

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TALISMAN DESIGNS, LLC, *et al.*,
Plaintiff,

v.

JACKSUN, *et al.*,

Defendant.

Civil Action No.

21-cv-777

(Judge Schwab)

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

Plaintiff submits this Memorandum in Support of its Motion for Default Judgment pursuant to Fed. R. Civ. P. 55 (b)(2) seeking entry of Judgment against the defaulting Defendants (“Defendants”) on the sole count of Copyright Infringement.

I. INTRODUCTION

This memorandum is filed in support of the lawsuit (as set forth in the caption above) that the Plaintiff brought seeking relief from the tireless efforts of the online copycats trying to destroy Plaintiff’s business.

In this case, Defendants are sellers of infringing products on at least one of the online marketplaces operated by Amazon.com, eBay.com, Aliexpress.com, Walmart.com, and wish.com, Defendants engaged in federal copyright infringement (Count I).

The remaining Defendants in this lawsuit have all defaulted and failed to cooperate in discovery. The Defendants have been properly served pursuant to Fed. R. Civ. P. 4 and are aware of this action, but nevertheless chose not to respond. The Clerk has entered default. The Plaintiff also served discovery upon Defendants, including Requests for Admission, and no response to the discovery was received. Plaintiff filed a Motion with this Court under Fed. R.

Civ. P. 55(b)(2) for a default judgment against Defendants an award of \$2,000,000.00 for their copyright infringement.

There are no issues of fact remaining in these lawsuits, and a default judgment should be entered against each Defendant providing for permanent injunctive relief, a damage award of at least \$2,000,000.00 in disgorgement of admitted profits against each individual Defendant, plus interest, a post-judgment asset restraining order, and an order authorizing the release and transfer of Defendants' assets, in whole or in part, awarded to Plaintiff. Courts in the Western District of Pennsylvania have previously entered a default judgment against each defendant in this amount or more using a similar method for proving and calculating damages that is used here. *See, e.g., Talsiman Designs LLC v. Ladyana US*, No. 22-994 (W.D. Pa. October 20, 2022)(Schwab, J); *Doggie Dental, Inc. v. Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021) (Hornak, CJ); *Osprey LLC v. Poolwhale, et al.*, No. 20-cv-1253 (W.D. Pa. December 3, 2020) (Hardy, J); *Doggie Dental, Inc. v. Anywill, et al.*, No. 19-cv-682 (W.D. Pa. August 14, 2020 (Hornak, CJ); and *Doggie Dental, Inc. v. Anywill, et al.*, No. 19-cv-746 (W.D. Pa. August 14, 2020 (Hornak, CJ).

II. ARGUMENT

A. This Court has Jurisdiction to Enter Default Judgment Against the Defendants

This Court has jurisdiction to grant Plaintiff's motion and enter default judgment against Defendants because the Court has subject matter jurisdiction over this action as well as personal jurisdiction over the Defendants. This Court has subject matter jurisdiction over this action pursuant to the Copyright Act. 17 U.S.C. §§ 101.

Personal jurisdiction may be established either by specific or general jurisdiction, but specific jurisdiction is appropriate in this case because of Defendants' contact with the forum. *See* 42 P. A. Cons. Stat. § 5322. The factors to consider when establishing specific jurisdiction are: "(1) the extent to which defendant 'purposefully avail[ed]' itself of the privilege of conducting activities in the State; (2) whether the Plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *See IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3rd Cir.1998). Defendants satisfy each of the factors to establish specific personal jurisdiction. Likewise, venue is proper pursuant 28 U.S.C. § 1391 and 28 U.S.C. § 1400(b).

First, Defendants purposefully availed themselves of the privilege of conducting business in Pennsylvania and this Judicial District. Defendants purposefully targeted sales of infringing products to Pennsylvania residents, and did in fact sell infringing products into Pennsylvania. *See Complaint*, ¶ 11 [ECF No. 2]. These actions are sufficient to establish jurisdiction over Defendants. 42 Pa. Cons. Stat. § 5322 (a). Second, Plaintiff's claims arise directly from actions that occurred in this Judicial District. Plaintiff purchased infringing products to determine their authenticity and had the infringing products shipped to Pennsylvania. *See Declaration of Katherine Waymire* [ECF No. 6]. These unauthorized and unlicensed sales of infringing products in this Judicial district establish this Court's jurisdiction over Defendants.

Lastly, this Court's exercise of specific personal jurisdiction over Defendants is "reasonable" under the constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The record in this case does not suggest that the burden of litigation in this District is extraordinary. Defendants offered to ship and sell their infringing products to any part of the United States. *See Complaint*, ¶ 11 [ECF No. 2]. Pennsylvania and this Court have a valid

interest in the resolution of the grievances of its citizens and businesses, particularly when they potentially involve issues of [Pennsylvania] law. *See Square D Co. v. Scott Elec. Co.*, No. 06-459, 2008 WL 4462298, at *12 (W.D. Pa. Sept. 30, 2008). Plaintiffs have a valid and substantial interest in having their legal rights recognized and vindicated. *Id.* Therefore, this Court's exercise of specific personal jurisdiction over Defendants is constitutionally reasonable.

B. Joinder of the Defendants is Appropriate

Joinder of the defendants is proper when plaintiff seeks relief “jointly, severally, or in the alternative with respect to arising out of the same transaction, occurrence or series of transactions or occurrences;” and “any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2). Joinder is consistent with the strongly encouraged policy of “entertaining the broadest possible scope of action consistent with fairness to the parties.” *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715. 724 (1966).

In a decision on joinder in an online counterfeiting case, the Northern District of Illinois found joinder was appropriate, stating:

According to the Merriam-Webster dictionary, “transaction” generally involves a “reciprocal effect” or “exchange,” whereas an “occurrence” is defined as something that simply “happens” or “appears.” Unlike a “transaction,” an “occurrence” is not necessarily the product of joint or coordinated action. The internet frequently produces occurrences that can be described as cooperative but not transactional or intentionally coordinated. Individual actions which alone may have minimal impact on society or the economy can have a substantial impact through aggregation that is only possible through the internet. Individuals on the internet can openly reach billions of people with a single click of a mouse, while at the same time hiding their identities, frustrating law enforcement. As a result, an “occurrence” of mass harm easily can be inflicted even if there is no express “transactional” coordination among the attackers. Rule 20’s inclusion of the term “occurrence” should allow plaintiffs to join in a single case the defendants who participate in such unlawful occurrences, despite the lack of a “transactional link.” The kind of harmful occurrences the internet enables — including mass foreign counterfeiting — were inconceivable when

Rule 20 was drafted. But the Rule’s inclusion of the term “occurrence” suggests that joinder is appropriate in cases alleging harm that is not strictly “transactional.” *Bose Corp. v. The Partnerships and Unincorporated Associations Identified on Schedule “A”*, No. 19-cv-7467 (N.D. Ill. Feb. 19, 2020) (Durkin, J.) at 10-11 [DE 46].

For at least these reasons, the Defendants are properly joined in this case.

C. Plaintiff Is Entitled to a Default Judgment Against Defendants

1. The Clerk Properly Entered Default as to Defendants

The Clerk of this Court enters a default “[w]hen a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.” Fed. R. Civ. P. 55(a). The Clerk entered default against Defendants because, as the docket reflects, the time for filing a responsive pleading expired after service.

2. Factual Allegations Establish Defaulting Defendants’ Liability

By failing to appear and defend against the Complaint, Defendants are deemed to have admitted every allegation therein, and the Court must only determine whether Plaintiff’s Complaint properly states a claim for relief. *See Hritz v. Woma Corp.*, 732 F.2d 1178, 1180 (3d Cir. 1984); *see also Pair Networks, Inc. v. Lim Cheng Soon*, 2013 WL 452565, *1 (W.D. Pa., Feb. 6, 2013).

a. Liability for Federal Copyright Infringement against Defendants

Liability for copyright infringement is established when the plaintiff demonstrates two elements: (1) ownership of a copyright and (2) copying by the defendant. *Dam Things From Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 561 (3d Cir. 2002).

The well-pled factual allegations of Plaintiff's *Complaint* properly allege the elements for each of the above claims. Moreover, the factual allegations in Plaintiff's *Complaint*, substantiated by the evidence submitted, conclusively establish the Defendants' liability under each of the claims asserted in the *Complaint*.

In addition to the well-pled factual allegations, admitted by default, and established by the evidence, Defendants have also made certain admissions by failing to respond to the *Request for Admission* served upon them. *See Malkin Dec.*,¹ ¶ 5. These deemed admissions include the following:

At all times relevant hereto, Plaintiff owned the U.S. Copyright Registration No. VA 2-218-985 ("Pig Face Sculpture") and Defendant knew that Plaintiff had the exclusive right to use and license its intellectual property and goodwill associated therewith.

Despite having the knowledge that you had no license or legal authority to do so, you engaged in the activity of promoting and otherwise advertising, selling, offering for sale, and/or distributing infringing products under your Seller ID or Seller IDs.

At all times relevant hereto, you have been engaged in the fraudulent promotion, advertisement, distribution, offering for sale, and/or sale of goods that are infringing at least one of Plaintiff's Mark, or Plaintiff's Trade Dress, and/or substantially similar copies of Plaintiff's Works.

You intentionally make, use, offer to sell, or import into the United States counterfeit and substandard copies of Plaintiffs' Product.

Accordingly, Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against the Defaulting Defendants.

¹ Refers to *Declaration of Brian Samuel Malkin* submitted herewith.

3. Plaintiff is Entitled to Defendants' Profits Under the Copyright Act

Pursuant to 17 U.S. Code § 504 (b), Plaintiff's damages may be the Defendant's profits less any expenses proven by the Defendants. In cases where defendants have failed to produce documents to characterize revenue, courts have entered a profits award for the entire revenue amount. *See WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. Ill. 2008) (“[t]he burden was therefore on PartyGaming to show that certain portions of its revenues...were not obtained through its infringement of WMS's marks.”); *Chloe v. Queen Bee of Beverly Hills*, 2009 U.S. Dist. LEXIS 84133, at *15-17 (S.D.N.Y. Jul. 16, 2009) (entering profits award for the entire revenue amount in trademark infringement case even though “records offer no guidance as to how much of this revenue stream related to [Plaintiff's] products [as opposed to other products not at issue in this case] or as to the costs incurred in acquiring and selling these products.”). Under normal circumstances, it is the infringer who bears the burden of “offering a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items in issue.” *Deckers Outdoor Corp. v. ShoeScandal.com, Ltd. liability Co.*, No. CV 12-7382 ODW (SHx), 2013 U.S. Dist. LEXIS 168545, at *12 (C.D. Cal. Nov. 25, 2013), citing *Sunbeam Prods., Inc. v. Wing Shing Prods. (BVI) Ltd.*, 311 B.R. 378, 401 (S.D.N.Y. 2004) *aff'd*, 153 F. App'x 703 (Fed. Cir. 2005). “But if the infringer has failed to produce any evidence ... the Court must determine the costs to be subtracted from revenue based on the evidence it has to determine profits.” *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1447 (Fed. Cir. 1998).

Since defaulting Defendants have chosen not to participate in these proceedings, Plaintiff has limited available information regarding defaulting Defendants' profits from the sale of infringing products. Defaulting Defendants have failed to appear in this matter and have not produced any documents or information: (1) characterizing each of the transactions in their

financial accounts, (2) other accepted payment methods; or (3) other Internet stores that they may be operating. As such, defaulting Defendants have not met their burden to apportion gross receipts between infringing and non-infringing product sales, or to show any deductions. See 17 U.S. Code § 504 (b); *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. 2008); *Nordock, Inc. v. Systems, Inc.*, 2017 U.S. Dist. LEXIS 192413, at * 7.

By failing to respond to Plaintiff's Requests for Admissions and failing to answer the Plaintiff's Complaint, each defaulting Defendant has admitted that profits from the sale of the infringing products totals more than \$2,000,000. *Complaint*, ¶¶ 51-56; See Fed. R. Civ. P. 36(a)(3). Because defaulting Defendants have not met their burden of apportioning gross sales or showing any deductions, the Court should award \$2,000,000 from each defaulting Defendant based on the Defendants' failure to answer Plaintiff's Requests for Admission. Deemed admissions have previously been used to establish profits to be disgorged in cases against sellers on online marketplaces. *Talsiman Designs LLC v. Ladyana US*, No. 22-994 (W.D. Pa. October 20, 2022) (Schwab, J), *Fitness Anywhere LLC v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-4155 (N.D. Ill., Sept. 26, 2019) (Lee, J.), and *LMVH Swiss Manufactures S.A. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-4383(N.D. Ill., Sept. 25, 2019) (Coleman, J.).

