

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

HAPPY HOUR THINKING, LLC,

Plaintiff,

v.

ZEUS, *et al.*,

Defendants.

Civil Action No. 23-cv-1293

Judge Horan

**MOTION TO AMEND FINAL DEFAULT JUDGMENT AND
PERMANENT INJUNCTION [ECF NO. 41] TO INCLUDE DEFENDANTS IN
APPENDIX “A”**

Plaintiff hereby moves the Court to amend its September 18, 2023, Final Default Judgment and Permanent Injunction [ECF No. 41] to include Defendants in Appendix “A”. In support thereof, Plaintiff states as follows:

I. INTRODUCTION

1. Plaintiff initiated this action against certain Defendants, including Defendants in Appendix “A”, on July 18, 2023, through the filing of its Complaint.

2. Defendants in Appendix “A” are in default, and the prerequisites for a default judgment have been met. Plaintiff engaged in settlement discussions with Defendants in Appendix “A”, but the attempts made to settle with Defendants in Appendix “A” have proven unsuccessful and default against the Defendants in Appendix “A” has been entered for failure to answer. *Malkin Dec.*¹ ¶ 7. Accordingly, Plaintiff seeks to amend the Court’s September 18, 2023

¹ Refers to the Declaration of Brian Samuel Malkin filed herewith.

Final Default Judgment and Permanent Injunction [ECF No. 41] to include Defendants in Appendix “A” liable on all counts of Plaintiff’s Complaint.

3. In online counterfeiting cases such as the present case, a Final Default Judgment and Preliminary Injunction has been amended to include a non-settling Defendant. *See Nifty Home Products, LLC v. Jacksun*, No. 22-cv-777 (WD Pa, November 18, 2022)(Schwab, J)[ECF No. 78] (granting motion to amend default judgment to add non-settling defendant); *Airigan v. Abigail*, No. 19-cv-503 (WD Pa., June 24, 2020) (Fischer, J)[ECF No. 64](same).

II. PRODEDURAL HISTORY

4. On July 18, 2023, Plaintiff filed its Application for a Temporary Restraining Order against Defendants, including Defendants in Appendix “A”. On July 19, 2023, the Court entered a sealed Order granting the Temporary Restraining Order setting a Hearing to Show Cause Why a Preliminary Injunction Should Not Issue [ECF No. 16] (“TRO”) and Order granting Plaintiff’s motion for alternative electronic service. [ECF No. 17] (“Alternative Service Order”).

5. Pursuant to the Court’s Orders, Plaintiff served all Defendants subject to the Alternative Service Order, including Defendants in Appendix “A,” with their respective Summons and a copy of the Complaint via electronic mail (“e-mail”) and by posting copies of the same on the ferencelawsuit.com website. *See* Summons/Return of Service [ECF No. 30]

6. On September 8, 2023, the Plaintiff requested the Clerk of Court to enter default against certain Defendants, excluding the Defendants in Schedule A. [ECF No. 36] On September 12, 2023, the Clerk’s default was entered. [ECF No. 37].

7. On September 15, 2023, Plaintiff filed its Motion for Entry of Final Default Judgment and Permanent Injunction Against Defendants, excluding Defendants in Appendix “A”. [ECF Nos. 38] and the Court entered a Final Default Judgment and Permanent Injunction [ECF No. 41] against Defendants, excluding Defendants in Appendix “A”.

8. Ultimately, Defendants in Appendix “A” did not settle with Plaintiff. *See Malkin Dec.* ¶ 7. Plaintiff requested the Clerk enter default against Defendants in Appendix “A,” and the Clerk’s default was entered on October 12, 2023. [ECF Nos. 53]

9. Plaintiff now moves the Court to grant Final Default Judgment and a Permanent Injunction against Defendants in Appendix “A” and submits this Motion to Amend the Final Default Judgment and Permanent Injunction to Include Defendants in Appendix “A”.

III. ARGUMENT

10. As alleged by Plaintiff, admitted by default, and established by the evidence submitted herewith, Defendants in Appendix “A” each operate and control an e-commerce store via an Internet marketplace website under its seller identification name listed on Appendix “A” hereto (the “Seller ID”). As set forth more fully in Plaintiff’s Application for Temporary Restraining Order and the supporting papers filed therewith, Defendants in Appendix “A” promoted, advertised, offered for sale, and sold products which infringe on Plaintiff’s patent US Design No. D 913,776 s (“Plaintiff’s Patent”), and some have used copies of substantial similar derivatives of copyrighted photographs of the Plaintiff’s Product, which are the subjected of U.S. Copyright VA -0002-34-9904 (“Plaintiff’s Work”), and are thus all are unfairly competing.

11. This Court has subject matter jurisdiction over this action pursuant to the 15 U.S.C. § 1121 and 28 U.S.C. §§1331 and 1338. This Court has supplemental jurisdiction

pursuant to 28 U.S.C. § 1367. *See Complaint*, ¶ 10 [ECF No. 2] Personal jurisdiction over Defendants in Appendix “A” and venue in this district are proper under 28 U.S.C. § 1391 as Defendants in Appendix “A” directed business activities toward consumers within this district and caused harm to Plaintiff’s business through the Internet based e-commerce store operating under their Seller IDs. (*See Id.* at ¶¶ 12 – 13, 23- 24).

12. A court may order a default judgment pursuant to Fed. R. Civ. P. 55(b)(2) following the entry of default by the court clerk under Rule 55(a). *See* Fed. R. Civ. P. 55. Upon entry of default by the clerk, the well-pled factual allegations of a plaintiff’s complaint, other than those related to damages, will be taken as true. *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)..As explained in detail in Plaintiff’s Motion for Default Judgment and Brief in Support (“Plaintiff’s Motion for FDJ”) [ECF No. 40], Plaintiff’s evidence establishes all of the relevant factors. The evidence and the record against Defendants in Appendix “A” clearly demonstrate that default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against Defendants in Appendix “A”.

13. This Court retained jurisdiction over this matter and the parties (including the Defendants in Appendix “A”), in order to construe and enforce this Judgment and permanent injunction. (*See* ECF No. 41, p. 11). Furthermore, a Court that issues a permanent injunction retains continuing jurisdiction to modify it whenever the principles of equity require it to do so. *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980) (citing *U.S. v United Shoe Machinery Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed. 562 (1968)). Permanent injunctive relief is appropriate where a plaintiff demonstrates 1) it has suffered irreparable injury; 2) there is no adequate remedy at law; 3) the balance of hardship favors an

equitable remedy; and 4) an issuance of an injunction is in the public's interest. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). As set forth in Plaintiff's Motion for Final Judgment and Permanent Injunction and the supporting papers filed therewith [ECF Nos. 39 and 40], Plaintiff has satisfied each of these elements.

14. Permanent injunctive relief is necessary, as the permanent injunction will ultimately will protect Plaintiff's property interest in its copyright. Thus, modifying the previously issued Final Default Judgment to include Defendants in Appendix "A" is appropriate.

15. Furthermore, as admitted by Defendants in Appendix "A" by default, their Seller ID is the essential component of its online activities and the means through which they further their infringing activities and cause harm to Plaintiff. In order to effectuate the addition of Defendants in Appendix "A" to the permanent injunction, they should be subject to all of the restraints previously ordered against Defendants in the court's Final Judgment and Permanent Injunction Order [ECF No. 41].

16. Because Defendants in Appendix "A" failed to answer and did not cooperate with discovery [See *Malkin Dec.* ¶¶ 1 -6], and all of the evidence and law that supported the original judgment and permanent injunction are applicable to the Defendants in Appendix "A", Plaintiff additionally suggests that it would be appropriate to award Plaintiff the damages of \$2,150,000.00 against Defendants in Appendix "A", individually and distinctly, for their copyright infringement and unfair competition, as these damages were found appropriate and were awarded against Defendants in the court's Final Judgment and Permanent Injunction Order [ECF No. 41].

17. In view of the foregoing, Plaintiff submits that modification of the Court's Final Default Judgment and Permanent Injunction to include Defendants in Appendix "A" is appropriate.

18. Like the previously granted motion for default judgment and permanent injunction [ECF No. 41], the Plaintiff does not believe a hearing is necessary in order to grant this motion. [ECF No. 39] (setting forth legal authority for motion for damages without a hearing).

19. An appropriate proposed Amended Final Judgment and Permanent Injunction is also filed herewith.

WHEREFORE, Plaintiff, respectfully requests the Court grant its Motion and amend the September 18, 2023, Final Default Judgment and Permanent Injunction [ECF No. 41] in accordance with the proposed order filed herewith, in order to include Defendants in Appendix "A".

Respectfully submitted,

Dated: October 12, 2023

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