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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Concord Servicing Corporation,

No. CV-15-01280-PHX-JAT

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Plaintiff,

ORDER

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v.

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Concord Resolution Incorporated,

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Defendant.

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Pending before the Court is Plaintiff Concord Servicing Corporation's motion for default judgment, (Doc. 12), against Defendant Concord Resolution, Inc., pursuant to Fed. R. Civ. P. 55(b). No response has been filed by Defendant. The Court will grant the motion.

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I.

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This action commenced on July 9, 2015, with the filing of the Complaint. (Doc. 1). Defendant has failed to answer or file any motion to dismiss in accordance with Federal and Local Rules.¹ Upon application, (Doc. 10), the Clerk of the Court entered default against Defendant on September 4, 2015. (Doc. 11). Plaintiff thereafter filed the pending motion for default judgment on September 21, 2015. (Doc. 12). Since the motion was filed, Defendant has failed to respond in any capacity.

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¹ Defendant received a demand letter from Plaintiff on May 15, 2015. (Doc. 12-2 at 2-3). Defendant was then served with the Complaint on July 23, 2015. (Doc. 9).

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A. Possible Prejudice to Plaintiff

The first Eitel factor weighs in favor of granting Plaintiff’s motion, as Plaintiff will be prejudiced if default judgment is not entered in its favor. At no point has Defendant responded to this action, and the record reflects that Plaintiff gave proper notice. (Docs. 2, 5, 9). If the motion is not granted, Plaintiff “will likely be without other recourse for recovery.” *PepsiCo, Inc. v. Cal. Sec. Cans.*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002); see also *United States v. \$86,496.00 in United States Currency*, No. CV-07-1693-PHX-DGC, 2008 U.S. Dist. LEXIS 115052, at *4-5 (D. Ariz. July 1, 2008) (citation omitted).

B. Merits of Plaintiff’s Claims

Where, as here, default has been entered, the factual allegations of the Complaint are taken as true. However, for this factor to weigh in favor of granting a motion for default judgment, a plaintiff must plead sufficient facts to “state a claim on which it may recover, which often requires establishing a prima facie case.” *Getty Images (US), Inc. v. Virtual Clinics*, No. C13-0626JLR, 2014 U.S. Dist. LEXIS 12449, at *8-9 (W.D. Wash. Jan. 31, 2014) (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)); see also *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992). Thus, the Court must analyze Plaintiff’s claims of trademark infringement and cybersquatting.

1. Trademark Infringement

To state a prima facie claim for trademark infringement under Title 15 U.S.C. § 1125 of the Lanham Act, Plaintiff must establish: (a) it has a valid, protectable trademark; and (b) Defendant’s use of the mark is likely to cause confusion. See *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1202-03 (9th Cir. 2012); *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir. 2007) (citing *Brookfield Communs., Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1047, 1053 (9th Cir. 1999); *Reno Air Racing*

1 Ass'n v. McCord, 452 F.3d 1126, 1134 (9th Cir. 2006) (citing KP Perm. Make-Up, Inc. v.
2 Lasting Impression, Inc., 408 F.3d 596, 602 (9th Cir. 2005)).

3 Plaintiff obtained a federal trademark registration for CONCORD in 1993, and
4 again in 2005. (Doc. 1 at 2). Plaintiff has made continuous and exclusive use of the
5 CONCORD mark for “many years” in providing “financial services, including delinquent
6 collections of installment contracts and other consumer obligations.” (Id. (internal
7 quotation marks omitted)). Plaintiff enjoys a positive reputation throughout the United
8 States, clients “identify the CONCORD mark with Plaintiff,” and Plaintiff “receives
9 clients and referrals from throughout the United States and internationally” based on its
10 positive reputation. (Id.). On October 31, 2014, Defendant was formed and began using
11 the business name CONCORD for debt collection services on behalf of pay day lenders.
12 (Doc. 1 at 1). Defendant also registered the domain name www.concordresolution.com to
13 advertise its service. (Id. at 2). Defendant never sought nor received authorization from
14 Plaintiff to use CONCORD, and Defendant had constructive notice of Plaintiff’s prior
15 use of CONCORD as a trademark for its services. (Id. at 3).

16 Plaintiff has clearly established that is has a valid, protectable trademark. It must
17 also show that a “likelihood of confusion” exists, which is the “central element of
18 trademark infringement,” and can be established by demonstrating that the “similarity of
19 the marks is likely to confuse customers about the source of the products.” *GoTo.com,*
20 *Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (citation omitted). In
21 determining the likelihood of confusion, the Court is guided by consideration of the eight
22 “so-called Sleekcraft factors . . . (1) the similarity of the marks; (2) the relatedness of the
23 two companies’ services; (3) the marketing channel used; (4) the strength of [Plaintiff’s]
24 mark; (5) [Defendant’s] intent in selecting its mark; (6) evidence of actual confusion; (7)
25 the likelihood of expansion into other markets; and (8) the degree of care likely to be
26 exercised by purchasers.”² Id. (citation omitted).

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28 ² In the context of services advertised over the internet, “the three most important Sleekcraft factors are (1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the “simultaneous use of the [internet] as a marketing channel.”

1 Accepting the well-pleaded facts of the Complaint as true, the Court finds that
2 under the Sleekcraft factors, Plaintiff has established that there is a likelihood of
3 confusion. *GoTo.com, Inc.*, 202 F.3d at 1205. Both companies are utilizing CONCORD,
4 making them identical marks, and Defendant is using a similar internet domain name and
5 website to advertise similar, if not identical services as Plaintiff. Plaintiff has a positive
6 reputation throughout the United States, and receives referral business both nationally
7 and internationally, indicating that Plaintiff has a strong mark that has been appropriated.
8 (Doc. 1 at 2-4). Plaintiff has submitted evidence of actual confusion between the two
9 marks, and the Complaint makes clear that Defendant’s intent was to to capitalize on the
10 established brand of Plaintiff for the purpose of offering a similar service to consumers.
11 Moreover, the fact that Defendant is operating a competing website and domain name
12 mitigates the weight of the seventh factor, “the likelihood of expansion into other
13 markets.” *GoTo.com, Inc.*, 202 F.3d at 1205. Finally, both companies offer debt
14 collection services, an industry that in many cases carries a stigma among the general
15 public. Plaintiff “enjoys a positive reputation” throughout the country and receives
16 “clients and referrals” based on its reputation. (Doc. 1 at 2). In selecting a debt collection
17 company, the consumer is likely to exercise reasonable discretion, and Plaintiff’s
18 reputation is essential to a viable candidacy as a potential service provider.

19 In sum, the Sleekcraft factors point to there being a high “likelihood of confusion”
20 over Defendant’s use of the trademarked CONCORD, and Plaintiff has therefore made
21 out a prima facie claim of trademark infringement.

22 23 **2. Cybersquatting**

24 The Ninth Circuit has described the act of cybersquatting as “the Internet version
25 of a land grab. Cybersquatters register well-known brand names as Internet domain
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27 *GoTo.com, Inc.*, 202 F.3d at 1205 (quoting *Brookfield Communs., Inc.*, 174 F.3d at 1055
28 n.16). Here, as discussed *infra*, the marks are identical, the service offered is very similar,
and both companies utilize the internet as a marketing channel. Thus, under the “most
important” factors, there is clearly a likelihood of confusion.

1 names in order to force the rightful owners of the marks to pay for the right to engage in
2 electronic commerce under their own name.” *Interstellar Starship Services, Ltd. v. Tchou*,
3 304 F.3d 936, 946 (9th Cir. 2002). The Anticybersquatting Consumer Protection Act
4 (“ACPA”), Title 15 U.S.C. § 1125 (d), was enacted to combat this practice. The ACPA
5 established that “[a] person shall be liable in a civil action by the owner of a mark . . . if,
6 without regard to the goods or services of the parties, that person (i) has a bad faith intent
7 to profit from that mark . . . ; and (ii) registers, traffics in, or uses a domain name [that is
8 confusingly similar to another’s mark or dilutes another’s famous mark].” 15 U.S.C. §
9 1125 (d)(1)(A).

10 The Complaint alleges that Defendant registered the domain name
11 www.concordresolution.com in bad faith, and with the intent to profit from goodwill
12 associated with Plaintiff’s trademark “for debt collection services.” (Doc. 1 at 7). Plaintiff
13 has utilized the domain name www.concordservicing.com continuously since 1996. (Doc.
14 1 at 3). Defendant’s domain name “suggests sponsorship by or affiliation with Plaintiff,”
15 as the two companies offer similar services and have similar web addresses. (Id.).
16 Moreover, Defendant uses the above-mentioned domain name for advertising its own
17 service, and has done so to create “initial interest confusion,” trade on Plaintiff’s
18 goodwill, and “unfairly compete” with a domain name “identical or confusingly similar
19 to CONCORD,” all while infringing on Plaintiff’s trademark. (Id.).

20 Accepting the Complaint’s facts as true, the Court finds that Plaintiff has made out
21 a prima facie case that Defendant’s use of its domain name was confusingly similar to
22 Plaintiff’s at the time of registration, and that Defendant did so with the bad faith intent to
23 profit from that mark in operating a debt collection service, in violation of 15 U.S.C. §
24 1125 (d)(1)(A). See *Aviva United States Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1266
25 (D. Ariz. 2012) (analyzing whether bad faith was present under the nine factors
26 articulated under 15 U.S.C. § 1125 (d)(1)(B)(1)). Plaintiff has therefore pleaded a
27 meritorious claim of cybersquatting.

28 Having reviewed the Complaint, Plaintiff has made out a prima facie claim for

1 trademark infringement and cybersquatting, the claims that Plaintiff seeks default
2 judgment on. The second Eitel factor therefore favors granting the motion.

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4 **C. The Sufficiency of the Complaint**

5 The Ninth Circuit has suggested that the third Eitel factor requires that Plaintiff's
6 Complaint "state a claim on which the [plaintiff] may recover." Danning, 572 F.2d at
7 1388. Based on the Court's analysis of the merits of Plaintiff's trademark infringement
8 and cybersquatting claims, nothing suggests that the Complaint fails to "state a claim on
9 which the [plaintiff] may recover," or that it fails to state a facially plausible claim for
10 relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The third Eitel factor favors granting
11 the motion.

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13 **D. Amount at Stake**

14 In considering the fourth Eitel factor, the Court must examine "the sum of money
15 at stake in relation to the seriousness of Defendant's conduct." *PepsiCo, Inc.*, 238 F.
16 Supp. 2d at 1176-77. "If the sum of money at stake is completely disproportionate or
17 inappropriate, default judgment is disfavored." *Gemmel v. Systemhouse, Inc.*, No. CIV
18 04-198-TUC-CKJ, 2008 U.S. Dist. LEXIS 81469, at *12 (D. Ariz. Jan. 3, 2008). In other
19 words, the Court must ensure that the amount of damages is reasonable and demonstrated
20 by the plaintiff's evidence. See Fed. R. Civ. P. 55(b); *LG Elecs., Inc. v. Advance Creative*
21 *Computer Corp.*, 212 F. Supp. 2d 1171, 1178 (N.D. Cal. 2002) ("[T]he evident policy of
22 [Rule 55(b)] is that even a defaulting party is entitled to have its opponent produce some
23 evidence to support an award of damages."). And "[a] default judgment must not differ in
24 kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P.
25 54(c).

26 Here, Plaintiff seeks permanent injunctive relief. (Doc. 12 at 5-8). Title 15 U.S.C.
27 § 1116 (a) authorizes the use of injunctive relief for trademark infringement. See
28 *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1061-62 (N.D. Cal. 2010).

1 Indeed, “[i]njunctive relief is the remedy of choice for trademark [cases because] there is
2 no adequate remedy at law for the injury caused by defendant’s continuing
3 infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1181 (9th Cir.
4 1988). Permanent injunctive relief is warranted where it is not “absolutely clear” that the
5 defendant has ceased its infringing behavior. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1178
6 (quoting *Friends of the Earth, Inc. v. Laidlaw Env. Services (TOC), Inc.*, 528 U.S. 167,
7 189 (2000)). And such relief is “routinely granted in cases where a defendant has not
8 appeared in the action at all,” as “the defendant’s failure to appear to answer . . . suggests
9 that the plaintiff would continue to be exposed to the risk of continuing harm by the
10 defendant’s misuse of the plaintiff’s mark.” *Avnet, Inc. v. Avana Techs. Inc.*, 2014 U.S.
11 Dist LEXIS 177436, at *25-26 (D. Nev. Dec. 3, 2014) (citing *Jackson v. Sutskie*, 255 F.
12 Supp. 2d 1096, 1103, (N.D. Cal. 2003)); see also *PepsiCo, Inc.*, 238 F. Supp. 2d at 1178;
13 *Ariz. Opera Co. v. AZ Opera Co.*, No. CV 06-998-PHX-JAT, 2007 U.S. Dist. LEXIS
14 48039, at *9 (D. Ariz. June 29, 2007); *Twentieth Century Fox Film Corp. v. Streeter*, 438
15 F. Supp. 2d 1065, 1072-73 (D. Ariz. 2006); *Philip Morris U.S.A. Inc. v. Castworld*
16 *Prods.*, 219 F.R.D. 494, 502 (C.D. Cal. Dec. 30, 2003). But Plaintiff must actually
17 establish that irreparable harm has occurred. See *MGM Studios, Inc., v. Grokster, Ltd.*,
18 518 F. Supp. 2d 1197, 1210-11 (C.D. Cal. 2007) (finding that post-eBay a court may no
19 longer presume irreparable harm in the permanent injunction context).

20 For Plaintiff to be entitled to permanent injunctive relief, it must first satisfy a
21 four-element test. Plaintiff must demonstrate: “(1) that it has suffered an irreparable
22 injury; (2) that remedies available at law, such as monetary damages, are inadequate to
23 compensate for that injury; (3) that, considering the balance of hardships between the
24 plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest
25 would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*,
26 547 U.S. 388, 391 (2006); *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt.*, 736 F.3d 1239
27 (9th Cir. 2013) (citations omitted).

28 Plaintiff has alleged that Defendant has infringed on the CONCORD mark by

1 willfully using it to advertise its debt collecting services. (Doc. 1 at 4). Defendant’s use
2 has “creat[ed] confusion among the consuming public, diminish[ed] the distinctiveness of
3 Plaintiff’s trademark and misappropriate[d] the associated goodwill.” (Id.). Plaintiff has
4 supported these pleaded facts—taken as true—with documentary evidence. (Doc. 12-2 at
5 4-9). The Court has already found that the Complaint makes out a prima facie claim of
6 trademark infringement and cybersquatting. Coupled with the preceding well-pleaded
7 facts and documentary evidence, the Court finds that Plaintiff has sufficiently established
8 that it suffered irreparable injury.

9 The Court also finds that Plaintiff has no other adequate remedy at law. Since
10 Plaintiff sent its demand letter on May 15, 2015, Defendant has not responded. On
11 September 4, 2015, the Clerk entered default, and in the intervening nine months,
12 Defendant has not responded. There is no evidence that it is “absolutely clear” that
13 Defendant has ceased infringing on Plaintiff’s trademark, and no evidence that absent an
14 injunction, Defendant will stop. It follows that injunctive relief is necessary to prevent
15 current and future infringement by Defendant. The balance of hardships also tips in
16 Plaintiff’s favor. Cost of compliance for Defendant is minimal, and Plaintiff faces
17 potential losses of reputation, customers, revenue, and distinctiveness if Defendant
18 continues to infringe. Finally, the public has a general interest in not being deceived or
19 confused by Defendant’s use of Plaintiff’s CONCORD mark and domain name.

20 Plaintiff has satisfied the four necessary elements to establish that permanent
21 injunctive relief is warranted. It follows that the Court will enjoin Defendant from
22 infringing/replicating the CONCORD mark and utilizing the domain name
23 www.concordresolutions.com. Plaintiff’s requested recovery is thus neither “completely
24 disproportionate [n]or inappropriate” and this Eitel factor favors granting Plaintiff’s
25 motion.

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27 **E. Possible Dispute Concerning Material Facts**

28 Defendant has not responded to this action at any point. Plaintiff sent Defendant a

1 Demand Letter on May 15, 2015, which went unanswered. (Doc. 12-2 at 2-3). The
2 Complaint was filed on July 9, 2015, (Doc. 1), and the record reflects that Defendant was
3 served on July 23, 2015. (Doc. 9). On September 3, 2015, Plaintiff applied for an entry of
4 default, (Doc. 10), which was entered by the Clerk of the Court on September 4, 2015.
5 (Doc. 11). Plaintiff thereafter filed the pending motion for default judgment on
6 September 21, 2015. (Doc. 12). In the intervening nine months, no answer was filed, no
7 relief was sought from the Clerk’s entry of default, and no opposition has been filed to
8 Plaintiff’s motion. Upon entry of default, the factual allegations of a Complaint, except
9 those relating to the amount of damages, are taken as true. *Yoo*, 615 Fed. Appx. at 870.
10 Thus, there is no dispute concerning material facts, and this factor weighs in favor of
11 granting default judgment. *Getty Images (US)*, 2014 U.S. Dist. LEXIS 12449, at *11-12
12 (citation omitted) (noting that “[w]hen default has been entered, courts find that there is
13 no longer the possibility of a dispute concerning material facts because the court must
14 take the plaintiff’s factual allegations as true”); *Landstar Ranger, Inc. v. Parth Enters.,*
15 *Inc.*, 725 F. Supp. 2d 916, 921 (N.D. Cal. 2010) (noting that where a plaintiff “has
16 supported its claims with ample evidence, and defendant has made no attempt to
17 challenge the accuracy of the allegations in the complaint, no factual disputes exist that
18 preclude the entry of default judgment”).

19
20 **F. Whether Default Was Due to Excusable Neglect**

21 As discussed supra, Defendant has had numerous opportunities to respond in some
22 capacity over the past thirteen months, and has failed to do so. (Doc. 9). Defendant has
23 offered no explanation for its failure to meet any of the deadlines associated with this
24 action. Nearly nine months has elapsed between the Clerk’s entry of judgment, and this
25 Court’s consideration of Plaintiff’s motion for default judgment. It is therefore highly
26 unlikely that Defendant’s “failure to answer and the resulting default was a result of
27 excusable neglect.” *Gemmel*, 2008 U.S. Dist. LEXIS 81469, at *13; *Shanghai*
28 *Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001) (finding

1 that no excusable neglect occurred where the defendants “were properly served with the
2 Complaint, the notice of entry of default, as well as the papers in support of the instant
3 motion”).

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5 **G. Policy Underlying the Federal Rules of Civil Procedure**

6 The final factor—the strong policy underlying the Federal Rules of Civil
7 Procedure favoring decisions on the merits—at least initially appears to weigh against
8 default judgment. “Cases should be decided upon their merits whenever reasonably
9 possible.” Eitel, 782 F.2d at 1472. But the mere presence of Fed. R. Civ. P. 55(b)
10 indicates that “this preference, standing alone, is not dispositive.” PepsiCo, Inc., 238 F.
11 Supp. 2d at 1177. Rule 55 permits termination of a case before the Court hears the merits
12 whenever a defendant fails to defend against an action. Moreover, the failure of
13 Defendant to contest the Complaint or seek relief from the Clerk’s entry of default
14 “makes a decision on the merits impractical, if not impossible.” PepsiCo, Inc., 238 F.
15 Supp. 2d at 1177. Accordingly, the final Eitel factor is not sufficient to preclude the Court
16 from entering default judgment.

17 Having reviewed Plaintiff’s motion and analyzed the applicable factors set forth in
18 Eitel, the Court finds that factors one through six weigh in favor of granting Plaintiff’s
19 motion. The final Eitel factor—deciding cases on their merits where reasonably
20 possible—is not sufficient to outweigh the aforementioned six factors. Therefore, for the
21 reasons set forth herein, the Court finds that Plaintiff is entitled to default judgment.

22
23 **III.**

24 Plaintiff also seeks an award of costs in the amount of \$629.00. (Doc. 8 at 9). 15
25 U.S.C. § 1117(a) authorizes the award of costs in trademark and cybersquatting cases. On
26 September 21, 2015, Plaintiff submitted a Statement of Costs, itemizing \$629.00 in total
27 costs for commencing this action, and swearing to its veracity. (Doc. 13). Courts in the
28 Ninth Circuit have previously awarded costs upon entering default judgment against a

1 defendant. Angel v. Capital Research Group, Inc., 2012 U.S. Dist. LEXIS 89856, at *15
2 (D. Haw. June 28, 2012); Dexter v. Homecomings Fin., L.L.C., 2011 U.S. Dist. LEXIS
3 154609, at *13 (D. Or. May 4, 2011); Elston v. Toma, 2005 U.S. Dist. LEXIS 42370, at
4 *21 n.8 (D. Or. March 24, 2005); Sony Music Entm't Inc. v. Elias, 2004 U.S. Dist. LEXIS
5 30385, at *15 (C.D. Cal. Jan. 21, 2004); Discovery Comm., Inc. v. Animal Planet Inc.,
6 172 F. Supp. 2d 1282, 1292 (C.D. Cal. 2001); see also Fed. R. Civ. P. 54(d)(1).

7 The Court sees no reason to depart from this line of cases. Plaintiff is entitled to an
8 award of \$629.00 for costs associated with bringing this action.

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10 **IV.**

11 Accordingly,

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