

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KTM AG,

Plaintiff,

v.

THE INDIVIDUALS,
CORPORATIONS, LIMITED
LIABILITY PARTNERSHIPS, AND
UNINCORPORATED ASSOCIATIONS
IDENTIFIED ON SCHEDULE A
HERETO,

Defendants.

No. 21-cv-01380

Judge John F. Kness

ORDER

Plaintiff KTM AG's motion (Dkt. 48) to compel nonparty Alipay Merchant Services Pte Ltd. (Alipay) to comply with the Court's final judgment order (Dkt. 46) is dismissed as moot. See accompanying Statement for details.

STATEMENT

I. Background

In March 2021, Plaintiff KTM AG (KTM) sued the numerous Defendants identified in "Schedule A" under the Lanham Act, 15 U.S.C. § 1051 *et seq.*; 28 U.S.C. § 1338(a)-(b); and 28 U.S.C. § 1331. (Dkt. 1 ¶ 1.) KTM alleged that Defendants engaged in trademark infringement against KTM's "federally registered KTM and DUKE trademarks" by "offering for sale and/or selling unauthorized and unlicensed products" considered to be inferior imitations and counterfeits. (*Id.* ¶ 3-4.) Overseas Defendants engaged in such selling over the Internet and conducted business with consumers within the United States, including Illinois and this District. (*Id.* ¶ 14.) As is common with Schedule A cases identifying overseas Defendants, the vast majority of Defendants failed to appear and defaulted.

KTM moved *ex parte* for entry of a temporary restraining order (TRO) against Defendants identified on Schedule A. (Dkt. 8.) The Court granted that motion, later extended the TRO, and then entered a preliminary injunction. (Dkt. 23, 25, 36.) After Defendants failed to appear or defend against this action, KTM moved for entry of default and default judgment. (Dkt. 41.) On October 6, 2021, the Court granted KTM's

motion for entry of default and default judgment (Dkt. 45) and issued a final judgment order in favor of KTM, determining that “[d]efaulting Defendants have sold products being counterfeit versions” of five of KTM’s trademarks. (Dkt. 46 at 1.) Of relevance here, the Court directed (among other things) that nonparty Alipay “shall, within five (5) business days of receipt of this Order, permanently restrain and enjoin any accounts connected to Defaulting Defendants, identified in Amended Schedule A from transferring or disposing of any money or other of Defaulting Defendants’ assets.” (*Id.* at 4.)

KTM filed the present motion to compel Alipay to comply with the Court’s final judgment order on February 9, 2022. (Dkt. 48.) Alipay filed its response in opposition on March 17, 2022 (Dkt. 59), and KTM replied on April 7, 2022. (Dkt. 64.)

II. Discussion

KTM contends in its motion to compel that “Aliexpress and Alipay contacted [KTM] on February 2, 2022, stating that [KTM] had ‘. . . not provided sufficient evidence of trademark infringement that warrants freezing these seller-defendants’ account’ and that Aliexpress and Alipay would unfreeze the accounts on February 10, 2022.” (Dkt. 48 ¶ 14.) KTM “objects to the proposed actions by the third-party platforms Aliexpress and Alipay as they are proposing to take actions in contradiction to those previously ordered by this Court and beyond the scope of their authority.” (*Id.* ¶ 15.) KTM requests that the Court “direct third-party platforms Aliexpress and Alipay to comply with the Court’s Orders” and alleges that, by their noncompliance, “Aliexpress and Alipay have engaged in conduct sanctionable under Rule 11 and should compensate [KTM] for bringing the present Motion including any other sanctions this Court deems appropriate.” (*Id.* ¶¶ 16, 19.)

In its response, Alipay first argues that Aliexpress should not have been included in KTM’s motion, for two reasons: (1) no more allegedly infringing posts exist on Aliexpress; and (2) Alibaba, the company operating Aliexpress, does not hold any Defendant accounts. Alipay thus states that “the allegedly infringing posts on www.aliexpress.com have been removed, and Alibaba—the company that operates www.aliexpress.com—holds no accounts for Defendants.” (Dkt. 59 at 1.) Alipay also argues that “Defendants have funds maintained by Alipay Merchant Services Pte Ltd., a Singaporean company. The funds maintained by Alipay in those accounts are held in Singapore.” (*Id.*) Alipay provides evidence of its incorporation in Singapore in Exhibit A attached to its response. (Dkt. 59-2 (Alipay MS Terms and Conditions)). Alipay further states that “Defendants’ accounts—including those for non-infringing Defendants—remain frozen.” (Dkt. 59 at 10 (citing Xiang Decl. ¶ 28 (“the 21-cv-1380 Defendants’ Alipay MS accounts remain frozen, as they were before [KTM] filed its motion to compel . . .”).)

In its reply, KTM expresses surprise at the distinction Alipay drew between the various entities, stating that KTM was “first informed that Aliexpress and Alipay are two separate entities and not associated with each other under the Alibaba

corporate umbrella” only in Alipay’s response brief. (Dkt. 64 at 3.) Accordingly, KTM notes that, “[a]ssuming the representations of counsel for Alipay are true, that Alipay is a Singapore company and that the funds maintained by Alipay are held in Singapore and outside of this Court’s jurisdiction,” then KTM “respectfully withdraws its demand for Alipay to transfer the Default funds to [KTM] to satisfy the awarded statutory damages in paragraph 7 of the Final Judgment Order.” (*Id.*)

In sum, the parties through their briefs resolved two separate issues. First, Alipay declared that Defendants’ accounts remain frozen, and the Court accepts that declaration. There is accordingly nothing for the Court to order regarding the freezing or refreezing of Defendants’ accounts, as Alipay remains in compliance with the final judgment order. Second, KTM withdrew its demand for Alipay to transfer the default funds. There is similarly nothing for the Court to order in this regard. Accordingly, with no readily apparent live issues remaining from KTM’s motion, the motion must be dismissed as moot.

As for Alipay’s substantive arguments included in its response, many of which defend the interests of the Schedule A Defendants, the Court declines to address them. It was proper for the Court to consider Alipay as an agent of Defendants and thus bound by the preliminary injunction. *See Kawada Co., Ltd. v. The Partnerships et al.*, No. 19-cv-06838, N.D. Ill., Dkt. 70 (12/18/19 hearing transcript) (considering third-party platform maintaining defendants’ accounts to be an agent of defendants) (citing *United States v. Mercy Reg’l Health Sys., Ltd.*, 2008 WL 695918, at *4 (S.D. Ill. Mar. 13, 2008) (“it is clearly within the Court’s power to restrain Defendants’ brokers, employees, and agents.”)). But Alipay remains a nonparty to this action and thus lacks standing to make such arguments on behalf of absent Defendants. *See Kawada Co., Ltd. V. The Partnerships et al.*, No. 19-cv-06838, N.D. Ill. 2019, Dkt. 70 (12/18/19 hearing transcript) (Lee, J.) (proper solution is “not for marketplace providers or payment processors . . . to come into court to defend the interests of the defendants. The solution is that if the defendants disagree with either the scope of the injunction or the merits of the claims, *defendants themselves come in and defend . . .*”) (emphasis added). If Defendants want to make arguments along the lines of those presented by Alipay, then it is up to Defendants to come before the Court to make those arguments.

Finally, in view of the ruling outlined above, the Court finds no basis to impose sanctions on Alipay or to award legal fees to KTM.

III. Conclusion

KTM's motion to compel is dismissed as moot. The Court declines to impose sanctions or award fees. If either party believes that the Court overlooked a live issue remaining to be decided, that party may file a motion for reconsideration.

SO ORDERED in No. 21-cv-01380.

Date: September 29, 2022



JOHN F. KNESS
United States District Judge