

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REDACTED CIVIL MINUTES - GENERAL

Case No.	SACV 19-1765 JVS (JDE)	Date	Sept. 1, 2021
Title	<u>Philips North America LLC et al. v. KPI Healthcare, Inc. et al.</u>		

Present: The Honorable	James V. Selna, U.S. District Court Judge		
Lisa Bredahl	Not Present		
Deputy Clerk	Court Reporter		
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
Not Present	Not Present		

Proceedings: [IN CHAMBERS] Order Regarding Motion for Default Judgment

Plaintiffs Philips North America LLC, Koninklijke Philips N.V., and Philips India Limited (collectively – “Philips”) filed a motion for default judgment against Defendants KPI Healthcare Inc. and KPI Healthcare eCommerce Inc. (collectively – “KPI”). Mot., ECF No. 169. Defendants have failed to oppose.

For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** the motion.

I. BACKGROUND

Philips is a leader in the field of medical imaging systems. FAC, ECF No. 32, ¶ 1. In this case, Philips alleges that KPI uses its international affiliates to import Philips’s ultrasound systems into the United States. Id. ¶ 3. KPI would then illegally hack into Philips’s proprietary software in the ultrasound systems to modify, tamper with, and alter the systems to enable unlicensed software features. Id. KPI would then sell these modified systems for a profit. Id. To hide their illegal conduct, KPI would modify the serial numbers and other hardware identifiers on the ultrasound systems. Id. ¶ 4.

Philips has asserted the following claims against KPI: (1) trademark infringement under 15 U.S.C. §§ 1125(a) and 1114; (2) false designation of origin under 15 U.S.C. § 1125(a); (3) false advertising under 15 U.S.C. § 1125(a); (4) circumventing of a technological measure under 17 U.S.C. § 1201; (5) modifying of copyright management information under 17 U.S.C. § 1202; (6) trade secret misappropriation under 18 U.S.C. § 1836 *et seq.*; (7) trade secret misappropriation and violations of California’s Uniform Trade Secret Act, California Civil Code § 3426 *et seq.*; (8) civil theft and violations of

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California's Penal Code §§ 484(a) and 496(a); (9) unfair business practices under California Business and Professions Code § 17200 *et seq.*; (10) false advertising under California Business and Professions Code § 17500 *et seq.*; and (11) copyright infringement under 17 U.S.C. §§ 100, 501 *et seq.* See generally id.

II. LEGAL STANDARD

Before a court can enter a default judgment against a defendant, a plaintiff must satisfy the procedural and substantive requirements for default judgment.

A. Procedural Requirements

For a default judgment, a plaintiff must satisfy the procedural requirements of the Federal Rules of Civil Procedure. Rule 54(c) states that a default judgment cannot grant relief that is different from the requested relief in a complaint. Fed. R. Civ. P. 54(c). Under Rule 55(a), a clerk must enter a default when a defendant has failed to plead, defend, or appear in any form. Fed. R. Civ. P. 55(a). Lastly, if a defaulting party has appeared in an action, then a plaintiff needs to serve a motion for default on the defaulting party. Fed. R. Civ. P. 55(b)(2).

In addition, a party seeking a default judgment must satisfy the requirements of Local Rule 55-1. To satisfy Local Rule 55-1, a plaintiff needs to submit a declaration establishing (1) when and against who the clerk entered a default, (2) the pleading on which default was entered, (3) whether the defaulting party is an infant or incompetent “and if so, whether that person is represented by a guardian, committee, conservator or other representative”, (4) whether the Servicemembers Civil Relief Act applies; and (5) whether the plaintiff served a notice of the motion on the defaulting party, if required by Federal Rule of Civil Procedure 55(b)(2). L.R. 55-1.

2. Substantive Requirements

The Ninth Circuit has identified seven factors (together, the “Eitel factors”) that a court considers when determining whether to grant a default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at issue; (5) the possibility of a dispute regarding material facts; (6) the strong policy favoring decisions on the merits.

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Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

On an application for a default judgment, the factual allegations in the complaint are taken as true, with the exception of those regarding damages. See Pope v. United States, 323 U.S. 1, 12 (1944); Geddes v. United Fin. Grp., 559 F.2d 557, 560 (9th Cir. 1977). “[N]ecessary facts not contained in the pleadings, and claims which are legally insufficient, are not established by default.” Cripps v. Life Ins. Co., 980 F.2d 1261, 1267 (9th Cir. 1992). “A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c).

III. DISCUSSION

A. Procedural Requirements

As a threshold issue, Philips satisfies Local Rule 55-1. Philips has filed a declaration in support of his motion that states that default was entered against Defendants, that Defendants are neither incompetent nor infants, and that the Servicemembers Civil Relief Act does not apply. See Wirtschafter Decl., ECF No. 169-3, ¶ 4. Philips has also sent written notice of this motion to KPI at its last publicly available address. Id. ¶ 3. As the Court has previously granted Cislo & Thomas, LLP’s motion to withdraw as counsel for KPI, this form of notice is required under Federal Rule of Civil Procedure 55(b). See Withdrawal Order, ECF No. 122. Finally, Philips has complied with Rule 54(c) because it seeks damages and injunctive relief, as requested in the FAC. FAC at 53-56.

B. Substantive Requirements

1. Possibility of Prejudice to Plaintiff

The first substantive factor favors default judgment because Philips has expended effort and incurred costs and fees in prosecuting this action. The Clerk entered default against Defendants on March 3, 2021. Default Order, ECF No. 147. Defendants have not subsequently moved for this Court to set aside default. As such, the Court finds that the first Eitel factor favors default judgment.

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2. *Substantive Merits and Sufficiency of the Complaint*

Taken together, the second and third Eitel factors, related to the merits of a plaintiff's claims and the sufficiency of the complaint, address whether the party seeking default judgment has stated a claim upon which it may recover. See, e.g., Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 498–99 (C.D. Cal. 2003) (citing PepsiCo Inc. v. California Security Cans, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002)). The Court addresses each of the claims in turn.

a. *Trademark Infringement*

To state a claim under 15 U.S.C. § 1125(a) for trademark infringement, “a plaintiff must prove two basic elements: (1) it has a valid, protectable trademark, and (2) [the defendant’s] use of the mark is likely to cause confusion.” Southern California Darts Association v. Zaffina, 762 F.3d 921, 929 (9th Cir. 2014). Philips has alleged that it “owns federally registered trademarks in the Philips name and logo, as well as in specific products.” Mot. at 5; see FAC ¶¶ 26-28. After making unauthorized modifications to Philips systems, KPI would sell the systems while bearing Philips’s trademarks. FAC ¶ 52. KPI is also using the trademarks to advertise the impermissibly modified systems without authorization. Id. ¶ 53. Philips alleges that this has caused and will continue to cause consumer confusion. Id. ¶ 86. This is sufficient to state a claim.

b. *False Designation of Origin*

“To prevail on a false designation of origin claim, a plaintiff must show that the defendant ‘used in commerce any word, term, name, symbol, or device . . .’ that is ‘likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of his goods by plaintiff.’” Entrepreneur Media, Inc. v. Innovation Institute, 2018 WL 4860037, at *4 (C.D. Cal. Aug. 2, 2018) (citing Castworld, 219 F.R.D. at 499). In addition to the facts previously listed in the discussion of the trademark infringement claim, Philips has also alleged that KPI’s use of Philips’s trademarks has caused “confusion, mistake, and deception in the public mind that: (i) the counterfeit systems sold by KPI are sponsored, approved, or endorsed by Philips, (ii) the systems sold by KPI as authorized as Diamond Select, and/or (iii) there is a relationship, association, or partnership between KPI and

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Philips and/or KPI and the Diamond Select program that does not, in fact, exist.” Id. ¶ 112; see also id. ¶ 70. This is sufficient to state a claim for false designation of origin.

c. False Advertising

To establish a false advertising claim under 15 U.S.C. § 1125(a), Philips “must allege a false or misleading representation of fact in commercial advertising or promotion that misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” Prager University v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) (internal quotation omitted). Here, Philips has alleged that KPI advertised that it “hosts the Philips Diamond Select program” without being authorized as such a host. FAC ¶¶ 61-62. This is a false representation of fact that relates to the origin of KPI’s services, and so is sufficient to state a claim for false advertising. These allegations are also sufficient to state a false advertising claim under California Business and Professions Code § 17500, which requires that Philips show that KPI “made a statement, in connection with the sale of personal property, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.” PepsiCo, 238 F. Supp. 3d at 1176.

d. Unfair Competition

State law claims of unfair competition and claims under California Business and Professions Code § 17200 are “substantially congruent” to claims made under the Lanham Act. Cleary v. News Corp., 30 F.3d 1255, 1262-63 (9th Cir. 1994). As the Court has concluded that Philips has stated claims under the Lanham Act, the Court can therefore also determine that Philips has stated claims for unfair business practices under California Business and Professions Code § 17200. See Starbuzz Tobacco, Inc. v. Melnick, 2015 WL 12656925, at *4 (C.D. Cal. July 31, 2015) (finding similarly).

e. Circumvention of a Technological Measure

17 U.S.C. § 1201(a)(1)(A) prohibits a person from “circumvent[ing] a technological measure that effectively controls access to a work protected under this title.” To “circumvent a technological measure” means “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or

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impair a technological measure, without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). A technological measure “effectively controls access to a work” “if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” 17 U.S.C. § 1201(a)(3)(B). Philips has alleged that it has registered copyright on a number of pieces of proprietary software. FAC ¶ 36. Philips had “multiple layers of technological controls to protect Philips’ copyright-protected works from unauthorized access.” Id. ¶ 38. KPI is alleged to have gained unauthorized access to Philips’ software and to have done so by circumventing Philips’ technological controls, allegations sufficient to state a claim. Id. ¶¶ 131-32.

f. Modification of Copyright Management Information

Under 17 U.S.C. § 1202(b)(1), “[n]o person shall, without the authority of the copyright owner or the law . . . intentionally remove or alter any copyright management information.” “Copyright management information” is “information conveyed in connection with copies or phonorecords of a work” including “information identifying the work” and the “[t]erms and conditions for use of the work.” 17 U.S.C. §§ 1202(c)(1), 1202(c)(6). Philips alleges that KPI distributed a Philips copyrighted brochure after it had removed Philips’ copyright notice and Philips’ name and trademark. FAC ¶¶ 72-74. This is sufficient to state a claim for modification of copyright management information.

Philips also contends that it has stated a claim for improper modification of copyright management information because each modification that KPI made to the configuration of the systems that it sold “necessarily modified the terms and conditions therein.” Mot. at 9. The Court does not agree that this is a basis for stating a claim under § 1202. Philips merely alleges that “Philips’ machine specific configuration files for controlling access only to licensed optional software include copyright management information under 17 U.S.C. § 1202(c)” and “KPI’s business of modifying Philips Ultrasound Systems includes modifications to such copyright management information.” FAC ¶¶ 143-44. These allegations do not explain, however, what modifications KPI made to the copyright management information in the systems that it sold. In essence, Philips’s allegations are conclusory because there are no factual allegations as to what illegal modifications were in fact made by KPI. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (holding that a plaintiff must state “enough facts to state a claim to relief that is plausible on its face”). Philips’s allegations in this respect are insufficient. The

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Court therefore **DENIES** default judgment with respect to this claim to the extent it relies on modification of the configuration files..

g. Copyright Infringement

Copyright infringement has two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 361 (1991). Philips has alleged facts that satisfy each of these elements. First, Philips has alleged that it owns copyright in a number of pieces of proprietary software. Id. ¶ 36. Second, Philips has also alleged that KPI distributed unauthorized copies of Philips’ copyright-protected software, which KPI had modified. Id. ¶¶ 47-50. This is sufficient to state a claim for copyright infringement.

h. Trade Secret Misappropriation

“To state a claim for trade secret misappropriation under the [Defend Trade Secrets Act] and the [California Uniform Trade Secrets Act], a plaintiff must allege that: ‘(1) the plaintiff owned a trade secret; (2) the defendant misappropriated the trade secret; and (3) the defendant’s actions damaged the plaintiff.’” Alta Devices, Inc. v. LG Electronics, Inc., 343 F. Supp. 3d 868, 877 (N.D. Cal. 2018) (quoting Space Data Corp. v. X, 2017 WL 5013363, at *2 (N.D. Cal. Feb. 16, 2017)).

The Court does not believe that Philips has stated claims for trade secret misappropriation. Nowhere in the FAC does Philips state what its trade secrets are. Rather, Philips merely states that both Philips Voyager Platform and Philips Common Platform “include[] Philips’ confidential and proprietary information, intellectual property and trade secrets.” FAC ¶ 35. In the Court’s view, this is insufficient to state a claim that Philips does in fact have a trade secret that was misappropriated. The Court **DENIES** default judgment as to the misappropriation claims.

i. Civil Theft

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“To show a violation of § 496(a), California courts require plaintiffs to show (1) property was stolen or obtained in a manner constituting theft, (2) the defendant knew the property was stolen or so obtained, and (3) the defendant received or had possession of the stolen property.” 1250916 Ontario Ltd. v. Kagan, 2020 WL 6436965, at *4 (C.D. Cal. Sept. 18, 2020) (citing Switzer v. Wood, 247 Cal. Rptr. 3d 114, 121 (Ct. App. 2019)). “Theft” is in turn defined at California Penal Code § 484(a) as to “steal, take, carry, lead, or drive away the personal property of another, or [to] fraudulently appropriate property which has been entrusted to him or her, or [to] knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or [to] cause[] or procure[] others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtain[] credit and thereby fraudulently get[] or obtain[] possession of money, or property or obtain[] the labor or service of another” See Switzer, 247 Cal. Rptr. 3d at 126-27 (defining “theft” for purposes of § 496(a) with reference to § 484(a)).

The FAC alleges that KPI foreign affiliates “are or have been licensed distributors of Philips Ultrasound Systems outside of the U.S. [and] are not authorized to sell, import into, or distribute Ultrasound Systems in the United States.” FAC ¶ 45. It further alleges that KPI “knowingly and intentionally . . . [sold] materially modified Ultrasound Systems in at least the U.S. without permission.” Id. ¶ 46 (emphasis omitted). KPI itself then distributed the systems. Id. ¶ 52. But this does not constitute theft as defined under § 484(a). Indeed, Philips notes that KPI’s foreign affiliates “purchased those systems from Philips’ foreign affiliates.” Mot. at 11. Although it may have been improper under the terms of the restrictions for KPI’s foreign affiliates to subsequently export the systems to the United States for resale, there is no indication that KPI’s actions fall into any possible definition of theft outlined above. The Court therefore **DENIES** default judgment as to the civil theft claim.

3. *Remaining Four Factors*

For the fourth factor, although the Court concludes that Philips requests too large a sum in damages, the Court limits the damages that it awards to Philips. See infra Section III.C. This allows the fourth factor to weigh in favor of default judgment. The fifth factor also weighs in favor of default judgment because “[u]pon entry of default, the well-pleaded allegations of the complaint relating to a defendant’s liability are taken as true.” PepsiCo, 238 F. Supp. 2d at 1175. Therefore, no disputes of fact preclude granting

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the motion. The sixth factor — whether the dispute is due to excusable neglect — does not weigh against entry of default judgment since there is no indication of neglect here. Indeed, Philips notes that KPI's former president, Steven Minn, has apparently had 43 email communications with Cislo & Thomas, LLP, KPI's former counsel, since November 2020. Wirtschafter Decl. ¶ 16. If anything, this indicates that KPI has been aware of this impending default judgment. The seventh factor, the strong policy favoring decisions on the merits, weighs against entry of a default judgment. But this factor alone is not sufficient to counterbalance the other factors in this case. See PepsiCo, 238 F. Supp. 2d at 1177.

As such, the Court **GRANTS** default judgment in favor of Philips.

C. Relief Sought

Philips seeks substantial relief. Specifically, Philips seeks “(1) [REDACTED] in disgorgement of profit damages for KPI’s violations of the Lanham Act, the trade secret acts, and copyright infringement (1st-3rd, 6th, 7th and 11th claims); (2) [REDACTED] in reasonable royalties for lost license fees for KPI’s violations of the Lanham Act, the trade secret acts, and copyright infringement (1st-3rd, 6th, 7th and 11th claims) and civil theft (8th claim); (3) not less than [REDACTED] in statutory damages for violations of the DMCA (4th and 5th claim); (4) [REDACTED] in attorneys’ fees and [REDACTED] in costs of suit, plus the fees incurred to prepare this Motion; (5) enhanced and punitive damages . . . ; and (6) injunctive and other non-monetary relief.” Mot. at 14. As to the “enhanced and punitive damages,” Philips seeks (1) [REDACTED], trebling the disgorgement of profits; (2) [REDACTED], trebling the royalties from lost license fees; and (3) [REDACTED] the maximum amount in statutory damages for violations of the Digital Millennium Copyright Act. Id. at 14 n.6, n.7, n.8. The Court addresses each basis of relief in turn.

1. Disgorgement of Profits

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Philips argues that it is entitled to at least [REDACTED] in disgorgement of profits because of violations of the Lanham Act, trade secret laws, and the Copyright Act. Id. at 14-15. It also argues that this amount in disgorgement of profits should be trebled to [REDACTED]. Id. at 14 n.6.

The Court has denied default judgment with respect to Plaintiffs' trade secret claims. See supra Section III.A.2.h. Nevertheless, the Court agrees that [REDACTED] in disgorgement of profits is appropriate because of the Court's entry of default judgment as to the trademark claims under the Lanham Act. Under 15 U.S.C. § 1117(a), a violation of 15 U.S.C. §§ 1125(a) or (d) entitles the plaintiff to defendant's profits, any damages sustained by the plaintiff, and the costs of the action. "In assessing profits, the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed." 15 U.S.C. § 1117(a); see Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 514 (9th Cir. 1985). Following entry of default judgment against a defendant as to trademark claims under the Lanham Act, courts have granted plaintiffs a defendant's total sales so long as those sales are established with reasonable certainty. See, e.g., Herbalife International of America, Inc. v. Healthy1 Inc., 2019 WL 7169795, at *6 (C.D. Cal. July 8, 2019); China Central Television v. Create New Technology (HK) Limited, 2015 WL 12732432, at *18 (C.D. Cal. Dec. 7, 2015); Wecosign, Inc. v. IFG Holdings, Inc., 845 F. Supp. 2d 1072, 1084-85 (C.D. Cal. Jan. 23, 2012). The Court has reviewed Philips' submissions, and evidence produced in this case show that KPI sold [REDACTED] in goods that infringe on KPI's trademark between 2015 and 2020, including systems that it sold to Probo Medical, LLC. Wirtschafter Decl. ¶¶ 8-9, Exs. E & F. This amount therefore is properly awarded to Philips.

15 U.S.C. § 1117(a) allows the Court to enter judgment "according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount." Philips argues that the Court should use this discretion to award treble damages and thereby "make clear to others that hacking FDA-regulated medical devices and putting cybersecurity at risk is serious, and will not be tolerated." Mot. at 20. "Although a judge or jury may award up to triple the amount of lost profits, actual damages and costs to compensate a mark holder, the Lanham Act has been construed to expressly forbid the award of damages to punish an infringer." Skydive Arizona, Inc. v. Qattrocchi, 673 F.3d 1105, 1114 (9th Cir. 2012) (citations omitted). Section 1117(a) expressly states that an award "shall constitute compensation and not a penalty." Philips seeks an award that would punish KPI because of the type of trademark

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infringement that it engaged in. This is not an appropriate basis for the Court to exercise its discretion to award treble damages. As (1) the Court rejects awarding treble damages under the Lanham Act, (2) the Court has denied default judgment as the trade secret claims, and (3) Philips does not argue that the copyright violations entitle it to treble damages, the Court declines Philips's request to award treble damages.

2. *Lost License Fees*

Philips seeks [REDACTED] as a reasonable royalty for lost license fees that Philips charges for software features that KPI improperly enabled on the systems it sold. Mot. at 16. These lost license fees are remedies for violations of the Lanham Act, trade secret acts, copyright infringement, and civil theft claims. *Id.* at 14.

“[I]n situations where the infringer could have bargained with the copyright owner to purchase the right to use the work, actual damages are what a willing buyer would have been reasonably required to pay a willing seller for the plaintiff’s work.” Jarvis v. K2 Inc., 486 F.3d 526, 533 (9th Cir. 2007) (citation omitted). “Notably, the ‘market approach is an objective, not a subjective, analysis,’—that is, ‘[t]he question is not what the owner would have charged, but rather what is the fair market value.’” Live Face on Web, LLC v. AZ Metroway, Inc., 2016 WL 4402796, at *4 (C.D. Cal. Aug. 15, 2016) (quoting first Mackie v. Rieser, 296 F.3d 909, 917 (9th Cir. 2002); then On Davis v. The Gap, Inc., 246 F.3d 152, 166 (2d Cir. 2001)) (alteration in original). “As a general rule, damages which result from a tort must be established with reasonable certainty.” Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993). Nevertheless, “courts have accepted less precise estimates of damages where a defendant frustrates the discovery of a precise amount by defaulting in the action.” Wecosign, Inc. v. IFG Holdings, Inc., 845 F. Supp. 2d 1072, 1084 (C.D. Cal. Jan. 23, 2012) (citing Taylor Made Golf Co. v. Carsten Sports, Ltd., 175 F.R.D. 658, 662 (S.D. Cal. 1997)).

Philips does not know the exact number of modifications that KPI made to Philips systems because KPI did not produce any discovery related to the modifications. Wirtschafter Decl. ¶ 10. Instead, Philips estimates the amount in lost license fees it suffered by multiplying the number of Philips systems that it knows KPI sold by the average value of the licenses made improperly available on each of five improperly sold devices that Philips was able to locate and inspect. Mot. at 16; Dickson Decl., ECF No. 173-1, ¶¶ 5. Using this method, Philips states that [REDACTED] systems were sold by

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KPI with an average of [REDACTED] in unlicensed options made available on each system, for a total of [REDACTED] in lost license fees. *Id.*

Philips's calculation of its lost license fees is highly speculative. [-----]

-REDACTED

-----] But the Court cannot make such an inference with any “reasonable certainty” based on only five systems. The Court therefore **AWARDS** Philips the amount in lost license fees that it would have received for the seven systems it did analyze, which amounts to [REDACTED]. Dickson Decl., Ex. I, ECF No. 173-2, at 24. Should Philips uncover more evidence that allows the Court to determine with reasonable certainty the amount of lost license fees for the other systems sold by KPI, Philips is invited to submit additional briefing.¹

3. *DMCA Statutory Damages*

Next, Philips seeks up to [REDACTED] in statutory damages for KPI's violation of the Digital Millennium Copyright Act. Mot. at 14, 17-19. For each violation of 17 U.S.C. § 1201 for circumvention of a technological measure, a plaintiff can elect to receive statutory damages "in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just." 17 U.S.C. § 1203(c)(3)(A). For each violation of 17 U.S.C. § 1202 for modification of copyright management information, a plaintiff can elect to receive statutory damages "in the sum of not less than \$2,500 or more than \$25,000." Id. § 1203(c)(3)(B).

¹ Philips argues that the amount it is awarded in lost license fees should be trebled. Mot. at 14 n.7. It argues that it is entitled to treble damages under California Civil Code § 496(c) and 15 U.S.C. § 1117(b). Id. Neither legal basis is appropriate, however, because Philips only argues that it is entitled to lost license fees tied to the provision of unlicensed options on the systems KPI sold, which is the basis for its copyright infringement claim.

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Philips argues that each time an unauthorized piece of software was enabled, KPI violated §§ 1201 and 1202. Mot. at 17. The Court notes that it has already held that Philips has failed to state a claim that each modification that KPI made of Philips's software constituted a violation of § 1202. See supra Section III.B.2.f. Damages therefore cannot be awarded on this basis. By contrast, it is clear that each modification of the systems' software to provide access to unlicensed software is a circumvention of technological measures.² As the Court noted in its previous subsection, however, the Court cannot extrapolate the number of times that KPI provided access to unlicensed features from a sample size of five systems. See supra Section III.C.2. [-----

-----REDACTED-----

-----]. As the Court believes that the acts of circumvention are severe, the Court **AWARDS** Philips \$2,000 per device, amounting to [REDACTED] in total.³ Once again, if Philips uncovers evidence that allows the Court to determine with more certainty the number of systems on which such circumvention occurred, Philips is invited to submit additional briefing.

4. *Attorney's Fees and Costs*

Philips seeks [REDACTED] in attorneys' fees and [REDACTED] in costs. Mot. at 21. A party prevailing on a Lanham Act claim is entitled to recover costs from prosecution of the action and can be awarded reasonable attorney fees "in exceptional cases." 15 U.S.C. § 1117(a). To determine whether a case is exceptional, courts may consider (1) "the substantive strength of a party's litigation position (considering both the governing law and the facts of the case)" and (2) "the unreasonable manner in which the case was litigated." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545,

² Philips also argues that KPI modified the language, video input and voltage, and the checksum value on the systems that it sold. Mot. at 18. [-----REDACTED-----
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³ Philips argues that "Minn and officers of KPI destroyed evidence that is directly relevant to Philips' recoverable damages." Mot. at 19 (emphasis omitted). The Court has reviewed Philips's citations and is not aware of any deposition testimony stating that the sales orders were destroyed. As it is the sales orders that would contain information about the number of systems that might have had additional features enabled, see Jacob Depo. ECF No. 169-6, at 59:16-24, the Court does not consider Philips's allegations about the destruction of evidence.

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554 (2014) (interpreting the term “exceptional” in the federal Patent Act’s identical fee-shifting provision).

The Court believes that it is appropriate to award attorney’s fees in this case. On default, allegations of willful infringement entitle a plaintiff to attorney’s fees. Derek Andrew, Inc. v. Poof Apparel Corp., 528 F.3d 696, 702 (9th Cir. 2008). A plaintiff can prove willfulness by establishing that a defendant knowingly infringed or acted indifferently towards a plaintiff’s rights. Philip Morris USA Inc. v. Liu, 489 F. Supp. 2d 1119, 1123 (C.D. Cal. 2007). Philips alleges that KPI’s actions were intentional and willful, most notably because KPI repeatedly states on its website that it is a “host” of the Philips Diamond select program and in so doing displays Philips’s logo. FAC ¶¶ 55-65. Because KPI has not answered, the Court must accept these allegations as true. Castworld, 219 F.R.D. at 500. This is sufficient to support an exceptional case determination under the Lanham Act and to conclude that Philips is entitled to an award of reasonable attorneys’ fees and costs under the Lanham Act.

The Court further notes that it has discretion to award Philips attorney’s fees and costs under the DMCA, 17 U.S.C. §§ 1203(b)(4)-(5), and the Copyright Act, 17 U.S.C. § 505. The Supreme Court has condoned consideration of several factors in deciding whether the award of attorney’s fees is appropriate in cases brought under the Copyright Act, those factors including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994); see also Unicorn Systems, Inc. v. Farmers Group, Inc., 405 F. App’x 152 ,155 (9th Cir. 2010) (approving of use of the Fogerty factors in determining whether to award fees under 17 U.S.C. §§ 505 and 1203(b)(5)). Here, the Court concludes that these factors weigh in favor of an award of attorney’s fees. As discussed above, enabling unlicensed software on the systems that it sold required KPI to hack into the systems and circumvent technological measures. See supra Section III.B.2.e-g. This constitutes willful and unreasonable conduct that the Court believes it is appropriate to deter. Furthermore, such conduct is clearly motivated by an interest in profiting from Philips’s copyrighted works without paying for expensive licenses, which sometimes cost tens of thousands of dollars. Philips’s lawsuit is not frivolous given the evidence presented in this case, and KPI has failed to participate in discovery, which has prevented Philips from understanding the full scope of the infringement that has occurred. Attorney’s fees and costs are therefore properly awarded to Philips.

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As a general principle, a party that is entitled to receive an award of attorney's fees for success on claims brought under the Copyright Act, Digital Millennium Copyright Act, or the Lanham Act cannot recover attorney's fees incurred in the prosecution of unrelated claims on which it does not prevail. See The Traditional Cat Association, Inc. v. Gilbreath, 340 F.3d 829, 833 (9th Cir. 2003) ("Controlling precedent establishes 'that a party entitled to attorney's fees as a prevailing party on a particular [copy-right] claim, but not on other claims in the same lawsuit, can only recover attorney's fees incurred in defending against that one claim or any 'related claims'" (citation omitted) (alteration in original)); Gracie v. Gracie, 217 F.3d 1060, 1070 (9th Cir. 2000) (for attorney's fees awarded under the Lanham Act, "apportionment or an attempt at apportionment is required unless the court finds the claims are so inextricably intertwined that even an estimated adjustment would be meaningless"). Here, the Court concludes that the claims for which attorney's fees are not awarded are so inextricably tied with those claims for which fees are awarded that apportionment would be meaningless. All of the claims that have been asserted in this case stem from KPI's improper sale, while using Philips's trademarks, of Philips systems that have been improperly altered to provide access to unlicensed, copyrighted software on the systems. See supra Section III.B.2. This conduct forms the basis of the copyright and trademark claims. Therefore, the litigation and factual investigation related to all the claims are intertwined and cannot be meaningfully distinguished for purposes of dividing attorney's fees and costs.

The Court next considers the amount of attorney's fees and costs that should be awarded. Specifically, the Court must "determine the presumptive lodestar figure by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate." Gracie, 217 F.3d at 1070 (citing Intel Corp. v. Terabyte International, 6 F.3d 614, 622 (9th Cir. 1993)). Philips presents a lodestar that is equal to the amount that it requests in attorney's fees – [REDACTED]. The Court believes that this amount is reasonable. Philips has presented a chart listing the rates and hours worked for the attorney's on this case. Hultquist Decl. ¶ 14. The hourly rates for the attorneys range from \$311 to \$630. Id. The Court has previously found that rates in this range are reasonable. See Crestmont Capital, LLC v. P.A.R. Consulting, LLC et al., 2020 WL 6528418, at *3 (C.D. Cal. Sept. 17, 2020) (approving of hourly rates ranging from \$360 to \$695). The number of hours in this case also appears reasonable to the Court given the number of motions that have been filed and the extended discovery disputes that have been ongoing following KPI's dissolution. See Wirtschafter Decl. ¶ 14; Compel Order, ECF No. 152, at 1-3 (summarizing extensive procedural background of case relating to discovery issues).

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The Court has also reviewed Philips's submitted billing and does not believe that the hours expended were unreasonable. See Billing Records, ECF No. 169-10.

The Court therefore **GRANTS** Philips its requested attorney's fees. Since the Court also concludes that the enumerated costs are reasonable, see Wirtschafter Decl. ¶ 10; Billing Records, the Court further **GRANTS** Philips its requested costs.

5. Joint and Several Liability

Having addressed Philips's requests for damages, the Court now turns to Philips's argument that judgment should be entered against KPI and its shareholders jointly and severally. Mot. at 24-25. Specifically, Philips seeks to have judgment entered against the following shareholders: (i) Steven Sangwon Minn (owner and shareholder of KPI Healthcare Inc.); (ii) Ji Sung Kim (shareholder of KPI Healthcare Inc.); (iii) Justin J. Minn (shareholder of KPI Healthcare Inc.); (iv) Dong Sik Park (shareholder of KPI Healthcare Inc.); (v) The Wells Doctors Healthcare Fund I (shareholder of KPI Healthcare Inc.); (vi) TWI Start-Ups & Young Entrepreneurs Fund (shareholder of KPI Healthcare Inc.); (vii) The Wells Investment, Inc. (shareholder of KPI Healthcare Inc.); (viii) Young Joon Sue (owner and shareholder of O2 Lifecare Inc.). Id.

The Court concludes that entry of such a judgment would be improper. Philips cites no case law that supports its request. Philips does cite to California Corporations Code § 2011(a)(1) and one case that explains that section, Mot. at 24-25, but § 2011(a)(1) merely provides that a cause of action against a dissolved corporation "may be enforced" against shareholders of the dissolved corporation "to the extent of their pro rata share of the claim or the extent of the corporate assets distributed to them upon dissolution of the corporation, whichever is less." This does not allow the Court to enter judgment against a non-party; it merely states that Philips can bring its causes of action against KPI's shareholders as well. If Philips seeks recovery from these individuals, Philips can separately attempt to bring claims against them.

6. Injunctive Relief

Finally, Philips seeks several forms of injunctive relief. Mot. at 22-23. To obtain a permanent injunction, a plaintiff must demonstrate:

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(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). The Court’s “decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court.” Id.

First, Philips seeks an injunction “barring Defendants, their shareholders, former officers, former employees, agents or anyone else acting on their behalf from modifying Philips ultrasound systems in any manner and from selling an ultrasound system that it knows or reasonable should know has been modified or using the Python Tool, or any other hacking tool KPI used.” Mot. at 22. Under 17 U.S.C. § 502(a), the court may “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” But irreparable harm is not presumed in copyright cases with respect to permanent injunctions, though such harm should not be difficult to establish. See Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 948 (N.D. Cal. 2009); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1214-15 (C.D. Cal. 2007). Philips does not attempt to argue why it should be entitled to a permanent injunction, however. See Mot. at 22. The Court cannot make a finding of irreparable harm if Philips does not even attempt to make such a showing. The Court therefore **DENIES** this permanent injunction.

Second, Philips requests “an order de-designating the sales data (Ex. E), and the corresponding purchase orders and invoices related to those transactions – all of which are designated AEO – so that Philips can track down each system and contact the owners, inspect the system for compliance with post-market FDA regulations and return each modified ultrasound system to its safe and properly licensed FDA-approved configuration.” Mot. at 23. This is not a form of injunctive relief, and is not appropriate for the Court to consider as part of this motion for default judgment. If Philips continues to seek such an order, Philips is invited to file a separate motion and relevant briefing in support.

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IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** the motion.

The Court asks the parties to meet and confer and notify the Court within seven days which parts of the order should be redacted.

IT IS SO ORDERED.

____ : ____
Initials of Preparer _____ : _____
lmb