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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPIN MASTER LTD. and SPIN MASTER, INC., *Plaintiffs* v. 13385184960@163.COM, 18888236883@163.COM, ALTAY, ANGELCITYER, BAMBOO001, CAOPING, CONGCONG2, DANDANXIAOWU, DAYINGJIA1256, DIAMOND BOUTIQUE, DIY GEM SHOP, DREAMSHIPS, DUMBLEDOR SHOP, EFASHIONER, EVERY DAY THERE WILL BE A NEW SUN, FASHIONABLE AND SPORT STORE, FASHIONDOFU, FELLA, FHIJHCF, FULLUSSET, GIFTSHOP2017, GIVE YOUR DREAM, GLOBAL_DAWN, GLOBAL-SPIRIT, GODCUP, GREEN FASHION, GUANGDONGHUATAI, GUIGIUDEDIAN, HAPPYSTORE99, HUASHAOSHOT, HUAXIAWAIMAOSHANG, ISHOP, ISYISY, IVANICABABYSHOP, JAHURTO, JASONSTORE1, JL&PREFECT, JUZIEJIA, KAIXUANXIAORENJIA, KEEP GOING, KRISTINECOTTRELL, LANXIHUANGLONGDONG, LIANJIAXIAODIAN, LOSTIU8, MAGIC CURRY, MAISYSTORE001, MAOMAO1608@163.COM, MIKEQYQ, MOMTUTUS, MR. P, MR.ZXX, MRY_STORE, NEWMERCHANTFASHION, NVC, PANDORA LOVE,	**18-cv-10524 (LGS) (KNF)**

QIQIYANYAN, QOMXZHK, RENDERINGYOU, SHENZHENYIWEIKEJIYOUXIANGONGSI, SHENZHEN YINFA TECHNOLOGY LTD, SHOW YOU NOW, SHU PANPAN WU SHOUSHOU, SIERMAOYIYOUXIANGONGSI, SMALL Y CLOTHES STORE, SMALLSMALLWORLD, THREEQIAOWAY, TIANCONG135, TOMIK18816764436, UTOPIA1973, UTOPIA2017, VALUABLE, YEHUDIEYE, WANGJUHUA11365, WENDY E-COMMERCE, WULI0014, WXXWW, XINYUDIYIYI, XYRSTOREKL, YIWU BLUE SKY, XIONGDISTORE, XUANXUAN636187, XZH, YANGMINGXIONGDI, YANGLIU248, YEKAIQIANG, YEQIRONG, YIHUIANDYIHUI, YOUR FASHION JEWELRY, YOUYOUSHANXI, YOYOBESS, YQUAN, YUXITAO, YY6752SDD, ZHANGDONGYUE, ZHANGXIAXIAZHANG, ZHENPINHUI and ZHENZHEN-FASHION,

Defendants

PLAINTIFFS' OBJECTION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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17 U.S.C. § 504(c) 5, 6
28 U.S.C. § 1961 6

GLOSSARY

Term	Definition	Docket Entry Number
Plaintiffs or "Spin Master"	Spin Master Ltd. and Spin Master, Inc.	N/A
Defendants	13385184960@163.com, 18888236883@163.com, Altay, angelcityer, bamboo001, caoping, congcong2, dandanxiaowu, dayingjia1256, Diamond boutique, DIY Gem shop, Dreamships, Dumbledor shop, Efashioner, Every day there will be a new sun, fashionable and sport store, fashiondofu, Fella, fhijhcf, Fullusset, giftshop2017, give your dream, global_dawn, global-spirit, Godcup, Green Fashion, guangdonghuatai, guigiudedian, happystore99, Huashaoshot, Huaxiawaimaoshang, ISHOP, ISYISY, ivanicababyshop, Jahurto, Jasonstore1, JL&prefect, juziEjia, kaixuanxiaorenjia, Keep going, kristinecottrell, Lanxihuanglongdong, lianjiaxiaodian, Lostiu8, magic Curry, maisystore001, maomao1608@163.com, Mikeqyq, MOMTUTUS, Mr. P, Mr.Zxx, MRY_Store, NewMerchantFashion, NVC, Pandora love, qiqiyanyan, Qomxzhk, Renderingyou, Shenzhenyiweikejiyouxiangongsi, Shenzhen Yinfa Technology LTD, Show You Now, Shu panpan wu shoushou, siermaoyiyouxiangongsi, Small Y Clothes Store, smallsmallworld, Threeqiaoway, tiancong135, Tomik18816764436, Utopia1973, Utopia2017, Valuable, yehudieye, wangjuhua11365, wendy E-commerce, wuli0014, wxxww, Xinyudiyiyi, xyrstorekl, yiwu blue sky, xiongdistore, xuanxuan636187, XZH, Yangmingxiongdi, yangliu248, yekaiqiang, yeqirong, YiHuiandYiHui, YOUR FASHION JEWELRY, youyoushanxi, YOYOBESS, Yquan, Yuxitao, YY6752SDD, Zhangdongyue, zhangxiaxiazhang, Zhenpinhui and zhenzhen-fashion	N/A
Defaulting Defendants	13385184960@163.com, 18888236883@163.com, Altay, angelcityer, bamboo001, caoping, congcong2, dandanxiaowu, dayingjia1256, Diamond boutique, Dreamships, Dumbledor shop, Every day there will be a new sun, fashiondofu, Fella, fhijhcf, Fullusset, giftshop2017, give your dream, global_dawn, global-spirit, Godcup, Green Fashion, guangdonghuatai, guigiudedian, Huashaoshot, Huaxiawaimaoshang, Jahurto, Jasonstore1, juziEjia, kaixuanxiaorenjia, Keep going, Lostiu8, maisystore001, maomao1608@163.com, Mikeqyq, MOMTUTUS, Mr. P, Mr.Zxx, MRY_Store,	N/A

	NewMerchantFashion, qiqiyanyan, Qomxzhk, Renderingyou, Shenzhenyiweikejiyouxiangongsi, Shenzhen Yinfa Technology LTD, Show You Now, Shu panpan wu shoushou, siermaoyiyouxiangongsi, smallsmallworld, Threeqiaoway, tiancong135, Tomik18816764436, Utopia1973, Utopia2017, Valuable, yehudieye, wangjuhua11365, wuli0014, wxxww, Xinyudiyiyi, xyrstorekl, yiwu blue sky, xiongdistore, xuanxuan636187, XZH, Yangmingxiongdi, yangliu248, yekaiqiang, yeqirong, YiHuiandYiHui, YOUR FASHION JEWELRY, youyoushanxi, Yquan, YY6752SDD, Zhangdongyue, zhangxiaxiazhang, Zhenpinhui and zhenzhen-fashion	
Sealing Order	Order to Seal File entered on November 13, 2018	1
Complaint	Plaintiffs' Complaint filed on November 13, 2018	7
Application	Plaintiffs' *Ex Parte* Application for: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts (as defined *infra*); 3) an order to show cause why a preliminary injunction should not issue; 4) an order authorizing bifurcated and alternative service and 5) an order authorizing expedited discovery filed on November 13, 2018	13-16
Arnaiz Dec.	Declaration of Jessica Arnaiz in Support of Plaintiffs' Application	14
Harrs Dec.	Declaration of Chris Harrs in Support of Plaintiffs' Application	15
Wolgang Dec.	Declaration of Spencer Wolgang in Support of Plaintiffs' Application	16
TRO	1) Temporary Restraining Order; 2) Order Restraining Assets and Merchant Storefronts, 3) Order to Show Cause Why a Preliminary Injunction Should Not Issue; 4) Order Authorizing Bifurcated and Alternative Service and 5) Order Authorizing Expedited Discovery entered on November 13, 2018	N/A
PI Show Cause Hearing	November 27, 2018 hearing to show cause why a preliminary injunction should not issue.	N/A
PI Order	November 28, 2018 Preliminary Injunction Order	4
Wish	A San Francisco, California-based, online marketplace and e-commerce platform located at Wish.com, which is owned by ContextLogic, Inc. ("ContextLogic"), that allows manufacturers and other third-party merchants, like Defendants, to advertise, distribute, offer for sale, sell and ship their retail products, which, upon information and belief, primarily originate from China, directly to	N/A

	consumers worldwide and specifically to consumers residing in the U.S., including New York	
User Account(s)	Any and all accounts with online marketplace platforms such as Wish, as well as any and all as yet undiscovered accounts with additional online marketplace platforms held by or associated with Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them	N/A
Merchant Storefront(s)	Any and all User Accounts through which Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them operate storefronts to manufacture, import, export, advertise, market, promote, distribute, display, offer for sale, sell and/or otherwise deal in products, including Counterfeit and/or Infringing Products, which are held by or associated with Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them	N/A
Spin Master Products	Spin Master's innovative children's lifestyle products and toys under their well-known brands, including: Twisty Petz, Flutterbye Fairy, Bunchems and Hatchimals, as well as under their licensed properties such as Paw Patrol and Air Hogs	N/A
Twisty Petz Products	Over 70 types of collectible, bejeweled pets that transform into sparkly bracelets, necklaces or backpack accessories with a few simple twists	N/A
Twisty Petz Mark	U.S. Trademark Registration No. 5,514,561 for "TWISTY PETZ" for a variety of goods in Class 28	N/A
Twisty Petz Work	U.S. Copyright Reg. VA 1-305-408, covering the Twisty Petz Packaging Artwork & Collectors' Guides	N/A
Counterfeit Products	Products bearing or used in connection with the Twisty Petz Mark and/or Twisty Petz Work, and/or products in packaging and/or containing labels and/or hang tags bearing the Twisty Petz Mark and/or Twisty Petz Work, and/or bearing or used in connection with marks and/or artwork that are confusingly or substantially similar to the Twisty Petz Mark and/or Twisty Petz Work and/or products that are identical or confusingly or substantially similar to the Twisty Petz Products	N/A
Financial Institutions	Any and all banks, financial institutions, credit card companies and payment processing agencies, such as ContextLogic, PayPal Inc. ("PayPal"), Payoneer Inc. ("Payoneer"), PingPong Global Solutions, Inc. ("PingPong"), and other companies or agencies that engage	N/A

	in the processing or transfer of money and/or real or personal property of Defendants	
Defendants' Assets	Any and all money, securities or other property or assets of Defendants (whether said assets are located in the U.S. or abroad)	N/A
Defendants' Financial Accounts	Defendants' Assets from any and all accounts associated with or utilized by any Defendant or any Defendant's Merchant Storefront(s) and User Account(s) (whether said account is located in the U.S. or abroad)	N/A
Defendants' Frozen Accounts	Defendants' Financial Accounts that were and/or are attached and frozen or restrained by the Financial Institutions pursuant to the TRO and/or PI Order, or which are attached and frozen or restrained pursuant to any future order entered by the Court in this Action	N/A
Defendants' Frozen Assets	Defendants' Assets from Defendants' Financial Accounts that were and/or are attached and frozen or restrained pursuant to the TRO and/or PI Order, or which are attached and frozen or restrained pursuant to any future order entered by the Court in this Action	N/A
Wish Discovery	The supplemental report identifying Defendants' Infringing Product Id, Merchant Id, Merchant Real Person Name, Email Address, Physical Address, Product Lifetime Units Sold and Product Lifetime GMV, provided by counsel for ContextLogic to Plaintiff's counsel pursuant to the expedited discovery ordered in both the TRO and PI Order	N/A
Motion for Default Judgment	Plaintiffs' Application for an Order to Show Cause Why Default Judgment and a Permanent Injunction Should Not be Entered Against Defaulting Defendants filed on March 13, 2019	40 - 43
Chung DJ Aff.	Affidavit by Andrew S. Chung in Support of Plaintiffs' Motion for Default Judgment	N/A
Show Cause Hearing	April 11, 2019 Show Cause Hearing on why default judgment and a permanent injunction should not be entered against Defaulting Defendants	N/A
Default Judgment Order	April 11, 2019 Order granting default judgment in favor of Plaintiffs and Plaintiffs' request for a permanent injunction	56
Scheduling Order	Scheduling Order for Damages Inquest entered on April 17, 2019	58
May 6, 2019 Order	May 6, 2019 Order extending the time for all parties to make their respective inquest submission by 14 days and directing Plaintiffs to serve Defaulting Defendants with the May 6, 2019 Order	60
May 10, 2019 Order	May 10, 2019 Order directing Plaintiffs to comply with the May 6, 2019 Order by 1) serving the Defendants with the	62

	same; and 2) filing proof of service with the Clerk of the Court	
Inquest Papers	Plaintiffs' inquest submissions in further support of Plaintiffs' Request for Statutory Damages and a Permanent Injunction filed on May 22, 2019	65-67
Yamali Inquest Aff.	Affidavit of Danielle S. Yamali in support of Plaintiffs' Request for Statutory Damages	66
Report and Recommendation	The Report and Recommendation entered on August 7, 2019 by Magistrate Judge Fox	80

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72(b) and Local Rule 72.1, Plaintiffs object to Magistrate Judge Fox's Report and Recommendation, recommending that no damages be awarded to Plaintiffs.[1] Plaintiffs respectfully submit that in light of the well-settled caselaw on the issue, including Your Honor's holding in *Off-White LLC v. A445995685, et al.*, No. 18-cv-2099 (LGS)(KNF), Dkt. 164 (S.D.N.Y. May 3, 2019), in addition to a near identical circumstance, as explained in Section IV(B) herein, where Judge Pauley granted damages despite a report and recommendation from Magistrate Judge Fox denying the same, (*see WowWee Grp., Ltd. v. Haoqin*, No. 17-cv-9893 (WHP)(KNF), 2019 U.S. Dist. LEXIS 48408 (S.D.N.Y. Mar. 22, 2019)), Plaintiffs have sufficiently established their entitlement to damages as a matter of law.

Plaintiffs are part of a large, multinational toy and entertainment company that designs and sells the Spin Master Products. Plaintiffs filed the instant action on November 13, 2018 against Defendants to protect themselves and their customers from, *inter alia*, large quantities of counterfeit children's toys sold by various sellers on Wish. This action has now advanced to the default judgment stage, and by Default Judgment Order dated April 11, 2019, the Honorable Lorna G. Schofield, granted default judgment and a permanent injunction in Plaintiffs' favor. By separate Order, the Court referred the matter to the Honorable Kevin Nathaniel Fox for an inquest into statutory damages. (Dkt. 55.) On August 7, 2019, Magistrate Judge Fox issued a Report and Recommendation. (Dkt. 80.)

It is Plaintiffs' position that Magistrate Judge Fox erred in recommending that the Court award no damages to Plaintiffs on the grounds that Plaintiffs failed to establish damages "with

[1] Where a defined term is referenced herein and not defined herein, the defined term should be understood as it is defined in the Glossary.

reasonable certainty." (Report and Recommendation, p. 10 *citing Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F. 3d 105, 111 (2d Cir. 1997)).[2] Plaintiffs respectfully submit that their request for statutory damages against each and every Defaulting Defendant is appropriate and reasonable pursuant to 15 U.S.C. § 1117(c) and 17 U.S.C. § 504(c).

II. PROCEDURAL HISTORY

In the interest of brevity, the procedural history is set forth in the Motion for Default Judgment, Inquest Papers, Chung DJ Aff. and Yamali Inquest Aff.

III. STATEMENT OF FACTS

Plaintiffs Spin Master are part of a large, multinational toy and entertainment company started in 1994 that designs and sells the Spin Master Products. Plaintiffs promote and sell the Spin Master Products throughout the United States and the world through major retailers, quality toy stores and online marketplaces. (Harrs Dec., ¶¶ 4-5.) One of Spin Master's most recent and successful products is Twisty Petz, which are bejeweled pets that transform into sparkly bracelets, necklaces or backpack accessories with a few simple twists. *Id*. at ¶ 6. Plaintiffs' Twisty Petz Products have achieved tremendous success and were named one of the "hottest toys for 2018" by the *New York Post* and included in *Amazon's 2018 Holiday Toy List*. *Id*. at ¶ 7.

While Plaintiffs have gained significant common law trademark and other rights in their Twisty Petz Products, through use, advertising and promotion, Plaintiffs have also protected their valuable rights by filing for and obtaining a federal trademark registration. *Id.* at ¶¶ 9-11. In

[2] While Magistrate Judge Fox cites to *Transatlantic Marine Claims* as the standard for Plaintiffs to establish damages, *Transatlantic Marine Claims* is distinguishable from the matter at bar as it does not involve a plaintiff requesting damages pursuant to either the Lanham Act or the Copyright Act.

addition, Spin Master also owns both registered and unregistered copyrights related to the Twisty Petz Products. *Id*. at ¶¶ 12-13.

Defaulting Defendants are located in China but conduct business in the U.S., including within this judicial district, and other countries through their User Accounts and Merchant Storefronts with and on Wish. (Complaint, Ex. D.) Plaintiffs retained New Alchemy Limited, a company that provides trademark infringement and other intellectual property research services to investigate and research manufacturers, wholesalers, and/or third-party merchants offering for sale and/or selling Counterfeit Products on Wish. (Arnaiz Dec., ¶¶ 3-4; Harrs Dec., ¶ 21; Wolgang Dec., ¶ 16.) Through their Merchant Storefronts, without Plaintiffs' authorization or consent, Defaulting Defendants were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products. (Arnaiz Dec., ¶ 6, Ex. A; Harrs Dec., ¶¶ 23-24; Complaint, Ex. D.)

Based on the discovery produced by ContextLogic, Defaulting Defendants collectively sold a minimum of 62,255 Counterfeit Products on Wish alone.[3] (Chung DJ Aff., ¶ 28, Ex. E.) In the experience of Plaintiffs' counsel, however, it is usual and customary for counterfeiters, such as Defaulting Defendants, to sell across multiple e-commerce platforms. (Chung DJ Aff., ¶ 30.) Therefore, Defaulting Defendants probably utilize other e-commerce platforms, such as eBay.com and Alibaba.com, as a matter of illustration, to circumvent the TRO and PI Order in order to continue to engage in counterfeiting and infringing activities, specifically the sale and/or offering for sale of Counterfeit Products. *Id*. at ¶ 31. Consequently, it is extremely likely that the number

[3] The individual breakdown of sales figures of Counterfeit Products for each and every Defaulting Defendant, as identified in the Wish Discovery, is attached to the Yamali Inquest Aff. as Exhibit E and Chung DJ Aff. as Exhibit E. Plaintiffs respectfully submit that Fed. R. Evid. 1006 authorizes the use of a summary sheet such as Exhibit E to establish damages in civil actions such as the instant action.

of sales of Counterfeit Products made by Defaulting Defendants greatly exceeds the numbers identified in the Wish Discovery. *Id.* at ¶ 32.

IV. ARGUMENT

A. PLAINTIFFS' REQUEST FOR STATUTORY DAMAGES AGAINST EACH AND EVERY DEFAULTING DEFENDANT UNDER THE LANHAM ACT OR COPYRIGHT ACT IS APPROPROATE AND REASONABLE

At the outset, with respect to Defendants angelcityer, caoping, MRY_Store, shenzhenenyiweikejiyouxiangongsi and global-spirit, these Defendants were included in Plaintiffs' Motion for Default Judgment and Inquest Papers, but subsequently, Plaintiffs reached a settlement with these Defendants and filed a Notice of Voluntary Dismissal. (Dkt 50.) Plaintiffs do not seek an award of statutory damages against these five Defendants as they were dismissed from this action on May 24, 2019. (Dkt. 69.)

Plaintiffs filed this action against Defaulting Defendants, among other Defendants, for trademark infringement, trademark counterfeiting and copyright infringement, among other causes of action. After reviewing the undisputed evidence, it became apparent that certain Defaulting Defendants infringed the Twisty Petz Mark while others infringed the Twisty Petz Work. Accordingly, in their Motion for Default Judgment and subsequent Inquest submission, Plaintiffs elected for statutory damages under the Copyright Act for four (4) Defaulting Defendants and under the Lanham Act for seventy (70) Defaulting Defendants. Plaintiffs are unaware of, and Magistrate Judge Fox cites to no caselaw barring Plaintiffs from recovering under both the Copyright Act and the Lanham Act as against separate Defendants in a single action. Moreover, Plaintiffs are not seeking to recover damages under both the Lanham Act and the Copyright Act for the same Defaulting Defendant. Thus, Plaintiffs respectfully submit that Magistrate Judge Fox

erred in determining that Plaintiffs request for damages under both the Lanham and Copyright Acts were contradictory.

Both the Lanham Act and the Copyright Act allow a plaintiff to elect either statutory damages or actual damages for willful infringement. *See* 15 U.S.C. § 1117(c) and 17 U.S.C. § 504(c). Magistrate Judge Fox found that Defaulting Defendants' conduct was willful (Report and Recommendation at p. 6), thus, it is axiomatic that Plaintiffs elected to request statutory damages pursuant to both the Lanham and Copyright Acts. Moreover, the rationale behind Plaintiffs' electing to request damages under different statutes is directly correlated to the lack of discovery received in this action. Specifically, the lack of complete information regarding Defaulting Defendants' sales, profits and infringements made Plaintiffs' request for statutory damages appropriate. *See, e.g. Nike, Inc v. Top Brand Co.*, No. 00Civ. 8179 (KMW) (RLE), 2006 U.S. Dist. LEXIS 76543 (S.D.N.Y. Feb. 27, 2006). As articulated in Plaintiffs' Inquest Papers, this case presents the exact circumstances that Congress envisioned in enacting the statutory damages provision of the Lanham Act. Specifically, the purpose of Section 1117(c) is to address the difficulty of calculating actual damages caused by counterfeiters. *See e.g., Pitbull Prods., Inc. v. Universal Netmedia, Inc.*, No. 07 Civ. 1784 (RMB)(GWG), 2007 U.S. Dist. LEXIS 82201, at *7 (S.D.N.Y. Nov. 7, 2007); *Rodgers v. Anderson*, No. 04 Civ. 1149 (RJH) (AJP), 2005 U.S. Dist. LEXIS 7054 (S.D.N.Y. Apr. 26, 2005) ("The rationale for this section is practical inability to determine profits or sales made by counterfeiters."); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 315 F. Supp. 2d 511, 520 (S.D.N.Y. 2004) ("Congress added the statutory damages provision of the Lanham Act in 1995 because 'counterfeiters' records are frequently nonexistent, inadequate, or deceptively kept . . ., making proving actual damages in these cases extremely difficult if not

impossible.") (internal citations omitted), *amended in part*, 328 F. Supp. 2d 439 (2004); *Tiffany (NJ) Inc. v. Luban*, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003) (same).

The Lanham Act provides that, at any time before final judgment is rendered, a trademark owner may elect to recover an award of statutory damages, rather than actual damages, for the use of a counterfeit mark in connection with goods or services in the amount of: (1) "not less than $1,000 or more than $200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just" or (2) if the use of the counterfeit mark is found to be willful, up to "$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just." 15 U.S.C. § 1117(c). Furthermore, Section 504(c) of the Copyright Act allows a copyright owner to elect statutory damages in the amount of "not less than $750 or more than $30,000 as the court considers just" with respect to any one work. Alternatively, where a court finds willful infringement, "the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.00." 17 U.S.C. § 504(c)(l)-(2). In light of Defaulting Defendants' knowing and intentional offering for sale and/or sale of Counterfeit Products, Plaintiffs seek statutory damages awards against each and every Defaulting Defendant.[4] Moreover, since Defaulting Defendants defaulted and failed to participate in discovery, the amount of Defaulting Defendants' profits is unknown. (Chung DJ Aff., ¶ 24.) Accordingly, Plaintiffs are deprived of the ability to prove a specific amount of actual damages and instead have been left with no choice but to seek an award of statutory damages. Plaintiffs' respectful requests for statutory damages are based upon a combined analysis of the following: 1) the Wish Discovery, which shows the number of sales of Counterfeit Products made by each

[4] Plaintiffs respectfully submit that they are entitled to post-judgment interest calculated pursuant to the statutory rate. "Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a).

Defaulting Defendant on Wish and 2) each Defaulting Defendants' wrongful use of the Twisty Petz Mark and Twisty Petz Work. (Yamali Inquest Aff., ¶ 19, Ex. E.) As such, Plaintiffs requested tiered statutory damages in proportion to the varied nature of Defaulting Defendants' infringing activities.

In the Report and Recommendation, Magistrate Judge Fox asserts that Plaintiffs set forth insufficient evidence in support of their request for tiered statutory damages. Plaintiffs respectfully submit that they put forth sufficient evidence in support of their request, including a complete analysis of Defaulting Defendants' infringing and counterfeiting activities on the Wish platform in the undisputed evidence. (Yamali Inquest Aff., Ex. E.) Had the Defaulting Defendants participated in this action, Plaintiffs would likely have more comprehensive documents and information to support their requests for damages. Further, as articulated in Plaintiffs' Inquest Papers, the number of sales of Counterfeit Products made by Defaulting Defendants as identified in the Wish Discovery are the lowest possible number of sales as it is likely that Defaulting Defendants' sales of Counterfeit Products are significantly higher than what has been identified through the limited discovery Plaintiffs' were able to obtain from the Third Party Service Providers. Plaintiffs were only able to set forth evidence they were able to obtain independently or through the limited discovery provided by the Third Party Service Providers.

In this district, even where there was no concrete information about the defendants' actual sales figures and profits, Courts have not hesitated to award higher statutory damages in favor of plaintiffs. *See, e.g., Pitbull Prods., Inc. v. Universal Netmedia, Inc.*, No. 07 Civ. 1784 (RMR) (GWG), 2007 U.S. Dist. LEXIS 82201, at *10–*11(S.D.N.Y. Nov. 7, 2007) (awarding plaintiff $250,000.00 per mark for two marks where defendant's conduct was willful and defendant's default "left the Court with no information as to any of the factors relating to the defendants'

circumstances," and noting that "Courts have awarded similar damages in other cases in which there was little information as to the defendants' infringement"); *Rodgers v. Anderson*, No. 04 Civ. 1149 (RJH) (AJP), 2005 U.S. Dist. LEXIS 7054, at *8 (S.D.N.Y. Apr. 26, 2005) (awarding $250,000.00 and noting that the amount "is consistent with (indeed, lower than) awards in similar cases," and citing cases); *see also All-Star Mktg. Grp., LLC v. Media Brands Co.*, 775 F. Supp. 2d 613, 624-25 (S.D.N.Y. 2011) (collecting cases awarding between $25,000.00 and $250,000.00 per mark). Awards of $1,000,000.00 and higher have been granted to plaintiffs in similar matters before this Court. *See, e.g., Louis Vuitton Malletier & Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567, 584 (S.D.N.Y. 2002) (awarding $1,000,000 in statutory damages for defendant's infringement of six Louis Vuitton marks, where the record contained no evidence of defendants' sales, nor the number of hits the website received); *Rolex Watch U.S.A., Inc. v. Brown*, No. 01 Civ. 9155 (JGK) (AJP), 2002 U.S. Dist. LEXIS 10054, at *8-9 (S.D.N.Y. June 5, 2002) (where the Defendant sold 10,000 counterfeit watches, the Court found $1,000,000 in statutory damages to be appropriate and sufficient).[5]

Further, Magistrate Judge Fox's assertion that Plaintiffs failed to explain why tiered requests are appropriate is inaccurate. In fact, Plaintiffs cited to a litany of caselaw where Judges in this Court have awarded tiered statutory damages ranging from $50,000.00 to $2,000,000.00, under similar circumstances, correlating with either the number of infringing uses or the number of infringing sales.[6] (Inquest Papers, Memorandum of Law at Section IV(B).) Plaintiffs explained

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[5] *See also, e.g., Mattel, Inc. v. 1994_honeymoon, et al.*, No. 18-cv-10427-KPF, Dkt. 59 (S.D.N.Y. Mar. 27, 2019); *Mattel, Inc. v. 276470, et al.*, No. 18-cv-10440-KPF, Dkt. 62 (S.D.N.Y. Mar. 27, 2019); *Off-White LLC v. A445995685, et al.*, No. 18-cv-2099-LGS-KNF, Dkt. 129 (S.D.N.Y. Nov. 16, 2018).

[6] *See, e.g., Nike, Inc. v. Wu*, 349 F. Supp. 3d 310 (S.D.N.Y. 2018); *Tiffany (NJ) LLC v. Forbse*, No. 11-cv-4976 (NRB), 2015 US Dist. LEXIS 129647, at *10-11 (S.D.N.Y. Sep. 22, 2015); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458 (RJS), 2010 U.S. Dist. LEXIS 5831, at *15 (S.D.N.Y. Jan. 20, 2010); *see also Spin Master Ltd. v. Alan Yuan's Store*, 325 F. Supp. 3d 413, 427-428 (S.D.N.Y. 2018); *Mattel, Inc. v. 1994_honeymoon, et al.*, No. 18-cv-10427-KPF, Dkt. 59 (S.D.N.Y. Mar. 27, 2019); *Mattel, Inc. v. Aaron's Fashion Store, et al.*, No. 18-cv-10437-KPF,

that the tiered requests ranging between $50,000.00 to $2,000,000.00 were appropriate as they were within the range of awards granted by courts in this district under similar circumstances. In fact, in an analogous trademark counterfeiting and infringement case, *Off-White LLC v. A445995685, et al.*, Your Honor granted awarded tiered statutory damages ranging from $100,000.00 to $2,000,000.00. Case No. 18-cv-2099 (LGS)(KNF), Dkt. 164 (S.D.N.Y. May 3, 2019).

Finally, Magistrate Judge Fox indicates that no explanation was provided with the references to "Exhibit D" in Exhibit E annexed to Plaintiffs' Inquest Papers. To clarify, Exhibit E of Plaintiffs' Inquest Papers was referencing Exhibit D to the Complaint, which includes printouts of the Infringing Listings for Counterfeit Products on Defendants' Merchant Storefronts, not Exhibit D to the Inquest Papers, which is the redacted Wish Discovery. The references to Exhibit

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Dkt. 79 (S.D.N.Y. Mar. 27, 2019); *Mattel, Inc. v. 276470, et al.*, No. 18-cv-10440-KPF, Dkt. 62 (S.D.N.Y. Mar. 27, 2019); *Tapestry, Inc., et al. v. baoqingtianff, et al.*, No. 18-cv-7650-PAE, Dkt. 34 (S.D.N.Y. Jan. 8, 2019); *Mattel, Inc. v. 86755, et al.*, No. 18-cv-8825-JSR, Dkt. 47 (S.D.N.Y. Dec. 17, 2018); *Ideavillage Prods. Corp. v. 711 Market, et al.*, No. 18-cv-7832-JMF, Dkt. 61 (S.D.N.Y. Dec. 12, 2018); *Wow Virtual Reality, Inc. v. BIENBEST, et al.*, No. 18-cv-3305-VEC, Dkts. 210-289, 302 (S.D.N.Y. Dec. 5, 2018); *Moose Toys Pty Ltd., et al. v. 963, et al.*, No. 18-cv-2187-VEC, Dkts. 160-251, 257 (S.D.N.Y. Nov. 30, 2018); *Off-White LLC v. A445995685, et al.*, No. 18-cv-2099-LGS-KNF, Dkt. 129 (S.D.N.Y. Nov. 16, 2018); *Ideavillage Prods. Corp. v. 29shyans2012, et al.*, 18-cv-6266 (AT), Dkt. No. 49 (S.D.N.Y. Nov. 6, 2018); *WowWee Group Limited, et al. v. A249345157, et al.*, No. 17-cv-9358 (VEC), Dkts. 46-179 (S.D.N.Y. July 31, 2018); *Ideavillage Prods. Corp. v. Bling Boutique Store, et al.*, No. 16-cv-9039 (KMW), Dkt. 92 (S.D.N.Y. July 24, 2018); *Allstar Marketing Group, LLC v. _GB Housewear Store, et al.*, No. 17-cv-7596 (SHS), Dkt. 92 (S.D.N.Y. July 9, 2018); *Rovio Entertainment Ltd. and Rovio Animation Oy v. Best Baby and Kid Store, et al.*, No. 17-cv-4884 (KPF), Dkt. 38 (S.D.N.Y. June 28, 2018); *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565 (JMF), Dkt. 49 (S.D.N.Y. June 7, 2018); *HICKIES, Inc. v. SHOP1668638 Store a/k/a Professional Shoes Company, et al.*, No. 17-cv-9101 (ER), Dkt. 22 (S.D.N.Y. May 4, 2018); *Ideavillage Prod.s Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., LTD., et al.*, No. 17-cv-9099 (JMF), Dkt. 34 (S.D.N.Y. March 1, 2018); *Ideavillage Prods. Corp. v. Chinafocus, et al.*, No. 17-cv-3894 (RA), Dkt. 50 (S.D.N.Y. Feb. 9, 2018); *Ontel Prods. Corp. v. Auto Mall, et al.*, No. 17-cv-5190 (AT), Dkt. 36 (S.D.N.Y. Nov. 27, 2017); *Rovio Entertainment Ltd. and Rovio Animation Oy v. Angel Baby Factory d/b/a Angelbaby_Factory, et al.*, No. 17-cv-1840 (KPF), Dkt. 65 (S.D.N.Y. Sept. 13, 2017); *Ontel Prods. Corp. v. Airbrushpainting Makeup Store, et al.*, No. 17-cv-871 (KBF), Dkt. 40 (S.D.N.Y. June 29, 2017); *Belstaff Grp. SA v. Doe*, No. 15-cv-2242 (PKC) (MHD), 2015 U.S. Dist. LEXIS 178124, at *10 (S.D.N.Y. June 18, 2015) and *Tory Burch LLC v. Yong Sheng Int'l Trade Co.*, No. 10 Civ. 9336 (DAB), 2011 U.S. Dist. LEXIS 158882, at *8 (S.D.N.Y. May 13, 2011).

D pinpointed the Defaulting Defendants' wrongful use of the Twisty Petz Work and/or Twisty Petz Mark in the evidence.

B. JUDGE PAULEY'S DECISION IN *WOWWEE GROUP., LTD. V. HAOQIN* WARRANTS A REJECTION OF MAGISTRATE JUDGE FOX'S REPORT AND RECOMMENDATION

In *WowWee Grp., Ltd.*, a matter analogous to the one at bar, Magistrate Judge Fox issued a nearly identical Report and Recommendation, recommending that no damages be awarded to the plaintiffs, and that the plaintiffs' motion for injunctive relief be denied. 2019 U.S. Dist. LEXIS 48408. Magistrate Judge Fox's Report and Recommendation was ultimately rejected by the Honorable William H. Pauley III. *Id*. at *2. In *WowWee Grp., Ltd.*, the evidence submitted in support of the plaintiffs' request for statutory damages consisted of an affidavit from the plaintiffs' attorney and a summary chart prepared by the plaintiffs detailing the number of infringements and the number of counterfeit products sold by each defaulting defendant. *Id*. at *8. While Magistrate Judge Fox found this evidence to be insufficient, Judge Pauley rejected his findings, holding that barring statutory damages "based on a plaintiff's inability to prove its losses with certainty undermines the express purpose of the remedy. Even if Plaintiffs' submissions do not justify their proposed award, this Court may still grant some level of damages based on a holistic consideration of the seven factors applied in copyright cases." *Id.* at *9 (citing *Lane Crawford LLC v. Kelex Trading (CA) Inc.*, 2013 U.S. Dist. LEXIS 170239, 2013 WL 6481354, at *3 (S.D.N.Y. Dec. 3, 2013), *report and recommendation adopted*, 2014 U.S. LEXIS 48408, 2014 WL 1338065 (S.D.N.Y. Apr. 3, 2014) (awarding statutory damages without evidence as to how many marks had been infringed, defendants' revenue, or plaintiffs' lost profits)). Likewise here, Plaintiffs submitted the same type of evidence as the plaintiffs in *WowWee* in support of their request for statutory damages (*i.e.*, an affidavit from Plaintiffs' attorney and a summary chart detailing the

number of infringements and the number of Counterfeit Products sold by each Defaulting Defendant). Despite his report and recommendation being rejected in *WowWee*, Magistrate Judge Fox issued the same recommendation herein and based his determination on the very same analysis that was ultimately rejected by Judge Pauley.

C. PLAINTIFFS ARE ENTITLED TO AN ORDER AUTHORIZING THE TRANSFER OF DEFAULTING DEFENDANTS' FROZEN ASSETS

Plaintiffs further renew their request for an order authorizing the transfer of Defaulting Defendants' Frozen Assets to satisfy any damages awarded to Plaintiffs. Without the issuance of a post-judgment asset transfer order, the statutory damages awards become meaningless – to use a common colloquialism, all bark but no bite. Simply put, if the Court denies Plaintiffs' respectful requests for an order transferring Defendants' Frozen Assets in partial or complete satisfaction of the statutory damages awarded to it, not only was the extensive motion practice futile, the deterrent purpose of statutory damages contemplated by Congress will be undermined. *See* 142 Cong Rec H 5776, at 1-2, 10 (1995). Plaintiffs respectfully submit that denying a post-judgment asset transfer order would result in a Pyrrhic victory, effectively denying Plaintiffs of the money judgments to which they are entitled.

In an analogous case, *Off-White LLC v. A445995685, et al.*, Your Honor granted the same exact relief requested, an asset transfer, to another plaintiff to satisfy the statutory damages awarded in that matter. Case No. 18-cv-2099 (LGS)(KNF), Dkt. 164 (S.D.N.Y. May 3, 2019). Accordingly, for the reasons set forth herein, and in Plaintiffs' Inquest Papers, Plaintiffs respectfully submit that the Court should enter an order granting Plaintiffs' request for an order authorizing the transfer of Defaulting Defendants' Frozen Assets in satisfaction of the judgment.

V. CONCLUSION

Based on the foregoing reasons, Plaintiffs respectfully request that the Court reject Magistrate Judge Fox's Report and Recommendation and grant their request for statutory damages and issue an order authorizing the release and transfer of Defaulting Defendants' Frozen Assets to satisfy the damages awarded to Plaintiffs in its entirety.

Dated: August 21, 2019

Respectfully submitted,

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