

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Vito Antonio Laera,
Plaintiff
v.
Cai Jun Fang,
Defendant

2:14-cv-00667-JAD-NJK

**Order Granting in Part and Denying in
Part Motion for Default Judgment,
Entering Default Judgment, and Closing
Case**

[ECF No. 24]

This breach-of-contract action stems from pro se plaintiff Vito Antonio Laera's allegedly longstanding business relationship with Cai Jun Fang, who performed business services for Laera in China until Laera discovered that Fang was siphoning money off the books. This is Laera's third attempt to secure a default judgment against Fang. I denied Laera's first motion for default judgment without prejudice because he failed to address the *Eitel* factors,¹ and I denied his second motion for default judgment without prejudice (which addressed the *Eitel* factors) because he failed to sufficiently prove damages.² Laera's third motion for default judgment both addresses the *Eitel* factors and includes documents to support his damages request.³ Because Laera has now shown that the *Eitel* factors weigh in favor of granting default judgment and has sufficiently proven the bulk of his damages request, I grant in part and deny in part his motion, enter default judgment for Laera and against Fang in the amount of \$759,794.30, and close this case.⁴

Background

Laera alleges that he employed Fang between 2002 and 2014 to perform China-based business services, including "sourcing, managerial services, office management, translating, and

¹ ECF No. 17.

² ECF No. 27.

³ ECF No. 24.

⁴ I find this motion suitable for disposition without oral argument. L.R. 78-1.

1 general business.”⁵ In April 2014, Laera discovered that Fang had “added an average of 8% to
2 the cost of the goods and or services” that Laera imported from China and pocketed that extra 8%
3 for himself.⁶ Laera also discovered that Fang had “overpaid himself \$400.00 per month salary”
4 by “shorting another employee his rightful salary,” overpayments that, according to Laera, totaled
5 \$30,400.⁷

6 Laera initially requested \$2.4 million in damages for the product mark-ups,⁸ but has now
7 scaled back his damages request to \$790,194.30. He seeks \$759,794.30 in damages for the
8 product mark-ups and \$30,400 in damages for the salary overpayments. Laera asserts claims for
9 (1) civil conspiracy, (2) conversion, (3) fraud, (4) misrepresentation, (5) unfair trade practices,
10 (6) unfair competition, (7) interference with contractual relations, (8) interference with
11 prospective advantage, (9) injurious falsehood, and (10) breach of fiduciary trust.⁹

12 Laera sued Fang on May 1, 2014, and properly served Fang on that date.¹⁰ Fang failed to
13 timely respond and Laera moved for, and received, a Clerk’s entry of default.¹¹ Laera then filed a
14 motion for default judgment, which I denied without prejudice because Laera failed to address
15 the *Eitel* factors.¹² Laera then filed a new motion addressing the *Eitel* factors, which I also denied
16 because he failed to sufficiently prove damages.¹³ Laera now submits this third motion for
17 default judgment that both addresses the *Eitel* factors and includes documentation to support his

18
19 ⁵ ECF No. 1 at 2.

20 ⁶ *Id.* at 5.

21 ⁷ *Id.* at 3, 7.

22 ⁸ ECF Nos. 9, 19.

23 ⁹ *Id.* at 2.

24 ¹⁰ ECF Nos. 1, 2, 4.

25 ¹¹ EFC Nos. 7, 8.

26 ¹² ECF No. 17.

27 ¹³ ECF Nos. 18, 20, 21.

1 damages request.

2 Discussion

3 A. Default judgement under FRCP 55

4 Federal Rule of Civil Procedure 55 provides a mechanism for obtaining a default
5 judgment against a party who has failed to plead or otherwise respond to claims brought against
6 it. After a Clerk's entry of default, the movant must request a default judgment from the court
7 under Rule 55(b)(2).¹⁴ A district court has discretion to enter a judgment by default, which
8 typically turns on consideration of the seven *Eitel* factors: (1) potential prejudice to the plaintiff,
9 (2) the merits of the plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the
10 amount of money at stake in the action, (5) the potential disputes of material facts, (6) whether
11 the default was due to excusable neglect, and (7) the strong federal policy favoring adjudications
12 on the merits.¹⁵

13 1. Possibility of prejudice, substantive merits, and sufficiency of the complaint

14 The first three *Eitel* factors weigh in favor of entering a default judgment. Laera will
15 suffer prejudice if a default judgment is not entered because Fang refuses to participate in this
16 case despite having been properly served with a copy of the summons and complaint and
17 engaging in informal settlement negotiations after Laera filed this action.¹⁶ As to the second and
18 third factors, Laera's claims are both sufficient and have merit. All of Laera's factual allegations
19 (besides those relating to damages) are deemed admitted by virtue of Fang's default, and Laera
20 adequately pleads at least one claim for conversion.

21 Under Nevada law, "[c]onversion is a distinct act of dominion wrongfully exerted over
22 personal property in denial of, or inconsistent with, title or rights therein or in derogation,

24 ¹⁴ *Eitel v. McCool*, 782 F.2d at 1470, 1471 (9th Cir. 1986); *Trustees of the Bricklayers & Allied*
25 *Craftworkers Local 13 Defined Contribution Pension Trust for S. Nev. v. Tumbleweed Dev., Inc.*,
26 2013 WL 143378, at *2 (D. Nev. Jan. 11, 2013) (citing *Eitel*).

27 ¹⁵ See *Eitel*, 782 F.2d at 1471–72.

28 ¹⁶ ECF Nos. 4, 24 at 7–8.

1 exclusion or defiance of [those] rights.”¹⁷ “[C]onversion is an act of general intent, which does
 2 not require wrongful intent and is not excused by care, good faith, or lack of knowledge.”¹⁸
 3 Laera adequately pleads a conversion claim based on the money Fang pocketed from the product
 4 mark-ups. He alleges that Fang “added an average of 8%” to the costs of Laera’s exports and
 5 that Fang kept the money for himself.¹⁹ Accordingly, I find that the first three *Eitel* factors weigh
 6 in favor of granting default judgment.

7 **2. Sum of money at stake and possible dispute of material facts**

8 The fourth and fifth *Eitel* factors also weigh in favor of granting a default judgment.
 9 Factor four considers the amount of money at stake and the seriousness of the defendant’s
 10 conduct, which involves an assessment of whether the recovery sought is proportional to the
 11 harm the defendant’s conduct has caused.²⁰ The amount of money in dispute is plainly
 12 significant—Fang’s product mark-ups alone total more than \$759, 794.30,²¹ and Laera offers
 13 invoices to show that this amount is directly proportional to the harm Fang caused.²²

14 The fifth *Eitel* factor considers any potential disputes about material facts. All non-
 15 damages material facts have been admitted as a matter of law by virtue of Fang’s default.²³
 16 Because Laera sufficiently alleges at least two claims for conversion, and the material facts
 17 supporting these claims are deemed admitted, the fifth *Eitel* factor also weighs in favor of default
 18 judgment.

19
 20 ¹⁷ *Edwards v. Emperor’s Garden Rest.*, 130 P.3d 1289, 1287 (Nev. 2006).

21 ¹⁸ *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000).

22 ¹⁹ ECF No. 1 at 5.

23 ²⁰ *See Trustees of the Bricklayers*, 2013 WL 143378, at *3 (internal citations omitted).

24 ²¹ *See id.* (finding that amount in controversy of less than \$20,000 was significant in ERISA
 25 benefits action).

26 ²² ECF No. 24-1–24-7.

27 ²³ FED. R. CIV. PROC. 8(b)(6) (“An allegation— other than one relating to the amount of
 28 damages—is admitted if a responsive pleading is required and the allegation is not denied.”).

1 **3. *Excusable neglect***

2 The sixth *Eitel* factor considers whether the default has resulted from excusable neglect
 3 of which there is no evidence to suggest. As the record reflects, a summons was issued to Fang
 4 on May 1, 2014, and service was effectuated on Fang at the Las Vegas Convention Center on that
 5 date. Laera moved the Clerk to enter default on May 28, 2014, after Fang's opportunity to
 6 respond had expired under FRCP 12.²⁴ To date, Fang has never appeared to defend this case.
 7 Because Fang had ample opportunity to respond to the allegations within Laera's complaint and
 8 has never appeared in this case, I find that the sixth *Eitel* factor also weighs in favor of entering a
 9 default judgment.

10 **4. *Decision on the merits***

11 The final *Eitel* factor takes into consideration the strong policy preference for disposing
 12 of cases on their merits.²⁵ Fang's failure to answer Laera's complaint or otherwise engage in the
 13 litigation process makes it unlikely that this case could eventually be resolved on the merits. I
 14 find that the policy preference in favor of decisions on the merits will not, without more,
 15 preclude entry of a default judgment. On balance, the *Eitel* factors weigh heavily in favor of
 16 entering a default judgment against Fang, so I proceed to determine the amount of the monetary
 17 award.

18 **B. Determination of damages**

19 Laera requests total damages of \$790,194.30 for the product mark-ups and Fang's salary
 20 overpayments. Laera offers sufficient evidence both through affidavits and invoices to
 21 demonstrate his entitlement to the \$759,794.30 in damages he requests for the product mark-
 22 ups.²⁶ Laera's affidavit explains how he arrived at this figure with references to the appropriate
 23 invoices that show that Fang marked up the prices on the goods that Laera imported from
 24

25
 26 ²⁴ ECF No. 24 at 2.

27 ²⁵ See *Eitel*, 782 F.2d at 1472.

28 ²⁶ ECF No. 24 at 5.

China.²⁷ I therefore find that Laera is entitled to \$759,794.30 in damages for the product mark-ups.

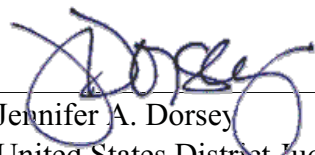
But Laera has not sufficiently proven the damages he requests for Fang's salary overpayments. To support this calculation, Laera offers the purported declaration of Wei Ting—the employee whose wages Fang allegedly stole—stating that Fang stole \$30,400 of his wages. But Ting's declaration is not properly authenticated because it is not made under penalty of perjury, so I exercise my discretion not to consider it.²⁸ Plus, it is not clear that it was Laera—not Ting—who suffered this harm. Because Laera offers no admissible evidence to support his salary-overpayment damages request, I decline to award him the \$30,400 in damages he requests for these alleged overpayments.

Conclusion

Accordingly, with good cause appearing and no reason to delay, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that **Laera's motion for default judgment [ECF No. 24] is GRANTED in part and DENIED in part.** Laera is entitled to \$759,794.30 in damages for the product mark-ups, but I decline to award him damages for the salary overpayments.

The Clerk of Court is directed to enter default judgment for Laera and against Fang in the amount of \$759,794.30 and CLOSE THIS CASE.

DATED: June 14, 2016


Jennifer A. Dorsey
United States District Judge

²⁷ See, e.g., *U.S. S.E.C. v. Brandonisio*, 2013 WL 5371626 (D. Nev. Sept. 24, 2013); *Trustees of Teamsters Local 631 Sec. Fund for S. Nev. v. Knox Installation-Dismantling and Services*, 2013 WL 4857897 (D. Nev. Sept. 9, 2013).

²⁸ FED. R. CIV. PROC. 56