

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

3	ELTTAC, INC.,)	
4)	Case No.: 2:13-cv-02116-GMN-NJK
	Plaintiff,)	
5	vs.)	
)	
6	BOUARI INTERNATIONAL)	
7	FRANCHISE, LLC, et al.,)	
)	
8	Defendants.)	
9)	

Pending before the Court is the Second Motion for Default Judgment, (ECF No. 47), filed by Plaintiff Elttac, Inc. (“Plaintiff”). For the reasons discusses below, the Court construes Plaintiff’s filing as a Motion for Clerk’s Entry of Default and refers the Motion to the Clerk of Court.

I. BACKGROUND

This action arises from allegations that Defendants Bouari International Franchise, LLC (“BIF”) and Carol Ann Chaney (“Chaney”) (collectively “Defendants”) induced Plaintiff into purchasing a franchise, property, and services based upon fraudulent misrepresentations and material omissions of fact. (See Am. Compl. ¶¶ 2–3, 7, ECF No. 7). Initially filed in Texas state Court, (ECF No. 1), Defendants removed the case to the United States District Court for the Eastern District of Texas and the parties subsequently stipulated to transferring the action to this Court. (See Order, ECF No. 16).

Shortly after the case was transferred here, Defendants’ counsel moved to withdraw from representation, (see ECF No. 21). Magistrate Judge Koppe ordered a hearing on the motion and expressly required that Chaney and a representative of BIF be present. (See Order, ECF No. 23). Despite receiving notice of the hearing, Chaney and BIF failed to attend. (See Mins. of

1 Proceedings, ECF No. 26). Judge Koppe granted Defendants' counsels' motion to withdraw and
2 gave Chaney and BIF twenty-one days to either notify the Court that they intend to proceed pro
3 se or have new counsel file a notice of appearance. (Id.).

4 Upon Defendants' failure to respond, Judge Koppe ordered the parties to show cause
5 "why the case should not be dismissed or default judgment be entered," under Federal Rule of
6 Civil Procedure 16(f) and 41(b). (See Order to Show Cause 1:19–22, ECF No. 33). Defendants
7 again failed to respond and Judge Koppe issued a report and recommendation in which she
8 recommended that default judgment be entered against Chaney and BIF. (R. & R. 2:4–14, ECF
9 No. 38). Defendants failed to file any objection and this Court accordingly adopted Judge
10 Koppe's report and recommendation in full. (See Order, ECF No. 39). The Clerk of Court
11 entered default judgment against Defendants on October 7, 2014. (See Clerk's J., ECF No. 40).

12 On December 11, 2015, Plaintiff filed a motion for default judgment ("First Motion for
13 Default Judgment") requesting that judgment be entered against Defendants for an array of fees
14 and costs. (Mot. for Default J. ¶ 13, ECF No. 41). These include "paid investments and franchise
15 fees of \$135,000.00, plus \$125,000.00 branding costs, \$225,000.00 in re-branding costs,
16 \$100,000.00 in development costs and attorney fees, \$450,000.00 for 3 years of lost income for a
17 total of \$1,035,000.00, plus an amount for exemplary and punitive damages, other amounts
18 deemed appropriate by the court, plus costs of court and interest." (Id.). Because the Court had
19 already ordered that default judgment be entered, Judge Koppe denied Plaintiff's motion as moot.
20 (See Order, ECF No. 43).

21 Plaintiff subsequently filed the instant Motion for Default Judgment ("Second Motion for
22 Default Judgment") on April 30, 2016. (See Mot. for Default J., ECF No. 47).

23 **II. LEGAL STANDARD**

24 Obtaining a default judgment is a two-step process governed by Rule 55 of the Federal
25 Rules of Civil Procedure. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First, the

1 moving party must seek an entry of default from the clerk of court. Fed. R. Civ. P. 55(a). Then,
2 after the clerk of court enters default, a party must separately seek entry of default judgment from
3 the court in accordance with Rule 55(b). Upon entry of a clerk’s default, the court takes the
4 factual allegations in the complaint as true. Nonetheless, while the clerk’s entry of default is a
5 prerequisite to an entry of default judgment, “a plaintiff who obtains an entry of default is not
6 entitled to default judgment as a matter of right.” Warner Bros. Entm’t Inc. v. Caridi, 346 F.
7 Supp. 2d 1068, 1071 (C.D. Cal. 2004) (citation omitted). Instead, whether to grant a default
8 judgment is in the court’s discretion. Id.

9 The Ninth Circuit has identified several relevant factors in determining whether to grant
10 default judgment including: (1) the possibility of prejudice to the plaintiff; (2) the merits of the
11 plaintiff’s substantive claims; (3) the sufficiency of the complaint; (4) the sum of money at stake
12 in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default
13 was due to the excusable neglect; and (7) the strong public policy favoring decisions on the
14 merits. Eitel, 782 F.2d at 1471–72.

15 **III. DISCUSSION**

16 Here, Plaintiff’s Motion is premature because Plaintiff has not moved for clerk’s entry of
17 default. It is well established that entry of default is a prerequisite to the entry of default
18 judgment. See Fed. R. Civ. P. 55(a); VonGrabe v. Sprint PCS, 312 F. Supp. 2d 1313, 1318 (S.D.
19 Cal. 2004) (“[A] plain reading of Rule 55 demonstrates that entry of default by the clerk is a
20 prerequisite to an entry of default judgment.”); Roman v. Travelers Home & Marine Ins. Co., No.
21 CV-17-08151-PCT-JAT, 2017 WL 3978706, at *3 (D. Ariz. Sept. 11, 2017) (“Before a party can
22 obtain a default judgment from the Court under Federal Rule 55(b), the Clerk of the Court must
23 enter default as provided in Federal Rule 55(a).”) (citing 10A, Charles A. Wright, Arthur R.
24 Miller & Mary K. Kane, Federal Practice & Procedure § 2682, at 10–11 (4th ed. 2016)).

1 However, in light of the procedural posture of this case, and in an effort to ensure a just
2 and speedy resolution of this matter, the Court will construe Plaintiff's instant Motion as a
3 Motion for Clerk's Entry of Default. The Court will refer the First Motion for Default Judgment,
4 (ECF No. 41), and Second Motion for Default Judgment, (ECF No. 47), to the Clerk of Court. In
5 the event the Clerk of Court enters default, Plaintiff may file a renewed motion for default
6 judgment.

7 **IV. CONCLUSION**

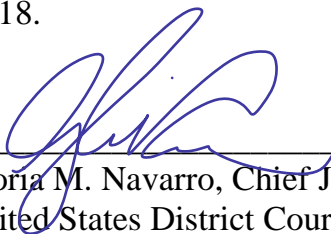
8 **IT IS HEREBY ORDERED** that Plaintiff's First Motion for Default Judgment, (ECF
9 No. 41), as well Plaintiff's Second Motion for Default Judgment, (ECF No. 47), are construed
10 together as a Motion for Clerk's Entry of Default under Federal Rule of Civil Procedure 55(a)
11 and is referred to the Clerk of Court.

12 **IT IS FURTHER ORDERED** that in the event the Clerk of Court enters default, the
13 Clerk of Court shall mail a copy of this Order and the entry of default to Defendants at their
14 addresses listed on the docket.

15 **IT IS FURTHER ORDERED** that the Court's Order adopting Judge Koppe's Report and
16 Recommendation, (ECF No. 39), and the Clerk's Entry of Default Judgment, (ECF No. 40), are
17 hereby **VACATED**.

18 **DATED** this 26 day of November, 2018.

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Gloria M. Navarro, Chief Judge
United States District Court