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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THREE LAKES DESIGN,  
Plaintiff,  
v.  
GINA SAVALA,  
Defendant.

No. 2:17-cv-01757 MCE CKD (PS)

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Before the court is plaintiff’s (“Three Lakes”) motion for default judgment against pro se defendant Savala. (ECF No. 23.) Defendant failed to file an opposition to the motion for default judgment in accordance with Local Rule 230(c). Accordingly, the hearing on the motion set for November 5, 2018 was vacated, and defendant was given additional time to respond to the motion. (ECF No. 28.) On November 30, 2018, defendant was given another extension of time and advised that failure to timely respond would result in a recommendation that default be entered against it. (ECF No. 29.) Defendant was served with this order on February 4, 2019. (ECF No. 30.) To date, defendant has not responded.

The undersigned has fully considered the briefs and record in this case and, good cause appearing, THE COURT FINDS AS FOLLOWS:

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1 I. BACKGROUND

2 Plaintiff commenced this action in August 2017, alleging violation of 17 U.S.C. § 101, et  
3 seq. (copyright infringement), violation of 15 U.S.C. § 1125(a) (unfair competition), violation of  
4 15 U.S.C. § 1125(a)(1)(B) (false advertising) and unfair competition under California state law.  
5 (ECF No. 1.) In September 2017, defendant filed an answer to the complaint. (ECF No. 7.)  
6 Between January and March 2018, plaintiff served discovery requests on defendant, but  
7 defendant never responded. (ECF No. 25 (“Brunt Decl.”), ¶¶ 4-5.) In June 2018, the court granted  
8 plaintiff’s unopposed motion to amend and directed defendant to file a response to the amended  
9 complaint within thirty days. (ECF No. 18.) Defendant failed to respond to the amended  
10 complaint filed June 11, 2018. (ECF No. 19 (“FAC”).)

11 On August 7, 2018, the Clerk of Court entered default as to defendant. (ECF No. 22.)  
12 Plaintiff filed the instant motion for default judgment on October 17, 2018. (ECF No. 23.)  
13 Defendant did not respond to two extensions of time and never opposed the default motion. (ECF  
14 Nos. 28 & 29.) Defendant’s last action in this case was filing an answer to the original complaint  
15 in September 2017. (ECF No. 7.)

16 The FAC alleges as follows: Plaintiff Three Lakes Design is a Utah company with its  
17 principal place of business in Herriman, Utah. (FAC, ¶ 2.) Plaintiff creates, makes, and sells  
18 jewelry online. (*Id.*, ¶ 9.) A significant portion of plaintiff’s profits comes from the online  
19 marketing of its unique jewelry pieces through the use of its original photographs that showcase  
20 its designs. (*Id.*, ¶ 10.) The photographs are meticulously chosen, planned, and executed,  
21 ensuring proper lighting, subjects, and framing. (*Id.*, ¶ 11.) Posted online, these images serve as  
22 unique digital business cards that link to Three Lakes’ online store. (*Id.*, ¶ 10.) To protect its  
23 original photographic images, plaintiff applied for and obtained federal copyright registrations for  
24 23 photographs (collectively “Three Lakes’ Photographs”).<sup>1</sup> (*Id.*, ¶¶ 21, 24, 25; *see* FAC at 6-28.)

25 Defendant Savala is an individual residing in Sacramento, California and doing business  
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27 <sup>1</sup> Per plaintiff’s request (Brunt Decl. at ¶ 10), the court takes judicial notice of plaintiff’s  
28 copyright registrations referenced in the FAC and attached as Exhibit B to the Brunt Declaration.  
(ECF No. 25-2.)

1 as Candy Couture Shop, with places of business in two locations in Sacramento. (FAC, ¶ 3.)  
2 Defendant markets and sells jewelry through online media, with more than 100,000 followers  
3 across her various social media platforms, including celebrities such as the Kardashians, Snooki,  
4 and Kaily Lowry. (Id., ¶ 16.)

5 Beginning on April 16, 2017, plaintiff discovered defendant had used exact replicas of  
6 Three Lakes' Photographs in her online marketing campaign and posted those photographs more  
7 than 51 times online. (Id., ¶¶ 12, 20; see also Matelski Decl., ECF No. 24.) Many of the stolen  
8 images depict plaintiff's owners' body parts modeling plaintiff's jewelry. (Id., ¶ 13; Matelski  
9 Decl. at ¶ 3.) When plaintiff's lawyer demanded that defendant cease using the Three Lakes'  
10 Photographs, defendant blocked plaintiff from viewing her Instagram account, where much of her  
11 marketing took place using plaintiff's photographs. (Brunt Decl., ¶ 3; Matelski Decl., ¶ 5.)  
12 Despite plaintiff's demand that defendant remove all depictions of Three Lakes' Photographs  
13 from her websites, social media accounts, and other online sources, defendant largely ignored  
14 plaintiff, forcing plaintiff to file the instant action on August 22, 2017. (Brunt Decl., ¶ 3;  
15 Matelski Decl., ¶¶ 5-6.)

16 Defendant has never been authorized or licensed by plaintiff to copy, use, distribute,  
17 and/or sell products using Three Lakes' Photographs on her website, in her advertising materials,  
18 and throughout her social media accounts. (FAC, ¶¶ 13, 26; see also Matelski Decl., ¶ 7.) The  
19 FAC seeks statutory damages and injunctive relief, among other relief. (Id. at 35-36.)

## 20 LEGAL STANDARDS

21 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party  
22 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend  
23 against the action. See Fed. R. Civ. P. 55(a). However, "[a] defendant's default does not  
24 automatically entitle the plaintiff to a court-ordered judgment." PepsiCo, Inc. v. Cal. Sec. Cans,  
25 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25  
26 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies  
27 within the district court's sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.  
28 1980). In making this determination, the court considers the following factors:

1 (1) the possibility of prejudice to the plaintiff, (2) the merits of  
2 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4)  
3 the sum of money at stake in the action[,] (5) the possibility of a  
4 dispute concerning material facts[,] (6) whether the default was due  
5 to excusable neglect, and (7) the strong policy underlying the Federal  
6 Rules of Civil Procedure favoring decisions on the merits.

7 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily  
8 disfavored. Id. at 1472.

9 As a general rule, once default is entered, well-pleaded factual allegations in the operative  
10 complaint are taken as true, except for those allegations relating to damages. TeleVideo Sys., Inc.  
11 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing Geddes v. United Fin.  
12 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); accord Fair Housing of Marin v. Combs,  
13 285 F.3d 899, 906 (9th Cir. 2002). In addition, although well-pleaded allegations in the  
14 complaint are admitted by a defendant's failure to respond, "necessary facts not contained in the  
15 pleadings, and claims which are legally insufficient, are not established by default." Cripps v.  
16 Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine, 572 F.2d  
17 1386, 1388 (9th Cir. 1978)); accord DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir.  
18 2007) (stating that a defendant does not admit facts that are not well-pled or conclusions of law);  
19 Abney v. Alameida, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004) ("[A] default judgment may not  
20 be entered on a legally insufficient claim"). A party's default does not establish the amount of  
21 damages. Geddes, 559 F.2d at 560.

## 22 II. DISCUSSION

### 23 A. Appropriateness of the Entry of Default Judgment Under the Eitel Factors

#### 24 1. *Factor One: Possibility of Prejudice to Plaintiff*

25 The first Eitel factor considers whether the plaintiff would suffer prejudice if default  
26 judgment is not entered, and such potential prejudice to the plaintiff militates in favor of granting  
27 a default judgment. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Here, plaintiff would potentially  
28 face prejudice if the court did not enter a default judgment. Absent entry of a default judgment,  
plaintiff would be without another recourse against defendant. Accordingly, the first Eitel factor  
favors the entry of a default judgment.

2. *Factors Two and Three: The Merits of Plaintiff's Substantive Claims and the Sufficiency of the Complaint*

The court considers the merits of plaintiff's substantive claims and the sufficiency of the complaint together below because of the relatedness of the two inquiries. The court must consider whether the allegations in the complaint are sufficient to state a claim that supports the relief sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.

To establish copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Here, as outlined above, plaintiff has adequately alleged that it owns the copyrights with respect to Three Lakes' Photographs, and that defendant copied and used these images on her social media platforms and/or websites without permission. As such, the complaint sufficiently states a claim for copyright infringement and has merit.

3. *Factor Four: The Sum of Money at Stake in the Action*

Under the fourth factor cited in Eitel, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." PepsiCo, Inc., 238 F. Supp. 2d at 1176-77; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D. Cal. 2003). "Default judgment is disfavored where the sum of money at stake is too large or unreasonable in relation to defendant's conduct." Vogel v. Rite Aid Corp., 992 F. Supp. 2d 998, 1012 (C.D. Cal. 2014).

In this case, plaintiff seeks statutory damages in the amount of \$292,100 pursuant to 17 U.S.C. § 504(c). (ECF No. 23 at 13.) This request is based on defendant's unauthorized use of 23 federally copyrighted photos that have been posted over 51 times on defendant's social media. (FAC, ¶ 20.) The total sum amounts to \$12,700 in damages per copyrighted image used by defendant. (ECF No. 23 at 18.)

Willful infringement permits the court to exercise discretion in awarding statutory damages of a sum not less than \$750 and not more than \$150,000 per work. 17 U.S.C. § 504(c)(1)-(2). Here, defendant's conduct was willful both because of plaintiff's allegations and

1 because of the court's inference due to defendant's default. See Stephen Wurth Photography, Inc.  
2 v. Wetpaint.com Inc., 2018 WL 5266861, \*4 (C.D. Cal. 2018). Based on the FAC, defendant  
3 blatantly and continuously copied nearly two dozen Three Lakes' Photographs for her own  
4 financial gain without seeking authorization from plaintiff. When plaintiff's lawyer contacted  
5 her, defendant effectively refused to take down the photos, instead blocking plaintiff's ability to  
6 view the photos on her social media account. The FAC recounts a statement, apparently made by  
7 defendant, that using unauthorized photographs had created "a huge mess" for her in the past,  
8 indicating that defendant knew the risks of using others' works without permission but continued  
9 to do it anyway. FAC, ¶ 18. Thus the statutory range of \$750 to \$150,000 per willfully infringed  
10 work is applicable in this case. While the total amount plaintiff seeks is arguably excessive, the  
11 court has discretion when awarding statutory damages and may grant a lesser award that will  
12 weigh in favor of granting default judgment.

13 4. *Factor Five: The Possibility of a Dispute Concerning Material Facts*

14 The facts of this case are relatively straightforward, and the court may assume the truth of  
15 well-pleaded facts in the complaint (except as to damages) following the clerk's entry of default.  
16 Thus, there is no likelihood that any genuine issue of material fact exists. See, e.g., Elektra  
17 Entm't Group Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal. 2005) ("Because all allegations in  
18 a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is  
19 no likelihood that any genuine issue of material fact exists"); accord Philip Morris USA, Inc., 219  
20 F.R.D. at 500; PepsiCo, Inc., 238 F. Supp. 2d at 1177. As such, the court concludes that the fifth  
21 Eitel factor favors a default judgment.

22 5. *Factor Six: Whether the Default Was Due to Excusable Neglect*

23 In this case, there is no indication in the record that defendant's default was due to  
24 excusable neglect. Despite having been properly served with the FAC, the request for entry of  
25 default, and the instant motion for default judgment, defendant failed to participate in this action  
26 after filing an answer to the original complaint in 2017. Defendant remained unresponsive after  
27 the entry of default against her, and after plaintiff filed the instant motion. Thus, the record  
28 suggests that defendant has not chosen not to defend herself in this action, and that the default did

1 not result from excusable neglect. Accordingly, this Eitel factor favors the entry of a default  
2 judgment.

3 6. *Factor Seven: The Strong Policy Underlying the Federal Rules of Civil*  
4 *Procedure Favoring Decisions on the Merits*

5 “Cases should be decided upon their merits whenever reasonably possible.” Eitel, 782  
6 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing  
7 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.  
8 PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslis, Inc. v. Naturemarket, Inc., 694 F.  
9 Supp. 2d 1039, 1061 (N.D. Cal. 2010). Accordingly, although the court is cognizant of the policy  
10 in favor of decisions on the merits—and consistent with existing policy would prefer that this  
11 case be resolved on the merits—that policy does not, by itself, preclude the entry of default  
12 judgment.

