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

WILLIAM ROUSER,

Petitioner,

No. 2:10-cv-2437 MCE JFM (HC)

vs.

STATE OF CALIFORNIA,

Respondent.

FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se in this action filed pursuant to 28 U.S.C. § 2254. On May 18, 2011, petitioner filed a motion for default judgment. Petitioner contends respondent failed to timely respond to this court’s March 25, 2011 order directing respondent to file a response within forty-five days of the date of the order. Respondent filed a motion to dismiss on May 11, 2011, two days beyond the deadline.

Federal Rules of Civil Procedure 55 governs the entry of default by the clerk and the subsequent entry of default judgment by either the clerk or the district court. In pertinent part, Rule 55 provides:

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

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1 (b) Entering a Default Judgment.

2 (1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that
3 can be made certain by computation, the clerk—on the plaintiff's request,
4 with an affidavit showing the amount due—must enter judgment for that
amount and costs against a defendant who has been defaulted for not
appearing and who is neither a minor nor an incompetent person.

5 (2) By the Court. In all other cases, the party must apply to the court for a
6 default judgment

7 The Ninth Circuit Court of Appeals has stated that Rule 55 requires a “two-step
8 process,” consisting of: (1) seeking the clerk’s entry of default, and (2) filing a motion for entry
9 of default judgment. Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir .1986) (“Eitel apparently
10 fails to understand the two-step process required by Rule 55.”); Symantec Corp. v. Global
11 Impact, Inc., 559 F.3d 922, 923 (9th Cir. 2009) (noting “the two-step process of ‘Entering a
12 Default’ and ‘Entering a Default Judgment’ ”).

13 In light of the requirement to obtain entry of default before seeking default
14 judgment, courts deny motions for default judgment where default has not been previously
15 entered. See, e.g., Marty v. Green, No. 2:10-cv-1823-KJM-KJN, 2011 WL 320303, at *3 (E.D.
16 Cal. Jan. 28, 2011) (“Plaintiff's motion for default judgment is denied because plaintiff did not
17 follow the procedural steps required to properly file a motion for default judgment. Specifically,
18 plaintiff failed to seek a clerk’s entry of default from the Clerk of Court prior to filing his motion
19 for default judgment.”); Norman v. Small, No. 09-cv-2233-WQH-NLS, 2010 WL 5173683, at *2
20 (S.D. Cal. Dec. 14, 2010) (denying plaintiff's motion for default judgment because “the clerk has
21 not entered default”); Bach v. Mason, 1901 F.R.D. 567, 574 (D. Idaho 1999) (“Plaintiffs have
22 improperly asked this court to enter a default judgment without first obtaining an entry of default
23 by the clerk. Since plaintiffs’ motion for entry of default judgment is improper, it is denied.”).

24 In this case, petitioner has not sought entry of default against respondent, and the
25 Clerk of Court has not entered default against the respondent in this case. Therefore, petitioner
26 has not complied with the requirements of Rule 55. Without first obtaining an entry of default

1 against the respondent, petitioner's motion for default judgment is improperly before this court.

2 See Bach, 190 F.R.D. at 574.

3 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's motion for
4 default judgment be denied.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that
10 failure to file objections within the specified time may waive the right to appeal the District
11 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: June 28, 2011.

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15 UNITED STATES MAGISTRATE JUDGE

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