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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IKHANA GROUP, LLC,

Plaintiff,

v.

VIKING AIR LIMITED,

Defendant.

Case No. 23-cv-01306-BAS-DEB

**ORDER GRANTING COUNTER-
CLAIMANT VIKING AIR,
LIMITED’S MOTION FOR
PRELIMINARY INJUNCTION
(ECF No. 9)**

And Related Counterclaim

This action is a license and trademark dispute between an aircraft manufacturer and an aircraft services business. Viking Air Limited manufactures the DHC-6 Twin Otter—a time-tested, twin turboprop aircraft that can operate on short runways. Ikhana Group, LLC services and modifies Twin Otters, particularly the older models that were produced in the twentieth century.

Two decades ago, the parties’ predecessors entered into a Data License and Royalty Agreement. They struck a deal where the aircraft manufacturer licensed valuable,

1 confidential data about the Twin Otter for the development of aircraft modifications. In
2 exchange, the services company agreed to pay a royalty when it sold a modification. Plus,
3 once the agreement was signed, the servicer received the right to use the Twin Otter
4 trademark to market the modifications.

5 Much has since changed. Ikhana and Viking stepped into the shoes of their
6 predecessors, and Viking restarted production of the Twin Otter. Then, without Viking's
7 cooperation, Ikhana developed a modification for newer Twin Otters. Ikhana wants to sell
8 this modification without Viking's approval, and the parties find themselves in a logjam.
9 They bring dueling claims invoking contract, trade secret, and unfair competition law.
10 Viking now moves for a preliminary injunction, arguing Ikhana is violating the terms of
11 the parties' agreement and misusing Viking's trade secrets.

12 At oral argument, the Court zeroed in on an injunction that would return the parties
13 to the status quo before litigation. Under this framing, Viking has the right to collect
14 royalties from Ikhana. Ikhana has the right to service and sell various modifications for
15 the Twin Otter. Does Ikhana also, however, have the right to develop and sell a Twin Otter
16 modification in the face of Viking's opposition?

17 The parties' agreement reveals the answer is no. Ikhana did not receive a license to
18 use Viking's data to develop any and all aircraft modifications; rather, the scope of the
19 license is limited to those modifications found in an agreed-upon appendix. The parties
20 contemplated new modifications would be identified and added to their deal, but they
21 agreed to work together to do so. None of the contract's terms give Ikhana the right to
22 forge ahead alone, especially in the face of opposition from its counterparty.

23 Therefore, Viking has shown a likelihood of success on its claim that Ikhana is in
24 breach of the licensing agreement, and the other requirements for injunctive relief are met.
25 A narrow prohibitory injunction is appropriate to return the parties to their positions before
26 litigation, but not unravel their two-decade contractual relationship. Hence, for the
27 following reasons, the Court grants Viking's Motion for a Preliminary Injunction.

28

BACKGROUND

I. The Twin Otter

This dispute centers on the Twin Otter—a lightweight, twin turboprop aircraft with short take-off and landing capabilities. (Barber Decl. ¶¶ 14–15, ECF No. 9-2.) Depending on its configuration, the Twin Otter can carry up to nineteen passengers, transport cargo, and perform other missions like search and rescue. (*Id.* ¶¶ 14, 47.)



De Havilland Canada (“DHC”) originally manufactured the Twin Otter between 1965 and 1988. (Barber Decl. ¶¶ 9–10; Zublin Decl. ¶ 9, ECF No. 28-1.) DHC produced three variants—the DHC-6 Series 100, Series 200, and Series 300. (Barber Decl. ¶ 9.) With production discontinued, these variants of the Twin Otter are known as legacy aircraft—or the Legacy Series. (*Id.* ¶¶ 9–11; Zublin Decl. ¶ 9.)

By the early 2000s, many Twin Otters were still in service, which created a market for modifying these aircraft and enhancing their operational life. (*See* Zublin Decl. ¶¶ 12, 14.) This aftermarket is Ikhana’s bread and butter. (*Id.* ¶ 4.) To understand this business, however, the Court briefly touches on the regulatory backdrop.

II. Design Certifications

The design of the Twin Otter and changes to the aircraft are subject to regulation in the United States and other jurisdictions. Under the Federal Aviation Act, Congress charged the Federal Aviation Administration with regulating aviation safety. 49 U.S.C. § 40101; *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 984 (9th Cir. 2019). “Accordingly,

1 the FAA has prescribed a comprehensive set of rules and regulations, including a multi-
2 step certification process, for aircraft design and production.” *GATX/Airlog Co. v. United*
3 *States*, 286 F.3d 1168, 1171 (9th Cir. 2002). Judge McKeown aptly summarized two
4 aspects of the certification process that are relevant here—the type certificate and the
5 supplemental type certificate:

6 The first stage of this process is type certification, in which airplane
7 manufacturers seek approval of new aircraft designs. Under federal
8 regulations, aircraft manufacturers must analyze and test their new aircraft
9 designs. Based on the resulting engineering and test data, the FAA then
10 determines the airworthiness of those designs. If the manufacturer
11 demonstrates that the design complies with federal regulations, the FAA
12 issues a type certificate. In most instances, the type certificate covers an
13 aircraft model, rather than an individual airplane.

14 Any major change to an FAA-approved design then requires additional
15 certification in the form of a supplemental type certificate, also known as an
16 STC. By issuing an STC, the FAA approves a modification to a previously-
17 certified aircraft design. STCs are obtained through the same process as type
18 certificates: the applicant must provide the FAA with sufficient engineering
19 and test data to demonstrate compliance with federal regulations.

20 *Id.* (citations omitted); *see also Riggs*, 939 F.3d at 984; *Helicopter Transp. Servs., LLC v.*
21 *Sikorsky Aircraft Corp.*, 448 F. Supp. 3d 1127, 1131 (D. Or. 2020).

22 **III. Data License and Royalty Agreement**

23 Returning to the early 2000s and the aging Twin Otter fleet, by then Bombardier had
24 acquired DHC—the Twin Otter’s original manufacturer. (Barber Decl. ¶ 9.) Meanwhile,
25 Ikhana’s predecessor, R.W. Martin, had “developed innovative solutions to enhance the
26 operational life of the [Twin Otter] and certify those solutions with national aviation
27 authorities to obtain Supplemental Type Certificates.” (Data License and Royalty
28 Agreement (“DLA”) Recitals, Barber Decl. ¶ 36, Ex. C, ECF 9-2 at 28 to 99.) One such
solution is the “Twin Otter wing box re-life STC,” which involves replacing “fatigue
critical components with new components.” (DLA App. C.) For this upgrade, the servicer
replaces certain wing panels on the aircraft and installs modifications detailed in service

1 bulletins, such as the “introduction of additional drain holes” and adding “flap hinge arm
2 inspection panels” to the aircraft. (*Id.*)

3 In August 2003, Bombardier and R.W. Martin entered into a Data License and
4 Royalty Agreement to address modifications to the Twin Otter. (Barber Decl. ¶ 36.) The
5 DLA binds Bombardier’s and R.W. Martin’s successors, so the Court refers to Ikhana in
6 lieu of R.W. Martin from here on out. (DLA § 10.1; *see also* Zublin Decl. ¶ 7.)

7 Bargain. After acknowledging Ikhana’s aftermarket development efforts, the parties
8 recited that they desired to “work together in developing, promoting, and selling” STCs for
9 the Twin Otter. (DLA Recitals.) To that end, the parties reached a deal where Bombardier
10 licensed detailed, confidential data about the Twin Otter to Ikhana. (*Id.* §§ 1.3, 2.1.) Ikhana
11 agreed this data is “confidential and proprietary to Bombardier” and “will be used by
12 [Ikhana] solely for the purpose set forth in Article I”—that is, “for the development of the
13 STCs, listed in Appendix A.” (*Id.* § 1.3.)

14 Bombardier also agreed to promote, “in close collaboration with [Ikhana],” the STCs
15 identified in Appendix A. (DLA § 1.1.1.) In addition, Bombardier agreed to sell Twin
16 Otter replacement parts to Ikhana at Bombardier’s “direct vendor’s cost.” (*Id.* § 1.4.1.)
17 Ikhana would then sell STC modifications “directly to the customer,” with the freedom to
18 “establish its own sale prices.” (*Id.* § 1.1.3.) In return for Ikhana securing proprietary data
19 about the Twin Otter, Bombardier’s marketing cooperation, and the right to purchase
20 discounted parts, Ikhana agreed to pay a royalty fee “for each STC sold in Appendix A,”
21 including the “wing box re-life STC” described above that was already available. (*Id.* §
22 3.1.)

23 Appendix A (STCs). When the DLA was executed, Appendix A identified six
24 additional STCs that were in development for the DHC-6 Series 200 and Series 300,
25 including modifications to increase the aircraft’s weight capacity and “re-life” the fuselage.
26 (DLA App. A.) Beyond these modifications, the parties agreed to “continue to work
27 together to identify additional enhancement programs for the Aircraft.” (*Id.* § 1.2.2.3.)
28 They agreed that new enhancements “will be defined and an estimated availability to

1 market date will be established.” (*Id.*) Planned STCs would then “be added to Appendix
2 A” and be “fully incorporated into and governed by” the DLA. (*Id.*)

3 Trademarks. After signing the DLA, Bombardier confirmed Ikhana’s use of specific
4 trade names. (Barber Decl. Ex. D.) Bombardier granted Ikhana permission to use the
5 “DHC-6” and “Twin Otter” trade names “in the promotion and the selling of [STCs] for
6 DHC-6 as long as the [DLA] is in full force.” (*Id.*)¹



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19 *An Ikhana-Modified Twin Otter*

20 **IV. Performance**

21 The parties worked collaboratively for many years to develop and market STCs for
22 the Twin Otter. (Barber Decl. ¶ 43; Zublin Dec. ¶ 7.) During this period, Viking stepped
23 into the shoes of Bombardier when Viking acquired the spare parts and product support
24

25
26 ¹ Viking asks the Court to take judicial notice of the U.S. Patent and Trademark Office’s
27 registration and acceptance of the Twin Otter trademark. (ECF No. 9-3; *see also* Barber Decl. ¶ 29, Exs.
28 A, B.) The Court grants the request. *See* Fed. R. Evid. 201(b); *see also, e.g., Autodesk, Inc. v. Dassault*
Systemes SolidWorks Corp., No. C08-04397 WHA, 2008 WL 6742224, at *2 (N.D. Cal. Dec. 18, 2008)
(taking judicial notice of similar materials).

1 business for the Legacy Series in 2005 and then later acquired the type certificates for the
2 aircraft in 2006. (Barber Decl. ¶¶ 9–10; Zublin Decl. ¶ 10.)

3 The Series 400. Viking’s plans for the Twin Otter went beyond selling spare parts
4 and supporting the Legacy Series. In 2007, Viking, at a cost of tens of millions of dollars,
5 started developing a fourth generation Twin Otter with modernized avionics and more
6 powerful engines. (Barber Decl. ¶ 16.) In 2010, Viking launched the DHC-6 Series 400,
7 and Viking has since produced more than one hundred and fifty Series 400 aircraft. (*Id.* ¶
8 20.)

9 Given its recent production, the Series 400 does not have the same need for “life-
10 extending modifications” as the Legacy Series. (Barber Decl. ¶ 45.) In the same vein,
11 Viking argues the purpose of the DLA is to support and upgrade the Legacy Series—not a
12 newer aircraft that did not exist when the DLA was formed. (Mot. 4:27–5:3; Barber Decl.
13 ¶ 40.) Viking, therefore, states it “needed to ensure that modifications to the 400 Series
14 Aircraft were, among other things, consistent with the 400 Series Aircraft’s branding and
15 in furtherance of the business case for developing it.” (*Id.* ¶ 45.) Thus, although the parties
16 explored modifications to the 400 Series, Viking avers that “the parties typically
17 documented their agreements as to modifications for the 400 Series Aircraft in separate
18 contracts or supplements to the DLA that reflected the unique considerations applicable to
19 the 400 Series Aircraft.” (*Id.* ¶ 46.)

20 Disputed STC. Viking further contends that in 2015, consistent with their prior
21 agreements, Viking and Ikhana “engaged in negotiations to develop a modification that
22 would increase to 14,000 pounds the maximum take-off weight (‘MTOW’) for the 400
23 Series Aircraft in commuter operations.” (Barber Decl. ¶ 52.) The parties prepared a draft
24 statement of work dated May 28, 2015, and memorialized their negotiations in a 2015
25 Discussion Paper. (*Id.* ¶ 53; Ex. G.) Ultimately, however, the parties were unable to reach
26 agreement on the STC concerning increasing the take-off weight of the 400 Series. (*Id.* ¶
27 54.)

1 Viking claims Ikhana breached the DLA when Ikhana later restarted development
2 of the modification to the 400 Series without disclosing the effort to Viking. (Barber Decl.
3 ¶ 58.) The Court will refer to this proposed STC for the 400 Series aircraft that increases
4 the aircraft’s maximum take-off weight for commuter operations as the Disputed STC.
5 Viking learned about the Disputed STC when a press release reported the modification
6 “will transform the DHC-6-400 series by combining a significant increase in payload
7 capabilities with the latest . . . avionics systems.” (*Id.* ¶ 59, Ex. H.) Viking submits it never
8 granted Ikhana permission to develop the Disputed STC under the DLA, and therefore also
9 never granted Ikhana permission to use any of its trademarks in connection with the
10 modification, let alone provide Viking’s proprietary data to a third party to create a newer
11 avionics system. (*Id.* ¶ 60.)

12 Ikhana, on the other hand, states its development of the Disputed STC is consistent
13 with the parties’ history. Ikhana submits that the parties did not regularly update Appendix
14 A to the DLA to formally add new STCs. (Zublin Decl. ¶ 17.) Instead, Ikhana would start
15 working on a new STC for the Twin Otter, notify Viking once the STC was issued by the
16 FAA, and then commence paying royalties upon sales of the STC. (*Id.*) Ikhana also shows
17 that in 2018, Viking conducted an audit of Ikhana’s royalty payments—a right afforded to
18 Viking under the DLA. (*Id.* ¶ 22.) In response to the audit, Ikhana produced a schedule
19 that listed twenty-five STCs that Ikhana owns related to the Twin Otter. (*Id.* ¶ 23, Ex. D.)
20 Ikhana claims Viking identified no discrepancies with the listed STCs or the way in which
21 Ikhana calculated royalties. Nor did Viking dispute that any of the STCs were covered by
22 the DLA. (*Id.* ¶ 25.)

23 Classic 300-G. During this same period, Viking was investing its resources into
24 developing a fifth generation Twin Otter—the Classic 300-G—that has an increased take-
25 off weight capacity “through the use of newer, lighter materials and system components.”
26 (Barber Decl. ¶¶ 63–64.) The Classic 300-G “is, unsurprisingly, initially more expensive
27 to purchase than a modification to an existing aircraft; its list price will be several million
28 dollars.” (*Id.* ¶ 67.) Thus, Viking contends sales of the Disputed STC by Ikhana “are

1 highly likely to depress sales of the Classic 300-G,” despite that Viking believes the Classic
2 300-G takes an approach to increasing take-off weight that is superior to the Disputed STC.
3 (*Id.* ¶¶ 62, 64–69.) Moreover, Viking claims it faces irreparable harm to its “reputation
4 and customer goodwill, due to the association of the Viking 400 Series Aircraft in
5 passenger operations with an out-of-date modification that increases operating costs and
6 eliminates one of the features for which the Twin Otter is best known: short take-off and
7 landing capabilities.” (*Id.* ¶ 100.) Viking states it therefore met with Ikhana and issued a
8 notice of default under the DLA based on Ikhana using Viking’s proprietary data for the
9 unauthorized STC. (*Id.* ¶¶ 73–74, Ex. I.)

10 **V. Litigation**

11 In July 2023, Ikhana filed this action against Viking. (Compl., ECF No. 1.) Ikhana’s
12 operative complaint brings claims for declaratory judgment, breach of the implied covenant
13 of good faith and fair dealing, unfair competition, and violation of the Sherman Act. (First
14 Am. Compl. ¶¶ 59–78, ECF No. 25.) On August 25, 2023, Viking counterclaimed against
15 Ikhana and its parent company, Aevex Aerospace, LLC.² (Counterclaim, ECF No. 4-1.)
16 Viking alleges Ikhana breached the DLA, misappropriated trade secrets in violation of both
17 the Defend Trade Secrets Act and California’s Uniform Trade Secrets Act, and violated
18 federal trademark law. (*Id.* ¶¶ 95–136.) The same day, Viking moved for a preliminary
19 injunction. (Mot., ECF No. 9.) Ikhana opposes. (Opp’n, ECF No. 28.) The Court heard
20 argument on the motion. (ECF No. 31; *see also* Tr., ECF No. 32.)

21 **LEGAL STANDARD**

22 A court may issue preliminary injunctive relief “to preserve the status quo between
23 the parties pending a resolution of a case on the merits,” *McCormack v. Hiedeman*, 694
24 F.3d 1004, 1019 (9th Cir. 2012) (citing *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d
25 1091, 1094 (9th Cir. 2010). “The Supreme Court has emphasized that preliminary
26 injunctions are an ‘extraordinary remedy never awarded as of right.’”

27
28 ² For simplicity, the Court refers to the related counter-defendant entities as “Ikhana” throughout this order.

1 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (quoting *Winter v.*
2 *Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

3 A movant seeking a preliminary injunction “must satisfy *Winter*’s four-factor test.”
4 *Garcia*, 786 F.3d at 740 (citing *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012));
5 accord *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 944
6 (9th Cir. 2013). Under this test, a movant must establish: (1) it is likely to succeed on the
7 merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the
8 balance of equities tips in the movant’s favor; and (4) a preliminary injunction is in the
9 public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing
10 *Winter*, 555 U.S. at 20).

11 ANALYSIS

12 I. Type of Injunction

13 At the threshold, Ikhana argues Viking is seeking a mandatory injunction, instead of
14 a prohibitory injunction. (Opp’n 9:8–24, n.7; see also Tr. 24:16–26:24.) “A prohibitory
15 injunction prohibits a party from taking action and ‘preserve[s] the status quo pending a
16 determination of the action on the merits.’” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma*
17 *GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009) (quoting *Chalk v. U.S. Dist. Court*, 840
18 F.2d 701, 704 (9th Cir. 1988)). The status quo refers to the last uncontested status that
19 preceded the controversy. *N.D. ex rel. Parents v. Haw. Dep’t of Educ.*, 600 F.3d 1104,
20 1112 n.6 (9th Cir. 2010). Put differently, the status quo is the “legally relevant relationship
21 between the parties before the controversy arose.” *Ariz. Dream Act Coal. v. Brewer*, 757
22 F.3d 1053, 1060 (9th Cir. 2014) (emphasis omitted).

23 By comparison, a mandatory injunction “orders a responsible party to ‘take action.’”
24 *Garcia*, 786 F.3d at 740 (quoting *Marlyn*, 571 F.3d at 879). This second type of injunction
25 “goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly
26 disfavored.” *Id.* (alteration in original) (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313,
27 1320 (9th Cir. 1994)). Hence, the standard for a mandatory injunction is “doubly
28

1 demanding” and requires showing the law and facts clearly favor the movant’s position.
2 *Id.*

3 Ikhana contends Viking’s proposed injunction “would go much further than
4 prohibiting just the STC application currently under consideration by the FAA.” (Opp’n
5 2:15–16.) Indeed, if the Court prevents “Ikhana from using trademarks and data that it has
6 license to use, the injunction would effectively halt Ikhana from marketing any of its STCs,
7 even those it has held and paid royalties on for decades.” (*Id.* 2:17–19.)

8 This concern is well-taken. The relevant relationship that predates this controversy
9 is the parties’ DLA. Before this dispute arose, Ikhana had the right to market and sell its
10 existing portfolio of STCs under the DLA. Ikhana likewise had the right to hold and use
11 Viking’s data as part of its STC business. In addition, because the DLA remained in effect,
12 Ikhana had the right to use certain trade names to market the existing STCs. Viking, on
13 the other hand, had the right to collect royalty payments from Ikhana. *See GoTo.com, Inc.*
14 *v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (explaining “[t]he status quo ante
15 litem refers not simply to any situation before the filing of a lawsuit, but instead to ‘the last
16 uncontested status which preceded the pending controversy’” (quoting *Tanner Motor*
17 *Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963))).

18 With this framing in mind, the Court stated at oral argument that it was considering
19 an injunction that only stops Ikhana from proceeding with the Disputed STC. (Tr. 3:1–10.)
20 The Court could do so by commanding Ikhana to withdraw its STC application with the
21 FAA. Viking, however, suggested that enjoining Ikhana from marketing and selling the
22 Disputed STC would have the same effect. (*Id.* 4:12–16.) The Court agrees. And this
23 narrow injunction would undoubtedly be prohibitory. If the Court stops Ikhana from
24 marketing and selling the Disputed STC, but does not unwind the parties’ twenty-year
25 contract, then Court will be returning the parties to their last uncontested status before this
26 controversy arose. *See Marlyn*, 571 F.3d at 879; *GoTo.com*, 202 F.3d at 1210. Hence, to
27 determine whether this narrow injunction should issue, the Court applies the traditional
28 *Winter* test for a prohibitory injunction below. *See Garcia*, 786 F.3d at 740.

1 **II. Success on the Merits**

2 Viking ties its success on the merits to its breach of contract, trade secret
3 misappropriation, trademark infringement, and unfair competition claims. (Mot. 10:8
4 21:7.) Because the breach of contract and trade secret claims pave the way for injunctive
5 relief, the Court limits its discussion to these claims.

6 **A. Breach of Contract**

7 The parties agree New York law governs the DLA. (Mot. 10 n.5; Opp’n 10 n.8; *see*
8 *also* DLA § 15.1.) Under New York law, a breach of contract claim has four elements:
9 “the existence of a contract, the plaintiff’s performance, the defendant’s breach, and
10 damages resulting from the breach.” *LMEG Wireless, LLC v. Farro*, 140 N.Y.S.3d 593,
11 596 (N.Y. App. Div. 2021). This dispute centers on the breach element, which requires
12 the Court to interpret the agreement.

13 The DLA, “like any other agreement,” is “subject to basic contract interpretation
14 principles.” *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013). “The
15 fundamental, neutral precept of contract interpretation is that agreements are construed in
16 accord with the parties’ intent’ and ‘[t]he best evidence of what parties to a written
17 agreement intend is what they say in their writing.” *Donohue v. Cuomo*, 38 N.Y.3d 1, 12
18 (2022) (quoting *Greenfield v. Philles Recs., Inc.*, 98 N.Y.2d 562, 569 (2002)). “As such,
19 ‘a written agreement that is complete, clear and unambiguous on its face must be enforced
20 according to the plain meaning of its terms.’” *Schron*, 20 N.Y.3d at 436 (quoting
21 *Greenfield*, 98 N.Y.2d at 569). “Whether a contractual term is ambiguous must be
22 determined by looking within the four corners of the document and not to extrinsic
23 sources.” *Triple Diamond Cafe, Inc. v. Those Certain Underwriters at Lloyd’s London*,
24 124 A.D.3d 763, 765 (N.Y. App. Div. 2015).

25 Moreover, merger clauses under New York Law “are not mere boilerplate.” *Torres*
26 *v. D’Alesso*, 80 A.D.3d 46, 53 (N.Y. App. Div. 2010) (emphasis omitted). A merger clause
27 establishes the parties’ intent that the contract “is to be considered a completely integrated
28 writing,” which “precludes extrinsic proof to add to or vary its terms.” *Primex Int’l Corp.*

1 *v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 600 (1997); *see also Schron v. Grunstein*, 32
2 Misc. 3d 231, 236 (N.Y. Sup. Ct. 2011) (“For this reason, courts dealing with agreements
3 containing merger clauses rarely admit extrinsic evidence to vary their terms.”).

4 Viking argues Ikhana breached the DLA by developing the Disputed STC because
5 “Ikhana never sought Viking’s consent and Viking never gave it.” (Mot. 11:5–6.) This
6 interpretation finds support in the plain meaning of the DLA’s terms. As mentioned, the
7 DLA grants Ikhana a license to use Viking’s confidential aircraft data in certain
8 circumstances:

9 [Viking] agrees to grant the right to [Ikhana] (hereinafter referred as
10 “License”), on a[n] exclusive and non-transferable basis and in accordance
11 with the terms and conditions set forth herein, to . . . use, copy and create
12 derivatives of the Aircraft Data (as later defined in Article 2) for the
13 development of the STCs, listed in Appendix A, and to ensure initial and
14 continuing conformity with the FAA, TC and other CAA. The Data shall be
15 used by [Ikhana] solely in connection with the purposes of this Agreement.

14 (DLA § 1.3.)

15 As seen, the scope of the license granted to Ikhana is not open ended; it is
16 circumscribed to using the data to develop those STCs “listed in Appendix A.” (*Id.*; *see*
17 *also id.* § 4.1 (providing Ikhana agrees the data will be used “solely for the purpose set
18 forth in Article I” and “will not be disclosed or transferred to any third party, except to
19 [aviation regulators,] without [Viking’s] prior written consent”). The parties identify
20 several STCs on Appendix A, but the Disputed STC is not one of them. (*See id.* App. A.)
21 And although the parties contemplated new STCs would be developed and subject to the
22 DLA’s terms, they agreed to jointly do so:

23 The Parties shall continue to work together to identify additional enhancement
24 programs for the Aircraft. Each program will be defined and an estimated
25 availability to market date will be established. This information will be added
26 to Appendix A, and will be fully incorporated into and governed by this
27 Agreement.

27 (*Id.* § 1.2.2.3.)

1 These terms are consistent with the parties’ recitals, which expressed their “desire
2 to work together in developing, promoting and selling Aircraft specific [STCs].” (DLA 1.)
3 *See Anonymous v. Anonymous*, 198 A.D.3d 526, 526 (N.Y. App. Div. 2021); *see also Est.*
4 *of Hatch by Ruzow v. Nyco Mins. Inc.*, 245 A.D.2d 746, 748 (N.Y. App. Div. 1997) (noting
5 “while a recital is not strictly part of a contract, it may have a material bearing on the
6 construction of the contract” (citing *Frenchman & Sweet, Inc. v. Philco Disc. Corp.*, 21
7 A.D.2d 180, 182 (N.Y. App. Div. 1964))). The parties also agreed the DLA “constitutes
8 the entire and only agreement between the Parties relating to the subject matter hereof, and
9 all prior negotiations, representations, agreements and understandings are superseded
10 hereby.” (*Id.* § 19.1.) Finally, they confirmed the DLA “shall not be amended or modified
11 except in writing signed by the authorized representatives of the parties hereto.” (*Id.* §
12 18.4.) “No course of dealing or usage of trade by or between the parties shall be deemed
13 to effect any such amendment or modification.” (*Id.*)

14 When these terms are read together, the Court draws two conclusions. First, the
15 DLA’s merger clause establishes the contract is fully integrated. *Cornhusker Farms, Inc.*
16 *v. Hunts Point Co-op. Mkt., Inc.*, 2 A.D.3d 201, 203 (N.Y. App. Div. 2003). Second, the
17 plain meaning of the DLA’s terms supports Viking’s interpretation that Ikhana’s license
18 does not include the right to develop any STC, especially one that is opposed by its
19 counterparty, Viking. To conclude otherwise would require the Court to ignore three parts
20 of the agreement: (1) the limiting language in the license grant, (2) the clause providing the
21 parties will “work together” to identify new STCs, and (3) the requirement that new STCs
22 be identified in Appendix A with a description and market availability date. (*See* DLA §§
23 1.2.2.3, 1.3.) *See Corhill Corp. v. S. D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961) (“It is a
24 cardinal rule of construction that a court should not ‘adopt an interpretation’ which will
25 operate to leave a ‘provision of a contract without force and effect.’”).

26 Therefore, if this interpretation prevails, Viking has shown a likelihood of success
27 on its claim that Ikhana is in breach of the DLA by developing and marketing the Disputed
28 STC. The Court turns to Ikhana’s three counterarguments.

1 Lack of Consent Provision. At oral argument, Ikhana argued Viking’s interpretation
2 should not control because there is no express consent provision in the DLA that gives
3 Viking the right to approve new STCs. (Tr. 19:14–20:9; 31:7–31:19.) The Court is
4 unpersuaded for two reasons. First, this argument is not developed in Ikhana’s opposition.
5 The brief does not mention the word consent. Rather, the opposition argues the course of
6 performance shows the DLA should be interpreted in Ikhana’s favor. (Opp’n 10:6–13:28.)
7 Second, as mentioned, the scope of Ikhana’s license is limited. Had the DLA granted
8 Ikhana a license to develop and sell any STCs—not just those ones listed in an agreed-
9 upon appendix—then the lack of an express consent provision would be compelling. The
10 Court, though, is presented with a fully integrated writing that provides for a license limited
11 in scope and states that the parties will work together to identify new STCs and list them
12 in an attached appendix. Consequently, Ikhana’s first counterargument is unpersuasive.
13 *See Donohue*, 38 N.Y.3d at 12 (explaining that what the contracting parties say in their
14 writing is the “best evidence” of what they intend).

15 Course of Performance – Ambiguity. Ikhana argues the parties’ course of
16 performance shows they did not enforce the requirement that new STCs be listed on
17 Appendix A. (Opp’n 10:6–13:8.) There are two ways this course of performance evidence
18 could be used under New York law. First, where a writing is ambiguous, course of
19 performance can be used to resolve the ambiguity. *E.g., Alternatives Fed. Credit Union v.*
20 *Olbios, LLC*, 14 A.D.3d 779, 781 (N.Y. App. Div. 2005). “Only when a contract is
21 ambiguous can the interpretation placed upon it by the parties, as shown by their conduct,
22 be considered in determining their intent, and even then, the parties’ practices are ‘merely
23 an interpretive tool and cannot be used to create a contractual right independent of some
24 express source in the underlying agreement.’” *Adamo v. City of Albany*, 156 A.D.3d 1017,
25 1018 (N.Y. App. Div. 2017) (alteration omitted) (quoting *Karol v. Polsinello*, 127 A.D.3d
26 1401, 1404 (N.Y. App. Div. 2015)).

27 Ikhana’s course of performance argument is unpersuasive because it short-circuits
28 the analysis under New York law. Although Ikhana argues the parties’ course of conduct

1 unambiguously supports its interpretation of the DLA, Ikhana does not identify which
2 portion of the contract is ambiguous. (See Opp’n 10:7–11:4.) The Court need go no
3 further. “[O]nly where an ambiguity is present in a contract may the subsequent conduct
4 of the parties be used to indicate their intent.” *Est. of Hatch by Ruzow v. Nyco Mins. Inc.*,
5 245 A.D.2d 746, 749 (N.Y. App. Div. 1997). Indeed, the first case Ikhana relies on for its
6 course of performance argument applies this same rule. *See Fed. Ins. Co. v. Ams. Ins. Co.*,
7 258 A.D. 2d 39, 44 (N.Y. App. Div. 1999) (noting “[w]here, as here, there are internal
8 inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to
9 determine the parties’ intent”). (See also Opp’n 10:12–15 (relying on *Fed. Ins. Co.*.)
10 Hence, because Ikhana does not point the Court to an ambiguity, the Court will not consider
11 course of performance to interpret the fully integrated DLA.

12 Course of Performance – Modification. Ikhana also argues the parties modified the
13 DLA through their course of performance, which is distinguishable from the interpretation
14 argument resolved above. (Opp’n 12:20–13:8.) “[A]ny written agreement, even one which
15 provides that it cannot be modified except by a writing signed by the parties, can be
16 effectively modified by a course of actual performance.” *Rosen Tr. v. Rosen*, 53 A.D.2d
17 342, 352 (N.Y. App. Div. 1976) (citing *All-Year Golf, Inc. v. Prod. Invs. Corp.*, 34 A.D.2d
18 246 (N.Y. App. Div. 1970)). That said, parties may limit the effect of conduct that is
19 inconsistent with the writing’s terms by including a no-waiver provision. *E.g.*, *Whitecap*
20 *(U.S.) Fund I, LP v. Siemens First Cap. Com. Fin. LLC*, 121 A.D.3d 584, 593 (N.Y. App.
21 Div. 2014) (relying on no-waiver clause); *BDCM Opportunity Fund II, LP v. Yucaipa Am.*
22 *All. Fund I, LP*, 112 A.D.3d 509, 511 (N.Y. App. Div. 2013) (same); *Town of Hempstead*
23 *v. Inc. Vill. of Freeport*, 15 A.D.3d 567, 569 (N.Y. App. Div. 2005) (same).

24 The DLA contains such a no-waiver provision. Section 18.2 provides: “Failure at
25 any time [by] a Party to enforce any provision of this Agreement shall neither constitute a
26 waiver of such provision nor prejudice its right to enforce such provision at any subsequent
27 time.” (DLA § 18.2.) Meaning, even if Viking repeatedly failed to enforce the requirement
28 that new STCs be listed in Appendix A through the parties’ cooperation, Ikhana agreed

1 that this failure does not prevent Viking from enforcing the requirement now.
2 Consequently, Ikhana’s reliance on course of performance evidence faces an uphill battle.
3 *See, e.g., Park Irmat Drug Corp. v. Optumrx, Inc.*, 152 F. Supp. 3d 127, 137 (S.D.N.Y.
4 2016) (refusing to “wade into [a] factual dispute” concerning conduct under an agreement
5 because the agreement contained a no-waiver clause, and such clauses are enforceable
6 under New York law).

7 Further, although a no-waiver clause itself may be waived, “such a waiver ‘will not
8 be lightly presumed.’” *Todd Eng. Enters. LLC v. Hudson Home Grp., LLC*, 206 A.D.3d
9 585, 587 (N.Y. App. Div. 2022) (quoting *Parlux Fragrances, LLC v. S. Carter Enters.,*
10 *LLC*, 204 A.D.3d 72, 87 (N.Y. App. Div. 2022)); *cf. Shionogi Inc. v. Andrx Labs, LLC*, 187
11 A.D.3d 422 (N.Y. App. Div. 2020) (reasoning in a licensing dispute that even if course of
12 performance evidence could be considered, the party could not overcome one of the
13 agreement’s other clauses). Regardless, Ikhana does not address the no-waiver clause.
14 And on this record, the Court is unconvinced that any course of performance prevents
15 Viking from enforcing the DLA’s terms, including the contract’s no-waiver clause.

16 In sum, the DLA’s terms support Viking’s interpretation, and Ikhana likely is in
17 breach of the contract under this interpretation. Ikhana neither identifies an ambiguity in
18 the DLA nor shows that course of performance evidence should trump the integrated
19 DLA’s terms. The Court therefore finds Viking has shown a likelihood of success on its
20 breach of contract claim.

