



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE INTERTRIBAL COURT OF SOUTHERN CALIFORNIA
RINCON BAND OF LUISEÑO INDIANS

RINCON BAND OF LUISEÑO INDIANS,
Plaintiff,

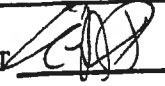
Case No. RINCON-02972009

v.

[PROPOSED] ORDER GRANTING
MOTION FOR ENTRY OF DEFAULT
JUDGMENT

MARVIN DONIUS, an individual, and
MUSHROOM EXPRESS, INC., a California
Corporation,
Defendants.

CERTIFIED COPY

CLERK OF THE COURT 

DATE ~~06-26-09~~ 06-26-09 PC1-50 RCVD

I. FACTUAL BACKGROUND

On April 17, 2009, the Plaintiff, Rincon Band of Luiseno Indians ("Tribe"), a federally recognized Indian Tribe, filed this action against non-Indian Defendants, Marvin Donius and Mushroom Express Corporation (collectively "Defendants"), alleging that the Defendants violated the Tribe's Sign Ordinance and Enforcement Code by constructing/erecting two signs on property located at 33777 Valley Center Road, Valley Center, CA ("Donius Property"), which is within the exterior boundaries of the Rincon Reservation. The Tribe alleged that the Defendants constructed/erected the signs without obtaining Tribal Council approval and the Defendants failed to take remedial actions after receiving a proper notice of violation. See Rincon Resolution No. 2009-05 ("Sign Ordinance") at ¶ 1; Enforcement Code §§11-304 and 305.

The Defendants were each properly served with the Summons on Complaint and Complaint in this action. See Proofs of Service (reflecting personal service on Donius on April 23, 2009 and service on Mushroom Express on April 20, 2009). On May 5, 2009 the Defendants

1 specially appeared *In Pro Per* and filed their Response and Objection asserting that the Court
2 lacked personal and subject matter jurisdiction over them and this matter. That motion was
3 denied at a duly notified hearing before the Court on May 27, 2009 where the Defendants
4 appeared *In Pro Per* and the Court, after a discussion with the parties and review of the Tribe's
5 brief in support of jurisdiction, found that it had both subject matter and personal jurisdiction
6 over the Defendants and the claims based on the Rules of Court and the Tribe's authority to
7 regulate the activities at issue on the Donius Property. The Court ordered the Defendants to file
8 their answer in Tribal Court within ten days of the hearing, i.e. June 8, 2009. The Court's order
9 was memorialized in writing and served on the parties. *See* Order of June 2, 2009. The
10 Defendants did not file an answer by the June 8th deadline. On June 18, 2009, the Tribe filed its
11 Request for Entry of Default and served a copy of that Request on Defendants. On June 18,
12 2009, the Clerk entered Defendants' default. Defendants have not sought relief from the entry of
13 their default. The Tribe now moves for entry of a Default Judgment. For the reasons discussed
14 below, the Court grants the Tribe's Motion.

18 II. JUDICIAL STANDARD

19 The Court adopts for the purposes of this Order the standards that apply to entry of
20 default judgment under Federal Rule of Civil Procedure 55. Federal Rule of Civil Procedure
21 55(b) provides for the Court's entry of a default judgment following the entry of default by the
22 Clerk. "The FRCP ... require that the applications for default set forth the following
23 information: (1) when and against which party default was entered; (2) the identification of the
24 pleadings to which default was entered; (3) whether the defaulting party is an infant or
25 incompetent person ... (4) that the Soldiers' and Sailors' Civil Relief Act of 1940 does not apply;
26
27
28

1 and (5) that notice of the application has been served on the defaulting party, if required.”

2 *Phillip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003).

3 The Court’s decision to grant or deny a default judgment is discretionary. *Elektra Entm’t*
4 *Group, Inc. v Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005). There are seven factors
5 applicable to the decision whether to grant a Default Judgment: (1) the possibility of prejudice to
6 the Plaintiff, (2) the merits of Plaintiff’s substantive claims, (3) the sufficiency of the complaint,
7 (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material
8 facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying
9 the Federal Rules of Civil Procedure favoring decisions on the merits. *Id.*, citing *Eitel v.*
10 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

13 III. DISCUSSION

14 A. Plaintiff has fulfilled the Procedural Requirements for a Default Judgment

15 The Tribe has complied with Federal Rule of Civil Procedure 55(b)(2) and the Second
16 Declaration of Brian Cleary establishes that (1) Defendants’ default was entered by the Clerk on
17 June 18, 2009; (2) the Defendants’ default was entered as to the Complaint filed on April 17,
18 2009; (3) the Defendants are not infants or incompetent persons; (4) the Soldiers’ and Sailors’
19 Civil Relief Act of 1940 does not apply; and (5) that notice of the Plaintiff’s Motion was served
20 on the Defendants.
21

22 B. Applying the *Eitel* Factors Confirms that this is a Proper Case for Entry of a 23 Default Judgment

24 1. Factor 1: Possibility of Prejudice to Plaintiff if Default Judgment is 25 Not Entered

26 The Tribe “would be denied the right to judicial resolution of the claims presented” in
27 this action if the Default Judgment was not entered. *Elektra Entm’t*, 226 F.R.D. at 392. Further,
28

1 Defendants, by choosing to default rather than appear and defend, are “deemed to have admitted
2 the truth of Plaintiff’s averments,” thereby establishing their violation of the Tribal Ordinance
3 and Code and that the Tribe would “likely suffer great prejudice” if a Default Judgment is not
4 entered. *Phillip Morris*, 219 F.R.D. at 499. This factor cuts in favor of granting the Tribe’s
5 Motion.
6

7 2. Factors 2 & 3: Merits of Plaintiff’s Substantive Claims and
8 Sufficiency of Plaintiff’s Pleading.

9 The second and third *Eitel* factors are commonly analyzed together and require that the
10 plaintiff state a claim upon which the plaintiff may recover. *Pepsico, Inc. v. California Security*
11 *Cans*, 238 F.Supp.2d 1172, 1175-76 (C.D. Cal. 2002).

12 a. Jurisdiction

13 To prevail on its claims, the Tribe has to have jurisdiction to regulate the activities
14 involved in this action. In its brief in support of jurisdiction, the Tribe established its jurisdiction
15 over the activities at issue on the Donius Property based on its tribal law and established federal
16 law recognizing that the Tribe has inherent power to regulate conduct of non-members on fee
17 land within the Reservation where that conduct threatens or has a direct effect on the political
18 integrity, the economic security, or the health or welfare of the Tribe. *See Montana v. United*
19 *States*, 450 U.S. 544, 565-66 (1981). The facts submitted in the Tribe’s brief in support of
20 jurisdiction establish that the Defendants’ activities on the Donius Property have a direct effect
21 on the political integrity, the economic security, or the health or welfare of the Tribe. *See Sign*
22 *Ordinance* at ¶ 7; Tribe’s Br. in Support of Jurisdiction at 3-5, 6-16. The Tribe therefore had
23 the authority to regulate the Defendants’ activities on the Donius Property.
24
25
26
27
28

1 b. First Claim for Violation of the Sign Ordinance

2 To prevail on the Tribe's first claim for relief, the Sign Ordinance Violation, the Tribe
3 has to establish that the Defendants violated a provision of the Sign Ordinance when they
4 constructed/erected the signage on the Donius Property. The Tribe's Sign Ordinance is a strict
5 liability statute and provides that "[a]ll signs erected on the Rincon Reservation must receive
6 Council approval before they are constructed/erected. All requests for Council approval must be
7 submitted in writing to the Executive Assistant of the Tribal Council and must meet the criteria
8 set forth in this Ordinance." See Sign Ordinance at ¶ 1. Further, paragraph 7 of the Sign
9 Ordinance provides that "[a]ny sign constructed/erected in violation of this ordinance shall be
10 considered an imminent threat to the environment and public health and safety, shall be
11 considered a substantive violation of Tribal Environmental law, and such violation shall be
12 subject to enforcement actions by the Enforcement Department ("RED") pursuant to the Chapter
13 11 of the Rincon Environmental Enforcement Ordinance," referred to herein as the Enforcement
14 Code. Paragraph 8 of the Sign Ordinance provides that "the Tribal Court is hereby empowered
15 to authorize the Tribe to remove noncompliant signs and to charge the property owner and/or the
16 owner of the sign with the expenses associated with such removal." Finally, paragraph 9 of the
17 Sign Ordinance provides that, "[o]wners of the land where the sign is located will be jointly and
18 severally liable with the sign owner."
19
20
21
22

23 The Tribe's Complaint contains the requisite allegations. The Defendants
24 constructed/erected two signs on the Donius Property on or about February 1, 2009 without
25 Council approval. See Complaint at ¶ 7. Defendants' failure to respond and defend constitutes
26 an admission that these statements are true. *Elektra Entm't*, 226 F.R.D. at 392. Therefore, the
27 Defendants' are jointly and severally liable for the construction/erection of the signage, which
28

1 violated Paragraphs 1 & 7 of the Sign Ordinance. Accordingly, the Tribe has established a claim
2 for the violation of the Sign Ordinance.

3 c. Plaintiff's Second Claim for Relief Failure to take Remedial
4 Action

5 To prevail on the Tribe's second claim for relief, violation of the Tribe's Enforcement
6 Code § 11-304, failure to take remedial action, the Tribe has to establish that 1) the Tribe
7 properly served a Notice of Violation on the Defendants regarding the non-compliant signage,
8 2) the Defendants did not take corrective action as set forth in that Notice or file a Request for
9 Hearing, and 3) the Tribe filed a Request for Court Order. If the Court finds the person named in
10 the Request for Order was properly served, failed to take corrective action or failed to timely
11 request a hearing, the Court shall issue an order granting some or all of the relief requested by
12 the Tribe's Enforcement Department. *See* Enforcement Code § 11-304. Further, Enforcement
13 Code § 11-305 authorizes the Court to impose civil penalties on the Defendants for violating
14 Section 1 of the Sign Ordinance, including a fine of up to \$5,000.00, a cease and desist order, an
15 order directing the person to take remedial action within a specified period of time, an order
16 directing the person to pay costs of any and all remedial actions taken by the Tribe to correct the
17 violation, and/or costs and legal fees to the prevailing party.

18 The Tribe's Complaint contains the requisite allegations. After an investigation
19 prompted by complaints from the Tribe's law enforcement regarding the signage, the Tribe
20 issued a Notice of Violation informing Defendants that the signage had been constructed/erected
21 on the Donius Property in violation of the Sign Ordinance and the Tribe served each Defendant
22 with a copy of the Notice and a copy of the investigative report. *See* Complaint ¶¶19-22,
23 Complaint Exhibits 1-4. The Defendants did not take any remedial action or seek a hearing on
24 the violation. *See* Complaint at ¶29. The Tribe's action included a Request for Court Order. *See*

1 Complaint at ¶ 29. These allegations are deemed true as a result of Defendants' refusal to appear
2 and defend. *Elektra Entm't*, 226 F.R.D. at 392. Therefore, the Tribe has established its second
3 claim for relief and the Court may grant the requested relief.

4
5 3. Factor 4: Amount of money at Stake in the Action

6 The Tribe seeks a \$5,000.00 civil fine for the Defendants' failure to take remedial action,
7 injunctive relief, plus costs for the Tribe's corrective action, if required, and attorney fees and
8 costs. Given that Defendants acted willfully, that their violations are ongoing and that, once their
9 motion to dismiss was denied, Defendants chose not to "comply with the judicial process or to
10 participate in any way in the present litigation," the "imposition of a substantial monetary award"
11 is justified and this factor is in favor of entering a default judgment. *Philip Morris*, 219 F.R.D. at
12 500.

13
14 4. Factor 5: Possibility of a Dispute Concerning Material Facts

15 A defendant's failure to respond to a complaint indicates that "the likelihood that any
16 genuine issue may exist is, at best, remote." *Philip Morris*, 219 F.R.D. at 500. Defendants filed
17 an unsuccessful motion to dismiss, Defendants were warned that their default would be taken
18 and Defendants chose not to defend the Complaint. Thus the likelihood of a dispute of material
19 facts is remote and this factor cuts in favor of entry of a default judgment.

20
21 5. Factor 6: Whether the Default was due to Excusable Neglect

22 Defendants were personally served with process and Defendants filed a motion to
23 dismiss. Defendants' failure to respond to the Complaint is due to "willful disobedience" of the
24 Court's Summons. *Philip Morris*, 219 F.R.D. at 500-01; *Elektra Entm't*, 226 F.R.D. at 393.
25 Therefore, this factor cuts in favor of entry of a Default Judgment.
26
27
28

1
2 6. Factor 7: Strong Policy Underlying the Federal Rules of Civil
3 Procedure favoring Decisions on the Merits

4 Defendants' decision not to defend these claims "makes a decision on the merits
5 impractical, if not impossible." *Pepsico, Inc.*, 238 F. Supp.2d at 117. Therefore, each and all the
6 *Eitel* factors favor entry of a Default Judgment.
7

8 **C. Remedies should be Granted**

9 The Tribe's remedies under the Sign Ordinance and Enforcement Code include 1) an
10 order finding the Defendant's liable for violation of the Sign Ordinance and requiring the
11 Defendants to remedy the violation, 2) an order authorizing the Tribe to enter the Donius
12 Property to remove the signs in violation of the Ordinance, 3) a judgment imposing on
13 Defendants a civil fine of \$5,000.00 and all costs for the Tribe's corrective measures and 4) an
14 order against Defendants for all other costs including reasonable attorney fees incurred by the
15 Tribe. See Sign Ordinance at ¶ 8; Enforcement Code §§ 11-304, 11-305. As the Tribe has met
16 the requisite elements for each of its claims, this is an appropriate case to award the following
17 relief as requested by the Tribe:
18
19

- 20 1. the Defendants are jointly and severally liable for violating the Tribe's Sign
21 Ordinance and Enforcement Code;
22
23 2. a \$5,000.00 civil fine is imposed on the Defendants for such violations;
24
25 3. Defendants are required to correct the Sign Ordinance violation within ten (10)
26 working days of the default judgment;
27
28 4. if Defendants fail to correct the violation within ten working days, the Tribe is
authorized to enter the Donius Property to remove the signs in violation of the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sign Ordinance and Defendants shall pay all costs for the Tribe's corrective measures; and

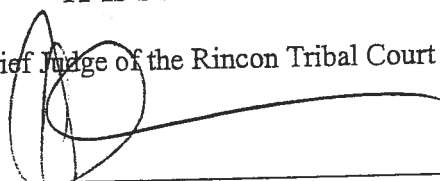
5. Defendants are required to pay all costs and attorney fees incurred by the Tribe for each claim.

IV. CONCLUSION

For the foregoing, the Tribe's Motion for entry of Default Judgment is granted.

IT IS SO ORDERED

Chief Judge of the Rincon Tribal Court



Anthony J. Brandenburg

Dated this 29 day of June, 2009