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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MECOM EQUIPMENT, LLC, a)	
California limited liability)	2:13-CV-01287-GEB-EFB
company,)	
)	
Plaintiff,)	<u>ORDER</u> *
)	
v.)	
)	
HYUNDAI CONSTRUCTION EQUIPMENT)	
AMERICAS, INC. f/k/a HYUNDAI)	
CONSTRUCTION EQUIPMENT USA,)	
INC., an Illinois corporation)	
principally operating in the)	
State of Georgia,)	
)	
Defendant.)	
)	

Plaintiff Mecom Equipment, LLC ("Plaintiff") moves for a preliminary injunction that would enjoin Defendant Hyundai Construction Equipment Americas, Inc. ("Defendant") "from terminating or otherwise modifying the discount pricing structure that [Defendant] has made available to [Plaintiff, which are] described in Exhibit B and Exhibit C to [Plaintiff's] Verified Complaint." (Pl.'s Not. of Mot. & Mot. for Prelim. Inj. ("Pl.'s Mot.") 1:9-11, ECF No. 15.) Defendant opposes the motion.

I. BACKGROUND

"[Plaintiff] sells construction equipment manufactured by [Defendant] both at retail (as a dealer in [Plaintiff]'s own right) and

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 at wholesale (to [Plaintiff]'s sub-dealers). [Plaintiff] is engaged
2 primarily in the retail sale of construction equipment, within the
3 meaning of the California Equipment Dealers Act." (Verified Complaint
4 ("VC") ¶ 27, ECF No. 1.) "[Plaintiff] has operated for many years as a
5 dealer/distributor of [Defendant]'s construction equipment and, in doing
6 so, built up a substantial amount of goodwill in regard to the equipment
7 at issue." (Id. ¶ 28.)

8 "Plaintiff currently purchases equipment from [Defendant]
9 pursuant to a written Master Distribution Agreement (see Exhibit A[,]
10 . . . the 'Agreement'), as modified by a discount agreement executed
11 with [Defendant] in 2010[,], which is effective at least through 2014
12 (see Exhibit B[,], . . . the 'Amendment.'" (Id. ¶ 3.) "The Amendment
13 provides [Plaintiff] with discounts [that] allow [Plaintiff] to purchase
14 Hyundai construction equipment at wholesale prices for subsequent re-
15 sale by [Plaintiff]" so that Plaintiff and Defendant could "penetrat[e]
16 markets in geographic areas where [Defendant] had not previously enjoyed
17 substantial sales of its construction equipment." (Id. ¶¶ 4-5 (citing
18 VC, Ex. B).) "In reliance on the Exhibit B discount structure being in
19 effect at least through 2014 . . . , [Plaintiff] completely modified its
20 business plans to specialize in Hyundai products and to service Hyundai
21 equipment purchased by [Plaintiff]'s customers." (Id. ¶ 9.)

22 "[Defendant] issued written notice to [Plaintiff] dated May
23 22, 2013 that [Defendant] will unilaterally cease to honor the . . .
24 Amendment as of July 1, 2013, even though the discount structure
25 established by the Amendment was, by its terms, to be in effect
26 throughout both 2013 and 2014." (Id. ¶ 12.) In that letter,
27 "[Defendant]'s Sales Manager Kirk Gillette advised [Plaintiff] that
28 . . . [Defendant] would only sell [Plaintiff] construction equipment at

1 'standard dealer purchase discounts . . . based on annual sales
2 volume'-i.e., not at the discounts negotiated in the Exhibit B and
3 Exhibit C Amendments to the underlying Agreement." (Id. ¶ 45.)

4 **II. LEGAL STANDARD**

5 "A preliminary injunction is 'an extraordinary and drastic
6 remedy, one that should not be granted unless the movant, by a clear
7 showing, carries the burden of persuasion.'" Lopez v. Brewer, 680 F.3d
8 1068, 1072 (9th Cir. 2012) (quoting Mazurek v. Armstrong, 520 U.S. 968,
9 972 (1997) (per curiam)). "A plaintiff seeking a preliminary injunction
10 must establish that he is likely to succeed on the merits, that he is
11 likely to suffer irreparable harm in the absence of preliminary relief,
12 that the balance of equities tips in his favor, and that an injunction
13 is in the public interest." Winter v. Natural Res. Def. Council, 555
14 U.S. 7, 20 (2008) (citing Munaf v. Geren, 553 U.S. 674, 689-90 (2008);
15 Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger v.
16 Romero-Barcelo, 456 U.S. 305, 311-12 (1982)).

17 Further, the Ninth Circuit's "'serious questions' approach
18 survives Winter when [it is] applied as part of the four-element Winter
19 test." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135
20 (9th Cir. 2011). In other words, "'serious questions going to the
21 merits' and a balance of hardships that tips sharply towards the
22 plaintiff can support issuance of a preliminary injunction, so long as
23 the plaintiff also shows that there is a likelihood of irreparable
24 injury and that the injunction is in the public interest." Id.

25 **III. DISCUSSION**

26 Plaintiff argues that Defendant did not have the right to
27 "cease to honor the . . . Amendment as of July 1, 2013 ([since] the
28 discount structure established by the Amendment was, by its terms, to be

1 in force at least throughout both 2013 and 2014.” (Pl.’s Mot. 3:5-8
2 (citing VC, Ex. D; VC ¶¶ 12, 45).) Plaintiff contends that Defendant has
3 violated the California Equipment Dealers Act (“CEDA”), which
4 prescribes:

5 Any dealer may bring an action against a
6 supplier in any court of competent
7 jurisdiction for damages sustained by the
8 dealer as a consequence of the supplier’s
9 violation of any provisions of this chapter,
10 together with costs and reasonable attorney’s
11 fees. The dealer may also be granted
injunctive relief against unlawful
12 termination, cancellation, nonrenewal, and
13 change in competitive circumstances. The
14 remedies set forth in this action shall not be
15 deemed exclusive and shall be in addition to
16 any other remedies permitted by law.

17 Cal. Bus. & Prof. Code § 22925. Plaintiff argues that it “now moves for
18 a Preliminary Injunction barring [Defendant] from altering the pre-
19 existing price structure,” which “[Defendant] has agreed to keep . . .
20 in effect pending the hearing of [the] motion for preliminary
21 injunction.” (Pl.’s Mot. 1:13-14, 1:11-13.)

22 **A. Statutory Injunctive Relief**

23 Plaintiff argues that

24 in statutory enforcement cases such as this
25 one, where the moving party has met the
26 ‘probability of success’ prong of the
27 preliminary injunction test, the court
28 presumes the moving party has met the
‘possibility of irreparable injury’ prong
because the passage of the statute is itself
an implied finding by the legislature that
violations will harm the public. Therefore,
further inquiry into irreparable injury is
unnecessary.

29 (Id. 5:19-24 (citing Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 459
30 (9th Cir. 1994)).) Plaintiff further argues that it “need only establish
31 a likelihood of success on the merits to be entitled to an injunction”
32 since “[it] is entitled to statutory injunctive relief to prevent this

1 material change in the competitive circumstances of [Plaintiff]'s
2 distribution agreement." (Id. 6:6-7, 1:9-11.)

3 Defendant counters that Plaintiff's reliance on Miller "is
4 incorrect" since "the Ninth Circuit explicitly overturned Miller and
5 found that 'the preliminary injunction standard articulated by the
6 Supreme Court in Winter . . . applies.'" (Def.'s Opp'n 5:19-23 (quoting
7 Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200
8 AFL-CIO, 611 F.3d 483, 490 (9th Cir. 2010)).) Defendant is correct. The
9 Ninth Circuit states in Small: "Unlike under the Miller standard, we do
10 not presume irreparable harm; rather, applying the Winter standard, we
11 ask whether the failure to issue an injunction 'likely' would cause
12 irreparable harm." Small, 611 F.3d at 494 (citing McDermott ex rel. NLRB
13 v. Ampersand Publ'g, LLC, 593 F3d 950 (9th Cir. 2010)). "Under Winter,
14 plaintiffs must establish that irreparable harm is likely, not just
15 possible, in order to obtain a preliminary injunction." Alliance for the
16 Wild Rockies, 632 F.3d at 1131 (citing Winter, 555 U.S. at 22).

17 **B. Irreparable Harm**

18 Plaintiff contends that "[Defendant]'s plan to discontinue
19 making equipment available to [Plaintiff] pursuant to the Exhibit B
20 discount structure will . . . irreparably harm [Plaintiff] in that
21 [Defendant]'s conduct, if not enjoined by this Court, will destroy the
22 goodwill currently enjoyed by [Plaintiff] in regard to its ongoing sale
23 of Hyundai construction equipment to [Plaintiff]'s sub-dealers." (Id.
24 3:23-26.) Plaintiff also contends that "[Defendant] effectively seeks to
25 strip [Plaintiff] of the goodwill that [it] has built up with its sub-
26 dealers as a Master Distributor." (Id. 4:10-11 (citing VC ¶¶ 17-18).)

