UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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| ELF-MAN, LLC,<br><br>Plaintiff,<br><br>v.<br><br>C.G. CHINQUE ALBRIGHT, et al.,<br><br>Defendants. | NO: 13-CV-0115-TOR<br><br>ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AS AGAINST DEFENDANTS DEAN BARNETT, BRENDA BARNETT, STEPHANIE HOUSDEN, ANDREW LINT, CARLOS RODRIGUEZ, RAFAEL TORRES, AND SHANNON WILLIAMS |

BEFORE THE COURT is Plaintiff's Motion for Default Judgments and Permanent Injunctions against Defendants D. & B. Barnett, Housden, Lint, Rodriguez, Torres and Williams (ECF No. 112). This matter was submitted for consideration without oral argument. The Court has reviewed the motion and the record and files herein and is fully informed.

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## FACTS[1]

This is an action concerning alleged copyright infringement of a motion picture. Plaintiff Elf-Man, LLC, is a limited liability company that produced the motion picture at issue in this matter, *Elf-Man*. Defendants, originally identified as Does, are individual computer users, identified by their IP addresses assigned by Internet Service Providers ("ISPs") on the date and time at which the infringing activity was observed.

Plaintiff alleges that Defendants used BitTorrent, an interactive peer-to-peer file transfer technology protocol to copy, download, share, and upload Plaintiff's motion picture, or permitted, facilitated, or promoted such conduct by others. Peer-to-peer networks, in their most common form, are computer systems enabling users to make files stored on each user's computer available for copying by other users, to search for files stored on other users' computers, and to transfer exact copies of the files from one computer to another via the internet. The complaint alleges that Plaintiff has recorded each Defendant identified as actually copying and publishing Plaintiff's motion picture via BitTorrent, as Plaintiff's investigator has downloaded the motion picture from each Defendant. Plaintiff alleges that, upon information

[1] Unless otherwise noted, these facts are excerpted from Plaintiff's complaint and used for purposes of the instant motion only.

and belief, each Defendant was a willing and knowing participant in the file transfer "swarm" at issue and engaged in such participation for the purpose of infringing Plaintiff's copyright.

Plaintiff sued Defendants, claiming copyright infringement, contributory infringement, and indirect infringement of copyright. Plaintiff's First Amended Complaint requests damages of $30,000 from each Defendant pursuant to 17 U.S.C. § 504(c)(1) for its claims of infringement and contributory infringement, and damages of not more than the statutory minimum of $750.00 on its indirect infringement claim. Plaintiff also requests entry of permanent injunctions enjoining each Defendant from directly, contributorily or indirectly infringing Plaintiff's rights in Plaintiff's motion picture, and reasonable costs and attorney fees.

The Clerk of Court has entered orders of default for all Defendants named in the instant motion. Despite being properly served, as of the date of this Order, the Non-Appearing Defendants have not filed an answer or moved to set aside their default. Plaintiff now moves for default judgment seeking the relief requested in its First Amended Complaint.

## DISCUSSION

Motions for entry of default judgment are governed by Federal Rule of Civil Procedure 55(b). Rule 55(b)(1) provides that the Clerk of Court may enter default

judgment when the plaintiff's claim "is for a sum certain or a sum that can be made certain by computation." Fed. R. Civ. P. 55(b)(1). When the value of the claim cannot be readily determined, or when the claim is for non-monetary relief, the plaintiff must move the court for entry of default judgment. Fed. R. Civ. P. 55(b)(2). In such circumstances, the court has broad discretion to marshal any evidence necessary in order to calculate an appropriate award. *See* Fed. R. Civ. P. 55(b)(2)(A)-(D). At the default judgment stage, well-pleaded factual allegations are considered admitted and are sufficient to establish a defendant's liability, but allegations regarding the amount of damages must be proven. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977); *Microsoft Corp. v. Lopez*, 2009 WL 959219 (W.D.Wash. 2009). The court must ensure that the amount of damages is reasonable and demonstrated by the evidence. *See* Fed. R. Civ. P. 55(b); *Getty Images (US), Inc. v. Virtual Clinics*, 2014 WL 358412 (W.D.Wash. 2014).

The entry of default judgment under Rule 55(b) is "an extreme measure." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002). "As a general rule, default judgments are disfavored; cases should be decided upon their merits whenever reasonably possible." *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1189 (9th Cir. 2009). In determining whether to enter default judgment, a court should consider the following factors: "(1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of

the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-72; *see also United States v. VanDenburgh*, 249 F. App'x 664, 665 (2007).

The Court considers each of the factors in turn.

1. Possibility of Prejudice to Plaintiff

Despite having been properly served, the Non-Appearing Defendants have failed to plead or otherwise defend. As a result, Plaintiff's claims against them cannot move forward on the merits, and Plaintiff's ability to obtain effective relief has been prejudiced. This factor weighs in favor of entering default judgment.

2. Merits of Plaintiff's Substantive Claims

Plaintiff's complaint alleges copyright infringement, contributory infringement, and indirect infringement of copyright for Defendants' alleged participation in a BitTorrent "swarm." However, given concerns raised in a related case, the Court has serious doubts about the merits of Plaintiff's substantive claims. In *Elf-Man, LLC v. Lamberson*, 2:13-cv-395-TOR, a case severed from the instant case, Defendant Ryan Lamberson alleges, *inter alia*, in his answer and counterclaim that Plaintiff purposely released *Elf-Man* into the bit torrent environment knowing, authorizing and inviting its copying and distribution.

Lamberson alleges that Plaintiff Elf-Man, LLC, has brought no lawsuits making direct accusations against an individual or organization of initially seeding the work into the bit torrent, and produced Elf-Man on DVD without significant anti-copying measures—nor has it issued any takedown notices. Lamberson further alleges that Plaintiff has used investigative methods known to lead to false positives, and engaged an "investigator" known for flawed and inaccurate data harvesting techniques, and that the investigator is a defendant in a class action lawsuit alleging fraud in connection with its relationship with a copyright owner and law firm. The Court recognizes Lamberson's allegations are just that, nothing has been proven to the Court. Though Elf-Man, LLC, ultimately voluntarily dismissed its claims against Mr. Lamberson, questions remain about the nature of its investigation into the defendants who allegedly downloaded and copied *Elf-Man*. For these reasons, this factor weighs against default judgment.

3. Sufficiency of the Complaint

The Court finds that the first amended complaint states a claim upon which relief may be granted in that it is grounded in a cognizable legal theory and alleges sufficient facts to support that theory. This factor weighs in favor of entering default judgment.

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4. Sum of Money at Stake

Plaintiff has requested the highest amount of statutory damages available under the Copyright Act, $30,000. In a copyright infringement case, a plaintiff may elect either actual or statutory damages. 17 U.S.C. § 504(a). Statutory damages may be not less than $750 or more than $30,000, "as the court considers just." 17 U.S.C. § 504(c)(1). "In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200." 17 U.S.C. § 504(c)(2).

Plaintiff argues that statutory damages may be increased if a defendant willfully infringed the copyright, and that Plaintiff alleged in its complaint that defendants willfully infringed the copyright, and facts in the complaint are admitted as true. ECF No. 112 at 3-4. Plaintiff, while maintaining that it is entitled to statutory damages of $150,000 because Defendants' conduct was willful, seeks "only" $30,000 in statutory damages.

Insofar as Plaintiff's argument about increased statutory damages for willful infringement is made to justify its request of $30,000 damages for each infringer, the Court is unpersuaded. Plaintiff has alleged, *inter alia*, that "numerous Defendants, either directly or indirectly, engaged in mass copyright infringement of Plaintiff's motion picture," ECF No. 26 at 19; "Each Defendant knew or should have known the infringing conduct observed by Plaintiff was unlicensed and in violation of Plaintiff's copyrights," *id*.; "each Defendant whose conduct constitute direct infringement was a willing and knowing participant in the swarm at issue and engaged in such participation for the purpose of infringing Plaintiff's copyright," *id*. at 20; "Defendants' conduct has been willful, intentional, in disregard of and indifferent to Plaintiff's rights," *id*. at 22. In other words, examined as a whole, Plaintiff has only very generally alleged willfulness—without any specific allegations as to which defendants might have willfully infringed or what behavior indicates their willfulness. Well pleaded allegations in a complaint are deemed admitted on a motion for default judgment, *see Matter of Visioneering Constr.*, 661 F.2d at 124, but the allegations must in fact be well pleaded—Plaintiff's allegations on this point are not. Plaintiff's complaint only alleges the most bare bones indication of willfulness, unsupported with factual allegations indicating intent or knowledge of infringement. Furthermore, the first amended complaint alleges only that at least some of the Defendants acted

willfully. Thus, Plaintiff acknowledges that some of the Defendants may have been involved only unintentionally with the swarm. The Court will not impute a state of mind to all Defendants based on such a pleading. Thus, Plaintiff's argument about willfulness, without more, is insufficient to sustain a finding that the Court should impose a $30,000 fine on each Defendant named in the instant motion.

5. Possibility of Dispute as to Material Facts

Given that the Non-Appearing Defendants have not answered the Complaint or otherwise participated in this case, there remains a possibility that material facts are disputed. This factor weighs against entering default judgment.

6. Whether Default is Attributable to Excusable Neglect

The Court has no means of determining whether excusable neglect contributed to the default of the Non-Appearing Defendants. Given that each of these Defendants was properly served, however, the Court will presume that excusable neglect did not play a role. This factor weighs in favor of entering default judgment.

7. Policy Favoring Decisions on the Merits

Public policy clearly favors resolution of cases on their merits. *Eitel*, 782 F.2d at 1472; *Westchester Fire*, 585 F.3d at 1189. Nevertheless, this policy must eventually yield to the proper administration of justice. Where, as here, a party

fails to defend on the merits of a claim, entry of default judgment is generally an appropriate remedy.

However, in this case, where Plaintiff has requested sizable statutory damages, and where a companion case has called into question the merits of Plaintiff's substantive claims, the Court elects to exercise its power under Rule 55(b)(2) to "conduct hearings" to "determine the amount of damages" and "establish the truth of any allegation by evidence." Fed. R. Civ. P. 55(b)(2). Accordingly, the Court directs Plaintiffs to brief and provide evidence supporting its substantive claims and amount of damages against each defaulting defendant separately. Upon a showing substantiating Plaintiff's claims against each Defendant, the Court will reconsider Plaintiff's motion for default judgment and request for attorney fees.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

Plaintiff's Motion for Default Judgments and Permanent Injunctions Against Defendants D. & B. Barnett, Housden, Lint, Rodriguez, Torres and Williams (ECF No. 112) is **DENIED with leave to renew.** Plaintiff is directed to submit a memorandum and evidence in support of its claims against each defaulting Defendant and in support of its request for damages on or before **October 6, 2014.**

The District Court Executive is hereby directed to enter this Order, provide copies to counsel, and mail a copy to all unrepresented Defendants at their addresses of record.

**DATED** September 3, 2014.

THOMAS O. RICE
United States District Judge