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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SUSTAINABLE PAVEMENT
TECHNOLOGIES, LLC,

Plaintiff,

v.

RICH HOLIDAY, et al.,

Defendants.

2:17-cv-02687-WBS-KJN

ORDER AND FINDINGS AND
RECOMMENDATIONS

Presently pending before the court is plaintiff Sustainable Pavement Technologies, LLC’s motion for default judgment against defendant Rich Holiday.¹ (ECF No. 70.) After Holiday failed to file a timely opposition, the motion was submitted on the record and written briefing pursuant to Local Rule 230(g). (ECF No. 72.) Holiday was ordered to file any opposition by April 29, 2019. (Id.) The deadline having passed, Holiday has again failed to file an opposition. For the reasons discussed below, the court recommends that plaintiff’s motion be GRANTED.

I. BACKGROUND

Plaintiff initiated this diversity action against defendants on December 26, 2017, alleging conversion/embezzlement and receipt of money belonging to plaintiff, under California law. (See

¹ This action proceeds before the undersigned pursuant to Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1).

1 generally Complaint, ECF No. 1 [“Compl.”].) Plaintiff Sustainable Pavement Technologies, LLC
2 (“SPT”) is a Texas limited liability company with its principal place of business located in the
3 State of Texas. (Compl. ¶ 1.) Defendant Holiday was an independent contractor doing business
4 with SPT, while residing and working within the Eastern District of California. (Compl. ¶¶ 2, 7.)

5 The complaint alleges that “[u]nbeknownst to SPT . . . Holiday . . . took monies belonging
6 to SPT by way of (a) depositing checks from SPT customers payable to SPT to Holiday’s own
7 deposit account or accounts, (b) obtaining payment from SPT customers of phony invoices for
8 services, (c) improperly receiving cash payments from clients/customers of SPT, and (d)
9 doctored, removed, deleted or changed SPT electronic log sheets to conceal the fact that [he was]
10 stealing from SPT.” (Compl. ¶ 8.) The complaint further alleges that

11 without the knowledge or consent of SPT, Holiday set up a deposit
12 account at Chase under a name identical or substantially similar to
13 SPT. Holiday caused checks from SPT clients/customers payable to
14 SPT to be intercepted and deposited into accounts controlled by
15 Holiday at Chase and BofA, and then disbursed proceeds thereof to
16 or for the benefit of himself. Further, Holiday submitted phony
17 invoices to SPT’s clients/customers and then deposited checks
18 payable to SPT given by SPT customers made on the phony invoices
19 to his deposit accounts at Chase and BofA. Additionally, Holiday ...
20 solicited and obtained cash advances from SPT’s clients/customers
in respect of goods/services provided by SPT which were never paid
over to SPT.

21 After a detailed examination of SPT’s books and records and those
22 of SPT’s clients/customers, SPT has determined that Holiday . . . had
23 embezzled or wrongly received at least \$200,000.00 over the last
24 three (3) years and that the amount taken from SPT could be much
25 greater.

26 (Compl. ¶¶ 9, 10.)

27 The complaint seeks “at least \$200,000.00” in damages, “interest thereon at the rate of
28 10% per annum from the time of taking the funds until judgment is entered,” “treble damages
under California Penal Code § 496,” and the costs of suit. (ECF No. 1 at 4-5.)

29 Holiday was properly served with process on January 15, 2018. (ECF No. 7.) After
30 Holiday failed to appear, the Clerk of Court entered defendant’s default on February 16, 2018.
31 (ECF Nos. 14, 15.) However, on April 23, 2018, Holiday appeared at a scheduling conference
32 and the court gave him thirty days to retain counsel and file a motion to set aside the default.

1 (ECF No. 24.) Holiday filed a motion to set aside the Clerk’s entry of default on May 21, 2018.

2 (ECF No. 28.) The court denied Holiday’s motion on August 2, 2018. (ECF No. 35.)

3 On January 1, 2019, plaintiff moved for default judgment against Holiday. (ECF No. 62.)
4 The motion was denied without prejudice subject to renewal, because the motion failed to address
5 the appropriate legal standards. (ECF No. 69.) Plaintiff renewed its motion for default judgment
6 on March 13, 2019. (ECF No. 70.) After Holiday failed to file a timely opposition, the court
7 vacated the hearing set for April 18, 2019, and took the matter under submission on the papers
8 without oral argument. (ECF No. 72.) Out of an abundance of caution, Holiday was given one
9 additional opportunity to file an opposition no later than April 29, 2019. (Id.) No opposition was
10 filed.

11 Plaintiff argues “that it is entitled to actual damages for embezzlement in the sum of
12 \$304,727.00 which amount should be trebled under California Penal Code § 496(c) for a total
13 damage award of \$914,181.00.” (ECF No. 70 at 5.)

14 II. LEGAL STANDARDS

15 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party
16 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend
17 against the action. See Fed. R. Civ. P. 55(a). However, “[a] defendant’s default does not
18 automatically entitle the plaintiff to a court-ordered judgment.” PepsiCo, Inc. v. Cal. Sec. Cans,
19 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
20 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies
21 within the district court’s sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.
22 1980). In making this determination, the court considers the following factors:

- 23 (1) the possibility of prejudice to the plaintiff, (2) the merits of
24 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4)
25 the sum of money at stake in the action[,] (5) the possibility of a
26 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.

27 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

28 As a general rule, once default is entered, well-pleaded factual allegations in the operative

1 complaint are taken as true, except for those allegations relating to damages. TeleVideo Sys., Inc.
2 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing Geddes v. United Fin.
3 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); accord Fair Housing of Marin v. Combs,
4 285 F.3d 899, 906 (9th Cir. 2002). In addition, although well-pleaded allegations in the
5 complaint are admitted by a defendant’s failure to respond, “necessary facts not contained in the
6 pleadings, and claims which are legally insufficient, are not established by default.” Cripps v.
7 Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine, 572 F.2d
8 1386, 1388 (9th Cir. 1978)); accord DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir.
9 2007) (stating that a defendant does not admit facts that are not well-pled or conclusions of law);
10 Abney v. Alameida, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004) (“[A] default judgment may not
11 be entered on a legally insufficient claim”). A party’s default does not establish the amount of
12 damages. Geddes, 559 F.2d at 560.

13 III. DISCUSSION

14 A. Possibility of Prejudice to Plaintiff

15 The first Eitel factor considers whether the plaintiff would suffer prejudice if default
16 judgment is not entered, and such potential prejudice to the plaintiff weighs in favor of granting a
17 default judgment. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Here, plaintiff would potentially
18 face prejudice if the court did not enter a default judgment. Absent entry of a default judgment,
19 plaintiff would be without another recourse against Holiday. Accordingly, the first Eitel factor
20 favors the entry of a default judgment.

21 B. The Merits of Plaintiff’s Substantive Claims and the Sufficiency of the Complaint

22 The court considers the second and third Eitel factors—the merits of the claims and the
23 sufficiency of the complaint—together because of the relatedness of the two inquiries. The court
24 must consider whether the allegations in the complaint are sufficient to state a claim that supports
25 the relief sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.

26 1. *Conversion*

27 Here, plaintiff asserts a claim of conversion under California law. “Conversion is
28 generally described as the wrongful exercise of dominion over the personal property of another.

1 The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal
2 property; (2) the defendant's disposition of the property in a manner that is inconsistent with the
3 plaintiff's property rights; and (3) resulting damages." Fremont Indem. Co. v. Fremont Gen.
4 Corp., 148 Cal. App. 4th 97, 119 (2007) (internal citation omitted).

5 Plaintiff pled and proved that: "(a) Holiday came into possession of checks intended for
6 and payable to SPT in the total amount of \$304,727.00, (b) that SPT neither knew nor authorized
7 Holiday to take such checks for himself, and (c) that SPT was damaged in the sum of
8 \$304,272.00 by reason of Holiday's wrongful taking of checks payable to and intended for SPT
9 by SPT's customers." (ECF No. 70 at 3.) The complaint sufficiently alleges that Holiday
10 wrongfully exercised dominion over plaintiff's funds without permission, inconsistent with
11 plaintiff's rights. (Compl. ¶¶ 8-10.) While the complaint does include the exact amount of funds
12 that Holiday had wrongfully exercised dominion over, he was put on notice of the amount in
13 question because the complaint seeks *at least* \$200,000.00 in damages. (ECF No. 1 at 4-5.)
14 Plaintiff has since proved the exact amount of ill-gotten funds through several declarations and
15 supporting exhibits. (ECF Nos. 61-2 - 61-9.)

16 2. *Treble Damages*

17 The complaint also asserts that plaintiff is entitled to treble damages pursuant to California
18 Penal Code § 496. (See ECF No. 1 at 4.) Under California law, "[a]ny person who has been
19 injured by [theft] may bring an action for three times the amount of actual damages, if any,
20 sustained by the plaintiff, costs of suit, and reasonable attorney's fees." Cal. Penal Code § 496(c).
21 Here, plaintiff pled and proved plaintiff was injured by Holiday's theft (i.e., conversion) of
22 plaintiff's funds. (Compl. ¶¶ 8-10.)

23 Accordingly, the second and third Eitel factors favor the entry of a default judgment.

24 C. The Sum of Money at Stake in the Action

25 Under the fourth factor cited in Eitel, "the court must consider the amount of money at
26 stake in relation to the seriousness of Defendant's conduct." PepsiCo, Inc., 238 F. Supp. 2d at
27 1176-77; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D.
28 Cal. 2003).

1 In this case, plaintiff seeks a total damage award of \$914,181.00. (ECF No. 70 at 5.)
2 Plaintiff established that Holiday's conduct caused plaintiff \$304,272.00 in actual harm, through
3 declarations and supporting exhibits. (ECF Nos. 61-2 - 61-9.)

4 Moreover, plaintiff established its right to treble damages. Under California Penal Code
5 § 496, "[a] criminal conviction is not a prerequisite to recovery of treble damages." Switzer v.
6 Wood, 35 Cal. App. 5th 116, *5 (Cal. Ct. App. 2019), as modified (May 10, 2019), review filed
7 (May 24, 2019); see also Bell v. Feibush, 212 Cal. App. 4th 1041, 1045 (2013). "All that is
8 required for civil liability to attach under section 496(c), including entitlement to treble damages,
9 is that a "violation" of subdivision (a) or (b) of section 496 is found to have occurred." Switzer,
10 35 Cal. App. 5th 116 at *5. "A violation of section 496(a) may, by its own terms, relate to
11 property that has been 'stolen' or 'that has been obtained in any manner constituting theft or
12 extortion.'" Id. at 6. Here, the complaint and declarations clearly establish that Holiday obtained
13 \$304,272.00 worth of plaintiff's money through conversion, a type of theft. (Compl. ¶¶ 8-10;
14 ECF Nos. 61-2 - 61-9.) Treble damages are, therefore, appropriate under California law.

15 While this is a large sum of money, the amount requested is supported by appropriate
16 documentation and is based upon an appropriate application of California law. Thus, this factor
17 favors the entry of a default judgment.

18 D. The Possibility of a Dispute Concerning Material Facts

19 Because the court may assume the truth of well-pleaded facts in the complaint (except as
20 to damages) following the clerk's entry of default, there is no likelihood that any genuine issue of
21 material fact exists. See, e.g., Elektra Entm't Group Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D.
22 Cal. 2005) ("Because all allegations in a well-pleaded complaint are taken as true after the court
23 clerk enters default judgment, there is no likelihood that any genuine issue of material fact
24 exists"); accord Philip Morris USA, Inc., 219 F.R.D. at 500; PepsiCo, Inc., 238 F. Supp. 2d at
25 1177. As such, the court concludes that the fifth Eitel factor favors a default judgment.

26 E. Whether the Default Was Due to Excusable Neglect

27 In this case, there is no indication in the record that defendant's default was due to
28 excusable neglect. Indeed, the court denied Holiday's motion to set aside the Clerk's entry of

1 default. (ECF No. 35.) Accordingly, this Eitel factor favors the entry of a default judgment.

2 F. The Strong Policy Underlying the Federal Rules of Civil Procedure Favoring
3 Decisions on the Merits

4 “Cases should be decided upon their merits whenever reasonably possible.” Eitel, 782
5 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing
6 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.
7 PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc., 694 F.
8 Supp. 2d 1039, 1061 (N.D. Cal. 2010). Accordingly, although the court is cognizant of the policy
9 in favor of decisions on the merits—and consistent with existing policy would prefer that this
10 case be resolved on the merits—that policy does not, by itself, preclude the entry of default
11 judgment.

12 In sum, after considering and weighing all the Eitel factors, the court concludes that
13 plaintiff is entitled to a default judgment against defendant in the amount of \$914,181.00.

14 IV. CONCLUSION

15 Accordingly, IT IS HEREBY RECOMMENDED that:

- 16 1. Plaintiff’s motion for default judgment (ECF No. 70) be GRANTED.
- 17 2. Judgment be entered in plaintiff’s favor and against defendant Rich Holiday.
- 18 3. Plaintiff be awarded a total damage award of \$914,181.00, which reflects \$304,727.00
19 in actual damages, trebled under California Penal Code § 496(c).
- 20 4. The Clerk of Court be directed to close this case.

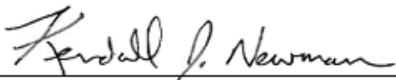
21 In light of these recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
22 discovery, and motion practice in this action are stayed pending resolution of these findings and
23 recommendations. Other than objections to the findings and recommendations or non-frivolous
24 motions for emergency relief, the court will not entertain or respond to any pleadings or motions
25 until the findings and recommendations are resolved.

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
28 days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served on all parties and filed with the court within fourteen (14) days after service of the
4 objections. The parties are advised that failure to file objections within the specified time may
5 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th
6 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

7 IT IS SO ORDERED AND RECOMMENDED.

8 Dated: June 14, 2019

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11 KENDALL J. NEWMAN
12 UNITED STATES MAGISTRATE JUDGE
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16 sustainable pavement.2687.F&R default
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