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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RAFAEL FLORES,

12 Plaintiff,

13 v.

14 SAN DIEGO POLICE DEPARTMENT et
15 al.,

16 Defendants.

Case No.: 15cv2024 AJB (RBB)

**REPORT AND
RECOMMENDATION GRANTING
MOTION FOR DEFAULT
[ECF NO. 44]**

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18 On January 5, 2017, Counterclaimants City of San Diego and John Sullivan (the
19 “Counterclaimants”) filed a “Request for Entry of Default of Counter-Defendant Rafael
20 Flores as to Any and All Counterclaims Asserted by Counterclaimants City of San Diego
21 and Officer John Sullivan” (the “Motion for Default”) [ECF No. 44]. No opposition to or
22 reply in support of the Motion for Default was filed. For the reasons discussed below, the
23 Motion for Default [ECF No. 44] should be **GRANTED**, and the Clerk of Court should
24 enter a default against Plaintiff as to the Counterclaims.

25 **I. BACKGROUND**

26 Plaintiff Rafael Flores filed his lawsuit against several Defendants on September
27 10, 2015 [ECF No. 1]. On November 25, 2015, the Defendants filed a Motion to Dismiss
28 or for a More Definite Statement [ECF No. 16]. The Court issued a Report and

1 Recommendation granting in part and denying in part Defendants’ motion [ECF No. 29],
2 which was adopted by United States District Court Judge Anthony J. Battaglia on August
3 22, 2016 [ECF No. 31]. On October 24, 2016, Defendants filed a document entitled,
4 “Defendants’ Answer to Plaintiff’s Complaint Under the Civil Rights Act 42 U.S.C. §
5 1983; Counterclaims of Counterclaimant City of San Diego and Officer Sullivan; and
6 Attached Exhibit A” (the “Counterclaims”) [ECF No. 32]. In this filing,
7 Counterclaimants City of San Diego¹ and John Sullivan pleaded claims against Flores for
8 negligent resisting arrest and assault and battery. (Defs.’ Answer Pl.’s Compl. &
9 Countercls. 14-15, Oct. 24, 2016, ECF No. 32.)² They seek damages and other relief in
10 connection with these claims. (Id. at 15-16.)

11 The Counterclaims were served on Plaintiff four separate times. First, they were
12 mailed to Flores on October 24, 2016. (See id. Attach. #2 Certificate Serv. 2-3, Oct. 24,
13 2016.) This pleading was again mailed to Plaintiff on November 17, 2016. (Certificate
14 Serv. 2-3, Nov. 17, 2016, ECF No. 36.) The Counterclaims were then personally served
15 on Flores while he was appearing in San Diego Superior Court on November 30, 2016.
16 (Certificate Serv. 2-3, Nov. 30, 2016, ECF No. 37.) Plaintiff was again served by mail on
17 December 7, 2016. (Certificate Serv. 3-4, Jan. 5, 2017, ECF No. 43.) Flores did not file
18 a responsive pleading to the Counterclaims. On January 5, 2017, the Counterclaimants
19 filed the Motion for Default [ECF No. 44].

20 II. LEGAL STANDARD

21 The Federal Rules of Civil Procedure provide, “When a party against whom a
22 judgment for affirmative relief is sought has failed to plead or otherwise defend, and that
23 failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed.
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26 ¹ The City of San Diego was not a named Defendant in Plaintiff’s Complaint. (See
27 Compl. 1-2, ECF No. 1.)

28 ² The Court will cite to documents as paginated on the electronic case filing system.

1 R. Civ. P. 55(a). In most cases, however, a default does not automatically entitle a party
2 to a default judgment. See 10 James Wm. Moore, et al., Moore’s Federal Practice
3 § 55.10[1], at 55-14 (3d ed. 2017) (footnotes omitted) (“Rule 55 requires a two-step
4 process. The first step, entry of default, is a ministerial matter performed by the clerk and
5 is a prerequisite to a later default judgment.”). The clerk of the court must enter a default
6 judgment “[i]f the plaintiff’s claim is for a sum certain or a sum that can be made certain
7 by computation.” Fed. R. Civ. P. 55(b)(1). “In all other cases, the party must apply to
8 the court for a default judgment.” Id. (b)(2)

9 Generally, “[i]f a defendant fails to respond to a complaint, default judgment may
10 be entered on behalf of the plaintiff.” Fed. Mar. Comm’n v. S.C. State Ports Auth., 535
11 U.S. 743, 757 (2002) (citation omitted) (discussing the Federal Maritime Commission
12 Rules of Practice and noting the similarity to the Federal Rules of Civil Procedure).
13 Service of process must be properly completed before a default judgment may be entered.
14 Jacobs v. Tenney, 316 F. Supp. 151, 165-66 (D. Del. 1970). But “default judgments are
15 ordinarily disfavored.” Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986). “Cases
16 should be decided upon their merits whenever reasonably possible.” Id. (citing Pena v.
17 Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985)).

18 **III. DISCUSSION**

19 In their Motion for Default, Counterclaimants contend that Plaintiff failed to
20 defend the claims against him within the time required by the Federal Rules of Civil
21 Procedure. (Mot. Default 2, ECF No. 44 (citations omitted).) They served the
22 Counterclaims on Flores both personally and by mail. (See id. at 3 (citations omitted).)
23 The Counterclaimants further state that in a telephone conversation with defense counsel
24 on December 7, 2016, Plaintiff acknowledged that he had been served with the
25 Counterclaims and that he was required to respond by December 21, 2016. (Id. at 3-4
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1 (citations omitted).³ The contents of this phone conversation were memorialized in a
2 letter sent to Flores the same day. (Id. at 4 (citations omitted).) Counterclaimants
3 indicate, however, that Flores failed to respond to the claims against him by December
4 21, 2016. (Id. at 5.) As a result, they ask that a default be entered against Plaintiff “for
5 failure to timely plead or otherwise defend against the Counterclaimants’
6 Counterclaims.” (Id.)

7 Federal Rule of Civil Procedure 12(a)(1)(B) states that “[a] party must serve an
8 answer to a counterclaim or crossclaim within 21 days after being served with the
9 pleading that states the counterclaim or crossclaim.” Fed. R. Civ. P. 12(a)(1)(B). Flores
10 was properly served with the Counterclaims on four separate occasions [ECF Nos. 32, 36,
11 37, 43]. Even if the Court were to use December 7, 2016, the last date Plaintiff was
12 served, as the date of service, his deadline to respond to the Counterclaims was January 3,
13 2017. See Fed. R. Civ. P. 12(a)(1)(B); see also Fed. R. Civ. P. 6(d) (“When a party may
14 or must act within a specified time after being served and service is made under Rule
15 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days
16 are added after the period would otherwise expire under Rule 6(a).”).

17 Flores has not filed any response to the Counterclaims. Nor has he made an
18 appearance in this case since filing a notice of change of address on August 18, 2016
19 [ECF No. 30]. Because Plaintiff did not respond to the Counterclaims by the deadline set
20 forth by the federal rules, a default should be entered against him. See Cook v. Olathe
21 Med. Ctr., Inc., Civil Action No. 10–2133–KHV, 2011 WL 1403176, at *1 (D. Kan. Apr.
22 13, 2011) (internal citation omitted) (“Pursuant to Rule 12(a)(1)(B), plaintiff had 21 days,
23 or until February 1, 2011, to file an answer or otherwise respond to the counterclaim.
24 Plaintiff did not do so. Because plaintiff has failed to plead or otherwise defend the
25 counterclaim, [defendant] is entitled to an entry of default under Rule 55(a).”).

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28 ³ The Counterclaimants incorrectly state that December 21, 2016, was the deadline for
Flores to respond to the Counterclaims.

1 As a result, the Motion for Default [ECF No. 44] should be **GRANTED**, and the
2 Clerk of Court should enter a default against Flores as to the Counterclaims.

3 **IV. CONCLUSION AND RECOMMENDATION**

4 For the reasons discussed, the Motion for Default [ECF No. 44] should be
5 **GRANTED**. The Clerk of Court should enter a default against Plaintiff as to the
6 Counterclaims. This Report and Recommendation will be submitted to the United States
7 District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. §
8 636(b)(1). Any party may file written objections with the Court and serve a copy on all
9 parties on or before May 19, 2017. The document should be captioned “Objections to
10 Report and Recommendation.” Any reply to the objections shall be served and filed on
11 or before June 2, 2017.

12 The parties are advised that failure to file objections within the specified time may
13 waive the right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153, 1157
14 (9th Cir. 1991).

15 **IT IS SO ORDERED.**

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17 Dated: April 21, 2017

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19 Hon. Ruben B. Brooks
20 United States Magistrate Judge
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