

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

BROADWAY PINE BRANDS LLC,

Plaintiff,

v.

MUSTB TOY STORE, *et al.*,

Defendants.

Civil Action No. 21-1736

(Judge Ranjan)

BROADWAY PINE BRANDS LLC,

Plaintiff,

v.

AMTOY, *et al.*,

Defendants.

Civil Action No. 22-358

(Judge Ranjan)

BROADWAY PINE BRANDS LLC,

Plaintiff,

v.

COCOCITY, *et al.*,

Defendants.

Civil Action No. 22-510

(Judge Ranjan)

**MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT AND
PERMANENT INJUNCTION**

Plaintiffs submit this Memorandum in Support of its Motion for Default Judgment pursuant to Fed. R. Civ. P. 55 (b)(2) seeking entry of Judgment against all the defaulting Defendants (“Defendants”) for patent infringement in all cases and additionally for trademark infringement and counterfeiting against Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72 in the *Amtoy*¹ case. As discussed below, the method for proving and calculating damages used in this Motion is similar to the method that has previously been used by this Court in multiple other online infringement cases, including by Chief Judge Hornak and Judge Weigand.

I. INTRODUCTION

Plaintiff is before this Court seeking relief from the tireless efforts of the online copycats trying to destroy Plaintiff’s small business. The defendants are sellers of infringing product on at least one of the Amazon.com, Aliexpress.com, eBay.com, or wish.com online marketplaces. The remaining Defendants in this lawsuit have all defaulted and failed to cooperate in discovery. It remains for the Court to consider the unrefuted facts and the supporting law and render a judgment consistent with prior judgments against e-commerce scofflaws.

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 has filed a Motion with this Court under Fed. R. Civ. P. 55(b)(2) for a default judgment against Defendants for patent infringement (Count I) in each case

¹ Refers to *Broadway Pine Brands LLC v. Amtoy*, No. 22-358. Correspondingly, *Mustb* refers to *Broadway Pine Brands LLC v. Mustb Toy Store*, No. 21-1736 and *Cococity* refers to *Broadway Pine Brands LLC v. Cococity*, No. 22-510. Where further clarification is not needed, collectively the cases are referred to as “the cases.”

and for trademark infringement and counterfeiting (Counts II, and III)² in the *Amtoy* case after Defendants established internet stores to offer to sell, and sold, knock-off and infringing versions of Plaintiff's Product, the SLIDEAWAY^{®3} toy storage bin protected by U.S. Patent No. 11,154,128 ("the '128 Patent").

There are no issues of fact remaining in this suit, and a default judgment should be entered against Defendants providing for permanent injunctive relief, a damage award (as discussed below) 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. This award and the method for calculating it is consistent with other awards made for admitted intentional patent infringement and trademark counterfeiting in the Western District of Pennsylvania. *See Aquapaw v. Allnice*, No. 20-1954 (W.D. Pa, July 29, 2022) (Wiegand, J.) [ECF No. 85] and related cases; *Doggie Dental, Inc. v AVANTDIGITAL*, No. 21-cv-271 (W.D. Pa., February 23, 2022) (Hornak, CJ); *Doggie Dental, Inc. v CDOFFICE*, No. 21-cv-565 (W.D. Pa., February 23, 2022) (Hornak, CJ); *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021) (Hornak, CJ); and *Osprey LLC v. Poolwhale, et al.*, No. 20-cv-1253 (W.D. Pa. Dec. 3, 2020) (Hardy, J).

² Only Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72 in *Amtoy* have infringed and counterfeited on Plaintiff Mark. As described below, all the Defendants have infringed on at least one claim of the Plaintiff's Patent.

³ U.S. Reg. No. 5,994,698 ("Plaintiff's Mark").

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 Patent Act, 35 U.S.C. § 271, and The All Writs Act, 28 U.S.C. § 1651(a), and additionally under 15 U.S.C. § 1121 of the Lanham Act as to certain other defendants.

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 Pa. 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 to 28 U.S.C. § 1391 and 28 U.S.C. § 1400(b).

