

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
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

F.G. CROSTHWAITE, et al.,

Plaintiffs,

v.

APOSHIAN EXCAVATING
COMPANY, INC.,

Defendant.

Case No. 13-cv-00363-TEH

**ORDER DENYING DEFENDANT’S
MOTION TO SET ASIDE DEFAULT
AND REFERRING MOTION FOR
DEFAULT JUDGMENT TO
MAGISTRATE JUDGE FOR
REPORT AND
RECOMMENDATION**

This matter came before the Court on March 31, 2014, on the motion of Defendant Aposhian Excavating Company, Inc. (“Defendant”) to set aside entry of default. Plaintiffs had previously moved for entry of default judgment, which the Court took under submission pending resolution of the instant motion. In light of the written and oral arguments made by the parties, the Court DENIES Defendant’s motion to set aside default, and REFERS the pending motion for entry of default judgment to a Magistrate Judge for a Report and Recommendation.

BACKGROUND

Plaintiffs – which are various employee benefit plans as defined by the Employee Retirement Income Security Act of 1974 (“ERISA”) § 3(3), 29 U.S.C. § 1002(3), and the Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO, *see generally* Complaint ¶¶ 1-2 – entered into a collective bargaining agreement with Defendant, a construction company that employed workers and paid for their fringe benefits through the plans. *Id.* ¶¶ 10-11. On January 25, 2013, Plaintiffs filed a complaint pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A), alleging that Defendant violated the collective bargaining agreement by failing to make regular and timely contributions to the plans; Plaintiffs sought, *inter alia*, payment of the delinquent

1 contributions, liquidated damages and attorneys’ fees and costs, as provided for in the
2 collective bargaining agreement. *Id.* at Prayer ¶ 2. As early as October 25, 2012, Plaintiffs
3 demanded payment of delinquent fringe benefit contributions owed for work performed by
4 Defendant’s employees for certain months in 2011 and 2012. Jan. 13, 2014 Nanda Decl. ¶
5 3, Docket No. 38. Plaintiffs filed suit when they were unable to collect payments from or
6 otherwise negotiate an agreement with Defendant based on conversations with Defendant’s
7 President, David Aposhian (“Aposhian”). *See id.* ¶¶ 3-12. In contrast, Aposhian claims
8 that Plaintiffs did not negotiate in good faith, would increase the figures of previously
9 agreed upon oral settlements by 30% to 50% in follow-up written correspondence, and
10 generally demanded growing attorneys’ fees. Mar. 12, 2014 Aposhian Decl. ¶ 2, Docket
11 No. 50-1.

12 After filing suit on January 25, 2013, Plaintiffs engaged in numerous attempts to
13 serve Defendant with the Summons and Complaint, and to reach a settlement. These
14 attempts failed. The Court details this history because it is relevant to whether good cause
15 exists to set aside default. On February 4, 2013, a paralegal for Plaintiffs’ counsel emailed
16 and mailed Aposhian a combined Notice and Acknowledgment of the Summons and
17 Complaint and Judgment Pursuant to Stipulation setting forth a payment plan. Jan. 13,
18 2014 Nanda Decl. ¶ 17 & Ex. N. Aposhian indicated that he would agree to acknowledge
19 service of the Summons and Complaint, and sign the Stipulation on behalf of Defendant,
20 and as an individual guarantor, but he did not do so. *Id.* ¶¶ 18-19. On February 20, 2013,
21 when Aposhian had not returned the signed documents, Plaintiffs’ counsel provided the
22 Summons, Complaint, related documents, and Stipulation to a process server with
23 instructions to serve the documents upon Defendant. *Id.* ¶ 20. On March 1, 2013,
24 Aposhian emailed Plaintiffs’ counsel’s paralegal and stated that he “received the papers
25 and will return them asap.” *Id.* ¶ 21 & Ex. Q. As discussed below, the process server was
26 unable to find and serve Defendant, so Aposhian presumably received the documents by
27 different means, such as from the emails Plaintiffs’ counsel sent. On March 14, 2013,
28 Aposhian emailed Plaintiffs’ counsel’s paralegal stating that he had called and emailed

1 Plaintiffs' counsel with questions about the payment plan but she refused to respond; he
2 also stated that his attorney was reviewing the Stipulation, and as soon as he was finished
3 reviewing, Aposhian would be in touch. *Id.* ¶ 23 & Ex. R. Plaintiffs never received the
4 signed Stipulation from Aposhian, and he refused to formally acknowledge receipt of the
5 Summons and Complaint. *Id.* ¶ 24.

6 Meanwhile, the process server made seven attempts to serve Defendant at the
7 address of record listed on the Utah Secretary of State website, but without success. *Id.* ¶
8 25 & Ex. S. Plaintiffs then retained a private investigator to locate and personally serve
9 Defendant. The investigator advised Plaintiffs' counsel that the address of record for
10 Defendant designated with the Utah Secretary of State for service of process was not
11 accurate, as Aposhian had relocated from that address some time ago. Plaintiffs'
12 investigator identified several other potential addresses for Defendant, but was unable to
13 confirm the addresses or otherwise locate Defendant. *Id.* ¶¶ 26-27. Plaintiffs' counsel
14 avers that she then asked the Union representative in that area to try to find an address for
15 Aposhian, but the representative too was unsuccessful. Mar. 5, 2014 Stafford Decl.
16 ¶ 9, Docket No. 48-3. On June 4, 2013, Plaintiffs moved for permission to serve
17 Defendant by publication. Docket Nos. 15-17. The Court denied this motion because it
18 was unclear at that time whether the proposed newspaper was one of "general circulation,"
19 as required by the Utah statute governing service by publication. Docket No. 18.
20 Plaintiffs' counsel avers that she told Aposhian that Plaintiffs would seek to serve him by
21 publication, and that this "upset and concerned" him, but that he still "would not accept
22 service." Mar. 5, 2014 Stafford Decl. ¶ 9.

23 In mid-July, 2013, Plaintiffs' attorneys spoke with Aposhian by telephone in an
24 attempt to resolve the matter and to obtain his address. *Id.* ¶ 10. Plaintiffs' counsel avers
25 that she "asked him repeatedly during [the] conversation to provide his address, and he
26 repeatedly ignored [her] and/or changed the subject," and opines that "[t]here was no doubt
27 in [her] mind that he was intentionally avoiding service, although again, he had advised
28 that he would accept." *Id.* She avers that Aposhian then gave her an address in Heber,

1 Utah, for an office building for 3 different businesses, one of which was his wife's, and
2 said that "the receptionist could get mail for him" and "accept mail," although Aposhian
3 "refused to agree that the receptionist could accept service for Defendant." *Id.* Plaintiffs
4 did not attempt to serve Defendant here because, according to Plaintiffs' counsel, "there
5 was no way that [she] was going to allow improper and/or questionable service of
6 process." *Id.* Aposhian contests this account. He avers that he "told Plaintiffs' attorneys
7 [he] could be served with the Summons and Complaint at [the Heber City address] where a
8 receptionist is available Monday through Friday, 9:00 a.m. to 5:00 p.m.," but neither he nor
9 the receptionist were ever served there. Feb. 19, 2014 Aposhian Decl. ¶ 2, Docket No. 42-
10 1. He further avers that "[w]hen [he] gave Plaintiffs' counsel the address of [his] office in
11 Heber City, Utah as a location where [he] could receive the Summons and Complaint, [he]
12 informed them that the receptionist there worked for both [his] wife and [him], not just
13 [his] wife." Mar. 12, 2014 Aposhian Decl. ¶ 4, Docket No. 50-1.

14 On August 27, 2013, Plaintiffs again moved for service by publication. Docket
15 Nos. 21-23. The Court granted the motion and authorized service by publication on
16 September 6, 2013. Docket No. 25. Pursuant to the Court's order, Plaintiffs published the
17 summons in the Salt Lake Tribune, a newspaper of general circulation published in the
18 State of Utah, once a week for four weeks beginning on September 13, 2013, with the final
19 publication on October 4, 2013. Docket No. 26.

20 Aposhian wrote a letter to the Court, dated October 20, 2013, stating that he was in
21 the process of paying Plaintiffs, had made a "good faith" payment of \$12,883.91, and was
22 looking to secure local counsel, and asked the Court to "give [him] time to secure local
23 counsel to defend [him] before granting a judgment against [his company]." Docket No.
24 31 (filed Oct. 30, 2013). On October 31, 2013, Plaintiffs moved for entry of default,
25 Docket No. 30, which the Clerk granted on November 5, 2013. Docket No. 32.

26 Notwithstanding Aposhian's letter to the Court, Defendant thereafter failed to file
27 an answer, enter the appearance of an attorney, move to set aside default, or otherwise
28 make any contact with the Court for the next three-and-a-half months. On January 13,

1 2014, Plaintiffs moved for entry of default judgment. Docket No. 36. Defendant did not
2 timely oppose the motion. However, five days before the February 24, 2014 hearing on
3 the motion for default judgment, Defendant filed the instant motion to set aside default,
4 Docket No. 42, and filed an untimely opposition to the pending motion for default
5 judgment. Docket No. 44. At the February 24, 2014 hearing, the Court took the motion
6 for default judgment under submission pending resolution of the instant motion to set aside
7 default.

8 9 **LEGAL STANDARD**

10 When a party against whom a judgment for affirmative relief is sought has failed to
11 plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk
12 must enter the party's default. Fed. R. Civ. P. 55 (a).¹ In determining whether to set aside
13 default for good cause under Rule 55(c), the court must consider three factors: (1) whether
14 the party seeking to set aside the default engaged in culpable conduct that led to the
15 default; (2) whether it had no meritorious defense; or (3) whether setting aside the default
16 would prejudice the other party. *United States v. Signed Pers. Check No. 730 of Yubran S.*
17 *Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010). "This standard, which is the same as is used
18 to determine whether a default judgment should be set aside under Rule 60(b), is
19 disjunctive, such that a finding that any one of these factors is true is sufficient reason for
20 the district court to refuse to set aside the default." *Id.* Importantly, "judgment by default
21 is a drastic step appropriate only in extreme circumstances; a case should, whenever
22 possible, be decided on the merits." *Id.* at 1091.

23 24 **DISCUSSION**

25 **A. Entry of Default Was Procedurally Proper.**

26 As a preliminary matter, Defendant raises several procedural challenges to the
27

28

¹ All references to "Rule" hereinafter refer to the Federal Rules of Civil Procedure.

1 Clerk’s entry of default under Rule 55(a), none of which have merit.

2 **1. Service of Process.**

3 Defendant argues that the default is void due to a defect in service of process. Mot.
4 at 3, Docket No. 42-6. A default or default judgment can be rendered void by failure to
5 properly serve a defaulting defendant. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851
6 (9th Cir. 1992). Defendant, as the party moving to set aside default on the basis of
7 improper service, bears the burden to prove that he is entitled to relief. *Cf. E.C. v. Internet*
8 *Solutions for Bus. Inc.*, 509 F.3d 1161, 1166 (9th Cir. 2007) (burden on defendant moving
9 to vacate default judgment). The Court finds that service by publication was proper here.

10 Rule 4(h) governs service of process on corporations. It provides that a corporation
11 may be served, *inter alia*, pursuant to the law of the state where the district court is located
12 – here, California – or where service is to be made – here, Utah. *See* Fed. R. Civ. P.
13 4(h)(1)(A) (referring to service under Rule 4(e)(1), which provides for service pursuant to
14 state law). California law provides that a summons may be served by publication if, upon
15 affidavit, a court is satisfied “the party to be served cannot with reasonable diligence be
16 served in another manner specified” by statute. Cal. Civ. Proc. Code § 415.50. Utah law
17 provides for service by publication on several grounds, including where, upon affidavit,
18 “the identity or whereabouts of the person to be served are unknown and cannot be
19 ascertained through reasonable diligence.” Utah R. Civ. P. 4(d)(4)(A). Here, Plaintiffs
20 moved to serve Defendant by publication under both California and Utah law. Docket No.
21 22. Plaintiffs’ counsel averred in the declaration in support of the motion to serve by
22 publication that: Aposhian, as President of Defendant, had received via email the Notice
23 and Acknowledgment of Receipt of the Summons and Complaint, and a draft stipulated
24 settlement, but had refused to acknowledge service of process; the process server hired by
25 Plaintiffs to serve Defendant at the address designated by the Utah Secretary of State for
26 service of process tried unsuccessfully to serve Defendant seven times; Plaintiffs hired a
27 private investigator who advised that the address provided for Defendant was no longer
28 accurate, and could not confirm any other potential addresses for Aposhian; Plaintiffs’

1 counsel, in fact, spoke to Aposhian as late as August 13, 2013, advising him that Plaintiffs
2 would seek permission from the Court to serve by publication; and Plaintiffs' counsel
3 again sent him a Notice and Acknowledgment of Receipt of the Summons and Complaint
4 via email, but he neither responded nor executed the Notice and Acknowledgment of
5 Receipt. Aug. 27, 2013 Nanda Decl., ¶¶ 3-7, 11, Docket No. 23. In light of this evidence,
6 the Court found on September 6, 2013, that Defendant could not be served with reasonable
7 diligence in any other manner set forth under the Federal Rules of Civil Procedure,
8 California Code of Civil Procedure sections 415.10 through 415.30, or Utah Rules of Civil
9 Procedure 4(d)(1) or 4(d)(2), and authorized service by publication. Docket No. 25.

10 Defendant now argues that Plaintiffs did not exercise reasonable diligence in
11 attempting to serve or locate him because he told Plaintiffs' counsel that he could be
12 served with the Summons and Complaint at an office in Heber City, Utah via a receptionist
13 who worked for him and his wife, and that Plaintiffs never availed themselves of this
14 opportunity to properly serve him there before resorting to service by publication. Feb. 19,
15 2014 Aposhian Decl. ¶ 2; Mar. 12, 2014 Aposhian Decl. ¶ 4. Plaintiffs' counsel avers that
16 although Aposhian agreed that the receptionist could "accept mail" for him, he refused to
17 agree that the receptionist could accept service on behalf of Defendant, and thus Plaintiffs
18 did not serve him there due to concerns about defects in such service of process. Mar. 5,
19 2014 Stafford Decl. ¶ 10. Resolution of this factual dispute, however, is unnecessary
20 because the Court finds that service by publication, which the Court approved, was
21 ultimately proper.

22 In addition to a showing of "reasonable diligence," Utah law specifically allows
23 service by publication "where there exists good cause to believe that the person to be
24 served is avoiding service of process." Utah R. Civ. P. 4(d)(4)(A). In light of what
25 appears to have been multiple refusals to sign the Notice of Acknowledgment and Receipt
26 of the Summons and Complaint between the filing of the lawsuit in January 2013, and as
27 late as August 2013, the Court finds that service by publication would have also been
28 proper on the basis that Aposhian evaded service of process. Thus, that Plaintiffs may

1 have been able to serve Defendant via other theoretical means does not defeat the validity
2 of Plaintiffs’ service by publication here. This conclusion is strengthened by the absence
3 of concern “that service by publication rarely results in actual notice,” *Watts v. Crawford*,
4 10 Cal. 4th 743, 749, n.5 (1995), because Aposhian was well-aware of the existence of the
5 lawsuit. *Cf. Internet Solutions for Bus. Inc.*, 509 F.3d at 1166 n.6 (observing relevance of
6 defaulting defendant’s acknowledgment that he knew the suit had been filed). Plaintiffs’
7 counsel exchanged emails with Aposhian that discuss the filed lawsuit and request his
8 signature of the Acknowledgment and Receipt of the Summons and Complaint. *See, e.g.*,
9 Jan. 13, 2014 Nanda Decl. Ex. N (Feb. 4, 2013 email enclosing letter from Plaintiffs’
10 counsel to Aposhian attaching Notice and Acknowledgement of Summons and
11 Complaint); *see also id.* ¶¶ 17-19, 21 & Ex. R (Aposhian writing in response to Feb. 4,
12 2013 email: “I received the papers and will return them ASAP” and “my attorney is
13 reviewing” the payment plan included with the papers). Moreover, Aposhian included the
14 case number for the instant action in his October 20, 2013 letter to this Court, further
15 indicating that he had actual notice of the lawsuit.² Docket No. 31. Defendant has failed to
16 meet its burden to show a defect in service of process. Accordingly, as service by
17 publication was proper, the default entered by the Clerk is not void.

