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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CLAUDINE OSGOOD, an individual,
and ANTON EWING, an individual,

Plaintiff,

v.

MAIN STREET MARKETING, LLC,
a Utah limited liability company;
JERROD ROBKER, an individual aka
Jerrod McAllister; Does 1-100, ABC
Corporations 1-100, XYZ, LLC's 1-
100,,

Defendants.

CASE NO. 16cv2415-GPC(BGS)

**ORDER GRANTING PLAINTIFF
EWING'S MOTION TO STRIKE
DEFENDANTS' ANSWER AND
GRANTING PLAINTIFFS EWING
AND OSGOOD'S MOTION FOR
ENTRY OF DEFAULT**

[Dkt. Nos. 64.]

Before the Court is Plaintiff Anton Ewing's motion to strike Defendant's Answer. (Dkt. No. 64-3.) Plaintiffs Ewing and Osgood also filed a motion for default, or in the alternative, motion for summary judgment. (Dkt. No. 64.) No opposition has been filed. On July 12, 2017, Plaintiff Ewing filed a declaration stating that Defendants have failed to file an opposition. (Dkt. No. 66.) Based on the reasoning below, the Court GRANTS Plaintiff Ewing's motion to strike Defendant's answer and GRANTS Plaintiffs Ewing and Osgood's motion for entry of default.

Background

On September 26, 2016, the case was removed from state court. (Dkt. No. 1.) On October 4, 2016, Plaintiffs Anton Ewing and Claudine Osgood, proceeding *pro se*,

1 filed a first amended complaint alleging three causes of action for violations under the
2 California Invasion of Privacy Act (“CIPA”) pursuant to California Penal Code section
3 630 *et. seq.*; the Racketeer Influenced and Corrupt Organizations Act (“RICO”),
4 pursuant to 18 U.S.C. §§ 1962(c), and (d)); and the Telephone Consumer Protection
5 Act (“TCPA”) pursuant to 47 U.S.C. § 227. (Dkt. No. 11, FAC). After the Court
6 denied Plaintiff Ewing’s motion to remand and granted in part and denied in part
7 Defendants’ motion to dismiss and motion to strike, Plaintiffs filed a second amended
8 complaint on January 17, 2017 against Defendants Main Street Marketing, LLC and
9 Jerrod Robker aka Jerrod McAllister (“McAllister”). (Dkt. No. 36.) An answer was
10 filed by both Defendants on January 31, 2017. (Dkt. No. 37.) On March 27, 2017, the
11 Court granted defense counsel’s motion to withdraw as counsel. (Dkt. No. 51.) In its
12 order, the Court directed Main Street Marketing, LLC to obtain substitute counsel
13 within thirty days and have counsel file a notice of appearance. (*Id.*) The Court also
14 directed Defendant McAllister to notify the Court of his current mailing address. (*Id.*)
15 Four months have passed and both Defendants have failed to comply. The Court noted
16 that Main Street Marketing, LLC may be subject to default proceedings if it failed to
17 obtain new counsel. (*Id.* at 3.)

18 Plaintiff Ewing now moves to strike both Defendants’ answer and seeks and
19 entry of default. Both Plaintiffs also filed a motion for entry of default, or in the
20 alternative, a motion for summary judgment. Defendants have not filed an opposition.

21 **A. Motion to Strike Answer**

22 Ewing moves to strike the Answer of Defendants since both have failed to
23 defend the action and failed to comply with Court orders and seeks an entry of default
24 pursuant to Federal Rule of Civil Procedure (“Rule”) 55(a)¹.

25 Obtaining default judgment is a two step procedure. Rule 55 provides that
26 “[w]hen a party against whom a judgment for affirmative relief is sought has failed to

27
28 ¹Ewing alleges he seeks default under Rule 55(b), (Dkt. No. 64-3 at 5); however,
the appropriate section is Rule 55(a). Since default has not yet been entered, Plaintiffs
cannot seek default judgment. See Fed. R. Civ. P. 55.

1 plead or otherwise defend . . . the clerk must enter the party’s default.” Fed. R. Civ.
2 P. 55(a). Second, after default is properly entered, a party seeking relief other than a
3 sum certain must apply to the Court for a default judgment. Fed. R. Civ. P. 55(b).

4 Since Defendants filed an Answer, the Court cannot enter default until the
5 Answer is stricken. An answer may be stricken if defendants fail to defend themselves.
6 See Microsoft Corp. v. Marturano, No. 06cv1747 OWW GSA, 2009 WL 1530040, at
7 *2, 6 (E.D. Cal. May 27, 2009) (striking answer against defendant who persistently
8 failed to participate in the action); Galtieri -Carlson v. Victoria M. Morton Enters.,
9 08cv1777 FCD-KJN-PS, 2010 WL 3386473, at *3 (E.D. Cal. 2010). In addition, when
10 a corporation fails to retain counsel to represent it in an action, its answer may be
11 stricken and a default judgment entered against it. Employee Painters’ Trust v. Ethan
12 Enters., Inc., 480 F.3d 993 (9th Cir. 2007). Procedurally, courts have stricken the
13 answers of corporate defendants who have failed to defend themselves, directed entry
14 of default, and then allowed the plaintiff to move for default judgment. See Rojas v.
15 Hawgs Seafood Bar, Inc., No. C08–03819 JF (PVT), 2009 WL 1255538, at *1 (N.D.
16 Cal. May 5, 2009) (“When a corporation fails to retain counsel to represent it in an
17 action, its answer may be stricken and a default judgment entered against it.”); Oracle
18 America, Inc. v. Serv. Key, LLC, No. C12-790SBA, 2013 WL 1195620, at *2-3 (N.D.
19 Cal. Mar. 22, 2013) (ordering that if substitute counsel is not found, the court will
20 strike answer and direct entry of default, and then plaintiff may file a motion for default
21 judgment).

22 Here, Main Street Marketing, LLC failed to retain counsel as directed by the
23 Court. Furthermore, Jerrod McAllister has failed to comply with the Court’s direction
24 to notify the Court of its address, has failed to file an opposition to Ewing’s motion for
25 default judgment; motion for leave to file an amended complaint and motion for
26 summary judgment; and failed to file an opposition to the instant motion. McAllister
27 has continuously failed to defend this action and it does not appear that he will be
28

1 doing so.² Ewing notes that Defendants are also defendants in another TCPA case in
2 this district, Melingonis v. Main Streat Marketing, LLC & Jerrod Robker, 16cv2292-
3 MMA (JLB). In that case, entry of default was entered on July 17, 2017 since no
4 answer had been filed in the case. (Id., Dkt. No. 15.)

5 Accordingly, because Defendants have failed to defend themselves in this action,
6 the Court GRANTS Plaintiff Ewing's motion to strike the Answer of Main Streat
7 Marketing, LLC and McAllister.

8 Ewing and Osgood also move for entry of default as to both Defendants.
9 Because Defendants' answer has been stricken, the Court GRANTS Ewing and
10 Osgood's motion for default pursuant to Rule 55(a).³

11 Conclusion

12 Based on the above, the Court GRANTS Plaintiff Ewing's motion to strike
13 Defendants' Answer and GRANTS Plaintiffs Ewing and Osgood's motion for entry of
14 default pursuant to Rule 55(a). The Court DIRECTS the Clerk of Court to enter default
15 as to Defendants Main Streat Marketing, LLC and Jerrod Robker. The hearing date
16 set for August 4, 2017 shall be vacated.

17 IT IS SO ORDERED.

18
19 DATED: July 27, 2017

20 
21 HON. GONZALO P. CURIEL
22 United States District Judge
23
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26 ²While not verified, Ewing claims that Jerrod McAllister was recently sentenced
27 to a term of incarceration in Utah after pleading guilty to three felony crimes. (Dkt.
28 No. 66 at 1.)

³Since the Court enters default as to both Defendants, the Court need not address
Plaintiffs' alternative motion for summary judgment.

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