

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

PAWESOME PET PRODUCTS LLC, *et al.*,

Plaintiffs,

v.

LV LIANG KITCHENWARE STORE, *et al.*,

Defendants.

Civil Action No.

24-cv-905

(Judge Hornak)

SUPPLEMENTAL STATEMENT ON DAMAGES

I. INTRODUCTION

This Court is intimately familiar with the facts in this case. A brief recap is offered for context. This lawsuit is related to all the ones that were filed and concluded before it. The lawsuit covers a snapshot in time where groups of Defendants flooded the market with cheaply produced patent infringing versions of Plaintiffs' patented BRISTLY® brand doggie toothbrush. Defendants systematic illegal conduct has eroded and destroyed the Plaintiffs' market where Plaintiffs are the original market maker. In order to stop the damage being caused by this onslaught of illegal sales, Plaintiffs filed serial related lawsuits. Based upon the limited information provided by the online platforms, Plaintiff does not believe that there are any repeat offenders who were in prior related lawsuits as defendants. Further, the time of this infringement by the defendants in this lawsuit and the concluded related lawsuits do not overlap. Thus, the individual damage awards sought are not duplicative as to any individual defendant.

In each case, the Court has granted, *inter alia*, both a temporary restraining order and a preliminary injunction tailored to stop the defendants' infringing conduct and to prevent further damage to the Plaintiffs' business. The pending motion for default judgment and permanent

injunction was filed to bring the cases to a conclusion. None of the remaining defaulting defendants have appeared nor objected to the motions for default judgment.

The uncontroverted evidence establishes, as a matter of law, the Defendants in each case intentionally infringed on Plaintiffs' Patent. In other words, the Plaintiffs have established that the Defendants are liable for patent infringement. This paper and the supporting Declaration and exhibits are filed to document that damages claimed against each of the Defendants. Similar evidence of damages was filed and accepted by the Court in the related concluded cases, with the Court finally awarding individual judgments of \$2,128,500, severally and distinctly, against each of the defendants in those cases. *Pawesome Pet Products, Inc. v. Dreambliss Stores, et al.*, No. 22-1584 (W.D. Pa., November 14, 2023)(Hornak, CJ)(ECF No. 96); *Pawesome Pet Products, Inc. v. Cutebear Store, et al.*, No. 22-1063 (W.D. Pa., November 14, 202)(Hornak, CJ)(ECF No. 104); *Pawesome Pet Products LLC v. Colorflowers, et al.*, No. 22-629 (Hornak, CJ)(ECF No. 180). Since the evidence of infringement is identical and the market for Plaintiff's products has merely expanded and become more valuable, Plaintiffs seek an identical judgment award against these Defendants.

II. ARGUMENT

Courts have consistently awarded large damages on default in online counterfeiting cases given the nature of the harm caused by online counterfeiting and the requested individual defendant damage awards are reasonable and appropriate. All the defaulting defendants are based in China, and for such foreign based sellers, use of e-commerce marketplaces like Alibaba, AliExpress, Amazon, eBay, Temu, Walmart, and Wish in the present cases provides direct access to millions of customers in the United States, which allows for distribution far greater than if the seller had sold counterfeit products in a brick-and-mortar store. Such high damage awards are even more appropriate and reasonable given how online shopping has increased,

along with the increase in foreign third-party sellers, like the defaulting defendants, on e-commerce platforms.

A. The Online Counterfeiting Problem

In its 2018 10-K filed with the with Securities and Exchange Commission, Amazon.com, Inc. stated for the first time that “We also may be unable to prevent sellers in our stores or through other stores selling unlawful, counterfeit, pirated, or stolen goods, selling goods in an unlawful or unethical manner, violating the proprietary rights of others, or otherwise violating our policies...” (*Ference Dec.*, Ex. 1) In its 2018 Annual Report, Amazon disclosed that the share of sales by third party sellers has grown from 3% to 58%. (*Id.*) These disclosures began to focus attention on the perils of online market places.

In August 2019, the Wall Street Journal published an article entitled “Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products.” (*Ference Dec.*, Ex. 2) This was followed by a November article entitled “Amazon’s Heavy Recruitment of Chinese Sellers Puts Consumers at Risk.” (*Ference Dec.*, Ex. 3) (“Amazon’s China business is bigger than ever. That is because it has aggressively recruited Chinese manufacturers and merchants to sell to consumers outside the country. And these sellers, in turn, represent a high proportion of problem listings found on the site...”) Later that month, the *Washington Post* published an article entitled “How Amazon’s quest for more, cheaper products has resulted in a flea market of fakes.” (*Ference Dec.*, Ex. 4) (“The continued abundance of counterfeit goods on the site is the result of Amazon’s decisions to prioritize a broad selection of products and cheaper prices over the deployment of aggressive technologies and policies that could further stem the problem...” and “[l]etting so many sellers in with few limitations has also created a marketplace for fakes that were more often found on street corners or flea markets”). Fox Business reports that while eBay’s counterfeit problem appears to be more serious, Amazon

is significantly more popular in terms of market size and therefore has come under heavier scrutiny than other sites. (*Ference Dec*, Ex. 5)

In December 2019 CNN published an article entitled “Fake and dangerous kids products are turning up for sale on Amazon.” (*Ference Dec.*, Ex. 6) As noted in the article, “businesses said Amazon put the onus on them to report suspicious listings and that this often amounted to a game of “whack-a-mole,” in which new listing appeared almost as soon as flagged ones were taken down.” The article continues, “Under current US case law, Amazon is not liable when third-party products sold on its site directly infringe on intellectual property or have safety defects. The liability lies with the third-party sellers. This is fundamentally different from how the law treats brick-and-mortar retailers like Target (TGT) or Walmart (WMT) or even your corner grocery. If you find a product at a physical store that infringes on your trademark, or you buy something defective there, you can sue the store even though they didn’t make the product.”

In 2020, the New York Times published an article entitled “Welcome to the Era of Fake Products.” (*Ference Dec.*, Ex. 7) The article opens with the following:

Imagine walking into your local grocery store and seeing two virtually identical cartons of milk right next to each other. The only discernible difference—and it’s barely discernible—is that there’s a tiny tag on one carton saying the milk is sold by a third-party seller. Oh, and it might have rat poop in it.

This scenario isn’t all that far from what’s happening in e-commerce retailers’ massive, hard-to-police markets of third-party sellers.

The rise of counterfeit goods and other phony products sold on the Internet has been swift—and it has largely gone unnoticed by many shoppers. But make no mistake: The problem is extensive. Most people don’t realize this, but the majority of listings on Amazon aren’t actually for items sold by Amazon—they’re run by third-party sellers. And even though many, many third-party sellers are upstanding merchants, an awful lot of them are peddling fakes.

As noted in the article, “Because there are rarely consequences for selling fakes, beyond a seller disappearing from a site, the seller can just reestablish its presence to continue to move its

inventory. ‘Once they’re off, they come back under a different brand and name.’” This article also noted how the third-party seller system is a boon to counterfeiters:

Counterfeits have always been an issue. But the Internet has exacerbated the problem.

In the brick-and-mortar days, a counterfeit product might have a harder time getting onto the shelves of a legitimate business, since it would be in a retailer’s best interest to vet the validity and safety of products the retailer might be liable for selling to a customer. Business owners were gatekeepers, and counterfeits were largely relegated to back alleys, figuratively and literally.

Things are different online. Smaller vendors who peddle counterfeits, particularly pseudonymous third-party sellers on e-commerce platforms with broad reach and trust, now have access to millions of customers they never had when they were lurking in downtown alleys and flea markets.

* * *

Making things particularly tricky is the fact that a single e-commerce product page may include offerings from the manufacturer as well as from many third-party sellers, some honest and some not so honest. On an ecommerce site, it’s as though those back-alley and swap-meet sellers have gotten to put their wares inside the store, on the same shelf as the real goods. And product placement relies on an algorithm that can push the cheapest version to the front of the shelf.

Also in 2020 the Canadian Broadcasting Company published an article entitled “We bought dozens of products from AliExpress, Amazon, eBay, Walmart and Wish. Over half were suspect fakes: Why you might want to think twice before shopping online.” (*Ference Dec.*, Ex. 8) As noted in this article, one counterfeit lipstick had over 751 times the amount of lead Health Canada considers acceptable in cosmetics.

The Trump Administration took note of the counterfeiting on online marketplaces. The *Fiscal Year 2018 Seizure Statistics* prepared by the U.S. Customs and Border Protection Office of Trade show that 87% of the seizures made of counterfeit goods originate in China (including Hong Kong). (*Ference Dec.*, Ex. 9) Plaintiffs believe all of the defaulting Defendants are located in China. Peter Navarro, director of the White House Office of Trade and Manufacturing Policy, has said that “for all practical purposes, these e-commerce hubs are basically laundries

for counterfeiting” and that “the administration also plans to target people offshore who ‘can’t be touched now.’” (*Ference Dec.*, Ex. 10)

On January 24, 2020, the Department of Homeland Security released a report entitled “Combating Trafficking in Counterfeit and Pirated Goods: Report to the President of the United States.” (*Ference Dec.*, Ex. 11) Section 5 of the Report is entitled “How E-Commerce Facilitates Counterfeit Trafficking” and begins:

While e-commerce has supported the launch of thousands of legitimate businesses, e-commerce platforms, third-party marketplaces, and their supporting intermediaries have also served as powerful stimulants for the trafficking of counterfeit and pirated goods. The central economic driver of such trafficking is this basic reality: **Selling counterfeit and pirated goods through e-commerce platforms and related online third-party marketplaces is a highly profitable venture.**

For counterfeiters, production costs are low, millions of potential customers are available online, transactions are convenient, and listing goods on well-known platforms provides an air of legitimacy. **When sellers of illicit goods are in another country, they are also exposed to relatively little risk of criminal prosecution or civil liability under current law enforcement and regulatory practices.** It is critical that immediate action be taken to protect American consumers and other stakeholders against the harm and losses inflicted by counterfeiters.

(p. 20) (emphasis added)

In discussing third-party marketplaces and counterfeiters (p. 22), the report states:

A counterfeiter seeking to distribute fake products will typically set up one or more accounts on third-party marketplaces, and these accounts can often be set up quickly and without much sophistication or many specialized skills. Under such circumstances, it is axiomatic that online retailers face much lower overhead costs than traditional brick-and-mortar sellers. There is no need to rent retail space or to hire in-person, customer-facing staff.

In a common scenario, third-party marketplace websites contain photos of the real product, fake reviews of the counterfeit product, and other such disinformation designed to mislead or fool the consumer into believing the legitimacy of the product. The proliferation of such disinformation is the hallmark of the successful online counterfeiter. Such deception not only provides counterfeiters with an enormous competitive advantage over their brick-and-mortar counterparts; legitimate sellers on the internet are harmed as well.

In some cases, counterfeiters hedge against the risk of being caught and their websites taken down from an e-commerce platform by preemptively establishing multiple virtual store-fronts. A key underlying problem here is that on at least some e-commerce platforms, little identifying information is necessary for a counterfeiter to begin selling. In the absence of full transparency, counterfeiters can quickly and easily move to a new virtual store if their original third-party marketplace is taken down

(emphasis added)

In discussing warehouses, fulfillment centers and counterfeit trafficking (p. 24), the Report states:

Certain e-commerce platforms have adopted a business model that relies on North American warehouses to provide space for foreign-made goods, followed by one-at-a-time order fulfillment, at which point the goods are individually packed and shipped to U.S. consumers on much shorter delivery timelines.

* * * *

In situations where the fulfillment center is outside the U.S. Customs area, this model provides the opportunity to use ocean container shipping as the primary mode of transit for the shipment, which keeps overall shipping costs relatively low as ocean cargo is much cheaper than air delivery. It is in part because of these incentives that these fulfillment centers have emerged as an important element of the supply chains for many counterfeit traffickers.

This language is referring specifically to the Fulfilled by Amazon (FBA) model that underlies Amazon Prime, where Amazon is responsible for the quick (mostly overnight) delivery of goods.

In April 2020, the Office of the United States Trade Representative released the 2019 Special 301 Report (*Ference Dec.*, Ex. 12) which again included China on the Priority Watch List. Under the heading of “Manufacturing, Domestic Sale, and Export of Counterfeit Goods,” (p. 42), the Report states:

China continued to be the world’s leading source of counterfeit goods, reflecting its failure to take decisive action to curb the widespread manufacture, domestic sale, and export of counterfeit goods. According to a 2019 Organization for Economic Co-operation and Development (OECD) report, China together with Hong Kong, through which Chinese merchandise often transships, continued to account for over 80 percent of seizures of counterfeit and pirated goods worldwide. Applying a different methodology, another analysis from the 2019 OECD report analyzed 2016 data and estimated that China and Hong Kong were the source of \$322 billion in fake exports, around 63.4 percent of the global total.

This massive problem impacts not only the interests of IP right holders, but also poses health and safety risks.

(footnotes omitted) The Report continued that “OECD reports have noted that the growth of small parcels containing counterfeit and pirated goods reflected the move the offline to online sales, and China together with Hong Kong have been the leading source of seized counterfeit goods shipped by mail or express couriers.” (p. 43, footnotes omitted)

B. The Harm Suffered by Legitimate Sellers is Existential

The Introduction to the “Combating Trafficking in Counterfeit and Pirated Goods” Report (pp. 7-10) (*Ference Dec.*, Ex. 11) begins by stating “E-commerce platforms represent ideal storefronts for counterfeits...and provide powerful platform[s] for counterfeiters and pirates to engage large number of potential consumers.” The Report continues:

The rapid growth of e-commerce platforms, further catalyzed by third-party online marketplaces connected to the platforms, has revolutionized the way products are bought and sold. “Online third-party marketplace” means any web-based platform that includes features primarily designed for arranging the sale, purchase, payment, or shipping of goods, or that enables sellers not directly affiliated with an operator of such platforms to sell physical goods to consumers located in the United States.

* * * *

While the expansion of e-commerce has led to greater trade facilitation, its overall growth— especially the growth of certain related business models—has facilitated online trafficking in counterfeit and pirated goods. American consumers shopping on e-commerce platforms and online third-party marketplaces now face a significant risk of purchasing counterfeit or pirated goods. This risk continues to rise despite current efforts across e-commerce supply chains to reduce such trafficking.

The rise in consumer use of third-party marketplaces significantly increases the risks and uncertainty for U.S. producers when creating new products. **It is no longer enough for a small business to develop a product with significant local consumer demand and then use that revenue to grow the business regionally, nationally, and internationally with the brand protection efforts expanding in step. Instead, with the international scope of e-commerce platforms, once a small business exposes itself to the benefits of placing products online — which creates a geographic scope far greater than its more limited brand protection efforts can handle — it begins to face increased foreign infringement threat.**

Moreover, as costs to enter the online market have come down, such market entry is happening earlier and earlier in the product cycle, further enhancing risk. If a new product is a success, counterfeiters will attempt, often immediately, to outcompete the original seller with lower-cost counterfeit and pirated versions while avoiding the initial investment into research and design.

In other words, on these platforms, the counterfeit and pirated goods compete unfairly and fraudulently against the genuine items. While counterfeit and pirated goods have been sold for years on street corners, alleys, and from the trunks of cars, these illicit goods are now marketed to consumers in their homes through increasingly mainstream e-commerce platforms and third party online marketplaces that convey an air of legitimacy.

(emphasis added)

As noted under “Key Drivers of Counterfeiting and Piracy in E-Commerce” (pp. 10-11):

Historically, many counterfeits were distributed through swap meets and individual sellers located on street corners. Today, counterfeits are being trafficked through vast e-commerce supply chains in concert with marketing, sales, and distribution networks. The ability of e-commerce platforms to aggregate information and reduce transportation and search costs for consumers provides a big advantage over brick-and-mortar retailers. Because of this, **sellers on digital platforms have consumer visibility well beyond the seller’s natural geographical sales area.**

Selling counterfeit and pirated goods through e-commerce is a highly profitable activity: production costs are low, **millions of potential customers are available online**, transactions are convenient, and listing on well-branded e-commerce platforms provides an air of legitimacy.

When sellers of illicit goods are in another country, they are largely outside the jurisdiction for criminal prosecution or civil liability from U.S. law enforcement and private parties.

* * * *

Third-party online marketplaces can quickly and easily establish attractive “store-fronts” to compete with legitimate businesses. On some platforms, little identifying information is necessary to begin selling.

A counterfeiter seeking to distribute fake products will typically set up one or more accounts on online third-party marketplaces. **The ability to rapidly proliferate third-party online marketplaces greatly complicates enforcement efforts, especially for intellectual property rights holders. Rapid proliferation also allows counterfeiters to hop from one profile to the next even if the original site is taken down or blocked. On these sites, online counterfeiters**

can misrepresent products by posting pictures of authentic goods while simultaneously selling and shipping counterfeit versions.

Counterfeiters have taken full advantage of the aura of authenticity and trust that online platforms provide. While e-commerce has supported the launch of thousands of legitimate businesses, their models have also enabled counterfeiters to easily establish attractive “store-fronts” to compete with legitimate businesses.

(emphasis added)

As recognized by this Report, online counterfeiting is an existential threat to small business in the United States, particularly to startup companies with a limited product line. An example of such a business is Forearm Forklift (*Ference Dec.*, Ex. 13) As noted in the CNBC article entitled “How Amazon put this man’s business on the brink of collapse,” “Forearm Forklift is hanging on by a thread. The company is down to 21 full-time employees from 52 at its peak and recorded less than \$500 in profit last year. Annual revenue in 2008 topped \$4 million and has since plunged 30 percent. **Retailers stopped placing orders because they were finding what appeared to be the same thing online for much cheaper.**” (emphasis added) As noted in the New York Times, the business of one company – Brush Hero – “could not stand the effect of counterfeits and would be laying off most of its staff.” (*Ference Dec.*, Ex. 7)

In the present cases, without the injunctive relief previously entered by the Court, the Plaintiffs would already be out of business because of the actions of the Defaulting Defendants. Plaintiffs business is not yet out of the woods, as other sellers have followed Defaulting Defendants in selling counterfeit products. By willfully selling on online marketplaces such as Amazon and eBay, the Defaulting Defendants have deliberately taken advantage of the anonymity provided by selling online. The equities weigh in favor of Plaintiffs.

C. The Plaintiffs Seek Damages Against Each Individual Defendant to Adequately Compensate Them for the Damages Each Individual Defendant Caused

In each instance, the Plaintiffs seek a damage award, individually and severally, of \$709,500, trebled, for a total of \$2,128,500. In support of its proof of damages, Plaintiffs offered

evidence through Defendants' admissions that they each sold 15,000 infringing units per month depriving Plaintiffs of at least \$20.00 profit per unit. Over 2 months, that amounts to \$600,000.00 in lost profits. Further, the Defendants admitted that Plaintiffs' sell 7,300 units of toothpaste as conveyed sales depriving Plaintiffs of at least \$7.50 profit per unit for \$54,750.00 per month. Over 2 months, that amounts to \$109,500.00.00 in lost profits. When the combined lost profits of \$709,500.00 is trebled for intentional infringement, also admitted by the Defendants, the total award is \$2,128,500.00 in damages. This methodology for calculating damages is identical to the one approved by other Judges in this District in their final judgments in multiple related cases. *See, e.g., Pawesome Pet Products, Inc. v. Dreambliss Stores, et al.*, No. 22-1584 (W.D. Pa., November 14, 2023)(Hornak, CJ)(ECF No. 96); *Pawesome Pet Products, Inc. v. Cutebear Store, et al.*, No. 22-1063 (W.D. Pa., November 14, 202)(Hornak, CJ)(ECF No. 104); *Pawesome Pet Products LLC v. Colorflowers, et al.*, No. 22-629 (Hornak, CJ)(ECF No. 180); *Broadway Pine Brands LLC v. Bonjin-US, et al.*, No. 22-cv-1609 (W.D. Pa. May 23, 2023)(Ranjan, J)[ECF No. 61](upon defendants' admissions, profits per unit, units per month, and months of infringing sales are awarded to plaintiff, and trebled for intentional infringement); *Broadway Pine Brands LLC v. Mustb Toy Store, et al.*, No. 21-cv-1736 (W.D. Pa. April 26, 2023)(Ranjan, J)[ECF No. 52] and related cases (same); *Aquapaw LLC v. Allnice, et al.*, No. 20-cv-1954 (W.D. Pa. July 29, 2022)(Wiegand, J)[ECF No. 85](same); and *Aquapaw Brands LLC v. Flopet, et al.*, No. 21-cv-988 (W.D. Pa July 29, 2022)(Wiegand, J)[ECF No. 58](same). Other courts have used requests for admissions in determining damage awards in an online counterfeiting case. *Oakley, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 20-cv-277 (N.D. Ill. June 9, 2020) (Gettleman, J.) (product was Oakley sunglasses); *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.)

(product was TRX fitness suspension trainers), 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.) (product was TAG Heuer watches).

Based upon the below arguments, the intentional and illegal conduct of the Defendants, and the evidence of record, Plaintiffs respectfully submit that these damages are reasonable.

D. The Damages that Plaintiffs Seek are Reasonable

Pursuant to 35 U.S.C. § 284, a court may award damages adequate to compensate for patent infringement. Under the *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F. 3d. 1275, 1284 case, the Federal Circuit instructs that courts must apply the *Panduit* test before awarding damages. Under that test, a patentee is entitled to lost profit damages if it establishes “(1) demand for the patented product; (2) absence of acceptable non-infringing alternatives; (3) manufacturing and marketing capability to exploit the demand; and (4) the amount of the profit it would have made.” *Id.* at 1285. Here, Defendants have admitted by their failure to respond to Plaintiffs’ requests for admissions: (1) that there was demand for Plaintiffs’ products; (2) that there was an absence of acceptable non-infringing substitutes; (3) that Plaintiffs had manufacturing and marketing capability to exploit the demand; and (4) the amount of profit that Plaintiffs would have made.

Plaintiffs file herewith a Declaration of Peter Dertsakyan in support of their claim for damages. Mr. Dertsakyan is the inventor and one of the original owner operators of the Doggie Dental, Inc. business that developed and sold the BRISTLY[®] doggie toothbrush at issue in these cases. *Dertsakyan Dec.*, ¶¶ 1- 2. He has over 5 years expertise in the Pet Toys and Pet Oral Care Products Market. *Id.*, ¶ 3. The BRISTLY[®] doggie toothbrush permit pets to brush their own teeth by chewing on the toothbrush. *Id.*, ¶2.

Mr. Dertsakyan assisted Plaintiffs in obtaining and analyzing the data concerning the market size and damages sustained in this case. *Id.*, ¶3. As the Court is aware, the Plaintiffs' product, invented by Dertsakyan, created a market in Pet Care Oral Products and Pet Toys that did not exist until Plaintiffs' innovation. *Id.*, ¶2. In formulating its damage claims based upon existing data, Plaintiffs rely upon Dertsakyan's expertise in the marketplace. Dertsakyan opined that online stores like the Defendants sell 15,000 doggie toothbrushes and deprive Plaintiffs of 7,300 units of toothpaste per month in convoyed sales. *Id.*, ¶ 7.

To put these sales into perspective, the U.S. market for Pet Toys was valued at 2.57 Billion Dollars in 2021, and beginning in 2022, was valued at 2.71 Billion Dollars. *Id.*, ¶ 4. The U.S. market for Pet Care Oral Products was valued at 1.7 Billion Dollars in 2022. *Id.*, ¶ 5. Both markets are projected to climb steadily, with compound annual growth of 6.7% or more. *Id.* ¶¶ 5 – 6. In Plaintiffs' claim for damages, it seeks to hold each Defendant, individually and severally, liable for the damages that defendant caused.

In support of the damage award, Dertsakyan provides "expert testimony as an aid to the determination of damages." 35 U.S. Code § 284. Dertsakyan declares the sales, if made by Plaintiffs, instead of stolen by a Defendant, would generate, on average, net receipts to Plaintiff of \$354,750.00 per store per month. For the two months that each Defendant infringed, the total receipts would be \$709,500.00. That amount represents a mere .05% of the total Pet Oral Care market and .03% of the total Pet Chew Toys market in the U.S. *See Id.*, ¶¶ 5 – 7. Based upon the review of all the information and his expertise, Dertsakyan opines that the award sought by Plaintiffs is reasonable and "adequate to compensate for the infringement." *Id.* According to Dertsakyan, Plaintiffs' estimate of sales stolen by Defendants is conservative since the number represents an average generated by sales of the small, medium, and large doggie toothbrushes. *Id.*, ¶ 8. Thus, the base damages Plaintiffs seek are reasonable and the remaining question is

whether there is a basis to award enhanced damages. By stealing the market away from the Plaintiffs, Defendants have engaged in the most egregious conduct possible. Plaintiffs originated and created the market that Defendants stole from them. Thus, the Plaintiffs are seeking enhanced damages.

E. Enhanced Treble Damages Should be Awarded Since the Defendants' Conduct is Egregious

Enhanced damages are as old as U. S. patent law. The Patent Act of 1793 mandated treble damages in any successful infringement suit. See Patent Act of 1793, §5, 1Stat. 322. In the Patent Act of 1836, however, Congress changed course and made enhanced damages discretionary, specifying that “it shall be in the power of the court to render judgment for any sum above the amount found by [the] verdict . . . not exceeding three times the amount thereof, according to the circumstances of the case.” Patent Act of 1836, §14, 5Stat. 123. In construing that new provision, the Supreme Court explained that the change was prompted by the “injustice” of subjecting a “defendant who acted in ignorance or good faith” to the same treatment as the “wanton and malicious pirate.” *Seymour v. McCormick*, 16 How. 480, 488 (1854). Against this backdrop, Congress enacted Section 284 in the 1952 codification of the Patent Act. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 106 (2016). “The stated purpose” of the 1952 revision “was merely reorganization in language to clarify the statement of the statutes.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 505, n. 20 (1964) (internal quotation marks omitted).

A district court’s discretion, however, is limited: courts may generally award enhanced damages only in egregious cases of willful misconduct. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 106 (2016). “Awards of enhanced damages under the Patent Act over the past 180 years establish that they are not to be meted out in a typical infringement case, but are instead designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior. The sort of

conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—**characteristic of a pirate.**” *Id.* at 103–04 (emphasis added). This is the type of conduct the defendants have done in these three cases. A district court’s award of enhanced damages is reviewed for abuse of discretion. *Id.* at 107.

By their default, the Defendants have admitted the allegations in the Complaint as true, including “Defendants [were] actively participating in a conspiracy to distribute and sell Infringing Products.” (*Complaint*, ¶ 11; *Colorflowers* at ECF No. 2; *Cutebear* at ECF No. 2; *Dreambliss* at ECF No. 2.) Defendants have also admitted that they knew about Plaintiffs’ patent before they began their infringing behavior, yet intentionally infringed anyway. (*Malkin Dec.*, ¶ 5; *Colorflowers* at ECF No. 145-2; *Cutebear* at ECF No. 75-2; *Dreambliss* at ECF No. 67-2.) These admitted allegations alone support an award of trebled damages. *See Jenn-Air Corp. v. Penn Ventilator Co.*, 394 F. Supp. 665, 676 (E.D. Pa. 1975) (“Upon proof of the willful and wanton infringement of Jenn-Air’s patents, the trial court may in its discretion award increased damages.... Stated differently, a patent owner is entitled to treble damages in a patent infringement action where the defendant had knowingly, deliberately and intentionally infringed the patent.” (citations omitted); *See also, Smith v. Alyeska Pipeline Serv. Co.*, 538 F. Supp. 977, 986 (D. Del. 1982) (“A patent owner is entitled to treble damages in a patent infringement action where the defendant has knowingly, deliberately, intentionally, wilfully, or wantonly infringed the patent.”), *aff’d*, 758 F. 2d 668 (Fed. Cir. 1984).

The evidence in the present cases also shows that all of the defaulting defendants are located in China. The evidence also shows that the defendants in *Colorflowers* used AliExpress, Amazon, eBay, and Wish to peddle their infringing products. In *Cutebear*, the evidence shows that the defendants were selling through those same four platforms plus Walmart. In *Dreambliss*,

the defendants were selling on those same five platforms plus Alibaba. These named defendant storefronts, however, are just the tip of the iceberg. Prior lawsuits have established that sellers like the defendants sell on multiple online platforms, through multiple storefronts, and, once caught up in one lawsuit, rely upon one or more alternative online platforms to sell their illegal products. This practice of using multiple online platforms, ensures maximum profits and lowers the risk of a seller being completely stopped from such sales. *Dertsakyan Dec.*, ¶ 9. Also, the extent of the sales by such sellers is not available information in a lawsuit because the defendants rarely, if ever, respond to discovery. Thus, enhanced damages are appropriate in these cases and the question becomes how much should the damages be enhanced.

In an online counterfeiting case, each of the defaulting defendants has access to millions (if not billions) of potential customers. Courts have recognized the reach of the Internet in awarding damages in online trademark counterfeiting cases. In a few online trademark counterfeiting cases where a few of the defendants appeared (and the other defendants defaulted), damages were dealt with in connection with the plaintiff's motion for summary judgment. In each case a significant damage award was entered, despite the defendants' lack of default. In one case, the court awarded the maximum \$2 million in trademark statutory damages against the defaulting defendants, and then awarded \$1 million in trademark statutory damages against the two non-defaulting defendants. In declining to adopt plaintiffs' argument that the maximum \$2 million in statutory damages should be awarded because that is what the court had already awarded against the defaulting defendants, the Court pointed out these two defendants were not in default. *Monster Energy Co. v. Meng Chun Jing*, No. 15-CV-2019, 2015 WL 4081288 (N.D. Ill. July 6, 2015). Of note, the amounts of the restrained assets were \$15,941.95 for one of the defendants and \$8,512.60 for the other defendant; these amounts are consistent with the restrained amounts in the present cases. In another case, the non-defaulting defendant

argued it had only sold eleven infringing hats for a total \$62 and statutory damages should be minimal. The Court, however, awarded Plaintiffs \$100,000 in damages based in part on “Defendant [having] the potential to reach a wide audience with its counterfeit goods because it advertised them on the internet, allowing for distribution far greater than if it had sold the hats in a brick-and-mortar store.” *Luxottica Group S.p.A. v. Li Chen*, No. 16-CV-6850, 2017 WL 836228 (N.D. Ill. March 2, 2017). The Court specifically contrasted this with the damage award in *Coach, Inc. v. Becka*, No. 5:11-CV-371, 2012 WL 5398830 (M.D. Ga. Nov. 2, 2012), where \$2,000 in damages was awarded and the Georgia Court noting the defendant “was operating out of a single small retail location, and [she] **did not sell or advertise the counterfeit items on the Internet.**” (emphasis added)

Examples of other online trademark counterfeiting cases where the maximum \$2 million statutory damages amount was awarded on default judgment include the following. *Airigan Solutions LLC v. Rainbow Island Store, et al.*, No. 23-cv-1327 (W.D. Pa. October 2, 2023)(Stickman, J.)(award of maximum statutory damages of \$2 Million for counterfeiting and \$150,000.00 statutory damages for copyright infringement)[ECF No. 51]; *see also, Volvo Trademark Holding AB v. The Unincorporated Associations Identified in Schedule “A”*, No. 19-cv-974 (E.D. Va. Dec. 30, 2019) (O’Grady, J.) (\$2 million dollars in statutory damages awarded against each defendant) [ECF No. 62 and 63]; *Michael Kors, L.L.C. v. The Partnerships and Unincorporated Associations Identified on Schedule “A”*, Case No. 15-cv-00124 (N.D. Ill. Mar. 25, 2015 and May 12, 2015) (\$2 million dollars in statutory damages awarded against each defendant) [ECF No. 44 and 61]; and *Monster Energy Co. v. The Partnerships and Unincorporated Associations Identified on Schedule “A”*, Case No. 15-cv-00277 (N.D. Ill. March 25, 2015) (\$2 million dollars in statutory damages awarded against each defendant) [ECF No. 50].

Although statutory damages are not available in patent cases, damages may be enhanced up to trebling of the damage amount. For the same reason that default judgements in online trademark counterfeiting cases have awarded the maximum statutory damage amount (a defendant's access to millions or billions of customers through the Internet), in default judgments for online patent counterfeiting cases courts have also awarded the maximum allowable damages (trebling the damage award). *See, e.g., Broadway Pine Brands LLC v. Bonjin-US, et al.*, No. 22-cv-1609 (W.D. Pa. May 23, 2023)(Ranjan, J)[ECF No. 61](upon defendants' admissions, patent damages trebled for intentional infringement); *Broadway Pine Brands LLC v. Mustb Toy Store, et al.*, No. 21-cv-1736 (W.D. Pa. April 26, 2023)(Ranjan, J)[ECF No. 52] and related cases (same); *Aquapaw LLC v. Allnice, et al.*, No. 20-cv-1954 (W.D. Pa. July 29, 2022)(Wiegand, J)[ECF No. 85](same); and *Aquapaw Brands LLC v. Flopet, et al.*, No. 21-cv-988 (W.D. Pa July 29, 2022)(Wiegand, J)[ECF No. 58](same). This Court should similarly treble the patent damage award.

III. CONCLUSION

The damage award sought by Plaintiffs is amply supported by the record before the Court and the law on patent damages. The Defendants have defaulted and admitted to their intentional infringement. Defendants stole a market that was originally and solely created by Plaintiffs. Plaintiffs have presented expert damage evidence through the Declaration of Peter Dertsakyan that establishes expected sales and receipts for each Defendant. As recognized in prior cases decided by this Court, the reason for trebling damages is to send a message of deterrence to these wrongdoers who are trying to game the system. The award also punishes the wrongdoing. Additionally, the Court achieves a consistency and parity for damages awarded against online infringers of all types. Awarding the maximum damage award by trebling it sends a message to the defendants and provides the strongest deterrent against would-be repeat offenders. Small

companies like Plaintiffs are locked in an existential struggle with foreign-based sellers like Defendants. Any measures this Court takes to protect Plaintiffs and disincentivize and punishes such egregious “pirate-like” behavior contributes to the interests of justice. The Court should enter a Default Judgment as described above.

Respectfully submitted,

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