

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA



Kim Kardashian West,
Plaintiff,
v.
Misguided Limited et al.,
Defendant.

2:19-cv-01258 VAP JEM

**Order DENYING Plaintiffs’
Request for Entry of Default and
GRANTING IN PART Plaintiffs’
Motion for Default Judgment
(Doc. No. 17, 19.)**

United States District Court
Central District of California

Before the Court is Plaintiff Kim Kardashian West and her loan out company Kimsaprincess, Inc.’s (“Kardashian”) request for entry of default against Defendant Misguided Limited (“Misguided UK”) and motion for default judgment against Defendants Misguided UK and Misguided USA Finance Inc. (“Misguided USA”). (Doc. Nos. 17, 19). After considering all papers filed in support of Kardashian’s motions, the Court **DENIES** Kardashian’s request for entry of default against Misguided UK and **GRANTS IN PART** Kardashian’s motion for default judgment against Misguided USA.

I. BACKGROUND

Kardashian is a television celebrity, model and spokesperson who enjoys a large social media following. Compl. ¶ 12. Because of her popularity and reach on social media, companies routinely pay Kardashian millions of dollars in fees to serve as a celebrity endorser. *Id.* ¶ 13.

1 Kardashian owns several federally registered trademarks in her name,
2 including without limitation: KIM KARDASHIAN WEST, U.S. Registration No.
3 4,989,420 (International Class 41); KIM KARDASHIAN WEST, U.S.
4 Registration No. 4,978,865 (International Class 35); and KIM
5 KARDASHIAN, U.S. Registration No. 4,516,079 (International Class 35). *Id.*
6 ¶ 42. Kardashian has used these marks extensively in connection with
7 many products and services, including Kardashian’s advertising and
8 promotion of third-party products in the fashion and beauty industries. *Id.* ¶
9 41.

10
11 Defendants Misguided UK and Misguided USA (collectively,
12 “Misguided”) is an online clothing retailer that specializes in inexpensive
13 clothing. *Id.* ¶ 16. It that has become well-known for copying designs worn
14 by celebrities, including Kardashian. *Id.* According to Kardashian,
15 Misguided USA’s website, www.misguidedus.com, includes entire pages
16 devoted to the sale of clothing inspired by Kardashian on which Misguided
17 uses Kardashian’s name and likeness without her permission to promote its
18 products. *Id.* ¶¶ 17, 18. In addition, Misguided has repeatedly used
19 Kardashian’s name and likeness without permission on its social media
20 platforms to promote the sale of its clothing. *Id.* ¶¶ 20, 21. Kardashian
21 alleges that the consuming public is likely and has come to the mistaken
22 conclusion that Kardashian is affiliated with Misguided. *Id.* ¶ 23.
23 Kardashian alleges Misguided has infringed her registered and common law
24 trademarks and has violated her right of publicity by using her name and
25 likeness on its websites and social media platforms. *Id.* ¶¶ 26, 44.

1 On February 20, 2019, Kardashian filed a complaint against
2 Misguided, alleging: (1) violations of her statutory right of publicity under
3 Cal. Civ. Code § 3344; (2) violations of her common law right of publicity; (3)
4 false designation of origin in violation of § 43 of the Lanham Act, 15 U.S.C. §
5 1125(a); (4) trademark infringement in violation of § 32 of the Lanham Act,
6 15 U.S.C. § 1114(1); and (5) common law trademark infringement. (Doc.
7 No. 1). Misguided has yet to respond to Kardashian’s complaint.

8 9 **II. REQUEST FOR ENTRY OF DEFAULT**

10 Before the Court decides whether to grant default judgment, Federal
11 Rule of Civil Procedure 55(b)(2) requires the Clerk’s entry of default. Entry
12 of default is appropriate “[w]hen a party against whom a judgment for
13 affirmative relief is sought has failed to plead or otherwise defend.” Fed. R.
14 Civ. P. 55(a). However, a party has no duty to defend unless the plaintiff
15 properly served the defendant with the summons and complaint, or waives
16 such service, pursuant to Federal Rule of Civil Procedure 4.

17
18 On April 10, 2019, Kardashian filed a request for entry of default against
19 Misguided UK. (Dkt. 17.) Therein, Kardashian provided that Misguided UK
20 was served on March 11, 2019 pursuant to Article 5 of the Hague
21 Convention in compliance for Rule 4(f). (Dkt. 17, Declaration of Gregory P.
22 Korn (“Korn Decl.”) ¶ 4.) On April 11, 2019, the clerk issued a “Notice of
23 Deficiency” stating that Plaintiffs’ request for entry of Misguided UK’s default
24 had been forwarded to the assigned judge for consideration, because the
25 clerk “does not have the authority to enter default against a foreign entity.”
26 (Dkt. 18.) Therefore, the Court must determine whether Misguided UK was

1 properly served in accordance with Rule 4(f), which governs the permissible
2 methods of service on a corporation in a foreign country.

3
4 Rule 4(h) states that a foreign corporation must be served, if outside the
5 United States, in accordance with Rule 4(f). Fed. R. Civ. P. 4(h). Rule
6 4(f)(1) authorizes service by methods specifically authorized by international
7 agreements, including the Hague Convention. It is mandatory to apply the
8 Hague Convention when both countries are signatories to the Convention.
9 See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699
10 (1988). The United Kingdom and the United States are both signatories, so
11 the rules of the Hague Convention apply. See *Buzztime Entm't, Inc. v. Sony*
12 *Computer Entm't Europe Ltd*, 2008 WL 11337017, at *2 (S.D. Cal. July 10,
13 2008).

14
15 Here, Kardashian engaged the services of “Across the Pond Services,”
16 an English company that specializes in serving process in the United
17 Kingdom pursuant to the Hague Convention. (Korn Decl. ¶ 2.) According to
18 Kardashian’s proof of service, process server John Frederick Talbot
19 (“Talbot”), acting as an agent for solicitor Graham Henry Bridgman
20 (“Bridgman”), served Misguided UK’s paralegal at its registered office in
21 Manchester, England on March 11, 2019. (Dkt. No. 14.) Kardashian’s
22 counsel contends that this method of service was done in accordance with
23 sub-paragraph (b) of the first paragraph of Article 5 of the Hague
24 Convention. (Korn Decl. ¶ 4.) Article 5, sub-paragraph (b) provides that
25 “[t]he Central Authority of the State addressed shall itself serve the
26 document or shall arrange to have it served by an appropriate agency ... by

1 a particular method requested by the applicant, unless such a method is
2 incompatible with the law of the State addressed.” See [https://assets.hcch](https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf)
3 [.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf](https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf), (Hague
4 Convention on the Service Abroad of Judicial and Extrajudicial Documents
5 in Civil or Commercial Matters), last visited on May 31, 2019.

6
7 Talbot was acting as an agent for Bridgman, a solicitor for the Senior
8 Courts of England and Wales, who was in turn acting at the direction of the
9 Central Authority of England and Wales. (Dkt. No. 14.) Therefore, Talbot
10 was acting on behalf of the Central Authority of England, which complies
11 with Article 5. However, the issue is whether the method requested by
12 Kardashian to serve Misguided UK is compatible with United Kingdom law.
13 United Kingdom Civil Procedural Rule 6.4.4 provides that “a document is
14 served personally on a company or other corporation by leaving it with a
15 person holding a senior position within the company or corporation.” U.K.
16 C.P.R. 6.4.4. “Senior position” is defined as a director, treasurer, secretary,
17 chief executive, manager or other officer of the company.” U.K. C.P.R. &
18 Service Practice Direction 6.2(1). In this case, Talbot served Misguided
19 UK’s paralegal, which is not a “senior position” under United Kingdom law;
20 thus, the method used in this case was “incompatible with the law of the
21 State addressed.”

22
23 For this reason, the Court finds Kardashian has not met her burden of
24 showing proper international service in accordance with the Hague
25 Convention as required under Rule 4(f). Because the Court finds Misguided
26 UK was not properly served, the Court **DENIES** Kardashian’s request for

1 entry of default.¹ The Court will give Kardashian an opportunity to renew a
2 motion for default judgment following proof of proper service of a summons
3 and complaint upon Misguided UK.

4 5 **III. MOTION FOR DEFAULT JUDGMENT**

6 **A. Legal Standard**

7 Federal Rule of Civil Procedure 55 authorizes the Court to enter a
8 default judgment against a party who “fail[s] to plead or otherwise defend” a
9 claim. Fed. R. Civ. P. 55 (a)–(b)(2). “Even if entry of default has been made
10 by the court clerk, granting a default judgment is not automatic; rather it is
11 left to the sound discretion of the court.” *PepsiCo v. Triunfo-Mex, Inc.*, 189
12 F.R.D. 431, 432 (C.D. Cal. 1999) (citing *Aldabe v. Aldabe*, 616 F.2d 1089,
13 1092 (9th Cir. 1980)). Upon default, the factual allegations of the complaint,
14 except those relating to the amount of damages, will be taken as true.
15 *Televideo Sys. Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987); see
16 also *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007); Fed. R.
17 Civ. P. 8(b)(6).

18
19 In exercising its discretion to grant or deny an application for default
20 judgment, the Court considers the following factors: (1) the possibility of

21
22

¹ Because Kardashian has not properly effectuated service on Misguided
23 UK, the Court cannot enter a default judgment against the foreign entity.
24 See *Keith J. Walker v. Elick Toby Bowler, et al.*, 2018 WL 6118427, at *2
25 (C.D. Cal. Feb. 2, 2018) (“Even assuming plaintiff had properly effectuated
26 service on the defendants in issue, entry of a default judgment under Fed.
R. Civ. P. 55(b) would be premature absent the Clerk’s entry of default as to
such defendant under Fed. R. Civ. P. 55(a).”) Notwithstanding, the Court
may enter default judgment against Misguided USA because the Clerk entered
default against them on March 29, 2019. (Doc. No. 12.)

