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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Karla Gomez-Silva,

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No. CV09-2120 PHX DGC

10

Plaintiff,

)

11

vs.

)

ORDER

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Jackson National Life Insurance
Company, a foreign corporation,

)

13

Defendants.

)

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15 Third-Party Defendant Angelica Ortiz has filed a motion to set aside the default
16 entered by the Clerk on June 15, 2010. Docs. 32, 36. Plaintiff has filed a response. Doc. 37.
17 Ortiz has filed no reply. For the reasons that follow, the Court will deny the motion.

18

I. Setting Aside Default Under Rule 55(c).

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The Court may set aside the entry of default if good cause is shown. FED. R. CIV. P.
20 55(c). In determining whether good cause has been shown, the Court considers (1) whether
21 there was culpable conduct on the part of the defendant; (2) whether any meritorious
22 defenses are available, and (3) whether there is any prejudice to the plaintiff. *See TCI Group*
23 *Life Insurance Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). “[T]he party seeking
24 to vacate a default judgment bears the burden of demonstrating that these factors favor
25 vacating the judgment.” *Id.*

26

A. Culpable Conduct.

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“A defendant’s conduct is culpable if he has received actual or constructive notice of
28 the filing of the action and intentionally failed to answer.” *Id.* at 697. “If a defendant ‘has

1 received . . . notice of the filing of the action and failed to answer,’ its conduct is culpable.”
2 *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th
3 Cir. 2004) (citing *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d
4 685, 690 (9th Cir. 1988)).

5 **B. Meritorious Defenses.**

6 To establish that a meritorious defense exists, a defendant must allege specific facts
7 that would constitute a defense. *Id.* at 700. The Court need not conclude that the defendant
8 will prevail on the alleged defense to determine that this factor weighs in favor of setting
9 aside default. *See Apache Nitrogen Products, Inc. v. Harbor Insurance Co.*, 145 F.D.R. 674,
10 682 (D. Ariz. 1993). The Court need only find that after a trial on the merits, the alleged
11 defense may cause a different result than default. *Id.*

12 **C. Prejudice.**

13 Prejudice, obviously, concerns any adverse effects the plaintiff might suffer if the
14 default is set aside.

15 **II. Analysis.**

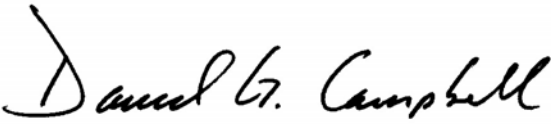
16 The motion filed by Third-Party Defendant Ortiz attempts to show that her failure to
17 respond to the complaint resulted from excusable neglect, but it does not address the second
18 or third factors required to set aside a default. Plaintiff’s response to the motion addressed
19 each of these factors and the relevant Ninth Circuit law (Doc. 37), but Ortiz never filed a
20 reply. Because Ortiz bears the burden of showing that the second and third factors are
21 satisfied, *TCI Group*, 244 F.3d at 696, and has not done so, the motion will be denied.

22 The Court also notes that the facts recited in Ortiz’s motion show that her counsel had
23 notice of the filing of the third-party complaint – knowledge attributable to Ortiz – and yet
24 failed to file a timely response. “If a defendant ‘has received . . . notice of the filing of the
25 action and failed to answer,’ its conduct is culpable.” *Franchise Holding II, LLC*, 375 F.3d
26 at 926. Thus, the first factor has not been satisfied.

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IT IS ORDERED that Third-Party Defendant Angelica Ortiz's motion to set aside default (Doc. 36) is **denied**.

DATED this 15th day of September, 2010.



David G. Campbell
United States District Judge