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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

99¢ ONLY STORES,  
a California corporation,

CASE NO. 1:10-cv-01343-LJO-SMS

Plaintiff,

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THE GRANT OF  
PLAINTIFF’S MOTION FOR  
DEFAULT JUDGMENT**

v.

VARIETY 99 CENTS PLUS, a California  
company; TOMY LE, an Individual; and  
DOES 1-20, INCLUSIVE,

Defendants.

(Doc. 14)

Plaintiff 99¢ Only Stores moves for Entry of Default Judgment against Defendants Tomy Le and Variety 99 Cents Plus. This Court has reviewed Plaintiff’s motion and supporting documents and has determined that this matter is suitable for decision without oral argument pursuant to Local Rule 78-230(g). Having reviewed all written materials submitted and applicable law, the Court recommends that Plaintiff’s motion be granted.

**I. Procedural and Factual Background**

On July 23, 2010, Plaintiff filed its complaint against Defendant Variety 99 Cents Plus, claiming false designation of origin, trademark infringement, trademark dilution, and unfair competition under the Lanham Act (15 U.S.C. § 1051 *et seq.*) as well as related claims under California state law. Plaintiff contended that Defendant deliberately misappropriated Plaintiff’s federally designated names and service marks to intentionally create confusion between its store and Plaintiff’s chain of stores, with the intent to misappropriate Plaintiff’s good will.

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1 The initial proof of service, filed August 11, 2010, identified Tomy Le as the owner of  
 2 Defendant Variety 99 Cents Plus. On September 28, 2010, Plaintiff amended its complaint to  
 3 add Tomy Le as a defendant. The Clerk issued a summons for Defendant Tomy Le on  
 4 September 29, 2010. Le was served on October 4, 2010. Neither Defendant answered or  
 5 otherwise appeared in this action. On November 9, 2010, the Clerk entered default against  
 6 Defendant Tomy Le. The Clerk entered default against Variety 99 Cents Plus on November 12,  
 7 2010.

8 According to the complaint, Plaintiff, a publically traded California corporation that  
 9 operates over 200 retail stores selling discounted merchandise, has done business in California  
 10 since 1982, when it opened its first store in Los Angeles. It uses a collection of service marks,  
 11 trademarks, and trade names, referred to as the “99¢ marks.” The common and essential element  
 12 of Plaintiff’s marks is the numeral “99,” which is usually large and central, making it the featured  
 13 component of each mark. Plaintiff uses the marks on its price signs; shelving; shopping carts,  
 14 bags, and baskets; receipts; merchandise stickers; employee name tags and apparel; company  
 15 vehicles; and purchase orders, letterhead, and annual reports. Plaintiff also uses the numeral  
 16 “99” in various ways in its slogans, promotions, and advertising. Plaintiff spends approximately  
 17 \$2 million annually on advertising.

18 Plaintiff has registered the following marks with the federal government:

19 **FEDERAL PTO REGISTRATIONS**

<b><u>Mark</u></b>	<b><u>Reg. No.</u></b>	<b><u>Reg. Date</u></b>
“ONLY 99 ONLY”	1,395,427	May 27, 1986
“99¢ ONLY STORES”	1,455,937	September 1, 1987
“DRIVER CARRIES 99¢ ONLY”	1,712,553	September 1, 1992
“OPEN 9 DAYS A WEEK 9 AM – 9PM”	1,724,475	October 13, 1992
“ONLY 99¢ ONLY”	1,730,121	November 3, 1992
“99¢ ONLY STORES” & design	1,741,928	December 22, 1992
“99¢ ONLY”	1,747,549	January 19, 1993
“99¢ ONLY STORES”	1,947,809	January 16, 1996

1	“99¢”	1,959,640	March 5, 1996
2	“99¢ ONLY STORES” & design	2,402,900	November 7, 2000
3	“99 THANKS”	2,761,939	September 9, 2003
4	“HIGHWAY 99”	3,132,449	August 22, 2006
5	“HIGHWAY 99” & design	3,132,450	August 22, 2006
6	“HIGHWAY 99 YOUR ROAD TO GREAT SAVINGS”	3,144,871	September 19, 2006

7 Registration numbers 1,712,553; 1,730,121; 1,741,928; 1,747,549; 1,947,809; 1,959,640;  
8 2,401,900; and 2,761,939 are incontestable under the Lanham Act. Plaintiff also has the  
9 following California state registrations:

10 **California State Registrations**

11	<b><u>Mark</u></b>	<b><u>Reg. No.</u></b>	<b><u>Reg. Date</u></b>
12	“99¢ ONLY”	23,078	May 9, 1985
13	“99¢”	23,958	August 1, 1985
14	“OPEN 9 DAYS A WEEK 9 AM TO 9 PM”	40,745	August 19, 1992
15	“99¢ ONLY STORES”	42,970	January 12, 1994

16 Plaintiff’s mark is distinctive and well-known. Numerous national and international  
17 media have profiled Plaintiff’s business, including its distinctive marks. The marks have been  
18 used in various television programs and in the works of a contemporary artist.

19 Defendants operate a similar discount retail business in Fresno, California, using the  
20 name “Variety 99 Cents Plus.” As illustrated in exhibit 19 to the complaint, their exterior sign  
21 mimics Plaintiff’s trademarks by using the same large 99¢ logo, centrally placed. Plaintiff  
22 contends that Defendants have constructive knowledge of Plaintiff’s federal and state registered  
23 trademarks, and employ the intentionally confusing logo to mislead customers. Plaintiff alleges  
24 that Defendants’ use of infringing trademarks implies to the public an association between  
25 Defendants’ business and Plaintiff. It damages Plaintiff’s good will and reputation, and dilutes  
26 the distinctiveness of Plaintiff’s trademarks.

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1 Plaintiff never consented to Defendants' use of its trademarks. On or about March 12,  
2 2009, Plaintiff sent Defendants actual notice of Plaintiff's trademark rights, identifying its  
3 federally registered marks. The letter demanded that Defendants cease and desist unauthorized  
4 use of its infringing marks. Defendants did not respond. Plaintiff has continued to attempt to  
5 communicate with Defendants, who have failed to respond.

6 **II. Discussion**

7 **A. Default Judgment**

8 Federal Rule of Civil Procedure 55(b)(2) provides for a default judgment:

9 (2) By the Court. In all other cases the party entitled to judgment by default shall  
10 apply to the court therefor; but no judgment shall be entered against an infant or  
11 incompetent person unless represented in the action by a general guardian,  
12 committee, conservator, or other such representative who has appeared therein. If  
13 the party against whom judgment by default is sought has appeared in the action,  
14 the party (or, if appearing by representative, the party's representative) shall be  
15 served with written notice of the application for judgment at least 3 days prior to  
16 the hearing on such application. If, in order to enable the court to enter judgment  
17 or to carry it into effect, it is necessary to take an account or to determine the  
18 amount of damages or to establish the truth of any averment by evidence or to  
19 make an investigation of any other matter, the court may conduct such hearings or  
20 order such references as it deems necessary and proper and shall accord a right of  
21 trial by jury to the parties when and as required by any statute of the United States.

22 “[U]pon default, the well pleaded allegations of the complaint relating to liability are  
23 taken as true.” *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319,  
24 1323 (7<sup>th</sup> Cir. 1983). *See also TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9<sup>th</sup> Cir.  
25 1987). Thus, “[a]t the time of entry of default, the facts alleged by the plaintiff in the complaint  
26 are deemed admitted.” 10 J. Moore, *Moore's Federal Practice* § 55.11 (3d ed. 2000).

27 A defendant is not deemed to have admitted any facts that are not well-pleaded or any  
28 conclusions of law. *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9<sup>th</sup> Cir. 2007), *cert.*  
29 *denied*, 129 S.Ct. 40 (2008). Allegations that do no more than parrot the language of the statute  
30 that the defendant is claimed to have violated are not well-pleaded facts but legal conclusions.  
31 *Id.* When a plaintiff fails to plead facts sufficient to support his or her cause of action, the  
32 defendant's liability is not established by default. *Danning v. Lavine*, 572 F.2d 1386, 1388 (9<sup>th</sup>  
33 Cir. 1978).

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1           **B.     Federal Claims**

2                   **1.     False Designation and Unfair Competition (15 U.S.C. § 1125(a))**

3           Plaintiff contends that Defendants have violated the statutory provisions relating to false  
4 designation and unfair competition set forth in 15 U.S.C. § 1125(a)(1). To establish a claim  
5 under this subsection, sometimes referred to as “false advertising,” a plaintiff must prove “(1) the  
6 defendant made a false statement about either the plaintiff’s or its own product; (2) the statement  
7 was made in a commercial advertising or promotion; (3) the statement actually deceived or had  
8 the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5)  
9 the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has  
10 been or is likely to be injured as a result of the false statement, either by direct diversion of sales  
11 from itself to defendant, or by a lessening of goodwill associated with the plaintiff’s product.”  
12 *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052 (9<sup>th</sup> Cir. 2008), *cert. denied*,  
13 129 S.Ct. 2788 (2009), *quoting Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835  
14 n. 4 (9<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 1047 (2002).. Plaintiff alleged that Defendants’ commercial  
15 use of a mark substantially similar to Plaintiff’s registered marks constitutes such a false  
16 statement and is likely to mislead potential customers, diverting sales from Plaintiff to  
17 Defendants and co-opting the goodwill associated with Plaintiff’s marks for Defendants’  
18 financial enrichment. These allegations establish a cognizable claim for which Plaintiff is  
19 entitled to default judgment against Defendants.

20                   **2.     Trademark Infringement (15 U.S.C. § 1114 and California Business**  
21                   **and Professions Code § 14245 )**

22           The Lanham Act (15 U.S.C. § 1114) “allows the holder of a protectable trademark to hold  
23 liable any person who, without consent, ‘use[s] in commerce any . . . registered mark in  
24 connection with the sale, offering for sale, distribution, or advertising of any goods or services’  
25 which is likely to cause confusion.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*,  
26 408 F.3d 596, 602 (9<sup>th</sup> Cir. 2005). To prevail on a claim of trademark infringement under 15  
27 U.S.C. § 1114, the plaintiff must establish that “(1) it has a protectable ownership interest in the  
28 mark; and (2) that the defendant’s use of the mark is likely to cause customer confusion.”  
*Department of Parks and Recreation for the State of California v. Bazaar del Mundo Inc.*, 448

1 F.3d 1118, 1124 (9<sup>th</sup> Cir. 2006). The analysis of trademark infringement is the same under  
2 federal and California law. *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088, 1100  
3 (9<sup>th</sup> Cir. 2004). Plaintiff has well pleaded its ownership interest in the 99¢ marks.

4 “The test of trademark infringement under state, federal, and common law is whether  
5 there will be a likelihood of confusion.” *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d  
6 1073, 1080 (9<sup>th</sup> Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006). To determine whether there is a  
7 likelihood of confusion between the parties’ allegedly similar goods and services, *AMF Inc. v.*  
8 *Sleekcraft Boats* directs the court to consider eight factors: “(1) strength of mark; (2) proximity of  
9 the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels  
10 used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) the  
11 defendant’s intent in selecting the mark; and (8) the likelihood of expansion of the product lines.”  
12 599 F.2d 341, 348-49 (9<sup>th</sup> Cir. 1979), *abrogated on other grounds*, *Mattel, Inc. v. Walking*  
13 *Mountain Productions*, 353 F.3d 792, 810 n. 19 (9<sup>th</sup> Cir. 2003). The *Sleekcraft* factors are not an  
14 exhaustive list of factors relevant to a judicial determination of the likelihood of consumer  
15 confusion, and courts must consider such factors as are relevant to the facts of the particular  
16 situation. *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1142  
17 (9<sup>th</sup> Cir. 2011).

18 A party claiming trademark infringement is not required to prove that the alleged  
19 infringer intended to deceive consumers. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d  
20 1280, 1293 (9<sup>th</sup> Cir. 1992). When an alleged infringer knowingly adopts a trademark similar to  
21 another’s, the court must assume that the public will be deceived. *Sleekcraft*, 599 F.2d at 354.

22 Plaintiff alleges Defendants’ use of substantially similar marks and a substantially similar  
23 name for a similar discount retail store. Similarity of marks in “sight, sound, or meaning” is a  
24 critical factor in assessing the likelihood of confusion of two marks. *M2 Software*, 421 F.3d at  
25 1082. When the products or services in question are related or complementary, as they are here,  
26 the likelihood of confusion is higher. *Id.*

27 Plaintiff has alleged a cognizable claim for trademark infringement, well-supported by  
28 factual allegations. As discussed above, by failing to respond to the complaint, Defendants are

1 deemed to have admitted those allegations. Accordingly, Plaintiff is entitled to default judgment  
2 on its trademark infringement claim.

3 **3. Dilution (15 U.S.C. § 1125 (c) (1) and California Business and**  
4 **Professions Code § 14330)**

5 Dilution refers to the diminution of a trademark’s value when it is used to identify  
6 different products. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9<sup>th</sup> Cir. 2002), *cert.*  
7 *denied*, 537 U.S. 1171 (2003). The Ninth Circuit has explained:

8 For example, Tylenol snowboards, Netscape sex shops, and Harry Potter dry  
9 cleaners would all weaken the “commercial magnetism” of these marks and  
10 diminish their ability to evoke their original associations. Ralph S. Brown, Jr.,  
11 *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale  
12 L.J. 1165, 1187 (1948), *reprinted in* 108 Yale L.J. 1619 (1999). These uses dilute  
13 the selling power of these trademarks by blurring their “uniqueness and  
14 singularity,” Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40  
15 Harv. L.Rev. 813, 831 (1927), and/or by tarnishing them with negative  
16 associations.

17 *Mattel*, 296 F.3d at 903.

18 When a trademark is blurred, its distinctiveness is diminished because it no longer brings to mind  
19 only the original user. *Id.* “Tarnishment occurs when a defendant’s use of a mark similar to a  
20 plaintiff’s [mark] presents a danger that consumers will form unfavorable associations with the  
21 mark.” *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 881 (9<sup>th</sup> Cir. 1999).

22 With the enactment of the Federal Trademark Dilution Act in 1996, the Lanham Act  
23 expanded to permit the owner of a famous mark to obtain an injunction against another person’s  
24 commercial use of his mark in commerce. *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d  
25 672, 676 (9<sup>th</sup> Cir. 2005). “Although this statutory language is ungainly, its meaning seems clear:  
26 It refers to the use of a famous and distinctive mark to sell goods other than those produced or  
27 authorized by the mark’s owner.” *Mattel*, 296 F.3d at 903. The purpose of anti-dilution  
28 provisions is to secure to the mark’s owner the goodwill of its business and to ensure that  
consumers can distinguish competing producers. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S.  
763, 774 (1992). In contrast to other trademark protection provisions, dilution focuses on  
protecting the integrity of the trademark rather than protecting consumers from confusion.  
*Mattel*, 296 F.3d at 905 (9<sup>th</sup> Cir. 2002).

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1 To prove a dilution claim, “a plaintiff must show that (1) the mark is famous and  
2 distinctive; (2) the defendant is making use of the mark in commerce; (3) the defendant’s use  
3 began after the mark became famous; and (4) the defendant’s use of the mark is likely to cause  
4 dilution by blurring or dilution by tarnishment.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628,  
5 634 (9<sup>th</sup> Cir. 2008). The analysis is the same under both federal and California state law. *Id.* To  
6 establish that a mark is “famous,” a court must consider various relevant factors, including (1)  
7 the duration, extent, and geographic reach of the advertising and publicity of the mark by the  
8 registrant and others; (2) the amount, value, and geographic extent of goods and services offered  
9 under the mark; (3) the extent of actual recognition of the mark; and (4) the nature of the mark’s  
10 registration. 15 U.S.C. § 1125(c).

11 Although the allegations within count 3 are largely legal conclusions, the factual  
12 allegations preceding the claims are sufficient to establish the elements of dilution by blurring.  
13 In support of its contention that its marks are “famous,” Plaintiff alleges that it operates a chain  
14 of 200 stores throughout California, Nevada, Texas and Arizona, and that it has used its marks  
15 for 29 years since it opened its first store. The marks are registered both nationally and in the  
16 State of California. The marks are consistent in that each features a large and centrally situated  
17 “99.” Plaintiff uses its marks in a consistent manner in promotions and advertising, at the point  
18 of sale, in administration and management, and in labeling and identification of its stores and  
19 products.

20 Defendants’ use of Plaintiff’s famous mark for use in their own commercial activities  
21 threatens the “generification” of Plaintiff’s marks to denote any discount retail store.  
22 Accordingly, the Court will order default judgment of Plaintiff’s dilution claim.

23 **D. Injunction**

24 Plaintiff seeks an injunction incorporating the following provisions. In addition,  
25 California Business and Professions Code § 14402 permits the entry of an injunction to restrain  
26 the use of an infringing trade name. This Court recommends that these provisions requested by  
27 Plaintiff be incorporated into the default judgment:

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1 Defendants and their officers, agents, and employees and those persons in active  
2 concert or participation with them who receive actual notice of the order by personal  
3 service or otherwise, are permanently enjoined and restrained from

- 4 1. Using, copying, simulating, or in any other way infringing on Plaintiff's 99¢  
5 marks, including all federally registered, state registered, and common law service  
6 marks, trade names, and trade dress, including but not limited to Federal  
7 Registration numbers 1,959,640; 2,401,900; 1,747,549; 1,741,928; 1,730,121;  
8 1,712,553; 1,455,937; 1,395,427; 2,761,939; 3,132,449; 3,132,450; 3,144,871;  
9 and California State Registration numbers 23,078; 23,958; 40,745; and 42,970.
- 10 2. Displaying any signage or other business identifiers, including but not limited to  
11 building signs, directional signs, monument signs, computer templates, banners,  
12 advertising media, menus, business cards, and brochures containing prominently  
13 figured characters "99," "99¢," "\$.99," or "\$0.99," or any characters confusingly  
14 similar thereto as the name or part of the name of Defendants' business or  
15 corporation.
- 16 3. Using "99," "99¢," "\$.99," or "\$0.99," or any mark confusingly similar thereto, as  
17 the name or part of the name of Defendants' business or corporation, and  
18 displaying any references to "99," "99¢," "\$.99," or "\$0.99," or any mark  
19 confusingly similar thereto, in or in connection with Defendants' business or  
20 corporate name.
- 21 4. Using the "¢" symbol to refer to "cent(s)" or "Cent(s)" as part of the name of  
22 Defendants' business or on any signage as part of the name or identifier of  
23 Defendants' business.
- 24 5. Using the numeral "99" as a feature of any business or corporate name.
- 25 6. Using the numeral "99" as a feature of any business identifiers, including but not  
26 limited to building signs, directional signs, monument signs, computer templates,  
27 banners, advertising media, menus, business cards, and brochures.
- 28 7. Using the numeral "99" as a stylized or fanciful numeral as part of a business  
name.
8. Using any of the marks from Plaintiff's federally registered and common law  
service marks, trade names, trade dress, or anything confusingly similar to the  
operation of Defendants' business including the signage, storefront facade,  
interior decor, shopping carts, bags, baskets, merchandise stickers, cash register  
receipts, employee aprons, shirts, and name tags; vehicles; letterhead; purchase  
orders; company brochures and business cards; website and advertising; or  
confusingly similar the Plaintiff's other business identifiers, such as building  
signs, directional signs, monument signs, computer templates, banners,  
advertising media, and menus.
9. Using purple, pink, or blue color hues, or combinations of colors, for the mark and  
name of Defendants' business wherever that business mark or name or both are  
used by Defendants, including the use of the business mark or name or both on the  
items and places set forth in paragraph 8 above.
10. Referring to "99¢ store(s)" or "99¢ Store(s)" as if they were a generic term  
applicable to a category of deep discount or other retail stores.
11. Using, copying simulating, or otherwise mimicking Plaintiff's trade dress.

1           **E. Attorneys' Fees**

2           “The court in exceptional cases may award reasonable attorney fees to the prevailing  
3 party.” 15 U.S.C. § 1117(a). Plaintiff contends that, because Defendants admitted through  
4 default that they knowingly, willfully, and maliciously used Plaintiff’s marks with the intent to  
5 trade on Plaintiff’s goodwill and to injure Plaintiff, this case is an exceptional case in which  
6 attorneys’ fees should be awarded to Plaintiff.

7           Whether an infringement case is exceptional is a question of law for the district court.  
8 *Watec Co., Ltd. v. Liu*, 403 F.3d 645, 656 (9<sup>th</sup> Cir. 2005); *Earthquake Sound Corp. v. Bumper*  
9 *Industries*, 352 F.3d 1210, 1216 (9<sup>th</sup> Cir. 2003). A trademark infringement case is exceptional  
10 when the record supports a finding that the defendant’s infringement was malicious, fraudulent,  
11 willful, or deliberate. *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9<sup>th</sup> Cir.  
12 2008); *Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1042 (9<sup>th</sup> Cir. 2003), *cert. denied*,  
13 540 U.S. 1111 (2004). Since the factual allegations of a complaint are deemed to be true in a  
14 default judgment action, a district court may properly award attorneys’ fees if the complaint  
15 alleged malicious, fraudulent, willful, or deliberate infringement. *Derek Andrew*, 528 F.3d at  
16 702; *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1023 (9<sup>th</sup> Cir. 2002); *Televideo*  
17 *Systems*, 826 F.2d at 917-18.

18           Here, the complaint includes no factual allegations that would support a finding that  
19 Defendants’ use of a sign including the term “99¢” was malicious, fraudulent, willful, or  
20 deliberate, only Plaintiff’s legal conclusions that Defendants’ use of a substantially similar mark  
21 was malicious, fraudulent, willful, or deliberate. Such allegations are not factual allegations that  
22 are presumed true in a default judgment.

23           Plaintiff’s sole factual allegation relating to the issue of malicious, fraudulent, willful, or  
24 deliberate conduct by Defendants is the allegation that Defendants did not change the name of  
25 the store or remove the offending signs after Plaintiff advised them in writing that the business  
26 name and signage infringed on Plaintiff’s trademarks. A finding that a defendant intentionally  
27 infringed on the plaintiff’s mark does not make a case exceptional in the absence of a showing of  
28 malicious, fraudulent, deliberate or willful conduct. *Watec*, 403 F.3d at 656; *Earthquake Sound*

1 *Corp.*, 352 F.3d at 1216-17. In the absence of factual allegations of exceptional conduct by  
2 Defendants, this Court does not find Plaintiff's case to be exceptional and denies Plaintiff's  
3 request for attorneys' fees.

4 **F. Monetary Damages**

5 Because these findings and recommendations recommend entry of judgment against  
6 Defendants for infringement, unfair competition, dilution, and false designation of origin, the  
7 Court may award Plaintiff damages including (1) Defendants' profits, (2) any damages sustained  
8 by Plaintiff, and (3) the cost of the action. 15 U.S.C. § 1117(a). If the District Judge determines  
9 to adopt these findings and recommendations, the Court may order an accounting of Defendants'  
10 profits as part of its order and a proof hearing to determine Plaintiff's damages. The Court's  
11 determination of monetary damages, including whether to grant damages, the amount of those  
12 damages, and whether those damages should be enhanced under 15 U.S.C. § 1117(b), may then  
13 follow.

14 **IV. Recommendation**

15 Accordingly, the Court **RECOMMENDS** that judgment be entered in this action against  
16 Defendants; that an injunction issue permanently restraining Defendants from the use of any  
17 federally designated names and service marks to intentionally create confusion between its store  
18 and Plaintiff's chain of stores; that an accounting of Defendants' profits be ordered; and that  
19 Plaintiff not be awarded attorneys' fees.

20 These Findings and Recommendations are submitted to the Honorable Lawrence J.  
21 O'Neill, United States District Court Judge, pursuant to the provisions of 28 U.S.C. §  
22 631(b)(1)(B) and Rule 305 of the Local Rules of Practice for the United States District Court,  
23 Eastern District of California. Within thirty (30) days after being served with a copy, any party  
24 may file written objections with the court, serving a copy on all parties. Such a document should  
25 be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the  
26 objections shall be served and filed within ten (10) days after service of the objections. The  
27 Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The

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1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

3  
4 IT IS SO ORDERED.

5 **Dated: June 8, 2011**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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