27 Defendant rejoins that "to meet its burden, [Plaintiff] must
28 'demonstrate, by the introduction of . . . evidence . . . that the harm

1 is real, imminent and significant, not just speculative or potential.'"
2 (Id. 6:27-7:1 (quoting Volkswagen AG v. Verdier Microbus & Camper, Inc.,
3 No. C 09-00231 JSW, 2009 WL 928130, at *6 (N.D. Cal. Apr. 3, 2009)).)
4 Defendant further argues that "[t]he claimed 'threat [of irreparable
5 harm] must be shown by probative evidence and conclusory affidavits are
6 insufficient.'" (Id. 7:7-8 (quoting Mandrigues v. World Savings, Inc.,
7 No. C 07-4497 JF (RS), 2009 WL 160213, at *3 (N.D. Cal. Jan. 20, 2009)
8 (citation omitted)) (second alteration in original).)

9 "[I]ntangible injuries, such as damage to . . . goodwill[]
10 qualify as irreparable harm." Rent-A-Ctr., Inc. v. Canyon Television &
11 Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 2001). "Although the
12 loss of goodwill and reputation are important considerations in
13 determining the existence of irreparable injury, there must be credible
14 . . . evidence that such damage threatens Plaintiff['s] business with
15 termination." Dotster, Inc. v. Internet Corp. for Assigned Names &
16 Numbers, 296 F. Supp. 2d 1159, 1163-64 (C.D. Cal. 2003) (citing Am.
17 Passage Media Corp. v. Cass Commc'ns, Inc., 750 F.2d 1470, 1473 (9th
18 Cir. 1985); Metromedia Broad. Corp. v. MGM/UA Entm't Co., Inc., 611 F.
19 Supp. 415, 426 (C.D. Cal. 1985)). "Mere financial injury . . . will not
20 constitute irreparable harm if adequate compensatory relief will be
21 available in the course of litigation." Goldie's Bookstore, Inc. v.
22 Superior Court of State of Cal., 739 F.2d 466, 471 (9th Cir. 1984)
23 (citing Sampson v. Murray, 415 U.S. 61, 90 (1974); L.A. Mem'l Coliseum
24 Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980)).
25 Further, "[s]peculative injury does not constitute irreparable injury
26 sufficient to warrant granting a preliminary injunction." Caribbean
27 Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)
28 (citing Goldie's Bookstore, Inc., 739 F.2d at 472)).

1 Plaintiff attaches declarations in support of its position
2 that it will suffer irreparable harm absent an injunction. Bill Zehender
3 ("Zehender"), a managing member of Plaintiff, declares: "Any action by
4 [Defendant] to unilaterally terminate the Exhibit B discount structure
5 will also irreparably harm [Plaintiff] because [Plaintiff] will be
6 deprived of the intangible value of all of [Plaintiff]'s sub-dealer
7 recruitment efforts" and "will, likewise, destroy the goodwill built up
8 by [Plaintiff] over many years of service as a Master Distributor for
9 [Defendant] (e.g., with [Plaintiff]'s multiple sub-dealers)." (Zehender
10 Decl. ¶¶ 19-20, ECF No. 15-3.) Plaintiff also submits declarations from
11 principals at four separate sub-dealers with whom Plaintiff does
12 business, in which each principal declares: "[I]f [sub-dealer] was able
13 to purchase Hyundai-brand equipment from [Plaintiff] only at prices
14 which are higher than the prices charged to Hyundai dealers who make
15 purchases directly from Hyundai, [sub-dealer] would obviously cease
16 buying Hyundai-brand equipment from [Plaintiff]." (Declaration of Mark
17 Lawrence ¶ 4, ECF No. 23-2; Declaration of Brant Ambrose ¶ 4, ECF No.
18 23-3; Declaration of Dick Lindsay ¶ 4, ECF No. 23-4; Declaration of
19 Walter Azevedl ¶ 4, ECF No. 23-5.)

