

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DocRx, Inc.,

Plaintiff,

vs.

DocRx Dispense, Inc.; Martin V.
Olson,

Defendants.

No. CV-14-00815-PHX-PGR

DEFAULT JUDGMENT OPINION
AND PERMANENT INJUNCTION
ORDER

Pending before the Court is Plaintiff’s Motion for Entry of Default Judgment (Doc. 27). Having considered the motion in light of the relevant record, the Court finds that the motion should be granted in part and denied in part pursuant to Fed.R.Civ.P. 55(b)(2).

Background

Plaintiff DocRx, Inc. commenced this action, which is based on federal question jurisdiction, on April 17, 2014. Its First Amended Complaint (“FAC”) (Doc. 9) alleges claims for Infringement of Federally Registered Trademark Under 15 U.S.C. § 1114 (First Cause of Action), Unfair Competition; False Designation of Origin Under 15 U.S.C. § 1125(a) (Second Cause of Action), Anticybersquatting

1 Consumer Protection Act Under 15 U.S.C. § 1125(d) (Third Cause of Action),
2 Common Law Unfair Competition (Fourth Cause of Action), and Intentional
3 Interference with Contractual Relations and Business Expectancies (Fifth Cause of
4 Action.)

5 The plaintiff, which operates throughout the United States, focuses on
6 providing medications and software to pharmacies and clinics that allow them to
7 dispense medications directly to patients. The plaintiff owns a United States Patent
8 and Trademark Office Service Mark Registration for its “DocRx” mark (Reg. No.
9 4.504,977); the trademark was registered in April 2014 and the registration notes
10 that the trademark was first used in commerce in March 2009. The plaintiff
11 registered its Internet domain name of “docrxdispensing.com” in January 2009.

12 The defendants, DocRx Dispense, Inc. and its president/principal Martin V.
13 Olson, also provide similar pharmaceutical and medical supply-related services.
14 DocRx Dispense, Inc. was incorporated in Arizona in September 2012; the FAC
15 alleges that DocRx Dispense Inc. is the alter ego of Martin V. Olson. Olson
16 registered the Internet domain name “doxrxdispense.com” in October 2011, and the
17 defendants also do business using the domain names “docrxdispense.net,”
18 “docrxdispensevideo.com,” and “docrxdispensewebinar.com.” The gist of the
19 plaintiff’s FAC is that the defendants’ subsequent use of confusingly similar
20 corporate name and domain names to compete with the plaintiff amounts to an
21 unauthorized use of the plaintiff’s DocRx mark and constitutes trademark
22 infringement and unfair competition.

23 DocRx Dispense, Inc. was served with process through the Arizona
24 Corporation Commission on April 28, 2014 (Doc. 13), and Martin V. Olson was
25 personally served with process on May 17, 2014 (Doc. 15). The plaintiff filed its
26 Application for Entry of Default and served it on the defendants on July 8, 2014

1 (Doc. 17), and the Clerk of the Court entered default against the defendants on July
2 9, 2014 (Doc. 18). In its pending default judgment application, the plaintiff seeks
3 damages and injunctive relief against the defendants, as well as an award of its
4 attorneys' fees and costs.

5 Discussion

6 A. Whether Default Judgment Should be Entered

7 The Court must consider seven factors in determining whether to exercise its
8 discretion to enter default judgment: (1) the possibility of prejudice to the plaintiff;
9 (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint;
10 (4) the sum of money at stake; (5) the possibility of a dispute concerning material
11 facts; (6) whether the default was due to excusable neglect; and (7) the strong policy
12 underlying the Federal Rules of Civil Procedure favoring decisions on the merits.
13 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.1986). In considering the Eitel
14 factors, the Court takes all factual allegations in the complaint as true, except for
15 those relating to damages. See TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d
16 915, 917 (9th Cir.1987).

17 The first factor weighs in favor of granting the plaintiff's motion because the
18 failure to enter default judgment will cause the plaintiff to continue to suffer damage
19 to its goodwill and business reputation due to the defendants' infringement of its
20 trademark and may leave it without any other recourse for recovery.

21 The second and third factors favor a default judgment because the FAC is
22 both factually and legally sufficient at least as to the federal claims alleged in it, and
23 because the defendants, by defaulting, have admitted the factual allegations in the
24 FAC not related to damages.

25 The fourth factor also favors a default judgment because the plaintiff is
26 seeking significant damages and injunctive relief, as well as its fees and costs, and

1 the requested relief is balanced in relation to the seriousness of the defendants'
2 infringing conduct.

3 The fifth factor also favors a default judgment because the sufficiency of the
4 FAC and the defendants' default, along with the plaintiff's submission of evidence
5 supporting its allegations regarding the defendants' infringing conduct, establish that
6 a dispute regarding material facts is not a genuine possibility.

7 The sixth factor further favors a default judgment because the likelihood of the
8 defendants' default being the result of excusable neglect is not a non-frivolous
9 possibility since the record clearly establishes that the defendants have been aware
10 of this action: the defendants were properly served with the FAC and the default
11 application, and the plaintiff's evidence shows that defendant Olson personally
12 communicated with the plaintiff's counsel on May 15, 2014, May 19, 2014, May 22,
13 2014, and June 9, 2014 regarding the possibility of resolving this action.

14 The seventh factor favors default judgment notwithstanding the strong public
15 policy favoring decisions on the merits because the defendants' failure to defend this
16 action renders an adjudication on the merits impractical, if not impossible.

17 Having reviewed all of the Eitel factors, the Court concludes that the entry of
18 default judgment against the defendants is appropriate.

19 B. Monetary Recovery

20 Based on the arguments presented and supported in its memorandum, the
21 Court concludes that the plaintiff is seeking damages only pursuant to § 35 of the
22 Lanham Act, 15 U.S.C. § 1117, for the profits it allegedly lost due to the defendants'
23 infringement of its trademark. Section 1117(a) governs the award of monetary
24 remedies in trademark infringement actions and provides for an award of the
25 defendants' profits, any damages sustained by the plaintiff, and the costs of the
26 action. Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1405 (9th Cir.1993).

1 The plaintiff seeks an award of \$945,000 in damages resulting from the defendants'
2 infringement. The amount sought consists of an award pursuant to § 1117(a) of
3 \$315,000 in actual damages sustained by the plaintiff in the form of its lost profits,
4 trebled pursuant to 15 U.S.C. § 1117(a) or §1117(b)¹. More specifically, the actual
5 damages claimed by the plaintiff are in two parts. First, the plaintiff states that its
6 discovery has disclosed five accounts the defendants have with clinical doctors'
7 offices which the plaintiff asserts have conservatively cost it \$240,000 in lost profits.
8 The plaintiff's computational reasoning is that transactions of this nature with clinical
9 doctors' offices average profits of \$2,000 to \$2,500 each month, that if the
10 defendants began infringing the plaintiff's mark in July 2012, they would have done
11 so for over two years before default was entered, so the plaintiff's lost profits equal
12 \$2,000/month x 24 months x 5 accounts, which is \$240,000 (before trebling.) The
13 evidence supplied by the plaintiff supporting its \$240,000 lost profit figure consists
14 (1) of three unauthenticated pages obtained from a company named Bryant Ranch
15 Prepack (Ex. F to Doc. 27-1) that apparently purport to show that the defendants had
16 a business arrangement with Bryant Ranch Prepack of some unspecified nature that
17 involved five other listed businesses, although there is no explanation in those
18 documents as to what the defendants' connection is with those other five
19 businesses, and (2) the declaration of Brian Ward (Ex. E to Doc. 27-1), who has
20 been the plaintiff's CEO for over 10 years and has been in the pharmaceutical
21 industry for over 18 years, who merely states in relevant part regarding these
22 purported five accounts of the defendants: "Based upon my experience in the
23

24 1

25 The plaintiff's memorandum cites in different places to both § 1117(a)
26 and § 1117(b) as the statutory authority for trebling damages so the Court is not
clear as to which section the plaintiff is actually relying on.

1 industry, on average, a clinic that is set up to dispense medication directly to patients
2 will net profits between \$2000 and \$2500 monthly.”

3 Second, the plaintiff also contends that it lost the opportunity to obtain the
4 business of Mackenzie HealthCare for drug testing services because that company
5 decided not to do business with either the plaintiff or the defendants, which also
6 sought Mackenzie Healthcare’s business, due to the confusion caused by the
7 similarity of their company names. The plaintiff’s computation reasoning as to its lost
8 profits from not obtaining the Mackenzie HealthCare account is that the contract
9 would have netted the plaintiff, on average, \$150,000 to \$200,000 in profit every six
10 months, and if Mackenzie HealthCare had entered into a deal with the plaintiff for the
11 three months before default was entered against the defendants the plaintiff would
12 have conservatively netted \$75,000 in profits since \$150,000/every six months
13 equates to \$25,000/month. The evidence supplied by the plaintiff supporting this lost
14 profit figure consists (1) of a declaration from Keith Barkley (Ex. C to Doc. 27-1), the
15 founder and managing director of Mackenzie HealthCare, who states in relevant
16 part: “I was approached by both companies to establish a business relationship. Due
17 to the trouble I had distinguishing between DocRx, Inc. and DocRx Dispense, Inc.
18 and the potential for confusion in the marketplace, I decided not to authorize any
19 business transactions between Mackenzie HealthCare and either company[,]” and
20 (2) the declaration of Brian Ward (Ex. E to Doc. 27-1), the plaintiff’s CEO, who
21 merely states in relevant part: “Based upon my experience in the industry, the
22 business deal contemplated with Mackenzie Healthcare for drug testing and
23 compounding services would have net profits, on average, \$150,00 to \$200,000
24 every six months.”

25 In order to be awarded § 1117 damages, the plaintiff “must prove both the fact
26 and amount of damages.” Lindy Pen Co. v. Bic Pen Corp., 892 F.2d at 1407. Since

1 trademark remedies are guided by tort law principles, the plaintiff must establish its
2 damages “with reasonable certainty,” which means that while requested damages
3 need not be calculated with absoluteness exactness, the evidence submitted by the
4 plaintiff must provide a reasonable basis for their computation. *Id.* The Court
5 concludes that it cannot award any lost profit damages to the plaintiff because the
6 evidence submitted by the plaintiff is simply too conclusory and/or speculative to
7 provide a sufficient basis for a damages determination in any amount. *See id.*, at
8 1408 (“Many courts have denied a monetary award in infringement cases when
9 damages are remote and speculative.”)

10 Even if the Court were to accept the Bryant Ranch Prepack documents as
11 sufficiently establishing that the defendants had five competing accounts, which they
12 do not, no sufficient evidence has been presented that the plaintiff would have
13 obtained those accounts but for the defendants’ infringement. The plaintiff has not
14 established that the defendants are its sole competitor or that it ever attempted to
15 obtain those five accounts, nor has it sufficiently established that its profits from
16 those accounts, had it obtained them, would have been in the range conclusorily
17 stated by Mr. Ward. The Court has the same problems with the Mackenzie
18 Healthcare-related evidence, *i.e.*, there is no sufficient evidence that Mackenzie
19 HealthCare would in fact have awarded its contract to the plaintiff but for the
20 defendants’ infringement or that the plaintiff would have profited from that contract
21 in the range conclusorily noted by Mr. Ward. As the Ninth Circuit has stated, “[t]o
22 establish damages under the lost profits method, a plaintiff must make a prima facie
23 showing of reasonably forecast profits[.]” *id.*, at 1407, and the plaintiff has not shown
24 that its suffered any lost profits with the required reasonable certainty. Since the
25 plaintiff has not provided a reasonable basis for computing damages, any
26 determination of actual damages would be improperly based on speculation and

1 would amount to an improper windfall to the plaintiff.

2 C. Injunctive Relief

3 In its motion, the plaintiff seeks the entry of both prohibitory and mandatory
4 injunctive relief. This requested relief consists of a permanent injunction prohibiting
5 the defendants from using any variant of the plaintiff's DocRx service mark and from
6 registering or using a domain name containing, confusingly similar to, or identical to
7 the DocRx service mark, as well as requiring the defendants to transfer the
8 registration and ownership rights of their "docrxdispense.com" domain name to the
9 plaintiff.

10 Injunctive relief is the preferred remedy in trademark infringement and unfair
11 competition cases because "there is no adequate remedy at law for the injury
12 caused by a defendant's continuing infringement." Century 21 Real Estate Corp. v.
13 Sandlin, 846 F.2d 1175, 1180 (9th Cir.1988); 15 U.S.C. § 1116(a). The Court has the
14 authority under the Lanham Act to "grant injunctions according to principles of equity
15 and upon such terms as the court may deem reasonable, to prevent the violation of
16 any right of the trademark owner." Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d
17 1126, 1137 (9th Cir.2006) (Internal quotation marks omitted); § 1116(a). As part of
18 its authority under the Anticybersquatting Consumer Protection Act, the Court has
19 the power to order the transfer of an infringing domain name to the owner of the
20 mark. 15 U.S.C. § 1125(d)(1)(C).

21 Notwithstanding the plaintiff's failure in its memorandum to set forth any
22 argument specifically directed at its request for injunctive relief, the Court concludes
23 that broad injunctive relief is appropriate here in light of the likelihood of confusion
24 arising from the defendants' use of the DocRx mark in offering services very similar
25 to those offered by the plaintiff. See GoTo.com, Inc. v. Walt Disney Co., 202 F.3d
26 1199, 1211 (9th Cir.2000) ("When the infringing use is for a similar service, a broad

1 injunction is especially appropriate.”) (Internal quotation marks omitted). More
2 specifically, the Court concludes that a permanent injunction is appropriate because
3 the record, viewed in light of the totality of the circumstances, sufficiently establishes
4 that the plaintiff has suffered an irreparable injury, that the remedies available at law,
5 such as monetary damages, are inadequate in this case to compensate the plaintiff
6 for its injury, that a remedy in equity is warranted upon consideration of the balance
7 of hardships between the plaintiff and the defendants, and that the public interest
8 would be served by a permanent injunction. La Quinta Worldwide LLC v. Q.R.T.M.,
9 S.A. de C.V., 762 F.3d 867, 879 (9th Cir.2014).

10 D. Attorneys’ Fees

11 The plaintiff seeks an award of its attorneys’ fees in its motion solely pursuant
12 to the Lanham Act, which provides that “[t]he Court in exceptional cases may award
13 reasonable attorneys fees to the prevailing party.” 15 U.S.C. § 1117(a). The Ninth
14 Circuit reasons that “generally a trademark case is exceptional for purposes of an
15 award of attorneys’ fees when the infringement is malicious, fraudulent, deliberate
16 or willful.” Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir.2000). The Court
17 concludes that an award of reasonable attorneys’ fees pursuant to § 1117(a) is
18 appropriate here due to the defendants’ refusal to defend this action, and because
19 the factual allegations in the FAC, which the defendants have admitted by their
20 default, together with the evidence submitted by the plaintiff reflecting the
21 defendants’ knowledge that they were infringing on the plaintiff’s DocRx mark, see
22 e.g., Keith Barkley’s declaration (Ex. C to Doc. 27-1) and the plaintiff’s counsel’s
23 correspondence with defendant Olson (Ex. I to Doc. 27-1), sufficiently indicate that
24 the defendants engaged in willful, deliberate infringement.

25 IT IS THEREFORE ORDERED that Plaintiff’s Motion for Entry of Default
26 Judgment (Doc. 27) is granted in part to the extent that plaintiff DocRX, Inc. seeks

1 the entry of a permanent injunction and an award of its reasonable attorneys' fees
2 and costs, and is denied to the extent that the plaintiff seeks an award of damages.

3 IT IS FURTHER ORDERED that the following permanent injunctive relief is
4 entered against defendants Martin V. Olson and DocRx Dispense, Inc.:

5 1. Defendants Martin V. Olson and DocRx Dispense, Inc., their agents,
6 representatives, employees, and assigns, and all persons in active concert and/or
7 participation with Martin V. Olson or DocRx Dispense, Inc. who receive notice of this
8 Order and/or the Court's Judgment in this action, are permanently enjoined from
9 registering, trafficking, using, or maintaining the registration of any domain name that
10 uses the term "DocRx."

11 2. Defendants Martin V. Olson and DocRx Dispense, Inc., their agents,
12 representatives, employees, and assigns, and all persons in active concert and/or
13 participation with Martin V. Olson or DocRx Dispense, Inc. who receive notice of this
14 Order and/or the Court's Judgment in this action, are permanently enjoined from
15 using any of plaintiff DocRx, Inc.'s trademarks, specifically its "DocRx" mark as
16 shown in the exhibit to the First Amended Complaint (Ex. A to Doc. 9-1), including
17 formatives thereof, any reproduction, counterfeit, copy or colorable imitation of the
18 infringing mark, or any other name, mark, designation or depiction in connection with
19 the defendants' activities or business in a manner that is likely to cause confusion
20 regarding whether defendant DocRx Dispense, Inc. is affiliated or associated with,
21 or sponsored by plaintiff DocRx, Inc., or that is likely to dilute the distinctiveness of
22 plaintiff DocRx, Inc.'s trademark or any other marks owned by plaintiff DocRx, Inc.

23 3. Defendants Martin V. Olson and DocRx Dispense, Inc., their agents,
24 representatives, employees, and assigns, and all persons in active concert and/or
25 participation with Martin V. Olson or DocRx Dispense, Inc. who receive notice of this
26 Order and/or the Court's Judgment in this action, are permanently enjoined from

1 assisting, aiding, or abetting any other person or business entity in engaging in or
2 performing any of the activities referred to in paragraphs 1 and 2.

3 4. Defendants Martin V. Olson and DocRx Dispense, Inc. are permanently
4 enjoined from possessing all stationery, forms, printed matter, advertising, and paper
5 goods containing the infringing mark and formatives thereof, and shall immediately
6 destroy all such infringing materials in their possession.

7 IT IS FURTHER ORDERED that the registration and ownership rights to any
8 infringing domain name that uses the term "DocRx," including, but not limited to, the
9 domain name "docrxdispense.com" shall be transferred from defendant Martin V.
10 Olson and transferred to plaintiff DocRx, Inc. Defendant Martin V. Olson is hereby
11 ordered to take all actions necessary to transfer the infringing domain name(s) to
12 plaintiff DocRx, Inc. Such transfer shall take place immediately, and no later than
13 fourteen (14) calendar days from the date defendant Martin V. Olson is served with
14 a copy of this Order and the Court's Judgment.

15 IT IS FURTHER ORDERED that defendant Martin V. Olson shall file with the
16 Court and serve on plaintiff DocRx, Inc.'s counsel within thirty (30) days after being
17 mailed a copy of this Order and the Court's Judgment, a report in writing, under oath,
18 setting forth in detail the manner and form in which he has complied with the terms
19 of the Court's injunction.

20 IT IS FURTHER ORDERED that plaintiff DocRx, Inc. shall file with the Court
21 and serve a copy on defendants Martin V. Olson and DocRx Dispense, Inc., a
22 motion for attorneys' fees and a bill of costs, pursuant to Fed.R.Civ.P. 54 and Local
23 Rule 54.1 and 54.2 no later than fourteen (14) days after the entry of the Court's
24 Judgment in this action.²

25 2

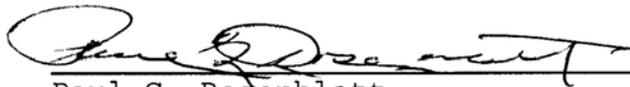
26 The plaintiff is advised that any motion it files for attorneys' fees

1 IT IS FURTHER ORDERED that in the event that Defendants Martin V. Olson
2 and DocRx Dispense, Inc. fail to comply with the material terms of this Order and the
3 Court's Judgment, plaintiff DocRx, Inc. shall be entitled to recover any reasonable
4 attorneys' fees and costs incurred in securing the defendants' compliance.

5 IT IS FURTHER ORDERED that plaintiff DocRx, Inc. shall use reasonable
6 efforts to serve a copy of this Order and the Court's Judgment on defendants Martin
7 V. Olson and DocRx Dispense, Inc. and shall file a notice of such service with the
8 Court.

9 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
10 in favor of plaintiff Doc.Rx, Inc. accordingly.

11 DATED this 20th day of April, 2015.

12
13 
14 Paul G. Rosenblatt
15 United States District Judge
16
17
18
19
20
21
22

23 _____
24 pursuant to 15 U.S.C. § 1117(a) must include a good faith effort by it to apportion
25 litigation-related time between the Lanham Act claims and the non-Lanham Act
26 claims, as required by the Ninth Circuit. See Gracie v. Gracie, 217 F.3d at 1069-70
("We hold that as a general matter, a prevailing party in a case involving Lanham
Act and non-Lanham Act claims can recover attorneys' fees only for work related to
the Lanham Act claims.")