No. 24-

IN THE

Supreme Court of the United States

GREGOR LESNIK AND STJEPAN PAPES,

Petitioners,

v.

ISM VUZEM, D.O.O., ISM VUZEM USA, INC., VUZEM USA, INC., ROBERT VUZEM, IVAN VUZEM, HRIDMONT D.O.O., AND GREGUREC, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act of 1986, 31 U.S.C. § 3729 (the FCA), prohibits a person from knowingly making, using, or causing to be made or used "a false record or statement material to an obligation to pay or transmit money or property to the Government" and from knowingly concealing or knowingly and improperly avoiding or decreasing "an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G) (setting forth what is known as a "reverse" claim under the FCA). Congress amended the FCA in 2009 to define "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3).

Respondent employers herein applied for visas to bring Petitioners and hundreds of co-employees to the U.S. to perform unskilled construction work. Respondents applied for non-petition-based B-1 (B1/B2) visas, which by statute, regulation and established case law of more than a half century may not be used for construction work. They did not apply for petition-based visas which are more expensive. The question is:

Whether knowingly applying impermissibly for the less expensive B1 visas, rather than alternative petition-based visas, was knowingly and improperly "avoiding or decreasing" an "obligation to pay or transmit money or property to the Government" under the FCA, 31 U.S.C. § 3729(a)(1)(G).

LIST OF PARTIES

The Petitioners are Gregor Lesnik and Stjepan Papes, appellants and relator plaintiffs below, who brought claims on behalf of themselves and on behalf of the United States. The Respondents are ISM Vuzem, d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., Robert Vuzem, Ivan Vuzem, HRID-Mont, d.o.o., and Gregurec, Ltd., respondents and defendants below.

RELATED CASES

United States of America ex rel. Gregor Lesnik and Stjepan Papes v. ISM Vuzem D.O.O., et al., No. 5:16-cv-01120, United States District Court Northern District of California. Judgment entered July 17, 2023.

United States of America ex rel. Gregor Lesnik and Stjepan Papes v. ISM Vuzem D.O.O., et al., No. 23-16114, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 12, 2024.

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Petitioners Gregor Lesnik and Stjepan Papes respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit Court in this case.

OPINIONS BELOW

The Ninth Circuit's opinion denying Lesnik and Papes' direct appeal is reported at 112 F.4th 816 and reproduced in Petitioners' Appendix ("Pet. App.") at 1-10a.

The United States District Court for the Northern District of California's opinion dismissing Lesnik and Papes' reverse claims under the FCA is reported at 2021 U.S. Dist. LEXIS 177678 and 2021 WL 4243399 and reproduced at Pet. App. 79-109a.

JURISDICTION

The Ninth Circuit entered judgment on August 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3729(a)(1)(G) of the False Claims Act sets forth the basis for a reverse claim, imposing liability for any person who:

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids

> or decreases an obligation to pay or transmit money or property to the Government…

31 U.S.C. § 3729(a)(1)(G).

Section 3729(b)(3) of the False Claims Act defines "obligation" as:

> an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment…

31 U.S.C. § 3729(b)(3).

INTRODUCTION

When a company wishes to employ foreign workers, it must apply for a visa for the workers. Immigration regulations designate specific categories of visas for particular workers depending on the type of work they will engage in. Fees for obtaining a visa also differ depending on the type of work the workers will engage in.

In this case, Respondents employers applied for a category of visa – B1/B2 visas - that by statute, established case law, and regulations may not be used for construction workers. The Respondents and their co-workers were hired to perform construction services. The fees for non-petition based B1/B2 visas are lower than for alternative petition-based visas, such as H2-B visas for temporary, non-agricultural workers. Respondents applied for B1/B2 visas for the purpose of avoiding paying the higher fees.

Petitioners' claim under the FCA is premised on Respondents' knowing and improper selection of the non-petition-based B1/B2 visas for Petitioners in order to avoid their obligation to the Government to pay for petition-based visas.

The District Court held the requirement to apply and pay for petition-based visas was a contingent obligation. The Ninth Circuit agreed with Petitioners that the authority relied on by the District Court had been legislatively overruled.

The Ninth Circuit nevertheless held that defendants did not have an "established duty" to pay the government on the basis that though they had applied for visas, they had not yet applied for the more expensive visas.

The Ninth Circuit's decision and reasoning conflicts with the plain language of the statute, its legislative history, and the reasoning in decisions from other Circuit Courts. In particular, the Respondents' obligation to apply for the visa category applicable to its unskilled workers is akin to the obligation in *U.S. ex rel Bahrani v. Conagra*, 465 F.3d 1189 (10th Cir. 2006) to pay a correct fee. The *Conagra* court held the failure to apply and pay for the proper export certification fell within the ambit of the reverse claim provision of the FCA. The same provision applies here, and the Ninth Circuit's holding that the failure to apply and pay for the proper visa category does not support a reverse claim stands in direct conflict. This Court's review is necessary to provide guidance and to avoid inconsistent judicial application of a federal law.

In addition, this case raises important questions of statutory interpretation that involve the compelling interest to avoid fraud against the Government in misuse of immigration applications.

STATEMENT OF THE CASE

Respondent employers bid for and obtained large construction contracts for sites in the United States, mostly large manufacturing plants including for Tesla in Fremont, California. 2-ER-181- 182, 2-ER-288-298, 2-ER-302-305, 3-ER-665-671; 4-ER-735- 747, 4-ER-750-784, 4-ER-796-800, 4-ER-810-846, 5-ER-1027-1041, 11-ER-2825-2926. The employers staffed the construction projects with foreign workers. 2-ER-188, 2-ER- 193, 2-ER-194, 2-ER-290, 311-313, 8-ER-1905-1938, 9-ER- 2174-2176, 9-ER-2177-2178, 9-ER-2224, 9-ER-2293, 9-ER- 2308-2311.

The employers applied for non-petition based B1-B2 visas. 2- ER-184-188, 2-ER-288-290. This included preparing hundreds of "welcome letters" with false information. 3-ER- 602-632. This was to have their employees enter the United States to perform construction work. 2-ER-182, 2-ER-186, 2-ER-290-291, 299-302; 2-ER-282, 2-ER-311-312. These workers were recruited, shepherded through visas, and worked grueling hours for little pay. 2-ER-184-197, 2-ER-288-306, 313. Two of the workers, Petitioners here, were told by Respondents employers to tell consular officials that they would work as a supervisor in the U.S. 2-ER-288-290, 2-ER-315, 2-ER-323. Invitation letters for Petitioners and other workers falsely represented that the individuals were knowledgeable and skilled and were being brought to the United States to apply that skillset to a technically

complex equipment installation. 3-ER-610, 3-ER- 614, 3-ER-624, 3-ER-691, 3-ER-693, 3-ER-716, 15-ER-3857-3862; *see generally*, 3-ER-602-632.

The workers, including Petitioners Lesnik and Papes, lacked specialized skills and were brought to the United States to perform unskilled construction work. All the workers did nothing but construction work in the United States. 2-ER-188, 2-ER-311-312, 9-ER-2309-2311. The employers admit on their own websites that their workers were present in the United States doing construction work. 8-ER-2007, 2008-2010, 2011-2013. They also revealed that their workers were admitted to the US with non-petition-based visas, specifically B-1 visas. 8-ER-2029; 3-ER-634-645. The employers paid the visa fees for the B-1 visas, despite the fact that it is not permissible to enter the United States on a B1/B2 visa to perform construction work. 9-ER-2320, 10-ER-2395; *see also* 9-ER-2198 (DHS letter to Senator Grassley).

Petitioners alleged in their Third Amended Complaint that the employers violated the FCA by applying for the less expensive visa with knowledge that it was impermissible to enter the United States for construction work on non-petition-based B1 visas instead of petition-based visas, such as H2-B visas for unskilled workers. Employers selected, applied for, and obtained the B1/B2 visas in an intentional scheme to reduce their visa-payment obligations.

While the Vuzem defendants may not have been required to use foreign employees for work in the U.S., or to apply for visas, once the Vuzem defendants did apply for visas they had an obligation to apply for, obtain and pay for the proper petition-based visas.

After entry of defaults against the employers, Petitioners moved for default judgments. The District Court denied the uncontested motion, concluding that the employers' obligation to apply for the more expensive visas was contingent and not for a fixed sum that was immediately due. This was the analysis of a legislatively overruled opinion erroneously cited by the District Court. The Ninth Circuit nevertheless affirmed the District Court's ruling on the analysis that there was not "an established duty" to pay the fee based visa application obligation in violation of the FCA reverse claim provision.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's interpretation of the reverse claim provision of the 2009 FCA is mistaken and conflicts with decisions from other Circuit Courts.

The reverse claim provision of the FCA sets forth a violation where a person knowingly avoids an obligation to pay money to the government. The False Claims Act of 1986 added the reverse false claims provision as one of the enumerated violations. 31 U.S.C. § 3729(a)(1)(G). The 1986 version of the statute did not include a definition of the term "obligation." The term "obligation" was defined in the 2009 amendments to mean "an established duty, whether or not fixed, arising from…statute or regulation…" 31 U.S.C. § 3729(b)(3).

Prior to the 2009 amendments, the term "obligation" was held to not include potential or contingent obligations to pay. *See American Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 735 (6th Cir. 1999) (holding an "obligation" exists where the defendant owes the

government "a specific, legal obligation at the time that the alleged false record or statement was made"); *see also U.S. v. Q Intern. Courier, Inc.*, 131 F.3d 770, 773, (8th Cir. 1997) ("The obligation cannot be merely a potential liability: instead, in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness").

Congress disagreed with the Circuit Courts' interpretation of the term "obligation." A Senate Report explaining the reasoning behind the 2009 amendments notes that "[t]he effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law." Senate Report 111-10, March 23, 2009, at 4 (2009). (Addendum, Item 4). The Senate Report specifically named, and overruled, the holding in *American Textile*, explaining that the new definition of obligation in the amendments is intended to include "contingent, non-fixed obligations" which may "[arise] across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that results in a duty to pay the Government money, whether or not the amount owed is yet fixed." Senate Report 111-10, March 23, 2009, at 14 & n.9 (2009).

The Senate Report added that the amendment was specifically intended to address situations like those at issue in *American Textile*, where importers mismarked the country of origin of their products to avoid paying customs duties. Senate Report 111-10, March 23, 2009,

pg. 14, n.10 (2009). A floor amendment removed the word "contingent" simply to avoid application of the provision to penalties rather than payment obligations that are not established or assessed. 155 Cong. Rec. S4543 (daily ed. April 22, 2009) (Addendum, Item 5).

In addition, the Senate Report endorsed the holding in another case: *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189 (10th Cir. 2006). *Conagra* was decided before the 2009 amendments, but Congress approved of its interpretation of the term "obligation." Senate Report 111-10, March 23, 2009, pg. 14 (2009).

The facts in *Conagra* involved a defendant's misrepresentations in altering export certificates to avoid the cost of obtaining replacement certificates for meat products. The *Conagra* court held that government regulations had "required Conagra to obtain replacement certificates and pay the accompanying fee." *Id.* at 1191. "[T]he obligation [in] Conagra was automatic." *Id.* at 1233.

Thus, the reverse claims provision of the FCA includes instances where the circumstances, laws, and/or the defendant's relationship with the government would typically result in the defendant having to pay the government in the normal course, but where the defendant has wrongfully avoided incurring charges for "a fixed sum immediately due" through misconduct.

The facts presented in this case are analogous to those found in *Conagra*. There, the court articulated the "independent source" from which the obligation to pay to file a corrected export certificate arose: the Conagra employees' determination that the original certificate was

inadequate and a replacement certificate with payment of the accompanying fee was necessary. 465 F. 3d at 1202. "It is the discovery that these changes are necessary that creates the obligation." *Id.*

Here, the "independent source" from which the obligation to pay the government arises from the employers' knowledge that the workers for whom they obtained visas were unskilled workers, and thus subject to a different category of visa with a higher fee. There is no dispute in this case that the employers' fee based obligations for the visas they applied for are set forth in immigration statutes and regulations. *See, e.g.,* 8 C.F.R. § 106.1(a) (requiring payment of the visa fees "associated with the benefit" sought); 8 C.F.R. § 214.2(h)(2)(i)(E) (requiring "a new or amended petition, with fee" when assigning H-1B work). It has been established for more than a half century that it is impermissible to enter the United States on B1/B2 visas to perform construction work. *See* 8 U.S.C. §§ 1101(a)(15)(B); 22 C.F.R. § 41.31(b)(1); *Matter of Hira*, 11 I. & N. Dec. 824 (BIA 1965, 1966, A.G. 1966); *International Union of Bricklayers and Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985).

There is also no dispute that the employers in this case applied for visas which were less expensive than the alternative visas - despite their intention, and actual actions, to assign the workers to perform general construction work.

The employers' knowledge of their workers' skill level and the correct visa they should have applied for *at the time they applied to bring them to the United States* is equivalent to the Conagra employees' determination that

a replacement certificate with an accompanying fee was necessary at the time they determined there were errors on the original certificates. According to the rationale set forth in *Conagra*, which is the rationale that was endorsed by Congress in the 2009 amendments to the FCA, an obligation to pay a fee arises at the time the defendant becomes aware of the need to take the action that requires payment of the fee.

The Ninth Circuit's reasoning in this case stands in direct conflict with that in *Conagra* and the clearly stated legislative intent of the definition of "obligation." The Ninth Circuit incorrectly assumed that Congress' 2009 definition of "obligation" has no bearing on the type of visa fraud scheme alleged by Petitioners here, by which the employers applied and paid for B1/B2 visas but directed their employees to perform work that required the more expensive petition based visas. Indeed, the employers knew all along that is what they intended to do, so their obligation to pay the higher fee—for the proper visa category—existed at all times.

The analysis and holding in *Conagra* was followed by a District Court in *Franchitti v. Cognizant Tech. Solutions Corp.*, 555 F. Supp. 3d 63 (D.N.J. 2021), which held defendant employer violated the FCA by decreasing its obligation to pay money to the government when it applied and paid for "L-1 and B-1 visas but direct[ed] its employees to perform work that required the more expensive H-1B visa." *Id.* at 71. The *Franchitti* holding is also consistent with Congress' intent in defining obligation to include the requirement to pay a fee that is properly owing under an applicable statute or regulation.

Confusion is evidenced by the differing decisions across the country on the question of whether it is a violation of the FCA's prohibition on decreasing an obligation to pay money to the government where a defendant employer decides to apply and pay for a less expensive visa while assigning work that requires a more expensive visa.

This Court should grant certiorari to clear the confusion and resolve the conflict between the Ninth Circuit's decision here and the meaning of the term "obligation" as set forth in the statute, including as interpreted in *Conagra* and the Senate Report detailing the legislative intent.

2. The question presented is one of national importance and this case is an ideal vehicle to consider it.

The United States immigration laws, the mechanisms through which the government ensures enforcement of them, and the impact of foreign workers taking jobs specified by statute for American workers, is an issue of paramount interest to the executive branch, the legislature, and the public.

The government regularly employs the FCA to enforce employer obligations to apply—and pay—for the correct visa for their workers, especially when an employer is engaged in a systematic scheme to obtain less expensive B-1 visas over more expensive visas. The exact same fact situation leading to the government using violations of the FCA as an enforcement mechanism is found in *United States ex rel. Michael Harmon v. L&T Technology Services, et. al.*, No. 2:16-cv-01114 (D.S.C.),

filed in the District of South Carolina. L&T Technology Services ("LTTS") underpaid visa fees owed to the United States by acquiring inexpensive B-1 visas rather than the more expensive petition-based H-1B visas. LTTS paid more than $9 million to the United States to settle the claims. *See* Press Release dated April 10, 2023, located at https://www.justice.gov/usao-sc/pr/larsen-toubro-technology-services-pays-9928000-resolve-false-claims-act-allegations.

The FCA was similarly enforced in the Eastern District of Texas in a case brought by the government against Infosys Corporation, which was also circumventing visa regulations by acquiring B-1 visas that did not correspond to the skill level of the workers holding them. Infosys paid $34 million to settle the case. *See* Press Release dated October 30, 2013, located at https://www.justice.gov/usao-edtx/pr/indian-corporation-pays-record-amount-settle-allegations-systemic-visa-fraud-and-abuse.

The Ninth Circuit's interpretation of § 3729(a)(1)(G) and (b)(3) means that an obligation to pay the government arises only after a visa application has been filed. This would eviscerate the legal ground for the government's settlements with LTTS and Infosys; it would also hobble the government's future efforts to enforce immigration laws against multinational employers that are engaging in large scale fraud against the United States.

As the *Conagra* court noted, the "cost of fraud cannot always be measured in dollars and cents" but it surely "erodes public confidence in government's ability to efficiently and effectively manage its programs." *Conagra*, 465 F.3d at 1203. The costs of removing the FCA's reverse

claim provision from the menu of options for immigration law enforcement are enormous both monetarily and as a matter of maintaining integrity in our society.

The employers in this case engaged in the type of large-scale fraud found in the LTTS and Infosys cases. The Petitioners supported their claims against the employers with compelling evidence. This case presents a factual scenario that is ideal for clarifying that the False Claims Act's reverse claim provision prohibits intentional schemes to circumvent visa fees by applying and paying for less expensive visas.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

DATED this 12th day of November, 2024.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16114
D.C. No. 5:16-cv-01120-BLF

UNITED STATES OF AMERICA EX REL. GREGOR LESNIK; UNITED STATES OF AMERICA EX REL. STJEPAN PAPES,

Plaintiffs-Appellants,

v.

ISM VUZEM D.O.O.; ISM VUZEM USA, INC.; VUZEM USA, INC.; ROBERT VUZEM; IVAN VUZEM; HRID-MONT D.O.O.; GREGUREC, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted June 12, 2024
San Francisco, California

Filed August 12, 2024

Appendix A

Before: Mary M. Schroeder, Ronald M. Gould, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Schroeder

OPINION

SCHROEDER, Circuit Judge:

Plaintiffs-appellants are noncitizen laborers who were brought into the United States to work for construction subcontractor defendants. Plaintiffs' appeal principally seeks to resuscitate a qui tam cause of action for violations of the False Claims Act (FCA). Plaintiffs allege that defendants violated the FCA by fraudulently applying for employment visas for plaintiffs that cost less than the ones for which defendants should have applied. The FCA creates liability for submission of a false claim to the government for payment. 31 U.S.C. § 3729(a)(1)(A). The violations alleged here are known as reverse false claims. The FCA defines a reverse false claim as "knowingly and improperly avoid[ing] or decreas[ing] an obligation . . . to pay . . . the Government." 31 U.S.C. § 3729(a)(1)(G). An "obligation" is in turn defined as an "established duty" to pay. 31 U.S.C. § 3729(b)(3).

Defendants made no appearance. The district court nevertheless dismissed plaintiffs' reverse false claims. It reasoned that even if the defendants should have applied for the more expensive visas, they did not do so, and therefore had no legal obligation to pay for such visas. Defendants faced only potential liability contingent upon

a finding that they violated applicable regulations in applying for the wrong visas. The court concluded that is not an "established duty" to pay the government, as required by the FCA. 31 U.S.C. § 3729(b)(3).

The district court also dismissed plaintiff Gregor Lesnik's forced labor claim asserted under 18 U.S.C. § 1589(a) of the Trafficking Victims Prevention Reauthorization Act (TVPRA). Lesnik had alleged that defendants threatened prosecution and sued him in order to coerce others to work. As Lesnik admitted, however, defendants' actions did not coerce Lesnik to provide any labor.

We affirm.

BACKGROUND

Plaintiffs are Gregor Lesnik, a resident of Slovenia, and Stjepan Papes, a resident of Croatia. They were allegedly recruited and hired to perform unskilled work on construction projects for entities in the United States, including Tesla. The lead contractor on the projects was Eisenmann Corporation. It subcontracted with defendants to provide laborers needed to complete the construction work. The defendants include related entities operated by Robert and Ivan Vuzem, residents of Slovenia. [1]

1. The seven defendants-appellees ("defendants") are Robert Vuzem; Ivan Vuzem; ISM Vuzem, d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; HRID-Mont, d.o.o.; and Gregurec, Ltd. The Third Amended Complaint named these defendants alongside numerous others that are not before us on appeal, including Tesla and Eisenmann.

The defendants allegedly helped plaintiffs obtain B-1 visas, to enter the United States, by submitting supporting letters to the United States Consulate. The B-1 visas are typically reserved for workers performing skilled work. Defendants allegedly knew that plaintiffs would not be performing such work but still sought the B-1 visas, making false statements in their letters about the nature of the work plaintiffs would perform. Defendants allegedly did so to avoid the higher application fees for the type of visas known as petition-based visas, intended for unskilled workers, including H2-B visas for temporary, non-agricultural workers.

After plaintiffs arrived in the United States, they worked for defendants at a Tesla plant in Fremont, California. Papes worked for defendants between 2013 and 2015. Lesnik was terminated in 2017, and defendants then allegedly sued him and threatened to have him "criminally prosecuted" as an example, in order to coerce the remaining workers to continue working.

Plaintiffs filed this action in 2016. In their third amended complaint, plaintiffs alleged two types of claims against the defendants relevant to this appeal. First, plaintiffs claimed that defendants violated the FCA by fraudulently applying for B-1 visas instead of petition-based visas, in order to reduce their visa-payment obligations. Second, Lesnik claimed that a subset of defendants[2]violated the TVPRA, after he was terminated,

2. Lesnik brought his TVPRA claim against only five of the defendants-appellees: Robert Vuzem; Ivan Vuzem; ISM Vuzem, d.o.o.; ISM Vuzem USA, Inc.; and Vuzem USA, Inc.

by filing suit and threatening criminal prosecution to coerce defendants' remaining workers to continue working.

Defendants did not appear, and plaintiffs filed motions for default judgment. The district court denied the motions and dismissed both the FCA claims and Lesnik's TVPRA claim. As to the FCA claims, the court held that defendants were never under any obligation to pay application fees for petition-based visas for which they did not apply, so defendants did not reduce or avoid any "obligation" to pay the government. The court dismissed Lesnik's TVPRA claim because he did not allege that defendants' actions coerced him to perform any labor. Plaintiffs appeal both determinations.

ANALYSIS

A. Reverse False Claims

We begin with the key statutory provisions of the FCA and its relevant definitions. The complaint alleges that defendants should have applied for visas that cost more than the ones for which they actually applied. While an ordinary false claim involves seeking money from the government to which the claimant is not entitled, we have the reverse situation here: defendants allegedly paid the government less than they should have. The FCA expressly imposes liability for reverse false claims where a person "knowingly makes [or] uses . . . a false record or statement material to an obligation to pay . . . the Government, or . . . knowingly and improperly avoids or decreases [such] an obligation." 31 U.S.C. § 3729(a)(1)(G).

The key issue thus becomes whether the defendants had an obligation to pay more than they did. The FCA provides a definition of "obligation," and that definition is critical to our analysis. It defines an "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, [or] from statute or regulation." 31 U.S.C. § 3729(b)(3).

Our Court has not yet interpreted this definition since its inclusion in 2009, so the district court looked to our leading pre-2009 authority for determining whether an obligation existed under the FCA, *United States v. Bourseau*, 531 F.3d 1159, 1169-70 (9th Cir. 2008). There, we embraced the Sixth Circuit's determination in *American Textile* that an "obligation" exists where a defendant owes the government "a specific, legal obligation at the time that the alleged false record or statement was made." *Id.* (quoting *Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 735 (6th Cir. 1999)). The Sixth Circuit explained that "[t]he obligation cannot be merely a potential liability[;] . . . a defendant must have had a present duty to pay" the government. *Am. Textile*, 190 F.3d at 735 (quoting *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997)). Congress confirmed this interpretation of the statute when it added a definition of "obligation" to the FCA in 2009. The definition requires that a legal obligation to pay the government be "established" at the time the false statement or record is made. 31 U.S.C. § 3729(b)(3).

In this case, because the statute requires an established legal obligation, it is not sufficient that

defendants applied for the wrong visas or may face liability for violating applicable regulations. They had no "established duty" to pay for visas for which they did not apply. 31 U.S.C. § 3729(b)(3). Indeed, the only specific, legal obligation defendants had at the time they applied for the B-1 visas was to pay the application fees for those visas. As then-District Judge Koh explained in her order dismissing defendants' claims against Tesla and Eisenmann:

> [T]here are no allegations that [defendants] ever submitted a visa application for the petition-based visas. To the contrary, Plaintiffs' allegations that [defendants] *did not* submit a visa application for the petition-based visas form the basis for Plaintiffs' reverse FCA claim. . . . Thus, there was no *obligation* to pay the government for a petition-based visa because no visa application for a petition-based visa was ever actually submitted. . . . As the Ninth Circuit held in *Bourseau*, "[t]he obligation cannot be merely a *potential* liability." 531 F.3d at 1169 (emphasis added). However, that is exactly what Plaintiffs are predicating their reverse FCA claim on: a *potential* liability incurred only if [defendants] had applied for the petition-based visas.

Lesnik v. Eisenmann SE, 374 F.Supp.3d 923, 940 (N.D. Cal. 2019).[3]

3. In a separate order, Judge Koh used the same reasoning to dismiss plaintiffs' reverse false claims against defendants.

Two other district courts in other circuits have expressly agreed with Judge Koh's opinion. *See United States ex rel. Kini v. Tata Consultancy Servs., Ltd.*., No. 17-CV-2526 (TSC), 2024 U.S. Dist. LEXIS 21130, 2024 WL 474260, at *4-5 (D.D.C. Feb. 7, 2024) (citing *Lesnik*, 374 F. Supp. 3d at 940) (rejecting a claim that defendant decreased its obligation to pay application fees for petition-based, H-1B visas by applying for cheaper visas, because defendant did not have an obligation to pay for visas for which they did not apply); *United States ex rel. Billington v. HCL Techs. Ltd.*, No. 3:19CV01185(SALM), 2022 U.S. Dist. LEXIS 134048, 2022 WL 2981592, at *8, *10 (D. Conn. July 28, 2022) (citing *Lesnik*, 374 F. Supp. 3d at 940) (rejecting a similar claim because there was "no obligation for defendants to pay the government for a more expensive H1-B [sic] visa because no such application was ever submitted").

Plaintiffs rely on *Franchitti v. Cognizant Technology Solutions Corp.*, the sole district court decision holding that in similar factual circumstances, a defendant had an "obligation" to pay application fees for visas for which it did not apply. *See* 555 F. Supp. 3d 63, 71 (D.N.J. 2021). That court said that a "plain language reading of the statute" was that the defendant "had an obligation to pay the appropriate fee for the privileges associated" with the more expensive visas. *Id.* The statute contains no such language. Moreover, the court never identified any legal authority that would establish such an obligation. *Id.* The court suggested that the obligation arose from an "implied contractual" or "fee-based" relationship

between defendant and the government. *Id.* (quoting 31 U.S.C. § 3729(b)(3)). But it never explained why such a relationship would obligate the defendant to pay a fee for a visa application it did not submit. Plaintiffs here make the same mistake: they never identify any legal authority establishing that defendants had such an obligation.

Plaintiffs criticize the district court for quoting part of a definition of "obligation" from *American Textile*, 190 F.3d at 735, that plaintiffs contend was abrogated when Congress subsequently defined the term in the FCA. The language the district court quoted was: "an obligation . . . must be for a fixed sum that is immediately due." *Am. Textile*, 190 F.3d at 735 (quoting *Q Int'l Courier, Inc.*, 131 F.3d at 774). Plaintiffs correctly point out that Congress's 2009 definition clarified that an obligation need not be "fixed." *See* 31 U.S.C. § 3729(b)(3) (defining an obligation as "an established duty, whether or not fixed"). The outdated reference to a "fixed sum," however, is not material to the issue decided. The word "fixed" referred to the amount of an obligation, not whether any obligation existed. *See United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1037 (5th Cir. 2016) (explaining that "'fixed' refers to the *amount* of the duty [to pay]," whereas "'established' refers to whether there is *any* [such] duty" (quoting 31 U.S.C. § 3729(b)(3))). The district court's decision did not depend upon whether the amount of an obligation was fixed; the court held defendants had no established obligation to pay for the petition-based visas. That ruling was and remains correct.

B. TVPRA Claim

The TVPRA renewed previous legislation aiming to "combat trafficking in persons, a contemporary manifestation of slavery" that "includes forced labor." 22 U.S.C. § 7101(a), (b)(3). To that end, the TVPRA includes a section prohibiting forced labor, including "by means of the abuse or threatened abuse of law or legal process." 18 U.S.C. § 1589(a)(3). The statute provides a civil remedy to victims. 18 U.S.C. § 1595(a).

Plaintiffs claim that defendants violated the statute by allegedly suing and threatening criminal prosecution of Lesnik for the purpose of coercing defendants' remaining workers to continue working. The TVPRA defines "abuse or threatened abuse of law or legal process" as improperly using or threatening the same "to exert pressure on another person to cause *that* person to take some action." 18 U.S.C. § 1589(c)(1) (emphasis added). A plain reading of this section is that the person facing abuse or threats must be the same person who is pressured to provide their labor. While defendants allegedly threatened and sued Lesnik after he was terminated, plaintiffs admitted that these actions were not taken to coerce him to provide any labor or services. The district court therefore correctly held that Lesnik failed to state a TVPRA claim.

CONCLUSION

Accordingly, we affirm the district court's dismissal of plaintiffs' FCA claims and Lesnik's TVPRA claim.

AFFIRMED.

APPENDIX B — ORDER DENYING DEFAULT JUDGMENT ON CLAIMS 2 AND 3; GRANTING RECONSIDERATION OF DENIAL OF ATTORNEYS' FEES ON CLAIM 9; AND DENYING WITHOUT PREJUDICE RULE 54 MOTION FOR ATTORNEYS' FEES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED MAY 30, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 16-cv-01120-BLF

GREGOR LESNIK AND STJEPAN PAPES,

Plaintiffs,

v.

EISENMANN SE, *et al.*,

Defendants.

ORDER DENYING DEFAULT JUDGMENT ON CLAIMS 2 AND 3; GRANTING RECONSIDERATION OF DENIAL OF ATTORNEYS' FEES ON CLAIM 9; AND DENYING WITHOUT PREJUDICE RULE 54 MOTION FOR ATTORNEYS' FEES

[Re: ECF 613, 614, 615]

Appendix B

Before the Court are three motions filed by Plaintiff Stjepan Papes ("Papes"): (1) a renewed motion for default judgment on Claims 2 and 3, *see* Mot. for Def. Jud., ECF 613; (2) an administrative motion for leave to file a motion for reconsideration of a prior order denying attorneys' fees in connection with Claim 9, *see* Admin. Mot., ECF 615; and (3) a motion for attorneys' fees and costs on Claims 2, 3, and 9 under Federal Rule of Civil Procedure 54, *see* Fees Mot., ECF 614. Plaintiff Gregor Lesnik ("Lesnik") is not a moving party with respect to the current motions. The Court finds the motions suitable for decision without oral argument. *See* Civ. L.R. 7-1(b).

For the reasons discussed below, Papes' fourth motion for default judgment on Claims 2 and 3 is DENIED. Papes' administrative motion for leave to file a motion for reconsideration, and his motion for reconsideration, are GRANTED. Finally, Papes' Rule 54 motion for attorneys' fees and costs is DENIED WITHOUT PREJUDICE.

I. BACKGROUND

This case was filed in 2016 and was litigated before District Judge Lucy H. Koh for nearly six years before it was reassigned the undersigned judge in 2022. The operative third amended complaint ("TAC") alleges that Robert Vuzem and Ivan Vuzem are residents of Slovenia who own and hold executive positions at ISM Vuzem, d.o.o., a Slovenia-based company. *See* TAC ¶¶ 9-11, ECF 269. ISM Vuzem USA, Inc., now dissolved, was a wholly owned subsidiary of ISM Vuzem, d.o.o. *See id.* ¶ 12. Vuzem USA, Inc. is a wholly owned subsidiary of ISM Vuzem,

d.o.o. *See id.* ¶ 13. HRID-MONT d.o.o. is a Slovenia-based company owned by the wife of Robert Vuzem. *See id.* ¶ 14. These defendants ("the Vuzem Defendants") allegedly trafficked low-skilled European laborers by transporting them to the United States to perform work for American manufacturers for less than minimum wage and without overtime pay. *See id.* ¶¶ 55-57. Lesnik, a resident of Slovenia, and Papes, a resident of Croatia, allegedly were transported to the United States by the Vuzem Defendants to work at various car manufacturing plants. *See id.* ¶¶ 59-60.

The TAC asserts thirteen claims against thirty-seven defendants on behalf of Lesnik and Papes and all others similarly situated. *See generally* TAC. While the case was pending before Judge Koh, most of those claims and defendants were dismissed. *See* Status Report, ECF 605. The only claims remaining in the case are three claims asserted by Plaintiff Papes, proceeding individually, against the Vuzem Defendants: Claim 2 for minimum wages under the Fair Labor Standards Act ("FLSA"), Claim 3 for overtime wages under the FLSA, and Claim 9 for trafficking and coerced labor under the Trafficking Victims Protection Reauthorization Act ("TVPRA"). *See id.* The Vuzem Defendants have defaulted. *See* Clerk's Entries of Default, ECF 430-31, 444-47.

Judge Koh denied three prior motions for default judgment against the Vuzem Defendants on Claims 2 and 3, without prejudice. *See* Prior Order Re Claims 2 and 3, ECF 587. Papes now brings a fourth motion for default judgment on Claims 2 and 3. Judge Koh granted in part

Papes' prior motion for default judgment on Claim 9 and denied Papes' request for attorneys' fees in connection with Claim 9. *See* Prior Order Re Claim 9, ECF 586. Papes seeks reconsideration of Judge Koh's denial of attorneys' fees in connection with Claim 9. Finally, Papes seeks an award of attorneys' fees and costs in connection with Claims 2, 3, and 9.

II. MOTION FOR DEFAULT JUDGMENT ON CLAIMS 2 AND 3 (ECF 613)

On September 20, 2021, Judge Koh issued an order denying without prejudice Papes' third motion for default judgment against the Vuzem Defendants on Claims 2 and 3, which seek minimum wages and overtime wages under the FLSA. This Court discusses Judge Koh's ruling where relevant to Papes' current fourth motion for default judgment on Claims 2 and 3.

A. Legal Standard on Default Judgment

Default may be entered against a party who fails to plead or otherwise defend an action, who is neither a minor nor an incompetent person, and against whom a judgment for affirmative relief is sought. Fed. R. Civ. P. 55(a). After an entry of default, a court may, in its discretion, enter default judgment. Fed. R. Civ. P. 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

In deciding whether to enter default judgment, a court may consider the following factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's

substantive claims; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

In considering these factors, all factual allegations in the plaintiff's complaint are taken as true, except those related to damages. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). When the damages claimed are not readily ascertainable from the pleadings and the record, the court may either conduct an evidentiary hearing or proceed on documentary evidence submitted by the plaintiff. *See Johnson v. Garlic Farm Truck Ctr. LLC*, 2021 U.S. Dist. LEXIS 113031, 2021 WL 2457154, at *2 (N.D. Cal. Jun. 16, 2021).

B. Discussion

"When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and parties." *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). The Court discusses in turn jurisdiction, service of process, and the *Eitel* factors.

1. Jurisdiction

Judge Koh previously determined that federal question jurisdiction exists with respect to Claims 2 and

3 because they are brought under a federal statute, the FLSA. *See* Prior Order Re Claims 2 and 3 at 7-8. This Court agrees that federal question jurisdiction exists on that basis.

Judge Koh previously determined that personal jurisdiction exists with respect to five of the six Vuzem Defendants. *See* Prior Order Re Claims 2 and 3 at 8-12. Judge Koh found that Vuzem USA is subject to general personal jurisdiction based on factual allegations that it was a California corporation prior to its dissolution. *See id.* This Court agrees. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015) ("The paradigmatic locations where general jurisdiction is appropriate over a corporation are its place of incorporation and its principal place of business."); Cal. Corp. Code § 2010(a) ("A corporation which is dissolved nevertheless continues to exist for the purpose of . . . defending actions . . . against it[.]").

Judge Koh found that ISM Vuzem d.o.o., ISM Vuzem USA, Robert Vuzem, and Ivan Vuzem are subject to specific personal jurisdiction based on factual allegations establishing that those defendants purposefully directed their activities to California and availed themselves of the privilege of conducting business in California; that Claims 2 and 3 arise out of those forum-related activities; and that exercise of jurisdiction over ISM Vuzem d.o.o., ISM Vuzem USA, Robert Vuzem, and Ivan Vuzem is reasonable. *See* Prior Order Re Claims 2 and 3 at 10-12. This Court agrees fully with Judge Koh's analysis. The TAC alleges among other things that ISM Vuzem d.o.o. and ISM Vuzem USA entered into contracts for

construction of facilities at the Tesla manufacturing plant in Fremont, California, and that Robert and Ivan Vuzem own and control the operations of ISM Vuzem d.o.o. and ISM Vuzem USA. *See* TAC ¶¶ 16, 213. Those and similar factual allegations in the TAC, which are taken as true for purposes of the motion for default judgment, are sufficient to satisfy the requirements for specific personal jurisdiction under the three-part test used in the Ninth Circuit. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

Judge Koh found that the sixth of the Vuzem Defendants, HRID-MONT d.o.o., is not subject to specific personal jurisdiction because the TAC contains no allegations that HRID-MONT d.o.o. directed any relevant activities toward California. *See* Prior Order Re Claims 2 and 3 at 11. Papes argues in his current motion that this Court may exercise specific personal jurisdiction over HRID-MONT d.o.o. under an alter ego theory. The alter ego theory of personal jurisdiction was not addressed in Judge Koh's prior order. *See id.* Personal jurisdiction over a corporation may be established by showing that the corporation is the alter ego of other entities or individuals as to whom personal jurisdiction exists. *See Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) (applying California law). The test is whether (1) there is such unity of interest and ownership that the separate personalities of the corporations no longer exist and (2) failure to disregard the corporations' separate identities would result in fraud or injustice. *See id.*

Here, the TAC alleges that "between Ivan Vuzem and Robert Vuzem and each of ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., and HRID-MONT d.o.o. there is such a unity of interest and ownership between the entities and their equitable owners that the separate personalities of the entities and the owners do not in reality exist." TAC ¶ 17. Papes also asserts that Robert and Ivan Vuzem transferred assets between ISM Vuzem, d.o.o. and HRID-Mont d.o.o., and that individuals were treated as employees of ISM Vuzem, d.o.o. and HRID-Mont d.o.o. at different times. *See* Mot. for Def. Jud. at 9-10. The Court finds that it may exercise personal jurisdiction over HRID-Mont d.o.o. based on allegations and evidence establishing that it is an alter ego of the other Vuzem Defendants.

2. Service of Process

When a plaintiff requests default judgment, the court must assess whether the defendant was properly served with notice of the action. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982); *Solis v. Cardiografix*, No. 12-cv-01485, 2012 U.S. Dist. LEXIS 119117, 2012 WL 3638548, at *2 (N.D. Cal. Aug. 22, 2012). Judge Koh previously reviewed the proofs of service filed in this case and found deficiencies only with respect to service on Defendants Magna d.o.o. and We-Kr d.o.o. *See* Prior Order Re Claims 2 and 3 at 12-14. Judge Koh expressly found that service on ISM Vuzem d.o.o., ISM Vuzem USA, Vuzem USA, Robert Vuzem, and Ivan Vuzem was compliant with Federal Rule of Civil Procedure 4 and the Convention on the Service Abroad of Judicial and

Extrajudicial Documents in Civil and Commercial Matters ("Hague Service Convention"), 20 U.S.T. 361, T.I.A.S. No. 6638. *See id.* The proof of service filed for HRID-Mont d.o.o. is substantially identical to the proof of service filed for ISM Vuzem d.o.o. *Compare* POS re HRID-Mont d.o.o., ECF 364, *with* POS re ISM Vuzem d.o.o., ECF 363. This Court agrees with Judge Koh's analysis and finds no basis to revisit it. Accordingly, this Court finds that the service requirement is satisfied with respect to all Vuzem Defendants.

3. *Eitel* Factors

Next, the Court considers whether default judgment against the Vuzem Defendants is warranted under the *Eitel* factors.

a. Factor 1 – Possibility of Prejudice

Under the first *Eitel* factor, the Court finds that Papes would be prejudiced without a default judgment against the Vuzem Defendants on Claims 2 and 3. Unless default judgment is entered, Papes will have no other means of recourse on those claims. *See Ridola v. Chao*, 2018 U.S. Dist. LEXIS 84241, 2018 WL 2287668, at *5 (N.D. Cal. May 18, 2018) (plaintiff prejudiced without default judgment because she "would have no other means of recourse against Defendants for the damages caused by their conduct"). The first factor therefore weighs in favor of granting default judgment.

b. Factors 2 and 3 – Merits and Sufficiency of Claims

The second and third *Eitel* factors address the merits and sufficiency of Papes' claims as pleaded in the TAC. Courts often analyze these two factors together. *See Dr. JKL Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010) ("Under an Eitel analysis, the merits of plaintiff's substantive claims and the sufficiency of the complaint are often analyzed together."). "[T]he general rule is that well-pled allegations in the complaint regarding liability are deemed true." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

Claim 2 alleges failure to pay minimum wages under the FLSA, 29 U.S.C. § 206(a). Claim 3 alleges failure to pay overtime wages under the FLSA, 29 U.S.C. § 207(a). "To establish a minimum-wage or overtime violation of the FLSA, Plaintiff must establish three elements: (1) she was an employee of Defendants, (2) she was covered under the FLSA, and (3) Defendants failed to pay her minimum wage or overtime wages." *Smith v. Nov. Bar N Grill LLC*, 441 F. Supp. 3d 830, 834 (D. Ariz. 2020).

i. Employee of Defendants

With respect to the first element, the Ninth Circuit has held that "the definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (internal

quotation marks and citation omitted). For example, "[w]here an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability." *Id.* at 1012 (internal quotation marks and citation omitted). Thus, in *Lambert*, the Ninth Circuit held that the chief executive officer and the chief operating officer of the defendant corporations' corporate parent were "employers" who could be held liable under FLSA. *See id.*

The TAC alleges that each of the Vuzem Defendants was Papes' employer within the meaning of the FLSA. *See* TAC ¶ 241. The TAC alleges that Papes was employed by ISM Vuzem, d.o.o., *see* TAC ¶ 60; each of the corporate Vuzem Defendants was the alter ego of the others, *see* TAC ¶ 17; the corporate Vuzem Defendants shared laborers, *see* TAC ¶ 15; and Robert and Ivan Vuzem controlled all aspects of the Corporate Vuzem Defendants, *see* TAC ¶¶ 10-11, 16-17. Those allegations, taken as true, establish that Papes was an employee of each of the Vuzem Defendants for purposes of the FLSA.

ii. Covered under the FLSA

With respect to the second element, an individual is covered under the FLSA if the individual "works for an enterprise engaged in commerce." *Smith*, 441 F. Supp. 3d at 841. The TAC alleges that the Vuzem Defendants are engaged in interstate commerce and/or the production of goods for commerce, within the meaning of the FLSA. *See* TAC ¶ 241.

iii. Failure to Pay Minimum or Overtime Wages

With respect to the third element, the TAC alleges that the Vuzem Defendants "suffered and permitted" Papes and others "to routinely work more than forty (40) hours a workweek while paying them less than minimum wages and without overtime compensation." TAC ¶¶ 239, 254. These general and conclusory allegations are insufficient to establish that Papes was paid less than minimum wages and was not paid earned overtime compensation. In order to establish a failure to pay minimum wages in violation of the FLSA, the employee must show that in a given work week, the total amount paid divided by the hours worked falls below the minimum wage set by the statute. *See Durland v. Straub*, No. 3:20-CV-00031-IM, 2022 U.S. Dist. LEXIS 122696, 2022 WL 2704169, at *5 (D. Or. July 12, 2022). In order to establish a failure to pay overtime wages, the employee must show that in a given work week, the employee worked more than forty hours and was not paid time and a half for all hours in excess of forty. *See id.* at *6. The TAC does not allege those specifics.

Judge Koh denied Papes' prior motion for default judgment on the basis that he failed to provide adequate support for his minimum wages and overtime claims. *See* Prior Order Re Claims 2 and 3 at 15-19. Judge Koh noted that Papes had attempted to provide the necessary information in his motion, but had misstated the federal minimum wage as $7.50 when in fact it was $7.25, had made inconsistent statements regarding when and how

much he was paid, and had improperly included transit time in his work hours. *See id.*

This Court finds that Papes once again has failed to provide adequate support for his minimum wages and overtime claims under the FLSA. Papes submits a Further Supplemental Declaration in support of his motion, to which are appended numerous spreadsheets and exchange rate charts that he presumably believes support his claims. The spreadsheets and charts are not summarized or totaled in the declaration. Other Courts have denied motions for default judgment when confronted with similar unwieldy evidence offered in support of a minimum wage claim under the FLSA. *See Durland*, 2022 U.S. Dist. LEXIS 122696, 2022 WL 2704169, at *6 ("Further, this Court cannot sift through pages of spreadsheets and pay stubs – some illegible – in an effort to infer whether a minimum wage violation occurred.").

The Court observes that the Further Supplemental Declaration refers the Court to several prior declarations and exhibits filed in this case, citing the ECF numbers for those documents and apparently expecting the Court to track them down and print them for reference in connection with the current motion. The Court's Standing Order Re Civil Cases expressly provides that " All factual and legal bases for a party's position with respect to a motion must be presented in the briefing on that motion. Arguments presented in earlier-filed briefs or documents may not be incorporated by reference." Standing Order § IV.D.

In short, Papes has failed to establish that his FLSA claims are meritorious through the allegations of the TAC or through the Further Supplemental Declaration submitted in support of his motion. The second and third factors therefore weigh against granting default judgment. "Of all the *Eitel* factors, courts often consider the second and third factors to be the most important." *Vietnam Reform Party v. Viet Tan – Vietnam Reform Party*, 416 F. Supp. 3d 948, 962 (N.D. Cal. 2019) (internal quotation marks and citation omitted). Thus, Papes' failure on these factors is fatal to his motion for default judgment.

The Court nonetheless briefly addresses the remaining *Eitel* factors for the sake of completeness.

c. Factor 4 – Sum of Money at Stake

Under the fourth *Eitel* factor, the Court must consider the amount of money at stake in relation to the seriousness of the Vuzem Defendants' conduct. "Default judgment is disfavored where the sum of money at stake is too large or unreasonable in light of defendant's actions." *Love v. Griffin*, No. 18-CV-00976-JSC, 2018 U.S. Dist. LEXIS 158355, 2018 WL 4471073, at *5 (N.D. Cal. Aug. 20, 2018), report and recommendation adopted, No. 18-CV-00976-JD, 2018 U.S. Dist. LEXIS 158412, 2018 WL 4471149 (N.D. Cal. Sept. 17, 2018). As noted above, Papes' declaration and attached spreadsheets and charts do not provide a summary or total of unpaid wages claimed. In his motion, he asserts that he seeks unpaid wages in the amount of $39,693.46, plus liquidated damages in an amount equal to the unpaid wages of $39,693.46, plus pre-judgment

interest. Had those damages been substantiated, they would not have been too large or unreasonable in light of the Vuzem Defendants' alleged blatant violations of the FLSA and trafficking. The fourth *Eitel* factor favors default judgment.

d. Factor 5 – Possibility of Dispute

Under the fifth *Eitel* factor, the Court considers whether there is a possibility of a dispute over any material fact. *See Love*, 2018 U.S. Dist. LEXIS 158355, 2018 WL 4471073, at *5; *Ridola*, 2018 U.S. Dist. LEXIS 84241, 2018 WL 2287668, at *13. Because Papes has failed to establish an entitlement to unpaid minimum or overtime wages, there is a possibility of dispute on his FLSA claims. This factor weighs against default judgment.

e. Factor 6 – Reason for Default

Under the sixth *Eitel* Factor, the Court considers whether the default was due to excusable neglect. There is no indication on this record that the Vuzem Defendants' failure to respond to this action was due to excusable neglect. This factor favors default judgment.

f. Factor 7 – Policy Favoring Decision on the Merits

The seventh *Eitel* factor, which is the strong policy favoring decisions on the merits, weighs against default judgment. In cases where the other *Eitel* factors weigh in favor of default judgment, the seventh factor will not

be an impediment to granting default judgment. *See Ridola*, 2018 U.S. Dist. LEXIS 84241, 2018 WL 2287668, at *13 ("Although federal policy favors decision on the merits, Rule 55(b)(2) permits entry of default judgment in situations, such as this, where a defendant refuses to litigate."). That is not the case here, however, where several of the *Eitel* factors weigh against default judgment.

g. Conclusion

Only the first, fourth, and sixth of the *Eitel* factors weigh in favor of default judgment. The second, third, fifth, and seventh factors weigh against default judgment. As noted above, the second and third factors are the most important. Accordingly, Papes' fourth motion for default judgment on Claims 2 and 3 is DENIED. No further motions for default judgment on Claims 2 and 3 will be entertained.

III. MOTION FOR RECONSIDERATION (ECF 615)

Judge Koh entered an order granting in part and denying in part Papes' motion for default judgment on Claim 9 for trafficking and coerced labor under the TVPRA. *See* Prior Order Re Claim 9, ECF 586. Specifically, Judge Koh granted the motion as to ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem, and denied the motion as to Vuzem USA, Inc. and HRID-Mont, d.o.o. *See id.* at 31. Judge Koh awarded Papes $305,500 in compensatory damages and $305,500 in punitive damages, for a total award of $611,000 in damages. *See id.* However, Judge Koh denied

Papes' request for attorneys' fees for failure to provide any supporting declarations or evidence that would support an award of attorneys' fees. *See id.*

Papes has filed an administrative motion for leave to seek reconsideration, and a proposed motion for reconsideration, of Judge Koh's ruling to the extent it may be construed as a bar to filing a motion for attorneys' fees under Federal Rule of Civil Procedure 54. *See* Admin. Mot., ECF 615.

Rule 54(d) provides that a claim for attorneys' fees must be made by motion; that an attorneys' fees motion must be filed within fourteen days after entry of judgment; and that such motion must specify the statute, rule, or other grounds giving rise to an entitlement to attorneys' fees. *See* Fed. R. Civ. P. 54(d)(2). Papes asserts that final judgment has not been entered in this case, and thus the fourteen-day period to file a Rule 54 motion for attorneys' fees has not yet been triggered. Papes also asserts that although his prior motion for default judgment on Claim 9 stated that attorneys' fees should be awarded, that statement was not intended to be a Rule 54 motion for attorneys' fees.

It appears that Judge Koh construed Papes' statement that attorneys' fees should be awarded as a Rule 54 motion for attorneys' fees. In denying that motion, Judge Koh stated that "Papes does not provides declarations or affidavits containing a statement of the services rendered by each person for whom fees are requested and a brief description of their relevant qualifications as is required

by Civil Local Rule 54-5(b)(2)-(3)." Prior Order Re Claim 9 at 31.

Having reviewed the prior motion for default judgment on Claim 9, and Judge Koh's ruling thereon, the Court finds that there was a misunderstanding as to whether the motion included a Rule 54 motion for attorneys' fees. Under these circumstances, the Court finds that reconsideration is appropriate under Civil Local Rule 7-9(b), permitting reconsideration based on the court's manifest failure to consider material facts or legal arguments. *See* Civ. L.R. 7-9(b)(3). Accordingly, Papes' administrative motion for leave to seek reconsideration, and motion for reconsideration, are GRANTED. Papes is not precluded from filing a Rule 54(d) motion for attorneys' fees in connection with Claim 9.

IV. MOTION FOR ATTORNEYS' FEES AND COSTS UNDER RULE 54 (ECF 614)

Papes has filed a motion under Rule 54(d), seeking an award of attorneys' fees and costs in connection with Claims 2, 3, and 9. Papes is not entitled to attorneys' fees and costs in connection with Claims 2 and 3, as the Court has denied his motion for default judgment on those claims. The Court therefore considers Papes' Rule 54(d) motion only in connection with Claim 9 under the TVPRA, on which Judge Koh granted default judgment against ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem in the total amount of $611,000. The Court evaluates Papes' request for attorneys' fees in connection

with Claim 9 herein. Papes' Bill of Costs will be addressed by the Clerk pursuant to Civil Local Rule 54-1.

A. Legal Standard

The TVPRA provides that a victim "may bring a civil action against the perpetrator . . . and may recover damages and reasonable attorneys fees." 18 U.S.C. § 1595(a). When calculating a reasonable attorneys' fee under federal law, courts in the Ninth Circuit follow "the 'lodestar' method, and the amount of that fee must be determined on the facts of each case." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001)). Under the lodestar method, the most useful starting point "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. *Id.*

"In determining a reasonable hourly rate, the district court should be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986). "Generally, the relevant community is the forum in which the district court sits." *Barjon v. Dalton*, 132 F.3d 496, 500 (9th. Cir. 1997). The fee applicant bears the burden of producing evidence, other than declarations

of interested counsel, that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum*, 465 U.S. at 896 n.11. Further, the district court should exclude hours that were not reasonably expended. *See Hensley*, 461 U.S. at 434.

B. Discussion

Papes' counsel, William C. Dresser, has provided a declaration in support of the motion for attorneys' fees. *See* Dresser Decl., ECF 614-2. The declaration includes billing records and summary charts of fees by major tasks. *See id.* Unfortunately, the Court cannot discern from the declaration and appended charts which hours were expended on Claim 9, as to which fees are recoverable, as opposed to Claims 2 and 3, as to which fees are not recoverable. For that reason, the Court has no option but to deny Papes' motion for attorneys' fees without prejudice. Papes may file a renewed motion for attorneys' fees, limited to those fees incurred in connection with Claim 9, by June 20, 2023. Such renewed motion need not include the underlying billing records previously submitted to the Court, but shall include a declaration of counsel and a summary chart showing the hours expended on Claim 9 by biller and task. Papes need not reserve a hearing date for a renewed fees motions; any renewed motion will be decided on the papers.

Papes' Rule 54 motion for attorneys' fees is DENIED WITHOUT PREJUDICE.

V. ORDER

(1) Papes' fourth motion for default judgment on Claims 2 and 3 (ECF 613) is DENIED. No further motions for default judgment on Claims 2 and 3 will be entertained.

(2) Papes' administrative motion for leave to file a motion for reconsideration, and his motion for reconsideration (ECF 615), are GRANTED.

(3) Papes' Rule 54 motion for attorneys' fees and costs (ECF 614) is DENIED WITHOUT PREJUDICE. Papes may file a renewed motion for attorneys' fees, limited to those fees incurred in connection with Claim 9, by June 20, 2023.

(4) This order terminates ECF 613, 614, and 615.

Dated: May 30, 2023

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX C — ORDER GRANTING IN PART AND DENYING PLAINTIFFS' THIRD MOTION FOR DEFAULT JUDGMENT AS TO TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT CLAIM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED SEPTEMBER 19, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 16-CV-01120-LHK

UNITED STATES OF AMERICA, EX REL. GREGOR LESNIK; STJEPAN PAPES,

Plaintiffs,

v.

EISENMANN SE, *et al.*,

Defendants.

ORDER GRANTING IN PART AND DENYING PLAINTIFFS' THIRD MOTION FOR DEFAULT JUDGMENT AS TO TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT CLAIM

Re: Dkt. No. 560

Before the Court is Plaintiffs Gregor Lesnik and Stjepan Papes' (collectively, "Plaintiffs") third motion

for default judgment as to Plaintiffs' Trafficking Victims Protection Reauthorization Act ("TVPRA") claim against Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., Robert Vuzem, Ivan Vuzem, and HRID-Mont, d.o.o. ECF Nos. 560 ("Mot."). Having considered the Plaintiffs' briefing, the relevant law, and the record in this case, the Court GRANTS in part and DENIES in part Plaintiffs' third motion for default judgment as to Plaintiffs' TVPRA claim.

I. BACKGROUND

A. Factual Background

1. The Parties

Defendant ISM Vuzem d.o.o. is a Slovenian business entity with its principal place of business in Slovenia. Third Amended Complaint, ECF No. 269, at ¶ 9 ("TAC"). Defendant ISM Vuzem USA, Inc. was a South Carolina corporation with its principal place of business in South Carolina. *Id.* at ¶ 12. Defendant Vuzem USA, Inc. was a California corporation with its principal place of business in California. *Id.* at ¶ 13. Defendant Robert Vuzem is a resident of Slovenia. *Id.* at ¶ 10. Defendant Ivan Vuzem is a resident of Slovenia. *Id.* at ¶ 11. Defendant HRID-MONT d.o.o. is a Slovenian corporation with its principal place of business in Slovenia. *Id.* at ¶ 14.

Plaintiff Gregor Lesnik is a resident of Slovenia and was allegedly hired by ISM Vuzem d.o.o. and brought to the United States to work at the Tesla manufacturing

plant in Fremont, California in 2015. *Id.* at ¶ 1. Plaintiff Stjepan Papes is a resident of Croatia and was allegedly hired by ISM Vuzem d.o.o. and brought to the United States to work at various locations between 2013 and 2015, including at the Tesla manufacturing plant in Fremont, California. *Id.* at ¶ 2.

2. Alleged Conduct of the Defendants

Plaintiffs allege that the Eisenmann Corporation ("Eisenmann"), a former Defendant in this case, formed relations with a number of manufacturing entities, such as Tesla, to perform construction work related to Eisenmann's equipment. TAC at ¶ 70. Plaintiffs allege that Eisenmann, to fulfill these agreements, would hire subcontractors who would then provide the laborers necessary to complete the equipment installation. *Id.* at ¶ 84, 107-8. Among those subcontractors were ISM Vuzem d.o.o., ISM Vuzem USA, Inc., and Vuzem USA, Inc. *Id.*

Although all of the work described in the TAC occurred in the United States, ISM Vuzem d.o.o. did not use American workers. Instead, the TAC alleges that ISM Vuzem d.o.o. and the other subcontractor Defendants hired workers internationally. For example, to help install a paint shop at a Tesla facility in Fremont, California, ISM Vuzem d.o.o. hired Lesnik and Papes. *Id.* at ¶¶ 1-2, 60, 111, 213. Lesnik and Papes were allegedly brought to the United States on B-1 visas that are generally reserved for skilled work, even though ISM Vuzem d.o.o. and other Defendants allegedly knew the workers would actually be performing unskilled construction work. *Id.*

at ¶¶ 58-91, 211. ISM Vuzem d.o.o. and other Defendants allegedly submitted letters to the United States Consulate containing false statements to obtain B-1 visas on Lesnik and Papes' behalf. *Id.* at ¶¶ 206, 211, 213, 216.

The TAC alleges that Lesnik and Papes, once in the United States, were paid far below minimum wage and were forced to work extreme hours. Lesnik allegedly worked at least 10-12 hours a day, over 80 hours a week, and received almost no time off work. *Id.* at ¶ 237. Papes worked a similar number of hours. *Id.* ISM Vuzem d.o.o also allegedly threatened to withhold pay if workers became too sick to work or reported a job injury; threatened to withhold medical benefits if workers reported a job injury; threatened to cancel visas; threatened to file a civil suit against Lesnik while he was hospitalized; and even told Lesnik that "this will not go well for you." *Id.* at ¶ 315, 338-39. The TAC also alleges that the foreign workers were subject to poor living conditions in the United States, such as being housed in facilities without kitchens, having multiple workers sleep in the same bedroom, and typically having 6 to 10 workers share a single bathroom. *Id.* at ¶ 318.

B. Procedural Background

Plaintiffs filed the complaint initiating this lawsuit on March 7, 2016. ECF No. 1. On July 15, 2016, Plaintiffs filed the First Amended Complaint. ECF No. 20. On April 25, 2017, the United States filed a notice that it would not intervene in the instant case. ECF No. 25. On April 25, 2017, the Court unsealed the complaint. ECF No. 26.

Appendix C

On August 8, 2017, the Court granted Plaintiffs' motion to file a Second Amended Complaint, and directed the United States to make a "prompt decision" regarding intervention. ECF No. 31. On October 5, 2017, the United States filed another notice that it would not intervene in the instant case. ECF No. 34. On November 11, 2017, Plaintiffs filed the Second Amended Complaint. ECF No. 37.

On July 12, 2018, various moving Defendants—Eisenmann, Tesla, Mercedes-Benz, Deere, REHAU, LaX, VW, Discatal, and BMW—filed a motion to dismiss the Second Amended Complaint. ECF No 219. On October 1, 2018, the Court granted in part and denied in part the motion to dismiss the Second Amended Complaint. ECF No. 255.

On October 31, 2018, Plaintiffs filed a 108-page Third Amended Complaint. ECF No. 269. ("TAC"). The TAC alleges 13 causes of action (some of which are duplicative). At issue in the instant third motion for default judgment is Plaintiffs' claim pursuant to the TVPRA (Count 9). *Id.* at ¶ 312.

On March 28, 2019, Plaintiffs filed summons returned notices for the TAC on Defendants. ECF Nos. 362-372. On April 17, 2019, Plaintiffs filed motions for entry of default against seven Defendants. ECF Nos. 382-388. On November 11, 2019, Plaintiffs filed motions for entry of default against the remaining Defendants. ECF Nos. 425-428. On November 7, 2019, the Clerk of the Court entered default against four of the Defendants. ECF Nos.

430-433. On January 16, 2020, the Clerk of the Court entered default against the seven remaining Defendants. ECF Nos. 443-449.

On February 19, 2020, the Court ordered Plaintiffs to file motions for default judgment by February 28, 2020. ECF No. 457. On February 28, 2020, Plaintiffs filed a motion for default judgment on their False Claims Act claim. ECF No. 461. On February 29, 2020, Plaintiffs filed a motion for default judgment on their Federal Labor Standards Act claims. ECF No. 470. On February 29, 2020, Plaintiffs also filed a motion for default judgment on their TVPRA claim and state trafficking claim. ECF No. 468.

On June 26, 2020, the Court denied without prejudice Plaintiffs' motions for default judgment. ECF No. 498. The Court explained that there were numerous deficiencies in Plaintiffs' motions, including (1) that Plaintiffs' motions failed to address the Court's subject matter and personal jurisdiction, and (2) that three of Plaintiffs' four default judgment motions failed to brief the *Eitel* factors, which govern entries of default judgment. *Id.*

On August 24, 2020, Plaintiffs filed a second round of motions for default judgment and entry of final judgment. ECF Nos. 501, 505, and 506. Plaintiffs filed a second motion for default judgment and an entry of final judgment on Plaintiffs' Fair Labor Standards Act claim. ECF No. 501. Plaintiffs filed a second motion for default judgment and an entry of final judgment on Plaintiffs' False Claims Act claim. ECF No. 505. Plaintiffs filed a third motion

for default judgment and an entry of final judgment on Plaintiffs' TVPRA claim. ECF No. 506.

On August 25, 2020, Plaintiffs filed notices of voluntary dismissal without prejudice of their California trafficking claims and California wage claims. ECF Nos. 512, 513.

On February 10, 2021, the Court denied Plaintiffs' second round of motions for default judgment without prejudice. ECF No. 551. The Court found that Plaintiffs had failed to establish the Court's personal jurisdiction over Defendants, which the Court must do before entering default judgment. *Id.* at 11. Furthermore, the Court found that Plaintiffs had failed to provide evidence that Defendants Magna d.o.o and We-Kr d.o.o. were properly served. *Id.* at 13.

On April 8, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' TVPRA claim. ECF No. 560 ("Mot."). On April 9, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' False Claims Act claim. ECF No. 564 ("Mot."). On April 11, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' Fair Labor Standards Act claim. ECF No. 565.

On September 17, 2021, the Court denied Plaintiffs' third motion for default judgment as to Plaintiffs' False Claim Act claim and dismissed Plaintiffs' False Claim Act claim with prejudice. ECF No. 585.

The Court will address Plaintiffs' third motion for default judgment as to Plaintiffs' Fair Labor Standards Act claims in a separate order.

Appendix C

C. Requests for Judicial Notice

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See*, *e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

In connection with Plaintiffs' motion for default judgment, Plaintiffs request judicial notice of Rule 4 of the Federal Rules of Civil Procedure (Ex. A); the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") (Ex. B); a list of signatories to the Hague Service Convention (Ex. C); the Republic of Slovenia's Reservations to the Hague Service Convention (Ex. D); the Republic of Slovenia's statutes for service of process (Ex. E); The United Kingdom of Great Britain and Northern Ireland Reservations to the Hague Service

Convention (Ex. F); and the United Kingdom's Central Authority Information (Ex. G). ECF No. 560-1, at 3-4 (Ex. A–G).

Rule 4 of the Federal Rules of Civil Procedure is a matter of public record and is therefore the proper subject of judicial notice. *See Black*, 482 F.3d at 1041. The Court therefore GRANTS Plaintiffs' request for judicial notice of Rule 4 of the Federal Rules of Civil Procedure (Ex. A).

Under Federal Rule of Civil Procedure 44.1, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. As such, the Court may take judicial notice of an authoritative statement of foreign law. *See McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 n. 10 (9th Cir. 1989) (noting that the Court may take judicial notice of foreign law where appropriate); *see also Philips v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 76054, 2016 WL 8505624, at *1 (N.D. Cal. Jun. 10, 2016) (same); *Securities and Exch. Comm. v. Nevatia*, 2015 U.S. Dist. LEXIS 151940, 2015 WL 6912006, at *4 n. 4 (N.D. Cal. Jun. 10, 2016) (same). Exhibits B-G are therefore the proper subject of judicial notice. As such, the Court GRANTS Plaintiffs' request for judicial notice of Exhibits B-F.

Plaintiffs further request judicial notice of the Articles of Incorporation of ISM Vuzem USA, Inc. (Ex. H); Certificate of Dissolution of ISM Vuzem USA, Inc. ("Ex. I"); Articles of Incorporation of Vuzem USA, Inc.

(Ex. J); Statement of Information of Vuzem USA, Inc. filed with the California Secretary of State (Ex. K); and Certificate of Dissolution of Vuzem USA, Inc. (Ex. L). ECF No. 560-1, at 5-6 (Ex. H–L). Each of these documents are public records and are therefore proper subjects of judicial notice. *Black*, 482 F.3d at 1041. According, the Court GRANTS Plaintiffs' request for judicial notice of exhibits H–L.

Finally, Plaintiffs request judicial notice of eight court filings in other federal cases. ECF No. 560-1, at 7-8 (Ex. P–W). Each of these documents is a public court filing and is therefore the proper subject of judicial notice. *Black*, 482 F.3d at 1041. Accordingly, the Court GRANTS Plaintiffs' request for judicial notice of exhibits P–W.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default judgment when the Clerk, under Rule 55(a), has previously entered a party's default. Fed. R. Civ. P. 55(b). "The district court's decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk enters default, all well-pleaded allegations regarding liability are taken as true, except with respect to damages. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) ("With respect to the determination of liability and the default judgment itself, the general rule is that well-pled allegations in the complaint regarding liability are deemed true."); *TeleVideo Sys. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) ("[U]pon default the factual

allegations of the complaint, except those relating to the amount of damages, will be taken as true.").

"Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

Furthermore, if a party was improperly served, the Court may not enter a default judgment against that party. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) (explaining that a "person is not bound by a judgment in litigation to which he or she has not been made a party by service of process.").

III. DISCUSSION

A. Jurisdiction

The Court begins by addressing subject matter jurisdiction, personal jurisdiction, and service of process. "When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties. A judgment entered without personal jurisdiction over the parties

is void." *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). In order to avoid the entry of an order of default judgment that may subsequently be attacked as void, the Court must determine whether jurisdiction over the instant case exists. "The party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). For the Court to exercise personal jurisdiction over a defendant, the defendant must also have been served in accordance with Federal Rule of Civil Procedure 4. *Mason*, 960 F.2d at 851 (explaining that an entry of default is void if there was improper service of process on a defendant).

The Court begins with subject matter jurisdiction and then proceeds to personal jurisdiction. Finally, the Court turns to service of process.

1. Subject Matter Jurisdiction

The Court previously dismissed Plaintiffs' first round motions for default judgment without prejudice for failure to address subject matter jurisdiction. ECF No. 498. Plaintiffs have now rectified that deficiency. Plaintiffs' instant third motion for default judgment seeks default judgment on Plaintiffs' claim under the TVPRA pursuant to 18 U.S.C. § 1595, *et seq.* Mot. at 25; TAC at ¶ 312. As such, the Court is satisfied that it has subject matter jurisdiction over Plaintiffs' claim pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1331 ("The district courts shall have

original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

2. Personal Jurisdiction

"[A] judgment entered without personal jurisdiction over the parties is void." *In re Tuli*, 172 F.3d at 712. Moreover, "[t]he party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Breeland*, 792 F.2d at 927 (citation omitted); *In re Boon Glob. Ltd.*, 923 F.3d 643, 650 (9th Cir. 2019) (explaining that it is the "party asserting jurisdiction [that] bears the burden to establish jurisdictional facts."). The Court previously denied Plaintiffs' second round motions for default judgment without prejudice because Plaintiffs failed to establish the Court's personal jurisdiction over Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., Robert Vuzem, Ivan Vuzem, and HRID-Mont, d.o.o. ECF No. 551, at 11. The Court warned Plaintiffs that if they failed to allege facts sufficient to establish the Court's personal jurisdiction over Defendants, "the Court will deny Plaintiffs' motions for default judgment with prejudice." *Id.* at 12.

Personal jurisdiction over an out-of-state defendant is appropriate if the relevant state's long-arm statute permits the assertion of jurisdiction without violating federal due process. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004). California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is co-extensive with federal due process requirements, and therefore the jurisdictional analyses under California

law and federal due process merge into one. *See* Cal. Civ. Proc. Code § 410.10 ("[A] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) ("California's long-arm statute . . . is coextensive with federal due process requirements, so the jurisdictional analyses under state law and federal due process are the same.").

For a court to exercise personal jurisdiction over a defendant consistent with due process, that defendant must have "certain minimum contacts" with the relevant forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). In addition, "the defendant's 'conduct and connection with the forum State' must be such that the defendant 'should reasonably anticipate being haled into court there.'" *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

A court may exercise either general or specific personal jurisdiction over a defendant. *See Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995). In the instant case, Plaintiffs argue that the Court may exercise general personal jurisdiction over Vuzem USA, Inc. and specific personal jurisdiction over ISM Vuzem d.o.o., ISM Vuzem USA, Inc., HRID-Mont d.o.o., Robert Vuzem, and

Ivan Vuzem. Mot. at 21-23. The Court addresses each argument in turn.

a. General Personal Jurisdiction over Vuzem USA, Inc.

Plaintiffs first argue that the Court may exercise general personal jurisdiction over Defendant Vuzem USA, Inc. because it "was a California corporation, registered on September 2, 2014, and dissolved on September 19, 2016." *Id.* at 21. A corporation is considered domiciled in the states where the corporation is incorporated and has its principal place of business. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923-24, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (explaining domicile). Under federal due process, a defendant domiciled within a state is subject to the state's general jurisdiction. *Milliken v. Meyer*, 311 U.S. 457, 462, 61 S. Ct. 339, 85 L. Ed. 278 (1940); *see also Ranza v. Nike, Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015) ("The paradigmatic locations where general jurisdiction is appropriate over a corporation are its place of incorporation and its principal place of business.").

Furthermore, California Corporations Code § 2010 provides that "[a] corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it . . . " Cal Corp. Code § 2010(a); *see also Soares v. Lorono*, 2015 U.S. Dist. LEXIS 79992, 2015 WL 3826795, at *3 (N.D. Cal. June 19, 2015) (explaining that a California corporation may be sued after it has dissolved for activities that took place pre-dissolution). Furthermore,

§ 2010 provides that "[n]o action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof." *Id.* § 2010(b).

Accordingly, the Court finds that it may exercise general personal jurisdiction over Vuzem USA, Inc. because it was a California corporation and dissolved only after the violations of the TVPRA that Plaintiffs allege in their TAC.

b. Specific Personal Jurisdiction over ISM Vuzem d.o.o., ISM Vuzem USA, Inc., HRID-Mont d.o.o., Robert Vuzem, and Ivan Vuzem

Plaintiffs argue that the Court may exercise specific personal jurisdiction over ISM Vuzem d.o.o., ISM Vuzem USA, Inc., HRID-Mont d.o.o., Robert Vuzem, and Ivan Vuzem. Mot. at 22. Under Ninth Circuit law, the Court may exercise specific personal jurisdiction over a nonresident defendant when (1) the nonresident defendant "purposefully direct[s] his activities or consummate[s] some transaction with the forum or resident thereof; or perform[s] some act by which he purposefully avails himself of the privilege of conducting activities in the forum"; (2) the claim "arises out of or relates to the defendant's forum-related activities"; and (3) the exercise of jurisdiction is reasonable. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff succeeds in satisfying the first two prongs, the burden then shifts to the nonresident

defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. *Id.*

Below, the Court first finds that it may properly exercise specific personal jurisdiction over ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem. Second, the Court finds that Plaintiffs have failed to establish the Court's specific personal jurisdiction over HRID-Mont d.o.o.

First, Plaintiffs allege that ISM Vuzem d.o.o., Vuzem USA, Inc., and ISM Vuzem USA each entered into contracts for the construction of facilities in California, including at the Tesla manufacturing plant in Fremont, California. Mot. at 23. Robert Vuzem and Ivan Vuzem allegedly own and control the operations of ISM Vuzem d.o.o., ISM Vuzem USA, Inc., and Vuzem USA, Inc. TAC at ¶ 16. Plaintiffs allege that Robert Vuzem came to Fremont, CA to oversee the work done in the district. Mot. at 23. Robert Vuzem and Ivan Vuzem also allegedly prepared representations as to the nature of work that Plaintiff Papes would perform in California so that Papes could procure a B-1 workers' visa. TAC at ¶ 110. Ivan Vuzem also allegedly paid workers directly into Slovenian bank accounts for work done in California for Eisenmann Corporation and at other manufacturing sites in the United States. *Id.* at ¶ 117.

Plaintiffs further allege that ISM Vuzem USA, on behalf of ISM Vuzem d.o.o., signed documents for the purpose of obtaining visas to bring workers to California. Mot. at 23. Plaintiffs were allegedly two of the workers

who were brought to California, and Plaintiffs' TVPRA claim arises out of the Plaintiffs' work and mistreatment while employed in California. *Id.* Specifically, Plaintiffs allege that they suffered coercion under the terms of the TVPRA at the Tesla manufacturing plant in Fremont, CA and at the Regional Medical Center in San Jose. *Id.* at 24.

Considering these allegations, the Court is satisfied that allegations regarding ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem establish that (1) each of these Defendants "purposefully direct[ed] his activities or consummate[ed] some transaction with the forum or resident thereof; or perform[ed] some act by which he purposefully avail[ed] himself of the privilege of conducting activities in the forum"; (2) the claim "arises out of or relates to the defendant's forum-related activities"; and (3) the exercise of jurisdiction is reasonable." *Schwarzenegger*, 374 F.3d at 802. Accordingly, the Court is satisfied that based on Plaintiffs' allegations, the Court may properly exercise specific personal jurisdiction under Ninth Circuit law over ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem. *Id.*

However, Plaintiffs fail to provide sufficient allegations to support the Court's exercise of specifical personal jurisdiction over HRID-Mont d.o.o. Plaintiffs fail to allege that any actions taken by HRID-Mont d.o.o. occurred in California or were otherwise directed at California. Rather, Plaintiffs' allegations regarding HIRD-Mont d.o.o. concern events that occurred elsewhere in the United States or in Slovenia. *See* Mot. at 23 (failing to point to any actions by HRID-Mont d.o.o. in California or directed at

California). Accordingly, the Court finds that Plaintiffs have failed to sufficiently allege that HRID-Mont d.o.o. conducted activities in California or purposefully directed it activities toward California.

As such, the Court may not exercise specific personal jurisdiction over HRID-Mont d.o.o. with respect to Plaintiffs' TVPRA claim, and the Court therefore DENIES Plaintiffs' motion for default judgment on Plaintiffs' TVPRA claim against HRID-Mont d.o.o. *See In re Tuli*, 172 F.3d at 712 ("A judgment entered without personal jurisdiction over the parties is void."); *see also Facebook, Inc. v. Pedersen*, 868 F. Supp. 2d 953 (N.D. Cal. 2012) (denying motion for default judgment for lack of specific personal jurisdiction over defendant).

3. Service of Process

For the Court to properly exercise personal jurisdiction over a defendant, the defendant must have been served in accordance with the Federal Rules of Civil Procedure. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) ("Defendants must be served in accordance with Rule 4(d) of the Federal Rules of Civil Procedure, or there is no personal jurisdiction." (footnote omitted)).

Federal Rule of Civil Procedure 4(h) governs the rules of service when a corporation is served outside of the United States. It states that if a foreign corporation is served "at a place not within any judicial district of the United States," it must be served "in any manner prescribed by Rule 4(f) for serving an individual, except

personal delivery under (f)(2)(C)(i)," unless a waiver of service has been filed. Fed. R. Civ. P. 4(h)(2).

Under Rule 4(f), a party may serve a corporation abroad using one of three methods:

> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice . . . unless prohibited by the foreign country's law, by . . . using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(1)-(3). Rule 4(f)(1) implements the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Service Convention"). The Hague Service Convention "specifies certain approved methods of service and preempts inconsistent methods of service wherever it applies." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507, 197

L. Ed. 2d 826 (2017) (internal citations omitted). The Hague Service Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad," if the country of destination is a signatory member to the Hague Service Convention. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988). The United States and Slovenia are both signatories to the Hague Service Convention, and therefore the Hague Service Convention governs service on Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem because "compliance with the [Hague Service Convention] is mandatory in all cases to which it applies." *Id.* at 705; Mot. at 4.

The principle means of service under the Hague Service Convention is through a signatory country's "Central Authority," which the Convention requires each country to establish for the purpose of effectuating service in its country. *See* Hague Service Convention, art. 2, 20 U.S.T. at 362; *see also Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (explaining Central Authority mechanism in the Hague Service Convention). However, submitting a document to the Central Authority is not the only method of service available under the Hague Service Convention. *See Water Splash*, 137 S. Ct. at 1508 (explaining various methods of service). Article 10 of the Hague Service Convention states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with:

> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention, 20 U.S.T. at 363; *Water Splash*, 137 S. Ct. at 1508 (explaining that the Hague Service Convention allows for other forms of service where a country does not object).

The Court previously found no deficiencies in Plaintiffs' service of process on Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. ECF No. 551, at 12 (identifying deficiencies only with service on Defendants Magna d.o.o. and We-Kr d.o.o.). The Court is therefore satisfied that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem have been properly served. Therefore, the Court properly exercises personal jurisdiction over ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem.

B. Whether Default Judgment is Proper

Having determined that the Court's exercise of subject matter jurisdiction and personal jurisdiction over the Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem is proper, the Court now turns to the *Eitel* factors to determine whether entry of default judgment against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem is warranted.

1. First *Eitel* Factor: Possibility of Prejudice

Under the first *Eitel* factor, the Court considers the possibility of prejudice to Plaintiffs if default judgment is not entered against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. "A plaintiff who is denied a default judgment and is subsequently left without any other recourse for recovery has a basis for establishing prejudice." *Michael Grecco Prods., Inc. v. Enthusiast Gaming, Inc*, 2020 U.S. Dist. LEXIS 231648, 2020 WL 7227199, at *6 (N.D. Cal. Dec. 8, 2020) (quoting *DiscoverOrg Data, LLC v. Bitnine Global, Inc.*, 2020 U.S. Dist. LEXIS 210494, 2020 WL 6562333, at *5 (N.D. Cal. Nov. 9, 2020)). Here, Plaintiffs have established that Plaintiffs will be prejudiced because Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem have not participated in this litigation and Plaintiffs would be without recourse to recover for the damages caused by

Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem if default judgment is not granted. Therefore, the first *Eitel* factor weighs in favor of granting default judgment.

2. Second and Third *Eitel* Factors: Merits of Plaintiffs' Substantive Claims and the Sufficiency of the Complaint

The second and third *Eitel* factors address the merits and sufficiency of Plaintiffs' claim as pleaded in the TAC. Courts often analyze these two factors together. *See Dr. JKL Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010) ("Under an *Eitel* analysis, the merits of plaintiff's substantive claims and the sufficiency of the complaint are often analyzed together."). In its analysis of the second and third *Eitel* factors, the Court will accept as true all well-pled allegations regarding liability in the TAC. *See Fair Hous. of Marin*, 285 F.3d at 906 ("[T]he general rule is that well-pled allegations in the complaint regarding liability are deemed true."). The Court will therefore consider the merits of Plaintiffs' claim and the sufficiency of the TAC together. The Court first discusses whether Plaintiffs have provided sufficient allegations to state a claim for coerced labor under TVPRA. Second, the Court discusses whether there is an alternative basis for liability under the TVPRA. Finally, the Court discusses the effect of Lesnik's 2016 settlement on Lesnik's TVPRA claim.

Appendix C

a. Whether Plaintiffs have Stated a Claim for Coerced Labor under the TVPRA

First, Plaintiffs bring a claim pursuant to the TVPRA against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. Under the TVPRA, "a defendant is liable for human trafficking for knowingly obtaining an individual's labor and services by means of actual and threatened serious harm—including financial and psychological harm—or knowingly benefitting from the obtaining of labor by such means." *Alabado v. French Concepts, Inc.*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *4 (C.D. Cal. May 2, 2016). The TVPRA includes a civil cause of action under 18 U.S.C. § 1595 that allows victims to seek damages and attorney's fees from the "perpetrator" of a violation of laws prohibiting trafficking and forced labor. Section 1595(a) also extends liability beyond perpetrators to anyone who "knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known" committed a violation of applicable trafficking and forced labor laws. *See Shuvalova v. Cunningham*, 2010 U.S. Dist. LEXIS 135502, 2010 WL 5387770, at *3 n.3 (N.D. Cal. Dec. 22, 2010) (explaining liability).

Plaintiffs argue that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem are liable under the TVPRA because they violated 18 U.S.C. § 1589. Section 1589(a) prohibits obtaining labor or services in four ways:

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint[.]

18 U.S.C. § 1589(a)(1)-(4). Specifically, Plaintiffs appear to argue that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem violated §§ 1589(a)(2) and (3).

Section 1589(c)(2) defines the "serious harm" referenced in § 1589(a)(2) as "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm," that is serious enough to compel a reasonable person to perform labor to avoid the harm. *See United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) (noting statutory amendments in 2000 sought to broaden § 1589 to nonviolent conduct by defining serious harm more broadly). Section 1589(a)(3) prohibits obtaining labor or services "by means of the abuse or threatened abuse of law or legal process." Accordingly, the Court

examines whether Plaintiffs' allegations demonstrate that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem coerced Plaintiffs' labor "by means of serious harm or threats of serious harm to that person or another person"; or "by means of the abuse or threatened abuse of law or legal process . . . " *See* 18 U.S.C. § 1589(a)(2), (3). The Court considers each in turn.

First, the Court considers whether Plaintiffs adequately allege that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem coerced labor "by means of serious harm or threats of serious harm to that person or another person." 18 U.S.C. § 1589(a)(2). The TAC alleges that ISM Vuzem d.o.o. threatened to withhold Plaintiffs Lesnik and Papes' pay if Plaintiffs became too sick to work or otherwise reported an injury on the job. TAC at ¶ 325. ISM Vuzem d.o.o. also allegedly threatened to fly Plaintiffs home without warning at Plaintiffs' own cost if they did not work every day. *Id.* at ¶ 326. Robert Vuzem also allegedly threatened to disparage Papes' reputation to other companies if Papes quit working for ISM Vuzem d.o.o. ECF No. 563, at ¶ 107 ("Papes Decl."). Although these are not allegations of physical harm, § 1589(a)(2) prohibits the coercion of labor through "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm," that is serious enough to compel a reasonable person to perform labor to avoid the harm. *See Dann*, 652 F.3d at 1169-72 (affirming § 1589 conviction where defendant threatened undocumented nanny with withholding back pay, false accusations of

theft, immigration consequences, and the defendant's potential loss of child custody).

Furthermore, the TAC alleges that ISM Vuzem d.o.o. threatened to cancel Plaintiffs' visas and endanger Plaintiffs' immigration status if they complained or did not work. *See* TAC at ¶ 335; Papes Decl. at ¶¶ 15, 106. "[M]ultiple jurisdictions have found that the threat of deportation may itself constitute a threat sufficient to satisfy the second and/or third element of [§ 1589] forced labor." *Echon v. Sackett*, 2017 U.S. Dist. LEXIS 152992, 2017 WL 4181417, at *14 (D. Colo. Sept. 20, 2017), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 182218, 2017 WL 5013116 (D. Colo. Nov. 1, 2017).

Plaintiffs have therefore provided sufficient allegations to establish that ISM Vuzem d.o.o coerced Plaintiffs' labor under the coerced labor provision, § 1589(a)(2), of the TVPRA by threatening to cancel Plaintiffs' visas and endanger Plaintiffs' immigration status if they complained or did not work; threatening to fly Plaintiffs home without warning at Plaintiffs' own cost if they did not work every day; and by threatening to withhold Lesnik and Papes' pay if Plaintiffs became too sick to work or otherwise reported an injury on the job. Furthermore, Plaintiffs have provided sufficient allegations to establish that Robert Vuzem coerced Plaintiffs' labor under the coerced labor provision, § 1589(a)(2), of the TVPRA by threatening to disparage Papes' reputation to other companies if Papes quit working for ISM Vuzem d.o.o. Accordingly, Plaintiffs' allegations are sufficient to state a claim that Plaintiffs were subject to coerced labor under § 1589(a)(2) by ISM Vuzem d.o.o. and Robert Vuzem.

Second, the Court considers whether Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem coerced labor "by means of the abuse or threatened abuse of law or legal process." 18 U.S.C. § 1589(a)(3). The TAC alleges that ISM Vuzem d.o.o threatened to cancel Plaintiffs' visas and endanger their immigration status if they complained or did not work. *See* TAC at ¶ 335; Papes Decl. at ¶¶ 15, 106. "[M]ultiple jurisdictions have found that the threat of deportation may itself constitute a threat sufficient to satisfy the second and/or third element of [§ 1589] forced labor." *Echon*, 2017 U.S. Dist. LEXIS 152992, 2017 WL 4181417, at *14; *Nuñag–Tanedo v. E. Baton Rouge*, 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011) (holding threat of deportation constitutes "abuse of legal process" within the meaning of § 1589 in cases concerning H1-B visa holders); *Aguirre v. Best Care Agency*, 961 F. Supp. 2d 427, 444 (E.D.N.Y. 2013) (stating that "[t]he threat of deportation alone may support a claim for forced labor" under § 1589). Plaintiffs also allege that Ivan Vuzem and Robert Vuzem threatened to sue Lesnik on behalf of the Vuzem entities when Lesnik was hospitalized in San Jose, CA after suffering an accident while at work for ISM Vuzem d.o.o. TAC at ¶ 315.

Plaintiffs have therefore provided sufficient allegations to establish that ISM Vuzem d.o.o coerced Plaintiffs' labor under the coerced labor provision, § 1589(a)(3), of the TVPRA by threatening to cancel Plaintiffs' visas and endanger Plaintiffs' immigration status if they complained or did not work. Furthermore, Plaintiffs have provided sufficient allegations to establish that Robert Vuzem and

Ivan Vuzem coerced Plaintiffs' labor under the coerced labor provision, § 1589(a)(3), of the TVPRA by threatening to sue Lesnik on behalf of the Vuzem entities when Lesnik was hospitalized in San Jose, CA after suffering an accident while at work for ISM Vuzem d.o.o. Accordingly, Plaintiffs' allegations are sufficient to establish that Plaintiffs were subject to coerced labor under § 1589(a)(3) by Defendants ISM Vuzem d.o.o., Robert Vuzem, and Ivan Vuzem.

In sum, the Court finds that Plaintiffs have stated a claim under the coerced labor provision of the TVPRA, § 1589, against Defendants ISM Vuzem d.o.o., Robert Vuzem, and Ivan Vuzem.

However, Plaintiffs have failed to provide any allegations that Defendants ISM Vuzem USA, Inc. and Vuzem USA, Inc. violated the TVPRA by coercing Plaintiffs' labor under § 1589. Accordingly, the Court next considers whether Defendants ISM Vuzem USA, Inc. and Vuzem USA, Inc. are liable under an alternative provision of the TVPRA.

b. Alternative Liability under the TVPRA for ISM Vuzem USA, Inc. and Vuzem USA, Inc.

Plaintiffs have stated a claim that Defendants ISM Vuzem d.o.o., Robert Vuzem, and Ivan Vuzem directly coerced Plaintiffs' labor in violation of the coerced labor provision of the TVPRA, § 1589. However, the TVPRA also gives rise to liability to "[w]hoever knowingly

benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means" proscribed under the four prongs of 18 U.S.C. § 1589(a), which the Court has discussed above. *See* 18 U.S.C. § 1595(b). Accordingly, Plaintiffs argue that Defendants ISM Vuzem USA, Inc. and Vuzem USA, Inc. both knowingly benefited financially from the coerced labor of Plaintiffs.

Plaintiffs argue that ISM Vuzem USA, Inc. is liable as a knowing beneficiary of coerced labor under 18 U.S.C. § 1595(b) because "ISM Vuzem USA, Inc. was the direct contractor with Eisenman and Tesla" at the Fremont, California worksite at which Plaintiffs worked. Mot. at 14; TAC at ¶ 213. Thus, Plaintiffs argue, ISM Vuzem USA, Inc. "financially benefitted from this venture." *Id.* Furthermore, Plaintiffs argue that "Robert [Vuzem] and Ivan Vuzem operated and managed their owned business, including in labor recruitment, employment practices, working conditions at job sites, pay and other business enterprise actions." *Id.* at 13-14. Accordingly, because Robert Vuzem and Ivan Vuzem threatened and coerced Plaintiffs directly, the financial benefits that ISM Vuzem USA, Inc. received from Plaintiffs' coerced labor were obtained knowingly. *Id.*

The Court agrees. Plaintiffs' allegations are sufficient to state a claim for TVPRA beneficiary liability against ISM Vuzem USA, Inc. because Plaintiffs allege that ISM Vuzem USA, Inc. "knowingly benefit[ed], financially or by receiving anything of value, from participate[ng] in a

venture which has engaged in the providing or obtaining of labor or services by any of the means" proscribed under the four prongs of 18 U.S.C. § 1589(a). *See* 18 U.S.C. § 1595(a); *Shuvalova*, 2010 U.S. Dist. LEXIS 135502, 2010 WL 5387770, at *3 n.3 (explaining that violation must be "knowing"). Accordingly, the Court finds that Plaintiffs have also stated a claim under the TVPRA against ISM Vuzem USA, Inc.

However, Plaintiffs' motion does not allege that Vuzem USA, Inc. knowingly benefited financially from the coerced labor of either Plaintiff. The Court therefore finds that Plaintiffs have failed to state a claim under the TVPRA against Vuzem USA, Inc.

Accordingly, the Court DENIES Plaintiffs' motion for default judgment against Vuzem USA, Inc. This is because a court may not enter a default judgment if, taking all well-pleaded factual allegations as true, the court finds that Plaintiffs are not entitled to relief under their claim. *See Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1992) (explaining that claims that are legally insufficient are not established by default); *see also Buza v. California Dep't of Corr. & Rehab.*, 2010 U.S. Dist. LEXIS 119588, 2010 WL 4316919, at *1 (N.D. Cal. Oct. 27, 2010) (denying motion for default judgment for failure to state a claim).

c. Papes has Stated a TVPRA Claim

In sum, the Court finds that Plaintiff Papes has stated a claim under the TVPRA against Defendants ISM

Vuzem d.o.o., ISM Vuzem USA, Inc, Robert Vuzem, and Ivan Vuzem. Accordingly, the Court finds that the second *Eitel* factor (merits of Papes' substantive claim) and third *Eitel* factor (sufficiency of the complaint) weigh in favor of granting default judgment as to Papes' TVPRA claim.

Next, the Court addresses Plaintiff Lesnik. The Court explains below that although Lesnik has stated a claim against Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc, Robert Vuzem, and Ivan Vuzem under the TVPRA on the basis of the allegations above, see *supra* Section III(B)(2)(a)-(b), Lesnik's TVPRA claim is barred in the instant case due to Lesnik's 2016 settlement agreement releasing Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc, Robert Vuzem, and Ivan Vuzem from liability.

d. Lesnik's 2016 Settlement Agreement

In its March 20, 2019 order, the Court granted Defendants Eisenmann and Tesla's motion to dismiss Lesnik's TVPRA claim against Eisenmann and Tesla on the ground that Lesnik's TVPRA claim is barred by a 2016 settlement agreement that Lesnik signed with Eisenmann, Tesla, and ISM Vuzem d.o.o. ECF No. 361, at 36 ("March 20, 2019 order") (explaining that Lesnik's TVPRA claim in the TAC is barred by 2016 settlement agreement). The settlement agreement ("Settlement Agreement") resolved an Alameda County Superior Court action filed after Lesnik was injured while working for ISM Vuzem d.o.o. in Fremont, California. ECF No. 300-3, Ex. A at 3 ("Settlement Agreement").

Appendix C

The Settlement Agreement released "all wage and hour and employment-related claims" arising out of Lesnik's employment injury suffered while working for ISM Vuzem d.o.o. in Fremont, CA. Settlement Agreement at 3-4. The Court found in its March 20, 2019 order that Lesnik could have brought his TVPRA claim in the 2016 Alameda County Superior Court action, and that Lesnik's TVPRA claim was therefore barred because the Settlement Agreement released "all wage and hour and employment-related claims," and Lesnik's TVPRA claim is employment-related as shown by Lesnik's allegations. ECF No. 361 at 36 (quoting from the Settlement Agreement).

Furthermore, the Settlement Agreement not only provides a release of liability for claims against ISM Vuzem d.o.o. and ISM Vuzem USA, Inc. Settlement Agreement at 1. The Settlement Agreement also provides a release of liability for "their current and former agents, employees, officers, directors and divisions, parents and subsidiaries, attorneys, and all of their predecessors-in-interest, successors, assigns and liability insurance carriers." *Id.* Plaintiffs allege that Robert Vuzem and Ivan Vuzem are directors of ISM Vuzem d.o.o. TAC at 10-11. Accordingly, the Settlement Agreement bars Lesnik's TVPRA claim in the instant third motion for default judgment against ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem.

Although Plaintiffs do not mention the 2016 Settlement Agreement in the instant third motion for default judgment, Plaintiffs do appear to recognize the limitations

the Settlement Agreement places on Lesnik's claim. Accordingly, Lesnik seeks recovery based only on "actionable wrongs after July of 2016." Mot. at 9. The Settlement Agreement was signed in June of 2016, and so Lesnik seeks to circumvent the release of liability imposed by the Settlement Agreement by seeking to recover damages caused by "post-2017 actions by the Vuzems individually and on behalf of their companies" after the Settlement Agreement was signed. Mot. at 12.

Specifically, Plaintiffs allege that "Defendants in 2018 and again in 2020 and 2021 took legal action against Mr. Lesnik to make an example of him." Mot. at 9. Lesnik also alleges that in 2018, Robert Vuzem and Ivan Vuzem tried to get Lesnik "criminally prosecuted." *Id.* at 12. As a result of these "post-2017 actions by the Vuzems," Lesnik alleges that he became "anxious and depressed" and in 2018 he was "put on a blood pressure lowering medication." *Id.* As such, Lesnik alleges that he "sustained injury because of these acts" between 2018 and 2021. *Id.* at 9.

However, Lesnik admits that ISM Vuzem d.o.o. fired him in 2017. *Id.* Accordingly, Lesnik argues that Robert Vuzem and Ivan Vuzem filed a lawsuit against Lesnik "to coerce remaining workers to continue to work," rather than to coerce Lesnik himself to work. *Id.* Plaintiffs thus argue that Lesnik has stated a claim under the TVPRA even though Lesnik admits that ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem's actions were not undertaken to coerce Lesnik to work or otherwise provide labor or services for ISM Vuzem d.o.o.,

ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem. Plaintiffs' argument lacks merit.

Plaintiffs' motion fails to cite a single case that finds a viable TVPRA claim where the plaintiff is not the person or persons defendants sought to coerce into labor or service. Furthermore, the Court does not find any precedent that would expand the civil cause of action under the TVPRA to cover harm caused to individuals who were not themselves coerced into labor or service. Rather, "[s]ection 1595 allows victims *of such forced labor* to recover damages and attorney's fees for violations of" the TVPRA. *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *4 (emphasis added). Lesnik does not allege that he was forced or coerced to perform any labor or service as a result of ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem's actions between 2018 and 2021.

Accordingly, the Court finds that Plaintiffs have failed to state a claim under the TVPRA for actions taken by Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem against Lesnik after he was fired by ISM Vuzem d.o.o. in 2017. Furthermore, Plaintiffs are barred from seeking recovery on behalf of Lesnik for violations of the TVPRA that took place prior to the 2016 Settlement Agreement.

Accordingly, the Court DENIES Lesnik's motion for default judgment against Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Robert Vuzem, and Ivan Vuzem.

This is because a court may not enter a default judgment if, taking all well-pleaded factual allegations as true, the court finds that Plaintiff in not entitled to relief. *See Cripps*, 980 F.2d at 1267 (explaining that claims that are legally insufficient are not established by default); *see also Buza*, 2010 U.S. Dist. LEXIS 119588, 2010 WL 4316919, at *1 (denying motion for default judgment for failure to state a claim).

3. Fourth *Eitel* Factor: The Amount of Money at Stake

Under the fourth *Eitel* factor, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo Inc. v. Cal Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002); *see also Eitel*, 782 F.2d at 1471-72. "The Court considers Plaintiff's declarations, calculations, and other documentation of damages in determining if the amount at stake is reasonable." *Trung Giang Corp. v. Twinstar Tea Corp.*, 2007 U.S. Dist. LEXIS 38642, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007).

Default judgment is disfavored when a large amount of money is involved or is unreasonable in light of the potential loss caused by the defendant's actions. *Id.* However, courts have found that this factor "presents no barrier to default judgment" as long as the potential damages were "proportional to the harm alleged." *See Liu Hongwei v. Velocity V Ltd.*, 2018 U.S. Dist. LEXIS 115636, 2018 WL 3414053, at *8 (C.D. Cal. July 11, 2018) (finding that a request of $4,000,000 was justified); *United States*

v. Roof Guard Roofing Co., 2017 U.S. Dist. LEXIS 215842, 2017 WL 6994215, at *3 (N.D. Cal. Dec. 14, 2017) (holding that a request for over $1,000,000 was reasonable because the tax debt was substantiated with proof provided by the government).

Here, Papes seeks to recover $1,500,000 in compensatory damages and $1,500,000 in putative damages. Mot. at 12-13. For the reasons explained below, *infra* Section III(C)(1)-(2), the Court concludes that an award of $305,500 in compensatory damages and $305,500 in punitive damages is reasonable and proportional to the TVPRA violation alleged herein. This award of damages is within the range of awards courts have found appropriate in cases involving similar claims. *See*, *e.g.*, *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *14 (awarding between $192,400 and $480,000 in compensatory damages and between $192,400 and $480,000 in punitive damages to each plaintiff for TVPRA claim); *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 25 (D.D.C. 2013) (awarding plaintiff $433,200 in compensatory damages and $543,041.28 in punitive damages for TVPRA claim). Therefore, the fourth *Eitel* factor weighs in favor of default judgment.

4. Fifth and Sixth *Eitel* Factors: Potential Disputes of Material Fact and Excusable Neglect

The fifth *Eitel* factor considers the possibility of disputes as to any material facts in the case. Where a defendant fails to appear in an action, a court can infer "the absence of the possibility of a dispute concerning

material facts." *Solaria Corp. v. T.S. Energie e Risorse, S.R.I.*, 2014 U.S. Dist. LEXIS 174433, 2014 WL 7205114, at *3 (N.D. Cal. Dec. 17, 2014). Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem have failed to make an appearance in this case. The Court therefore takes the allegations in the complaint as true and holds that there is no dispute over material facts. *Fair Hous. of Marin*, 285 F.3d at 906 ("With respect to the determination of liability and the default judgment itself, the general rule is that well-pled allegations in the complaint regarding liability are deemed true."). Furthermore, the evidence provided by Papes establishes that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem violated the TVPRA with respect to their actions against Papes. TAC at ¶¶ 312-353 (providing allegations regarding Defendants' conduct with respect to violations of the TVPRA).

The sixth *Eitel* factor considers whether failure to appear was the result of excusable neglect. Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem were each properly served under the Hague Service Convention and Federal Rule of Civil Procedure 4(f). *See* Section III(A)(3), *supra* (explaining why service was proper). Nonetheless, Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem have not made an appearance nor challenged the entry of default in this case. Based on this record, nothing before the Court suggests that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem's failure to appear or litigate this case was the result of excusable neglect. As such, Defendants ISM

Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem have no excusable reason to fail to appear in the instant case.

5. Seventh *Eitel* Factor: Policy Favoring Decision on the Merits

Although the policy favoring decision on the merits generally weighs strongly against awarding default judgment, district courts regularly hold that the policy against default judgment, standing alone, is not dispositive, especially where a defendant fails to appear or defend himself. *See*, *e.g.*, *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1061 (N.D. Cal. 2010) (explaining that where defendants have failed to appear, policy of favoring decisions on the merits will not block default judgment); *Hernandez v. Martinez*, 2014 U.S. Dist. LEXIS 112405, 2014 WL 3962647, at *9 (N.D. Cal. Aug. 13, 2014) (same). Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem were properly served and have not made an appearance nor challenged the entry of default. Thus, the likelihood of the case proceeding to a resolution on the merits is low. Accordingly, the Court finds that this factor slightly weighs against default judgment.

6. Balancing of *Eitel* Factors

In sum, the following six *Eitel* factors weigh in favor of default judgment as to Papes' TVPRA claim: (1) the possibility of prejudice, (2) the merits of Papes' substantive claim, (3) the sufficiency of the complaint, (4) the sum of

money at stake in the action, (5) the possibility of a dispute concerning material facts, and (6) excusable neglect. *See Eitel*, 782 F.2d at 1471-72. The final factor, the policy favoring decisions on the merits, weighs slightly against default judgment. The Court concludes that the last *Eitel* factor is outweighed by the other six factors that favor default judgment. *See*, *e.g.*, *Michael Grecco Prods., Inc.*, 2020 U.S. Dist. LEXIS 231648, 2020 WL 7227199, at *6 (concluding that the last *Eitel* factor, which weighed slightly against default judgment, was outweighed by the first six *Eitel* factors, which weighed in favor of default judgment); *DiscoverOrg*, 2020 U.S. Dist. LEXIS 210494, 2020 WL 6562333, at *8 (same). Thus, the Court concludes that default judgment is appropriate as to Papes' TVPRA claim against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem.

C. Damages

A plaintiff who seeks default judgment "must also prove all damages sought in the complaint." *Dr. JKL Ltd.*, 749 F. Supp. 2d at 1046 (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003)). Federal Rule of Civil Procedure 55 does not require the Court to conduct a hearing on damages, as long as it ensures that there is an evidentiary basis for the damages awarded in the default judgment order. *See Action SA v. Marc Rich & Co.*, 951 F.2d 504, 508 (2d Cir. 1991), *abrogated on other grounds as recognized by Day Spring Enters., Inc. v. LMC Int'l, Inc.*, 2004 U.S. Dist. LEXIS 19927, 2004 WL 2191568 (W.D.N.Y. Sept. 24, 2004).

In the instant case, Papes seeks the following relief: (1) compensatory damages; (2) punitive damages; and (3) attorney's fees and costs. The Court addresses each form of relief in turn.

1. Compensatory Damages

First, Papes seeks $1,500,000 in compensatory damages against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. Mot. at 10. With respect to a coerced labor claim under the TVPRA, a plaintiff may recover emotional distress damages for losses suffered that are the "proximate result of the offense." *See* 18 U.S.C. § 2259(b)(3). A plaintiff may also recovery damages for "lost income" suffered as a "proximate result of the offense." *Id.* at § 2259(c)(2)(D). "Additionally, courts determine if the award is within a reasonable range by looking to similar awards for trafficking victims." *Carazani*, 972 F. Supp. 2d at 25 (internal quotation marks omitted).

Papes alleges that he has "suffered great physical harm and emotional stress from working under conditions of coerced labor," and has "suffered hypertension from stress and anxiety." Mot. at 10. Papes further alleges that he "cannot now go for long walks, play soccer, ride a bicycle or do other things." *Id.* Papes attests that he worked in the United States for ISM Vuzem d.o.o for 611 days. *Id.* at 11. Papes therefore argues that he is entitled to damages for emotional distress equivalent to $2,000 for each day of forced labor for a total of $1,222,000. *Id.* at 12. Papes further argues that as a result of the harm

he experienced, he is unable to work and is entitled to $200,000 for loss of income. Accordingly, Papes seeks a total of $1,500,000 in compensatory damages. *Id.* The Court notes that $1,222,000 plus $200,000 is $1,522,000, but Papes states that he requests a total award of $1,500,000 in compensatory damages.

In order to determine whether Papes' requested award is reasonable, the Court looks to similar awards in other cases. *Carazani*, 972 F. Supp. 2d at 25 (looking to other cases to gauge reasonableness); *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *13 (same). In similar cases dealing with victims of forced labor, courts generally award plaintiffs $400-$500 per day for damages resulting from emotional distress. *See*, *e.g.*, *Wang v. Gold Mantis Constr. Decoration*, LLC, 2021 U.S. Dist. LEXIS 99966, 2021 WL 2065398, at *9 (D. N. Mar. I. May 24, 2021) (awarding $425 per day for forced labor); *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *13 (awarding $400 per day for forced labor); *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 531-32 (D. Md. 2016) (awarding $400 per day for forced labor); *Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 458 (E.D. Va. 2015) (awarding $400 per day for 18 months of forced labor); *Carazani*, 972 F. Supp. 2d at 25 (awarding $400 per day for forced labor claim); *Doe v. Howard*, 2012 U.S. Dist. LEXIS 125414, 2012 WL 3834867, at *3-4 (E.D. Va. 2012) (awarding $500 per day for forced labor).

Thus, based on the awards of compensatory damages for emotional distress in other cases, the Court finds that $500 per day is a reasonable award. An award of $500

per day for 611 days of forced labor results in an award of $305,500 for emotional distress.

Next, the Court finds that after reviewing Papes' declaration, an award of $200,000 for loss of income lacks evidentiary support. Papes attests that due to his detrimental treatment while coerced into labor by Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem, Papes is currently unable to work and earn income. Papes Decl. at ¶¶ 120, 128. Plaintiffs argue that "Papes is not able to work until his condition substantially improves." Mot. at 12.

However, Papes has not provided any evidence to support an award of $200,000. For example, Papes does not attest to how much he would have expected to make each day that he has been unable to work and how many days he has been unable to work. Indeed, Papes provides no explanation whatsoever for how the $200,000 request for loss of income was calculated. A plaintiff who seeks default judgment must "prove all damages sought in the complaint." *Dr. JKL Ltd.*, 749 F. Supp. 2d at 1046. Papes has failed to prove that he is entitled to $200,000 in lost income because Papes has failed to provide sufficient evidence to support an award of that amount.

Accordingly, the Court finds that Papes is entitled to a total award of $305,500 in compensatory damages. This award is similar to awards found in other cases under the TVPRA. See, e.g., *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *14 (awarding up to $480,000 in compensatory damages to each plaintiff for TVPRA

claim); *Carazani*, 972 F. Supp. 2d at 25 (awarding plaintiff $433,200 in compensatory damages for TVPRA claim).

2. Punitive Damages

Second, Papes requests an award of punitive damages equal to the award of compensatory damages. Mot. at 13. The Ninth Circuit has recognized that punitive damages are available under the TVPRA. *See Ditullio v. Boehm*, 662 F.3d 1091, 1094 (9th Cir. 2011) ("We hold that the TVPA permits recovery of punitive damages because it creates a cause of action that sounds in tort and punitive damages are available in tort actions under the common law."). Courts therefore routinely award punitive damages at a 1:1 ratio to compensatory damages for forced labor claims under the TVPRA. *See*, *e.g.*, *Wang*, 2021 U.S. Dist. LEXIS 99966, 2021 WL 2065398, at *16 (awarding punitive damages at a 1:1 ratio with compensatory damages); *Alabado*, 2016 U.S. Dist. LEXIS 194389, 2016 WL 5929247, at *14 (same); *Carazani*, 972 F. Supp. 2d at 26 (same). Accordingly, the Court awards Papes $305,500 in punitive damages.

3. Attorney's Fees and Costs

Third, Papes seeks attorney's fees against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. Mot. at 2. However, as to Papes' request for attorney's fees, the instant third motion for default judgment states only that Papes seeks "compensatory damages, exemplary damages, and attorney's fees against defendants." Mot. at 2. In the damages section of the

instant third motion for default judgment, Papes merely states "[a]ttorney's fees should also be awarded." Mot. at 30. Papes provides no further statements or information regarding attorney's fees. Papes does not request a specific amount of attorney's fees. Furthermore, Papes does not provides declarations or affidavits containing a statement of the services rendered by each person for whom fees are requested and a brief description of their relevant qualifications as is required by Civil Local Rule 54-5(b)(2)-(3). Accordingly, the Court DENIES Papes' request for attorney's fees.

In sum, the Court finds that Papes is entitled to an award of $305,500 in compensatory damages and $305,500 in punitive damages. Papes is thus entitled to a total award of $611,000 in damages against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Papes' third motion for default judgment on Plaintiffs' TVPRA claim against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Robert Vuzem; and Ivan Vuzem. Furthermore, the Court awards Papes $305,500 in compensatory damages and $305,500 in punitive damages. Thus, Papes is entitled to a total award of $611,000 in damages.

The Court DENIES Papes' request for attorney's fees for failure to request a specific amount of attorney's

fees and for failure to provide any information or documentation supporting Papes' request.

The Court DENIES Papes' third motion for default judgment on Plaintiffs' TVPRA claim against Defendants Vuzem USA, Inc. and HRID-Mont, d.o.o.

Finally, the Court DENIES Lesnik's third motion for default judgment on Plaintiffs' TVPRA claim against Defendants ISM Vuzem d.o.o., ISM Vuzem USA, Inc., Vuzem USA, Inc., Robert Vuzem, Ivan Vuzem, and HRID-Mont, d.o.o.

IT IS SO ORDERED.

Dated: September 19, 2021

/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge

APPENDIX D — ORDER DENYING PLAINTIFFS' THIRD MOTION FOR DEFAULT JUDGMENT AND DISMISSING WITH PREJUDICE PLAINTIFFS' FALSE CLAIMS ACT CLAIM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED SEPTEMBER 17, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 16-CV-01120-LHK

UNITED STATES OF AMERICA, EX REL. GREGOR LESNIK; STJEPAN PAPES,

Plaintiffs,

v.

EISENMANN SE, *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' THIRD MOTION FOR DEFAULT JUDGMENT AND DISMISSING WITH PREJUDICE PLAINTIFFS' FALSE CLAIMS ACT CLAIM

Re: Dkt. No. 564

Before the Court is Plaintiffs Gregor Lesnik and Stjepan Papes' (collectively, "Plaintiffs") third motion

for default judgment as to Plaintiffs' False Claims Act claim against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; Gregurec Ltd; LB Metal d.o.o.; Mos Servis, d.o.o.; and Magna, d.o.o. (collectively, "Non-Appearing Defendants"). ECF No. 564 ("Mot."). Having considered the Plaintiffs' briefing, the relevant law, and the record in this case, the Court DENIES Plaintiffs' third motion for default judgment and DISMISSES with prejudice Plaintiffs' False Claims Act claim against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; Gregurec Ltd; LB Metal d.o.o.; and Mos Servis, d.o.o.

I. BACKGROUND

A. Factual Background

1. The Parties

Defendant ISM Vuzem d.o.o. is a Slovenian business entity with its principal place of business in Slovenia. Third Amended Complaint, ECF No. 269, at ¶ 9 ("TAC"). Defendant ISM Vuzem USA, Inc. was a South Carolina corporation with its principal place of business in South Carolina. *Id.* at ¶ 12. Defendant Vuzem USA, Inc. was a California corporation with its principal place of business in California. *Id.* at ¶ 13. Defendant Robert Vuzem is a resident of Slovenia. *Id.* at ¶ 10. Defendant Ivan Vuzem is a resident of Slovenia. *Id.* at ¶ 11. Defendant HRID-MONT d.o.o. is a Slovenian corporation with its principal place

of business in Slovenia. *Id.* at ¶ 14. Defendant Gregurec Ltd is an English business entity with its principal place of business in England. *Id.* at ¶ 18. Defendant LB Metal d.o.o. is a Slovenian corporation with its principal place of business in Slovenia. *Id.* at ¶ 32. Defendant Mos Servis d.o.o. is a Slovenian corporation with its principal place of business in Slovenia. *Id.* at ¶ 44. Defendant Magna, d.o.o. is a Slovenian corporation with its principal place of business in Slovenia. *Id.* at ¶ 39.

Plaintiff Gregor Lesnik is a resident of Slovenia and was allegedly hired by ISM Vuzem d.o.o. and brought to the United States to work at the Tesla manufacturing plant in Fremont, California in 2015. *Id.* at ¶ 1. Plaintiff Stjepan Papes is a resident of Croatia and was allegedly hired by ISM Vuzem d.o.o. and brought to the United States to work at various locations between 2013 and 2015, including at the Tesla manufacturing plant in Fremont, California. *Id.* at ¶ 2.

2. Alleged Conduct of the Defendants

Plaintiffs allege that the Eisenmann Corporation ("Eisenmann"), a former Defendant in this case, formed relations with a number of manufacturing entities, such as Tesla, to perform construction work related to Eisenmann's equipment. TAC at ¶ 70. Plaintiffs allege that Eisenmann, to fulfill these agreements, would hire subcontractors who would then provide the laborers necessary to complete the equipment installation. *Id.* at ¶ 84, 107-8. Among those subcontractors were ISM Vuzem d.o.o. and other Non-Appearing Defendants. *Id.*

Although all of the work described in the Third Amended Complaint ("TAC") occurred in the United States, ISM Vuzem d.o.o. did not use American workers. Instead, the TAC alleges that ISM Vuzem d.o.o. and the other subcontractor Non-Appearing Defendants hired workers internationally. For example, to help install a paint shop at a Tesla facility in Fremont, California, ISM Vuzem d.o.o. hired Lesnik and Papes. *Id.* at ¶¶ 1-2, 60, 111, 213. Other Non-Appearing Defendants allegedly helped to supply these international workers. *Id.* at ¶¶ 33, 84. Lesnik and Papes were allegedly brought to the United States on B-1 visas that are generally reserved for skilled work, even though ISM Vuzem d.o.o. and other Non-Appearing Defendants allegedly knew the workers would actually be performing unskilled construction work. *Id.* at ¶¶ 58-91, 211. ISM Vuzem d.o.o. and other Non-Appearing Defendants allegedly submitted letters to the United States Consulate containing false statements to obtain B-1 visa on Lesnik and Papes' behalf. *Id.* at ¶¶ 206, 211, 213, 216.

B. Procedural Background

Plaintiffs filed the complaint initiating this suit on March 7, 2016. ECF No. 1. On July 15, 2016, Plaintiffs filed the First Amended Complaint. ECF No. 20. On April 25, 2017, the United States filed a notice that it would not intervene in the instant case. ECF No. 25. On April 25, 2017, the Court unsealed the complaint. ECF No. 26.

On August 8, 2017, the Court granted Plaintiffs' motion to file a Second Amended Complaint, and directed

the United States to make a "prompt decision" regarding intervention. ECF No. 31. On October 5, 2017, the United States filed another notice that it would not intervene in the instant case. ECF No. 34. On November 11, 2017, Plaintiffs filed the Second Amended Complaint. ECF No. 37.

On July 12, 2018, various moving Defendants—Eisenmann, Tesla, Mercedes-Benz, Deere, REHAU, LaX, VW, Discatal, and BMW—filed a motion to dismiss the Second Amended Complaint. ECF No 219. On October 1, 2018, the Court granted in part and denied in part the motion to dismiss the Second Amended Complaint. ECF No. 255.

On October 31, 2018, Plaintiffs filed a 108-page Third Amended Complaint. ECF No. 269. ("TAC"). The TAC alleges 13 causes of action (some of which are duplicative). At issue in the instant third motion for default judgment is Plaintiffs' False Claims Act claim (Count I). *Id.* at ¶¶ 125, 201.

On March 28, 2019, Plaintiffs filed summons returned notices for the TAC on the Non-Appearing Defendants. ECF Nos. 362-372. On April 17, 2019, Plaintiffs filed motions for entry of default against seven of the Non-Appearing Defendants. ECF Nos. 382-388. On November 11, 2019, Plaintiffs filed motions for entry of default against the remaining four Non-Appearing Defendants. ECF Nos. 425-428. On November 7, 2019, the Clerk of the Court entered default against four of the Non-Appearing Defendants. ECF Nos. 430-433. On January 16, 2020,

the Clerk of the Court entered default against the seven remaining Non-Appearing Defendants. ECF Nos. 443-449.

On February 19, 2020, the Court ordered Plaintiffs to file motions for default judgment by February 28, 2020. ECF No. 457. On February 28, 2020, Plaintiffs filed a motion for default judgment on their False Claims Act claim (Count I). ECF No. 461. On February 29, 2020, Plaintiffs filed a motion for default judgment on their Federal Labor Standards Act claims (Counts 2 and 3). ECF No. 470. On February 29, 2020, Plaintiffs also filed a motion for default judgment on their Trafficking Victims Protection Reauthorization Act claim (Claim 9) and state trafficking claim (Claim 10). ECF No. 468.

On June 26, 2020, the Court denied without prejudice Plaintiffs' motions for default judgment. ECF No. 498. The Court explained that there were numerous deficiencies in Plaintiffs' motions, including (1) that Plaintiffs' motions failed to address the Court's subject matter and personal jurisdiction, and (2) that three of Plaintiffs' four default judgment motions failed to brief the *Eitel* factors, which govern entries of default judgment. *Id.*

On August 24, 2020, Plaintiffs filed a second round of motions for default judgment and entry of final judgment. ECF Nos. 501, 505, and 506. Plaintiffs filed a second motion for default judgment and entry of final judgment on Plaintiffs' Fair Labor Standards Act claim. ECF No. 501. Plaintiffs filed a second motion for default judgment

and entry of final judgment on Plaintiffs' False Claims Act claim. ECF No. 505. Plaintiffs filed a second motion for default judgment and entry of final judgment on Plaintiffs' Trafficking Victims Protection Reauthorization Act claim. ECF No. 506.

On August 25, 2020, Plaintiffs filed notices of voluntary dismissal without prejudice of their California trafficking claims and California wage claims. ECF Nos. 512, 513.

On February 10, 2021, the Court denied Plaintiffs' second round of motions for default judgment without prejudice. ECF No. 551. The Court found that Plaintiffs had failed to establish the Court's personal jurisdiction over Defendants, which the Court must do before entering default judgment. *Id.* at 11. Furthermore, the Court found that Plaintiffs had failed to provide evidence that Non-Appearing Defendants Magna d.o.o and We-Kr d.o.o. were properly served. *Id.* at 13.

On April 8, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' Trafficking Victims Protection Reauthorization Act claim. ECF No. 560. On April 9, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' False Claims Act claim. ECF No. 564 ("Mot."). On April 11, 2021, Plaintiffs filed a third motion for default judgment on Plaintiffs' Fair Labor Standards Act claim. ECF No. 565. The Court will address Plaintiffs' third motions for default judgment on Plaintiffs' Trafficking Victims Protection Reauthorization Act claim and Fair Labor Standards Act claim in separate orders.

C. Requests for Judicial Notice

The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Moreover, courts may consider materials referenced in the complaint under the incorporation by reference doctrine, even if a plaintiff failed to attach those materials to the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See*, *e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

In connection with Plaintiffs' third motion for default judgment, Plaintiffs request judicial notice of the complaint in *United States v. Infosys Limited* (Ex. M); the Settlement Agreement in *United States v. Infosys Limited* (Ex. N); and the United States Attorney's Office for the Eastern District of Texas's Press Release from October 30, 2013 (Ex. O). ECF No. 560-1, at 6 (Ex. M–O). Each of these documents is a court filing or matter of public record and is therefore the proper subject of judicial notice. *See Black*, 482 F.3d at 1041. The Court therefore GRANTS Plaintiffs' request for judicial notice of Exhibits M–O.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 55(b)(2), the Court may enter a default judgment when the Clerk, under Rule 55(a), has previously entered a party's default. Fed. R. Civ. P. 55(b). "The district court's decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk enters default, all well-pleaded allegations regarding liability are taken as true, except with respect to damages. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) ("With respect to the determination of liability and the default judgment itself, the general rule is that well-pled allegations in the complaint regarding liability are deemed true."); *TeleVideo Sys. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) ("[U]pon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.").

"Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

Furthermore, if a party was improperly served, the Court may not enter a default judgment against that

party. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) (explaining that a "person is not bound by a judgment in litigation to which he or she has not been made a party by service of process.").

III. DISCUSSION

A. Jurisdiction

The Court begins by addressing subject matter jurisdiction, personal jurisdiction, and service of process. "When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties. A judgment entered without personal jurisdiction over the parties is void." *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). In order to avoid the entry of an order of default judgment that may subsequently be attacked as void, the Court must determine whether jurisdiction over the instant case exists. "The party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). For the Court to exercise personal jurisdiction over a defendant, the defendant must also have been served in accordance with Federal Rule of Civil Procedure 4. *Mason*, 960 F.2d at 851 (explaining that an entry of default is void if there was improper service of process on a defendant).

Appendix D

The Court begins with subject matter jurisdiction and then proceeds to personal jurisdiction. Finally, the Court turns to service of process.

1. Subject Matter Jurisdiction

The Court previously dismissed Plaintiffs' first and second round motions for default judgment without prejudice for failure to address subject matter jurisdiction. ECF No. 498. Plaintiffs have now rectified that deficiency. Plaintiffs' instant third motion for default judgment seeks default judgment on Plaintiffs' claim under the False Claims Act pursuant to 31 U.S.C. § 3729, *et seq.* Mot. at 26; TAC at ¶ 202. As such, the Court is satisfied that it has subject matter jurisdiction over Plaintiffs' claim pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

2. Personal Jurisdiction

"[A] judgment entered without personal jurisdiction over the parties is void." *In re Tuli*, 172 F.3d at 712. Moreover, "[t]he party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists." *Breeland*, 792 F.2d at 927 (citation omitted); *In re Boon Glob. Ltd.*, 923 F.3d 643, 650 (9th Cir. 2019) (explaining that it is the "party asserting jurisdiction [that] bears the burden to establish jurisdictional facts."). The Court previously twice denied Plaintiffs' three motions for default judgment without prejudice because Plaintiffs

failed to establish the Court's personal jurisdiction over Non-Appearing Defendants. *See* ECF No. 498, at 2; ECF No. 551, at 11. The Court warned Plaintiffs that if they failed to allege facts sufficient to establish the Court's personal jurisdiction over Defendants, "the Court will deny Plaintiffs' motions for default judgment with prejudice." *Id.* at 12.

Personal jurisdiction over an out-of-state defendant is appropriate if the relevant state's long-arm statute permits the assertion of jurisdiction without violating federal due process. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004). California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is co-extensive with federal due process requirements, and therefore the jurisdictional analyses under California law and federal due process merge into one. *See* Cal. Civ. Proc. Code § 410.10 ("[A] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) ("California's long-arm statute . . . is coextensive with federal due process requirements, so the jurisdictional analyses under state law and federal due process are the same.").

For a court to exercise personal jurisdiction over a defendant consistent with due process, that defendant must have "certain minimum contacts" with the relevant forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66

S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). In addition, "the defendant's 'conduct and connection with the forum State' must be such that the defendant 'should reasonably anticipate being haled into court there.'" *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

A court may exercise either general or specific personal jurisdiction over a defendant. *See Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995). In the instant case, Plaintiffs argue that the Court may exercise specific personal jurisdiction over all Non-Appearing Defendants because the FCA provides for nationwide service of process. Mot. at 24. The Court agrees.

The False Claims Act ("FCA") provides in relevant part:

> Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

See 31 U.S.C. § 3732(a). "[W]hen a statute authorizes nationwide service of process, national contacts analysis

is appropriate. In such cases, 'due process demands [a showing of minimum contacts with the United States] with respect to foreign defendants before a court can assert personal jurisdiction.'" *Go–Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1089) (quoting *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985) (alteration in original)). "[I]n a statute providing for nationwide service of process, the inquiry to determine minimum contacts is thus whether the defendant has acted within any district of the United States or sufficiently caused foreseeable consequences in this country." *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (internal citation and quotation marks omitted). Accordingly, the proper inquiry is whether each defendant had sufficient minimum contacts with the United States, rather than the forum state. *Id.*

Plaintiffs allege that each of the Non-Appearing Defendants had sufficient minimum contacts with the United States. ISM Vuzem d.o.o., ISM Vuzem USA, Inc., and Vuzem USA, Inc. allegedly entered into contracts for the construction of facilities at various construction sites in the United States, including in Fremont, CA. Mot. at 22-23; TAC at ¶ 13, 15, 84. These Non-Appearing Defendants also allegedly hired foreign workers and brought them into the United States on B-1 visa. *Id.*

Robert Vuzem and Ivan Vuzem allegedly own and control the operations of ISM Vuzem d.o.o., ISM Vuzem USA, Inc., and Vuzem USA, Inc. TAC at ¶ 16. Furthermore, Robert Vuzem allegedly traveled to

the Fremont, California construction site to observe operations. Mot. at 23. Robert Vuzem and Ivan Vuzem also allegedly prepared representations as to the nature of work that Plaintiff Papes would perform in the United States so that Papes could procure a B-1 workers' visa. TAC at ¶ 110. Ivan Vuzem also allegedly paid workers directly into Slovenian bank accounts for work done in California for Eisenmann and at other manufacturing sites in the United States. *Id.* at ¶ 117.

HRID-MONT d.o.o. allegedly contracted with Eisenmann to bring in construction workers to the United States. Mot. at 23; TAC at ¶ 15.

Gregurec Ltd allegedly "acted as 'subcontractor' to broker or supply B1 visa workers at virtually all, if not all, construction and manufacturing sites or for all defendant manufacturing companies mentioned" in the TAC. TAC at ¶ 18.

LB Metal d.o.o. allegedly supplied workers at the Tesla manufacturing plan in Fremont, California. Mot. at 24; TAC at ¶ 32.

Mos Servis, d.o.o. allegedly supplied workers at sites across the United States for contracts with Eisenmann, including at the Tesla manufacturing plant in Fremont, California. *Id*; TAC at ¶ 44.

Magna, d.o.o. allegedly supplied workers at sites across the United States for contracts with Eisenmann. *Id.*; TAC at ¶ 39.

Accordingly, the Court finds that Plaintiffs have adequately alleged that each of the Non-Appearing Defendants have had sufficient minimum contacts with the United States as a whole to establish the Court's specific personal jurisdiction over each Defendant under the FCA's nationwide service of process provision. *See United States v. Orthopedic All.*, LLC, 2020 U.S. Dist. LEXIS 201226, 2020 WL 6151084, at *3 (C.D. Cal. July 13, 2020) (finding that district court had specific personal jurisdiction over defendant in FCA action based on minimum contacts with the United States); *United States ex rel. Silingo v. Mobile Med. Examination Servs.*, Inc., 2015 U.S. Dist. LEXIS 186860, 2015 WL 12752552, at *4 (C.D. Cal. Sept. 29, 2015) (same).

3. Service of Process

For the Court to properly exercise personal jurisdiction over a defendant, the defendant must have been served in accordance with the Federal Rules of Civil Procedure. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) ("Defendants must be served in accordance with Rule 4(d) of the Federal Rules of Civil Procedure, or there is no personal jurisdiction." (footnote omitted)).

Federal Rule of Civil Procedure 4(h) governs the rules of service when a corporation is served outside of the United States. It states that if a foreign corporation is served "at a place not within any judicial district of the United States," it must be served "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)," unless a waiver of

service has been filed. Fed. R. Civ. P. 4(h)(2). Plaintiffs have only submitted a waiver of service for Defendant Gregurec Ltd. *See* ECF No. 159.

Under Rule 4(f), a party may serve a corporation abroad using one of three methods:

> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice . . . unless prohibited by the foreign country's law, by . . . using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(1)-(3). Rule 4(f)(1) implements the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Service Convention"). The Hague Service Convention "specifies certain approved methods of service and preempts inconsistent methods of service wherever

it applies." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507, 197 L. Ed. 2d 826 (2017) (internal citations omitted). The Hague Service Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad," if the country of destination is a signatory member to the Hague Service Convention. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988). The United States, Slovenia, the United Kingdom, and Croatia are all signatories to the Hague Service Convention, and therefore the Hague Service Convention governs service on Non-Appearing Defendants because "compliance with the [Hague Service Convention] is mandatory in all cases to which it applies." *Id.* at 705; Mot. at 4.

The principle means of service under the Hague Service Convention is through a signatory country's "Central Authority," which the Convention requires each country to establish for the purpose of effectuating service in its country. *See* Hague Service Convention, art. 2, 20 U.S.T. at 362; *see also Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (explaining Central Authority mechanism in the Hague Service Convention). However, submitting a document to the Central Authority is not the only method of service available under the Hague Service Convention. *See Water Splash*, 137 S. Ct. at 1508 (explaining various methods of service). Article 10 of the Hague Service Convention states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with:

> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention, 20 U.S.T. at 363; *Water Splash*, 137 S. Ct. at 1508 (explaining that the Hague Service Convention allows for other forms of service where a country does not object).

The Court therefore examines service of process on Non-Appearing Defendants under the Hague Service Convention. Below, the Court first explains that Plaintiffs properly effected service of process on Non-Appearing Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; LB Metal d.o.o.; and Mos Servis, d.o.o. Second, the Court explains that Plaintiffs have not demonstrated that Non-Appearing Defendant Magna d.o.o. was properly served.

First, in the Court's February 10, 2021 order denying Plaintiffs' second round motions for default judgment, the Court found no deficiencies in Plaintiffs' service of process on Non-Appearing Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; LB Metal d.o.o.; and Mos Servis, d.o.o. *See* ECF No. 551, at 12 (identifying deficiencies with only Defendants Magna d.o.o. and We-Kr d.o.o.). The Court is therefore satisfied that Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; LB Metal d.o.o.; and Mos Servis, d.o.o. have been properly served under the Hague Service Convention and Federal Rule of Civil Procedure 4(f). Gregurec Ltd waived service of process. *See* ECF No. 159. Therefore, the Court properly exercises personal jurisdiction over ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; LB Metal d.o.o.; Mos Servis, d.o.o.; and Gregurec Ltd.

Second, the Court's February 10, 2021 order denying Plaintiffs' second round motions for default judgment warned Plaintiffs that they had provided insufficient evidence that Magna d.o.o. was properly served under the Hague Service Convention and Federal Rule of Civil Procedure 4(f). ECF No. 551 at 13. Specifically, Plaintiffs filed a certificate of service for Slovenian Defendant Magna d.o.o, which contained a postal receipt for registered mail with acknowledgment of receipt. ECF No. 370. Slovenia had stated that service by postal channels under Article 10(a) "is only permitted if judicial documents are sent to the addressee by registered letter with acknowledgment of

receipt and the documents are written in, or accompanied by, a translation into the Slovene language." *See* Republic of Slovenia's Declarations and Reservations to the Hague Service Convention, December 18, 2012, available at https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=420&disp=resdn (last visited September 14, 2021). Plaintiffs did not attest that Magna d.o.o. was served in the Slovene language. *See*, *e.g.* Dresser Decl. in Support of First Amended Motions for Default Judgments, ECF No. 502, at 4; ECF No. 503, at 1 (Ex. 409). In the Court's February 10, 2021 order, the Court clearly warned Plaintiffs that they must rectify this deficiency if they chose to refile their motion for default judgment, or the Court would deny the motion for default judgment with prejudice. ECF No. 551 at 13.

Plaintiffs' instant third motion for default judgment once again does not clarify whether Magna d.o.o. was served with documents translated into the Slovene language. *See* Mot. at 21. Furthermore, Plaintiffs have filed a declaration in support of the instant motion allegedly attesting to the adequacy of service on all Non-Appearing Defendants. *See* ECF No. 560-2, at 2 ("Divjak Decl."). The declaration acknowledges that Slovenia has stated that service is only allowed by postal channels if "judicial documents are sent to the addressee by registered letter with acknowledgment of receipt and the documents are written in, or accompanied by, a translation into the Slovene language." *Id.* However, the declaration then states that as to service on Magna d.o.o., "[t]he service by post of the above listed individuals and entities was by registered letter with acknowledgment of receipt." *Id.* The

declaration does not state that the documents were written in the Slovene language or accompanied by a translation into the Slovene language.

The Court provided a clear warning in its February 10, 2021 order that Plaintiffs must attest that service on Magna d.o.o. included documents that were written in the Slovene or accompanied by a translation into the Slovene language. Plaintiffs have failed to do so. Plaintiffs have therefore failed to provide evidence that service was affected in accordance with Article 10(a) of the Hague Service Convention and Federal Rule of Civil Procedure 4(f). Because "[f]ailed service cannot support the entry of a default judgment," the Court DENIES Plaintiff's third motion for default judgment as to Magna d.o.o. *Heifetz v. Breed Properties*, 2017 U.S. Dist. LEXIS 25666, 2017 WL 713303, at *3 (N.D. Cal. Feb. 23, 2017) (citing *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992)).

Furthermore, the Court already provided Plaintiffs with an opportunity to demonstrate that Magna d.o.o. was properly served in accordance with Article 10(a) of the Hague Service Convention and Federal Rule of Civil Procedure 4(f). *See* ECF No. 551. Plaintiffs have failed to do so. Accordingly, the Court orders the Clerk of Court to vacate the January 16, 2020 entry of default against Magna d.o.o. *See Michael Grecco Productions, Inc. v. Enthusiast Gaming, Inc.*, 2020 U.S. Dist. LEXIS 129660, 2020 WL 4207445, at *6 (N.D. Cal. July 22, 2020) (explaining that "no default may be taken" against defendant if defendant was not properly served). Magna d.o.o. must be properly served before Plaintiffs seek an entry of default against Magna d.o.o.

B. Whether Default Judgment is Proper

Having determined that the Court's exercise of subject matter jurisdiction and personal jurisdiction over the remaining Non-Appearing Defendants (ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; LB Metal d.o.o.; Mos Servis, d.o.o.; and Gregurec Ltd.) is proper, the Court now turns to the *Eitel* factors to determine whether entry of default judgment against the remaining Non-Appearing Defendants is warranted.

1. First *Eitel* Factor: Possibility of Prejudice

Under the first *Eitel* factor, the Court considers the possibility of prejudice to Plaintiffs if default judgment is not entered against the Non-Appearing Defendants. "A plaintiff who is denied a default judgment and is subsequently left without any other recourse for recovery has a basis for establishing prejudice." *Michael Grecco Prods.*, 2020 U.S. Dist. LEXIS 129660, 2020 WL 7227199, at *6 (quoting *DiscoverOrg Data, LLC v. Bitnine Global, Inc.*, 2020 U.S. Dist. LEXIS 210494, 2020 WL 6562333, at *5 (N.D. Cal. Nov. 9, 2020)). Here, Plaintiffs have established that Plaintiffs will be prejudiced because Non-Appearing Defendants have not participated in this litigation and Plaintiffs would be without recourse to recover for the damages caused by Non-Appearing Defendants if default judgment is not granted. Therefore, the first *Eitel* factor weighs in favor of granting default judgment.

2. Second and Third *Eitel* Factors: Merits of Plaintiffs' Substantive Claims and the Sufficiency of the Complaint

The second and third *Eitel* factors address the merits and sufficiency of Plaintiffs' claims as pleaded in Plaintiffs' TAC. Courts often analyze these two factors together. *See Dr. JKL Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010) ("Under an *Eitel* analysis, the merits of plaintiff's substantive claims and the sufficiency of the complaint are often analyzed together."). In its analysis of the second and third *Eitel* factors, the Court will accept as true all well-pled allegations regarding liability in the TAC. *See Fair Hous. of Marin*, 285 F.3d at 906 ("[T]he general rule is that well-pled allegations in the complaint regarding liability are deemed true."). The Court will therefore consider the merits of Plaintiffs' claims and the sufficiency of the TAC together.

Pursuant to 31 U.S.C. §§ 3729(a)(1)(C) and 3729(a)(1)(G), Plaintiffs seek recovery on behalf of the United States pursuant to a reverse False Claims Act ("FCA") claim against Non-Appearing Defendants. Specifically, Plaintiffs seek to recover for "the reduction in payment of obligations being the difference in application fees between petition-based visas and non-petition-based visas" that Non-Appearing Defendants paid for workers entering the United States. Mot. at 1. Plaintiffs allege that Non-Appearing Defendants are liable because they applied for non-petition based B-1 and B-2 visas for their workers to enter the United States, which incur less fees than petition-based visas. *Id.* at 4. Plaintiffs allege that it

is "impermissible to enter the United States on B1/B2 visa to perform construction work." *Id.* Plaintiffs' reverse FCA argument therefore rest on the argument that because Non-Appearing Defendants falsely obtained cheaper B-1 non-petition visas, Non-Appearing Defendants avoided an obligation to pay the government the higher fees associated with the more expensive petition-based visas intended for non-skilled workers. *Id.* at 7-9. Thus, Plaintiffs argue, "[o]btaining improper visa is actionable as a FCA claim." *Id.* Plaintiffs further argue that all Non-Appearing Defendants are liable on a conspiracy basis. *Id.* at 13.

The Court already explained that Plaintiffs' FCA claim lacked merit in the Court's March 20, 2019 order granting in part and denying in part Defendants Eisenmann and Tesla's motion to dismiss in the instant case. ECF No. 361, at 11. Thus, Plaintiffs have known the deficiency with their FCA claim since March of 2019. Specifically, the Court explained in its March 20, 2019 order that Defendants in this case were never under any obligation to pay visa fees associated with the petition-based visas. *Id.* The Court explained that the FCA is focused on "those who present or directly induce the submission of false or fraudulent claims" to the government. *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 136 S. Ct. 1989, 1996, 195 L. Ed. 2d 348 (2016). Plaintiffs proceed in this case under the reverse false claims provision, 31 U.S.C. § 3729(a)(1)(G). A reverse FCA claim under § 3729(a)(1)(G) involves "fraudulently reducing the amount owed to the government," which constitutes a false claim. *See Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*,

637 F.3d 1047, 1056 (9th Cir. 2011). Section 3729(a)(1)(G) creates liability for any person who "knowingly" uses "a false record or statement material to an *obligation* to pay . . . the Government, or knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay . . . the Government." *Id.* (emphasis added).

Importantly, the FCA defines "obligation" as "an established duty . . . arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3). Thus, "[t]he obligation cannot be merely a potential liability. . . ." *United States v. Bourseau*, 531 F.3d 1159, 1169 (9th Cir. 2008) (quoting *Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 735 (6th Cir. 1999)). Accordingly, "an obligation under the meaning of the False Claims Act[] must be for a fixed sum that is immediately due." *Am. Textile Mfrs.*, 190 F.3d at 735.

Here, Plaintiffs have not alleged that Non-Appearing Defendants submitted visa applications for the more expensive petition-based visas. On the contrary, Plaintiffs allege that Non-Appearing Defendants did *not* submit visa applications for petition-based visas. Mot. at 9; TAC at ¶¶ 54-55, 87-91. Rather, Plaintiffs allege that Non-Appearing Defendants submitted visa applications for less expensive non-petition based visa. *Id.* Thus, there was no obligation to pay the government for a petition-based visa because no visa applications for petition-based visas were submitted. As the Ninth Circuit held in *Bourseau*,

"[t]he obligation cannot be merely a potential liability." *Bourseau*, 531 F.3d at 1169. However, that is exactly what Plaintiffs predicate their reverse FCA claim on: a potential liability incurred only if Non-Appearing Defendants had applied for petition-based visas. Because no petition-based visa applications were made, there was no "fixed sum that [was] immediately due," which is a requirement for an obligation to arise under the FCA. *American Textile Manufacturers*, 190 F.3d at 735.

Thus, Plaintiffs' argument that Non-Appearing Defendants incurred FCA liability by avoiding an obligation to pay the government higher visa fees associated with the petition-based visas lacks merit. The obligation to pay the government only arises upon applying for a visa. Accordingly, Plaintiffs' reverse FCA claim under 31 U.S.C. § 3729(a)(1)(G) fails because Plaintiffs have not shown that Non-Appearing Defendants applied for a visa that obligated Non-Appearing Defendants to pay a higher "fixed sum that is immediately due." *American Textile Manufacturers*, 190 F.3d at 735.

Finally, because Plaintiffs' reverse FCA claim under § 3729(a)(1)(G) fails as to Non-Appearing Defendants, there can be no underlying conspiracy to commit a violation of the FCA claim under § 3729(a)(1)(C). Section 3729(a)(1)(C) requires a conspiracy "to commit a violation" of the other subparagraphs constituting a claim under the FCA. Numerous courts have found that an underlying violation of the other subparagraphs constituting a claim under the FCA is required to state a claim for conspiracy to commit a violation of the FCA. *See*, *e.g.*, *Bishop v. Wells Fargo &*

Co., 823 F.3d 35, 50 (2d Cir. 2016) ("[T]he relators cannot show a conspiracy to commit fraud given that they have not sufficiently pleaded fraud under the FCA"), *vacated on other grounds by* 137 S. Ct. 1067, 197 L. Ed. 2d 169; *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 507 (3d Cir. 2017) ("[T]here can be no liability for conspiracy where there is no underlying violation of the FCA."). Thus, because Plaintiffs have failed to allege a reverse FCA claim under § 3729(a)(1)(G), Plaintiffs also fail to state a conspiracy claim under § 3729(a)(1)(C).

Accordingly, the Court finds that Plaintiffs' allegations fail to state a FCA claim as to Non-Appearing Defendants. Because the Court finds that Plaintiffs' TAC fails to state a claim as to Plaintiffs' FCA claim, the Court need not address the remaining *Eitel* factors. *See Golden W. Veg, Inc. v. Bartley*, 2017 U.S. Dist. LEXIS 11848, 2017 WL 386254, at *6 (N.D. Cal. Jan. 27, 2017) (explaining that failure to satisfy the second and third *Eitel* factors is sufficient to deny a motion for default judgment). This is because a court may not enter a default judgment if, taking all well-pleaded factual allegations as true, the court finds that Plaintiffs are not entitled to relief. *See Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1992) (explaining that claims that are legally insufficient are not established by default); *see also Buza v. California Dep't of Corr. & Rehab.*, 2010 U.S. Dist. LEXIS 119588, 2010 WL 4316919, at *1 (N.D. Cal. Oct. 27, 2010) (denying motion for default judgment for failure to state a claim).

Moreover, because the Court finds that Plaintiffs have failed to state a claim with respect to Plaintiffs' FCA

cause of action, the Court finds that Plaintiffs' FCA claim must be dismissed. *See Moore v. United Kingdom*, 384 F.3d 1079, 1090 (9th Cir. 2004) (stating that dismissal is proper where plaintiff is not entitled to default judgment because Plaintiffs fails to state a claim for relief); *see also Buza*, 2010 U.S. Dist. LEXIS 119588, 2010 WL 4316919, at *1 (dismissing claim after denying motion for default judgment for failure to state a claim).

In its March 20, 2019 order, the Court dismissed Plaintiffs' FCA claim against Defendants Eisenmann and Tesla with prejudice. ECF No. 361, at 14. The Court explained that Plaintiffs had already been given leave to amend the pleadings twice and any further amendment would be futile and unduly prejudicial to Eisenmann and Tesla. *Id.* Thus, Plaintiffs had been clearly warned as to the precise deficiency with their FCA claim.

In the instant third motion for default judgment as to Non-Appearing Defendants, Plaintiffs made no effort to correct that deficiency or address the Court's arguments identified in the Court's March 20, 2019 order. Indeed, in the section of the instant third motion for default judgment addressing the second *Eitel* factor (merits of substantive claim) and third *Eitel* factor (sufficiency of the complaint), Plaintiffs' argument in support of the FCA claim merely states that "the TAC provides detailed factual allegations as to the elements of the FCA. Plaintiff has presented substantial evidence demonstrating the merits of the FCA." Mot. at 27.

Accordingly, the Court finds that leave to amend would be futile and cause undue delay. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (explaining that denial of leave to amend is appropriate if amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith). Since March 7, 2016, Plaintiffs have amended their complaint three times and thus filed a total of four complaints. Plaintiffs have also filed three motions for default judgment on Plaintiffs' FCA claim against Non-Appearing Defendants. Plaintiffs have been on notice of the deficiency with their FCA claim since March of 2019 and yet have made no effort to provide an alternative legal argument or further allegations to address that deficiency. Accordingly, the Court DISMISSES Plaintiffs' FCA claim with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' third motion for default judgment on Plaintiffs' False Claims Act claim, ECF No. 564, and DISMISSES with prejudice Plaintiffs' False Claims Act claim against Defendants ISM Vuzem d.o.o.; ISM Vuzem USA, Inc.; Vuzem USA, Inc.; Robert Vuzem; Ivan Vuzem; HRID-MONT d.o.o.; Gregurec Ltd; LB Metal d.o.o.; and Mos Servis, d.o.o.

The Court also orders the Clerk of the Court to VACATE the January 16, 2020 entry of default against Magna d.o.o.

IT IS SO ORDERED.

Dated: September 17, 2021

/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge