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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEVI STRAUSS & CO.,)	No. C-06-3765 SC
)	
Plaintiff,)	
)	ORDER GRANTING
v.)	PLAINTIFF'S MOTION
)	FOR DEFAULT JUDGMENT
FOX HOLLOW APPAREL GROUP, LLC, a)	AGAINST
New York corporation, PARIGI GROUP,)	<u>KOLONAKI, INC.</u>
LTD., a New York corporation;)	
KOLONAKI, INC., a California)	
corporation; INDUSTRIAL COTTON,)	
INC., a New York corporation; TURN)	
ON PRODUCTS, INC., a New York)	
corporation; FOREVER 21, INC., a)	
Delaware corporation; MAXX)	
ACCESSORIES, INC., a New York)	
corporation,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff Levi Strauss & Co. ("Plaintiff" or "LS&CO") brought this action against seven companies, all of which have been dismissed except for Defendant Kolonaki, Inc. ("Defendant"). Plaintiff asserts causes of action for trademark infringement and dilution under federal and California law based on Defendant's use of a pocket stitching design that allegedly infringes Plaintiff's Arcuate trademark. Defendant was properly served with a summons and the Complaint on June 23, 2006, but failed to respond. Docket No. 11. As a result, on November 29, 2006, the Clerk of the Court entered default against Defendant. Docket No. 17.

1 Presently before the Court is Plaintiff's Motion for Default
2 Judgment. For the reasons stated herein, the Court GRANTS
3 Plaintiff's Motion for Default Judgment and AWARDS Plaintiff
4 \$75,600.00 in damages and \$10,075.54 for attorneys' fees and
5 costs. The Court further ENJOINS Defendant from manufacturing,
6 distributing, or selling any goods that infringe LS&CO's Arcuate
7 Stitching Design trademark.

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9 **II. BACKGROUND**

10 Plaintiff Levi Strauss & Co. is a large apparel company which
11 manufactures a variety of products, including traditional denim
12 blue jeans. See Compl., ¶ 4. Defendant Kolonaki, Inc. operates a
13 chain of retail clothing shops called "Georgiou." See id., ¶ 6.
14 Plaintiff alleges that Defendant has been selling jeans and capri
15 pants which use stitching designs in a way that is confusingly
16 similar to LS&CO's trademarks. See Compl., ¶¶ 19-20. Plaintiff
17 brought this case asserting causes of action for (1) federal
18 trademark infringement under 15 U.S.C. §§ 1114-1117, (2) federal
19 unfair competition under 15 U.S.C. § 1125, (3) federal dilution of
20 a famous mark under 15 U.S.C. § 1125(c), (4) California trademark
21 infringement and dilution under Cal. Bus. & Prof. Code §§ 14320,
22 14330, 14335, 14340, and (5) California unfair competition under
23 Cal. Bus. & Prof. Code § 17200. See Compl., ¶¶ 37-57.

24 Plaintiff seeks actual damages of \$25,200.00, which it
25 asserts should be awarded in treble, for a total of \$75,600.00.
26 See Pl.'s Mot. for Default J., 5. With respect to attorneys' fees
27 and costs, Plaintiff contends it is owed a total of \$15,186.16.

1 See Gilchrist Decl., ¶ 8. This amount is the sum of fees and
2 court costs in connection with preparing and serving the
3 complaint, correspondence, and requesting entry of default against
4 Defendant (fees related to the other parties have been deducted).
5 See id. Plaintiff also seeks a permanent injunction to prevent
6 Defendant from making further commercial use of its trademarks.
7 See Compl., ¶ 75.

8 9 **III. LEGAL STANDARD**

10 After entry of default, the Court may enter a default
11 judgment. Fed. R. Civ. P. 55(b). "However, entry of default does
12 not automatically entitle the non-defaulting party to entry of a
13 default judgment regardless of the fact that the effect of entry
14 of a default is to deem allegations admitted." In re Villegas,
15 132 B.R. 742, 746 (9th Cir. BAP 1991). Rather, "the decision to
16 enter a default judgment is discretionary." Alan Neuman Prods.,
17 Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988).

18 First, the Court must "access the adequacy of service of
19 process on the party against whom default is requested." Board of
20 Trustees of the N. Cal. Sheet Metal Workers v. Peters, No. C-00-
21 0395 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2,
22 2001). Once the Court determines that service was sufficient, it
23 may consider the following factors when exercising its discretion
24 to enter a default judgment:

25 (1) the possibility of prejudice to the plaintiff, (2)
26 the merits of plaintiff's substantive claim, (3) the
27 sufficiency of the complaint, (4) the sum of money at
28 stake in the action; (5) the possibility of a dispute
concerning material facts; (6) whether the default was

1 due to excusable neglect, and (7) the strong policy
2 underlying the Federal Rules of Civil Procedure
favoring decisions on the merits.

3 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The
4 general rule of law is that upon default the factual allegations
5 of the complaint, except those relating to the amount of damages,
6 will be taken as true." Geddes v. United Fin. Group, 559 F.2d
7 557, 560 (9th Cir. 1977). Therefore, for purposes of this Motion,
8 the Court accepts as true the facts as portrayed in the Complaint.

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10 **IV. DISCUSSION**

11 **A. Service of Process**

12 Service of process was adequate. Federal Rule 4(e) allows
13 service upon an individual by personally delivering the summons
14 and complaint. Fed. R. Civ. P. 4(e)(2). Rule 4(h) allows service
15 upon a corporation by personally delivering the summons and
16 complaint to the corporation's authorized agent. Fed. R. Civ. P.
17 4(h)(2). On June 23, 2006, a copy of the Complaint, Summons, and
18 other related documents were personally delivered to Mr. George
19 Georgiou, who was authorized to accept the documents. See
20 Certificate of Service, Docket No. 11.

21 **B. Merits of the Motion**

22 Accepting the allegations in the Complaint as true, as it
23 must, the Court finds that the Eitel factors weigh in favor of
24 entering default judgment.

25 **1. Prejudice to the Plaintiff**

26 Plaintiff would suffer prejudice without entry of default
27 judgment. If Defendant is allowed to continue manufacturing
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1 products that infringe upon Plaintiff's trademarks, Plaintiff will
2 face irreparable harm from trademark infringement and dilution.
3 See Compl., ¶ 35.

4 2. Merits of Plaintiff's Substantive Claims

5 a. Trademark Infringement

6 In order to prevail on a trademark infringement claim,
7 Plaintiff must establish "that it has a protected interest (or
8 trademark right)" and that Defendant's usage is "likely to cause
9 consumer confusion and thus infringe upon that interest." Levi
10 Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354 (9th Cir.
11 1985). Both California and federal law focus on "the likelihood
12 of confusion as to source or sponsorship." Toho Co. v. Sears,
13 Roebuck & Co., 645 F.2d 788, 791 (9th Cir. 1981).

14 As alleged in the Complaint, Plaintiff has a valid trademark
15 for Arcuate stitching. See Compl., ¶¶ 13-16, Ex. B. Defendant
16 has infringed on the trademarks by producing blue jeans and capri
17 pants that are confusingly similar to those produced by LS&CO.
18 Id., ¶¶ 19-20, Ex. D.

19 b. Unfair Competition

20 Plaintiff also alleges that Defendant competed unfairly in
21 violation of 15 U.S.C. § 1125(a) by using LS&CO's designs and
22 marks in a way that is likely to cause public confusion or mistake
23 as to their connection or origin. See Compl., ¶ 43. "The test
24 for false designation under the Lanham Act, as well as the
25 common-law and statutory unfair competition claims, is whether
26 there was a 'likelihood of confusion.'" Walter v. Mattel, Inc.,
27 210 F.3d 1108, 1111 (9th Cir. 2000). As discussed in the previous

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1 section, Plaintiff has established that Defendant's blue jean and
2 capri pant products created a likelihood of confusion.

3 c. Trademark Dilution

4 Section 1125(c) of Title 15 was recently amended by the
5 Trademark Dilution Revision Act of 2006. Pub. L. No. 109-312, 120
6 Stat. 1730 (2006). The statute provides a remedy for dilution by
7 blurring and by tarnishment. Dilution by blurring is defined as
8 "association arising from the similarity between a mark or trade
9 name and a famous mark that impairs the distinctiveness of the
10 famous mark." Id. at (c)(2)(B). Dilution by tarnishment is
11 "association arising from the similarity between a mark or trade
12 name and a famous mark that harms the reputation of the famous
13 mark." Id. at (c)(2)(C). The statute requires that an owner
14 prove the non-owner's use "is likely to cause dilution by blurring
15 or dilution by tarnishment, regardless of the presence or absence
16 of actual or likely confusion." Id. at (c)(1).

17 Section 1125(c) no longer requires the owner to demonstrate
18 actual harm, a standard established by the Supreme Court in
19 Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 433-34 (2003).
20 The revision changes the law to the pre-Moseley standard. Under
21 that test, injunctive relief is available if a plaintiff can
22 establish that (1) its mark is famous; (2) the defendant is making
23 commercial use of the mark in commerce; (3) the defendant's use
24 began after the plaintiff's mark became famous; and (4) the
25 defendant's use presents a likelihood of dilution of the
26 distinctive value of the mark. Panavision Int'l, L.P. v. Toeppen,
27 141 F.3d 1316, 1324 (9th Cir. 1998). Plaintiff has shown that its
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1 trademarks are famous, Compl., ¶ 16; Defendant is using the marks
2 in commerce, Compl., ¶ 19-20 and Ex. D; Defendant's use began
3 after the mark became famous, Compl., ¶ 11; and the use is likely
4 to cause dilution, Compl., ¶ 19. Furthermore, Defendant's
5 trademark infringement was willful. Compl., ¶ 49. Defendant had
6 prior knowledge of Plaintiff's trademarks and the similarity
7 between both companies' products, but nonetheless continued to use
8 the offending designs. See Gilchrist Decl., ¶ 2.

9 3. Sufficiency of the Complaint

10 Plaintiff's Complaint properly alleges the elements for the
11 above causes of action. The Complaint sets forth the identity of
12 LS&CO's mark, the extent to which LS&CO has used the mark, and the
13 fame of the mark. See Compl., ¶¶ 11-16. The Complaint alleges
14 that Defendant used Plaintiff's mark in connection with the sale
15 of blue jeans and capri pants without LS&CO's consent. See id.,
16 ¶¶ 19-20. The Complaint further asserts that Defendant's use of
17 LS&CO's marks is likely to confuse and deceive customers. See
18 id., ¶ 19. The Complaint also alleges that LS&CO's trademarks have
19 been diluted by Defendant's products. See id., ¶ 47.
20 Accordingly, Plaintiff's Complaint is sufficient.

21 4. Other Factors

22 The other factors from Eitel weigh in favor of entering a
23 default judgment. First, the amount of money at stake in this
24 case is low in relation to the gravity of Defendant's conduct.
25 Second, there is relatively little possibility of a dispute
26 concerning material facts. Plaintiff has provided evidence of its
27 valid trademark and Defendant's use of confusingly similar
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1 stitching. Third, there is no indication that Defendant failed to
2 respond due to excusable neglect. Though Defendant never answered
3 the Complaint, a representative of Defendant discussed the matter
4 with Plaintiff's counsel. See Gilchrist Decl., ¶ 2. Finally, the
5 policy underlying the Federal Rules of Civil Procedure favoring
6 decisions on the merits does not preclude entry of default
7 judgment. Rule 55 authorizes the Court to enter default in
8 situations such as this. See Fed. R. Civ. P. 55; Klopping v.
9 Fireman's Fund, 1996 WL 75314 at *3 (N.D. Cal. Feb. 13, 1996). In
10 light of the Eitel factors, this Court finds that entry of default
11 judgment is appropriate.

12 C. Remedies

13 Plaintiff has requested monetary damages, attorneys' fees and
14 costs, and equitable relief in the form of a permanent injunction.

15 1. Damages

16 Plaintiff seeks actual damages in the amount of \$25,200.00,
17 and thus total treble damages of \$75,600.00. This amount is based
18 upon evidence obtained from the president of Kolonaki, Inc.,
19 George Georgiou. The lead attorney for Plaintiff spoke with Mr.
20 Georgiou who stated that he purchased 300 units of the infringing
21 blue jeans from a vendor in China for \$6.00. See Gilchrist Decl.,
22 ¶ 2. Georgiou was selling the jeans for \$48.00 per pair,
23 resulting in a gross profit of \$42.00 per unit, a total of
24 \$12,600.00. See id. In addition, Plaintiff seeks damages for an
25 infringing denim capri pant, which was also offered for sale at
26 the Georgiou store. See id., ¶ 3. Plaintiff has estimated that
27 Defendant purchased the same number of capri pants at the same
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1 profit margin as the blue jeans and thus seeks additional damages
2 of \$12,600.00 for the capri pants. See id., ¶ 7. Plaintiff
3 requested Defendant's gross profit and volume information for the
4 capri pants, but Mr. Georgiou never gave Plaintiff this
5 information and failed to attend the scheduled deposition. See
6 id., ¶ 3-5. Defendant has had more than ample opportunity to
7 answer Plaintiff's requests and should not be rewarded for his
8 silence. Therefore, the Court will accept Plaintiff's estimation
9 as to the damages for the capri pants.

10 As of the date Plaintiff submitted this motion, despite
11 Plaintiff's repeated requests that Defendant stop selling the
12 infringing jeans and capri pants, Defendant has continued to sell
13 the products See id., ¶ 6. Defendant's violation is thus willful,
14 which entitles Plaintiff to treble damages under 15 U.S.C. § 1117.
15 In total, Defendant is liable for \$75,600.00 in damages.

16 2. Attorneys' Fees and Costs

17 Subject to 15 U.S.C. § 1117(a), Plaintiff is entitled to
18 recover attorney's fees and costs for Defendant's willful
19 trademark infringement, which qualifies as an "exceptional case."
20 See Earthquake Sound Corp. v. Bumper Indus., 352 F.3d 1210, 1216
21 (9th Cir. 2003). To determine a reasonable attorney fee award
22 under section 1117(a), courts employ the lodestar method. See
23 id.; Yahoo!, Inc. v. Net Games, Inc., 329 F.Supp.2d 1179, 1181
24 (N.D. Cal. 2004); Winterstein v. Stryker Corp. Group Life Ins.
25 Plan, 2006 WL 1889901 (N.D. Cal. July 10, 2006). This method
26 determines the reasonable attorney fee by "multiplying the number
27 of hours the prevailing party reasonably expended on the

1 litigation by a reasonable hourly rate." Morales v. City of San
2 Rafael, 96 F.3d 359, 363 (9th Cir. 1996).

3 Plaintiff has accounted for \$14,311.50 in attorneys' fees and
4 \$874.66 in costs for a total of \$15,186.16. The amount for costs
5 is reasonable in light of the funds Plaintiff expended for court
6 filings, service of process, and collecting evidence. The amount
7 for attorneys' fees is comprised of over 40 hours of attorney time
8 and several hours of legal assistant time. One attorney, a
9 partner, was billed at approximately \$440 per hour, the other
10 attorney, an associate, was billed at approximately \$276 per hour,
11 and the legal assistant, a paralegal, was billed at approximately
12 \$104 per hour. While these rates are higher than those set in
13 Yahoo!, other cases in this District have set significantly higher
14 rates based on an attorney's skill, experience, and reputation.
15 See e.g., Cancio v. Financial Credit Network, Inc., 2005 WL
16 1629808 (N.D. Cal. July 6, 2005). Though most of the attorney
17 time billed to this matter appears to be reasonable, the Court
18 finds that the billing of 23.5 hours of associate time for the
19 preparation of a motion for default judgment, see Gaudreau Decl.,
20 ¶ 4, is too high in light of the fact that the motion is similar
21 to one reviewed by this Court in a prior case for LS&CO in which
22 the same associate only billed 2.1 hours. The Court will
23 therefore allow 5.0 hours of associate time for the current
24 motion. It may have required more time to prepare the instant
25 motion than the prior motion because of the additional damages
26 section, but could not reasonably have taken over 11 times as
27 long. As a result, the Court finds a reasonable amount for
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1 attorneys' fees is \$9,200.88. The Court will award Plaintiff full
2 costs of \$874.66. Thus, the total amount for fees and costs is
3 \$10,075.54.

4 3. Injunctive relief

5 Plaintiff has demonstrated that its trademark rights are
6 being violated by Defendant. Under the Lanham Act, the Court may
7 grant an injunction. See 15 U.S.C. § 1116(a); Century 21 Real
8 Estate Corp. v. Sandlin, 846 F.2d 1175, 1180-81 (9th Cir. 1988)
9 ("Injunctive relief is the remedy of choice for trademark and
10 unfair competition cases"). Furthermore, injunctive relief is
11 available in the default judgment setting. See e.g., Philip
12 Morris USA, Inc. v. Castworld Products, Inc., 219 F.R.D. 494 (C.D.
13 Cal. 2003). This Court finds that an injunction is appropriate
14 because it will best serve to protect Plaintiff from the risk of
15 continuing irreparable harm.

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17 **V. CONCLUSION**

18 The Court GRANTS Plaintiff's Motion for Default Judgment. As
19 a consequence, the Court AWARDS Plaintiff \$75,600.00 for damages
20 and \$10,075.54 for attorneys' fees and costs. The Court also
21 GRANTS Plaintiff's request for an injunction.

22 Good cause appearing, Defendant, Kolonaki, Inc., its
23 principals, agents, affiliates, employees, officers, directors,
24 servants, privies, successors, assigns, and all persons acting in
25 concert or participating with it or under its control who receive
26 actual notice of this Order, are hereby permanently ENJOINED and
27 RESTRAINED, directly or indirectly, from doing, authorizing or
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1 procuring any persons to do any of the following until such time
2 as this Order is dissolved or modified by further order:

3 (1) Manufacturing, licensing, selling, offering for sale,
4 distributing, importing, exporting, advertising, promoting, or
5 displaying any products that display any stitching or other design
6 in the shape illustrated in Exhibit D of the Complaint, or any
7 stitching or other design that is substantially similar to the
8 Plaintiff's Arcuate trademark;

9 (2) Otherwise violating the rights of Plaintiff Levi Strauss
10 & Co. in and to the Arcuate trademark; and

11 (3) Assisting, aiding or abetting any person or entity
12 engaging in or performing any act prohibited by this Order.

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14 IT IS SO ORDERED.

15 Dated: April 17, 2007



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UNITED STATES DISTRICT JUDGE