

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

MAXUM INDEMNITY COMPANY,

Plaintiff,

No. 2:11-cv-2014 GEB EFB

vs.

COURT SERVICES, INC.,

Defendant.

FINDINGS AND RECOMMENDATIONS

This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1) for hearing on plaintiff Maxum Indemnity Company’s motion for entry of default judgment against defendant Court Services, Inc. Dckt. No. 19. A hearing on the motion was held on May 16, 2012. Attorney Elizabeth Musser appeared at the hearing on behalf of plaintiff; defendant failed to appear. For the reasons stated on the record at the hearing, as well as for the reasons stated herein, the undersigned recommends that plaintiff’s motion for default judgment be granted.

I. BACKGROUND

In this action, plaintiff Maxum Indemnity Company (“Maxum”) seeks “a declaration that it has no duty to defend or indemnify Court Services in connection with *Mays v. Board of County Commissioners*, Case No. 1:09-cv-00662-WJ-KBM (D.N.M.) (the “Underlying Action”),

1 under a general liability insurance policy issued to Court Services, policy no. PRO 0031780-01,
2 effective June 18, 2008 to June 18, 2009 (the “Maxum Policy”).” First Am. Compl. (“FAC”),
3 Dckt. No. 7, ¶ 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1),
4 because Maxum is a citizen of the States of Delaware and Georgia and Court Services is a
5 citizen of the States of Nevada and California, and the amount in controversy exceeds \$75,000,
6 exclusive of interests and costs. FAC ¶ 10.

7 The Underlying Action was commenced in July 2009 by Magan Marie Mays (“Mays”),
8 who “alleges that she was taken to hotels and raped repeatedly by Court Services employee
9 Albert Preston Long while she was being transferred from a prison in Tennessee to a prison in
10 New Mexico.” FAC ¶ 16. Mays’ Second Amended Complaint in the Underlying Action asserts
11 negligent hiring and supervision claims against Court Services, asserts that Court Services is
12 negligent per se because it failed to comply with federal regulatory standards for transporting
13 prisoners, asserts that Court Services violated Mays’s Eighth and Fourteenth Amendment rights
14 by failing to implement standards that would ensure her personal safety, and asserts a claim for
15 false imprisonment. Mays seeks compensatory damages, punitive damages, and costs of suit.

16 Maxum is currently defending Court Services under the Maxum Policy, subject to a
17 complete reservation of rights. FAC ¶ 23. The Maxum Policy provides coverage for “property
18 damage” and “bodily injury” caused by an “occurrence,” and certain “personal and advertising
19 injury” enumerated offenses, including false imprisonment. FAC ¶¶ 26-33. In this action,
20 Maxum seeks a declaration that it has no duty to defend (first cause of action) or indemnify
21 (second cause of action) Court Services in connection with the Underlying Action, alleging
22 declaratory relief is proper since “[t]here exists a genuine and bona fide dispute, and an actual
23 controversy and disagreement between Maxum and Defendants about whether Maxum has a
24 duty to defend [or indemnify] Court Services in connection with the Underlying Action.” FAC
25 ¶¶ 35, 40.

26 ///

1 A certificate of service, filed December 14, 2011, demonstrates that the summons and
2 complaint were served on Eric Scott Kindley, a person authorized to accept service of process
3 for defendant, by leaving the first amended complaint and summons with “UPS Store Clerk Jane
4 Doe,” the person in charge of the UPS office at 1169 South Main Street, #295, Manteca,
5 California on December 9, 2011, and by thereafter mailing the documents to Kindley on
6 December 9 via First Class mail, postage prepaid. Dckt. No. 13. On February 14, 2012,
7 pursuant to Maxum’s request, the Clerk of Court entered defendant’s default. Dckt. Nos. 15, 17.
8 On April 2, 2012, Maxum moved for default judgment against defendant, Dckt. No. 19, and mail
9 served a copy of the motion on defendant, Dckt. No. 19-12. Defendant has not filed any
10 opposition to the motion and, as noted above, failed to appear at the May 23, 2012 hearing on the
11 motion.

12 II. DISCUSSION

13 A. Standards

14 It is within the sound discretion of the district court to grant or deny an application for
15 default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this
16 determination, the court considers the following factors:

17 (1) the possibility of prejudice to the plaintiff, (2) the merits of
18 plaintiff’s substantive claim, (3) the sufficiency of the complaint,
19 (4) the sum of money at stake in the action, (5) the possibility of a
20 dispute concerning the material facts, (6) whether the default was
due to excusable neglect, and (7) the strong policy underlying the
Federal Rules of Civil Procedure favoring decisions on the merits.

21 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). “In applying this discretionary
22 standard, default judgments are more often granted than denied.” *Philip Morris USA, Inc. v.*
23 *Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003) (quoting *PepsiCo, Inc. v.*
24 *Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999)).

25 As a general rule, once default is entered, the factual allegations of the complaint are
26 taken as true, except for those allegations relating to damages. *TeleVideo Systems, Inc. v.*

1 *Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (citations omitted). However, although well-
2 pleaded allegations in the complaint are admitted by defendant’s failure to respond, “necessary
3 facts *not* contained in the pleadings, and claims which are *legally insufficient*, are *not* established
4 by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

5 B. Entitlement to Default Judgment

6 Here, the court finds that the majority of the *Eitel* factors weigh in favor of granting
7 Maxum’s motion for default judgment and that Maxum be granted a declaration that it has no
8 duty to defend or indemnify Court Services in the Underlying Action.

9 1. Possibility of Prejudice to Maxum

10 The first *Eitel* factor considers whether Maxum would suffer prejudice if default
11 judgment is not entered, and such potential prejudice to Maxum militates in favor of entering
12 default judgment. *See PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. Here, Maxum would potentially
13 face prejudice if the court did not enter default judgment because absent entry of default
14 judgment, Maxum would be without another recourse for recovery and could be forced to
15 continue its defense of Court Services in the Underlying Action. Accordingly, the first *Eitel*
16 factor favors the entry of default judgment.

17 2/3. Merits of Maxum’s Substantive Claim/Sufficiency of the Complaint

18 The second and third factors also favor the entry of default judgment. As a general rule,
19 once default is entered, the factual allegations of the complaint are taken as true, except for those
20 allegations relating to the damages. *TeleVideo Systems, Inc.*, 826 F.2d at 917-18. Here,
21 Maxum’s first amended complaint and evidence in support of its default judgment motion
22 establish that Maxum is entitled to the declaratory relief it seeks. For declaratory relief, there
23 must be ““a substantial controversy, between the parties having adverse legal interests, of
24 sufficient immediacy and reality to warrant issuance of a declaratory judgment.”” *Spokane*
25 *Indian Tribe v. United States*, 972 F.2d 1090, 1092 (9th Cir. 1992) (quoting *Maryland Casualty*
26 *Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)); 28 U.S.C. § 2201(a) (“In a case of

1 actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of
2 an appropriate pleading, may declare the rights and other legal relations of any interested party
3 seeking such declaration, whether or not further relief is or could be sought.”); 28 U.S.C. § 2202
4 (“[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted,
5 after reasonable notice and hearing, against any adverse party whose rights have been
6 determined by such judgment.”); *see also Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal.
7 App. 3d 405, 410 (1989) (Pursuant to California law, a complaint for declaratory relief must
8 demonstrate the following: (1) a proper subject of declaratory relief and (2) an actual controversy
9 involving justiciable questions relating to the rights or obligations of a party); Cal. Civ. Proc.
10 Code § 1060 (“Any person interested under a written instrument, excluding a will or a trust, or
11 under a contract, or who desires a declaration of his or her rights or duties with respect to another
12 . . . may, in cases of actual controversy relating to the legal rights and duties of the respective
13 parties, bring an original action or cross-complaint in the superior court for a declaration of his
14 or her rights and duties . . . [regarding] any question of construction or validity arising under the
15 instrument or contract.”).

16 Here, taking plaintiff’s allegations as true, plaintiff is entitled to a declaration that it does
17 not have a duty to defend or indemnify Court Services under the Maxum Policy in connection
18 with the Underlying Action. Although the Maxum Policy provides coverage for “property
19 damage” and “bodily injury” caused by an “occurrence,” and certain “personal and advertising
20 injury” enumerated offenses, including false imprisonment, (a) the Underlying Action does not
21 seek damages arising out of “property damage”; (b) the Underlying Action does not seek
22 damages arising out of any “bodily injury” caused by an “occurrence” (defined as “an
23 accident”), because Mays’ claims for bodily injury in the Underlying Action arise out of an
24 intentional assault and rape; (c) any potential for “bodily injury” coverage under the Maxum
25 Policy for the Underlying Action is eliminated by the Policy’s “Designated Work” and
26 “Designated Ongoing Operations” exclusions, which eliminate the potential for coverage of

1 ongoing and completed operations arising out of prisoner transportation services; and (d) any
2 potential for “personal and advertising injury” coverage under the Maxum Policy is limited by
3 the “Assault and Battery Coverage Sublimit,” which provides \$25,000 per claim and \$50,000
4 aggregate limits for claims “caused by” (1) “assault and battery committed by any person,” (2)
5 “[t]he failure to suppress or prevent assault and battery by any person,” (3) “[t]he failure to
6 provide an environment safe from assault and battery ...,” or (4) “[t]he negligent hiring,
7 supervision, or training of any person.” *See generally* FAC; *see also* DeJesso Decl., Dckt. No.
8 19-1, ¶ 4, Ex. A (Maxum Policy). As of the time Maxum filed the first amended complaint
9 herein, Maxum had “paid more than \$59,000 in defense fees, costs, and expenses on behalf of
10 Court Services in connection with the Underlying Action.” FAC ¶ 24. As of March 2012,
11 Maxum had paid more than \$95,000 in defense fees, costs, and expenses on behalf of Court
12 Services in connection with the Underlying Action. DeJesso Decl. ¶ 11.

13 Accordingly, the second and third *Eitel* factors favor the entry of default judgment.

14 4. Sum of Money at Stake

15 Under the fourth factor cited in *Eitel*, “the court must consider the amount of money at
16 stake in relation to the seriousness of Defendant’s conduct.” *PepsiCo, Inc.*, 238 F. Supp. 2d at
17 1177; *see also Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 500 (C.D. Cal.
18 2003). Here, the sum of money at stake does not clearly weigh for or against granting the
19 motion. Although Maxum is not seeking monetary damages herein (suggesting this factor
20 weighs in Maxum’s favor), a declaration that Maxum does not need to indemnify or defend
21 Court Services could have a significant monetary impact on Court Services.

22 5. Possibility of a Dispute Concerning the Material Facts

23 The fifth factor also weighs in favor of granting Maxum’s motion for default judgment.
24 The facts of this case are relatively straightforward, and Maxum has provided the court with
25 well-pleaded allegations supporting its claims. Here, the court may assume the truth of
26 well-pleaded facts in the complaint following the clerk’s entry of default and, thus, there is a

1 very low likelihood that any genuine issue of material fact exists. *See, e.g., Elektra Entm't*
2 *Group Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal.2005) (“Because all allegations in a
3 well-pleaded complaint are taken as true after the court clerk enters default judgment, there is no
4 likelihood that any genuine issue of material fact exists.”); *accord Philip Morris USA, Inc.*, 219
5 F.R.D. at 500; *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177.

6 6. Whether the Default Was Due to Excusable Neglect

7 The sixth factor also weighs in Maxum’s favor. Court Services did not respond to
8 Maxum’s complaint, even though Maxum agreed to an extension of Court Services’ time to
9 answer so that it could obtain counsel, and delayed an additional week in seeking Court
10 Services’ default. Court Services still has not appeared in this action or responded to the motion
11 for default judgment, despite receiving notice of it. Thus, the record suggests that Court Services
12 has chosen not to defend itself in this action, and not that the default resulted from any excusable
13 neglect. *See Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal.
14 2001) (finding no excusable neglect because the defendants were properly served with the
15 complaint, the notice of entry of default, and the papers in support of the motion for default
16 judgment).

17 7. Policy Favoring Decisions on the Merits

18 Finally, the seventh *Eitel* factor weighs against granting the motion for default judgment.
19 The strong policy underlying the Federal Rules of Civil Procedure favors decisions on the
20 merits. *Eitel*, 782 F.2d at 1472. However, district courts have concluded with regularity that this
21 policy, standing alone, is not dispositive, especially where a defendant fails to appear or defend
22 itself in an action. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177; *see Craigslist, Inc. v. Naturemarket,*
23 *Inc.*, 2010 WL 807446, at *16 (N.D. Cal. Mar. 5, 2010); *ACS Recovery Servs., Inc. v. Kaplan,*
24 *2010 WL 144816*, at *7 (N.D. Cal. Jan.11, 2010); *Hartung v. J.D. Byrider, Inc.*, 2009 WL
25 1876690, at *5 (E.D. Cal. June 26, 2009). Accordingly, although there is a strong policy
26 favoring decisions on the merits, that policy does not by itself preclude entry of default

1 judgment.

2 Therefore, because the *Eitel* factors weigh in favor of granting default judgment to
3 Maxum, the undersigned will recommend granting Maxum's motion.¹

4 III. CONCLUSION

5 Based on the foregoing findings, IT IS HEREBY RECOMMENDED that:

- 6 1. Maxum's motion for default judgment, Dckt. No. 19, be granted; and
7 2. Maxum be awarded a declaration stating that it has no duty to defend or indemnify
8 Court Services, Inc. in the Underlying Action entitled *Mays v. Board of County Commissioners*,
9 Case No. 1:09-cv-00662-WJ-KBM (D.N.M.).

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
15 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
16 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: June 8, 2012.

18 
19 EDMUND F. BRENNAN
20 UNITED STATES MAGISTRATE JUDGE

21
22
23
24
25 _____
26 ¹ At the hearing on Maxum's motion, Maxum's counsel indicated that Maxum is not seeking to recover its costs in this action.