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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HANA MODZ, LLC, an Illinois
Limited Liability Company,

Plaintiff,

vs.

ILLVAPES, LLC, a California Limited
Liability Company, and DOES 1-10,

Defendant,

CASE NO. 14-CV-1235 JLS (JLB)
**ORDER GRANTING MOTION
FOR DEFAULT JUDGMENT**

(Doc. No. 8)

Presently before the Court is Plaintiff’s Motion for Default Judgment. (Mot. for Default J., ECF No. 8.) Having considered the Plaintiff’s arguments and the law, the Court **GRANTS** the Motion.

BACKGROUND

Plaintiff, Hana Modz, LLC, “developed and sells one of the leading advanced electronic cigarette product lines on the market.” (Complaint 2, ECF No. 1; Mot. for Default J. 1, ECF No. 8.) Plaintiff has been using the trademark and logo “HANA MODZ” since at least April 1, 2013 to market and sell electronic cigarette products. (Complaint 3, Ex. B, C, ECF No. 1.) Plaintiff also owns U.S. Trademark Registration 4620234, which issued after the Complaint was filed. Plaintiff is the owner of registered copyrights for photographs of the Hana Modz products, effective April 22,

1 2014.¹ (*Id.* at Ex. A.) Defendant, IllVapes, markets and sells electronic cigarette
2 products online and through its store in Pacific Beach, California. (*Id.* at 3.) On or
3 about April 1, 2014, IllVapes began marketing and selling electronic cigarette products
4 using the Hana Modz name, logo, and copyrighted content. (*Id.*) IllVapes is not an
5 authorized distributor of Hana Modz products or otherwise affiliated with Hana Modz.
6 (*Id.*)

7 Plaintiff and Defendant attempted settlement discussions, but were unable to
8 reach a resolution of the dispute. (Mot. for Default J. 1, ECF No. 8.) Plaintiff filed a
9 Complaint on May 16, 2014, alleging Trademark Infringement, Copyright
10 Infringement, Unfair Competition, and False Advertising. (Complaint, ECF No. 1.)
11 Plaintiff brings this lawsuit against Defendant, IllVapes, LLC, claiming that it
12 unlawfully markets and sells products using Hana Modz's mark, logo, and copyrighted
13 works. After Defendant failed to respond, the Clerk entered default on October 8,
14 2014. (Entry of Default, ECF No. 7.) On January 5, 2015, Plaintiff filed this Motion
15 for Default Judgment.

16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 55 permits a court to enter default judgment.
18 A court is to grant or deny default judgment at its discretion. *See Alan Neuman Prods.,*
19 *Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (citing *Haw. Carpenters' Trust*
20 *Funds v. Stone*, 794 F.2d 508, 511–12 (9th Cir. 1986); *Eitel v. McCool*, 782 F.2d 1470,
21 1471 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)). The
22 Ninth Circuit has set out seven factors for a court to consider when exercising this
23 discretion:

24 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
25 substantive claim, (3) the sufficiency of the complaint, (4) the sum of
26 money at stake in the action, (5) the possibility of a dispute concerning
27 material facts, (6) whether the default was due to excusable neglect, and
28 (7) the strong policy underlying the Federal Rules of Civil Procedure
favoring decisions on the merits.

¹The first photograph in Exhibit A is registered under Registration No. V Au 1-163-553. The second photograph in Exhibit A is registered under Registration No. V Au 1-163-403.

1 *Eitel*, 782 F.2d at 1471–72 (citation omitted). When weighing these factors, well-pled
2 factual allegations not related to the amount of damages are taken as true. *TeleVideo*
3 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (quoting *Geddes v.*
4 *United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977)); *see also* Fed. R. Civ. P. 8(b)(6).
5 To prove damages, a plaintiff may submit declarations or the Court may hold an
6 evidentiary hearing. *See Affinity Group, Inc. v. Balsler Wealth Mgmt.*, 2007 WL
7 1111239, at *1 (S.D. Cal. Apr. 10, 2007).

8 ANALYSIS

9 1. Default Judgment

10 The Court finds that, in light of the facts of this case, Plaintiff’s Motion for
11 Default Judgment should be **GRANTED**. Reviewing the *Eitel* factors, all favor
12 Plaintiff.

13 A. Possibility of Prejudice to Hana Modz

14 *Eitel*’s first factor looks to whether a plaintiff would suffer prejudice if its
15 motion were denied. *Eitel*, 782 F.2d at 1471; *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.
16 Supp. 2d 1172, 1177 (C.D. Cal. 2002). In this case, denial of this motion would result
17 in prejudice to Plaintiff because Plaintiff would be left without recourse to prevent
18 IllVapes from infringing upon its rights in the future as well as to recover for the harm
19 which has already occurred. Thus, this factor favors entry of default judgment.

20 B. The Merits of Plaintiff’s Substantive Claims and the Sufficiency of the 21 Complaint

22 The second and third *Eitel* factors address the substantive merits of the claim and
23 the sufficiency of the complaint. *Eitel*, 782 F.2d at 1472; *Affinity Group*, 2007 WL
24 1111239, at *2. The Ninth Circuit has suggested that these factors require that a
25 plaintiff “state a claim on which the [plaintiff] may recover.” *See Kloeping v.*
26 *Fireman’s Fund*, 1996 WL 75314, at *2 (N.D. Cal. Feb. 13, 1996) (quoting *Danning*
27 *v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

28

1 (i) *Trademark Infringement*

2 Plaintiff's claim for trademark infringement arises under the Lanham Act. 15
3 U.S.C. § 1125(a). To prevail, Plaintiff must show "(1) that it has a protectible
4 ownership interest in the mark; and (2) that the defendant's use of the mark is likely to
5 cause consumer confusion." *Network Automation, Inc. v. Advanced Sys. Concepts,*
6 *Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Dep't of Parks & Recreation v.*
7 *Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006)).

8 The likelihood of confusion is the "central element of trademark infringement,"
9 and can also be articulated as a "determination of whether the similarity of the marks
10 is likely to confuse customers about the source of the products." *GoTo.com, Inc. v.*
11 *Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000) (internal citations and quotations
12 omitted). The Ninth Circuit has set forth eight factors to guide the determination of
13 likelihood of confusion: (1) the similarity of the marks; (2) the relatedness of the two
14 companies' services; (3) the marketing channel used; (4) the strength of the plaintiff's
15 mark; (5) Defendant's intent in selecting its mark; (6) evidence of actual confusion; (7)
16 the likelihood of expansion into other markets; and, (8) the degree of care likely to be
17 exercised by purchasers. *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir.
18 1979).

19 The eight-factor test is a "pliant" one, however, in which "some factors are much
20 more important than others." *Brookfield Communications, Inc. v. West Coast Entm't*
21 *Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999) (citations omitted). In the context of the
22 Internet, the three most important factors are: (1) the similarity of the marks, (2) the
23 relatedness of the goods or services, and (3) the "simultaneous use of the Web as a
24 marketing channel." *Id.* at 1054 n.16.

25 Here, Plaintiff adequately alleges a trademark infringement claim. Plaintiff has
26 established that it has protectable common law trademark rights in the HANA MODZ
27 mark and logo based on prior use. (Compl. 2–3, ECF No. 1.) Furthermore, Plaintiff
28 is the registered owner of the "HANA MODZ" mark, which issued after this Complaint

1 was filed. Moreover, Plaintiff alleges facts indicating that Defendant's use of an
2 identical mark in connection with the sale of its electronic cigarette products is likely
3 to cause confusion in the market place. (Compl., ECF No. 1). Plaintiff alleges that the
4 use of this mark is likely to confuse consumers, internet users, and the public that
5 "IllVapes is the source, origin, or sponsor of Hana Modz's products or that Hana Modz
6 otherwise approves of or has an affiliation with IllVapes." (Mot. for Default J. 3-4,
7 ECF No. 8.) In summary, the marks are identical, Plaintiff competes with Defendant
8 to market goods and services to the same audience, the products are similar—if not
9 identical—and both Parties make simultaneous use of the Internet to market their
10 products.

11 Plaintiff's allegations, which are taken as true in light of Defendant's default,
12 adequately establish that Defendant's use of the "HANA MODZ" mark is likely to
13 confuse consumers. Plaintiff's pleadings and exhibits are thus sufficient to support its
14 trademark infringement claim and the Court **GRANTS** Plaintiff's motion for default
15 judgment.

16 (ii) *Copyright Infringement*

17 Plaintiff's claim for copyright infringement arises under the 17 U.S.C. §§ 106
18 and 501. To state a claim for copyright infringement, "a plaintiff must show: (1)
19 ownership of a valid copyright and (2) copying by the defendant of the protectable
20 elements of the work." *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999).

21 Here, Plaintiff adequately alleges a copyright infringement claim. The
22 Complaint establishes that Plaintiff is the owner of registered copyrights for the two
23 photographs of its products. (Complaint 3, Ex. A, ECF No. 1.) In addition, the
24 Complaint alleges that IllVapes copied protected elements of the copyrighted works.
25 Specifically, IllVapes created advertisements and marketing materials that mimic the
26 composition, color, and general appearance of the Copyrighted Works and appear on
27 IllVapes' website and Facebook page. (*Id.* at Ex. C.) The Complaint also alleges that
28 Defendant willfully committed these violations in order to take advantage of the

1 significant name recognition and goodwill surrounding the Hana Modz products. (*Id.*
2 at 6.)

3 Plaintiff's pleadings and exhibits are thus sufficient to support its copyright
4 infringement claim and the Court **GRANTS** Plaintiff's motion for default judgment.

5 *(iii) Unfair Competition and False Advertising*

6 California's Unfair Competition Law prohibits any "unlawful, unfair or
7 fraudulent business act or practice." Cal. Bus. And Prof. Code § 17200. The false
8 advertising law prohibits any "unfair, deceptive, untrue or misleading advertising." *Id.*;
9 Cal. Bus. and Prof. Code § 17500. Violations of the false advertising law necessarily
10 violate the unfair competition law. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950 (Cal.
11 2002). Claims under these statutes are governed by the "reasonable consumer" test.
12 *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). Under this "reasonable
13 consumer" standard, a plaintiff must show that "members of the public are likely to be
14 deceived." *Id.* (quoting *Bank of West v. Sup. Ct.*, 833 P.2d 545, 546 (Cal. 1992)).

15 Here, Plaintiff adequately alleges violations of both the unfair competition and
16 false advertising laws. The Complaint alleges that Defendant used the Hana Modz
17 brand name, logo, and copyrighted content to promote, market, and advertise IllVapes
18 electronic cigarette products. Further, the Complaint alleges that Defendant deceived
19 consumers into believing they were purchasing Hana Modz products, when they are in
20 fact purchasing imitations.

21 Plaintiff's pleadings and exhibits are thus sufficient to support its unfair
22 competition and false advertising claims and the Court **GRANTS** Plaintiff's motion for
23 default judgment.

24 **C. *The Sum of Money at Stake in the Action***

25 The fourth factor examines the amount of money at issue. *Eitel*, 782 F.2d at
26 1471. "[T]he court must consider the amount of money at stake in relation to the
27 seriousness of Defendant[s]' conduct." *Cal. Sec. Cans*, 238 F. Supp. 2d at 1176–77.

28 With respect to the sum of money at stake in this action, Plaintiff is seeking

1 \$307,974 in statutory damages and attorney's fees as well as a permanent injunction
2 against continued infringement. This amount is reasonable in relation to Defendant's
3 conduct, and thus, this factor favors entry of default judgment.

4 ***D. The Possibility of a Dispute Concerning Material Facts***

5 Because Defendant has refused to participate in this lawsuit, no possibility of
6 dispute concerning material facts has been presented. Moreover, there is little
7 possibility of dispute because the Court takes all factual allegations in the complaint
8 as true based on the entry of default. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d
9 915, 917–18 (9th Cir. 1987). Thus, factor five weighs in favor of granting default
10 judgment.

11 ***E. Possibility of Excusable Neglect***

12 Defendants have made no showing of excusable neglect. And when a defendant
13 has been served with notice of the complaint and the application for default judgment,
14 there is effectively no potential that its default was due to excusable neglect. *See, e.g.,*
15 *Virgin Records Am., Inc. v. Cantos*, 2008 WL 2326306, at *3 (S.D. Cal. June 3, 2008);
16 *Affinity Grp.*, 2007 WL 1111239, at *3. Accordingly, it is unlikely that Defendant's
17 default is due to excusable neglect. Plaintiff's submissions indicate that the parties
18 corresponded prior to serving Defendant with this lawsuit and that settlement
19 negotiations failed. Defendant is most likely aware that this litigation is pending but
20 has nevertheless declined to participate. Therefore, the sixth factor also favors granting
21 Plaintiff's motion.

22 ***F. Policy Favoring Decisions on the Merits***

23 "While the public policy favoring disposition of cases on their merits weighs
24 against default judgment, that single factor is not enough to preclude imposition on this
25 sanction." *Rio Props., Inc. v. Rio Int'l. Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002).
26 "Moreover, [a] Defendant's failure to answer Plaintiffs' Complaint makes a decision
27 on the merits impractical, if not impossible." *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177.

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1 The fact that Defendant refuses to participate in the judicial process renders a decision
2 on the merits virtually impossible.

3 In light of the above considerations, the Court **GRANTS** Plaintiff's Motion for
4 Default Judgment.

5 **2. Damages**

6 Once default judgment is deemed appropriate, the Court conducts an inquiry into
7 the appropriate relief and amount of damages. *See Sony Computer Entm't Am., Inc. V.*
8 *Divineo, Inc.*, 457 f. Supp. 2d 957 (N.D. Cal. 2006). Plaintiff requests the Court grant
9 both injunctive and monetary relief.

10 **A. Injunctive Relief**

11 Plaintiff seeks a permanent injunction barring Defendant from continued use of
12 the "HANA MODZ" brand name, logo, and copyrighted content. The traditional
13 standard governing the issuance of a permanent injunction requires that Plaintiff
14 demonstrate the following: "(1) that it has suffered an irreparable injury; (2) that
15 remedies available at law, such as monetary damages, are inadequate to compensate for
16 that injury; (3) that, considering the balance of hardships between the plaintiff and
17 defendant, a remedy in equity is warranted; and (4) that the public interest would not
18 be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S.
19 388, 391 (2006).

20 Here, Plaintiff has shown that it is entitled to permanent injunctive relief.
21 Defendant's continued use of the "HANA MODZ" mark causes ongoing injury to
22 Plaintiff's business that is likely irreparable. By selling lower cost, imitation products
23 not manufactured or controlled by Hana Modz, Defendant has damaged the reputation
24 and goodwill of Hana Modz. It is unclear how many consumers have been, or will be,
25 diverted due to Defendant's infringement; this ongoing loss of sales and injury to
26 goodwill cannot be cured by money damages. *See Rent-A-Ctr., Inc. v. Canyon*
27 *Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir.1991) ("[I]ntangible
28 injuries, such as damage to . . . goodwill [] qualify as irreparable harm."). As to the

1 balance of hardships, Plaintiff's interest in maintaining the integrity of its registered
2 trademark and copyrighted photographs and protecting its goodwill outweighs any
3 interest that Defendant may have in continued infringement. Finally, the public interest
4 in maintaining vigorous protection for intellectual property rights also favors an
5 injunction.

6 Accordingly, injunctive relief is warranted and the Court **GRANTS** Plaintiff's
7 request for a permanent injunction.

8 ***B. Statutory Damages***

9 Plaintiff also seeks statutory damages in the amount of \$300,000 for the willful
10 infringement of Hana Modz's copyrights. In copyright infringement cases, a plaintiff
11 may elect either statutory or actual damages. 17 U.S.C. § 504(a). Under 17 U.S.C. §
12 504(c)(1), Plaintiff is entitled to between \$750 and \$30,000 in statutory damages for
13 each act of infringement. When infringement was committed willfully, the Court in its
14 discretion may increase the statutory damages award up to \$150,000 for each act of
15 infringement. 17 U.S.C. § 504(c)(2). A defendant willfully infringes on the copyright
16 of another by acting "with knowledge that the defendant's conduct constitutes
17 copyright infringement." *Peer Intern. Corp. v. Pausa Records, Inc.*, 909 F.2d 1332,
18 1336 & n.3 (9th Cir. 1990). The court has wide discretion in determining what amount
19 of statutory damages should be awarded, and should consider what is just in the
20 particular case, the nature of the copyright, and the circumstances of the infringement.
21 *Id.* at 1336 (citing *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984);
22 *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952)).

23 As set forth in the Complaint, Defendant infringed on two of Plaintiff's
24 copyrighted works. (Complaint, Ex. A–C, ECF No. 1.) Plaintiff's Complaint alleges
25 that Defendant blatantly and unabashedly infringed the Copyrighted Works by using
26 original and edited Hana Modz photographs. Plaintiff claims that this is demonstrative
27 of Defendant's willful intent to take advantage of Plaintiff's significant name
28 recognition and goodwill. Because Defendant chose to not defend itself in this lawsuit,

1 it has not contested the allegations or otherwise established good faith belief in its
2 innocence. The Court finds that these omissions in defending itself show evidence of
3 willfulness. *Derek Andrew, Inc. v. Proof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir.
4 2008) (when a defendant defaults, “all factual allegations in the complaint are deemed
5 true, including the allegation of willful infringement.”)

6 Accordingly, the Court awards Plaintiff statutory damages in the amount of
7 \$150,000 for each violation. This amount is appropriate to achieve the goal of
8 deterrence in light of Defendant’s willful behavior.

9 **C. Attorney’s Fees**

10 Plaintiff also seeks attorney’s fees and costs in the amount of \$7,974. 17 U.S.C.
11 § 505 authorizes an award of attorney fees and costs to the prevailing party in a
12 copyright infringement suit. District Courts should consider the following
13 nonexclusive factors in determining an award of attorney fees: (1) the degree of success
14 obtained; (2) frivolousness; (3) motivation; (4) the objective unreasonableness of the
15 losing party’s factual and legal arguments; and (5) the need, in particular
16 circumstances, to advance considerations of compensation and deterrence. *Entm’t*
17 *Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1229 (9th Cir. 1997)
18 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)). Furthermore,
19 attorney’s fees are also available in trademark infringement suits when the defendant’s
20 conduct is “malicious, fraudulent, deliberate, or willful.” *Rio Props., Inc. v. Rio Int’l*
21 *Interlink*, 284 F.3d 1007, 1023 (9th Cir. 2002).

22 Plaintiff’s factual allegations, taken as true in light of Defendant’s default,
23 indicate that Defendant willfully infringed on Plaintiff’s trademarks and copyrights and
24 also violated California’s unfair competition and false advertising laws. Further,
25 Plaintiff has established that Defendant’s infringement was knowing and deliberate.
26 Defendant failed to come forth with any viable defenses or good faith justifications for
27 its actions. Defendant’s inaction supports the merits of Plaintiff’s claims and its
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1 inability to defend itself. The Court finds an award of attorney fees is justified in light
2 of the circumstances and is necessary to deter further infringing conduct.

3 Based on Plaintiff's submissions, the Court finds that an award of costs and
4 attorney's fees in the amount of \$7,974 is reasonable and justified. (Norton Decl., ECF
5 No. 8-2; Orion Decl., ECF No. 8-3.) Accordingly, the Court **GRANTS** Plaintiff's
6 request for costs and attorney's fees.

7 **CONCLUSION**

8 For the reasons stated above, the Court:

9 (1) **GRANTS** Plaintiff's motion for default judgment.

10 (2) **GRANTS** Plaintiff's request for a permanent injunction. Defendant and each
11 of its agents, servants, employees, attorneys, and those persons in active concert or
12 participation with any of them are **HEREBY ENJOINED** from:

13 (a) using the HANA MODZ mark, or any colorable imitation thereof or
14 confusingly similar term, in the electronic cigarette market, without
15 authorization from Plaintiff;

16 (b) using the Hana Modz logo, or any colorable imitation thereof or
17 confusingly similar logo, in the electronic cigarette market, without
18 authorization from Plaintiff;

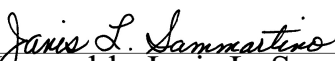
19 (c) advertising, marketing, promoting, selling, distributing, or otherwise
20 commercially using the designation "clone," "1:1 clone," "copy," or
21 similar phrase in connection with the use of the HANA MODZ mark,
22 Hana Modz logo, and Hana Modz copyrighted content.

23 (3) **GRANTS** Plaintiff's request for statutory fees in the amount of \$300,000.

24 (4) **GRANTS** Plaintiff's request for \$7,974 in costs and attorney's fees.

25 **IT IS SO ORDERED.**

26 DATED: February 27, 2015

27 
28 Honorable Janis L. Sammartino
United States District Judge