IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Bitzer Kuhlmaschinenbau GmbH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CA No.: 3:13-cv-0381-K
	§	
Beiging Brilliant Refrigeration Equipment Co., Ltd., Xinchang Liyondgda Refrigeration Machinery Co., Ltd., and Li Yongda	§	
	§	
Defendants.	§	

DEFAULT JUDGMENT

Before the Court is Plaintiff's Motion for Default Judgment, filed on March 6, 2013. After considering Plaintiff's Motion for Default Judgment; the Complaint for Trademark Infringement, Trademark Dilution, False Designation of Origin, Unfair Competition, and Patent Infringement; the arguments of counsel; and all other relevant matters on file with the Court, the Court finds good cause to enter a default judgment against Defendants Beijing Brilliant Refrigeration Equipment Co., Ltd., Xinchang Liyongda Refrigeration Machinery Co., Ltd., and Li Yongda ("Defendants"), including a permanent injunction against Defendants and an award of damages to Bitzer in an amount equivalent to its costs incurred and reasonable attorneys' fees for which each Defendant is jointly and severally liable.

Background Facts

On January 29, 2013, Plaintiff Bitzer Kuhlmaschinenbau GmbH ("Bitzer")

initiated this action against Defendants, alleging willful federal trademark infringement, false designation of origin and false representation of fact, federal trademark dilution, unfair competition under the Lanham Act, and patent infringement. (Compl. ¶¶ 36-86.) On January 30, 2013, Defendants were properly served with the Summonses, the Complaint, and the Temporary Restraining Order in this matter. On February 4, 2013, Defendants e-mailed counsel for Bitzer, admitting their mistake and infringement of Bitzer's trademarks and patents and addressing specific allegations and information in the Complaint and Temporary Restraining Order, demonstrating Defendants' awareness of this matter. (*See* DeWerff Aff. at 2, App. at 2; E-mail from Winston to Pl.'s Counsel Dated Feb. 4, 2013, DeWerff Aff. Ex. C, App. at 10.) Counsel for Bitzer responded to Defendants via e-mail on February 7, 2013, indicating Bitzer's willingness to resolve the matter, and followed up with a telephone conversation with Defendant Li Yongda on February 8, 2013, during which Yongda indicated that he would check his e-mail to review counsel's correspondence. (*See* DeWerff Aff. at 2, App. at 2; E-mail from Pl.'s Counsel to Winston & Li Yongda Dated Feb. 7, 2013, DeWerff Aff. Ex. D, App. at 12.) But Defendants have not communicated with counsel for Bitzer since the conversation of February 8, 2013. (DeWerff Aff. at 2, App. at 2.) Defendants failed to timely file an answer within the 21-day window prescribed by Rule 12 and failed to plead or otherwise defend pursuant to Rule 55. Fed. R. Civ. P. 12(a)(1)(A)(i); Fed. R. Civ. P. 55(a); (*see also* DeWerff Aff. at 2, App. at 2). The Clerk entered default against

Defendants on February 26, 2013, pursuant to Federal Rule of Civil Procedure 55. (Dkt. No. 23.)

Entry of Default Judgment

Once default is entered, Federal Rule of Civil Procedure 55 allows a court in its discretion to enter a default judgment when a party seeking the judgment applies to the court. Fed. R. Civ. P. 55(b)(2). The Fifth Circuit looks to the following six factors when considering whether to enter a default judgment: (1) whether the default was caused by a good faith mistake or excusable neglect; (2) whether there has been substantial prejudice; (3) the harshness of a default judgment; (4) whether there are material issues of fact; (5) whether grounds for a default judgment are clearly established; and (6) whether the court would think itself obligated to set aside the default on the defendant's motion. *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998). Generally, a defendant's failure to appear weighs against the defendant with respect to these factors. *Chevron*, 2009 U.S. Dist. LEXIS 74751, at *5.

Here, the Court finds that Defendants have not offered any evidence that their failure to appear is the product of "a good faith mistake or excuse," and that Bitzer's interests have been substantially prejudiced by Defendants' failure to respond to the Complaint. The Court further finds that Defendants have ignored the Complaint despite proper service, so a default judgment would not be unusually harsh. The Court also finds that there are no material issues of fact due to Defendants' failure to respond to the Complaint. The Court finds that the grounds for default judgment are

clearly established because the Defendants were properly served but failed to answer or otherwise appear. Finally, the Court finds no evidence of record to indicate that the court would be obligated to set aside the default on Defendants' motion. Accordingly, because the six factors for default judgment weigh in favor of Bitzer and the Clerk has entered default against Defendants, the procedural prerequisites to entering default judgment are satisfied. Fed. R. Civ. P. 55(b)(2); (Dkt. No. 23).

Defendants' Liability

Where a default has been entered pursuant to Federal Rule of Civil Procedure 55, the factual allegations of the complaint—except those relating to the amount of damages—are taken as true. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 653 (Fed. Cir. 1985); 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.32[1][a] (3d ed. 2012). Thus, the following factual allegations, among others included in Bitzer's Complaint, are taken as true:

1. Bitzer is the sole owner of Trademark Registration No. 1,694,000 in International Classes 7 and 11 and Trademark Registration No. 4,017,827 in International Classes 7 and 11 (collectively "the Bitzer Marks"). (Compl. ¶¶ 11-13.)
2. Bitzer is the sole owner of U.S. Design Patent No. D479,247 ("Bitzer's Patent"). (Compl. ¶ 18.)
3. Defendants have and are currently manufacturing, distributing, and offering

for sale compressors that infringe the Bitzer Marks, dilute the Bitzer Marks, falsely designate the source of the compressors, and infringe Bitzer's Patent ("the Infringing Products"). (Compl. ¶ 22.)

4. The virtually identical design, the virtually identical logo, and the virtually identical kelly green color of Defendants' products are likely to confuse consumers and demonstrate that Defendants are infringing the Bitzer Marks and Bitzer's Patent. (Compl. ¶ 22.)

5. Defendants are willfully infringing the Bitzer Marks by their unauthorized use of confusingly similar and identical marks on and in connection with the Infringing Products. (Compl. ¶¶ 36-48.)

6. Defendants are manufacturing, importing, using, distributing, offering for sale and/or selling compressors that falsely designate and/or misrepresent the source of the compressors. (Compl. ¶¶ 49-58.)

7. Defendants are diluting the distinctiveness of the Bitzer Marks by blurring the marks' ability to act as a distinctive identifier of source or origin and by circumventing Bitzer's efforts designed to maintain the integrity of the products with which its trademarks are associated. (Compl. ¶¶ 59-69.)

8. Defendants are misappropriating Bitzer's rights in its trademarks with the intention to capitalize for Defendants' own pecuniary gain on the goodwill and excellent reputation of Bitzer, which Bitzer has expended substantial time, resources and effort to obtain, and are therefore unjustly enriched and are

benefiting from property rights which rightfully belong to Bitzer. (Compl. ¶¶ 70-74.)

9. Defendants are manufacturing, importing, using, distributing, offering for sale and/or selling compressors that infringe Bitzer's Patent. (Compl. ¶¶ 75-86.)

Based on the factual allegations listed above and others contained in the Complaint, the Court finds that Defendants are liable for the various counts in the Complaint, including, willful federal trademark infringement, false designation of origin and false representation of fact, federal trademark dilution, unfair competition under the Lanham Act, and patent infringement. *Nishimatsu Constr.*, 515 F.2d at 1206; *Kori*, 761 F.2d at 653; 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.32[1][a] (3d ed. 2012); (Compl. ¶¶ 36-86). With liability established against Defendants with respect to the various counts in the Complaint, the Court turns to the various remedies requested in Bitzer's Complaint.

Remedies

The relief available on default judgment cannot differ in kind from, or exceed in amount, the relief prayed for in the Complaint. Fed. R. Civ. P. 54(c); *In re Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992); *Sapp v. Renfroe*, 511 F.2d 172, 176 n. 3 (5th Cir. 1975). In its Complaint, Bitzer requested relief in the form of temporary, preliminary, and permanent injunctions; all gains, profits, and advantages derived from Defendants' wrongful acts; damages, including lost profits, sustained by Bitzer and such other compensatory damages under 15 U.S.C. § 1117(a), 17 U.S.C. § 504,

and 35 U.S.C. § 284; the cost of this action pursuant to 15 U.S.C. § 1117(a) and 35 U.S.C. § 284; three times the amount of Defendants' profits or Bitzer's damages, whichever is greater, pursuant to 15 U.S.C. § 1117(b) and 17 U.S.C. § 504, and an award of treble damages pursuant to 35 U.S.C. § 284; statutory damages pursuant to 15 U.S.C. § 1117(c); punitive damages; and Bitzer's attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 35 U.S.C. § 285. (Compl. ¶¶ 44-48, 57-58, 65-67, 69, 72-74, 84-86, Prayer for Relief (A)-(I).) With this Motion, Bitzer requests a permanent injunction, the cost of this action, and attorneys' fees. The Court finds that Bitzer's requested relief does not differ in kind from, nor exceed in amount, what is demanded in the pleadings. Whether relief is appropriate is, thus, based on the relevant governing law. *Chevron*, 2009 U.S. Dist. LEXIS 74751, at *7.

Permanent Injunction

The federal statutes relating to trademark infringement, false designation of origin and false representation of fact, trademark dilution, unfair competition under the Lanham Act, and patent infringement provide that courts may grant permanent injunctive relief in accordance with principles of equity and on such terms as the court deems reasonable. *See* 35 U.S.C. § 283 (1952); 15 U.S.C. § 1116 (2008). A party seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The party seeking relief must show: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that,

considering the hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Id.*

"Courts routinely find irreparable harm, and therefore grant permanent injunctions where, as here, the infringer and the patentee are direct competitors." *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2008 U.S. Dist. LEXIS 79689, at *11 (N.D. Cal. Mar. 21, 2008), *aff'd in part*, 582 F.3d 1288 (Fed. Cir. 2008). Here, the Court finds that Plaintiff and Defendant are direct competitors who sell and advertise their compressors in the same industry channels and marketplaces, including the same AHR Expo trade show where this Court temporarily enjoined Defendants from using, selling, or offering for sale the Infringing Products. (Compl. ¶ 33.) Since Defendants' Infringing Products directly compete with Bitzer's products, the Court finds that irreparable harm exists and a permanent injunction is warranted. *See Fresnius Med. Care Holdings*, 2008 U.S. Dist. LEXIS 79689, at *11; *see also O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, No. 2-04-CV-32 (TJW), 2007 U.S. Dist. LEXIS 25948, at *7-8 (E.D. Tex. Mar. 21, 2007), *rev'd on other grounds*, 521 F.3d 1351 (Fed. Cir. 2008) (granting permanent injunction based on the "high value of intellectual property when it is asserted against a direct competitor in the plaintiff's market").

The Court further finds that the Defendants' failure to appear and subsequent default constitutes an actual success on the merits, that monetary damages would not

prevent future infringement, that any potential harm to Defendants is outweighed by the continuing harm to Bitzer's business, and that injunctive relief serves the public interest by promoting intellectual property laws. *Chevron* , 2009 U.S. Dist. LEXIS 74751, at *3-4; (Compl. ¶¶ 27-28, 34-35). Thus, each prong of the trademark test for permanent injunction are satisfied, along with the three shared prongs of the patent test for permanent injunction. *Chevron*, 2009 U.S. Dist. LEXIS 74751, at *8; *eBay*, 547 U.S. at 391.

Thus, the Court finds that the four-prong test for permanent injunction is satisfied, and permanent injunctive relief is appropriate. *See eBay*, 547 U.S. at 391; *Fresenius Med. Care Holdings*, 2008 U.S. Dist. LEXIS 79689, at *11; *Chevron*, 2009 U.S. Dist. LEXIS 74751, at *8. Accordingly, the Court grants Plaintiff's request for permanent injunction and makes permanent the terms of the Temporary Restraining Order. (Dkt. No. 8.)

Costs and Attorneys' Fees

Violations of federal statutes relating to trademark infringement, false designation of origin and false representation of fact, trademark dilution, and unfair competition under the Lanham Act entitle the prevailing party to recover, subject to principles of equity, the infringing party's profits, any damages sustained by the prevailing party, **and the costs** of the action. 15 U.S.C. § 1117(a)(3) (2008). Similarly, upon a finding of patent infringement, the prevailing party is entitled to compensatory damages of at least a reasonable royalty, together with interests **and**

costs as fixed by the court. 35 U.S.C. § 284 (1999). In "exceptional cases" a court may also award **reasonable attorneys' fees** to the prevailing party in these contexts. 15 U.S.C. § 1117(a)(3); 35 U.S.C. § 285 (1952). Given Defendants' reluctance to engage with Bitzer and failure to appear, in its Motion for Default Judgment, Bitzer seeks to recover costs and attorneys' fees under 15 U.S.C. § 1117(a) and 35 U.S.C. §§ 284-85.

Regarding costs, because Bitzer has established liability with respect to its claims of trademark infringement, false designation of origin and false representation of fact, trademark dilution, unfair competition under the Lanham Act, and patent infringement against Defendants', the Court finds that Bitzer is entitled to recover its costs specific to the present matter, including the fee for filing the Complaint in the amount of $350.00 and the fee for service of the Complaint and Summons in the amount of $344.62, for a total of $694.62. (*See* DeWerff Aff. at 2, App. at 2; Proof of Cost of Filing Fees, DeWerff Aff. Ex. A, App. at 5; Proof of Cost of Service, DeWerff Aff. Ex. B, App. at 7-8.)

Regarding attorneys' fees, because Defendants' actions were intentional and because Defendants have completely disregarded this litigation by failing to appear, the Court finds that Bitzer is also entitled to recover reasonable attorneys' fees. *Taco Cabana Intern., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991), *aff'd* 505 U.S. 763, 112 (1992) (attorneys' fees award of $940,000 affirmed where defendant "brazenly copied" plaintiff's trade dress and infringement was established under the

Lanham Act); *Chevron*, 2009 U.S. Dist. LEXIS 74751, at *9-10 (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 502 (C.D. Cal. 2003)). Specifically, the Court finds that Defendants' manufacturing, distributing, displaying, marketing, and offering for sale products using a design that is virtually identical to Bitzer's design, by using logos on their products and marketing materials that are virtually identical to Bitzer's trademarks, and by using a virtually identical color to Bitzer's own compressors show Defendants' culpability and brazen copying of Bitzer's products. *Taco Cabana*, 932 F.2d at 1127; (Compl. ¶ 22, 24). And Defendants also failed to appear, resulting in an entry of default. (Dkt. No. 23.) Accordingly, the Court finds that Bitzer is entitled to reasonable attorneys' fees.

The Fifth Circuit uses the "lodestar" method to calculate reasonable attorneys' fees. *Heidtman v. Cnty. of El Paso*, 171 F.3d 1038, 1043 (5th Cir. 1999). Reasonable attorneys' fees are calculated by multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate for such work in the community, and an affidavit from a responsible attorney may set out these details. *Tollett v. City of Kemah*, 285 F.3d 357, 367-69 (5th Cir. 2002). A court may raise or lower the lodestar amount based on the weight of twelve factors set forth in *Johnson v. Georgia Highway Express*, but the award should not be adjusted if the *Johnson* factors were considered when determining the original lodestar amount. *Johnson v. Ga. Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors that may be relevant to determining the reasonableness of attorneys' fees include, but are not

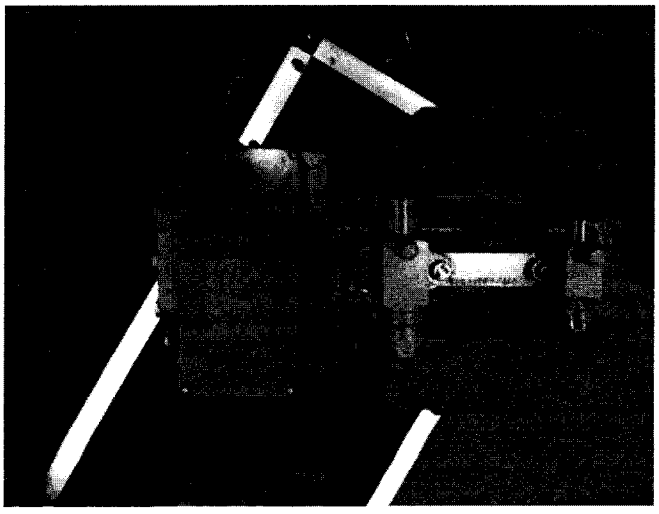
limited to: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or by the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the lawyer or lawyers performing the services; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. The Court finds that the affidavit by Jay Utley accompanying this Motion appropriately sets forth facts demonstrating the reasonableness of the attorneys' fees requested under the *Johnson* factors. (*See* Utley Aff., App. at 13-17.)

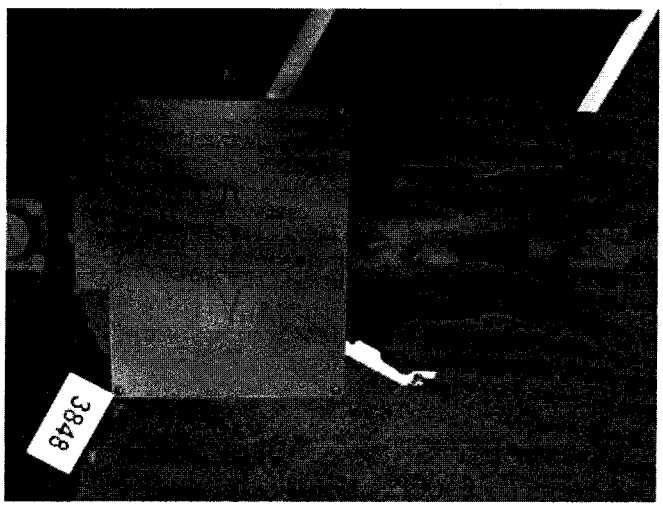
Bitzer's attorneys' fees specific to preparation of the Complaint, the Memorandum of Law In Support of the Ex Parte Application for Temporary Restraining Order, the First Emergency Motion to Extend Temporary Restraining Order, the Second Emergency Motion to Extend Temporary Restraining Order, the Request for Clerk's Entry of Default, this Motion for Default Judgment, and all accompanying documents, filings, declarations, appendices, and affidavits resulted in 249.60 hours of attorney time. (*See* Utley Aff., App. at 14.) The Court finds that a reasonable hourly rate for this type of work in the intellectual property legal community is $522.57 per hour, especially given the time-sensitive nature of this litigation, the necessary time spent by several experienced partners, and the first to

third quartile ranges (i.e., middle 50th percentile ranges) of hourly rates for partners and associates with various years of experience provided in the AIPLA Report of the Economic Survey 2011. (*See* Utley Aff., App. at 15-16; Utley Aff. Ex. B, App. at 23-25.) Thus, the Court finds that reasonable attorneys' fees for this case amount to $130,433.00. (*See* Utley Aff., App. at 13-17.)

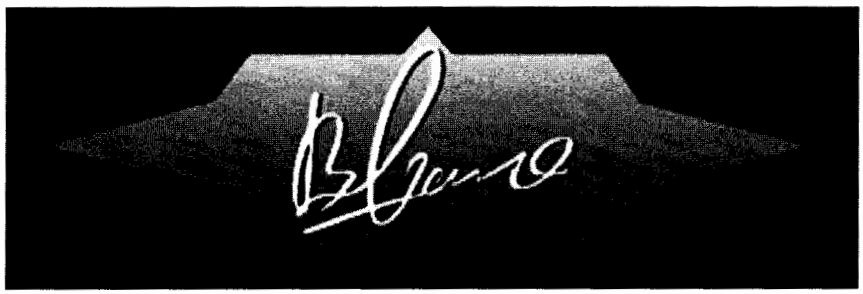
THEREFORE, the Court grants Plaintiff's Motion for Default Judgment, and IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants Beijing Brilliant Refrigeration Equipment Co., Ltd., Xiachang Liyongda Refrigeration Machinery, Co., Ltd., and Li Yongda, along with all persons acting in concert with these Defendants or at their direction, are PERMANENTLY ENJOINED from:

(a) the public display, directly or indirectly manufacturing, importing, using, offering for sale, selling, causing to be sold, or in any way distributing any of the following compressors, or marketing materials, specifications, drawings, or any other materials that describe the following compressors:





(b) the public display, directly or indirectly manufacturing, importing, using, offering for sale, selling, causing to be sold, or in any way distributing any compressors, marketing materials, specifications, drawings, or any other materials that include the following brand:



(c) the public display, sale, or offer to sell of any medium or small four cylinder compressors, or marketing materials specifications, drawings, or any other materials that describe those compressors;

(d) representing that Defendants' goods and/or services are licensed, authorized, or permitted in any way to use any of Bitzer's intellectual property, including Bitzer's patents, trademarks, trade secrets, or trade dress associated with the compressors;

(e) directly or indirectly manufacturing, importing, using, offering for sale, selling, causing to be sold, or in any way distributing any medium or small four cylinder compressors;

(f) providing, circulating, or otherwise disseminating any marketing materials, specifications, drawings, or any other materials that describe the medium or small four cylinder compressors;

(g) the public display, directly or indirectly manufacturing, importing, using, offering for sale, selling, causing to be sold, or in any way distributing any compressors with kelly green coloring, or marketing materials, specifications, drawings, or any other materials that depict compressors with kelly green coloring;

(h) removing, destroying, secreting, or otherwise disposing of any machinery, apparatus, business records, or documents relating to Defendants' medium or small four cylinder compressors;

(i) conspiring with or inducing any person or entity to commit any of the above-prohibited acts; and

(j) attempting, causing, or assisting any of the above-described acts.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's

request for attorneys' fees and costs incurred should be and is hereby GRANTED, that Plaintiff shall have and recover attorneys' fees in the amount of $130,433.00, which sum is reasonable and was incurred by Plaintiff in this case, and that Plaintiff shall recover its costs incurred in prosecuting this action in the amount of $694.62, with each Defendant jointly and severally liable for such attorneys' fees and costs.

When it granted Plaintiff's application for Temporary Restraining Order, the Court required Plaintiff to post a bond of $10,000. The purpose of such a bond is to provide "security . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined and restrained." Fed. R. Civ. P. 65(c). The Court has determined that Plaintiff has succeeded on its claims and that a permanent injunction is warranted. Therefore, the Court DISSOLVES the bond and DIRECTS the Clerk of the Court to return the current $10,000 bond to Plaintiff.

SO ORDERED

Signed on May 22nd, 2013.

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UNITED STATES DISTRICT JUDGE