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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 AJF Inspections Incorporated,

No. CV-22-01922-PHX-JAT

10 Plaintiff,

**ORDER**

11 v.

12 IOC Franchising LLC, et al.,

13 Defendants.  
14

15 Pending before the Court is Defendant IOC Franchising's ("IOC") Motion to Set  
16 Aside Entry of Default Pursuant to Rule 55. (Doc. 14). Plaintiff AJF Inspections ("AJF")  
17 has filed a response, (Doc. 16), and IOC has replied, (Doc. 17). The Court now rules on  
18 this motion.

19 **I. BACKGROUND**

20 Plaintiff AJF Inspections brought a complaint against Defendant IOC and related  
21 entities on November 10, 2022, claiming that IOC made false and misleading statements  
22 in violation of the Lanham Act. (*See* Doc. 6 at 7); 15 U.S.C. § 1125. Specifically, AJF  
23 claims that Defendants, in a series of advertisements, made eight claims regarding IOC and  
24 its business practices that were false. (*See id.*). On December 2, IOC was served with the  
25 complaint and summons. (Docs. 8, 9, 10). Prior to December 12, the date by which  
26 Defendants were required to file a response, Defendant Kloc, the owner of IOC, sent an  
27 email to Plaintiff's counsel asking that the complaint be voluntarily dismissed and stating  
28 that he would defend himself in litigation if necessary. (Doc. 14 at 1). No formal answer

1 or other motion was filed with the Court, however.

2 Plaintiff did not respond to the email and instead waited until December 13 and filed  
3 an application for entry of default judgment. (Doc. 11). Only after the application was filed  
4 did Plaintiff respond to Defendant Kloc’s email. (Doc. 14 at 2). That same day the clerk  
5 entered default against Defendants. (Doc. 12). Shortly thereafter, Defendants hired  
6 Counsel. (Doc. 15). Defendants now move to set aside the entry of default judgement.  
7 (Doc. 14).

## 8 II. LEGAL STANDARD

9 The Court may set aside an entry of default for good cause. Fed. R. Civ. P. 55(c).  
10 The Court considers three factors to determine if good cause exists to set aside an entry of  
11 default: (1) whether the movant engaged in “culpable” conduct; (2) whether a meritorious  
12 defense exists; and (3) whether setting aside the default judgment would prejudice the other  
13 party.<sup>1</sup> *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085,  
14 1091 (9th Cir. 2010). “The party seeking to vacate a default judgment bears the burden of  
15 demonstrating that these factors favor vacating the judgment.” *TCI Grp. Life Ins. Plan v.*  
16 *Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001), *overruled on other grounds by Egelhoff v.*  
17 *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001). It should be noted that this standard is  
18 disjunctive in that “a finding that any one of these factors is true is sufficient reason for the  
19 district court to refuse to set aside the default.” *Mesle*, 615 F.3d at 1091. Yet, “default  
20 judgments are ordinarily disfavored. Cases should be decided upon their merits whenever  
21 reasonably possible.” *New Gen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016)  
22 (quoting *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986)). Generally, only extreme  
23 circumstances warrant the entry of default judgments. *See Mesle*, 615 F.3d at 1091–92.  
24 Furthermore, the rules governing the setting aside of default “are solicitous toward  
25 movants, especially those whose actions leading to default were taken without the benefit

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28 <sup>1</sup> Plaintiff calls these three inquiries the “Falk factors,” citing to *Falk v. Allen*. *See Falk v. Allen*, 739 F.2d 416, 463 (9th Cir. 1984). *Falk* concerns a motion under Rule 60(b), however. *See id.* at 462; Fed. R. Civ. P. 60(b). As this case concerns Rule 55(c), this Court will cite to *Mesle* for this three-factor analysis. *See Mesle*, 615 F.3d at 1091.

1 of legal representation.” *Mesle*, 615 F.3d at 1089.<sup>2</sup>

### 2 **III. ANALYSIS**

3 The standard under Rule 55 for setting aside an entry of default is “good cause.” *See*  
4 Fed. R. Civ. P. 55(c). Because there is good cause to set aside the default, and because  
5 there are no extreme circumstances surrounding Defendants’ failure to respond that warrant  
6 a default judgement, this Court will set aside the entry of default. Here, Defendants did not  
7 engage in any culpable conduct that would warrant default. Further, Defendants have  
8 alleged enough facts that, taken on their face, could provide a meritorious defense. And  
9 finally, setting aside this default would not greatly prejudice Plaintiff. Therefore, setting  
10 aside default in this case is warranted.

#### 11 **a. Culpable Conduct**

12 In assessing culpability, courts must look to whether the failure to answer was done  
13 in bad faith. *Mesle*, 615 F.3d at 1092. If a defendant “has received actual or constructive  
14 notice of the filing and *intentionally* failed to answer[,]” his conduct is culpable. *Id.*  
15 (emphasis in original). This means that the defendant purposefully did not answer in order  
16 to “take advantage of the opposing party, interfere with judicial decision making, or  
17 otherwise manipulate the legal process.” *Id.* (internal quotations omitted). Mere failure to  
18 respond, by itself, however, is not enough.

19 Defendants argue that there was no willfulness in their failure to appear. (*See* Doc.  
20 14 at 5). They claim that they timely sent an email to opposing counsel discussing the case,  
21 and assumed that they would receive a response before the time to file arrived. (*See id.*).  
22 Furthermore, in the email, Defendants expressed their intent to defend in litigation if  
23 necessary. (*See id.*). After Plaintiff failed to respond, Defendants again emailed Plaintiff,  
24 on December 12, asking for an acknowledgement of the previous email. (*See id.*). Pointing  
25 to language from Rule 60(b), which governs the opening of final judgments, Defendants  
26 assert that the failure to appear was the result of “excusable neglect.” (*Id.* at 6). Because of  
27 the actions they took to respond via email and attempt to resolve the case, they claim that

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28 <sup>2</sup> At all times leading up to the entry of default judgement, none of the Defendants were represented by counsel. They are currently represented, however.

1 they were acting entirely reasonably in failing to respond. (See *id.*).

2 Plaintiff claims that the usual “bad faith” standard should not apply because the  
3 Defendants are sophisticated parties. (See Doc. 16 at 9). When dealing with a sophisticated  
4 individual or entity, the failure to answer is assumed to be intentional. *Mesle*, 615 F.3d at  
5 1093. Courts assume that such defendants have “an understanding of the consequences” of  
6 their actions and thus that their failure to respond was purposeful. *See id.* Plaintiff asserts  
7 that Defendant Kloc is sophisticated because he owns and operates multiple businesses  
8 throughout the country. (Doc. 16 at 9). Furthermore, Plaintiff claims that Kloc has been  
9 involved in numerous lawsuits, and that he is therefore familiar with the legal process. In  
10 addition, Plaintiff points to the email, which included “legal citations” and “acknowledged  
11 the December 12th deadline,” to assert that Kloc had a “clear understanding of the legal  
12 process and the requirement to file an answer.” (*Id.*). In the alternative, Plaintiff argues that  
13 even if Defendants are not deemed sophisticated, they offer no credible explanation for  
14 failing to respond, and thus that their conduct was culpable.

15 This Court finds that Defendants’ conduct was not culpable. First, Defendants are  
16 not sophisticated entities for purposes of default analysis. The standard articulated in *Melse*  
17 is not mere sophistication, but legal sophistication. As that court noted, intentionality is  
18 never assumed “except when the moving party is a *legally* sophisticated entity or  
19 individual.” *Mesle*, 615 F.3d at 1093 (emphasis added). Here, Defendant Kloc is not a  
20 lawyer, and importantly, was not represented by counsel at the time of default. He thus did  
21 not have the legal training or experience that would make him “legally sophisticated” for  
22 purposes of default analysis. The *Mesle* court noted the importance of these factors in  
23 making a sophistication determination. *See id.* (noting that it was “sufficient to observe that  
24 *Mesle* is not a lawyer and that he was unrepresented at the time of default ....”). Simply  
25 because Kloc owns a number of businesses and has been involved in legal proceedings at  
26 some time in the past does not make him legally sophisticated. Therefore, his conduct can  
27 only be deemed culpable if he acted in bad faith.

28 Second, there is no showing of any bad faith in Defendants’ failure to respond. As

1 noted above, Defendant Kloc quickly responded to the lawsuit by sending an email  
2 attempting to avoid litigation. He also noted his intent to defend himself should the lawsuit  
3 proceed. Furthermore, this Court finds that it was reasonable for Kloc, who was  
4 unrepresented at the time, to believe that he would receive a response before the filing  
5 deadline. After the entry of default, he quickly hired an attorney and filed a motion to set  
6 aside the default. Ultimately, then there is no evidence of intentionality or bad faith on the  
7 part of Defendants in failing to appear. In addition, none of these circumstances are  
8 extreme. Consequently, Defendants' conduct is not culpable.

9 **b. Meritorious Defense**

10 In order to show that a meritorious defense exists, Defendants must "present specific  
11 facts that would constitute a defense." *Id.* at 1094. In this analysis, it is not the role of the  
12 Court to assess the veracity of the facts alleged. *Id.* It merely must find that the facts  
13 presented, if true, constitute the basis for a meritorious defense. *Id.* Ultimately, the burden  
14 on defendants here "is not extraordinarily heavy." *Id.* Because Defendants have presented  
15 facts which, if true, show that their claims were not false or misleading, they do have a  
16 meritorious defense.

17 Defendants assert that there are significant differences between the services they  
18 offer and the services offered by AJF. (*See* Doc. 14 at 5). Specifically, Defendants claim  
19 that they offer supplemental and additional coverage in areas that Plaintiff does not. (*See*  
20 *id.*). Thus, they maintain, their claims about the services offered by Plaintiff are neither  
21 false nor misleading. Defendants' assert that their claims are based on information that  
22 Plaintiff makes publicly available via its website and other means. (*See id.*). Furthermore,  
23 Defendants claim that they were making comparisons between their companies and  
24 Plaintiff's company based on standard definitions of the terms "snapshot" and "summary,"  
25 claiming that AJF does not offer a snapshot while Defendants' companies do. (*See id.*);  
26 Doc 16-2 at 4. In addition, Defendants point to the initial email correspondence with  
27 Plaintiff in which Defendant Kloc pointed to a number of facts that he claims constitute a  
28 basis for a meritorious defense. (*See id.* at 4). Specifically, the email states, among other

1 things, that IOC offers additional insurance coverage which AJF does not, that AJF does  
2 not provide recall checks, that AJF does not provide a one-year warranty like Defendants  
3 do, and that AJF does not include videos in its inspection reports. (*See* Doc. 16-2 at 3–4).  
4 This, Defendants argue, shows that the advertisements that were sent out comparing their  
5 services with Plaintiff’s were neither false nor misleading. (*See* Doc. 14 at 5). Defendants  
6 also claim that Plaintiff cannot establish damages. (*See id.*).

7 Plaintiff counters that these are merely “conclusory positions” that lack “affirmative  
8 facts” to support them. (*See* Doc. 16 at 11). It argues that all that Defendants have shown  
9 is that Plaintiff’s website does not list all of the services AJF provides. (*See id.*). It states  
10 that it will prove, through witness testimony, that it does provide all of the services that  
11 Defendants claim it does not. (*See id.* at 12). Plaintiff maintains that no meritorious defense  
12 can be based on the assertion that it did not advertise all available services on its publicly  
13 available website. (*See id.*). Furthermore, it states that “[i]njury is presumed in Lanham Act  
14 cases involving false comparative advertising.” (*See id.* at 13). Thus, the claim that AJF  
15 cannot establish damages, it maintains, is without merit.

16 Defendants have alleged enough specific facts to establish a meritorious defense.  
17 They have pointed to specific services which they claim are not provided by AJF, but that  
18 are provided by IOC. Thus, they argue, their advertisements were factually based. They  
19 assert that publicly available information about AJF shows that it does not provide certain  
20 insurance coverage, snapshots or video in its inspection reports, and recall checks, among  
21 other things. These move beyond conclusory statements. They are facts which, for purposes  
22 of analyzing whether a meritorious defense exists, the Court must take as true. It may very  
23 well be that Plaintiffs will present witness testimony that disproves these facts, but that  
24 only serves to counter Defendants’ defense. It does not negate that defense completely.  
25 This Court does consider Defendants’ claim that Plaintiff cannot establish damages to be a  
26 conclusory statement. Yet one conclusory statement does not negate the fact that another  
27 meritorious defense has been established by Defendants. Consequently, Defendants have  
28 met this prong of the test.

1                   **c. Prejudice to Plaintiff**

2                   Finally, this Court finds that Plaintiff will not be prejudiced by the setting aside of  
3 the entry of default here. To determine whether prejudice will result from setting aside  
4 default, the court must look to whether Plaintiff’s ability to “pursue his claim will be  
5 hindered.” *Falk*, 739 F.2d at 463. Further, the “setting aside of a judgment must result in  
6 greater harm than simply delaying resolution of the case.” *Mesle*, 615 F.3d at 1095. Thus,  
7 a mere delay in reaching a final judgment is not enough. Plaintiff must show that further  
8 harm will result if the default is set aside. Here, no such harm has been alleged that cannot  
9 be easily corrected by a court order.

10                  Plaintiff asserts that setting aside the default will cut against the goal of expeditious  
11 relief. (*See* Doc. 16 at 14). AJF states that it acted expeditiously in sending its initial cease-  
12 and-desist letter, and in advancing its claims. (*See id.*). Further, it claims that it did this  
13 because of its desire to see Defendants stop their false advertising. (*See id.*). Consequently,  
14 if the default is set aside, Plaintiff argues, it would “provide further opportunity for  
15 Defendants to attack AJF’s goodwill and reputation.” (*See id.*). As evidence of this they  
16 cite Kloc’s email in which he “threatened to ramp up his attacks on AJF if the lawsuit was  
17 not dismissed.” (*See id.*).

18                  Defendants counter that throughout the course of this lawsuit, they have acted  
19 expeditiously and will continue to do so. (*See* Doc. 14 at 4). They note that they  
20 immediately responded to the lawsuit by emailing Plaintiff’s counsel and immediately  
21 hired counsel after the notice of default. (*See id.*). Shortly thereafter, Defendants’ counsel  
22 contacted Plaintiff’s counsel to discuss the default and find a solution. (*See id.*). This,  
23 among other things, Defendants claim, shows that Plaintiff will be “subjected to no greater  
24 delay than would ordinarily be expected” in any litigation. (*See id.*). Thus, they maintain,  
25 setting aside this default will not prejudice Plaintiff. (*See id.*).

26                  It seems clear that the delay in reaching final judgement that will result from setting  
27 aside default here is no greater than the delay that would be present had Defendants timely  
28 appeared and responded to the initial complaint. This type of delay is not enough to

1 prejudice Plaintiff to such an extent that default would be warranted. Additionally, given  
2 that Defendant Kloc indicated in his email, sent before the default date, his intent to  
3 vigorously litigate should the need arise, it is difficult to see how Plaintiff is truly  
4 prejudiced. Despite knowing this, Plaintiff tactically decided not to respond to Defendants  
5 and chose to wait and seek default instead. That Plaintiff is not getting an early victory  
6 because of that is not prejudice. There may be some prejudice that would result from the  
7 fact that Defendants would be able to continue to make allegedly false statements about  
8 AJF and its business practices. Yet, as AJF stated it would have done had there been no  
9 default, (*See* Doc. 16 at 14), it is free to seek a preliminary injunction blocking Defendants  
10 from further attacking it with misleading advertising. Thus, the prejudice resulting from  
11 setting aside default is not that great. And any prejudice of this type that results can easily  
12 and quickly be prevented by this Court. Consequently, this Court finds that no prejudice  
13 will result from setting aside the entry of default.

#### 14 **IV. CONCLUSION**

15 Accordingly,

16 **IT IS ORDERED** that IOC's Motion to Set Aside Entry of Default Pursuant to  
17 Rule 55, (Doc. 14), is **GRANTED**. The default entered at Doc. 12 as to Defendants IOC  
18 Franchising LLC, Curt1 LLC, and Curtis Kloc is set aside.

19 **IT IS FURTHER ORDERED** that Defendant IOC, Curt1 LLC, and Curtis Kloc  
20 shall answer or other response to the complaint within fourteen days from the date of this  
21 order.

22 **IT IS FURTHER ORDERED** denying Defendants' request for fees and costs  
23 because the Court does not find any such award to be justified in this case.

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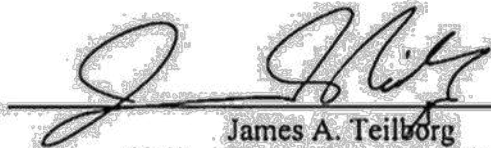
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**IT IS FURTHER ORDERED** that Plaintiff's Motion for Discovery, (Doc. 13), is **DENIED** as moot.

Dated this 18th day of May, 2023.



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James A. Teilborg  
Senior United States District Judge