

2011 WL 1427635

Only the Westlaw citation is currently available.

United States District Court,
S.D. Florida.

TRACFONE WIRELESS, INC., a
Delaware Corporation, Plaintiff,

v.

BEQUATOR CORPORATION, LTD.,
a foreign corporation, Defendant.

No. 10-cv-21462 (WMH).

|
April 13, 2011.

Attorneys and Law Firms

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FINAL JUDGMENT AND PERMANENT INJUNCTION AGAINST DEFENDANT, BEQUATOR CORPORATION, LTD.

HOEVELER, District Judge.

*1 THIS CAUSE is before the Court upon Plaintiff, TRACFONE WIRELESS, INC.'s ("TracFone"), motion for entry of default final judgment and a permanent injunction (the "Motion") brought in the above-captioned lawsuit against Defendant, BEQUATOR CORPORATION, LTD., a foreign corporation ("Defendant" or "Bequator").

Upon review of the Motion, the record, and being otherwise duly advised in the premises, the undersigned makes the following findings.

FACTUAL BACKGROUND

I. Plaintiff, TracFone Wireless, Inc.'s Business

TracFone is the largest provider of prepaid wireless telephone service in the United States, and markets its service under the TracFone, Net 10, SafeLink and Straight Talk brands (hereinafter referred to as "TracFone Prepaid Phones" or "Phones"). Complaint at ¶ 29 TracFone

customers prepay for wireless service by purchasing TracFone airtime cards and wireless phones specially manufactured for TracFone by leading mobile phone manufacturers, such as Motorola and Nokia. *Id.* Under this business model TracFone delivers affordable Phones to consumers who often cannot afford the fees for traditional monthly service. *Id.* at ¶ 31

TracFone subsidizes its customers' acquisition of its Phones by selling the Phones to retailers for much less than the phones cost TracFone from the manufacturers. *Id.* TracFone recoups this subsidy by selling prepaid airtime to customers who buy subsidized Phones. *Id.* TracFone takes several steps to protect its investment in the subsidized Phones, which are designed to make sure that the Phones can only be used on TracFone's wireless network. Specifically,

- the Phone manufacturers install TracFone's proprietary software on the Phones that prevents them from being used on other wireless systems; and,
- the Phones are sold subject to terms and conditions—which are printed on the outside of the retail packaging of the Phones¹ and are set forth in printed inserts included in the packaging of the Phones—that restrict and limit the sale and use of the Phones.

¹ The retail packaging in which new TracFone Phones are sold contains the following language printed in red banner on the outside of the package, and phones sold through the Net10, SafeLink and Straight Talk brands contain similar language:

THIS TRACFONE HANDSET IS SOLD EXCLUSIVELY FOR USE WITH TRACFONE PREPAID WIRELESS SERVICE. YOU AGREE NOT TO TAMPER WITH OR ALTER THE SOFTWARE OR HARDWARE IN THIS PHONE, OR ASSIST OTHERS IN SUCH ACTS, OR TO EXPORT TRACFONE HANDSETS OUTSIDE OF THE UNITED STATES. THESE ACTS VIOLATE TRACFONE'S RIGHTS AND COULD VIOLATE STATE AND FEDERAL LAWS. TRACFONE WILL PROSECUTE VIOLATORS TO THE FULL EXTENT OF THE LAW. BY PURCHASING OR OPENING THIS PACKAGE, YOU ARE AGREEING TO THESE TERMS AND THE TERMS AND CONDITIONS OF SERVICE

IN THE ENCLOSED USER GUIDE (AND AVAILABLE AT *WWW.TRACFONE.COM*).

Id. at ¶¶ 39–43

Id. at ¶¶ 32, 40–46

In connection with advertising and selling its Phones, TracFone has used, and continues to use, several trademarks (the “Marks”) in commerce including the marks TracFone, NET10, SafeLink and Straight Talk.² *Id.* at ¶¶ 33–37 The Marks constitute the lawful, valued, subsisting and exclusive property of TracFone. *Id.* at ¶¶ 34, 36 Only TracFone and its authorized, affiliated agents are permitted to use the Marks. *Id.* at 137

² In particular, TracFone owns and has also used the following trademarks: (1) Incontestable [United States Trademark Registration No. 2,114,692](#) for TracFone, based on a first use date of June 30, 1996; (2) [United States Trademark Registration Nos. 3,224,929](#) and [3,222,623](#) for TracFone Nationwide Prepaid Wireless and Design based on a first use dates of December 31, 2005; (3) [United States Trademark Registration No. 3,118,250](#) for NET10, based on a first use date of March 1, 2005; (4) [United States Trademark Registration Nos. 3,255,754, 3,253,506, and 3,251,389](#) for NET10 Pay As You Go Made Simple and Design, based on first use dates of December 31, 2005; (5) [United States Trademark Registration No. 3,630,321](#) for SafeLink Wireless and Design, based on a first use date of September 12, 2008; and (6) [Straight Talk and Straight Talk and Design](#), based on a first use date of May 29, 2009. *Id.* at ¶¶ 33, 36

TracFone's Marks are well known and established to customers and the trade as symbols identifying and distinguishing TracFone's products and services. *Id.* at ¶¶ 34, 36 The Marks also signify distinctive products and services of high quality and provide actual notice that TracFone's Phones are intended for use solely within TracFone's network. *Id.* Accordingly, the Marks have become an intrinsic and essential part of the valuable goodwill and property of TracFone. *Id.*

*2 TracFone has learned that although large quantities of its TracFone Prepaid Phones are being purchased at retailers throughout the United States, a significant number of these TracFone Prepaid Phones are not being activated for use on the TracFone network. *Id.* at 147 Instead, entities and individuals are purchasing and selling TracFone Prepaid Phones in bulk quantities for use outside of the TracFone Prepaid Wireless Service and

Coverage Area. *Id.* at 148 The Phones are removed from their original packaging, shipped overseas, and “unlocked” or “reflashed.” *Id.*³ As a result of these actions, TracFone loses both: (1) the subsidy that it provided when selling the phone to the retailer; and (2) the revenue from selling airtime on that handset. *Id.* at 169

³ The process of “unlocking” or “reflashing” TracFone Prepaid Phones involves circumventing the electronic protections installed in the handset, and then erasing, removing and/or disabling the TracFone Prepaid Software. Complaint at 149 Once a TracFone Prepaid Phone has been unlocked or reflashed, it is no longer operable within TracFone's prepaid wireless virtual network, and is operable on other cellular networks. *Id.* at 150 TracFone no longer has a revenue source to recoup the invested subsidy on that phone. *Id.*

II. Defendant's Business

Defendant is engaged in business practices involving the bulk purchase and resale of TracFone Prepaid Phones, computer unlocking or reflashing of TracFone Prepaid Phones, alteration of TracFone's copyrighted and proprietary software installed in the Phones, and trafficking of the Phones for profit. *Id.* at ¶ 2

For example, from 2006 through 2007, Defendant purchased and/or sold thousands of TracFone Prepaid Phones from several known bulk resellers of TracFone Prepaid Phones against whom TracFone obtained Final Judgments and Permanent Injunctions. *Id.* at ¶¶ 58–61 In purchasing these phones, Defendant, among other things, conspired and worked in concert with other individuals to circumvent retailers' policies limiting the number of TracFone Prepaid Phones an individual may purchase. *Id.* at 164 Defendant was often able to buy the Phones without paying State or other taxes associated with the purchase because of the large volume of Phones it purchased. *Id.* at 165

Since Defendant often removed the Phones from their original packaging, removed the warranty information and/or shipped the Phones outside the United States, the Phones do not carry TracFone's manufacturer's warranty. *Id.* at 170 Accordingly, Defendant's actions invalidate the warranty associated with TracFone Prepaid Phones in its entirety. *Id.* Thus, TracFone Prepaid Phones differ materially from the genuine TracFone Prepaid Phones

sold by authorized TracFone retailers, all of which carry a manufacturer's warranty. *Id.*

Defendant's business practices also resulted in a shortage of available TracFone Prepaid Phones. *Id.* at ¶¶ 72 Moreover, the Phones that Defendant bought and/or sold do not work as intended because the reflashed Phones are unable to access TracFone's Prepaid Wireless Service. *Id.* at ¶ 73

III. The Present Litigation

As a result of Defendant's business activities, TracFone asserted claims against the Defendant for federal trademark infringement, 15 U.S.C. § 1114; federal unfair competition, 15 U.S.C. § 1125; breach of contract; contributory trademark infringement; copyright infringement of the prepaid software under 17 U.S.C. § 101 *et seq.*; violations of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.*; tortious interference with a contractual right; conspiracy to induce breach of contract; civil conspiracy; and unjust enrichment. TracFone has succeeded in proving its claims and Defendant is hereby permanently enjoined and liable to TracFone for the damages set forth herein.

JURISDICTION AND VENUE

*3 This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 1338, and 17 U.S.C. § 1203 because TracFone's claims arise under federal law, specifically, the United States Copyright Act, Title 17 of the United States Code, and United States Trademark Act, Title 15 of the United States Code. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over TracFone's state law claims because those claims are so related to the federal claims that they form part of the same case or controversy.

Defendant is subject to the general personal jurisdiction of this Court because it has engaged in systematic and ongoing business transactions in the State of Florida with citizens of the State of Florida, and within this District. Complaint at ¶ 8 Indeed, Defendant has purchased substantial quantities of TracFone Prepaid Phones from companies and individuals located within this District. *Id.* at ¶ 9

Defendant is further subject to the personal jurisdiction of this Court pursuant to: Fla. Stat. § 48.193(1)(a) because it has conducted, engaged in and carried out business ventures within the State of Florida; § 48.193(1)(b) because it has committed tortious acts within the State of Florida; and § 48.193(1)(g) by failing to perform acts required by a contract to be performed in the State of Florida. *Id.* at ¶ 15 Moreover, Defendant is also subject to this Court's personal jurisdiction pursuant to § 48.193(2) because it has engaged in substantial and not isolated business activity within the State of Florida. *Id.*

By virtue of (a) operating, conducting, engaging in, or carrying on a business venture in this state and/or (b) by engaging in substantial and not isolated activity within the State of Florida, Defendant has accepted the privilege extended by law to non-residents of the State of Florida to operate, conduct, engage in, or carry on a business or business venture in the state, and is thus subject to service of process pursuant to Fla. Stat. § 48.181(1). TracFone perfected service on Defendant by sending a copy of the Summons and Complaint to Defendant via FedEx International mail.

Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b), and 28 U.S.C. § 1400, because a substantial part of the events or omissions giving rise to the claim occurred in this District, the impact of Defendant's conduct occurred in this District, and Defendant is subject to personal jurisdiction in this District.

STANDARD OF REVIEW

A "defendant, by his default, admits the plaintiff's well-pleaded allegations of fact," as set forth in the operative complaint. *Eagle Hosp. Physicians*, 561 F.3d at 1307. "With regard to the measure of damages, the allegations contained in the complaint are not considered admissions by virtue of the default; [r]ather, the Court determines the amount and character of damages to be awarded." *TracFone Wireless, Inc. v. Anadisk, LLC*, 685 F.Supp.2d 1304, 1310 (S.D.Fla.2010) (citing *Zambrana v. Geminis Envios Corp.*, No. 08-20546-CIV, 2009 WL 1585995 at * 2 (S.D.Fla. June 4, 2009) (internal quotations and citations omitted)). According, TracFone can establish the amount of damages by submitting sufficient evidence to support the request for damages. *Id.* (internal quotations omitted).

In accessing damages without a hearing, it is appropriate for the Court to utilize “mathematical calculations.” *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1544 (11th Cir.1985).

DISCUSSION

I. TracFone's Trademark Related Claims (Counts One, Two and Four)

*4 Section 32(1) of the Lanham Act protects against the use in commerce of “any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(l)(a). Section 43(a) of the Lanham Act states that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of such person with another person, or as to the origin, sponsorship or approval of his or her goods, services, or commercial activities by another person,

or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

“[T]he Court interprets this Section [§ 43(a)] as having created a federal cause of action for infringement of unregistered trademark or trade dress and concludes that such a mark or trade dress should receive essentially the same protection as those that are registered.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992) (Stevens, J., concurring). Accordingly, in order to prevail on a claim of trademark infringement under Sections 32 and 43, TracFone must

demonstrate that (1) it has a valid, protectable mark and (2) that Defendant's use of the mark is “likely to cause confusion, or to cause mistake, or to deceive.”

Contributory infringement extends to “all those who knowingly play a significant role in accompanying the unlawful purpose.” *Anadisk*, 685 F.Supp.2d at 1311 (quoting *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 295 F.Supp. 479, 500 (S.D.N.Y.1968)). See also *Estee Lauder, Inc. v. Watsky*, 323 F.Supp. 1064, 1067 (S.D.N.Y.1970). “If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.” *Anadisk*, 685 F.Supp.2d at 1311 (quoting *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982)). See also *Rolux Watch USA, Inc. v. Meece*, 158 F.3d 816, 828 (5th Cir.1998).

A. Valid and Protectable Mark

Pursuant to Section 7(b) of the Lanham Act, a certificate of registration of a trademark issued by the United States Patent and Trademark Office is “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate.” 15 U.S.C. § 1057(b). Moreover, the Eleventh Circuit strongly presumes registered marks to be valid. See *Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 1562 (11th Cir.1991); *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1184–1185 (5th Cir.1980). If a registered trademark is incontestable, its validity, ownership, and exclusive right of use are conclusive and irrebuttable, subject only to a limited number of defenses. See 15 U.S.C. § 1115(b); *Soweco*, 617 F.2d at 1184–1185.

*5 In addition to the legal presumption afforded to registered trademarks, TracFone's Marks are also valid because they have acquired secondary meaning.⁴ Indeed, TracFone's Marks are well known and established to customers and the trade as symbols identifying and distinguishing TracFone's products and services, and signifying distinctive services of exceptional quality.

Anadisk, 685 F.Supp.2d at 1311; Complaint at ¶¶ 34, 36. As a result of the high quality of TracFone's products, services, sales, promotion and advertising, the Marks have become an intrinsic and essential part of the valuable goodwill and property of TracFone. *Id.*

4 The Eleventh Circuit has set forth a number of factors to be considered in determining whether a mark has acquired secondary meaning, including:

- (1) the length and manner of its use; (2) the nature and extent of advertising and promotion;
- (3) the efforts made by the plaintiff to promote a conscious connection in the public's mind between the [mark] and the plaintiff's product or business; and (4) the extent to which the public actually identifies the [mark] with the plaintiff's product or venture.

ConAgra, Inc. v. Singleton, 743 F.2d 1508, 1513 (11th Cir.1984).

B. Likelihood of Confusion

The Eleventh Circuit considers seven factors to determine whether there is a likelihood of confusion: (1) type of mark; (2) similarity of mark; (3) similarity of the products the marks represent; (4) similarity of the parties' retail outlets and customers; (5) similarity of advertising media used; (6) defendant's intent; and, (7) actual confusion. *See Dieter v. B & H Indus. of Sw. Fla., Inc.*, 880 F.2d 322, 326 (11th Cir.1989). Each of these factors demonstrates that Defendant's products are likely to cause confusion.

1. Type of Mark

Courts determine the level of protection to be afforded a mark based upon the mark's strength: the stronger the mark, the greater the scope of protection. *Frehling Enters., Inc. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1335 (11th Cir.1999). Marks can be grouped into one of four categories: "(1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary." *Id.* Third party use of the Marks is another important factor in determining a mark's strength—"the less that third parties use the mark, the stronger it is, and the more protection it deserves." *Frehling Enters., Inc.*, 192 F.3d at 1336. The final factor to consider in determining the strength of a mark is whether it is "incontestable"—the strength of the mark is enhanced if the United States Patent and Trademark Office has declared a mark "incontestable." *Id.*

TracFone's Marks—which are arbitrary marks—are due considerable protection based on the foregoing factors. *See Anadisk*, 685 F.Supp.2d at 1312. An arbitrary mark, such as 'Sun Bank' when applied to banking services, is one that bears no relationship to the product and is the strongest types of mark. *Id.* at 1335–36. Just as the "Sun Bank" mark is arbitrary as applied to banking services, *see id.*, TracFone's Marks are arbitrary as applied to prepaid phone service and are entitled to substantial protection. *Id.* at 1335–36. Second, only TracFone and its affiliates use the Marks. *See Frehling Enters., Inc.*, 192 F.3d at 1336 (finding that no third-parties use the marks is another indication of the strength of the Marks). Finally, the TracFone trademark is "incontestable" and, therefore, entitled to another layer of protection.

2. Similarity of the Marks

*6 In determining the similarity of the marks, "the court compares the marks and considers the overall impressions that the marks create, including the sound, appearance, and manner in which they are used." *Frehling Enters., Inc.*, 192 F.3d at 1337. In this case, the Marks on the infringing phones are identical but the infringing Phones no longer conform to TracFone's specifications but still contain the actual TracFone Mark on the handset. Consumers only learn that the phone no longer operates as designed upon attempting to use the infringing phone for its intended purpose of accessing the TracFone prepaid wireless system. Defendant's infringing scheme thus causes confusion among consumers. *See Int'l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1248 (11th Cir.2002).

3. Similarity of the Products the Marks Represent

"The greater the similarity between the products and services, the greater the likelihood of confusion." *E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc.*, 756 F.2d 1525, 1530 (11th Cir.1985). Defendant's infringing phones appear virtually identical to unaltered TracFone Phones. Complaint at ¶ 52.

4. Similarity of the Parties' Retail Outlets and Customers

"This factor takes into consideration where, how, and to whom the parties' products are sold." *Frehling Enters., Inc.*, 192 F.3d at 1339. Defendant's infringing phones are sold through internet retail outlets and appear to

the customer as an authentic TracFone. Complaint at ¶¶ 53–54 Defendant is targeting the same consumers as TracFone—individuals looking for affordable, high quality wireless telephones. *Id.* See *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1541 (11th Cir.1986) (“[l]ikelihood of confusion is more probable if the products are sold through the same channels to the same purchasers”).

5. Similarity of Advertising Media

“This factor looks to each party's method of advertising.” *Id.* Although TracFone's advertising is much more extensive than Defendant's, Defendant, just like TracFone, advertises on the internet. See *Exxon Corp. v. Texas Motor Exch. of Houston, Inc.*, 628 F.2d 500, 505 (5th Cir.1980) (finding the greater the similarity between the advertising campaigns, products and services, the greater the likelihood of confusion).⁵

⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

6. Defendant's Intent

This factor looks to whether “a defendant adopted a plaintiff's mark with the intention of deriving a benefit from the plaintiff's business reputation.” *Frehling Enters., Inc.*, 192 F.3d at 1340. Likelihood of confusion can be demonstrated as a matter of law if this factor is present. *Babbit Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1179 (11th Cir.1994); *Frehling Enters., Inc.*, 192 F.3d at 1340. Defendant's infringing scheme includes selling Phones with TracFone's Marks intact, which demonstrates that it seeks to derive a benefit from TracFone's business reputation. Moreover, Defendant knowingly played a significant role in the bulk purchasing, unlocking, reflashing and reselling the Phones with the Marks intact.

7. Actual Confusion

*7 “The law is well settled in this circuit that evidence of actual confusion between trademarks is not necessary to a finding of *likelihood* of confusion.” *E. Remy Martin*, 756 F.2d at 1529; *Montgomery v. Noga*, 168 F.3d 1282, 1302 (11th Cir.1999) (“[W]e have held that a plaintiff is not required to provide evidence of actual confusion in order to prove *likelihood* of confusion.”). Adopting

an identical mark “with the intent of deriving benefit from the reputation of [Plaintiff's mark] may alone be enough to justify the inference that there is confusing similarity.” *AmBrit*, 812 F.2d at 1542; see also *Int'l Cosmetics Exch., Inc.*, 303 F.3d at 1248–49 (holding that concurrent use of same mark on similar product was sufficient to demonstrate a likelihood of confusion); *Babbit Electronics, Inc.*, 38 F.3d at 1179–80 (finding a likelihood of confusion despite a lack of evidence of actual confusion).

Based on the evidence presented, the parties sell virtually identical looking, directly competing products to the same purchasers through the same channels of trade utilizing the same advertising vehicles. Therefore, there is a strong likelihood of confusion as to the source of Defendant's products.

C. Resale of a Genuine Trademarked Product And the Material Difference Exception

Defendant's products are also infringing because they are materially different than TracFone's genuine Phones. The first sale doctrine does not apply when an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner. See *Davidoff*, 263 F.3d at 1301; *Iberia Foods*, 150 F.3d at 302–3; *Enesco*, 146 F.3d at 1087 (quoting *Warner–Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996) (holding that a non-conforming product is not genuine and “its distribution constitutes trademark infringement”); *Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1302 (5th Cir.1997); *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 644 (1st Cir.1992); *Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68, 73 (2d Cir.1987). Indeed, materially different products that have the same trademark may confuse consumers and erode consumer goodwill toward the mark. See *Iberia Foods*, 150 F.3d at 303; *Nestle*, 982 F.2d at 638.

A material difference is one that consumers consider relevant to a decision about whether to purchase a product. See *Martin's Herend Imports*, 112 F.3d at 1302; *Nestle*, 982 F.2d at 641. Because a myriad of considerations may influence consumer preferences, the threshold of materiality must be kept low to include even subtle differences between products. See *Iberia Foods*, 150 F.3d at 1304; *Nestle*, 982 F.2d at 641. The resale of a trademarked product that has been

altered, resulting in physical differences in the product, may constitute a material difference giving rise to a trademark infringement claim. See *Nestle*, 982 F.2d at 643–44 (applying the material difference exception, e.g., differences in the composition, presentation and shape of premium chocolates); *Original Appalachian Artworks*, 816 F.2d at 73 (applying the material difference exception where the infringing Cabbage Patch Kids dolls had Spanish language adoption papers and birth certificates, rather than English); *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1384–85 (9th Cir.1984) (finding willful infringement where the defendant sold genuine Sealy mattresses together with non-Sealy foundations); *Singer Mfg. Co. v. Briley*, 207 F.2d 519 (5th Cir.1953) (sale of reconditioned trademarked goods with no mention that the product was reconditioned constitutes trademark infringement); *Joy Manu. Co. v. CGM Valve & Gauge Co., Inc.*, 730 F.Supp. 1387 (S.D.Tex.1989) (finding intentional infringement where the defendant used unauthorized nameplates bearing plaintiff's mark on valves that defendant refurbished to look like new, but failed to indicate them as used or reconditioned).

*8 For example, reselling products with inferior warranties also constitutes a material difference. See *Perkins School for the Blind v. Maxi-Aids, Inc.*, 274 F.Supp.2d 319, 324 (E.D.N.Y.2003) (holding that plaintiff asserted a valid trademark infringement claim where defendant sold genuine Perkins Brailers products with an inferior warranty); *Movado Group, Inc. v. Matagorda Ventures, Inc.*, 2000 WL 1855120, *4 (S.D.N.Y.2000) (finding that the warranty can make the products sufficiently significantly different to constitute infringement). Several courts have held that the purchase and resale of goods solely within the United States may constitute infringement when differences exist in quality control or the products themselves. See *Enesco*, 146 F.3d at 1087; *Warner–Lambert*, 86 F.3d at 6; *Matrix Essentials*, 988 F.2d at 590–91; *Shell Oil Co. v. Commercial Petroleum Inc.*, 928 F.2d 104, 107 (4th Cir.1991).

Defendant resells and knowingly plays a significant role in the resale of TracFone Phones that are materially different than those sold by TracFone. For instance, the warranty information is removed, which invalidates the warranty in its entirety. Complaint at ¶ 70 Furthermore, the TracFone packaging is removed and the handsets are sold in packaging that is not approved by TracFone's quality controls. *Id.* at ¶ 71 See *Enesco*, 146 F.3d at 1087;

Warner–Lambert, 86 F.3d at 6; *Matrix Essentials*, 988 F.2d at 590–91; *Shell Oil Co. v. Commercial Petroleum Inc.*, 928 F.2d 104, 107 (4th Cir.1991) (differences exist in quality control or the products themselves may result in infringement). Thus, under the material difference exception, Defendant's actions constitute trademark infringement. *Anadisk*, 685 F.Supp.2d at 1315.⁶

⁶ Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this infringement.

II. TracFone's Breach of Contract Claim (Count Three)

To prevail on a cause of action for breach of contract, a party must show: (1) the existence of a valid and enforceable contract, (2) breach of the contract, and (3) damages. See *AIB Mortgage Co. v. Sweeney*, 687 So.2d 68, 69 (Fla. 3rd Dist.Ct.App.1997). Moreover, Florida law provides that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” Fla. Stat. § 672.204(1) (adopting U.C.C. 2–204). This statute includes “shrinkwrap contracts” like the one at issue, where an agreement becomes effective as soon as a customer opens the product. *Anadisk*, 685 F.Supp.2d at 1315; *TracFone Wireless, Inc. v. Access Telecom, Inc.*, 642 F.Supp.2d 1354, 1364 (S.D.Fla.2009).

In “Florida and the federal circuits, shrinkwrap ... agreements are valid and enforceable contracts.” *Salco Distributions, LLC v. iCode, Inc.*, 2006 WL 449156 at *2 n. 5 (M.D.Fla. Feb.22, 2006) (holding purchaser of software product was bound by terms of shrinkwrap agreement upon opening the packaging of the product, reasoning that a “vendor, as master of the offer, may invite acceptance by conduct and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.”) (quoting *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir.1996)); see also *Anadisk*, 685 F.Supp.2d at 1315; *Microsoft Corp. v. Big Boy Dist. LLC*, 589 F.Supp.2d 1308, 1320 (S.D.Fla.2008) (enforcing agreement against a downstream purchaser whose association with the manufacturer included indirect contacts through another party); *Siedle v. National Ass'n of Securities Dealers, Inc.* 248 F.Supp.2d 1140 (M.D.Fla.2002) (upholding the validity of a click-wrap agreement); *Mgmt. Computer*

Controls, Inc. v. Charles Perry Constr., Inc., 743 So.2d 627 (Fla. 1st DCA 1999) (discussing the enforceability of a forum selection clause contained in a license agreement affixed to the outside of the software packaging where packaging displayed a sticker that provided “[by] opening this packet, you indicate your acceptance of the [plaintiffs] license agreement.”).

*9 The outside retail packaging of TracFone's Phones contain conspicuous language restricting the use of the Phones for TracFone Prepaid Wireless service and prohibits the consumer from tampering or altering the software or hardware in the phone. The language provides in part “[b]y purchasing or opening this package, you are agreeing to these terms and the terms and conditions of service in the enclosed user guide.” Complaint at ¶ 40 Accordingly, an enforceable contract exists between the parties as to Defendant's use of the Phones and Defendant has breached the parties' contract by, *inter alia*, purchasing TracFone Prepaid Phones with the specific intent to reflash or unlock the phones and ship the phones outside of the United States. *Anadisk*, 685 F.Supp.2d at 1315; Complaint at 194. Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this breach.

III. TracFone's Copyright and DMCA Claims (Counts Five, Six and Seven)

A. TracFone's Copyright Claims

To establish copyright infringement, TracFone must prove: 1) ownership of a valid copyright, and 2) copying of constituent elements of the work that are original. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *Bateman v. Mnemonic, Inc.*, 79 F.3d 1532, 1540 (11th Cir.1996). In the context of computer software, as is the case for TracFone, when the defendant has engaged in literal or verbatim copying of all of the protected source code, there is sufficient evidence to authorize a finding of infringement. See *Bateman*, 79 F.3d at 1544 n. 25. See also *Montgomery v. Noga*, 168 F.3d 1282, 1292 (11th Cir.1999) (upholding copyright claim based on copying over seventy percent of the source code from original version in which the claimant owned a registered copyright).

TracFone owns United States Copyright Registration No. TX0006515894 for its computer program for cellular

handset-resident prepaid system. Complaint at ¶ 38 Pursuant to the copyright application, the software was created in 2002 and first used in commerce on January 1, 2003. *Id.* at Exhibit C. The application for registration was filed with the Library of Congress on September 15, 2006. *Id.* A certificate of copyright registrations creates a rebuttable presumption that the copyright is valid. See *Montgomery*, 168 F.3d at 1292; 17 U.S.C. § 410(c) (“the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.”). Thus, TracFone has a valid copyright registration. See *Anadisk*, 685 F.Supp.2d at 1316.

Defendant's and/or its co-conspirators' actions in reflashing or otherwise modifying the federally copyrighted TracFone Prepaid Software, without TracFone's authority or consent, creates an unauthorized reproduction and derivative work of the TracFone Prepaid Software. Complaint at ¶¶ 102–103 Accordingly, TracFone's copyright has been infringed. See *Anadisk*, 685 F.Supp.2d at 1316. Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this infringement.

B. DMCA Violations

*10 17 U.S.C. § 1201(a)(1) states that:

No person shall circumvent a technological measure⁷ that effectively controls access to a work⁸ protected under this title.

⁷ “[T]o ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A).

⁸ “[A] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” 17 U.S.C. § 1201(a)(3)(B).

17 U.S.C. § 1201(a)(2) states that:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title [17 U.S.C.A. S1 et seq.]; or,

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

The TracFone Prepaid Software contains technological measures that in the ordinary course of the measures' operation require the application of information, or a process or a treatment, with TracFone's authority, to gain access to the proprietary software. Complaint at 1106 TracFone did not give Defendant or its co-conspirators authority to reflash, unlock, or otherwise to avoid, bypass, remove, disable, deactivate, or impair the technological measures for effectively controlling access to and operation of the TracFone Prepaid Software. *Id.* at 1108. Moreover, Defendant acted, and/or knowingly engaged in a conspiracy, to avoid, bypass, remove, disable, deactivate, or impair TracFone's technological measure for effectively controlling access to the proprietary software without TracFone's authority. *Id.* at ¶ 110. Defendant engaged in this conduct for the purpose of reselling the altered devices for a profit, and not for the sole purpose of lawfully connecting to a wireless telephone communication network. *Id.* at ¶ 111.

Further, Defendant and/or its co-conspirators is in possession of certain instrumentalities that avoid, bypass, remove, disable, deactivate, or otherwise impair the technological measures within the TracFone Prepaid Software that effectively control access to the proprietary TracFone Prepaid Software. *Id.* at ¶ 114. Accordingly, Defendant is, or was knowingly facilitating co-conspirators who are, trafficking in the service of

circumventing TracFone's technological measures that effectively control access to TracFone's Prepaid Software by offering to the public its alteration service for a fee. *Id.* at ¶ 117 Based on the foregoing, Defendant has violated the DMCA and TracFone is entitled to recover statutory damages for Defendant's violation. See *Anadisk*, 685 F.Supp.2d at 1317.

With respect to TracFone's request for a permanent injunction for these DMCA violations, the Court must consider the new DMCA exemption that was issued in July 2010, and whether Defendant's conduct falls within said exemption. *Butler v. Alabama Judicial Inquiry Com'n*, 261 F.3d 1154, 1157 (11th Cir.2001); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir.2000) (holding that the court must determine the impact of changes in the law in order to determine whether the new law renders the controversy moot).

*11 On June 11, 2010, the Register of Copyrights issued its Recommendation of the Register of Copyrights in RM 2008–8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (“Recommendation”) which states that:

To clarify the intended scope of the class, the Register recommends that the “sole purpose” language be altered and that the appropriate limitation be that the circumvention was “solely in order to connect to such a wireless telecommunications network.” This properly shifts the emphasis to the objective of the activity rather than whether the person engaging in the activity is doing so with an expectation of profit. While it would have the result, in some cases, of permitting circumvention of access controls by companies that purchase used handsets from consumers in order to make those handsets usable on other networks, the requirement (discussed below) that the handsets must be “used” would prevent the abuses singled out by the opponents of the proposed class as their principal grounds for objection: the bulk purchase of unused handsets that are offered for sale at low prices and the resale of those handsets after removing the technological restrictions that limit the use of the handsets to a single network.

Based on the record evidence, the Register finds that bulk reselling of new mobile phones by commercial ventures is a serious matter. There is no justification

for the result of this rulemaking proceeding to condone, either expressly or implicitly, the illegal trafficking of mobile phones. Such illicit practices raise the cost of doing business, which in turn affects the marketplace for mobile phones and the prices consumers pay for such devices. The Register finds that the exemption should be limited to include only “used” mobile phones. The term “used,” as applied in this context, refers to a mobile phone that has been activated with the carrier or provider that sold the phone at a subsidized price and that the person activating the phone must actually have used on that carrier's network. This additional language would likely promote continued usage of the phone on that network because a consumer would be unlikely to switch wireless networks immediately after activating the phone. This new language would also prevent bulk resellers from taking advantage of the exemption after purchasing new mobile devices *en masse* at retail establishments and immediately unlocking them to be sold outside the United States.

Based in part on this recommendation, in July 2010, the exemption to prohibition against circumvention, 37 CFR 201.40, was amended to exclude the following activity: “computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.” It is clear from the Recommendation and the new DMCA exemption that Defendant's activities do not fall under the new DMCA exemption and it can and should be enjoined from its illegal activities.

*12 Pursuant to 17 U.S.C. 1203(c)(3)(A), TracFone is also entitled to recover statutory damages “of not less than \$200 or more than \$2,500” for each TracFone Prepaid Phone Defendant altered, or sold as part of a conspiracy to alter, in furtherance of the Bulk Resale Scheme. See *Anadisk*, 685 F.Supp.2d at 1318 (awarding statutory damages per act of circumvention in the total amount of \$12,375,000); *Stockwire Research Group, Inc. v. Lebed*, 577 F.Supp.2d 1262, 1268 (S.D.Fla.2008) (awarding statutory damages per act of circumvention in the total amount of \$2,357,200.00); see also *Microsoft Corp. v. Silver Star Micro, Inc.*, No. 1:06-cv-1350-WSD, 2008 WL 115006 at * 9 (N.D.Ga. Jan.9, 2008) (awarding the statutory maximum for each of defendant's acts of circumvention);

Sony Computer Entm't Am., Inc. v. Divineo, Inc., 457 F.Supp.2d 957, 967–68 (N.D.Cal.2006) (awarding statutory damages in amount of \$5,791,400.00 under the DMCA in a default judgment against defendant); *Sony Computer Entm't Am., Inc. v. Filipiak*, 406 F.Supp.2d 1608 (N.D.Cal.2005) (entering final judgment against defendant for \$6,018,700.00 in statutory damages under the DMCA based on defendant's sale of 7194 infringing items); *Coxcom, Inc. v. Chaffee*, 2007 WL 1577708 (D.R.I. May 31, 2007) (“Courts have interpreted this provision [17 U.S.C. 1203(c)(3)(A)] to authorize an award of statutory damages ‘for each device sold ’”) (emphasis added) (quoting *Filipiak*, 406 F.Supp.2d at 1074).

Business records and declarations produced by TracFone demonstrate that Defendant sold and trafficked *at minimum* 18,616 TracFone Prepaid Phones in furtherance of the Bulk Resale Scheme. Complaint at Composite Exhibit D Defendant's sale of these Phones has caused damage and substantial and irreparable harm to TracFone. Complaint at ¶¶ 69–75 Furthermore, Defendant's actions were willful and necessitate an award at the maximum statutory amount. See *Anadisk*, 685 F.Supp.2d at 1318; *Filipiak*, 406 F.Supp.2d at 1075 (awarding the maximum statutory award per circumvention based, in part, on defendant's willful violations of the DMCA). Accordingly, TracFone is awarded statutory damages against Defendant in the maximum amount of \$46,540,000 for Defendant's violations of the DMCA. 17 U.S.C. 1203(c)(3)(A); see also *Anadisk*, 685 F.Supp.2d at 1318; *Stockwire Research Group, Inc. v. Lebed*, 577 F.Supp.2d at 1268; *Microsoft Corp.*, 2008 WL 115006 at * 9; *Divineo, Inc.*, 457 F.Supp.2d 957; *Filipiak*, 406 F.Supp.2d 1608; *Chaffee*, 2007 WL 1577708.

IV. TracFone's Conspiracy Claims (Counts Eight and Ten)

To properly state a claim for civil conspiracy, a plaintiff must allege “(a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.” *Florida Fern Growers Assoc., Inc. v. Concerned Citizens of Putnam Cty.*, 616 So.2d 562, 565 (Fla. 5th DCA 1993).

*13 The evidence shows that Defendant worked in concert with other individuals who were engaged in the

unlawful bulk purchasing, reflashing, and sale of the altered TracFone Phones. Complaint at ¶¶ 62–68; 122–125; 133–136 In furtherance of this conspiracy, Defendant purchased TracFone Prepaid Phones from non-parties to this suit. *Id.* at ¶ 62 Furthermore, as a result of the conspiracy, TracFone has suffered damages in the form of lost sales, lost profits, loss of ability to control the quality of its product, inability to supply retailers with sufficient volume of Phones, and loss of business reputation and goodwill. *Id.* at 1169–75 Accordingly, Defendant has actively participated in a conspiracy to induce breach of contract and a conspiracy in violation of Florida common law. *Anadisk*, 685 F.Supp.2d at 1318; *Florida Fern Growers Assoc.*, 616 So.2d at 565. Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this unlawful conspiracy.

IV. TracFone's Tortious Interference Claim (Count Nine)

To prevail on a claim of tortious interference, TracFone must show: “(1) the existence of a business relationship or an enforceable contract, (2) knowledge of the relationship on the part of the defendant, (3) an intentional and unjustified interference with the relationship by the defendant, and (4) damage to the plaintiff as a result of the breach of the relationship.” *Carl v. Republic Security Bank*, 282 F.Supp.2d 1358, 1371–1372 (S.D.Fla.2003); see also *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla.1985) (elements of tortious interference with a business relationship); *Wackenhut Corp. v. Maimone*, 389 So.2d 656, 657 (Fla. 4th Dist.Ct.App.1980) (elements of tortious interference with a contractual relationship).

TracFone has properly established the existence of an enforceable contract. Defendant knew about the contractual relationship and, despite its knowledge, it intentionally and unjustifiably interfered with the relationship. *Id.* at ¶ 129. Defendant's actions caused TracFone to suffer damages. *Id.* at ¶ 130. Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this tortious interference.

VI. TracFone's Unjust Enrichment Claim (Count Eleven)

To prevail on a cause of action for unjust enrichment, a plaintiff must show that: 1) a benefit was conferred on the defendant, 2) the defendant had knowledge of the benefit

conferred, 3) the defendant accepted and retained the benefit, and 4) it would be inequitable for the defendant to retain the benefit without compensation to the plaintiff. *N.G.L. Travel Assocs. v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3rd Dist.Ct.App.2000); see also *Nova Information Sys., Inc. v. Greenwich Ins. Co.*, 365 F.3d 996, 1006–07 (11th Cir.2004). Courts have held that a claim for unjust enrichment, a form of equitable relief, cannot stand if an express contract exists. *Morris v. ADT Sec. Services*, 580 F.Supp.2d 1305, 1312–13 (S.D.Fla.2008) (claim for unjust enrichment may proceed where plaintiff has not asserted a claim based on an express contract). Because the Court has previously found Defendant liable for breach of contract, this claim only applies to the Phones Defendant purchased and sold that are not subject to the “shrinkwrap” agreements that form the basis of TracFone's breach of contract claim.

*14 By bulk purchasing the TracFone Prepaid Phones from bulk resellers below the manufacturers' cost of the phones, Defendant obtained benefits from TracFone that have resulted in significant financial benefits to Defendant through its resale of the bulk purchased TracFone Prepaid Phones. Complaint at ¶ 140 Defendant acquired the benefits voluntarily and with full knowledge. *Id.* at 1141. Defendant has retained the benefits under such circumstances that make it unjust and inequitable for Defendant to retain the benefits without paying TracFone the value of the benefits Defendant's acquired. *Id.* at 1142. Therefore, Defendant has been unjustly enriched by its actions. Because TracFone has elected to collect only statutory damages under the DMCA, the Court will not discuss the damages TracFone has suffered as a result of this unjust enrichment.

CONCLUSION

Accordingly, it is hereby,

ORDERED, ADJUDGED and DECREED that:

1. Final judgment is hereby entered against Defendant, Bequator Corporation Ltd. and in favor of the Plaintiff, TracFone Wireless, Inc., on all of the claims set forth in TracFone's Complaint.
2. Pursuant to 17 U.S.C. 1203(c)(3)(A), TracFone is entitled to recover statutory damages “of not less than

\$200 or more than \$2,500” for each TracFone Prepaid Phone Defendant altered, or sold as part of a conspiracy to alter, in furtherance of the Bulk Resale Scheme. The Court finds that Defendant altered, or sold as part of a conspiracy to alter, at minimum, 18,616 TracFone Prepaid Phones in furtherance of the Bulk Resale Scheme in violation of the DMCA. Final Judgment is hereby entered against Defendant and in favor of the Plaintiff, in the principal amount of **\$46,540,000** which shall bear interest at the legal rate, and for which let execution issue forthwith.

3. Defendant Bequator Corporation Ltd. is hereby PERMANENTLY ENJOINED from:

a. purchasing and/or selling any wireless mobile handset that it knows, or should know, bears, or at

LG 100C	Motorola C139	Nokia 1100
LG 220C	Motorola C155	Nokia 1112
LG 290C	Motorola C261	Nokia 1600
LG 1500	Motorola C343	Nokia 2126
LG 200C	Motorola EM326g	Nokia 2126i
LG 200CM	Motorola RAZR V3a	Nokia 2285
LG 300G	Motorola V170	Nokia 2600
LG 320G	Motorola V171	Nokia 3390
LG 400G	Motorola V176	Samsung R355C
LG 410G	Motorola V176	Samsung R451C
LG 420G	Motorola W175g	Samsung R810C
LG 600G	Motorola W260g	Samsung T101G
LG 3280	Motorola W370	Samsung T105G
LG CG225	Motorola W375	Samsung T155G
Kyocera K126C	Motorola W376g	Samsung T201G
	Motorola W377g	Samsung T301G
	Motorola W385	Samsung T401G

*15 b. rekitting, reflashing and/or unlocking of any TracFone Handset;

one time bore, any TracFone/NET10/Straight Talk/SafeLink Trademark, any other trademark owned or used by TracFone, or any other model of wireless mobile phone sold or marketed by TracFone (“TracFone Handsets”). Specifically, Defendant is enjoined from purchasing and/or selling all models of wireless phones currently offered for sale by TracFone, or that may be offered for sale in the future, as listed and updated from time to time on TracFone's, NET10's and SafeLink's websites, www.tracfone.com, www.net10.com, www.straighttalk.com and www.safelink.com, respectively, and including without limitation the following TracFone/NET10 handsets:

c. accessing, altering, erasing, tampering with, deleting or otherwise disabling TracFone's

proprietary prepaid cellular software contained within any model of TracFone Handsets;

- d. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in rekitting, reflashing and/or unlocking TracFone Handsets and/or hacking, altering, erasing, tampering with, deleting or otherwise disabling the software installed in TracFone Handsets;
- e. facilitating or in any way assisting other persons or entities who Defendant knows or should know are engaged in any of the acts prohibited under this Permanent Injunction including, without limitation, the buying and/or selling of unlocked TracFone Handsets; and,
- f. knowingly using the TracFone/NET10/Straight Talk/SafeLink Trademarks or any other trademark owned or used by TracFone, or that is likely to cause confusion with TracFone/NET10/Straight Talk/SafeLink Trademarks, without TracFone's prior written authorization.

3. The Court retains jurisdiction over this matter and the parties to this action in order to enforce any violation of the terms of this Permanent Injunction.

4. If Defendant violates the terms of this Permanent Injunction TracFone shall be entitled to file an Affidavit or Declaration of Violation requesting that the Court

order the payment of compensatory damages to TracFone in the amount of Five Thousand Dollars and No Cents (\$5,000.00 (U.S.)) for each Phone purchased, sold, unlocked, reflashed, altered, rekitting, advertised, solicited and/or shipped in violation of the Permanent Injunction, or a single damages award of One Million Dollars and No Cents (\$1,000,000.00 (U.S.)), whichever is greater. TracFone shall provide at least five (5) working days notice to Defendant after filing an Affidavit or Declaration of Violation. The Court finds that any amounts awarded under this paragraph are compensatory and reasonable estimations of the minimum damages suffered by TracFone for such a breach and will serve to compensate TracFone for its losses in the event Defendant violates the terms of this Permanent Injunction.

5. The last known address of Defendant, Bequator Corporation Ltd. Is 19th Floor, Suite B Wing, Yee Commercial Building, 3-7 Wing Kut Street, Central Hong Kong.

6. The address of Plaintiff, TracFone Wireless, Inc. is 9700 Northwest 112th Avenue, Miami, Florida 33178.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1427635