

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OPERATING ENGINEERS' HEALTH  
AND WELFARE TRUST FUND FOR  
NORTHERN CALIFORNIA, et al.,  
  
Plaintiffs,  
  
v.  
  
VORTEX MARINE CONSTRUCTION  
INC.,  
  
Defendant.

Case No. 17-cv-03614-KAW

**ORDER TEMPORARILY GRANTING  
MOTION TO SET ASIDE ENTRY OF  
DEFAULT**

Re: Dkt. No. 23

On June 22, 2017, Plaintiffs filed the instant case against Defendant Vortex Marine Construction, Inc., alleging that Defendant failed to pay contributions for hours worked by its employees, as required by the Bargaining and Trust Agreements and the Employee Retirement Income Security Act ("ERISA"). (Compl. ¶¶ 15, 20.) After Defendant failed to answer the complaint, default was entered on August 29, 2017. (Dkt. No. 10.)

Defendant now moves to set aside the entry of default. (Def.'s Mot., Dkt. No. 23.) Upon consideration of the parties' filings, as well as the arguments presented at the April 19, 2018 hearing, and for the reasons stated below, the Court TEMPORARILY GRANTS Defendant's motion to set aside entry of default, CONDITIONED on payment of Plaintiffs' attorney's fees and provision of the past-due contribution reports.

**I. BACKGROUND**

On June 22, 2017, Plaintiffs filed this ERISA case against Defendant. (Dkt. No. 1.) Defendant was served with the complaint by substitute service; the papers were left with a manager at Defendant's office on July 14, 2017, and a copy of the complaint and summons were mailed to Defendant's office on July 17, 2017. (Dkt. No. 8.)

1           On July 17, 2017, Plaintiffs' counsel received an e-mail from Kevin Dow. (Minser Decl. ¶  
2 2, Dkt. No. 32; see also Minser Decl., Exh. A.) Mr. Dow stated that he was "the CFO for Vortex  
3 Marine Construction and am in receipt of the subject Summons." (Minser Decl., Exh. A.) Mr.  
4 Dow stated that Defendant "prefers to resolve the issue without further legal escalation," and  
5 asked how the case could be "resolved without escalating the legal channels." (Id.) Plaintiffs'  
6 counsel responded by identifying the amounts owed by Defendant and the option of entering into a  
7 payment plan. (Minser Decl. ¶ 3.)

8           Defendant did not file an answer to the complaint. On August 23, 2017, Plaintiffs moved  
9 for entry of default. (Dkt. No. 9.) On August 29, 2017, the Clerk entered default as to Defendant.  
10 (Dkt. No. 10.)

11           On September 13, 2017, Plaintiffs' counsel had a phone call with Blaise Fettig, Defendant's  
12 CEO. (Minser Decl. ¶ 4; Fettig Decl. ¶ 2, Dkt. No. 24.) During this call, Mr. Fettig asked what  
13 the status of the litigation was. (Minser Decl. ¶ 4.) Plaintiffs' counsel explained that Defendant  
14 was in default, and that Plaintiffs would pursue default judgment if the parties could not resolve  
15 the case. (Minser Decl. ¶ 4.) Throughout September 2017, Plaintiffs' counsel continued to  
16 communicate with Defendant regarding payment plan terms, including e-mailing Mr. Fettig and  
17 telephone calls with Defendant's representative, Mike Silva. (Minser Decl. ¶ 5.) The last  
18 communication appears to be from October 20, 2017, when Plaintiffs' counsel sent Mr. Fettig and  
19 Mr. Silva an e-mail with proposed terms of a payment plan. (Minser Decl. ¶ 6.) Neither Mr.  
20 Fettig nor Mr. Silva responded. (Minser Decl. ¶ 6.)

21           On January 3, 2018, Plaintiffs' counsel received a call from Mr. Fettig. (Minser Decl. ¶ 7.)  
22 Mr. Fettig asserted that he intended to make a significant payment toward the amount owed in  
23 mid- to late- February, and requested that Plaintiffs delay filing a motion for default judgment.  
24 Plaintiffs' counsel stated that they could not delay due to the large amount owed and the status of  
25 the litigation. On February 6, 2018, Plaintiffs filed their motion for default judgment. (Dkt. No.  
26 15.)

27           On February 14, 2018, Defendant's counsel informed Plaintiffs' counsel that Defendant  
28 wanted to resolve the amounts due and requested that the motion for default judgment be

1 postponed. (Minser Decl. ¶ 9.) Plaintiffs' counsel responded that they had already offered  
2 payment plan options, which were declined. Further, because of the amounts owed, Plaintiffs  
3 were not willing to postpone the motion. Plaintiffs' counsel indicated that Defendant could,  
4 however, propose a lump sum payment offer or request a payment plan. Defendant did neither.

5 On February 20, 2018, Defendant filed an opposition to Plaintiffs' motion for default  
6 judgment, as well as the instant motion. (See Dkt. No. 26.) In support of the motion to set aside  
7 entry of default, Mr. Fettig provided a declaration stating that "[d]ue to the press of other business  
8 and the negligence of a former employee, Kevin Dow, [he] did not receive actual notice of the  
9 summons in this case until after the Court had already entered default against [Defendant]."  
10 (Fettig Decl. ¶ 3.) Mr. Fettig further asserted that around September 2017, he "began investigating  
11 other concerns [he] had with Mr. Dow's performance for the company and then happened upon  
12 notice of this proceeding." (Fettig Decl. ¶ 3.)

13 On March 6, 2018, Plaintiffs filed an opposition to the motion to set aside entry of default.  
14 (Plfs.' Opp'n, Dkt. No. 31.) Plaintiffs noted that Defendant had failed to provide contribution  
15 reports for November 2017 through January 2018, and had failed to make any payments on its  
16 account since the motion for default judgment was filed. (Minser Decl. ¶ 10.) On March 13,  
17 2018, Defendant filed its reply. (Def.'s Reply, Dkt. No. 33.)

## 18 II. LEGAL STANDARD

19 Federal Rule of Civil Procedure 55(c) permits the Court to "set aside an entry of default for  
20 good cause, and it may set aside a final default judgment under Rule 60(b)." In determining "good  
21 cause," the Court typically considers three factors:

- 22 (1) whether the party seeking to set aside the default engaged in  
23 culpable conduct that led to the default; (2) whether it had no  
24 meritorious defense; or (3) whether reopening the default judgment  
would prejudice the other party.

25 United States v. Signed Personal Check No. 730 of Yurban S. Mesle (Mesle), 615 F.3d 1085, 1091  
26 (9th Cir. 2010). Because this standard "is disjunctive, . . . a finding that any one of these factors is  
27 true is sufficient reason for the district court to refuse to set aside the default." *Id.* At the same  
28 time, the Ninth Circuit has long emphasized that "judgment by default is a drastic step appropriate

1 only in extreme circumstances; a court should, whenever possible, be decided on the merits." Falk  
2 v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). Moreover, while the same "good cause" test applies to  
3 motions seeking relief from entry of default under Rule 55(c) and default judgment under Rule  
4 60(b), "the test is more liberally applied in the Rule 55(c) context . . . because . . . there is no  
5 interest in the finality of the judgment with which to contend." Mesle, 615 F.3d at 1091 n.1 (citing  
6 Haw. Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986)).

### 7 III. DISCUSSION

#### 8 A. Culpable Conduct

9 "[A] defendant's conduct is culpable if he has received actual or constructive notice of the  
10 filing of the action and intentionally failed to answer." TCI Grp. Life Ins. Plan v. Knoebber, 244  
11 F.3d 691, 697 (9th Cir. 2001) (internal quotation omitted), overruled on other grounds by Egelhoff  
12 v. Egelhoff ex rel. Breiner, 532 U.S. 141, 147-50 (2001). To be "intentional," however, the  
13 "movant cannot be treated as culpable simply for having made a conscious choice not to answer;  
14 rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as  
15 an intention to take advantage of the opposing party, interfere with judicial decisionmaking, or  
16 otherwise manipulate the legal process." Mesle, 615 F.3d at 1092; see also TCI Grp. Life Ins.  
17 Plan, 244 F.3d at 698 ("a defendant's conduct was culpable . . . where there is no explanation of  
18 the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond").

19 Here, Defendant asserts that its failure to respond was not culpable because its CFO  
20 received notice of the complaint, but apparently failed to inform the CEO. (Def.'s Mot. at 3; see  
21 also Def.'s Reply at 2.) Defendant acknowledges in its reply that Mr. Dow was the CFO, but  
22 argues that he was terminated afterwards, and that the CEO did not discover that the case had been  
23 filed until after entry of default. (Def.'s Reply at 2; Fettig Decl. ¶ 3.) Plaintiffs, in turn, argue that  
24 Defendant's officer did receive the summons and complaint, and points to Board of Trustees v.  
25 Westech Roofing, in which the district court declined to vacate the default entered. (Plf.'s Opp'n at  
26 12-13.)

27 In Westech Roofing, the district court found that the defendant's conduct was culpable  
28 because the complaint was personally served on the defendant's agent of service, and then was

1 "misplaced or discarded." Case No. 12-cv-5655-JCS, 2014 WL 46633, at \*1 (N.D. Cal. Jan. 6,  
2 2014). The district court also noted that the defendant failed to assert that it was unaware of the  
3 action, but had instead stated that "after it misplaced or threw away the complaint, it simply 'forgot  
4 about it.'" Id. Significantly, the district court emphasized the "troubling" history of litigation  
5 between the two parties, including that the plaintiffs had filed at least eight actions against the  
6 defendant to enforce its benefit obligations. Id.

7 The Court finds that the defendant's conduct, while arguably irresponsible, does not rise to  
8 the level of culpability, i.e., being in bad faith. While Defendant's officer did receive the summons  
9 and complaint prior to the entry of default, it appears that Defendant's failure to respond was due  
10 to a breakdown in internal communications rather than a deliberate decision not to answer with the  
11 "intention to take advantage of the opposing party, interfere with judicial decisionmaking, or  
12 otherwise manipulate the legal process." Mesle, 615 F.3d at 1092. Moreover, this case is  
13 distinguishable from Westech Roofing, where the defendant not only received the complaint and  
14 summons, but had a history of litigation with the plaintiffs, including eight prior suits. See 2014  
15 WL 46633, at \*1. Based on that, the district court could reasonably conclude that the failure to  
16 answer was in bad faith, as the defendant had a long history of noncompliance with its contractual  
17 obligations. See id. at \*2. By contrast, the instant case has no such additional "troubling" facts  
18 that would suggest that the failure to answer was deliberate.<sup>1</sup> Taking into consideration the Ninth  
19 Circuit's stated preference to decide cases on their merits, rather than on default, the Court finds  
20 that this factor weighs in favor of setting aside entry of default.

21 **B. Meritorious Defense**

22 "A defendant seeking to vacate a default judgment must present specific facts that would  
23 constitute a defense." TCI Grp., 244 F.3d at 700. This burden "is not extraordinarily heavy."  
24 Mesle, 615 F.3d at 1094; see also id. (explaining the "minimal nature of the burden"). Instead,  
25 "[a]ll that is necessary to satisfy the 'meritorious defense' requirement is to allege sufficient facts

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27 <sup>1</sup> While Plaintiffs also point to Defendant's failure to move to set aside the default or otherwise  
28 respond to the pending litigation even after it learned of this case, these actions occurred after  
Defendant's initial failure to answer, which in turn led to the entry of default. (See Plfs.' Opp'n at  
12-14.)

1 that, if true, would constitute a defense . . . . Id.

2 Here, Defendant argues that it has a meritorious defense to portions of the alleged debt.  
3 (Def.'s Mot. at 4.) Specifically Defendant challenges: (1) the ability to collect amounts owed after  
4 the complaint was filed; (2) the use of estimates rather than the sums actually owed, and (3) the  
5 legality of the 12% interest rate. (Id.; see also Def.'s Reply at 3.)<sup>2</sup> Plaintiffs correctly respond that  
6 courts have allowed ERISA plaintiffs to recover additional contributions and related amounts due  
7 that arose during the course of litigation, that Plaintiffs are authorized to estimate contributions  
8 where Defendant failed to submit a contribution report, and that Plaintiffs only seek a 10% interest  
9 rate. (Plf.'s Opp'n at 15, 17.)

10 Again, the Ninth Circuit has emphasized that the burden to establish a meritorious defense  
11 is "minimal." TCI Grp., 244 F.3d at 700. At the very least, there appears to be a dispute about  
12 whether the Dredging Agreements permit a 10% or 12% interest rate. At the hearing, Plaintiffs  
13 also argued that the Dredging Agreements are in fact separate from the applicable trust fund  
14 agreements. Such matters go to the merits of the case, and should not be decided on a motion to  
15 set aside default. The Court, therefore, finds that this is sufficient to satisfy the second factor.  
16 While Plaintiffs suggest that the Court set aside default only as to specific issues raised by  
17 Defendant, Plaintiffs cite no authority that supports setting aside default on a piecemeal basis. The  
18 Court declines to do so, and concludes that this factor weighs in favor of setting aside entry of  
19 default.

20 **C. Prejudice**

21 Finally, the parties dispute whether Plaintiffs would be prejudiced if the entry of default is  
22 set aside. "To be prejudicial, the setting aside of a judgment must result in greater harm than  
23 simply delaying resolution of the case. Rather, the standard is whether plaintiff's ability to pursue  
24 his claim will be hindered." TCI Grp. Life Ins. Plan, 244 F.3d at 701 (internal quotation omitted).

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26 \_\_\_\_\_  
27 <sup>2</sup> In its initial motion, Defendant raised additional arguments, including that Plaintiffs erroneously  
28 sought 20% liquidated damages rate and a statute of limitations issue. (Def.'s Mot. at 4.)  
Defendant does not raise the liquidated damages issue in its reply, and appears to concede that  
there is no statute of limitations problem. (Def.'s Reply at 3.)

1 Here, Plaintiffs argue that they will be prejudiced because they have "expended a great  
2 amount of resources toward resolving this dispute," and that setting aside default would "allow  
3 Defendant to avoid paying what it owes in employee benefit contributions." (Plf.'s Opp'n at 19.)  
4 With respect to the latter, Plaintiffs do not explain why Defendant will be able to avoid paying  
5 employee benefit contributions; if Plaintiffs win on the merits, Defendant will be required to make  
6 the payments it has allegedly failed to make.

7 As to Plaintiff's argument that it has expended significant resources in this case, the Ninth  
8 Circuit has recognized that the district courts have discretion to place conditions on the setting  
9 aside of a default, in order to rectify any prejudice suffered by the non-defaulting party as a result  
10 of the default. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydroelec.*, 854 F.2d  
11 1538, 1546 (9th Cir. 1988). Several cases have conditioned the setting aside of the entry of  
12 default on payment of attorney's fees, particularly when the court found that the defendant's  
13 behavior, while not culpable, was problematic. See *Walpex Trading Co. v. Yacimientos*  
14 *Petroliferos Fiscales Bolivianos*, 109 F.R.D. 692, 698 (S.D.N.Y. 1986) (requiring payment of  
15 attorney's fees and costs where there was a one-year delay because the defendant's attorneys  
16 ignored the complaint and assumed that management would handle it); *In re Arthur Treacher's*  
17 *Franchisee Litig.*, 92 F.R.D. 398, 418-19 (E.D. Penn. 1981) (requiring payment of attorney's fees  
18 and costs where the defendant's behavior was "cavalier"); *E. & J. Gallo Winery v. Cantine Rallo,*  
19 *S.P.A.*, 430 F. Supp. 2d 1064, 1094 (E.D. Cal. 2005) (requiring payment of attorney's fees and  
20 costs prior to the defendant informing the plaintiff of its intent to defend where the defendant  
21 received actual notice of the lawsuit but failed to recognize the need to respond to the complaint).

22 The Court finds that this factor favors setting aside entry of default, but conditioned on  
23 Defendant paying part of Plaintiffs' attorney's fees because Defendant's behavior after entry of  
24 default unduly increased the costs of litigation to Plaintiffs. Specifically, despite knowing of the  
25 entry of default in September 2017, Defendant failed to move to set aside entry of default for  
26 nearly five months. (See *Fettig Decl.* ¶ 3; *Minser Decl.* ¶ 5.) Instead, Defendant only moved to  
27 set aside entry of default after Plaintiffs had already filed the pending motion for default judgment  
28 due to Defendant's failure to respond to Plaintiffs' efforts to settle the case. (See *Minser Decl.* ¶¶

1 6-9.) Thus, Defendant's actions directly resulted in Plaintiffs incurring attorney's fees that were  
2 otherwise avoidable if Defendant had timely moved to set aside entry of default.

3 Under these circumstances, the Court finds it appropriate to condition setting aside entry of  
4 default on the payment of Plaintiffs' attorney's fees incurred between September 13, 2017 -- when  
5 Defendant's CEO was informed of the default -- and the April 19, 2018 hearing. At the hearing,  
6 Defendant requested that it not pay attorney's fees related to Plaintiffs' opposition to the instant  
7 motion because their motion was meritorious. The Court finds, however, that Defendant's delay in  
8 filing the motion to set aside entry of default likely resulted in Plaintiffs opposing the motion to set  
9 aside to begin with, due to Defendant's failure to respond to Plaintiffs' settlement offer or make  
10 payments in the interim. Further, courts have routinely required the payment of attorney's fees  
11 associated with a motion to set aside entry of default as a condition for granting the motion. E.g.,  
12 *Leadership Studies, Inc. v. Readytomanage, Inc.*, No. 2:15-cv-9459-CAS (AJWx), 2016 WL  
13 4425713, at \*8 (C.D. Cal. Aug. 16, 2016); *Coen Co. v. Pan Int'l, Ltd.*, 307 F.R.D. 498, 508 (N.D.  
14 Cal. 2015); *Bernal v. Rodriguez*, Case No. 5:16-cv-152-CAS(DTBx), 2016 WL 4267942, at \*4  
15 (C.D. Cal. Aug. 9, 2016); *Ocwen Loan Servicing, LLC v. Akbari*, No. 2:11-cv-1781-LRH-VCF,  
16 2013 WL 5596661, at \*1 (D. Nev. Oct. 10, 2013); *In re Arthur Treacher's Franchisee Litig.*, 92  
17 F.R.D. at 418-19.

18 In addition to the payment of attorney's fees, the Court also conditions setting aside entry  
19 of default on Defendant's provision of the past due contribution reports to Plaintiffs. Compare  
20 with *Nilsson*, 854 F.2d at 1547 (affirming district court's decision conditioning setting aside entry  
21 of default on payment of attorney's fees and the defendants responding promptly and completely  
22 to all discovery). Notably, Defendant never disputed that it is not required to provide these  
23 contribution reports, and indeed complained that Plaintiffs are seeking sums based on estimates  
24 rather than the actual amounts due. (See Def.'s Mot. at 4; Def.'s Reply at 3.) This condition  
25 further mitigates the prejudice to Plaintiffs by allowing both parties to determine the extent of  
26 Defendant's liability.

27 **IV. CONCLUSION**


28 For the reasons stated above, the Court TEMPORARILY GRANTS Defendant's motion to



1 set aside entry of default, **CONDITIONED** on Defendant paying Plaintiffs' attorney's fees between  
2 September 13, 2017 and April 19, 2018, and Defendant providing the missing contribution reports.  
3 The parties are ordered to meet and confer within **seven days** of this order, to determine if they  
4 can come to an agreement on the amount of attorney's fees. If the parties are unable to resolve this  
5 matter, Plaintiffs are to file a supplemental declaration providing the amount sought, as well as  
6 sufficient documentation for the Court to review for reasonableness, within **fourteen days** of this  
7 order. Defendant may file any objections within **seven days** of the filing of Plaintiffs'  
8 supplemental declaration. The Court will then determine the amount Defendant shall pay. Once  
9 Defendant has paid the attorney's fees and provided the missing the contribution reports, the Court  
10 will enter an order granting the motion to set aside entry of default. Failure to satisfy both  
11 conditions will result in the motion to set aside entry of default being denied.

12 IT IS SO ORDERED.

13 Dated: April 27, 2018

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15 KANDIS A. WESTMORE  
16 United States Magistrate Judge  
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