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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THUNDERBIRD RESORTS INC., a
British Virgin Isles corporation
Plaintiffs,
v.
MITZIM PROPERTIES, INC., a Nevada
corporation; TALOMA ZULU, S.A., a
Panamanian corporation; JACK RAY
MITCHELL, an individual
Defendants.

Case No.: 15cv1304 JAH (BGS)

**ORDER AND ENTRY OF DEFAULT
JUDGMENT AGAINST TALOMA
ZULU, S.A.**

INTRODUCTION

On March 20, 2017, this matter came on for hearing on the motion for default judgment filed by Thunderbird Resorts Inc. (“Plaintiff”). Plaintiff was represented by attorney David Lichtenstien. Defendant Taloma Zulu, S.A., a Panamanian corporation (“Taloma”) did not appear. After consideration of the pleadings, application for default judgment, and supplemental application for default judgment submitted by Plaintiff, and for the reasons set forth below, this Court enters default judgment against Defendant Taloma, in favor of Plaintiff, in the amount of \$407,643.24.

BACKGROUND

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2 In 2002, Plaintiff partnered with Angular Investments Corporation, a Panamanian
3 corporation (“Angular”) to operate casinos and related businesses in Costa Rica.
4 Thunderbird and Angular formed Grupo Thunderbird de Costa Rica, S.A. (“GTCR”). The
5 entities agreed to split all profits from GTCR equally. Angular’s principal, Murray Jo
6 Zimmer (“Zimmer”), became Thunderbird’s “country manager” for its operations in Costa
7 Rica.

8 On June 12, 2015, Plaintiff filed a Complaint against Zimmer, Angular, Mitzim
9 Properties, Inc., a Nevada corporation (“Mitzim”) and Taloma alleging seven causes of
10 action including breach of fiduciary duty and fraud, a civil RICO claim under 18 U.S.C. §
11 1961, et seq. against all defendants, a state tort action for conversion, and equitable claims
12 for constructive trust and accounting. *Doc. No. 1*. On September 11, 2015, Plaintiff filed
13 a First Amended Complaint (“FAC”) adding an eighth claim for Breach of Contract and
14 joining Defendant Jack R. Mitchell; former CEO of Plaintiff and Zimmer’s partner in
15 Mitzim. *See Doc. No. 28*.

16 On December 31, 2015, Plaintiff moved for issuance of Letters Rogatory, as to
17 Defendants Angular and Taloma. *See Doc. Nos. 45, 46*. This Court granted Plaintiff’s
18 motions (*doc. nos. 54, 55*), and requests for international judicial assistance were sent to
19 the appropriate judicial authorities of the Republic of Panama (“Panama”). *See Doc. Nos.*
20 *54, 55*. On December 19, 2016, Plaintiff filed proof of service via Letters Rogatory,
21 asserting that service was effected on Taloma’s registered agent for service of process on
22 or about September 26, 2016, in accordance with Fed.R.Civ.P. 4(f)(1) and 4(h)(2) and the
23 Inter-American Convention on Letters Rogatory and Additional Protocol. *Doc. Nos. 63,*
24 *64*. On December 30, 2016, Plaintiff filed a request for Clerk’s Entry of Default against
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1 Defendant Taloma. See *Doc. No.* 66. The Clerk of Court entered default against Taloma
2 on January 03, 2017. ¹ *Doc. No.* 68.

3 On January 27, 2017, Plaintiff filed a motion for default judgment against Taloma
4 on the second cause of action for aiding and abetting a breach of fiduciary duty. *Doc. No.*
5 70. This Court held a hearing on Plaintiff’s motion. *Doc. No.* 74. Defendant not appearing,
6 the Court issued an order granting the motion for default judgment against Taloma and
7 directing Plaintiff to supplement the pleadings to clarify or explain damages suffered over
8 and above \$657,975.00. *Doc. No.* 73. Plaintiff timely filed its supplemental briefing on
9 damages. *Doc. No.* 75. The matter is now before the Court.

10 **DISCUSSION**

11 Plaintiff requests an entry of default judgment by the Court in the amount of
12 \$825,125.35. The total consists of initial claimed damages of \$657, 975.00, plus additional
13 damages of \$73,430.45 for a total damages award of \$731,405.45; prejudgment interest
14 from the filing date of the Complaint under California Civil Code §§3287-3289; and costs
15 of litigation.

16 **1. LEGAL STANDARD**

17 Rule 55(a) of the Federal Rules of Civil Procedure provides that “[w]hen a party
18 against whom a judgment for affirmative relief is sought has failed to plead or otherwise
19 defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s
20 default. Rule 55(b) allows default judgment to be entered by the Clerk of Court if the
21 amount sought is “for a sum certain or for a sum which can by computation be made
22 certain.” Fed. R. Civ. P. 55(b)(1). In all other cases, the application must be made to the
23 court. Fed. R. Civ. P. 55(b)(2). “If, in order to enter judgment or to carry it into effect, it
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25 ¹ Plaintiff also filed proof of service and requested Clerk’s Entry of Default and default judgment as to
26 Angular. *Doc. Nos.* 63, 65, 67. Angular later appeared and filed a motion to set aside entry of default and
27 a motion to dismiss for lack of jurisdiction. *Doc. Nos.* 79, 80. This Court granted both motions and
28 dismissed the action against Angular for lack of personal jurisdiction after an evidentiary hearing. *Doc.*
No. 120; *See Thunderbird Resorts, Inc. v. Zimmer*, No. 15CV1304-JAH (BGS), 2018 WL 4700498, at *1
(S.D. Cal. Sept. 30, 2018).

1 is necessary to take an account or to determine the amount of damages ..., the court may
2 conduct such hearings or order such references as it deems necessary and proper.” *Id.*

3 2. ANALYSIS

4 A. Damages

5 Plaintiff’s FAC alleges that between 2010 and 2014, over \$550,000 of the amount
6 paid to Taloma by GTCR was redirected to Defendant Zimmer personally within a matter
7 of days. Additionally, Plaintiff alleges that in 2010, Taloma paid \$107,975.00 toward the
8 purchase of an office building located at 12255 Parkway Centre Drive in Poway, California
9 (the “Poway Property”), for the benefit of co-defendant Mitzim. Plaintiff further alleges
10 that Taloma made payments to Zimmer’s personal friends Donald and Kathleen Mechling;
11 to Cajite de Musica Celestial S.A., a company controlled by Zimmer’s former secretary;
12 and to Prestige RV, Inc., a company owned by Zimmer and his friend Ken Horn – all of
13 which Plaintiff contends are funds that were diverted, misappropriated, embezzled, and/or
14 converted out of Plaintiff’s fifty-percent share of GTCR profits for Defendants’ own
15 improper, personal use. In the supplemental application for default judgment, Plaintiff
16 identifies payments from Taloma of \$66,500.00 to Prestige RV, Inc. on May 7, 2008 and
17 \$6,930.45 to Donald and Kathleen Mechling on June 3, 2014.

18 In reviewing the record, Taloma paid “Chicago Title C and I Escrow” \$108,000.00
19 in October of 2010, corresponding in time with the Poway Property purchase by Mitzim².
20 *Doc. Nos.* 3-11 at 2; 69-3 at 7. The Court calculates an additional transfer of funds totaling
21 \$587,200.00 from Taloma to Zimmer between October 2010 and October 2014. *See Doc.*
22 *Nos.* 3-15 at 2-7; 69-3 at 6-8. Although GTCR began making payments to Taloma in early
23 2007, Plaintiff has not provided the Court with sufficient evidence to associate Taloma’s
24 2008 payment to Prestige RV, Inc. directly or indirectly with Zimmer, nor other named
25 co-defendants. The same holds true for the June 3, 2014 payment to Donald and Kathleen
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28 ² The Court notes that between July and October 2010, Plaintiff and Plaintiff’s subsidiary also made
payments toward the purchase of the Poway Property totaling \$144,950.00. *Doc. No.* 3-11 at 2.

1 Mechling. The Court finds that key portions of Salomon Guggenheim’s declaration in
2 support of Plaintiff’s supplemental application is based on information provided by an
3 outside source - not on personal knowledge - indicated by multiple uses of the preface “as
4 I am informed.” The record supports Defendants misappropriated, embezzled, or
5 converted funds from GTCR totaling \$695,200.00 - half of which was due to Plaintiff under
6 the agreement with Angular to split profits equally - resulting in actual damages to Plaintiff
7 in the amount of \$347,600.00.

8 **B. Pre-Judgment Interest**

9 Plaintiff requests prejudgment interest at the rate of seven percent from the filing
10 date of the Complaint under California Civil Code §§3287-3289. California Civil Code
11 section 3287, subdivision (a) allows a person to recover prejudgment interest on “damages
12 certain, or capable of being made certain by calculation” from the day such right to
13 damages or reimbursement vests³. California Civil Code § 3287(a); *Evanston Ins. Co. v.*
14 *OEA, Inc.*, 566 F.3d 915, 921 (9th Cir. 2009). The “vesting” requirement is “satisfied at
15 the time that the amount of damages become certain or capable of being made certain, not
16 the time liability to pay those amounts is determined.” *Id.* citing *Hartford Accident &*
17 *Indem. Co. v. Sequoia Ins. Co.*, 211 Cal.App.3d 1285, 1291 (1989). Under § 3287(a), a
18 legal dispute as to liability will not preclude a grant of prejudgment interest, however, when
19 the amounts due depend on disputed facts subject to judicial determination, the certainty
20 requirement under the statute is not met. *Id.* (quoting *Highlands Insurance Co. v.*
21 *Continental Casualty Co.* 64 F.3d 514, 521 (9th Cir.1995); *Olson v. Cory*, 35 Cal.3d 390,
22 402 (1983). “[P]rejudgment interest runs from the date when the damages are of a nature
23 to be certain or capable of being made certain by calculation and when the exact sum due
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27 ³ California Civil Code § 3287(a) provides, in pertinent part, “[e]very person who is entitled to recover
28 damages certain, or capable of being made certain by calculation, and the right to recover which is
vested in him upon a particular day, is entitled also to recover interest thereon from that day.”

1 to the plaintiff is made known to the defendant.” *Id.* (quoting *Levy–Zentner Co. v. Southern*
2 *Pac. Transp. Co.*, 74 Cal.App.3d 762, 142 Cal.Rptr. 1, 25 (1977)).

3 On June 26, 2015, Plaintiff filed a Notice of Application for Writ of attachment,
4 including exhibits which itemized the amounts paid by GTCR to Taloma and transferred
5 from Taloma to Zimmer. *Doc. No.* 3-11 at 2-7. Plaintiff filed the FAC on September 11,
6 2015 and effected service on Taloma on or about September 26, 2016. At such time,
7 damages were readily ascertainable. The amount of damages certain, however, is at issue.
8 Although no conflicting evidence or factual dispute is presented, the prospect of recovering
9 (1) the entire amount paid to Taloma by GTCR (over 2,000,000.00 as alleged) or (2) the
10 entire amount paid by Taloma to, or on behalf of, Defendants is speculative and
11 inconsistent with other allegations in the Complaint. See *Thompson v. Asimos*, 6 Cal. App.
12 5th 970, 992, (Ct. App. 2016) (finding that the court erred in applying the prejudgment
13 interest formula to an amount not certain). The amount of damages certain and owed to
14 Plaintiff is fifty percent of the amount embezzled from GTCR by Defendants through
15 Taloma. Accordingly prejudgment interest of seven percent is appropriate on a damages
16 award of \$347,600.00, running from September 26, 2016. The annual interest on
17 \$347,600.00 is \$24,332.00 per year or \$66.66 per day. As of the date of this order and entry
18 of final judgement, the total interest accrued is \$59,596.24.

19 **C. Costs**

20 Plaintiff seeks to recover costs, consisting of filing fees and fees for the issuance of
21 Letters Rogatory by the Clerk of Court. The Court finds such fees appropriate in the amount
22 of \$447.00.

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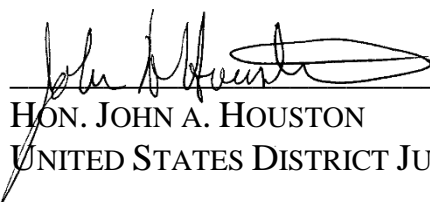
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CONCLUSION AND ORDER

Plaintiff's application (doc. no. 70) and supplemental application (doc. no. 75) for default judgment against Taloma Zulu, S.A. are **GRANTED in part** and **DENIED in part**. The Clerk of Court shall enter default judgment in in favor of Plaintiff, Thunderbird Resorts, Inc., in the amount of \$407,643.24.

IT IS SO ORDERED.

DATED: March 8, 2019



HON. JOHN A. HOUSTON
UNITED STATES DISTRICT JUDGE