IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Avvo Incorporated, Plaintiff, v. Chang Liang, et al., Defendants.	No. CV-16-00892-PHX-DLR **ORDER**

Plaintiff Avvo Incorporated has moved for default judgment against Defendants Chang Liang and Huang Shaoqing pursuant to Federal Rule of Civil Procedure 55(b). (Doc. 38.) The time for filing responses has long passed and none have been filed. For reasons stated below, default judgment is appropriate.

I. Background

Avvo owns avvo.com, an online lawyer rating and review system. (Doc. 1 ¶ 1.) In March 2016, Avvo brought this action alleging that Defendants operate a website that is a complete "rip" of avvo.com, meaning Defendants deliberately have copied avvo.com entirely, including its text, images, videos, and underlying code. (¶¶ 4-5.) Avvo alleges that Defendants use their website to engage in "phishing," a scam by which an internet user is tricked into revealing personal or confidential information, which the scammer then can use illicitly. (¶ 5.) Avvo asserts seven claims: (1) violation of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(5)(C); (2) violation of A.R.S. § 18-542; (3) service mark infringement under 15 U.S.C. § 1114; (4) unfair competition under

15 U.S.C. § 1125(a): (5) copyright infringement under 17 U.S.C. §101[1]; (6) breach of contract; and (7) conversion. Avvo seeks damages, attorneys' fees and costs, and injunctive relief.

In April 2016, Avvo filed an *ex parte* motion for a temporary restraining order (TRO), which the Court granted. (Docs. 9, 12, 14.) The TRO enjoined Defendants from operating the offending website or any others that contain Avvo's intellectual property, and ordered impounded all copies of Avvo's work in Defendants' possession. (Doc. 14.) The Court also scheduled a preliminary injunction hearing for April 19, 2016. (*Id.*)

The Court later granted Avvo leave to serve Defendants via email. (Doc. 16-17.) Avvo then served Defendants with the summons, complaint, application for TRO, and TRO on April 6, 2016. (Doc. 18-19.) Defendants, however, did not appear at the preliminary injunction hearing, nor did they file responsive memoranda. Accordingly, after hearing from Avvo, the Court entered an order converting the TRO into a preliminary injunction. (Docs. 25, 28.)

Defendants thereafter failed to answer the complaint, appear, or otherwise participate in this action. Avvo applied for entry of default on September 8, 2016, and the Clerk entered default against Defendants the following day. (Docs. 32, 34.) The next month, Avvo filed the instant motion for default judgment against Defendants. (Doc. 38.)

II. Default Judgment Standard

After default is entered by the clerk, the district court may enter default judgment pursuant to Rule 55(b). The court's "decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Although the court should consider and weigh relevant factors as part of the decision-making process, it "is not required to make detailed findings of fact." *Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

The following factors may be considered in deciding whether default judgment is

[1] Avvo does not seek default judgment on Count V.

appropriate: (1) the possibility of prejudice to the plaintiff, (2) the merits of the claims, (3) the sufficiency of the complaint, (4) the amount of money at stake, (5) the possibility of factual disputes, (6) whether default is due to excusable neglect, and (7) the policy favoring decisions on the merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In considering the merits and sufficiency of the complaint, the court accepts as true the complaint's well-pled factual allegations, but the plaintiff must establish all damages sought in the complaint. *See Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977).

A. Possible Prejudice to Avvo

The first *Eitel* factor weighs in favor of default judgment. Defendants failed to respond to the complaint or otherwise appear in this action despite being served with the complaint, the application for default, and the motion for default judgment. If default judgment is not granted, Avvo "will likely be without other recourse for recovery." *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). The prejudice to Avvo in this regard supports the entry of default judgment.

B. Merits of the Claims and Sufficiency of the Complaint

The second and third *Eitel* factors favor default judgment where, as in this case, the complaint sufficiently states plausible claims to relief under the pleading standards of Rule 8. *See id.* at 1175; *Danning v. Lavine*, 572 F.2d 1386, 1388-89 (9th Cir. 1978). A review of the complaint's well-pled allegations shows that Avvo has stated plausible claims to relief against Defendants. Indeed, in granting Avvo's application for a TRO and motion for preliminary injunction, the Court previously determined that Avvo was likely to succeed on the merits of its claims. It is axiomatic that a party who is likely to succeed on its claims has sufficiently stated plausible claims to relief.

C. Amount of Money at Stake

Under the fourth *Eitel* factor, the Court considers the amount of money at stake in relation to the seriousness of the defendants' conduct. *See PepsiCo*, 238 F. Supp. 2d at 1176. Here, Avvo first seeks $2,000,000 in damages for trademark infringement. (Doc.

38 at 15-18.) In cases involving counterfeit marks, the Lanham Act authorizes statutory damages of up to $2,000,000 for willful infringement. 15 U.S.C. § 1117(c). Avvo seeks the statutory maximum in light of Defendants' egregious counterfeiting. Defendants ripped Avvo's entire website and pretended to operate as Avvo in order to phish for personal and confidential information from unsuspecting users. Under these circumstances, the Court finds that the maximum statutory penalty is appropriate to compensate Avvo for Defendants' willful infringement.

Avvo next seeks $50,000 for prospective corrective advertising. "An award of the cost of corrective advertising, like compensatory damage awards in general, is intended to make the plaintiff whole. It does so by allowing the plaintiff to recover the cost of advertising undertaken to restore the value plaintiff's trademark has lost due to defendant's infringement." *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 988 (9th Cir. 1995). Avvo contends that, without Defendants' participation in this case, "it is impossible . . . to ascertain the number of consumers who were searching for [Avvo's] site and who were diverted to Defendants' site. It is additionally impossible to determine how many consumers gave Defendants their personal information to their detriment." (Doc. 38 at 17.) Because of these uncertainties, Avvo estimates its prospective corrective advertising costs at $50,000, noting that if Defendants managed to steal the identities of any Avvo customers the amount of corrective advertising could be great. (*Id.*) Taking the factual allegations in the complaint as true, as the Court must at this stage, the Court finds a real risk that Defendants' infringement led to the illicit use of unsuspecting users' personal information. Accordingly, Avvo's estimated $50,000 for prospective corrective advertising is reasonable under the circumstances of this case.

Additionally, Avvo seeks $5,000 in statutory damages under A.R.S. § 18-543, which creates civil remedies for victims of internet fraud or theft. Under this section, a person adversely affected by internet fraud or theft may recover "the greater of actual damages or five thousand dollars[.]" Avvo has elected the latter.

Finally, Avvo seeks $27,660.00 in attorneys' fees and $1,732.24 in costs under the

Lanham Act, which permits fee awards in "exceptional cases." 15 U.S.C. § 1117(a). An exceptional case is one that "stands out from others with respect to the substantive strength of a party's litigating position." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, -- U.S. --, 134 S. Ct. 1749, 1756 (2014). Here, the Court finds that this case is "exceptional" under the *Octane Fitness* standard given Defendants' blatant and egregious duplication of Avvo's intellectual property for nefarious purposes. Further, having considered Avvo's itemized billing records, the experience of counsel, the novelty and difficulty of the issues presented, the results obtained, and the others factors enumerated in LRCiv 54.2(c)(3), the Court finds that Avvo's fee request is reasonable under the circumstances.

Accordingly, although Avvo seeks a substantial amount in damages and attorneys' fees, the amount of money at stake is proportional to the seriousness of Defendants' misconduct. The fourth *Eitel* factor therefore weighs in favor of default judgment.

D. Possible Dispute Concerning Material Facts

Given the sufficiency of the complaint and Defendants' default, "no genuine dispute of material facts would preclude granting [Avvo's] motion." *PepsiCo*, 238 F. Supp. 2d at 1177.

E. Whether Default Was Due to Excusable Neglect

Defendants were properly served with process in this matter. They also were served with copies of the application for default and the present motion for default judgment. It therefore "is unlikely that Defendant[s'] failure to answer and the resulting default was a result of excusable neglect." *Gemmel v. Systemhouse, Inc.*, No. CIV 04-187-TUC-CKJ, 2008 WL 65604, at *5 (D. Ariz. Jan. 3, 2008). This *Eitel* factor, like the other five discussed above, weighs in favor of default judgment.

F. Policy Favoring a Decision on the Merits

The last factor always weighs against default judgment given that cases "should be decided on their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. The mere existence of Rule 55(b), however, "indicates that this preference, standing alone, is

not dispositive." *PepsiCo*, 238 F. Supp. 2d at 1177 (citation omitted).

Moreover, Defendants' failure to answer the complaint "makes a decision on the merits impractical, if not impossible." *Gemmel*, 2008 WL 65604, at *5. Stated differently, it is difficult to reach the merits when the opposing parties are absent. Because Avvo has asserted plausible claims to relief to which Defendants have failed to respond, the policy encouraging decisions on the merits does not weigh against the granting of default judgment in this case.

III. Conclusion

Having reviewed the record and considered the *Eitel* factors as a whole, the Court concludes that the entry of default judgment against Defendants is appropriate under Rule 55(b).

IT IS ORDERED that Plaintiff Avvo Incorporated's motion for default judgment against Defendants Chang Liang and Huang Shaoqing (Doc. 38) is **GRANTED**. Default judgment is entered in favor of Avvo and against Defendants Liang and Shaoqing as follows:

1. In the amount of $29,392.24 in attorneys' fees and costs pursuant to the Lanham Act;

2. In the amount of $2,000,000 as an award of compensatory damages pursuant to the Lanham Act;

3. In the amount of $50,000 for corrective advertising;

4. In the amount of $5,000 as statutory damages under A.R.S. § 18-543;

5. Defendants, their respective officers, agents, servants, employees, and/or all persons acting in concert or participation with them, or any of them, are prohibited from:

(a) continuing to operate the offending website at the wyhes.com and t6t7.net domain names, or on any other domain name; operating any other website that purports to originate from or be condoned by Avvo or contains any trademarks, copyrights, or other intellectual property belonging to Avvo; and using Avvo's trademarks, or confusingly similar variations thereof, alone or in combination with any

other letters, words, letter strings, phrases, or designs, in commerce or in connection with any other business or for any other purpose;

(b) Verisign, Inc. is instructed to disable the counterfeit Avvo.com website, regardless of the domain name(s) hosting it, and so long as it is within Verisign's Top Level Domains (TLDs), should Defendants refuse to comply with the Court's injunction;

(c) Verisign, Inc. is instructed to disable any other websites within its TLDs that Defendants set up in order to avoid the orders of this Court, effectively turning the website into a "moving target" that can never actually be restrained;

(d) the following possessions of Defendants shall be impounded: (1) all copies of Avoo's works, in any format, in Defendants' possession or under their control; (2) all hard drives, computers, or other storage devices that contain Avoo's marks, works, or other copyrighted images; and (3) the wyhes.com and t6t7.net domain names, which are hereby forfeited to Avoo.

IT IS FURTHER ORDERED that Avvo's bond, posted on May 4, 2016 in the amount of $100.00 is **EXONERATED** and shall be returned to Avvo by the Clerk of the Court.

IT IS FURTHER ORDERED that the Clerk of the Court shall terminate this case.

Dated this 10th day of May, 2017.

Douglas L. Rayes
United States District Judge