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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ADOBE SYSTEMS INCORPORATED,

No. C-14-2152 EMC

Plaintiff,

v.

SOFTWARE SPEEDY, *et al.*,

Defendants.

**ORDER GRANTING DEFENDANT
HARRISON’S MOTION FOR A MORE
DEFINITE STATEMENT AND
DENYING MOTION TO DISMISS**

(Docket No. 28)

I. INTRODUCTION

Pending before the Court is the motion to dismiss or, in the alternative, motion for more definite statement filed by Defendant Justin Earl Harrison. Mr. Harrison contends that Adobe has failed to plead sufficient facts to establish his personal liability for the copyright and trademark infringement claims alleged in this action. Mr. Harrison also requests that Adobe be ordered to provide a more definite statement which specifically lists the copyrights and trademarks that he is alleged to have infringed. The Court finds this matter suitable for disposition without oral argument and **VACATES** the hearing set for December 18, 2014. For the following reasons, Mr. Harrison’s motion to dismiss will be **DENIED** and the motion for more definite statement **GRANTED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2014, this Court dismissed a copyright and trademark infringement action brought by Adobe against 8 defendants. *See Adobe Systems Inc. v. Colorado Internet Services, LLC*, No. C-13-4193 EMC, 2014 WL 1007627 (N.D. Cal. Mar. 12, 2014). The Court found that Adobe had misjoined unrelated defendants who were alleged to have engaged in separate acts of

1 infringement. *See id.* at *4. Over the subsequent months, Adobe has filed a number of similar
2 individual suits against these, and other, defendants. *See Adobe Systems Inc. v. Softwaremedia.com*,
3 No. C14-2147 LHK; *Adobe Systems Inc. v. Bargain Software Shop*, No. C14-3721 EMC; *Adobe*
4 *Systems Inc. v. Software Tech*, C14-2140 RMW. The complaints in these actions are largely
5 identical, with slight changes to reflect the name of defendant involved in the suit and the underlying
6 sale forming the basis of the infringement claim.

7 This action is brought against Software Speedy – who is alleged to be a “business of
8 unknown status operating from Atlanta, Georgia” – and Justin Earl Harrison – who is alleged to be
9 Software Speedy’s owner. Compl. ¶¶ 2, 7. On November 2, 2013, Mr. Harrison, on behalf of
10 Software Speedy, entered into an agreement with Adobe to join Adobe’s “Partner Connection
11 Program Reseller Agreement” (“APCPRA”). Docket No. 34-3. In the registration, Mr. Harrison
12 listed his job role as “Sales Representative” and under the category “Additional Contact Type”
13 asserted “Lead Sales; Lead Marketing.” *Id.* at 1. Adobe argues that Defendants breached the
14 APCPRA by “(i) ordering Adobe Acrobat software products from unauthorized distributors; (ii)
15 offering for sale, selling, and distributing licenses for counterfeit and/or unauthorized original
16 equipment manufacturer software products; and (iii) offering for sale, selling, and distributing
17 electronic software downloads without a license.” Compl. ¶ 31.

18 Adobe further alleges that on October 2, 2013, an Adobe investigator purchased a purported
19 copy of Adobe Acrobat X Standard Full Retail Download Windows from Software speedy’s website
20 for \$119.99. *Id.* ¶ 33. Following the purchase, Software Speedy provided the investigator with
21 download installation instructions and a serial number to activate the software. *Id.* ¶ 34. Adobe
22 contends that it has now “confirmed that the serial number provided by Defendants for the
23 [electronic software downloads] was unauthorized OEM product not for resale.” *Id.* On the basis of
24 this single sale, Adobe asserts five causes of action against both Software Speedy and Mr. Harrison:
25 (1) Trademark infringement in violation of 15 U.S.C. § 1114; (2) false designation of origin/false or
26 misleading advertising in violation of 15 U.S.C. § 1125(a); (3) dilution in violation of 15 U.S.C. §
27 1125(c); (4) copyright infringement in violation of 17 U.S.C. § 501(a); and (5) a violation of
28 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200.

1 Software Speedy answered Adobe’s complaint on September 9, 2014. Docket No. 23. Mr.
2 Harrison, represented by the same counsel representing Software Speedy, filed the instant motion to
3 dismiss, or in the alternative for a more definite statement on September 15, 2014. Docket No. 28.

4 **III. DISCUSSION**

5 A. Legal Standard

6 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the
7 failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to
8 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*
9 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995). In considering such a motion, a court
10 must take all allegations of material fact as true and construe them in the light most favorable to the
11 nonmoving party, although “conclusory allegations of law and unwarranted inferences are
12 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
13 Cir.2009). While “a complaint need not contain detailed factual allegations . . . it must plead
14 “enough facts to state a claim to relief that is plausible on its face.” *Id.* “A claim has facial
15 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
16 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662
17 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is
18 not akin to a ‘probability requirement’ but it asks for more than sheer possibility that a defendant
19 acted unlawfully.” *Iqbal*, 129 S.Ct. at 1949.

20 B. Discussion

21 As detailed above, Software Speedy has answered Adobe’s complaint. Mr. Harrison moves
22 for dismissal on the grounds that the complaint fails to state a claim against him personally for
23 trademark or copyright infringement. Adobe responds that its complaint states a claim against Mr.
24 Harrison. First, it argues that to the extent that Software Speedy is an unincorporated entity, Mr.
25 Harrison is directly liable for its actions. Second, they argue that to the extent Software Speedy is a
26 corporation, Mr. Harrison can be held liable under an alter ego theory of liability. Finally, Adobe
27 contends that Mr. Harrison can still be held personally liable for his own specific tortious conduct,
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1 even if it was taken while in his role as a corporate officer. The Court addresses each argument in
2 turn.

3 1. Ascertaining Software Speedy’s Business Entity Form

4 The Court must begin by ascertaining what form of business entity Software Speedy actually
5 is. Unfortunately, the lawyering on this critical question leaves much to be desired. On one hand,
6 Adobe filed its complaint listing Software Speedy as a “Business Entity of Unknown Status.” At the
7 same time, the complaint contains a number of “alter ego” related allegations, including that Adobe
8 is “informed and believed” that “Defendant Software Speedy has failed to observe corporate
9 formalities required by law” – suggesting Adobe is alleging that Software Speedy is a corporation.
10 Compl. ¶ 5. Then, in its opposition to Mr. Harrison’s motion to dismiss, Adobe takes the position
11 that Software Speedy is an unincorporated entity and asserts, for the first time, that it has researched
12 corporate filings in every state and found no corporate registration for “Software Speedy.” Docket
13 No. 36, at 4.

14 On the other hand, counsel for Mr. Harrison and Software Speedy – presumably the
15 individual who could definitively answer this question – has failed to clearly articulate and support
16 Software Speedy’s business form. Counsel began Software Speedy’s Answer to the complaint by
17 stating: “Defendant SOFTWARE SPEEDY, a limited liability company hereby Answers Plaintiff
18 Adobe Systems, Inc.’s Complaint for Damages as follows.” Docket No. 23, at 2. In the instant
19 motion to dismiss, counsel makes vague references to Software Speedy being a “corporate entity,”
20 but fails to provide any declaration or judicially noticeable evidence (such as a statement of
21 incorporation filed with a secretary of state, etc.). Finally, in the reply in support of the motion to
22 dismiss, defense counsel finally asserts, in passing, that the reason Adobe “couldn’t find any
23 information regarding the named Defendant ‘Software Speedy’ is because that name is a DBA of the
24 entity, which Adobe’s counsel did locate – Technology Solutions Online, Ltd.” Docket No. 38, at 3.
25 This, of course, raises the question why defense counsel filed an answer – which is subject to
26 Federal Rule of Civil Procedure 11 strictures – asserting that his client was a limited liability
27 company. *See, e.g., Ruth v. Unifund CCR Partners*, 604 F.3d 908, 911 (6th Cir. 2010) (“The
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1 requirement that parties have a good-faith basis for their pleadings applies to answers every bit as
2 much as it does to counterclaims.”).

3 This case has been pending for seven months. There is no reason something as basic as a
4 defendant’s form of business entity should still be unclear – particularly where it bears directly on
5 the question of another defendant’s personal liability. Nonetheless, counsel for Software Speedy
6 and Mr. Harrison has now made an unambiguous assertion in a pleading signed pursuant to Rule 11
7 that Software Speeding is a d/b/a of a corporate entity – Technology Solutions Online, Ltd.¹
8 Accordingly, for purposes of the instant motion, the Court will examine Adobe’s complaint in light
9 of Technology Solutions Online Ltd’s apparent corporate form.

10 Within one week of the filing of this order, Software Speedy is **ORDERED** to file a
11 declaration with supporting documentation reflecting the existence of Technology Solutions Online,
12 Ltd. as well as its relationship to Software Speedy. Further, Software Speedy shall file an amended
13 answer which properly reflects its status.

14 2. Adobe Has Failed to Sufficiently Allege that Software Speedy Is Simply Mr.
15 Harrison’s Alter Ego

16 Adobe argues that even given the protections afforded by the corporate form, Mr. Harrison
17 may be held liable for Software Speedy’s obligations under the alter ego doctrine. The alter ego
18 doctrine provides that “when the corporate form is used to perpetrate a fraud, circumvent a statute,
19 or accomplish some other wrongful or inequitable purpose the courts will ignore the corporate entity
20 and deem the corporation’s acts to be those of the persons or organizations actually controlling the
21 corporation.” *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000).
22 Under California law, to pierce the corporate veil via an alter ego theory, a creditor must show “(1)
23 that there be such unity of interest and ownership that the separate personalities of the corporation
24 and the individual no longer exist and (2) that, if the acts are treated as those of the corporation
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27 ¹ According to the website of the Secretary of State for the State of Georgia, Technology
28 Solutions, Ltd. was registered as a corporation on October 10, 2012 by Mr. Harrison. *See, e.g.,*
Zamudio v. County of Los Angeles, No. CV 13-895 ABC (PJWx), 2013 WL 3119178, at *4 (C.D.
Cal. May 16, 2013) (taking judicial notice of “California Secretary of State Business Search”).

1 alone, an inequitable result will follow.” *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 606 (Cal. 1985)
2 (internal quotation marks and citation omitted).

3 There is no set “litmus test” for determining when the corporate veil will be pierced – the
4 above test depends on the “circumstances of each particular case.” *Baize v. Eastridge Companies*,
5 47 Cal. Rptr. 3d 763, 770 (2006). However, certain factors, such as “[u]ndercapitalization of the
6 business, commingling of corporate and personal funds, and failure to observe corporate formalities”
7 can leave an individual “vulnerable to a finding of alter ego liability.” *Toho-Towa Co., Ltd. v.*
8 *Morgan Creek Prods., Inc.*, 159 Cal. Rptr. 3d 469, 479 (Ct. App. 2013).

9 In its Complaint, Adobe makes a series of allegations pertaining to alter ego liability.
10 Specifically, the Complaint – like all of Adobe’s complaints in the similar actions it has filed –
11 generally allege:

12 3. Plaintiff is informed and believes that, at the time of its
13 creation, now, and at all times relevant to this Complaint, Defendant
14 Software Speedy did not and does not have sufficient funding to
15 assume responsibility for its foreseeable and actual liabilities.

16 4. Plaintiff is informed and believes that since the time of
17 its creation, now, and at all times relevant to this Complaint,
18 Defendant Software Speedy was undercapitalized.

19 5. Plaintiff is informed and believes that since the time of
20 its creation, now, and at all times relevant to this Complaint,
21 Defendant Software Speedy has failed to observe corporate formalities
22 required by law.

23 Compl. ¶¶ 3-5. These allegations fail to sufficiently allege that Mr. Harrison should be liable under
24 an alter ego theory or that Software Speedy’s corporate form should be disregarded. It is unclear
25 how Adobe could have pled, in good faith and on “information and belief” anything regarding
26 Technology Solutions Online Ltd/Software Speedy’s corporate practices since it did not even know
27 Software Speedy’s business entity form. In light of these circumstances, these conclusory
28 allegations do not establish a plausible claim of alter ego liability. *Cf. Holzli v. Deluca Enters.*, No.
11-06148(JBS/KMW), 2012 WL 983693 (D.N.J. Mar. 21, 2012) (stating that “bare-boned
allegations of undercapitalization and common control and/or management, standing alone, do not
rise to the level of plausibility required to survive a 12(b)(6) motion” and that “parroting of the
alter-ego factors alone is insufficient to satisfy the required pleading standards”).

1 The Court is sympathetic to Adobe’s arguments that facts relevant to proving an alter ego
2 claim are frequently not publically available and that discovery is necessary on this point. However,
3 under *Iqbal*, Adobe may not simply rely on legal conclusions and boilerplate allegations in bringing
4 causes of action against a corporate officer, at least where the plaintiff appears to know nothing
5 about the defendant’s form of business. Under these circumstances, Adobe must present *some*
6 factual allegations from which it may be plausibly inferred that the alter ego allegations are true.

7 The Court notes that Software Speedy has answered the complaint and will be subject to
8 discovery – including discovery into its corporate form. Should discovery reveal a basis for
9 asserting an alter ego claim against Mr. Harrison, Adobe may seek leave to amend its complaint to
10 assert such a claim.

11 3. Adobe Has Adequately Alleged a Basis for Holding Mr. Harrison Personally Liable

12 Even where alter ego liability does not exist, a corporate officer or director remains
13 “personally liable for all torts which he authorizes or directs or in which he participates,
14 notwithstanding that he acted as an agent of the corporation and not on his own behalf.” *Id.* at 1021
15 (quoting *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852
16 (N.D. Cal. 1979)). In *Committee for Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 914 (9th Cir. 1996),
17 the Ninth Circuit recognized the “applicability of the principle to trademark infringement generally.”
18 *Id.* at 823-24. ““Personal liability on the part of corporate officers have typically involved instances
19 where the defendant was the guiding spirit behind the wrongful conduct, or the central figure in the
20 challenged corporate activity.” *Roylance v. Carney*, No. 5:13-cv-04258-PSG, 2014 WL 1652440,
21 at *3 (N.D. Cal. Apr. 23, 2014) (quoting *j2 Global Commc’ns, Inc. v. Blue Jay, Inc.*, No. 4:08-cv-
22 4254-PJH, 2009 WL 29905, at *5 (N.D. Cal. Jan. 5, 2009)).

23 Here, the complaint (and attached exhibits) alleges that Mr. Harrison owns Software Speedy.
24 Compl. ¶ 7. Additionally, in filling out Adobe’s APCPRA application, Mr. Harrison allegedly listed
25 himself as a “sales representative” and that the application also listed “Lead Sales; Lead Marketing”
26 under the “Additional Contact Type” field. *Id.*, Ex. C. As to the alleged infringing conduct at issue
27 in this case, Adobe alleges that “Defendants are not authorized distributors or resellers of [electronic
28 software downloads] of Plaintiff’s software products.” *Id.* ¶ 32. Nonetheless, it is alleged that

1 Software Speedy sold a download copy of Adobe Acrobat X Standard and used an unauthorized
2 OEM serial number. *Id.* ¶¶ 32, 35.

3 While close, the Court finds that Adobe has adequately alleged, for purposes of the pleading
4 stage, Mr. Harrison’s personal involvement in the alleged infringement. It is alleged that Software
5 Speedy’s very sale of an electronic download copy of Adobe’s software with an OEM key
6 constitutes infringement. Insofar as Mr. Harrison is alleged to be owner and lead marketing and lead
7 sales representative of the company, there is a plausible basis for concluding that he participated,
8 authorized or directed the challenged activity involved in this case. Accordingly, Mr. Harrison’s
9 motion to dismiss is **DENIED**.

10 C. Mr. Harrison’s Motion for a More Definite Statement Will Be Granted

11 In the alternative, Mr. Harrison has moved for a more definite statement under Rule 12(e).
12 He argues that Adobe has identified “over one thousand (1,000) separate marks in its Exhibits to the
13 Complaint.” Docket No. 29, at 10. He argues that “not all of these marks could be subject to the
14 claims” asserted in this action as they “relate to software not alleged to have been sold by any of the
15 Defendants.” *Id.* Accordingly, he seeks to have Adobe “clearly identify, within reasonable
16 measures, what the Defendants are alleged to have violated.” *Id.*

17 “A Rule 12(e) motion for more definite statement is disfavored and is proper only if the
18 complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted,
19 meaning the complaint is so vague that the defendant cannot begin to frame a response.” *Craigslit,*
20 *Inc. v. Autoposterpro, Inc.*, No. CV 08 05069 SBA, 2009 WL 890896, at *4 (N.D. Cal. Mar. 31,
21 2009). Here, defense counsel has already framed a response in the form of Software Speedy’s
22 answer, thus undercutting any contention that the complaint is “too vague.”

23 Nonetheless, “[m]erely listing a plurality of marks which a trademark holder has acquired . . .
24 is not enough to put a party on notice of trademark infringement, nor is it appropriate for a party to
25 make the blanket statement that the accused infringers ‘have infringed its registered and unregistered
26 marks.’” *Valoro v. Valero Energy Corp.*, No. 14-21694-CIV, 2014 WL 3920035, at *4 (S.D. Fla.
27 Aug. 11, 2014). Thus, in *Monster Cable Products v. Euroflex S.R.L.*, 642 F. Supp. 2d 1001 (N.D.
28 Cal. 2009), the plaintiff had listed three marks that it had acquired and then alleged that defendants

1 had “infringed its registered and unregistered marks.” *Id.* at 1010. While the court denied
2 defendant’s motion to dismiss, it granted the Rule 12(e) motion, ordering the plaintiff to “identify[]
3 each of its marks . . . that have allegedly been infringed.” *Id.*; *see also Louisiana Pacific Corp. v.*
4 *James Hardie Bldg. Prods., Inc.*, No. C12-3433 SC, 2012 WL 5520394 (N.D. Cal. Nov. 14, 2012)
5 (granting motion to dismiss to the extent it was “predicated on Defendant’s alleged infringement of
6 unidentified marks” and ordering plaintiff to “amend its Complaint to specifically identify each and
7 every mark that Defendant allegedly infringed”)

8 Here, Adobe has alleged a single infringing sale of Adobe Acrobat X Standard. Compl. ¶ 33.
9 Nonetheless, as detailed above, it also makes a much broader and more general allegation that
10 Defendants’ actions infringe on Plaintiff’s “trademarks and copyrights.” *Id.* ¶ 36. Further, Exhibit
11 A, a “non-exhaustive list of Plaintiff’s trademark registrations,” contains numerous marks and is
12 referenced in Adobe’s first cause of action. *Id.* ¶ 42. A far longer “non-exhaustive list” of Adobe’s
13 copyrights is referenced in Adobe’s fourth cause of action. *Id.* ¶ 69. Such general references to all
14 of Adobe’s marks and a general allegation that Defendants have infringed its “marks” or
15 “copyrights” is insufficient. *See, e.g., id.* (“Without permission, Defendants intentionally and
16 knowingly reproduced, counterfeited, copied, displayed, and/or manufactured Plaintiff’s protected
17 works by offering, advertising, promoting, retailing, selling, distributing counterfeit Adobe Acrobat
18 software which are at a minimum substantially similar to plaintiff’s copyright protected works (*see*
19 non-exhaustive list of Plaintiff’s copyright registrations attached hereto as **Exhibit B**).”).

20 Mr. Harrison is entitled to clear notice of the alleged trademarks or copyrights he is alleged
21 to have infringed, particularly in light of the sheer number of marks Adobe has referenced by
22 incorporation in the complaint. *See Lincoln Labs., Inc. v. Savage Labs., Inc.*, 26 F.R.D. 141, 143 (D.
23 Del. 1960) (“[D]efendant’s motion requests identification of each of the plaintiff’s trade names and
24 trademarks alleged to have been copied by the defendant. This is a request proper under a 12(e)
25 motion. . . . [I]t is necessary for defendant, in the instant case, to be informed of the specific trade
26 names and trademarks which are claimed to have been infringed, in order for defendant to make a
27 responsive pleading. Defendant should not be required to guess which of the plaintiff’s 60
28 trademarks he is supposed to be infringing . . .”). Accordingly, Mr. Harrison’s Rule 12(e) motion

1 is **GRANTED** and Adobe is **ORDERED** to amend its complaint to expressly list the trademarks
2 and copyrights it has a good faith basis for believing Defendants have infringed. To the extent that
3 further acts of alleged infringement come to light during discovery, Adobe may move to amend its
4 complaint to assert those allegedly infringed marks and copyrights as well.


5 **IV. CONCLUSION**

6 For the foregoing reasons, Mr. Harrison's motion to dismiss is **DENIED**. The motion for
7 more definite statement is **GRANTED**. Adobe shall file an amended complaint which expressly
8 alleges each mark or copyright that they believe Defendants have infringed. This amended
9 complaint shall be filed within thirty days of this order.

10 This order disposes of Docket No. 28.

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12 IT IS SO ORDERED.

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14 Dated: December 16, 2014

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17 EDWARD M. CHEN
18 United States District Judge
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