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28UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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YUGA LABS, INC.,

Plaintiff(s),

v.

RYAN HICKMAN,

Defendant(s).

Case No. 2:23-CV-111 JCM (NJK)

ORDER

Presently before the court is plaintiff Yuga Labs Inc. (“plaintiff”)’s motion for default judgment. (ECF No. 23). Defendant Ryan Hickman (“defendant”) sent a letter to the court *pro se* purporting to oppose that motion (ECF No. 24), to which plaintiff replied (ECF No. 25).

I. Background

Because the clerk has entered default against defendant “the well-pleaded factual allegations of the complaint are taken as true, except for those allegations relating to damages.” *Geddes v. United Fin. Grp.*, 559 F.2d 557 (9th Cir. 1977). The court thus treats each of plaintiff’s asserted facts as true, incorporates those allegations, and provides a factual summary of the complaint below.

Plaintiff is a company responsible for developing the “smart contract” underlying a series of non-fungible tokens (“NFTs”) called the “Bored Ape Yacht Club” (“BAYC”). (ECF No. 1 at 4). As the court understands the technology, NFTs are digital identifiers that provide the purchasing user with a unique piece of content—here, digital art. Plaintiff sold 10,000 unique BAYC NFTs for prices ranging from \$169 to \$236 each. (*Id.*)

Plaintiff’s NFTs enjoyed wide public recognition and were prominently featured in popular press. (*Id.* at 4–5). They were resold for millions at auction, and popular brands sought plaintiff

1 out to collaborate and capitalize on the success of the BAYC NFTs. (*Id.* at 5–6). Because of that
2 recognition, plaintiff sought to register several trademarks in the BAYC NFTs and at the time the
3 complaint was filed had several pending trademark registrations for “BORED APE YACHT
4 CLUB,” “BAYC,” “BORED APE,” and three different logos in several different classes of goods.
5 (*Id.* at 6–10). Plaintiff has used the marks in commerce since at least 2021, and consumers
6 associate the marks with plaintiff. (*Id.* at 10–11).

7 Defendant is a Nevada resident. (*Id.* at 3). Alongside three non-parties to this suit, he
8 created a separate smart contract (“RRBAYC RSVP”) that underlies a series of NFTs called
9 “RRBAYC.” (*Id.* at 11). These “copycat” NFTs use different digital identifiers than plaintiff’s
10 (and come from a different source), but purport to provide the purchasing user with the same
11 product as plaintiff’s BAYC NFTs. (*Id.*) That is, defendant’s copycat NFTs provide the user with
12 the same images produced by plaintiff’s BAYC NFTs. Defendant sold his NFTs on the domain
13 “rrbayc.com”—a website that, in addition to its name, made use of several of plaintiff’s other
14 marks. (*Id.* at 11–12).

15 Defendant, alongside others, proceeded to sell these counterfeit NFTs on other online
16 exchanges in direct competition with plaintiff while using plaintiff’s marks to advertise his
17 counterfeit NFTs. (*Id.* at 12–14). He did so despite knowledge that consumers would be confused
18 into thinking they were buying legitimate BAYC NFTs. (*Id.*)

19 Defendant also designed a bespoke marketplace for his RRBAYC NFTs to be sold
20 alongside original BAYC NFTs called “Ape Market,” operating at the web address
21 “apemarket.com.” (*Id.* at 14–15). In order to access Ape Market, users were required to purchase
22 a RRBAYC NFT. (*Id.*) Ape Market featured several of plaintiff’s marks, and it appears the
23 defendant’s primary goal was to mislead consumers such that they could not tell whether they were
24 buying one of the original BAYC NFTs that was being resold or one of his counterfeit RRBAYC
25 NFTs. (*Id.*)

26 Throughout this conduct, defendant used the social media platform formerly known as
27 Twitter to advertise his fraudulent NFTs. (*Id.* at 15–16). He created promotional material meant
28 to imitate plaintiff’s material and paid for promotion of his own products. (*Id.*) Moreover, he

1 made public statements that “[Intellectual Property] in NFT is myth.” (*Id.* at 16). In the end,
2 defendant and his compatriots sold the counterfeit RRBAYC NFTs to more than 3,000 consumers,
3 and he had an agreement to receive 15% of the all sales in exchange for his development and
4 promotional work. (*Id.*)

5 As a result of all this, plaintiff brought this complaint alleging two causes of action: (1)
6 false designation of origin under 15 U.S.C. § 1125(A) related to defendant’s unauthorized use of
7 plaintiff’s marks in creating and promoting his counterfeit NFTs, and (2) cybersquatting under 15
8 U.S.C. § 1125(D) related to defendant’s intentional use of two domain names that are confusingly
9 similar to plaintiff’s marks to mislead consumers. After being served, defendant failed to respond
10 to the complaint. The clerk entered his default on March 20, 2023. (ECF No. 20). Plaintiff now
11 moves for default judgment based on that entry of default. (ECF No. 23).

