

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KINECT SOLAR, LLC.,
Plaintiff

v.

GLOBUS ENTERPRISES, LLC.,
QUIN ROHRER,
Defendants

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No. 1-23-CV-00674-DII

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiff Kinect Solar’s Motion for Default Judgment, Dkt. 22. After reviewing Kinect’s motion and the relevant case law, the undersigned recommends that the motion be granted.

I. BACKGROUND

Plaintiff Kinect, a boutique solar solutions company that provides logistics services for the solar and renewable energy industry, initiated this lawsuit against Defendants Globus Enterprises and Quin Rohrer, national equipment brokers specializing in renewable energy equipment, based on Defendants’ alleged “scheme to defraud and steal \$252,913.50” from Kinect. Dkt. 1, at 1-2. Kinect claims that Defendants approached Kinect about purchasing 1,519 Znshinesolar ZXM6-NH144 Series 450w Monocrystalline Split Silver Frame Clear Backsheet 1500v 300MM cable, PV-JX1203 Modules (“the Units”) and that Kinect agreed to purchase the Units

and then wired \$252,913.50 to Globus's bank account. *Id.* at 1. Defendants never delivered the Units and did not respond to requests from Kinect to return the funds. *Id.* at 2. Defendants then stated that their bank account was in the process of being closed, and they were unable to issue a refund. *Id.* Despite later representations from Defendant Rohrer that the Units were in transit, and then that Kinect's money would be refunded, Kinect never received the Units or the refund. *Id.* at 5. Based on this transaction, Kinect brings claims for fraud, conversion, theft under the Texas Theft Liability Act, fraudulent inducement/misrepresentation, money had and received, and breach of contract. *Id.* at 5-10.

Kinect filed this lawsuit on June 15, 2023. Defendants did not respond to the suit by the answer deadline of July 10, 2023, and have not appeared before this Court. Accordingly, Kinect has filed the instant Motion for Default Final Judgment pursuant to Federal Rule of Civil Procedure 55(b)(2). Dkt. 22.

II. LEGAL STANDARD

Under Rule 55 of the Federal Rules of Civil Procedure, federal courts have the authority to enter a default judgment against a defendant that has failed to plead or otherwise defend itself. Fed. R. Civ. P. 55(a)-(b). That said, "[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). A party is not entitled to a default judgment simply because the defendant is in default. *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). Rather,

a default judgment is generally committed to the discretion of the district court. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977).

In considering Kinect's motion, the Court must determine: (1) whether default judgment is procedurally warranted; (2) whether Kinect's complaint sets forth facts sufficient to establish that he is entitled to relief; and (3) what form of relief, if any, Kinect should receive. *United States v. 1998 Freightliner Vin #: 1FUYCZYB3WP886986*, 548 F. Supp. 2d 381, 384 (W.D. Tex. 2008); *see also J & J Sports Prods., Inc. v. Morelia Mexican Rest., Inc.*, 126 F. Supp. 3d 809, 813 (N.D. Tex. 2015) (using the same framework).

III. DISCUSSION

A. Procedural Requirements

To determine whether entry of a default judgment is procedurally warranted, district courts in the Fifth Circuit consider six factors: "(1) whether material issues of fact are at issue, (2) whether there has been substantial prejudice, (3) whether the grounds for default are clearly established, (4) whether the default was caused by a good faith mistake or excusable neglect, (5) the harshness of a default judgment, and (6) whether the court would think itself obliged to set aside the default on the defendant's motion." *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998).

On balance, the *Lindsey* factors weigh in favor of entering a default judgment against Defendants. Because Defendants have not filed a responsive pleading, there are no material facts in dispute. *See Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("The defendant, by his default, admits the

plaintiff's well-pleaded allegations of fact.”). Defendants’ failure to appear and respond has ground the adversary process to a halt, prejudicing Kinect’s interest in pursuing his claim for relief. *See J & J Sports*, 126 F. Supp. 3d at 814 (“Defendants’ failure to respond threatens to bring the adversary process to a halt, effectively prejudicing Plaintiff’s interests.”) (internal citation and quotation marks omitted). The grounds for default are established: Defendants were properly served on June 19, 2023, did not answer the complaint by the answer deadline of July 10, 2023, and have failed to appear and participate at all. *See* Dkt. 15, at 1-2; Fed. R. Civ. P. 12(a)(1)(A)(i) (requiring Defendants to serve an answer within 21 days after being served with the summons and complaint). There is no indication that the default was caused by a good faith mistake or excusable neglect. The undersigned therefore finds that default judgment is procedurally warranted.

B. Sufficiency of Kinect’s Complaint

Default judgment is proper only if the well-pleaded factual allegations in Kinect’s complaint establish a valid cause of action. *Nishimatsu Constr. Co.*, 515 F.2d at 1206. By defaulting, a defendant “admits the plaintiff’s well-pleaded allegations of fact.” *Id.* In determining whether factual allegations are sufficient to support a default judgment, the Fifth Circuit employs the same analysis used to determine sufficiency under Rule 8. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015). A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The factual allegations in the complaint need only “be enough to raise a right to relief above the

speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Wooten*, 788 F.3d at 498 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While “detailed factual allegations” are not required, the pleading must present “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The sufficiency of Kinect’s pleadings as to each of its claims is addressed below.

1. Fraud

To succeed on a claim for fraud under Texas law, a plaintiff must show that: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury. *D&R Constructors Inc. v. Texas Gulf Energy Inc.*, No. 01-15-00604-CV, 2016 WL 4536959, at *14 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. denied).

In this case, Kinect has alleged that (1) the Defendants contacted Kinect and offered to sell 1,519 Units; (2) the Units were a deliverable product Kinect could receive; (3) the Defendants regularly engaged in a series of phone calls, emails, and texts with Kinect that they would make the Units available on or by March 27, 2023; (4) the Defendants sought to be paid for the Units; (5) Kinect relied upon these representations and wired the Defendants \$252,913.50 for the Units; (6) the

Defendants never actually had such Units; and (7) not receiving these Units has substantially injured Kinect, who has still not been refunded the money. Dkt. 1, at ¶¶ 14-28; 29-38. The undersigned finds that Kinect has alleged facts supporting each element of a fraud claim under Texas law; therefore, Kinect has sufficiently stated a claim for fraud against Defendants and default judgment should be entered against Defendants on Kinect's fraud claim.

2. Conversion

Conversion is the “unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights.” *Wells Fargo Bank Nw., N.A. v. RPK Cap. XVI, LLC*, 360 S.W.3d 691, 699 (Tex. App.—Dallas 2012, no pet.). To establish a claim for conversion, a plaintiff must demonstrate that (1) the plaintiff owned or had possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Grand Champion Film Prod., L.L.C. v. Cinemark USA, Inc.*, 257 S.W.3d 478, 485 (Tex. App.—Dallas 2008, no pet.). The plaintiff also must establish it was injured by the conversion. *United Mobile Networks, LP. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997).

Here, Kinect has alleged that (1) Kinect had in its possession \$252,913.50; (2) the Defendants have taken such money into their possession; (3) Kinect has

repeatedly requested the money to be returned; and (4) the Defendants have refused to return Kinect's money. Dkt. 1, at ¶¶ 14-28; 39-45. Kinect has also alleged that it has been injured by the Defendants' actions, through payment for the Units Kinect never received. *Id.* The undersigned finds that Kinect has sufficiently alleged a claim for conversion and that default judgment should be entered against Defendants as to Kinect's conversion claim.

3. Texas Theft Liability Act claim

Under the Texas Theft Liability Act, "a person who commits theft is liable [civilly] for the damages resulting from the theft." Tex. Civ. Prac. & Rem. Code § 134.003(a); *see Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366 (Tex. 2009). To recover in this context for a civil theft under the Act, a plaintiff must establish: (1) the plaintiff had a possessory right to property; (2) the defendant unlawfully appropriated property in violation of the theft provisions of the Texas Penal Code; and (3) the plaintiff sustained damages as a result of the theft. *Wellogix, Inc. v. Accenture, LLP*, 788 F. Supp. 2d 523, 542 (S.D. Tex. 2011). Section 31.03(a) of the Texas Penal Code provides that a person "commits an offense if he unlawfully appropriates property with intent to deprive the owner of the property." Tex. Pen. Code § 31.03(a). Appropriation of property is unlawful if it is without the owner's effective consent. *Id.* § 31.03(b)(1).

Kinect alleges that while it initially voluntarily paid Defendants, it never received the Units and then demanded a refund. Dkt. 1, at 14-28, 46-57. Kinect further alleges that it was entitled to possess the funds, that Defendants unlawfully

appropriated the funds in violation of Section 31.03 of the Texas Penal Code, and that it was damaged through Defendants' unlawful retention of its money. *Id.* Based on these allegations the undersigned finds that Kinect has stated a claim under the Texas Theft Liability Act and that default judgment should be entered against Defendants as to this claim.

4. Fraudulent inducement/Misrepresentation

“Fraudulent inducement is a distinct category of common-law fraud that shares the same elements [of common-law fraud] but involves a promise of future performance made with no intention of performing at the time it was made.” *Zorrilla v. Aypco Constr. II LLC*, 469 S.W.3d 143, 153 (Tex. 2015). As stated above, Kinect has alleged facts supporting each of the elements of fraud. *See supra* Part III.B.1. Kinect has further alleged that the Defendants made a future promise—to deliver the Units to Kinect—without ever having any intent to provide Kinect with these Units, because Defendants never had the Units in the first instance. Dkt. 1, at ¶¶ 58-67. Based on these allegations, the undersigned finds that Kinect has stated a claim for fraudulent inducement/misrepresentation and that default judgment in Kinect's favor should be entered on Kinect's fraudulent inducement/misrepresentation claim.

5. Money had and received

The elements of a claim for money had and received are that (1) defendant holds money and (2) the money in equity and good conscience belongs to plaintiff. *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951); *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 917 (Tex. App.—Fort Worth 2017, pet. denied).

Here, Kinect alleges that (1) the Defendants still retain Kinect's money and (2) the money belongs to Kinect as Kinect never received the Units for which it paid. Dkt. 1, at ¶¶ 14-28, 68-70. The undersigned finds Kinect has stated a claim for money had and received. Accordingly, default judgment against Defendants as to this claim should be entered.

6. Breach of contract

To prevail on a claim for breach of contract, a plaintiff must show that the (1) the parties entered into a contract containing certain terms; (2) the plaintiff did what the contract required it to do; (3) the defendant did not do what the contract required it to do—the breach; and (4) the plaintiff was damaged as a result of defendant's breach. *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018).

Here, Kinect has alleged that (1) Kinect entered into an agreement whereby it agreed to pay the Defendants \$252,913.50 in exchange for 1,519 Units; (2) Kinect transferred the money into Globus's bank account; (3) the Defendants retained that money and never sent Kinect the Units; and (4) Kinect has never received the Units. Dkt. 1, at ¶¶ 14-28, 71-76. The undersigned finds that Kinect has stated a claim for breach of contract. Therefore, default judgment as to this claim should be entered against Defendants.

* * *

Kinect's factual allegations and the record before the undersigned are enough to raise Kinect's right to relief above a speculative level as to all of its claims against

Defendants. *Wooten*, 788 F.3d at 498. The undersigned therefore finds that default judgment is substantively warranted as to an entry of judgment on all counts.

C. Relief

Federal Rule of Civil Procedure 54(c) states that “[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c). In other words, the relief prayed for in a complaint defines the scope of relief available on default judgment. *Id.*

A defendant’s default concedes the truth of the allegations of the complaint concerning the defendant’s liability, but not damages. *United States v. Shipco Gen. Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987). Ordinarily, damages will not be awarded without a hearing or a demonstration by detailed affidavits establishing the necessary facts. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979). However, when the amount of damages or costs can be determined with certainty by reference to the pleadings and supporting documents, and when a hearing would not be beneficial, a hearing is unnecessary. *James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993). A sum capable of mathematical calculation is one that can be “computed with certainty by reference to the pleadings and supporting documents alone.” *Id.* at 311.

1. \$252, 913.50 in wired funds

Here, Kinect has established it wired funds in the amount of \$252,913.50 to Defendants and has established— through submission of declarations and testimony in connection with preliminary injunction proceedings—that it received nothing in exchange for these funds. *See* Declaration of Kinect CEO Lauren Carson, Dkt. 9-1 at

¶¶ 6, 12, 22 (stating “On March 23, 2023, Kinect wired the payment of two-hundred fifty-two thousand, nine-hundred thirteen dollars and fifty cents (\$252,913.50) to Globus’ bank account, as instructed by Defendants. A true and accurate copy of the wire confirmation is attached hereto as Exhibit B.”; “To date, Defendants have failed to make the Units available to Kinect, despite Kinect’s payment to Defendants of \$252,913.50.”; “To date, Defendants have refused to refund any [of] Kinect’s funds.”).

Accordingly, Kinect’s request for compensatory damages in the amount of \$252,913.50 should be granted.

2. Attorneys’ fees

Kinect seeks “reasonable attorneys’ fees and costs, including those pursuant to applicable statutes” in addition to other damages. Dkt. 1, at 12. Pursuant to Texas law, Kinect is entitled to its costs and reasonable and necessary attorneys’ fees incurred based on Defendants’ civil theft, pursuant to Texas Civil Practice and Remedies Code § 134.005(b). That section provides “[e]ach person who prevails in a suit under this chapter [i.e., the Texas Theft Liability Act] shall be awarded court costs and reasonable and necessary attorney’s fees.” Because the undersigned has found that default judgment should be entered against Defendants on Kinect’s claim for liability under the Texas Theft Liability Act, the Court should also award Kinect its costs and reasonable and necessary attorney’s fees (as reflected in Dkt. 22-2). pursuant to Tex. Civ. Prac. & Rem. Code § 134.005(b).

Also, under § 38.001 of the Texas Civil Practices and Remedies Code, Kinect is entitled to recovery of its attorneys’ fees and costs because this action involves “an

oral or written contract.” Tex. Civ. Prac. & Rem. Code § 38.001. Because the undersigned has found that Kinect is entitled to a default judgment on its claim for breach of contract, Kinect’s requests should be awarded its costs and reasonable and necessary attorneys’ fees (as reflected in Dkt. 22-2) pursuant to Tex. Civ. Prac. & Rem. Code 38.001 as well. A court may enter an award of attorneys’ fees under Tex. Civ. Prac. & Rem. Code 38.001 in connection with a default judgment. *See, e.g., Wells Fargo Bank, N.A. v. Dixon*, No. 3:20-CV-00745-X, 2021 WL 1250340, *3 (N.D. Tex. April 20, 2021) (awarding attorneys’ fees on default judgment for breach of contract).

3. Pre- and post-judgment interest

Under Texas law, prevailing parties generally receive prejudgment interest as a matter of course. *Executone Info. Sys. Inc. v. Davis*, 26 F.3d 1314, 1329-30 (5th Cir. 1994). Prejudgment interest begins to accrue on the earlier of: the 180th day after the date the defendant receives written notice of the claim; or the date the suit is filed. Here, the applicable date is the date this lawsuit was filed, i.e., June 15, 2023. Prejudgment interest is computed as a simple interest rate equal to the post-judgment interest rate applicable at the time the judgment is rendered. The applicable interest rate at the time of Kinect’s filing was 8.5%. Accordingly, to the extent the Court grants Kinect’s request for default judgment against Defendants in the amount of \$252,913.50, Kinect requests for prejudgment interest as the prevailing party, at the rate of 8.5%, or applicable interest rate at the time of judgment, should be granted.

Federal courts may award post-judgment interest pursuant to 28 U.S.C. § 1961 (“Interest shall be allowed on any money judgment in a civil case recovered in a district court.”); see *Harris v. Mickel*, 15 F.3d 428, 431 & n.4 (5th Cir. 1994). Federal law, specifically 28 U.S.C. § 1961(a), provides that interest is allowed on “any money judgment in a civil case recovered in a district court” at the rate of the “weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.” 28 U.S.C. § 1961(a). This provision has been interpreted to mean that “once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed.” *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1103 (D.C. Cir. 1984); *La. & Ark. Ry. v. Pratt*, 142 F.2d 847, 849 (5th Cir. 1944). Accordingly, Kinect’s request an award of post-judgment interest at the rate applicable at the time judgment is rendered should be granted.

IV. RECOMMENDATION

In accordance with the foregoing discussion, the undersigned **RECOMMENDS** that the District Court **GRANT** Kinect’s Motion for Default Final Judgment against Defendants, Dkt. 22. Kinect should be awarded compensatory damages in the amount of \$252,913.50, attorneys’ fees in the amount of \$31,687.24, costs, and pre- and post- judgment interest at the rates applicable at the time final judgment is rendered. The referral of this case should now be **CANCELED**.

V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED February 28, 2024



DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE