

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

ABAGAIL, *et al.*,

Defendants.

Civil Action No. 19-cv-503

Judge Fischer

**MOTION TO AMEND FINAL DEFAULT JUDGMENT AND
PERMANENT INJUNCTION [ECF NO. 52] TO INCLUDE DEFENDANT SITE LLY**

Plaintiff hereby moves the Court to amend its August 13, 2019, Final Default Judgment and Permanent Injunction [ECF No. 52] to include Defendant SITE LLY. In support thereof, Plaintiff states as follows:

I. INTRODUCTION

1. Plaintiff initiated this action against certain Defendants, including Defendant SITE LLY, on May 2, 2019, through the filing of its Complaint for trademark counterfeiting and infringement, federal unfair competition, patent infringement, false designation of origin, common law unfair competition, and common law trademark infringement. An Amended Complaint was filed on May 28, 2019, adding additional Defendants.

2. Defendant SITE LLY is in default, and the prerequisites for a default judgment have been met. Plaintiff had engaged in settlement discussions with Defendant SITE LLY, but the attempts made to settle with Defendant SITE LLY have proven unsuccessful. Accordingly, Plaintiff seeks to amend the Court's August 13, 2019, Final Default Judgment and Permanent

Injunction [ECF No. 52] to include Defendant SITELLY liable on all counts of Plaintiff's Amended Complaint.

3. In online counterfeiting cases such as the present case, a Final Default Judgment and Preliminary Injunction has been amended to include a non-settling Defendant. *See Apple Corps Ltd. v 3W Store*, No. 18-cv-60656 [ECF No. 66] (S.D. Fla. May 17, 2018) (Amended Final Default Judgment and Preliminary Injunction entered without hearing one day after motion to amend was filed).

II. PRODEDURAL HISTORY

4. On May 2, 2019, Plaintiff filed its Application for a Temporary Restraining Order against Defendants, including Defendant SITELLY. The same day the Court entered a sealed Order granting the Temporary Restraining Order setting a Hearing to Show Cause Why a Preliminary Injunction Should Not Issue (ECF No. 10). On May 8, 2019, the Temporary Restraining Order was extended and the Show Cause Hearing rescheduled (ECF No. 21).

5. On May 28, 2019, Plaintiff filed an Amended Complaint adding additional Defendants [ECF No. 24] and a Motion to Amend the Temporary Restraining Order to include the newly added Defendants [ECF No. 25]. On May 29, 2019, the Court entered the Amended Temporary Restraining Order and set a Show Cause Hearing Why a Preliminary Injunction Should not Issue [ECF No. 29]. On July 5, 2019, the Court entered a Preliminary Injunction [ECF No. 40].

6. On May 2, 2019, Plaintiff also filed its *Ex Parte* Motion for an Order Authorizing Alternative Service on Defendants, including Defendant SITELLY, pursuant to Federal Rule of Civil Procedure 4(f)(3), which the Court granted [ECF No. 11]. On May 28, 2010, Plaintiff also

moved to Amend the Alternative Service Order to include the Defendants added in the Amended Complaint; this Motion was granted on May 29, 2019 [ECF No. 31]. Pursuant to the Court's Orders, Plaintiff served all Defendants subject to the Orders, including Defendant SITELLY, with their respective Summons and a copy of the Amended Complaint via electronic mail ("e-mail") and by posting copies of the same on the ferencelaw.com website. *See* Summons/Return of Service [ECF No. 41].

7. The time allowed for Defendant SITELLY to respond to the Amended Complaint has expired. *See* Declaration of Brian Samuel Malkin in Support of Plaintiff's Motion to Amend Final Default Judgment and Permanent Injunction to Include Defendant SITELLY ("Malkin Dec. in Support of Motion to Amend FDJ") ¶ 13. Defendant SITELLY has not been granted any extension of time to respond, nor has it served or filed an Answer or other response. (*Id.* at ¶ 15.) To Plaintiff's knowledge, Defendant SITELLY is neither an infant nor incompetent person, and upon information and belief, the Servicemembers Civil Relief Act does not apply. (*Id.* at ¶ 17).

8. On July 19, 2019, the Plaintiff requested the Clerk of Court to enter default against all Defendants except E-AUCTION MAVEN, OUTDOORSHOP, and SITELLY. [ECF No. 42] On July 22, 2019, the Clerk's default was entered. [ECF No. 45]

9. On July 22, 2019, Plaintiff filed its Motion for Entry of Final Default Judgment Against Defendants, excluding Defendants E-AUCTION MAVEN, OUTDOORSHOP, and SITELLY. [ECF No. 46] Thereafter, Defendants E-AUCTION MAVEN and OUTDOORSHOP were voluntarily dismissed [ECF No. 53] and the Court entered a Final Default Judgment and Permanent Injunction [ECF No. 52] against all Defendants, excluding Defendant SITELLY.

10. Defendant SITELLY contacted Plaintiff's counsel to facilitate settlement. *See* Malkin Dec. in Support of Motion to Amend FDJ, ¶ 10. The matter between the parties, however, was ultimately not resolved. *See Id.* Plaintiff requested the Clerk enter default against Defendant SITELLY, and the Clerk's default was entered on May 29, 2020. [ECF No. 59]

11. Plaintiff now moves the Court to grant Final Default Judgment against Defendant SITELLY and submits this Motion to Amend the Final Default Judgment and Permanent Injunction to Include Defendant SITELLY.

III. ARGUMENT

12. As alleged by Plaintiff, admitted by default, and established by the evidence submitted herewith, Defendant SITELLY operates and controls an e-commerce store via an Internet marketplace website under its seller identification name listed on Schedule "A" hereto (the "Seller ID"). As set forth more fully in Plaintiff's Application for Temporary Restraining Order and the Declaration of Margaret B. Tyler filed in support thereof [ECF No. 6, Attachment 2], Defendant SITELLY promoted, advertised, offered for sale, and sold products which are counterfeit and infringe Plaintiff's patent.

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338. (*See Amended Complaint*, ¶ 1 [DE 24]) Personal jurisdiction over Defendant SITELLY and venue in this district are proper under 28 U.S.C. § 1391 as Defendant SITELLY directs business activities toward consumers within this district and causes harm to Plaintiff's businesses through the Internet based e-commerce store operating under its Seller ID. (*See Id.* at ¶¶ 1-3).

14. A court may order a default judgment pursuant to Fed. R. Civ. P. 55(b)(2) following the entry of default by the court clerk under Rule 55(a). See Fed. R. Civ. P. 55. Upon entry of default by the clerk, the well-pled factual allegations of a plaintiff's complaint, other than those related to damages, will be taken as true. See *Hritz v. Woma Corp.*, 732 F.2d 1178, 1180 (3d Cir. 1984); see also *Pair Networks, Inc. v. Lim Cheng Soon*, 2013 WL 452565, *1 (W.D. Pa., February 6, 2013). As explained in detail in Plaintiff's Motion for Default Judgment and Brief in Support ("Plaintiff's Motion for FDJ") (ECF Nos. 46 and 47), Plaintiff's evidence establishes all of the relevant factors. The Counterfeit Goods at issue in Plaintiff's Motion for FDJ are the same Counterfeit Goods at issue in the present motion. The well-pled factual allegations of Plaintiff's Amended Complaint, coupled with specifically paragraphs 44 - 79, properly allege the elements for Counts I, II, III, IV, and V of the Complaint. The Complaint, pleadings, and declaration filed in support of Plaintiff's Motion to Amend FDJ to include Defendant SITELLY clearly demonstrate that default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against Defendant SITELLY.

15. This Court retained jurisdiction over this matter and the parties (including SITELLY), in order to construe and enforce this Judgment and permanent injunction. (See ECF No. 52, p.10, VI. E). Furthermore, a Court that issues a permanent injunction retains continuing jurisdiction to modify it whenever the principles of equity require it to do so. *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980) (citing *U.S. v United Shoe Machinery Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed. 562 (1968)). Permanent injunctive relief is appropriate where a plaintiff demonstrates 1) it has suffered irreparable injury; 2) there is no adequate remedy at law; 3) the balance of hardship favors an equitable remedy; and 4) an issuance of an injunction is in the public's interest. *eBay, Inc. v. MercExchange, LLC*, 547 U.S.

388, 392-93, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). As set forth in Plaintiff's Motion for FDJ [ECF No. 47, p. 19], Plaintiffs have satisfied each of these elements.

16. Permanent injunctive relief is necessary, as the permanent injunction will ultimately prevent consumer confusion and deception in the marketplace by Defendant SITELLY, and will protect Plaintiff's property interest in its trademarks and patent. Thus, modifying the previously issued Final Default Judgment to include Defendant SITELLY is appropriate.

17. Furthermore, as admitted by Defendant SITELLY by default, its Seller ID is the essential component of its online activities and the means through which it furthers its counterfeiting scheme and causes harm to Plaintiffs. In order to effectuate the addition of Defendant SITELLY to the permanent injunction, its Seller ID and any other of its alias seller identification names being used and/or controlled by Defendant SITELLY to engage in the business of marketing, offering to sell, and/or selling goods bearing counterfeits and infringements of the Plaintiff's Marks should be ordered to be permanently disabled. (*See* Amended Complaint at ¶ 43 [ECF No. 24]).

18. Plaintiff additionally suggests that it would be appropriate to award Plaintiff damages against Defendant SITELLY. As set forth in detail in Plaintiff's Motion for FDJ [ECF No. 47], the evidence clearly establishes Defendants, including Defendant SITELLY, intentionally copied Plaintiff's Marks for the purpose of deriving the benefit of Plaintiff's famous reputations. In any event, Defendant SITELLY defaulted on Plaintiff's allegations of willfulness. (*See* Amended Complaint at ¶ 43 [ECF No. 24]) *See also Tiffany (NJ) Inc. v. Luban*, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003) (infringement is deemed willful "[b]y virtue of the default"); *Arista Records, Inc. v. Beker Enterprises, Inc.*, 298 F. Supp. 2d 1310, 1313 (S.D. Fla.

2003) (finding a Court may infer willfulness from the defendants' default). Based upon those considerations, Plaintiff respectfully suggests the Court include Defendant SITELLY in the statutory damages award pursuant to 15 U.S.C. § 1117(c)(2), which awarded Plaintiffs \$2,000,000.00 against each Defendant.¹

19. In view of the foregoing, Plaintiff submits that modification of the Court's Final Default Judgment and Permanent Injunction to include Defendant SITELLY is appropriate.

WHEREFORE, Plaintiff Airigan Solutions, LLC, respectfully requests the Court grant its Motion and amend the August 13, 2019, Final Default Judgment and Permanent Injunction [ECF No. 52] in accordance with the proposed order filed herewith, in order to include Defendant SITELLY.

Respectfully submitted,

Dated: June 2, 2020

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¹ Plaintiff limits its request as to damages for Counts II, III, IV, and V of the Amended Complaint as to Defendant SITELLY to the amount awarded pursuant to Count I and entry of the requested equitable relief.

ATTACHMENT “A”
DEFENDANT BY NUMBER AND SELLER ID

Def No.	Defendant / Amazon Store Name	Amazon ASIN Number(s)	Amazon Seller ID
26	Sitelly	B07NS2XFKS	A1X0D9XW5NZPBR

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2020, the foregoing document is being filed via the Case Management/Electronic Case Filing (CM/ECF) system; I also certify that on the same day, a true copy of the foregoing is being served in accordance with the Order Authorizing Alternate Service.

/s/ Stanley D. Ference III