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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERN WRIGHT, JUNE WRIGHT, and
SUPERANTENNA CORPORATION,

Plaintiffs,

v.

MICHAEL BLOOM, JAIMEE BLOOM,
KINGSBRIDGE CORPORATION, OFFSHORE
SOLUTIONS, INC., SINOTECH
CORPORATION, DIFONA COMMUNICATION
GMBH, BULLIVANT HOUSER BAILEY PC,
and DOES 1–10,

Defendants.

No. C 12-00746 WHA

**ORDER RE MOTION FOR
DEFAULT JUDGMENT
AGAINST DIFONA
COMMUNICATION GMBH**

MICHAEL BLOOM, JAIMEE BLOOM, and
KINGSBRIDGE CORPORATION,

Third-Party Plaintiffs,

v.

JESSICA STEPHENS and BONNIE CRYSTAL,

Third-Party Defendants.

INTRODUCTION

Plaintiffs filed a motion for default judgment against the sole remaining defendant in this action. To the extent stated below, plaintiffs’ motion for default judgment is **GRANTED AND IS OTHERWISE DENIED.**

1 process. The motion to dismiss for lack of personal jurisdiction was denied, but was granted as
2 to the lack of service. Plaintiffs later completed service of process to Difona via the Hague
3 Convention procedures (Cohen Decl. ¶ 8). Difona filed an answer to the second amended
4 complaint on January 25, 2013 (Dkt. No. 106).

5 A mandatory settlement conference was set before Magistrate Judge Paul Grewal on
6 April 26, 2013. Neither Difona nor its counsel appeared at the settlement conference. Following
7 the conference, the action was settled as to all claims except as to plaintiffs' claims against
8 Difona. Counsel for Difona then filed a motion to withdraw as counsel. By order dated May 23,
9 counsel's motion to withdraw was denied, and plaintiffs and Difona were referred to Judge
10 Grewal for a further settlement conference (Dkt. No. 120). Judge Grewal set a date for the
11 settlement conference, but Difona did not attend (Dkt. No. 126). Counsel for Difona filed
12 detailed declarations regarding their efforts to inform Difona of its obligation to appear at the
13 settlement conference (Dkt. Nos. 128 and 128-1).

14 By order dated June 11, this Court found that counsel's efforts to provide notice to
15 Difona regarding the mandatory settlement conference were adequate but that Difona appeared
16 "to be shirking its obligations to litigate this action (despite having appeared and answered the
17 complaint several months ago) and is now preventing a complete resolution of the case" (Dkt.
18 No. 131). Due to Difona's failure to obey Court orders and to cooperate with its counsel to
19 defend itself or otherwise resolve this action, the motion to withdraw as counsel for Difona was
20 granted. Counsel were ordered to give notice to Difona of the order allowing existing counsel to
21 withdraw and to have new counsel appear for Difona. Counsel were further ordered to "inform
22 Difona that failure to do so will likely result in default being entered against Difona, which will
23 in turn likely result in a monetary judgment being entered against it. Such a judgment, if not
24 paid, would interfere with Difona's ability to do business in the United States, among other
25 things" (*ibid.*). Lastly, the order provided that plaintiffs could file a motion for default judgment
26 against Difona if it had not appeared in this action through new counsel by July 8. Counsel for
27 Difona filed a declaration of Attorney Andrea Anapolsky stating that Difona had been notified of
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1 the Court’s order granting the motion to withdraw and requiring Difona to appear through new
2 counsel by July 8 (Anapolsky Decl.).

3 Difona has not made any filings since the entry of that order. Plaintiffs have now filed a
4 motion for default judgment against Difona. No opposition has been received. Accordingly, to
5 the extent stated below, the motion for default judgment is **GRANTED**.

6 ANALYSIS

7 1. DEFAULT JUDGMENT.

8 Courts have inherent equitable powers to dismiss actions or enter default judgments for
9 failure to prosecute, contempt of court, or abusive litigation practices. *TeleVideo Sys., Inc. v.*
10 *Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987) (citations omitted). A court must consider: “(1)
11 the existence of extraordinary circumstances and the presence of wilfulness, bad faith, or fault by
12 the offending party; (2) the efficacy of lesser sanctions; and (3) the relationship or nexus
13 between the misconduct and the matters in controversy.” *Estrada v. Speno & Cohen*, 244 F.3d
14 1050, 1058 (9th Cir. 2001). “In addition, as optional considerations, the court may also assess
15 the prejudice to the party-victim of the misconduct and the government interests at stake.” *Ibid*.

16 A. Extraordinary circumstances.

17 Difona failed to appear for two mandatory settlement conferences set by Magistrate
18 Judge Grewal. Difona, though located in Germany, had retained local counsel to defend itself in
19 this action. Counsel (the law firms of Seyfarth Shaw LLP and LaDue Curran & Kuehn LLC)
20 filed two motions to dismiss on Difona’s behalf, as well as an answer. Counsel informed the
21 Court that Difona has not paid any of its legal fees for their services. Several months after
22 counsel first notified Difona that they would seek to withdraw as counsel if the fees were not
23 paid, Difona sent an email to counsel requesting to “end [the] collaboration” (LaDue Decl. ¶ 9).

24 At the April 26 mandatory settlement conference before Magistrate Judge Grewal, all
25 parties except Difona attended. The case was settled completely except for plaintiffs’ claims
26 against Difona. Both Difona and its counsel were order to attend a second mandatory settlement
27 conference before Judge Grewal. Counsel attended the conference, held on May 29, but Difona
28 did not. Following the conference, Judge Grewal ordered counsel for Difona to file a declaration

1 describing the events leading up to the conference and any justification or excuse Difona had
2 provided for its actions. Judge Grewal's order stated (Dkt. No. 126):

3 This is not the first time Difona has violated this court's order to
4 appear at a settlement conference. On April 26, 2013, the court
5 convened a settlement conference in this case, but as it did today,
6 Difona elected to violate the court's order to send a representative.
7 Difona's refusal to follow court orders has consumed valuable
8 court time and resources that would have otherwise been directed
9 to others seeking relief from this institution. Equally important,
10 Difona has disrespected the time and resources of the other parties
11 in this case who complied with their obligation to appear.

12 Counsel filed declarations describing the notice and information they provided to Difona
13 of the Court's order requiring its appearance at the May 29 settlement conference (Dkt. No. 128).
14 Five days before the conference, counsel (specifically Attorney John LaDue) advised Mr.
15 Kräemer of Difona that his failure to personally appear at the settlement conference would likely
16 result in sanctions from the Court and requested authority to negotiate a settlement if Mr.
17 Kräemer would not appear (LaDue Decl. ¶ 9). On the day of the settlement conference, Mr.
18 Kräemer emailed counsel, stating that he could not attend the conference because Difona is a
19 small company and cannot afford to shut down its business and travel from Germany to
20 California. Mr. Kräemer did not give counsel any authority to negotiate a settlement with
21 plaintiffs (*id.* at ¶ 12).

22 By order dated June 11, this Court found that Difona appeared to be shirking its
23 obligations to litigate this action and was preventing a complete resolution of the case (Dkt. No.
24 131). Counsel were ordered to and did inform Difona that failure to appear through new counsel
25 by July 8 would likely result in a default judgment being entered against it (*ibid.*; Anapolsky
26 Decl.).

27 No new counsel have appeared for Difona in this action. Plaintiffs filed a motion for
28 default judgment and provided notice of the motion to Difona. No opposition was received.
Difona did not appear at the hearing on the motion for default judgment.

Difona has repeatedly ignored Court orders, wasting the resources of the Court and the
other parties. It appears that Difona does not intend to further litigate or defend itself in this
action, as it failed to appear by the Court-ordered deadline, did not respond to the motion for

1 default judgment, and did not appear at the hearing on the motion. These circumstances are
2 extraordinary and demonstrate intentional and wilful conduct on the part of Difona.

3 **B. Efficacy of Lesser Sanctions.**

4 Our court of appeals has recognized that in some cases, “a judge’s warning to a party that
5 a future failure to obey a court order will result in default judgment can itself suffice to meet the
6 ‘consideration of alternatives’ requirement.” *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 132
7 (9th Cir. 1987). This order finds that the present action is such a case, where the circumstances
8 establish that Difona, having been very clearly warned that it must appear through counsel and
9 actively defend this action or face default, has wilfully flouted Court orders and does not intend
10 to defend against plaintiffs’ claims. Moreover, Difona is a small company located in Germany
11 and does not appear to have personnel or assets in this country. Thus, imposing sanctions or
12 levying penalties would not be effective.

13 **C. Nexus between Difona’s Misconduct and the Matters in Controversy.**

14 Generally, a court “cannot order default against a party as a sanction of misconduct that
15 is unrelated to the merits.” *Estrada v. Speno & Cohen*, 244 F.3d 1050, 1058 (9th Cir. 2001)
16 (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349–50 (1909)). Here, Difona’s
17 demonstrated unwillingness to defend itself in this action is clearly connected to the merits of the
18 case.

19 Accordingly, this order hereby **STRIKES** Difona’s answer and **ENTERS DEFAULT**
20 **JUDGMENT** against Difona.

21 **2. DAMAGES.**

22 Once default is entered, the well-pleaded factual allegations in the complaint are taken as
23 true, except for those relating to the amount of damages. *Heidenthal*, 826 F.2d at 917–18.
24 “[N]ecessary facts not contained in the pleadings, and claims which are legally insufficient, are
25 not established by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir.
26 1992); *see also DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007). A court has
27 “wide latitude” and discretion in determining the amount of damages to award upon default
28 judgment. *James v. Frame*, 6 F.3d 307, 310 (9th Cir. 1993). The plaintiff must provide

1 evidence of its damages, and the damages “must not differ in kind, form, or exceed in amount,
2 what is demanded in the pleadings.” Rule 54(c).

3 Plaintiffs’ motion for default judgment seeks \$223,000 for unauthorized sales of the
4 Difona HF-P1 antenna and \$47,800 for unauthorized sales of the Super Antenna YP-3 antenna.
5 Plaintiffs also seek attorney’s fees for willful and malicious misappropriation of trade secrets and
6 injunctive relief. The gravamen of plaintiffs’ claims against Difona is that Difona sold
7 unauthorized or pirated copies of plaintiffs’ products and misappropriated plaintiffs’ trade
8 secrets. From 2009 through 2011, Difona was plaintiffs’ exclusive distributor and dealer for
9 Super Antenna products in Germany and central Europe (Compl. ¶ 203; Wright Decl. ¶ 3). The
10 complaint alleges that since January 2012, Difona has sold illegal copies of Super Antenna
11 products and misappropriated plaintiffs’ trade secret designs, business plans, and confidential
12 information (Compl. at ¶ 223).

13 In support of their motion for default judgment and damages, plaintiffs submit the
14 declarations of plaintiff Vern Wright and third-party defendant Bonnie Crystal. Ms. Crystal is an
15 electronics and RF engineer and amateur radio operator. She states that is currently the president
16 and Chief Technology Officer of a company that designs and produces HF antennas and is the
17 founder and executive director of Hfpack, “the largest ham radio organization devoted to
18 amateur HF portable operation” (Crystal Decl. ¶¶ 1–2). Ms. Crystal compared the Difona HF-P1
19 antenna to the Super Antenna MP-1 antenna and determined that the two antennas are very
20 similar. She states that the Difona HF-P1 was most likely manufactured by the same company
21 that had manufactured the older Super Antenna MP-1 products (*id.* at ¶ 4, 15). Plaintiff Wright
22 also states that the HF-P1 “is an exact copy” of his MP-1 antenna (Wright Decl. ¶ 7). This order
23 finds that the evidence submitted is sufficient to establish for purposes of this order that the
24 Difona HF-P1 antenna is similar or substantially similar to the Super Antenna MP-1 antenna.

25 As to damages, however, plaintiffs have not established a sufficient basis of proof for
26 their claim that, since January 2012, Difona sold an estimated 200 units of the Super Antenna
27 YP-3 antenna and 2000 units of the “pirated MP-1 Antennas,” for a total profit of \$270,800. The
28 only evidence submitted on this topic is the declaration of plaintiff Wright. He states that he has

1 been in the antenna manufacturing and sales business since December 1999 (*id.* at ¶ 2). Plaintiff
2 Wright states that “for approximately [two-and-a-half] years from 2009 to mid-2011, Difona
3 ordered approximately \$100,000 in products from plaintiffs” (*id.* at ¶ 4; *see also* Compl. ¶ 209).
4 He opines that, “based on [his] knowledge of the market, the sales history between Super
5 Antenna and Difona and the other European distributors that have placed orders with Difona
6 instead of Super Antenna,” that Difona sold at least 2,000 HF-P1 antennas from January 2012 to
7 the present ((Wright Decl. ¶ 8). Similarly, he estimates that Difona has sold at least 200 of the
8 YP-3 antennas. Plaintiff Wright, however, has not been qualified as an expert in this matter. He
9 does not submit any evidence in support of his estimates for the number of units of each product
10 sold. In fact, the figures he estimates for Difona’s profits for the 18-month period between
11 January 2012 and the date of his declaration vastly exceed the amount of products Difona
12 ordered from Super Antenna for the entire 30-month period between 2009 through mid-2011,
13 when Difona was the exclusive distributor for Super Antenna in Germany and central Europe (*id.*
14 at ¶ 4). Accordingly, this order finds that the empirical evidence of Difona’s historical purchases
15 from Super Antenna is a more reliable basis for estimating sales. For the 18-month period at
16 issue here, Super Antenna’s estimated lost sales, based on past sales history, is \$60,000.

17 Although plaintiffs have not provided a specific break-down of the units of each product
18 Difona ordered from Super Antenna, or Super Antenna’s profit therefrom, it can be inferred that
19 the \$100,000 is a wholesale price. Super Antenna’s profits on the sales would, at a minimum,
20 subtract the cost of purchasing the product from the manufacturer. Here, Super Antenna has not
21 provided an express break-down of the cost for each type of unit. Based on the figures provided
22 regarding the prices paid to the manufacturer for each product, this order will conservatively
23 estimate that the cost to purchase a manufactured product was at least 25% of the sale price.
24 Accordingly, a fair estimate of plaintiffs’ lost profits, based on historical sales figures, would be
25 75% of \$60,000, or **\$45,000**.

26 **3. OFFSET FROM SETTLEMENT WITH OTHER DEFENDANTS.**

27 California Code of Civil Procedure Section 877 provides that, where a plaintiff has
28 entered into a good faith settlement with some defendants, the “plaintiff’s claims against the

1 other defendants are to be reduced by the amount of consideration paid for the settlement.”
2 *Erreca’s v. Superior Court*, 19 Cal. App. 4th 1475, 1488 (1993) (internal quotations omitted).
3 “The nonsettling defendants obtain in return a reduction in their ultimate liability to the
4 plaintiff.” *Ibid.* (citing *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 871–72 (1987)).
5 Such an offset applies where a release is given in good faith “to one or more of a number of
6 tortfeasors claimed to be liable for the *same tort*.” Cal. Code Civ. Proc. 877 (emphasis added).

7 Plaintiffs’ original motion did not address the issue of offset at all, although the Court is
8 aware that a settlement has been reached with all other defendants. Following the Court’s
9 request for supplemental briefing, plaintiffs have provided information regarding the settlement
10 agreement reached with defendants Michael and Jamie Bloom, Kingsbridge Corporation,
11 Offshore Solutions, Inc., and Sinotech Corporation (the “Bloom defendants”) and with defendant
12 law firm Bullivant Houser Bailey PC. Plaintiffs have now filed a declaration from counsel,
13 Attorney Garry Cohen, as well as plaintiffs’ settlement conference statements, prepared for the
14 settlement conferences held before Magistrate Judge Grewal.

15 Plaintiffs state that the law firm defendant Bullivant paid \$15,000 to settle the claims
16 against it, which relate to the alleged securities law violations. These claims are separate and
17 distinct from plaintiffs’ claims against Difona, which relate to fraud and trade secret
18 misappropriation through overseas sales of pirated products. The Bloom defendants paid
19 \$225,000 to settle plaintiffs’ claims against them. As set forth in plaintiffs’ settlement statement,
20 the claims against the Bloom defendants on which the settlement was based relate to the
21 takeover of plaintiffs’ company through an allegedly fraudulent securities transaction,
22 defendants’ siphoning off of funds and inventory from plaintiffs, and the sales plaintiffs lost due
23 to the disruptions to their business. Plaintiffs’ settlement statement also contends that Difona
24 stole the designs for their products and had them manufactured at a Chinese factory controlled
25 by the Bloom defendants (Dkt. No. 143 at 11). The statement itemizes separate damage amounts
26 for the Bloom defendants and Difona. As to Difona, plaintiffs state that they are entitled to
27 \$224,000 in damages (but would be willing to settle for \$100,000 in addition to a permanent
28 injunction and assurances of no future sales of pirated products) (*id.* at 18–19).

1 Plaintiffs have also submitted the declaration of Attorney Cohen, who states that the
2 allegations from the second amended complaint “linking Difona [] with Michael Bloom were
3 not used nor discussed in reaching settlement with the Bloom Defendants” (Cohen Decl. ¶ 5).
4 Additionally, according to Attorney Cohen, plaintiffs did not argue at the settlement conference
5 that the Bloom defendants should be liable for Difona’s illegal sales. This order finds that
6 Difona is not entitled to an offset under Section 877 for the settlement reached by the Bloom
7 defendants. Plaintiffs’ claims against Difona for fraud and misappropriation of trade secrets
8 through sales of pirated products in Europe are separate and distinct from the claims settled and
9 released against the Bloom defendants.

10 **4. ATTORNEY’S FEES.**

11 Under California Civil Code Section 3426.4, a plaintiff may recover reasonable
12 attorney’s fees and costs for willful and malicious misappropriation. The complaint alleges that
13 Difona’s misappropriation was willful and malicious and includes facts (here assumed true) that
14 would provide a sufficient basis for such a finding (Compl. ¶ 265). Plaintiffs’ counsel, Attorney
15 Garry Cohen, has filed a declaration stating that his actual time spent on this action specifically
16 dealing with Difona was over 70 hours, at a billing rate of \$440 per hour. Attorney Cohen has
17 reduced his fee request and seeks \$25,000. Accordingly, pursuant to Section 3426.4, an award
18 of **\$25,000 IN FEES** is appropriate. Plaintiffs have not submitted any information regarding any
19 costs actually and reasonably incurred, so none will be awarded.

20 **4. INJUNCTIVE RELIEF.**

21 Plaintiffs further seek to permanently enjoin Difona from selling pirated Super Antenna
22 products or misrepresenting to others that it is affiliated with Super Antenna or the Wrights.
23 This order **HEREBY ENJOINS** Difona from holding itself out as in any way affiliated with
24 SuperAntenna Corporation, Vern Wright, or June Wright and is further enjoined from selling,
25 distributing, or promoting any antennas or accessories under the name of Super Antenna,
26 SuperAntenna, or “MP-1.”

27 **CONCLUSION**

28 To the extent stated above, plaintiffs’ motion for default judgment against Difona is


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GRANTED. Default judgment in the total amount of **\$70,000** and a permanent injunction will be entered against Difona. This amount includes the attorney's fees awarded herein.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: August 22, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE