

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

MILITARY WITH PTSD, INC.,)	
SHAWN JACLYN GOURLEY, and)	
JUSTIN GOURLEY,)	
)	
Plaintiffs,)	
)	
v.)	3:17-cv-00073-RLY-MPB
)	
KAREN SABOURIN and PROLYMPIAN)	
INTERNATIONAL, INC.)	
)	
Defendants.)	

ENTRY ON PLAINTIFFS’ MOTION FOR DEFAULT JUDGMENT

On May 2, 2017, Military with PTSD, Inc. (“MPI”), Shawn Jaclyn Gourley (“Shawn”), and Justin Gourley (“Justin”) (collectively “Plaintiffs”) filed the present action alleging that Karen Sabourin (“Sabourin”) and Prolympian International, Inc. (“Prolympian”) (collectively “Defendants”) made damaging false and misleading statements about Plaintiffs. When Defendants did not respond or otherwise defend, Plaintiffs obtained an entry of default. Now, Plaintiffs seek a default judgment. For the reasons stated below, the court **GRANTS** Plaintiffs’ Motion.

I. Background

Shawn and Justin are a military family that educate others on the effects of Post-Traumatic Stress Disorder (“PTSD”). (See Filing No. 1, Complaint at 2, ¶ 2). They own a copyright in the book “The War at Home: One Family’s Fight against PTSD” (the “War at Home”), which they published in 2011. (*Id.* ¶¶ 2, 3). The War at Home has been

listed as a number one seller on Amazon.com. (*Id.* ¶ 2). Shawn and Justin run MPI, a non-profit corporation organized to help educate veterans, caretakers, and civilians about the effects of PTSD. (*Id.* 1 – 2, ¶¶ 1, 4). MPI operates six different programs that all educate and help families struggling with PTSD. (*See id.* 2 – 4, ¶¶ 6 – 11). In 2015, MPI’s Facebook page had over 77,000,000 post views and had over 21,000 daily interactions from members. (*Id.* at 3, ¶ 6) Shawn and Justin have also received awards as well as national recognition for their work. (*Id.* at 4 – 5, ¶¶ 14, 15).

In November of 2015, Sabourin contacted MPI about donating proceeds from her own book to help MPI. (*Id.* at 6, ¶ 21). Sabourin is the CEO of Prolympian, which is an organization that actively recruits coaches who “treat” PTSD. (*Id.* at 5, ¶ 16).

Prolympian coaches are trained in a technique called “Jabatzu,” which is a form of hypno-therapy and allegedly helps treat the effects of PTSD. (*Id.* at 7, ¶ 22). Later in the month, Sabourin offered giving MPI members a steep discount for treatment from Prolympian. (*Id.*). MPI rejected Sabourin’s offer, stating that it could not endorse any organization or its method of treatment. (*Id.*).

In the spring of 2016, Sabourin began alluding to a business relationship between Prolympian and MPI in its marketing materials sent to potential coaches. (*See id.* at 7, ¶ 23). Sabourin also began hosting recruitment events at which she explained that Prolympian had a “military contract” with a certain nonprofit group founded by a military couple. (*Id.* at 7 – 8, ¶ 23). During these events, Sabourin, without permission, would also read excerpts from the War at Home. (*Id.* at 8, ¶ 25).

Hoping to form a business relationship, Sabourin offered Shawn a job to become a regular speaker on Defendants' radio show. (*Id.* at 9, ¶ 28). On September 6, 2016, Sabourin traveled to Evansville and met with Shawn and Justin to discuss the job offer. (*Id.* ¶ 29). After this meeting, Shawn began receiving phone calls and messages from people asking if she was the person who had the "military contract" with Defendants. (*Id.* at 9 – 10, ¶ 31). Shawn explained that there was no contract and she had only discussed appearing on Defendants' radio show. (*Id.*). In October, Sabourin sent Shawn a proposed contract regarding the position on Defendants' radio show. (*Id.* at 10, ¶ 32). Shawn sent the contract to her attorney and explained that she would be in touch with Defendants after his review. (*Id.*).

During this time, Shawn continued receiving more communications asking her to confirm the existence of a "military contract." (*Id.* ¶ 33). In November of 2016, Shawn contacted Sabourin and directed her to stop using her story and publicly stating that there was a "contract" between Prolympian and MPI. (*Id.* at 11, ¶ 34). This request went unanswered. (*Id.* ¶ 35). On December 30, 2016, Shawn contacted Sabourin and inquired as to the identity of the organization Sabourin purportedly had a "contract" with. (*Id.* ¶ 36). This request, too, went unanswered. (*Id.*). Finally, on December 31, 2016, Shawn posted a video on YouTube explaining that there was no contract between MPI and Prolympian. (*Id.* at 11 – 12, ¶ 37).

Sabourin did not take too kindly to this video. She began posting false and misleading statements about Shawn and Justin. (*Id.* at 12, ¶ 38). She published statements—including on MPI's Facebook page—that Justin committed "stolen valor" by

misrepresenting his military service in order to gain money. (*Id.*). She also published statements stating that Plaintiffs had demanded \$459,000 for access to MPI's members and that Shawn and Justin have a lengthy criminal history. (*Id.*). At the same time, Defendants continued to represent to potential coaches that a "contract" exists between MPI and Defendants, and that Plaintiffs had endorsed Defendants' programs and techniques. (*Id.* at 13, ¶ 41).

II. Procedure

On May 2, 2017, Plaintiffs filed a complaint against Defendants alleging violations of the Lanham Act, the Copyright Act, and certain state laws related to unfair competition, defamation, and unjust enrichment. (*See* Filing No. 1). On August 1, 2017, Plaintiffs requested entries of default since Defendants had not responded or otherwise attempted to defend. (Filing Nos. 14 and 15). The clerk subsequently entered entries of default against both Defendants. (Filing Nos. 16 and 17).

On August 21, 2017, nearly three weeks after the entries of default had been entered, Sabourin filed a "Motion concerning validity of documents." (Filing No. 18). The Magistrate Judge denied this motion as improper because Sabourin, *pro se*, filed it on behalf of Prolympian, and it is well established that non-lawyers cannot represent corporations. (Filing No. 19); *see 1756 W. Lake Street LLC v. American Chartered Bank*, 787 F.3d 383, 385 (7th Cir. 2015). To date, Defendants have not filed any other motion.¹

¹ Defendants explained in their "Motion" that they were never served with any legal documents. However, Plaintiffs filed proofs of service on July 31, 2017. (Filing Nos. 10 and 11). Moreover, to the extent that Defendants wish to appear and challenge the default judgment at a later time,

On January 4, 2018, Plaintiffs moved for a default judgment. (Filing No. 20). On January 31, 2018, the court scheduled a prove-up hearing (Filing No. 24) to determine the amount of damages and to establish the truth of Plaintiff's allegations. *See* Fed. R. Civ. P. 55(b)(2); *O'Brien v. R.J. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1404 (7th Cir. 1993). A copy of the notice was sent to Defendants via international mail. (Filing No. 24). On February 12, 2018, the court conducted the hearing, in which Plaintiffs presented multiple witnesses to support their claims. (Filing No. 25). Defendants did not appear.

III. Legal Standard

A party may seek a default judgment by complying with Rule 55, which sets out a two-step procedure. *See* Fed. R. Civ. P. 55(a) – (b); *VLM Food Trading Intern., Inc. v. Illinois Trading Co.*, 811 F.3d 247, 255 (7th Cir. 2016). At step one, a plaintiff must apply for an entry of default. *See* Rule 55(a). The clerk of the court must enter a default when a defendant fails to plead or otherwise defend. *Id.* Once the clerk of the court has entered an entry of default, the well-pleaded allegations are accepted as true, and the defaulting party can no longer contest liability unless the entry of default is vacated. *VLM Food Trading*, 811 F.3d at 255.

However, an entry of default “does not of itself determine rights.” *Id.* (quoting *United States v. Borchardt*, 470 F.2d 257, 260 (7th Cir. 1972)). Plaintiff must also satisfy step two and seek a default *judgment* pursuant to Rule 55(b). *See id.* “[A] default

the court notes that Rule 60(b) is available as a remedy. *See* Fed. R. Civ. P. 60(b); *see also Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994).

judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint.” *O’Brien*, 998 F.2d at 1404.

IV. Discussion

Plaintiff has moved for default judgment on three claims in the Complaint: false advertising (Count 1), copyright infringement (Count 2), and defamation (Count 4). The court will first discuss defendants’ liability for each below, accepting as true the allegations in the complaint. *VLM Food Trading*, 811 F.3d at 255. The court will then discuss remedies.

A. Defendants’ Liability

1. False Advertising under the Lanham Act

Section 43(a) of the Lanham Act prohibits false or misleading representations of another person’s commercial activities. *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999) (citing 15 U.S.C. § 1125(a)). To establish a claim under Section 43(a), a plaintiff must prove:

(1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.

Id. (citation omitted). Section 43(a) also prohibits false endorsements. To state such claim, a plaintiff must show that the defendant’s false representations likely caused consumers to believe that plaintiff endorsed the defendant’s products. *Martin v. Wendy’s*

Int., Inc., 183 F.Supp.3d 925, 935 (N.D. Ill. 2016); *see also Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 522 (7th Cir. 2014).

Here, Defendants represented that it had a business relationship with MPI through its marketing materials and during its recruitment events. On at least one occasion, Sabourin referred to a “military contract” with a certain nonprofit group founded by a military couple. As a result of Defendants’ statements, Plaintiffs fielded numerous calls to see if there was, in fact, a contract between MPI and Prolympian. Defendants’ false statements likely deceived potential coaches, influenced potential coaches’ decision to train with Defendants, and caused potential coaches to believe that Plaintiffs endorsed Defendants’ technique. As a result of these false representations, Plaintiffs were injured. Accordingly, Plaintiff has carried its burden in showing both false advertising and false endorsement claims under Section 43(a) of the Lanham Act.

2. Copyright Violations under the Copyright Act

The Copyright Act of 1976 extends copyright protection to literary works. *See* 17 U.S.C. § 106(4). It also grants the copyright holder the exclusive right to perform or to authorize another to publically perform the work. *Id.* “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991) (citation omitted); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) (citation omitted). A person can infringe a copyright directly, *e.g. Radji v. Khakbaz*, 607 F.Supp. 1296, 1298 – 99 (D. D.C. 1985) (finding copyright infringement where newspaper reprinted excerpts

from book without permission), or vicariously, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (noting one infringes vicariously by profiting from direct infringement while declining to stop or limit it).

Plaintiffs have a registered copyright in the War at Home. Sabourin read substantial portions of the War at Home at recruitment meetings across the country as well as on social media. These were public performances and were not authorized by Plaintiffs. Prolympian directly profited from Sabourin's infringement by receiving fees from potential coaches. Accordingly, Plaintiff has made out a prima facie case of copyright infringement.

3. Defamation *per se* under Indiana Common Law

To state a claim for defamation *per se* under Indiana law, a plaintiff must prove (1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages. *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 186 (Ind. 2010) (citation omitted). "A statement is defamatory if it tends 'to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person.'" *Id.* (quoting *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007) (internal citation omitted)). A statement is considered defamation *per se* when it imputes criminal conduct or misconduct in a person's business or occupation. *Id.*

Defendants have made statements that MPI is a "fraud," that Justin committed "stolen valor" by misrepresenting his military service for purposes of personal monetary gain, and that Shawn demanded \$459,000 for access to MPI's members. Defendants have also published that Justin and Shawn have lengthy criminal histories and have

defrauded others for personal gain. These statements were posted on the internet and social media websites. *Charles v. Vest*, 90 N.E.3d 667, 671 (Ind. Ct. App. 2017) (noting statement was published for purposes of defamation where it was posted on Facebook). These statements impute criminal conduct and misconduct with the operation of MPI. Accordingly, Plaintiffs have sufficiently shown Defendants statements are defamation *per se*.

B. Requested Relief

1. False Advertising under the Lanham Act

Plaintiff requests that the court issue a permanent injunction to enjoin Defendants from (1) falsely advertising or representing themselves as being connected with the Plaintiffs, through sponsorship or association, (2) engaging in any act which is likely to cause members of the public to believe that any goods or services of Defendants are endorsed by or approved by Plaintiffs, and (3) otherwise unfairly competing with Plaintiffs.

The Lanham Act authorizes injunctive relief. *See Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 – 41 (7th Cir. 2013). A court may grant a permanent injunction where: (1) the plaintiff has suffered an irreparable injury, (2) plaintiff's remedies at law are inadequate, (3) an injunction is warranted when considering the balance of harms between the parties, and (4) an injunction is in the public interest. *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007). Even in cases of default, the court must still engage in the analysis

of whether an injunction is appropriate. *See id.* (reversing district court that granted injunction based on default judgment).

Violations of the Lanham Act are presumed to cause irreparable harm. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). Even without the presumption, evidence submitted at the hearing shows that Plaintiffs' harm cannot be adequately compensated for with damages. It would be difficult, if not impossible, to ascertain the amount of economic harm Plaintiffs have suffered and will continue to suffer if Defendants continue to represent that (1) MPI and Defendants have a commercial relationship, and (2) that Plaintiffs endorse Defendants products. Plaintiffs have met the standard for showing irreparable harm.

Plaintiffs have also shown that there would be no adequate remedy at law absent injunctive relief because Plaintiffs would be forced to repeatedly file lawsuits every time Defendants made false representations. *MetroPCS v. Devor*, 215 F.Supp.3d 626, 639 (N.D. Ill. 2016).

The balance of hardships weighs in favor of granting injunctive relief. Plaintiffs' reputation in the veteran community is important to the long-term sustainment of MPI, and since Defendants began making false representations, MPI has experienced a decline in donations and book purchases. On the other hand, there is no evidence of harm to Defendants. Defendants have no interest in making false statements, and Defendants cannot consider it a burden to follow the law. *MetroPCS*, 215 F.Supp.3d at 640.

Lastly, an injunction is in the interest of the public. False representations only serve to mislead the public, in particular, potential coaches who register for Defendants'

training. The public has a strong interest in knowing that there is no commercial relationship between Defendants and Plaintiffs.

Accordingly, Plaintiff's request for injunctive relief will be granted—with one exception. The court does not grant Plaintiff's request to enjoin Defendants from “otherwise unfairly competing with Plaintiffs” as this request is vague and overbroad.

2. Violations under the Copyright Act

The Copyright Act authorizes the award of damages, injunctive relief, costs, and attorney's fees—all of which are requested by Plaintiffs.

The Copyright Act allows plaintiffs to elect between actual damages or statutory damages. *See* 17 U.S.C. § 504(a). With respect to statutory damages—which Plaintiffs seek—the court may award a sum not less than \$750 but not greater than \$30,000 per instance of infringement. *Id.* § 504(c).

Plaintiffs request the court find three instances of copyright infringement based on Defendants' unauthorized reading of excerpts from the War at Home in Seattle, Washington; San Diego, California; and Chicago, Illinois. At the prove-up hearing, two witnesses testified that they attended training sessions in Seattle, Washington and Chicago, Illinois. There was, however, no evidence that Defendants read excerpts in San Diego, California. Based on this evidence, the court finds that Plaintiffs have proven that on two separate occasions, Defendants infringed Plaintiffs' copyright. Accordingly, the court awards Plaintiffs \$15,000 per instance for a total award of \$30,000.

The Copyright Act also authorizes a court to award injunctive relief to enjoin any future violations of a plaintiff's copyright. 17 U.S.C. § 502; *Jobete Music Co., Inc. v.*

Johnson Communications, Inc., 285 F.Supp.2d 1077, 1092 (S.D. Ohio 2003) (citation omitted) (noting courts routinely issue injunctions where liability is established and there is a continuing threat to the copyright). Because there is a continuing threat to the copyright, and for many of the same reasons as stated in the prior section, the court will enjoin Defendants from publically reading excerpts from a War at Home, either at a recruitment presentation or on social media.

Lastly, the Copyright Act authorizes the court, in its discretion, to award costs and attorney's fees to successful plaintiffs. 17 U.S.C. § 505. Courts typically award costs to prevailing parties in copyright cases. *Arclightz and Films Pvt. Ltd. v. Video Palace Inc.*, 303 F.Supp.2d 356, 365 (S.D N.Y. 2003) (citation omitted). Attorney's fees are likewise appropriate under the Copyright Act and have been awarded for the purpose of encouraging colorable claims of copyright infringement. *See Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931, 942 (7th Cir. 1989). Plaintiffs have requested that the court award \$400 for costs and \$15,345.00 for attorney's fees incurred in the present litigation. Counsel for Plaintiffs has also submitted an Affidavit attesting to the costs and fees. Finding this request reasonable, the court will grant Plaintiffs' request for costs and attorney's fees.

3. Defamation *per se* under Indiana Common Law

Damages are presumed in actions for defamation *per se* because they are the natural and probable consequence of such statements. *See Dugan*, 929 N.E.2d at 186; *Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223, 1230 (Ind. Ct. App. 2005). Even in the

absence of proof of actual harm, the court may award a substantial sum. *See Cortez*, 827 N.E.2d at 1230.

Plaintiff requests \$110,000 in damages based on Defendants previously mentioned statements. Though not required, evidence presented at the prove-up hearing showed that Shawn has suffered a significant amount of stress which affected her health and her education as a result of Sabourin's statements. Shawn testified that she was an A student at Liberty University, but when Sabourin started making defamatory statements, Shawn's grades plummeted. Though Justin did not testify, Sabourin made defaming statements about his military service. Accordingly, the court finds \$110,000 to be an appropriate sum of damages. *See Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1258 (N.D. Ind. 2005) (upholding defamation award of \$400,000); *Powers v. Gastineau*, 568 N.E.2d 1020, 1026 (Ind. Ct. App. 1991) (upholding defamation award of \$75,000).

In addition to presumed damages, a plaintiff may also recover special damages upon proper proof. *Cortez*, 827 N.E.2d at 1230. Special damages may be awarded for financial damages as a consequence of the defamatory statements. *Id.* Plaintiffs request \$5,425.59 in damages for lost profits from book sales in 2017 and \$4,684.05 in damages for lost charitable donations in 2017. (*See* Filing No. 22, Affidavit of Shawn Gourley at 2 – 3, ¶¶ 6, 7). Plaintiffs' lost profits and donations calculations are based on the decrease in book sales and charitable donations from 2016 to 2017. The court finds these damages to be adequately proven and will award them accordingly.

Lastly, Plaintiffs request the court permanently enjoin Defendants from making and publishing further defamatory *per se* statements. However, the court does not grant

this request as permanently enjoining speech would seemingly constitute a prior restraint and present a First Amendment concern. *See e360 Insight*, 500 F.3d at 605 – 606 (noting that there are sensitive First Amendment issues presented in the context of permanent injunctions in defamation actions).

V. Conclusion

For the reasons stated above, Plaintiff's Motion for Default Judgment is **GRANTED**. (Filing No. 20). Judgment is hereby entered in favor of the Plaintiffs and against the Defendants as follows:

Count 1 – Lanham Act Violations: Judgment in favor of Plaintiff MPI against Defendants for false advertising and false endorsement in violation of section 43(a) of the Lanham Act.

Defendants and their officers, agents, and representatives are hereby permanently restrained and enjoined from (1) falsely advertising or representing themselves as being connected with the Plaintiffs, through sponsorship or association; and (2) engaging in any act which is likely to cause members of the relevant trade and/or public to believe that any goods or services of Defendants are in any way endorsed by, approved by, and/or associated with Plaintiffs.


Count 2 – Copyright Act Violations: Judgment in favor of Plaintiffs' Shawn Jaclyn Gourley and Justin Gourley against Defendants for copyright infringement in violation of 17 U.S.C. §§ 106(4) and 501(a) of the 1976 Copyright Act. Plaintiffs are awarded \$30,000.00 in statutory damages and \$400.00 in costs. Plaintiffs' Counsel is awarded \$15,345.00 in attorney's fees.

Defendants and their officers, agents, and representatives are hereby permanently restrained and enjoined from: (1) publicly reading excerpts from, or summaries of, Plaintiffs' copyrighted book, without Plaintiffs' permission, at any recruitment or marketing presentations or meetings related to Defendants' goods or services, and (2) publishing or distributing any excerpts from, or summaries of, Plaintiffs' copyrighted book, without Plaintiffs' permission, on the Internet or any social media website, including on any email distribution, telecommunications site, online video chat, or online voice call.

Count 4 – Defamation Judgment in favor of all Plaintiffs against Defendants for defamation *per se* under Indiana law. Plaintiffs are awarded \$110,000.00 in compensatory damages, \$5,425.59 in special damages for lost profits from book sales, and \$4,684.05 in special damages for lost charitable donations.

Final judgment cannot be entered though because Counts 3 and 5 remain. Should Plaintiff wish to dismiss these claims, the court will enter final judgment accordingly.

SO ORDERED this 8th day of May 2018.


RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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