UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Ryan James McMillin, Debtor.	Case No.: 2:19-bk-12402-ER Adv. No.: 2:19-ap-01137-ER
Elite Optoelectronics Co., Ltd a China Limited Liability Company, Plaintiff, v. Ryan James McMillin, Defendant.	**MEMORANDUM OF DECISION FINDING THAT ELITE OPTOELECTRONICS CO., LTD. IS ENTITLED TO DAMAGES OF $672,341.98 ON ITS CLAIMS UNDER 11 U.S.C. § 523(A)(4) AND (A)(6)** [No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)]

The Court has previously found that Defendant Ryan James McMillin ("McMillin") is liable to Plaintiff Elite Optoelectronics Co., Ltd ("Elite") under § 523(a)(4) and (a)(6)[1] for embezzling Elite's inventory, trademarks, and internet domain name.[2] The Court ordered the parties to submit additional evidence and briefing regarding the amount of Elite's damages. Having

[1] Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

[2] *See* Doc. Nos. 112–13.

reviewed the papers submitted by the parties,[3] the Court finds that McMillin is liable to Elite in the amount of $672,341.98.[4]

I. Background

The basis for McMillin's liability to Elite is set forth in the Court's prior ruling granting Elite's Motion for Summary Judgment (the "Liability Ruling").[5] Familiarity with the Liability Ruling is assumed, and the information contained therein is repeated only to the extent necessary to address the parties' arguments regarding Elite's damages.

As set forth in the Liability Ruling, Elite is entitled to damages of $343,788.00 as a result of McMillin's embezzlement of Elite's inventory.[6] Elite now seeks additional damages of $1,316,139.65 (for total damages of $1,659,927.65), consisting of the following:

1) $272,673.12 on account of lost profits on the embezzled inventory,
2) $135,350.31 in prejudgment interest on the embezzled inventory,
3) $4,608.00 for the cost of recovering the 250 Trademark,[7]
4) $554,562.24 in treble statutory damages for McMillin's embezzlement of Elite's 250 Trademark pursuant to 15 U.S.C. § 1117(a),
5) $100,000.00 in statutory damages for McMillin's embezzlement of Elite's internet domain name,
6) $246,730.10 in attorney's fees, and
7) $2,215.88 in costs.

McMillin does *not* challenge Elite's requests for $135,350.31 in prejudgment interest for the embezzled inventory, $4,608.00 for the cost of recovering the 250 Trademark, $246,730.10 in attorney's fees, and $2,215.88 in costs. McMillin does dispute Elite's entitlement to $272,673.12 in lost profits on the embezzled inventory, $554,562.24 in statutory damages for embezzlement of the 250 Trademark, and $100,000.00 in statutory damages for the embezzlement of the internet domain name. McMillin argues that Elite's request for damages of $272,673.12 on account of lost profits on the embezzled inventory is speculative, and that Elite has failed to establish that the product would have actually sold for the claimed amount. McMillin asserts that the requests for $554,562.24 in statutory damages for embezzlement of the 250 Trademark and $100,000 in statutory damages for embezzlement of the internet domain name are excessive and unduly punitive.

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[3] The Court reviewed the following papers in adjudicating this matter:
1) Plaintiffs' Motion for Damages Pursuant to Entry of Summary Judgment of § 523(a)(4) Embezzlement Claim and § 523(a)(6) Claim [Doc. No. 116];
2) Opposition to Plaintiff's Motion for Damages [Doc. No. 117]; and
3) Plaintiff's Reply to Defendant's Opposition to Motion for Damages [Doc. No. 118].

[4] Pursuant to Civil Rule 78(b) and LBR 9013-1(j)(3), the Court finds this matter to be suitable for disposition without oral argument.

[5] Doc. No. 112.

[6] Liability Ruling at 14–15 and 20.

[7] Unless otherwise indicated, capitalized terms not defined herein have the meaning set forth in the Liability Ruling.

II. Findings Regarding Elite's Damages

A. Elite Is Not Entitled to $272,673.12 in Damages for Lost Profits

In support of its contention that it is entitled to $272,673.12 in damages for lost profits on the embezzled inventory, Elite relies upon the testimony of Clayton D. Bellows ("Bellows"), a certified public accountant. To calculate foregone profits, Bellows estimated the retail price of the embezzled inventory by applying a 2.58x markup.[8] He then deducted the estimated costs of selling the inventory from the retail price.[9] Bellows derived the 2.58x markup and the estimated cost of selling the inventory from an analysis of the tax returns of GS-LLC, GS-Inc., and Tac Crew LLC.[10]

Elite bears the burden of establishing, by a preponderance of the evidence, the amount of damages that are non-dischargeable. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654 (1991). Elite has failed to carry its burden of showing that it is entitled to $272,673.12 in damages for lost profits.

First, Elite has failed to submit sufficient evidence demonstrating that the embezzled inventory sold for a 2.58x markup. Bellows testifies that the 2.58x markup "was concluded as reasonable from [my] analysis of gross profit margins on GS-LLC, GS-Inc., and Tac Crew, LLC's (a related entity to GS-Inc.) tax returns and from industry ratios."[11] Bellows has not produced the tax returns that he analyzed or explained precisely how he computed the markup from the tax returns. Bellows testifies that "RMA Industry Ratios" informed his analysis,[12] but he does not specifically identify the ratios upon which he relied or explain how those ratios provide a reliable guidepost to estimating an appropriate markup for the embezzled inventory at issue here. Bellows's testimony is far too conclusory and lacking in detail to support a finding that McMillin was able to sell the embezzled inventory at a 2.58x markup to wholesale price.

Second, Bellows's estimate of the costs of selling the embezzled inventory suffers from the same lack of detail. Bellows testifies that his estimate of the avoided costs was derived from a review of the tax returns of GS-LLC, GS-Inc, and Tac Crew LLC, but Bellows does not explain what information on the tax returns enabled him to arrive the estimate. The absence of specificity in Bellows's testimony prevents the Court from entering the finding that Elite requests regarding its damages from lost profits.

Because Elite has not carried its burden, the Court will not award it any damages on account of lost profits from the embezzled inventory.

B. Elite Is Not Entitled to $135,350.31 in Prejudgment Interest on the Embezzled Inventory

Although McMillin does not challenge Elite's request for $135,350.31 in prejudgment interest on the embezzled inventory, the Court is required to independently find that Elite is entitled to the damages it requests. Elite asserts that under California law, it is entitled to prejudgment interest of 10%. In support of its claim for prejudgment interest, Elite relies upon *Naviscent, LLC v. Otte (In re Martinez)*, 610 B.R. 290, 307 (Bankr. N.D. Cal. 2019), in which a bankruptcy court awarded prejudgment interest under Cal. Civ. Code §§ 3336 and 3287 to an embezzlement victim.

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[8] Bellows Decl. [Doc. No. 116-1] at ¶ 7.
[9] *Id.* at ¶ 8.
[10] *Id.*
[11] *Id.* at ¶ 7.
[12] *Id.* at ¶ 3.

Elite's reliance upon *In re Martinez* is misplaced because the bankruptcy court's findings regarding prejudgment interest were reversed on appeal. The reversing court held that the bankruptcy court erred by awarding prejudgment interest:

> *'[W]here the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate.'* [*Duale v. Mercedes-Benz USA, LLC*, 148 Cal. App. 4th 718, 729, 56 Cal.Rptr.3d 19 (2007)]. Here, while Martinez knew that she embezzled money from Naviscent over the years, there is no reason to believe that she kept records of the amounts, or even that such amounts were clear from Naviscent's various records. *See Levy-Zentner Co. v. S. Pac. Transp. Co.,* 74 Cal. App. 3d 762, 799, 142 Cal.Rptr. 1 (1977) ("We reasoned that where a defendant does not know what amount he owes and cannot ascertain it except by accord or judicial process, he cannot be in default for not paying it."). Again, it took Medina 116 hours to do such analysis with a background in forensic accounting.
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> Courts generally apply a liberal construction in determining whether a claim is certain" under section 3287. *State of California v. Cont'l Ins. Co.*, 15 Cal. App. 5th 1017, 1038, 223 Cal.Rptr.3d 716 (2017) (citing *Howard v. Am. Nat. Fire Ins. Co.*, 187 Cal. App. 4th 498, 535, 115 Cal.Rptr.3d 42 (2010)). Even so, that certainty "is absent when the amounts due turn on disputed facts..." *Id.* (citing *Olson v. Cory*, 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720 (1983)). The amount that Martinez owed to Naviscent turned on disputed facts. It was therefore not "capable of being made certain by calculation" as that phrase has been interpreted in the case law.
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> It was error to award Naviscent prejudgment interest.

Otte v. Naviscent, LLC, 624 B.R. 883, 908–09 (N.D. Cal. 2021) (emphasis in original).

As was the case in *Otte v. Naviscent*, ascertainment of Elite's damages for McMillin's embezzlement turned on disputed facts, and resolving the dispute required extensive litigation. Therefore, Elite is not entitled to prejudgment interest on the embezzled inventory.

C. Elite Is Entitled to Damages of $4,608.00 for the Actual Cost of Recovering the 250 Trademark

Title 15 U.S.C. § 1125(a) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
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> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Damages for a breach of 15 U.S.C. § 1125(a) are calculated under 15 U.S.C. § 1117(a), which entitles a plaintiff "to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action…. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount."

In the Liability Ruling, the Court found that McMillin embezzled the 250 Trademark and used the 250 Trademark to benefit his own competing business. The findings in the Liability Ruling establish that McMillin violated 15 U.S.C. § 1125(a), and that Elite is therefore entitled to damages under 15 U.S.C. § 1117(a).

Elite was required to spent $4,608.00 to regain control of the 250 Trademark that McMillin embezzled.[13] Pursuant to 15 U.S.C. § 1117(a), Elite is entitled to damages of $4,608.00 for the costs of recovering the trademark.

D. Elite Is Not Entitled to Treble Damages of $554,562.24 Under 15 U.S.C. § 1117(a)

Pursuant to 15 U.S.C. § 1117(a), Elite seeks treble damages for McMillin's embezzlement of the 250 Trademark. McMillin contends that Elite's request for treble damages is entirely punitive and bears no relation to Elite's actual damages.

In awarding damages under 15 U.S.C. § 1117(a), the Court "must not only be guided by principles of equity but must also ensure that its award constitutes 'compensation and not a penalty.'" *Nat'l Prod., Inc. v. Gamber-Johnson LLC*, 734 F. Supp. 2d 1160, 1164 (W.D. Wash. 2010), *aff'd,* 449 F. App'x 638 (9th Cir. 2011); *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997) (stating that "§ 1117 allows the district court to award the plaintiff any just monetary award so long as it constitutes 'compensation' for the plaintiff's losses or the defendant's unjust enrichment and is not simply a 'penalty' for the defendant's conduct").

Elite asserts that it is entitled to treble damages in the amount of $554,562.24 under 15 U.S.C. § 1117(a). Elite arrives at this figure by tripling its alleged actual damages of $277,281.12 (comprised of alleged damages of $272,673.12 in lost profits and damages of $4,608.00 for recovery of the trademark), and then subtracting the damages already sought to avoid a double recovery.

As set forth in Section II.A., above, Elite has failed to establish that it is entitled to actual damages of $272,673.12 in lost profits. Elite's actual damages under 15 U.S.C. § 1117(a) are limited to the $4,608.00 it spent to recover the 250 Trademark. The Court finds that Elite is not entitled to a trebling of the $4,608.00 in damages for recovering the trademark because Elite has not demonstrated that a trebling of damages would be compensatory rather than punitive. In its briefing in support of treble damages, Elite emphasizes the willful and fraudulent nature of McMillin's conduct, rather than attempting to quantify the damages caused by that conduct. Elite even admits that its damages "cannot be easily or accurately calculated."[14]

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[13] Liu Decl. [Doc. No. 116-2] at ¶ 3.

[14] Doc. No. 116 at 8.

Elite has failed to show how its request for treble damages would constitute compensation as opposed to a penalty. The Court declines to treble Elite's actual damages of $4,608.00.

E. Elite is Entitled to Statutory Damages of $75,000 Under 15 U.S.C. § 1117(d)

As set forth in the Liability Ruling, McMillin embezzled Elite's internet domain name by using the domain to benefit McMillin's competing business. McMillin's embezzlement of Elite's internet domain constitutes cyberpiracy within the meaning of 15 U.S.C. § 1125(d). Under 15 U.S.C. § 1117(d), a cyberpiracy victim such as Elite may obtain an "award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just."

"To determine a reasonable amount of statutory damages [under 15 U.S.C. § 1117(d)], 'courts generally consider a number of factors ..., including the egregiousness or willfulness of the defendant's cybersquatting, the defendant's use of false contact information to conceal its infringing activities, the defendant's status as a 'serial' cybersquatter ... and other behavior by the defendant evidencing an attitude of contempt towards the court of the proceedings.' *Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1086 (C.D. Cal. 2012) (internal citation omitted). In *Wecosign*, the court awarded statutory damages of $50,000 where the defendant provided false contact information to the domain name registrar.

Here, McMillin used Elite's internet domain name to benefit McMillin's own business that was directly competing with Elite's business. As further explained in the Liability Ruling, McMillin thereby embezzled Elite's internet domain name, and in so doing engaged in conduct that inflicted willful and malicious injury under 11 U.S.C. § 523(a)(6) upon Elite's property. The Court finds that McMillin's conduct was sufficiently egregious to support an award of damages of $75,000 under 15 U.S.C. § 1117(d).

F. Elite is Entitled to Attorney's Fees of $246,730.10 and Costs of $2,215.88 Under 15 U.S.C. § 1117(a)

Although McMillin does not challenge Elite's request for attorney's fees of $246,730.10 and costs of $2,215.88, the Court is obligated to independently evaluate the requested fees and costs.

Pursuant to 15 U.S.C. § 1117(a), the "court in exceptional cases my award reasonable attorney fees to the prevailing party" with respect to claims under 15 U.S.C. § 1125(a). As set forth above, McMillin violated 15 U.S.C. § 1125(d) by embezzling Elite's internet domain name and violated 15 U.S.C. § 1125(a) by embezzling Elite's 250 Trademark. Consequently, Elite is entitled to attorney's fees and costs if it can establish that this is an "exceptional case" for purposes of 15 U.S.C. § 1117(a).

"[A] case is exceptional within the meaning of 15 U.S.C. § 1117(a) where the infringement is willful, deliberate, knowing or malicious." *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir. 2003). In the Liability Ruling, the Court found that McMillin acted willfully and maliciously when he embezzled both Elite's internet domain name and the 250 Trademark. The Court finds that this is an exceptional case that warrants an award of attorney's fees and costs.

In view of the complexity of this litigation, the Court finds the attorney's fees of $246,730.10 and costs of $2,215.88 requested by Elite to be reasonable. Pursuant to 15 U.S.C. § 1117(a), the Court will award Elite the requested attorney's fees and costs.

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III. Conclusion

Based upon the foregoing, the Court finds that Elite is entitled to damages in the amount of $672,341.98, consisting of $343,788.00 for the value of the embezzled inventory, $4,608.00 for the actual cost of recovering the 250 Trademark pursuant to 15 U.S.C. § 1117(a), $75,000 in statutory damages for McMillin's cyberpiracy pursuant to 15 U.S.C. § 1117(d), and $246,730.10 in attorney's fees and $2,215.88 in costs pursuant to 15 U.S.C. § 1117(a).

The Court will enter final judgment finding that Elite is entitled to damages of $672,341.98 on its § 523(a)(4) embezzlement claim and § 523(a)(6) claim.[15]

[15] As set forth in the Liability Ruling and the *Interlocutory Order: (1) Granting Motion for Summary Judgment; (2) Setting Briefing Schedule on Damages Motion; (3) Vacating Pretrial Conference and Trial Dates; and (4) Setting Continued Status Conference for July 13, 2021 at 10:00 a.m.* [Doc. No. 113], the Court finds pursuant to Civil Rule 54(b) that there is no just reason to delay the entry of final judgment on Elite's claims under § 523(a)(4) and (a)(6).

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Date: July 12, 2021

Ernest M. Robles
United States Bankruptcy Judge