A deemed admission of two million dollars (\$2,000,000) in profit to be disgorged is not objectively unreasonable. In similar cases in this District the court has awarded two million dollars (\$2,000,000) in statutory damages against each defendant. Such an award serves the public interest in making the misconduct unprofitable and deter future willful violations. entered maximum statutory damages against Defendants in other online counterfeiting cases. See *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) (\$2

million in damages against each defendant) [DE 34], *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) (same) [DE 44], and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) (same) [DE 52]. In short, in all anticounterfeiting cases in this district, the Court has awarded the maximum damages under the law.

In addition to admitting their infringement is willful, each Defendant has also admitted that it made “more than \$2,000,000.00 (United States Dollars) in profit on the sales of the counterfeit goods.” *Complaint*, ¶ 56. In circumstances where no evidence of a defendant’s profit was available, courts have consistently awarded at least \$1 million dollars in statutory damages.² Furthermore, courts have awarded high damage amounts where a defendant’s counterfeiting activities attracted wide market exposure through Internet traffic or advertisement. *See Coach, Inc. v. Ocean Point Gifts*, 2010 U.S. Dist. LEXIS 59003, *15-16 (D.N.J. Jun. 14, 2010) (high damage awards in counterfeit cases were “due in part to the wide market exposure that the Internet can provide”); *Burberry Ltd. v. Designers Imports, Inc.*, 2010 U.S. Dist LEXIS 3605, *28-29 (S.D.N.Y. Jan. 19, 2010) (damages amount based, in part, on “Defendant’s ability to reach a vast customer base through internet advertising”).

In the present case, an award of 2,000,000.00 dollars (also Defendant’s admitted minimum profit) is appropriate to serve the purposes of: (1) deterring the defendant and others situated like it from bringing into commerce counterfeit goods, (2) compensating the plaintiffs for damages caused by defendant’s infringement, and (3) punishing the defendant appropriately

² *See, e.g., Eye Safety Sys., Inc. v. The Partnerships and Unincorporated Ass’ns. Identified in Schedule “A”*, Case No. 18-cv-00034 [D.E. 42] (N.D. Ill. Mar. 1, 2018) (awarding \$1 million in statutory damages per defendant, entering permanent injunction, and ordering PayPal to transfer defendants’ funds to plaintiff as partial satisfaction of judgment); *Spin Master Ltd. v. The Unincorporated P’ships and Ass’ns. Identified in Schedule “A”*, Case No. 18-cv-01270 [D.E. 39] (N.D. Ill. Apr. 25, 2018) (same).

for its counterfeiting activities. Indeed, courts in this district have entered maximum statutory damages against Defendants in other online counterfeiting cases. *See Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) (\$2 million in damages against each defendant), *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) (same), and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) (same). *See Doggie Dental v. Anywill*, No. 19-cv-682 (W.D. Pa., August 14, 2020)(Hornak, CJ); *Doggie Dental v. Max_Buy*, 19-746 (W.D. Pa., August 14, 2020) (Hornak, CJ); *Doggie Dental v. Go Well*, 19-1282(W.D. Pa., August 14, 2020) (Hornak, CJ); and *Doggie Dental v. Worthbuyer*, 19-1283 (W.D. Pa., August 14, 2020) (Hornak, CJ). In short, in all anticounterfeiting cases in this district, the Court has awarded the maximum damages under the law.

6. Plaintiff is Entitled to Permanent Injunctive Relief

Plaintiff also seek a permanent injunction enjoining Defendants from infringing or otherwise violating Plaintiff's rights in its product, including at least all injunctive relief previously awarded by this Court to Plaintiff in the temporary restraining order and preliminary injunction. *See Evony, LLC*, 2011 WL 1230405 at *7 (“In this case, Plaintiff has achieved “actual success on the merits” through the admission of liability arising from Defendant's default. Furthermore, the Verified Complaint establishes that Defendant unlawfully sells and distributes copyrighted and trademarked material of the Plaintiff's. Nothing in the facts before the Court indicates that Defendant has ceased this infringing activity; thus, a permanent injunction is warranted in this case on all claims of the Verified Complaint.”). Plaintiff is also entitled to injunctive relief so it can take prompt action against any new online marketplace accounts or websites that are identified, found to be linking to Defendants, and selling infringing

knock-off products. A plaintiff is entitled to a permanent injunction under the Copyright Act, and Pennsylvania common law. 17 U.S.C. § 502; and *B&B Microscopes v. Armogida*, 532 F. Supp. 2d 744, 760 (W.D. Pa. 2007) (citing *Brody's, Inc. v. Brody Bros., Inc.*, 454 A.2d 605, 607 (Pa. Super. Ct.1982)). *See also Evony, LLC*, 2011 WL at *7.

A permanent injunction, like the damages under the Copyright Act, would help deter other individuals or corporations from infringing Plaintiff's copyright rights. Additionally, entry of a permanent injunction against Defendants in this case will help expedite any future litigations between the defaulting Defendants and Plaintiff, if a case between the parties arises in the future. This equitable result would be in the interest of justice and provide Plaintiff with more flexibility to protect its intellectual property rights. As such, permanent injunctions are routinely entered by other Courts in similar counterfeiting cases. *See cases cited, infra.*

7. Plaintiff Requests That This Court Order the Transfer to It of Remaining Assets in Defaulting Defendants' Accounts

Plaintiff requested a temporary restraining order and preliminary injunction, *inter alia*, to prevent Defendants from transferring the funds held in their accounts beyond this Court's jurisdiction. This Court granted the temporary restraining order and preliminary injunction, preventing Defendants from accessing the funds in their accounts. [ECF Nos. 14 and 32]. This Court found that Plaintiff had established a likelihood of success on the merits and irreparable harm in the absence of a temporary restraining order and preliminary injunction. *See Id.*

Plaintiff now requests that this Court order the assets currently held in the defaulting Defendants' accounts be transferred to Plaintiff in partial payment of any award of damages. In the absence of such an Order, it is likely that Plaintiff will be left without any effective means by which to collect from Defendants any monetary judgment entered by this

Court. As explained, previously, Defendants and any assets they own, other than those held in their respective accounts, are presumably located in China. There is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments. Moreover, as explained in some detail previously, Defendants are involved in illegal counterfeiting operations and go to great lengths to conceal their identities and whereabouts. As a result, even in the unlikely event that Plaintiff could enforce a U.S. judgment in the Chinese courts, it will be virtually impossible to locate Defendants or any assets they may hold in order to satisfy any monetary damages awarded in this case.

Such orders are routinely entered by this Court to satisfy monetary judgment awards in similar counterfeiting cases. *See Talsiman Designs LLC v. Ladyvana US*, No. 22-994 (*W.D. Pa.* October 20, 2022) (*Schwab, J.*); *Doggie Dental v. Ahui*, 19-1627 (September 27, 2021) (*Hornak, CJ.*); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (*W.D. Pa.*, April 21, 2020) (*Schwab, J.*); *Rapid Slicer LLC v. Art-House*, No. 19-411 (*W.D. Pa.*, Jan. 9, 2020) (*Horan, J.*); and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (*W.D. Pa.*, Aug 13, 2019) (*Fischer, J.*); *See Doggie Dental v. Anywill*, No. 19-cv-682 (*W.D. Pa.*, August 14, 2020) (*Hornak, CJ.*); *Doggie Dental v. Max_Buy*, 19-746 (*W.D. Pa.*, August 14, 2020) (*Hornak, CJ.*); *Doggie Dental v. Go Well*, 19-1282 (*W.D. Pa.*, August 14, 2020) (*Hornak, CJ.*); and *Doggie Dental v. Worthbuyer*, 19-1283 (*W.D. Pa.*, August 14, 2020) (*Hornak, CJ.*).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant its Motion; enter judgment against Defendants for federal copyright infringement (Count I); permanently enjoin Defendants; award the disgorgement of profits in accordance with 15 U.S.C.

§ 1117(a) as to all Defendants; order disgorgement of Defendants' profits the Copyright Act; enter a permanent injunction order prohibiting Defendants from selling Infringing Products and transferring all assets in Defendants' financial accounts to Plaintiff in partial payment of the any default judgment.

Respectfully submitted,

Dated: October 25, 2022

/s/ Stanley D. Ference III

Stanley D. Ference III

Pa. ID No. 59899

courts@ferencelaw.com

Brian Samuel Malkin

Pa. ID No. 70448

bmalkin@ferencelaw.com

FERENCE & ASSOCIATES LLC

409 Broad Street

Pittsburgh, Pennsylvania 15143

(412) 741-8400 – Telephone

(412) 741-9292 – Facsimile

Attorneys for Plaintiff