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

RESULTS BYIQ, LLC,)	Case No. C 11-0550 SC
)	
Plaintiff,)	ORDER DENYING DEFENDANTS'
)	MOTION TO DISMISS AND
v.)	DENYING PLAINTIFF'S
)	APPLICATION FOR DEFAULT
NETCAPITAL.COM, LLC; NETWIRE,)	<u>JUDGMENT</u>
INC.; NETMOVIES, INC.)	
)	
Defendants.)	
)	

I. INTRODUCTION

Plaintiff Results ByIQ ("Plaintiff") has applied for default judgment against Defendants NetCapital.com, LLC ("NetCapital.com"), NetMovies, Inc. ("NetMovies"), and NetWire, Inc. ("Netwire") (collectively, "Defendants"). ECF No. 17 ("App. for Default J."). Defendants have not filed an Opposition to Plaintiff's application but have moved to quash Plaintiff's service of summons and to dismiss the Complaint. ECF No. 18 ("Mot. to Dismiss"). Plaintiff filed an Opposition to Defendants' Motion to Dismiss. ECF No. 20 ("Opp'n"). Defendants have not filed a Reply. For the reasons set forth below, the Court DENIES Defendants' Motion to Dismiss. The Court also DENIES Plaintiff's Application for Default Judgment without prejudice.

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1 **II. BACKGROUND**

2 Plaintiff filed a Complaint for wire fraud against Defendants
3 on February 7, 2011 and a First Amended Complaint on February 10,
4 2011. ECF Nos. 1 ("Compl."), 4 ("FAC"). The FAC alleges that
5 Plaintiff is a California corporation with its principal place of
6 business in California and that Defendants are incorporated in
7 Delaware with a principal place of business at 165 Nantasket Beach
8 Avenue, Hull, Massachusetts, 02045 ("165 Nantasket Beach Ave.").
9 FAC ¶¶ 4, 7-9. All three of the Defendants appear to be
10 affiliated. See id. Ex. B ("Consulting Agreement") ¶ 1. According
11 to the FAC, the Defendants are the alter-egos of John Fanning
12 ("Fanning").¹ Id. ¶ 13. Fanning has declared that he is a
13 founder, manager, and officer of Defendants. ECF 18-1 ("Fanning
14 Decl.") ¶ 1.

15 Plaintiff alleges that, pursuant to its Consulting Agreement
16 with Defendants and at the insistence of Fanning, Plaintiff
17 provided Defendants with hundreds of hours of services valued at
18 tens of thousands of dollars. Id. ¶ 21, 23-24. According to the
19 Consulting Agreement, which was signed by Defendants on October 27,
20 2006, Defendants' address is 165 Nantasket Beach Ave. Id. Ex. A
21 ("Consulting Agreement"). The Consulting Agreement also provides:

22 All notices under this Agreement shall be in writing,
23 and shall be deemed given when personally delivered,
24 sent by confirmed telecopy or other electronic means, or
25 ten (10) days after being sent by prepaid certified or
26 registered U.S. mail to the address of the party to be
27 noticed as set forth herein or such other address as
28 such party last provided to the other by written notice.

¹ Fanning was originally named as a Defendant in the Complaint and FAC. Plaintiff voluntarily dismissed its claims against Fanning without prejudice on March 20, 2011. ECF. No. 10.

1 Id. ¶ 7.

2 Plaintiff alleges that Defendants failed to compensate
3 Plaintiff for services rendered under the Consulting Agreement. To
4 recover, Plaintiff brought claims for violation of the Racketeer
5 Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§
6 1961 et seq., fraud in the inducement, fraudulent conveyance,
7 breach of contract, account stated, and open book account against
8 Defendants. Id. ¶¶ 46-84.

9 Plaintiff, through a licensed process server, served a copy of
10 the Summons, Complaint, and FAC on Tom Carmody ("Carmody") at 165
11 Nantasket Ave. on February 14, 2011. ECF No. 8 ("Proof of
12 Service"). The process server declares that Carmody "was
13 identified as an officer qualified by law to accept service on
14 behalf of [Defendants]." Id. The process server also declares
15 that 165 Nantasket Ave. is the principal office of NetWire and
16 NetMovies in Massachusetts, as registered with the Massachusetts
17 Secretary of State. Id.

