

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

ALLSEASON ENTERPRISES, LLC,

Plaintiff,

v.

MYKYTA MELNIK LLC, *et al.*,

Defendants.

Civil Action No. 24-cv-921

(Judge Colville)

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

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

I. INTRODUCTION

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

In this case, Defendants are sellers of infringing products on at least one of the online marketplaces operated by Aliexpress.com, Amazon.com, eBay.com, Joybuy, Temu.com, Walmart.com, and wish.com. Defendants engaged in federal copyright infringement (17 U.S.C. § 501(a)) and Federal and state unfair competition. Some of the Defendants engaged in Trademark Counterfeiting and/or Ratings Hi-Jacking as well.

The remaining Defendants in this lawsuit have all defaulted and failed to cooperate in

discovery. The Defendants have been properly served pursuant to Fed. R. Civ. P. 4 and are aware of this action, but nevertheless chose not to respond. The Clerk has entered default. The Plaintiff also served discovery upon Defendants, including Requests for Admission, and no response to the discovery was received.

By their default, Defendants have conceded the truth of the allegations of the Complaint. By their failure to respond to Requests for Admission, Defendants have admitted the matters therein. There are no issues of fact remaining in this suit, and a default judgment should be entered against Defendants providing for permanent injunctive relief, an award of damages against each individual Defendant, severally and individually, as listed on Schedule A comprising, statutory damages (of \$150,000.00 multiplied by the number of copyrighted words infringed) for their intentional copyright infringement, and disgorgement of admitted profits (\$2,000,000.00) for their unfair competition or statutory damages for counterfeiting, a post-judgment asset restraining order, and an order authorizing the release and transfer of Defendants' assets from the Third-Party Service Provider(s) and Financial Institution(s) to satisfy the damages, in whole or in part, awarded to Plaintiff. Courts in the Western District of Pennsylvania have previously entered a default judgment against each defendant in this amount or more using a similar method for proving and calculating damages that is used here. *See, e.g., 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); Talsiman Designs LLC v. Ladynana US, No. 22-994 (W.D. Pa. October 20, 2022)(Schwab, J); Doggie Dental, Inc. v Ahui, et al., No. 19-cv-1627 (W.D. Pa., Sept. 27, 2021) (Hornak, CJ); Osprey LLC v. Poolwhale, et al.,*

No. 20-cv-1253 (W.D. Pa. December 3, 2020) (Hardy, J); *Doggie Dental, Inc. v. Anywill, et al.*, No. 19-cv-682 (W.D. Pa. August 14, 2020 (Hornak, CJ); and *Doggie Dental, Inc. v. Anywill, et al.*, No. 19-cv-746 (W.D. Pa. August 14, 2020 (Hornak, CJ).

II. LEGAL ANALYSIS

A. This court has jurisdiction to enter default judgment against 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 15 U.S.C. §§ 1114, 1116, 1125(a), and 1125(d); 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, and The All Writs Act, 28 U.S.C. § 1651(a). *See Complaint*, ¶ 12 [ECF No. 2] and *Amended Complaint* ¶ 11 [ECF No. 27].

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

First, Defendants purposefully availed themselves of the privilege of conducting business in Pennsylvania and this Judicial District. Defendants purposefully targeted sales of infringing products to Pennsylvania residents, and did in fact sell infringing products into

Pennsylvania. *See Complaint*, ¶ 12 [ECF No. 2] and *Amended Complaint* ¶ 12 [ECF No. 27]. These actions are sufficient to establish jurisdiction over Defendants. 42 Pa. Cons. Stat. § 5322 (a). Second, Plaintiff's claims arise directly from actions that occurred in this Judicial District. Plaintiff purchased infringing products to determine their authenticity and had the infringing products shipped to Pennsylvania. *See Declaration of Dee Odell* [ECF No. 13 and ECF No. 32]. These unauthorized and unlicensed sales of infringing products in this Judicial district establish this Court's jurisdiction over Defendants.

Lastly, this Court's exercise of specific personal jurisdiction over Defendants is "reasonable" under the constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The record in this case does not suggest that the burden of litigation in this District is extraordinary. Defendants offered to ship and sell their infringing products to any part of the United States. *See Complaint*, ¶ 12 [ECF No. 2] and *Amended Complaint* ¶ 12 [ECF No. 27]. Pennsylvania and this Court have a valid interest in the resolution of the grievances of its citizens and businesses, particularly when they potentially involve issues of [Pennsylvania] law. *See Square D Co. v. Scott Elec. Co.*, No. 06-459, 2008 WL 4462298, at *12 (W.D. Pa. Sept. 30, 2008). Plaintiff has a valid and substantial interest in having their legal rights recognized and vindicated. *Id.* Therefore, this Court's exercise of specific personal jurisdiction over Defendants is constitutionally reasonable.

B. Joinder of the Defendants is appropriate.

Joinder of the defendants is proper when plaintiff seeks relief "jointly, severally, or in the alternative with respect to arising out of the same transaction, occurrence or series of transactions or occurrences;" and "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). 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. 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 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.

C. Plaintiff is entitled to a default judgment against Defendants.



1. The Clerk properly entered default as to Defendants.

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

2. Factual allegations establish the defaulting Defendants’ liability.

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

At all times relevant hereto, Plaintiffs owned the common law trademark CLEAN NUTRA™ and registered trademarks CLEAN NUTRA & design (U.S. Reg. No.

7031116):  and CLEAN NUTRACEUTICALS & design (U.S. Reg. No. 7031117):  (“Plaintiff’s Marks”) and Defendant knew that Plaintiffs had the exclusive right to use and license their intellectual property and the goodwill associated therewith.

At all times relevant hereto, Plaintiffs owned the common law trade dress rights comprising the organization, selection of the text, arrangement of the elements of the creative artwork and colors for the label, the differently colored spheres containing abbreviations for various vitamins, minerals, and supplements, the black tree shaped background and the distinctly proportioned text for Plaintiff’s Product, (the “Plaintiff’s Trade Dress”):



and Defendant knew that Plaintiffs had the exclusive right to use and license their intellectual property and the goodwill associated therewith.

At all times relevant hereto, Plaintiff owned U.S. Copyright Reg. Nos. TX 9-367-638, TX 9-388-519, TX 9-388-522, TX 9-388-523, TX 9-389-848, TX 9-389-849, TX 9-394-790 all with the title “Multimineral Sea Moss Black Seed” published on October 15, 2022. (“Plaintiff’s Works”).

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

At all times relevant hereto, you have been engaged in the fraudulent promotion, advertisement, distribution, offering for sale, and/or sale of goods that are infringing copies of Plaintiff’s Product.

You intentionally copied and/or infringed Plaintiff’s intellectual property, in order to benefit from the Plaintiffs’ fame, reputation, and goodwill to divert Plaintiffs’ profits into your business.

You intentionally make, use, offer to sell, or import into the United States counterfeit and substandard copies of Plaintiff's Product with English language packaging and instructions.

(Declaration of Brian Samuel Malkin, ¶¶ 1 -5, filed herewith)

A. Liability for Copyright Infringement¹

Liability for copyright infringement is established when the plaintiff demonstrates two elements: (1) ownership of a copyright and (2) copying by the defendant. *Dam Things From Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 561 (3d Cir. 2002). Plaintiff has demonstrated through its images attached to the Complaint, copyright registration, and screenshots of Defendants' website advertising, that each of the Defendants infringed on Plaintiff's copyrighted images. Moreover, the Defendants have admitted to liability through their failure to answer the Complaint, as amended. (¶¶ 60 – 67). Thus, all the Defendants are liable for copyright infringement.

B. Liability for Unfair Competition

To prevail on a claim of false designation of origin under Section 43(a) of the Lanham Act, Plaintiff must prove that the Defaulting Defendants used in commerce, in connection with any goods or services, any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, which is likely to deceive as to the affiliation, connection, or association of the Defaulting Defendants with Plaintiff, or as to the origin, sponsorship, or approval, of the Defaulting Defendants' goods by Plaintiff. 15 U.S.C. § 1125(a)(1). In this case, the use of the copyrighted photos and other photos Plaintiff uses to designate and advertise its goods. As with trademark infringement claims, the test for liability for false designation of origin

¹ See fn. 1, *supra*.

under Section 43(a) is also “whether the public is likely to be deceived or confused by the similarity of the marks at issue.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780, 112 S. Ct. 2753, 2763 (1992).

Whether a defendant’s use of plaintiff’s trademarks created a likelihood of confusion between the plaintiff’s and the defendant’s products is also the determining factor in the analysis of unfair competition under the common law of Pennsylvania. *Mateson Chemical Corp. v. Vernon*, 2000 WL 680020, at *5 n. 7 (E.D.Pa. May 9, 2000).

It has long been established in the Third Circuit that unfair competition includes using a plaintiff’s photographs to pass off knock-off products and divert sales from the plaintiff. In *L’Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 650 (3d Cir. 1954), the Court found a Complaint properly pleaded a violation Section 43(a) of the Lanham Act when alleging that the defendant was using photographic reproductions of plaintiff’s dress in order to sell its inferior, poor-quality knock-off of the same dress. In this case, all Defendants used a photograph of Plaintiff’s product to sell their knock-off products. See *Odell Dec.*² [ECF No. 13 and ECF No. 32]

In addition to their admitted unfair competition through their unauthorized use of the Plaintiff’s copyrighted photos (*Complaint* and *Amended Complaint*, ¶¶ 68 – 78), some of the defendants admit to hi-jacking the Plaintiff’s ratings. *Complaint* and *Amended Complaint*, ¶¶ 87 - 97) In all events, Plaintiff having established liability for unfair competition, an award of damages against each of the Defendants is legally appropriate.

C. Liability for Trademark Infringement and Counterfeiting

² Refers to *Declaration of Dee Odell* [ECF No. 13, ECF No. 32]

Title 15 U.S.C. § 114 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 Contacts, Inc. v. WhenU.com*, 414 F.3d 400, 406-407 (2d Cir. 2005) (internal quotations omitted).

To prevail on a claim of false designation of origin under Section 43(a) of the Lanham Act, Plaintiff must prove that the Defaulting Defendants used in commerce, in connection with any goods or services, any word, term, name, symbol or device or any combination thereof, or any false designation of origin, which is likely to deceive as to the affiliation, connection, or association of the Defaulting Defendants with Plaintiff or as to the origin, sponsorship, or approval, of the Defaulting Defendants’ goods by Plaintiff. 15 U.S.C. § 1125(a)(1). As with trademark infringement claims, the test for liability for false designation of origin under Section 43(a) is also “whether the public is likely to be deceived or confused by the similarity of the marks at issue.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780, 112 S. Ct. 2753, 2763 (1992).

Whether a defendant’s use of plaintiff’s trademarks created a likelihood of confusion between the plaintiff’s and the defendant’s products is also the determining factor in the analysis

of unfair competition under the common law of Pennsylvania. *Mateson Chemical Corp. v. Vernon*, 2000 WL 680020, at *5 n. 7 (E.D.Pa. May 9, 2000). Further, the test to determine trademark infringement liability under Pennsylvania common law is the same as the likelihood of consumer confusion test outlined in 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). The well-pled factual allegations of Plaintiff's Complaint, as amended, properly allege the elements for each of the above claims. Furthermore, the factual allegations in Plaintiff's Complaint, as amended, substantiated by the evidence submitted, conclusively establish the Defaulting Defendants' liability under each of the claims asserted in the Complaint, as amended.

3. Plaintiff is entitled to statutory damages under the Copyright Act.

A Plaintiff may be awarded statutory damages under the Copyright Act. A plaintiff may pursue statutory damages of up to \$150,000.00 per infringement for willful copyright infringement. 17 U.S.C. § 504(c)(2). Defendants purposefully infringed Plaintiff's copyrighted images for profit. *See Complaint*. By their failure to respond, Defendants have admitted their infringement is willful. *See Evony, LLC v. Holland*, No. 2:11- CV-00064, 2011 WL 1230405 (W.D. Pa. Mar. 31, 2011). *See also 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 infringed Plaintiff's copyrighted images to sell knockoff goods, Plaintiff is entitled to statutory damages of \$150,000 per infringement of copyrighted image per defendant. In the *Evony* case, Judge McVerry awarded the maximum statutory copyright damages of \$300,000 (\$150,000 for each of the two works infringed) as a deterrent against the defaulting defendant for its willful infringement of the Plaintiff's copyrighted works. Likewise, Chief Judge

Hornak has also awarded the maximum damages for each instance of copyright infringement committed by each defendant. *See Doggie Dental v. Anywill*, No. 19-cv-682 (W.D. Pa., August 14, 2020)(Hornak, CJ); *Doggie Dental v. Max_Buy*, 19-746 (W.D. Pa., August 14, 2020) (Hornak, CJ); *Doggie Dental v. Go Well*, 19-1282(W.D. Pa., August 14, 2020) (Hornak, CJ); and *Doggie Dental v. Worthbuyer*, 19-1283 (W.D. Pa., August 14, 2020) (Hornak, CJ).

4. Plaintiff is Entitled to Statutory Damages Under the Lanham Act³

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.”⁴ 15 U.S.C. § 1117(c)(2). Defendants purposefully infringe Plaintiff’s mark for profit. *See Complaint*, ¶¶ 79 - 86. 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.⁵ 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

³ While all the Defendants have infringed on at least one of the Plaintiff’s copyrighted works and thus unfairly competed, the only identified Defendant in this motion that has counterfeited Plaintiff’s marks is Defendants No. 41.

⁴ Damages for Counts II and IV (Section 43(a) of the Lanham Act), Count V (common law unfair competition) VI (common law trademark infringement), are encompassed in any statutory damages awarded under 15 U.S.C. § 1117(c) Count III (counterfeiting and trademark infringement) or Count I (Federal Copyright Infringement).

⁵ 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).

“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 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, Plaintiffs 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 \$1,000,000.00 (United States Dollars) in profit on the sales of the counterfeit goods.” *Malkin Dec.* ¶ 5. In circumstances where no evidence of a defendant’s profit was available, courts have consistently awarded at least \$1 million dollars in statutory damages.⁶ Furthermore, courts have awarded high damage amounts where a defendant’s counterfeiting activities attracted wide market exposure through Internet traffic or advertisement.

⁶ 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 plaintiffs 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); *Levi Strauss & Co. v. The Unincorporated P’ships and Ass’ns. Identified in Schedule “A”*, Case No. 17-cv-04561 [D.E. 33] (N.D. Ill. Aug. 1, 2017) (same); *Yeti Coolers, LLC v. Taneil George*, Case No. 17-cv-62215 [D.E. 46] (S.D. Fl. Mar. 29, 2018) (same); *Mycoskie, LLC v. csmlong188*, Case No. 17-cv-60782 [D.E. 43] (S.D. Fl. Jul. 21, 2017) (same); *Fendi Adele, S.R.L. v. alma Hernandez*, Case No. 17-cv-62379 [D.E. 37] (S.D. Fl. Jan. 28, 2018) (same); *Burberry Ltd. v. The Partnerships and Unincorporated Ass’ns. Identified in Schedule “A”*, Case No. 17-cv-03255 [D.E. 37] (N.D. Ill. June 7, 2017) (same); *Louis Vuitton Malletier, S.A. v. Andrew Henry*, Case No. 17-cv-61034 [D.E. 40] (S.D. Fl. Aug. 22, 2017) (same); *Cartier Int’l A.G. v. Anotoky*, Case No. 17-cv-60831 [D.E. 38] (S.D. Fl. Jul. 6, 2017) (same); *Lacoste Alligator S.A. v. 6666 store*, Case No. 17-cv-60046 [D.E. 49] (S.D. Fl. Jun. 28, 2017) (same); *Gucci Am., Inc. v. 8710 t-shirt shop*, Case No. 16-cv-63002 [D.E. 58] (S.D. Fl. Mar. 27, 2017) (same); and *Louis Vuitton Malletier, S.A. v. afste nxmu*, Case No. 17-cv-61819 [D.E. 39] (S.D. Fl. Dec. 12, 2017) (same).

