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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Equal Employment Opportunity Comm.,)

No. CV-11-1355-PHX-SMM (BSB)

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Plaintiff,)

11

v.)

**MEMORANDUM OF DECISION
AND ORDER**

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Recession Proof USA LLC, et al.,)

13

Defendants.)

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Pending before the Court is Magistrate Judge Bridget S. Bade’s Report and Recommendation recommending that Plaintiff’s motion for default judgment be granted in part and denied in part. (Doc. 48.) Plaintiff has filed a limited objection to the Report and Recommendation. (Doc. 67.) After considering the Report and Recommendation and the arguments raised in Plaintiff’s Objection, the Court will deny the objection and affirm in part and deny in part Judge Bade’s Report and Recommendation.

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STANDARD OF REVIEW

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When reviewing a Magistrate Judge’s Report and Recommendation, this Court “shall make a *de novo* determination of those portions of the report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c); see also Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991) (citing Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983)).

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Failure to object to a Magistrate Judge’s recommendation relieves the Court of

1 conducting *de novo* review of the Magistrate Judge’s factual findings; the Court then may
2 decide the dispositive motion on the applicable law. Orand v. United States, 602 F.2d 207,
3 208 (9th Cir. 1979) (citing Campbell v. United States Dist. Ct., 501 F.2d 196 (9th Cir.
4 1974)). By failing to object to a Report and Recommendation, a party waives its right to
5 challenge the Magistrate Judge’s factual findings, but not necessarily the Magistrate Judge’s
6 legal conclusions. Baxter, 923 F.2d at 1394; see also Turner v. Duncan, 158 F.3d 449, 455
7 (9th Cir. 1998) (failing to object to a Magistrate Judge’s legal conclusion “is a factor to be
8 weighed in considering the propriety of finding waiver of an issue on appeal”); Martinez v.
9 Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991) (citing McCall v. Andrus, 628 F.2d 1185, 1187
10 (9th Cir. 1980)).

11 **DISCUSSION¹**

12 Plaintiff Equal Employment Opportunity Commission (“EEOC”) moved for default
13 judgment in this case alleging race discrimination and retaliation. (Doc. 47.) In its First
14 Amended Complaint (Doc. 16), EEOC brought claims against Defendants Recession Proof
15 USA LLC (“Recession Proof”), Phillip D. Smith d/b/a Recession Proof USA LLC, Phillip
16 Smith d/b/a Prime Time Marketing Solutions LLC, and Prime Time Marketing Solutions
17 LLC d/b/a/ USA Supreme Technology. (Doc. 16.) EEOC alleged that Defendants terminated
18 Recession Proof employee Richard Miller for opposing what he reasonably believed was
19 discrimination, and that they terminated Recession Proof employee Ron Frasso for
20 participating in a proceeding under Title VII, in violation of Section 704(a) of Title VII, 42
21 U.S.C. §§ 2000e-3(a). (Doc. 16 at 16-17.) EEOC further alleged that Miller was terminated
22 based on his race in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). (Doc.
23 16 at 14.)

24 EEOC properly served Defendants (Docs. 32, 33, and 34), but Defendants failed to
25 appear or otherwise respond to the First Amended Complaint. Subsequently, the Clerk of
26

27 ¹The factual and procedural history of this case are set forth in the Magistrate Judge’s
28 Report and Recommendation. (Doc. 60.)

1 Court entered default against Defendants. (Docs. 37 and 46.) Judge Bade held a hearing on
2 the EEOC's motion for default judgment. (Doc. 53.) Following the hearing, Judge Bade
3 recommended that default judgment be entered in favor of the EEOC and against Recession
4 Proof USA LLC and Prime Time Marketing Solutions LLC d/b/a USA Supreme Technology.
5 (Doc. 60.) Judge Bade found that Recession Proof USA LLC and Prime Time Marketing
6 Solutions LLC d/b/a USA Supreme Technology were joint employers of Miller and Frasso.
7 (Id. at 21.) However, Judge Bade further recommended that EEOC's request for default
8 judgment against Defendants' Phillip Smith d/b/a Recession Proof USA LLC and Phillip
9 Smith d/b/a Prime Time Marketing Solutions LLC be denied. (Id. at 16.)

10 Objection

11 EEOC objects to Judge Bade's factual findings that EEOC failed to adequately plead
12 an alter-ego /veil-piercing theory of liability that would hold Smith personally liable for the
13 actions of Recession Proof USA LLC. (Doc. 67.) EEOC further objects to the Judge Bade's
14 recommendation that the Court not allow EEOC to further amend its complaint. (Id.)

15 Judge Bade's Report and Recommendation discussed in detail the factual and
16 procedural background of this case. Judge Bade found that EEOC had not explained why
17 it failed to include any factual allegations relevant to its alter ego/veil piercing theory in its
18 First Amended Complaint. (Doc. 60 at 15.) After thoroughly reviewing the controlling legal
19 principles at issue, Judge Bade concluded that default judgment should not be entered against
20 Phillip D. Smith d/b/a Recession Proof USA LLC or Phillip Smith d/b/a Prime Time
21 Marketing Solutions LLC. (Id. at 15-16.) As to further amendment, Judge Bade
22 recommended that the Court deny any further amendment of the complaint because it was
23 untimely and would prolong completion of a case that has proceeded to the judgment stage.
24 (Id. at 16.) Moreover, Plaintiff seeks to rectify its earlier omissions at the end of the case.
25 Plaintiff is a prodigious litigator in the courts of the United States. Plaintiff's counsel is well
26 aware of the legal theories when it seeks to impose liability against an adversary.

27 Having reviewed Judge Bade's legal conclusions and the objection made by Plaintiff,
28 the Court finds that Judge Bade adequately addressed all of Plaintiff's arguments and adopts

1 her reasoning finding that default judgment should not be entered against Phillip D. Smith
2 d/b/a Recession Proof USA LLC or Phillip Smith d/b/a Prime Time Marketing Solutions
3 LLC. The Court further agrees that any further amendment of the complaint be denied
4 because it was untimely and would prolong completion of a case that has proceeded to the
5 judgment stage.

6 Damages

7 Following the default damages hearing, Judge Bade recommended that Miller and
8 Frasso be granted back pay, compensatory and punitive damages against Defendants
9 Recession Proof USA LLC and Prime Time Marketing Solutions LLC d/b/a USA Supreme
10 Technology. The Court has reviewed these recommendations and finds that Miller and
11 Frasso are entitled to back pay, compensatory and punitive damages against these
12 Defendants. Further, the Court has reviewed the damages recommendations and finds
13 reasonable the back pay and compensatory damages, but will reduce the punitive damage
14 award. The Court finds that Miller's and Frasso's back pay and compensatory damages
15 awards are sizeable and that a further sizeable punitive award is not appropriate. Finally,
16 Judge Bade recommended and this Court finds that injunctive relief be granted against
17 Defendants Recession Proof USA LLC and Prime Time Marketing Solutions LLC d/b/a USA
18 Supreme Technology.

19 **CONCLUSION**

20 Accordingly, for the reasons set forth,

21 **IT IS HEREBY ORDERED** approving, incorporating, and adopting in part and
22 denying in part the Report and Recommendation of Magistrate Judge Bridget S. Bade. (Doc.
23 60.)

24 **IT IS FURTHER ORDERED GRANTING** Plaintiff's Motion for Default Judgment
25 against Defendants Recession Proof USA LLC and Prime Time Marketing Solutions LLC
26 d/b/a USA Supreme Technology, as set forth below, and be denied in all other respects.
27 (Doc. 48.)

28 **IT IS FURTHER ORDERED DENYING** Plaintiff's Objection to Magistrate

1 Judge's Report and Recommendation and denying Plaintiff's motion for leave to amend
2 complaint. (Doc. 67.)

3 **IT IS FURTHER ORDERED GRANTING** Richard Miller equitable remedies in
4 the amount of \$41,461 in back pay and \$276 in prejudgment interest, totaling \$41,737 in
5 equitable damages against Defendants Recession Proof USA LLC and Prime Time
6 Marketing Solutions LLC d/b/a USA Supreme Technology.

7 **IT IS FURTHER ORDERED GRANTING** Ron Frasso equitable remedies in the
8 amount of \$34,784 in back pay and \$228.19 in prejudgment interest, totaling \$35,012.19 in
9 equitable damages against Defendants Recession Proof USA LLC and Prime Time
10 Marketing Solutions LLC d/b/a USA Supreme Technology.

11 **IT IS FURTHER ORDERED** awarding Richard Miller \$15,000 in compensatory
12 and \$5,000 in punitive damages against Defendants Recession Proof USA LLC and Prime
13 Time Marketing Solutions LLC d/b/a USA Supreme Technology.

14 **IT IS FURTHER ORDERED** awarding Ron Frasso \$5,000 in compensatory and
15 \$5,000 in punitive damages against Defendants Recession Proof USA LLC and Prime Time
16 Marketing Solutions LLC d/b/a USA Supreme Technology.

17 **IT IS FURTHER ORDERED** awarding Miller and Frasso post-judgment interest
18 under 28 U.S.C. § 1961.

19 **IT IS FURTHER ORDERED DISMISSING** Plaintiff's hostile work environment
20 claim pursuant to Plaintiff's voluntary withdrawal of that claim. (See Doc. 51 at 7.)

21 **IT IS FURTHER ORDERED GRANTING INJUNCTIVE RELIEF**, as follows:

22 1. Defendants Recession Proof USA LLC and Prime Time Marketing Solutions
23 LLC d/b/a USA Supreme Technology and their officers, agents, employees, successors,
24 assigns and all persons in active concert or participation with them, are permanently enjoined
25 from (a) discriminating against any employee on the basis of race and (b) retaliating against
26 any employee because he or she (i) opposed discriminatory conduct believed to be unlawful
27 under Title VII, (ii) reported conduct believed to be unlawful under Title VII to Defendants'
28 managers, (iii) filed a charge or assisted or participated in the filing of a charge of race

1 compensation, assignment, or other terms, and conditions or privileges of employment. It
2 is also unlawful to retaliate against any person because the person protested or reported the
3 discriminatory practices to management or the Equal Employment Opportunity Commission
4 (EEOC).

5 Employers shall not discriminate against any employee on the basis of race and shall
6 not retaliate against any employee for complaining about race discrimination.

7 If you believe you have been discriminated against, you have the right to seek
8 assistance from:

9 EEOC, 3300 North Central Avenue, Suite 690

10 Phoenix, Arizona 85012

11 Telephone: (602) 640-5000

12 TTY: (602) 640-5072

13 Website (national): www.eeoc.gov
14

15 You have the right to file a charge with the EEOC if you believe you are being
16 discriminated against or retaliated against for reporting discrimination.

17 No Retaliation Clause. It is against the law for any action to be taken against you by
18 any supervisory or management official of your employer for: (1) opposing race
19 discrimination or other discriminatory practices made unlawful by federal or state law; (2)
20 filing a charge or assisting or participating in the filing of a charge of discrimination; or (3)
21 assisting or participating in an investigation or proceeding brought under Title VII. Should
22 any such retaliatory actions be taken against you, you should immediately contact the EEOC
23 at the address or telephone number listed above.

24 **IT IS FURTHER ORDERED** that this Court retains jurisdiction over this matter in
25 order to enforce the injunctive relief.

26 **IT IS FURTHER ORDERED** denying without prejudice Plaintiff's request for
27 attorney's fees and costs.

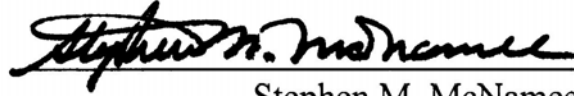
28 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter judgment

1 accordingly.

2 DATED this 4th day of December, 2013.

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Stephen M. McNamee
Senior United States District Judge

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