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UNITED STATES DISTRICT COURT

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DISTRICT OF ARIZONA

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Jes Solar Co., LTD, a South Korean Corporation;)
Airpark Co., LTD, a South Korean Corporation;)
and Hankook Technology, Inc., a South Korean)
Corporation,)

CV 12-626 TUC DCB

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Plaintiffs,)

AMENDED ORDER

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v.)

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Matinee Energy, Inc., a Nevada Corporation;)
Samsun, LLC, a Virginia LLC; S. Chin Kim;)
John S. Lee; Chun Rae Kim; Paul Jeoung; Tong)
Soo Chung,)

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Defendants.)

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The Court denies Defendants Matinee, S. Chin Kim and Tong Soo Chung’s Motion to Set Aside Default, grants Defendant Chun Rae Kim’s Supplemental Motion to Vacate Default. The case shall be set for trial as to damages for Defendants Matinee, S. Chin Kim and Tong Soo Chung. A case management scheduling conference shall be held as to Defendant Chun Rae Kim.

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A. Case Background

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Plaintiffs filed the Complaint on August 21, 2012, alleging that the Defendants bilked them out of approximately \$2,000,000 in advance fees for a bogus solar power plant project to be constructed in Benson, Arizona. Plaintiffs seek damages totaling approximately \$5,000,000.

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On December 11, 2012, the Clerk of the Court entered default against all the Defendants when they failed to appear. On December 13, 2012, the Plaintiffs filed a Motion

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1 for Entry of Default Judgment and for a hearing to determine the amount of unliquidated
2 damages included in the claims for relief, set a sum certain for damages by calculation, and
3 for the Court to award punitive damages. Still Defendants did not appear. The Court,
4 however, did not set a hearing. Under Federal Rule 55 of the Federal Rules of Civil
5 Procedure, the Court “may” conduct a hearing to determine the amount of damages, Rule
6 55(b)(2)(B), but a hearing is unnecessary if the evidence submitted is sufficient to support
7 the damages request, or if the amount claimed may be discerned from definite figures in the
8 documentary evidence or affidavits, *Transatlantic Marine Claims Agency, Inc. v. Ace*
9 *Shipping Corp.*, 109 F.3d 105, 111 (2d Cir.1997), or if the amount claimed is one capable of
10 ascertainment from definite figures in the documentary evidence or affidavits, *United Artists*
11 *Corp. v. Freeman*, 605 F.2d 854, 867 (5th Cir.1979). Because the Court’s calendar was
12 extremely heavy at the time, it asked the Plaintiffs to submit the evidence of damages by
13 affidavit. Plaintiff did so on January 28, 2013, by filing a Motion to Supplement the Motion
14 for Default Judgment.

15 On May 12, 2013, the Defendants Matinee Energy Inc., Tong Soo Chung, Paul
16 Jeoung, and S. Chin Kim appeared by filing a Motion to Set Aside the Default and
17 Opposition to Motion for Entry of Default Judgment. On April 12, 2013, Defendant Chun
18 Rae Kim filed, *pro se*, a Motion for Joinder in the Motion to Set Aside the Default. On May
19 15, 2013, after securing counsel, Defendant Chun Rae Kim filed a Supplemental Motion to
20 Vacate Default and Opposed Plaintiffs’ Motion for Entry of Default Judgment.

21 The defaulted Defendants are Defendant Matinee, a Nevada corporation, engaged
22 in the development of power plant projects involving solar power in the states of California,
23 Arizona, and Nevada. (Amended Complaint (AC) (Doc. 25) at 24.) Defendants S. Chin
24 Kim, Paul Jeoung, and Tong Soo Chung are employees of Matinee: Tong Soo Chung is the
25 CEO of Matinee East-Asia region, (AC at 36) and S. Chin Kim is the Vice President of
26 Matinee, (AC at 43). Defendant Chun Rae Kim is the son-in-law to Defendant John S. Lee,
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1 the owner of Defendant Samsun, a Virginia corporation, engaged in assisting with Matinee
2 solar power plant construction projects. Defendants Samsun and John S. Lee have not
3 appeared in the case.

4 **B. Federal Rule Civil Procedure 55**

5 Default is governed by Fed.R.Civ.P. 55(a) and entry of default judgment is made
6 pursuant to Fed.R.Civ.P. 55(b)(2). Entry of default, here, was provided for as follows:
7 “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead
8 or otherwise defend as provided by these rules and that fact is made to appear by affidavit
9 or otherwise, the clerk shall enter the party's default.”

10 Plaintiffs seek a default judgment under Fed.R.Civ.P. 55(b), which provides:
11 “Judgment by default may be entered . . . By the Court. [And],. . . If the party against whom
12 judgment by default is sought has appeared in the action, the party . . . shall be served with
13 written notice of the application for judgment at least 3 days prior to the hearing on such
14 application. If, in order to enable the court to enter judgment or to carry it into effect, it is
15 necessary to take an account or to determine the amount of damages or to establish the truth
16 of any averment by evidence or to make an investigation of any other matter, the court may
17 conduct such hearings or order such references as it deems necessary and proper and shall
18 accord a right of trial by jury to the parties when and as required by any statute of the United
19 States.”

20 Defendants seek to set aside the default, under Rule 55(c), which provides: “The
21 court may set aside an entry of default for good cause . . .” In determining whether good
22 cause exists, a court must consider three factors: ““(1) whether the plaintiff will be
23 prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable
24 conduct of the defendant led to the default.”*Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d
25 1108, 1111 (9th Cir.2011) (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir.1984)). These
26 factors are disjunctive, *Brandt*, 653 F.3d at 1111 (quoting *Falk*, 739 F.2d at 463), meaning

1 that the court may refuse to set aside the default if it holds any one of the three factors is true.
2 *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th
3 Cir.2010).

4 In applying the *Falk v. Allen* factors, the Court must remember that a judgment by
5 default is a drastic step which is appropriate only in extreme circumstances, and a case
6 should, whenever possible, be decided on the merits. *Mesle*, 615 F.3d at 1091 (quoting *Falk*,
7 739 F.2d at 463). In the context of setting aside a default, rather than a default judgment, the
8 Court’s discretion is especially broad. *Brady v. United States*, 211 F.3d 499, 504 (9th Cir.
9 2000), *O’Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir.1994).

10 In the motion to set aside the default, the Defendants Matinee, S. Chin Kim, Paul
11 Jeoung and Tong Soo Chung decline to respond item by item to the allegations in the
12 Complaint “because of the extreme complexity of the case” and because it is unnecessary.
13 (Motion (Doc. 48) at 3.) Defendants assert the “Plaintiffs bear the burden of establishing that
14 there is some factual basis to the Complaint and damages.” *Id.* Defendants, however, bear
15 the burden of demonstrating the factors tip in their favor for determining whether or not to
16 set aside the default. *Franchise Holding II*, 375 F.3d at 926. And, all facts alleged in the
17 Complaint are taken as true until and unless the default is set aside. *Cripps v. Life Insur. Co.*
18 *of North Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

19 **1. Whether Defendants engaged in culpable conduct**

20 “A defendant's conduct is culpable if he has received actual or constructive notice
21 of the filing of the action and *intentionally* failed to answer.” *TCI Group Life Ins. Plan v.*
22 *Knoebber*, 244 F.3d 691, 697 (9th Cir.2001) (emphasis in original). For a failure to answer
23 to be intentional, “the movant must have acted with bad faith.” *Mesle*, 615 F.3d at 1092. It
24 is not enough that a movant simply made a conscious choice not to answer, *id.*, or

1 neglectfully¹ failed to answer, yet offers a “credible, good faith explanation negating any
2 intention to take advantage of the opposing party, interfere with judicial decisionmaking, or
3 otherwise manipulate the legal process[.]” he or she is not necessarily culpable. *TCI Group*,
4 244 F.3d at 697–98 (holding family emergency explanation for missing deadline was weak,
5 but not the result of deviousness or willfulness); *Bateman v. U.S. Postal Service*, 231 F.3d
6 1220, 1225 (9th Cir.2000)). Culpable behavior “usually involves conduct by parties that is
7 calculated to help them retain property in their possession and avoid liability by staying out
8 of court: for instance, when companies act to avoid service in order to thwart their customers'
9 attempts to bring suit against them.” *Mesle*, 615 F.3d at 1094.