20 These declarations evince that Plaintiff will likely lose
21 business from its sub-dealers, and the associated goodwill of that
22 business, if Defendant is not enjoined. However, Plaintiff avers in its
23 Verified Complaint that "[i]mmediately prior to filing this [action,
24 Plaintiff] filed its Demand for Arbitration with the AAA," and there is
25 no indication from any sub-dealer principal that any sub-dealer would
26 cease doing business with Plaintiff if Plaintiff prevails in the
27 arbitration proceeding. (VC ¶ 23.) Therefore, Plaintiff's argument that
28 it will lose the sub-dealer business on a permanent basis has not been

1 shown to "constitute irreparable injury sufficient to warrant granting
2 a preliminary injunction." Caribbean Marine Servs. Co., Inc., 844 F.2d
3 at 674.

4 Further, Plaintiff alleges that "[it] sells approximately 90%
5 of the equipment purchased from [Defendant] to retail customers." (VC
6 ¶ 27.) Plaintiff also avers in its Verified Complaint that "[it] would
7 be able to continue to make sales of equipment at retail to its own
8 customers." (Pl.'s Reply 20:1-2.) Therefore, at most, Plaintiff stands
9 to lose 10 percent of its business related to Defendant's equipment if
10 Defendant alters its discount structure. However, Plaintiff has provided
11 no "credible . . . evidence that such damage threatens Plaintiff['s]
12 business with termination." Dotster, Inc., 296 F. Supp. 2d at 1163-64.

13 Plaintiff has also failed to provide evidence concerning what
14 percentage of Plaintiff's overall business is involved with the sale of
15 Defendant's equipment to sub-dealers. Defendant submitted evidence
16 showing that "the annual impact of the change from the special discount
17 program under the Addendum to the normal dealer discount program is less
18 than 10% of [Plaintiff]'s total annual sales." (Decl. of Kirk Gillette
19 ("Gillette Decl.") ¶ 18, ECF No. 20-3.) Defendant bases this calculation
20 on the following information: (1) "[i]n the 12 months from July 1, 2012
21 to June 30, 2013, [Plaintiff] purchased 63 pieces of new equipment from
22 [Defendant] at a total cost of approximately \$8.5 million," (Gillette
23 Decl. ¶ 15); (2) "[h]ad the same purchases been made under the normal
24 dealer discount program set forth in [Defendant]'s May 22, 2013 letter
25 to [Plaintiff], [Plaintiff] would have paid [Defendant] approximately
26 \$10 million[, resulting in] an approximate \$1.5 million difference,"
27 (id.); (3) Plaintiff's "Business Plan [for 2013] sets forth
28 [Plaintiff]'s sales from all sources for 2012" with total sales of

1 \$15,907,000. (Id. ¶ 17.) Therefore, the discount pricing difference
2 represents only 9.43 percent of Plaintiff's total sales.

3 Although "[m]ere financial injury . . . will not constitute
4 irreparable harm," Goldie's Bookstore, Inc., 739 F.2d at 471, "[t]he
5 threat of being driven out of business is sufficient to establish
6 irreparable harm." L.A. Mem'l Coliseum Comm'n, 634 F.2d at 1203. "The
7 majority of district courts addressing this issue have concluded that a
8 loss of at least thirty percent of a plaintiff's business can constitute
9 irreparable harm." Phany Poeng v. United States, 167 F. Supp. 2d 1136,
10 1143 (S.D. Cal. 2001) (emphasis added) (collecting cases); see also
11 Blind Doctor Inc. v. Hunter Douglas, Inc., No. C-04-2678 MHP, 2004 WL
12 1976562, at *2 (N.D. Cal. Sept. 7, 2004) (denying motion for preliminary
13 injunction "requiring [defendant] to continue making its products
14 available to [plaintiff] for retail sale" when "statistical evidence
15 [showed] that [defendant's] products accounted for only 37 percent of
16 [plaintiff's] sales"); RasterOps v. Radius, Inc., 861 F. Supp. 1479,
17 1497 (N.D. Cal. 1994) ("[T]he court finds it very difficult to
18 understand how a product group that accounts for a relatively small
19 percentage of the company's sales [(about five to nine percent)] . . .
20 could possibly play such a vital role in [plaintiff's] future."); Dimare
21 Fresh, Inc. v. Sun Pac. Mktg. Coop., Inc., No. CIV-F-06-1265 AWI SMS,
22 2006 WL 2686969, at *3 (E.D. Cal. Sept. 19, 2006) (finding no showing of
23 irreparable injury when plaintiff "ha[d] not stated what percentage of
24 its total revenues (as opposed to percentage of tomato business) would
25 be impacted"); Fin. & Sec. Prods. Ass'n v. Diebold, Inc., No. C 04-04347
26 WHA, 2005 WL 1629813, at *6 (C.D. Cal. July 8, 2005) (finding no
27 irreparable injury when plaintiff's evidence of harm to third parties
28 amounted to only "a small percentage of their overall business").

1 Plaintiff also provides additional averments from Zehender,
2 which also fail to demonstrate irreparable injury. For example, some of
3 his averments demonstrate that damages would provide adequate relief:
4 "If [Defendant] is allowed to alter the discount structure, [Plaintiff]
5 will be forced to buy equipment from [Defendant] at markedly greater
6 prices, such that [Plaintiff] will be much less competitive price-wise."
7 (Zehender Decl. ¶ 16); "The prices at which [Plaintiff] purchases
8 equipment from [Defendant] will rise by an average of approximately
9 14-15% if [Defendant] is unilaterally allowed to abandon the Exhibit B
10 discount schedule bargained for by [Plaintiff]." (id.); "[Plaintiff]
11 will have a dramatically higher carrying cost on any inventory that
12 [Plaintiff] purchases from [Defendant]." (Zehender Supplemental Decl.
13 ¶ 23, ECF No. 23-1); "[Plaintiff] will be forced to liquidate millions
14 of dollars of excess inventory to avoid floor-plan interest charges."
15 (Id. ¶ 14.)

16 Zehender also makes other statements that lack evidentiary
17 support: "[Plaintiff]'s sub-dealers [who cease] mak[ing] wholesale
18 purchases from [Plaintiff] . . . will instead purchase Hyundai equipment
19 directly from Hyundai." (Zehender Decl. ¶ 16); "[Defendant]'s conduct
20 would disrupt the retail distribution of Hyundai construction equipment
21 within the entire geographic area served by [Plaintiff] and
22 [Plaintiff]'s sub-dealers, irreparably harming [Plaintiff]'s image with
23 end users across [Plaintiff]'s geographic territory." (id. ¶ 21); "[T]he
24 contractual discount structure [changes] would put [Plaintiff] virtually
25 out of the market and force [Plaintiff] to completely change [its]
26 business model. . . . [Plaintiff]'s ability to continue as a viable
27 entity is far from certain. In short, the amount of damage this change
28 will have on [Plaintiff] is virtually impossible to calculate."

1 (Zehender Supplemental Decl. ¶ 2); "The legal exposure alone (as a
2 result of our potential violation of the sub-dealer's CEDDA rights, and
3 the ability of those dealers to pursue damages AND attorneys' fees
4 against us) is daunting." (Id. ¶ 24.)

5 These averments are

6 inadmissible conclusions of [Plaintiff's] own
7 executive[] that if [a preliminary injunction does
8 not issue] Plaintiff['s] goodwill and [image] will
9 be damaged due to an anticipated decrease in sales.
10 Such conclusory statements cannot support a finding
11 of irreparable injury for the issuance of a
12 preliminary injunction. Am. Passage Media Corp. [v.
13 Cass Commc'ns, Inc.], 750 F.2d [1470,] 1473 [(9th
14 Cir. 1985)] (declarations of plaintiff's executives
15 detailing the disruptive effect of defendant's
16 exclusive contracts on plaintiff's business could
not support the issuance of a preliminary
injunction because they were "conclusory and
without sufficient support in facts[]"); Goldie's
Bookstore, Inc., [739 F.2d at 472] (reversing
issuance of preliminary injunction where district
court had determined that plaintiff "would lose
goodwill and 'untold' customers" because the
finding was not based on any factual allegations
and was speculative).

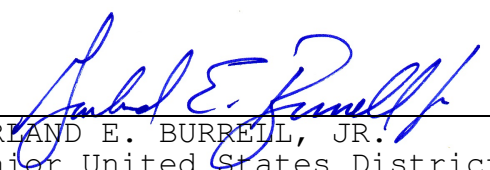
17 Dotster, Inc., 296 F. Supp. 2d at 1164 n.2 (first citation omitted).

18 For the stated reasons, Plaintiff has not demonstrated that it
19 will suffer irreparable harm absent the issuance of a preliminary
20 injunction.

21 IV. CONCLUSION

22 Therefore, Plaintiff's motion for a preliminary injunction is
23 DENIED.

24 Dated: August 8, 2013

25 
26 _____
27 GARLAND E. BURRELL, JR.
28 Senior United States District Judge