UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

COMPETITIVE TECHNOLOGIES, INC., Plaintiff,	:	
v.	:	Civil No. 3:07cv01327 (PCD)
BENJAMIN MARCOVITCH, BETTY RIOS VALENCIA, JOHN DEREK ELWIN, III, AGROFRUT, E.U., and SHELDON STRAUSS, Defendants.	:	

RULING ON MOTION FOR DEFAULT JUDGMENT

Pursuant to Federal Rule of Civil Procedure 55(b), Plaintiff Competitive Technologies, Inc. ("CTT" or "Plaintiff") seeks default judgment against Defendants Benjamin Marcovitch ("Marcovitch"), Betty Rios Valencia ("Rios Valencia"), Agrofrut, E.U. ("Agrofrut") and Sheldon Strauss ("Strauss") (collectively, "Defendants").[1] Default was entered pursuant to Rule 55(a) against Marcovitch and Rios Valencia on June 4, 2009 [Doc. No. 149] for failure to appear for a long-scheduled jury selection of which they were admittedly aware. Default was entered pursuant to Rule 55(a) against corporate defendant Agrofrut on June 1, 2009 [Doc. No. 145] for failure to obtain counsel and for failure to comply with the court's trial preparation order notwithstanding the court's warning that failure to do so would result in the entry of default. Default was entered pursuant to Rule 55(a) against Strauss on June 1, 2009 [Doc. No. 145] for failure to comply with the trial preparation order despite the court's warning that failure to do so would result in the entry of default. Strauss also failed to appear for jury selection. For the reasons stated herein, Plaintiff's Motion for Default Judgment [Doc. No. 168] is GRANTED.

[1] Plaintiff withdrew its claims against Defendant John Derek Elwin, III, who filed for bankruptcy. [Doc. No. 168-3 at FN 1] See also Doc. Nos. 148 & 149 (granting Plaintiff's oral motion to dismiss Defendant Elwin).

I. DISCUSSION

A. Defendants Marcovitch and Rios Valencia

Defendants Marcovitch and Rios Valencia have filed numerous voluminous briefs and motions in opposition to the motion for default judgment. [Doc. Nos. 172, 173, 174, 175, 179, 182, 183] Essentially, they contend that they should be excused, for various reasons, for having failed to appear for jury selection, or in the alternative, that the case against them is based upon perjury or otherwise lacks merit. They do not contest or specifically address the amount of damages sought by Plaintiffs.

Notices of the jury selection scheduled for June 4, 2009 in this case were sent by the court to all parties on May 11, 2009, May 20, 2009, and again on June 2, 2009. [Doc. Nos. 134, 138, 146] Defendants do not claim that they were unaware that they had been ordered to appear for jury selection. The parties had previously filed a joint motion on consent to continue an earlier jury selection date, which was granted, showing that Defendants were aware of the impeding jury selection and also of the procedure for obtaining a continuance. [Doc. Nos. 132, 133] On the date of scheduled jury selection, Defendants, who are acting *pro se*, simply failed to appear. The assembled prospective jurors were dismissed, and defaults were entered against Marcovitch and Rios Valencia. Later that day, the court received Defendants' motion to continue the jury selection. Given that Defendants would need to travel here from outside the country, they must have been aware for some time that they had not made travel arrangements and thus did not plan to attend the jury selection, yet they failed to seek a continuance in a timely manner.

Defendants contend that because of the cost and effort involved, they cannot and should not be required to travel the long distance to Connecticut from Colombia for jury selection. [See

Doc. No. 172 at 1] Whether they can be compelled to defend themselves in Connecticut is a jurisdictional question that has already been addressed by the court, which found jurisdiction over Defendants. Defendants traveled to Connecticut to engage in the transactions at issue in this case, so it is not inappropriate to require them to travel here to defend themselves in a lawsuit arising from those transactions. It was not acceptable for Defendants to wait until after the court-ordered jury selection had passed to propose that the jury selection be conducted by video conference, which in any case is not practical. Similarly, Marcovitch's being "a blind person with a heart condition" [Doc. No. 172 at 1] does not entitle him to simply fail to appear for jury selection, nor does Rios Valencia claim to have any medical condition that would have prevented her from appearing. On various occasions during this case, at Defendants' request, the court has ordered that certain accommodations, such as conducting depositions by video, be made on account of Defendants' location and alleged medical conditions, but it is not the prerogative of Defendants to unilaterally determine what their obligations are. Ultimately, Defendants are responsible for obeying clear and unambiguous court orders, which they have failed to do.

Nor is Defendants' *pro se* status an excuse for their failure to appear for jury selection. Defendants' late-filed Motion to Adjourn Jury Selection complain that Defendants "[have] been forced to proceed *pro se* for reasons beyond [their] control." [Doc. Nos. 150 & 157 at ¶ 2] To the contrary, in conjunction with their former attorney John Kaiser's April 23, 2009 Motion to Withdraw, Defendants executed signed acknowledgments that they were "aware of the upcoming court schedule involving this case" and that they "expressly desire that [Attorney Kaiser] immediately cease any further representation in this case." [Doc. No. 130-3 at 4-5] When Attorney Kaiser sought to withdraw, Marcovitch and Rios Valencia had already entered *pro se*

appearances. [Doc. Nos. 100 & 106] The motion to withdraw was granted [Doc. No. 133] based upon Attorney Kaiser's representation that the Defendants had not paid him in over a year, and upon a finding by the court that Attorney Kaiser had submitted ample evidence that Defendants had requested, were aware of, and consented to his withdrawal, and were prepared to honor all impending deadlines in the case. In that ruling, the court specifically advised Defendants that they "will have been afforded ample time for compliance" with the Trial Preparation Order, and that "it shall be the obligation of Defendants, acting *pro se* or through their substitute counsel which is yet to appear, to ensure compliance with this and future deadlines." [Doc. No. 133 at 2] The court further warned that "in the absence of timely compliance . . . default will enter." Id.

The Court concludes that Defendants' disregard of its orders was willful, knowing, and deliberate, and that this was not the type of error that should be excused by virtue of Defendants' *pro se* status. See Bank of Montreal v. Mitsui Manufacturers Bank, 1989 U.S. Dist. LEXIS 12976 at *7-8 (S.D.N.Y. 1989) ("The solicitude extended to *pro se* litigants is generally calculated to alleviate the natural confusion attendant to a layman's excursion into the courts . . . It is not designed to facilitate a refractory *pro se* litigant's disregard of court orders."). To the extent that Defendants' various filings in opposition to the motion for default judgment could be construed as a motion pursuant to Rule 55(c) to set aside an entry of default "for good cause shown" or to set aside a default judgment in accordance with Rule 60(b), they are denied. See Lowey Dannenberg Cohen PC v. Dugan, 249 F.R.D. 67, 68-69 (S.D.N.Y. 2008) ("the principal factors bearing on the appropriateness of relieving a party of a default are whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented."). The propriety of default judgment in this instance is reinforced by a review of the

extensive record in this case, which has been rife with evasive, dilatory and apparently dishonest behavior by Defendants, who have already repeatedly been excused for various procedural irregularities and failures to comply with court orders.

Defendants also contend that default judgment should not enter against them because the allegations in Plaintiff's Amended Complaint are false. Defendants have filed a Motion for the Taking of Judicial Notice [Doc. No. 182], contending that the record demonstrates that one of Plaintiff's primary witnesses, John Nano, has engaged in perjury. This motion, along with Defendants' various oppositions to the motion for default judgment, rehashes at length the arguments Defendants raised in opposition to summary judgment, which are based largely on Defendants' self-serving and conclusory allegations that Plaintiff is lying. However, in an abundance of caution, this court narrowly denied summary judgment to Plaintiff on the basis that there were disputes as to the credibility of the witnesses for both sides that should be resolved by a finder of fact. Had Defendants desired a jury trial on the merits as they now claim, they need only have availed themselves of the opportunity by complying with the trial preparation order and by appearing for jury selection, as ordered by the court. However, Defendants failed to do so, and the merits of their case and the equities of the situation are not such that justice requires that they be given another opportunity.

B. Defendant Agrofrut

Agrofrut is a corporation and as such, it cannot represent itself *pro se*, but must retain counsel, as it was advised to do upon the withdrawal of Attorney Kaiser. Agrofrut failed to obtain substitute counsel and default was entered against it. Agrofrut has not filed any opposition to the motion for default judgment, or at least none that addressed the issues specific

to it as opposed to those raised generally by Defendants Marcovitch and Rios Valencia, and discussed above. Therefore, default judgment is entered against it.

C. Defendant Strauss

Strauss has also filed numerous briefs and motions in opposition to the motion for default judgment. [Doc. Nos. 169, 170, 184, 185] Many of the observations above apply to Strauss as well. Like the other Defendants, Strauss offers both an excuse for his failure to comply with court-ordered deadlines, as well as contesting the merits of Plaintiff's case against him. Strauss states that "As of April 27, 2009, I was under the distinct impression that I was dismissed as a Defendant due to the fact that I was not listed as a Defendant in a court filing by the Plaintiff." [Doc. No. 169 at 9] Notwithstanding Plaintiff's alleged omission of Strauss from a document, Strauss fails to point to anything in the record that would reasonably afford him the belief that he had been dismissed from the case. The docket does not reflect a dismissal of Strauss or a termination of the case as to him. Furthermore, regardless of any acts or omissions by Plaintiff, Strauss continued to receive notices from the Court itself regarding impending deadlines in the case, with which he was obliged to comply or face default. Nonetheless, he failed to comply with the trial preparation order or to appear for jury selection.

Strauss also contests the substance of Plaintiff's case against him, contending that "The only reason that this case is being pursued against Defendant Strauss is that he has [been] highly critical of John Nano" [Doc. No. 169 at 4], and that the allegations against him are "nothing but a fabrication." [Doc. No. 169 at 5] Strauss further states that "Fundamental fairness and due process would suggest that Defendant Strauss has a right to a jury trial" [Doc. No. 169 at 6] and that "manifest injustice" will result otherwise. [Doc. No. 185 at 2] Strauss could have exercised

his right to a jury trial and to contest the merits of the claims against him by complying with the trial preparation order and the order to appear for jury selection, which he failed to do.

Finally, Strauss alone among the Defendants addressed the issue of the amount of damages, having filed a Motion to Deny Plaintiff's Computation of Damages and to Require an Evidentiary Hearing. [Doc. No. 170] Strauss argues that "Damages attributable to Defendant Sheldon Strauss are far in excess of reasonability" [Doc. No. 170 at 2] and that the "outrageously high level of damages . . . has no basis in reality." [Doc. No. 170 at 5-6] However, these objections go essentially to the merits of the case; that is, Strauss appears to argue that the damages are excessive because he has done nothing wrong, but the default is a concession of liability as to the factual allegations in the complaint, and he offers no law or argument that the damages sought by Plaintiff are impermissible or inappropriate in light of that determination of his liability.

II. DAMAGES

Plaintiff has submitted documentation of the basis for the damages sought, including affidavits with respect to attorneys' fees and costs, such that the court determines that it is unnecessary to hold an evidentiary hearing with respect to damages. [See Doc. Nos. 168-3 through 168-7, and Doc. No. 24 (Amended Complaint)]. While the attorneys' fees are substantial, the court concludes that they are reasonable in light of the fact that Plaintiff was required over the course of the two years since this case was filed on August 31, 2007 to respond to many motions of questionable merit that were filed by Defendants, and because Plaintiff was required to engage in further motion practice in order to extract routine discovery from Defendants. Judgment is hereby entered as follows:

(1) A judgment against Marcovitch, Rios Valencia, Agrofrut and Strauss, jointly and severally, for damages in the amount of $750,000.00 in connection with the claims asserted against those defendants in Counts I through XI and XIV of the Amended Complaint;

(2) A judgment against Marcovitch, Rios Valencia and Agrofrut, jointly and severally, for treble damages in the amount of $2,250,000.00 in connection with the claims asserted against those defendants in Count XIII of the Amended Complaint;

(3) A judgment against Marcovitch, Rios Valencia and Agrofrut, jointly and severally, for common law punitive damages in the amount of $600,788.45 in connection with the claims asserted against those defendants in Counts XI and XIV of the Amended Complaint;

(4) A judgment against Marcovitch, Rios Valencia, Agrofrut and Strauss, jointly and severally, for reasonable attorneys' fees and costs in the amount of $600,788.45 in connection with the claims asserted against those defendants in Counts XI and XIV of the Amended Complaint;

(5) A judgment against Rios Valencia and Agrofrut, jointly and severally, for punitive damages in the amount of $750,000.00 in connection with the claims asserted against those defendants in Count XI of the Amended Complaint;

(6) A judgment against Marcovitch pursuant to Count XII of the Amended Complaint declaring and adjudging that Marcovitch was properly removed as a member of CTT's Board of Directors for cause on August 8, 2007 due to Marcovitch's breaches of his fiduciary duties to CTT and his violations of CTT's Corporate Code of Conduct, and that Marcovitch therefore is no longer a member of CTT's Board of Directors;

(7) A judgment against Marcovitch pursuant to Count XII of the Amended Complaint for

a permanent injunction prohibiting Marcovitch from acting, purporting to act, or holding himself out in any way as a member of CTT's Board of Directors; and

(8) A judgement against Strauss pursuant to Count XIV of the Amended Complaint for a permanent injunction prohibiting Strauss from soliciting proxies in contravention of Section 14(a) of the Exchange Act and Rule 14(a) promulgated thereunder.

III. CONCLUSION

For the reasons stated herein, Plaintiff's Motion for Default Judgment [Doc. No. 168] is GRANTED. Damages are ordered in the amounts indicated above, along with the stated declaratory and injunctive relief. The Motion by Strauss to Deny Plaintiff's Computation of Damages and to Require an Evidentiary Hearing [Doc. No. 170] is DENIED. The Motion for Reconsideration by Marcovitch and Rios Valencia of the denial of their late-filed Motion to Continue Jury Section [Doc. No. 172] is DENIED. The Motion for the Taking of Judicial Notice by Marcovitch and Rios Valencia [Doc. No. 182] is DENIED. The Clerk shall close the case.

SO ORDERED.

Dated at New Haven, Connecticut, September 8, 2009.

/s/_____
Peter C. Dorsey, U.S.D.J.