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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC., et al.,
Plaintiffs,
v.
NIKOLAY HOLPER,
Defendant.

Case No. 20-cv-06023-JCS

**REPORT AND RECOMMENDATIONS
REGARDING MOTION FOR
DEFAULT JUDGMENT**

Re: Dkt. No. 39

I. INTRODUCTION

Plaintiffs Meta Platforms, Inc. f/k/a Facebook, Inc. and Instagram, LLC (collectively, “Facebook”) move for default judgment against Defendant Nikolay Holper, an individual residing in Belarus. The undersigned magistrate judge held a hearing on January 28, 2022, and thereafter took supplemental briefing. For the reasons discussed below, the undersigned recommends that the motion be GRANTED IN PART and DENIED IN PART.

Because not all parties have appeared and consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c), the case will be reassigned to a United States district judge for all further proceedings, including action on the recommendations of this report. Facebook shall serve a copy of this report on Holper by the same means the undersigned previously authorized to serve the complaint, and file proof of service to that effect. Any party may file objections to the recommendations herein no later than fourteen days after being served with this report.

II. BACKGROUND

A. Allegations of the Complaint

Because a plaintiff’s allegations are generally taken as true in the context of default judgment, this section summarizes Facebook’s allegations as if true. Nothing in this section should be construed as resolving any question of fact that might have been disputed had Holper

United States District Court
Northern District of California

1 appeared in the case.

2 Facebook’s Instagram product is a social network for sharing photographs and videos.
3 Compl. (dkt. 1) ¶ 13. Among other features, registered users can follow one another, “like” other
4 users’ posts, and comment on posts. *Id.* ¶ 15. All users must agree to terms of use, which:

5 prohibit users from (a) “do[ing] anything unlawful, misleading, or
6 fraudulent or for an illegal or unauthorized purpose;” (b)
7 “interfer[ing] or impair[ing] the intended operation of [Instagram];”
8 (c) “attempt[ing] to buy, sell, or transfer any aspect of [an Instagram]
9 account;” (d) “creating accounts or collecting information in an
automated way . . . ;” and (e) “violat[ing] (or help[ing] or
encourag[ing] others to violate) [Instagram] terms or their policies
including . . . the Instagram Community Guidelines.”

10 *Id.* ¶¶ 16–17 (alterations in original). The community guidelines incorporated by the terms of use
11 “prohibit users from ‘artificially collecting likes, followers, or shares,’ and ‘create[ing] accounts
12 for the purpose of violating [Instagram’s] guidelines.’” *Id.* ¶ 19 (alterations in original).

13 The terms of use also limit use of Instagram’s intellectual property to circumstances
14 expressly permitted by Instagram’s “Brand Guidelines,” which “prohibit using the marks in a way
15 that ‘[m]akes the Instagram brand the most distinctive or prominent feature,’ ‘[i]mplies
16 partnership, sponsorship or endorsement,’ or ‘combine[s] “Insta” or “gram” with [the user’s] own
17 brand.’” *Id.* ¶ 18 (alterations in original). Facebook holds multiple registrations for the
18 INSTAGRAM word mark. *Id.* ¶¶ 21–22 & Ex. 2.

19 Doing business as “Nakrutka,” Holper has offered services “designed to artificially inflate
20 the ‘likes,’ ‘comments,’ ‘views,’ and ‘followers’ of Instagram accounts” since June 26, 2017 at the
21 latest. *Id.* ¶ 1. He charges fluctuating prices depending on the type and volume of engagement to
22 be purchased and the degree of apparent authenticity desired. *Id.* ¶¶ 32–34 & Exs. 4, 7. Using a
23 “a network of bots and Instagram accounts,” Holper has “deliver[ed] millions of automated likes
24 to his customers,” including “over 8 million likes over the course of just two days.” *Id.* ¶ 35.
25 Instagram users with no followers have been able to purchase from Holper thousands of likes at a
26 time; Facebook offers examples of photographs receiving up to 10,000 likes within minutes of a
27 purchase. *Id.* ¶ 36. In January of 2020, Facebook learned that Holper has registered and used the
28 “instagram.by” domain since no later than 2017. *Id.* ¶ 23. Since no later than August of 2020,

1 Holper has referred to his service with the names “CHEAT INSTAGRAM” and “INSTAGRAM
2 BOOST,” used the email address “info@instagram.by,” and included a false copyright notice
3 reading “© NAKRUTKA INSTAGRAM 2017-2019” on his websites, including nakrutka.cc. *Id.*
4 ¶ 25.

5 According to Facebook, Holper’s conduct “interfered and continues to interfere with
6 Instagram’s service and burden Facebook and Instagram’s computer network,” and has harmed
7 Facebook’s brand and goodwill by “creat[ing] an inauthentic experience for Instagram users who
8 used, viewed, and relied on [Holper’s] fake engagement services.” ¶ 37.

9 On January 1, 2020, Facebook disabled Holper’s Facebook and Instagram accounts, told
10 him that his access had been revoked, and notified him that “that his fake engagement activity
11 violated Facebook’s and Instagram’s [terms of use] and U.S. law.” *Id.* ¶ 26. Holper responded by
12 “indicating that he refused to cease his unlawful activities,” and posted on an internet forum that
13 Facebook had blocked his access. *Id.* ¶¶ 26–27 & Ex. 5. Since then, Holper has continued to
14 provide the same fake engagement services through his websites. *Id.* ¶ 28. In February of 2020,
15 Facebook sent Holper a cease and desist letter, to which he did not respond. *Id.* ¶¶ 29–31 & Ex. 6.

16 Facebook asserts the following claims: (1) breach of contract, specifically the Instagram
17 terms of use, brand guidelines, and community guidelines, *id.* ¶¶ 41–48; (2) violation of California
18 Penal Code section 502, Compl. ¶¶ 49–55; (3) violation of the Computer Fraud and Abuse Act
19 (“CFAA”), 18 U.S.C. § 1030, Compl. ¶¶ 56–66; (4) unjust enrichment, *id.* ¶¶ 67–76;
20 (5) trademark and service mark infringement in violation of 15 U.S.C. § 1114, Compl. ¶¶ 77–86;
21 (6) infringement and false designation of origin in violation of 15 U.S.C. § 1125(a), Compl. ¶¶ 87–
22 97; (7) dilution of trademarks in violation of 15 U.S.C. § 1125(c), Compl. ¶¶ 98–106; and
23 (8) cybersquatting in violation of 15 U.S.C. § 1125(d), Compl. ¶¶ 107–20. The complaint seeks
24 injunctive relief, damages, disgorgement, and attorneys’ fees. *See* Compl. at 19–22 (prayer for
25 relief).

26 **B. Procedural History**

27 Facebook filed this case on August 27, 2020. Completing service on Holper, who lives in
28 Belarus, proved challenging.

1 Based on Facebook’s diligent but unsuccessful attempt to serve Holper via the Hague
2 Convention, the undersigned on September 27, 2021 authorized service through alternative means
3 under Rule 4(f)(3) of the Federal Rules of Civil Procedure. That order provided that Facebook
4 could “serve [Holper] by completing *both* of the following: (1) sending summons, the complaint,
5 and a copy of this order to [Holper] at the three email addresses identified in [Facebook’s] motion
6 (info@instagram.by, jaholper@gmail.com, and mail@holper.by); and (2) mailing the same
7 documents to [Holper] at 22 Volkova Street, Apartment #2, Zhlobin, Gomel, Belarus,” and that
8 service would “be effective upon completion of those steps and filing proof of service.” Order re
9 Service (dkt. 27).

10 Facebook filed proof of service (dkt. 28) on September 30, 2021 indicating that it
11 completed services as instructed on September 27, 2021. The Clerk entered Holper’s default (dkt.
12 32) on November 4, 2021. Facebook filed its present motion (dkt. 39) on December 20, 2021.

13 **C. Facebook’s Motion**

14 Facebook asserts that the Court has federal question jurisdiction over its federal claims
15 pursuant to 28 U.S.C. § 1331, supplemental jurisdiction over its state claims pursuant to 28 U.S.C.
16 § 1367, and also diversity jurisdiction over all claims pursuant to 28 U.S.C. § 1332. Mot. (dkt. 39)
17 at 4.

18 Facebook asserts that Holper consented to this Court’s personal jurisdiction by accepting
19 the Instagram terms of use, although it initially failed to offer a copy of those terms as evidence.
20 *Id.* at 4–5. As a separate basis for personal jurisdiction, Facebook contends that Holper
21 purposefully directed his conduct to this forum when he sold fake engagement to California users,
22 employed California IP addresses to deliver those services, and targeted a business based on
23 California (Instagram), which is where the harm that he caused was inflicted. *Id.* at 5–9.
24 Facebook also presents an argument based on purposeful availment. *Id.* at 9–10. Facebook notes
25 that Holper was properly served in accordance with the undersigned’s previous order authorizing
26 service by mail and email. *Id.* at 11.

27 Facebook argues that each of the factors enumerated in *Eitel v. McCool*, 782 F.2d 1470,
28 1471–72 (9th Cir. 1986), favors entry of default judgment. Mot. at 11–20. Addressing the factors

1 that relate to the merits of its claims, Facebook contends that each of its claims is well founded
 2 and sufficiently alleged. *Id.* at 12–19. Turning to remedies, Facebook argues that its Lanham Act
 3 claims warrant statutory damages, *id.* at 20–22; its breach of contract, CFAA, section 502, and
 4 Lanham Act claims warrant injunctive relief, *id.* at 22–23; and its section 502 claim warrants an
 5 award of attorneys’ fees, although Facebook did not initially set forth a specific amount of fees it
 6 has incurred, instead asking the Court to award Facebook its “reasonable attorneys’ fees and costs
 7 in this matter, the amounts of which should be determined following the granting of this motion, at
 8 which point [Facebook] will submit an affidavit in support of the same,” *id.* at 23–24.

9 Facebook requests statutory damages totaling \$6,100,000, consisting of two million dollars
 10 for each of three websites allegedly infringing Facebook’s trademarks and one hundred thousand
 11 dollars for cybersquatting based on Holper’s registration of the instagram.by domain. *Id.* at 20–
 12 22. It seeks a permanent injunction barring Holper from:

- 13 a. Accessing or attempting to access Facebook and Instagram’s
 14 service, platform, and computer systems;
- 15 b. Creating or maintaining any Instagram accounts in violation of
 16 Instagram’s Terms of Use;
- 17 c. Engaging in any activity that disrupts, diminishes the quality of,
 18 interferes with the performance of, or impairs the functionality of
 19 Facebook and Instagram’s service, platform, and computer systems;
- 20 d. Engaging in any activity, or facilitating others to do the same, that
 21 violates Instagram’s Terms of Use, Community Guidelines, or other
 22 related policies;
- 23 e. Engaging in any use, including advertising, promoting, marketing,
 24 franchising, selling, and offering for sale any goods or services, in
 25 connection with the Instagram trademarks, or any similar mark or
 26 designation, that is likely to cause confusion, or to cause mistake as
 27 to the affiliation of that use with Instagram;
- 28 f. Engaging in any activity which tarnishes or lessens the
 distinctiveness of the Instagram trademarks; and
- g. Registering, trafficking, or using any domain name that is identical
 or confusingly similar to any of the Instagram trademarks.

26 Proposed Order (dkt. 39-2) at 1–2.

27 To support its motion, Facebook offered a declaration by its researcher and threat
 28 investigator Andrew Herter, who states that Holper used “more than 48,000 Instagram accounts to

1 deliver fake engagement . . . to more than 38,000 Instagram accounts belonging to users in the
2 United States,” by “artificially increasing the likes and followers for certain Instagram accounts.”
3 Herter Decl. (dkt. 39-1) ¶ 4(a). According to Herter, many of Holper’s Instagram accounts and the
4 accounts that received his fake engagement use California IP addresses. *Id.* ¶ 4(c). Herter
5 includes a machine-translated screenshot of Holper’s website at nakrutka.by, which automatically
6 redirected to nakrutka.com. *Id.* ¶ 5 & Ex. A. The translated website prominently features the text
7 “INSTAGRAM BOOST,” includes “© NAKRUTKA INSTAGRAM 2017-2019” at the bottom of
8 the page, and lists the email address “info@instagram.by.” *Id.* Ex. A.

9 **D. The Hearing**

10 At the hearing, the undersigned magistrate judge asked Facebook to provide copies of the
11 terms of use and guidelines on which it relies that were in effect at the relevant times, as opposed
12 to merely a URL for the current documents that have since been revised. The undersigned
13 requested supplemental briefing as to whether Holper used the Cyrillic or Latin alphabet on his
14 websites and the significance of using a different alphabet from Facebook’s trademark if he used
15 Cyrillic, noting that Facebook initially provided only translations. The undersigned asked
16 Facebook to address whether a Cyrillic version could be considered a counterfeit mark, and if not,
17 how that would affect Facebook’s entitlement to damages under the Lanham Act. The
18 undersigned requested additional evidence, as opposed to merely allegations in the complaint, to
19 support Facebook’s request for the maximum allowable statutory damages. The undersigned also
20 requested briefing as to whether the context of Holper’s use supported likelihood of confusion or
21 could implicate a fair use defense. Finally, the undersigned asked Facebook to request its
22 attorneys’ fees now rather than waiting until after the Court rules on the motion for default
23 judgment.

24 **E. Facebook’s Supplemental Brief and Evidence**

25 Following the hearing, Facebook submitted supplemental briefing and evidence in
26 response to the undersigned’s concerns. Facebook contends that it has now provided the
27 supplemental materials the undersigned requested, Supp’l Br. (dkt. 44) at 1, that Facebook’s
28 allegations must be taken as true and Holper waived any affirmative defenses, *id.* at 1–2, 4, that

1 even if Holper had not waived his defenses, he would not be able to show fair use, *id.* at 5–8, that
 2 Holper’s use of a Cyrillic version of the INSTAGRAM mark is a breach of contract and likely to
 3 cause confusion, *id.* at 2–3, that Holper’s conduct was sufficiently willful to support statutory
 4 damages, *id.* at 8–9, and that Facebook should be awarded attorneys’ fees totaling \$178,702 and
 5 costs totaling \$10,184.44, *id.* at 9–22.

6 Facebook has now provided original Cyrillic-alphabet screenshots of Holper’s website,
 7 Andre Decl. Exs. A–C, as well as the terms of use and guidelines applicable to users in Belarus
 8 during the period at issue, *see generally* Sharpe Decl. (dkt. 44-4). The version effective April 19,
 9 2018 includes the terms previously recited in Facebook’s complaint. *See, e.g.*, Sharpe Decl. Ex. A
 10 at ECF p. 40¹ (prohibiting “anything unlawful, misleading, or fraudulent or for an illegal or
 11 unauthorized purpose,” “interfer[ing] or impair[ing] the intended operation of [Instagram],”
 12 “attempt[ing] to buy, sell, or transfer any aspect your account,” “creating accounts or collecting
 13 information in an automated way,” and violating or encouraging violations of the community
 14 guidelines or brand guidelines); *cf.* Compl. ¶¶ 16–17 (same). An earlier version that took effect in
 15 2013 uses somewhat different language, but imposes substantially the same restrictions and
 16 obligations. *See, e.g.*, Sharpe Decl. Ex. A at ECF p. 6 (prohibiting, *e.g.*, use for unauthorized
 17 purposes, disruption of Instagram’s services, violation of the community guidelines, and creating
 18 accounts using automated means). The community guidelines prohibit “artificially collecting
 19 likes, followers, or shares.” *Id.* at 44, 47, 50, 54, 58, 62, 67, 71, 75.

20 Facebook has also now provided a translated interview with Holper published by a
 21 Belarussian website in which Holper stated that his services “may violate some Instagram rules”
 22 and that he does not intend to comply with Facebook’s request to cease his activities, Herter
 23 Supp’l Decl. (dkt. 44-3) Ex. A, a translated screenshot of Holper’s public Telegram social media
 24
 25

26 ¹ Sharpe’s declaration includes multiple versions of the terms of use, some apparently identical
 27 and each with its own internal pagination, as a single exhibit. This report cites those documents
 28 using the page numbers assigned by the Court’s ECF filing system. In the future, counsel is
 encouraged to file separate documents as separate exhibits, with a sufficient explanation of the
 relevance of each document.

1 channel where he provided updates about his services, Andre Decl. Ex. D,² and evidence
2 supporting its costs and attorneys' fees, *see generally* Mortimer Decl. (dkt. 44-1).

3 **III. ANALYSIS**

4 **A. Legal Standard**

5 After default has been entered against a party, a district court may grant an application for
6 default judgment in its discretion. *See* Fed. R. Civ. P. 55(b)(2). If the court is satisfied that
7 jurisdiction is proper and that service of process upon the defendant was adequate, it then
8 considers several factors in determining whether to grant default judgment:

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

13 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). In making its decision, the court takes
14 all factual allegations in the complaint, except those relating to damages, as true. *TeleVideo Sys.,*
15 *Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (citing *Geddes v. United Fin. Grp.*, 559
16 F.2d 557, 560 (9th Cir. 1977)).

17 **B. Jurisdiction and Service of Process**

18 A court considering a motion for default judgment must determine whether it has both
19 subject matter jurisdiction and personal jurisdiction, and dismiss sua sponte if it does not. *In re*
20 *Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Here, the Court has subject matter jurisdiction under the
21 federal question statute, 28 U.S.C. § 1331, because Facebook asserts federal claims under the
22 Lanham Act and the CFAA. The Court has supplemental jurisdiction over Facebook's related
23

24 ² While not relevant to the outcome, the undersigned puts little stock in the translated interview
25 and Telegram channel, both of which Facebook's witnesses state were machine-translated using
26 "publicly available tooling." *See* Andre Decl. ¶ 5; Herter Supp'l Decl. ¶ 2. No Facebook witness
27 has vouched for the accuracy of those translations or demonstrated that they are competent to do
28 so, nor has Facebook provided any details regarding the "tooling" it used to create them. Even
aside from the potential for wholesale inaccuracy, nuance—which might be important for some
the particular statements offered—can easily be lost in automated translation. Despite some
reservations, the undersigned accepts Facebook's similarly thinly substantiated translations of the
basic contents of Holper's websites, including that "ИHCTAГPAM" is a Cyrillic alphabet
transliteration of "INSTAGRAM."

1 state-law claims under 28 U.S.C. § 1367(a).

2 Personal jurisdiction is somewhat more complex, given that Holper resides in Belarus, but
 3 not significantly so. “Because California’s long-arm jurisdictional statute is coextensive with
 4 federal due process requirements, the jurisdictional analyses under state law and federal due
 5 process are the same.” *Dole Food Company, Inc. v. Watts*, 303 F.3d 1104, 1110 (9th Cir.2002)
 6 (citing Cal. Code Civ. Proc. § 410.10)). The exercise of specific jurisdiction over a nonresident
 7 defendant requires three elements:

8 (1) the non-resident defendant must purposefully direct his activities
 9 or consummate some transaction with the forum or resident thereof;
 10 *or* perform some act by which he purposefully avails himself of the
 11 privilege of conducting activities in the forum, thereby invoking the
 12 benefits and protections of its laws;

11 (2) the claim must be one which arises out of or relates to the
 12 defendant’s forum-related activities; and

13 (3) the exercise of jurisdiction must comport with fair play and
 14 substantial justice, i.e. it must be reasonable.

14 *Id.* at 1111 (citation omitted). “[T]he purposeful direction or availment requirement for specific
 15 jurisdiction is analyzed in intentional tort cases under the ‘effects’ test derived from *Calder v.*
 16 *Jones*, 465 U.S. 783 (1984),” which “requires that the defendant allegedly have (1) committed an
 17 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows
 18 is likely to be suffered in the forum state.” *Id.*

19 The undersigned has previously found that a defendant sending a takedown notice under
 20 the Digital Millennium Copyright Act to a California company satisfied the test for personal
 21 jurisdiction. *See generally Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1022–25 (N.D. Cal.
 22 2015). Similar considerations warrant exercising jurisdiction here. Facebook is widely known to
 23 be headquartered in California. Taking Facebook’s allegations as true, Holper intentionally
 24 manipulated Facebook’s Instagram platform and infringed its trademarks, predictably causing
 25 harm to Facebook in California, from which Facebook’s present claims arise. The undersigned is
 26 satisfied that the conduct at issue warrants exercising personal jurisdiction over Holper despite his
 27 residence outside of this forum. *See also Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co.*,
 28 No. 19-cv-01167-JST (AGT), 2021 WL 5707741, at *3–5 (N.D. Cal. Oct. 21, 2021) (finding

1 personal jurisdiction as to a Chinese defendant similarly accused of infringing Facebook’s
2 trademarks, cybersquatting, and breaching Facebook’s terms of use), *recommendation adopted*,
3 2021 WL 5707740 (N.D. Cal. Nov. 16, 2021).

4 As a separate and sufficient basis for jurisdiction, Holper consented to the jurisdiction of
5 this Court by agreeing to Instagram’s terms of use. *See Sharpe Decl. Ex. A at ECF p. 42*
6 (providing that except for claims by consumers against Facebook, “you agree that the claim must
7 be resolved exclusively in the U.S. District Court for the Northern District of California or a state
8 court located in San Mateo County, that you submit to the personal jurisdiction of either of these
9 courts for the purpose of litigating any such claim, and that the laws of the State of California will
10 govern these Terms and any claim, without regard to conflict of law provisions”). Consent to such
11 a term in a contract is sufficient to establish personal jurisdiction. *See Automattic*, 82 F. Supp. 3d
12 at 1021–22 (citing, *e.g.*, *S.E.C. v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007)).

13 As for service of process, the Federal Rules of Civil Procedure permit service outside of
14 the United States “by other means not prohibited by international agreement, as the court orders.”
15 Fed. R. Civ. P. 4(f)(3). The undersigned previously authorized Facebook to serve Holper by mail
16 and email, dkt. 27, which are not methods prohibited by international agreement, and Facebook
17 completed service in that manner, dkt. 28.

18 **C. Arbitration Clause**

19 The various versions of the Instagram terms of use that Facebook filed with its
20 supplemental brief include arbitration provisions reading substantially as follows:

21 Except if you opt-out or for disputes relating to: (1) your or
22 Instagram’s intellectual property (such as trademarks, trade dress,
23 domain names, trade secrets, copyrights and patents); (2) violations
24 of the API Terms; or (3) violations of provisions 13 or 15 of the Basic
25 Terms, above (“Excluded Disputes”), you agree that all disputes
26 between you and Instagram (whether or not such dispute involves a
27 third party) with regard to your relationship with Instagram, including
28 without limitation disputes related to these Terms of Use, your use of
the Service, and/or rights of privacy and/or publicity, will be resolved
by binding, individual arbitration under the American Arbitration
Association’s rules for arbitration of consumer- related disputes and
you and Instagram hereby expressly waive trial by jury.

E.g., Sharpe Decl. Ex. A at ECF p. 13.

1 At least some of the claims at issue here, such as Facebook’s trademark claims, are
2 specifically excluded from the arbitration provision as “relating to . . . Instagram’s intellectual
3 property.” *See id.* In an abundance of caution, the undersigned addresses whether this provision
4 is an impediment to granting default judgment on any other claims.

5 In another case, the undersigned has previously recommended that default judgment be
6 granted despite an apparently applicable mandatory arbitration clause. *Flexible Funding, Ltd. v.*
7 *Hare*, No. 18-cv-03720-JCS, 2019 WL 12872785, at *8–10 (N.D. Cal. Oct. 25, 2019),
8 *recommendation adopted sub nom. Flexible Funding, Ltd. v. Apollo Search Partners LLC*, No.
9 C 18-03720 WHA, 2019 WL 12872783 (N.D. Cal. Dec. 9, 2019). As discussed in *Flexible*
10 *Funding*, a defendant’s mere failure to respond to a plaintiff’s demands or appear in a judicial
11 action likely does not establish waiver of the defendant’s right to demand arbitration. *See id.* at *9
12 (citing, *e.g.*, *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1413 (9th Cir. 1990)). That said, “the
13 Federal Arbitration Act requires judicial proceedings to yield to arbitration only when a party
14 affirmatively invokes its right to arbitrate.” *Id.* at *10 (citing 9 U.S.C. § 3). While Holper may
15 not have waived any right he might have had to demand arbitration, there is no indication that he
16 has invoked it, and so long as he fails to do so, this case may proceed.

17 **D. *Eitel* Factors**

18 Several of the *Eitel* factors weigh in favor of granting default judgment against Holper
19 simply because he has not appeared in this action. Since Holper failed to respond to the complaint
20 or otherwise appear in this action, Facebook will be left without a remedy, and therefore
21 prejudiced, if default judgment is not granted. The sum of money is not so high as to weigh
22 against granting judgment to the extent that damages are supported by evidence, an issue
23 discussed separately below. Holper was properly served through multiple channels with
24 Facebook’s complaint, and there is no indication that his default is due to excusable neglect.
25 Finally, while there is a strong public policy favoring the resolution of disputes on the merits, that
26 is not possible in this case because Holper has failed to appear to defend the case, and there is no
27 indication that he intends to do so.

28 The remaining factors, “the merits of plaintiff’s substantive claim” and “the sufficiency of

1 the complaint,” are intertwined where, as here, the case has not advanced beyond the pleading
2 stage. The undersigned addresses each of Facebook’s claims in turn.

3 **1. Breach of Contract**

4 Under California law, the “cause of action for damages for breach of contract is comprised
5 of the following elements: (1) the contract, (2) plaintiff’s performance or excuse for
6 nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” *Armstrong*
7 *Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 n.6 (2004).

8 Facebook sufficiently alleges that Holper agreed to the Instagram terms of use, which
9 incorporate the Community Guidelines and Brand Guidelines, when he created a personal
10 Instagram account. Compl. ¶ 42. Facebook’s express allegation of its own performance is
11 conclusory, *see id.* ¶ 47, but the allegations of Holper using the various accounts he created to
12 provide fake engagement for his clients support a sufficient inference that Facebook provided
13 Holper with the services contemplated by the terms of use. Facebook sufficiently alleges breach
14 in that Holper’s sale of services to inflate users’ “likes” and similar metrics of engagement, *see id.*
15 ¶¶ 32–36, violated the Community Guidelines’ prohibition against “artificially collecting likes,
16 followers, or shares,” *see id.* ¶ 19, and thus violated the provision of the terms of use that prohibits
17 violating or helping others to violate the Community Guidelines, *see id.* ¶ 17.

18 To the extent Facebook bases its contract claim on Holper’s purported misuse of its
19 trademarks, Facebook is also entitled to judgment on that claim based on its allegations of Holper
20 using the “INSTAGRAM” mark on his websites. Even though supplemental evidence made clear
21 that Holper generally used the Cyrillic alphabet “ИHCTAГPAM” rather than the Latin alphabet
22 “INSTAGRAM” as the mark is registered, the brand guidelines, incorporated by the terms of use,
23 specifically provide that the “word Instagram cannot be . . . modified, abbreviated or translated
24 regardless of the surrounding text.” *E.g.*, Sharpe Decl. Ex. A at ECF p. 82. Facebook has
25 sufficiently shown that Holper breached that restriction. Moreover, Facebook’s allegations of
26 Holper’s registration and use of the instagram.by domain sufficiently state a claim for breach of
27 the terms of use, because in at least that instance Holper used Instagram’s trademark in a manner
28 not expressly permitted by the Brand Guidelines or by prior written permission. *See* Compl. ¶ 18;

1 e.g., Sharpe Decl. Ex. A at ECF p. 9.

2 The undersigned is therefore satisfied that Facebook has sufficiently alleged Holper’s
3 breach of contract, and—taking those allegations as true for the purpose of default judgment—that
4 Facebook has presented a meritorious claim.

5 **2. CFAA and Penal Code Section 502**

6 The CFAA prohibits acts of computer trespass by those who are not
7 authorized users or who exceed authorized use. It creates criminal and
8 civil liability for whoever “intentionally accesses a computer without
9 authorization or exceeds authorized access, and thereby obtains . . .
10 information from any protected computer.” 18 U.S.C.
11 § 1030(a)(2)(C). “The statute thus provides two ways of committing
12 the crime of improperly accessing a protected computer: (1) obtaining
13 access without authorization; and (2) obtaining access with
14 authorization but then using that access improperly.” *Musacchio v.*
15 *United States*, [577 U.S. 237, 240] (2016). The CFAA provides a
16 private right of action for “[a]ny person who suffers damage or loss
17 by reason of a violation of this section.” 18 U.S.C. § 1030(g).

18 *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1065–66 (9th Cir. 2016). Other prongs of
19 the statute prohibit “intentionally accessing a protected computer without authorization” and either
20 “caus[ing] damage and loss,” 18 U.S.C. § 1030(a)(5)(C), or “recklessly caus[ing] damage,” *id.*
21 § 1030(a)(5)(B), as well as knowingly transmitting code or commands to intentionally cause
22 damage to a protected computer, *id.* § 1030(a)(5)(A), and knowingly accessing a protected
23 computer without authorization to further a fraud and obtain something of value, *id.* § 1030(a)(4).
24 A “protected computer” is defined broadly as one that is “used in or affecting interstate or foreign
25 commerce or communication.” 18 U.S.C. § 1030(e)(2)(B).

26 The Ninth Circuit has held that the use of Facebook’s services after receipt of a cease-and-
27 desist letter violates the CFAA. *Power Ventures*, 844 F.3d at 1069 (“[W]e hold that, after
28 receiving the cease and desist letter from Facebook, Power intentionally accessed Facebook’s
computers knowing that it was not authorized to do so, making Power liable under the CFAA.”).³

³ The Supreme Court’s recent consideration of the CFAA’s phrase “exceeds authorized access” in *Van Buren v. United States*, 141 S. Ct. 1648 (2021), does not alter this conclusion. There, the Court held that “an individual ‘exceeds authorized access’ when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him.” *Id.* at 1662. Here, Facebook contends that

1 Facebook alleges that Holper continued to access Instagram (and thus Facebook’s servers) to
 2 provide fake engagement services after publicly acknowledging receipt of Facebook’s letter
 3 revoking his access, and in doing so deceived users as to whether engagement on that platform
 4 was real and harmed Facebook’s goodwill. *See* Compl. ¶¶ 26–28, 38. Taking into account *Power*
 5 *Ventures*’ holding that continued access after a cease-and-desist letter is not “authorized” for the
 6 purpose of the CFAA, the undersigned agrees that the conduct alleged violates at least the “with
 7 intent to defraud” and “causes damage and loss” prongs of the statute. *See* 18 U.S.C. § 1030(a)(4),
 8 (a)(5)(C).

9 Facebook also alleges that its loss of customer goodwill and the cost of its efforts to
 10 investigate and stop Holper’s conduct meet the CFAA’s \$5,000 damages threshold, *id.* ¶¶ 39, 64, a
 11 position that the Ninth Circuit endorsed on materially indistinguishable facts in *Power Ventures*,
 12 844 F.3d at 1066 (“It is undisputed that Facebook employees spent many hours, totaling more than
 13 \$5,000 in costs, analyzing, investigating, and responding to Power’s actions. Accordingly,
 14 Facebook suffered a loss under the CFAA.”).

15 The language of section 502 of the California Penal Code differs somewhat from the
 16 CFAA, providing for a claim where, among other circumstances, a defendant:

17 (1) Knowingly accesses and without permission alters, damages,
 18 deletes, destroys, or otherwise uses any data, computer, computer
 19 system, or computer network in order to either (A) devise or execute
 any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully
 control or obtain money, property, or data[; or]

20 (2) Knowingly accesses and without permission takes, copies, or
 21 makes use of any data from a computer, computer system, or
 22 computer network, or takes or copies any supporting documentation,
 whether existing or residing internal or external to a computer,
 computer system, or computer network.

23 Cal. Penal Code § 502(c). Courts have nevertheless generally held that “the necessary elements of
 24 Section 502 do not differ materially from the necessary elements of the CFAA,” and analyzed
 25 such claims together. *E.g., Multiven, Inc. v. Cisco Sys., Inc.*, 725 F. Supp. 2d 887, 895 (N.D. Cal.

26
 27 _____
 28 after it sent a letter revoking his access, Holper was not authorized to access its servers at all, not
 that he exceeded some limited degree of authorized access. The Ninth Circuit’s holding in *Power*
Ventures remains binding precedent as to such a theory.

1 2010).

2 Consistent with Ninth Circuit precedent, the undersigned has previously held that the
 3 access-based framework of the CFAA and section 502 applies only to password-protected
 4 websites, not to websites made generally available to the public without any requirement to
 5 authenticate a right of access. *Meta Platforms, Inc. v. BrandTotal Ltd.*, ___ F. Supp. 3d ___, No.
 6 20-cv-07182-JCS, 2022 WL 1990225, at *24–25 (N.D. Cal. June 6, 2022) (citing *hiQ Labs, Inc. v.*
 7 *LinkedIn Corp.*, 31 F.4th 1180, 1195–96 (9th Cir. 2022)). Here, Facebook alleges that Holper’s
 8 unauthorized use of its services involved using “thousands of Instagram accounts” to provide fake
 9 engagement, implying that Holper has signed into Instagram to use the site in a manner that
 10 requires a username and password. The rule of *hiQ* excluding websites that are accessible to the
 11 general public without a password from the scope of the CFAA is therefore not a barrier to
 12 Facebook’s claims in this case.

13 The undersigned therefore recommends granting default judgment on Facebook’s CFAA
 14 and section 502 claims.

15 3. Unjust Enrichment

16 The question of whether “unjust enrichment” is a viable claim under California law
 17 remains somewhat unsettled, at least with respect to Ninth Circuit precedent. The Ninth Circuit
 18 held in a 2015 decision that no such claim existed, but that courts could “construe the cause of
 19 action as a quasi-contract claim seeking restitution.” *Astiana v. Hain Celestial Grp., Inc.*, 783
 20 F.3d 753, 762 (9th Cir. 2015) (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App.
 21 4th 221 (2014)).⁴ Subsequent unpublished decisions by the Ninth Circuit, which are not
 22 precedential but may be considered for their persuasive value, have differed as to whether that
 23 remains true, or whether a later 2015 decision by the California Supreme Court recognized such a
 24 claim. *Compare Baiul-Farina v. Lemire*, 804 F. App’x 533, 537 (9th Cir. 2020) (“The complaint

25 _____
 26 ⁴ In its discussion of this claim, Facebook cites only district court decisions predating the Ninth
 27 Circuit’s holding that such a claim does not exist. Mot. at 15. Moreover, one of those cases
 28 addresses restitution only as a remedy under ERISA, a statute not at issue in this case, not as a
 claim in itself. *Associated Third Party Administrators, Inc. v. Truvillion*, No. C-06-04817 MJJ
 (EDL), 2007 WL 9728933, at *2 (N.D. Cal. Apr. 17, 2007), *recommendation adopted*, 2007 WL
 9728934 (N.D. Cal. Aug. 29, 2007).

1 alleged an unjust enrichment claim against Ukraine, but “[u]njust enrichment is not a cause of
2 action’ under California law.” (quoting *McBride v. Boughton*, 123 Cal. App. 4th 379, 387
3 (2004)), with *Bruton v. Gerber Prod. Co.*, 703 F. App’x 468, 470 (9th Cir. 2017) (“But since [the
4 district court decision at issue], the California Supreme Court has clarified California law,
5 allowing an independent claim for unjust enrichment to proceed in an insurance dispute.” (citing
6 *Hartford Cas. Ins. Co. v. J.R. Mktg., LLC*, 61 Cal. 4th 988, 1000 (2015))).

7 Facebook has not addressed this question, nor has it clearly argued that a quasi-contract
8 theory would apply to the facts at issue if the Court were to construe its claim as such. Facebook
9 also requests no relief for its unjust enrichment claim, instead tying its request for damages to its
10 Lanham Act claims, *see* Mot. at 20–22, its request for injunctive relief to its contract, CFAA,
11 section 502, and Lanham Act claims, *see* Mot. at 22–23, and its request for attorneys’ fees to its
12 section 502 claim, Mot. at 23. Since the unjust enrichment claim appears to be irrelevant to the
13 judgment Facebook seeks, and Facebook has not addressed potential uncertainty as to its viability,
14 the undersigned recommends that the Court decline to enter default judgment on this claim.

15 4. Cybersquatting

16 The Lanham Act’s cybersquatting provision establishes liability where a defendant “(1) the
17 defendant registered, trafficked in, or used a domain name; (2) the domain name is identical or
18 confusingly similar to a protected mark owned by the plaintiff; and (3) the defendant acted with
19 bad faith intent to profit from that mark.” *DSPT Int’l, Inc. v. Nahum*, 624 F.3d 1213, 1218–19
20 (9th Cir. 2010); *see* 15 U.S.C. § 1125(d); *Amazon.com, Inc. v. Expert Tech Rogers Pvt. Ltd.*, No.
21 20-cv-07405-PJH (JSC), 2021 WL 4461601, at *7 (N.D. Cal. Sept. 22, 2021), *recommendation*
22 *adopted*, 2021 WL 4896120 (N.D. Cal. Oct. 20, 2021).

23 Holper’s registration of the instagram.by domain, and his use of that domain for his email
24 address in conjunction with his business selling fake engagement in violation of Instagram’s terms
25 of use, meets each of those elements. The undersigned recommends that default judgment be
26 granted as to Facebook’s cybersquatting claims.

27 5. Other Trademark Claims

28 Facebook brings several other Lanham Act claims, all based on Holper’s purported use of

1 the “INSTAGRAM” mark on his websites: an infringement claim under 15 U.S.C. § 1114, Compl.
 2 ¶¶ 77–86; a false designation of origin claim under § 1125(a), Compl. ¶¶ 87–97; and a dilution
 3 claim under § 1125(c), Compl. ¶¶ 98–106.

4 The Lanham Act requires a plaintiff pursuing a trademark infringement claim to present
 5 evidence of a valid mark, that the mark has been used in commerce, and that the defendant’s use
 6 of the mark is likely to cause confusion, or mistake, or to deceive as to sponsorship, affiliation, or
 7 the origin of the goods or services in question. 15 U.S.C. §§ 1114, 1125(a); *Levi Strauss & Co. v.*
 8 *Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985). Here, Facebook has sufficiently alleged that
 9 its INSTAGRAM mark is registered and valid, that it uses the mark in commerce. Compl. ¶¶ 20–
 10 22 & Ex. 2. On default judgment, those allegations are taken as true, and are sufficient to establish
 11 those elements of the claim.

12 As for Holper’s use of the mark, even though he has primarily used the Cyrillic text
 13 “ИИСТАГРАМ” rather than “INSTAGRAM,” *see* Andre Decl. Exs. C–D, courts have generally
 14 recognized direct transliterations of a trademark as sufficiently similar to support a likelihood of
 15 confusion. *E.g., Dor Yeshurim, Inc. v. A Torah Infertility Medium of Exch.*, No. CV 10-2837 JFB
 16 WDW, 2011 WL 7285038, at *3–4 (E.D.N.Y. Aug. 10, 2011), *recommendation adopted*, 2012
 17 WL 464000 (E.D.N.Y. Feb. 10, 2012); *Vantone Grp. Liab. Co. v. Yangpu NGT Indus. Co.*, No.
 18 13CV7639-LTS-MHD, 2015 WL 4040882, at *5 (S.D.N.Y. July 2, 2015). Facebook’s allegations
 19 as to this element are plausible and sufficient to support its claim.

20 The Lanham Act’s false designation of origin provision prohibits using in commerce, “on
 21 or in connection with any goods or services, . . . any word, term, name, symbol, or device, or any
 22 combination thereof, or any false designation of origin, false or misleading description of fact, or
 23 false or misleading representation of fact, which . . . is likely to cause confusion, or to cause
 24 mistake, or to deceive as to the affiliation, connection, or association of such person with another
 25 person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial
 26 activities by another person.” 15 U.S.C. § 1125(a). As in an action for trademark infringement
 27 under 15 U.S.C. § 1114(1)(a), the key question for a false designation of origin claim under §
 28 1125(a) is “whether the public is likely to be deceived or confused by the similarity of the marks.”

1 *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir.1988) (quoting *New West*
 2 *Corp. v. NYM Co.*, 595 F.2d 1194, 1201 (9th Cir. 1979)). Again, Facebook has met that
 3 standard—particularly with respect to the copyright notices at the bottom of Holper’s websites
 4 suggesting that the websites are themselves Instagram’s intellectual property or that such
 5 intellectual property is with permission. *See* Compl. ¶ 25.

6 In order to prove a dilution claim under the Lanham Act, “a plaintiff must show that (1) the
 7 mark is famous and distinctive; (2) the defendant is making use of the mark in commerce; (3) the
 8 defendant’s use began after the mark became famous; and (4) the defendant’s use of the mark is
 9 likely to cause dilution by blurring or dilution by tarnishment.” *Jada Toys, Inc. v. Mattel, Inc.*,
 10 518 F.3d 628, 634 (9th Cir. 2008) (citing *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1324
 11 (9th Cir. 1998). For largely the same reasons discussed above, Facebook has sufficiently alleged
 12 each of those elements here.

13 To the extent any “argument could be made that [Holper] was employing nominative fair
 14 use, . . . that is a defense that must be raised during litigation.” *Yelp Inc. v. Catron*, 70 F. Supp. 3d
 15 1082, 1095 (N.D. Cal. 2014) (citing *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171,
 16 1175 (9th Cir. 2010)). Since Holper did not appear and assert fair use or any other affirmative
 17 defense, the undersigned declines to consider such defenses.

18 The undersigned therefore recommends that default judgment be GRANTED as to
 19 Facebook’s Lanham Act claims.

20 **E. Relief Sought**

21 Once liability is established through a defendant’s default, a plaintiff is required to
 22 establish that the requested relief is appropriate. *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560
 23 560 (9th Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1, 12 (1944)). The plaintiff must
 24 submit proof of their damages rather than relying on the allegations of their complaint. *See*
 25 *TeleVideo*, 826 F.2d at 917–18.

26 **1. Statutory Damages**

27 Facebook seeks statutory damages on its Lanham Act claims.

28 Beginning with the cybersquatting claim, the statute permits a plaintiff to elect “an award

1 of statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per
 2 domain name, as the court considers just.” 15 U.S.C. § 1117(d). Here, Holper’s registration of
 3 instagram.by (a domain that, except for the country suffix, consists solely of Facebook’s
 4 “INSTAGRAM” mark), and his use of that domain to conduct a business based entirely on clear
 5 violations of the Instagram terms of use, represents an egregious violation of § 1125(d). By
 6 failing to appear in this case or engage with Facebook’s demands that he cease his infringement,
 7 Holper has also deprived Facebook of any ability to determine the extent to which he used the
 8 infringing domain to fraudulently present himself as an official representative of Instagram.
 9 Holper’s use of the instagram.by domain is supported by evidence, in that the screenshot of one of
 10 Holper’s website attached to investigator Andrew Herter’s declaration includes Holper’s
 11 info@instagram.by email address in its listing of contact information. Herter Decl. Ex. A; *see*
 12 *also* Andre Decl. Exs A–C (including “info@instagram.by” in the Latin alphabet even in the
 13 original Cyrillic alphabet versions of the websites). The undersigned recommends awarding the
 14 maximum \$100,000 damages for Facebook’s cybersquatting claim.

15 Turning to Facebook’s non-cybersquatting trademark claims, the Lanham Act provides for
 16 statutory damages for use of a counterfeit mark, as follows:

17 (1) not less than \$1,000 or more than \$200,000 per counterfeit mark
 18 per type of goods or services sold, offered for sale, or distributed, as
 the court considers just; or

19 (2) if the court finds that the use of the counterfeit mark was willful,
 20 not more than \$2,000,000 per counterfeit mark per type of goods or
 21 services sold, offered for sale, or distributed, as the court considers
 just.

22 15 U.S.C. § 1117(c). Facebook relies on this subsection and cites no other basis for statutory
 23 damages for its non-cybersquatting claims.

24 As a starting point, Facebook asserts three instances of infringement, based on three
 25 websites where Holper used its “INSTAGRAM” mark. That premise is questionable in light of
 26 Facebook’s investigator’s declaration that “[a]s of December 17, 2021, the nakrutka.by website
 27 redirects individuals that visit that domain to nakrutka.com,” and no clear indication that the
 28 screenshot taken nakrutka.by several months earlier in fact represented a separate website rather

1 than the content of nakrutka.com. Regardless, the Lanham Act does not calculate statutory
 2 damages based on the number of instances of a mark or the number of websites where it appears,
 3 but instead based on the number of marks infringed and the number of “type[s] of goods or
 4 services sold” or offered. 15 U.S.C. § 1117(c); see *Expert Tech Rogers Pvt. Ltd.*, No. 20-cv-
 5 07405-PJH (JSC), 2021 WL 4461601, at *9. There is no indication that Holper used more than
 6 one mark, or that he used it to offer more than one “type of . . . services.”

7 More fundamentally, though, Facebook has not sufficiently demonstrated the use of a
 8 “counterfeit mark,” as required for statutory damages under § 1117(c). While Facebook’s briefs
 9 address that subsection as if it applies to any form of trademark infringement, courts and
 10 commentators have noted that “counterfeiting” is something more than typical infringement:

11 As one district court has explained, “counterfeiting is the ‘hard core’
 12 or ‘first degree’ of trademark infringement that seeks to trick the
 13 consumer into believing he or she is getting the genuine article, rather
 14 than a ‘colorable imitation.’” *Gucci Am., Inc. v. Guess?, Inc.*, 868 F.
 15 Supp. 2d 207, 242 (S.D.N.Y. 2012) (citing 4 McCarthy on
 16 Trademarks § 25:10); see also McCarthy, § 25.01[5][b] (“[T]he
 Lanham Act carves out ‘counterfeit’ as a more egregious type of
 ‘colorable imitation.’ When courts have used the term ‘counterfeit,’
 it has usually been in the context of invoking greater discretionary
 remedies.”).

17 *Gibson Brands, Inc. v. John Hornby Skewes & Co.*, No. CV 14-00609 DDP (SSx), 2016 WL
 18 7479317, at *5 (C.D. Cal. Dec. 29, 2016).

19 The Ninth Circuit has set forth particular elements required to invoke damages under
 20 § 1117(c):

21 Section 1117(c) allows a plaintiff to opt for statutory damages in cases
 22 involving the use of a counterfeit mark. 15 U.S.C. § 1117(c). . . . In
 23 order to invoke § 1117’s special civil monetary remedies against
 24 counterfeiting, [a plaintiff] must establish that: (1) [the defendant]
 25 intentionally used a counterfeit mark in commerce; (2) knowing the
 26 mark was counterfeit; (3) in connection with the sale, offering for
 27 sale, or distribution of goods; and (4) its use was likely to confuse or
 28 deceive. See McCarthy § 25:15 (citing 15 U.S.C. §§ 1114(1)(a),
 1117(b)). In this context, the mark used by [the defendant] was
 counterfeit if: (1) it was a non-genuine mark identical to [the
 plaintiff’s] mark; (2) [the plaintiff’s] mark was registered on the
 Principal Register for use on the same goods to which [the defendant]
 applied the mark; (3) [the plaintiff’s] mark was in use; and (4) [the
 defendant] was not authorized to use [the plaintiff’s] mark on [the
 product at issue]. See *id.* (citing 15 U.S.C. §§ 1116(d)(1)(B), 1127).

1 *Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 720–21 (9th Cir. 2005);
 2 *see also Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 946 (9th Cir. 2011)
 3 (citing *Idaho Potato* for the rule that statutory damages under § 1117(c) only when “the mark in
 4 question [is] (1) a non-genuine mark identical to the registered, genuine mark of another, where
 5 (2) the genuine mark was registered for use on the same goods to which the infringer applied the
 6 mark”).

7 Facebook has not addressed or attempted to satisfy the requirement that a counterfeit mark
 8 must be “identical” to the registered mark. Facebook cites a three district court cases recognizing
 9 marks as supporting a likelihood of confusion. Supp’l Br. at 3. One of those cases says nothing
 10 about whether the marks are “identical,” nor does it address counterfeiting damages under
 11 § 1117(c). *Dor Yeshurim*, 2011 WL 7285038, at *4–7 (finding a likelihood of confusion, noting
 12 that the applicable standard did not require marks to be identical, declining to award damages
 13 under § 1117(a), and not discussing § 1117(c)). A second case describes two marks based on
 14 kanji⁵ characters and using similar Latin transliterations as “practically identical” and sufficient to
 15 support a likelihood of confusion, but does not address counterfeiting or damages. *Munhwa*
 16 *Broad. Corp. v. Solafide, Inc.*, No. SA CV 07-699 DOC (ANx), 2007 WL 2667451, at *2, *5–6
 17 (C.D. Cal. July 16, 2007). The third case describes a transliterated mark as “identical” in a passing
 18 reference (which Facebook’s brief does not discuss), but again does not address counterfeiting or
 19 damages. *Vantone Grp.*, 2015 WL 4040882, at *5 (denying a motion to dismiss an infringement
 20 claim under Rule 12(b)(6)). The undersigned is aware of no case awarding damages under
 21 § 1117(c) where the infringing mark used a different alphabet from the registered mark.

22 The Cyrillic text “ИHCTAГPAM” appearing on Holper’s websites may have the same
 23 meaning as “INSTAGRAM,” but it is a different set of letters with a distinctly different
 24 appearance. Accordingly, while the undersigned accepts that Holper’s Cyrillic transliteration is

25
 26 ⁵ Kanji is a system of Chinese characters used to write Japanese. Although the court in *Munhwa*
 27 *Broadcasting* described the mark at issue as using kanji, the case concerned a Korean television
 28 show, so it seems likely that the mark actually used the *hanja* system of writing *Korean* using
 Chinese characters. The distinction does not appear to have been important to that case and is of
 no consequence to this one. This report refers to the mark in *Munhwa Broadcasting* as using kanji
 for consistency with the terminology used in that decision.

1 sufficiently similar to support a likelihood of confusion, Facebook has not met its burden to show
 2 that it is an “identical” mark for the purpose of “§ 1117’s special civil monetary remedies against
 3 counterfeiting.” See *Idaho Potato*, 425 F.3d at 720; see also *Pogrebnoy v. Russian Newspaper*
 4 *Distribution, Inc.*, 289 F. Supp. 3d 1061, 1070 (C.D. Cal. 2017) (treating “Kurier” and the
 5 apparently equivalent Cyrillic “Kypbep” as two different marks, in a case where that approach
 6 does not seem to have been a subject of dispute), *aff’d*, 742 F. App’x 291 (9th Cir. 2018); *Munhwa*
 7 *Broad.*, 2007 WL 2667451, at *2 (noting that one of the parties filed separate applications for a
 8 kanji character logo and its Latin alphabet transliteration as two different marks).

9 Facebook also asserts that “modern internet browsers translate foreign languages into the
 10 user’s preferred language,” such that “anyone who accesses the Nakrutka Websites and whose
 11 preferred language uses Latin letters will see the INSTAGRAM Mark exactly as written here:
 12 INSTAGRAM.” Supp’l Br. at 3. Facebook has offered no evidence to support the assertion in its
 13 supplemental brief that “anyone” who accesses Holper’s websites would see them translated and
 14 transliterated into the user’s preferred language and writing system. Nor has it cited any authority
 15 to suggest that the automated actions of a third party’s web browser can create liability under
 16 section 1117(c) for someone whose website, in its native form, uses a non-identical mark.

17 The undersigned therefore recommends that Facebook’s motion be DENIED as to
 18 statutory damages under § 1117(c).⁶

19 2. Injunctive Relief

20 Facebook asks the Court to enter a permanent injunction against Holper as set forth
 21 beginning on page 1, line 16 of its proposed order (dkt. 39-2). To obtain a permanent injunction,
 22 Facebook “must demonstrate: (1) that [it has] suffered an irreparable injury; (2) that remedies
 23 available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,
 24

25 ⁶ Holper’s registration and use of the domain name “instagram.by,” which uses the Latin alphabet
 26 and thus the identical text of Facebook’s registered marks, could perhaps support counterfeiting
 27 damages, but in light of the more specific statutory provision addressing cybersquatting discussed
 28 above, the undersigned finds the maximum statutory damages available under § 1117(d) to be
 sufficient compensation for that violation, without also resorting to § 1117(c) to provide additional
 damages for the same conduct. Facebook has not argued that Holper’s use of that domain name
 warrants damages under § 1117(c).

1 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is
2 warranted; and (4) that the public interest would not be disserved by a permanent injunction.”
3 *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). All of these requirements are
4 satisfied here.

5 Irreparable harm is “that for which compensatory damages are unsuitable.” *MGM Studios,*
6 *Inc. v. Grokster, Ltd.*, 518 F.Supp.2d 1197, 1210 (C.D. Cal. 2007) (quoting *Wildmon v. Berwick*
7 *Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992)). “Likelihood of future infringement,
8 therefore, generally leads to a finding of irreparable harm ‘given the difficulty of protecting a right
9 to exclude through monetary remedies that allow an infringer to use [a protected work] against the
10 [rightholder’s] wishes.’” *Sanrio, Inc. v. Torres*, No. CV14-03736 MMM (JCx), 2015 WL
11 12661916, at *10 (C.D. Cal. Jan. 5, 2015) (quoting *eBay*, 547 U.S. at 395 (Roberts, C.J.,
12 concurring)). The facts here support a finding that Facebook faces a threat that Holper will
13 continue to use Facebook’s marks, violate its terms of use, and access its servers without
14 permission in the absence of a permanent injunction. In particular, the undersigned takes judicial
15 notice that Holper’s infringing websites remain available advertising his services in substantially
16 the same form even after he received notice of this lawsuit. *See, e.g.*, www.nakrutka.com
17 (accessed September 27, 2022).

18 Holper’s default further supports the conclusion that a permanent injunction is necessary
19 because monetary damages will be inadequate to protect Facebook’s trademark rights. *See*
20 *Warner Bros. Home Entm’t Inc. v. Jimenez*, No. CV 12-9160 FMO JEMX, 2013 WL 3397672, at
21 *7 (C.D. Cal. July 8, 2013) (“[M]onetary damages alone are inadequate to compensate plaintiff
22 because defendant’s refusal to participate in the action makes it impossible for plaintiff to
23 determine defendant’s actual profits, the amount of lost income as a result of defendant’s
24 conduct, or take any action to prevent further infringement.”).

25 The balance of the hardships also weighs in favor of entering a permanent injunction
26 “because defendant faces no cognizable hardship in refraining from future infringement of
27 plaintiff’s copyrighted works,” *id.*, or from compliance with the terms of use to which he agreed,
28 or from lack of access to websites he has no right to use after Facebook revoked permission.

1 Finally, the public interested is not disserved by entry of a permanent injunction because it
 2 is in the public interest to protect the rights of trademark holders and to prevent infringing conduct
 3 that is likely to deceive and confuse consumers, *see Sanrio*, 2015 WL 12661916, at *11, as well as
 4 the other unlawful conduct at issue.

5 The undersigned therefore recommends that Facebook’s request for a permanent injunction
 6 be GRANTED. The undersigned has reviewed the specific language of the proposed permanent
 7 injunction, and finds that it is “narrowly tailored . . . to remedy only the specific harms shown by
 8 the plaintiffs, rather than ‘to enjoin all possible breaches of the law.’” *Iconix, Inc. v. Tokuda*, 457
 9 F. Supp. 2d 969, 998 (N.D. Cal. 2006) (quoting *Price v. City of Stockton*, 390 F.3d 1105, 1117
 10 (9th Cir. 2004)). The specific language of the proposed order pertaining to injunctive relief should
 11 therefore be adopted.

12 3. Attorneys’ Fees and Costs

13 Section 502 of the California Penal Code allows a prevailing plaintiff to recover its
 14 reasonable attorneys’ fees. Cal. Penal Code § 502(e)(2). Rule 54(d)(1) of the Federal Rules of
 15 Civil Procedure permits a prevailing plaintiff to recover its litigation costs other than attorneys’
 16 fees. Facebook here seeks fees totaling \$178,702 and costs totaling \$10,184.44.

17 Facebook’s attorneys’ hourly rates—\$530 per hour for second-year associates, Mortimer
 18 Decl. ¶¶ 10–11, up to \$725 per hour for a senior associate with significant practice experience, *id.*
 19 ¶ 9, up to \$780 per hour for a counsel with nearly twenty years of experience, *id.* ¶ 8, and up to
 20 \$1,165 per hour of an office managing partner with thirty years of experience who spent only four
 21 hours on the case, *id.* ¶ 7—are within the reasonable range of the local market. The undersigned is
 22 not satisfied, however, that all of the time spent on the case was reasonably incurred. In light of
 23 Facebook’s attorneys’ failure to address key issues (like website translations) in their original
 24 motion, failure to achieve success on the bulk of their request for statutory damages, and facially
 25 unreasonable amounts of time spent on relatively straightforward phases of the case,⁷ the

26 _____
 27 ⁷ For example, “approximately 35.9 hours to prepare and file multiple motions to continue case
 28 management conferences and multiple case management statements and to prepare for and appear
 at the case management conferences” in this case where the defendant never appeared, Mortimer

United States District Court
Northern District of California

1 undersigned recommends a forty-percent reduction in the award of attorneys’ fees, for a total
2 award of \$107,221.20. *See Fox v. Vice*, 563 U.S. 826, 838 (2011) (“The essential goal in shifting
3 fees is to do rough justice, not to achieve auditing perfection.”).

4 Facebook’s costs are well substantiated and largely reflect the difficult task of attempting
5 service under the Hague Convention in Belarus. Facebooks attorneys have exercised billing
6 judgment in not including legal research costs in their request. Mortimer Decl. ¶ 16 & Exs. B–D.
7 The undersigned recommends that the requested costs be awarded in full.

8 **IV. CONCLUSION**

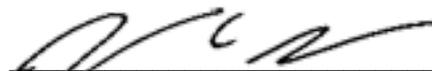
9 The undersigned recommends that Facebook’s motion for default judgment be GRANTED
10 IN PART and DENIED IN PART, for the reasons discussed above. The undersigned recommends
11 that judgment be entered against Holper in the total amount of \$217,405.64 (consisting of
12 \$100,000 in statutory damages for cybersquatting, \$107,221.20 in attorneys’ fees, and \$10,184.44
13 in costs), and that a permanent injunction be entered consistent with the terms of Facebook’s
14 proposed order.

15 Facebook is ORDERED to serve a copy of this report on Holper by the same methods the
16 undersigned previously authorized for serving the complaint, and to file proof of service to that
17 effect.

18 This case will be reassigned to a United States district judge for all further proceedings,
19 including action on the recommendations of this report. Any party may file objections to these
20 recommendations no later than fourteen days after being served with a copy of this report.

21 ///

22 Dated: September 27, 2022

23 
24 _____
25 JOSEPH C. SPERO
26 Chief Magistrate Judge

27 _____
28 Decl. ¶ 13, and “approximately 71.3 hours researching, drafting, and arguing Plaintiffs’ motion for
alternative service,” *id.* ¶ 14.