**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| BROADCAST MUSIC, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>JEFFREY ALAN HATHCOCK individually and d/b/a ROCK N' HORSE SALOON; and JANET HAYRE, individually and d/b/a ROCK N' HORSE SALOON,<br><br>Defendants. | Case No.: 1:17-cv-00188-DAD-BAM<br><br>**FINDINGS AND RECOMMENDATIONS REGARDING PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT**<br><br>(ECF No. 12) |

On June 21, 2017, Plaintiffs Broadcast Music, Inc., Welsh Witch Music, Coral Reefer Music, Sony/ATV Songs LLC, Unichappell Music Inc., Sloopy II Inc. d/b/a Sloopy II Music, Bocephus Music, Inc., Warner-Tamerlane Publishing Corp., Big Yellow Dog LLC d/b/a International Dog Music and Scamporee Music ("Plaintiffs") filed a motion for default judgment against Defendants Jeffrey Alan Hathcock, individually and d/b/a Rock N' Horse Saloon and Janet Hayre, individually and d/b/a/ Rock N' Horse Saloon ("Defendants"). No opposition was filed.

The motion was referred to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. The Court deemed the matter suitable for decision without oral argument pursuant to Local Rule 230(g), and vacated the hearing scheduled for August 25, 2017. Having considered the moving papers and the Court's file, the Court RECOMMENDS that Plaintiffs' motion for default judgment be GRANTED.

## I. BACKGROUND

Plaintiffs allege five claims of willful copyright infringement arising from Defendants' unauthorized public performance of the following musical compositions: (1) Dreams; (2) Margaritaville; (3) Piece of My Heart; (4) Blues Man; and (5) Love Done Gone. Plaintiffs allege that these musical compositions were performed without authorization at Defendants' business establishment, known as Rock N' Horse Saloon, on July 12, 2016. Doc. 1, Complaint ¶¶ 20-21 and Schedule.

According to Plaintiffs' moving papers, Plaintiff Broadcast Music, Inc. ("BMI") is a "performing rights society" which licenses the right to publicly perform a repertoire of nearly 12 million copyrighted musical compositions works on behalf of the copyright owners of these works. The remaining Plaintiffs in this action are the copyright owners of the five individual compositions identified above from whom BMI has acquired the right to bring this action. Doc. 12-1, Declaration of John Ellwood ("Ellwood Decl."), ¶¶ 2, 5.

BMI's main business is to license the right to publicly perform any of the works in BMI's repertoire by means of "blanket license agreements." Id. at ¶¶ 2-3. These licenses are available to music users, such as the Defendants, and permit music users to perform any of the nearly 12 million musical compositions in the BMI repertoire. Id. at ¶ 5.

BMI operates as a non-profit-making performing rights organization. Id. at ¶ 3. BMI distributes all of the money it collects in license fees from licensees, such as restaurants, hotels and nightclubs, as royalties to its affiliated publishers and composers, after the deduction of operating expenses and reasonable reserves. Id.

Between July 2015 and August 2016, BMI repeatedly informed the Defendants of the need to obtain permission for public performances of copyrighted music. Doc. 12-4, Declaration of Brian Mullaney ("Mullaney Decl.") at ¶¶ 3-8. BMI offered to enter into a blanket license agreement with the Defendants, but Defendants failed to do so. Id. at ¶¶ 3, 8. BMI's records indicate that BMI licensing personnel telephoned the Defendants on twenty-eight (28) occasions and sent more than twenty-five (25) letters. Id. at ¶¶ 3, 4, 5, 7, 12, 13.

Plaintiffs filed the underlying action on February 9, 2017. Doc. 1. Plaintiffs personally served Defendant Jeffrey Alan Hathcock with the summons and complaint on February 16, 2017, and served Defendant Janet Hayre via substituted service on February 18, 2017. Docs. 4, 5, Proofs of Service. Defendants did not respond to the complaint, and on April 3, 2017, Plaintiffs filed a request for entry of default. Doc. 6. The following day, on April 4, 2017, the Clerk of the Court entered default against Defendants. Docs. 7, 8. Thereafter, on June 21, 2017, Plaintiffs filed the instant motion for default judgment. Doc. 12.

## II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 55(b)(2), a plaintiff can apply to the court for a default judgment against a defendant that has failed to plead or otherwise defend against the action. Fed. R. Civ. P. 55(b)(2). "Upon default, the well-pleaded allegations of a complaint relating to liability are taken as true." *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983); *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a 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. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal. 2002); *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

## III. ANALYSIS

Applying the factors articulated by the Ninth Circuit in *Eitel*, the Court finds these factors weigh in favor of granting Plaintiffs' motion for default judgment.

### A. Possibility of Prejudice to Plaintiffs

The first factor considers whether a plaintiff would suffer prejudice if default judgment is not entered. *See Pepsico, Inc.*, 238 F.Supp.2d at 1177. Generally, where default has been entered against a defendant, a plaintiff has no other means by which to recover damages. *Id.*; *Moroccanoil, Inc. v. Allstate Beauty Prods.*, 847 F.Supp.2d 1197, 1200-01 (C.D. Cal. 2012). Therefore, the Court finds

Plaintiffs would be prejudiced if default judgment is not granted, and this factor weighs in favor of default judgment.

**B. Merits of the Plaintiffs' claims and the Sufficiency of the Complaint**

The second and third *Eitel* factors, taken together, "require that [the] plaintiff[s] state a claim on which [they] may recover." *Pepsico, Inc.*, 238 F. Supp. 2d at 1175. Notably a "defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).

Plaintiffs' complaint alleges violations of the United States Copyright Act. Under that act, the owner of a copyright has the exclusive rights to publicly perform the copyrighted work, and may institute an action against an infringer of that copyright. 17 U.S.C. §§ 106, 501. To establish copyright infringement, plaintiffs must show (2) ownership of the allegedly infringed material and (2) demonstrate that the alleged infringers violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001), as amended (Apr. 3, 2001), *aff'd sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002), *and aff'd sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

Here, Plaintiffs allege that they own valid copyrights for the musical compositions in the BMI Repertoire: (1) Dreams; (2) Margaritaville; (3) Piece of My Heart; (4) Blues Man; and (5) Love Done Gone. Complaint at ¶¶ 4-13 and Schedule. Plaintiffs further allege that Defendants are liable for the unauthorized public performance of these musical compositions, and the Defendants were not licensed or otherwise authorized to publicly perform these musical compositions even though they were previously and repeatedly admonished regarding the need for a license. Complaint ¶¶ 19, 20, 26.

The Court finds that Plaintiffs' complaint sufficiently states a claim for copyright infringement, and this factor weighs in favor of default judgment.

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

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

Here, Plaintiffs seek a total judgment of $20,830.00, which includes statutory damages of $15,000.00, attorneys' fees in the amount of $5,000.00 and costs in the amount of $830.00. Doc. 12. The Court finds the amount at stake is proportional to the harm caused by Defendants' conduct and, therefore, this factor does not weigh against entry of default judgment.

**D. The Possibility of a Dispute Concerning Material Facts**

The facts of this case are straightforward, and Plaintiffs have provided the Court with well-plead allegations and a declaration with exhibits in support. Here, the Court may assume the truth of well-plead facts in the complaint following the clerk's entry of default and, thus, there is no likelihood that any genuine issue of material fact exists. Defendants' failure to file an answer in this case or a response to the instant motion further supports the conclusion that the possibility of a dispute as to material facts is minimal. *See, e.g.*, *Elektra Entm't Grp. Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) ("Because all allegations in a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any genuine issue of material fact exists.").

**E. Whether the Default Was Due to Excusable Neglect**

The sixth *Eitel* factor considers the possibility that Defendants' default resulted from excusable neglect. *PepsiCo, Inc.*, 238 F.Supp.2d at 1177. Courts have found that where defendants were "properly served with the complaint, the notice of entry of default, as well as the paper in support of the [default judgment] motion," there is no evidence of excusable neglect. *Shanghai Automation Instrument Co. v. Kuei*, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001). Upon review of the record, the Court finds that the default was not the result of excusable neglect. *See PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. According to the Court's docket, it appears that Plaintiffs properly served Defendant Jeffrey Alan Hathcock by personally delivering a copy of the summons and complaint to him on February 16, 2017. Doc. 5. Plaintiffs also properly served Defendant Janet Hayre by substituted service on February 18, 2017, by leaving copies with Defendant Hathcock, her son, on February 18, 2017, and by mailing copies on February 21, 2017. Doc. 4. Service of process was therefore sufficient.[1]

[1] Relevant here, Federal Rule of Civil Procedure 4(e) permits an individual to be served by delivering a copy of the summons of the complaint to the individual personally or by following state law where the district court is located. Fed. R. Civ. P. 4(e)(1), (2)(A). Under California law, if the summons and complaint cannot with reasonable diligence be

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