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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

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9 ROBERTO A. SOTELO,

CASE NO. 1:08-cv-01342-LJO-SKO

10 Plaintiff,

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING MOTION TO SET ASIDE  
ENTRY OF DEFAULT BE GRANTED

11 v.

12 T. BIRRING, et al.,

(Doc. 122)

13 Defendants.

TEN-DAY OBJECTION DEADLINE

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16 **Findings and Recommendations Recommending**  
**Motion to Set Aside Entry of Default be Granted**

17 **I. Procedural History**

18 Plaintiff Roberto A. Sotelo, a state prisoner proceeding in forma pauperis, filed this civil  
19 rights action pursuant to 42 U.S.C. § 1983 on September 10, 2008. This action is proceeding on  
20 Plaintiff's second amended complaint, filed March 22, 2012, against Defendant Barry J. Green for  
21 acting with deliberate indifference to Plaintiff's medical needs, in violation of the Eighth  
22 Amendment of the United States Constitution.

23 On January 3, 2013, following the execution of personal service and Defendant's failure to  
24 file a timely response to the complaint, the Clerk of the Court entered default against Defendant.  
25 Fed. R. Civ. P. 55(b)(1). Pending before the Court is Defendant's motion to set aside entry of  
26 default, filed on April 4, 2013. Plaintiff did not file an opposition.

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1 **II. Discussion**

2 **A. Legal Standard**

3 As a general rule, default is disfavored and cases should be decided on their merits whenever  
4 reasonably possible. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1189 (9th Cir. 2009)  
5 (quotation marks omitted); *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 693 (9th Cir. 2001);  
6 *Eitel v. McCool*, 782 F.3d 1470, 1472 (9th Cir. 1986). The Court may set aside entry of default for  
7 good cause, Fed. R. Civ. P. 55(c) (quotation marks omitted), which requires consideration of three  
8 factors: (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious  
9 defense, and (3) whether culpable conduct of the defendant led to the default, *Brandt v. American*  
10 *Bankers Ins. Co. of Florida*, 653 F.3d 1108, 1111 (9th Cir. 2011) (citing *Falk v. Allen*, 739 F.2d 461,  
11 463 (9th Cir. 1984)) (quotation marks omitted).

12 **B. Prejudice to Plaintiff**

13 In this case, no prejudice to Plaintiff has been shown. The standard is whether Plaintiff's  
14 ability to pursue his claim will be hindered, *Falk*, 739 F.2d at 463 (quotation marks omitted), and  
15 neither mere delay nor merely having to litigate on the merits constitutes prejudice, *TCI Group Life*  
16 *Ins. Plan*, 244 F.3d at 701 (quotation marks omitted). Plaintiff did not oppose the motion to set aside  
17 entry of default, Plaintiff previously signed a stipulation to set aside default, and there is simply no  
18 other support in the record for a finding of prejudice.<sup>1</sup> Thus, the first factor weighs in favor of setting  
19 aside the entry of default.

20 **C. Meritorious Defense**

21 With respect to the existence of a meritorious defense, the burden "is not extraordinarily  
22 heavy," *TCI Group Life Ins. Plan*, 244 F.3d at 700, and Defendant has submitted a declaration that  
23 his treatment of Plaintiff was reasonable and consistent with the accepted standard of care, Doc. 122-  
24 2, Green Dec., ¶8.

25 For an Eighth Amendment claim arising out of medical care in prison, Plaintiff "must show  
26 (1) a serious medical need by demonstrating that failure to treat [his] condition could result in further

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28 <sup>1</sup> On January 23, 2013, the Court issued an order informing the parties that they may not stipulate to setting  
aside the entry of default and requiring Defendant to file a motion demonstrating good cause. (Doc. 121.)

1 significant injury or the unnecessary and wanton infliction of pain,” and (2) that “the defendant’s  
2 response to the need was deliberately indifferent.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th  
3 Cir. 2012) (citing *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). “A difference of opinion  
4 between a physician and the prisoner - or between medical professionals - concerning what medical  
5 care is appropriate does not amount to deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978,  
6 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*, 680 F.3d  
7 at 1122-23 (citing *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1986)). Rather, Plaintiff “must  
8 show that the course of treatment the doctors chose was medically unacceptable under the  
9 circumstances and that the defendants chose this course in conscious disregard of an excessive risk  
10 to [his] health.” *Snow*, 681 F.3d at 988 (citing *Jackson*, 90 F.3d at 332) (internal quotation marks  
11 omitted).

12 Therefore, a showing that the medical care delivered by Defendant fell within the accepted  
13 standard of care is sufficient to demonstrate the existence of a potentially meritorious defense and  
14 this factor also weighs in favor of setting aside entry of default.

15 **D. Culpable Conduct by Defendant**

16 Finally, Defendant has provided a detailed explanation regarding the steps he took once his  
17 wife was served with the summons and complaint at their residence. Those steps included notifying  
18 Doctor Boparai, the Chief Physician and Surgeon who had been Defendant’s boss when he worked  
19 at the prison, and contacting the Registry of Physician Services, which was Defendant’s employer  
20 when he worked at the prison. Defendant believed nothing further was required of him at the time,  
21 and when he was subsequently notified that he needed to complete a request for representation, he  
22 did so.

23 Conduct is considered culpable where no explanation inconsistent with a devious, deliberate,  
24 willful, or bad faith failure to respond is provided. *TCI Group Life Ins. Plan*, 244 F.3d at 698  
25 (quotation marks omitted). Here, the events leading to the entry of default support a finding of  
26 excusable neglect rather than any sort of willful misconduct. *Id.* at 697-99. As there is no evidence  
27 in the record that Defendant acted in bad faith or in an otherwise culpable manner, the third and final  
28 factor also supports setting aside entry of default.

1 **III. Recommendation**

2 Accordingly, with all three factors weighing in favor of setting aside the entry of default, the  
3 Court HEREBY RECOMMENDS that Defendant’s motion be GRANTED.

4 These Findings and Recommendations will be submitted to the United States District Judge  
5 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **ten (10) days**  
6 after being served with these Findings and Recommendations, the parties may file written objections  
7 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
8 Recommendations.” The parties are advised that failure to file objections within the specified time  
9 may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.  
10 1991).

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14 IT IS SO ORDERED.

15 **Dated: June 13, 2013**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE