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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SQUARE D. COMPANY,

Plaintiff,

No. CIV S-08-1312 JAM EFB PS

vs.

CHAWN PHILLIP ANDERSON,  
HEATHER MARIE APODACA,  
formerly d/b/a AA & M ELECTRIC,  
and AA & M ELECTRIC, INC.,

FINDINGS AND RECOMMENDATIONS

Defendants.

\_\_\_\_\_/

Plaintiff moves for default judgment against defendant AA & M Electric, Inc., pursuant to Fed. R. Civ. P. 55(b)(2). The motion was heard before the undersigned on September 2, 2009.<sup>1</sup> Attorneys Robert Swanson and Daniel Stouder appeared on behalf of plaintiff; no appearance was made on behalf of defendant corporation or the individual defendants. At the direction of the court, additional briefing was submitted by plaintiff on September 30, 2009.

After consideration of the moving papers, plaintiff's oral argument, and supplemental briefing, the court makes the following findings and recommendations.

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<sup>1</sup> This case was referred to the undersigned pursuant to Local Rule 72-302(c)(19) and 28 U.S.C. § 636(b)(1).

1 BACKGROUND

2 This is an action pursuant to the Racketeer Influenced and Corrupt Organizations Act  
3 (“RICO”), 18 U.S.C. §§ 1961 *et seq.* Plaintiff claims that defendants engaged in a fraudulent  
4 scheme of submitting false invoices to plaintiff, in excess of \$1 million, in violation of 18 U.S.C.  
5 § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise  
6 engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or  
7 participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of  
8 racketeering activity or collection of unlawful debt.”). The following additional claims are also  
9 made: breach of contract, common law fraud, and violation of Cal. Bus. & Prof. Code §§ 17200  
10 *et seq.* (fraudulent business practices).

11 The complaint recounts that, commencing late 2004, plaintiff initiated a voluntary recall  
12 of its Arc Fault Interrupter Circuit Breakers manufactured by plaintiff between March 1, 2004  
13 and September 23, 2004. In 2005, plaintiff reached an agreement with defendants to replace  
14 circuit breakers subject to the recall. Defendants submitted invoices for more than 18,000  
15 addresses purportedly serviced between November 2005 and June 2007; plaintiff contends these  
16 invoices included invalid addresses, and valid addresses that were not serviced.

17 Plaintiff is incorporated in Delaware, with its principle place of business in Palatine,  
18 Illinois; the individual defendants are married, citizens of California and domiciled in San  
19 Joaquin County. The individual defendants were the sole proprietors of defendant AA & M  
20 Electric d/b/a until it became incorporated on January 12, 2007, in California, with its principal  
21 place of business in Tracy, California. The corporation has since been suspended.<sup>2</sup>

22 The instant action was filed on June 10, 2008. On June 16, 2008, process was served  
23 upon the corporation by personal service upon its authorized agent (Erica Calderon, Los  
24 Angeles), as well as upon the individual defendants. All returns of service were filed November  
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26 <sup>2</sup> See California Secretary of State, “California Business Search” for “AA & M Electric Inc.,” at <http://kepler.sos.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C2943172>.

1 12, 2008. *See* Dckt. Nos. 12, 13, 14.

2 On July 23, 2008, individual defendants Anderson and Apodaca answered the complaint  
3 on behalf of themselves, in pro se, and purportedly on behalf of AA & M Electric, Inc. Pursuant  
4 to a regularly scheduled status conference held on November 12, 2008, and pursuant to the  
5 court's scheduling order filed November 13, 2008, the individual defendants were instructed to  
6 obtain counsel for AA & M Electric, Inc. Dckt. No. 16. On January 14, 2009, after the  
7 individual defendants failed to obtain counsel for their corporation, despite adequate time to do  
8 so, this court struck defendants' answer as to AA & M Electric, Inc., and directed the Clerk of  
9 Court to enter the corporation's default. Dckt. Nos. 21, 22. Plaintiff timely moved for default  
10 judgment, but repeatedly rescheduled the hearing in an effort to obtain discovery from the  
11 defendants. Dckt. Nos. 23, 25, 35; *see also*, Dckt. No. 37. The individual defendants have been  
12 served with all pertinent moving papers and exhibits. While the individual defendants  
13 participated in the preparation of a discovery statement, *see* Dckt. No. 44, at p. 3, they have not  
14 responded, nor obtained counsel to respond, to the instant motion for default judgment.

15 DISCUSSION

16 Process was served upon the corporate defendant, AA & M Electric, Inc., on June 16,  
17 2008, which has not appeared in this action. Dckt. No. 12. *See Pacific Atlantic Trading Co. v.*  
18 *M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir.1985) (default judgment void without personal  
19 jurisdiction). The Clerk of Court entered the default of AA & M Electric, Inc., on January 14,  
20 2009. Dckt. No. 22.

21 Entry of default pursuant to Fed. R. Civ. P. 55(a) effects defendant's admission of the  
22 well-pled factual allegations of the complaint, except those relating to the amount of damages.  
23 *See* Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages— is  
24 admitted if a responsive pleading is required and the allegation is not denied"); *Geddes v. United*  
25 *Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977); *Anderson v. Air West*, 542 F.2d 1090, 1093  
26 (9th Cir. 1976). Entry of default judgment remains within the sound discretion of the district

1 court, even when the defendant is technically in default. *See Lewis v. Lynn*, 236 F.3d 766, 767  
2 (5th Cir. 2001); *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986); *Aldabe v. Aldabe*, 616  
3 F.2d 1089, 1092 (9th Cir. 1980).

4 Pursuant to the default of AA & M Electric, Inc., the court finds that the complaint states  
5 the following claims for which relief can be granted, specifically, that:

6 1. Plaintiff Square D Company (“Square D”) sells its Circuit Breakers to authorized  
7 distributors who, in turn, sell them to retail outlets or directly to home builders, who then install  
8 them in homes. Compl., at ¶ 15.

9 2. Square D does not sell Circuit Breakers directly to homeowners and therefore does not  
10 have a means to readily identify the homes in which the Circuit Breakers are installed. *Id.*

11 3. In late 2004, Square D, in conjunction with the Consumer Product Safety  
12 Commission, initiated a voluntary recall of its Arc Fault Interrupter Circuit Breakers,  
13 manufactured by Square D between March 1, 2004 and September 23, 2004. Compl., at ¶ 10.

14 4. To accomplish this recall, Square D entered into contracts with local electricians to  
15 locate homes containing the recalled Circuit Breakers, and to replace them. Compl., at ¶¶ 16, 17.

16 5. After replacing the Circuit Breakers, the electricians would take the recalled breakers  
17 to an authorized Square D distributor and receive full credit against the newly-installed Circuit  
18 Breakers, and then send invoices to Square D for payment. Compl., at ¶¶ 18, 19.

19 6. In the fall of 2005, defendant Chawn Anderson, a licensed electrician, on behalf of  
20 AA & M Electric d/b/a, entered into a contract pursuant to which Square D agreed to pay \$90  
21 per home for labor associated with replacing the recalled breakers, payment conditioned  
22 payment upon Square D receiving written invoices listing the address of each serviced home.  
23 Compl., at ¶¶ 20-23.

24 7. From November 28, 2005 to June 9, 2007, the individual defendants, on behalf of AA  
25 & M Electric d/b/a and later AA & M Electric, Inc., prepared and submitted to Square D, 51  
26 invoices totaling \$1,676,700.00. Compl., at ¶ 24.

1           8. The number of home addresses listed in each invoice ranged from 29 to 1,042, and the  
2 total number of addresses submitted exceeded 18,000. Compl., at ¶ 25.

3           9. Listed addresses for the Las Vegas, Nevada, area intentionally included both  
4 nonexistent (invalid) addresses, and valid addresses that were not serviced. Compl., at ¶¶ 26-33.

5           10. In January 2007, Anderson and Apodaca incorporated AA &M Electric d/b/a into  
6 AA & M Electric, Inc., by filing Articles of Incorporation with the Office of the California  
7 Secretary of State. Compl., at ¶ 29.

8           11. From January 2007 through May 7, 2007, the individual defendants, on behalf of AA  
9 & M Electric, Inc., prepared twenty (20) invoices for work performed in the Las Vegas, Nevada  
10 area; at least eleven (11) of these invoices contain false information. Compl., at ¶ 31; Willhoite  
11 Decl., Dckt. No.56, ¶¶ 11 *et seq.*<sup>3</sup>

12           12. These eleven invoices containing false and fraudulent information demonstrate that  
13 defendant corporation and its owners were engaged in an enterprise affecting interstate  
14 commerce, which involved a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)  
15 (the RICO Act), and Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and which constituted common  
16 law fraud, and breached the parties' contract. Compl., at ¶¶ 36-81.

17           Pursuant to the supplemental and original declarations filed by Jim Willhoite, Product  
18 Support Specialist at Square D Company's Lexington, Kentucky plant (*see generally*, Dckt. Nos.  
19 56, 38, and attached exhibits), and based upon Mr. Willhoite's research and compilation thereof,  
20 plaintiff's actual damages are calculated as follows:

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23           <sup>3</sup> Of the 20 invoices identified in the complaint, the following invoice numbers (and  
24 dates of invoice) contained false information: Invoice No. 20504 (dated 2-27-07); Invoice No.  
25 20219 (dated 3-07-07); Invoice No. 20231 (dated 3-13-07); Invoice No. 20296 (dated 3-22-07);  
26 Invoice No. 20307 (dated 3-26-07); Invoice No. 20317 (dated 3-28-07); Invoice No. 20327  
(dated 4-04-07); Invoice No. 20341 (dated 4-09-07); Invoice No. 20373 (dated 4-25-07); Invoice  
No. 20388 (dated 5-01-07); Invoice No. 20403 (dated 5-07-07). *Cf.*, Cmpl., at ¶ 31, and Exhibit  
1 to Willhoite Supp. Decl., Dckt. No. 56.

1 a. The 11 invoices submitted by defendants, on behalf of AA & M Electric, Inc., during  
2 the relevant period, contain 5,890 addresses in the Las Vegas, Nevada area, after subtracting for  
3 duplicate addresses. Willhoite Decl. (Dckt. No. 56), at ¶ 12.

4 b. Plaintiff Square D paid defendants a total of \$530,100 to replace Circuit Breakers at  
5 these 5,890 addresses. *Id.*

6 c. Of the 5,890 addresses billed by defendants to plaintiff during this period, 3,174  
7 addresses do not exist. *Id.*, at ¶ 18.

8 d. Calculated at \$90.00 per nonexistent address, Square D overpaid AA & M Electric,  
9 Inc., for work billed in Las Vegas, Nevada, after January 2007, a total amount of \$285,660.00.  
10 *Id.*, at ¶ 19.

11 Therefore, plaintiff Square D suffered actual damages in the amount of \$285,660.00, as a  
12 result of defendants' fraudulent conduct on behalf of AA & M Electric, Inc.

13 There are no policy considerations that preclude the entry of default judgment of the type  
14 requested. *See Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).<sup>4</sup> Plaintiff would be  
15 prejudiced if default judgment were not granted; plaintiff has demonstrated the merits of its  
16 claims based on the well pled, unopposed, factual allegations of the complaint; the overall sum  
17 of money at stake supports granting the requested relief; there is no reasonable possibility of a  
18 dispute concerning material facts because defendants have declined the opportunity to answer  
19 the complaint or challenge the motion for default judgment; there is no indication that  
20 defendant's default was due to excusable neglect, since it was given repeated notice and

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22 <sup>4</sup> In assessing whether to grant a motion for default judgment, the court must consider  
the following factors:

23 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's  
24 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at  
25 stake in the action, (5) the possibility of a dispute concerning the 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.

26 *Eitel v. McCool*, 782 F.2d at 1471-72.

1 opportunities to participate in this action; and, finally, while public policy favors judicial  
2 decisions on the merits, this consideration must be balanced with the reality that defendant's  
3 failure to act has rendered it "impractical, if not impossible" to reach a decision on the merits,  
4 *Elektra Ent. Group, Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (citations omitted),  
5 which would, in any case, likely conform to the findings set forth herein.

6         Based on the foregoing, the court finds that plaintiff is entitled to the relief requested.  
7 However, two qualifications are in order. First, plaintiff Square D emphasizes that it is not at  
8 this time able to determine other amounts that AA & M Electric, Inc., may have charged for  
9 work that it did not perform on valid addresses, because defendants have not yet produced all  
10 requested discovery. Second, this award does not include, and is made without prejudice to any  
11 future award of punitive damages, e.g., treble damages authorized by 18 U.S.C. § 1964(c),  
12 pursuant to resolution of this case in its entirety.

### 13 CONCLUSION

14         Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 15         1. Plaintiff's motion for default judgment against defendant AA & M Electric, Inc.,  
16 Dckt. No. 35, be GRANTED;
- 17         2. The Clerk of Court be directed to enter default judgment against defendant AA & M  
18 Electric, Inc.;
- 19         3. Plaintiff be awarded \$285,660.00 actual damages;
- 20         4. Such award be made without prejudice to a further motion for default judgment, or  
21 amended default judgment, based upon newly acquired evidence demonstrating further  
22 fraudulent conduct by defendant AA & M Electric, Inc., and
- 23         5. Such award be made without prejudice to an award of punitive damages against  
24 defendant AA & M Electric, Inc., pursuant to resolution of this case in its entirety.

25         These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after

1 being served with these findings and recommendations, any party may file written objections  
2 with the court and serve a copy on all parties. Such a document should be captioned "Objections  
3 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the  
4 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158  
5 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: November 13, 2009.

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9 EDMUND F. BRENNAN  
10 UNITED STATES MAGISTRATE JUDGE  
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