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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADOBE SYSTEMS INCORPORATED,

Plaintiff,

v.

BERNARD NWUBAH,

Defendant.

Case No. 18-CV-06063-LHK

**ORDER GRANTING MOTION FOR
DEFAULT JUDGMENT**

Re: Dkt. No. 45

Before the Court is Plaintiff Adobe Systems Incorporated's ("Plaintiff") motion for default judgment. ECF No. 45. Having considered the filings of Plaintiff, the relevant law, and the record in the instant case, the Court GRANTS Plaintiff's motion for default judgment.

I. BACKGROUND

A. Factual Background

Plaintiff is a Delaware corporation with a principal place of business in San Jose, California. ECF No. 1 ("Compl.") ¶ 1. Defendant Bernard Nwubah ("Defendant") is an individual who resides in New Orleans, Louisiana. Id. ¶ 2. Defendant does business under the names "Bright Optics" and "Bright Optics 544." Id. Plaintiff alleges that ten Doe Defendants also serve as employees and agents of Defendant. Id. ¶ 4.

1 Plaintiff develops and distributes computer software (collectively, “Adobe-Branded
2 Software”). Id. ¶ 12. In connection with Plaintiff’s business, Plaintiff owns numerous trademarks
3 that Plaintiff uses to market and sell software. Id. ¶ 17. Of relevance to the instant case, Plaintiff
4 has registered the following six word and design marks, which Plaintiff uses in connection with
5 Plaintiff’s sale of computer software programs: ADOBE® (USPTO Reg. No. 1,475,793), A
6 ADOBE® (USPTO Reg. No. 1,901,149), A® (USPTO Reg. Nos. 1,852,943 and 2,081,343), and
7 ACROBAT® (USPTO Reg. Nos. 1,833,219 and 3,652,382). Id. Plaintiff has also secured
8 copyright registrations for various versions of software, such as Adobe Acrobat X Pro (TX 7-358-
9 035) and Adobe Acrobat XI Pro (TX 7-624-519), among others, with the United States Copyright
10 Office. Id. ¶ 18.

11 Plaintiff alleges that Defendant advertised and sold counterfeit Adobe-Branded Software
12 through numerous internet sales platforms. Id. ¶ 22. For example, Plaintiff alleges that Defendant
13 used www.ebay.com (“eBay”) to sell counterfeit Adobe-Branded Software through numerous
14 seller IDs, such as “wal4732,” “bernarnwuba_0,” “jbiggs2me_4,” and others. Id. Plaintiff asserts
15 that when Defendant conducted sales of counterfeit Adobe-Branded Software through eBay,
16 Defendant utilized the payment platform PayPal, Inc. (“PayPal”). Id. ¶ 23.

17 Plaintiff alleges that Defendant also sold counterfeit Adobe-Branded Software through
18 other online sales platforms, such as the ones located at www.amazon.com (“Amazon”),
19 www.bonanza.com (“Bonanza”), www.dealscube.com (“dealsCube”), and www.toucanddeal.com
20 (“Toucan Deal”). Id. ¶ 24. Defendant purportedly used a number of seller IDs to sell Adobe-
21 Branded Software on these platforms, such as “sambiggs,” “Top Shop,” “Bright Optics,” “gregla,”
22 “Bcnwubah,” “Lashop112,” “lashop,” “lagreg,” and “lashopster,” among others. Id.

23 Plaintiff alleges that Plaintiff regularly investigates the sale of counterfeit Adobe-Branded
24 Software on the foregoing platforms. Id. ¶ 22. In the course of these investigation efforts,
25 Plaintiff alleges that Plaintiff made eight “evidentiary buys” from Defendant, the details of which
26 are outlined below.

27 On or about March 1, 2016, Plaintiff purchased a purported “Adobe Acrobat X Pro Full
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1 Version for Windows” from Defendant’s eBay account “wal4732” for a cost of \$88.99. Id. ¶ 27.
2 Payment was made through PayPal to the email address “pblorange@yahoo.com” identified in
3 the PayPal receipt as “Pablo Orange.” Id. On or about March 3, 2016, Plaintiff received a
4 shipment pursuant to this order with a return address of “Bright Optics, P.O. Box 870662, New
5 Orleans, LA 70187.” Id. The shipment contained a copy of software that purported to be ADOBE
6 ACROBAT X PRO© contained in packaging virtually identical to Plaintiff’s packaging, complete
7 with Plaintiff’s trademarks and copyrights. Id. Plaintiff confirmed that the item provided by
8 Defendant contained a counterfeit copy of ADOBE ACROBAT X PRO©. Id. ¶ 28. Plaintiff also
9 confirmed that the disc and packaging were counterfeit and had not been manufactured or
10 authorized for manufactured by Plaintiff. Id. Moreover, the serial number affixed to the product
11 was counterfeit and would not decode. Id.

12 On July 25, 2016, Plaintiff mailed a cease-and-desist letter to Defendant at the return
13 address identified in the aforementioned package. Id. ¶ 29. Plaintiff received no response. Id.
14 When Plaintiff sent follow-up correspondences to Defendant via email on August 22, 2016, and
15 September 6, 2016, Plaintiff again received no response. Id.

16 On or about June 7, 2017, Plaintiff purchased a purported “Adobe Acrobat XI Pro Full
17 Version 2PCs for Windows Digital/Download with Updates” from Defendant’s Bonanza account
18 “sambiggs” for a cost of \$45.00. Id. ¶ 30. Payment was made via Amazon Pay, and the Bonanza
19 receipt identified “bcnwubah@ymail.com” as the seller. Id. On or about that same date, Plaintiff
20 received an email from the seller through Bonanza that provided a serial number and a link to a
21 download of software that purported to be ADOBE ACROBAT XI PRO©. Id. Plaintiff
22 confirmed that the file downloaded from the link contained a counterfeit copy of ADOBE
23 ACROBAT XI PRO©. Id. ¶ 31. Moreover, the serial number provided by Defendant was
24 counterfeit. Id.

25 On July 7, 2017, Plaintiff mailed Defendant another cease-and-desist letter, this time to
26 Defendant’s residence. Id. ¶ 32. Plaintiff received no response. Id. Plaintiff sent follow-up
27 correspondences to Defendant via email on August 1, 2018 and August 16, 2018. Id.

1 On or about August 10, 2017, Plaintiff purchased a purported “Adobe Acrobat XI Pro Full
2 Version 2PCs for Windows with Updates Download” from Defendant’s Bonanza account “gregla”
3 for a cost of \$35.00. Id. ¶ 34. On or about that same date, on August 10, 2017, Plaintiff received
4 an email from Defendant through Bonanza that contained a serial number and a link to download
5 the software that purported to be ADOBE ACROBAT XI PRO©. Id. Plaintiff then confirmed
6 that the file contained a counterfeit copy of ADOBE ACROBAT XI PRO©. Id. ¶ 35. Moreover,
7 the serial number provided by Defendant was counterfeit. Id.

8 Plaintiff sent a third cease-and-desist letter to Defendant via email on August 30, 2017. Id.
9 ¶ 36. Plaintiff sent follow-up emails on September 25, 2017 and October 9, 2017. Id. Plaintiff
10 received no response. Id.

11 On or about October 12, 2017, Plaintiff purchased a purported “Adobe Acrobat Xi Pro Full
12 Version for Windows 3pc with Updates!!” from Defendant’s dealsCube account “Bcnwubah” for
13 a cost of \$30.00. Id. ¶ 37. Payment was made through dealsCube, which identified the seller on
14 the invoice as “Bright Optics, PO Box 870612, New orleans [sic], Louisiana 70187, United
15 States.” Id. On or about that same date, Plaintiff received an email from the seller from the email
16 address “brightoptics544@yahoo.com.” Id. The email provided a serial number and a link to
17 download a copy of software that purported to be ADOBE ACROBAT XI PRO©. Id. Plaintiff
18 confirmed that the file contained a counterfeit copy of ADOBE ACROBAT XI PRO©. Id. ¶ 38.
19 Moreover, the serial number provided by Defendant was counterfeit. Id.

20 On or about November 16, 2017, Plaintiff purchased a purported “Adobe Acrobat Xi Pro
21 Full Version 2 PC’s for Windows” from Defendant’s Bonanza account “Lashop112” for a cost of
22 \$35.00. Payment was made via Amazon Pay, which identified the seller with the email address
23 “sambiggsny@yahoo.com.” Id. ¶ 39. On or about that same date, Plaintiff received an email from
24 Defendant through Bonanza with a serial number and a link to download a copy of software that
25 purported to be ADOBE ACROBAT XI PRO©. Id. Plaintiff confirmed that the file contained a
26 counterfeit copy of ADOBE ACROBAT XI PRO©. Id. ¶ 40. Moreover, the serial number
27 provided by Defendant was counterfeit. Id.

1 On January 30, 2018, Plaintiff sent another cease-and-desist letter to Defendant via email
2 but once again received no response. Id. ¶ 41.

3 On or about March 19, 2018, Plaintiff purchased a purported “Adobe Acrobat Xi Pro
4 Download full American Version” from Defendant’s Toucan Deal account “Top Shop” for a cost
5 of \$29.99. Id. ¶ 42. Payment was made through PayPal to “Big Nard,” with the email address
6 “bignard504@gmail.com.” Id. On or about that same date, Plaintiff received an email from
7 “Bright Optics,” from the email address “brightoptics544@yahoo.com,” that provided a serial
8 number and a link to download a copy of software that purported to be ADOBE ACROBAT XI
9 PRO©. Id. Plaintiff confirmed that the file downloaded at the link contained a counterfeit copy of
10 ADOBE ACROBAT XI PRO©. Id. ¶ 43. Moreover, the serial number provided by Defendant
11 was counterfeit. Id.

12 On or about June 26, 2018, Plaintiff made a purchase of a purported “Adobe Acrobat Xi
13 Pro Download Full Version!! for Windows (2 PC’s)” from Defendant’s eBay account
14 “bernarnwuba_0” for a cost of \$23.00. Id. ¶ 44. Payment was made via credit card to
15 “WAL4732.” Id. On or about that same date, Plaintiff received an email through eBay that
16 provided a serial key and a link to download a copy of software that purported to be ADOBE
17 ACROBAT XI PRO©. Id. Plaintiff confirmed that the file downloaded at the link contained a
18 counterfeit copy of ADOBE ACROBAT XI PRO©. Id. ¶ 45. Moreover, the serial number
19 provided by Defendant was counterfeit. Id.

20 Finally, on or about January 9, 2019, Plaintiff purchased a purported “Adobe Acrobat XI
21 Pro Download Full Version!! For Windows()” from Toucan Deal from Defendant’s Toucan Deal
22 account “Icely Deals” for a cost of \$45.00. ECF No. 34-1 at 9. Payment was made through PayPal
23 to “The Deals,” with an email address of “chuknwubah@gmail.com.” Id. On or about the same
24 date, January 9, 2019, Plaintiff received an email from “La Shop,” from the email address
25 “lashop808@gmail.com,” that provided a serial number and a link to download a copy of software
26 that purported to be ADOBE ACROBAT XI PRO©. Id. Plaintiff confirmed that both the file and
27 the serial number were counterfeit. Id.

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B. Procedural History

1 On October 3, 2018, Plaintiff filed a complaint against Defendant that alleged five claims:
2 (1) federal trademark infringement, 15 U.S.C. § 1114; (2) false designation of origin and unfair
3 competition, 15 U.S.C. § 1125(a); (3) trademark dilution, 15 U.S.C. § 1125(c); (4) federal
4 copyright infringement, 17 U.S.C. § 501(a); and (5) violation of the California Unfair Competition
5 Law (“UCL”), Cal. Bus. Prof. Code § 17200, et seq. ECF No. 1 (“Compl.”). Plaintiff sought both
6 injunctive relief and statutory damages. *Id.* ¶¶ 62, 72, 78, 84, 91, 92.

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8 Defendant was served with Plaintiff’s complaint on December 3, 2018. ECF No. 17. On
9 December 25, 2018, Plaintiff and Defendant stipulated that Defendant would have until January
10 23, 2019 to answer Plaintiff’s complaint. *Id.* Defendant did not meet the January 23, 2019
11 deadline. Accordingly, on March 1, 2019, Plaintiff moved for entry of default against Defendant.
12 ECF No. 22. On March 7, 2019, the Clerk entered default against Defendant. ECF No. 27.

13 On March 6, 2019, the Court held a case management conference that Plaintiff attended.
14 ECF No. 39. At the March 6, 2019 case management conference, the Court raised the issue of
15 personal jurisdiction over Defendant and required Plaintiff to address personal jurisdiction, and
16 particularly the Ninth Circuit’s decision in *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), in
17 any motion for default judgment. *Id.* at 1–2.

18 On June 5, 2019, Plaintiff moved to take limited third-party discovery in order to learn the
19 extent of Defendant’s allegedly infringing sales. ECF No. 29. On June 5, 2019, the same day, the
20 Court granted Plaintiff’s motion for third-party discovery. ECF No. 31.

21 On August 14, 2019, Plaintiff filed a motion for default judgment. ECF No. 34. Plaintiff’s
22 motion for default judgment only contained a single paragraph discussion of personal jurisdiction
23 over Defendant, and Plaintiff’s motion for default judgment failed to discuss *Boschetto*. *Id.* at 2.
24 On August 16, 2019, Plaintiff filed a supplemental brief that addressed the Court’s personal
25 jurisdiction over Defendant. ECF No. 39.

26 On December 5, 2019, the Court denied Plaintiff’s motion for default judgment without
27 prejudice. ECF No. 43. The Court concluded that Plaintiff failed to demonstrate that the Court

1 had personal jurisdiction over Defendant. Specifically, under the “purposeful direction” test,
2 Plaintiff was required to show that Defendant “(1) committed an intentional act, (2) expressly aimed
3 at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum
4 state.” Id. at 10 (quoting Wash. Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 673 (9th Cir.
5 2012). Though Plaintiff demonstrated that Defendant committed an intentional act and thus satisfied
6 the first prong of the purposeful direction test, Plaintiff did not fulfill the second, express aiming
7 prong.

8 Specifically, Plaintiff attempted to establish express aiming “merely by pointing to the fact that
9 Plaintiff suffered harm in California.” Id. at 11. This, the Court held, was “simply not enough to
10 satisfy the express aiming requirement” because “specific personal jurisdiction must arise from a
11 defendant’s own contacts with the forum state, not from a plaintiff’s or a third party’s contacts with the
12 forum state.” Id. (citing Walden v. Fiore, 571 U.S. 277, 286 (2014)).

13 Instead, the Court determined that it “must determine whether Defendant’s own contacts
14 constitute express aiming at California.” Id. Plaintiff argued that its eight evidentiary buys across a
15 two-year period amounted to express aiming. The Court concluded otherwise because “[t]hese
16 ‘evidentiary buys’ . . . [were] simply the kind of ‘random, fortuitous, attenuated’ contacts that depend
17 on *Plaintiff’s contacts with the forum*, not the contacts of Defendants.” Id. (internal alterations
18 omitted). The Court then analyzed relevant case law and determined that “a limited number of
19 products shipped into a forum flowing from a defendant’s online sales activity is insufficient to
20 establish express aiming.” Id. at 13.

21 The Court therefore denied Plaintiff’s motion for default judgment. The Court, however,
22 denied the motion without prejudice and noted that “Plaintiff includes several exhibits that purport to
23 show Defendant’s total amount of sales of counterfeit Adobe-Branded Software across the United
24 States and in other countries. Id. at 16. Though it was “not clear from the face of these exhibits how
25 many sales Defendant made to California in particular,” the Court held that these sale records could
26 “demonstrate that Defendant’s contacts with California were systematic and continuous rather than
27 isolated and fortuitous,” so long as the records established that “Defendant conduct[ed] regular sales in

1 California.” Id.

2 On January 3, 2020, Plaintiff filed the instant motion for default judgment. ECF No. 45
3 (“Mot.”). Additionally, pursuant to the Court’s instruction, Plaintiff proffered third-party sales records
4 that establish that from December 2016 to July 2018, Defendant made 863 sales to California
5 consumers for \$36,251.28—or approximately 18 percent of Defendant’s total 4,795 sales. ECF No.
6 45-1 (“Pham Decl.”) ¶¶ 15, 16.

7 **II. LEGAL STANDARD**

8 Pursuant to Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default
9 judgment when the Clerk, under Rule 55(a), has previously entered a party’s default. Fed. R. Civ.
10 P. 55(b). “The district court’s decision whether to enter a default judgment is a discretionary one.”
11 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk enters default, all well-
12 pleaded allegations regarding liability are taken as true, except with respect to damages. See *Fair*
13 *Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) (“With respect to the determination
14 of liability and the default judgment itself, the general rule is that well-pled allegations in the
15 complaint regarding liability are deemed true.”); *TeleVideo Sys. v. Heidenthal*, 826 F.2d 915, 917–
16 18 (9th Cir. 1987) (“[U]pon default the factual allegations of the complaint, except those relating
17 to the amount of damages, will be taken as true.”); *Philip Morris USA v. Castworld Prods.*, 219
18 F.R.D. 494, 499 (C.D. Cal. 2003) (“[B]y defaulting, Defendant is deemed to have admitted the
19 truth of Plaintiff’s averments.”). “In applying this discretionary standard, default judgments are
20 more often granted than denied.” *Philip Morris*, 219 F.R.D. at 498.

21 “Factors which may be considered by courts in exercising discretion as to the entry of a
22 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of
23 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in
24 the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was
25 due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
26 Procedure favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir.
27 1986).

1 **III. DISCUSSION**

2 **A. Jurisdiction**

3 “When entry of judgment is sought against a party who has failed to plead or otherwise
4 defend, a district court has an affirmative duty to look into its jurisdiction over both the subject
5 matter and the parties. A judgment entered without personal jurisdiction over the parties is void.”
6 *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). In order to avoid the entry of an
7 order of default judgment that may subsequently be attacked as void, the Court must determine
8 whether jurisdiction over the instant case exists. The Court begins with subject matter jurisdiction
9 and then proceeds to personal jurisdiction.

10 **1. Subject Matter Jurisdiction**

11 Here, Plaintiff brings this action, in part, pursuant to federal law, namely the Lanham Act
12 and 17 U.S.C. §501(a). Therefore, the Court is satisfied that the Court has subject matter
13 jurisdiction pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1331 (“The district courts shall have
14 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the
15 United States.”). The Court also has supplemental jurisdiction over Plaintiff’s related state law
16 claim that Plaintiff brings under the California Unfair Competition Law, Cal. Bus. Prof. Code §
17 17200, et seq. See 28 U.S.C. § 1367(b) (“In any civil action of which the district courts have
18 original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims
19 that are so related to claims in the action within such original jurisdiction that they form part of the
20 same case or controversy under Article III of the United States Constitution.”). The Court
21 proceeds to consider whether the Court possesses personal jurisdiction over Defendant.

22 **2. Personal Jurisdiction**

23 In the ordinary course of litigation, a defect in personal jurisdiction is either asserted or
24 waived by a party. See Fed. R. Civ. P. 12(h)(1) (explaining that defects in personal jurisdiction
25 are waived unless timely raised in a Rule 12 motion to dismiss or responsive pleading). Not so in
26 the context of a motion for default judgment. Instead, “when a court is considering whether to
27 enter a default judgment, it may dismiss an action sua sponte for lack of personal jurisdiction.” In

1 re Tuli, 172 F.3d at 712 (citations omitted).

2 “The party seeking to invoke the court’s jurisdiction bears the burden of establishing that
3 jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v.*
4 *Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). “Personal jurisdiction over an out-of-
5 state defendant is appropriate if the relevant state’s long arm-statute permits the assertion of
6 jurisdiction without violating federal due process.” *Schwarzenegger v. Fred Martin Motor Co.*,
7 374 F.3d 797, 800–01 (9th Cir. 2004). California’s long arm statute, Cal. Civ. Proc. Code §
8 410.10, is co-extensive with federal due process requirements, and therefore the jurisdictional
9 analyses under California law and federal due process merge into one. See Cal. Civ. Proc. Code
10 § 410.10 (“[A] court of this state may exercise jurisdiction on any basis not inconsistent with the
11 Constitution of this state or of the United States.”); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647
12 F.3d 1218, 1223 (9th Cir. 2011) (“California’s long-arm statute . . . is coextensive with federal due
13 process requirements, so the jurisdictional analyses under state law and federal due process are the
14 same.”).

15 For a court to exercise personal jurisdiction over a defendant consistent with due process,
16 that defendant must have “certain minimum contacts” with the relevant forum “such that the
17 maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”
18 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457,
19 463 (1940)). In addition, “the defendant’s ‘conduct and connection with the forum State’ must be
20 such that the defendant ‘should reasonably anticipate being haled into court there.’” *Sher v.*
21 *Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (quoting *World-Wide Volkswagen Corp. v.*
22 *Woodson*, 444 U.S. 286, 297 (1980)).

23 A court may exercise either general or specific jurisdiction over a defendant. *Ziegler v.*
24 *Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995). General jurisdiction exists when a defendant
25 is physically present or when a defendant’s activities in the state are “continuous and systematic”
26 such that the contacts approximate physical presence in the forum state. See *Schwarzenegger*, 374
27 F.3d at 801 (citation omitted). If general jurisdiction is inappropriate, a court may still exercise

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1 specific jurisdiction if the defendant “has sufficient contacts with the forum state in relation to the
2 cause of action.” Sher, 911 F.2d at 1361. The Court considers each type of personal jurisdiction
3 in turn.

4 **a. General Jurisdiction**

5 The Court may exercise general personal jurisdiction over a defendant who is domiciled in
6 the forum state. *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).

7 Additionally, general jurisdiction over a nonresident exists where a defendant has “continuous and
8 systematic” contacts with the forum state such that the defendant may be “haled into court in the
9 forum state to answer for any of its activities anywhere in the world.” *Schwarzenegger*, 374 F.3d
10 at 801. Plaintiff alleges that Defendant resides in New Orleans, Louisiana, and Plaintiff does not
11 allege that Defendant is a California domiciliary. Compl. ¶ 2. Nor does Plaintiff allege that
12 Defendant has the level of continuous and systematic contacts with California that would support
13 a finding of general jurisdiction. Accordingly, Defendant is not subject to this Court’s general
14 jurisdiction.

15 **b. Specific Jurisdiction**

16 When general personal jurisdiction is absent, the Court may still exercise specific personal
17 jurisdiction in appropriate circumstances. For specific jurisdiction, the Ninth Circuit has adopted a
18 three-prong test that requires the plaintiff to show that: (1) the defendant purposefully directed its
19 activities at residents of the forum or purposefully availed itself of the privilege of doing business
20 in the forum; (2) the plaintiff’s claim arises out of or relates to those activities; and (3) the
21 assertion of personal jurisdiction is reasonable and fair. *Schwarzenegger*, 374 F.3d at 802.

22 **i. Purposeful Direction**

23 The first prong of the Ninth Circuit’s specific jurisdiction test requires a showing of either
24 purposeful direction or purposeful availment, depending on the claims at issue. *Id.* Accordingly,
25 the first question before the Court is whether Plaintiff’s complaint implicates purposeful direction
26 or purposeful availment. “For both trademark infringement actions and copyright infringement
27 actions, the Ninth Circuit requires a showing of purposeful direction.” *Adobe Sys. Inc. v. Blue*

1 Source Grp., Inc., 125 F. Supp. 3d 945, 960 (N.D. Cal. 2015). The same is true for claims brought
2 under California’s Unfair Competition Law. *Id.* Thus, the Court must determine whether Plaintiff
3 has met the burden of showing that Defendant purposefully directed the activities that underlie the
4 instant case at California.

5 To establish purposeful direction, a plaintiff must show that a defendant satisfies the so-
6 called Calder test. As the Ninth Circuit has explained, to satisfy the Calder test, a plaintiff must
7 show that a defendant “(1) committed an intentional act, (2) expressly aimed at the forum state, (3)
8 causing harm that the defendant knows is likely to be suffered in the forum state.” *Wash. Shoe*
9 *Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012).

10 • **Intentional Act**

11 In the context of the Calder test, an intentional act is “an external manifestation of the
12 actor’s intent to perform an actual, physical act in the real world.” *Wash. Shoe Co.*, 704 F.3d at
13 674; *Schwarzenegger*, 374 F.3d at 806 (an intentional act “refers to an intent to perform an actual,
14 physical act in the real world”). In the Ninth Circuit, an “intentional act” includes selling an
15 allegedly infringing product. *Wash. Shoe Co.*, 704 F.3d at 674.

16 According to Plaintiff, Defendant engaged in numerous sales of allegedly counterfeit
17 Adobe-Branded Software. Compl. ¶¶ 19–51. This conduct clearly amounts to a series of
18 “intentional acts” for the purposes of the Calder test. *Wash. Shoe Co.*, 704 F.3d at 674.
19 Accordingly, Plaintiff has satisfied the first prong of the Calder test.

20 • **Express Aiming**

21 As the Court previously explained, in *Walden v. Fiore*, 571 U.S. 277 (2014), the United
22 States Supreme Court stressed that specific personal jurisdiction must arise from a defendant’s
23 own contacts with the forum state, not from a plaintiff’s or a third party’s contacts with the forum
24 state. *Id.* at 286. Thus, due process “requires that a defendant be haled into court in a forum State
25 based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’
26 contacts he makes by interacting with other persons affiliated with the State.” *Id.* It is clear from
27 *Walden* that Plaintiff cannot establish express aiming merely by pointing to the fact that Plaintiff

1 suffered harm in California. See, e.g., *Axiom Foods, Inc. v. Acerchem Internat'l, Inc.*, 874 F.3d
2 1064, 1069–70 (9th Cir. 2017) (explaining that a theory of “individualized targeting” is no longer
3 sufficient to establish express aiming).

4 Accordingly, the Court must determine whether Defendant’s own contacts constitute
5 express aiming at California. Numerous courts have confronted this issue in the context of online
6 sales platforms like the ones Defendant used to sell the allegedly counterfeit Adobe-Branded
7 Software in the instant case. Indeed, the Ninth Circuit has specifically held that “maintenance of a
8 passive website alone cannot satisfy the express aiming prong.” *Brayton Purcell LLP v. Recordon*
9 *& Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010). Instead, “something more,” namely “conduct
10 directly targeting the forum,” is required for express aiming. *Id.*

11 As the Court previously concluded, Plaintiff’s eight “evidentiary buys” are insufficient to
12 establish express aiming because these purchases are simply the kind of “random, fortuitous, []
13 attenuated” contacts that depend on *Plaintiff’s contacts with the forum*, not the contacts of
14 Defendant. This time, however, Plaintiff also proffers evidence that from December 2016 to July
15 2018, Defendant made 863 sales to California consumers for \$36,251.28—or approximately 18
16 percent of Defendant’s total sales during that period. *Pham Decl.* ¶¶ 15, 16.

17 Though limited online sales into a forum state are “insufficient to [create] a substantial
18 connection” with that forum state, a defendant that “conduct[s] regular sales in California” may be
19 able to satisfy the express aiming prong of the Calder test. *Boschetto v. Hansing*, 539 F.3d 1011,
20 1017–18 (9th Cir. 2008). Indeed, in its previous order denying Plaintiff’s motion for default
21 judgment without prejudice, the Court “note[d] that Plaintiff includes several exhibits that purport
22 to show Defendant’s total amount of sales of counterfeit Adobe-Branded Software across the
23 United States and in other countries. . . . [I]t is possible that these sales records will demonstrate
24 that Defendant’s contacts with California were systematic and continuous rather than isolated and
25 fortuitous.” *ECF No. 43* at 16 (quotation marks omitted).

26 The Court now holds that these sales records and Plaintiff’s explanation of their contents
27 demonstrate that Defendant’s contacts with California were systematic and continuous. In the

1 instant case, Plaintiff has established that from December 2016 to July 2018, Defendant made 863
2 sales to California consumers for \$36,251.28—or approximately 18 percent of Defendant’s total
3 sales during that period. Pham Decl. ¶¶ 15, 16. Given that these sales to California consumers
4 constitute such a large percentage of Defendant’s total sales and occurred consistently within days
5 of other sales over a two-year period, Defendant’s actions are not random, isolated or fortuitous
6 and instead are systematic and continuous. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770,
7 781 (1984) (holding regular circulation of magazines in the forum state established specific
8 jurisdiction because regular monthly sales of a substantial number of magazines could not be
9 random, isolated, or fortuitous); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297
10 (1980) (“[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated
11 occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or
12 indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in
13 one of those States”); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir.
14 2011) (“[I]t does not violate due process to hold [defendant] answerable in a California court for
15 the contents of a website whose economic value turns, in significant measure, on its appeal to
16 Californians.”).

