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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

CROSSFIT, INC.,  
Plaintiff,  
v.  
ANDRES DEL CUETO DAVALOS,  
Defendant.

Case No. 14-cv-00725-BLF

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR DEFAULT JUDGMENT  
AGAINST DEFENDANT ANDRES DEL  
CUETO DAVALOS**

[Re: ECF 40]

Plaintiff CrossFit, Inc. (“CrossFit”) moves for default judgment against the only remaining defendant in this case, Andres Del Cueto Davalos (“Del Cueto”). The Court has considered CrossFit’s briefing and evidence as well as the oral argument that CrossFit’s counsel presented at the hearing on February 23, 2017. The motion is GRANTED for the reasons discussed below.

**I. BACKGROUND**

CrossFit’s complaint alleges the following facts: CrossFit is a Delaware corporation which provides personal fitness services and products. Compl. ¶¶ 2-3, ECF 1. CrossFit certifies personal trainers, coordinates an annual worldwide fitness competition known as the “CrossFit Games,” disseminates fitness and nutrition information through the “CrossFit Journal,” and sells CrossFit-branded merchandise through the “CrossFit Store” on the CrossFit website. *Id.* ¶ 3. CrossFit has used the mark “CrossFit” in commerce since at least 1985 and the mark has been registered with the United States Patent and Trademark Office since at least 2005. *Id.* ¶ 18.

CrossFit licenses “affiliates” to operate individual CrossFit-branded programs. Compl. ¶ 24. A CrossFit affiliate offering the CrossFit program refers to its physical location as a “box.” *Id.* ¶ 20. CrossFit takes many precautions to ensure that services provided by affiliates are of the highest quality, such as requiring all CrossFit trainers to obtain certification through a CrossFit certification seminar and limiting each affiliate to operating a single CrossFit program to ensure the quality of hands-on involvement by the owner. *Id.* ¶¶ 26-27. CrossFit’s rule is “one trainer,

1 one box.” *Id.* ¶ 26.

2 In February 2010, Defendant Del Cueto signed an affiliate agreement granting him  
3 authority to operate a CrossFit program at one location in Mexico. Compl., ¶ 30-31. Del Cueto  
4 chose the affiliate name “CrossFit Alfa” and he was granted permission to register the domain  
5 name www.crossfitalfa.com. *Id.* Del Cueto renewed his affiliate agreement annually through  
6 2014. *Id.* ¶ 32.

7 In July 2011, Del Cueto caused his agent, Alfa Extreme Fitness S.A. De C.V. (“Alfa  
8 Extreme Fitness”), to register the domain name www.crossfitbeta.com. *Id.* ¶ 35. At an unknown  
9 date, Del Cueto and Alfa Extreme Fitness caused the domain names www.crossfitalfa.com and  
10 www.crossfitbeta.com to redirect website visitors to a third website, www.wodbox.com, in order  
11 to siphon CrossFit consumers to their own “Wodbox Training Centers.” *Id.* ¶¶ 36-40. Del Cueto  
12 and Alfa Extreme Fitness now operate twenty-five unauthorized “Wodbox Training Centers”  
13 across Mexico, each holding itself out to be related to CrossFit. *Id.* ¶ 39. Del Cueto and Alfa  
14 Extreme Fitness use the CrossFit marks and brand to promote their “Wodbox” businesses. *Id.* ¶  
15 40.

16 CrossFit filed this lawsuit against Del Cueto and Alfa Extreme Fitness on February 14,  
17 2014, but it subsequently dismissed Alfa Extreme Fitness, leaving Del Cueto the only remaining  
18 defendant. Compl., ECF 1; Notice of Voluntary Dismissal, ECF 41. The complaint asserts two  
19 claims against Del Cueto, the first for breach of contract and the second for violation of the  
20 Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. § 1125(d). Del Cueto did not  
21 respond to the complaint and CrossFit obtained a Clerk’s entry of default on September 21, 2016.  
22 Clerk’s Notice of Entry of Default, ECF 39. CrossFit now seeks default judgment.

23 **II. LEGAL STANDARD**

24 Pursuant to Federal Rule of Civil Procedure 55, a court may grant default judgment against  
25 a defendant who has failed to plead or otherwise defend an action. Fed. R. Civ. P. 55(b)(2).  
26 “When entry of judgment is sought against a party who has failed to plead or otherwise defend, a  
27 district court has an affirmative duty to look into its jurisdiction over both the subject matter and  
28 the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). The district court also must “assess the

1 adequacy of the service of process on the party against whom default is requested.” *DFSB*  
2 *Kolletive Co., Ltd. v. Bourne*, 897 F. Supp. 2d 871, 877 (N.D. Cal. 2012) (internal quotation  
3 marks and citation omitted).

4 Even when those requirements are satisfied, the plaintiff is not automatically entitled to a  
5 default judgment, and “[t]he district court’s decision whether to enter a default judgment is a  
6 discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising that  
7 discretion, this Court must consider the following seven factors articulated by the Ninth Circuit in  
8 *Eitel v. McCool* (“*Eitel* factors”): “(1) the possibility of prejudice to the plaintiff, (2) the merits of  
9 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in  
10 the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was  
11 due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil  
12 Procedure favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir.  
13 1986).

14 In evaluating the *Eitel* factors, well-pled allegations in the complaint are taken as true,  
15 except those regarding damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th  
16 Cir. 1987). The Court may, in its discretion, consider evidence submitted with a motion for  
17 default judgment to determine damages. *Id.*

18 **III. DISCUSSION**

19 **A. Service**

20 Federal Rule of Civil Procedure 4(f) provides that service on an individual in a foreign  
21 country is adequate if made “by any internationally agreed means of service that is reasonably  
22 calculated to give notice, such as those authorized by the Hague Convention on the Service  
23 Abroad of Judicial and Extrajudicial Documents.” Fed. R. Civ. P. 4(f)(1). CrossFit submits  
24 evidence that the Judicial Branch of the State of Mexico certified that service of process was  
25 effected on Del Cueto in accordance with the Hague Convention on January 28, 2016. Dussealt  
26 Decl. ¶ 7, ECF 40-1; CrossFit, Inc.’s Certification of Service of Process, ECF 32. “[A] plaintiff’s  
27 proof of service constitutes prima facie evidence of valid service which can only be overcome by  
28 strong and convincing evidence.” *Chassin Holdings Corp. v. Formula VC Ltd.*, No. 15-CV-

1 02294-EMC, 2017 WL 66873, at \*5 (N.D. Cal. Jan. 6, 2017) (internal quotation marks and  
2 citation omitted). The Court is satisfied that service of process was adequate with respect to Del  
3 Cueto.

4 **B. Jurisdiction**

5 The Court next turns to the issues of subject matter jurisdiction and personal jurisdiction.  
6 Claim 2 asserts violations of the ACPA, which imposes liability on persons who register, traffic,  
7 or use domain names with a bad faith intent to profit from the trademark of another. The Court  
8 therefore has subject matter jurisdiction under both 28 U.S.C. §1331, conferring subject matter  
9 jurisdiction over civil actions arising under federal law, and 28 U.S.C. § 1338, conferring subject  
10 matter jurisdiction over civil actions arising under federal statutes relating to trademarks.

11 The Court also has personal jurisdiction over Del Cueto. Claim 1 asserts breach of the  
12 affiliate agreement between CrossFit and Del Cueto, which provides in relevant part that “[a]ll  
13 disputes arising out of this Agreement will be subject to the exclusive jurisdiction of the state  
14 courts located in Santa Cruz County, California, and the federal courts located in Santa Clara  
15 County, California, and each party hereby consents to the personal jurisdiction thereof.” CrossFit  
16 Affiliate Agreement ¶ 11.5, Exh. B to Compl., ECF 1. This language is sufficient to confer  
17 personal jurisdiction here. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)  
18 (“For example, particularly in the commercial context, parties frequently stipulate in advance to  
19 submit their controversies for resolution within a particular jurisdiction. . . . Where such forum-  
20 selection provisions have been obtained through ‘freely negotiated’ agreements and are not  
21 ‘unreasonable and unjust,’ their enforcement does not offend due process.”) (internal citations  
22 omitted); *Calix, Inc. v. Alfa Consult, S.A.*, No. 15-CV-00981-JCS, 2015 WL 3902918, at \*3 (N.D.  
23 Cal. June 24, 2015) (“A contract’s forum selection clause is by itself sufficient to establish consent  
24 and confer personal jurisdiction.”).

25 **C. Eitel Factors**

26 Turning to the first of the *Eitel* factors, prejudice to the plaintiff, CrossFit would have no  
27 recourse absent default judgment because Del Cueto has elected not to respond to the complaint,  
28 thereby denying CrossFit a hearing on its claims.

1           The second and third factors, addressing the merits of the plaintiff’s claims and the  
2 sufficiency of the complaint, are satisfied if the plaintiff asserts claims upon which he may  
3 recover. *IO Group, Inc. v. Jordon*, 708 F. Supp. 2d 989, 997 (N.D. Cal. 2010). CrossFit’s  
4 complaint alleges facts adequate to state claims for both breach of the affiliate agreement and  
5 violation of the ACPA. *See* Compl. ¶¶ 49-54 (breach of contract), ¶¶ 55-59 (ACPA).

6           With respect to the fourth factor, the sum of money at stake, CrossFit seeks \$200,000 in  
7 statutory damages under the ACPA as well as costs and reasonable attorneys’ fees. Among the  
8 remedies available to a plaintiff who establishes a violation of the ACPA are statutory damages in  
9 an amount not less than \$1,000 and not more than \$100,000 per domain name, an award of costs,  
10 and, in exceptional cases, an award of reasonable attorneys’ fees. 15 U.S.C. §§ 1117(a), (d).  
11 CrossFit requests that maximum statutory damages of \$100,000 for each of the two domain names  
12 used by Del Cueto which incorporated the “CrossFit” mark, [www.crossfitalfa.com](http://www.crossfitalfa.com) and  
13 [www.crossfitbeta.com](http://www.crossfitbeta.com). CrossFit argues that the maximum statutory damages are warranted here  
14 because Del Cueto’s conduct was particularly egregious. The facts alleged in the complaint,  
15 which are taken as true for purposes of this motion, establish that Del Cueto used domain names  
16 incorporating the correctly spelled “CrossFit” mark to redirect consumers to another website for  
17 the purpose of competing directly with CrossFit when Del Cueto was under contract to further the  
18 CrossFit brand. Compl. ¶¶ 36-45. Courts in this district have held that domain names  
19 incorporating the plaintiff’s correctly spelled mark are more malicious than domain names that  
20 misspell the mark or incorporate the mark alongside misspelled words, *see Facebook, Inc. v.*  
21 *Banana Ads LLC*, No. CV 11-03619-YGR (KAW), 2013 WL 1873289, at \*16 (N.D. Cal. Apr. 30,  
22 2013), and that maximum statutory damages are appropriate when the defendant willfully used the  
23 plaintiff’s trademarks to compete with the plaintiff, *see eAdGear, Inc. v. Liu*, No. CV–11–05398  
24 JCS, 2012 WL 2367805, at \*19 (N.D. Cal. June 21, 2012). This Court concludes that Del Cueto’s  
25 conduct likewise warrants imposition of the maximum statutory damages for each of the two  
26 domain names at issue.

27           CrossFit is entitled to recover costs of suit under the ACPA. *See* 15 U.S.C. § 1117(a) (a  
28 plaintiff establishing violation of 15 U.S.C. § 1125(d) may recover the costs of the action). The

1 Court also concludes that this is an exceptional case warranting an award of attorneys’ fees. *See*  
2 *id.* (“The court in exceptional cases may award reasonable attorney fees to the prevailing party.”).  
3 “A trademark case is exceptional where the district court finds that the defendant acted  
4 maliciously, fraudulently, deliberately, or willfully.” *Watec Co. v. Liu*, 403 F.3d 645, 656 (9th  
5 Cir. 2005). Del Cueto entered into a contract with CrossFit, which he renewed for several years  
6 running, which granted him authority to use the CrossFit mark consistently with specific  
7 requirements intended to maintain the integrity of the CrossFit brand. *See* CrossFit Affiliate  
8 Agreement, Exh. B to Compl., ECF 1. Instead, Del Cueto used domain names incorporating the  
9 CrossFit mark to redirect consumers seeking an authentic CrossFit program to Del Cueto’s  
10 unauthorized and directly competing programs. Compl. ¶¶ 36-46, ECF 1. Del Cueto’s malicious  
11 and willful misuse of the CrossFit mark renders this an exceptional case within the meaning of 15  
12 U.S.C. § 1117(a). CrossFit therefore will be granted an opportunity to present evidence of its  
13 costs and attorneys’ fees after entry of default judgment.

14 The fifth factor, the possibility of a dispute regarding material facts, and the sixth factor,  
15 whether the default was due to excusable neglect, also weigh in favor of default judgment. Del  
16 Cueto has made no effort to dispute the facts alleged in the complaint despite being served with  
17 the action approximately a year ago. CrossFit additionally emailed a copy of the present motion to  
18 Del Cueto at his last known email addresses despite the fact that no notice of the motion was  
19 required. *See* Fed. R. Civ. P. 55(b)(2) (requiring notice of motion for default judgment only when  
20 the party against whom default judgment is sought has appeared in the case). Nothing in the  
21 record suggests that Del Cueto’s use of the domain names at issue was the result of excusable  
22 neglect rather than intentional misconduct.

23 The seventh and final factor, the strong public policy favoring decisions on the merits,  
24 does not preclude default judgment when the other *Eitel* factors favor it. *PepsiCo, Inc. v.*  
25 *California Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Here, Del Cueto’s failure to  
26 answer the complaint “makes a decision on the merits impractical, if not impossible.” *Id.*

27 Having concluded that all but the last of the *Eitel* factors favor default judgment, the Court  
28 GRANTS CrossFit’s motion.

1           **D.     Injunctive Relief**

2           In addition to the statutory damages, costs, and attorneys’ fees discussed above, CrossFit  
3 requests that the Court permanently enjoin Del Cueto from using the CrossFit mark or any variant  
4 thereof, and to cooperate in transferring the domain names www.crossfitalfa.com and  
5 www.crossfitbeta.com to CrossFit.

6           This Court has express statutory “power to grant injunctions, according to the principles of  
7 equity and upon such terms as the court may deem reasonable” to prevent a violation of the  
8 ACPA. *See* 15 U.S.C. § 1116(a). “Injunctive relief is the remedy of choice for trademark and  
9 unfair competition cases, since there is no adequate remedy at law for the injury caused by a  
10 defendant’s continuing infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175,  
11 1180 (9th Cir. 1988). In order to obtain permanent injunctive relief, “[a] plaintiff must  
12 demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such  
13 as monetary damages, are inadequate to compensate for that injury; (3) that, considering the  
14 balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4)  
15 that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v.*  
16 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

17           With respect to the first factor, irreparable injury, CrossFit has alleged that Del Cueto is  
18 using the domain names www.crossfitalfa.com and www.crossfitbeta.com to divert consumers  
19 seeking a CrossFit program to Del Cueto’s competing programs. *See* Compl. ¶¶ 36-39. Del  
20 Cueto’s unauthorized use of the CrossFit mark in the domain names is likely to mislead consumers  
21 into believing that Del Cueto’s competing programs are affiliated with CrossFit. *See id.* ¶¶ 43-44.  
22 The fitness programs offered by Del Cueto differ materially from genuine CrossFit programs and  
23 CrossFit cannot maintain its customary quality control procedures for ensuring proper training at  
24 Del Cueto’s programs. *See id.* ¶¶ 45-46. These allegations give rise to a reasonable inference that  
25 Del Cueto’s conduct is confusing consumers and otherwise damaging goodwill in the CrossFit  
26 brand. “[I]ntangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify  
27 as irreparable harm.” *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d  
28 597, 603 (9th Cir. 1991).

1 As to the second factor, the adequacy of remedies at law, monetary damages are  
2 inadequate to compensate CrossFit for ongoing loss of customers and goodwill. *See Active Sports*  
3 *Lifestyle USA, LLC v. Old Navy, LLC*, No. SACV 12-572 JVS EX, 2014 WL 1246497, at \*3 (C.D.  
4 Cal. Mar. 21, 2014) (“[L]oss of goodwill and damage to reputation are not easily measured, often  
5 rendering money damages inadequate.”).

6 Turning to the third factor, balance of hardships, it is not clear whether depriving Del  
7 Cueto of use of the subject domain names would injure his business. However, Del Cueto does  
8 not have a legal right to use the domain names in the manner described in the complaint, and  
9 permitting him to do so would cause CrossFit injury in the form of customer confusion and loss of  
10 goodwill. The Court thus concludes that this factor weighs in favor of granting the requested  
11 injunctive relief.

12 With respect to the fourth and final factor, the public interest, “[i]n the trademark context,  
13 the public interest is usually the right of the public not to be deceived or confused.” *Century 21*  
14 *Real Estate*, 2011 WL 221651, at \*13.

15 After considering all of these factors, the Court concludes the requested injunctive relief is  
16 appropriate in this case.

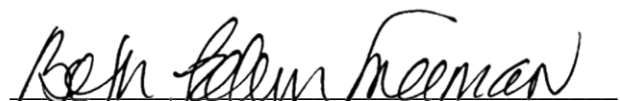
17 **E. Proposed Default Judgment Submitted by CrossFit**

18 CrossFit has submitted a Proposed Default Judgment that generally is consistent with the  
19 present order. However, the Court finds paragraph 3(e) of the Proposed Default Judgment,  
20 prohibiting Del Cueto from “[o]therwise competing unfairly with CrossFit in any manner,” to be  
21 overly broad. *See* Proposed Default Judgment, ECF 40-13. Accordingly, the Court will omit that  
22 language before signing CrossFit’s Proposed Default Judgment.

23 **IV. ORDER**

24 CrossFit’s motion for default judgment is GRANTED.

25  
26 Dated: February 24, 2017

  
BETH LABSON FREEMAN  
United States District Judge

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