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

TERRYLYN MCCAIN,

Plaintiff,

No. 2:11-cv-01265 KJM KJN PS

v.

CALIFORNIA HIGHWAY PATROL,
et al.,

Defendants.

ORDER

Presently before the court is a motion to set aside the Clerk’s Certificate of Entry of Default filed by two defaulted defendants, Brent Mangham and Michael Walling (Dkt. No. 58).¹ The court heard this matter on its law and motion calendar on October 27, 2011. (Minutes, Oct. 27, 2011, Dkt. No. 69.) Deputy Attorney General William Krabbenhoft appeared on behalf of Mangham and Walling. Plaintiff, who is proceeding without counsel, appeared and represented herself at the hearing. The undersigned has considered the briefs, oral arguments, and appropriate portions of the record in this case and, for the reasons stated below, grants the motion to set aside the default on the grounds that plaintiff did not effectuate proper service of process on Mangham and Walling and, accordingly, the default was entered in error. Consistent

¹ This case proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 with Mangham and Walling’s request, Mangham and Walling shall file answers to plaintiff’s
2 complaint within 14 days of the date of this order.

3 I. BACKGROUND

4 Plaintiff alleges in her verified complaint that on March 14, 2011, at
5 approximately 7:30 p.m., she was driving eastward on “highway 4” in her automobile, a “1994
6 Jaguar SJX,” when she was pulled over by California Highway Patrol (“CHP”) Officer
7 Mangham. (See Compl. ¶¶ 7, 16-17, 23, 25-28, 73, Dkt. No. 1.) It appears from plaintiff’s
8 allegations that plaintiff refused to provide Officer Mangham with identification, registration, or
9 both and was subsequently arrested, handcuffed, searched by Officer Jane Doe #1, placed in a
10 patrol vehicle, booked into the San Joaquin County Jail, and cited for various traffic violations.
11 (See id. ¶¶ 33-64, 73.) Plaintiff appears to allege that CHP Officer Walling assisted Officer
12 Mangham during the traffic stop and arrest. (See id. ¶¶ 8, 52-53.)

13 Plaintiff filed her complaint on May 11, 2011, alleging claims against Officers
14 Mangham and Walling in their individual capacities. (Compl. ¶¶ 7-8.) That same day, the Clerk
15 of Court issued a summons as to defendants including Officers Mangham and Walling (Dkt.
16 Nos. 1-2).

17 On June 3, 2011, plaintiff filed Return of Service forms pertaining to defendants
18 including Officers Mangham and Walling, which were executed under penalty of perjury by
19 plaintiff’s process server, Patricia Bonnifield (Dkt. No. 6). Ms. Bonnifield’s Return of Service
20 forms declare that she served Officers Mangham and Walling on May 13, 2011; Officers
21 Mangham and Walling contend that the attempted service actually occurred on May 12, 2011.
22 (Compare Return of Service, Dkt. No. 6 at 2-3, with Lawton Decl. ¶¶ 4, 8, Dkt. No. 58, Doc. No.
23 58-1.)

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1 The Return of Service forms are rather cryptic. The Return of Service Form
2 relating to the purported service of Officer Mangham states, in relevant part:

3 Other (specify): OFFICER OF THE DAY – CHP – NO NAME BADGE
4 WHO SUMMONS WAS LEFT WITH.

5 SHARON CHP office
6 Officer Mangham at 3330 Ad Art Rd.
7 Skton, CA 95215

8 (Return of Service, Dkt. No. 6 at 2.) The form pertaining to the service of Officer Walling states,
9 in relevant part:

10 Other (specify): OFFICER OF The day – CHP – NO NAME BADGE
11 WHO SUMMONS WAS LEFT WITH. OFFICER Refused To give NAME
12 TOOK THE Summons AND SAID Sharon would BE RIGHT Out

13 SHARON! CHP office
14 Officer Walling Served at 3330 Ad Art Rd.
15 Sktn, CA 95215

16 (Return of Service, Dkt. No. 6 at 3.) Neither Return of Service form reflects the particular
17 documents that were purportedly served.

18 On June 9, 2011, plaintiff requested that default be entered against Officers
19 Mangham and Walling, and the Clerk of Court entered those defendants' default on June 10,
20 2011 (Dkt. Nos. 12-14).² At no time did plaintiff file a motion for default judgment as to Officer
21

22 ² Shortly after the entry of default, Deputy Attorney General William Krabbenhoft, who had
23 appeared as counsel of record for the CHP but had not at that point appeared as counsel of record
24 for Officers Mangham or Walling, contacted the Office of the Clerk on an ex parte basis attempting
25 to have the Clerk's entry of default set aside. Rather than file a noticed motion addressing the entry
26 of default as directed by the Clerk's staff, Mr. Krabbenhoft persisted in contacting the Office of the
Clerk on an ex parte basis. As a result, the court issued the following minute order:

 The court has become aware that counsel for defendant California
Highway Patrol ("CHP") has contacted the Office of the Clerk by telephone
regarding the clerk's entry of default entered against defendants Walling and
Mangham (Dkt. No. 14) and has attempted to discuss or contest the merits of
plaintiff's service of process on those two defendants and/or the subsequent
clerk's entry of default. To the extent that counsel for CHP represents
defendants Walling and Mangham and wishes to contest the clerk's entry of
default or the adequacy of service of process, he must file a properly noticed

1 Mangham or Officer Walling.

2 On September 16, 2011, Deputy Attorney General William Krabbenhoft appeared
3 on behalf of Officers Mangham and Walling and filed the pending motion to set aside the entry
4 of default on the grounds that Officers Mangham and Walling were not properly served with
5 process (Dkt. No. 58). The motion indicates that Officers Mangham and Walling intend to file
6 an answer to the complaint within ten days after the motion to set aside the default is granted.
7 (Memo. of P. & A. In Supp. of Mot. to Set Aside Def. at 3:26-27, Dkt. No. 58.) At the hearing,
8 Mr. Krabbenhoft requested 14 days to file such answers.

9 **II. LEGAL STANDARDS**

10 Federal Rule of Civil Procedure 55 governs the entry of default by the clerk and
11 the subsequent entry of default judgment by either the clerk or the district court. In relevant part,
12 Rule 55(a) provides:

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

16 Fed. R. Civ. P. 55(a).³

17 Federal Rule of Civil Procedure 55(c) provides that “[t]he court may set aside an
18 entry of default for good cause.” “The court’s discretion is especially broad where . . . it is entry

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20 motion to attack the clerk’s entry of default or plaintiff’s service of process.
21 Counsel for CHP is ordered to cease contacting the Office of the Clerk by
22 telephone to discuss or contest the merits of the entry of default or service of
process. IT IS SO ORDERED.

23 (Minute Order, June 15, 2011, Dkt. No. 17.)

24 ³ As the Ninth Circuit Court of Appeals has stated, Rule 55 requires a “two-step process”
25 consisting of: (1) seeking a clerk’s entry of default, and (2) filing a motion for the entry of default
26 judgment. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) (“Eitel apparently fails to
understand the two-step process required by Rule 55.”); accord Symantec Corp. v. Global Impact,
Inc., 559 F.3d 922, 923 (9th Cir. 2009) (noting that Rules 55(a) and (b) provide a two-step process
for obtaining a default judgment).

1 of default that is being set aside, rather than a default judgment.” O’Connor v. State of Nev., 27
2 F.3d 357, 364 (9th Cir. 1994). A court considers three factors in determining whether good
3 cause exists: ““(1) whether [the party seeking to set aside the default] engaged in culpable
4 conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether
5 reopening the default judgment would prejudice’ the other party.” United States v. Signed
6 Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091-94 (9th Cir. 2010)
7 (hereinafter, “Mesle”) (modification in original) (quoting Franchise Holding II v. Huntington
8 Rests. Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004)). Under this disjunctively framed
9 standard, “a finding that any one of these factors is true is sufficient reason for the district court
10 to refuse to set aside the default.” Id. The party seeking relief from the entry of default bears the
11 burden of showing that these factors favor such relief. See Franchise Holding II, 375 F.3d at 926.

12 However, a clerk’s entry of default may be set aside as void when default was
13 entered in the absence of proper service of process. See Mason v. Genisco Tech. Corp., 960 F.2d
14 849, 851 (9th Cir. 1992) (holding that because service of process on a party in an earlier action
15 against whom a default judgment was entered was not proper, the default judgment in the earlier
16 action was void and had no preclusive effect in the present action); accord James v. Scribner, 415
17 Fed. Appx. 835, 836 (9th Cir. 2011); see also Banks v. ACS Educ., No. 10cv1886-BTM (CAB),
18 2011 WL 811601, at *1 (S.D. Cal. Mar. 2, 2011) (unpublished) (“Improper service of the
19 complaint presents good cause to set aside entries of default.”); Warren v. City of Grass Valley,
20 No. 2:10-CV-1650-JAM-EFB, 2011 WL 596707, at 1-2 (E.D. Cal. Feb. 9, 2011) (unpublished)
21 (setting aside entry of default on the basis of insufficient evidence of proper service of process);
22 Arthur Court Designs, Inc. v. Jensen, No. C-09-0584 EMC, 2009 WL 2157544, at *4 (N.D. Cal.
23 July 20, 2009) (unpublished) (same); Van Dyke v. N. Leasing Sys., Inc., No. CIV.S. 07-1877
24 FCD GGH PS, 2009 WL 1396193, at *3 (E.D. Cal. May 14, 2009) (unpublished) (“The court
25 finds that NLS has shown good cause for setting aside the clerk’s entry of default due to
26 defective service.”), adopted by 2009 WL 2044254 (E.D. Cal. July 13, 2009); cf., Benny v. Pipes,

1 799 F.2d 489, 492 (9th Cir. 1986) (“A failure to make a timely answer *to a properly served*
2 *complaint* will justify the entry of a default judgment” (emphasis added).).

3 Resolution of a motion to set aside the entry of default is necessarily informed by
4 the well-established policies favoring resolution of lawsuits on the merits and generally
5 disfavoring default judgments. See Mesle, 615 F.3d at 1091 (“Crucially, . . . judgment by default
6 is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be
7 decided on the merits.”) (citation and quotation marks omitted); Westchester Fire Ins. Co. v.
8 Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009) (“As a general rule, default judgments are
9 disfavored; cases should be decided upon their merits whenever reasonably possible.”).

10 III. DISCUSSION

11 Officers Mangham and Walling first contend that plaintiff failed to effectuate
12 proper service of process on them and that, accordingly, the clerk’s entry of default should be set
13 aside as entered in error. They subsequently argue that good cause supports setting aside the
14 default under the three-factor test referenced above. Because the undersigned concludes that
15 service was not proper, and thus default was entered in error, the court need not reach the parties’
16 arguments under the three-factor test.

17 In regards to effectuating service of process on individual defendants, Federal
18 Rule of Civil Procedure 4(e) provides:

19 **Serving an Individual Within a Judicial District of the United States.**

20 Unless federal law provides otherwise, an individual--other than a minor,
21 an incompetent person, or a person whose waiver has been filed--may be
22 served in a judicial district of the United States by:

23 (1) following state law for serving a summons in an action brought in
24 courts of general jurisdiction in the state where the district court is located
25 or where service is made; or

26 (2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the
individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place

1 of abode with someone of suitable age and discretion who resides there; or

2 (c) delivering a copy of each to an agent authorized by appointment
3 or by law to receive service of process.

4 Additionally, a plaintiff may seek a written waiver of service by an individual defendant. See
5 Fed. R. Civ. P. 4(d)(1).

6 Here, plaintiff vehemently disclaims any intention on her part to have effectuated
7 service of process on Officers Mangham and Walling pursuant to California state law. (Pl.'s
8 Opp'n at 3-4.) Although Officers Mangham and Walling have raised the issue of potential
9 service pursuant to various provisions of the California Code of Civil Procedure, plaintiff
10 counters that the California Code of Civil Procedure "has absolutely no barring [*sic*] on the case
11 at bar" and "is irrelevant to this instant action." (Id. at 4.) Because plaintiff has chosen not to
12 argue proper service under California law, the undersigned does not analyze whether service was
13 proper pursuant to Federal Rule of Civil Procedure 4(e)(1) and, in turn, the California Code of
14 Civil Procedure.

15 Turning to the federal procedural rules governing service of process, plaintiff has
16 not argued or presented evidence supporting that she sought a written waiver of service by
17 Officers Mangham or Walling in accordance with Federal Rule of Civil Procedure 4(d)(1).
18 Additionally, plaintiff has not persuasively argued, or presented evidence supporting, that her
19 process server personally served the summons and complaint on Officers Mangham or Walling
20 or left a copy of each at the officers' respective dwellings or usual places of abode in accordance
21 with Federal Rules of Civil Procedure 4(e)(1) and (e)(2).⁴ Moreover, Officers Mangham and
22 Walling filed declarations under penalty of perjury representing that they have not been

23
24 ⁴ At the hearing, plaintiff argued that her process servers served Officers Mangham and
25 Walling at their "abode," which plaintiff characterized as the CHP field office in Stockton,
26 California. Setting aside the other mechanical defects in the purported service, the term "abode"
does not mean an "office." The term "abode" is generally defined as "A home; a fixed place of
residence." Black's Law Dictionary 5 (7th Ed. 1999).

1 personally served with a summons and complaint and have not received a summons, complaint,
2 or waiver of service form via mail. (Mangham Decl. ¶ 1, Dkt. No. 58, Doc. No. 58-2; Walling
3 Decl. ¶ 1, Dkt. No. 58, Doc. No. 58-3.)

4 The propriety of service rests on whether Ms. Bonnifield properly effectuated
5 service on Officers Mangham and Walling pursuant to Federal Rule of Civil Procedure 4(e)(2)(c)
6 by “delivering a copy of [the summons and complaint] to an agent authorized by appointment or
7 by law to receive service of process” on behalf of the officers.

8 The parties present different accounts of Ms. Bonnifield’s attempted service of
9 process. Plaintiff contends that proper service was effectuated on the CHP and Officers
10 Mangham and Walling on May 13, 2011, when Ms. Bonnifield, accompanied by a witness,
11 Randy Lantrip, left three envelopes with summonses and complaints on the counter at the CHP
12 field office in Stockton, California. (See Pl.’s Opp’n at 3.) More specifically, Ms. Bonnifield’s
13 sworn affidavit filed with plaintiff’s written opposition states:

14 I, Patricia Bonnifield, delivered three documents to the [CHP] Office on
15 May 13, 2011 at approximately 10:00 A.M. This day I asked Randy
16 Lantrip to ride with me to witness my deliveries and keep me safe. I tried
17 to give the documents to the officer at the duty desk but he refused to take
18 them. He went to the back of the building and then returned to the front
19 counter and told me Barbara would be up in a few minutes. While waiting
20 for Barbara I asked the officer for his name and he refused to comply. He
21 did not have a name tag on his shirt.

22 We waited for 10 to 15 minutes for Barbara but she never came to the
23 front desk. I had other duties to attend to so I left feeling confident that the
24 documents had been served. An unidentified woman did come to the
25 hallway before we left and looked at Randy and me, then returned to the
26 direction she came from.^{5]}

22 (Bonnifield Aff., Dkt. No. 67, Doc. No. 67-1.) A sworn affidavit of Randy Lantrip is in accord
23 with Ms. Bonnifield’s affidavit (Dkt. No. 67, Doc. No. 67-1).

24 In contrast to the affidavits filed by plaintiff, Officers Mangham and Walling offer

26 ⁵ It is entirely unclear who the person referred to as “Barbara” is.

1 the declaration of Annette Lawton, who is an Office Services Supervisor at the CHP's field
2 office in Stockton, California. (Lawton Decl. ¶ 1, Dkt. No. 58, Doc. No. 58-1.) Under penalty of
3 perjury, Ms. Lawton describes the CHP's policies regarding acceptance of service of process as
4 follows:

5 As part of my duties, I am authorized to accept service of summons [*sic*]
6 and subpoena's [*sic*]. I also supervise Sharon Parker, known as our
7 Subpoena Clerk. When someone shows up at our office with papers to
8 serve, either I or Sharon are called to the front. We review the papers and
accept service when appropriate. The Officers who work at the public
front counter are not authorized to accept service on behalf of the CHP or
any CHP Officer.

9 (Id. ¶ 2.) Contrary to Ms. Bonnifield's and Mr. Lantrip's affidavits, Ms. Lawton's declaration
10 states that plaintiff's representatives attempted to serve papers at the CHP's Stockton field office
11 on May 12, 2011, at approximately 2:40 p.m., not May 13, 2011. (Id. ¶ 4.) Ms. Lawton declares
12 that she was told that a person was attempting to serve papers at the front desk; that Subpoena
13 Clerk Sharon Parker was not available at the time; and that by the time that Ms. Lawton arrived
14 at the front counter, the person attempting to serve papers had left. (Id. ¶¶ 4-5.) She further
15 declares that plaintiff's representatives did not leave three envelopes with summonses and
16 complaints; rather, only one complaint, one summons, and one proof of service had been left on
17 the counter and none of the documents was specifically designated for Officers Mangham or
18 Walling. (Id. ¶¶ 5, 7.) Ms. Lawton declares that she notified and sent a copy of the single set of
19 documents to "CHP-Legal." (Id. ¶ 6.) Ms. Lawton, who is also the "custodian of records for
20 documents pertaining to McCain," declares on the basis of personal knowledge that "[s]ince
21 May 12, 2011, the CHP field office has not received via mail or by hand delivery any summons
22 or complaint." (Id. ¶ 7.)

23 In regards to Rule 4(e)(2)(c), plaintiff's process server would have had to serve a
24 summons and complaint on "an agent authorized by appointment or by law to receive service of
25 process" for each officer, both of whom have been sued in their individual capacity. In regards to
26 an agent authorized by law, plaintiff has not cited any California statute or regulation that

1 authorizes an agent to accept service of process on behalf of a CHP officer.⁶ And in regards to an
2 agent authorized by appointment, Officer Mangham, Officer Walling, and Annette Lawton all
3 declare that the officers at the public counter of the CHP field office in Stockton were not
4 authorized to accept service of process on behalf of Officers Mangham or Walling, or any other
5 CHP officer. (Lawton Decl. ¶ 2; Mangham Decl. ¶ 3; Walling Decl. ¶ 3.) Although there are
6 conflicting affidavits and declarations in the record regarding the timing of the attempted service,
7 plaintiff still has not shown substantial compliance with Rule 4(e)(2)(C). Plaintiff's Return of
8 Service forms simply state that plaintiff served the "officer of the day," who was not authorized
9 to accept service on behalf of CHP officers sued in their individual capacity. See Gerritsen v.
10 Consulado General De Mexico, 989 F.2d 340, 340, 344 (9th Cir. 1993) (holding that under then-
11 numbered Rule 4(d), defendants sued in their individual capacities had to be served personally or
12 by leaving a copy of the summons and complaint at their usual place of abode, and not by leaving
13 process with an employee at their place of employment). In light of plaintiff's failure to
14 substantially comply with Rule 4(e) and the general policy favoring resolution of cases on the
15 merits, the undersigned recommends that the Clerk's Certificate of Entry of Default as to
16 Officers Mangham and Walling be set aside.

17 IV. CONCLUSION

18 For the foregoing reasons, IT IS HEREBY ORDERED that:

19 1. The motion to set aside the Clerk's Certificate of Entry of Default filed by
20 defendants Mangham and Walling (Dkt. No. 58) is granted.

21 2. The Clerk's Certificate of Entry of Default pertaining to defendants
22 Mangham and Walling (Dkt. No. 14) is set aside.

23 _____
24 ⁶ Although not in a published decision or an unpublished decision issued on or after January
25 1, 2007, and therefore not referred to here for precedential value, see Ninth Cir. Rule 36-3, the Ninth
26 Circuit Court of Appeals has noted that "there is no statute that authorizes an agent to receive process
for a California Highway Patrol officer." Littlejohn v. Denno, 9 F.3d 1552, at *1 (9th Cir. Oct. 26,
1993) (unpublished).

