

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

HONG-NGOC T. DAO,
Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY
OF BOSTON,
Defendant.

Case No. [14-cv-04749-SI](#)

**ORDER GRANTING DEFENDANT'S
MOTION TO SET ASIDE DEFAULT
AND DENYING PLAINTIFF'S
MOTIONS TO STRIKE**

Re: Dkt. Nos. 9, 13, 21

Defendant's motion to set aside the default and plaintiff's motion to strike are scheduled for a hearing on February 6, 2015. Pursuant to Civil Local Rule 7-1(b), the Court determines that these matters are appropriate for resolution without oral argument and VACATES the hearing. For the reasons set forth below, the Court GRANTS defendant's motion to set aside the default, DENIES plaintiff's motion to strike, and ORDERS Liberty to file its answer with the Court within three (3) days of this Order.

BACKGROUND

On October 26, 2014, plaintiff Hong-Ngoc T. Dao filed this lawsuit against defendant Liberty Life Assurance Company of Boston ("Liberty"). Plaintiff has a contract with Liberty for supplemental disability insurance. Compl. ¶ 13. The complaint alleges, among other things, that Liberty breached this contract by failing to conduct a thorough and fair review of plaintiff's medical condition following plaintiff's claim for long-term disability benefits, and by wrongfully refusing to pay the requested benefits. *Id.* ¶¶ 24-51, 72.

On October 1, 2014, plaintiff served a settlement demand and draft complaint on defendant. Decl. of Joseph Charles in Opp. to Def's Mot. ¶ 3 ("Charles Decl."). Liberty retained

1 its current counsel within the month. Decl. of Stacy Tucker in Supp. of Def's Mot. ¶ 4 ("Tucker
2 Decl."). On October 26, 2014, plaintiff filed her complaint with the Court. The complaint was
3 mailed on November 3, 2014, and delivered to defendant's corporate offices four days later.
4 Charles Decl. ¶ 10. Because service was made by mail pursuant Rules 4(h) and 4(e)(1) of the
5 Federal Rules of Civil Procedure, defendant was required to answer the complaint by December 4,
6 2014.

7 Though defendant received the complaint on November 7, 2014, it was routed to various
8 Liberty offices over the next two weeks before being sent to CSC, defendant's agent for service of
9 process. *See* Tucker Decl. Exs. A, B. When defendant's counsel finally received the complaint on
10 December 1, 2014, it bore a cover sheet from CSC stating that the complaint had been served on
11 CSC on November 24, 2014. *Id.* ¶¶ 4-5, Exs. A, B. Defendant's counsel states "I have represented
12 Liberty Life in many other cases and have represented other clients whose registered agent for
13 service is CSC Corporation. Based on my experience, all complaints that CSC processes as a
14 registered agent include this cover page and I routinely review and rely on the accuracy of the
15 information on these cover sheets as to the date and type of service. I have never seen a CSC cover
16 sheet with inaccurate information until this action." *Id.* ¶ 6. Defense counsel states that she did
17 not carefully review the attached summons and complaint to confirm the CSC cover sheet
18 information was accurate because she had recently reviewed the draft copy of the complaint. *Id.*
19 Instead, she incorrectly assumed that the answer would be due on December 15, twenty-one days
20 after the date listed on the CSC cover sheet. *See id.*

21 Plaintiff filed a motion for entry of default on December 5, 2014. Dkt. No. 7. The same
22 day, defendant's counsel learned of plaintiff's motion through an Electronic Case Filing (ECF)
23 notification. Tucker Decl. ¶ 7.¹ It is undisputed that on December 5, 2014, defense counsel called
24 plaintiff's counsel, Joseph Charles, and left him a voice message stating that she was confused by
25 plaintiff's motion for entry of default because defendant understood that its answer was due on
26

27 ¹ Defendant's counsel states, "As my firm had been retained to represent Liberty Life in this
28 matter, once we knew of service, our calendaring clerk set up an electronic notification even
though Liberty Life had not yet appeared." *Id.*

1 December 15, 2014, based on a November 24, 2014 service date. *Id.* ¶ 9; Charles Decl. ¶ 14. The
2 Clerk entered default on December 8, 2014. Dkt. 8. Counsel spoke on the phone on December 8,
3 2014, and during that phone call plaintiff's counsel refused to grant defendant an extension of time
4 to file an answer. Charles Decl. ¶ 18. On December 9, 2014, defense counsel left Mr. Charles
5 another voice message asking whether plaintiff's counsel was aware of the Northern District's
6 recently adopted Guidelines for Professional Conduct, and asking whether counsel would stipulate
7 to reopening the case to avoid the need for defendant to file a motion to set aside the default. *Id.*
8 ¶ 22. Plaintiff's counsel states that he returned the phone call the next day and left a message
9 stating the following:

10 I explained that Plaintiff could not agree to release Defendant from
11 its default because Plaintiff had yet to hear any compelling
12 explanation of excusable neglect offered by Defendant. I explained
13 to Ms. Tucker that, yes, we had read the Guidelines of Professional
14 Conduct several times and were confident that Plaintiff had
15 complied with the Guidelines in all respects. Finally, I explained
16 that Guideline 15, in our opinion, related to the seeking of a default
17 "judgment or other substantive order" and not to a request for entry
18 of default and as such, Guideline 15 did not "require" Plaintiff to
19 contact Defendant prior to seeking entry of default. I further
20 informed Ms. Tucker that, in compliance with Guideline 15-
21 Default- Plaintiff was giving Defendant an opportunity to cure its
22 default before filing for a default judgment or seeking a substantive
23 order by allowing Defendant time to file a motion to have the
24 default set aside.

18 *Id.* ¶ 23.² Defendant filed a motion to set aside the default on December 12, 2014. Dkt. No. 12.

19 _____
20 ² Guideline 15 of the Northern District's Guidelines for Professional Conduct, titled "Default,"
21 states, "A lawyer should not seek an opposing party's default to obtain a judgment or substantive
22 order without giving that opposing party sufficient advance written warning to allow the opposing
23 party to cure the default."

22 As an initial matter, the Court notes that the entry of default by the Clerk is a step prior to
23 seeking a default judgment, and thus it is not obvious that Guideline 15 does not apply to seeking
24 the entry of default as opposed to only the entry of a default judgment. In any event, the preamble
25 to the Guidelines states that all counsel have the duties of "civility, professional integrity, personal
26 dignity, candor, diligence, respect, courtesy, cooperation and competence"; that "[t]hese
27 Guidelines are structured to provide a general guiding principle in each area addressed followed
28 by specific examples *which are not intended to be all-encompassing*"; and "[e]very attorney who
enters an appearance in this matter shall be deemed to have pledged to adhere to the Guidelines.
Counsel are encouraged to comply *with both the spirit and letter* of these Guidelines." Further,
Guideline 4 states that counsel should cooperate regarding granting extensions of time, and
Guidelines 10 states that counsel should cooperate to avoid unnecessary motion practice.

It is the Court's view that the instant motion practice (which included plaintiff's 25 page
opposition, voluminous declarations and exhibits, and two separate motions to strike by plaintiff
accompanied by additional declarations and exhibits) was completely unnecessary and should

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 55(c), a district court may set aside the entry of default upon a showing of "good cause." Fed. R. Civ. P. 55(c). To determine good cause, a court must consider three factors: (1) whether the party seeking to set aside the default engaged in culpable conduct that led to the default; (2) whether it had no meritorious defense; or (3) whether reopening the default judgment would prejudice the other party. *United States v. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010). "This standard . . . is disjunctive, such that a finding that any one of these factors is true is sufficient reason for the district court to refuse to set aside the default." *Id.* However, even if one of the factors goes against the defendant, the Court may still exercise its discretion and grant the motion. *See Brandt v. Am. Bankers Ins. Co.*, 653 F.3d 1108, 1112 (9th Cir. 2011) ("A district court may exercise its discretion to deny relief to a defaulting defendant based solely upon a finding of defendant's culpability, but need not."). In considering a motion to set aside default, a court should bear in mind that "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). A district court's determination of whether to set aside the entry of default pursuant to Rule 55(c) is reviewed for abuse of discretion. *Mesle*, 615 F.3d at 1091.

Here, all three factors weigh in favor of setting aside the default. "[A] defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in original), *overruled in part on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001). "[I]n this context the term 'intentionally' means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather . . . the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.'" *Mesle*,

have been avoided by a joint stipulation of the parties. The Court directs plaintiff's counsel to review the Guidelines of Professional Conduct an additional time and to adhere to both the spirit and the letter of those Guidelines in all further practice in this case and the Northern District.

1 615 F.3d at 1092 (quoting *TCI Grp.*, 244 F.3d at 697). Defendant states that its failure to file an
2 answer was the result of a minor oversight: a misplaced reliance on the deadline provided by its
3 agent for service of process. Tucker Decl. ¶¶ 6, 8. While the mistake could perhaps have been
4 avoided by a more thorough examination of the summons and complaint, the oversight was not
5 clearly made in bad faith. Accordingly, this factor weighs in favor of setting aside the default.

6 In addition, Liberty has provided the Court with specific facts that would constitute a
7 meritorious defense. The Ninth Circuit has explained that the “meritorious defense” requirement
8 “is not extraordinarily heavy.” *TCI Grp.*, 244 F.3d at 700. “All that is necessary to satisfy [the]
9 requirement is to allege sufficient facts that, if true, would constitute a defense.” *Id.* The veracity
10 of the factual allegations is determined by litigation on the merits, not by the court in deciding a
11 motion to set aside a default. *Id.* In this case, Liberty asserts that the denial of plaintiff’s insurance
12 claim was the result of plaintiff’s failure to provide Liberty with required documentation, rather
13 than a breach of its duties under the insurance contract. *See* Tucker Decl. ¶ 3. These facts, if true,
14 constitute a defense to plaintiff’s claims.

15 Plaintiff disputes, at length, the sufficiency of Liberty’s defense. Pl.’s Opp. at 15-21. The
16 Court finds that plaintiff’s arguments raise factual questions that cannot be resolved at this stage of
17 the litigation. *See Mesle*, 615 F.3d at 1094. Plaintiff also objects that defendant relies on
18 inadmissible hearsay evidence in support of its defense. However, these objections are without
19 merit because admissible evidence is not required at this stage to support meritorious defenses.
20 *See Results ByIQ, LLC v. NetCapital.com, LLC*, No. C 11-0550 SC., 2012 WL 2838594, at *4
21 (N.D. Cal. July 10, 2012).³

22 As to the final factor, there is no evidence that plaintiff would be prejudiced by setting
23 aside the default. To be prejudicial, the setting aside of a default must result in greater harm than
24 simply delaying resolution of the case, or forcing the plaintiff to litigate on the merits. *TCI Grp.*,
25 244 F.3d at 701. The appropriate standard is whether the plaintiff’s ability to pursue her claim will
26 be hindered. *Id.* (quoting *Falk*, 739 F.2d at 463). Plaintiff claims prejudice on two grounds: first,
27

28 ³ Accordingly, the Court DENIES plaintiff’s motion to strike. Dkt. No. 13.

1 that setting aside the default will result in delayed payments to plaintiff;⁴ second, that the
2 "cumulative effect of time, money and stress resulting from litigating this matter further is
3 unwarranted." Pl.'s Opp. at 21-22. But this is precisely the delay and litigation that precedent
4 explicitly excludes from the definition of prejudice. *See TCI Grp.*, 244 F.3d at 701.⁵ Because
5 there is no other evidence of prejudice, this factor weighs in favor of setting aside the default.
6 Accordingly, the Court GRANTS defendant Liberty's motion. Dkt. No. 9.

7 As an alternative to complete denial of defendant's motion, plaintiff requests that this Court
8 "deny the motion as to the uncontested claims for relief (claims 2 through 7) and/or order that
9 Liberty has waived all of its affirmative defenses" because it did not raise the defenses in a
10 responsive pleading. Pl.'s Opp. at 1. Assuming the Court has such discretion, the Court
11 nevertheless finds that "neither the purpose of Rule 55(c) nor the interests of justice would be
12 served by denying Defendant's motion and entering default judgment" as to those claims. *See*
13 *FOC Financial Ltd. P'ship v. Nat'l City Commercial Capital Corp.*, 612 F. Supp. 2d 1080, 1084
14 (D. Ariz. 2009) (granting defendant's motion to set aside default where defendant provided a
15 defense to one of plaintiff's claims but not others). Further, granting defendant's motion only on
16 the condition that defendant waives its affirmative defenses—no matter how meritorious those
17 defenses may be—directly undermines the policy in favor of resolution on the merits. *See Falk*,
18 739 F.2d at 463. Accordingly, the Court declines to retain the default as to the second through
19 seventh claims, or deprive defendant of its affirmative defenses.⁶

20 _____
21 ⁴ Although plaintiff alleges that defendant owes her payments, defendant states that it has already
22 overturned the denial of plaintiff's claim, and has made retroactive payments up to the date on
23 which the claim was initially denied. Whether payments to plaintiff are delayed is a factual
24 question not appropriate for resolution at this stage.

25 ⁵ Plaintiff mistakenly relies on *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*,
26 375 F.2d 922 (9th Cir. 2004), as authority for her contention that delayed payments constitute
27 prejudice. In that case, the finding of prejudice was based on the risk that a delay would allow
28 defendants to "move and hide assets" to shield them from judgment. *See id.* at 926. Thus, the
issue was not whether payments would be delayed, but whether payments would be made at all.

⁶ Plaintiff has filed an "Objection to, and Motion to Strike, Reply Evidence and New Argument."
Dkt. No. 21. Plaintiff objects to the introduction of new evidence and argument in defendant's
reply brief. *Id.* at 1-3. Because the Court reaches its conclusions without relying on the new
evidence or argument contained in defendant's reply brief, the Court DENIES defendant's motion
to strike as moot. Dkt. No. 21.

1 **CONCLUSION**

2 For the foregoing reasons, the Court GRANTS defendant Liberty's motion to set aside the
3 entry of default, Dkt. No. 9, DENIES plaintiff's motions to strike, Dkt. Nos. 13, 21, and ORDERS
4 Liberty to file its answer within three (3) days of the issuance of this Order.

5
6 **IT IS SO ORDERED.**

7
8 Dated: February 3, 2015



9
10 SUSAN ILLSTON
11 United States District Judge

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