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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

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| <p>J & J SPORTS PRODUCTIONS INC.,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="padding-left: 80px;">v.</p> <p>JAVIER MENDOZA CERVANTES,</p> <p style="padding-left: 40px;">Defendant.</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>Case No.: 1:16-cv-00485 DAD JLT</p> <p>ORDER GRANTING MOTION TO SET ASIDE DEFAULT (Doc. 19)</p> <p>ORDER WITHDRAWING FINDINGS AND RECOMMENDATIONS TO GRANT DEFAULT JUDGMENT</p> <p>ORDER GRANTING THE DEFENDANT’S MOTION TO PROCEED IN FORMA PAUPERIS (Doc. 18)</p> |
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The plaintiff claims that on May 2, 2015, Javier Mendoza Cervantes unlawfully intercepted and broadcast “*The Fight of the Century; Floyd Mayweather, Jr. v. Manny Pacquino Championship Fight Program*,” at the La Tormenta Night Club despite that the he had not purchased the license to do so. (Doc. 1 at 4-6) When the defendant failed to answer the complaint after the plaintiff filed proof of service (Doc. 11), the Clerk of the Court entered default. (Doc. 13)

Javier Mendoza Cervantes seeks to have the Court set aside the entry of default. (Doc. 19) He claims that he did not own the nightclub at the time of the broadcast and claims that he did not receive service of the summons and complaint. He asserts he would answer once he receives service. Though the Court finds that service was proper on the defendant, it finds good cause to set aside the default because doing so serves the interests of justice.

1 **I. Motion to Set Aside the Default**

2 The Federal Rules of Civil Procedure govern the court’s entry of default. Pursuant to Rule 55,
3 “[t]he court may set aside an entry of default for good cause.” Fed. R. Civ. P. 55(c).

4 To determine “good cause”, a court must “consider[] three factors: (1) whether [the
5 party seeking to set aside the default] engaged in culpable conduct that led to the
6 default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the
7 default judgment would prejudice” the other party. *See Franchise Holding II*, 375 F.3d
8 at 925–26. This standard, which is the same as is used to determine whether a default
9 judgment should be set aside under Rule 60(b), is disjunctive, such that a finding that
10 any one of these factors is true is sufficient reason for the district court to refuse to set
11 aside the default. *See id.* Crucially, however, “judgment by default is a drastic step
12 appropriate only in extreme circumstances; a case should, whenever possible, be
13 decided on the merits.” *Falk*, 739 F.2d at 463; see also *Latshaw v. Trainer Wortham &*
14 *Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir.2006); *Speiser, Krause & Madole P.C. v. Ortiz*,
15 271 F.3d 884, 890 (9th Cir.2001); *TCI Group*, 244 F.3d at 695–96.1 *United States v.*

16 *Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010)

17 **A. Discussion and Analysis**

18 i. Timeliness

19 Motions made pursuant to Rule 55 must be made within a reasonable time of the judgment,
20 and no more than one year after entry of judgment. Fed. R. Civ. Proc. 60(c)(1). Here, the Clerk
21 entered default on September 12, 2012. (Doc. 13). The defendant filed his motion to set aside the
22 default three months later. While he offers no explanation for this delay¹, the amount of time that
23 passed is not so significant as to weigh against granting the motion.

24 ii. Culpable conduct

25 Actions are culpable when “there is no explanation of the default inconsistent with a devious,
26 deliberate, willful, or bad faith failure to respond.” *TCI Group*, 244 F.3d at 697 (citing *Kingvision*
27 *Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999)). The defendant claims that
28 he was not served though he admits “the business [was] served.” (Doc. 19 at 2) Notably, the plaintiff
filed a proof of service indicating that “Javier Mendoza Cervantes a/k/a Javier C. Mendoza,

¹ Notably, the defendant appeared at court on November 29, 2016 at the time previously set for the motion for default judgment. However, when the defendant did not oppose the motion, the Court vacated the hearing on November 22, 2016 after finding the matter suitable for decision without hearing (Doc. 16). At that time, the Clerk of the Court personally served the defendant with the Findings and Recommendation to grant the motion for default judgment. The Court surmises that seeing the amount that the judgment was recommended to be spurred the defendant into action.

1 individually and d/b/a La Tormenta Night Club” was personally served with the summons and
2 complaint on August 17, 2016 at 8910 Winlock Street in Bakersfield (Doc. 11) where the defendant
3 admits he resided in the past. (Doc. 19 at 3) He offers no explanation as to when he moved from the
4 Winlock address or how he became aware of the lawsuit or why he believes service was effective on
5 the business but not him despite that only one service occurred.² He *does* explain that he “sold the bar
6 in around March 2015” (Doc. 19 at 3), but the plaintiff points out that the liquor license remained in
7 the defendant’s name until August 2015 (Doc. 20 at 5). Thus, the Court does not find that the
8 defendant has adequately explained his conduct and has not overcome the proof that he was personally
9 served. Thus, this factor weighs against setting aside the default.

10 iii. Meritorious Defense

11 In seeking to vacate a default, a defendant “must present specific facts that would constitute a
12 defense.” *TCI Group*, 244 F.3d at 700. However, the burden “is not extraordinarily heavy.” *Id.* A
13 defense does not have to be proven by a preponderance of the evidence, but the moving party must
14 establish “a factual or legal basis for the tendered defense.” *Tri-Con’t Leasing Corp., Inc. v.*
15 *Zimmerman*, 485 F. Supp. 496, 497 (N.D. Cal. 1980).

16 The defendant asserts that he sold the bar before the program was intercepted and broadcast at
17 the night club. (Doc. 19 at 3) Moreover, it appears that the liquor license was transferred, though it
18 was transferred months after the program was broadcast. (Doc. 20 at 5) Accordingly, though the
19 Court cannot say definitively that the defense will carry the day, it is, at least, colorable. Thus, this
20 factor weighs in favor of setting aside the entry of default.

21 iv. Prejudice

22 “To be prejudicial, the setting aside of a judgment must result in greater harm than simply
23 delaying resolution of the case.” *TCI Group*, 244 F.3d at 701. The relevant inquiry is “whether [the
24 plaintiff’s] ability to pursue its claim will be hindered. *Falk*, 739 F.2d at 463. A delay “must result in
25 tangible harm such as a loss of evidence, increased difficulties of discovery, or greater opportunity for
26 fraud or collusion” for the setting aside of default to be prejudicial to the plaintiff. *TCI Group*, 244

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² Notably, the defendant reports that he currently works for La Tormenta (Doc. 18).

1 F.3d at 701 (citing *Thomspon v. American Home Assur.*, 95 F.3d 429, 433-34 (6th Cir. 1996)).

2 Naturally, setting aside the entry of default would delay resolution of the case. However, the
3 length of the delay is minimal and there is no indication that witnesses have disappeared or that
4 evidence has been lost. Accordingly, this factor weighs in favor of setting aside the entry of default or
5 default judgment.

6 Consequently, the Court will set aside the default, withdraw the findings and recommendation
7 to grant default judgment and order the defendant to respond to the complaint within 21 days.

8 **II. Application to Proceed In Forma Pauperis**

9 The Court may authorize the defense of an action without prepayment of fees when an
10 individual “submits an affidavit that includes a statement of all assets such person . . . possesses [and]
11 that the person is unable to pay such fees or give security therefor.” 28 U.S.C. § 1915(a). The Court
12 has reviewed the application and has determined the defendant’s affidavit satisfies the requirements of
13 28 U.S.C. § 1915(a). Therefore, the defendant’s motion to proceed in forma pauperis (Doc. 18) is

14 **GRANTED.**

15 **ORDER**

16 Based upon the foregoing, the Court **ORDERS:**

17 1. The defendant’s motion to set aside the default (Doc. 19) is **GRANTED** and, in light of
18 this finding, the motion for default judgment (doc. 15) is **DISREGARDED** as **UNRIPE**;

19 2. The defendant SHALL file his responsive pleading within 21 days³;

20 3. The Findings and Recommendation to grant default judgment (Doc. 17) is
21 **WITHDRAWN**;

22 4. The defendant’s motion to proceed in forma pauperis (Doc. 18) is **GRANTED**.

23
24 IT IS SO ORDERED.

25 Dated: **January 12, 2017**

26 **/s/ Jennifer L. Thurston**
UNITED STATES MAGISTRATE JUDGE

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28 ³ The defendant is advised that his failure to file a responsive pleading within 21 days will result in default being entered against him.