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AMERANTH, INC.

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

AMERANTH, INC. a Delaware corporation,

Plaintiff,

v.

SPLICK-IT, INC., a Delaware corporation, and DOES 1 through 20, inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT.

Case No. 17-cv-1093-DMS (WVG)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF AND CROSS-DEFENDANT AMERANTH, INC.'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST DEFENDANT AND CROSS-COMPLAINANT SPLICK-IT, INC. [FRCP 55(b)(2)]**

Date: July 23, 2021
Time: 1:30 p.m.
Dept: 13A (13th Floor)
Judge: Hon. Dana M. Sabraw

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Pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, plaintiff and cross-defendant Ameranth, Inc. ("Ameranth") requests the Court to enter default judgment against defendant and cross-complainant Splick-It Inc. ("Splick-It") as set forth herein.

## I. INTRODUCTION

This is an action for breach of a written patent license agreement between Ameranth, as licensor, and Splick-It, as licensee. Splick-It breached its contractual obligations to pay license fees to Ameranth, and Ameranth filed suit on April 26, 2017, in San Diego Superior Court, to pursue collection of the amounts owed to it under the parties' license agreement.

As alleged in Ameranth's Complaint, Ameranth and Splick-It entered into a 1st Amended License Agreement on November 19, 2013. A true and correct copy of the 1st Amended License Agreement (the "License Agreement") is lodged with the Court as **Exhibit 1**. Under the terms of the License Agreement, Splick-It obtained a license to Ameranth's entire family of Ameranth's on-line and mobile ordering patents (the '850, '325, '733, '077 patents, and all continuations and continuations-in-part of such patents (collectively, the "Licensed Patents")). Exh. 1, ¶ 1.2.

The License Agreement provides that Splick-It shall pay Ameranth royalties of: (a) $10 per month for each customer location at which Splick-It's on-line/ mobile ordering system was deployed and used; and (b) $0.10 per order placed on the system. Exh. 1, ¶ 5.2. Splick-It's royalty obligation to Ameranth would continue until the earlier of: (a) the expiration of the term of *all* of the Licensed Patents; (b) the final determination of invalidity or unenforceability of *all* claims of *all* of the Licensed Patents; or (c) Ameranth's election to terminate the License Agreement if Splick-It breached its obligations and failed to cure such breach. Exh. 1, ¶¶ 5,3, 6.1, 6.2. None of these events have occurred, several claims of the Licensed Patents remain unexpired, valid, and enforceable, and the License Agreement remains in

effect. McNally Decl., ¶ 3.

As alleged in Ameranth's complaint, Splick-It paid license fees under the License Agreement through the end of 2015. However, beginning in the first quarter of 2016, Splick-It began breaching its obligations under the agreement by failing and refusing to report or pay royalties to Ameranth. Splick-It has not paid any license fees to Ameranth for any period beyond December 31, 2015. McNally Decl., ¶ 4.

Splick-It originally answered the complaint and filed a cross-complaint, and removed the lawsuit to federal court. In its May 26, 2017 cross-complaint (Dkt. No. 3), at paragraph 3, Splick-It represented to the Court that it had acquired and combined with O-Web (one of the parties Ameranth had separately sued for patent infringement):

> On April 14, 2016, Splick-It acquired O-Web Technologies, Inc. d/b/a ONOSYS (hereinafter, "O-Web"), a developer of enterprise-level online ordering systems for restaurants. O-Web was formerly a competitor of Splick-It. The combined company provides multi-unit restaurants access to a proven mobile and online ordering system, integrated loyalty and catering programs, and technology support that allows restaurants to stay focused on their food, operations and customer service.

Dkt. No. 3, ¶ 3.

As the Court is aware, Splick-It's former counsel, in support of his motion to withdraw from representation of Splick-It in this matter, advised the Court on October 10, 2020: "I am informed and believe that Splick-It has ceased all operations, is no longer in business, all directors and officers have resigned, and there is no remaining representative authorized to direct my activities in this action on behalf of Splick-It." Dkt. No. 39-1, ¶ 3. Subsequently, on January 29, 2021, after granting Splick-It's former counsel's motion to withdraw, the Court issued an Order striking Splick-It's answer and cross-complaint, and directing entry of default against Splick-It. Dkt. No. 44. The Clerk entered Splick-It's default on February 1, 2021. Dkt. No. 45. The Court's January 29, 2021 Order also directed Ameranth to file a motion or entry of default judgment under Fed. R. Civ. Proc. 55(b) and Civil Local

Rule 55.1. Counsel for O-Web, the company with which Splick-It was merged, likewise filed a motion to withdraw from representation of O-Web, but the Court has never acted on the motion. Case No. 12-cv-0732, Dkt. No. 58.

Splick-It never produced to Ameranth documentation of the number of its customer deployments or sales transactions. However, in response to a third-party subpoena served by Ameranth, Splick-It's founder and former COO, Tarek Dimachkie, produced several documents, including copies of Splick-It's financial statements for 2017 and 2018. McNally Decl., ¶ 5; NOL, Exhs. 2, 3 (at pp. 78-84). The financial statements reveal that Splick-It had revenues of $2,524,193 in 2017, and of $1,445,574 in 2018. NOL, Exh. 3, p. 78.

Dimachkie's document production likewise contained financial statements for O-Web, which was acquired by and combined with Splick-It in 2016. McNally Decl., ¶ 7; NOL, Exh. 3 (pp. 85-93). O-Web's financial statements report that O-Web had revenues in 2017 of $2,500,165 (NOL, Exh. 3, p. 86), very similar to those of Splick-It for the same year.

O-Web submitted an Expert Witness Report of R. Christopher Anderson with Respect to Damages in Ameranth's patent infringement suit against O-Web on August 7, 2018. Hejmanowski Decl., ¶¶ 2 - 4; NOL, Exh. 4. Schedule 4A of Mr. Anderson's expert report lists the number of on-line and mobile transaction processed by O-Web in 2017 from which O-Web derived the $2,500,165 in annual revenue—5,867,150 transactions. NOL, Exh. 4. Those numbers produce a ratio of 2.35 ordering transactions for every $1 in revenue.

Applying O-Web's transactions-to-revenue ratio to its related company's (Splick-It's) reported revenues for 2017 and 2018 yields the following estimated transaction numbers for Splick-It:

2017

$2,524,193 (revenue) x 2.35 = 5,931,853 (transactions)

2018

$1,445,574 (revenue) x 2.35 = 3,397,099 (transactions)

Under the terms of the Ameranth-Splick-It License Agreement, these transaction numbers generate the following license royalty obligations to Ameranth:

2017

5,931,853 (transactions) x $0.10 = $593,185.30 (royalties)

2018

3,397,099 (transactions) x $0.10 = $339,709.90 (royalties)

**Total**: $932,895.20

This total figure does not include the "$10 per month per customer location" monthly royalties as provided for in section 5.2 of the License Agreement because Ameranth does not have reliable data concerning the number of customer locations at which the Splick-It system was deployed and used in 2017 and 2018. The calculation also does not include any royalties that are owed for the year 2016, despite the fact that Splick-It failed to make any royalty payments to Ameranth for 2016. Therefore, Ameranth believes that the $932,895.20 figure (derived from Splick-It's and O-Web's own financial statements and utilizing the royalty rates in the License Agreement) is not only a reasonable, but actually a *conservative*, estimate of the amount of Splick-It's monetary liability to Ameranth under the License Agreement.

## II. DISCUSSION

### A. The Entry of Default Against Splick-It Constitutes an Admission of the Liability Allegations of the Complaint

The consequence of the Court's entry of default against Splick-It is that the factual allegations of the complaint regarding Splick-It's liability for breach of the License Agreement (but not the amount of damages) are deemed admitted and taken as true. Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977); Penpower Technology Ltd. v. S.P.C. Technology, 627 F.Supp.2d 1083, 1088 (N.D.

Cal. 2008); Taylor Made Golf Co., Inc. v. Carsten Sports. Ltd., 175 F.R.D. 658, 661 (S.D. Cal. 1997). Moreover, because Splick-It actually appeared in this action and answered the complaint before its answer was stricken, there is no procedural impediment to entry of default judgment judgment under Rule 55(b)(2). Thus, the well-pleaded allegations for breach of contract contained in Ameranth's complaint against Splick-It are sufficient to establish liability for breach of the License Agreement.

**B. Judgment Should be Entered Against Splick-It for $932,895.20**

Rule 55(b)(2) requires the amount awarded pursuant to a default judgment to be determined by the Court when the plaintiff's claim is not for a "sum certain." Where precise ascertainment of damages is frustrated by the defaulting defendant's failure to participate in the litigation, as is the case here with Splick-It, "relaxed standards of proof" may be applied to demonstration of damages. Taylor Made Golf Co., Inc. v. Carsten Sports, Ltd., 175 F.R.D. 658, 662 (S.D. Cal. 1997). In such circumstances, "(p)roof of actual damages or profits is not necessary, as 'it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' Thus, the court may rely on circumstantial evidence of the extent of the defendant's wrongdoing to assess damages." Id. (citing Nintendo v. Ketchum, 830 F.Supp. 1443, 1445–46, (M.D.Fla.1993)).

Pursuant to Rule 54(c), a default judgment must be consistent with the relief prayed for in the pleadings of the party in whose favor judgment is being entered. Here, Ameranth's complaint against Splick-It expressly sought recovery of monetary damages for royalties owed by Splick-It to Ameranth under the terms of the License Agreement. A complaint need not demand a sum certain in order for the plaintiff to recover damages on default; it is sufficient if the complaint puts the defendant "on notice that the plaintiff was seeking such damages when the defendant was served

with the complaint." Ames v. STAT Fire Suppression, Inc., 227 F.R.D. 361, 362 (E.D. N.Y. 2005); see also Henry v. Sneiders, 490 F.2d 315, 317 (9th Cir. 1974)(upholding default judgment of $235,338 where complaint prayed for "damages for breach of contract, the amount of which was to be proved a trial"); Shapkin/Crossroads Productions, Inc. v. Legacy Home Video, Inc., 122 F.3d 1073 (9th Cir. 1997)("In its complaint Shapkin requested actual or statutory damages that were to be determined in the future. So long as a plaintiff requests actual damages in its complaint, it may receive them in a default judgment even though it did not request a specific amount"). Here, Ameranth's complaint clearly put Splick-It on notice that Ameranth was seeking royalties owed under the terms of the License Agreement.

As discussed above, the $932,895.20 default judgment figure sought by Ameranth is sufficiently supported. It is based on the internal financial statements of Splick-It and O-Web (which Splick-It acquired and with which it combined in 2016) produced by Tarek Dimachkie, Splick-It's founder and former COO in response to a subpoena (NOL, Exhs. 2, 3), and by the 2018 expert witness report of R. Christopher Anderson submitted on behalf of O-Web in Ameranth's related patent infringement action against O-Web. The proposed default judgment figure is also conservative in that: (a) it includes royalties for ordering transactions only, and not any monthly royalties based on the number of customer location deployments of the Splick-It system; and (b) it includes royalties for 2017 and 2018 only, even though Splick-It failed to pay royalties for any period of time beyond December 31, 2015.

### C. The Judgment Should Extend to Splick-It, its Successors-in-Interest, and/or Alter Egos

As explained in Ameranth's February 1, 2021, Request for Extension of Time to File Motion for Default Judgment (Dkt. No. 46), Splick-It itself is no longer in operation, but its business and assets (including the business of O-Web, which

Splick-It acquired and combined with in 2016) appear to have been purchased by or transferred to other entities that may prove to be successors-in-interest to, or even alter-egos of, Splick-It. In order to prevent such entities from unfairly and unjustly avoiding liability if they, in fact, constitute successors-in-interest or alter-egos of Splick-It, the judgment should include Splick-It, its successors-in-interest, and/or its alter egos. *See*, *e.g.*, Fed. R. Civ. Proc. 25(c) ("[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party"); Wright & Miller, 7C Fed. Prac. & Proc. Civ. (3d ed.), §*1958 Transfer of Interest in Action* ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor is not named").

## III. CONCLUSION

For the foregoing reasons, Ameranth respectfully requests the Court to enter judgment in favor of Ameranth and against Splick-It, its successors-in-interest, and/or its alter egos, in the sum of $932,895.20. Additionally, because Splick-It's cross-complaint was stricken by the Court, Ameranth requests that judgment be entered in favor of Ameranth against Splick-It's cross-complaint.

Respectfully submitted,

Dated: May 28, 2021 **CALDARELLI HEJMANOWSKI PAGE & LEER LLP**

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