18 After Defendants failed to answer or otherwise respond to this
19 action, the Clerk of the Court entered default on March 17, 2011.
20 ECF No. 9 ("Entry of Default"). On June 20, 2011, Plaintiff moved
21 for default judgment in the amount of \$259,131.05. App. for
22 Default J. at 2. Approximately two weeks later, Defendants moved
23 to dismiss for lack of proper service pursuant to Rule 12(b)(5) of
24 the Federal Rules of Civil Procedure. Mot. to Dismiss at 1-2.

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1 **III. LEGAL STANDARD**

2 **A. Rule 12(b)(5)**

3 Under Rule 12(b)(5) of the Federal Rules of Civil Procedure, a
4 defendant may move for dismissal due to insufficient service of
5 process. See Fed. R. Civ. P. 12(b)(5). "A federal court does not
6 have jurisdiction over a defendant unless the defendant has been
7 served properly under Fed. R. Civ. P. 4 [W]ithout
8 substantial compliance with Rule 4 'neither actual notice nor
9 simply naming the defendant in the complaint will provide personal
10 jurisdiction.'" Direct Mail Specialists, Inc. v. Eclat
11 Computerized Tech., 840 F.2d 685, 688 (9th Cir. 1988) (citations
12 omitted). "Once service is challenged, plaintiff[] bear[s] the
13 burden of establishing that service was valid under Rule 4."
14 Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). Factual
15 issues concerning service of process may be determined by the
16 district court through affidavits, depositions, or oral testimony.
17 United States v. Coker, 09-CV-02012-JAM-DAD, 2010 U.S. Dist. LEXIS
18 117637, at *9 (E.D. Cal. Oct. 21, 2010). If the plaintiff is
19 unable to satisfy its burden of demonstrating effective service,
20 the court has discretion to either dismiss or retain the action.
21 See Stevens v. Sec. Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir.
22 1976).

23 **B. Default Judgment**

24 After entry of a default, the Court may enter a default
25 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
26 so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092
27 (9th Cir. 1980), is guided by several factors. As a preliminary
28 matter, the Court must "assess the adequacy of the service of

1 process on the party against whom default judgment is requested."
2 Bd. of Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. C-00-
3 0395 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2,
4 2001). If the Court determines that service was sufficient, it
5 should consider whether the following factors support the entry of
6 default judgment: (1) the possibility of prejudice to the
7 plaintiff; (2) the merits of plaintiff's substantive claim; (3) the
8 sufficiency of the complaint; (4) the sum of money at stake in the
9 action; (5) the possibility of a dispute concerning material facts;
10 (6) whether the default was due to excusable neglect; and (7) the
11 strong policy underlying the Federal Rules of Civil Procedure
12 favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470,
13 1471-72 (9th Cir. 1986). "The general rule of law is that upon
14 default the factual allegations of the complaint, except those
15 relating to the amount of damages, will be taken as true." Geddes
16 v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977). However,
17 "necessary facts not contained in the pleadings, and claims which
18 are legally insufficient, are not established by default." Cripps
19 v. Life Ins. Co., 980 F.2d 1261, 1267 (9th Cir. 1992).

20

21 **IV. DISCUSSION**

22 **A. Defendants' Motion to Dismiss**

23 Defendants move to dismiss the FAC on the grounds that
24 Plaintiff failed to effect proper service. Mot. to Dismiss at 2.
25 According to the Proof of Service, Plaintiff served a copy of the
26 Summons and Complaint on Carmody at 165 Nantasket Beach Ave.
27 However, Fanning declares that Defendants have not done business at
28 165 Nantasket Beach Ave. since 2008 and that Carmody "is not an

1 officer, director, manager or employee of any of the Defendants."
2 Fanning Dec. ¶ 5. Fanning also declares that: Defendants' agent
3 for service of process, registered with the Delaware Secretary of
4 State, is Rick Bell ("Bell"); Bell's business address is in
5 Delaware; all of Defendants are Delaware corporations with
6 principal places of business in Delaware; none of Defendants are
7 registered as foreign corporations to do business in Massachusetts;
8 and NetMovies and NetWire allowed their authorizations to do
9 business in Massachusetts to expire in 2008. Id. ¶¶ 2-4.

10 In Opposition, Plaintiff offers the declaration of Paul
11 Charlton ("Charlton"), the manager of Plaintiff. ECF 20-1
12 ("Charlton Opp'n Decl.") ¶ 3. Attached to the declaration are a
13 number of documents Charlton retrieved from the Internet on July
14 18, 2011, indicating that Defendants' business address is 165
15 Nantasket Beach Ave., including: internet domain records for
16 NetCapital.com, NetWire, and NetMovies; public records from the
17 Massachusetts Secretary of State for NetMovies and NetWire;
18 multiple documents from www.netcapital.com authored after January
19 2008; and a "contact page" for www.netwire.com. Id. ¶ 4, Exs. A-I.

20 Charlton declares that Defendants never provided Plaintiff
21 with notice of an address different from the one provided in the
22 Consulting Agreement -- 165 Nantasket Beach Ave. -- and that
23 Carmody is known to him as the Chief Marketing Officer of
24 NetCapital.com. Id. ¶¶ 11, 14. Charlton also declares that Stuart
25 Smilowitz ("Smilowitz"), who allegedly served Defendants at 165
26 Nantasket Beach Ave. on February 15, 2011, told him that Carmody
27 orally accepted service on behalf of Defendants. Smilowitz also
28 told Charlton that 165 Nantasket Beach Ave. had a sign naming

1 NetCapital.com as a tenant. Additionally, Charlton declares that,
2 after a diligent search of the public records, he determined that
3 neither NetMovies nor NetWire is currently registered to do
4 business in the state of Delaware.² Id. ¶ 15.

5 Defendants did not file a Reply in support of their Motion to
6 Dismiss or otherwise challenge Plaintiff's Opposition or the facts
7 set forth in Charlton's Opposition Declaration.

8 Under Rule 4(h) of the Federal Rules of Civil Procedure, a
9 plaintiff may serve a corporate defendant "by delivering a copy of
10 the summons and of the complaint to an officer, a managing or
11 general agent, or any other agent authorized by appointment or by
12 law to receive service of process." Fed. R. Civ. P. 4(h)(1)(B).
13 Alternatively, a plaintiff may follow the state law for service of
14 process in the state where the district court is located or where
15 service is made. Fed. R. Civ. P. 4(h)(1)(A). In Massachusetts, a
16 corporate defendant may be served "by delivering a copy of the
17 summons and of the complaint to an officer, to a managing or
18 general agent, or to the person in charge of the business at the
19 principal place of business thereof within the Commonwealth, if
20 any; or by delivering such copies to any other agent authorized by
21 appointment or by law to receive service of process." Mass. R.
22 Civ. P. 4(d)(2).

23 Plaintiff has met its burden of demonstrating effective
24 service. The Proof of Service shows that Smilowitz served the
25 Complaint, FAC, and Summons on Carmody at 165 Nantasket Beach Ave.

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27 ² Charlton also declares that the Delaware address offered by
28 Defendants is actually the address of the agent for service of
process for NetCapital.com and that none of the Defendants have
employees who work at the address. Charlton Opp'n Decl. ¶ 12.

1 approximately one week after the action was filed. Proof of
2 Service at 1-2. Smilowitz declares that Carmody was "identified as
3 an officer qualified by law to accept service on behalf of
4 [Defendants]." Id. at 2. The 2006 Consulting Agreement, which was
5 attached to the FAC and has not been challenged by Defendants,
6 identifies Defendants' address as 165 Nantasket Beach Ave. and
7 provides that all notices under the Consulting Agreement shall be
8 delivered to that address. Charlton declares that Defendants never
9 provided Plaintiff with an address different from the one in the
10 Consulting Agreement. Charlton Opp'n Decl. ¶ 11. Further,
11 Plaintiff has offered a variety of documents indicating that
12 Defendants' address remains 165 Nantasket Beach Ave., including
13 public records from the Massachusetts Secretary of State. Charlton
14 Decl. Exs. A-I.

15 In light of the evidence offered by Plaintiff, the Court finds
16 Defendants' Motion to Dismiss and Fanning's declaration
17 unpersuasive. Fanning declares that Defendants and their agent for
18 service of process are located in Delaware and that Defendants have
19 not done business at 165 Nantasket Beach Ave. since 2008. Fanning
20 Decl. ¶¶ 2-4. However, Fanning and Defendants do not dispute that
21 their address is identified as 165 Nantasket Beach Ave. in the
22 Consulting Agreement. They do not dispute that they never notified
23 Plaintiff of a change of address. Nor do they otherwise challenge
24 any of the evidence offered by Plaintiff showing that Defendants'
25 address remains 165 Nantasket Beach Ave. Fanning also declares
26 that Carmody "is not an officer, director, manager or employee of
27 Defendants." Id. ¶ 5. However, Fanning is silent as to Carmody's
28 position with Defendants at the time of service.

1 For these reasons, the Court finds that Plaintiff served
2 Defendants in accordance with Rule 4 of the Federal Rules of Civil
3 Procedure. Accordingly, the Court DENIES Defendants' Motion to
4 Dismiss.

5 **B. Plaintiff's Application for Default Judgment**

6 The Court finds default judgment is inappropriate because
7 Plaintiff has failed to provide sufficient evidence of its damages.
8 Upon default, the factual allegations in the complaint relating to
9 damages are not taken as true. Geddes, 559 F.2d at 560. "The
10 plaintiff is required to provide evidence of its damages, and the
11 damages sought must not be different in kind or amount from those
12 set forth in the complaint." Amini Innovation Corp. v. KTY Int'l
13 Mktg., 768 F. Supp. 2d 1049, 1054 (C.D. Cal. 2011). Courts
14 generally require the plaintiff to submit admissible evidence to
15 support damages calculations. Id. "If the facts necessary to
16 determine damages are not contained in the complaint, or are
17 legally insufficient, they will not be established by default."
18 Philip Morris U.S.A. Inc. v. Castworld Prods., 219 F.R.D. 494, 498
19 (C.D. Cal. 2003).

20 In the FAC, Plaintiff seeks judgment against Defendants for
21 \$163,800 for its first cause of action for RICO violations (\$54,000
22 in compensatory damages and \$109,200 in exemplary and punitive
23 damages); \$245,700 for its second cause of action for fraud in the
24 inducement (\$81,900 in compensatory damages and \$163,800 in
25 exemplary and punitive damages), and \$54,600 in compensatory
26 damages for its third, fourth, fifth, and sixth causes of action.
27 FAC at 12-13. Plaintiff also seeks attorney's fees, costs, and
28 post-judgment interest. Id. It is unclear how Plaintiff arrived

1 at its different compensatory damages figures. According to
2 invoices attached to the FAC, Plaintiff provided Defendants with
3 \$41,550 in services at a rate of \$150 per hour. FAC ¶ 23, Ex. D.

4 In its Application for Default Judgment, Plaintiff seeks total
5 damages of \$245,700. App. for Default J. ¶ 8. In support of its
6 damages figures, Plaintiff submits a declaration by Charlton
7 stating that Defendants "owe for 364 hours of services rendered at
8 the market rate of \$225/hour [as opposed to the \$150/hour rate
9 identified in the invoices attached to the FAC], for a principal
10 amount of \$81,900 that remains unpaid since at least January 1,
11 2008."³ ECF 17-2 ("Charlton Default J. Decl.") ¶ 7. Plaintiff
12 provides no other documentary evidence supporting its damages
13 figures and no explanation for the inconsistency between the hourly
14 rates identified in Charlton's declaration and the invoices
15 attached to the FAC. Plaintiff also seeks costs of \$781.05 and
16 "reasonable attorney's fees" of \$12,650. App. for Default J. ¶¶ 5-
17 6. Again, the only support provided for these figures is the
18 declaration of Charlton, which provides no details as to how these
19 figures were determined. See Charlton Default J. Decl. ¶¶ 9-10.
20 Plaintiff does not specify the hourly rates of its attorneys,
21 average local hourly rates for attorneys, or the number of legal
22 hours billed, or provide an itemized list of costs.

23 The Court finds that Plaintiff has submitted inadequate
24 evidence to support entry of default judgment in the requested

25 ³ Plaintiff claims it is entitled to treble damages under 18 U.S.C.
26 § 1964(c), App. for Default J. ¶ 7, which provides that "[a]ny
27 person injured in his business or property by reason of a violation
28 of section 1962 . . . shall recover threefold the damages he
sustains and the cost of the suit, including a reasonable
attorney's fee."

1 amount of \$259,131.05. The evidence submitted by Plaintiff does
2 not provide sufficient detail for the Court to determine the amount
3 owing under the Consulting Agreement or reasonable attorney's fees
4 and costs. The Court is also troubled by the inconsistency between
5 the hourly rate for Plaintiff's services identified in Charlton's
6 declaration and the invoices attached to the FAC. Accordingly,
7 Plaintiff's Application for Default Judgment is denied without
8 prejudice.

9
10 **V. CONCLUSION**

11 For the reasons stated above, the Court DENIES Defendants
12 NetCapital.com LLC, NetMovies Incorporated, and NetWire
13 Incorporated's Motion to Dismiss. Further, the Court DENIES
14 Plaintiff Results ByIQ's Motion for Default Judgment without
15 prejudice.

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17 IT IS SO ORDERED.

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19 Dated: October 18, 2011

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UNITED STATES DISTRICT JUDGE

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