

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016

Title: GRYPHON MOBILE ELECTRONICS, LLC, ET AL. V BROOKSTONE, INC., ET AL.

PRESENT: The Honorable DAVID O. CARTER, U.S. District Judge

Deborah Goltz
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR DEFENDANT:
None Present

**PROCEEDINGS (IN CHAMBERS): ORDER GRANTING PLAINTIFFS’
MOTION FOR DEFAULT
JUDGMENT [37]**

Before the Court is Plaintiffs’ Motion for Default Judgment (“Motion”) (Dkt. 37). The Court finds this matter appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15. Having considered the Motion, the Complaint (“Compl.”) (Dkt. 1), and the other materials filed in support of the Motion, the Court GRANTS IN PART Plaintiffs’ Motion.

I. Background

A. Facts

In light of the procedural posture of this case, the Court adopts the following facts as set out in Plaintiff’s Complaint.

Spacekey (USA), Inc. (“Spacekey”) is the owner of U.S. Patent No. D711,318 S (the “318 Patent”), a design patent that pertains to a mobile charging device. Compl. ¶ 12; *id.* Ex. A at 2. Gryphon Mobile Electronics, LLC (“Gryphon,” and together with Spacekey, “Plaintiffs”) imports and distributes those mobile charging devices under its federally registered trademark, U.S. Trademark Reg. No. 4,571,191 PowerAll (PowerAll). *Id.* ¶ 12; *id.* Ex. B at 2–3.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 2

Defendant Manchester Equipment Co., Inc. (“Manchester” or “Defendant”) manufactures mobile charging devices with the name “Armorall.” Compl. ¶14. Plaintiffs allege Defendant advertises and sells the infringing product on their websites, www.armorallbattery.com and www.piggybackbattery.com. Compl. ¶¶ 8, 19. Plaintiffs also allege Defendant sold a total of 400 units of infringing products to a wholesale distributor, H.L. Dalis, Inc. (“H.L. Dalis”), who then sold these units to a retailer, Brookstone, Inc. (“Brookstone”). Tai Decl. Ex. A. Defendant also sold a total of 13 units of infringing products to a third party dealer, AutoMat Auto Interiors and Tops (“AutoMat”). *Id.* Ex. E. Plaintiffs assert Defendant previously purchased 1,545 units of the PowerAll Charger from Plaintiffs between March 2014 and October 2014. Ko Decl. ¶ 3.

In November 2014, Plaintiffs notified Defendant its Armorall charger was an infringement upon the ‘318 Patent and Gryphon’s PowerAll trademark. Compl. ¶ 15. “Despite having notice of the Patent-in-Suit and Gryphon’s federally registered trademark, Defendants continued to pass off the ‘Armorall’ brand charging device as Gryphon’s product.” *Id.* ¶ 16. In or around August 2015, Plaintiffs sent further correspondence to Defendant demanding it “cease [its] fraudulent and unlawful conduct.” *Id.* ¶ 17.

Plaintiffs have not granted express or implied patent licensing to Defendant. *Id.* ¶ 24. Although Manchester claimed – through counsel – the company’s redesign of the product avoids infringement of the ‘318 patent, Plaintiffs allege the redesign was too minimal to sufficiently avoid patent infringement. *Id.* ¶ 18. Indeed, even though Manchester states it redesigned its product, it “continued to use products of the knock-off product in its advertisement.” *Id.*

Based on the above allegations, Plaintiffs allege Defendant’s actions have infringed both the ‘318 patent and PowerAll trademark. *Id.* ¶¶ 23, 29.

B. Procedural History

Plaintiffs filed suit against Defendant¹ in this Court on December 10, 2015 alleging (1) patent infringement, (2) trademark infringement in violation of the Lanham Act, (3) false designation of origin in violation of the Lanham Act, (4) unfair business practices in violation of California Business & Professions Code §§ 17200, 17500, and

¹ Plaintiffs originally filed suit against Brookstone, H.L. Dalis, and Manchester in this Court on December 10, 2015. (Dkt. 1). Brookstone and H.L. Dalis were terminated as defendants on April 1, 2016. (Dkts. 34, 35). Thus, Manchester is the only remaining Defendant.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 3

(5) a claim for accounting of all gains, profits and advantages derived from their violations. *Id.* ¶¶ 22–43.

Defendant Manchester was served with the Summons and Complaint on January 5, 2016 (Dkt. 20), but failed to respond. Plaintiffs requested an entry of default against Defendant on February 4, 2016 (Dkt. 21), which the Clerk entered the following day (Dkt. 22).

An Order to Show Cause was issued on March 22, 2016 as to why this case should not be dismissed for lack of prosecution. (Dkt. 28). The Court considered Plaintiffs' filing of a Motion for Default Judgment an appropriate response. (Dkt. 29).

Plaintiffs filed a Motion for Default Judgment against the remaining Defendant, Manchester, on May 6, 2016. (Dkt. 37). On June 9, 2016, the Court issued an Order for Additional Briefing to ask the Plaintiffs to address the Court's concerns regarding the requested damages, costs, and injunctive relief (Dkt. 40). Subsequently, Plaintiffs submitted a supplemental brief in support of their Motion ("Supplemental Brief") (Dkt. 41). On June 27, 2016, the Court issued a Second Order for Additional Briefing (Dkt. 43), which Plaintiffs responded to on July 7, 2016 ("Second Supplemental Brief") (Dkt. 45).

II. Legal Standard

Federal Rule of Civil Procedure 55(b) provides that the Court may, in its discretion, order default judgment following the entry of default by the Clerk. Local Rule 55 sets forth procedural requirements that must be satisfied by a party moving for default judgment. Upon entry of default, the well-pleaded allegations of the complaint are taken as true, with the exception of allegations concerning the amount of damages. *See, e.g., Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). However, "necessary facts not contained in the pleading, and claims which are legally insufficient, are not established by default." *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992). Where the pleadings are insufficient, the Court may require the moving party to produce evidence in support of the motion for default judgment. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

When deciding whether to enter default judgment, courts consider seven factors:

- (1) [T]he possibility of prejudice to the plaintiff;
- (2) the merits of plaintiff's substantive claim;
- (3) the sufficiency of the complaint;
- (4) the sum of money at stake in the action;
- (5) the possibility of a dispute concerning material facts;
- (6) whether the default was due to excusable neglect; and
- (7) the

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 4

strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

If a plaintiff seeks money damages, “[t]he plaintiff is required to provide evidence of its damages, and the damages sought must not be different in kind or amount from those set forth in the complaint.” Fed. R. Civ. P. 54(c). When ‘proving-up’ damages, admissible evidence (including witness testimony) supporting . . . damage calculations is usually required.” *Amini Innovation Corp. v. KTY Int’l Mktg.*, 768 F. Supp. 2d 1049, 1054 (C.D. Cal. 2011).

III. Analysis

A. Local Rule 55-1

Plaintiffs have satisfied the requirements of Federal Rule of Civil Procedure 55(b) and Local Rules 55-1 and 55-2. Plaintiffs have shown they requested default judgment against Defendant, default was entered against Defendant by the Clerk on February 5, 2016, Defendant is not an infant or incompetent person, and the Servicemembers Civil Relief Act, 50 U.S.C. § 521, does not apply here. *See* Tai Decl. ¶¶ 9, 18.

B. *Eitel* Factors

The Court now considers each *Eitel* factor in turn.

i. Possibility of Prejudice to the Plaintiffs

The first *Eitel* factor requires the Court to consider the harm to Plaintiffs if a default judgment is not granted. *See PepsiCo, Inc. v. California Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Plaintiffs allege their patent and trademark have been infringed by Defendant’s actions. Compl. ¶¶ 23, 29. Absent default judgment, Plaintiff would lack recourse for recovery since Defendant has failed to appear or defend this suit. *Id.*; *Philip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). Accordingly, the first factor supports granting default judgment against Defendant.

ii. The Merits and Sufficiency of Plaintiffs’ Substantive Claims

The second and third *Eitel* factors look to whether the plaintiff’s complaint has sufficiently stated a claim for relief. *PepsiCo*, 238 F. Supp. 2d at 1175. “In considering the sufficiency of the complaint and the merits of the plaintiff’s substantive claims, facts

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 5

alleged in the complaint not relating to damages are deemed to be true upon default.” *Bd. of Trs. Of Sheet Metal Workers v. Moak*, No. C 11-4620 CW, 2012 WL 5379565, at *2 (N.D. Cal. Oct. 31, 2012) (citing *Geddes*, 559 F.2d at 560).

Here, Plaintiffs’ Complaint alleges five causes of action: (1) patent infringement, (2) trademark infringement in violation of the Lanham Act, (3) false designation of origin in violation of the Lanham Act, (4) unfair competition and deceptive practices in violation of California Business & Professions Code §§ 17200, 17500, and (5) accounting for all gains, profits and advantages derived from Defendant’s violations. Compl. ¶¶ 22–43.

In their Second Supplemental Brief, Plaintiffs clarify they seek default judgment on their first and third claims. Second Supp’l Brief at 2. Thus, the Court will consider the merits of those two claims.

1. Patent Infringement

The Court will first consider the sufficiency of the Complaint and the merits of Plaintiffs’ patent infringement claim. A patent is “presumed valid” under 35 U.S.C. § 282. “The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” 35 U.S.C. § 282.

Here, the Complaint sufficiently alleges Plaintiff Spacekey’s ownership of the patent in question. *See* Compl. Ex. A at 2. Because Defendant does not appear in this action to challenge the patent’s validity, Spacekey’s patent is presumed to be valid. Plaintiffs also assert Defendant lacked express or implied patent licensing. *Id.* ¶ 24.

35 U.S.C. § 271(a) states “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.” Infringement of a design patent occurs when “the patented design, or any colorable imitation thereof,” is applied to “any article of manufacturer for the purpose of sale.” 35 U.S.C. § 289; *see also McIntire v. Sunrise Specialty Co.*, 944 F. Supp. 2d 933, 937 (E.D. Cal. 2013).

In order to establish infringement of a design patent, a plaintiff must show that an “ordinary observer familiar with the patented product would be deceived into believing that the accused product is the same as the patented design.” *Amini*, 768 F. Supp.2d at 1055 (citing *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 681 (Fed. Cir. 2008)).

Here, Plaintiffs allege Manchester has “directly infringed or indirectly infringed by inducing the infringement of the ornamental design claimed in the ‘318 Patent by

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 6

manufacturing, importing, marketing, advertising and distributing, or by knowing[ly] aiding and abetting the manufacture, import, marketing, advertisement and distribution of products that embody the patent design described and claimed in the ‘318 Patent.” Compl. ¶ 23. The Court also notes Plaintiffs provide a sketch of their product included with its patent registration as well as an image of Defendant’s product found on www.piggybackbattery.com. Compl. Ex. A; Ko Decl. Ex. A. Accepting Plaintiffs’ well-pleaded allegations as true, *Bd. of Trs. Of Sheet Metal Workers*, 2012 WL 5379565, at *2, and based on its review of the sketch and images provided, the Court concludes an ordinary observer familiar with Plaintiffs’ patented design would be deceived into believing Defendant’s product is the same as the patented design.

As such, Plaintiffs have sufficiently alleged facts to constitute a meritorious claim for infringement of a registered design patent.

2. False Designation of Origin

The Court will next consider the sufficiency of the Complaint and the merits of Plaintiffs’ false designation of origin claim.

To prevail on a claim under § 1125(a), a plaintiff must allege “the defendant’s use of its mark is likely to cause confusion, deception or mistake as to ‘the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.’” *See Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1058 (N.D. Cal. 2010) (quoting 15 U.S.C. § 1125(a)(1)(A)).

In their Complaint, Plaintiffs have adequately alleged Gryphon is the owner of the trademark at issue. Compl. ¶ 1; *id.* Ex. B. Additionally, Plaintiffs allege Manchester used the PowerAll mark in commerce. *See id.* ¶ 16 (noting Manchester “continued to pass off the ‘Armorall’ brand charging device as Gryphon’s product). According to Plaintiffs, Manchester has “infringed and will continue to infringe upon Gryphon’s rights in and related to its federally registered ‘PowerAll’ trademark.” Compl. ¶ 29. Plaintiffs add that Gryphon notified Manchester in November 2014 that the Armorall charging device was infringing Gryphon’s trademark. *Id.* ¶ 15. Plaintiffs further note the similarity between the PowerAll and Armorall products, an instance of customer confusion, and the fact that Manchester was a former customer of Gryphon. *See* Compl. ¶¶ 13–14. Plaintiffs state Manchester acted in concert with the other previously-named defendants, Brookstone and H.L. Dalis. Second Supp’l Brief at 5; *see also* Compl. ¶ 34 (referring collectively to “Defendants” in discussing false designation of origin claim).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016

Page 7

For claims brought under § 1114 and § 1125, “the critical determination is whether an alleged trademark infringer’s use of a mark creates a likelihood that the consuming public will be confused as to who makes what product.” *Jada Toys, Inc. v. Matel, Inc.*, 518 F.3d 628, 532 (9th Cir. 2007) (citation and internal quotation marks omitted). To determine the likelihood of confusion, the Ninth Circuit applies eight factors, known as the *Sleekcraft* factors: “(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) [defendant’s] intent in selecting the mark; and (8) likelihood of expansion of the product lines.” *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979). To be clear, “[t]hese elements are not applied mechanically; courts may examine *some or all* of the factors, depending on their relevance and importance.” *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1076 (9th Cir. 2006) (emphasis added); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011) (“[T]he list is not exhaustive . . . other variables may come into play depending on the particular facts presented.”).

Given the particular facts of this case, the Court will consider the following factors: (1) proximity of goods, (2) similarity of the marks, (3) evidence of actual confusion, (4) types of goods and the degree of care likely to be exercised by the purchaser, and (5) Defendant’s intent in selecting the mark.

Regarding proximity of goods, “[w]here goods are related or complementary, the danger of consumer confusion is heightened.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992). Considering Plaintiffs have alleged sufficient facts for a meritorious design patent infringement claim, the similarity of the products at issue counsels in favor Plaintiff.

“Three general principles help determine whether marks are similar. First, ‘[s]imilarity is best adjudged by appearance, sound, and meaning.’ Second, the ‘marks must be considered in their entirety and as they appear in the marketplace.’ Third, ‘similarities are weighed more heavily than differences.’” *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1032 (9th Cir. 2010) (citations omitted). In cases where a defendant’s goods use “the [m]arks in an identical manner on practically identical goods to [p]laintiff’s products,” the second *Sleekcraft* factor weighs in the plaintiff’s favor. *Otter Products, LLC v. Berrios*, No.13-cv-4384-RSWL-AGRx, 2013 WL 5575070, at *5 (C.D. Cal. Oct. 10, 2013). In the case, the Court finds Defendant’s mark Armorall to be similar to Plaintiffs’ PowerAll mark both in appearance and meaning. Given the marks are being used on “practically identical goods” – mobile charging devices, *see* Compl. ¶¶ 13–14 – this factor weighs in Plaintiffs’ favor.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 8

Evidence of actual confusion may manifest in the form of members of the buying public “mistakenly purchas[ing]” defendant’s product, believing it was plaintiff’s product, or vice versa. *James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc.*, No. 11-cv-1309-DOC-ANx, 2013 WL 655314, at *9 (C.D. Cal. Feb. 21, 2013) (citing *Echo Drain v. Newsted*, 307 F.Supp.2d 1116, 1126 (C.D. Cal. 2003)). Here, Plaintiffs allege customer confusion between the two devices. See Compl. ¶ 13. Accepting this allegation as true, the Court finds this factor weights in Plaintiffs’ favor.

In assessing whether there is a likelihood of confusion, courts look to whether the good is one in which buyers are likely to exercise greater care in their purchase. *Otter Products*, 2013 WL 5575070, at *5. “When dealing with inexpensive products, customers are likely to exercise less care, thus making confusion more likely.” *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1060 (9th Cir. 1999). Here, both Plaintiffs and Defendant are selling their chargers for a fairly inexpensive price. Because the goods in question are relatively inexpensive, the Court finds this factor to weigh in Plaintiffs’ favor.

Finally, “[w]hen the alleged infringer knowingly adopts a mark similar to another’s, [the court] must presume that the public will be deceived.” *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1085 (9th Cir. 2005) (citing *Sleekcraft*, 599 F.2d at 354). Further, the failure of a party to defend itself against allegations of trademark infringement is indicative of willfulness. See *Philip Morris U.S.A. Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 500 (C.D. Cal. 2003). In this case, Plaintiffs allege Defendant was a former customer of Gryphon. Compl. ¶ 14. Given Defendant’s status as a prior customer, and given Defendant’s failure to participate in the underlying action, the Court finds this factor to weigh in favor of Plaintiffs.

Because these *Sleekcraft* factors weigh in favor of Plaintiffs, the Court finds Defendant’s use of Plaintiffs’ Mark is likely to cause confusion. Thus, the Court finds Plaintiffs have adequately established the elements necessary for their false designation of origin claim.

3. Conclusion on Second and Third *Eitel* factors

Taking the facts alleged in the Complaint and declarations as true, the Court concludes Plaintiffs have sufficiently stated meritorious claims for patent infringement and false designation of origin. The second and third *Eitel* factors thus favor entry of default judgment against Defendant on these claims.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 9

iii. Sum of Money at Stake

The fourth *Eitel* factor requires the Court to weigh the amount of money at stake against the seriousness of Defendant’s conduct. “Default judgment is disfavored where the sum of money at stake is too large or unreasonable in relation to defendant’s conduct.” *Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1012 (C.D. Cal. 2014).

As set forth in the Complaint, Plaintiffs request damages from the Defendant for its violation of the ‘318 Patent and PowerAll trademark, and seek to treble these damages in light of Defendant’s willful and deliberate violations. Compl. at 12–13. Plaintiffs also seek in their Complaint all reasonable attorney’s fees, costs of suit, and injunctive relief. *Id.* Plaintiffs specifically seek \$77,682 in treble damages based on damages recoverable under the Lanham Act, \$4,707.29 in attorney’s fees, and \$3,787.50 in costs of suit, and issuance of a permanent injunction against Defendant. Supp’l Brief at 4–5.

In light of the alleged conduct, and considered Defendant has not appeared to defend itself in this action, the Court does not find the requested amount to be too large or unreasonable (though the Court will consider what specific damages amount if warranted below).

This factor thus favors entry of default judgment against the Defendant.

iv. Possibility of a Dispute Concerning Material Facts

Where a plaintiff’s complaint is well-pleaded and the defendant makes no effort to properly respond, the likelihood of disputed facts is very low. *See Landstar*, 725 F. Supp. 2d at 921–22. Here, because Defendant has failed to respond to the Complaint, it has admitted all material facts alleged in Plaintiffs’ Complaint. *See, e.g. PepsiCo*, 238 F. Supp. 2d at 1177. This factor weighs in favor of default judgment.

v. Possibility of Excusable Neglect

While there is always a possibility that a defendant might show up claiming excusable neglect, where the defendant “[was] properly served with the Complaint, the notice of entry of default, as well as the papers in support of the instant motion,” this factor favors entry of default judgment. *Shanghai Automation Instrument Co. Ltd. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001). Here, despite proper service by the Plaintiffs, the Defendant has made no effort to defend this suit. This is true even though Defendant initially responded through its counsel to claim its Armorall product did not infringe Plaintiffs’ patent. Compl. ¶ 18. The likelihood of excusable neglect is low, and this factor favors default judgment. *See PepsiCo*, 238 F. Supp. 2d at 1172.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 10

vi. Policy Favoring Decision on the Merits

Although decisions on the merits are preferred, this does not prevent a court from entering judgment where the defendant refuses to respond. *Id.* at 1177. Here, because Defendant has failed to respond to Plaintiffs' Complaint, the Court is unable to make a decision on the merits. This failure to appear does not preclude the entry of default judgment.

vii. Conclusion

Taken together, the *Eitel* factors weigh in favor of granting default judgment against Defendant.

IV. Remedies

Having determined that the Application for Default Judgment should be granted, the Court now turns to the issue of what relief is appropriate. In this case, Plaintiffs request monetary damages and injunctive relief.

A plaintiff requesting default judgment “must also prove all damages sought in the complaint.” *Dr. JKL Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1046 (N.D. Cal. 2010) (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003)). Rule 55 does not require the court to conduct a hearing on damages, so long as it ensures there is an adequate basis for the damages awarded in the default judgment. *Action S.A. v. Marc Rich & Co. Inc.*, 951 F.2d 504, 508 (2d Cir. 1991). “The Court considers Plaintiff’s declarations, calculations, and other documentation of damages in determining if the amount at stake is reasonable.” *Truong Giang Corp. v. Twinstar Tea Corp.*, No. 06-CV-03594, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007).

A. Monetary Damages

Plaintiffs request \$25,894 as damages under § 1117(a). Supp’l Brief at 3–4. Section 1117(a) allows a plaintiff to recover the defendant’s profits if the defendant violates § 1125(a). *See* 15 U.S.C. § 1117(a). Absent the defendant’s proof of costs, the plaintiff may recover the defendant’s total sales revenue, which is calculated by multiplying the quantity of infringing products sold by the price charged by the defendant. *See Kerr Corp. v. Tri Dental, Inc.*, No. 12-CV-0891, 2013 WL 990532, at *6 (C.D. Cal. Mar 11, 2013) (“Plaintiff multiplied the quantity of product sold times the price charged by TDI as reflected on the Invoices to generate Defendants’ total for each

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 11

sale.”) (citation omitted); *see also Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1084 (C.D. Cal. 2012).

Plaintiffs derive the \$25,894 figure from documents related to Defendant’s sales of infringing products. *See* Ko Decl. ¶ 7. H.L. Dalis purchased 400 units of Defendant’s infringing products at prices ranging from \$56 to \$81 per unit, for a total of \$24,997. *See id.* Ex. A; Supp’1 Brief at 3. In addition, Plaintiffs also received information regarding Defendant’s sale of infringing products from AutoMat. Ko Decl. ¶ 8. AutoMat confirmed they had purchased 13 units of Defendant’s infringing products at \$69 per unit, for a total of \$897. *Id.* Ex. E; Supp’1 Brief at 3. Plaintiffs therefore estimate Defendant’s total revenue from its sales of infringing products to be \$25,894. Supp’1 Brief at 3.

Based on the supporting documentation, the Court finds Plaintiffs are entitled to recover Defendant’s sales revenue in the amount of \$25,894.

B. Treble Damages

Plaintiffs also ask the Court to treble damages. Mot. at 4. While Plaintiffs provided no explanation for this request in their original Motion, *see id.*, they state in the Supplemental Brief that treble damages are appropriate pursuant to 15 U.S.C. § 1117(b). *See* Supp’1 Brief at 3.

Section 1117(b) provides:

for any violation of § 1114(1)(a) of this title or section 220506 of Title 36, in a case involving use of a counterfeit mark or designation (as defined in section 1116(d) of this title), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages . . . if the violation consists of

(1) intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark, in connection with the sale, offering for sale, or distribution of goods or services . . . or (2) providing goods or services necessary to the commission of a violation specified in paragraph (1).

In its Second Supplemental Brief, Plaintiffs concede that 15 U.S.C. § 1117(b) only provides for treble damages where a “counterfeit mark” is used. *See* Second Suppl. Brief. At 6. Because Plaintiffs have not sufficiently alleged Manchester used a counterfeit mark, the Court finds treble damages are not appropriate pursuant to 15 U.S.C. § 1117(b).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 12

In the alternative, Plaintiffs request the Court to award treble damages pursuant to 35 U.S.C. § 284. *Id.* 35 U.S.C. § 284 provides that a court “may increase the damages up to three times the amount found or assessed.” The decision to award enhanced damages is within the Court’s discretion. *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 301 F.R.D. 487, 490 (C.D. Cal, 2014). In determining “whether to grant enhanced damages as allowed under 35 U.S.C. § 284,” a court applies “a two-step process.” *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 37 (Fed. Cir.2012) (citing *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1569–70 (Fed. Cir. 1996)). The two-step inquiry first requires the fact finder to determine “whether an infringer is guilty of conduct upon which increased damages may be based. If so, the court then determines, exercising its sound discretion, whether, and to what extent, to increase the damages award given the totality of the circumstances.” *Id.* The culpability requirement may be satisfied by “[a]n act of willful infringement.” *Id.* “Willfulness of the infringement is the sole basis for the court’s exercise of its discretion to enhance damages under 35 U.S.C. § 284 (1988).” *Graco, Inc.v. Binks Mfg. Co.*, 60 F.3d 785, 792 (Fed. Cir. 1995). The Federal Circuit has outlined the following factors to consider on enhancement:

- (1) whether the infringer deliberately copied the ideas or design of another;
- (2) whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed;
- (3) the infringer’s behavior as a party to the litigation;
- (4) Defendant’s size and financial condition;
- (5) Closeness of the case;
- (6) Duration of defendant’s misconduct;
- (7) Remedial action by the defendant;
- (8) Defendant’s motivation for harm;
- (9) Whether defendant attempted to conceal its misconduct.

Informatica Corp. v. Business Objects Data Integration, Inc., 489 F. Supp. 2d 1075, 1084 (N.D. Cal. 2007) (Laporte, J.).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 13

Plaintiffs cite 35 U.S.C. § 284 for the first time in their Second Supplemental Brief, and fail to conduct a thorough analysis of the two-step process or the relevant factors outlined above. *See* Second Supp’l Brief at 6–7. Because Plaintiffs have failed to conduct this analysis, the Court, in its discretion, declines to award Plaintiffs treble damages. *See Tech. Advancement Grp., Inc. v. IvySkin, LLC*, 2:13CV89, 2014 WL 3501060, at *5 (E.D. Va. July 14, 2014) (“While willfulness can indeed be a basis of increased damages, the Court disagrees that simply continuing to infringe after a plaintiff files a complaint alleging patent infringement amounts to willfulness. To show willful infringement, “a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.”) (citation and internal quotation marks omitted).

C. Injunctive Relief

Plaintiffs have also a permanent injunction to enjoin Defendant from infringing the ‘318 patent and PowerAll trademark pursuant to 35 U.S.C. § 283 and 15 U.S.C. § 1116. Compl. at 11–12; Supp’l Brief at 4–5. Plaintiffs have proposed Defendant be enjoined from the following:

Manufacturing, importing, marketing, advertising, offering for sale, selling, or otherwise distributing any mobile charging device that embodies the design claimed in U.S. Design Patent No. D711,318S (the “‘318 Patent”);

Using in commerce any reproduction, counterfeit, copy, or colorable imitation of Gryphon’s POWERALL trademark in connection with the sale, offering for sale, distribution, or advertising of any mobile charging device;

Reproducing, counterfeiting, copying, or colorably imitating Gryphon’s POWERALL trademark and applying such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of any mobile charging device;

Using in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 14

misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association between Manchester’s products and the products of Gryphon; and

Assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to above.

Supp’l Brief at 4–5.

Under 35 U.S.C § 283, “[c]ourts may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” Likewise, under the Lanham Act, the “district court has the ‘power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right’ of trademark owner.” *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1137 (9th Cir. 2006) (citing 15 U.S.C § 1116(a)).

A four factor test for injunctive relief applies in this context. *See eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 392 (2006); *see also Amini*, 768 F. Supp. 2d 1049. In order for the Court to grant a permanent injunction, Plaintiffs must demonstrate:

(1) That [they] ha[ve] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff[s] and defendant[s], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1088 (9th Cir. 2015) (quoting *eBay*, 547 U.S. at 391).

Plaintiffs have sufficiently demonstrated irreparable harm. The undisputed evidence provides that Defendant sold and offered to sell chargers that infringe Plaintiffs’ patent and trademark. *See* Compl. ¶¶ 23, 29; Ko Decl. ¶ 4. Plaintiffs argue they have suffered threats to the survival of their business and harm to their reputation and goodwill. Mot. at 9. “Harm resulting from lost profits and lost customer goodwill is irreparable because it is neither easily calculable [] nor easily compensable[,] and [it is]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 15

therefore an appropriate basis for injunctive relief.” *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F.Supp. 2d 1058, 1066 (N.D. Cal. 2000).

Plaintiffs have sufficiently shown the remedies available at law are inadequate to compensate for the injuries suffered. “Injunctive relief is the remedy of choice for trademark and unfair competition cases, since there is no adequate remedy at law for the injury caused by a defendant’s continuing infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988). Absent permanent injunctive relief, Plaintiffs will be forced to repeatedly file suit any time Defendant infringes their patent and trademark.

In determining whether an injunction is appropriate, the Court must determine whether it is “absolutely clear” that Defendant’s wrongful behavior “could not reasonably be expected to recur.” *PepsiCo*, 238 F. Supp. 2d at 1178 (citing *Friends of the Earth, Inc., v. Laidlaw Env. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Plaintiffs allege that as of the filing of this Motion, Defendant continues to offer infringing products for sale on its website. Mot. at 3. Therefore, in the absence of opposition by Defendant, it is not “absolutely clear” Defendant’s wrongful behavior has ceased.

The balance of hardships also weighs strongly in Plaintiffs’ favor. Plaintiffs are threatened with irreparable harm in the absence of a permanent injunction. On the other hand, the issuance of an injunction serves to curtail Defendant’s infringing actions. “Where the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense ‘merits little equitable consideration’” *See Triad Sys. Corp. v. Se. Exp. Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988), *superseded by statute on other grounds as recognized by Apple Inc. v. Psystar Corp.*, 658 F.3d 1150 (9th Cir. 2011)).

Finally, Plaintiffs have demonstrated the granting of a permanent injunction would not disserve public interest. An injunction is in the public interest because “[t]he public has an interest in avoiding confusion between two companies’ products.” *Internet Specialties W., Inc. v. Milon–DiGiorgio Enters., Inc.*, 559 F.3d 985, 993 n.5 (9th Cir. 2009).

Thus, because all four factors weigh in favor of issuing permanent injunctive relief, the Court finds Plaintiffs are entitled to a permanent injunction against Defendant.

D. Attorney’s Fees

Plaintiffs seek \$4,707.28 in attorney’s fees. Supp’l Brief at 4.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 16

The Court notes § 1117(a) of the Lanham Act provides for recovery of attorney’s to the prevailing party” in “exceptional cases” of violations under section 1125(a). *See* 15 U.S.C. § 1117(a). The term “exceptional” involves cases in which the trademark infringement was “malicious, fraudulent, deliberate, or willful.” *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir. 2008). “Willful infringement can be inferred from a defendant’s failure to defend.” *Otter Products*, 2013 WL 5575070, at *13 (citing *eAdGear, Inc. v. Liu*, No. CV-11-05398 JCS, 2012 WL 2367805, at *19 (N.D. Cal. Jun. 21, 2012)). Similarly, under 35 U.S.C. § 285, “the Court must first determine that a case is ‘exceptional’ and then it may exercise its discretion to award fees to the prevailing party.” *Decker Outdoors Corp. v. ShoeScandal.com, LLC*, No. CV 12-7382 ODW (SHx), 2013 WL 6185203, at *3 (C.D. Cal. Nov. 25, 2013). The standard for determining whether a case is exceptional under § 285 was outlined in *Brooks Furniture Mfg., Inc. v. Dutailier Int’l Inc.*, 393 F.3d 1378 (Fed. Cir. 2005). “There, the Federal Circuit held that an award of attorneys’ fees is permissible ‘when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions.’” *Id.* (quoting *Brooks* 393 F.3d at 1381).

Here, Plaintiffs simply “contend that this is an exceptional case, especially in light of the fact that Manchester had knowledge of its infringement and refused to cooperate in turning over relevant documents concerning its infringing activity.” Mot. at 8. Plaintiffs do not provide any citation for this sentence. Further, the “fact that a default judgment was entered against [Manchester] does not alone make this case exceptional—despite the default finding of willfulness.” *Deckers Outdoor Corp. v. ShoeScandal.com, LLC*, No. CV 12-7382 ODW (SHx), 2013 WL 6185203, at *3 (C.D. Cal. Nov. 25, 2013) (citations omitted). “[A]lthough a finding of willful infringement is a sufficient basis for finding a case exceptional, it does not compel such a finding.” *Id.* at *4 (citations omitted).

As a court in this District explained in *Deckers*,

The bare default finding of willful infringement is insufficient evidence of exceptional circumstances to warrant an attorneys’-fees award. Attorneys’ fees are not awarded as a matter of course, and should not be permitted in the ordinary, typical patent suit. Neither default judgments nor willful infringement are uncommon in patent-infringement cases. The Court is not willing to categorize a default finding of willfulness as exceptional without some additional extraordinary circumstances plead in the complaint. An

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-2056-DOC (JCGx)

Date: July 12, 2016
Page 17

attorneys'-fees award should be premised upon a finding of unfairness, bad faith, or other equitable consideration of similar force that makes it grossly unjust that the prevailing party be left to bear the burden of its counsel's fees. Deckers's complaint does not allege such circumstances here.

Id.; see also *Tech Advancement*, 2014 WL 3501060, at *6.

Based on the above, the Court declines to award attorney's fees in this case.

E. Costs of Suit

Plaintiffs are entitled to recover the costs incurred in litigating this action “[u]pon finding for the claimant.” 35 U.S.C. § 284. Further, pursuant to § 1117(a)(3), plaintiffs are entitled recover “costs of action” for Defendants’ violation of § 1125(a).

Plaintiffs seek \$3,787.50 in costs. Supp’l Brief at 5. Plaintiffs’ request is supported by the declaration of Gryphon’s Chief Financial Officer. *See* Ko Decl. ¶ 9. The declaration states Gryphon incurred \$3,387.50 in fees to effectuate service of subpoenas to Defendant and its purported dealers in order to obtain the number of infringing product sales carried out by Defendant. *Id.* Plaintiffs also request \$400 for the filing fee.

The Court concludes the fees incurred were reasonable and necessary to effectively prosecute this action. Accordingly, the Court awards \$3,787.50 in costs.

V. Disposition

For the foregoing reasons, the Court ORDERS as follows:

- Default judgment is GRANTED as to Plaintiffs’ patent infringement and false designation of origin claims;
- Plaintiffs are AWARDED (1) \$25,894 in monetary damages, and (2) \$3,787.50 in costs;
- Plaintiffs’ proposed permanent injunction is GRANTED.

The Clerk shall serve this minute order on the parties.