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**United States District Court
Central District of California**

OTTER PRODUCTS LLC; TREEFROG
DEVELOPMENTS, INC. d/b/a
LIFEPROOF,
Plaintiff,
v.
ACE COLORS FASHION, INC.;
ELECTRONICOS; SHAYNA’S CELL
PHONE ACCESSORIES; VANESSA
ACCESSORIES; DOES 1–10, inclusive,
Defendants.

Case No. 2:14-cv-00141-ODW(PJWx)

**ORDER GRANTING APPLICATION
FOR DEFAULT JUDGMENT
AGAINST DEFENDANT
ELECTRONICOS [60]**

I. INTRODUCTION

Plaintiffs Otter Products, LLC (“OtterBox”) and Treefrog Developments, Inc., dba LifeProof (“LifeProof”) discovered that Defendant Electronicos was selling unauthorized goods bearing Plaintiff’s registered trademarks. Plaintiffs filed suit. Despite proper service, Electronicos failed to answer or otherwise respond to this litigation. The Court Clerk entered default, and Plaintiffs moved for default judgment on their trademark claim.

1 For the reasons discussed below, the Court **GRANTS** Plaintiff’s Application
2 for Default Judgment against Defendant Electronicos and awards OtterBox and
3 LifeProof a total of \$45,000.00 in statutory damages along with a permanent
4 injunction against Electronicos.¹ (ECF No. 60.)

5 **II. FACTUAL BACKGROUND**

6 OtterBox is a Colorado limited-liability company with its principal place of
7 business in Colorado. (Compl. ¶ 1.) OtterBox is a leading retailer and distributor of
8 protective cases and accessories for portable electronic devices, e.g., iPhones, iPads,
9 and Kindle readers. (*Id.* ¶¶ 15, 16.) The company and its various products have
10 received local and national consumer awards and have garnered extensive media
11 coverage. (*Id.* ¶¶ 18, 19.) OtterBox is the exclusive owner of federally registered and
12 common-law trademarks (“OtterBox Mark”). OtterBox has spent considerable
13 resources in developing consumer recognition of and goodwill towards its brand. (*Id.*
14 ¶ 21).

15 Plaintiff Treefrog Development, Inc. dba LifeProof (“LifeProof”) is a Delaware
16 corporation with its principal place of business in California. (*Id.* ¶ 2.) LifeProof is
17 also a leading designer, manufacturer, distributor, and seller of protective cases and
18 accessories for electronic mobile devices, e.g., iPhones and iPads. (*Id.* ¶ 23.)
19 LifeProof is the exclusive owner of federally registered and common-law trademarks,
20 including Registration No. 4,057,201 for “LIFEPROOF” (“LifeProof Mark”). (*Id.*
21 ¶¶ 25, 26.) LifeProof has spent considerable resources developing consumer
22 recognition through national and international marketing and the development of trade
23 dress and copyrighted material. (*Id.* ¶ 25.)

24 On October 17, 2013, the Plaintiffs’ investigator Joseph Perez visited
25 Electronicos at two separate locations: 936 South Maple Street, Suite #20, Los
26 Angeles, and 1000 South Maple Avenue, Suite #7, Los Angeles. (Perez Decl. ¶ 2,
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28 ¹ After carefully considering the papers filed in support of and in opposition to the Motion, the Court
deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 Ex. 2.) At the first location, Perez identified approximately 25 LifeProof cases on
2 display, and he procured one “orange LifeProof fire case” for \$25.00. (*Id.* Ex. 2.) At
3 the second location, Perez identified approximately 40 LifeProof cases on display and
4 he procured one “red LifeProof fire case” for \$20.00 after some haggling. (*Id.*) Said
5 cases were later inspected by Plaintiffs and determined to be counterfeit products.
6 (*Id.*)

7 On January 7, 2014, Plaintiffs filed this action against Electronicos and several
8 others under eight alternative theories of relief, including federal trademark
9 infringement. (ECF No. 45.) Electronicos was served with a Summons and
10 Complaint on January 20, 2014. (ECF No. 11.) Electronicos was again served with a
11 Summons and Complaint on March 14, 2014, with personal service on Pedro Perez,
12 the person-in-charge at Electronicos. (ECF No. 26.) The Court noted that Plaintiffs
13 did not properly serve Electronicos under Federal Rule of Civil Procedure 4(e). (ECF
14 No. 52.). On June 20, 2014, Plaintiff’s reserved Electronicos. (ECF No. 53.) On
15 July 24, 2014, the Clerk subsequently entered default against Electronicos. (ECF
16 No. 57.) Plaintiffs’ Application for Entry of Default Judgment is now before the
17 Court for decision. (ECF No. 60.)

18 III. LEGAL STANDARD

19 Federal Rule of Civil Procedure 55(b) authorizes a district court to grant default
20 judgment after the Clerk enters default under Rule 55(a). Local Rule 55-1 requires
21 that the movant submit a declaration establishing (1) when and against which party
22 default was entered; (2) identification of the pleading to which default was entered;
23 (3) whether the defaulting party is a minor, incompetent person, or active service
24 member; and (4) that the defaulting party was properly served with notice.

25 A district court has discretion whether to enter default judgment. *Aldabe v.*
26 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Upon default, the defendant’s liability
27 generally is conclusively established, and the well-pleaded factual allegations in the
28 complaint are accepted as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–

1 19 (9th Cir. 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560
2 (9th Cir. 1977)).

3 In exercising its discretion, a court must consider several factors, including
4 (1) the possibility of prejudice to plaintiff; (2) the merits of plaintiff’s substantive
5 claim; (3) the sufficiency of the complaint; (4) the sum of money at stake; (5) the
6 possibility of a dispute concerning material facts; (6) whether the defendant’s default
7 was due to excusable neglect; and (7) the strong policy underlying the Federal Rules
8 of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470,
9 1471–72 (9th Cir. 1986).

10 IV. DISCUSSION

11 The Court finds that all of the *Eitel* factors weigh in favor of granting default
12 judgment. The Court therefore awards Plaintiffs \$45,000.00 in statutory damages.

13 A. Notice

14 Under the Federal Rules of Civil Procedure, an individual may be served in a
15 judicial district of the United States by following state law for serving a summons of
16 the state where the district court is located. Fed. R. Civ. P. § 4(e)(1). Under
17 California law, a party is properly served by leaving a copy of the summons and the
18 complaint at the individual’s “usual place of business” in the presence of “a person
19 apparently in charge of his or her office, [or] place of business . . . at least 18 years of
20 age.” Cal. Civ. Proc. Code § 415.20(b). In such a case, the plaintiff must send a copy
21 of the summons and complaint via first-class mail “to the person to be served at the
22 place where a copy of the summons and complaint were left.” *Id*

23 On June 20, 2014, Plaintiffs’ process server served a copy of the Summons and
24 Complaint to Electronicos’s place of business and also mailed copies of the
25 documents to the business. (ECF No. 53.) This was the second time that Plaintiffs
26 served Electronicos, though the Court found that the first attempt at service did not
27 strictly comply with California law. Plaintiffs have also served Electronicos with both
28 applications for entry of default and applications for entry of default judgment. There

1 is thus little concern that Electronicos is unaware of this action. The Court
2 accordingly finds that the Plaintiffs properly served Electronicos under Rule 4(e)(1)
3 and Code of Civil Procedure section 415.20(b).

4 **B. *Eitel* Factors**

5 Plaintiffs move for entry of default judgment against Electronicos for their
6 claims of trademark infringement in violation of the Lanham Act, 15 U.S.C. § 1114.
7 The Court finds that the *Eitel* factors weigh in favor of granting default judgment.

8 1. *Possibility of Prejudice to the Plaintiff*

9 The first *Eitel* factor examines whether the plaintiff will be prejudiced if default
10 judgment is not granted against the Defendant. *Eitel*, 782 F.2d at 1472. A plaintiff
11 suffers prejudice if there is no recourse for recovery absent default. *Philip Morris*
12 *USA, Inc. v. Castworld Prod., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003); *PepsiCo,*
13 *Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002). Electronicos has
14 failed to appear or to offer a defense in this case. (ECF No. 56.) As litigation cannot
15 move forward, the only way for Plaintiff to obtain relief is through default judgment.
16 This factor accordingly favors default judgment.

17 2. *Merits of Plaintiff's Substantive Claim and Sufficiency of the Complaint*

18 The second and third *Eitel* factors require that the plaintiff “state a claim on
19 which the [plaintiff] may recover.” *Castworld*, 219 F.R.D. at 499 (quoting *PepsiCo,*
20 238 F. Supp. at 1175). To succeed under the Lanham Act, the plaintiff must show that
21 the defendant used the plaintiff’s own protectable trademark without consent in
22 commerce for the sale, use, or advertising of any product and in a way that is likely to
23 cause confusion, mistake, or to deceive customers. 15 U.S.C. § 1114(a)(1);
24 *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1046 (9th Cir.
25 1999).

26 Generally, the court applies a multifactor test to determine the likelihood of
27 confusion. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir.
28 2003). But such an examination is unnecessary because virtually identical marks, like

1 the counterfeit marks at issue here, are “inherently confusing.” *Philip Morris USA,*
2 *Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004); *Brookfield*, 174 F.3d at
3 1056.

4 Plaintiffs have demonstrated the necessary elements for trademark infringement
5 under the Lanham Act. Plaintiffs identify in their Complaint LifeProof’s exclusive
6 ownership of the LifeProof Mark and lack of consent to Electronicos’s use of the
7 mark. (Compl. ¶¶ 26, 44.) Additionally, Plaintiffs plead Electronicos’s illicit use of
8 the LifeProof Mark in connection with the sale of multiple units of counterfeit
9 products. (*Id.* ¶¶ 30–32, 35–38; Perez Decl. Ex. 1.) The Court presumes that the
10 goods found at Electronicos are confusing within the meaning of the Lanham Act
11 because they are “counterfeits”—goods packaged as genuine OtterBox and LifeProof
12 products but not actually made or authorized by Plaintiffs. (Compl. ¶¶ 30, 32, 33).
13 The fact that the infringing marks is an exact copy of Plaintiffs’ mark establishes the
14 likelihood of confusion. Electronicos wholly appropriated Plaintiffs’ registered mark
15 without permission and, as such, is liable for trademark infringement. For these
16 reasons, the second and third *Eitel* factors favor entry of default judgment.

17 3. *Sum of Money at Stake*

18 The fourth *Eitel* factor examines whether the sum of money at stake is
19 proportionate to the harm caused by the defendant’s actions. *Landstar Ranger, Inc. v.*
20 *Parth Enters., Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010). Under 15 U.S.C.
21 § 1117(c)(2), a court may award statutory damages up to \$2,000,000 per counterfeit
22 mark if the infringement was “willful.” Plaintiffs requested \$100,000 in statutory
23 damages against Electronicos. (Mot. 10.) Plaintiffs’ request for relief is well within
24 the parameters Congress set forth in 15 U.S.C. § 1117(c)(2). While not necessarily
25 the amount the Court awards, the damages requested are proportionate to
26 Electronicos’s wrongful conduct and the harm caused.

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1 4. *Possibility of Disputed Material Facts*

2 The fifth *Eitel* factor examines whether there is likelihood of a dispute of
3 material facts. *Eitel*, 782 F.2d at 1472. When deciding whether to grant default
4 judgment, the court accepts all factual allegations that are well pleaded in the
5 complaint as true. *Televideo*, 826 F.2d at 917–18. As such, when the plaintiff pleads
6 the facts necessary for the plaintiff to prevail on their claims, there is little possibility
7 of dispute over material facts. *Castworld*, 219 F.R.D. at 498.

8 In the present case, Plaintiffs allege all the facts necessary to prevail on their
9 claim. The Court has also reviewed images of the products bearing the infringing
10 marks and notes the identity between the infringing marks and the registered ones.
11 Because a dispute of material facts is unlikely, this factor favors default judgment.

12 5. *Possibility of Excusable Neglect*

13 The sixth *Eitel* factor considers whether the defendant’s actions may be caused
14 by excusable neglect. *Eitel*, 782 F.2d at 1472. There is very limited possibility of
15 excusable neglect when the defendant is properly served and is aware of the pending
16 litigation. *Wecosign, Inc., v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1082 (C.D.
17 Cal. 2012). Plaintiffs properly served Electronicos on June 20, 2014, and Defendant
18 has failed to respond to the Complaint in any way. Plaintiffs have also served
19 Electronicos with notice of their applications for entry of default and default
20 judgment. (ECF No. 46; ECF No. 60.) As Electronicos has received no less than six
21 notices regarding this litigation, there is very little possibility of excusable neglect.
22 Therefore, this factor favors default judgment.

23 6. *Policy for Deciding Cases on the Merits*

24 There is a strong policy for deciding cases on their merits “whenever
25 reasonably possible.” *Eitel*, 782 F.2d at 1472. But a defendant’s failure to appear or
26 to respond makes a decision on the merits “impossible.” *Wecosign*, 845 F. Supp. 2d at
27 1083. As Electronicos has failed to respond to Plaintiffs’ Complaint, this factor favors
28 default judgment. (ECF. No. 56.)

1 **C. Remedies**

2 Plaintiffs requested \$100,000.00 in statutory damages against Electronicos and
3 a permanent injunction. For the reasons below, the Court awards Plaintiffs
4 \$45,000.00 and grants Plaintiffs’ request for a permanent injunction.

5 *1. Statutory Damages*

6 After a finding of trademark infringement, a court may award statutory
7 damages between \$1,000 and \$200,000 per counterfeit mark per type of good or
8 service sold or offered in sale. 15 U.S.C. § 1117(c). Alternatively, if the court finds
9 “willful” trademark infringement, the court may award up to \$2,000,000 per
10 counterfeit mark per type of goods or services sold or offered. *Id.* § 1117(c)(2). On
11 default judgment, a district court must accept the plaintiff’s willful-infringement
12 allegations as true. *Derek Andrews, Inc., v. Poof Apparel Corp.*, 528 F.3d 696, 702
13 (9th Cir. 2008).

14 Statutory damages make deliberate acts of trademark infringement unprofitable,
15 thereby supporting the Ninth Circuit’s deterrence policy. *Maier Brewing Co. v.*
16 *Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968); *see also Playboy*
17 *Enters., Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272, 1275 (9th Cir. 1982)
18 (explaining that trademark infringement should be deterred because “inadequate
19 judicial response” harms both the trademark owner and the consuming public, who
20 unwittingly pays premiums for lower quality goods). Nevertheless, deterrence
21 measures are subject to “principles of equity” and are meted out under the “wide
22 scope” of the district court’s discretion. *Maier Brewing*, 390 F.2d at 121.

23 Plaintiffs argue that neither the profits Electronicos realized nor the losses
24 incurred by Plaintiffs as a result of the infringement can be determined with precision
25 since Electronicos failed to appear and present relevant sales and profit data. (Mot. 8.)
26 The only exact accounting of counterfeit units comes from the Plaintiffs’
27 investigator’s observation of 65 counterfeit units and the subsequent sale of two of
28 those units. (Perez Decl. Ex. 2.) It is unclear how many units were sold, for what

1 amount, and for how long. Still, observed infringement is indicative of further
2 wrongful behavior. While Plaintiffs' investigator only observed 65 counterfeit units
3 for sale, it is likely that Electronicos has sold, is selling, and will sell many more units
4 that infringe upon Plaintiffs' registered marks.

5 A lack of complete information makes it impossible for the Court to assign a
6 damages award with precision. However, the Lanham Act does not require precision.
7 The Court's wide scope of discretion requires only that statutory damages be awarded
8 subject to principles of equity and all relevant factors, including willfulness
9 allegations that must be accepted as true at this stage.

10 The Court finds that the \$100,000 award Plaintiffs request is excessive in light
11 of the circumscribed infringement appearing from the limited facts available to the
12 Court. But given the Ninth Circuit's deterrence policy and the demonstrated strength
13 of the OtterBox and LifeProof marks, the Court must award statutory damages that
14 adequately discourage Electronicos and other businesses like it from future
15 infringement. The Court also notes that Electronicos's refusal to respond to this
16 litigation despite being served numerous times serves to aggravate Defendant's
17 liability. The Court accordingly awards Plaintiffs a total \$45,000.00 in statutory
18 damages for willful trademark infringement as authorized by 15 U.S.C. § 1117(c)(2).

19 2. *Permanent Injunction*

20 Under the Lanham Act, a district court may grant an injunction in accordance
21 with "principles of equity" and "upon such terms as the court may deem reasonable"
22 to prevent further violations of the mark. 15 U.S.C. § 1116(a); *Castworld*, 219 F.R.D.
23 at 502; *PepsiCo*, 238 F. Supp. 2d at 1177. Permanent injunctions have been granted
24 in cases where a defendant is aware of the pending litigation but has not appeared in
25 the action. *Castworld*, 219 F.R.D. at 502; *PepsiCo*, 238 F.Supp.2d at 1178. But a
26 plaintiff is not "automatically" entitled to injunctive relief. *PepsiCo*, 238 F. Supp. 2d
27 at 1177. Injunctive relief is improper in circumstances where it is "absolutely clear"
28 that the wrongful behavior "has ceased and will not begin again." *Id.* at 1177, 1178.

1 When seeking injunctive relief, a plaintiff must establish “(1) actual success on
2 the merits; (2) a likelihood of irreparable injury if injunctive relief is not granted; (3) a
3 balance of hardships favoring Plaintiff; and (4) that an injunction will advance the
4 public interest.” *Wecosign*, 845 F. Supp. 2d at 1084 (granting a permanent injunction
5 in a trademark infringement action); *see Winter v. Natural Res. Def. Council, Inc.*, 555
6 U.S. 7, 20 (2008) (granting a preliminary injunction prohibiting sonar in training
7 exercises).

8 Plaintiffs have adequately established all elements necessary for injunctive
9 relief. First, the Court has already determined that Plaintiffs succeed on the merits of
10 this case. Second, there is a high likelihood of irreparable injury to Plaintiffs, as
11 Electronicos is likely to continue selling counterfeit goods and benefiting from the use
12 of the counterfeit mark. Third, the balance of hardships favors Plaintiffs since there is
13 no indication that Electronicos will be prejudiced in any way—Electronicos need only
14 stop selling counterfeit goods. Finally, in terms of policy, “injunctive relief is the
15 remedy of choice” for trademark infringement as there is no other adequate remedy
16 when a defendant continuously violates a mark. *Century 21 Real Estate Corp. v.*
17 *Sandin*, 846 F.2d 1175, 1180 (9th Cir. 1988). For those reasons, the Court grants
18 Plaintiffs’ request for a permanent injunction against Electronicos.

19 The Court has also reviewed the language of the proposed permanent injunction
20 submitted by Plaintiffs and finds it appropriately tailored to this case’s circumstances.
21 (*See* ECF No. 45-5.) The Court will therefore issue the proposed injunction along
22 with the default judgment.

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V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Plaintiffs' Application for Default Judgment Against Defendant Electronicos. (ECF No. 60.) The Court thus awards Plaintiffs a total of \$45,000.00 in statutory damages and grants Plaintiffs' request for a permanent injunction. A default judgment and injunction will issue separately.

IT IS SO ORDERED.

August 21, 2014



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE