UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BIOCON LIMITED,

Plaintiff,

v.

ABRAXIS BIOSCIENCE, Inc.,

Defendant.

DECISION AND ORDER

16-CIV-6894 (RMB)

I. Introduction

This Decision and Order relates to a contractual dispute between Plaintiff Biocon Limited ("Biocon") and Defendant Abraxis Bioscience, Inc. ("Abraxis"). Biocon contends that Abraxis wrongfully terminated the parties' License Agreement, dated June 27, 2007 (Limaye Decl. Ex. A), and is seeking temporary and preliminary injunctive relief in aid of its arbitration against Abraxis. Biocon moves this Court to order Abraxis to continue supplying Biocon with Abraxane®, a cancer medication, under the License Agreement until the parties resolve their dispute in arbitration, which was initiated on September 2, 2016.[1]

Abraxis responds that Biocon materially breached the License Agreement by failing to prevent the illegal export, or "diversion," of Abraxane® out of Biocon's sales territory. Abraxis

[1] According to the License Agreement,

> [A]ny disputes or controversies arising out of or in relation to this Agreement shall be resolved exclusively through arbitration . . . . The Parties may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction or other interim or conservatory relief, as necessary, without breach of this arbitration agreement . . . .

(License Agreement § 13.5(a).)

argues that its termination of the License Agreement was lawful. Abraxis disputes the basis of termination and opposes Biocon's motion.

For the reasons set forth below, and based upon the entire record herein, Biocon's motion for temporary and preliminary injunctive relief (# 7) is denied.

II. Background

Under the License Agreement, Abraxis granted Biocon the right to distribute the drug Abraxane® in India and other South Asian countries on an exclusive basis, and in various Middle Eastern countries on a co-exclusive basis. (License Agreement § 2.7.) On July 26, 2016, Abraxis sent Biocon a Notice of Material Breach and Termination of License Agreement, based upon "diversion" of Abraxane® to improper markets. (Limaye Decl. Ex. R ("In view of . . . Biocon's failure to stop exportation of the Products outside the Territory, ... the License Agreement is hereby terminated . . . .").) The Notice states that Abraxis previously had "provided written notice of Biocon's material breach of the License Agreement based on such diversion" in a letter dated May 14, 2015 (Id. Ex. G), but the "continuous and sustained diversion" of Abraxane® during the 60-day cure period "left Abraxis no choice" but to terminate the License Agreement. (Id. Ex. R.) Biocon claims that Abraxis's termination was wrongful because "to be actionable, the diversion must have occurred with knowledge (and there was none); and . . . at termination, no 'material breach' existed." (Pl.'s Mem. of Law in Support of Pl.'s Mot. for Temp. Restraining Order and Preliminary Injunctive Relief in Aid of Arbitration ("Pl. Mem."), dated Sept. 1, 2016, at 14.) Biocon adds that Abraxis "waived its termination right . . . after it sent the May 2015 Letter" because while Abraxis "withheld supply pending review" in 2015, it "resumed supply in August 2015." (Id. at 18-19 (emphasis removed).) On September 12, 2016, Biocon filed a Request for Arbitration against Abraxis before the International Chamber of

Commerce. (Hearing Tr., dated Sept. 13, 2016, at 4.)

There have been extensive briefing and oral argument in this matter. On September 1, 2016, Biocon filed an Order to Show Cause for Preliminary Injunction and Temporary Restraining Order (#7) ("Proposed Order") that would "require[e] that Defendant supply the subject product in accordance with purchase orders submitted by Plaintiff under the Agreement." (Proposed Order at 1-2.) The Court will treat the Proposed Order as a motion for temporary and preliminary injunctive relief. See, e.g., Arag-A Ltd. v. Republic of Argentina, 2016 WL 1451586, at *4 (S.D.N.Y. Apr. 12, 2016) ("[P]laintiffs . . . moved, by order to show cause, for a temporary restraining order and a preliminary injunction."). On September 2, 2016, Abraxis filed its Memorandum of Law in Opposition to Plaintiff's Motion for Injunctive Relief ("Def. Mem.").[2] Biocon filed a reply brief on September 6, 2016 (Reply Mem. of Law in Further Support of PL.'s Mot. For Temp. Restraining Order and Preliminary Injunctive Relief in Aid of Arbitration (the "Reply")), and Abraxis filed a sur-reply on September 9, 2016 (Def.'s Sur-Reply Memo. of Law in Further Opp. to Pl.'s Motion for Injunctive Relief (the "Sur-Reply")).

On September 13, 2016, the Court heard helpful oral argument. On September 20, the Court invited the parties to inform the Court whether they wished to hold a further evidentiary hearing or "whether . . . the Court [should] decide [Biocon's] motion . . . based on their written submissions and . . . oral argument." (Order, dated Sept. 20, 2016). Neither party requested that the Court hold such a further hearing. (See Joint Letter to the Court, dated Sept. 21, 2016.)

Biocon argues that it "will be irreparably harmed if relief is not granted" and that it "is

[2] Also on September 2, the Court ordered "that [Biocon] shall file a reply brief with authorities . . . on or before . . . September 6," and "that [Abraxis] shall file a sur-reply brief with authorities . . . on or before . . . September 9" and address "the date and manner of termination of the parties' License Agreement, including any waiver or estoppel from terminating the Agreement." (Order, dated Sept. 2, 2016, at 1-2.) The court also directed the "parties [to] commence arbitration forthwith." (Id. at 1 (emphasis removed).)

likely to succeed on the merits at arbitration because Abraxis's termination was wrongful." (Pl. Mem. at 14, 19.) As to irreparable harm, Biocon claims that without a supply of Abraxane® "hundreds of women with advanced, metastatic breast cancer . . . will be denied the right to treat their cancer with a unique drug on which they have come to rely." (Id. at 29.) Biocon also claims that it "will lose customers if it experiences any sustained outage of Abraxane®" and its "reputation as a reliable supplier of life-saving medications will plummet." (Id. at 30.) Additionally, Biocon argues that Indian law requires it "to provide the [Indian] government with six months' notice if supply is to be discontinued," and "violation of the [law] is punishable with imprisonment . . . and [make Biocon] liable [for a] fine." (Id. at 20-21.)

Abraxis counters that "Biocon's request for a[n] . . . injunction fails." (Def. Mem. 2.) Abraxis argues that Biocon "cannot establish the requisite element of irreparable harm" because it "has not shown that patients will be unable to obtain [substitute cancer medications] from other sources." (Id. at 27.) Abraxis also contends that the termination does not threaten Biocon's "viability" "[b]ecause Abraxane constitutes a relatively small percentage of Biocon's business." (Id. at 21.) "[T]o the extent Biocon claims to be worried about a potential loss of sales to customers who may leave if it is not able to distribute Abraxane®, it cannot show that such harm is not compensable with monetary damages and therefore not a basis for injunctive relief." (Id. at 21-22 (citation omitted).) And, as to "the risk of fine or imprisonment," Abraxis responds that Biocon has not met its burden of proof by "merely attach[ing] a copy of an Indian statute and assert[ing] that the law applies to Biocon." (Sur-Reply at 6.) Abraxis also states that "Biocon agreed to undertake all obligations associated with protecting [Abraxane®] from being diverted," and "[i]ts failure to live up to that essential obligation was a material breach warranting immediate termination of the contract." (Def. Mem. 29.) Abraxis further argues that it "did not

waive its right to terminate by shipping product to Biocon" because "Biocon [had] assured Abraxis that it would revamp its distribution to correct the . . . diversion problem." (Sur-Reply at 8.) Abraxis "[r]el[ied] on these and other promises" when it resumed shipping. (Id.) An "audit showed a continuing failure [by Biocon] to prevent diversion," and Abraxis validly "terminated the License Agreement." (Id.)

III. Legal Standard

A court may issue an injunction if the movant shows "(a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 172 (2d Cir. 2001).

In the Second Circuit, "a showing of irreparable harm [is] the most important prerequisite for the issuance of a preliminary injunction." NAACP v. Town of East Haven, 70 F.3d 219, 224 (2d Cir. 1995). Irreparable harm must be "likely and imminent, not remote or speculative, and . . . not capable of being fully remedied by money damages." Id.

"[T]o satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury." Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (quoting Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007)). However, even if the movant can legally assert injury to another, he must "present[] sufficient supporting evidence" that the injury is "likely and imminent." Bradley v. Rite Aid Corp., 2015 WL 11422293, at *2 (C.D. Cal. Nov. 30, 2015). Where there is a "lack of proof regarding imminent irreparable harm [it] prevents Plaintiffs from demonstrating the kind

of irreparable harm necessary for this Court to order injunctive relief." Krueger Invs., LLC v. Cardinal Health 110, Inc., 2012 WL 3028349, at *5 (D. Ariz. July 24, 2012).

"When the alleged harm is the loss of customers and business as a result of a breached agreement for an exclusive distributorship, that harm is compensable with money damages." World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp., 694 F.3d 155, 161 (2d Cir. 2012). This is because "lost profits stemming from the inability to sell the terminated product could be compensated with money damages determined on the basis of past sales of that product." Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 38 (2d Cir. 1995).

For plaintiffs pointing to irreparable harm in foreign jurisdictions, "[t]he party relying on foreign law has the burden of proof. It must establish precisely what that law is and how it is interpreted. . . . Generally [expert] affidavits are the minimal formal requirements." Application of Chase Manhattan Bank, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), aff'd, 297 F.2d 611 (2d Cir. 1962). If the harm is a fine, "the potential harm is monetary damages, [and] the harm can be readily calculated and Plaintiffs can be made whole for such damages in the future, if appropriate. Such damages, by definition, are the opposite of irreparable harm." Bradley v. Cnty. of Will, 2011 WL 1456780, at *4 (N.D. Ill. Apr. 14, 2011).

Where, as here, a movant has "failed to establish that [it] would suffer irreparable harm in the absence of an injunction, there is no need to reach the second portion of the preliminary injunction analysis." Jayaraj v. Scappini, 66 F.3d 36, 38-39 (2d Cir. 1995).

IV. Analysis

Biocon Has Not Demonstrated Irreparable Harm

Biocon contends, as noted, that "hundreds of women with advanced, metastatic breast cancer . . . will be denied the right to treat their cancer with a unique drug on which they have

come to rely." (Pl. Mem. 29.) Abraxis responds that Biocon "has not shown that patients will be unable to obtain [substitute cancer medications] from other sources." (Def. Mem. at 23.) For one thing, "Biocon [cannot] demonstrate that Abraxis will be precluded from distributing Abraxane . . . through other licensees, or tha[t] Abraxis itself cannot distribute." (Id.)

As an initial matter, the Second Circuit Court of Appeals has stated, "[t]o satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury." Faiveley Transp., 559 F.3d at 118 (quoting Grand River, 481 F.3d at 66). Any potential harm to patients who are not plaintiffs in this action is not controlling. In Grasso Enterprises, LLC v. Express Scripts, Inc., several pharmacies sought an injunction requiring a health insurance plan manager to pay certain prescription drug claims. 2015 WL 10781579, at *1 (E.D. Mo. Mar. 4, 2015), aff'd, 809 F.3d 1033 (8th Cir. 2016). In addressing the potential harm to the pharmacies' customers, the court held, "In the irreparable harm analysis, only harm to the plaintiffs is considered. The Pharmacies' customers are not parties before the Court, so any harm to them is not considered within this factor." Id. at *4. Similarly, in Bradley v. Rite Aid Corp., a doctor argued that his patients would be irreparably harmed without an injunction requiring the defendant to fill prescriptions issued from the doctor's office. 2015 WL 11422293, at *1-2 (C.D. Cal. Nov. 30, 2015). The court rejected this argument because the doctor "cited no authority for the proposition that [he] ha[d] standing to present claimed injuries to patients that will result absent the issuance of the requested [injunctive relief]." Id. at *2.

In any event, the record here is bereft of evidence establishing "likely and imminent" harm to patients that take Abraxane® distributed by Biocon. See NAACP, 70 F.3d at 224; see also Grasso Enters., 2015 WL 10781579, at *4 ("Regardless [of whether the court can consider customer harm], there is no evidence before the Court that any customer has suffered harm.");

Rite Aid, 2015 WL 11422293, at *2 ("[E]ven assuming that they have standing to present arguments on behalf of their patients, Plaintiffs have not presented sufficient supporting evidence."). Indeed, Biocon acknowledges that prescribers in India will "likely switch [their patients] to an alternative drug." (Pl. Mem. at 23.) While Biocon states that those alternative drugs "may not be as effective" (Limaye Decl. ¶ 46), it offers no evidence to support its conclusory assertion. Cf. SymQuest Grp., Inc. v. Canon U.S.A., Inc., 2015 WL 6813599, at *8 (E.D.N.Y. Aug. 7, 2015) (denying motion for injunctive relief where dealer of office imaging equipment had not shown it "would be unable to obtain [generic parts] from a third-party" to service the equipment it had sold under the terminated dealership agreement), report and recommendation adopted, 2015 WL 6813494 (E.D.N.Y. Aug. 28, 2015). Moreover, Biocon acknowledges that Abraxis ceased supplying Biocon with Abraxane® for several months during 2015 and does not suggest—much less demonstrate— that any patients were harmed as a result. (See Limaye Decl. ¶ 18.)

Biocon also contends it will be irreparably harmed because it will "lose customers" and its "reputation as a reliable supplier of life-saving medications will plummet." (Pl.'s Mem. 30.) Abraxis responds, "[b]ecause Abraxane constitutes a relatively small percentage of Biocon's business," Biocon has not shown that the termination "threaten[s] [its] viability." (Id. at 21.) "[T]o the extent Biocon claims to be worried about a potential loss of sales to customers who may leave if it is not able to distribute Abraxane®, it cannot show that such harm is not compensable with monetary damages and therefore not a basis for injunctive relief." (Id. at 21-22 (citation omitted).)

Biocon's circumstances are similar to those in Krueger Investments, LLC v. Cardinal Health 110, Inc., where a group of pharmaceutical retailers moved for injunctive relief against

their controlled substance supplier, who suspected that "diversion of controlled substances might be occurring." 2012 WL 3028349, at *1-2. The court denied the request and held that the retailers "failed to demonstrate sufficient irreparable harm in the absence of an injunction." Id. at *5. In particular, although the retailers "argue[d] that "it [wa]s a virtual certainty that the business w[ould] not be able to survive' . . . , [they] failed to substantiate this claim by showing that their business c[ould] [not] continue based on either the sale of non-controlled substances alone or in combination with their other suppliers of controlled substances." Id. And "[a]lthough [the retailers] claim[ed] that their harm c[ould] [not] be compensated, ... [g]iven the availability of [the retailers'] historic purchase and sales data," the court held "that a reasonable basis exist[ed] for calculating the loss of future revenue due to [the supplier's] decision to cease all shipments of controlled substances." Id. at *6. Biocon is similarly situated, and it has not even attempted to show that its business cannot continue in "developing, marketing, and distributing [other] pharmaceutical products." (Limaye Decl. ¶ 3.)

And, Biocon has available to it the "historic purchase and sales data" it needs to "calculate[e] the loss of future revenue." See Krueger Invs., 2012 WL 3028349, at *6. "When the alleged harm is the loss of customers and business as a result of a breached agreement for an exclusive distributorship, that harm is compensable with money damages," World Wide Polymers, 694 F.3d at 161, because "lost profits stemming from the inability to sell [a single] terminated product could be compensated with money damages determined on the basis of past sales of that product," see Tom Doherty Assocs., 60 F.3d at 38; see also United Prescription Servs., Inc. v. Gonzalez, 2007 WL 1526654, at *5 (M.D. Fla. May 23, 2007) (declining to enjoin suspension of pharmacy's license to distribute controlled substances because, although "[the pharmacy] . . . claim[ed] that the loss of goodwill w[ould] irreparably harm its reputation" as a

dependable pharmacy, "the Court believe[d] that any harm to [the pharmacy's] reputation . . . c[ould] be rectified with monetary damages").

When Abraxis cut Biocon's supply temporarily in 2015, Biocon calculated that it "lost more than fifty prescribers in India alone and its secondary vial sales were reduced from more than 2000 vials to only 1000 vials." (Limaye Decl. ¶ 49.) Biocon does not show that it would be unable to calculate with similar precision its monetary losses resulting from Abraxis cutting Biocon's supply again. As Abraxis argues, Biocon has not shown that any "harm [would] not [be] compensable with monetary damages." (Def. Mem. 22.)

Other decisions in this District involving exclusive distributors support a finding of no irreparable harm. In Lanvin Inc. v. Colonia, Inc., a perfume supplier terminated its agreement granting a distributor exclusive rights to manufacture and sell perfumes made from the supplier's fragrance essence and to use the supplier's trademarks in connection with perfumes it manufactured and sold in the U.S. 739 F. Supp. 182, 185 (S.D.N.Y. 1990). The distributor moved for temporary and preliminary injunctive relief and argued that "it w[ould] suffer irreparable injury" because its "inventory of [licensed perfumes] [wa]s 'soon to be exhausted.'" Id. at 185-86. The court rejected that argument because "[w]here a terminated distributor sells numerous other brands, it does not establish irreparable harm." Id. at 193. Biocon likewise distributes other pharmaceutical products. (Limaye Decl. ¶ 3.) It has not established irreparable harm from being unable to distribute Abraxane®.

Similarly, in PDL Vitari Corp. v. Olympus Industries, Inc., a frozen dessert distributor moved for injunctive relief when its supplier terminated the parties' exclusive distributorship agreement. 718 F. Supp. 197, 198 (S.D.N.Y. 1989). The distributor "argue[d] that the loss of credibility it w[ould] suffer if its order [went] unfilled . . . constitute[d] irreparable harm." Id. at

204. The court denied the motion for an injunction because the distributor "c[ould] be compensated for his losses in part by projecting profits from the orders received and in part by looking at the actual sales of the . . . product. . . . The ability of [the distributor] to recover money damages as an adequate remedy for losses suffered preclude[d] a finding of irreparable harm." Id. at 205. As noted above, Biocon also will be able to calculate its losses based on its previous sales and orders received.

Courts have found harm to be irreparable "[w]here the availability of a product is essential to the life of the business or increases business of the plaintiff beyond sales of that product—for example, by attracting customers who make purchases of other goods while buying the product in question" because "the damages caused by loss of the product will be far more difficult to quantify than where sales of one of many products is the sole loss." Tom Doherty, 60 F.3d at 38. But Biocon does not establish that Abraxane® is essential to the life of its business, see id., which consists of "developing, marketing, and distributing [multiple] pharmaceutical products" (Limaye Decl. ¶ 3).

Biocon does contend that its inability to sell Abraxane® will have an adverse impact on Biocon's other oncology products. (Id. ¶ 50). This may suggest that Biocon's damages "will be . . . difficult to quantify" if Abraxane® "attract[s] customers who make purchases of other [drugs distributed by Biocon]" and who will stop purchasing these other drugs if Biocon stops distributing Abraxane®. See Tom Doherty, 60 F.3d at 38. However, Biocon does not show that the Abraxane® customers it lost when Abraxis suspended supply in 2015 stopped buying other Biocon products. Indeed, Biocon cites only one instance where its present distribution of other drugs might be affected by its inability to distribute Abraxane®, i.e. a "blanket contract for supply of a number of products (including Abraxane®)" that allegedly would be put "at risk"

"[i]f Biocon is unable to supply Abraxane®." (Limaye Decl. ¶ 51.) Biocon did not include a copy of the contract in its submissions, and the Court is unable to assess the risk that Biocon would be in breach of the blanket contract. Even assuming Biocon were in breach, and the counterparty terminated the contract, Biocon has not shown that its losses under the blanket contract "will be . . . difficult to quantify." See Tom Doherty, 60 F.3d at 38. Therefore, Biocon has not shown that losing this blanket contract could not be compensated with money damages.

The circumstances of this case distinguish it from the case law on which Biocon relies. For example, in Reuters Ltd. v. United Press International, Inc., where the defendant refused to supply the plaintiff with photographs for the plaintiff's news wire service, "many of the [plaintiff's] customers ha[d] indicated not only a strong preference for the [defendant's photographs], but also ha[d] threatened to stop dealing with the [plaintiff] [altogether] if it c[ould] not supply [defendant's product]," even though a third party had agreed to supply plaintiff with photographs. 903 F.2d 904, 908 (2d Cir. 1990). There was no dispute that the defendant's photographs were the "lifeblood" of the plaintiff's business, and that losing those photographs during the pendency of the case would have "threaten[ed] [its] continued viability." Id. Here, on the other hand, Biocon "develop[s], market[s], and distribut[es] [multiple] pharmaceutical products" (Limaye Decl. ¶ 3), and it has not shown that any customer will stop buying its other products if Biocon is unable to distribute Abraxane®.

Biocon also relies upon Asa v. Pictometry International Corp., where the licensee sold geographic mapping and imagery services, and terminating the license arguably would have prevented the licensee from "updat[ing] its image libraries." 757 F. Supp. 2d 238, 240, 244 (W.D.N.Y. 2010). Such a "major disruption" of the licensee's only line of business would have diminished its ability to "attract new customers" and retain "existing customers." Id. at 244-45.

Biocon, on the other hand, has not shown that its overall business would suffer a major disruption. See supra pp. 8-10. In particular, it has not shown that it will be unable to continue distributing other drugs if it is unable to distribute Abraxane®.

Biocon also contends, as noted, that it will suffer irreparable harm in the form of (unspecified) fines or even imprisonment of its officers if it ceases supplying Abraxane® to India without notice to Indian regulators. (Pl. Mem. at 24.) But Biocon has provided no evidence that it likely will be subject to such fines or imprisonment. It has submitted the text of an Indian statute, which appears to make Biocon "liable [for a] fine" "[i]f [it] contravenes [the Indian government's] order" to provide notice. (Limaye Decl. Ex. E.) Biocon has not submitted expert testimony as to the law's interpretation or the likelihood of the Indian government levying a fine against Biocon. See Chase Manhattan Bank, 191 F. Supp. at 209 ("The party relying on foreign law has the burden of proof. It must establish precisely what that law is and how it is interpreted. . . . Generally [expert] affidavits are the minimal formal requirements."). And, any fines India may levy against Biocon are compensable through money damages. See Cnty. of Will, 2011 WL 1456780, at *4 ("Plaintiffs argue that they will be irreparably harmed because they can be fined . . . . However, if the potential harm is monetary damages, then the harm can be readily calculated and Plaintiffs can be made whole for such damages in the future, if appropriate. Such damages, by definition, are the opposite of irreparable harm.").

Although imprisonment may constitute irreparable harm, see Burdine v. Johnson, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000) ("[Habeas petitioner] suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution."), Biocon has not shown that imprisonment of its directors or officers is "likely or imminent" under Indian law, NAACP, 70 F.3d at 224. Biocon relies upon an Indian statute stating, "any person [who] contravenes" the

notice requirement before ceasing distribution "shall be punishable . . . with imprisonment." (Limaye Decl. Ex. E). This language without more is insufficient; there needed to be expert testimony as to the law's interpretation. See Chase Manhattan Bank, 191 F. Supp. at 209. Biocon did not even mention the risk of imprisonment during oral argument. (See Hr'g Tr., dated Sept. 13, 2016.) Nor did Biocon suggest the Indian government imprisoned Biocon's officers in 2015 when Abraxis temporarily stopped supplying Biocon with Abraxane®. (See id.)

Biocon Has Not Shown a Likelihood of Success on the Merits or Raised Sufficiently Serious Questions on the Merits and Shown that the Balance of Hardships Tips Decidedly in Its Favor

Where, as here, a movant has "failed to establish that [it] would suffer irreparable harm in the absence of an injunction, there is no need to reach the second portion of the preliminary injunction analysis." Jayaraj, 66 F.3d at 38-39. Assuming arguendo that Biocon had shown irreparable harm (which it has not), the Court, nevertheless, likely would find that Biocon has not shown that it is likely to succeed on the merits of its claim or that it raised sufficiently serious questions on the merits and shown that the balance of hardships tips decidedly in its favor. See Zervos, 252 F.3d at 172.[3]

Under the License Agreement, Biocon agreed to refrain from "directly or indirectly . . . Market[ing] [Abraxane®] outside the Territory" and to "remain responsible . . . for any breaches . . . caused by . . . [its] Affiliates or any Sublicensee." (License Agreement § 2.3.) Biocon does not deny that diversion occurred. (See Pl. Mem. 6 ("Parties [have been] purchasing Abraxane® in India and illegally exporting it to other countries to re-sell it at a higher price.").) Furthermore, after Abraxis provided notice to Biocon on July 26, 2016, and an opportunity to cure these alleged breaches as required by the License Agreement (see License Agreement § 9.3), it appears

[3] The merits of this case are being resolved in arbitration.

undisputed that there was a continuing failure to prevent diversion (see Hennion Decl. ¶ 16-17, 20-21). Thus, the Court or the arbitrator might find that these events were sufficient to justify Abraxis in terminating the License Agreement. (See License Agreement § 9.3 ("This Agreement shall be subject to early termination by either Party . . . in the event of a material breach hereof . . .").)

Nor has Biocon shown a balance of hardships tipping decidedly in its favor. Biocon argues that "Abraxis will suffer little harm" from an injunction whereas "Biocon will suffer irreparable harm that cannot be compensated monetarily." (Pl. Mem. 24.) Biocon references the alleged harm to patients, the "permanent[] los[s] [of] customers and its goodwill," and the possibility of "its principals [being] imprison[ed]." (Id.) For the reasons stated previously, Biocon has not shown that any of these alleged injuries will occur and/or cause irreparable harm. If an injunction were issued it "would force [Abraxis] to endure an unsatisfactory relationship with a licensee it no longer trusts," Lanvin, 739 F. Supp. at 196 (holding that balance of hardships tipped in favor of the supplier when distributor failed to prevent the product from being "resold outside of the [distributor's] [t]erritory"). It would require Abraxis to continue supplying Abraxane® to Biocon despite the risk that diversion will continue.

V. Conclusion and Order

For the foregoing reasons, Plaintiff's motion for temporary and preliminary injunctive relief (#7) is denied.

Dated: New York, New York
September 26, 2016

Richard M. Berman, U.S.D.J.