found. of State Univ. of New York v. Mylan Pharms. Inc.*, 723 F. Supp. 2d 638, 658-59 (D. Del. 2010) (citing cases). However, as was previously noted, to the extent that Plaintiff can show that these harms have occurred at Defendant's hands, Plaintiff must also demonstrate a causal nexus[9] between the price erosion/lost business opportunity and the patent infringement at issue, in order to distinguish between "irreparable harm caused by patent infringement and irreparable harm caused by otherwise lawful competition—e.g., sales that would be lost even if the offending feature were absent from the accused product." *Apple Inc. v. Samsung Electronics Co.*, 735 F.3d 1352, 1361 (Fed. Cir. 2013) ("*Apple III*") (internal quotation marks, citation and brackets omitted); *see also Apple IV*, 809 F.3d at 640; *Omnitracs, LLC v. Platform Sci., Inc.*, Case No.: 20-cv-0958-JLS-MDD, 2021 WL 857005, at *6 (S.D. Cal. Mar. 8, 2021). To meet this requirement, the patentee must show "some connection" between the patented feature and the demand for the accused product. *Apple III*, 735 F.3d at 1364; *see also Apple IV*, 809 F.3d at 641.[10]

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[9] "[A] causal nexus linking the harm and the infringing acts must be established regardless of whether the injunction is sought for an entire product or is narrowly limited to particular features." *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 640 (Fed. Cir. 2015) ("*Apple IV*").

[10] The causal nexus requirement analysis is a "flexible" one. *Apple IV*, 809 F.3d at 641. A movant need not establish proof that "customers buy the infringing products *only* because of [] particular [claimed] features"; evidence that "features claimed in the . . . patents were important to product sales and that customers sought these features in the [products] they purchased" is "evidence of casual nexus . . . and thus irreparable harm." *Id.* at 644 (emphasis in original).

One challenge for Plaintiff here is that in the PI Motion briefing process and at the hearing, it did not do a good job explaining: (1) what portion of Defendant's respective products at issue are comprised of the relevant patented features/functionalities; and (2) why there was some connection between the patented features/functionalities and a customer's decision to buy the Defendant product(s) at issue. (D.I. 112 at 4; Defendant's Hearing Presentation, Slide 49; Tr. at 215-18) Plaintiff provided no market surveys or expert testimony on these points. (D.I. 59 at 11; Tr. at 218) Instead, to establish the requisite nexus, Plaintiff seemed content to rely in significant part on some very general deposition testimony provided by a Birdeye witness, which was not particularly helpful. (D.I. 89 at 4 (citing D.I. 90, ex. 7 at 189-91); *see also* Tr. at 75-77) Indeed, the evidence indicates that, at least with regard to some of the Asserted Patents, the patented features make up only a portion of an Accused Product's functionality—and that customers sometimes purchase the product but decide not to pay for the allegedly covered functionality. (Tr. at 58-59)

Below, the Court will first attempt to divine what is the relevant market in which harm is said to have occurred; thereafter, it will examine the evidence that Plaintiff has put forward regarding that alleged harm.

a. Defining the Relevant Market

In assessing PI motions like these, it is often helpful to discern what is the relevant market in which the plaintiff provides services. This can help the Court, *inter alia*, assess the magnitude or relative impact of any harm to Plaintiff from unlawful patent infringement. *See Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics, LLC*, Civil Action No. 17-1390-LPS-CJB, 2018 WL 395750, at *15 (D. Del. Jan. 8, 2018); *Kone Corp. v. ThyssenKrupp USA, Inc.*, Civ. Action No. 11-465-LPS-CJB, 2011 WL 13137061, at *17 (D. Del. Dec. 2, 2011).

Plaintiff did not present expert testimony as to what is the relevant market here.[11] Instead, Plaintiff largely relied on the testimony of its two employee witnesses: Dr. Null and Mr. Desai. To that end, both men repeatedly asserted that the focus of Plaintiff's ORM business is on the enterprise market segment and (to a much lesser extent) on the "middle" market segment (sometimes referred to as the "mid-market" or "mid-cap" segment, and which includes customers with annual revenue of between $50 and $500 million). (D.I. 49 at 18; D.I. 79 at 8;

Below, when assessing the individual instances of alleged harm cited by Plaintiff, if anything, the Court gave Plaintiff some benefit of the doubt on this "nexus" issue. But at times, Plaintiff's showing in this regard was so weak that the Court could not credit it at all.

[11] Defendant did not do so either, but it is of course Plaintiff's burden to sufficiently demonstrate that irreparable harm will befall it if an injunction is not granted.

Tr. at 21, 85-86, 91; D.I. 89 at 2)[12] And in his testimony, Mr. Desai then framed the relevant ORM market in which Plaintiff competes with Defendant in very narrow terms, describing it as encompassing: (1) "platform"[13] ORM providers; in the (2) enterprise market segment. (*See* Tr. at 87, 92-93) Having framed the relevant market in that way, Mr. Desai explained that there were only two platform providers in the enterprise space: Plaintiff and Defendant. (*Id.*)

In the Court's view, however, the record evidence does not support defining the relevant market so narrowly. The Court comes to that conclusion for a few reasons.

As an initial matter, the Court does not see why Plaintiff and Defendant should only be understood to be competing with each other (and others) in the enterprise market segment. It appears that both companies pursue customers in the mid-market segment and the small market segment as well. (D.I. 83, ex. 12 at BE00003363; PX-58; Tr. at 92-93)[14] Indeed, of the seven examples of alleged price erosion/lost opportunities raised by Plaintiff (and discussed further below), three of them involved companies that were not in the enterprise segment. (Defendant's Hearing Presentation, Slides 34-35, 43-44, 46; D.I. 88, ex. 45)

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[12] Mr. Desai explained that, in addition to the enterprise and middle market segments, the ORM marketplace includes a "small" market segment (involving customers with an annual revenue of less than $50 million). (Tr. at 85)

[13] Mr. Desai testified that in the ORM marketplace, companies could offer "surveys . . . reviews . . . [or] social media information[,]" among other things. (Tr. at 86) He said that a "platform company is a company that combines multiple products into a single offering, so at the end you don't have to go through three or four vendors to get that end product" and that would also "give [the customer] the orchestration why these products are working or [are] not working." (*Id*. at 86-87) Mr. Desai distinguished this from a "product company[,]" which is a company that might deliver "one of those three" services. (*Id.* at 86)

[14] In fact, Mr. Gupta asserted that Defendant's primary market segment was the "Small-Business" market segment. (Gupta Decl. at ¶ 20)

Additionally, the evidence indicates that Defendant does not exclusively (or even primarily) provide its customers with a platform (i.e., a very large grouping) of ORM services. To be sure, Defendant is capable of offering its customers a full platform of services, and at times thus refers to itself as a "platform company." (Tr. at 183) But the record indicates that Defendant offers customers numerous different products (including Listings, Reviews, Interactions, Referrals, Social, Surveys, Ticketing, Insights, Google Seller Ratings and CRM integration) on a product-by-product basis, (D.I. 83, ex. 20 at 10; Tr. at 166), and that many other ORM companies do the same, (Tr. at 139).[15] And according to Defendant's CEO Mr. Gupta, "very few" of Defendant's customers (amounting to about 10-15 percent) buy as many as three to four or more such products over the course of their relationship with Defendant. (Tr. at 161) Instead, approximately 90 percent of Defendant's customers shop for "one or two products" from Defendant at a time. (*Id.*) This evidence shows that Plaintiff and Defendant are not rightly characterized as simply competing in a "platform ORM provider" market; the relevant competitor group must also include other ORM companies that make product-by-product ORM sales.

From there, the question becomes: "Then how many other ORM companies ('platform' companies or not) truly compete with Plaintiff and Defendant for sales?" Here, the evidence suggests that the correct number must be a large one. Put differently, contrary to Plaintiff's claim, the evidence does not show that Plaintiff and Defendant are the only two companies who compete for the same types of ORM customers. For example:

[15] Plaintiff's own records confirm that many of these other purported "non-platform" companies regularly competed with Plaintiff (and Defendant) for business in 2019 and 2020. (Tr. at 145)

- Grids generated by third party website G2[16] in the relevant time frame list ORM providers who serve all market segments and plot those companies along two axes ("Market Presence" and "Satisfaction"). (D.I. 83, ex. 5) There were nearly 50 companies on these grids in total; at least 10 or 11 such companies, including both Plaintiff and Defendant, are in the top right quadrant of the grid. (*Id.*; *id.*, ex. 12 at BE00003363) In other G2 grids focusing solely on the enterprise market segment, Plaintiff and Defendant were two of six to nine companies overall, and were two of a handful of such companies who plotted in the upper-right-most portion of the grid. (*Id.*; *id.*, ex. 25 at REP_RXM_0006807; PX-57). And in G2 grids depicting the mid-market segment, Plaintiff and Defendant were two of 11 to 19 companies overall, and two of a handful of companies that plotted in the upper-right-most portion of the grid. (D.I. 83, ex. 12 at BE00003363; PX-58)[17]

- In a presentation that [redacted] made to [redacted] discussions, one slide contained a graphic regarding the ORM market; the slide was titled "Competitive Landscape: It's Crowded" and the graphic included the logos of approximately 30 companies, including Defendant. (D.I. 83, ex. 12 at BE00003364; Tr. at 157-58)

- Mr. Gupta stated that he agreed with the sentiments expressed by this slide; he asserted that Defendant competes in a market that includes between 30-50 competitors (such as Podium, Thryv, Yext, Chatmeter, Trustpilot, Vendasta, Weave, Swell, Grade.us, Binary Fountain, Gatherup, Reviews.io, ReviewTracker and Satisfacts). (Tr. at 158, 162-64; *see also* Gupta Decl. at ¶ 13)

- When testifying about a document prepared by Plaintiff entitled "The Complete Guide to Reputation Score and Online Reputation Management[,]" Mr. Desai confirmed that the other six companies listed in a chart along with Plaintiff and

[16] Plaintiff relies on and has touted the accuracy of G2's rankings. (D.I. 83, ex. 8 at 134-35; *id.*, ex. 25 at REP_RXM_0006807; Tr. at 88-89) Defendant does the same. (D.I. 83, ex. 9 at 203-04; Gupta Decl. at ¶ 12)

[17] It is true that, in many of these grids, Plaintiff and Defendant appear to be two of the highest-rated companies. (Tr. at 92) But in the remainder of the ample record before it, the Court sees little evidence that this means that the two entities only tended to compete with each other over customers. As will be set out further below, the evidence is really to the contrary—that many other companies provided competition for Plaintiff and Defendant in these spaces.

Defendant (that is, Podium, Kyruss, Qualtrics, Chatmeter, Medallia and Yext) were all companies that potential Reputation customers would also consider when making ORM purchasing decisions. (D.I. 83, ex. 8 at 90-91)

- In a Reputation document prepared for a potential enterprise customer, Plaintiff listed not only Defendant, but also Chatmeter and SynUp as entities for which Plaintiff had prepared a "Competitive Comparison." (DX-20 at REP_RXM_0004863; Tr. at 124)

- A Reputation spreadsheet that lists all of the company's business opportunities that were closed from 2019-20 ("Reputation Won/Lost Spreadsheet"), and which Mr. Desai called "the source of truth," showed plaintiff competing with many other ORM companies other than Defendant (including MaritzCX, Medallia, SpreadFast, Yext, Binary Fountain, MomentFeed, Qualtrics, Bazaarvoice and Sprinklr) for business. (Tr. at 126-35; Defendant's Hearing Presentation, Slide 27) In total, the document indicates that Plaintiff considered Defendant to be its main competitor for only approximately [redacted] opportunities out of many thousands of opportunities listed in the spreadsheet, or approximately [redacted] of the total. (D.I. 83, ex. 29; DX-37; Defendant's Hearing Presentation, Slide 30; Tr. at 130, 208)

In sum, the Court agrees with Plaintiff that it is not "sufficient to conclude that the true number of competitors are those that that have some non-zero presence in the enterprise or mid-market space." (D.I. 89 at 2) And there is no doubt that Plaintiff and Defendant directly compete with each other for business and, at times, are each other's main competitor for a prospective client. But despite this, the record clearly undermines Plaintiff's suggestion that the relevant market is essentially a two-player (i.e., Plaintiff and Defendant) "platform" services/enterprise segment ORM market. Instead, it shows that Plaintiff and Defendant compete for business: (1) in all three market segments; (2) often on a product-by-product basis; and (3) with many, many other ORM providers. And it suggests that Plaintiff and Defendant are each other's main competitor on a very small percentage of the total number of customer opportunities that each side pursues.

b. Plaintiff's Specific Examples of Alleged Harm

With the relevant ORM market framed as set out above, the Court now examines Plaintiff's specific examples of alleged harm.

On that front, Plaintiff's primary thrust was to identify particular customers and argue that Defendant's infringing acts caused it to have to lower its price in order to obtain or retain the customer's business (or that Plaintiff otherwise lost that business when it failed to lower its price). The number of identified customers changed a bit over time. In Plaintiff's initial opening brief, it had identified four such customers. (D.I. 49 at 7-8, 19-20; Desai Decl. at ¶¶ 18-22) By the time it filed its supplemental opening brief on August 26, 2021, Plaintiff had identified eight. (D.I. 79 at 9) And as of the PI hearing, Plaintiff was pressing its case as to seven of those eight. (Tr. at 100-18; D.I. 109, ex. 3 at Slide 2) The Court will consider the evidence as to each of those seven companies below,[18] explaining whether it finds each instance to amount to

[18] The Court recognizes that three of these customers ([redacted]) were added after pre-hearing document discovery had closed, and that one of them [redacted] was added after all pre-hearing discovery had closed. (D.I. 112 at 5; Defendant's Hearing Presentation, Slide 33) As to at least [redacted] there appears to be no evidence of Defendant's own documentation regarding the company in the record. (D.I. 112 at 7; Tr. at 117-18) And Defendant alleges that during the PI hearing, through the testimony of Mr. Desai, Plaintiff "provided new details on [many of the] alleged examples." (D.I. 112 at 5) As a result of all of this, Defendant has moved to exclude these three examples from the record, pursuant to Federal Rules of Civil Procedure 37(c)(1) and 26. (*Id.*)

The process leading to a PI hearing can be fast-moving, but it should also be fair. The Court acknowledges Defendant's argument that these examples were raised only late in the discovery period (or after discovery had closed), which did not give Defendant a full opportunity to probe the allegations. That said, the Court will address these three examples below. It does so because: (1) in light of the ultimate decision here, the failure to strike these examples from the record does not prejudice Defendant; and (2) Defendant was at least able to make some response persuasive evidence of price erosion or a lost business opportunity that bears some connection to alleged patent infringement:

- **FirstKey Homes ("FirstKey")**: Plaintiff alleges that "[i]n mid-2020, Reputation was in discussion with [FirstKey, which had been a Birdeye customer since 2018,] to provide products and services that include the Accused Products, including up to 300,000 survey completes and six brand competitive reporting licenses. Although this package is historically valued at $[redacted], FirstKey wished to cap its expenses at $[redacted], and expressed a lack of understanding as to why the price should be so high. . . . FirstKey ultimately obtained products and services from Birdeye." (Desai Decl. at ¶¶ 18-19; *see also* Tr. at 101-04; Gupta Decl. at ¶ 24) Plaintiff argues that "[t]he fact that FirstKey expected a price point approximately [redacted]% less than the value that Reputation's products offers suggests the type of irreparable price erosion that the law is designed to prevent." (D.I. 49 at 19; *see also* DX-32 at REP_RXM_0001670 (Plaintiff account executive noting that FirstKey Homes was "big time budget hunting"))

  Defendant argues that this is not a persuasive example because the pricing for FirstKey was driven by "the customer's budget of $[redacted]." (D.I. 112 at 6; DX-32 at REP_RXM_0001671 (noting that Plaintiff was told that FirstKey "had to keep things under $[redacted]")) That may be so. And the Court wishes it had more details about this example (such as what particular products or services FirstKey actually purchased). But the fact that Defendant was willing to offer their Accused Products (which the Court assumes contained at least some of the accused functionalities) for a far lower price than Plaintiff normally would have charged is at least some evidence supportive of Plaintiff's position.

- **Lion's Choice Restaurant ("Lion's Choice")**: Plaintiff alleges that Birdeye was able to "pilfer away" this customer in November of 2020 "by undercutting Reputation at a lower price." (Desai Decl. at ¶ 20; *see also* Tr. at 104-07) Lion's Choice was discussing multiple products with Plaintiff and the sticking point was the cost for "Professional Services[,]" which relates to "set up and implementation"; Plaintiff's pricing for that service would normally have been $[redacted]. (Tr. at 104,

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to Plaintiff's arguments about these entities in both its briefing and at the PI hearing. (D.I. 112 at 6-7; Defendant's Hearing Presentation, Slide 34)

106) Defendant had quoted Lion's Choice a price of $[redacted] for Professional Services. (DX-30 at REP_RXM_0003712; Tr. at 105) Plaintiff ultimately offered $[redacted] for this service, Defendant's final offer was $[redacted]. (Tr. at 106; Gupta Decl. at ¶ 28; PX-88) Plaintiff lost the business to Defendant. (Tr. at 107; Gupta Decl. at ¶ 28)

This is not compelling evidence. First, the Court has little information on what type of patented functionalities (if any) Lion's Choice was being offered here. Second, Plaintiff has made no showing that the Professional Services portion of the deal, which is the portion that Plaintiff alleges Defendant undercut it on price, is linked to a patented feature. (D.I. 112 at 6) Third, Mr. Gupta provided detailed information about the negotiation process as to Lion's Choice, which indicated that factors other than price or accused software content (including Lion's Choice's dissatisfaction with Plaintiff's ability to provide timely references, with Plaintiff's sales approach and with Plaintiff's overall capabilities as compared with Defendant) are what drove Lion's Choice's decision. (Gupta Decl. at ¶¶ 25-26) And fourth, with regard to the entire package of services that Lion's Choice was purchasing, Defendant actually offered a *higher* price than did Plaintiff (i.e., it won the business for a total of $[redacted] while Plaintiff was offering $[redacted]). (*Id.* at ¶ 28)

- **Freddy's Frozen Custard and Steakburgers ("Freddy's")**: Plaintiff alleges that this company, its customer since May 2016, "disclosed to Reputation that in mid-2019, Birdeye offered a package comparable to Reputation's, including the functionalities covered by the [p]atents-in-suit, at a price point of $[redacted] per location, which is significantly lower than the price of $[redacted] that Reputation charges Freddy's per location." (Desai Decl. at ¶ 21; *see also* PX-102 (Freddy's representative noting that Defendant was being "extremely aggressive in their offer"); Tr. at 109-11)) "In order to keep Freddy's business, Reputation had to include [redacted] (resulting in a loss of revenue for Reputation [of about $[redacted])." (Desai Decl. at ¶ 21; *see also* Tr. at 112-13)

  The documentation for this customer is a little confusing, and not well-explained by the parties. It suggests that as of August 2019, Plaintiff had quoted Freddy's a cost of $[redacted] per location per month (there is no reference to any prior $[redacted] per location per month charge), and that Defendant had quoted Freddy's $[redacted] per location per month. (PX-59; PX-102) But as the transaction is described above by Plaintiff, the Court agrees that it could amount to some evidence of price erosion that bears a connection to alleged patent infringement.

- **Henderson-Webb Apartments ("Henderson-Webb")**: Plaintiff alleges that this "Reputation customer was courted heavily by Birdeye and was offered a package comparable to Reputation's at $[redacted]." (Desai Decl. at ¶ 22) The company's "contract with Reputation was $[redacted]" and "Reputation had to reduce the value of Henderson-Webb's contract to $[redacted] to convince Henderson-Webb to remain a Reputation customer[,]" as Birdeye's offer "constitute[ed] a nearly [redacted]% discount." (Desai Decl. at ¶ 22)

  This is not compelling evidence. Again here, the Court has little information about the extent to which patented functionalities were a part of the "package" that Henderson-Webb was purchasing, or about how important those functionalities were to a customer's buying decision. Moreover, it appears that the roughly $[redacted] contractual reduction in value that Plaintiff agreed to relates to "[redacted]" (or "[redacted]" fees), which have not been shown to be a patented service. (Tr. at 114) Ultimately then, as far as the Court is aware, Plaintiff won the business by charging a higher price for, *inter alia*, patented services than Defendant offered. The Court does not see how this evidence (without more) demonstrates price erosion.

- [redacted] Plaintiff alleges that "Birdeye charged $[redacted] vs. Reputation's $[redacted][.]" (D.I. 79 at 9 (citing RXM_REP_0007724))

  This is not compelling evidence. The Court again has no information about what services were being offered by Reputation and Birdeye and how much, if any, of those services amounted to patented functionalities. Additionally, [redacted] was already a Birdeye customer as of the relevant time period, and [redacted]s existing contract with Birdeye was $[redacted]. (D.I. 88, ex. 45 at REP_RXM_0007725; Tr. at 114-115) Plaintiff claims that it lost out on price because [redacted] could not meet its minimum $[redacted] contract requirement. (D.I. 88, ex. 45 at REP_RXM_0007725) But Defendant argues that the available evidence shows that as to the cost of the actual services at issue, Defendant's price ($[redacted]) was *higher* than Plaintiff's price ($[redacted]). (Defendant's Hearing Presentation, Slide 44; *see also* D.I. 88, ex. 45 at REP_RXM_0007724; D.I. 112 at 6) In the end, without more information about what types of products were at issue, and in light of the fact that [redacted] seems to have made its decision based on its desire not to meet a $[redacted] minimum payment requirement, this is not persuasive evidence that Plaintiff lost a customer to Defendant due to patent infringement.

- [redacted]): Plaintiff alleges that "Birdeye charged under $[redacted], more than [redacted]% less than Reputation's quote of $[redacted]" (on services that Reputation would normally have charged $[redacted] for) and that Birdeye ultimately won the business. (D.I. 79 at 9 (citing RXM_REP_0002677, RXM_REP_7481); *see also* Tr. at 116)

  This is not compelling evidence. Once again, the Court does not know what products [redacted] was purchasing, what amount of those products involved patented functionalities, and whether those patented functionalities made a difference to [redacted] purchasing decision. Beyond that, Plaintiff's records regarding this process indicate that the reason why Plaintiff lost this business to Defendant was that [redacted] "did not need [redacted] at the time." (D.I. 88, ex. 46) It seems undisputed that "[redacted]" is not a patented feature. (Defendant's Hearing Presentation, Slide 43; Tr. at 116) In light of the lack of information about the services at issue, coupled with the evidence that Plaintiff lost the contract because its proposal included a non-patented service that cost money and that [redacted] did not want, this is not strong evidence of a lost business opportunity connected to patent infringement.[19]

- [redacted] Plaintiff alleges that this "customer had expressed that Reputation's price was 'double the next competitor,' but that the customer was 'interested in working with [Reputation] to negotiate down the price due to the strength of the platform." (D.I. 79 at 9-10) "Ultimately, the customer went with the

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[19] In his testimony (though it was a bit unclear to the Court), Mr. Desai may have been suggesting that Plaintiff did not in fact price "[redacted]" into its $[redacted] offer to [redacted]—and that instead, the notation about that product was simply an indication that in future years, Plaintiff would attempt to sell [redacted] the service. (Tr. at 116-17) If that is the suggestion, it seems to contradict Plaintiff's record of the sales opportunity, which indicates that [redacted] turned Plaintiff down because it "did not need [redacted] *at the time*." (D.I. 88, ex. 46 (emphasis added))

> much cheaper Birdeye quote." (*Id.* (citing RXM_REP_0002677))
>
> There is little evidence of record regarding this customer negotiation (perhaps due in part to the fact that Plaintiff did not cite [redacted] as an example of a lost business opportunity until after the pre-hearing discovery period had closed). *See supra* n.18. What there is suggests that Plaintiff proposed pricing of $[redacted] (on some unknown amount of products) and that this was about "[redacted]" what Defendant charged. (Tr. at 117-18; PX-85 at cell Q1724) Depending on what products were at issue, this could be some evidence of a lost business opportunity due to patent infringement, but again, the details are minimal.

In sum, of these seven instances of alleged harm, the Court concludes that, at best, only a few of them provide some reasonable evidence of price erosion (or that Plaintiff's unwillingness to erode its price cost it a customer) connected to the alleged patent infringement.

In addition to these individual instances of alleged harm, late in the game, Plaintiff also made a more general allegation: that because of Birdeye's alleged infringement, Reputation "has had to cease charging for [redacted] for *all* of its customers (*e.g.*, $[redacted] per location in 2018 to [redacted] in 2020)." (D.I. 110 at 1 (emphasis in the original))[20] During his testimony at the PI hearing, Mr. Desai explained that, as of 2018, Plaintiff sold a [redacted]" for $50 per month per location. (Tr. at 118) He stated that by 2020, Plaintiff had done a "market analysis" and decided that it "could not charge for [redacted] anymore" and that this was due solely to Defendant's "activities and undercutting [on price.]" (*Id.* at 119-20; D.I. 109,

[20] This specific argument about price erosion was not made in Plaintiff's opening brief, (D.I. 49 at 17-20), nor in its supplemental opening brief, (D.I. 79 at 8-10). The argument was instead first made in Plaintiff's supplemental answering brief, which was filed on September 2, 2021. (D.I. 89 at 5) That begs the question: If this is purportedly a significant example of price erosion clearly linked to Defendant's conduct—one that had occurred by 2020 and that was causing true irreparable harm—why was it not mentioned at all in either of Plaintiff's opening briefs?

ex. 3 at 3; D.I. 110 at 1-2) The difficulty here for Plaintiff is the thinness of its evidence linking this price change to Defendant's actions. To be sure, in his testimony at the PI hearing, Mr. Desai said there was such a link. But Plaintiff provided absolutely no supplementary evidence to substantiate that claim. It did not, for example, provide evidence of the "market analysis" that led to the change, or any further details about the discussions relating to that market analysis. And in light of the above-referenced evidence showing how many different companies compete with Plaintiff, it is difficult to believe that this price change was due solely to Defendant's conduct. In light of all of this, the Court cannot give this accusation any significant weight.

c. Conclusion

In conclusion, Plaintiff has put forward evidence indicating that, in a few instances in 2019-20, it may have been forced to lower the price of its patented software products in order to fend off Defendant's allegedly infringing competition, or may have lost out on business to Defendant because it refused to do so. But those are just a few of thousands of instances in those years where Plaintiff competed with Defendant and/or with other companies for business in the relevant market.[21] (Tr. at 198-99; Defendant's Hearing Presentation, Slide 3); *see also Bayer Intell. Prop. GmbH v. CAP IM Supply, Inc.*, Civil Action No. 17-cv-591-RGA, 2018 WL 1517688, at *11 (D. Del. Mar. 28, 2018) (noting that "the multi-competitor nature of the . . . market," among other factors, suggest alternate reasons for lost sales); (D.I. 82 at 1 ("Out of more than 7,000 opportunities identified [in the Reputation Won/Lost Spreadsheet,] Reputation has identified only 56 opportunities lost to Bird[e]ye, of which only a handful are alleged as

[21] Indeed, as if to underscore that Plaintiff and Defendant rarely compete alone for customers, in at least three of the seven examples of alleged harm pressed by Plaintiff, there were other competitors for the business aside from Defendant. (Gupta Decl. at ¶¶ 24-25; Defendant's Hearing Presentation, Slide 43; PX-81 at BE00004344)

instances of harm.”). And there is no strong evidence suggesting that any unlawful competition from Defendant drove Plaintiff to have to lower price across the marketplace in any coordinated way. (D.I. 59 at 10-11)

In order to sufficiently demonstrate irreparable harm, Plaintiff needs to demonstrate the “likelihood of *substantial* and *immediate* irreparable injury.” *Apple Inc.*, 695 F.3d at 1374 (citations omitted) (emphasis added). Its showing of alleged harm here did not satisfy that test. (Tr. at 212)

3. Adequacy of Money Damages

Defendant’s final argument against irreparable harm is that, to the extent Plaintiff has provided evidence suggesting that it has faced or will face harm from patent infringement, any such harm can be adequately compensated by money damages. (D.I. 59 at 12-13; D.I. 82 at 10; D.I. 112 at 1) “[T]here is no presumption that money damages will be inadequate” in connection with a PI motion; rather “[s]ome evidence and reasoned analysis for that inadequacy should be proffered.” *Nutrition 21*, 930 F2d. at 872 (emphasis removed); *see also Automated Merch. Sys., Inc. v. Crane Co.*, 357 F. App’x 297, 301 (Fed. Cir. 2009) (“The burden is [] on the patentee to demonstrate that its potential losses cannot be compensated by monetary damages.”). The Court agrees that Plaintiff has not provided the requisite evidence here.

In its opening brief, Plaintiff argued that it “stands to lose untold millions as a function of it having to lower prices to match consumer expectations *ad infinitum*, even after Birdeye’s infringement stops” and that this is “[f]ar from being compensable with money damages[.]”[22] (D.I. 49 at 19-20) But as noted above, Plaintiff has not made a sufficient evidentiary showing to

[22] The Court again notes that Plaintiff did not proffer a damages expert to provide analysis on this point.

substantiate that charge. At most, it has shown that Defendant's alleged infringement has had a small impact on its business. The few instances of harm it did link with Defendant's alleged infringement seem as if they could be quantified by money—an amount totaling no more than a few hundred thousand dollars in damages (compared to Plaintiff total revenues of approximately $[redacted] million in 2019 and 2020). (Defendant's Hearing Presentation, Slide 19; D.I. 82 at 10; D.I. 83, ex. 39); *see Symbol Techs., Inc.*, 729 F. Supp. 2d at 664–65 ("In the Court's view, there is evidence that [the plaintiff] suffered, and continues to suffer, some degree of price erosion as a result of [the defendant's] conduct. However, without more, the Court is not persuaded that this evidence supports a finding that [the plaintiff's] price erosion damages are incapable of being quantified, or that [the plaintiff] could not be fully compensated by a monetary award."); *see also Neology, Inc.*, 2012 WL 2308202, at *29-30; *Kone Corp.*, 2011 WL 13137061, at *18; *CNH Am. LLC v. Kinze Mfg., Inc.,* C.A. No. 08-945 (GMS), 2009 WL 10672773, at *2 (D. Del. Nov. 13, 2009).

B. Conclusion

A preliminary injunction is a drastic and extraordinary remedy. On these facts, Plaintiff has not met its burden to show that such a remedy is warranted. This is due to its failure to sufficiently demonstrate irreparable harm for all of the reasons set out above (i.e., its substantial delay in seeking injunctive relief, the lack of substantial harm connected to patent infringement and the reparability of any such harm). That failing alone warrants denial of the Motion.

IV. CONCLUSION

For the foregoing reasons, the Court recommends that Plaintiff'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 18, 2022** for review by the Court. It should be accompanied by a motion for redaction that shows that the presumption of public access to judicial records has been rebutted with respect to the proposed redacted material, by including a factually-detailed explanation as to how that material is the "kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: January 12, 2022

Christopher J. Burke

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE