

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 21-CV-61332-RAR

CHANEL, INC.,

Plaintiff,

v.

ANALUXURYFASHION, et al.

Defendants.

**DEFENDANTS SHENZHEN XINSU IMPORT AND EXPORT CO., LTD.
AND FOSHAN JIYUANMEI ELECTRONIC COMMERCE CO., LTD.’S
MOTION TO SET ASIDE FINAL DEFAULT JUDGMENT**

Defendants Shenzhen Xinsu Import and Export Co., Ltd. (Def. #45 and #48) and Foshan Jiyuanmei Electronic Commerce Co., Ltd. (Def. #42) (“Defendants”), hereby move, pursuant to Fed. R. Civ. P. 60(b), to set aside the default final judgment entered on October 13, 2021 (Dkt. 37)

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 12, 2022, nearly one year after this Court’s entry of a default final judgment, Defendants’ appeal was dismissed by the Eleventh Circuit. (Exh. 1). Defendants were previously represented by counsel. Or so they believed. (Exh. 2 at ¶¶ 4-6; Exh. 3 at ¶¶ 4-6). Then, after nearly a year passed by with the appeal pending and having already been dismissed twice on procedural grounds, Defendants were advised by prior counsel that a voluntary dismissal of the appeal would be an appropriate strategy to facilitate settlement discussions with Plaintiff. (Exh. 2 at ¶ 6; Exh. 3 at ¶ 6). Assuming the worst and concerned about the viability of the appeal, Defendants took immediate action and contacted the undersigned counsel on October 6, 2022 to ascertain the status of their appeal and this case. (Exh. 2 at ¶ 8; Exh. 3 at ¶ 8.)

The undersigned counsel made an immediate effort to confer with Plaintiff's counsel and was able to discuss the present motion with Plaintiff's counsel the following day. The undersigned counsel was formally engaged on October 10, 2022 and the immediate motion followed.

As further detailed below, good cause exists for this Court to set aside the final default judgment because Defendants have been substantially prejudiced by the acts of prior counsel. Indeed, the Eleventh Circuit dismissed Defendant's appeal not once, but twice, because of prior counsel's failure to file transcript order forms and appendices to Defendants' briefs. Defendants acted diligently in securing representation from the undersigned counsel to rectify the situation and their failure to appear was the result of excusable neglect. Alternatively, the exceptional and unfortunate circumstances here warrant the granting of relief pursuant to the "catch-all" provision under Fed. R. Civ. P. 60(b)(6).

ARGUMENT

The Eleventh Circuit has "a strong policy of determining cases on their merits and...therefore view[s] defaults with disfavor." *In re: Worldwide Web Systems Inc.*, 328 F. 3d 1291, 1295 (11th Cir. 2003). "[C]ourts generally have found it appropriate for trial judges to exercise their discretion in favor of setting aside defaults so that cases may be decided on their merits." *Flores v. Labor Grp. Corp.*, No. 09-20335-CIV, 2013 WL 12200417, at *1 (S.D. Fla. Nov. 13, 2013).

A district court "may set aside a final default judgment under [Federal Rule of Civil Procedure] 60(b)." Fed. R. Civ. P. 55(c). "The exclusive method for attacking a default judgment in the district court is by way of a Rule 60(b) motion." *Nat'l Loan Acquisitions Co. v. Pet Friendly, Inc.*, 743 F. App'x 390, 391 (11th Cir. 2018) (per curiam) (citing *Gulf Coast Fans, Inc. v. Midwest Elects. Imps., Inc.*, 740 F.2d 1499, 1507 (11th Cir. 1984)). On a proper motion, and if appropriate,

a district court may relieve a party from default judgment based on:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b).

Fed. R. Civ. P. 60(b).

The movant seeking relief under Rule 60(b) “must demonstrate a justification so compelling that the [district] court [is] required to vacate its order.” *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (quoting *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993)). “By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 454 F. Supp. 3d 1259, 1268 (S.D. Fla. 2020). “[W]hether to grant the requested [Rule 60(b)] relief is . . . a matter for the district court’s sound discretion.” *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014) (alteration in original) (quoting *Cano*, 435 F.3d at 1342). However, the defaulting party must bring a Rule 60(b) motion “no more than a year after the entry of the judgment.” See Fed. R. Civ. P. 60(c)(1); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393 (1993) (“If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party’s neglect must be excusable.”).

I. THE JUDGMENT SHOULD BE SET ASIDE PURSUANT TO FRCP 60(b)(1)

The default final judgment should be set aside because Defendant’s failure to appear was

due solely to acts of prior counsel which constitute excusable neglect and because Defendants have acted diligently under the circumstances here.

Pursuant to Fed. R. Civ. P. 60(b)(1), a default judgment can be set aside for “mistake inadvertence, surprise or excusable neglect.” To set aside a default judgment for excusable neglect in the Eleventh Circuit, the defaulting party must show: (1) it had a meritorious defense; (2) granting the motion would not prejudice the other party; and (3) they had a “good reason” for failing to respond. *MTACC Ltd. v. CHF Corp.*, No. 20-22383-Civ-WILLIAMS/TORRES, at *6 (S.D. Fla. Dec. 24, 2020) (citing *Grant v. Pottinger-Gibson*, 725 F. App’x 772, 775 (11th Cir. 2018)). The determination of what constitutes excusable neglect is generally an equitable one, taking into account the totality of the circumstances surrounding the party’s omission.” *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 934 (11th Cir. 2007). Defendants have met their burden and each factor is addressed in turn.

A. Defendants Have Meritorious Defenses

The first element requires a moving party to establish a meritorious defense “by a clear and definite recitation of the facts.” *Gibbs v. Air Canada*, 810 F.2d 1529, 1538 (11th Cir. 1987). “A general denial of the plaintiff’s claims contained in an answer or another pleading is not sufficient.” *S.E.C. v. Simmons*, 241 F. App’x 660, 664 (11th Cir. 2007). Rather, the moving party “must make an affirmative showing of a defense that is likely to be successful.” *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986).

Rather than proceeding with a single counterfeit trademark infringement complaint against a single defendant, Plaintiff has instead opted to over litigate this matter by asserting a number of causes of action against over three hundred defendants. Plaintiff’s apparent strategy is to initiate cases such as the instant one and name as many unrelated defendants as possible that they can find.

In utilizing this approach, Plaintiff asserts a myriad of various allegations for which it purports as amounting to some level of “egregious” and “willful” counterfeiting activity which it claims to suffer from. While this strategy appears to have garnered the approval of this Court, said approval should not simply be rubber-stamped by the Court, especially where Plaintiff’s allegations are conclusory and factually unsupported.

Defendants take issue with Plaintiff’s allegations which are comprised of legal conclusions and lack any factual basis or support as to Defendant. Defendants have a meritorious defense to, or at the very least, maintain a position which is entirely opposite to Plaintiff, and which would require that the parties engage in the discovery process to obtain a factual resolution for at the very least.

“¶ 25 Defendants’ Counterfeit Goods are of a quality substantially different than that of Chanel’s genuine goods. Defendants are actively using, promoting and otherwise advertising...”

Defendants contend that Plaintiff has failed to establish any evidence or facts during the pendency of this action which goes to show that Defendant’s allegedly counterfeit goods (specifically here, hats) are substantially different quality than Plaintiff’s goods. Defendants further contend that Defendants’ products are of equal or better quality than what Plaintiff contends to be genuine goods.

“¶ 32 Defendants’ above identified infringing activities are likely to cause confusion, deception, and mistake in the minds of consumers before, during, and after the time of purchase. Moreover, Defendants’ wrongful conduct is likely to create a false impression and deceive customers, the public, and the trade into believing there is a connection or association between Chanel’s genuine goods and Defendants’ Counterfeit Goods, which there is not.

Defendants argue that Plaintiff has not made any requisite showing that Defendants’ alleged activities have actually caused any of the harms it alleges which occurs to consumers.

Defendants further contend that the conduct as alleged fails to deceive anyone that the products sold have any connection or association with Plaintiff's goods. In other words, Defendants' contend that consumers who are shopping for the alleged counterfeit products are well-aware of the products that they are purchasing.

B. Plaintiff Will Not Be Prejudiced

A "delay is insufficient for prejudice as is requiring a party to prove its case on the merits." *Coniglio v. Bank of Am., NA*, 638 F. App'x 972, 975 (11th Cir. 2016). Defendants are ready, willing, and able to defend the merits as should the Plaintiff be willing to prosecute this matter. Otherwise, Plaintiff should have not commenced this action.

Plaintiff has not expended a great deal of effort or resources to date. This was a pure default against over 300 defendants and there has not been any significant motion practice, discovery, dispositive pleadings, or trial. Plaintiff simply filed a suit that it has filed literally hundreds of times before, which is improper where the allegations asserted are irrelevant or overreaching as to Defendants. As discussed below, while the judgment was entered nearly one year ago, Defendants should not be penalized for the delays caused by prior counsel. Defendants sincerely lament the entry of this default final judgment, however, urges the Court to consider that Plaintiff will simply be unaffected in terms of prejudice and Defendant is ready and prepared to defend this case on the merits.

C. Excusable Neglect

Defendants' circumstance presents a strange and unfortunate situation, but Defendants were by all standards diligent and attentive to this matter. Defendants should not be penalized for their excusable neglect from any harm caused by prior counsel. This is not a case involving an attorney's inattention or busy litigation docket. Rather, this case involves at least two different

countries, the United States and China, whose differences are astoundingly different as they pertain to the rule of law, culture, tradition, and most importantly, language. Defendant's diligence cannot be understated. Defendants are a Chinese companies located in and doing business primarily in China, went through lengths to obtain counsel. Defendants diligently retained counsel and attempted to communicate as best it could despite the obvious language barrier and difference in time zones.

The Eleventh Circuit "has demonstrated its wariness of grants of Rule 60(b)(1) relief for excusable neglect based on claims of attorney error," *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1114 (11th Cir. 1993), because, even in cases where an attorney commits gross misconduct, a party must still demonstrate his own diligence. *See Securities and Exchange Commission v. Simmons*, 241 F. App'x 660, 664 (11th Cir. 2007) ("At the very least, a party must demonstrate his own diligence, even where the attorney commits gross misconduct."). Defendants should not be penalized for errors of prior counsel, as Defendants acted diligently.

While the typical notion that "a person voluntarily chooses his or her attorney as representative" and therefore, "cannot avoid consequences of this choice in the event of acts or omissions by the attorney" is understandably the norm for courts in this circuit, it must be stressed that this is not a case of a domestic defendant. Rather, this case involves foreign defendants who reside in non-English, non-Western countries, and are haled into the courts of American jurisdiction by way of selling a single, allegedly counterfeit product not to a consumer, but to Plaintiff's counsel and parties acting in cahoots therewith. *cf. (Maurer Rides USA, Inc. v. Beijing Shibaolai Amusement Equip. Co.*, No. 6:10-cv-1718-Orl-37KRS, at *12-13 (M.D. Fla. July 23, 2014) ("Fully aware that this case had been filed against them, Defendants chose—based on the advice of an attorney whom they never retained and who was not licensed to practice in Florida—

not to answer the Complaint and instead to rely on the possibility that service had been improperly effectuated.”).

In *Maurer Rides*, supra, the defendant had actual notice of the suit and, despite having an initial consultation with counsel who gave ill-fated advice, the defendant there “did not monitor the case or retain counsel to do so” for nearly a year. *Id.* at 13. The court ultimately concluded that the defendant “made no efforts to ensure that the case was progressing as the attorney had predicted, nor did they take any other action to make sure that their interests were being protected.” *Id.* Unlike the defendant in *Maurer Rides*, Defendants acted diligently after being notified that a suit had been filed by retaining prior counsel. Defendants did not have any other reason to believe that the case was not progressing through the appellate court, and immediately sought for and retained new counsel after learning that the appeal was dismissed. (Exh. 2, at ¶¶ 6-7; Exh. 3 at ¶¶ 6-7.) Simply put, Defendants have acted diligently and reasonably under these unique circumstances and setting aside the final default judgment is warranted for such excusable neglect.

Notwithstanding that Defendants dismissed their appeal on advice of counsel, the impropriety of the appeal itself warrants an exercise of discretion from the Court to grant the relief requested here. *MTACC Ltd. v. CHF Corp.*, No. 20-22383-Civ-WILLIAMS/TORRES, at *14 (S.D. Fla. Dec. 24, 2020) (“*See, e.g., Community Dental Servs. v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002) (concluding that a defendant was entitled to relief under 60(b)(6) where his lawyer's gross negligence led to a default judgment and the lawyer had repeatedly misrepresented to the defendant that the case was proceeding smoothly).”).

II. THE JUDGMENT SHOULD BE SET ASIDE UNDER FRCP 60(b)(6)’S “CATCH-ALL” PROVISION

Alternatively, the default final judgment should be set aside pursuant to the catch-all “any other reason that justifies relief” provision under Fed. R. Civ. P. 60(b)(6). “This clause is a broadly

drafted umbrella provision which has been described as a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.” *Griffin v. SwimTech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Defendants acknowledge that this is an “extraordinary remedy,” but these are “exceptional circumstances” which warrant relief. *Id.*

A. Plaintiff’s Evidence Fails to Support a Finding of Willful Infringement

"District courts have wide discretion in awarding statutory damages." *Automobili Lamborghini SpA v. Lamboshop, Inc.*, No. 2:07-CV-00266-JES-SPC, 2008 WL 2743647, at * 5 (M.D. Fla. Jun. 5, 2008). In calculating statutory damages under Section 1117(c), courts have generally considered: "(1) the expenses saved and profits reaped; (2) the revenue lost by the plaintiff; (3) the value of the copyright; (4) the deterrent effect of others besides the defendant; (5) whether the defendant's conduct was innocent or willful; (6) whether a defendant cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant." *Luxottica Grp. S.p.A. v. Casa Los Martinez Corp.*, No. 1:14-cv-22859-JAL, 2014 WL 4948632, at *4 (S.D. Fla. Oct. 2, 2014). "'Statutory damages are not intended to provide a plaintiff with a windfall recovery;' they should bear some relationship to the actual damages suffered." *Clever Covers, Inc. v. Sw. Fla. Storm Def., LLC*, 554 F.Supp.2d 1303, 1313 (M.D. Fla. 2008) (quoting *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F.Supp. 560, 568-69 (S.D.N.Y. 1995))

Here, the evidence presented by Plaintiff fails to establish Defendants’ willfulness and the allegations as to Defendants’ conduct insufficiently supports a finding of willfulness. "A finding of willful infringement-violative conduct that the defendant knew to be improper and done in bad faith-justifies an award of heightened damages." *Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472, 1476 (11th Cir .1991). Maximum statutory damages award is particularly

appropriate for trademark infringement that is markedly egregious or is otherwise exceptional. *See, e.g., Microsoft Corp. v. Gordon*, No. 1:06-CV-2934-WSD, 2007 WL 1545216 (N.D. Ga. May 24, 2007) ("The Court believes that statutory damage maximums should be reserved for cases of notable scope or particularly egregious conduct.")

Here, the only evidence relied upon by Plaintiff in support of its motion for final default judgment specifically as to Defendants included only evidence indicating that a single allegedly infringing and counterfeit hat was sold by Defendants. Plaintiff's allegations, as a whole, do not apply to Defendants and certainly the sale of a single allegedly counterfeit hat does not support a finding of willfulness. Accordingly, the default final judgment should be set aside under Rule 60(b)(6) in the interest of equity and fairness.

B. Awarding \$2,000,000 in Statutory Damages is Unjust Where Courts Within This District Have Routinely Ordered Lower Damages Per Chanel Mark

Relief pursuant to Rule 60(b)(6)'s catch-all provision must be granted where the award of \$2,000,000 in statutory damages against Defendants is unsupported by evidence and unjustly excessive given the circumstance. Plaintiff sought the maximum statutory damages for willful conduct, \$2,000,000.00 per mark counterfeited. However, the facts as alleged do not justify imposing the statutory maximum. Courts in this very district have refused to award Plaintiff the maximum amount of statutory damages despite such other cases having facts which are far more egregious than the ones alleged against Defendants here.

Unlike well-pled allegations of fact, allegations relating to the amount of damages are not admitted by virtue of default. *Id.* Rather, the Court must determine both the amount and character of damages. *Id.* (citing *Miller v. Paradise of Port Richey, Inc.*, 75 F. Supp. 2d 1342, 1346 (M.D. Fla. 1999)). Therefore, even in the default judgment context, "[a] court has an obligation to assure that there is a legitimate basis for any damage award it enters ..." *Anheuser Busch, Inc. v. Philpot*,

317 F.3d 1264, 1266 (11th Cir. 2003). *See also Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1544 (11th Cir. 1985) (explaining that damages may be awarded on default judgment only if the record adequately reflects a basis for an award of damages).

Courts within this district have held in similar cases involving the same Plaintiff here that a reasonable calculation of damages per Chanel trademark infringement is \$6,000 per mark. Plaintiff has previously suggested elsewhere, and courts within this district have agreed, that the appropriate statutory award in the normal case is \$6,000.00 per mark counterfeited. *Chanel Inc. v. 7perfecthandbags.com*, No. 1:12-cv22057-PAS, DE 207, p. 14. ("Chanel respectfully suggests the Court could start with a baseline of the statutory award of \$1,000.00, treble it to reflect Defendants' willfulness, and then double the product for the purpose of deterrence.").

Here, Plaintiff has provided little support to substantiate a maximum statutory award against Defendants. Plaintiff's counsel provided declarations which indicated that a single sale was made. Notwithstanding that said sale was made to a party affiliated with Plaintiff, a single sale of an allegedly infringing counterfeit product does not justify a maximum award. In addition, the evidence that Plaintiff proffered indicates that Defendant allegedly sold a single type of product, bearing at most just two Chanel trademarks.

Selling a single type of product and purportedly infringing upon two out of twenty-three trademarks as Plaintiff claims in this action does not justify a maximum award. *See Chanel, Inc. v. P'Ship or Unincorporated Ass'n*, No. 1:12-cv-22745, 2014 WL 352208, at * 7 (S.D. Fla. Jan. 31, 2014) (noting \$6,000 per mark to be customary, but awarding \$18,000 per mark infringed in case involving Chanel counterfeit sunglasses); *Coach, Inc. v. Cosmetic House*, No. 10-2794 (WHW), 2011 WL 1211390, at * 6-7 (D.N.J. Mar. 29, 2011) (awarding \$10,000 per mark infringed as to "numerous" Coach counterfeit sunglasses sold for \$5.00 each). The Court should

grant relief under Rule 60(b)(6)'s catch-all provision and reduce the amount of statutory damages to an amount in-line with other cases involving the same Chanel trademarks.

At the very least, the Court should set aside the default final judgment so as to require Plaintiff to submit evidence to substantiate the claims against Defendants. *See Maurer Rides USA, Inc. v. Beijing Shibaolai Amusement Equip. Co.*, No. 6:10-cv-1718-Orl-37KRS, at *15 (M.D. Fla. July 23, 2014) ("Nevertheless, the Court will permit Plaintiffs to move for a new damages award. If they choose to do so, their motion should: (1) identify which evidence, if any, is available now that was unavailable to the Court during the first damages hearing; and (2) address why that evidence justifies issuing monetary relief. If Plaintiffs fail to file a timely and compliant motion, the Court will enter Second Amended Judgments without awarding damages.").

CONCLUSION

Defendants' motion to set aside the default final judgment should be granted.

Dated: October 13, 2022

Respectfully submitted,

/s/ Edward Chen

Edward Chen (CA Bar #312553)
(*pro hac vice pending*)

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Counsel for Defendants

**CERTIFICATE OF GOOD FAITH CONFERENCE; CONFERRED BUT UNABLE TO
RESOLVE ISSUES PRESENTED IN THE MOTION**

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues but has been unable to resolve the issues.

Dated: October 13, 2022

By: /s/ Edward Chen
Edward Chen (CA Bar #312553)
(*pro hac vice pending*)