

RECEIVED

JUL 19 2017

SUPERIOR COURT
DEPT. 52

FILED

Superior Court of California
County of Los Angeles

AUG 07 2017

Sherri R. Carter, Executive Officer/Clerk
By Maria Frances Lopez, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

v.

NINGBO BEYOND HOME TEXTILE CO.,
LTD., NINGBO BEYOND IMPORT &
EXPORT CO., LTD., NINGBO BEYOND
KIDS GLOBAL BRAND CO., LTD., AND
NINGBO BEYOND FASHION CO., LTD.,

Defendants.

Case No. BC499771

**MEMORANDUM OPINION
REGARDING ENTRY OF DEFAULT
JUDGMENT AND DEFAULT PROVE UP
HEARING**

Date: August 4, 2017
Time: 8:30 a.m.
Dept: 52
Judge: Honorable Susan Bryant-Deason

Action Filed: January 24, 2013

INTRODUCTION

On January 24, 2013, Plaintiff filed the Complaint in this matter against the above-captioned Ningbo defendants alleging violations of the Unfair Competition Law ("UCL"), Business and Professions Code section 17200. (Complaint, filed on January 24, 2013.) The four Defendants in this litigation are Ningbo Beyond Home Textile Co., Ltd., Ningbo Beyond Import & Export Co., Ltd., Ningbo Beyond Kids Global Brand Co., Ltd., and Ningbo Beyond Fashion Co., Ltd. (collectively "Defendants" or "Ningbo"). Defendants are apparel manufacturing

1 companies located in the People's Republic of China ("China") and make substantial sales of
2 apparel and other products in California. (Complaint, ¶10, 16 and 19.)

3 On December 8, 2016, the Court granted Plaintiff's motion to deem the Defendants deemed
4 to have been served under the Hague Convention on the Service Abroad of Judicial and
5 Extrajudicial Documents in Civil and Commercial Matters ("Hague Convention"). (December 8,
6 2016 Minute Order, referred to herein as "Minute Order.") This Court entered an Order to Show
7 Cause Regarding the Entry of Default and Default Judgment. (Minute Order.) Default was
8 entered against the Defendants on February 7, 2017. Plaintiff has now applied for entry of default
9 judgment for injunctive relief and civil penalties against Defendants.

10 The Court hereby grants this application. The Court addresses and rejects the assertion of
11 the Ministry of Justice of the People's Republic of China, provided to Plaintiff a few days before
12 the hearing on Plaintiff's motion to deem Defendants to have been served under the Hague
13 Convention, that Plaintiff's Complaint does not involve "civil or commercial matters" under that
14 treaty. The Court also finds that it has personal jurisdiction over the Defendants and that, in any
15 event, Defendants have constructively waived any defense of personal jurisdiction.

16 Finding the facts set out in the Complaint to be true, as it must, the Court finds that Plaintiff
17 has set out a prima facie case of Defendants' violation of the UCL as alleged in Plaintiff's First
18 Cause of Action such that this Court may enter default judgment. This finding is supported by the
19 supplemental facts proffered by Plaintiff and admitted into evidence by the Court, including the
20 Declarations of Liying Huang (Microsoft), Michael Draper (Adobe), Dipica Patel (Symantec),
21 Shahin Kohan (AIMS360), Scott Allen (AIMS360 and NOTICE), Oralia Salcido (Three Dots),
22 Dr. Carl Shapiro (Plaintiff's expert), and Dr. Peter Kilduff (Plaintiff's expert), as well as the
23 Declaration and Supplemental Declaration of Emilio Varanini (co-lead counsel for Plaintiff). In
24 entering default judgment, the Court hereby grants the injunctive relief requested by Plaintiff, and
25 awards Plaintiff \$ 3,232,310 in civil penalties. The Court finds Defendants to have been
26 sufficiently on notice as to the relief requested and finds the relief requested to be supported by
27 the facts and the case law.

1 **FACTUAL BACKGROUND**

2 The four Defendants in this litigation are Ningbo Beyond Home Textile Co., Ltd., Ningbo
3 Beyond Import & Export Co., Ltd., Ningbo Beyond Kids Global Brand Co., Ltd., and Ningbo
4 Beyond Fashion Co., Ltd. Defendants are apparel manufacturing companies located in the
5 People's Republic of China ("China") and make substantial sales of their apparel products in
6 California. (Complaint, ¶ 10, 16 and 19.) Because Defendants are all located in China, which is a
7 signatory to the Hague Convention, service in this matter must be effectuated in accordance with
8 the Hague Convention. (See Code Civ. Proc., §413.10, subd. (c).)

9 On February 26, 2013, the Process Service Network ("PSN") forwarded the translated
10 service package to the Central Authority in China (the "Ministry of Justice," referred to herein as
11 "MOJ") designated pursuant to the Hague Convention as the authority charged with effectuating
12 service on Plaintiff's behalf. (Varanini Decl., ¶¶ 7-10.)

13 On November 27, 2013, PSN informed Plaintiff that their agent in China reported that the
14 MOJ received our documents relating to the four Defendants on March 12, 2013, and the
15 documents were assigned to court on April 3, 2013, but service was not completed because of the
16 influence of the Defendants, which are powerful local companies, on the court. (Varanini Decl., ¶
17 11.)

18 On April 30, 2015, Plaintiff sent a follow-up letter to the MOJ inquiring as to the status of
19 service. (Varanini Decl. ¶ 12, Exh. 1.) In that letter, Plaintiff requested that the MOJ (1) examine
20 the status of service on the Defendants and (2) require the local court to serve the Complaint and
21 other documents as soon as possible.

22 On March 7, 2016, Plaintiff sent another follow-up letter to the MOJ inquiring as to the
23 status of service. (Varanini Decl. ¶ 15, Exh. 2.) That letter explicitly informed the MOJ that
24 Plaintiff would proceed with this motion "to determine that Ningbo Beyond be deemed to be
25 served pursuant to Article 15 of the Hague Convention." (*Id.*) Plaintiff has received no response
26 to these letters. (Varanini Decl., ¶ 12 and 15.)

27 On May 23, 2016, Plaintiff sent letters to both the Zhejiang DOS Law firm ("DOS Law
28 Firm") in Ningbo City, China, and its client Ningbo Beyond Home Textile Co., Ltd., attaching a
3

1 copy of Plaintiff's letter dated May 7, 2016 to the Central Authority. (Varanini Decl. ¶ 16, Exh.
2 3.)

3 On June 17, 2016, the DOS Law Firm sent a letter to Plaintiff stating that they did not
4 represent Ningbo Beyond in this matter, but confirmed through their client that Ningbo Beyond
5 Home Textile "never received any official documents about the case (Case No. BC499771)".
6 (Varanini Decl. ¶ 17, Exh. 4.) The DOS Law Firm further admonished Plaintiff to send the
7 relevant documents to the Defendants "according to the Hague Service Convention" and provided
8 a Chinese version of a case from the Supreme People's Court holding that service in China could
9 be effectuated only through the Hague Convention. ((Varanini Decl. ¶ 17); Translation of *The*
10 *Approval of the Supreme People's Court On Dealing with the American Court That Did Not Send*
11 *Divorce Verdicts to Our People's Court Through Diplomatic Channels* (Jiangsu Province
12 Supreme People's Court Dec. 26, 1985) (Varanini Decl. ¶ 18, Exh. 5)). The DOS Law Firm also
13 returned the documents that were enclosed with Plaintiff's May 23rd letter. (Varanini Decl., ¶
14 17.)

15 From November 2015 to January 2016, PSN's agent in China performed three status checks
16 with the MOJ at the request of Plaintiff's counsel. The clerk repeated the same message to the
17 agent: that the MOJ is "not releasing information about cases to 'outside sources,'" and only an
18 attorney "authorized to act on behalf of the plaintiff" may make the request. (Varanini Decl., ¶ 13.)

19 The Court observes that neither in the Hague Convention itself nor in China's reservations
20 to that treaty does the requirement appear that a Chinese-licensed attorney¹ authorized to act on
21 behalf of the plaintiff must be hired to ascertain the status of a service request or to deem service
22 to be effectuated. Furthermore, Plaintiff states that it is not aware of any official statement from
23 China indicating such a requirement had been imposed even prospectively, let alone retroactively.
24 Even the DOS Law Firm's letter to Plaintiff, and the Supreme People's Court case they cite
25 therein, nowhere mention such a requirement. (Varanini Decl. ¶¶ 17 and 18, Exhs. 4 and 5

26
27 ¹ The requirement of an attorney of necessity would require the services of an attorney
28 licensed in China. (Varanini Decl., ¶ 14.) Plaintiff stated its belief that retaining such an attorney
would be futile at this point given the nature of this case and developments in the legal profession
in China. (*Id.*) The issue is moot.

1 (Translation of *The Approval of the Supreme People's Court On Dealing with the American*
2 *Court That Did Not Send Divorce Verdicts to Our People's Court Through Diplomatic Channels*
3 (Jiangsu Province Sup. People's Ct. Court Dec. 26, 1985).) However, the Court finds that this
4 issue became mooted by developments a few days before the hearing on Plaintiff's motion to
5 deem Defendants to be served under the Hague Convention.

6 On November 1, 2016, Plaintiff filed the motion to deem Defendants to be served pursuant
7 to the Hague Convention, as incorporated by Code of Civ. Proc. §413.10(c), and sent a copy to
8 the MOJ. (Plaintiff's Motion to Deem Defendants to be Served, filed on November 1, 2016.)

9 On November 17, 2016, the MOJ responded for the first time to Plaintiff via email
10 confirming that notice of Plaintiff's motion had been received and forwarded to the Supreme
11 People's Court. (Varanini Decl., ¶¶ 20-21, Exhs. 6 and 7.) The MOJ representative—Ms. Zhiying
12 Li—informed Plaintiff that “once they [the Supreme People's Court] finish service and send back
13 the report of service, we will issue the certificate of service and get back to you [sic] first thing.”
14 (Varanini Decl. ¶21, Exh.7.) The MOJ representative disclaimed any requirement that a Chinese-
15 licensed attorney authorized to act on behalf of the plaintiff must be hired to ascertain the status
16 of a service request or to deem service to be effectuated. (Varanini Decl. ¶ 20.)

17 On December 1, 2016, Plaintiff notified Ms. Li that the hearing date for the motion had
18 been moved up to December 8, 2016. (Varanini Decl, ¶ 21; Exh. 7.)

19 On December 4, 2016, Plaintiff received an email from Ms. Li with the “formal reply” of
20 the Supreme People's Court, stating: “The court, as the competent authority to execute the
21 requests, holds that the case does not fall into the scope of civil or commercial matters according
22 to Chinese domestic law, and the Hague Service Convention does not apply to this case.
23 Therefore, all the four requests have been rejected. We will return all the materials to you
24 following this email.” (Varanini Decl. ¶¶ 21-22, Exh. 7.)

25 On December 5, 2016, Plaintiff received a scanned copy of the formal reply from the
26 Supreme People's Court stating the same. (Varanini Decl. ¶¶ 21 and 23, Exhs. 7 and 8.) The MOJ
27 never offered to Plaintiff any reasoning supporting the conclusion of the Supreme People's Court
28

1 that this case was not a civil or commercial matter covered by the Hague Convention. (Varanini
2 Decl., ¶ 22.)

3 At the December 8, 2016 hearing, counsel for Plaintiff alerted this Court to this
4 correspondence with MOJ. Plaintiff presented in oral argument its reasoning as to why it
5 disagreed with China's interpretation of the Hague Convention. At that hearing, the Court granted
6 Plaintiff's motion, finding that Plaintiff complied with the Hague Convention, and ordered that
7 the "Defendants shall be deemed to have been adequately served as of the date of this order."
8 (Minute Order.)²

9 On February 7, 2017, the Court also asked Plaintiff to file a proposed statement of the
10 Court's decision and set an Order to Show Cause for the Entry of Default or Default Judgment.
11 (Minute Order.) In response, Plaintiff filed an application for the entry of default judgment,
12 providing notice to the MOJ of the filing of these documents as ordered by the Court. The Court
13 finds that the MOJ, or any other authority or entity acting on behalf of China, can make China's
14 position known in American courts if China deems it to be appropriate. (*In Re: Vitamin C*
15 *Antitrust Litig.*, No. 13-4791-cv, 2016 WL 5017312 at *2, fn. 5 (2d. Cir. September 20, 2016)
16 (reversing on international comity grounds, Second Circuit deferred to the Ministry's statement
17 that Chinese law required defendants to violate U.S. antitrust law).)

18 ANALYSIS

19 I. THE AUTHORITY FOR THIS COURT TO ENTER DEFAULT JUDGMENT UNDER THE HAGUE 20 CONVENTION

21 The Hague Convention is an international treaty that enables global litigation over disputes
22 by addressing the previous "judicial nightmare" involved in service of process for global disputes
23 such as those involving the United States and foreign defendants. (See Comment, Service of
24 Process Abroad Under the Hague Convention, 71 Marquette L. Rev. 649, 650 (1988).) The Hague
25 Convention mandates that service of a foreign defendant of a complaint and other associated
26 documents be effectuated via a Central Authority designated by that defendant's home country.

27
28 ² Pursuant to that Minute Order, Plaintiff served notice of this ruling upon the Central
Authority in China. (Notice of Entry of Minute Order, filed January 12, 2017.)

1 (*Id.*, at p. 658.) China has objected to any other methods of service set out in Article 10 of the
2 Hague Convention, including service via mail. (See Declaration and Notifications, Hague
3 Conference on Private International Law, [http://www.hcch.net/index_en.php?act=status.
4 comment&csid=393&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn).) Thus, service must be performed in China by its Central
5 Authority without allowing for other non-governmental forms of substitute service. (See Varanini
6 Decl., ¶ 18, Exh. 5 [referencing translation of case: *The Approval of the Supreme People's Court
7 On Dealing with the American Court That Did Not Send Divorce Verdicts to Our People's Court
8 Through Diplomatic Channels* (Jiangsu Province Sup. People's Ct. Court Dec. 26, 1985)].)

9 Code of Civil Procedure section 413.10, subdivision (c) allows service on foreign
10 defendants in conformity with the Hague Convention.³ This statute has a closely similar federal
11 counterpart: individuals may be served outside the United States “by any internationally agreed
12 means of service that is reasonably calculated to give notice, such as those authorized by the
13 Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents.”
14 (Fed. Rules Civ. Proc., rule 4(f), 28 U.S.C.). The four Defendants do not have any subsidiaries or
15 counsel located in California. (Varanini Decl., ¶¶ 2-3.) Nor do they have an agent for service even
16 though they do a substantial amount of business with California. (Varanini Decl., ¶¶ 2-3.)
17 Plaintiff has proceeded through the Hague Convention as required by Code of Civ. Proc.
18 §413.10(c) to serve these foreign defendants in China. (Varanini Decl., ¶¶ 7-11.) Plaintiff
19 repeatedly followed up on the status of service without success either in effectuating service or in
20 obtaining any final response from the MOJ as to why service could not be effectuated. (Varanini
21 Decl., ¶¶ 11-13, 15-16, and 19.)

22
23
24 ³ Except as otherwise provided by statute, a summons shall be served on a person: . . . (c)
25 Outside the United States, as provided in this chapter or as directed by the court in which the
26 action is pending, or, if the court before or after service finds that the service is reasonably
27 calculated to give actual notice, as prescribed by the law of the place where the person is served
28 or as directed by the foreign authority in response to a letter rogatory. These rules are subject to
the provisions of the Convention on the ‘Service Abroad of Judicial and Extrajudicial
Documents’ in Civil or Commercial Matters (Hague Service Convention).

1 Where the Hague Convention applies, it is controlling under Code of Civ. Proc. §413.10(c).
2 Pursuant to Art. 15 of the Convention, which is applicable to both China and the United States,⁴
3 this Court may enter default judgment where no service certificate has been received, if all the
4 following conditions are met:

- 5 a) the document was transmitted by one of the methods provided for in this Convention,
6 b) a period of time of not less than six months, considered adequate by the judge in the
7 particular case, has elapsed since the date of the transmission of the document,
8 c) no certificate of any kind has been received, even though every reasonable effort has
9 been made to obtain it through the competent authorities of the State addressed.

10 “The Convention regulates the method for obtaining a default judgment when documents are
11 served abroad.” (*Silverman v. Modulgranito Iberico, S.A.*, (D.D.C., No. 89-0432-OG Apr. 30,
12 1990) 1990 WL 481934, *1.) Based on the facts set out above and the oral argument offered by
13 Plaintiff at the December 8, 2016 hearing, the Court granted Plaintiff’s motion to deem
14 Defendants to be served under the Hague Convention and issued an order to show cause as to
15 why default or default judgment should not be entered. (Minute Order.)

16 Article 15 of the Hague Convention grants this Court the power to enter a default judgment.
17 (*Silverman*, 1990 WL 481934, at pp. *1-2.) The Court does so, explaining below why it rejected
18 China’s summary assertion that the Hague Convention does not apply. The Court further explains
19 its reasoning that it has personal jurisdiction over the Defendants to enter the default judgment
20 and that the Defendant’s government has in any event forfeited their right, given they are entities
21 under Chinese corporate law, to assert that defense.

22 **A. PLAINTIFF’S CASE IS A “CIVIL OR COMMERCIAL” MATTER COVERED BY THE HAGUE
23 CONVENTION**

24 The Court finds that Plaintiff’s case is a civil or commercial matter covered by the Hague
25 Convention. First, the Practical Handbook on the Operation of the Hague Convention, which is a
26 significant source to which the courts can refer for the construction of that treaty (*Denlinger v.*
27 *Chinadotcom Corp.* (2003) 110 Cal.App.4th 1396, 1404), states that the term “civil or commercial

28 ⁴ See United States and China Declarations of Applicability of Art. 15(2),
<https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf>.

1 matters” in Art. 1 of the Convention should be “interpreted liberally and in an autonomous
2 manner,” and without reference exclusively to either the domestic law of the Requested State
3 (e.g., China) or the Requesting State (e.g., California). (Bernasconi, Practical Handbook on the
4 Operation of the Hague Service Convention (4th ed. 2016) pp. 24-28 (summarizing Conclusions
5 and Recommendations of the 2014, 2009, 2003, 1989, and 1977 Special Commissions on the
6 operation of the Hague Convention).) As the Handbook reports, in Germany, the fact that German
7 law does not allow for punitive or trebled damages did not bar service of actions from the U.S.
8 seeking such damages as “civil matters” for the purposes of Art. 1 of the Convention. (*Id.* at pp.
9 27-28.) The actions of other signatory countries to the Hague Convention are relevant to its
10 construction. (*Air France v. Saks* (1985) 470 U.S. 392, 396-97, 404.) The MOJ has not provided
11 any reasoning suggesting that Plaintiff’s case is not a civil or commercial matter as a matter of
12 international law.

13 Indeed, the MOJ’s position contradicts the understanding of the United States at the time it
14 ratified the Hague Convention that all matters that qualify as being civil or commercial in the
15 United States also qualify as being civil or commercial under the Hague Convention. The Report
16 of the Senate Committee on Foreign Relations on the Convention on the Service Abroad of
17 Judicial and Extrajudicial Documents, S.Exec.Rep. No. 6, 90th Cong., 1st Sess., 3 (April 12,
18 1967) states that “[t]his Convention is an important step towards the international codification of
19 a uniform law governing the service of judicial and extrajudicial documents abroad.” In the
20 Appendix to that Report, a representative of the National Conference of Commissioners on
21 Uniform State Laws, who participated in the work that led up to the Hague Convention, opined
22 that “it gives to our people, whether litigating rights in State or Federal courts, a very useful tool
23 in furthering a fair determination of their rights, where nationals of other countries are involved,
24 that would otherwise be denied to them. (*Id.* at 9 [Appendix, Statement of Joe C. Barrett,
25 Attorney at Law].) And the principal appointed representative of the U.S. delegation that
26 negotiated the Hague Convention, who had been involved with the revision of the Judicial Code
27 of the United States, stated that “the duty of the central authority is to secure the service of the
28

1 process rather than to concern itself with the merits of the litigation.” (*Id.* at 13 [Appendix,
2 Statement of Philip W. Amram, Attorney at Law].)

3 Generally, statements by government representatives involved in treaty negotiations are
4 entitled to great weight. (See *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176,
5 184-85.) The U.S. Supreme Court has regularly referred to materials like these in construing
6 treaties. (See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (1987) 482 U.S. 522,
7 530, 537 (referring to reports by Mr. Amram as to the Hague Convention).) Where there are two
8 reasonable interpretations of treaty provisions, the one that expands or enlarges rights is to be
9 preferred “so as to effect the apparent intention of the parties to secure equality and reciprocity
10 between them.” (*Jordan v. Tashiro* (1928) 278 U.S. 123, 127.) The Court follows *Jordan* in
11 favoring the interpretation of the Hague Convention pressed here by the Plaintiff as that
12 interpretation enlarges the rights of all American litigants.

13 The only explanation Plaintiff can discern for the ruling it received is that the Requested
14 State may be treating its case as not being civil or criminal because of the identity of Plaintiff’s
15 counsel as a government entity. The Court addresses and rejects that distinction.

16 First, the Court refers to the ongoing reports of Special Commissions, composed of
17 representative experts acting as delegates from the signatory States of the Hague Convention. As
18 no international court exists to interpret the Convention, the work of the Special Commissions
19 may be used to interpret the practical scope of the Hague Convention. (See *Brockmeyer v. May*
20 (9th Cir. 2004) 383 F.3d 798, 803; *Hyundai Merchant Marine Co. Ltd. v. Grand China Shipping*
21 *Hong Kong* (S.D. Ala. 2012) 878 F.Supp.2d 1252, 1257-58.) The 2014 Special Commission, in
22 which representatives of China and the United States both participated, made the following
23 recommendations: (1) it was important for there to be effective cross-border judicial and
24 administrative cooperation in civil and commercial matters; (2) that the terms “civil or
25 commercial” be interpreted in a liberal, consistent, and autonomous manner; and (3) it
26 “welcome[d]” the practice of signatory States to not refuse requests “based solely on the entity
27 making the request.” (Hague Conference on Private International Law, *Conclusions and*
28 *Recommendations of the 2014 Special Commission on the Practical Operation of the Hague*

1 *Convention Service, Evidence and Access to Justice Conventions* (May 23-24, 2014), ¶¶ 1, 40-
2 41, available at <<https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf>>.)⁵

3 Second, the Court refers to the MOJ's historical practice through 2016 as being to the
4 contrary of the position that it is now taking. Plaintiff has successfully served other Chinese
5 corporate defendants through the MOJ with closely analogous complaints in the *Cathode Ray*
6 *Tube Antitrust Litigation*. (Varanini Decl., ¶ 25.) Moreover, China as a Requested State has never
7 refused to serve federal government civil papers in a federal enforcement action on the basis that
8 such matters were not civil or commercial in nature under China's domestic laws. (See, e.g.,
9 Federal Communications Commission, Forfeiture Order, *In The Matter of C.T.S. Technology Co.*
10 (F.C.C. No. 16-67 May 24, 2016) 31 FCC Rcd. 6126, 6126-28, 2016 WL 3023102, *1-2
11 (ordering default judgment under Art. 15 of \$34,912,500 against Chinese defendants).) The
12 "Circular on the Service Abroad of Judicial Documents in Foreign-Related Administrative Cases"
13 issued by the Office of the Supreme People's Court of China in 2004 states that service of process
14 of China's own actions on foreign corporate defendants under its civil laws can be carried out
15 under the Hague Convention as a civil or commercial matter. (Varanini Decl., ¶27 [referencing
16 Office of the Supreme People's Court, Notification of Judicial Documents in Foreign
17 Administrative Cases, Law Office [2004] 346, which was translated using Google Translate].)
18 The Court sees no reason why similar American actions should not be treated the same.

19 **B. FACTS SUPPORTING THE EXERCISE OF PERSONAL JURISDICTION**

20 Under Code of Civil Procedure §410.10, California courts may exercise jurisdiction on any
21 basis not inconsistent with the Constitution of this state or of the United States. California's long-
22 arm statute allows courts to exercise personal jurisdiction "to the full extent permissible under the
23 U.S. Constitution." (*Daimler AG v. Bauman* (2014) 134 S. Ct. 746, 753.) However, as set out in
24

25 ⁵ China sent representatives to this Special Commission who were thanked for their
26 translation of certain documents. (See *Conclusions and Recommendations of the 2014 Special*
27 *Commission on the Practical Operation of the Hague Convention Service, Evidence and Access*
28 *to Justice Conventions, supra*, at ¶ 7; see also Hague Conference on Private International Law,
Questions for Contracting States: P.R. China (2014), available at <
https://assets.hcch.net/upload/wop/2014/2014sc_14cn.pdf>.)

1 the key *Asahi* opinion, there is a split within the U.S. Supreme Court as to whether placement of a
2 defendant's product in the stream of commerce is enough, when it is foreseeable that product
3 would end up in a forum State, or whether something more is required. (Compare *Asahi Metal*
4 *Industry Co. v. Superior Court of Cal., Solano Cty.* (1987) 480 U.S. 102, 111-12 (plur. opn. of
5 O'Connor, J.) (requiring "something more" than placing goods into stream of commerce, even if
6 defendant is "awar[e]" that the stream "may or will sweep the product into the forum State" such
7 as making deliberate decisions to market its product in the forum State, controlling or employing
8 the distribution system that brought its product into the forum State, or doing business in the
9 forum State) with e.g., *id.* at pp.120-21 (conc. opn. of Brennan, J.) (placement of a product in the
10 stream of commerce suffices where a defendant is aware that a distribution system will end up
11 placing its component products in a forum State because the manufacturer to which it sells these
12 products makes regular sales in a forum State).) Although a plurality of the U.S. Supreme Court
13 was willing in 2011 to adopt Justice O'Connor's "purposeful availment" standard (*J. McIntyre*
14 *Mach., Ltd. v. Nicastro* (2011) 564 U.S. 873, 874, 886 (plur. opn. of Kennedy, J.) (noting that the
15 sole fact that four machines manufactured by a defendant ended up in a forum State did not
16 suffice to establish sufficient contact for purposes of meeting this standard), two other justices
17 found it premature to address the application of *Asahi's* plurality opinion versus *Asahi's*
18 concurring opinion (*id.* at pp. 888-92 (conc. opn. of Breyer, J., joined by Alito, J.) (finding that
19 there was no regular flow or sales into the forum State, that no facts had been offered by the
20 plaintiff to show a specific effort by the defendant to market its products in the forum State, and
21 that plaintiff also failed to offer facts set out by the dissenting opinion that might have established
22 a connection such as the size and scope of the forum State's business in this market).). However,
23 this Court finds it has personal jurisdiction over Defendants even under the more stringent
24 standards set out in the plurality opinions in *Asahi* and *McIntyre* as tempered by the concurring
25 opinion in *McIntyre*.

26 Defendants directly shipped sizeable quantities of goods into California and sold them to
27 California companies in glaring contrast to the facts in *Asahi* and *McIntyre*. From 2010-2012,
28 Ningbo shipped 323,231 pounds of apparel products into California. (Suppl. Decl. of Emilio

1 Varanini, ¶¶ 5-8 & Exhs. A-D.)⁶ These included shipments to California companies and
2 consignees: “Between July 2010 and February 2011, Ningbo shipped over 10,500 pounds of their
3 products to the Port of Los Angeles and the Port of Long Beach for Envelope Group. Between
4 January 2010 and May 2012, the Ningbo Companies shipped over 104,000 pounds of their
5 products to the Port of Los Angeles and the Port of Long Beach for Dream USA. Between
6 February 2010 and September 2011, the Ningbo Companies shipped over 63,000 pounds of their
7 products to the Port of Los Angeles and the Port of Long Beach for Lorenzino Collection.”
8 (Complaint, ¶28;⁷ see Suppl. Decl. of Emilio Varanini, Exhs. A-D.) Other sources confirm the
9 identity and business of these customers: Envelope Group is a California company, located in
10 Gardena, California, that sells apparel;⁸ Dream USA is a California company located in Los
11 Angeles that sells apparel;⁹ and Lorenzino Collections is also a California company located in
12 Los Angeles that sells apparel.¹⁰ Placing sizeable quantities of goods in the stream of commerce
13 with the expectation that they will eventually be purchased or used in California “indicates an
14 intention to serve the California market,” and constitutes purposeful availment where the conduct
15

16 ⁶ As far as this section of the memorandum opinion refers to evidence that supplements
17 the allegations of Plaintiff’s complaint, the Court admits this evidence for reasons explained
18 below in its discussion of its finding of a prima facie case that the Defendants violated
19 California’s Unfair Competition Law.

20 ⁷ This Court can find the facts set out in the Complaint to be true for purposes of entering
21 a default judgment and thus for determining whether it has personal jurisdiction over Defendants.
22 As part of the civil prove-up hearing, Plaintiff submitted additional declarations that this Court
23 finds comport with the factual allegations in the Complaint for purposes of discussing its personal
24 jurisdiction over Defendants.

25 ⁸ <https://panjiva.com/Envelope-Group-Llc/1979375>. The Court admits the additional
26 evidence as to the identity of some of Defendants’ customers for the limited and nonhearsay
27 purpose of showing that Defendants did substantial enough business with California apparel
28 distributors and retailers to support this Court’s exercise of personal jurisdiction. (Cf. *People v.*
Smith (2009) 179 Cal.App.4th 986, 1004-05 (agreements between defendant and substantial
number of third parties in which defendant promised to pay fantastical returns to all those third
parties is relevant for the nonhearsay purpose of showing defendant was generating money to pay
existing investors by soliciting new ones).)

⁹ http://godreamusa.com/?ctg=10&d_list=view#; see Suppl. Decl. of Emilio Varanini,
Exh. E (May 11, 2017 order of Ningbo apparel by Dream USA)

¹⁰ <https://www.bbb.org/losangelessiliconvalley/business-reviews/mens-clothing-and-furnishings-retail/lorenzino-collections-in-los-angeles-ca-100094372>;
<https://www.manta.com/c/mb4qfmy/lorenzino-collections-inc> .

1 creates a “substantial connection” with California. (*Bridgestone Corp. v. Superior Court* (2002)
2 99 Cal.App.4th 767, 774-775, 777 (holding that large volume of tire sales to Japan for resale in
3 California satisfied purposeful availment).) The Washington Supreme Court recently upheld
4 personal jurisdiction where the defendants placed products in the stream of commerce with the
5 intent that they would be incorporated into products sold in large quantities in Washington. (*State*
6 *of Washington v. LG Electronics, Inc.*, (Wash. Sup. Ct. 2016) 375 P.3d 1035, 1042, *cert. denied*
7 (2017) 137 S.Ct. 648.) This Court holds that Defendants’ substantial shipments into California,
8 including to California companies, alone satisfies the purposeful availment standard.

9 The Court also finds that additional facts here support the existence of personal jurisdiction.
10 First, the importance of the forum State’s market in which a defendant’s products have been sold
11 must also be considered. (See *McIntyre*, 564 U.S. at pp. 908-09 (dissenting opinion); accord *id.* at
12 pp. 888-92 (concurring opinion).) Here, the California apparel manufacturing industry is the
13 center of apparel manufacturing in the U.S., generating “over \$5 billion in revenue every year.”
14 (Complaint, ¶¶ 12, 17; Shapiro Decl., ¶ 16.) Defendants’ products compete with products that are
15 manufactured and/or sold by California companies.” (Complaint, ¶ 19 and 29; see, e.g., Kilduff
16 Decl., ¶¶ 6, 12, 18; Allen Decl., ¶¶ 2, 6-11.) Defendants clearly “targeted the forum” by
17 intentionally doing business in California in competition with California’s apparel industry,
18 which has a strong presence in Los Angeles County. (See, e.g., Complaint, ¶¶ 4, 17, 26; Kilduff
19 Decl., ¶¶ 14, 18; Supp. Varanini Decl., ¶¶ 5-8 & Exhs. A-D.)

20 Second, efforts to deliberately target specific companies located within the forum State by
21 committing intentional and tortious acts must also be considered as constituting additional facts
22 supporting this Court’s exercise of jurisdiction. (See *Calder v. Jones* (1984) 465 U.S. 783, 789-
23 90.) Here, Defendants pirated the software products of California companies such as Adobe and
24 Symantec by using those products without paying licensing fees or royalties. (Complaint, ¶ 10;¹¹

25 ¹¹ Though these facts were alleged on information and belief, this Court finds them to be
26 true for purposes of entering a default judgment as permitted by California law. (*San Gabriel*
27 *Valley Bank v. Lake View Town Co.* (1906) 7 Cal.Unrep. 266, 270.) Moreover, these facts as
28 alleged, even on information and belief, comport with the facts set out in the Declarations of
Michael Draper (Adobe) and Dipica Patel (Symantec).

1 see Draper Decl. (Adobe), ¶¶ 5-6; Patel Decl. (Symantec), ¶¶ 4-6; cf. *Pavlovich v. Sup. Ct.* (2002)
2 29 Cal.4th 262, 278 (even a defendant's knowledge that his tortious conduct may generally harm
3 the computer industry, which is centered in California, is a relevant, though not determinative,
4 fact to establishing personal jurisdiction).)

5 In fact, the exercise of personal jurisdiction is supported by Defendants' continuing
6 contacts with this forum up until this year. Since the inception of this lawsuit, Defendants have
7 continued selling apparel to California-based apparel distributors and retailers, importing at least
8 146.30 metric tons or 322,532.98 pounds of their apparel products through California ports as part
9 of those sales. (Varanini Decl., ¶ 28.) And just in May of this year, Dream USA ordered multiple
10 shipments of Defendants' apparel products for delivery in California even as Plaintiff was
11 contacting them regarding this action. (See Supp. Decl. of Varanini, ¶ 16 & Exh. D.)

12 **C. THE FORFEITURE OF THE RIGHT OF DEFENDANTS TO ASSERT PERSONAL**
13 **JURISDICTION DUE TO THE POSITION OF THEIR GOVERNMENT**

14 Plaintiff argues in the alternative that this non-compliance with the Hague Convention
15 should also operate as a forfeiture or constructive waiver of Defendants' right to assert lack of
16 personal jurisdiction as an affirmative defense. After careful consideration of this argument,
17 including answers to questions this Court asked Plaintiff during hearings on the Order to Show
18 Cause, this Court accepts Plaintiff's position.

19 Chinese corporations that do business in and to California, without having registered with
20 the California Secretary of State and provide an agent for service, have that privilege because
21 China signed the Hague Convention such that Californians who are victims of, or have a legal
22 dispute with, Chinese companies could serve process on those companies in China through the
23 Hague Convention and ensure that those companies would have to appear in a California court.
24 (Cf. *Sumitomo*, 457 U.S. at p. 187 ("Because 'corporation[s] can have no legal existence outside
25 of the boundaries of the sovereignty by which [they are created],' [citation], it became necessary
26 to negotiate new treaties granting corporations legal status and the right to conduct business in
27 other countries.")). In instances in which process is allowed to be served on Chinese companies
28 pursuant to the Hague Convention, it makes sense, as part of the benefit of the bargain struck by

1 the Hague Convention, that Chinese companies would still have the same right as American
2 companies to invoke personal jurisdiction as a defense even if those Chinese companies had not
3 incorporated in California or designated an agent for service. (See *BG Group, PLC v. Republic of*
4 *Argentina* (2014) 134 S.Ct. 1198, 1206 (“As a general matter, a treaty is a contract, though
5 between nations. Its interpretation normally is, like a contract's interpretation, a matter of
6 determining the parties' intent.”); *Ross v. Thompson* (1912) 223 U.S. 317, 331-32 (“But it is urged
7 that treaties are to be liberally construed. Like other contracts, they are to be read in the light of
8 the conditions and circumstances existing at the time they were entered into, with a view to
9 effecting the objects and purposes of the states thereby contracting.”).)

10 However, the position of the MOJ that service cannot be effectuated as to this case usurps
11 the benefit of the bargain struck by the signatories to the Hague Convention: Ningbo can freely
12 do business in California, without having to incorporate in California or designate an agent for
13 service, secure in the knowledge that they may be shielded from service at the discretion of their
14 government. The original Hague Convention Actes et Documents provide that compliance with
15 the Hague Convention is mandatory, and “Articles 15 and 16 provide an indirect sanction against
16 those who ignore it.” (*Volkswagenwerk Aktiengesellschaft v. Schlunk*, (1984) 486 U.S. 694, 705
17 (citing 1965 Conférence de la Haye de Droit International Privé, Actes et Documents de la
18 Dixième Session (Notification), 92, 363 (1965)).) Accordingly, in these circumstances, foreign
19 corporations such as Ningbo should be deemed to have waived their defense of personal
20 jurisdiction as a proper sanction to ensure mandatory compliance with the Hague Convention.
21 This result is a fair sanction that carries out the benefit of the bargain struck by the signatories to
22 the Hague Convention.

23 First, corporations organized under Chinese law only have corporate existence due to the
24 actions of their government and so should be held accountable in appropriate circumstances such
25 as these for its acts. (See *Sumitomo*, 457 U.S. at p. 187.) Second, these corporations should not be
26 allowed to conduct business liability-free in California given this failure to follow the rules of the
27 Hague Convention. Absent this sanction, these companies can do business in California while
28 avoiding incorporation or designating an agent for service, while benefitting from their

1 government's improper exercise of discretion to avoid service of process, and while retaining the
2 argument that there is no personal jurisdiction over their conduct in California. (Cf. *Insurance*
3 *Corp. of Ireland, Ltd. v. Compagnie des Bauzites de Guinee* (1982) 456 U.S. 694, 705 (failure to
4 raise timely defense to personal jurisdiction under Fed. Rule 12(h)(1) constitutes waiver of
5 defense; Rule 37(2)(A) sanction for failure to comply with discovery that results in finding of
6 personal jurisdiction constitutes "constructive waiver").)

7 **II. ENTRY OF DEFAULT JUDGMENT UNDER THE HAGUE CONVENTION, ARTICLE 15,**
8 **FOLLOWING THE PROCEDURES OF CODE CIVIL PROCEDURE, SECTION 585**

9 The Hague Convention sets out that default judgment may be entered pursuant to Article
10 15, but leaves the process for entering that judgment up to domestic law. The Court agrees with
11 Plaintiff that Code of Civil Procedure section 585, subdivision (b),¹² supplies the process for entry
12 of default judgment under the Hague Convention, since the position taken by China is akin to a
13 refusal by its corporations, the Ningbo Defendants, to respond to the complaint. Pursuant to this
14 procedure, this Court "shall hear the evidence offered by the plaintiff, and shall render judgment
15 in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint...as appears
16 by the evidence to be just." (Code of Civ. Proc., §585, subd. (b).) The UCL, Business and
17 Professions Code section 17200, *et. seq.*, prohibits all "unlawful, fraudulent or unfair" business
18 acts or practices. Plaintiff's First Cause of Action specifically alleges that the Defendants violated
19 the "unfair" prong of the UCL. (Complaint ¶ 52-53.) An act or practice is "unfair" under section
20 17200 if it "threatens an incipient violation of antitrust law, or violates the policy or spirit of one
21 of those laws...or otherwise significantly threatens or harms competition." (*Cel-Tech*
22 *Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) The
23 first step for this Court to determine if the Plaintiff has presented facts that allow it to find a prima
24 facie case for relief under the fairness prong of the UCL. (See *Johnson v Stanhiser* (1999) 72
25 Cal.App.4th 357, 361; *FTC v. Hope for Car Owners* (E.D. Cal. No. 2:12-cv-778-GEB-EFB Jan.

26 ¹² Plaintiff filed the notice of default on February 7, 2017 and served it the same day,
27 giving Defendants 10 days' notice before the hearing. (See Rule of Court, rule 3.110, subd. (h).)
28 This Court accordingly entered default. What is now before the Court is a civil prove-up hearing
regarding entering default judgment. (See *Devlin v. Kearney Mesa* (1984) 155 Cal.App.3d 381,
385-86.)

1 24, 2013), 2013 WL 322895, *4, 5.) This Court can make such a finding by accepting as true
2 Plaintiff's well-pleaded allegations in its Complaint such that the default judgment would, in
3 effect, "confess" the material facts of the complaint. (*Kim v. Westmore Partners, Inc.*, (2011) 201
4 Cal.App.4th 267, 281; see *Johnson*, 72 Cal.App.4th at p. 261; *Hope for Car Owners*, 2013 WL
5 322895 at p. *4.)

6 However, this Court orally ruled in its Order to Show Cause hearings that Plaintiff must
7 submit evidence for a civil prove-up hearing on its request for civil penalties as if it were seeking
8 damages. (Cf., e.g., *People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 667-668
9 (assuming the complaint notice requirement for damages to be assessed as part of a default
10 judgment applied to civil penalties); Code of Civ. Proc., §585, subd. (b) (discussing the need for a
11 civil prove-up hearing for damages).) Moreover, this Court orally ruled in its Order to Show
12 Cause hearings that because this case had been stayed for over four years to allow for service of
13 the Complaint, it was exercising its discretion in requiring Plaintiff to submit additional evidence
14 comporting with the allegations in its complaint as a precursor to its awarding injunctive relief
15 and civil penalties. (See, e.g., Code of Civil Proc., § 585, subd. (b); *Devlin*, 155 Cal.App.3d at p.
16 386; see also, e.g., *Electronic Funds Solution v. Murphy* (2005) 134 Cal.App.4th 1161, 1182
17 (evidence can be submitted in a prove-up hearing even if it was not available at the time that a
18 complaint was filed).) Finally, this Court orally informed Plaintiff in its Order to Show Cause
19 hearings that it required Plaintiff to submit evidence that would support findings by the Court
20 pertaining to the relief sought by Plaintiffs—see, e.g., Code of Civ. Proc., §585, subd. (b)—as to
21 the following issues: (1) a threat of software piracy by the Defendants remains in 2017 such that
22 injunctive relief is appropriate¹³ and (2) an extension of injunctive relief to third parties in

23
24 ¹³ See, e.g., *McGill v. Citibank N.A.* (2017) 2 Cal.5th 945, 958 (injunctive relief
25 benefitting the public may still be awarded even if it has not been established that the conduct is
26 ongoing or likely to reoccur); *Robinson v. U-Haul Co. of Calif.* (2016) 4 Cal.App.5th 304, 315-16
27 (even voluntary discontinuance of illegal behavior may not suffice to avoid injunctive relief
28 where defendants have not taken action to legally bind them to a violation-free future); *id.* at 316-
17 (ingrained illegally practice of defendants that only stopped when defendants were threatened
with an injunction cannot be relied on to avoid a recurrence of illegal behavior in the future).

1 California who import, distribute, or sell Defendants' apparel products could be crafted in a
2 manner that would not disrupt the current commercial apparel contracts of these third parties with
3 Defendants.¹⁴

4 In response, Plaintiff submitted the following declarations setting out supplemental
5 evidence: the Declarations of Liying Huang (Microsoft), Michael Draper (Adobe), Dipica Patel
6 (Symantec), Shahin Kohan (AIMS360), Scott Allen (AIMS360 and NOTICE), Oralia Salcido
7 (Three Dots), Dr. Carl Shapiro (Plaintiff's expert), and Dr. Peter Kilduff (Plaintiff's expert), as
8 well as the Declaration and Supplemental Declaration of Emilio Varanini (co-lead counsel for
9 Plaintiff). The Court finds the declarations by lay witnesses to be admissible as supplemental
10 evidence for purposes of entering a default judgment and as support for the relief requested by
11 Plaintiff. (See, e.g., Code of Civ. Proc., § 585, subd (d).)

12 The Court also finds that the Declarations of Dr. Shapiro and Dr. Kilduff are properly
13 admissible, as expert opinions, regarding the short- and long- term negative effects of
14 Defendants' conduct on competition in the apparel manufacturing industry. (See Evid. Code, §
15 802; Law Rev. Comm. Comments to Evid. Code, §802; *Asahi Kasei Pharma Corp. v. Actelion,*
16 *Inc.* (2013) 222 Cal.App.4th 945, 975-76 (expert's opinion admissible where expert's
17 qualifications as an economist were not challenged and where his opinion as to lost profits was
18 not based on speculation).) Both experts are extremely well-qualified: Dr. Shapiro has an
19 extensive background in, and special knowledge of, economic and intellectual property principles
20 as well as the assessment of anti-competitive effects (Shapiro Decl., ¶¶ 1-7); Dr. Kilduff has an
21 extensive background in, and personal knowledge of, apparel manufacturing and marketing
22

23
24 ¹⁴ See, e.g., *United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83
25 Cal.App.4th 1146, 1165 (court held that injunction barring employer from making contributions
26 to farmworker committee formed by employers to oppose unionization could extend to prevent
27 contributions to committee, as laundered through third parties, so long as contributions to
28 churches were exempted); *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.4th 675,
685-86 (court upheld injunction on defendant's lien contracts, in spite of assignment of those
contracts to third parties, because defendant could repurchase outstanding lien contracts or pay
off homeowner delinquencies to avoid foreclosure).

1 (especially as far as the apparel industry in Southern California is concerned) as well as the
2 increasing use of technology in the apparel industry (Kilduff Decl., ¶¶ 1, 14).¹⁵

3 As far as the Declaration and Supplement Declaration of Emilio Varanini include exhibits
4 with charts setting out the imports of Defendants' items into California for the period 2010-2012
5 and 2013-2016, those charts (and the summary of those charts set out in these declarations) are
6 admissible.¹⁶ Plaintiff also submits limited evidence obtained by Defendants' own web site (as
7 translated using Google Translate)¹⁷ as to Defendants' substantial positive cash flow. The Court
8 admits this evidence as party admissions. (Evid. Code, § 1220.)

9 Finally, Plaintiff submits two studies: one a 2011 study commissioned by Microsoft and the
10 other a 2014 Harvard-National Association of Manufacturers study. The Court admits these
11 studies for two limited purposes: (1) for the limited non-hearsay purpose of showing that

12
13 ¹⁵ As far as the declaration of Plaintiff's experts Drs. Shapiro and Kilduff report
14 background facts such as those pertaining to the nexus between apparel manufacturing and
15 California as part of their analysis of the short- and long- term anti-competitive effects of
16 Defendants' conduct, those background facts are admissible in a default judgment proceeding
17 notwithstanding any hearsay objection. (See *City Bank of San Diego v. Ramage* (1968) 266
18 Cal.App.2d 570, 584 (hearsay admissible in civil prove-up hearing); see also, e.g., *People v.*
19 *Sanchez* (2016) 63 Cal.4th 665, 685-86 (expert may rely on hearsay, or background information
20 relied on in their profession, in forming an opinion).) But even if a hearsay objection could
21 otherwise be entertained on such background facts as the nexus between California and the
22 apparel industry, they would be admissible in any event admissible as "original evidence" of
23 legally operative conduct, for example, the existence of a nexus between the apparel industry and
24 California for purposes of granting relief as to Defendants' violation of the UCL. (See *Jazayeri v.*
25 *Mao* (2009) 174 Cal.App.4th 301, 311-12.)

26 ¹⁶ The data underlying these calculations derives from U.S. customs data compilations
27 made available through a private company. (Varanini Decl., ¶ 28.) As such, it is admissible
28 without the need to provide foundational testimony. (See *Mao*, 174 Cal.App.4th at p. 316; *Yankee*
Atomic Elec. Co. v. U.S. (Fed. Cl. Sept. 17, 2004) 2004 WL 2450874, **3-6.) Because this
calculation is being offered as "original evidence" of legally operative conduct that Defendants
are continuing their unlawful activities in California, it is admissible on that nonhearsay ground
even if hearsay objections were cognizable in civil prove-up hearings. (See *Mao*, 174 Cal.App.4th
at pp. 311-12.)

25 ¹⁷ "Google Translate is a free multilingual machine translation service developed by
26 Google, to translate text, speech, images, sites, or real-time video from one language into another.
27 It offers a web interface, mobile apps for Android and iOS, and an API that helps developers
28 build browser extensions and software applications. Google Translate supports over 100
languages at various levels and as of May 2013, serves over 200 million people daily."
https://en.wikipedia.org/wiki/Google_Translate (footnotes omitted).

1 practices like those of the Defendants significantly threaten or harm competition;¹⁸ and (2) to
2 support the propriety of its entry of default judgment as a policy matter on Plaintiff's unfairness
3 claim under the UCL.¹⁹

4 Based on the allegations in Plaintiff's complaint and this supplemental evidence, the Court
5 finds a prima facie case for a default judgment under the UCL's unfairness prong. Following the
6 discussion of the evidence supporting the Court's finding of a prima facie case, the Court then
7 turns to the relief requested by Plaintiff.

8 **A. THE FACTUAL ALLEGATIONS IN PLAINTIFF'S COMPLAINT AS SUPPORT FOR A FINDING**
9 **OF A PRIMA FACIE CASE FOR A DEFAULT JUDGMENT UNDER THE UCL**

10 The Court finds the following material facts of the Complaint support its finding that
11 Plaintiff has presented a prima facie case for a default judgment under the UCL. "California is
12 home to numerous artists, creators, inventors, authors, software designers, engineers, researchers,
13 and other innovators. These pioneers invest billions of dollars every year to create the electronic
14 devices, software, information technology, films, recordings, pharmaceuticals, and fashion that
15 people across California, the United States, and the world use every day. In California,
16 intellectual property industries employ 7.4 million people and produce \$923 billion of economic
17 output." (Complaint, ¶ 1.)

18 "California's economy thrives on the intellectual property of the artists, creators, inventors,
19 authors, software designers, engineers, researchers, and other innovators who live and work in the
20 state. Beyond the companies that create the intellectual property, piracy affects numerous other
21 industries that use this intellectual property such as the apparel industry." (Complaint, ¶ 2.)

22 "California's economy loses \$34 billion annually as a result of counterfeiting and piracy.
23 The theft of intellectual property created by Californians, including the downstream, anti-

24
25 ¹⁸ See *Sun Microsystems, Inc. v. Microsoft Corp.* (N.D. Cal. 2000) 87 F.Supp.2d 992, 999-
1000; see also *Smith*, 179 Cal.App.4th at pp. 1004-05; *Mao*, 174 Cal.App.4th at pp. 311-12.

26 ¹⁹ See *Qualley v. Clo-Tex Intern. Inc.* (8th Cir. 2000) 212 F.3d 1123, 1128; *State v.*
27 *Erickson* (Ak. Sup. Ct. 1978) 574 P.2d 1, 4-6; see also *Franz v. Bd. of Medical Quality Assurance*
28 (1982) 31 Cal.3d 124, 139 fn.6. For this limited purpose, the Court is not required to take judicial
notice or otherwise determine if admission of these studies would comply with hearsay rules even
if hearsay objections were cognizable in civil prove-up hearings.

1 competitive effects on California companies who comply with the law by paying license fees,
2 cannot be remedied simply by filing lawsuits in those foreign countries where the piracy or
3 counterfeiting occurs.” (Complaint, ¶ 3.)

4 “The American apparel manufacturing industry, centered in Los Angeles, has become
5 increasingly reliant upon software in the manufacturing and on-time inventory and shipping of
6 apparel such as clothes and other items. These law-abiding companies spend substantial capital to
7 license the software that enables them to run their businesses in the 21st Century.” (Complaint, ¶
8 4.)

9 “When overseas companies pirate software used in apparel design such as Adobe
10 Photoshop or other back-office software, such as Microsoft Office, by not paying licensing fees to
11 software developers, they obtain a critical short-term advantage over their American competitors.
12 That is, by not paying for software while their license fee-paying competitors do, overseas
13 apparel companies thereby gain a substantial and unfair cost advantage in an industry
14 characterized by very thin margins.” (Complaint, ¶ 5.)

15 “Moreover, they also obtain a long-term advantage: American companies that are
16 developing the software of tomorrow which will streamline apparel design, manufacturing, and
17 delivery are disincentivized from investing in developing such software if they know that
18 overseas apparel companies will simply pirate that software, refusing to pay licensing fees and
19 thus undermining the return on investment in development of such software. And, insofar as
20 American apparel companies themselves attempt to develop that software, they will suffer from a
21 competitive disadvantage vis-à-vis their overseas counterparts, who can take the money saved
22 from paying licensing fees to gain an edge in financing research and development of such
23 software. Thus, by using software without paying for it now, overseas apparel companies can
24 stunt the development of such software by and for American apparel companies while investing
25 in the development of such software for themselves and thereby gain an even further advantage
26 over American apparel companies.” (Complaint, ¶ 6.)

27 “In fact, over time, apparel companies who are deprived of the competitive advantages of
28 software may simply choose to downsize in the United States and relocate overseas, resulting in

1 the permanent loss of jobs and manufacturing in California and elsewhere. The loss of a
2 competitive advantage, resulting in downsizing and overseas relocation, is most often not
3 reversed as witnessed by such industries as the television industry where televisions are no longer
4 manufactured in the United States.” (Complaint, ¶ 7.)

5 “Other state laws, federal laws, and international treaties, do not address the pernicious
6 downstream effects of such piracy in the California apparel industry. The defendants’ use of
7 pirated software to gain a competitive short-term and long-term advantage over domestic apparel
8 companies in California can however be remedied by proscribing such tactics as an unfair method
9 of competition under California law.” (Complaint, ¶ 8.)

10 Defendants engaged in unfair competition by illegally using pirated software to gain an
11 unfair competitive advantage over apparel industry competitors in California. (See Complaint, ¶¶
12 13-14, 20, and 29.) The pirated software programs on Ningbo’s computer systems included
13 Microsoft Windows XP Professional, Windows Server Enterprise, Microsoft SQL Server
14 Enterprise, and Microsoft Office. (Complaint, ¶ 37.) The estimated license value of the pirated
15 Microsoft software programs, as of February 9, 2012, was \$351,326.00. (Complaint, ¶ 38.)
16 Defendants are also “illegally using additional pirated software programs from Adobe, a company
17 based in San Jose, California, Symantec, a company based in Mountain View, California, and
18 Corel Corporation (“Corel”), a company based in Ottawa, Canada.” (Complaint, ¶¶ 10, 39.)²⁰ And
19 “the Ningbo Companies’ products compete with products that are manufactured and/or sold by
20 California companies.” (Complaint, ¶¶ 19 and 29.)

21 The California apparel manufacturing industry is the center of apparel manufacturing in the
22 U.S., employing over 58,000 people in 2011 alone and generating over \$5 billion in revenue
23 every year since 1990. (See Complaint, ¶ 17.) Between 2010-2012, Defendants shipped 323,231
24 pounds of apparel products into California. (Compare Complaint, ¶ 10 and 27 (referring to
25

26 ²⁰ Though these allegations were made on information and belief, this Court accepts the
27 facts contained in these allegations as being true for purposes of entering a default judgment.
28 (*San Gabriel Valley Bank*, 7 Cal.Unrep. at p. 270.) Moreover, as explained below, these facts as
alleged, even on information and belief, comport with the facts set out in the Declarations of
Michael Draper (Adobe) and Dipica Patel (Symantec).

1 713,000 pounds in erroneously including Defendants' non-apparel products) with Supp. Varanini
2 Decl., ¶¶ 5-8 & Exhs. A-D (correcting the record based on a contemporaneous analysis of data to
3 find that 323,231 pounds of Defendants' apparel products were imported into California).) In
4 manufacturing these products, Ningbo used pirated software programs owned by Adobe,
5 Microsoft, and Symantec.(Complaint, ¶¶ 10, 3-39.) Software and information technology are
6 critical to the apparel manufacturing business, having applications in everything from initial
7 design to programming machines to cut and assemble fabrics to quality control. Further, profit
8 margins in the apparel manufacturing industry are very thin. (Complaint, ¶ 11.) Given these thin
9 margins, Defendants' cost savings derived from piracy creates an "unfair competitive advantage
10 that substantially harms competition in the California apparel industry." (Complaint, ¶¶ 2, 8, 14,
11 41, 44, 48.) Defendants can enjoy the "further advantage of being able to use those cost savings
12 to hire more workers or invest in research to innovate and thereby gain further advantages."
13 (Complaint, ¶¶ 10-11, 13.)

14 California is further harmed by the downstream effects of Defendants' piracy because
15 "software companies innovating and producing software for the apparel industry, facing piracy of
16 such software and the consequent reduced returns for investing in such software, will reduce their
17 investment and innovation in such software. As a result, apparel manufacturers will have reduced
18 access to efficiency-enhancing software that enables them to continue doing business in
19 California in the face of lesser labor and other costs overseas." (Complaint, ¶48; see *id.* ¶¶ 14, 45-
20 47.) If Defendants "continue to illegally use copyrighted software in connection with the
21 production or manufacture of goods sold or transported in or delivered to California, competition
22 in the California apparel industry will be substantially harmed. California apparel manufacturers
23 will face a cost disadvantage and jobs in the industry may, as a result, continue the trend in the
24 industry of migrating overseas." (Complaint, ¶51; see *id.*, ¶ 14.)
25
26
27
28

1 **B. PLAINTIFF'S SUBMITTED DECLARATIONS AS SUPPORT FOR THE FINDING OF A PRIMA**
2 **FACIE CASE FOR A FINDING OF A PRIMA FACIE CASE FOR A DEFAULT JUDGMENT**
3 **UNDER THE UCL**

4 For the civil prove-up hearing, Plaintiff submitted several declarations as support for there
5 being a prima facie case that the Defendants violated the UCL and for the relief requested by
6 Plaintiff. This Court summarizes those declarations and explains how they support the Court's
7 finding of a prima facie case for imposing a default judgment against Defendants under the UCL.

8 **1. Expert Declarations**

9 *Declaration of Carl Shapiro.* Dr. Carl Shapiro is an economist with an extensive
10 background in assessing anti-competitive effects from market behavior, in examining the
11 information technology sector, and in studying innovation and intellectual property. (Shapiro
12 Decl., ¶¶ 1-7.) Dr. Shapiro has testified as an expert on numerous occasions and has served in
13 high-level positions in the United States Department of Justice advising on competition policy
14 issues. (Shapiro Decl., ¶¶ 5-6.)

15 Dr. Shapiro reaffirms, based on his review of data, the assertion in Plaintiff's complaint that
16 California apparel manufacturers in California employs about 50,000 workers and produce goods
17 worth more than \$5 billion annually. (Shapiro Decl., ¶ 16.) He reaffirms, based on his review of
18 the data, the assertions in Plaintiff's complaint that apparel manufacturing involves low margins
19 of around 5% or less such that apparel manufacturers are vulnerable to even small cost
20 advantages enjoyed by competitors. (*Id.*, ¶¶ 12-16.) Dr. Shapiro elaborates on the allegations set
21 out in Plaintiff's complaint as to how companies stealing software, i.e., using software without
22 paying for it, confirms on those companies a significant advantage over competitors who cannot
23 match the margin savings involved without producing apparel below cost and losing money. (*Id.*,
24 ¶ 16.) And Dr. Shapiro explains how piracy is a serious problem in the apparel manufacturing
25 industry based on his review of the data, with 28.2% of all apparel sold in the United States in
26 2011 was manufactured in China using pirated software. (Shapiro Decl., ¶ 17.)

27 Dr. Shapiro also reaffirms, based on his review of the data, the allegations of Plaintiff's
28 complaint regarding the negative longer-term effects of piracy in the apparel manufacturing

1 sector on innovation and investment. (*Id.*, ¶¶ 19-23.) Based on his review of other declarations
2 submitted to him by Plaintiffs, Dr. Shapiro points out that software for the apparel industry is
3 developed in California. (*Id.*, ¶ 20.) He further points out that piracy of software by apparel
4 manufacturers causes innovation to decline both because it reduces the revenue of apparel
5 software makers and because it shifts sales away from firms that do not pirate software towards
6 firms that do, reducing the market for apparel software in the first instance. (*Id.*, ¶¶ 16, 20.) This
7 is not just an abstract assertion of the loss of funds necessary for investment and innovation: Dr.
8 Shapiro opines based on his review of data that the total value lost due to software piracy in the
9 apparel industry was roughly \$2.3 billion in 2011, that software piracy in the apparel industry
10 amounted to 28% of that loss, and that an estimated 77% of the software used by apparel
11 manufacturers in China in 2011 was unlicensed. (*Id.*, ¶ 22.)

12 *Declaration of Peter Kilduff.* Dr. Peter Kilduff has extensive experience in apparel
13 manufacturing and merchandising, and analyzing competitive conditions in apparel markets.
14 (Kilduff Decl., ¶¶ 1-2.) This includes analyzing the apparel manufacturing industry in China and
15 the United States. (*Id.*, ¶¶ 2-3.)

16 Like Dr. Shapiro, Dr. Kilduff reaffirms, based on his own special knowledge, the assertions
17 in Plaintiff's complaint the substantial presence of apparel manufacturing in California,
18 specifically the Greater Los Angeles, a presence that has led to demand for courses related to
19 apparel manufacturing and marketing at Cal Poly Pomona, where he heads the Department of
20 Apparel Merchandising and Management. (Kilduff Decl., ¶¶ 1, 14.)²¹ Based on his own special
21 knowledge as developed in studies and analyses, as well as the actual review of technologies used
22 in apparel manufacturing, Dr. Kilduff reaffirms assertions in Plaintiff's complaint by explaining
23 how the use of a wide variety of those technologies gives apparel manufacturers in California a
24 competitive advantage. (Kilduff Decl., ¶¶ 6-12, 15.)

25 Dr. Kilduff discusses several of those technologies in additional detail beyond the more
26 general allegations of Plaintiff's complaint, including automated sewing machine plants and

27
28 ²¹ The Court notes that the numbers reported by Dr. Kilduff differ slightly from those
reported by Dr. Shapiro, but finds the differences to be immaterial.
26

1 sewbots, computer-aided design programs, adding Radio Frequency Identification Tags to apparel
2 to better track orders and inventory, and innovative programs in imaging and visualization
3 technologies such as Microsoft's Kinect Scanner and Tukatech's Tuka3D CAD that can allow
4 domestic companies to manufacture and ship customized, made-to-fit apparel. (*Id.*, ¶¶ 6, 11 &
5 Exh. B.) He explained how new software technology, known as Apparel Made for 4 U, uses an
6 avatar re-creation of an individual with that individual's scanned body measurements, as well as
7 those individual's preferences in terms of colors and images, to manufacture and custom-deliver a
8 garment in four hours. (*Id.*, ¶¶ 7-11.) And he explained how apparel manufacturers use software
9 to manage the entire apparel lifecycle from design to ordering to manufacturing to distribution
10 and then to sale, including the use of Enterprise Resource Planning ("ERP") software to integrate
11 all of this as seamlessly as possible. (*Id.*, ¶ 12.)

12 Based on his studies of the apparel manufacturing industry all over the world, Dr. Kilduff
13 opined that because low margins characterized the apparel manufacturing industry, and using
14 apparel software required a significant investment, apparel manufacturers could benefit by using
15 that software without paying license fees. (*Id.*, ¶ 16.) These apparel manufacturers can use these
16 additional savings from pirating software to hire additional employees and build additional
17 facilities. (*Id.*, ¶ 18.) And as these apparel manufacturers drive competitors who do pay these
18 licensing fees out of business, this will dry up the very customers that apparel software producers
19 need for their products, acting as a disincentive to the creation of those software products. (*Id.*)

20 In addition, Dr. Kilduff explains how these technologies produced by California software
21 manufacturers and used by California apparel manufacturers can only be used if the intellectual
22 property rights safeguarding the value of these technologies are protected. (Kilduff Decl., ¶ 17.)
23 The theft of these technologies by overseas manufacturers who do not pay license fees for their
24 use serves as a separate disincentive to the innovation and development of these technologies and
25 as these technologies dry up, apparel manufacturers are motivated to move their facilities
26 offshore. (See *id.*)

27 Dr. Shapiro's and Dr. Kilduff's expert opinions thus together support the allegations of
28 Plaintiff's complaint, and this Court's finding of a *prima facie* case of Defendants' conduct

1 violating the UCL, as they provide important detail as to how Defendants' conduct in fact poses a
2 short-term and a long-threat to competition in the apparel manufacturing industry in California.

3 **2. Lay Declarations as to Defendants' Use of Software Without Paying Licensing Fees**

4 *Declaration of Liying Huang (Microsoft).* Liying Huang was an attorney involved in
5 Microsoft's lawsuit against Defendants in China and is very knowledgeable about the facts
6 summarized in Plaintiff's complaint. (Huang Decl., ¶ 1.) Attorney Huang sets out how in 2012
7 Microsoft filed one complaints against each of the Defendants, four in total, in the People's Court
8 in Zhejiang Province in China that set out Microsoft's evidence as to the Defendants' use of its
9 software without paying licensing fees and its belief, based on the Defendants' job postings, that
10 the piracy of Microsoft's software might be more widespread than the evidence Microsoft had in
11 its possession. (Huang Decl., ¶¶ 2-4 & Exhs. A-D.) Microsoft thereupon applied for and was
12 granted an evidence preservation request that allowed it to go onto the premises of the Defendants
13 and find evidence (if any) that Defendants were using unlicensed versions of Microsoft's
14 software, including making duplicate copies, taking screenshots, video-recording, and taking
15 photos. (*Id.*, ¶¶ 5-7 & Exhs. E-H.)

16 In that same month in 2012, the evidence preservation process ordered by the People's
17 Court was carried out with photographs of screenshots being taken to document the preservation
18 of evidence. Out of 100 computers on Defendants' premises, the inspector appointed by the
19 People's Court chose 11 computers at random to examine and take screenshots; out of 25 servers,
20 that same inspector chose 5 servers at random to examine and take screenshots. (Huang Decl., ¶ 8
21 & Exhs. J-L.) Based on the resulting screenshots and extrapolations of the amount of unlicensed
22 software found on those computers and servers of Defendants that were examined by the court-
23 appointed inspector to those computers and servers of Defendants that remained unexamined,
24 Microsoft amended its complain to add a variety of additional software products and amounts of
25 software products that it believed were used by Defendants without paying licensing fees.
26 (Huang Decl., ¶¶ 9-11, 14.) Plaintiffs have added the amounts of unpaid licensing fees for these
27 additional software products and arrive at the total of \$546,890. (Supp. Varanini Decl., ¶ 12.) The
28

1 court-appointed inspector also found software products of third parties such as McAfee,
2 Symantec, and Adobe. (Huang Decl., ¶ 13 & Exh. M.)

3 After Plaintiff filed its complaint on January 23, 2013, the People's Court strongly pushed
4 Microsoft and the Defendants to settle their outstanding lawsuit. (*Id.*, ¶ 15.) Microsoft and the
5 Defendants reached a settlement, referred to as the Civil Mediation Paper, in which the
6 Defendants purchased licenses for certain Microsoft software products and paid a lump sum
7 (though less than what Microsoft had claimed as its economic losses). (See *id.*, ¶ 18-20 & Exh.
8 N.)

9 The purchases of these licenses did cover what Microsoft had considered to be the
10 outstanding licenses based on the court-ordered inspection. (Huang Decl., ¶ 20.) And Defendants
11 promised not to engage in any unlicensed use of Microsoft's software. (*Id.*, ¶ 17 & Exh. N.)
12 However, Microsoft cannot be 100% certain that Defendants are using only licensed versions of
13 its software as of May 20, 2017. (*Id.*, ¶ 21.) The Civil Mediation Paper does not provide for any
14 audit rights. (*Id.*). The Civil Mediation Paper does not provide for a court-supervised or court-
15 ordered injunction. (*Id.*, ¶ 22.) Absent such an injunction provision or such an audit provision,
16 Microsoft can only find out if Defendants are using unlicensed versions of its software if it were
17 to file a court action (for which it would somehow need to find new evidence) and then obtain a
18 court-ordered inspection. (See *id.*, ¶¶ 21-22.)

19 *Declaration of Michael Draper (Adobe).* Michael Draper is the Global Manager Piracy
20 Investigations and Cyber Fraud at Adobe Systems, which is headquartered in San Jose,
21 California, and has an extensive background in addressing piracy issues. (Draper Decl., ¶¶ 1-2.)
22 Adobe's software is used across many industries, including across the entire apparel
23 manufacturing process, ranging from design, modeling, and publishing to promoting products.
24 (Draper Decl., ¶ 3.) Adobe became involved with this case in 2012 when Microsoft contacted it
25 and informed it that screenshots of Defendants' computer systems that were taken by a court-
26 ordered inspector included one screenshot with an Adobe product. (Draper Decl., ¶ 4.) Adobe
27 checked and found that Defendants had not paid license fees for that product. (Draper Decl., ¶ 5.)
28 Adobe suspected that Defendants may have used other Adobe products without paying licensing

1 fees based on their advertising jobs that required the use of those other Adobe products but
2 ultimately decided not to proceed as Microsoft had because their direct evidence of piracy was so
3 limited. (*Id.*) As of 2017, Adobe cannot rule out that Defendants are using its software products
4 without paying the requisite licensing fees. (*Id.*, ¶ 6.)

5 *Declaration of Dipica Patel (Symantec).* Dipica Patel is Brand Protection Manager for
6 Symantec Corp., which is headquartered in Mountain View, California, and whose software is
7 used across many industries to protect the cybersecurity of companies and their computer
8 systems. (Patel Decl., ¶¶ 1-3.) Symantec became involved with this case in 2012 when Microsoft
9 contacted it and informed it that screenshots of Defendants' computer systems that were taken by
10 a court-ordered inspector included some of Symantec's products. (Patel Decl., ¶ 4.) Symantec
11 checked and could not find any evidence that the Defendants had purchased licenses for those
12 products. (*Id.*, ¶ 5.)

13 These declarations, taken together, all support the allegations in Plaintiff's complaint that
14 Defendants engaged in large-scale use of the software products of various companies without
15 paying licensing fees, and this Court's finding of a prima facie case that the Defendants violated
16 the UCL. Indeed, they provide important detail as to the Defendants' pirating of these software
17 products and support the conclusion that Defendants' engaging in software piracy as of 2017
18 cannot be ruled out.

19 **3. *Lay Declarations as to the Effects of Software Piracy by Overseas Apparel***
20 ***Manufacturers on Domestic Apparel Manufacturers and Domestic Apparel Software***
21 ***Producers***

22 *Declaration of Scott Allen (AIMS360, NOTICE).* Scott Allen is the current Director of
23 Training and Education at Aims360, which makes apparel manufacturing software designed to
24 manage the ERP process and is headquartered in Los Angeles. (Allen Decl., ¶ 1.) He was the
25 former Chief Financial Officer of NOTICE, an apparel manufacturing company that was
26 headquartered in Los Angeles but went out of business in approximately 2010. (See Allen Decl.,
27 ¶¶ 1, 11.) Mr. Allen first explains the capabilities of the AIMS360 software product in managing
28 the ordering, manufacturing, supply, delivery, and sale process for apparel products in an

1 integrated way, using the latest hardware such iPads and interfacing with social media designed
2 specifically for the apparel industry. (*Id.*, ¶¶ 3-4.) He confirms the importance of these apparel
3 software products to the competitiveness of apparel manufacturers. (*Id.*, ¶ 5.)

4 Mr. Allen further explains that NOTICE, as an apparel manufacturer located in Los
5 Angeles, occupied a niche in manufacturing and selling “Made in the U.S.A. products,” with
6 materials that whenever possible were sourced in the United States, across the United States to
7 better boutiques, noted outlets, and large apparel retailers. (Allen Decl., ¶¶ 6-8.) His company’s
8 products—strapless tops, skirts, and dresses—were designed to last for years in contrast to
9 apparel imports that often do not survive more than a year’s washing. (*Id.*, ¶ 7.)

10 In his company’s low-margin apparel manufacturing industry, the use of apparel software
11 played an important role in design (where they used Adobe products), in back-office accounting
12 (where they used Microsoft software products), and in managing the process from ordering
13 through manufacturing to distribution and sales (where they looked for products like AIMS360.
14 (*Id.*, ¶ 9.) Products like AIMS360 also allowed them to track their costs for purchasing materials
15 such as buttons and incorporate those costs into their design by considering for example how
16 many button holes or hooks to have. (*Id.*, ¶ 9.)

17 And because his company’s industry was a low-margin one, Mr. Allen explained how
18 apparel importers could enjoy not inconsiderable savings from using software without paying
19 licensing fees. (Allen Decl., ¶ 10.) With those savings, adding up month after month, they could
20 hire another shipper or contractor or offset materials or labor costs. (*Id.*)²²

21 *Declaration of Shahin Kohan* (AIMS360). Shahin Kohan is the Managing Director of
22 AIMS360, which is in downtown Los Angeles and has customers in such countries as the United
23 States, the United Kingdom, Australia, Canada, and New Zealand. (Kohan Decl., ¶¶ 1, 3.) He
24 supplies the ERP software described above in the summary of Mr. Allen’s testimony with 5,000
25 installations of his software plus the sale of teaching copies to universities including eight in

26 ²² Because this opinion testimony is based on Mr. Allen’s direct knowledge of the apparel
27 industry due to his work for an apparel manufacturer and later for an apparel software producer, it
28 is admissible even though Mr. Allen is a lay witness. (See, e.g., *People v. McAlpin* (1991) 53
Cal.3d 1289, 1309.)

1 California (which to this Court highlights the importance of apparel software in the apparel
2 manufacturing business). (Kohan Decl., ¶ 3.) Mr. Kohan further explains how apparel software
3 has become so important to apparel manufacturing that specialized software, known as Electronic
4 Data Interchange, is used to handle communications between department stores and apparel
5 manufacturers so that apparel manufacturers can be informed as to how to split department store
6 chain orders up among individual stores in that chain. (*Id.*, ¶ 4.) As of the date of his declaration,
7 Mr. Kohan also offers a cloud-based version of his software that can be accessed anywhere with
8 an Internet connection and is being used by approximately 500 companies and 7,000 users. (*Id.*, ¶
9 3.) Mr. Kohan's software is essential in the apparel manufacturing business to ensure just-in-time
10 delivery to compete with apparel importers; large ERP manufacturers of software such as SAP
11 and Oracle have had trouble retooling their software for the apparel business. (*Id.*, ¶¶ 5-6.)

12 The risk of piracy of his software, or hacking of his cloud services, impacts Mr. Kohan's
13 ability to roll out product enhancements and features as his company must be able to recover its
14 R&D costs. (Kohan Decl., ¶ 10.) And in the low-margin apparel manufacturing business,
15 companies that pirate his products, or those of Adobe, can save considerable funds on
16 subscription fees, using those funds to pay for extra employees and equipment. (*Id.*, ¶ 11.)²³

17 *Declaration of Oralia Salcido* (Three Dots). Oralia Salcido is the Purchasing Agent for
18 Three Dots Corporation, a clothing design and manufacturing company headquartered in Garden
19 Grove, California. (Salcido Decl., ¶ 1.) Three Dots designs and manufactures women's clothes for
20 the United States and (for a small percentage of their sales) the Japanese apparel markets, doing
21 \$18 million in business annually. (Salcido Decl., ¶ 3.) Three Dots manufacturers in, and
22 whenever possible sources its materials from, the United States. (*Id.*, ¶ 4.)

23 Three Dots uses American computer software such as that sold by Adobe and Microsoft
24 throughout its business including design, manufacture, marketing, sales, and accounting. (*Id.*, ¶
25 5.) It employs four full-time IT-related and E-commerce related employees and runs a third party

26 ²³ As with the opinion testimony of Mr. Allen, Mr. Kohan's testimony here is admissible.
27 (See, e.g., *McAlpin*, 53 Cal.3d at p. 1309.) Given 80% of his customers are apparel manufacturers
28 and 20% are apparel importers, Kohan Decl., ¶ 10, Mr. Kohan has direct knowledge of both sides
of the apparel manufacturing industry.

1 online hosted shopping cart for its sales (Salcido Decl., ¶ 5), facts from which this Court can and
2 does infer that the use of software plays an important role in Three Dots' apparel business. Three
3 Dots explains that not only does it pay licensing fees for its use of software—stating emphatically
4 that it would never “bootleg” or “pirate” others products or designs—but that apparel
5 manufacturers who avoid pay such licensing fees gain an unfair commercial advantage. (*Id.*, ¶ 6.)

6 The lay declarations of Mr. Allen, Mr. Kohan, and Ms. Salcido, taken together, support the
7 allegations in Plaintiff's complaint that software piracy by companies like Defendants can gain
8 them a significant short-term cost advantage over California apparel manufacturers, and this
9 Court's finding of a prima facie case that the Defendants violated the UCL. They also help
10 illustrate the longer-term effects of that software piracy, as set out in summary form in the
11 allegations in Plaintiff's complaint, in hurting the businesses of apparel software producers and
12 apparel manufacturers in California alike, thereby supporting this Court's finding of a prima facie
13 case that the Defendants violated the UCL.

14 **C. SUPPLEMENTAL FACTS SUBMITTED BY PLAINTIFF OUTSIDE OF THE DECLARATIONS AS**
15 **SUPPORT FOR A FINDING OF A PRIMA FACIE CASE FOR A DEFAULT JUDGMENT UNDER**
16 **THE UCL**

17 Besides the declarations discussed above, Plaintiff supplements the facts alleged in its
18 complaint with the following. First, Plaintiff submits evidence that, since it filed its complaint in
19 2013, Defendants have not stopped selling apparel to California-based apparel distributors and
20 retailers, importing at least 146.30 metric tons or 322,532.98 pounds through California ports as
21 part of those sales. (Varanini Decl., ¶ 28.) This fact is important because it shows the Defendants
22 are continuing to compete with apparel manufacturers in California such that their acts continue
23 to present a threat of unfair competition in violation of the UCL.

24 Moreover, Defendants appear to enjoy a substantial, positive cash flow: per their own 2013
25 *Internet milestones* report, they were constructing a 40,000 square meter textile headquarters.²⁴
26 This fact is important because it shows that Defendants can benefit from their acts of unfair

27 ²⁴ <http://www.china-beyond.com/About/index/gid/2> [as translated using Google
28 Translate].

1 competition in enhancing their already positive cash flow and in their using that cash flow to
2 improve their physical facilities.

3 Finally, Plaintiff submits two studies: one a 2011 study commissioned by Microsoft and the
4 other a 2014 Harvard-National Association of Manufacturers study. The 2011 study explains that
5 in China, pirating manufacturers gain an annual competitive advantage of \$837 million, which
6 can be used to build 66 manufacturing plants or hire 217,000 employees each year.²⁵ The 2014
7 Harvard-NAM study estimates that from 2002-2014, global software piracy cost California
8 \$21,717,416,550 in manufacturing revenue and 4,147 lost manufacturing jobs.²⁶ These studies are
9 important in showing how practices like those of the Defendants significantly threaten or harm
10 competition.²⁷

11 This Court thus credits this additional evidence in finding a prima facie case that
12 Defendants violated the UCL. This evidence helps quantify the competitive advantage enjoyed by
13 companies like Defendants that engage in software piracy, provides at least one example of what
14 a positive cash flow that may originate from such piracy can do for a company that engages in it,
15 and demonstrates that Defendants are still competing with California apparel manufacturers since
16 the filing of Plaintiff's complaint.

17 Based on the evidence in Plaintiff's complaint, this Court has found that Plaintiff has
18 presented a prima facie case that Defendants violated the UCL. The civil default prove-up
19 declarations and other supplemental facts submitted by Plaintiff support those findings. This
20 Court hereby enters judgment that Defendants violated the UCL as alleged in the First Cause of
21 Action in the Complaint. (See *Johnson*, 72 Cal. App. 4th at p. 361; *Hope for Car Owners*, 2013
22 WL 322895 at pp. *4-6.)

23 _____
24 ²⁵ Keystone Strategy, *Play Fair Day Analysis*, 28 (2011), http://www.microsoft.com/en-us/news/presskits/antipiracy/docs/playfair_analysis.pptx.

25 ²⁶ Kerr and Mouray, *Economic Impact of Global Software Theft on U.S. Manufacturing Competitiveness and Innovation*, 28 (2014), http://iptheft.nam.org/full_study_1-30-14.pdf

26 ²⁷ This Court notes that Plaintiff has not only sued Defendants for such practices because
27 they significantly threaten or harm competition in the apparel manufacturing industry in
28 California but also sued an Indian apparel manufacturer for similar practices. See, e.g.,
<https://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-landmark-settlement-pratibha-syntex>.

1 **D. THE ENTRY OF INJUNCTIVE RELIEF**

2 Plaintiff requests that this Court enter the following injunctive relief: (1) a provision that
3 bars Defendants from directly using pirated products in the design, manufacture, order, sale,
4 processing, and delivery of apparel products; (2) a provision that bars Defendants from indirectly
5 using pirated products in the design, manufacture, order, sale, processing, and delivery of apparel
6 products (known as a “ring-fencing”); and (3) a provision designed to prevent Defendants from
7 doing business in California until they present sufficient evidence that they have cured their
8 violations of the UCL. Together, these provisions all remedy the downstream effects of
9 Defendants’ conduct.

10 The Court finds this injunctive relief to be appropriate under the law. The need to ensure
11 that Defendants do not continue violating the UCL justifies the combined anti-piracy and ring-
12 fencing components of the first injunctive provision. (See *Sun Microsystems, Inc. v Microsoft*
13 *Corp.* (N.D. Cal. 2000) 87 F.Supp.2d 992, 997-98, 1004-05, 1006-1007 (discussing the UCL); see
14 also *FTC v. Colgate-Palmolive Co.*, (1965) 380 U.S. 374, 396 (Where there is a reasonable basis
15 to believe defendants will engage in future violations, injunctive relief should be “broa[d] enough
16 to prevent [defendants] from engaging in similarly illegal practices.”); *Hope for Car Owners*,
17 2013 WL 322895 at p. *5 (approving similar injunctive relief in the context of a default
18 judgment).) Indeed, Microsoft itself testified that because such an injunctive provision is absent in
19 its settlement with the Defendants, it could not enforce the Defendants’ “promise” to refrain from
20 using its software products without paying licensing fees. (See Huang Decl., ¶ 22.)²⁸

21 Because Defendants secured a downstream advantage over their competitors across their
22 entire line of apparel products due to their use of pirated software, the second set of “cure”
23 injunctive provisions, barring Defendants from doing business in California as far as apparel is
24 concerned until they submit to the jurisdiction of the Court are also justified under the UCL. (See
25 *Yanting Zhang v. Sup. Ct.* (2015) 57 Cal.4th 364, 371.) Plaintiff requests as part of this second set

26
27 ²⁸ This Court also notes that Plaintiff obtained similar injunctive relief as part of a
28 settlement it reached with an Indian apparel manufacturer engaged in conduct like that of the
Defendants. See, e.g., <https://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-landmark-settlement-pratibha-syntex>.

1 of "cure" provisions that this Court allow Plaintiff to move to amend the default judgment to bar a
2 nonparty who is in, or is subject to, the jurisdiction of California from distributing or receiving
3 any of Defendants' products in the State of California, after giving notice to said nonparties, until
4 Defendants present sufficient evidence that they have cured their violations of the UCL. Plaintiff
5 points out that these nonparties would, in effect, be acting as the agents of the Defendants in
6 aiding them to evade the default judgment and the need to cure Defendants' noncompliance with
7 the UCL.

8 Although the Court finds such an order to be appropriate (see *Ross v. Sup. Ct.* (1977) 19
9 Cal.3d 899, 905-06), this Court asked Plaintiff to present information as to how the Court could
10 craft the injunctive relief applicable to third parties to avoid disrupting their current contractual
11 relationships with the Defendants. Plaintiff testifies that it reached out to those consignment
12 companies that import Defendants' products. Based on that effort, Plaintiff learned that the
13 process for ordering apparel products from the Defendants takes three to four months because of
14 the need to exchange apparel samples to ensure the apparel products ordered match demand for
15 those products in the United States and to then order apparel products from Defendants. Plaintiff
16 further learned that Defendants do not appear to enter into long-term contracts for the delivery of
17 apparel products: this matches other testimony presented by Plaintiff as to the short-term cycles
18 present in this industry. (See Supp. Decl. of Varanini, ¶¶ 15-17.)

19 Based on this information, Plaintiff has proposed the following injunctive terms be added as
20 far as third parties are concerned. First, Plaintiff has proposed that this second set of cure
21 provisions barring Defendants from doing business in the apparel industry in California be stayed
22 for four months from the date of entry of this Court's Order. Next, Plaintiff has proposed that
23 during that four-month period, Plaintiff will make reasonable efforts to contact companies
24 involved in the import, distribution, or sale of Defendants' products to advise them of this Court's
25 Order, including the bar on Defendants doing business in the apparel industry in California. These
26 efforts will include publishing the Court's Order on the California Department of Justice's public
27 web site. (See Supp. Decl. of Varanini, ¶¶ 14-17.) This Court finds this proposal to be reasonable
28

1 in avoiding disruption to the present commercial relationships of third parties in California with
2 Defendants and so orders it in its entirety. (Compare, e.g., *United Farm Workers of America*, 83
3 Cal.App.4th at p. 1165; *Custom Craft Carpets*, 159 Cal.App.4th at pp. 685-86.)

4 Although this case is approximately four and one half years old, and the Defendants' settled
5 piracy action in China with one of the software manufacturers, this Court finds that these
6 injunctive provisions are all justified by the threat of continued software piracy by the
7 Defendants. (See *McGill*, 2 Cal.5th at p. 958; *U-Haul*, 4 Cal.App.5th at pp. 315-17; see also
8 *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1178 (court can disregard promise
9 not to engage in wrongdoing in future in imposing an injunction under the UCL).) The software
10 companies have testified that they cannot be sure that the Defendants are not engaged in software
11 piracy as of the date of this Order. The Defendants were engaged in large-scale use of software,
12 without paying license fees, involving multiple software companies as of the date that Chinese
13 courts allowed Microsoft to conduct an inspection of Defendants' computer system (See, e.g.,
14 Huang Decl., ¶¶ 9-14 & Exh. M; Draper Decl., ¶¶ 5-6; Patel Decl., ¶¶ 4-6.) The settlement in
15 China of Microsoft's case against the Defendants does not operate to prevent legally a recurrence
16 of piracy in the future even vis-à-vis Microsoft, let alone other software companies. (See Huang
17 Decl., ¶¶ 21-22.) Indeed, the timing of that settlement, arising only after Plaintiff sued Defendants
18 in this Court (see Huang Decl., ¶ 15), further supports the propriety of imposing injunctive relief
19 to prevent a recurrence of Defendants' illegal conduct as to Microsoft and to bar Defendants from
20 using the software products of other companies without paying license fees. (See *U-Haul*, 4
21 Cal.App.5th at pp. 315-17.) And software piracy by overseas apparel manufacturers presents a
22 serious, ongoing threat to the viability of competition from domestic apparel manufacturers,
23 further justifying the ordering of the injunctive relief requested by Plaintiff. (See, e.g., Shapiro
24 Decl., ¶¶ 12-17, 19-23; Kilduff Decl., ¶¶ 16-18; see also, e.g., Allen Decl., ¶¶ 9-10; Kohan Decl.,
25 ¶¶ 5-6, 10-11; Salcido Decl., ¶¶ 5-6.)

1 **E. THE ASSESSMENT OF CIVIL PENALTIES**

2 Pursuant to Business & Professions Code, sections 17200 and 17206, Plaintiff sought the
3 imposition of civil penalties up to the amount of \$2,500 for each violation of the UCL.
4 (Complaint, ¶ 60.) What constitutes a “violation” of the UCL for purposes of civil penalties is to
5 be determined by the circumstances of a case, with the guidance that a reasonable relationship
6 should exist between the violation(s) so designated for purposes of civil penalties and the gain, or
7 opportunity for gain, occasioned by the acts of unfair competition. (See, e.g., *People v. JTH*
8 (2013) 212 Cal.App.4th 1219, 1250 (citing *People v. Sup. Ct. (Olson)* (1979) 96 Cal.App.3d
9 181).) The assessment of the amount of civil penalties per violation is also informed by the need
10 to punish the wrongdoer and deter future misconduct. (See, e.g., *People v. First Federal Corp.*
11 (2002) 104 Cal.App.4th 721, 732 (citing *People v. Sup. Ct. (Kaufman)* (1974) 12 Cal.3d 421,
12 431).) And, it can also be informed by a defendant’s persistent engagement in such conduct even
13 after receiving complaints and even after being informed that its conduct is being investigated and
14 prosecuted. (See, e.g., *People v. Overstock.Com, Inc.* (2017) 12 Cal.App.5th 426, 437.)

15 The Court imposes civil penalties in the amount of \$3,232,310 and finds the Defendants to
16 be on sufficient notice that such an amount of civil penalties could be imposed. Defendants were
17 on notice that Plaintiff had alleged that they imported 713,000 pounds of apparel goods into
18 California between 2010 and 2012 (Complaint, ¶ 10 and 27), which could form the basis for an
19 assessment of civil penalties even if the actual amount imported into California was 323,231
20 pounds. (See Supp. Varanini Decl., ¶¶ 5-8 & Exhs. A-D.) Defendants were on notice that Plaintiff
21 had alleged that they obtained a short-term advantage on their profits from sales of those apparel
22 goods imported into California by not having to pay licensing fees—in addition to a longer-term
23 advantage on innovation and reinvestment—such that the “violation” for purposes of the UCL
24 would be the sale of each individual apparel item. (See Complaint, ¶¶ 5-11, 14, 44-51.) And
25 Defendants were on notice from the Plaintiff’s complaint that the Court could impose civil
26 penalties up to \$2,500 per violation, i.e., for each item of apparel imported into California. (See
27 Complaint, ¶ 60.) In fact, given the breadth of Defendants’ illegal acts as alleged by Plaintiffs
28 (see, e.g., Complaint, ¶¶ 10, 3-39), Defendants were on notice that civil penalties could be

1 assessed per violation in such an amount (subject to the \$2,500 per violation cap) as to deter them
2 from engaging in such wrongful acts going forward and to punish them for their past wrongful
3 conduct. Thus, the questions for this Court are how to determine how many violations were
4 committed by Defendants and what amount per violation to assess as civil penalties that will meet
5 the goal of deterrence while still ensuring a reasonable relationship between that amount and the
6 gain, or opportunity for gain, of the Defendants.

7 Plaintiff has presented expert testimony, based on the analysis of data, as to how this Court
8 can determine how many individual items of Defendants' apparel were imported into California
9 by determining the average weight of each individual item of apparel. (Shapiro Decl., ¶ 26.) Each
10 individual item can be deemed a single violation. The Court credits this testimony, finding that
11 each individual item of apparel weighs on average one pound and thus the Defendants committed
12 323,231 violations corresponding to the 323,231 pounds of apparel products shipped into
13 California pursuant to the evidence presented by Plaintiff in this civil default prove-up
14 proceeding.²⁹

15 The next question the Court addresses is how much the amount of penalties should be per
16 violation. First, that amount must bear a reasonable relationship to the short-term *and* long-term
17 gains the Defendants could or have enjoyed from their conduct. Second, that amount must be of a
18 sufficient heft to meet the goals of deterrence, e.g., to punish the Defendants for their past bad
19 acts and deter them and others from future misconduct.

20 Originally, Plaintiff inquired of its experts as to whether an assessment of \$2 per pound of
21 apparel, reflecting both the short-term gains from Defendants' conduct in a low-margin industry
22 and the longer-term gain from being able to use those savings to innovate and invest. Plaintiffs'
23 expert found this initial assessment to be reasonably related to the gain, or opportunity for gain, to
24 the Defendants from their misconduct. (Shapiro Decl., ¶¶ 27-29.)

25
26
27 ²⁹ Estimates based on such averages is permissible as individualized proof of harm is not
28 required to impose civil penalties. (See, e.g., *People v. Sarpas* (2014) 225 Cal.App.4th 1539,
1568.)

1 However, Plaintiff's expert informed Plaintiff that it found this amount "likely" to be
2 insufficient to deter Defendants' (and others) future misconduct and punish Defendants for past
3 misconduct. (Shapiro Decl., ¶ 29.) He pointed out that multiplying each violation by only \$2.00
4 is not high enough to serve as deterrence given the risk of detection is much "likely" lower than
5 would be reflected in a \$2.00 per violation assessment. Plaintiffs' other evidence also supported
6 the notion that Defendants were significant software pirates in using the software products of
7 American companies without paying license fees (see Huang Decl., ¶¶ 9-14 & Exh. M; Draper
8 Decl., ¶¶ 5-6; Patel Decl., ¶¶ 4-6) because of their apparent assessment that the risk of detection
9 would be extremely low. That assessment was accurate: Microsoft discovered that the piracy of
10 their software was far more extensive than they knew after the on-site inspection was ordered in
11 China while Adobe and Symantec only discovered the piracy of their software after being alerted
12 to it by the results of Microsoft's on-site inspection. Even today, these very same software
13 companies cannot rule out that Defendants are engaged in the use of their software products
14 without paying license fees. (See, e.g., Huang Decl., ¶ 21.) And, per the Defendants' own 2013
15 Internet milestones report submitted by Plaintiff, this Court has a reasonable basis for believing
16 the Defendants to be profitable firms.³⁰

17 Moreover, deterrence is also important here because of the harmful cycle described in the
18 declarations submitted by Plaintiff: The competitive advantage gained by Defendants from their
19 misconduct drives out the apparel manufacturing base in California on which apparel software
20 companies in California depend to grow their own business. Without customers for their software,
21 the software companies cannot do business, let alone make the investments needed to grow. (See
22 Shapiro Decl., ¶¶ 16, 20; Kilduff Decl., ¶¶ 16, 18; see also, e.g., Allen Decl., ¶¶ 9-10 (explaining
23 based on personal experience the not inconsiderable savings advantage gained by overseas
24 apparel manufacturers who engage in software piracy); Kohan Decl., ¶ 11 (same).) Pursuant to
25 two studies submitted by Plaintiff, behavior like that committed by the Defendants has substantial

26
27 ³⁰ See, <http://www.china-beyond.com/About/index/gid/2>. (Supp. Varanini Decl., ¶ 11.)
28

1 adverse effects in the aggregate by pirating firms who can then spend these illegal savings as they
2 choose versus non-pirating California apparel manufacturers that incur software expenditures.³¹

3 Deterrence is important because the Defendants have continued to do business in California
4 even after being made aware of this lawsuit. The decision by the MOJ to reject Hague Convention
5 service on the Defendants encourages the Defendants to continue to do business in California.
6 Thus, only an assessment of a significant sum in civil penalties may operate as a deterrent to such
7 tactics.

8 Based on this assessment of Plaintiff's expert, on the additional evidence submitted by
9 Plaintiff, and on the inferences drawn from that evidence by the Court, the Court hereby imposes
10 \$3,232,310 in civil penalties pursuant to Business & Professions Code Section 17206. (See Supp.
11 Varanini Decl., ¶¶ 9-13.) Defendants were on fair notice that such an amount could be assessed as
12 Plaintiff's complaint contained allegations that civil penalties could be assessed in the amount of
13 \$2,500 per violation and that the determination of what constitutes a violation could be made
14 based on Defendants' shipment of individual apparel items into California amounting in the
15 aggregate to 713,000 pounds (even if that amount has now turned out to be erroneous). (See *Brar*,
16 134 Cal.App.4th at p. 668 (holding that default judgment of \$1.8 million for civil penalties under
17 the UCL was proper because complaint gave fair notice that civil penalties could be assessed at
18 least in the amount of \$2,500 times 1,500 violations for a total of \$3.75 million in civil penalties);
19 see generally *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (the "primary purpose of the section
20 [Code of Civil Procedure section 585] is to guarantee defaulting parties adequate notice of the
21 maximum judgment that may be assessed against them").) Such an amount includes an assessment
22 that is reasonably related to the Defendants' own short-term and long-term gains from their
23 misconduct. (See, e.g., *JTH*, 212 Cal.App.4th at p. 1250.) And such an amount also includes an
24 assessment that is reasonably gauged from a deterrence perspective as a fair punishment for
25

26 ³¹ See Keystone Strategy, *Play Fair Day Analysis*, 28 (2011),
27 http://www.microsoft.com/en-us/news/presskits/antipiracy/docs/playfair_analysis.pptx. (Supp.
28 Varanini Decl., ¶ 13); Kerr and Mouray, *Economic Impact of Global Software Theft on U.S. Manufacturing Competitiveness and Innovation*, 28 (2014), http://iptheft.nam.org/full_study_1-30-14.pdf. (*Id.*)

1 Defendants' past illegal acts, for Defendants' persistence in engaging in such acts, and to deter
2 future wrongdoing on the part of Defendants and others given the serious aggregate effects of the
3 kind of conduct committed by Defendants and others. (See, e.g., *Overstock.Com, Inc.*, 12
4 Cal.App.5th at p. 437; *First Federal Corp.*, 104 Cal.App.4th at p. 732.)

5 While the extent of piracy by Defendants of the software of American software companies
6 is unknown (and thus not set out in Plaintiffs' complaint), this Court is entitled to estimate that
7 the failure to pay license fees for the use of the software of these three companies may be
8 sufficiently large in and of itself and in its short-term and long-term effects to justify the
9 assessment of \$3,232,310 in civil penalties. (Cf. *Electronic Funds Solution*, 134 Cal.App.4th at p.
10 1182 (court has more latitude for estimating damages in a civil prove-up hearing [i.e., lost profits]
11 where the difficulty in estimation arises from the defendants' bad faith conduct in blocking
12 discovery).) Here, the MOJ's refusal to allow service of process in contravention of its Hague
13 Convention obligations blocks Plaintiff from obtaining the kind of evidence necessary to prove up
14 the exact amounts of additional license fees not paid by Defendants for their use of software.
15 Moreover, Plaintiff has submitted evidence that software companies cannot be sure that their
16 products are not being pirated by Defendants, or of the extent to which their products are being
17 pirated, absent discovery directed to Defendants. (See Huang Decl., ¶ 21; Draper Decl., ¶ 6.) And
18 Plaintiff has submitted evidence that the actual lost license fees by at least one software company,
19 Microsoft, are far greater than what is reported in Plaintiff's complaint. (See Supp. Varanini
20 Decl., ¶ 12 (adding up the lost license fees as reported in Microsoft's declaration and coming with
21 the total of \$546,890); see also Huang Decl., ¶¶ 9-12.)

22 Nor is the amount assessed excessive in and of itself. (Compare, e.g., *Overstock.Com*, 12
23 Cal.App.5th at pp. 437-39 (assessment of \$6,828,800 in civil penalties not excessive in relation to
24 factors used to assess civil penalties, to other cases, or to constitutional principles).)

25 CONCLUSION

26 Therefore, for all of the foregoing reasons, the Court orders that judgment be entered for
27 Plaintiff on the default of Defendants Ningbo Beyond Home Textile Co., Ltd., Ningbo Beyond
28 Import & Export Co., Ltd., Ningbo Beyond Kids Global Brand Co., Ltd., and Ningbo Beyond

1 Fashion Co., Ltd and grants Plaintiff's application for default judgment, awarding the injunctive
2 relief requested as well as civil penalties in the amount of \$3,232,310. A separate Order and Final
3 Judgment will be issued on the date of entry of this Memorandum Opinion.
4

5 Dated: 8/7/17
6

Hon. Susan Bryant-Deason
HON. SUSAN BRYANT-DEASON
JUDGE OF THE SUPERIOR COURT
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28