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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

TELEBRANDS CORP.,

Plaintiff,

v.

VINDEX SOLUTIONS LLC, et al.,

Defendants.

Case No. 21-cv-00898-BLF

**ORDER GRANTING MOTION FOR
DEFAULT JUDGMENT**

[Re: ECF No. 61]

Before the Court is Plaintiff Telebrands Corp.’s (“Telebrands”) motion for default judgment against Defendants Henan Derun New Material Technology Co. (“Henan Derun”) and XNH US (“XNH”) (collectively, “Defendants”) in this unfair competition case based on Defendants’ alleged sales of transcutaneous electrical nerve stimulation (“TENS”) units without clearance from the U.S. Food and Drug Administration (“FDA”).

Based on the below reasoning, the Court GRANTS Telebrands’ motion.

I. BACKGROUND

A. Regulatory Background

The Federal Food, Drug, and Cosmetic Act (“FDCA”) provides requirements for medical devices according to a three-tiered system—Class I, II, and III devices. *See* 21 U.S.C. § 360c-(a)(1). TENS units, the devices at issue in this litigation, are classified as Class II devices. *See* 21 C.F.R. § 882.5890. Before a manufacturer can bring a Class II device to market, the FDCA requires filing a 510(k) premarket submission with the FDA. 21 U.S.C. § 360(k); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 477–79 (1996). Under the 510(k) process, if the Class II device is deemed “substantially equivalent” to a pre-existing device with prior clearance, it can be put on the market. *See* 21 C.F.R. § 807.100; *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 925 (9th Cir. 2010). A device is “substantially

1 equivalent” to a predicate device when it has the same intended use and the same technological
2 characteristics like materials, design, and energy source. *See* 21 C.F.R. § 807.100(b).

3 **B. Factual Background**

4 Defendants are Chinese corporations with their principal places of business in China. *See*
5 Complaint, ECF No. ¶¶ 19, 21. Defendants allegedly conduct business throughout the United States
6 through online promotion of their TENS products. *See id.* Telebrands is a New Jersey corporation
7 with its principal place of business in New Jersey, which allegedly conducts business throughout
8 the United States. *See id.* ¶ 13.

9 This action involves TENS units, which are medical devices used for pain relief that deliver
10 electrical impulses through electrodes placed on a user’s skin. Telebrands allegedly markets a
11 product called the Hempvana Rocket, which is a wireless, electronic TENS unit. *See id.* ¶ 33. On
12 November 19, 2020, Telebrands allegedly entered into a license agreement with Healthcare
13 Innovations LLC, which had obtained a 510(k) premarket clearance from the FDA to sell—and for
14 its licensees to sell—the Hempvana Rocket within the United States. *See id.* ¶ 34. Telebrands sells
15 the Hempvana Rocket nationally, including on a proprietary website and on third-party websites
16 like Amazon and Facebook. *See id.* ¶ 35.

17 Telebrands alleges that Defendants have competing products available on Amazon within
18 the United States. *See id.* ¶ 36. Henan Derun markets the Massager Pen under its UniforU brand.
19 *See id.* ¶ 36(f). XNH markets the Meridian Energy Acupuncture Pen under its FOHYLOY brand.
20 *See id.* ¶ 36(h). Telebrands alleges that it consulted with Exponent, Inc., which determined that
21 Defendants’ products are TENS units for which Defendants did not obtain the requisite 510(k)
22 clearance. *See id.* ¶¶ 38–44.

23 Telebrands alleges that Defendants have caused it irreparable harm by selling the Accused
24 Products in the U.S. without the requisite clearance. First, Telebrands alleges that Defendants
25 unfairly avoided the cost of obtaining 510(k) clearance and now can avail themselves of the
26 popularity of the Hempvana Rocket. *See id.* ¶ 49. Telebrands alleges that its business model is to
27 make large advertising expenditures for the launch of a new product to create a recognizable brand
28 for that product. *See id.* ¶ 46. Telebrands alleges that Defendants will “piggyback off” Telebrands’

1 advertising related to the Hempvana Rocket, including because websites like Amazon show similar
2 products in search results. *See id.* ¶¶ 45, 47. Second, Telebrands alleges that the sales of
3 Defendants’ TENS products will lead to the dilution of the market for handheld TENS devices,
4 including because consumers will be misled into thinking the Accused Devices are safe and
5 equivalent to the Hempvana Rocket despite lacking 510(k) clearance. *See id.* ¶¶ 51–53.

6 Telebrands alleges violations of (1) California’s Unfair Competition Law, Cal. Bus. & Prof.
7 C. § 17200 *et seq*; (2) Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et*
8 *seq*; (3) the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann.
9 § 201-1 *et seq*; (4) the Delaware Deceptive Trade Practices Act, 6 Del. C. § 2531 *et seq*; and (5) the
10 Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101. *See* Complaint, ECF No. 1
11 ¶¶ 56–96. Telebrands seeks a permanent injunction restraining Defendants from “directly or
12 indirectly continuing to lawfully distribute [their] uncleared TENS units through third party
13 marketplaces such as Amazon, or any person or entity acting in concert with Defendants, from
14 continuing to unlawfully distribute [their] uncleared TENS units through third-party marketplaces
15 such as Amazon, in retail stores or through any other medium within the United States.” *Id.*
16 at 17–18.

17 **C. Procedural Background**

18 Telebrands filed the Complaint on February 4, 2021, asserting claims against Defendants
19 VindEx Solutions LLC (“VindEx”); Cornerstone Trading LLC (“Cornerstone”); Gloria Business,
20 Inc. (“Gloria”); Techno Zone, LLC (“Techno Zone”); Okapi, LLC (“Okapi”); Henan Derun;
21 Shen Zhen Hei Shi Investment Ltd. (“Shen Zhen”); and XNH. *See* ECF No. 1. On the same date,
22 Telebrands filed an application for a temporary restraining order “enjoining Defendants, and all of
23 those acting in concert or participation with Defendants, from directly or indirectly, continuing to
24 unlawfully distribute Defendants’ unauthorized TENS units either through third-party marketplaces
25 such as Amazon, by telephone, in retail stores or through any other medium within the United
26 States.” ECF No. 3.

27 On February 8, 2021, the Court ordered Defendants to respond to Telebrands’ application
28 by February 10, 2021 and directed Telebrands to serve Defendants notice of the Court’s order by

1 email no later than February 8, 2021. *See* Order, ECF No. 9. On February 10, 2021, upon
2 Telebrands’ request, the Court permitted Telebrands to serve Defendants through Amazon Seller
3 Messaging Assistant, which Telebrands did as authorized. *See* Order, ECF Nos. 11, 12. The Court
4 heard Telebrands’ application on February 11, 2021, and only counsel for VindEx, Techno Zone,
5 Okapi, and Gloria appeared. *See* Order, ECF No. 26 at 1. The Court issued a temporary restraining
6 order and ordered the other Defendants, including Henan Derun and XNH, to show cause why the
7 preliminary injunction should not issue. *See id.* at 2. When they failed to respond, the Court issued
8 a preliminary injunction ordering that these Defendants were “restrained and enjoined from
9 distributing . . . uncleared TENS units within the United States either through third-party
10 marketplaces including Amazon or Facebook, by telephone, in retail stores, or through any other
11 medium within the United States,” including “Defendant Henan Derun New Material Technology
12 Co., Ltd.’s UniforU brand Massager pen” and “Defendant XNH US’s FOHYLOY brand Meridian
13 Energy Acupuncture Pen.” Order, ECF No. 37 at 8. On April 19, 2021, the Court granted
14 Telebrands’ motion to serve Henan Derun and XNH with the Complaint and the order granting
15 Telebrands’ application for a temporary restraining order via Amazon Seller Messaging Assistant.
16 *See* Order, ECF No. 46.

17 Telebrands voluntarily dismissed its claims against Gloria, Shen Zhen, Okapi, Techno Zone,
18 Cornerstone, and VindEx. *See* ECF Nos. 31, 32, 41, 45, 48, 52. Accordingly, Henan Derun and
19 XNH are the only Defendants remaining in this action.

20 On July 19, 2021, Telebrands filed a motion for entry of default against Henan Derun and
21 XNH. *See* ECF No. 57. The Court entered default against Henan Derun and XNH on July 20, 2021.
22 *See* ECF No. 58. On October 14, 2021, Telebrands filed the present Motion for Default Judgment
23 against Henan Derun and XNH. *See* ECF No. 61. Neither Henan Derun nor XNH filed a response,
24 and the deadline to file a response has passed. Civ. L.R. 7-3(a). Pursuant to Civil Local Rule 7-1(b),
25 the Court found the Motion appropriate for determination without oral argument. *See* ECF No. 62.

26 **II. LEGAL STANDARD**

27 Default may be entered against a party who fails to plead or otherwise defend an action, who
28 is neither a minor nor an incompetent person, and against whom a judgment for affirmative relief is

1 sought. Fed. R. Civ. P. 55(a). After an entry of default, a court may, in its discretion, enter default
2 judgment. *Id.* R. 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In deciding
3 whether to enter default judgment, a court may consider the following factors: (1) the possibility of
4 prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claims; (3) the sufficiency of
5 the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning
6 material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy
7 underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*,
8 782 F.2d 1470, 1471–72 (9th Cir. 1986). In considering these factors, all factual allegations in the
9 plaintiff’s complaint are taken as true, except those related to damages. *TeleVideo Sys., Inc. v.*
10 *Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). When the damages claimed are not readily
11 ascertainable from the pleadings and the record, the court may either conduct an evidentiary hearing
12 or proceed on documentary evidence submitted by the plaintiff. *See Johnson v. Garlic Farm Truck*
13 *Ctr. LLC*, No. 20–cv–03871–BLF, 2021 WL 2457154, at *2 (N.D. Cal. Jun. 16, 2021).

14 **III. DISCUSSION**

15 **A. Jurisdiction**

16 **1. Subject Matter Jurisdiction**

17 The Court has diversity jurisdiction over this lawsuit under 28 U.S.C. § 1332. District courts
18 have original jurisdiction over all civil actions where (1) the matter in controversy exceeds the sum
19 or value of \$75,000, exclusive of interest and costs and (2) the action is between citizens of a U.S.
20 state and citizens or subjects of a foreign state. *See* 28 U.S.C. § 1332(a). Telebrands alleges that
21 the amount in controversy exceeds \$75,000. *See* Complaint, ECF No. 1 ¶ 22. Further, Telebrands
22 alleges that Defendants are Chinese corporations and that Telebrands is a New Jersey corporation.
23 *See id.* ¶¶ 13, 19, 21.

24 **2. Personal Jurisdiction**

25 The Court has personal jurisdiction over Defendants. “Federal courts ordinarily follow state
26 law in determining the bounds of their jurisdiction over persons.” *Walden v. Fiore*, 571 U.S. 277,
27 283 (2014) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014)). California’s long-arm
28 statute is coextensive with federal due process requirements. *See Schwarzenegger v. Fred Martin*

1 *Motor Co.*, 374 F.3d 797, 800–801 (9th Cir. 2004). “Although a nonresident’s physical presence
 2 within the territorial jurisdiction of the court is not required, the nonresident generally must have
 3 ‘certain minimum contacts . . . such that the maintenance of the suit does not offend traditional
 4 notions of fair play and substantial justice.’” *Walden v. Fiore*, 571 U.S. 277, 283 (2014). (quoting
 5 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Telebrands alleges that Defendants “have
 6 engaged in the unlawful marketing, soliciting and selling of their TENS units to customers” in
 7 California. *See* Complaint, ECF No. 1 ¶ 23. Further, Telebrands’ claims arise out of Defendants’
 8 marketing, soliciting, and selling of their TENS units. Accordingly, the Court finds that it has
 9 specific jurisdiction over Defendants for purposes of Telebrands’ claims. *See Schwarzenegger*,
 10 374 F.3d at 802.

11 **B. Service of Process**

12 When a plaintiff requests default judgment, the court must assess whether the defendant was
 13 properly served with notice of the action. *See, e.g., Solis v. Cardiografix*, No. 12–cv–01485,
 14 2012 WL 3638548, at *2 (N.D. Cal. Aug. 22, 2012). Substantial compliance with Rule 4 of the
 15 Federal Rules of Civil Procedure is required. *See Travelers Cas. and Sur. Co. of Am. v. Brenneke*,
 16 551 F.3d 1132, 1135 (9th Cir. 2009). Rule 4 allows service of an individual in a foreign country
 17 (1) by any internationally agreed means of service that is reasonably calculated to give notice, such
 18 as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial
 19 Documents; (2) if there is no internationally agreed means, or if an international agreement allows
 20 but does not specify other means, by a method that is reasonably calculated to give notice, including
 21 using any form of mail that the clerk addresses and sends to the individual and that requires a signed
 22 receipt, unless prohibited by the foreign country’s law; and (3) by other means not prohibited by
 23 international agreement, as the Court orders. *See* Fed. R. Civ. P. 4(f).

24 Telebrands was unable to find proper addresses for service of Defendants. *See* Stone Decl.,
 25 ECF No. 44-1 ¶ 5. In February 11, 2021, Telebrands received correspondence from Henan Derun
 26 through Amazon, but all communications have ceased since February 18, 2021. *See id.* ¶¶ 5, 8.
 27 Telebrands has never received any correspondence from XNH. *See id.* ¶ 5. Without addresses,
 28 Telebrands is unable to serve Defendants according to the Hague Convention. *See id.* ¶ 12. On

1 April 16, 2021, Telebrands filed an ex parte application seeking leave to serve Defendants via
2 alternative means using Amazon Seller Messaging. *See* Ex Parte Application, ECF No. 44. The
3 Court granted Telebrands’ application. *See* Order, ECF No. 46. On May 13, 2021, Telebrands filed
4 a proof of service indicating that it had served Defendants with the verified complaint and summons
5 using Amazon Seller Messaging. *See* ECF No. 55 ¶¶ 1–2. Further, Telebrands indicated that it
6 attempted to serve Defendants by mail. *See id.*, Ex. C.

7 The Court finds that Telebrands has provided Defendants with adequate notice of service of
8 the action under Rule 4. Telebrands sought to serve Defendants under the Hague Convention, but
9 it was unable to find proper addresses despite substantial efforts. Telebrands then sought the Court’s
10 leave to serve Defendants by alternative means (Amazon Seller Messaging), which the Court
11 granted. *See* Order, ECF No. 46. Telebrands served Defendants accordingly. *See* ECF No. 55 ¶¶
12 1–2. There is no indication that serving Defendants via Amazon Seller Messaging is prohibited by
13 international agreement. Further, the Court finds that serving Defendants by Amazon Seller
14 Messaging was reasonably calculated to give notice to the Defendants. Henan Derun was even
15 corresponding with via Amazon early in 2021 before it went silent. *See* Stone Decl., ECF No. 44-
16 1 ¶¶ 5, 8. Accordingly, the Court finds that Telebrands served Defendants in at least substantial
17 compliance with Rule 4.

18 Based on the above reasoning, the Court finds that Telebrands properly served Defendants
19 with notice of this action.

20 **C. *Eitel* Factors**

21 Courts consider the seven *Eitel* factors in determining whether to grant a motion for default
22 judgment. *Eitel*, 782 F.2d at 1471–72. The Court will consider each factor in turn.

23 **1. Factor 1 – Prejudice to Plaintiff**

24 Under the first *Eitel* factor, the Court considers whether Telebrands would be prejudiced
25 unless default judgment were entered against Defendants. Telebrands argues that it would be left
26 without recourse to recover for the harm already inflicted by Defendants if the Court did not grant
27 it default judgment. *See* Motion, ECF No. 61 at 25. The Court agrees. *See Ridola v. Chao*, No.
28 16–cv–02246–BLF, 2018 WL 2287668, at *5 (N.D. Cal. May 18, 2018).

1 Accordingly, the first *Eitel* factor weighs in favor of default judgment.

2 **2. Factors 2 and 3 – Merits of Plaintiff’s Substantive Claims and Sufficiency of**
3 **Complaint**

4 Under the second and third *Eitel* factors, the Court considers the merits of Telebrands’
5 substantive claims and the sufficiency of Telebrands’ Complaint. Telebrands brings claims against
6 Defendants under five states’ unfair competition laws: (1) California’s Unfair Competition Law,
7 Cal. Bus. & Prof. C. § 17200 *et seq*; (2) Florida’s Deceptive and Unfair Trade Practices Act, Fla.
8 Stat. § 501.201 *et seq*; (3) the Pennsylvania Unfair Trade Practices and Consumer Protection Law,
9 73 Pa. Stat. Ann. § 201-1 *et seq*; (4) the Delaware Deceptive Trade Practices Act, 6 Del. C. §2531
10 *et seq*; and (5) the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101. Defendants have
11 not raised the issue of whether Telebrands can bring claims under multiple states’ unfair competition
12 laws simultaneously, since they have not opposed Telebrands’ default judgment motion.

13 Telebrands alleges the same conduct by both Defendants—selling TENS units throughout
14 the US without obtaining the requisite clearance. The Court considers the merits of each of
15 Telebrands’ claims and the sufficiency of Telebrands’ complaint as to each claim in turn.

16 **a. California Unfair Competition Law (Cal. Bus. & Prof. C. § 17200 *et seq*)**

17 Telebrands brings a claim under the California Unfair Competition Law (“UCL”). The
18 California Supreme Court has clarified that the UCL, because it is “written in the disjunctive,”
19 prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts
20 of practices, and (3) fraudulent acts or practices. *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular*
21 *Tel. Co.*, 20 Cal. 4th 163, 180 (1999); *accord Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152,
22 1168 (9th Cir. 2012). To plead a UCL claim, a plaintiff’s must allege that a defendant’s conduct
23 violates one of these three “prongs.” *Id.* In addition, because a UCL claim may only be brought by
24 “a person who has suffered injury in fact and has lost money or property as a result of the unfair
25 competition,” Cal. Bus. & Prof. Code § 17204, a plaintiff must “demonstrate some form of economic
26 injury.” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 323 (2011).

27 For the “unfair” prong of the UCL, the California Supreme Court has defined “unfair” as
28 “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of

1 one of those laws because its effects are comparable to or the same as a violation of the law, or
2 otherwise significantly threatens or harms competition.” 20 Cal. 4th at 187. Further, the California
3 Supreme Court requires that “any finding of unfairness to competitors under section 17200 be
4 tethered to some legislatively declared policy or proof of some actual or threatened impact on
5 competition.” *HSBC Bank Nevada*, 691 F.3d at 1170 (quoting *Cel-Tech*, 20 Cal. 4th at 185).

6 The “unlawful” prong of the UCL “borrows violations of other laws and treats them as
7 unlawful practices that the unfair competition law makes independently actionable.” *Cel-Tech*,
8 20 Cal. 4th at 180. In other words, to be “unlawful” under the UCL, Defendants’ conduct must
9 violate another “borrowed” law. *HSBC Bank Nevada*, 691 F.3d at 1168. “Virtually any state,
10 federal or local law can serve as the predicate for an action under section 17200.” *Id.* (quoting
11 *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 515 (2002)) (alterations
12 omitted).

13 Telebrands alleges that Defendants have violated the UCL by offering TENS units in
14 competition with Telebrands and advertising and distributing them despite failing to obtain the
15 required 510(k) premarket clearance. *See* Complaint, ECF No. 1 ¶ 59. Telebrands alleges that it
16 will suffer irreparable harm in the form of significant customer loss and lost market share in the
17 portable, handheld TENS unit market. *See id.* ¶ 60. Telebrands argues that Defendants’ distribution
18 of uncleared TENS units contrary to FDA regulations is unfair competition in violation of the UCL.
19 *See* Motion, ECF No. 61 at 18. Telebrands argues Defendants’ conduct is at the expense of
20 competitors who play by the rules, giving Defendants an unfair competitive advantage. *See id.*
21 Telebrands analogizes the present case to *Optivus Technology, Inc. v. Ion Beam Applications S.A.*,
22 No. CV 03–2052 SJO (VBKx), 2004 WL 5530838 (C.D. Cal. Dec. 29, 2004). In that case, a
23 Central District of California Court found on summary judgment that it could not be said as a matter
24 of law that the plaintiff had no claim under the UCL based on allegations that a competitor marketed
25 a competing device without first obtaining approval from the FDA. *See id.* at *16.

26 The Court finds that Telebrands has adequately pled a meritorious UCL claim for unfair or
27 unlawful competition. First, Telebrands has adequately alleged that Defendants violated FDA
28 regulations, giving them an unfair competitive advantage—which the Court finds to be sufficient

1 for pleading unfair or unlawful conduct. Second, Telebrands has adequately alleged economic
2 injury in the form of lost market share and customers. *See* Complaint, ECF No. 1 ¶ 60. The *Optivus*
3 case further supports the sufficiency of Telebrands’ pleadings. *See Optivus*, 2004 WL 5530838,
4 at *16.

5 Accordingly, the Court finds that the second and third *Eitel* factors favor default judgment
6 as to Telebrands’ UCL claim.

7 **b. Florida’s Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201 *et***
8 ***seq*)**

9 Telebrands brings a claim under the Florida Deceptive and Unfair Trade Practices Act
10 (“FDUTPA”). The FDUTPA prohibits “[u]nfair methods of competition, unconscionable acts or
11 practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” *See*
12 Fla. Sta. § 501.204(1). Further, the FDUTPA is intended “[t]o protect the consuming public and
13 legitimate business enterprises from those who engage in unfair methods of competition, or
14 unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” *See*
15 Fla. Sta. § 501.202(2). The Florida Supreme Court has held that deception constitutes a
16 “representation, omission, or practice that is likely to mislead the consumer acting reasonably in the
17 circumstances, to the consumer’s detriment.” *PNR, Inc. v. Beacon Property Mgmt., Inc.*,
18 842 So.2d 773, 777 (Fla. 2003); *Harrison v. Lee Auto Holdings, Inc.*, 295 So.3d 857, 862 (Fla. Dist.
19 Ct. App. 2020). A FDUTPA claim has three elements: “(1) a deceptive act or unfair practice;
20 (2) causation; and (3) actual damages.” *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. Dist. Ct.
21 App. 2006).

22 Telebrands argues that it has adequately pled a deceptive trade practice under the FDUTPA.
23 Telebrands argues Defendants have sold devices that use the same technology as Telebrands’
24 devices and have the same health risks, without disclosing that Defendants did not seek FDA
25 clearance for those devices. *See* Motion, ECF No. 61 at 21. Telebrands argues that Defendants’
26 conduct has caused a significant reduction in Telebrands’ market share. *See id.* at 21–22.

27 The Court agrees with Telebrands. Telebrands has adequately pled that Defendants engaged
28 in a deceptive or unfair practice that caused competitive harm to Telebrands. *See* Complaint,

1 ECF No. 1 ¶ 59; *Rollins*, 951 So.2d at 869.

2 Based on the above reasoning, the Court finds that the second and third *Eitel* factors favor
3 default judgment as to Telebrands’ FDUTPA claim.

4 **c. Pennsylvania Unfair Trade Practices and Consumer Protection Law**
5 **(73 Pa. Stat. Ann. § 201-1 et seq)**

6 Telebrands brings a claim under the Pennsylvania Unfair Trade Practices and Consumer
7 Protection Law (“UTPCPL”). The UTPCPL prohibits engaging in “unfair methods of competition”
8 and “unfair or deceptive acts or practices,” including “[c]ausing likelihood of confusion or of
9 misunderstanding as to the source, sponsorship, approval or certification of goods or services.”
10 73 Pa. Stat. Ann. § 201-2(4)(ii). An act or a practice is deceptive or unfair if it has the “capacity or
11 tendency to deceive.” *Pa. Dept. of Banking v. NCAS of Del., LLC*, 995 A.2d 422, 444
12 (Pa. Commw. Ct. 2010) (citations omitted). In making this determination, courts consider factors
13 including “(1) [w]hether the practice, without necessarily having been previously considered
14 unlawful, offends public policy as it has been established by statutes, the common law, or otherwise
15 – whether, in other words, it is within at least the penumbra of some common-law, statutory, or
16 other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or
17 unscrupulous, (3) whether it causes substantial injury to consumers (or competitors or other
18 businessmen).” *See Com. Ex rel. Zimmerman v. Nickel*, 26 Pa. D. & C. 3d 115, 120–21 (C.P. 1983)
19 (citations omitted).

20 Telebrands argues that it has adequately pled that Defendants violated the UTPCPL because
21 it has alleged that Defendants advertise their TENS units as a safe and effective health product, and
22 Defendants’ products pop up on third-party marketplace websites when consumers search for
23 Telebrands’ TENS unit. *See Motion*, ECF No. 61 at 23–24. In fact, Telebrands alleges, Defendants’
24 TENS units are not as safe and effective as Defendants’ marketing would suggest, since Defendants
25 did not get the proper FDA clearance before bringing them to market. *See id.* at 24. Telebrands
26 argues that this constitutes deceptive or unfair conduct, since it creates a substantial likelihood that
27 consumers will be misled. *See id.* Further, Telebrands argues that Defendants’ conduct negatively
28 impacted Telebrands’ ability to sell its own TENS units. *See id.*

1 The Court agrees with Telebrands. Telebrands has adequately alleged a UTPCPL violation,
2 particularly given the UTPCPL provision enumerating that “[c]ausing likelihood of confusion or of
3 misunderstanding as to the source, sponsorship, approval or certification of goods or services” is an
4 unfair or deceptive act or practice. 73 Pa. Stat. Ann. § 201-2(4)(ii). Further, the factors courts use
5 to determine whether a practice is unfair or deceptive supports the merits of Telebrands’ UTPCPL
6 claim. *See Zimmerman*, 26 Pa. D. & C. 3d at 120–21. Telebrands has adequately alleged that
7 Defendants’ conduct “offends public policy” as established by FDA regulations; that Defendants’
8 conduct is plausibly “unscrupulous;” and that it causes “substantial injury” to Telebrands—a
9 competitor of Defendants. *See id.*

10 Based on the above reasoning, the Court finds that the second and third *Eitel* factors weigh
11 in favor of default judgment as to Telebrands’ UTPCPL claim.

12 **d. Delaware Deceptive Trade Practices Act (6 Del. C. § 2531 et seq)**

13 Telebrands brings a claim under the Delaware Deceptive Trade Practices Act (“DTPA”).
14 Similar to the UTPCPL, the DTPA prohibits engaging in a “deceptive trade practice . . . in the course
15 of a business, vocation, or occupation,” including by causing “likelihood of confusion or of
16 misunderstanding as to the source, sponsorship, approval, or certification of goods or services[.]”
17 6 Del.C. § 2532(a)(2). “In order to prevail [on a DTPA claim], a complainant need not prove
18 competition between the parties or actual confusion or misunderstanding.” 6 Del.C. § 2532(b). The
19 DTPA is “remedial in nature and liberally construed.” *Enzo Life Scis., Inc. v. Digene Corp.*,
20 295 F.Supp.2d 424, 428 (D. Del. Mar. 31, 2003) (quoting *State ex rel. Brady v. Preferred Flourish*
21 *Network, Inc.*, 791 A.2d 8, 20 (Del. Ch. 2001)).

22 Telebrands argues that courts consider the DTPA coextensive with common law unfair
23 business practice principles, for which the Delaware Court of Chancery has held “[t]he essential
24 element separating unfair competition from legitimate market participation... is an unfair action on
25 the part of defendant by which he prevents plaintiff from legitimately earning revenue.” *See Motion*,
26 ECF No. 61 at 23 (quoting *Ethypharm S.A. v. Abbott Labs.*, 598 F.Supp.2d 611, 618 (D. Del. 2009)).
27 Further, Telebrands argues that it has adequately pled a DTPA violation by alleging that Defendants
28 “leapfrogged” FDA regulations, thereby securing a significant share of the TENS unit market to

1 Telebrands’ detriment. *See id.* at 24.

2 The Court agrees with Telebrands. Telebrands has plausibly alleged that Defendants
3 engaged in “likelihood of confusion or of misunderstanding as to the source, sponsorship, approval,
4 or certification of goods or services” by selling TENS units without FDA clearance. 6 Del.C.
5 § 2532(a)(2); *see, e.g.*, Complaint, ECF No. 1 ¶ 51. Further, Telebrands has plausibly alleged that
6 it was damaged by Defendants’ conduct. *See* Complaint, ECF No. 1 ¶¶ 49–53.

7 Accordingly, the Court finds that the second and third *Eitel* factors weigh in favor of default
8 judgment as to Telebrands’ DTPA claim.

9 **e. Colorado Consumer Protection Act (Colo. Rev. Stat. § 6-1-101)**

10 Telebrands brings a claim under the Colorado Consumer Protection Act (“CCPA”). The
11 CCPA prohibits a person from engaging in a deceptive trade practice in the course of the person’s
12 business, vocation, or occupation. *See* Colo. Rev. Stat. § 6-1-105. To adequately plead a CCPA
13 claim, a plaintiff must allege (1) that the defendant engaged in an unfair or deceptive trade practice;
14 (2) that the challenged practice occurred in the course of defendant’s business, vocation, or
15 occupation; (3) that it significantly impacts the public as actual or potential consumers of the
16 defendant’s good, services, or property; (4) that the plaintiff suffered injury in fact to a legally
17 protected interest; and (5) that the challenged practice caused the plaintiff’s injury. *See Rhino*
18 *Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003) (citing *Hall v. Walter*,
19 969 P.2d 224, 235 (Colo. 1998)).

20 For the first and second elements of a CCPA claim, Telebrands points to a provision of the
21 CCPA enumerating that deceptive trade practices include where a person “[r]efuses or fails to obtain
22 all governmental licenses or permits required to perform the services or to sell the goods, food,
23 services, or property as agreed to or contracted for with a consumer.” Colo. Rev.
24 Stat. § 6-1-105(1)(z). By alleging that Defendants sold TENS units within the course of their
25 business without the requisite FDA clearance, Telebrands argues it has adequately pled the first and
26 second elements of a CCPA claim. *See* Motion, ECF No. 61 at 19. Given the clear language of the
27 CCPA provision Telebrands cites, the Court agrees.

28 For the third element of a CCPA claim, Telebrands argues that Defendants’ conduct

1 significantly impacted the public because unregulated TENS units were offered for sale throughout
2 the United States. *See* Motion, ECF No. 61 at 19. The Court agrees that Telebrands has adequately
3 pled the third element of a CCPA claim. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain,*
4 590 F.Supp. 1083, 1086 (N.D. Ill. 1984) (“plaintiff must show defendant has engaged in deceptive
5 practices in promoting its goods or services to its market in general,” as opposed to “a single course
6 of deceptive conduct by a defendant toward a plaintiff”).

7 For the fourth and fifth elements of a CCPA claim, Telebrands argues that Defendants’
8 conduct caused Telebrands to suffer an injury in fact. Telebrands argues that it has adequately
9 alleged that it has suffered competitive harm based on Defendants’ conduct. Telebrands argues that
10 Defendants’ decision to “cut the line by ignoring FDA regulations” led to a precipitous loss in
11 Telebrands’ customers and market share for its TENS unit products. *See* Motion, ECF No. 61 at 20.
12 The Court agrees. Telebrands has adequately alleged an injury-in-fact resulting from Defendants’
13 alleged conduct. *See* Complaint, ECF No. 1 ¶¶ 49–53.

14 Based on the above reasoning, the Court finds that Telebrands has adequately alleged the
15 elements of a CCPA claim against Defendants. Accordingly, the second and third *Eitel* factors
16 weigh in favor of a default judgment.

17 **3. Factor 4 – Sum of Money at Stake**

18 Under the fourth *Eitel* factor, the Court considers the sum of money at stake in relation to
19 the seriousness of Defendants’ conduct. Telebrands requests a permanent injunction preventing
20 Defendants and all those acting in concert or participation with Defendants from “directly or
21 indirectly[] continu[ing] to unlawfully distribute Defendants’ TENS units either through third-party
22 marketplaces such as Amazon, by telephone, in retail stores or through any other medium within
23 the United States, unless and until Defendants secure the requisite clearance from the FDA pursuant
24 to Section 510(k) of the Food Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*” *See* Proposed
25 Order, ECF No. 61-2 ¶ 9. Telebrands argues that it has tailored its request for injunctive relief to
26 Defendants’ specific misconduct, so default judgment is appropriate. *See* Motion, ECF No. 61 at 25
27 (citing *Bittorrent, Inc. v. Bittorrent Mktg. GmbH*, No. 12–cv–02525–BLF, 2014 WL 5773197,
28 at *10 (N.D. Cal. Nov. 5, 2014)). The Court agrees. The relief Telebrands requests—an injunction

1 on selling TENS units without FDA clearance—is tailored to the alleged conduct—selling TENS
2 units without FDA clearance.

3 Accordingly, the fourth *Eitel* factor weighs in favor of default judgment.

4 **4. Factor 5 – Possibility of a Dispute Concerning Material Facts**

5 Under the fifth *Eitel* factor, the Court considers the possibility of a dispute concerning
6 material facts. Telebrands argues that because Defendants have not answered or appeared in this
7 matter, there is unlikely to be a dispute concerning material facts. *See* Motion, ECF No. 61 at 26.
8 The Court agrees, particularly since Telebrands pleads plausible claims for violation of various
9 states’ unfair competition laws and all liability-related allegations are deemed true.

10 Accordingly, the fifth *Eitel* factor weighs in favor of default judgment.

11 **5. Factor 6 – Whether Default was Due to Excusable Neglect**

12 Under the sixth *Eitel* factor, the Court considers whether Defendants’ default was due to
13 excusable neglect. Telebrands argues that Defendants’ default is not due to excusable neglect, since
14 Telebrands has sent them numerous messages through Amazon Seller Messaging that Defendants
15 have ignored. *See* Motion, ECF No. 61 at 26. The Court agrees. Based on Telebrands’ extensive
16 efforts to contact Defendants that have received no response, the Court is satisfied that Defendants’
17 default in this case is not due to excusable neglect. Such is particularly true for Henan Derun, which
18 initially corresponded with Telebrands before going silent without explanation. *See* Stone Decl.,
19 ECF No. 44-1 ¶¶ 5, 8.

20 Accordingly, the sixth *Eitel* factor weighs in favor of default judgment.

21 **6. Factor 7 – Policy Favoring Decisions on the Merits**

22 Under the seventh *Eitel* factor, the Court considers the strong policy underlying the Federal
23 Rules of Civil Procedure favoring decisions on the merits. Telebrands argues that Defendants’
24 failure to answer Telebrands’ Complaint makes resolution on the merits impossible, so this factor
25 favors default judgment. *See* Motion, ECF No. 61 at 26. The Court agrees. Defendants’ failure to
26 participate in this litigation makes a decision on the merits impossible, and default judgment is
27 Telebrands’ only recourse. *See United States v. Roof Guard Roofing Co. Inc.*,
28 No. 17–cv–02592–NC, 2017 WL 6994215, at *3 (N.D. Cal. Dec. 14, 2017) (“When a properly

1 adversarial search for the truth is rendered futile, default judgment is the appropriate outcome.”).

2 Accordingly, the seventh *Eitel* factor weighs in favor of default judgment.

3 **D. Requested Relief**

4 Telebrands argues that it is entitled to a permanent injunction preventing Defendants from
5 selling TENS units without FDA clearance anywhere in the United States. *See* Motion, ECF No. 61
6 at 26–27. In determining whether to grant permanent injunctive relief, courts consider whether a
7 plaintiff has demonstrated: “(1) that it has suffered an irreparable injury; (2) that remedies available
8 at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering
9 the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
10 (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v.*
11 *MercExchange, LLC*, 547 U.S. 388, 391 (2006).

12 Telebrands argues that each of the state statutes under which it brings its claims provide for
13 equitable relief, including injunctions. *See* Cal. Bus. & Prof. C. § 17203; Colo. Rev. Stat. § 6-1-110;
14 Fla. Stat. § 501.211; 73 Pa. Stat. Ann § 201-9.2; 6 Del.C. § 2533. Further, Telebrands argues that a
15 permanent injunction is warranted here under the equity factors. Telebrands argues that it has
16 established irreparable harm, since the market for TENS units is an “elastic market which has a
17 highly specific consumer demographic, which Telebrands simply will not be able to retake.” *See*
18 Motion, ECF No. 61 at 26. Telebrands further argues that the “loss and the effective diminution of
19 Telebrands’ brand name and recognition” cannot be addressed through monetary damages. *See id.*
20 at 27. Additionally, Telebrands argues that the balance of hardships weighs in its favor, since a
21 permanent injunction will merely require Defendants to go through the same regulatory process that
22 Telebrands and other sellers went through. *See id.* And finally, Telebrands argues that the public
23 interest would be served by an injunction, since consumer safety is at issue. *See id.*

24 The Court agrees with Telebrands. Telebrands has adequately shown that a permanent
25 injunction is authorized by the state statutes under which Telebrands brings its claims. Further,
26 Telebrands has established that the equity factors support issuing the requested permanent
27 injunction. Telebrands adequately alleges that the competitive harm caused by Defendants’ conduct
28 is irreparable and will not be addressed by monetary damages. *See* Complaint, ECF No. 1 ¶¶ 49–53.

1 Further, the Court agrees that the balance of hardships and the public interest favor the requested
2 permanent injunction, particularly since it allows Defendants to sell TENS units once they gain the
3 proper FDA clearance. Additionally, the Court notes that a nationwide injunction is appropriate.
4 *See Allergan, Inc. v. Athena Cosmetics, Inc.*, No. SACV 07–1316 JVS (RNBx),
5 2013 WL 12142655, at *4 (C.D. Cal. Mar. 6, 2013); *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 133
6 Cal.App.4th 1277, 1291–93 (2005).

7 Accordingly, the Court GRANTS Telebrands' requested permanent injunction.

8 **IV. ORDER**

9 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 10 1. Telebrands' motion for default judgment is GRANTED;
- 11 2. The Court will issue a separate injunction; and
- 12 3. Notice of this Order and Judgment may be served on Defendants by sending copies
13 via Amazon Seller Messaging.

14 Dated: April 8, 2022



15
16 BETH LABSON FREEMAN
United States District Judge