13 In sum, upon consideration of all the Eitel factors, the court concludes that plaintiff is  
14 entitled to a default judgment against defendant and recommends that such a default judgment be  
15 entered. All that remains is a determination of the specific relief to which plaintiff is entitled.

16 B. Terms of the Judgment to Be Entered

17 After determining that a party is entitled to entry of default judgment, the court must  
18 determine the terms of the judgment to be entered. Plaintiff’s motion for default judgment  
19 requests an award of statutory damages and injunctive relief, which were also requested in the  
20 complaint.<sup>2</sup> Each form of relief is addressed separately below.

21 1. Statutory Damages

22 In a claim for copyright infringement, a plaintiff may elect to seek either actual or  
23 statutory damages. 17 U.S.C. § 504. The statute provides for statutory damages for all  
24 infringements of a given work of not less than \$750.00 and not more than \$30,000, as the court

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26 <sup>2</sup> Although the FAC also sought an award of attorneys’ fees and costs, such relief is not requested  
27 in the motion for default judgment; thus the court does not evaluate whether such relief should be  
28 award. Moreover, in its proposed order submitted in conjunction with the motion for default  
judgment, plaintiff indicates that it “has elected to forego its claims for unfair competition [and]  
false advertising” as set forth in the FAC.

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

5 In determining the amount of statutory damages, courts are guided by “the nature of the  
6 copyright, the circumstances of the infringement and the like, ... but with the express qualification  
7 that in every case the assessment must be within the prescribed [maximum or minimum].” Peer  
8 Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990) (citing F.W. Woolworth  
9 Co. V. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952)). Courts in this district have  
10 previously looked to seven factors in evaluating whether a proposed award of statutory damages  
11 is just: (1) “the expenses saved and the profits reaped;” (2) “the revenues lost by the plaintiff;”  
12 (3) “the value of the copyright;” (4) “the deterrent effect on others besides the defendant;” (5)  
13 “whether the defendant’s conduct was innocent or willful;” (6) “whether a defendant has  
14 cooperated in providing particular records from which to assess the value of the infringing  
15 material produced;” and (7) “the potential for discouraging the defendant.” See, e.g. Microsoft  
16 Corp. v. Nop, 549 F. Supp. 2d 1233, 1237 (E.D. Cal. 2008).

17 Plaintiff’s request for \$12,700 damages per copyrighted photograph used without  
18 authorization is arguably within the range awarded by California district courts in similar  
19 circumstances. See Stross v. Redrhino Group, Inc., 2019 WL 1581393, \*3 (C.D. Cal. 2019)  
20 (awarding statutory damages of \$30,000 under 17 U.S.C. § 504(c) for defendant’s unauthorized  
21 use of one copyrighted photograph “in multiple posts on his website” in a “blatant case of  
22 copyright infringement”); Korzeniewski v. Gopackup, Inc., 2019 WL 316811, \*2 (C.D. Cal.  
23 2019) (awarding statutory damages of \$15,000 for defendant’s unauthorized use of one  
24 copyrighted photograph on its website and social media accounts); Stephen Wurth Photography,  
25 Inc. v. Wetpaint.com Inc., 2018 WL 5266861, \*6 (C.D. Cal. 2018) (awarding statutory damages  
26 of \$50,000, or 10,000 per infringed work, based on defendant’s unauthorized use of five  
27 copyrighted photographs to drive “significant attention and traffic to [its] website,” giving it a  
28 “substantial ill-gotten commercial advantage”); Kilina America, Inc. v. R. & R Goldman Assoc.,



1 Inc., 2018 WL 6984818, \*4 (C.D. Cal. 2018) (awarding \$30,000 statutory damages where  
2 “[d]efendant has infringed on plaintiff’s copyright and refuses to litigate its infringement such  
3 that it would be possible to calculate actual damages. Defendant has unlawfully sold clothing  
4 bearing Plaintiff’s design without obtaining a license of permission to use the design.”).

5 Here, due to the relative simplicity of Three Lakes’ Photographs, which functioned as a  
6 set of images showcasing plaintiff’s original jewelry rather than works of independent value and  
7 artistic merit, the court finds an award of \$12,700 per infringed work to be excessive. It is  
8 unclear what monetary value the images have on their own, or what amount they could be  
9 licensed for. While the FAC suggests that April 2017 should have been a high-profit month for  
10 plaintiff but was not, it does not directly link any lost profits to defendant’s infringement. (FAC,  
11 ¶ 12.) The FAC alleges that, after discovering defendant’s widespread unauthorized use of its  
12 photos, plaintiff “has essentially stopped publishing new photos of its designs, for fear that  
13 Defendant will misappropriate those as well.” (Id., ¶ 15.) While the FAC does not estimate a  
14 specific monetary loss to plaintiff due to defendant’s actions, this point is well-taken. Certainly,  
15 given defendant’s “blatant infringement” of the copyrighted images for commercial advantage,  
16 and the large number of works infringed, the award should be substantial so as to have a deterrent  
17 effect. The court also recognizes that defendant’s failure to participate in this lawsuit has  
18 deprived plaintiff of discovery with respect to defendant’s use of Three Lakes’ Photographs and  
19 potential profits reaped from such use.

20 Having considered the Microsoft factors, the undersigned finds a statutory award of  
21 \$5,000 per infringed work, or \$115,000, to be appropriate. That amount is sufficient to fairly  
22 compensate plaintiff, as well as to deter defendant and others from similar conduct, without being  
23 unduly punitive.<sup>3</sup>

## 24 2. Injunctive Relief

25 Plaintiff further requests that defendant be permanently enjoined from further  
26 unauthorized infringement of Three Lakes’ Photographs pursuant to 17 U.S.C. § 502.

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27 <sup>3</sup> The FAC also seeks post-judgment interest pursuant to 28 U.S.C. § 1961(a). This is addressed  
28 in the recommendation below.

1 The court may grant “temporary and final injunctions on such terms as it may deem  
2 reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). To obtain a  
3 permanent injunction, a plaintiff “must demonstrate: (1) that it has suffered an irreparable injury;  
4 (2) that remedies available at law, such as monetary damages, are inadequate to compensate for  
5 that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a  
6 remedy in equity is warranted; and (4) that the public interest would not be disserved by a  
7 permanent injunction.” eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

8 Here, plaintiff has shown that it suffered an irreparable injury for which remedies  
9 available at law are inadequate. Given defendant’s evasive past behavior and near-refusal to  
10 participate in this litigation, it appears likely that her infringement of Three Lakes’ Photographs  
11 would continue absent an injunction. Furthermore, considering the balance of hardships between  
12 plaintiff and defendant, a permanent injunction is warranted, because defendant would suffer no  
13 cognizable hardship from merely being prevented from engaging in unlawful activity, whereas  
14 plaintiff’s copyrights would be further infringed if defendant’s conduct is not enjoined. Finally,  
15 the public interest would undoubtedly be served by the enforcement of federal copyright law.

16 Therefore, the court awards plaintiff’s requested injunctive relief.

17 CONCLUSION

18 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

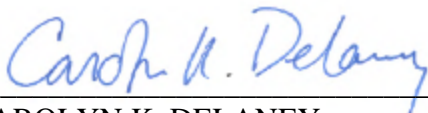
- 19 1. Plaintiff’s motion for default judgment (ECF No. 23) be GRANTED IN PART, in  
20 the terms outlined in this order.
- 21 2. Judgment be entered in plaintiff’s favor and against defendant.
- 22 3. Plaintiff be awarded statutory damages in the amount of \$115,000, with any  
23 postjudgment interest accruing after the entry of judgment in accordance with  
24 federal law.
- 25 4. Defendant be permanently enjoined from further unauthorized infringement of the  
26 23 copyrighted images at issue (Three Lakes’ Photographs);
- 27 5. The Clerk of Court be directed to vacate all dates and close this case.

28 /////

1 IT IS ALSO HEREBY ORDERED that plaintiff shall forthwith serve copies of this order  
2 and findings and recommendations on defendant by U.S. mail at her last-known addresses.

3 These findings and recommendations are submitted to the United States District Judge  
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
5 days after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Such a document should be captioned  
7 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
8 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
9 objections. The parties are advised that failure to file objections within the specified time may  
10 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th  
11 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

12 Dated: May 3, 2019

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15 CAROLYN K. DELANEY  
16 UNITED STATES MAGISTRATE JUDGE  
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