12 **II. Legal Standard**

13 Obtaining a default judgment is a two-step process. *Eitel v. McCool*, 782 F.2d 1470, 1471
14 (9th Cir. 1986). First, “[w]hen a party against whom a judgment for affirmative relief is sought
15 has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the
16 clerk must enter the party’s default.” Fed. R. Civ. P. 55(a). Federal Rule of Civil Procedure
17 55(b)(2) provides that “a court may enter a default judgment after the party seeking default applies
18 to the clerk of the court as required by subsection (a) of this rule.”

19 The choice whether to enter a default judgment lies within the discretion of the court.
20 *Aldabe v. Aldabe*, 616 F.3d 1089, 1092 (9th Cir. 1980). In the determination of whether to grant
21 a default judgment, the court should consider the seven factors set forth in *Eitel*: (1) the possibility
22 of prejudice to plaintiff if default judgment is not entered; (2) the merits of the claims; (3) the
23 sufficiency of the complaint; (4) the amount of money at stake; (5) the possibility of a dispute
24 concerning material facts; (6) whether default was due to excusable neglect; and (7) the policy
25 favoring a decision on the merits. 782 F.2d at 1471–72. In applying the *Eitel* factors, “the factual
26 allegations of the complaint, except those relating to the amount of damages, will be taken as true.”
27 *Geddes* 559 F.2d at 560; *see also* Fed. R. Civ. P. 8(d).

28

1 **III. Discussion**

2 Plaintiff has already obtained the clerk’s entry of default against defendant. (ECF Nos. 19;
3 20). Now, in accordance with FRCP 55(b), plaintiff moves for default judgment against defendant
4 on all its claims. (ECF No. 23). While defendant purports to oppose the motion, he does not
5 meaningfully dispute the facts or procedural history of the case. Thus, after considering the *Eitel*
6 factors, the court will GRANT plaintiff’s motion and award it \$193,863.70 in damages plus costs
7 and attorney fees in an amount to be determined by a subsequent motion.

8 A. Defendant’s Response

9 In response to plaintiff’s motion, defendant sent a letter to the court *pro se* purporting to
10 oppose an entry of default judgment. (ECF No. 24). Upon closer inspection, however, it appears
11 that defendant does not reference this specific case at all.

12 As an initial matter, the court notes that a “document filed *pro se* is to be liberally
13 construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent
14 standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
15 (internal quotation marks and citation omitted). However, “*pro se* litigants in an ordinary civil
16 case should not be treated more favorably than parties with attorneys of record.” *Jacobsen v.*
17 *Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986). “Although we construe pleadings liberally in their
18 favor, *pro se* litigants are bound by the rules of procedure.” *Ghazali v. Moran*, 46 F.3d 52, 54 (9th
19 Cir. 1995). Thus, the court will liberally construe defendant’s opposition.

20 Nevertheless, defendant’s arguments are not even responsive to the procedural question
21 before this court—whether default judgment is appropriate. He spends the majority of the letter
22 complaining of purported discovery violations. Namely, that plaintiff’s law firm “continues to
23 harass and intimidate” him by making discovery requests in other cases that he believes are
24 overbroad. *See* (ECF No. 24 at 1). That may be true; the requests might be overbroad. But that
25 question (whether he must respond to a discovery request in a separate suit in a different district)
26 is wholly irrelevant to whether default judgment in this matter is appropriate.

27 Defendant purports to provide evidence that he was never properly served. He attaches as
28 an exhibit screenshots of a surveillance video showing documents blowing in the wind on his

1 porch. *See (id. at 5)*. However, it is unclear what those documents were, what date the surveillance
2 footage was taken, or, indeed, why the exhibit is relevant at all. The affidavit of service in this
3 matter explains that a process server served defendant by leaving the documents with a person of
4 suitable age and discretion, which is a valid method of service pursuant to the Federal Rules of
5 Civil Procedure. *See (ECF No. 18)*. Simply providing unauthenticated pictures of documents on
6 a porch is not enough to overcome the sworn affidavit of the process server.

