

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

FIRST TEXAS  
PRODUCTS, LLC,  
Plaintiff,

v.

SHANGHAI TIANXUN  
ELECTRONIC  
EQUIPMENT COMPANY,  
LTD., et. al.,  
Defendants.

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EP-17-CV-331-PRM

ORDER GRANTING PLAINTIFF’S  
MOTION FOR DEFAULT JUDGMENT

On this day, the Court considered Plaintiff First Texas Products LLC’s [hereinafter “Plaintiff”] “Request for Entry of Default and Motion for Default Judgment against Defendants TheSellingPost.Biz, LLC, Shanghai Tianxun Electronic Equipment Company, Ltd., and Shanghai Zhangdu Electronic Commerce Co., Ltd. d/b/a KingDetector” (ECF No. 17) [hereinafter “Motion for Default Judgment”], filed on February 13, 2018, in the above-captioned cause. The Court also considered Plaintiff’s “Request for Entry of Default and Motion for Default Judgment against Defendant Costway.com” (ECF No. 30), filed on April 27, 2018.

In the instant motions, Plaintiff asks the Court to enter default judgment against Defendants TheSellingPost.Biz, LLC, Shanghai Tianxun Electronic Equipment Company, Ltd., Shanghai Zhangdu Electronic Commerce Co., Ltd. d/b/a KingDetector, and Costway.com [hereinafter referred to collectively as “Defendants”].<sup>1</sup> Mot. Default J. 1. As of the date of this Order, Defendants have neither appeared nor responded. After due consideration of Plaintiff’s arguments, the Court is of the opinion that Plaintiff’s Motions for Default Judgment should be granted as to all Defendants for the reasons that follow.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

This case arises out of a copyright and trademark dispute between Plaintiff and Defendants. Plaintiff alleges that Defendants are selling counterfeit metal detectors. Plaintiff is headquartered in El Paso, Texas, and designs, tests, manufactures, and sells metal detectors domestically and internationally. Compl. 4, Nov. 2, 2017, ECF No. 1. Plaintiff has several federally registered copyrights and trademarks, including registered copyrights and trademarks for its Bounty Hunter line of metal detectors. *Id.*

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<sup>1</sup> One additional Defendant, Blue Marble Products, LLC, was named in the suit. Blue Marble is not implicated in this Order.

Plaintiff alleges that Shanghai Electronic acted in concert with Blue Marble, Costway.com, TheSellingPost.biz, and Shanghai Zhangdu Electric Commerce Co. d/b/a KingDetector to import counterfeit metal detectors into the United States that are identical in appearance to Plaintiff's Bounty Hunter products. *Id.* at 4–5. Plaintiff did not manufacture, authorize, or sponsor the alleged counterfeit metal detectors. *Id.* at 5. Further, Defendants allegedly distributed printed materials—*i.e.*, user's manuals—that include artwork and literature nearly identical to Plaintiff's copyrighted materials. *Id.* at 5, Ex. 2.

Accordingly, Plaintiff brought suit in federal court on November 2, 2017. *Id.* at 1. Therein, Plaintiff claims that the counterfeit metal detectors are causing a loss in the sales of its genuine products as well as confusing or disappointing customers who purchase the counterfeit products. *Id.* at 6. Plaintiff anticipates continuing to suffer such losses if Defendants continue to import counterfeit goods. *Id.* at 7. Thus, Plaintiff requests an injunction restraining Defendants from continuing their conduct, damages representing Defendants' profits, attorney's fees, and costs. *Id.* at 10.

Although several defendants were named in the lawsuit, only one defendant, Blue Marble, responded. Plaintiff subsequently reached a settlement with Blue Marble. Mot. for Agreed J., June 6, 2018, ECF No. 44. Plaintiff now seeks a default judgment against each of the remaining parties who were unresponsive to the claim.

## II. LEGAL STANDARD

Plaintiff must establish three elements to obtain a default judgment: (1) default, (2) entry of default, and (3) default judgment. *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137,141 (5th Cir. 1996).

A default occurs when “a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules.” *Id.* The clerk of the court will execute an entry of default when default is established by affidavit or otherwise. *Id.* After the clerk’s entry of default, “a plaintiff may apply for a judgment based on such default. This is a *default judgment.*” *Id.*

As noted above, Defendants failed to appear. Subsequently, the Clerk of the Court has entered an entry of default as to these Defendants. Entry of Default, Feb. 16, 2018, ECF No. 21; Entry of

Default, May 1, 2018, ECF No. 31. Therefore, the Court must determine whether a default judgment is appropriate.

Courts have developed a two-part analysis in determining whether a default judgment should be entered against a defendant. *See, e.g., Ins. Co. of the W. v. H & G Contractors, Inc.*, No. C-10-390, 2011 WL 4738197, at \*2–3 (S.D. Tex. Oct. 5, 2011). First, the Court must consider whether the entry of default judgment is appropriate under the circumstances by considering the following factors:

[1] whether material issues of fact are at issue, [2] whether there has been substantial prejudice, [3] whether the grounds for default are clearly established, [4] whether the default was caused by a good faith mistake or excusable neglect, [5] the harshness of the default judgment, and [6] whether the court would think itself obliged to set aside the default on the defendant's motion.

*See Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998).

Second, the Court must assess the merits of the plaintiff's claims and find a sufficient basis in the pleadings for the judgment. *See Nishimatsu Const. Co. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Although the defendant may be in default, "[t]he defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Id.*

The Fifth Circuit has cautioned that “[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.” *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (quoting *Sun Bank of Ocala v. Pelican Homestead & Savings Ass’n.*, 874 F.2d 274, 276 (5th Cir. 1989)) (internal quotation marks omitted) (alterations in original). Indeed, such orders are “available only when the adversary process has been halted because of an essentially unresponsive party.” *Sun Bank of Ocala*, 874 F.2d at 276 (quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970)) (internal quotation marks omitted). Thus, ordering a default judgment lies within the discretion of the district judge, and a “party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default.” *Lewis*, 236 F.3d at 767 (quoting *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996)) (internal quotation marks omitted).

### III. ANALYSIS

#### A. Default Judgment Factors

After considering the six factors outlined in *Lindsey*, the Court concludes that each factor weighs in favor of a default judgment. First,

no material issues of fact exist because Defendants failed to respond or plead. Plaintiff clearly lays out the grounds for its relief and provides supporting documentation of its right to recovery. *See* Compl. 7–10, Exs. 1–8.

Second, Defendants do not incur substantial prejudice because they failed to contest any of the allegations. The Court accepts Defendants' silence as an admission that Plaintiff's allegations are true. *See Nishimatsu*, 515 F.2d at 1206 (noting that a "defendant, by his default, admits the plaintiff's well-pleaded allegations of fact"). Since Defendants admit the allegations against them, they do not face prejudice. Conversely, prejudice exists against Plaintiff given that Defendants' silence has halted the adversarial process. Specifically, Plaintiff has been deprived of the opportunity to conduct discovery and determine the scope of Defendants' alleged wrongful conduct. *See* Mot. Default J. 4.

Third, Plaintiff's timely service, reasonable prayer for relief, and Defendants' failure to appear establish clear grounds for default judgment.

Fourth, Defendants have failed to claim the presence of a good faith mistake or excusable neglect. The Summons and Complaint have been served on each Defendant.<sup>2</sup> Despite this service, Defendants have offered no explanation for their failure to appear.

Fifth, nothing about the circumstances of this request or the amount claimed makes this judgment particularly “harsh.” The lack of any apparent defenses or excuses for Defendants’ default makes this a reasonable default judgment.

Sixth, and finally, while the entry of default judgment is “extreme” and “not favored by the Federal Rules,” the Court has no choice but to enter a default judgment due to Defendants’ failure to participate in the adversarial process. Consequently, all six of the *Lindsey* factors weigh in favor of a default judgment. *See Lindsey*, 161 F.3d at 893.

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<sup>2</sup> The Summons and Complaint were served on the registered agents of Defendant TheSellingPost.Biz via certified mail. Summons Returned Executed, Dec. 28, 2017, ECF No. 12. Further, the Summons and Complaint were served by personal service on Defendants Shanghai Tianxun and KingDetector. Certificate of Service, Feb. 9, 2018, ECF No. 15; Certificate of Service, Feb. 9, 2018, ECF 16. Finally, the Summons and Complaint were served on a person authorized by law to accept service of process on behalf of Defendant Costway.com. Summons Returned Executed, Mar. 7, 2018, ECF No. 23.



## **B. Plaintiff's Pleadings**

The Court recognizes that “a defendant’s default does not in itself warrant the court in entering a default judgment.” *Nishimatsu*, 515 F.2d at 1206. Rather, “[t]here must be a sufficient basis in the pleadings for the judgment entered.” *Id.* Therefore, the Court must evaluate each of Plaintiff’s claims to determine if Plaintiff has put forward sufficient facts to establish a well-pleaded complaint.

In its Complaint, Plaintiff puts forward four claims for relief:

(1) Copyright Infringement in Violation of the Copyright Act, 17 U.S.C. § 501, *et seq.*; (2) Trade Dress Infringement in Violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) Infringement in Violation of Texas Business & Commerce Code §§ 16.26, *et seq.*; and (4) Unfair Competition in violation of Texas State Common Law. Compl. 7–10.

The Court concludes that the factual allegations pleaded in Plaintiff’s Complaint provide a sufficient basis for entering default judgment against Defendants as to each alleged violation.

### **1. Count One**

“Copyright infringement claims have two basic elements:

(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Sanchez v. Hacienda Records & Recording Studio, Inc.*, 42 F. Supp. 3d 845, 851 (S.D. Tex. 2014) (quoting *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013)). Here, Plaintiff provided documentation that it owns valid, registered copyrights for its Bounty Hunter products and related printed materials. Compl. Exs. 5–8. Further, Plaintiff provided side-by-side images of its original printed materials and Defendants’ materials, which appear to have copied the constituent elements of Plaintiff’s copyrighted user’s manuals. *Id.* at Exs. 1–4. Accordingly, Plaintiff has provided a sufficient factual basis for default judgment as to Count One.

## **2. Counts Two, Three, and Four**

Plaintiff’s second, third, and fourth counts succeed or fail together because their Texas state statutory and common law claims have identical elements to a claim under the Lanham Act.<sup>3</sup> Thus, the Court will analyze these claims together.

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<sup>3</sup> The elements of trademark infringement pursuant to the Texas Business and Commerce Code § 16.26, which prohibits trademark infringement, are identical to those under the Lanham Act. *Elvis*

In order to recover for Trade Dress Infringement in Violation of § 43(a) of the Lanham Act, a plaintiff must show: “(1) the trade dress is protectable, meaning it is inherently distinctive or has acquired secondary meaning; (2) the defendant’s trade dress creates a likelihood of confusion; and (3) if the trade dress is not registered, the plaintiff must prove the trade dress is non-functional.” 15 U.S.C. § 1125(a). “The touchstone of [liability under the Lanham Act] is whether the defendant’s actions are ‘likely to cause confusion.’” *Philip Morris*, 549 F. Supp 2d at 848.

In the Fifth Circuit, “trade dress” is the “design or packaging of a product which serves to identify the product’s source.” *Eppendorf-Netheler-Hinz GMBH v. Ritter GMBH*, 289 F.3d 351, 354 (5th Cir. 2002). Further, “trade dress protection extends only to incidental, arbitrary or ornamental product features which identify the source of the product. If a product feature is functional, it cannot be protected trade dress.” *Id.* at 355. Trade dress is “inherently distinctive” when

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*Presley Enters., Inc. v. Capece*, 141 F.3d 188, 193 (5th Cir. 1998); *Philip Morris USA Inc. v. Lee*, 549 F. Supp. 2d 839, 847 n.6 (W.D. Tex. 2008). Similarly, “the same facts which would support an action for trademark infringement would also support an action for [common law] unfair competition.” *Marathon Mfg. Co. v. Enerlite Prods. Corp.*, 767 F.2d 214, 217 (5th Cir. 1985); *Philip Morris*, 549 F. Supp. 2d at 847 n.6.

its “intrinsic nature serves to identify a source of a product.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

Here, the Court concludes that Plaintiff has pled facts to support its claim that Defendants violated the Lanham Act. First, Plaintiff has alleged sufficient facts to support that its Bounty Hunter product’s design may be inherently distinctive by providing images of the product’s original design. Compl. Exs. 1, 3. Second, images of Defendants’ metal detectors suggest that Defendants copied Plaintiff’s product design in its entirety, which creates a likelihood of confusion. *Id.* Third, Plaintiff provides a Trademark registration number for its Bounty Hunter product; therefore, Plaintiff need not prove the trade dress is non-functional. *Id.* at 6. Accordingly, the Court finds that Plaintiff has provided a sufficient factual basis to support a default judgment as to Counts Two, Three, and Four.

#### **IV. RELIEF**

In its Motion for Default Judgment, Plaintiff seeks several forms of relief. The Court will address each in turn.

## 1. Injunctive Relief

First, Plaintiff seeks a permanent injunction restraining and enjoining Defendants from manufacturing, importing, purchasing, distributing, selling, or offering for sale counterfeit metal detectors.

Mot. Default J. 3–4. Plaintiff contends there is no adequate remedy at law for Defendants’ ongoing wrongful conduct. Compl. 8. Specifically, if no injunctive relief is granted, Plaintiff asserts it will continue to be irreparably harmed. *Id.*

A plaintiff seeking a permanent injunction must demonstrate:

“(1) that it has 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 and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Pursuant to the Copyright Act, a court “‘may’ grant injunctive relief ‘on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.’” *Id.* at 392 (citing 17 U.S.C. § 501(a)).

The Court agrees with Plaintiff that it has been irreparably harmed and that it will continue to be harmed if Defendants' conduct continues. Further, the Court concurs that monetary damages are inadequate to compensate for that injury and that the balance of hardships falls on Plaintiff. The continued importation and sale of counterfeit metal detectors may affect Plaintiff's future sales and affect consumers' confidence in the quality of Plaintiff's products. Moreover, Defendants have no right to manufacture and import counterfeit goods. Finally, no public interest would be disserved by a permanent injunction. Rather, the public interest is served by avoiding consumer confusion related to the source of products in the marketplace. Accordingly, the Court is of the opinion that Plaintiff's request for a permanent injunction should be granted.

## **2. Monetary Damages**

Second, Plaintiff asks the Court to enter damages in the amount of \$50,000 against each Defendant. Mot. Default J. 4. Plaintiff provided support for this request in a supplemental briefing. *See* Pl.'s Resp. to Order to Show Cause, July 27, 2018, ECF No. 47. Therein, Plaintiff avers that the Court may, in its discretion, award Plaintiff

\$50,000 per Defendant in statutory damages or, in the alternative, based on Plaintiff's lost profits. *Id.*

Plaintiff cites the Copyright Act, 17 U.S.C. § 504(c), to support its request for statutory damages.<sup>4</sup> *Id.* at 2. Section 504(c) gives courts broad discretion in awarding copyright damages. Damages may be awarded in an amount of up to \$30,000 for non-willful violations, or up to \$150,000 for willful violations. 17 U.S.C. § 504(c). “[C]ourts must award damages according to the number of separate and independent works infringed.” *Broad. Music, Inc. v. Tex Border Mgmt., Inc.*, 11 F. Supp. 3d 689, 697 (N.D. Tex. 2014) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) (“Both the text of the Copyright Act and its legislative history make clear that statutory damages are to be calculated according to the number of works infringed, not the number of infringements.”)). Participants who act together in a copyright

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<sup>4</sup> Plaintiff also seeks statutory damages pursuant to the Lanham Act, 15 U.S.C. § 1117(c)(1). *Id.* at 2–3. This section allows for statutory damages in lieu of actual damages for the use of counterfeit marks. Because Plaintiff's Lanham Act claim is for trade dress infringement and not specifically for the use of counterfeit marks, the Court is of the opinion that 15 U.S.C. § 1117(c)(1) is inapplicable.

infringement action may be held jointly liable. *See Broad Music*, 11 F. Supp. 3d at 693.

Courts may consider the following factors in setting statutory damage amounts: “the expenses saved and profits reaped by the infringer, the deterrent effect of the award on defendant and on third parties, and the infringer’s state of mind in committing the infringement.” *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1176 (N.D. Tex. 1997).

Here, Plaintiff alleges that Defendants copied two of its copyrighted user’s manuals, which include original, copyrighted text and artwork. Further, because the copied user’s manuals are nearly exact replicas of Plaintiff’s user’s manuals, the violations appear willful. In considering the amount of statutory damages, the Court considers potential profits reaped by the infringer. It is difficult to determine the exact amount of actual damages “due to the failure of Defendants to appear and answer discovery.” Pl.’s Resp. to Order to Show Cause 1. Therefore, the Court considers Plaintiff’s estimated lost revenue as a rough proxy for Defendants’ profits. Plaintiff provides a declaration from its Chief Financial Officer estimating that Plaintiff has “lost an



amount equal to 10% of its sales of Bounty Hunter Junior and Pinpointers metal detectors” due to Defendants’ actions.<sup>5</sup> *Id.* at Ex. 1. Plaintiff’s Chief Financial Officer equates these lost sales “to approximately \$277,500 . . . on an annualized basis.” *Id.*

Based on Plaintiff’s estimate of lost sales and the discretion afforded to the Court in assessing statutory damages pursuant to the Copyright Act, the Court grants Plaintiff’s request for damages in the amount of \$50,000 against each Defendant.

### **3. Attorney’s Fees and Costs**

Third, Plaintiff seeks attorney’s fees and costs. Pursuant to the Lanham Act, prevailing plaintiffs are entitled to recover costs. 15 U.S.C. § 1117(a). Additionally, the Court “in exceptional cases may award reasonable attorney fees to the prevailing party.” *Id.* Here, Defendants failed to appear and participate in the adversarial process. Further, Defendants’ violations appear to be willful, as their allegedly counterfeit metal detectors and printed materials are nearly identical to Plaintiff’s products and printed materials. The Court finds these circumstances to be an exceptional case and therefore grants Plaintiff’s

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<sup>5</sup> The declaration does not explain how Plaintiff arrived at its conclusion that it has lost 10% of its sales.

request for attorney's fees. Plaintiff provided an affidavit that explains its basis for calculating attorney's fees in the amount of \$10,557.00.<sup>6</sup> Mot. Default J. Ex. 2. Accordingly the Court enters judgment against Defendants, jointly and severally, for Plaintiff's costs of court and for the amount of \$10,557.00 in attorney's fees.

## V. CONCLUSION

Accordingly, **IT IS ORDERED** that Plaintiff First Texas Products LLC's "Request for Entry of Default and Motion for Default Judgment against Defendants TheSellingPost.Biz, LLC, Shanghai Tianxun Electronic Equipment Company, Ltd., and Shanghai Zhangdu Electronic Commerce Co., Ltd. d/b/a KingDetector" (ECF No. 17) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's "Request for Entry of Default and Motion for Default Judgment against Defendant Costway.com" (ECF No. 30) is **GRANTED**.

**IT IS FURTHER ORDERED** that Defendants and Defendants' agents, employees, and attorneys, and all those persons who act in

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<sup>6</sup> In the affidavit, Plaintiff provided information about the number of hours counsel spent on the case as well as counsel's hourly rate. The Court has reviewed the hours and rate and determined that both are reasonable.

concert with them who receive notice of this Order, are permanently enjoined from manufacturing, importing, purchasing, distributing, selling, or offering for sale any counterfeit metal detectors, including Plaintiff's Bounty Hunter line of products, as well as any associated and related products and literature.

**IT IS FURTHER ORDERED** that Plaintiff is awarded judgment against each Defendant in the amount of \$50,000. Post-judgment interest is awarded at the rate of 5.0% to be compounded per annum until paid in full, pursuant to the provisions of 28 U.S.C. § 1961(b).

**IT IS FINALLY ORDERED** that Plaintiff is awarded judgment against Defendants, jointly and severally, for \$10,557 in attorney's fees, plus all costs of court. Post-judgment interest is awarded at the rate of 5.0% to be compounded per annum until paid in full, pursuant to the provisions of 28 U.S.C. § 1961(b).

SIGNED this 31<sup>st</sup> day of July, 2018.

  
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**PHILIP R. MARTINEZ**  
**UNITED STATES DISTRICT JUDGE**