First, Defaulting Defendants purposefully availed themselves of the privilege of conducting business in Pennsylvania and this Judicial District. Defendants purposefully targeted sales of Infringing Products to the Western District of Pennsylvania, offered to sell Infringing Products to Pennsylvania residents, and did in fact sell Infringing Products into Pennsylvania. *See Mustb Toy Store Complaint* [ECF No. 2] ¶ 14, *Cococity Complaint* [ECF No. 2] ¶ 14, and *Amtoy Complaint* [ECF No. 2] ¶ 14. These actions are sufficient to establish jurisdiction over Defaulting 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 Mustb Toy Store, Dee Odell Declaration* [ECF No. 12]. *Cococity, Dee Odell Declaration*. [ECF No. 10] and *Amtoy* [ECF No. 10]. These unauthorized and unlicensed sales of Infringing Products in this Judicial district establish this Court's jurisdiction over Defaulting 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. *Mustb Toy Store Complaint* [ECF No. 2] ¶ 14, *Cococity Complaint* [ECF No. 2] ¶ 14, and *Amtoy Complaint* [ECF No. 2] ¶ 14. 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 September 30, 2008). Plaintiff 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

The courts in this district have universally approved the joinder of online patent infringement defendants in one case. *See Aquapaw Brands LLC v. Tiktoks*, No. 21-cv-696 (W.D. Pa., Jul. 29, 2022) (Wiegand, J.) [ECF No. 56]; *Aquapaw Brands LLC v. Flopet*, No. 21-cv-988 (W.D. Pa., Jul. 29, 2022) (Wiegand, J.) [ECF No. 58]; *Aquapaw Brands LLC v. Yan-Peng*, No. 1784 (W.D. Pa., Jul. 29, 2022) (Wiegand, J.) [ECF No. 62]; *Aquapaw LLC v. Allnice*, No. 20-

1954 (W.D. Pa., Jul. 29, 2022) (Wiegand, J.) [ECF No. 85]; *Doggie Dental, Inc. v. Cdoffice*, No. 21-cv-271 (W.D. Pa., Sept. 7, 2021) (Hornak, C.J.) [ECF No. 126].

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). There is no difference in the analysis under either Rule 20 or 35 U.S.C. § 299 of the Patent Act. *See* 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Kyl observing that Section 299 “effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas”). 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].

Moreover, in the present case there is something more -- the admitted allegations of the Complaint (*i.e.*, cooperating, communicating, coordinating with a common goal of creating one illegal competing marketplace). These additional activities further establish the necessary commonality to join the defendants into one action under either Rule 20 or Section 299. Thus, the well-pled factual allegations of Plaintiff's Complaint properly allege the elements for joinder and the Defendants are properly joined in this case.

Recognizing this, in the recent case of *Doggie Dental, Inc. v. CDOFFICE, et al*, No. 21-cv-271, Chief Judge Hornak ruled joinder of the Defendants was permissible because the Complaint sufficiently alleged the right to relief against the joined defendants arises "out of the same transaction, occurrence, or series of transactions or occurrences," and that are "questions of law or fact common to all the defendants." [ECF No. 126]. For at least these reasons, the Defendants are properly joined in this case. *See also Aquapaw v. Allnice*, No. 20-1954 (W.D. Pa, July 29, 2022) (Wiegand, J.) [ECF No. 85] (joinder of patent defendants appropriate when accused products or processes are the same in respects relevant to the patent).

C. Plaintiff Are 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.

2. Factual Allegations Establish Defaulting Defendants' Liability

By failing to appear and defend against the Complaint, Defaulting 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., February 6, 2013). Plaintiff now move this Court for a default judgment finding that Defaulting Defendants are liable on Plaintiff's Complaint.

a. All Defendants are Liable for Patent Infringement.

“Section 271(a) of the Patent Act defines direct infringement as ‘whoever without authority makes, uses, offers to sell, or sells any patented invention, within the U.S. or imports into the U.S. any patented invention during the term of the patent therefor, infringes the patent.’ 35 U.S.C. § 271(a).” *Grecia v. McDonald's Corp.*, 2018 U.S. App. LEXIS 5903, at *7-8 (Fed. Cir. Mar. 6, 2018).

In this case, Plaintiff is the lawful owner of the '128 patent. Plaintiff has submitted extensive documentation showing that Defendants make, use, offer for sale, sell, and/or import in the United States for subsequent sale or use products that infringe directly at least claim 1 of the '128 patent. *Mustb Toy Store, Dee Odell Dec.*, Composite Exhibit 1 [ECF No. 12]; *Cococity, Dee Odell Dec.*, Composite Exhibit 1 [ECF No. 13] and, *Amtoy, Dee Odell Dec.*, Composite Exhibit 1 [ECF No. 10]; *Nate Jelovich Declaration*, ¶¶ 29-31; Exhibit 4 to the Complaint [ECF No. 2]. To show infringement, Plaintiff submitted a detailed infringement claim chart for Plaintiff's '128 patent that set forth the text of the patent claim to compare with images of the infringing products. Thus, Plaintiff has proven by uncontroverted evidence their patent infringement claims.

As to validity, “[e]ach issued patent carries with it a presumption of validity under 35 U.S.C. § 282.” *Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190, 1205 (Fed. Cir. 2017). “This presumption is sufficient to establish a likelihood of success on the validity issue, absent a challenge by the accused infringer.” *Id.* Here, there is no challenge by any of the accused infringers, thus validity is established by default as well.

The well-pled factual allegations of Plaintiff’s Complaint, including specifically those in Paragraphs 41 - 49, 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 Defaulting Defendants’ liability asserted in the Complaint.

In addition to the well pled factual allegations, admitted by default, and established by the evidence, Defendants have also made admissions by failing to respond to the *Requests for Admissions* served upon them concurrent with the service of the Complaint and Summons. 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 *Requests for Admissions* served upon them. *See Malkin Dec.*,⁴ ¶ 5. These deemed admissions include the following:

At all times relevant hereto, Plaintiff owned Plaintiff’s Patent (defined as U.S. Patent No. 11,154,128 entitled “STORAGE CONTAINER WITH AN INTEGRATED MAT, and which covers Plaintiff’s Product).

You were on notice of the ‘128 patent before you began manufacturing, offering for sale, selling, promoting, advertising, and otherwise distributing the Infringing Product.

You have intentionally infringed and continue to infringe at least one claim of the Plaintiff’s Patent either directly or indirectly through acts of contributory infringement or inducement in violation of 35 U.S.C. § 271, by making, using, selling, importing and/or offering to sell Infringing Products.

⁴ Refers to *Declaration of Brian Samuel Malkin* submitted herewith.

But for your infringement and/or counterfeiting of Plaintiff's products, Plaintiff would have made each sale you made instead and at Plaintiff's pre-infringement selling price.

At all times relevant hereto, there was consumer demand for the Plaintiff's Product.

At all times relevant hereto, Plaintiff have the manufacturing and marketing capability to meet the consumer demand for the Plaintiff's Product.

Admit that there is no acceptable non-infringing substitute for the Plaintiff's Product.

Admit that you are selling the infringing product on multiple online platforms including the online platform identified in this lawsuit.

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

b. Certain Defendants are Liable for Trademark Infringement and Counterfeiting in Addition to Patent Infringement⁵

Title 15 U.S.C. § 1114 (Section 32 of the Lanham Act) provides liability for trademark infringement if, without the consent of the registrant, a defendant uses "in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark which is likely to cause confusion, or to cause mistake, or to deceive." In order to prevail on its trademark infringement claim, Plaintiff must establish that "(1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) in connection with the sale or advertising of goods or services, (5) without plaintiff's consent" and (6) "that defendant's use of the mark is likely to cause confusion as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of the defendant's goods, services, or commercial activities by plaintiff." *1-800*

⁵ Only Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72 in *Amtoy* have infringed and counterfeited on Plaintiff Mark.

Contacts, Inc. v. WhenU.com, 414 F.3d 400, 406-407 (2d Cir. 2005) (internal quotations omitted). The test to determine trademark infringement under Pennsylvania common law is the same as the likelihood of consumer confusion under Section 32(a) of the Lanham Act. *See, e.g., Tillery v. Leonard & Sciolla LLP*, 521 F. Supp. 2d 346, 348 n.1 (E.D. Pa. 2007); *see also Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 472 (3d Cir.1994). Certain Defendants have admitted through their default they used Plaintiff's registered mark SLIDEAWAY® to sell Counterfeit Goods.

3. The Admitted Damages by way of Profits are Established by the Evidence

Defendants have also made certain admissions about damages by failing to respond to the *Requests for Admissions* served upon them. *See Malkin Dec.*, ¶ 5. These deemed admissions include the following:

Admit that each month you sold 15,000 units of the Infringing Product.

Admit that the profit per unit of the Infringing Product was at least \$20.00;

Accordingly, a Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure considering the evidence on damages, as discussed below, should be entered against the Defaulting Defendants.

a. Plaintiff is Entitled to a Damage Award Under the Patent Act Against All Defendants

These lawsuits are for intentional patent infringement damages. In each lawsuit, the Plaintiff is seeking an award of \$300,000.000 times each month the Defendant infringed, trebled for intentional infringement, severally and individually, against each Defendant for their intentional patent infringement, based upon the following facts and the law below. Importantly, using a similar methodology (relying on deemed admissions) for calculating damages, our courts

in the Western District have awarded individual judgments of \$2,128,500.00 against defendants in prior patent infringement cases. *See Doggie Dental, Inc. v AVANTDIGITAL*, No. 21-cv-271 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v CDOFFICE*, No. 21-cv-565 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ).

Returning to the current cases, the claims of Plaintiff's Patent as published were the subject of a first office action allowance. Thus, the allowed claims and published claims were identical. Defendants' infringement began as early as November 21, 2019 (the publication date) and continued for at least two months past the issue date of October 26, 2021. The Plaintiff's evidence shows that after the issue date of the '128 patent each Defendant offered the Infringing Product for at least two months over the time that Plaintiff purchased the product, filed the lawsuit, and the Third-Party Service Providers confirmed that the listings were suspended and no longer offering Infringing Products.

Thus, as a matter of law, the Defendants intentionally infringed on Plaintiffs' Patent for at least two months. Defendants admitted, by their failure to answer requests for admissions that they sold 15,000 infringing units each month depriving Plaintiff of at least \$20.00 profit for unit. Over 2 months, that amounts to \$600,000.00 in lost profits. When that amount is trebled against each Defendant for their admitted intentional infringement, it comes to \$1,800,000.00. This methodology for calculating damages, including trebling, is similar to the one approved by Chief Judge Hornak in his most recent final judgments in *CDOFFICE* and *AVANTDIGITAL*, *supra*, and by Judge Weigand in *Aquapaw Brands LLC v. Allnice*, No. 20-1954 (July 29, 2022) and *Aquapaw Brands LLC v. TIKTOKS*, No. 21-cv-696 (July 29, 2022).

Proving lost profits damages first requires evidence that the infringer's activities directly led to the lost profits. "To recover lost profits damages, the patentee must show a reasonable probability that, 'but for' the infringement, it would have made the sales that were made by the infringer." *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1542 (Fed. Cir. 1995). One way to show the reasonable probability occurred is by applying the "Panduit test: (1) demand for the patented product; (2) absence of acceptable non-infringing substitutes; (3) manufacturing and marketing capability to exploit the demand; and (4) the amount of the profit it would have made." *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995). Here, Plaintiff has offered testimony by way of declaration plus the admissions of the Defendants in order to meet each of these elements.

In this case, Plaintiff has handily proven each of the elements required to recover lost profits through their patent, claims chart, testimony, and the admissions of the Defendants. Defendants have not contested or put forth any evidence to contradict the Plaintiff's damages case as to the infringement of their patent.

This Court has relied, in part, on admissions made though failure to answer in awarding damages against similar counterfeiting and infringing defendants in prior cases. This award and the method for calculating it is consistent with other awards made for admitted intentional patent infringement in the Western District of Pennsylvania. *See Aquapaw v.s. Allnice*, No. 20-1954 (W.D. Pa, July 29, 2022) (Wiegand, J.)[ECF No. 85] and related cases; *Doggie Dental, Inc. v AVANTDIGITAL*, No. 21-cv-271 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v CDOFFICE*, No. 21-cv-565 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ); *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). It is submitted that the award sought in this case would achieve the purposes of punishment, deterrence, and parity with similar damage awards. This Court has recognized the importance of all of these points in its prior damage awards. *See id.*

As an example, a deemed admission of over two million dollars (\$2,000,000) or more 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 or more against each defendant. Such an award serves the public interest in making the misconduct unprofitable, deterring future willful violations, and achieving parity in damage awards in this District. This award and the method for calculating it is consistent with other awards made for admitted intentional patent infringement in the Western District of Pennsylvania. *See Doggie Dental, Inc. v AVANTDIGITAL*, No. 21-cv-271 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v CDOFFICE*, No. 21-cv-565 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ); *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); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) (\$2 million in damages against each defendant) [ECF No. 34]; *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) (same) [ECF No. 52], *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) (same) [ECF No. 44].

In short, since the evidence offered against each Defendant proves the first date they began selling the infringing product and the profits they took from Plaintiff over two months, the total amounts having been supported by the fact and the law, the total damages awarded against each Defendant should be \$1,800,000.00 for their intentional infringement.

b. Plaintiff is also entitled to Statutory Damages Under the Lanham Act as to Certain Defendants⁶

The Lanham Act provides that the Plaintiff may elect at any time to recover statutory damages “if the court finds that the use of the counterfeit mark was willful, not more than \$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” 15 U.S.C. § 1117(c)(2). Defendants purposefully infringe Plaintiff’s mark for profit. *See Complaint*, ¶¶ 50 - 57. The undisputed facts of this case show that Defendants’ actions must be willful use of a counterfeit mark under the meaning of the Lanham Act.⁷ Indeed, by their failure to respond, Defendants have admitted their infringement is willful. *Tiffany (NJ) Inc. v. Luban*, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003) (infringement is deemed willful “[b]y virtue of the default”). Because Defendants willfully use Plaintiff’s mark to sell counterfeit goods, Plaintiff is entitled to statutory damages of \$2,000,000 per defendant.

Congress enacted the statutory damages remedy in trademark counterfeiting cases because evidence of a counterfeiter’s profits in such cases is almost impossible to ascertain since “records are frequently nonexistent, inadequate, or deceptively kept.” *See Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 315 F. Supp. 2d 511, 520 (S.D.N.Y. 2004); *see also Coach, Inc. v. Weng*, 2014 U.S. Dist. LEXIS 79005, at *41-42 (S.D.N.Y. June 7, 2014) (“Section 1117(c) of

⁶ Only Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72 in *Amtoy* have infringed and counterfeited on Plaintiff’s Mark.

⁷ Under the Lanham Act, it is not necessary a defendant knew a mark was registered for statutory damages to be awarded. *See* 15 U.S.C. ¶ 1116(d)(1)(B)(i).

the Lanham Act was created to give victims of trademark infringement and unfair competition an avenue for recovering damages when a defendant hides, alters, or destroys business records.”). Given Defaulting Defendants’ propensities to conceal their identities, disappear and destroy or hide any evidence or records of their counterfeiting and infringing actions, and that to date, no Defaulting Defendants have appeared, answered or otherwise responded to the Complaint, Plaintiff cannot ascertain Defaulting Defendants’ actual profits. Simply put, this case presents the exact circumstances that Congress envisioned in its enactment of Section 1117(c).

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* ¶ 57. In circumstances where no evidence of a defendant’s profit was available, courts have consistently awarded at least \$1 million dollars in statutory damages.⁸ 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 the maximum statutory damages of \$2 million dollars (also Defendant’s admitted minimum profit) is appropriate to serve the purposes of: (1) deterring

⁸ *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).

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 for its counterfeiting activities. Indeed, courts in this district have entered maximum statutory damages against Defendants in other online counterfeiting cases. *See Talsiman Designs LLC v. Ladyvana US*, No. 22-994 (W.D. Pa. Oct. 20, 2022) (Schwab, J.) (\$2 million in damages against each defendant); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) (same), *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., Aug. 14, 2020)(Hornak, CJ); *Doggie Dental v. Max_Buy*, 19-746 (W.D. Pa., Aug. 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., Aug. 14, 2020) (Hornak, CJ). In short, in all anticounterfeiting cases in this district, the Court has awarded the maximum damages under the law.

4. Plaintiff is Entitled to Both Damages for Patent Infringement and Trademark Infringement as against Certain Defendants.

A Plaintiff may be awarded statutory damages under the Lanham Act in addition to lost profits under the Patent Act. As to Count I (Patent Infringement), Plaintiff elects to seek an award of lost profits of \$1,800,000.00 against all the Defendants in every case, individually and severally. Additionally, in the *Amtoy* case, as to Count II (Trademark Infringement and Counterfeiting) and III (Common Law Trademark Infringement) Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72 case have infringed and counterfeited on Plaintiff Mark, Plaintiff seeks

to elect additional statutory damages of \$2,000,000.00 individually and severally.⁹ Other courts have made such awards on default judgment motions, particularly where the defendant's infringement has been willful. *Starbucks Corporation v. Glass*, 2016 WL 6126255 (C.D. Cal. 2016) ("While a plaintiff must choose between recovering statutory damages and actual damages under either Lanham Act and the Copyright Act, nothing prohibits a plaintiff from seeking statutory damages under one act and actual damages under the other, or vice versa."), *citing Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F. 3d 1007, 1011 (9th Cir. 1994). Courts have also awarded statutory damages under both the Copyright and Lanham Acts. *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) and related cases; *Ontel Products Corporation v. Airbrushing Makeup Store*, 2017 WL 1969681 (S.D.N.Y. 2017) (due to defendants' willful counterfeiting, the court awarded statutory damages under the Copyright and Lanham Acts); *Yash Raj Films (USA), Inc. v. Sidhu*, 2010 WL 1032792 (E.D. Cal. 2010) (court awarded same as a deterrence).

5. Plaintiff is Entitled to Permanent Injunctive Relief

In addition to the foregoing relief, Plaintiff seeks entry of a permanent injunction enjoining Defaulting Defendants from infringing or otherwise violating Plaintiff's rights in its patent product, including at least all injunctive relief previously awarded to by this Court to Plaintiff in the temporary restraining order and preliminary injunction. 35 U.S.C. § 283 and Federal Rule of Civil Procedure 65. Plaintiff are also entitled to injunctive relief so they can take prompt action against any new online marketplace accounts or websites that are identified, found

⁹ As for *Amtoy*, Counts II and III, the damages for common law trademark infringement are subsumed by the statutory trademark damages and thus Plaintiff is not seeking a monetary award for Count III (common law trademark infringement).

to be linking to Defendants, and selling Infringing Product. The injunctive relief ordering storefronts selling infringing products taken down ensures that “zombie” sales (sales of infringing products from prior restrained storefronts) cannot take place using that storefront’s electronic communications and processing in the future. This relief has been approved such relief in prior cases. *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ)); *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); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) [ECF No. 34]; *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) [ECF No. 44]; and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) [ECF No. 52].

A permanent injunction, like the trebled lost profit damages requested in all the cases in the motion, and maximum statutory damages requested in *Amtoy* would help deter other individuals or corporations from infringing Plaintiff’s valuable patent rights. Additionally, entry of a permanent injunction against Defendants in these cases 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 Aquapaw v. Allnice*, No. 20-1954 (W.D. Pa, July 29, 2022) (Wiegand, J.) [ECF No. 85] and related cases; *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ)); *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); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) [ECF No. 34]; *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) [ECF No. 44]; and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) [ECF No. 52].

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

Plaintiff requested a temporary restraining order and preliminary injunction, *inter alia*, to prevent Defaulting Defendants from transferring the funds held in their Third-Party Service Provider(s) and Financial Institution(s) accounts beyond this Court's jurisdiction. This Court granted the temporary restraining order and preliminary injunction, preventing Defendants from accessing the funds in their Third-Party Service Provider(s) and Financial Institution(s) accounts. 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.

Plaintiff now request that this Court order the Third-Party Service Provider(s) and Financial Institution(s) to transfer to Plaintiff the assets currently held in the defaulting Defendants' Third-Party Service Provider(s) and Financial Institution(s) accounts 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 Third-Party Service Provider(s) and Financial Institution(s) 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 Doggie Dental, Inc. v AVANTDIGITAL*, No. 21-cv-271 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v CDOFFICE*, No. 21-cv-565 (W.D. Pa., February 23, 2022)(Hornak, CJ); *Doggie Dental, Inc. v Ahui, et al.*, No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021 (Hornak, CJ); *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); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.) [ECF No. 34]; *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) [ECF No. 44]; and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) [ECF No. 52]. *See also Eye Safety Sys., Inc. v. The Partnerships and Unicorporated Ass 'ns. Identified in Schedule "A"*, Case No. 18-cv-00034 (N.D. Ill. Mar. 1, 2018) (ordering PayPal to transfer defendants' funds to Plaintiff as partial satisfaction of judgment) [ECF No. 41]; *Yeti Coolers, LLC v. Taneil George*, Case No. 17-cv-62215 [ECF No. 46] (S.D. Fl. Mar. 29, 2018) (same).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court grant its Motion for Default Judgment and Permanent Injunction, in each of these cases; enter judgment against all the Defendants in each case for patent infringement (Count I) in all the cases; and additionally in the *Amtoy* case for trademark infringement and counterfeiting (Count II) and common trademark infringement (Count III) against Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72; permanently enjoin all the Defendants in all the cases; award admitted lost profits on the patent count (Count I), trebled; award statutory damages against certain defendants in the *Amtoy* case on the trademark infringement and counterfeiting count (Count II); award Plaintiff pre-judgment interest on the above damage awards; and grant such further relief as this Court deems appropriate. Plaintiff additionally request that this Court order the Third-Party Service Provider(s) and Financial Institution(s) to transfer Defendants’ assets held by the Third-Party Service Provider(s) and Financial Institution(s) to Plaintiff in partial payment of any default judgment entered against Defendants.

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Respectfully submitted,

Dated: November 23, 2022

/s/ Stanley D. Ference III

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