

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

SIERRA DUST CONTROL, L.L.C.,
Plaintiff,

v.

NEXT LEVEL ENERGY SERVICES, L.L.C.,
Defendant.

Civil Action No. 2:15-cv-2047

Jury Trial Demanded

SIERRA DUST CONTROL L.L.C.'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	2
	A. The Patents-in-Suit – System and Methods for Controlling Silica Dust During Hydraulic Fracturing Operations	2
	B. Next Level’s Infringing Dust-Operation System	3
III.	ARGUMENT	4
	A. Sierra Dust Control is likely to succeed on the merits of its infringement claims.	4
	i. Next Level infringes at least Claim 1 of the ’261 patent and Claim 6 of the ’482 patent.	4
	ii. The Patents-in-Suit are Presumed Valid and Enforceable	8
	B. Sierra Dust Control will be irreparably harmed absent a preliminary injunction	9
	C. The balance of hardships weighs in favor of injunction.....	11
	D. A preliminary injunction is in the public interest.	12
IV.	CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs v. Andrx Pharm.</i> , 452 F.3d 1331 (Fed. Cir. 1993).....	4, 12
<i>Acumed LLC v. Stryker Corp.</i> , 551 F.3d 1323 (Fed. Cir. 2008)	12
<i>Altana Pharma AG v. Teva Pharm. USA, Inc.</i> , 566 F.3d 999 (Fed. Cir. 2009)	11
<i>AstraZeneca LP v. Apotex, Inc.</i> , 633 F.3d 1042 (Fed. Cir. 2010)	8
<i>Broadcom Corp. v. Qualcomm, Inc.</i> , 543 F.3d 683 (Fed. Cir. 2008)	12
<i>Brooktrout, Inc. v. Eicon Networks Corp.</i> , No. 203-CV-59, 2007 WL 1730112 (E.D. Tex. June 14, 2007).....	9
<i>Circle R, Inc. v. Smithco Mfg., Inc.</i> , 919 F. Supp. 1272 (N.D. Iowa 1996).....	11
<i>Douglas Dynamics, LLC v. Buyers Products Co.</i> , 717 F.3d 1336 (Fed. Cir. 2013)	10
<i>Fiber Sys. Int'l, Inc. v. Applied Optical Sys., Inc.</i> , No. 2:06-CV-473, 2008 WL 906330 (E.D. Tex. Mar. 31, 2008).....	10
<i>H.H. Robertson, Co. v. United Steel Deck, Inc.</i> , 820 F.2d 384 (Fed. Cir. 1987)	5
<i>High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.</i> , 49 F.3d 1551 (Fed. Cir. 1995)	11
<i>Illinois Tool Works, Inc. v. Grip-Pak, Inc.</i> , 906 F.2d 679 (Fed. Cir. 1990)	5
<i>Markman v. Westview Instruments</i> , 52 F.3d 967 (Fed. Cir. 1995)	4
<i>Oakley, Inc. v. Sunglass Hut Int'l</i> , 316 F.3d 1331 (Fed. Cir. 2003).....	5
<i>Purdue Pharma L.P. v. Boehringer Ingelheim GmbH</i> , 237 F.3d 1359 (Fed. Cir. 2001)	8

<i>Sanofi-Synthelabo v. Apotex, Inc.</i> , 470 F.3d 1368 (Fed. Cir. 2006)	12
<i>Sofamor Danek Group v. DePuy-Motech, Inc.</i> , 74 F.3d 1216 (Fed. Cir. 1996)	5
<i>SynQor, Inc v. Artesyn Techs., Inc.</i> , No. 2:07-CV-497-TJW-CE, 2011 WL 238645 (E.D. Tex. Jan. 24, 2011).....	4, 12
<i>Titan Tire Corp. v. Case New Holland, Inc.</i> , 566 F.3d 1372 (Fed. Cir. 2009)	8
<i>Versata Software Inc. v. SAP Am., Inc.</i> , 717 F.3d 1255 (Fed. Cir. 2013)	12
<i>Versata Software Inc. v. SAP Am., Inc.</i> , No. 2:07-CV-153 CE, 2011 WL 4017944 (E.D. Tex. Sept. 9, 2011).....	12
<i>Windsurfing Int’l, Inc. v. AMF, Inc.</i> , 782 F.2d 995 (Fed. Cir. 1986)	12

Statutes

35 U.S.C. § 282 (2015)	8
35 U.S.C. § 283 (2015)	4

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Sierra Dust Control L.L.C. (“Sierra Dust Control”) respectfully moves for a preliminary injunction enjoining Defendant Next Level Energy Services L.L.C. (“Next Level”) from making, using, selling, offering for sale, or operating in the United States its dust-control systems, which infringe Sierra Dust Control’s U.S. Patent Nos. 9,162,261 (“the ’261 patent”) and 9,168,482 (“the ’482 patent”) (collectively, the “Patents-in-Suit”), attached as Exhibits A and B respectively.

I. INTRODUCTION

Sierra Dust Control, based in Tatum, Texas, provides frac-sand dust-control services using its proprietary technology that is the subject of U.S. Patent No. 8,881,749 (“the ’749 patent”) (Exhibit C) and the Patents-in-Suit. Sierra Dust Control’s system is focused on controlling the exposure of silica dust during the unloading and transfer of frac sand through a sand delivery system. The process allows Sierra Dust Control’s customers to safely and efficiently transfer frac sand during hydraulic fracturing operations. Accordingly, Sierra Dust Control’s patented processes allow their customers to provide a safe working environment for their employees, which is regulated by the Occupational Safety and Health Administration (OSHA).

Next Level is a direct competitor of Sierra Dust Control in the frac-sand dust-control market. In fact, Next Level has focused all of its operations on the exact same purpose, using the exact same process, as Sierra Dust Control and continued to contract jobs with past, current, and potential customers of Sierra Dust Control. Next Level’s website claims that it “specialize[s] in Dust Collection on Frac sites to keep your location in compliance with OSHA regulations for silica dust exposure.” *See* Exhibit D. Each new contract with a customer for dust-control operations increases Next Level’s market share at Sierra Dust Control’s expense and costs Sierra Dust Control valuable future growth opportunities. The irreparable injuries cannot be rectified

by mere monetary damages, and Next Level's infringement inherently undermines Sierra Dust Control's valuable patent rights.

This is the second suit Sierra Dust Control has filed against Next Level. In the first-filed suit, Civil Action No. 2:14-cv-00495, filed in this Court on April 14, 2015, Sierra Dust Control asserted the '749 patent, a continuation of the '261 patent.¹

II. FACTUAL BACKGROUND

A. The Patents-in-Suit – System and Methods for Controlling Silica Dust During Hydraulic Fracturing Operations

The Patents-in-Suit are directed to a system and method for capturing silica dust generated during movement of sand through a sand delivery system by using portable dust collectors, commonly referred to as “air systems.” *See* Abstract of the '261 patent and '482 patent (Exhibits A and B). The '482 patent is a divisional of the '749 patent, and focuses on the method of capturing dust generated during movement of sand. *See* the '482 patent, Abstract. The '261 patent is the parent of both the '749 and '482 patents. The '261 patent focuses on a system for controlling silica dust that is generated from the transfer of frac sand from a sand storage container through the conveyor system. *See* the '261 patent, Abstract.

The system and methods claimed within the '749 patent and the Patents-in-Suit are extremely important inventions in the fracking industry because “frac sand contains a high proportion of silica, [and] the [un]loading [and transfer]. . .of frac sand presents significant safety challenges.” *Id.* at 1:32-35. According to OSHA, the best way to eliminate health concerns arising from the unloading and transfer of frac sand is to “carefully control worker exposure to silica dust.” *Id.* at 1:42-43. The system and method of the '749 patent and the Patents-in-Suit is

¹ Sierra Dust Control filed an initial suit against Next Level asserting the '749 which issued before the two patents at issue in the current suit. *See Sierra Dust Control, L.L.C. v. Next Level Energy Services, L.L.C.*, No. 2:15-cv-00495 (Dkt. No. 1). Sierra Dust Control filed a separate suit asserting the Patents-in-Suit because Next Level opposed amending the complaint to add the two recently issued patents to the first case.

to control the silica dust generated along a conveyor system via a “plurality of inlets,” and generating negative air and pressure at each of the inlets to “induce the collection of silica dust at the selected points along the conveyor system.” *See Id.* at 1:57-67. In order to efficiently collect the dust, “flexible hoses [] tap [the] manifold,” and the “manifold[] sit on or close to the ground.” *See Id.* at 5:23-24, 52-53. Lastly, a “flexible cover system” may be constructed substantially an entire length over the lateral conveyor. *See Id.* at 8:65-66. Based on the air quality monitoring test results performed by OSHA and other third party testing, this provides an efficient system and method of capturing and removing silica dust from the worksite to create a safe work environment.

B. Next Level’s Infringing Dust-Operation System

Next Level is based in Carthage, Texas, but their dust-control operating system competes nationally directly with Sierra Dust Control’s operating systems. Sierra Dust Control has attached claim charts for the ’261 patent and the ’482 patent showing how Next Level’s dust-collection system infringes the Patents-in-Suit. *See Declaration of inventor Kim Smith* (Exhibit E) at ¶ 4 and Exhibits 1 and 2 to the *Smith Declaration*. Next Level’s dust-collection systems meet every claim limitation of at least independent claim 1 of the ’261 patent and independent claim 6 of the ’482 patent. The infringing characteristics are evident in the claim charts, and will be discussed in greater detail in section III(A) below.

Accordingly, a preliminary injunction should be granted because: (1) Sierra Dust Control has a significant likelihood of success on the merits of this case, given the presumed validity of the Patents-in-Suit and the clear infringement by Next Level; (2) Sierra Dust Control will suffer irreparable harm unless the Court enjoins Next Level’s infringement; (3) the balance of hardships weighs heavily in favor of injunctive relief; and (4) enjoining Next Level’s infringement would promote the public interest.

III. ARGUMENT

The Court has statutory authority to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283 (2015); *see also SynQor, Inc v. Artesyn Techs., Inc.*, No. 2:07-CV-497-TJW-CE, 2011 WL 238645, at *2 (E.D. Tex. Jan. 24, 2011). In patent cases, the prerequisites for preliminary injunction are (1) the likelihood of the patentee’s success on the merits; (2) the plaintiff has suffered irreparable harm; (3) the balance of hardships weighs in favor of injunction; and (4) the public interest would not be disserved by the injunction. *See Abbott Labs v. Andrx Pharm.*, 452 F.3d 1331, 1334 (Fed. Cir. 1993).

A. Sierra Dust Control is likely to succeed on the merits of its infringement claims.

i. Next Level infringes at least Claim 1 of the ’261 patent and Claim 6 of the ’482 patent.

An assessment of the likelihood of proving infringement requires a two-step analysis. First, the claims must be construed to determine their proper scope and meaning. *See Markman v. Westview Instruments*, 52 F.3d 967, 1000 (Fed. Cir. 1995). Second, the accused device is compared to the properly construed claims to determine if each claim limitation is met either literally or by a substantial equivalent. *See id.* at 976.

The asserted claims of the ’261 patent correspond to claims 1 and 9 of the ’749 patent, which have been asserted in the first-filed action. The claims that are the subject of this motion call for essentially similar elements and limitations as the asserted claims of the ’749 patent, as they relate to a conveyor moving sand, a manifold, conduits to capture the dust, and a cover to contain the dust. In the first-filed action, neither party identified a single claim limitation that required construction. *See Joint Claim Construction and Prehearing Statement*, No. 2:15-cv-

00495 (Dkt. No. 28). Accordingly, none of the terms in the asserted claims of the '261 or '482 patents should require construction either.

In the preliminary injunction context, however, the court is not obligated to conclusively interpret the claims. *Sofamor Danek Group v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996). Sierra Dust Control need only show that each claim limitation in a single claim is likely present in the accused device to prove infringement. *See, e.g., Oakley, Inc. v. SunGloss Hut Int'l*, 316 F.3d 1331, 1344 (Fed. Cir. 2003). In this case, Sierra Dust Control has attached claim charts that show substantial evidence that Next Level infringes at least claim 1 of the '261 patent and claim 6 of the '482 patent. *See Smith Decl.* and Exhibits 1 and 2 thereto. Even so, at the preliminary injunction stage, proof of infringement beyond all question is not required. *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 682 (Fed. Cir. 1990) (citing *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987)).

a. Infringement of Claim 1 of the '261 patent

Claim 1 of the '261 patent recites:

A system for controlling silica dust generated during the transfer of frac sand from a storage container through a conveyor system including a container conveyor for offloading sand from the container and a lateral conveyor for laterally transporting sand received from the container conveyor, comprising:

an air system for generating a negative pressure;

a system of conduits having inlets for collecting silica dust generated at selected points along the conveyor system during the transfer of sand from the container, the system of conduits comprising:

at least one manifold extending along at least a portion of a lateral side of the lateral conveyor; and

a plurality of flexible conduits pneumatically coupled to the air system through the at least one manifold and providing the inlets; and

a flexible cover system enclosing a space extending substantially an entire length of the lateral conveyor, a discharge end of the container conveyor extending

through an aperture in a selected wall of the flexible cover system to a discharge point within the enclosed space, wherein the at least one manifold is disposed below the discharge point within the enclosed space and at least one of the plurality of flexible conduits extends upward from the at least one manifold to provide at least one inlet disposed within the enclosed space to collect dust generated by the discharge of sand from the container conveyor,

wherein the air system is pneumatically coupled to the system of conduits and generates a negative pressure at each of the inlets to induce the collection of silica dust at the selected points along the conveyor system.

the '261 patent, Claim 1.

The Next Level system used at the PetroMax frac site near College Station, Texas contains a storage container that transfers frac sand through a conveyor system via a container conveyor and offloads that sand onto a lateral conveyor to transport the sand. *See Smith Decl.* ¶ 5 and Exhibit 1 thereto, at 1-2. Further, the Next Level system contains two air systems, but one of the air systems generates negative air pressure from selected points along the lateral conveyor, as required by the claim. *See Smith Decl.* ¶ 6 and Exhibit 1 thereto, at 2-3, 9. The Next Level system also contains conduits with inlets for collecting the silica dust at points along the conveyor system with at least one manifold extending lateral to the lateral conveyor, and a plurality of flexible conduits coupled to the air system mentioned above via the manifold. *See Smith Decl.* ¶ 7 and Exhibit 1 thereto, at 3-6. Further, the Next Level system contains a flexible cover system enclosing substantially an entire length of the lateral conveyor with the discharge end of the container conveyor extending through a wall of the flexible cover system. *See Smith Decl.* ¶ 8 and Exhibit 1 thereto, at 7. Moreover, the manifold in the Next Level system is below the discharge point and contains at least one flexible conduit that extends upward to provide at least one inlet disposed within the enclosed space to collect dust generated from the discharge of sand from the container conveyor and onto the lateral conveyor. *See Smith Decl.* ¶ 9 and Exhibit 1 thereto, at 8.

The claim chart taken in conjunction with the inventor's declaration establishes Next Level's likelihood of infringement of at least claim 1 of the '261 patent.

b. Infringement of Claim 6 of the '482 patent

Claim 6 of the '482 patent recites as follows:

A method of capturing dust generated during movement of sand through a sand delivery system:

positioning an inlet at a first end of each of a plurality of conduits in a position for collecting dust in a corresponding space surrounding a corresponding point along a lateral conveyor forming a portion of the sand delivery system;

coupling a second end of each of the plurality of conduits in fluid communication with a manifold system including at least one manifold extending substantially parallel to the ground along a lateral side of the lateral conveyor and at least partially below a point at which the lateral conveyor receives sand from a container forming a portion of the sand delivery system and providing sand to the lateral conveyor, wherein each of the plurality of conduits extends upward from the at least one manifold for positioning the corresponding inlet for collecting dust in the corresponding space along the lateral conveyor;

covering substantially an entire length of the lateral conveyor including the point at which the lateral container receives sand from the container and the space corresponding to the inlet of each of the plurality of conduits with a cover for containing dust generated during movement of sand along the conveyor;

drawing air through the manifold system and the plurality of conduits to capture dust generated during the movement of sand along the conveyor through the inlet of the each of the plurality of conduits.

the '482 patent, Claim 6.

The Next Level operating system performs a method of capturing dust during movement of sand through a sand delivery system. *See Smith Decl.* ¶ 10 and Exhibit 2 thereto, at 1-2. The Next Level system captures dust because the conduits and respective inlets are placed at selected points along a lateral conveyor. *See Smith Decl.* ¶ 11 and Exhibit 2 thereto, at 2-3. Further, the Next Level system captures dust by coupling the end of the conduits in fluid communication with the manifold while the manifold extends parallel to the ground and laterally to the lateral

conveyor. *See Smith Decl.* ¶ 12 and Exhibit 2 thereto, at 3-6. Further, the manifold in the Next Level system is below a point where the lateral conveyor receives sand from a container and the conduit extends upward from the manifold to properly position the inlet for collecting dust along the lateral conveyor. *Id.* In order for the Next Level system to properly control the dust, it covers substantially the entire lateral conveyor, including the points where the lateral conveyor receives sand and the space corresponding to the inlets of the conduits. *See Smith Decl.* ¶ 13 and Exhibit 2 thereto, at 6-7. The Next Level system also controls the dust by drawing air through the manifold system to capture dust. *See Smith Decl.* ¶ 14 and Exhibit 2 thereto, at 7-8.

ii. The Patents-in-Suit are Presumed Valid and Enforceable

Section 282 of the Patent Act provides that a patent shall be presumed valid. *See* 35 U.S.C. § 282 (2015). Accordingly, the accused infringer bears the ultimate burden of proof at trial of proving invalidity and must do so by clear and convincing evidence. *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1365 (Fed. Cir. 2001); *see Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009).

To establish a likely success on the merits, Sierra Dust Control only needs to show that “its infringement claim will likely withstand [defendant’s] challenges to the validity and enforceability of the ... patent[s].” *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1050 (Fed. Cir. 2010). Hence, Sierra Dust Control may rely on the presumption of validity to establish its likelihood of success. *See Purdue Pharma L.P.* 237 F.3d at 1365 (“Every patent is presumed valid, so if [the accused infringer] fails to identify any persuasive evidence of invalidity, the very existence of the patent satisfies [patentee’s] burden on validity.”). Even if Next Level were able to produce some evidence of invalidity, which it cannot, Sierra Dust Control could still establish likely success on the merits by showing that Next Level’s invalidity arguments lack substantial merit. *See Id.* at 1363.

Because the claims asserted in this motion correspond to narrower claims in the ‘749 patent, any prior art asserted against the ‘749 patent would likely be relevant to the asserted claims in this motion. In the first-filed action, however, Next Level did not identify any prior art relevant to the ‘749 patent and has therefore waived its right to challenge the validity of the ‘749 patent by failing to provide any invalidity contentions by the Court’s September 10, 2015 deadline. *See Sierra Dust Control, L.L.C. v. Next Level Energy Services, L.L.C.*, No. 2:15-cv-00495 (Dkt. Nos. 24, 26). It is therefore extremely unlikely that Next Level will be able to come forward with any relevant prior art pertinent to either the ’261 and ’482 patents, considering its failure to identify any prior art before now and considering the fact that the strongest evidence of prior art was overcome during prosecution.

B. Sierra Dust Control will be irreparably harmed absent a preliminary injunction

Sierra Dust Control has provided adequate proof that Next Level’s ongoing infringement of the Patents-in-Suit irreparably harms Sierra Dust Control’s business endeavors and harms the value of the Patents-in-Suit. Sierra Dust Control and Next Level are direct competitors. *See Declaration of Sierra Dust Control Operation Manager Cody Baker* at ¶ 4 (Exhibit F). This Court has held that direct competition “weighs heavily in the court’s analysis” because “intellectual property is quite valuable when it is asserted against a competitor in the plaintiff’s market.” *Brooktrout, Inc. v. Eicon Networks Corp.*, No. 203-CV-59, 2007 WL 1730112, at *1 (E.D. Tex. June 14, 2007). Further, as discussed above, Sierra Dust Control has established likelihood of success on the merits. This Court has held that “[i]n light of the finding of likelihood of success on the merits, the adverse impact the defendant’s sales will have on the plaintiff’s business leads the court to conclude that money damages are inadequate to compensate for infringement,” especially “given the parties’ status as competitors in the same market.” *Fiber Sys. Int’l, Inc. v. Applied Optical Sys., Inc.*, No. 2:06-CV-473, 2008 WL 906330,

at *3 (E.D. Tex. Mar. 31, 2008). Sierra Dust Control and Next Level are in direct competition with one another, and “[w]here two companies are in competition against one another, the patentee suffers the harm—often irreparable—of being forced to compete against products that incorporate and infringe its own patented inventions. *Douglas Dynamics, LLC v. Buyers Products Co.*, 717 F.3d 1336, 1344 (Fed. Cir. 2013). In *Douglas Dynamics*, the Federal Circuit held that the defendant irreparably harmed the plaintiff because the defendant damaged the plaintiff’s reputation and perception in the marketplace, even though there was no proof that the plaintiff lost sales or market share. *Id.* As established below, Next Level’s actions are even more egregious because it has caused an immediate effect on Sierra Dust Control’s sales and market share by using Sierra Dust Control’s patented dust-control operations and methods.

The attached declaration of Cody Baker, operations manager of Sierra Dust Control, establishes the irreparable harm that Sierra Dust Control will suffer if Next Level is not enjoined during the pendency of this case. Using Sierra Dust Control’s patented technology, Next Level has secured jobs with potential customers of Sierra Dust Control. *See Baker Decl.* ¶ 5, 6. Next Level obtained at least three jobs with potential Sierra Dust Control customers in 2014: Trican, Frac Tech Services International, and EP Energy. *See Exhibit G (Campbell Depo.)*, at 23; *See Exhibit H (Brown Depo.)*, at 28. Further, Next Level has contacted other current and potential Sierra Dust Control customers to obtain dust-collection jobs, including Halliburton, Calfrac Well Services, Weatherford, Anadarko, and Sanjel Corp. *See Exhibit G*, at 21; *See Baker Decl.* ¶ 5, 6, 8. At least some of Next Level’s 2014 jobs infringe the ’749 patent in the first-filed case. In May 2015, it is believed that Next Level contracted a job with a current customer of Sierra Dust Control, Cal Frac Well Services. *See Baker Decl.* ¶ 6. Further, Sierra Dust Control contracted a job with PetroMax Operating Company in 2015, and clearly expected to work on PetroMax’s

next fracing job. *See Baker Decl.* ¶ 7. But, in November 2015, Sierra Dust Control learned that Next Level had taken a job with PetroMax using Sierra Dust Control’s system and method that infringes the Patents-in-Suit. *Id.* In November 2015, Sierra Dust Control provided a demo of its dust-control operations for PumpCo Services with the expectation of receiving a contract for a future job. *See Baker Decl.* ¶ 8. But Sierra Dust Control obtained knowledge that Next Level just completed PumpCo’s most recent job in December 2015. *Id.* Next Level continues to grow its share in the dust-control market by performing operations using Sierra Dust Control’s patented system and methods.

Finally, in efforts to settle the first-filed litigation, Next Level’s counsel informed Sierra Dust Control’s counsel that Next Level is in poor financial condition. Accordingly, Next Level will likely be unable to respond in money damages – an important factor in determining irreparable harm. *See Altana Pharma AG v. Teva Pharm. USA, Inc.*, 566 F.3d 999, 1010 (Fed. Cir. 2009); *Circle R, Inc. v. Smithco Mfg., Inc.*, 919 F. Supp. 1272, 1302 (N.D. Iowa 1996); *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995).

Next Level’s continued attempts to lure past, current, and potential customers from Sierra Dust Control by using Sierra Dust Control’s patented dust-operation technology, has resulted in the loss of revenue for Sierra Dust Control. If Next Level is not preliminarily enjoined from infringing Sierra Dust Control patents, it is inevitable that Sierra Dust Control will continue to lose customers and revenue during the pendency of this litigation without any realistic prospect that Next Level can respond in damages. *See Baker Decl.* ¶ 9.

C. The balance of hardships weighs in favor of injunction

As shown above, if an injunction does not issue, Sierra Dust Control will suffer irreparable harm. Next Level will likely argue that an injunction will cripple its business because it depends on the infringing dust-control operations to gain customers. Such an argument is

unpersuasive. The hardship to Next Level of preliminarily enjoining its infringing conduct is limited to the injury ordinarily expected when an injunction is imposed. Mere hardship incurred in the process of ceasing operations is not sufficient. As the Federal Circuit clearly stated, “[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.” *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1330 (Fed. Cir. 2008) (quoting *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)). Next Level “should not be permitted to prevail on a theory that successful exploitation of infringing technology shields a party from injunctive relief.” *Versata Software Inc. v. SAP Am., Inc.*, No. 2:07-CV-153 CE, 2011 WL 4017944, at *2 (E.D. Tex. Sept. 9, 2011) *aff’d in part, vacated in part, remanded*, 717 F.3d 1255 (Fed. Cir. 2013) (quoting *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008) (internal quotation marks omitted).

D. A preliminary injunction is in the public interest.

This Court has found that “the public has an interest in a strong patent system and it is generally in the public interest to uphold patent rights against an adjudicated infringer.” *SynQor, Inc.*, 2011 WL 238645, at *4. In general, public policy favors the enforcement of patent rights. *See Abbott Labs*, 452 F.3d at 1348 (Fed. Cir. 2006) (“[W]e agree with the district court that the public is best served by enforcing patents that are likely valid and infringed.”). Further, protecting Sierra Dust Control’s rights also advances the public’s interest in obtaining access to new technologies because “the encouragement of investment-based risk is the fundamental purpose of the patent grant, and is based directly on the right to exclude.” *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006).

As stated above, Next Level is benefitting from its infringement on Sierra Dust Control’s patented technology. There is no public interest in allowing Next Level to benefit from such

activity because Next Level is devaluing Sierra Dust Control's patented rights. This is neither fair to Sierra Dust Control nor to the potential customers that would receive a high value dust-operation system from Sierra Dust Control.

IV. CONCLUSION

For the foregoing reasons, Sierra Dust Control respectfully requests that this Court enter a preliminary injunction enjoining and prohibiting Next Level, its officers, agents, servants, employees, attorneys, and those persons acting in concert or participation with Next Level from making, using, selling, offering for sale, and operating its dust-control systems and any other system that infringes the Patents-in-Suit, and from engaging in any other conduct or activity that induces or contributes to the infringement of the Patents-in-Suit during pendency of this litigation.

Dated: December 14, 2015

Respectfully submitted,

/s/ Herbert J. Hammond

Herbert J. Hammond

State Bar No. 08858500

Herbert.Hammond@tklaw.com

Shivan V. Mehta

State Bar No. 24083490

Shivan.Mehta@tklaw.com

THOMPSON & KNIGHT LLP

One Arts Plaza

1722 Routh St., Suite 1500

Dallas, Texas 75201

214.969.1700

214.969.1751 (Fax)

RON ADKISON

State Bar No. 00921090

Adkison Law Firm

300 W. Main St.

Henderson, TX 75652

903/657-8545 Telephone

903/657-6108 Facsimile

ATTORNEYS FOR PLAINTIFF

SIERRA DUST CONTROL, L.L.C.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically on the 14th day of December, 2015 in compliance with Local Rule CV-5(a) and has been served on all counsel who have consented to electronic service and all other counsel by regular mail.

/s/ Herbert J. Hammond

Herbert J. Hammond