

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Bala Bangles, Inc.,)	
)	
Plaintiff,)	Civil Action No. 1:21-cv-05051
)	
v.)	
)	Judge John Robert Blakey
The Entities and Individuals Identified in)	
Annex A,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR
DEFAULT JUDGMENT**

I. BACKGROUND

a. FACTUAL HISTORY

Plaintiff, Bala Bangles, Inc. (“Bala” or “Plaintiff”) brings this action for federal copyright infringement, federal trademark infringement, counterfeiting, federal unfair competition, false designation of origin, and design patent infringement. As alleged in the Complaint, Defendants have engaged in the widespread marketing, advertising, offering for sale, and sale of counterfeit products sold under Bala’s trademark, BALA. These sales are solicited and made on online marketplaces and on internet websites that portray Defendants’ products as genuine Bala products in order to cause confusion among the public and to illicitly profit from that confusion. In short, Defendants have run sophisticated infringement operations seeking to exploit Bala and its brand, with disregard for anything except making money. Bala has brought this action to protect the goodwill represented by its valuable trademark and to protect its customers and potential customers from unwittingly purchasing inferior, counterfeit products sold by Defendants.

b. PROCEDURAL HISTORY

On September 23, 2021, Bala filed this complaint for violations of federal law. Dkt. 1. On September 28, 2021, the Court granted Bala's motions for an *ex parte* temporary restraining order, for electronic service, and for leave to file under seal. Dkt. 21. Since that time, Bala provided PayPal, Alibaba, Aliexpress, Amazon, eBay, DHgate, Shopify, and Wish with a copy of the order, resulting in the freezing of the accounts associated with each Defendant identified in Exhibit A attached hereto such that Defendants have been restrained from removing or transferring money in those accounts. Bala timely served the complaint and summons on Defendants, as evidenced by the proof of service filed with the Court on December 21, 2021. Defendants' answers were due 6 months ago, on November 1, 2021. In the interim, Bala engaged in settlement discussions with many Defendants, and subsequently dismissed those Defendants from the proceeding that have cooperated ("Dismissed Defendants"). Bala has contacted the respective platforms to remove the restraint from the Dismissed Defendants' accounts. At this point, 341 Defendants remain that have not contacted Bala or otherwise appeared before this Court ("Defaulting Defendants"). Defaulting Defendants did not plead or otherwise defend this action within the time prescribed by Fed. R. Civ. P. 12. Upon information and belief, none of the Defaulting Defendants are active-duty members of the U.S. armed forces. *See* Exhibit B. Decl. of Michelle Bolos ¶ 4.

II. JURISDICTION

This Court has original subject matter jurisdiction over the claims in this action pursuant to 28 U.S.C. §§ 1331 and 1338. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred. Each of the Defaulting Defendants directly targets business activities toward consumers in the United States, including Illinois, by offering online sales via one or

more interactive, commercial websites, identified in Annex A to the Complaint. Each of the Defaulting Defendants is committing tortious acts in Illinois by targeting Illinois residents for its sales as evidenced by Defaulting Defendants' offering to ship their products to Illinois, falsely holding themselves out to be affiliated with Bala by displaying Bala's registered trademark and/or products that infringe Bala's design patent to Illinois residents, accepting payment in U.S. dollars, and, on information and belief, selling counterfeit products using Bala's federally registered trademark and/or copyrighted materials to Illinois residents. *See* Complaint at ¶ 5. Without the benefit of an evidentiary hearing, a plaintiff bears only the burden of alleging a *prima facie* case for personal jurisdiction; all of a plaintiff's asserted facts should be accepted as true and any factual determinations should be resolved in its favor. *See uBID, Inc. v. GoDaddy Group, Inc.* 623 F.3d 421, 423 (7th Cir. 2010).

III. ARGUMENT

a. THE COURT SHOULD ENTER DEFAULT JUDGMENT FOR PLAINTIFF ON EACH OF ITS FOUR CLAIMS FOR RELIEF

In a case such as this where claims for relief are not for a sum certain or cannot be made certain by computation, a party seeking default judgment must apply to the court. Fed. R. Civ. P. 55(b)(2). By this motion, Bala applies for default judgment and requests an order providing the relief requested in the Complaint and detailed below, including monetary and injunctive relief, including an order that all assets in Defaulting Defendants' PayPal and merchant accounts be transferred to Bala.