7 Thus, defendant fails to explain his failure to respond to the complaint in *this* action. He
8 does not meaningfully dispute the allegations in this complaint, nor does he provide the court with
9 any evidence contradicting the declaration of service or the subsequent entry of clerk's default.
10 He simply argues that plaintiff's attorneys may have committed discovery violations in other
11 matters and provides an unauthenticated exhibit purporting to show papers on his porch (but not
12 what they were or how they got there). Thus, broadly construing defendant's objections and
13 nevertheless overruling them, the court will consider whether the *Eitel* factors weigh in favor of
14 default judgment.

15 B. *Eitel* Factors

16 The first *Eitel* factor weighs in favor of granting plaintiff's motion for default judgment.
17 Plaintiff faces prejudice because defendant's failure to appear and defend the claims against him
18 undermines plaintiff's ability to secure relief against defendant. Therefore, if plaintiff's motion
19 for default judgment is not granted, plaintiff "will likely be without other recourse for recovery."
20 *PepsiCo, Inc. v. Cal. Security Cans*, 283 F.Supp.2d 1127, 1177 (C.D. Cal. 2002).

21 The second and third *Eitel* factors also weigh in favor of default judgment. Plaintiff's
22 complaint states plausible claims for relief for false designation of origin under 15 U.S.C.
23 § 1125(A) and cybersquatting under 15 U.S.C. § 1125(D). (*See ECF No. 1*). Further, plaintiff's
24 complaint is well pleaded as it identifies defendant, enumerates plaintiff's rights under the Lanham
25 Act, describes the steps defendant took to infringe upon these rights, and sets forth causes of action
26 for defendant's conduct as recounted above in the background section of this order. (*See id.*)

27 The fifth *Eitel* factor favors default judgment as well. "Once the court clerk enters a
28 default, the well-pleaded factual allegations of the complaint are taken as true, except for those

1 allegations relating to damages.” *Geddes*, 559 F.2d at 560. Given the sufficiency of the complaint,
2 including evidence of plaintiff’s trademark rights, defendant’s willful infringement, and
3 defendant’s default, “no genuine dispute of material facts would preclude granting [plaintiff’s]
4 motion.” *Cal. Security Cans*, 238 F. Supp. 2d at 1177.

5 Applying the sixth factor, the court cannot conclude that defendant’s default is due to
6 excusable neglect. Plaintiff properly served defendant with summons and the complaint. (ECF
7 No. 18). Defendant’s failures to respond and to litigate this case cannot be attributable to excusable
8 neglect and are instead willful. This factor weighs in favor of default judgment.

9 The seventh *Eitel* factor weighs against default judgment, however. “Cases should be
10 decided upon their merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. But the mere
11 existence of Rule 55(b) “indicates that this preference, standing alone, is not dispositive.” *Cal.*
12 *Sec. Cans*, 238 F. Supp. at 1177 (citation omitted). Moreover, defendant’s failure to respond to
13 the complaint “makes a decision on the merits impractical, if not impossible.” *Id.*

14 Finally, under the fourth *Eitel* factor, the court considers the amount of money at stake in
15 relation to the seriousness of defendant’s conduct. *See id.* at 1176. “This requires that the court
16 assess whether the recovery sought is proportional to the harm caused by defendant’s
17 conduct.” *Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Trust & Plan v.*
18 *T.E.N. Mech. Corp.*, No. 2:10-cv-02258-RLH-NJK, 2013 WL 1249600 (D. Nev. March 27, 2013)
19 (quoting *Landstar Ranger, Inc. v. Parth Enter., Inc.*, 725 F. Supp. 2d 916, 921 (N.D. Cal. 2010)).
20 Plaintiff seeks minimum statutory damages for the two domains implicated in the cybersquatting
21 claim (\$2000 pursuant to 15 U.S.C. § 1117(d)), as well as \$191,863.70 related to the false
22 designation claim, which it alleges is the amount defendant earned for creating and marketing the
23 infringing NFTs. In addition, plaintiff seeks attorneys’ fees and costs.

24 Plaintiff is entitled to statutory damages since it has succeeded on its cybersquatting claim.
25 *See* 15 U.S.C. § 1117(d). Further, it provides defendant’s deposition testimony from another
26 parallel case verifying that he earned \$191,863.70 from the infringing tokens. *See* (ECF No. 23 at
27 Exs. A, B). The total monetary damages requests are thus reasonable because the amount
28 represents no more than the harm defendant caused plaintiff.

1 Thus, save for factor five’s preference to resolve cases on the merits, every factor weighs
2 in favor of default judgment. Given this overwhelming balance, the court finds default judgment
3 appropriate and will GRANT plaintiff’s motion. To that end, and as discussed in factor four,
4 plaintiff has thus proven its damages calculation and will be entitled to recover \$193,863.70 in
5 total monetary damages from defendant.

6 Plaintiff also seeks attorney fees and costs. Costs and fees are available in cases under the
7 Lanham Act where the acts of infringement are “malicious, fraudulent, deliberate, or willful.”
8 When a complaint pleads willful infringement and a district court enters default judgment, the
9 court must find that the infringement was willful when evaluating motions for attorney's fees. *See*
10 *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir. 2008).

11 Here, plaintiff’s complaint alleges that defendant acted willfully and intentionally when he
12 infringed on plaintiff’s rights. Because all allegations in the complaint are taken as true upon entry
13 of default, plaintiff has sufficiently proven its entitlement to attorney fees and costs under 17
14 U.S.C. § 1117(a). Thus, it shall be permitted to file a supplemental motion for attorney fees and a
15 bill of costs for the court to consider.

16 Finally, plaintiff seeks four forms of injunctive relief:

17 (1) an order and judgment requiring Hickman to be enjoined from
18 using the BAYC Marks in any manner, engaging in any act or thing
19 likely to cause confusion to the public as to the source of the
20 products or services; (2) a judgment ordering Hickman to file and
21 serve a report setting forth the manner in which Hickman has
22 complied with the injunction and ceased all offering of products or
services under the BAYC Marks; (3) a judgment ordering Hickman
to deliver for destruction, or show proof thereof, all infringing
material; and (4) a judgment ordering Hickman to withdraw any
applications Hickman filed anywhere for the BAYC Marks

23 (ECF No. 25 at 8). Injunctive relief is available under the Lanham Act. *See* 15 U.S.C. § 1116.
24 Indeed, it is the “remedy of choice for trademark and unfair competition cases, since there is no
25 adequate remedy at law for the injury caused by a defendant’s continuing infringement.” *Century*
26 *21 Real Est. Corp. v. Sandlin*, 846 F.2d 1175, 1181 (9th Cir. 1988).

27 A party seeking an injunction (whether preliminary or permanent) must establish four
28 factors: (1) success on the merits (or likelihood thereof, for a preliminary injunction), (2) a

1 likelihood of irreparable harm without the injunction, (3) a balance of hardships that tips in its
2 favor, and (4) the injunction is in the public interest. *See, e.g., Winter v. Nat. Res. Def. Council,*
3 *Inc.*, 555 U.S. 7, 20 (2008). In trademark infringement cases, once a party shows a likelihood of
4 success on the merits, there is a presumption of irreparable harm. 15 U.S.C. § 1116(a).

5 Plaintiff has established each of those factors. Not only has it proven a likelihood of
6 success, but it has actually succeeded on its claim because of this court's grant of default judgment.
7 Because of that success plaintiff is also entitled to the statutory presumption of irreparable harm.
8 *See id.* Moreover, the third and fourth factors tip in favor of plaintiff because without an injunction
9 defendant could continue to market NFTs that infringe on plaintiff's trademark rights, thus
10 confusing consumers. The public interest is served by preventing defendant from marketing
11 competing products using a confusingly similar market, and the hardships plaintiff would have to
12 endure to continue vindicating its rights otherwise (i.e., more lawsuits) counsel in favor of a
13 permanent injunction. Thus, the court is satisfied that a permanent injunction is appropriate, in
14 addition to the other equitable relief that plaintiff requests to effectuate that injunction.

15 **IV. Conclusion**

16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for
18 default judgment (ECF No. 23) be, and the same hereby is, GRANTED.

19 IT IS FURTHER ORDERED that within seven (7) days of this order plaintiff shall file a
20 proposed judgment consistent with the foregoing.

21 DATED August 16, 2023.

22 
23 _____
UNITED STATES DISTRICT JUDGE