17 Indeed, this case is analogous to *Oakley, Inc. v. Donofrio*, 2013 WL 12126017 (C.D. Cal.
18 Jun. 14, 2013). In *Oakley*, the court held that specific jurisdiction was proper because defendant
19 was not a “one-shot online seller” but rather, “engage[d] in a substantial volume of transactions”
20 in California. *Id.* at *5. “While Defendants did not themselves operate eBay or specifically
21 choose to sell to California customers, they did not passively place their items in the stream of
22 commerce but rather exploited the benefits of the California market.” *Id.* at *6. Specifically,
23 “[t]he transaction records produced by Defendants in jurisdictional discovery, which show many
24 California sales per month, reveal that Defendants’ contacts with California were systematic and
25 continuous rather than isolated and fortuitous.” *Id.* at *6. Therefore, “[t]he sale of [Defendant’s]
26 products in [California] is not ‘coincidental’ but rather a predictable consequence of Defendant’s
27 business model.” *Cave Man Kitchens Inc. v. Caveman Foods, LLC*, 2019 WL 3891327, at *6

1 (W.D. Wash. Aug. 19, 2019); see also *Mountz, Inc. v. Ne. Indus. Bolting & Torque, LLC.*, 2016
2 WL 6699295, at *4 (N.D. Cal. Sept. 30, 2016), report and recommendation adopted, 2016 WL
3 6679548 (N.D. Cal. Nov. 14, 2016) (holding plaintiff satisfied express aiming because, among
4 other things, “Defendant sells to the general public, including to consumers who reside in the State
5 of California and the Northern District of California” and “threatened to ‘specifically go after’
6 Plaintiff’s customers, some of which are located in California”).

7 Accordingly, Plaintiff has satisfied the express aiming requirement necessary to establish
8 purposeful direction. The Court next addresses foreseeable harm—the third prong of the
9 purposeful direction inquiry.

10 • **Foreseeable Harm**

11 “Harm suffered in the forum state is a necessary element in establishing purposeful
12 direction.” *Morrill*, 873 F.3d at 1144. There is foreseeable harm when a jurisdictionally sufficient
13 amount of harm is suffered in the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
14 *Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006). Here, Plaintiff has established foreseeable
15 harm because Defendant expressly aimed its conduct at the California market and a large
16 proportion of Defendant’s total infringing sales—approximately 18 percent, or 863 sales from
17 December 2016 to July 2018—were to California consumers. *Mavrix Photo, Inc.*, 647 F.3d at
18 1231 (“The economic loss caused by the intentional infringement of a plaintiff’s copyright is
19 foreseeable.”). “Because [Defendant’s] actions destroyed this California-based value, a
20 jurisdictionally significant amount of [Plaintiff’s] economic harm took place in California.” *Id.*;
21 see also *Adobe Sys. Inc v. Accoladian Res., LLC*, 2014 WL 3737979, at *3 (N.D. Cal. July 28,
22 2014) (“The complaint alleges economic loss based on defendants’ use of misappropriated
23 software to compete for customers.”).

24 Accordingly, Plaintiff has established purposeful direction, the first prong necessary for
25 specific jurisdiction.

26 **ii. Claims Arising Out Of, Or Related To, Forum Activities**

27 The second prong of specific jurisdiction requires that a plaintiff’s claims arise out of or
28

1 relate to a defendant’s forum-based activities. Schwarzenegger, 374 F.3d at 802. Plaintiff
2 satisfies this requirement, as the Plaintiff’s claims arise out of Defendant’s “acts of willful
3 infringement and unfair competition in this district” and “in California.” Compl. ¶ 8; see
4 Accoladian Res., 2014 WL 3737979, at *4 (concluding that the plaintiff’s claims arose out of the
5 defendant’s activities in California because the defendant sold and distributed plaintiff’s products
6 in California without authorization).

7 **iii. Whether The Exercise of Personal Jurisdiction is Reasonable and Fair**

8 The third and final prong requires assessing whether the exercise of personal jurisdiction is
9 reasonable and fair. Schwarzenegger, 374 F.3d at 802. In cases where the first two prongs of the
10 specific jurisdiction inquiry are satisfied, “the defendant [must] present a compelling case that the
11 exercise of jurisdiction would not be reasonable.” Id. (quotation marks omitted). Here,
12 Defendant, “who is in default, has not argued that the exercise of personal jurisdiction is
13 unreasonable. Accordingly, the Court concludes that the exercise of personal jurisdiction over
14 [Defendant] is reasonable in the instant case.” Fresh Packing Corp. v. Guicho, 2016 WL
15 1365947, at *5 (N.D. Cal. Apr. 6, 2016); Neves v. Benchmark Recovery, Inc., 2015 WL 6957525,
16 at *2 (N.D. Cal. Nov. 11, 2015) (granting motion for default judgment and holding that
17 “exercising specific jurisdiction would be reasonable” because “Defendants have not argued that
18 this matter should be litigated elsewhere”).

19 **c. Service**

20 Finally, for the Court to exercise personal jurisdiction over a defendant, the defendant must
21 have been served in accordance with Federal Rule of Civil Procedure 4. See Jackson v.
22 Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982) (“Defendants must be served in accordance with
23 Rule 4(d) of the Federal Rules of Civil Procedure, or there is no personal jurisdiction.” (footnote
24 omitted)); see also Pension Tr. Fund for Operating Eng’rs v. Kickin Enters., 2012 WL 6711557,
25 at *3 (N.D. Cal. Dec. 20, 2012) (“[W]here entry of default judgment is requested, the Court must
26 determine whether service of process was adequate.”).

27 Service on Defendant was proper. The affidavit of service shows that Defendant was

1 personally served and accepted service of Plaintiff’s complaint on December 3, 2018. ECF No.
2 16. Indeed, on December 25, 2018, Plaintiff and Defendant stipulated that Defendant would have
3 until January 23, 2019 to answer Plaintiff’s complaint. ECF No. 17. Defendant signed the
4 stipulation as a pro se litigant but thereafter refused to take any actions in instant case. Id.

5 Accordingly, because service on Defendant was proper, the Court may exercise personal
6 jurisdiction over Defendant. See *Marshall Wealth Mgmt. Grp., Inc. v. Santillo*, 2019 WL 79036,
7 at *4 (N.D. Cal. Jan. 2, 2019).

8 **B. Whether Default Judgment is Proper**

9 Having determined that the exercise of subject matter jurisdiction and personal jurisdiction
10 over Defendant is appropriate, the Court now turns to the Eitel factors to determine whether entry
11 of default judgment against Defendant is warranted.

12 **1. First Eitel Factor: the Possibility of Prejudice**

13 Under the first Eitel factor, the Court considers the possibility of prejudice to a plaintiff if
14 default judgment is not entered against a defendant. “A plaintiff who is denied a default judgment
15 and is subsequently left without any other recourse for recovery has a basis for establishing
16 prejudice.” *Adobe Sys. Inc. v. Acheampong*, 2019 WL 7212311, at *5 (N.D. Cal. Sept. 24, 2019),
17 report and recommendation adopted, 2019 WL 7212310 (N.D. Cal. Oct. 10, 2019). Here,
18 Plaintiff has established that it will be prejudiced because Defendant has not participated in this
19 litigation beyond signing the stipulation and Plaintiff would be without recourse to stop
20 Defendant’s infringement or to recover for the harm and damages caused by Defendant.
21 Therefore, the first Eitel factor weighs in favor of granting default judgment.

22 **2. Second and Third Eitel Factors: Merits of Plaintiff’s Substantive Claims and the**
23 **Sufficiency of the Complaint**

24 The second and third Eitel factors address the merits and sufficiency of Plaintiff’s claims
25 as pleaded in the Complaint. Courts often analyze these two factors together. See *Dr. JKL Ltd. v.*
26 *HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010) (“Under an Eitel analysis, the
27 merits of plaintiff’s substantive claims and the sufficiency of the complaint are often analyzed

1 together.”). In its analysis of the second and third Eitel factors, the Court will accept as true all
2 well-pled allegations regarding liability. See *Fair Hous. of Marin*, 285 F.3d at 906 (“[T]he general
3 rule is that well-pled allegations in the complaint regarding liability are deemed true.”). The Court
4 will therefore consider the merits of Plaintiff’s claims and the sufficiency of the Complaint
5 together.

6 Plaintiff asserts five claims against Defendant: (1) federal trademark infringement, 15
7 U.S.C. § 1114; (2) false designation of origin and unfair competition, 15 U.S.C. § 1125(a); (3)
8 trademark dilution, 15 U.S.C. § 1125(c); (4) federal copyright infringement, 17 U.S.C. § 501(a);
9 and (5) violation of the UCL, Cal. Bus. Prof. Code § 17200, et seq. However, Plaintiff’s motion
10 for default judgment does not ask for default judgment as to Plaintiff’s third claim for trademark
11 dilution. Accordingly, the Court only analyzes whether the second and third Eitel factors are
12 satisfied as to Plaintiff’s first, second, fourth, and fifth causes of action.

13 **a. Plaintiff Adequately Pleads Claim One for Federal Trademark Infringement,**
14 **Claim Two for False Designation of Origin, and Claim Five for Violation of the**
15 **UCL**

16 Courts typically analyze claims for federal trademark infringement, false designation of
17 origin, and violations of the UCL together. See, e.g., *Adobe Sys., Inc. v. Dafang USA, LLC*, 2019
18 WL 7841862, at *2 (C.D. Cal. Aug. 22, 2019); *Adobe Sys. Inc. v. Tanvir*, 2017 WL 2986219, at *3
19 (N.D. Cal. July 13, 2017) (“The first, second, and fifth claims [for trademark infringement, false
20 designation of origin, and violations of the UCL] share the same analysis . . .”).

21 “To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C.
22 § 1114, a party ‘must prove: (1) that it has a protectable ownership interest in the mark; and
23 (2) that the defendant’s use of the mark is likely to cause consumer confusion.’” *Network*
24 *Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting
25 *Dep’t of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006)).

26 Here, as to the first issue, Plaintiff has adequately alleged and exhibited its ownership and
27 rights to the six marks in question by providing the relevant registration certificates. Compl. ¶ 17;
28 *id.*, Ex. A. “A mark’s registration on the Principal Register in the Patent and Trademark Office

1 (“PTO”) is evidence of the validity of the registered mark.” Tanvir, 2017 WL 2986219, at *3
2 (citation omitted).

3 With respect to the second issue, Plaintiff has also demonstrated that Defendant’s use of its
4 marks is likely to cause consumer confusion. In the instant case, Plaintiff alleges Defendant
5 “intentionally and knowingly used in commerce the reproductions, counterfeits, copies, and/or
6 colorable imitations of Plaintiff’s registered marks in connection with the sale, offering for sale,
7 and/or distribution of Defendant’s software products by importing, offering, advertising,
8 promoting, retailing, selling, and/or distributing counterfeit and/or unauthorized copies of Adobe-
9 Branded Software bearing Plaintiff’s Trademarks.” Compl. ¶ 57. “When the alleged infringer
10 knowingly adopts a mark similar to another’s, we must presume that the public will be deceived.”
11 M2 Software, Inc. v. Madacy Entertainment Corp., 421 F.3d 1073, 1085 (9th Cir. 2005) (citation
12 omitted). Furthermore, “[a] party’s failure to participate in litigation indicates a willful use of a
13 counterfeit mark,” and where, as here, a defendant “disregard[s] [a] cease-and-desist notice and
14 continue[s] to sell,” this “is further evidence of . . . intentionality.” Tanvir, 2017 WL 2986219, at
15 *4 (citations omitted).

16 Accordingly, Plaintiff sufficiently alleges that Defendant’s counterfeit and unauthorized
17 use of its registered trademarks is likely to cause confusion. *Id.*; Acheamong, 2019 WL 7212311,
18 at *5 (“Here, taking the factual allegations in the Complaint as true, Defendant misappropriated
19 Plaintiff’s ‘Adobe’ trademark and affixed it to counterfeited products that appear substantially
20 similar to those sold by Plaintiff, and then sold and marketed those products through an online
21 marketplace. Accordingly, the undersigned finds that Defendant’s use of the ‘Adobe’ mark would
22 cause consumer confusion.”); Adobe Sys. Inc. v. Gray, 2017 WL 3083686, at *5 (N.D. Cal. June
23 22, 2017), report and recommendation adopted, 2017 WL 3051482 (N.D. Cal. July 19, 2017)
24 (“[Plaintiff] likewise sufficiently charged that Defendant advertised and sold counterfeit discs on
25 eBay that were advertised as Adobe products without Adobe’s permission; thus, Defendant’s use is
26 likely to confuse or deceive customers as to their source.”).

27 As a result, “[b]ecause the trademark-infringement, unfair-competition, and business-

1 practices causes of action share the same analysis, [Defendant] has properly stated all three
2 claims.” Tanvir, 2017 WL 2986219, at *4.

3 **b. Plaintiff Adequately Pleads Claim Four for Federal Copyright Infringement**

4 To state a claim for copyright infringement, “two elements must be proven: (1) ownership
5 of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist
6 *Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Here, Plaintiff sufficiently alleges
7 its ownership of various copyrights at issue in the instant case and provides documentation of its
8 copyright registrations. Compl. ¶¶ 18, 80; *id.*, Ex. B. Plaintiff also adequately alleges that
9 Defendant, without consent or authorization, intentionally and knowingly reproduced and
10 counterfeited Plaintiff’s protected works by importing, offering, advertising, promoting, and
11 selling counterfeit and unauthorized software that was, at minimum, substantially similar to
12 Plaintiff’s copyrights. *Id.* ¶¶ 81–82. “Accordingly, both elements of the copyright infringement
13 claim are met, and Plaintiff has successfully stated a claim upon which it may recover damages.”
14 *Dafang*, 2019 WL 7841862, at *6; see also *Tanvir*, 2017 WL 2986219, at *5 (holding under
15 similar facts that Adobe successfully stated a copyright infringement claim and satisfied the
16 second and third Eitel factors).

17 Therefore, the second and third Eitel factors weigh in favor of granting default.

18 **3. Fourth Eitel Factor: The Amount of Money at Stake**

19 Under the fourth Eitel factor, “the court must consider the amount of money at stake in
20 relation to the seriousness of Defendant’s conduct.” *PepsiCo Inc. v. Cal Sec. Cans*, 238 F. Supp.
21 2d 1172, 1176 (C.D. Cal. 2002); see also *Eitel*, 782 F.2d at 1471-72. “The Court considers
22 Plaintiff’s declarations, calculations, and other documentation of damages in determining if the
23 amount at stake is reasonable.” *Trung Giang Corp. v. Twinstar Tea Corp.*, 2007 WL 1545173, at
24 *12 (N.D. Cal. May 29, 2007). Default judgment is disfavored when a large amount of money is
25 involved or is unreasonable in light of the potential loss caused by the defendant’s actions. *Id.*

26 Nonetheless, courts have found that this factor “presents no barrier to default judgment”
27 even when millions of dollars were at stake, as long as the potential damages were “proportional

1 to the harm alleged.” See Liu Hongwei v. Velocity V Ltd., 2018 WL 3414053, at *8 (C.D. Cal.
2 July 11, 2018) (finding that a request of \$4,000,000 was justified); United States v. Roof Guard
3 Roofing Co., 2017 WL 6994215, at *3 (N.D. Cal. Dec. 14, 2017) (holding that a request “totaling
4 over a million dollars” was reasonable because the tax debt was substantiated with proof provided
5 by the government).

6 Here, Plaintiff’s motion for default judgment seeks to recover a total of \$214,845.31 or
7 what Plaintiff can document as “Defendant’s known total revenue.” Mot. at 1, 23; Pham Decl.
8 ¶ 15. The Court holds that this request is reasonable and proportional to the numerous federal and
9 state law violations set forth in Plaintiff’s complaint. Indeed, in cases involving the same Plaintiff
10 and similar claims for trademark and copyright infringement, courts have granted default
11 judgment and awarded even higher amounts. See, e.g., Dafang, 2019 WL 7841862, at *6
12 (awarding \$360,000 in statutory damages and \$10,800 in attorney’s fees); Gray, 2017 WL
13 3083686, at *7 (awarding \$360,000 in statutory damages). Therefore, the fourth Eitel factor
14 weighs in favor of default judgment.

15 **4. Fifth and Sixth Eitel Factors: Potential Disputes of Material Fact and Excusable**
16 **Neglect**

17 The fifth Eitel factor considers the possibility of disputes as to any material facts in the
18 case. Where a defendant fails to appear in an action, a court can infer “the absence of the
19 possibility of a dispute concerning material facts.” Solaria Corp. v. T.S. Energie e Risorse, S.R.I.,
20 2014 WL 7205114, at *3 (N.D. Cal. Dec. 17, 2014). Defendant has failed to make an appearance
21 in this case. The Court therefore takes the allegations in the Complaint as true and holds that there
22 is no dispute over material facts. Fair Hous. of Marin, 285 F.3d at 906.

23 The sixth Eitel factor considers whether failure to appear was the result of excusable
24 neglect. A summons was issued for Defendant on October 4, 2018. ECF No. 10. An affidavit of
25 service shows that Defendant was personally served and accepted service of Plaintiff’s complaint
26 on December 3, 2018. ECF No. 16. Indeed, on December 25, 2018, Plaintiff and Defendant
27 stipulated that Defendant would have until January 23, 2019 to answer Plaintiff’s complaint. ECF

1 No. 17. Defendant signed the stipulation as a pro se litigant but thereafter refused to take any
2 actions in instant case. *Id.* Based on this record, nothing before the Court suggests that
3 Defendant’s failure to appear or litigate this case was the result of excusable neglect. In these
4 circumstances, it appears that Defendant has no excusable reason to fail to appear in the instant
5 case.

6 Thus, the fifth and sixth Eitel factors favor entry of default judgment.

7 **5. Seventh Eitel Factor: Policy Favoring Decision on the Merits**

8 While the policy favoring decision on the merits generally weighs strongly against
9 awarding default judgment, district courts have regularly held that this policy, standing alone, is
10 not dispositive, especially where a defendant fails to appear or defend itself. See, e.g., *Craigslist,*
11 *Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1061 (N.D. Cal. 2010); *Hernandez v. Martinez,*
12 *2014 WL 3962647, at *9* (N.D. Cal. Aug. 13, 2014). Although Defendant was properly served,
13 Defendant has not made an appearance nor challenged the entry of default. Thus, the likelihood of
14 the case proceeding to a resolution on the merits is unlikely. Accordingly, the Court finds that this
15 factor slightly weighs against default judgment.

16 **6. Balancing of Eitel Factors**

17 In sum, six of the Eitel factors in the instant case weigh in favor of default judgment: the
18 possibility of prejudice, the merits of Plaintiff’s substantive claims, the sufficiency of the
19 complaint, the sum of money at stake in the action, the possibility of a dispute concerning material
20 facts, and excusable neglect. See *Eitel*, 782 F.2d at 1471–72. The last factor, the policy favoring
21 decisions on the merits, weighs slightly against default judgment.

22 The Court finds that the seventh Eitel factor is outweighed by the other six factors that
23 favor default judgment. See, e.g., *Hernandez*, 2014 WL 3962647, at *9 (seventh Eitel factor
24 outweighed by remaining six factors where defendants failed to appear for over a year and a half
25 prior to the default judgment). The Court therefore finds that default judgment is appropriate in
26 this case.

27 **C. Remedies**

28

1 A plaintiff seeking default judgment “must also prove all damages sought in the
2 complaint.” Dr. JKL Ltd., 749 F. Supp. 2d at 1046 (citing Philip Morris USA, Inc. v. Castworld
3 Prods., Inc., 219 F.R.D. 494, 498 (C.D. Cal. 2003)). Federal Rule of Civil Procedure 55 does not
4 require the Court to conduct a hearing on damages, as long as the Court ensures that there is an
5 evidentiary basis for the damages awarded in the default judgment. See Action SA v. Marc Rich &
6 Co., 951 F.2d 504, 508 (2d Cir. 1991), abrogated on other grounds as recognized by Day Spring
7 Enters., Inc. v. LMC Int’l, Inc., 2004 WL 2191568 (W.D.N.Y. Sept. 24, 2004).

8 As discussed above, Plaintiff seeks injunctive relief and \$214,845.31 in statutory damages.
9 Mot. at 23–25.

10 **1. Injunctive Relief**

11 Plaintiff seeks entry of a permanent injunction against Defendant to prevent future
12 infringing activity. Specifically, Plaintiff requests a permanent injunction as follows:

- 13 (1) enjoining and permanently restraining Defendant from copying, importing, advertising,
14 offering for sale, selling and/or distributing, whether directly or indirectly, counterfeit
15 ADOBE®, A ADOBE®, A®, and ACROBAT®-branded related computer software,
16 including any software bearing Plaintiff’s marks that are confusingly similar to the
17 trademarks, trade names, designs or logos of Plaintiff;
- 18 (2) enjoining and permanently restraining Defendant from using Plaintiff’s registered
19 ADOBE®, A ADOBE®, A®, and ACROBAT® trademarks in commerce or any copy,
20 reproduction, or colorable imitation, or confusingly similar simulation of Plaintiff’s
21 trademarks on or in connection with the promotion, advertising, distribution,
22 manufacture or sale of any computer software;
- 23 (3) ordering Defendant to cancel, withdraw and recall all his promotions, advertisements
24 and merchandise bearing Plaintiff’s registered trademarks or any confusingly similar
25 simulation to Plaintiff’s registered trademarks, which have been published, placed or
26 shipped by Defendant or under Defendant’s authority, to any person, entity, or
27 customer, including, without limitation, any publisher, agency, wholesaler, distributor,

1 retailer, consignor or marketer, and also deliver to each publisher or customer a copy of
2 this Court’s order as it relates to said injunctive relief against Defendant; and
3 (4) ordering Defendant to deliver to Plaintiff for destruction all ADOBE computer
4 software, including but not limited to the Adobe Acrobat X Pro© and Adobe Acrobat
5 XI Pro© software, in his possession or under his control to the extent that any of these
6 items are in Defendant’s possession and not lawfully licensed by Defendant from
7 Plaintiff.

8 Mot. at 24–25.

9 Under the Lanham Act, courts have the “power to grant injunctions, according to the
10 principles of equity and upon such terms as the court may deem reasonable, to prevent the
11 violation of any right” of the trademark holder. 15 U.S.C. § 1116(a). “Injunctive relief is the
12 remedy of choice for trademark . . . cases, since there is no adequate remedy at law for the injury
13 caused by a defendant's continuing infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846
14 F.2d 1175, 1180 (9th Cir. 1988).

15 Similarly, under the Copyright Act, courts have power to “grant temporary and final
16 injunctions on such terms as it may deem reasonable to prevent or restrain the infringement of a
17 copyright.” 17 U.S.C. § 502(a). “Generally, a showing of copyright infringement liability and the
18 threat of future violations is sufficient to warrant a permanent injunction.” *Jackson v. Sturkie*, 255
19 F. Supp. 2d 1096, 1103 (N.D. Cal. 2003) (quoting *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp.
20 923, 948 (N.D. Cal. 1996)); *id.* (“[D]efendant’s past behavior and on-going ability to infringe
21 plaintiff’s copyright constitute a continued threat of future infringing activity.”).

22 Here, the Court concludes that Plaintiff is entitled to a permanent injunction. Plaintiff sent
23 multiple cease-and-desist letters to Defendant, but Defendant continues to infringe on Plaintiff’s
24 trademarks and copyrights. Compl. ¶¶ 29, 32, 36, 41; Pham Decl. ¶ 17; Pham Decl., Ex. 15.
25 “Additionally, Defendant’s failure to appear in this action makes it difficult for plaintiff to prevent
26 further infringement.” *Acheampong*, 2019 WL 7212311, at *9. Without a permanent injunction,
27 Plaintiff will be harmed by defendant’s continuing infringement and the threat of future violations.

28

1 Accordingly, the Court concludes that injunctive relief is appropriate here to prevent
2 Defendant from making unauthorized use of Plaintiff’s intellectual property. See *id.*; *Tanvir*, 2017
3 WL 2986219, at *6 (N.D. Cal. July 13, 2017) (granting injunctive relief in similar circumstances);
4 *Dafang*, 2019 WL 7841862, at *9 (same).

5 **2. Statutory Damages**

6 For trademark infringement, Plaintiff may recover statutory damages of “not less than
7 \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for
8 sale, or distributed, as the court considers just.” See 15 U.S.C. § 1117(c)(1). If the Court
9 determines that the infringement was willful, however, a plaintiff may recover a maximum of
10 \$2,000,000 per mark infringed. See *id.* § 1117(c)(2); see *Dafang*, 2019 WL 7841862, at *7
11 (“Section 1117(c) permits an award in an amount up to \$200,000 per counterfeit mark or up to
12 \$2,000,000 per counterfeit mark if the use of the mark was willful.”).

13 For copyright infringement, a plaintiff may elect to recover statutory damages “of not less
14 than \$750 or more than \$30,000 as the court considers just.” 17 U.S.C. § 504(c)(1). If the Court
15 determines that the infringement was willful, however, a plaintiff may recover a maximum of
16 \$150,000 per work infringed. See *id.* § 504(c)(2).

17 Here, Plaintiff has adequately pleaded that Defendant’s trademark and copyright
18 infringement was willful. As Plaintiff notes, Defendant could therefore be liable for millions of
19 dollars. Mot. at 23. Courts, however, have “discretion to determine statutory damages, subject
20 only to the statutory minima and maxima.” *Tanvir*, 2017 WL 2986219, at *7 (collecting cases).
21 Courts should ensure that statutory damages awards on default judgment “bear[] a ‘plausible
22 relationship to Plaintiff’s actual damages.’” *Yelp Inc. v. Catron*, 70 F. Supp. 3d 1082, 1102 (N.D.
23 Cal. 2014) (quoting *Adobe Sys., Inc. v Tilley*, 2010 WL 309249, at *5 (N.D. Cal. Jan. 19, 2010)).
24 “While a plaintiff in a trademark or copyright infringement suit is entitled to damages that will
25 serve as a deterrent, it is not entitled to a windfall.” *Id.*

26 In light of this authority, Plaintiff requests only \$214,845.31—an amount that is
27 “representative of Defendant’s known total revenue” for counterfeiting and selling Plaintiff’s

1 products. Mot. at 23. As noted previously, courts have awarded higher amounts in statutory
2 damages for similar conduct involving the same Plaintiff. See, e.g., Dafang, 2019 WL 7841862,
3 at *6 (awarding \$360,000 in statutory damages for willful trademark and copyright infringement
4 and \$10,800 in attorney’s fees); Gray, 2017 WL 3083686, at *7 (awarding \$360,000 in statutory
5 damages for willful trademark and copyright infringement).

6 Accordingly, the Court finds that a total award of \$214,845.31 for Defendant’s willful
7 trademark and copyright infringement “bears a plausible relationship to Plaintiff’s actual
8 damages,” will adequately “serve as a deterrent,” and will not constitute a “windfall” to Plaintiff.
9 See Yelp Inc., 70 F. Supp. 3d at 1102 (quotation marks omitted). Therefore, the Court finds that
10 Plaintiff is entitled to \$214,845.31 in statutory damages.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Plaintiff’s motion for default judgment.
13 Specifically, the Court awards Plaintiff injunctive relief as follows:

- 14 (1) enjoining and permanently restraining Defendant from copying, importing, advertising,
15 offering for sale, selling and/or distributing, whether directly or indirectly, counterfeit
16 ADOBE®, A ADOBE®, A®, and ACROBAT®-branded related computer software,
17 including any software bearing Plaintiff’s marks that are confusingly similar to the
18 trademarks, trade names, designs or logos of Plaintiff;
- 19 (2) enjoining and permanently restraining Defendant from using Plaintiff’s registered
20 ADOBE®, A ADOBE®, A®, and ACROBAT® trademarks in commerce or any copy,
21 reproduction, or colorable imitation, or confusingly similar simulation of Plaintiff’s
22 trademarks on or in connection with the promotion, advertising, distribution,
23 manufacture or sale of any computer software;
- 24 (3) ordering Defendant to cancel, withdraw and recall all his promotions, advertisements
25 and merchandise bearing Plaintiff’s registered trademarks or any confusingly similar
26 simulation to Plaintiff’s registered trademarks, which have been published, placed or
27 shipped by Defendant or under Defendant’s authority, to any person, entity, or
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customer, including, without limitation, any publisher, agency, wholesaler, distributor, retailer, consignor or marketer, and also deliver to each publisher or customer a copy of this Court’s order as it relates to said injunctive relief against Defendant; and (4) ordering Defendant to deliver to Plaintiff for destruction all ADOBE computer software, including but not limited to the Adobe Acrobat X Pro© and Adobe Acrobat XI Pro© software, in his possession or under his control to the extent that any of these items are in Defendant’s possession and not lawfully licensed by Defendant from Plaintiff.

Additionally, the Court awards Plaintiff \$214,845.31 in statutory damages.

IT IS SO ORDERED.

Dated: June 23, 2020



LUCY H. KOH
United States District Judge