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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ALBERT CALDERON, an individual on
12 behalf of himself and all others similarly
13 situated, et al.,

14 Plaintiffs,

15 v.

16 TOTAL WEALTH MANAGEMENT,
17 INC. et. al,

18 Defendants.
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Case No.: 3:15-cv-01632-BEN-NLS

ORDER:

**1) DENYING PLAINTIFFS’
REQUEST FOR ENTRY OF
DEFAULT JUDGMENT;**

**2) DENYING DEFENDANT JED
COOPER’S MOTIONS TO STRIKE
AND DISMISS; and**

**3) DENYING JOINT MOTION FOR
STAY**

[Docket Nos. 99, 105, 117]

23 Before the Court are Plaintiffs’ request for entry of default judgment against
24 Defendant Jed Cooper (Docket No. 99), Defendant Cooper’s motion to strike and dismiss
25 (Docket No. 105), and Plaintiffs and Defendant Cooper’s joint motion for stay (Docket
26 No. 177). The Court finds the motions suitable for determination on the papers without
27 oral argument, pursuant to Civil Local Rule 7.1.d.1. For the reasons set for below, each
28 motion is **DENIED**.

1 **A. Plaintiffs’ Request for Default Judgment**

2 On March 24, 2017, Plaintiffs filed their request for the Clerk of Court to enter
3 default judgment against Defendant Jed Cooper (“Cooper”). (Docket No. 99.) On May
4 4, 2017, Defendant Cooper filed a motion to strike and dismiss arguing, *inter alia*, that
5 entry of default judgment against him would be improper because Plaintiffs failed to
6 serve him with the operative Third Amended Complaint (“TAC”). (Docket No. 105.)
7 Plaintiffs’ opposition to Cooper’s motion to dismiss does not deny that Plaintiffs failed to
8 serve Cooper with the TAC. (*See* Docket No. 106, Pls.’ Opp’n at 6-8.) Instead, Plaintiffs
9 appear to argue that because Cooper was served with but never responded to the Second
10 Amended Complaint (Docket No. 1-2, “SAC”), and “no allegations changed as to those
11 asserted against Jed Cooper between the Second and Third versions,” they are entitled to
12 entry of default judgment for Cooper’s failure to respond to the SAC. (Pls.’ Opp’n at 10-
13 11.) The Court disagrees.

14 Federal Rule of Civil Procedure 5¹ generally requires an amended complaint be
15 served on every party. *See* Fed. R. Civ. P. 5(a)(1). The TAC, once filed, became the
16 operative complaint, and because the Court did not order otherwise, Plaintiffs were
17 required to serve it on Cooper. *Id.* Plaintiffs implicitly concede that they failed to serve
18 the TAC on Cooper. (Pls.’ Opp’n at 6-8, 10-11.) As a result, Plaintiffs’ request for entry
19 of default against Cooper for the allegations in the SAC is improper, and is therefore
20 **DENIED.**

21 **B. Cooper’s Motion to Strike and Dismiss**

22 Cooper moves to strike Plaintiffs’ request for entry of default judgment pursuant to
23 Rule 12(b)(f), and to dismiss the claims against him pursuant to Rule 12(b)(6) and Rule
24 41(b). Rule 12(b)(f) permits a court to “strike from a *pleading* an insufficient defense or
25 any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12
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28 ¹ Unless the stated otherwise, all future references to Rules in this Order are to the
Federal Rules of Civil Procedure.

1 (emphasis added). Plaintiffs’ request for entry of default is not a “pleading,” rendering
2 Cooper’s motion to strike moot. Accordingly, Cooper’s motion to strike is **DENIED**.

3 Rule 41(b) provides: “If the plaintiff fails to prosecute or to comply with these
4 rules or a court order, a defendant may move to dismiss the action or any claim against
5 it.” Fed. R. Civ. P. 41(b). Cooper admits that due to unknown reasons, he did not
6 respond to the SAC and only became aware of the request for entry of default from
7 another party, despite Plaintiffs’ continual prosecution of this action. (Docket No. 105,
8 Def.’s Mot. at 4-6.)

9 There is strong policy underlying the Rules that favors decisions on the merits.
10 *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (citation omitted). Additionally,
11 federal district courts are directed to construe, administer and employ the Rules “to
12 secure the just, speedy, and inexpensive determination of every action and proceeding.”
13 Fed. R. Civ. P. 1. In light of the procedural history of this case and these considerations,
14 the Court finds dismissal of Plaintiffs’ claims against Cooper pursuant to Rule 41(b) is
15 not justified. Additionally, the Court finds Cooper’s motion to dismiss for failure to state
16 a claim premature because he was not properly served with the TAC. Therefore,
17 Cooper’s motion to dismiss is **DENIED without prejudice**. The Court shall permit
18 Plaintiffs to effect proper service on Cooper, to which Cooper may file his answer or
19 otherwise respond.

20 **C. Joint Motion for Stay**

21 Finally, Plaintiffs and Cooper jointly move to stay the case on the grounds that the
22 remaining defendants in the action are either under receivership, have not appeared and
23 are awaiting default judgment,² or are part of Plaintiffs’ appeal to the Ninth Circuit.³

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26 ² At the time the parties’ joint motion was filed, the parties also indicated that a stay was
27 warranted because Plaintiffs’ request for entry of default against Cooper and Cooper’s
28 motion to strike and dismiss were still pending. However, as the Court has ruled on the
request and motion, this ground is moot.

³ Case No. 17-55217.

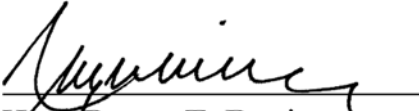
1 (Docket No. 117.) The Court disagrees that a stay is warranted or necessary. Based on
2 the Court's rulings in this Order regarding Plaintiffs' request for entry of default
3 judgment and Cooper's motion to strike and dismiss, Plaintiffs' action may proceed as to
4 their claims against Cooper. The parties have not demonstrated that these claims are so
5 inextricably tied to the Defendants in Plaintiffs' appeal to justify any further delay in this
6 case. Therefore, the parties' joint motion for stay is **DENIED**.

7 **CONCLUSION**

8 In sum, for all of the aforementioned reasons, Plaintiffs' request for entry of
9 default judgment against Defendant Cooper, Defendant Cooper's motion to strike, and
10 the parties' joint motion for stay are **DENIED**. Cooper's motion to dismiss is **DENIED**
11 **without prejudice**. Plaintiffs shall serve Cooper with a copy of the TAC in accordance
12 with the Rules within **seven (7) days** of the date of this Order. Cooper shall file his
13 answer or otherwise respond to the TAC within **twenty-one (21) days** of its service.

14 **IT IS SO ORDERED.**

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16 Dated: October 10, 2017

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18 Hon. Roger T. Benitez
19 United States District Judge
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