

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

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|------------------------------------|---|---------------|
| PAWESOME PET PRODUCTS LLC, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | 2:22-cv-00629 |
| v. |) | |
| |) | |
| COLORFLOWERS, et al., |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM ORDER

AND NOW, on this 22nd day of June, 2023, the Court **DENIES** Defendant KingworaUS’ Motion to Vacate Entry of Default (ECF No. 125) as explained below.

I. BACKGROUND

The parties are well versed in the history of this litigation and its factual background, so the Court recites it only as necessary here. This case concerns alleged infringement of Plaintiff’s patents pertaining to dental chew toys for dogs. Defendant KingworaUS (“Defendant”) was named in a Complaint filed in this Court on April 28, 2022. (*See* ECF No. 2.) The Complaint and other relevant documents were served upon Defendants via electronic process—email and website publication—pursuant to this Court’s Order authorizing alternative service. (*See* ECF No. 24, 33.) Defendant did not respond, and on June 21, 2022, the Clerk of Court entered default against Defendant. (*See* ECF No. 60.)

On November 2, 2022, attorney Adam E. Urbanczyk filed a Motion to appear *pro hac vice* on behalf of Defendant, which the Court granted, and Defendant filed a Motion to Vacate the Clerk’s entry of default the next day. (ECF No. 123–25.) After a brief period of discovery regarding matters related to service, the Motion to Vacate was fully briefed by the parties and is now ripe for disposition. (*See* ECF No. 138, 142, 144.)

II. LEGAL STANDARD

“The court may set aside an entry of default for good cause[.]” Fed. R. Civ. P. 55(c). The decision to set aside an entry of default is “left primarily to the discretion of the district court.” *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984) (citing *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244 (3d Cir. 1951)). However, the Third Circuit disfavors defaults and prefers decisions on the merits. *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982).

Courts are required to consider the following three primary factors when deciding to vacate an entry of default: (1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a meritorious defense; and (3) whether the default was the result of the defendant’s culpable conduct. *Sourcecorp Inc. v. Croney*, 412 F. App’x 455, 459 (3d Cir. 2011) (citing *\$55,518.05 in United States Currency*, 728 F.2d at 195).¹

III. DISCUSSION

a. Validity of service under the Hague Convention

Defendant’s primary argument in favor of vacating the entry of default is that alternative service is not permitted on Defendants in China under the Hague Convention.

The Hague Convention is a treaty which generally requires signatories to send judicial documents through the Central Authority of the State. 20 U.S.T. 361, Art. 1–6; *see also Aquapaw Brands LLC v. Yan-Peng*, No. 21-cv-1784, 2023 WL 3538551, at *2 (W.D. Pa. May 18, 2023) (Wiegand, J.). However, Article 10, provides exceptions to the general rule and allows judicial documents to be sent directly to persons abroad through postal channels, provided that the receiving country has not objected to Article 10. *Aquapaw Brands*, 2023 WL 3538551, at *2; *see*

¹ At times, the Third Circuit has also instructed district courts to consider a fourth factor: the effectiveness of alternative sanctions. *See, e.g., Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73–74 (3d Cir. 1987).

also *Water Splash, Inc. v. Menon*, 581 U.S. 271, 279 n.3 (2017) (“Article 10(a) . . . is the only provision in the Convention that specifically contemplates direct service, without the use of an intermediary.”).

This argument fails on its face. Though the argument in Defendant’s briefing concerns the service of process on defendants in *China*—which has objected to Article 10—the evidence in this case indicates that Defendant is domiciled in *Hong Kong*—which has not objected to Article 10. (See ECF No. 125-1 ¶¶ 4–7; see also *Aquapaw Brands*, 2023 WL 3538551, at *2–3 (concluding that electronic service of process on Defendant KingworaUS was proper because “KingworaUS is domiciled in Hong Kong . . . and [Hong Kong] has not objected to Article 10(a)”)).²

Moreover, the Court notes that the method of service at issue here—email service to the account associated with Defendant’s business and publication via Plaintiff’s counsel’s website—comports with constitutional notions of due process because it was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also *Henry F. Teichmann, Inc. v. Caspian Flat Glass OJSC*, No. 13-cv-458, 2013 WL 1644808, at *2 (W.D. Pa. April 16, 2013) (service of process via email proper).

Thus, the Court concludes that service on Defendant was proper.

b. Rule 55(c) standard

Defendant argues that—notwithstanding the allegedly improper service of process—the entry of default should be set aside because the Third Circuit’s test for vacating the entry of default

² The Court notes that, even if Defendant were domiciled in China and not Hong Kong, it is far from clear that service of process would be improper under the Hague Convention. See, e.g., *Hangzhou Chic Intelligent Tech. Co. v. P’ships & Unincorporated Ass’ns Identified on Schedule A*, No. 20-cv-4806, 2021 WL 1222783, at *4 (N.D. Ill. April 1, 2021); *Jackson Lab’y v. Nanjing Univ.*, No. 17-cv-363, 2018 WL 615667, at *3–4 (D. Maine Jan. 29, 2018) (collecting cases).

weighs in Defendant's favor. (*See* ECF No. 125, at 8.) For the reasons set forth below, the Court concludes that the standard for vacating the entry of default is not met here.

i. Prejudice to Plaintiff

“Prejudice exists if circumstances have changed since entry of default such that plaintiff's ability to litigate its claim is now impaired in some material way or if relevant evidence has become lost or unavailable.” *Accu-Weather, Inc. v. Reuters, Ltd.*, 779 F. Supp. 801, 802 (M.D. Pa. 1991). “Detriment in the sense that plaintiff will be required to establish the merit of its claims does not constitute prejudice in this context.” *Id.* (citing *Nash v. Signore*, 90 F.R.D. 93, 95 (E.D. Pa.1981)).

Plaintiffs do not affirmatively argue that they would be prejudiced, but merely assert—without supporting argumentation—that “[t]he issue of prejudice to the Plaintiff is neutral in this case.” (ECF No. 142, at 22.) For its part, Defendant argues that the only prejudice Plaintiff would face if default is set aside would be “being requi[r]ed to show that they have pleaded a cognizable claim against Defendant.” (ECF No. 125, at 9.)

The Court agrees with Defendant and concludes that this factor weighs in favor of vacating the entry of default.

ii. Existence of a meritorious defense

Plaintiff and Defendant dispute the degree to which Defendant has raised a meritorious defense. Defendant argues that it has a complete defense to Plaintiff's claims because Defendant's product does not infringe the asserted patent, pointing at length to particular features of its product and the features of Plaintiff's patent and history of its patent application. (*See* ECF No. 125, at 9–12; ECF No. 144, at 7–8.) Plaintiff, similarly pointing to particular features of its patent and Defendant's product, argues that Defendant's product infringes on Plaintiff's patent. (*See* ECF No. 142, at 16–18.)

If the Court were to reach a full-throated determination of whether Defendant infringed upon Plaintiff's patent, further briefing and an evidentiary hearing would likely be required. However, given the validity of service (discussed above) and the culpability of Defendant's conduct (discussed below), the Court concludes that *even if* Defendant had raised a prima facie meritorious defense, setting aside the entry of default would not be appropriate here. Because a determination in Defendant's favor would not move the needle, the Court declines to determine conclusively whether a meritorious defense exists in this case. The Court assumes *arguendo* that this factors weighs in favor of vacating the entry of default.

iii. Whether entry of default was the result of Defendant's culpable conduct

In the context of Rule 55(c), "culpable conduct" is more than mere negligence; it is conduct that is taken willfully or in bad faith. *See Action Adjustment Serv., Inc. v. Heenan*, No. 20-cv-2032, 2021 WL 3015412, at *11 (E.D. Pa. June 2, 2021) (citing *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181, 1183 (3d Cir. 1984)). "Reckless disregard for repeated communications from plaintiffs and the court . . . can satisfy the culpable conduct standard." *Id.*

In short, the Court has no difficulty concluding that the entry of default in this case was due to Defendant's culpable conduct. Defendant has not disputed that it had access to an email inbox to which at least five (5) emails were sent regarding the pendency of this litigation during late May and early June 2022. Initially, Defendant claimed that it did not receive such messages, but instead obliquely asserted that "the service of process email *was sent* to the junk inbox of the Store's email." (ECF No. 125, at 12 (emphasis added)).

In response, Plaintiff makes three points. First, Plaintiff points to evidence produced in discovery that a representative of Defendant *affirmatively marked* those messages as spam—namely images of Defendant's Gmail account indicating that the reason the message was in the

spam folder was because “you” (i.e. the Defendant) “reported this message as spam from your inbox.” (ECF No. 142, at 20.)

Second, Plaintiff argues that Defendant marked the relevant message as spam not immediately upon or shortly after its receipt, but instead several months after Defendant filed the instant Motion. (*See* ECF No. 142, at 19–22.) Specifically, Plaintiff points out that the at-issue email message was still in the Defendant’s spam box as of February 7, 2023, but Gmail’s default rules indicate that messages that have been in the spam folder for over thirty (30) days are automatically deleted. (*See* ECF No. 142, at 21; 142-3 ¶ 22.) According to Plaintiff’s uncontroverted assertions, Defendant’s declarant confirmed in discovery that he was the only individual with access to the Gmail account in question and that he did not alter the default rules for the Gmail account. (*Id.*; ECF No. 142-3 ¶ 16.) Therefore, Plaintiff reasons, Defendant must have marked the message as spam sometime after January 8, 2023—approximately seven (7) months after the relevant email messages were delivered and approximately two (2) months after Defendant filed the instant Motion. (*See* ECF No. 143, at 19–22.)

Finally, Plaintiff points out that Defendant’s arguments appear to pertain only to one email message, when several were sent. (ECF No. 142, at 19.)

In its Reply, Defendant apparently concedes that a representative of the Defendant actually marked the messages as spam³ but claims that he did so “without knowing or understanding its context or nature.” (*See* ECF No. 144, at 9.) Therefore, Defendant argues that its conduct was at worst negligent. However, Defendant simply does not respond to Plaintiff’s assertion that the

³ The Court notes that Defendant attaches but does not reference a Reddit thread regarding emails going to the spam folder with the notation of having been marked by the user as spam when in fact the user did not take such action. (*See* ECF No. 144-1, at 4.) Because Defendant’s actual briefing appears to concede that Defendant affirmatively marked the messages as spam—contending that he did so out of ignorance—the Court disregards this attachment.

evidence produced in discovery indicates that the Defendant marked messages as spam *after the instant Motion was filed*. (See ECF No. 125, at 9.)

Based on the evidence before it, and Defendant's failure to rebut the Plaintiff's *prima facie* plausible arguments, the Court concludes, for the purposes of ruling on the instant Motion, that Defendant actually received notice of this litigation and now seeks to make its conduct appear less culpable so as to meet the Rule 55 standard. This conduct is at the very least willful and therefore culpable.

For the reasons set forth above, the Court concludes that the Rule 55(c) standard for setting aside a default judgment is not met here.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Vacate Entry of Default (ECF No. 125) is **DENIED**.

s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge