



1 for the purpose of extracting gold and silver. (*Id.* at ¶¶ 12, 13, 19.) The plant never  
2 produced any meaningful quantities of gold and silver, and Balser’s method could not be  
3 confirmed through an independent laboratory. (*Id.* at ¶¶ 20, 22.) Gold Star sued Balser  
4 and Morris for securities violations, racketeering, fraud, conversion, breach of covenant  
5 of good faith and fair dealing, breach of contract, and conspiracy. (*Id.* at ¶¶ 49-88.)

6 Balser failed to respond to Gold Star’s amended complaint by March 23, 2015.  
7 Accordingly, Gold Star applied for entry of default as to Balser (Doc. 21), and default  
8 was entered on April 2 (Doc. 27).

9 Likewise, Morris failed to respond to Gold Star’s amended complaint by April 4,  
10 2015. Accordingly, Gold Star applied for entry of default as to Morris (Doc. 28), and  
11 default was entered on April 10 (Doc. 29).

12 On July 31, Balser moved to set aside the entry of default against him. (Doc. 53.)  
13 In his affidavit (Doc. 53-1), he explained he did not receive a copy of Gold Star’s  
14 complaint until weeks after service had been executed on March 1. He further explained  
15 that, due to his limited resources and communication capabilities, he was unable to retain  
16 an attorney quickly and was unable to explain his circumstances to his attorney until  
17 meeting with him on May 29.

18 On August 17, Morris moved to set aside the entry of default against him. (Doc.  
19 63.) In his affidavit (Doc. 63-1), he explained he did not receive a copy of Gold Star’s  
20 complaint until May. He further explained he thought Balser’s attorney was representing  
21 him as well as Balser. After he discovered otherwise on July 17, he asked the Court for  
22 an extension of time and retained a lawyer, whom he instructed to file an answer as soon  
23 as possible.

24 Gold Star opposes both motions. (Doc. 64.) In response to Balser’s motion, Gold  
25 Star argues that an email sent by Balser’s attorney on March 26, 2015, belies Balser’s  
26 claim that he could not quickly communicate with an attorney and indicates unreasonable  
27 delay. In response to Morris’s motion, Gold Star argues Morris’s affidavit is inadequate,  
28 false, and inconsistent with Balser’s affidavit. Gold Star also claims that neither

1 defendant has a meritorious defense to the underlying allegations and that setting aside  
2 these defaults would unfairly prejudice Gold Star. For these same reasons, Gold Star  
3 moved for default judgment against Balser and Morris. (Doc. 58.)  
4

## 5 **II. ANALYSIS**

6 “The court may set aside an entry of default for good cause . . . .” Fed. R. Civ. P.  
7 55(c). “To determine ‘good cause,’ a court must consider three factors: (1) whether the  
8 party seeking to set aside the default engaged in culpable conduct that led to the default;  
9 (2) whether it had no meritorious defense; or (3) whether reopening the default judgment  
10 would prejudice the other party. This standard, which is the same as is used to determine  
11 whether a default judgment should be set aside under Rule 60(b), is disjunctive, such that  
12 a finding that any one of these factors is true is sufficient reason for the district court to  
13 refuse to set aside the default.” *United States v. Signed Pers. Check No. 730 of Yubran S.*  
14 *Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (alterations and citations omitted).

15 “Crucially, however, judgment by default is a drastic step appropriate only in  
16 extreme circumstances; a case should, whenever possible, be decided on the merits.  
17 Additionally, while the same test applies for motions seeking relief from default  
18 judgment under both Rule 55(c) and Rule 60(b), the test is more liberally applied in the  
19 Rule 55(c) context . . . because in the Rule 55 context there is no interest in the finality of  
20 the judgment with which to contend.” *Id.* at 1091 & n.1 (alteration and citations  
21 omitted).

### 22 **A. Neither Defendant Engaged in Culpable Conduct**

23 “A defendant’s conduct is culpable if he has received actual or constructive notice  
24 of the filing of the action and *intentionally* failed to answer. . . . [T]he term ‘intentionally’  
25 means that a movant cannot be treated as culpable simply for having made a conscious  
26 choice not to answer; rather, to treat a failure to answer as culpable, the movant must  
27 have acted with bad faith, such as an intention to take advantage of the opposing party,  
28 interfere with judicial decisionmaking, or otherwise manipulate the legal process.” *Id.* at

1 1092 (alteration and citations omitted) (emphasis in original). Typically, when a  
2 defendant's conduct is deemed culpable, "there is no explanation of the default  
3 inconsistent with a devious, deliberate, willful, or bad faith failure to respond." *Id.*  
4 (citation omitted).

5 **1. Balsler**

6 Balsler has offered a plausible explanation for his default, consistent with good  
7 faith conduct. According to his affidavit (Doc. 53-1), the complaint was served on him  
8 by delivery to his wife on March 1, 2015. He was living in a different city at the time,  
9 with limited contact with his family. The complaint was then placed with other mail,  
10 which was forwarded to him weeks later. Due to his limited resources and  
11 communication capabilities, he could not retain an attorney quickly. His employer  
12 eventually retained an attorney for him. He was not able to explain his circumstances to  
13 his attorney until meeting with him on May 29, 2015.

14 In response to this explanation, Gold Star points to an email sent by Balsler's  
15 attorney on March 26, 2015. (Doc. 64-1.) From this email, Gold Star draws two  
16 inferences: (1) Balsler's affidavit is false because Balsler was apparently able to contact an  
17 attorney quickly, and (2) Balsler's delay in moving to set aside default was unreasonable  
18 because he was represented by an attorney several days before default was entered.  
19 Neither of these inferences is valid.

20 First, the fact that Balsler had representation as of March 26, 2015, does not  
21 contradict his affidavit. Balsler does not specify when he retained counsel. Although he  
22 states he was unable to explain his circumstances to his attorney until May 29, 2015, that  
23 statement is consistent with his claim of limited communication capabilities. Indeed,  
24 Balsler's attorney attested that, though he was retained on March 26, he was not able to  
25 collect essential information until meeting with Balsler on May 29. (Doc. 65-1.)

26 Second, the fact that Balsler had representation as of March 26, 2015, does not  
27 make his delay in moving to set aside default unreasonable. Balsler's attorney acted  
28 prudently by emailing Gold Star's attorney on March 26, asking for a withdrawal of entry

1 of default. (Doc. 64-1.) The subsequent delay in moving to set aside default is somewhat  
2 understandable given that Balser’s attorney could not collect necessary information from  
3 Balser until May 29. (Doc. 65-1.)

4 Even if the delay were unreasonable, it would not establish an “intention to take  
5 advantage of the opposing party, interfere with judicial decisionmaking, or otherwise  
6 manipulate the legal process.” *Mesle*, 615 F.3d at 1092 (citation omitted). At most,  
7 unreasonable delay would indicate error on the part of Balser’s attorney. And “on a  
8 motion to set aside a default or default judgment, courts have been reluctant to attribute to  
9 the parties the errors of their legal representatives.” *Jackson v. Beech*, 636 F.2d 831, 837  
10 (D.C. Cir. 1980) (citation omitted). Therefore, Balser has not engaged in culpable  
11 conduct.

## 12 **2. Morris**

13 Morris has also offered a plausible explanation for his default, consistent with  
14 good faith conduct. According to his affidavit (Doc. 63-1), the complaint was served on  
15 him by delivery to a homeless man staying at his house on March 14, 2015. Morris was  
16 out of town and had allowed the man to stay at his house. The man did not tell Morris of  
17 the complaint. Morris first discovered the complaint when he returned home in May.  
18 Morris then spoke with Balser, who said his attorney would represent both of them. It  
19 was not until July 17 that Morris found out he was not being represented. He then asked  
20 the Court for an extension of time and retained a lawyer. He instructed his lawyer to file  
21 an answer as soon as possible.

22 Gold Star contends Morris’s affidavit is inadequate, false, and inconsistent with  
23 Balser’s affidavit. No persuasive evidence supports these contentions. Morris’s affidavit  
24 suffices to show he did not engage in culpable conduct.

## 25 **B. Both Defendants Have Raised Meritorious Defenses**

26 “All that is necessary to satisfy the ‘meritorious defense’ requirement is to allege  
27 sufficient facts that, if true, would constitute a defense: the question whether the factual  
28

1 allegation is true is not to be determined by the court when it decides the motion to set  
2 aside the default.” *Mesle*, 615 F.3d at 1094 (alteration and citations omitted).

3 Balsler raises various defenses in his affidavit (Doc. 53-1), including: his methods  
4 are valid scientific processes; he always honestly represented his processes and  
5 conclusions; he never planned to deceive; he never had a written agreement regarding his  
6 services; and he never made the statements attributed to him in the complaint. These  
7 facts, if true, would constitute meritorious defenses. Gold Star’s contention that the  
8 defenses are false is beside the point.

9 Morris raises defenses in his motion to set aside default (Doc. 63): he denies the  
10 scheme attributed to him in the complaint, and he points out that the land sale contracts  
11 he sold contained no warranties or promises that would give rise to Gold Star’s claims  
12 against him. These facts, if true, would also constitute meritorious defenses.

13 **C. Plaintiff Would Not Be Prejudiced by Setting Aside the Defaults**

14 “To be prejudicial, the setting aside [of the default] must result in greater harm  
15 than simply delaying resolution of the case. Rather, the standard is whether plaintiff’s  
16 ability to pursue his claim will be hindered.” *TCI Grp. Life Ins. Plan v. Knoebber*, 244  
17 F.3d 691, 701 (9th Cir. 2001) (alteration and citations omitted).

18 Setting aside these defaults will not hinder Gold Star’s ability to pursue its claims.  
19 There is no indication the defaults have resulted in “tangible harm such as loss of  
20 evidence, increased difficulties of discovery, or greater opportunity for fraud or  
21 collusion.” *Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996),  
22 *quoted with approval in Knoebber*, 244 F.3d at 701.

23 Gold Star contends the defaults have prolonged the litigation, increased its costs,  
24 and given the defendants an opportunity to plan for an adverse outcome. But this is just  
25 to say the defaults have caused delay. Mere delay is not prejudice.

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