21 **B. Trade Secret Misappropriation**

22 Viking brings claims for violation of the Defend Trade Secrets Act (“DTSA”) and
23 California’s Uniform Trade Secrets Act. The Court need only address the DTSA here. “To
24 succeed on a claim for misappropriation of trade secrets under the DTSA, a plaintiff must
25 prove: (1) that the plaintiff possessed a trade secret, (2) that the defendant misappropriated
26 the trade secret; and (3) that the misappropriation caused or threatened damage to the
27 plaintiff.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657–58 (9th Cir.
28 2020) (citing 18 U.S.C. § 1839(5)).

1 The DTSA defines a trade secret to include “scientific, technical, . . . or engineering
2 information, including patterns, plans, . . . [and] designs.” 18 U.S.C. § 1839(3). The
3 information must “derive[] independent economic value, actual or potential, from not being
4 generally known to, and not being readily ascertainable through proper means by, another
5 person who can obtain economic value from the disclosure or use of the information.” *Id.*
6 Hence, “the definition of trade secret consists of three elements: (1) information, (2) that is
7 valuable because it is unknown to others, and (3) that the owner has attempted to keep
8 secret.” *InteliClear*, 978 F.3d at 657.

9 Viking argues Ikhana is misappropriating its valuable information—the confidential
10 aircraft data—by using the data outside the scope permitted by the DLA. (Mot. 21:10–24.)
11 Viking contends Ikhana is welcome to develop its “own technologies and compete” against
12 Viking, but what Ikhana cannot do is “take [Viking’s] trade secrets” and then use them
13 against Viking despite the limitations in the parties’ contract that allowed Ikhana to possess
14 the data. (Tr. 14:11–15.)

15 As mentioned above, Viking licensed a trove of confidential data about the Twin
16 Otter to Ikhana. (DLA § 1.3.1, 2.1.) Ikhana agreed to use this data “solely in the connection
17 with the purposes of [the DLA].” (*Id.* § 1.3.1.) Appendix E to the DLA identifies the data
18 by listing numerous schematics—assembly drawings—for the Twin Otter, including for
19 the aircraft’s wings and certain internal structures. (*Id.* App. E.) Viking attests to the
20 economic value of this data and the company’s efforts to keep it secret. (Barber Decl. ¶¶
21 21–27.) “[I]t is well settled that detailed manufacturing drawings and tolerance data are
22 prima facie trade secrets.” *A. H. Emery Co. v. Marcan Prod. Corp.*, 389 F.2d 11, 16 (2d
23 Cir. 1968); *see also, e.g., Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d
24 1169, 1176, 1184 (W.D. Wash. 2019) (finding trade secret claim plausible where former
25 employee misappropriated aircraft manufacturer’s information concerning design and
26 certification of aircraft); *John Bean Techs. Corp. v. B GSE Grp., LLC*, 480 F. Supp. 3d
27 1274, 1296–1302 (D. Utah 2020) (finding schematics manual for air conditioning
28 equipment in military aircraft met definition of trade secret under the DTSA and state

1 uniform act). Viking thus shows its confidential aircraft data is entitled to trade secret
2 protection. In addition, for the reasons described above, Viking demonstrates Ikhana lacks
3 the contractual right to use the data in connection with the Disputed STC. Therefore,
4 Viking shows a likelihood of success on its DTSA claim.

5 Ikhana advances two counterattacks. First, Ikhana argues there is no trade secret
6 liability because Ikhana is not in breach of the DLA. (Opp'n 14:7–23.) This argument,
7 however, is dispelled by the Court's analysis on the contract claim above.

8 Second, Ikhana argues Viking does not adequately define its trade secrets. (Opp'n
9 14:24–16:24.) Ikhana contends Viking's descriptions of its trade secrets are “too broad
10 and vague for purposes of establishing the first element of a trade secret claim.” (*Id.* 15:8–
11 16:24.) The trade secret proponent generally must “describe the subject matter of the trade
12 secret with sufficient particularity to separate it from matters of general knowledge in the
13 trade or of special persons who are skilled in the trade, and to permit the defendant to
14 ascertain at least the boundaries within which the secret lies.” *E.g., Alta Devices, Inc. v.*
15 *LG Elecs., Inc.*, 343 F. Supp. 3d 868, 881 (N.D. Cal. 2018). Viking, however, satisfies this
16 standard. The DLA includes an appendix that identifies the Twin Otter schematics at issue,
17 and Viking's declarant also describes the aircraft data it seeks to protect. (DLA App. E;
18 *see also* Barber Decl. ¶ 22.)

19 Further, the Court finds persuasive Judge Koh's decision in *Alta Devices, Inc. v. LG*
20 *Electronics, Inc.*, 343 F. Supp. 3d at 881. There, Judge Koh rejected LG's argument that
21 Alta failed to identify its trade secrets with sufficient particularity where the secrets were
22 provided to LG under a non-disclosure agreement. *Id.* at 880–84. Judge Koh reasoned that
23 “because Alta's claims are based on the Confidential Information exchanged pursuant to
24 the 2011 NDA, [LG] can hardly claim it is unable to determine what trade secrets Alta gave
25 [LG] in 2011 and 2012.” *Id.* at 881 (quotation marks omitted). Similarly, here, Ikhana is
26 a party to the contract that led to the exchange of the trade secret information. Although
27 Ikhana succeeded its predecessor, Ikhana's president and declarant has “held a senior
28 leadership position with Ikhana or its predecessor, R.W. Martin, Inc., since 1987.” (Zublin

1 Decl. ¶ 1.) Ikhana “can hardly claim it is unable to determine what trade secrets” are at
2 issue. *See Alta Devices*, 343 F. Supp. 3d at 881. Ikhana’s second argument therefore does
3 not withstand scrutiny.

4 Simply put, Viking shows a likelihood of success on its claim under the DTSA based
5 on Ikhana using its proprietary aircraft data outside the scope of the DLA.

6 **III. Irreparable Harm**

7 To obtain preliminary relief, Viking must demonstrate that irreparable harm is likely
8 in the absence of an injunction. *Winter*, 555 U.S. at 20, 22–23. “Irreparable harm is
9 traditionally defined as harm for which there is no adequate legal remedy, such as an award
10 of damages.” *Brewer*, 757 F.3d at 1068 (citing *Rent-A-Ctr., Inc. v. Canyon Television &*
11 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). Moreover, “[a] preliminary
12 injunction may only be granted when the moving party has demonstrated a significant
13 threat of irreparable injury, irrespective of the magnitude of the injury.” *Simula, Inc. v.*
14 *Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999).

15 Viking identifies four grounds for irreparable harm. (Mot. 22:10–24.) The Court
16 addresses two of them here. First, Viking contends it will suffer irreparable harm because
17 Ikhana wrongly used its trade secrets to develop the Disputed STC and plans to continue
18 to take advantage of Viking’s information by selling the STC. (*Id.* 22:10–23.) Second,
19 Viking argues it will lose prospective sales of its aircraft and suffer harm to its reputation
20 and goodwill. (*Id.* 22:15–24; *see also* Barber Decl. ¶¶ 98–100.)

21 If misappropriated trade secrets are being used for commercial advantage, then this
22 showing supports a finding of irreparable harm. *E.g., Cutera, Inc. v. Lutronic Aesthetics,*
23 *Inc.*, 444 F. Supp. 3d 1198, 1209 (E.D. Cal. 2020); *Waymo LLC v. Uber Techs., Inc.*, No.
24 C 17-00939 WHA, 2017 WL 2123560, at *11 (N.D. Cal. May 15, 2017); *Brocade*
25 *Commc’ns Sys., Inc. v. A10 Networks, Inc.*, No. C 10-3428 PSG, 2013 WL 890126, at *9
26 (N.D. Cal. Jan. 23, 2013). Further, “[e]vidence of threatened loss of prospective customers
27 or goodwill certainly supports a finding of the possibility of irreparable harm.” *Stuhlberg*
28 *Int’l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001); *see*

1 *also, e.g., Synopsys, Inc. v. InnoGrit, Corp.*, No. 19-CV-02082-LHK, 2019 WL 2617091,
2 at *4 (N.D. Cal. June 26, 2019) (reasoning “[a]mple case law supports” the argument “that
3 loss of market share and lost profits” can support a finding of irreparable harm”). Finally,
4 the Court notes some decisions presume a finding of irreparable harm in the trade secret
5 context, but other decisions question the legitimacy of this presumption. *E.g., Comet*
6 *Techs. United States of Am. Inc. v. Beuerman*, No. 18-CV-01441-LHK, 2018 WL 1990226,
7 at *5 (N.D. Cal. Mar. 15, 2018) (collecting cases); *but see Cutera*, 444 F. Supp. 3d at 1208
8 (noting other district courts have declined to rely on this presumption in light of more recent
9 Ninth Circuit cases).

10 The Court finds Viking meets its burden of demonstrating a likelihood of irreparable
11 harm. Viking shows Ikhana is using its trade secrets for commercial advantage—the
12 Disputed STC—and intends to continue using them, likely causing Viking harm. This
13 showing is enough to support the limited injunction contemplated by the Court. *See, e.g.,*
14 *Cutera, Inc.*, 444 F. Supp. 3d at 1209; *Digital Alpha Advisors, LLC v. Ladak*, No. 2:23-
15 CV-01339-JAD-DJA, 2023 WL 6521029, at *3 (D. Nev. Sept. 15, 2023). The Court is
16 also unpersuaded an award of money damages will be sufficient in these circumstances.
17 *See Stuhlberg*, 240 F.3d at 841; *see also Cutera, Inc.*, 444 F. Supp. 3d at 1209.

18 The Court reaches this conclusion notwithstanding Ikhana’s argument that the
19 parties’ history of calculating royalty amounts demonstrates any harm can be addressed by
20 damages. (Opp’n 20:9–21:2.) This argument is inconsistent with the agreement that binds
21 Ikhana. Ikhana agreed that a breach of the DLA shall cause “irreparable harm to [Viking],”
22 and Viking’s “right to an injunction is necessary because any other remedy may be
23 insufficient to fully compensate [Viking].” (DLA § 4.5.)

24 The law supports using Ikhana’s concession to bolster the conclusion that irreparable
25 harm is likely. *See, e.g., Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999)
26 (applying New York law and reasoning that where a contract conceded that a breach would
27 cause irreparable harm, this concession could arguably be viewed as an admission by the
28 breaching party “that plaintiff will suffer irreparable harm were he to breach the contract’s

1 [relevant] provision”); accord *Intertek Testing Servs., N.A., Inc. v. Pennisi*, 443 F. Supp.
2 3d 303, 332 (E.D.N.Y. 2020) (“Although not dispositive, Pennisi’s acknowledgement in
3 the Employment Agreement that a violation of the non-competition and non-solicitation
4 restrictions would cause plaintiff irreparable harm entitling it to injunctive relief, further
5 supports a finding of irreparable harm.”); *Roswell Cap. Partners LLC v. Alternative Const.*
6 *Techs.*, No. 08 CIV 10647(DLC), 2009 WL 222348, at *17 (S.D.N.Y. Jan. 30, 2009)
7 (concluding provisions in agreements governed by New York law specifying that “a default
8 constitutes irreparable harm” supported a finding of irreparable harm). Consequently, even
9 though this provision is not dispositive, it supports a finding of irreparable harm when
10 considered in combination with Viking’s showing above.

11 Ikhana’s stronger point is that Viking’s delay in seeking injunctive relief undermines
12 the claim of irreparable harm. (Opp’n 18:4–20:2.) Courts, including this one, have relied
13 on a party’s delay to deny injunctive relief. See, e.g., *Oakland Trib., Inc. v. Chron. Pub.*
14 *Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a
15 preliminary injunction implies a lack of urgency and irreparable harm.”); *Hueso v. Select*
16 *Portfolio Servicing, Inc.*, No. 18-CV-1892-BAS-WVG, 2019 WL 3459013, at *2, 5 (S.D.
17 Cal. July 31, 2019) (finding delay “counsels against a finding that the requested relief is
18 warranted”). “Delay in seeking a remedy is an important factor bearing on the need for a
19 preliminary injunction, the rationale being that absent a good explanation, a [movant]
20 would promptly have sought an injunction if it were being irreparably harmed.” *Open Text,*
21 *S.A. v. Box, Inc.*, 36 F. Supp. 3d 885, 909 (N.D. Cal. 2014).

22 Viking first became aware of the Disputed STC around October 2022. (Barber Decl.
23 ¶ 59, Ex. H.) Viking moved for injunctive relief on the same day it filed its Answer and
24 Counterclaim—August 25, 2023. (ECF Nos. 4, 9.) Therefore, the delay is about ten
25 months. Unless there is “a good explanation,” this magnitude of delay supports denying
26 injunctive relief. See *Open Text*, 36 F. Supp. 3d at 909; see also *Miller ex rel. NLRB v.*
27 *Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (“[T]hat [the moving party] tarried
28

1 so long before seeking this injunction is . . . relevant in determining whether relief is truly
2 necessary.”).

3 Viking replies that its delay was reasonable because Viking was diligently pursuing
4 a resolution with Ikhana between December 2022 and July 2023. (Reply 8:12–8:28; *see*
5 *also* Tr. 16:3–17:15.) “A reasonable delay before filing suit, or between filing suit and
6 moving for [a] preliminary injunction, may be excused if a [movant] can demonstrate it
7 has attempted to protect its rights through out-of-court protests or negotiations.” *CrossFit,*
8 *Inc. v. Nielsen*, No. 3:12-cv-325 AJB (WVG), 2012 WL 12872471, at *4 (S.D. Cal. Sept.
9 12, 2012); *see also HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12-CV-2884-MMA (WMC),
10 2013 WL 12074966, at *8 (S.D. Cal. Oct. 3, 2013) (granting preliminary injunction motion
11 filed eight months after complaint where the plaintiff had sought a negotiated resolution);
12 *Guess?, Inc. v. Tres Hermanos*, 993 F. Supp. 1277, 1286 (C.D. Cal. 1997) (“The nine
13 month delay from the cease-and-desist letter to the filing of suit is a reasonable time for
14 Plaintiff to have allowed Defendants to respond to its request and pursue settlement
15 avenues.”).

16 There is no dispute that Viking repeatedly attempted informal resolution during the
17 period of delay. (*See* Zublin Decl. ¶¶ 32–36; *see also* Barber Decl. ¶¶ 71–92.) Ikhana casts
18 doubt on the sincerity and reasonableness of Viking’s overtures, but this outcome is to be
19 expected. The only time this set of circumstances will reach a court is when the efforts to
20 resolve the matter informally were unsuccessful. Given the nature of the parties’ dispute,
21 the timeline of the anticipated irreparable harm, and Viking’s out-of-court efforts to resolve
22 the matter, the Court is satisfied that the delay here does not justify denying injunctive
23 relief. *See Open Text*, 36 F. Supp. 3d at 909; *HM Elecs.*, 2013 WL 12074966, at *8.

24 In short, Viking meets its burden to demonstrate that irreparable harm is likely in the
25 absence of an injunction.

26 **IV. Balance of Equities**

27 To qualify for injunctive relief, Viking must show the balance of the equities tips in
28 its favor. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). In assessing

1 whether Viking meets its burden, “the court has a ‘duty . . . to balance the interests of all
2 parties and weigh the damage to each.’” *Id.* (quoting *Los Angeles Mem’l Coliseum*
3 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)). Viking argues
4 the equities tip in its favor because Ikhana is unlawfully exploiting its trade secrets and
5 prohibiting Ikhana from wrongly using Viking’s data would not cause Ikhana any hardship.
6 (Mot. 23:1–24:7.) Further, although Ikhana contends an injunction would be devastating
7 to its business (Opp’n 23:9–25), the Court ameliorated this concern by narrowing the scope
8 of the proposed injunction. A narrow injunction will not pulverize Ikhana’s existing
9 business; rather, the Court only contemplates prohibiting Ikhana from marketing and
10 selling the Disputed STC. Hence, the Court finds the balance of the equities tips in
11 Viking’s favor, satisfying the third requirement for injunctive relief.

12 **V. Public Interest**

13 Finally, the Court agrees with Viking that an injunction would be in the public
14 interest. “Courts often find that the public has a strong interest in protecting intellectual
15 property rights.” *WeRide Corp. v. Kun Huang*, 379 F. Supp. 3d 834, 854 (N.D. Cal. 2019)
16 (citing cases). Further, the public interest is served when a defendant “is asked to do no
17 more than abide by trade laws and the obligations of contractual agreements.” *Henry*
18 *Schein, Inc. v. Cook*, 191 F. Supp. 3d 1072, 1078 (N.D. Cal. 2016); *accord OmniGen Rsch.,*
19 *LLC v. Yongqiang Wang*, No. 6:16-CV-268-MC, 2017 WL 5505041, at *22 (D. Or. Nov.
20 16, 2017) (“There is ‘a public interest in upholding the law and contracts, and having
21 parties abide by their legal duties.’” (quoting *Pac. Kidney & Hypertension, LLC v.*
22 *Kassakian*, 156 F. Supp. 3d 1219, 1229 (D. Or. 2016))). Ikhana’s opposition invokes
23 concerns over aviation safety (Opp’n 21:15–23:8), but a narrow injunction would not
24 disturb Ikhana’s existing STCs that support the Legacy Series. The Court finds this final
25 requirement is met, making an injunction appropriate under the *Winter* test.

26 **VI. Bond**

27 Under Rule 65(c), “[t]he court may issue a preliminary injunction . . . only if the
28 movant gives security in an amount that the court considers proper to pay the costs and

1 damages sustained by any party found to have been wrongfully enjoined.” Fed. R. Civ. P.
2 65(c). “Despite the seemingly mandatory language,” this rule grants the court discretion
3 to determine “the amount of security required, *if any*.” *Johnson v. Couturier*, 572 F.3d
4 1067, 1086 (9th Cir. 2009) (quoting *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir.
5 2003)); *see also Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878,
6 882 (9th Cir. 2003) (“The district court is afforded wide discretion in setting the amount of
7 the bond.”).

8 Because “the purpose of . . . a bond is to cover any costs or damages suffered by the
9 [party sought to be enjoined] arising from a wrongful injunction,” *see Gorbach v. Reno*,
10 219 F.3d 1087, 1092 (9th Cir. 2000), “the party affected by the injunction [bears the]
11 obligation of presenting evidence that a bond is needed,” *see Conn. Gen.*, 321 F.3d at 883.
12 *Accord Gorbach*, 219 F.3d at 1092 (affirming district court’s decision not to require bond
13 where the party sought to be enjoined “did not show that there would be any” damages);
14 *see also Extreme Reach, Inc. v. Spotgenie Partners, LLC*, No. CV 13-07563-DMG (JCGx),
15 2013 WL 12081182, at *9 (C.D. Cal. Nov. 22, 2013) (“The burden of establishing the
16 amount of bond necessary to secure against the wrongful issuance of an injunction rests
17 with the [non-movant].”).

18 At oral argument, the Court expressed that a bond would be appropriate and inquired
19 as to the proper amount. (Tr. 5:2–14, 33:12–34:5.) Ikhana requested a substantial bond,
20 but it was unable to provide specifics that would support its substantial request. (*Id.* 34:1–
21 5.) Having also considering the parties’ briefing on this issue, the Court finds it is
22 appropriate to set the bond amount at zero without prejudice. *See Extreme Reach, Inc.*,
23 2013 WL 12081182, at *9. If Ikhana believes a bond is still appropriate considering the
24 Court’s narrow injunction below, Ikhana may submit an *ex parte* application with
25 evidentiary support addressing this issue. After reviewing Ikhana’s submission and any
26 response by Viking, the Court will revisit the amount of bond under Rule 65(c).

1 **CONCLUSION & ORDER**


2 In light of the foregoing, the Court **GRANTS** Counter-Claimant Viking Air,
3 Limited's Motion for a Preliminary Injunction. (ECF No. 9.)

4 Accordingly, until entry of final judgment in this action, the Court **ENJOINS**
5 Counter-Defendants Ikhana Group, LLC and Aevex Aerospace, LLC, together with their
6 agents, employees, representatives, and all persons and entities in concert or participation
7 with them from offering, marketing, or selling any modification that increases the
8 maximum take-off weight of Viking's 400 Series Twin Otter Aircraft ("DHC-6-400") in
9 commuter operations.

10 This injunction does not require Ikhana to withdraw its application from the Federal
11 Aviation Administration to amend Supplemental Type Certificate SA02682LA, and this
12 order does not enjoin Ikhana from marketing, offering, or selling its existing Supplemental
13 Type Certificates for the Twin Otter.

14 **IT IS SO ORDERED.**

15
16 **DATED: November 7, 2023**


Hon. Cynthia Bashant
United States District Judge