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**United States District Court
Central District of California**

10 NOLAN MILLER INCORPORATION, a
11 California corporation,

12 Plaintiff,

13 v.

14 KEVIN SCOTT HEES, an individual; and
DOES 1 through 10, inclusive.,

15 Defendants.

Case No. 2:17-cv-07355-ODW(PLA)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
APPLICATION FOR DEFAULT
JUDGMENT [42]; DENYING
DEFENDANT'S MOTION TO SET
ASIDE DEFAULT [50]**

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I. INTRODUCTION

18 This case arises out of an employment/contractor relationship gone bad between
19 Plaintiff Nolan Miller Incorporation and Defendant Kevin Scott Hees. Hees, a
20 photographer, was hired by Plaintiff, a fashion company, to take photographs of
21 Plaintiff's products for use in marketing and advertising. After Hees stopped working
22 for Plaintiff, he allegedly gained access to Plaintiff's website, accessed and then
23 deleted a large amount of content and photographs, not all of which were taken by
24 Hees. Hees claims that the contract was unconscionable because it did not
25 compensate him for his photography services.

26 Hees refused to participate in discovery, and Plaintiff moved to compel Hees to
27 deposit all photographs Hees took on Plaintiff's behalf with an escrow company to be
28 held there until the completion of this case. The Court granted Plaintiff's Motion, but

1 Hees never complied with the Order—either by producing the photographs or
2 submitting a declaration explaining that he did not have them—so the Court struck his
3 answer and entered default. (ECF No. 39.) Additionally, Hees never paid \$100 in
4 sanctions which the Court ordered against him. (ECF No. 35.)

5 Pending before the Court are (1) Plaintiff’s Application for Default Judgment
6 and (2) Hees’ Motion to Set Aside Default. (ECF Nos. 42, 50.) For the following
7 reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff’s
8 Application (Mot. Def. J., ECF No. 42) and **DENIES** Hees’ Motion (ECF No. 50).

9 **II. BACKGROUND**

10 Plaintiff owns all rights in the Mark Zunino brand of high-end women’s
11 dresses. (Compl. ¶ 20, ECF No. 1.) Around January 2016, Plaintiff hired Hees as a
12 photographer to take photographs of models wearing Mark Zunino dresses, which
13 would then be uploaded to Plaintiff’s website, www.MarkZunino.com, and Plaintiff’s
14 social media accounts. (*Id.* ¶ 23.) On September 28, 2016, Plaintiff and Hees entered
15 into a written agreement (the “Written Agreement”), which specifically provided:

- 16 a. WHEREAS, Hees has been hired by NMI for the position of
17 Art Director, with job duties including but not limited to:
18 photography, website maintenance, blog maintenance and
19 online magazine development and maintenance.
- 20 b. [1.1] NMI hereby grants Hees, and Hees hereby accepts, the
21 right to use any ONE (1) image from every photoshoot Hees
22 conducts under the employment of NMI. The image may be
23 used in any way Hees sees fit for any personal or personal
24 business usage conducted by Hees.
- 25 c. [2.1] All photographic images created by Hees for and while
26 employed by NMI shall become the sole, legal property of NMI
27 EXCEPT the one (1) image chosen by Hees for his personal or
28 personal business usage.
- 29 d. [2.2] All photographic images created by Hees for and while
30 employed by NMI will remain the sole, legal property of NMI
31 EXCEPT the one (1) image chosen by Hees for his personal or
32 personal business usage even after the employment relationship
33 has ended or been terminated.
- 34 e. [4.1] “Confidential Information” shall include any

1 confidential technical data, trade secret, know-how or other
2 confidential information disclosed by any party hereunder in
and form

3 f. [4.3] Each party agrees that it will not use Confidential
4 Information of the other for any purpose other than for the
5 performance of the rights and obligations hereunder during the
6 term of this Agreement without the other party's prior written
7 consent. Each party further agrees that Confidential
Information of the other shall remain the sole property of the
other

8 (Compl. ¶ 27.) Hees oversaw numerous photo shoots, at Plaintiff's instruction and
9 expense, with models wearing Plaintiff's dresses, including a beach photoshoot in
10 March 2017, and a desert photo shoot in May 2017. (*Id.* ¶¶ 28–31.) Hees also took
11 photographs for the Mark Zunino Brand Book 2017. (*Id.* ¶¶ 32–33.) Plaintiff
12 registered copyrights for all of the photographs taken for these projects. (*Id.* ¶¶ 29, 31,
13 33.)

14 On September 7, 2017, Hees terminated his employment as a photographer and
15 art director for Plaintiff through a text message. (*Id.* ¶ 34.) Then, Hess accessed the
16 administrative login of Plaintiff's website, www.MarkZunino.com, without
17 authorization and deleted content and photographs, including photographs taken by
18 Hees but also photographs that were not taken by Hees. (*Id.* ¶ 35.) On September 8,
19 2017, Hees sent a takedown notice under the Digital Millennium Copyright Act
20 ("DMCA") to Shopify.com, purporting to own the copyright to a certain photograph
21 appearing on the Mark Zunino website. (*Id.* ¶ 46.) Shopify responded that the
22 takedown notice was insufficient as it did not satisfy all of the requirements under the
23 DMCA. (*Id.* ¶ 48.)

24 Plaintiff demanded that Hees return all of Plaintiff's photographs, but Hees
25 refused and responded that he would only return the photographs for a sizeable
26 payment. (*Id.* ¶ 38.)

27 Plaintiff filed its Complaint against Hees on October 6, 2017, alleging claims
28 for copyright infringement, false designation of origin and unfair competition,

1 conversion, trespass to chattels, breach of contract, and breach of the implied covenant
2 of good faith and fair dealing. Plaintiff seeks damages and equitable relief in the form
3 of an injunction requiring Hees to return the photographs. As compensatory damages,
4 Plaintiff alleges that it would cost no less than \$150,000 to re-shoot and edit the photo
5 shoots and another \$15,000 to employ a new website designer to re-program and add
6 content to Plaintiff’s website. (*Id.* ¶¶ 40–41.)

7 On October 30, 2017, Hees, appearing pro se, filed what the Court construed as
8 a general denial, in which he claimed he is “not guilty to all complaints.”¹ (ECF No.
9 12.) To date, Hees has not raised any defenses. The Court issued a Self-
10 Representation Order on November 2, 2017, that includes warnings and explanations
11 of various phases of the case, like the discovery and motion process. (ECF No. 16.)
12 The Court also set a scheduling conference to take place on January 22, 2018.

13 On December 22, 2017, Plaintiff moved to compel Hees to deposit the
14 photographs he took on behalf of Plaintiffs with an escrow company. (ECF No. 21.)
15 When Hees failed to timely oppose the Motion, the Court issued an order continuing
16 the hearing date on the Motion and setting February 5, 2018, as the new deadline for
17 the opposition. (ECF No. 23.) In that order, the Court also warned Plaintiff that any
18 future failure to comply with Court Orders, the local rules, or the Federal Rules of
19 Civil Procedure, may be grounds for sanctions, including entry of default. The Court
20 also encouraged Plaintiff to consult with the pro bono legal clinic and reminded the
21 parties of the January 22 Scheduling Conference and the requirement to submit a Rule
22 26(f) report. The order also specified that “[f]ailure to abide by the Rule 26(f)
23 conference requirements may result in the imposition of sanctions.”

24 On January 12, 2018, Hees opposed Plaintiff’s Motion. (ECF No. 24.) At the
25 hearing on February 26, 2018, Hees appeared, but was disrespectful and interrupted
26 the Court at least two times. As a result, the Court ended the hearing and granted

27 ¹ While Plaintiff now claims that Hees’ “answer” did not conform to the Federal Rules of Civil
28 Procedure, Plaintiff never moved to dismiss or strike Hees’ answer before the Court struck it as a
sanction. (*See* Mot. Def. J. 8 n.2.)

1 Plaintiff's Motion. (ECF No. 34.) On February 28, 2018, the Court sanctioned Hees
2 \$100 for failing to participate in the Rule 26(f) conference. (ECF No. 35.) Hees
3 never paid the sanction or complied with the Court's order granting Plaintiff's Motion
4 to Compel. As a result, the Court struck Hees' pleadings and entered default against
5 him. (ECF Nos. 39, 40.)

6 Plaintiff brought the instant motion for default judgment on April 16, 2018.
7 (Mot. Def. J., ECF No. 42.) In the Motion, Plaintiff claims that since the February
8 hearing, Hees has committed further violations of Plaintiff's copyrights by publishing
9 photographs he took of Plaintiff's products on his social media accounts. (Mot. 7.)
10 Additionally, Hees edited the photos to include Hees's own registered trademarks,
11 falsely indicating that Hees, rather than Plaintiff, is the source of the goods and
12 services depicted therein. (*Id.*) On March 15, 2018, Hees posted on social media a
13 number of photographs he took on Plaintiff's behalf and declared that notwithstanding
14 Plaintiff's representatives informing him that he could not post on social media any of
15 the work he completed for Plaintiff, Hees would continue doing so. (*Id.*) The Court
16 held a hearing on Plaintiff's Motion on April 30, 2018. (ECF No. 42.) Both parties
17 appeared and presented arguments.

18 On May 1, 2018, Hees moved to set aside the default entered against him.
19 (ECF No. 50.) After considering the papers filed in connection with the Motion, the
20 Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ.
21 P. 78(b); C.D. Cal. L.R. 7-15.

22 **III. LEGAL STANDARD**

23 **A. Motion to Set Aside Default**

24 A court may set aside an entry of default or a default judgment where the
25 moving party establishes a proper ground for relief under the applicable Federal Rule
26 of Civil Procedure. Pursuant to Federal Rule of Civil Procedure 55(c), a court "may
27 set aside an entry of default for good cause." Pursuant to Federal Rule of Civil
28 Procedure 60(b), by contrast, a court may set aside a final judgment only under

1 specific conditions, including a showing of “mistake, inadvertence, surprise, or
2 excusable neglect.” Fed. R. Civ. P. 60(b)(1); *see Haw. Carpenters’ Trust Funds v.*
3 *Stone*, 794 F.2d 508, 513 (9th Cir. 1986).

4 The Ninth Circuit utilizes the same three-factor test to determine good cause
5 under Rule 55(c) as it does for setting aside a final judgment under Rule 60(b).
6 *Yagman v. Galipo*, No. CV 12-7908, 2013 WL 1287409, at *8 (C.D. Cal. Mar. 25,
7 2013); *see Haw. Carpenters’ Trust Funds*, 794 F.2d at 513. The Court may deny a
8 motion to set aside an entry of default if the moving party fails to satisfy any one of
9 the following factors: (1) the moving party’s own culpable conduct led to the default;
10 (2) the nonmoving party would be prejudiced by setting aside the default; or (3) the
11 moving party has no meritorious defense. *See TCI Grp. Life Ins. Plan v. Knoebber*,
12 244 F.3d 691, 696 (9th Cir. 2001), overruled in part on other grounds by *Egelhoff v.*
13 *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001); *Am. Ass’n of Naturopathic Physicians*
14 *v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000); *Cassidy v. Tenorio*, 856 F.2d 1412,
15 1415 (9th Cir. 1988).

16 **B. Motion for Default Judgment**

17 Before the Court can award a default judgment, the requesting party must
18 satisfy the procedural requirements established under the Local Rules of this district
19 and Rule 55 of the Federal Rules of Civil Procedure. *PepsiCo, Inc., v. Cal. Sec. Cans*,
20 238 F. Supp. 2d 1172, 1174 (C.D. Cal 2002). Central District of California Local
21 Rule 55-1 requires that the movant submit a declaration establishing: (1) when and
22 against whom default was entered; (2) identification of the pleading to which default
23 was entered; (3) whether the defaulting party is a minor, an incompetent person, or
24 exempt under the Servicemembers’ Civil Relief Act; and (4) that the defaulting party
25 was served with notice, if required by Fed. R. Civ. P. 55(b)(2). *Vogel v. Rite Aid*
26 *Corp.*, 992 F. Supp. 2d 998, 1006 (C.D. Cal. 2014); C.D. Cal. Local Rule 55-1.

27 If these procedural requirements are satisfied, a district court has discretion to
28 grant a default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In

1 exercising its discretion, a court must consider several factors (the “*Eitel* Factors”): (1)
2 the possibility of prejudice to plaintiff; (2) the merits of plaintiff’s substantive claim;
3 (3) the sufficiency of the complaint; (4) the sum of money at stake; (5) the possibility
4 of a dispute concerning material facts; (6) whether the defendant’s default was due to
5 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
6 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471–72
7 (9th Cir. 1986). Generally, upon entry of default, the defendant’s liability is
8 conclusively established, and the Court accepts the well-pleaded factual allegations in
9 the complaint as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th
10 Cir. 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th
11 Cir. 1977)).

12 IV. DISCUSSION

13 A. Hees’ Motion to Set Aside Default

14 In support of his Motion, Hees provides only the following explanation:

15 Plaintiff took possession of and used (commercially) work
16 completed and paid for by Defendant from Nov. 1, 2015 to Oct.
17 9, 2016 to promote Plaintiff’s brand and Plaintiff never paid for
18 work. Plaintiff took possession of and used (commercially)
19 work completed and paid for by the Defendant from Oct. 10,
20 2016 to currently [sic] to promote Plaintiff’s brand. Defendant
21 was coerced into signing a one-sided agreement against the
22 Defendant’s will. The work has not been paid for by the
23 Plaintiff to the Defendant.

24 (ECF No. 50 at 2.) Instead of addressing any of the factors relevant to whether he
25 should be excused from the default entered against him, Hees’ explanation relates
26 only to the merits of the case. Therefore, the Court finds that Hees has not met his
27 burden to establish that good cause exists to set aside the default.

28 Additionally, Hees’ own conduct led to the entry of default against him. He
repeatedly failed to comply with the Court’s orders, despite multiple warnings that
doing so would result in the imposition of sanctions. The Court **DENIES** Hee’s
Motion. (ECF No. 50.)

1 **B. Plaintiff’s Motion for Default Judgment**

2 1. *Procedural Requirements*

3 Plaintiff has satisfied the procedural requirements for default judgment pursuant
4 to Rule 55(a) and Local Rules 55-1 and 55-2. Plaintiff served Hees with the
5 complaint and summons on October 10, 2017. (ECF No. 11.) The Clerk entered
6 default against Hees on March 20, 2018. (ECF No. 40.) In support of its Motion,
7 Plaintiff submitted a declaration from its attorney, Jeffrey Kobulnick, stating that Hees
8 is not an infant, is not incompetent, and is not in military service or otherwise
9 exempted from the Soldiers’ and Sailors’ Civil Relief Act of 1940. (Decl. of Jeffrey
10 A. Kobulnick (“Kobulnick Decl.”) ¶ 5, ECF No. 43.) Plaintiff served its Motion and
11 the accompanying declarations and exhibits on Hees by mail and e-mail. (*Id.* ¶ 10.)
12 As discussed below, Plaintiff seeks damages in excess of those pleaded in the
13 Complaint, in violation of Rule 54(c), so the Court analyzes damages separately.
14 Plaintiff has complied with all other procedural requirements for the entry of default
15 judgment.

16 2. *Eitel Factors*

17 **(a) Possibility of Prejudice to Plaintiff**

18 With respect to the first *Eitel* factor, Plaintiff would suffer prejudice if the
19 default judgment is not entered because Plaintiff would be without order recourse for
20 recovery. Hees has consistently refused to participate in the discovery process.
21 Therefore, this factor weighs in favor of entry of default judgment.

22 **(b) Substantive Merits and Sufficiency of the Complaint**

23 The second two *Eitel* factors require that a “plaintiff state a claim on which the
24 [plaintiff] may recover.” *PepsiCo*, 238 F. Supp. 2d at 1175. In order to weigh these
25 two factors, the Court must review each of Plaintiff’s claims.
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Copyright Infringement (17 U.S.C. § 501)

To prevail on its claim for copyright infringement, Plaintiff must establish that Defendant violated an exclusive right of the copyright owner as provided by 17 U.S.C. § 106. Plaintiff asserts its exclusive right of reproduction and distribution of the subject photographs was violated by Hees pursuant to 17 U.S.C. § 501(a).

Plaintiff alleges that Plaintiff is the registered copyright owner of at least three separate collective works (the Beach photoshoot, the Desert photoshoot, and the Mark Zunino Brand Book 2017), each of which contains numerous photographs taken from the same photoshoots, all of which are Plaintiff’s sole legal property. (Compl. ¶¶ 28–33, Exs. 1–3.) Plaintiff further alleges that Hees has reproduced and distributed these photographs online for his own benefit, without Plaintiff’s consent, and in violation of the parties’ Contract concerning the ownership of such photographs. (*Id.* ¶¶ 52, 59–65, Exs. 4–7.) Plaintiff established that Hees violated its copyright at least twenty times by posting subject photographs (in excess of the amount allowed by the Contract) to his own social media sites. (Decl. of Mark Zunino (“Zunino Decl.”) ¶¶ 19–22, Exs. 4–15, ECF No. 44.) Such allegations set forth the elements necessary to satisfy Plaintiff’s copyright infringement cause of action.

Digital Millennium Copyright Act (17 U.S.C. § 1202)

Section 1202(a) provides that “[n]o person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement (1) provide copyright management information that is false, or (2) distribute or import for distribution copyright management information that is false.” Section 1202(c) defines “copyright management” to include (1) the title and other information identifying the work, including the information set forth on a notice of copyright, (2) the name of, and other identifying information about, the author of a work, and (3) the name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of a copyright.

1 Plaintiff alleges that Hees violated the DMCA by “intentionally providing,
2 distributing and displaying copyright management information that is false for many
3 photographs that [Hees] knew that Plaintiff owns copyrights.” (Compl. ¶ 67.)
4 Plaintiff further alleges that Hees published the photographs in a manner that
5 represents to the public that he owns the copyright to these photographs. (*Id.* ¶ 53.)
6 For other photographs, Hees added variations of his registered HEES trademarks. (*Id.*
7 ¶ 54, Ex. 8.) The photographs attached to the Complaint confirm that Hees posted
8 some of the photographs with the HEES mark affixed to them and posted some
9 without any attribution to Plaintiff’s brand or copyright. (*See, e.g.*, Compl. Exs. 4, 8.)
10 These allegations are sufficient to state a claim for a violation of the DMCA.

11 False Designation of Origin and Unfair Competition (15 U.S.C. § 1125(a))

12 Section 1125(a) of the Lanham Act prohibits the use of any trademark in a
13 manner that is likely to confuse or mislead consumers as to the source of sponsorship
14 of goods or services. 15 U.S.C. § 1125(a). To prove a claim under this statute,
15 Plaintiff must show: (1) it has a valid, protectable trademark, and (2) that defendant’s
16 use of the mark is likely to cause confusion. *Kythera Biopharmaceuticals, Inc. v.*
17 *Lithera, Inc.*, 998 F. Supp. 2d 890 897–98 (C.D. Cal. 2014) (outlining the elements for
18 § 1114 and finding that a claim under § 1125 “requires proof of the same elements as .
19 . . . [§ 1114].”). Plaintiff alleges that by reason of Hees’ posting Plaintiff’s photographs
20 on social media emblazoned with Hees’ own trademark, without Plaintiff’s consent,
21 Hees is likely to confuse or mislead consumers as to the source or sponsorship of the
22 goods and services reflected in Plaintiff’s photographs. (Compl. ¶¶ 70–78.)
23 However, Plaintiff has not alleged that it owns a valid, protectable trademark in the
24 contents of the photographs.

25 Accordingly, the Court concludes that Plaintiff has failed to adequately plead a
26 claim for false designation of origin and unfair competition. Plaintiff is therefore not
27 entitled to default judgment on this claim.

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1 Unfair Competition (Cal. Bus. & Prof. Code § 17200)

2 Section 17200 of the California Business and Professions Code prohibits unfair
3 and fraudulent business practices. Plaintiff alleges that by reason of Hees’s posting of
4 Plaintiff’s photographs on social media emblazoned with Hees’s own trademark,
5 without Plaintiff’s consent, Hees violated both the “unfair” and “fraudulent” prongs of
6 the UCL. (Compl. ¶¶ 79–89; Mot. Def. J. 12.) As Plaintiff explains in its Application
7 for Default Judgment, its Unfair Competition claim is based on the same facts as its
8 claim under 15 U.S.C. § 1125. Therefore, the Court finds that this claim is derivative
9 of Plaintiff’s § 1125 claim.

10 Because Plaintiff has failed to adequately plead a claim under § 1125, the Court
11 also finds that Plaintiff’s unfair competition claim must fail. Plaintiff is not entitled to
12 default judgment on this claim.

13 Conversion

14 “The elements of a conversion claim are (1) the plaintiff’s ownership or right to
15 possession of the property at the time of the conversion; (2) the defendant’s
16 conversion by a wrongful act or disposition of property rights; and (3) damages.”
17 *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 601 (9th Cir. 2010) (citing *Oakdale*
18 *Vill. Grp. v. Fong*, 43 Cal. App. 4th 539, 543–44 (1996)). Plaintiff alleges that (1)
19 Plaintiff owns certain photographs, (2) Hees deleted those photographs from
20 Plaintiff’s website without Plaintiff’s consent, and refuses to return them to Plaintiff,
21 and (3) Plaintiff has been harmed as a result. (Compl. ¶¶ 90–95.) Plaintiff has
22 adequately pleaded a claim for conversion.

23 Trespass to Chattels

24 In order to prevail on a claim for trespass based on accessing a computer
25 system, the plaintiff must establish: (1) defendant intentionally and without
26 authorization interfered with plaintiff’s possessory interest in the computer system;
27 and (2) defendant’s unauthorized use proximately resulted in damage to plaintiff.
28 *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1069–70 (N.D. Cal. 2000).

1 Plaintiff alleges that it owns the website, www.MarkZunino.com, and that Hees
2 intentionally and substantially interfered with Plaintiff’s website by deleting a
3 significant portion of the content thereon, without Plaintiff’s consent. (Compl. ¶¶ 96–
4 102.) These allegations are sufficient to state a claim for trespass to chattels.

5 Unauthorized Access to Computers, Computer Systems and Computer Data
6 (Cal. Penal Code § 502(e))

7 Section 502(c)(1) of the California Penal Code prohibits the knowing alteration
8 or deletion of the computer data of another person in order to either (a) defraud,
9 deceive, or extort, or (b) wrongfully control or obtain money, property, or data.
10 Section 502(e)(1) authorizes the bringing of a civil cause of action for compensatory
11 damages and injunctive relief by any person who has been damaged by reason of
12 violation Section 502(c).

13 Plaintiff alleges that Hees knowingly altered and deleted a significant portion of
14 Plaintiff’s website content in order to both extort money from Plaintiff and to
15 wrongfully control said content by deletion. (Compl. ¶¶ 103–16.) Plaintiff has
16 adequately pleaded a claim under Cal. Penal Code § 502(e).

17 Intentional Interference with Prospective Economic Relations

18 The elements of the tort of intentional interference with prospective economic
19 advantage are:

- 20 (1) An economic relationship between the plaintiff and some
21 third party, with the probability of future economic benefit to
22 the plaintiff; (2) the defendant’s knowledge of the relationship;
23 (3) intentional acts on the part of the defendant designed to
24 disrupt the relationship; (4) actual disruption of the relationship;
and (5) economic harm to the plaintiff proximately caused by
the acts of the defendant.

25 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). To state
26 a claim for intentional interference, the plaintiff must plead that the defendant’s
27 conduct was “wrongful by some legal measure other than the fact of interference
28 itself.” *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995).

1 Plaintiff alleges that (1) it had prospective economic relations with certain
2 clients, including an upcoming business trip to New York, which contained the
3 reasonable probability of future economic benefit to Plaintiff, (2) Hees had actual
4 knowledge of these prospective economic relations, (3) Hees intentionally timed his
5 deletion of Plaintiff's website content and monetary demand to interfere with those
6 economic relations, (4) Hees's acts did cause disruption to those economic relations,
7 and (5) Plaintiff was harmed as a result. (Compl. ¶¶ 117–22.)

8 Plaintiff has sufficiently pled the elements necessary to state a claim for
9 intentional interference with prospective economic relations.

10 Negligent Interference with Prospective Economic Relations

11 The tort of negligent interference with prospective economic advantage is
12 established where a plaintiff demonstrates that

13 (1) an economic relationship existed between the plaintiff and a
14 third party which contained a reasonably probable future
15 economic benefit or advantage to plaintiff, (2) the defendant
16 knew of the existence of the relationship and was aware or
17 should have been aware that if it did not act with due care its
18 action would interfere with this relationship and cause plaintiff
19 to lose in whole or in part the probable future economic benefit
20 or advantage of the relationship, (3) the defendant was
21 negligent, and (4) such negligence caused damage to plaintiff in
22 that the relationship was actually interfered with or disrupted
23 and plaintiff lost in whole or in part the economic benefit or
24 advantage reasonably expected from the relationship.

25 *Verhaus v. Shultz*, 155 Cal. App. 4th 1072, 1078 (2007). Plaintiff alleges that (1)
26 Plaintiff had prospective economic relationship with clients which contained the
27 reasonable probability of future economic benefits to Plaintiff, (2) Hees had actual
28 knowledge of these prospective economic relations, (3) Hees acted negligently and
with disregard to said prospective economic relations, and (4) Hees' acts caused
disruption to those prospective economic relations. (Compl. ¶¶ 123–28.) Plaintiff has
adequately pleaded a claim for this cause of action.

1 Breach of Contract

2 “[T]he elements of a cause of action for breach of contract are (1) the existence
3 of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3)
4 defendant’s breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty,*
5 *LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Plaintiff alleges that (1) Plaintiff and
6 Hees entered into a contract, (2) Plaintiff performed under the contract, (3) Hees
7 breached the contract by using more than one photograph from each of Plaintiff’s
8 various photoshoots for Hees’ own use without Plaintiff’s consent, and (4) Hees’
9 breaches caused damages to Plaintiff. (Compl. ¶¶ 129–34.) Plaintiff has adequately
10 pleaded a claim for breach of contract.

11 Breach of Implied Covenant of Good Faith and Fair Dealing

12 The elements of a cause of action for breach of the implied covenant of good
13 faith and fair dealing are: (1) plaintiff and defendant entered into a contract, (2)
14 plaintiff performed under the contract, (3) all conditions required for defendant’s
15 performance under the contract occurred or were excused, (4) defendant unfairly
16 interfered with plaintiff’s right to receive the benefits of the contract, and (5) the
17 plaintiff was harmed by the defendant’s conduct. Judicial Council of California, Civil
18 Jury Instruction 325 (West 2018); *see also Kransco v. Am. Empire Surplus Lines Ins.*
19 *Co.*, 23 Cal. 4th 390, 400 (2000).

20 Plaintiff alleges that (1) Plaintiff and Hees entered into a contract, (2) Plaintiff
21 performed under the contract, (3) all conditions required for Hees’ performance under
22 the contract occurred or were excused, (4) Hees unfairly interfered with Plaintiff’s
23 right to receive the benefits of the contract by using Plaintiff’s time and resources to
24 pursue wholly personal projects during Plaintiff’s photoshoots, and taking
25 photographs of Plaintiff’s models for Hees’ personal projects, without Plaintiff’s
26 consent, and (5) Plaintiff was harmed as a result. (Compl. ¶¶ 55–57, 135–40.)
27 Plaintiff has sufficiently pled the elements necessary to state a claim for this cause of
28 action.

1 Breach of Fiduciary Duty of Loyalty

2 Under California law, an employer may expect the undivided loyalty of its
3 employees. *See Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 410 (2007). The
4 elements of this claim are (1) the existence of a relationship giving rise to a duty of
5 loyalty, (2) one or more breaches of that duty, and (3) damage proximately caused by
6 that breach. *In re Brocade Commc'ns Sys., Inc. v. Derivative Litig.*, 615 F. Supp. 2d
7 1018, 1050 (N.D. Cal. 2009). “The duty of loyalty is ‘breached, and may give rise to
8 a cause of action in the employer, when [an] employee takes action which is inimical
9 to the best interests of the employer.’” *Id.* (quoting *Stokes v. Dole Nut Co.*, 41 Cal.
10 App. 4th 285, 295 (1995)).

11 Plaintiff alleges that (1) Hees owed Plaintiff an undivided duty of loyalty by
12 reason of his employment with Plaintiff, (2) Hees breached his duty of loyalty by
13 using Plaintiff’s time and resources to pursue personal projects and taking
14 photographs of Plaintiff’s models for Hees’ personal campaign without Plaintiff’s
15 consent, and (3) Plaintiff was harmed as a result. Plaintiff has adequately pleaded a
16 claim for this cause of action.

17 **(c) Sum of Money at Stake**

18 The Court “must consider the amount of money at stake in relation to the
19 seriousness of Defendants’ conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176. In doing so,
20 the Court must “assess whether the recovery sought is proportional to the harm caused
21 by [a] defendant's conduct.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F.
22 Supp. 2d 916, 921 (N.D. Cal. 2010).

23 Plaintiff seeks \$3,000,000 in statutory damages plus \$515,000 in compensatory
24 damages. Plaintiff also requests an award for attorneys’ fees. As discussed further
25 below, these amounts are excessive. Because it is the Court’s obligation to assess the
26 appropriate amount of damages, the Court finds that the amount actually awarded,
27 \$15,000 in statutory damages and \$165,000 in compensatory damages, is reasonable
28

1 and weighs in favor of entry of default judgment.

2 **(d) Possibility of Dispute Concerning Material Facts**

3 Although Hees has attempted to argue that the Written Agreement is
4 unconscionable and that Plaintiff owes him money for services rendered and goods
5 provided, he has not raised any affirmative defenses or counterclaims, which he would
6 need to do in order to obtain the relief he seeks. Hees has repeatedly ignored Court
7 orders and has refused to seek out legal counsel or even some guidance from the pro
8 se legal clinic, so the Court believes it is unlikely that Hees would be able to
9 successfully raise these claims in the future. As a result, the validity of the Written
10 Agreement has not been challenged. Therefore, this factor weighs in favor of granting
11 default judgment.

12 **(e) Excusable Neglect**

13 The entry of default against Hees was not due to excusable neglect. Hees has
14 known about the entry of default since March 2018. Although he moved to set aside
15 the default, his motion came over a month after the default was entered and after the
16 Court had already held a hearing on Plaintiff's Motion for Default Judgment.
17 Additionally, Hees' Motion to Set Aside the Default is bare bones and contains little
18 to no argument or explanation as to why the Court should reconsider its entry of
19 default against him. This factor weighs in favor of granting default judgment.

20 **(f) Strong Policy of Favoring Decisions on the Merits**

21 Hees' failure to meaningfully participate in this litigation and follow the Court's
22 orders or the rules of procedure makes a decision on the merits "impractical if not
23 impossible." *See Elektra Entm't Grp. Inc. v. Crawford*, 226 F.R.D. 388, 392 (C.D.
24 Cal. 2005). Therefore, this factor weighs in favor of granting default judgment.
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1 3. *Damages*

2 **(a) Statutory Damages**

3 Section 504 of the Copyright Act provides that a “copyright owner may elect, at
4 any time before final judgment is rendered, to recover, instead of actual damages and
5 profits, an award of statutory damages for all infringements involved in the action,
6 with respect to any one work.” 17 U.S.C. § 504(c)(1). A court, in its discretion, can
7 award not less than \$750 but not more than \$30,000 per copyright infringed.
8 Enhanced damages of up to \$150,000 per copyright infringed may be granted on a
9 finding of willful infringement. “The court has wide discretion in determining the
10 amount of statutory damages to be awarded, constrained only by the specified maxima
11 and minima.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984).

12 Plaintiff seeks an award of statutory damages of \$150,000 for each of the
13 twenty established copyright infringements. The Court finds that amount excessive,
14 given that Hees is an individual and has claimed to not have enough money to hire an
15 attorney in this case. Additionally, Plaintiff has not established that Hees has
16 experienced any financial gain from his publishing of the subject photographs.
17

18 Therefore, Court awards \$750 for each infringement, for a total statutory
19 damages award of \$15,000. These damages serve the purpose of deterrence and
20 punishment for willful infringement in this case.

21 **(b) Compensatory Damages**

22 In the Complaint, Plaintiff estimated that the value of the photographs Hees
23 deleted from Plaintiff’s website was \$150,000. Now, Plaintiff seeks an award of
24 \$500,000 for these photographs, relying on a statement from Hees, where he said that
25 it would cost at least \$500,000 for Plaintiff to re-shoot and edit all of the photographs
26 taken from 36 different photoshoots. (Mot. Def. J. 20.) Plaintiff also seeks \$15,000 to
27 employ a new website designer to re-program and add content to Plaintiff’s website
28 that would be comparable to the website’s former condition. (*Id.*; Compl. ¶ 41.)

1 Pursuant to Rule 54(c) a default judgment may not differ in kind from, or
2 exceed in amount, what is demanded in the pleadings. Even so, Plaintiff is now
3 seeking damages in excess of what it alleged in its Complaint. Plaintiff may not
4 recover on default judgment anything in excess of the amount of compensatory
5 damages alleged in the complaint, \$165,000 (\$150,000 for the value of the
6 photographs + \$15,000 to re-program the website). Therefore, the Court awards
7 Plaintiff \$165,000 in compensatory damages.

8
9 **(c) Attorneys' Fees**

10 Plaintiff requests attorneys' fees and costs in the amount of \$74,790.65 as the
11 prevailing party. (Mot. Def. J. 20.) Plaintiff calculated this amount pursuant to the
12 fee schedule in Local Rule 55-3, assuming the amount of damages would be over
13 \$3,000,000.

14 The Court approves of using the schedule in Local Rule 55-3. Since the total
15 amount of damages is \$180,000, the corresponding amount of attorneys' fees is
16 \$7,200.

17 **4. Injunctive Relief**

18 Plaintiff asks the Court to (1) prohibit Hees from distributing any more of
19 Plaintiff's photographs and other materials, (2) order Hees to return all photographs
20 and materials to Plaintiff, and (3) order third parties who are in a position to ensure
21 Hees' compliance with the Court's order to take reasonable steps to do so. (Mot. Def.
22 J. 23.) "According to well-established principles of equity," a plaintiff seeking a
23 permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury;
24 (2) that remedies available at law, such as monetary damages, are inadequate to
25 compensate for that injury; (3) that, considering the balance of hardships between the
26 plaintiff and defendant, a remedy in equity is warranted; and (4) that the public
27 interest would not be disserved by a permanent injunction." *eBay Inc. v.*
28 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

1 The Court finds that injunctive relief is not appropriate in this instance, because
2 Plaintiff will be made whole through monetary damages. Therefore, the Court
3 **DENIES** Plaintiff's request for injunctive relief.

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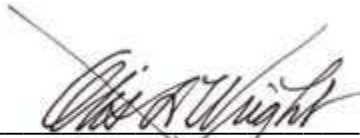
IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Hees' Motion to Set Aside Default. (ECF No. 50.) Additionally, the Court **GRANTS** Plaintiff's Application for Default Judgment as to liability on the following causes of action: Copyright Infringement (17 U.S.C. § 501); Digital Millennium Copyright Act (17 U.S.C. § 1202); Conversion; Trespass to Chattels; Unauthorized Access to Computers, Computer Systems, and Computer Data (Cal. Penal Code § 502(e)); Intentional Interference with Prospective Economic Relations; Negligent Interference with Prospective Economic Relations; Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing; and Breach of Fiduciary Duty of Loyalty. (ECF No. 42.) The Court **DENIES** Plaintiff's Motion on its claims for False Designation of Origin and Unfair Competition (15 U.S.C. § 1125(a)) and Unfair Competition (Cal. Bus. & Prof. Code § 17200). (ECF No. 42.) The Court awards Plaintiff \$180,000 in damages (\$15,000 in statutory damages and \$165,000 in compensatory damages) and \$7,200 in attorneys' fees. The Court **DENIES** Plaintiff's request for injunctive relief.

The Court **ORDERS** Plaintiff to submit a proposed judgment consistent with this order no later than **July 25, 2018**.

IT IS SO ORDERED.

July 20, 2018



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE