

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  
27

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

99¢ ONLY STORES,  
a California corporation,

Plaintiff,

v.

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

Defendants.

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

**ORDER ADOPTING IN PART  
FINDINGS AND RECOMMENDATIONS  
ON PLAINTIFF'S MOTION FOR  
DEFAULT JUDGMENT**

(Doc. 17)

Plaintiff 99¢ Only Stores sought default judgment against defendants Tomy Le and Variety 99 Cents Plus. This matter was referred to U.S. Magistrate Judge Sandra M. Snyder, pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304.

On June 8, 2011, the Magistrate Judge filed Findings and Recommendations that plaintiff's motion be granted, that an injunction restraining defendants' future use of the infringing mark be issued, and that an accounting be ordered to determine defendants' profits. The Magistrate Judge recommended that this Court refrain from granting attorneys' fees.

The Findings and Recommendations were served on the parties and contained notice to the

1 parties that any objections to the Findings and Recommendations were to be filed within thirty days.  
2 On July 8, 2011, plaintiff filed its objections solely with regard to the Magistrate Judge's  
3 recommendation against a grant of attorneys' fees (Doc. 19).  
4

5 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted a  
6 *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings  
7 and Recommendations generally to be supported by the record and proper analysis; however, in light  
8 of defendants' failure to appear to defend the case, the nature of defendants' business, and the  
9 likelihood that the expense of an accounting may be grossly disproportionate to the amount of  
10 damages to be recovered from defendants, this Court finds the Magistrate Judge's recommendation  
11 to order an accounting to determine damages to be impracticable. In addition, this Court declines  
12 to adopt the Magistrate Judge's recommendation to deny attorneys' fees.  
13

14 Accordingly, IT IS HEREBY ORDERED that the Findings and Recommendations, filed June  
15 8, 2011, are adopted in part and rejected in part and:

- 16 1. The Clerk of Court shall enter default judgment in favor of plaintiff and against  
17 defendants Variety 99 Cents Plus and Tomy Le;
- 18 2. Defendants, their officers, agents, and employees, and those persons in active concert  
19 or participation with them who receive actual notice of the order by personal service  
20 or otherwise, are permanently enjoined and restrained from:
  - 21 a. Using, copying, simulating, or in any other way infringing on plaintiff's 99¢  
22 marks, including all federally registered, state registered, and common law  
23 service marks, trade names, and trade dress, including but not limited to  
24 Federal Registration numbers 1,959,640; 2,401,900; 1,747,549; 1,741,928;  
25 1,730,121; 1,712,553; 1,455,937; 1,395,427; 2,761,939; 3,132,449;  
26 3,132,450; 3,144,871; and California State Registration numbers 23,078;  
27 23,958; 40,745; and 42,970;

- 1 b. Displaying any signage or other business identifiers, including but not limited  
2 to building signs, directional signs, monument signs, computer templates,  
3 banners, advertising media, menus, business cards, and brochures containing  
4 prominently figured characters “99,” “99¢,” “\$.99,” or “\$0.99,” or any  
5 characters confusingly similar thereto as the name or part of the name of  
6 defendants’ business or corporation;  
7  
8 c. Using “99,” “99¢,” “\$.99,” or “\$0.99,” or any mark confusingly similar  
9 thereto, as the name or part of the name of defendants’ business or  
10 corporation, and displaying any references to “99,” “99¢,” “\$.99,” or “\$0.99,”  
11 or any mark confusingly similar thereto, in or in connection with defendants’  
12 business or corporate name;  
13  
14 d. Using the “¢” symbol to refer to “cent(s)” or “Cent(s)” as part of the name of  
15 defendants’ business or on any signage as part of the name or identifier of  
16 defendants’ business;  
17  
18 e. Using the numeral “99” as a feature of any business or corporate name;  
19  
20 f. Using the numeral “99” as a feature of any business identifiers, including but  
21 not limited to building signs, directional signs, monument signs, computer  
22 templates, banners, advertising media, menus, business cards, and brochures;  
23  
24 g. Using the numeral “99” as a stylized or fanciful numeral as part of a business  
25 name;  
26  
27 h. 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 plaintiff’s other business identifiers, such  
as building signs, directional signs, monument signs, computer templates,  
banners, advertising media, and menus;  
i. 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 h above;  
j. 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; and

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  
27

- k. Using, copying, simulating, or otherwise mimicking plaintiff's trade dress;
- 3. The restrictions and provisions of paragraph 2 shall remain in force in perpetuity;
- 4. This Court retains jurisdiction over this matter for the purpose of making any further orders necessary or proper for the construction of this Judgment, the enforcement thereof, and the punishment of any violations thereof;
- 5. The present case being exceptional, plaintiff is entitled to its reasonable attorneys' fees and costs. Within fourteen (14) days of this order, plaintiff shall file with Magistrate Judge Sandra M. Snyder a declaration of its costs and fees incurred as a result of this litigation; and
- 6. Plaintiff shall personally serve a copy of this order on defendants. Within ten (10) days thereafter, plaintiff shall file its proof of service with the Court.

IT IS SO ORDERED.

**Dated: July 11, 2011**

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE