

1 because Plaintiff has an opportunity to litigate the case on its merits. Second, the Magistrate Judge
2 found that Plaintiff sufficiently stated claims for conversion and a violation of the Federal
3 Communications Act of 1934 (arising in 47 U.S.C. § 605(a)). Third, in considering the sum of
4 money at stake, the Magistrate Judge found factor weighed against the entry of default judgment
5 given the substantial amount sought and the apparent concession by Plaintiff that the amount of
6 damages requested was not tailored to the specific act of the broadcast at The Playhouse Lounge.
7 Fourth, the Magistrate Judge found that there is a possibility of dispute of material facts because Ms.
8 Clifton appeared to defend in the action. Finally, the Magistrate Judge found that it was unlikely that
9 the entry of default by the Clerk of Court was not the result of excusable neglect. See Shanghai
10 Automation Instrument Co., Ltd. v. Kuei, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001).

11 In addition to weighing the Eitel factors, the Magistrate Judge noted “the question arises as to
12 whether the Court has the discretion to enter default judgment against less than all of the defendants”
13 because Ms. Clifton remains to defend. (Doc. 27 at 8). The Magistrate Judge observed that the
14 Federal Rules of Civil Procedure direct the entry of final judgment “only if the court expressly
15 determines that there is no just reason for delay.” (Id.) (quoting Fed. R. Civ. P 54(b)). The
16 Magistrate Judge found that if the allegations of Plaintiff’s Complaint were true, the liability of the
17 defendants would be uniform and the relief offered must be consistent. (Id.) As a result, the
18 Magistrate Judge concluded there was a just reason for delay in the entry of default judgment “given
19 the overlapping nature of the claims as to different defendants” (Id.) (quoting SEC v. Loomis, 2010
20 U.S. Dist. LEXIS 87021, at *12-13 (E.D. Cal. Aug. 24, 2010)).

21 **II. Plaintiff’s Objections**

22 Plaintiff filed objections to the Findings and Recommendation, asserting: “Plaintiff objects to
23 1) the determination that the presence of a second Defendant . . . precludes the entry of default
24 judgment against Defendant Andrade. . . and 2) the determination that certain Eitel v. McCool
25 factors were not satisfied.” (Doc. 32 at 3).

26 Plaintiff contends there is no potential incongruity, and that “uniformity of liability is not
27 necessary.” (Id. at 7). Plaintiff argues that although the company “seek[s] to hold both Defendants
28 liable through its Complaint, this is not a dispositive factor.” (Id.) Further, Plaintiff asserts “there

1 can be no reasonable argument that the liability of the two Defendants is intertwined. If it is possible
2 that one defendant may be liable and the other not, or that defendants may be liable under different
3 theories, both possibilities of which are present herein, default judgment under Rule 54(b) is
4 permissible.” (Id. at 7-8).

5 With regard to the Eitel factors, Plaintiff asserts the Magistrate Judge erred in finding certain
6 factors were not satisfied. (Doc. 32 at 8-9). Plaintiff asserts it is prejudiced because “Plaintiff has an
7 opportunity to litigate the matter against Defendant Clifton, not Defendant Andrade.” (Id. at 9). In
8 addition, Plaintiff argues the sum of money at stake does not weigh against entry of default judgment
9 because the Court has the discretion to award less than the amount sought. (Id.) Finally, Plaintiff
10 asserts, “The fact that Defendant Clifton may or may not be held liable does not impact the liability
11 of Defendant Andrade. There is no possibility of dispute with respect to him; Defendant Andrade is
12 liable because the allegations of the Complaint (as to him) are taken as true.” (Id.)

13 **III. Discussion**

14 First, the Magistrate Judge noted the Court had the discretion to enter default judgment, and
15 that Fed. R. Civ. P. 54(b) allows entry of judgment in fewer than all claims or parties “only if . . .
16 there is no just reason for delay.” (Doc. 27 at 8). The Magistrate Judge did not determine, as
17 Plaintiff asserts, that the existence of a defendant who remains to defend in the action *precludes* the
18 entry of default judgment. Upon review of the allegations of Plaintiff’s Complaint, the Magistrate
19 Judge determined liability must be consistent for the defendants in the action, and that “the alleged
20 liability of the individual defendants overlaps with the liability as to the entity of the Playhouse
21 Lounge.” (Id.) Accordingly, the Magistrate Judge determined it was in the interest of justice not to
22 enter default judgment against Mr. Andrade while Ms. Clifton remains to defend. (Id. at 9) (citing
23 SEC, 2010 U.S. Dist. LEXIS 87021, at *12-13)).

24 Second, Plaintiff has not shown an error regarding the Magistrate Judge’s application of the
25 Eitel factors. Though Plaintiff has the opportunity to litigate the case on its merits against Ms.
26 Clifton and not against Mr. Andrade, the possibility remains Plaintiff may be successful in his
27 litigation against Ms. Clifton. Importantly, the Magistrate Judge did not recommend that the default
28 judgment be denied with prejudice, and Plaintiff may again seek the entry of default judgment

1 against Mr. Andrade at a later date. With regard to the sum of money at stake in the action, the
2 Magistrate Judge determined Plaintiff's request was disproportionate to the seriousness of Mr.
3 Andrade's conduct, because a proper license for the broadcast at issue cost \$1,100 but Plaintiff
4 sought a reward for \$110,000. That the Court may choose to decrease the award amount does not
5 change proportionality of the amount requested to the alleged wrongful act. See King v. Nat'l Credit
6 Works, Inc., 2011 U.S. Dist. LEXIS 96951, at *19 (E.D. Cal. Aug. 30, 2011) ("Default judgment is
7 disfavored when a large amount of money . . . is unreasonable in light of the defendant's actions").
8 On the other hand, if the Court chose to enter default judgment and decrease the amount, this factor
9 may not have weighed against Plaintiff, as the Court has determined previously. See, e.g., J & J
10 Sports Productions, Inc. v. Cal. City Post No. 467, 2011 U.S. Dist. LEXIS 79656 (E.D. Cal. July 21,
11 2011) (finding the amount requested does not weigh against the entry of default judgment, because
12 the Court declined to enter judgment in that amount).

13 In the complaint, Plaintiff alleges both defendants are "an owner, and/or operator, and/or
14 licensee, and/or permittee, and/or person in charge, and/or an individual with dominion, control,
15 oversight and management of the commercial establishment doing business as Playhouse Lounge..."
16 (Doc. 1 at 3). As a result, there is the possibility of dispute of material facts, because in litigating the
17 case on the merits, Ms. Clifton may prove that she was not an owner, and that Mr. Andrade is solely
18 liable for the unlawful broadcast. However, if Ms. Clifton is unable to establish that she was not an
19 owner of the establishment, both defendants may be liable. Thus, there is a *possibility* of a dispute
20 regarding material facts in the action, and this fact weighed against the entry of default judgment
21 against Mr. Andrade.

22 **IV. Conclusion and Order**

23 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) and Britt v. Simi Valley
24 United School Dist., 708 F.2d 452, 454 (9th Cir. 1983), this Court has conducted a *de novo* review of
25 the case. Having carefully reviewed the entire file, the Court finds that the Findings and
26 Recommendation are supported by the record and by proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed September 27, 2011 (Doc. 27), are **ADOPTED IN FULL**; and
2. Plaintiff's motion for default judgment against Sergio Andrade is **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Dated: October 19, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE