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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

The Senior's Choice.,  
  
                    Plaintiff,  
  
                    vs.  
  
Carolyn Mattingly., et al.,  
  
                    Defendants.

CASE NO. SACV 11-1622-JST (MLGx)

**ORDER DENYING PLAINTIFF'S  
APPLICATION FOR DEFAULT  
JUDGMENT**

1 Before the Court is an Application for Default Judgment filed by Plaintiff The  
2 Senior's Choice ("Plaintiff"). (Appl., Doc. 25.) Plaintiff seeks the entry of default  
3 judgment against Defendant Advantage Home Care Consultant, LLC ("Defendant" or  
4 "Advantage").<sup>1</sup> (Appl. at 1.) Plaintiff seeks permanent injunctive relief, monetary  
5 damages, attorneys' fees, and costs. (Mem. of P. & A. at 2, Doc. 25, Ex. 1.) The Court  
6 finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D.  
7 Cal. R. 7-15. Accordingly, the hearing set for August 3, 2012 at 2:30 p.m. is VACATED.  
8 Having read and considered the papers, the Court DENIES Plaintiff's Application for  
9 Default Judgment.

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11 **I. Factual and Procedural Background**

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13 Plaintiff is a corporation that provides goods and/or services related to senior citizen  
14 care and is the registered owner of following copyrights (collectively, "the Copyrighted  
15 Works"):

- 16 i. TXu 975-095 (The Senior's Choice operating and  
17 marketing manual)
- 18 ii. TX7-246558 (The Senior's Choice two step operating  
19 systems manual)
- 20 iii. TX7-246-561 (The Senior's Choice executive  
21 operating systems manual)
- 22 iv. TZ6-320-566 (certified companion aid program)
- 23 v. TX6-344-418 ("Is Remaining Independent In Your  
24 Own Home Important To You?")
- 25 vi. TX6-344-416 ("Remain Independent In The Home  
26 You Love")

27  
28 <sup>1</sup> On March 7, 2012, Defendant Carolyn Mattingly filed for Chapter 7 bankruptcy in federal court in the Northern District of Georgia. (Paganetti Decl. ¶ 10, Doc. 19.)

- 1                   vii. TX6-620-604 (“The Caregiver’s Own”),
- 2                   viii. TX6-344-419 (“Your Guide To Fall Prevention”)
- 3                   ix. TX6-344-417 (“Your Guide To Fall Recovery”)
- 4                   x. TX6-344-415 (“Your Guide To Osteoporosis [sic]”)

5 (Compl. ¶ 6, Doc. 1.)

6           On July 3, 2005, Plaintiff entered into a Membership Agreement with Defendant  
7 Carolyn Mattingly (“Mattingly”). (*Id.* ¶ 8, Ex. 1.) “Mattingly [is an] officer, director,  
8 shareholder and/or managing partner/member [of Advantage].” (*Id.* ¶ 10.) At some  
9 undetermined date, but “within four years from the filing of [Plaintiff’s Complaint],”  
10 Mattingly and Advantage began “using confidential information including copyrighted  
11 written material of the Plaintiff” (*id.*), by incorporating the Copyrighted Works into  
12 Advantage’s “employee forms, contracts, employee training manuals, quality improvement  
13 plan, training manuals, strategic planning information, marketing manuals, websites,  
14 templates, operating systems manuals, [and] financial planning and aid program  
15 information.” (Everhart Decl. ¶ 4, Doc. 25, Ex. 3.) The gravamen of Plaintiff’s Complaint  
16 appears to be that Advantage obtained the membership of a company named Home  
17 Wellness Care by using the Copyrighted Works, and that if Advantage had not used the  
18 Copyrighted Works, Home Wellness Care would have become a member of the Plaintiff  
19 instead. (*Id.* ¶ 5.)<sup>2</sup>

20           On October 19, 2011, Plaintiff filed its Complaint against Mattingly and Advantage.  
21 Plaintiff brought a claim for breach of contract against Mattingly and claims of “copy-  
22 write [sic] infringement, conversion, unjust enrichment, [and] constructive trust” against  
23 Advantage. (Mem. P & A at 1; Compl., Doc. 1.) Neither Defendant filed an Answer to  
24 Plaintiff’s Complaint. Accordingly, on March 5, 2012, the Clerk entered the Default of  
25 both Mattingly and Advantage. (Doc. 18.) On April 20, 2012, Plaintiff filed its first  
26 Application for Default Judgment against Mattingly and Advantage. (Doc. 22.) The Court  
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28           <sup>2</sup> As discussed throughout this order, Plaintiff’s Complaint lacks specificity.

1 denied Plaintiff's Application because Plaintiff did not include a memorandum setting  
2 forth the legal authority upon which a plaintiff bases its application, pursuant to Local Rule  
3 7-5. (Order at 1, Doc. 24.) On July 6, 2012, Plaintiff filed a second Application for  
4 Default Judgment against Advantage. Plaintiff included a Memorandum of Points and  
5 Authorities addressing Plaintiff's claim for copyright infringement only. (Doc. 25, Ex. 1.)  
6

## 7 **II. Legal Standard**

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9 Under Rule 55 of the Federal Rules of Civil Procedure, default judgment is a two-  
10 step process. *See* Fed. R. Civ. P. 55; *see also Eitel v. McCool*, 782 F.2d 1470, 1471 (9th  
11 Cir. 1986). Prior to entry of default judgment, there must be an entry of default. *See* Fed.  
12 R. Civ. P. 55. Upon entry of default, the factual allegations of the complaint, save for  
13 those concerning damages, are deemed to have been admitted by the defaulting party. Fed.  
14 R. Civ. P. 8(b)(6); *see Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).  
15 However, "a defendant is not held to admit facts that are not well-pleaded or to admit  
16 conclusions of law." *United States v. Cathcart*, No. C 07-4762 PJH, 2010 WL 1048829,  
17 \*4 (N.D. Cal. Feb. 12, 2010).

18 "Entry of a default judgment is not a matter of right. Its entry is entirely within the  
19 court's discretion and may be refused where the court determines no justifiable claim has  
20 been alleged." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1271 (N.D. Cal. 2004) (citing *Draper v.*  
21 *Coombs*, 792 F.2d 915, 924 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th  
22 Cir. 1980)). The Ninth Circuit has set out seven factors to be considered by courts in  
23 reviewing a motion for default judgment: "(1) the possibility of prejudice to the plaintiff,  
24 (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the  
25 sum of money at stake in the action, (5) the possibility of a dispute concerning material  
26 facts, (6) whether the default was due to excusable neglect, and (7) the strong policy  
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1 underlying the Federal Rules of Civil Procedure favoring decisions on the merits.” *Eitel*,  
2 782 F.2d at 1471-72.

3 “If the court determines that the allegations in the complaint are sufficient to  
4 establish liability, it must then determine the ‘amount and character’ of the relief that  
5 should be awarded.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916,  
6 920 (C.D. Cal. 2010) (quoting 10A Charles Alan Wright, Arthur R. Miller, & May Kay  
7 Kane, *FEDERAL PRACTICE AND PROCEDURE* § 2688, at 63 (3d ed. 1998)). This is  
8 because the allegations of the amount of damages suffered are not necessarily taken as  
9 true. *See Geddes*, 559 F.2d at 560.

10 Accordingly, the Court may hold a hearing to determine the amount of damages.  
11 Fed. R. Civ. P. 55(b)(2)(B). Under Ninth Circuit law, “[i]t is well settled that a default  
12 judgment for money may not be entered without a hearing unless the amount claimed is a  
13 liquidated sum or capable of mathematical calculation.” *Davis v. Fendler*, 650 F.2d 1154,  
14 1161 (9th Cir. 1981). However, a “hearing” under this rule need not include live  
15 testimony, but may instead rely on declarations submitted by the parties, so long as notice  
16 of the amount requested is provided to the defaulting party. C.D. Cal. R. 55-2.

