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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL KENNA, an individual,
Plaintiff,
v.
LIVEAUCTIONEERS, Inc., et al.,
Defendant.

CV 21-05862-RSWL-AGRx
ORDER re: MOTION FOR DEFAULT JUDGMENT [42]

Plaintiff Michael Kenna initiated this Action against Defendants Liveauctioneers, Inc., Live Auctioneers, LLC, and Black River Auction, LLC alleging copyright infringement and vicarious and/contributory copyright infringement.¹

Currently before the Court is Plaintiff's Motion for Default Judgment against Defendant Black River

¹ Both Liveauctioneers, Inc. and Live Auctioneers, LLC were, upon stipulation, dismissed with prejudice from this Action. ECF No. 40.

1 Auction, LLC on the copyright infringement claim
2 ("Motion") [42]. Having reviewed all papers submitted
3 pertaining to the Motions, the Court **NOW FINDS AND RULES**
4 **AS FOLLOWS:** the Court **GRANTS** the Motion.

5 **I. BACKGROUND**

6 **A. Factual Background**

7 The Complaint alleges:

8 Plaintiff Michael Kenna ("Plaintiff") is an
9 individual residing in Seattle, Washington. Compl. ¶ 4,
10 ECF No. 1. Plaintiff is an accomplished and acclaimed
11 photographer known for his black and white landscapes.
12 Id. ¶ 9. Plaintiff is the sole owner of original
13 photographs (the "Subject Photographs") that are
14 registered with the United States Copyright Office under
15 registration numbers: VA0002251320, VA0002246059,
16 VA0002238659, and TX0004141083. Id. ¶ 10. Plaintiff's
17 prints retail from \$2,500.00 to \$15,000.00 from
18 authorized galleries. See generally Decl. of Michael
19 Kenna ("Kenna Decl.") ¶ 4, ECF No. 42-1.

20 Black River Auction, LLC ("Defendant") is a New
21 Jersey company who infringed on Plaintiff's copyrighted
22 works. See Compl. ¶¶ 7-8; ECF No. 12. Defendant
23 infringed on Plaintiff's Subject Photographs without his
24 consent by selling fourteen of them for \$861 on Live
25 Auctioneers, LLC's website. Compl. ¶ 12; Pl.'s Mot. for
26 Default J. ("Mot."), Ex. B, ECF No. 42-3. Defendant
27 viewed Plaintiff's Subject Photographs and then
28 identically copied them to sell online. Id. ¶ 14.

1 Plaintiff is entitled to disgorgement of Defendant's
2 profits attributed to the Subject Photographs. Id. ¶
3 18.

4 **B. Procedural Background**

5 On July 20, 2021, Plaintiff filed its Complaint
6 alleging a claim for copyright infringement and
7 vicarious and/contributory copyright infringement.² On
8 July 28, 2022, Plaintiff amended its Complaint by
9 replacing the fictitious name DOE 1 with the true name
10 Black River Auction, LLC. ECF No. 12.

11 On March 4, 2022, Plaintiff served Defendant by
12 leaving the Summons at Defendant's residence with
13 someone of suitable age and discretion who resided at
14 the residence. POF, ECF No. 28. Defendant had until
15 March 25, 2022, to answer the Complaint. Id. Defendant
16 did not answer or otherwise respond to the Complaint by
17 March 25, 2022. Pursuant to Plaintiff's request, the
18 Clerk entered default as to Defendant on May 24, 2022,
19 per Federal Rules of Civil Procedure 55(a). ECF No. 38.
20 Defendants Live Auctioneers, LLC. and Liveauctioneers,
21 Inc. were dismissed by stipulation. ECF No. 39. On
22 September 6, 2022, Plaintiff filed the instant Motion
23 for Default Judgment. ECF No. 42. On the same day
24 September 6, 2022, Plaintiff served Defendant with
25 notice of the entry of default judgment and notice of
26

27 ² Plaintiff requests the court enter default against
28 Defendant as to Plaintiff's copyright infringement claim. Pl.'s
Mot. for Default J. ("Mot.") 1:3-4, ECF No. 42.

1 the Motion. See Mot. iii:1-3. Defendant did not file
2 an Opposition. Plaintiff seeks the following damages:
3 statutory damages totaling \$150,000; costs incurred in
4 the litigation totaling \$750.01; and attorneys' fees
5 totaling \$6,600. Id. at ii:19-26.

6 II. DISCUSSION

7 A. Legal Standard

8 The granting of default judgment is within the
9 discretion of the district court. Aldabe v. Aldabe, 616
10 F.2d 1089, 1092 (9th Cir. 1980); see Fed. R. Civ. P. 55.
11 Procedural and substantive requirements must be
12 satisfied.

13 Procedurally, the requirements set forth in Federal
14 Rules of Civil Procedure ("FRCP" or "Rule") 54(c) and
15 55(b), and Local Rule 55-1 must be met. See Vogel v.
16 Rite Aid Corp., 992 F. Supp. 2d 998, 1006 (C.D. Cal
17 2014). Local Rule 55-1 provides:

18 When an application is made to the Court for a
19 default judgment, the application shall be
20 accompanied by a declaration in compliance with
21 F.R.Civ.P. 55(b)(1) and/or (2) and include the
22 following: (a) When and against what party the
23 default was entered; (b) The identification of
24 the pleading to which default was entered; (c)
25 Whether the defaulting party is an infant or
26 incompetent person, and if so, whether that
27 person is represented by a general guardian,
28 committee, conservator or other representative;

1 (d) That the Service Members Civil Relief Act,
2 50 U.S.C. App. § 521, does not apply; and (e)
3 That notice has been served on the defaulting
4 party, if required by F.R.Civ.P. 55(b) (2).

5 L.R. 55-1.

6 Courts should also consider the following factors
7 in determining whether to grant a motion for default
8 judgment: "(1) the possibility of prejudice to
9 plaintiff, (2) the merits of plaintiff's substantive
10 claims, (3) the sufficiency of the complaint, (4) the
11 sum of money at stake in the action, (5) the possibility
12 of a dispute concerning the material facts, (6) whether
13 defendant's default was the product of excusable
14 neglect, and (7) the strong public policy favoring
15 decisions on the merits." Eitel v. McCool, 782 F.2d
16 1470, 1471-72 (9th Cir. 1986).

17 If the court determines that the defendant is in
18 default, "the factual allegations of the complaint,
19 other than those relating to damages, are taken as
20 true.'" Televideo Sys., Inc. v. Heidenthal, 826 F.2d
21 915, 917-18 (9th Cir. 1987) (quoting Geddes v. United
22 Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977)).
23 Additionally, "[w]hen entry of judgment is sought
24 against a party who has failed to plead or otherwise
25 defend, a district court has an affirmative duty to look
26 into its jurisdiction over both the subject matter and
27 the parties." In re Tuli, 172 F.3d 707, 712 (9th Cir.
28 1999).

1 If the Court determines that the allegations in the
2 complaint are sufficient to establish liability, the
3 plaintiff must provide proof of all damages sought in
4 the complaint, and the Court must determine the "amount
5 and character" of the relief that should be awarded.
6 Vogel, 992 F. Supp. 2d at 1005-06 (citations omitted).
7 "A default judgment must not differ in kind from, or
8 exceed in amount, what is demanded in the pleadings."
9 Fed. R. Civ. P. 54(c).

10 **B. Discussion**

11 1. Jurisdiction and Service of Process

12 a. *Subject Matter Jurisdiction*

13 In considering whether to enter default judgment,
14 the Court first determines whether it has jurisdiction
15 over the subject matter and the parties. See In re
16 Tuli, 172 F.3d at 712. The Court has subject matter
17 jurisdiction over this action. Plaintiff's claim for
18 copyright infringement arises under the Copyright Act of
19 1976, 17 U.S.C. § 101 *et seq.* District courts have
20 original jurisdiction of any civil action "arising under
21 any Act of Congress relating to . . . copyrights." 28
22 U.S.C. § 1338(a). Therefore, the Court has federal
23 question jurisdiction over this claim under 28 U.S.C. §§
24 1331, 1338(a).

25 b. *Personal Jurisdiction*

26 Personal jurisdiction is also satisfied. While
27 Defendant is a limited liability company in New Jersey,
28 specific personal jurisdiction is demonstrated, as

1 Plaintiff alleges that the copyright infringement giving
2 rise to this action took place in this forum. See
3 Compl. ¶ 3.

4 c. *Service of Process Is Proper*

5 Service of process is met because Plaintiff served
6 Defendant with the Summons and Complaint on March 4,
7 2022, as evidenced by the Proof of Service. ECF No. 28.
8 Plaintiff served the Summons and Complaint on
9 Defendant's agent's residence, or usual place of abode,
10 with the agent's sister in compliance with Federal Rule
11 of Civil Procedure 4. Id.; See ECF No. 38.

12 2. Procedural Requirements

13 Plaintiff has met the procedural requirements for
14 default judgment pursuant to Federal Rules of Civil
15 Procedure 55 and Central District Local Rule 55-1.
16 Under Rule 55(a), the Clerk properly entered default
17 against Defendant on May 24, 2022 [38]. Plaintiff moved
18 pursuant to Rule 55(b) for entry of default judgment on
19 September 6, 2022 [42].

20 Plaintiff has also established the Local Rule 55-1
21 requirements. Per the Motion, the Clerk entered default
22 against Defendant on May 24, 2022, as to Defendant;
23 Defendant is neither a minor, nor an incompetent person
24 nor in the military service or otherwise exempted under
25 the Soldier's and Sailor's Civil Relief Act of 1940, the
26 predecessor to the Servicemembers Civil Relief Act; and
27 Defendant was served with the Motion for Default
28 Judgment on September 6, 2022. ECF No. 43.

1 3. Eitel Factors

2 Plaintiff has sufficiently set forth the seven
3 Eitel factors: "(1) the possibility of prejudice to the
4 plaintiff; (2) the merits of plaintiff's substantive
5 claims; (3) the sufficiency of the complaint; (4) the
6 sum of money at stake in the action; (5) the possibility
7 of a dispute concerning the material facts; (6) whether
8 the default was due to excusable neglect; and (7) the
9 strong public policy underlying the Federal Rules of
10 Civil Procedure favoring decisions on the merits."
11 Eitel, 782 F.2d at 1471-72.

12 a. *Risk of Prejudice to Plaintiff*

13 "The first Eitel factor considers whether a
14 plaintiff will suffer prejudice if a default judgment is
15 not entered." Vogel, 992 F. Supp. 2d at 1007.

16 This factor weighs in favor of granting default
17 judgment. Defendant neither filed nor requested an
18 extension to submit an opposition. As such, Defendant
19 has failed to participate in the litigation and, without
20 default judgment, Plaintiff would be unable to halt
21 Defendant's infringement or recoup damages for harm
22 suffered. IO Grp., Inc. v. Jordon, 708 F. Supp. 2d 989,
23 997 (N.D. Cal. 2010).

24 b. *Sufficiency of the Complaint and Likelihood*
25 *of Success on the Merits*

26 The second and third Eitel factors consider the
27 merits of the plaintiff's substantive claims and the
28 sufficiency of the complaint. "Under an [Eitel]

1 analysis, [these factors] are often analyzed together.”
2 Dr. JKL Ltd. V. HPC IT Educ. Ctr., 749 F. Supp. 2d 1038,
3 1048 (N.D. Cal. 2010). Plaintiff has asserted a
4 meritorious claim for willful copyright infringement.

5 To plead a viable copyright infringement claim
6 pursuant to 17 U.S.C. § 501, Plaintiff must establish
7 “(1) ownership of a valid copyright, and (2) copying of
8 the constituent elements of the work that are original.”
9 Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., 499 U.S.
10 340, 361 (1991). Absent direct evidence of copying, the
11 second prong is satisfied by showing that “the infringer
12 had access to the work and that the two works are
13 substantially similar.” Shaw v. Lindheim, 919 F.2d
14 1353, 1356 (9th Cir. 1990). In some cases, “absent
15 evidence of access, a ‘striking similarity’ between the
16 works may give rise to a permissible inference of
17 copying.” Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th
18 Cir. 1987).

19 Plaintiff owns four valid copyrights for the
20 Subject Photographs with the following registration
21 numbers: VA0002251320, VA0002246059, VA0002238659, and
22 TX0004141083. Compl. ¶10. Therefore, the first prong
23 is satisfied.

24 In addition, Defendant likely copied the Subject
25 Photographs. Plaintiff is an accomplished and
26 critically acclaimed photographer. Id. ¶ 9. Moreover,
27 Defendant marketed the Subject Photographs alongside
28 Plaintiff’s name on the website. See, Ex. B.

1 Additionally, Plaintiff alleges that Defendants
2 willfully copied, reproduced, displayed, and distributed
3 the Subject Photographs without Plaintiff's consent.
4 Id. ¶ 12. The Subject Photographs appear to be
5 identical copies of Plaintiff's original work. See Exs.
6 A, B. Therefore, Defendant clearly had access to the
7 Subject photographs given that the works on the website
8 are strikingly similar to Plaintiff's photographs.
9 Plaintiff has thus adequately pled that Defendants
10 infringed upon his copyright and entry of default is
11 favored. Dr. JKL Ltd., 749 F. Supp. 2d at 1049.

12 c. *Sum of Money at Stake in the Action*

13 "Under the [fourth] Eitel factor, the court must
14 consider the amount of money at stake in relation to the
15 seriousness of Defendant's conduct." PepsiCo, Inc. v.
16 Cal. Sec. Cans, 238 F. Supp. 2d 1172, 1176 (C.D. Cal.
17 2002). The Court will review declarations,
18 calculations, and other damages documentation to
19 determine whether the sum of money at stake is
20 appropriate. HICA Educ. Loan Corp. v. Warne, No. 11-CV-
21 04287-LHK, 2012 WL 1156402, at *3 (N.D. Cal. Apr. 6,
22 2012).

23 Here, Plaintiff requests \$150,000 in statutory
24 damages pursuant to 17 U.S.C. § 504(c); \$6,600 in
25 attorneys' fees; and \$750.01 in recoverable costs. Mot.
26 1:10-13.

27 The Copyright Act permits a copyright owner to
28 recover "statutory damages for all infringements

1 involved in the action...in a sum of not less than \$750
2 or more than \$30,000 as the court considers just.” 17
3 U.S.C. § 504(c)(1). However, “[i]n a case where . . .
4 the court finds . . . that infringement was committed
5 willfully, the court in its discretion may increase the
6 award of statutory damages to a sum of not more than
7 \$150,000” for each infringement. 17 U.S.C. § 504(c)(2).

8 Plaintiff seeks \$150,000 in statutory damages for
9 the two hundred infringed photographs. The Complaint
10 sufficiently pleads that Defendant willfully infringed
11 on the Subject Photographs because Defendant “willfully
12 copied, reproduced, displayed, and distributed the
13 Subject Photographs.” Compl. ¶ 12. The Court
14 recognizes that Plaintiff did not have the opportunity
15 to conduct full discovery regarding damages due to
16 Defendant’s default. As discussed below in this Order,
17 the requested \$150,000 does not outpace the
18 egregiousness and willfulness of Defendant’s conduct,
19 considering that Defendant infringed on two hundred of
20 Plaintiff’s photographs and marketed the Subject
21 Photographs on its website alongside Plaintiff’s name
22 and the photographs’ original titles. See Ex. B. Thus,
23 this factor weighs towards granting this Motion.

24 d. *The Possibility of a Dispute Concerning the*
25 *Material Facts*

26 The fifth Eitel factor examines the likelihood of a
27 dispute between the parties regarding the material facts
28 in the case. A defendant is “deemed to have admitted

1 all well-pleaded factual allegations” in the complaint
2 upon entry of default. DirectTV, Inc. v. Hoa Huynh, 503
3 F.3d 847, 851 (9th Cir. 2007).

4 This factor weighs towards granting default
5 judgment. There is a low possibility of dispute as the
6 Complaint aptly demonstrates that the works are
7 substantially similar and that the Subject Photos were
8 distributed and sold by the Defendant. See generally
9 Compl. Additionally, due to Defendant’s lack of
10 response after default was entered against him, he has
11 failed to dispute any material facts.

12 e. *The Possibility of Excusable Neglect*

13 Excusable neglect considers factors such as
14 “prejudice . . ., the length of the delay and its
15 potential impact on judicial proceedings, the reason for
16 the delay, including whether it was within the
17 reasonable control of the movant, and whether the movant
18 acted in good faith.” J.L. v. Moreno Valley Unified
19 Sch. Dist., No. CV 09-1978 ODW (PJWx), 2010 WL 1708839,
20 at *1 (C.D. Cal. Apr. 20, 2010) (internal quotation
21 marks and citations omitted).

22 Excusable neglect is negligible, as Defendant
23 received the Summons, Complaint, and instant Motion.
24 Defendant failed to either oppose the Motion or request
25 an extension to file an opposition. Thus, this factor
26 weighs in favor of default.

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1 f. *Public Policy Favoring Decisions on the*
2 *Merits*

3 The Ninth Circuit has stated that “[c]ases should
4 be decided upon their merits whenever reasonably
5 possible.” Eitel, 782 F.2d at 1472. However, “this
6 preference, standing alone, is not dispositive.”
7 PepsiCo, 238 F. Supp. 2d at 1177. The copyright
8 infringement claim cannot be adjudicated, as Defendant
9 failed to Answer or appear in the action. While this
10 factor may weigh against entering default judgment, the
11 Court nonetheless will grant the Motion in light of the
12 remaining factors.

13 In total, the Eitel factors weigh towards granting
14 default judgment.

15 4. Character and Amount of Plaintiff’s Recovery

16 Plaintiff requests \$150,000 total statutory
17 damages, attorneys’ fees totaling \$6,600, and \$750.01 in
18 recovery costs. The Court takes up the validity of each
19 request in turn.

20 a. *Statutory Damages*

21 17 U.S.C. § 504 provides, in relevant part: “an
22 infringer of copyright is liable for either - (1) the
23 copyright owner’s actual damages and any additional
24 profits of the infringer . . . or (2) statutory
25 damages.” 17 U.S.C. § 504(a). A “copyright owner may
26 elect . . . to recover . . . an award of statutory
27 damages . . . in a sum of not less than \$750 or more
28 than \$30,000 as the court considers just.” 17 U.S.C. §

1 504(c)(1). "In a case where the copyright owner
2 sustains the burden of proving, and the court finds,
3 that infringement was committed willfully, the court in
4 its discretion may increase the award of statutory
5 damages to a sum of not more than \$150,000." 17 U.S.C.
6 § 504(c)(2).

7 In exercising its discretion, "the court can
8 consider such factors as: "(1) the expenses saved and
9 the profits reaped; (2) the revenues lost by the
10 plaintiff; (3) the value of the copyright; (4) the
11 deterrent effect on others besides the defendant; (5)
12 whether the defendant's conduct was innocent or willful;
13 (6) whether a defendant has cooperated in providing
14 particular records from which to assess the value of the
15 infringing material produced; and (7) the potential for
16 discouraging the defendant." Columbia Pics. Film Prod.
17 Asia Ltd. V. Uth, CIV S-06-1054 FCD DAD, 2007 WL 36283,
18 at *3 (E.D. Cal. Jan. 4, 2007).

19 Plaintiff's proposed statutory damages of \$150,000
20 is a reasonable request. Plaintiff alleged that it
21 would have cost Defendant \$2500 per photograph to obtain
22 Plaintiff's work. Mot. 11:1-3. Because Defendant sold
23 at least fourteen of the Subject Photographs, this
24 accounts for \$35,000 in lost revenue. See id. at 11:3-
25 5.

26 "To prove 'willfulness' under the Copyright Act,
27 the plaintiff must show (1) that the defendant was
28 actually aware of the infringing activity, or (2) that

1 the defendant's actions were the result of 'reckless
2 disregard' for, or 'willful blindness' to, the copyright
3 holder's rights." Louis Vuitton Malletier, S.A. v.
4 Akanoc Solutions, Inc., 658 F.3d 936, 944 (9th Cir.
5 2011). Here, Defendant's website clearly displayed
6 Plaintiff's name and the works' titles alongside the
7 Subject Photographs. See Compl., Ex. B. The images
8 evidence that Defendant at least should have known that
9 the photos belonged to Plaintiff Michael Kenna.
10 Plaintiff has thus sufficiently pled willful
11 infringement of Plaintiff's copyright. Considering the
12 degree of Defendant's willfulness, \$150,000 is
13 reasonable, particularly because Defendant infringed on
14 two hundred of Plaintiff's photographs and Plaintiff
15 lost at least \$35,000 in revenue for the fourteen
16 photographs Defendant sold. Mot. 11:1-5. Pursuant to
17 17 U.S.C. § 504(c)(2), the Court does not disturb
18 Plaintiff's request for \$150,000 statutory damages.

19 5. Attorneys' Fees and Costs

20 The court, in its discretion, may award costs and
21 reasonable attorneys' fees to the prevailing party,
22 pursuant to section 505 of the Copyright Act. 17 U.S.C.
23 § 505. Central District Local Rule 55-3 provides a
24 schedule of attorneys' fees applicable to a default
25 judgment if an applicable statute provides for the
26 recovery of attorneys' fees; as previously mentioned, 17
27 U.S.C. § 505 of the Copyright Act allows for attorneys'
28 fees.

1 For judgments over \$100,000, like the \$150,000 the
2 Court has awarded in statutory damages, the total is
3 "\$5,600 plus 2% of the amount over \$100,000;" that is,
4 \$6,600. C.D. Cal. R. 55-3. Additionally, pursuant to
5 17 U.S.C. § 505, the Court grants recovery costs of
6 \$750.01. Id.

7 **III. CONCLUSION**

8 Based on the foregoing, the Court **GRANTS**
9 Plaintiff's Motion for Default Judgment against
10 Defendant for the sole claim of copyright infringement.
11 In sum, Plaintiff has sufficiently pled willful
12 copyright infringement and is awarded \$157,350.01:
13 \$150,000 in statutory damages under 17 U.S.C. § 504(c);
14 \$6,600 in attorneys' fees pursuant to Local Rule 55-3;
15 and \$750.01 in costs pursuant to 17 U.S.C. § 505.

16 **IT IS SO ORDERED.**

17
18 DATED: November 15, 2022

/s/Ronald S.W. Lew
HONORABLE RONALD S.W. LEW
Senior U.S. District Judge

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