

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

THE CALIFORNIA BEACH CO., LLC.,
Plaintiff,
v.
HAN XIAN DU,
Defendant.

Case No. 19-cv-08426-YGR (LB)

**SECOND REPORT AND
RECOMMENDATION FOR
DAMAGES, FEES, AND COSTS**

Re: ECF Nos. 34 and 46

INTRODUCTION

The court previously recommended entry of default judgment in in favor of the plaintiff, California Beach Co., LLC. (“CBC”), and against the defendant, Han Xian Du, based on the defendant’s submitting false takedown notices under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, to Facebook, Instagram, and Amazon, which disabled CBC’s accounts.¹ The court recommended awarding damages (either in the form of lost profits or lost time, but not both) and attorney’s fees and costs and asked for supplemental declarations

¹ Compl. – ECF No. 1; Report and Recommendation – ECF No. 43. Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

1 supporting the damages, fees, and costs.² The plaintiff submitted the declarations. The court
 2 recommends awarding lost profits of \$316,991, attorney’s fees of \$51,474, and costs of \$1,384.12.

3 4 **STATEMENT**

5 The main issue is CBC’s entitlement to damages in the form of lost profits. This section
 6 summarizes the record relevant to that determination.

7 The complaint had the following allegations about CBC’s sales, revenues, and damages.

8 The DMCA takedowns cost CBC hundreds of thousands of dollars in lost sales during the
 9 Christmas shopping season and immeasurable harm in the form of lost consumer goodwill.³ The
 10 holiday sales seasons during late December and early January are critical sales months for CBC.⁴
 11 As of the date of the complaint (December 26, 2019), “CBC is losing an estimated \$100,000 every
 12 week its CMC Facebook and Instagram pages are down. . . .”⁵

13 CBC sells its products through channels that include its own website, Amazon.com, and other
 14 third-party retailers.⁶ Its sales “are driven primarily through its social media presence on Instagram
 15 and Facebook[, which are] critical marketing platforms for CBC[, . . . [and] customers nearly
 16 always first learn about CBC’s products on the Instagram or Facebook [] platforms.”⁷

17 Approximately 98 percent of CBC’s monthly revenues “derive” from CBC’s presence on
 18 Facebook and Instagram: “The social and direct searches that result in sales are from those
 19 consumers purchasing CBC’s product through a direct link from Facebook or IG or by searching
 20 for ‘POP N GO’ in the Google search bar or on Amazon, after learning the product name via
 21 advertising on social media platforms.”⁸

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 24 ² Report and Recommendation – ECF No. 43 at 14–15.

25 ³ Compl. – ECF No. 1 at 2.

26 ⁴ *Id.* at 4 (¶ 10).

27 ⁵ *Id.* at 8 (¶ 41).

28 ⁶ *Id.* at 4 (¶ 10).

⁷ *Id.* (¶ 11).

⁸ *Id.* at 4–5 (¶ 12).

1 In its prayer for relief, CBC asks for permanent injunctive relief, its costs and attorney’s fees,
2 prejudgment and post-judgment interest, and “such other and further relief as the Court deems just
3 and proper.”⁹

4 In an initial declaration to support its damages, CBC’s CEO Austin Wright estimated that CBC
5 lost roughly \$316,991 in sales, calculated as follows.¹⁰ In February through April 2020, it made
6 \$2,630,303 in gross sales (an average of \$876,768 per month), but in December 2019 and January
7 2020, it made \$600,015 in sales (an average of \$300,008 per month).¹¹ In September through
8 November 2019, it averaged monthly gross sales of \$316,991.¹² To estimate what it lost from the
9 fraudulent takedown notices, it

10 split the difference between [the] average sales [from September to November 2019 of
11 \$316,991 and February to April 2020 of \$876,768.] This amounts to \$485,503. . . . Had
12 CBC averaged this amount of sales in the affected months of December 2019 and January
13 2020, we would have made a total of \$917,006 . . . rather than \$600,015. Accordingly, we
conservatively estimate that CBC’s lost sales were no less than the differences in those
amounts, or \$316,991.¹³

14 In its supplemental motion for damages in the form of loss profits, CBC says that “[t]o clarify,
15 as previously was not made clear, the numbers presented in the Declaration of Austin Wright
16 attached to the Motion for Default Judgment were lost gross profits accounting for the cost of
17 goods and shipping and other expenditures.”¹⁴

18 In an earlier declaration (cited in the default-judgment motion), CBC’s CEO says the
19 following about how its revenue derives from Facebook and Instagram:

20 Instagram and Facebook are critical marketing platforms for CBC and drive a substantial
21 percentage of CBC’s sales. CBC utilizes a data analytics platform that provides insight into
22 where the traffic referral for every CBC sale originates. From that data, we can see that
23 CBC’s presence on Facebook and Instagram directly contributes to the majority of CBC’s
revenue. For example, in November 2019, CBC made approximately \$409,000 in sales. Of

24 ⁹ *Id.* at 8 (¶¶ 42–48).

25 ¹⁰ Wright Decl. – ECF No. 35 at 2 (¶ 7).

26 ¹¹ *Id.* at 2–4 (¶ 7).

27 ¹² *Id.*

28 ¹³ *Id.*

¹⁴ Mot. – ECF No. 47 at 2.

1 that total, approximately \$155,000 came directly from customers who clicked through
 2 Facebook and \$29,000 came directly from customers who clicked through Instagram. Of
 3 the remaining sales that are not “direct” click-throughs, most of those sales are also
 4 attributable to CBC’s Facebook and social media presence, as CBC advertises exclusively
 on Facebook and Instagram, which means as much as 98% of CBC’s revenue is directly
 attributable to CBC’s presence on Facebook and Instagram.¹⁵

5 CBC submitted a supplemental declaration about its lost profits.¹⁶ It provided its daily gross
 6 sales during the takedown period (December 19, 2019 to January 11, 2020 (the disabling of the
 7 Facebook and Instagram platforms was from December 19 to January 10)).¹⁷ It provided its
 8 average daily sales during five relevant time periods: (1) November 19 to November 30, 2019 (the
 9 “normal” sales period before the holiday season; (2) December 1 to December 18, 2019 (also a
 10 normal sales period leading to the holiday season); (3) December 19, 2019 to January 11, 2020
 11 (the fallout period from the takedown); (4) January 12 to January 31, 2020 (the recovery period
 12 after the takedown); and (5) February 2020, when sales improved.¹⁸ The average daily gross sales
 13 in the five periods were as follows:

Period	Average Daily Gross Sales
1	\$13,284
2	\$15,086
3	\$ 4,097
4	\$12,287
5	\$23,870 ¹⁹

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 20 CBC seeks its losses from periods three and four, the period of depressed sales.²⁰ If sales had
 21 continued at the same level as period two (a conservative approach given the holidays), the sales
 22 for periods three and four would have been \$663,784, as opposed to the actual sales of \$344,072,
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 15 Wright Decl. – ECF No. 5 at 9–10 (¶ 20); Mot. – ECF No. 34 at 10.

16 Wright Decl. – ECF No. 45-3.

17 *Id.* at 3–4 (¶ 6); Report and Recommendation – ECF No. 43 at 2, 13.

18 Wright Decl. – ECF No. 45-3 at 4–5 (¶ 7).

19 *Id.* at 6 (¶ 8).

20 *Id.* (¶ 10).

1 which results in \$319,712, roughly the same amount (\$316,991) that CBC demanded initially in its
 2 motion for default judgment.²¹ CBC subsequently analyzed trends in periods three and four (based
 3 on data from period five) to estimate daily sales in period three of \$18,014 and in period four of
 4 \$20,942, resulting in total gross lost sales of \$507,104.²² It calculated CBC’s gross-profit margin
 5 during periods one through five (deducting costs such as goods sold, merchant changes, Shopify
 6 platform fees, rush fees, and other administrative costs), which resulted in a 76.9 percent gross-
 7 profit margin, which — applied to \$507,104 in lost gross sales (under CBC’s trended approach) —
 8 resulted in damages of \$389,963.²³

9 ANALYSIS

10 1. Damages

11 In the earlier report and recommendation, the court recommended that the trial judge find that
 12 the complaint put the defendant on notice about the amount of damages.²⁴ The remaining issue is
 13 whether CBC proved its lost profits “through testimony or written affidavit.” *Bd. of Trs. of the*
 14 *Laborers Health & Welfare Trust Fund for N. Cal. v. A&B Bldg. Maint. Co. Inc.*, No. C 13-00731
 15 WHA, 2013 WL 5693728, at *4 (N.D. Cal. Oct. 17, 2013); *see Cannon v. City of Petaluma*, No. C
 16 11-0651 PJH, 2011 WL 3267714, at *2 (N.D. Cal. July 29, 2011) (requires admissible evidence,
 17 including witness testimony); *see also Bd. of Trs. of Bay Area Roofers Health & Welfare Trust*
 18 *Fund v. Westech Roofing*, 42 F. Supp. 3d 1220, 1232 n.13 (N.D. Cal. 2014) (the plaintiff has the
 19 burden to establish damages).

20 The time period for the harm was December 19, 2019 to January 10, 2020 (the disabling of the
 21 Facebook and Instagram platforms) and, within that period, December 25, 2019 to January 4, 2020
 22 (the removal of the product from the Amazon sales platform).²⁵ The plaintiff quantified its lost
 23 profits based on its sales in the relevant time periods before and after the takedown and made
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25 ²¹ *Id.* at 7 (¶ 11); Report and Recommendation – ECF No. 43 at 4.

26 ²² Wright Decl. – ECF No. 45-3 at 8 (¶ 13).

27 ²³ *Id.* at 8–9 (¶¶ 13–15).

28 ²⁴ Report and Recommendation – ECF No. 43 at 12.

²⁵ *Id.* at 13.

1 reasonable assumptions about lost sales in the takedown period. The statute allows the recovery of
 2 “any damages, including costs and attorneys’ fees. . . .” 17 U.S.C. § 512(f). While “[t]he question
 3 of what types of damages are available under § 512(f) is yet to be addressed by appellate courts[,]”
 4 at least one district court has suggested that a plaintiff can recover lost profits for lost sales as
 5 “other damages” under § 512(f). *Lenz v. Universal Music Corp. (Lenz II)*, No. C 07-3783 JF, 2010
 6 WL 702466, at *5 (N.D. Cal. Feb. 25, 2010); *Sky Billiards, Inc. v. WolVol, Inc.* No.
 7 515CV02182RGKKX 2016 WL 7479428, at *4 (C.D. Cal. July 11, 2016) (denying motion to
 8 dismiss a § 512(f) claim where the plaintiff “pled sufficient facts to show an actual relationship
 9 between it and Amazon, and that the \$250,000 in lost sales was a proximate result of [the
 10 defendant’s] conduct”). Given the default-judgment context, the plaintiff supported its request
 11 sufficiently.

12 The plaintiff has two calculations of lost profits: (1) \$316,991 initially and (2) \$389,963 after
 13 the court asked for more information. Because the second submission was a court-ordered cross
 14 check on the reasonableness of \$316,991, the court recommends \$316,991 because it is the
 15 plaintiff’s initial request.

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17 **2. Attorney’s Fees and Costs**

18 CBC seeks its statutory fees and costs of \$51,474 in attorney’s fees and \$1,384.12 in costs and
 19 submitted their billing rates, billing records, and supporting declarations.²⁶ 17 U.S.C. § 512(f).
 20 CBC’s submissions establish that the fees are the reasonable lodestar fees and the costs are
 21 reasonable.

22 To determine a reasonable fee award in a case like this, federal courts use the lodestar method.
 23 *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008); *see Hensley v.*
 24 *Eckerhart*, 461 U.S. 424, 433 (1983). The court calculates a “lodestar amount” by multiplying the
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 28 ²⁶ Mot. – ECF No. 47 at 2; Briant Decl. – ECF No. 48; Pellant Decl. – ECF No. 49; Williamson Decl.
 – ECF No. 50.

1 number of hours counsel reasonably spend on the litigation by a reasonable hourly rate. *Camacho*,
2 523 F.3d at 978.

3 A reasonable hourly rate is that prevailing in the community for similar work performed by
4 attorneys of comparable skill, experience, and reputation. *Id.* at 979. The relevant community is
5 “the forum in which the district court sits,” which here is the Northern District of California. *Id.*
6 The party requesting fees must produce satisfactory evidence—in addition to the attorney’s own
7 affidavits or declarations—that the rates are in line with community rates. *Blum v. Stenson*, 465
8 U.S. 886, 895 n.11 (1984); *Jordan v. Multomah Cnty.*, 815 F.2d 1258, 1263 (9th Cir. 1987).

9 Reasonable hours expended on a case are hours that are not “excessive, redundant, or
10 otherwise unnecessary.” *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)
11 (quoting *Hensley*, 461 U.S. at 434). The party requesting fees must provide detailed time records
12 documenting the tasks completed and the time spent. *Hensley*, 461 U.S. at 437; *McCown*, 565 F.3d
13 at 1102; *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945–46 (9th Cir. 2007).

14 Here, CBC described the qualifications and rates of its attorneys.²⁷ Based on the submissions
15 and the court’s knowledge about prevailing rates, the rates are reasonable. *Echague v. Metro. Life*
16 *Ins. Co.*, 69 F. Supp. 3d 990, 996 (N.D. Cal. 2014). A review of the billing records shows that the
17 hours expended were reasonable, and by discounting the fees, CBC exercised reasonable billing
18 judgment. The costs also are reasonable.

19 20 CONCLUSION

21 In its earlier report and recommendation, the undersigned recommended that the district judge
22 grant the default-judgment motion. The undersigned supplements its earlier recommendation with
23 this recommendation for the award of lost profits of \$316,991, attorney’s fees of \$51,474, and
24 costs of \$1,384.12. CBC must file a proposed form of judgment that complies with this
25 recommendation within 14 days.

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²⁷ Briant Decl. – ECF No. 48 at 2–3 (¶ 3); Pellant Decl. – ECF No. 49 at 2 (¶¶ 4–5); Williamson Decl.
– ECF No. 50 at 2 (¶¶ 4–5).

1 Any party may file objections to this Report and Recommendation with the district judge
2 within 14 days after being served with a copy. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); N.D.
3 Cal. Civ. L.R. 72. Failure to file an objection may waive the right to review of the issue in the
4 district court.

5 CBC must serve this report and recommendation to the defendant by email to
6 duhanxian@hotmail.com (and by whatever other means it has) and file proof of service within two
7 business days after service.

8 **IT IS SO ORDERED.**

9 Dated: October 6, 2020



10 LAUREL BEELER
11 United States Magistrate Judge

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