

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-05520 SJO (PJWx) DATE: May 5, 2017

TITLE: Stephen Handy Aguiar v. MySpace LLC, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Not Present
Courtroom Clerk Court Reporter

COUNSEL PRESENT FOR PLAINTIFF: Not Present
COUNSEL PRESENT FOR DEFENDANTS: Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT [Docket No. 87]; DENYING PROPOSED INTERVENOR'S MOTION FOR LEAVE TO INTERVENE [Docket No. 76]; DENYING PROPOSED INTERVENOR'S EX PARTE APPLICATION FOR AN ORDER STAYING ALL BRIEFING AND ANY HEARINGS RE: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT [Docket No. 88]

The first matter before the Court is Plaintiff Stephen Handy Aguiar's ("Plaintiff") Motion for Default Judgment ("Motion for Default Judgment"), filed April 10, 2017. On April 18, 2017, Plaintiff filed a Notice of Defendants MySpace LLC ("MySpace") and Legacy Vision LLC ("Legacy") (collectively, "Defendants") Failure to File Opposition to Motion for Default Judgment. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for May 8, 2017. See Fed. R. Civ. P. 78(b).

On March 7, 2017, Proposed Intervenor MySpace LLC's ("Proposed Intervenor") filed a Motion for Leave to Intervene ("Motion to Intervene"), which Plaintiff opposed on March 14, 2017, and to which Proposed Intervenor replied on March 21, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for April 4, 2017. See Fed. R. Civ. P. 78(b). Finally, on April 14, 2017, Proposed Intervenor filed an Ex Parte Application for An Order Staying All Briefing and Any Hearings Re: Plaintiff's Motion for Default Judgment ("Ex Parte Application II"), which Plaintiff opposed the same day.

For the following reasons, the Court **GRANTS** Plaintiff's Motion for Default Judgment, **DENIES** Proposed Intervenor's Motion to Intervene, and **DENIES** Proposed Intervenor's Ex Parte Application II.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges the following. In 2008, Plaintiff opened a MySpace account, and entered into a user agreement, which stated that, *inter alia*, MySpace would protect the privacy of its users' account information. (Second Am. Compl. ("SAC") ¶¶ 1-2, ECF No. 22.) In or about April 2009, pursuant to a Drug Enforcement Administration ("DEA") drug trafficking investigation, DEA agents

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discovered that Plaintiff may have had a Myspace.com user account. (SAC ¶ 6.) On April 24, 2009, a DEA agent served an administrative subpoena on MySpace, requesting information about Plaintiff's suspected user account pursuant to the ongoing criminal investigation. (SAC ¶ 7.) Plaintiff alleges that MySpace "voluntarily disclosed material that was beyond the scope of a lawful subpoena. This material included photographs and user friends in electronic storage for one hundred and eight days or less." (SAC ¶ 12.) MySpace's disclosure led ultimately to Plaintiff's indictment and conviction for drug trafficking in the underlying criminal case styled *United States of America v. Aguiar*, No. CR 09-00090 (D. Vt.) (the "Criminal Action").¹ (Mot. Default J. 3, ECF No. 87.) Plaintiff alleges that his attorney in the criminal matter "failed to provide Plaintiff with discovery evidence related to the allegations herein until November 2013," when Plaintiff first discovered that MySpace disclosed information in an allegedly unlawful manner. (SAC ¶ 15.)

On November 7, 2014, Plaintiff, a federal prisoner then-proceeding *pro se*, initiated this action against MySpace and other defendants. (ECF No. 7.) On October 9, 2015, Plaintiff filed the operative SAC against MySpace under the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*, and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.* (the "SCA/ECPA") and for breach of contract pursuant to the privacy and disclosure provisions of MySpace's user agreement. (SAC 5.) MySpace was served with the SAC on November 4, 2015, (ECF No. 26), and filed a Motion to Dismiss the SAC ("Motion to Dismiss") on November 24, 2015. (ECF No. 27.)

On October 21, 2016, the Court adopted U.S. Magistrate Judge Patrick J. Walsh's ("Judge Walsh") Amended Report and Recommendations ("Amended R&R"), denying MySpace's Motion to Dismiss ("Order Denying Motion to Dismiss"). (See ECF Nos. 40-41.) After MySpace failed to file a responsive pleading within 14 days of the Order Denying Motion to Dismiss, Judge Walsh ordered MySpace's counsel to file an answer to the SAC or explain why an answer had not been filed by November 22, 2016. (Nov. 17, 2016 Order, ECF No. 43.)

On November 21, 2016, Ms. Jane A. Rheinheimer ("Ms. Rheinheimer"), then-counsel for Defendant MySpace, explained that MySpace LLC had changed its name to "Legacy Vision LLC" in March 2016, that "MySpace LLC no longer exists," and that "[t]he client has requested that no further work be done by this office." (Explanation for Why Answer Has Not Been Filed ("Explanation") 1, ECF No. 44.) On December 5, 2016, Plaintiff filed a Motion to Join, or in the

¹ The Court takes judicial notice of the documents filed and orders issued in the Criminal Action, as facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. "Judicial records and dockets from the same or a closely related case are proper facts for judicial notice under this standard." *United States v. Beattie*, No. CV 06-03537 VRW, 2007 WL 1430044, at *1 (N.D. Cal. May 14, 2007) (citing *Miles v. State of California*, 320 F.3d 986, 987 (9th Cir. 2003) (taking judicial notice of a state court order and docket).

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Alternative, Substitute Legacy with or in place of MySpace, (ECF No. 46), and filed a Declaration and Affidavit for Entry of Default. (ECF No. 47). Judge Walsh granted Plaintiff's motion to add Legacy as a Defendant pursuant to Federal Rule of Civil Procedure 25(c), and noted that Ms. Rheinheimer's Explanation was "somewhat confusing" because she "filed pleadings on behalf of Myspace after [March 2016], never informing the Court, as she does now, that Myspace 'no longer exists.'" (See Dec. 19, 2016 Order, ECF No. 48; Dec. 22, 2016 Order, ECF No. 50.) On December 28, 2016, due to a clerical error, default was incorrectly entered against "My Space Inc. aka Legacy Vision LLC." (ECF No. 51.)

In February 2017, Brown White & Osborn LLP ("BWO") appeared as counsel of record for Plaintiff. (ECF Nos. 60-61.) Accordingly, the matter was transferred from Judge Walsh's calendar to the calendar of this Court.

On March 8, 2017, Ms. Rheinheimer filed a Motion for Withdrawal as Attorneys of Record for Defendant ("Motion to Withdraw"), in which she declared under penalty of perjury that she was "advised by the previous corporate counsel for Viant, Inc. on September 16, 2016, that our services would not longer be required in connection with this matter," and that her communications to her client Viant—including copies of all pleadings, motions, and minute orders in this action—had gone unanswered.² (Decl. of Jane A. Rheinheimer in Supp. Mot. Withdraw as Attorney ¶ 3, ECF No. 77.)

Subsequently, consistent with Judge Walsh's December 22, 2016 Order and pursuant to Plaintiff's request for correction, (ECF No. 65), the Court directed the Clerk of the Court to issue a revised entry of default against "MySpace LLC and Legacy Vision LLC," (Mar. 17, 2017 Order 1, ECF No. 82), and default was entered accordingly that day.³ (ECF No. 83.) The Court also granted Ms. Rheinheimer's Motion to Withdraw. (Mar. 17, 2017 Order 1.) On April 10, 2017, Plaintiff filed the instant Motion for Default Judgment.

The Court discusses the Motion to Intervene, Ex Parte Application II, and Motion for Default Judgment in turn.

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II. DISCUSSION

² The identity of Viant is explained in Section II.A., *infra*.

³ It does not appear that Legacy was served with the operative Summons and SAC after being added to this action. Regardless, Legacy did not raise this, or any, argument in response to the entry of default and Motion for Default Judgment.

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A. Proposed Intervenor's Motion to Intervene

Proposed Intervenor seeks to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a)(2) ("Rule 24(a)(2)") or, in the alternative, under Rule 24(b)'s permissive intervention standard. (Mot. Intervene 6-9, ECF No. 76.) Proposed Intervenor refuses to file an opposition to the Motion for Default Judgment, claiming that it is not a party to the action; at the same time, it asserts that it would suffer "significant prejudice" because default judgment has been entered against it. (Mot. Intervene 6.) Proposed Intervenor does not explain why its assets would be impaired by default judgment against an allegedly "separate and distinct" entity. (Mot. Intervene 11.)

Proposed Intervenor theorizes that, following entry of default against "My Space Inc. aka Legacy Vision LLC," Plaintiff moved for default judgment against "the same defendant," and after not receiving any opposition to its motion for default judgment and "discover[ing] that [Defendant] likely no longer has any assets with which to pay any judgment awarded against it, [Plaintiff] seeks to substitute in third-party to pay any judgment awarded." (Mot. Intervene 1.) Proposed Intervenor misunderstands this case.

First, Proposed Intervenor is incorrect in averring that "Plaintiff already has the default judgment against Judgment Debtor to which he is entitled." (Mot. Intervene 8.) No judgment has yet been awarded against Defendant; it is the subject of the instant Motion for Default Judgment. Second, as early as November 2015, MySpace clarified in its Motion to Dismiss that **it was "erroneously [s]ued and served as MY SPACE INC."** (Mot. Dismiss 1, ECF No. 27) (emphasis added). For the following 15 months, Defendant proceeded in this action without incident as "MySpace LLC." (See, e.g., ECF Nos. 44-45.) Thus, contrary to Proposed Intervenor's characterization, Plaintiff's request to correct the entry of default was not a tactical end-run to obtain default judgment against a new entity with assets (*i.e.*, by seeking judgment against MySpace LLC rather than Myspace Inc.). Rather, Plaintiff requested rectification of a clerical error, as the Court stated: "Because default was entered inconsistently with the Court's December 22, 2016 order, the Court strikes the Entry of Default, and directs the Clerk to issue a revised entry of default against 'MySpace, LLC and Legacy Vision, LLC.'" (Mar. 17, 2017 Order 1, ECF No. 82) (emphases omitted). It is clear that Defendant/Proposed Intervenor MySpace has been in this action since the start; Plaintiff did not "seek[] to substitute in third-party to pay any judgment awarded."⁴ (Mot. Intervene 1.)

The Court's review of the documents provided by Plaintiff and MySpace supports the same conclusion. Proposed Intervenor claims that Defendant Myspace ceased to exist upon changing

⁴ Thus, for purposes of this Order, "Proposed Intervenor" and "Defendant" are used interchangeably to refer to Defendants MySpace LLC and/or Legacy Vision LLC, against whom default has been entered.

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its name to Legacy Vision in March 2016, and Proposed Intervenor, a wholly new entity, sprung into existence four days later and assumed none of the Defendant's liabilities. (See Mot. Intervene 3; Decl. of Larry Madden in Supp. of Mot. Intervene ("Madden Decl.") ¶¶ 3-9.) The Court is not persuaded.⁵ At the start of this case in 2014, Defendant MySpace (erroneously sued in this action as My Space, Inc.) was owned by Specific Media, whose parent company was Interactive Media Holdings, Inc.⁶ (Decl. of Scott J. Hunter in Supp. of Mot. Intervene ("Hunter Decl.") ¶¶ 6-8, ECF No. 80-1, Ex. F.) In 2015, Interactive Media Holdings, Inc. rebranded as Viant. See <https://viantinc.com/about-us/>. Viant Technology, LLC was formed in February 2016. (Hunter Decl. ¶ 10, Ex. I.) Some time in 2016, Viant was acquired by Time, Inc. (Hunter Decl. ¶ 11, Ex. R 145.) On March 3, 2016, MySpace changed its name to Legacy Vision LLC. (Hunter Decl. ¶ 12, Ex. K.) On March 7, 2017, Proposed Intervenor was formed; on April 1, 2016, it registered with the California Secretary of State. (Hunter Decl. ¶¶ 13-14, Exs. L, M.)

A search of "MySpace LLC" on the California Secretary of State website reveals that it has the same address as the headquarters of Time, Inc., the parent company of Viant. (Hunter Decl. ¶¶ 11, 13-15, Exs. L, M, N.) A search of "Legacy Vision LLC" on the website shows that Legacy Vision filed a Statement of Information on November 2, 2015—four months before Defendant MySpace allegedly changed its name to Legacy Vision—with the following information: the limited

⁵ Through a complicated series of transactions not previously disclosed to the Court, Proposed Intervenor argues that a Time, Inc. subsidiary transferred MySpace's assets—but none of its liabilities—to Proposed Intervenor, which currently operates under the same. (Madden Decl. ¶¶ 7-9.) MySpace fails to provide any documentation to support these purported transactions.

⁶ The Court takes judicial notice of the relevant publicly accessible company web sites, several screen shots of which are attached as **Exhibits F, N, R, S** to the Hunter Declaration (<http://corp.specificmedia.com/privacy>, <http://www.timeinc.com>, <https://viantinc.com>, <http://www.ltlawattorneys.com>). "[A]s a general matter, web sites and their contents may be proper subjects for judicial notice." *Caldwell v. Caldwell*, No. CV 05-04166 PJH, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006); see *Rearden LLC v. Rearden Commerce, Inc.*, 597 F. Supp. 2d 1006, 1013 n.3 (N.D. Cal. 2009) (taking judicial notice of contents of a webpage listing a company's office locations).

Records gleaned from Secretary of State web sites, including that of the California Secretary of State, <https://businesssearch.sos.ca.gov/>, are proper matters for judicial notice. *L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 938 (C.D. Cal. 2011) (taking judicial notice of the results of a records search from California Secretary of State website). Accordingly, the Court takes judicial notice of **Exhibits I, K, L, M** to the Hunter Declaration.

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liability company name is listed as "MYSPACE LLC"; the manager of the entity is "Viant Technology Inc."; and the "AUTH PERSON" who completed the form was Timothy C. Vanderhook, Chief Executive Officer of MySpace LLC and Viant Technology LLC.⁷ (Hunter Decl. ¶¶ 9, 19, Ex. R.) "Viant Technology **Inc.**" is listed as the "Manager" of Legacy Vision, and has an address that matches that of Viant Technology **LLC's** headquarters in Irvine, California.⁸ See <https://viantinc.com/contact/>. (emphasis added).

Moreover, Proposed Intervenor's counsel, LTL Attorneys LLP ("LTL"), was counsel of record for MySpace LLC in another action in the District of Delaware, captioned *FO2GO LLC v. MySpace LLC*, No. CV 15-00095 RGA (the "Delaware Action"), filed **January 27, 2015**.⁹ (Hunter Decl. ¶ 21, Ex. T Case docket for *FO2GO LLC v. MySpace LLC*, No. CV 15-00095 RGA.) In other words, assuming Proposed Intervenor did not exist until March 2016, it was somehow represented by the same firm over a year before.

Finally, had MySpace filed the required Corporate Disclosure Statement mandated under Federal Rule of Civil Procedure 7.1 and Local Rule 7.1-1, and timely apprised the Court of material changes in corporate ownership, the parties' and Court's expenditure of time and resources to determine the corporate history and ownership of MySpace could have been avoided. See L.R. 7.1-1 ("Counsel shall be under a continuing obligation to file an amended Notice if any material

⁷ A previous Statement of Information, filed October 14, 2015, was completed by Madden of Viant Technology LLC, (Madden Decl. ¶ 1), and lists Interactive Media Holdings, Inc. as its "Manager," and an address matching Viant Technology LLC's Los Angeles office. See <https://viantinc.com/contact/>.

⁸ These search results further contravene Proposed Intervenor's repeated unsuccessful attempts at distancing itself from Defendant MySpace: "Part of Plaintiff's confusion may arise from his conflating of Viant, **Inc.**, which Ms. Rheinheimer claimed to represent, with Viant Technology **LLC**—the current parent of Proposed Intervenor." (Reply in Supp. Mot. to Intervene ("Reply Intervene") 3 n.3, ECF No. 84) (emphases in original).

⁹ The Court takes judicial notice of the fact that MySpace was a named defendant in the Delaware Action, that LTL represented MySpace in that suit, and of the documents filed therein. See *Beattie*, 2007 WL 1430044, at *1; *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings). In the Delaware Action, MySpace filed the following corporate disclosure statement: "Defendant Myspace LLC hereby states that it is wholly owned by Viant Technology **Inc.**, a privately held company." (No. CV 15-00095-RGA, ECF No. 9) (emphasis added). Again, this collapses Proposed Intervenor's argument that "Viant Technology LLC" and "Viant Technology Inc." are different entities.

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change occurs in the status of interested parties, as through merger or acquisition or change in carrier that may be liable for any part of a judgment."). Instead, MySpace waited over seven months to notify Judge Walsh and Plaintiff of the material name change—even though it allegedly rendered MySpace out of existence—and only now argues, without sufficient evidence, that it is a wholly new entity. (See Explanation; Dec. 22, 2016 Tr. 2:14-19.)

Because the Court finds that Proposed Intervenor is already a party to the action, Rule 24 is inapplicable. See, e.g., *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) ("The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit.") (citation omitted)). Proposed Intervenor could have, and should have, opposed the Motion for Default Judgment, but chose not to do so.

Proposed Intervenor's Motion to Intervene, and the accompanying Request for Judicial Notice, are **DENIED**.

B. Proposed Intervenor's Ex Parte Application II

The Court next discusses Proposed Intervenor's Ex Parte Application II to stay all briefing and any hearing on the Motion for Default Judgment until the Court rules on Proposed Intervenor's pending Motion to Intervene. (Ex Parte Appl. II 1, ECF No. 88.) Proposed Intervenor argues that, as a non-party, it lacked standing to oppose the Motion for Default Judgment, such that it would suffer prejudice absent a stay of the proceedings. (Ex Parte Appl. II 1.)

As discussed above, intervention is unnecessary because Proposed Intervenor is already a party. In the alternative, Proposed Intervenor again fails to establish emergency circumstances warranting ex parte relief. On February 28, 2017, the Court denied Proposed Intervenor's Ex Parte Application for a Stay of Entry of a Default Judgment, ("Ex Parte Appl. I"), ECF No. 68), because the circumstances did not justify emergency relief. (Feb. 28, 2017 Order, ECF No. 70.) Proposed Intervenor's instant Ex Parte Application II is based on essentially the same grounds as its previous application: that default judgment should be stayed because Proposed Intervenor is a "completely new and separate entity" from Defendant MySpace and has never been a party to this action, and that it would suffer significant harm absent the opportunity to defend itself against default judgment. (*Compare* Ex Parte Appl. I 1, *with* Ex Parte Appl. II 1.) Moreover, Proposed Intervenor only sought ex parte relief 28 days after the revised entry of default—when the Court stated that Plaintiff may move for default judgment—and four days after the Motion for Default Judgment was filed. (Pl.'s Opp'n to Ex Parte Appl. II ("Opp'n to Ex Parte Appl. II") 1-2, ECF No. 89.)

The Court **DENIES** Proposed Intervenor's Ex Parte Application II.

C. Plaintiff's Motion for Default Judgment

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Obtaining a default judgment is a two-step process. First, the plaintiff must establish default by affidavit or otherwise, after which the court clerk enters default. See Fed. R. Civ. P. 55(a). Second, the plaintiff must apply to the court for a default judgment if the plaintiff's claim is for a sum that is not certain or a sum that cannot be made certain by computation. See Fed. R. Civ. P. 55(b).

Pursuant to the Local Rules of the Central District of California, applications for the entry of default judgment must be accompanied by a declaration that includes the following information:

- (a) When and against what party the default was entered;
- (b) The identification of the pleading to which default was entered;
- (c) Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative;
- (d) That the Servicemembers Civil Relief Act (50 U.S.C. App. § 521) does not apply; and
- (e) That notice has been served on the defaulting party, if required by [Fed. R. Civ. P.] 55(b)(2).

L.R. 55-1; see also Fed. R. Civ. P. 55(b)(2). Here, Plaintiff has satisfied each of these procedural requirements, as detailed in the declaration of Laura Gladwin Payne. (Decl. of Laura Gladwin Payne in Supp. of Pl.'s Mot. Default J. ¶¶ 2-7, ECF No. 87-1.)

The Court now turns to the substantive requirements for obtaining default judgment. A district court's decision to grant or deny default judgment is discretionary. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). A court considers the following seven factors, commonly referred to as the "*Eitel* factors":

- (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.

Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Once the court clerk has entered a party's default, "the well-pleaded factual allegations of the complaint are taken as true, except for those allegations relating to damages." *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219

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F.R.D. 494, 498 (C.D. Cal. 2003) (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987)). The Court considers each *Eitel* factor in turn.

1. Possibility of Prejudice to Plaintiff

Under the first *Eitel* factor, the Court examines whether a plaintiff will be prejudiced if the request for entry of default judgment is denied. *Eitel*, 782 F.2d at 1471. A plaintiff who is denied a default judgment and is subsequently left without other recourse for recovery has a basis for establishing prejudice. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

Here, Plaintiff argues that he would be prejudiced absent entry of judgment because "MySpace made the strategic decision to not file an answer to Mr. Aguiar's [SAC] and to refuse to litigate the case," and now tries to escape judgment by claiming it was a new and different, unrelated entity than Defendant. (Mot. Default J. 5.) The Court agrees that, absent entry of default judgment, Plaintiff would be left without a remedy as a result of MySpace's gamesmanship and evasion. This factor weighs strongly in favor of default judgment.

2, 3. Merits of the Substantive Claim and Sufficiency of the Complaint

The second and third *Eitel* factors focus on the merits of the plaintiff's substantive claims and the sufficiency of the complaint. *See Eitel*, 782 F.2d at 1471. Together, these two factors require that a plaintiff state claims upon which recovery is possible. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1175. In the SAC, Plaintiff asserts claims for violation of the SCA/ECPA and breach of contract.

Plaintiff sufficiently states a claim under section 2703 of the SCA/ECPA.¹⁰ Plaintiff alleges that the DEA's subpoena sought records of Plaintiff's MySpace account consisting of: "[N]ame, postal code, country, e-mail address, date of account creation, IP address at account sign-up, and logs showing IP address and date stamps for account accesses, photographs, friends, private messages **over 180 days old** and any other information available." (SAC ¶¶ 7-8, Ex. A) (emphasis added). Plaintiff alleges that MySpace "knowingly and willfully extract[ed] photographs, user friends, and other information in electronic storage for one hundred and eighty days or less from Plaintiff's MySpace.com user account and providing that information to government agents of the [DEA] without a valid search warrant." (SAC 5.) Under the SCA/ECPA, a warrant is required for an electronic communication service provider to disclose information that has been in electronic storage for 180 days or less. *See Doe v. U.S. S.E.C.*, No. MC 11-80184 CRB, 2011 WL 4593181, at *3-4 n.4 (N.D. Cal. Oct. 4, 2011) (citing 18 U.S.C. § 2703(a); distinguishing from

¹⁰ The ECPA encompasses the Wiretap Act (Chapter 119, 18 U.S.C. §§ 2510, *et seq.*) and the SCA (Chapter 121, 18 U.S.C. §§ 2701, *et seq.*). In the SAC, Plaintiff alleges that MySpace acted in violation of the SCA, particularly 18 U.S.C. section 2703(a). (SAC ¶ 15.)

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18 U.S.C. § 2703(b), which allows disclosure of such content older than 180 days with a warrant, subpoena, or court order, and 18 U.S.C. § 2703(c), which allows disclosure of customer information (excluding contents of communications) with a warrant, court order, or consent).

Next, Plaintiff sufficiently states a claim for breach of contract, which requires: "(1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damage to the plaintiff therefrom." *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008). Plaintiff alleges that, in creating his MySpace account, he entered into a user agreement that stated that MySpace would protect the privacy of its users' account information, that Plaintiff had kept his settings to private, that MySpace provided to the DEA entire contents of information in electronic storage without a warrant and beyond the scope of a lawful subpoena, and that Plaintiff was convicted due, in part, to MySpace's disclosure of the information. (SAC 2.)

At the motion to dismiss stage, MySpace's sole basis for dismissal was that Plaintiff's SCA/ECPA and breach of contract claims were barred by the two- and four-year statutes of limitations, respectively; MySpace did not argue on the merits that Plaintiff failed to sufficiently state his claims. (Am. R&R 3, ECF No. 40.) The Court denied MySpace's Motion to Dismiss and found that Plaintiff is entitled to equitable tolling for the SCA/ECPA claim and that the statute of limitations for contractual breach had not yet run. (Am. R&R 4-5; Order Accepting Am. R&R, ECF No. 41.) For purposes of default judgment, the Court takes the SAC's well-pleaded factual allegations (except as to damages) as true, and finds that Plaintiff has sufficiently stated his two claims. Factors two and three weigh in favor of granting the Motion for Default Judgment.

4. Sum of Money at Stake

The fourth *Eitel* factor concerns the amount the plaintiff requests in monetary damages. See *Eitel* 782 F.2d at 1471. Default judgment is disfavored where the sum of money at stake is too large or unreasonable in relation to the defendant's conduct. See *Truong Giang Corp. v. Twinstar Tea Corp.*, No. C 06-03594 JSW, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007) (citing *Totten v. Hurrell*, No. 00-2718, 2001 U.S. Dist. LEXIS 20259, at *2 (N.D. Cal. Nov. 28, 2001)).

Plaintiff seeks a total of \$1,129,067.15: \$528,000 in actual damages, \$528,000 in punitive damages provided under the SCA/ECPA, \$73,005.50 in attorney's fees, and \$61.65 in costs. (Mot. Default J. 7-9; Decl. of Stephen H. Aguiar in Supp. of Mot. Default J. ("Aguiar Decl.") ¶¶ 2-7, ECF No. 87-3; Decl. of Caleb E. Mason in Supp. of Mot. Default J. ("Mason Decl. Re Default") ¶ 11, ECF No. 87-2, Ex. A.) The Court discusses the proper measure of monetary relief available to Plaintiff in Section II.B., *infra*.

5. Possibility of a Dispute Concerning Material Facts

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The fifth *Eitel* factor examines the likelihood of dispute between the parties regarding the material facts surrounding the case. *Eitel*, 782 F.2d at 1471-72. When a complaint and motion for default judgment are unopposed, the factor is neutral because the possibility of a dispute is unknown. *Bd. of Trs. of Laborers Health & Welfare Trust Fund v. Perez*, No. C 10-2002, 2011 WL 6151506, at *8 (N.D. Cal. Nov. 7, 2011).

When MySpace moved to dismiss the SAC on November 24, 2015, it raised only a statute of limitations challenge. (See *generally* Mot. Dismiss.) MySpace had the opportunity, but failed, to oppose the Motion for Default Judgment. Even without ascribing bad faith, MySpace's failure to answer the SAC suggests that "there is no possibility of a dispute concerning material facts" See *McComb v. Vejar*, No. CV 14-00941 RSWL, 2014 WL 5494017, at *7 (C.D. Cal. Oct. 28, 2014) (finding no material factual dispute where defendants "failed to respond or appear in this action"). This factor weighs in favor of granting the Motion for Default Judgment.

6. Possibility of Excusable Neglect

The sixth factor considers whether the defendant's default is the result of excusable neglect. *Eitel*, 782 F.2d at 1472. The possibility of excusable neglect is remote where the defendant is provided proper notice of the pending suit, but does not contact the court or the plaintiff in any manner. See *Philip Morris*, 219 F.R.D. at 501.

This factor weighs heavily in favor of granting entry of default judgment. As discussed above, MySpace failed to file an answer and continuously concealed material changes in its corporate organization and history. As of December 19, 2016, the parties were put on notice that default would be entered against MySpace LLC and Legacy Vision LLC, notwithstanding the clerical error. (See Dec. 19, 2016 Order.) It appears that, based on the erroneous entry of default, Defendant expected Plaintiff to move for default judgment against the erroneously named "My Space Inc. aka Legacy Vision LLC," and sought to "intervene" only after entry of default reflected the correct names of Defendants. MySpace's conduct hardly suggests excusable neglect.

7. Public Policy Favoring Decision on the Merits

The final *Eitel* factor requires the Court to consider the strong federal policy in favor of making decisions on the merits. *Eitel*, 782 F.2d at 1472. Courts have recognized, however, that "this preference, standing alone, is not dispositive." *PepsiCo*, 238 F. Supp. 2d at 1177 (citation omitted). Moreover, a defendant's failure to answer a plaintiff's complaint "makes a decision on the merits impractical, if not impossible." *Id*; see also *TVB Holdings (USA) Inc. v. Emon Inc.*, No. 13-CV-624-JLS, 2014 WL 3717889, at *4 (C.D. Cal. July 23, 2014). Under Rule 55(a), "termination of a case before hearing the merits is allowed whenever a defendant fails to defend an action." *PepsiCo*, 238 F. Supp. 2d at 1177. MySpace's inexplicable failure to answer the SAC,

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refusal to oppose the Motion for Default Judgment, and attempts at evasion make a decision on the merits highly impractical.

8. Conclusion Regarding Eitel Factors

On balance, the application of the *Eitel* factors entitles Plaintiff to default judgment against Defendants MySpace LLC and Legacy Vision LLC.

D. Relief Sought

Plaintiff requests that the Court award a total of \$1,129,067.15: \$528,000 in actual damages, \$528,000 in punitive damages under the SCA/ECPA, \$73,005.50 in attorneys' fees, and \$61.65 in attorneys' costs. A plaintiff seeking default judgment is "required to prove all damages sought in the complaint." *Phillip Morris*, 219 F.R.D. at 498. The Court turns to each category of relief.

1. Actual Damages

Under the SCA/ECPA, the Court "may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000." See 18 U.S.C. § 2707(c).

Plaintiff requests the following in actual damages: \$88,000, which was seized by the Government and subsequently forfeited; \$340,000 in lost earnings (\$42,500 per year for the eight-year period from his arrest to entry of default judgment); and \$100,000 in emotional and psychological damages. (Mot. Default J. 7-8; Aguiar Decl. ¶¶ 3-7.) Plaintiff was arrested on July 30, 2009 and convicted of conspiracy and drug offenses on April 11, 2011. (Mot. Default J. 7.) Plaintiff was sentenced to 360 months' imprisonment and has been incarcerated continuously since his arrest. (Mot. Default J. 8.) Plaintiff argues that he was "investigated, indicted, and convicted based in large part on the evidence that MySpace unlawfully disclosed to the DEA and that which was derivative thereof." (Mot. Default J. 7.)

To support his valuation of actual damages for the time period of his incarceration, Plaintiff analogizes the case with wrongful conviction actions. (See Mot. Default J. 8-10.) Plaintiff's reliance on *Restivo v. Hessemann*, 846 F.3d 547 (2d Cir. 2017), is inapposite. In *Restivo*, in which the plaintiffs filed a 42 U.S.C. section 1983 action after their convictions for rape and second degree murder had been set aside, the Second Circuit affirmed a damages award of \$1 million per year of incarceration upon considering evidence that the plaintiffs suffered "grave harm from their 18 years of wrongful incarceration," including the stigma resulting from the nature of the crimes of which they were wrongfully convicted. See 846 F.3d at 588. Here, Plaintiff concedes

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that this is not a wrongful conviction case, clarifies that "**this is not a section 1983 case**," (Mot. Default J. 10) (emphasis in original), and draws no factual or legal parallels with *Restivo*. Indeed, Plaintiff proceeds to distinguish SCA/ECPA damages valuations from those in 42 U.S.C. section 1983 cases: unlike with the "various restrictions on Section 1983 damages," "[t]here is no need for a court-imposed 'cutoff' of actual-damages liability under the **express, textual** 'actual damages' remedy of the SCA/ECPA." (Mot. Default J. 10) (emphasis in original). Yet Plaintiff relies on *Restivo*, a section 1983 action, to argue that his proposed valuation is reasonable.

Furthermore, the *Restivo* plaintiffs had their convictions overturned; in contrast, Plaintiff's 28 U.S.C. section 2255 habeas corpus petition in his underlying Criminal Action was denied by U.S. District Judge William K. Sessions III ("Judge Sessions") on January 23, 2017. (Criminal Action Docket No. 780 at 1-2¹¹) (Opinion and Order adopting in full the Magistrate Judge's Report and Recommendation). Judge Sessions, who presided over the Criminal Action trial, found that "the evidence supporting Mr. Aguiar's conviction was overwhelming. The trial included testimony from multiple cooperating co-defendants, recorded intercepts, verified controlled purchases, and hundreds of pieces of evidence," and found that, in affirming the conviction and sentence, the Second Circuit "referenced 'the volume of evidence introduced at trial by the government' in finding that an allegedly-unconstitutional search was harmless." (Criminal Action Docket No. 780 at 3.) Plaintiff subsequently appealed Judge Sessions' Order, and the appeal is pending. (Criminal Action Docket No. 782; Mot. Default J. 9.) Thus, even assuming, *arguendo*, that MySpace's alleged misconduct contributed "in large part" to Plaintiff's conviction, as Plaintiff avers, it does not follow that Plaintiff would have been acquitted. To conclude, as Plaintiff has, that he is entitled to these damages because he would not have been convicted absent MySpace's improper disclosures, is speculative.

Nevertheless, a party "aggrieved by a violation of the Act could obtain the minimum statutory award without proving actual damages."¹² See *In re Haw. Airlines, Inc.*, 355 B.R. 225, 230-31 (D.

¹¹ This citation refers to pages 1-2 of the Opinion and Order docketed as No. 780 in the Criminal Action.

¹² In *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 204-06 (4th Cir. 2009), the Fourth Circuit held that actual damages are required to recover SCA statutory damages, which it concluded by analogizing the SCA with the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.* However, "as recognized by the majority of federal courts to have examined this issue . . . the [Wiretap] Act and the SCA are different statutes, with different purposes, and they penalize different behavior." *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 427-28 (S.D.N.Y. 2010) (concluding that "Defendants are accordingly entitled to the statutory minimum of \$1,000 per violation of the statute, whether or not they have suffered actual damages"); see also *Shefts v. Petrakis*, 931 F. Supp. 2d 916, 919 (C.D. Ill. 2013) (declining to follow *Van Alstyne*, and agreeing with

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Haw. 2006) (finding that recovery of statutory damages under SCA is "not tied to actual damages or profits"); accord, *Chavan v. Cohen*, No. CV 13-01823 RSM, 2015 WL 4077323, at *4 (W.D. Wash. July 6, 2015); *Pure Power*, 759 F. Supp. 2d at 428. Because Plaintiff does not otherwise show entitlement to actual damages, the Court awards the statutory minimum of \$1,000 per violation. See *Pure Power*, 759 F. Supp. 2d at 430 (awarding \$1,000 for each of four violations where no actual damages were suffered).

Taking the SAC allegations as true, the Court finds one violation of the SCA/ECPA. See *In re Haw.*, 355 B.R. at 232 (finding that if violations occurred "several times in short succession, it might be appropriate to aggregate those intrusions if they functionally constituted a single visit to the website. At the other end of the spectrum, violations that were significantly separated in time and that accessed different information would clearly constitute separate violations of the Act entitled to separate statutory damage awards") (citation omitted); *Pure Power*, 759 F. Supp. 2d at 429 (aggregating intrusions because "the period over which Defendants' emails were accessed was relatively short, and because there is no evidence indicating the number of times each account was accessed"). Here, Plaintiff alleges that the DEA served the subpoena on MySpace on April 24, 2009 and, "[o]n or about May 9, 2009, Myspace officials provided the entire contents of Plaintiff's photo albums and all user friends, among other information in electronic storage, MySpace extracted from his user account to DEA Agent Justin Couture." (SAC ¶¶ 7,9.) Plaintiff does not allege that multiple violations occurred.

Accordingly, the Court awards Plaintiff **\$1,000** in statutory damages against Defendants MySpace LLC and Legacy Vision LLC, jointly and severally.

2. Punitive Damages

In addition to actual damages, Plaintiff seeks punitive damages of \$528,000. Punitive damages are warranted where the violation is "willful or intentional," 18 U.S.C. 2707(c), and "on account of wanton, reckless, or malicious conduct." *Chavan*, 2015 WL 4077323, at *6 (citing *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978)). Punitive damages are traditionally designed to punish and deter and thus may exceed the aggrieved party's actual loss." *Jacobson*, 592 F.2d at 521 (citations omitted) (discussing punitive damages under Wiretap Act of the ECPA).

Plaintiff alleges that, although "aware of and very familiar with," the SCA/ECPA, MySpace, "a large company with a large legal staff and regular dealings with the government," "knowingly and willfully" extracted information in electronic storage and provided such information to DEA agents

reasoning of district court decisions that found that SCA does not require actual damages as precursor to recovery)

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in violation of the statute. (Mot. Default J. 13; SAC 5.) Plaintiff fails to allege acts rising to the level of "wanton, reckless, or malicious conduct." See *Chavan*, 2015 WL 4077323, at *6.

The Court **DENIES** Plaintiff's request for punitive damages.

3. Attorneys' Fees and Costs

The SCA/ECPA provides for "[a] reasonable attorney's fee and other litigation costs reasonably incurred." 18 U.S.C. 2707(b)(3). The judgment amount, exclusive of costs, is \$1,000. Under Local Rule 55-3's schedule, the attorneys' fees award for this amount of judgment would be \$300. See L.R. 55-3 (30% with a minimum of \$250 for judgment ranging from \$0.01 to \$1,000). Plaintiff requests a fee in excess of the Local Rule: \$73,005.50 in attorneys' fees and \$61.65 in costs, based on 216.7 hours of work since Plaintiff's counsel, BWO, appeared in this action in January 2017. (See Mason Decl. Re Default ¶¶ 4, 11.)

Mason avers that this case "has been very different from the 'normal' default judgment case with respect to time, difficulty and novelty of the legal issues involved, and the fact that despite being technically a default case, it is being aggressively litigated by My Space." (Mason Decl. Re Default ¶ 3.) BWO retraced the corporate "name change" transactions that MySpace underwent since the litigation began, filed a supplemental brief in support of Plaintiff's original motion for default judgment, requested a corrected entry of default, opposed the Motion to Intervene and Ex Parte Applications, prepared a joint Rule 26(f) report, (Mason Decl. Re Default ¶¶ 5-8.) Mason is charging a discounted rate of \$475 (his normal hourly rate is \$500), his associate is charging \$300 per hour, and his paralegal is charging \$180 per hour. (Mason Decl. Re Default ¶ 2.)

The Court agrees that this is not a run-of-the-mill motion for default judgment. Although it claims otherwise, MySpace has been actively opposing the motion and has concealed material information or otherwise muddied its representations to the Court. Plaintiff's counsel's rates, hours, and costs expended appear reasonable in light of the intensive fact-finding and briefing required to, *inter alia*, decipher MySpace's corporate organization and history in order to determine the parties against whom default judgment should be entered.

The Court **AWARDS** Plaintiff's counsel **\$73,005.50** in attorneys' fees and **\$61.65** in costs.

4. Post-Judgment Interest

Under federal law, post-judgment interest is mandatory for a judgment in a civil case recovered in a district court, and shall be calculated from the date of entry of judgment "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961; see *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th

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Cir. 1995) (citation omitted). Post-judgment interest applies to the entire judgment, including principal, pre-judgment interest, attorneys' fees, and costs. *Air Separation*, 45 F.3d at 290-91.

The Court **GRANTS** Plaintiff's request for post-judgment interest at the statutory rate.

III. RULING

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Default Judgment, **DENIES** Proposed Intervenor's Motion for Leave to Intervene, and **DENIES** Proposed Intervenor's Ex Parte Application for an Order Staying All Briefing and Any Hearings Re: Plaintiff's Motion for Default Judgment. Judgment shall be entered in favor of Plaintiff and against Defendants MySpace LLC and Legacy Vision LLC, jointly and severally, in the following amounts: (1) **\$1,000** in statutory damages; (2) **\$73,005.50** in attorneys' fees; (3) **\$61.65** in costs; and (4) post-judgment interest at the statutory rate on the judgment amount of \$74,067.15. This case shall close.

IT IS SO ORDERED.