The Complaint seeks relief for: (1) copyright infringement under 17 U.S.C. §§ 106 and 501, (2) trademark infringement and counterfeiting under 15 USC §1114(1)(A), (3) false designation of origin and unfair competition under 15 USC §1125(a)(1), and (4) design patent infringement under 35 USC § 271. Bala alleges facts sufficient to support default judgment for

Bala on each of those claims. Complaint at ¶ 30-67. When a court determines that a defendant is in default, the factual allegations of the complaint are taken as true and may not be challenged, and the defendants are liable as a matter of law as to each cause of action alleged in the complaint. *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994). By failing to answer, defend, or appear in this action, Defaulting Defendants have demonstrated lack of interest in or credible argument in opposition to this Court's rendering judgment for Bala, and have admitted the allegations in the Complaint. *See* Fed. R. Civ. P. 8(b)(6); *Wehrs v. Wells*, 688 F.3d 886, 892 (7th Cir. 2012) (upon entry of default, the well-pled allegations of the complaint relating to liability are taken as true). The unchallenged facts constitute and support legitimate causes of action such that Bala is entitled to relief.

i. Count I: Federal Copyright Infringement

To prevail on a federal copyright claim, a plaintiff must prove (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original. *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 914 (7th Cir. 2007); *Feist Pub., Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991).

Neither copyright ownership nor the fact of copying can be disputed in this case. The copyrights asserted in the Complaint are federally registered and the corresponding certificates of registration constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. 17 U.S.C. § 410, Dkt. 1 at ¶¶ 15-17. Bala has also alleged that the Defaulting Defendants have deliberately copied, displayed, distributed, reproduced and/or made derivative works incorporating the Copyrighted Material on the respective storefronts in violation of 17 U.S.C. § 106. Dkt. 1 at ¶ 42. The Copyrighted Material that is used without authorization by Defaulting Defendants is accessible on either Bala's website or on its social media accounts.

The images used by Defaulting Defendants are identical or nearly identical and indistinguishable copies of Bala's Copyrighted Material, and thus the copying extends to Bala's protectable expression in the images. Dkt. 1 at ¶¶ 29, 34, 40-44. Accordingly, a Plaintiff establishes copying by showing that Defendants had access to the images and the infringing material is substantially similar to the Copyrighted Material. *Francescatti v. Germanotta*, No. 11 CV 5270, 2014 WL 2767231, at *7 (N.D. Ill. June 17, 2014). The Copyrighted Material is used by Bala in legitimate advertising and product listings for the Bala products, and therefore Defaulting Defendants use the Copyrighted Material in a bid to confuse consumers by including the images in its advertisements and product listings. Dkt. 1 at ¶¶ 34-35. Accordingly, Bala therefore requests entry of judgment with respect to Count I for copyright infringement.

ii. Count II: Federal Trademark Infringement and Counterfeiting

To prevail on its trademark infringement and counterfeiting claims under the Lanham Act, Bala must show that it has trademark rights in the marks at issue and that Defaulting Defendants' infringing uses are likely to cause confusion with Bala's mark. 15 U.S.C. §1125(a); 15 U.S.C. §1114; *McGraw-Edison Co. v. Walt Disney Prods.*, 787 F.2d 1163, 1166-1167 (7th Cir. 1986). In assessing likelihood of confusion, the Seventh Circuit examines several factors, including (1) similarity of the marks; (2) relatedness of the products; (3) area and manner of concurrent advertising and use; (4) degree of care likely to be exercised by the consumer; (5) strength of the marks; and (6) instances of actual confusion. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 897 (7th Cir. 2001).

Bala's Complaint alleges that Bala's registered trademark is inherently distinctive when applied to Bala products, that Bala has used its mark exclusively and continuously, and that Bala's trademark has never been abandoned. The registration for Bala's trademark is valid,

subsisting, and in full force and effect, and thus constitutes *prima facie* evidence of its validity and of Bala's exclusive right to use the trademark pursuant to 15 U.S.C. § 1057(b). Complaint at ¶ 18-21. Bala further alleges that Defaulting Defendants intentionally deceive and mislead consumers by creating websites that appear as if they belong to authorized online retailers who offer bona fide Bala goods by including Bala's trademark without Bala's permission. Complaint at ¶¶ 33-34. Since Defendants have failed to respond or otherwise plead in this matter, the Court must accept the allegations contained in Bala's Complaint as true. *See* Fed.R.Civ.P. 8(b)(6); *see also Wehrs v. Wells*, 688 F.3d 886, 892 (7th Cir. 2012) (upon entry of default the well-pled allegations of the complaint relating to liability are taken as true). Accordingly, Bala requests entry of judgment with respect to Count II for trademark infringement.

iii. Count III: False Designation of Origin and Unfair Competition

A plaintiff bringing a false designation of origin claim and unfair competition claim under 15 U.S.C. § 1125(a) must allege: (1) defendant used a false designation of origin, (2) defendant's use of the products was in interstate commerce, and (3) the likelihood that consumers will be confused by defendant's false designation of origin. *Web Printing Controls Co., Inc. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204 (7th Cir. 1990).

Bala's Complaint alleges that Defaulting Defendants used false designations by using Bala's trademark in order to promote, market, offer for sale, and sell counterfeit Bala goods and have created and are creating a likelihood of confusion, mistake, and deception as to affiliation, connection, or association with Bala or the origin, sponsorship, or approval of Defaulting Defendants' counterfeit Bala goods. By using Bala's trademarks on counterfeit Bala goods, Defaulting Defendants create a false designation of origin. Complaint at ¶ 56. The Complaint

also alleges that Defaulting Defendants’ use of the mark is in interstate commerce, and that Defaulting Defendants’ malicious, intentional, and willful intent to trade on Bala’s goodwill causes consumer confusion. Complaint at ¶ 50, 57. Therefore, Bala requests entry of judgment with respect to Count III.

iv. Count IV: Design Patent Infringement

Design patent infringement occurs where there is an application of “the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale...” 35 USC § 289. To sufficiently state a claim for design patent infringement, a plaintiff must (1) allege ownership of a design patent, (2) name each defendant, (3) cite the patent being infringed, (4) state the means by which the defendant(s) are infringing, and (5) point to the sections of patent law invoked. *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000).

Bala’s Complaint alleges that Bala is the exclusive licensee of all right, title, and interest in the Design Patent D 888,167 (“the ’167 patent”). Dkt. 1 at ¶¶ 22, 23. The Defaulting Defendants against which the Design Patent is being asserted were originally named in Bala’s Annex A. Dkt. 28. Bala’s Complaint similarly cites the patent being infringed by the Defendants (Dkt. 1 at ¶ 63), that the Defendants infringe the ’167 patent by importing, making, selling, and offering for sale products protected by the ’167 patent (Dkt. 1 at ¶ 64) and identifies the sections of patent law being invoked (Dkt. 1 at ¶ 1 citing 35 USC § 271 and at ¶ 66 citing 35 USC § 283). Therefore, Bala requests entry of judgment with respect to Count IV.

b. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF AND MONETARY DAMAGES

Pursuant to Federal Rule of Civil Procedure 55(b)(2), Bala requests, within the scope of its Complaint, permanent injunctive relief and recovery of Defaulting Defendants' profits as specified below. Bala further requests any additional relief that the Court deems just and proper.

i. Injunctive Relief

Bala is entitled to injunctive relief pursuant to the Lanham Act, 15 U.S.C. § 1116(a), the Copyright Act, 17 U.S.C. § 502, and the Patent Act, 35 U.S.C. § 283.

To obtain injunctive relief pursuant to the Lanham Act, Bala must demonstrate that: (1) it has suffered irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) the balance of hardships warrants a remedy at equity; and (4) the public interest would not be disserved by a permanent injunction. *Amer. Taxi Dispatch v. Amer. Metro Taxi*, 582 F.Supp.2d 999, 1005 (N.D. Ill. 2008); *eBay, Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1839 (2006) ("it is not necessary for Plaintiff to prove actual damages or injury to obtain injunctive relief").

The Seventh Circuit has "clearly and repeatedly held that damage to a trademark holder's goodwill can constitute irreparable injury for which the trademark owner has no adequate legal remedy." *Re/Max North Cent., Inc. v. Cook*, 272 F.3d 424, 432 (7th Cir. 2001) (citing *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 469 (7th Cir. 2000) ("[t]he most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendants' good"). Irreparable injury is often found in trademark infringement cases because "confused persons will mistakenly attribute to Plaintiff defects or negative impressions they have of defendants' goods or services, and then the Plaintiff's reputation is at risk." *Venus Laboratories, Inc. v. Vlahakis*, Civ. No. 15 C 1617, 2015 WL

1058264 at *3 (N.D. Ill. March 5, 2015), citing 5 McCarthy on Trademarks and Unfair Competition, § 30:47.30 (4th ed.). “This threatened and actual loss of reputation and good will cannot adequately be compensated for in dollars and cents after the fact.” *Id.* The risk of irreparable harm is particularly relevant here because the products made and sold under Bala’s trademark come from a different manufacturer and are almost certainly of inferior quality. This increases the risk that the products sold by Defaulting Defendants are manufactured defectively and are inferior to Bala’s genuine products.

Bala is entitled to injunctive relief under the Copyright Act. 17 U.S. C. § 502. The essence of the injury in “copyright infringement is that the copyright owner is deprived of control over the use of the copyrighted material.” *Igram v. Page*, 1999 WL 705895, at * (N.D. Ill. Aug. 27, 1999). Courts have also held that irreparable injury is evident where a defendant has “usurped” plaintiff’s “creative control” by unlawfully licensing plaintiff’s copyrighted work. *See Kinsey v. Jambow, Ltd.*, 76 F. Supp. 3d 708, 710 (N.D. Ill. 2014) (finding irreparable injury where defendant licensed plaintiff’s copyrighted work without authorization). As a result of Defaulting Defendants’ unauthorized exploitation of Bala’s copyrighted material, Defaulting Defendants have irreparably harmed, and continue to irreparably harm Bala through misappropriation of the ability to control use of the copyrighted material; and ultimately, some other remedy, such as monetary relief, would be inadequate because Bala would continue to be deprived of its ability to control the copyrighted material, further losing control over the reputation and goodwill that it has worked so long to establish among consumers, as consumers are deceived into believing the goods being purchased are somehow affiliated with or approved by Bala. Dkt. 18, Declaration of Maximilian Kislevitz ¶ 36. This weighs in favor of entry of a permanent injunction prohibiting Defaulting Defendants’ continued use, marketing, or sale of

products using Bala's copyrighted material. Further, the Court has already considered the necessary factors for issuance of an injunction and granted Plaintiff's motion for a preliminary injunction. Dkt. 42.

Moreover, irreparable harm results from design patent infringement when remedies at law are inadequate to compensate for the injury. As established by the Federal Circuit: "[h]arm to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of harm that is often not fully compensable by money because the damages caused are speculative and difficult to measure." *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994).

As a result of Defaulting Defendants' unauthorized exploitation of one or more of Bala's trademark, copyrights, and/or design patent, Defaulting Defendants have irreparably harmed, and continue to irreparably harm Bala through misappropriation of the ability to control the quality of products sold under Bala's trademark; and ultimately, some other remedy, such as monetary relief, would be inadequate because Bala would continue to be deprived of its ability to control the quality of goods sold under its trademark, losing control over the reputation and goodwill that it has worked so long to establish among consumers. Dkt. 17, Declaration of Maximilian Kislevitz ¶ 35. Each of these factors weighs in favor of entry of a permanent injunction prohibiting Defaulting Defendants' continued use, marketing, or sale of products infringing Bala's mark, copyrights, and/or design patent. Further, the Court has already considered the necessary factors for issuance of an injunction and granted Bala's motion for a preliminary injunction. Dkt. 42.

ii. Damages

a. Statutory Damages Pursuant to the Lanham Act

The Lanham Act, 15 U.S.C. § 1117(c), provides for statutory damages in cases involving counterfeit marks ranging from “not less than \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just,” or where the violation is considered willful, the court can award “\$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” Courts often find that statutory damages are appropriate in default judgment cases because the information needed to prove actual damages is within the infringer’s control and is not disclosed. *Deckers Outdoor Corp. v. Does 1-55*, No. 11 C 10, 2011 WL 4929036, at *4 (N.D. Ill. Oct. 14, 2011).

Willful infringement may be attributed to a defendant's actions where he had knowledge that his conduct constituted infringement or where he showed reckless disregard for the owner's rights. *Lorillard Tobacco Co. v. S & M Cent. Service Corp.*, No. 03 C 4986, 2004 WL 2534378, *7 (N.D. Ill. Nov. 8, 2004). Knowledge need not be proven directly, but can be inferred from a defendant’s conduct. *Id.* Additionally, courts have concluded that by way of default, a defendant admits that its fraudulent conduct was undertaken willfully and deliberately. *See MetroPCS v. Devor*, 215 F. Supp. 3d 626, 638 (N.D. Ill. Oct. 14, 2016).

Here, Defaulting Defendants’ infringement was willful. Each of the Defaulting Defendants used Bala’s trademark or colorable imitation thereof with their products to confuse and deceive customers into thinking Defaulting Defendants’ products were Bala’s. Defaulting Defendants willfully intended to trade on the recognition of, and willfully intended to harm the

reputation of the registered Bala trademark by offering products of inferior quality in connection with the mark.

Because the Lanham Act does not provide guidance as to how to select an appropriate statutory damages award within the range provided in the statute, courts have looked to cases applying the statutory damage provision of the Copyright Act. *Id.* at *4. The Seventh Circuit has held that a court awarding statutory damages is “not required to follow any rigid formula but instead enjoys wide discretion.” *Deckers Outdoor Corp. v. Does 1-55*, No. 11 C 10, 2011 WL 4929036, at *5 (N.D. Ill. Oct. 14, 2011). In fact, courts have held that a Plaintiff in a trademark infringement case is entitled to recover enhanced statutory damages even where its actual damages are nominal or non-existent. *Ford Motor Co. v. Cross*, 441 F. Supp. 2d 837, 852 (E.D. Mich. 2006). Additionally, courts have recognized the deterrent effect of statutory damages as a proper objective. *Id.*

Bala requests the maximum statutory damages award, \$2,000,000 per Defaulting Defendant as a result of Defaulting Defendants’ willful infringement as well as Bala’s level of success of the BALA brand. For example, Bala has sold millions of dollars’ worth of its Bala products, has been featured Vogue, Cosmopolitan, Forbes, Goop, CNN, Shark Tank, and more and has been promoted by celebrities. If Defendants are not deterred from this type of behavior, Bala will continue to suffer. *See* Dkt. 17, Decl. of Maximilian Kislevitz ¶¶ 36, 37. Additionally, because these products are marketed online and can be viewed and purchased by customers throughout the world, a high statutory damages award is warranted. *See Chanel, Inc. v. Matos*, 133 F. Supp. 3d 678, 688 (D.N.J. 2015), citing *Coach, Inc. v. Ocean Point Gifts*, 2010 WL 2521444, at *4 (D.N.J. June 14, 2010) (“[t]hese cases often have high damage awards due in part to the wide market exposure that the Internet can provide”); *see also Burberry Ltd., et al. v. The*

Partnerships, et al., No. 1:14-cv-08220 (Dkt. 44–45) (N.D. Ill. Dec. 11, 2014) (awarding \$2,000,000 in statutory damages per defendant); *Oakley, Inc. v. Does 1-100*, No. 1:12-cv-9864 (N.D. Ill. Jan. 30, 2013) (Dkt. 32) (awarding \$2,000,000 in statutory damages per defendant); *True Religion Apparel, Inc. et al. v. Does 1-100*, No. 1:12-cv-9894 (N.D. Ill. Feb. 6, 2013) (Dkt. No. 43) (awarding \$2,000,000 in statutory damages per defendant); *Noted, LLC v. The Partnerships and Unincorporated Associations Identified on Schedule A*, No. 1:20-cv-7411 (N.D. Ill. March 9, 2021) (awarding \$1,000,000 in statutory damages per defendant); *Carve Design, LLC v. The Partnerships and Unincorporated Associations Identified on Schedule A*, No. 1:21-cv-2145 (N.D. Ill. October 8, 2021) (awarding \$250,000 in statutory damages per defendant); *Springdale Acoustics, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule A*, No. 1:21-cv-2789 (N.D. Ill. November 4, 2021) (awarding \$1000,000 in statutory damages per defendant).

b. Statutory Damages for Copyright Infringement

A plaintiff in a case involving copyright infringement may elect to receive statutory damages of “not less than \$750 or more than \$30,000 as the court considers just.” 17 U.S.C. § 504(c)(1). When the copyright infringement is found to be willful, statutory damages may be “a sum of not more than \$150,000.” 17 U.S.C. § 504(c)(2).

The Seventh Circuit's standard for awarding statutory damages for copyright infringement under 17 U.S.C § 504(c) is articulated in *Chi-Boy Music v. Charlie Club*, 930 F.2d 1224, 1229 (7th Cir. 1991). Where the defendant knows that his conduct constitutes infringement or where he shows reckless disregard of the copyright owner's rights, the infringement is willful. See *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 511 (7th Cir. 1994). Knowledge need not be proven directly, but can be inferred from a defendant's

conduct. *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) (Finding that “[w]illful blindness is knowledge, in copyright law”).

In this case, the Defaulting Defendants clearly had knowledge that their activities constituted infringement or at least have a reckless disregard for Bala’s rights in Bala’s copyrights. Additionally, in similar cases involving willful copyright infringement, courts have awarded significant damages, including up to the maximum provided by law. *See Games Workshop Ltd. v. The Partnerships*, No. 19-cv-3821 (N.D. Ill. Aug. 28, 2019) (unpublished) (Docket No. 50) (awarding \$100,000 in statutory damages per defendant for willful copyright infringement); *Entertainment One UK Ltd. v. The Partnerships*, No. 19-cv-6257 (unpublished) (Docket No. 46) (awarding \$100,000 in statutory damages per defendant for willful copyright infringement); *Monster Energy Company v. Xianda Lin, et al.*; No. 1:16-cv-0622 (N.D. Ill. Mar. 14, 2016) (unpublished) (Docket No. 51) (awarding \$150,000 in statutory damages per defendant for willful copyright infringement). Thus, Bala’s request for a statutory damages award in the amount of one hundred and fifty thousand dollars (\$150,000) per Defaulting Defendant for willful copyright infringement of Bala’s Copyrighted Material is appropriate.

c. Monetary Damages for Design Patent Infringement

Design patent holders may recover the total profits made by a defendant under 35 U.S.C. § 289. Typically a damages award of Defendants’ profits under Section 289 involves two steps: “First, identify the ‘article of manufacture’ to which the infringed design has been applied. Second, calculate the infringer’s total profit made on that article of manufacture.” *Samsung Elecs. Co. v. Apple, Inc.*, 137 S. Ct. 429, 434 (2016). Similarly, typically plaintiffs bear the burden to show the article of manufacture and the defendants’ total profit on that article. *Nordock, Inc. v. Sys., Inc.*, No. 11-CV-118, 2017 WL 5633114, at *3 (E.D. Wis. Nov. 21, 2017).

Thereafter defendants have the burden to produce evidence showing the article of manufacture in the event the defendant believes the article of manufacture differs. *Id.* The defendant also has the burden to produce evidence as to any deductions from the total profit identified by plaintiff. *Id.*

“Although § 289 does not explicitly impose any burden on the defendant, this shift in the burden of production is consistent with the disgorgement of profits in other contexts.” *Nordock, Inc. v. Sys., Inc.*, 2017 WL 5633114, at *3. “[Patent holders] are entitled to an award best approximating their actual loss, and the infringers must bear the burden of uncertainty.” *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation*, 831 F. Supp. 1354, 1388 (N.D. Ill. 1993) (citations omitted).

When defendants fail to produce documents to characterize revenue, courts have entered a profits award for the entire revenue amount. *See WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. Ill. 2008) (“[t]he burden was therefore on PartyGaming to show that certain portions of its revenues...were not obtained through its infringement of WMS's marks.”); *Chloe v. Zarafshan*, No. 1:06 CIV. 3140 RJHMH, 2009 WL 2956827, at *6-8 (S.D.N.Y. Sept. 15, 2009) (entering profits award for the entire revenue amount in trademark infringement case even though “records offer no guidance as to how much of this revenue stream related to [Plaintiff’s] products (as opposed to other products not at issue in this case) or as to the costs incurred in acquiring and selling these products.”). As mentioned above, typically defendants bears the burden of “offering a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items in issue.” *Deckers Outdoor Corp. v. ShoeScandal.com, LLC*, No. CV 12-7382 ODW SHX, 2013 WL 6185203, at *2 (C.D. Cal. Nov. 25, 2013), citing *Sunbeam Prods., Inc. v. Wing Shing Prods. (BVI) Ltd.*, 311 B.R. 378, 401 (S.D.N.Y. 2004) *aff’d*, 153 F. App’x 703 (Fed. Cir. 2005). “[I]f the infringer has failed to

produce any evidence ... the Court must determine the costs to be subtracted from revenue based on the evidence it has to determine profits.” *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1447 (Fed. Cir. 1998).

The asserted Design Patent claims “[t]he ornamental design for a weighted exercise band.” Dkt. 1-1. In the case of a design for a single-component product, such as the weighted exercise band, the “product is the article of manufacture to which the design has been applied.” *Samsung Elecs. Co. v. Apple, Inc.*, 137 S. Ct. at 367. As such, the relevant article of manufacture is each of the Infringing Products sold by Defaulting Defendants.

Plaintiff has very limited and in some instances no available information regarding Defaulting Defendants’ profits from the sale of Infringing Products because Defaulting Defendants have failed to appear in this matter and have not produced any documents or information to elaborate upon the transactions in their financial accounts, other accepted payment methods other than those frozen pursuant to the TRO, or confirm whether Defendants are operating any other storefronts selling infringing products. Thus, Defaulting Defendants have not met their burden to apportion gross receipts between infringing and non-infringing product sales, or shown any deductions. *WMS Gaming, Inc. v. WPC Prods. Ltd.*, 542 F.3d 601, 608 (7th Cir. 2008); *Nordock, Inc. v. Sys., Inc.*, 2017 WL 5633114, at *3. Due to the Defendants’ failure to appear and meet their burden of apportioning gross sales or showing any deductions, the Court should award the greater of the amount restrained or \$250.00 for each Defaulting Defendant. *See* 35 U.S.C. § 289; *Oakley, Inc. v. The Partnerships, et al.*, No. 20-cv-02970 (N.D. Ill. Oct. 26, 2020) (unpublished) (Docket No. 61) (“Although the information about defendants’ profits and revenues is sparse and there is the possibility that the restrained funds were generated by non-infringing sales, the court concludes that plaintiff’s efforts provide the

best available measure of profits.”); *Oakley, Inc. v. The Partnerships, et al.*, No. 20-cv-06676 (N.D. Ill. Feb. 4, 2021) (unpublished) (Docket No. 53) (same).

Based on the limited information provided by PayPal and the respective merchant platforms corresponding with the Defaulting Defendants against which Bala is pursuing its design patent claim indicates that the amount currently restrained in individual Defaulting Defendants’ known financial accounts ranges from \$0 - \$16,036, with the average balance in the range of \$581. Bolos Declaration at ¶ 5. A breakdown by Defaulting Defendant against which Bala seeks default judgment for the design patent claim of the amount currently restrained and Plaintiff’s requested profit award under 35 U.S.C. § 289 is provided in the chart in Paragraph 5 of the Bolos Declaration. *Id.* at ¶ 5.

d. Other Non-Monetary Damages

The Lanham Act provides for destruction of the infringing articles. 15 U.S.C. §1118. Bala requests that the Court order all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of Defaulting Defendants that bear a reproduction, counterfeit, copy, or colorable imitation of Bala’s trademark, be delivered up and destroyed.

IV. CONCLUSION

Bala will be prejudiced should the Court not grant default judgment against the Defaulting Defendants. Bala has suffered monetarily and irreparably through harm to its reputation because of Defaulting Defendants’ acts. Based upon the foregoing, Bala respectfully requests that the Court enter default judgment against the Defaulting Defendants in the above-referenced action and award Plaintiff: (1) statutory damages in the amount of \$2,000,000 per Defaulting Defendant pursuant to 15 U.S.C. 1117(c), (2) \$150,000 per Defaulting Defendants identified in Exhibit A pursuant to 17 U.S.C. § 504(c)(2); (3) a corresponding profit award under 35 U.S.C. § 289 against each Defaulting Defendant indicated as having committed Design Patent

infringement in Exhibit A hereto, (4) a permanent injunction prohibiting Defaulting Defendants from engaging in the conduct described in the Complaint, (5) an order transferring all assets in Defaulting Defendants' PayPal and respective merchant accounts to Bala, and (6) an order that the Defaulting Defendants must destroy all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of Defaulting Defendants that bear a reproduction, counterfeit, copy, or colorable imitation of Bala's trademark be delivered to Bala for destruction.

Dated: May 5, 2022

Respectfully submitted,

Bala Bangles, Inc.

/s/ Michelle Bolos

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