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### 18 **III. Discussion**

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#### 20 *a. Merits of Plaintiff’s Substantive Claim and Sufficiency of Plaintiff’s* 21 *Complaint*

22 To prevail on a claim for copyright infringement, the Plaintiff “must demonstrate  
23 (1) ownership of a valid copyright, and (2) copying of constituent elements of the work  
24 that are original.” *Funky Films, Inc. v. Time Warner Entm’t Com.*, 462 F.3d 1072, 1076  
25 (9th Cir. 2006) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361  
26 (1991)). Plaintiff has alleged “ownership of copy-write [sic] numbers or registered copy-  
27 write [sic] numbers of proprietary information.” (Mem. of P. & A at 3.) Plaintiff also has  
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1 alleged Advantage infringed “Plaintiff’s registered copyright by development, copying,  
2 making, using, altering for sale, . . . and/or incorporating information which has been  
3 copyrighted by Plaintiff.” (Compl. ¶ 15.) These allegations are supported by a declaration  
4 from Plaintiff’s President, Steve Everhart. (Everhart Decl., Doc. 25, Ex. 3.)

5 Plaintiff’s allegations contain few specific facts and are essentially vague  
6 restatements of legal conclusions. The Court concludes that Plaintiff has provided only  
7 enough factual information to establish valid ownership of registered copyrights (Compl. ¶  
8 6), and fails to establish that Defendant “cop[ied] constituent elements of the work that are  
9 original.” *Funky Films*, 462 F.3d at 1076. “Absent evidence of direct copying, ‘proof of  
10 infringement involves fact-based showings that the . . . two works are ‘substantially  
11 similar.’” *Id.* (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir.  
12 2000)). Plaintiff has not submitted evidence of direct copying. Beyond the deficient  
13 allegations in Plaintiff’s Complaint, Plaintiff has submitted a single declaration stating  
14 “[Defendant’s materials are] *similar* to the information on which [Plaintiff] has a current  
15 copywrite [sic].” (Everhart Decl. ¶ 4 (emphasis added).) Similarity between Advantage’s  
16 materials and the Copyrighted Works is insufficient to satisfy the second prong of a valid  
17 claim for copyright infringement, and the Plaintiff has not provided any basis in the form  
18 of allegations or evidence for the Court to conclude that the works are “substantially  
19 similar.” *Id.* (holding claim for copyright infringement failed because protectable elements  
20 were not substantially similar). Accordingly, this factor weighs against default judgment.

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22 *b. Possibility of Dispute Concerning Material Facts*

23 “[This] *Eitel* factor examines the likelihood of dispute between the parties regarding  
24 the material facts surrounding the case.” *Craigslist Inc. v. Naturemarket, Inc.*, 694 F.  
25 Supp. 2d 1039, 1060 (N.D. Cal. 2010). Where a plaintiff has filed a well-pleaded  
26 complaint, the possibility of dispute concerning material facts is remote. *See, e.g.*,  
27 *Landstar Ranger*, 725 F. Supp. 2d at 921-22 (“Since [plaintiff] has supported its claims  
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1 with ample evidence, and defendant has made no attempt to challenge the accuracy of the  
2 allegations in the complaint, no factual disputes exist that preclude the entry of default  
3 judgment.”).

4       Similarity in a copyright infringement claim is a fact intensive inquiry. *See Funky*  
5 *Films*, 462 F.3d at 1076. While Advantage has seemingly abandoned its defense in this  
6 action, Plaintiff does not support its claims with ample evidence or specific allegations.  
7 *C.f.*, *Craigslist*, 694 F. Supp. 2d at 1060-61(“Plaintiff has set forth adequate allegations  
8 detailing Defendants’ [actions of Fraud and Trademark Infringement]”). The only  
9 evidence Plaintiff provides actually suggests the likely existence of a material dispute, at  
10 least as to the similarity of the Copyrighted Works to the purportedly infringing materials.  
11 (*See* Everhart Decl. ¶ 4.) Therefore, this factor weighs against default judgment.

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13               *c. Remaining Eitel Factors*

14       The Court concludes that the remaining *Eitel* factors weigh in favor of granting  
15 Plaintiff’s application for default judgment. Plaintiff will suffer prejudice if the Court does  
16 not grant its application because it has no other means of recourse. The amount of money  
17 at stake is proportionate to the seriousness of Defendant’s alleged conduct. *See Craigslist*,  
18 694 F. Supp. 2d at 1060 (holding that this factor weighed in favor of default judgment  
19 where plaintiff asserted copyright, trademark, breach of contract, and fraud claims and  
20 sought damages in the range of \$1,177,827.07 to \$4,900,327.07). Plaintiff has also  
21 provided evidence that Advantage was properly served (Docs. 12 – 15), and there is no  
22 evidence Advantage’s default is the result of excusable neglect. *See Landstar Ranger*, 725  
23 F. Supp. 2d at 922 (concluding that this factor favored default judgment and possibility of  
24 excusable neglect is remote where defendant had been properly served) (internal citation  
25 and quotation omitted). Finally, the Court’s strong policy favoring a decision on the merits  
26 has been made impossible to pursue by Advantage’s failure to appear and defend. *See*  
27 *Craigslist*, 694 F. Supp. 2d at 1061. However, because the Plaintiff’s Complaint is devoid  
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1 of specific allegations, the Court cannot conclude that the Plaintiff is likely to succeed on  
2 the merits, and the potential for a dispute of material fact is significant, the Court  
3 concludes the *Eitel* factors weigh against the entry of default judgment. Accordingly,  
4 Plaintiff's Application for Default Judgment is DENIED.

#### 5 6 **IV. Remedies**

7  
8 Plaintiff seeks to permanently enjoin Advantage from unauthorized use of the  
9 Copyrighted Works. Additionally, Plaintiff seeks to recover damages in the amount of  
10 \$25,000.00, attorney's fees in the amount of \$11,874.00, and court costs in the amount of  
11 \$573.00. Even if this Court were to determine that default judgment should be entered,  
12 Plaintiff fails to prove that it is entitled to its requested remedies. *See Geddes*, 559 F.2d at  
13 560.

##### 14 15 a. Permanent Injunction

16 Pursuant to 17 U.S.C. § 502(a), the Court is authorized to grant injunctions "as it  
17 may deem reasonable to prevent or restrain infringement of a copyright." *See Craigslist*,  
18 694 F. Supp. 2d at 1061-62 (citing 17 U.S.C. § 502(a)). In order for the Court to grant a  
19 permanent injunction, Plaintiff must demonstrate: (1) actual [or potential] success on the  
20 merits; (2) a likelihood of irreparable injury if injunctive relief is not granted; (3) a balance  
21 of hardships favoring Plaintiff; and (4) that an injunction will advance the public interest.  
22 *Winter v. Natural Res. Def. Counsel*, 555 U.S. 7, 20 (2008). "Generally, an injunction  
23 must be narrowly tailored to remedy only the specific harms shown by a plaintiff, rather  
24 than to enjoin all possible breaches of the law." *Craigslist*, 694 F. Supp. 2d at 1062.

25 In this case, Plaintiff fails to demonstrate actual or potential success on the merits of  
26 its copyright infringement claim, as described above. Similarly, Plaintiff's request for  
27 injunction against Advantage "using [Plaintiff's] copyrighted written material in  
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1 [Advantage’s] own business” (Mem. P & A at 4) is vague and asserts no *specific* harm to  
2 be enjoined. Plaintiff’s request is essentially a request to enjoin Advantage against “all  
3 possible breaches of law.” *Id.* at 1062.

4  
5 *b. Damages*

6 Under the Copyright Revision Act of 1976, “an infringer of copyright is liable for  
7 . . . the copyright owner’s actual damages and any additional profits of the infringer.” 17  
8 U.S.C. § 504(a)(1). “As a general rule, damages which result from a tort must be  
9 established with reasonable certainty . . . [d]amages are not rendered uncertain because  
10 they cannot be calculated with absolute exactness, yet, a reasonable basis for computation  
11 must exist.” *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993)  
12 (internal quotation marks omitted).

13 Here, Plaintiff seeks damages “in the amount of loss [sic] membership fees in the  
14 amount of \$25,000.00.” (Mem. P & A at 2.) Plaintiff submits the declaration of its  
15 President, Steven Everhart, which states that “[Plaintiff] has lost membership fees in the  
16 amount of \$25,000.00 from the loss of a potential member to provide home care service,  
17 namely Home Wellness Care, who became a member of [Advantage].” (Everhart Decl. ¶  
18 5.) Plaintiff does not specify whether \$25,000.00 is an estimate of actual damages and/or  
19 additional profits of the infringer, nor does Plaintiff discuss how the membership fees  
20 would be offset by the service provider’s additional costs. 17 U.S.C. § 504(a)(1).

21 Furthermore, Plaintiff appears to base its computation for damages in the amount of  
22 \$25,000.00 on Plaintiff’s loss of “membership fees” from a third party. (Mem. P & A at 3;  
23 Everhart Decl. ¶ 5.) However, Plaintiff fails to demonstrate how the loss of membership  
24 fees is a result of Advantage’s alleged infringement or attributable to Advantage’s alleged  
25 infringement. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir.  
26 2004) (“From the statutory language [of section 504(b)], it is apparent that a causal link  
27 between the infringement and the monetary remedy sought is a predicate to recovery of  
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1 both actual damages and profits.”). Nor does Plaintiff demonstrate that \$25,000.00 is a  
2 reasonable value of the Copyrighted Works in the market. *See Frank Music Corp. v.*  
3 *Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th Cir. 1985) (setting the test of market  
4 value in the Ninth Circuit “as a willing buyer would have been reasonably required to pay  
5 to a willing seller for plaintiffs’ work.”). In fact, Plaintiff does not provide any explanation  
6 of what services by the Plaintiff or access to Plaintiff’s Copyrighted Works these  
7 membership fees entail, or why these fees prove to be a reasonable basis for the  
8 computation of actual damages for Advantage’s alleged infringement of the Copyrighted  
9 Works. *Lindy Pen Co.*, 982 F.2d at 1408 (citing *Vuitton et Fils, S.A. v. Crown Handbags*,  
10 492 F. Supp. 1071, 1077 (S.D.N.Y. 1979) (“The discretionary award of either damages or  
11 profits assumes an evidentiary basis on which to rest such an award. Without such a basis  
12 there can be no recovery.”)). Plaintiff’s declaration by Everhart is insufficient to provide  
13 any evidentiary basis to support Plaintiff’s request for \$25,000.00 in monetary damages.  
14

15 c. Attorneys’ Fees

16 According to the Plaintiff, “[u]nder 17 U.S.C. section 505 the court has the  
17 discretion to award court costs and attorney’s fees in a copy-write [sic] infringement  
18 action.” (Mem. P & A at 3.) Under Local Rule 55-3, attorney’s fees may be awarded when  
19 an applicable statute provides for such recovery. C.D. Cal. R. 55-3.

20 Plaintiff seeks attorney’s fees in the amount of \$11,784.00. (Mem. P & A at 4.) In  
21 support of Plaintiff’s request, Plaintiff filed a declaration by counsel which states:  
22 “[Plaintiff’s counsel is] currently charging [the Plaintiff] at the rate of \$250.00 per hour . . .  
23 [Plaintiff] to date has incurred attorney’s fees in the amount of \$11,784.00.” (Paganetti,  
24 Decl. ¶¶ 2-3.)

25 Again, Plaintiff fails to demonstrate any reasonable basis for its calculation.  
26 Plaintiff has not provided a statement of services, any documentation detailing specific  
27 tasks, or the number of hours Plaintiff’s counsel worked on behalf of the plaintiff, that  
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1 would support counsel's estimate of \$11,784.00. Plaintiff further fails to provide any  
2 evidence of market rates that would show counsel's rate of \$250.00 per hour is reasonable  
3 for the services provided. *See, e.g., Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th  
4 Cir. 2007) (holding that attorney affidavits regarding prevailing rates are satisfactory  
5 evidence of prevailing market rates). Plaintiff's reliance on a single declaration from  
6 Plaintiff's attorney detailing only counsel's hourly rate and Plaintiff's final bill is  
7 insufficient to meet Plaintiff's burden of documenting and submitting as evidence the  
8 appropriate hours expended in the litigation. *See id.* at 948 (citing *Gates v. Deukmejian*,  
9 987 F.2d 1392, 1397 (9th Cir. 1992)).

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**V. Conclusion**

For the foregoing reasons, the Court DENIES Plaintiff's Application for Default Judgment. This action is stayed as to Defendant Mattingly, and the clerk shall administratively close the case.

DATED: July 31, 2012



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JOSEPHINE STATON TUCKER  
UNITED STATES DISTRICT JUDGE