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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

10  
11 AMETHYST KELLY, professionally  
known as IGGY AZALEA,

12 Plaintiff,

13 vs.

14 PRIMCO MANAGEMENT, INC., et  
15 al.,

16 Defendants.

CASE NO. CV-14-7263-BRO-SH  
Hon. Beverly Reid O'Connell

**NOTICE OF MOTION AND  
MOTION FOR A FORMAL  
DECREE *PRO CONFESSO*  
AGAINST DEFENDANTS PRIMCO  
MANAGEMENT, INC., ESMG INC.  
AND TOP SAIL PRODUCTIONS,  
LLC OR, IN THE ALTERNATIVE,  
FOR LEAVE TO FILE MOTION  
FOR DEFAULT JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF; DECLARATION OF  
STEPHEN D. ROTHSCHILD;  
[Proposed] ORDER**

[Filed in Response to October 27,  
2014 Order re: Default]

Date: January 5, 2015  
Time: 1:30 p.m.  
Ctrm: 14

Action Filed: September 17, 2014  
Trial Date: None

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25 TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND  
26 THEIR COUNSEL:

27 PLEASE TAKE NOTICE that, on January 5, 2015 or as soon thereafter as the  
28

1 matter may be heard in Courtroom 14 of the above-entitled court, the Honorable  
2 Beverly Reid O’Connell presiding, plaintiff Amethyst Kelly (“plaintiff”), in  
3 response to the Court’s October 27, 2014 Order Re Default (Document 16), will and  
4 hereby does move for a formal decree *pro confesso* against defendants Primco  
5 Management, Inc., ESMG Inc., and Top Sail Productions, LLC (collectively, the  
6 “Primco defendants”).

7 The grounds for the motion are that

8 (1) on October 24, 2014, the Clerk entered default as to the Primco defendants  
9 and ordered plaintiff to file and serve a motion for default judgment no later than  
10 November 24, 2014;

11 (2) plaintiff’s claims against the Primco defendants rest on the same legal  
12 theories as her claims against defendants Maurice Williams, etc. and James  
13 McMillan, etc., who are not in default; and

14 (3) in accordance with *Frow v. De La Vega*, 82 U.S. 552, 553, 15 Wall. 552,  
15 21 L.Ed. 60 (1872) and its progeny, including *Westchester Fire Ins. Co. v. Mendez*,  
16 585 F.3d 1183, 1189 (9<sup>th</sup> Cir. 2009), the proper procedure when claims against a  
17 defendant in default rest on the same legal theories as claims against a defendant not  
18 in default is to (a) enter a formal decree *pro confesso* against the defaulting  
19 defendant, whereby the defaulting defendant is formally decreed to have admitted  
20 plaintiff’s allegations against it, and (b) defer entry of judgment against the  
21 defendant in default pending a determination of plaintiff’s claims as against any  
22 similarly situated defendants who are not in default.

23 In the alternative, plaintiff seeks leave to file a motion for default judgment  
24 against the Primco defendants after the deadline set in this Court’s October 27, 2014  
25 order.

26 This motion is based on this notice; the memorandum of points and

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1 authorities, Declaration of Stephen D. Rothschild, and exhibit thereto; the Court's  
2 file herein; and on such other matter as may be presented at the hearing on the  
3 motion.

4 DATED: November 24, 2014 KING, HOLMES, PATERNO &  
5 BERLINER, LLP

6  
7 By: \_\_\_\_\_ /s/  
8 HOWARD E. KING  
9 STEPHEN D. ROTHSCHILD  
10 Attorneys for Plaintiff AMETHYST KELLY,  
11 professionally known as IGGY AZALEA  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On October 24, 2014, the Clerk of this Court entered the defaults of  
4 defendants Primco Management, Inc. (“Primco”), ESMG Inc. (“ESMG”), and Top  
5 Sail Productions, LLC (“Top Sail”) (collectively, the “Primco defendants”).  
6 (Document 15.)

7 On October 27, 2014, this Court issued an Order re Default ordering plaintiff  
8 Amethyst Kelly (“plaintiff”) to file and serve a motion for default judgment against  
9 the Primco defendants (Document 16.)

10 The instant motion seeks a formal decree *pro confesso* deeming the Primco  
11 defendants to have admitted the allegations in the complaint, because a default  
12 judgment would be premature.

13 When plaintiff’s claims against a defendant in default and against a non-  
14 defaulting defendant rest on the same theories, the proper procedure is to enter a  
15 formal decree *pro confesso* against the defendant in default, and to defer entry of  
16 judgment until plaintiff obtains judgment against the non-defaulting defendant. The  
17 reason for the rule is that it would be incongruous to issue a judgment against a  
18 defaulting defendant when there is a chance (however slim) that an answering  
19 defendant might prevail on the merits.

20 The gravamen of plaintiff’s claims against the Primco defendants, who are in  
21 default, and against defendants Maurice Williams (“Williams”) and James  
22 McMillan (“McMillan”), who are not in default, is the same: that defendants seek to  
23 exploit intellectual property stolen from plaintiff, and that the purported agreement  
24 under which they claim the right to exploit the stolen intellectual property is a  
25 forgery.

26 Accordingly, this Court should enter the requested decree. However, if the  
27 Court determines that it is appropriate at this time to enter judgment against the  
28 Primco defendants subject to plaintiff’s satisfaction of the requirements for entry of

1 a default judgment, plaintiff respectfully requests the opportunity to move for a  
2 default judgment within a reasonable time after the denial of the instant motion.

3 **II. STATEMENT OF FACTS**

4 **A. Procedural History of the Action**

5 Plaintiff filed her complaint on September 17, 2014. (Document 7-1.)<sup>1</sup> The  
6 complaint alleges claims for relief for copyright infringement, declaratory judgment,  
7 violation of California Civil Code section 3344, misappropriation of common law  
8 right of publicity, trademark infringement, trademark dilution, violation of  
9 California Business and Professions Code sections 17200 *et seq.*, rescission and  
10 restitution, and conversion.

11 Plaintiff served the summons and complaint on Primco on September 22,  
12 2014, ESMG on September 19, 2014, and Top Sail on September 19, 2014.  
13 (Documents 11-13.) None of the Primco defendants responded to the complaint.  
14 Therefore, on October 20, 2014, plaintiff filed a request for entry of default against  
15 the Primco defendants. (Document 14.) The Clerk entered the Primco defendants'  
16 defaults on October 24, 2014. On October 27, 2014, this Court ordered plaintiff to  
17 file a motion for default judgment no later than November 24, 2014. (Document  
18 16.)

19 On October 30, 2014, plaintiff filed her first amended complaint (Document  
20 18.) The purpose of the amendment was to add as a defendant James McMillan.  
21 The amendment did not change any claims or allegations against the Primco  
22 defendants.

23 Counsel for Williams has agreed to respond to the FAC on December 4, 2014.  
24 (Document 21, Declaration of Stephen D. Rothschild re: Defendant Maurice

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25  
26 <sup>1</sup> Plaintiff inadvertently omitted the exhibits to the complaint when it was initially  
27 filed. Plaintiff filed a notice of errata correcting that error on September 17, 2014.  
28 (Document 7.) References to the complaint in this memorandum are to the complete  
version attached to the notice of errata.

1 Williams' Time to Respond to First Amended Complaint, Exs. 1 and 2.) Counsel  
2 for McMillan has agreed to timely return an executed acknowledgement of receipt  
3 of the FAC and to respond to the FAC on McMillan's behalf. (Declaration of  
4 Stephen D. Rothschild attached hereto, Ex. 1.)

5 **B. Factual Background**

6 Plaintiff is a recording artist. (Document 7-1, Complaint, ¶ 7.) Plaintiff also  
7 is the owner of the registered word mark in her stage name, "Iggy Azalea" (the  
8 "Mark"). (*Id.*, ¶ 23.) Sometime between April 2008 and January 2009, Williams  
9 stole the contents of plaintiff's computer, including certain of plaintiff's unreleased  
10 and unfinished sound recordings (the "Unreleased Masters"). (*Id.*, ¶¶ 31.)

11 Sometime thereafter Williams forged a recording agreement purporting to  
12 grant him rights in plaintiff's intellectual property, including the Unreleased  
13 Masters, the Mark, and plaintiff's name and likeness (the "Forged Agreement").  
14 (*Id.*, ¶¶ 35-39.)

15 On or about July 24, 2014, Williams and the Primco defendants published a  
16 press release announcing a joint venture among them and claiming that they had  
17 "secured the rights" to release sound recordings derived from the Unreleased  
18 Masters pursuant to the Forged Agreement. (*Id.*, ¶¶ 41-44.) On August 25, 2014,  
19 Williams and the Primco defendants began distributing and selling to the public  
20 recordings incorporating the Unreleased Masters, and announced that they were  
21 going to release more of plaintiff's Unreleased Masters. (*Id.*, ¶¶ 45-49.)

22 After filing the complaint, plaintiff learned that Williams had purported to  
23 grant to McMillan exactly the same rights he granted to the Primco defendants.  
24 Accordingly, plaintiff's first amended complaint (the "FAC") added McMillan as a  
25 defendant to the action. (Document 18, ¶¶ 53-56.) The addition of McMillan as a  
26 defendant did not add, delete, or modify any of plaintiff's allegations against the  
27 Primco defendants in the Complaint.

28 Thus, the theories of plaintiff's claims against the Primco defendants,

1 Williams and McMillan are the same: that they have no rights to plaintiff's  
2 Unreleased Masters, Mark, name or likeness because Williams stole the Unreleased  
3 Masters and forged the Forged Agreement based upon which all of the defendants  
4 have claimed the right to exploit plaintiff's intellectual property and publicity rights.

5 **III. BECAUSE THE THEORY OF PLAINTIFF'S CLAIMS REMAINS TO**  
6 **BE LITIGATED AGAINST THE NON-DEFAULTING DEFENDANTS,**  
7 **THIS COURT SHOULD ENTER A DECREE *PRO CONFESSO***  
8 **DEEMING THE PRIMCO DEFENDANTS TO HAVE CONFESSED**  
9 **THE TRUTH OF THE ALLEGATIONS IN THE COMPLAINT**

8 In [\*Westchester Fire Ins. Co. v. Mendez\*, 585 F.3d 1183, 1189 \(9<sup>th</sup> Cir. 2009\)](#)  
9 the court, quoting the Supreme Court's opinion in [\*Frow v. De La Vega\*, 15 Wall.](#)  
10 [\*552\*, 82 U.S. 552, 554, 21 L.Ed. 60 \(1872\)](#), held as follows:

11 It has long been established that, where there are several  
12 defendants, the transgressions of one defaulting party  
13 should not ordinarily lead to the entry of a final judgment,  
14 let alone a judgment fatal to the interests of other parties.

15 As the Supreme Court stated more than a century ago:

16 The true mode of proceeding where a bill makes a  
17 joint charge against several defendants, and one of them  
18 makes default, is simply to enter a default and a formal  
19 decree *pro confesso* against him, and proceed with the  
20 cause upon the answers of the other defendants.... But if  
21 the suit should be decided against the complainant on the  
22 merits, the bill will be dismissed as to all the defendants  
23 alike—the defaulter as well as the others. If it be decided  
24 in the complainant's favor, he will then be entitled to a  
25 final decree against all.

26 [\*Frow v. De La Vega\*, 15 Wall. 552, 82 U.S. 552, 554, 21](#)  
27 [\*L.Ed. 60 \(1872\)\*](#).

28 The court explained the *Frow* rule in more depth in [\*In re First T.D. & Inv.\*,](#)  
[\*Inc.\* 253 F.3d 520, 532-533 \(9<sup>th</sup> Cir. 2001\)](#), as follows:

29 The leading case on the subject of default judgments in  
30 actions involving multiple defendants is *Frow v. De La*  
31 *Vega*, 15 Wall. 552, 82 U.S. 552, 21 L.Ed. 60 (1872). The  
32 Court held in *Frow* that, where a complaint alleges that  
33 defendants are jointly liable and one of them defaults,  
34 judgment should not be entered against the defaulting  
35 defendant until the matter has been adjudicated with  
36 regard to all defendants. *Id.* at 554. It follows that if an  
37 action against the answering defendants is decided in their  
38 favor, then the action should be dismissed against both

1           answering and defaulting defendants. *Id.*

2           The Eleventh Circuit has extended the rule in *Frow*  
3           to apply to defendants who are similarly situated, even if  
4           not jointly and severally liable. See [Gulf Coast Fans, Inc.  
5           v. Midwest Elecs. Imps., Inc., 740 F.2d 1499, 1512 \(11th  
6           Cir.1984\)](#); accord 10A Charles Alan Wright, Arthur R.  
7           Miller & Mary Kay Kane et al., *Federal Practice and  
8           Procedure* § 2690, (3d ed.1998). The plaintiff in *Gulf  
9           Coast* was a distributor of ceiling fans that filed a lawsuit  
10          for breach of contract against both the U.S.-based importer  
11          and the Hong Kong-based exporter with which it did  
12          business. 740 F.2d at 1505. The plaintiff had obtained a  
13          default judgment against the exporter but lost at trial  
14          against the importer, when the jury found that it was the  
15          plaintiff who had breached the contract. *Id.* at 1505–06.  
16          The court noted that, under *Frow*, the plaintiff would not  
17          have been able to obtain a default judgment against the  
18          exporter had it claimed that the importer and exporter were  
19          jointly liable. *Id.* at 1512. Although defendants were not  
20          jointly liable, the court vacated the default judgment  
21          against the exporter because “[i]t would be incongruous  
22          and unfair to allow [the plaintiff] to collect a half million  
23          dollars from [the defaulting defendant] on a contract that a  
24          jury found was breached by [the plaintiff].” *Id.*

25                 It would likewise be incongruous and unfair to  
26                 allow the Trustee to prevail against Defaulting Defendants  
27                 on a legal theory rejected by the bankruptcy court with  
28                 regard to the Answering Defendants in the same action.  
29                 The bankruptcy court justified the conflicting outcomes on  
30                 the basis that FTD and Defendants were involved in many  
31                 individual transactions, not simply one transaction with  
32                 many parties. Nevertheless, each transaction between FTD  
33                 and Defendants followed an identical pattern with almost  
34                 identical legal documents. The Trustee filed a single  
35                 complaint against all 132 investors. More importantly, the  
36                 central legal issue concerning each transaction was the  
37                 same. A result in which the bankruptcy court finds §  
38                 10233.2 applies to certain Defendants and not to others is  
39                 both incongruous and unfair. We therefore hold that the  
40                 bankruptcy court violated the *Frow* principle and abused  
41                 its discretion by entering final default judgments, pursuant  
42                 to Fed.R.Civ.P. 54(b), that directly contradicted its earlier  
43                 ruling in the same action.

44                 (Footnotes omitted.)

45                 See also, e.g., [Shanghai Automation Instrument Co., Ltd. v. Kuei 194](#)  
46                 [F.Supp.2d 995 \(N.D.CA.2001\)](#) (“[w]here *Frow* applies, it would be an abuse of  
47                 discretion to enter a default judgment against some but not all defendants prior to  
48                 adjudication of the claims against answering defendants”).



1 In the case at bar, the Primco defendants' liability depends on whether  
2 Williams stole the Unreleased Masters and/or forged the Forged Agreement. Those  
3 issues remain to be litigated against Williams and McMillan, unless they also  
4 default. Accordingly, although plaintiff certainly would prefer to obtain a default  
5 judgment against the Primco defendants, plaintiff believes this Court must adhere to  
6 the *Frow* rule and enter a formal decree *pro confesso* against the Primco defendants.

7 **IV. CONCLUSION**

8 For each of the foregoing reasons, plaintiff respectfully requests that this  
9 Court enter the requested decree. In the alternative, should this Court find that  
10 plaintiff's interpretation of the *Frow* rule is incorrect, plaintiff requests an  
11 opportunity to move for default judgments against the Primco defendants.

12 DATED: November 24, 2014 KING, HOLMES, PATERNO &  
13 BERLINER, LLP

14  
15 By: \_\_\_\_\_/s/  
16 HOWARD E. KING  
17 STEPHEN D. ROTHSCHILD  
18 Attorneys for Plaintiff AMETHYST KELLY,  
19 professionally known as IGGY AZALEA  
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**DECLARATION OF STEPHEN D. ROTHSCHILD**

I, Stephen D. Rothschild, declare:

1. I am an attorney licensed to practice before all of the courts of this State and admitted to practice before this Court, and am a partner of King, Holmes, Paterno & Berliner, LLP, attorneys for plaintiff Amethyst Kelly herein. I have personal knowledge of the matters below and could and would testify competently to them if asked.

2. Attached hereto as Exhibit 1 is a true and correct copy of a November 21, 2014 email that I received from Joseph E. Porter III, Esq., counsel for defendant James McMillan, in which Mr. Porter confirmed that he will be timely executing and returning to me an acknowledgement of receipt of the summons and first amended complaint on behalf of his client.

3. Attached hereto as Exhibit 2 is a copy of plaintiff’s proposed order on the instant motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 24, 2014 at Los Angeles, California.

/s/ \_\_\_\_\_  
Stephen D. Rothschild

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1900 Avenue of the Stars, Twenty-Fifth Floor, Los Angeles, CA 90067-4506.

On November 24, 2014, I served true copies of the following document(s) described as **NOTICE OF MOTION AND MOTION FOR A FORMAL DECREE PRO CONFESSO AGAINST DEFENDANTS PRIMCO MANAGEMENT, INC., ESGM INC. AND TOP SAIL PRODUCTIONS, LLC OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE MOTION FOR DEFAULT JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF STEPHEN D. ROTHSCHILD; [Proposed] ORDER** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with King, Holmes, Paterno & Berliner, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 24, 2014, at Los Angeles, California.



Yvette T. Toko

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**SERVICE LIST**

*Amethyst Kelly p/k/a Iggy Azalea, v. Primco Management, Inc., et al.*  
U.S.D.C. Case No.: CV-14-7263-BRO-SH

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