1 prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the
2 sufficiency of the complaint; (4) the sum of money at stake in the action; (5)
3 the possibility of a dispute concerning material facts; (6) whether the default
4 was due to excusable neglect; and (7) the strong policy underlying the
5 Federal Rules of Civil Procedure favoring decisions on the merits
6 (collectively, "*Eitel* factors"). *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th
7 Cir. 1986). The merits of the plaintiff's substantive claim and the sufficiency
8 of the complaint are often treated by courts as the most important *Eitel*
9 factors. *Mnatsakanyan v. Goldsmith & Hull APC*, No. 2:12-cv-04358-MMM-
10 PLAx, 2013 WL 10155707, at *10 (C.D. Cal. May 14, 2013).

11
12 In addition, Local Rule 55-1 provides that an application for default
13 judgment must be accompanied by a declaration in compliance with Federal
14 Rule of Civil Procedure 55(b) setting forth, inter alia, when and against what
15 party the default was entered and the identification of the pleading to which
16 default was entered.

17 18 **B. Discussion**

19 As a threshold matter, Kardashian has satisfied the requirements of
20 Local Rules 55-1 and 55-2 and Federal Rule of Civil Procedure 55(b).
21 Kardashian has requested (Dkt. 11) and received (Dkt. 12) an entry of
22 default against Misguided USA. Moreover, Misguided USA is neither an
23 infant nor incompetent nor in military service or otherwise exempt under the
24 Soldiers' and Sailors' Civil Relief Act of 1940. See Motion at 13; Doc. No.
25 19-1, Declaration of Gregory Korn ("Korn Decl.") ¶ 2). Having determined
26 Kardashian's procedural compliance, the Court will address each *Eitel* factor

1 to determine whether Kardashian is entitled to a default judgment against
2 Misguided USA.

3
4 1. Possibility of Prejudice to Plaintiff

5 The first *Eitel* factor considers “whether the plaintiff will suffer prejudice
6 if default judgment is not entered.” *PepsiCo, Inc. v. California Sec. Cans*,
7 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Absent default judgment in
8 this case, Kardashian would be denied the right to judicial resolution of the
9 claims presented, and would be without other recourse for recovery. *See id.*;
10 *Elektra Entm’t Group Inc. v. Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005).
11 Accordingly, this factor weighs in favor of default judgment.

12
13 2. The Merits of Plaintiff’s Substantive Claims and Sufficiency of the
14 Complaint

15 Courts often consider the second and third *Eitel* factors together. *See*
16 *PepsiCo*, 238 F. Supp. 2d at 1175. The second and third *Eitel* factors look at
17 whether Plaintiff’s complaint has sufficiently stated a claim for relief. In their
18 analysis of the second and third *Eitel* factors, courts accept as true all well-
19 pleaded allegations regarding liability. *See Fair Hous. of Marin v. Combs*,
20 285 F.3d 899, 906 (9th Cir. 2002).

21 a. Trademark Infringement

22 Kardashian seeks default judgment against Misguided USA on her
23 claims for trademark infringement in violation of § 32 of the Lanham Act, 15
24 U.S.C. § 1114(1), and for false designation of origin in violation of § 43 of the
25 Lanham Act, 15 U.S.C. § 1125(a). Section 32 of the Lanham Act “provides
26 the registered owner of a trademark with an action against anyone who

1 without consent uses a ‘reproduction, counterfeit, copy, or colorable
2 imitation’ of the mark in such a way that ‘is likely to cause confusion or to
3 cause mistake, or to deceive.’” *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d
4 1083, 1085 (9th Cir. 1998) (quoting 15 U.S.C. § 1114(1)). Similarly, section
5 43(a) of the Lanham Act creates a civil cause of action against “[a]ny person
6 who ... uses in commerce any word, term, name, symbol, or device ... or ...
7 false or misleading representation of fact, which ... is likely to cause
8 confusion ... as to the affiliation ... or approval of his or her goods, services,
9 or commercial activities by another person” 15 U.S.C. § 1125(a).

10
11 To establish a trademark infringement claim under either section of the
12 Lanham Act, a party “must prove: (1) that it has a protectible [sic] ownership
13 interest in the mark; and (2) that the defendant's use of the mark is likely to
14 cause consumer confusion.” *Dep't of Parks & Recreation v. Bazaar Del*
15 *Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006).

16
17 1. Ownership of a Valid Trademark

18 Registration of a mark is “prima facie evidence of the validity of the
19 registered mark[,],... of the registrant's ownership of the mark, and ... [of the]
20 exclusive right to use the registered mark in commerce on or in connection
21 with the goods or services specified in the registration.” 15 U.S.C. § 1115(a);
22 *see also Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d
23 1036, 1047 (9th Cir. 1999) (party's “registration of the mark on the Principal
24 Register in the Patent and Trademark Office constitutes prima facie
25 evidence of the validity of the registered mark and of exclusive right to use
26 the mark on the goods and services specified in the registration”).

1
2 Kardashian alleges that she owns several valid federally registered
3 trademarks in her name. Compl. ¶¶ 42, 43. These marks include (1) U.S.
4 Registration No. 4,989,420, International Class 41 for KIM KARDASHIAN
5 WEST; (2) U.S. Registration No. 4,978,865, International Class 35, for KIM
6 KARDASHIAN WEST; and (3) U.S. Registration No. 4,516,079, International
7 Class 35, for KIM KARDASHIAN. *Id.* Because Misguided USA has failed to
8 rebut the presumption of ownership by virtue of default, the Court finds
9 Kardashian has sufficiently alleged ownership of a valid trademark.

10
11 2. Likelihood of Confusion

12 The test for likelihood of confusion is whether a ‘reasonably prudent
13 consumer’ in the marketplace is likely to be confused as to the origin of the
14 good or service bearing one of the marks.” *Dreamwerks Production Group,*
15 *Inc. v. SKG Studio, d/b/a Dreamworks SKG*, 142 F.3d 1127, 1129 (9th Cir.
16 1998). In celebrity-based infringement actions, the Ninth Circuit examines
17 eight factors to determine the likelihood of confusion:

18
19 (1) the level of recognition that the [celebrity] has among the
20 segment of the society for whom the [opposing party's] product
21 is intended; (2) the relatedness of the fame or success of the
22 [celebrity] to the [opposing party's] product; (3) the similarity of
23 the likeness used by the [opposing party] to the actual
24 [celebrity]; (4) evidence of actual confusion; (5) marketing
25 channels used; (6) likely degree of purchaser care; (7) [the
26

1 opposing party's] intent [in] selecting the [celebrity]; and (8)
2 likelihood of expansion of the product lines.

3
4 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001).

5
6 Accepting Kardashian's allegations as true, the Court finds that the
7 *Downing* factors weigh in favor of finding a likelihood of confusion. First,
8 Kardashian is a world-famous celebrity who "enjoys one of the largest social
9 media followings of any celebrity in the world, including more than 120
10 million followers on Instagram, and close to 60 million followers on Twitter."
11 Compl. ¶ 12; Declaration of Kim Kardashian West ("Kardashian Decl.") ¶ 6).
12 As such, the first *Downing* factor weighs in Kardashian's favor because "[a]
13 mark with extensive public recognition and renown deserves and receives
14 more legal protection than an obscure or weak mark." *YKK Corp. v.*
15 *Jungwoo Zipper Co.*, 213 F.Supp.2d 1195, 1200 (C.D. Cal. 2002).

16
17 Second, Kardashian's allegations support a finding that the
18 "relatedness" of Kardashian's fame is closely related to Misguided USA's
19 fashion brand. Kardashian is a highly sought-after spokesperson for
20 products in the fashion and cosmetics industries. Doc. No. 19-1,
21 Declaration of Todd Wilson ("Wilson Decl.") ¶ 2). Relatedly, Misguided USA
22 is a "fast-fashion" clothing company that is "particularly well-known for
23 copying designs worn by famous celebrities, which it then offers for sale on
24 its sites within days—sometimes even hours—of the celebrity appearing in
25 the clothing." Compl. ¶ 16. Indeed, Misguided USA's website includes
26 pages devoted entirely to the sale of clothing inspired by Kardashian.

1 Compl. ¶ 17. Therefore, the Court finds that this creates a danger that “the
2 public will mistakenly assume there is an association between the producers
3 of the related foods, though no such association exists.” *AMF Inc. v.*
4 *Sleekcraft Boats*, 599 F.2d 341, 350 (9th Cir. 1979).

5
6 With respect to the third and fourth *Downing* factors, Kardashian has
7 submitted extensive evidence showing Misguided USA’s use of her fame to
8 promote the sale of its clothing. This evidence includes copies of webpages
9 from www.misguidedus.com featuring photographs of Kardashian and nine
10 screenshots of Misguided USA using Kardashian’s photograph on its
11 Instagram account to promote its brand. Korn Decl. ¶¶ 8-10, Ex. 4-15.
12 Next, with respect to actual confusion, Kardashian alleges that Misguided
13 USA’s systematic use of her fame has caused the public to “come to the
14 mistaken conclusion that she is affiliated with Misguided and is working
15 hand in hand with the company to create “fast fashion” versions of her
16 clothing.” Compl. ¶ 23. In support, Kardashian submits an article entitled
17 *Kim K and Misguided: Fast Fashion at its Quickest or a Marketing Ploy in*
18 *Disguise?* which accuses Kardashian of coordinating with Misguided USA.
19 Korn Decl. ¶ 11, Ex. 16. Additionally, Kardashian herself declares that she
20 has seen articles online accusing her of secretly collaborating with
21 Misguided USA. Kardashian Decl. ¶ 12. Based on these allegations and
22 supporting evidence, the Court finds the third and fourth *Downing* factors
23 weigh in Kardashian’s favor.

24
25 As to the fifth *Downing* factor, “convergent marketing channels increase
26 the likelihood of confusion.” *Sleekcraft*, 599 F.2d at 353. Here, both parties

1 sell their products online and promote their brand through the use of social
2 media, specifically Instagram. Because of Kardashian’s social media
3 following, “companies routinely pay Kardashian millions of dollars in fees to
4 serve as a celebrity endorser.” Compl. ¶ 13. Depending on the nature of
5 the post, Kardashian receives fees from \$300,000 to \$500,000 for a single
6 social media post. Wilson Decl. ¶ 5. Similarly, Misguided USA promotes its
7 brand and products through social media posts and online articles. Compl.
8 ¶ 45. The Court finds these allegations sufficient to support a finding that
9 the parties use similar marketing channels to sell their products. Thus, this
10 factor weights in Kardashian’s favor.

11
12 Finally, with respect to the seventh *Downing* factor, “[t]he relevant
13 question is whether the defendants intended to profit by confusing
14 customers” by implying endorsement.” *White v. Samsung Elec.*, 971 F.2d
15 1395, 1400 (9th Cir. 1992). Here, Kardashian alleges Misguided USA has
16 “repeatedly used Kardashian’s name and image without authorization to
17 generate interest in their brand and website, and to elicit sales of their
18 products.” Compl. ¶ 15. Kardashian further alleges that Misguided USA
19 “purposefully inserted Kardashian’s Instagram username @kimkardashian
20 into its post[s] to capitalize on her celebrity status and social media following
21 in promoting the sale of its upcoming product.” *Id.* ¶ 20. Accepting
22 Kardashian’s allegations as true, the Court finds this factor weighs in favor
23 of finding a likelihood of confusion.

24
25 Although Kardashian has not alleged facts to support the sixth (i.e.,
26 likely degree of purchaser care) or eighth (i.e., likelihood of expansion of

1 product lines) *Downing* factors, “the factors should not be weighed or
2 applied mechanistically, but used as a guide in assessing likelihood of
3 confusion.” *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1165 (C.D.
4 Cal. 2009) (citing *Dreamwerks*, 142 F.3d at 1129.) Because the majority of
5 *Downing* factors favor likelihood of confusion, the Court finds Kardashian’s
6 allegations sufficient to support a finding of likelihood of confusion.
7 Therefore, the Court finds that Kardashian has sufficiently alleged false
8 designation of origin and trademark infringement.

9
10 b. Right of Publicity

11 Kardashian seeks default judgment on her common law and statutory
12 right of publicity claims. Mot. at 14. In California, “the right of publicity is
13 both a statutory and a common law right.” *Comedy III Productions, Inc. v.*
14 *Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001). To sustain a common law
15 cause of action for right of publicity, a plaintiff must prove: “(1) the
16 defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's
17 name or likeness to defendant's advantage, commercially or otherwise; (3)
18 lack of consent; and (4) resulting injury.” *Downing*, 265 F.3d at 1001
19 (quoting *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983)).
20 Under California’s statutory right of publicity, codified as Cal. Civ. Code §
21 3344, “any person who knowingly uses another's name, voice, signature,
22 photograph, or likeness, in any manner ... for purposes of advertising ...
23 without such person's prior consent ... shall be liable for any damages
24 sustained by the person.” Cal. Civ. Code § 3344(a). To prevail on a
25 statutory right of publicity claim under section 3344, a plaintiff must prove all
26 the elements of the common law cause of action and “allege a knowing use

1 by the defendant as well as a direct connection between the alleged use
2 and the commercial purpose.” *Downing*, 265 F.3d at 1001 (quoting
3 *Eastwood*, 149 Cal. App. 3d at 417).

4
5 Kardashian alleges that Misguided USA “has willfully and without
6 authorization used Kardashian’s name, image, likeness, and persona for
7 commercial purposes, to advertise the Misguided brand and website, and to
8 promote the sale of clothing on Misguided’s site.” Compl. ¶ 34. Kardashian
9 alleges that, as a direct and proximate result of Misguided USA’s conduct,
10 Kardashian has suffered damages in the amount of no less than \$10 million.
11 Compl. ¶¶ 28, 36. According to Kardashian, Misguided USA’s unauthorized
12 use of her name and image have been particularly harmful because it
13 damages her credibility and dilutes her brand by making it appear as though
14 she is indiscriminately endorsing Misguided’s products. Kardashian Decl.
15 ¶¶ 11-12; Wilson Decl. ¶¶ 10-12. Taken as true, the Court finds these
16 allegations sufficiently allege that Misguided USA knowingly used
17 Kardashian’s image for a commercial advantage without her consent and
18 that Kardashian has suffered an injury as a result. Further, Kardashian’s
19 allegations that Misguided USA used Kardashian’s name and image on its
20 website to advertise its brand and promote the sale of clothing, taken as
21 true, shows a direct connection between Misguided USA’s use and a
22 commercial purpose. Therefore, the Court finds that Kardashian has
23 adequately pled common law and statutory right of publicity claims.

24
25 Accordingly, the second and third *Eitel* factors favor entry of default
26 judgment against Misguided USA.

1
2 3. The Sum of Money at Stake

3 The fourth *Eitel* factor requires the Court to balance the amount of
4 money at stake against the seriousness of Defendant's conduct. "Default
5 judgment is disfavored where the sum of money at stake is too large or
6 unreasonable in relation to defendant's conduct." *Vogel v. Rite Aid Corp.*,
7 992 F. Supp. 2d 998, 1012 (C.D. Cal. 2014). In her motion, Kardashian
8 seeks \$5,000,000 in damages based on her right of publicity claims,
9 \$103,600 in attorneys' fees and a permanent injunction. Mot. at 17-18, 20-
10 22.

11
12 On a right of publicity claim, Kardashian is entitled to seek lost profits in
13 the form of the fair market value of her name; however, the amount must be
14 limited to the manner in which her name was used by Misguided USA. See
15 *Clark v. Am. Online Inc.*, 2000 WL 33535712, at *8 (C.D. Cal. Nov. 30,
16 2000). The Court acknowledges that Kardashian has adduced evidence
17 that she receives millions of dollars from licensing deals to allow third-party
18 companies to use her name and image. Kardashian Decl. ¶ 13; Wilson
19 Decl. ¶¶ 3-7. However, as discussed *infra*, the Court finds that \$5 million is
20 not an accurate measure tailored to the specific misconduct of Misguided
21 USA. Therefore, this factor advises against entering default judgment as to
22 damages.

23
24 4. Possibility of a Dispute Concerning Material Facts

25 The fifth *Eitel* factor requires the Court to consider the possibility of
26 dispute as to material facts in the case. Where a plaintiff's complaint is well-

1 pleaded and the defendants make no effort to properly respond, the
2 likelihood of disputed facts is very low. See *Landstar Ranger, Inc. v. Parth*
3 *Enters., Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010). “Because all
4 allegations in a well-pleaded complaint are taken as true after the court clerk
5 enters default judgment, there is no likelihood that any genuine issue of
6 material fact exists.” *Elektra Entm’t*, 226 F.R.D. at 393. Accordingly, the fifth
7 *Eitel* factor weighs in favor of default judgment.

8
9 5. Possibility of Excusable Neglect

10 The sixth *Eitel* factor considers the possibility that a defendant’s default
11 resulted from excusable neglect. *Vogel*, 992 F. Supp. 2d at 1013; see also
12 *Eitel*, 782 F.2d at 1471–72. Due process requires that interested parties be
13 given notice of the pendency of the action and be afforded an opportunity to
14 present its objections before a final judgment is rendered. *Mullane v.*
15 *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). While there is
16 always a possibility that a defendant might appear and claim excusable
17 neglect, where the defendants “were properly served with the Complaint,
18 the notice of entry of default, as well as the papers in support of the instant
19 motion,” this factor favors entry of default judgment. *Shanghai Automation*
20 *Instrument Co. Ltd. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001).
21 Here, despite proper service, Misguided USA made no effort to defend this
22 suit. Moreover, Kardashian’s counsel provides that Misguided’s counsel
23 informed him “that neither of the Misguided entities intended to respond to
24 [Kardashian’s] Complaint.” Korn Decl. ¶ 4. Taken as true, this obviates a
25 finding of a possibility of excusable neglect. Therefore, the sixth *Eitel* factor
26 favors default.

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1 6. The Strong Public Policy Favoring Decisions on the Merits

2 The seventh *Eitel* factor requires the Court to consider the strong judicial
3 policy favoring decisions on the merits before granting default judgment.
4 Whenever reasonably possible, cases should be decided upon their merits.
5 *Eitel*, 782 F.2d at 1472; *PepsiCo*, 238 F. Supp. 2d at 1177. However, the
6 policy favoring decisions on the merits does not prevent a court from
7 entering judgment where a defendant refuses to respond. *PepsiCo*, 238 F.
8 Supp. 2d at 1177. Here, the Court is unable to make a decision on the
9 merits because Misguided USA has intentionally chosen not to respond or
10 take any action to defend itself in this case. Accordingly, the seventh *Eitel*
11 factor does not preclude the Court from entering default judgment against
12 Misguided USA.

13
14 7. Summary of the *Eitel* Factors

15 Based on the analysis above, the Court finds that *Eitel* factors support
16 entry of default judgment against Misguided USA. Kardashian has no other
17 recourse and there is little possibility of excusable neglect in light of
18 Misguided USA's intentional decision not to participate in this litigation.
19 Further, Kardashian claims have merit, were sufficiently alleged in the
20 Complaint, and there appears to be no dispute about material facts. Given
21 the factual circumstances here, these factors outweigh the large amount of
22 money at stake and the policy favoring decisions on the merits. Accordingly,
23 the Court enters default judgment against Misguided USA.

1 C. Requested Relief

2 Once liability is established, the plaintiff seeking default judgment must
3 then establish that the requested relief is appropriate. *Geddes v. United Fin.*
4 *Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). A plaintiff's demand for relief must
5 be specific and a plaintiff "must 'prove up' the amount of damages." *Elektra*
6 *Entm't Group v. Bryant*, 2004 WL 783123, at *5 (C.D. Cal. Feb. 13, 2004);
7 Fed. R. Civ. P. 8(a)(3). Pursuant to Rule 55(b)(2), district courts enjoy a
8 "wide latitude" of discretion in determining damages. *Elektra Entm't*, 226
9 F.R.D. at 394. Here, Kardashian seeks \$5 million in damages; \$103,600 in
10 attorneys' fees and a permanent injunction. The Court will address each of
11 Kardashian's requested remedies in turn.

12 13 1. Damages

14 Kardashian seeks \$5 million in lost profits caused by Misguided USA's
15 misconduct pursuant to Cal. Civ. Code 3344 (a). See Cal. Civ. Code §
16 3344(a) (providing that a plaintiff may recover "the greater of seven hundred
17 fifty dollars (\$750) or the actual damages suffered by him or her as a result
18 of the unauthorized use, and any profits from the unauthorized use that are
19 attributable to the use and are not taken into account in computing the
20 actual damages.") "[T]he standard for measuring lost profits in a right of
21 publicity case is the fair market value of the right to use plaintiff's name or
22 likeness in the manner in which it was used by defendant." *Clark*, 2000 WL
23 33535712, at *8; see also *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d
24 867, 875 (C.D. Cal. Jan. 22, 1999) *rev'd on other grounds*, 255 F.3d 1180
25 (9th Cir. 2001) (celebrity entitled to compensatory damages in an amount
26

1 representing the fair market value of the right to utilize his name and
2 likeness in the manner in which it was used by defendant magazine).

3
4 Here, Kardashian estimates that the fair market value of Misguided
5 USA's use of her name and likeness is no less than \$5 million based on her
6 previous licensing deals. Mot. at 17. Kardashian explains that her
7 multimillion dollar licensing deals are for "more involved arrangements
8 where [she] will partner with a company for a longer period of time," that she
9 "often works closely with [her] licensing partners to develop specific
10 products for her endorsement," and that she "typically insist[s] on reviewing
11 and approving all products that are promoted using [her] name and image
12 before the products are released to the public." Kardashian Decl. ¶¶ 7, 13.
13 To substantiate her \$5 million estimated fair market value, Kardashian
14 compares Misguided USA's use of her name and image to a recent
15 licensing deal with a company that manufactures wearable consumer
16 goods. Wilson Decl. ¶ 7. There, the licensee agreed to pay Kardashian
17 over \$6 million annually plus a significant equity interest in exchange for two
18 promotional appearances and the right to use Kardashian's name and
19 image in marketing and selling goods. *Id.* ¶¶ 7-8.

20
21 The Court finds that such licensing deals are distinguishable from the
22 manner in which Misguided USA used Kardashian's name and image in this
23 case. Here, with the exception of two, the Instagram posts at issue do not
24 directly seek to promote the sale of Misguided USA's clothing. *Compare*
25 Compl. ¶ 20 and Dkt. 19-1, Ex. 8 *with* Dkt. 19-1, Ex. 9-15. Rather, Exhibits
26 9-15 show Misguided USA using Kardashian's name and image to create

1 comedic internet memes and to report on recent news involving Kardashian
2 and her famous family. Consequently, these images are likely not violations
3 of Kardashian's right of publicity because such uses are protected by the
4 First Amendment. See *Winter v. DC Comics*, 30 Cal. 4th 881, 888, 69 P.3d
5 473, 477 (2003). Nevertheless, because Misguided USA failed to appear
6 and defend, the Court declines to consider the First Amendment defense to
7 mitigate damages and includes these Instagram posts in calculating
8 damages for deterrence purposes.

9
10 Furthermore, with respect to Exhibit 8 and the Instagram post pictured in
11 the Complaint, the Court finds that Misguided USA's use therein is
12 analogous to Kardashian's one-off endorsement deals, where she is paid
13 \$300,000 to \$500,000 for a single social media post, rather than her
14 multimillion dollar licensing deals. Wilson Decl. ¶ 5. Thus, the Court
15 concludes that the proper measure of damages should be in the range of
16 \$300,000 to \$500,000 per unauthorized Instagram post. In light of
17 Misguided USA's goodwill in taking the most recent Instagram post down
18 "without any admission whatsoever of liability," Dkt. 19-1, Ex. 1, the Court
19 finds the appropriate measure of damages to be the minimum amount of
20 \$300,000 per post. Here, Kardashian submitted evidence of nine
21 unauthorized Instagram posts containing her name and image on Misguided
22 USA's account. Compl. ¶ 20; Dkt. 19-1, Ex. 8-15. Accordingly, the Court
23 finds damages in the amount of \$2,700,000 (\$300,000 x 9 posts) to be
24 reasonable.

1 2. Injunctive Relief

2 Kardashian seeks an injunction enjoining Misguided USA from using
3 Kardashian’s trademarks in connection with any product or service sold,
4 marketed, or distributed by Misguided USA.² Compl. ¶¶ 63; Mot. at 20-21.
5 The Lanham Act expressly permits district courts to issue injunctions to
6 prevent trademark infringement under 15 U.S.C. § 1116(a). Permanent
7 injunctive relief is appropriate where a plaintiff demonstrates: (1) it has
8 suffered irreparable harm; (2) there is no adequate remedy at law; (3) the
9 balance of hardships favors an equitable remedy; and (4) an issuance of an
10 injunction is in the public’s interest. *eBay, Inc. v. MercExchange, LLC*, 547
11 U.S. 388, 391–92 (2006).

12
13 The Court finds that Kardashian’s requested injunctive relief is
14 appropriate. First, there is a likelihood of irreparable harm in the form of
15 damages to Kardashian’s trademarks, business reputation and goodwill.
16 *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250
17 (9th Cir.2013) (holding that loss of control over business reputation and
18 damage to goodwill are cognizable irreparable harms in the trademark
19 infringement context). Second, the Court doubts legal remedies are
20 adequate to compensate for this harm. *See Century 21 Real Estate Corp.*
21 *v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988) (“Injunctive relief is the
22 remedy of choice for trademark and unfair competition cases, since there is

23
24 ² Kardashian’s Motion only seeks injunctive relief pursuant to the Lanham
25 Act and not pursuant to her California right of publicity claims. Mot. at 20-
26 21. As such, Kardashian has failed to meet her burden that she is entitled
 to injunctive relief pursuant to her right of publicity claims, and thus, the
 Court cannot permanently enjoin Misguided USA from using Kardashian’s
 “name, image, likeness, and persona” as requested in her Complaint.

1 no adequate remedy at law for the injury caused by a defendant's continuing
2 infringement.”). Third, the Court finds that the equities favor injunctive relief.
3 Finally, injunctive relief would not disserve the public interest, as it would
4 protect the public from likely confusion. Accordingly, the Court **GRANTS**
5 Kardashian’s permanent injunction and enjoins Misguided USA from using
6 Kardashian’s trademarks in connection with the sale, marketing or
7 distribution of its products.

8 9 3. Attorneys’ Fees

10 Pursuant to Local Rule 55-3, Kardashian requests attorneys’ fees in the
11 amount of \$103,600. Mot. at 22. In default judgment actions, Local Rule
12 55-3 provides “a default calculation of fees[.]” *Vogel v. Harbor Plaza Ctr.,*
13 *LLC*, 893 F.3d 1152, 1159 (9th Cir. 2018). However, “[i]f a party seeks a fee
14 ‘in excess of’ the schedule and timely files a written request to have the fee
15 fixed by the court, then the court ... is obliged to calculate a ‘reasonable’ fee
16 in the usual manner, without using the fee schedule as a starting point.” *Id.*

17
18 Here, in seeking attorney's fees, Kardashian does not seek to deviate
19 from the schedule. Therefore, the Court will apply Local Rule 55-3 to
20 calculate attorneys’ fees. See *Vogel*, 893 F.3d at 1160 (“[Local Rule 55-3]
21 gives lawyers who obtain default judgments and who are entitled to
22 statutory fees the option of recovering a set amount without going through
23 the hassle of submitting records.”). According to the schedule, where a
24 judgment is over \$100,000, reasonable attorney's fees will be \$5,600 plus
25 2% of the amount over \$100,000. See Local Rule 55-3. Based on the
26 abovementioned judgment of \$2,700,000, Kardashian is entitled to

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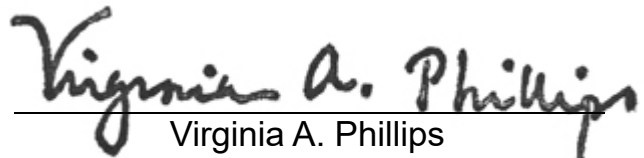
1 attorneys' fees in the amount of \$59,600 ($\$5,600 + 0.02(\$2,700,000)$). The
2 Court finds this amount to be reasonable.

3
4 **IV. CONCLUSION**

5 The Court **DENIES** Kardashian's request for entry of default against
6 Misguided UK. The Court **GRANTS IN PART** Kardashian's Motion for
7 Default Judgment against Misguided USA and permanently enjoins
8 Misguided USA from using Kardashian's trademarks in connection with the
9 sale, marketing or distribution of its products. The Court awards Kardashian
10 \$2,700,000 in damages and \$59,600 in attorneys' fees.

11
12 **IT IS SO ORDERED.**

13
14 Dated: 7/2/19

15 
16 Virginia A. Phillips
17 Chief United States District Judge
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