10 **Defendants Matinee, S. Chin Kim, Paul Jeoung, and Tong Soo Chung**

11 Here, Plaintiffs attempted to serve the Defendant Matinee by serving its last known
12 registered agent, but discovered the agent had resigned without being replaced. Plaintiffs
13 attempted to serve Defendants S. Chin Kim and Paul Jeoung at the Matinee Tucson office,
14 but discovered the office closed and telephones disconnected. There was no forwarding
15 address or telephone number. Defendant Matinee argues it was not deliberately avoiding
16 service of process; there was simply some confusion involved when the company moved its
17 place of business. (Reply (Doc. 57) at 6.) “The default was occasioned by inadvertence by
18 Defendant Matinee when it closed its Arizona office . . .” (Motion (doc. 48) at 4.)

19 Defendant Matinee charges that the alternative service made by Plaintiffs on it by
20 serving the Arizona Corporation Commission was not proper because Plaintiffs could have
21 served Matinee at its Nevada headquarters, (Complaint (Doc. 25) at 12), and as of September
22 19, 2012, its website reflected a new Nevada statutory agent.

23 Defendants S. Chin Kim and Paul Jeoung complain about being served by
24 publication. They assert that if Plaintiffs had searched Nevada Corporation Commission

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26 ¹Neglect encompasses simple, faultless careless omissions to act. *TCI Group*, 244 F.3d
27 at 697 (quoting *Pioneer Inv. Servs Co.v. Brunswick Assocs Ltd. P'ship*, 507 U.S. 380, 388
(1993)).

1 records, Plaintiffs would have found information for S. Chin Kim, reflecting a San Mateo,
2 California address. Alternatively, Defendants argue that Plaintiffs believed S. Chin Kim
3 resided in either New York or New Jersey, (Complaint (Doc. 25) at 7), but Plaintiffs made
4 no effort to find him there. Plaintiffs believed Paul Jeoung resided in California, (Complaint
5 (Doc. 25) at 10), but Plaintiffs made no effort to find him there.

6 Defendants misstate their challenges because the alternative forms of service utilized
7 in this case were proper under Fed. R. Civ. P. 4(e)(1) and Arizona law.² More accurately
8 described, Defendants challenge is that the Plaintiffs failed to exercise due diligence in
9 attempting personal service on them. Defendants assert that the record must reflect that in
10 fact, the Plaintiffs did not know the residence of the Defendants. It is not enough to simply
11 allege it; the record must reflect the efforts made by Plaintiffs to locate the Defendants.
12 (Motion (Doc. 48) at 5 (citing *Llamas v. Superior Court in and For Pima County*, 474 P.2d
13 479, 460 (Ariz. 1970)); *Barlage v. Valentine*, 110 P.3d 371, 375 (Ariz. App. 2005).

14 Defendant asserts that Plaintiffs were aware he is a prominent attorney and former
15 head of Invest Korea, a South Korean public organization which promotes Korean business.
16 (Complaint (Doc. 25) at 36.) Therefore, Plaintiffs should have served Defendant Tong Soo
17 Chung in South Korea. Plaintiffs, however, chose to serve Defendant Tong Soo Chung at the
18 law offices of Lim, Ruger and Kim, LLP, by service made on Judy Kim. Defendant Tong
19 Soo Chung argues she was not authorized to accept service for him. The Lim, Ruger & Kim
20 law firm, is a California law firm, and Defendant Tong Soo Chung is of counsel with a
21 designated place of practice being Los Angeles and area of practice being “corporate
22 international.” Defendant Tong Soo Chung, CEO of Matinee East-Asia region, directed
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24 ²The Court approved the alternative service by publication of Defendants S. Chin Kim
25 (Doc. 19) and Paul Jeoung (Doc. 20). Under certain circumstances, 16 A.R.S. 4.1(j) , the
26 Arizona Corporation Commission may accept service on behalf of an entity. Plaintiffs asked
27 the Arizona Corporation Commission to accept service for Defendant Matinee, it agreed, and
28 Plaintiffs, accordingly, served Defendant Matinee.

1 Plaintiff Hankook Tech to retain Lim, Ruger & Kim, which required Hankook to waive a
2 conflict of interest due to Tong Soo Chung’s status as co-founder and being “of counsel” at
3 the law firm.

4 Accordingly, service was properly made in California by leaving a summons and
5 complaint at a Defendant’s place of business. (Opposition (Doc. 51) at 12-13 (citing Cal.
6 Code. Civ. P. §§ 415.20(b), 416.90, 416.10-416.90). The service documents were given to
7 Judy Kim, the law firm’s administrator, who Defendant Tong Soo Chung argues was not
8 authorized to accept service on his behalf, but in the Ninth Circuit it suffices, if service is
9 made upon “any individual so integrated with the organization that [she] will know what to
10 do with the papers and who stands in such a position as to render it fair, reasonable and just
11 to imply the authority on [her] part to receive service.” *Id.* at 14 (quoting *Edwards v.*
12 *Occidental Chemical Corporation*, 892 F.2d 1442, 1447 (9th Cir. 1990) (quoting *Direct Mail*
13 *Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988)).

14 This Court approved the alternative service for Defendants S. Chin Kim and Paul
15 Jeoung because it believed they were avoiding service of process, which was the same reason
16 the Plaintiffs served Matinee alternatively.³ When these Defendants left Arizona, they
17 simply disappeared leaving no forwarding address or telephone number. They left town
18 owing rent for their offices and owing wages to their employees. Neither their employees
19 nor the landlord knew they were leaving or where they went. Their statutory agent resigned
20 without being replaced. Plaintiffs checked the Nevada State Corporation Commission
21 website mid-August and mid-September, but found no replacement agent. The Court notes
22 that the information for Defendant S. Chin Kim would have reflected a California address,
23 which does not coincide with Plaintiffs’ belief he may reside in New York or New Jersey.

24 Perhaps, Plaintiffs could have chased the Defendants S. Chin Kim, Paul Jeoung, and
25 Matinee longer or tried to serve them in other locals, as they did Defendant Tong Soo Chung.

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27 ³See n. 2.

1 But this is not a case where using a form of alternative service has caused the Defendants to
2 be uniformed of the Complaint against them. The record reflects that on September 22, 2012,
3 the Korean Times, a newspaper serving the Korean-America community, reported Defendant
4 Tong Soo Chung disavowed any involvement in the affairs between JES Solar and Matinee,
5 and he said he had not received a copy of the Complaint. But September 27, 2012, the
6 newspaper reported that on September 18, Defendant S. Chin Kim, sent a letter in response
7 to the JES Solar lawsuit asserting the litigation was invalid because JES Solar had filed for
8 bankruptcy.⁴ Additionally, an email on November 21, 2012, from the Lim, Ruger & Kim
9 law firm reflects counsel there was monitoring this lawsuit. The email reported the firm had
10 discovered the amendment of the Complaint to add Plaintiff Hankook, a previous client the
11 firm had represented, and consequently the firm informed the Plaintiff's attorney that it
12 would not be representing Defendant Tong Soo Chung in the Jes Solar action.

13 As for Defendant Paul Jeoung, he too had actual knowledge of the law suit because
14 he told Defendant Chun Rae Kim's father-in-law, John S. Lee, in September that Defendant
15 Matinee would be providing an attorney for Defendant Chun Rae Kim. (Supplement (Doc.
16 65: Affidavit ¶ 26.)

17 **Chun Ray Kim**

18 Defendant Chun Ray Kim admits he was properly served with the Complaint.
19 Accordingly, he knew an answer was due within 20 days. After he was served with the
20 Complaint, he attests he contacted his father-in-law, who told him that Defendant Matinee
21 would file a timely appearance on his behalf, *id.* ¶ 26. He also received a copy of the default
22 entered by this Court on December 11, 2012, so he knew Matinee did not appear and answer
23 the Complaint. Again, he contacted his father-in-law and was told that Matinee would file
24 a Motion to Set Aside the Default on his behalf too, but when the motion was filed, he was

26 ⁴Jes Solar is not in bankruptcy despite the extreme financial difficulties it experienced
27 as a result of the fraudulent transactions by Defendants. (Opposition (Doc. 51) at 5-7.)

1 not represented. Accordingly, he was forced to file a Motion to Join, *pro se*, and then filed
2 a Supplemental Motion to Vacate Default and to Oppose Plaintiffs' Motion for Default
3 Judgment (Doc. 65). The Court finds that the evidence reflects that Defendant Chun Ray
4 Kim intended to proceed in accordance with the other Defendants. He knew an answer was
5 required, and was content to proceed in accordance with the other Defendants. Only now
6 that he was not represented in the motion to set aside the default does Defendant Chun Ray
7 Kim act independently.

8 **Defendants' Culpability**

9 The Court has no problem finding that the Defendants received at the very least
10 constructive notice of the filing of the action. The Court finds that Defendants intentionally
11 chose to not answer the Complaint to take advantage of the opposing party, interfere with
12 judicial decision making, or otherwise manipulate the legal process.

13 Defendants Matinee, S. Chin Kim, Paul Jeoung, and Tong Soo Chung's assertions
14 of improper service are not only wrong, they do not provide a credible, good faith
15 explanation for their failures to answer. Defendants do not even assert negligence in respect
16 to not answering the Complaint; the only negligence Defendants suggest is related to
17 oversights they made when closing the Tucson office that necessitated alternative service.
18 Culpable behavior "usually involves conduct by parties that is calculated to help them retain
19 property in their possession, and avoid liability by staying out of court: for instance, when
20 companies act to avoid service in order to thwart their customers' attempts to bring suit
21 against them." *Mesle*, 615 F.3d at 1094. The Defendants exhibited such culpable conduct,
22 here.

23 This factor tips in favor of not setting aside the default, and especially cuts against
24 setting aside the default for Defendants Matinee, S. Chin Kim, Paul Jeoung, and Tong Soo
25 Chung.

26 **2. Whether Defendant has a meritorious defense**

1 **Defendants Matinee, S. Chin Kim, Paul Jeung, and Tong Soo Chung**

2 After the Plaintiffs responded to the Defendants’ Motion to Set Aside the Default,
3 the Defendants filed a Reply, wherein they raised for the first time substantive defenses: 1)
4 Plaintiffs have not been authorized by the Arizona Corporation Commission to do business
5 in Arizona; 2) there is not complete diversity between the parties, and 3) Plaintiffs’ Amended
6 Complaint fails to allege facts sufficient to support claims for breach of contract, unjust
7 enrichment, conspiracy, fraudulent inducement, and conversion.

8 Plaintiffs ask the Court to strike the Reply or allow it to file a Sur-Reply. The
9 Defendants excuse their violation of the longstanding rule in the Ninth Circuit that a moving
10 party must present all of its evidence or raise all of its legal arguments in a substantive brief,
11 rather than a reply. The excuse is because a motion to set aside a default must necessarily
12 be filed in “fire-drill” mode. “They have discovered they have lost a lawsuit they knew
13 nothing about, they scramble to find counsel to represent them and counsel scrambles to
14 assemble facts and documents from the clients and to research the law. Keeping in mind that
15 timeliness is a key element of a motion to set aside default, counsel files a motion to set aside
16 default with all of the information he has available, balancing the timeliness with
17 completeness. That is what happened in this case.” (Opposition to Motion to Strike (Doc.
18 60) at 2.) Defendants argue the Court should allow the Plaintiffs to file a Sur-Reply.

19 The Court does not believe this is what happened here because the record reflects
20 the Defendants knew about this law suit from its inception. Nevertheless, the Court will not
21 strike the Reply, and will instead allow the Sur-reply.

22 Default has been entered in this case and until set aside, the factual allegations of the
23 Complaint are taken as true, but necessary facts not contained in the pleadings, and claims
24 which are legally insufficient, are not established by default.” *Cripps*, 980 F.2d at 1267. The
25 Court has reviewed the Amended Complaint and finds it pleads facts to support its claims of
26 breach of contract, unjust enrichment, conspiracy, fraudulent inducement, and conversion.

1 The Complaint alleges the Defendants Matinee and Samsun, and their employees
2 and agents, acted together in various ways, such as meeting with Plaintiffs, entering into
3 contracts with Plaintiffs, and demanding advance payments from Plaintiffs, to fraudulently
4 induce Plaintiffs to pay money to the Defendants. (Complaint (Doc. 25) ¶¶ 20-78.) The
5 Complaint alleges Defendants perpetrated the alleged scam first on Plaintiff Hankook from
6 approximately mid-July 2010, *id.* ¶ 27, to about March, 2011, when Defendants shifted their
7 attention to Plaintiffs Jes Solar and Airpark, *id.* ¶¶ 41-42.

8 The Complaint alleges the Defendants induced the Plaintiffs to enter into contractual
9 agreements by telling them that Defendants had secured financing from the United States
10 government and JP Morgan Chase for the billion dollar project to construct a solar power
11 plant. *Id.* ¶¶ 24, 43-44. Defendants caused Plaintiffs to incur expenses and costs, including
12 payments under specified partnership agreements to Samsun for geotechnical investigations,
13 inter-connection impact studies, public relations, and liaison services to JP Morgan Chase.
14 *Id.* ¶¶ 28, 48-49. Defendants caused Plaintiffs to enter into specified contracts with Matinee
15 whereby Plaintiffs agreed to be a buy-in, “turn-key” contractor for engineering, procurement
16 and construction (EPC contractor) on the allegedly bogus solar power plant project. *Id.* ¶¶
17 29,30-31, 52-53. Defendants demanded advance payments from Plaintiffs under various
18 auspices, such as telling Plaintiffs that they needed to put up their money before JP Morgan
19 Chase would issue the line of credit financing, bringing Plaintiffs to meet with Matinee’s
20 well known and prestigious CEO Defendant Tong, *id.* ¶ 36, and conducting bogus
21 groundbreaking ceremonies in Arizona, *id.* ¶¶ 58-64. In the end, there was no JP Morgan
22 Chase financing because Matinee failed to provide disclosure of its assets as collateral, *id.*
23 ¶ 72, and there was no solar power plant construction project. Plaintiffs repeatedly
24 demanded that Defendants move forward with the construction project to no avail. *Id.* ¶¶ 39,
25 75. The Plaintiffs have incurred several million dollars in losses due to Defendant’s breach
26 of the contracts. *Id.* ¶¶ 28, 66, 124. These factual allegations support the claims challenged

1 by the Defendants. The conspiracy count does not fail under Arizona law because it is not
2 a stand alone claim, but is a claim that the Defendants conspired to commit fraud. *Id.* ¶ 101.
3 (Ds’ Reply at 4.)

4 The Defendants’ other two legal defenses also fail.

5 The Arizona statute, A.R.S. § 10-1501, which requires special authorization from
6 the Arizona Corporation Commission for a foreign corporation to transact business in this
7 state, does not apply. The statutory requirements do not apply to conducting an isolated
8 transaction that is completed within thirty days and is not taken in the course of repeated
9 transactions of a like nature. A.R.S. § 10-1501(B)(10). To determine whether a foreign
10 corporation is “doing business,” the Court considers what is actually done in the state, not
11 what could have been done under the contract. *L.M. White Contracting Co. v. St. Joseph*
12 *Structural Steel Co.*, 488 P.2d 196, 199 (Ariz. App. 1971). There must be something more
13 than an isolated single act; conduct in Arizona must be a substantial part of its ordinary
14 business. *Nat’l Union Indem. Co. v. Bruce Bros., Inc.*, 38 P.2d 648, 651 (Ariz. 1934). And,
15 simply maintaining, defending or settling a legal proceeding does not constitute transacting
16 business within the meaning of the statute. A.R.S. § 10-1501(B)(1). Defendants do not
17 submit any factual basis for application of this statute in this case.

18 The Defendants assert that Defendant Tong Soo Chung is a “stateless” U.S. citizen
19 because he resides in South Korea and that this defeats diversity jurisdiction over the action.
20 Citizenship for diversity purposes requires a showing that the party is a citizen of the United
21 States and is domiciled in a state. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826,
22 828-29 (1989); *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). In
23 the Ninth Circuit, the longstanding rule is: “[a] person is ‘domiciled’ in a location where he
24 or she has established a ‘fixed habitation or abode in a particular place, and intends to remain
25 there permanently or indefinitely.’” *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986). The
26 Court looks to factors such as current residence, voting registration and voting practices,

1 location of personal and real property, location of brokerage and bank accounts, spouse and
2 family, memberships in unions and organizations, place of employment or business, driver's
3 license and automobile registration, and payment of taxes. *Id.* at 750.

4 Defendant Tong Soo Chung provides an affidavit in which he attests that he has
5 resided in South Korea since 2002, but he does not assert he is domiciled there and offers no
6 evidence to suggest he intends to remain there permanently or indefinitely. The self-serving
7 affidavit does not rebut Plaintiffs' evidence that Defendant Tong Soo Chung is employed as
8 an attorney at Lim, Ruger, and Kim, LLP., in its Los Angeles office. Plaintiffs also tender
9 a Schedule A (FEC Form 3) for the Federal Election Commission for the Defendant's Report
10 of Receipts and Disbursements for an Authorized [election] Committee, which reflects a
11 mailing address for Defendant Tong Soo Chung in Maryland. His domicile in Maryland
12 would not destroy diversity. The Court retains diversity jurisdiction over this action.

13 **Chun Ray Kim**

14 Defendant Chun Ray Kim asserts he was dragged into the whole matter because his
15 father-in-law, Defendant John S. Lee, the owner of Defendant Samsun, asked him to translate
16 Korean to English on documents and at meetings between the parties. He asserts he runs a
17 tofu restaurant in Virginia, and he was not paid any compensation of any kind for his
18 involvement with Jes Solar. (Supplement Motion (Doc. 65-2): Affidavit ¶¶ 5, 24.)
19 Additionally, Defendant Chun Rae Kim argues that his involvement was minimal, and the
20 actions he took were taken at the express direction of the Plaintiffs.

21 "In fact, the one-hundred and six (106) paragraph Complaint only mentions Mr. Kim
22 in three (3) of its paragraphs. Furthermore, the only paragraph that can be assumed to have
23 been intended to allege conspiracy against Mr. Kim states that Mr. Kim 'formed a solar
24 energy consulting company [J & A Solar, Inc.] on behalf of the Consortium that consisted
25 of Plaintiffs Jes Solar and Airpark.'" (Chun Rea Kim Reply (Doc. 68) at 6; see also
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1 Complaint at ¶¶ 54, 56.) Defendant Chun Rae Kim cannot be found to have conspired with
2 Plaintiffs to defraud them.

3 **Meritorious Defenses**

4 Defendants Matinee, S. Chin Kim, Paul Jeoung, and Tong Soo Chung offer no
5 meritorious defenses, and this factor tips against setting aside the default entered against
6 them. Defendant Chun Rae Kim has alleged sufficient facts that, if true, would constitute a
7 defense because a jury might find he was not an agent or employee of Samsun. Except as
8 an agent or employee of Defendant Samsun, the Complaint fails to allege sufficient facts to
9 support the conspiracy charges against Defendant Chun Rae Kim. This factor tips in favor
10 of setting aside the default entered against Defendant Chun Rae Kim.

11 **3. Whether the Plaintiff will be prejudiced**

12 “To be prejudicial, the setting aside of a judgment must result in greater harm than
13 simply delaying resolution of the case.” *TGI Group Life Insur. Plan*, 244 F.3d at 700. Rather,
14 “the delay must result in tangible harm such as loss of evidence, increased difficulties of
15 discovery, or greater opportunity for fraud or collusion.” *Id.* at 701 (citing *Thompson v. Am.*
16 *Home Assur. Co.*, 95 F.3d 429 (6th Cir.1996)).

17 Plaintiffs argue that delaying entry of the Judgment in this case allows the
18 Defendants more time to abscond or dissipate assets that are the subject of the default.
19 Plaintiffs offered to consent to setting aside the default, if Defendants would provide an
20 accounting of their assets and how Plaintiffs’ funds were disbursed, but Defendants refused.
21 Plaintiffs assert this shows the Defendants’ intend to continue to delay resolution of this
22 action and the Plaintiffs’ recovery of several million dollars.⁵

24 ⁵Defendants seek to strike this argument, pursuant to Fed. R. Evid. 408, which
25 prohibits the use of a settlement or compromise offer to prove or disprove the validity or
26 amount of a disputed claim or to impeach by a prior inconsistent statement, but the evidence
27 may be considered for other purposes, such as proving bias, prejudice, to negate a contention
28 of undue delay, or prove an effort to obstruct a criminal investigation or prosecution. Here,

1 Court sets the default aside for Defendant Chun Rae Kim. As to Defendants Matinee, S.
2 Chin Kim, Paul Jeoung, and Tong Soo Chung, the Court finds this is an exceptional case and
3 denies the Motion to Set Aside the Default.

4 **Accordingly,**

5 **IT IS ORDERED** that the Motion to Set Aside Default (Doc. 48) filed by
6 Defendants Tong Soo Chung, Paul Jeoung, S. Chin Kim, and Matinee Energy is DENIED.

7 **IT IS FURTHER ORDERED** that the Supplemental Motion to Vacate Default
8 (Doc. 65) filed by Chun Rae Kim is GRANTED, and the Clerk of the Court shall set aside
9 the default entered against Defendant Chun Rae Kim.

10 **IT IS FURTHER ORDERED** that the Motion for Joinder by Chun Rae Kim in the
11 Motion to Set Aside Default (Doc. 61) is DENIED AS MOOT.

12 **IT IS FURTHER ORDERED** that the Motion to Strike Paragraphs 9 and 10 (Doc.
13 55) filed by the Defendants is DENIED.

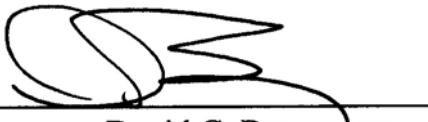
14 **IT IS FURTHER ORDERED** that the Motion to Strike Reply (Doc. 58) filed by
15 the Plaintiffs is DENIED AS MOOT because Plaintiffs have filed a Sur-reply.

16 **IT IS FURTHER ORDERED** that the Motion to Supplement the Motion for
17 Default Judgment (Doc. 45) is DENIED AS MOOT; the Defendants having now appeared,
18 the matter of damages shall be set for trial.

19 **IT IS FURTHER ORDERED** that the Motion for Default Judgment (Doc. 41)
20 remains pending for disposition by trial.

21
22 **IT IS FURTHER ORDERED** that the parties shall file a Joint Pretrial Order within
23 30 days of the filing date of this Order. Subsequently, a Pretrial Conference will be held by
24 the Court.

25 DATED this 25th day of July, 2013.

26 
27 David C. Bury
28 United States District Judge

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4 **FORM OF PRETRIAL ORDER**
5 **IN THE UNITED STATES DISTRICT COURT**
6
7 **FOR THE DISTRICT OF ARIZONA**

8)
9)
10 Plaintiff,)
11 v.) CV TUC DCB
12)
13) **JOINT PROPOSED PRETRIAL ORDER**
14 Defendant.)
15)

16 (Although the text of the pretrial order appears in single space, the actual order submitted by
17 the parties must be double spaced and conform in all other respects to the Local Rules.)

18 The following are pretrial proceedings in this cause as agreed to by the parties and
19 approved by the Court:

20
21 **I. NATURE OF ACTION**

22 This is an action for: (Short concise statement of the case, including the nature of the
action and the relief sought.)

23 **II. STATEMENT OF JURISDICTION**

24 Statement of jurisdiction: (state the claims and cite the statutes which give this Court
25 jurisdiction over each claim.)

26 **III. CONTESTED ISSUES OF LAW/FACT**

27 State the ultimate issues of fact and law which must be decided at trial. State only the
28 issues of fact and law necessary and material for a verdict in this case. Each issue must be
stated separately and specifically.

1 **IV. LIST OF EXHIBITS**

2 Each party shall list the exhibits it intends to offer at trial.

3 **V. LIST OF WITNESSES**

4 Each party shall list the witnesses it intends to call at trial.

5 **VI. JURY TRIAL or BENCH TRIAL**

6 The parties shall state whether the trial is a jury or bench trial.

7 **For a Jury Trial**

8 At the Pretrial Conference, the Court will direct the parties to file proposed voir dire,
9 objections to exhibits, deposition testimony, stipulated jury instructions, stipulations,
10 counsel's additional proposed jury instructions, motions in limine, and trial memoranda 20
11 days prior to trial. Any opposition shall be filed five days thereafter.

12 **For a Bench Trial**

13 At the Pretrial Conference, the Court will direct the parties to file trial briefs,
14 objections to exhibits, motions in limine, stipulations, and proposed findings of fact and
15 conclusions of law 20 days prior to trial. Any opposition shall be filed five days thereafter.

16 **VII. PROBABLE LENGTH OF TRIAL**

17 Each party shall identify the estimated length of time it will take to present its case.

18 **VIII. CERTIFICATION**

19 **The undersigned counsel for each of the parties in this action do hereby approve
20 and certify the form and content of this proposed Joint Pretrial Order.**

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Attorney for Plaintiff

Attorney for Defendant