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”).

5. Plaintiff is entitled to disgorgement of profits under the Lanham Act.

Under the Lanham Act, once liability is established, “...the plaintiff shall be entitled...subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.”⁷ *See* 15 U.S.C. § 1117 (a). The court’s determination of a damage award is based upon considerations of “equity, reason, and pragmatism.” *World Entertainment, Inc. v. Brown, et al.*, No. 09-5365 (E.D. Pa., May 20, 2011), *slip op.* at 5 [ECF No. No. 64] (citations omitted).

In *Banjo Buddies, Inc. v. Renofsky*, 399 F. 3d 168, 175 (3d. Cir. 2005), the Third Circuit has set forth a five-factor test to determine when disgorgement of the defendant’s profits is appropriate. These factors “include, but are not limited to (1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making misconduct unprofitable, and (6) whether it is a case of palming off.” Based upon the facts as well plead by the Plaintiff and admitted by the Defendants’ defaults, each of these factors weigh in favor of the disgorgement of the defendants’ profits.

⁷ Disgorgement of profits as damages for Count V (common law unfair competition) are encompassed in any damages awarded under 15 U.S.C. § 1117(a) for Counts II and IV (federal unfair competition).

Section 35(a) of the Lanham Act provides that “[i]f the plaintiff shall be required to prove defendant’s sales only; defendant must prove all elements of cost or deduction claimed.” 15 U.S.C. § 1117(a); *Banjo Buddies, Inc.*, 399 F. 3d at 176. The Supreme Court has made it clear that:

[t]he burden is on the infringer to prove that his infringement had no cash value in sales made by him. If he does not do so, the profits made on the sales of goods bearing the infringing mark properly belong to the owner of the mark. There may well be a windfall to the trademark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark. But to hold otherwise would give the windfall to the wrongdoer. *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. 2008), citing *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 206-07 (1942). See also *Wesco Mfg. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1488 (11th Cir. 1987) (“Although the exact amount of infringing sales cannot be determined from the [evidence], exactness is not required. [The defendant] is in the best position to ascertain exact sales and profits, and it bears the burden of doing so in an accounting.”); *Id.* at 1487-88 (“A plaintiff need not demonstrate actual damage to obtain an accounting of an infringer’s profits under Section 35 of the Lanham Act. It is enough that the plaintiff proves the infringer’s sales. The burden then shifts to the defendant, which must prove its expenses and other deductions from gross sales.” (citations omitted)).

In cases where defendants have failed to produce documents to characterize revenue, courts have entered a profits award for the entire revenue amount. See *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. Ill. 2008) (“[t]he burden was therefore on PartyGaming to show that certain portions of its revenues...were not obtained through its infringement of WMS's marks.”); *Chloe v. Queen Bee of Beverly Hills*, 2009 U.S. Dist. LEXIS 84133, at *15-17 (S.D.N.Y. Jul. 16, 2009) (entering profits award for the entire revenue amount in trademark infringement case even though “records offer no guidance as to how much of this revenue stream related to [Plaintiff’s] products [as opposed to other products not at issue in this case] or as to the costs incurred in acquiring and selling these products.”). Under normal circumstances, it is the infringer who bears the burden of “offering a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items in issue.” *Deckers*

Outdoor Corp. v. ShoeScandal.com, Ltd. liability Co., No. CV 12-7382 ODW (SHx), 2013 U.S. Dist. LEXIS 168545, at *12 (C.D. Cal. Nov. 25, 2013), citing *Sunbeam Prods., Inc. v. Wing Shing Prods. (BVI) Ltd.*, 311 B.R. 378, 401 (S.D.N.Y. 2004) *aff'd*, 153 F. App'x 703 (Fed. Cir. 2005). “But if the infringer has failed to produce any evidence ... the Court must determine the costs to be subtracted from revenue based on the evidence it has to determine profits.” *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1447 (Fed. Cir. 1998).

Since defaulting Defendants have chosen not to participate in these proceedings, Plaintiff have limited available information regarding defaulting Defendants’ profits from the sale of infringing products. Defaulting Defendants have failed to appear in this matter and have not produced any documents or information: (1) characterizing each of the transactions in their financial accounts, (2) other accepted payment methods; or (3) other Internet stores that they may be operating. As such, defaulting Defendants have not met their burden to apportion gross receipts between infringing and non-infringing product sales, or to show any deductions. *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. 2008); *Nordock, Inc. v. Systems, Inc.*, 2017 U.S. Dist. LEXIS 192413, at * 7.

By failing to respond to Plaintiff’s Discovery and failing to answer the Plaintiff’s Complaint, each defaulting Defendant has admitted that profits from the sale of the infringing products totals more than \$2,000,000. *Complaint and Amended Complaint*, ¶ 59; *see* Fed. R. Civ. P. 36(a)(3). Because defaulting Defendants have not met their burden of apportioning gross sales or showing any deductions, the Court should award two million dollars (\$2,000,000) from each defaulting Defendant based on the Defendants’ failure to answer. Deemed admissions have previously been used to establish profits to be disgorged in cases against sellers on online marketplaces. *Fitness Anywhere LLC v. The Partnerships and Unincorporated Associations*

Identified on Schedule "A", No. 19-cv-4155 (N.D. Ill., Sept. 26, 2019) (Lee, J.), and *LMVH Swiss Manufactures S.A. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-4383(N.D. Ill., Sept. 25, 2019) (Coleman, J.).

A deemed admission of two million dollars (\$2,000,000.00) in profit to be disgorged is not objectively unreasonable. Courts in our district have awarded \$2,000,000.00 in damages as profit to be disgorged in *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.); *See also, 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). *Talisman Designs, LLC v. Ahappyday*, No. 20-cv-1915 (W.D. Pa, February 24, 2022)(Colville, J) [ECF No. No. 79] and *Talisman Designs v. Angelworld*, No. 21-cv-1292 (W.D. Pa., February 24, 2022)(Colville, J)[ECF No. No. 50]. Also, in similar cases in this District the court has awarded two million dollars (\$2,000,000) in statutory damages against each defendant. Such an award serves the public interest in making the misconduct unprofitable and deter future willful violations. entered maximum statutory damages against Defendants in other online counterfeiting cases. (\$2 million in damages against each defendant), *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.) (same), and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.) (same). *See Doggie Dental v. Anywill*, No. 19-cv-682 (W.D. Pa., August 14, 2020)(Hornak, CJ); *Doggie Dental v. Max_Buy*, 19-746 (W.D. Pa., August 14, 2020) (Hornak, CJ); *Doggie Dental v. Go Well*, 19-1282(W.D. Pa., August 14, 2020) (Hornak, CJ); and *Doggie Dental v. Worthbuyer*, 19-1283 (W.D. Pa.,

August 14, 2020) (Hornak, CJ). In short, in all anticounterfeiting cases in this district, the Court has awarded the maximum damages under the law.

6. Damages pursuant to the Copyright Act may be combined with damages under the Lanham Act.

A Plaintiff may be awarded statutory damages under the Copyright Act in addition to a disgorgement of a defendant's profits under the Lanham Act. 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. *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).

D. Plaintiff is Entitled to Permanent Injunctive Relief

In addition to the foregoing relief, Plaintiff seeks entry of a permanent injunction enjoining Defendants from infringing or otherwise violating Plaintiff's rights in its intellectual property, including at least all injunctive relief previously awarded to by this Court to Plaintiff in the temporary restraining order and preliminary injunction. See *Evony, LLC v. Holland*, No. 2:11-CV-00064, 2011 WL 1230405, at *7 (W.D. Pa. Mar. 31, 2011) ("In this case, Plaintiffs have achieved "actual success on the merits" through the admission of liability arising from Defendant's default. Furthermore, the Verified Complaint establishes that Defendant unlawfully

sells and distributes copyrighted and trademarked material of the Plaintiffs. Nothing in the facts before the Court indicates that Defendant has ceased this infringing activity; thus, a permanent injunction is warranted in this case on all claims of the Verified Complaint.”). Plaintiff is also entitled to injunctive relief so it can can prompt action against any new online marketplace accounts or websites that are identified, found to be linking to Defendants, and selling Infringing Product. A plaintiff is entitled to a permanent injunction under the Lanham Act, Patent Act, and Pennsylvania common law. 15 U.S.C. § 1116; 35 U.S.C. § 283; and *B&B Microscopes v. Armogida*, 532 F. Supp. 2d 744, 760 (W.D. Pa. 2007) (citing *Brody’s, Inc. v. Brody Bros., Inc.*, 454 A.2d 605, 607 (Pa. Super. Ct.1982)).

A permanent injunction, like the requested damages under the Copyright and Lanham Acts, would help deter other individuals or corporations from infringing Plaintiff’s valuable trademark and patent rights. Additionally, entry of a permanent injunction against Defendants in this case will help expedite any future litigations between the defaulting Defendants and Plaintiff, if a case between the parties arises in the future. This equitable result would be in the interest of justice and provide Plaintiff with more flexibility to protect its intellectual property rights. As such, permanent injunctions are routinely entered by other Courts in similar online counterfeiting cases. *See 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); *Nifty Home Products, Inc. v. Kafa Company, et al.*, No. 22-cv-1694 (W.D. Pa., September 12, 2023)(Colville, J.)(ECF No. 77]; *Talisman Designs, LLC v. Ahappyday*, No. 20-cv-1915 (W.D. Pa, February 24, 2022)(Colville, J) [ECF No. No. 79]; *Talisman Designs v. Angelworld*, No. 21-

cv-1292 (W.D. Pa., February 24, 2022)(Colville, J); *Doggie Dental v. Ahui*, 19-1627 (September 27, 2021)(Hornak, CJ); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.); *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.); and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.); *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); *Airigian v. Bufugiujan, et al.*, 18-cv-1330-NBF and *Airigan v. Artifacts-Selling, et al*, 18-cv-1462-NBF, and *Airigan v. Babymove, et al.*, 19-cv-166-NBF.

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

Plaintiff requested a temporary restraining order and preliminary injunction, *inter alia*, to prevent Defendants from transferring the funds held in their Third Party Service Provider(s)⁸ and Financial Institution(s)⁹ accounts beyond this Court's jurisdiction.[ECF No. 4] This Court granted the temporary restraining order, an amended temporary restraining order, and a preliminary injunction, preventing Defendants from accessing the funds in their Third Party Service Provider(s) and Financial Institution(s) accounts.

⁸ Refers to Amazon Services, LLC d/b/a Amazon.com, and Amazon Payments, Inc. d/b/a Amazon Pay (collectively "Amazon"), Joybuy Marketplace operated by Jingdong E-Commerce (Trade) Hong Kong Co. , Ltd and JD E-Commerce America (collectively, "Joybuy"), Whaleco Inc., a Delaware Corporation, which is a wholly owned subsidiary of Pinduoduo Inc. which is owned by PDD Holdings (collectively, "Temu"), eBay, Inc. d/b/a ebay.com, Walmart Inc. and Wal-Mart.com USA, LLC, wish.com, Alibaba.com US LLC d/b/a Alibaba.com and Aliexpress.com.

⁹ Refers to financial institutions, including but not limited to, Zhejiang Ant Small and Micro Financial Services Group Co., Ltd. AliPay (China) Internet Technology Co. Ltd., and Alipay.com Co., Ltd. (collectively referred to as "AliPay")⁹, Amazon Payments, Inc., Walmart Pay, PayPal, Inc. d/b/a paypal.com, and Context Logic, Inc. d/b/a wish.com ("Financial Institutions").

[ECF Nos. 19, 34, 53] This Court found that Plaintiff had established a likelihood of success on the merits and irreparable harm in the absence of a temporary restraining order and preliminary injunction. *See Id.*

Plaintiff now requests that this Court order the 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 won, 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 our Courts to satisfy monetary judgment awards in similar counterfeiting cases. *See 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, 2023)(Hornak, CJ)(ECF No. 104); Pawesome Pet Products LLC v. Colorflowers, et al., No. 22-629 (Hornak, CJ)(ECF No.*

180); *Nifty Home Products, Inc. v. Kafa Company, et al.*, No. 22-cv-1694 (W.D. Pa., September 12, 2023)(Colville, J.)[ECF No. 77]; *Talisman Designs, LLC v. Ahappyday*, No. 20-cv-1915 (W.D. Pa, February 24, 2022)(Colville, J) [ECF No. No. 79]; *Talisman Designs v. Angelworld*, No. 21-cv-1292 (W.D. Pa., February 24, 2022)(Colville, J); *Doggie Dental v. Ahui*, 19-1627 (September 27, 2021)(Hornak, CJ); *Airigan Solutions, LLC v. Belvia*, No. 20-cv-284 (W.D. Pa., April 21, 2020) (Schwab, J.); *Rapid Slicer LLC v. Art-House*, No. 19-411 (W.D. Pa., Jan. 9, 2020) (Horan, J.); and *Airigan Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa., Aug 13, 2019) (Fischer, J.); *Doggie Dental v. Anywill*, No. 19-cv-682 (W.D. Pa., August 14, 2020)(Hornak, CJ); *Doggie Dental v. Max_Buy*, 19-746 (W.D. Pa., August 14, 2020) (Hornak, CJ); *Doggie Dental v. Go Well*, 19-1282(W.D. Pa., August 14, 2020) (Hornak, CJ); and *Doggie Dental v. Worthbuyer*, 19-1283 (W.D. Pa., August 14, 2020) (Hornak, CJ).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant its Motion for Default Judgment; enter judgment against Defendants for all counts in the Complaint; permanently enjoin Defendants and award Plaintiff statutory damages for copyright infringement pursuant to 17 U.S.C. § 504(c) against all the defendants; award Plaintiff disgorgement of the Defendants' admitted profits for their unfair competition, award statutory damages for trademark counterfeiting against Defendant No. 41, award Plaintiff pre-judgment interest and post-judgment interest on the above damages awards; and grant such further relief as this Court deems appropriate. Plaintiff additionally requests 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.

Respectfully submitted,

Dated: September 16, 2024

/s/ Stanley D. Ference III

Stanley D. Ference III

Pa. ID No. 59899

courts@ferencelaw.com

Brian Samuel Malkin

Pa. ID No. 70448

bmalkin@ferencelaw.com

FERENCE & ASSOCIATES LLC

409 Broad Street

Pittsburgh, Pennsylvania 15143

(412) 741-8400 - Telephone

(412) 741-9292 – Facsimile

Attorneys for Plaintiff