

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

EPIC GAMES, INC., et al.,  
Plaintiffs,  
v.  
JAMES MENDES, et al.,  
Defendants.

Case No. 17-cv-06223-LB

**ORDER ADDRESSING PLAINTIFFS’  
MOTION FOR DEFAULT JUDGMENT  
AGAINST DEFENDANT KONSTANTIN  
VLADIMIROVICH RAK**

Re: ECF No. 33

**INTRODUCTION**

Plaintiffs Epic Games, Inc. and Epic Games International S.à.r.l. (collectively, “Epic”) are the authors of Fortnite, a multiplayer survival-and-building action video game. Epic alleges that the defendants — James Mendes, Konstantin Vladimirovich Rak, and Oleksey Olekseevich Stegailo — created software “cheats” that allow players to modify Fortnite to give themselves unfair competitive advantages over other players, thereby undermining the integrity of Fortnite and ruining the game-play experience for players who play without cheats. Epic brought claims for (1) copyright infringement, 17 U.S.C. § 501 et seq., (2) contributory copyright infringement, 17 U.S.C. § 501 et seq., (3) trademark infringement, 15 U.S.C. § 1114, (4) false designation of origin, 15 U.S.C. § 1125(a), (5) breach of contract, and (6) violations of the California Unfair Competition law, California Business and Professional Code § 17200 et seq.

1 At issue is Epic’s motion for default judgment against Mr. Rak. On January 29, 2018, the  
 2 undersigned granted Epic leave to serve Mr. Rak with the summons and complaint by email. *Epic*  
 3 *Games, Inc v. Mendes*, No. 17-cv-06223-LB, 2018 WL 582411 (N.D. Cal. Jan. 29, 2018) (*Epic*  
 4 *D*).<sup>1</sup> On February 14, 2018, Epic served Mr. Rak with the summons and complaint at his email  
 5 addresses konstantin.rak1@gmail.com and rak13@spaces.ru.<sup>2</sup> Mr. Rak has not appeared in this  
 6 action and has not filed a respond to the complaint.<sup>3</sup> After the Clerk of Court entered default,<sup>4</sup> Epic  
 7 moved for default judgment against Mr. Rak on its direct-copyright-infringement, trademark-  
 8 infringement, and false-designation-of-origin claims.<sup>5</sup>

9 Epic does not ask for any money damages from Mr. Rak. Instead, it limits its claim for relief to  
 10 a permanent injunction barring Mr. Rak from using Epic’s copyrighted works or trademark in  
 11 connection with the advertising, demonstration, or distribution of any video, or sale of any goods  
 12 or services, and/or developing or distributing any item that modifies Epic’s protected computer  
 13 code.

14 The undersigned is inclined to recommend that Epic’s motion for default judgment be denied,  
 15 primarily due to questions regarding the merits of Epic’s claims and the sufficiency of its  
 16 complaint.<sup>6</sup> Before making a recommendation, however, the undersigned grants Epic the  
 17 opportunity to amend its complaint, file a new motion for default judgment that addresses the  
 18 deficiencies identified below, or both. If Epic submits any new filings, it must serve on Mr. Rak  
 19 certified Russian translations of its filings (along with the native English versions) and write a

20 \_\_\_\_\_  
 21 <sup>1</sup> ECF No. 24. Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations  
 are to the ECF-generated page numbers at the top of documents.

22 <sup>2</sup> Proof of Service – ECF No. 25.

23 <sup>3</sup> See Docket.

24 <sup>4</sup> Entry of Default – ECF No. 32.

25 <sup>5</sup> Mot. for Default Judgment – ECF No. 33. Epic did not move for default judgment on its claims for  
 contributory copyright infringement, breach of contract, and the California Unfair Competition Law,  
 and stated that those claims should be dismissed. *Id.* at 12 n.2.

26 <sup>6</sup> A magistrate judge may not exercise jurisdiction under 28 U.S.C. § 636(c)(1) without the consent of  
 27 all parties. Absent consent, the undersigned will ultimately have to direct the Clerk of Court to  
 reassign the case to a district judge and will make a recommendation on Epic’s motion for default  
 28 judgment. The parties will have an opportunity to object to that recommendation.

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1 cover letter or email to Mr. Rak in both English and Russian, and must file both the English  
2 versions and the certified Russian translations on the docket. To allow Epic time both to prepare  
3 its filings and to obtain translations, the undersigned grants Epic 30 days from the date to file an  
4 amended complaint or to file a new motion for default judgment if it does not amend its  
5 complaint. (If it amends its complaint, it must obtain a new entry of default before it can file a new  
6 motion for default judgment.) If Epic does not file an amended complaint or a new motion for  
7 default judgment within that timeframe, the undersigned will direct the Clerk of Court to reassign  
8 this case to a district judge and will recommend that the newly assigned judge deny Epic’s motion  
9 for default judgment.

10  
11 **STATEMENT<sup>7</sup>**

12 Founded in 1991, Epic Games, Inc. is a leading video game developer for PC, console, and  
13 mobile platforms.<sup>8</sup> Epic is the author of Fortnite, a multiplayer survival-and-building action video  
14 game where players explore, scavenge gear, build fortified structures, and fight waves of monsters  
15 who want to kill the player and her friends.<sup>9</sup> Fortnite is an extremely popular game with over ten  
16 million players.<sup>10</sup>

17  
18 **1. Epic’s Fortnite Copyrights**

19 Epic Games, Inc. is the author and owner of all copyrights in Fortnite, including but not  
20 limited to its maps, items, characters, user interface, and software.<sup>11</sup> Epic owns copyrights in  
21 Fortnite, including U.S. Copyright Registration Nos. TXu 1-895-864, TX 8-186-254, TX 8-254-  
22 659, and TX 8-352-178.<sup>12</sup>

23 \_\_\_\_\_  
24 <sup>7</sup> Unless otherwise noted, the facts recited in the Statement are allegations from the Complaint.

25 <sup>8</sup> Compl. – ECF No. 1 at 3 (¶ 11).

26 <sup>9</sup> *Id.* at 2 (¶ 1), 3 (¶ 12).

27 <sup>10</sup> *Id.* at 3 (¶ 15).

28 <sup>11</sup> *Id.* at 4 (¶ 18).

<sup>12</sup> *Id.* (¶ 20); Compl. Ex. A – ECF No. 1-1.

1 **2. Epic’s Fortnite Trademark**

2 Epic began using the FORTNITE mark in commerce at least as early as October 11, 2013.<sup>13</sup>  
 3 Since its first use, Epic has continually used the FORTNITE mark in connection with video-game  
 4 software.<sup>14</sup> Epic has invested substantial resources in marketing, advertising, and distributing  
 5 video games under the FORTNITE mark.<sup>15</sup> Fortnite — the video game bearing the FORTNITE  
 6 mark — has more than ten million players.<sup>16</sup> Epic has attained substantial goodwill and strong  
 7 recognition in the FORTNITE mark, and that mark has come to be associated with Epic.<sup>17</sup> Epic  
 8 owns United States Patent and Trademark Office (“USPTO”) Registration No. 4,481,629 for the  
 9 FORTNITE mark.<sup>18</sup> Epic also has a pending application for FORTNITE, USPTO Serial No.  
 10 87,484,706, for use in association with “[e]ntertainment services, namely, providing on-line  
 11 computer games.”<sup>19</sup>

12  
 13 **3. Epic’s Contractual Agreements with Users**

14 To use or access Epic’s websites, services, products, or content, a user must agree to Epic’s  
 15 Terms of Service (“Terms”).<sup>20</sup> The Terms provide that “[t]he Services, including all content,  
 16 features, and functionality thereof, are owned by Epic, its licensors, or other providers of such  
 17 material and are protected by United States and international copyright . . . laws.”<sup>21</sup> Additionally,  
 18 the Terms state that users “are permitted to use the Services for [] personal, non-commercial use  
 19 only or legitimate business purposes related to [a user’s] role as a current or prospective customer  
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 22 <sup>13</sup> Compl. – ECF No. 1 at 4 (¶ 21).

23 <sup>14</sup> *Id.* (¶ 22).

24 <sup>15</sup> *Id.* (¶ 23).

25 <sup>16</sup> *Id.* (¶ 24).

26 <sup>17</sup> *Id.* (¶ 25).

27 <sup>18</sup> *Id.* (¶ 27); Compl. Ex. B – ECF No. 1-2.

28 <sup>19</sup> Compl. – ECF No. 1 at 5 (¶ 28).

<sup>20</sup> *Id.* (¶ 29).

<sup>21</sup> *Id.* (¶ 30).

1 of Epic. Except as provided below, [users] must not copy, modify, create derivative works of,  
 2 publicly display, publicly perform, republish, or transmit any of the material obtained through the  
 3 Services, or delete, or alter any copyright, trademark, or other proprietary rights notices from  
 4 copies of materials from the Services.”<sup>22</sup> Under the Terms, users “must not reproduce, sell, or  
 5 exploit for any commercial purposes any part of the Services, access to the Services or use of the  
 6 Services or any services or materials available through the Services.”<sup>23</sup> Moreover, users “may use  
 7 the Services only for lawful purposes and in accordance with these Terms of Service. [Users]  
 8 agree not to access or use the Services for any purpose that is illegal or beyond the scope of the  
 9 Services’ intended use (in Epic’s sole judgment).”<sup>24</sup> Mr. Rak had an account with Epic and agreed  
 10 to be bound by the Terms by registering that account and by using Epic’s services.<sup>25</sup>

11 To use or play Fortnite, a user must affirmatively accept the Fortnite End User License  
 12 Agreement (“EULA”).<sup>26</sup> The EULA grants users “a personal, non-exclusive, non-transferable,  
 13 non-sublicensable limited right and license to install and use one copy of the Software on a device  
 14 for . . . personal entertainment use.”<sup>27</sup> Under the EULA, Fortnite users may not, among other  
 15 things, “use it commercially or for a promotional purpose,” “copy, reproduce, distribute, display,  
 16 or use it in a way that is not expressly authorized in this Agreement,” “reverse engineer, derive  
 17 source code from, modify, adapt, translate, decompile, or disassemble it or make derivative works  
 18 based on it,” or “create, develop, distribute, or use any unauthorized software programs to gain  
 19 advantage in any online or other game modes.”<sup>28</sup> Mr. Rak agreed to abide by the EULA by  
 20 downloading and accessing Fortnite.<sup>29</sup>

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22 <sup>22</sup> *Id.* (¶ 31).

23 <sup>23</sup> *Id.* (¶ 32).

24 <sup>24</sup> *Id.* (¶ 33).

25 <sup>25</sup> *Id.* (¶ 34).

26 <sup>26</sup> *Id.* (¶ 35).

27 <sup>27</sup> *Id.* at 6 (¶ 36).

28 <sup>28</sup> *Id.* (¶ 37).

29 <sup>29</sup> *Id.* (¶ 38).

28

1 **4. The Fortnite Game and Cheating in Fortnite**

2 Fortnite was first released in or about October 2013.<sup>30</sup> Epic publicly released Fortnite’s free-to-  
3 play “Battle Royale” game mode on or about September 26, 2017.<sup>31</sup> In Fortnite’s Battle Royale  
4 game mode, players drop into an environment via a glider from a flying battle bus and engage in  
5 intense player-versus-player combat until only one player remains standing.<sup>32</sup>

6 Cheats modify games to give a user an unfair competitive advantage over other players.<sup>33</sup>  
7 Cheats give a cheater the power to do or see things that other players cannot do or see.<sup>34</sup> For  
8 example, a cheat may enable the user to see through solid objects, teleport, impersonate another  
9 player by “spoofing” that player’s user name, or make moves other players cannot, such as a spin  
10 followed by an instant headshot to another player.<sup>35</sup>

11 Epic does not allow or support cheats in Fortnite, including in the Battle Royale game mode.<sup>36</sup>  
12 Players who use cheats ruin the game play experience for those who play without cheats and  
13 undermine the integrity of Fortnite.<sup>37</sup>

14  
15 **5. Mr. Rak’s Acts**

16 Mr. Rak downloaded and accessed Fortnite.<sup>38</sup> Mr. Rak created, developed, and/or wrote a  
17 software cheat for Fortnite’s Battle Royale game mode.<sup>39</sup> Mr. Rak created and posted a video on  
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21 <sup>30</sup> *Id.* at 3 (¶ 13).

22 <sup>31</sup> *Id.* (¶ 14).

23 <sup>32</sup> *Id.* (¶ 16).

24 <sup>33</sup> *Id.* at 6 (¶ 39).

25 <sup>34</sup> *Id.* (¶ 40).

26 <sup>35</sup> *Id.*

27 <sup>36</sup> *Id.* (¶ 41).

28 <sup>37</sup> *Id.* (¶ 42).

<sup>38</sup> *Id.* at 8 (¶ 59).

<sup>39</sup> *Id.* (¶ 60).

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1 YouTube to advertise, demonstrate, and distribute his cheat.<sup>40</sup> The video features Epic’s  
2 FORTNITE mark.<sup>41</sup>

3 To use Mr. Rak’s cheat, users must download the cheat and then “inject” the cheat computer  
4 code into the copyrighted Fortnite code.<sup>42</sup> Once the cheat is injected into Fortnite, the cheat  
5 modifies the copyright-protected game code, altering the game and the experience of those who  
6 play it.<sup>43</sup> The game, after being altered by Mr. Rak’s cheat, also contains the FORTNITE mark.<sup>44</sup>  
7 Epic has not authorized Mr. Rak to use Epic’s FORTNITE mark or copyrighted work in this  
8 manner.<sup>45</sup>

9 In or about October 2017, Mr. Rak posted a video along with a post on YouTube that was  
10 available at <http://www.youtube.com/watch?v=9gcP1eElxsU> (“Rak Video”) that demonstrated  
11 and provided a link to download his cheat.<sup>46</sup> The Rak Video and associated post contained  
12 instructions on how to download and install the cheat and showed full-screen gameplay using the  
13 cheat.<sup>47</sup> On or about October 17, 2017, Epic submitted a takedown notice to YouTube for the Rak  
14 Video under the Digital Millennium Copyright Act (“DMCA”).<sup>48</sup> YouTube took down the Rak  
15 Video.<sup>49</sup> On or about October 23, 2017, Mr. Rak submitted a counter-notification under the  
16 DMCA to YouTube for the Rak Video.<sup>50</sup> Epic does not allege that YouTube ever put the Rak  
17 Video back up. As of the date of this order, the Rak Video remains down, with a message that  
18 reads, “This video is no longer available due to a copyright claim by Epic Games, Inc..” [sic]

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<sup>40</sup> *Id.* (¶ 61).

<sup>41</sup> *Id.* (¶ 62).

<sup>42</sup> *Id.* (¶ 63).

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* (¶ 64).

<sup>45</sup> *Id.* (¶ 65).

<sup>46</sup> *Id.* (¶ 66).

<sup>47</sup> *Id.* (¶ 67).

<sup>48</sup> *Id.* at 9 (¶ 68).

<sup>49</sup> *Id.* (¶ 69).

<sup>50</sup> *Id.* (¶ 70).

1 **6. Procedural History**

2 On October 27, 2017, Epic filed its complaint, alleging six claims: (1) copyright infringement,  
3 17 U.S.C. § 501 et seq., (2) contributory copyright infringement, 17 U.S.C. § 501 et seq.,  
4 (3) trademark infringement, 15 U.S.C. § 1114, (4) false designation of origin, 15 U.S.C. § 1125(a),  
5 (5) breach of contract, and (6) violations of the California Unfair Competition law, California  
6 Business and Professional Code § 17200 et seq.

7 Mr. Rak’s DMCA counter-notification listed a physical address in Russia.<sup>51</sup> Mr. Rak’s  
8 counter-notification also listed an email address, konstantin.rak1@gmail.com.<sup>52</sup> Mr. Rak’s  
9 counter-notification also stated that Mr. Rak “consent[s] to the jurisdiction of the Federal District  
10 Court for the district in which my address is located, or if my address is outside of the United  
11 States, the judicial district in which YouTube is located, and will accept service of process from  
12 [Epic].”<sup>53</sup> Epic also identified a second email address associated with Mr. Rak, rak13@spaces.ru,  
13 which is the email address associated with Mr. Rak’s Epic user account.<sup>54</sup>

14 Epic moved for leave to serve the summons and complaint on Mr. Rak via email at  
15 konstantin.rak1@gmail.com and rak13@spaces.ru pursuant to Federal Rule of Civil Procedure  
16 4(f)(3).<sup>55</sup> On January 29, 2018, the undersigned granted Epic leave to serve Mr. Rak via email,  
17 provided that it translated the summons and complaint into Russian before serving them on Mr.  
18 Rak and wrote its cover email to Mr. Rak in both English and Russian. *Epic I*, 2018 WL 582411.  
19 On February 14, 2018, Epic served a certified Russian translation of the summons and complaint  
20 on Mr. Rak via email.<sup>56</sup> Mr. Rak responded to Epic’s email but has not appeared in this action or  
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23 <sup>51</sup> Mot. to Serve Rak via Alternative Means – ECF No. 19 at 4; Atamas Decl. Ex. A (Rak Counter-  
Notification) – ECF No. 21-1 at 2.

24 <sup>52</sup> Mot. to Serve Rak via Alternative Means – ECF No. 19 at 4; Atamas Decl. Ex. A (Rak Counter-  
Notification) – ECF No. 21-1 at 2.

25 <sup>53</sup> Atamas Decl. Ex. A (Rak Counter-Notification) – ECF No. 21-1 at 2.

26 <sup>54</sup> Atamas Decl. – ECF No. 21 at 2 (¶ 3).

27 <sup>55</sup> Mot. to Serve Rak via Alternative Means – ECF No. 19.

28 <sup>56</sup> Proof of Service – ECF No. 25.



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1 filed a response to the complaint.<sup>57</sup> Epic moved for entry of default, and on March 27, 2018, the  
2 Clerk of Court entered default against Mr. Rak.<sup>58</sup> On April 20, 2018, Epic moved for default  
3 judgment on its direct-copyright-infringement, trademark-infringement, and false-designation-of-  
4 origin claims and asked the court to enter a permanent injunction against Mr. Rak.<sup>59</sup> Epic served  
5 its motion for default judgment by email on Mr. Rak at konstantin.rak1@gmail.com and rak13@  
6 spaces.ru.<sup>60</sup>

7  
8 **JURISDICTION AND SERVICE**

9 Before entering a default judgment, a court must determine whether it has subject-matter  
10 jurisdiction over the action and personal jurisdiction over the defendant. *See In re Tuli*, 172 F.3d  
11 707, 712 (9th Cir. 1999). A court also must ensure the adequacy of service on the defendant. *See*  
12 *Timbuktu Educ. v. Alkaraween Islamic Bookstore*, No. C 06-0325 JSW, 2007 WL 1544790, at \*2  
13 (N.D. Cal. May 25, 2007).

14 The court has subject-matter jurisdiction because Epic brings claims for copyright and  
15 trademark infringement under 17 U.S.C. § 501 et seq., 15 U.S.C. § 1114, and 15 U.S.C. § 1125(a),  
16 and therefore invokes federal-question jurisdiction. *See* 28 U.S.C. § 1331.

17 The court has personal jurisdiction over Mr. Rak because he submitted a DMCA counter-  
18 notification in which he expressly stated that he “consent[s] to the jurisdiction of the Federal  
19 District Court for the district in which my address is located, or if my address is outside of the  
20 United States, the judicial district in which YouTube is located[.]”<sup>61</sup> Mr. Rak’s address on his  
21 DMCA counter-notification was outside of the United States.<sup>62</sup> YouTube is located in the  
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23 \_\_\_\_\_  
<sup>57</sup> Simpkins Decl. – ECF No. 35 at 2 (¶ 3).

24 <sup>58</sup> Entry of Default – ECF No. 32.

25 <sup>59</sup> Mot. for Default Judgment – ECF No. 33.

26 <sup>60</sup> *Id.* at 19. It is unclear if Epic served Mr. Rak with a Russian translation of its default-judgment  
motion or only an English version.

27 <sup>61</sup> Atamas Decl. Ex. A (Rak Counter-Notification) – ECF No. 21-1 at 2.

28 <sup>62</sup> *Id.*

1 Northern District of California.<sup>63</sup> Mr. Rak thus has consented to personal jurisdiction here. *See,*  
 2 *e.g., Technologias Avanzadas RD, SRL v. Riegler*, No. 16-cv-06701-EDL, 2017 WL 2772301, at  
 3 \*2 (N.D. Cal. June 1, 2017) (holding that sending a DMCA counter-notification is an “affirmative  
 4 act” by a defendant that constitutes consent to personal jurisdiction); *Crunchyroll, Inc. v. Pledge*,  
 5 No. C 11-2334 SBA, 2014 WL 1347492, at \*9 (N.D. Cal. Mar. 31, 2014) (same).

6 Mr. Rak was adequately served with the summons and complaint. Mr. Rak submitted a DMCA  
 7 counter-notification in which he expressly stated that he “will accept service of process from  
 8 [Epic].”<sup>64</sup> Relying on that consent, the court previously granted leave for Epic to serve Mr. Rak  
 9 via email pursuant to Federal Rule of Civil Procedure 4(f)(3). *Epic I*, 2018 WL 582411.  
 10 Additionally, the court ordered Epic to provide a certified translation of the summons and  
 11 complaint into Russian before serving them on Mr. Rak and to write its cover email to Mr. Rak in  
 12 both English and Russian. *Id.* at \*3. Epic timely served a certified Russian translation of the  
 13 summons and complaint on Mr. Rak via email in compliance with this order.<sup>65</sup> Service was  
 14 therefore proper. *See id.* at \*2 (“in similar cases, courts have allowed plaintiffs to serve summons  
 15 and complaints by email to Russian parties” and “[w]here, as here, a defendant has submitted a  
 16 DMCA counter-notice that lists his or her email address and that expressly states that he or she  
 17 ‘will accept service of process,’ courts have allowed plaintiffs to serve the summons and  
 18 complaint on that email and have held that such service comports with due process”) (citing *Ultra*  
 19 *Records, LLC v. Teoh*, No. 16cv9996 (DLC), 2017 WL 1753485, at \*2 (S.D.N.Y. Apr. 18, 2017);  
 20 *Rosen v. Imagevenue.com*, No. CV 13-01742 (MANx), 2014 WL 12601326, at \*2–3 (C.D. Cal.

21 \_\_\_\_\_  
 22 <sup>63</sup> Compl. – ECF No. 1 at 9 (¶ 72); *accord, e.g., Shropshire v. Canning*, No. 10-CV-01941-LHK, 2011  
 23 WL 90136, at \*1 (N.D. Cal. Jan. 11, 2011) (YouTube is located in the Northern District of California).

24 <sup>64</sup> Atamas Decl. Ex. A (Rak Counter-Notification) – ECF No. 21-1 at 2.

25 <sup>65</sup> Proof of Service – ECF No. 25. Epic served the summons and complaint on Mr. Rak via email 110  
 26 days after it filed its complaint. *See id.* Because Mr. Rak is not located within the United States, the  
 27 90-day time limit for service in Federal Rule of Civil Procedure 4(m) does not apply. *Lucas v. Natoli*,  
 28 936 F.2d 432, 432 (9th Cir. 1991). Courts can “set[] a reasonable time limit for service in a foreign  
 country to properly manage a civil case.” *Inst. of Cetacean Research v. Sea Shepherd Conservation*  
*Soc’y*, 153 F. Supp. 3d 1291, 1320 (W.D. Wash. 2015) (quoting *Baja Devs. LLC v. TSD Loreto*  
*Partners*, No. CV-09-756-PHX-LOA, 2009 WL 2762050, at \*1 (D. Ariz. Aug. 28, 2009)). Epic has  
 served Mr. Rak within a reasonable time here.

1 Aug. 11, 2014); *Xcentric Ventures, LLC v. Karsen, Ltd.*, No. CV 11-1055-PHX-FJM, 2011 WL  
2 3156966, at \*2 (D. Ariz. July 26, 2011)).

#### 3 4 **DEFAULT-JUDGMENT ANALYSIS**

5 Under Federal Rule of Civil Procedure 55(b)(2), a plaintiff may apply to the district court for a  
6 default judgment against a defendant who has failed to plead or otherwise defend an action. *See*  
7 *Draper v. Coombs*, 792 F.2d 915, 924–25 (9th Cir. 1986). After entry of default, well-pleaded  
8 allegations in the complaint regarding liability and entry of default are taken as true, except as to  
9 damages. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002); *TeleVideo Sys., Inc. v.*  
10 *Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). The court need not make detailed findings of  
11 fact. *Combs*, 285 F.3d at 906. Default judgment cannot differ in kind from or exceed the amount  
12 demanded in the pleadings. Fed. R. Civ. P. 54(c).

13 A defendant’s default does not automatically entitle the plaintiff to a court-ordered judgment.  
14 *Draper*, 792 F.2d at 924–25. That decision lies within the court’s discretion. *Pepsico, Inc. v. Cal.*  
15 *Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002). Default judgments are generally  
16 disfavored because “[c]ases should be decided upon their merits whenever reasonably possible.”  
17 *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (citing *Pena v. Seguros La Comercial, S.A.*,  
18 770 F.2d 811, 814 (9th Cir. 1985)). In deciding whether to enter a default judgment, courts in the  
19 Ninth Circuit consider: “(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s  
20 substantive claim[s], (3) the sufficiency of the complaint, (4) the sum of money at stake in the  
21 action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the default was  
22 due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil  
23 Procedure favoring decisions on the merits.” *Id.* at 1471–72. “Of all the *Eitel* factors, courts often  
24 consider the second and third factors to be the most important.” *Mohanna v. Bank of America,*  
25 *N.A.*, No. 16-cv-01033-HSG, 2017 WL 976015, at \*3 (N.D. Cal. Mar. 14, 2017) (internal  
26 quotation marks omitted) (citing cases). Here, some of the *Eitel* factors favor Epic but the majority  
27 of them — including, significantly, the second and third factors — do not.

1 **1. The Possibility of Prejudice to the Plaintiff (First *Eitel* Factor)**

2 The first *Eitel* factor considers whether the plaintiff would suffer prejudice if default judgment  
3 is not entered, and whether such potential prejudice to the plaintiff weighs in favor of granting a  
4 default judgment. Mr. Rak has not filed a response to the complaint or defended this action. If Mr.  
5 Rak is engaging in activity that violates Epic’s rights, Epic may be without recourse absent a  
6 default judgment. On the other hand, if Mr. Rak’s allegedly infringing material has been deleted  
7 and Mr. Rak is not engaging in activity that violates Epic’s rights, Epic’s request for injunctive  
8 relief might be moot. *Cf. Luxul Tech. Inc. v. NectarLux, LLC*, No. 14-CV-03656-LHK, 2016 WL  
9 3345464, at \*13 (N.D. Cal. June 16, 2016) (deletion of allegedly infringing materials renders  
10 request for injunctive relief moot) (citing *Seven Words LLC v. Network Solutions*, 260 F.3d 1089,  
11 1100 (9th Cir. 2001)).<sup>66</sup> As of the date of this order, the Rak Video has been taken off of  
12 YouTube, and Epic does not allege that Mr. Rak has been engaging in any other infringing  
13 activity. It therefore appears that Epic may have already obtained at least some of the relief it  
14 seeks. This factor is, at best, neutral, and does not weigh strongly in favor default judgment.  
15

16 **2. The Merits and Sufficiency of the Claims (Second and Third *Eitel* Factors)**

17 The second and third *Eitel* factors consider the merits of the claim and the sufficiency of the  
18 complaint. *Eitel*, 782 F.2d at 1471. “The Ninth Circuit has suggested that [these factors] . . .  
19 require that plaintiffs’ allegations ‘state a claim on which the [plaintiff] may recover.’” *Klopping*  
20 *v. Fireman’s Fund*, No. C 94-2684 TEH, 1996 WL 75314, at \*2 (N.D. Cal. Feb. 13, 1996)  
21 (quoting *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)). “[W]hen seeking a default  
22 judgment, a plaintiff should provide the Court with points and authorities containing citations to  
23 authority showing that the plaintiff’s claim or claims include allegations of all the necessary  
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25 \_\_\_\_\_  
26 <sup>66</sup> Even if a defendant stops his infringing activity, injunctive relief may be warranted where there is no  
27 assurance that the defendant will continue to not infringe going forward. *See U.S.A. Futsal Fed’n v.*  
28 *USA Futsal LLC*, No. 17-cv-04206-LB, 2018 WL 2298868, at \*15 (N.D. Cal. May 21, 2018) (citing *E*  
*& J Gallo Winery v. Consorzio del Gallo Nero*, 782 F. Supp. 457, 468 (N.D. Cal. 1991)). There is  
nothing in the record indicating whether that is or is not the case with respect to Mr. Rak.

1 elements required for entitlement to relief. It is the [plaintiff]’s burden to demonstrate to the Court  
 2 that under the pertinent law, the plaintiff’s claims, as alleged, are legally sufficient.” *Very Music*  
 3 *Inc. v. Kid Glove Prods., Inc.*, No. EDCV 12-4891 JGB (FFMx), 2016 WL 6674991, at \*3 (C.D.  
 4 Cal. Apr. 28, 2016) (quoting *S.A. ex. rel. L.A. v. Exeter Union Sch. Dist.*, No. 1:09-cv-00834 AWI  
 5 GSA, 2009 WL 1953462, at \*3 (E.D. Cal. July 7, 2009)).

6 Epic moves for default judgment against Mr. Rak on three of its six claims: (1) direct  
 7 copyright infringement, (2) trademark infringement, and (3) false designation of origin.

## 8 **2.1 Copyright Infringement**

9 “To establish direct copyright infringement, [a plaintiff] must (1) ’show ownership of the  
 10 allegedly infringed material’ and (2) ’demonstrate that the alleged infringers violate at least one  
 11 exclusive right granted to copyright holders under 17 U.S.C. § 106.’” *Disney Enters., Inc v.*  
 12 *VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*,  
 13 508 F.3d 1146, 1159 (9th Cir. 2007)).

### 14 **2.1.1 The right to prepare derivative works based upon a copyrighted work**

15 Epic first argues that Mr. Rak violated its exclusive right “to prepare derivative works based  
 16 upon the copyrighted work[.]” 17 U.S.C. § 106(2). Epic alleges that Mr. Rak’s cheat “injects” the  
 17 cheat’s computer code into its copyrighted Fortnite code, thereby modifying the Fortnite code and  
 18 creating a new derivative work.<sup>67</sup>

19 “To prove a claim of direct copyright infringement, a plaintiff must show that he owns the  
 20 copyright and that the defendant himself violated one or more of the plaintiff’s exclusive rights  
 21 under the Copyright Act.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing *A&M*  
 22 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)). Epic does not allege that Mr.  
 23 Rak himself violated its right to prepare derivative works. Epic alleges that users can download  
 24 Mr. Rak’s cheat and then “inject” the cheat into Fortnite code, but it does not allege that Mr. Rak  
 25  
 26

27 \_\_\_\_\_  
 28 <sup>67</sup> Mot. for Default Judgment – ECF No. 33 at 13.

1 himself injected the cheat into Fortnite code or created an unauthorized derivative work.<sup>68</sup> On this  
2 theory, the second and third *Eitel* factors weigh against granting default judgment.

### 3 **2.1.2 The right to perform a copyrighted work publicly**

4 Epic next argues that Mr. Rak violated its exclusive right “in the case of . . . audiovisual  
5 works, to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). Epic alleges that it is the  
6 author and owner of all copyrights in Fortnite, including but not limited to its maps, items,  
7 characters, user interface, and software, and that the Rak Video showed full-screen gameplay of  
8 Fortnite and thereby infringed upon Epic’s right to “perform” Fortnite.<sup>69</sup> Epic’s theory raise a  
9 number of questions that its motion and the authorities cited therein do not fully address. Epic has  
10 therefore not met its burden of demonstrating to the court that under the pertinent law, its claims,  
11 as alleged, are legally sufficient. *Cf. Very Music*, 2016 WL 6674991, at \*3.

#### 12 **2.1.2.1 The scope of Epic’s copyright**

13 First, it is not clear exactly what the scope of Epic’s copyright is or how far it extends.

14 Epic says that it has registered copyrights in Fortnite and cites to *Three Boys Music Corp. v.*  
15 *Bolton*, 212 F.3d 477 (9th Cir. 2000) for the proposition that “[r]egistration is prima facie evidence  
16 of the validity of a copyright.” *Id.* at 488–89. That is true, but it is somewhat beside the point; the  
17 question is not whether Epic’s copyright in the Fortnite game is valid, but how far its copyright in  
18 the game extends. Epic argues that its copyright in the Fortnite game “also creates copyright  
19 protection for screen displays associated with that code,” citing *Clarity Software, LLC v. Allianz*  
20 *Life Insurance Co. of North America*, No. 2:04-cv-1441, 2006 WL 2346292 (W.D. Pa. Aug. 11,  
21 2016).<sup>70</sup> But that case noted that “[c]ourts have reached varying conclusions regarding whether an  
22 application for a copyright in source code also creates copyright protection for screen displays.”  
23 *Id.* at \*6; *see id.* at \*6–7 (citing cases). Epic does not explain how to navigate this varying case  
24 law.

25 \_\_\_\_\_  
26 <sup>68</sup> See Compl. – ECF No. 1 at 8 (¶ 63).

27 <sup>69</sup> Mot. for Default Judgment – ECF No. 33 at 13.

28 <sup>70</sup> *Id.* at 12.

1           Additionally, Epic does not allege what exactly Mr. Rak publicly performed or address  
 2 whether its copyright extends to that performance. On this issue, Epic’s complaint says only that  
 3 the Rak Video “showed full screen gameplay using the cheat,” without more.<sup>71</sup> Epic does not  
 4 allege what the video performs or discuss whether it had copyright, and if so what copyright it  
 5 had, in what the video shows.<sup>72</sup> Epic’s current complaint and motion are insufficient to meet its  
 6 burden of demonstrating to the court that under the pertinent law, its claims, as alleged, are legally  
 7 sufficient.

### 8                           **2.1.2.2     Video games as public performances**

9           Second, there is the more fundamental question of whether playing a video game and posting  
 10 footage of that gameplay to YouTube, constitutes “perform[ing a] copyrighted work publicly” for  
 11 the purposes of 17 U.S.C. § 106(4) in the first place. Epic cites only one case in its argument on  
 12 this issue: *Valve Corp. v. Sierra Entertainment Inc.*, 431 F. Supp. 2d 1091 (W.D. Wash. 2004).<sup>73</sup>  
 13 But that case is not directly on point. The main issue in *Valve* was breach of contract, not  
 14 copyright. The plaintiff was a computer-game developer that entered into a contract with a  
 15 software publisher to sell its computer games at retail. *Id.* at 1093–94. The defendant licensed the  
 16 plaintiff’s game to cyber-cafes. *Id.* at 1094. The parties’ main dispute was a contract dispute about  
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19 <sup>71</sup> See Compl. – ECF No. 1 at 8 (¶ 67). Epic elaborates in its motion that the Rak Video showed  
 20 “elements such as the glider players use to access the island and the unique building aspects of the  
 21 game.” Mot. for Default Judgment – ECF No. 33 at 13. But it does not allege these facts in its  
 22 complaint — and in its motion, it states that its glider and building aspects are copyright-protected as a  
 23 conclusion. *Id.* (As a note, while the Rak Video is no longer available on YouTube, Epic submitted a  
 copy of it as an exhibit to its default-judgment motion. The video shows a glider for approximately 45  
 seconds (from 6:35 to 7:20) of its 14-minutes-and-31-seconds runtime. It is not clear from the video or  
 from Epic’s filings what it means by “building aspects” of the game and what portions, if any, of the  
 video includes those aspects.)

24 <sup>72</sup> For example, Epic does not discuss if the portions of Fortnite that Mr. Rak performed were artistic  
 25 and therefore more likely copyrightable or purely functional and therefore less. *Cf. Apple Computer,*  
*Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 & n.10 (9th Cir. 1994) (noting that “graphical user  
 interfaces generated by computer programs are partly artistic and partly functional”).

26 <sup>73</sup> Epic cites two other cases, *Blizzard Entertainment, Inc. v. Lilith Games (Shanghai) Co. Ltd.*, No. 15-  
 27 cv-04084-CRB, 2018 WL 1242053 (N.D. Cal. Mar. 8, 2018) and *Clarity Software*, 2006 WL 2346292,  
 28 but neither addressed the question of public performance. Instead, both cases involved a software  
 company suing another company for making its own software that copied the plaintiff’s software.

1 whether the contract allowed the defendant to license the plaintiff's software to cyber-cafes (i.e.,  
2 whether cyber-cafe licenses constituted "retail"). *Id.* at 1094–102.

3 The *Valve* parties had a secondary dispute about copyrights. But the right at issue there was the  
4 right to distribute software, which is governed by 17 U.S.C. § 106(3), and not the right to publicly  
5 perform it, which is governed by 17 U.S.C. § 106(4). *See Valve*, 431 F. Supp. 2d at 1102. *Valve* is  
6 therefore not directly on point with respect to Epic's claims here.

7 *Valve* did address, in passing, the right to publicly perform video games. *See id.* at 1097. But  
8 its discourse on that subject only raises additional questions about Epic's position. The defendant  
9 in *Valve* raised an argument about whether playing video games constituted a public performance  
10 and cited to the Ninth Circuit's decision in *Allen v. Academic Games League of America, Inc.*, 89  
11 F.3d 614 (9th Cir. 1996). A brief summary of that case may be helpful. The plaintiff in *Allen* was a  
12 game developer (for board games, not video games). The plaintiff sued the defendants — non-  
13 profit organizers of a tournament for students playing the games — alleging that they violated his  
14 17 U.S.C. § 106(4) right to publicly perform his games. *Id.* at 615–16. The Ninth Circuit affirmed  
15 summary judgment in favor of the defendants. The Ninth Circuit noted that "perform[ing]" a  
16 work, as used in 17 U.S.C. § 106(4), included "play[ing]" the work, 17 U.S.C. § 101, but it then  
17 held that "the interpretation of 'play,' as used to define 'perform' in § 101 of the Copyright Act,  
18 has generally been limited to instances of playing music or records" and "has not been extended to  
19 the playing of games." *Allen*, 89 F.3d at 616 (citing cases). The Ninth Circuit held that an  
20 interpretation of 17 U.S.C. § 106(4) public-performance rights as including the right to play a  
21 game in public "would mean interpreting the Copyright Act in a manner that would allow the  
22 owner of a copyright in a game to control when and where purchasers of games may play the  
23 games" and rejected that interpretation, writing, "this court will not place such an undue restraint  
24 on consumers." *Id.*

25 *Allen*, of course, did not involve video games. *Valve* indicated that playing video games in  
26 public might constitute a public performance for purposes of Section 106. *See Valve*, 431 F. Supp.  
27 2d at 1097. *Valve* distinguished *Allen* on the grounds that the cyber-cafes at issue there were fee-  
28 based, whereas the tournament in *Allen* was not. *Id.* ("[*Allen*] held that whether the performance is



1 fee-based is an important factor in determining whether the performance is public.”) (citing *Allen*,  
2 89 F.3d at 616). But it is unclear that this distinction helps Epic — it does not allege that the Rak  
3 Video was fee-based in any way.

4 The concerns the *Allen* court had about giving copyright owners too much control over when  
5 and where purchasers of their games can play them might logically apply to video games too. Are  
6 video games different? Given that this is a default-judgment motion where the court does not have  
7 the benefit of full briefing on both sides, the court declines to rule on whether posting a video on  
8 YouTube of gameplay from a video game does or does not infringe upon a copyright holder’s 17  
9 U.S.C. § 106(4) rights. The court will just say this: if it does infringe, Epic has not met its burden  
10 of demonstrating that to the court. Epic’s lone citation to *Valve* does not get it there. On this  
11 theory, the second and third *Eitel* factors weigh against granting default judgment.

## 12 **2.2 Trademark Infringement**

13 “To prevail on a trademark infringement claim under [the Lanham Act, 15 U.S.C.] § 1114, a  
14 plaintiff must show: (1) it owns the trademark at issue; (2) the defendant has used in commerce  
15 without authorization, a copy, reproduction, counterfeit or colorable imitation of the plaintiff’s  
16 mark in connection with the sale, distribution, or advertising of goods and services; and (3) the  
17 defendant’s use of the mark is likely to cause confusion or to cause mistake or to deceive.”

18 *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1058 (N.D. Cal. 2010) (citing 15  
19 U.S.C. § 1141(1)). “The Supreme Court has made it clear that trademark infringement law  
20 prevents only unauthorized uses of a trademark in connection with a commercial transaction in  
21 which the trademark is being used to confuse potential consumers.” *Bosley Med. Inst. v. Kremer*,  
22 403 F.3d 672, 676 (9th Cir. 2005) (citing *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924)).  
23 “[T]rademark infringement protects only against mistaken *purchasing decisions* and not against  
24 confusion generally.” *Id.* at 677 (emphasis in original) (quoting *Lang v. Ret. Living Publ’g Co.,*  
25 *Inc.*, 949 F.2d 576, 582–83 (2d Cir. 1991)).

1 Epic does not plead that Mr. Rak used any trademark in connection with any commercial  
 2 transaction such that consumers may be misled in their purchasing decisions. Epic argues that  
 3 “Mr. Rak used the FORTNITE mark in commerce without authorization.”<sup>74</sup> But merely alleging  
 4 that a defendant used a trademark “in commerce” does not plead a trademark-infringement claim:  
 5 the use must be “in connection with a sale of goods or services” to be infringing. *Bosley*, 403 F.3d  
 6 at 677. Epic does not plead that Mr. Rak proposed any commercial transaction or offered anything  
 7 for sale, much less that consumers would be misled into buying something from him or any other  
 8 third party under the mistaken belief that it was coming from Epic. On this theory, the second and  
 9 third *Eitel* factors weigh against granting default judgment.

### 10 **2.3 False Designation of Origin**

11 The Lanham Act, 15 U.S.C. § 1125(a), “imposes liability on ‘[a]ny person who, on or in  
 12 connection with any goods or services . . . uses in commerce any word, term, name, symbol, or  
 13 device, or any combination thereof, or any false designation of origin, false or misleading  
 14 description of fact, or false or misleading representation of fact,’ which is likely to confuse or  
 15 deceive as to the origin of those goods and services.” *Bladeroom Grp., Ltd. v. Facebook, Inc.*, 219  
 16 F. Supp. 3d 984, 993 (N.D. Cal. 2017) (quoting 15 U.S.C. § 1125(a)). This statute has “two  
 17 notable and important limitations.” *Id.* “First, the Supreme Court has held that the phrase ‘origin  
 18 of goods’ only ‘refers to the producer of the tangible goods that are offered for sale, and not to the  
 19 author of any idea, concept, or communication embodied in those goods.’” *Id.* (quoting *Dastar v.*  
 20 *Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003)). “This is because the protections of  
 21 the Lanham Act ‘were *not* designed to protect originality or creativity’ in the same way as  
 22 copyright and patent laws.” *Id.* (emphasis in original) (quoting *Dastar*, 539 U.S. at 37). Second,  
 23 just like a trademark-infringement claim under 15 U.S.C. § 1114, a false-designation-of-origin  
 24 claim under 15 U.S.C. § 1125(a) “only applies in circumstances involving a ‘commercial  
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<sup>74</sup> Mot. for Default Judgment – ECF No. 33 at 14.

1 transaction’ in which ‘the trademark is being used to confuse potential consumers.’” *Id.* (quoting  
2 *Bosley*, 403 F.3d at 676).

3 Epic does not plead that Mr. Rak offered any tangible goods for sale, much less that he falsely  
4 designated the origin of any such goods or confused any potential consumers. On this theory, the  
5 second and third *Eitel* factors weigh against granting default judgment.

### 6 7 **3. The Sum of Money at Stake (Fourth *Eitel* Factor)**

8 The fourth *Eitel* factor considers the sum of money at stake in the action. When the money is  
9 substantial or unreasonable, default judgment is discouraged. *Eitel*, 782 F.2d at 1472 (three-  
10 million dollar judgment, considered in light of parties’ dispute as to material facts, supported  
11 decision not to enter default judgment); *Tragni v. Souther Elec. Inc.*, No. 09-32 JF (RS), 2009 WL  
12 3052635, at \*5 (N.D. Cal. Sept. 22, 2009); *Bd. of Trs. v. RBS Wash. Blvd., LLC*, No. C 09-00660  
13 WHA, 2010 WL 145097, at \*3 (N.D. Cal. Jan. 8, 2010). When the sum of money at stake is  
14 tailored to the specific misconduct of the defendant, default judgment may be appropriate. *See Bd.*  
15 *of Trs. of the Sheet Metal Workers Health Care Plan of N. Cal. v. Superhall Mech., Inc.*, No. C 10-  
16 2212 EMC, 2011 WL 2600898, at \*2–3 (N.D. Cal. June 2011) (the amount of unpaid  
17 contributions, liquidated damages, and attorney’s fees were appropriate as they were supported by  
18 adequate evidence provided by the plaintiffs). Here, Epic is not asking for any money. This *Eitel*  
19 factor therefore weighs in favor of granting default judgment.

### 20 21 **4. The Possibility of a Dispute or Excusable Neglect (Fifth and Sixth *Eitel* Factors)**

22 The fifth and sixth *Eitel* factors consider the possibility of a dispute concerning material facts  
23 and whether a defendant’s failure to respond was likely due to excusable neglect. There is no  
24 indication that any material facts are in dispute here, so the fifth *Eitel* factor appears to weigh in  
25 favor of granting default judgment. The sixth is more complicated.

26 It is not clear whether Mr. Rak’s default here was due to excusable neglect. On the one hand,  
27 Mr. Rak was validly served with the summons and complaint — which was translated into  
28 Russian for him — and (according to Epic), Mr. Rak responded to Epic’s email serving the

1 summons and complaint on him.<sup>75</sup> On the other hand, it is not clear whether Mr. Rak understood  
 2 the legal significance of the summons or complaint or how to respond in a legal proceeding taking  
 3 place in what is, from his perspective, a foreign country. Notably, while Epic says that Mr. Rak  
 4 “responded to [Epic’s] email,” it does not say what Mr. Rak’s response was or whether Mr. Rak’s  
 5 response indicated that he understood what was going on. Nor does Epic say what, if anything, it  
 6 did to follow up with Mr. Rak after he responded. The court does not mean to suggest that Mr.  
 7 Rak is free to ignore this action without consequence or that default judgment would be improper.  
 8 But nor do the facts in this record foreclose the possibility that Mr. Rak’s neglect may be  
 9 excusable. *Cf. TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 699 & n.6 (9th Cir. 2011)  
 10 (considering whether defaulting defendant was “unfamiliar with the legal system” in evaluating  
 11 whether her default was due to excusable neglect), *overruled on other grounds as recognized in*  
 12 *Newgen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016). Given the lack of information  
 13 the court has about Mr. Rak’s status or understanding of this action or about Epic’s and Mr. Rak’s  
 14 interaction after Epic served the summons and complaint on Mr. Rak, the court will say just this: if  
 15 the sixth factor weighs in favor of default judgment, on this record, it does not do so strongly.

##### 17 **5. The Strong Policy Favoring Decisions on the Merits (Seventh *Eitel* Factor)**

18 The seventh *Eitel* factor considers the strong policy underlying the Federal Rules of Civil  
 19 Procedure favoring decisions on the merits. Although default judgment is disfavored, “[t]he very  
 20 fact that F.R.C.P. 55(b) exists shows that this preference, standing alone, is not dispositive.”  
 21 *Kloeping*, 1996 WL 75314, at \*3. “While the Federal Rules do favor decisions on the merits,  
 22 they also frequently permit termination of cases before the court reaches the merits[,] . . . [as]  
 23 when a party fails to defend against an action[.]” *Id.* That said, while not necessarily dispositive,  
 24 this factor does lend some weight against a default judgment, as decisions on the merits are  
 25 favored and default judgments are not.

26  
 27 \_\_\_\_\_  
 28 <sup>75</sup> See Simpkins Decl. – ECF No. 35 at 2 (¶ 3).

**CONCLUSION**

On balance, on this record, the *Eitel* factors weigh against granting default judgment.

The undersigned grants Epic leave to amend its complaint, file a new motion for default judgment, or both. (If Epic amends its complaint, it must obtain a new entry of default before it can file a new motion for default judgment.)

If Epic submits any new filings, it must serve on Mr. Rak certified Russian translations of its filings (along with the native English versions) and write a cover letter or email to Mr. Rak in both English and Russian, and must file both the English versions and the certified Russian translations on the docket.

Should Epic not file an amended complaint or a new motion for default judgment within 30 days of the date of this order, the undersigned will direct the Clerk of Court to reassign this case to a district judge and will recommend that the newly assigned judge deny Epic’s motion for default judgment.

The court directs Epic to serve this order on Mr. Rak.

**IT IS SO ORDERED.**

Dated: June 12, 2018



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LAUREL BEELER  
United States Magistrate Judge

United States District Court  
Northern District of California

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