18
19
20 ² Defendant’s citation to *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), for
21 the proposition that service by publication is insufficient where a defendant’s location is
22 known is inapposite. In that case, the Court held that notice by publication and posting of
23 an intended tax sale of property did not satisfy the requirements of the Due Process Clause,
24 because it could not “be expected to lead to actual notice to the mortgagee” on the basis
25 that such notices are meant to attract prospective purchasers and mortgagees are unlikely
26 to make “special efforts to keep abreast of such notices.” *Id.* at 799. Accordingly, the
27 Court held that “[n]otice by mail or other means as certain to ensure actual notice is a
28 minimum constitutional precondition to a proceeding which will adversely affect the
liberty or property interests of any party, whether unlettered or well versed in commercial
practice, if its name and address are reasonably ascertainable.” *Id.* at 800. *Mennonite* did
not hold that in all circumstances service by publication can be defeated by the theoretical
existence of a reasonably ascertainable address, especially where circumstances indicate
that a defendant has evaded service of process. Here, service by publication was proper
under Utah law, Defendant had actual notice of the existence of the suit, and thus the
possibility that he may have been served at an alternative address does not defeat the
Court-approved service by publication.

1 **2. Response Indicating Intent to Defend Prior to Entry of Default.**

2 The Court finds unpersuasive Defendant’s argument that the Clerk improperly
3 entered default because Aposhian’s October 20, 2013 letter to the Court constitutes a
4 pleading or otherwise shows an intention to defend the action. Under Rule 55(a) of the
5 Federal Rules of Civil Procedure, the clerk must enter a party’s default when shown by
6 affidavit that the defaulting party has “failed to plead or otherwise defend” against the
7 action. Fed. R. Civ. P. 55(a). Defendant directs the Court to authority interpreting Rule
8 55(b)(1) – governing entry of default judgment against a party who has failed to appear –
9 for the proposition that courts generally find that “an appearance in an action ‘involves
10 some presentation or submission to the court’ . . . [b]ut because judgments by default are
11 disfavored, ‘a court usually will try to find that there has been an appearance by
12 defendant.’” *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840
13 F.2d 685, 689 (9th Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice
14 & Procedure § 2683, at 415, 430 (2d ed. 1983)). While judgments by default are
15 disfavored, the practice of liberally interpreting an appearance or finding an intent to
16 defend is not without limitation. For example, in *Wilson v. Moore and Associates, Inc.*,
17 564 F.2d 366, 369 (9th Cir. 1977), the court held that the president of corporation’s
18 informal letter to plaintiff’s counsel (a copy of which was sent to the clerk of the district
19 court) was not the equivalent of a formal court appearance where the plaintiff provided
20 actual, unqualified notice that a delay in answering the complaint would result in default.
21 *Id.* at 367. Similarly, in *Direct Mail Specialists*, the court held default judgment could not
22 be vacated on the basis that defendants “appeared” in the action. There, “settlement
23 negotiations” conducted before and on the day the summons was served, and an oblique
24 mention of referring the case to an attorney, did not demonstrate an appearance or “a clear
25 purpose to defend the suit.” 840 F.2d at 689 (citations omitted). These cases show that in
26 the context of attempting to void a default judgment, courts require more than a colorable
27 appearance and a mere inference of an intention to defend.

28 The Court rejects Defendant’s argument that the Clerk’s entry of default pursuant to

1 Rule 55(a) must be set aside based on Aposhian’s October 20, 2013 letter or retention of
 2 counsel three months after entry of default. First, “[c]orporations and other unincorporated
 3 associations must appear in court through an attorney.” *In re Am. W. Airlines*, 40 F.3d
 4 1058, 1059 (9th Cir. 1994) (citing *C.E. Pope Equity Trust v. United States*, 818 F.2d 696,
 5 697-98 (9th Cir. 1987)). As Aposhian is not an attorney, his letter cannot constitute a
 6 formal appearance or a pleading filed on behalf of Defendant Aposhian Excavating
 7 Company, Inc. Additionally, to the extent Defendant argues that his letter constitutes an
 8 appearance or a pleading, entry of default could have been rendered as a sanction because
 9 of Defendant’s failure to comply with Civil Local Rule 3-9(b), which requires that “a
 10 corporation, unincorporated association, partnership or other such entity may appear only
 11 through a member of the bar of this Court.” Civil L.R. 3-9(b); *see Employee Painter’*
 12 *Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993, 998 (9th Cir. 2007) (recognizing default as
 13 a permissible sanction for failure to comply with local rules requiring representation by
 14 counsel).

15 Second, Defendant nevertheless maintains that because the Clerk entered default six
 16 days after the letter was received without warning, it should now be set aside. The
 17 authorities³ cited by Defendant do not impose a requirement that the Court order
 18 Defendant to retain counsel before the Clerk enters default, or otherwise suggest that the
 19 Clerk violated Rule 55(a) by entering default, which the Clerk was required to do when it
 20 appeared, upon affidavit, that Defendant failed to plead or otherwise defend the suit.

21 Third, the October 20, 2013 letter – in light of the history of the case both before
 22 and after Aposhian sent it – does not evince a clear purpose to plead or otherwise defend
 23 the suit sufficient to void the Clerk’s default. Here, Aposhian had knowledge of the
 24 lawsuit as early as January, 2013. He did not retain an attorney, despite writing to
 25 Plaintiffs’ counsel that he was having his attorney review the Notice and Acknowledgment
 26 of the Summons and Complaint and Stipulated Settlement in March, 2013. Jan. 13, 2014

27
 28 ³ *See Employee Painter’ Trust*, 480 F.3d at 998 & *United States v. High Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993).

1 Nanda Decl. ¶¶ 21-23 & Ex. R. Defendant did not enter an appearance for counsel and
2 Aposhian did not answer the complaint or even sign the Acknowledgment of Receipt of
3 the Summons and Complaint, despite clearly having possession of it. The Court is
4 unaware of any evidence in the record whereby Defendant communicated a clear intention
5 to defend itself in the lawsuit prior to October, 2013. While Aposhian wrote to the Court
6 on October 20, 2013, and asked the Court to “give [him] time to secure local counsel to
7 defend [him] before granting a judgment against [his company],” Docket No. 31,
8 Defendant then failed to enter an appearance of counsel or otherwise defend the suit over
9 the next three months. Thus, given this inaction both before and after Aposhian sent the
10 letter, the Court cannot infer a clear purpose by Defendant to defend the suit. *Cf. Direct*
11 *Mail Specialists*, 840 F.2d at 689. Accordingly, the Court finds that the Clerk’s entry of
12 default was not procedurally defective in this regard.

13 **3. Complaint Seeking Amount in Excess of That Demanded in Pleadings.**

14 Defendant argues that entry of default was improper because Plaintiffs seek
15 damages in excess of the amount pleaded in the complaint. The authorities cited by the
16 parties, however, pertain to Rule 54(c), which provides that a “*default judgment* must not
17 differ in kind from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ.
18 P. 54(c) (emphasis added). At issue here is whether the Clerk properly entered default
19 pursuant to Rule 55(a). Rule 55(a) requires that the clerk enter the party’s default “[w]hen
20 a party against whom a judgment for affirmative relief is sought has failed to plead or
21 otherwise defend, and that failure is shown by affidavit or otherwise.” Defendant argues
22 that because Plaintiffs in their Complaint do not list the actual amount of contributions,
23 liquidated damages, and attorneys’ fees and costs sought, it “would be manifestly unfair if
24 the court were then to award relief not previously specified – relief that, perforce, could
25 not have been included in the defendant’s decisional calculus.” *Hooper-Haas v. Ziegler*
26 *Holdings, LLC*, 690 F.3d 34, 40 (1st Cir. 2012). However, the Court notes that in the
27 context of default judgment motions, “[c]ourts have awarded damages not specifically
28 mentioned in complaints in ERISA cases where the defaulting defendants were on notice

1 of the post-complaint amounts sought.” *Bd. of Trustees v. Tim Kruse Constr., Inc.*, No. C
2 12-05322 JSW, 2013 WL 5487368, at *3 (N.D. Cal. Oct. 2, 2013) (collecting cases).⁴
3 Even though Rule 55(b)(1) is not squarely before the Court here, the complaint indicates
4 that Defendant owed “a sum that can be made certain by computation,” based on the
5 collective bargaining agreement and records of payments, which undermines Defendant’s
6 argument. Moreover, consistent with *Tim Kruse Construction*, Plaintiffs submitted
7 evidence that indicates multiple communications with Aposhian that apprised Defendant of
8 the amounts owed. Thus, on Defendant’s motion to set aside default, there is no indication
9 that the Clerk’s entry of default with respect to this issue was procedurally improper. To
10 the extent Defendant argues that there is a factual dispute about the amounts owed,
11 Defendant may raise those arguments in the context of the motion for default judgment,
12 discussed below.

13
14 **B. Defendant’s Culpable Conduct Led to Entry of Default.**

15 The Court declines to exercise its discretion to vacate the default entered against
16 Defendant because the record reflects culpable conduct by Aposhian, Defendant’s
17 President, leading to entry of default. *Brandt v. Am. Bankers Ins. Co. of Florida*, 653 F.3d
18 1108, 1110 (9th Cir. 2011). “[A] defendant’s conduct is culpable if he has received actual
19 or constructive notice of the filing of the action and *intentionally* failed to answer.”
20 *Yubran S. Mesle*, 615 F.3d at 1092 (citing *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d
21 691, 697 (9th Cir. 2001) (emphasis in *TCI Group*)). As the Ninth Circuit explained:

22 in this context the term “intentionally” means that a movant
23 cannot be treated as culpable simply for having made a
24 conscious choice not to answer; rather, to treat a failure to
25 answer as culpable, the movant must have acted with bad faith,
26 such as an “intention to take advantage of the opposing party,
interfere with judicial decisionmaking, or otherwise manipulate
the legal process.” We have “typically held that a defendant’s
conduct was culpable for purposes of the [good cause] factors

27
28 ⁴ Defendant’s attempt to distinguish *Tim Kruse Construction* on the basis that the
defendant there had been properly served fails because, here, Plaintiffs properly served
Defendant by publication.

1 where there is no explanation of the default inconsistent with a
2 devious, deliberate, willful, or bad faith failure to respond.

3 *Id.* (citing *TCI Group*, 244 F.3d at 697-98).

4 First, Aposhian had actual notice of the filing of the action, as indicated from the
5 multiple email correspondences and phone calls between Plaintiffs' counsel and Aposhian.
6 Aposhian knew Plaintiffs filed suit against him as early as February 4, 2013, when a
7 paralegal for Plaintiffs' counsel emailed him a Notice and Acknowledgement of the
8 Summons and Complaint, and attached those and related documents. Jan. 13, 2014 Nanda
9 Decl. ¶ 17 & Ex. N. On March 1, 2013, Aposhian emailed Plaintiffs' counsel's paralegal
10 and stated that he "received the papers and will return them asap." *Id.* ¶ 21 & Ex. Q. He
11 failed to do so. On March 14, 2013, Aposhian emailed Plaintiffs' counsel and
12 acknowledged that his attorney was reviewing the Stipulation, which was part of a Notice
13 and Acknowledgement of the Summons and Complaint; this admission raises the question
14 of why he did not subsequently accept service or defend the action if he was in contact
15 with an attorney at this early procedural stage. *Id.* ¶ 23 & Ex. R.

16 Second, the Court finds that this conduct shows an intentional failure to answer.
17 Plaintiffs hired a process server, and when attempts to serve Defendant failed, resorted to
18 hiring a private investigator to track down a valid address. Aposhian had knowledge that
19 Plaintiffs were going to serve him via publication, and did not appear or otherwise defend
20 against the suit at that time. In fact, he only sent a letter to the Court after the Salt Lake
21 Tribune published and republished the summons over a four-week period. In fact, despite
22 Aposhian's October 20, 2013 letter to the Court – wherein he states for the first time that
23 he needed time to secure local counsel before a grant of default against his company – he
24 then waited over three additional months after default was entered before retaining
25 counsel. This long delay further supports the inference that this conduct was willful.
26 Lastly, Defendant moved to set aside default five days before the scheduled hearing on
27 Plaintiffs' motion for default judgment, which indicates that Defendant waited until the
28 last possible opportunity to take action and respond to the lawsuit.

Based on this record, the Court concludes that Defendant evaded service of process

1 and engaged in delay tactics over a nearly ten month period. These actions are consistent
2 with an “intention to take advantage of” Plaintiffs and “manipulate the legal process,” and
3 the Court finds that “there is no explanation of the default inconsistent with a . . .
4 deliberate, willful, or bad faith failure to respond.” *TCI Group*, 244 F.3d at 697-98.
5 Moreover, “were the Court to vacate the default against Defendant it would prejudice
6 Plaintiffs by encouraging a continued pattern of conduct that is a burden to Plaintiffs and
7 the Court and is contrary to the purposes of ERISA.” *Bd. of Trustees of the Bay Area*
8 *Roofers Health & Welfare Trust Fund v. Westech Roofing*, No. 12-CV-05655-JCS, 2014
9 WL 46633, at *2 (N.D. Cal. Jan. 6, 2014). Because of Defendant’s culpable conduct
10 leading to entry of default, the Court DENIES Defendant’s motion to set aside default
11 because he has failed to show good cause pursuant to Rule 55(c).

12
13 **C. The Court Refers Plaintiffs’ Motion for Default Judgment to a Magistrate**
14 **Judge for a Report and Recommendation.**

15 Presently before the Court is Plaintiffs’ motion for default judgment, filed on
16 January 13, 2014. Defendant, once he retained counsel, filed an untimely opposition
17 requesting a continuance of the hearing on the motion for default judgment and asserting
18 that factual disputes exist regarding the amount of contributions and liquidated damages
19 owed. Docket No. 44; *see also* Feb. 19, 2014 Aposhian Decl. ¶ 3(b) (presenting evidence
20 in support of his contention that his accounting of unpaid contributions and liquidated
21 damages is no more than \$7,424.60 versus Plaintiffs’ figure of \$21,670). The Court finds
22 that resolution of Plaintiffs’ motion for default judgment, and in particular any factual
23 findings with respect to the amount of money at stake and the possibility of a dispute
24 regarding material facts in this regard, is appropriate for adjudication by a Magistrate
25 Judge. Accordingly,

26 1) Pursuant to Civil Local Rule 72-1, all matters concerning Plaintiffs’ motion for
27 default judgment – including the amount of contributions, damages, reasonable attorneys’
28 fees and costs owed to Plaintiffs – are referred to a randomly assigned Magistrate Judge.

1 2) The Magistrate Judge shall supervise and issue findings and recommendations
2 regarding this referred motion for default judgment, and may make any order for
3 supplemental briefing or hold an evidentiary hearing on all matters connected thereto. The
4 Magistrate Judge shall file the findings and recommendations with the Clerk of Court and
5 serve a copy on the parties in this action.

6 3) Unless otherwise provided, within 14 days of the service of the findings and
7 recommendations, any party may serve and file objections thereto, together with notice
8 setting the objections for hearing before this Court. The objecting party shall note each
9 particular finding and recommendation to which an objection is made, shall note the legal
10 authority for the objection, and shall propose alternative findings or recommendations.

11 4) Unless otherwise provided, within 14 days of the service of the objections, any
12 party may serve and file a response thereto. Within 5 days of the service of the response,
13 the objecting party may file a reply thereto.

14 5) The memoranda and other papers filed in support of the objections, in opposition
15 thereto, and reply shall conform with Civil Local Rule 7.

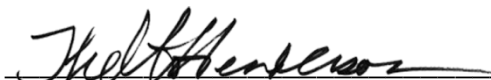
16 6) This Court's review of the findings and recommendations and objections thereto
17 will conform with Civil Local Rule 72-3.

18
19 **CONCLUSION**

20 For the foregoing reasons, Defendant's motion to set aside default is DENIED, and
21 Plaintiffs' motion for entry of default judgment is REFERRED to a Magistrate Judge.

22
23 **IT IS SO ORDERED.**

24
25 Dated: 04/10/14



THELTON E. HENDERSON
United States District Judge

26
27
28