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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMIE STEPHEN,

Plaintiff,

CIV S-09-1516 MCE EFB (TEMP) P

vs.

F. ZHANG, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding with counsel in an action under 42 U.S.C. § 1983. On June 21, 2011, the court entered default against defendants Sisto and Haviland. On June 28, 2011, Sisto and Haviland moved to set aside the entry of default. They have also joined their co-defendants, Zhang and Swarthout, in a motion for an extension of time in which to file a response to the second amended complaint.

Fed. R. Civ. P. 55(c) authorizes a court to set aside entry of default for “good cause.” “The court’s discretion is especially broad where, as here, it is entry of default that is being set aside, rather than a default judgment.” *O’Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir. 1994).

A court determines the existence of good cause for removing a default by considering the following factors: (1) whether the party seeking to set aside the entry of default engaged in

1 culpable conduct that led to the default; (2) whether there is any meritorious defense to
2 plaintiff's claims; or (3) whether setting aside the entry of default will prejudice the plaintiff.
3 *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th
4 Cir. 2010). “[A] finding that any one of these factors is true is sufficient reason for the district
5 court to set aside the entry of default.” *Id.* “[J]udgment by default is a drastic step appropriate
6 only in extreme circumstances; a case should, whenever possible, be decided on the merits.” *Id.*

7 “A defendant’s conduct is culpable if he has received actual or constructive notice of the
8 filing of an action and intentionally failed to answer.” *Signed Personal Check*, 615 F.3d at 1092.
9 In contrast to requiring a separate showing of bad faith by an ordinary defendant who fails to
10 answer, “[w]hen considering a legally sophisticated party’s culpability in a default, an
11 understanding of the consequences of its actions may be assumed, and with it, intentionality.”
12 *Id.* at 1093 (citing *Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc.*, 840 F.2d 685,
13 690 (9th Cir. 1988)(upholding the district court’s refusal to vacate a default judgment because
14 defendant’s president, “as a lawyer, was presumably well aware of the dangers of ignoring
15 service of process”)).

16 “A defendant seeking to vacate a default judgment must present specific facts that would
17 constitute a defense. But the burden on a party seeking to vacate a default judgment is not
18 extraordinarily heavy. All that is necessary to satisfy the ‘meritorious defense’ requirement is to
19 allege sufficient facts that, if true, would constitute a defense: ‘the question whether the factual
20 allegation is true’ is not to be determined by the court when it decides the motion to set aside the
21 default. Rather, that question ‘would be the subject of the later litigation.’” *Signed Personal*
22 *Check*, 615 F.3d at 1094 (internal citations omitted).

23 “To be prejudicial, the setting aside of a judgment must result in greater harm than
24 simply delaying resolution of the case. Rather, ‘the standard is whether plaintiff’s ability to
25 pursue his claim will be hindered.’” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701
26 (9th Cir. 2001). “[T]he delay must result in tangible harm such as loss of evidence, increased

1 difficulties of discovery, or greater opportunity for fraud or collusion.” *Id.* (citation omitted).

2 The court finds that defendants Sisto and Haviland have shown good cause for setting
3 aside the entry of default. The court finds no culpable conduct here, nor is any prejudice to
4 plaintiff apparent in setting aside the entry of default. Moreover, the motion to extend the time
5 to respond to the complaint is well taken. In the event the district judge assigned to this case
6 adopts the magistrate judge’s recommendation of June 21, 2011, to deny the motion to declare
7 plaintiff a vexatious litigant, all defendants will have ten days from the entry of the district
8 judge’s order in which to file a response to the second amended complaint. If the motion to
9 declare plaintiff a vexatious litigant is granted, defendants’ responses will be due no later than
10 ten days after they are notified that plaintiff has posted security.

11 Accordingly, IT IS HEREBY ORDERED that:

12 1. The amended motion to set aside entry of default (Docket No. 101) is granted.

13 2. The motion for an extension of time (Docket No. 102) is granted. In the event the
14 district judge assigned to this case adopts the magistrate judge’s recommendation of June 21,
15 2011, to deny the motion to declare plaintiff a vexatious litigant, all defendants will have ten
16 days from the entry of the district judge’s order in which to file a response to the second
17 amended complaint. If the motion to declare plaintiff a vexatious litigant is granted, defendants’
18 responses to the second amended complaint will be due no later than ten days after they are
19 notified that plaintiff has posted security.

20 3. Plaintiffs’ motions for default judgment (Docket Nos. 103, 104, 105 and 108) are
21 denied as moot.

22 DATED: July 25, 2011.

23 
24 EDMUND F. BRENNAN
25 UNITED STATES MAGISTRATE JUDGE
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