UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNSON & JOHNSON, *et al.*,

Plaintiffs,

v. Case No. 8:19-cv-1673-AEP

XS SUPPLY, LLC, *et al.*,

Defendants.
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**REPORT AND RECOMMENDATION**

Plaintiffs Johnson & Johnson, Ethicon, Inc., and Ethicon US, LLC ("Ethicon") brought this action against Defendants XS Supply, LLC ("XS Supply"), Jon M. Bird, Tyler Berger, Ivan Rodimushkin, David W. Longdue III, and Brendan Thomas (collectively, the "XS Supply Defendants"), alleging claims for: (1) federal trademark infringement (Counts I and II); (2) false description and designation of origin in commerce (Count III); (3) federal false advertising (Count IV); (4) federal dilution of mark (Count V); (5) Florida dilution of mark and injury to business reputation (Count VI); (6) Florida Deceptive and Unfair Trade Practices violation (Count VII); (7) common law unfair competition (Count VIII); and (8) common law unjust enrichment (Count IX) (Doc. 1). Subsequently, Ethicon amended its allegations to add several additional defendants, including: (1) Lion Heart Surgical Supply LLC, Lion Heart Surgical Supply Corp., Fabian Conde, and Janaina D. Nascimento (collectively, the "Lion Heart Defendants"); (2) Very Nice Deals, Inc. d/b/a AK Global Med ("AK Global") and Ashraf Abukhalaf

(collectively, the "AK Global Defendants"); (3) M/S Medserve ("Medserve") and Pritamdas Arora ("Arora") (collectively, the "Medserve Defendants"); and (4) Pure Care Traders F.Z.E. ("Pure Care") and Ali Hussain ("Hussain") (collectively, the "Pure Care Defendants"). In its Second Amended Complaint, Ethicon set forth its claims against the Medserve Defendants and the Pure Care Defendants, alleging that they supplied and/or produced counterfeit Ethicon products (Doc. 116). After the Medserve Defendants and the Pure Care Defendants failed to appear, Ethicon moved for entry of default against both the Medserve Defendants and the Pure Care Defendants (Docs. 329, 330), which the Clerk of Court subsequently entered (Docs. 333-36). Ethicon now moves for entry of a default judgment against the Medserve Defendants and against the Pure Care Defendants (Doc. 337, 338). For the following reasons, it is recommended that Ethicon's motion for default judgment (Doc. 337) be granted.[1]

## I. Background

Ethicon is the owner of three well-established registered trademarks that appear on the packaging of genuine Ethicon SURGICEL products (collectively, the "SURGICEL Marks"): "Surgicel," "Ethicon" and **ETHICON** (Doc. 116, ¶33). For more than 60 years, Ethicon has been selling SURGICEL surgical products used to

[1] All the parties consented to the undersigned's jurisdiction except the Medserve Defendants and the Pure Care Defendants (Docs. 91, 92). *See* 28 U.S.C. § 636. Since the Medserve Defendants and the Pure Care Defendants did not consent to the undersigned's jurisdiction, the District Judge was reassigned to the case after judgment was entered against the other Defendants for purposes of entry of judgment and a permanent injunction against the Medserve Defendants and against the Pure Care Defendants.

control bleeding, known as hemostats (Doc. 116, ¶28). The SURGICEL family of products includes what it now brands as the SURGICEL Original Absorbable Hemostat, SURGICEL FIBRILLAR, as well as other products (Doc. 116, ¶28).

Authentic SURGICEL products are made from specially treated materials, including oxidized regenerated cellulose, that have several qualities that are useful for surgery (Doc. 116, ¶29). First, SURGICEL products are highly effective hemostats used for controlling bleeding during surgery (Doc. 116, ¶29; Doc. 108, Declaration of Benjamin D. Fitz ("Fitz Decl."), ¶4). Second, SURGICEL products are absorbable in the body, so they can be left inside of the patient after surgery, where they will harmlessly dissolve (Doc. 116, ¶29; Fitz Decl., ¶4). Third, SURGICEL devices act as an antimicrobial agent (Doc. 116, ¶29; Fitz Decl., ¶4). Each of these features—the hemostatic properties, the absorbable properties, and the antimicrobial properties—are important in surgeries and are attributable to the oxidized state of the regenerated cellulose material used to make SURGICEL products, since non-oxidized regenerated cellulose fiber does not possess the hemostatic or antimicrobial properties and will not absorb in the body (Doc. 116, ¶¶29-30).

All authentic SURGICEL Absorbable Hemostat distributed in the United States is manufactured, according to a specific and consistent formula, at a factory in Neuchatel, Switzerland, which employs rigorous quality control, specialized equipment, and consistent processes to produce a product that surgeons can rely on to be the same material in each package (Doc. 116, ¶32). Ethicon also uses a factory

located in San Lorenzo, Puerto Rico, which manufactures several SURGICEL products, including the SURGICEL Absorbable Hemostat, for distribution in regions outside of the United States (Doc. 116, ¶32). In addition to its direct sales, Ethicon distributes SURGICEL products through its authorized distributors, who then sell the products to healthcare facilities, such as hospitals, for use in surgical procedures (Doc. 116, ¶32). Between the manufacturing and distribution controls along with other control systems, Ethicon endeavors to safeguard the reputation for safety, reliability, and quality that SURGICEL products developed over a period of 60 years (Doc. 116, ¶32).

Indeed, Ethicon uses distinctive packaging on both the interior and exterior of the packaging to distinguish its products in the marketplace (Doc. 116, ¶34). Ethicon has used and currently uses the trademarks and trade dress in commerce in connection with the sale of SURGICEL products and plans to continue such use in the future, including prominently displaying them in advertising and promotional materials (Doc. 116, ¶35). Further, Ethicon has engaged and continues to engage in activities to promote SURGICEL products and the business and goodwill associated with its trademarks and to expand the use and reputation of its trademarks, trade dress, logos, copyrights, and property through the United States, each of which symbolize Ethicon's business goodwill and remain invaluable assets to Ethicon (Doc. 116, ¶36).

Pertinent to this case, in May 2019, Ethicon received several complaints regarding defective SURGICEL Absorbable Hemostat at the University of

Kentucky Medical Center, which Ethicon tested and determined to be counterfeit (Doc. 116, ¶37). More specifically, during a brain surgery conducted on May 10, 2019, a neurosurgeon at the University of Kentucky Medical Center noticed that a SURGICEL product felt, acted, and handled differently than usual and was neither packaged the way it usually was nor folded properly in the pouch (Doc. 116, ¶38). A technician involved in the surgery further observed that the product did not cut with scissors the way it had previously and kept rolling up after being cut into shape for use, which was also atypical (Doc. 116, ¶38). The surgeon transmitted the complaint to an Ethicon sales representative, who obtained photographs and a sample of the inferior product (Doc. 116, ¶38). Subsequently, the same surgeon reported similar complaints on May 24 and May 30, 2019 and provided photographs of the problematic SURCICEL products (Doc. 116, ¶39). The photographs revealed that the packaging of the problematic products displayed lot number KGB6651 and indicated that the products were manufactured in San Lorenzo, Puerto Rico (Doc. 116, ¶40). As this lot number was not intended for sale in the United States, and as it was in fact shipped to non-U.S. countries in 2016, the product could not have been sourced from an authorized U.S. distributor of SURGICEL products (Doc. 116, ¶40). Subsequent testing conducted by Ethicon experts in both the packaging and the product departments reviewed the University of Kentucky sample and concluded that it was counterfeit and, importantly, that it was critically defective and dangerous, including a lack of sufficient oxidation to be

absorbed if left in the body after surgery and that the counterfeit products were not sterile (Doc. 116, ¶¶41-52).

After learning of the counterfeit SURGICEL products at the University of Kentucky, Ethicon received an invoice from the University of Kentucky indicating that it purchased more than 1,000 units of SURGICEL Absorbable Hemostat from XS Supply (Doc. 116, ¶53). The invoice (1) indicated that the XS Supply Defendants sold products with the same lot numbers as the counterfeit sample that Ethicon obtained from the University of Kentucky and tested, and (2) misrepresented that the product purported to be SURGICEL Original hemostat, which it was not (Doc. 116, ¶¶54-55). Instead, the product that the XS Supply Defendants shipped to the University of Kentucky was not distributed in the United States, with the carton prominently indicating that the product was not intended for re-export in the United States (Doc. 116, ¶56).

Given the foregoing, Plaintiffs initiated this action against the XS Supply Defendants in July 2019 (Doc. 1). Upon consideration, the undersigned issued an *Ex Parte* Seizure Order against the XS Supply Defendants on July 15, 2019 (Doc. 32). Two days later, Ethicon executed the Seizure Order at XS Supply's corporate offices and warehouse, where they obtained records and information indicating that XS Supply bought counterfeit products from the Lion Heart Defendants (Doc. 116, ¶¶57-58).

The next day, on July 18, 2019, Ethicon submitted an Amended Complaint, setting forth claims against the XS Supply Defendants and the Lion Heart

Defendants (Doc. 36). The same day, the undersigned issued another *Ex Parte* Seizure Order, this time as to the Lion Heart Defendants (Doc. 42). Four days after that, Ethicon executed the July 18, 2019 Seizure Order at the Lion Heart Defendants' corporate offices and warehouse, collecting multiple units of SURGICEL products that Ethicon concluded were counterfeit after testing the seized products and reviewing their packaging (Doc. 116, ¶62). Despite prior warnings by a previous customer about the potentially counterfeit products the Lion Heart Defendants sold, the Lion Heart Defendants sold the counterfeit products to the XS Supply Defendants without disclosing any of the concerns raised by the original customer, and the XS Supply Defendants then sold those products to the University of Kentucky, potentially putting several patients at risk (Doc. 116, ¶¶63-67). The Lion Heart Defendants then purchased more counterfeit SURGICEL products from its overseas supplier after the initial sale to the XS Supply Defendants, but Ethicon seized those products during the seizure before the Lion Heart Defendants could sell them (Doc. 116, ¶68).

During the Lion Heart seizure, Ethicon also obtained documents confirming that the Lion Heart Defendants purchased the counterfeit products from Pure Care, an overseas supplier that none of the Lion Heart Defendants ever met, with whom they had not previously conducted business, and about whom they did not know much (Doc. 116, ¶69). Ethicon additionally obtained documents confirming that Pure Care purchased the counterfeit SURGICEL products from Medserve (Doc. 116, ¶72). Based on these documents, Ethicon requested to submit a second

amended complaint to assert claims against the Medserve Defendants and the Pure Care Defendants, which the undersigned granted (Docs. 98, 115, 116). Namely, in October 2019, the undersigned permitted Ethicon to submit a Second Amended Complaint, asserting claims for, among other things, federal trademark infringement, false description and designation of origin in commerce, federal false advertising, federal and state trademark dilution, state deceptive and unfair trade practices, common law unfair competition, and common law unjust enrichment, and alleging that the Medserve Defendants and the Pure Care Defendants, without authorization from Ethicon, purchased, marketed, advertised, distributed, sold, offered for sale, and otherwise used in commerce in the United States counterfeit SURGICEL® surgical devices, all of which claims, Ethicon alleged, have given rise to significant damages (Doc. 116).

Through third-party discovery, Ethicon discovered that one of Pure Care's other customers was AK Global, so Ethicon, through counsel and investigators, made a test purchase of several SURGICEL products from AK Global, with AK Global handling the negotiations and invoicing but shipping coming directly from Medserve in India to Ethicon's investigators located in the Middle District of Florida (Doc. 116, ¶73). Upon testing of the samples sold to its investigators by AK Global and Medserve, Ethicon confirmed that multiple lots of SURGICEL, including both the packaging and the product itself were counterfeit and that what appeared to be authentic SURGICEL FIBRILLAR product was sold in counterfeit packaging (Doc. 116, ¶¶74-83). The SURGICEL Marks appear on the packaging

of Ethicon's SURGICEL products, including the counterfeit SURGICEL products trafficked by Medserve and Pure Care (Doc. 116, ¶¶34, 39, 44, 81); Doc. 102, Second Declaration of Daniel Burkley ("Second Burkley Decl."); Doc. 101, Second Declaration of Denise Dacey ("Second Dacey Decl.") (providing images and analysis of the outer packaging and foil seal pouches for the counterfeits). The counterfeit SURGICEL products that the Medserve Defendants and the Pure Care Defendants trafficked do not exhibit the same qualities as the genuine products, largely because they are significantly less oxidized (Doc. 116, ¶50; Fitz Decl., ¶¶9-10). Because the oxidization of a SURGICEL hemostat is what gives it its antimicrobial, hemostatic, and absorption profiles, the counterfeits will simply not function the way surgeons expect and need SURGICEL devices to function (Doc. 116, ¶¶50-51; Fitz Decl. ¶¶5 & 11). For example, the counterfeits are unlikely to effectively control bleeding and would be considered critical failures by Ethicon's manufacturing standards (Doc. 116, ¶50; Fitz Decl., ¶¶8-11). The counterfeits also lack sufficient oxidation to be reliably absorbed by the body after surgery (Doc. 116, ¶51; Fitz Decl., ¶7). The counterfeit device will thus remain in the body after surgery as a foreign object, which creates a host of serious risks to the patient, including infection, foreign body granuloma, and surgical adhesions (Doc. 116, ¶51).

In addition, the counterfeit SURGICEL devices sold by Medserve and Pure Care are bacterially contaminated (Doc. 116, ¶52). Ethicon sent several counterfeit SURGICEL samples to an outside laboratory for testing, and the results showed

that the counterfeits are teeming with a host of bacteria (Doc. 338, Declaration of Geoffrey Potter, dated February 2, 2022 ("Potter Feb. 2022 Decl."), Ex. 1). Using a contaminated surgical device on a patient, especially one designed to be left inside the body, creates a serious risk of infection and related complications (Fitz Decl., ¶¶7, 11, 12).

Given the foregoing, Ethicon sought to pursue its claims in the Second Amended Complaint against both the Medserve Defendants and the Pure Care Defendants. The Medserve Defendants and the Pure Care Defendants failed to respond to the Second Amended Complaint or otherwise appear or defend, despite being properly served by Ethicon, and, thus, defaults were entered against them pursuant to Rule 55(a), Federal Rules of Civil Procedure (Docs. 333-36). Consequently, Ethicon now moves for entry of a default judgment and permanent injunction against the Medserve Defendants and the Pure Care Defendants under Rule 55(b) (Docs. 337, 338).[2] Essentially, Ethicon requests that judgment be entered in favor of Ethicon and against the Medserve Defendants in the amount of $12,000,000 in statutory damages, with interest accruing at the current per annum legal rate; judgment be entered in favor of Ethicon and against the Pure Care Defendants in the amount of $6,000,000 in statutory damages, with interest accruing at the current per annum legal rate; the Medserve Defendants and the Pure Care Defendants be permanently enjoined from manufacturing, buying, selling,

[2] The undersigned previously entered judgment against the other Defendants. Only the claims against the Medserve Defendants and the Pure Care Defendants remain.

importing, marketing, advertising, distributing, or in any way using in United States commerce any goods, including authentic goods, bearing any trademarks owned by Ethicon, Inc. or Ethicon US, LLC (the "Ethicon Marks") or otherwise infringing or diluting any of the Ethicon Marks; the Medserve Defendants and the Pure Care Defendants be permanently enjoined from mentioning "Ethicon" or using any of the Ethicon Marks in their publicity, promotion, or advertising; and the Medserve Defendants and the Pure Care Defendants be permanently enjoined from using any logo, trade name, or trademark that is calculated to falsely represent or that has the effect of falsely representing that the services or products of any of the Medserve Defendants and the Pure Care Defendants are sponsored by, authorized by, or in any way associated with Ethicon.

## II. Legal Standard

"When a defendant has failed to plead or defend, a district court may enter judgment by default." *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1244 (11th Cir. 2015) (citing Fed. R. Civ. P. 55(b)(2)). Following entry of a default under Rule 55(a), a defendant is deemed to admit a plaintiff's well-pleaded allegations of fact, and, therefore, before entering a default judgment under Rule 55(b), a district court must ensure that the well-pleaded allegations in the complaint actually state a substantive cause of action and that a substantive, sufficient basis exists in the pleadings for the particular relief sought. *Tyco Fire & Sec., LLC v. Alcocer*, 218 F.

App'x 860, 863 (11th Cir. 2007) (citation omitted).[3] If the allegations of the complaint, accepted as true, establish the defaulted defendants' liability, then the court should enter judgment against them. *See, generally, Chanel, Inc. v. besumart.com*, 240 F. Supp. 3d 1283, 1288-89 (S.D. Fla. 2016). Although a defaulted defendant is deemed to admit the well-pleaded allegations of fact, the defaulted defendant "is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005) (citation and quotation omitted). Rather, entry of a default judgment is only warranted where a sufficient basis exists in the pleadings for the judgment entered. *Surtain*, 789 F.3d at 1245 (citation omitted).

Courts assess pleadings in conjunction with a default judgment by a standard "akin to that necessary to survive a motion to dismiss for failure to state a claim." *Id*. (citation omitted). Namely, a court may enter a default judgment only where a pleading contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). At all times, the decision to enter

[3] Unpublished opinions are not considered binding precedent but may be cited as persuasive authority. 11th Cir. R. 36-2.

a default judgment remains within the discretion of the district court. *Hamm v. Dekalb County*, 774 F.2d 1567, 1576 (11th Cir. 1985).

Notably, allegations regarding the amount of damages are not admitted by virtue of default. *Wallace v. The Kiwi Grp., Inc.*, 247 F.R.D. 679, 681 (M.D. Fla. 2008) (citation omitted). Rather, the plaintiff bears the burden to demonstrate the amount of damages it contends should be awarded, with the court determining the amount and character of damages to be awarded. *Id.* Though the court may hold an evidentiary hearing to determine an appropriate amount of damages, it is not required to do so, especially where, as here, the essential evidence is of record. *See Tara Prods., Inc. v. Hollywood Gadgets, Inc.*, 449 F. App'x 908, 911-12 (11th Cir. 2011) (noting that, when considering when to enter or effectuate a default judgment, the court maintains discretion regarding whether to conduct an evidentiary hearing to determine the amount of damages); *see S.E.C. v. Smyth*, 420 F.3d 1225, 1232 n.13 (11th Cir. 2005) ("Rule 55(b)(2) speaks of evidentiary hearings in a permissive tone ... We have held that no such hearing is required where all essential evidence is already of record."); *Wallace*, 247 F.R.D. at 681 ("If a default judgment is warranted, the Court may hold a hearing for purposes of assessing damages. … However, a hearing is not necessary if sufficient evidence is submitted to support the request for damages."); *see* Fed. R. Civ. P. 55(b)(2). Indeed, the "Court may award statutory damages 'without holding an evidentiary hearing based upon affidavits and other documentary evidence if the facts are not disputed.'" *Michael Kors L.L.C. v. AirTnMax Store*, Case No. 20-cv-62455-BLOOM/Valle, 2021 WL

2592367, at *6 (S.D. Fla. Feb. 16, 2021) (quoting *Perry Ellis Int'l, Inc. v. URI Corp.*, No. 06-22020-CIV, 2007 WL 3047143, at *1 (S.D. Fla. Oct. 18, 2007)). Notwithstanding, a court must assure that a legitimate basis exists for any damage award it enters. *See Anheuser Busch, Inc. v. Philpot*, 317 F.3d 1264, 1266 (11th Cir. 2003).

## III. Discussion

### A. Liability

Ethicon has pleaded various causes of action against the Medserve Defendants and the Pure Care Defendants for violating Ethicon's trademark rights under federal and state law. Based on its well-pleaded allegations and supporting affidavits and declarations, Ethicon established that it can prevail on its trademark claims by showing: "(1) that they possess a valid mark, (2) that the defendants used the mark, (3) that the defendants' use of the mark occurred 'in commerce,' (4) that the defendants used the mark 'in connection with the sale . . . or advertising of any goods,' and (5) that the defendants used the mark in a manner likely to confuse consumers." *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218 (11th Cir. 2008). Where the defendants have sold counterfeit products and/or packaging intended to look exactly like genuine products and packaging, likelihood of consumer confusion is presumed. *See Casa Dimitri Corp. v. Invicta Watch Co. of Am.*, 270 F. Supp. 3d 1340, 1359 (S.D. Fla. 2017) (noting that courts generally engage in a seven-factor assessment of whether a likelihood of confusion exists but indicating that application of the factors is unnecessary where use of an identical mark, *i.e.* a

counterfeit mark, is at issue); *Dive N' Surf, Inc. v. Anselowitz*, 834 F. Supp. 379, 382 (M.D. Fla. 1993) ("[B]ecause the counterfeit symbols and the genuine symbols are substantially similar as to both design and use and because defendant sold the counterfeit symbols to the public, the court presumes that defendant's counterfeit items caused public confusion in the marketplace."). Further, in cases alleging willful infringement, the defendants' willfulness is established by virtue of their default. *See Chanel, Inc.*, 240 F. Supp. 3d at 1292; *Perry Ellis*, 2007 WL 3047143, at *7 ("PEI's allegation that URI intentionally, knowingly, and willfully infringed upon PEI's trademarks has been established by the default."); *Arista Recs., Inc. v. Beker Enters., Inc.*, 298 F. Supp. 2d 1310, 1313 (S.D. Fla. 2003) (collecting cases). Lastly, individual owners or officers are personally liable for a company's trademark infringement if they direct, control, ratify, participate in, or are the moving force behind the infringing activity. *ADT LLC. v. Alarm Prot. Tech Fla., LLC*, 646 F. App'x 781, 787-88 (11th Cir. 2016) (citing *Babbit Elecs., Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1184 (11th Cir. 1994)) (quotation omitted).

To summarize, Ethicon's Second Amended Complaint provides detailed allegations as to how the counterfeits sold by all Defendants, including the Medserve Defendants and the Pure Care Defendants, resemble authentic Ethicon SURGICEL devices and copy Ethicon's registered trademarks, but are in fact inferior fakes that pose an extreme danger to patients (Doc. 116, ¶¶41-52, 69-83). Ethicon also alleges that the Medserve Defendants and the Pure Care Defendants sold these dangerous counterfeits to customers in the United States (Doc. 116, ¶¶69-

74). Ethicon further alleges that the individual defaulted Defendants – Arora and Hussain – are the owners and principals of their respective companies, that they control those companies, and that they personally sold the counterfeits on behalf of their companies (Doc. 116, ¶¶19, 20, 23, 24). These allegations establish liability as to the Medserve Defendants and the Pure Care Defendants under Ethicon's stated causes of action. Indeed, several non-defaulting Defendants, who were downstream sellers of the same counterfeits originally sold by the Medserve Defendants and the Pure Care Defendants, vigorously challenged the sufficiency of Ethicon's allegations, and the undersigned found Ethicon's allegations sufficient and denied their motions to dismiss (Doc. 178). Accordingly, when accepted as true, Ethicon's allegations and supporting documentation, as detailed above and below, establish liability on behalf of the Medserve Defendants and the Pure Care Defendants as a matter of law.

### 1. The Medserve Defendants Sold Over 4,000 Dangerous Counterfeit SURGICEL Devices

The evidence available to Ethicon demonstrates that Medserve sold, at minimum, 4,388 counterfeit SURGICEL devices bearing the SURGICEL Marks. From seizures and discovery in this action, Ethicon learned that Medserve sold 840 counterfeit SURGICEL Absorbable Hemostat devices (70 boxes of 12 units) to Pure Care in January 2019 (Potter Feb. 2022 Decl., Ex. 2). In turn, Pure Care sold those 840 counterfeits to the Lion Heart Defendants, who sold them to the XS Supply Defendants, who in turn sold them to the University of Kentucky Medical Center (Potter Feb. 2022 Decl., Ex. 3-5). Medserve also sold an additional 240 counterfeit

SURGICEL Absorbable Hemostat devices to Pure Care (Potter Feb. 2022 Decl., Ex. 2). Ethicon received and tested a sample of the Medserve-originated counterfeits from the University of Kentucky and determined that the products were counterfeit (Second Dacey Decl., ¶¶3-11; Second Burkley Decl., ¶¶6-14).

Additionally, Medserve shipped 276 counterfeit SURGICEL devices into the United States as part of a test purchase by Ethicon's investigators (Potter Feb. 2022 Decl., Ex. 6). Ethicon's investigators purchased the products from AK Global, but they were shipped to the investigators directly by Medserve (Potter Feb. 2022 Decl., Ex. 6). Ethicon's investigators received two different counterfeit products: (1) SURGICEL Absorbable Hemostat devices; and (2) SURGICEL FIBRILLAR devices (Second Dacey Decl., ¶12). Ethicon tested samples of products from each category and concluded that they were all counterfeit (Second Dacey Decl., ¶¶12-30; Second Burkley Decl., ¶¶15-40).

Finally, from its litigation against the Medserve Defendants, Ethicon has indisputable evidence that Medserve sold at least 3,032 counterfeit SURGICEL devices to eSutures.com ("eSutures") and shipped them to eSutures' Illinois warehouse (Potter Feb. 2022 Decl., Ex. 7). Those products included: 2532 units of counterfeit SURGICEL Absorbable Hemostat and 500 units of counterfeit SURGICEL FIBRILLAR (Potter Feb. 2022 Decl., Ex. 7). Ethicon filed suit against eSutures on June 15, 2020, executed a Seizure Order at eSutures' warehouse shortly thereafter, and seized SURGICEL devices that Ethicon tested and confirmed to be counterfeit (Potter Feb. 2022 Decl., Ex. 8). On its invoices, Medserve fraudulently

called the counterfeit SURGICEL devices "cotton gauge" to avoid detection by authorities, but the invoices list the product codes for the (counterfeit) SURGICEL Absorbable Hemostat devices (product codes 1952 and 1953, corresponding to different sizes) and SURGICEL FIBRILLAR devices (product code 1961) (Potter Feb. 2022 Decl., Ex. 7).

**2. The Pure Care Defendants Purchased and Sold More Than 1,000 Dangerous Counterfeit SURGICEL® Devices**

The evidence received from seizures and discovery from the non-defaulting Defendants in this action demonstrates that Pure Care purchased and sold over a thousand counterfeit SURGICEL devices, each bearing the SURGICEL Marks. Specifically, Pure Care purchased a total of 1,080 counterfeit SURGICEL Absorbable Hemostat devices (90 boxes of 12 units) from Medserve. In January 2019, Pure Care sold 840 counterfeit SURGICEL Absorbable Hemostat products (70 boxes of 12 units) to the Lion Heart Defendants (Potter Feb. 2022 Decl., Ex. 3). As discussed above, those products were ultimately sold to the University of Kentucky Medical Center, and Ethicon determined that they were counterfeit (Second Dacey Decl., ¶¶3-11; Second Burkley Decl., ¶¶6-14). In May 2019, Pure Care sold a second shipment of 120 counterfeit SURGICEL Absorbable Hemostat products (10 boxes of 12 units) to Lion Heart (Potter Feb. 2022 Decl., Ex. 9). Those counterfeits were recovered by Ethicon during the seizure at Lion Heart's offices (Potter Feb. 2022 Decl., ¶ 3).

### 3. Medserve Is a Willful, Recidivist Counterfeiter of Medical Devices and the Manufacturer of the Highly Dangerous Counterfeits at Issue

Medserve is not merely a large-volume seller of these dangerous counterfeit SURGICEL devices: Medserve is in fact the source and manufacturer of the counterfeits, which Arora assembled with his bare hands on the floor of his dirty apartment.

#### a. Medserve Manufactured all the Counterfeit SURGICEL Devices and Knew That Its Unsanitary Assembling Process Was Causing Infections

Ethicon first became aware of Medserve after executing the *Ex Parte* Seizure Order issued by the undersigned against the Lion Heart Defendants, and information from the seizure allowed Ethicon to trace the sale of the counterfeits from the University of Kentucky all the way back to Medserve in Delhi, India. As noted, on October 4, 2019, Ethicon amended its allegations to name the Medserve Defendants in the Second Amended Complaint (Doc. 116). That same day, upon Ethicon's motion, the undersigned issued a Letter of Request to the Honorable High Court of Delhi, seeking the Indian courts' assistance in combatting these dangerous counterfeits by issuing a seizure order in India (Doc. 117). Through Indian counsel, Ethicon filed suit against the Medserve Defendants in the Honorable High Court of Delhi, which, with the support of this Court's Letter of Request, issued an *ex parte* seizure order (Potter Feb. 2022 Decl., ¶4). Ethicon executed that seizure in Delhi on October 14, 2019, with Indian and American counsel in attendance (Potter Feb.

2022 Decl., ¶5). The seizure simultaneously occurred at Medserve's storefront, its warehouse, and Arora's apartment (Potter Feb. 2022 Decl., ¶5).

The Medserve Defendants were caught in the middle of a large counterfeit manufacturing operation they were running out of Arora's unsanitary apartment (Potter Feb. 2022 Decl., ¶6). Ethicon found piles of empty, never-sealed counterfeit SURGICEL Absorbable Hemostat pouches, along with similar amounts of a third-party manufacturer's plain, non-sterile gauze cut and folded into a shape resembling SURGICEL Absorbable Hemostats (Potter Feb. 2022 Decl., ¶6). These counterfeits were being assembled on the floor of Arora's unkempt and non-sterile apartment (Potter Feb. 2022 Decl., ¶7). Ethicon subsequently confirmed that the plain gauze located in Arora's apartment matched the counterfeit SURGICEL products recovered in the University of Kentucky Medical Center (Potter Feb. 2022 Decl., Ex. 10).

Communications recovered by Ethicon during the seizure revealed Medserve admitting to selling counterfeit Ethicon products. For example, in one communication, Medserve noted that a Chinese hospital who had received its counterfeit SURGICEL products "told us it cause[d] infection," which prompted Arora to note that "[w]hen we pack material, we use our hands to pack, maybe it created problem" (Potter Feb. 2022 Decl., Ex. 11, at 3). Other communications revealed specific details of Medserve's counterfeiting operation.

In the Second Amended Complaint, Ethicon alleged that some of the counterfeit SURGICEL FIBRILLAR sold by AK Global and Medserve appears to

have been expired product repackaged into counterfeit packaging with fake expiration dates (Doc. 116, ¶83). Medserve's communications confirmed that to be the case: Medserve worked with eSutures, who sent Medserve the expired devices, which Medserve repackaged into counterfeit packaging and sent back into the U.S. medical supply chain (Potter Feb. 2022 Decl., Ex. 7, 12-15). As described more fully in the Second Amended Complaint, the process of repackaging expired surgical devices into counterfeit packaging poses extreme health risks, including that the sterile product will be contaminated during the repackaging process (Doc. 116, ¶83). Tragically – and unsurprisingly, given the dirty and uncontrolled environment in which the Medserve Defendants manufactured the counterfeits – Ethicon confirmed that the counterfeit repackaged SURGICEL FIBRILLAR sold by Medserve was non-sterile and bacterially contaminated (Potter Feb. 2022 Decl., Ex. 1).

**b. The Medserve Defendants Created Fraudulent Shipping and Customs Documentation to Conceal Its Counterfeiting and Instructed Its Customers to Do the Same**

The Medserve Defendants also provided eSutures with instructions for how to create fraudulent shipping and customs declarations to prevent the expired products from being detected. For example, the Medserve Defendants explained:

> There is no need to mention the expiry or lot. Just need to mention that it's a cotton foam, no need to mention its use or anything.
>
> Just need to write cotton foam samples and send it via Aramex. … No need to mention reference code or item name on the invoice.

> Only mention the size and name it as cotton foam samples and that's it.

(Potter Feb. 2022 Decl., Ex. 16). In another message, the Medserve Defendants warned that under no circumstances could the authorities know this was expired product being shipped: "[w]e'll be f[*]cked if we mention 'expire' there . . . we'll all expire. It is not allowed" (Potter Feb. 2022 Decl., Ex. 17). In other messages, the Medserve Defendants explained how to keep the numbers on the shipping invoice fraudulently low to avoid attention and how to ship the product by courier to avoid scrutiny (Potter Feb. 2022 Decl., Ex. 18-19). The Medserve Defendants employed these fraudulent tactics when they shipped thousands of counterfeit SURGICEL devices to eSutures, listing the SURGICEL devices as "samples" of "cotton gauge" or "cotton foam," with a value of "one hundred USD only" (Potter Feb. 2022 Decl., Ex. 7).

**c. The Medserve Defendants Also Manufactured and Sold Vast Quantities of Defective, Highly Dangerous Counterfeits of Ethicon's LIGACLIP Surgical Devices**

When Ethicon was in the middle of executing the seizure at Arora's apartment in Delhi, Medserve received a shipment of thousands of counterfeit Ethicon LIGACLIP Extra Ligating Clips packed loosely in large, non-sterile plastic bags, delivered within full view of Ethicon's counsel and Indian law enforcement (Potter Feb. 2022 Decl., ¶8). Documentary evidence shows that the Medserve Defendants sold at least 4,320 counterfeit LIGACLIP devices to eSutures, which were packaged in counterfeit packaging (Potter Feb. 2022 Decl., Ex. 7 & 20). The

Medserve Defendants also sold over 2,000 additional counterfeit LIGACLIP devices to International Medical Distribution LLC in Texas, which in turn sold the counterfeit devices to eSutures (Potter Feb. 2022 Decl., Ex. 21 & 22).

Ethicon's LIGACLIP family of surgical devices are ligating clips used to ligate – *i.e.*, to occlude or close off – blood vessels during surgery (*see* Potter Feb. 2022 Decl., Ex. 24, 25). Ethicon tested samples of the LIGACLIP devices recovered from the Medserve Defendants and conclusively determined those devices to be counterfeit (Potter Feb. 2022 Decl., Ex. 20, 25). Ethicon's scientists tested the Medserve Defendants' counterfeit LIGACLIP devices and found them to fail several critical functional tests (Potter Feb. 2022 Decl., Ex. 24, 25). For instance, the counterfeit LIGACLIP products create a weaker ligation and seal, and they pull off more easily (Potter Feb. 2022 Decl., Ex. 24, 25). The result of the failure of these inferior counterfeits could be catastrophic bleeding and even death of the patient (Potter Feb. 2022 Decl., Ex. 25).

To be clear: Ethicon's Second Amended Complaint does not contain allegations concerning the counterfeit LIGACLIP devices that Medserve manufactured and sold into the United States by the thousandfold, and Ethicon does not seek damages here regarding the counterfeit LIGACLIP devices. As explained below, however, the scope of the Medserve Defendants' counterfeit manufacturing operation, and the thousands of additional lives it has placed at risk with the counterfeit LIGACLIP devices, remain relevant to the equities of the case and the appropriate injunctive relief to be awarded.

Indeed, Medserve is a recidivist counterfeiter of U.S. medical devices. In December 2011, a medical device distributor named RAM Medical, Inc. pleaded guilty to selling hundreds of boxes of counterfeit surgical mesh falsely bearing the marks of a U.S. medical device manufacturer. In its press release concerning the prosecution, the United States Department of Justice specifically identified "M/S Medserve in Delhi, India" as the origin of the counterfeits (Potter Feb. 2022 Decl., Ex. 26).

**B. Statutory Damages**

Having established liability on behalf of both the Medserve Defendants and the Pure Care Defendants, the inquiry turns to the appropriate remedy. In an anti-counterfeiting action under the Lanham Act, the "plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits … an award of statutory damages." 15 U.S.C. § 1117(c). In cases of willful infringement, the court may award statutory damages of "not more than $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)(2); *see also PetMed Express, Inc. v. MedPets.Com*, 336 F. Supp. 2d 1213, 1220-21 (S.D. Fla. 2004) (collecting cases and noting "[s]everal courts have found statutory damages [e]specially appropriate in default judgment cases.").

Here, Ethicon elects to recover statutory damages under 15 U.S.C. § 1117(c) rather than actual damages against the Medserve Defendants and the Pure Care Defendants. District courts maintain broad discretion in determining the amount

of a statutory damages to award. *PetMed Express,* 336 F. Supp. 2d at 1219. Statutory damages awards should serve the dual purpose of compensating the plaintiff and sanctioning and deterring infringers. *See id.* at 1220-21 ("Statutory damages under § 1117(c) are intended not just for compensation for losses, but also to deter wrongful conduct."). Given the facts of this case, including the potential physical harm and loss of life due to the counterfeits sold by the Medserve Defendants and the Pure Care Defendants, a maximum award of statutory damages is warranted.

The Medserve Defendants and the Pure Care Defendants sold thousands of fake, contaminated surgical supplies into the United States, putting thousands of patients' lives at risk. As detailed above, Ethicon's Second Amended Complaint and supporting affidavits and exhibits contain detailed allegations and proof demonstrating the extreme risk to patient health and safety posed by these counterfeits, all of which remains unrebutted by the Medserve Defendants and the Pure Care Defendants. These non-functional, bacterially contaminated counterfeits have been implanted in hundreds, possibly thousands, of patients' bodies in the United States. Because the counterfeits fail to dissolve after surgery, an untold number of patients are walking around today with these contaminated counterfeits still inside of them. The human cost of the Medserve Defendants' and the Pure Care Defendants' counterfeiting operation remains horrific. Significantly, the dire impact of these counterfeits on public health, and the counterfeiters' wanton disregard for human health and safety, make this case an extreme outlier in the anti-counterfeiting caselaw.

Regardless, even in standard commercial anti-counterfeiting cases, courts consistently issue substantial statutory damages against defaulted counterfeiters. In a typical action where sellers of counterfeit clothing or handbags fail to appear, federal district courts in Florida routinely grant plaintiff's requests for an entry of $1 million in statutory damages, *en masse*, against each of dozens or hundreds of online sellers based on evidence of a single counterfeited mark on a single product. *See, e.g.*, *Apple Corps Ltd. v. alchemytee.com*, CASE NO. 21-CV-60699-RAR, 2021 WL 4973113, at *5 (S.D. Fla. June 7, 2021) (noting that the "only available evidence demonstrates that each Defendant promoted, distributed, advertised, offered for sale, and/or sold at least one type of good bearing marks which were counterfeits of at least one of the Plaintiffs' Marks," collecting cases where $1 million statutory damages were awarded in similar circumstances, and awarding $1 million statutory damages against each of 117 defaulted defendants who sold a counterfeit item of clothing); *Michael Kors*, 2021 WL 2592367, at *6-7; *MPL Commc'n Ltd. v. 123ohoh Store*, Case No. 19-cv-62891-BLOOM/Valle, 2020 WL 2554614, at *5-6 (S.D. Fla. Feb. 13, 2020). For example, plaintiffs were awarded the maximum of $2 million per infringing mark – leading to total damages awards of $6 million and $4 million respectively – in two cases where the defaulted defendants sent faxes advertising vacation deals that used airlines' logos without permission. *Delta Air Lines Inc. v. Sotolongo*, Case No. 6:15-cv-2079-Orl-31TBS, 2017 WL 990602, at *4 (M.D. Fla. Feb. 24, 2017), *report and recommendation adopted*, 2017 WL 979074 (M.D. Fla. Mar. 14, 2017); *Am. Airlines Inc. v. In Charge Mktg., Inc.*, Case No. 2:10-cv-467-FtM-

29SPC, 2011 WL 13294632, at *2 (M.D. Fla. Mar. 21, 2011). In the *Delta Airlines* case, the court found the $6 million maximum statutory damages award appropriate because the "nature, scope, and duration of [the defaulted defendants'] illegal activities render [them] particularly culpable," noting that the defaulted defendants had sent "thousands" of faxes over the course of nine months. 2017 WL 990602 at *3-4, *report and recommendation adopted*, 2017 WL 979074.

The need to punish and deter the Medserve Defendants and the Pure Care Defendants presents an immeasurably more compelling case for awarding the maximum statutory damages. The *Delta Airlines* and *American Airlines* cases involved vacation advertisements using counterfeit airline logos, sent out in thousands of faxes over the course of several months, while this case involves thousands of extremely dangerous counterfeits of life-saving surgical devices being delivered throughout the medical supply chain in the United States over the course of years.

**1. The Medserve Defendants**

While all the Medserve Defendants and the Pure Care Defendants are highly culpable for their pivotal roles in this counterfeiting scheme, Arora and his company, Medserve, sit at the very top of the counterfeiting ring. No doubt exists as to their willfulness or culpability: Ethicon caught Medserve's owner, Arora, in the act of manufacturing the counterfeits under filthy conditions on the floor of his apartment (Potter Feb. 2022 Decl., ¶¶6-7). Arora knowingly stuffed plain gauze into counterfeit SURGICEL packaging with his bare hands (Potter Feb. 2022 Decl.,

Ex. 11). Arora is well-versed in techniques for smuggling counterfeit medical devices into the United States to avoid the detection of federal authorities and taught his co-conspirators how to do the same (Potter Feb. 2022 Decl., Ex. 16-19).

Arora's manufacture and sale of the counterfeits continued undeterred after a hospital directly informed him that his fake SURGICEL were causing infections in patients (Potter Feb. 2022 Decl., Ex. 11). At the same time, Arora also manufactured and distributed dangerous counterfeit LIGACLIP devices (Potter Feb. 2022 Decl., ¶8 & Ex. 7, 20, 21, 24, 25). In total, Arora sold more than 4,000 fake, contaminated SURGICEL devices and more than 6,000 fake LIGACLIP devices into the United States. Arora engaged in this behavior knowing he was harming and putting at risk scores of patients.

Arora stopped manufacturing and selling these dangerous counterfeits only because Ethicon, with this Court's assistance, stopped him. It took extraordinary efforts to do so: using *ex parte* seizures and independent investigative techniques in the United States to track down the origins of the counterfeit SURGICEL devices reported by the University of Kentucky; extensive covert on-the-ground investigation and surveillance in India to locate Arora's home and offices; obtaining a Letter of Request from this Court to the Indian judicial authorities; and obtaining and executing an *ex parte* seizure through the Honorable High Court of Delhi. Arora is a recidivist counterfeit manufacturer. It does not appear that he will stop putting patients' lives at risk so long as he finds it profitable to quickly assemble and

sell fake, low-quality, non-sterile surgical devices. Now that he has finally been caught, the need for deterrence could not be higher.

As indicated, the Lanham Act provides for a statutory damages award of up to $2 million "per counterfeit mark per type of goods or services sold." 15 U.S.C. § 1117(c)(2). Arora sold two types of counterfeit products bearing the SURGICEL Marks: counterfeit SURGICEL Absorbable Hemostat and counterfeit SURGICEL FIBRILLAR. These are two different types of products. The SURGICEL Absorbable Hemostat is the original oxidized regenerated cellulose device that has been a staple of surgical practices for decades, while the SURGICEL FIBRILLAR is a newer surgical device that has a more complex, multilayered structural composition that allows it to stop bleeding (*see* Potter Feb. 2022 Decl., Ex. 27). The three registered SURGICEL Marks appear on the counterfeit packaging (*i.e.*, the outer carton and the foil pouch containing the device itself) of each of these two different products. (Doc. 116, ¶¶33-34, 39, 44, 74-76, 81); *see* Second Burkley Decl.; *see* Second Dacey Decl.).

In total, therefore, Medserve and Arora are liable for statutory damages on six counterfeit marks. Accordingly, Ethicon seeks an award a total of $12 million in statutory damages, the maximum of $2 million per counterfeit mark per type of good sold, against Medserve and Arora. Based on the foregoing, an award of $12 million in statutory damages against the Medserve Defendants is warranted.

### 2. The Pure Care Defendants

According to Ethicon, less is known about Pure Care and its principal, Hussain, who did not participate in this litigation and who successfully evaded Ethicon's attempts to learn more about them through its independent investigation. The documentary evidence is clear, however, that Pure Care purchased at minimum 1,080 dangerous counterfeit SURGICEL devices from Medserve and sold 920 of those units to the Lion Heart Defendants, starting the supply chain that would lead to the counterfeits ending up in the hands of a neurosurgeon in the middle of performing a craniotomy at the University of Kentucky Medical Center.

As noted above, Pure Care and Hussain's willfulness is established by their default. Pure Care's willfulness is also readily inferred by the fact that it is a distributor running out of the Dubai Free Trade Zone that purchased large quantities of Ethicon medical devices at a steep discount from a known counterfeiter in Delhi, India, who imported the products into Dubai by falsely listing them as "samples" of "gauge" that was made from natural fabric (Potter Feb. 2022 Decl., Ex. 2). The undisputed facts are that Pure Care sold nearly a thousand dangerous counterfeit medical devices into the United States, where they were eventually sold to the University of Kentucky Medical Center. After the counterfeiting came to light, the federal government seized all the SURGICEL devices left within the University of Kentucky that matched the lot numbers originally sold by Pure Care. The government recovered only a fraction of what had been sold (Potter Feb. 2022 Decl., Ex. 28). Hundreds of contaminated, non-functional counterfeits sold by Pure

Care had already been sewn into patients, and Ethicon therefore argues that the Court should hold Pure Care responsible.

As Ethicon contends, Pure Care and Hussain sold counterfeits of SURGICEL Absorbable Hemostat bearing all three of the SURGICEL Marks. Consequently, Ethicon seeks statutory damages of $2 million per mark, for a total of $6 million against Pure Care and Hussain. Given the foregoing, an award of $6 million is warranted against the Pure Care Defendants.

### C. Permanent Injunction

While Ethicon seeks money damages against the Medserve Defendants and the Pure Care Defendants only in connection with its request for statutory damages under the Lanham Act and does not seek additional monetary damages under its other causes of action, Ethicon seeks a permanent injunction against each of the Medserve Defendants and the Pure Care Defendants in connection with all of its claims. In seeking permanent injunctive relief, Ethicon must satisfy a four-factor test before the Court may grant such relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Namely, according to well-established principles of equity, a plaintiff requesting a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of 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.* (citations omitted). The Lanham Act explicitly provides district

courts with the power to grant injunctions, according to principles of equity and upon such terms as the district court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered with the Patent and Trademark Office or to prevent a violation of 15 U.S.C. § 1125(a), (c), or (d). 15 U.S.C. § 1116(a). Accordingly, a plaintiff alleging claims under the Lanham Act, who demonstrates all four factors for a permanent injunction, is entitled to permanent injunctive relief to protect the plaintiff form future harm. *See Neva, Inc. v. Christian Duplications Intern., Inc.*, 743 F. Supp. 1533, 1548-49 (M.D. Fla. 1990); *see also PetMed Express*, 336 F. Supp. 2d at 1223.

Previously, the District Judge issued temporary restraining orders, which the undersigned later converted into preliminary injunctions and then permanent injunctions, against the XS Supply Defendants, the AK Global Defendants, and the Lion Heart Defendants, all of whom appeared and defended themselves in this action, for the same alleged violations and misconduct (Docs. 59, 60, 205, 314, 325). Notably, the XS Supply Defendants, the AK Global Defendants, and the Lion Heart Defendants were the downstream sellers of the counterfeits sold by the Medserve Defendants and the Pure Care Defendants, and they all faced the same claims for their sales of those counterfeit products. Ethicon therefore requests that the Court likewise permanently enjoin the Medserve Defendants and the Pure Care Defendants from purchasing, selling, or advertising any Ethicon products, or any products bearing any of Ethicon's trademarks, especially given the more egregious misconduct committed by the Medserve Defendants and the Pure Care Defendants.

To that end, accepting the well-pleaded facts as true, the undisputed facts detailed above demonstrate that entry of a permanent injunction against both the Medserve Defendants and the Pure Care Defendants is warranted. Namely, Ethicon demonstrated that it has been irreparably injured by the Medserve Defendants' and the Pure Care Defendants' counterfeiting, which confuses the public, harms Ethicon's goodwill, and potentially causes physical harm to individuals who receive the counterfeit supplies during a surgical procedure; that no adequate remedy at law exists to prevent the future harm of the Medserve Defendants and the Pure Care Defendants continued infringing use; that the balance of the equities overwhelmingly favors Ethicon; and that preventing future manufacture and distribution of dangerous fake surgical devices serves the public interest. Moreover, as noted, this Court entered similar injunctions against the XS Supply Defendants, the AK Global Defendants, and the Lion Heart Defendants in this action (Docs. 205, 314, 325), and, in addition, Ethicon received a similar injunction in its separate action against eSutures (Potter Feb. 2022 Decl., Ex. 29). *See also, e.g.*, *Perry Ellis*, 2007 WL 3047143, at *6-10 (awarding statutory damages and entering permanent injunction prohibiting defendants from "using PEI's trademarks, including but not limited to the PEA trademark, in any manner whatsoever."). Accordingly, entry of a permanent injunction is warranted.

## IV. Conclusion

For the foregoing reasons, it is hereby

RECOMMENDED:

1. Ethicon's Motion for Default Judgment (Doc. 337) be GRANTED.

2. Judgment be entered in favor of Ethicon and against the Medserve Defendants on its claims for relief in the Second Amended Complaint in the amount of $12,000,000 in statutory damages, with interest accruing at the current per annum legal rate, for which sum let execution issue.

3. Judgment be entered in favor of Ethicon and against the Pure Care Defendants on its claims for relief in the Second Amended Complaint in the amount of $6,000,000 in statutory damages, with interest accruing at the current per annum legal rate, for which sum let execution issue.

4. The Medserve Defendants and Pure Care Defendants, along with their respective principals, agents, members, servants, employees, directors, officers, parents, successors, heirs, assigns, executors, representatives, and subsidiaries, and all other persons in active concert or participation with them, be permanently enjoined from manufacturing, buying, selling, importing, marketing, advertising, distributing, or in any way using in United States commerce any goods, including authentic goods, bearing any trademarks owned by Ethicon, Inc. or Ethicon US, LLC, *i.e.* the Ethicon Marks, or any reproduction, counterfeit, copy, colorable imitation of, or any logo, trade name, or trademark confusingly similar to any of the Ethicon Marks, or otherwise infringing or diluting any of the Ethicon Marks.

5. The Medserve Defendants and Pure Care Defendants, along with their respective principals, agents, members, servants, employees, directors, officers, parents, successors, heirs, assigns, executors, representatives, and subsidiaries, and

all other persons in active concert or participation with them, be further permanently enjoined from mentioning "Ethicon" or using any of the Ethicon Marks in its publicity, promotion, or advertising, including, without limitation, on any domain name, website, uniform resource locator (URL), Internet store, or online marketplace platform.

6. The Medserve Defendants and Pure Care Defendants, along with their respective principals, agents, members, servants, employees, directors, officers, parents, successors, heirs, assigns, executors, representatives, and subsidiaries, and all other persons in active concert or participation with them, be further permanently enjoined from using any logo, trade name, or trademark that is calculated to falsely represent or that has the effect of falsely representing that the services or products of any of the Medserve Defendants or the Pure Care Defendants are sponsored by, authorized by, or in any way associated with Ethicon, or affixing, applying, annexing, or using in connection with the sale of any goods a false description or representation, including words or other symbols tending to falsely describe or represent such goods as being Ethicon products, or engaging in any act that is likely to cause the trade, retailers, or members of the purchasing public to believe that any of the Medserve Defendants or the Pure Care Defendants is associated with Ethicon.

7. The Court retain jurisdiction to enforce the Default Judgment and Permanent Injunction.

8. The Clerk be directed to close this case and terminate any remaining deadlines.

IT IS SO REPORTED in Tampa, Florida, this 1st day of August, 2022.

ANTHONY E. PORCELLI
United States Magistrate Judge

**NOTICE TO PARTIES**

A party has fourteen days from the date they are served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. See 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1). **Should the parties wish to expedite the resolution of this matter, they may promptly file a joint notice of no objection.**

cc: Hon. Virginia M. Hernandez Covington
Counsel of Record