

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MEDCAPGROUP, LLC,

Plaintiff

v.

PRAXSYN, Inc. fka MESA PHARMACY,  
INC,

Defendant

all other claims and parties

2:14-cv-01864-JAD-GWF

**Order & Default Judgment Against  
Fourth-Party Defendant  
Medcare Finance, LLC**

[ECF Nos. 53, 84, 87]

When MedCapGroup, LLC sued prescription-medicine compounder Mesa Pharmacy,<sup>1</sup> alleging that Mesa’s undisclosed conduct before selling certain of its accounts receivable to MedCap rendered those accounts uncollectable, Mesa filed a third-party complaint against Dave Brown, claiming that Brown—the middleman in the account-purchase transaction—is responsible for the misrepresentations. Brown claims that he was acting as the Chief Operating Officer of Medicare Finance, LLC and that it was Medicare and its manager Greg Sundem who are responsible for Medicare’s actions—not him. Medicare did not answer Brown’s fourth-party complaint for indemnification and declaratory relief, and the Clerk entered default. Brown now moves for—and the magistrate judge recommends that I grant—a default judgment against Medicare.<sup>2</sup> Medicare objects.<sup>3</sup> After a de novo review, I adopt the recommendation, grant the motion, and direct the Clerk to enter default judgment against Medicare.

<sup>1</sup> Mesa is now known as Praxsyn, Inc.

<sup>2</sup> ECF No. 54 (motion); ECF No. 84 (findings and recommendation). I find these matters suitable for disposition without oral argument. Nev. L.R. 78-1.

<sup>3</sup> ECF No. 87.

1 **Discussion**

2 **A. Medicare was served.**

3 The magistrate judge’s first step in evaluating Brown’s motion for default judgment was  
4 to confirm that Medicare was properly served with process.<sup>4</sup> Medicare is a Nevada limited  
5 liability company in “revoked” status with the Nevada Secretary of State.<sup>5</sup> Brown served  
6 Medicare using a combination of rules: FRCP 4(e)(1), which permits service by a method  
7 prescribed by state law; and Nevada Rule of Civil Procedure 4(d)(1), which allows service on a  
8 corporation to be made on the Nevada Secretary of State.<sup>6</sup> Medicare challenges the magistrate  
9 judge’s conclusion that service was adequate, arguing that “there is no evidence that Brown  
10 complied with NRCP 4(d)(1) and sent a copy of the complaint and summons via registered or  
11 certified mail to Greg Sundem, as manager of Medicare.”<sup>7</sup>

12 But Medicare’s suggestion that the rule mandated this mailing ignores key language in the  
13 rule. NRCP 4(d)(1) requires that a copy of service also be mailed only “if it shall appear . . . that  
14 there is a last known address of a known officer, general partner, member, manager, trustee or  
15 director of said entity or association *outside the state*.”<sup>8</sup> The Secretary of State’s records reflect a  
16 single manager of Medicare: Greg Sundem. Both addresses on record for Sundem are Nevada  
17 addresses, so it does not appear that any manager has an address “outside the state.”<sup>9</sup> So Brown  
18 did not have to mail a copy of the summons and complaint to Sundem to effectuate service under  
19 NRCP 4(d)(1); he was required only to serve the Secretary of State and post a copy of the  
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22 <sup>4</sup> ECF No. 84 at 2–3.

23 <sup>5</sup> ECF No. 54 at 5.

24 <sup>6</sup> ECF No. 43 (affidavit of service).

25 <sup>7</sup> ECF No. 87.

26 <sup>8</sup> Nev. R. Civ. P. 4(d)(1) (emphasis added).

27 <sup>9</sup> ECF No. 54 at 5 (listing a Reno address and a Las Vegas address for Sundem).  
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1 summons and complaint at this courthouse, which he did.<sup>10</sup> Medicare’s objection to the  
2 magistrate judge’s determination that Medicare was properly served is overruled.

3 **B. The *Eitel* Factors support a default judgment against Medicare.**

4 District courts consider seven factors when deciding whether to enter a default judgment  
5 against a defaulted party: (1) potential prejudice to the claimant; (2) the merits of the claimant’s  
6 substantive claim; (3) the sufficiency of the complaint; (4) the amount of money at stake in the  
7 action; (5) the potential dispute of material facts; (6) whether the default was due to excusable  
8 neglect; and (7) the strong federal policy favoring adjudications on the merits.<sup>11</sup> The magistrate  
9 judge found that these factors weigh in favor of entering a default judgment in favor of Brown  
10 and against Medicare.<sup>12</sup> Medicare challenges that conclusion.<sup>13</sup>

11 Medicare’s main argument is that the factors do not support a default judgment because it  
12 was not properly served.<sup>14</sup> Having found that service was properly effectuated, I give no weight  
13 to this argument. In challenging the first *Eitel* factor—the potential prejudice to  
14 Brown—Medicare adds that “if this Court were to set aside the default and allow the case to  
15 proceed on its merits[,] Brown would be able to pursue his claims against Medicare.”<sup>15</sup> But the  
16 record does not support this notion. Service was effectuated on Medicare via Nevada’s  
17 alternative statutory method for service on corporations because Medicare’s corporate status was  
18 in default.<sup>16</sup> That service was completed in October 2015,<sup>17</sup> and the Clerk entered default against

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20 <sup>10</sup> See Nev. R. Civ. P. 4(d)(1) and ECF No. 43.

21 <sup>11</sup> *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

22 <sup>12</sup> ECF No. 84 at 7.

23 <sup>13</sup> ECF No. 87.

24 <sup>14</sup> *Id.* at 3.

25 <sup>15</sup> *Id.*

26 <sup>16</sup> ECF No. 54 at 2, ¶ 4.

27 <sup>17</sup> ECF No. 43.

1 Medicare more than a year ago.<sup>18</sup> But Medicare made no effort to set aside the default; it first  
2 joined the default discussion after Magistrate Judge Foley recommended that I enter default  
3 judgment against Medicare, even though Medicare is represented by the same attorney that  
4 represents defendant Mesa.<sup>19</sup> Medicare has given me no reason to believe that it—a defunct  
5 Nevada corporation that has ignored this litigation for more than a year—will suddenly defend  
6 this case on its merits if I disregard the magistrate judge’s well-reasoned recommendation and  
7 (without even a motion to do so) set aside the Clerk’s default against it. Thus, the first *Eitel*  
8 factor continues to weigh in favor of entering a default judgment.

9 I also cannot conclude on this record that Medicare’s failure to participate in this case was  
10 the result of excusable neglect. Its argument that it was improperly served rests on its own  
11 decision to ignore a critical clause in NRCP 4(d)(1). Medicare does not argue that it was unaware  
12 of this lawsuit, just that it was justified in ignoring the suit because service was inadequate.<sup>20</sup>  
13 Ignoring service based on a selective reading of the service rules is not excusable neglect. The  
14 sixth factor also weighs in favor of entering a default judgment.

15 On the second through fifth factors, Medicare offers only the conclusory statements that  
16 Brown’s factual allegations “are without merit because the acts he committed in this case were  
17 solely for his benefit,” not Medicare’s; that the amount of money at stake is yet undetermined; and  
18 that the facts are “in dispute.”<sup>21</sup> But just saying so does not make it so. As a result of Medicare’s  
19 failure to respond to the complaint, the facts are deemed admitted, and Medicare has proffered  
20 nothing to refute them. Thus, the second and fifth *Eitel* factors weigh in favor of default.

21 Magistrate Judge Foley undertook a review of Brown’s claims against Medicare, complete  
22 with a discussion of the applicable standards, and he concluded that Brown had adequately pled  
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24 <sup>18</sup> ECF No. 47.

25 <sup>19</sup> ECF No. 87.

26 <sup>20</sup> *Id.* at 4–5.

27 <sup>21</sup> *Id.* at 3–5.

1 the facts to obtain indemnification and declaratory relief against Medicare.<sup>22</sup> Medicare offers  
2 nothing substantive to undermine that conclusion, and my own de novo review unearths nothing.  
3 So, the third factor also weighs in favor of entering a default judgment.

4 The fourth factor—the amount of damages at stake—is yet unknown and thus does not tip  
5 the scales in either direction. And although the seventh and final factor almost always weighs  
6 against the entry of default judgment, I do not find that the public policy favoring the resolution  
7 of claims on their merits outweighs factors one, two, three, five, and six, all of which weigh in  
8 favor of entering default judgment against Medicare.

9 **Conclusion**

10 Accordingly, with good cause appearing and no reason to delay, IT IS HEREBY  
11 ORDERED, ADJUDGED, AND DECREED that:

- 12 • The Magistrate Judge’s **Findings and Recommendations [ECF No. 84] are**  
13 **ADOPTED;**
- 14 • Medicare’s objections to the Magistrate Judge’s Report and Recommendations [ECF No.  
15 **87] are OVERRULED;**
- 16 • Dave Brown’s Motion for Default Judgment Against Fourth-Party Defendant Medicare  
17 Finance, LLC [ECF No. 53] is **GRANTED**. The Clerk of Court is instructed to enter  
18 JUDGMENT<sup>23</sup> in favor of Brown and against fourth-party defendant Medicare as follows:
  - 19 • Medicare must indemnify Brown for any liability in this case, consistent with  
20 Brown’s first claim for relief; and

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26 <sup>22</sup> ECF No. 84 at 4–6.

27 <sup>23</sup> This judgment only resolves the claims by third-party defendant/fourth-party plaintiff Brown  
28 against fourth-party defendant Medicare Finance LLC.

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- Should Brown be held liable in this case, Brown is entitled to the protections of Nevada law limiting the liability of a member of a limited liability company; therefore, the conduct alleged against Brown, if wrongful, was in Brown's capacity as an employee of Medicare and not individually, so that Brown's liability in this case, if any, will be imputed to Medicare and not to Brown individually.

DATED: February 8, 2017

  
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Jennifer A. Dorsey  
United States District Judge